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Notice of Appeal.

In Chancery of New Jersey.

Filed Feb. 25, 1929.

10

Between

AUSTIN J. WALDRON, INC.,
Complainant,

and

JULIETTE V. CUTLEY,
Defendant.

} Appeal.
} Notice of

20

The defendant, Juliette V. Cutley, hereby appeals from the whole and every part of the final decree made in the above entitled cause by the Chancellor on the advice of the Honorable Alonzo V. Church, Vice-Chancellor, to the Court of Errors and Appeals in the last resort in all cases.

30

ELMER W. ROMINE,
Solicitor for Defendant.

Dated, February 15, 1929.

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

ELMER W. ROMINE.

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Petition of Appeal.

Filed Feb. 25, 1929.

NEW JERSEY COURT OF ERRORS AND APPEALS.

| | | | |
|----|--|---|------------------------|
| 10 | Between AUSTIN J. WALDRON, INC., Complainant-Respondent, and JULIETTE V. CUTLEY, Defendant-Appellant. | } | Petition of Appeal. |
|----|--|---|------------------------|

20 *To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:*

30 The humble petition of Juliette V. Cutley, the appellant in the above stated cause, respectfully shows that your petitioner finds herself aggrieved by a decree of the Court of Chancery made by his Honor, Edwin Robert Walker, on the advice of the Honorable Alonzo Church, Vice-Chancellor, bearing date the 1st day of February, 1929, in a cause wherein the said Austin J. Waldron, Inc. were complainants and your petitioner was defendant, in this respect, to wit: That the said decree orders and directs your petitioner on the 15th day of February, 1929, at ten o'clock in the forenoon at the office of Pilgrim and Ritger, 43 Lincoln Park, Newark, New Jersey, to pay to complainant the sum of Twenty-Nine Thousand Dollars (\$29,000.00) with interest from July 12th, 1928, together with taxes, insurance, and such other adjustments as are provided for in a certain contract of purchase, less the amount of principal due on the mortgage

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Petition of Appeal.

therein mentioned, originally Fifteen Thousand Dollars (\$15,000.00), which mortgage has now been reduced to Fourteen Thousand Five Hundred Dollars (\$14,500.00), making a total due of Fourteen Thousand Dollars (\$14,000.00) besides taxes, insurance and interest, together with taxed costs; and further orders, adjudges and decrees that if petitioner should fail or neglect to pay the said sum of Twenty-Nine Thousand Dollars (\$29,000.00) with interest, together with costs, in the manner aforesaid, the same shall become a lien upon the lands and the premises sold under direction of the Court to satisfy such lien and petitioner ordered to pay any deficiency; and that petitioner is further required to pay complainant a counsel fee of Three Hundred Fifty Dollars (\$350.00) and your petitioner humbly appeals from the order or decree of the Court of Chancery upon the ground that the same is erroneous, for that the property mentioned in the contract of purchase and ordered to be taken by petitioner by the Court of Chancery was fraudulently misrepresented in that petitioner was induced to enter into a contract of purchase for the price of Twenty-Nine Thousand Dollars (\$29,000.00) upon the representation that the building located on the lands described in the contract of purchase were of all brick construction, with triple floors and metal lathing throughout, whereas in fact such was not the case, of which the complainant, its agents and representatives, well knew, but designedly and for the purpose of inducing petitioner to enter in a contract, well knowing that petitioner relied upon the same, made the false and fraudulent statements, knowing that they were untrue, and for that the complainant is

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Petition of Appeal.

estopped from claiming any benefit under such contract of purchase or from forcing petitioner to take the property, and for that the Court of Chancery should have in its discretion denied relief by specific performance and directed the return of the deposit of Five Hundred Dollars (\$500.00) as paid by petitioner.

10

Your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

ELMER W. ROMINE,
Solicitor for and of Counsel with
Defendant-Appellant.

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Answer to Petition of Appeal.

Filed Feb. 28, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.AUSTIN J. WALDRON, INC.,
Complainant-Appellee,

vs.

JULIETTE V. CUTLEY,
Defendant-Appellant.On Appeal
from the
Court of
Chancery.

10

Answer to
Petition
of Appeal.

The answer of Austin J. Waldron, Inc., the
above named Appellee to the petition of Juliette
V. Cutley, the above named appellant.

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This appellee, not admitting the truth of all or
any of the matters in the said petition of appeal
contained, for answer thereto nevertheless admits
that a decree was on February 1, 1929, made and
entered in the Court of Chancery of New Jersey,
in the above entitled cause, for the purposes in said
petition mentioned and as therein set forth; but
as to the substance and form of said decree this
appellee begs leave to refer thereto when the same
shall be produced.

30

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

PILGRIM & RITGER,
Solicitors for and of Counsel with Appellee.

40

Bill of Complaint.

Filed July 19, 1928.

IN CHANCERY OF NEW JERSEY.

To his Honor, EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

10 The complainant, Austin J. Waldron, Inc., a Corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex, respectfully shows:

1. It is a Corporation of the State of New Jersey, and on the fourth day of May, 1928, was seized of an estate in fee simple to all that certain lot, tract, or parcel of land situate, lying, and being in the Village of South Orange, County of Essex, State of New Jersey, known as No. 282 Highland Road, South Orange, New Jersey, and described as follows:

30 BEGINNING at a point on the southwesterly side of Highland Road distant 1014.83 feet westerly from Ridgewood Road; thence running along Highland Road north 45 degrees 09 minutes 30 seconds west 80 feet to a point; thence south 44 degrees 50 minutes 30 seconds west 117 feet to a point; thence south 45 degrees 9 minutes 30 seconds east and parallel with the first course, 80 feet to a point; thence north 44 degrees 50 minutes 30 seconds east 117 feet to the point and place of BEGINNING.

40 2. On the date last mentioned the complainant entered into a certain agreement with Juliette V. Cutley wherein and whereby the complainant agreed to convey the said lands and premises by

Bill of Complaint.

deed of warranty on or before June 4, 1928, at ten o'clock in the forenoon to the said Juliette V. Cutley in consideration of the payment by the said Juliette V. Cutley of \$29,000; and the said Juliette V. Cutley agreed to pay to complainant the said purchase price of \$29,000 by the payment of \$500.00 on the signing of said agreement, and the payment of \$13,500 in cash on delivery of the deed, and also agreed to take said premises subject to a first mortgage of \$15,000 which was at that time a lien on the premises, and agreed to pay the same according to the terms thereof, the said deed to be delivered at the office of Henry Young, Jr., 786 Broad Street, Newark, New Jersey, on June 4, 1928, at ten o'clock in the forenoon. 10

3. The said Juliette V. Cutley paid to complainant the sum of \$500.00 at the time of the execution and delivery of the said agreement. 20

4. On June 4, 1928, the complainant was ready to convey said lands and premises hereinabove referred to, to the said Juliette V. Cutley in accordance with the terms of said agreement, but the said Juliette V. Cutley requested the complainant to allow her an extension of time to take title. Complainant extended time for the performance of said contract from time to time and on July 6th notified the said Juliette V. Cutley fixing July 12th at two o'clock in the afternoon as the time and the office of Pilgrim and Ritger, 43 Lincoln Park, Newark, as the place for the delivery of its deed and notified the said Juliette V. Cutley that the reason for changing the place of the delivery of the deed was that the office of Henry Young, Jr. was no longer at 786 Broad Street, Newark. The 30 40

Bill of Complaint.

said Juliette V. Cutley was also notified that time was made of the essence of said contract and that if she did not perform proceedings would be taken against her at once.

10 5. On the said 12th day of July the complainant was represented at the office of Pilgrim and Ritger by Austin J. Waldron, its President, and at that time and place he had in his possession a warranty deed conveying the lands and premises hereinabove referred to to the said Juliette V. Cutley duly executed and proved by the complainant for the purpose of delivering the said deed to the said Juliette V. Cutley upon payment by the said Juliette V. Cutley of the balance of the purchase money pursuant to the terms of said agreement.
20 The said Juliette did not appear at said time and place, nor at any time before three o'clock in the afternoon although complainant's representative remained there until three o'clock.

6. The husband of the said Juliette V. Cutley appeared at the said time and place, but neglected and refused to accept said deed and pay therefor the amount agreed in said agreement.

30 7. The complainant has always been ready and willing and now tenders itself ready and willing to perform its part of the said agreement and on being paid the remainder of said purchase money with interest to convey the said land and premises to the said Juliette V. Cutley by warranty deed duly executed by the complainant.

40 Complainant is without adequate remedy in the Courts at law and, therefore, prays:

Bill of Complaint.

1. That Juliette V. Cutley who is the defendant to this suit may answer this bill of complaint and each statement therein made.

2. That the said Juliette V. Cutley may be compelled by the decree of this court specifically to perform the said agreement with complainant, and to pay to complainant the remainder of the said purchase money, as in and by said agreement provided, with interest from the time said purchase money ought to have been paid, on the delivery by complainant to said Juliette V. Cutley of a deed executed by complainant, as in said agreement provided. 10

3. That in case the said defendant, Juliette V. Cutley should, within the time limited by this Court for such performance of said contract, fail and neglect, upon the tender of said deed, to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum, together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainant, and that the said lands and premises may be sold under the direction of this court for the satisfaction of such lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale, that the said defendant may be ordered by this court to pay said deficiency, together with interest and costs of this complainant. 20 30

4. That a writ of subpoena may issue, commanding said defendant to answer this bill of com-

Answer to Bill of Complaint.

plainant and to abide by such decree as this court may make in the premises.

PILGRIM & RITGER,
Solicitors for and of Counsel with Complainant.

10

Answer to Bill of Complaint.

Filed Aug. 20, 1928.

IN CHANCERY OF NEW JERSEY.

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Between

AUSTIN J. WALDRON, INC.,
Complainant,

and

JULIETTE V. CUTLEY,
Defendant.

On Bill, &c.
Answer.

The defendant, Juliette V. Cutley, of Morristown, Morris County, New Jersey, answering the complainant, says:

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1. The defendant has no knowledge as to whether complainant was seized of an estate in fee simple to all that certain lot, tract or parcel of land in the Village of South Orange, Essex County, New Jersey, and referred to in paragraph 1 of the complaint and therefore leaves the complainant to its proof.

40

2. This defendant denies the allegations of paragraph 2 of the complaint with this modification

Answer to Bill of Complaint.

and statement: That on or about May 1st, 1928, defendant negotiated with the agents and representatives of complainant for the purchase of a property known as No. 282 Highland Road, South Orange, New Jersey, for the price of \$28,000.00, upon the understanding and representations by the agents and representatives of the complainant that the dwelling, on said property, was of all brick construction, triple floors and metal lath construction throughout and the garage was to compare with the dwelling in that it was to be all brick construction, and this defendant relying upon said representations and believing them to be true paid the sum of \$500.00 by check as a deposit. That thereafter, a written agreement was entered into between the defendant and the complainant wherein the price for the property was increased to \$29,000.00 and in and by said agreement the complainant guaranteed to this defendant the manner of construction as was represented to her by the agents and representatives of the complainant at the time of her negotiations for purchase, it being further agreed this defendant was to assume a first mortgage of \$15,000.00, on the property and pay the difference in cash at the time of taking deed. And this defendant further says that thereafter by another agreement, the time of taking title was fixed for June 4, 1928, at the office of Henry Young, Jr., 786 Broad Street, Newark, N. J.

3. This defendant admits the payment of \$600.00 at the time and in the manner as stated in paragraph 2, of this answer.

4. This defendant admits that on June 4, 1928, the date set for the closing of title and delivery of

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Answer to Bill of Complaint.

the deed, a further extension was allowed and granted to July 12th, 1928, but this defendant says that at no time did she make any agreement that time was to be the essence of the contract.

10 5. This defendant admits that on July 12th, 1928, she did not appear and pay the balance of the purchase price and take title for the reason that this defendant discovered that the dwelling on the property, which she agreed to purchase, was not as represented by complainant and its representatives; that it was not of all brick construction but merely brick veneer; that the flooring was not triple flooring throughout and metal lathing existed only in the bathrooms and that the
20 garage was not of all brick construction but merely of brick veneer and by reason thereof this defendant has been deceived and induced to purchase a property for a price much in excess of its true value and for a greater sum than defendant would have agreed to pay had she known the true facts at the time of entering into the agreement to purchase.

30 6. This defendant understands that her husband appeared at the time and place arranged for the passing of title and then and there refused to accept the deed and pay the amount agreed upon for the reasons as stated that the dwelling and garage on said property contracted to be purchased was not as represented.

7. This defendant denies that complainant has always been ready and willing to perform its part of the agreement of purchase and sale, and this

Answer to Bill of Complaint.

defendant says that by reason of the deceit and fraud practiced upon her she has declined to take title to the property and demands the return of the deposit of \$500.00 paid.

ELMER W. ROMINE,
Solicitor for and of Counsel
with the Defendant. 10

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Reply to Answer.

Filed Sept. 14, 1928.

IN CHANCERY OF NEW JERSEY.

Between

AUSTIN J. WALDRON, INC.,
Complainant,

and

JULIETTE V. CUTLEY,
Defendant.

On Bill, Etc. 10
Reply to
Answer.

Complainant denies all the allegations of new matter contained in the answer of the defendant.

PILGRIM & RITGER, 20
Solicitor of Complainant.

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Testimony.

IN CHANCERY OF NEW JERSEY.

November 15, 1928.

Between

AUSTIN J. WALDRON, INC.,
Complainant,

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and

JULIETTE V. CUTLEY,
Defendant.

20

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, ALONZO CHURCH, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of MESSRS. PILGRIM & RITGER, (by MR. RITGER) for Complainant; ELMER W. ROMINE, for Defendant.

30

Mr. Ritger: Your Honor, this is an action for specific performance on a real estate contract. We allege that we are ready, willing and able to perform; and this defense is that there is fraud in the signing of the contract.

The Court: What is the defense?

Mr. Romine: The defense is that there were misrepresentations as to the character of the property which induced them to enter into the contract.

40

The Court: All right. All you have to do is to introduce your contract in evidence.

Austin J. Waldron—Direct.

I suppose Mr. Romine won't object to that.

Mr. Romine: No objection.

Mr. Ritger: I offer in evidence contract dated May 4, 1928, between Austin J. Waldron, Inc., and Juliette V. Cutley, which mentions property 282 Highland Road, South Orange.

10

(Contract marked Exhibit C-1.)

AUSTIN J. WALDRON, sworn.

Direct-examination by Mr. Ritger:

Q. Mr. Waldron, are you an officer of the plaintiff, Austin J. Waldron, Inc.? A. Yes.

Q. What is your position? A. President of the company. 20

Q. The president of the company. You are the person who signed the contract just offered in evidence and marked, C-1? A. Yes.

Q. I show you a paper dated July 6, 1928, which is produced by the defendant, and ask you if you recognize the signature on that paper. A. That is my signature.

Mr. Ritger: I offer in evidence letter dated July 6, 1928, addressed to Juliette V. Cutley and signed A. J. Waldron, Inc., A. J. Waldron, president. 30

Mr. Romine: I don't know how far that may not bind us.

The Court: I don't know what it is.

Mr. Romine: Well, it is a letter that they wrote after the contract was signed, in which they fixed a certain day as to time being the 40

Austin J. Waldron—Direct.

essence of the contract. We did not agree to it. It may be proper as a step in the case, but not to bind us.

The Court: I don't know. Are they the vendors?

10 Mr. Ritger: We are the vendors, the complainant is the vendor.

The Court: I will admit it.
(Letter marked Exhibit C-2.)

Mr. Ritger: I would like to read the letter, your Honor, to have the matter brought to your Honor's attention.

The Court: Do you want to read it into the record?

20 Mr. Ritger: I would like to read it into the record.

The Court: All right.

30 Mr. Ritger: "July 6, 1928. Mrs. Juliette V. Cutley, Morris Avenue, Morristown, New Jersey. Dear Madam: Please take notice that under your contract A. J. Waldron, Inc. for the purchase of property 282 Highland Road, South Orange, the above company hereby fixes Thursday, July 12, at the office of Pilgrim & Ritger, 43 Lincoln Park, Newark, at two o'clock in the afternoon, as the time and place for delivery of its deed to you. At that time and place this company will have its deed ready for presentation. The change of place for the delivery of deed is made for the reason that the office of Henry Young, Jr. is no longer at 786 Broad Street, Newark. Time is hereby made of the essence of this contract, and if your part is not performed on that day, this company will take proceedings against you at once."

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Austin J. Waldron—Direct.

The Court: What is the date of that?

Mr. Ritger: It is dated July 6, 1928.
 "Yours very truly, A. J. Waldron, Inc., A.
 J. Waldron, President."

Q. On July 12, 1928, were you present at the of-
 fice of Pilgrim and Ritger? A. Yes.

10

Q. Did you at that time have this deed, the exe-
 cution of which I think Mr. Romine will admit—

Mr. Romine: We do not dispute.

Q. —did you have this deed dated June 4, 1928,
 and executed by the Austin J. Waldron, Inc., Aus-
 tin J. Waldron, president, Henry Young, Jr., sec-
 retary, and with proof taken before William J.
 Goodsir—did you have this deed in your possession?
 A. Yes.

20

Mr. Ritger: I ask the deed be marked.
 (Deed marked Exhibit C-3).

Q. Did anyone appear at that time? A. Yes.

Q. Who came? A. Mr. Cutley.

Q. Did Mr. Cutley produce the cash required
 under your contract? A. No.

Q. That is \$13,500? A. No.

Q. Did he perform his end of the contract? A.
 No.

30

Q. Did Mrs. Cutley appear? A. No.

Mr. Ritger: That is all.

The Court: Wait a minute. Any cross?

Mr. Romine: Not at this time on these
 papers.

The Court: Now, it seems to me he has
 made out a *prima facie* case.

Mr. Ritger: Except, your Honor, I have
 not proven title to the property. I have the

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Juliette V. Cutley—Direct.

deeds here. It is not admitted in the papers.

Mr. Romine: It is not a question of title to the property. We are not disputing that.

Mr. Ritger: The Complainant rests.

Mr. Romine: Mrs. Cutley.

10

JULIETTE V. CUTLEY, sworn for Defendant.

Direct-examination by Mr. Romine:

Q. You are the defendant in this proceeding, Mrs. Cutley. A. Yes, Mr. Romine.

Q. And the wife of Matthew Cutley. A. Yes.

Q. You live where? A. Morristown, 20 Morris Avenue.

20

Q. When did you first see this property which is the subject of controversy. A. Oh, I saw this property a year before the time I took—I purchased the property or signed the contract or met Mr. Vanony. I saw the property a year before.

Q. And had the property been completed at that time? A. Oh, no, it was not quite completed when I saw it—well, almost, they were decorating it.

30

Q. The outside of it had been completed? A. Yes.

Q. When were you next introduced to the property? A. Well—

Q. Or had anything to do with it before the signing of these papers? A. Well, I saw an ad in the paper, the Times, I think, advertising a house in the Oranges. I think the house was twenty thousand, and I went down to look at the house and I—they took me—no, they—Mr. Borsa, I think showed me the house and I didn't care for it, so I asked

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Juliette V. Cutley—Direct.

him to show me another one in the Wyoming neighborhood, and they didn't have anything just at present, but, I said, "Don't show me anything on Highland Avenue because I have seen those houses," but, "Oh," they said, "Yes?" "Well," he said, "we haven't anything to show you today, but we will come again, we will get in touch with you and show you something else," but Mr. Vanony took me—said, "No, we will go down to Highland Avenue; you are interested in a house in Highland Avenue, you have seen the house in Highland Avenue." So I did, and he showed me—I showed him a house I really was interested in, but—and he said, "Well,"—but it was a little—it was too much money, so he said, "Well, we will get you that house cheaper." 10

Q. Who said that? A. Vanony said, "We can get that house very much cheaper from Mr. Waldron," and then we heard Mr. Waldron was offering for the house,—“We can get that very much cheaper.” I said, well, that was an inducement if they could get the house cheaper—it would be better for me to get it through them than to go to Mr. Waldron. 20

Q. Who was this Pflueger—Connelly you spoke of? What was their business? A. They are in the real estate business. 30

Q. Located where? A. In South Orange.

Q. And who was Mr. Vanony? A. The salesman.

Q. Now, what happened as a result of that talk with reference to this property that you had looked at before? A. What?

Q. You were down there looking at property?
A. Yes. 40

Juliette V. Cutley—Direct.

Q. What happened then? A. Well, he said—at that time he said there was—it was a solid brick house and had—

Q. Who said that? A. Mr. Vanony, and said it was metal lath and triple floors.

10 Q. Was anything done about making an offer on that property? A. Oh, yes. He said to me, “Well, you made an offer on the property.” “Well,” I said, “all right,” I said, “twenty-five thousand,” and then he said he went to Mr. Waldron with that offer and Mr. Waldron—of course, he came back and he said he wouldn’t accept it, to make another offer, so there was another offer made for twenty-eight thousand.

20 Q. What happened as a result of that offer? A. Well, the result of that offer was that I signed—I signed a contract, which read that it was a solid brick house and metal lath.

Mr. Ritger: I object and move the answer be stricken out.

The Court: Yes. The contract speaks for itself.

Q. Well, you signed a paper with whom? A. I—I signed a paper with Mr. Vanony.

30 Q. Yes? A. I think in Mr. Borsa’s presence, and it was a solid brick house and a—

Q. No, not what was in the paper, but what did they tell you about the house? A. Well, they said

Mr. Ritger: I object.

A. (Continuing.) It was a solid brick house and metal lath and triple floors.

40 Q. Now, after signing that memoranda that you speak of, what happened next in the course of the

Juliette V. Cutley—Direct.

proceedings? A. Why, we went back to Mr. Waldron with that offer for twenty-eight thousand and a five hundred dollar deposit.

Q. You— A. And he said—

Q. Did you— A. —that he would not accept it for that money.

Q. Did you make a check for five hundred dollars? A. Yes. 10

Q. Is this the check of five hundred dollars that you refer to (showing witness paper)? A. Yes.

Mr. Romine: I offer this in evidence.

(Check marked Exhibit D-1.)

Q. And that is dated May 1st, and according to the check that transaction took place on May the 1st, 1928? A. Yes. 20

The Court: Has it ben marked?

Mr. Romine: Yes, your Honor.

Q. Now, after the giving of that check, you say they would not accept the twenty-eight thousand? A. No, they would not accept the twenty-eight thousand.

Q. Then what happened? A. Why, I think Mr. Vanony went back and Mr. Connelly came up and talked me into giving more money. 30

Q. How much more? A. Well, I said I would give five hundred and he talked me into giving five hundred more. It was one thousand.

Q. And increased the price to twenty-nine thousand? A. Twenty-nine thousand.

Q. When he talked you into increasing the price, what was the inducement? A. The inducement was it was a solid brick house with metal lath and triple floors.

Q. Did you make any agreement in there as to 40

Juliette V. Cutley—Direct.

the increase, in writing? A. No, not in writing.

10 Q. Then, following that, was a contract presented to you, that is the contract in evidence with Waldron Company? Following your agreement to pay the twenty-nine thousand dollars was this contract submitted to you (showing witness paper) with the Waldron Company? Just look at the back of it. I think it shows signatures. A. Well, no, I don't think—not at that time.

Q. Well, I do not mean at that time; I mean, was it submitted at any time after that? A. Oh, yes.

Q. How long after, do you know? The contract appears to be dated May the fourth, 1928. A. Yes.

20 Q. Do you know whether as a matter of fact it was signed by you on that date or not? A. The date that we agreed to pay the twenty-nine, no, not the date that we agreed to pay the twenty-nine.

Q. No? A. No.

Q. Then, how long afterwards? A. Well, they—quite awhile afterwards. They had to make that up. You see it was not made up.

30 Q. I see. And who brought this contract with the Waldron Company to you for signature? A. Mr. Vanony.

Q. And that was the same Mr. Vanony that was connected with the Connelly Company at South Orange? A. Yes.

40 Q. Was there anything said by Mr. Vanony before you signed this contract with reference to the house or grounds? A. Oh, why, yes. He talked up the house, you know, and tried to really—you know—said that it would be—it is—in inducement he said, "It is an investment to buy a house." He said, "Even if you don't occupy it yourself, why,

Juliette V. Cutley—Direct.

we could almost sell it for you with a thousand dollar advance now." Is that what you mean?

Q. I want to know what he said to you, if anything, further respecting the character of the house. A. Oh, well, just that, the same thing. It is solid brick house and metal lath and that, of course, was the inducement to me to pay—to give them the extra money, thinking I was getting a solid brick house. 10

Q. And you then signed the contract, which is now in evidence. A. Yes.

Q. Did you know at that time anything about the house other than what Mr. Vanony had told you as to its being all brick and metal lath and triple flooring? A. No, I did not.

Q. Now, did you learn after the signing of that contract anything different about the construction of the house? A. Why, yes, we did, after the visit I made Mr. Waldron, he told me that it was not a solid brick house. 20

Q. How did that conversation come up? A. Well, when I thought I had signed a contract—we had owned our house, we had a very attractive fixture in it and I wanted to change the fixture in Mr. Waldron's house and put our fixture down there, so I went down that day to meet Mr. Waldron and to ask him if I could change the fixture, and I said—he said, "Of course, you can," and he went right in and took his fixture right out. He said, "I will do it myself," and he took it out and after that we were outside talking in the car that we were talking about the house, so we said, "This is a solid brick house?" "Oh, no," he says, "this is not a solid brick house," and, of course, in that way we were leaving—Mr. Cutley had to go back 30 40

Juliette V. Cutley—Cross.

to business and we were leaving there hurriedly, and, of course, we went back with the fixtures and we didn't—we talked on the way home about the house. When he said twenty-nine thousand for a solid brick house is a terrible price, of course, I said I wouldn't give twenty-nine thousand for a house, for a brick veneer house.

10

Q. Was that the first time you had any intimation that it was not as represented? A. Yes.

Q. Why didn't you take this property and carry out the contract? A. Well, we were investigating about it, about the brick house to find out about it and we—and really—really—I—I—I told Mr. Cutley right there and then I would not take the house and it really went over in his hands and I really had nothing more to do with it; he took up the matter himself.

20

Q. Is that the reason you did not go through with the contract— A. Yes.

Q. —because it was not an all brick house? A. (No answer.)

Cross-examination by Mr. Ritger:

Q. Mrs. Cutley, when you first saw the house, do you remember what time of the year it was?

30

A. You mean, the very first time I saw it?

Q. The very first time you saw it, yes. A. It was in the fall of the year, around between October and November, nineteen—(interrupted)

Q. Yes. A. —I was in there, I don't remember exactly, but they were decorating—they were paneling that wall when I was in there the first time.

Q. That was 1927? A. Yes, and they were putting panels and painting on the wall when I saw

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it the first time.

Juliette V. Cutley—Cross.

Q. And who took you there that time? A. I was just in the neighborhood and we went in ourselves, the door was open.

Q. Was your husband with you? A. Yes.

Q. And you don't remember what month of the year it was, do you? A. Well, it was in the fall of the year. I think it was the fall of the year. I — (witness stops of her own accord.) 10

Q. How long did you stay that time, do you remember? A. We just went in the living room, just saw they were painting the house; that is the only place we went.

Q. Did you get in touch with the owner of the— A. Not then. Oh, no, not until the next spring.

Q. In the spring, then, did you get in touch with the owner? A. Mr. Cutley, called Mr. Waldron up and asked him how much he was asking for that house, and, of course, he said he was asking twenty-nine thousand, or something like that, and I said, Oh, well, that we would have to think about it again, because it was too much money; we didn't want to pay that much. 20

Q. You were present when Mr. Cutley called up Mr. Waldron? Were you present then? A. Well, I think probably I was in the house some place.

Q. Were there any questions asked Mr. Waldron as to the construction of the house at that time? A. No. 30

Q. Did you make an offer or did your husband make an offer for the property? A. No.

Q. How soon after that first conversation did you get in touch with Mr. Waldron again? A. Not again. We called him up a couple of times and we were going to go directly to him to the house. 40

Juliette V. Cutley—Cross.

10 Q. Yes. A. After we were looking—as I say, we were looking around for a cheaper house in the neighborhood and we saw this house advertised and that is how Mr. Vanony worked us in here, worked us in that house. I really knew what I could get the house—almost felt that I could get the house cheaper through—go directly to Mr. Waldron, but he claimed he could get it so much cheaper for us that I said, “Well, if you can do that, then go ahead.”

Q. Was Mr. Cutley with you the first time you went in the house? A. Yes, Mr. Cutley was with me every time.

Q. Every time that you saw the house? A. Yes.

20 Q. Now, had you seen the house between the time of your first visit and the telephone call to Mr. Waldron? A. Oh, we just—we passed in the neighborhood; we used to pass through the neighborhood in the street.

Q. How many times? A. I lived in Brooklyn and every time we would go to Brooklyn we would always go down through that neighborhood.

Q. And, after your conversation with Mr. Waldron, you went to the office of Pflueger-Connelly? A. Yes.

30 Q. Did you go to the office, Mrs. Cutley? A. No, I did not.

Q. How soon after that did you get in touch with an agent relative to a property? A. Well, Mr. Cutley did, after he received a letter. I think he did.

40 Q. Received a letter from whom? A. Well, he had been investigating the house, you know, to see about it, and I think it was in reference to a letter that he got on the 12th, wasn't it, from Mr. Waldron?

Juliette V. Cutley—Cross.

Q. Well, no. You are skipping too long a period. After you had a conversation with Mr. Waldron over the telephone in the spring of 1928—

A. Yes.

Q. —you got in touch with an agent relative to the property, didn't you? A. Yes. Well, that was just previous to our signing the contract for it.

10

Q. Yes. About how long before the contract of May 4th was signed did you get in touch with the agent? A. Well, when we saw—he went right ahead with it then; he went down to see Mr. Waldron then. When I made the first offer, you mean?

Q. Yes. A. Well, he—

Q. When was that? A. Why, that was in May. I really don't remember the date; I can't remember the date; I don't remember the date.

Q. It was in the early part of May? A. May.

20

Q. And how did you come to get in touch with Connolly relative to this property? A. Through showing us the other property I went down with him to show—(interrupted)

Q. Who was it that showed you the other property, Mr. Borsa? A. Mr. Borsa showed it to—

Q. And he took you? A. To this other house.

Q. At this time that Mr. Borsa took you, was anything said about the heating plant in this house?

30

A. No.

Q. Was anything said about the floors by Mr. Borsa, and did you go into the question of what the floors were and what the—(interrupted) A. Oh, yes. Mr. Borsa said that the floors—right away he said that the floors were triple floors, he did say that they were triple floors.

Q. You were interested in the floors and they were triple— A. And that—

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Juliette V. Cutley—Cross.

Q. —and the walls were solid brick. A. Yes.

Q. Did he use the word "solid", do you know?
A. Yes.

10 Q. He said they were solid walls? A. He said it was a solid wall. I don't know whether he said "solid" or not, but it was a solid brick house; that is what I understood, solid brick house. What other way could he express it? That is the way, solid brick house.

Q. That is the way Mr. Borsa told you? A. Yes, because I live in a brick veneer myself and I knew that was a different—that was different, and it attracted me, that difference.

Q. And Mr. Borsa told you that the first time you went there? A. Yes. Mr. Connelly was with him.

20 Q. Mr. Connelly was with Borsa the first time he went to the house? A. Yes; Connelly showed us the house, yes; they were there. The Pleuger-Connelly people showed us the house.

Q. Which one was it that said the—(interrupted) A. They both did, but Mr. Vanony—they both talked it up. They both said it was—but Vanony said it was a solid brick house.

Q. And had triple floors. A. Yes.

30 Q. And had metal lath throughout. A. Mr. Borsa said—I know particularly Mr. Borsa spoke about the solid floors—the triple floors, but I can't say that Mr. Vanony said at that time. It was when they came up to sign this contract and to ask more money, the inducement was "it is a solid brick house."

Q. At the time you—(interrupted) A. I can't—I don't think they did the first time, but he did the second time when he said, "Why, you remem-

Juliette V. Cutley—Cross.

ber," he said, "you are getting a solid brick house" when we offered twenty-five thousand.

Q. Are you changing now and saying that it was not the first time that they took you up to the house that this conversation took place, but that the first time the solid brick house was mentioned was before the contract was signed? A. I remember particularly about the floors that first time, but I don't remember the first time that he spoke about the walls. 10

Q. I see. A. But I do remember that inducement for the house—giving more money—was the solid brick house, yes.

Q. Was there anything said about a solid brick house the first time that Mr. Borsa took you to the place? A. Well, we asked him, "Is this a solid brick house?" 20

Q. Yes. And what did he say? A. Why, I think we asked him—I don't remember—I don't know really about the solid brick house, but I saw the house and I thought all those houses were solid brick, I was under that impression, all those houses in that street were solid brick. I afterwards found out that they didn't own—that none of them were solid brick. Mr. Cutley investigated and found out that none of them were solid brick. 30

Q. You are not certain whether anything was said about the house being solid brick or not. A. No, I can't say that first time, because I understood that it was a solid brick; I thought I was getting a solid brick house.

Q. You made no inquiries about any other parts of the building at that time? That is, do you happen to know whether it is steam heat or hot air or hot water? A. Oh, I think I did. I know it is 40

Juliette V. Cutley—Cross.

steam heat, because I know a little about it myself; I didn't have to ask that question; I saw it; I went through the house.

Q. You noticed that it was steam heat? A. Yes.

10 Q. Now, did Mr. Borsa ever take you there again? A. No, not Mr. Borsa, no; they never took me there again at all. I never went there again with them. They came up to Morristown and did all the business in Morristown. Mr. Vanony came back and forth.

Q. You went to that house on only one occasion with the agent? A. Yes.

Q. And you never went there again with Mr. Connelly? A. No.

Q. Mr. Borsa or Mr. Vanony? A. No.

20 Q. And did you visit the house alone or with your husband between the time you got in touch with the agent and between the time you actually signed up any papers? A. Yes; we went down a couple of times thinking we would see Mr. Waldron; we wanted to speak to him about some things and the other times he was never there.

Q. What were the— A. Excepting the time we made the appointment with him.

30 Q. That was after the contract was signed, though. A. Yes.

Q. Do you know how many times it was that you actually went to visit that house altogether? A. Oh, I couldn't tell you.

Q. Between the time you first saw it and the time the contract was made? A. No; I was never inside of it only once; I was never inside of it only once. Oh, let me see. Oh, yes, another time I was in. We went there. The door was open. Mr. Cutley and I went through one Sunday.

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Juliette V. Cutley—Cross.

Q. Was that before the contract was signed? A. No, after. Well, I don't remember, really. I really couldn't say. Let me see now. After the contract was signed I don't think I was. Let me see now. Let me think. I think after the contract was signed every time the door was locked, we went down there and every time we went in the door was locked. 10

Q. You didn't get in once after the contract was signed? A. And we wanted to speak to Mr. Waldron about the fixtures and we thought about telephoning him he would be working next door and we would go in, but the door was locked.

Q. What business is Mr. Cutley in now? A. He is with the State Highway.

Q. What? A. He has a State position, in the Maintenance he has a position. 20

Q. Did he ever have anything to do with the construction of buildings? A. No, not buildings; only roads.

Q. Either here or in Jersey City? A. No, he did not, no. Only roads. He never had anything only in the highways.

Q. He never was in the building line? A. No.

Q. Never had anything to do with the construction of houses? A. No. 30

Q. Did you ever take anyone up there with you to look at the house other than the agent? A. I went there one time with my mother, but the door was locked and Mr. Waldron—and I saw Mrs. Waldron there, but Mr. Waldron he was away and we couldn't wait for him. I wanted to show my mother the house, but we couldn't get in.

Q. Now, at the time you signed a memorandum or some—at the time you made an agreement for 40

Juliette V. Cutley—Cross.

twenty-eight thousand dollars, did you say? A. Yes.

Q. You say you made an offer of twenty-eight thousand? A. Yes.

10 Q. Did the agent tell you at that time that the place was all brick or solid brick and that there were triple floors and that they had metal lath throughout? A. Yes.

Q. Did he tell you that? A. Yes.

Q. And when you signed the contract marked C-1, which is the contract dated May 4th—(interrupted) A. The first contract I signed I remember that we missed—Mr. Cutley particularly made them put it in. He said, "Put that down there, solid brick" that we were getting a solid brick house. That first contract—

20 Q. Mr. Cutley— A. —we signed—the second one—

Q. Mr. Cutley told the agent to put that in? A. Yes.

Q. "Solid brick"? A. He said it was solid brick. But he said, "Now, be sure to put that down there." I remember him saying that.

Q. Did he put in about triple floors? A. I don't remember about the triple floors, if he put that down.

30 Q. And the metal lath? A. But he put in "solid brick", I remember that.

Q. I show you a paper and ask you if that is your signature. A. Yes, that is my signature.

Q. Is that the paper that you signed, and are referring to? A. That is not the first paper I signed. That is not the first paper I signed. You see, they brought up a paper and I signed it, and then when they came up again for the twenty-eight

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Juliette V. Cutley—Cross.

thousand they made up another paper and I signed it.

Q. Yes. And then you signed one for twenty-nine thousand like that, and then you signed a final contract, didn't you? A. I signed one for twenty-eight thousand and I signed one for twenty-nine. I signed two different papers. I know it was in the first paper, but I couldn't say it was in the second paper I signed. 10

Q. The second paper you signed—oh, you don't know whether the second paper was the same as the first? A. I mean—I thought it was the same. I thought I was signing the same paper, the same agreement and all, and, of course, I signed it and I didn't look at it, but I know it was in the first paper. 20

Mr. Ritger: I ask this be marked for identification. 20

(Paper marked C-4 for identification.)

Q. When you saw Mr. Waldron at the house and took the fixture away, that was the first inkling you had that it was not a solid brick house, is that correct? A. Yes.

Q. And that it did not have triple floors? A. Yes. 30

Q. And that there were no metal laths, that the house was not entirely metal lath, is that correct? A. Yes.

Q. Did you give Mr. Waldron any written notice that you wanted to cancel this contract? A. I don't know whether I—I didn't do it. I told Mr. Cutley on the way home that I didn't want the house, if it was not a solid brick house, I didn't want it and Mr. Cutley took it up then and I did. 40

Juliette V. Cutley—Cross.

n't do anything about it at all. He said he will take this matter up.

Q. Mr. Cutley took care of it from that time on?

A. Yes.

Q. And you personally have not been in touch with Mr. Waldron or the agent after that time?

A. No.

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Q. Did you have any visits by the agents after that time? A. Why, with Mr. Vanony; I think he was at the house, I think he was.

Q. And Mr. Connelly? A. Yes, he was. I think he—I didn't see Mr. Connelly. Mr. Connelly was at the house there, spoke to Mr. Cutley and I didn't see him. I didn't see Mr. Vanony there, I don't think, maybe once at the house, but I didn't see him.

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Q. Where is the fixture now? A. It is in our house.

Q. Where? A. It is in the house up there.

Q. In Morristown? A. Yes.

Q. You know nothing about adjournments for the time of closing, do you? A. No, I do not. Mr. Cutley attended to all that. I was not very well at the time and I did not—he said he didn't want to worry me. He said, "I will take this matter up."

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Q. Did you ever see any ads in the newspaper concerning this building? A. No, I did not.

Q. You did not go to it from an ad there? A. No, I did not.

Q. I thought you mentioned that you saw an ad in the newspaper. A. Yes, but it was not that house; it was a house that was advertised for twenty thousand in a different section on the other side of Wyoming Avenue. When Mr. Borsa showed me the house I said, "No, I won't have it; no, not
40 for twenty thousand."

Matthew Cutley—Direct.

MATTHEW CUTLEY, sworn for defendant.

Direct-examination by Mr. Romine:

Q. Mr. Cutley, you are the husband of Juliette V. Cutley, defendant in this suit? A. I am.

Q. Do you recall the first time that you saw the property at South Orange which is the subject of this litigation? A. I do. 10

Q. When was it? A. I used to go—I went down to Brooklyn quite often and we would always drive through there, through these different streets, and I saw the house in question two or three times.

Q. And how long before this final contract was signed, can you tell us? A. Oh, approximately three or four months.

Q. Did you and Mrs. Cutley visit the property? A. Yes, but we couldn't get in. 20

Q. Were you ever with Mrs. Cutley when she examined the property and they were decorating inside? A. Yes.

Q. How long before this contract was signed? A. It was on a Sunday we examined it. They were not decorating, but the decorating was actually going on. You could see the paint around.

Q. And that was how long before this final contract was signed? A. Oh, the final contract was signed on the 7th of May and that was two or three months before. 30

Q. And were you with Mrs. Cutley when she visited the Pfleuger-Connelly real estate agents of South Orange? A. Yes.

Q. And was that the time that you went over with those agents to the property at 282 Highland Avenue? A. No, not the first time. The first Sunday we went with Mr. Borsa to look at a house south of South Orange Avenue and the following 40

Matthew Cutley—Direct.

Sunday they came up during the week and they said, "We have got something just what you like." And Borsa came with us the first time. The second time Vanony and Borsa came.

Q. Well, is that the Sunday that you looked at the property? A. Yes.

10 Q. Now the subject of controversy? A. Yes. Made an offer on it.

Q. Well, now, who went with you and Mrs. Cutley to see the property on that occasion? A. Both Borsa and Vanony.

Q. And was anything said at that time about the character of the property? A. Yes.

20 Q. What and by whom? A. It was said by Vanony that it was triple floors and metal lath throughout and a solid brick house, the best buy in South Orange.

Q. Had you mentioned the fact or Mrs. Cutley mentioned the fact that you had been in conference with Mr. Waldron about this property before? A. We said we knew about the house. We didn't want to look at that house. We knew that that house was on the market, but they drove us around there; they drove us to two or three others—he showed us a couple of other houses, passed by the Piper houses, and he said, "This is the house you want."

30 Q. And was any offer made at that time? A. Twenty-five thousand dollars.

Q. And what became of the offer? A. Well, he said, "I will go down and I will submit the offer to Mr. Waldron the following night. He went down there the following—he went down there the following night, he said, and saw Mr. Waldron and he was going to throw him out of the house for making such an offer."

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Matthew Cutley—Direct.

Q. Well, what happened after that? A. Well, he—a couple of days elapsed and they came back again; they said, “You can buy that house for twenty-eight thousand.”

Q. Who came and where did they come? A. Borsa and Vanony came.

Q. Where to? A. To my house at South Orange
—at Morristown. 10

Q. And was Mrs. Cutley present at that time?
A. Yes.

Q. What, if anything, did either one of them say? A. Well, Borsa said nothing. Vanony did the talking.

Q. What did he say? A. He said, “This here is a fine house.” He said, “It is solid brick and metal lath,” he said, “and triple floors throughout and it is the best buy in South Orange.” He said, “We
could turn it over at an advance of twenty-five
hundred dollars maybe in a week or so.” He said,
“I would advise you to take it.” “Well,” I said,
to Mrs. Cutley, “In view of the fact that it is a
solid brick house, metal lath and triple floors, I
believe that you could get maybe thirty thousand
dollars for it.” 20

Q. And was that the time that the deposit of
five hundred dollars was made? A. The five
hundred dollars was made that time, May the first. 30

Q. Now, following that what happened that you
know about yourself? A. Well, following that it
seems that they went down with the offer of twenty-eight thousand dollars to Mr. Waldron and they came back and Mr. Connelly came up then to put the deal over finally. They thought they were not heavy enough and they brought Mr. Connelly in on the scene. Mr. Connelly said, “This is a fine buy.” He said, “You are making no mistake at
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Matthew Cutley—Direct.

twenty-nine thousand." He said, "This is a solid brick house, metal lath and triple floors throughout." He said, "We can sell this house at any time for you at an advance of twenty five hundred dollars." He said, "Now, I would advise you to take it." I said to him, "The fact of the matter is
 10 that you are just adding your commission on to the price that Waldron wants, aren't you?" He said, "Why, no, not at all." So I wanted him to split the commission. I said, "I will go half with you on it." I said, "We will give you five hundred dollars." He said, "No. We can see no reason why we should split our commission." And finally we talked it over and signed up for twenty-nine thousand dollars.

Q. Now, did they come back again with the final
 20 contract after that? A. No, they did not. Vanyony did, though. We signed the first contract, the memorandum to purchase the first for twenty-nine thousand dollars, then that was on a Friday and he came back on the seventh and he said, "Well, here it is." He said, "I got you—" He said, "I got it all signed, sealed and delivered, all fixed up." Then he said, "I had a hard job to get Henry Young to take his acknowledgment, to go and see
 30 Henry Young to take his acknowledgment," but, he said, "everything is fine," and he handed Mrs. Cutley the contract to sign. I said, "Let me see that before you sign it." I said, "I see in here that you have not got inserted that the house is solid brick, metal lath and triple floors." He said, "No." He said, "That is all right," he said, "we sign them up this way." He said, "All these conditions are the same." I said, "Is it all right?" He said, "Yes." I said to Mrs. Cutley, "In view of that
 40 fact," I said, "you can sign it."

Matthew Cutley—Direct.

Q. Now, following that, were you down at the property after the signing of the contract with Mrs. Cutley when you had a talk with Mr. Waldron?

A. Yes.

Q. How long after? A. On the tenth of May.

Q. And in that conversation was there anything said about the character of the property? A. Well, first, Mrs. Cutley said to Mr. Waldron, she said, "I would like to get—I would like to use our own fixture from Morristown," she said, "Will you let me have this fixture here?" He said, "Why, certainly." So then we came outside and Mr. Waldron and we got talking about it. I said, "We always tried to get a solid brick house." Well, he said, "This is not a solid brick house." "Well," I said, "Vanony represented it as a solid brick house," but he said "it is just as good." He said, "The exterior is solid brick and you can't break it with a sledge." And I said, "How about the metal lath?" "No, no, there is no metal lath," he says, "no triple floors". Did you ever see a house with triple floors?" I said, "I certainly did."

Q. Well, following that, what happened so far as Mrs. Cutley was concerned? A. Well, on the way home to Morristown she said, "I will not take that house," she said, "It is not as represented," she said, "And I have been tricked into buying it and I will not take it."

Q. What did you do about it after that? Did Mrs. Cutley give you any instructions? A. Well, she said to me, "Try and find out what you can about that sort of houses." And I inquired from several people and they said, "You are stuck. The house is not solid brick, it is not metal lath; none of those houses are solid brick, metal lath or triple floors; the speculators do not build them."

Matthey Cutley—Cross.

Q. Well, did you notify Mr. Waldron that Mrs. Cutley would not take the property? A. I notified Vanony down in Connelly's office in South Orange.

Mr. Romine: That is all.

Cross-examination by Mr. Ritger:

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Q. You said you had friends in Brooklyn? A. Yes.

Q. Did you know them in early 1927? A. My mother-in-law.

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Q. Oh, and how long had you been visiting them going through this particular section? A. Oh, we would go down maybe two or three times a month and oftentimes we would take a ride down to the Essex County Park reservation to see the deer—take the baby down.

Q. And you would turn over and— A. Go down South Orange Avenue and in through those streets, all those streets.

Q. Highland Avenue and Highland Road included. A. Yes.

Q. Did you ever go through there when there were not any houses? A. No, no. I never did, Mr. Ritger.

30

Q. Do you know when those houses were begun up there? A. What?

Q. Do you know when they begun to build those houses? A. No, I don't know a thing about it.

The Court: What has that got to do with it?

Mr. Ritger: I was going to ask when he first went down there to show when the houses were—(interrupted)

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Matthey Cutley—Cross.

The Court: He told you he went down there about a year before he consummated the deal.

Q. You went in the house the year before you—
(interrupted) A. No, no, sir.

Q. When was the first time you went in the house? A. The first time I went in the house was when I went in with Vanony and Borsa. 10

Q. But you made an offer for it before you went in the house. A. No, never made an offer until we got to the living room.

Q. But you called Mr. Waldron? A. Never called Mr. Waldron. I never made an offer to Mr. Waldron, and some time in February we called up and asked him what the price of that house was and if he owned that house in South Orange. He said, "Yes." 20

Q. Yes? A. And what the price was and at that time he mentioned thirty thousand dollars.

Q. Thirty thousand. A. I said, "It is too much for me."

Q. And that ended it? A. And that ended it, yes.

Q. You had not been in the house? A. I had not been in the house, no; saw it from the outside. 30

Q. And the first time you went in the house was with Mr. Borsa? A. And Mrs. Cutley.

Q. And Mrs. Cutley? A. Yes.

Q. What part of the house did you look at? A. Oh, I looked at the whole thing.

Q. Did you go down in the cellar? A. Yes.

Q. Did you go right up to the top? A. Yes.

Q. You went through the whole place? You live in a brick veneer house? A. Yes.

Q. How do you know it is brick veneer? A. 40

Matthew Cutley—Cross.

Huh! How do I know the house I live in is brick veneer?

Q. Yes. A. Because I built it.

Q. You did? A. We built the house.

Q. You had it— A. Yes, we had it constructed.

Q. You were not the contractor, were you? A.

Oh, no.

10

Q. Did you ever try to find out by testing on this particular house as to whether it is brick veneer or whether it is solid brick? A. No, I never tried to find out. I didn't think it was necessary when it was represented it was a solid brick house.

Q. And did you examine the floors at all? A. How could you examine and tell whether there were three floors or not? That couldn't be done unless you bore through it. No, we never did that.

20

Q. And you did not attempt to find out whether they were metal lath? A. No, only from inquiry.

Q. Yes. And those were the three things that you were interested in from the start? A. They were the three things that we thought we were getting value paid. That was the inducing factor to buy the house.

Q. From the first time you met the agent— A. Yes.

30

Q. —until you signed up, you had those three things in mind. A. Yes, after they told us.

Q. And when did you actually sign— Oh, you did not sign the contract. A. I didn't sign anything.

Q. When this contract, marked C-1, was signed by Mrs. Cutley you looked it over and noticed that it did not include those three items. A. I certainly did.

40

Q. And nevertheless you signed, you allowed her to sign it. A. I allowed her to sign it after we got

Matthew Cutley—Cross.

the admission from Vanony that everything was all right. He said, "It is just the same as solid brick, metal lath," or otherwise we would not have signed it.

Q. You had conversations with Mr. Connelly after the signing of this contract, did you not? A. He came up to the house seven or eight times. 10

Q. Seven or eight times? A. Yes.

Q. After the signing of the contract? A. Yes, easily that.

Q. And what was the first occasion of his coming up after the signing of the contract? A. Oh, he was passing, it seems that he goes—he passes by and he had Mrs. Connelly in the car with him one Sunday and some other gentlemen from Orange and they stopped and I went outside and talked to them. 20

Q. Did you ever call him on the telephone? A. Never.

Q. You never called Vanony on the telephone? A. Oh, Vanony, yes. You said did I ever call Connelly.

Q. All right. Connelly. A. No.

Q. Did you ever call Vanony? A. Yes.

Q. When did you call him? A. Oh, I called him that—after we had signed the first memorandum of purchase, asking what was the matter, after we gave them the five hundred dollars he didn't show up. 30

Q. Yes. A. And they finally brought the contract marked C-1? A. Well, I don't know without seeing it.

Q. (Showing witness paper.) A. Yes, that is the contract.

Q. Contract dated May 4th? A. Yes, he brought that up on the 7th one evening. 40

Matthey Cutley—Cross.

Q. Now, after that, when was the first time that you were in touch with Connelly or Vanony or Borsa? A. The first time after that I went down to South Orange to notify them that I would not take the house.

10 Q. You went to their office? A. Met them outside, met Vanony outside.

Q. What day was that? A. Oh, I couldn't tell what day it was, but it was before the expiration—it was prior to June the 4th.

20 Q. And was there any conversation about extending time? A. Well, the conversation was this: I said to Vanony, I said, "We won't take the house. You misrepresented the house. You said it was solid brick, metal lath and triple floors through-out." "Well," he said, "Waldron told me it was." He said "Waldron is getting part; if you don't take it, we will keep the five hundred."

Q. Was there anything said about giving an extension of the contract? A. No extension. The only thing was this, that he said, "Well, why don't you investigate it?" He said, "We will get you an extension of twenty days."

30 Q. To investigate what? A. To investigate whether or not it was solid brick or brick veneer or whether it had metal lath and triple floors in.

Q. Hadn't Mr. Waldron told you that it didn't have those things? A. Yes, he told me.

Q. How could you have investigated? A. But Vanony said to investigate for myself, he said.

Q. And you said, all right, you would? A. Yes. Waldron told Vanony that it had.

Q. And you said you would investigate. A. And I said I would investigate.

40 Q. And you did investigate? A. I did investigate, yes.

Matthey Cutley—Cross.

Q. And the matter had been adjourned for twenty days? A. Vanony said, "We will get you a twenty day adjournment on it or we will get you three months on it," he said, "time is not of the essence."

Q. So you arranged for the 24th? A. I didn't arrange at all. He said—let the twenty days go off. 10

Q. What did you do about the deposit at that time? A. About the deposit?

Q. Yes. A. Well, they had the five hundred.

Q. Yes. A. What could you do?

Q. What did you do? A. What could you do?

The Court: Now, answer the question. Did you do anything or not?

Witness: No, no, we didn't do anything. 20

The Court: Well, then, say so.

Q. Then, later was there an arrangement made with you of any kind for meeting Mr. Waldron to take title? A. There was no arrangement made with me. On the sixth of July—on the seventh of July Mrs. Cutley received a registered letter and I signed for it at the post office.

Q. And— A. And it was special delivery or registered, I am not positive. 30

Q. Letter dated July sixth and marked C-2, is this the letter that she received? A. Yes.

Q. And in answer to that letter what did you do? A. I went down to the office, to your office.

Q. Whose office? A. Pilgrim & Ritger.

Q. And who did you meet there? A. I met you and Mr. Waldron.

Q. And do you remember the conversation that took place at that time? A. You handed me the 40

Matthew Cutley—Cross.

deed. I said, "We don't want it." I said, "I don't want the deed. I don't want the property."

Q. Is that all that took place? A. Oh, well, he talked—Mr. Waldron says, "Well," he said, "I will tell you what to do." He said, "You go," he said, "To Pflueger-Connelly and offer them five hundred
10 dollars and they will jump at the five hundred," he says, "and you will get the credit on the house." He says, "There is no fraud on my part, and, as far as that is concerned," he said, "if there is any fraud, it is with the agent.

Q. Did you— A. He said, "The agents are the ones that misrepresented it." He said, "I am going to see this contract through if I never sell another house."

Q. Did you say anything about your Morristown
20 house? A. Didn't say a word about the Morristown house.

Q. There was no word said in that office about the Morristown house? A. I said we didn't sell our Morristown house.

Q. You did say that? A. You asked me if we sold it and I said we didn't sell it.

Q. Did Mr. Ritger ask you whether or not you were trying to sell it? A. I don't—I don't know
30 whether you did or not, to tell you the truth, I don't know whether you did or not.

Q. Did you say at that time, about two o'clock on the twelfth day of July, words to the effect that "I have not—we have not disposed of our Morristown house, and for that reason do not want to carry both houses." A. Never said a word.

Q. "It would cost too much money?" A. No. Never said a word.

Q. And did you at that time use words to the
40 effect that if Mr. Waldron forced you into complet-

Matthew Cutley—Cross.

ing this contract you would get an extension of time by putting in the defense that there was misrepresentation and fraud? A. Never said a thing—that is Connelly's story.

Q. And that it would take at least six months to—(interrupted) A. Never said it at all.

Q. No conversation about—(interrupted). A. 10
No conversation using that as a defense.

Q. And there was no conversation at that time to the effect that the sale of the Morristown house was all that held up the closing of the transaction of the 282 Highland Road property? A. That never had anything to do with holding up the transaction because I had arranged to get the money, but I couldn't get it when it was not a solid brick house.

Q. Did you use the words that you wanted the house? A. No, I didn't—never used the words. 20
What did I want it for?

Q. Was there any conversation then about an additional deposit? A. Waldron wanted twenty-five hundred dollars.

Q. And what did you say? A. I said, "Nothing doing."

Q. Didn't you answer that you would see if you could get it? A. I never answered that at all. 30

Mr. Ritger: That is all.

Mr. Romine: That is all we have.

The Court: Is that the case? Well, how have you connected Mr. Waldron with these alleged misrepresentations?

(Discussion).

The Court: Do you want to put any witnesses on the stand?

Charles A. Borsa—Direct.

Mr. Ritger: I would like to make a motion now—

The Court: If you make a motion and I deny it, you cannot put any witnesses on.

Argument.

10 The Court: I am inclined to think that no fraud has been shown sufficient to hold Mr. Waldron, but if you want to put on any witnesses, all right.

Mr. Ritger: Mr. Waldron.

The Court: There is no use of calling Mr. Waldron to have him say that he didn't say this, because they admit that he did not make any such representations. They say it was Mr. Vanony, or whatever the man's name is.

20 Mr. Ritger: All right. Never mind, then, Mr. Waldron.

Mr. Borsa.

CHARLES A. BORSA, sworn for Complainant.

Direct-examination by Mr. Ritger:

Q. Mr. Borsa—

30 The Court: Is this man going to deny he made such representations?

Mr. Ritger: Yes, your Honor.

The Court: All right.

Q. Mr. Borsa, you took Mr. and Mrs. Cutley up to see the property, 282 Highland Road? A. Yes.

Q. How many times? A. Twice.

40 Q. On these two occasions—was anything said on those two occasions about the construction of

Charles A. Borsa—Cross.

the house? A. Not—I never mentioned anything about the construction other than the general appearance. The only thing was said, there was an alcove there and Mrs. Cutley said she would like to have an arch put in there. I said, “Probably we might be able to induce Mr. Waldron to put that in.” 10

Mr. Ritger: That is all.

The Court: Well, now, there is your flat denial. That is all you want of him.

Mr. Ritger: That is all.

Cross-examination by Mr. Romine:

Q. Who went along with you on these occasions besides Mr. and Mrs. Cutley? A. I was alone the first time. The second time Mr. Vanony was with me. 20

Q. And were you with the people all of the time or did you remain outside? A. No, sir; I was with them all the time.

Q. And do you know whether Mr. Vanony had any conversations with Mr. and Mrs. Cutley when you were not present? A. I was present all the time we were there.

Q. How did you go up there, in an automobile? 30
A. Yes.

Q. Well, now, did you go out in the car at any time while they were at the building? A. No, sir.

Q. Did they go upstairs? A. Yes, sir.

Q. Where did you go? A. With them.

Q. You did not miss them for a minute, is that right? A. Didn't miss them for a minute. I was with them all the time they were there.

Q. Did you come up to Morristown with them? 40
A. With who?

Charles A. Borsa—Cross.

Q. Mr. Connelly. A. Yes, sir.

Q. Where did you remain then? A. In the car.

Q. And Mr. Connelly went in the car? A. With Mr. Vanony.

Q. That was the occasion of the second contract?

A. That was the occasion of the signing of the second contract.

10 Q. Increasing the price to twenty-nine thousand.

A. Yes, sir.

Q. When you went back to the office did Mr. Vanony have a talk with Mr. and Mrs. Cutley? A. When we went back to the office?

Q. Yes, that first occasion. That first occasion when you went to the property. A. No. We left them at that time and they went on and drove home.

20 Q. Do you know whether they saw Mr. Vanony that after—after that at the office or at any other place? A. Well, I couldn't say. I know he must have seen them, because they went on with the business.

Q. So that Vanony went on with the business on occasions when you were not present? A. Yes.

Mr. Romine: That is all.

Witness: After that.

30 Mr. Ritger: That is all.

The Court: That is all.

Mr. Ritger: Mr. Vanony,

Frederick L. Vanony—Direct.

FREDERICK L. VANONY, sworn for Complainant.

Direct-examination by Mr. Ritger:

Q. You are the Mr. Vanony that has been referred to as connected with Pflueger-Connelly Company? A. Yes.

10

Q. Do you remember the first time that you met Mr. Cutley?

The Court: If you are going to deny these alleged misrepresentations, just deny them.

Q. Did you ever represent to Mr. Cutley or Mrs. Cutley that this house was of solid brick construction and that it had triple floors and that it had metal lath throughout? A. I did not, sir. I never had the occasion to.

20

The Court: Well, now, that is the end of that.

Cross-examination by Mr. Ritger:

Q. Now, what did you tell Mrs. Cutley about the character of the house? A. I never went into details of the construction of that house, because it was not necessary. Mr. Cutley had seen the house months prior to the time I met Mr. and Mrs. Cutley in the building, Mr. Cutley represented to me that he knew all about the house, so he said, "Van, it is not a question of the house," he said, "it is a question of the price," he says, "because I have made an offer on the house," he says, "and Mr. Waldron has refused it." "Now," I said, "What was the offer you made?" He said, "Twenty-five thousand dollars." "Well," I said, "that is rather

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Frederick L. Vanony—Cross.

ridiculous for property of this kind, because it is a block of thirty, thirty-five thousand dollar homes," and Mr. Cutley said, "Well, what can you get it for?" "Well, now," I said, "I can't say, but if you will leave it to me, I will do the best I can. I will see what I can purchase the house for." The
 10 sole, only conversation relative to that premises was price, as Mr. Cutley and Mrs. Cutley were thoroughly familiar, in fact, more familiar with the house than I was, because that was the first time I had ever been on the premises.

The Court: Now, I think that will do for an answer. You have answered it.

Q. Let me ask you this: Did you make out the first memoranda agreement with Mrs. Cutley? A.
 20 I did, sir.

Q. Do you remember Mr. Cutley telling you to put that clause that it was an all brick house? A. Mr. Cutley never told me anything to do. I made the contract of my own volition and handed it to Mr. Cutley and Mrs. Cutley when it was completed for signature— No instructions from anybody.

Q. Did you put it in? A. Did I put what in, sir?

Q. That clause. A. I don't know. If I see the
 30 contract, I will recognize it. You are talking of the preliminary contract now?

Q. Yes. A. (Witness nods no.)

Q. Do you remember going to Morristown interviewing Mr. Cutley and Mr. Hegarty, when a motion came up to dismiss the answer in this case? A. Mr. Cutley called me up to Morristown to see him. I went up to see Mr. Cutley.

Q. Did you see Mr. Hegarty there? A. I saw
 40 some gentleman. I don't know what his name was.

Frederick L. Vanony—Cross.

Q. Mr. Hegarty. Is that the gentleman? A. That is the gentleman.

Q. Didn't you tell Mr. Hegarty at that time that you had represented the house to be a solid brick house with triple floors and metal lath through-out? A. The question was never asked me by Mr. Hegarty.

10

Q. Didn't you have an affidavit which had been prepared by Mr. Ritger or someone in Pilgrim and Ritger's office with relation to the subject matter? A. I did, sir.

Q. And didn't you tell Mr. Cutley in Mr. Hegarty's presence that that affidavit was not right? A. I said nothing about the affidavit except that the Pilgrim & Ritger folks wanted me to sign an affidavit, which I was not going to sign as I referred it to my own attorney and he said, "Sign nothing. When the case comes up, if it does, you appear as a witness and tell the story."

20

Q. Now, you did refer in that conversation, to your own account, didn't you? A. I did.

Q. And isn't it a fact after you had this conversation with Mr. Hegarty and Mr. Cutley, that Mr. Hegarty said that—first, let me ask you: Didn't you ask Mr. Hegarty to draw up an affidavit and to incorporate in that affidavit the allegation that you had represented this house to be solid brick, triple floors and metal lath? A. I had no occasion to draw—(interrupted)

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The Court: Did you or did you not?

Witness: I did not, sir.

Q. And didn't Mr. Hegarty say that "he was not in partners with me, but had an office in connection with my offices" and that the best thing for

40

Frederick L. Vanony—Cross.

you to do if you had your own attorney was to have your own attorney draw up an affidavit which set forth the facts? A. Mr. Cutley asked me to bring that affidavit that I was asked to sign over to his attorney, Mr. Hegarty, which I did. I drove over to Mr. Hegarty's house with Mr. Cutley and he said, "Will you show this affidavit to my attorney?" I said, "Well, there is no reason why I shouldn't," and that is all there was to the entire transaction. Mr. Hegarty says, "Are you going to sign it?" I said, "No, sir; I am not going to sign any affidavit from anybody."

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20 Q. Didn't Mr. Cutley question you in the presence of Mr. Hegarty about the first memoranda agreement which was signed, wherein that clause as to the solid brick house was incorporated by you? A. No, sir; there was not— (interrupted).

30 Q. Didn't you say at that time that you were unable to get the original signed contract, but that you had a copy that they used or a form that they used and didn't you give that to Mr. Cutley? A. Mr. Cutley asked me for a copy of the original contract, and I said, "That is in the office and any time you care to go down to Pflueger & Connelly's office, they will be glad to show it to you." He says, "Have you got a blank form of the contract I signed?" I said, "I think I have." We always carry those, the agents carry them. I said, "Yes," so I handed him a blank form.

Q. And this is the one you handed him? A. Well, I don't know. I handed him a blank form of contract.

Mr. Romine: That is all.
(Discussion).

Austin J. Waldron—Recalled—Direct.

AUSTIN J. WALDRON, recalled.

Examined by Mr. Ritger:

Q. On July 12th, the date that you met Mr. Cutley at the office of Pilgrim & Ritger, do you remember the conversation that was had with Mr. Cutley? A. I remember some.

10

Q. At the beginning of the conversation what did he say was the reason for not taking the title? A. He said, "I am sorry—"

Mr. Romine: I object to that, because Mrs. Cutley said she told her husband to tell him that she would not take the title because it was not as represented. Now, Mr. Cutley had no further authority in the matter to do that, and, if he went down and volunteered something of his own accord, it would not be material.

20

The Court: I agree with you. I do not think that is material.

Mr. Ritger: I withdraw the witness.

Mr. Romine: May I, while the witness is on the stand, ask a question or two?

The Court: Yes, if you make him your own witness.

30

Direct-examination by Mr. Romine:

Q. This contract that has been offered in evidence, Mr. Waldron, between the Waldron, Inc., and Juliette V. Cutley, who prepared that contract? A. I don't know.

Q. Well, did you know that it was being authorized? A. Yes.

Q. You had authorized it to be done? A. No.

40

Austin J. Waldron—Recalled—Cross.

Q. You had agreed as to the price? A. Yes.

Q. And you had signed the contract before it was signed by Mrs. Cutley? A. No.

The Court: Well?

Witness: I don't know.

10 Q. You don't know. Do you remember who the contract was given to for signature by Mrs. Cutley? A. No, I don't, because Mrs. Cutley was not with—I never seen Mrs. Cutley.

Q. But you had been negotiating back and forth with—A. No, sir, not me.

Q. (Continuing) —with the Pflueger-Connelly and Vanony, had you not? A. Mr. Connelly.

Q. Mr. Connelly and Vanony was connected with it? A. Yes, sir.

20 Q. Mr. Vanony was connected with Mr. Connolly? A. Yes, Mr. Connelly or Vanony.

Q. Did you know Mr. Vanony was going up to get the signature of Mrs. Cutley? A. I didn't know that at all. I didn't know who was going up there, whether it was Mr. Connelly, Mr. Vanony or who.

Q. But you knew somebody was going up? A. I knew that somebody was taking care of it, yes.

30 Q. And they were taking care of it for you, weren't they? A. Yes.

Examined by Mr. Ritger:

Q. Did you authorize either Mr. Connelly or Mr. Vanony or Mr. Borsa to represent that house as having a solid brick construction, triple floors or metal lath? A. I couldn't do that, because it isn't. Never said it.

Mr. Ritger: That is all.

40 The Court: What is the use of that? They

William A. Hegarty—Direct.

admit the representations were by the agent.

Mr. Ritger: That is all.

The Court: Is there anything else?

Mr. Romine: Yes. Mr. Hegarty.

WILLIAM A. HEGARTY, sworn for Defendant. 10

Direct-examination by Mr. Romine:

Q. Mr. Hegarty, you are a counsellor-at-law of the State of New Jersey? A. I am.

Q. And you remember an occasion where Mr. Cutley came to your home with Mr. Vanony? A. I do.

Q. And was that at about the time the question was up on motion to strike out the answer in this case? A. It was. 20

Q. Did you have any conversation with Mr. Vanony or was there any conversation between Mr. Cutley and Mr. Vanony in your presence? A. Well, briefly stated, I was surprised when Mr. Cutley and Mr. Vanony came to the house. We sat in our living room—my living room, and, after being introduced to Mr. Vanony by Mr. Cutley, Mr. Vanony produced an affidavit and said that he had gotten it from some office, I don't know whether it was Connelly's office or Pilgrim & Ritger's, and they wanted him to sign it and he said, no, that he borrowed it to go over and have his attorney pass on it first, and they said to him, "Well, what about it?" And he said the contents of that affidavit were absolutely untrue. He said he wanted to be fair and honest with Mr. Cutley and make 30 40

William A. Hegarty—Direct.

an affidavit stating exactly what were the facts and I told him then and there that if he had a personal attorney that I would commend him to the care of that attorney and the drawing of that affidavit.

10 Q. Was there anything said by him in that conversation as to what the facts were? A. Yes. It had to do with the statements made by Vanony as to the construction of the house, that is, solid brick, the flooring and the metal lath.

Q. Well, what did Mr. Vanony say in reference to that as to his representations? A. Mr. Vanony said it was made, but the fact of the matter was that the house was not of that construction.

20 Q. And who did he say had made them? A. That he made the—it was his sale.

Q. And he wanted to make an affidavit which would set forth those facts? A. That is true.

Q. And you commended him to his own attorney? A. I did.

Examined by Mr. Ritger:

Q. Did he make that affidavit? A. No, sir.

Mr. Ritger: That is all.

30 Witness: You mean did he make—(interrupted)

Q. He did not bring any affidavit to you? A. He did bring an affidavit.

Q. Signed? A. He had an affidavit that had been prepared to sign either by your office or in Mr. Connelly's office, which set forth—(interrupted)

40 Q. I am not referring to that. Did he bring any signed affidavit to you? A. There was no signed affidavit.

Matthew A. Cutley—Recalled—Direct.

Mr. Ritger: That is all.

Witness: He just brought the—(interrupted)

The Court: That is all.

Witness: —unsigned paper.

10

MATTHEW A. CUTLEY, recalled.

Examined by Mr. Romine:

Q. You remember the occasion of your going to Mr. Hegarty's home with Mr. Vanony? A. I do.

Q. And what happened there? A. Well, Mr. Vanony took out an affidavit that he said had been prepared by Connelly and Pilgrim & Ritger's office, and, he said, "It is all a bunch of lies," he said, "And I want to make an affidavit for you," he says, "I misrepresented the house," he said, "and I don't feel," he said, "that I am doing the right thing by signing this affidavit."

20

Q. And did he say anything then and there as to what his misrepresentations had been? A. Did he say what his representations had been, there to Mr. Hegarty? A. Yes, he said in the presence of Mr. Hegarty, he said, "I represented this house as a solid brick house, metal lath and triple floor."

30

Q. What did Mr. Hegarty say about the preparation of that affidavit, if anything? A. Well, Mr. Hegarty said, "Now," he says, "I haven't—" he said, "I am not in partners with Mr. Romine," he said, "but I have adjoining offices, and if you want to draw up an affidavit that will satisfy yourself, go to your own attorney."

Mr. Romine: That is all.

40

*Matthew A. Cutley—Recalled—Cross.**Examined by Mr. Ritger:*

Q. How did Mr. Vanony happen to be up at your place that time? A. Mr. Vanony came up to my house that night.

10 Q. Voluntarily? A. Voluntarily. He was up—
Go on.

Q. No telephone call? A. No telephone call. He was after me seven or eight times. He was up there the night before last, too.

Q. What did he want? What did he want? A. Well, he wanted to testify this way or that way. He didn't know what he wanted, and I wouldn't see him.

Q. Did he want any money? A. Yes, he wanted money.

20 Q. How much did he want? A. He wanted a thousand dollars.

Q. And how much did you offer him? A. I offered him nothing. I said, "I will have you indicted."

Mr. Ritger: That is all.

Mr. Romine: That is all.

The Court: That is all.

Mr. Ritger: Mr. Vanony.

30

FREDERICK L. VANONY, recalled:

The Court: He has already told his story.

Mr. Ritger: Just relative to this conversation, I want to give him a chance.

The Court: What do you call this, sur-sur-rebuttal?

40

Mr. Ritger: Very much like it.

Frederick L. Vanony—Recalled—Direct.

Q. Mr. Vanony, how did it happen you went up to Mr. Cutley's place that evening? A. I had a friend that lived in Morristown and Mr. Cutley called up this particular friend and asked her to get in touch with me to come up to see him—very important.

Q. And you saw him? A. I came up to Morristown on that telephone call, yes. 10

Q. You had a conversation with him about an affidavit, did you? A. I did, sir.

Q. Did he make any proposition to you? A. He certainly did.

Q. What was his proposition? A. He said he would give me a hundred dollars if I would sign an affidavit and a hundred dollars if he won his case, that is, if the motion was thrown out—his motion was dismissed, or some technical expression. I said, "Mr. Cutley, I am not after any money; the only thing I am interested in is the ten hundred and twenty-five dollar commission which my firm is entitled to. If they get that, I will get my ten per cent." 20

Q. Are you employed by Pflueger-Connelly now? A. No, sir.

Examined by Mr. Romine:

Q. You have been trying to get in touch with Mr. Cutley in the last few days, haven't you? A. I have not. Mr. Cutley telephoned down to have me come up and see him. 30

Q. I am talking about the last two or three days? A. I am talking about the last two or three days; Mr. Cutley has left word for me to come up and see him. I had an appointment with him yesterday that he made himself in Morristown at twelve o'clock. 40

Frederick L. Vanony—Recalled—Cross.

10 Q. Isn't it a fact that you have been calling up the house in Morristown trying to make an appointment with Mr. Cutley on your initiative? A. The only telephone call was yesterday when I spoke to Mrs. Cutley, asking where was Mr. Cutley, "he made an appointment for twelve o'clock with me to meet me. He isn't here and I cannot wait. What does he want?"

Q. Isn't it a fact that that telephone conversation you had with Mrs. Cutley was because of the fact that you had tried to meet Mr. Cutley on a prior occasion and Mr. Cutley didn't show up? A. No, sir, absolutely not, sir.

20 Q. All right. A. That was that particular twelve o'clock date. That was yesterday Mr. Cutley didn't show up and I called his house and I couldn't wait. It was then twelve thirty. I made no appointment with Mr. Cutley.

Mr. Ritger: Your Honor, I find I did not put Mr. Connelly on the stand. He is also one of the agents.

WILLIAM J. CONNELLY, sworn.

30 *Examined by Mr. Ritger:*

Q. Did you ever represent, Mr. Connelly, to Mrs. Cutley, or her husband, that this building was of solid brick construction, triple floors and metal lath? A. I did not.

Mr. Ritger: That is all.

Mr. Romine: No questions.

The Court: That is all.

40 The Court: Now, my feelings about this case, as I said before, are that I cannot see

William J. Connelly—Direct.

that Mr. Waldron has been connected in any way with these misrepresentations, but I am perfectly willing to receive memorandums from counsel, if you want to submit them.

Mr. Romine: I would like to do that, your Honor.

10

The Court: Then, there are two points; one is whether he is responsible under the law, assuming that the agent did make the misrepresentation; and the other is, of course, a question of fact, whether the representations were made.

I cannot see that you have shown a proper agency between these agents and Mr. Connelly. Mrs. Cutley went herself to these people and they said, "Yes, we have got a house; it belongs to Waldron," and he didn't tell them to sell the house at all. He came to him and asked him if he would sell it and he said, "Yes, I will sell it for twenty-nine thousand dollars." And what they said to induce these people to buy at twenty-nine thousand, I don't think can be attributed to Mr. Waldron as fraud.

20

Mr. Romine: I have some cases which I have tried to follow in bringing out the evidence.

30

The Court: All right.

Mr. Ritger: Also there is the other question as to whether they had the right, even if the representations were made, to rely on them, there being the opportunity to examine the property.

The Court: You can set that up in your brief also.

40

Opinion.

Filed Jan. 22, 1929.

IN CHANCERY OF NEW JERSEY.

| | | | |
|----|---|---|----------|
| 10 | Between AUSTIN J. WALDRON, INC., Complainant, and JULIETTE V. CUTLEY, Defendant. | } | Opinion. |
|----|---|---|----------|

PILGRIM & RITGER, for Complainant.

ELMER W. ROMINE, ESQ., for Defendant.

20 CHURCH, Vice Chancellor:

This is a bill for the specific performance of a contract for the sale by the complainant to the defendant of premises on Highland Road, South Orange.

30 Defendant resists, alleging the following misrepresentations: There were no triple floors; there was no metal lath and that the building was not solid brick construction. It is admitted that the building does not comply with these alleged representations. It is also admitted that the final contract of sale does not contain any of these alleged representations.

40 The facts appear to be that defendant Mrs. Cutley, was looking for a home. She went to Pflueger Connelly Company and the representative of this real estate concern showed her various houses. Mrs. Cutley then saw the house in dispute and the

Opinion.

agents said "We can get you that house cheaper." There were negotiations with the owner, Mr. Waldron, who refused several offers and finally signed the agreement of sale which as I have said, contains none of the alleged representations.

There are, therefore, two aspects of this case to be considered.

10

First, were they made at all by anybody? The testimony, as I read it, leads me to believe they were not. Mrs. Cutley, a very temperamental and excitable witness, looked over the property carefully and says, "I was under that impression, that all those houses in that street were solid brick," and again, "I thought I was getting a solid brick house." There is no direct proof that Connelly and Pflueger misrepresented the house in any way.

20

Assuming that they did, can this be charged to Mr. Waldron, who signed the agreement of sale without any of these alleged representations. Connelly and Pflueger were not his agents—they were engaged by Mrs. Cutley.

Even if they were they had no right to bind him by misrepresenting facts, when he had no knowledge of the misrepresentations. 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. There is no need of citations for this proposition. No instructions of any kind have been proven as between Connelly and Pflueger and Waldron.

30

I will advise a decree directing specific performance.

40

Final Decree.

IN CHANCERY OF NEW JERSEY.

| | | | |
|----|---|---|--------------------------------|
| 10 | Between AUSTIN J. WALDRON, INC., Complainant, and JULIETTE V. CUTLEY, Defendant. | } | On Bill, Etc. Final Decree. |
|----|---|---|--------------------------------|

20 This matter coming on to be heard in the presence of Frederic C. Ritger of Pilgrim and Ritger, Solicitors of the Complainant, and Elmer W. Romine, Solicitor of the Defendant, 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 the complainant, Austin J. Waldron, Inc. was, on the 4th day of May, 1928, seized in fee simple of all that certain lot, tract, or parcel of land and premises situate, lying and being in the Village of South Orange, in the County of Essex, and State of New Jersey

30 BEGINNING at a point on the southwesterly side of Highland Road distant 1014.83 feet westerly from Ridgewood Road; thence running along Highland Road north 45 degrees 09 minutes 30 seconds west 80 feet to a point; thence south 44 degrees 50 minutes 30 seconds west 117 feet to a point; thence south 45 degrees 9 minutes 30 seconds east and parallel with the first course, 80 feet to

40

Final Decree.

a point; thence north 44 degrees 50 minutes 30 seconds east 117 feet to the point and place of BEGINNING. Subject to existing valid restrictions of record, and zoning ordinance of the Village of South Orange;

That on said 4th day of May, 1928, the said complainant entered into an agreement in writing with the defendant, Juliette V. Cutley, wherein and whereby said complainant agreed to convey the said lands and premises by deed of warranty on or before the 4th day of June, 1928, to the said Juliette V. Cutley, and the said Juliette V. Cutley agreed to pay therefore the sum of \$29,000 by the payment of \$500.00 which was paid at the execution of said agreement, and by the payment of the remainder of the purchase price upon the delivery of said deed by the payment of \$13,500 in cash and by assuming a first mortgage of \$15,000 then a lien on said premises.

And it further appearing to the satisfaction of the court that the said defendant has refused and failed to perform the said agreement on her part, and that the said complainant has always been and still is ready and willing to comply in all things with the terms of the said agreement on its part,

And the court being of the opinion that the complainant is entitled to the specific performance of the aforesaid agreement as prayed for by it in its bill of complaint filed herein;

It is on this 1st day of February, 1929, ORDERED, ADJUDGED AND DECREED, that the said agreement be in all things specifically performed by the said defendant, and that the said defendant, on the 15th day of February, 1929, at the hour of

Final Decree.

ten o'clock in the forenoon at the office of Pilgrim and Ritger, 43 Lincoln Park, Newark, New Jersey, pay to the said complainant the sum of \$29,000 with interest thereon from the 12th day of July, 1928, together with the taxed costs of this suit as hereinafter allowed, together with taxes, insurance and such other adjustments as are provided for in said contract of purchase, less the amount of principal due on the mortgage therein mentioned originally \$15,000, which mortgage has now been reduced to \$14,500, making a total due the complainant of \$14,000 besides taxes, insurance, and interest as herein provided, together with the taxed costs of this suit as hereinafter allowed upon the delivery at the same time and place by said complainant to said defendant, Juliette V. Cutley, of a warranty deed, duly executed and proved by the said complainant, Austin J. Waldron, Inc. conveying to the said Juliette V. Cutley the said lands and premises in fee.

It is further ORDERED, ADJUDGED AND DECREED that if, at the time and place hereinbefore mentioned, the said defendant should fail or neglect to pay the said sum of \$29,000 with interest as hereinbefore mentioned, together with said taxed costs as hereinbefore mentioned, together with taxes, insurance and such other adjustments as are provided for in said contract of purchase, less the amount of principal due on the mortgage therein mentioned, originally \$15,000., which mortgage has now been reduced to \$14,500, making a total due the complainant of \$14,000 besides taxes, insurance and interest as herein provided,

Final Decree.

shall be and become and are hereby impressed as a lien upon the said lands and premises in favor of the said complainant, to the end that said land and premises may be sold, pursuant to law, and under the direction of this court, to satisfy such lien, and that in case a deficiency should arise upon such sale, the said defendant may be ordered by this court to pay such deficiency. 10

It is further ORDERED that the said defendant pay to the said complainant the costs of this suit to be taxed, including a counsel fee of Three Hundred and Fifty Dollars which is hereby allowed to said complainant.

It is further ORDERED that true but uncertified copies of this decree and of said taxed costs be served on the solicitor of said defendant within 5 days after the date hereof. 20

E. R. WALKER,
C.

Respectfully Advised,
ALONZO CHURCH,
V. C.

I hereby approve of the foregoing Decree as to form.

ELMER W. ROMINE, 30
Solicitor of Defendant.

Exhibit C-1.*Contract for Sale of Property.***REQUIREMENTS ON CLOSING TITLES.**

Insurance policies and duplicates; Tax and Water Receipts, Leases, Deeds or Agreements relating to premises; Interest receipts and receipts
 10 for principal payments on mortgages should be produced.

If the grantor is married, both parties must join in the execution of the deed.

The Purchaser should have cash or a certified check drawn to his order.

THIS AGREEMENT,

made this Fourth day of May, 1928, Between A.
 20 J. Waldron Incorporated, of the City of Newark, in the County of Essex and State of New Jersey hereinafter described as the seller

And Juliette V. Cutley
 of the City of Morristown in the County of Morris and State of New Jersey hereinafter described as the purchaser

WITNESSETH, That the seller agrees to sell and convey, and the purchaser agrees to purchase
 30 all that lot of land, with the buildings and improvements thereon, situate in the Village of South Orange, County of Essex, State of New Jersey, described as follows: No. 282 Highland Road, South Orange, New Jersey.

This property is conveyed subject to the zoning ordinances of the Village of South Orange, New Jersey and restrictions of record, if any.

Thirteen Thousand, Five Hundred and 00/100
 40 Dollars Payable as follows:

Exhibit C-1.

Five Hundred and 00/100 Dollars on the signing of this contract, the receipt of which is hereby acknowledged.

Thirteen Thousand, Five Hundred and 00/00 Dollars in cash on the delivery of the deed, as hereinafter provided.

Subject, however, to a First Mortgage of \$15,000 at present a lien on the premises, and paying the same according to the terms thereof. 10

All fixtures and personal property, such as shades, chandeliers, electrical fixtures, gas ranges, etc., appurtenant to or used in connection with said premises are included in this sale.

This sale covers all right, title and interest of the seller of, in and to any land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining said premises, to the center line thereof, and all right, title and interest of seller in and to any award made or to be made in lieu thereof, and in any award for damage to said premises by reason of change of grade of any street; and the seller will execute and deliver to the purchaser, on closing of title, or thereafter, on demand all proper instruments for the conveyance of such title and the assignment and collection of any such award. 20 30

Said premises are sold subject to the provisions of Zoning Ordinances or restrictions and regulations affecting the construction and use of buildings, adopted or imposed by the State of New Jersey or municipality thereof affecting said premises.

The deed shall be a full covenant warranty deed in the proper form, and shall be duly executed and acknowledged by the seller, at the seller's expense, to convey to the purchaser, or the purchaser's as- 40

Exhibit C-1.

signs, the absolute fee of the above premises, free of all encumbrances, except as above stated.

The deed shall be delivered and title passed at the office of Henry Young, Jr. 786 Broad Street, Newark, New Jersey, on or before June 4th, 1928, at 10 o'clock, forenoon.

10 Taxes, Rents, water rents, insurance premiums and interest on mortgages if any, are to be apportioned.

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

20 If there be a water meter on the premises, the seller shall furnish a reading to a date not more than thirty days prior to the time herein set for closing title and the unfixed meter charge for intervening time shall be apportioned on the basis of such last reading.

30 All notes or notices of violation of law or municipal ordinances, orders or requirements noted in or issued by any State or Municipal Department, Board, Commission or other authority, having jurisdiction against or affecting the premises at the date hereof, shall be complied with by the seller and the premises shall be conveyed free of same,

40

Exhibit C-1.

and this provision of this contract shall survive delivery of the deed hereunder.

The risk of loss or damage to said premises by fire, until the delivery of the deed, is assumed by the seller.

The purchaser is to pay all assessments levied and imposed after the date hereof. 10

The Stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

The purchaser binds himself to pay the consideration in the manner aforesaid.

The seller agrees that Pflueger Connelly Company of South Orange, N. J., brought about this sale and agrees to pay them the broker's commission in full therefor of 3½% of the purchase price on passing of title. 20

Witness, the hands and seals of the above parties:

A. J. WALDRON, INC.
A. J. WALDRON (Seal)
President.

In presence of:

F. L. Danory.

JULIETTE V. CUTLEY (Seal) 30

Attest

Henry Young, Jr.
Secretary.

Exhibit C-1.

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

Be it Remembered, That on this Seventh day of
 May, the year of our Lord One Thousand Nine
 Hundred & twenty-eight before me, the subscriber,

A Notary Public of New Jersey County
 10 personally appeared

A. J. Waldron

who being by me duly sworn, doth depose and
 make proof to my satisfaction, that he well knows
 the corporate seal of

A. J. Waldron, Inc.

the grantors mentioned in the within Indenture;
 20 that the seal thereto affixed is the proper corporate
 seal of the said company; that the same was so
 affixed thereto and the said deed signed and deliv-
 ered by Henry Young, Jr., who was at the date and
 execution thereof, the Secretary of said company,
 in the presence of the said deponent, as the volun-
 tary act and deed of the said company, and that
 the said deponent thereupon signed the same as
 subscribing witness.

A. J. WALDRON.

30 Sworn and subscribed before me }
 on the day and year aforesaid. }

F. L. Vanony,

Notary Public of New Jersey

My Commission expires Feb. 16, 1930.

Exhibit C-2.**PILGRIM AND RITGER**

Counselors at Law

43 Lincoln Park

Newark, N. J.

Phone 7500 Mitchell

Charles C. Pilgrim

Frederic C. Ritger

10

 John A. Karl

July 6, 1928

Mrs. Juliette V. Cutley,

Morris Av.,

Morristown, N. J.

Dear Madam:

Please take notice that under your contract with
A. J. Waldron, Inc. for the purchase of property
282 Highland Road, South Orange, the above com-
pany hereby fixes Thursday, July 12th, at the of-
fice of Pilgrim and Ritger, 43 Lincoln Park, New-
ark, at two o'clock in the afternoon as the time and
place for the delivery of its deed to you. At that
time and place this company will have its deed
ready for presentation. 20

The change of place for delivery of deed is made
for the reason that the office of Henry Young, Jr. 30
is now longer at 786 Broad St., Newark.

Time is hereby made of the essence of this con-
tract and if your part is not performed on that
day this company will take proceedings against
you at once.

Yours very truly,

A. J. WALDRON, INC.

A. J. WALDRON,

Pres. 40

FR/MK

Exhibit C-3.

THIS INDENTURE, Made the fourth day of June in the year of our Lord One Thousand Nine Hundred and twenty-eight

10 Between Austin J. Waldron, Inc. a Corporation of the State of New Jersey, having its principal office in the City of Newark, Essex County, of the first part;

AND Juliette V. Cutley, of the City of Morristown, in the County of Morris and State of New Jersey, of the second part;

20 WITNESSETH, That the said party of the first part, for and in consideration of One Dollar (\$1.00) and other good and valuable considerations, lawful money of the United States of America, to the Corporation aforesaid well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, remise, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, remise, release, enfeoff, convey and confirm to the
30 said party of the second part, and to her heirs and assigns, forever, ALL that certain lot, tract, or parcel of land and premises, situate, lying, and being in the Village of South Orange, in the County of Essex, and State of New Jersey, more particularly described as follows:

40 BEGINNING at a point on the southwesterly side of Highland Road distant 1014.83 feet westerly from Ridgewood Road; thence running along Highland Road north 45 degrees 09 minutes 30

Exhibit C-3.

seconds west, 80 feet to a point; thence south 44 degrees 50 minutes 30 seconds west 117 feet to a point; thence south 45 degrees 9 minutes 30 seconds east and parallel with the first course, 80 feet to a point; thence north 44 degrees 50 minutes 30 seconds east 117 feet to the point and place of BEGINNING.

10

This conveyance is made subject to existing valid restrictions of record, if any, also to zoning ordinances in the Village of South Orange.

This conveyance is made subject to a first mortgage of \$15,000.00 held by the Prudential Insurance Company which the party of the second part assumes and agrees to pay.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

20

And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns, to her own proper use, benefit and behoof forever.

30

And the said Austin J. Waldron, Inc. for itself, its successors in office or assigns does covenant, grant and agree, to and with the said party of the second part, her heirs and assigns, that the said Austin J. Waldron, Inc. at the time of the sealing

40

Exhibit C-3.

and delivery of these presents, was lawfully seized in its own right of a good, absolute, and indefeasible estate of inheritance in fee simple, of and in all and singular the above granted, bargained and described premises, with the appurtenances, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in
10 manner and form aforesaid.

And that the said party of the second part, her heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said party of
20 the first part, its successors in office or assigns, or of any other person or persons lawfully claiming or to claim the same.

And that the same now are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature and kind soever, except as hereinbefore mentioned.

And also, that the said party of the first part
30 and its successors in office or assigns, and all and every other person or persons whomsoever, lawfully or equitably deriving and estate, right, title or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for it or them, shall and will at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, her heirs and assigns, make, do and
40 execute, or cause or procure to be made, done or

Exhibit C-3.

executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted, in and to the said party of the second part, her heirs and assigns forever, as by the said party of the second part, her heirs or assigns, or her counsel learned in the law, shall be reasonably advised or required. 10

And the said Austin J. Waldron, Inc. its successors in office or assigns, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, her heirs and assigns, against the said party of the first part, and its successors in office or assigns, and against all and every person or persons whomsoever, lawfully claiming or to claim the same, shall and will Warrant and by these presents forever Defend. 20

In Witness Whereof, the said party of the first part hath caused its corporate Seal to be hereto affixed and attested by its Secretary, and these presents to be signed by its President, the day and year first above written.

AUSTIN J. WALDRON, INC. 30
 By Austin J. Waldron,
 President.
 (Seal)

Signed, Sealed and Delivered }
 in the Presence of }

Attest:

Henry Young, Jr.
 Secretary.

Exhibit C-3.

State of New Jersey, }
 County of Essex, }^{ss. :}

Be it Remembered, That on this twelfth day of July, in the year of our Lord One Thousand Nine Hundred and twenty-eight, before me the subscriber, personally appeared Henry Young, Jr., who
 10 being by me duly sworn on his oath, says that he is the Secretary of the Austin J. Waldron, Inc. the grantor named in the within Deed, that Austin J. Waldron is the President of said corporation; that deponent well knows the corporate seal of said corporation; and the seal affixed to said Deed is such corporate seal and was thereto affixed, and said Instrument signed and delivered by said
 20 President, as and for his voluntary act and deed and as and for the voluntary act and deed of said corporation, in presence of deponent, who thereupon subscribed his name thereto as a witness.

HENRY YOUNG, JR.

Sworn and subscribed before me,
 at Newark, N. J., the date aforesaid.

Wm. J. Goodsir

Commission expires

(Seal) July 18, 1932.

30 *Endorsed*—Deed. Austin J. Waldron, Inc. to Juliette V. Cutley. Dated, June 4, 1928.

Exhibit D-1.

FIRST NATIONAL BANK

Morristown, N. J., May 1st, 1928

Pay to the order of Pflueger-Connelly Co...\$500.00

Five Hundred Dollars

10

JULIETTE V. CUTLEY.

(Stamped)

The Mt. Pleasant

National Bank

Newark, N. J.

Paying Teller

Paid 5/15/28

20

30

40

*Exhibit D-1.**Endorsed on back:*

Payto the order of A. J. Waldron
 Pflueger-Connelly Co.
 August Pflueger, Pres.
 A. J. Waldron

10

Pay any Bank
 Banker or Trust Co.
 or Order
 Prior Endorsements
 Guaranteed
 May 14, 1928
 Federal Reserve Bank
 of New York
 1-120

20

Pay to the Order of
 Fidelity Union Trust Co.
 Newark, N. J.
 Prior Endorsements Guaranteed
 The Mt. Prospect National Bank
 Newark, N. J.
 May 12, 1928

30

Pay to the Order of
 Any Bank Banker or Trust Co.
 Prior Endorsements Guaranteed
 Fidelity Union Trust Co.
 Newark, N. J.

Pay and Bank Broker or Trust Co.
 or Order

Prior Endorsements Guaranteed
 May 14, 1928

Fidelity Union Trust Co.
 Newark 55-9

40

New Jersey
 Roy F. Duke, Treasurer

New Jersey Court of Errors and Appeals

AUSTIN J. WALDRON, INC.,
Complainant-Appellee,

vs.

JULIETTE V. CUTLEY,
Defendant-Appellant.

On Appeal
from the
Court of
Chancery.

BRIEF OF DEFENDANT-APPELLANT.

Preliminary Statement.

This is an appeal from a decree of the Court of Chancery for specific performance (pages 68-71). The defendant-appellant declined to take title to the property at Number 282 Highland Road, South Orange, New Jersey, for the reason that there were material misrepresentations as to the construction of the dwelling house and garage which induced her to sign the contract of purchase (page 26, lines 21-22).

Facts.

Mrs. Cutley is a resident of Morristown, Morris County, New Jersey (page 20, line 16). Pursuant to a notice in the newspaper advertising sale (page 20, line 34) of property in the Oranges, Mrs. Cutley visited the real estate offices of the Pflueger-Connelly Company at South Orange (page 21). Representatives of this real estate agency exhibit-

ed several properties (page 21). Among the properties discussed was one at Number 282 Highland Road, South Orange, owned by Waldron, Inc.

An offer was made by Mrs. Cutley of Twenty-Five Thousand Dollars (\$25,000.00) (page 22), and submitted, which was refused by the owners (page 23). One of the representatives of the Pflueger-Connelly Company induced Mrs. Cutley to raise her offer, *representing that the house was of all-brick construction, metal lath throughout, with triple floors*, and, therefore, worth more money (page 23, line 36). Relying upon these representations Mrs. Cutley signed a memorandum of purchase at the price of Twenty-Eight Thousand Dollars (\$28,000.00) which contained the statement about the construction of the building. At the same time she gave her check for Five Hundred Dollars (\$500.00) as a deposit (page 23) (Exhibit D-1, page 83).

Thereafter a representative of the Pflueger-Connelly Company reported that Austin J. Waldron, Inc. would not sell for less than Twenty-Nine Thousand Dollars (\$29,000.00) (page 23, line 34). The representative, who was then acting for the Waldron Corporation produced a formal contract duly signed by the seller (pages 24-40) and urged Mrs. Cutley to execute that contract, referring to the fact that the house was of better construction and worth the money because of the all-brick construction, metal lathing and triple floors. Mrs. Cutley referred the matter to her husband, who was then present (page 40). He suggested that these representations about the construction of the house be inserted in the contract, but the agent assured him that it was understood. Mrs. Cutley, relying upon his statement, signed the contract for the increased price.

Later, upon investigation, and before the taking of title, it was discovered by Mrs. Cutley that the representations were false (pages 25-41) and that the house was not as represented. Mrs. Cutley therefore refused to take the title (page 26) whereupon suit for specific performance was instituted (pages 6-10).

The appellant insists that such representations were the inducing cause for signing the contract and warrant the Court in denying specific performance.

POINTS FOR DISCUSSION.

1. There were material misrepresentations.
2. The complainant is bound by the representations.
3. Appellant was misled into signing the contract.
4. Complainant's remedy is not in equity.

ARGUMENT.

I.

There were material misrepresentations.

Mr. Vanony, sales agent for the Pflueger-Connelly Company, told Mrs. Cutley (page 22) "It was a solid brick house and metal lath and triple floors." This statement was made in the presence of Mr. Cutley (page 39, line 17). Mrs. Cutley relied upon this statement by not only signing the original memorandum of purchase, but later agreed to the increase of price, at which time the representation was repeated (page 23, line 35). It is suggested by counsel for complainant that defendant had ample opportunity to investigate the premises before the contract was signed.

The house was completed when negotiations were pending for its purchase. As stated by Mr. Cutley (page 44, line 16), it was impossible to ascertain by inspection of the property as to whether the representations were correct.

The floors had been laid, the walls finished, and the sides of the building completed (page 26, line 34).

No one could determine the true conditions without tearing up the floors, taking off a part of the walls and sides of the building.

It is only where by inspection conditions are obviously apparent, visible to the eye not to exist as represented, that estops one from claiming fraud.

Here the purchaser had a right to rely on the representations as true, and did rely upon them until it was discovered otherwise.

Complainant's counsel points to the denial of Mr. Vanony as indicating such were never made,

yet how can we reconcile the admissions of Mr. Vanony made to Mr. Hegarty, a reputable member of the bar.

Mr. Hegarty says (page 59) that Vanony came to his house about the making of an affidavit after this suit was started. He, Vanony, referred to an affidavit drawn up by Waldron's attorney and according to Mr. Hegarty Vanony said, referring to such affidavit, that "*the contents of that affidavit were absolutely untrue.*" "He (Vanony) wanted to be fair and honest with Mr. Cutley and make an affidavit *stating exactly what were the facts*" (pages 59-60).

Vanony then admitted to Mr. Hegarty that *he, Vanony, had made the statements about the construction of the house, that is, it was of solid brick, triple floors and metal lath*, and that he made such statements to put through the sale (page 60), knowing that they were untrue.

In view of this self-evident admission are we going to believe Vanony and disbelieve Mr. Hegarty, a disinterested witness? I think not. Vanony's actions, as supported by the testimony, indicate quite clearly that if Cutley wanted the benefit of a truthful statement as to these representations, which were admittedly made before Mr. Hegarty, that such would be forthcoming from him for a valuable consideration (page 62, line 17). When Cutley refused to pay him to tell the truth he very readily joins with the Pflueger-Connelly Company in denying such were ever made.

Both Mr. and Mrs. Cutley relied on these representations as representing the true situation about the property, because after the contract was signed and when talking with Mr. Waldron (page 25, line 38), as he admitted, Mr. Cutley referred to the all-brick house and learned for the first time (page

41) that such was not the construction. Mrs. Cutley, realizing that she had been deceived, refused to take the property (page 26). Mrs. Cutley requested no adjournment—that was voluntarily done by Waldron, Inc.

It was admitted by complainant that the house was not as represented.

The law is well settled that Courts of Equity will often refuse to enforce the specific performance of an agreement that they would not, on the evidence, set aside.

Stoutenburgh vs. Tompkins, 9 Equity, Page 332.

Bowker vs. Cunningham, 78 Equity, Page 458.

Bartley vs. Lindabury, 89 Equity, Page 8 at Page 11.

In Muller et al vs. Weiss et al, 91 Equity, Page 29, at Page 31, it was held:

“The statement of Muller as to the size of the lots also appears from the testimony to be material misrepresentation. He said the corner lot was thirty feet by ninety-five feet; and the inside lot twenty-five feet by one hundred feet. As a fact, the corner was thirty-seven hundredths feet by ninety-three forty-six hundredths feet on the street lines; and the other three lots all less than one hundred feet in depth, although the centre line of number 55 is about six inches over one hundred feet. This tract is not a large one, and the difference in area, as represented by the complainant, is substantial; in the building of a large apartment house on it as contemplated by Weiss its size was a matter of considerable financial interest.

“There is also evidence as to a misstatement of Muller as to the cost of excavating the rock on the property. These misstatements are in themselves sufficient to warrant me in denying specific performance. *In suits for specific performance anything said or done to mislead the purchaser compels the court to deny relief to the complainant.* Bowker vs. Cunningham, 78 Equity 458; Pyatt vs. Lyons, 51 Equity 308; Brisbane vs. Sullivan, 86 Equity 411; Neptune Fisheries Company vs. Cape May Real Estate Company, 89 Equity 552.”

In Bowker vs. Cunningham, 78 Equity, Page 458 at Page 461, it was held:

“Under the conditions named complainant is not entitled to the aid of a court of equity in compelling defendant to specifically perform her agreement to sell. It is one of the necessary inherent qualities of a decree for specific performance that it does complete justice. King vs. Morford, 1 Equity (Saxt.) 274, 282. In suits of this nature this court will grant its aid or not, according to the justice of the case. Miller vs. Chetwood, 2 Equity (1 Gr. Ch.) 199, 208. A decree for specific performance will never be made, unless substantial justice will be advanced thereby. Ely vs. Perrine, 2 Equity (1 Gr. Ch.) 396, 402. ‘This court will not become an instrument of injustice; and if the case presented is such that it would be unconscientious to grant the complainant the relief he seeks, and repugnant to a just sense of right between man and man, the court will refuse its aid. * * * *’
The defendant may be unable to prove any mistake, fraud, or accident, in reference to its execution; and yet the conduct of the complainant may have induced such a state of things in relation to the subject-matter of the agreement as would make it not only

proper, but the plain duty of the court to refuse its aid in enforcing its specific performance. Stoutenburgh vs. Tompkins, 9 Equity (1 Stock.) 332, 335, 336. *'The remedy by specific performance is discretionary. The question in such cases is not what must the court do, but what, in view of all the circumstances of the case in judgment, should it do to further justice.'* Johnson vs. Somerville, 33 Equity (6 Stew.) 152, 153. The foregoing citations, as well as those hereinafter to be made, measurably disclose the extent to which principles of ethics may appropriately be considered in suits of this nature. An unintentional misrepresentation of a material matter will be operative as a bar to a decree for specific performance. Wuesthoff vs. Seymour, 22 Equity (7 C. E. Gr.) 66, 69. *The material inquiry is not whether a complainant intended to mislead defendant, but is, did he mislead him?* Prof. Pomeroy says:

'In maintaining the defense to a suit for specific performance, the knowledge, belief, or intent of the party making the representations is wholly immaterial, and the question is not raised. The point upon which the defense turns is the fact of the other party having been misled by a representation calculated to mislead him, and not the existence of a design to thus mislead.' Pom. Spec. Perf. 217.

"In *Bascomb vs. Beckwith*, L. R., 8 Equity 100, a map was exhibited to the purchaser which was not misleading if examined carefully and which was not intended to mislead, but which was liable to mislead if not carefully examined, and which map did in fact mislead the purchaser; specific performance was accordingly denied."

In *Carskadden vs. Kennedy*, 40 Equity, Page 259 at Page 271, it was held:

“The court will never interfere where the party has practiced any fraud or has been guilty of misrepresentations in any material particular. *Plummer vs. Keppler*, 11 C. E. Gr. 481, 482; *Wuesthoff vs. Seymour*, 7 C. E. Gr. 66, 69; *Scott vs. Shiner*, 12 C. E. Gr. 185; *Stover vs. Wood*, 11 C. E. Gr. 417; *Redmond vs. Eilley*, Sax. 320; *Wakeman vs. Dodd*, 12 C. E. Gr. 564.

“When a person enters into an agreement on the faith of a misrepresentation made to him, the entire contract is thereby rendered invalid, it being impossible, in such case, to determine how far the false statement may have operated to induce him to accept the proposition of the other party. Waterman on Spec. Perf. (Ed. 1881) 403, 293; Woolam vs. Hearn, 2 Lead. Cas. in Equity (3d Am. Ed.) 666, 667.”

In *Stoutenburgh vs. Tompkins*, 9 Equity, Page 332, it was held:

“A court will not decree specific performance where it would be inequitable under all the circumstances of the case. Where a contract is hard and destitute of all equity, the court will leave parties to their remedy at law.

“An agreement may be fully proved, it may be clear in every particular, and upon its face equal and just in all its parts; the defendants may be unable to prove any mistake, fraud or accident in reference to its execution, and yet the conduct of the complainant may have induced such a state of things in relation to the subject matter of the agreement as would make it not only proper, but the plain duty of the court to refuse its aid in enforcing its specific performance.”

II.

The complainant is bound by the representations.

The learned Vice Chancellor who heard the case, recommending decree, misinterpreted the law and the facts of the case. In his opinion (pages 66-67) he declared that there was no direct proof of misrepresentation by the Pflueger-Connelly Company. It is true that the company as a corporate entity did not make representations; they, like all other corporations, acted through their agents, salesmen and representatives. Their agents stand in a position of *loco parentis*; the agents' acts were of course the acts of their principal. The Pflueger-Connelly Company were the agents of Waldron, Inc., and there is abundant evidence on the part of defendant-appellant and her husband, Mr. Cutley, to indicate that statements were made respecting the construction of the house which as a matter of fact were untrue.

The opinion of the Vice Chancellor, continuing, states:

“Assuming that they did (meaning make representations) can this be charged to Mr. Waldron, who signed the agreement of sale without any of these alleged representations. Connelly and Pflueger were not his agents, they were engaged by Mrs. Cutley.

“Even if they were they had no right to bind him by misrepresenting facts when he had no knowledge of the misrepresentations.”

In this conclusion we think the Court was in error. At no time was the Pflueger-Connelly

Company agents of Mrs. Cutley. Certainly not when the final contract was signed, because *Mr. Waldron admits (Page 58 line 29) they were taking care of it for him.* In the final contract of purchase (Exhibit C-1, page 75) Austin J. Waldron, Inc. recognized the Pflueger-Connelly Company as its agents and agreed to pay them a commission of three and a half per cent. (3½%) on the sale. There can be no doubt, therefore, as to the Pflueger-Connelly Company and their salesmen being agents for Waldron, Inc.

The further statement by the Vice Chancellor to the effect that even if they were the agents of Waldron they had no right to bind him by misrepresenting the facts, is a misconception of the law.

A principal cannot benefit by fraudulent statements of an agent. It was held in *Dunston Lithograph Company vs. Borgo*, reported in 84 Law, Page 623, that:

"The principal who seeks to enforce a contract obtained by the fraudulent misrepresentations of his agent is as fully bound by those misrepresentations as if made by himself, notwithstanding the fact that they were made without his authority or knowledge."

In *Reitman v. Fiorillo*, 76 L. 815, it was held

"An innocent principal cannot assert any rights or retain any benefits upon a contract when it is procured by the fraud of his agent."

See *Kavky v. Harris, et al.*, 102 L. 371 at p. 373.

The wisdom of such a legal construction may readily be understood to mean that no person should be forced to carry out a contract where the facts and circumstances indicate that they were

persuaded into such arrangement by any false or fraudulent representations.

In the brief of counsel for complainant a number of cases are cited on the question of agency in an effort to establish that in all cases a principal is not bound by the representations of an agent where he goes beyond the scope of his authority. These cited cases do not control a situation of this kind, for in the cases quoted it will be observed that either the agent was offering the property for a price less than that authorized by the principal, or was making statements with respect to the payment of liens, or was endeavoring to change the terms of a written contract already entered into.

In the instant case representations as to the construction of the building were made to induce the signing of the contract, and in such instances where such representations appear to be false the principal cannot benefit thereby to the extent of compelling specific performance.

The logic of such a proposition of law is to prevent fraud. The trend of the cases cited by appellant establish the rule that where fraud or misrepresentations enter into the inducement to a contract which otherwise would not have been made, no benefit can be derived therefrom, even though, as stated, in the Borgo case, the principal may be entirely innocent of such representation.

III.

Appellant was misled into signing the contract.

By way of inquiry we may ask what induced Mrs. Cutley to sign the final contract, the fulfillment of which is sought to be carried out by these proceedings? Certainly it was not the price for it had then reached the amount of Twenty-Nine Thousand Dollars (\$29,000.00).

Both Mr. and Mrs. Cutley state that Vanony, the salesman for the Pflueger-Connelly Company; was present with the final contract (pages 24-25-40). *He, Vanony, through the Pflueger-Connelly Company, was representing Waldron, Inc.*

Throughout the whole transaction Vanony was the one who induced the signing of the memorandum of purchase and contract. From the first memorandum until the final contract his representations about the character of the house were the predominating inducing factors. His original representation was the inducing cause. It was proper to refer to oral testimony as supporting the representations.

In *Carskaddon vs. Kennedy*, 40 Equity, Page 259 at Page 271, it was said:

“Upon a bill for specific performance of a written agreement, it is competent for defendant to prove parol declarations made at the time of the contract, though not incorporated in the agreement, in order to rebut the complainant's equity.” Citing *Miller vs. Chetwood*, 1 Gr.Ch. 199, 201, 207; *Stoutenburgh vs. Tompkins*, 1 Stock. 337, 338.

The first memorandum, which by the way was not produced in Court by the Pflueger-Connelly Company, contained the clause as to the construction of the house.

The second memorandum, dealing with a raise in price to Twenty-Eight Thousand Dollars (\$28,000.00), was signed by Mrs. Cutley upon the sole representation that the house, being all-brick, triple floors and metal lath, was worth the price and could easily be resold for more than that amount (page 32).

Again, at the time of the final contract, he, Vanony, was stressing these representations to induce defendant to enter into the purchasing agreement (pages 24-25-40).

Mr. Cutley testified concerning the execution of the final contract (page 40, lines 26-40), referring to Vanony's statements at that time: "He came back on the seventh and he said, 'Well, here it is.' He said, 'I got you—' He said, 'I got it all signed, sealed and delivered, all fixed up.' Then he said, 'I had a hard job to get Henry Young to take his acknowledgment, to go and see Henry Young to take his acknowledgment,' but, he said, 'everything is fine,' and he handed Mrs. Cutley the contract to sign. I said, 'Let me see that before you sign it.' I said, 'I see in here that you have not got inserted that the house is solid brick, metal lath and triple floors.' He said, 'No.' He said, 'That is all right,' he said, 'we sign them up this way.' He said, 'All these conditions are the same.' I said, 'Is it all right?' He said, 'Yes.' I said to Mrs. Cutley, 'In view of that fact,' I said, 'you can sign it.'" At this time there was no one present but Mr. and Mrs. Cutley and Mr. Vanony. Vanony was representing his company who were then acting for Waldron, Inc.

Mrs. Cutley states that if she had known the true facts she would not have considered the property (page 14).

She was misled and deceived and tricked into signing the contract, and the principal, no matter

how innocent he pretends to be, would not be permitted to enforce his contract where the purchaser was deceived.

IV.

Complainant's remedy is not in equity.

Evidence of fraud or misrepresentation may be slight, there may be instances where no actual fraud can be proven, and yet from all the circumstances it would be unjust and unfair to enforce a contract.

In *Muller vs. Weiss*, 91 Equity, Page 29 at Page 31, it was said:

“There is evidence as to a misstatement of Muller as to the cost of excavating the rock on the property. These misstatements are in themselves sufficient to warrant me in denying specific performance. *In suits for specific performance anything said or done to mislead the purchaser compels the court to deny relief to the complainant.*” (Citing cases).

In *Stoutenburgh vs. Tompkins*, 9 Equity, Page 332, it was said:

“A court will not decree specific performance where it would be inequitable under all the circumstances of the case. *Where a contract is hard and destitute of all equity the court will leave parties to their remedy at law.*”

In the early case of *Miller vs. Chetwood*, 2 Equity, Page 199, and followed thereafter the law was stated to be:

“If misrepresentations were made at the time, *though not in writing calculated to*

mislead in any essential particular, the party will be left to his remedy at law."

See also Crane vs. De Camp, 21 Equity, Page 418.

Would it be fair, equitable or just to force upon Mrs. Cutley the performance of a contract for property which does not represent what she understood and supposed was the kind of property she agreed to purchase.

Mrs. Cutley acted in good faith; she relied upon what the representative of Mr. Waldron told her; she had no means of determining otherwise. Waldron, Inc. certainly cannot gain the benefit of a sale when the agents or salesmen, acting for it, were over-zealous and extravagant in their statements, inducing a sale which otherwise would not have been made if the true situation was explained.

The test is, would Mrs. Cutley have entered into a contract of purchase, would she have agreed to the various increases in price, unless these representations had in fact been made? Mrs. Cutley hesitated about going through with the contract and only did so when she was assured the house had these special advantages, which were not only proven to be false but admitted to be so.

Our Courts have indicated that equity and good conscience should never permit a contract to be enforced where there is even a taint of deception.

It is thereupon respectfully submitted that the Court of Chancery committed error in granting a decree of specific performance and for the reasons stated such decree should be reversed.

ELMER W. ROMINE,
Attorney for and of Counsel
with Appellant.

New Jersey Court of Errors and Appeals

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| AUSTIN J. WALDRON, INC., <i>Complainant-Appellee,</i> | } | <i>On Appeal from the Court of Chancery.</i> |
| <i>vs.</i> | | |
| JULIETTE V. CUTLEY, <i>Defendant-Appellant.</i> | | |

BRIEF OF COMPLAINANT-APPELLEE.

Facts.

This is an appeal from a decree entered in the Court of Chancery, advised by CHURCH, V.-C.

Complainant sought and obtained a decree for specific performance of its contract Exhibit C. 1 (p. 72) for the sale of property 282 Highland Road, South Orange, New Jersey. Facts proven below are best stated by reference to the opinion of the Vice-Chancellor:

CHURCH, VICE-CHANCELLOR:

“This is a bill for the specific performance of a contract for the sale by the complainant to the defendant of premises on Highland Road, South Orange.

“Defendant resists, alleging the following misrepresentations: There were no triple floors; there was no metal lath and that the building was not solid brick construction. It is admitted that the building does not comply with these alleged representations. It is also admitted that the final contract of sale does not contain any of these alleged representations.

“The facts appear to be that defendant Mrs. Cutley, was looking for a home. She went to Pflueger Connelly Company and the representative of this real estate concern showed her various houses. Mrs. Cutley

then saw the house in dispute and the agents said 'We can get you that house cheaper.' There were negotiations with the owner, Mr. Waldron, who refused several offers and finally signed the agreement of sale which as I have said, contains none of the alleged representations.

"There are, therefore, two aspects of this case to be considered.

"First, were they made at all by anybody? The testimony, as I read it, leads me to believe they were not. Mrs. Cutley, a very temperamental and excitable witness, looked over the property carefully and says, 'I was under that impression, that all those houses in that street were solid brick,' and again, 'I thought I was getting a solid brick house.' There is no direct proof that Connelly and Pflueger misrepresented the house in any way."

ARGUMENT.

The decree requiring specific performance on the part of the defendant should be affirmed for the following reasons:

1. The defendant has not proven that Pflueger Connelly Co. who negotiated the agreement were the agents of the complainant, but the evidence conclusively shows that they were, if anything, the agents of the defendant.

2. The defendant has not proven that the representations were made.

3. Assuming for the purpose of argument that the Pflueger Connelly Co. were the agents of Austin J. Waldron, Inc., for the sale of the premises in question, unauthorized representations made by them were not within the scope of their authority and, therefore, not binding on their principal.

4. The defendant had no right to rely on representations whether made by the agent or by the principal.

5. The defendants did not rely on any misrepresentations.

1. The defendant has not proven that Pflueger Connelly Co. who negotiated the agreement were the agents of the complainant, but the evidence conclusively shows that they were, if anything, the agents of the defendant.

On the question of the agency of Pflueger Connelly Co. the Court is respectfully referred to the transcript of testimony. No where does it appear that Austin J. Waldron, Inc. engaged Pflueger Connelly Co. to sell the premises in question. The only testimony on the point appears on page 58. Mr. Waldron as witness of the defendant was asked about the signing of the contract and at the end of his testimony the question was put to him (p. 58, l. 26), "But you knew somebody was going up?" The answer was (p. 58, l. 28), "I knew that somebody was taking care of it, yes." Question: "And that they were taking care of it for you, weren't they?" He answered "Yes."

This testimony referred to the actual execution of the contract by Mrs. Cutley. On the other hand the testimony of Mrs. Cutley (pp. 20 and 21) is to the effect that Mrs. Cutley was looking at other houses submitted by Pflueger Connelly Co. and that after a time Mr. Vanony of that company showed her other houses in the neighborhood of the Waldron house, and attention being called to the Waldron house Vanony told her (p. 21, l. 18) "Well we will get you that house cheaper." This statement is repeated three times. Then (p. 22, l. 12)

Mrs. Cutley says she authorized the payment of \$25,000 and later, \$28,000. *On cross examination she said that Mr. Cutley had been in touch with Mr. Waldron direct months before.* She spoke to the agents and (p. 28, l. 12) after the agent indicated that he could get the house cheaper for Mrs. Cutley she said, "Well, if you can do that, then go ahead."

The testimony of the husband of the defendant is to the same effect (p. 38).

On page 38, line 39, the agent stated that he would go to Mr. Waldron to submit an offer of \$25,000; that he had then seen Mr. Waldron and Mr. Waldron had threatened to throw him out of the house for making such an offer.

Later (p. 40, l. 9), when an offer of \$28,000 was refused, Mr. Cutley asked the agent about the price and said "The fact of the matter is that you are just adding your commission on the price that Waldron wants are you not?" The answer was, "Why, no, not at all." Mr. Cutley desired to split commissions with the agent and said, "I will go half with you on it * * *. We will give you five hundred dollars." This offer was refused.

From the foregoing testimony it is apparent that the defendant, Mrs. Cutley, had engaged Pflueger Connelly to obtain the house at a cheaper price than was originally quoted by Waldron direct; viz., \$30,000 (testimony, p. 43, l. 23). Now they seek to show that representations alleged to have been made to them by their own agents should be used against Mr. Waldron whose only transactions with the agents were to refuse offers sent to him by the defendant, and to agree that Pflueger Connelly Co.

were to receive a commission on the passing of title.

In proof of agency the defendant has fallen down completely.

2. The defendant has not proven that the representations were made.

The testimony concerning the making of representations by Pflueger Connelly Co. employees is very questionable and an examination of the contradictions appearing in the testimony of Mrs. Cutley would lead to the conclusion that no representations were made, but that Mrs. Cutley assumed that the house contained triple floors, metal laths, and was of solid brick construction.

It appears that Mrs. Cutley had seen the house in question and was interested in it (p. 21, l. 12). Mrs. Cutley's first testimony concerning representations is to the effect (p. 23, l. 36) that she increased the price because of Vanony's statement that the house was solid brick, with metal lath, and triple floors.

On cross examination Mrs. Cutley said that she was in the neighborhood of the building in the fall of 1927 (p. 26, l. 38); that the next spring she was in touch with Mr. Waldron (p. 27, l. 19) and later saw Mr. Connelly and that thereafter she saw the property with Mr. Borsa (p. 29, l. 25, etc.) saying that Mr. Borsa told her that the floors were triple, that the walls were solid brick, and immediately after giving this testimony she says (p. 30, l. 19) that Mr. Connelly was with Borsa and that Mr. Vanony and Mr. Connelly both said that the house was solid brick, had triple floors, and

was metal throughout. Then the testimony was changed to the effect that Mr. Borsa spoke about the triple floors (p. 30, l. 31), but was uncertain about what Mr. Vanony had said (p. 30, l. 33). Then she changed her testimony to the effect that the floors were talked about on the first occasion, but she did not remember that the walls were talked of (p. 31, l. 10).

She then says that she saw the house and thought that all the houses were solid brick. Her words are (p. 31, l. 25, etc.), "I was under that impression, all those houses in that street were solid brick." Then she further said in answer to another question about the house's being solid (p. 31, l. 33, etc.) "No, I can't say that first time, because I understood it was a solid brick; I thought I was getting a solid brick house."

The testimony of Mrs. Cutley is so contradictory and uncertain as to what representations were made that it is only logical to feel that she assumed the house contained triple floors, metal lath, and was of solid brick construction. Then again, the fact that the defendants claim to have had these representations made on every occasion they met the agents down to the time of signing the contract, and that their main discussion seemed to center around these representations, would lead one to believe that *if these three items were the most important in their negotiations that they would have been included in the final contract, and would have been examined into.* Mr. and Mrs. Cutley were intelligent people. If the representations had been made as they claim they were, they would have insisted on their being in the contract of sale. The omission from the

contract of sale of these important provisions leads to the logical conclusion that there were no such representations made. The agents, Borsa (p. 51, l. 1), Vanony (p. 53, l. 19) and Connelly (p. 64, l. 35) deny emphatically that there ever were any representations of the character mentioned.

If the defendants were sincere in their claim that the property had been misrepresented to them they would have demanded a return of the \$500 deposit (p. 35, l. 35, etc.) and they would not, after having been given to understand that the house was not solid brick, etc. have taken the fixture to their Morristown house and have kept it there up to the time of trial (p. 36, l. 20).

It is, therefore, respectfully urged that the making of representations has not been proven.

3. Assuming for the purpose of argument that the Pflueger Connelly Co. were the agents of Austin J. Waldron, Inc. for the sale of the premises in question unauthorized representations made by them were not within the scope of their authority and, therefore, not binding on their principal.

“The general rule is that the principal is not bound unless the agent’s acts are within the apparent scope of his authority.” *Agency* 2 C. J. 573.

“A person dealing with an agent should ascertain the extent of his authority from the principal.” *Agency* 2 C. J. 563.

A real estate agent can not be considered as a general agent so that a real estate agent’s acts are not binding upon the principal unless they are within the scope of his employment. A real estate agent is employed to procure a

purchaser and is a special agent in the eyes of the world.

“The power merely to sell does not authorize the agent to exchange, mortgage, or make representations as to the quantity, quality, or condition of real estate, etc.” *Cyc.* 31, p. 1364, *Principal and Agent*, citing *National Iron Armour Co. v. Brunner and Baxter*, 19 Eq. 331, and many other cases to the same effect.

In the case of *National Iron Armour Co. v. Brunner and Baxter*, 19 Eq. 331, the Court held that a party dealing with an agent for a special purpose must ascertain at his own peril the agent's power. In that case an agent has made a contract of sale which was approved by the owner. Later the agent made some further agreement with the purchaser. The Court at page 335 said,

“There is no proof in the case that the defendants in any way held out Forepaugh as their agent or did or permit any act which would deceive or mislead the complainant as to his power to make a contract as agent at a fixed price, and the approval of such contract by the defendants does not hold him out to the world as an agent to sell at any other price or to vary the terms of sale. * * * A purchaser must ascertain at his own peril the power of the agent, and if the agent's contract on its terms is approved and adopted by the principal, the purchaser has no right to infer from that fact that the agent has the power to alter the terms of the contract. An agent with restricted power to sell land at a given price has no power to alter the terms of the contract. An agent with restricted power to sell land at a given price has no power to bind his principal by any representation as to quantity or quality of the land. That is beyond his power.”

“Where a broker’s agency is a special one as where he is authorized to sell real estate, a person dealing with him is ordinarily bound to ascertain the scope of his authority and accordingly is chargeable with notice of the limitation of his powers, unless such limitation is given by secret instructions.” 9 *C. J.* 669, citing *Merritt v. Wasenich*, 49 Fed. 785.

I quote the syllabus from the latter case:

“A real estate agent in order to induce his non-resident principal to make a sale wrote that the property might be sold for \$27,000 and that this was from \$2,000 to \$3,000 more than it was worth. A few days later it was sold for \$35,000. HELD that the statement must be considered a representation of fact and not of opinion merely. The fact that the owner’s son was in the city about a month before and had written her that the property was worth \$35,000 was not sufficient to show that she did not rely on the agent’s representation. One who purchases real estate from a non-resident owner through a real estate broker is bound to ascertain not only the terms of his authority, but also the correspondence by which such authority was obtained.”

Here the purchaser at \$32,000 of certain property brought suit for specific performance. The Court refused to order conveyance because of the agent’s defrauding his principal by representing to the principal that the property was worth about \$25,000 when in fact he knew it was worth more. The agent had made a contract to sell for \$32,000 when he knew that he could get \$35,000. When the purchaser tried to get specific performance of the \$32,000 contract the Court refused on the ground that the agent’s authority to sell was a special authority and that the agent should have gotten \$35,000 in accordance with the instructions in a letter which

required that the agent get in touch with the owner about the price. Here, although the agent had the right to sell and signed an agreement of sale the Court placed it as a duty of the purchaser to ascertain what the principal's instructions were as to a sale before the principal could be bound.

“In the absence of express authority the principal is not liable for representations not within the ordinary scope of broker's employment.” 9 C. J. 672 *Agency*, citing *Branchman v. Leighton*, 60 Mo. A. 38, holding that where a real estate broker in order to make a sale represented that the assessment for sewer in process of construction near the property had been paid, the owner is not liable therefor in an action for deceit, in the absence of evidence that he gave the broker authority to make such representations, it not being within the ordinary scope of the agent's employment. Also citing *Planer v. U. S. Equitable Life Assurance Society*, 37 Atl. 668, holding that a broker for the sale of land at a price fixed can not bind the owner by representation or contract, and the owner's offer to sell can not be varied by the broker's letter of acceptance reciting that the purchaser understands the property is of a certain dimension, and further holding that a real estate broker can not bind an owner by granting possession or by making repairs unless with the owner's consent.

If the representations complained of had been inserted in the contract, and the owner had signed the contract or approved of it, then, of course, he would be bound and on the discovery of the falsity of such representations the purchaser could rescind the contract, but inasmuch as there is no proof that the owner ever authorized or had knowledge of the alleged representations he surely can not be charged with them.

At the end of his opinion, after having decided that the facts showed Pflueger Connelly Co. were not the agents of the complainant, Austin J. Waldron, Inc. and that no misrepresentations had been made, although not necessary in his decision of the suit, Vice-Chancellor Church says (p. 67, l. 28),

“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. There is no need of citations for this proposition, no instructions of any kind have been proven as between Connelly and Pflueger and Waldron.”

Although this rule was not required for a decision in the case at bar, still it is a correct statement of the law.

Hann v. Freestone, et al., 123 Atl. 701—Supreme Court (1924): Justice Black says (p. 702):

“Because it is settled that a special agent does not bind his principal unless his authority be strictly pursued, and those dealing with him are chargeable with notice of its extent. *Cooley v. Perrine*, 41 Law 322.”

And further on the same page the Court goes on to say

“* * * So, one who claims through a special agent takes the risk of his want of power,” citing *Black v. Shreve*, 13 Eq. 455, and *Scherer v. Post Office B. & L.*, 91 L. 666—103 A. 202.

Black v. Shreve, 13 Eq. 455, Court of Errors and Appeals, Whelpley, J., at page 462 says:

“No principle of law is better settled than that one who claims through a special agent takes the risk of his want of power.”

Sherer v. Post Office B. & L., 91 L. 666, Court of Errors and Appeals, 103 *Atl.* 202: Justice Black says at page 203,

“No principle of law is better settled than that one who claims through a special agent takes the risk of his want of power” citing *Black v. Shreve*, 13 *Eq.* 462, “If a special agent exceeds his authority, the principal is not bound.” *Parsons on Contracts* (9th Ed.) Vol. 1, page 42.

4. The defendant had no right to rely on representations whether made by the agent or by the principal.

Cases in New Jersey consistently hold that in the absence of actual fraud the doctrine of *caveat emptor* would apply in situations such as appears in this case. *Industrial Savings & Loan Co., et al., v. Grace Frances Plummer*, 92 *Atl.* 583; *L. R. A.* 1915, C. 613, holding to the effect that every person reposes at his peril in the opinion of others when he has equal opportunity to form and exercise his own judgment citing 2 *Kent Com.* 485.

“Courts of equity like Courts of law did not aid parties who will not aid or use their sense of discretion in matters of this character,” citing *Willard Jur.* 152. “Under such conditions the doctrine of *caveat emptor* is equally applicable at law as in equity.”

The Court in the *Industrial Savings & Loan Co.* case said as to relative duties of the parties that the common law affords to everyone a reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of negligence, folly, or careless indifference to ordinary and accessible matters of opinion. It is well known that real estate brokers in order

to consummate a deal will make statements concerning value and quality of a property which statements are not strictly true and a person dealing with a real estate agent has the duty placed upon him of making a reasonable investigation of the premises concerned. There are several cases in this State dealing with representations of the character complained of in this suit, and the outcome thereof being that where the defendant had an opportunity of examining the premises, and further where he does examine the premises he is bound by his own judgment, and is precluded from reliance on the representations made by the seller.

Freedman v. Kensico Realty Co., 99 *Eq.* 115: Fielder, *V.-C.* (at p. 118):

“In the sale and purchase of real estate, the parties usually deal with each other at arms length and there is nothing to indicate that this was other than a usual transaction of sale and purchase. The vendee says he made no examination of the building before agreeing to purchase, except to spend about five minutes in the entrance hall. Even that slight inspection must have acquainted him with the fact that the units were separated by a wall, and if it was so highly important to know whether or not each unit had a separate wall for its floor beams, it was his duty to satisfy himself by examination or inquiry. Courts do not aid a purchaser of real estate who is carelessly indifferent to the use of ordinary caution before entering into a contract, when he is left free and uninfluenced to make examination of the property and to exercise his own judgment in determining whether or not to buy.

“The doctrine of *caveat emptor* is applicable to the purchase of real estate and is applied as well in equity as at law.” Citing *Denman v. Katz*, 63 *Eq.* 613; *Industrial Savings Co. v. Plummer*, 84 *E.* 184; *Hawthorne v. Ordenson*, 94 *E.* 588.

And in concluding the Court says at *page 119*:

“That the division wall between the two units or buildings in question is a party wall, and that the vendee was not apprised of that fact, has no bearing upon the agreement entered into between the parties, as evidenced by their contract.”

Mount v. Loizeaux, 92 *Atl.* 593:

“Where it appeared that the defendant Loizeaux had made an investigation of timberland in Newfoundland, Canada, with the assistance of guides and experts, from which he reached an estimate of value of the lands and timber and water rights which he thereafter communicated to the plaintiff who, acting upon his own initiative and upon the invitation of the defendant, sent his son, an expert in forestry to investigate conditions for him, who made his report, and thereafter as a result of that investigation and his own inquiries the plaintiff purchased stock of the company owning the land, held in an action for deceit, the undisputed testimony concerning the plaintiff’s independent inquiry and investigation made it manifest that the purchase was made upon the strength of his own investigation, and not as a result of the defendant’s representations.

“Where a vendor does nothing to hinder or obstruct an independent investigation by a proposed vendee, but invites, assists, and encourages it, and such an investigation is made by the vendee who thereafter purchases, statements of the vendor regarding the extent and value of the *locus in quo* made before the investigation, will be regarded as mere matters of opinion, and will not present the basis for an action for deceit.”

Elmora Development Co. v. Horowitz, 130 *Atl.* 651: Broker’s statement of work or value of lots held not such a representation as to entitle the party to whom it was made to rely on it.

Defendant's physical or financial condition is not a ground for denial of decree of enforcement in view of complainant's offer to modify terms of contract at defendant's option.

Financial reverses are not ground for denying specific performance.

In this case the broker told the defendant that plaintiff's property was worth \$63,389 the price agreed to be paid, but it does not appear that Tanenbaum was the agent of complainant. It appears that he was to receive a commission from the complainant, but it does not appear that complainant made any such promise before the contract, or that the complainant authorized him to negotiate the sale of the lots. Besides, the statement of worth or value of the lots is not such a representation as the defendant was entitled to rely upon even if made by the complainant. It also appears that the statement was not relied on. Both parties had placed higher values on their properties than could be in fact sustained.

To illustrate the rule herein set forth we refer the Court to the case of *David Tobin, et al. v. Bella Piewro, et al.*, 128 A. 154. The complainant sought to have a contract for the conveyance of real property rescinded on the ground of fraud. The facts showed that an agent prevented the complainants from making an examination they thought to undertake. The complainants were shown an apartment and told that the rest of the building was in similar condition. When they attempted to look through other apartments the agent told the prospective purchasers that the other apartments were occupied by ignorant foreigners who did not understand our language and that it would be impractical to

complete the examination of the entire building, and reiterated the assurance as to the similarity of all apartments comprising the same number of rooms throughout the structure. It developed that the two apartments shown were the only two in the building which were up to date and on this ground the Court refused to enforce the contract of sale. *The Court in the foregoing case says that ordinarily a purchaser is charged with what an examination of the premises will reveal, but not in this case.*

In the foregoing case the Court mentioned the case of *Strauss v. Rabe*, 127 *Atl.* 188, which is as follows:

Vice-Chancellor Bentley in referring to an attorney's agency relative to closing of a title transaction says at page 190,

"The acts of a special agent do not bind his principal unless the latter's authority is strictly pursued, and those who deal with such an agent are charged with notice of the extent of such authority." *Cooley v. Perrine*, 41 N. J. L. 322, *affirmed* 42 N. J. L. 623; *Milne v. Kleb*, 44 N. J. Eq. 378, 14 A. 646. Also (at p. 190),

"When a vendor delivers a written contract for the sale of land to an attorney, and asks the latter to represent him upon the passing of title, without further instructions, and it is known to the purchaser that the contract, by its express terms, has fixed a final, specific day upon which the deed is to be delivered, the purchase money paid, and the other matters in the contract adjusted and concluded, the charter of the agent's powers fixes them, and the purchaser can not thereafter claim the benefit of any treaty with the agent not found within the contract, either expressly or by necessary implication unless the act of the agent is either expressly or impliedly ratified by his

principal. If it is sought by the purchaser to modify any of the terms of the contract, or impose a new one in any material matter affecting the principal's right, the former must, under the cases just cited, make certain, at his own peril, that the agent's authority is sufficient to permit him to perform such act."

The foregoing quotation was used by Vice-Chancellor Church in his opinion in *Hartman v. Church Construction Co.*, 139 Atl. 484.

It is certainly true that the defendant knew she was dealing with an agent for the purpose of getting a house cheaper than the owner would sell to her direct. If in her choice of an agent she picked one who would puff up the property in order to put through the sale she assuredly is in no position to complain.

In *Kafka v. Grant*, 73 L. 451, it was held that where a real estate agent told prospective purchasers that property was about 25 x 65 when it was in fact 23 x 60, but the purchasers were taken to the property and examined it, the agent further stating that the property was leased for five years when in fact four months of the time had expired, held that neither statement was fraudulent or such misrepresentation as to justify the rescission by the purchaser of the contract of sale.

If the false statement concerns a matter which can not be discovered by ordinary inspection, or if the party making such false statement makes use of such artifices and thereby prevents the party from making inspection, fraud exists notwithstanding such inspection.

In the case of *Crescent Ring Co. v. Travelers Indemnity Co.*, 132 *Atl.* 106 (at p. 109), Chancellor Walker says:

“While one sued for fraud can not set up as a defense that if the plaintiff had exercised reasonable care he would not have been defrauded; yet where no active wrongdoing is attributed to the principal defendant, and reliance is placed upon the fraud of an agent, who was not instructed or actually or impliedly authorized to commit it, there can be no recovery by a plaintiff who could have protected himself by examining into the character of the transaction and the truthfulness of the representations made, unless the defendant with knowledge ratifies it, and this the indemnity company did not do.”

5. The defendants did not rely on any misrepresentation.

There is another element in the testimony which should be considered. When the time came for the closing of title about June 4, 1928 (p. 46, l. 5) Cutley seems to have gone to the office of Pflueger Connelly Co. for the purpose of telling them that the Cutleys did not intend to complete their contract. Vanony is supposed to have told Cutley to investigate (p. 46, l. 24) and notwithstanding the fact that Waldron had previously informed Cutley that the premises did not comply with the alleged representations (p. 40, l. 32) Mr. Cutley says that he later investigated and a twenty-day adjournment was allowed. The Answer (paragraph 4) admits that an extension was allowed and granted to July 12, 1928.

If, after having signed the contract in May, and after having received knowledge that the three virtues were missing, they continued to

investigate as to the value and utility of the building in question, they, by their own testimony, show that the three virtues were not to their minds essential at the time of the signing of the contract:

C. J. 13-391 Para. 297:

“Where the party does not rely on the representation, as where he either does not believe it or relies on his own judgment or the result of his own inquiries in the matter, there is no fraud as to him. A case of this kind arises where the seller of goods knowingly makes false representations to the buyer as to their quality, but the buyer in making the purchase relies on a test of their quality made of a sample selected by him. So one who contracts for the purchase of real estate after representations and statements of the vendor as to its character and value, but after he has visited and examined it for himself and has had the means and opportunity of verifying such statements, can not avoid the contract on the ground that they were false or exaggerated. Where a party submits the determination of a question concerning which representations are made to his attorney, such fact will tend to show non-reliance on the representations of the adverse party.”

In a very recent decision of the Court of Chancery *Condon v. Sandhowe*, 127 *Atl.* 101, the facts are somewhat similar to the case at bar. There a bill was filed to foreclose a mortgage on real estate and in the answer of the defendant a charge of fraud was set up. The defendants claimed that the complainant fraudulently represented to them that the dwelling upon the land conveyed and upon which the mortgage was a lien was constructed of hollow tile, when in fact it was not so constructed, and that by such corrupt practice upon which the defendants relied

they were induced to enter into a contract for the purchase of premises. A rescission of the contract was prayed. The complainant denied the representations. The learned Vice-Chancellor in that case found that it was impossible to come to a conclusion other than that perjury of the worst kind had been committed, and said that a decision can be effected that stands upon a more satisfactory foundation and which must be controlling no matter what may have been the truth as to the alleged misrepresentations before the contract of sale was executed. However, during negotiations the defendants, especially Mrs. Sandhowe, made repeated calls to the premises and on one of them both defendants were accompanied by two men named Fitzpatrick when an elaborate examination of the premises was made. The defendants and the Fitzpatricks said that the latter were taken there for the purpose of having one of them act as chauffeur and to have the other or both of them pass their untechnical opinion as to the desirability of the premises as a suburban residence. It was clear to the Vice-Chancellor that the defendants did not rely on the representations made by the complainants, but undertook an examination of the property for the purpose of determining the truthfulness as to the construction's being of hollow tile. Representations are alleged to have been made by the complainant, Condon, and the Court at page 102 says,

“Even assuming for the purpose of this consideration of the case that all the defendants say is true, it seems to me to disclose beyond peradventure as I have already said that the defendants did not rely upon what they had been told by the complainant and must be presumed to have car-

ried out their own investigation and to have found the conditions as they existed."

The Court indicates that the defendants would have been entitled to rely on any such statements as that with which they charge the complainants, but say that the trouble is

"* * * that they did not do so, but preferred to investigate the matter for themselves, and having done so must be charged for what is reasonable to be assumed they found, or could have found, if their investigation was made with the care and completeness to be expected of one who deals at arm's length with another."

In the case at bar there is no doubt that the defendants visited the premises in question, and examined it from top to bottom before signing the contract.

The Court further at page 102 says:

"This rule will be found discussed in Pomeroy's Equity Jurisprudence para. 893. In a footnote at p. 1852, in the fourth edition of that work the author points out as a ground of the latter branch of the rule the practical impossibility of learning just how much information a party has obtained by such inquiry, and the opportunity otherwise of repudiating any transaction fairly entered into with which he had become dissatisfied. The same rule is laid down in 12 R. C. L. at p. 357."

The Court also refers to *Atwood v. Small* (6 Clar. & F. 232) and many other cases. The Court also refers to the case of *Dewitt v. Van Sickle*, 29 Eq. 209, wherein it appears

"A person who wilfully closes his eyes to avoid seeing what believes he would he see if he kept them open must be considered to have seen what any man with his eyes open would have seen."

The following quotation is taken from the Condon case page 102:

“Had there been any effort to frustrate the attempt of the defendants in their examinations of the buildings, a different situation would have been presented. The completest opportunity was afforded them in this respect.

“Furthermore, the defendants say that they had full knowledge of the fraud practiced at their expense as early as June, 1923, and, in fact, as early as that month charged the complainants therewith. Notwithstanding, and although the complainants emphatically deny any fraud, nothing further was done except the writing of a single letter until December of that year, when the writ of attachment above mentioned was sued out. Explanations have been attempted of this delay, but they fail to excuse it. One who believes that he has been wronged in the manner charged in the counter-claim does not remain quiescent over a period of six months, but, on the other hand, immediately upon the charge being denied, proceeds to litigate.”

The defendant's testimony in the case at bar (p. 25, l. 25) is to the effect that a few days after she signed her contract she had an interview with the President of the complainant and was informed that the house was not of solid brick construction; that the walls were not metal lath, and that the floors were not of triple thickness. This knowledge must have come to her in the early part of May. Notwithstanding this the complainant did not demand a return of her deposit money until her Answer was filed about the middle of August. Defendants, it will also be remembered (p. 26, l. 2), took with them a fixture after having received definite information from Waldron as to the construction of the house. The two latter

facts would indicate that they placed no importance in any alleged representations.

It might be claimed by the defendant that it would be impossible to determine whether a building were brick veneer, had metal lath, or triple floors. The defendants claim to have inquired several times about the *three virtues* of the house they were about to buy. The fact that the items were mentioned so often in the negotiations would indicate that they had some doubt about their existence. Two simple methods were open to them. They could have inquired of Waldron, and they could have examined the plans and specifications at the Building Department Office. They would then have had reliable information. The fact that they did not attempt to question Waldron before signing the contract, or attempt to test the walls and floors does not indicate that the defendant had complete confidence in the agents, but shows beyond a doubt that they were not interested in these three items, but were satisfied with their own observation of the appearance of the house.

Conclusion.

The greater part of the foregoing argument is prepared under the assumption that the representations complained of were actually made by the agents of the complainant. The complainant, however, respectfully urges that inasmuch as the facts show that the agents were not complainant's agents, but were the agents of the purchaser (the defendant), and that even though they were the agents of the purchaser, the representations were not in fact made, but that the purchaser, in her deliberations, assumed that

the house was of a certain construction and dealt with the agents under that assumption, it is not necessary to have a decision of any points of law.

In concluding, reference is made to several cases cited in appellant's brief, as follows:

Reitman v. Fiorillo, 72 *Atl.* 74: Here both the agency and the fraud were already proven. The complainant was taken advantage of by the agent because he was an illiterate Italian. Furthermore, this transaction had to do with warehouse receipts and not real estate. In the case at bar competent parties were dealing in a real estate transaction.

Kavky v. Harris, 132 *Atl.* 750: This case differs from ours in that the fraud here was clearly that of the principal. In this case the principal misrepresented facts to an innocent agent who in turn misrepresented to defendant. Surely under such circumstances (which are not like ours) a fraudulent principal would not be permitted to enforce his fraudulently obtained contract.

Muller v. Weiss, 91 *N. J. Eq.* 29, cited in appellant's brief under Points 1 and 4 was appealed and on appeal it was held that certain misstatements of Muller were not sufficient to warrant denying specific performance. See 91 *N. J. E.* 321.

Complainant, therefore, respectfully urges an affirmance of its decree.

Respectfully,

PILGRIM & RITGER,
Attorneys for and of Counsel
with Appellee.