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BILL OF COMPLAINT.

(Filed January 9, 1920)

IN CHANCERY OF NEW JERSEY.

*To the Honorable, Edwin Robert Walker, Chancellor
of the State of New Jersey:* 19

The complainant, Clifton N. Phillips, of the city of Ventnor City, County of Atlantic and State of New Jersey, respectfully shows:

1. That prior to and on the 9th day of January, A. D. 1919, Martha K. Thomas, of Linwood, County of Atlantic and State of New Jersey, was the owner of record of all the following described premises situate in the city of Ventnor City, County of Atlantic and State of New Jersey, bounded and described as follows: 20

BEGINNING in the Westerly line of Surrey Avenue at a distance of 215 feet South from the Southerly line of Ventnor Avenue and runs thence (1) in the Westerly line of Surrey Avenue, South 50 feet to a point; thence (2) Westwardly, at right angles to Surrey Avenue 125 feet to a point; thence (3) Northwardly, parallel to Surrey Avenue 50 feet to a point; thence (4) Eastwardly, at right angles to Surrey Avenue 125 feet to the Westerly line of Surrey Avenue and the place of beginning. 30

2. That on the 9th day of January, A. D. 1919, the

said Martha K. Thomas entered into an agreement of lease with complainant, leasing the said premises to complainant for a period of one year from the 15th day of January, A. D. 1919, to the 15th day of January, A. D. 1920, at the rent or sum of seven hundred and fifty dollars (\$750) per annum being paid as follows: Sixty-two and fifty hundreds dollars (\$62.50) on the 15th day of each calendar month, a copy of which lease is hereunto annexed and made a part hereof and marked "Schedule I."

10 That complainant entered into possession of said premises and still is in possession of the same.

3. That in and by the terms of the said lease, it was provided among other things as follows:

"Party of the first part does hereby give to party of the second part, option of buying said property at any time up to expiration of this lease."

20 4. That at the time of the making of said lease and the making of said option it was agreed by and between the said Martha K. Thomas and your complainant that the price of said premises would be \$10,500 to be paid as follows: \$5,000 cash and an existing mortgage of record of \$5,000 against said premises.

30 5. That the object of the specific agreement above mentioned was to give to the complainant an option to purchase said property at any time prior to the expiration of the lease, the consideration of said option being the leasing by your complainant from the defendant of the said premises and the payment of the rent mentioned and reserved in said lease. That your complainant fully intended to exercise

said option and purchase said premises in accordance with the terms thereof, for the price of \$10,500 at and before the expiration of the term of said lease.

6. That sometime in the month of October and prior to the 27th day of October, an employee of H. G. Harris Company, a corporation of the State of New Jersey, engaged in the real estate business in Atlantic City, New Jersey, called at the premises of your complainant, which he occupies as a home, for the purpose of showing a prospective purchaser through the premises. That your complainant inquired of the said agent of the H. G. Harris Company his purpose in desiring to view the premises and was informed by him that H. G. Harris Company had entered into an agreement of sale with the said Martha K. Thomas, whereby the said Martha K. Thomas had agreed to sell the said premises to the H. G. Harris Company for the sum of \$10,200, of which price the said H. G. Harris Company had paid to the said Martha K. Thomas \$200 on account. That your complainant thereupon informed the said agent of H. G. Harris Company that he had an option to purchase the said premises from the said Martha K. Thomas for the sum of \$10,500, which option did not expire until the 15th day of January, A. D. 1920, and that he, your complainant, intended to exercise said option and to purchase said property for said price of \$10,500, and notified the said agent of the said H. G. Harris Company that the said Martha K. Thomas had no right to sell said premises to the said H. G. Harris Company nor to any one else, and that if they, the said H. G. Harris Company undertook to complete its agreement of purchase with

the said Martha K. Thomas and to accept a deed from her for said premises, it was subject to your complainant's right to purchase said premises for the said price of \$10,500, at any time on or before the 15th day of January, A. D. 1920.

7. That immediately thereafter your complainant called upon the said Martha K. Thomas at her home in Linwood and stated to her that he intended to exercise the option contained in said lease for the purchase of the said premises and tendered himself ready and willing to perform on his part all of the terms of said option and insisted that she, the said Martha K. Thomas, perform said option on her part and execute a deed to your complainant for the said premises.

8. That the said Martha K. Thomas thereupon informed your complainant that she recollected that she had made such an option and that the consideration price for said premises was to be the sum of \$10,500 and at the same time the said Martha K. Thomas produced her copy of the lease containing said option and then stated to your complainant that at the time she entered into the agreement of sale to sell said property to the said H. G. Harris Company, she had forgotten the fact that she had given your complainant an option to purchase said property and thereupon told your complainant that she would return to the H. G. Harris Company the \$200 consideration price paid to her by the said H. G. Harris Company in part payment of the consideration price mentioned in her agreement of sale with said H. G. Harris Company and ask for a return of said agreement of sale. That your complainant insisted that she comply with the terms of her option

with him and execute a deed to him for the said premises, but the said Martha K. Thomas stated that she would not do so until she had returned to the said H. G. Harris Company the said \$200 and received back from it her agreement of sale with it.

9. That subsequently to this personal interview and within a day or so thereof your complainant wrote a letter to the said Martha K. Thomas in which he tendered himself ready and willing at any time to perform the terms of the said option mentioned in said lease and herein above referred to and to take said property for the said price of \$10,500 and calling upon the said Martha K. Thomas to execute to him a deed for the said premises in accordance with the terms of said option and in reply thereto received the following letter which is annexed to the said lease and made part of "Schedule I":

October 28th, 1919
Linwood, N. Jersey

Mr. C. Phillips:

In answer to your letter of October twenty seventh in regard to purchasing property 6 S. Surrey, which option was overlooked by me, and which I will notify Mr. Harris to release me from my agreement with him to sell same, I agree to sell you my property 6 South Surrey, Ventnor for ten thousand five hundred, this being the price I offered to sell to you last January.

Martha K. Thomas.

10. That upon receiving said letter, he annexed it to his said lease and caused the same to be recorded and the said letter and lease was recorded in the office of the clerk of Atlantic County at May's

Landing, New Jersey, in book of miscellaneous records No. 7, page 387, on November 15, 1919, at 8 A. M., as will appear by the indorsement on "Schedule I" herein above referred to.

10 11. That subsequently to the writing of said letter, your complainant received a letter from the said Martha K. Thomas in which she stated that the said H. G. Harris Company had refused to accept the return of the said \$200 and had returned the same to her and had stated that they would insist upon her performing the terms of the agreement of sale with them and of executing a deed of conveyance to them in accordance therewith.

20 12. That at the time of the making of the agreement between Martha K. Thomas and the said H. G. Harris Company the said H. G. Harris Company was acting as real estate agents for the said Martha K. Thomas and were the real estate agents through whom your complainant rented the premises in question from the said Martha K. Thomas.

30 13. That your complainant is informed and believes and therefor charges that the said H. G. Harris Company did not enter into negotiations with the said Martha K. Thomas for the sale of the said premises until after they had secured a purchaser for the same and the said H. G. Harris Company, through its agents, negotiated for the sale of the premises with the said Martha K. Thomas, concealing from her the fact that they had a purchaser for the same at a higher price than the price that they had agreed to pay therefor.

14. Your complainant is further informed and be-

lieves and therefor charges that at the time of the entering into the negotiations for the sale of the said premises between the said H. G. Harris Company and the said Martha K. Thomas, that the said H. G. Harris Company well knew that your complainant had an option to purchase the said premises for the said sum of \$10,500. That at the time the agent of the said H. G. Harris Company called at your complainant's house for the purpose of doing the same and was informed by your complainant of your complainant's option to purchase the said premises, that the agreement of sale between the H. G. Harris Company and the said Martha K. Thomas had not yet been entered into. 19

15. That your complainant has been in actual possession of the said premises from the 15th day of January, 1919, down to the present time and was in possession thereof at the time of the negotiations for the sale of said premises between the said H. G. Harris Company and the said Martha K. Thomas, but that no inquiry was ever made of him of his interests therein or whether he had any rights in the premises at all either as tenant or otherwise, notwithstanding he would have been ready and willing at all times to advise the H. G. Harris Company of his interest in the said premises and of the fact that he had an option to purchase the same for the price of \$10,500, which option he intended to exercise. 20
30

16. Your complainant further avers and charges that at the time of the entering in of the said agreement of sale between H. G. Harris Company and Martha K. Thomas, the said H. G. Harris Company well knew your complainant's interests in said prem-

ises and well knew that your complainant had an option to purchase the same for the price of \$10,500, and well knew that your complainant intended to exercise said option.

10 17. Your complainant further shows that by deed of conveyance, dated the 12th day of December, A. D. 1919, and recorded in the office of the Clerk of Atlantic County on the 22nd day of December, A. D. 1919, the said Martha K. Thomas conveyed the said premises in accordance with her agreement with the said H. G. Harris Company to one William S. Prosser, who is an employee of the said H. G. Harris Company, and your complainant is informed and believes and therefor charges that the said Prosser is holding said premises in trust for the said H. G. Harris Company. That the said Prosser paid no consideration whatsoever for the said premises and is merely holding the same in order to give the appearance that he is an innocent purchaser for value whereas 20 as a matter of fact he paid no consideration whatsoever for the premises and is holding the same as trustee for the said H. G. Harris Company.

30 18. That on the 15th day of December, A. D. 1919, William S. Prosser in order as it appears to secure payment of the sum of \$4500 in six months with interest at the rate of six per cent per annum, executed to James F. Halliman a mortgage for \$4500, dated the 15th day of December, A. D. 1919, and recorded in the office of the Clerk of Atlantic County on December 22nd, A. D. 1919. That your complainant avers and charges that the mortgage is not a bona fide mortgage given to secure the sum of \$4500, and further avers and charges that there was no consideration whatsoever given for said mortgages, but

if said mortgage is a valid and subsisting lien, then it is subject to your complainant's right to have said premises conveyed to him in accordance with the agreement above set forth.

19. Complainant further shows that the conveyance to the said William S. Prosser above referred to was made with the object of preventing complainant from exercising the option of purchase contained in said lease and that it was intended to operate a fraud upon complainant. 10

20. Complainant further shows that he is ready and willing and has at all times been ready and willing to pay the sum of \$10,500 for the conveyance of the said property in accordance with the agreement above referred to and that he is still ready and willing to exercise the said option and to consummate the said purchase and to pay the said sum of \$10,500 upon the proper transfer of the said premises to him and has offered to purchase the same from the H. G. Harris Company and from the said William S. Prosser, and from the said Martha K. Thomas, but that the H. G. Harris Company, William S. Prosser, James F. Halliman and Martha K. Thomas refuse to convey the said property to the complainant and have so notified the complainant. 20

In consideration whereof and forasmuch as complainant is without adequate remedy at law and has no remedy save in a court of equity, the complainant prays: 30

1. That this Honorable Court adjudge and decree that the conveyance made by the said Martha K. Thomas to the said William S. Prosser, as particu-

larly hereinabove described, shall be considered null and void and for nothing holden to the end that complainant may be placed back in the same position as before the said conveyance was made.

10 2. That this Honorable Court adjudge and decree that the said Martha K. Thomas, H. G. Harris Company, James F. Halliman and William S. Prosser, or some of them, be compelled to specifically perform the agreement mentioned in paragraphs 1 and 2 of this bill and marked "Schedule I," and that they or some of them be compelled to convey the premises described in this bill of complaint, upon the payment of the sum of \$10,500 by complainant to whomever the Court may direct.

20 3. That this Honorable Court adjudge and decree that the said Martha K. Thomas, H. G. Harris Company, James F. Halliman and William S. Prosser be restrained and enjoined from making any conveyance of the said lands and premises above mentioned and described or any portion thereof except to the complainant and that they likewise be enjoined and restrained from in any other way disposing or encumbering the said premises.

30 4. That the said Martha K. Thomas, H. G. Harris Company and James F. Halliman and William S. Prosser be restrained and enjoined from taking any proceedings whatsoever in any court of law or otherwise for the purpose of removing the said complainant from the said premises at the expiration of the lease mentioned in paragraphs 1 and 2 of this bill and marked "Schedule I," and be further restrained and enjoined from in any wise interfering with or disturbing the possession of the said complainant

of, in and to the said premises by virtue of said lease and of said agreement of sale.

5. That the mortgage made by the said William S. Prosser to James F. Halliman, dated December 15, 1919, and recorded December 22, 1919, be set aside and for nothing holden and cancelled of record or in the alternative that the complainant be permitted to pay off said mortgage as part of the consideration price for said premises.

10

6. That a writ of subpoena may issue commanding Martha K. Thomas, H. G. Harris Company, James F. Halliman and William S. Prosser, the defendants in this suit, to answer all and singular the matters and things hereinabove set forth and complained of, without oath, and to stand to, abide by and perform such orders and decrees as this Court may make in the premises.

7. And that complainant may have such further and other relief as the nature of the case may require.

20

BOURGEOIS & COULOMB,
*Solicitors for and of Counsel
with Complainant.*

LETTER ATTACHED TO LEASE
(RECORDED).

30

October 28th, 1919
Linwood, N. J.

Mr. C. Phillips

In answer to your letter of October twenty seventh

in regard to purchasing property 6 S. Surrey, which option was overlooked by me, and which I will notify Mr. Harris to release me from my agreement with him to sell same, I agree to sell you my property 6 South Surrey, Ventnor for ten thousand five hundred. This being the price I offered to sell to you last January.

Martha K. Thomas.

10

SCHEDULE "I."

THIS INDENTURE, made the ninth day of Jan. A. D. Nineteen Hundred and Nineteen BETWEEN Mrs. Martha Thomas, Shore Road, Linwood, N. J. of the first part, and Clifton N. Phillips of the second part.

20 WITNESSETH, That the said party of the first part has let, and by these presents does grant, demise and to farm let unto the said party of the second part, frame dwelling house, 6 So. Surrey Ave., Ventnor, N. J. with the appurtenances from Jan. 15, 1919 to Jan. 15, 1920 at the rent or sum of Seven hundred and fifty dollars per annum to be paid as follows: Sixty two & 50/100 on the 15th day of each calendar month.

30 PROVIDED, That if any rent shall be due and unpaid, or if default be made in any of the covenants herein contained, then this lease shall immediately cease and become void, and it shall be lawful for the said party of the first part, without notice and without any demand for said rent to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however.

AND the said party of the second part does hereby

covenant and agree, to and with the said party of the first part, to pay the said rent in the proportions and upon the conditions aforesaid, and not to assign this lease, and not to underlet said premises, or any part thereof, nor permit any person or persons to occupy the same, or any part thereof, nor use or permit any part thereof to be used for any other purpose than

nor make or suffer to be made any alteration therein, without the written consent of the said party of the first part; and also at the expiration of said term to yield up and surrender the possession thereof, with the appurtenances in as good state and condition as the same now are, or may be put into by the said party of the first part, reasonable wear and tear and accidents happening by fire or other casualties excepted. 10

Clifton N. Phillips hereby agrees to pay one half of the cost of painting exterior of 6 So. Surrey Ave. work to be done during Spring of 1919. Party of the first part does hereby give to party of the second part, option of buying said property at any time up to expiration of this lease. 20

AND the said party of the first part does covenant that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

IN WITNESS WHEREOF the said parties have interchangeably set their hands and seals hereto the day and year first written. 30

Martha K. Thomas

Clifton N. Phillips

SIGNED, SEALED AND DELIVERED,)

In the presence of)

Albert L. Caryell

(On reverse side)
LEASE

Mrs. Martha Thomas
to
Clifton N. Phillips
6 So. Surrey Ave.

Expires Jan. 15, 1920

10

Received Nov. 15, 1919 at 8:00 A. M.
and recorded in the Clerk's Office of
Atlantic County, at Mays Landing, N.
J. in Book of Miscellaneous Records
No. 7, page 387

Edwin A. Parker, Clerk,
A. M. B.

IN CONSIDERATION of the letting of the prem-
ises described in this lease, and of the sum of one
20 dollar to in hand paid do hereby
become surety for the punctual payment of the rent
and performance of the covenants mentioned in said
lease, to be performed by and if any default
shall be made therein do hereby promise
and agree to pay unto the said such sum
or sums of money as will be sufficient to make such
deficiency, and fully satisfy the conditions of such
Lease, without requiring any notice of non-payment,
or proof of demand being made.

30 GIVEN under hand and seal this
day of 19
SIGNED, SEALED AND DELIVERED,)
in the presence of)

ANSWER.

(Filed January 19, 1920)

IN CHANCERY OF NEW JERSEY.

<hr style="width: 10%; margin: 0 auto;"/> <p>Between CLIFTON N. PHILLIPS, <i>Complainant,</i> and MARTHA K. THOMAS <i>et als.</i>, <i>Defendants.</i></p>	}	<p>On Bill, &c. Answer.</p>
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The joint and several answers of Martha K. 20
Thomas, William S. Prosser, H. G. Harris Com-
pany, a corporation, and James F. Halliman, all of
Atlantic City, New Jersey:

1. Defendants admit paragraph 1 of the bill of
complaint.

2. They admit paragraph 2 of the bill of com-
plaint.

3. They admit paragraph 3 of the bill of com- 30
plaint.

4. Defendants Prosser, Harris Company and
Halliman say they have no knowledge sufficient to
found a belief as to the allegations in paragraph 4

of the bill and they pray proof, and the defendant Thomas denies that any price was agreed upon.

5. They deny both the conclusions and statements of fact in paragraph 5.

6. Thomas has no knowledge of the facts set forth in paragraph 6 of the bill save by the bill and prays proof if the same be necessary. Harris Company,
10 Prosser and Halliman deny the allegations in said paragraph.

7. Prosser, Harris Company and Halliman have no knowledge of the facts stated in paragraph 7 of the bill save by the bill and they pray proof. Thomas admits that complainant was at her home as stated, but denies that he stated he intended to exercise the option or that he tendered himself ready and willing to do the same.

20

8. Prosser, Harris Company and Halliman have no knowledge of the facts alleged in paragraph 8 of the bill save by the bill and they pray proof. Thomas denies that she said that the consideration for the sale of the premises was ever agreed to be \$10,500, but admits that she did say to complainant that she had forgotten the existence of the option at the time she entered into the agreement of sale with Harris Company and she told complainant that she was
30 willing to deed the property to him provided Harris Company would accept a return of the \$200 paid as earnest money and relieve her from the performance of the contract.

9. They admit the letter referred to in paragraph 9 of the bill.

10. They have no knowledge concerning the facts set forth in paragraph 10 and they pray proof, if necessary.

11. Admit paragraph 11 of the bill.

12. They deny paragraph 12 of the bill.

13. Thomas has no knowledge concerning the averments in paragraph 13 save by the bill and she prays proof, if necessary. Harris Company, Prosser and Halliman deny the averments. 10

14. Thomas has no knowledge of the averments in paragraph 14 of the bill save by the bill and she prays proof. Prosser, Harris Company and Halliman deny the averments.

15. They admit paragraph 15 of the bill. 20

16. Thomas has no knowledge of the averments in paragraph 16 of the bill save by the bill and she prays proof. Prosser, Harris Company and Halliman deny the averments.

17. Thomas admits paragraph 17 of the bill which avers the execution of the deed, as to the other averments says she is without knowledge save by the bill. Prosser, Harris Company and Halliman make like admissions, but deny Prosser was a mere trustee for Harris & Company. 30

18. Thomas has no knowledge concerning the statements in paragraph 18 of the bill save by the bill and prays proof, if necessary. Prosser, Harris

Company and Halliman admit the statements except they deny the mortgage was not a bona fide mortgage.

19. Thomas has no knowledge concerning the statements in paragraph 19 of the bill save by the bill, and she prays proof, and Prosser, Harris Company and Halliman deny the averments.

10 20. Defendants have no knowledge concerning the averments in paragraph 20 of the bill and they pray proof.

C. L. COLE,
*Solicitor for and of Counsel
with Defendants.*

20

30

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between	}	On Bill, &c., for Specific Perform- ance. Final Hearing.	10
CLIFTON N. PHILLIPS, Complainant,			
and			
MARTHA K. THOMAS, <i>et</i> <i>als.</i> , Defendants.			

Before his Honor, E. B. LEAMING, Vice-Chan- 20
cellor, at the Chancery Chambers, Atlantic City,
New Jersey, on Monday, March 1st, 1920.

APPEARANCES:

BOURGEOIS & COULOMB, Esqs., for Complainant;
HON. C. L. COLE and WILLIAM CHARLTON, Esq., for
Defendants. 30

CLIFTON N. PHILLIPS, the complainant, being duly sworn according to law, on his oath says:

By Mr. Coulomb:

Q. Mr. Phillips, you are the complainant in this suit for the purpose of having Mrs. Thomas convey to you the property in which you are now living?

10 A. I am.

Q. Where do you reside at the present time?

A. 6 South Surrey Avenue.

Q. And how long have you resided there?

A. Going on five years.

Mr. Coulomb: It is admitted in the pleadings, if your Honor please, that he occupies the premises which are described in the bill of complaint.

20 Q. Did you on the 9th of January, 1919, enter into a lease from Mrs. Martha K. Thomas for the premises in question?

A. I did.

Q. I show you a paper dated the 9th of January, 1919, and ask you whether that is the lease that you had with Mrs. Thomas?

A. It is.

30 Q. I show you the signature and ask you whether that is your signature and the signature of Mrs. Thomas?

A. Yes.

Q. On the second page or on the reverse, rather, of this instrument there is written the following: "The party of the first part does hereby give party of the second part option to buy said property at any time up to expiration of this lease." Was that

option endorsed on that lease at the time you received your copy back from Mrs. Thomas signed by her?

A. It was.

Q. Where were these leases prepared?

A. Mr. Coryell's office.

Q. And by whom?

A. By me.

Q. Who wrote them?

A. I wrote them, I copied them from the old lease which H. G. Harris had made out the year previous.

Q. For the same property?

A. Same property, yes.

Q. And you say it was occupied by you the year previous?

A. Yes.

Q. For several years previous?

A. For three or four years previous.

Q. After you made up the leases what did you do with them?

A. I made them up in Mr. Coryell's office and then as I was ready to hand them to him to be signed some people came in, he was busy, so I went down to Mr. Harris, and I remembered that I had spoken to Mrs. Thomas about an option and I called up Mr. Coryell and asked him if I should put that option in and he said yes, if Mrs. Thomas would sign it it would be all right; so I put the option in both leases and came down to Mr. Coryell's office and he signed them and I sent them by mail.

By the Vice-Chancellor:

Q. Who signed them?

A. Mr. Coryell's real estate man was the witness.

Q. The lease is not signed by the principal?

Mr. Coulomb: Oh, yes, it is.

A. And after he had witnessed my signature I sent them over to Mrs. Thomas and in a few days I received my signed copy back, which this is.

By Mr. Coulomb:

10 Q. Now, at the time that you signed this lease did you have any agreement with Mrs. Thomas touching the price which you were to pay for the property?

A. Why, I asked Mrs. Thomas what she would sell the property to me for and she said \$10,500, but I was more concerned at the time in having an option there, to not put me out of the house, to be notified first if she was going to sell it, because I have two little children and their mother is not living and I am very dependent on a home for them.

20 Q. Was the price fixed by Mrs. Thomas?

A. Yes.

Q. At how much?

A. At \$10,500.

Q. And why wasn't it put in the option?

A. Well, I thought I didn't have to put it in, because I thought she would notify me, if she was going to sell it she would notify me first and then I could say if I would be able to pay that price.

30 Q. Did you have any experience prior to this time in drawing leases of this character?

A. No, I have not.

Q. You say the two leases that you signed were sent to Mrs. Thomas?

A. Yes.

Q. Where did she live?

A. Linwood, N. J.

Q. And did you subsequently receive one of them back?

A. I did.

Q. And is this lease which you have identified the one you received back from Mrs. Thomas?

A. It is.

Mr. Coulomb: I ask that that be marked at the present time. It is admitted, but I want it marked.

16

(Said paper marked Exhibit C1.)

Q. Who lives in the house there with you?

A. My two children and the housekeeper.

Q. Now, sometime in October did you have any notification in any way at all, from Mrs. Thomas that the house had been sold or agreed to have been sold?

A. Yes, I had a note from Mrs. Thomas saying that she had sold the house.

20

By Mr. Cole:

Q. Pardon me. Have you the note?

A. No, I haven't the note.

Q. What did you do with it?

A. Why, I guess it is down to the house, I think it is.

Mr. Cole: Well, if there was a writing I think we ought to have it. 30

The Witness: Well, it was just a note.

Mr. Cole: Pardon me. If there is a note let us have it.

The Vice-Chancellor: Yes; the objection is properly taken.

By Mr. Coulomb:

Q. Where were you at the time that letter was received, if it was a letter?

A. I was in New York.

Q. And what did you do on your return when you discovered the letter?

10 A. I called up to see if Mrs. Thomas was there and she wasn't at home, she was up in Philadelphia at the time.

Q. Did you subsequently see her?

A. I made two trips over to see her and finally found her there, asked her about the transaction, told her I would like to buy the house, I had the option in there. She said she didn't know anything about it, she hadn't looked at her lease since she signed it and put it away.

20 Q. Did she subsequently find the lease or look for it on that day?

A. Yes; she went upstairs and looked around for quite a while and finally brought it down, said she had never noticed it at all, paid any attention to it, didn't know that I wanted to buy the house.

Q. What did she say then about it?

30 A. She said she would like to have me the purchaser, as I had been a very good tenant, and she was awfully sorry about it, that she had entered into an agreement and she would sell it to me for the price she had agreed upon at the time she signed that paper, \$10,500, but that she would have to write to Harris to release her and she would send back the money binding the contract.

Q. Did you afterwards see Mr. Harris in regard to this matter?

A. Yes, right after that I went up to see Mr. Harris in his office and I told him about it, that I had this option there; he said he didn't know anything about it. I said "Well, I can't give up the house. I haven't any place to go to." He said, "Why, you haven't any chance to get title to the house, but you have a fine damage suit against Mrs. Thomas." I said, "I don't want any money from Mrs. Thomas, I just want the house to live in." "Well," he said, "I can't do anything more; I have agreed to sell the house." 10

Q. Subsequently to that did you receive a letter from Mrs. Thomas in regard to the matter? I show you a letter, part of which is attached to the lease, which is dated October 28th, 1919, Linwood, N. J., addressed to C. Phillips.

A. Yes.

Q. I ask you to read that letter.

A. "Mr. C. Phillips. In answer to a letter of October 27th in regard to purchasing property 6 South Surrey, which option was overlooked by me and which I will notify Mr. Harris to release me from my agreement with him to sell same, I agree to sell you my property, 6 South Surrey Avenue, Ventnor, for \$10,500, being the price I offered to sell to you last January. I signed an agreement to sell this property to Mr. Townsend without looking over my lease which contained your option. I shall return to him his payment binding the agreement and at the same time asking him to release me. Yours respectfully, Martha K. Thomas." 20 30

Q. Now, when did you receive that letter?

A. Why, I wrote Mrs. Thomas the letter which this was an answer to, and she didn't get it, and I called her up on the telephone to know if she had gotten this letter two or three days after I had

mailed it to her, she said no, she hadn't gotten it, she was coming in town, I said, "Would you come to see me? It is quite important to take this matter up right away." When she came down to see me I showed her a copy of the letter which I had sent her, and Mrs. Thomas' daughter was with her, and I asked Mrs. Thomas if she wouldn't please answer that letter, and she sat down at my desk and wrote this.

10 Q. Was the daughter there and Mrs. Thomas as well, at the time it was written?

A. Yes.

Q. There was a suggestion made by Judge Cole that you dictated that letter. Did you dictate that letter?

A. No, I didn't dictate the letter. Mrs. Thomas wrote the letter, and she asked me one or two questions about what was in my letter, the copy of which she had before her on the desk.

20 Q. When you saw Mrs. Thomas prior to the writing of that letter—when you went over to see her in answer to the letter she had written you, or by reason of that letter, did you tender yourself ready and willing to perform the contract and pay the price?

A. I did.

Q. Did she give you any reason why she was unable at that time to do so?

30 A. Oh, that she couldn't accept it because she had entered into this other contract and she didn't know where she stood.

At this point a recess was taken until two o'clock P. M.

Hearing of the cause resumed after recess, in the presence of the respective counsel heretofore noted.

Mr. Coulomb: I want to put this letter in evidence. It is in three sections, all part of the same letter.

(Said letter marked Exhibit C2.)

10

CLIFTON N. PHILLIPS, recalled.

By Mr. Coulomb:

Q. Did you find the note, Mr. Phillips?

A. Yes, sir.

20

Mr. Cole: I will have this marked for identification, letter dated October 4th, 1919.

(Said letter marked Exhibit D1 for identification.)

Mr. Coulomb: I might just make an inquiry about it, Judge, if you don't mind.

Mr. Cole: Yes.

30

Q. Mr. Phillips, is this letter which was marked for identification the letter you were referring to this morning as having advised you the house was sold?

A. Yes.

The Vice-Chancellor: May I see what this letter is that was just produced?

(Exhibit D1 for identification handed to Vice-Chancellor.)

Cross-examination.

By Mr. Cole:

10 Q. Who were present at the time Mrs. Thomas signed this writing dated October 28th, 1919?

A. Why, at my house, you mean?

Q. Yes.

A. Mrs. Thomas and her daughter and myself.

Q. Just what was the conversation before she wrote this paper? Just what was said between you two? She came, as I understand, to your house by your invitation, did she not?

20 A. Well, I called Mrs. Thomas up and she said that she hadn't gotten the letter, and she was coming to town. "Well," I says, "if it isn't too much out of your way would you run down and see me?" and she said yes.

Q. Now, having arrived, what was the talk between you before she wrote and signed this paper of October 28th?

A. Why, I just showed her the letter, a copy of the letter that I had written, and asked her to answer it, as I wanted to file them with my lease.

30 By the Vice-Chancellor:

Q. That you wanted what?

A. Wanted to——

By Mr. Cole:

Q. File it with my lease?

A. Yes.

Q. Now, was that all that was said?

A. Well, I don't remember, Judge——

Q. Do you recall anything more?

A. ——whether there was anything more said.

Q. Now, she having read your letter, or a copy, and this conversation having followed, then what happened?

A. Why, Mrs. Thomas—I gave Mrs. Thomas the letter and asked her would she answer it, and she sat down to the desk and answered it, the letter. 10)

Q. All right. Now, then, is this writing of October 28th entirely her thoughts or did you assist her?

A. Only when she asked me.

Q. What did she ask you and in what respect did you assist her?

A. Well, there was just one or two small ways, she asked me how to—oh, just a word or two in it, I just don't remember exactly what it was, it was very little.

Q. Before she signed this did she talk with you 20 about seeking a release from the contract she had made with Prosser?

A. Yes.

Q. You understood that she had to be released from Prosser before she could perform with you, didn't you?

Mr. Coulomb: That is objected to, if your Honor please.

30

The Vice-Chancellor: I think it is proper cross-examination.

Mr. Coulomb: I want to state my objection, simply that I don't think it makes any difference whether she was bound up by a subsequent contract

with Prosser, that he might have some right of action against her. Now, in other words, I think it is a mistaken notion as a matter of law that she was obliged to get rid of her contract with Prosser before she could perform her contract with Mr. Phillips.

The Vice-Chancellor: You will have the benefit of your objection, but I think it is proper cross-examination.

10

Q. (Repeated.) You understood that she had to be released from Prosser before she could perform with you, didn't you?

A. Shall I answer that?

Q. Yes.

The Vice-Chancellor: Did you understand the question? Read it to him, if he is in doubt.

20 (Question repeated.)

A. She said that she would ask to be relieved.

Q. Did she tell you why she would ask to be released?

A. Yes.

Q. What did she say?

30 A. That she would ask to be released because she realized that I had an option to buy the house which she hadn't known of at the time she made the agreement, and therefore she would ask to be released from it so she could fulfil my option.

Q. Now, at that time was it your understanding that she had to procure a release from Prosser before she could deed the property to you?

A. I didn't understand that she had to, no.

Q. Well, if you didn't understand that, did you tell her so?

A. Well, I didn't know enough about law to know that she would have to be released from that or not, and I supposed that he would release her.

Q. You say you supposed he would?

A. Yes.

Q. Now, did you regard this note or letter of hers to you as accepting the proposition in your letter of October 27th?

A. I did.

Q. And the proposition which you understood she was accepting is the proposition that you made in this letter of October 27th? 10

A. That is what I thought——

Q. Pardon me. Now, answer my question. That is your letter (exhibiting paper to witness), isn't it?

A. Yes.

Mr. Cole: I will have this marked for identification.

(Said paper marked Exhibit D2 for identification.) 20

Q. (Repeated.) And the proposition which you understood she was accepting is the proposition that you made in this letter of October 27th?

A. Yes.

The Vice-Chancellor: What is the contract price in the other contract? 30

Mr. Cole: \$10,200, \$300 less than what he agreed to pay.

Q. Have you one of your old leases here?

A. What—H. G. Harris lease? No.

Q. Lease for this property.

A. Any one of the previous leases?

Q. Yes.

A. No, I haven't any.

Q. You had been in possession for how long?

A. When?

Q. Before this lease of 1919?

A. Over three years.

10 Q. And did it contain any option to buy before this?

A. I don't think so.

Q. I think that is all.

By Mr. Charlton:

Q. Mr. Phillips, at the time you wrote the letter of October 27th did you know that Mrs. Thomas had entered into an agreement with somebody else?

20 A. No, sir—I didn't know what the agreement was, all I knew was this letter.

By Mr. Cole:

Q. You got a letter October 4th notifying you it had been sold?

Mr. Coulomb: He has admitted that.

30 A. But I didn't get it for some time; I was away for a week, I was in New York a week or ten days, and when I came home the letter was at the house.

By Mr. Charlton:

Q. When did you call at the H. G. Harris offices—before October 27th or afterwards?

A. It was after I had seen Mrs. Thomas.

Q. After this letter had been written and the letter attached to the lease had been written—after that?

A. No, it was before that.

Q. Before that?

A. Before that; it was after I had seen Mrs. Thomas.

Q. Then before any of these writings referred to here you had been told by Mr. Harris, hadn't you, 10 that they were going to insist upon their agreement?

A. That he was going to insist upon his agreement?

Q. Yes.

A. Why, he said he had sold the house, that is all.

By the Vice-Chancellor:

Q. That was before this letter of October 28th 20 was signed?

Mr. Charlton: And before this letter of October 27th.

A. It was after I had seen Mrs. Thomas.

Q. Well, was it before these letters were written or afterwards?

A. Well, it was after I had consulted Mrs. Thomas. 30

By Mr. Charlton:

Q. That is not the question. Did you see Mr. Harris and have his refusal before this letter was written?

The Vice-Chancellor: That is the letter of October 28th.

A. I don't remember how much time there was between the time I saw Mrs. Thomas and when I wrote this letter.

Q. That is not the question. How long were you in New York?

A. A week or ten days.

10) Q. What day did you get back in October from New York?

A. I couldn't say the day. That letter had been at the house about ten days when I got back.

Q. That would be October 14th, wouldn't it?

A. Yes.

Q. Then how did you know that Mr. Harris was interested in the proposition?

20) The Vice-Chancellor: That Mr. Harris had anything to do with it, did you say?

Mr. Charlton: Yes, sir.

A. Why, I didn't know—Mrs. Thomas didn't say in this letter—until I went over to see Mrs. Thomas; I made an effort to see her, she was away.

Q. How long after you returned from New York was it before you finally saw Mrs. Thomas?

A. I think about ten days.

30) Q. Ten days?

A. Yes.

Q. And then did you go immediately to see Mr. Harris?

A. No, not immediately; I tried to see Mr. Harris once and he wasn't in—some time after that.

Q. Can you say definitely whether you saw him before Exhibit C2 was executed—

A. No, I cannot.

Q. —or not?

A. No.

By the Vice-Chancellor:

Q. You know what Exhibit C2 means, do you?

A. Yes, sir.

Q. That means the letter which was signed on October 28th.

10

A. It wasn't before that, I don't think.

Q. Now, try and be sure, because you have answered both ways, and it isn't possible to give more force to one of your answers than the other. If you don't know don't try to say.

A. Yes, sir. Well, I can't say, then, accurately.

Mr. Cole: He testified in answer to Mr. Coulomb's question, as I remember it, that it was before.

20

The Vice-Chancellor: He first said before, he now says he thinks it was after, in response to my question or my suggestion he says he doesn't know.

Q. Now, try and think, if you can.

A. I had a few words with Mr. Harris just standing up in his office, he didn't ask me to come in and sit down, and he was very short about it. I know it was after I had seen Mrs. Thomas, but I couldn't say accurately whether it was after that letter or not.

30

Q. You saw Mrs. Thomas twice then, did you?

A. Once at her place and once at my house.

Q. At the time you saw her at her place—that was after she had written you the letter telling you she had sold it?

A. Yes, sir.

Q. And between that time and the time that she signed this letter?

A. Yes, sir.

By Mr. Charlton:

Q. Did you have any discussion with Mrs. Thomas, in your house about the H. G. Harris Company?

10 A. No, only what had happened, she had sold to—made the engagement to sell to a man named Townsend—there was so many mixed up in it I don't know which—there was Townsend, Mr. Harris and Prosser and then somebody—Mr. Hallahan, so it wasn't very clear.

Q. You had notice that Mr. Prosser had taken actual title to this property in December, hadn't you? Did you receive a letter from me to that effect?

A. Yes. Well, that was just recently.

20 Q. Did you make any effort to obtain the property from Mr. Prosser?

Mr. Coulomb: That is objected to. He had no contract, no option or no understanding with Mr. Prosser.

30 Mr. Charlton: I merely wanted to show that he made no effort to complete any right he had under the other option, that he made no effort to complete the unenforceable option that he had.

Mr. Coulomb: If it was unenforceable why should he?

The Vice-Chancellor: I do not see that that is material. I confess I don't know whether he had any contract or not.

By the Vice-Chancellor:

Q. I would like to ask about the first visit, the first time you saw Mrs. Thomas. I don't seem to have that clear in my memory. Where did you say you saw her first?

A. At her house in Linwood.

Q. After she wrote you that letter?

A. Yes, sir.

Q. And that was how long before the time she signed this letter of October 28th? 10

A. Oh, I think probably a week.

Q. What conversation did you have with her on the first occasion?

A. Why, I just asked her about it, I had just come home and had gotten her letter, she signed the agreement to sell the property, and I told her that I wanted to buy the house and that I hadn't any idea that she would sell it without notifying me, that I had to have it for a home, I hadn't any other place to go, and she said she had made a mistake, she had forgotten about it being in the lease, went upstairs and looked around for the lease and found it in the desk, came down, said she was very sorry about it, she would do whatever she could that was right to sell it to me. 20

Q. And then what was the occasion of going to see her the second time?

A. I didn't go to see her the second time.

Q. You had her come to see you the second time? 30

A. I wrote her—

Q. That was in response to your letter?

A. Yes, she was coming in town, I asked her if I could see her.

Q. I get it straight now.

By Mr. Cole:

Q. Isn't this what happened: When you found that you had an imperfect option you presented the matter to your counsel and he told you the thing to do was to make a proposition to Mrs. Thomas in writing and have her accept it in writing and then you would have a perfect contract that could be enforced?

A. I think I wrote this letter before——

10 Q. Now, pardon me.

The Vice-Chancellor: Answer his question. Can you say yes or no to that?

Q. Please read the question.

(Question repeated.)

A. No.

20 Q. When did you first consult counsel about this matter?

A. Do you know the date?

Mr. Cole: Can't you aid him, Mr. Coulomb?

A. I can't tell you the date.

By the Vice-Chancellor:

30 Q. Was it before or after the 28th of October?

A. I think it was after.

By Mr. Cole:

Q. You think it was after?

A. I think so.

Q. Now, did you know on October 27th, when you wrote this letter, that you had an imperfect option?

A. No.

Q. Did you think you had one that could be enforced?

A. I did.

Q. And you thought that when you wrote this letter of October 27th, did you?

A. Yes.

Q. Why did you say in that "I find that no price was mentioned in my option to buy same at any time up to expiration of lease" if you thought you had a perfect and enforceable option? 10

A. Because Mrs. Thomas had said \$10,500.

Q. That isn't answering my question. My question is if you thought that you had a perfect and enforceable option why did you suggest in your letter that the option did not name a price?

A. Because she had named the price.

Q. Did you think it was important at the time you wrote this letter that there should be an agreement in writing concerning the price? 20

A. I thought it was necessary to a sale.

Q. You say you did think it was necessary?

A. It was necessary for me to take title to have a price named.

Q. Did anybody suggest that to you?

A. Not that I remember of.

Q. That was your own idea, was it?

A. I think so.

Q. Eh?

A. I think so.

30

Mr. Coulomb: We rest.

Mr. Cole: We will offer this letter of October 4th.

(Said paper marked Exhibit D1.)

Mr. Cole: Also this letter of October 27th.

(Said paper marked Exhibit D2.)

10 MARTHA K. THOMAS, one of the defendants, being
duly sworn according to law, on her oath says:

By Mr. Cole:

Q. You are the Martha K. Thomas who owned this property in question here, are you?

A. I am.

20 Q. Now, will you tell us your recollection of what took place when you went to Mr. Phillips' home on October 28th, when you wrote this letter, just what was said and done. Speak so the Vice-Chancellor can hear you.

30 A. Well, I went to Mr. Phillips' house, he called me on the 'phone, requested me to come over on important business, and he asked me if I knew that Harris & Company had resold this house, I told him no, I didn't, and he said they had and made a profit of \$2,000, and he said—asked me if I didn't know that he had an option to buy the house and I told him that I didn't know it, that he had an option, in fact I had never read that part of the lease, I always had a real estate man to attend to my affairs, and Mr. Phillips said that—"Well, it is necessary for you to—I will have to have you set a price on this house before I can buy the——"

By the Vice-Chancellor:

Q. Have to have what?

A. "Have to have a price on this house before I can purchase the house," and he says, "It will be very necessary for you to let Harris & Company know that I am going to exercise this option," and I said I had written—I have a letter here to Harris & Company, stating that you had an option, that I had overlooked your option, and that I was sending that to him, enclosing the \$200 on account. Well, he said that would do, he thought it would be all right. So then he said, "Now, you must give me a price on this house, because otherwise I can't purchase it." So he got me to write this letter at his home setting the price. 10

Q. Was this conversation you are giving now all one conversation that occurred?

A. At this date.

Q. At his house?

A. Yes. 20

By Mr. Cole:

Q. Well, now, what else, if anything, if you remember?

A. Well, I mailed the letter to Harris & Company.

Q. Now, just a moment.

By the Vice-Chancellor:

30

Q. Was that the letter he had written?

A. No, that is the one I had written to Harris & Company, remailing the check of \$200 on the agreement.

Q. I thought you said he prepared the letter?

A. No, he prepared the other letter to him naming the price of the house, in answer to his letter.

Q. He prepared that, did you say?

A. Yes.

Q. I thought this was in your handwriting?

A. Mr. Phillips dictated that letter to me and I wrote it at his dictation.

By Mr. Cole:

10 Q. You are talking now about the letter of October 28th, which you signed at his home?

A. Yes.

Q. You say he dictated that?

A. Yes.

Q. And you wrote it while he dictated it?

A. Yes, because Mr. Phillips said I hadn't any right, morally or lawfully, to sell this house, and he had an option, and, of course, I really never read the lease.

20 Q. Now, you say you sent a letter to Harris & Company?

A. Yes.

Q. Who wrote that?

A. Why, I wrote that, returning the check that they had paid on account of that agreement.

Q. When did you do that? When did you mail the check?

30 A. Why, I mailed it the day I was at Mr. Phillips' house, whatever that day was.

Q. Part of the same transaction?

A. Yes, that day, Mr. Phillips had nothing to do with that.

Q. Did he know that you were going to return the check?

A. Yes.

Q. And is that the check (exhibiting to witness)?

A. Yes, that is the check.

Mr. Cole: I offer that.

(Said check marked Exhibit D3.)

The Vice-Chancellor: What is its date?

Mr. Coulomb: October 17th.

10

Q. There is a letter here dated October 17th, addressed to Mr. Townsend. Is that the letter you have in mind as having been written to Harris & Company?

A. Yes, this is the one.

Mr. Cole: I offer that.

(Said paper marked Exhibit D4.)

20

The Vice-Chancellor: Is that letter the same date as the check?

Mr. Cole: Yes.

The Vice-Chancellor: The letter to Harris and the check are some ten days before—

A. Well, I hesitated, because Mr. Phillips told me I should see a lawyer, and I hesitated about getting one, because I thought both the contracting parties would fix it all right because they knew it was—

30

Q. This is what the Vice-Chancellor has in mind.

A. What is that?

Q. You were at Mr. Phillips' home on the 28th?

A. Yes.

Q. When you signed the letter to him?

A. Yes.

Q. But this letter to Mr. Townsend is dated "Linwood, October 17th," and your check is of that date. Now, you have just said that both letters were written at the same time. Are you right about that?

10 A. Well, let me see that, Mr. Cole. This was mailed on the same day that I wrote the letter to Mr. Phillips in Mr. Phillips' house, but I had written this, intending to send it back to Harris, and I kept waiting to see what would develop.

Q. Where did you write that?

A. At home, in my own home.

Q. But you didn't mail it until the same date that you wrote the letter at Mr. Phillips' house?

A. I mailed it the same day.

Q. Well, did Mr. Phillips know about that letter of October 17th?

20 A. Yes.

Q. How did he know about it?

A. Because he had told me I would have to apply to the court for the writ.

The Vice-Chancellor: Is the envelope of that letter here?

Mr. Charlton: No, we haven't it. I can show the correct date we received it.

30

A. (Continuing) He said he would have to apply to the court to get a writ—or what did he say? I don't remember now, I am nervous.

Q. What I want to be clear about is this: Had he seen this letter dated October 17th, addressed to Mr. Townsend before—

A. Yes.

Q. — he saw it in his home?

A. Yes, he saw it.

Q. Where did he see it?

A. In his home.

Q. Well, had you been there twice?

A. No, once.

Q. My question is, had he seen this letter before October 28th, when you were in his home?

A. No, he hadn't seen it before.

10

Q. Well, did he know that you had written this letter?

A. Yes, I showed him the letter.

Q. On that date?

A. On that date.

Q. Well, how did you come to write this letter to Mr. Townsend?

A. Because Mr. Phillips told me over the 'phone that I hadn't any right to sell this property to Harris & Company, that I would have to return that check, as he had an option to buy the property.

20

Q. Then was it following what he told you over the 'phone that you tried to be released from Townsend?

A. Yes.

The Vice-Chancellor: Will you read the letter, Judge?

(Said letter read by counsel.)

30

Q. Do you know why it was you held the letter from the 17th until you saw Mr. Phillips?

A. Yes, I know; because my brother-in-law wanted me to see the lawyer about this whole affair, said I would get in trouble. I said it wasn't necessary, be-

cause I thought Mr. Phillips and Mr. Harris would fix it all right, I thought that they knew it was a mistake, both sides, I thought it wasn't necessary for me to go to the expense of any lawyer, that is what I said.

Q. After you had mailed the letter and returned the check did you hear from Harris or Townsend?

A. Yes.

Q. What did they say?

10 A. Why, they said they had already resold the property, the house, and that they were enclosing the check, that they had resold the house and they thought if I couldn't fix it up with my tenant it would be a very ugly lawsuit.

Q. Did they return the check?

A. Yes, they returned the check then.

By the Vice-Chancellor:

20 Q. Are you sure that Mr. Phillips told you on that occasion at his house that Mr. Harris had resold your property at a profit of a thousand dollars, or something like that?

A. Yes; he told me they had sold it for \$2,000 profit.

Q. On that occasion?

A. Yes, that day.

By Mr. Cole:

30 Q. Have you the letter that Harris & Company or Townsend wrote you returning the check?

A. I think your son has it.

Q. Is this the letter (exhibiting)?

A. Yes.

Mr. Cole: I offer that.

(Said paper marked Exhibit D5.)

Q. Now, did the statement that Mr. Phillips made to you, that Harris & Company had resold this property at a profit of \$2,000, have any influence on you in signing this letter of October 28th, agreeing to sell to him?

A. Why, no, I was simply trying to do right by Mr. Phillips and by Mr. Harris. I wanted to do the right thing, whatever that was, and Mr. Phillips had been a good tenant and I really would like him to have had the property, but of course he didn't buy so—and I didn't know he had an option, I didn't think he wanted it. 10

Q. He says that the question of the amount that he was to pay for this property under his option was discussed and talked about between you and him before the lease was signed, that he was to pay \$10,500: Is that so?

A. Well, not before the lease was signed; that question came up in the spring, when we had some painting done in the house. Mr. Phillips rented the house for 1919 with the understanding that he should rent it for the same figure and that he would pay for half the painting of the house; instead of the rent being nine hundred, as I wanted the new year, we made it the same, seven-fifty, I think it was, and he should pay for half of the painting, and then when he called me over to see the painting and the house and see that everything was all right, why, I suggested him buying the house and he wanted to know what I would take for it, I said ten thousand or ten thousand five hundred. 20 30

Q. Now, just right there, Mrs. Thomas. Was that after the lease had been made?

A. That was in the spring, March, I think.

Q. Was it after the lease had been made?

A. Yes.

Q. Well, at that time did he tell you he had an option?

A. No.

Q. You didn't know it then even?

A. No, I didn't know it, Judge Cole.

By the Vice-Chancellor:

10

Q. Now, are you positive of what you say—that that was the first time you ever discussed price with him?

A. That was the first time the price was discussed. I wanted Mr. Phillips to buy the house.

Q. That was some three months after the lease?

A. Yes.

Q. The lease was in January?

A. Yes.

20

By Mr. Cole:

Q. How much did you sell to Harris & Company for?

A. Ten thousand two hundred.

Q. That is the real consideration, is it?

A. Yes, sir.

Q. Is that all you received?

A. That is all I received.

30

Cross-examination.

By Mr. Coulomb:

Q. Mrs. Thomas, you remember the occasion when Mr. Phillips called at your home in Linwood, don't you?

A. Which one, Mr. Coulomb?

Q. Mr. Phillips, when he called at your house in Linwood.

A. Which occasion, Mr. Coulomb?

Q. Why, somewhere around October, after you had written this letter of October 4th. I show you the letter of October 4th, which is marked Exhibit D1, and ask you whether you remember writing that letter to Mr. Phillips, stating that you had sold the house?

A. Yes, I wrote this letter; I remember writing it. 10

Q. Now, do you remember Mr. Phillips calling at your house in Linwood after you had written that letter?

A. Yes, Mr. Phillips called, I remember that very well.

Q. And do you remember making a search for the lease?

A. Yes.

Q. And having found it? 20

A. Yes.

Q. And having seen in the lease the option?

A. I remember having seen the lease.

Q. Have you that lease with you?

A. My attorney has the lease.

Q. Now, this is the lease that is found in your own possession, in your box of papers, is it not (exhibiting paper to witness)?

A. Yes, this is the lease.

Q. And was it about that time that you wrote the letter to Mr. Harris which is dated October 17th, which has been marked Exhibit D4 and which I now show you, enclosing the check also dated October 17th? 30

A. No, that wasn't the time.

Q. It was after that, was it, that you wrote that letter?

A. Yes.

Q. It was how long afterwards, so far as you can recollect, your best recollection—a day or so?

A. After what, Mr. Coulomb?

Q. After Mr. Phillips had called at your house.

A. That I sent that letter?

Q. No, that you wrote the letter.

A. I don't know what letter you mean.

Q. This letter of October 17th; you wrote that
10 letter on the date that is there, didn't you, Mrs. Thomas?

A. Yes.

Q. But you say you didn't mail it until later?

A. Is this the letter that I wrote to Mr. Phillips about selling the property?

Q. No, this is the letter you wrote to Mr. Harris, dated October 17th. I want to know how long that letter was written after Mr. Phillips called on you at your house in Linwood?

20 A. I am sorry, I can't tell you that.

Q. You don't remember it?

A. I don't remember it.

Q. Now, are you quite sure, Mrs. Thomas, that there was no conversation at all about the price of this house prior to January?

A. No, there wasn't because I asked Mr. Phillips several times to buy the property and——

Q. Was there any price mentioned then, what it should be?

30 A. No, there was no price mentioned of any kind. I told Mr. Phillips I would sell him the house reasonable, he was a very good tenant and the house wasn't paying me, I showed him where I wasn't getting enough rent for the house and that it wasn't paying me and I would like to dispose of it.

Q. And you wanted to sell it to him?

A. Yes.

Q. And you had been after him several times for him to buy it?

A. Yes.

Q. And you say there was no price mentioned down until somewhere in March when the painting was done?

A. Yes, that was the time.

Q. At that time you mentioned what price—\$10,500?

A. I mentioned either ten or ten thousand five hundred. Mr. Phillips said at that time that he had other property and he didn't care to buy property, that he was thinking about building a bungalow on the shore road.

Q. Now, Mrs. Thomas, I show you the letter which you say Mr. Phillips dictated. How much did he dictate of that letter?

A. Mr. Phillips dictated all the letter.

Q. And where were you when he dictated it?

A. In Mr. Phillips' home.

Q. And you wrote the letter as he dictated it?

A. Yes.

Q. Word by word?

A. Yes, I did.

Q. Did he dictate more than one word at a time or several words?

A. Well, I think several words at a time.

Q. And you are quite sure about that?

A. Yes, I am sure.

Q. How did it come to be mentioned—you heard him as he dictated it, of course, otherwise you couldn't have written it?

A. Why, certainly.

Q. Now, when he dictated to you that that was the price you mentioned in January—you say here, "I

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agree to sell you my property, 6 South Surrey Avenue, for \$10,500, this being the price I offered to sell it to you last January”—do you remember him dictating that?

A. Mr. Phillips dictated the whole letter.

Q. Do you remember that feature of it?

A. I remember all of it. I tell you I was so nervous at the time—if I had thought I wouldn't have written the letter at all.

10 Q. You remember writing, however, that you offered to sell to him—“the price I offered to sell to you last January”?

A. Yes, I remember putting it all in just as it is written.

Q. Why did you put in that you offered to sell to him as of January if there had been no offer to sell and no price fixed in January?

A. Well, Mr. Phillips thought it was best to do that.

20 Q. Don't you know, according to your own statement that that was untrue?

A. Well, yes, I think it was untrue.

Q. You think it was? Don't you know it was, if what you say now is true, that no price was mentioned until March?

A. Yes, it wasn't the truth.

Q. Now, isn't it possible that you were mistaken about that, that when this agreement was made for the new lease—

30 A. No, Mr. Coulomb, I am not mistaken.

Q. Just one minute, Mrs. Thomas. When you were agreeing for the new lease you said you had an agreement then as to fixing the price, and the price was fixed because he was to do half the painting?

A. Yes.

Q. Now, wasn't there mention made then of his buying for \$10,500?

A. No, no mention at all. Mr. Phillips wouldn't listen to buying the house in January. I asked him two or three times to buy it, he said he didn't care to buy the property, he was property poor, he had a large property out in Pittsburg and other property he mentioned, he didn't want to own any more.

Q. So when you put in this letter "in January" there was no question in your mind at that time what it meant, was there?

A. I shouldn't have put that in.

Q. Why do you say you shouldn't have put it in?

A. Because it wasn't the truth.

Q. Well, is the rest of the letter true?

A. Yes.

Q. And that is the only untrue statement in the letter?

A. I think it is.

Q. And the only time that you ever mentioned the price to him in March, about, of 1919?

A. That is the only time I remember of mentioning the price.

Q. Who negotiated the sale of this house with you for H. G. Harris Company?

A. Mr. Townsend.

Q. And did he tell you at that time he had a purchaser for it?

A. No.

Q. Were you at that time in anywise anxious to sell the property?

A. Yes.

Q. Very anxious to sell it?

A. Yes, I was very anxious to sell it.

Q. When did you sign the deed for the property? Do you remember?

Mr. Coulomb: Have you the deed?

Mr. Charlton: No.

Mr. Coulomb: Will you admit it was December 12th?

Mr. Charlton: December 12th is right.

Q. Where was the deed signed?

A. Down in this building.

10 Q. I beg your pardon?

A. Downstairs. Isn't this the Land Title Building?

Mr. Cole: Real Estate & Law Building.

A. Real Estate & Law Building.

Q. Who was present at the settlement?

A. Mr. Townsend, Mr. Zimmerman.

Q. Who is Mr. Zimmerman?

A. He is with Harris & Company.

20 Q. Mr. Townsend was present?

A. Yes.

Mr. Coulomb: Have you the agreement?

Mr. Charlton: Yes (producing paper and handing to counsel).

Q. I show you a paper and ask you whether this is the agreement of sale which you had?

30 A. Yes.

Q. That agreement is with William S. Prosser?

A. Yes.

Q. How came it that you said you sold it to H. G. Harris Company?

A. Well, Mr. Townsend I supposed represented Harris & Company, I didn't know who was the one purchased it.

Q. Did you know Mr. Prosser?

A. No, I didn't know Mr. Prosser.

Q. And you thought you were selling it to H. G. Harris Company?

A. Yes.

Mr. Coulomb: I will ask that this be marked for identification.

Mr. Cole: I am going to put it in evidence myself. 10

Mr. Coulomb: Oh, all right.

Q. Who was it advised you you had better see a lawyer about it?

A. Mr. Phillips.

Q. And you didn't care to see any attorney about it?

A. No, I didn't think it was necessary. 20

Q. When did you first consult counsel? Do you remember who Mr. Phillips asked you to go to see?

A. Yes, Mr. Phillips asked me to see Mr. Cole, Judge Cole; he said he was a very good lawyer.

Q. Don't you remember that you came to my office at one time?

A. Yes.

Q. And I advised you that you had better see some other counsel?

A. Yes. 30

Q. That you would have to see some other counsel?

A. Yes, you did.

Mr. Cole: I want to offer this agreement of October 3d, 1919, between Mrs. Thomas and William S. Prosser.

(Said paper marked Exhibit D6.)

By Mr. Cole:

Q. Mrs. Thomas, have you had any business experience?

A. Not very much, Mr. Cole.

Q. You are a widow?

A. Yes.

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MATTIE JONES, a witness produced in behalf of the defendants, being duly sworn according to law, on her oath says:

By Mr. Cole:

Q. Are you the daughter of Mrs. Thomas who was just on the stand?

20 A. Yes.

Q. Where is your home?

A. Why, at the present time Philadelphia.

Q. Were you with her on the occasion in October last, when she visited the property she owns on Surrey Avenue, Surrey Place, then occupied by Mr. Phillips?

A. Yes.

Q. Will you tell the Vice-Chancellor in your own way all that you can now remember that was said and took place while you were there—right in your own way? Speak so he can hear you.

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A. Well, I don't remember very much about it, because, of course, I didn't know all that was going on about this, living in Philadelphia, but Mr. Phillips called up and said that he had some business to talk

to Mrs. Thomas about and as long as we were going over would we stop in, which we did, and after we arrived there he said that he could not exercise his option, as I can understand it, unless he would have some written agreement, and he dictated the letter for mother to write, which she did write, and that is all I know. He said that Harris & Company had made a profit of \$2,000, I think, or at least the house was—had been sold for twelve thousand, I forget which, something like that, and that is really all I can remember. 10

Q. Did your mother ask to go along with her to see Mr. Phillips? How did you come to go, in other words?

A. Well, I was down here visiting her, naturally—I was only here for a short time—I would go with her.

Q. Is that all you can recall that happened, that was said?

A. Yes, that is all I can recall, because, as I say, I didn't know very much about it at the time. 20

Q. Can you remember whether the statement Mr. Phillips made, that Harris & Company had sold this property at a profit of \$2,000, or whatever it was he said about that, was made before he started to dictate the letter which your mother signed or after?

A. Yes, it was before.

By the Vice-Chancellor:

Q. Did you say that he dictated the letter to your mother? I didn't catch that. 30

A. Yes.

By Mr. Cole:

Q. Didn't you so say?

A. Yes, he dictated the letter.

Cross-examination.

By Mr. Coulomb:

Q. Where were you, Mrs. Jones, when this letter was being written?

A. Why, I was right in the same room, in the reception hall.

Q. Where was it? You say in the same room. What room was it?

A. Well, the first—regular reception hall, you just go in from the door.

Q. And Mrs. Thomas was sitting where?

A. At the desk, that is where she wrote the letter, at Mr. Phillips' desk.

Q. Don't you remember Mr. Phillips giving her a letter, a copy of a letter, and asking her to answer it? Do you remember that?

A. No, I don't remember it. Asking her to answer it?

Q. Yes. Do you know why you went there to Mr. Phillips' house?

A. I went there because Mr. Phillips said he had some business to talk over, and, of course, naturally I would go along.

Q. And with whom did he say he had business to talk over?

A. Well, I don't remember whether it was mother that answered the 'phone or not.

Q. Do you remember something having been said about a letter that Mr. Phillips had written not having been answered?

A. No, I don't remember.

Q. You don't remember that?

A. No.

Q. When you got down to Mr. Phillips' house do

you remember something having been said there about answering a letter which Mr. Phillips had written and which your mother hadn't answered?

A. No, I don't remember that.

Q. You don't remember that?

A. No, I don't.

Q. Do you remember whether your mother asked Mr. Phillips in the course of writing this letter what she should say at different stages of it?

A. Yes, she did; that is the reason he dictated it. 10

Q. She asked him what she should say?

A. What she should say.

Q. Yes. How many times did she ask him that?

A. I don't know.

Q. More than once?

A. I couldn't tell you; I don't remember.

By the Vice-Chancellor:

Q. What did you mean when you said he dictated it? What did you mean by dictating it? 20

A. Why, he told her what to say, what to write, and she wrote it.

By Mr. Coulomb:

Q. Well, didn't your mother ask him just to assist her in the framing of the letter? Wasn't that all that happened, Mrs. Jones?

A. What do you mean? Tell me again. 30

Q. In the writing of this letter your mother wrote it, didn't she?

A. Yes.

Q. She wrote the letter herself?

A. Yes.

Q. With her own hands?

A. Yes.

Q. Now, isn't it a fact that in the course of the letter she simply asked Mr. Phillips what she should say at certain stages of the letter as she progressed in writing the letter?

A. No; he dictated it all, as I can remember—I am sure.

Q. Do you remember anything that he dictated in it?

10 A. No, I don't remember anything.

Q. What were you doing during the time the letter was being dictated?

A. I was walking around.

Q. You were walking around?

A. Yes, I was walking around, looking.

Q. Always in the same room?

A. Not all the time I wasn't in the same room but I was during that letter.

20 Q. You stayed there while the letter was being dictated?

A. Yes, I was there.

Q. Did your mother ask you anything about the letter?

A. No.

Q. Did you say anything to her about it?

A. Not that I can remember.

Q. Was there any question ever made as to the truthfulness of any statement in the letter?

A. Not that I can remember.

30 Q. Your mother never accused Mr. Phillips of having requested her to write something that was not true in the letter, did she?

A. No.

By Mr. Cole:

Q. Do you recall, Mrs. Jones, whether on that oc-

casation you saw the check of your mother's of October 17th, and the letter of that date to Mr. Townsend—whether you saw that there on that day or not?

A. No, I don't recall.

J. T. TOWNSEND, a witness produced in behalf of the defendants, being duly sworn according to law, 10
on his oath says:

By Mr. Charlton:

Q. Mr. Townsend, what is your business?

A. Real estate business, sir.

Q. With whom are you associated?

A. I am in H. G. Harris Company's office.

Q. And how do you work in that office—under what terms?

A. Well, when I sell goods that is listed there I participate in half of the profits, when I find things outside and buy them and sell them—

Q. Do you make all the profit in such cases?

A. Yes, sir, when I buy them outright.

Q. Do you know Mrs. Thomas?

A. Yes, sir.

Q. I show you Exhibit D6 and ask you if you have seen this agreement before?

A. Yes, sir.

Q. Are you the one who brought about that agreement?

A. I am, yes, sir.

Q. Now, at the time you consulted Mrs. Thomas regarding the purchase of the property did you know there was a tenant in possession?

A. Yes, sir.

Q. Did you know anything about his lease?

A. No, sir.

Q. Did you ever see his lease?

A. No, sir.

Q. Did you know there was any alleged option in it?

A. No, sir.

Q. Nobody ever told you any such thing?

10 A. No, sir.

Q. What were you told with respect to his term?

Mr. Coulomb: By whom?

Q. By Mrs. Thomas.

Mr. Coulomb: She wasn't in possession of the property, Mr. Phillips was in possession.

20 Mr. Charlton: I am asking him what he was told about Mr. Phillips' term by Mrs. Thomas.

Mr. Coulomb: If the Court please, I can't see how that would be binding on Mr. Phillips, what he was told by somebody else. It was his duty to have inquired of Mr. Phillips.

30 The Vice-Chancellor: I do not see how the inquiry is of any importance one way or another. He is charged with the knowledge of this lease, there is no question about that; that is all he is charged with the knowledge of. If you want to show that he is charged with anything more it is proper for you to show that, or that he had more knowledge, but you cannot show that he had less to an advantage. It would be a waste of time.

Mr. Charlton: I merely wanted to make it conform with the agreement, that was all.

Q. Did you purchase this property with your own money or through H. G. Harris Company?

A. With my own money.

Q. Why did you have the agreement made with Mr. Prosser?

A. Merely as a convenience, that is all, which I often do.

Q. Explain that to the Vice-Chancellor, why you didn't take it in your own name? 10

A. Well, when I often buy properties I take the title in some one's name, when there is no mortgage to be created, sometimes I sell the property myself and list it with the other agents and they sell it, and I always think that it is better to have it some one else, rather always have it in some one else's name except myself, properties I am speculating in, that is why I—I take my own. 20

Q. Didn't Mrs. Thomas know it was going to be put in Mr. Prosser's name?

A. No, she never asked the question.

Q. She never asked you who he was when she signed the agreement?

A. No, not at all.

Q. When was the first time you had any knowledge that Mr. Phillips had an option?

A. When I received the letter from Mrs. Thomas.

Q. Do you know when that was? 30

A. I think somewheres around the last of October, I can't just recall the date, but that was the letter that you have reference to.

Q. Did you have Mr. Harris answer that letter for you?

A. Answer it, yes, sir.

Q. Is that the letter he sent her (exhibiting paper to witness)?

A. That is the letter he sent her.

Q. Was her letter answered immediately or did it wait some time?

A. No, I think it was answered the following day, possibly—likely two days.

Q. Couldn't by any chance have been twelve days later?

10 A. No.

Q. Now, Mr. Townsend, have you taken title to this property?

A. Have we taken title?

Q. Yes.

A. Yes.

The Vice-Chancellor: What was the date of the answer, the date he answered her letter?

20 Mr. Charlton: The day following the receipt of her letter, he said.

The Vice-Chancellor: Have you got the letter?

Mr. Charlton: Oh; this letter is October 29th.

Q. Then you are now the owner of the property?

A. Well, yes, sir, in one sense of the word.

Q. In Mr. Prosser's name?

30 A. In one sense of the word.

Q. Did you make an agreement to re-sell that property?

A. Yes, sir.

Q. And do you know the date of that agreement?

A. I think right around the 27th or 28th, probably.

Mr. Coulomb: Have you got the agreement here?

Mr. Cole: Yes; we always bring everything we have; we never leave anything home.

Mr. Charlton: This is only an unsigned copy.

Mr. Coulomb: I object to the admission of that copy. It doesn't purport to be signed by anybody.

Mr. Charlton: I didn't offer it.

Mr. Cole: You called for it.

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Mr. Coulomb: You said you had the agreement.

Mr. Cole: I thought I had, too, but it has not been signed.

Q. Had you made any agreement prior to the time you received the letter and the check from Mrs. Thomas?

A. Yes, sir.

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Mr. Coulomb: That is objected to. They say it is in writing. Now, we have a right to see what the situation was on or about that time.

The Vice-Chancellor: See whether he made any agreement in writing prior to that time. If so he will have to get it.

Mr. Charlton: Well, that was a fact, Vice-Chancellor, it was in writing.

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Cross-examination.

By Mr. Coulomb:

Q. You had this agreement made to Mr. Prosser so that you wouldn't have to assume the mortgage—is that right?

A. No mortgage to assume in that case, Mr. Coulomb.

10 Q. Wasn't there? Doesn't the agreement say the purchaser is to assume a \$5,000 mortgage and agree to pay it?

A. Not between I and Mrs. Thomas.

Q. No, but you are not a party to this agreement.

A. No, no, but the previous agreement I have reference to.

20 Q. \$200 cash on signing agreement, receipt whereof is hereby acknowledged, \$4,800 on day of settlement, existing first mortgage of \$5,000 to be assumed by purchaser as part of the purchase money herein mentioned?

A. Yes, sir.

Q. You didn't want to assume the mortgage and so you put the title in somebody else—is that it?

A. No, sir; no, sir.

Q. Were you the purchaser of this property or was Mr. Prosser?

A. I was really the purchaser and used Mr. Prosser to take title.

30 Q. Mr. Prosser is a single man, isn't he?

A. Yes, sir.

Q. Of any financial responsibility?

A. I don't know.

Q. He was obliged to assume the payment of a \$5,000 mortgage, wasn't he, under that agreement?

A. He was under that agreement but he would be perfectly safe in doing so.

Q. That may be true but you didn't want to do it?

A. Oh, yes, I was willing to do it.

Q. If you were willing to do it why didn't you take the agreement in your own name?

A. Well, like I say, I often buy properties in some one else's name.

Q. Didn't you want Mrs. Thomas to know that you were going to purchase that property?

A. I had no objection whatever, no questions asked.

Q. And you were acting as an agent at that time for Mrs. Thomas?

A. No, sir.

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CLIFTON N. PHILLIPS, recalled.

By Mr. Coulomb:

Q. Mr. Phillips, where did you have the negotiations with Mrs. Thomas, if any place at all, for the lease which was signed January 9th, 1919, which contained the option?

A. Why, before drawing up this lease I went over to see Mrs. Thomas to ask her about renewing it, and I had told her that I didn't see any reason why she should keep having it drawn up through Harris & Company and have them collect some money for it; when I wanted any repairs done they didn't pay any attention to it, I had to go to her anyhow.

Q. Was there anything said there about the amount of the rent?

A. So when I went there to see her I took up the matter with her of the rent and of the option. That was before I drew up this lease. And I said that I

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didn't know for sure at that time that I wanted to buy the house, but I didn't want to be put out of it without having notice that she was going to sell it to somebody else, to be given the first chance. I asked her about what price she wanted, she said well, she couldn't get out on less than \$10,500; so it was some time after that that this was drawn up.

10 Q. Now, do you remember any conversation with her in March, or thereabouts, at a time when you were finishing the painting of the house, or had finished the painting, in which there was a price mentioned?

A. Yes; she said the same price, \$10,500.

20 Q. Now, when she was in your house on the 27th day of October, or the 28th, whichever it was—28th of October, she says that when you dictated there about the price having been mentioned in January that that was untrue. Is that a fact? Was it true or not true that she had mentioned \$10,500 in January?

A. She had mentioned it as the price that she wanted for the house, and after talking about it, talking about buying the house, about—she wanted to sell it so much, I asked her how much she wanted, she said \$10,500.

Q. She said you dictated the terms of that letter. Did you dictate the terms of the letter?

30 A. No; I put the letter in front of Mrs. Thomas at my desk, which I had written to her and which she hadn't answered, at that time I asked her to please answer that letter; she started to answer and she came to several parts of my letter where she said "Now, just how shall I make this? How shall I word this?" She said she wasn't used to answering a letter of that kind, and I helped her at times when she asked me.

Q. Did you dictate that letter in the sense of dictating every word that was in it?

A. No.

Q. Or telling her what to say in it?

A. No, only when she would ask me.

Q. Did she ask you about the price of \$10,500 or did she recollect that price herself?

A. She remembered that, that was the price she had always asked me for the house.

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Cross-examination.

By Mr. Cole:

Q. I will ask you again whether at that time you had yet consulted a lawyer about this case? Now, that is October 28th, 1919. Had you yet consulted your lawyer?

A. I don't think so.

Q. Now, one other question: How long was it before Mrs. Thomas signed this lease that you say you had discussed the question of option and price? 20

A. Why, a few weeks; when I went over to see her about the details of renewing the lease.

Q. And at that time you were in possession under an existing lease without an option—is that so?

A. Yes, sir, and that lease hadn't run out, the H. G. Harris lease.

By Mr. Coulomb:

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Q. The leases that you had made previously were made through H. G. Harris Company?

A. H. G. Harris was at that time Mrs. Thomas' agent.

Q. For the renting of this house?

A. Yes, sir.

By Mr. Charlton:

Q. When was Mr. Harris the agent, or the Harris Company, for the renting of this house?

A. From the time that I moved in the house, going on five years, until I went over in December to speak to Mrs. Thomas about it, and she said for me to make up the lease and that would do away with the commission to Harris & Company.

Q. Were they her agents in January, 1918?

10 A. Yes, sir; I have the leases at the house.

Q. Was Mr. Townsend their agent at that time?

A. No, he was not, Haverstick, of H. G. Harris Company.

Q. Did you ever have any dealings with Mr. Townsend?

A. No, I didn't know him.

Q. And in all their leases there was no option?

A. No, not that I know of.

20 By Mr. Coulomb:

Q. Mr. Phillips, I show you a letter which is dated October 17th, and marked D4, and I ask you whether you saw that letter on the day that Mrs. Thomas was at your house, on the 28th of October?

A. I have never seen that letter before or that check.

Q. You have never seen either of them?

A. Never.

Q. Did she have them with her on that day?

30 A. No, sir, I have never seen them before. That was on October 17th, and she was at my house some time after that. She told me that she had the check and hadn't cashed it and she hadn't put it in the bank, she had it at home and she hadn't cashed it yet, and she would send it back, but I never seen that before, the letter or the check.

BOTH SIDES REST.

EXHIBIT "C1."

THIS INDENTURE made the ninth day of Jan. A. D. Nineteen Hundred and Nineteen. BETWEEN Mrs. Martha Thomas, Shore Road, Linwood, N. J. of the first part, and Clifton N. Phillips, of the second part.

WITNESSETH, That the said party of the first part has let, and by these presents does grant, demise and to farm let unto the said party of the second part, Frame dwelling house—6 So. Surrey Ave. Ventnor N. J. with the appurtenances from Jan. 15, 1919 to Jan. 15, 1920 at the rent or sum of Seven hundred and fifty dollars per annum to be paid as follows: Sixty two & 50/100 on the 15th day of each Calendar month. 10

PROVIDED, That if any rent shall be due and unpaid, or if default be made in any of the covenants herein contained, then this lease shall immediately cease and become void, and it shall be lawful for the said party of the first part, without notice and without any demand for said rent, to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however. 20

AND the said party of the second part does hereby covenant and agree, to and with the said party of the first part, to pay the said rent in the proportions and upon the conditions aforesaid; and not to assign this lease, and not to underlet said premises, or any part thereof, nor permit any person or persons to occupy the same, or any part thereof, not use or permit any part thereof to be used for any other purpose than 30

nor make or suffer to be made any alteration therein, without the written consent of the said party of the first part; and also at the expiration of said term, to yield up and surrender the possession thereof, with the appurtenances in as good state and condition as the same now are, or may be put into by the said party of the first part, reasonable wear and tear and accidents happening by fire or other casualties excepted.

10 Clifton N. Phillips hereby agrees to pay one half of the cost of painting exterior of 6 So. Surrey Ave. work to be done during Spring of 1919.

Party of the first part does hereby give to party of the second part, option of buying said property at any time up to expiration of this lease.

AND the said party of the first part does covenant that the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peaceably and quietly
20 have, hold and enjoy the said demised premises for the term aforesaid.

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

X Martha K. Thomas

Clifton N. Phillips

SIGNED SEALED AND DELIVERED)

in the presence of)

Albert L. Coryell)

30

(ENDORSEMENT)

LEASE

Mrs. Martha Thomas

to

Clifton N. Phillips

6 So. Surrey Ave.

Expires Jan. 15, 1920.

Received Nov. 15, 1919 at 8:00 A. M.
and recorded in the Clerk's Office of
Atlantic County at Mays Landing,
N. J. in Book of Miscellaneous Records
No. 7, page 387 &c.

Edwin A. Parker, Clerk
A M B

EXHIBIT "C2."

10

October 28th 1919
Linwood, New Jersey.

Mr. C. Phillips

In answer to your letter of October twenty-seventh in regard to purchasing property 6 S. Surrey, which option was overlooked by me, and which I will notify Mr. Harris to release me from my agreement with him to sell same, I agree to sell you my property 6 South Surrey, Ventnor for ten thousand five hundred, this being the price I offered to sell to you last January. I signed an agreement to sell this property to Mr. Townsend without looking over my lease, which contained your option. I shall return to him his payment binding the agreement, and at the same time asking him to release me.

Yours Resp.

Martha K. Thomas.

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EXHIBIT "D1."

Linwood New Jersey—
Oct. 4th 1919

Mr. C. Phillips

Dear Sir.

I have sold the house you are occupying (6 S. Surrey) and at the expiration of your lease will
10 have to ask you to vacate.

I want to thank you most heartily for being such a Splendid Tenant. I wish you were the purchaser.

Please send the Rent to me as usual up to the Expiration of your lease—Jan. 15th 1919

My furniture & etc will move over here at any time you say—I am perfectly willing to wait until the 16th of Jan—which (is the day of settlement) I could make arrangements to send them over at that time.

20

Yours Resp.

Mrs. M. K. Thomas

Linwood N. J.

Route B.

 EXHIBIT "D2."

Oct. 27 1919
Atlantic City, N. J.

30

Dear Mrs. Thomas—

In looking over my lease of your property 6 So. Surrey Ave. which I now occupy, I find that no price was mentioned in my option to buy same at any time up to expiration of lease. I desire to exercise my option if you will accept the following terms—

I agree to pay you \$10,500 for your property at 6 So. Surrey Ave. Ventnor, N. J. Same to be paid at the expiration of my present lease which expires Jan.-15-1920.

If satisfactory to you, will you please write me your acceptance of my offer.

Very truly yours,
Clifton N. Phillips.

10

EXHIBIT "D3."

No..... Atlantic City, N. J. Oct. 17th 1919
ATLANTIC CITY NATIONAL BANK 55-139
Pay to the order of H. G. Harris & Co. part pay-
ment for Agreement of sale Two hundred Dollars
\$200.xx/100 Martha K. Thomas

20

EXHIBIT "D4."

Linwood New Jersey
October 17th 1919

Mr. Townsend.

I reference to option granted to you for property on Surrey Place, owned by me, I desire to inform you, that upon the examination of the lease of Mr. C Phillips, present tenant I find that the same con- 30
tains a clause, granting an option to purchase the property at the expiration of the present lease Mr. Phillips has informed me that he intends to exercise this option In the event that Mr Phillips does not take advantage of this option of course our agreement will stand good.

I am returning herewith your check for two hundred dollars

Yours Resp.
Martha K. Thomas

EXHIBIT "D5."

10 Member Atlantic City
Real Estate Board
H. G. Harris & Co.
Real Estate and Insurance
Guarantee Trust Building
Atlantic City, N. J.

Oct. 29, 1919.

Mrs. Martha K. Thomas,
Route B, Linwood, N. J.

Dear Madam:—

20 I herewith return to you your check for \$200. This property has been resold and of course we cannot accept the return of the money after you had signed a contract on same.

The new purchaser will insist upon taking title.

It looks to me, if you cannot settle with your tenant, it will mean a very ugly law suit, which I regret very much.

Yours,
H. G. Harris

30 HGH/J

EXHIBIT "D6."

AGREEMENT FOR SALE OF LAND

Martha K. Thomas

to

Wm. S. Prosser

ARTICLES OF AGREEMENT, MADE THIS third day of October in the year of our Lord one thousand nine hundred and nineteen.

BETWEEN Martha K. Thomas, widow, of Linwood, N. J. of the first part and William S. Prosser, of the City of Atlantic City, County of Atlantic and State of New Jersey, party of the second part WITNESSETH, that the said party of the first part, for and in consideration of the sum of TEN THOUSAND DOLLARS to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that she, the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of general warranty free from all incumbrance excepting hereinafter mentioned on or before the sixteenth day of January, 1920 all that lot, tract, or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Ventnor City in the county of Atlantic and State of New Jersey, bounded and described as follows: BEGINNING in the Westerly line of Surrey Place two hundred and twenty-five feet North of the Northerly line of Atlantic Avenue, and extending thence (1) Northwardly along the Westerly line of Surrey Place fifty feet; thence (2)

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Westwardly parallel with Atlantic Avenue one hundred and twenty-five feet; thence (3) Southwardly parallel with Surrey Place fifty feet; thence (4) Eastwardly parallel with Atlantic Avenue one hundred and twenty-five feet to the place of beginning. Including screens and awnings, if any.

Subject to restrictions, if any, as imposed by previous owners.

AND the said William S. Prosser for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs and assigns, that he, the said party of the second part, will pay and satisfy or cause to be paid and satisfied unto the said party of the first part, the said sum of TEN THOUSAND DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: Two Hundred Dollars cash on signing agreement, receipt whereof is hereby acknowledged; Forty-eight Hundred Dollars on date of settlement, January 16, 1920; existing first mortgage of Five Thousand Dollars to be assumed by purchaser as part of the purchase money herein mentioned.

Adjustments for interest, taxes, water, sewer, insurance, rents, etc. to be made as of date of settlement. Tax year to be considered from January to January.

Settlement to be made at the office of H. G. Harris & Co., Guarantee Trust Building, Atlantic City, N. J. on or before three o'clock P. M., January 16, 1920.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the sixteenth day of

January, 1920 and from thence take the rents, issues and profits to his and their use forever.

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

IN WITNESS WHEREOF, the said parties have hereunto interchangeable set their hands and seals the day and year first above mentioned. 10

Martha K. Thomas (SEAL)

William S. Prosser (SEAL)

SIGNED, SEALED AND DELIVERED,

in the presence of

J. T. Townsend

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CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

	Between	
10	CLIFTON N. PHILIPS, <i>Complainant,</i>	} On Bill, &c. Final Hearing. Conclusions.
	and	
	MARTHA K. THOMAS, <i>et als.,</i> <i>Defendants.</i>	

BOURGEOIS & COULOMB, ESQS., for Complainant;
HON. C. L. COLE and WILLIAM B. CHARLTON, ESQ.,
20 for Defendants.

LEAMING, V. C. (orally):

I entertain the view suggested early in the argument, that this case is purely a question of evidence; in the last analysis it reduces itself to that, and that alone, in my judgment. The inquiry is:
30 Does the evidence justify with clearness a finding of fact that an option of purchase for \$10,500 was given at the time the lease was made?

The lease contains what has been referred to as an option of purchase. I scarcely know whether it can be called that or not. It is clearly meaningless or forceless at best. It, in terms, gives to the tenant

an option of purchase without specifying anything more, consequently it gives him nothing in the form it is executed. Now, what was in fact agreed upon and intended to be put in that lease is not at all free from doubt in my mind, and the existence or non-existence of such a doubt is the test of right to relief in a specific performance case. The law will not privilege a court of equity to grant that form of relief where there is an element of material and substantial doubt, either of law or of fact. It may have been that when that lease was signed both parties clearly understood that they were obligating the landlord to sell that property at any time during the succeeding year to the tenant for \$10,500 in cash; it may be, I say, that Mrs. Thomas understood that and that Mr. Phillips intended to state that when he wrote the lease, but it is far from certain that either of those propositions is true. Mrs. Thomas on her part says she did not know there was an option in the lease and that never prior to that time had she given him a price on that property in the nature of an option. If her testimony is true, she signed the lease without knowing there was any suggestion of an option of any kind in the lease or without realizing that she was obligating herself in any manner to sell that property for a given price, should the tenant elect to take it, during the succeeding year.

Nor do I think it clear that in the form that the supposed option is expressed it was really intended to be anything more than that type of option which we frequently find in leases which gives a tenant what is called the preference right of purchase. In other words, the landlord engages that if a purchaser is found, the tenant shall have the first right at the proposed selling price. There is nothing in

the form of the imperfect option that clearly indicates that it may not have been intended to be of that nature, and if the testimony of Mrs. Thomas is at all to be relied upon, I think it is very doubtful whether she ever understood that she ever was under any obligation greater than that to Mr. Phillips. Her testimony is that she never offered it to him for a given price, either by option or otherwise, prior to the succeeding March; that she did not know that
10 this option was contained in this lease in any form, and I very much doubt whether any court of equity in a specific performance case would have the right to disregard her testimony under all the circumstances that are here present.

Of course these inquiries could not be indulged at all, but for the fact that in the following October Mrs. Thomas signed a writing in effect reciting that she had in the preceding January given an option to Mr. Phillips for the succeeding year at a price
20 of \$10,500. If the option given in January had in fact been to that effect and had been imperfectly stated in the lease, I can see how the subsequent writing could have supplied the error in the lease and satisfied the statute of frauds and rules of evidence. Otherwise the October incident was clearly a new contract. Mrs. Thomas says that what she wrote in October she wrote merely at Mr. Phillips' dictation, and that it did not truly state any January contract, and her daughter testifies that what
30 she wrote on that occasion she wrote at Mr. Phillips' dictation. In other words, her desire or friendship or appreciation of Mr. Phillips was such that she desired to aid him and she was at that time apparently quite as willing to depend upon and trust him as she had been in the preceding January when she signed her lease without knowing it had an

option of purchase in it after he had prepared it. If that statement on her part is true, the October writing did not supply any missing terms of the January lease.

The argument is made by Judge Cole that this act on her part in October was purely conditional, and it seems to me almost impossible to escape the conclusion that it was in spirit conditional, if it was not expressly so; it seems to me the spirit of the occasion imposed such a condition, the condition being that what she was doing was to help Mr. Phillips, providing she could help him without embarrassing herself by reason of the agreement she had already executed for the sale of the property to another. No one can suppose for a moment that Mrs. Thomas would have deliberately tied herself up in that manner had she realized the position she was placing herself in. If Mr. Phillips had known, as it seems to me he must have known, the position the paper which he was having her sign was placing her in, his act would have been, to say the very least, ungallant; and it seems to me that it is impossible for the mind to rest upon that meeting of the parties in the home of Mr. Phillips and visualize what there transpired upon any theory or upon any conception other than that what Mrs. Thomas did, and all she did, was because and only because she was induced to believe by the very nature of the whole occasion that she could help Mr. Phillips without injuring herself or in any way embarrassing herself. I cannot believe but that that condition pervaded the atmosphere of the entire occasion from beginning to end, and that any writing signed by her at that time must be accepted with such an implied condition, if it was not in it expressed, and for Mr. Phillips at this time to seek to enforce that against

her in such manner as will embarrass her with the persons to whom she has made a prior agreement of sale violates, to my mind, the conscientious spirit of that occasion to such an extent that it would be unjustified and inadequate to support an equitable decree.

10 But entirely aside from that, I think the evidence cannot be said to clearly disclose an original contract or option in the original lease made in January for the sale of that property for any fixed price.

Unless further reflection leads me to a conviction that I am in error in this, I shall advise a decree dismissing the bill. I will give the case further reflection, first having my stenographer transcribe the views which I have expressed, and should I be led to another conviction, I shall be entirely free to say so.

Heard and determined March 1st, 1920.

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NOTICE OF APPEAL.

(Served March 6, 1920)

(Filed March 8, 1920)

IN CHANCERY OF NEW JERSEY.

10

Between

CLIFTON N. PHILLIPS,
Complainant,

and

MARTHA K. THOMAS, *et*
als.,

Defendants.

On Bill, &c.
Notice of Appeal.

20

The complainant hereby appeals from the whole and every part of the decree made in the above-stated cause on March 4, A. D. 1920, to the Court of Errors and Appeals in the last resort in all causes.

Dated March 6, 1920.

BOURGEOIS & COULOMB,
Solicitors of Complainant.

H. R. COULOMB,
Of Counsel. 30

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

H. R. COULOMB,
Of Counsel.

NOTICE OF DEPOSIT OF SECURITY.

(Served March 6, 1920)

IN CHANCERY OF NEW JERSEY.

10 Between

CLIFTON N. PHILLIPS,
Complainant,

and

MARTHA K. THOMAS, *et*
*als.,**Defendants.*On Bill, &c.
Notice.20*To C. L. Cole, Esq., and William Charlton, Esq.,
Solicitors for Defendants:*Please Take Notice that we have this day filed in
the Court of Chancery of New Jersey, \$100.00 as
security for costs on appeal in the above matter.

Dated March 6, 1920.

BOURGEOIS & COULOMB,

Solicitors for Complainant.

30

ORDER.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between		19
CLIFTON N. PHILLIPS,	}	
Complainant-Appellant,		
and		
MARTHA K. THOMAS, H.		On Bill, &c.
G. HARRIS COMPANY,		Order.
JAMES F. HALLIMAN		
and WILLIAM S. PROS-		
SER,		
Defendants-Respondents.		20

It appearing that notice of appeal has been duly served and filed in the above matter and that \$100 has been deposited as security for costs, and good cause being shown,

It Is, on this thirteenth day of April, A. D. 1920, on motion of Bourgeois & Coulomb, solicitors for and of counsel with complainant, Ordered that the time for filing the petition of appeal be and the same is hereby extended until Monday, the 19th day of April.

E. R. WALKER,
Ordinary.

Filed April 13, 1920.

THOMAS F. MARTIN,
Clerk.

PETITION OF APPEAL.

(Served April 10, 1920)

(Filed April 13, 1920)

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

10

Between

CLIFTON N. PHILLIPS,
Complainant-Appellant,
andMARTHA K. THOMAS, H.
G. HARRIS COMPANY,
JAMES F. HALLIMAN
and WILLIAM S. PROS-
SER,

20

*Defendants-Respondents.*On Bill, &c.
Petition of Appeal.*To the Honorable the Court of Errors and Appeals
in the last resort in all causes:*

30 The petition of Clifton N. Phillips, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by the whole of the final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 4th day of March, A. D. 1920, wherein the said Clifton N. Phillips was complainant and the said Martha K.

Thomas, H. G. Harris Company, James F. Halliman, and William S. Prosser were defendants, in this respect, that the said decree adjudged and decreed that the said bill of complaint be dismissed with costs.

And your petitioner appeals from the whole and every part of said decree upon the following grounds:

1. Because the complainant was entitled to a specific performance of the option of sale contained in the lease set forth in the bill of complaint. 10

2. Because the consideration price for the conveyance of said premises had been agreed upon at and before the making of the option and afterward evidenced in writing so that there was a complete contract capable of being specifically enforced by the Court of Chancery at the time of the filing of the bill and the trial of said cause. 20

3. Because at the time of the filing of the bill of complaint and the trial of said cause there was written evidence of the consideration price for the conveyance of said premises which referred to the option of sale contained in the lease and which, together with the option, made a complete contract capable of being specifically enforced by a decree of the Court of Chancery.

4. Because it was not necessary that the consideration price be mentioned in the option, it appearing that said consideration price was contained in a writing made prior to the filing of the bill of complaint and offered and received in evidence upon the trial of said cause. 30

5. Because it was not necessary that the consideration price for the conveyance of said premises be agreed upon at the time of the making of the option if said consideration price was in fact agreed upon and reduced to writing and which writing was signed by the defendant, Martha K. Thomas, at any time prior to the filing of the bill and the trial of said cause.

10 6. Because it was not necessary in order to give the complainant a right superior to the defendant's that there should have been an enforceable contract for the sale of said premises in existence at the time when the said Martha K. Thomas entered into the agreement to sell the said premises to the defendant, William S. Prosser.

20 7. Because the defendants, William S. Prosser, H. G. Harris Company and James F. Halliman at the time of the accrual of their respective rights were chargeable with notice of the complainant's right to have a conveyance of said premises even though at the time of the accrual of such rights the complainant's contract was unenforceable because of the failure to reduce one of the terms, to wit, the price, to writing.

30 8. Because the defendants, H. G. Harris Company, William S. Prosser, and James F. Halliman were chargeable with notice of all of the complainant's rights, he being a tenant in possession, whether such rights were strictly enforceable or not.

9. Because the requirement to have the contract for the sale of land in writing signed by the person

to be charged therewith is a rule of evidence and the complainant having produced at the trial of said cause an enforceable contract, the terms of which were reduced to writing and signed by the person to be charged, to wit, Martha K. Thomas, the said contract was sufficient even though some of the terms of said contract, to wit, the price, had not been reduced to writing until after the contract between Martha K. Thomas and the defendant, Prosser, had been entered into.

10

Your petitioner therefore prays that said decree of the said Chancellor be 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.

BOURGEOIS & COULOMB,
Solicitors of Complainant.

H. R. COULOMB,

Of Counsel. 20

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ANSWER TO PETITION OF APPEAL.**NEW JERSEY COURT OF ERRORS AND APPEALS.**

10 Between

CLIFTON N. PHILLIPS,
Complainant-Appellant,

and

MARTHA K. THOMAS, H.

G. HARRIS COMPANY,

JAMES F. HALLIMAN

and WILLIAM S. PROS-

SER,

Defendants-Respondents.

On Bill, etc.

Answer to Petition
of Appeal.

20

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

The answer of H. G. Harris Company, James F. Halliman and William S. Prosser, the respondents herein, respectfully shows:

30 That they were the defendants in the above-named cause in which an appeal was taken to this Honorable Court from the decree of his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 4th day of March, 1920, which said decree adjudged and decreed that the said bill of complaint be dismissed with costs.

And these respondents answering the petition of appeal duly filed herein say:

1. Answering the 1st paragraph, they deny that the complainant was entitled to a specific performance of the option of sale contained in the lease set forth in the bill of complaint.

2. Answering the 2d paragraph, they say that the consideration price for the conveyance of said premises had not been agreed upon before the making of the option, and that there was not a specific writing which made a complete contract capable of being specifically enforced by the Court of Chancery at the time of the filing of the bill and the trial of said cause. 10

3. Answering paragraph 3, they say that there was no written evidence of the consideration price for the conveyance of said premises at the time of the filing of the bill of complaint and the trial of said cause because said writing which was attempted to be introduced to show such proof was a mere conditional writing depending upon the action of these respondents. 20

4. Answering paragraph 4, they say that it was necessary that the consideration price be mentioned in the option, and that the subsequent writing, although made prior to the filing of the bill of complaint and offered and received in evidence at the trial, was as stated in the preceding paragraph merely an additional writing depending upon the action of these respondents. 30

5. Answering paragraph 5, they say that it was

necessary that the consideration price for the conveyance of said premises be agreed upon in writing at the time of the making of the option.

6. Answering paragraph 6, they say that it was necessary in order to give the complainant a right superior to the defendants that there should have been an enforceable contract for the sale of the premises in existence at the time that the said
10) Martha K. Thomas entered into the agreement to sell the said premises to the respondent, William S. Prosser.

7. Answering paragraph 7, they deny that they were chargeable with notice of the complainant's right to have a conveyance of said premises because at the time they entered into the contract to purchase said premises, complainant had unenforceable option, unenforceable because there was no price
20 agreed upon in writing.

8. Answering paragraph 8, they say that they were chargeable only with the written terms of the lease, and that the lease contained an option unenforceable because the price was not mentioned in writing.

9. Answering paragraph 9 they deny the conclusions at law of paragraph 9.

30) The respondents, therefore, pray that the said decree of the said Chancellor be confirmed with costs.

WILLIAM CHARLTON,
*Solicitor for Respondents, H.
G. Harris Company, James
F. Halliman and William S.
Prosser.*

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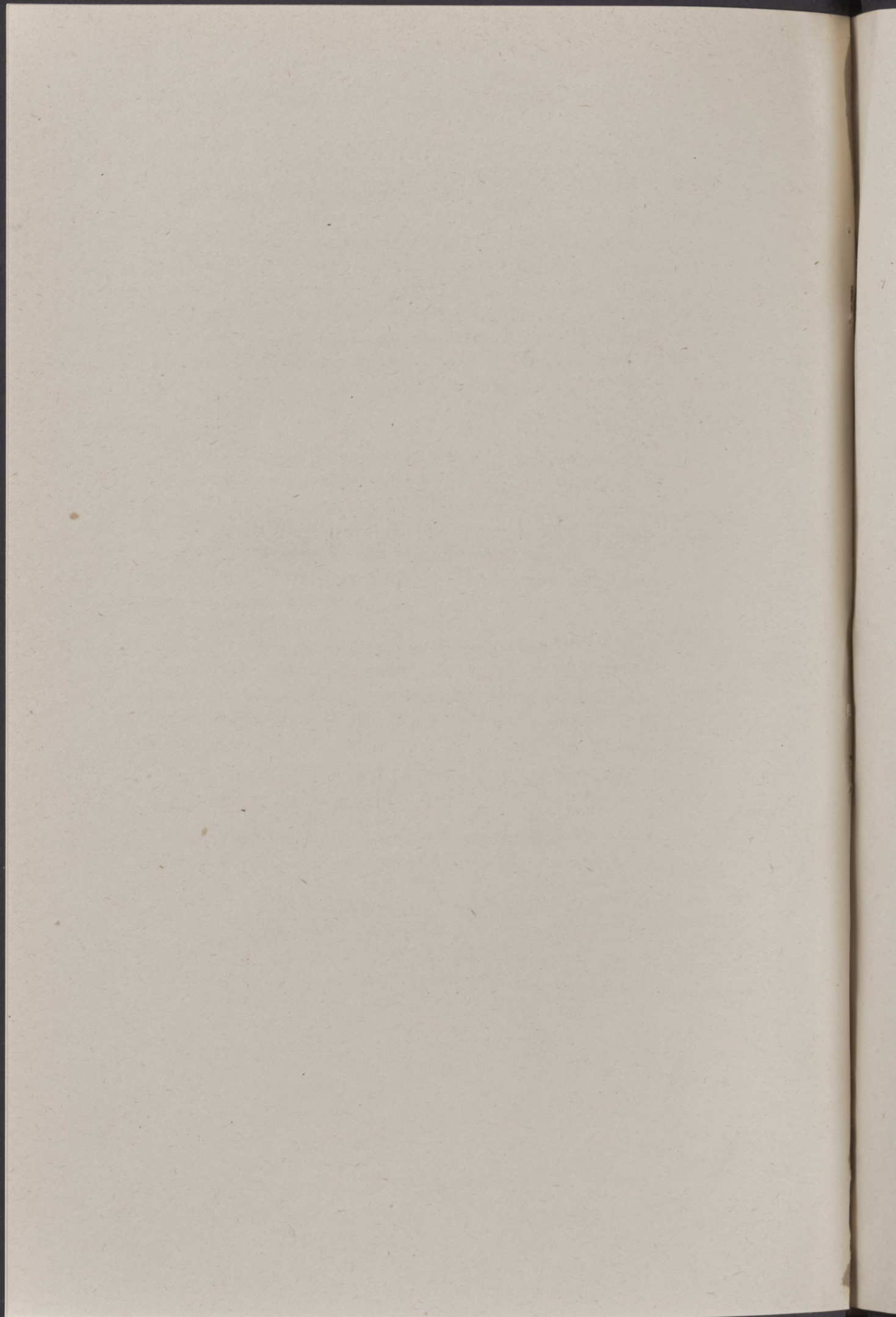
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NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between	}	On Bill for Specific Performance. On Appeal.
CLIFTON N. PHILLIPS,		
<i>Complainant-Appellant,</i>		
and		
MARTHA K. THOMAS, <i>et als.</i> ,		
<i>Defendants-Respondents.</i>		

BRIEF OF BOURGEOIS & COULOMB, SOLICI-
TORS FOR COMPLAINANT-APPELLANT.

The appeal in this case bring up for review a decree of the Court of Chancery advised by Vice-Chancellor Leaming dismissing the bill of complaint and refusing specific performance of the option of sale contained in a lease.

THE FACTS.

The complainant, Clifton N. Phillips, was in possession of property situate at 6 South Surrey Place in the City of Ventnor, which was owned by Martha K. Thomas, one of the defendants. He had occupied the place under a yearly lease for several years prior to January, 1919. On January 9, 1919, he entered

into a written lease for another year with the defendant, Martha K. Thomas. The lease is referred to in the bill of complaint and is printed as an exhibit at pages 71, 72. Prior to the making of the lease he had had some talk with Mrs. Thomas concerning the purchase of the property, and Mrs. Thomas had agreed to sell it to him for the price of \$10,500. Mr. Phillips was not at that time ready to purchase, but when the new lease was drawn he inserted in the lease the option of sale in the following language:

“Party of the first part does hereby give to party of the second part option of buying said property at any time up to expiration of this lease” (p. 72, lines 13-15).

It will be observed that the option did not contain the agreed price of \$10,500. It was testified to by Mr. Phillips that the option was inserted for his protection in order that he and his family would not be put out of their home without, at least, giving him the opportunity of purchasing the property (p. 22, lines 13-19).

The leases were drawn by Mr. Phillips and he testified that the price was omitted merely because of his ignorance concerning the proper method of drawing such an option. In October, 1919, upon the return from a trip to New York, Mr. Phillips received a letter from Mrs. Thomas which is printed as an exhibit on p. 74, lines 1-23, advising him that the property had been sold to William S. Prosser. Phillips then made several efforts to get into communication with Mrs. Thomas and finally did see her at her home in Linwood at which time he recalled to Mrs. Thomas' attention the fact that he had an option to purchase the property. Mrs. Thomas then recol-

lected the option and told Mr. Phillips she had agreed to sell the property to Mr. Prosser and would return Mr. Prosser his money and sell the property to Mr. Phillips, who then and there announced his intention of accepting the option and purchasing the property for \$10,500, the price which had theretofore been agreed upon between Mrs. Thomas and himself. He also wrote Mrs. Thomas a letter to that effect and requested Mrs. Thomas to answer it. The letter which Mr. Phillips wrote is printed as exhibit on p. 74, l. 30, and the letter in reply is printed on p. 73, lines 10-30.

The testimony also showed that Mrs. Thomas' reply was written in Mr. Phillips' home, No. 6 South Surrey Place p. 26, lines 4-9. Mrs. Thomas testified that the letter was written at the dictation of Mr. Phillips p. 42, lines 6-15; p. 51, l. 16. Mr. Phillips testified that he did not dictate the letter, but that Mrs. Thomas did ask him during the course of writing the letter if what she had said was all right, p. 26, lines 16-19.

Mrs. Thomas did attempt to get rid of her contract with Prosser, but was unsuccessful in so doing; pp. 75, 76, Exs. D4, D5; p. 43, l. 10, and upon the advice of her counsel, executed a deed to the premises to William S. Prosser.

It further appeared from the testimony that William S. Prosser, who was Mrs. Thomas' grantee, was not in fact the true owner. It appeared he was a clerk in the office of H. G. Harris Company and that the property had really been paid for by J. Tower Townsend, who had a working agreement with H. G. Harris Company for the division of profits, p. 61, l. 15; p. 63, l. 4. The testimony further showed that notwithstanding Mr. Phillips was in actual physical possession of the property, which

fact was well known to Prosser, H. G. Harris Company and J. Tower Townsend, neither of them made any effort to find out from Mr. Phillips what his rights in the premises were, p. 61, l. 34 to p. 62, l. 25, and furthermore the testimony shows that before the deed was actually executed by Mrs. Thomas, both H. G. Harris Company and William S. Prosser knew that Mr. Phillips had an option to purchase the property for the price of \$10,500 and had announced his intention of exercising that option and purchasing the property.

Mrs. Thomas in her testimony denied that she had any agreement with Mr. Phillips prior to or contemporaneous with the making of the lease that the property could be purchased for \$10,500, but did admit that in April of 1919, three months after the lease was made, and several months before she agreed to sell the property to William S. Prosser, she had importuned Mr. Phillips to buy the property for \$10,500 (page 47, line 13 to page 48, line 20; page 50, line 23 to page 51, line 15). Her testimony that she had not agreed on a price of \$10,500 in January in this respect was negatived by the fact that in her own letter and over her signature she states, as will appear from the exhibit, page 73, lines 10-30, that the price of \$10,500 was the agreed price, and furthermore in her letter (Exhibit D4, page 75, line 26) she writes Mr. Townsend that she intends to convey to Mr. Phillips. There is no contention on her part at all that this letter was in any wise induced by Mr. Phillips.

ARGUMENT.

The Vice-Chancellor's refusal to advise a decree of specific performance is based upon the proposition that the option of purchase as contained in the lease not stating the purchase price, the option was unenforceable in the Court of Equity and that the subsequent letter containing the price was insufficient to remove this objection as against William S. Prosser, because he had entered into the agreement of purchase with Mrs. Thomas before that letter was written.

Complainant does not understand such to be the law. At the common law verbal contracts of sale were enforceable and they are still enforceable in this State, unless the enforcement of them is prohibited by the terms of the Statute of Frauds.

This case is governed by the fourth paragraph of the fifth section of that statute. Comp. Stat. 2612, which section provides as follows:

“That no action shall be brought upon any contract of sale of lands, tenements or hereditaments or any interest in or concerning them unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.”

It will be noticed that this section does not make verbal contracts for the sale of lands void as is the case with regard to the sale of goods, wares and merchandise for the price of \$30 and upwards, and other matters contained in Section 6 of said statute, which provides:

“That every contract for the sale of goods,

wares and merchandise for the price of \$30 or upwards shall be void."

In the latter case the statute makes the contract if not in writing absolutely void. It never has any legal life, but in the case touching sale of lands the contract is left intact. The statute merely introduces a new rule of evidence.

Whitehead vs. Burgess, 61 L. 75-76;

Wilkinson, et als., vs. Van Riper, 63 L. 394-396;

Adams vs. Grady, 77 L. 301-303.

The inhibition goes only to its enforcement, and complainant insists that the statute is fully complied with if the agreement be in writing either in one or more documents before the action is instituted. Such a compliance meets the literal requirements of the statute, but the statute has never been given such a narrow construction, as it is well established that the fact of the contract being in writing need not be set up in the bill of complaint, and that unless the Statute of Frauds is pleaded, the law will presume that the contract was in writing and complainant's suit may be maintained.

Wilkinson Gladis Co. vs. Van Riper, 63 L. 394.

In the case at hand the completed written agreement appears in two documents, but this is no objection under the statute, because there is nothing in the statute which requires that it shall be contained in a single writing. All that is required is that the memorandum shall be in writing at the time the action is brought. However, the Vice-Chancellor's refusal to decree a specific performance was

not based upon this point. His refusal was based upon the ground that Prosser's equities were superior to the equities of Phillips, the complainant, and based that right upon the fact that Prosser had entered into his agreement with Mrs. Thomas before Mrs. Thomas had reduced to writing that portion of the agreement touching the sale price. In this conclusion we contend the Vice-Chancellor erred. The premises were occupied by Phillips and his family. It was the duty of Prosser to have made inquiry on the premises of the tenant to ascertain what his rights in the premises were.

Hoy vs. Brammell, 19 Eq. 563;

Vreedenburgh vs. Burnett, 31 Eq. 229;

Gardham vs. Chester, 60 Eq. 238;

Wood vs. Price, 81 Atl. 983;

McClung Drug Co. vs. City Investment Co.,
108 Atl. 967.

If Prosser had made inquiry of Phillips, in possession of the property, he would have at once learned that Phillips had an option to purchase the property. It was of no moment to Prosser whether that option was verbal or written. He could not interpose the statute in a proceeding between Mrs. Thomas, the owner, and Phillips, the holder of the option. If the option had been verbal and Mrs. Thomas did not choose to interpose the statutory defense, Phillips would have been entitled to a decree of specific performance (*Gough vs. Williamson*, 62 E. 526) and Prosser, if he had made the inquiry and learned the situation, would have had no equities against Phillips in the matter, nor would he acquire equities against him by refraining or failing to make that inquiry which would have given him full knowledge of the situation, and certainly Prosser acquired no equities as against Phillips by his failure to make

inquiry of Phillips in possession because one term of the option had not at that time been reduced to writing. The statute is satisfied if a writing is in existence at the time the suit is instituted. It is a matter of evidence only.

The Vice-Chancellor assumed that Prosser might interpose the Statute of Frauds as a defense to the action of Phillips against Mrs. Thomas. Prosser had notice of Phillips' option before he completed his purchase with Mrs. Thomas (page 75, line 20). He was made a party for the purpose of compelling him to specifically perform Mrs. Thomas' agreement in the event that the Court decreed that Phillips was entitled to have specific performance as against her. In this respect the case is entirely similar to the case of *Brinton vs. Scull*, 35 Atl. 843-847. Prosser was not a bona fide purchaser without notice because to be such he must not only have agreed to purchase without notice of complainant's previous agreement, but he must also have actually paid the purchase money and taken his deed without such notice.

Dean vs. Anderson, 34 Eq. 503.

If he has paid part only before notice, he will be protected only to the extent of his actual payment.

Haughwaut vs. Murphy, 22 Eq. 548;

Brinton vs. Scull, 35 Atl. 843.

The agreement between Mrs. Thomas and Prosser was made on the 3d day of October, 1919, (page 77, line 8). After Mr. Phillips had taken the matter up with Mrs. Thomas, she returned the \$200 down money to Prosser on October 17, 1919, (page 75, line 24). That letter gave him actual notice and he had constructive notice by Phillips' possession of the

property at and before the time of the making of the first agreement. Phillips exercised his option to purchase on October 27, 1919, (page 74, line 30). Prosser returned the money to Mrs. Thomas on October 29, 1919, (page 76, line 10). The deed of conveyance was not made until December 12, 1919, (bill of complaint, page 8, line 9; admitted in answer, page 17, line 26).

Under the cases above mentioned, in the event of a decree for specific performance by Mrs. Thomas to Phillips, Prosser's rights were to have the \$200 he had paid to Mrs. Thomas secured to him out of the moneys that Phillips must pay to Mrs. Thomas as the purchase money. Other than that he had no rights against Phillips. He was not authorized to interpose the statute as a defense. Such a defense could be interposed only by Mrs. Thomas herself.

The language is:

"No action shall be brought upon any contract for the sale of lands or interest concerning them unless the contract shall be in writing."

Phillips had no standing to bring an action against Prosser on his option. There was no privity of contract between Prosser and Phillips. Phillips' action was against Mrs. Thomas only, and she only could defend that action. Under the circumstances of this case Phillips had a right of action against Mrs. Thomas. Prosser likewise had a right of action against Mrs. Thomas. As between Phillips and Prosser it was a question of superiority of equities only, and the interposing of a statutory defense is not to be considered in determining which equity is superior.

Mrs. Thomas had agreed with Mr. Phillips upon the terms of this option. One of the terms had by

inadvertence been omitted. Upon a bill to reform that contract, if it had appeared by both parties that the term had been omitted by inadvertence, the contract would have been reformed. After it had been reformed and thus perfected, a bill for specific performance would have been sustained. Hence, may not an honest woman do without litigation that which the Court would decree to be done by litigation? In this case Mrs. Thomas notified Prosser at the time of returning the money that she intended to convey to Mr. Phillips (page 75, line 26). She was then impelled by an honest motive, and it is unfortunate if it be true that the Statute of Frauds could be made a vehicle for inducing honest people to repudiate their moral obligations and then seek legal defense by interposing the Statute of Frauds. If such a situation can arise as a matter of law, it surely is devoid of all equity in favor of those who are parties to it.

The 9th Section of the Statute of Frauds, Comp. Stat. 2616, is as follows:

“That the consideration of any promise, contract or agreement required by this act to be put in writing need not be set forth or expressed in said writing but may be proved by any other legal evidence.”

A similar section is contained in the Statute of Frauds of the State of Massachusetts, and Justice Holmes in the case of *Hay vs. Jackson*, 159 Mass. 451, 34 N. E. 683, where the question was whether or not the consideration had been sufficiently expressed in the memorandum of agreement, said:

“It seems to be disposed of by Section 2 of our statute that the consideration of such promise, contract or agreement need not be

set forth or expressed in a writing signed by the party to be charged therewith."

The option of purchase as contained in the lease, even without the purchase price being mentioned was sufficient under the Statute of Frauds to impose a legal obligation upon Mrs. Thomas to convey the property, so that at the time she entered into the agreement with Mr. Prosser for the sale thereof, there was outstanding a valid legal obligation on her part to convey to Mr. Phillips if he so desired, of which valid legal obligation the defendant, Prosser, was chargeable with notice by reason of the fact that Mr. Phillips was in possession of the property and all of his interests therein could have been determined by inquiry. It is true that the option was unenforceable in a court of equity in a bill for specific performance, because one of the terms of the option was missing, namely, the price, but that inability of the Court of Chancery to enforce such an option is not the result of any equitable defect so far as the binding obligation of the contract was concerned, but merely because of its inability to consider oral evidence concerning this term of the contract. In other words, the position the Court of Chancery takes under such circumstances is that while there is a binding obligation on the part of the owner to sell the property, that obligation is unenforceable in the court of equity, because there is no written evidence of the price and the court cannot take oral evidence to supply that omission. The failure to insert the price in no wise diminishes its force as a legal obligation to sell. Its only effect was to disable the Court of Chancery from specifically enforcing it. It must therefore follow that at the time Mr. Prosser entered into this contract, had he made inquiry of

Mr. Phillips as he was obliged to, concerning Mr. Phillips' interest in the premises, and had he been told as he undoubtedly would have been told, that Mr. Phillips was in possession under a lease containing an option of purchase for the price of \$10,500, and it had developed that the price was not mentioned in the option and Mr. Prosser relying upon that defect had entered into the contract to purchase the property, he could not be said to have had an equity superior to that of Mr. Phillips.

The requirement by the Court of Chancery that the terms of the contract which it is asked to specifically perform must be fixed and determined in writing, or at least so provided for in the writing that the Court of Chancery may determine them readily, is not a matter of substantive law but a pure matter of evidence, and the defect may be supplied at any time. It may be supplied in the answer or by letters, the only requirements being that the writing supplying the defect must show in itself that it relates to the principal contract. We submit that if her answer to the bill of complaint had admitted that the price referred to in the option of sale contained in the lease was to be \$10,500, even though her answer had not been filed until after her agreement was made with Prosser, that would have been sufficient to justify and require the Court of Chancery to make a decree of specific performance, *Gough vs. Williamson*, 62 E. 526. The letter that Mrs. Thomas wrote refers specifically to the option contained in the lease and refers specifically to the fact that that was the price agreed upon, as an admission it was just as strong and effectual as it would have been if it appeared by her answer, and we submit that merely because at the time it was written she had entered into another contract did not affect the

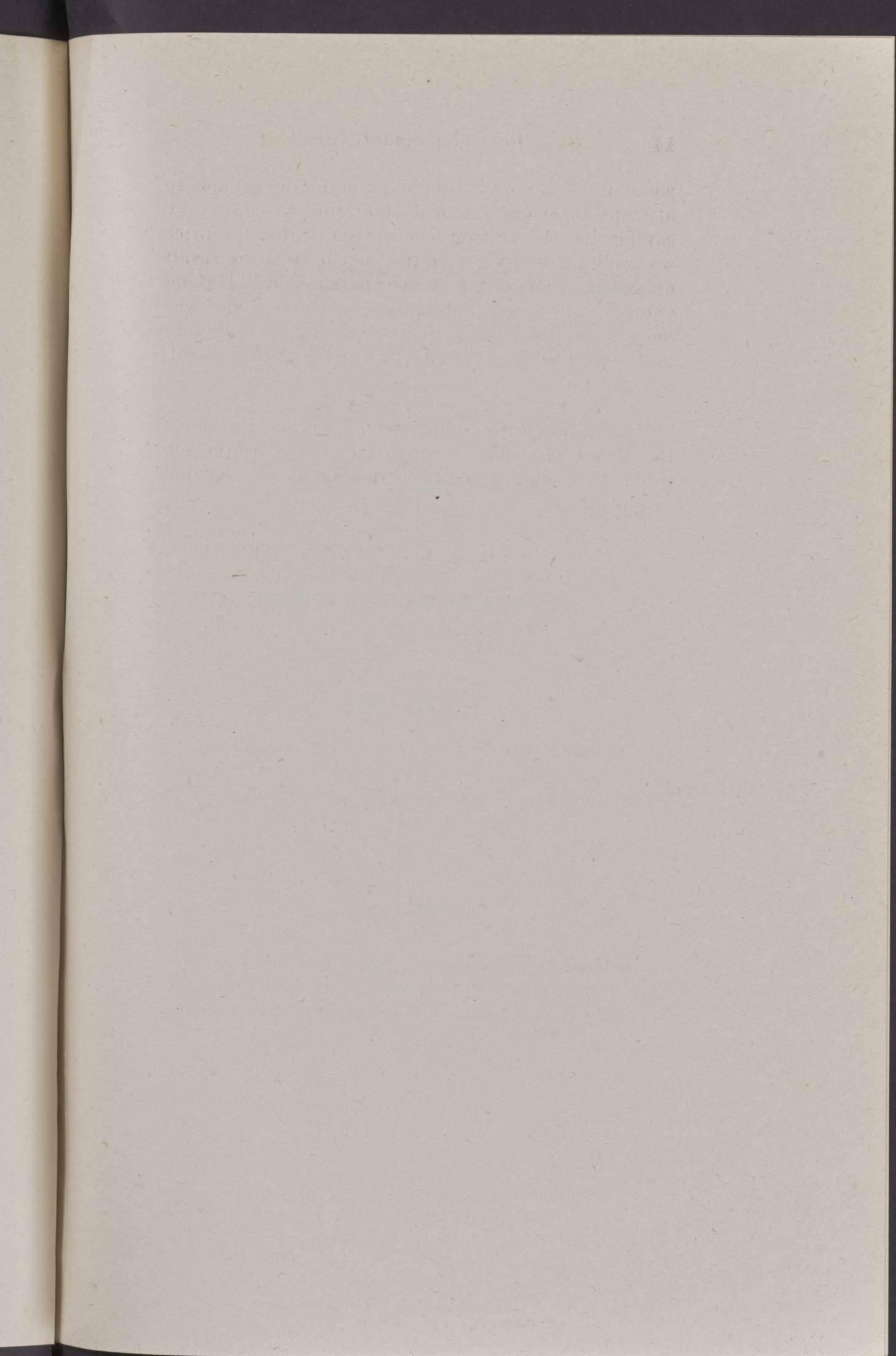
force of her written admission. Prosser knew or should have known that Mr. Phillips had an option to purchase the property, but the Court of Chancery says that at the time he entered into such contract that the only knowledge he could have obtained was knowledge that Phillips had a contract, which the Court of Chancery would not specifically enforce. We think that this is taking too narrow a view of the rights of Mr. Phillips, notice of which was chargeable to Mr. Prosser. We contend that Mr. Prosser did not take advantage of the fact that Mr. Phillips' contract could not be specifically enforced as it stood at the time he entered into his contract, nor could he by entering into his contract deprive Mr. Phillips of the right to make use of whatever written evidence he might afterwards obtain setting forth the purchase price. At the time Mrs. Thomas agreed to sell the property to Mr. Prosser she was legally bound to sell it to Mr. Phillips for the sum of \$10,500. If she afterwards, either designedly or inadvertently, either through persuasion or coercion, over her own signature agreed that the price for the property referred to in the option was \$10,500, such evidence was available in favor of Mr. Phillips notwithstanding it was actually written after she had agreed to sell the property to someone else.

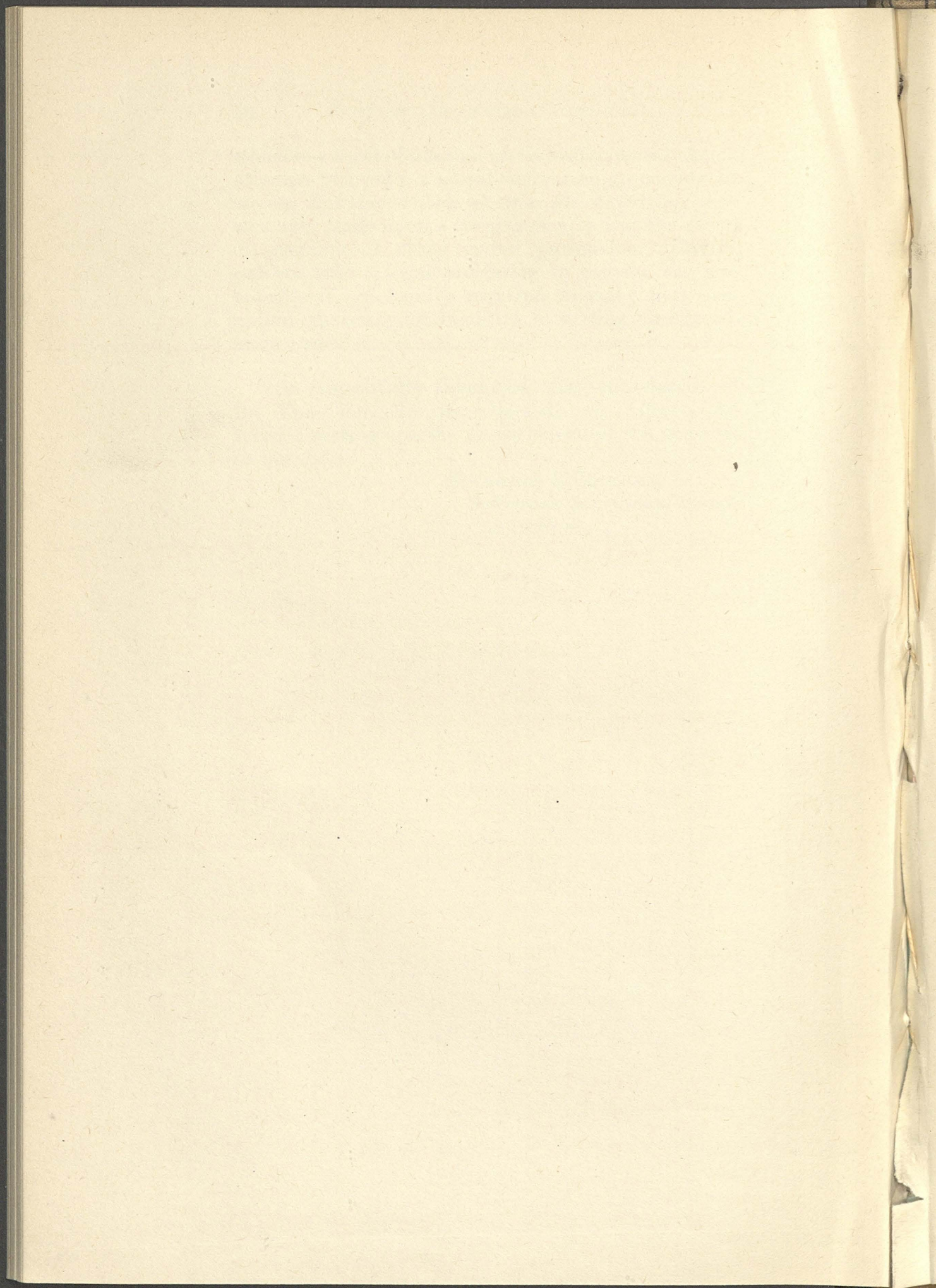
Nor does it make any difference if the contention of the defendant, Thomas, be believed that her setting forth the price was contingent upon being able to get rid of the Prosser contract. All that the Court of Chancery desires is written evidence of the price agreed upon over the signature of the person agreeing to sell and it does not lie within the mouth of the vendor who has made an agreement to sell which is unenforceable in the Court of Chancery and

which is a legal obligation and a highly moral one, to attempt to evade a moral obligation to convey by saying that the writing wherein she stated the price was only made upon a contingency or was the result of coercion or other undue persuasion. Having entered into a legal obligation to convey, she was morally if not legally required to make that obligation perfect by setting forth in writing the agreed-upon price.

It is respectfully submitted that the decree of the Vice-Chancellor be reversed, and a decree entered directing specific performance of the contract in question.

BOURGEOIS & COULOMB,
*Solicitors for Complainant-
Appellant.*





New Jersey Court of Errors and Appeals

Between
Clifton N. Phillips,
Complainant-Appellant,
and
Martha K. Thomas, et als.,
Defendants-Respondents.

POINTS FOR RESPONDENTS.

STATEMENT.

Appellant's brief has not been handed us and the following points are being presented in anticipation of his brief and upon the assumption that the brief will set forth the facts in detail.

ARGUMENT.

We feel that the conclusions of the Vice-Chancellor vindicate themselves and that we may safely rely upon a mere statement of the points.

Point I.

The lease contains an incompleated option and by itself could not be a ground for specific performance. The language (page 72) is:

“Party of the first part does hereby give to party of the second part the option of buying said property at any time up to expiration of this lease.”

It will be observed that no terms are named to make a binding contract—it was necessary to supply the omission either by verbal testimony which is prohibited under the cases or by a subsequent writing.

Point II.

The agreement of October 3, 1919, between Thomas and Prosser was binding upon Thomas and made at a time when Phillips had no enforceable option or agreement. True, Phillips was in possession and Prosser was bound to know the extent of his rights. His rights were expressed in the lease and if Prosser had read it, he would have seen that Phillips had no option he could enforce against Thomas.

Point III.

After Prosser had procured a binding agreement from Thomas, Phillips, by Exhibit D2, undertook to supply the missing link in his option in that he practically makes, or undertakes to, a new agreement and fix a price which he will pay. Her answer (Ex-

hibit C2) is clearly conditional upon being released from the Prosser agreement. She says:

“I will notify Mr. Harris to release me from my agreement with him to sell same,” &c.

Again:

“I shall return to him his payment binding the agreement and at the same time asking him to release me.”

Prosser refused to release Mrs. Thomas and in consequence her agreement to sell, if it may be termed such in her letter of October 28th became ineffective and unenforceable. The circumstances surrounding the procurement of the letter (Exhibit C2) from Mrs. Thomas are such as to deprive Mr. Phillips of a standing in a court of equity. We need not detail the testimony, but ask a reading of the testimony of Mrs. Thomas and Phillips upon this aspect of the case.

The Vice-Chancellor's reasoning and conclusion upon this feature of the case is quite satisfactory to us and we think unanswerable.

Point IV.

In fact there was no price named at the time the lease was made. Phillips says there was, but in this he is contradicted by Mrs. Thomas, and the Vice-Chancellor says the weight is with her and we assert the same. That being so, the letter of Phillips to Thomas and her reply did not supply the proof necessary to validate the option; it created, if anything, a new and independent contract and that new and independent contract is not the basis of the bill.

Point V.

Appellant is seeking specific performance which is always a matter of legal discretion and will not be enforced where an inequity will follow. The Vice-Chancellor has found, and properly so, that Mrs. Thomas did not know the option was in the lease and that her actions throughout were in good faith and her efforts were to assist Phillips when she found herself in the embarrassing position of probably being bound to two adverse interests. The equities are with the respondents and the case is one where appellant should be left to his remedy at law.

Respectfully submitted that the decree should be affirmed.

C. L. COLE,
*Of Counsel for Martha K.
Thomas.*

WILLIAM CHARLTON,
*Of Counsel with Prosser,
et als., Respondents.*

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