INDEX.

STIPULATION.

(Filed May 7, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between:
JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the ESTATE OF WILLIAM B. LIPPINCOTT, deceased,
Complainants-Appellants,
and
WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR and JOHN S. WARNER,
Defendants-Respondents.

On Appeal from Court of Chancery. Stipulation.

Between:
WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the ESTATE OF WILLIAM B. LIPPINCOTT, deceased, WILLIAM J. LIPPINCOTT, individually, and CAROLINE W. LIPPINCOTT,
Complainants-Appellants,
and
WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR and JOHN S. WARNER,
Defendants-Respondents.

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

1. That in printing the state of the case, there shall not be printed with the complainants' bill the copy of the agreement of sale attached thereto, but same shall be printed only as Exhibit C1.

2. That there shall not be printed in the state of the case, Exhibit C2, same being a copy of agreement of sale printed as Exhibit C1.

3. That there shall not be printed the copy of the last will and testament and codicil thereto of William B. Lippincott, deceased, attached to said bill.

4. That in printing Exhibit C1, there shall not be attached thereto the survey of the mansion house which was attached to the original agreement.

5. That there shall not be printed the pleadings in the suit of William J. Lippincott and Laura L. Evans, executors of the Estate of William B. Lippincott, deceased, William J. Lippincott, individually, and Caroline W. Lippincott, complainants, against William A. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, defendants, except that in connection with said cause there shall be printed the agreement of sale attached to the complainants' bill in that cause, but there shall be omitted therefrom the survey of the mansion house which was attached to the original agreement of sale.

6. That the decree of the Court of Errors and

Appeals in the case of John O. Wilson, Laura L. Evans, individually, and William B. Lippincott and Laura L. Evans, executors of the estate of William B. Lippincott, deceased, against William H. Windolph, *et al.*, shall also constitute a determination of the companion suit of William J. Lippincott and Laura L. Evans, executors of the estate of William B. Lippincott, deceased, William J. Lippincott, individually, and Caroline W. Lippincott, complainants, against William H. Windolph, *et al.*, it having been stipulated at the trial by counsel of the respective parties that the same situation exists as to both cases and that the testimony taken and correspondence introduced in the first case is applicable to the second case.

BLEAKLY, STOCKWELL & BURLING,
Solicitors of Complainants,
PHILIP WENDKOS,
Solicitor of Defendants, William H. Windolph and William R. Goldsborough,
JOSEPH S. LOW,
Solicitor of Defendants, George A. Wonfor and John S. Warner.

AMENDED BILL OF COMPLAINT.

(Filed Mar. 16, 1927.)

IN CHANCERY OF NEW JERSEY.

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

The complainants, John O. Wilson, of the Township of Moorestown, County of Burlington and State of New Jersey; Laura L. Evans, of the Town of Marlton, County of Burlington and State of New Jersey, and William J. Lippincott and Laura L. Evans, executors of the last will and testament of William B. Lippincott, deceased, respectfully show that:

1. On the 15th day of December, 1925, William B. Lippincott, widower, and Laura L. Evans were seized in fee simple of all the following described tract or parcel of lands and premises situate in the Township of Evesham, County of Burlington and State of New Jersey, bounded as follows:

"BEGINNING at a point in the middle line of the Camden, Ellisburg and Marlton Turnpike Road and the Easterly line of Cropwell Road; thence (1) North twenty-six degrees and forty-nine minutes east, seven chains and four links to a point in the land of the Philadelphia, Marlton and Medford Railroad Company; thence (2) South seventy-one degrees and twenty-five minutes East, eight chains and four links to another point in the land of the Philadelphia, Marlton and Medford Railroad Company, formerly corner to David D. Griscom's land; thence (3) North thirty degrees and five minutes East forty-seven links to a stone in the Northerly line of the land of the Philadelphia, Marlton and Medford Railroad; thence, continuing on the same course along the line of David D. Griscom's land, eleven chains and seventy-two links to a locust stake in a ditch; thence (4) still along the line of Griscom's land South fifty-one degrees and seven minutes East, five chains and fourteen links to a locust stake in said ditch, thence (5) still by Griscom's land, North thirty-three degrees and forty-nine minutes East, twelve chains and seventy-seven links to a stone corner, thence (6) still by Griscom's land, South seventy-one degrees and twenty minutes East, nine chains and twenty-four links to a stone corner to said Griscom's land in the line of land of Joseph M. Brick thence (7) along the line of Brick's land North twenty-five degrees and thirty-seven minutes East, six chains and ninety-five links to a stone corner to other lands of the said David D. Griscom's; thence (8) by said Griscom's land, North sixty-three degrees and thirty-five minutes, West, fifteen chains and thirty-six links to a corner two feet Southeast of a stone placed for a corner; thence (9) still by Griscom's land South forty-three degrees and twenty-five minutes West, three chains and thirty-eight links to a stone; thence (10) still by Griscom's land North seventy degrees and five minutes West, ten chains and sixty links to a stone; buried; thence (11) still

by Griscom's land South fifty-five degrees and fifty-five minutes West one chain and four links to a stone on the ditch bank, thence (12) still by Griscom's land South sixty-four degrees and fifty-five minutes West, four chains and eighteen links to a corner thirteen feet Southeast of the center of the bridge on the Cropwell Road thence (13) nearly along the ditch and by line of William B. Lippincott land North fifty-nine degrees and thirty-five minutes West, five chains and fifteen links to a stake on the Northerly edge of the ditch, thence (14) still by Lippincott's land, South thirteen degrees and twenty-five minutes West one chain and fifty-one links to an old poplar stump, thence (15) still by Lippincott's land North sixty-four degrees and thirty-five minutes West, one chain and thirty-six links to a corner; thence (16) South eighty-two degrees and forty minutes West, one chain and forty-four links to a stone, corner to other land of William B. Lippincott; thence (17) by William B. Lippincott's other land South fifteen degrees and seven minutes West, seventeen chains and thirty-eight links to a stone; thence (18) still by William B. Lippincott's land South twenty-two degrees and sixteen minutes West thirteen chains and thirty-nine links to a corner in the middle of the aforesaid turnpike; thence (19) along the middle of the said turnpike, South seventy degrees and fifty-seven minutes West, eight chains and fifty-five links to the place of beginning.

CONTAINING seventy-eight and fifty-one-hundredths (78.50) acres of land, be the same more or less.

EXCEPTING thereout and therefrom the

mansion house and lot of land whereon the same is located, containing one and ninety-three one-hundredths (1.93) acres, according to a survey thereof attached to this agreement, and SUBJECT to the railroads' rights of way and the railroad's right to use of Station Site."

2. On the said 15th day of December, 1925, said William B. Lippincott, widower, and Laura Evans and William Evans, her husband, entered into a certain agreement in writing with the said William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, hereinafter called the defendants, wherein and whereby the said William B. Lippincott, together with Laura Evans and William Evans, her husband, agreed to convey to the defendants on the 3rd day of August, 1926, the said lands and premises described in paragraph 1, by deed of special warranty, in consideration of the payment by the said defendants of the sum of eight hundred fifty dollars ($850.00) per acre, which acreage was to be ascertained by a survey thereof to be made by Henry Lippincott of Marlton, N. J., and the said defendants agreed to pay to said William B. Lippincott and to Laura Evans and William Evans, her husband, the said purchase price of eight hundred fifty dollars ($850.00) per acre in the following manner, to wit:

A first payment of sixty-two hundred dollars, recepit whereof was thereby acknowledged by the said parties of the first part.

The further sum of fifteen thousand five hundred dollars ($15,500) was to be paid at the time of final settlement, and a bond and mortgage was to be executed by the said parties of the second part to Laura Evans, one of the said parties of the first

part, for the amount of the balance of the purchase price, when ascertained in the manner aforesaid, which said mortgage was to be payable in instalments of at least eight thousand dollars ($8000.00) annually, the whole amount thereof to be paid within five years from the date thereof, and to bear interest at the rate of six per cent per annum, payable semi-annually; said mortgage was to contain the usual tax, insurance and default clauses and to be in form to be approved by John O. Wilson, of Fourth and Market Streets, Camden, N. J., and was also to contain a release clause providing that land fronting on Marlton Pike for a depth of two hundred feet, might be released at the price of twelve dollars and fifty cents ($12.50) per front foot, and that land fronting on Cropwell Road, for a depth of two hundred feet, might be released at the price of eight dollars ($8.00) per front foot, and that the balance of the farm might be released from the lien and operation of the said mortgage upon the payment of the sum of eight hundred dollars ($800.00) per acre. Said mortgage was also to contain a clause that upon the payment of any annual instalment of principal the said parties of the second part should be entitled to a release of land according to the schedule hereinabove mentioned, to the amount of said annual payment; the said deed to be delivered and final settlement to be made at the office of John O. Wilson, southwest corner of Fourth and Market Streets, Camden, N. J., on the 3rd day of August, A. D. 1926, at the hour of eleven o'clock in the forenoon of said day. A true copy of said written agreement with survey attached thereto is hereunto annexed and made a part hereof.

3. The said defendants paid to William B. Lippincott, and to William Evans and Laura Evans, his wife, the said sum of sixty-two hundred dollars ($6200.00) at the time of the execution and delivery of the said agreement.

4. On the 30th day of January, 1926, the said William Evans and Laura Evans, his wife, of the Town of Marlton, Township of Evesham, County of Burlington and State of New Jersey, by deed duly executed and intended to be forthwith recorded, in consideration of the sum of one dollar ($1.00) and other good and valuable considerations, granted and conveyed unto John O. Wilson, one of the complainants herein, *inter alia,* the lands and premises mentioned and described in the foregoing agreement, in fee, and also duly assigned to said John O. Wilson, all their rights under said agreement.

5. At the request of the defendants and by mutual arrangement of the parties to the agreement, the time for settlement under said agreement was extended to October 18, 1926, at the same hour and place.

6. Pursuant to the terms of said agreement and to the directions of complainant, John O. Wilson, and said William B. Lippincott, Henry Lippincott of Marlton, N. J., made an accurate survey of the lands and premises mentioned in said agreement, a copy whereof is attached hereto and made a part hereof, and ascertained the total acreage comprised within the title lines of said farm to be seventy-eight and fifty-two one-hundredths acres (78.52) and the acreage for which payment was to be made by the defendants, the parties of the second part in said agreement, was seventy-two and one hundred

ninety-eight one-thousandths (72.198) acres, as shown on said survey, reference to which is hereby made.

7. On the said 18th day of October, 1926, at the hour of eleven o'clock in the forenoon of said day, complainants, John O. Wilson and Laura L. Evans, and William B. Lippincott, duly attended at the office of the said John O. Wilson, southwest corner of Fourth and Market Streets, Camden, N. J., prepared to make settlement with the defendants under said agreement and to deliver a special warranty deed to the said defendants for said property, duly executed and acknowledged by the owner of said property, conveying the title to said lands and premises in accordance with the terms and conditions of said agreement. Complainants, John O. Wilson and Laura L. Evans, and William B. Lippincott had caused to be prepared, pursuant to the terms of said agreement, a bond and mortgage to be executed by the defendants to said Laura Evans. Complainants, John O. Wilson, and Laura L. Evans, and William B. Lippincott continued to attend at the aforesaid place fixed for settlement throughout the said 18th day of October, 1926, ready and willing to make settlement pursuant to the terms of said agreement, but the defendants did not nor did any of them or anyone for them, attend at the time and place aforesaid, but on the contrary, and prior to the said time, said, defendants notified complainant, John O. Wilson, that they would not attend said settlement and proposed to forfeit the deposit moneys under said agreement.

8. On the 16th day of December, 1926, and after the filing of the original bill herein, William B. Lippincott, one of the parties of the first part in said agreement, departed this life at the Town of Marlton, aforesaid, leaving him surviving as his heirs at law and next of kin, his son, William J. Lippincott and his daughter, Laura L. Evans, and leaving a last will and testament, wherein the said William J. Lippincott and Laura L. Evans were appointed executors thereof. Said William B. Lippincott had a life estate in said property and such estate as he had has now been determined by his death, but his executors have an interest in the cash proceeds of said sale. Said last will and testament and codicil attached thereto were duly proved and admitted to probate by the Surrogate of the County of Burlington and State of New Jersey, on the 4th day of January, 1927, copies whereof are attached hereto.

9. The defendants refused, failed and neglected to appear at the time and place fixed for settlement under said agreement and wholly failed and refused to make settlement thereunder and to carry out the terms of said agreement, and still do so refuse to carry out the terms of said agreement.

10. Complainant, John O. Wilson, has always been ready and willing and now tenders himself ready and willing to perform his part of the said agreement, and the said William B. Lippincott was always ready and willing and tendered himself ready and willing to perform his part of the said agreement up to the time of his death aforesaid, and complainants, William J. Lippincott and Laura L. Evans, executors of the last will and testament of William B. Lippincott, deceased, have always been ready and willing since the death of the said William B. Lippincott to perform their part of the

said agreement, and upon being paid the remainder of said purchase money with interest, pursuant to the terms of said agreement, and the complainants tender themselves ready and willing to convey the said lands and premises to the said William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, by a special warranty deed, duly executed by them for the premises aforesaid, in accordance with the terms and conditions of said agreement.

11. Orella E. Wilson, wife of complainant, John O. Wilson, tenders herself ready and willing to execute and has executed a good and sufficient release of her dower or other rights in and to the lands and premises mentioned and described in said agreement.

The complainants are without adequate remedy in the courts at law and therefore pray:

1. That William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, who are defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That the said William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, may be compelled by the decree of this Court specifically to perform the said agreement with complainants, and to pay to complainants the remainder of the said purchase money by the payment of cash and by the execution of the bond and mortgage, as in and by said agreement provided, with interest from the time said purchase money ought to have been paid, on the delivery by complainants to said William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, of a deed executed by complainants, as in said agreement provided.

3. That in case the said defendants, William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, should, within the time limited by this Court for such performance of said contract, fail and neglect, upon the tender of said deed, to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum, to wit, the entire purchase price less a credit for the first payment of sixty-two hundred dollars ($6200.00), together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainants, and that the said lands and premises may be sold under the direction of this Court for the satisfaction of such lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale, that the said defendants may be ordered by this Court to pay said deficiency, together with interest and costs to these complainants.

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

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainants.

(Note:—Copy of agreement of sale attached to amended bill but here omitted having by stipulation of counsel been printed only as Exhibit C1. Copy of will of William B. Lippincott and survey of mansion house mentioned in the agreement of sale are also omitted by stipulation of counsel.)

[Endorsed]

Service of a copy hereof is hereby acknowledged this 10th day of March, 1927.

Philip Wendkos,
Solicitor of Defendants,
William H. Windolph and
William R. Goldsborough,
Joseph S. Low,
Solicitor of Defendants,
George A. Wonfor and
John S. Warner.

ANSWER TO AMENDED BILL.

(Filed June 8, 1927.)

IN CHANCERY OF NEW JERSEY.

Between: John O. Wilson, Laura L. Evans, individually, and William J. Lippincott and Laura L. Evans, executors, etc., *Complainants,* and William H. Windolph, *et als.,* *Defendants.*	Answer to Amended Bill.

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

1. They have not sufficient information to form a belief as to the truth of the allegations set forth in paragraph 1 of the amended bill of complaint, and complainants will be obliged to make strict proof thereof.

2. Defendants deny that they had entered into an agreement with complainants for the purchase of the lands and premises described in paragraph 1 at the rate of eight hundred and fifty dollars ($850.00) per acre. They further deny that the acreage was to be ascertained by a survey thereof to be made by Henry Lippincott of Marlton, N. J. Defendants never authorized the said Henry Lippincott to make a survey of the lands described in paragraph 1 of the amended bill of complaint, and they deny that the acreage was to be ascertained by the said Henry Lippincott, of Marlton, N. J. Defendants deny that they had agreed to pay an additional sum of fifteen thousand five hundred dollars, and that they were to execute a bond and mortgage to Laura Evans for the amount of the balance of the purchase price. Defendants deny that the purchase price was ever ascertained, and, furthermore, defendants did not agree to any manner of ascertainment of the purchase price. Defendants never agreed to pay any stipulated purchase price for the lands and premises described in paragraph 1 of the amended bill of complaint. Defendants have no knowledge or information that the mortgage referred to in the amended bill of complaint was to be payable in any manner or method whatsoever, or within any specified period, or that said mortgage was to contain any tax, insurance and default clauses, or was to contain what complainants term the usual tax, insurance and default clauses. Defendants have no information as to the form of the mortgage which was to be approved by John O. Wilson, of Fourth and Market Streets, Camden, N. J. Defendants have no knowledge or information to form a belief as to the truth of the release clause set forth in the amended bill of complaint, and were not aware that

any release clause was to be contained in the said mortgage. Defendants further have no information as to the amount of said mortgage, nor have the defendants agreed to execute a mortgage in any amount to the said Laura Evans.

3. Defendants deny that they paid to complainants the sum of sixty-two hundred dollars ($6200.00) at the time of the execution and delivery of said agreement, but paid the same some time prior thereto.

4. Defendants have no knowledge or information to form a belief as to the truth of the allegations set forth in paragraph 4 of the amended bill of complaint, and leave complainants to their strict proof.

5. Defendants have no knowledge or information to form a belief as to the truth of the allegations set forth in paragraph 5 of the amended bill of complaint, and leave complainants to their strict proof.

6. Defendants have no knowledge or information to form a belief as to the truth of the allegations set forth in paragraph 6 of the amended bill of complaint, and leave complainants to their strict proof. Defendants deny that the survey, a copy of which is attached and made a part of the amended bill of complaint, is the survey of the lands referred to in paragraph 1 of the amended bill of complaint, and further deny that the total acreage comprised within the lines of said survey amounts to 78.52 acres, and further deny that the complainants ascertained the total acreage comprised within the lines set out on the aforesaid survey. Defendants deny that 72.198 acres was the acreage for which payment was to be made by them.

7. Defendants deny that John O. Wilson, Laura L. Evans and William B. Lippincott appeared at the office of said John O. Wilson on the 18th day of October, 1926, prepared to deliver a special warranty deed to defendants, duly executed and acknowledged by the owner of the lands and premises referred to in paragraph 1 of the amended bill of complaint. Defendants have not seen the deed above referred to, but deny that any deed which complainants might have delivered on the aforesaid date would have conveyed the title to said lands and premises free and clear of all encumbrances. Defendants deny all of the other allegations set forth in paragraph 7 of the amended bill of complaint.

8. Defendants have not sufficient information to form a belief as to the truth of the allegations set forth in paragraph 8 of the amended bill of complaint. Defendants deny that William J. Lippincott and Laura L. Evans, executors of the estate of William B. Lippincott, have any right or interest in the cash proceeds of any sale of the lands referred to in paragraph 1, nor do they have any interest in the lands referred to in paragraph 1 of the amended bill of complaint. Defendants will move to dismiss the amended bill of complaint on account of the improper joinder of parties, on the grounds that the said William J. Lippincott and Laura L. Evans have no interest in subject-matter of this suit.

9. Defendants deny the allegations contained in paragraph 9 of the amended bill of complaint.

10. Defendants deny the allegations contained in paragraph 10 of the amended bill of complaint, and aver that John O. Wilson has never been ready

and willing to perform his part of said agreement, and furthermore, defendants were never under any obligations to the said John O. Wilson, nor did John O. Wilson undertake in any manner whatsoever to perform any agreement. Defendants had never entered into an agreement of any character, relating to the subject-matter of this suit, with the said John O. Wilson. The said John O. Wilson was not an assignee of Laura L. Evans and William Evans, and is, therefore, not a proper party to this suit. Defendants will move to dismiss the amended bill of complaint on the ground that the said John O. Wilson is not a proper party to this suit.

11. Defendants deny the allegations set forth in paragraph 11 of the amended bill of complaint.

First Defense.

Defendants had never entered into an agreement with complainants, whereby defendants agreed to purchase premises referred to in paragraph 1 of the amended bill of complaint. Negotiations which defendants had with complainants were incomplete, unsettled and were in such state that the minds of the defendants and complainants had not met.

Second Defense.

By reason of the family relationship between Henry Lippincott and the complainants, defendants never agreed to the selection of the said Henry Lippincott as the person to survey for defendants the farm referred to in paragraph 1 of the amended bill

of complaint. Notwithstanding the privilege which complainants granted to defendants to select a surveyor of their own choosing, complainants refused to permit defendants to select their own surveyor.

Third Defense.

The survey attached to the amended bill of complaint is incorrect, is not a survey of the lands of Laura L. Evans, and accordingly the acreage contained within the bounds thereof is incapable of ascertainment.

Fourth Defense.

Complainants do not have, nor did they ever have title to the whole of the lands referred to in paragraph 1 of the amended bill of complaint, and defendants shall demand strict proof of complainants' title to the aforesaid lands.

Fifth Defense.

Complainants were never able and are not able to deliver title to the aforesaid lands, free and clear of all encumbrances.

Sixth Defense.

Complainants were never able, nor are they able to deliver a marketable title to the lands aforesaid.

Seventh Defense.

Defendants will move to dismiss the amended bill of complaint because of the variance shown on the face of the amended bill, because in paragraph 1 complainants allege that William B. Lippincott, widower, and Laura L. Evans were seized in fee simple of the lands described in paragraph 1, in paragraph 8 of the amended bill of complaint complainants allege that William B. Lippincott had a life interest in said property, and also because William J. Lippincott and Laura L. Evans, executors of the last will and testament of William B. Lippincott, were made a party to the amended bill, whereas, it is alleged in paragraph 8 of said amended bill that William B. Lippincott had only a life estate in the lands described in said amended bill.

Eighth Defense.

Complainant, John O. Wilson, is improperly joined because Laura L. Evans and William Evans, her husband, had not duly assigned unto him all their rights under the agreement referred to in the amended bill of complaint.

Ninth Defense.

Complainant, Laura L. Evans, had conveyed premises referred to in paragraph 1 of the amended bill, to John O. Wilson, prior to the time when she had agreed to convey to defendants the lands and premises aforesaid. Therefore, defendants, by way of counter-claim, demand from the said Laura L.

Evans all moneys received by her from the said John O. Wilson on account of the conveyance of the aforesaid lands by her to him.

PHILIP WENDKOS,
JOSEPH S. LOW,
Solicitors for and of Counsel with Defendants.

REPLICATION.

(Filed June 13, 1927.)

IN CHANCERY OF NEW JERSEY.

Between: JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc., *Complainants,* and WILLIAM H. WINDOLPH, *et als.,* *Defendants.*	On Bill, &c. Replication.

Complainants, by way of reply to the answer to amended bill of the defendants, say:

Complainants join issue as to the answer to the amended bill.

As to the ninth defense and so much thereof as may be considered by the Court as counter-claim, these complainants say:

1. They repeat each and every averment in the bill of complaint.

2. They deny each and every statement in defendants' answer and in each and ever defense attached to said answer. They deny that by reason of anything stated in said answer or in said ninth defense, defendants are entitled to recover from complainants any sum of money or to obtain any other relief, and as to said counter-claim complainants say that it is unsupported by any averment in said answer or in said defenses and that the same is without equity, and complainants will ask that the same be dismissed.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainants.

ORDER OF REFERENCE.

(Filed June 21st, 1927.)

IN CHANCERY OF NEW JERSEY.

Between: JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc., *Complainants,* and WILLIAM H. WINDOLPH, *et als.,* *Defendants.*	On Bill, &c. Order of Reference.

Application for this purpose having been made by Bleakly, Stockwell & Burling, solicitors for and of counsel with the complainants, and counsel for the defendants consenting hereto:

It is on this 21st day of June, 1927, ordered that the above stated cause be referred to Honorable E. B. Leaming, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him, and advise what order or decree should be made therein.

E. R. WALKER,
C.

On motion of
BLEAKLY, STOCKWELL & BURLING,
Of Counsel with Complainants.

We consent to the entering of the above order.
PHILIP S. WENDKOS,
JOSEPH S. LOW,
Solicitors for and of Counsel with Defendants.

A true copy.
THOMAS BARBER,
Clerk.

DESIGNATION.

(Filed July 9, 1927.)

IN CHANCERY OF NEW JERSEY.

Between: JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc., *Complainants,* and WILLIAM H. WINDOLPH, *et als.,* *Defendants.*	On Bill, etc. Designation.

This matter being opened to the Court by Bleakly, Stockwell & Burling, solicitors of the complainant, and counsel for the respective parties having consented hereto;

It is, on this 6th day of July, nineteen hundred twenty-seven, ordered that the 17th day of January, nineteen hundred twenty-eight, at the hour of ten o'clock in the forenoon, at the Chancery Chambers in the Court House, in the City of Camden, be designated as the time and place for the hearing of the above-entitled cause.

E. B. Leaming,
V. C.

On motion of
Bleakly, Stockwell & Burling,
Of Counsel with Complainants.

We consent to the entering of the above designation.

Joseph S. Low,
Philip S. Wendkos,
Solicitors for and of Counsel with Defendants.

NOTICE OF HEARING.

(Filed July 14, 1927.)

IN CHANCERY OF NEW JERSEY.

Between: John O. Wilson, Laura L. Evans, individually, and William J. Lippincott and Laura L. Evans, executors, etc., *Complainants,* and William H. Windolph, *et als.,* *Defendants.*	On Bill, &c. Notice of Hearing.

To Philip Wendkos, Esq., and Joseph S. Low, Esq., Solicitors for the Defendants:

Take notice of the hearing of this cause before the Honorable Edmund B. Leaming, the Vice Chancellor of this Court, to whom the said cause has been referred, on the 17th day of January, 1928, at the hour of ten o'clock in the forenoon, at the Chancery Chambers in the Court House in the City of Camden, the time and place designated by the order of the said Vice Chancellor made on the 6th day of July, 1927.

Bleakly, Stockwell & Burling,
Solicitors of Complainants.

[ENDORSED]

Service of the above notice is hereby acknowledged this 9th day of July, 1927.

Joseph S. Low,
Philip Wendkos,
Solicitors for and of
Counsel with Defendants.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.
#62/520.

Between: JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc., *Complainants,* and WILLIAM H. WINDOLPH, *et als.,* *Defendants.*	On Bill, Etc.

IN CHANCERY OF NEW JERSEY.
#62/521.

Between: WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc., and WILLIAM J. LIPPINCOTT, individually, and CAROLINE W. LIPPINCOTT, *Complainants,* and WILLIAM H. WINDOLPH, *et als.,* *Defendants.*	On Bill, Etc.

January 17, 1928.

LEAMING, V. C.

APPEARANCES:
BLEAKLY, STOCKWELL & BURLING, ESQS., by HENRY F. STOCKWELL, ESQ., for complainants.
PHILIP WENDKOS, ESQ., and JOSEPH S. LOW, ESQ., for defendants.

IN CHANCERY OF NEW JERSEY.
#62/520.

Between:
JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc.,
Complainants,
and
WILLIAM H. WINDOLPH, *et als.,*
Defendants.

On Bill, Etc.

The Court: Is the complainant ready in Wilson against Windolph? Who represents the complainant in Wilson against Windolph?

Mr. Stockwell: I represent the complainant.

The Court: Make your proof.

EDGAR D. MCGONIGLE, sworn.

By Mr. Stockwell:

Q. Where do you live, Mr. McGonigle?
A. 183 Franklyn Street, Merchantville, New Jersey.
Q. Your name is Edgar D. McGonigle?
A. Edgar D.
Q. I show you a written agreement dated the 15th day of December, 1925, between William Evans and Laura Evans, his wife, etc., and William H. Windolph, and others, did you sign that as a witness?
A. I did for the last two signatures.
Q. Which?
A. George A. Wonfor, and John S. Warner.
Q. Where was that executed?
A. 619 Market Street, I think it was.
Q. Whose office?
A. John S. Warner.
Q. Did you see George Wonfor sign?
A. Yes, sir.
Q. And Warner sign?
A. Yes, sir.

The Court: Are these agreements admitted? Can't we move on?

Mr. Stockwell: They have denied everything, and then some.

The Court: Do you want the signatures proven?

Mr. Wendkos: Yes, sir, if the Court please, not so much the signatures as the circumstances of execution.

The Court: Do you admit the signatures?

Mr. Wendkos: I can't admit the signatures because I am not thoroughly familiar with them. I raise the question about the circumstances of the execution of this contract, and as soon as Mr. Stockwell is through with his proof I would like to ask a few questions concerning it before it is admitted in evidence.

The Court: If there is any doubt about it go ahead, but don't take up the time if it isn't necessary. If Mr. Wendkos claims they haven't written these signatures go ahead with your proof.

Mr. Stockwell: Do you admit the signatures of the other two parties?

Mr. Wendkos: I will admit nothing.

Robert C. Bitting, sworn.

By Mr. Stockwell:

Q. What is your full name?
A. Robert C. Bitting.
Q. What is your business or profession?
A. At the present time I am an electrical merchant.

Q. What were you doing in December, 1925?
A. I was a real estate salesman for John S. Warner.
Q. Look at this agreement dated December 15, 1925, and tell me whether that is your signature as a witness?
A. Yes.
Q. Whose signature did you witness?
A. I witnessed the buyers' signatures.
Q. Who are they?
A. William H. Windolph and William R. Goldsborough.
Q. Did you see them sign it?
A. Yes, sir.
Q. You were employed by Mr. Warner?
A. Yes, sir.
Q. Is that John S. Warner who signed this as a purchaser?
A. That is right.
Q. You were brought here under supoena, weren't you?
A. Yes, sir.
Q. Did you see anybody else sign?
A. All the buyers.
Q. That is; Wonfor and Warner?
A. Yes, sir.
Q. After it was signed did you deliver this to someone?
A. Not directly after it was signed by them, sometime later it was delivered.

Cross-examination.

By Mr. Wendkos:

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

A. No, sir.

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

A. It was not.

The Court: At the time who signed it?

Mr. Wendkos: The buyers, the defendants, meaning William Windolph, Goldsborough, Wonfor, and John S. Warner.

By the Court:

Q. You say that notation was not there at the time William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner signed the agreement?

A. It was not there at that time.

Q. Why do you say it was over your signature?

A. I just witnessed the performance.

Q. Right over your signature it says, "words Laura Evans, one of, inserted between 17th and 18th lines, 4th page, before execution," why do you certify it was inserted before execution if it wasn't?

A. It wasn't there at the time I had the purchasers sign and witnessed it.

Q. You witnessed it and you certify they were there at the time of execution?

A. Not that that writing was there.

Q. I want to know why you certified to that over your signature and now say it was not?

A. It was not there at the time I signed it.

Q. Why did you say it was over your writing?

A. I didn't say so, I simply witnessed the signatures of William H. Windolph and William Goldsborough.

Q. At the time you signed it as witness these words, "Laura Evans, one of inserted between 17th and 18th lines, 4th page before execution," was not written there at the time you signed it?

A. Not there when I signed the agreement or when the purchasers signed the agreement.

By Mr. Wendkos:

Q. Mr. Bitting, who signed the contract first?

A. Mr. Wonfor signed it first.

Q. Did all the purchasers sign the contract first?

A. Yes.

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

A. No.

Q. Now, this notation refers to an interlineation—

The Court: William Evans, Laura Evans, and William Lippincott, are they the sellers?

Mr. Wendkos: Yes, sir, and this contract was signed by the buyers and while in the possession of Mr. Bitting he testified that notation over his signature was not there.

Q. Do you say that notation was not made by you?

A. It was not.

Q. Was it made under your direction?

A. No, sir.

Q. Did you know the interlineation to which the notation refers was in the body of the contract at the time it was signed by the buyers in your presence?

A. No, it was not.

Q. Was the interlineation made in your presence?

A. No, sir.
Q. Was it made at your request?
A. No.
Q. Do you know by whom it was made?
A. No, sir.
Q. You still say the interlineation and the notation was not made while the contract was in your possession?
A. It was not.

Mr. Wendkos: I object to that being introduced in evidence.

By the Court:

Q. When did it leave your possession?
A. When I returned it to John O. Wilson's office.
Q. John O. Wilson represented the sellers?
A. Yes, sir.
Q. And that writing had been put in there since then?
A. Evidently, because it wasn't there when I witnessed the signatures.

The Court: Who is Laura Evans, what relation has she to the agreement, was she one of the owners?

Mr. Stockwell: She is the owner.

The Court: Can you tell me where that interlineation comes in? I have before me a copy of the bill—

Mr. Wendkos: The 4th page, 17th and 18 lines. I have a number of copies of this contract and all of them are in like condition.

By Mr. Stockwell:

Q. Did you deliver one copy or several copies to John O. Wilson?
A. There were several, there were four or five, as a matter of fact.
Q. I am handing you a copy which was just handed to me by Mr. Wendkos, counsel for the defendant, in open court, is that a copy of the agreement which I have just shown you?
A. Yes.
Q. And does your name appear on that?
A. Yes, sir.
Q. Do you know Mr. McGonigle's signature?
A. Yes, sir.
Q. They are his original signatures?
A. Yes, sir.
Q. Does the name of Mr. Warner appear?
A. Yes, sir.
Q. Mr. Wonfor?
A. Yes, sir.
Q. Mr. Goldsborough?
A. Yes, sir.
Q. Mr. Windolph?
A. Yes, sir.
Q. William Evans, Laura Evans, and William Lippincott?
A. Yes, sir.
Q. The three names, William Evans, Laura Evans, and William Lippincott were not on there when you delivered that copy to John O. Wilson's office?
A. No.
Q. Did you deliver those papers for the purpose of having them executed by the grantors?
A. Yes.
Q. Did you subsequently take them away from Mr. Wilson's office?

A. Yes.

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

A. Among others.

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

A. Yes.

Q. No question about that, is there?

A. No.

Q. Weren't the words to which Mr. Wendkos has called your attention, that is, those above your signature on the paper, weren't they on the copy when you took it away?

A. At the time I took it way, yes.

Q. You never raised any question about it?

A. I did to myself but I didn't to Wilson's office.

Q. You were acting for the buyers, weren't you?

A. I was acting for both buyer and seller.

Q. Mr. Warner was the agent and also he was one of the buyers, is that correct?

A. Correct.

Q. Did you notice these words above your signature on the copy at the time you took it away—you say you raised the point in your own mind?

A. Not until I returned to the office and looked it over, I noticed it at that time.

Q. You know what the words mean, don't you?

A. Yes, I know what they mean.

Q. And they appear on page 4, line 4 of the 3rd paragraph of that page?

A. Yes.

Q. In other words, the words are inserted in the body of the instrument in accordance with the notation above your signature on the instrument, correct?

A. Yes.

Mr. Stockwell: I offer the original and copy in evidence.

Mr. Wendkos: I object to its introduction in evidence.

The Court: Let it be filed.

Mr. Wendkos: Exception, please.

The Court: You don't need to take any exception, any errors I make are for your good.

(Said papers offered in evidence and marked Exhibits C1 and C2.)

By the Court:

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

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

Q. Who represented Windolph, Goldsborough and Wonfor?

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

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

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

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

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

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

A. Yes, sir.
Q. All of them containing the interlineation?
A. Yes.
Q. So they all had been executed by the owners of the land, all the agreements, at the time you received them and delivered them to them?
A. Yes.

By Mr. Stockwell:

Q. I show you a letter dated October 15, 1926, on the letterhead of John S. Warner, having the signature of John S. Warner—

The Court: I think Counsel is entitled to see it if he wants to.

The Witness: He won't even let me see it.

Mr. Stockwell: Now!

The Witness: You took it away from me.

Mr. Stockwell: This gentleman is coming and looking over my shoulder. May I get my question out first?

The Court: Counsel is entitled to inspect it before he answers it.

Q. Do you know the signature of John S. Warner?
A. Yes, sir.
Q. Is that his signature on that paper?
A. I don't think so.
Q. Whose signature is it?
A. I think it is his secretary's.

Mr. Stockwell: I ask that it be marked for identification.

(Said letter offered in evidence and marked Exhibit C3 for identification.)

Q. Did you ever see that letter before?
A. To the best of my knowledge, no.

The Court: Mark it for identification. I think I would like to ask one more question.

By the Court:
Q. You said you delivered these copies to these several vendees?
A. Yes, sir.
Q. And you had observed that this interlineation had been made by the sellers, after the instrument had been delivered to them they had interlined it and then annexed their signatures and returned it to you, you observed that, you say?
A. Yes.
Q. Did you call attention of any of the purchasers to the interlineation?
A. No, I did not, not at that time. I had noticed it upon return to the office and wondered why it was done, but I did not attach enough importance to it at the time to raise an issue at that time on it.
Q. When did you call their attention to it?
A. Some time later, quite a few months, several months later, because when I first handled this transaction it was new to me, I was new in the business, in fact, I had just secured a license and gotten in Mr. Warner's office.
Q. How much later, about what time?
A. That I called their attention to it?

Q. Yes.

A. I should say it was 3 or 4 months.

Q. That would make it—the agreement was dated the 15th day of December, 1925?

A. Somewhere around March or April.

Q. Had anything transpired in the meantime with reference to the property?

A. No.

Q. Was there any change of possession or any further negotiation or disagreement between the parties at all?

A. No.

Q. It would be about April, you say?

A. March or April to the best of my knowledge.

Q. I haven't read the agreement recently, do you recall whether the agreement calls for anything to be done in the interim and the following March or April, any payments to be made under it, anything of that kind?

A. No.

The Court: Can counsel tell me?

Mr. Wendkos: No, there are not, if the Court please.

Q. Then things still remain, so far as the agreement is concerned, or so far as any action under the agreement was concerned in the same condition it had been when the agreement was signed and returned to you?

A. Yes.

Q. What did you say to these parties when you called their attention to that interlineation?

A. I called their attention to it it wasn't there when I witnessed their signatures, and I didn't know

whether it meant a great deal or not, but it had not been there.

Q. Who did you say that to, all of them?

A. I don't recollect whether I said it to them all or not, but I said it to Mr. Windolph and Mr. Warner.

Q. Now, there are two more, Goldsborough and Wonfor.

A. I may have told Mr. Wonfor, but I am not certain about that.

Q. Can't you make sure, it might be important?

A. I have no definite way of fixing with certainty that I mentioned it to Mr. Wonfor and Mr. Goldsborough, but I am positive I mentioned it to Mr. Windolph and Mr. Warner, and I am almost sure I mentioned it to Mr. Wonfor.

Q. What did they say?

A. I don't recall their exact words, but they thought it was strange that it should have been inserted after they had signed it.

Q. That is all they said, was it?

A. Yes.

Q. Did you still later mention it to any of the others that you haven't named—Mr. Goldsborough, you said you weren't sure about?

A. I didn't come in contact with Mr. Goldsborough as I did the other men.

Q. Did you at any time later mention it to Mr. Goldsborough?

A. Not to my knowledge.

By Mr. Stockwell:

Q. Mr. Bitting, I understand you to say you called their attention to it 3 or 4 months after you got the agreement from John O. Wilson?

A. Yes, sir, but I noticed it right away.
Q. You noticed it right away?
A. As soon as I got back to the office.
Q. And you called their attention to it 3 or 4 months after that?
A. Yes.

The Court: He can't say he called the attention of all of them to it.

By Mr. Wendkos:

Q. When did you receive these contracts from Mr. Wilson's office?
A. About between the 15th and 18th of February, 1926.
Q. So these contracts were not signed on the same day?
A. No.

The Court: What did I say the date was?

Mr. Wendkos: The witness said between the 15th and 18th of February he received the contract.

The Court: The agreement is dated December 15, you did not receive it that day?

A. No, sir.

By Mr. Stockwell:

Q. You knew there was difficulty in getting the Evans signatures.
A. Yes, sir.
Q. And that is why they were not signed immediately?

A. Yes, sir.

By Mr. Wendkos:

Q. I show you a letter over Mr. John O. Wilson's signature, do you recognize that letter?
A. Yes, sir.

Mr. Stockwell: What is the date?

Mr. Wendkos: January 26, 1926.

By Mr. Stockwell:

Q. Mr. Bitting, the office of John S. Warner conducted the negotiations for the purchase of this property, didn't they?
A. Yes, sir.
Q. And they acted as the intermediary between the purchasers and the sellers, didn't they, throughout?
A. That is right.
Q. And that was before the agreements were signed as well as after the agreements were signed?
A. Before the agreements were signed.
Q. And afterwards in the receipt and transmission of the copies, of the executed copies of the agreements?
A. Yes, sir.
Q. So everything that happened here went through Warner's office, isn't that correct?
A. Yes.
Q. So that the sellers did not come into contact personally with Windolph or—do you know whether they did or not?
A. To my knowledge they did not.
Q. And your office acted for all the parties in putting this deal through?

A. Yes.
Q. All of the purchasers?
A. Yes.

By Mr. Wendkos:

Q. But your office got the commission from the sellers, did they?
A. Yes, sir.
Q. I show you another letter signed by Mr. Wilson under date of February 19th, do you recognize this letter as having been sent to your office?
A. Yes, sir, I do.

Mr. Wendkos: I ask that both of these letters be marked.

(Said letters offered in evidence and marked Exhibit D1 and D2 for identification.)

By Mr. Stockwell:

Q. The purchasers wanted an extension of time in view of not getting the papers, didn't they?
Mr. Wendkos: These letters are not in evidence, they are simply identified.

The Court: There is no use going into a day's trial of this case if these agreements have been altered in a manner that will vitiate them and deny them right to specific performance, and we had better determine that right now if we can, accurately. I am a little in doubt in my own mind, I know what it would do to a promissory note to make an alteration of that kind, that field has been pretty well covered in my period as a law practitioner, but I am not quite clear

whether an interlineation that may not be said to be vital to an agreement, and this seems to me to be one of that nature, where that agreement is afterward retained by the purchaser who had prior to the alteration signed it, and he had the opportunity to see it, and in the case of several of these purchasers they did see it and retained the agreement and made no protest, made no objection, my present impression is that so far as they are concerned it would not vitiate the agreement, but if they did not see it, if their attention was not called to it, if they at no time consented, either expressly or impliedly, to this interlineation, I am very much in doubt whether it wouldn't vitiate your agreement.

Mr. Stockwell: I was going to have Mr. Stannert testify to what happened.

The Court: It says to whom the purchase money mortgage is to be made to.

Mr. Stockwell: The testimony will show the defendants made no objection and refused just to carry it out because they didn't have the money.

The Court: Have you got any more to show, anything you can introduce to show that these purchasers, especially Windolph, who this last witness, Mr. Bitting, can't say had had this brought to his attention, that he had knowledge of this alteration and he made no objection, and made no protest?

Mr. Stockwell: Only Wilson's office never had any personal contact with Windolph, everything was conducted through Warner. Warner brought the papers there, and he took them away, and the correspon-

dence has all been conducted through Warner, except letters just before the date of settlement which were addressed to all.

The Court: On what theory do you hold that you can bind a defendant who did not know of that alteration to the agreement? It had been altered after they signed it, without their knowledge.

Mr. Stockwell: As I understand the testimony of this witness he delivered a copy finally executed to each one of the defendants.

The Court: Yes.

Mr. Stockwell: And he called the attention of all but Windolph to it, am I correct on that?

The Court: Almost correct, he called the attention of all except Windolph and Goldsborough, as to them he couldn't be sure, but he thinks he did Mr. Goldsborough, but he has no recollection of calling Mr. Windolph's attention to it.

Mr. Stockwell: It seems to me, after having received the papers executed from the hands of their own agent, he was representing them and bound to disclosed the information he had received, that they would be bound by what that agent knew and the information which he already received.

The Court: He had no power to agree to anything for them, their signatures were necessary to the agreement to what they were to be bound to. Now, they sign an agreement, that agreement is delivered to the seller for him to sign, and the seller before he

signs it makes an interlineation—not a very material one, it is true, but yet an interlineation. It changes the agreement which they have signed. Now, I can see if they in receiving that agreement back observed this interlineation, this change, and made no protest, that they may have adopted it, but unless you can bring it to their knowledge I am afraid it vitiates your right. Who in the world took the responsibility of altering an agreement after it had been executed by the purchaser? Can you find that out?

Mr. Stockwell: I was about to call Mr. Stanert.

Mr. Wendkos: If the Court please, if I may inject a thought here, in a matter of this kind it appears to me that a new contract has been submitted to the purchasers which they would have to re-execute in order to be binding upon them, and there being no re-execution of that contract I can't see that there can be an adoption of it.

The Court: It is quite possible. If you can, show who did it, perhaps he had authority to do it.

WILLIAM R. STANERT, sworn.

By Mr. Stockwell:

Q. Mr. Stanert, are you associated with the office of John O. Wilson?

A. I am.

Q. Did you have personal charge of the preparation and execution of the agreements which have been offered in evidence?

A. I did.

Q. Did you ever personally meet William H. Windolph or William H. Goldsborough?

A. No, sir.

Q. Won't you tell us how these agreements were executed?

A. The agreements were handed to Mr. Bitting when finally prepared for delivery to his principles for execution. He took them away and after two or three days they were brought back to us and we endeavored to secure the signatures of Mrs. Evans and her husband. There had been some family difficulty which occasioned a long delay in securing the signature of the husband, we finally got it, and on account of that family difficulty the insertion was made there to insure that Mrs. Evans would secure the consideration from the property.

The Court: Was that made after William Evans signed it?

The Witness: No, before William Evans or Laura Evans had signed it.

The Court: I can't find where the interlineation comes in.

Mr. Stockwell: Page 4.

Q. Now, what occurred between you and Mr. Bitting at the time of the delivery of the executed papers?

A. This matter was called—

Q. Before that time with reference to this interlineation?

A. He knew the situation so far as the family affairs were concerned.

Q. Who did?

A. Mr. Bitting.

Q. Who told him?

A. I told him, Mr. Wilson told him, I heard him tell him on several occasions, and you will find in the correspondence letters back and forth accounting for the delay, and we also told him when this interlineation went in there, and he had full knowledge of it the day he took the agreement from our office.

The Court: About that interlineation?

The Witness: Yes, sir, he knew, and the question had not been raised by anyone from that day to this as to the interlineation in the agreement.

Q. You say his attention was called to it?

A. Yes, sir.

Q. Any objection made?

A. None whatever.

Q. Was there any objection made by any one of the four purchasers at any time after that?

A. Never has been any objection made to it until today.

Q. Never heard that question raised until today?

A. Never.

Cross-examination.

By Mr. Wendkos:

Q. Mr. Stanert, when was the signature of the Evans' finally obtained?

A. My recollection of it is it was obtained—it must have been 6 weeks, I am not exact on the date, but it must have been 6 weeks after the date of the

original agreement, if I remember rightly, and on account of the delay we gave an extension of 45 days. At the time of the delivery of the original agreement an extension of 45 days was granted by reason of delay occasioned by our failure to get the signatures.

Q. Was it sometime in the month of February?

A. No, I would say it was prior to that, my recollection is it was 45 days.

Q. If I call your attention to this letter—

A. I assume you have that letter of extension?

Q. I call your attention to this letter dated February 19, would that help you fix the date?

A. Oh, yes, this letter wasn't delivered until some two or three weeks after the agreements were delivered.

Q. Have you your files to show that?

A. That is the date of the letter, it stands for itself.

Q. You say the letter itself was not delivered—

A. This letter of extension was not delivered until several weeks after the actual delivery of the agreements themselves.

Q. Do you know when the agreements themselves were delivered?

A. My best recollection is about 45 days after the date of the agreements themselves.

Q. You heard Mr. Bitting testify they were delivered sometime in February, the 15th of February?

A. I don't know how he has set that, but the story is this question came up, the question came up about this letter, sometime after the agreements had been delivered, and to the best of my recollection it was a couple of weeks after they had been delivered and they felt as though they were entitled to an extension by reason of the delay of time in getting the agreement.

Q. Mr. Bitting, you know, was employed by Mr. Warner?

A. That is right.

Q. Mr. Warner was the real estate broker who received the authority to sell the farm, wasn't he?

A. Yes, sir.

Q. And he really acted for the seller, didn't he?

A. Yes, sir.

Q. And he represented the sellers in the preparation of the agreement?

A. That is correct.

Q. And Mr. Bitting also acted on behalf of the sellers, didn't he?

A. Yes, I should say he did.

Q. How do you know that the alteration was called to the attention of the buyers, if at all?

A. I have no way of knowing it except I say it was called to the attention of Mr. Bitting, because I never met any of the buyers except Mr. Bitting and Mr. Warner.

By Mr. Stockwell:

Q. You say Mr. Bitting represented the sellers?

A. The history of this case is—if I may say it this way—Mrs. Evans and Mr. William J. Lippincott, who is a brother of Mrs. Evans, were approached by an agent of John S. Warner, or an employee of his, with a request that they sell their farm; Mr. Lippincott had some negotiations with them and fearing to go on himself he brought it down to the office of John O. Wilson and the balance of negotiations were conducted in our office with Mr. Bitting, representing Mr. Warner, and Mr. Warner himself on a number of occasions.

The Court: Mr. Bitting having some parties in prospect, I suppose, as purchasers?

The Witness: Yes. As a matter of fact, the names of the purchasers were not disclosed to us until after the first draft of the agreement had been drawn, and then they had to be withdrawn. We asked at the time — the first agreement was delivered without names in practically the same form that was finally executed and they brought it back and said, "These are the four men who are going to buy this property," and we prepared new agreements and put these names in.

By Mr. Stockwell:

Q. Did you assume John S. Warner was the purchaser?

A. Yes, sir, we never knew any different until they asked us to insert these names in the new agreement; as a matter of fact, it was Mr. Warner's check which made the deposit on account of the contract.

The Court: Are you sure that interlineation was made before Mr. Evans signed?

The Witness: Yes, sir, it was.

The Court: And before Mrs. Evans signed?

The Witness: Yes, sir.

The Court: And before William Lippincott signed?

The Witness: Yes, sir.

Mr. Stockwell: I have nothing further on that point.

The Court: That is all.

The Court: I am very much in doubt, Mr. Stockwell, of your ability to enforce this agreement, or of your right to enforce it unless you can show, at least, that all of the parties to the second part of the agreement knew of this interlineation and made no protest; that might be, if you could show that, a ratification on their part. I say it might be, but I am not sure it might, but it might be, but if you are not able to show that all of them knew it, learned of it at sometime prior to the commencing of this suit, I am awfully afraid it would equitable operate to deny you the right of specific performance. I am not sure whether the doctrine would be carried so far as it is in the case of a promissory note, which is a highly commercial instrument, an instrument of the lex mercatoria, almost as sacred as a bank note, from an alteration. It may be in a case of this kind, a sale of real estate, an agreement for the sale of real estate, that the lack of importance of the alteration to the purchasers would be an element that ought to be taken into account. I can't see that this interlineation, which shows the person to whom the mortgage is to be made, in any way concerns the purchasers or interferes with them, I don't know why they need be interested in the question of the person to whom this mortgage is made, yet that is by the interlineation itself made one of the material features of the agreement. I am very much in doubt, I would like to hear from counsel.

Mr. Stockwell: Suppose I call these gentlemen.

JOHN S. WARNER, sworn.

By Mr. Stockwell:

Q. Mr. Warner, you were one of the purchasers named in this agreement about which we are talking, December 15, 1925?

A. Yes, sir.

Q. You signed that?

A. Yes, sir.

Q. Did you send Mr. Bitting down to Mr. Wilson's office with these agreements?

A. I did.

Q. Mr. Bitting was in your office working for you?

A. Practically taking care of the entire transaction.

Q. You knew there was some difficulty in securing the signatures of William and Laura Evans to the agreement?

A. Yes, sir.

Q. You were informed of that?

A. Yes, sir.

Q. And therefore there was some delay?

A. Yes, sir.

Q. Wasn't your attention called to this interlineation on the last page?

A. Not until sometime afterwards, Mr. Bitting called my attention to a notation that had been made.

Q. Then?

A. I didn't notice it at the time.

Q. You noticed it afterwards?

A. Yes, sir.

Q. When he called your attention to it you noticed

A. Yes, sir.

Q. Did you say anything to the other people about it?

A. No, I did not, I thought it was rather curious that a notation of that character was made.

Q. You were acting for the other men?

A. But I did not call their attention to it.

Q. You were acting for the other purchasers throughout this transaction?

A. I was, through Mr. Bitting.

Q. Correspondence was conducted through you for the sellers?

A. Yes, sir.

Q. You were representing the purchasers, I mean?

A. We were representing the sellers.

Q. You were getting a commission from the sellers but weren't you representing the buyers?

A. Yes, sir.

Q. Weren't you acting for them throughout this transaction?

A. Yes, sir.

Q. In fact, you were one of the buyers?

A. Yes, sir.

Q. Now, did you attend to the delivery of the copies of these executed agreements to the other parties?

A. No.

Q. Did you give any instructions about them?

A. I advised Mr. Bitting to see that the purchasers received their agreements.

Q. And you know they did receive them, do you know that?

A. Other than I know Mr. Bitting delivered them to them.

Q. But you don't know what he might have said to them?

A. No, sir, I wasn't with them.

Q. Was this matter ever called to your attention afterwards by any of the other buyers, this interlineation?

A. No, sir.

Q. Or the insertion of the words, "Laura Evans" never heard that mentioned?

A. Not until just recently.

Q. Why didn't you call this to the attention of the other men associated with you?

A. I understand Mr. Bitting when he called my attention to it advised me he called Mr. Windolph's attention to it.

Q. What did Mr. Bitting say to you?

A. I understand he called Mr. Windolph's attention to the notation.

Q. Did Mr. Bitting tell you that?

A. He also called my attention to it, at the time, I believe, he notified Mr. Windolph of the notation.

Q. Were you together at the time?

A. No, we weren't together, at no time have we been together.

Q. The purchasers have never been together?

A. No, sir.

Q. What do you mean by saying it was at the same time?

A. It was at the time he called my attention to it he had been to see Mr. Windolph.

Q. Did Mr. Bitting tell you he had called Mr. Windolph's attention to this interlineation?

A. He did.

Mr. Wendkos: If the Court, please, I don't see how that would affect Mr. Windolph.

The Court: I don't think so.

Mr. Stockwell: I will call Mr. Bitting then.

Mr. Wendkos: I would like to ask this witness a few questions.

Q. You have kept your copy from the time of its receipt from the hands of Mr. Bitting?

A. I have.

Q. You gentlemen asked for an extension of time, didn't you?

A. Yes, sir.

Q. You were acting for the four purchasers in asking for this extension of time?

A. Yes, and our reason for that, if you will allow me to say, when the property was being sold and being purchased it was being purchased as a whole, as one property, and we didn't know of the two agreements on the two farms coming into effect until the day it was presented to be signed by the purchasers, and due to the fact that the Evans' signatures could not be secured we said the settlement, if made on the two farms should be made at the same time and an extension should be given for the time of the holdup in securing the signatures of the Evans agreement.

Q. You were co-operating with your associates in this purchase, in securing this extension, acting for them?

A. I advised Mr. Bitting to take the matter up with the office of Mr. Wilson inasmuch as the agreement had been held up for signatures I felt, as far as I was concerned there should be an extension of time.

Q. And that was granted?

A. Yes, sir.

Q. And letters of extension were given to you?

A. I believe so.

Q. And the time finally set was October 18th, wasn't it? I show you a letter, carbon copy of letter, October 8, 1926, signed, John O. Wilson, and addressed to William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, did you receive the original of that letter?

A. I believe I did.

Q. The date for settlement was the 18th of October, that is correct, isn't it?

A. That is right.

Q. What is the answer?

A. That is correct.

Q. Now, before that time you notified Mr. Wilson that the purchasers did not want to go ahead with the deal, is that correct?

A. I believe I did.

Q. I show you a letter which is marked C3 for identification—

Mr. Wendkos: If the Court please, it would appear to me that Mr. Stockwell should show that information was binding upon the other party.

The Court: I will have to determine that, I suppose, by what he does show.

The Witness: That information was given to me by Mr. Bitting and I forwarded the information.

The Court: On to whom?

The Witness: To Mr. John O. Wilson.

Q. And did you do it in this letter of October 15, 1926, which is marked C3 for identification?

A. That is the letter.

Q. And that was written by your authority?

A. Yes, sir.

Mr. Stockwell: I offer that.

(Said letter now marked Exhibit C3.)

Mr. Stockwell: I also offer in evidence the carbon copy. I call for the production of the letter.

The Court: This letter from you to John O. Wilson was in reply to this?

The Witness: Yes.

Q. In reply to the one under date of the 8th of October, and the reply by you was the 15th?

The Witness: Yes.

Q. I show you a letter, copy dated August 31, 1926, look at that and tell me whether you received the original of that from John O. Wilson?

A. We did receive a letter in regard to the extension of time.

Q. I show you a paper which is marked "copy" and signed "Laura Lippincott Evans" dated August 18, 1926, and ask you whether the original of that paper was enclosed in the letter of August 31, 1926?

A. That I can't say.

Q. The letter of August 31, which you say you received, says, "I enclose herewith extension agreements which have been signed in connection with your purchase from William J. Lippincott and Mrs. Laura L. Evans," were the papers enclosed?

A. I am under the impression we received the extention of time.

Mr. Stockwell: I offer these in evidence.

(Said papers offered in evidence and marked Exhibit C5.)

Q. Will you look at this paper and see whether you can identify that as a copy of the extension agreement which was mailed to you?

A. I am not so sure I received that in two letters, but I am convinced we have received the extension from both parties interested. I don't happen to have my copies with my letters in and I can't recall as receiving them as one or two.

The Court: The extension of time for settlement?

The Witness: Yes, sir.

The Court: Executed by the sellers?

The Witness: By the sellers.

Mr. Stockwell: He can't identify this as the particular paper.

The Witness: You can ask Mr. Bitting that question, if you wish.

Q. You say you don't have your letter file here?

A. What letters I have in the case are in the hands of my attorney.

Q. I show you letter copy dated August 28, 1926, addressed to John S. Warner, Palmyra, New Jersey, and asked you whether you received the original of that from John O. Wilson?

A. I don't recall that letter.

Cross-examination.

By Mr. Wendkos:

Q. When you made your signature here, when you affixed your signature to the contract, was this notation appearing thereon?

A. Not at the time I signed the agreement.

Q. Was the interlineation in the contract?

A. Not at the time I signed the agreement.

Q. You didn't know of that addition until it was called to your attention by Mr. Bitting?

A. That was at the time I learned of the change in the contract.

William R. Stanert, recalled.

By Mr. Wendkos:

Q. I see you signed these letters, Mr. Stanert, or this one particularly, that is your signature?

A. Yes, sir.

Q. You signed them for Mr. Wilson as principal, didn't you?

A. That is right.

Q. According to your bill Mr. Wilson purchased this land, didn't he?

A. What?

Q. According to the bill of complaint, the allegations of the complaint, Mr. Wilson purchased the property?

Mr. Stockwell: I object to that, that is not cross-examination.

Mr. Wendkos: I want to know in what capacity he wrote this letter, either for Mr. Wilson as owner or as attorney, or how?

Mr. Stockwell: If you want to know that ask him?

The Witness: He wrote it effect as title owner of the premises.

Q. As title owner of the premises?
A. That is right.
Q. Is it true also that this letter—
A. He had the title to the property at the time this letter was signed, yes.

By Mr. Stockwell:

Q. Mr. Wilson is a lawyer, I believe?
A. Yes.

The Court: What is this letter?

The Witness: It refers to the sending of the extension agreements to Mr. Warner, and this one refers to a different time for settlement under the agreement.

ROBERT C. BITTING, recalled.

By Mr. Stockwell:

Q. Did you hear the testimony of Mr. Warner?
A. I couldn't hear it very plainly, no; I tried to listen but he spoke very low.

Q. I understood Mr. Warner to say that you told him that you had called to the attention of Mr. Windolph this interlineation at the time you delivered the paper to him?
A. No.
Q. In view of that statement—
A. No, I don't think Mr. Warner told you that, not at the time the paper was delivered, no, I don't think Mr. Warner said that.
Q. Then I misunderstood him. What did he say then, or what did you say?
A. I called Mr. Warner's attention to it sometime later, it must have been three or four months, and about the same time I called Mr. Windolph's attention to it.
Q. When did you call Mr. Windolph's attention to it?
A. After about three or four months after the execution.
Q. What about Mr. Goldsborough?
A. I didn't say anything to him about it, I didn't come in close contact with Mr. Goldsborough.
Q. Didn't meet him at all?
A. Yes, sir, I met him, but I didn't call his attention to it.
Q. Didn't you deliver the executed copy of the agreement to Mr. Goldsborough?
A. I did.
Q. If you told Mr. Warner and Mr. Windolph why didn't you tell him?
A. I didn't know it at the time I delivered the agreement.
Q. Why didn't you tell him later?
A. I didn't come in contact with him.

The Court: What about Wonfor, did you tell him?

The Witness: I am not certain at all that I told him.

GEORGE A. WONFOR, sworn.

By Mr. Stockwell:

Q. Now, Mr. Wonfor, you live in Camden?
A. Yes, sir.
Q. You are a photographer?
A. Yes, and my business is in Camden?
Q. You signed this agreement?
A. Yes, sir.
Q. When did you first see the interlineation just above the signature of Mr. Bitting on the last page?
A. I can't fix any time, this paper did not come into my hands for quite some time after it was executed in this way. Mr. Warner acting for me as the agent, of course, transacted the necessary business other than what papers were necessary for me to sign. At the time this paper was handed to me for my signature it was perfectly blank so far as signatures or any additions other than just the plain document.
Q. You understood the sellers had yet to sign the paper?
A. Yes, sir, I was the first signer—I fixed that in my mind in this way, the paper being perfectly blank I was asked to sign way down here.
Q. After you had signed you got back an executed copy, didn't you?
A. Not until quite some time afterwards.
Q. When you got it back you read it over, didn't you?

A. I didn't read it over carefully, but I just skimmed through it as you carelessly will and say, "Well, it looks the same document."
Q. At the time you signed the sellers had not signed?
A. No.
Q. Then you weren't interested in finding out whether the sellers had signed?
A. I turned to the back page.
Q. And you looked over the back page?
A. Yes, sir.
Q. Didn't you see these words along there then, referring to the interlineation?
A. I can't say that it really came to my notice.
Q. Now, this was blank?
A. Yes, was perfectly blank.
Q. And now it comes back executed and I want to know whether you did not read over what was put on there after you executed it?
A. I can't say I did.
Q. Will you say you did not?
A. I will say I did not.
Q. You did not what?
A. Read that.
Q. What?
A. This insertion in here.
Q. You didn't see it there?
A. I didn't see it there.
Q. When was your attention first called to it?
A. I don't recall, I can't fix it.
Q. You saw it before you came in here to-day?
A. Yes, but, of course, since this case has been pending we have gone on with things a little more carefully and I picked this up when I was going over it.
Q. Are you the man who picked it up?

A. I can't say I was the man who picked it up, but in going over the document, of course, very carefully; as things are handed to you sometimes and your mind is occupied with other things you are in a hurry and go through with this particular business because you have another appointment you have, that is, generally.

Q. It was a considerable sum of money, you were an obligor, and you had certain conditions to perform?

A. Yes, sir.

Q. And you still say you glanced through that last page without reading it over?

A. When the document came into my hands, yes.

Q. Between that time and the time for settlement did you look at it again?

A. I can't say I did, I think it was filed away and not brought out until such time as we had to give it some consideration.

The Court: You mean after suit was brought?

The Witness: Possibly that was the time, Judge.

Q. I show you letter copy which has been offered in evidence, marked C4, dated October 8, 1926, signed John O. Wilson, addressed to William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, did you receive the original of that letter, or one of the originals of that letter? I do not refer to the typewriting below, that is not a part of the exhibit.

Mr. Stockwell: I call for the original of that letter, the letter of October 8th.

Mr. Wendkos: I haven't that.

The Witness: I don't recall it.

Q. Don't recall receiving that letter?

A. No.

Q. Mr. Wonfor, I show you a post office registry receipt, No. 8473, with a signature on the back, George A. Wonfor, is that your signature?

A. No, sir.

Q. Whose signature is it, who signed that for you?

A. Where was this letter addressed to?

Q. I don't know, I will prove that. You don't know?

A. I might be able to place it if I knew where the letter was forwarded to.

Q. Is that your signature?

A. No, sir.

Q. Or anybody in your office?

A. I don't recall, it may have come to my office or it may have come to my home.

Q. If this was mailed to Cinnaminson, Burlington County, New Jersey—is that your home?

A. Yes, sir.

Q. Well, with that information ——

Mr. Wendkos: The witness has testified it is not his signature.

Q. Can you say whether that is the signature of anybody in your home?

Mr. Wendkos: I object to that question.

The Court: Let it be answered.

A. It may be the signature of my daughter and it might be my son, it doesn't look like Mrs. Wonfor's signature.

Q. Don't you know the signatures of those people to say whether or not this is the signature of one or the other?

A. I can't say I do.

Q. One is your wife's and the other your daughter?

A. I feel it is not Mrs. Wonfor's signature, it might be my daughter's and then again my son's, but either one signing my name ——

Q. Do you get your mail under the address of Cinnaminson, Burlington County, New Jersey?

A. Yes, sir—no, we get it under the post office of Palmyra, New Jersey.

Q. Do you have letters addressed to you at Cinnaminson?

A. Yes, and receive them through Palmyra.

Q. A rural delivery?

A. No, I think it is the postman.

Cross-examination.

By Mr. Wendkos:

Q. Mr. Wonfor, did anyone call your attention to that addition outside of myself?

A. No, sir.

Q. When did I call your attention to that notation?

A. In one of our conferences.

Q. How long ago was that?

A. Last week I particularly place it.

Q. Before that time you did not know of that notation or interlineation?

A. It did not come to my attention.

CONCLUSIONS.

Leaming, V. C.:

I am unable to believe that it would be advantageous to go any further in the trial of this case. The court room is full of witnesses and it is obvious we have before us a long session on other controverted points, and if the law is as I understand it to be the evidence already taken, touching which there can be no dispute, is conclusive of the case, and it seems to me it would be a waste of time and energy to go further into the other points which obviously are controverted.

The facts touching the present situation are not disputed. The contract which complainants seek to enforce as vendors was with four vendees as purchasers. These four vendees signed the contract after it had been prepared in type. At the time the vendees signed the vendors had not signed and were not present; the contract was then sent to the vendors for the purpose of having it executed by them. Instead of executing it in the terms it had been signed by the vendees, the vendors, who now seek the enforcement of the contract, saw fit to make an interlineation. That interlineation consisted of interlining on the fourth page between the 17th and 18th lines the words, "Laura Evans one of" making the contract read that the purchase money bond and mortgage which was to be executed by the vendees was to be made to Laura Evans, one of the said parties of the first part, whereas the contract as originally prepared and as signed by the vendees provided that the mortgage should be executed to the parties of the first part, three in number. Accord-

ingly this contract which is now offered in evidence as the basis of this suit for specific performance is not the same contract which the defendants as vendees signed. It is an altered contract, altered by the vendors after the vendees had executed it, and without their knowledge or consent. The statute of frauds provides in substance that a written instrument in the nature of a contract for the sale of land must be signed by the parties to be charged, or someone lawfully authorized in their behalf. This instrument which complainants now seek to enforce against the vendees is not the instrument which these vendees executed, it is another instrument by reason of the change which the vendors made in it.

During the noon recess hour I have undertaken to examine the authorities in this State touching the alteration of written instruments and so far as I have been able to ascertain there appears to be no dissent from the views which were early entertained in this State and have since been repeatedly adopted.

One of the early cases I have before me, although there are two to substantially the same effect prior to it, is the case of *Hunt v. Gray,* reported in 35 N. J. L., 227. In that case a well considered and carefully prepared opinion was filed by Chief Justice Beasley in the Supreme Court of this State. He says on page 230, "I have no doubt any legal instrument is, as a means of evidence, annulled by such an act"—that is, by alteration by the party who seeks its enforcement. "This was the doctrine, as extracted from the Year Books, expounded in Pigot's case, 11 Rep. 27." He then proceeds with a review of English authorities; among other authorities he refers to *Master v. Miller,* and says: "In *Master v. Miller,* 4 T. R. 320, this principle was adjudged to be applicable to promissory notes, and upon grounds of

public policy which would extend so as to embrace all written contracts. To the extent that a legal instrument will be avoided by an alternation made, either directly or indirectly, by the party claiming an interest under it, this doctrine has been repeatedly recognized by this court, and, as a principle of our legal system, it is not to be questioned. *Price's Adm'r. v. Tallman's Adm'r., Coxe* 447; *Den. v. Wright,* 2 *Halst.* 175; *Bell v. Quick, et al.,* 1 *Green* 312." He then continues, "The reasons for this rule are obvious and of the most solid character. In its absence the inducement to fraud would be very strong, and public policy requires that, in the language of Lord Kenyon, 'no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected.' Even immaterial alterations are fatal, as the rule, to be efficacious, cannot permit a person to tamper, in any degree, with the written contract of another in his possession. If the instrument has been altered by the mistake of the party holding it, relief must be sought in a court of equity. Within this limit I do not find that the legal principle has has been seriously called in question." The case under consideration there was the alteration of a note, but as you will see from what I have already quoted from the opinion, the doctrine is expressly extended to all written contracts. The doctrine is not only expressly extended to all written contracts but it is also expressly stated to include immaterial alterations made by the party who seeks enforcement. The next case appears to have been the case of *Schmidt v. Quinzel.* That was a case before the Court of Errors and is reported in 55 N. J. E. 792. That case refers to the case of *Hunt v. Gray,* and approves of it broadly, as well as the other cases

which *Hunt v. Gray* cites from this state. Then followed the case of *Jones v. Crowley,* 57 N. J. L. 222. That was a case in the Supreme Court and the opinion is written by Mr. Justice Depue. It also adopts the principles that are laid down in *Hunt v. Gray,* and the other cases to which I have referred.

Now, the only hesitancy I have in adopting the views already stated is the thought that perhaps the rule could be relaxed as to immaterial alterations without impairing its efficacy and usefulness. But, as will be observed, the language of Chief Justice Beasley is to the effect that public policy requires the enforcement of the rule even as to immaterial alterations. My impression is—I didn't have time to verify it—that in the Negotiable Instrument Act, which we have adopted in conformity with other states, there has been a liberalization of this doctrine, and that the provision there with reference to alterations of negotiable instruments is that to void the instruments, the alteration must be in a material part. I say, that is my recollection; I may not be right about that, and not having had time to look at it I will have to depend on my memory; but that, of course, would not affect the situation here at all, because that is purely a statutory modification of the rule in that particular instance, if the modification has been made by the Legislature that I suggest; I only refer to it as showing a possible modern tendency toward relaxation of the rule. But even though we might assume that an immaterial alteration should not have so drastic an effect how are we to say that this alteration is not a material one? Is this court to be called upon to say that these vendees have no choice as to whom their mortgagees shall be, whether it shall be the parties whom they agreed to make it or whether it shall be the

single person that is named in the altered contract? I think no court should be called upon to go so far as to say that that is not a material alteration from the viewpoint or interests of the vendees in this case.

However, without undertaking to determine whether this alteration can be said to be in a material provision of the instrument, it seems to me that the earlier decisions bind this court to the doctrine that even in an alteration of the instrument, by the party who seeks enforcement, in an immaterial part will exclude the instrument from evidence and deny the right of specific enforcement.

Now, if this be the law, and I shall hold it to be, I see no use in going further into the voluminous testimony that is evidently awaiting us. I will sustain the objection on behalf of the defendants which I tentatively overruled when the objection was made and will exclude this contract from evidence on the proofs that have been made. That, of course, will operate in a dismissal of the bill.

Another case is set for trial at this time: Are counsel in the case ready to proceed.

Mr. Wendkos: Do I understand from your Honor's decision that the parties are placed in *status quo* by reason of that decision?

The Court: I did not undertake to pass upon that. My own notion would be—but I won't undertake to say, it is outside the scope of my authority. So far as the present bill is concerned it is necessarily dismissed by the ruling I have made.

Mr. Stockwell: Frankly, your Honor this next case is another contract, but there is no use wasting

time, the facts are the same; it appears to be of the same order.

The Court: Why not stipulate it?

Mr. Stockwell: With the understanding the testimony already given can be applicable to both cases, the testimony already given can be applicable to both cases.

Mr. Wendkos: Yes, sir.

The Court: I would like to add to what I have already said a matter that escaped my attention; the question of the adoption of this alternation by the vendees. Touching that no more need be said than that the evidence does not disclose that the vendees were made acquainted with this change. One of the vendees has testified he knew nothing about it until it arose in the matter of the defense of this suit, and another of the vendees, the evidence discloses, may have had it brought to his attention at some subsequent time, or may not, there seems to be an absolute uncertainty as to that. So there is no evidence that he ever learned of the alteration. The other vendees seem to have had it brought to their attention some time after the alteration was made. I meant to refer to that in the statement of facts which I first made, and I mention it now since counsel have already indicated that the case which is to follow is of exactly the same nature.

Now, in the case which is to follow, the case of *William J. Lippincott v. William H. Windolph,* file No. 62521, I understand counsel to say that exactly the same situation exists.

Mr. Stockwell: That is, the four defendants who are the purchasers in the present agreement are the four purchasers in the second agreement, but the names of the sellers are William J. Lippincott, Caroline W. Lippincott, William B. Lippincott.

The Court: And the alteration made was exactly, the same alteration except the interlineation is the name of "William J. Lippincott one of" interlined on page 3 between lines 29 and 30.

Mr. Stockwell: Correct.

The Court: With the understanding that counsel on both sides are stipulating that exactly the same situation is presented in this case as was in the one just disposed of I will make the same disposition and dismiss the bill.

Mr. Stockwell: The testimony offered as to the first agreement is applicable also to the second agreement, the same correspondence.

Mr. Wendkos: Yes.

The Court: I think the disposition of these two cases is prudent from all aspects. Counsel can now take the cases, if so advised, to the Court of Appeals, on a very short record, and that court will be enabled to determine finally what the law may be in this respect, whether I have erred or not, and it will probably save a great deal of labor in a long trial of this case and then a review by the Court of Errors with a long and tedious record.

Mr. Wendkos: My associate counsel, Mr. Low,

has requested me to determine from your Honor whether you will hear us on the question of counsel fee.

The Court: I think in view of the fact that the cases go off on this feature before the examination of any witnesses touching the merits I will not pass upon that until the cases come back from the Court of Errors.

(Heard and determined January 17, 1928.)

DECREE FOR DISMISSAL OF VENDOR'S BILL.

(Filed Mar. 5, 1928.)

IN CHANCERY OF NEW JERSEY.

Between: JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the ESTATE OF WILLIAM B. LIPPINCOTT, deceased, *Complainants,* and WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR, and JOHN S. WARNER, *Defendants.*	On Bill for Specific Performance. Decree for Dismissal of Vendor's Bill.

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

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

"All the following described tract or parcel of land situate in the Township of Evesham in the County of Burlington and State of New Jersey, and bounded as follows: BEGINNING at a point in the middle line of the Camden, Ellisburg and Marlton Turnpike Road and the Easterly line of Cropwell Road; thence (1) North twenty-six degrees and forty-nine minutes east, seven chains and four links to a point in the land of the Philadelphia, Marlton and Medford Railroad Company; thence (2) South seventy-one degrees and twenty-five minutes East, eight chains and four links to another point in the land of the Philadelphia, Marlton and Medford Railroad Company, formerly corner to David D. Griscom's land; thence (3) North thirty degrees and five minutes East forty-seven links to a stone in the Northerly line of the land of the Philadelphia, Marlton and Medford Railroad; thence continuing on the same course along the line of David D. Griscom's land, eleven chains and seventy-two links to a locust stake in a ditch; thence (4) still

along the line of Griscom's land South fifty-one degrees and seven minutes East, five chains and fourteen links to a locust stake in said ditch, thence (5) still by Griscom's land, North thirty-three degrees and forty-nine minutes East, twelve chains and seventy-seven links to a stone corner, thence (6) still by Griscom's land, South seventy-one degrees and twenty minutes East, nine chains and twenty-four links to a stone corner to said Griscom's land in the line of land of Joseph M. Brick thence (7) along the line of Brick's land North twenty-five degrees and thirty-seven minutes East, six chains and ninety-five links to a stone corner to other lands of the said David D. Griscom's; thence (8) by said Griscom's land, North sixty-three degrees and thirty-five minutes, West fifteen chains and thirty-six links to a corner two feet southeast of a stone placed for a corner; thence (9) still by Griscom's land South forty-three degrees and twenty-five minutes West, three chains and thirty-eight links to a stone; thence (10) still by Griscom's land South fifty-five degrees and fifty-five minutes West one chain and four links to a stone on the ditch bank, thence (12) still by Griscom's land South sixty-four degrees and fifty-five minutes West, four chains and eighteen links to a corner thirteen feet Southeast of the centre of the bridge on the Cropwell Road, thence (13) nearly along the ditch and by line of William V. Lippincott land North fifty-nine degrees and thirty-five minutes West, five chains and fifteen links to a stake on the Northerly edge of the ditch, thence (14) still by Lippincott's land, South thirteen degrees and twenty-five minutes West one chain and fifty-

one links to an old poplar stump, thence (15) still by Lippincott's land North Sixty-four degrees and thirty-five minutes West, one chain and thirty-six links to a corner; thence (16) South eighty-two degrees and forty minutes West, one chain and forty-four links to a stone, corner to other land of William B. Lippincott; thence (17) by William B. Lippincott's other land South fifteen degrees and seven minutes west, seventeen chains and thirty-eight links to a stone; thence (18) still by William B. Lippincott's land South twenty-two degrees and sixteen minutes West thirteen chains and thirty-nine links to a corner in the middle of the aforesaid turnpike; thence (19) along the middle of the said turnpike, South seventy degrees and fifty-seven minutes, West eight chains and fifty-five links to the place of beginning. CONTAINING seventy-eight and fifty one-hundredths (78.50) acres of land, be the same more or less, EXCEPTING thereout and therefrom the mansion house and lot of land whereon the same is located, containing one and ninety-three one hundredths (1.93) acres, according to a survey thereof attached to this agreement, and SUBJECT to the railroads' rights of way and the railroads' right to use of station site."

And the aforesaid William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, on the 15th day of December, nineteen hundred and twenty-five, executed the instrument in writing above referred to and submitted the executed instrument to the complainants for the purpose of executing same, and accompanied delivery of the aforesaid written instrument with the payment of $6200.00.

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

And it further appearing that the aforesaid interlineation had been made by complainants without the knowledge and consent of defendants and that said alteration had not been adopted by the defendants and that the defendants had not been made acquainted with the aforesaid alteration by the complainants after the complainants had made the change, which alteration is in a material part of the contract,

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

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

made by the parties hereto for the sale and purchase of lands above described.

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

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

E. R. WALKER,
C.

Respectfully advised:
E. B. LEAMING,
V. C.

NOTICE OF APPEAL.

(Filed Mar. 13, 1928.)

IN CHANCERY OF NEW JERSEY.

Between: JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc., *Complainants,* and WILLIAM H. WINDOLPH, *et als.*, *Defendants.*	Notice of Appeal. On Bill, &c.

The complainants, John O. Wilson, Laura L. Evans, individually, and William J. Lippincott and Laura L. Evans, executors, etc., hereby appeal from the final decree made by the Chancellor on the advice of Vice-Chancellor E. B. Leaming, in the above-entitled cause on the fifth day of March, 1928, and from every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainants.

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

H. F. STOCKWELL,
Of Counsel with Complainants.

[ENDORSED]

Service of a copy of the within notice of appeal is hereby acknowledged this 10th day of March, 1928.

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

PETITION OF APPEAL.

(Filed April 13, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between: JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc., *Complainants-Appellants,* and WILLIAM H. WINDOLPH, *et als.,* *Defendants-Respondents.*	On Appeal from Court of Chancery. Petition of Appeal.

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

The petition of John O. Wilson, Laura L. Evans, individually, and William J. Lippincott and Laura L. Evans, executors of the last will and testament of William B. Lippincott, deceased, the appellants in the above-stated cause, respectfully shows that:

Your petitioners find themselves aggrived by a a final decree made in the Court of Chancery by his

Honor Edwin Robert Walker, Chancellor of the State of New Jersey (advised by Honorable E. B. Leaming, Vice-Chancellor), bearing date the fifth day of March, 1928, wherein the said John O. Wilson, Laura L. Evans, individually, and William J. Lippincott and Laura L. Evans, executors, etc., were complainants, and the said William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner were defendants, in this respect, to wit:

That the said decree adjudges that that certain agreement in writing between the appellants and the respondents, set forth in the bill of complaint, being a contract for the sale by the appellants to the respondents of certain lands and premises in the County of Burlington and State of New Jersey, should be

> "declared of no effect and be annulled by reason of the material alteration made by the complainants in the manner above set forth, as means of evidence of a contract made by the parties hereto for the sale and purchase of lands above described";

and that

> "the complainants pay to the said defendants the cost of this suit to be taxed, which is hereby allowed to said defendants."

And your petitioners humbly appeal from each and every part of the said decree of the Chancellor as aforesaid, upon the ground that the same is erroneous, in that:

1. The Court found that

> "Complainants, Laura L. Evans, William

Evans, her husband, and William B. Lippincott tendered an instrument in writing but said instrument not having been executed by complainants, wherein and whereby the said complainants agreed to convey said lands and premises by deed of special warranty on or before the 18th day of October, nineteen hundred and twenty-six, to William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, the following described lands (being the lands set up in the bill of complaint) * * * *

And the aforesaid William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, on the 15th day of December, nineteen hundred and twenty-five, executed the instrument in writing above referred to and submitted the executed instrument to the complainants for the purpose of executing same, and accompanied delivery of the aforesaid written instrument with the payment of $6200.00.

* * * * * * *

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

Whereas, the Court should have found, upon the evidence before the Court, that the interlineation complained of was not made except with the knowledge and consent of the defendants (present respondents) or their authorized agent in that behalf, and that said interlineation, when made, was brought to the attention of the said defendants (present respondents) or their duly authorized agent in that behalf, who assented thereto, and each and every of the defendants received an executed copy of the said instrument with said interlineation, and took, received and held the same without objection or protest, from the date of the execution thereof down to the filing of the bill of complaint in said cause.

2. The Court found as follows:

"And it further appearing that the aforesaid interlineation had been made by complainants without the knowledge and consent of defendants and that said alteration had not been adopted by the defendants and that the defendants had not been made acquainted with the aforesaid alteration by the complainants after the complainants had made the change, which alteration is in a material part of the contract."

Whereas, the Court should have found, upon the evidence before the Court, that the said interlineation was made only with the knowledge and consent of the defendants (present respondents) and that said interlineation was adopted by the defendants, who had been made acquainted therewith, had acquiesced therein, assented thereto and made no objection thereto, prior to the filing of the bill of complaint herein, and also that said interlineation, in any event, was in an immaterial part of said contract and as to which the defendants (present respondents) were in no way injured or affected in any of their rights under said contract.

3. The Court found that:

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

Whereas, the Court should have found, upon the evidence before it, that the said instrument in writing was, in fact, the contract of the defendants (present respondents) and was and is available to complainants (present appellants) as evidence of the contract between the parties for the sale and purchase of the lands described, and should have found that the defendants (present respondents) having knowledge of said interlineation and having received at the hands of the authorized agents of the defendants executed copies of said contract, with said interlineation duly noted thereon, made no objection thereto, acquiesced therein and were and are estopped to set up any objection to said interlineation and, in any event, the said contract is a valid contract between the parties and the interlineation mentioned in said decree was an immaterial alteration, not affecting the rights of the defendants.

4. The Court ordered, adjudged and decreed that "the aforesaid instrument be declared of no

effect and be annulled by reason of the material alteration made by the complainants in the manner above set forth, as means of evidence of a contract made by the parties hereto for the sale and purchase of lands above described."

Whereas, the Court should have found that the defendants (present respondents) be required to specifically perform their contract as represented by the said instrument in writing.

Your petitioners, therefore, pray that said decree of the Chancellor may be wholly reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem proper.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Appellants.

[ENDORSED]

Consent is hereby given to the filing of the within petition of appeal out of time.

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

ANSWER TO PETITION OF APPEAL.

(Filed May 3, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between: JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc., *Complainants-Appellants,* and WILLIAM H. WINDOLPH, *et als.*, *Defendants-Respondents.*	On Appeal from Court of Chancery. Answer to Petition of Appeal.

The answer of William H. Windolph, William R. Goldsborough, George A. Wonfor and John S. Warner, the above-named respondents, to the petition of appeal of John O. Wilson, Laura L. Evans, individually, and William J. Lippincott and Laura L. Evans, executors, etc., the above-named appellants.

These respondents, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admit that a decree was, on March 5, 1928, made and entered in the Court of Chancery of New Jersey, in

the above-entitled cause, for the purposes in said petition mentioned and as therein set forth, but as to the substance and form of said decree, these respondents beg leave to refer thereto when the same shall be produced.

These respondents are advised and believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these respondents.

PHILIP WENDKOS,
JOSEPH S. LOW,
Solicitors for and of Counsel with Respondents.

[ENDORSED]

Consent is hereby given to the filing of the within answer out of time.
Bleakly, Stockwell & Burling,
Solicitors for Appellants.

NOTICE OF HEARING.

(Filed May 3, 1928.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between: JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors, etc., *Complainants-Appellants,* and WILLIAM H. WINDOLPH, *et als.*, *Defendants-Respondents.*	On Appeal from Court of Chancery. Notice of Hearing.

To the Respondents and to Philip Wendkos and Joseph S. Low, their solicitors:

Take notice that the argument of the appeal in the above-entitled cause will be brought on at the next term of the Court of Errors and Appeals, to be held at the State House, at Trenton, on Tuesday, the fifteenth day of May, A. D. 1928, at the hour of eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Appellants.

[ENDORSED]

Service of a copy of the within notice of hearing is hereby acknowledged this 26th day of April, 1928.

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

EXHIBIT C1.

THIS AGREEMENT, made the 15th day of Dec. in the year of our Lord one thousand nine hundred and twenty-five, by and between WILLIAM EVANS and LAURA EVANS, his wife, and WILLIAM B. LIPPINCOTT of the Town of Marlton, Evesham Township, County of Burlington and State of New Jersey, hereinafter called the parties of the first part and WILLIAM H. WINDOLPH, of Ridley Park, Delaware County, State of Pennsylvania, WILLIAM R. GOLDSBOROUGH, of Meadowbrook, Montgomery County, State of Pennsylvania, GEORGE A. WONFOR, of Cinnaminson Township, Burlington County, State of New Jersey, and JOHN S. WARNER, of Riverton, Burlington County, State of New Jersey,
hereinafter called the parties of the second part.

WITNESSETH, that the said parties of the first part hereby agree to sell and convey, and the said parties of the second part hereby agree to buy all the following described tract or parcel of land situate in the Township of Evesham in the County of Burlington and State of New Jersey, and bounded as follows: BEGINNING at a point in the middle

line of the Camden, Ellisburg and Marlton Turnpike Road and the Easterly line of Cropwell Road; thence (1) North twenty-six degrees and forty-nine minutes east, seven chains and four links to a point in the land of the Philadelphia, Marlton and Medford Railroad Company; thence (2) south seventy-one degrees and twenty-five minutes East, eight chains and four links to another point in the land of the Philadelphia, Marlton and Medford Railroad Company, formerly corner to David D. Griscom's land; thence (3) north thirty degrees and five minutes East forty-seven links to a stone in the Northerly line of the land of the Philadelphia, Marlton and Medford Railroad; thence, continuing on the same course along the line of David D. Griscom's land, eleven chains and seventy-two links to a locust stake in a ditch; thence (4) still along the line of Griscom's land South fifty-one degrees and seven minutes East, five chains and fourteen links to a locust stake in said ditch, thence (5) still by Griscom's land, North thirty-three degrees and forty-nine minutes East, twelve chains and seventy-seven links to a stone corner, thence (6) still by Griscom's land, South seventy-one degrees and twenty minutes East, nine chains and twenty-four links to a stone corner to said Griscom's land in the line of land of Joseph M. Brick thence (7) along the line of Brick's land North twenty-five degrees and thirty-seven minutes East, six chains and ninety-five links to a stone corner to other lands of the said David D. Griscom's; thence (8) by said Griscom's land, North sixty-three degrees and thirty-five minutes, West, fifteen chains and thirty-six links to a corner two feet Southeast of a stone placed for a corner; thence (9) still by Griscom's land South forty-three degrees and twenty-five minutes West, three chains

and thirty-eight links to a stone; thence (10) still by Griscom's land North seventy degrees and five minutes West, ten chains and sixty links to a stone, buried; thence (11) still by Griscom's land South fifty-five degrees and fifty-five minutes West one chain and four links to a stone on the ditch bank, thence (12) still by Griscom's land South sixty-four degrees and fifty-five minutes West, four chains and eighteen links to a corner thirteen feet Southeast of the centre of the bridge on the Cropwell Road thence (13) nearly along the ditch and by line of William B. Lippincott land North fifty-nine degrees and thirty-five minutes West, five chains and fifteen links to a stake on the Northerly edge of the ditch, thence (14) still by Lippincott's land, South thirteen degrees and twenty-five minutes West one chain and fifty-one links to an old poplar stump, thence (15) still by Lippincott's land North sixty-four degrees and thirty-five minutes West, one chain and thirty-six links to a corner; thence (16) South eighty-two degrees and forty minutes West, one chain and forty-four links to a stone, corner to other land of William B. Lippincott; thence (17) by William B. Lippincott's other land South fifteen degrees and seven minutes West, seventeen chains and thirty-eight links to a stone; thence (18) still by William B. Lippincott's land South twenty-two degrees and sixteen minutes West thirteen chains and thirty-nine links to a corner in the middle of the aforesaid turnpike; thence (19) along the middle of the said turnpike, South seventy degrees and fifty-seven minutes West, eight chains and fifty-five links to the place of beginning. CONTAINING seventy-eight and fifty one-hundredths (78.50) acres of land, be the same more or less, EXCEPTING thereout and therefrom the mansion house and lot

of land whereon the same is located, containing one and ninety-three one-hundredths (1.93) acres, according to a survey thereof attached to this agreement, and SUBJECT to the railroads' rights of way and the railroad's right to use of Station Site, for the price or sum of Eight Hundred and Fifty Dollars ($850.00) per acre, the acreage to be ascertained by a survey thereof to be made by Henry Lippincott, of Marlton, N. J., the cost of which survey shall be paid by the parties of the first part, and in case survey is shown to be inaccurate the parties of the first part shall only be entitled to collect for the correct acreage, which survey shall include the entire farm of the said parties of the first part, comprising all the lands within the title lines, including the lands comprised within the railroads' rights of way and the Railroad Station Site, but the acreage for which payment is to be made by the parties of the second part shall exclude the acreage contained within the lines of all railroads' rights of way passing through or across the said farm, and shall also exclude the acreage comprised within the Railroad Station Site, TOGETHER with the hereditaments and appurtenances to the same belonging, under and subject to the following terms and conditions:

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

The further sum of Fifteen Thousand Five Hundred Dollars ($15,500.) shall be paid at the time of final settlement, and a bond and mortgage executed by the said parties of the second part Laura Evans one of to/the said parties of the first part, for the amount of the balance of the purchase price, when ascertained in the manner aforesaid, which said mortgage shall be payable in installments

of at least Eight Thousand Dollars ($8000.) annually, the whole amount thereof to be paid within five years from the date thereof, and to bear interest at the rate of six per cent per annum payable semi-annually. Said mortgage to contain the usual tax, insurance and default clauses and to be in form to be approved by John O. Wilson, of Fourth and Market Sts., Camden, N. J. Said mortgage also to contain a release clause providing that land fronting on Marlton Pike for a depth of two hundred feet, may be released at the price of Twelve Dollars and Fifty Cents per front foot, and that land fronting on Cropwell Road, for a depth of two hundred feet, may be released at the price of Eight Dollars per front foot, and that the balance of the farm may be released from the lien and operation of the said mortgage upon the payment of the sum of Eight Hundred Dollars per acre. Said mortgage also to contain a clause that upon the payment of any annual installment of principal the said parties of the second part shall be entitled to a release of land according to the schedule hereinabove mentioned, to the amount of said annual payment.

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

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

It is further understood and agreed that the parties of the first part shall have the right to retain possession of such part of the farm on which there

may be growing crops for the purpose of removing same within a reasonable time, not exceeding four months after date set for final settlement.

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

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

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

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

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

In consideration of the fact that the tenant house on these premises were included in the survey of lands excepted from this agreement, the parties of the first part hereby agree to allow the sum of One Thousand Dollars upon the mortgage to be taken hereunder, which credit shall be made at the time of final settlement.

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

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

The parties of the second part covenant and agree that they will not record, cause or permit or suffer to be recorded this agreement or any copy thereof in the Office of the Register of Deeds of Camden County, or the Clerk's Office of Burlington County, or any other public office.

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

William Evans (LS)
Laura Evans (LS)
William B. Lippincott (LS)
William H. Windolph (LS)
William R. Goldsborough (LS)
G. W. Wonfor (LS)
John S. ~~Cramer~~ WARNER (LS)

Signed, Sealed and
Delivered in the
Presence of
Words "Laura Evans one of" inserted
between 17th and 18th lines 4th page
before execution.
Robt. C. Bitting
Robt. C. Bitting
Edgar D. McGonigal
Edgar D. McGonigal

January 30, 1926.

For value received, we, the undersigned, William Evans and Laura Evans, his wife, of the Town of Marlton, Township of Evesham, County of Burlington and State of New Jersey, hereby sell, assign, transfer and set over all our right, title and interest in and to the within agreement, unto John O. Wilson, of the Township of Moorestown, County of Burlington, and State of New Jersey.

Laura Evans.

EXHIBIT C3.

JOHN S. WARNER
SUBURBAN REALTOR
520 Cinnaminson Avenue
Palmyra, N. J.

Oct. 15, 1926

Mr. John O. Wilson
Camden, N. J.
Dear Sir:—

In reply to your letter of Oct. 8th, 1926, Mr. Bitting has advised me that Messrs. Goldsborough and Wonfor are not in position to make settlement on the Lippincott Farm which necessitates the forfeit of all money paid on account.

Very truly yours
John S. Warner

JSW:J

EXHIBIT C4.

October 8, 1926.

Messrs. William H. Windolph,
William R. Goldsborough, George A.
Wonfor and John S. Warner:
Gentlemen:

You made an agreement, dated December 15, 1925, with William Evans and Laura Evans, his wife, and William B. Lippincott for the purchase by you of approximately 78.50 acres of land in the Township of Evesham, County of Burlington, State of New Jersey, excepting thereout the mansion house, etc., as provided for in said agreement, under which agreement settlement was required to be made at my office, southwest corner of Fourth and

Market Streets, Camden, N. J., on August 3, 1926, at the hour of eleven o'clock in the forenoon of that day.

At your request and by mutual arrangement of the parties to the agreement, the time for settlement under said agreement was extended to October 18, 1926. Said property was to be surveyed by Henry Lippincott in order to ascertain the correct acreage of the property being conveyed. That survey has been made and a copy thereof was delivered to you long since. According to said survey as provided in the agreement, the acreage amounts to 73.71 acres, and at the price of $850.00 per acre the total purchase price is $62,653.50.

Since the execution of said agreement, I have taken title to said premises, subject to said agreement, and will be prepared for settlement on October 18, 1926, at the hour of eleven o'clock in the forenoon, at my office, southwest corner of Fourth and Market Streets, Camden, N. J., being the place fixed for settlement in said agreement, at which time and place you are required to attend and settle in accordance with the terms of said agreement.

Very truly yours,
John O. Wilson
Wm. R. Stanert
Atty. in Fact.

Copies of the above mailed to the four persons addressed at the following addresses, by registered mail, October 13, 1926.

Mr. William H. Windolph, Ridley Park, Delaware Co., Pa.

Mr. George A. Wonfor, Cinnaminson, Burlington Co., N. J.

Mr. John S. Warner, Riverton, N. J.

Mr. William R. Goldsborough, Meadowbrook, Montgomery Co., Pa.

EXHIBIT C5.

August 31, 1926.

Mr. John S. Warner,
Palmyra, New Jersey.
Dear Sir:—

I enclose herewith extension agreements which have been signed in connection with your purchases from Mr. William J. Lippincott and Mrs. Laura L. Evans.

Very truly yours,

WRS/W
Encs.

COPY

August 18th, 1926.

Mr. John S. Warner,
Palmyra, N. J.
Dear Sir:—

In consideration of the fact that some of the parties interested in sales agreement for purchase of my farm consisting of seventy-three acres, located in Evesham Township, on the Marlton Pike, and for which settlement is called for by present agreement Sept. 18th, 1926.

I hereby agree to extend time for settlement to Oct. 18th, 1926. All of the other provisions of existing agreements to remain unchanged.

Yours truly
(signed) Laura Lippincott Evans.

AGREEMENT OF SALE (LIPPINCOTT).

The following is the agreement of sale, the specific performance of which is sought in the case of William J. Lippincott and Laura L. Evans, et al. vs. William H. Windolph, et al., and attached to the

amended bill of complaint filed in that cause, all other pleadings in said cause having been omitted from the state of the case by stipulation of counsel.

THIS AGREEMENT, made the 15th day of Dec. in the year of our Lord one thousand nine hundred and twenty-five, by and between WILLIAM J. LIPPINCOTT and CAROLINE W. LIPPINCOTT, his wife, of the Township of Evesham, County of Burlington and State of New Jersey, and WILLIAM B. LIPPINCOTT, Widower, of the Town of Marlton, County of Burlington and State of New Jersey, hereinafter called the parties of the first part, and WILLIAM H. WINDOLPH, of Ridley Park, Delaware County, State of Pennsylvania, WILLIAM R. GOLDSBOROUGH, of Meadowbrook, Montgomery County, State of Pennsylvania, GEORGE A. WONFOR, of Cinnaminson Township, Burlington County, State of New Jersey, and JOHN S. WARNER, of Riverton, Burlington County, State of New Jersey, hereinafter called the parties of the second part.

WITNESSETH, That the said parties of the first part hereby agree to sell and convey to the said parties of the second part, and the said parties of the second part hereby agree to buy from the said parties of the first part, ALL that certain farm or plantation known as the William B. Lippincott Farm, situate on the Marlton Pike near Cropwell Station, partly in the County of Camden and partly in the County of Burlington and State of New Jersey, containing approximately one hundred and two acres of land; EXCEPTING thereout and therefrom the mansion house and lot of land whereon the same is located, containing two and twenty-seven one-hundredths (2.27) acres, according to a survey thereof attached to this agreement, AND SUBJECT to the railroads' rights of way, ALSO SUBJECT to the right of way in the rear of the said farm granted

and conveyed to Samuel Vennell; RESERVING a right of way over the lane fifty feet in width as now laid out, extending from the mansion house to the Marlton Pike, as shown on the map attached hereto, for the price or sum of Eight Hundred and Fifty Dollars ($850.00) per acre, the acreage to be ascertained by a survey thereof to be made by Henry Lippincott, the cost of which survey shall be paid by the parties of the first part, and in case survey is shown to be inaccurate party of the first part shall only be entitled to collect for the correct acreage, which survey shall include the entire farm of the said parties of the first part comprising all the lands within the title lines, including the lands comprised within the railroads' rights of way, the said right of way granted to said Vennell, and the right of way reserved over the lane fifty feet in width, but the acreage for which payment is to be made by the parties of the second part shall exclude the acreage contained within the lines of all railroads' rights of way passing through or across the said farm and shall also exclude the acreage comprised within the said right of way granted to said Samuel Vennell, TOGETHER with the hereditaments and appurtenances to the same belonging, under and subject to the following terms and conditions:

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

The further sum of Twenty-one Thousand Five Hundred Dollars shall be paid at the time of final settlement, and a bond and mortgage executed by the said parties of the second part William J. Lippincott, one of to/the said parties of the first part, for the amount of the balance of the purchase price,

when ascertained in the manner aforesaid, which said mortgage shall be payable in installments of at least Eleven Thousand Dollars annually, the whole amount thereof to be paid within five years from the date thereof, and to bear interest at the rate of six per cent per annum payable semi-annually. Said mortgage to contain the usual tax, insurance and default clauses and to be in form to be approved by John O. Wilson of Fourth and Market Sts., Camden, N. J. Said mortgage also to contain a release clause, providing that the tenant house fronting on the Marlton Pike with a lot 100 x 200 feet may be released by the payment of Five Thousand Dollars on account of the principal of said mortgage, and that the balance of the land fronting on the Marlton Pike, for a depth of two hundred feet may be released at the price of Twelve Dollars and Fifty Cents per front foot and that land fronting on Cropwell Road for a depth of two hundred feet may be released at the price of Eight Dollars per front foot, and that the balance of the farm may be released from the lien and operation of the said mortgage upon the payment of the sum of Eight Hundred Dollars per acre. Said mortgage also to contain a clause that upon the payment of any annual installment of principal the parties of the second part shall be entitled to a release of land according to the schedule hereinabove mentioned, to the amount of said annual payment.

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

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

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

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

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

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

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

It is also understood and agreed that the said parties of the second part shall have the right to change the right of way hereby reserved over the lane fifty feet wide, extending from the Mansion house to the Marlton Pike, as shown on the map attached hereto,

at any time to a more practical location in a manner satisfactory to the parties of the first part.

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

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

It is further agreed that time is of the assence of this contract, and in case the purchasers do not attend at the time of final settlement to receive the deed and pay the balance of the purchase price and execute the bond and mortgage to the said party of the first part, then the first payment hereinabove mentioned may at the option of the parties of the first part be applied on account of the purchase price, and the balance of the purchase price shall be payable to the said parties of the first part on demand, or, the said parties of the first part may retain the first payment hereinabove mentioned as

damages agreed and liquidated, for the failure of the said parties of the second part to carry out the terms of this agreement, in such case this agreement shall be null and void.

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

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

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

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

William J. Lippincott (LS)
Caroline W. Lippincott (LS)
William B. Lippincott (LS)
William H. Windolph (LS)
William R. Goldsborough (LS)
G. W. Wonfor (LS)
John S. Warner (LS)

SIGNED, sealed and
Delivered in the
Presence of
Words "William J. Lippincott, one of" inserted between lines 29 and 30, Page 2, before execution.
Robt. C. Bitting
Robt. C. Bitting
Edgar D. McGonigal
Edgar D. McGonigal

EXHIBIT D1.

JOHN O. WILSON
Market Street at Fourth
Camden, N. J.

January 26, 1926.

Mr. John S. Warner,
Camden, N. J.

Dear Sir:—

Referring to the execution of the agreements on the farm near Marlton, N. J. owned by Laura Evans, I wish to advise you that we have been delayed in delivering these agreements to you because we have been unable to obtain the husband's signature. These people are having some trouble between them, and we anticipate going through with the deal, even if it is necessary to make application for a divorce, for which we have grounds, but I am still hoping that an amicable arrangement can be made between husband and wife, whereby this agreement will be executed.

We will not ask you to hold the matter in abeyance longer than this week, within which time we will have the matter settled definitely with the husband, one way or the other.

Yours very truly,
John O. Wilson

JOW:MB

EXHIBIT D2.

JOHN O. WILSON
Market Street at Fourth
Camden, N. J.

February 19, 1926

Mr. John S. Warner,
639 Market St.,
Camden, N. J.

Dear Sir:—

With regard to a certain agreement made by and between William Evans and others, covering the sale of a farm near Marlton, N. J., which agreement was only recently executed and delivered to you, although it is dated sometime prior thereto.

This letter is to evidence that the settlement date as set out in said agreement is extended for a period of forty-five days from the said date set out in said agreement. All other conditions of said agreement, of course, to apply, effective as of that date.

Yours very truly,

John O. Wilson
Atty. for Laura Evans

WRS:MB

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between: No. 1.
JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the ESTATE OF WILLIAM B. LIPPINCOTT, deceased,
Complainants-Appellants,
and
WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR and JOHN S. WARNER,
Defendants-Respondents.
Between: No. 2.
WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the ESTATE OF WILLIAM B. LIPPINCOTT, deceased, WILLIAM J. LIPPINCOTT, individually, and CAROLINE W. LIPPINCOTT,
Complainants-Appellants,
and
WILLIAM H. WINDOLPH, WILLIAM R. GOLDSBOROUGH, GEORGE A. WONFOR and JOHN S. WARNER,
Defendants-Respondents.

On Appeal from the Court of Chancery

BRIEF FOR COMPLAINANTS-APPELLANTS.

There are two cases involved in this appeal. They are precisely alike in purpose, in defendants and in the single issue involved in this appeal. Some of the complainants are in each bill. The two bills are filed on behalf of the vendors of real estate, seeking a specific performance of the contract by the vendees. The proofs in the one case (*John O. Wilson, Laura L. Evans, et al. v. William H. Windolph, et al.*), are to govern both cases. A decree of dismissal was entered in each case, based upon the one set of proofs.

The complainants' bill in each case was dismissed by the Court of Chancery (Honorable E. B. Leaming, Vice-Chancellor), on the sole ground that an alteration had been made in the contract of sale by the vendors after the vendees had signed the instrument. The case was halted almost at its beginning, when testimony on this point was brought out and, without going further, the Court said:

(Conclusions, p. 71, lines 1 to 15):

> "I am unable to believe that it would be advantageous to go any further in the trial of this case. The court room is full of witnesses and it is obvious we have before us a long session on other controverted points, and if the law is as I understand it to be the evidence already taken, touching which there can be no dispute, is conclusive of the case, and it seems to me it would be a waste of time and energy to go further into the other points which obviously are controverted."

FACTS.

—The contract (Exhibit C1, p. 96) required the defendants (vendees) to purchase a farm in Burlington County, of approximately 78.50 acres, with one or two small parcels excepted, at the rate of $850.00 per acre; there was an initial deposit of $6200.00 when the contract was signed and the further sum of $15,500 was to be paid in cash at the time of final settlement, and

> "a bond and mortgage executed by the said par-
> Laura Evans, one of
> ties of the second part to/ the said parties of the first part, for the amount of the balance of the purchase price."

—Settlement was required to be made at the office of John O. Wilson in Camden, August 3, 1926, at eleven A. M.

—The time for settlement, at the request of the defendants *conveyed through John S. Warner, one of their number and the agent and acting for all the defendants,* was extended first for a period of forty-five days, to wit, to September 18, 1926 (Exhibit D2, p. 114), and thereafter on August 18, 1926, the time was further extended from September 18th to October 18th, 1926. (Exhibit C5, p. 106.)

We direct notice especially to the fact that these communications as to extensions were made through John S. Warner, a real estate agent.

—On October 8, 1926, the time for settlement approaching, the vendors (complainants), through their attorney, directed a letter to all of the defendants. (Exhibit C4, p. 104.) This letter called attention to the date of settlement, the acreage computed,

the total price, and also that said John O. Wilson had taken title from the complainants since the date of the agreement and would be ready to make settlement at the time agreed upon, to wit, October 18, 1926, at the hour and place agreed upon. *Instead of appearing at the settlement or arranging for a settlement, the defendants (purchasers) notified the vendors, through their attorney, that they did not propose to make settlement and that they would forfeit the deposit money paid on account.* This notice is contained in a letter by John S. Warner, one of the vendees and acting for all four, reading as follows:

(Exhibit C3, p. 104):

"JOHN S. WARNER.
SUBURBAN REALTOR.
520 Cinnaminson Avenue,
Palmrya, N. J.

Oct. 15, 1926.

Mr. John O. Wilson
Camden, N. J.
Dear Sir:
In reply to your letter of Oct. 8th, 1926, Mr. Bitting has advised me that Messrs. Goldsborough and Wonfor are not in position to make settlement on the Lippincott Farm which necessitates the forfeit of all money paid on account.

Very truly yours,
John S. Warner.

JSW:J"

Here again, it will be noted that John S. Warner acted for the four purchasers.

—No objection was ever made by the purchasers or any of them to the alteration hereinabove referred to. That point was not raised on their motion to strike out the bill, made long before trial, nor was it raised in the answer when it was finally filed, nor was any such objection made at the time of settlement or at any time prior thereto. As already indicated, the defendants deliberately defaulted on the agreement and notified the vendors that they would not carry out the agreement. (Exhibit C3, p. 104.)

—The fact of an alteration having been made in the instrument was brought out by the second witness called by complainants (Robert C. Bitting). He was an associate of John S. Warner, one of the defendants (p. 33), was brought in under subpoena by the complainants (p. 33, line 20) and was obviously an adverse witness. Under cross-examination by the defendants' attorney, he stated:

1. That the notation over the signatures of the witnesses on the last page of the agreement, to wit:
"Words 'Laura Evans one of' inserted between 17th and 18th lines 4th page before execution."
was not made in his handwriting.

2. Page 34, top of page:
"Q. Was the notation on that contract at the time the buyers signed the contract?
A. It was not."

3. Page 35, bottom of page:
"Q. Was the interlineation made in your presence?
A. No, sir.
Q. Was it made at your request?
A. No.
Q. Do you know by whom it was made?

A. No, sir.

Q. Do you still say the interlineation and the notation was not made while the contract was in your possession?

A. It was not."

The witness then said in answer to the Court (page 36):

"By the Court:

Q. When did it leave your possession?

A. When I returned it to John O. Wilson's office.

Q. John O. Wilson represented the sellers?

A. Yes, sir.

Q. And that writing had been put in there since then?

A. Evidently, because it wasn't there when I witnessed the signatures."

This testimony was a great surprise to complainants' counsel, who immediately, to ascertain exactly what took place between the parties, first cross-examined this witness, Bitting, and then called the two defendants who were in court (John S. Warner and George A. Wonfor), and also examined William R. Stanert, of the office of John O. Wilson, who handled the transaction for Mr. Wilson, and as a result of this examination we have the following established:

(a) —The agreements were prepared in Mr. Wilson's office and then delivered to Mr. Bitting for delivery to his principles for execution. (Stanert, p. 50.) Bitting delivered to the office of John O. Wilson, after execution by the purchasers, four or five copies of the agreement (p. 37, line 3, &c.). When these copies, all executed by the purchasers, were delivered to Wilson's office they had not been signed

by the vendors—they were delivered for the purpose of having them signed by the vendors (p. 37, lines 28 to 35). Some time later, Bitting for the buyers went to Wilson's office and took the copies away, after the documents had been signed by the vendors (p. 38, lines 1 to 10).

—As to the interlineation, Bitting says:

(Line 11, p. 38):

"Q. Weren't the words to which Mr. Wendkos has called your attention, that is, those above your signature on the paper, weren't they on the copy when you took it away?

A. At the time I took it away, yes.

Q. You never raised any question about it?

A. I did to myself but I didn't to Wilson's office.

Q. You were acting for the buyers, weren't you?

A. I was acting for both buyer and seller.

Q. Mr. Warner was the agent and also he was one of the buyers, is that correct?

A. Correct.

Q. Did you notice these words above your signature on the copy at the time you took it away —you say you raised the point in your own mind?

A. Not until I returned to the office and looked it over, I noticed it at that time.

Q. You know what the words mean, don't you?

A. Yes, I know what they mean.

Q. And they appear on page 4, line 4 of the 3rd paragraph of that page?

A. Yes.

Q. In other words, the words are inserted in the body of the instrument in accordance with

the notation above your signature on the instrument, correct?

A. Yes."

And further, when questioned by the Court, the witness says (line 19, page 39):

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

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

Q. Who represented Windolph, Goldsborough and Wonfor?

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

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

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

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

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

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

A. Yes, sir.

Q. All of them containing the interlineation?

A. Yes.

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

A. Yes."

Although Bitting did not admit that his attention was called to this interlineation at the time

he received the executed copies from the hands of Mr. Stanert, of Wilson's office, he does say that he noticed it immediately upon his return to his office after the agreements were handed to him (page 44, top), and says that he called the attention of Mr. Warner (vendee and also agent for the other vendees) and vendee Windolph to this alteration or interlineation three or four months after he got the executed agreements from John O. Wilson. (Bottom page 43, top page 44.)

(b) —Furthermore, Mr. Stanert who handled this transaction for John O. Wilson's office, states positively as follows:

That Bitting knew the difficulty between Laura Evans and her husband, William Evans (p. 50), and further:

"We (Stanert and Wilson) also told him (Bitting) when this interlineation went in there, and he had full knowledge of it the day he took the agreement from our office.

The Court: About that interlineation?

The Witness: Yes, sir, he knew, and the question had not been raised by anyone from that day to this as to the interlineation in the agreement.

Q. You say his attention was called to it?

A. Yes, sir.

Q. Any objection made?

A. None whatever."

—The purpose of the interlineation was stated by Mr. Stanert (page 50, lines 8, etc.). The difficulty over harmonizing differences between Laura Evans and her husband were set forth furthermore in letter from John O. Wilson to John S. Warner, dated January 26, 1926 (Exhibit D1). The defen-

dants, therefore, knew of the trouble the complainants were having in getting the papers executed and harmonizing the differences between Laura Evans and William Evans. This matter in particular was known by John S. Warner and his deputy, Bitting (Exhibit D1, page 113).

—The change or interlineation was made *before* William Evans or Laura Evans had signed it. (Stanert, page 50, lines 18 to 25.)

—The vendors and their attorneys did not carry on this transaction with the vendees personally. It was all through John S. Warner, one of the vendees, and his deputy, Bitting (page 54). It was Bitting, for Warner's office, who came and got the agreements after they had been prepared in Wilson's office, took them to the vendees, had the copies executed by the vendees and then delivered the executed papers to John O. Wilson's office. The correspondence, both before and after the agreements were signed, was to and through Warner's office. See the following:

(Exhibit D1, January 26, 1926, p. 113.)

(Exhibit D2, which is an extension agreement, dated February 19, 1926.)

(Exhibit C5, letter of extension, dated August 18, 1926.)

(Exhibit C3, page 104, letter refusing to complete settlement and forfeiting deposit, dated October 15, 1926.)

It will be noticed that this letter of October 15th is in reply to Exhibit C4, letter of October 8th, addressed to all of the defendants by John O. Wilson.

Even here, John S. Warner receives instructions from his associates and acts for them all. In other words, throughout the transaction, to the very close, Warner acted for himself and his three associates, the vendees, in all matters involving this contract, the extensions of time with reference thereto and finally in refusing to perform.

Warner says that Bitting was working for him in his office

> "practically taking care of the entire transaction" (page 56, line 16).

He admits knowledge of the interlineation, but says he did not tell the others about it (p. 57, lines 5, etc.):

> "Q. You were acting for the other purchasers throughout this transaction?
>
> A. I was, through Mr. Bitting.
>
> Q. Correspondence was conducted through you for the sellers?
>
> A. Yes, sir.
>
> Q. You were representing the purchasers, I mean?
>
> A. We were representing the sellers.
>
> Q. You were getting a commission from the sellers, but weren't you representing the buyers?
>
> A. Yes, sir.
>
> Q. Weren't you acting for them throughout this entire transaction?
>
> A. Yes, sir.
>
> Q. In fact, you were one of the buyers?
>
> A. Yes, sir.
>
> Q. Now, did you attend to the delivery of the copies of these executed agreements to the other parties?

A. No.

Q. Did you give any instructions about them?

A. I advised Mr. Bitting to see that the purchasers received their agreements."

He also says that Bitting told him, Warner, that he had told Mr. Windolph about it. (Page 58). He admits (page 59) that he was acting for the purchasers in securing extensions of time and in refusing to go on with the agreement (page 60).

ARGUMENT.

We have, under the undisputed testimony, therefore, the positive statement of the witness Stanert, who acted for the sellers ——

—That the interlineation was made in his office before the paper was executed by the vendors.

—That before the agreements so executed by the vendors were delivered to the agent of the vendees, that agent was told of the interlineation and he made no objection thereto.

—And we have it conceded by that agent of the vendees (Bitting) that he at least knew of this interlineation immediately upon his return to his own office on the receipt of these agreements so executed by the vendors and that he directed the attention of Mr. Warner and of Mr. Windolph, two of the defendants, to this interlineation; that he made no objection to Mr. Stanert or to Mr. Wilson or the vendors with reference to such interlineation.

—Mr. Warner concedes that he knew about the interlineation and made no objection.

Therefore, we have this situation:

1. The person or persons (Bitting and Warner)

who acted for the vendees throughout, both in personal contact and through correspondence, knew of the interlineation and made no objection thereto, and neither Windolph nor Warner, who admittedly were told of the interlineation, made any objection thereto for a period of months after their attention was directed to it, and the letter Exhibit C3 (page 104) calls especial attention to the fact that Goldsborough and Wonfor could not raise the funds to make the settlement and for that reason alone the defendants refused to go forward with the settlement.

In short, two of the vendees knew all about the interlineation months before the time for settlement and made no objection and even obtained an extension of time for settlement after that (August 18, 1926, Exhibit C5) and the man or men (Warner and Bitting) who acted for all four buyers as their agent throughout had full knowledge of this interlineation promptly after it was made.

2. Under this state of facts, we claim that all four vendees (defendants) were estopped from setting up this defense at the trial, by their knowledge of the fact and their acquiescence therein and actual refusal to make settlement for an entirely different reason, to wit, lack of funds.

(a) As to Warner and Windolph, there can be no dispute, because it is not denied that those two had full knowledge of the interlineation and made no objection.

(b) As to Wonfor and Goldsborough:

Goldsborough did not appear at the trial. He, therefore, could not be examined by complainant's counsel. Wonfor was called from his attorney's table and examined by complainant's counsel and he admitted that he examined the last page of his copy

of the agreement after it was brought back to him, executed by the vendors, but was unwilling to admit that he saw the interlineation plainly standing out from the last page of his copy. (Wonfor pages 66 and 70.) But as to Wonfor and Goldsborough, we say that they are chargeable with the knowledge received by their agents, who acted for them throughout. The information was imparted as a part of the very transaction in which Warner and Bitting acted as exclusive agents for the four vendees and while carrying out the transaction for the vendees. It cannot be charged that there was any bad faith shown by the vendors or their attorney. The record is entirely barren of any testimony from which such an inference could be drawn; in fact, there is no such charge made by the defendants. Mr. Stanert acted in perfect good faith and communicated the information to the very man with whom he had been dealing throughout and who was acting for the four vendees.

We, therefore, claim that the interlineation was by and with the knowledge and consent of the vendees and, therefore, no objection could thereafter be made by them to such interlineation or change.

AGENCY—KNOWLEDGE IMPUTED TO PRINCIPAL.

Vulcan Detinning Co. v. American Can Co., (E & A.) 72 Eq., page 400: Here the Court lays down the rule as to imputed knowledge as follows:

> "The knowledge of the agent is chargeable upon his principal whenever the principal, if acting for himself, would have received notice of the matters known to the agent."

With reference to such rule, the Court observes as follows:

> "This rule, it will be observed, is far more favorable to the respondents in the present case than that of Willard v. Denise, and is, in our judgment, the rule to be applied whenever the presumption of imputed knowledge becomes pertinent to the rights or remedies of litigating parties."

The cited case, *Vulcan Detinning Co. v. American Can Co.,* dealt with a situation where the knowledge possessed by the agent was not acquired by him while acting for his principal. Even in that situation, the Courts have imputed knowledge of the agent to the principal under certain conditions.

In the case now before the Court, however, we are dealing with knowledge imputable through an agent to his principal, while the agent was dealing in the very transaction for which the agency was established. Furthermore, the information conveyed to the agent thus acting for his principal was of a fact which was a condition of the actual delivery of the agreement by the vendors. Until such delivery, the transaction was an open one and not completed and not binding on either party.

There is no fraud or bad faith shown or intimated. The change made in the agreement was in an entirely immaterial matter, which did not increase the obligations of the defendants or affect their rights. While the agreement as originally drawn provided that the purchase money mortgage should be made

> "to the parties of the first part,"

it was then made to read

> "to Laura Evans, one of the parties of the first part."

We urge upon this Court that where no fraud is shown and under circumstances disclosed by this record, where perfect good faith was shown in the transaction and where the vendees refused to carry out the agreement on an entirely different ground, to wit, lack of funds, the Court should hold this change as immaterial and as not justifying an annullment of the agreement.

Sooy v. State, 41 N. J. L. 400, cited with approval in *Vulcan Detinning Co. v. American Can Co., supra* (Court of E. & A.) Here the Court says that:

> "The notice must come to the agent while he is concerned for the principal, and in the course of the same transaction, and if he have notice only by some other transaction, foreign to the business in hand, this will not affect the principal."

The Court further says that the principle

> "would seem to be one that aimed to award to each the benefits and burdens which would have arisen if the business had been transacted by both in person. Such a result would follow if the rule to be adopted were that whenever the principal, if acting in the matter for himself, would have received the notice, the knowledge of his agent shall be chargeable to him."

Camden Safe Deposit & Trust Co. v. Lord, 67 N. J. Eq. 489:

> "The knowledge of an agent is imputable to his principal when it relates to the business which the agent is carrying on for the principal; but if the agent, in the course of the business in which he is employed, commits an independent fraud, for his own benefit, designedly against his principal, and it is essential to the carrying out of the fraud that he should conceal the real facts from his principal, the presumption of constructive notice is destroyed."

Law v. Stokes, 32 N. J. L. 49 (Sup. Ct.)

> "A principal is bound by the acts of his agent, within the authority he has actually given him, which includes not only the precise act expressly authorized to be done, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that he is liable for the acts of the agent, within the appearance of authority he knowingly permits the agent to assume, or holds the agent out to the public as having."

21 R. C. L. page 853:

> "*Express and Implied Authority.* Very obviously, the principal is liable for all such acts and statements of his agent as he may have expressly authorized; and this includes by implication, whether the agency be general or special, all such powers as are necessary and proper as a means of effectuating the purposes for which the agency was created. Being clothed with power to do a particular act, the agent will be deemed to have also whatever authority attaches to the doing of the act or is necessary to its performance. And this permits him to adopt any recognized usage or mode of dealing."

Page 854:

> "The liability of the principal is not limited to such acts of the agent as are expressly authorized or necessarily implied from express authority. All such acts of the agent as are

within the apparent scope of the authority conferred on him are also binding upon the principal, apparent authority being that which, though not actually granted, the principal knowingly permits the agent to exercise, or which he holds him out as possessing. * * * (Page 856.) Indeed, whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages, and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it"

Bodine v. Berg, 82 N. J. L. 662: In the cited case, the general manager of the bank altered the date of a note. The bank claimed this was done without authority. On the question of agency, the Court said as follows:

"The question is not whether the agent, in what he did, acted without negligence or whether the result of his conduct was beneficial to the principal, but whether the acts he performed were done strictly in connection with the particular matter in which he was employed to act for the principal. There is no rule of law by which an agent represents his principal only so long as his acts are beneficial and performed without negligence, but ceases to represent him when the acts he performs as agent are negligently performed or turn out to be the reverse of beneficial to the principal. One who claims the beneficial results of a general agency cannot disavow the untoward results of

the negligent acts of his own agent in the identical transaction."

The Court goes on to say as follows:

"Should we assume, however, that the alteration was made by the manager without the authority of the bank, the fact that the bank held as an asset this altered note was known to the manager, which knowledge was acquired by him in a transaction within the scope of the bank's business."

And further, at page 669:

"Therefore, in this case the bank had knowledge that it was the holder of a promissory note, the date of which had been, as it is claimed, altered by its general manager without authority. In such case the act of alteration may be ratified by the bank, and it has been decided that accepting payment on account of the note, and the bringing of a suit on the note as altered, amounts to a ratification of what had been done."

The Court further says that in that particular case the bank held the note, chargeable with knowledge of its alteration by its agent and did not disavow the act.

In other words, under the established authorities in this State, the knowledge of the agents Bitting and Warner, was the knowledge of the principal, to wit, the four defendants. The acts of the agents Bitting and Warner in accepting delivery of the four agreements upon condition of their alteration by the vendors in the manner indicated by the vendors' attorney at the time of delivery, and their acquiescence therein, was the act of the defendants

and the acquiescence of the defendants therein. The express limits of the authority of the agent were not conveyed by the defendants to the complainants. The agents presumed to act in all things respecting the transaction for the vendees (defendants). Under such circumstances, the vendors and their attorney had the right to deal with the agent in good faith, on the assumption that he did represent his principals and could consent to and acquiesce in this immaterial alteration which did not in any wise enlarge the obligations or impair the rights of the vendees.

We, therefore, hold in this respect that by acceptance of the executed agreement with this alteration, the alteration being a condition of the delivery and a consummation of the contract, the agents of the defendants accepted and consented to that alteration. Two of the defendants, with actual knowledge, made no protest, and the other two defendants are chargeable with knowledge through their agents. The defendants are, therefore, bound either upon the theory of knowledge and consent to the change at the time it was made and as a condition of delivery of the agreements, or upon a theory of knowledge of the fact of alteration through their agents, their acquiescence therein and pursuing a course thereafter inconsistent with a repudiation of that alteration. They had a contract for the purchase of a large farm. It was most material to the interest of the vendors that either the agreement be made or not made. Their operation of the farm would be completely changed by the making of the contract. Defendants were bound to immediately apprise the complainants of any fact which they considered as a justification for an annullment of the agreement. On top of all this, we have the unmistakable fact

that this point of alteration was never even considered by the defendants. At the time called for performance, they then declined to perform because, as they said, they had no money. The only inference, however, is that they wished to repudiate the contract at the trial because of the falling market.

The learned Vice Chancellor bases his conclusions on *Hunt v. Gray,* 35 N. J. L. 227. The principle as there laid down, applies the old common law rule in all its strictness. The Court in that case held that the change made in the instrument was a material change. Although that was so held, the Court even went on to say:

> "Even immaterial alterations are fatal, as the rule, to be efficacious, cannot permit a person to tamper, in any degree, with the written contract of another in his possession." (Page 231.)

This case, *Hunt v. Gray,* is cited in *Jones v. Crowley,* 57 N. J. L. 222 (Sup. Ct). The change made was on the face of the instrument, a most material change. The Court, however, cited the case *Hunt v. Gray* as to immaterial alterations.

In *Schmidt v. Quinzel,* 55 N. J. Eq. 792, (E. & A.), the Court dealt with an alteration which was material and the Court so found. The Court of Errors and Appeals, in the cited case, however, does not state the rule so broadly as the two previously cited cases. It expressly finds that the alteration is a material one, and then holds:

> "The alteration considerably enlarged the scope of the instrument as a means of evidence, and therefore was a material one. Having been made by the other party, the complainant, it annulled the instrument as a contract, or as evidence of a contract, in his favor."

It remains for this Court, however, to state whether it shall be the rule in our jurisdiction that even an immaterial alteration made by one party to a contract after execution by the other party is to annul the instrument and, if so, under what conditions. We call the Court's attention, however, to the original English case, out of which these authorities flow, to wit: Pigot's Case, 11 Coke 27, cited in *Camden Bank v. Hall,* 14 Law 584, and it is there apparent that even where the rule is very strict, it has no application where the alteration is

"by consent of the parties."

We submit that the strictness of the original common law rule should be modified, so that an immaterial alteration, which does not affect the interests of the other party to the contract, does not enlarge his obligations, and especially where it is done in perfect good faith, as in the present suit, should not justify an annullment of the instrument.

—We wish especially to direct the Court's attention to the fact that the alteration in this instrument was made by the vendor's attorney *before* execution by the vendors and before delivery of the duplicate executed copies of that instrument to the vendees. Each and every vendee received through his agents, Bitting and Warner, an executed copy of the instrument, with the identical alteration embodied on the face of the instrument and with the identical notation above the signatures of the witnesses. We hold that the delivery to the agent of the vendees was conditioned upon an acceptance of the alteration made and the acceptance of the executed copies with such alteration was an acceptance thereof and consent thereto.

We submit that the decision of the Court below

should be reversed and the lower Court should proceed with the proofs on all phases of the litigation raised by the two bills of complaint.

Respectfully submitted,
BLEAKLY, STOCKWELL & BURLING,
Solicitors for Complainants-Appellants.

NOTE: The notation of interlineation inserted at the end of the agreement above the signatures of the witnesses was with pen in black ink.

The interlineation in the body of the agreement was in type inserted between the lines.

The contracts were typewritten.

BLEAKLY, STOCKWELL & BURLING.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between:

JOHN O. WILSON, LAURA L. EVANS, individually, and WILLIAM J. LIPPINCOTT and LAURA L. EVANS, executors of the ESTATE OF WILLIAM B. LIPPINCOTT, deceased,

Complainants-Appellants,

and

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

Defendants-Respondents.

Between:

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

Complainants-Appellants,

and

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

Defendants-Respondents.

On Appeal from the Court of Chancery.

BRIEF FOR DEFENDANTS-RESPONDENTS.

There are two suits involved in this appeal. They are precisely alike in purpose, in defendants and in the single issue involved in this appeal. The proofs in the one case are to govern both cases.

WAS AN ALTERATION MADE IN THE CONTRACT?

There is no disagreement as to the facts, it being testified to by witnesses called by complainants-appellants (Bitting at p. 34) that neither the notation over his signature nor the interlineation in the body of the contract were made at the time it was signed by the buyers in his presence; he delivered the agreements signed by the vendors, with the interlineations to each of the buyers (p. 41) without calling the attention of any of the purchasers to the interlineation until several months later (p. 42) sometime around March or April.

(p. 49) Mr. Stanert, who was associated with the office of John O. Wilson had personal charge of the preparation and execution of the agreements by the vendors. After the agreements were executed by the purchasers they were brought back and he endeavored to secure the signatures of Mrs. Evans and her husband. The signatures were finally obtained after a long delay, and on account of the family difficulty (between Mr. and Mrs. Evans), the insertion was made there to insure that Mrs. Evans would secure the consideration from the property.

WAS THE ALTERATION MADE WITH THE BUYERS' KNOWLEDGE?

On p. 56, Mr. Warner testified that his attention was called to the interlineation on the last page some time after the agreements were executed by the parties, Mr. Bitting having called his attention to a notation that had been made (p. 57) but he did not call the attention of the other men to it. At the time he signed the agreement, neither the notation nor the interlineation appeared on the contract.

(On p. 66) George A. Wonfor testified that at the time the paper was handed to him for signature it was perfectly blank as far as signatures or any additions were concerned. He was the first signer and he did not get back an executed copy until some time afterwards. (p. 67) The words referring to the interlineation did not come to his notice, he did not read it, nor did he see it. (p. 70) At no time before a conference with counsel in preparation for trial, did the interlineation come to his attention.

IS BITTING'S KNOWLEDGE CHARGEABLE TO THE BUYERS?

(p. 43) When Bitting called the buyers' attention to the interlineation he told them that it was not there when he witnessed the signature, but he does not recollect whether he said it to them all or not, but he does recall saying it to Windolph and Warner. He could not state with certainty that he mentioned it to Wonfor and Goldsborough.

There is absolutely nothing in the testimony to disclose the extent and the nature of the authority

conferred on Bitting and by whom it was conferred. Can it be said that because Bitting was the conduit for the transmission of the agreements for the purpose of having them executed by the parties, that he was the agent of the buyers for the purpose of assenting to the alteration? Such a conclusion is untenable. Nowhere does it appear that Bitting was directed to call the buyers' attention to the interlineation.

In order to bind these buyers to the contract which the complainants asked the Court of Chancery to enforce, it would have to be signed by them or their duly authorized agent. The contract which they signed was devoid of any interlineation, whereas the contract submitted to them contained the interlineation referred to and was not re-executed by them or by their duly authorized agent. Without the re-execution of the altered land contract, there can not be a meeting of the minds of the parties to this suit, and in the absence of that confluence there can be no contract.

It is difficult to see how all four buyers could be bound by the knowledge which Bitting had, when complainants prove that only one and possibly two of the buyers were given the information concerning the interlineation months after delivery of the contract. Under such circumstances and in the discretion of the Court below, specific performance of the contract could not be decreed against all the defendants.

> "In order that there may be a ratification of a preceding act or document, all the details of the act and all the terms of the document must be brought home to the attention of the party whose ratification is sought."
>
> *Rabinowitz, et als. v. Rooney, et als.*, 97 N. J. E. 49.

It cannot be said that Bitting was carrying on the business of purchasing the lands for the defendants. If he were, he would have had the authority to sign the original agreement and would have the right, either directly or by imputation, to approve, in writing, the interlineation made by the complainants or their counsel. Although the interlineation was communicated to Bitting, it was without instruction to call the buyers' attention to that interlineation:

> "Such communication is exclusively between the principal and his agent and is simply intended by the principal as a delegation of power or instruction to his agent and the principal gives his agent no authority to deliver his letter to the other principal."
>
> *Potter v. Hollister*, 45 N. J. E. 508;
> *Stengel v. Sergeant*, 74 N. J. E. 20.

There can be no ratification of the altered contract unless it be in writing and signed by the parties to be charged. There is nothing in the testimony to show that Bitting was authorized to act in behalf of the defendants for the purpose of ratifying the alteration. Bitting's knowledge of the alteration could certainly not bind those vendees without whose knowledge and assent the alteration was made.

> "The next contention argued before us is that the Court erred in refusing to charge that knowledge of the borough engineer of the violation of the contract was knowledge of the borough. We consider that this refusal was proper under the facts exhibited in the testimony. The case made by the defendants was that the departure from the provisions of the contract was not only with the knowledge but with the express consent of the engineer, and on the other

> hand, the case of the plaintiff was that this departure was not only without his consent but without his knowledge. In this situation of the proofs, conceding the knowledge of the engineer of the violation of the contract by the contractor, coupled with the former's consent to such violation, such knowledge will not be imputed to the respondent."
>
> *Borough of Deal v. Sieling, et al.,* 102 N. J. L. 585.

The law is built on the premise that the agent's knowledge is not imputed to his principal, and where the agent joins with the other party to defraud his principal, then the principal is regarded as having no knowledge at all. *Vulcan Detinning v. American Can,* 72 N. J. E. 389.

Where the agent is actively engaged in the acquisition of the information while in the employ of or associated with his principal, then the agent's knowledge is imputed to his principal. While "B" was the president of the "A" bank, but in the course of his practice of the legal profession, he drafted and acknowledged the execution of a mortgage to "D." Later the bank took a mortgage on the same premises. The bank's mortgage was declared subject to "D's" mortgage because "B's" knowledge of the execution of the prior mortgage was imputed to the bank. "B" was actively engaged in the acquisition of the information while associated with the bank. *Willard v. Denise,* 50 N. J. E. 482.

In the Vulcan case, "K," complainant's agent, acquired the knowledge of a secret detinning process two years before he became complainant's agent. Consequently, his knowledge was not imputed to his principal.

In the Willard case, two things concurred: (1) the active participation on the part of the agent in acquiring the information and (2) the knowledge was obtained by the agent while he was employed by his principal; while in the Vulcan case only one factor was present, and that was the active participation on the part of "K," the agent, in acquiring the information.

Assuming, without conceding, that Bitting was the agent of the buyers, then, in order to charge them with knowledge of the alteration, appellants will have to show that Bitting actively participated in the making of the alteration. If they succeed in showing that both factors were present, then we must be brought to the irresistible conclusion that Bitting joined with the vendors to defraud his principals by leading them to believe that their offer was accepted by the sellers. As a consequence, the presumption of knowledge by the vendees is destroyed and the law places them in the position of having no knowledge of the alteration at all.

THE EFFECT OF THE ALTERATION ON THE VALIDITY OF THE CONTRACT.

> "To maintain that a party may reform a written instrument by his own act, is, in reality, to convert all contracts into oral contracts; the written instrument would no longer be the depository of the intention of the parties, but either party could make it accord with the remembrance of the by-standers.
>
> "The law prohibits a party from altering a written contract, *ex mero motu,* whatever his design may be, whether good or bad."

Hunt v. Gray, 35 N. J. L. 227.

"The law is settled in this State that if a deed be altered by the party to whom it belongs even though in an immaterial part, such alteration avoids the deed."

Van Anken v. Homeback, 14 N. J. L. 179; *Hunt v. Gray,* 35 N. J. L. 227.

"Even immaterial alterations are fatal as the rule to be efficacious cannot permit a person to tamper in any degree with the written contract of another in his possession."

Jones v. Crawley, N. J. L. 57, page 222.

"And even though it be conceded, as respondent contends, that these words were written in this contract to make it conform to the real agreement of the parties, and was made in good faith, that will not alter or change the rule that the alteration would release the other party thereto."

Ostrander v. Messmer, 223 N. W. 438 (Mo.).

"The interlineation without the knowledge or consent of the lessors after they had signed it, destroyed its binding effect upon them. The question is whether the contract in its altered condition is the contract into which the parties entered. The altered paper is not the contract which the party has made and the courts cannot declare it to be his contract or enforce it as such."

Hall v. Cannory, 220 S. W. 737. 187 Ky. 718.

"It is true that any alteration of a written contract by one party to it will release the other party. According to the rule which formerly prevailed in this State, it did not matter whether the alteration was material or immaterial. But the rule has been modified by the Negotiable Instrument Act."

Highland v. Scales Co., 209 S. W. 895 (Mo.).

"This contract shall be null and void, and the earnest money shall be returned to the purchaser at his option should the wording of this contract be changed in any manner after the contracting parties have signed."

McClure v. Real Estate Co., 268 S. W. 675.

It is doubtful whether this Court can state that an alteration made by one party to a contract after execution by the other party, in order to annul the instrument, must be material. In the first place, one of the parties, Laura L. Evans, has made it clear that the alteration was a material one because she wanted it to be certain that she alone would receive the full consideration from the sale of the property.

If the rule established by the Court of Errors and Appeals of this State will be modified so as to annul contracts which were altered only in a material part, great confusion will result. The rule, as it is established in the State of New Jersey, is definitive and reliable, and to destroy its efficacy would result in much harm. The very fact that the alteration in this instrument was made by the vendors' attorney before execution by the vendees indicated that it was made at the request of the vendors. If delivery to Bitting were accompanied by a direction

from the vendors or their attorney to call the vendees' attention to the alteration, then there might be a possibility that delivery was conditioned upon an acceptance of the alteration made. But in the case of contracts for the sale of land, an acceptance can only be made in writing, and since there was no real acceptance of the contract by the vendees, there was no consent to the alteration made by the vendors, before delivery of the contracts to the vendees.

We submit that the decision of the Court below be affirmed for the reason that no action can be brought upon a contract for the sale of lands unless it be in writing and signed by the parties to be charged or their duly authorized agent.

Respectfully submitted,
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PHILIP WENDKOS,
Of Counsel.