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STIPULATIONS.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR and JOHN S. WARNER,
Plaintiffs-Appellants,
v.
WILLIAM J. LIPPINCOTT and LAURA J. EVANS, executors of the Estate of WILLIAM B. LIPPINCOTT, individually, and CAROLINE LIPPINCOTT,
Defendants-Respondents.

WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR and JOHN S. WARNER,
Plaintiffs-Appellants,
v.
JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased,
Defendants-Respondents.

On Appeal from New Jersey Supreme Court.
Stipulations.

It is hereby stipulated by and between counsel for the respective parties in these causes as follows:

(1) That in printing the State of the Case there shall not be printed the pleadings in the suit of William H. Windolph and other plaintiffs v. John O. Wilson and others, defendants.

(2) That there shall not be printed the State of the Case in the causes entitled, "Between John O. Wilson and others, complainants-appellants, and William H. Windolph and others, defendants-respondents; and also Between William J. Lippincott and Laura L. Evans, executors, and others, complainants-appellants, and William H. Windolph and others, defendants-respondents;" Exhibit P3, except that the agreement of sale between William Evans and Laura Evans, his wife, and William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, be printed.

(3) That there shall not be printed the findings of the New Jersey Court of Errors and Appeals in the causes above named, but that reference be made to 6 A. R. 1367—143 Atl. 346, where the opinion of this Court may be found.

PHILIP WENDKOS,
Attorney for Plaintiffs-Appellants.
BLEAKLY, STOCKWELL & BURLING,
Attorneys for Defendants-Respondents.

SUMMONS.

STATE OF NEW JERSEY TO WILLIAM J. LIPPINCOTT AND CAROLINE W. LIPPINCOTT; LAURA EVANS AND WILLIAM J. LIPPINCOTT, EXECUTORS OF THE ESTATE OF WILLIAM B. LIPPINCOTT, DECEASED:

(L. S.)

You are summoned to answer the annexed complaint of William H. Windolph, George A. Wonfor, William R. Goldsborough and John S. Warner in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiffs may proceed in the suit and judgment may be entered against you.

Witness, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this 20th day of November, nineteen hundred and twenty-eight.

FRED L. BLOODGOOD,
Clerk.

JOSEPH S. LOW,
PHILIP WENDKOS,
Attorneys.

COMPLAINT.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER, *Plaintiffs,* v. WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased, *Defendants.*	Action at Law. Complaint.

Plaintiffs, William H. Windolph and William R. Goldsborough, residing in the City of Philadelphia, State of Pennsylvania, and George A. Wonfor and John S. Warner, residing in Palmyra, County of Burlington, State of New Jersey, say that:

1. On or about December 15th, 1925, plaintiffs proposed in writing to defendants to purchase their farm, situate on Marlton Pike and Cropwell Road,

in the County of Burlington, New Jersey, a copy of which writing is attached hereto and marked Exhibit A.

2. Accompanying plaintiffs' written proposal, plaintiffs paid the sum of eighty-five hundred ($8500.00) dollars to these defendants, who, according to the writing marked Exhibit A, acknowledged receipt thereof.

3. Defendants refused and failed to accept plaintiffs' proposal. Notwithstanding such refusal, defendants attempted to compel these plaintiffs to perform another contract, which was never entered into by plaintiffs for the sale and purchase of defendants' lands.

4. Defendant brought these plaintiffs into the Court of Chancery of New Jersey for the purpose of compelling these plaintiffs to perform such contract, which they had not entered into, but the Court of Chancery dismissed the proceedings instituted by the defendants against the plaintiffs. A copy of the decree of the Court of Chancery is attached hereto and marked Exhibit B.

5. Not satisfied with the findings of our Court of Chancery, defendants had its proceedings reviewed by the New Jersey Court of Errors and Appeals, the court of last resort in all causes in this State, and that Court affirmed the decree of the Court of Chancery of New Jersey and concluded for all time that the instrument which was submitted by the defendants was not the contract which plaintiffs had agreed to enter into, and furthermore, that no contract for the purchase and sale of defen-

dants' lands had ever been entered into by the defendants and plaintiffs.

A copy of the findings of the Court of Errors and Appeals is attached hereto and marked Exhibit C.

6. Plaintiffs have demanded the return of the moneys which they gave to defendants, but the latter have refused to return the sum of eighty-five hundred ($8500.00) dollars which they have retained since December 15th, 1925.

Plaintiffs therefore demand as damages the sum of eighty-five hundred ($8500.00) dollars, together with interest thereon from December 15, 1925, and costs of suit.

JOSEPH S. LOW,
PHILIP WENDKOS,
Attorneys for Plaintiffs.

THIS AGREEMENT, made the Fifteenth day of December, in the year of our Lord one thousand nine hundred and twenty-five, by and between WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT, his wife, of the Township of Evesham, County of Burlington and State of New Jersey, and WILLIAM B. LIPPINCOTT, Widower, of the Town of Marlton, County of Burlington and State of New Jersey, hereinafter called the parties of the first part, and WILLIAM H. WINDOLPH, of Ridley Park, Delaware County, State of Pennsylvania, WILLIAM R. GOLDSBOROUGH, of Meadowbrook, Montgomery County, State of Pennsylvania. GEORGE A. WONFOR, of Cinnaminson Township, Burlington County, State of New Jersey, and JOHN S. WARNER, of Riverton, Bur-

lington County, State of New Jersey.
hereinafter called the parties of the second part.

WITNESSETH, That the said parties of the first part hereby agree to sell and convey to the said parties of the second part, and the said parties of the second part hereby agree to buy from the said parties of the first part, ALL that certain farm or plantation known as the William B. Lippincott Farm, situate on the Marlton Pike near Cropwell Station, partly in the county of Camden and partly in the County of Burlington and State of New Jersey, containing approximately one hundred and two acres of land, EXCEPTING thereout and therefrom the mansion house and lot of land whereon the same is located containing two and twenty-seven one-hundredths (2.27) acres, according to a survey thereof attached to this agreement, AND SUBJECT to the railroads' rights of way, ALSO SUBJECT to the right of way in the rear of the said farm granted and conveyed to Samuel Vennell; RESERVING a right of way over the lane fifty feet in width as now laid out, extending from the mansion house to the Marlton Pike, as shown on the map attached hereto, for the price or sum of Eight Hundred and Fifty Dollars ($850.00) per acre, the acreage to be ascertained by a survey thereof to be made by Henry Lippincott, the cost of which survey shall be paid by the parties of the first part, and in case survey is shown to be inaccurate party of the first part shall only be entitled to collect for the correct acreage, which survey shall include the entire farm of the said parties of the first part comprising all the lands within the title lines, including the lands comprised within the railroads' rights of way, the said right of way granted to said Vennell, and the right of way reserved over the lane fifty feet in width, but the acreage for which

payment is to be made by the parties of the second part shall exclude the acreage contained within the lines of all railroads' rights of way passing through or across the said farm and shall also exclude the acreage comprised within the said right of way granted to said Samuel Vennell, TOGETHER with the hereditaments and appurtenances to the same belonging, under and subject to the following terms and conditions:

A first payment of Eighty-five Hundred Dollars, receipt whereof is hereby acknowledged by the said parties of the first part.

The further sum of Twenty-one Thousand Five Hundred Dollars shall be paid at the time of final setlement, and a bond and mortgage executed by the said parties of the second part William J. Lippincott, one of to /the said parties of the first part, for the amount of the balance of the purchase price, when ascertained in the manner aforesaid, which said mortgage shall be payable in installments of at least Eleven Thousand Dollars annually, the whole amount thereof to be paid within five years from the date thereof, and to bear interest at the rate of six per cent per annum payable semi-annually. Said mortgage to contain the usual tax, insurance and default clauses and to be in form to be approved by John O. Wilson of Fourth and Market Sts., Camden, N. J. Said mortgage also to contain a release clause, providing that the tenant house fronting on the Marlton Pike with a lot 100 x 200 feet may be released by the payment of Five Thousand Dollars on account of the principal of said mortgage, and that the balance of the land fronting on the Marlton Pike, for a depth of two hundred feet may be released at the price of Twelve Dollars and Fifty Cents per front foot and that land fronting

on Cropwell Road for a depth of two hundred feet may be released at the price of Eight Dollars per front foot, and that the balance of the farm may be released from the lien and operation of the said mortgage upon the payment of the sum of Eight Hundred Dollars per acre. Said mortgage also to contain a clause that upon the payment of any annual installment of principal the parties of the second part shall be entitled to a release of land according to the schedule hereinabove mentioned, to the amount of said annual payment.

Final settlement shall be made at the office of John O. Wilson, Southwest corner of Fourth and Market Sts., Camden, N. J., on the third day of August A. D. 1926, at the hour of eleven o'clock in the forenoon of said day, unless the parties to this agreement shall agree upon a previous date.

All taxes upon the said premises to be conveyed to the said parties of the second part shall be apportioned to the date of final settlement.

It is further understood and agreed that the parties of the first part shall have the right to retain possession of such part of the farm on which there may be growing crops for the purpose of removing same within a reasonable time, not exceeding four months after date set for final settlement.

It is further understood and agreed that the parties of the first part shall have the right to cut such firewood for the purpose of fuel in his mansion house as may be necessary for the use of his family, during the years 1925 and 1926.

It is further understood and agreed that the parties of the second part shall have the right, at any time hereafter, to erect a "For Sale" sign upon the property, and shall have the right to enter upon the said farm for the purpose of showing prospective purchasers about the same.

It is further understood and agreed that the parties of the second part shall have the right, after a period of two years from the date of this agreement, to extend the right of way from the Marlton Pike through the remaining property of the parties of the first part in a manner satisfactory to them, and upon the payment to them of the sum of Eight Hundred and Fifty Dollars per acre for the area taken for the extension of said right of way.

It is also understood and agreed that the parties of the first part shall have the right to cut and remove ten logs for the purpose of making lumber for general repairs and improvements to their said buildings.

It is also understood and agreed that the said parties of the second part shall have the right to change the right of way hereby reserved over the lane fifty feet wide, extending from the Mansion house to the Marlton Pike, as shown on the map attached hereto, at any time to a more practical location in a manner satisfactory to the parties of the first part.

It is also understood and agreed that title to the said premises shall be free and clear of all restrictions of a character that would interfere with the general scheme of building development, and all incumbrances, including municipal liens and assessments, except the rights of telephone, electric light and water companies, which title shall be a marketable title subject only to such exceptions as are set out herein, and at the time of final settlement the parties of the first part shall tender to the parties of the second part a special warranty deed, conveying such title, or in the event that such title cannot be delivered as above, then the deposit made herewith shall be returned to the said parties of the second part, together with the amount of expenses

incurred by the said parties of the first part in obtaining searches upon the said premises and in the examination of the title to the same.

All adjustments shall be made as of the third day of August, A. D. 1926, and possession of the said premises shall be given to the said parties of the second part, except as above stated, at the time of final settlement.

It is further agreed that time is of the essence of this contract, and in case the purchasers do not attend at the time of final settlement to receive the deed and pay the balance of the purchase price and execute the bond and mortgage to the said party of the first part, then the first payment hereinabove mentioned may at the option of the parties of the first part be applied on account of the purchase price, and the balance of the purchase price shall be payable to the said parties of the first part on demand, or, the said parties of the first part may retain the first payment hereinabove mentioned as damages agreed and liquidated, for the failure of the said parties of the second part to carry out the terms of this agreement, in such case this agreement shall be null and void.

The parties of the second part shall pay for all searches and other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto which shall be paid for by the parties of the first part.

This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

The parties of the second part covenant and agree that they will not record, cause or permit to be recorded this agreement or any copy thereof in the office of the Register of Deeds of Camden County,

or the Clerk's Office of Burlington County, or any other public office.

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

WILLIAM J. LIPPINCOTT (LS)
CAROLINE W. LIPPINCOTT (LS)
WILLIAM B. LIPPINCOTT (LS)
WILLIAM H. WINDOLPH (LS)
WILLIAM R. GOLDSBOROUGH (LS)
GEO. A. WONFOR (LS)
JOHN S. WARNER (LS)

Signed, sealed and Delivered in the Presence of

Words "William J. Lippincott, one of" inserted between lines 29 & 30, page 2, before execution.

ROBT. C. BITTING
ROBT. C. BITTING
EDGAR D. McGONIGAL
EDGAR D. McGONIGAL

DECREE FOR DISMISSAL OF VENDOR'S BILL.

IN CHANCERY OF NEW JERSEY.

Between

WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the Estate of WILLIAM B. LIPPINCOTT, individually, and CAROLINE W. LIPPINCOTT and WILLIAM J. LIPPINCOTT,

Complainants,

and

WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR and JOHN S. WARNER,

Defendants.

On Bill for Specific Performance.
Decree for Dismissal of Vendor's Bill.

This cause coming on to be heard in the presence of Henry F. Stockwell, solicitor of the complainants, and Philip Wendkos and Joseph S. Low, solicitors of the defendants, and the Court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon:

And it appearing to the satisfaction of the Court that complainants, William J. Lippincott and Caroline W. Lippincott, his wife, and William B. Lippincott, tendered an instrument in writing, but said instrument not having been executed by complainants, wherein and whereby the said complainants agreed to convey said lands and premises by deed of special warranty on or before the 18th day of October, nineteen hundred and twenty-six, to William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, the following described lands situate in the Township of Evesham, in the County of Burlington, and in the Township of Delaware, County of Camden and State of New Jersey:

"ALL that certain tract or parcel of land, situate in the Township of Evesham, in the County of Burlington, and in the Township of Delaware, County of Camden and State of New Jersey, bounded and described as follows:

"BEGINNING at a point in the middle of the Marlton Pike, corner to lands of Laura L. Evans; thence north twenty-four degrees thirty four minutes east eight hundred and eighty-four feet to a stone; thence north seventeen degrees five minutes east eleven hundred forty-seven feet to a stone; thence north eighty-four degrees fifty-eight minutes east ninety-five feet to a stake; thence south sixty-two degrees seventeen minutes east eighty-nine and seven-tenth feet to a stake, in the Camden and Medford Railroad; thence north fifteen degrees forty-five minutes east ninety-nine and eight-tenths feet to a stake in the edge of a creek; thence nearly along same south fifty-seven degrees fifteen minutes east three hundred thirty-nine and one tenth feet to a stake in the forks

of the Creek and middle of Cropwell Road; thence North seven degrees thirty minutes east eight hundred seventy-six and four-tenths feet to a post in line of lands of Harvey D. Lippincott and the southerly line of W. H. Vennell's land, thence along the Southerly line of the said Vennell's land north seventy-six degrees forty-two minutes west eight hundred sixty and two-tenths feet to a stake; thence still along Vennell's land south nineteen degrees thirty-eight minutes west four hundred and five feet to a stone; thence along Vennell's land north eighty-nine degrees twelve minutes west six hundred ninety-one and three tenths feet to a stone near the edge of the Camden and Medford Railroad; thence south three degrees twenty minutes west, crossing the Camden and Medford Railroad three hundred seventeen and three-tenths feet to a stone; thence South seventy-nine degrees three minutes west five hundred twenty-two feet to a stake; thence along the line of Marhold Branch, sixty-eight degrees fifty-seven minutes west four hundred four and five-tenths feet to a point; thence south seventy-eight degrees forty-eight minutes west five hundred forty-seven and three-tenths feet to a stake; thence continuing south seventy-one degrees thirty-nine minutes west two hundred seventy-one and three tenths feet to a stake in the forks of the Marhold Branch and the Pensauken Creek and the Burlington and Camden County line; thence north seventy-eight degrees forty-two minutes west one hundred twenty-six feet to a stake crossing the same Pensauken Creek; thence south forty-three degrees eighteen minutes west eighty-two and seven-tenths feet to a stake; thence south fifty-four

degrees fifty-seven minutes east, crossing the Burlington and Camden County line and Pensauken Creek, the distance of fifteen hundred and nine feet to a stake; thence south eight degrees thirty-three minutes west, recrossing the Burlington and Camden County line and the Pensauken Creek, the distance of six hundred ninety-four and seven-tenths feet to a stake in the Marlton Pike; thence along Marlton Pike south sixty-seven degrees twelve minutes east one hundred nine and two-tenths feet to a point; thence continuing along the Marlton Pike south sixty-eight degrees fifteen minutes east one hundred ninety-eight feet to a point therein; thence south nineteen degrees ten minutes west fifteen and four tenths feet to a stake in the aforesaid Marlton Pike; thence along the aforesaid Marlton Pike south sixty-eight degrees forty minutes east three hundred eighty-four and eight-tenths feet to a stake; thence north twenty-one degrees ten minutes east fourteen and nine-tenths feet to to an iron pin in said Pike; thence continuing in said Pike south sixty-eight degrees thirty minutes east four hundred seventy-six feet to the place of beginning.

"CONTAINING one hundred two and seven hundred fifteen one-thousandths acres.

"EXCEPTING thereout and therefrom the mansion house and lot of land whereon the same is located, containing two and two hundred seventy-two one-thousandths acres (2.272), and subject to the right of way of the Camden and Medford Railroad, passing through the northerly portion of said farm, containing two and twenty-two one hundredths (2.22) acres, also subject to the right of way of the Philadelphia, Marlton and Medford Railroad, passing through

the southerly portion of said farm containing one and fifty-three one hundredths (1.53) acres, and also subject to the right of way in the rear of said lands and premises, granted and conveyed to Samuel Vennell; reserving a right of way over the lane fifty (50) feet in width, extending from the mansion house to the Marlton Pike, as shown in said survey."

And the aforesaid William H. Windolph, William R. Goldsborough, George A. Wonfor, and John S. Warner, on the 15th day of December, nineteen hundred and twenty-five, executed the instrument in writing above referred to and submitted the executed instrument to the complainants for the purpose of executing same, and accompanied delivery of the aforesaid written instrument with the payment of $8500.00.

And it further appearing to the satisfaction of the Court that the aforesaid instrument was altered while in the possession of complainants by the interlineation at their request on the fourth page of aforesaid instrument, between lines 17 and 18, of the words, "William J. Lippincott, one of," without notifying the defendants herein of complainants' intention to make said alteration and without notifying said defendants after the making of the aforesaid interlineation by the complaints, that the said interlineation had been made by the complainants before the complainants had executed the aforesaid contract.

And it further appearing that the aforesaid interlineation had been made by complainants without the knowledge and consent of defendants and that said alteration had not been adopted by the defendants, and that the defendants had not been made

acquainted with the aforesaid alteration by the complainants after the complainants had made the change, which alteration is in a material part of the contract.

And the Court being of the opinion that the aforesaid instrument in writing, by reason of the aforesaid alteration made in the manner above described, is not the same contract which the defendants as vendees signed, and is not available to complainants as evidence of the contract made between the parties hereto for the sale and purchase of the lands above described,

It is, on this 5th day of March, nineteen hundred and twenty-eight, ordered, adjudged and decreed that the aforesaid instrument be declared of no effect and be annulled by reason of the material alteration made by the complainants in the manner above set forth, as means of evidence of a contract made by the parties hereto for the sale and purchase of lands above described.

It is further ordered that the said complainants pay to the said defendants the cost of this suit to be taxed, which is hereby allowed to said defendants.

It is further ordered that true but uncertified copies of this decree and said tax costs be served on the solicitor of said complainants within fifteen days after the date hereof.

Respectfully advised:

E. B. Leaming, *V. C.*

Consented to:

Bleakly, Stockwell & Burling,
Solicitor for Complainants.

Joseph S. Low,
Philip Wendkos,
Solicitors for Defendants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JOHN O. WILSON, *et al.*,
Complainants-Appellants,

v.

WILLIAM H. WINDOLPH, *et al.*,
Defendants-Respondents.

WILLIAM H. LIPPINCOTT, *et al.*, executors, &c., *et al.*,
Complainants-Appellants,

v.

WILLIAM H. WINDOLPH, *et al.*,
Defendants-Respondents.

(Submitted May 11th, 1928. Decided October 15th, 1928.)

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1. Specific performance will not be decreed by a courty of equity unless the existence and terms of the contract be clearly proved.

2. Alteration, in the legal sense, is the change in some feature of an existing and complete legal instrument.

3. It is an elementary rule of the law of contracts that a contract does not come into existence until the proposition is met by an acceptance which corresponds with it entirely and adequately.

4. A contract for sale and purchase of land, after execution by vendees, was changed by vendors by substituting a different mortgagee in the proposed purchase-money mortgage, and then signed by them. Held, that no contract was legally made.

On appeals from decrees advised by Vice-Chancellor Leaming.

Messrs. Bleakly, Stockwell & Burling, for the appellants.

Mr. Philip Wendkos, for the respondents.

The opinion of the Court was delivered by Parker, J.

The same evidence, with the exception of the particular documents giving rise to the suits, was used in oth bactions, and the decision in one controls that in the other. The Wilson case will be particularly treated herein.

It is a vendor's suit for a specific performance of an alleged written contract to purchase real estate. When the case came to a hearing, it developed almost immediately that the so-called "contract," complete in form, had been presented first for signature to the vendees and signed by them, and then taken by an intermediary to the vendors for them to sign. Mrs. Laura Evans, one of those named as

vendors, then objected to the clause relating to a purchase-money mortgage as contained in the paper, and which provided that the mortgage should be by the "parties of the second part to the parties of the first part," because her husband was one of the "parties of the first part;" she was on bad terms with him and so she refused to sign. After some negotiations among the parties of the first part, of which the vendees had no actual notice or knowledge, it was agreed that the mortgage should read to Mrs. Evans alone, and accordingly her name was interlined in the instrument already signed by the vendees, so that the clause read, "to Laura Evans, one of the said parties of the first part." In that form, the venders all signed; but, of course, it is plain that neither the vendees nor the vendors executed the paper that had been executed by the other party. When this fact was made plain, the Vice-Chancellor halted the hearing, heard argument, considered the matter over the noon recess, and on reconvening the Court dismissed the vendors' bill of complaint; and counsel, stating that the other suit was precisely similar and adopting for that the testimony already taken, he dismissed that bill also. His conclusions were oral and are, as we think, not reported.

We consider that his disposition of the matter was entirely correct. The appellants argued before the Vice-Chancellor that as the several manifold originals of the paper, signed by complainants after the change, had been delivered to the several defendants and accepted by them without objection, they must be deemed to have assented to them; and that even, although they knew nothing of the matter for some time afterwards, running into months in some cases, retention of the paper after discovery, without repudiation, spelled acceptance. The

further point is made here, though apparently not made below, that Bitting, the go-between who went back and forth between the several parties, was the agent of the defendants and that his knowledge of the change at the time it was made was theirs, and hence they were bound by it. All this we deem too uncertain and nebulous to support a decree for specific performance at the instance of a vendor. Specific performance will not be decreed unless the existence and terms of the contract be clearly proved. If it be reasonably doubtful whether the contract was finally closed, equity will not interfere (*Brown v. Brown,* 33 N. J. Eq. 650).

On this branch of the case, therefore, we conclude that the proof touching assent of defendants to the paper in its modified form is insufficient to sustain a decree. As to Bitting, he was merely a runner for a real estate broker and his task was confined to bringing the parties together on the terms, something which he conspicuously failed to do.

This brings us to the fundamental ground for denial of the aid of the Court, and, as we view it, that ground is the non-existence of any complete contract. The Vice-Chancellor in his oral deliverance spoke of alteration as a bar to recovery, and gave some attention to the question of materiality of an alteration. Of course, there was an alteration of the paper in the ordinary or physical sense, but as we understand the matter, alteration in the legal sense relates wholly to the change in some feature of a paper already legally complete. This was the situation, for example, in the leading case of Master v. Miller, 4 T. R. 320; 2 E. R. C. 669, and in Hunt v. Gray, 35 N. J. Law, 227, cited by the Vice-Chancellor, and we think the cases digested under the heading of alteration will be found to refer to completed writings. The present case is not in that

class, but, as we view it, comes under the elemental rule that the bargain, or promise to be enforced, whether written or oral, must have been completely determined between the parties, and its terms definitely ascertained.

Brown v. Brown, *supra.*

"There is no contract unless the parties thereto assent; and they must assent to the same thing in the same sense. * * * It becomes a contract only when the proposition is met by an acceptance which corresponds with it entirely and adequately. * * * The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions, and it must not qualify them by any new matter * * * there are cases where the answer * * * departs from the proposition * * * or substitutes for the contract tendered, one more satisfactory to the respondent. In these cases there is no assent, and no contract. * * * An answer or a compliance has been sometimes held insufficient to make a contract where the difference in terms between the parties did not seem to be very important. In fact, the Court seldom inquires into the magnitude or effect of this diversity; if it clearly exist, that fact is enough. 2 Pars. Cont. ch. 2, Par. 1."

These principles are illustrated by such cases as Jordan v. Norton, 4 M. Y. W. 155; 6 E. R. C. 141; Peltier v. Collins, 3 Wend. 459; Gross v. Yeskel, 98 N. J. Eq. 64; affirmed, 100 N. J. Eq. 293; 13 Comp. Stat., p. 281, Par. 66. Tested by these rules, there was no contract between the parties.

It will have been observed that, according to Professor Parsons, the Courts pay little attention to

questions of materiality in this class of cases. We need not stop to consider what stand to take touching this feature, as we are clear that the change was material. The paper, as the vendees signed it, called for a mortgage to the vendors jointly; there were three vendors; Mrs. Evans was one, her husband another, the third was William B. Lippincott. As modified before vendors signed, it required a mortgage to Mrs. Evans alone, and for the important reason that she wished to control it alone and that her husband should have nothing to do with it. This might well make all the difference to the vendees-mortgagors between considerate treatment by joint mortgagees and harsh treatment and a demand for the pound of flesh from the substituted mortgagee. It is true, of course, that the mortgage made under the contract as drawn might have come to Mrs. Evans by assignment, but in view of the evidence and as a practical matter, the chances were strongly to the contrary, and the difference may well have been of great consequence to the vendees.

As already intimated, the dismissal of the bill was right, and the decree is therefore affirmed.

For affirmance—The Chief Justice, Trenchard, Parker, Minturn, Kalisch, Black, Katzenbach, Campbell, Lloyd, White, Van Buskirk, McGlennon, Kays, Hetfield, Dear, JJ. 15.

For reversal—None.

ANSWER.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER,
Plaintiffs,
v.
WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased,
Defendants.

Answer.

Summons issued Nov. 20, 1928.

Defendants, jointly and severally answering the complaint in the above-entitled cause, say:

1. Defendants deny that plaintiffs, by the paper writing referred to in said paragraph as Exhibit A, merely proposed to purchase from the defendants the farm recited in said Exhibit A, but say

that plaintiffs agreed to purchase said farm from the defendants.

2. This paragraph is denied.

3. This paragraph is denied.

4. This paragraph is denied, except that defendants admit that Exhibit B is a copy of a certain decree made in the Court of Chancery in a certain cause wherein these defendants were complainants and the plaintiffs herein were defendants.

5. This paragraph is denied, except that defendants admit that they filed an appeal from the decree of the Court of Chancery in said recited cause to the Court of Errors and Appeals of New Jersey. They specifically deny that the findings of the Court of Errors and Appeals are as stated in said paragraph and deny that they have the legal effect as in said paragraph claimed.

6. Defendants deny that plaintiffs have ever demanded the return of the moneys recited in said paragraph, but admit that the moneys therein recited have not been paid by defendants to plaintiffs. They specifically deny that plaintiffs are entitled to the said sum of $8500.00 or any part thereof or to any interest thereon.

DEFENSES.

1. The alteration in the contract between the plaintiffs and defendants, set up in the complaint as Exhibit A, was made in good faith by and with

the authority and consent of the plaintiffs and or their duly authorized agents in that behalf.

2. The alteration in the contract between the plaintiffs and defendants set up as Exhibit A in the complaint was ratified and confirmed by the plaintiffs.

3. The alteration in the contract between the plaintiffs and defendants set up as Exhibit A in the complaint was accepted and acquiesced in by the plaintiffs, without rescission or attempted rescission on their part by reason of said alteration.

4. Plaintiffs expressly waived objection to the alteration in the contract, Exhibit A, set up in the complaint, and to any alleged claim, right or demand arising thereout.

5. Plaintiffs expressly waived any and all alleged claims or demands to the return of the moneys paid by plaintiffs to the defendants under said contract.

6. Plaintiffs voluntarily abandoned and renounced their said contract and gave notice thereof to the defendants and surrendered to defendants any and all rights to or interest in or in respect to the moneys paid by plaintiffs to defendants under said contract, Exhibit A, set up in said complaint.

7. Plaintiffs never rescinded nor did they ever attempt to rescind said contract, nor did they ever give notice of avoidance of said contract, Exhibit A, set up in the complaint, by reason of said alteration mentioned in the complaint or for any other cause whatever.

8. Plaintiffs never demanded of the defendants the return of the moneys paid on account of the contract, Exhibit A, set up in the complaint, but, on the contrary, deliberately and voluntarily renounced to the defendants the said moneys theretofore paid on account and any claim thereto or any interest therein, and notified defendants that they abandoned their said contract.

9. Plaintiffs are guilty of laches in enforcing their alleged demand set up in the complaint.

10. Plaintiffs never offered to carry out the alleged oral offer set up in the complaint, but on the contrary refused to carry out said offer and the written contract executed by the parties to carry out said offer and acceptance.

11. Defendants at all times have been willing to carry out the said offer of purchase set up in the complaint, but plaintiffs refused to perform said agreement, abandoned the same and expressly waived and abandoned any alleged right to or interest in said moneys voluntarily deposited by the plaintiffs with the defendants.

12. The plaintiffs did not deal personally with the defendants or the defendants' agent, but at all times acted through John S. Warner, one of the plaintiffs, and duly authorized agent of all the plaintiffs in that behalf. Said alteration of Exhibit A set up in the complaint, as stated in the complaint, was made in good faith by the defendants, with the knowledge and consent of the said John S. Warner, one of the plaintiffs, and agent for all of the plaintiffs, before execution thereof by the defen-

dants, and was thereafter acquiesced in by the plaintiffs, by reason whereof plaintiffs are barred of their action set up in the complaint.

13. The plaintiffs elected to abandon and renounce their said contract for a cause unrelated to the said alteration in the contract mentioned in the complaint, to wit, they did not have the money to complete said contract, and thereby became and are barred of their action set up in the complaint and waived and renounced their right to the moneys theretofore paid on account to the defendants under said contract, Exhibit A.

14. Plaintiffs are estopped to make any claim for or to the moneys paid to the defendants under said contract, Exhibit A, mentioned in the complaint, and it would be inequitable and against good conscience to permit the plaintiffs to recover said moneys or any part thereof, because the plaintiffs constituted John S. Warner and/or Robert C. Bitting, their agent or agents in that behalf, dealt with the defendants only by and through said agent or agents, suffered and permitted the defendants in good faith to deal with said agent or agents on the assumption that said agent or agents had authority to represent the plaintiffs in all things respecting said contract mentioned as Exhibit A in the complaint and because said agent or agents consented and agreed to the alteration in said contract, and thereupon all copies of said contract were executed by the defendants as duplicate originals with the alteration made therein, and the plaintiffs, through their said agent or agents, received said duplicate original contracts, so altered, and said duplicate original contracts, so executed by all the defendants,

after said alteration, were delivered to the said plaintiffs and to each one of them by and through their said agent, John S. Warner, and thereafter neither the plaintiffs nor did any of them object to said alteration, but, on the contrary, asked defendants for extensions of time in which to perform their said contract and received the same from the defendants, and thereafter, and on the day fixed for settlement under said contract, based upon said extensions of time, notified the said defendants that they did not propose to carry out their said contract but would abandon the same and would and did forfeit the moneys paid on account under said contract, Exhibit A, and renounced any right and claim thereto; nor did the plaintiffs at any time thereafter, or any of them, protest against or object to said alteration so made, and by reason thereof defendants were deprived of the right to resell their said property or to make full use thereof, as they could have done if the plaintiffs had attempted to rescind or had rescinded said contract or given notice of avoidance thereof because of said alleged unauthorized alteration of said agreement, and further, because the defendants have, in the assertion of any such right or demand, been guilty of laches in respect of all matters connected with said alteration or arising thereout.

BLEAKLY, STOCKWELL & BURLING,
Attorneys for Defendants.

NOTICE.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER,
Plaintiffs,
v.
WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased,
Defendants.

Action at Law.
Notice.

To Bleakly, Stockwell and Burling, Attorneys for the Defendants:

Please take notice that on Saturday, February 2nd, 1929, I will apply to Hon. Frank T. Lloyd, Justice of the New Jersey Supreme Court, at his chambers, at Cove Road and Maple Avenue, Merchantville, N. J., to dismiss the answer filed on behalf of the defendants, and to ask for a summary

judgment for the plaintiffs against the defendants for the following reasons:

1. The allegations and statements of the answer are sham and frivolous. Both the Court of Chancery of New Jersey and the New Jersey Court of Errors and Appeals have, at the instance of the defendants, already adjudicated that the parties hereto have not entered into any contractual relationship with each other for the purpose of purchasing the land described in Exhibit A attached to the complaint filed herein.

2. The denial of paragraph 2 of the complaint is sham, because both the paper writing, Exhibit A, and the decree of the Court of Chancery, which is admitted by the defendant, recites the receipt of the sum of eighty-five hundred dollars ($8500.00) by the defendants.

3. The denial of paragraph 3 is a sham and frivolous, because the Court of Chancery of New Jersey did not permit the introduction in evidence of the paper writing on which the defendant had brought suit against the plaintiffs for the purpose of compelling the plaintiffs to perform the alleged contract which the defendants claim had been entered into. The ruling of the Court of Chancery was affirmed by the New Jersey Court of Errors and Appeals. The denial contained in paragraph 3 of the answer is both sham and frivolous because the New Jersey Court of Errors and Appeals affirmed the findings of the Court of Chancery of New Jersey and gave as its reason in part that the contract alleged by these defendants had never been entered into by the plaintiffs in this suit.

4. The findings of the New Jersey Court of Errors and Appeals speak for themselves.

5. The defendants herein admitted that they are retaining the sum of eighty-five hundred dollars ($8500.00) without showing that they have a right to retain said sum.

6. Our Court of Chancery of New Jersey has decreed that the alteration in the instrument referred to in the first defense was not made in good faith and with the authority and consent of the plaintiffs or their duly authorized agent; that it was not ratified and confirmed by the plaintiffs and that it was not accepted and acquiesced in by the plaintiffs without rescission of the alleged contract on their part by reason of said alteration, and further, that plaintiffs had not expressly waived objection to the alteration in the instrument shown in Exhibit A in the complaint, or to any alleged claim, right or demand arising thereout and that plaintiffs did not expressly waive any and all alleged claims or demands of the return of the moneys paid by the plaintiffs to the defendants.

7. The findings of our Court of Chancery in the above respect were confirmed by the New Jersey Court of Errors and Appeals. Plaintiffs could not have voluntarily abandoned and renounced the contract alleged by these defendants for the reason that both our Court of Chancery and our Court of Errors and Appeals have found that no contract had ever been entered into between plaintiffs and defendants. As a consequence, plaintiffs could not have given notice of their abandonment or their renunciation of the alleged contract and could not

have surrendered to defendants any and all rights to or interest in the moneys paid by plaintiffs to defendants, the receipt of which is acknowledged by the Exhibit A, and so found by the decree of our Court of Chancery.

8. As a consequence of the findings of our Court of Chancery and our Court of Errors and Appeals, plaintiffs could never have rescinded a contract which they had never entered into, nor could they have ever given notice of avoidance to a contract which they had never entered into.

9. Our Courts have already found that the very existence of the alteration admittedly made by the defendants or their duly authorized agent placed the parties in this proceedings, who were the same parties in the proceedings commenced by the defendants in our Court of Chancery, in the position of never having entered into a contract for the sale and purchase of the lands set forth in Exhibit A attached to the complaint herein filed.

10. Laches is unknown in the court of law, the time within which these plaintiffs have a right to bring their action is governed by the Statute of Limitations of this State. The allegations of paragraph 10 of the answer is both sham and frivolous because these plaintiffs are not obligated to carry out an oral offer to purchase lands as is specifically provided by the statute, Section 5 of the Statute on Frauds and Perjuries of this State.

11. The allegations of paragraph 11 of the answer are sham and frivolous because, although the defendants might have been willing to carry out an

oral offer to purchase as set up in the complaint, there is no obligation on the part of the plaintiffs to carry out said offer on their part because no agreement had ever been entered into between the parties to this cause or the cause commenced in the Court of Chancery. It was, therefore, impossible for these plaintiffs to have abandoned and expressly waived any right or interest in the moneys voluntarily deposited by the plaintiffs with the defendants.

12. Paragraph 12 of the answer is sham and frivolous, in that these allegations are contrary to the conclusions and finding of the Court of Chancery of New Jersey at the suit of the defendants against the plaintiffs.

13. The allegations in paragraph 13 are sham and frivolous in that the plaintiffs could not have elected to abandon and renounce the contract which they had never entered into. Such was the findings of the Court of Errors and Appeals of New Jersey and the Court of Chancery.

14. Paragraph 14 of the answer should be stricken, in that it does not set forth statements of fact but conclusions of law; moreover, these conclusions are not in accord with the conclusions of our Court of Chancery and they are not in accordance with the evidence already submitted by these parties in our Court of Chancery at the time suit was brought by these defendants against the plaintiffs. Said paragraph 14 contains much scandalous matter and should be entirely stricken.

JOSEPH S. LOW,
PHILIP WENDKOS,
Attorneys for Plaintiffs.

MEMORANDUM.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER,
Plaintiffs,
v.
WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased,
Defendants.

Action at Law.
On Motion to Strike Answer and Defenses.
Memorandum.

For the motion, PHILIP WENDKOS, ESQ., JOSEPH S. LOW, ESQ.
Contra, BLEAKLY, STOCKWELL & BURLING, ESQS.

JESS, J.:

In a suit in the Court of Chancery, brought by the defendants in this case, as vendor, against the

plaintiffs here, as vendees, an instrument purporting to be an agreement between the parties for the sale and purchase of a farm, was held by Vice-Chancellor Leaming not to be a contract enforceable by a decree for specific performance. This decision was affirmed by the Court of Errors and Appeals (Wilson, *et al.,* v. Windolph, *et al.;* Lippincott, *et al.,* v. Windolph, *et al.,* 143 Atl. 346).

The theory upon which the complaint in the present suit is drawn is that, it having been judicially declared that there was never any enforceable contract between the parties, the plaintiffs are entitled to recover the sum of $8500, which they paid to the defendants under the terms of the intended agreement. The plaintiffs alleged a "proposal" to the defendants for the purchase of the farm, the payment by the plaintiffs and the receipt by the defendants of $8500, the failure and refusal of the defendants to accept the proposal, the attempt of the defendants to compel the plaintiffs, by a bill in Chancery, to perform a contract different from that which the plaintiffs had proposed, the decree of the Court of Chancery against the defendants, the affirmance of that decree by the Court of Errors and Appeals, the demand by the plaintiff for the return of the money paid by them and the refusal of the defendants to return it. The defendants generally deny the allegations of the complaint and set up fourteen defenses.

The substance of most of the separate defenses is that the alterations made in the paper writing by the defendants, after it had been signed by the plaintiffs and delivered to the defendants, were made with the authority and consent of the plaintiffs and were ratified and confirmed by them; that the plaintiffs expressly waived all claims and demands for the return of the deposit money.

These allegations, unless sham, raise questions of fact which entitle the defendants to their day in court.

In contending that these defenses are sham, plaintiffs rely upon the findings of the Court of Chancery and the Court of Appeals that a contract never existed between the parties and that the decisions in that suit are *res adjudicata* upon the issues tendered by the defendants.

I cannot concur in that view. The Court of Errors and Appeals did not decide these questions of fact in Wilson v. Windolph, *supra*. Mr. Justice Parker, speaking for the Court, said: "Specific performance will not be decreed unless the existence and terms of the contract be clearly proved. If it be reasonably doubtful whether the contract was finally closed, equity will not interfere. Brown v. Brown, 33 N. J. Eq. 650. On this branch of the case, therefore, we conclude that the proof touching assents of defendants to the paper in its modified form, is insufficient to sustain a decree."

The decree in the specific performance suit is not *res adjudicata* so far as this action at law is concerned. There is no identity of the thing sued for or of the cause of action. The decree is not so in point as to control the issue in the pending action. Hoffmeir v. Trost, 85 Atl. 221.

It is entirely possible that evidence touching assent of plaintiffs to the paper in its modified form, which was insufficient to sustain a decree that they specifically perform the contract, might satisfy a jury that such assent was given. The defendants by their pleadings say there was such assent and they cannot be estopped from raising that defense by the finding in the Chancery Court that the evidence on that point was not of the clear and con-

vincing character required to warrant a decree for specific performance.

The fact that the contract was unenforceable against the plaintiffs, did not constitute a bar to its performance by the plaintiffs. Aalfor v. Kinney, 7 N. J. Adv. Rep. 328. Assuming that the plaintiffs learned when the paper writing was returned to them in its modified form that it was, because of the alteration, nugatory as an agreement binding upon them, there was nothing to prevent them from treating it as a contract and further performing, if they deemed it to be to their interest to do so. It was their option upon the discovery of any unauthorized change in the provisions of the paper, to renounce it, as not their contract, or to accept it as altered. The defense is, in substance, that the plaintiffs adopted the latter of these alternatives, and by their acts and conduct, gave affirmative evidence of their adoption of the paper writing as an agreement by which they were bound.

The acts of the parties in dealing with the subject-matter of their contract afford the best indication of their intention either to execute it or annul it. Kerney v. Johnson, 144 Atl. 808.

Paragraph 2 of the answer, which denies the payment of $8500, will be stricken as sham. From the record before me on this motion it appears conclusively that that sum was paid by the plaintiffs and its receipt acknowledged by the defendants.

The motion will be denied as to the other paragraphs of the answer and as to the several separate defenses, except paragraphs 7, 9, 10 and 14, which will be struck out.

It may be well to point out that the complaint relies upon the finding and decree in the Chancery suit that the instrument purporting to be a contract was altered, while in the possession of the defen-

dants, by the interlineation of the words, "William J. Lippincott, one of." The copy of the instrument annexed to the complaint and relied upon as a mere proposal, contains these words without anything on the face of the paper itself to indicate any alteration. I assume that this is a copy of the instrument as altered and that it, instead of the original writing, as executed by the plaintiffs, inadvertently was made a part of the complaint.

FRANK B. JESS,
Circuit Court Judge, sitting as Sup. Ct. Commr.

ORDER.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER,
Plaintiffs,
v.
WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased,
Defendants.

Order.

A motion having been made by Philip Wendkos and Joseph S. Low, attorneys for plaintiffs, for the purpose of dismissing the answer of defendants in the above-entitled cause, and arguments thereon having been made by counsel for plaintiffs and defendants, and they having submitted briefs thereon, and the Court having considered the same;

It is, on this 19th day of July, 1929, ordered that the motion of the plaintiffs be and is hereby denied

except that it be further ordered that paragraph 2 of the defendants' answer *he* and is hereby stricken because it is sham, and defenses numbered 7, 9, 10 and 14 of the answer be and are hereby stricken.

FRANK B. JESS,
Judge.

Entered October 9, 1929.
On motion of
PHILIP WENDKOS and
JOSEPH S. LOW,
Attorneys for Plaintiffs.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of order in the above-stated cause as the same remains on file in my office.

In testimony whereof, I have set my hand and the seal of said Court, at Trenton, this ninth day of October, A. D. nineteen hundred and twenty-nine.

FRED L. BLOODGOOD,
Clerk.

(Seal)

EXCEPTIONS.

(Filed July 12th, 1929.)

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

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WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER, *Plaintiffs,* v. WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased, *Defendants.*	Action at Law. On Plaintiffs' Motion to Strike Out. Exceptions.

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Defendants except to so much of the order of this Court entered by Honorable Frank B. Jess, Circuit Court Judge, June 26, 1929, as strikes out special defenses of the defendants Nos. 7, 9, 10 and 14. 30

BLEAKLY, STOCKWELL & BURLING,
Attorneys for Defendants.

REPLY.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER, *Plaintiffs,* v. WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased, *Defendants.*	Action at Law. Reply.

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1. Plaintiffs join issue with the allegations contained in paragraphs 1, 3, 4, 5, 6 of the answer and also with the allegations contained in the defenses.

2. Replying specifically to paragraphs 1, 4 and 5 and 6 of the answer, plaintiffs say that the instruments marked Exhibits A, B and C are to be construed by the Court, the said exhibits presenting only questions of law.

3. Replying specifically to 1st, 2nd, 3rd and 4th defenses, plaintiffs say that the New Jersey Court of Errors and Appeals have already determined that the alteration in the instrument marked Exhibit A was not made in good faith by and with the authority and consent of plaintiffs or their duly authorized agents in that behalf, and that said alteration was not ratified and confirmed by the plaintiffs, and that said alteration was not accepted and acquiesced in by the plaintiffs. Said Court had determined that there never was a contract in existence between the plaintiffs and defendants capable of rescission by these plaintiffs. Said Court of Errors and Appeals has already determined that plaintiffs did not expressly waive objection to the alteration in the instrument marked Exhibit A set up in the complaint and that plaintiffs did not waive objection to any alleged claim, right or demand arising thereout.

4. Replying specifically to the 5th defense, by virtue of the findings of the New Jersey Court of Errors and Appeals, to the effect that there was no contract entered between these plaintiffs and defendants, these plaintiffs became entitled to the return of the deposit of $8500.00 which they made at the time they submitted their written proposal to purchase the farm lands to these defendants.

5. Replying specifically to the 6th, 7th, 8th, 11th and 13th defenses, plaintiffs say that defendants have already introduced in evidence in the Chancery Court between the same parties a letter addressed to the defendant, John O. Wilson, in which it is stated that a Mr. Bitting has advised John S. Warner, one of the plaintiffs in this suit, that

Messrs. Goldsborough and Wonfor, two other plaintiffs, are not in position to make settlement on the Lippincott farm, which necessitates the forfeit of all moneys paid on account.

Said letter was before the Court of Errors and Appeals for consideration and said Court determined finally that as to Bitting, "he was merely a runner for a real estate broker and his task was confined to bringing the parties together on the terms, something which he conspicuously failed to do." Plaintiffs deny that there ever was a contract in existence between the parties to this suit, the Court of Errors and Appeals found that said instrument marked Exhibit "A" was not legally complete. Plaintiffs deny that they abandoned and renounced a contract legally complete. Plaintiffs obtained no rights under said instrument which they could surrender. The defendants, not having accepted plaintiffs' offer, the money consideration paid by plaintiffs failed of its legal function and defendants were obligated to return to plaintiffs the moneys which they paid on account of a contract which the parties to this suit were to have entered into. Plaintiffs charge, however, that no contract had been entered into between them and plaintiffs concerning the sale and purchase of the lands described in the aforesaid instrument.

Plaintiffs charge that they could not have rescinded the instrument marked Exhibit "A." The New Jersey Court of Errors and Appeals has for all times determined that said instrument was not legally complete. Plaintiffs were legally unable to renounce to defendants the money paid by them on account. Therefore, plaintiffs deny that they relinquished their claim to said moneys and further deny that they authorized any person to renounce, relinquish or abandon their claim to said moneys or

to notify defendants that they abandoned, renounced or relinquished their claim thereto.

6. Replying specifically to the 12th defense of the defendants' answer, our Court of Errors and Appeals has affirmed the decree of the Court of Chancery in the suit between the same parties hereto, and by said decree it was for all times adjudicated that the instrument marked Exhibit A was altered by these defendants without notifying plaintiffs of their intention to make said alteration and without notifying them that they had made said alteration, and that said alteration had been made by these defendants without the knowledge and consent of these plaintiffs and that said alteration had not been adopted by these plaintiffs, and that these plaintiffs had not been made acquainted with the aforesaid alteration by these defendants after the latter had made the change; and that by reason of said alteration made in the manner above described, said instrument is not the same contract which these plaintiffs signed, and is not available to these defendants as evidence of the contract made between the parties hereto for the sale and purchase of the lands above described.

JOSEPH S. LOW,
PHILIP WENDKOS,
Attorneys for Plaintiffs.

TESTIMONY.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

WILLIAM H. WINDOLPH, *et al.*,
Plaintiffs,
v.
WILLIAM J. LIPPINCOTT, *et al.*,
Defendants,
and
WILLIAM H. WINDOLPH, *et al.*,
Plaintiffs,
v.
JOHN C. WILSON, *et al.*,
Defendants.

Action at Law.

Mt. Holly, N. J., January 27, 1930.

TESTIMONY.

Before HON. FRANK B. JESS, Judge, and a jury.

APPEARANCES:
For plaintiffs, PHILIP WENDKOS, ESQ.
For defendants, MESSRS. BLEAKLY, STOCKWELL & BURLING.

Mr. Wendkos: Now, if your Honor please, in view of your Honor's orders striking from the answer certain of the allegations, I think we can expedite matters by stipulating on the record that $6,200 in one case and $8,500 in the other case was actually received.

Mr. Stockwell: We received that money and at all times retained it and were never requested to return it until this suit was brought.

The Court: Very well.

Mr. Wendkos: If your Honor please, I had a certified copy of the findings of the Court of Errors and Appeals, but last night, looking through my papers, I found it has been lost. The case is reported in the official reports ——

Mr. Stockwell: If your Honor please, with your permission, I forgot to say anything about this chancery suit. Mr. Wendkos has referred to it. Personally, I think it has nothing to do with the case, but since he has mentioned it I think it is my duty to clear that situation up.

(Mr. Stockwell makes a further opening to the jury.)

Mr. Wendkos: I was saying before, if your Honor please, that I had a certified copy of the findings of the Court of Errors, but it was lost out of my case last night. The case is officially reported. I don't know what the equity report is at this time, but it is reported in 143 Atlantic, at page

346, Wilson, et al., v. Windolph, et al., and Lippincott, et al., v. Windolph, et al., the Court of Errors of New Jersey, decided October 15, 1928. In view of the absence of my certified copy, I would like to introduce one of my own copies. This is a copy of the findings of the Court of Errors and Appeals. I offer the book or the copy that I have made.

Mr. Stockwell: I think we have a certified copy here.

Mr. Wendkos: Go ahead.

The Court: Put yours in.

Mr. Wendkos: I offer in evidence a copy of the decree or findings of the Court of Errors in the case of John O. Wilson, et al., complainants-appellants, v. Windolph, et al., respondents; and also in the case of William J. Lippincott, et al., executors, &c., complainants, v. William H. Windolph, et al., defendants-respondents.

The Court: They may be marked.

(Paper marked Exhibit P1.)

Mr. Stockwell: I object merely on the ground that in my judgment it is immaterial to this controversy.

The Court: You are not objecting to it as being indicative of what it purports to show?

Mr. Stockwell: Oh, no.

The Court: It is admitted subject to that objection.

Mr. Wendkos: I also offer in evidence a certified copy of a decree in the Court of Chancery involving the same suits as those in the Court of Errors and Appeals.

Mr. Stockwell: The same objection.

(Paper marked Exhibit P2.)

Mr. Wendkos: I also offer in evidence a printed copy of the proceedings which was served upon me by Mr. Stockwell, which was a state of the case as it was brought before the Court of Chancery to be presented to the Court of Errors and Appeals at the time that he took his appeal.

Mr. Stockwell: Do you present this record with the testimony set forth therein as evidence in this case?

Mr. Wendkos: Exactly, as evidence in this case.

Mr. Stockwell: And the evidence there given?

Mr. Wendkos: And the evidence there given.

Mr. Stockwell: No objection.

The Court: It may be marked.

(Book marked Exhibit P3.)

Mr. Wendkos: I don't know which case is first, the Lippincott or the Wilson case.

The Court: I think the Lippincott case is first.

ROBERT C. BITTING, sworn for plaintiffs.

Direct examination.

By Mr. Wendkos:

Q. Look at this agreement dated December 15, 1925, and tell me whether that is your signature as witness.

A. It is.

Q. Now, whose signature did you witness?

A. I witnessed William H. Windolph and William R. Goldsborough.

Q. Whose signatures did you witness?

A. William H. Windolph and William R. Goldsborough.

Q. Did you see them sign it?

A. I did.

Q. You were employed by Mr. Warner?

A. I was.

Q. Is that John S. Warner who signed this as a purchaser?

A. Yes, sir.

Q. Did you see anybody else sign?

A. No, I didn't.

Q. After it was signed did you deliver this to someone?

A. After it was signed by all of the parties there who were the purchasers I delivered it to Wilson's office.

Q. You delivered what?

A. I delivered it to Wilson's office, John O. Wilson.

Q. Now, Mr. Bitting, I call your attention to a notation made over your signature. Is this notation made in your own handwriting?

A. It is not.

Q. Was the notation on that contract at the time the buyers signed it?

A. It was not.

Q. By the buyers you mean who?

A. William H. Windolph and William R. Goldsborough.

By the Court:

Q. What about the other two?

A. Wonfor and John S. Warner.

By Mr. Wendkos:

Q. Now, are you positive ——

A. Absolutely.

Q. Now, wait a minute. Are you positive that that notation was not there at the time that you signed it as a witness?

A. Absolutely.

Q. Now, who signed the contract first?

A. As I recall it, Mr. Windolph was the first one to sign the contract.

Q. Did all the purchasers sign the contract first?

A. Yes, sir.

Q. Were the signatures of the sellers on the contract while it was in your possession?

A. No, they were not.

Q. Now, do you say that that notation was not made by you?

A. It was not.

Q. Was it made under your direction?

A. No, sir.

Q. Do you know the interlineation to which the notation refers was in the body of the contract at

the time it was signed by the buyers in your presence?

A. I know that it was not there when it was signed by the buyers.

Q. Was the interlineation made in your presence?

A. No, sir.

Q. Or made at your request?

A. No, sir.

Q. Do you know by whom it was made?

A. I do not.

Q. You still say that the interlineation and the notation were not made while the contract was in your possession?

A. It was not made while in my possession.

Q. When did it leave your possession?

A. When I took it to John O. Wilson's office for execution.

Q. Now, whom did John O. Wilson represent?

A. Well, he represented practically the same parties as I did. He represented the sellers.

Q. Can you recall how many copies of those instruments or of that instrument you delivered to the office of John O. Wilson?

A. As I recall it, there were four or five of each.

Mr. Wendkos: I believe we may save time, if your Honor please, if I refer to this other contract, the Evans contract, because I would like to introduce that in evidence and have him testify from that, because the same testimony applies.

Q. This other contract—you said there were three or four of each—is this the other contract you refer to? (Paper shown witness.)

A. It is.

Q. Do the names of the buyers appear on that other contract with Evans and others?
A. Yes, sir.

The Court: Mr. Wendkos, for the purpose of clarity, suppose the first contract or the first instrument, paper writing, be marked now in evidence and then the second, and then we can refer to them in that way.

Mr. Wendkos: All right. I introduce in evidence a paper writing dated the 15th day of December, 1925, between William J. Lippincott and others and William H. Windolph and others.

(Paper marked Exhibit P4.)

I introduce in evidence another paper writing dated the 15th day of December, 1925, between William Evans and others and William H. Windolph and others.

Mr. Stockwell: No objection to either paper. Are you introducing at this time there the other copies? Will you have them marked?

Mr. Wendkos: Yes, the Evans paper and the Lippincott paper.

(Paper marked Exhibit P5.)

Q. Did you deliver those papers for the purpose of having them executed by the sellers?
A. I did.
Q. Did you subsequently take them away from Mr. Wilson's office?

A. I did.

Q. Did you take this particular copy which I now show you, with the signatures on it, away from John O. Wilson's office?

A. I did.

Q. When you took it away, were the names of William Evans, Laura Evans and William Lippincott on that instrument?

A. They were.

Q. And in the case of the other instrument were the names of William J. Lippincott and Caroline, his wife?

A. That is correct.

Q. And the others mentioned as sellers?

A. Yes, sir.

Q. When did you first observe the presence of a notation over your signature as a witness, in the one case the words, "William J. Lippincott, one of," inserted between lines 29 and 30, page 2—correct me if I am wrong on that—lines 17 and 18, page 3; and in the other case the words, "Laura Evans, one of," between the seventeenth and eighteenth lines, fourth page.

A. The question is, when did I observe that interlineation?

Q. When did you observe that notation?

A. It was some time, a considerable length of time after execution.

Q. Now, do you know when they were actually executed?

A. As near as I can recall it, the William J. Lippincott contract, I had the purchasers sign sometime around the 15th, the 14th or 15th of December; then I returned it to John O. Wilson's office for execution, and I think it was a matter of three or four days later that they secured the signatures. This one contract was returned to me.

Q. Was that returned to you?
A. Yes.

By the Court:

Q. P4, is it?
A. The William J. Lippincott contract.

By Mr. Wendkos:

Q. Was returned to you?
A. Yes.
Q. When was the Evans contract returned to you?
A. It was at least six weeks later.
Q. Can you fix the date of the month, about what date of the month?
A. Well, it was sometime after the middle of February.
Q. At the time you took those contracts away was either the notation or the interlineation in those instruments?
A. No, they were not.
Q. No, I mean from Mr. Wilson's office the second time after they were executed by the sellers.
A. Oh; I didn't notice it at the time I took them away from Mr. Wilson's office.
Q. Did anybody in Mr. Wilson's office or Mr. Wilson himself, or Mr. Lippincott or any of the sellers, parties to that contract, did they call your attention to that notation or interlineation?
A. No, sir.
Q. Are you positive of that?
A. Absolutely, because I discovered it myself sometime later.
Q. Will you tell me the circumstances under which the delivery was made to you and the general en-

vironment of the office and how the papers were delivered to you?

A. Well, my dealings were mostly with Mr. Stanert, and as I recall it, he delivered the papers to me.

Q. Where did he deliver the papers to you?

A. In his office, in John Wilson's office.

Q. Where is that office?

A. Third and Market, Camden.

Q. Sure it is Third and Market?

A. Well, it is in that block. I don't know the exact number, but it is on Market Street.

Q. Camden?

A. Camden.

Q. On what floor of the building is Mr. Stanert's office?

A. First floor.

Q. Front or back or middle?

A. Well, it is towards the front.

Q. Did he give you this instrument in his office?

A. He did.

Q. How many of them did he give you?

A. Well, there were four or five of the William J. Lippincott contract, as I recall it.

Q. How many of Evans?

A. As I recall it, I didn't get them at the same time, some time later, the Evans.

Q. Well, now, at the time that he delivered the Lippincott papers to you, did he say anything?

A. No, there was nothing drawn to my attention whatsoever about any change or anything in the contract.

Q. Were they delivered to you in a package or envelope or any way?

Mr. Stockwell: Objected to as leading.

The Court: Objection sustained.

Q. Well, how were they delivered to you?

A. Well, they were in this form, folded up like that, four or five of them handed to me.

Q. Can you recall the exact words that Mr. Stanert used at the time he handed them to you?

A. Well, as I recall it, I requested the contracts, asked him if they were executed and witnessed, and he said yes, and pulled them out and handed them to me. That is my recollection.

Q. What did you do then?

A. Well, I took them back to the office, and in the course of the next several days I delivered them to the respective purchasers, excepting, as I recall it, I delivered all except Mr. Wonfor's, and I believe I left that with Mr. Warner to deliver.

Q. Did you say anything to the purchasers regarding anything about the contracts?

A. No, I did not.

Q. Did you specifically mention any of the features with respect to interlineations or notations?

A. No, sir.

Q. Now, can you recall what you did say?

A. Well, I just, as I recall it, handed them and said, "Here is the copy of the option," as I always call them, "to purchase."

Q. Now, I understood you to say that you represented somebody. Whom did you represent?

A. I was working in John S. Warner's real estate office as a salesman and I was selling this property.

Q. For whom?

A. For William J. Lippincott, and at that time I didn't know there were two farms, I thought it was all one, one property, and William J. Lippincott owned it all, that there was 186 acres, more or less. We had it listed in our office for sale and

that was my business, selling real estate, and I tried to sell it. Finally, I had those purchasers; I said that I was representing William J. Lippincott.

Q. Did you ever talk to the owners of the farm?

A. It was not originally listed by me in our office. The listing was in the office and I was down at the farm on numerous occasions and had conversations with Mr. Lippincott regarding the purchase price and other minor details.

Q. Do you remember at the time of the chancery suit the Vice-Chancellor asked you the following question: ——

Mr. Stockwell: I object. He has already put this paper in evidence. It is from some other record. This is his own witness. Do you propose to contradict it, lay a foundation for contradiction of your own witness?

Mr. Wendkos: I do not propose to contradict.

The Court: Then, what he said there, of course, is already in evidence. Objection sustained.

Q. Did you at any time ever call the attention of the buyers, who are the plaintiffs in this suit, to either the interlineation or the notation, or both?

A. Not directly, no, not collectively or to all of them. I had mentioned it to one and I believe two after I discovered it, a considerable length of time after I brought it back from Wilson's office.

Q. Can you fix the time which you say is a considerable time after you brought them back from Mr. Wilson's office?

A. As near as I can recall it, there was a period

of possibly three or four months afterwards that I noticed it.

Q. Was there any change of position or any further negotiations or disagreement between the parties up until the time that you discovered that interlineation or notation?

A. Not that I recall.

Q. As far as you can recall, were there any payments to be made on account of the agreement between this date and the time of settlement?

A. I don't just quite understand the question. Repeat it, please.

Q. As far as you can recall.

Mr. Stockwell: I object. It is in the statement.

The Court: It is in the agreement.

Q. Can you recall to whom you drew the attention of either the interlineation or the notation, or both, and what you said when you called the attention to the interlineation and notation, or either?

A. As I recall it, I mentioned to Mr. Warner first. I was looking over the contract and I noticed this writing in ink, and the rest of it was made out in typewriting, and I knew it had not been there before, and it was a condition added after Warner, Wonfor, Windolph and Goldsborough had signed it, and it looked queer to me, and I called Mr. Warner's attention to it, mentioned it to him. I don't know that I showed him the contract, but I told him that there had been some additions made there in pen and ink. I thought it was queer. I am almost positive, but I think I also mentioned it to Mr. Windolph, not showing him the contract, but mentioning that there had been something added in pen and ink over my signature after he had signed it.

Q. But you hadn't actually shown it to him ——

Mr. Stockwell: I object to the form of the question.

The Court: Objection overruled.

Q. Had you actually shown the papers with those words written or printed in ink on there?

A. No, sir.

Q. Did you show it to anybody?

A. No, sir.

Q. I mean to any of the purchasers?

A. No, sir.

Q. As far as you know, were all of the negotiations and transactions concerning the sale of this property handled through your office?

A. As far as I know, I handled most of the transactions.

Q. Now, do you know whether the sellers and buyers ever got together, met each other in person?

A. I know that they had not, because I had seen them individually.

Q. Are you positive of that fact between the dates of December 15, 1925, and December 31, 1926?

A. I am.

Q. Are you positive of that fact between the dates of December 15, 1925, and up until the time that the parties appeared in the Chancery Court in Camden?

A. I am.

Q. Are you positive that there was no communication in writing between the sellers and the buyers concerning the purchase and sale of this property?

A. Not so far as I know.

Q. Aside from the agreement, I mean.

A. Not so far as I know; none brought to my attention.

Q. Well, you were in Mr. Warner's office, were you not?

A. Yes, sir.

Q. Do you know whether or not there were any communications sent to him concerning the interlineation or alteration?

A. No, sir; there was not.

Q. Do you know whether Mr. Wilson's office had ever had any personal contact with all or any of the buyers aside from Mr. Warner?

A. Not to my knowledge.

Q. Were you present at any time when there were any communications, verbal or otherwise, made between the office of Mr. Wilson and Mr. Warner?

A. I believe that I was in Mr. Wilson's office once when Mr. Warner was in there. What the occasion was or whether it was on that particular business, I can't recall.

Q. Well, were you there at that time in connection with any transaction concerning this particular farm?

A. As I recall it I was, because that is about the only transaction I had with Wilson's office.

Q. Well, now, did Mr. Warner go there for the same purpose that you did?

A. Possibly it was the time that he paid the checks over on these options.

Q. Can you recall when that time was?

A. Well, it must have been the time of execution of these agreements.

Q. Execution by whom?

A. By the purchasers.

Q. Well, now, when did you deliver both of what you call the options to the office of Mr. Wilson?

A. It was around the 15th of December.

Q. Was the delivery of the checks made at the same time as the delivery of what you call the options?

A. Yes, as I recall it, went there and made the checks out.

Q. And Mr. Warner made the delivery of those checks?

A. Yes.

Q. Was that the only occasion when you saw Mr. Warner in the office of Mr. Wilson?

A. It was.

Q. And, so far as you know, that is the only occasion when Mr. Warner was in the office of Mr. Wilson in connection with these particular options, as you call them?

A. That is correct.

Q. I want to get this clear in my mind: you represented the sellers of these farms?

Mr. Stockwell: Objected to. He has asked that once before, and that is a question of law, in any event.

Mr. Wendkos: No, agency is a question of fact, as I see it.

The Court: Well, it is perfectly clear as to what he said about that, Mr. Wendkos. He said he was employed by Mr. Warner, this farm was listed in Warner's office and he was the man representing Warner, who had the negotiations with the seller. He says—it already appears on record without objection—he says that he represented Mr. Lippincott.

Mr. Wendkos: Well, of course, I am entitled to add to that the question whether he represented the seller of the other farm, the Evans.

The Court: Yes, you may bring that out if that doesn't appear.

Mr. Stockwell: The question was not that, your Honor.

The Court: No, finish the question.

Q. Did you represent the seller, the Evans, of the other farm on Cropwell Road?

Mr. Stockwell: I object and ask that the question be addressed to facts on which the Court can determine whom he represented.

The Court: I will have to sustain that objection to the form of the question.

Q. Well, then, I would ask this question: which of the sellers mentioned in those two papers did you represent?

Mr. Stockwell: Objected to for the same reason.

The Court: Yes, that might be purely a question of law. He might show circumstances from which you say an inference of agency arose, whatever the contracts were with those persons, whatever the circumstances of the transaction were, may be shown.

Q. Well, suppose I put it this way: did you speak with the owners of these farms at any time?

A. I represented William J. ——

Q. Now, wait a minute. Just answer this question: I ask you whether you spoke to the owners

of these farms at any time prior to the preparation of these instruments and their execution.

A. One farm, yes.

Q. Now, which farm is that?

A. William J. Lippincott.

Q. Did you speak with the owner of the other farm?

A. No, sir; never knew him, never met the man. Mr. Evans, I presume, was supposed to be the owner, or Laura Evans and her husband, and I never met those parties.

Q. You never met those parties?

A. No.

Q. When Mr. Lippincott spoke to you did he treat those two farms as one?

A. That was my impression originally, that it was to be sold as one parcel.

Q. When you say an impression, how did you get that impression?

A. The fact was not brought out that it was two farms, it was not brought to my attention and I didn't actually know that it was two farms until sometime later.

Q. When was that?

A. Well, it was up to the time of the preparation of the contract itself. I was very much surprised to see there were two.

Q. Who drew your attention to that fact?

A. When it was under preparation I believe that Mr. Lippincott did mention that it was partly owned by Evans.

Q. What was partly owned by Evans?

A. This lot of ground or parcel containing 186 acres, more or less.

Q. Well, before that time what did he tell you about the ownership of this 186 acres?

A. Well, I understood it had been in the family

Q. Don't tell me how, you only tell me what he said.

A. He told me it had been in the Lippincott family for quite a number of years, handed down from father to son.

Q. Now, what was in the family so many years?

A. The farm that I was to sell for him.

Q. What acreage?

A. Well, it was placed at 186, more or less, but never any definite amount was mentioned. I didn't know the acreage of the parcel.

Q. Did you at any time tell him that you had a purchaser for the entire farm?

A. Yes.

Q. And when you told him that, did he ask you to speak to anybody else?

A. He referred me to John O. Wilson's office; said that it would have to be taken care of, done through Wilson.

Q. And after that time you had no further contact with Mr. Lippincott?

A. Very slight contact. All the dealing then was transferred to John O. Wilson's office.

Q. And there you met whom?

A. I met John O. Wilson and Mr. Stanert.

Q. And with whom did you negotiate concerning the purchase of this farm?

A. Well, John O. Wilson and Mr. Stanert.

Q. And did they tell you whom they represented?

A. Yes.

Q. Who?

A. William J. Lippincott.

Q. Nobody else?

A. And when it got to the point of making out

these options they represented William J. Lippincott and Laura Evans.

Q. You mean by that the drafting of these papers?

A. Yes.

Q. Was there anything said to you by Mr. Wilson or Mr. Stanert concerning the names of the principals whom you were to represent?

A. The purchasers, you mean?

Q. No, the principals whom you were to represent.

Mr. Stockwell: I think that is still objectionable.

Mr. Wendkos: Why?

Mr. Stockwell: Why, that is a roundabout way to bring in the question of representation again. I move that part of the question be stricken out.

The Court: The motion is granted.

Q. Did anyone say to you that "You are authorized to sell this farm of 186 acres?"

A. Yes, Mr. Lippincott authorized our office to sell it. It was listed. I knew the circumstances of that listing and he verified it verbally to me on numerous occasions; and after it came to the final point that I had somebody interested in the purchase, I think he said that John O. Wilson's office would have to draw up the papers, and I would have to take care of it through his office, which I did. I was selling it on a commission, representing the owners, selling their property.

Q. And when you say the owners, who are they?

A. William J. Lippincott and Laura Evans, through John O. Wilson's office as representative.

Q. Now, can you recall that listing that appeared in your office for the sale of this farm?

A. Well, it was listed as ——

Q. Wait a minute. Can you recall it?

A. Yes.

Q. Can you recall it sufficiently clearly that you can visualize what appeared on that listing?

A. Well, the amount of acreage was on there, yes, I recall it.

Q. How much was that?

A. 186, more or less.

Mr. Stockwell: Objected to unless it is shown that this paper, whatever they are referring to as a listing, was signed by our clients.

Mr. Wendkos: Well, now, we will come to that. I am asking for what appeared on that particular paper.

Mr. Stockwell: I call for the production of that paper.

The Court: Of course, the paper itself would be the best evidence.

Mr. Wendkos: Well, it so happened that their office has been closed, and I question seriously whether the records are available.

The Court: Well, it ought to be shown first that they are not available before this becomes competent.

Mr. Wendkos: Of course, that would mean that this witness stand down for a minute until that

appears. May I ask the question subject to that showing?

The Court: Well, the difficulty is that the answer is then on the record and it may not be possible to lay a foundation properly for that question, and still it is there.

Mr. Wendkos: Well, as far as that is concerned it is not necessary for the authority to sell real estate to be in writing.

The Court: Well, he is asked about a listing. I suppose a listing means something more than a mere verbal communication, it means some definite date; and if this situation involves a writing the writing is the best evidence. If the writing cannot be produced, then, of course, you may go into his recollection of the matter.

Mr. Wendkos: May I see whether this question is admissible?

Q. Did you obtain the listing from Mr. Lippincott?

Mr. Stockwell: Objected to.

A. I did not.

Mr. Wendkos: That is all.

Cross-examination.

By Mr. Stockwell:

Q. Where are you employed now, Mr. Bitting?
A. Employed in Philadelphia.
Q. Are you any longer connected with John S. Warner?
A. No, sir.
Q. How many years were you with Mr. Warner?
A. I wouldn't say I was with him a year. I don't recall exactly, but it was probably less than a year.
Q. How much?
A. Probably a little less than a year I was in the Camden office.
Q. You were in the Camden office? You were in charge of the Camden office?
A. No, sir.
Q. Who was in charge of it?
A. Well, we both worked out of the office.
Q. Who are we?
A. I was employed with Mr. Warner, so I presume he was in charge.
Q. While he was in charge, you were employed by him, were you? Mr. Warner was a real estate man?
A. Yes.
Q. Office in Riverton?
A. Where?
Q. He had an office in Palmyra and another office in Camden?
A. Yes.
Q. And did you also work out of the Palmyra office?
A. Well, I was in there occasionally. I wouldn't say I worked out of it, no.

Q. Well, did you work in it?

A. No.

Q. Did you have anything to do with the Palmyra office?

A. No.

Q. Who gave you your instructions?

A. Well, what instructions have you reference to?

Q. In connection with your business?

A. Well, I was employed as a salesman; my instructions were to go out and sell property.

Q. Now, when you thought you had a prospect, what did you do?

A. Tried to close them.

Q. Did you make any report to Mr. Warner?

A. Well, no detailed reports or written reports.

Q. Well, were you acting as an independent man or were you employed by Warner?

A. I was employed by Warner as a salesman.

Q. You were acting for Mr. Warner in whatever you did; is that correct?

A. He was my superior, of course; I was employed by him.

Q. And when did your employment cease?

A. I would say sometime in October, I would say, September or October, 1926, if I recall correctly.

Q. October, 1926?

A. Yes.

Q. What time in October?

A. Well, I can't place any definite date.

Q. Well, were you there throughout the month of October?

A. Yes, I probably was.

Q. Probably you were?

A. Yes.

Q. Now, who secured these prospects?

A. I did.

Q. You did?

A. Yes.

Q. That is, you got these four gentlemen, including your employer?

A. Yes.

Q. You mean to say you sold it to him?

A. I did.

Q. Did those four people meet in your office at any time?

A. No.

Q. Well, who took care of those four men in this operation?

A. Took care of them in what way, do you mean, selling them the property?

Q. No, here are four men buying.

A. Well, I seen them individually.

Q. Now, I understood you to say in your direct examination that the four men, with the exception of Mr. Warner, did not meet the sellers; am I correct in that statement?

A. Didn't meet the sellers?

Q. Did you say that?

A. Yes.

Q. Now, how were the communications of the buyers, those four men, brought to the attention of the sellers? How was the contact?

Mr. Wendkos: I object to that question because of its indefiniteness and irrelevancy. This witness has testified that he represented the sellers only.

Mr. Stockwell: I submit he has not said that. That was an improper remark.

Mr. Wendkos: Oh, no; he said distinctly he represented Mr. Lippincott and Mr. Evans through Mr. Wilson.

The Court: Assuming that is true, why isn't it proper to ask him how the sellers and buyers were brought in contact, if he knows?

A. Well, they were never brought together. I went and seen them individually and sold them.

Q. You acted as a go-between, then, to the sellers and buyers?

A. No go-between; I was selling some property for Mr. Wilson's office and Lippincott and Laura Evans, and I was working for a commission.

Q. Incidentally, you got a commission, didn't you?

A. I was working for a commission.

Q. Did you get a commission or did Warner?

A. I would get it from Warner. Warner would get the commission and then I would get it.

Q. Did you ever hear about the commission being returned?

A. Did I return the commission?

Q. Yes.

A. No.

Q. Did you hear about Mr. Warner returning the commission?

Mr. Wendkos: I object to this as not cross-examination. On direct examination there were no questions at all concerning commissions. I can't see any relevancy to this line of cross-examination at all.

Mr. Stockwell: Now, if your Honor please, this man, it will be shown, or has already been shown, did form a contact between the buyers and sellers.

The Court: That already appears.

Mr. Stockwell: Now, it is perfectly proper to ask him about commission. He has already answered that he did get a commission. I asked whether it was returned.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

Q. What is your answer to that question?
A. Repeat the question.
Q. Do you know of Mr. Warner returning the commission?
A. No, I don't know what Mr. Warner did with his at all.
Q. Now, you got the contracts from Wilson's office; that is correct, is it?
A. That is correct.
Q. And you took the contracts to these four buyers; is that correct?
A. I think I took them to three buyers and the other one was left in Mr. Warner's office for him to take care of.
Q. Do you know whether it reached the fourth man?
A. I have no way of determining, no.
Q. You don't know that?

Mr. Stockwell: I call for the production of the four executed copies. I have already noticed him to produce them.

Mr. Wendkos: I have only three.

Mr. Stockwell: Well, let's have the three.

Mr. Wendkos: There are two up there and here is the third one. (Producing papers.)

Q. At the time you took the contracts away from Wilson's office, were they four in number?

A. Possibly five, four or five.

Mr. Wendkos: I think we ought to know which contract.

Q. And when I say four that is my mistake; I should have said four copies of each contract, that is, as to each farm.

A. No, I didn't take four of each farm away at one time.

Q. I didn't say at one time. Did you take them away at any time, four of each contract?

A. That is right, four or five, I don't recall which it was.

Q. Of each farm?

A. Yes.

Q. Now, what did you do with those four copies of each contract?

A. I gave them to the purchasers, with the exception of Mr. Wonfor's, but as I recall it now, Mr. Warner took and said he would deliver it.

Q. And which was the one person that you didn't deliver to?

A. Mr. Wonfor.

Q. At the time you received those copies, were the names of the sellers at the bottom of each instrument?

A. The last time I took them, yes.

Q. I mean when you took them after execution.

A. Yes.

Q. Were the names of all the sellers on each contract, that is, the signatures of all the sellers?

A. That is correct.
Q. How do you know that?
A. Well, I looked at them.
Q. When did you look at them?
A. When I took them back to the office.
Q. All right. Tell me how you looked at them.
A. How I looked at them?
Q. Yes.
A. Why, just like you would, like this, turn right over to the back.
Q. Keep on going?
A. Yes.
Q. Got down to the bottom?
A. Down to the bottom.
Q. What did you look for there?
A. I looked for the signatures of the sellers.
Q. Whose signatures?
A. The sellers.
Q. Yes, certainly. They are up at the top, aren't they?
A. Yes, that is correct.
Q. Now, you didn't look at the witnesses' signatures to this, did you?
A. Well, I signed as a witness for two of them. I didn't look at the witnesses for these.
Q. And you say you didn't see the interlineation over here with pens strung across the paper?
A. Not immediately, no.
Q. Didn't you see it before you left the office of Wilson?
A. Absolutely, I didn't look at it before I left the office of Wilson.
Q. Didn't Mr. Stanert at that office call your attention to that notation at the bottom of each instrument and the interlineation in each instrument at the time he handed those papers to you?

Mr. Wendkos: I object to this question, if your Honor please, for this reason: any communication made by the office of Mr. Wilson to this witness, who was the representative of the principals, sellers, is really in effect a privileged communication and it is not intended for the ears or eyes of the buyers in this suit unless specific instructions be given to that effect.

The Court: No, but he has already testified in direct examination that his attention was not called to the change by Mr. Stanert. Counsel certainly has a right to inquire into that.

Mr. Stockwell: It is Mr. Wendkos' own question.

Mr. Wendkos: All right.

Q. Will you answer that question?
A. What is the question?

(Question repeated.)

A. He did not.
Q. You say you left the office after the inspection of this instrument and all the copies of both instruments without any knowledge of that notation at the bottom or without any knowledge of the insertion of the two or three words which are on the interlineation?

Mr. Wendkos: I think this witness has testified that he had not inspected, that he did not inspect those papers in Mr. Wilson's office. It is inferred and I don't think it is a correct statement of

the fact. If that is to be asked as a question, that is another matter, but I believe the statement of fact should be correct.

Mr. Stockwell: This witness has already said that before he left that office he looked over each instrument.

Mr. Wendkos: Oh, no, on the contrary.

The Witness: No, sir.

The Court: My understanding of what he said was that he looked at the signatures.

The Witness: After I got back to our office.

Mr. Stockwell: You didn't say that, Brother. I ask that the record be read.

(Previous testimony read.)

Q. Do you say that at the time you were in Wilson's office and before you left Wilson's office you didn't look at those instruments at all?

A. To the best of my knowledge, Mr. Stanert handed me those folded up like this and I took them and left the office, and then when I got back to our office, John S. Warner's office ——

Q. One minute. Please answer my question.

(Question repeated.)

A. Well, I think I answered the question, to make it short.

Q. No, I want an answer to this question.

Mr. Wendkos: The witness has already answered it.

A. I have already answered.

The Court: If there is any doubt about it ask the question and let the witness give a responsive answer.

(Question repeated as follows: Do you say that at the time you were in Wilson's office and before you left Wilson's office you didn't look at those instruments at all?)

A. No.

The Court: That leaves it in doubt.

(Question repeated.)

The Court: You see, the question is, you say that at the time that didn't happen. You say after.

By Mr. Wendkos:

Q. In other words, you didn't see them?
A. In other words, I didn't see the contracts or look at them to examine them in Wilson's office.

By Mr. Stockwell:

Q. You say they were folded up when they were handed you and you took them away with you folded up?
A. That is true, to the best of my knowledge.
Q. Well, what I want is the actual fact. Any question about it in your mind?

A. No.

Q. Why do you say to the best of your knowledge?

A. That is what we go by, our knowledge.

Q. No, but the question is of recollection, whether you do know.

A. Well, I do know, if that is satisfactory.

Q. How long after you returned to the office was it before you delivered the papers to the other men, the buyers?

A. Well, as near as I can recollect, I ——

Mr. Wendkos: I think we ought to know which papers, because one set of papers was delivered ——

The Court: Yes, tell which it means.

Q. Were they delivered at different times to the buyers?

A. Different sets of papers, yes.

Q. Were they delivered at different times or did you hold them and deliver them all at one time?

A. To the best of my knowledge they were delivered at separate times.

Q. Do you state that now as a fact, that they were delivered?

A. To the best of my knowledge.

Q. You are still using the expression, "to the best of my knowledge."

A. That's the best I can say.

By the Court:

Q. Of course, if you can't say it positive, if you can't remember, you can say that you don't remember.

A. My recollection was that I delivered the Lippincott papers to the parties in person, and that when the Laura Evans papers came along six weeks or two months later, I mailed them. That is my recollection of it.

By Mr. Stockwell:

Q. Then did you look at these papers, inspect them, before you delivered them to the buyers?

A. When I got back to the office I glanced over the signatures of the sellers.

Q. And at that time did you note the notation at the bottom? You say you hadn't noticed it then?

A. Not at that time.

Q. After you had received the papers from the hands of Mr. Stanert—you know Mr. Stanert, don't you, in Mr. Wilson's office?

A. Yes.

Q. —— for execution by your clients ——

Mr. Wendkos: I want to know whose clients.

Mr. Stockwell: The buyers.

Mr. Wendkos: I object to that for the same reason I objected to the other.

The Court: The clients?

Mr. Stockwell: I will eliminate the clients.

The Court: Execution by the buyers?

Mr. Stockwell: By the buyers, yes.

Q. Now, we get you going to the buyers, and after the buyers have signed, then you take the papers signed back to Wilson's office?

A. That is correct.

Q. You did it in person?

A. Yes.

Q. Who went with you?

A. No one.

Q. Was there anyone there with you at the time besides Stanert?

A. No, sir.

Q. When were the checks deposited on account?

A. When were they deposited on account?

Q. Yes.

A. As near as I can recollect, around the 15th of December.

Q. Well, when was that, with reference to these several visits to Wilson's office?

A. Well, I personally didn't deposit the checks.

Q. Well, I understood you did or Warner did.

A. I made numerous visits to Wilson's office.

Q. Were the checks deposited by your office, Warner's office?

A. By Mr. Warner?

Q. Yes; before or after you had the buyers sign?

A. After I had them sign.

Q. How long after?

A. Well, I would say in the course of two or three days. It was in the neighborhood or in the vicinity of the 15th of December.

Q. Weren't those checks deposited at the time you re-delivered those instruments signed by the purchasers to Wilson's office?

A. I don't quite understand just what you mean.

Q. Weren't the checks delivered to Mr. Wilson's office at the time the executed contracts, executed by the purchasers, were delivered to Wilson's office?

A. No, I don't think so. I think that I delivered the papers to Wilson's office with the signature of the purchasers, and therefore that Mr. Warner delivered the checks another time.

Q. Wasn't Warner there at the same time, that is, when you delivered those instruments?

A. I don't think so. I think he delivered the checks later.

(Recess till 1.30 P. M.)

(Trial of the cause resumed at 1.30 P. M.)

ROBERT C. BITTING, resumed.

By Mr. Stockwell:

Q. Mr. Bitting, you testified in the case before Vice-Chancellor Leaming, involving the two contracts which have been mentioned in this suit?

A. Two contracts?

Q. The Evans contract and the Lippincott contract, or, as you call it, an option or proposal or whatnot.

A. Yes.

Q. Do you remember that?

A. That is right.

Q. I ask you if this statement is correct: ——

Mr. Wendkos: If your Honor please, I don't think that this statement could be used in the sense that Mr. Stockwell wishes to use it. This testimony

is evidence. It speaks for itself. There is no opportunity given to the plaintiffs' side to use any of this testimony except as introducing it in evidence.

The Court: No, this is cross-examination, and if there is anything which from the standpoint of counsel seems to be inconsistent or contradictory with his testimony now given, of course, it is admissible. Is that the purpose?

Mr. Stockwell: That is the purpose.

Mr. Wendkos: All right.

Q. "Q. What is the relation of this witness to the several defendants? You say you represented whom?

"A. I represented both John S. Warner, the real estate agent in the transaction ——

"Q. Who represented Windolph, Goldsborough and Wonfor?

"A. John S. Warner's office, and I was acting as the salesman.

"Q. I don't understand. Windolph, Goldsborough and Wonfor, you said, were in Warner's office?

"A. They were the purchasers and I was the salesman who handled the transaction.

"Q. And after you got the agreement back with that interlineation, you delivered it to whom?

"A. I delivered it to the several men, the buyers whose names appear on there.

"Q. One copy to Windolph, one to Goldsborough, one to Wonfor and one to Warner?

"A. Yes, sir.

"Q. All of them containing the interlineation?

"A. Yes.

"Q. So they all had been executed by the owners of the land, all the agreements, at the time you received them and delivered them to them?

"A. Yes."

Is that examination true?

A. Will you please repeat the last question that I answered yes to?

Q. "So they all had been executed by the owners of the land, all the agreements, at the time you received them and delivered them to them? A. Yes." Is that testimony true?

A. That is true.

Q. Then, do you wish to change your testimony where you said that you didn't believe you handed any copy to Mr. Wonfor?

A. That is as I recall it since, that I had left a copy with Mr. Warner, but I presume he delivered it to Mr. Wonfor.

Q. Did you say that in your previous examination here?

A. No, I don't think I did.

Q. You said you did leave one with Mr. Wonfor, didn't you?

A. I said I left it, as I recollect it, with Mr. Warner, who was to deliver it to Mr. Wonfor. The reason I say that, in talking afterwards with Mr. Warner I was under the impression that I did deliver each one individually. Of course, this was a long time after the transaction and your memory doesn't hold good in details; so Mr. Wonfor didn't get it from Mr. Warner, so I couldn't have delivered it to Mr. Wonfor.

Q. Do you still say you didn't deliver it to Mr. Wonfor or to Mr. Warner?

A. To my best recollection I delivered it to Mr. Warner, who was to deliver it to Mr. Wonfor.

Q. I still repeat, did you deliver it to Mr. Wonfor or not?

A. I delivered it to Mr. Warner, who was to deliver it to Mr. Wonfor.

Q. You did deliver it to Mr. Warner but you didn't deliver it to Mr. Wonfor?

A. Not at that time.

Q. At any time?

A. Not to the best of my knowledge, no.

Q. And this answer to the Vice-Chancellor's question is incorrect, you say?

A. Well, it was to this extent: that I was under the impression at the time that I had individually delivered to each one, but I since recall that Mr. Wonfor was one exception, that I did deliver it to Mr. Warner and he was supposed to deliver it to Mr. Wonfor.

Q. Let me direct your attention to this statement which I have already read: "Q. Who represented Windolph, Goldsborough and Wonfor? A. John S. Warner's office, and I was acting as the salesman." Is that statement correct by you?

A. I would say it was incorrect.

Q. Then why did you say it?

A. Because, naturally, when a salesman in one sense of the word represents both sides, and naturally, I was representing the buyers, I was working for a commission.

Q. Your sole aim was as a salesman trying to get a commission?

A. I did nothing other than that for the buyers.

Q. I ask you now whether the statement is correct as given in this testimony: "Q. Who represented Windolph, Goldsborough and Wonfor? A.

John S. Warner's office, and I was acting as the salesman." Is that statement correct?

A. Insofar as selling the purchasers the ground, yes, I was the salesman. I sold them the property for John L. Wilson and William J. Lippincott and Laura Evans.

Q. Did anybody besides Warner's office look after the interests of Windolph, Goldsborough and Wonfor, to your knowledge?

A. Not to my knowledge, no.

Q. Didn't you undertake to look after their interests?

A. To the extent of getting their check and returning the ——

Q. To any extent with reference to this transaction.

A. To the extent of getting across a sale and taking their check to Warner's office.

Q. Didn't Warner's office, as stated here, act for Windolph, Goldsborough and Wonfor?

A. Just the same as any real estate man acts between seller and buyer.

Q. You mean you undertook to represent both sides?

A. We undertook to sell them the property.

Q. And you undertook to represent the buyers in taking care of their interests at the same time; is that correct?

A. It shows that what you call the buyers ——

Q. Is that a fact?

Mr. Wendkos: I think this examination has gone far enough, and I think Mr. Stockwell should stipulate just exactly in what respect Mr. Warner's office had represented the buyers, for what purpose, and so forth. This witness has repeatedly said

that he represented the sellers and was interested in the commission and was only interested in getting the money as a deposit on this contract.

Mr. Stockwell: I am interested in ascertaining whether or not, among other things, this is a credible witness, and his testimony before the Vice-Chancellor and here don't agree in the respect I have mentioned.

Mr. Wendkos: I don't think that is true.

The Court: I suppose it is for the jury to say whether they do agree or not.

Mr. Stockwell: I think I should have considerable latitude in this cross-examination.

The Court: What is the question now? Any question unanswered?

Mr. Stockwell: No.

The Court: Ask the question and I will rule.

Q. Now, Mr. Bitting, I ask you whether the testimony as now outlined to you, found on page 45, given at the same trial, is correct:

"Q. Mr. Bitting, the office of John S. Warner conducted the negotiations for the purchase of this property, didn't it?

"A. Yes, sir."

This examination is by me, your Honor.

"Q. And they acted as the intermediary between the purchasers and the sellers, didn't they, throughout?

"A. That is right.

"Q. And that was before the agreements were signed as well as after the agreements were signed?

"A. Before the agreements were signed.

"Q. And afterwards in the receipt and transmission of the copies, of the executed copies of the agreements?

"'A. Yes, sir.

"Q. So everything that happened here went through Warner's office, isn't that correct?

"A. Yes.

"Q. So that the sellers did not come into contact, personally, with Windolph or—do you know whether they did or not?

"A. To my knowledge they did not.

"Q. And your office acted for all the parties in putting this deal through?

"A. Yes.

"Q. All of the purchasers?

"A. Yes."

Is that testimony correct?

A. Certainly it is, to the extent of—where it was statements from me, true absolutely to the extent that every real estate office acts for both parties concerned; I mean insofar as the sale is concerned I was acting and got the checks over to the office.

Q. Do you mean to tell us that Mr. Lippincott, Mr. William Lippincott here, ever employed you to negotiate a sale?

A. I would say we were representing him; we had the listing of his farm.

Q. Anything you did; you explained that he was the seller and you were going to get a commission on the sale?

A. That is right.

Q. You said before you got the commission or wanted the commission; is that right?

A. Well, to a certain extent I got it.

Q. You got your share of it?

A. Well, not actual cash. I got credit for it but that is another story.

Q. You got credit for it?

A. I got credit for it, but in the final analysis, on counting up, I didn't get any cash.

Q. You haven't cancelled the credit, have you?

A. No.

Q. You know that Warner's office got the commission from the seller, don't you?

A. I don't know whether they did or not.

Q. Well, how comes it that you have a credit then if you have got nothing?

A. Well, because the deal was not finally consummated and it didn't go through.

Q. It is your idea then that no commission should be retained if the deal didn't go through?

A. No, it is not my idea, but I didn't actually get it to retain.

Q. In your talk with these four purchasers, was any question raised by them as to who should get the mortgage?

Mr. Wendkos: Objected to, if your Honor please, as immaterial and irrevelant. The contract speaks for itself. Any negotiations or transactions or conversations here ——

The Court: If the question relates to a time prior to the time of the proposal then I think it is irrelevant.

Mr. Stockwell: You mean after ——

The Court: Anything prior to the time this contract or paper was signed.

Mr. Stockwell: We have Mr. Wendkos' theory one minute that there was no contract and there isn't anything, and then he wants to bind somebody by a contract. If I understand, he makes the proposal, it is Mr. Wendkos' theory, and I want to know whether at any time the question of the mortgagee, the personality of the mortgagee, was raised in these negotiations.

Mr. Wendkos: That is objected to.

The Court: I will sustain the objection.

Q. Did you at any time after the paper was signed, these contracts were signed by Windolph, et al.—by al. I mean the others of the four—question them about the personality of the mortgagee?

Mr. Wendkos: I will object to that, if your Honor please.

The Court: I will overrule the objection now, as to something that happened after the paper was signed.

(Objection noted for plaintiffs as ground of appeal.)

A. Well, the question is, did I discuss with them the mortgagee after it was signed?

Q. Yes.

A. No.

Q. Did you have anything to do with fixing the terms of sale? Did you do that, have anything to do with that?

Mr. Wendkos: I object to that, anything coming prior to the writing.

Mr. Stockwell: I didn't ask what the terms of sale were.

The Court: I overrule the objection. Did you or didn't you?

A. No, John O. Wilson's office fixed the sale, the terms of sale.

Q. They fixed the terms of sale?

A. Yes.

Q. After the agreements were executed by your people, that is, Windolph, et al., did you go out to the Lippincott farm or the Evans farm?

A. Did I go out afterwards?

Q. Yes.

A. As I recall I went out, yes.

Q. And you went out there during the summer of 1926?

A. Yes.

Q. Did you go out alone or with some of these parties?

A. Not with any of the parties, no.

Q. You went alone?

A. Yes.

Q. You went to Mr. Lippincott, William Lippincott, at one time and asked for an extension of the time for settlement, didn't you?

A. I believe there was an extension requested on account of the delay in signing of one set of papers.

Q. But I ask you if you didn't go out there for the purpose of asking for an extension of time for the purchasers to make their settlement.

Mr. Wendkos: I object unless it can be shown that the request for an extension of time was made at the behest of the plaintiffs in this suit, and that he was authorized to make such a request which would be binding upon the plaintiffs.

Mr. Stockwell: The whole question of authority ——

The Court: Objection overruled.

Q. Do you understand the question?
A. As I recall it the extension of time was due to delay in signing a set of papers.
Q. Won't you answer the question?

By the Court:

Q. Not what it was due to, as a matter of fact; whether you went out on the Lippincott farm and asked Lippincott or any of the parties for an extension.
A. I don't know as I personally asked Mr. Lippincott but I do recall asking Wilson's office.

By Mr. Stockwell:

Q. Didn't you first go out to Mr. Lippincott and didn't Mr. Lippincott say you would have to go down and talk to Wilson's office about it?
A. There must have been something mentioned by Mr. Lippincott. I don't recall the incident about the extension.
Q. You went for an extension of time?
A. Not primarily, because I understood ——
Q. I don't care what you understood. I want to

know whether you didn't go to either Lippincott or Wilson for an extension of time in which the purchasers could make a settlement.

A. I do recall Wilson.

Q. Well, you did go to Wilson; that is correct?

A. Yes.

Q. When was that?

A. Well, it must have been sometime after the signing of the second set of papers, Laura Evans' papers, because it didn't go through. There was a delay of about forty-five days.

Q. Didn't you get an extension as late as August, 1926?

A. I don't recollect.

Q. You don't have Warner's correspondence here, do you?

A. No.

Q. You know that extensions were asked for and obtained, do you not, as asked by Windolph, et al., through the office of John S. Warner; you know that to be a fact, don't you?

A. I know there was one particular extension, yes.

Q. So that in the end the settlement was to take place in October rather than in August, as called for by the agreement?

A. Well, that was due to the forty-five days' delay in signing the Evans' agreement.

(Question repeated.)

Q. I want you to answer that question. You haven't answered it yet. Please answer that question.

A. I am answering you to the best of my ability. I can't answer you anything I don't recollect. My recollection is there was an extension granted for forty-five days.

Q. Forty-five days from when?

A. From the date of the original date, December 15, because the Laura Evans' papers were not signed until February or something like that.

Q. Did you obtain that extension?

A. I believe that I went to Wilson's office and obtained that extension.

Q. Who sent you there?

A. Who sent me there?

Q. Yes.

A. Well, I really went on my own hook, because they were delayed in signing and I thought we ought to have—Mr. Warner and I may have talked it over and I thought we ought to have it, an extension due to the delay of signing it.

Q. Do you say Warner sent you there?

A. Well, I was practically handling the transaction. Mr. Warner didn't just give me any specific orders but I went down and asked Wilson's office for an extension of time. Whether they sent it in the form of a letter or whether I undertook to talk with him I don't recollect.

Q. Had you had any other transactions, real estate transactions, before you put this one through?

Mr. Wendkos: Objected to as being imaterial and irrelevant.

The Court: Objection sustained.

Q. Mr. Bitting, now, you were in Mr. Wilson's office at the time after the papers were signed by the sellers; we are agreed on that, aren't we, that you are there?

A. Well, I took the papers there after they were signed.

Q. And you went and got them?
A. I went and got them after the sellers signed, that is correct.
Q. How old are you?
A. How old?
Q. Yes.
A. Well, I am forty years of age, forty-one.
Q. What was your business before you became a real estate agent?

Mr. Wendkos: Objected to as being immaterial and irrelevant to this issue.

The Court: I don't see how it is material.

Mr. Stockwell: Well, I don't just care to disclose my purpose now. That is the only question. I am not going into his past life.

A. I suppose if I was a lady I could object to that question of age.

Mr. Stockwell: It is a matter of no importance, if your Honor please.

The Court: Objection sustained.

Q. Now, we come down to the date of the taking of those agreements away from Wilson's office signed by the sellers. You went there for what purpose that day?
A. To get the papers.
Q. They were supposed to be contracts, were they, land contracts?
A. Well, I always referred to them and understood them as options.

Q. Well, you know they were to be signed by people who owned the land?

A. Yes.

Q. And you went there to get them after the owners had signed the agreements?

A. That is correct.

Q. And you went there for the purpose of getting them to take them to the purchasers?

A. That is correct.

Q. Do I understand that you were not interested in opening up those papers and finding out whether they had been signed by the owners of the land before you took them away?

Mr. Wendkos: Objected to. What this witness was interested in is of no materiality at all. It is what he actually did.

The Court: I overrule the objection.

(Question repeated.)

A. Before I took them away from Wilson's office? No. I presumed they were signed and in order.

Q. But you were willing to take them away and deliver them to your people, that is, to the purchasers, without even seeing that they were signed?

A. I think I told you before that I looked at them after I got back to the office and saw that they were signed.

Q. I know you said that, and I want to know what the reason was for not looking at them, as you say, at Wilson's office?

A. Because naturally I took Mr. Stanert's word that they were signed and took them back to the office. Casually I glanced over them before I delivered them.

Q. Why did you look at them?

A. To see if they were signed.

Q. You thought it was pertinent then to see that they were signed?

A. Not pertinent, no; I just expected to see that they were signed and they were.

Q. Were they still folded up when you got ready to take them and deliver them?

A. They were folded up. I carried them in my pocket to the office. I had to open them up to look at them.

Q. And then you thought that it was worth while to open them up and look at them?

A. I looked at them, yes.

Mr. Stockwell: That is all.

Re-direct examination.

By Mr. Wendkos:

Q. I want to clear up this question of commissions. Did you actually receive either any cash or a bona fide credit on a share of the commission on the sale of this farm?

A. No, I didn't receive any cash.

Q. How about a credit?

A. Any credit to the extent of anything material.

Q. Just explain that. I want to know whether that credit was based upon any advance of money that you got previously or whether it was just a credit on the books for this particular sale.

A. The usual method was on settlement—there was no definite time of settlement—when there was any money coming to me on commission Mr. Warner would make out a check. Now, this sale, there was

a certain definite amount credited to me, but in view of the fact that it was not settled I never got actual cash in money or in material for this particular sale.

Q. No other consideration of any kind?

A. No.

Q. Now, did you ever get back the agreements after they were signed by the sellers and redelivered to the buyers aside from holding them in the course of the trial?

A. No.

Q. Do you know whether the buyers, after they signed the first time, had signed the papers again?

A. Had signed them a second time?

Q. Yes.

A. No, I never knew or had any knowledge of their signing anything again.

Q. Did the buyers ever show you the papers, aside from this court work after you delivered them to them?

A. As I recall it I may have glanced over the papers of Mr. Warner, but there was never any issue or any question raised that I recollect looking at the other purchasers' papers, for I never seen them until they were in court here.

Q. Now, I would like to know in exactly what manner and to what extent and for what purpose you personally represented the buyers?

A. For the commission that I got out of the transaction.

Q. I mean the buyers.

A. Oh, the buyers?

Q. Yes.

A. Well, I sold them the ground to get a commission.

Q. Now, get this question again: I want to know

for what purpose, to what extent, you represented the buyers, if at all?

A. Well, I represented them to the extent that I was selling them a piece of ground.

Q. All right. Why do you call that representation?

A. Well, I don't know whether it is representing them or not. I sold them the ground and that is all the interest I had in the buyers.

Q. Do you know what the word representation means?

A. Well, I would take representation to mean that you were looking for all interests of the party you represent.

Q. Well, now, whom did you represent here?

A. I represented the sellers, because they was the ones that was paying me a commission.

Mr. Wendkos: That is all.

Re-cross examination.

By Mr. Stockwell:

Q. The commission was the only thing you were working for; is that it?

A. Yes, that is all any salesman works for.

Q. When you say you or I do you mean yourself or do you mean John Warner's office?

A. I am speaking for myself.

Q. You are not speaking for John Warner?

A. I can't speak for another man.

Mr. Stockwell: That is all.

WILLIAM GOLDSBOROUGH, sworn for plaintiffs.

Direct examination.

By Mr. Wendkos:

Q. Mr. Goldsborough, I show you two papers, written instruments, on which your name appears. That is one of them. We will call that the Evans proposal, and this we will call the Lippincott proposal. Your name appears on both of those proposals, does it not?

A. It does.

Q. Now, can you recall whether you signed those papers before they were signed by the sellers?

A. I do recall that I signed them before they were signed by the sellers.

Q. And when you signed them can you recall whose other names were on there?

A. I cannot.

Q. Can you recall at the time that you signed those papers whether these names on the left-hand side for "witnesses" appear?

A. I couldn't do that either.

Q. Can you recall whether at the time you signed this very fine writing appeared under the words "In the presence of?"

A. I couldn't recall that, sir.

Q. Will you say that it did or did not appear?

A. I would say that it did not.

Mr. Stockwell: What are you referring to?

Mr. Wendkos: I am referring to the very fine wording, the interlineation in this case, the words,

"'Laura Evans, one of' inserted between the 17th and 18th lines, fourth page, before execution." That is in the Evans proposal. Now, in the Lippincott proposal I refer to the very fine written words, "'William J. Lippincott, one of' inserted between lines 29 and 30, page 2, before execution."

Q. Now, can you recall having received those papers back again?

A. Yes.

Q. And when they were returned to you were they executed or signed by the sellers?

A. Yes, they were signed.

Q. Who returned them to you, can you recall that?

A. I think that Mr. Bitting did.

Q. Now, at the time that he returned it to you did he call your attention to any notation made over his signature or any interlineation made in the body of the instrument?

A. There were no remarks made concerning any changes whatever.

Q. Well, can you recall the circumstances, that is, the place where he delivered these papers to you?

A. It must have been in my office.

Q. And where is that?

A. In the Bulletin Building, Philadelphia.

Q. Do you recall what he said to you at the time he delivered it to you?

A. I can't recall anything.

Q. But you are quite positive that he didn't make any ——

Mr. Stockwell: Objected to as leading.

Q. Did he have anything to say to you?

A. Well, I really couldn't answer that question,

because I can't recall anything that he might have said.

Q. Well, can you recall whether or not he referred to the notation and the interlineation?

A. I know that he didn't do that.

Q. Did you, yourself, see them?

A. I did not.

Q. When was the first that you saw it?

A. I don't think that I had ever seen it other than the time it was brought up in court before Vice-Chancellor Leaming.

Q. You have heard Mr. Stockwell ask Mr. Bitting a question referring to testimony which he gave at the time this case was tried in the Chancery Court, and one of the questions that he mentioned particularly was this: "Who represented Windolph, Goldsborough and Wonfor? A. John S. Warner's office and I was acting as the salesman." The next question was, "I don't understand." You will recall these questions were asked by Vice-Chancellor Leaming at the time of the last hearing. "Q. I don't understand. Windolph, Goldsborough and Wonfor you said were in Warner's office? A. They were the purchasers and I was the salesman who handled the transaction." Did you authorize Mr. Bitting to represent you?

A. I did not.

Q. In this particular transaction?

A. I did not.

Q. What did Mr. Bitting do with respect to your end of this proposal?

A. I think he first called to see me regarding the fact whether I would be interested in purchasing any ground and I went out to the property with him one afternoon. I think he called to see me once after that time when I gave him my check as initial deposit.

Q. But you actually made your own investigation?
A. I saw the property myself.
Q. Other than giving him your check did you authorize Mr. Bitting or anybody else in Mr. Warner's office to represent you in this transaction?
A. I did not.

Mr. Wendkos:: That is all.

Cross-examination.

By Mr. Stockwell:

Q. You didn't testify in that suit in the Court of Chancery, did you, Mr. Goldsborough?
A. I did not.
Q. Where do you live?
A. Meadowbrook, Pennsylvania.
Q. What is your business?
A. Silk throwster.

Mr. Stockwell: I call for the production of a letter of October 8, 1926, addressed to William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner.

(Letter produced.)

Q. Where is it you live?
A. Meadowbrook.
Q. What county?
A. Montgomery.
Q. Pennsylvania?
A. Yes.
Q. Did you live there in October, 1926?
A. I did.

Q. Did you receive that letter or a copy of it at or about the date named in that letter? (Letter shown witness.)

A. I wouldn't say exactly that I had received this letter, but I do remember receiving something from your office at one time. I couldn't recall just what it was. If that is the only thing that you ever sent me from your office that is the thing I received. I don't remember receiving the letter.

Q. You do me too much honor. This didn't come from my office. I am Mr. Stockwell. Well, now, I am interested in knowing whether you got this letter or a copy of it, Mr. Goldsborough?

A. I really couldn't answer that question.

Q. Have you read it over?

A. I have read the letter enough to be familiar with its contents.

Q. You received a letter of that purport, didn't you?

A. I couldn't say truly. I received something from John O. Wilson's office at one time. I think I only received one communication.

Q. You won't say that you didn't receive it, will you?

A. No, I won't say that I didn't receive it.

(Letter marked Exhibit A for identification.)

Q. Did you ever communicate directly, that is, personally, with Mr. Lippincott here in this transaction?

A. No.

Q. Or with Mrs. Evans?

A. No.

Q. Or with any other one of the sellers?

A. No.

Q. All your dealings were with John S. Warner, were they not?

A. The only dealings I had in reference to the sale was when Mr. Bitting came into my office and I gave him a check.

Q. To whose order did you draw a check?

A. I couldn't tell you that.

Q. You don't know to whose order you drew the check?

A. I positively couldn't tell you to whose order I drew the check.

Q. You knew whom he represented, didn't you, Bitting, didn't you?

A. Would you mind asking that question differently?

(Question repeated.)

A. Yes, I knew he was a representative of John Warner's office, yes, real estate office.

Q. And, of course, you knew that John S. Warner was in on this deal with you, didn't you?

A. Yes.

Q. He was one of the four buying the property; you knew that?

A. Yes, sir.

Q. And you also knew he was a real estate agent?

A. Yes.

Q. And you know that he was the person or his office was the office dealing directly with the sellers, you knew that, didn't you?

A. Yes.

Q. So far as you were concerned you hadn't undertaken to do it personally, had you?

A. No.

Q. You had no contact with the sellers at all, did you?

A. No.

Q. Did you appear at the time fixed for settlement on the sale of these properties?

A. I did not.

Q. Did you notify Mr. Warner to appear for the sale?

A. I did not.

Q. Why didn't you appear?

A. Sometime during the summer previous to the date of settlement Mr. Windolph called my attention to the fact that settlement was drawing near. He also called my attention to the fact that there had been changes in these agreements—that was the first that I had ever known anything about it —and that we were not going to make settlement, it would not be necessary to go to make settlement, if I decided that I was not going to make settlement, and that is why I didn't appear for settlement.

Q. So you had decided then that there were changes in the agreement which did not compel you to make the settlement; is that it?

A. Yes.

Q. And who communicated this fact?

A. Mr. Windolph.

Q. Now, after you had that information did you communicate with Mr. Warner?

A. I did not.

Q. Why didn't you?

A. I wouldn't say that I had any more interest regarding that part of it, because I thought if there was anything further that Mr. Bitting would probably call me or your office would probably call me or write me.

Q. Don't put it on me, Brother, because I didn't get into this deal, or didn't until a year afterwards. I am just trying the case.

The Court: He probably refers to Mr. Wilson's office.

The Witness: Mr. Wilson's office.

Mr. Stockwell: I am another man. I don't know to whom you refer but I am not he.

By the Court:

Q. May I ask when it was, as nearly as you can recall, that Windolph called your attention to these alleged changes in the agreement?

A. Sometime during the summer, previous to the date of settlement. I imagine from this paper here, I see that the date of the settlement was in October.

Q. It was during that summer?

A. Yes.

By Mr. Stockwell:

Q. Well, now, after you got that information you asked for an extension of time, didn't you?

A. I didn't.

Q. Don't you know that Mr. Warner was asking for an extension of time?

A. I did not.

Q. You didn't want any extension of time; is that it?

A. I wasn't very much interested from that time on.

Q. Well, did you know that an extension of time had been asked for?

A. I didn't know that it had been asked for, but, I think, I was informed that it had been granted.

Q. Well, this was after you found out about the change in the agreement, wasn't it?

A. Yes.

Q. Then you just sat tight or said you thought you would rest on your legal rights and you wouldn't go to this settlement at all?

A. I wouldn't exactly say that I construed them as legal rights, just personal rights.

Q. Well, that was a mistake on my part. I don't think they are legal rights either. I will call them what you considered rights; and you thought you would, in the slang phrase, stand pat and see what happened?

A. That is right.

Q. And did you get a report as to what had happened at the time this settlement was scheduled for?

A. No.

Q. Never inquired as to that?

A. No.

Q. Didn't ask Mr. Warner?

A. No.

Q. Didn't take it up with Mr. Bitting?

A. No.

Q. How about going to these other men that you were tied up with in this deal, did you go to them?

A. I did not.

Q. Or communicate with them?

A. I did not.

Q. Did you ask anybody to return your money?

A. No.

Q. Well, now, as a matter of fact, the real estate market didn't look so good in October, 1926, as it had in December, 1925, did it?

A. I don't recall whether it did or not.

Q. Hadn't there been a slight recession?

A. There had.

Q. What the real estate men called a slight recession?

A. I am not in the real estate business, so I couldn't say.

Q. There had been a drop?

A. Yes.

Q. Fewer buyers, smaller prices and so forth; that is true, isn't it?

A. Yes.

Q. So that a man who was dealing in real estate would not naturally be as keen for a settlement in October as he would in December?

Mr. Wendkos: I object. This man has testified he is not in the real estate business, so it is not material what other people would do.

The Court: Objection sustained.

Q. Then so far as you are concerned, after you had made up your mind not to attend the settlement, you did nothing further?

A. I did not.

Q. Well, when next did you do anything in this matter?

A. I couldn't say that I did anything until I was informed that we were going to be sued for specific performance.

Q. That is when you took an interest?

A. I think it was, yes.

Mr. Stockwell: That is all.

Mr. Wendkos: All right, Mr. Goldsborough.

GEORGE A. WONFOR, sworn for plaintiffs.

Direct examination.

By Mr. Wendkos:

Q. Mr. Wonfor, what is your business?

A. Photographer.

Q. Are you one of the persons who signed these papers before you? Just take them up. One is the Evans and one is the Lippincott.

A. My signature is on them.

Q. And when you signed it were there any other signatures on there?

A. No, sir; there were not.

Q. You were the first man to sign?

A. I was.

Q. Were there any notations on the left-hand side above the names of the witnesses at the time that you signed that contract?

A. None whatsoever.

Q. Were there notations appearing on there, "Laura Evans, one of," and so forth, and "William J. Lippincott, one of," and so forth? Did they appear on those papers or any papers in connection with this transaction that you signed?

A. Before signing those papers I read them over and there were no notations or interlineations or anything whatsoever. It was just a straight-forward document, as I would term it, and I was asked if I was satisfied with it. As far as my knowledge would permit in the matter it appeared to be all right.

Q. Who asked you?

A. Whoever it was that presented it to me, if it

was Mr. Bitting—I think it was Mr. Bitting. Most of my dealings have been through Mr. Bitting.

Q. And he asked you whether you were satisfied with it?

A. Yes.

Q. And you said what?

A. "It appears to be all right."

Q. And you signed it?

A. Yes, sir.

Q. Now you are quite positive that there was no other signature on that paper when you signed it?

A. Absolutely.

Q. And that there were no notations or interlineations in the papers?

A. None whatsoever.

Q. And there were no names of the witnesses on the left-hand side?

A. None whatsoever.

Q. Now when did you get the papers back?

A. Quite a long time after their execution.

Q. When you say execution what do you mean?

A. Well, I mean having all the parties interested sign them.

Q. Now when you got them back again did you look them over?

A. Other than just to turn to the last page and see that all signatures were there. I didn't examine it through page by page.

Q. Who handed you those papers back again?

A. There was such a time elapsed I am not positive whether they were handed to me by hand by anyone or whether they came to me by mail, but they eventually came into my possession, quite a long time afterwards.

Q. Now, after they were handed you again, after they were signed by the sellers, by anybody, did that person who handed you back the papers call

your attention to any notations or interlineations in the papers?

A. None whatsoever.

Q. Did Mr. Bitting do it?

A. No, sir.

Q. Did Mr. Warner call your attention to it?

A. No, sir.

Q. When was your attention first called to the notations and the interlineations?

A. In your office in preparatiion for the defense of the suits brought before Vice-Chancellor Leaming.

Q. Now, in this transaction who represented you?

A. Joe Low. Oh, I beg your pardon.

Q. I mean in this transaction. Well, I will put it this way: who first made you acquainted with this farm or farms?

A. Mr. Bitting.

Q. Did you ever have any dealings with him before?

A. No.

Q. And when he made you acquainted with that for what purpose did he do it?

A. To interest me to buy it, buy a share of it.

Q. Did he tell you the names of the sellers whom he represented?

A. Yes.

Q. Who were they?

A. The name that I recall would be Lippincott, the Lippincott farms.

Q. The Lippincott farms?

A. Yes.

Q. Did he say that he represented the Evans?

A. No, not that I can recall. He took me out and showed me the property one day and went over it and he spoke of it as the Lippincott farms.

Q. Did you meet Mr. Lippincott there?

A. No.
Q. You didn't?
A. No.
Q. Did you ever meet Mr. Lippincott?
A. No, sir.
Q. Before or after the signing of those papers?
A. No, sir.
Q. Did Mr. Lippincott or anyone acting for him call your attention to these notations and interlineations in the papers?
A. No, sir.
Q. Now, I am going to ask you about this letter. It was asked before, I will ask it again. Just look at that letter. (Witness examines letter.) Do you recall receiving that letter?
A. I have no recollection of receiving such a letter.
Q. Would you say positively that you did not receive it?
A. I wouldn't say positively, no, but there is one clause in it that would partly fix it in my mind in an indirect manner and that is that "Since the execution of this agreement I have taken title to the said premises." The letter is signed by John O. Wilson. And I think I would particularly have noted that if I had received this letter.
Q. Now, after having noted that, would you say that you hadn't received it?
A. I would say I hadn't. And the time has elapsed to such an extent that, of course, our memory is not absolutely clear on it.
Q. But to the best of your recollection, in the absence of the impression that that statement would have made upon you, would you now say that you had or had not received that letter?
A. I really feel that that statement would have impressed me so strongly that it should be pretty clear in my mind whether I had received it.

Q. Are you willing to say that you had not received it?

A. I don't like to be positive, make an absolute denial that I didn't receive it, but it is possible that I didn't.

Q. Well, would you say positively that you had received it?

A. No, I wouldn't say positively that I had received it.

Mr. Wendkos: That is all.

Cross-examination.

By Mr. Stockwell:

Q. In any event you knew what the date of settlement was, didn't you, Mr. Wonfor?

A. I did not.

Q. You never knew?

A. No, I didn't. I will qualify that answer in this way: I met Mr. Bitting after he received my check in the matter and he advised me that there was an extension of time or there was a question up for an extension of time, and owing to that fact and not receiving my copies of the agreements until quite some time afterwards, I was not conversant with the time of settlement.

Q. Well, you knew what the time of settlement was; that is fixed in the contract, or as Mr. Wendkos called them, in the proposals or options?

A. At the time, yes.

Q. And the time fixed for settlement was the 3rd day of August, 1926, in the agreements themselves?

A. Yes, sir.

Q. Now, you knew the time had been extended, didn't you?

A. I understood it was to be. I am not clear whether I was advised that the time had been extended or whether there were arrangements being made to have an extension.

Q. Well, you were one of the parties to this agreement, weren't you?

A. It is true.

Q. You were interested in knowing when you had to make settlement, weren't you?

A. True.

Q. Well, why didn't you ascertain when the settlement was to be?

A. Because I felt that Mr. Warner's office would keep me advised as to the procedure that was in question.

Q. You had never met Mr. Bitting before this transaction?

A. No.

Q. You knew Mr. Warner very well?

A. Yes.

Q. Your communications were with Mr. Warner, weren't they?

A. Mr. Warner through Mr. Bitting.

Q. And you felt that Mr. Warner was taking care of that end of it?

A. I felt that he would advise me of such time as the thing required my attention.

Q. And then you say you didn't know anything about the settlement to take place on October?

A. No, sir.

Q. Didn't you think it was rather a long time elapsing between the date of this contract and the time for some settlement under the contract?

A. I can't say that I gave it any thought along

that line.

Q. Isn't it a fact that you advised Mr. Warner or his office that you would not be able to go through with the contract so far as you were concerned?

A. No, sir; I did not.

Q. Nothing of that kind?

A. Nothing of that sort whatsoever.

Q. You say you were ready and willing to go on with the contract?

A. I was not approached in the matter as to settlement other than the signing of the agreements in evidence. When we entered into the agreement we expected to fulfill it.

Q. Now, we are getting along to October, 1926, and nothing had been done about this letter to which reference has been made. Now, how long did you let it run without making any more inquiry?

Mr. Wendkos: What letter is this, Mr. Stockwell?

Mr. Stockwell: The letter which he has before him.

A. I can't say that I made any inquiry.

Q. Didn't make any inquiry at all?

A. No, sir.

Q. How long did it run in that state? This is the year 1929. You signed the agreements in 1925, or the latter part of 1925. Now, when did you do something after December, 1925?

A. As I previously testified, then I left the matter in the hands of Mr. Warner's office to keep me advised at such time any further action so far as I was concerned was necessary.

Q. Well, did you assume that the settlement had gone through or hadn't gone through after a year or two elapsed of time?

A. I didn't assume anything, because I had been advised as to the extension of time. I didn't know whether the extension of time was one day or was five years.

Q. And you were not concerned except upon getting some word from Warner?

A. That is the idea.

Q. Well, then did you become active in this before the suit was actually brought for specific performance?

A. I would say no.

Q. In other words, you had done nothing up to that time?

A. Nothing.

Q. You didn't appear at the time of settlement, of course, in view of what you said?

A. I didn't know when it was.

Q. You didn't appear then?

A. No, sir.

Q. Mr. Bitting said he was representing Warner, did he not?

A. Yes.

Q. And you knew that Mr. Warner was one of the four men in on this deal, four purchasers?

A. Yes.

Q. You relied upon Mr. Warner to take care of your interest?

A. I wouldn't say that.

Q. All right. To what extent did you rely upon him?

A. I might term it, to answer that question, in comparison of an act of trade. If you buy a good article from a merchant, a wholesaler, he looks to you to pay for it, and I treated Mr. Warner's office in the like capacity.

Q. But he was one of the four in on this deal, was he not?

A. That is true.

Q. Sort of a partner of the other three in this operation?

A. Yes.

Mr. Wendkos: Objected to as a conclusion.

The Court: Yes, it might call for a conclusion. The fact that he was in with them, of course, is perfectly patent.

Q. Didn't you regard him as such?

A. As a party ———

Q. As a sort of partner in this deal?

A. As a purchaser, yes.

Q. I understood that after you got these papers into your possession with the signatures on you had looked at the papers. Now, what part of the papers did you look at? By papers I refer to the two sets of contracts.

A. My recollection in the matter would be that I would turn to the last page to see that all signatures had been affixed.

Q. You feel that you did that?

A. I feel that I did that.

Q. But you don't feel that you would have seen this notation at the bottom there in ink?

A. No, because I never read it.

Q. It is rather striking, isn't it, and different from anything on the page?

A. That is true.

Q. Was in different penmanship?

A. True.

Q. Stands out pretty well from the face of the paper, doesn't it?

A. Yes.

Q. But you are quite sure you didn't see that?

A. Yes.

Q. But immediately opposite that you saw the names of the Lippincotts, signatures of the Lippincotts, immediately opposite this interlineation?

A. I can't say that I examined them in detail to particularly note that.

Q. Well, you were interested to know whether the document was a complete document when it came to you, weren't you?

A. That is true.

Q. And as you say you turned to the last page to see if it had been signed?

A. True.

Q. And you wanted to see if it had been properly signed?

A. Well ——

Q. Well, you wanted to know that all the people who were parties of the first part had signed it, didn't you?

A. Yes.

Q. And you noted that?

A. Will you permit a question? Properly signed?

Q. Well, signed; leave out the word properly.

A. Of course, this notation might go as a part of a witness. Not being of a legal mind we wouldn't interpret it correct or incorrect.

Q. Well, that is after you read it. You couldn't very well interpret it before you read it, could you?

A. No, we had seen it, after I had particularly noted it. My feeling in the matter is this, Mr. Stockwell: that seeing that there wouldn't attract undue attention as far as I am concerned because

that is in the line where the witnesses are and the signatures. If that had been inserted in here it probably would not have attracted my attention as far as I was concerned, personally; but over there we took it as a part of the witness and the signatures.

Q. Now, are you willing to say that you didn't see that notation above the signature of Bitting, witness?

A. I didn't until it was drawn—I think in reading over these papers in our attorney's office I picked up something more in the body of the agreement as I read along, that I recall, that was not in there at the time I signed the papers. In other words, it had been injected in between the lines, if I am not mistaken, yes.

Q. As a matter of fact, Mr. Wonfor, at the time you executed the paper did you know who was to be the mortgagee in that mortgage?

A. I can't say that I could answer that question.

Q. You don't know whether it is Laura Evans or Tom Jones was party of the first part or not? You were not interested in that, were you?

Mr. Wendkos: I object to that, if your Honor please. The paper speaks for itself.

The Court: Yes, he was just asked now if he was interested. I will allow that question.

(Objection noted for plaintiffs as ground of appeal.)

A. I was interested? Is that your question?

Q. That is the question. You were interested in

who was the mortgagee in that mortgage which was to be given back to you?

A. I should have been.

Q. I didn't ask you that.

A. I feel that I must answer that question again as I did in qualifying another question. If you are dealing with someone whom you have confidence in as a salesman or a house that they are representing you put your confidence in that person, feeling that the transaction is going to be true and clear and aboveboard on any matters of fraud or what not.

Q. But so far as you were concerned did it make any difference to you whether in this particular paper which I am showing you here—this is the Lippincott agreement—whether the mortgage was made payable to William J. Lippincott or whether it was made payable to the three or four people—to the three people who were parties of the first part there?

A. Well, I would only ——

The Court: Just a moment. Now, if this question is directed to a time subsequent to the time of the signing of the paper by Mr. Wonfor I think it is objectionable. I won't put it that way; I mean if it is directed to a time when he was signing a paper then I think it is objectionable, because the paper does speak for itself; but any time after that I think it would be entirely competent.

Mr. Stockwell: I will address myself to a later period, your Honor.

Q. And so far as you were concerned did you care, after you had actually signed the paper, whether it would be changed or altered to make the mort-

gage payable to one of the three grantors or to the three grantors?

Mr. Wendkos: I object to that, if your Honor please, for this reason: that any alteration in a contract, of course, according to law, vitiates it. Now, whether or not the persons considered the change material or not does not enter into the question at all. I think the Court of Errors in this particular case has definitely ruled that materiality of an alteration has no concern with the alteration at all. Now, whether or not one cares whether another name is in there or another person is mortgagee rather than the contractor or vendor is of no concern so long as the alteration has been made, whether it be of a material or immaterial part. In the opening Mr. Stockwell has already stated there were some family differences, and I think it is certainly material whether the mortgage was to be made to them or to some other person. I object to that line of questions.

The Court: I think it is only material as bearing upon the defense that there was an assent or acquiescence in the change. That is the reason I ruled that the question ought not to be directed to his state of mind at the time the proposal was made and when he signed, because there the proposal was put in writing and signed by the parties, and it didn't make any difference what mental reservation he had or what interest there was. But one of the defenses was that there was a consent or acquiescence in this change. Therefore, I think the state of mind is to be considered upon that question only.

Mr. Wendkos: I know, but, if your Honor please,

in those matters covered by the Statute of Frauds, particularly any contract relating to an interest in real estate, is divorced entirely from the state of mind unless it can be shown that after the alteration had been made that there was an acquiescence, not by a state of mind but by a writing or memorandum signed by the parties to be charged. These plaintiffs cannot be charged with the acquiescence or adoption of this particular contract or instrument, whatever you wish to call it.

Mr. Stockwell: Mr. Wendkos has set up in his complaint a proposal, as he calls it, not on an instrument within the Statute of Frauds at all; and on his own theory his argument has no application whatever.

The Court: I understood that it was the theory of the plaintiffs that it amounted only to a proposal.

Mr. Stockwell: That is his theory.

The Court: That because the proposal was not accepted in the terms in which it was submitted that they were relieved. I adhere to the view that I have taken, Mr. Wendkos.

Mr. Wendkos: May I have an exception?

The Court: Yes.

(Objection noted for plaintiffs as ground of appeal.)

Q. Do you understand the question now?

(Question repeated as follows: "And so far as you were concerned did you care, after you had actually signed the paper, whether it would be changed or altered to make the mortgage payable to one of the three grantors or to the three grantors?")

A. Yes, I would object.

Q. Why?

A. If we had entered into an agreement with you to sell me a certain article at a certain price and I feel that you are an owner and somebody else comes along and wants me to pay him the money, why, naturally I am going to question it.

Q. Well, then, Mr. Wonfor, why did you put in this so-called proposal of yours a clause which reads: "This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto?"

Mr. Wendkos: There is no evidence here yet of any assignment of this paper. There is no evidence here so far that there was any assignment of the rights under these papers.

The Court: Well, is there any objection to the question?

Mr. Wendkos: Certainly there is an objection to the question.

The Court: Well, state it then, Mr. Wendkos.

Mr. Wendkos: I believe the question was whether or not Mr. Wonfor had in his proposal the follow-

ing language: "Heirs, executors, administrators and assigns."

Mr. Wendkos: Well, now again I say that that ——

The Court: I sustain the objection.

(Objection noted for defendants as ground of appeal.)

Mr. Stockwell: That is all.

Re-direct examination.

By Mr. Wendkos:

Q. Would it have been objectionable to you, personally, if you would have found that Mr. Wilson was to be a mortgagee?
A. Yes, sir.
Q. Did you, personally, ask for any extensions under these papers?
A. No, sir.
Q. Did you join in any requests for extensions?
A. No.

Mr. Wendkos: That is all.

Re-cross examination.

By Mr. Stockwell:

Q. Did you in that respect, as in the other respects, look to Mr. Warner to do what was proper to be done for you?
A. Will you frame that again?

Mr. Wendkos: I think this question is entirely too general. It should relate specifically to what he wanted Mr. Warner to do for him especially, and in view of your Honor's ruling with respect to the adoption of the change.

Mr. Stockwell: But Mr. Wonfor's statement heretofore and his explanation was that he expected Mr. Warner to do whatever was necessary.

The Court: You will have to ask him what was necessary.

(Question repeated as follows: "Did you in that respect, as in the other respects, look to Mr. Warner to do what was proper to be done for you?")

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. As a seller I would naturally expect the office handling the matter to present it to us in entirety, without any mistakes or reservations. I withdraw the word reservations.

Q. As a seller are you referring to yourself?

A. I was referring to Mr. Warner's office. My interpretation of your question is that I would look to Mr. Warner's office to protect our interest. Is that your interpretation?

Q. Mr. Warner being one of the four buyers?

A. You wouldn't take that stand in the matter, you wouldn't feel that way in the matter, no; not as a buyer but as a seller.

Q. Well, you are not a seller, you are a buyer, aren't you?

A. I am a buyer, yes, but Mr. Warner's office was the sellers.

Q. Well, what was Mr. Warner?

A. Well, Warner, personally, was a buyer but Mr. Warner's office was a seller.

Q. Well, who is Mr. Warner's office?

A. Mr. Bitting is the representative.

Q. Well, then you divide Mr. Warner into two parts, Mr. Warner as the seller and Mr. Warner as the buyer?

A. I would say yes, in this particular case.

Mr. Stockwell: That is all.

Mr. Wendkos: That is all.

JOHN S. WARNER, sworn for plaintiffs.

Direct examination.

By Mr. Wendkos:

Q. Do you have those papers before you, Mr. Warner, the Lippincott and Evans matter? Will you look at them and tell me whether you signed those papers?

A. Yes, sir.

Q. Who signed first?

A. I couldn't say. I signed them last.

Q. You were one of the purchasers, were you not?

A. Yes.

Q. You signed it last?

A. I signed last.

Q. As one of the purchasers?

A. Purchasers.

Q. Did the names of the sellers appear on the contract at the time that you signed?

A. Not at the time; no, sir.

Q. At the time that you signed those papers did there appear a notation over the names of the witnesses, over the signatures?

A. No, sir.

Q. In the one case the words "Laura Evans, one of" inserted between lines—whatever they may be —and in the other case the words "William J. Lippincott, one of" inserted between the lines mentioned there? Did those notations appear on the papers when you signed them?

A. They did not.

Q. Do you remember when you signed those papers?

A. Not exactly the date; no, sir.

Q. Well, about when with respect to the date of the paper?

A. Well, it is around the middle of December.

Q. Did you present the money or the checks at the same time these papers were submitted to the office of John O. Wilson, executed by the buyers?

A. Well, at the time we received our deposit with the understanding that there was to be one agreement—there were two agreements prepared and there was a delay of some time waiting for the other set of agreements; and upon receiving the agreements on the two pieces of property is at the time when the check was paid to Mr. Wilson's office.

Q. Well, I mean this: let's take the Lippincott paper first. As I understand you to say, the purchasers signed first; is that true?

A. Yes, sir.

Q. And you were the last of the purchasers to sign?

A. Yes, sir.

Q. And the signatures of the sellers had not yet appeared there?

A. No, sir.

Q. And there were no notations on there?

A. No, sir.

Q. And no interlineations?

A. No, sir.

Q. Now, after you signed them did you take them personally over to the office of Mr. Wilson?

A. I did not.

Q. Well, did you accompany anybody who did take them?

A. I did.

Q. Who took them there?

A. Mr. Bitting.

Q. And did you have the checks with you at the time?

A. I did.

Q. For the Lippincott paper?

A. For the complete transaction.

Q. Well, you mean the first deposit?

A. Yes.

Q. That is, for the whole farm you had your checks?

A. That is right.

Q. And you left them there in the office of Mr. Wilson?

A. I did.

Q. And did you get back any of the agreements?

A. Not at that time.

Q. Now, how long was it after that that you got back any of these papers?

A. I would judge about three weeks.

Q. And which papers did you get?

A. May I—pardon me. I misunderstood your question.

Q. I asked you in the first place, after you deposited the checks as a deposit on the whole transaction, including both farms, when after that did you get any of the papers executed by the sellers?

A. The one set of agreements came back very shortly after our payment.

Q. Which was that?

A. It was the Lippincott. The second lot didn't come back for quite some time. I would say that was about three weeks.

Q. Sure it wasn't any longer than three weeks?

A. Well, I would say three weeks. It was quite some time, I know.

Q. Well, did they come back in the same month of December?

A. No, they came back sometime in January.

Q. Now, for whom were you acting in this transaction?

A. The sellers of the property.

Q. Who were they?

A. The Lippincotts and the Evans.

Q. Was the notation appearing on those papers above the signatures of the witnesses, was that called to your attention immediately upon the return thereof to you?

A. It was not.

Q. Did you get them from the office of Mr. Wilson?

A. I did not.

Q. Who did get them?

A. Mr. Bitting.

Q. And did he give them to you?

A. He did.

Q. All of them?

A. The ones that belonged to me.

Q. When you say the ones that belonged to you now, what do you mean?

A. Well, gave them all to me for signing, then I retained my own copy.

Q. I mean after they had been taken back from the office of Mr. Wilson, after the sellers had signed, did he deliver all of the fully executed papers to you?

A. He did.

Q. To you personally?

A. Yes.

Q. All of them?

A. Yes.

Q. How many?

A. There were to my knowledge four, one for each of us; that is, eight in all.

Q. Eight in all?

A. I believe so.

Q. And you had physical possession of all the eight of them?

A. We did; I did.

Mr. Stockwell: This is Mr. Wendkos' own witness.

Mr. Wendkos: Well, he said, "We did."

Q. Did you see them?

A. I did.

Q. Did you examine them carefully?

A. I did.

Q. Did you see any of the notations appearing that I call your attention to now?

A. I did not.

Q. And after you got them, what did you do with them?

A. Signed them and returned all the copies but the one that I kept for my own personal holding to Mr. Bitting.

Q. I don't understand you, Mr. Warner, I am sorry. I understood you to say that you were the last of the purchasers to sign?

A. Yes, sir.

Q. Am I right?

A. Yes, sir.

Q. And then, after the purchasers had signed these agreements, or papers, as I call them, they were sent over to the office of Mr. Wilson; is that true?

A. That is correct.

Q. And they were in the possession of Mr. Wilson's office for quite some time?

A. That is correct.

Q. Now, after they were returned to you fully executed by the sellers, did you sign them again?

A. No, sir.

Q. Well, what did you do?

A. I received my copy for myself. That is all I received.

Q. Well now, which is correct, whether you received eight or one?

A. Well, I don't understand your remarks. In the first place, I only received my one.

Q. Who gave it to you?

A. Mr. Bitting.

Q. Do you know what happened to the rest of them?

A. Why, to my knowledge, they were delivered to the other three parties.

Q. And how did you know, to your knowledge?

A. Well, I instructed Mr. Bitting to deliver them.

Q. Beg pardon.

A. I instructed Mr. Bitting to deliver them.

Q. But you don't know whether they were actually delivered?

A. No, sir.

Q. Did you hear Mr. Bitting testify that it was left to you to deliver Mr. Wonfor's copies?

A. I did.

Q. Now, is that correct?

A. Mr. Wonfor's copy I do know was the last one to be delivered, and that was in the office some time, and I had left instructions for it to be delivered. Whether it was delivered in person or by mail I couldn't say.

Q. I see.

A. But I didn't personally deliver it.

Q. You didn't?

A. No, sir.

Q. When was your attention for the first time called to the notations and the interlineations in those papers?

A. It was quite some time after they were in my possession.

Q. Well, now, how long after that?

A. Oh, probably a couple months.

Q. You say that it was a couple months after this agreement came to your possession?

A. I would say so, yes.

Q. And who called it to your attention?

A. Mr. Bitting.

Q. And for whom was Mr. Bitting acting?

A. He was acting for the sellers.

Q. And for whom were you acting?

A. I was acting for the sellers.

Q. Did you notify any of the other buyers of the presence of that interlineation or notation?

A. I did not; no, sir.

Q. Do you know whether Mr. Bitting had actually

called the attention of the other buyers to these notations and interlineations?

A. We had a conversation ——

Q. I mean do you know whether Mr. Bitting did call the attention of the other buyers to these notations and interlineations? Do you know that?

A. No, I don't know it.

Q. Did the buyers themselves tell you about this notation?

A. They did not.

Q. Or the interlineations?

A. They did not.

Q. Now, did you personally ask for any extension for the time of settlement under these instruments? Please answer responsively. I am making these questions as clear as I know how. Did you personally ask the sellers or Mr. Wilson or Mr. Lippincott or Mrs. Evans or anyone in Mr. Wilson's office for an extension of time of settlement?

A. No, sir.

Q. Did you instruct anyone to ask for an extension of time of settlement of Mr. Lippincott, Mrs. Evans or Mr. Wilson or anyone in his office?

A. No, sir.

Q. Now, would it have made any difference to you who the mortgagee would have been if it were called to your attention after the execution, after the signing of these papers?

A. It would.

Q. By that I mean if the name of the mortgagee were changed in the papers after you had signed them, without your knowledge, would it have made any difference to you?

A. It would.

Q. Have you any reason for making that statement?

A. Well, in the event of a mortgage being given

I should have naturally wanted to know who my mortgage was being given to, in regards to payment of any interest.

Q. Let me ask you this: did you have a signed authority, signed by Mr. Lippincott or Mrs. Evans, directed to you, to sell their farm for them?

Mr. Stockwell: I object, unless the writing is produced.

Mr. Wendkos: Well, I want to find out whether there is one first.

The Court: Objection overruled.

Q. Did you have a signed authority, what we call a listing, a signed listing?

A. I did not.

Q. Did you attempt to get one?

A. We did.

Q. What was the reason that you had not succeeded? Why hadn't you succeeded?

A. Mr. Lippincott advised that he was agreeable to the selling of property, but that Mr. Wilson represented him, and the negotiations should be taken to Mr. Wilson's office, which was verified by Mr. Wilson.

Q. Now, how was the land known in your office, as two separate properties or as a single?

A. No, as the Lippincott farm.

Q. Did you ever speak to Mr. Lippincott?

A. I did.

Q. On what occasion?

A. I was taken down by an agent who had received the information in regards to the sale of the property, and I went to meet Mr. Lippincott and go over the property.

Q. And at that time he told you what?

A. That the property was for sale, less the dwelling and the dwelling on the crossroads—facing on the crossroads.

Q. Did he say anything about the acreage?

A. Well, 186 acres more or less.

Q. Did he tell you it was one or two farms?

A. I knew it as the Lippincott farm.

Q. Well, I am asking you did he tell you? Did he tell you there was one or two farms?

A. One farm.

Q. One farm?

A. We worked on it all the way through as one farm.

Q. Did the name of Mrs. Evans ever appear before until the preparation of these papers?

A. No.

Q. You never knew Mrs. Evans?

A. I never knew her, never met her.

Mr. Wendkos: That is all.

Cross-examination.

By Mr. Stockwell:

Q. You are in the real estate business in Camden, Mr. Warner?

A. Yes, sir.

Q. I have given notice to produce sundry papers, letters and so forth. Will you kindly produce those, Mr. Warner? I also served a subpoena duces tecum on Mr. Warner here to produce sundry papers and documents. Have you the papers named in this notice?

A. I have, sir. What do you want? (Produces papers.)

Q. Are they in chronological order?
A. I believe they are.
Q. You are the John Warner named in these two agreements as one of the purchasers?
A. Yes, sir.
Q. You obtained, at or about the time the papers were signed, an agreement that you should have the commission on the sale; is that correct?
A. Yes.
Q. And that agreement was to be what percentage of the price?
A. Five per cent, I believe.
Q. And what part of that commission was paid at the time the papers were executed?
A. There was no commission paid. There was a credit of ten per cent credited on the payment when the other checks was turned in on the agreement.
Q. Ten per cent on what?
A. Ten per cent of the purchase price of the total farm was paid down and we received our interest.
Q. And you were to get, according to the terms of your commission agreement that you signed at the time the papers were signed or about that time, what per cent of the total commission?
A. As I recall, ten per cent.
Q. I want to show you a carbon copy of a letter dated December 15, 1925, addressed by William J. Lippincott to Mr. John S. Warner.

(Mr. Wendkos examines letter.)

Mr. Wendkos: All right.

Q. Did you receive the original of that letter?
A. I did.
Q. That is your signature at the bottom, isn't it?
A. Yes, sir.

Mr. Stockwell: I ask that this be marked for identification.

(Letter marked Exhibit B for identification.)

The Court: What is the date?

Mr. Stockwell: December 15, 1925.

Q. And by that paper and at the time referred to you received either in cash or by credit the sum of $2,125 on account of your commission?

Mr. Wendkos: The paper speaks for itself.

A. The credit on the agreement.
Q. Credit to whom?
A. Credit to me on the agreement; no cash was turned over.
Q. Did you at the time the papers were delivered by you or by Bitting in your presence to Wilson's office, deliver checks on account of the purchase price?
A. We did.
Q. Were those checks drawn by you?
A. They were.

Mr. Wendkos: If your Honor please, I think this line of testimony is entirely covered by the stipulation. There is no denial.

The Court: Stipulation of what?

Mr. Wendkos: We stipulated on the opening at the beginning of the trial that you did not deny definitely stating that you received the money.

Mr. Stockwell: Certainly we received that money.

Mr. Wendkos: What is the use of going over it again?

Mr. Stockwell: I am not; I am going to show who paid the check.

Mr. Wendkos: It is not material.

Mr. Stockwell: I consider it very material on the question of agency, authority.

Mr. Wendkos: Well, I can't conceive of it having any materiality in view of the admission that they received the money.

Mr. Stockwell: It makes no difference whether they received the money or not. I take it that I have the right, if your Honor please, to bring out all the facts and circumstances touching this transaction which will throw any light on the question of agency as between Mr. Warner and the other people under the agreements and as between Mr. Warner and Mr. Bitting and as to Wilson's office and all four of these parties.

The Court: Is it your idea that this letter or this line of examination has a bearing upon the question of agency?

Mr. Stockwell: I do; yes, sir. I ask it for that purpose alone.

The Court: On that theory I think it is admissible.

Mr. Wendkos: Is that letter introduced in evidence?

Mr. Stockwell: No, it is marked for identification. I think I have no right to offer it yet.

Mr. Wendkos: I am willing to have it offered.

Mr. Stockwell: I offer it in evidence.

(Paper marked Exhibit D1.)

(Question repeated as follows: Were those checks drawn by you?)

Mr. Wendkos: I object. If this line of examination is on the question of agency only, the letter certainly does speak for itself, and all the matters of relationship between the parties are certainly set out in that letter.

Mr. Stockwell: The letter says nothing as to the source of the money and who deposited it.

Mr. Wendkos: Therefore, I certainly object to the line of testimony. If it is only agency he wants to establish, then this letter establishes it better than oral testimony can. It speaks for itself. And if you are going to show the source of the money I can't see where this is material, in view of the admissions.

Mr. Stockwell: The avenue through which the money reached the sellers.

The Court: I suppose where it came from and

to whom it was entrusted for the purpose of completing the settlement—or not the settlement, but the agreement—well, I think it is material.

(Objection noted for plaintiffs as ground of appeal.)

Q. Now, will you answer that question?

(Question repeated as follows: Were those checks drawn by you?)

A. The original check to Mr. Wilson was drawn by me.

Q. Wasn't one of those checks drawn by you on the Broadway Merchants Trust Company of Camden against your own account, J. S. Warner, in the sum of $6,375, dated December 23, 1925?

A. It was.

Q. That is made payable to W. J. Lippincott, is it not?

A. I believe so.

Q. And wasn't the other check drawn on your private account on the First National State Bank of Camden by you in the sum of $4,599.38?

A. That is correct.

Q. That is February 2, 1926?

A. As near as I can recall the date.

The Court: What was the date of the first one?

Mr. Stockwell: December 23, 1925.

Q. I also wish to show you a copy of a letter dated December 15, 1925, signed Laura Evans, and addressed to you.

Mr. Wendkos: All right. That may go in.

Q. I think you had better see it. Mr. Wendkos says I can put it in. I assume, however, you will admit that you received the letter, the original of it?

A. Yes, sir.

(Letter marked Exhibit D2.)

Q. And according to that paper, that is, Exhibit D2, which is marked, you were to receive or did receive $1,602.62 on account of your commission on that contract?

A. By credit in our agreements. In that case there was no money paid for it.

Q. But you paid money, as you told us, through two checks?

A. Yes, sir.

Q. Which constituted deposits on account of the purchase price; is that correct?

A. That is correct.

Q. And those checks which I have mentioned to you, how did you give them, on your private bank account? They were for sums due less the commission which you were deducting; is that correct?

A. Correct.

Q. So that if you might have given your check for the entire amount and received back a check for the commission or part of the commission it would have amounted to the same thing, would it not?

A. But we didn't receive any checks for commission.

Q. No, you took a credit?

A. Took a credit.

Q. And deducted the amount of that commission from the check which you turned over, in the checks which you turned over to Wilson's office?

A. In answer to your question, Mr. Stockwell, I received three checks from the purchasers.

Q. I didn't ask you anything about that. I am asking you what you did in the payment of those moneys, and I ask you whether or not the amounts of the checks which you gave to Wilson, Wilson's office, for the account of these sellers, were not the amounts to be paid on account according to the agreements, less the share of commission you were to have.

A. Correct.

Q. Did you pay back any of that commission to the sellers?

A. No, sir.

Q. Was Mr. Bitting an employee of yours?

A. He was.

Q. In your real estate office?

A. Yes, sir.

Q. The people who constituted the purchasers here, to your knowledge did they communicate with the sellers except through your office?

A. Not to my knowledge.

Q. Those communications went through your office, did they not?

A. That is correct.

Q. And isn't it true that you obtained for them extensions from the sellers of the time to make settlement under the contract?

A. Mr. Bitting did, through my office. Mr. Bitting ——

Q. Mr. Bitting did it for you, did he not?

A. Did it for me.

Q. You wanted those extensions, didn't you?

A. Well, I felt that we was duly entitled to them.

Q. And you asked for them and you got them; is that correct?

A. That is correct.

Q. So that, whereas the time for settlement under the contracts was early in August—I think August 3rd—the time to which these agreements were extended as to settlement was the 18th of October?

A. October.

Q. Is that correct?

A. Correct.

Q. 1926; is that correct?

A. That is correct.

Q. Now, I show you a letter of February—a copy of February 25, 1926, addressed by John O. Wilson or W. R. Stanert, in his office, to you, and ask you if you received the original of that letter?

Mr. Wendkos: I object to the introduction of that letter, if your Honor please. Mr. Warner, please don't read that letter. I object to the introduction of this letter on the ground that this is a communication between principal and agent and intended only for the eyes of the agent, under the authority of Stangel v. Sargent, 74 Equity, page 20.

The Court: Let me see the authority too—That is supposed to be from whom?

Mr. Stockwell: Supposed to be from the attorney for the sellers.

Mr. Wendkos: They have established the appointment of the agency, the making of the agency authority, and now, subsequent to the date of December 15th, this letter is attempted to be introduced. On

the authority of this case, Stangel v. Sargent, 74 Equity, page 20, "No communication made by the seller to his agent is intended to be for the buyer until contents be communicated to the buyers, and is not a communication which is to bind them in the transaction."

The Court: That seems to be pretty clear on it, but how does that affect the situation here?

Mr. Wendkos: Well, whatever transpired ——

The Court: Is it offered for the purpose of showing an agency?

Mr. Stockwell: Not for the purpose of showing an agency between Warner and the sellers, an agency between Warner and—not merely an agency but what actually happened between these parties. Warner was one of the purchasers himself. Warner is also, as we say, an agent for all the purchasers, all communications in which the purchasers ——

Mr. Wendkos: That is not the evidence.

Mr. Stockwell: It is going right in here now.

Mr. Wendkos: The evidence all up to date is that he is the agent for the sellers, but there is no testimony here that he is the agent for the buyers.

Mr. Stockwell: That is what we are proceeding to prove, your Honor.

Mr. Wendkos: That may be true; you haven't done it yet.

The Court: Will you state the purpose of this letter?

Mr. Stockwell: In other words, your Honor, I have here a series of letters running from the attorney for the sellers to Warner, one of the buyers, and who, according to the testimony so far, also was the committee through whom all the information went from the sellers to the buyers; a series of communications which will show extensions of time obtained, extensions of time granted, and other letters which are most interesting here, showing in the end, as we say, an absolute forfeiture on behalf of the sellers of all rights in this deposit money. In other words, it is perfectly possible, even as a layman, Mr. Wonfor said, for a real estate man to be in on both ends of the transaction, and that is the way he regarded this and that is certainly what happened. For the purpose of collecting the commission only, Mr. Warner can be said to have been the agent of the sellers; but for all other purposes he was the agent of the buyers, and through him, for the benefit of the buyers, went all these communications both to and from; and there was no communication went to the buyers direct or from the buyers direct except through Warner.

Mr. Wendkos: If your Honor please, I think it is quite clear what these letters state. These letters don't simply state that "You are agent for the purpose of collecting the commission, for collecting any consideration for your service in consummating the sale of my farm." That is what he was the agent for.

Mr. Stockwell: This letter is sent, according to its face, right at the time they got the credit.

Mr. Wendkos: Exactly, but the reason for this letter is for the approval of the authority, and you know, in order to collect a commission, there must be an authority given, and that is the authority given to Warner for the sale, acting as agent for the owners of these particular properties for the sale thereof. Now, any future communications between him and his agent is for themselves only.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

(Question repeated as follows: Now I show you a letter of February—copy of February 25, 1926, addressed by John O. Wilson or W. R. Stanert, in his office, to you, and ask you if you received the original of that letter.)

A. Original of this letter?
Q. Yes.
A. I don't recall this letter.
Q. Then you say you didn't receive it?
A. I don't recall receiving it.

Mr. Stockwell: I ask that it be marked for identification.

(Letter marked Exhibit C for identification.)

Q. Now I show you a letter of February 19th, signed "John O. Wilson, attorney for Laura Evans;" that is produced by Mr. Wendkos, your attorney, so I assume you will you say received that. That is the original.
A. Correct.

Mr. Stockwell: I offer it in evidence.

Mr. Wendkos: I object to the introduction of any of these letters in evidence.

Mr. Stockwell: Shall I then hold these until I put them in as part of my defense?

The Court: It had better be marked for identification.

(Letter marked Exhibit D for identification.)

(Adjourned till January 28, 1930, at 10.00 A. M.)

Mt. Holly, N. J., January 28, 1930.

(Trial of the cause resumed at 10.00 A. M.)

JOHN S. WARNER, resumed.

Mr. Stockwell: I want to call for the production of a letter signed "John O. Wilson" to John R. Warner, dated February 19, 1926.

(Letter produced.)

Mr. Stockwell: Do you object to this being offered in evidence?

Mr. Wendkos: Oh, yes. I object on the ground that these communications are between principal and agent and intended for their eyes only.

The Court: Objection overruled. The point is that you are not objecting to it being offered at this time, but you are objecting to its relevancy and competency?

Mr. Wendkos: Relevancy and competency.

The Court: Do you wish to offer it?

Mr. Stockwell: Yes, I offer it.

(Objection noted for plaintiffs as ground of appeal.)

(Letter marked Exhibit D3.)

Mr. Stockwell: I call for the production of a letter signed John O. Wilson, addressed to John S. Warner, dated June 1, 1926.

Mr. Wendkos: No, I haven't any such letter.

Mr. Stockwell: Have you a letter signed William J. Lippincott, addressed to William H. Windolph, dated May 27, 1926?

Mr. Wendkos: No.

Q. I want to show you a letter copy dated June 1, 1926, addressed to John S. Warner, and ask you if you received the original of that letter?

Mr. Wendkos: The same objection is made to the introduction of this letter as to relevancy, and that it is a communication between principal and agent, solely for their consideration.

The Court: Well, he simply asks now if he received the original of which this is purported to be a copy.

A. I don't recall receiving the letter.

Q. Was not such copy which I now show you, which is dated May 27, 1926, addressed to William H. Windolph, was not that received by your office in the letter from John O. Wilson?

Mr. Wendkos: I object to that, whether it was received at his office. I object to this examination unless it can be shown that Mr. Warner, the wit-

ness, himself actually received this letetr. The letter is addressed to William H. Windolph.

The Court: That is the question, I suppose, whether he received it.

A. No, I don't recall receiving this letter.

(Letter marked Exhibit E for identification.)

Q. Mr. Warner, you did, however, receive an extension of time of forty-five days ——

Mr. Wendkos: Objected to.

Mr. Stockwell: May I finish my question?

Mr. Wendkos: I thought you were through.

Q. —— forty-five days from the date called for settlement under the agreement?

Mr. Wendkos: Objected to as being oral testimony varying the terms of a written contract.

Mr. Stockwell: What is the contract?

Mr. Wendkos: Well, or whatever it may be, the written instrument, as I call it, sets forth certain terms, and the defendants claim to have entered into a contract, according to his defense, and the terms of which are set forth in the writing. Of course, we claim that there was no contract, but nevertheless there is a paper writing setting forth certain terms and conditions. Now he is asking this witness whether he had received an extension,

without putting in evidence any written statement that the extension had been made, signed by the parties to the cause. I can't see how this would affect any written instrument. That is so fundamental.

Mr. Stockwell: If your Honor please, as I understand the plaintiff's case, he claims that the proposal to buy these properties, or proposals, were made in writing to my clients; that he paid at the time, or that they paid at the time the proposals were submitted, certain sums of money on account of those proposals; that, as he claims, we refused to accept the proposals and retained the purchase money. Now, my theory of the case on this point is, of course, that the agency of Warner for the other three purchasers is material. Warner was not only an agent for the other three, on the theory that he was a real estate agent acting for the three, but he was one of four joint adventurers, and acting for the four, his word would go as of the four. So far, it is shown from the mouths of their own witnesses all of the communications went from Mr. Warner's office in the name of Warner; we propose to show that not only did these people know of what they claim is an alteration in the proposal, but that even after they knew of that so-called alteration they asked for and obtained extensions of time in which to make settlement; that they did it on two occasions and this was the first one of which I am speaking now, which extends the time to appear to forty-five days, which would bring it up to sometime in September; and then there is a later one which brought it on down to October 8th, and that was followed by a letter to all of the parties, which letter they have already produced here, showing ——

The Court: Do you claim that these alleged extensions were arranged in writing?

Mr. Stockwell: I claim that they were granted in writing.

The Court: In writing?

Mr. Stockwell: Yes, and that they were asked for only by Mr. Warner.

The Court: Well, then, assuming, Mr. Wendkos, that your point is well taken, doesn't that answer it?

Mr. Wendkos: No, for this reason, if your Honor please: I think there are two things wrong in Mr. Stockwell's premise. In the first place, there has been absolutely no proof of any agency on the part of Mr. Warner to bind the other three buyers in any respect other than to take the proposal that they signed and deliver them to the office of John O. Wilson. Secondly, I think that Mr. Stockwell is wrong when he states that the extensions or requests for extensions were made after the discovery of the interlineations and the notations or alterations. I think it has been very clearly demonstrated here, at least Mr. Goldsborough had definitely said, "I didn't see those alterations until we were in the Chancery Court."

Mr. Stockwell: Oh, no; he said he knew it in the summer of 1926.

(After further argument.)

The Court: Well, this is entirely preliminary,

it is in your case and, of course, it cannot prove anything, but he can cross-examine with reference to the theory of his case. I overruled the objection.

(Objection noted for plaintiffs as ground of appeal.)

Mr. Wendkos: That exception is based upon the theory that there is no writing in evidence now changing the terms of the written instrument.

The Court: Well, it is not in evidence because you object, very properly, because of the witness' statement that he has no knowledge of receiving those letters, and only copies are offered.

(Question repeated as follows: Mr. Warner, you did, however, receive an extension of time of forty-five days from the date called for settlement in the agreement?)

A. I, personally, didn't receive that.
Q. Well, who did?
A. Mr. Bitting.
Q. Well, who is Bitting?
A. Mr. Bitting was my salesman acting in the transaction all the way through. Mr. Bitting sold me.
Q. He did what?
A. Mr. Bitting sold me my interest; Mr. Bitting acted for me all the way through in my transaction.
Q. He sold you?
A. He sold me. I had nothing to do in selling to the other three parties.
Q. Then how did it come that you took the commission?

A. It came to our office. Our office had the listing.
Q. What is your office but you?
A. My office.
Q. Your office is you, isn't it?
A. Yes.
Q. You took the commission, didn't you, or credit for it?
A. Yes.
Q. And yet you say he sold the ground to you?
A. He sold my interest, yes.
Q. Well, you knew an extension of time had been granted, didn't you, for forty-five days?
A. Yes.
Q. Knew about that; isn't that right?
A. Yes, sir.
Q. And you acted on the assumption that it had been granted?
A. Yes.
Q. Now, I want to show you another letter copy dated August 31, 1926, addressed to John S. Warner.

Mr. Stockwell: I call for the production of the original of that letter.

Mr. Wendkos: I will see if I have it.

(Examines papers and produces another letter.)

Mr. Stockwell: Now, if your Honor please, the letter about which we were talking a moment ago of June 1st is produced. I would like to offer that in evidence. Is there objection to it being offered now when it ought to be offered later?

The Court: The witness ought to have a chance to see it.

(Letter submitted to witness.)

Q. That is produced by your counsel.

A. I don't recall receiving the letter. You see, our transactions was carried through negotiations principally by Mr. Bitting.

Q. The letters addressed to you went into your letter file, I presume?

A. Our communication was strictly handled by Mr. Bitting.

Q. Didn't you turn over your letter file on this transaction to Mr. Wendkos for the purpose of that trial?

A. We did.

Q. And wasn't that letter in that file?

A. It was. I don't recall seeing that letter before.

Mr. Stockwell : I offer it in evidence unless the objection be at this time that it is offered now instead of as part of my own case.

Mr. Wendkos: No, I object to it being introduced in evidence, not only on that ground, but on the ground that this is a communication between principal and agent, not intended for the other parties to the instrument.

The Court: Perhaps the letter ought to be reserved, in view of the fact that the witness says he doesn't recall receiving it, until proof of its mailing. It may be marked for identification.

(Letter marked Exhibit F for identification.)

Mr. Stockwell: I want to call again for the production of the letter of May 27, 1926, which was enclosed in that letter of June 1st.

Mr. Wendkos: I see no reference to a letter of May 27 here.

Mr. Stockwell: I ask for the production of that letter.

Mr. Wendkos: I don't know what letter he means.

Mr. Stockwell: Have you no letter signed by him?

Mr. Wendkos: They are all the letters that I have. Pick them out.

Q. Do you say that you didn't receive the letter signed by William J. Lippincott, which is stated in the letter of June 1st to have been enclosed therein?

A. I don't recall receiving any letter from Mr. Lippincott.

Q. Didn't I show you the letter of August 31st? I don't think I did. I show you a letter copy dated August 31, 1926, addressed to John S. Warner.

(Letter submitted to Mr. Wendkos.)

Mr. Stockwell: I call for the production of the original of that letter.

A. I don't recall receiving the letter.

Mr. Stockwell: What is the answer to my call?

Mr. Wendkos: For what?

Mr. Stockwell: Letter of August 31st.

Mr. Wendkos: I haven't it. The only other letters that I have are dated January 26th, September 7th, September 14th.

Mr. Stockwell: I ask that this letter be marked for identification.

(Letter marked Exhibit G for identification.)

Q. I want to show you a letter copy dated August 28, 1926, addressed to John S. Warner. Did you receive the original of that letter?

A. I don't recall it.

Q. Do you say you didn't receive it?

A. I don't recall receiving that letter.

Q. Do you say you didn't receive it?

A. I didn't receive it.

Q. You say you didn't receive it or ——

A. I didn't receive it.

Q. What enabled you to say that you didn't receive this?

A. I don't recall receiving the letter due to the fact that the communications, when they came in through John O. Wilson's office, was handled by my salesman, Mr. Bitting.

Q. The mail addressed to you was opened by Mr. Bitting?

A. It was opened by the secretary.

Q. And then you say you didn't see any of the correspondence that went from John O. Wilson to you?

A. There may be one or two letters in the early part of the transaction, but practically all mail that came in during the transaction was handed over to Mr. Bitting as it came in from the office.

Q. Well, in any event, you know that you obtained the extension to October 18, 1926, didn't you?

A. I know that there was an extension.

Q. To October 18, 1926; is that correct?

A. Yes, sir.

Q. That was obtained by you or through your office, was it not?

A. By Mr. Bitting.

Q. By Mr. Bitting, but he was acting for you, was he not?

A. He was acting for the office; yes, sir.

Q. And October 18, 1926, is the date mentioned as the date for settlement in this letter copy of August 28, 1926; is that correct?

A. That is right.

Q. Well, how did you know that you had the extension if you didn't receive any letter crediting it?

A. Mr. Bitting told me he had received the extension.

(Letter marked Exhibit H for identification.)

Q. I show you a letter copy of September 7, 1926. I call for the original. I will change that and show you the original, which is produced by Mr. Wend kos, letter signed John O. Wilson, dated September 7, 1926, addressed to you. Did you receive that letter?

A. No, sir; that is another transaction that has been handled directly by Mr. Bitting.

Q. Well, did you do anything about getting title insurance, as testified in this letter?

A. I did not. I didn't handle that.

Mr. Stockwell: Do you object to its offer now, because it is offered now?

Mr. Wendkos: I object to the offer of this let-

ter because it is a communication between principal and agent.

The Court: Did he say he received it?

The Witness: I did not.

The Court: He says he didn't.

(Letter marked Exhibit I for identification.)

Q. Was this letter in the letter file of your office at the time turned over by you to Mr. Wendkos for this trial?

A. They were.

Mr. Stockwell: Have you the letter of September 14, 1926?

(Letter produced.)

Q. Mr. Wendkos produces on my call a letter of September 14, 1926, signed John O. Wilson, addressed to you, John S. Warner, Palmyra, New Jersey. Did you get that letter?

A. I don't recall receiving that letter.

By Mr. Wendkos:

Q. Just a moment. For the sake of clearing up things, to whose attention is this letter addressed?

A. That is Mr. Bitting also. Mr. Bitting has handled, as I said before, the transactions all the way through in our communication.

By Mr. Stockwell:

Q. I understood you to say he was acting for your office.

A. That is right.

Q. In this transaction?

A. And he has taken care of all the mail that has come in in Wilson matter.

Q. Was this letter of September 14, 1926, in your letter file which was delivered to Mr. Wendkos for this trial?

A. I believe so.

(Letter marked Exhibit J for identification.)

Mr. Stockwell: I call for the production of two letters of October 8, 1926, addressed to the four men, four purchasers.

(Letters produced by Mr. Wendkos.)

Q. I show you two letters dated October 8, 1926, one of which is signed John O. Wilson, by W. R. Stanert, addressed to Messrs. William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner; the other signed John O. Wilson, by William R. Stanert and William J. Lippincott. Did you receive the original letter which is already marked Exhibit A for identification?

A. I don't recall receiving that letter.

Q. I show you the other letter, of the same date, October 8, 1926, which is the green carbon copy, signed John O. Wilson, W. R. Stanert and William J. Lippincott, addressed to the four purchasers. Did you receive that copy? I call your attention to the fact that that green copy is produced to me by your attorney, Mr. Wendkos.

A. I don't recall the letter.

Q. Were those two letters in the letter file from your office turned over to Mr. Wendkos for this trial?

A. Yes, the communications were.

Mr. Stockwell: I ask that that be marked for identification.

(Letters marked Exhibit K for identification.)

Q. I show you a letter dated October 15, 1926, addressed to John O. Wilson, signed John S. Warner, dated October 15, 1926. Did you send that letter?

A. By information given to me by Mr. Bitting.

Q. Did you send that letter?

A. I did.

Mr. Stockwell: I ask that this be marked for identification.

(Letter marked Exhibit L for identification.)

Q. Now, after seeing this letter of October 15, 1926, signed by you, to John O. Wilson, do you still say that you did not receive or do not recall receiving the two letters of October 8th?

A. I don't recall those letters.

Q. Isn't that letter of October 15, 1926, an express reply to the two letters of October 8th? Look at it.

A. But our communication and reply ——

Q. Please answer my question.

A. Yes, sir.

Q. Do you answer my question yes, sir?

A. Yes, sir.

Q. Then that letter of October 15th expressly refers to the two letters of October 8th; that is correct, isn't it?

A. Yes, sir.

Q. Are the facts stated in your letter of October 15th, addressed to John O. Wilson, true?

A. As given to me by Mr. Bitting.

Q. I ask that question over again. Please answer the question.

A. As given to me by Mr. Bitting.

Q. Well, were they true?

A. As far as I know.

Q. Now, as you stated, you knew that the time for settlement had been extended to October 18th?

A. Yes.

Q. Did you attend ——

A. I did not.

Q. —— on October 18th?

A. I did not.

Q. Did you send anybody there October 18th?

A. I did not.

Q. That is, at the place fixed for settlement?

A. I did not.

Q. Did you communicate in any way with Mr. Wilson or Mr. Lippincott or the Evanses in reference to that settlement except in the letter of October 15, 1926, which is marked L for identification?

A. That is all.

Q. That is the only communication? Do you know of any communication from any of the four purchasers except this one, this October 15th letter?

A. I never had any connection with the other purchasers.

Q. What?

A. I never had any connection with the other purchasers. I don't know what their action has been.

Q. Well, you are connected with the proposal which you submitted, as you call it, aren't you?

A. Yes, sir.

Q. You are undertaking to buy together a couple pieces of property?

A. Yes.

Q. Now, you knew you were buying farms or a farm, didn't you?

A. Yes.

Q. Or undertaking to do it?

Mr. Wendkos: Your Honor, this is immaterial. The papers speak for themselves. It takes a lot of time going over things already in evidence.

Mr. Stockwell: I don't know that I am wasting time. That comes with rather poor grace from my friend.

The Court: There is no objection to that specific question.

Q. You knew there were farms, did you not?

A. Yes.

Mr. Wendkos: Objected to as being immaterial and irrelevant.

The Court: Objection overruled.

Q. And you knew, of course, that the sellers would be expecting a settlement on October 18th, 1926, didn't you?

Mr. Wendkos: If your Honor please, I object to it as being immaterial and irrelevant. Whatever

they expected is not material to this issue. There is certain information here in writing and that speaks for itself, and no parol testimony may be given to vary or modify or change it.

The Court: I understand the witness has said that he did not recall practically any of these letters. Certainly that makes it proper to ask him on cross-examination the question to which objection is now made, and the objection is overruled.

Mr. Wendkos: If your Honor please, I ask an exception on this ground: that if these letters are not in evidence and this witness knows nothing about the contents, then surely this line of examination is not cross-examination.

The Court: Why is it objectionable to ask whether he knew of this extension?

Mr. Wendkos: Well, I don't think that was the question. The question was whether the other people had expected the settlement.

The Court: Read the question.

Mr. Stockwell: May I enlighten your Honor? I don't know whether your Honor understands it. The question I am asking him frankly is whether he did not know that there were farms, whether he did not know that the sellers were expecting to make settlement at that time, and I am going ahead to show what would be the result to these people of not telling them that they were going to make settlement. In other words, the sellers were misled; they were strung along for a period of months, to their detriment or damage.

(Question repeated as follows: And you knew, of course, that the sellers would be expecting a settlement on October 18th, 1926, didn't you?)

The Court: Objection overruled.

A. Yes, sir.

Q. Do you know anything about peach trees, how they must be treated in order to preserve them from season to season?

Mr. Wendkos: I ask your Honor how that is material. I certainly object to that question entirely.

Mr. Stockwell: I will state frankly what I propose to show, your Honor, is that a very considerable part of this land is in peach trees, and it was absolutely necessary that these trees ——

Mr. Wendkos: Is it in writing?

Mr. Stockwell: I am addressing his Honor; that it was absolutely necessary for the preservation of these trees and their protection that they be wormed and that they be wormed early. If he doesn't know he can say so, and if he does know I want to know it.

Mr. Wendkos: I certainly object to this line of questions entirely, for this reason: there is nothing in the pleadings about peach trees or worms; there certainly is nothing in the contract about peaches, or rather, the writings, I call it; and any testimony to be elicited varying the terms of these instruments is certainly objectionable, or injecting any other thing about peaches or any other conditions other than what is contained in those writings.

Mr. Stockwell: Of course, the whole point of this, your Honor, is that the people knew, professed to know, they have admitted that they knew that there was some change in the proposal which they had made. They made no objection, they made no claim, they attempted to do nothing, they sat still and received these letters and obtained extensions of time on the theory that the agreements were all right; and it is pertinent to show that it was to the damage of the sellers. Of course, if this man doesn't know he can say that he doesn't know; I will prove it by somebody else, any minor matters.

Mr. Wendkos: I object to this as entirely irrelevant and immaterial.

The Court: I can't see that it is yet, Mr. Stockwell, relevant.

Mr. Stockwell: I don't know that I have made myself clear, but the question of ratification and the question of waiver come in; and if there is ——

The Court: I don't quite understand, of course, the peach tree theory.

Mr. Stockwell: I am not a farmer, but I have had this rubbed into my bones so many times in other matters that I know.

The Court: Well, you are not claiming any damage by reason of it.

Mr. Stockwell: No, there is no damage, but I want to show that their going clear up to the date of settlement without protest that the alteration

was objectionable, without saying a word, was to the detriment of my clients, and that goes to the question of ratification.

(After further argument.)

The Court: There is no counter-claim for damage here?

Mr. Stockwell: No, sir.

The Court: I sustain the objection.

(Objection noted for defendants as ground of appeal.)

By Mr. Stockwell:

Q. Did you in any way, at any time, orally or in writing, offer to carry out the terms of this so-called proposal which you made for the purchase of these farms?

Mr. Wendkos: I think that is immaterial, if your Honor please, entirely immaterial.

Mr. Stockwell: That goes to the very meat of this case.

Mr. Wendkos: Oh, no, just the contract.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

Mr. Wendkos: For this reason:—will your Honor hear me on the question?

The Court: Yes, I might as well get your grounds on the record.

Mr. Wendkos: There is no necessity for anyone to carry out any proposal that he may make unless it be accepted on the identical terms. A mere offer to do a thing does not carry with it the liability or responsibility to do it, anything that has been offered to be done. Liability to do that which has been offered arises only upon the acceptance of the offer. And our theory in this case is that our offer had not been accepted, therefore we are absolutely under no liability to do anything whatsoever; and there being no meeting of the minds, there did not carry with that the so-called contractual relationship between the parties, where they are obligated inter sese.

The Court: I think there can be no question about that, that the buyers were not obliged to offer to carry out their original contract or so-called proposal which they had signed. That is not the point. But if they had offered to carry it out, or the question of whether they did or did not offer to carry that original contract out, is relevant to the question of whether there was any objection or whether there was any assent to the contract. It is on that theory.

Mr. Wendkos: I see. All right.

(Question repeated as follows: Did you in any way, at any time, orally or in writing, offer to carry

out the terms of this so-called proposal which you made for the purchase of these farms?)

A. As far as my own interest, I did not, inasmuch as there has been changes which entered into the change of my mind.

Q. Did you ever object to the sellers or to Mr. Wilson, the attorney for the sellers, that this so-called alteration was improper?

A. I did not.

Q. Do you know of anybody else making any such objection?

A. I don't know whether Mr. Bitting did or not.

Q. Well, you heard his testimony, didn't you?

A. I did.

Q. Well, you didn't appear at the time fixed for settlement to carry out any proposal, did you?

A. I did not.

Q. Either original or altered proposal, any proposal?

A. I did not.

Q. Or any contract?

A. I did not.

Q. Your idea was that you had abandoned the contract, wasn't it?

A. I didn't approve of the change that had been made.

Q. Hadn't you abandoned the contract?

A. Under the conditions of the contract I did.

Q. What do you mean when you say in the letter, "which necessitates the forfeiture of all money paid on account"? What do you mean by that?

A. It was not in regards to my own interest.

Q. Oh, it was not?

A. No, sir.

Q. Well, why don't you say so then?

Mr. Wendkos: The letter speaks for itself, Mr. Stockwell.

Q. Why didn't you say so then?
A. I didn't understand your question.
Q. Do you understand it now?
A. I do.
Q. All right. Why don't you say so in this letter then?
A. That letter applies to the two other buyers.
Q. Well, what were you doing then, if that is your theory, what were you doing on your own account about these gentlemen?
A. I wasn't interested in settling on a change of our agreements.
Q. Were you interested in settling that agreement without any change?

Mr. Wendkos: Objected to. That is not the theory of this issue at all.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

Q. Will you answer that?
A. As far as my interest was concerned.
Q. Then why don't you say so? Why didn't you present yourself at the time of settlement or write some letter indicating?
A. I left that in the hands of Mr. Bitting.
Q. You left that to Bitting?
A. I did.
Q. Well, what was Bitting doing? Where was Bitting then?

A. I can't answer that question.

Q. Did you tell Bitting to do something about it?

A. Mr. Bitting was taking care of the transaction all the way through.

Q. Did you tell Mr. Biting to do anything about your end of it for the settlement?

A. Before the settlement?

Q. For the settlement; anything in reference to the settlement?

A. I told him that I would not be interested in making a settlement on a change of the agreements.

Q. Well, you can dictate letters, can't you, and you have a stenographer in your office, a typewriter?

A. Yes, but I didn't handle any communication.

Q. You didn't? How is it you wrote, then, this letter of October 15, 1926?

A. I didn't finish my answer to you. I didn't answer any communications with the exception of this one letter, and this one letter, I believe, is the only one that I know of that has gone out.

Q. But this letter relates to the very question of settlement, doesn't it?

A. As the information was passed on to me by Mr. Bitting.

Q. And it relates to the question of settlement?

A. Yes.

Q. And it refers to the two letters which told you when the settlement would be and that they would be prepared to make settlement at that time, and told you the place of settlement besides; that is correct, isn't it?

A. That is correct.

Q. Then if you didn't propose to do anything or you did propose to do anything about your end of the settlement, why didn't you write and say or go and say something about it?

A. I handed that transaction over to Mr. Bitting.

Q. Bitting received that?

A. Yes.

Q. Did you ever ask for the return of the moneys which were paid on account?

A. I did not.

Q. Well, presumably you are interested in money, aren't you?

A. Yes, sir.

Q. And your checks had been drawn to the order of the sellers or their attorney when these deposits were made; that is correct?

A. Correct.

Q. Now, weren't you interested in getting your money back?

A. It is a matter that has been handed to my attorney.

Q. Well, when was it handed to your attorney?

A. On the change of the agreements.

Q. When was it handed to your attorney?

A. In the course of the proceedings of our other trial.

Q. Then you let it run from the time when you first knew about this change clear down to the date of the trial before Vice-Chancellor Leaming before you said anything to anybody about it; is that it?

A. That is proper.

Q. Or anything about a change?

A. That is proper.

The Court: What was the date of that trial?

Mr. Wendkos: Bill of complaint filed March 16, 1927; answer filed June 8.

Mr. Stockwell: The designation shows the 17th day of January, 1928.

Mr. Wendkos: Quite a number of motions were made, however, between the time of the filing of the bill and the designation.

The Court: Well, it was heard on the day of the designation?

Mr. Wendkos: Yes.

The Court: When was the bill filed?

Mr. Wendkos: March 16, 1927.

Q. You knew that John O. Wilson represented the sellers in this transaction, didn't you?
A. I did.
Q. No question about that?
A. No.
Q. He was looking after their interests, wasn't he?
A. He was.
Q. Was anybody looking after the interests of the purchasers other than yourself?
A. Mr. Bitting.

Mr. Stockwell: That is all.

The Witness: Your Honor, I would like to correct a statement to my attorney, if you don't mind, that was made yesterday.

By the Court:

Q. You have some testimony that you wish to correct?
A. Yes, sir.
Q. Well, you want to have a chance to appear?

By Mr. Wendkos:

Q. What is it about?

A. I made a statement to you yesterday that it was about three weeks after I received the agreements when my attention had been called to the change. I reconsidered that and it was about three months afterwards, three months afterwards when the change was called to my attention.

By the Court:

Q. You stated, I think, as I recall it, Mr. Warner, that the so-called Evans agreement was returned to you about three weeks after the papers had been left with Wilson. That was your statement, wasn't it?

A. I believe so.

Q. Now you wish to change that?

A. I wish to change the statement that was made in regard to Mr. Bitting calling my attention to the notations.

Mr. Stockwell: I think it is entirely improper for counsel to interfere here. The witness is undertaking to make a change and I think he ought to do so without any interference from counsel and make his own statement.

Mr. Wendkos: All right.

By Mr. Wendkos:

Q. You may proceed then, Mr. Warner.

A. The notice that Mr. Bitting gave me in regard to the change was about three months after the papers had first been delivered.

By the Court:

Q. You say now, Mr. Warner ——

A. About three months.

Q. About three months after?

A. About three months after.

Q. After what period?

A. After the receiving of the agreement that the notice of the change was made.

Q. Well, the papers were first left with Mr. Wilson or in Mr. Wilson's office?

A. Yes, they were.

Q. And then I understand that the Lippincott agreement was returned shortly; is that right?

A. Yes.

Q. Now you say that the Evans agreement was not returned for a period of about three months?

A. Afterwards.

Q. After that?

A. Yes.

Q. And was it then that you say, it was that time that your attention to the change was called by ——

A. Shortly after that time my attention was called to the change but I didn't see the change personally on the agreement till at the attorney's office.

Q. Then after your attention was called to this change ——

A. My attention was called to the change, which I said I thought it was rather strange in making such a change.

Q. You felt that was an important change?

A. I felt it was strange for the agreement to be changed after it had been signed. I didn't investigate it until my attention was called to the wording of it at the attorney's office. That was my first of seeing it. I wish to make that statement.

Q. But while your attention was called to this

change, which you regarded as somewhat strange, nevertheless you didn't personally look up the agreement to see what the change was?

A. I did not; no, sir.

Further cross-examination.

By Mr. Stockwell:

Q. Now in view of what you have stated may I ask you one or two more questions? When in months —referring to months now—did you get the agreements back from the Wilson office, executed?

A. Our first agreement came back very shortly after the execution, but it was quite some time afterwards when we received the others.

Q. When did you receive the second set of papers?

A. I can't give you a definite date.

Q. Well, somebody said about three months here a few minutes ago; I think that was your statement?

A. About three months. I can't give you exact.

Q. What did you refer to when you said three months?

A. From the time of our entering into our first agreement.

Q. You mean you got those papers back about three months after the first agreements were gotten back? I don't understand you?

A. I think it was about that time; yes, sir.

Q. Well, that is what you are talking about then when you say three months, is it?

A. Yes, sir.

Q. And you got the first agreements back right away after they were signed?

A. Yes.

Q. I mean very promptly after you people sent them, didn't you?

A. Yes.

Q. And that was either the last part of December or early in January, 1926, wasn't it?

A. Somewhere along there.

Q. And you say you didn't get the other agreements back until about three months after that?

A. I believe that is about right; yes, sir.

Q. That would be April, wouldn't it?

A. Yes, sir.

Q. Might it not have been in March?

A. I wouldn't say so.

Q. Might it not have been in March?

A. I wouldn't say the month. I don't recollect the month.

Q. And as I understand now, your attention was called to this change or alteration right away after you got this second set of papers back?

A. Yes, sir.

Q. So that would bring it in March or April, 1926, that you knew about the changes?

A. Yes, sir.

Mr. Stockwell: That is all.

Re-direct examination.

By Mr. Wendkos:

Q. Mr. Warner, you testified that you don't recall having received either copies or originals of these two letters of October 8, 1926. Is there anything in those letters which would have attracted your attention and which you would have remembered had you received the letters a day after they had been written or shortly after they had been written?

Mr. Stockwell: Attract his attention to what?

Mr. Wendkos: Is there anything in the letters that would have so attracted his attention that he would have remembered having received them?

A. Most assuredly.
Q. I beg pardon.
A. Yes, sir.
Q. What is that?
A. The transfer of the premises, the title, to John O. Wilson.
Q. Well, what difference would that have made or why should that have impressed itself upon your mind?

Mr. Stockwell: Objected to.

The Court: Overruled.

Mr. Stockwell: Withdrawn.

A. I knew personally who I was dealing with, and not with John O. Wilson as purchaser.
Q. Well, would it have made any difference?
A. Most asuredly.
Q. Just explain.

Mr. Stockwell: Objected to.

The Court: Yes, he said it would have made a difference. The objection is to the explanation. I sustain the objection.

Mr. Wendkos: All right. I won't go any further.

Q. I again refer you to the letter of October 15th.

I would like you to clear this up. Does the information which is contained in that letter—or was that information given to you by the persons mentioned in that letter?

A. No, sir; I never came in contact with the persons mentioned in this letter.

Q. Who are they?

A. Mr. Goldsborough and Mr. Wonfor.

Q. Well, did they tell you ——

Mr. Stockwell: Objected to. It is your own witness.

Q. Who gave you that information?

A. Mr. Bitting.

Q. I do want to clear this up. Here is a letter dated September 14, 1926, which distinctly shows that it is addressed to the attention of Mr. Biting. Did you ever see that letter?

Mr. Stockwell: Is this letter in evidence or marked for identification? Is that one of the letters that were marked for identification.

Mr. Wendkos: No, sir.

Q. Did Mr. Bitting ever tell you that he had received such a letter?

A. I don't recall him calling my attention to it.

Q. Now you still say that none of these letters that were shown to you by Mr. Stockwell ever came to your personal attention?

A. Not personally.

Q. And the only correspondence that you had with the office of Mr. Wilson was the letter of October 15th?

A. That was all.

Mr. Wendkos: That is all.

Re-cross examination.

By Mr. Stockwell:

Q. In view of that question I show you again the two letters of October 8th, 1926, Exhibits K and A for identification. Do you say that they were not brought to your personal attention?

A. I don't recall receiving those letters.

Q. How can you say that, Mr. Warner, in view of the fact that you have already stated that you sent the letter of October 15th, which expressly refers to "In reply to your letter of October 8, 1926"?

A. This information was given to me by Mr. Bitting.

Q. I am not asking you about any information; I am asking you if you don't say in this letter of October 15th, "In reply to your letter of October 8, 1926;" don't you say that?

A. Maybe, but this letter ——

Q. Don't you say that?

A. That letter says that.

Q. Didn't you write the letter?

A. That letter is ——

Q. Didn't you send that letter?

A. No, it is not signed by me. That is not my signature on that letter.

Q. I didn't ask you that. Do you mean to say that you haven't already told me in this testimony that you sent that letter?

A. It was sent from our office.

Q. Didn't you send that letter?

A. We did, but I don't recall your communication here.

Q. What does "J. S. W." mean down here in the left-hand corner of this letter?

A. That is put in by the stenographer.
Q. What does "J. S. W." mean?
A. Stands for my name.
Q. Stands for J. S. Warner?
A. Yes.
Q. It means dictated by J. S. Warner, doesn't it?
A. Yes, sir.

Mr. Stockwell: That is all.

Mr. Wendkos: In view of the statement made by the witness, apparently, I think I would like to clear up a few things.

Re-direct examination.

By Mr. Wendkos:

Q. In the month of May you were shown a letter solely for the purpose of fixing time. Now you have stated that about three months or so after the delivery of the Lippincott agreements you received the Evans agreements.

Mr. Stockwell: I object because he didn't use the words "or so."

Q. Three months or so, three months after—now what did you say?
A. I said about three months.
Q. About three months; all right. Now about three months after the receipt of the Lippincott agreement you testified that you received the Evans paper?

Mr. Stockwell: I object. This has already been covered, and then the attorney now is assuming to tell the witness what he has testified to. This is his own witness.

The Court: Yes, it has been covered, but as I understand, Mr. Wendkos, this is preliminary to some question which he wants to ask which was brought out by the witness' own correction of his testimony; is that correct?

Mr. Wendkos: In view of the statement made, I myself am not clear as to the time when he observed or his attention was called to the alteration.

Mr. Stockwell: He has already stated.

Mr. Wendkos: Now I think we have the opportunity here ——

Mr. Stockwell: Three months from March or April.

Mr. Wendkos: I think we have the opportunity here, in view of the fact that there is in existence a certain copy of a letter dated May 27th, addressed to Mr. Windolph, and not Mr. Warner, I want to ask this witness whether the extension of time was granted before or after his attention was called to those alterations. That is my question.

The Court: That is the question.

Q. Now I repeat this: in view of your voluntary statement I ask you this: there is a letter addressed to Mr. William H. Windolph, Camden, N. J., dated May 27th. Now, I would like you ——

Mr. Stockwell: May I say right here that the witness has already denied the receipt of any such letter, and he certainly cannot base his recollection on something as to which he says he has no knowledge and which he repudiates?

Mr. Wendkos: It makes no difference, because what I am trying to do is fix the time, and here is a date fixed on a certain piece of paper, May 27th. Now, whether this witness received it or not is immaterial. I would like to be able to fix this as the turning point or the time, either before or after which he had notice or knowledge of these alterations.

The Court: How is that going to help him if he doesn't know anything about the contents of that letter?

Mr. Wendkos: Only as to date. I am not asking him the contents of the letter at all.

Mr. Stockwell: But you are contradicting him in attempting to have him testify to a letter which he says he never received, which he does not know anything about.

Mr. Wendkos: Only as to the date of this letter. I am not asking about the contents. Whatever they may refer to is of no concern to this question. I am only requesting him to fix the time by this letter dated May 27th.

Mr. Stockwell: It seems to me it is perfectly easy for Mr. Wendkos to ask straight questions and address himself to time if that is what he is after, and

you don't have to do it with reference to this letter, which they have already repudiated and as to which Mr. Warner knows nothing, according to his own statement.

The Court: You may ask the question and embrace the date of that letter and the signers of the letter and the addressee of the letter and ask a question if you want to with reference to that.

Q. I again call your attention to this letter or a copy of it ——

The Court: The date, not the contents of the letter, the date of the letter.

Mr. Wendkos: Not the contents at all, and the addressee; that is what I want to do.

The Court: All right.

Q. I now refer you to a copy of a letter dated May 27, 1926, addressed to Mr. William H. Windolph, Camden, N. J. Now, in view of your voluntary statement with respect to this date, May 27, 1926, was it before or after this date that your attention was called to the fact that the agreements had been changed?

Mr. Stockwell: Mr. Wendkos in his question said, "In view of your voluntary statement about this date, May 27, 1926."

Mr. Wendkos: No, I didn't say that.

Mr. Stockwell: If I am wrong, but that is the way I understood it.

By the Court:

Q. Do you understand the question?
A. I think I do. Mr. Wendkos' question was in regard to the date ——
Q. Whether practically, as I understand the question, it is whether you say that your attention was called to the change in the instruments before or after May 27, 1926?
A. It was.
Q. Well, which, before?
A. Afterwards.

The Court: Is that all, Mr. Wendkos?

Mr. Wendkos: I think that is all.

Re-cross examination.

By Mr. Stockwell:

Q. In view of your statement do you still say that you did not receive a letter on June 1, 1926, signed John O. Wilson, to John S. Warner?

Mr. Wendkos: The witness has already testified he received that letter.

Mr. Stockwell: He said he had no recollection of receiving it. You have asked two or three times, tried to get him to reinforce that.

Q. It is true of that letter too, isn't it?
A. No, I don't recall receiving it.
Q. Now, what is there about the date, May 27, 1926, that enabled you to change your testimony and

date the knowledge you received of the change in May 27, 1926?

A. It was sometime, to my mind, it was sometime on in August.

Q. What?

(Question repeated.)

A. Well, it was about, I would judge, about three months after the supposed extension had been granted that Mr. Bitting had called my attention to it.

Q. What was that? When, now, do you say you got the information about the alteration?

A. I would think it was about three months after.

Q. After what?

A. After the extension had been granted and the change.

Q. When was that?

A. About three months after receiving the papers.

Q. Well, now you have given us some dates here. I want you to say now, after all your voluntary statements and what not, when, in what month, you received the information about the changes in these papers. Why the hesitancy in answering that? It is a perfectly good question.

A. If I can recall it was about three months after I had my attention called to it.

Mr. Stockwell: Please repeat the question.

(Question repeated.)

Q. You understand that question, don't you?

A. That would be about August, according to that.

Q. You say that you received no information about this change until August?

A. I don't recall any; no, sir.

Q. Then why did you say earlier in your testimony that it was approximately three months—you fixed the date—three months from the date of the agreement, which would bring it, as you yourself stated, in March or April? Why did you say that?

A. You said March or April.

Q. I asked you and you said yes, didn't you?

A. I wasn't so sure of your date.

Q. Didn't you say three months?

A. I did say so.

Q. Three months after the date of the agreement?

A. Yes.

Q. And it was in December, wasn't it?

A. It was, yes.

Q. Which would bring it March or April, counting it either three or four months, to suit yourself?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. That is what you said before, isn't it?

A. Yes.

Q. Well, did you tell the truth then or tell it in August, when you answered the question?

A. I am trying to tell the truth.

Q. Well, Mr. Warner, you can't tell the truth both times. Which was it?

A. You realize that I am recalling the notation that Mr. Bitting gave me in regard to the extension and it was about three months after that.

Q. Three months after what?

A. That he called my attention to the change.

Q. And it was three months from what?

The Court: From the extension, he said.

A. From the extension that he gave.

Q. When did this idea get into your head about that it was three months from the extension instead of three months from the date of the contract? When did you first think about that, over night?

A. It has been going in my mind that that is when my attention was called to it.

Q. Did you think about it last night? Is that when you thought you would change your mind and change your date?

A. Yes, I have been thinking it over, that that was about right.

Q. That is what you thought over during the night; is that correct?

A. Yes, I have been giving that more thought.

Q. Well, then, why did you come into court this morning and tell me that it was either March or April, three months from December 15th?

A. I can't answer that question.

Q. You can't answer that, can you?

A. Not of my knowledge here.

Mr. Stockwell: That is all.

THOMAS A. PATTERSON, sworn for plaintiffs.

Direct examination.

By Mr. Wendkos:

Q. Mr. Patterson, what is your relation to Mr. Windolph, William H. Windolph?

A. A confidential secretary.

Q. Is there any reason for Mr. Windolph's absence today?

A. Why, Mr. Windolph is in Florida. He underwent a very serious operation, amputation of the foot below the ankle.

Q. Do you know of a purchase made by Mr. Windolph of lands on Marlton Pike and Cropwell Road, near Marlton?

A. I know of it, yes.

Q. Did you see his papers in connection with the purchase?

A. I saw the papers, yes.

Q. And were they intrusted in your care by Mr. Windolph?

A. They were intrusted in my care to put in the safe deposit box, as the other mortgages.

Q. Of which you have ——

A. Access and charge of.

Q. Do you have sole charge of them?

A. Yes, sir.

Q. Now can you recall when you received that paper from Mr. Windolph?

A. I wouldn't want to say off-hand.

Q. Well, can you recall when that paper was taken from the box?

A. No, I have no recollection of the date.

Q. Can you fix it in connection with any event?

A. No, I wouldn't want to put myself on record.

Q. Was there any occasion for removing that paper from the box?

A. Only one occasion, and that was when it was asked of me that I gave it to Mr. Windolph.

Q. Well, when was that?

A. When he asked for it, just once, he asked for the papers and I gave them to him.

Q. Can you give me any idea when that was, not day or date or month or week, I don't expect that, but I mean in connection with any particular event?

A. That would be in 1926?

Q. Don't ask me; I am asking you. Can you fix any time or any event associated with that time when the papers were removed by you from the box and given to Mr. Windolph?

A. You mean the reason why he wanted the papers?

Q. Well, tell us that.

A. Why, he said he wanted the papers to ——

Mr. Stockwell: I object, if your Honor please.

The Court: Objection sustained.

A. Mr. Windolph would ask for the papers, I gave him the papers.

Mr. Stockwell: I object and move that be stricken out.

The Court: He has already testified to that.

Q. Well, what was the occasion for giving it to him?

A. There was some ——

The Court: Now just a moment. Is he going to testify to anything that Mr. Windolph said?

A. Well, what Mr. Windolph told me, he said ——

Q. No, don't testify what he told you.

The Court: That is objectionable. Counsel is trying to find out if there is anything that will enable you to fix with any certainty the date when you handed those papers to Mr. Windolph. I understand you to say no.

A. Of course, I could have had that date from my records in the office. I have records of those things. I have so many other matters, mortgages and so on, that I take care of, you know, that I don't have all this right in my mind, and I have records of them in the office. I could have produced and given you that.

By Mr. Wendkos:

Q. Well, can you tell us this: have you any idea when Mr. Windolph gave you those papers?

The Court: That is the file, as he has testified?

Mr. Wendkos: He gave him to put in the box; he testified to that.

A. Definitely, no, I couldn't say.

Q. Well, about what time? I don't expect you to fix the day and date.

A. I should imagine it was shortly after he put up his deposit.

Q. Well, about what time did he put up his deposit?

A. That I have the record of in my office. I couldn't give you that off-hand. I wouldn't want to say anything that I was not absolutely sure of.

Q. Well, from the time—you say that it was shortly after he put up his deposit that you received those papers?

A. I imagine so.

Q. Do you imagine so or do you know so?

A. I wouldn't say—I don't know so, no.

Q. Well, was it a long time after he put up the deposit?

Mr. Stockwell: Well, Mr. Wendkos, he is your witness. I think it is proper that I object to it.

The Court: Objection sustained.

A. I wouldn't want to make a statement that I would not be sure of, and I wouldn't want to say that.

Q. Can you give us an idea of how long those papers remained in the box in your possession?

A. That would be uncertain too, because as I say, I have ——

Q. A day, two days, a year?

A. Well, I would say three months or so, two or three months.

Q. Two or three months?

A. Yes.

Q. And then you gave them to Mr. Windolph?

A. Yes, oh, yes. He in turn, I suppose, handed them to his attorney.

Mr. Stockwell: I object to that. Not what you supposed.

A. He, in turn, gave them to his attorney.

By Mr. Stockwell:

Q. Do you know that?

A. Nobody else he would give them to.

Mr. Stockwell: I move it be stricken out.

The Court: Strike it out.

By Mr. Wendkos:

Q. Well, do you know that he gave those papers to his attorney?

A. Yes, positively sure, certainly.

Q. Have you any idea when he gave them to his attorney?

A. I have a receipt. I have all those days and dates. I could have submitted all those statements and facts. I have got those dates, you know, but I just don't have them memorized.

Q. Well, do you know the occasion for delivering those papers to the attorney? Do you know why?

A. Yes.

Q. Why?

A. Why, he was informed there was some alteration or so on.

By Mr. Stockwell:

Q. He was what?

A. He was told, I suppose ——

Mr. Stockwell: I object and ask to strike it out.

By Mr. Wendkos:

Q. Tell me why ——

The Court: If he knows.

A. Some alteration in the contract.

Q. Did his attorney call for them?

A. Yes.

Q. I am his attorney?

A. Yes.

Q. Did I call for those papers?
A. That is right.
Q. And did I speak to you about them?
A. Of course, Mr. Windolph—I overheard a conversation that you wanted the papers because of the fact ——

Mr. Stockwell: I object.

The Court: Objection sustained.

Mr. Wendkos: Conversation made in the presence of this witness.

Q. Well, now, did I ask you for the papers?

Mr. Stockwell: Objected to.

A. Mr. Wendkos asked Mr. Windolph.
Q. From the time that you put them in the box up until the time that you gave them back to Mr. Windolph were they ever removed from the box?
A. Absolutely no.
Q. Would you say again that those papers were delivered to you by Mr. Windolph and put in the box by you shortly after the ——

Mr. Stockwell: Objected to as leading.

The Court: Objection sustained. In the first place does he know? He has not indicated any knowledge of when the deposits were made. He says he has a record of them.

Q. Did you draw a deposit check?
A. No, Mr. Windolph drew the deposit check.

Q. Well, have you any idea how long the papers remained in the box?

A. No, I would only be guessing if I would say. I don't know.

Q. Would you say a short time or a long time?

Mr. Stockwell: Objected to.

The Court: Objection sustained.

A. I have a fair ——

The Court: Just a moment. I sustain the objection.

A. I would say a long time.

The Court: Strike it out.

Mr. Wendkos: That is all.

Mr. Stockwell: No questions.

PLAINTIFF RESTS.

MOTION FOR NON-SUIT.

Mr. Stockwell: If the Court please, I want to move for a non-suit on the following grounds:

The theory of the case of the plaintiff as shown by his own complaint is that there was a proposal made by the plaintiffs to the defendants for the purchase of certain land; that this proposal was in writing; that the defendants refused to accept that

proposal and that the defendants have retained the deposit money. That, I believe, contains the essential averments of each complaint.

The complaint sets out—it is not very long—that on or about December 15, 1925, plaintiffs proposed in writing to defendants to purchase their farm situate on Marlton Pike and Cropwell Road in the County of Burlington, New Jersey, a copy of which is attached hereto and marked Exhibit A.

2. Accompanying plaintiffs' written proposal plaintiffs paid the sum of $6,200 to these defendants who, according to the writing marked Exhibit A, acknowledged the receipt thereof.

3. Defendants refused and failed to accept plaintiffs' proposal; notwithstanding such refusal defendants attempted to compel these plaintiffs to perform,'' &c. Then at the end the plaintiffs have demanded the return of the moneys.

Now, in other words, we have here a theory of a proposal in writing for the purchase of land, the deposit of moneys by the plaintiffs under that proposal, and on their own theory and acknowledgment of the receipt of the money under that proposal, not only so but the case at the present moment shows by the testimony that the deposit money was paid on account of each agreement; that the checks were drawn by Warner on his private account to the order of the sellers or their attorneys; the moneys were received and retained by the sellers, and that the purchasers have never until the filing of this suit demanded the return of those moneys or any part of them. Not only so, but the commission was paid to one of the purchasers and retained.

Now, further than that, we have a statement in the

complaint itself that the defendants acknowledged the receipt of said deposit. I believe the plaintiffs have already offered in evidence the contract or those papers which they call—that is correct, isn't it?

Mr. Wendkos: Only to the extent of the proposal.

Mr. Stockwell: Well, you put them in evidence. Well, they are marked as exhibits for the plaintiff and in evidence, and for whatever the purpose the Court may consider them evidence, but they are in evidence; and it shows that those papers are signed by these defendants, which, to the extent anyhow of acknowledging the receipt of the deposit money, is shown by the papers defendants put in, regardless of whether there is any binding contract upon the defendants set up in the complaint. It is proved by them. The moneys were paid by them on a certain proposal, they have been received and retained by the sellers, right up to the date set, and still hold the moneys.

Now, your Honor will see that by a series of questions on cross-examination it has been established that all communications from the purchasers to the sellers passed through Warner. Warner was one of the four. No matter if Warner says that he never saw two of these men, the fact remains that the four, by their proposal—call it a proposal or agreement—the four were tied up in the same bag under a proposal which makes that a joint adventure on their behalf. The four men were on a joint adventure for the purchase of those two farms.

While I am on the subject, I will say this: that my theory is, and I believe the law sustains the proposition, that any one of a series of joint adven-

turers in this case, one of the four, the acts of the one within the adventure are the acts of the four, and the knowledge of the one adventurer is the knowledge of the four; and for the purpose of this case everything of which Warner had knowledge was the knowledge of the other three men as well, no matter what they may say about it.

Now, we go a little bit further and we find that under their own admission Goldsborough and Windolph, under the testimony of Goldsborough, their own witness, that they knew about the change in the summer of 1926. They knew about it and they did nothing, and as Goldsborough said, he communicated with no one, he did not give any notice to anybody or communicate with the sellers or their attorneys and he did not attend any settlement and was not interested in any settlement.

Now, as to Warner, Warner shows that he had knowledge. To be sure, his testimony is in pretty bad shape, as I see it, as far as Warner is concerned. But under his statement he had that knowledge in March or April of 1926. But for the purpose of this motion it makes no difference whether he knew those facts in March or April or June or July, which, according to his statement, would be immaterial. The fact is that he knew and he knew months before the time for settlement and he knew before he asked for, through Bitting, and got an extension of time in August, by which the time was extended from September until October 18th.

Now, that leads me to this. As I view this situation, your Honor, under Mr. Wendkos' proposal—and first I shall discuss it from his own standpoint—he says that there was no written contract, that there was a written proposal. Very well; when the written proposal was given to my people, my people took the written proposal and my people got the check

under that written proposal, and my people, according to his own statement and according to the evidence, acknowledged the receipt of that money under that written proposal. Mind you, it is under their own written proposal. We acknowledged the receipt of it on his own theory. Therefore we have a proposal made, we have the money paid on account of that proposal, we have that money retained, and it is retained at the present time. So that for the purpose of his case there was an acceptance of their own proposal.

Now, that leads us to this, your Honor; the question of knowledge or want of knowledge. I say that the knowledge of Warner was the knowledge of the four, and I go even beyond that and show that as to three they have actually admitted that they have the knowledge months before the time for settlement; and as to Wonfor, Wonfor paid no attention to anything. He was willing that the contract should go for years without even asking when the settlement was to be. Now, he looked to Mr. Warner; that is, he was to do what was necessary, as he said, in that respect. But the knowledge of Warner was the knowledge of the four, whether you consider he was his agent or whether you consider him as a joint adventurer or both.

Now, we have an acknowledgment of the receipt of it, and on the theory that the alteration was not authorized, then we have a proposal and they were entitled to treat it as an acceptance of that proposal, and they evidently were treating it as an acceptance of the proposal, because that went down to the time of the settlement. And that puts them in this legal situation; that before they can come into court and ask for the return of the money which was deposited under their own proposal they must show themselves willing to comply with the terms of the pro-

posal. They were never to appear on September 8th; no one appeared; and according to the letter of Mr. Warner there, "We forfeit—" he doesn't say everybody but "all the deposit money is forfeited." That is the language of that letter. So that whether you regard it as a proposal or whether you regard it as an agreement between the parties, on the theory that the contract was absolutely authorized, in the one case you have a contract by which a mortgage was to be made to Laura Evans; in the other case you have a mere proposal that a mortgage be made to the party of the first part. In the first case you have a proposal that was accepted and they had a right to act on the theory of an acceptance, and they must show a willingness, an offer to settle under the first contract, first proposal, or their so-called proposal, before they can set up any claim for the return of the money.

On the other hand, if you shall regard the alteration as authorized, as we claim—I think that is all about it—then the ratification by their own silence in the face of the fact as brought out in the testimony, then we have the necessity on their part of the willingness to make a settlement instead of writing a letter, as they did, abandoning settlement and waiving the rights on the deposit.

So, I say, your Honor, they neither set up in their complaint or do they prove any attempt to get the money back after offering to settle under their so-called proposal, any demand for the money, any offer of settlement under that proposal or agreement, whatever you may call it; but on the other hand they show expressly an intention to abandon the whole enterprise; and we feel that we are entitled to a nonsuit as the case now stands.

(Mr. Wendkos replies.)

The Court: You need not pursue the argument, as I am satisfied that the motion for a non-suit should not prevail.

RECESS TILL 1.30 P. M.

(Trial of the cause resumed at 1.30 P. M.

DEFENDANT'S TESTIMONY.

WILLIAM R. STANERT, sworn for defendants.

Direct examination.

By Mr. Stockwell:

Q. Where do you live, Mr. Stanert?
A. Merchantville, New Jersey.
Q. What is your business?
A. I am associated with John O. Wilson, Camden, New Jersey, as his office manager.
Q. Were you associated with him in the year 1925?
A. I was.
Q. From that time down to the present time?
A. Yes, sir.
Q. Where was his office then located, in 1925?
A. Southeast corner of 4th and Market Street, Camden.
Q. Where is it now?
A. In the Wilson Building, Broadway and Cooper Street, Camden.
Q. Did your office represent William J. Lippin-

cott, William B. Lippincott and Caroline Lippincott?

A. Yes, sir.

Q. William Evans and Laura Evans and William Lippincott again?

A. Yes, sir.

Q. Have you personal knowledge of the transaction involved in the sale or proposed sale of the farms belonging to these people I have named?

A. Yes, sir; I have.

Q. When did it first come into your office as an item of business?

A. Early in December.

Q. What year?

A. Early in December of 1925.

Q. How did it get in there?

A. It was brought to it by William J. Lippincott.

Q. The gentleman sitting to my right?

A. Yes.

Q. And were you given any instructions by him?

A. We were.

Q. Did any one call on you representing the proposed purchasers?

A. Yes, sir.

Q. Who called?

A. Mr. John S. Warner and Mr. Bitting.

Q. As a result of instructions given you by Mr. Lippincott did you prepare forms of agreements?

A. We did.

Q. I show you an original paper, original executed paper, dated December 15, 1925, bearing the signatures of William Evans, Laura Evans, William B. Lippincott, William H. Windolph, William P. Goldsborough, G. A. Wonfor and John S. Warner, and I also show you another original paper dated December 15, 1925, signed by the same people.

A. It is not signed by the same people, is it?

Q. Well, correct me on it then; signed by William J. Lippincott and Laura Evans, executors of the estate of William B. Lippincott, William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner. Did you draw these two papers?

A. I assisted in the preparation of them.

Q. Did you have them typed?

A. I did.

Q. In whose office were they typed?

A. John O. Wilson's.

Q. Before the typing of these particular papers were other drafts prepared?

Mr. Wendkos: I object to that if your Honor please, as immaterial and irrelevant, as to what happened before the preparation of these papers.

Mr. Stockwell: It is immaterial to me if you don't want it.

The Court: All right. Objection sustained.

Q. Upon the drafting of these two instruments what did you do?

A. We presented them to Mr. Bitting for the signature.

Q. Who?

A. We presented them to Mr. Bitting.

Q. What is his first name?

A. I don't know.

Q. Who is he?

A. The gentleman sitting right down here, and employed by John S. Warner.

Q. All right.

A. For him to obtain the signatures of the purchasers.

Q. Before they were taken away by him were they inspected by anybody?

A. They were.

Q. By whom?

A. By Mr. Bitting.

Q. Then you say they were taken away?

A. Yes.

Q. And for what purpose?

A. For execution by the purchasers.

Q. Then what happened?

A. After being out of our office for a few days they were returned by Mr. Bitting and Mr. Warner, together with the names of the four purchasers attached to each of five copies of each agreement.

Q. Now just slow down a bit.

A. At that time Mr. Warner presented his checks in connection with those two agreements for the purchase price provided in the agreements, less a sum which was equal to one-half of the approximate commission which he would get at the final settlement.

Q. Whose checks were they?

A. John S. Warner's.

Q. To whose order?

A. One to William J. Lippincott, the other to Laura L. Evans.

Q. Were those checks cashed?

A. The one to William J. Lippincott was taken to the bank and certified there and cashed. The one to Laura Evans was held in our office for some little time after the papers were handed to us.

Q. Why?

A. Because we were unable to secure the signature of William Evans, one of the parties of the first part, to one of these agreements, and the husband of Laura Evans.

Q. Was the check subsequently deposited?

A. It was.

Q. Paid?

A. It was paid.

Q. Say whether or not the sums which were deposited were the sums called for by the two papers you have before you?

A. They were less a sum equal to one-half of the estimated commission due Mr. Warner in the transactions.

Q. You say both Mr. Warner and Mr. Bitting were present at that time?

A. They were.

Q. Who produced the checks?

A. Mr. Warner.

Q. Give us anything further that was said at that interview.

A. We told him that there might be some delay in securing the execution of the Evans agreement owing to family difficulties, but that we would secure it as promptly as possible and that we would not use the payment made at that time on account of that agreement until we were able to deliver the agreement itself properly executed.

Q. Was anything else said at that interview that you recall?

A. We had a discussion as to the acreage and questions of title examinations and the state of the title and things that would be kindred to that. I know nothing else.

Q. All right. What was the next thing that happened?

A. We secured the execution of the agreement between William J. Lippincott, his wife and father, and delivered that agreement, or delivered four copies of it, to Mr. Bitting in our office.

Q. Who was there with him, if anybody?

A. He was alone.

Q. And prior to that time had you obtained the signatures of your clients to the agreement?

A. We had, of those three.

Q. Now what had you done with reference to that paper between the two interviews with Bitting that you have mentioned?

A. We inserted four or five words with the intention of having the mortgage as called for by that agreement to run to Mr. William J. Lippincott, one of the parties of the first part, instead of to all three of them.

Q. Was that change made before your clients signed it?

A. It was.

Q. And then the paper came back to your office, or was it signed in your office by your clients?

A. It was brought back to our office.

Q. And then you say somebody called for the agreement?

A. Mr. Bitting.

Q. Now what did you tell Mr. Bitting before you delivered that executed paper to him?

A. I explained to Mr. Bitting the reason for making this change in this paper and asked him to go carefully over it and see that it was properly executed and everything was all right, satisfactory to him, before he took it away. I gave him four copies of it and he went over each of the four copies. They were lying flat on Mr. Wilson's desk at the time he came after them, and he went over and saw that it was properly executed, he rolled them up, put a band around them and carried them away in that manner.

Q. What was his reply to this change you mentioned?

A. He made no comment on it, nothing that im-

pressed itself on me at this time; no objection to it. And I guess that was about all there was; there was no comment made or objection to it.

Q. Did he express any disapproval of it?

A. None whatever.

Q. Will you say whether or not the interlineation in the two papers which I show you were also made in the other copies of the same instruments?

A. They were.

Q. And was a notation as to the interlineation made on each one of the copies as made in the original?

A. It was.

Q. And you say that the papers were flat on Mr. Wilson's desk?

A. Yes, sir.

Q. Were they at any time up to the time you delivered them to Mr. Bitting folded up?

A. Not to my knowledge.

Q. Well, did you fold them up?

A. No, sir.

Q. And how were they when you found them?

A. They were perfectly flat on Mr. Wilson's desk, in the folder which they kept them in, a flat article.

Q. Where was Bitting when you got them from Mr. Wilson's desk?

A. Standing right alongside of me in Mr. Wilson's room.

Q. What did you do with the papers as soon as you got them from Wilson's desk?

A. Spread the copies out on Mr. Wilson's desk for Mr. Bitting to check them over and go over them.

Q. What did he do?

A. He went over them very carefully, inspected each one of the four copies that he took away.

Q. And then what did he do?

A. He rolled them in a roll, they were all together, they were on an oblong paper, rolled them in a roll and put a rubber band around them and carried them away.

Q. At the time you were dealing with Bitting did you know that he was in the office of John S. Warner?

A. Yes, sir.

Q. Did he make any comments to you about his relations there with Mr. Warner?

A. None particular, except that he said he would bring Mr. Warner, that he would discuss this with Mr. Warner and various things of that nature.

Q. You say Mr. Warner did come in with him at one time?

A. He did.

Q. At the time the checks were delivered?

A. Right.

Q. Now, thereafter, was there at any time any objection made from any source to this interlineation?

A. None.

Q. These interlineations, that is, one on each instrument?

A. That is right.

Q. Either by Bitting or Warner or any of the four purchasers?

A. None whatever.

Q. Was there ever a demand made on your office for the return of the money?

A. None whatever, sir.

Q. Or any part of it?

A. No, sir.

Q. Was there ever any offer to return the commission?

A. No, sir.

Q. Which had been deducted?

A. No, sir.

Q. Now after these papers were delivered to Bitting in the form in which you have just stated—I want to get this clear—how many copies of each paper did you deliver to Bitting?

A. Four.

Q. Were they all executed in the same manner?

A. Yes, sir.

Q. Now, thereafter, did you have any correspondence with John S. Warner?

A. Yes, sir.

Q. Touching these transactions?

A. I did.

Q. I show you a letter of January 26, 1926, signed John O. Wilson, addressed to John S. Warner, which letter has been handed to me by Mr. Wendkos on call. Was that letter sent by you to John S. Warner?

A. It was.

Mr. Stockwell: I offer it in evidence.

Mr. Wendkos: I object to that offer on the grounds previously stated, that this is a communication between principal and agent and intended for themselves.

The Court: Objection overruled.

(Paper marked Exhibit D4.)

Q. I show you a letter of February 19, 1926, signed "John O. Wilson, W. R. S.," at the bottom. Did you dictate that letter that is addressed to John S. Warner?

A. I did.

Q. Did you send that to him?
A. I did.

Mr. Stockwell: That is already in evidence, your Honor.

Q. I show you a letter signed "John O. Wilson," addressed to John S. Warner, dated June 1, 1926. It is marked Exhibit F for identification. Did you dictate that letter?
A. I did.
Q. Did you send that to Mr. Warner?
A. Yes, sir.
Q. Now, was there any enclosure in that letter?
A. There was.
Q. I show you a letter copy dated May 27, 1926, marked Exhibit E for identification, and ask you whether the original of this copy was inserted in the letter of June 1, 1926.
A. It was.

Mr. Stockwell: I offer this copy of May 27, 1926, and also the letter of June 1, 1926.

Mr. Wendkos: I object to the introduction of these letters on the grounds previously stated, and also that the letter of June 1 states "I enclose letter which has been signed by William J. Lippincott in connection with the agreement for the sale of this farm." Now, the letter speaks for itself, and there is no testimony at this time to show that this particular copy had been signed by Mr. William J. Lippincott.

Mr. Stockwell: As a matter of fact it shows that it is not signed.

Mr. Wendkos: Well, the copy of the original that had been signed.

Q. How about the original papers? You say the letter of May 27, 1926, was enclosed by you in that letter. I want to know whether the original of this letter was signed by William J. Lippincott.

Mr. Wendkos: I object to that, if your Honor please, for this reason: there is no reference to any letter of May 27th in the letter of June 1st, and if there is any parol testimony offered to vary or alter the terms of that letter it is objectable. Now, it is an oral statement by this witness as to what that letter refers to.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

Q. What is your answer?
A. It was signed by William J. Lippincott.

(Letters marked Exhibits D5 and D6.)

Q. I show you a letter dated December 15, 1925, signed William J. Lippincott, addressed to John S. Warner. That has already been marked Exhibit D1.

Mr. Wendkos: Yes, I let that go in.

Q. Do you know where that was delivered, by mail or ——
A. Handed to him in our office.

Q. Handed to whom?
A. John S. Warner.
Q. In your office?
A. Yes.
Q. And I show you a companion paper, December 15th, signed Laura Evans, addressed to John S. Warner. What have you to say about that?
A. The same applied to that.
Q. You mean that was delivered to John S. Warner?
A. In our office.
Q. In your office?
A. Yes, sir.
Q. I show you a copy of a letter dated August 31, 1926, addressed to John S. Warner; it is marked Exhibit G for identification; and ask you whether the original of that letter was sent by you to John S. Warner.
A. It was.
Q. What was enclosed in that letter? By the way, whose signature is attached to the letter?
A. Mine. To the letter enclosed in this?
Q. Yes.

Mr. Wendkos: I object to any testimoy other than what appears in that letter.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. There were two letters enclosed in this.
Q. I am in error. I didn't make myself clear. I want to know whose signature was attached to the letter of August 31, 1926.

A. John O. Wilson.

Q. Now, there were papers in that letter, you say?

A. Yes, sir.

Q. And I show you what were marked copies of two papers and ask you whether the originals of those papers were enclosed in the letter of August 31, 1926.

A. They were.

Q. The papers which I show you are dated August 18, 1926; is that right?

A. That is right.

Q. And I ask you whether the papers which were enclosed were signed, and if so, by whom?

A. They were signed, one by William J. Lippincott, and the other by Laura Evans.

Q. And I think you have already stated the originals were enclosed in the letter of August 31, 1926?

A. They were.

Mr. Stockwell: I offer the letter and the enclosure in evidence.

Mr. Wendkos: I object, if your Honor please, to their introduction in evidence, on the same ground as previously stated: letters to an agent are intended only for him.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

(Letters marked Exhibits D7, D8 and D9.)

Q. I show you a letter signed John O. Wilson,

addressed to John S. Warner, dated September 7, 1926, marked I for identification. Did you send that letter?

A. No, I didn't.

Q. Who did send it?

A. Samuel J. Edwards.

Mr. Stockwell: This letter is produced from the final original letter produced from the file by Mr. Wendkos and evidently delivered to him by Mr. Warner. I offer it in evidence.

Mr. Wendkos: I object to it. In the first place it is not written by this witness; he said he didn't send it, apparently knows nothing about it. What Mr. Edwards did cannot be testified to by this witness.

Mr. Stockwell: That actually is true, your Honor, but the fact is that Mr. Warner has already stated that this particular letter was taken from his file and was in his file and delivered by him to Mr. Wendkos, and I now get it from Mr. Wendkos on call from him. It is an original letter signed by John O. Wilson and in the files of Mr. Warner.

Mr. Wendkos: But Mr. Warner also testifies that he did not receive that letter himself. It may have been put in his files by somebody in his office.

Mr. Stockwell: It is addressed to John S. Warner.

Mr. Wendkos: That may be, but he said he never got them.

Mr. Stockwell: Oh, he didn't say that.

The Court: It was one of the letters he didn't recall.

Mr. Stockwell: Didn't recall, and it was in his file and he delivered this file over to Mr. Wendkos.

The Court: I think it is for the jury under the evidence to say whether the letter was received by Mr. Warner. The objection is overruled.

(Objection noted for plaintiffs as ground of appeal.)

(Letter marked Exhibit D10.)

Q. Now, I show you a letter copy dated September 14, 1926, addressed to John S. Warner, and ask you whether the original of that letter was mailed by you to John S. Warner.

A. It was.

Q. Has the original ever been returned?

A. No, sir.

Mr. Stockwell: I offer it in evidence.

The Court: It may be marked.

Mr. Wendkos: I object to it for the same reason.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

(Letter marked Exhibit D11.)

Q. I show you a letter copy, green copy, dated October 28, 1926, marked K for identification, which paper was received from the file of Mr. Wendkos on call.

Mr. Wendkos: That is so.

Q. And ask you what you did with the original of that letter or copies of the original.

A. I sent them by registered mail to the four people named in the agreement of sale; that is, William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner.

Q. Now, were several copies made of that same letter?

A. There were.

Q. Who signed the original or copies or all?

A. Copies of this letter I signed on behalf of Mr. Wilson as attorney in fact, and then had the signature of William A. Lippincott attached below where I had signed on each one of the copies.

Q. In the same way that the particular copy now shown you is signed?

A. That is exactly like it.

Q. What did you do with each one of those papers?

A. Took them to the post-office and personally mailed them by registered mail to each one of those individuals.

Q. I show you another green copy dated October 8, 1926, and ask you whether that is another copy of the same paper you have referred to that is marked Exhibit K for identification.

A. Yes.

Q. Now, by reference to the second copy which you now have, will you tell me to what addresses you mailed the copies of that letter?

A. William H. Windolph, Ridley Park, Delaware County, Pennsylvania; John S. Warner, Riverton, New Jersey; George A. Wonfor, Cinnaminson, Burlington County, New Jersey; William R. Goldsborough, to Meadowbrook, Mortgomery County, Pennsylvania.

Q. Did any one of those copies ever come back?

A. No, sir.

Q. I show you another paper marked Exhibit A for identification and is produced from the files of Mr. Wendkos, dated October 8, 1926, addressed to the four men purchasers, and ask you whether copies of that paper were made.

A. They were.

Q. How many copies and what did you do with them?

A. Four copies; I signed them on behalf of Mr. Wilson, mailed them by registered mail to the four addressees contained in the body of this letter.

Q. And to what addresses did you mail them? I show you in connection therewith a green copy dated October 8, 1926, signed John O. Wilson, by W. R. Stanert, and I ask you whether this copy is a copy of the same paper A, for identification.

Mr. Wendkos: If your Honor please, I object to having this witness read over this green copy. This appears to be the original letter, and the best evidence, of course, is the original letter.

Mr. Stockwell: He has produced the original letter himself. Here it is.

Mr. Wendkos: I know, there it is; that is the best evidence.

Q. I don't think my question is completed yet. The same question I put as to the other letter.

The Court: He was asked, the question was as to what addresses he mailed this letter.

Mr. Wendkos: And this green copy is shown to him for the purpose of seeing to what addresses he mailed them.

Q. Did you make any notation at the time of mailing these letter copies?

A. I did.

Q. On what did you make the notation?

A. On an exact carbon copy of the letter itself.

Q. I show you a carbon copy of the letter of October 8, 1926, signed John O. Wilson by W. R. Stanert, and ask you whether, on that paper, you made a notation of the addresses to which you mailed those letters.

A. I did.

Q. And in testifying now to the addresses to which you mailed them are you refreshing your recollection from a memorandum which you made at the time of mailing?

A. I am.

Q. Made by you?

A. Yes.

Q. All right. Now, what addresses did you mail these letters to?

A. To William H. Windolph, Ridley Park, Delaware County, Pennsylvania; George A. Wonfor, Cinnaminson, Burlington County, New Jersey; John S. Warner, Riverton, New Jersey; William R. Goldsborough, Meadowbrook, Montgomery County, Pennsylvania.

Q. Did any one of those letters come back?
A. No, sir.
Q. With the envelope in which it was sent?
A. No, sir.
Q. Was there anything on the envelope which would permit its being remailed to your office?
A. Oh, yes; it contained our usual return card, John O. Wilson, with our address on.
Q. On the outside of the envelope?
A. On the outside of the envelope.
Q. Postage prepaid on every one of them?
A. Yes.
Q. On all these letters you sent out?
A. Yes.

Mr. Stockwell: I offer them in evidence.

(Papers marked Exhibits D12, D13 and D14.)

Mr. Stockwell: Also a copy of the same letter.

(Copy marked Exhibit D15.)

Q. Now, did you get any reply to these letters of October 8th?
A. Yes, sir.
Q. From whom?
A. John S. Warner.
Q. I show you a letter of October 15, 1926, signed John S. Warner, addressed to John O. Wilson. I ask you if that is the letter you received in reply.
A. That is.

Mr. Stockwell: I offer it in evidence.

Mr. Wendkos: Objected to for the reason stated, as a communication between agent and principal.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

(Paper marked Exhibit D16.)

Q. I show you an original letter signed John O. Wilson and addressed to John S. Warner, September 14, 1926, produced from the file of Mr. Wendkos, marked Exhibit J for identification.

Mr. Wendkos: Yes.

Mr. Stockwell: I offer that in evidence.

Mr. Wendkos: Objected to for the same reason.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

(Paper marked Exhibit D17.)

Q. Now, aside from this very considerable correspondence did you have oral conversation with Mr. Warner about these two items?

Mr. Wendkos: I object to any oral testimony for the purpose of varying the terms of any written instrument.

The Court: Of course, if it is offered for that purpose it would be inadmissible. If it is offered for the purpose of varying the terms of a written instrument it would be inadmissible.

Mr. Stockwell: I don't offer it for that purpose.

The Court: On that statement I overrule the objection.

(Question repeated.)

A. Yes.

Q. Now, when did you have the conversation?

A. Between the date of the agreements, which is about the 15th of December, and the delivery of the Evans agreement, which, according to my records, was about the—just after the middle of February.

Q. What was that conversation?

Mr. Wendkos: I object to any conversation concerning this agreement that had already been delivered.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. It was about the non-delivery of the Evans agreement and the delay in securing the signatures of the sellers to these papers.

Q. In that conversation was anything said about an extension of time?

Mr. Wendkos: I object. There is plenty of correspondence here concerning extension of time and no oral testimony is admissible in view of the presence of written testimony.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. Yes, sir; there was.
Q. What was it?
A. Mr. Warner ——

Mr. Wendkos: I object to that question.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. Mr. Warner said that on account of delay in securing the execution of those papers he would not be able to go ahead with the title examination and felt that he should be entitled to some delay in the final settlement, and as a result of that we granted an extension of the contract.
Q. What time?
A. We granted an extension of forty-five days from the original time set for settlement of the title.
Q. And this was done by this correspondence which is now in evidence?
A. Yes.
Q. Did you have any conversation after that?
A. Yes.
Q. About these proposed sales?
A. Yes.
Q. When and what was the conversation?
A. Sometime, my recollection is, between the date when we delivered that extension agreement, which

would be, I should say, sometime after the middle of February, and the first of June, when, after quite a number of discussions, I think, Mr. Warner and Mr. Bitting said that they felt that they should have the same extension of time of the Lippincott agreement that they had on the Evans agreement.

Q. Who should have?

A. That the purchasers, by reason of the fact that that was supposed to be one settlement, and they wanted to work it up that way, and they felt they were entitled to the same extension on that one as they were on the Evans agreement.

Mr. Wendkos: Now, if your Honor please, I move that this testimony be stricken entirely, on the authority of Kerzner v. Chanin, 118 Atlantic, 693: "A written contract for the sale of land being within the Statute of Frauds cannot be varied by a substituted subsequent oral agreement, purporting to make material changes in the written agreement."

An agreement for sale of land is the exception raised by Williston on Contracts, that all such agreements must be in writing, and there can be no oral modification of them; if your Honor cares to see the authority.

(After further argument.)

The Court: You may renew your motion either at the close of the witness' testimony or at the close of the case.

Mr. Wendkos: If I decide to move it at the close of the case it will be a proper motion.

By Mr. Stockwell:

Q. You related one conversation you had with Mr. Warner about these two proposed sales; is that correct?

A. Yes.

Q. Now, we started to talk about another conversation.

Mr. Wendkos: It is understood, if your Honor please, that this testimony is given over objection?

The Court: Yes.

Q. Now, did you have a later conversation, when was it and what was said?

A. I think I testified that I had a conversation with Mr. Warner between the delivery of the Lippincott agreements and the delivery of the Evans agreements, which were about sometime in the middle of February or towards the early part of March.

Q. You told us about that. Now, later on.

A. Later on, after the Evans agreement had been delivered, we had a conversation, I think, in connection with the title of the property and the acreage contained in the certificate which we had then made in connection with the agreements which were executed.

Q. Did you have any conversation at that time about extension of time?

A. Not with Mr. Warner. After the original extension—when I say the original extension I mean that which was given for forty-five days with each one of the agreements—the Evans extension was given within a few days after the delivery of the Evans agreement; the Lippincott extension of forty-

five days was given, I think, in May; well, it was sent to them from my office on the first of June in 1926. Now, those extension agreements I had talked with Mr. Warner about.

Q. Now, did you talk with Mr. Bitting about any extension?

A. Yes, I did.

Q. When?

A. About, my recollection is, it was late in July or the early part of August.

Q. Now, tell us the conversation.

A. Mr. Bitting came into the office with all the papers, which he said he had presented to Mr. Lippincott for signature, asking for an extension of thirty days in the final settlement of the contracts, and that Mr. Lippincott would not sign those papers until they had been left at our office and actually had our approval. Mr. Bitting told me that Mr. Lippincott had said ———

Mr. Wendkos: I object to any testimony about what Mr. Bitting told you.

The Court: Yes.

Mr. Wendkos: He said Mr. Bitting told him what Mr. Lippincott said. I object to that as being irrelevant and immaterial.

Mr. Stockwell: The testimony of Bitting is admissible about Mr. Lippincott; I think it is perfectly proper.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. Mr. Bitting told me that Mr. Lippincott would not sign that paper until it had our approval. Then in the course of my conversation with Mr. Bitting, I endeavored to alter the promised extension agreement which Mr. Bitting had submitted to Mr. Lippincott for signature.

Q. Did Mr. Bitting present that to you?

A. Mr. Bitting presented papers to me that he had prepared; I assume he prepared them.

Q. Well, did you draft a new paper?

A. I drafted one of the papers and endeavored to make it acceptable to them.

Q. To whom?

A. To Mr. Bitting.

Q. Then what did you do?

A. It was not acceptable to him and I finally secured the signatures of Mr. Lippincott and Mrs. Evans to the papers which Mr. Bitting had originally submitted.

Q. I show you Exhibit D7 and also D8 and D9 and ask you whether D8 and D9, which is the original of those papers, were the papers you prepared for Mr. Bitting.

A. They are copies of papers which I had signed for Mr. Bitting.

Q. And to whom did you mail them or send them?

A. John S. Warner, Palmyra, New Jersey.

Q. That is the originals of those?

A. Yes, sir.

Q. And they granted an extension to what date?

A. October 18, 1926.

Q. Later on was there another extension? Was there another extension after this?

A. None after that.

Q. It called for settlement October 18, 1926?

A. Yes, sir.

Q. Did you receive word from Mr. Warner or any of the other three purchasers with reference to the settlement under the agreement other than the letter of October 15, 1926, Exhibit D16?

A. No, sir.

Q. Either oral or in writing?

A. No, sir.

Q. Any request from any of the four purchasers for the return of the deposit money?

A. No, sir.

Q. Any objection to any interlineation in the papers?

Mr. Wendkos: Objected to.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. None whatever, sir.

Q. Any offer to carry out any proposal or any agreement which had been signed by them?

Mr. Wendkos: Objected to as being immaterial and irrelevant and incompetent.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. No, sir.

Q. Now, on October 18th, which, according to the letter of October 8th, was the time for settlement—is that correct, October 18th?

A. Yes, sir.

Q. Where was the place of settlement according to these written papers, that is, the two agreements or proposals, as you call them?

A. At the office of John O. Wilson, Fourth and Market Street, Camden, New Jersey.

Q. I ask you whether you attended at that time and place that day?

A. I did.

Q. For the purpose of settlement?

A. I did, sir.

Q. Were you there throughout the day?

A. The entire day.

Q. Did anyone appear from the purchasers, either the purchasers in person or through a representative?

A. They did not.

Q. Was there any message from them?

A. There was none.

Q. Did you have anything to do with the purchasers, any personal contact with them, except with and through John S. Warner?

A. None whatever.

Mr. Stockwell: That is all. Cross-examine.

Cross-examination.

By Mr. Wendkos:

Q. Mr. Stanert, how long have you been associated with John O. Wilson?

A. From 1915 till the present time, with the exception of about two years when I was in the army.

Q. What are your duties there?

A. They are general in their nature. It is more or less secretarial and assistant to him in his various financial matters and real estate.

Q. You take care of all the various settlements that go through his office?

A. Yes, I am in direct charge of all the settlements that go through that office.

Q. What are the settlements?

A. They represent mortgage settlements, real estate settlements and various other transactions on behalf of himself and his clients.

Q. Are your duties quite extensive?

A. Yes, very.

Q. Well, give us an idea of the extensiveness of your duties.

A. Well, it is a little difficult to outline those to you, but ours is a busy office, as you know. Mr. Wilson's investments are quite widespread and his legal practice and financial business has been spread over a period of about thirty years, and as a result of that experience he has a very widespread clientele and a lot of things to look after.

Q. Quite a lot?

A. Yes, there are.

Q. Will you tell me the number of things that you looked after on December 15, 1925?

A. On December 15, 1925?

Q. Yes.

A. No, I don't believe I can tell you a lot of those things.

Q. Can you give me any instance aside from this?

A. No, I don't think I do recall.

Q. Can you tell me of any incident that occurred that occurred on the 4th day of January, 1926,

A. No, I don't believe I can.

Q. Can you tell ms of any incident that occurred on the 27th day of May, 1926?

A. Yes, I can tell you one there. That was the preparation of the letter granting an extension of forty-five days.

Q. I mean aside from those.

A. No, I can't tell you any particular thing that I did.

Q. Now, could you tell me what occurred on June 1, 1926?

A. Aside from just my ordinary business there I have no specific instance to state to you.

Q. You can't recall any incident on that day, can you, any specific settlement?

A. Not in particular, no.

Q. A mortgage settlement or real estate settlement?

A. No, I don't recall to mind, today.

Q. Can you recall a specific settlement on January 4, 1926?

A. No, I don't.

Q. Perhaps I can recall one for you. Do you recall the settlement of properties 101, 103, 105 and 107 North Sixth Street, in the City of Camden?

Mr. Stockwell: Well, what would that have to do with this?

A. No, I don't recall.

Mr. Stockwell: I object, your Honor.

Mr. Wendkos: To test this witness' veracity and recollection. Here are specific instances that he has testified to, dates; he knew exactly what he did on those dates.

The Court: Well, most of those dates, I would like to say, Mr. Wendkos, as to most of those dates his recollection has been refreshed by certain documentary evidence.

(Last question repeated.)

A. It was a settlement for property for which J. Robley Tucker was interested, and in which either Mr. Wilson or one of his companies had purchased an interest.

Q. Do you remember the date of that settlement?

A. I don't recall the exact date. You gave me the date as January 4th. I am assuming you are telling the truth.

Q. I ask you if you know what took place that day.

A. You are asking me if I recall a settlement having taken place at that time.

Q. Was Mr. Warner representing the sellers along with you, or was he representing you?

A. Mr. Warner came to us representing the buyers.

Q. Representing the buyers?

A. Yes, sir.

Q. On page 53 of the State of the Case in the Chancery suit, Mr. Stanert, I am going to ask you these questions and answers and I will ask you whether you stated so or testified so in the Chancery suit. The question was: "Q. Mr. Bitting, you know, was employed by Mr. Warner?" And the answer was, "That is right."

Mr. Stockwell: It is your examination, Mr. Wendkos?

Mr. Wendkos: It is mine.

Q. "Q. Mr. Warner was the real estate broker who received the authority to sell the farm, wasn't he?

"A. Yes, sir.

"Q. And he really acted for the seller, didn't he?

"A. Yes, sir.

"Q. And he represented the sellers in the preparation of the agreement?

"A. That is true.

"Q. And Mr. Bitting also acted on behalf of the sellers, didn't he?

"A. Yes, I should say he did." Now, I ask you which of the statements is correct, this statement that you testified to in the Chancery suit or the present statement.

A. Both statements are correct.

Q. Now, I can't conceive of that. Now, he either represented the sellers or represented the buyers. Which do you say he did?

A. I say that my statements are both correct, he represented both parties.

Q. Now, with respect to the preparation of the agreements, whom did he represent?

A. I say that he represented both parties, because his client was undisclosed at the time we prepared the original agreement.

Q. Do you deny at this time that Mr. Warner received the authority to sell the farm from the owners?

A. I do not.

Q. Do you deny that Mr. Bitting acted on behalf of the sellers?

A. I do not.

Q. Now, you haven't given us a full history of

this alteration. I would like you to tell me by whom, physically, actually, with pen and ink or with typewriter, the interlineation was made in this instrument.

A. The interlineation in this instrument was made physically by a stenographer in our office whose name at that time was Geraghty.

Q. At whose request were they made?

A. Made on the request of John O. Wilson. He directed her to do it on behalf of the ——

Q. I want to know just a plain answer, at whose request?

A. At the request of William J. Lippincott and Laura Evans.

Q. Did William J. Lippincott request the stenographer to do it?

A. No, Mr. Wilson told ——

Q. Who requested the stenographer to do it?

A. Mr. Wilson.

Q. In your presence?

A. Yes, sir.

Q. Now, when did he do that?

A. It was some time prior to the execution by the sellers of this agreement.

Q. By the sellers?

A. Yes.

Q. Now, can you tell us when that was with respect to the date of the agreement?

A. In both agreements it was done about two or three days after the agreements were returned to us executed on behalf of the buyers.

Q. Is that also true in the case of the Evans agreement?

A. They were both made at the same time.

Q. They were both made at the same time?

A. Yes, sir.

Q. Now, who gave Mr. Wilson the authority to alter those contracts?

A. Mr. Lippincott and Mrs. Evans.

Q. Did you say anything about it when a request of that kind was made, to alter an executed instrument?

A. I don't understand your question. No, we didn't, because it was a perfectly logical thing to do under the terms of the agreement and under the conditions under which they were operating.

Q. Now, before Mr. Wilson instructed the stenographer to make that change did he get in touch with the buyers?

A. No, sir; he didn't.

Q. Did he do that on his own volition?

A. Yes.

Q. And that notwithstanding the fact that it was a solemn undertaking, signed by various purchasers?

A. I have stated to you how he gave the instructions to do it. Now, regardless of the instrument it was, that is what happened.

Q. Did Mr. Lippincott, himself, speak to you about the alteration of this agreement?

A. He discussed the matter with Mr. Wilson and I.

Q. And who else, Mr. Wilson and whom?

A. Mr. Wilson and me.

Q. What did he say to you?

A. He said that his father was an elderly man, William B. Lippincott, a man close to ninety years old, who held a life estate in this property; the property came by descent to William J. Lippincott; his father was an elderly man and might die in a very short time, and he felt that he wanted the mortgage to run to himself; his wife will join on her dower rights; of course, the property belonged to him; and to save complication in the collection

of the mortgage he wanted the mortgage to run to him.

Q. That was after the instruments were already signed by the buyers?

A. Yes, sir.

Q. And in your possession?

A. Yes, sir.

Q. And while in your possession Mr. Lippincott instructed Mr. Wilson to erase and change them?

A. That is right, sir.

Q. You say that happened about two or three days after the receipt of the instruments signed by the buyers?

A. Yes, sir.

Q. Did Mrs. Evans come in at the same time?

A. No, Mrs. Evans didn't come in just at that time.

Q. When did she come in?

A. Mrs. Evans had been—we had Mrs. Evans' matter before us prior to the time we changed that for Mr. Lippincott.

Q. But you hadn't received the signed instruments yet, had you, from Mrs. Evans?

A. We had the instructions from Mrs. Evans to change them but we didn't have them back from the purchasers signed at the time we received her instructions.

Q. Now, did you receive some instructions before the preparation of the instruments themselves at your office?

A. No, sir; we didn't.

Q. Now, with respect to the date which appears on were prepared a few days, probably a week, before instruments physically prepared at your office?

A. They were prepared, my recollection is, they

were prepared a few days, probably a week, before that date.

Q. And do you recall when they were actually delivered to Mr. Bitting for execution by the buyers?

A. My recollection is that is was one or two days before the 15th of December.

(Adjourned till January 29, 1930, at 10:00 A. M.)

Mt. Holly, N. J., January 29, 1930.

(Trial of the cause resumed at 10:00 A. M.)

WILLIAM R. STANERT, resumed for defendants.

Mr. Stockwell: In the discussion regarding the testimony yesterday there are two or three matters I neglected to examine Mr. Stanert upon, and I should like to ask him about those matters now.

The Court: All right.

Further direct examination.

By Mr. Stockwell:

Q. Mr. Stanert, as I now recall, I did not direct your attention to the delivery of the second set of papers; that was the Evans' papers, involving Laura Evans?

A. That is right.

Q. Won't you tell me what occurred at the time of the delivery of those papers?

A. Mr. Bitting called for them and I took them in the same rom where he got the other papers and spread them out.

Q. What had been done with the Evans' papers prior to this interview?

A. An interlineation had been made of those words which have been set out in various papers here, that

is, the words, "Laura Evans, one of" had been inserted between two lines in the agreement and the notation of it had been made over Mr. Bittings' signature, where he had witnessed it on the last page.

Q. Now, tell us what happened? What was said?

A. I spread the papers out there in the same manner that I did the other ones, and I explained to Mr. Bitting the reason for the delays in securing the execution of this set of papers by the sellers, and called his attention to the fact that this change had been made, and told him that it had been made in order that Mrs. Evans should receive the proceeds of this mortgage instead of her husband having any part of it; they having made a settlement of their real estate and made various conveyances in connection with it.

Q. After that statement was made by you to him what, if anything, did he say?

A. He made no comment, as I can recall. He looked the papers over to see that they were properly executed. How he took them away I don't know at this time. I know he did take them from the office, four copies.

Q. Were they wrapped up when you handed them to him?

A. No, sir; they were not.

Q. State whether or not they were examined by him.

A. They were.

Q. Well, how, a casual examination or thorough examination?

A. No, he was very careful to see that they were properly executed by the seller.

Q. Did he look over the last page?

A. Yes, he had to.

Q. Now, state whether or not the five copies of this paper were all alike or were they different as to this notation?

A. They were alike in this correction and notation.

Q. And then how many copies did Mr. Bitting receive from you?

A. Four.

Q. And they were signed by whom?

A. They were signed by the four purchasers and the three parties selling.

By the Court:

Q. When did this take place?

A. This occurred within a few days of February 15th, according to my best recollection.

Q. Before or after February 15th?

A. As a matter of fact it was after the 15th of February. It was the latter part of the month.

Q. Did I understand your testimony yesterday, Mr. Stanert, that the checks were turned over by Mr. Warner at the time the Lippincott agreement was delivered?

A. No, they were turned over before either set of agreements were delivered. The checks were turned over to us at the time Mr. Warner and Mr. Bitting had brought both sets of papers back from the purchasers signed by them and left with us for the execution by the sellers.

By Mr. Stockwell:

Q. His Honor directed your attention to the date February 15th. I want to show you Exhibit D6, letter from John O. Wilson to John S. Warner,

which is dated February 19th, 1926, and ask you whether from that letter you can fix the date of delivery of those papers to Mr. Bitting.

A. My recollection is it was done simultaneously with that.

Mr. Stockwell: Your Honor, while the letter says, "With regard to a certain agreement made by and between Laura Evans and others, covering the sale of that farm near Marlton, New Jersey, which agreement was only recently executed and delivered to you," I think this is dated sometime prior thereto, so it must have been delivered sometime previous to this letter.

The Court: What is the date of it?

Mr. Stockwell: February 19th, 1926.

Q. Mr. Stanert, if any objection had been made by the purchasers or anybody for them to the insertion of the words, "Laura Evans, one of" and "William Lippincott, one of" in the other agreements, instead of to all the sellers, I want to know whether or not the sellers stood ready to execute the agreement according as they were presented.

Mr. Wendkos: Objected to as immaterial and irrelevant.

(Mr. Stockwell replies.)

The Court: I sustain the objection.

(Objection noted for defendants as ground of appeal.)

Q. Did you ever visit the property yourself?

A. Yes, sir.

Q. Do you know whether any sign of any kind was put on this property at any time? I don't know whether you do or not?

A. I don't know.

Q. John O. Wilson is made one of the defendants in one of these suits?

A. Yes.

Q. I ask you whether or not the interest of Mr. Wilson is a personal interest or simply as trustee for Laura Evans.

A. Simply as trustee for Laura Evans.

Mr. Stockwell: Cross-examine.

Cross-examination.

By Mr. Wendkos:

Q. Now, Mr. Stanert, do you stick to that last answer?

A. Yes, sir.

Q. Quite positive?

A. Yes, Mr. Wilson holds title to that property as trustee for Laura Evans.

Q. Have you the deed here?

A. No, sir; I haven't.

Q. Did you prepare it?

A. I did.

Q. Do you recall the habendum clause?

A. No, sir; I don't at this writing.

Q. Will you say that it has the usual habendum clause in that deed?

A. Yes, sir; I think it was.

Q. It runs to Mr. Wilson, to his heirs and assigns?

A. Exactly right.

Q. Notwithstaning that statement do you still say that Mr. Wilson holds as trustee?

A. I do.

Q. Did Mrs. Evans reserve for herself anything but a beneficial interest in that estate?

A. Not in the deed.

Q. I want to call your attention to page 63, my examination of you in the Chancery suit:

"Q. I see you signed these letters, Mr. Stanert, or this one particularly, that is your signature?

"A. Yes, sir.

"Q. You signed them for Mr. Wilson as principal, didn't you?

"A. That is right.

"Q. According to your bill Mr. Wilson purchased this land, didn't he?

"A. What?

"Q. According to the bill of complaint, the allegations of the complaint, Mr. Wilson purchased the property?

"Mr. Stockwell: I object to that, that is not cross-examination.

"Mr. Wendkos: I want to know in what capacity he wrote this letter, either for Mr. Wilson as owner or as attorney, or how?

"Mr. Stockwell: If you want to know that ask him.

"The Witness: He wrote it effect as title owner of the premises.

"Q. As title owner of the premises?

"A. That is right.

"Q. Is it true also that this letter—(Then I showed you the letter at that time.)

"A. He had the title to the property at the time this letter was signed, yes."

Did you answer in this way in the Chancery suit?
A. Yes, I did.

Q. Now, the letter that was referred to and which is marked Exhibit D1 in the suit, in the appeal, the State of the Case in preparation for the appeal, it was dated January 26, 1926.

Mr. Stockwell: Where is it stated? Where do you find that in the record?

Mr. Wendkos: On page 113.

Q. In the testimony you are speaking where the examination referred to a particular letter. There were two letters and the exhibit, naturally the last presented at that time, and one is dated January 26, 1926, and one February 19, 1926, and you say that is your testimony?

Mr. Stockwell: Mr. Wendkos is reading from his own examination in another suit in which the letters in that examination are not identified in the testimony of this witness, so far as I can see.

Mr. Wendkos: The Court asked this question: "What is this letter?"

Mr. Stockwell: Where?

Mr. Wendkos: On line 20, page 64.

Mr. Stockwell: All right.

Mr. Wendkos: "The witness: It refers to the sending of the extension agreements to Mr. Warner, and this one refers to a different time for settlement under the agreement."

Mr. Stockwell: I have no objection.

Q. You still say you testified in this manner in the Chancery suit?

A. Yes, I don't deny anything I said at that trial.

Q. Would that make any difference with respect to the testimony you just gave?

A. None whatever.

Q. Well, do you still say that on the 26th of January, 1926, Mr. Wilson had title to this property?

A. I do.

Q. And you still say that those agreements which you call agreements were delivered on February 19, 1926, signed by Mrs. Evans?

A. Those agreements signed by Mrs. Evans were delivered prior to February 19, 1926.

Q. I understood you to say that it was simultaneous with the letter of February 19, 1926.

A. I corrected that answer upon Mr. Stockwell's showing me a copy of the letter which I had written under date of February 19th, and which referred to the delivery of the agreement a few days before that date.

Q. But you still say it is after February 15th, do you not?

A. Yes.

Q. Sometime between February 15th and February 19th?

A. Yes.

Q. Now, did Mr. Wilson sign the agreement, the same paper that Mrs. Evans signed?

A. I don't understand what you mean by that. Which paper do you refer to?

Q. I mean the paper that is in the exhibit now, the undertaking on the part of Evans to convey a piece of land to these plaintiffs.

A. My recollection is the paper was signed by Laura L. Evans.

Q. Laura Evans alone?

A. I think that was the circumstance, yes.

Q. Only by her?

A. Is that paper available for evidence?

The Court: I don't quite comprehend the purpose of this line of testimony. I was curious to know why Mr. Wilson was made a defendant. It has been explained with the statement that he was trustee for Laura Evans. Now, has there been any question—evidently Mr. Wilson was made a defendant by the plaintiffs. What is involved here? Isn't this raising some collateral question that is not involved?

Mr. Wendkos: No.

The Court: Well, let me hear what it is, because I don't want to go off on a side-track unless it is necessary.

Mr. Wendkos: I think I brought this out; that notwithstanding the statement made by the witness that Mr. Wilson was a trustee for Mrs. Evans, the habendum clause in the deed is very clearly to his own use.

The Court: Well, what difference does it make for the purpose of this suit?

Mr. Wendkos: For the reason that Mrs. Evans has parted with her title to this property.

The Court: Well, what they say is, there was

never any question on that ground, that she had parted with her title, her property, and, therefore, couldn't give a deed. That is what I am getting at.

Mr. Wendkos: No, that is not the point, if your Honor please. Here is an offer made to a certain individual, Evans. That offer could not be accepted by Mrs. Evans once she has parted with the title. That is the point of the examination.

The Court: But that is not one of the issues in this case.

Mr. Wendkos: I think it is one of the issues in this case.

The Court: Where is there anything to suggest it, Mr. Wendkos?

Mr. Wendkos: Because of the very fact that they did not accept our offer, or refused or could not accept our offer, didn't make a contract.

The Court: Yes, I can understand that.

Mr. Wendkos: And that is the point that I am trying to make here. Of course, I don't want to delay the matter. I don't want to get into an argument before your Honor on a legal question that I think it is worth while bringing out.

Mr. Stockwell: As a matter of fact the notices were signed John O. Wilson, as having taken title for Laura Evans, it is in evidence here, fixing the time for settlement, calling attention to the set-

tlement. The property was owned by Laura Evans at the time she signed the agreement. She had a right to assign her interest and the assignee had a right to carry out the agreement, as he notified them he has a right to do.

The Court: I don't wish to restrict you, Mr. Wendkos, in any respect as to any matter that is at all relevant to the issue.

Mr. Wendkos: I thought that this was relevant to this, therefore, I took the time. If I am wrong I stand here to be corrected.

The Court: Well, I am not yet convinced that it is relevant.

Mr. Wendkos: I think, if your Honor please, on the suggestion made this morning, I hope to make it clear to your Honor's mind later on.

The Court: Very well.

Mr. Wendkos: I will have to repeat some questions I asked yesterday, because it would be impossible to keep the thread.

Q. Now, Mr. Stanert, I don't know whether I asked you this, but I will ask you again; whether you actually dictated the agreements?

A. I did.

Q. Didn't you say yesterday that Mr. Wilson dictated the agreements?

A. No, I did not, sir.

Q. In whose presence did you dictate the agreements?

A. In the presence of the stenographer.

Q. Was Mr. Bitting present at the time?

A. Let me think. The original draft of that agreement I believe he was present.

Q. Who else was present?

A. I don't recall. Mr. Wilson possibly was in the room, because we had been discussing the terms, which had been left open between Mr. Bitting and Mr. Warner and Mr. Lippincott.

Q. Now, how long, if you you can recall, how long did he remain in the office while those agreements were being dictated?

A. How long did I remain there?

Q. Mr. Bitting remain.

A. Oh, I don't recall that. I might say this to you: that the agreements which were dictated in Mr. Bitting's presence, we only used, they were used—they were dictated without the names of the purchasers, who were not disclosed to us, and the final drafts of the agreements were copied from this with some slight changes and put in definite form.

Q. Isn't it quite possible that you left quite a space in the original draft for the names of the buyers?

A. That is correct, we did.

Q. So, therefore, you didn't redraw them, did you?

A. Yes, we did.

Q. Well, now, what do you mean by that, when you say you left quite a space for the buyers ——

Mr. Stockwell: If your Honor please, may I just say this: because Mr. Wendkos had strongly objected to my asking the witness anything about the drafts before these papers were executed. Now he is just covering the same ground in cross-examina-

tion to which he objected to my saying anything about in my direct examination.

Mr. Wendkos: Well, now, if your Honor please ——

Mr. Stockwell: I am not objecting to it. It is a strange ——

The Court: All right, if there is no objection. Go ahead.

Q. Now, I want to show you the actual papers, and I would like you to tell me whether these papers were not originally prepared with a space sufficient for the introduction of the names of the buyers and sellers and whether those names were not introduced later and that new agreements were not prepared.

Mr. Stockwell: I object to that question. He has about five questions in one. I think it ought to be separated.

Mr. Wendkos: Well, I will do that.

Q. As a matter of fact, Mr. Stanert, the first page of that agreement was rewritten?

A. Only the first page.

Q. The first page of that agreement was rewritten?

Mr. Stockwell: If your Honor please, he has had this witness testify to a certain paper which he handed the witness, and it is not even marked.

The Court: Have those papers been marked?

Mr. Wendkos: Oh, yes; P5 and P4 are the papers that are shown to the witness.

Mr. Stockwell: That is not a frank statement, because he handed up two or three other papers.

The Court: Let the witness see the papers and identify those to which he has referred.

A. One, two, three—where is the fourth one?
Q. I only asked you three.
A. The front sheet of those three agreements was retyped before they were signed by anybody.
Q. Will you identify them by the marking of the stenographer?
A. The last paper is marked M. The papers are P4, P5 and M.
Q. Can you say how long Mr. Bitting remained in the office at the time these first papers were drawn—or dictated, rather?
A. It was quite a period. I don't recall the exact time at that time.
Q. How long do you suppose Mr. Bitting remained in your office at the time you delivered the Lippincott papers executed by the seller?-
A. He wasn't there very long.
Q. Did you hand him those agreements?
A. I did.
Q. How long after you handed him the agreements did he depart?
A. I don't recall the exact time.
Q. Would you say it was a very short time?
A. Yes.
Q. In other words, it was like the usual handing of a paper to a person departing from the office?
A. I couldn't say that. He made a perusal of

the papers before he left. After he had the papers he didn't stay very long.

Q. He just looked them over casually, did you say?

A. No, sir; he didn't.

Q. Just perused them?

A. No, sir; he didn't peruse them. I should say he looked them over very carefully, when a man spreads papers out on the desk to check signatures.

Q. Did he spread them on your desk?

A. No, sir, he didn't; he spread it on the desk of John O. Wilson.

Q. Where were they before he spread them on the desk?

A. Right on that desk in a folder.

Q. In a folder?

A. In a legal folder, like we kept them in. They were either inside or on top of a brown manila folder in which we had all the papers enclosed.

Q. When you say a folder you don't mean a small envelope?

A. No, sir; I mean a large legal-sized folder, such as are used in legal offices.

Q. Was Mr. Wilson in the room then?

A. I don't recall that he was.

Q. Would you say that he was not?

A. I make no statement about that. I don't recall.

Q. Was anyone else in the room?

A. It is the custom of the young lady stenographer ——

Q. No.

The Court: You can't tell what the custom was. If you don't recall, if you don't know, say so.

A. I don't know.

Q. You don't know?
A. No, sir.
Q. Can you give us an idea how long Mr. Bitting stayed there?
A. No, I wouldn't undertake to give you that.
Q. Did he look them over himself?
A. Yes, sir.
Q. Without interruption?
A. Well, I don't know what you mean by interruption.
Q. Well, if you want to know what the word interruption means ——
A. Well, I didn't interrupt him.
Q. Well, that is exactly what I want to know.
A. The papers were there available for his inspection and I was there with him; I don't know whether anyone came in the room and talked to me at that time or him. I can't recall that at this time.
Q. He inspected them all by himself?
A. I was there with him.
Q. Yes, but I am asking you this: he inspected them by himself; is that true?

By the Court:

Q. Do you understand the question?
A. Yes, sir.

By Mr. Wendkos:

Q. I understood you to say in your direct examination that there were two letters, papers of extension, dated October 8, 1926.

Mr. Wendkos: May I have those?

Mr. Stockwell: They are all the exhibits.

(Handing bunch of papers to witness.)

Q. Let me call your attention to those papers.

A. That is what I mean, yes.

Q. I understood you to say yesterday in the examination that you signed those two papers.

A. No, sir, I didn't; I said I secured the signatures of Laura Evans and William J. Lippincott to those two papers.

Q. I beg your pardon. I understood you to say that.

A. I said that I signed this letter. (Indicating.)

Q. Now, can you recall, with respect to December 15, 1925, when the interlineations were physically made in the Lippincott papers?

A. Those agreements came into our hands a few days after they were dated. They were dated by the purchasers. Some of the purchasers dated them on the 15th of December. They came in to us some few days after that.

Q. How many days?

A. To my recollection, it was within a week after that time, during the period of a week.

Q. About the 22nd of December, would you say that?

A. I don't like to fix an exact date. I can identify that date exactly by the date of Mr. Warner's check, certified by the Broadway Merchants Trust Company, and which has been brought into your testimony here.

Q. Anyway, sometime between the 20th and 22nd; would you say that?

A. I won't bind myself down to that. If you will show me that copy of that check I will tell you the exact date.

Q. Very well. Anyway, it is about a week after the 15th?

A. That is my recollection of the date.

Q. Very well. Now, I ask you when that interlineation was physically made and you say it was about a week?

A. No, I say it was between that time when the agreements were brought back and their delivery to Mr. Bitting, signed by the sellers.

Q. Now, as I understand this, the check was not delivered at the same time that the papers signed by the purchasers were delivered?

A. Yes, it was.

Q. It was delivered at the same time?

A. Yes.

Q. So, then, I understand you to say that those interlineations were made in the Lippincott papers about a week after the 15th of December?

A. Well, I won't tie it to a week. If you will give me that memorandum of that check I will tell you the exact date.

Q. In other words, as I understand it, Mr. Stanert—I am going to state it in the form really of a question—you didn't certify that check until after you secured the signatures of the sellers; is that right?

A. That is right.

Q. In other words, the check had actually been delivered at the same time that the papers signed by the purchasers were delivered?

A. Yes.

Q. But you held the checks?

A. Only until the afternoon of the same day.

Q. As the signatures by the sellers?

A. To the Lippincott agreement, yes.

Q. To the Lippincott agreement?

A. That is right.

Q. Did I understand you to say yesterday that you say Mr. Wilson received his instructions, or, as a matter of fact, you were present when the instructions were given by Mr. Lippincott, to make the change in the papers?

A. That is correct; I did say that.

Q. And pursuant to those instructions, the change was made?

A. Yes, sir.

Q. And at the time that the change was made, did you get in touch with either Mr. Bitting or any of the buyers?

A Not at the time the change was made; no, sir.

Q. Did you notify them of your intention to make that change?

A. Not at that time; no, sir.

Q. Did Mr. Bitting ask you at the time that he received the Lippincott papers from you, did he ask you for the Evans papers?

A. I think he did.

Q. And did you explain the reason why they would not be delivered at that time?

A. Yes, we did.

Q. Well, what did you say to him?

A. I told him the difficulty in securing the signature of the husband to consummate the agreement and that we were working out a negotiation—as a matter of fact, we were negotiating through Mr. Ephraim Tomlinson, of Camden, to use his best influences to secure a separation of the property of those two people in order that we could consummate this sale on behalf of Mrs. Evans.

Q. Now, when he called for those agreements after you had informed him—I call them agreements qualifiedly, however—after you had notified him that Mrs. Evans, or the Evans papers had been signed, he called for them, didn't he?

A. Yes, sir.

Q. Did you hand them to him?

A. I gave them to him in Mr. Wilson's room.

Q. In what form were they, or what sort of container?

A. They were flat, as the other ones were.

Q. Was Mr. Wilson present at the time you handed him those papers?

A. I don't recall.

Q. How long did he stay?

A. I don't recall that.

Q. Would you say that it was a longer or shorter time than the time that he stayed in the examination of the Lippincott papers?

A. I wouldn't attempt to set a time.

Q. Did he examine those papers?

A. Yes, sir, he did.

Q. Would you say it was a long examination?

A. Yes, I should say it was a reasonable time for looking over papers of that character.

Q. Did he look over the signatures of the sellers?

A. He did.

Q. Were you present when he made the investigation?

A. I was, sir.

Q. You watched him do it?

A. I did.

Q. And after he was through with the examination he walked out, didn't he?

A. That is right.

Q. Now, Mr. Stanert, who actually made the notations over Mr. Bitting's signature?

A. Made by Miss Marie Geraghty.

Q. In your presence?

A. Yes, sir.

Q. At your direction?

A. At the direction of Mr. Wilson.

Q. You heard Mr. Wilson direct the stenographer to do it?

A. I did.

Q. And she printed the words in?

A. She did, sir.

Q. Was that done at the same time or simultaneously with the interlineations?

A. It was.

Q. Was Mr. Bitting's signature on the paper at the time?

A. It was.

Q. And did you inform him that you intended to make a notation over his signature?

A. No, sir, we didn't.

Q. You stated yesterday that Mr. Bitting was the agent for both the sellers and the buyers. How do you know that he was the agent for the buyers?

A. The only way I know that is that he presented the names of his buyers to us.

Q. Well, what makes you say that he was their agent?

A. Well, wouldn't you assume that a man was

Q. I want to know what makes you say that he was their agent.

A. Well, he acted for these four purchasers all through this transaction.

Q. And how did he act for them?

A. He was very much interested in the preparation of the agreement from their standpoint on the question of releases from this mortgage which was taken back, the exceptions which were to be put in there, about leaving out this man's house and the right of way.

Q. Didn't you state in the Court of Chancery

that he represented the sellers in the transaction of this agreement?

A. Yes.

Mr. Stockwell: You asked him that yesterday, the same question.

Mr. Wendkos: Well, I just want to refresh his mind, that is all.

Q. When did you receive your instructions about making the interlineation in the Evans papers?

A. Prior to the receipt, some date prior to the receipt of those papers back from Mr. Warner's clients, signed.

Q. Signed?

A. Yes, some days prior to their signature by Mr. Warner's clients, before they came into our possession.

Q. And in the case of the Lippincott papers you received the instructions ——

A. After they were in our hands.

Q. After they were in your hands?

A. Yes, sir.

Q. And when was the interlineation physically made in the Evans papers?

A. They were made at the same time as those in the Lippincott papers.

Q. And the notation was made by Miss Geraghty at the same time?

A. Yes.

Q. Over Mr. Bitting's signature?

A. Yes.

Q. And did you inform Mr. Bitting of your intention to make that notation over his signature?

A. No, sir.

Q. And did he know that you made that notation or caused it to be made at the time that you made it?

A. No, sir.

Q. But in either case the interlineations and the notations were made in the papers after they had been executed by the buyers?

A. That is right, sir.

Mr. Wendkos: That is all.

By Mr. Stockwell:

Q. Mr. Stanert, before you delivered either set of papers to Mr. Bitting did you advise him of the change made in the papers?

A. I did.

Q. And of the notation ——

A. I did.

The Court: He has testified to that.

Mr. Stockwell: That is all.

WILLIAM J. LIPPINCOTT, sworn for defendants.

Direct examination.

By Mr. Stockwell:

Q. Mr. Lippincott, is your name William B. or William J.?

A. William J.

Q. Are you the gentleman named as William J.

Lippincott in two papers concerned with the sale of a couple of farms or two parts of one farm in Burlington County?

A. I am.

Q. The papers we have been talking about in this case?

A. Yes.

Q. Did you ever meet William H. Windolph or William R. Goldsborough?

A. I did not.

Q. Or George A. Wonfor?

A. Yes, I met him.

Q. In connection with these sales?

A. No.

Q. Did you meet John S. Warner in connection with this sale, either of these sales?

A. I beg pardon. I misunderstood you in the question before. I met Mr. Warner but not the other gentleman.

Q. You signed these two papers marked P4 ——

A. Yes, sir; I signed that.

Q. And did you sign the paper marked P5, William B. Lippincott?

A. I am William J.

Q. You are William J.? Well, your name doesn't appear on that?

A. No.

Q. Now, at any time after the execution of these papers, did any one of the four purchasers or anyone on behalf of the four purchasers demand the return of any deposit of money?

Mr. Wendkos: Objected to.

A. They did not.

The Court: Objection was made, but the witness

answered before the Court could rule. The objection will be overruled and an exception noted.

(Objection noted for plaintiffs as ground of appeal.)

Q. Mr. Lippincott, I didn't know you were so prompt in your answers; but give time for any objection that is to be made before you answer. Did anybody, any one of these four, or Mr. Warner or anybody for Mr. Warner or for the four, offer to return any commission allowed or paid on these agreements?

Mr. Wendkos: Objected to as being immaterial, irrelevant and incompetent.

The Court: I will overrule the objection.

(Objection noted for plaintiffs as ground of appeal.)

Q. What is your answer?
A. They did not.
Q. Did any one of the four purchasers communicate with you orally or in writing, offering to carry out the terms of these two papers, P4 and P5, or offering to pay for these two farms or either one of them?

Mr. Wendkos: I object to that on the ground that this is an oral statement or attempt to vary the terms of a written instrument by oral testimony.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. They did not.

Q. After the execution of these two papers, P4 and P5, did anybody put a "For Sale" sign on that property?

A. They did.

Q. What was that sign?

A. "Farm for sale by John S. Warner."

Q. What kind of a sign was it?

A. Made of wood.

Q. How big?

A. Well, I should say 4 by 6.

Q. Did it have the name of John S. Warner on it?

A. John S. Warner.

Q. How soon after the delivery of these papers was that sign put up, approximately?

A. I should judge about a week or a week and a half.

Q. How long did the sign remain there?

A. Till long after the time was out.

Q. What time?

A. When they were supposed to pay for the farm.

Q. Was it there as late as October 18, 1926?

A. Yes, it was there until the following spring.

Q. Did any one of the four purchasers or people named here as purchasers in those two papers, P4 and P5, ever take it down?

A. They did not.

Q. How did it get down?

A. The wind blew it down.

Q. Did you have anything to do with the putting of this sign up on your property?

A. I did not.

Q. Did you request that it be put up?

A. I did not.

Q. I call your attention to the paper P4, which bears your signature, and to the clause ——

Mr. Wendkos: That paper speaks for itself. It is in evidence.

Mr. Stockwell: It is on that page, your Honor, the right to put up a sign.

Q. Do you know whether under this agreement the puchaser is given the right to put a "For Sale" sign on the property?

Mr. Wendkos: Objected to as being already in evidence. The paper speaks for itself.

Mr. Stockwell: It is right here. Here it is.

The Court: It is in evidence. Of course it might be read to the jury, as a matter of fact.

Mr. Stockwell. "It is further understood and agreed—" I am reading from this paper P4—"that the purchaser shall have the right at any time thereafter to erect a 'For Sale' sign upon the property and shall have the right to enter upon the said farm for the purpose of showing prospective purchasers about the same."

Q. Do you know of any of those purchasers John S. Warner bringing anybody there for the purpose of selling the farm?

Mr. Wendkos: Objected to as being immaterial.

The Court: Objection overruled.

(Objection noted for plaintiffs as ground of appeal.)

A. Not that I know of.
Q. Did Mr. Bitting ever bring anybody there?
A. Not that I know of.

Mr. Wendkos: Objected to.

The Court: He says he doesn't know.

(Objection noted for plaintiffs as ground of appeal.)

Q. Who is your attorney in this matter?
A. John O. Wilson.
Q. Did you refer this matter to him?
A. I did.
Q. Have you referred it to him to look after the matter?
A. John O. Wilson.
Q. Do you know Mr. Stanert?
A. Very well.
Q. Is Mr. Stanert associated with Mr. Wilson?
A. He is.

Mr. Stockwell: That is all.

Cross-examination.

By Mr. Wendkos:

Q. Mr. Lippincott, I want to get clear in my mind about the dates of that sign. I understood you to say that about a week and a half after you signed the agreement, or the papers, that that sign was erected; is that true?

A. To the best of my knowledge.

Q. And that it remained on the premises until the spring of 1927?

A. Yes.

Q. Till the spring of 1927?

A. Yes.

Q. You saw it there all the time?

A. Yes.

Q. You didn't take it down?

A. I did not.

Q. You made no objection to its erection at the time?

A. No, not at all.

Q. You permitted it to be erected?

A. I did.

Q. And when did you appear in Camden for the purpose of signing the deed for this property?

A. I didn't sign—when did I appear to sign the deed?

Q. Yes.

A. December 15th—the 3rd of August.

Q. The 3rd of August of 1926?

A. Yes.

Q. And you never signed the deed?

Mr. Wendkos: The witness volunteered the statement that he had never signed the deed.

Mr. Stockwell: He never signed the deed?

Mr. Wendkos: I understood him to say that.

A. No, I haven't answered that question because I don't know what deed there was for me to sign at that time.

Q. Well, I ask you whether you appeared in Camden for the purpose of signing a deed.

A. I did, I appeared there, but I couldn't sign the deed ——

Q. Did you sign the deed?

A. No.

Q. Have you the check here for the commissions which you paid Mr. Warner?

A. I have not.

Mr. Stockwell: There is no claim that he paid any check to Mr. Warner.

Mr. Wendkos: The statement was that no commission was returned.

The Court: The check given—checks were given by the sellers, according to the evidence, for the amount of the commission up to a certain point.

Mr. Wendkos: Well, it needn't be a check.

Q. Did you pay, actually pay commissions to Mr. Warner?

A. It was taken out.

Q. Did you pay?

A. No—yes.

Q. Now what did you do?

The Court: Now, that is susceptible of two constructions, Mr. Wendkos: did he pay? He made the allowance; so that he understood the testimony, he didn't actually give him a check.

Mr. Wendkos: Yes, that is true, if your Honor please. I don't pretend to ask any redundant ques-

tions, don't expect answers that are possible of two interpretations. I would like to know whether the statements of this witness would be in conformity with that of Mr. Warner, that is all. Mr. Warner has testified that he received a credit on account of the papers, the agreement for the purchase price.

Q. Now is that true, Mr. Lippincott, that Mr. Warner received a credit on account of the purchase price representing his share of the commissions that you had agreed to pay?

A. He did.

Q. When did you sign those papers?

A. Well, I don't recall the date that I signed those papers.

Q. Can you give us any idea?

A. No, I can't.

Q. Well, now, if the papers are dated December 15th, would that help you to gauge that time?

A. Well, it was sometime, if I remember correctly, after that.

Q. Now, when you signed those papers, were the names, or the signatures of the buyers, on them already?

A. They were.

Q. And were any of the names of the sellers on there at that time?

A. All of them.

Q. When you signed?

A. The names of the sellers were all put on at one time. We were all together and signed it at one time.

Q. But after the names of the buyers were put on?

A. Yes.

Q. Now did you give any instructions about any changes to be made in the papers?

A. After considering the shape that my sister's farm was in, I mentioned it to John O. Wilson that I thought it would be better for he to change mine, so as to have both the papers the same.

Q. That was after the buyers had signed?

A. That was after the buyers had signed.

Q. And you and he talked over what changes were to be made?

A. We did.

Q. And they were made according to your instructions?

A. Yes.

Q. Were you present when they were made?

A. I was not.

Q. So that you didn't sign on the day that the changes were made?

A. I did not.

Q. And evidently you must have signed a few days later?

A. Sure.

Q. Now, did you notify the buyers or any of them of the change that you had decided upon before you signed the papers?

A. I did not.

Q. Did you instruct anyone to notify the buyers?

A. I did not.

Q. Or any of the buyers?

A. I did not.

Q. Or anybody representing them?

A. I did not.

Q. You never met any of the buyers?

A. Only Mr. Warner.

Mr. Wendkos: That is all.

Re-direct examination.

By Mr. Stockwell:

Q. One more question, Mr. Lippincott. Because of this pending sale did you refrain from doing anything to your farm in the way of preservation of that farm or trees thereon in the fall of 1926?

Mr. Wendkos: Objected to as being immaterial.

The Court: I sustain the objection.

Mr. Stockwell: The theory is, your Honor, that by reason of this sale—I don't want to argue if your Honor has ruled on it.

The Court: I have already ruled.

DEFENDANTS REST.

WILLIAM R. STANERT, recalled.

Further cross-examination.

By Mr. Wendkos:

Q. Mr. Stanert, did you prepare a deed out of Mr. Wilson?
A. Yes, sir.
Q. Was it executed by Mr. Wilson?

A. Yes, sir.
Q. And his wife?
A. Yes, sir.
Q. In your presence?
A. Yes, sir.
Q. Did you take the acknowledgments?
A. I won't say to that. The instrument I think would speak for itself if it was available. I don't recall.
Q. Is it available?
A. I will ask Mr. Stockwell. If it is in his files it is.

Mr. Stockwell: What is the deed?

The Witness: The deed from John O. Wilson and his wife to the purchasers under this agreement.

(Deed produced by Mr. Stockwell.)

Q. Is that it?

(Paper shown witness.)

A. That is the deed.
Q. Do you recall this deed?
A. Yes, sir; I do.
Q. That is the deed executed by Mr. Wilson?
A. That is right.

Mr. Stockwell: If the Court please, I wish to object to this line of examination because there is no charge in the complaint that there has been any refusal to convey any property. The question of title is not raised in any way in the pleadings.

Mr. Wendkos: I will withdraw it.

The Court: The objection is well taken. It is withdrawn.

Mr. Stockwell: I would like to offer in evidence our copies of the two papers, the contracts, as I call them, which are already in evidence.

(Papers marked Exhibit D18 and D19.)

BOTH SIDES REST.

MOTION FOR DIRECTION.

Mr. Wendkos: This is a motion for direction of a verdict for the plaintiffs. The first ground is that the construction made of the contracts by the Court of Errors and Appeals is *res adjudicata.*

Secondly, there was no contract entered into betwen the parties to this suit, and, therefore, the defendants have no legal right to retain any moneys paid simultaneously with the offer to purchase the farm by the plaintiffs.

And then I might add this: that the paper signed by the plaintiffs in this suit is not the same paper that was signed by the defendants; that in order to bind the plaintiffs in this suit, it is necessary, according to our statutes, that the paper or memorandum or obligation must be signed by the parties to be charged; and there was no re-execution by the plaintiffs in this suit of the paper that was submitted by the defendants to the plaintiffs.

(Mr. Stockwell replies.)

The Court: I think the motion, Mr. Wendkos,

made yesterday was to strike out all of Mr. Stanert's testimony with reference to matters which might be construed as a ratification of the contract. That was the point?

Mr. Wendkos: Yes, that was the point.

The Court: That it was irrelevant, immaterial and incompetent. I did not rule upon that motion yesterday, but now I will for the purpose of the record, so that you may have the benefit of that. The motion wi be denied.

The motion for a directed verdict will also be denied, for the reason that I am of the opinion that the defense set up in this case, that there was, by acts and words and conduct of the plaintiffs, an assent to and ratification of the contracts as altered, is a proper legal defense, and that there has been offered and adduced evidence which the jury may find tends to support that defense. In any event I feel that under the evidence and under the law a question is presented for the jury. There is no question at all in my mind—I do not see how there can be—that the decision of the Court of Errors and Appeals in the case between the same parties, involved the same contract, is absolutely dispositive of the question as to whether or not the paper writing as altered and then executed by the vendors, constitute a contract. There is no question whatever that the Court held in that case that there never was any contract between the parties. But the question as to whether there was a ratification or an assent to the contract as altered is still open, and that is the question, in my view, that is raised in this case by the pleadings and which under the evidence must be submitted to the jury.

(Objection noted for plaintiffs as ground of appeal.)

CHARGE OF THE COURT.

Ladies and gentlemen of the jury. You are trying two suits, which are being tried together, because they arise out of substantially the same transaction and practically the same questions are involved in each case; but, of course, you will understand that it will be necessary for you to render a separate verdict in each case. The plaintiffs in one suit are William H. Windolph, George A. Wonfor, William R. Goldsborough and John S. Warner. The defendants are John O. Wilson, Laura L. Evans, William J. Lippincott and Laura L. Evans, executors of the estate of William B. Lippincott, deceased. The plaintiffs in the other suit are the same, and the defendants are William J. Lippincott and Laura L. Evans, executors of the estate of William B. Lippincott, deceased, if I have stated the two separate cases correctly. In any event there are two separate suits and the plaintiffs are the same in both cases and the defendants are not altogether the same in both cases.

The object of the plaintiffs in each suit is to recover back deposits of money or payments on account made by them to the defendants under circumstances which have been explained to you in the evidence. The theory of the plaintiffs is that these moneys in each case were paid in connection with a proposal which they made to the defendants for the purchase of certain real estate owned by the defendants, that the proposals were not accepted by the defendants and that, therefore, they, the plaintiffs, are entitled to recover the amounts of money paid in connection with those proposals.

Now, it is not disputed that in December or thereabouts in the year 1925 the plaintiffs desired to pur-

chase a farm of about 180 acres, consisting of two tracts of land situate at or near Marlton, partly, I think the evidence shows, in Burlington County and partly in Camden. One of these tracts was owned by William J. Lippincott and William B. Lippincott and the other by Laura Evans and William B. Lippincott. It appears that after some preliminary negotiations a form of agreement covering each of the tracts of land and stipulating the terms of sale and purchase was prepared in the office of the attorney for the defendants, who were the owners of the land. These writings were then delivered to an intermediary for the purpose of obtaining the signatures of the buyers, who are the plaintiffs in these suits. The papers were executed by the buyers and returned to the attorney for the sellers in order that they might be signed by the sellers. The initial payments called for by the proposed agreement were made by the purchasers or one who was acting for the purchasers. The papers were thereafter executed by the sellers. Before the execution, however, that is, the signing of the papers, a change was made in one provision of the proposed agreements as they had been signed by the buyers, the plaintiffs here. The agreements, as originally drawn, provided that, in part payment of the purchase price, the vendees, that is, the purchasers, should give a mortgage to the parties of the first part, that is, the vendors. This clause was altered so as to provide in one agreement that a purchase money mortgage should be made to William J. Lippincott, one of the parties of the first part, and in the other agreement that the mortgage should be made to Laura Evans, one of the parties of the first part in that agreement. A notation was made at the bottom of each instrument in the space reserved for witnesses to the agreement that the alteration was made before execution; and

my recollection of the evidence is that it is not disputed that the alteration was made before the execution by the sellers of the property. There is, on the other hand, no question whatever that the alteration was made after the signing of the papers by the proposed purchasers. So as I say, it may be taken as clearly established that the alterations were made before the papers were signed by the vendors and delivered to the vendees, and that prior to the delivery to the vendees or any one acting for them, the vendees had no knowledge of the alteration and that none of them personally had any knowledge or notice of the change until sometime after the delivery and the making of the payments on account of the purchase price.

Now, as I have said, the plaintiffs seek to recover the amounts paid on the theory that they did not execute the papers which were signed by the vendors and that, therefore, there never was any contract between them and the vendors. Their insistment is that they signed certain paper writings which set forth the terms of the contract of purchase by which they were willing to bind themselves, but that those paper writings were altered by the vendors in a material particular before being signed by them; so that there was no meeting of the minds of the parties, which is essential to the making of a contract. There is no question that the alteration made in the instruments after their execution by the vendees, that is, the buyers, was material. The vendees expressed themselves as willing to give a mortgage to the vendors; the change made in the instruments required that the mortgage should be given to one of the vendors.

But whether the alteration was material or not is a question not essential to the determination of these cases. It only need be said that if the change was

made without the knowledge or assent of the vendees then there was no contract. There is no contract in any case unless the parties thereto assent, and they must assent to the same thing, in the same sense. A proposition becomes a contract only when it is met by an acceptance which corresponds with it entirely and adequately. The assent must comprehend the whole of the proposition. It must be exactly equal to its extent and provisions and it must not qualify them by any new matter.

Thus the plaintiffs, in signing the form of agreement for the purchase of defendants' land and delivering those forms of agreement to the defendants' attorney in effect submitted to the defendants a proposition in writing to purchase the lands on certain definitely specified terms; and if that proposition in the form of a draft agreement had been executed precisely as written and signed by the defendants, then, of course, there would have been a binding and enforceable contract between the parties. As they were not accepted as submitted—that is, accepted now by the vendors, the owners—as they were not accepted as submitted, but on the contrary were altered in one of their clauses, then there was no contract between the parties unless the plaintiffs assented to the alteration either at the time the agreements were returned to them or subsequently assented to or ratified by them, either expressly or by their acts or course of conduct. Whether there was such an assent or ratification is the question submitted to you for your decision, and that decision must be based upon the evidence as to what was done and said by the parties after the paper writings had been signed by all of them.

These instruments were delivered to the plaintiffs after they had been signed by the defendants. A reading of them would show not only that the altera-

tion had been interlined in the body of the agreement, but that it had been noted at the bottom thereof, opposite the signatures, as having been made before execution. The plaintiffs, the proposed purchasers, say that they did not learn of the change until a considerable time after the papers were delivered to them. If you should find from the evidence that after learning of the alteration in the papers they had signed, or if any authorized agent of theirs in the course of the transaction had acquired such knowledge, as that they by their acts or conduct or the acts or conduct of their agent in the course of his employment accepted or assented to the alterations or to the instrument as altered, then the instruments constituted a contract by which they were bound and they cannot recover in these suits in that event.

One of the acts upon which the defendants rely as evidence of acceptance of the agreements by the plaintiffs is the request for an extension of the time for settlement. That such a request was made and that the defendants extended the time for settlement is not controverted. If this request for an extension was made either by the plaintiffs or their agents with their knowledge, or with the knowledge of their agent that the agreement had been altered, would that fact indicate an acceptance of the agreements or an assent to them as altered?

The defendants have also shown that one of the plaintiffs, Mr. Warner, notified the defendants, that is, the owners of the property, in effect that he was advised that two of the plaintiffs, two of the proposed purchasers, would not be able to carry out their agreement, and this would necessitate the forfeiture of the money paid on account. I have not attempted to quote that letter verbatim, and it is not before me, but it is in evidence and you will have

it in consideration of the case along with the other letters. From that letter you are asked by the defendants to draw an inference favorable to their contention that the agreement as altered had been accepted by the plaintiffs. Whether such an inference should be drawn will depend upon what you find the facts to be with reference to the knowledge which the plaintiffs had as to the change in the agreements at the time the letter was written. If you find they then had or were then chargeable with knowledge of the alterations and either themselves or by their agent expressed a purpose of forfeiting the money paid on account of the purchase price or under the proposed agreements because of their inability to carry out the agreement, then there would seem to be in the circumstances some basis for an inference which the defendants ask you to draw in support of their defense that there was an acceptance or an assent to the contracts as modified.

Now, in connection with the consideration of the question whether the plaintiffs had knowledge or were chargeable with knowledge of the change in the agreements when the transactions relied upon in part by the defendants as showing an acceptance of the agreements took place, and whether those transactions were binding upon the plaintiffs, it is essential to determine whether Warner or Bitting was the agent of the plaintiffs in those transactions. Mr. Bitting was employed by Mr. Warner as salesman, according to the testimony, I think, of both gentlemen. It is a legitimate inference to be drawn from the evidence, I think, that what Mr. Bitting did was primarily in the service of his employer and for compensation to be paid by his employer. Was his employer, Mr. Warner, the agent of the other plaintiffs? I say the agent of the other plaintiffs because you will understand that he is one of the plaintiffs

in this suit, as being one of the parties to the proposed agreements. Mr. Warner was not only one of the parties to this proposed contract but he appears to have been, so far as the evidence goes, the only one of the four gentlemen who took an active participating interest in the transaction. The first payments, when the so-called proposal was submitted, were made by his checks, with the explanation he has given to the jury as to the circumstances of those payments. It also appears, as I recall his testimony, that it was at his instance that an extension of time for settlement was asked for and granted.

It can hardly be said that he was representing the vendors, that is, the owners, as it is a principle of law that no person can act as agent in a transaction in which he has an interest or to which he is a party on the side opposite to his principal. Mr. Warner had an interest in the transaction as one of the purchasers. His interest as purchaser did not coincide with the interest of the defendants as sellers. But there is no question that Mr. Warner or his salesman brought the parties together, and that the vendors recognized Warner as the selling agent by paying to him or giving him credit for part of the commission. But it is equally clear, I think, that after the parties were brought together, Mr. Warner was referred to Mr. Wilson as the attorney who would represent the vendors in the transaction, and that Wilson dealt with the vendees only through Warner and Bitting except as to certain letters which were mailed from Wilson's office to each of the vendees.

The evidence also appears to indicate that the plaintiffs, with the exception of Warner and possibly of Mr. Wonfor, did not come into any personal contact with the defendants in the course of the trans-

action. Whatever was done after the parties reached a point of putting their understanding into writing seems to have been done on behalf of the sellers by Mr. Wilson or Mr. Stanert, his associate, and on behalf of the buyers by Mr. Warner or his employee, Mr. Bitting. If you find that Warner, or Warner and Bitting were the agents of the plaintiffs in the transaction, then any knowledge they had concerning the transaction was the knowledge of the plaintiffs and any act which they did within the scope of their agency would be binding upon the plaintiffs.

Now, ladies and gentlemen, by commenting upon or referring to some of the evidence in this case you must not understand that I have thereby intended to give any special importance or significance to that evidence or to indicate that it should have any special weight in your consideration. You are to rely solely upon your recollection of the evidence. Give it, and any particular part of it, such weight as you believe it is entitled to receive and draw from the facts as you find them, from the evidence, such inferences as might legitimately be drawn by reasonable minds.

Now, since it conclusively appears that the forms of agreement which the plaintiffs signed and submitted to the defendants were altered before their execution by the defendants, it is manifest that neither the vendees nor the vendors executed the papers that had been executed by the other party. The paper writings, therefore, as executed, constituted no agreement between the parties. The defendants admit the alteration of the paper writings but set up the defense that the papers as altered were accepted and assented to by the plaintiffs and that in this way there was brought into existence a

binding contract between the parties. That is the contention of the defense. If you find the defendants have made out that claim, that defense, by the greater weight of the evidence, your verdict should be in favor of the defendants. If you reach the conclusion that the evidence does not preponderate in support of the defendants' contention then your verdict must be for the plaintiffs for the full amount of the claim in each suit, with interest from the time the payments were made, which I think the evidence establishes as somewhere between December 15th and December 22nd, 1925. The amount, you will recall, paid on account of the Lippincott agreement, has been stipulated to be $8,500 and on the Evans agreement to be $6,200. If you find for the plaintiffs you will compute on each of these sums interest at the rate of six per cent per annum and include such interest in your verdict in each case. If you find in favor of the defendants, your verdict will be in each case that the plaintiffs have no cause of action.

On behalf of the plaintiffs I charge request number 4 as follows:

4. If you find that the parties in this suit have not agreed to the same thing in the same sense and that their minds had not met on the same ground, then you shall find for the plaintiffs.

I charge number 5:

5. If you find from the evidence that no election to be bound by that contract can be spelled out of the plaintiffs' conduct, you shall find for the plaintiffs. And I will add to that, the conduct or acts of the

plaintiffs or the acts of the plaintiffs' duly authorized agent.

6. If you find from the evidence that plaintiffs' conduct displayed a mere disinclination to be bound by the contract, then you shall find for the plaintiffs.

11. If you find that the interlineations had not been ratified or adopted by the plaintiffs, then your verdict shall be for the plaintiffs.

The other requests to charge are not charged except as they may have been covered in the instructions already given you, and the requests to charge which I have charged are not to be understood as in any sense modifying the general instructions already given you.

Mr. Wendkos: Plaintiffs except to the refusal of the court to charge as requested.

Mr. Stockwell: Defendants except to the charging of requests 4, 6 and 11 of plaintiffs.

EXHIBIT D1.

December 15, 1925.

Mr. John S. Warner,
639 Market St.,
Camden, N. J.

Dear Sir:—

In consideration for your services in consummating sale of my farm, located near Marlton, N. J. under a certain agreement made by and between William J. Lippincott, et ux, et al, and William H.

Windolph, et als, dated the 15th day of December, 1925, I agree to pay you a commission of 5% of the total sale price, to be calculated on the final settlement figures.

By your acceptance of this agreement hereon, you acknowledge receipt of the sum of $2125.00 on account of said commission, and the balance of said commission is to be paid to you when, as and if the settlement under the above mentioned agreement takes place, and in the event that settlement is not made as provided therein, my liability to you is entirely cancelled.

Yours very truly,
WILLIAM J. LIPPINCOTT.

Accepted,
John S. Warner,
Agent.

EXHIBIT D2.

December 15, 1925.

Mr. John S. Warner,
639 Market St.,
Camden, N. J.
Dear Sir:—

In consideration for your services in consummating sale of my farm, located in Marlton, N. J., under a certain agreement made by and between William Evans, et ux, et al., and William H. Windolph, et als, dated the 15th day of December, 1925, I agree to pay you a commission of 5% of the total sale price, to be calculated on the final settlement figures.

By your acceptance of this agreement hereon, you acknowledge receipt of the sum of $1600.62 on account of said commission, and the balance of said

commission is to be paid to you when, as and if the settlement under the above mentioned agreement takes place, and in the event that settlement is not made as provided therein, my liability to you is entirely cancelled.

Yours very truly,
Laura Evans.

Accepted,
John S. Warner, Agent.

EXHIBIT D3.

1/28/30 K
JOHN O. WILSON
Market Street at Fourth
Camden, N. J.

February 19, 1926.

Mr. John S. Warner,
639 Market St.,
Camden, N. J.
Dear Sir:—

With regard to a certain agreement made by and between William Evans and others, covering the sale of a farm near Marlton, N. J., which agreement was only recently executed and delivered to you, although it is dated sometime prior thereto.

This letter is to evidence that the settlement date as set out in said agreement is extended for a period of forty-five days from the said date set out in said agreement. All other conditions of said agreement, of course, to apply, effective as of that date.

Yours very truly,
John O. Wilson
Atty for Laura Evans

WRS:MB

EXHIBIT D4.

JOHN O. WILSON
Market Street at Fourth
Camden, N. J.

January 26, 1926.

Mr. John S. Warner,
Camden, N. J.

Dear Sir:—

Referring to the execution of the agreements on the farm near Marlton, N. J. owned by Laura Evans, I wish to advise you that we have been delayed in delivering these agreements to you because we have been unable to obtain the husband's signature. These people are having some trouble between them, and we anticipate going through with the deal, even if it is necessary to make application for a divorce, for which we have grounds, but I am still hoping that an amicable arrangement can be made between husband and wife, whereby this agreement will be executed.

We will not ask you to hold the matter in abeyance longer than this week, within which time we will have the matter settled definitely with the husband, one way or the other.

Yours very truly,

John O. Wilson

JOW:MB

EXHIBIT D5.

JOHN O. WILSON
Market Street at Fourth
Camden, N. J.

June 1, 1926.

Mr. John S. Warner,
639 Market St.,
Camden, N. J.
Dear Sir:

I enclose letter which has been signed by William J. Lippincott, in connection with the agreement for the sale of his farm.

This is in line with our agreement with you and extends the time for settlement for a period of 45 days.

Very truly yours,
John O. Wilson

WRS EMc

EXHIBIT D6.

May 27, 1926.

Mr. William H. Windolph,
Camden,
N. J.
Gentlemen:

I hereby agree to defer the settlement for the property covered by agreement between myself and others and yourself and others, dated the fifteenth day of December, 1925, for the sale of my farm, for a period of forty-five days from the date set in the

agreement for this settlement. All other conditions of the agreement remain the same.

Very truly yours,

EXHIBIT D7

August 31, 1926.

Mr. John S. Warner,
Palmyra, New Jersey.

Dear Sir:

I enclose herewith extension agreements which have been signed in connection with your purchases from Mr. William J. Lippincott and Mrs. Laura L. Evans.

Very truly yours,

WRS-W
Encs.

EXHIBIT D8.

August 18th, 1926.

Mr. John S. Warner,
Palmyra, N. J.

Dear Sir:

In consideration of the fact that some of the parties interested in sales agreement for purchase of my farm consisting of One Hundred acres, located in Evesham Township, on the Marlton Pike, and for which settlement is called for by present agreement Sept. 18th, 1926.

I hereby agree to extend time for settlement to

Oct. 18th, 1926. All other provisions of existing agreements to remain unchanged.

Yours truly,
(signed) William J. Lippincott.

EXHIBIT D9.

August 18th, 1926.

Mr. John S. Warner,
Palmyra, N. J.
Dear Sir:

In consideration of the fact that some of the parties interested in sales agreement for purchase of my farm consisting of seventy-three acres, located in Evesham Township, on the Marlton Pike, and for which settlement is called for by present agreement Sept. 18th, 1926.

I hereby agree to extend time for settlement to Oct. 18th, 1926. All of the other provisions of existing agreements to remain unchanged.

Yours truly
(signed) Laura Lippincott Evans.

EXHIBIT D10.

JOHN O. WILSON
Market Street at Fourth
Camden, N. J.

September 7th, 1926.

Mr. John S. Warner,
Palmyra, N. J.
Dear Sir:

Won't you kindly advise us when you order Title

Insurance for the Lippincott property, so that we can assist the Title Company in this examination by turning over to them all the old Title papers, which will no doubt expedite the delivery of the Settlement Certificate.

Yours very truly,
Jno. O. Wilson
per W E

SJE.SS

EXHIBIT D12.

1/22/30 K

October 8, 1926.

Messrs. William H. Windolph,
William R. Goldsborough, George A. Wonfor and John S. Warner:

Gentlemen:

You made an agreement, dated December 15, 1925, with William Evans and Laura Evans, his wife, and William B. Lippincott for the purchase by you of approximately 78.50 acres of land in the Township of Evesham, County of Burlington, State of New Jersey, excepting thereout the mansion house, etc., as provided for in said agreement, under which agreement settlement was required to be made at my office, southwest corner of Fourth and Market Streets, Camden, N. J., on August 3, 1926, at the hour of eleven o'clock in the forenoon of that day.

At your request and by mutual arrangement of the parties to the agreement, the time for settlement under said agreement was extended to October 18, 1926. Said property was to be surveyed by Henry

Lippincott in order to ascertain the correct acreage of the property being conveyed. That survey has been made and a copy thereof was delivered to you long since. According to said survey as provided in the agreement, the acreage amounts to 73.71 acres, and at the price of $850.00 per acre the total purchase price is $62,653.50.

Since the execution of said agreement, I have taken title to said premises, subject to said agreement, and will be prepared for settlement on October 18, 1926, at the hour of eleven o'clock in the forenoon, at my office, southwest corner of Fourth and Market Streets, Camden, N. J., being the place fixed for settlement in said agreement, at which time and place you are required to attend and settle in accordance with the terms of said agreement.

Very truly yours,

John O. Wilson
W R Stanert
Atty in fact

EXHIBIT D15.

Same as Exhibits D13 & 14

October 8, 1926.

Messrs. William H. Windolph,
William R. Goldsborough, George A.
Wonfor and John S. Warner:

Gentlemen:

You made an agreement, dated December 15, 1925, with William J. Lippincott and Caroline, his wife, and William B. Lippincott for the purchase by you of approximately 100 acres of land on the Marlton Pike, partly in the County of Camden and partly

in the County of Burlington, under which agreement settlement was required to be made at my office, southwest corner of Fourth and Market Streets, Camden, N. J., on August 3, 1926, at the hour of eleven o'clock in the forenoon of that day.

At your request and by mutual arrangement of the parties to the agreement, the time for settlement under said agreement was extended to October 18, 1926. Said property was to be surveyed by Henry Lippincott in order to ascertain the correct acreage of the property being conveyed. That survey has been made and a copy thereof was delivered to you long since. According to said survey as provided in the agreement, the acreage amounts to 97.173 acres, and at the price of $850.00 per acre the total purchase price is $82,597.05.

I will be prepared for settlement on October 18, 1926, at the hour of eleven o'clock in the forenoon, at my office, southwest corner of Fourth and Market Streets, Camden, N. J., being the place fixed for settlement in said agreement, at which time and place you are required to attend and settle in accordance with the terms of said agreement.

Very truly yours,

John O. Wilson

W. R. Stanert

Atty in fact

William J. Lippincott

EXHIBIT D16.

Phone, Riverton 619
JOHN S. WARNER
SUBURBAN REALTOR
Oct. 15, 1926

Mr. John O. Wilson,
Camden, N. J.

Dear Sir:—

In reply to your letter of Oct. 8th, 1926 Mr. Bitting has advised me that Messrs. Goldsborough and Wonfor are not in position to make settlement on the Lippincott Farm which necessitates the forfeit of all money paid on account.

Very truly yours,
JOHN S. WARNER.

JSW:J

EXHIBIT D17.

Same as D11

JOHN O. WILSON
Market Street at Fourth
Camden, N. J.
September 14, 1926.

Mr. John S. Warner,
Palmyra, New Jersey.

Dear Sir:—

Attention: Mr. Bitting.

I understand Mr. Warner is out of town, but it came to our attention soon after the extension was

granted that you had not made application for your title insurance.

The purpose of this letter is to see if you wont kindly do this. Of course, we do not want to be arbitrary, but we will be prepared, on behalf of Mr. Lippincott and Mrs. Evans, to make settlement on the day settlement is due.

We are not prepared to grant any further extensions, nor are we prepared to excuse your non-settlement by reason of your not having your title examination.

Wont you get busy with this, so there wont be any trouble at the finish.

Very truly yours,

John O. Wilson

WRS/NW

EXHIBIT D18.

THIS AGREEMENT, made the 15th day of Dec. in the year of our Lord one thousand nine hundred and twenty-five, by and between WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT, his wife, of the Township of Evesham, County of Burlington and State of New Jersey, and WILLIAM B. LIPPINCOTT, Widower, of the Town of Marlton, County of Burlington and State of New Jersey, hereinafter called the parties of the first part, and WILLIAM H. WINDOLPH, of Ridley Park, Delaware County, State of Pennsylvania, WILLIAM R. GOLDSBOROUGH of Meadowbrook, Montgomery County, State of Pennsylvania, GEORGE A. WONFOR, of the Cinnaminson Township, Burlington County, State of New Jersey, and John S. WAR-

NER, of Riverton, Burlington County, State of New Jersey.
hereinafter called the parties of the second part.

WITNESSETH, That the said parties of the first part hereby agree to sell and convey to the said parties of the second part, and the said parties of the second part hereby agree to buy from the said parties of the first part, ALL that certain farm or plantation known as the William B. Lippincott Farm, situate on the Marlton Pike near Cropwell Station, partly in the County of Camden and Partly in the County of Burlington and State of New Jersey, containing approximately one hundred and two acres of land, EXCEPTING thereout and therefrom the mansion house and lot of land whereon the same is located, containing two and twenty-seven one-hundredths (2.27) acres, according to a survey thereof attached to this agreement, AND SUBJECT to the railroads' rights of way, ALSO SUBJECT to the right of way in the rear of the said farm granted and conveyed to Samuel Vennell; RESERVING a right of way over the lane fifty feet in width as now laid out, extending from the mansion house to the Marlton Pike, as shown on the map attached hereto, for the price or sum of Eight Hundred and Fifty Dollars ($850.00) per acre, the acreage to be ascertained by a survey thereof to be made by Henry Lippincott, the cost of which survey shall be paid by the parties of the first part, and in case survey is shown to be inaccurate party of the first part shall only be entitled to collect for the correct acreage, which survey shall include the entire farm of the said parties of the first part comprising all the lands within the title lines, including the lands comprised within the railroads' rights of way, the said right of way granted to said Vennell, and the right of way reserved over

the lane fifty feet in width, but the acreage for which payment is to be made by the parties of the second part shall exclude the acreage contained within the lines of all railroads' rights of way passing through or across the said farm and shall also exclude the acreage comprised within the said right of way granted to said Samuel Vennell, TOGETHER with the hereditaments and appurtenances to the same belonging, under and subject to the following terms and conditions:

A first payment of Eighty-Five hundred dollars receipt whereof is hereby acknowledged by the said parties of the first part.

The further sum of Twenty-One Thousand Five Hundred Dollars shall be paid at the time of final settlement, and a bond and mortgage executed by the said parties of the second part William J. Lippincott, one of to /the said parties of the first part, for the amount of the balance of the purchase price, when ascertained in the manner aforesaid, which said mortgage shall be payable in installments of at least Eleven Thousand Dollars annually, the whole amount thereof to be paid within five years from the date thereof, and to bear interest at the rate of six per cent per annum payable semi-annually. Said mortgage to contain the usual tax, insurance and default clauses and to be in form to be approved by John O. Wilson of Fourth and Market Sts., Camden, N. J. Said mortgage also to contain a release clause, providing that the tenant house fronting on the Marlton Pike with a lot 100 x 200 feet may be released by the payment of Five Thousand Dollars on account of the principal of said mortgage, and that the balance of the land fronting on the Marlton Pike, for a depth of two hundred feet may be released at the price of Twelve Dollars

and Fifty Cents per front foot and that land fronting on Cropwell Road for a depth of two hundred feet may be released at the price of Eight Dollars per front foot, and that the balance of the farm may be released from the lien and operation of the said mortgage upon the payment of the sum of Eight Hundred Dollars per acre. Said mortgage also to contain a clause that upon the payment of any annual installment of principal the parties of the second part shall be entitled to a release of land according to the schedule herein above mentioned, to the amount of said annual payment.

Final settlement shall be made at the office of John O. Wilson, Southwest corner of Fourth and Market Sts., Camden, N. J., on the third day of August, A. D. 1926, at the hour of eleven o'clock in the forenoon of said day, unless the parties to this agreement shall agree upon a previous date.

All taxes upon the said premises to be conveyed to the said parties of the second part shall be apportioned to the date of final settlement.

It is further understood and agreed that the parties of the first part shall have the right to retain possession of such part of the farm on which there may be growing crops for the purpose of removing same within a reasonable time, not exceeding four months after date set for final settlement.

It is further understood and agreed that the parties of the first part shall have the right to cut such firewood for the purpose of fuel in his mansion house as may be necessary for use of his family, during the years 1925 and 1926.

It is further understood and agreed that the parties of the second part shall have the right, at any time hereafter, to erect a "For Sale" sign upon the property, and shall have the right to enter upon

the said farm for the purpose of showing prospective purchasers about the same.

It is further understood and agreed that the parties of the second part shall have the right, after a period of two years from the date of this agreement, to extend the right of way from the Marlton Pike through the remaining property of the parties of the first part in a manner satisfactory to them, and upon the payment to them of the sum of Eight Hundred and Fifty Dollars per acre for the area taken for the extension of said right of way.

It is also understood and agreed that the parties of the first part shall have the right to cut and remove ten logs for the purpose of making lumber for the general repairs and improvements to their said buildings.

It is also understood and agreed that the said parties of the second part shall have the right to change the right of way hereby reserved over the lane fifty feet wide, extending from the Mansion house to the Marlton Pike, as shown on the map attached hereto, at any time to a more practical location in a manner satisfactory to the parties of the first part.

It is also understood and agreed that title to the said premises shall be free and clear of all restrictions of a character that would interfere with the general scheme of building development, and all incumbrances, including municipal liens and assessments, except the rights of telephone, electric light and water companies, which title shall be a marketable title subject only to such exceptions as are set out herein, and at the time of final settlement the parties of the first part shall tender the parties of the second part a special warranty deed, conveying such title, or in the event that such title cannot be delivered as above then the deposit made

herewith shall be returned to the said parties of the second part, together with the amount of expenses incurred by the said parties of the first part in obtaining searches upon the said premises and in the examination of the title to the same.

All adjustments shall be made as of the third day of August, A. D. 1926, and possession of the said premises shall be given to the said parties of the second part, except as above stated, at the time of final settlement.

It is further agreed that time is the essence of this contract, and in case the purchasers do not attend at the time of final settlement to receive the deed and pay the balance of the purchase price and execute the bond and mortgage to the said party of the first part, then the first payment hereinabove mentioned may at the option of the parties of the first part be applied on account of the purchase price, and the balance of the purchase price shall be payable to the said parties of the first part on demand, or, the said parties of the first part may retain the first payment hereinabove mentioned as damages agreed and liquidated, for the failure of the said parties of the second part to carry out the terms of this agreement, in such case this agreement shall be null and void.

The parties of the second part shall pay for all searches and other expenses, excepting the preparation of the deed and the necessary revenue stamps attached thereto which shall be paid for by the parties of the first part.

This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

The parties of the second part covenant and agree that they will not record, cause or permit to be recorded this agreement or any copy thereof in

the Office of the Register of Deeds of Camden County or the Clerk's Office of Burlington County, or any other public office.

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

WILLIAM J. LIPPINCOTT (LS)
CAROLINE W. LIPPINCOTT (LS)
WILLIAM B. LIPPINCOTT (LS)
WILLIAM H. WINDOLPH (LS)
WILLIAM R. GOLDSBOROUGH (LS)
GEO. A. WONFOR (LS)
JOHN S. WARNER (LS)

SIGNED, sealed and Delivered in the Presence of

Words "William J. Lippincott, one of" inserted between lines 2 and 3, page 3, before execution.

ROBT. C. BITTING
ROBT. C. BITTING
EDGAR D. McGONIGAL
EDGAR D. McGONIGAL

EXHIBIT D19.

1/27/30 K.

THIS AGREEMENT, made the 15th day of Dec. in the year of our Lord one thousand nine hundred and twenty-five, by and between WILLIAM EVANS and LAURA EVANS, his wife, and WILLIAM B. LIPPINCOTT of the Town of Marlton, Evesham Township, County of Burlington and State of New Jersey, hereinafter called the parties of the first part and WILLIAM H. WINDOLPH, of Ridley

Park, Delaware County, State of Pennsylvania, WILLIAM R. GOLDSBOROUGH, of Meadowbrook, Montgomery County, State of Pennsylvania, GEORGE A. WONFOR, of Cinnaminson Township, Burlington County, State of New Jersey, and JOHN S. WARNER, of Riverton, Burlington County, State of New Jersey,
hereinafter called the parties of the second part.

WITNESSETH, that the said parties of the first part hereby agree to sell and convey, and the said parties of the second part hereby agree to buy all the following described tract or parcel of land situate in the Township of Evesham in the County of Burlington and State of New Jersey, and bounded as follows: BEGINNING at a point in the middle line of the Camden, Ellisburg and Marlton Turnpike Road and the Easterly line of Cropwell Road; thence (1) North twenty-six degrees and forty-nine minutes east, seven chains and four links to a point in the land of the Philadelphia, Marlton and Medford Railroad Company; thence (2) South seventy-one degrees and twenty-five minutes East, eight chains and four links to another point in the land of the Philadelphia, Marlton and Medford Railroad Company, formerly corner to David D. Griscom's land; thence (3) North thirty degrees and five minutes East forty-seven links to a stone in the Northerly line of the land of the Philadelphia, Marlton and Medford Railroad; thence, continuing on the same course along the line of David D. Griscom's land, eleven chains and seventy-two links to a locust stake in a ditch; thence (4) still along the line of Griscom's land South fifty-one degrees and seven minutes East, five chains and fourteen links to a locust stake in said ditch, thence (5) still by Griscom's land, North thirty-three degrees and forty-nine minutes East, twelve chains and seventy-seven

links to a stone corner, thence (6) still by Griscom's land, South seventy-one degrees and twenty minutes East, nine chains and twenty-four links to a stone corner to said Griscom's land in the line of land of Joseph M. Brick thence (7) along the line of Brick's land North twenty-five degrees and thirty-seven minutes East, six chains and ninety-five links to a stone corner to other lands of the said David D. Griscom's; thence (8) by said Griscom's land, North sixty-three degrees and thirty-five minutes, West fifteen chains and thirty-six links to a corner two feet Southeast of a stone placed for a corner; thence (9) still by Griscom's land South forty-three degrees and twenty-five minutes West, three chains and thirty-eight links to a stone; thence (10) still by Griscom's land North seventy degrees and five minutes West, ten chains and sixty links to a stone, buried; thence (11) still by Griscom's land South fifty-five degrees and fifty-five minutes West one chain and four links to a stone on the ditch bank, thence (12) still by Griscom's land South sixty-four degrees and fifty-five minutes West, four chains and eighteen links to a corner thirteen feet Southeast of the centre of the bridge on the Cropwell Road thence (13) nearly along the ditch and by line of William B. Lippincott land North fifty-nine degrees and thirty-five minutes West, five chains and fifteen links to a stake on the Northerly edge of the ditch, thence (14) still by Lippincott's land, South thirteen degrees and twenty-five minutes West one chain and fifty-one links to an old poplar stump, thence (15) still by Lippincott's land North sixty-four degrees and thirty-five minutes West, one chain and thirty-six links to a corner; thence (16) South eighty-two degrees and forty minutes West, one chain and forty-four links to a stone, corner to other land of William B. Lippin-

cott; thence (17) by William B. Lippincott's other land South fifteen degrees and seven minutes West, seventeen chains and thirty-eight links to a stone; thence (18) still by William B. Lippincott's land South twenty-two degrees and sixteen minutes West thirteen chains and thirty-nine links to a corner in the middle of the aforesaid turnpike; thence (19) along the middle of the said turnpike, South seventy degrees and fifty-seven minutes West, eight chains and fifty-five links to the place of beginning. CONTAINING seventy-eight and fifty one-hundredths (78.50) acres of land, be the same more or less, EXCEPTING thereout and therefrom the mansion house and lot of land whereon the same is located, containing one and ninety-three one-hundredths (1.93) acres, according to a survey thereof attached to this agreement, and SUBJECT to the railroads' rights of way and the railroad's right to use of Station Site for the price or sum of Eight Hundred and Fifty Dollars ($850.00) per acre, the acreage to be ascertained by a survey thereof to be made by Henry Lippincott, of Marlton, N. J., the cost of which survey shall be paid by the parties of the first part, and in case survey is shown to be inaccurate the parties of the first part shall only be entitled to collect for the correct acreage, which survey shall include the entire farm of the said parties of the first part, comprising all the lands within the title lines, including the lands comprised within the railroads' rights of way and the Railroad Station Site, but the acreage for which payment is to be made by the parties of the second part shall exclude the acreage contained within the lines of all railroads' rights of way passing through or across the said farm, and shall also exclude the acreage comprised within the Railroad Station Site, TOGETHER with the hereditaments and appurte-

nances to the same belonging under and subject to the following terms and conditions:

A first payment of Sixty-two Hundred Dollars, receipt whereof is hereby acknowledged by the said parties of the first part.

The further sum of Fifteen Thousand Five Hundred Dollars ($15,500.) shall be paid at the time of final settlement, and a bond and mortgage executed by the said parties of the second part to /the said parties of the first part, for the amount of the balance of the purchase price, when ascertained in the manner aforesaid, which said mortgage shall be payable in installments of at least Eight Thousand Dollars ($8000.) annually, the whole amount thereof to be paid within five years from the date thereof, and to bear interest at the rate of six per cent per annum payable semi-annually. Said mortgage to contain the usual tax, insurance and default clauses and to be in form to be approved by John O. Wilson, of Fourth and Market Sts., Camden, N. J. Said mortgage also to contain a release clause providing that land fronting on Marlton Pike for a depth of two hundred feet, may be released at the price of Twelve Dollars and Fifty Cents per front foot, and that land fronting on Cropwell Road, for a depth of two hundred feet, may be released at the price of Eight Dollars per front foot, and that the balance of the farm may be released from the lien and operation of the said mortgage upon the payment of the sum of Eight Hundred Dollars per acre. Said mortgage also to contain a clause that upon the payment of any annual installment of principal the said parties of the second part shall be entitled to a release of land according to the schedule hereinabove mentioned, to the amount of said annual payment.

Laura Evans one of

Final settlement shall be made at the office of John O. Wilson, Southwest corner of Fourth and Market Sts., Camden, N. J. on the third day of August, A. D. 1926, at the hour of eleven o'clock in the forenoon of said day, unless the parties to this agreement shall agree upon a previous date.

All taxes upon the said premises to be conveyed to the said parties of the second part shall be apportioned to the date of final settlement.

It is further understood and agreed that the parties of the first part shall have the right to retain possession of such part of the farm on which there may be growing crops for the purpose of removing same within a reasonable time, not exceeding four months after date set for final settlement.

It is further understood and agreed that the parties of the first part shall have the right to cut such firewood for the purpose of fuel in his mansion house as may be necessary for the use of his family, during the years 1925 and 1926.

It is further understood and agreed that the parties of the second part shall have the right, at any time hereafter, to erect a "For Sale" sign upon the property, and shall have the right to enter upon the said farm for the purpose of showing prospective purchasers about the same.

It is also understood and agreed that title to the said premises shall be free and clear of all restrictions of a character that would interfere with the general scheme of building development, and all incumbrances, including municipal liens and assessments, except the rights of telephone, electric light and water companies, and shall be a marketable title, subject only to such exceptions as are set out herein, and at the time of final settlement the parties of the first part shall tender to the parties of the second part a special warranty deed, conveying

such title, or in the event that such title cannot be delivered as above, then the deposit made herewith shall be returned to the said parties of the second part, together with the amount of expenses incurred by the said parties of the first part in obtaining searches upon the said premises and in the examination of the title to the same.

All adjustments shall be made as of the third day of August, A. D. 1926, and possession of the said premises shall be given to the said parties of the second part, except as above stated, at the time of final settlement.

It is further agreed that time is of the essence of this contract, and in case the purchasers do not attend at the time of final settlement to receive the deed and pay the balance of the purchase price and execute the bond and mortgage to the said parties of the first part, then the first payment hereinabove mentioned may at the option of the parties of the first part be applied on account of the purchase price, and the balance of the purchase price shall be payable to the said parties of the first part on demand, or, the said parties of the first part may retain the first payment hereinabove mentioned as damages agreed and liquidated for the failure of the said parties of the second part to carry out the terms of the said agreement, in such case this agreement shall be null and void.

In consideration of the fact that the tenant house on these premises were included in the survey of lands excepted from this agreement, the parties of the first part hereby agree to allow the sum of One Thousand Dollars upon the mortgage to be taken hereunder, which credit shall be made at the time of final settlement.

The parties of the second part shall pay for all searches and other expenses, excepting the prepara-

tion of the deed and the necessary revenue stamps attached thereto which shall be paid for by the parties of the first part.

This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

The parties of the second part covenant and agree that they will not record, cause or permit or suffer to be recorded this agreement or any copy thereof in the Office of the Register of Deeds of Camden County, or the Clerk's Office of Burlington County, or any other public office.

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

WILLIAM EVANS (LS)
LAURA EVANS (LS)
WILLIAM B. LIPPINCOTT (LS)
WILLIAM H. WINDOLPH (LS)
WILLIAM R. GOLDSBOROUGH (LS)
GEO. A. WONFOR (LS)
JOHN S. WARNER (LS)

Signed, Sealed and Delivered in the Presence of

Words "Laura Evans, one of" inserted between 17th and 18th lines, 4th page, before execution.

ROBT. C. BITTING
ROBT. C. BITTING
EDGAR D. McGONIGAL
EDGAR D. McGONIGAL

Jan 30, 1926

For value received, we, the undersigned, William Evans and Laura Evans, his wife, of the Town of Marlton, Township of Evesham, County of Burlington and State of New Jersey, hereby sell, assign, transfer and set over all our right, title, and interest in and to the within agreement, unto John O. Wilson

of the Township of Moorestown, County of Burlington, and State of New Jersey

Laura Evans.

(Endorsed)

AGREEMENT OF SALE.
WILLIAM EVANS, et ux
et al,
to
WILLIAM H. WINDOLPH,
et als,
1 & 3
Law Offices of
JOHN O. WILSON
Market Street at Fourth
Camden, N. J.

POSTEA.

NEW JERSEY SUPREME COURT.

BURLINGTON COUNTY.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER, *Plaintiffs,* v. WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased, *Defendants.*	Action at Law. Postea.

This case was tried before Circuit Court Judge Frank B. Jess, and a jury, at the Burlington County Circuit, on January 27, 28 and 29, 1930. The jury rendered a general verdict against the plaintiffs and in favor of the defendants of no cause for action.

FRANK B. JESS,
Judge of Circuit Court.

JUDGMENT.

Whereupon it is adjudged that the complaint of the plaintiffs be dismissed and that the defendants, William J. Lippincott and Caroline W. Lippincott; Laura Evans and William J. Lippincott, executors of the Estate of William B. Lippincott, deceased, do recover of the said plaintiffs, William H. Windolph, George A. Wonfor, William R. Goldsborough, John S. Warner, their costs, which have been taxed at the sum of fifty-one dollars and fifty cents.

Costs, $51.50.

Judgment signed and entered February 7, 1930.

WM. S. GUMMERE,
C. J.

NOTICE OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.
34-48.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER,
Plaintiffs-Appellants.
v.
WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased,
Defendants-Respondents.

Notice of Appeal.

To Bleakly, Stockwell & Burling, Attorneys for Defendants:

Please take notice, that the plaintiffs appeal from the whole of the judgment entered in this case, from the New Jersey Supreme Court to the New Jersey Court of Errors and Appeals, the court of last resort in all causes.

PHILIP WENDKOS,
JOSEPH S. LOW,
Attorneys for Plaintiffs-Appellants.

REASONS.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM H. WINDOLPH, *et al.*, *Plaintiffs-Prosecutors*, v. WILLIAM J. LIPPINCOTT, *et al.*, *Defendants-Respondents.*	On Appeal. Reasons.
and WILLIAM H. WINDOLPH, *et al.*, *Plaintiffs-Prosecutors*, v. JOHN O. WILSON, *et al.*, *Defendants-Respondents.*	On Appeal. Reasons.

To Bleakly, Stockwell & Burling, Attorneys for Defendants:

Sirs:

Please take notice, that the plaintiffs-prosecutors will rely upon the following reasons upon the argument of the appeal in the above matter:

(1) The Court erred in permitting the introduc-

tion in evidence of the following documents over the objection of plaintiff's counsel:

(a) Letter signed John O. Wilson to John R. Warner, dated February 19, 1926.

(b) Copy of a letter dated June 1, 1926, addressed to John S. Warner.

(c) Copy of letter dated August 31, 1926, and the enclosures therein contained. Exhibits D7-8-9.

(d) Letter signed John O. Wilson, addressed to John S. Warner, dated September 7, 1926, and sent by Samuel J. Edwards.

(e) Letter dated September 14, 1926, addressed to John S. Warner.

(f) Letter of October 15, 1926, signed John S. Warner, addressed to John O. Wilson.

(g) Instrument dated December 15, 1925, known as the Lippincott proposal, as evidence of a contract between the parties to this suit.

(h) Instrument dated December 15, 1925, known as the Evans proposal, as evidence of a contract between the parties to this suit.

(2) The Court erred in permitting the following questions to be asked of Robert C. Bitting, one of the plaintiff's witnesses, by defendant's counsel over the objection of plaintiff's counsel:

(a) "Q. Did you at any time after the paper was signed, these contracts were signed by

Windolph, et al.—by al.; I mean the others of the four—question them about the personality of the mortgagee?''

(b) ''Q. But I ask you if you didn't go out there for the purpose of asking for an extension of time for the purchasers to make their settlement?''

(c) ''Q. Do I understand that you were not interested in opening up those papers and finding out whether they had been signed by the owners of the land before you took them away?''

(3) The Court erred in permitting the following questions to be asked of George A. Wonfor, one of the plaintiffs, by defendant's counsel, over the objection of plaintiff's counsel:

(a) ''Q. You don't know whether it is Laura Evans or Tom Jones was party of the first part or not? You were not interested in that, were you?''

(b) ''Q. And so far as you were concerned, did you care, after you had actually signed the paper, whether it would be changed or altered to make the mortgage payable to one of the three grantors or to the three grantors?''

(c) ''Q. Well, then, Mr. Wonfor, why did you put in this so-called proposal of yours a clause which reads, 'This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto?' ''

(d) ''Q. Did you, in that respect, as in other respects, look to Mr. Warner to do what was proper to be done for you?''

(4) The Court erred in permitting the following questions to be asked of John S. Warner, one of the plaintiffs, by defendant's counsel, over the objection of plaintiffs' counsel:

(a) "Q. Were those checks drawn by you?

(b) "Q. No, I show you a letter of February, copy of February 25, 1926, addressed by John O. Wilson or W. R. Stanert, in his office, to you, and ask you if you received the original of that letter?"

(c) "Q. And you knew, of course, that the sellers would be expecting a settlement on October 18th, 1926, didn't you?"

(d) "Q. Did you, in any way, at any time, orally or in writing, offer to carry out the terms of this so-called proposal which you made for the purchase of these farms?"

(e) "Q. Were you interested in settling that agreement without any change?"

(5) The Court erred in permitting the following questions to be asked of William R. Stanert, one of defendants' witnesses, by defendants' counsel, over the objection of plaintiffs' counsel:

(a) "Q. I show you a letter of January 26th, 1926, signed John O. Wilson, addressed to John S. Warner, which letter has been handed to me by Mr. Wendkos on call. Was that letter sent by you to John S. Warner?"

(b) "Q. I show you a letter copy dated May 27, 1926, marked Exhibit 'E' for identification, and ask you whether the original of this copy was inserted in the letter of June 1, 1926?"

(c) "Q. How about the original papers? You say the letter of May 27, 1926, was enclosed by you in that letter. I want to know

whether the original of this letter was signed by William J. Lippincott?''

(d) ''Q. What was enclosed in that letter? By the way, whose signature is attached to the letter?''

(e) ''Q. Between the date of the agreements, which is about the 15th of December, and the delivery of the Evans' agreement, which, according to my records, was about the—just after the middle of February did you have a conversation?''

(f) ''Q. In that conversation, was anything said about an extension of time?

What was it?

When and what was the conversation?''

(g) ''Q. Now, we started to talk about another conversation?

Now, tell us the conversation?''

(h) ''Q. Any objection to any alteration in the papers?''

(6) The Court erred in permitting the following questions to be asked of William J. Lippincott, one of the defendants, by defendants' counsel, over the objection of plaintiffs' counsel:

(a) ''Q. Did anybody, any one of these four, or Mr. Warner, or anybody for Mr. Warner or for the four, offer to return any commission allowed or paid on these agreements?''

(b) ''Q. Did any one of the four purchasers communicate with you orally or in writing, offering to carry out the terms of these two papers, P4 and P5, or offering to pay for these two farms or either one of them?''

(c) ''Q. Do you know of any of those purchasers or John S. Warner bringing anybody there for the purpose of selling the farm?''

(d) "Q. Did Mr. Bitting ever bring anybody there?"

(8) The Court erred when it permitted the introduction of oral testimony varying the terms of a written instrument.

(7) The Court erred when it refused to direct a verdict in favor of the plaintiffs and against the defendants.

(9) The Court erred when it permitted the introduction of oral testimony varying the terms of a written instrument.

(10) The Court erred when it permitted the introduction of evidence showing the adaptation of the alteration in the written proposals by the plaintiffs through their own conduct of their agents.

(11) The Court erred in refusing to limit the testimony relating to the acceptance by the plaintiffs of an offer required to be in writing by the Statute of Frauds, by an acceptance in writing only in accordance with the requirements of Sec. (5) of the Statute of Frauds.

PHILIP WENDKOS,
Attorney for Plaintiffs.

We hereby consent to the filing of the above reasons out of time.

BLEAKLY, STOCKWELL & BURLING,
Attorneys for Defendants.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER,
Plaintiffs-Appellants,

v.

WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT; LAURA EVANS and WILLIAM J. LIPPINCOTT, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased,
Defendants-Respondents.

WILLIAM H. WINDOLPH, GEORGE A. WONFOR, WILLIAM R. GOLDSBOROUGH, JOHN S. WARNER,
Plaintiffs-Appellants,

v.

JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased,
Defendants-Respondents.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF FOR DEFENDANTS-RESPONDENTS.

These two cases were tried together at the Burlington Circuit of the Supreme Court, because they involve identical issues, the same plaintiffs and, in part, the same defendants. By stipulation (1) the pleadings in only one of the cases are printed. The agreements of sale are identical as to form and provisions, excepting only as to the description of the lands to be conveyed, the price and the names of the vendors. Each suit is based on a theory of the plaintiffs that a "written proposal" of purchase was made to the owners accompanied by a deposit on account and that this so-called proposal by the owners was not accepted by the owners. The cases went to the jury on evidence submitted by the defendants showing or tending to show ——

——that the alteration by the vendors changing the name of the mortgagee named in each instrument was with the knowledge and assent of the vendees:

——that the vendees assented to and accepted this change, thus establishing a contract between the parties, partly oral and partly written in character:

——that with knowledge of this change the vendees dealt with the vendors and with the property in a manner consistent only with a theory of a meeting of the minds on the basis of that change:

——that with full knowledge of the change the vendees made no objection thereto, but abandoned the contracts because of lack of funds and consented to a "forfeiture of the deposits."

The jury found a verdict for the defendants in each case.

The issues before this Court on appeal, therefore, are as follows:

(1) Were the defendants (appellees) precluded from setting up their defense by any theory of *res adjudicata* arising from the decree of the Court of Chancery in a specific performance suit involving the same parties?

(2) Did the Statute of Frauds bar the defense as set up in the pleadings and made at the trial?

(3) Did the trial Court err in admitting evidence tending to prove an agreement of sale between the parties, partly written and partly oral in character?

(4) Did the trial Court err in admitting testimony tending to prove assent to and acceptance of the change made in the written form of agreement or "proposal" by the plaintiffs?

(5) Did the Court err in admitting testimony tending to establish an adoption and ratification of the agreement as changed?

(6) Did the Court err in admitting testimony tending to prove the agency of Warner and/or Bitting for and on behalf of the plaintiff?

We believe the testimony submitted amply justified the verdicts assuming the validity of the defense pleaded and presented at the trial.

STATEMENT OF FACTS.

Plaintiffs attached to each complaint a copy of a contract bearing the signatures of the plaintiffs as vendees and of the defendants as vendors (D18, p. 296; D19, p. 302). The complaint refers to this

document as a "written proposal" (4 and 5), asserts that "accompanying plaintiffs' proposal, plaintiffs paid the sum of $8500.00 to these defendants, who, according to the writing marked Exhibit A, acknowledged receipt thereof" (p. 5), and that "defendants" refused and failed to accept "plaintiffs' proposal" (p. 5). Each paper is dated December 15, 1925. John S. Warner, one of the purchasers, was a real estate agent with offices in Camden and Palmyra. In his employ and acting for him was one Bitting (Warner, pp. 145, 158, 156 and 161). Warner's office worked up the prospects and approached the defendants as owners on the subject of a sale of the farms. Warner's office had no general listing of these farms for sale (137, line 15). The defendants referred the whole matter to J. O. Wilson, of Camden, as their attorney to conduct the negotiations with Warner's office, *i. e.,* Warner and Bitting (Stanert, 205), and Warner and Bitting then went to Wilson's office to fix the terms of purchase. William R. Stanert, office manager for attorney Wilson (204, l. 25) transacted practically all of the business in connection with these proposed sales. Drafts of two agreements to cover the two farms (or two parts of one farm, as plaintiffs prefer to refer to them) were made by Stanert (205, line 25) and delivered by him to Bitting at Wilson's office. Bitting inspected the papers (207, line 5) and then took them away to be signed by the purchasers (207). The purchasers did not appear in person then, nor did the vendors or their attorney ever meet them with the exception of Warner, who called at Wilson's office. All communications, oral and written, from and to the purchasers were through Warner and his employee, Bitting. This is evidenced by the letters in evidence and as well by the testimony of

Stanert (p. 231, lines 22 to 27) and by the admission of Warner (p. 145) and Bitting (p. 88, lines 7 to 10 and pp. 89 and 90). After a few days, these agreements were returned to Wilson's office by Bitting and Warner "with the names of the four purchasers attached to each of five copies of each agreement" (Stanert, 207, l. 15), with checks of Warner, they being for the amounts required by the ~~agents~~ agreements to be deposited on execution

> "less a sum which was equal to one-half of the approximate commission which he (Warner) would get at final settlement" (207, line 20).

One check payable to William J. Lippincott on his contract was certified and cashed (207). The check to Laura Evans was held in Wilson's office "some little time," while an adjustment was being made between William and Laura Evans and their signatures procured (207, bottom). This check was then collected. After these two agreements were executed by the purchasers and delivered to Wilson's office and before the vendors signed, the latter had their attorney change the name of the mortgagee in the agreements, by interlining the words

> "William J. Lippincoft, one of"

(p. 298, lines 18 and 19) in one, and by interlining the words

> "Laura Evans, one of" (306, line 10)

in the other (Stanert, p. 209). Thereafter, Bitting called for the executed papers. Mr. Stanert, of Wilson's office, relates what then followed:

> "Q. Now what did you tell Mr. Bitting before you delivered that executed paper to him?
>
> A. I explained to Mr. Bitting the reason for

making this change in this paper and asked him to go carefully over it and see that it was properly executed and everything was all right, satisfactory to him, before he took it away. I gave him four copies of it and he went over each of the four copies. They were lying flat on Mr. Wilson's desk at the time he came after them, and he went over and saw that it was properly executed, he rolled them up, put a band around them and carried them away in that manner.

Q. What was his reply to this change you mentioned?

A. He made no comment on it, nothing that impressed itself on me at this time; no objection to it. And I guess that was about all there was; there was no comment made or objection to it.

Q. Did he express any disapproval of it?

A. None whatever.

Q. Will you say whether or not the interlineations in the two papers which I show you were also made in the other copies of the same instruments?

A. They were.

Q. And was a notation as to the interlineation made on each one of the copies as made in the original?

A. It was.

Q. And you say that the papers were flat on Mr. Wilson's desk?

A. Yes, sir.

Q. Were they at any time up to the time you delivered them to Mr. Bitting folded up?

A. Not to my knowledge.

Q. Well, did you fold them up?

A. No, sir.

Q. And how were they when you found them?

A. They were perfectly flat on Mr. Wilson's

desk, in the folder which they kept them in, a flat article.

Q. Where was Bitting when you got them from Mr. Wilson's desk?

A. Standing right alongside of me in Mr. Wilson's room.

Q. What did you do with the papers as soon as you got them from Wilson's desk?

A. Spread the copies out on Mr. Wilson's desk for Mr. Bitting to check them over and go over them.

Q. What did he do?

A. He went over them very carefully, inspected each one of the four copies that he took away.

Q. And then what did he do?

A. He rolled them in a roll, they were all together, they were on an oblong paper, rolled them in a roll and put a rubber band around them and carried them away."

Bitting received four copies of each instrument, all executed in the same manner and all containing the interlineation and the notation thereof at the bottom of each paper above the signature of the witness (210, line 5; 211, line 22; 212, lines 1 to 10). No objection to these changes was ever made at any time thereafter by any one. Bitting denies that his attention was called to the interlineations by Stanert, but admits noticing the changes later in Warner's office (p. 56, line 28). One executed copy was retained by Warner. Warner says his attention was called to the interlined changes by Bitting "probably a couple of months" after the executed papers were returned from Wilson's office (p. 135, lines 18 to 30). Warner did not protest this change either personally, by letter or through Bitting. In

fact, neither he nor any other of the purchasers ever raised the question at all until the trial before Vice-Chancellor Leaming in the specific performance suit. His language is:

"Q. Then you let it run from the time when you first knew about this change clear down to the date of the trial before Vice-Chancellor Leaming before you said anything to anybody about it; is that it?

A. That is proper.

The Court: What was the date of that trial?

Mr. Wendkos: Bill of complaint filed March 16, 1927; answer filed June 8.

Mr. Stockwell: The designation shows the 17th day of January, 1928."

But he did send the letter of October 15, 1926, to defendants' attorney, John O. Wilson (see Exhibit D16, p. 295):

"Phone, Riverton 619

JOHN S. WARNER
SUBURBAN REALTOR

Oct. 15, 1926.

Mr. John O. Wilson,
Camden, N. J.
Dear Sir:

In reply to your letter of Oct. 8th, 1926, *Mr. Bitting has advised me that Messrs. Goldsborough and Wonfor are not in position to make settlement on the Lippincott Farm which necessitates the forfeit of* ALL *money paid on account.*

Very truly yours,

JSW:J JOHN S. WARNER."

This was, therefore, on Warner's own admission from six to eight months *after he knew of the interlined changes.*

Warner and Bitting acted for the buyers throughout. All communications for the purchasers were sent to Warner by name (see Exhibits D1, 2, 3, 4, 5, 7, 8, 9, 10)—not merely in his care. All communications from the purchasers came from Warner under his own name (D16). Warner's office on behalf of the buyers received the agreements when executed and distributed them (Bitting, p. 82) one executed copy (with interlineations, &c.) to each of the purchasers. On behalf of the purchasers, Warner's office conducted all negotiations up to and including the execution and delivery of the instruments. Stanert says (p. 231, lines 23 to 27):

> "Q. Did you have anything to do with the purchasers, any personal contact with them, except with and through John S. Warner?
>
> A. None whatever."

(See also Bitting, p. 62, lines 15 to 25.) (Stanert, p. 234, line 21.)

Warner's office then later applied to sellers for an extension of time for settlement (Bitting, pp. 95 and 96; Stanert, pp. 228, 229, 230; p. 224, line 30; 225, lines 18 to 35; p. 226, top of page). This was granted by letter of June 1, 1926, to Warner (Exhibit D5) enclosing formal extension dated May 27, 1926 (Exhibit D6). Again months later, Warner's office applied for another extension and these were granted by letter to Warner dated August 31, 1926, and containing formal extensions signed as of August 18, 1926 (Exhibits D8 and D9). And the last extension, on Warner's own admission, must have been several months after he admitted knowledge of the interlineations (Warner, p. 145, line 18 to line 3, page 146):

"Q. Was Mr. Bitting an employee of yours?

A. He was.

Q. In your real estate office?

A. Yes, sir.

Q. The people who constituted the purchasers here, to your knowledge did they communicate with the sellers except through your office?

A. Not to my knowledge.

Q. Those communications went through your office, did they not?

A. That is correct.

Q. And isn't it true that you obtained for them extensions from the sellers of the time to make settlement under the contract?

A. Mr. Bitting did, through my office. Mr. Bitting ——

Q. Mr. Bitting did it for you, did he not?

A. Did it for me.

Q. You wanted those extensions, didn't you?

A. Well, I felt that *we* was duly entitled to them.

Q. And you asked for them and you got them; is that correct?

A. That is correct."

Both Windolph and Goldsborough knew about the changes in the agreements as early as the summer of 1926. Windolph told Goldsborough (Goldsborough p. 109) that settlement was drawing near and called Goldsborough's attention to the "changes in the agreement;" that "we are not going to make settlement, it would not be necessary to go to make settlement" (Goldsborough, page 108). But Goldsborough knew that an extension of the time of settlement was being obtained or had been obtained

from the purchasers. Yet on receiving the two letters from the vendors dated October 8, 1926 (Exhibits D12, D15, pp. 292-293) expressly calling attention to the settlement date, he paid no attention to them and gave no indication to the vendors that there was any or would be any objection to the changes in the agreements. Instead, through Warner, the person who had all along acted for all of the purchasers, the letter of October 15, 1926 (Exhibit D16, p. 295) goes to Wilson, the representative of the vendors, explicitly informing the vendors that

> "Messrs. Goldsborough and Wonfor are *not in position to make settlement—which necessitates the forfeit of all money paid on account.*"

Wonfor got his copies of the two agreements after execution by vendors. His "dealings" were "through Mr. Bitting" (p. 113). Although he does not admit the receipt of the letters of October 8, 1926 (D12 and D15), defendants made clear proof of their mailing by registered mail to the address of each of the purchasers (219-220) and no one of the letters was returned (222). But in any event, Wonfor knew the date for settlement, ignored it completely, except for the letter of October 15, 1926 (Exhibit D16), dispatched by Warner to Wilson

> "forfeiting all money paid on account."

In the meantime, the purchasers had taken advantage of their rights under the agreements and placed a large "For Sale" sign on the property. It read "Farm for Sale by John S. Warner." It was kept there by purchasers until after the date fixed for settlement (October 18th) and in the end was blown down (Lippincott, p. 265). The defendants attended at the time and place of settlement, ready and willing

to convey the property to plaintiffs (23). No word was received from plaintiffs, either in person, by telephone or by letter, except the letter of October 15th, forfeiting all money paid on account (D16). (Stanert, p. 230, line 4 to bottom of page):

"Q. Did you receive word from Mr. Warner or any of the other three purchasers with reference to the settlement under the agreement other than the letter of October 15, 1926, Exhibit D16?

A. No, sir.

Q. Either oral or in writing?

A. No, sir.

Q. Any request from any of the four purchasers for the return of the deposit money

A. No, sir.

Q. Any objection to any interlineation in the papers?

A. None whatever, sir.

Q. Any offer to carry out any proposal or any agreement which had been signed by them?

A. No, sir."

(See also Stanert, p. 231).

Following the date set for settlement (October 18th) no word was received by vendors from plaintiffs even down to the day of trial of the specific performance suit.

ARGUMENT.

I.

The matters of defense in the present suit are not *res adjudicata* under the decree of the Court of

Chancery in the Specific Performance suit, nor under this Court's decree of affirmance.

The Supreme Court laid down the Rule as to *Res Adjudicata* in *Hoffmeier v. Trost,* 83 N. J. L. 358, as follows:

> "I. A matter is not *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the persons and parties, the quality of the persons for and against whom the claim is made, and the judgment in the former action be so in point as to control the issue in the pending one.
>
> 2. A proper test in determining whether a prior judgment between the same parties concerning the same matters is a bar to a subsequent action, is to ascertain whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first; if so the prior judgment is a bar. But if the evidence offered in the second suit is sufficient to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit."

But here we do not have present any one of those necessary elements to constitute *res adjudicata.*

The suit in the Court of Chancery was one for specific performance of a written land contract. The decision in such a suit lies in the sound discretion of the Chancellor. The principles which govern that suit are radically different from those which govern a suit at law.

This Court held in *Brown v. Brown,* 33 N. J. Eq. 650, as follows:

> "3. Where jurisdiction 'in a suit for specific

performance' exists, the remedy is not of right; the Court holds it in judicial discretion, controlled by principles of equity and justice."

This Court again, in *Worth v. Watts,* 76 N. J. Eq. 299, stated the rule as follows:

"A Court of equity, when asked to decree the specific performance of a contract, will examine not only the contract itself, but the relations of the parties and the surrounding circumstances; and if by reason of inadequacy of consideration and the other circumstances of the case, there is reason to suspect fraud, specific performance will be denied, and the complainant left to his remedy at law."——

P. 305:

"It may be that some contract of sale was made, and that moneys were paid thereon by Worth. If he can establish such facts in a court of law, he may have his remedy there by way of damages or a return of the moneys paid; but specific performance of the alleged contract set up in the bill should be denied."

—Therefore, the mere fact that in a specific performance suit, a Court of equity may in its discretion say that the proofs were insufficient to warrant a decree in that suit, does not carry with it as a necessary conclusion that a jury in a suit at law for the recovery of a deposit might not consider the evidence which was given in the Court of Chancery or other evidence which might be submitted to it entirely sufficient to support a verdict in a Court of law. In short, the principles involved in the two types of litigation are entirely different and the

remedies sought are different. The principles governing the respective Courts are different. The Court of Chancery can throw out a specific performance suit, because either it may consider the law not entirely clear or the facts not entirely free from doubt, or because for some other reason, it should consider such suit inequitable. It lies in the sound discretion of a Court of equity to make or refuse a decree in a specific performance suit; but in a Court of law a jury weighs the testimony and weighs the credibility of witnesses and can find the facts on evidence which a Court of Chancery in a specific performance suit might consider inadequate to support a decree in the latter type of suit.

We find nothing in the opinion of this Court in the Appeal involving the Specific Performance litigation, nor in its decree of affirmance in any respect altering these principles. (See opinion of this Court in Lippincott *v. Windolph,* 6 Ad. Rep. 1367, 143 Atl. 346.)

But the plaintiffs in the present suits set up a "written proposal," accompanied by a deposit, and claim a right to recover back the deposits, on a theory that defendants

> "refused and failed to accept plaintiffs' proposal" (Complaint, p. 5).

So far as this litigation is concerned, defendants could accept that proposal orally or in writing, or they could agree with plaintiffs on a modified proposal, and that could be oral or in writing or partly both. The modification of the terms of the proposal could be agreed to by plaintiffs orally or in writing or their assent to and acceptance of any change therein could be oral or written or inferred from their conduct.

There is no question of attempting to "vary the

terms of a written instrument" by oral testimony. But a contract can lie partly in writing and partly in parol. And the parties can modify a written contract by a subsequent oral contract. We can have a written proposal and a parol acceptance or vice versa, and we could have a counter proposal, oral or written, and parole acceptance by the plaintiffs.

In the present case, there was a written form of contract, signed by vendees—its submission to vendors with check—a modification of that paper with the assent of the vendees—an execution of the paper in its modified form by vendors and its redelivery to vendees, who knew of that modification, accepted it and retained it and the benefits thereunder for months after admittedly knowing of the change and making no objection thereto. And with that knowledge and after long acquiescence in that modification, plaintiffs deliberately renounce their right to a return of the deposit money and "forfeit" it.

The Supreme Court had before it more facts and more witnesses than testified in the Chancery suit.

Under the principles governing *"Res Adjudicata"* that doctrine cannot be applied to this case.

II.

The Statute of Frauds did not prevent the defendants from asserting by way of defense any of the matters covered by the evidence.

1. The plaintiffs did not plead the Statute. They assert a right to take advantage of the Statute by the rule laid down in Lozier v. Hill, 68 N. J. Eq. 300; Degheri v. Carovine, 100 N. J. Eq. 499; Douma v. Powers, 92 N. J. Eq. 25.

But it is doubtful if those authorities intended

to extend the rule in favor of a plaintiff who may wish to set it up to defeat a defense made by the answering defendants.

2. But, if it be held that plaintiffs can in this case have advantage of the Statute without pleading it, yet that Statute of Frauds avails them nothing under the issues here presented.

——*We do not have to prove a written agreement or one enforceable within the Statute.* It can be any contract, formal or informal, oral or written, or partly each. *In short, to defeat plaintiffs' action, an oral agreement and payment of deposit thereunder and refusal of plaintiffs to carry it out are sufficient.*

——In short, defendants are not seeking to enforce anything: plaintiffs are the actors trying to get back a deposit on a theory that it is wrongfully withheld. Any evidence tending to show an oral or informal agreement, extensions of time or other modifications of such agreement, are admissible. And for the same reason, oral statements and correspondence showing an agreed modification of the proposal (so called), a consent to such modification and acquiescence in such change after knowledge thereof, are all proper to *establish an oral or informal offer and acceptance* as shown by the completed papers.

——In brief, plaintiffs were obliged to prove an offer, a deposit, and our refusal—all or part can be in writing or parol so far as our defense in this style of action is concerned.

A contract, oral or informal (*i. e.* not enforceable under the Statute of Frauds) is nevertheless "legal" and the "parties are at liberty to act under such contracts if they see proper."

- Gannon v Brady Co - 82 L. 411
- Austead v Cook 291 Pa 335 (140 Atl. 139)
- Passino v Brady Co (83) 83 L. 411
- Messenger - Patterson 91 L. 654
- Donaldson v Ludlow 94 L. 306
- 13 C. J. pp. 241-242
  281 (see 87 (3)
- Gray v Foster 10 Watts (Pa) 280
- Tiet v La Salle Mfg Co 5 Daly (N.Y.) 19

The Supreme Court held in *Eaton v. Eaton,* 35 N. J. L. 290:

> "The statute of frauds is an insuperable barrier to an action to enforce a parol contract within its provisions, but it does not make the transaction illegal, and parties are at liberty to act under such contracts if they see proper.
>
> 3. When a person with a full knowledge of the facts voluntarily pays money which the law would not compel him to pay, but which, in equity and conscience he ought to have paid, he has no remedy to recover it back.
>
> 4. In an action to recover back money thus paid, parol proof not offered to establish the existence of the trust, with a view to its enforcement as a legal obligation, but as part of defense, that the money was a voluntary payment on an obligation, which, though not legally binding, was obligatory in *foro conscientiae,* is competent.
>
> 5. Such evidence is not obnoxious to the rule which precludes the admission of parol evidence to contradict or vary the legal import of a written instrument. It is competent evidence to show a want of consideration, and fraud or imposition in procuring the instrument on which suit is brought."

The Court also said:

> "But so long as the other party is willing to carry out his contract by making a conveyance, no action can be maintained to recover back a consideration voluntarily paid" (p. 293).

The Court then held that the evidence was "competent" and that, therefore, it must be left to the jury (p. 293).

See also *Perloff v. Island Development Co.* (Supreme Court), 4 Misc. Rep. 473 (133 Atl. Rep. 178).

III.

The knowledge of Bitting and Warner of the alteration in the instruments was imputed to their principals, Goldsborough, Windolph and Wonfor.

The testimony shows that the fact of the change was communicated to and was actually known by Goldsborough and Windolph (page 109) and Warner (page 135). Wonfor alone, of the four purchasers, asserts that he did not know, and this notwithstanding the letter of Warner (D16, p. 295), asserting that Wonfor and Goldsborough "are not in a position to make settlement" and that, therefore, all money paid on account was forfeited. But, in view of the admission of Warner as to his own knowledge, and of the admission of Goldsborough as to the knowledge of himself and Windolph, the question of imputed knowledge becomes important only as to Wonfor.

Wonfor relied on Warner for everything in the transaction (Wonfor, pp. 117-118 (bottom), p. 119, top).

Warner and Bitting were the agents for the purchasers in all matters relating to the enterprise. The purchasers (aside from Warner) never met the sellers or the latters' attorney. The purchasers conducted all their negotiations with sellers through Warner and Bitting. All correspondence from and to the purchasers went through Warner as agent of the purchasers. Extensions of time were sought on their behalf by Warner and Bitting and they were granted in letters addressed to Warner. Warner put his sales sign on the property in order to sell

for the account of the plaintiffs. The terms of the agreement were worked up by Stanert for sellers and Bitting and Warner for purchasers.

(Citation of the testimony on these points have been given under the caption "Statement of Facts.")

And in the end it was Warner who, on behalf of all, "forfeited all moneys paid on account." That letter (Exhibit D16, p. 295) was at no time repudiated by the plaintiffs, even in their testimony given in this case.

Therefore, an agency in Warner and Bitting to act for all the purchasers in matters pertaining to the transaction must be implied. The knowledge the agents obtained was pertinent to the very matters which they in fact transacted for the principals. That knowledge was obtained while acting for the principals.

The attempt of both Bitting and Warner to make it appear that they were simply agents of the sellers to earn a commission is negatived by all the correspondence, by their own acts and words and by the testimony of the principals as well. Of course, Warner and Bitting were legally entitled to collect a commission from the sellers and to that extent they may be deemed agents of the sellers. But for all other purposes and throughout the negotiations and subsequent dealings they always acted for and in the interests of the purchasers. Wilson's office looked after the interests of the sellers.

(The citations of testimony are given in full under the caption "Statement of Facts.")

Sooy v. State (E. and A.), 41 N. J. L. 400:

> "The knowledge of the agent is chargeable upon his principal whenever the principal, if

acting for himself, would have received notice of the matters known to the agent."

Furthermore, as to Wonfor, who said he did not know of the change, the jury were entitled to consider——

——the fact that Wonfor received his copies of the executed instruments containing the interlineation and the notation thereof at the bottom of the instruments (113, lines 20 to 30):

——his admission that he looked over the last page to see if the vendors had signed (p. 113, line 27; pp. 120 and 121):

——that all the others have admitted knowledge of the alteration:

——that Warner, on behalf of all and with special reference to Wonfor and Goldsborough, wrote the letter of October 15, 1926, forfeiting the deposit, after having for months full knowledge of this alteration (D16):

and then determine whether, in fact, Wonfor did not have actual notice of the change.

IV.

The plaintiffs, under their own theory of a proposal, and deposit thereunder, were bound to prove a refusal by defendants to carry out such proposal.

In short, when they assert that we in good conscience ought not to keep the deposits, they must prove *themselves* willing to carry out the proposal. They must tender performance before they can ask for a return of the deposit. In order to make out a case, the plaintiffs must put the defendants "in default."

Smith v. Smith, 28 N. J. L. 217 (top), and *Long v. Hartwell,* 34 N. J. L. 116, as follows:

> "If vendor or vendee wishes to enforce contract against the other, he immediately makes his part of the agreement precedent."

And also at page 125.

Plaintiffs made no offer to perform, either under their so-called "written proposal" or under the modified proposal and acceptance shown by the defendants, but on the contrary stated in writing to defendants that they could not perform and that they forfeited the deposit moneys (D16). Defendants were at no time in default.

We submit that the issues presented were properly presented to the jury under evidence legally competent and that, therefore, the findings by the jury should be held to be final.

The judgments should be affirmed.

Respectfully submitted,

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Defendants-Respondents.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR and JOHN S. WARNER,
Plaintiffs-Appellants,

v.

WILLIAM J. LIPPINCOTT and LAURA J. EVANS, executors of the Estate of WILLIAM B. LIPPINCOTT, individually, and CAROLINE LIPPINCOTT,
Defendants-Respondents,

and

WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR and JOHN S. WARNER,
Plaintiffs-Appellants,

v.

JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the Estate of WILLIAM B. LIPPINCOTT, deceased,
Defendants-Respondents.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS.

STATEMENT OF THE FACTS.

The appellants are the purchasers. John S. Warner, one of the appellants, was the real estate agent who was authorized by the respondents to sell the lands in question. He was also one of the purchasers. Mr. Bitting was the salesman employed by John S. Warner. Mr. John O. Wilson, one of the respondents, was the attorney of the sellers and later became the owner of the lands of Laura Evans, one of the sellers. Mr. Stanert was the personal secretary of Mr. John O. Wilson.

Mr. Bitting found the prospects, William H. Windolph, Mr. William R. Goldsborough, Mr. George A. Wonfor and Mr. Warner (S. C., p. 157, l. 10), who proposed to purchase the lands in question. He laid before Mr. Wilson the proposal of these appellants, and in the latter's office drafts of the proposed agreement were prepared, and later they were signed by each of the appellants. When they were signed by the purchasers there were no interlineations, notations or additions (S. C., p. 54, ll. 3-4). While the drafts were in the possession of the appellants, the respondents informed Mr. Wilson that they wanted to have the terms of the agreement changed. Instead of having the mortgage payable to all of the sellers, it was to be made payable to Laura L. Evans in the one case and to William J. Lippincott in the other. After the drafts were signed by the purchasers, and before they were signed by the sellers, the following words were interlined: "William J. Lippincott, one of" in one set and the words, "Laura Evans, one of" in the other set. The desire of the sellers to have one of

the terms of the mortgage changed was not transmitted to any of the other purchasers. Nowhere in the testimony does it appear that Mr. Bitting or Mr. Warner was informed at the time the deposit checks were delivered that the terms of the agreement would have to be changed.

TESTIMONY.

Mr. Lippincott had never come in contact with any of the buyers directly (S. C., p. 263, ll. 8-18). He did not notify the buyers or any of them of the change that they had decided upon before the sellers signed the papers (S. C., p. 271, ll. 23-27); and he did not instruct anyone to notify the buyers or anybody representing them (S. C., p. 271, ll. 28-32).

As a result of instructions given Mr. Wilson by Mr. William J. Lippincott (S. C., p. 236, ll. 5-35), his stenographer inserted four or five words with the intention of having the mortgage as called for by the agreement, to run to William J. Lippincott, one of the parties of the first part, instead of to all three of them. The change was made before our clients signed (S. C., p. 209, ll 13-15) the papers.

Nowhere, however, does it appear that Mr Stanert gave Mr. Bitting specific instructions to call to the attention of the buyers the changes made in the drafts after they were executed by them.

Mr. Robert C. Bitting, on the other hand, testified that the notation over his signature was not made in his own handwriting, and that it was not on the contract at the time the buyers signed it (S. C., p. 53, ll. 27-35). The notation was not made by him or at his direction (S. C., p. 54, ll. 1-15). He

observed the notation a considerable length of time after the execution (S. C., p. 56, ll. 16-37). The Evans contract was returned to him 6 weeks later, sometime after the middle of February (S. C., p. 57, ll. 13-33). At the time that he took them away, the second time, from John O. Wilson's office, he did not notice either the notation or interlineation in the instruments (S. C., p. 58, ll. 28-29). No one in Mr. Wilson's office or Mr. Wilson himself, or Mr. Lippincott or any of the sellers, parties to the contract, called his attention to that notation or interlineation (S. C., p. 58, ll. 30-33).

He delivered the papers to the respective purchasers, but did not say anything to them regarding anything about the contracts (S. C., p. 59, ll. 13-27). The interlineation was made physically by Wilson's stenographer in Wilson's office, whose name at that time was Geraghty, at the request of William J. Lippincott, and upon instructions given the stenographer by Mr. Wilson (S. C., p. 236, ll. 5-22). It was done sometime prior to the execution by the sellers of these drafts and about two or three days after the agreements were returned executed on behalf of the buyers. Mr. Wilson was given the authority to alter those contracts by Mr. Lippincott and Mrs. Evans (S. C., p. 236, ll. 5-35). Wilson had the instructions from Mrs. Evans to change them, but he did not have them back from the purchaser signed at the time he received her instructions (S. C., p. 237, ll. 1-10). At the time the change was made he did not get in touch with either Mr. Bitting or any of the buyers. He did not notify them of his intention to make the change (S. C., p. 237, l. 11).

William R. Goldsborough, one of the plaintiffs, testified that he recalled that he signed papers

before they were signed by the sellers (S. C., p. 102, ll. 17-18). He would say that the very fine writing under the words "in the presence of" did not appear at the time he signed them (S. C., p. 102, ll. 23-31). At the time that Mr. Bitting returned the papers he made no remarks concerning any changes whatever (S. C., p. 103, ll. 14-21). He did not see them himself, he doesn't think that he had ever seen it other than the time it was brought up in court before Vice-Chancellor Leaming (S. C., p. 104, ll. 3-11).

Mr. Windolph and he were not going to make settlement (S. C., p. 108, ll. 9-33). He did not ask for any extensions of time and did not know that Mr. Warner was asking for an extension of time, and he was not very much interested from that time on (S. C., p. 109, ll. 21-35).

Mr. George A. Wonfor, one of the plaintiffs, testified that he was the first man to sign. There were no notations on the left-hand side above the names of the witnesses at the time that he signed (S. C., p. 113, ll. 10-18). He got the papers back quite a long time after the execution and looked them over just to turn to the last page and see that all the signatures were there. He didn't examine it through page by page (S. C., p. 113, ll. 19-33).

After they were handed to him again, after they were signed by the sellers, the person who handed him back the papers did not call his attention to any notations or any interlineations in the papers (S. C., p. 114; ll. 1-7). His attention was first called to the notations or interlineations in his attorney's office in preparation for the defense of the suits brought before Vice-Chancellor Leaming (S. C., p. 114, ll. 8-10).

Mr. John S. Warner testified that the names of

the sellers did not appear on the contract at the time that he signed, and there was no notation over the names of the witnesses (S. C., p. 130, ll. 4-9), and there were no interlineations in the papers at the time he signed (S. C., p. 131, ll. 3-8). After he signed, Mr. Bitting took the papers over to Mr. Wilson's office and he accompanied him there and left the deposit checks in the office of Mr. Wilson (S. C., p. 131, ll. 8-30). He was acting for the sellers of the property in this transaction (S. C., p. 138, ll. 19-21).

His attention was called for the first time to the notations and interlineations in those papers quite some time after they were in his possession, probably a couple of months He did not notify any of the other buyers of the presence of that interlineation (S. C., p. 135, ll. 32-35). He did not personally ask the sellers or Mr. Wilson or anyone in Mr. Wilson's office for an extension of time for settlement (S. C., p. 136, ll. 13-24). He did not approve of the change that had been made. Under the conditions of the contract he abandoned it (S. C., p. 172, ll. 25-30).

Mr. Goldsborough also testified that he investigated the property himself. Other than giving him a check, he did not authorize Mr. Bitting or anybody else in Mr. Warner's office to represent him in this transaction (S. C., p. 105, ll. 1-6).

Mr. Stanert testified that on the 26th day of January, 1926, Mr. Wilson had title to the Evans property. It was not until sometime between the 15th of February and the 19th of February that the papers signed by Mrs. Evans and her father were delivered to Mr. Bitting (S. C., p. 247, ll. 9-28).

ARGUMENT.

The respondents commenced the suit in specific performance in the Court of Chancery of New Jersey, on March 15, 1927, and when it was brought out in the testimony that an interlineation had been made without the knowledge or consent of the appellants:

> "If the law is as he understood it to be," said the Court, "the evidence already taken, TOUCHING WHICH THERE CAN BE NO DISPUTE, is conclusive of the case;" and it seemed to the Court that it would be a waste of time and energy to go further into points which obviously were controverted.
>
> Vice-Chancellor Leaming regarded it as an altered contract, altered by the vendors after the vendees had executed it and without their knowledge or consent. The Statute of Frauds in substance provides that a written instrument in the nature of a contract for the sale of land must be signed by the parties to be charged or someone lawfully authorized in their behalf. This instrument which complainants now seek to enforce against the vendees is not the instrument which these vendees executed. It is another instrument by reason of the change which the vendors made in it. Touching the question of adoption of this alteration no more need be said than that the evidence does not disclose that the vendees were made acquainted with this change.

A decree was entered in the Court of Chancery in accordance with the findings of Vice-Chancellor

Leaming. An appeal was taken from that decree by the respondents to this Court. The opinion of this Court was written by Justice Parker.

> "The disposition of the matter by the Court in Chancery was entirely correct. The point is made, here, though apparently not made below, that Bitting, the go-between, who went back and forth between the several parties, was agent of the defendants, and that his knowledge of the change at the time it was made, was theirs, and hence they were bound by it. All this we deem too uncertain and nebulous to support a decree for specific performance at the instance of a vendor." On this branch of the case, therefore, this Court concluded that the proof touching assent of the defendants to the paper in its modified form is insufficient to sustain a decree. This brings us to the fundamental ground for denial of the aid of the Court; and that ground is the non-existence of any complete contract. The present case comes under the elemental rule that the bargain or promise to be enforced be completely determined by the parties, and its terms definitely ascertained. Parties must assent to the same thing in the same sense. The assent must be exactly equal to the extent and provisions of the proposal. And it must not qualify it by any new matter. In such cases there is no assent and no contract. Tested by these rules, there was no contract between the parties. *Wilson, et al., v. Windolph, et al.,* 6 A. R. 1367—143 Atl. 346.

THE LAW.

The testimony divides itself into three parts: (1) that which relates to the making of the interlineation, (2) that which relates to knowledge of the interlineation on the part of the plaintiffs-appellants, and (3) that which relates to its adoption by them.

ORAL TESTIMONY IS INADMISSIBLE TO VARY THE TERMS OF A WRITTEN INSTRUMENT CONCERNING AN INTEREST IN LAND.

The third subdivision will be considered first, because under that head come all of the objections made by the appellants to the introduction of testimony by the respondents tending to show an adoption of the interlineation by the purchasers. The reason given in practically all instances, was that such testimony would tend to vary the terms of the written instruments which are supposed to contain the engagements of the parties. The theory on which plaintiffs-appellants brought their suit to recover the deposits paid to the respondents, was, that because there was no contract in existence between the parties to this suit, the respondents were not justfiied in retaining the moneys which they received on account thereof. The reason given by the trial Court for the admission of testimony showing assent and ratification of the contracts was that oral statements, made by either party to the instruments, after they had been signed, are admissible in evidence.

An examination of the literature reveals a large number of cases in which statements made contemporaneously with the execution of the instruments were not admissible, of which the following are examples: *Hallenback v. Chapman,* 72 N. J. L. 201; *Shinn v. Black,* 117 Atl. Rep. 143, 97 N. J. L. 219; *Naumberg v. Young,* 44 L. 341; *Hoffman v. Seidman,* 127 Atl. 199, 101 N. J. L. 106; *Yates v. Townsend,* 139 Atl. 11; *Wills v. Camden Line,* 140 Atl. 310, 104 N. J. L. 428; *Kerzner v. Chanin,* 118 A. 693, 98 N. J. L. 38; *Schiff v. Alexander,* 130 Atl. 133, 3 M. 817. Cases in which statements made BEFORE execution were not admitted in evidence are exemplified by *Ramsey v. Perth Amboy Shipbuilding and Engineering Co.,* 72 N. J. E. 165; *Newcomb v. Kloeblen,* 77 N. J. L. 791; *Kasselman v. Cohen,* 135 Atl. 349; *Nageli v. Silk Exchange,* 134 Atl. 721, 4 M. 763.

And cases in which statements made AFTER execution were not admitted in evidence are exemplified by *Brautigam v. Dean,* 85 N. J. L. 549; *American Surety v. Masan,* 87 L. 290; *Gold v. Schneider,* 130 Atl. 133, 2 M. 179.

The conclusion, then, is that parol testimony of conversations held between the parties, or of declarations made by either of them, WHETHER BEFORE, OR AFTER, OR AT THE TIME of the completion of the contract, will be rejected. *Naumberg v. Young, supra.*

In many of the reported decisions, the Court excluded testimony which tended to vary, add to or alter a written instrument OR a contract. Such language renders uncertain the kind of an instrument to which the rule laid down by *Naumberg v. Young* would apply. The matter was set at rest by Justice Trenchard in *Cohen v. Cohen,* 140 Atl. Rep. 319, 101 N. J. E. 401:

> "The rule excluding parol evidence has no place in any inquiry, unless the Court has before it some ascertained paper, beyond question binding and effective.

If the learned trial Court proceeded on the theory that the instruments introduced in evidence were binding upon the parties to the suit and effective as a contract for the sale of land, then, on the repeated pronouncements of this Court, evidence tending to vary or add to its terms would be clearly inadmissible.

If, on the other hand, the trial Court conceived the written instruments (Exhibits P4 and P5) incomplete and ineffectual as binding contracts for the sale and purchase of the lands described therein, then oral statements respecting the subject-matter and even writings or memoranda, not signed by the plaintiffs-appellants, would be clearly inadmissible for the purpose of proving a completed contract, or for the purpose of supplying omissions without which there could not be a contract. *Quinn v. Amendola,* 138 Atl. 693, 5 M. 932. The only evidence by which the rights and liabilities of the contracting parties shall be measured and determined is the written instrument itself. *Schenck v. Spring Lake Co.,* 47 N. J. E. 44; *Van Syckle v. Dalrymple,* 32 N. J. E. 233; *Swain v. Seamans,* 76 U. S. 254; *Lawyer v. Post,* 109 Fed. 512; *Snow v. Nelson,* 113 Fed. 353; *Whittier v. Dana,* 92 Mass. 326.

The oral testimony of Mr. Stanert (p. 223, l. 20, to p. 230, l. 35) is clearly inadmissible because, by its introduction, essential terms of the bargain would be added. The writings must contain all the essential terms of the bargain, expressed with such certainty that they may be ascertained from the

writing itself without the aid of oral evidence. Nothing can be added or supplied by parol proof, for the introduction of evidence of that kind would let in, at once, all the evils which the statute was designed to suppress. *Randolph v. General Investors Co.,* 128 Atl. 156, 97 N. J. E. 227; *Halpern v. Shierkin,* 129 Atl. 487, 98 N. J. E 28; *Johnson v. Buck,* 35 N. J. L. 338; *Schwarzman v. Creveling,* 85 N. J. E. 402.

There is, therefore, no such a thing as an adoption of a contract for the sale of land by words or acts. Unless the engagements of the parties to the bargain are reduced to a writing, containing all of its essential terms from which it can be ascertained that a contractual relationship between the parties had been brought into being, no action can be brought thereon. *Kerzner v. Chanin,* 118 A. 693; *Platt v. Currie,* 100 E. 543; *Schiff v. Alexander,* 130 A. 133, 3 M. 817; *Collins Realty v. Sale,* 144 Atl. 587, 6 A. R. 756.

> The bar of the statute is complete and its force can neither be strengthened nor impaired by anything that has happened in the meantime. The statute leaves nothing for presumption. When the Legislature itself has expressly provided what facts shall take a given case out of the statute, courts of law are not permitted to ingraft upon it other exceptions not contained therein, however inequitable the enforcement of the statute may be. The general rule is that, where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Where the enactment is to secure the general objects of policy or morals, no consent will render a non-compliance with the statute effectual. Even where the

> purchasers have done an act which it would be a fraud on their part to controvert, because the other party has acted upon it in the belief that what was done was in compliance with the terms of the undertaking, would not be a bar to the plea of the statute in an action at law. *Freeman v. Conover,* 112 Atl. 324, 95 N. J. L. 89.

IN THE ABSENCE OF AN AGREEMENT THE ACTS OF ONE CO-ADVENTURER DOES NOT BIND THE OTHERS.

In his argument of the motion for a non-suit as against the plaintiffs-appellants, counsel for the respondents urged that, since the four purchasers were tied up in the same bag, the four men were on a joint adventure, the acts of the one within the adventure are the acts of the four; and for the purpose of this case everything of which Warner had knowledge was the knowledge of the other three men as well, no matter what they may say about it.

> A joint adventure, like a partnership, is a relation arising from contract. INTER SESE, the fact of partnership, as well as the rights, duties and obligations of partners, arise wholly from the terms of the contract; and as to the third person, the same rule prevails. There must be some contract on his part, in legal effect, creating as between the partners and the persons actually carrying on the business the relation of principal and agent. *Wild v. Davenport,* 48 N. J. L. 129.

Scan the testimony as one will, such a contract is not to be found in the evidence.

> In the absence of an agreement that Warner should have the usual power of a partner, as agent of the firm to bind the partnership, the relations were not those of partners but of mere common interest in a joint adventure. In all such cases, the subscribers enter into relations of trust and confidence with each other. They engage in a common enterprise for their mutual benefit and have the right to demand and expect from their associates good faith in all that relates to their common interest. *Jackson v. Hooper,* 76 N. J. E. 185.

A single special venture by two or more persons on joint account in the purchase of land to hold for sale at a profit does not create a partnership in respect to the land, but merely a tenancy in common between them. An agreement to share the profits and losses in a single transaction does not create a partnership. *Thompson on Real Property,* Sec. 1777, V. 2, p. 971; *Clark v. Sidway,* 142 U. S. 682; *Jordan v. Soule,* 12 Atl. Rep. 786 (Maine).

In the absence of such an agreement, and in the absence of express authority conferred upon Warner by the other purchasers, it cannot be said that any extensions of the settlement date were obtained at their request. His authority to bind his co-adventurers must be delineated by an application of the elementary rules of agency; and since AN AGREEMENT has not been established by the proofs, he acted outside the scope of any authority which he may have possessed. The acts of Warner cannot bind the other purchasers unless his authority is strictly pursued, and those who dealt with him are charged with notice of the extent of such authority. *Strauss v. Rabe,* 127 Atl. 188; *Cooley v. Perrine,* 42 L. 623; *Milne v. Kleb,* 44 E. 378.

IN THE ABSENCE OF SPECIFIC AUTHORITY APPELLANTS CANNOT BE BOUND BY THE ACTS OF ROBERT C. BITTING OR JOHN S. WARNER.

Vice-Chancellor Church, in *Waldron v. Cutley,* 144 Atl. 447, says that it is a well-known principle of law that a real estate agent is not a general agent, and therefore the real estate agent's acts are not binding, unless within the scope of his authority; and any parol evidence relied on to establish the authority of a broker to make a binding contract must be clear and decisive. *Stengel v. Sargent,* 74 N. J. E. 20; *Hill v. Adams Express Co.,* 74 N. J. L. 338; *Thompson v. Killhefer,* 125 Atl. 11; *Shauinger v. Apter,* 125 Atl. 31, 95 N. J. E. 70.

> Silence was entirely consistent with the non-existence of authority to bind the purchasers but not with its existence; *Milne v. Kleb,* 44 E. 378. Declarations and doings of a third person, acting in the capacity of an agent, to be admitted in evidence against the principal as the representations or acts of the principal himself, whom the agent represents, must be shown to have been made within the scope of the delegated authority. *Runk v. Ten Eyck,* 24 L. 756; *Huebner v. Erie R. Co.,* 69 N. J. L. 327.

Even if it may be inferred that the principal knew that the agent had known of the interlineation and was satisfied with it, or that the sellers would have executed and delivered a deed, under the circumstances, to the purchaser, upon the receipt of the purchase price, those facts fall short of ratifying the agent's act. *Lindley and O'Reilly v. Kein,* 54 N. J. E. 418.

Where the agent has been originally employed by the sellers he must be considered as primarily their agent, although he afterwards assumed to act as the agent for the purchasers.

Being the agent of the sellers at the time of his negotiations with the buyers, he had no right to accept from the latter the employment as the buyer's agent, without a disclosure to them of his agency for the sellers, and his failure to make this disclosure to the buyers, before they signed the written contract, was a fraudulent concealment of a material fact.

Warner and Bitting were absolutely precluded from accepting the agency for the buyers because they could not, with due regard for their interest, disclose the family differences of the sellers. The sellers considered it of vital importance that their plans should not be disclosed. But the very fact that the agent of the sellers knew something of their scheme or their reason for the altered or new term, and knew that silence as to the circumstances of the sale was then of importance to the sellers, made it impossible for Bitting and Warner, fairly, openly and in entire good faith, to accept an agency from the buyers. The disclosure of family differences was a confidential statement by a principal to an agent, which would scarcely have been made to a person supposed to be an agent of the purchasers, whose duty it would be to disclose it to them. Such communication, if made, would undoubtedly result in fixing a less sum for the offer. The negotiations were conducted and the terms of sale agreed upon, while Bitting and Warner were still acting towards the sellers in the confidential relation of agent. And the purchasers, BEFORE SIGNING a written contract, binding themselves to carry out the terms agreed to, while the confidential relation existed,

were entitled to a full disclosure of all the facts. *Spencer Heater v. Abbott,* 91 N. J. L. 584; *Marsh v. Buchan,* 46 N. J. E. 595.

There is no proof in the testimony that Warner or Bitting were the agents of the purchasers, but, on the contrary, the testimony of Goldsborough and Wonfor, and even of Warner, negatives the idea of such an agency. From the decision quoted above, there cannot even be a legal inference that Bitting and Warner were the agents of the appellants to the extent of binding them to an acceptance of the RESPONDENT'S proposal containing the name of only a single mortgage.

THE FINDINGS OF THE COURT OF ERRORS AND APPEALS ARE RES ADJUDICATA OF THE ISSUES RAISED IN THIS SUIT AS BETWEEN THE PARTIES.

In the suit for the specific performance of what the respondents regarded as a contract for the sale of the lands in question, the answers of these appellants denied the existence of a contract between the parties. Negotiations which defendants had with complainants were incomplete, unsettled, and were in such state that the minds of the parties had not met. By their ninth defense in the Wilson case, these appellants alleged that Laura L. Evans had conveyed the premises to John O. Wilson prior to the time when she HAD UNDERTAKEN to convey the same to defendants, and therefore defendants, by way of counter-claim, demand from the said Laura L. Evans, all moneys received by her from the said John O. Wilson.

In the present suit for the return of the deposits, appellants set up a proposal to purchase the lands of respondents, accompanied by a deposit of $8500 in the Lippincott case and $6200 in the Wilson case. They allege that the respondents refused and failed to accept plaintiff's proprosal and attempted to compel these plaintiffs to perform another contract which was never entered into between the parties; that the Court of Chancery dismissed the proceedings instituted by these respondents, and, on appeal, this Court concluded FOR ALL TIMES that the instrument which was submitted by the respondents was not the contract which plaintiffs had proposed to enter into; and, furthermore, that NO CONTRACT for the purchase and sale of respondent's lands had ever been entered into by the parties to this suit.

Respondents denied that the paper signed by these appellants was a mere proposal. They admit the entry of the decree in Chancery and the findings of the Court of Errors and Appeals, but denied that they have the legal effect claimed by these appellants. By their defenses, the respondents affirmatively allege that the alterations in the contract were made in good faith by and with the authority and consent of the plaintiffs and or their duly authorized agents in that behalf; that the alteration was ratified and confirmed by the plaintiffs; that it was accepted and acquiesced in by the plaintiffs without rescission or attempted rescission on their part; that they waived objection to the alteration and to a return of the moneys paid; that they abandoned and renounced their said contract and gave notice thereof to defendants and surrendered to defendants any and all rights to or interest in the moneys paid by plaintiffs to defendants under said contract.

They then set up the defense of equitable estoppel, which was stricken.

The decree of the Court of Chancery, entered on the 5th day of March, 1928, ordered the dismissal of respondent's bill because it appeared to the satisfaction of the Court that the instrument signed by appellants was altered at the request of complainants, at their request, without notifying the defendants herein of complainant's intention to make said alteration or after the making thereof, before the complainants had actually executed the aforesaid contract; and because the interlineation had been made by complainants without the knowledge and consent of defendants; and because the said alteration had not been adopted by the defendants, and because it was of the opinion that, by reason of the aforesaid alteration, the instrument signed by complainants is not the same contract which defendants as vendees signed, and is not available to complainants as evidence of the contract of the parties.

The Court of Errors and Appeals affirmed the decree of the Court of Chancery reported in 143 Atl., p. 346, *Wilson, et al., v. Windolph, et al.* This Court held that there was no assent to the change in terms on the part of these appellants. The fundamental ground for denial of the aid of the Court was the NON-EXISTENCE OF ANY COMPLETED CONTRACT. There was no assent to the same thing in the same sense, and the bargain was not completely determined between the parties (Exhibit, S. C., p. 19).

Fortified with the decree of the Court of Chancery and its affirmance by this Court, appellants moved to dismiss respondents' answer in the present suit, for the reasons that the Chancery decree and its affirmance were dispositive of the issues raised by

the pleadings, and particularly because there was no contract existing between the parties. The trial Court struck the second paragraph of the answer and Affirmative Defenses Nos. 7, 9, 10 and 14 (Exhibts, S. C., p. 41).

The reply filed by these appellants set up the decree of the Court of Chancery and its affirmance by the Court of Errors and Appeals, the non-existence of a contract between the parties, and demanded a return of the money paid by appellants.

In addition to the identity of the issues raised in both the equity and law suits between the identical parties, the following exhibits forming part of the record in the State of the Case in the appeal from the Chancery suit were made a part of the record of the law suit, letter dated Oct. 15th, 1926, from John S. Warner to John O. Wilson, Exhibit (D16); letter dated Oct. 8, 1926, from John O. Wilson to William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, Exhibit (D15); letter dated August 31st, 1926, addressed to John S. Warner (D7); letter copy dated August 18th, 1926, from Laura Lippincott Evans to John S. Warner, Exhibit (D9); letter dated Jan. 26, 1926, from John O. Wilson to John S. Warner, Exhibit (D4); letter dated February 19, 1926, from John O. Wilson to John S. Warner, Exhibit (D3).

> In denying appellants' motion for a direction of a verdict in their favor, the Court declared (S. C., p. 275, ll. 12-30): "There is no question at all in my mind—I do not see how there can be—that the decision of the Court of Errors and Appeals in the case between the same parties, involving the same contract, is absolutely dispositive of the question as to whether or not the paper writings as altered and then executed by the vendors constitute a

> contract. There is no question whatever that the Court held in that case that there never was any contract between the parties. But the question as to whether there was a ratification or an assent to the contract as altered is still open, and that is the question, in my view, that is raised in this case by the pleadings, and which, under the evidence, must be submitted to the jury. I am of the opinion (S. C., p. 275, ll. 30-35) that the defense set up in this case, that there was, by acts, words and conduct of the plaintiffs, an assent to and ratification of the contracts as altered, is a proper and legal defense."

In the heat of the argument counsel for plaintiffs utterly forgot to call the trial Court's attention to the fact that it already had, by its order stricken from respondent's answer the very issues which it now considered as having been raised.

The seventh defense alleges that plaintiffs never rescinded nor did they give notice of avoidance of said contract, by reason of said alteration. The ninth defense sets up the equitable defense of laches; and the fourteenth defense charges that it would be inequitable and against good conscience to permit the plaintiffs to recover said moneys, because through their agent or agents, they suffered the defendants to deal with them on the assumption that these agents had authority to represent the plaintiffs in all things respecting said contract.

Aside from the question of the legality of such a defense in a law suit, *Freeman v. Conover, supra,* by the trial Court's own order (Exhibit, S. C., p. 41) issues which the Court conceived had been raised, were IN FACT NOT RAISED. The refusal of the

trial Court to direct a verdict for the appellants was therefore errors.

In a rescission suit one of the issues raised by the pleadings and tried was whether the complainant, with intent to cheat and defraud the defendant, made certain false representations. The bill was dismissed. The defendant in her suit at law raised the same or identical issue already decided by the court of equity. The complainant now seeks to restrain the defendant from proceeding with her law suit.

The parties, the cause of action and the subject-matter are identical. The difference in the nature of the relief does not prevent the decree from operating in estoppel. It is enough if the matter was triable in the first suit and that it was actually litigated and adjudicated and the same misrepresentation forms the basis of each suit and the primary inquiry vital to a recovery in either suit is, (a) was the misrepresentation made (b) would the evidence adequate to a recovery in the second suit have been sufficient to support the first? The defendants threw their lot with the Court of Chancery, and after an exhaustive investigation (approved) and affirmed by the Court of Errors and Appeals) and upon principles more favorable to her than the law courts could afford, the cause which they again desire to litigate, was determined against them, and by that determination they are bound.

It is not necessary that the action in which the judgment is found, and that in which it is relied on as an estoppel, should be of the same kind, or for the same cause of action. If a question upon the execution or validity of a deed in fee be put in issue in an action of trespass, and expressly found by the jury, such verdict and judgment upon it may

be relied on as a conclusive evidence of such fact; in the trial of a real action or writ of right, between the same parties, for the same estate. It has become a fixed fact between these parties for all purposes; a *fortiori* is a judgment, a bar to a second suit involving the same cause of action only seeking different relief.

Vice-Chancellor Backes in *Sarson v. Maccia,* 108 Atl. 109, 90 N. J. E. 433.

The judgment of a Court of competent jurisdiction on a question of law or fact, when litigated or determined, is conclusive upon the parties and their privies, not only in the suit in which it is pronounced, but in all future litigation between the same parties or their privies, touching upon the same subject-matter. In re: *Walsh's Estate,* 80 Eq. 565-74 A. 563; *Gyarfas v. Karpf,* 83 L. 387.

It is a part of our fundamental law that facts actually decided by an issue in any suit cannot again be litigated between the same parties. There is no way to avoid the conclusion that the agreement was not the product of fraud and that it was based upon a good consideration, namely, the avoidance of publicity and the purchase of a release for one-third of the damages demanded, both of which issues having been passed upon by the law court. *Phillips v. Pullen,* 45 N. J. E. 180.

THE TRIAL COURT SHOULD HAVE DIRECTED A VERDICT FOR THE PLAINTIFFS-APPELLANTS.

The instruments which form the basis of this action have been declared by the Court of Chancery and affirmed by the Court of Errors and Appeals as not being the same instruments signed by both

parties. The terms of the proposals are not ambiguous, and extraneous evidence does not appear to be necessary to explain their meaning. The construction and effect of a written instrument is a matter of law to be determined by the Court and not by the jury, unless construction depends upon extrinsic facts which are in dispute. *Geiger v. Waldron,* 125 Atl. 18, 100 N. J. L. 93.

It is undisputed that the interlineation was made after the signature of the drafts by the purchasers and before they were signed by the sellers. Therefore, the Court should have construed, as a matter of law, that there was no contract in existence and directed the jury to return the moneys to appellants. *Hope v. The Macabees,* 91 N. J. L. 148; *Downs v. N. J. Fidelity, etc.,* 91 N. J. L. 523.

THERE WAS NO CONTRACT BETWEEN THE PARTIES.

The circumstance of the execution of the signature of the instruments have been sufficiently set forth in the statement of the facts and testimony. The law applicable to the situation may be found in the following authorities.

An agreement for the sale of an interest in lands not having been signed by the defendant, is as to him, by force of the Statute of Frauds, void. *O'Donnell ad. Brehen,* 36 N. J. L. 257; *Rutan v. Herichman,* 30 N. J. L. 255.

In order to give the rejected offer any new vitality, there must be a renewal of it, or renewed assent to it, by the party who made it. It seems self-evident that, if the parties agree to deal on the basis of a rejected offer, the vendors' assent

thereto, being an essential part of the contract, must be in writing. It was not in writing in this case.

Where a contract within the Statute of Frauds is made out by correspondence, the correspondence taken together must establish the contract in all its terms. It can receive no aid from parol evidence. After the contract has once expired, it could not be resuscitated by parol, any more than it could have been originally created by parol. *Lewis v. Johnson,* 143 N. W. 1127; *Williston on Contracts,* p. 128, par. 73.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he relies upon the character or qualities of an individual or has, in this case, reasons why he does not wish to deal with a particular party. *Williston on Contracts,* p. 139, Sec. 80; *Boulton v. Jones,* 2 H. & N. 564; *Boston Ice Co. v. Potter,* 123 Mass. 28, and other cases cited on p. 139, Williston.

If A makes an offer to B, B cannot assign, and B's assignee cannot accept and thus establish contractual relations with A, at least if A does not know that such assignee is the party who accepts. *Boston Ice v. Potter,* 123 Mass. 28; *Rease v. Kittle,* 49 S. E. 150; *Dyer v. Duffy,* 24 L. R. A. 339.

THE ACCEPTANCE MUST BE MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE STATUTE OF FRAUDS AND IN THE SAME SENSE AS THE OFFER.

If A and B make a valid oral contract, and subsequently A delivers to B a written contract which

varies from the terms of the oral contract, B's omission to notify A that he does not assent to the rescission of the oral contract and to the substitution therefor of the written contract, ought not to operate as a substitution of the written contract for the oral contract. *Picard v. Beers,* 81 N. E. 246.

A conditional or qualified acceptance of an offer does not constitute an agreement unless the condition is complied with. *Kehler Flour v. Linden,* 119 N. E. 698; *Putram v. Grace,* 37 N. E. 166; *Harris v. Scott,* 32 Atl. 770.

If it appears that the parties mean to have all the terms of their contract reduced to writing AND SIGNED, neither party will be bound until that is done. The propriety of this rule is still more apparent in a case where the law expressly requires them to make no other than written contracts. Until both parties had assented to the provisions of the contract in the manner provided by law, there was only a negotiation for a bargain, which was never completed, and which neither party was bound to complete. *Water Commissioners v. Brown,* 32 N. J. L. 504 Atl. 510.

Although the plaintiff had, in its bill of particulars, attempted to show that the three papers therein included constituted the written contract upon which the action was brought, over the objection and exception of defendants, the Court permitted plaintiff to put in evidence letters which passed between the parties after the making of the alleged contract, and finally the learned trial Judge, in his charge to the jury, left it to the jury to determine whether the defendants, after receiving from the plaintiff a letter showing acceptance, by their course of action and conduct acquiesced in, adopted

and approved the modifications of the proposition communicated to plaintiff by defendants.

The Court apparently overlooked the fact that under the plea of the Statute of Frauds, all of the terms of the contract upon which plaintiff relied should be evidenced by some note or memorandum in writing, signed by the defendant who is sought to be charged therewith, and that there was no written acceptance by defendant of the modifications of the proposed agreement.

As the proofs showed a state of facts to which the Statute of Frauds was a defense, the complaint should have been dismissed. *Peninsular Trading Agency v. Frazer,* 176 N. Y. S. 739.

A mere offer, not accepted, involves no concurrence of wills, and can never constitute a contract. And though there is an acceptance, if it is not to the exact thing offered, or if it is accompanied by any conditions or reservations, however slight in time or otherwise, no contract is made. It is the same where new terms are introduced. They constituted an offer on the other side, and leave the question open. *Marshall v. Eisen Vineyard Co.,* 28 N. Y. S. 62; *Williston on Contracts,* p. 134, Sec. 77; *Wilson, et al., v. Windolph,* 143 Atl. 346, 6 A. R.

THE QUESTIONS SUBMITTED BY THE TRIAL COURT TO THE JURY WERE ALREADY DISPOSED OF BY THE COURT OF ERRORS AND APPEALS.

The trial Court was entirely in accord with the Court of Errors and Apepals on what must be done by the parties in order to create a contractual rela-

tionship between them. It recognized that acceptance must correspond entirely and adequately with the proposal; the assent must comprehend the whole of the proposition. Furthermore, as the propositions were not accepted as submitted, but, on the contrary, were altered in one of their clauses, then there was no contract between the parties.

It was, therefore, superfluous for the trial Court to have submitted to the jury the question whether the plaintiffs assented to the alteration either at the time the agreements were returned to them or were subsquently assented to or ratified by them, either expressly or by their acts or course of conduct, because ratification by conduct was not an issue in the case and because our Court of Errors and Appeals has already stated that the claim made by the respondents that the acceptance of the papers by the appellants without objection and that the retention of the papers after discovery of the change without repudiation, spelled acceptance, is entirely too nebulous and uncertain.

It was not for the jury to determine whether the knowledge of Warner was the knowledge of the appellants, because the decree of the Court of Chancery affirmed by the Court of Errors and Appeals for all times definitely established that the interlineation had been made without the knowledge and consent of these appellants (S. C., p. 17, ll. 32-36) and that the alteration had not been adopted by the defendants, and that the purchasers had not been made acquainted with the alteration.

The jury should not have been asked to draw an inference that the agreements as altered had been accepted by plaintiffs, from a letter written by Warner to the effect that he was advised that two of the plaintiffs would not be able to carry out their

agreement, which would necessitate the forfeiture of the money paid on account (S. C., p. 280, ll. 29-36; p. 281, ll. 2-19). This letter (D16, S. C., p. 295) was before this Court in the appeal from the Court of Chancery. Notwithstanding, this Court concluded that the proof touching assent of defendants to the paper in its modified form is insufficient. In the absence of completed agreement, there can be no forfeiture.

It was not the province of the jury to find whether Warner and Bitting were the agents of the plaintiffs in the transaction and that any act which they did within the scope of their agency would be binding upon the plaintiffs (S. C., p. 283, ll. 6-12). This Court has already determined that Bitting was not the agent of the plaintiffs and that his knowledge was not their knowledge and that the plaintiffs could not be bound by whatever he knew or did. Bitting was characterized as merely a runner for a real estate broker and his task was confined to bringing the parties together on the terms, something which he conspicuously failed to do (S. C., p. 22, ll. 1-20).

The trial Court charged that the paper writings, as executed, constituted no agreement between the parties; but asked the jury to determine whether the papers as altered were accepted and assented to by the plaintiffs, and that in this way there was brought into existence a binding contract between the parties.

That question had already been answered by the Chancery Court and the Court of Errors and Appeals, in the negative. THERE WAS NO CONTRACT BETWEEN THE PARTIES (S. C., p. 23, l. 34).

Counsel, therefore, respectfully submits that the

judgment of the New Jersey Supreme Court be reversed and the respondents be directed to return to the appellants the deposits which they made, together with interest from December 15th, 1925. *Yeskel v. Gross,* 144 Atl. 312, 7 A. R. 312, affirmed.

PHILIP WENDKOS,
Attorney for Plaintiffs-Appellants.