

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

WALTER S. ENTRIKIN,

Complainant-Appellant,

and

SABINE W. WISTER,

Defendant-Respondent.

ON APPEAL FROM
CHANCERY

BRIEF FOR APPELLANT

On a vendee's bill for the specific performance of a contract to convey real estate there was a decree dismissing the bill. That decree is here on appeal for review, the contention being here that the learned Vice Chancellor, who heard the cause in the Court below, reached an erroneous conclusion upon the facts there presented which justified a decree for the complainant. On the final hearing the complainant's right to relief was based on one or the other of two contracts—one made with complainant by the vendor-respondent herself by a series of letters, one signed by her and other letters signed by others, all relating to the transaction and duly connected by reference and all authorized, adopted and acted upon by her, and the other claimed to be a contract subsequent to the letters, and signed in her name by her agent, Mr. Needles, a real estate broker, in whose hand she had placed the property for sale, and who negotiated the sale to the vendee-appellant.

The negotiations were conducted by the agent with the vendee in person, and with the vendor by correspondence, and finally resulted in an unqualified acceptance of an offer to purchase at a stated price, and upon terms fully disclosed in the correspondence.

Mr. Needles had conducted a real estate business in Cape May City for several years prior to this transaction and had on his books for sale the property in question. He had had the property for sale about four years, it having been placed in his hand by the respondent personally with instructions to sell the property at a price that would net her \$50,000.00, but had been unable to secure a purchaser at the price fixed until he received an offer from the appellant, one Entrikin, to purchase the property for \$40,000.00, which offer resulted in the series of letters, which, taken together, constitute the negotiations and the signed agreement, a memorandum thereupon, upon which appellant rests his right to relief.

The correspondence begins with a letter dated August 3, 1925, in which Mr. Needles writes to Mrs. Anna W. Meirs (daughter of respondent), who resided in Philadelphia, Pennsylvania (*C1: Case, p. 12, line 30*):

"I am submitting an offer of \$40,000.00 for the entire Wister property, including the two cottages and riparian rights, on the following terms;—one third cash and the balance to remain on mortgage for five years at six per cent. Will you kindly submit this offer to Mrs. Wister and advise me."

On August 4, 1925, Mrs. Meirs replied (*C2: Case, p. 13, line 4*):

"I have shown my mother (Mrs. Jones Wister) your letter in reference to the sale of her Cape May property, —She wishes me to state that at the present time she is not willing to accept the \$40,000.00 offer, but if your customer is willing to raise it five or six thousand dollars more, she might be persuaded to give it favorable consideration."

On August 11, 1925, Mr. Needles again wrote Mrs. Meirs (*C3: Case, p. 13*):

"My client has made me another offer for your

mother's property—which I wish you would submit to her and let me hear from you—It is \$42,500.00 on the following terms: \$12,500.00 cash and the balance on a mortgage for five years at six per cent., payable semi-annually.”

That letter brought from Mrs. Meirs in reply a letter dated August 13, 1925, in which she said (*C4: Case, p. 13, line 29*):

“My mother, Mrs. Jones Wister, wishes me to advise you that she is *not willing* to let her property at Cape May be sold for \$42,500.00, *unless she receives \$20,000.00* in cash, and the balance on a mortgage for five years, at six per cent., payable semi-annually.—You can send your answer to my mother—as I am leaving the City.”

10

On the following day, August 14, 1925, Mr. Needles wrote to Mrs. Jones Wister as follows (*C5: Case, p. 14, line 5*):

“I received a letter from your daughter, Mrs. Meirs, which stated that you would sell your entire property at Cape May for the sum of \$42,500.00 on the following terms: \$20,000.00 cash and the balance to remain on mortgage for five years, with interest at six per cent., payable semi-annually, with the privilege of paying off said mortgage at any interest-bearing period. *This price and terms are agreeable to my client.*”

20

In this letter Mr. Needles further says:

“I would like very much to prepare the *agreements of sale* making the first payment \$2,000.00 and the balance of \$18,000.00 to be paid on or before sixty or ninety days, whichever is agreeable to you, and the other balance to remain on mortgage.

30

P. S. My charge for selling is five per cent.”

Under date of August 17, 1925, Mr. Thomas Stokes, Mrs. Wister's Philadelphia attorney, wrote a letter to Mr. Needles in which he said (*C6: Case, p. 14, line 35*):

10 “Mrs. Jones Wister informs me that *she has sold her Cape May properties for \$42,500.00, of which \$2,000.00 is to be payable in cash and the balance on a six per cent. mortgage. Mrs. Wister has requested me to write to you and if you have prepared the agreement of sale will you send me two copies. Please arrange to have \$1,000.00 paid on account.*”

The following letter, signed by Mrs. Wister, was received by Mr. Needles (*C7: Case, p. 15, line 8*):

 “I got the Cape May deeds today from my deposit box and will give them to Mr. Thomas Stokes—he will *communicate with you.*”

On August 18, 1925, Mr. Needles wrote Mr. Stokes acknowledging the receipt of his letter of August 17th and saying in reply (*C8: Case, p. 15, line 17*):

20 “Am enclosing you agreement of sale properly executed by Mr. Entrikin for the Wister property, also check for \$1,000.00, being on account of purchase price.”

On the same date Mr. Stokes wrote Mr. Needles (*C9: Case, p. 15, line 35*):

 “Mrs. Wister informs me that \$2,000.00 is to be paid at the execution of the agreement.”

To which Mr. Needles replied by letter dated August 19, 1925, referring to Mr. Stokes' letter of August 18th, saying (*C10: Case, p. 16, line 6*):

30 “Am enclosing my extra check for \$1,000.00 to be applied to the purchase price for Mrs. Jones Wister's

property, this City. I would have sent you this check in the first place, but your letter called for \$1,000.00 instead of \$2,000.00."

This was acknowledged by letter of Stokes to Needles under date of August 20, 1925, saying (*C11: Case, p. 16, line 20*):

"Yours of the 19th enclosing additional check for \$1,000.00 to Mrs. Wister received. I expect to see Mrs. Wister this evening."

Mrs. Wister's signed letter under date of August 18th to her agent, Needles, together with the letter of her attorney, Mr. Stokes, dated August 17th, to her agent, and by him communicated to Entrikin, the purchaser, was an unqualified acceptance of the previous offer of the latter to purchase the property at a stated price on definite terms. That signed letter of Mrs. Wister, in connection with the other correspondence, constitutes a memorandum of the contract signed by the party to be charged sufficient to satisfy the statute of fraud. 10

Though no formal contract was stipulated for or discussed during the negotiations, Needles, the agent, fulfilled his duty to his principal by procuring from Entrikin, the purchaser, his signature to a binding contract, thus supplying the element of mutuality. The receipt of August 18, 1925, for \$1,000.00 of the purchase money and the supplemental receipt of August 19, 1925, for an additional \$1,000.00 signed by Needles for Mrs. Wister, were the necessary result of his previous instructions by letter from Mr. Stokes and implied in his authority as her real estate agent. They contained no new terms, they merely restated the terms already settled. 20 30

Touching the letters themselves, Mrs. Meirs, the daughter, testified that her mother, Mrs. Wister, knew she was writing to Mr. Needles, and further said:

"She told me to write a letter as she would speak to

a secretary. I had no authority, I simply quoted her words, that was all." (*Case, p. 36, line 3.*)

Mrs. Wister testified that she authorized her daughter to write the letters to Mr. Needles, and told her what to write. She further testified that Mr. Stokes was her attorney, and had entire charge of her affairs, and that she "turned the whole matter over to him." (*Case, pp. 36, 37.*)

10 Mr. Stokes testified that Mrs. Wister wrote him informing him of the transaction and of the terms and was asked to produce the letter, but the Court sustained an objection to its production, holding it to be a privileged communication of client to attorney, although the client seemed willing to waive the privilege and so stated. (*Case, p. 40, line 5, et. seq.*)

20 There was, it seems, no specific authority conferred on the real estate broker to sign a contract for the sale of land binding his principal, and it does not appear in the case that the signing of the receipt of August 18, 1925, setting forth the terms of the bargain, was ever brought to her knowledge, but she had, at that time, as she says, turned over the whole matter to Mr. Stokes, whose instructions were:

"Please arrange to have \$1,000.00 paid on account."

That \$1,000.00 was to be obtained from the purchaser, Entrikin, who naturally was entitled to acquire and have something setting forth the purpose for which the same was being paid to the agent. From the circumstances, therefore, it may be reasonably inferred that though originally without authority to bind his principal his unauthorized act was ratified. *Sproul vs. Lloyd, N. J. L. 96, 317.*

30 In *Johnson vs. Buck, 35 N. J. L. 338, 344*, it was held that it is not essential that the whole bargain be contained in one memorandum. It will be sufficient to satisfy the statute of frauds if the terms can be gathered from two or more detached papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former.

In *Charlton vs. Columbia Real Estate Co.*, 67 N. J. L. Eq. 629, this Court said:

“It is not necessary that all the terms of the contract be agreed to at one time, nor written down at one time nor on one piece of paper. If all the papers, taken together, contain the whole bargain, they form such a memorandum as will satisfy this statute. Nor does it signify to whom the memorandum is addressed. It may be to a third person, and yet be a good writing to satisfy the statute of fraud. Form is not important. The reason for this is clear. The memorandum is only necessary to evidence the contract, not to constitute it. The contract is made before any signature thereof by the parties. The memorandum or note thereof is only evidence of what the contract was. When the memorandum exists, and is legally given in testimony, it becomes evidence of the contract claimed to have been made. The memorandum is not the contract but only evidence of the contract.”

10

In the cited case it was held (reversing the Court of Chancery) that a signed but undelivered lease might be resorted to as evidence of the details of a lease pursuant to the terms of a previously signed memorandum in writing of an oral agreement for a lease, to show a completed agreement upon the terms of the lease.

20

The case shows that at no time while the negotiations were pending was a formal written agreement stipulated for, discussed or even mentioned. The minds of the parties met on the terms of the bargain without reference to any writing. The decisions in this Court hold that where on cases within the statute of fraud the negotiations have been conducted in writing, if there has been a final agreement between the parties, the terms of which are evidenced in a manner to satisfy the statute, the agreement will be binding although the parties may have contemplated the preparation and signing of a more formal written agreement.

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Wharton vs. Stoutenburgh, 35 N. J. L. Eq. 266.

McCulloch vs. Lake & Risley Co., 91 N. J. L. 381.

Karflage vs. Kahrs, 94 N. J. L. Eq. 443.

Mente & Co. vs. Heller, 123 Atl. Rep. 755.

Respectfully submitted the appellant was entitled to specific performance of his contract by respondent; that the decree made in the Court below is erroneous and should be reversed.

HERBERT R. VOORHEES,

Solicitor of Appellant.

U. G. STYRON,

Of Counsel.

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NEW JERSEY

Court of Errors and Appeals.

10

BETWEEN :

WALTER S. ENTRIKIN,
Complainant-Appellant,

and

SABINE W. WISTER,
Defendant-Respondent.

} On Appeal from
Chancery.

PETITION OF APPEAL.

20

(Filed Feb. 1, 1926.)

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

The petition of Walter S. Entrikin respectfully shows that your petitioner finds himself aggrieved by a final decree made by the Court of Chancery, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the 31st day of December, A. D. nineteen hundred and twenty-five, in that the said decree recites and adjudges that your petitioner is not entitled to the relief prayed for in his bill of complaint, and doth decree that your petitioner's said complaint be dismissed, and your petitioner appeals from the said decree and from every part thereof on the ground that the same is erroneous and that the decree should have found and adjudged the several allegations of your petitioner's complaint to have been proved, and should have ordered, adjudged and decreed that your petitioner was entitled to have a decree directing the defendant to convey to it

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the lands and premises described in complainant's bill, in accordance with the prayer thereof.

Your petitioner, therefore, prays that the said decree may be reversed and for nothing holden and that your petitioner may have such further relief as shall be meet.

HERBERT R. VOORHEES,
Solicitor for Petitioner.

U. G. STYRON,
Of Counsel.

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IN CHANCERY OF NEW JERSEY.

BETWEEN:

WALTER S. ENTRIKIN,
Complainant,

and

SABINE W. WISTER,
Defendant.

On Bill, etc.

20

NOTICE OF APPEAL.

(Filed Feb. 1, 1926.)

Walter S. Entrikin, the above-named complainant, hereby appeals from the decree, entered in the above-entitled cause on the 31st day of December, 1925, dismissing the complaint herein, and from every part thereof to the Court of Errors and Appeals in the last resort in all causes.

Dated: January 27, 1926.

30

HERBERT R. VOORHEES,
Solicitor of Complainant.

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

U. G. STYRON,
Of Counsel.

Service of within notice is hereby acknowledged this 1st day of February, 1926.

EDWARD L. KATZENBACH,
Att'y for Def't-Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN

WALTER S. ENTRIKIN,
*Complainant-Appellant,**and*SABINE W. WISTER,
Defendant-Respondent.} On Appeal from
} Chancery.

10

ANSWER TO PETITION OF APPEAL.

(Filed February 1, 1926.)

The answer of the respondent, Sabine W. Wister, to the petition of appeal of the above-named appellant says:

This respondent, not acknowledging all or any of the matters which, in the said petition of appeal, are contained, to be true, for answer thereto, nevertheless, says and admits that a decree was, on the 31st day of December, 1925, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated. As to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the decree is agreeable to equity and she prays that the same may be affirmed in these presents, with costs to be adjudged to the respondent.

20

EDWARD L. KATZENBACH,
Solicitor for and of counsel with
Defendant-Respondent.

30

IN CHANCERY OF NEW JERSEY.

BILL OF COMPLAINT.

(Filed Sept. 10, 1925.)

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

The complainant, Walter S. Entrikin, of Cape May
10 City, in the County of Cape May and State of New
Jersey, respectfully shows:

1. That on August 18, 1925, Sabine W. Wister was
the owner in fee simple of all that certain lot or parcel
of land and premises, situate in the City and County
of Cape May, in the State of New Jersey, aforesaid,
described according to a survey thereof made June 27,
1881, as follows:

20 Situate at the northwesterly corner of Beach
Avenue and Ocean Street. Containing in front
or breadth on said Beach Avenue, one hundred
and fifty feet, and extending of that width in
length or depth northwestwardly between lines
parallel with said Ocean Street and in the north-
easterly line thereof one hundred and fifty-seven
and three-tenths feet, and in the southwesterly
line thereof ninety-two and six-tenths feet to
ground of William Marks, upon which it has a
width of one hundred and thirty-six feet.
30 Bounded southwestwardly by ground now or
late of Victor Denizot, northwestwardly by
ground now or late of William Marks, north-
eastwardly by said Ocean Street, and southeast-
wardly by Beach Avenue aforesaid. Also all
that parcel of land flowed by tidewater lying
in front thereof as described in Riparian Grant
by the State of New Jersey to William Weight-
man, Jr., bearing date December 3, 1881, and
duly recorded.

2. On said date said Sabine W. Wister, being the owner of said land as aforesaid, and minded to sell the same, and complainant being minded to become the purchaser thereof an agreement in writing was made between complainant and said Sabine W. Wister, acting by one Sol Needles, her duly authorized agent, and whose act she thereafter ratified, whereby she agreed to sell and convey to complainant and complainant agreed to purchase the above-described land for the price or sum of forty-two thousand five hundred (\$42, 10 500) dollars, which sum it was agreed should be paid and satisfied in the following manner: \$2,000 thereof at the time of the signing of said writing, \$18,000 thereof on the day of settlement, to be made within 60 days from the date of said writing and \$22,500, the balance of said purchase money to be secured by mortgage on said property, payable at the expiration of 5 years from the date of settlement, with interest thereon payable at the rate of 6 per cent per annum. A copy of said writing is hereto annexed. 20

3. That complainant upon the signing of said writing paid in accordance with the terms of said agreement the sum of \$2,000 on account of said purchase money, and is able, willing and ready and anxious to perform all of the terms of said agreement on his part to be performed, and hereby waives the benefit of the credit of \$22,500 by way of mortgage, as provided in said writing and offers to pay the same in cash at the time of settlement.

4. That on August 29, 1925, said Sabine W. Wister 30 notified complainant that she would refuse to perform said agreement on her part or further proceed therein, and she still refuses so to do, claiming that the price for said property, for which she agreed to sell the same to complainant, is inadequate and insufficient, and has wholly repudiated said agreement and denies the obligation thereof.

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

1. That Sabine W. Wister, who is the defendant in this suit, may answer this bill of complaint without oath and each statement therein made.

2. That said defendant be decreed to specifically perform said agreement and convey said property to complainant by a sufficient deed of conveyance upon complainant paying in cash the full consideration thereof.

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

HERBERT R. VOORHEES,
Solicitor for Complainant.
U. G. STYRON,
Of counsel with Complainant.

SOL NEEDLES

20

REAL ESTATE AND INSURANCE

508 WASHINGTON STREET

CAPE MAY, N. J.

August 18th, 1925

Received of Walter Entriken, one thousand dollars (\$1,000.00) on account purchase price of Wister property located northwest corner Beach Avenue and Ocean Street, Cape May City, New Jersey, including riparian rights of 183 feet parallel with Beach Avenue, purchase
30 price is forty-two thousand five hundred dollars (\$42,500.00). One thousand dollars (\$1,000.00) to be paid within sixty days, nineteen thousand dollars (\$19,000.00) in cash on day of settlement and twenty-two thousand five hundred dollars (\$22,500.00) to remain on mortgage for five years at 6 per cent interest. Settlement within sixty days (60) at my office.

SABINA WISTER
by SOL NEEDLES,
Agent.

August 19th, 1925

Received of Walter Entriken, the second one thousand dollars (\$1,000.00) referred to above, leaving balance of eighteen thousand (\$18,000.00) to be paid in cash at settlement.

SABINA WISTER
by SOL NEEDLES,
Agent.

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IN CHANCERY OF NEW JERSEY.

BETWEEN

WALTER S. ENTRIKEN,
Complainant,

and

SABINE W. WISTER,
Defendant.

On Bill, Etc.

20

ANSWER AND ANSWER IN LIEU
OF PLEA.

(Filed Sept. 30, 1925.)

The Answer and Answer in Lieu of Plea of the defendant, Sabine W. Wister.

The defendant herein, Sabine W. Wister, answering the Bill of Complaint herein, says that:

30

1. Paragraph one is admitted.

2. Defendant admits she was the owner of the land described in the Bill of Complaint herein, but denies all other statements and allegations contained in paragraph two of said Bill of Complaint.

3. The defendant denies that the sum of two thousand dollars (\$2,000.00), or any other sum, was paid to her by complainant on account of the purchase price under the terms of an agreement, and defendant par-

ticularly denies making or authorizing anyone in her behalf to make any agreement with complainant. Defendant has no knowledge or information sufficient to form a belief as to the remaining statements and allegations contained in paragraph three of the Bill of Complaint.

4. Paragraph four is denied.

This defendant, by way of answer in lieu of plea, says that:

10 1. No contract or agreement for the sale of the lands, tenements and hereditaments in said Bill of Complaint described or any interest in or concerning them, or any memorandum or note thereof, was in writing signed by the defendant, or by any person thereunto by her lawfully authorized.

20 2. Sol Needles, the person stated in the Bill of Complaint to have been the agent of defendant, was not her agent to make a sale of the premises in said Bill of Complaint described, or to make and sign a written contract or agreement or memorandum or note thereof in writing in behalf of said defendant, the said Sol Needles never having been authorized by defendant to make or sign a written contract or agreement or memorandum or note in behalf of defendant.

30 3. Defendant has no knowledge or information as to the said Sol Needles having in her behalf made or signed a written contract or agreement or memorandum or note for the sale of the premises in said Bill of Complaint described, and defendant says that if said Sol Needles has signed the alleged agreement, contract, note or memorandum, a copy of which is annexed to the Bill of Complaint, same was done without the authority of defendant, and that said unauthorized act on the part of the said Sol Needles has never been ratified by her.

EDWARD L. KATZENBACH,
Solicitor of Defendant.

Formal replication filed by Complainant.

IN CHANCERY OF NEW JERSEY.

BETWEEN

WALTER S. ENTRIKIN,
Complainant,

and

SABINE W. WISTER,
Defendant.} On Bill, &c.
} Final Hearing.

Atlantic City, N. J., December 8, 1925.

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TESTIMONY.

Before Hon. R. H. Ingersoll, Vice-Chancellor.

Appearances—For the Complainant, Herbert R. Voorhees, Esq., and U. G. Styron, Esq. For the Defendant, Edward L. Katzenbach, Esq., and Thomas Stokes, Esq.

Mr. Styron—Mr. Attorney-General, have you certain original letters? Letter dated August 3d, 1925, addressed to Mrs. R. W. Mears, 2400 Locust Street, Philadelphia. 20

Mr. Katzenbach—Mr. Styron, this is the letter. We are, of course, entirely agreeable that that letter should be offered. It contains on the bottom of it a copy of an answer which undoubtedly you have. We will just strike this out. The Vice-Chancellor will understand. I will draw a pencil mark through it.

The Court—That is not a part of the exhibit, the part that is now being stricken out? 30

Mr. Katzenbach—It would make no difference because you have it in another form anyhow, but it will be stricken out and then this exhibit will be marked, I suppose, *Exhibit 1* on the part of the complainant?

Mr. Styron—I will get them in chronological order. A letter dated August 11, 1925, addressed to Mrs. R. W. Mears, 2400 Locust Street, Philadelphia?

Mr. Katzenbach—This letter also contains a copy of the answer on the back which I will strike out, only just the letter itself.

Mr. Styron—Nothing is to be offered save the letter. A letter dated August 18, 1925, addressed to Mr. Thomas Stokes, Land Title Building, Philadelphia?

Mr. Katzenbach—Mr. Styron, I don't mean to interfere with the method of presentation, perfectly agreeable to produce that letter of August 18th. As a matter
10 of fact, however, there was one of August 14th which preceded that. I don't know whether you want that or not.

Mr. Styron—Let me see if I have that.

Mr. Katzenbach—I think we may quite as well put these letters in order.

Mr. Styron—I want to do that, put them in chronologically.

Mr. Katzenbach—That is the only reason I mentioned to you there was a letter of August 14th.

Mr. Styron—If you will let me have that I won't use
20 a copy.

Mr. Katzenbach—You want the letter of August 14th addressed to Mrs. Wister, then the letter of August 18th, which is addressed to Mr. Stokes?

Mr. Styron—August 18th addressed to Mr. Stokes.

Mr. Katzenbach—You have that.

Mr. Styron—August 19th, addressed to Mr. Stokes.
(Letter produced.)

Mr. Styron—You may have the originals of these
30 when you want them.

Mr. Katzenbach—I was going to say what I thought was this that undoubtedly each have copies of these letters, if we had all the letters arranged in order as they came and let his Honor have the original exhibits, duly marked on behalf of both, we would all be supplied with copies of the matters in the record.

Letters offered and admitted in evidence and marked as follows:

Letter of August 3d, Needles to Mrs. Mears. *Exhibit C 1.*

Letter of August 4th, Mrs. Mears to Needles. *Exhibit C 2.*

Letter of August 11th, Needles to Mrs. Mears. *Exhibit C 3.*

Letter of August 13th, Mrs. Mears to Mr. Needles. *Exhibit C 4.*

Letter August 14th, Needles to Mrs. Wister. *Exhibit C 5.*

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Letter August 17th, Stokes to Needles. *Exhibit C 6.*

Letter August 18th, Mrs. Wister to Needles. *Exhibit C 7.*

Letter August 18th, Needles to Stokes. *Exhibit C 8.*

Letter August 18th, Stokes to Needles. *Exhibit C 9.*

Letter Needles to Stokes, August 19th. *Exhibit C 10*

Letter Stokes to Needles, August 20th. *Exhibit C 11.*

Receipt. *Exhibit C 12.*

Mr. Katzenbach—You are going to include in each of those letters the papers that went with it that were included, enclosed in the letters? **20**

Mr. Styron—Yes.

Mr. Katzenbach—Going to put them right in, is that the idea?

Mr. Styron—Yes.

Mr. Katzenbach—Going to have separate exhibit numbers?

Mr. Styron—There may be some objection to those.

Mr. Katzenbach—There is no objection to the correspondence. **30**

Mr. Styron—The next one is under date of August 21st, Stokes to Needles. *Exhibit C 13.*

Letter under date of August 24th, Stokes to Needles. *Exhibit C 14.*

Mr. Katzenbach—You have got a letter of August twenty-second, Needles to Stokes, which goes before that.

Mr. Styron—I don't know that. Have you such a letter?

(Letter produced.)

Mr. Styron—That would be 14.

Mr. Katzenbach—That would be August 22d, Needles to Stokes.

Mr. Styron—Lets make that 13½.

The Court—That would only be one to change, August 24th, we better make that 15, that would be
10 the only change, August 22, *Exhibit 14* and August 24th, *Exhibit 15*, Stokes to Needles.

(*Exhibit C 14* changed to *Exhibit C 15* and letter of August 22d marked *Exhibit C 14*.)

Mr. Styron—Mr. Attorney-General, is there any objection to this correspondence being read into the record?

Mr. Katzenbach—No, I don't see any objection to the correspondence being read into the record. If His Honor will follow your reading so as to see at each
20 stage just what, if any, offer was made and just what, if any, acceptance was made in the terms of the offer, it may save subsequent discussion.

Mr. Styron—I rather think it might be helpful to the Court to follow this.

The Court—Proceed.

Mr. Styron—Letter under date of August third, 1925, as follows:

“Mrs. R. W. Mears,
2040 Locust Street, Philadelphia, Pa.

30 Dear Mrs. Mears:

As per our conversation the other day, I am submitting an offer of forty thousand dollars for the entire Wister property, including the two cottages and riparian rights, on the following terms: one third cash and the balance to remain on mortgage for five years at six per cent. Will you kindly submit this offer to Mrs. Wister and advise me as soon as possible. Very truly yours,
Sol Needles.” C 1.

Letter addressed to Mr. Sol Needles, 508 Washington Street, Cape May City, New Jersey:

"Dear Mr. Needles.

I have shown my mother, Mrs. Jones Wister, your letter in reference to the sale of her Cape May property located at the corner of Ocean and Beach avenues, including two cottages and riparian rights, and she wishes me to state that at the present time she is not willing to accept the \$40,000 offer, but if your customer is willing to raise it five or six thousand dollars more she might be persuaded to give it favorable consideration. Very truly yours, Ann W. Mears (Mrs. R. W.) August 4, 1925." C 2. 10

Letter dated August 11, 1925, addressed:

"Mrs. R. W. Mears,

2048 Locust Street, Philadelphia, Pa.

"Dear Mrs. Mears:

My client has made me another offer for your mother's property, including the two cottages and riparian rights, which I wish you would submit to her and let me hear from you as soon as possible. It is \$42,500 on the following terms, \$12,500 cash and the balance on mortgage for five years at six per cent payable semi-annually. Awaiting her reply, I am Very truly yours, Sol Needles." C 3. 20

Letter addressed to Mr. Sol Needles, 508 Washington Street, Cape May, N. J.:

"My Dear Mr. Needles:

My mother (Mrs. Jones Wister) wishes me to advise you that she is not willing to let the property at Cape May be sold for \$42,500 unless she receives \$20,000 in cash, the balance on mortgage for five years at six per cent payable semi-annually. My mother would leave the cottages fully furnished, but reserves the right to remove certain family pieces that cannot be parted with and do not belong there. You can send your answer to my mother at 1819 Walnut Street, Philadelphia, as I am leaving the city on Saturday. Yours very truly, Ann W. Mears (Mrs. R. W.), August 13, '25." C 4. 30

Letter under date of August 14, 1925, addressed:

"Mrs. Jones Wister, Lankenau Hospital, Girard Avenue and Corinthian Streets, Philadelphia, Pa.

Dear Mrs. Wister:

I received a letter from your daughter, Mrs. Mears, which stated that you would sell your entire property at Cape May, including the contents with the exception of some few personal belongings, for the sum of \$42,500, on the following terms: \$20,000 cash and the balance
10 to remain on mortgage for five years with interest at six per cent payable semi-annually, with the privilege of paying off said mortgage at any interest bearing period. This price and terms are agreeable to my client. Thinking that you were at your home I called your daughter on the phone and she advised me that you were still in the hospital, which I was very sorry to hear, and advised me to write you there. I would like very much to prepare the agreements of sale making the first payment two thousand dollars and the balance of \$18,000 to be paid
20 on or before sixty or ninety days, whichever is agreeable to you, and the other balance to remain on mortgage. Would it be possible for you to see me some time this week, having your attorney to meet me so that we can close the deal? Any day that is convenient for you will be perfectly all right for me. Kindly advise me as soon as possible. With regards I am, Very truly yours, Sol Needles. P. S. My charge for selling is five per cent." C 5.

Letter dated August 17, 1925, re Mrs. Jones Wister
30 Cape May property:

"Mr. Sol Needles,
Cape May, N. J.

Dear Sir:

Mrs. Jones Wister informs me that she has sold her Cape May properties for \$42,500 of which two thousand is to be payable in cash and the balance on a six per cent mortgage. Mrs. Wister has requested me to write you and if you have prepared the agreement of sale will you send me two copies? Please arrange to have one

thousand paid on account. If the agreement of sale has not been prepared, give me the name of the purchaser and other details and I will prepare it. Yours very truly, Thomas Stokes." C 6.

Letter as follows:

"Chestnut Hill, c/o W. A. Fuller, Esq.,

Dear Mr. Needles:

I got the Cape May deeds today from my deposit box and will give them to Mr. Thomas Stokes care of George Wharton Pepper, 2221 Land Title Building, and he will communicate with you. Sincerely, Sabine W. Wister, August 18, 1925." C 7. 10

Letter under date of August 18, 1925:

"Mr. Thomas Stokes, 2221 Land Title Building, Philadelphia, Pa.:

Dear Sir:

I have your letter of August 17th, and I am herewith enclosing you agreement of sale properly executed by Mr. Entrikin, for the Wister property, Beach avenue, this city, and also check for one thousand dollars being on account of purchase price. If this agreement meets with your approval and the approval of Mrs. Wister, will you kindly have her sign both copies and return to me. You will again find enclosed an authorization of sale which you will have Mrs. Wister sign and return one to me. Will you kindly send me the deed to the property so that I can have a search started. 20

Hoping to be favored with an early reply, I am, Yours very truly, Sol Needles." C 8.

Letter dated August 18, 1925, Re Mrs. Jones Wister Property: 30

"Mr. Sol Needles, Real Estate Agent,

Cape May, N. J.

Dear Sir:

Mrs. Wister informs me that two thousand dollars is to be paid at the execution of the agreement. Yours very truly, Thomas Stokes." C 9.

Letter dated August 19, 1925:
"Mr. Thomas Stokes,
2231-42 Land Title Building,
Philadelphia, Pa.

Dear Sir:

I have your letter August eighteenth, and in reply to same am enclosing you extra check one thousand dollars to be applied on the purchase price for Mrs. Jones Wister's property, this city. I would have sent
10 you this check in the first place but your letter called for one thousand dollars instead of two thousand dollars. Will you kindly change the agreement of sale and have Mrs. Wister sign and return one to me. Very truly yours, Sol Needles." *C 10.*

Letter under date of August 20, 1925. "Re Mrs. Jones Wister Cape May property:

"Mr. Sol Needles,
Cape May, N. J.

Dear Sir:

20 Yours of the 19th enclosing additional check for one thousand dollars to Mrs. Wister received. I expect to see Mrs. Wister this evening. Yours very truly, Thomas Stokes." *C 11.*

Under date of August 21, 1925. "Re Mrs. Jones Wister Cape May property:

"Mr. Sol Needles,
Cape May, N. J.

Dear Mr. Needles:

30 Pursuant to our telephone conversation, I am returning herewith the agreement of sale and your two checks for one thousand dollars each to the order of Mrs. Jones Wister. I am also returning the paper authorizing you to sell the property for \$42,500 on a five per cent commission. Mrs. Wister is unwilling to sell at this figure. Yours very truly, Thomas Stokes." *C 12.*

Letter under date of August 22, 1925:
 "Mr. Thomas Stokes,
 2231-42 Land Title Building,
 Philadelphia, Pa.

Dear Mr. Stokes:

I am returning to you the agreement of sale and authorization along with the checks, two, amounting to two thousand dollars for the initial payment for the Wister property this city. Will you kindly have same signed and return to me not later than Wednesday, August the 26th, 1925. Very truly yours, Sol. Needles." C 13. 10

Under date of August 24, 1925. "Re Mrs. Jones Wister Cape May property:

"Mr. Sol Needles,
 508 Washington Street.
 Cape May, N. J.

Dear Mr. Needles:

I have your letter of August 22nd enclosing papers and two checks for two thousand dollars, all of which I am returning herewith. I shall probably come down to Cape May on Thursday. Yours very truly, Thomas Stokes." C 14. 20

Mr. Katzenbach—I would have no objection except relevancy. Go ahead and put them in, because in the Court of Chancery we argue those things for what they are worth.

Mr. Styron—One check number 9660 issued by Sol Needles under date of August 18, 1925, for one thousand dollars to the order of Mrs. Jones Wister and the other check number 9664 under date of August 19, 1925, to the order of Mrs. Jones Wister for one thousand dollars issued by Sol Needles. 30

(Checks admitted and marked *Exhibits C 15* and *16*, respectively.)

Counsel, as I understand, admit on the record these are the checks referred to in the correspondence having been in the possession of Mr. Stokes at one time.

Mr. Katzenbach—They were the checks referred to.

Sol Needles, sworn for the complainant.

Direct examination, by Mr. Styron.

Q. Mr. Needles, are you the Sol Needles whose letters have been just read on the stand?

A. Yes, sir.

Q. Concerned with that correspondence?

A. Yes, sir.

Q. You know Mr. Thomas Stokes, do you?

A. Yes, sir.

10 Q. And have you met Mrs. Mears?

A. No.

Q. Ever have any conversation with her?

A. Over the telephone.

Q. Do you know the property referred to?

A. Yes, sir.

Q. What is your business?

A. Real estate business.

Q. Where?

A. Cape May City, N. J.

20 Q. How long have you been in business?

A. Neighborhood of twenty years.

Q. Do you know this property?

A. Well.

Q. Did you have it in your hands for sale?

A. Yes, sir.

Q. Was it on your books for sale?

A. On my books; yes, sir.

Q. How did it get there?

A. Mrs. Wister gave it to me.

30 Q. Who?

A. Mrs. Wister.

Q. Personally?

A. Personally; yes, sir.

Q. What were her instructions at the time she gave it to you?

A. To sell the property.

Mr. Katzenbach—I feel I have a right here to ask if they are going to be conversations or letters of Mrs. Wister, the exact production of

the letters or the exact conversation, date and place.

The Court—Yes.

Mr. Styron—I am asking, if your Honor please, for the conversation. I think, in view of the fact that we are introducing notes and memorandums of a contract previously made, that the court has a right to know and we have a right to introduce evidence of the surrounding circumstances.

10

The Court—There is no objection to the conversation made at all.

Mr. Styron—But Mrs. Wister is at present in court and the conversation that he purposes to relate, as I understand it, is that had with Mrs. Wister.

The Court—Yes, there is no objection to that.

Mr. Katzenbach—I am not objecting to that, Mr. Styron.

The Court—But the desire is that we shall have the conversation and not his conclusion.

Mr. Katzenbach—The time and place of the conversation and not his general substance of it.

Q. When did you have a conversation with Mrs. Wister relating to this property?

A. I couldn't just say the date.

Q. Was it prior to this?

A. Three or four or five years ago.

Q. What did that conversation relate to?

A. To sell the property.

30

Q. What was said to you by her about selling the property?

A. She told me to sell the property so it would net her fifty thousand dollars.

Q. Is that the price that you had it for sale on your books?

A. At fifty thousand dollars net to her.

Q. Did you have any inquiries from purchasers about the property?

Mr. Katzenbach—That is objected to as irrelevant.

Mr. Stryon—If your Honor please, I want to show this contract is fair, that it is about the value of the property at the time it was made.

10 Mr. Katzenbach—I don't think, sir, that that is a relevant fact anyhow. This bill of complaint is for a specific performance of what is alleged to be a contract. It alleges, if your Honor recalls the pleadings, that on August eighteenth a certain contract was made in which Mr. Needles purports to be the agent of Mrs. Wister. It has nothing to do with the matters of values of property or of previous business transactions which were had between Mrs. Wister and Mr. Needles. I think the matter is irrelevant and immaterial and that is my only ground for objecting. I do not think that it has anything to do with the present case.

20 Mr. Stryon—This court would certainly refuse to enforce the performance of a contract that was unfair as to price.

The Court—If it should develop that is the defense, I will give you an opportunity to present what you believe to be the facts, but at the present time this testimony is inadmissible. There is no pleading to indicate that.

Q. Did you subsequently have a customer for that property?

30 A. Subsequent to the time that I sold the property?

Q. No.

A. Negotiated for the property?

Q. Prior to the time that you sold the property?

A. No, I didn't have anybody.

Mr. Katzenbach—Just one moment. I don't know whether that means anything to the court, but it doesn't to me.

The Court—I take it he means between the time the property was placed in his hands and the

time he had the present customer he had no other client for it.

A. You are right, your Honor.

Mr. Katzenbach—That may be what he means, sir; it isn't exactly what he said.

The Court—I will so consider it.

A. That is the meaning.

Q. You had an inquiry from Mr. Entrikin, didn't you?

A. Yes, sir.

10

Q. Did you communicate his offer, if he made any, to anyone?

A. Did I communicate to anyone his offer?

Q. Yes.

A. Excepting Mrs. Wister.

Q. You told someone that you had an offer, didn't you?

A. Did I tell someone I had an offer?

Q. Yes.

A. Not until I sold the property to Mr. Entrikin, I didn't.

20

Q. Did you tell Mrs. Mears that you had an offer for the property?

A. Yes, I submitted to Mrs. Mears.

Q. Who is Mrs. Mears?

A. Mrs. Mears I understand is Mrs. Wister's daughter.

Q. What was the conversation referred to in *Exhibit 1*? *Exhibit 1* is the letter of August third. The letter says, "As per our conversation of the other day I am submitting an offer"; what was that prior conversation that you had?

30

Mr. Katzenbach—I feel that I ought to object to that as being irrelevant. I didn't object to the introduction to such correspondence as was there, but certainly the response to that letter shows that up to the date of the response there was nothing which could lead to any understanding whatsoever and the conversation is irrelevant

to the matter at issue in the present case, any conversation that he had with Mrs. Mears on and prior to August third.

The Court—Upon what do you base the relevancy, Mr. Styron?

Mr. Styron—Perhaps it isn't except the surrounding circumstances is all.

The Court—Sustain the objection.

Q. Now, Mr. Needles, was forty-two thousand five
10 hundred the entire value of that property?

A. I would consider—

Mr. Katzenbach—Objected to.

The Court—Sustain the objection.

Q. Was there anything said at any time during the negotiations relating to the making or signing of a formal agreement?

Mr. Katzenbach—Well, I object to that question. The correspondence, of course, speaks and relates to the signing of a formal agreement.
20 The question is indefinite as it does not say with whom any conversation was held or when.

The Court—It is a question of course objectionable except as a preliminary question.

Mr. Katzenbach—Was there anything said, sir? One never knows who may have said it. I may have said it. Your Honor may have said it.

The Court—The answer could be yes or no on the present question.

Mr. Styron—If your Honor please, as the matter stands on the record, the whole transaction was carried on by correspondence between two or three persons and to make that at all important, the fact that a form of agreement was referred to in the correspondence, there would have had to have been some negotiations which made the making of the formal agreement an essential element of that contract. Now, I want to know
30 whether anything was left out or whether that is

the complete contract. That is the object of my question.

The Court—I will sustain—

Mr. Katzenbach—The letter which is in evidence, *Exhibit 5*, which Mr. Needles has just acknowledged as one of those which in total he wrote, from Mr. Needles to Mrs. Wister, speaks of a formal written agreement which Mrs. Wister was to sign and requested to sign one. The correspondence shows it. I don't see how we are going to get away from that by the correspondence by verbal testimony. 10

The Court—I will sustain the objection.

Mr. Styron—But, if your Honor please, that is not the contract. The contract was entered into by previous letters. That was a matter that was introduced by Mr. Needles who was the agent. If he was the agent the contract had been concluded before by the letter of Mr. Needles—

The Court—No. 20

Mr. Katzenbach—The contract which is sought to be specifically performed in the pleadings is alleged to have been on the eighteenth and this is a letter which is on the fourteenth.

The Court—And that *Exhibit 5* of August 14th states in general terms the prices and terms agreeable and asks for a commission of five per cent.

Mr. Katzenbach—Even at that, sir, that letter, you will notice before it says “the price is agreeable,” it speaks on the line before that “with the privilege of paying off said mortgage at any interest-bearing period,” which was never contained in anything before that. 30

The Court—I will sustain—

Mr. Styron—If your Honor please, that is an important element in this case and I should like to get my offer on the record.

The Court—All right, you may do so.

10 Mr. Styron—The letter of August eleventh, Needles to Mears, says this: "My client has made me another offer for your mother's property as is which I wish you would submit to her and let me hear from you; it is \$42,500 on the following terms, \$12,500 cash, the balance on mortgage for five years at six per cent, payable semi-annually." This is followed by the letter of August 13th, "My mother, Mrs. Jones Wister, wishes me to advise you that she is not willing to let her property at Cape May be sold for \$42,500 unless she receives \$20,000 in cash and the balance on mortgage for five years at six per cent payable semi-annually. You can send your answer to my mother."

20 The next one is this: "I received a letter from your daughter, Mrs. Mears, which stated that you would sell your entire property at Cape May for the sum of \$42,500 on the following terms: \$20,000 cash and the balance to remain on mortgage five years with interest at six per cent payable semi-annually with the privilege of paying off said mortgage at any interest bearing period. These prices and terms are agreeable to my client."

30 Then in the same letter, finally, after that acceptance that concludes, that is the effect of what the agreement is, practically the agreement, it is the effect of what it is, and then following that he injects on his own account "I would very much like to prepare the agreement of sale." The agreement of sale had never been discussed.

Mr. Katzenbach—Which indicates that there was an agreement of sale to be prepared, an agreement of sale to be executed and I call your Honor's attention again to the fact that if there were any offer that had been made, that is if Mrs. Mears were in position to have made any

offer to Mrs. Wister it was not stated in the terms of that letter, because there was another condition which was injected, namely the privilege of paying off a mortgage at any interest period, which your Honor well knows is sometimes conceived to be an important element in a contract. In fact very frequently in insurance company mortgages which are paid off prior to the time when the principal is due there has to be a bonus paid in order for the privilege of paying them off. That is a new element which was injected, so that up to the present moment there was no contract. I beg your Honor's pardon; I seem to be arguing at the present moment instead of objecting. 10

The Court—I will sustain the objection.

Mr. Styron—If your Honor please, I am offering this on the strength of a decision of the Court of Errors and Appeals, in the case of *Mente* against *Heller*, 123 *Atlantic*. The statement is this: "Where a complete contract between the parties is established by letters and correspondence, such letters and correspondence will constitute their contract without a formal written contract unless it be shown that the parties made it—that is the written contract—an essential part of their negotiations that there should be a final formal written contract." 20

The Court—No question about that. How does that effect the admission or rejection of the present question? 30

Mr. Styron—I think it seems to me I have a right to negative the fact that there ever was anything mentioned at the time of the conclusion of that contract and that is the act of the agent and in turn the act of Mr. Stokes who were the only two that ever referred to it down to the time the proposition was made on one side and

accepted on the other. There had never been any question of signing the agreement.

Mr. Katzenbach—Yes, but I don't feel that my opponent can be serious in saying that there was an offer and acceptance made down to the point when Mr. Stokes talks about Mrs. Wister signing the contract.

The Court—I understand the objection to the present question. I have not changed my views.

10 Q. Did you subsequently have some conversation with Mr. Stokes relative to the reasons for refusing to carry out the arrangement?

A. Yes, sir.

Q. When?

A. Over the telephone.

Q. What reason did he give you?

Mr. Katzenbach—I object to the reason.

The Court—Sustain the objection.

No cross-examination.

20

Thomas Stokes, sworn for complainant.

Direct examination, by Mr. Styron.

Q. Mr. Stokes, you are an attorney-at-law?

A. I am.

Q. In Pennsylvania?

A. Yes, sir.

Q. Do you represent or have you represented Mrs. Wister, the defendant in this suit?

A. I have represented her as an attorney-at-law.

30 Q. Did you have anything to do with the transaction which is now occupying the attention of the court?

Mr. Katzenbach—I object to that question.

(Question withdrawn.)

Q. Did you have any conversation with Mrs. Wister relative to that transaction?

Mr. Katzenbach—I object; confidential communication.

The Court—Sustain the objection.

Q. You wrote—

Mr. Katzenbach—I admit he wrote the letters that have been introduced, if that is what you want.

Mr. Styron—I want more than that.

Q. Under date of August 17, 1925, you wrote a letter to Mr. Needles in which you said that “Mrs. Jones Wister informs me that she has sold her Cape May properties for \$42,000 of which \$2,000 is to be payable in cash and the balance by a six per cent mortgage. Mrs. Wister has requested me to write to you.” Did she tell you that she had sold the property for \$42,000? **10**

Mr. Katzenbach—I object. The letter speaks for itself. We have admitted Mr. Stokes wrote the letter. Any communication between Mrs. Wister and Mr. Stokes we object to on the ground confidential communication between client and attorney.

The Court—Sustain the objection.

Q. Did you have authority from Mrs. Wister to write that letter? **20**

Mr. Katzenbach—Object.

Mr. Styron—I think I have a right to ask that.

The Court—The only difficulty is that by agreement of counsel these letters have been offered and I take it it is assumed that counsel had the authority to so write until it is questioned. If it is questioned I will give you the opportunity to show it.

Mr. Katzenbach—We admit the writing of the letters. **30**

Mr. Styron—Suppose this lady comes on the stand herself—

The Court—You are anticipating the defense. If she does that I will give you the opportunity to go into it. Sustain it at the present time.

Q. Did you—did Mrs. Stokes tell you—

A. I am Mr. Stokes.

Q. —Mrs. Wister tell you that two thousand dollars was to be payable in cash or twenty thousand dollars?

Mr. Katzenbach—Objected to.

The Court—Sustain the objection.

Mr. Styron—If your Honor please, can I develop the truth of this thing? That is an evident mistake on the face of it. Here is the man who wrote the letter and I think I ought to—

10

The Court—Until it is questioned it is assumed to be true. I don't see it is necessary for you at the present time to anticipate that is going to be denied. If it is I have stated to you that you will have opportunity to present whatever evidence you may see fit.

Mr. Styron—If your Honor please, it is plain on its face it is an error in Mr. Stokes' writing it not following the direction of his client in saying \$20,000 in cash instead of two.

Mr. Katzenbach—The letters are to speak for themselves.

20

The Court—I will permit you to cross-examine him if there is an apparent mistake in the paper; I haven't had any suggestion that there was such a thing.

Mr. Styron—If your Honor please, suppose he is not called, then I would be shut out from all benefit of his testimony.

The Court—Not at all. You may now subpoena him if you desire, but to anticipate a defense the Court—

30

Mr. Styron—I am content to let the letters and the question of authority stand as it is. I appreciate the rules of evidence in those particulars, but I wanted to find out whether or not she actually told him two thousand dollars was cash or twenty thousand dollars. That, of course, is an obvious error.

The Court—If it is for that purpose I will permit it, to that extent only.

Mr. Styron—I appreciate the Attorney-General's objection.

Mr. Katzenbach—I ask, if your Honor overrules my objection on that point, may I ask an exception? I don't think as a matter of fact it is particularly or peculiarly material.

The Court—What is there to indicate that there is any error in that letter at all?

Mr. Katzenbach—The previous offer and correspondence.

Mr. Styron—"Please arrange to have one thousand paid on account," then the next letter **10** he says—

The Court—What is the difference?

Mr. Styron—Was evidently referred at first to one thousand paid at the time, which says \$20,000 that was to be paid in cash. May I ask the witness what he meant by that?

The Court—Yes.

Mr. Katzenbach—I am making an objection.

Q. What did you understand—

Mr. Katzenbach—My objection to that would **20** be that the letters speak for themselves.

The Court—Sustain the objection to that question in its form. It is alleged here that there is an apparent error in one of the letters of Mr. Stokes and although I don't say it is an error, I will permit you to have him, if he desires, to explain the error if it is an error.

Q. Calling your attention to this language in your letter of August 17, 1925, to Mr. Needles, which language is: "Mrs. Jones Wister informs me that she has sold her Cape May properties for \$42,500, of which **30** \$2,000 is to be payable in cash and the balance on six per cent mortgage. Mrs. Wister has requested me to write to you." Is there any error in the two-thousand-dollar amount that you have stated in that?

Mr. Katzenbach—This is the point on which your Honor overruled me?

The Court—Yes.

A. I had not seen Mrs. Wister or seen any correspondence up to that time and Mrs. Wister was in the hospital and she wrote me a letter, which I received; upon receipt of that letter, as I read it, it said two thousand dollars.

Q. Have you that letter now?

Mr. Katzenbach—I object to that.

The Court—Sustain that objection.

10 Mr. Styron—Your Honor please, may I have the letter if it is in his possession?

Mr. Katzenbach—I object to that as confidential communication between attorney and client.

The Court—Sustain the objection.

Mr. Styron—She is not claiming the privilege.

Mr. Katzenbach—I am claiming it for her.

Mr. Styron—You can't do that.

Mr. Katzenbach—Does Mrs. Wister have to rise in court herself?

Mr. Styron—Absolutely.

20 The Court—I will permit the Attorney-General to make the claim for his client.

Q. So you wrote that letter then without any knowledge of what the actual terms of the agreement were?

A. Yes.

Q. You had no knowledge at all?

30 A. I had no knowledge except the letter I received from Mrs. Wister. I had no knowledge of any of the terms except stated therein. I found that there was to be paid two thousand paid down; she wrote me a letter to that effect and I consequently wrote to Mr. Needles.

Q. And did the letter that you received from her state the terms of the contract?

Mr. Katzenbach—Object to.

The Court—Sustain the objection.

Q. Was the letter that you received from her signed by her?

Mr. Katzenbach—Objected to.

The Court—Sustain the objection.

Mr. Styron—I am not asking the contents. I am asking whether signed.

The Court—Sustain the objection.

Mr. Katzenbach—Don't matter whether a mere memorandum or whether it was signed it is confidential.

Q. Do you know of your own knowledge how much mortgage Mrs. Wister was to take back?

Mr. Katzenbach—I object. The bill seeks a specific performance of an alleged contract. It is irrelevant to the case as to whether Mr. Stokes knew or didn't know anything about the amounts of mortgages which may have been mentioned in negotiations. 10

The Court—I will sustain the objection.

Q. Did Mrs. Wister ever at any time authorize you to take up the matter with Mr. Needles?

Mr. Katzenbach—Object.

The Court—Sustain the objection.

Q. You did correspond, though, with Mr. Needles on this matter, didn't you? 20

A. I did; the letters are in evidence.

Q. Did you do that without authority?

Mr. Katzenbach—I object.

The Court—Sustain the objection.

Q. Did you know whether or not Mrs. Wister informed Mr. Needles that you would take up the matter with him?

Mr. Katzenbach—I object.

The Court—I will permit the question if he knows. *Exhibit C 7* says "My dear Mr. Needles: I got the Cape May deeds today from my deposit box and will give them to Mr. Thomas Stokes, care of George Wharton Pepper, 2221 Land Title Building, and he will communicate with you." Signed Mrs. Wister. 30

Q. Did you communicate with Mr. Needles?

A. I did. My letter is in evidence.

Q. You wrote the letter and Mr. Needles did communicate with you, didn't he?

A. He wrote me.

Q. And you wrote him the letter of August seventeenth?

A. Just as you read it here.

Q. In which she said that she had sold her Cape May properties?

10 Mr. Katzenbach—Letter speaks for itself. I object.

Mr. Styron—Well, I can—

Mr. Katzenbach—Whatever is in the letter.

Q. In which you said "of which, \$42,500, two thousand is to be payable in cash." You said that, didn't you?

Mr. Katzenbach—I object. The letter speaks for itself. He has admitted writing the letter.

A. I wrote the letter, yes, sir.

20 Q. Now I am asking you whether or not, in view of her instructions to you, you made that statement in your letter on information obtained from her or without any knowledge at all?

Mr. Katzenbach—Well, I object to that. It is the same objection, if there were any communications.

Mr. Styron—If your Honor please, I am doing this on the theory that she employed this method when she directed Mr. Needles to communicate.

30 The Court—I do not understand the purpose of devoting time to this question of two thousand or twenty thousand dollars. Where is it relevant? You don't claim that two thousand was to be the only amount paid and balance mortgage?

Mr. Styron—No.

The Court—From the pleading the other side don't claim that.

Mr. Styron—The theory, if your Honor please, on which I am trying to present this case is that

the agreement had been made with the parties and was evidenced, to satisfy the statute of frauds by the offer and acceptance and the acting of the parties in agreement therewith.

Mr. Katzenbach—May I ask, Mr. Styron, do you specifically abandon any claim that the document appended to the complaint, signed by Mr. Needles under date of August 18th is any part of the contract or alleged contract on which he seeks specific performance?

10

Mr. Styron—I do not abandon it. I most assuredly stick to it and insist that was ratified by the subsequent action of the parties.

The Court—Sustain the objection to the present question.

Q. Did you subsequently learn that your statement that two thousand in cash was to be paid was erroneous?

Mr. Katzenbach—I think the letters speak for themselves as to what Mr. Stokes learned or did not learn and is entirely irrelevant.

20

The Court—I will permit that question.

A. Yes, Mr. Needles enclosed agreements of sales in a letter that he wrote.

Q. I am asking about the two thousand dollar payment. Did you find that your statement in your letter of August 17, 1925, regarding the two thousand dollars was erroneous?

A. I did when I saw the agreements of sale which Mr. Needles had prepared and send on to be approved.

Q. Why did you conclude that your statement was erroneous by viewing the agreements of sale?

30

Mr. Katzenbach—Calls for a conclusion instead of a fact. I would object to it as calling for a conclusion.

The Court—I will permit that question.

A. I saw the agreements of sale were drawn that way and I found that the two thousand was an error, twenty thousand cash.

Q. Did it occur to you that Mr. Needles' statements in the agreements of sale might be erroneous?

A. That didn't occur to me.

Q. And that was the only source from which you learned that the two thousand dollar payment mentioned was erroneous?

A. No; that was the first time I noticed that wasn't the correct amount.

Q. Did you learn from any other source?

10 Mr. Katzenbach—Objected to.

The Court—Sustain the objection.

Q. Under date of August 18, 1925, you wrote to Mr. Needles as follows: "Mrs. Wister informs me that two thousand is to be paid at the execution of the agreement." Is that correct?

A. That is.

Q. She did so inform you?

A. Yes, sir.

Mr. Katzenbach—Letter speaks for itself.

20 No cross-examination.

Mr. Styron—Mr. Attorney-General, do you admit on the record Mrs. Meers had authority to write the letters that she wrote?

Mr. Katzenbach—Mrs. Meers' mother was in the hospital and she just simply passed things on. She had no authority to do anything.

Mr. Styron—Then I will have to call Mrs. Meers.

30

Mrs. Annie Meers, sworn for complainant.

Direct examination, by Mr. Styron.

Q. Mrs. Meers, you are the daughter of Mrs. Wister?

A. I am.

Q. Did you receive a letter from Mr. Needles under date of August 3d, 1925, a letter that I show you?

A. I did.

Q. And did you reply to that letter?

A. I did.

Q. I show you *Exhibit C 2* and ask you if that is the reply which you made?

A. Yes, sir.

Q. This letter states: "I have shown my mother your letter in reference to the sale of Cape May property located corner of Ocean and Beach Avenue." Did you show it to her?

A. Will you tell me the date of that letter?

Q. This is under date of August 4th?

A. Yes.

10

Q. And further says: "She wishes me to state that at present she is not willing to accept the \$40,000 offer, but if your customer is willing to raise it five or six thousand dollars she might be persuaded to give it favorable consideration." She say that to you?

A. Yes. May I make a remark?

Q. No.

The Court—Not just now.

Q. And then you received other correspondence from Mr. Needles following that, did you not?

20

A. Only the ones that have been exhibited.

Q. And later you wrote Mr. Needles in response to some correspondence you received?

A. Yes.

Q. I show you *Exhibit C 4* under date of August 13th and ask you if you wrote that?

A. Yes.

Q. That letter says: "My mother, Mrs. Jones Wister, wishes me to advise you that she is not willing to let her property at Cape May be sold for \$42,000." She told you that, did she?

30

A. Yes.

Q. "—unless she receives \$20,000 in cash and the balance on a mortgage for five years at six per cent payable semiannually." Did she tell you that?

A. Yes.

Q. And authorize you to write that to Mr. Needles?

A. She told me to write a letter as she would speak to a secretary.

Q. And you undoubtedly had her authority when you did that?

A. I had no authority. I simply quoted her words, that is all.

Q. But she knew that you were writing to Mr. Needles about her Cape May property?

A. Yes.

Q. Were you ever present at any interviews she had with Mr. Stokes?

10 A. No.

No cross-examination.

Mr. Styron—Now, Mr. Attorney-General, will you admit on the record that Mrs. Jones Wister authorized Mr. Stokes to write those letters or must I call her?

Mr. Katzenbach—You better call Mrs. Wister.

20 *Mrs. Sabine W. Wister*, sworn for complainant.

Direct examination, by Mr. Styron.

Q. Mrs. Wister, you have heard read some of the letters written by Mrs. Meers your daughter to Mr. Needles?

A. Yes.

Q. You authorized those letters to be written?

A. I beg pardon.

Q. Did you authorize those letters to be written by your daughter?

30 A. Yes, I did.

Q. You told her what to write?

A. Yes.

Q. And Mr. Stokes is your attorney, isn't he?

A. Yes, he has entire charge of my affairs.

Q. And is familiar with all of them?

A. Yes.

Q. And did you confer with Mr. Stokes on the matter of the sale of your Cape May property?

A. Not before Mrs. Meers had that correspondence.

Q. Not before but you conferred with him during the course of the correspondence, did you not?

A. No.

Q. Never?

A. Not until after it was all over.

Q. Don't you remember, Mrs. Wister, that you wrote to Mr. Needles that Mr. Stokes would take care of it for you?

Mr. Katzenbach—We will admit that she did, as far as that goes. I feel that Mrs. Wister should be informed—she may desire or she may not desire to take advantage of it but I feel that she should be informed that the communications which passed between her and her attorney, Mr. Stokes, are confidential if she desires to make them so. 10

The Court—Yes.

Q. You did take the matter up with Mr. Stokes after you had received an offer of \$42,000, did you not, \$20,000 to be cash and the balance on mortgage? 20

A. After Mr. Needles wrote to me.

Q. Then you took it up with Mr. Stokes?

A. Then I turned the whole matter over to him.

Q. And gave him full authority to act for you?

A. No, I said I would take his advice.

Q. So that whatever he did he was authorized to do?

Mr. Katzenbach—I object.

The Court—Sustain the objection.

A. I didn't authorize him to do anything.

The Court—No questions now. 30

Mr. Katzenbach—Mrs. Wister perhaps doesn't hear as well.

Mr. Styron—I want her to hear. I don't want to take any undue advantage.

The Court—I don't think she heard my ruling.

Q. Now do you remember writing to Mr. Needles this letter under date of August 18, 1925: "I got the Cape May deeds today from my deposit box and will

give them to Mr. Thomas Stokes, care of George Whar-
ton Pepper, 2221 Land Title Building, and he will
communicate with you." Now why did you get—

Mr. Katzenbach—We admit that she did.

Q. You wrote that letter to Mr. Needles?

A. Yes.

Q. Why did you write that letter to him?

Mr. Katzenbach—Object as calling for a con-
clusion. Letter speaks for itself.

10 The Court—I will permit it.

A. That is only in answer to his letter, that is all, and
I sent it quick as possible.

Q. At that time did you consider the property sold?

A. No, I did not.

Mr. Katzenbach—I object to that.

A. I couldn't make up my mind to that fact at all.

Q. And you knew that Mr. Needles had been writing
you letters making you offers, didn't you?

A. I knew Mr. Needles had been writing.

20 Q. Didn't you know the offers that he had been
making?

A. What?

Q. Didn't you know the offers that he had been
making?

A. Yes, I knew the offers, but I wasn't satisfied with
them.

Q. He first offered you forty thousand dollars, didn't
he?

A. Yes.

30 Q. And that wasn't satisfactory?

A. Yes.

Q. And you so stated through your daughter?

A. Yes.

Q. And he next offered you \$42,500?

A. Which was also not satisfactory.

Q. Not satisfactory unless you had \$20,000 in cash
and rest on mortgage; that was satisfactory then?

A. Well, I hadn't made up my mind to that either.

Q. Hadn't you told your daughter to write that?

Mr. Katzenbach—I object to that.

The Court—I will permit that.

A. I was sick and I had two nurses, night nurse and day nurse, and this was the first letter I had written after I was sick and I can't remember, can't remember for anything I had to say.

Q. I am not referring to the letter that you wrote; I am referring to the letter that your daughter wrote for you in which she stated your wishes; you knew what she was writing about \$42,000 and \$20,000, didn't you? 10

A. I knew she was writing.

Q. You knew substantially what she said, didn't you?

A. I can't help it; I wasn't satisfied with that price.

Q. Now did you tell Mr. Stokes that you were to get a two thousand dollar deposit instead of one thousand?

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

Q. You don't remember what you told him about it?

A. No.

Q. But whatever you did tell him—whatever he did do or say you stand by, don't you? 20

Mr. Katzenbach—I think that is unfair.

A. All depends.

The Court—I will sustain the objection to that.

Q. You said to Mr. Needles in your letter of August 18th, "He (referring to Mr. Stokes) will communicate with you." Did you give him any specific instructions?

A. I have no communication with Mr. Stokes at all until that agreement came from Mr. Needles for me to sign which I wasn't satisfied with and I didn't sign it. 30

Q. But you intended that they should, that Mr. Needles and Mr. Stokes should discuss the matter freely, didn't you?

A. I don't know—

Mr. Katzenbach—I object.

Q. What did you mean?

A. I was a pretty sick woman at that time and I don't know what I did.

The Court—I sustained the other objection.

Q. Did you write to Mr. Stokes about how much cash you were to receive under that agreement?

A. No, I didn't write to him at all.

Q. You didn't write to him?

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

Q. He seems to recall that you did; you have probably forgotten it. If you did write him have you any objection to that letter being produced by him?

10 Mr. Katzenbach—You understand, Mrs. Wister—

A. Not at all. If I wrote it. I don't know whether I wrote it at all.

Q. Have you any objection.

20 Mr. Katzenbach—I want to be certain Mrs. Wister understands she is entitled to claim the privilege of confidential communication between her and her attorney. I, of course, am not in a position to limit what her desires may be in that respect, but I feel it my duty to call her attention to the fact that she has that privilege, that communications, what was said by words or writings to Mr. Stokes are privileged if you desire to make them so.

A. We didn't have any communication.

Q. If there was a letter written aren't you willing Mr. Stokes shall produce it?

30 Mr. Katzenbach—Just a minute, you understand the privilege, communication between you and Mr. Stokes?

A. Much obliged to you, but I don't know what all this has to do with it.

Q. You want the whole truth of this matter finally before the court?

A. Yes; I think the offer of \$42,500 was an insult to me. It was entirely too small. Only communication I had with Mr. Needles was \$50,000, not to me; that was the only communication I had with him and that was before the boom at Cape May.

Q. But you want the whole of this matter brought to the light and decided by the court, don't you?

A. Yes.

Q. And you have no objection, if there are any letters written by you to Mr. Stokes about this matter, to have those letters produced, have you?

Mr. Katzenbach—Just one moment. I want Mrs. Wister to understand that she don't have to have those letters admitted unless she wants them admitted.

10

A. I don't want admitted because I don't think I wrote any any how.

Q. Don't you think you want to carry out the contract anyhow, do you?

A. I don't think I wrote any letters to Mr. Stokes. It was a conversation with him.

Q. If you wrote any you don't want them admitted, is that the idea?

A. Very well, no, don't admit them.

Q. Now, you have since sold that property, haven't you, Mrs. Wister?

20

A. What?

Q. Haven't you sold that property?

Mr. Katzenbach—That is objected to as irrelevant.

Mr. Styron—I think that is relevant.

A. Have I what?

The Court—I will permit it.

Q. Have you since sold your Cape May property?

A. I leave that to Mr. Stokes.

30

Q. Don't you know?

A. He has the whole thing in his hands.

Q. Don't you know?

A. No; I don't know anything.

Q. Don't you know whether, the fact whether any offer for sale has been brought to your attention?

Mr. Katzenbach—Your Honor admitted the question, I think perhaps to save time.

Mr. Styron—I think you are helping to save time.

Mr. Katzenbach—I think it is irrelevant.

The Court—Sustain the objection to the present question.

Q. Can you say whether or not you have since sold the property?

A. I leave up to Mr. Stokes; I don't know whether I have sold it or not.

10 Q. You don't know whether you have sold it or not?

A. No.

Q. And if you have sold it you have no objection to Mr. Stokes stating whether you have or not?

A. I don't know what all your questions are driving at at all.

Q. Why would you be unwilling to have Mr. Stokes state if you have sold the property?

The Court—Sustain the objection.

No cross-examination.

20 Recess taken to 2.00 P. M.

AFTERNOON SESSION.

Trial of the cause resumed at 2.00 P. M.

Sol Needles, recalled.

Direct examination, by Mr. Styron.

31 Q. Mr. Needles, I show you what purports to be a receipt under date of August 18, 1925, and what purports to be a receipt under date of August 19, 1925, and I ask you if you signed that receipt?

A. Yes, sir; I did.

Q. Under what circumstances was it given?

Mr. Katzenbach—I object.

(Question withdrawn.)

Q. It states you received from Walter Entrikin one thousand dollars August 18th?

A. On account of purchase price, yes, sir.

Q. Whatever the receipt says?

A. Yes, sir.

Q. That of August 19th recites you received of Walter Entrikin the second thousand dollars referred to?

A. Yes, sir; when Mr. Stokes called my attention to it.

Q. Did you receive that money?

A. I did, yes, sir. This is the first receipt and then I put the second receipt on the same with the first receipt.

Q. Why was there two separate receipts for two separate amounts?

A. Because Mr. Stokes wrote me a letter telling me to send him a check for one thousand dollars and agreements, if I had them prepared, in the meantime he discovered was two thousand to be paid and he called my attention by letter that I should send him another thousand which I did and gave Mr. Entrikin the receipt for the thousand dollars when he gave it to me. 10

Q. Did you receive those two sums from Mr. Entrikin?

A. Yes.

Mr. Katzenbach—I object as being immaterial. 20

The Court—I will permit it. I think it is material.

Q. And the two checks that you sent to Mr. Stokes, do they represent these two amounts?

A. Those two thousand dollars and the money is still in the bank.

Mr. Katzenbach—Same objection.

The Court—Permit it.

Mr. Styron—If your Honor please, I offer that paper in evidence for what it may be worth. 30

Mr. Katzenbach—I object to the offer.

Mr. Styron—It is a question of authority and that is contested.

Mr. Katzenbach—I object to it on that ground, of course.

The Court—I will permit the exhibit.

(Receipt admitted and marked *Exhibit C 17*.)

Q. The two checks that you sent were subsequently returned to you, were they not?

A. Yes, sir.

Q. This letter of August twenty-fourth from Mr. Stokes to you says: "I have your letter of August 22nd enclosing papers and two checks for one thousand dollars all of which I am returning herewith. I shall probably come down to Cape May on Thursday."

A. Yes, sir.

10 Q. Did he come down to Cape May on Thursday?

A. I couldn't tell you what day he came to Cape May; I think it was on Thursday.

Q. After the return of those checks?

A. Yes.

Q. Did he see you?

A. He saw me, yes, sir.

Q. Did he have any discussion with you respecting this transaction?

20 Mr. Katzenbach—Object to it as irrelevant and, as Mr. Stokes was the—well, I suppose would have to admit any conversation that they had if they had any.

The Court—I will permit it.

(Question repeated.)

A. Yes, sir; he did.

Q. What was said by him, if anything, about this matter?

30 A. The matter was talked over generally and in the course of conversation in regards to this sale he said "of course Mr. Needles is entitled to his commission" and I told him that it wasn't a matter of commission with me, it was simply a matter of principle and, as near as I can remember, the conversation ended there and he said that he would go down and see Mrs. Wister and see if there could be a compromise made.

Q. Well, did he give you any reason why it was decided not to carry out this agreement?

A. Oh, he called me on the telephone, he told me that they would not sign the agreement because they had a bigger offer of fifty thousand dollars from the—

Mr. Katzenbach—I object to this as being irrelevant.

The Court—I will permit it.

A. Because he had an offer of \$50,000. I says “Do you think that is right?” over the telephone, and says “don’t do anything until I see my party” and I went to see Mr. Entrikin. In the meantime I got Mr. Stokes to hold it over until the next morning and I went up to see him. In the course of my conversation at that time he said to me then, he said, “of course you know you will be entitled to your commission.” I said “It isn’t a matter of commission; it is a matter of principle and honor” and I said to Mr. Stokes “what would you think if I done the same thing to you,” right in Mr. Stokes’ office, and as near as I can remember he says, “You don’t think that Mrs. Wister would sell her property for \$42,500 when she can get fifty thousand?”

Q. Did he say whether or not he was then treating with anyone for a sale of the property at fifty thousand?

A. No, he told me he could get fifty thousand.

Mr. Katzenbach—I object.

The Court—I will permit it.

Q. He said he could get fifty thousand?

A. Was offered fifty thousand.

Q. Did he refer to that fact on the Thursday, if it was Thursday that he came down to your office?

A. How much they could get for it?

Q. Yes.

A. I can’t recall that.

Q. You don’t remember what the conversation was?

A. No, but I remember the compromise that they wanted to make.

Mr. Katzenbach—I am not cross-examining, but just while he is on the stand I am going to ask him about this.

Mr. Styron—In other words you are taking him as your witness?

Mr. Katzenbach—Yes, at the present time.

By Mr. Katzenbach.

Q. You enclosed to Mr. Stokes in your letter of August 18th these copies of the proposed agreement of sale?

A. Yes, sir.

10 Q. That is signed by Mr. Entrikin?

A. Yes, sir.

Q. And they are the same copies that Mr. Stokes subsequently sent back to you?

A. They are; yes, sir.

Q. In a letter in which he refers to returning these papers?

A. Yes, sir.

Q. Now, in the same letter of August 18th you sent an authorization of which this is a copy?

20 A. Yes, sir.

Q. Both of these so-called agreements were returned to you neither one being signed, both unsigned by Mrs. Wister?

A. Yes, sir.

Q. Also this copy of the authorization was returned to you unsigned?

A. Yes, sir.

(Agreements and authorization offered and admitted in evidence marked *Exhibits D 1* and *2.*)

30 Q. I show you *Exhibit C 17* purporting to be a receipt signed by you; you didn't send that or any copy of it to Mrs. Wister or Mr. Stokes, did you?

A. No, sir.

Q. Or say anything of them after having signed one, did you?

A. No, sir.

By Mr. Styron.

Q. Referring to *Exhibit D 1* I ask you who directed you to prepare that agreement and send it up for signature?

A. Mr. Stokes.

Q. Did Mr. Entrikin, your customer, direct you to prepare any such agreement?

A. No.

Q. Was there, prior to the time that you were directed by Mr. Stokes to prepare that, any discussion between Mr. Stokes and Mr. Entrikin or Mr. Stokes and you that that agreement or any other formal agreement was to be prepared? 10

A. No; I didn't know Mr. Stokes in the matter until I got a letter from Mr. Stokes instructing me to send up the agreements if I had them prepared, if not send the names of the parties concerned and he would prepare the agreement.

Q. And that was communicated to you by letter?

A. By letter from Mr. Stokes to me. 20

Q. But prior to that time had you mentioned the fact of an agreement?

A. With Mr. Stokes? I had nothing at all to do with Mr. Stokes.

Mr. Katzenbach—I object because don't say to whom.

(Question withdrawn.)

Q. Now, I call your attention to some lead pencil memoranda on the face of the original of that form of agreement and I ask you whether that was there when you sent it up? 30

A. No, sir; there was no lead pencil marks on that agreement except where it said "Mrs. W." on it.

Q. Is that in the same condition that it was in when it was returned to you?

A. With those lead pencil marks, I believe it was because I never made them.

Q. Were they there at the time you received it back from Mr. Stokes?

A. That I couldn't tell you.

Q. Has it been in your custody ever since?

A. It has, but never noticed what these scratches were and never even seen them before until a few minutes ago. This is the only lead pencil marks I put on this agreement of sale.

Q. This, what do you mean by this?

A. "Mrs. W." a "Mrs. W." for Mrs. Wister to sign.

Q. Opposite the seals?

10 A. Yes.

Q. Calling your attention to *Exhibit D 2*, which is the authorization, you are asked whether you were instructed by Mr. Entrikin to prepare and send that for signature?

Mr. Katzenbach—I object. There was no question whether Mr. Entrikin asked him to prepare.

A. It is customary this agreement with us.

20 The Court—Let that be stricken from the record.

Q. Why was *Exhibit D 2* sent?

Mr. Katzenbach—I object as calling for a conclusion.

A. It is customary.

The Court—I will permit it.

Mr. Styron—That is not a conclusion.

Q. Your answer is that it is customary?

A. Customary to draw an agreement of sale as well as authorization in all sales of real estate.

30 Q. Customary between whom?

A. For the sale of real estate between the seller and agent.

Q. Is that why you followed it in this instance?

A. Yes, sir.

Q. And was it without suggestion from anybody?

A. Yes, sir; I never make a sale without I do those things.

Thomas Stokes, recalled.

Direct examination, by Mr. Styron.

Q. Now, Mr. Stokes, has the property been sold?

Mr. Katzenbach—I object as irrelevant.

Mr. Styron—Mrs. Wister went on the stand and swept away the sealed confidence.

Mr. Katzenbach—I am not objecting on the ground so much of sealed confidence, because you are asking something which may or may not have been communicated; I am objecting on the question of its irrelevancy to this issue. 10

The Court—I will permit it.

A. She has entered into an agreement of sale for the property.

Q. For how much money?

A. Sixty-five thousand.

Q. When was that that she entered into the agreement?

A. I think some time—

Mr. Katzenbach—May I understand my objection stands to the whole line? 20

The Court—Certainly.

A. I think some time in September; I don't recollect the date exactly.

Q. Was that prior to the filing of the bill in this cause?

A. What was the date of the filing of the bill, do you know?

Q. September the eighth; was that prior to September eighth? 30

A. I will have to look at my papers; I don't recollect.

The Court—Filed September tenth, the bill was.

A. I think September eighth was the date of that agreement.

Q. Have you the agreement?

A. No, I haven't.

Q. Do you recall about its terms?

Mr. Katzenbach—I object. I think that is going to far.

The Court—Yes, sustain the objection.

Q. Did you make any effort to sell that property prior to the date that you actually contracted on September eighth?

Mr. Katzenbach—Object to that.

The Court—Sustain the objection.

10 Q. I call your attention to a letter addressed to Charles C. Campbell, 517 Washington Street, Cape May, and ask you if you wrote that letter?

A. I did.

Mr. Styron—I offer that in evidence.

Mr. Katzenbach—I object on the ground of irrelevancy.

Mr. Styron—My offer, if your Honor please, is on the ground as furnishing a reason, assuming that they had a valid contract, why that contract was not carried out.

20 The Court—Sustain the objection. I have permitted proof of an agreement of sale and that is as far as necessary to go.

Q. I call your attention to what purports to be a notice, with your name at the bottom and your office address and I ask you if you prepared that notice or caused it to be prepared?

A. I did.

Q. For what purpose?

3 Mr. Katzenbach—I object to any examination connected with this particular notice upon the ground that it is irrelevant to the issue in the case.

The Court—Sustain the objection.

(Papers marked *C 18* and *19* for identification.)

Complainant rests.

Defendant rests.

INGERSOLL, *V. C.*:

As I feel now I do not think it is necessary for me to hold this matter under advisement. It is quite clear to my mind that Mr. Needles never had any authority, either express or implied, to enter into a binding contract as representing Mrs. Wister. It is quite clear that there is nothing in the testimony which gave him the specific authority to enter into a contract and it is as clear, I think, that there is nothing in the correspondence which would indicate that anyone considered that he was being given authority to make a contract for Mrs. Wister, and it is also quite as clear that he himself did not so understand the communications. He specifically, after he receives the money, prepares the contract for sale which is executed by the purchaser and sends to Mrs. Wister for her signature. That certainly is some indication that he, Needles, did not think that he had any authority to make a binding contract or that the receipt he was giving was a binding contract and it is to some extent, perhaps not to as great an extent, proved that Mr. Entrikin did not so consider it. Mr. Entrikin did not rely upon the receipt signed by Needles as agent of Mrs. Wister, he signed a contract on his part for the purchase of the premises, which contract is sent to Mrs. Wister for her signature and returned. Without going further I think it is perfectly clear that Needles was not authorized to enter into this contract.

It is just as clear that this contract which Needles made was not ratified. The contract itself could not be ratified because it was unknown. I am speaking now of the specific contract set forth in the receipt signed by Needles as agent and I cannot find sufficient in the testimony to indicate that there was any ratification or any agreement between the parties to ratify any contract between them.

Now upon the point that the minds did not meet. It is perfectly true that if the minds do meet and the contract is not set out in its entirety that the purchaser may waive certain rights the contract speaks of he is going

to make and doesn't go into detail enough to make it specific, he can, upon a bill for specific performance waive that right and say "yes, our minds met, it is not expressed here just what our agreement was, therefore I waive the right," but he cannot, as I understand the law, come into court afterwards and say that because I now waive a point which I insisted upon in dealing with a contract and the other side refused to accept that I can now waive and say that our minds did meet at the
10 time we made the contract. The minds must have met to have made a contract and I cannot find sufficient in the testimony or in the writings to say that there was a contract between these parties which is so evidenced as to be enforceable by specific performance of this contract.

I deem it my duty in this case to advise a dismissal of the bill.

C 15.

12/8/25 L.

In Payment of Account as Below
Return if Incorrect

SOL NEEDLES
REAL ESTATE AND INSURANCE
508 WASHINGTON ST.

No. 9660

INVOICES AMOUNT

CAPE MAY, N. J., August 18th, 1925.

on account of purchase
price of Beach Ave.,
property

PAY TO THE
ORDER OF Mrs. Jones Wister \$1000.00/100
One thousand and 00/100.....Dollars

TO
THE MERCHANTS NATIONAL BANK
CAPE MAY N. J.

SOL NEEDLES

EXHIBIT C 15.

C 16.

12/8/25 L.

In Payment of Account as Below
Return if Incorrect

SOL NEEDLES
REAL ESTATE AND INSURANCE
508 WASHINGTON ST.

No. 9664

INVOICES AMOUNT

CAPE MAY, N. J., 8/19/25 19

Second check
on a/c of Purchase
Price as Per
agreement

PAY TO THE
ORDER OF Mrs. Jones Wister

\$1000.00/100

One Thousand _____ Dollars

TO
THE MERCHANTS NATIONAL BANK
CAPE MAY N. J.

SOL NEEDLES

EXHIBIT C 16.

C 17.

12/8/25 L.

Bell 37-J
Keystone 167-D

SOL NEEDLES

REAL ESTATE AND INSURANCE

508 WASHINGTON STREET

CAPE MAY, N. J.

10

August 18th, 1925

Received of Walter Entriken One thousand dollars (\$1000.00) on account purchase price of Wistar property located North West Corner Beach Avenue and Ocean Street, Cape May City, New Jersey, including Riparian Rights of 183 feet parallel with Beach Avenue, purchase price is Forty two thousand five hundred dollars (\$42,500.00). One thousand dollars (\$1000.00) to be paid within sixty days, Nineteen thousand dollars (\$19,000.00) in cash on day of settlement and Twenty two thousand five hundred dollars (\$22,500.00) to remain on mortgage for five years at 6% interest. Settlement within sixty days (60) days at my office.

20

SABINA WISTER
by SOL NEEDLES

Agt

August 19th, 1925

Received of Walter Entrikin, the second one thousand dollars (\$1000.00) referred to above, leaving balance of Eighteen thousand (\$18,000.00) to be paid in cash at settlement.

30

SABINA WISTER
by SOL NEEDLES

Agt

D 1.

12/8/25.

Agreement, made the Eighteenth day of August A. D., 1925, BETWEEN Mrs. Jones Wister of the City and County of Philadelphia, State of Pennsylvania of the first part, and Walter Entrikin or assigns, of the City and County of Cape May, State of New Jersey

10 of the second part, as follows, to wit: The said party of the first part agree so sell and convey to the said party of the second part, who agrees to purchase All that certain lot of land and buildings thereon including sufficient furniture to furnish both cottages with the exceptions of certain family articles that do not belong in the cottages, lying and situate on the North West Corner of Beach Ave., and Ocean Street, including the Riparian Right of one hundred eighty three feet, (183) parallel with Beach Ave., Cape May City, New Jersey,

20 for the sum of Forty two thousand five hundred dollars (\$42,500.00) on the following terms. Twenty thousand dollars (\$20,000.00) cash and the balance of twenty two thousand five hundred dollars (\$22,500.00) to remain on mortgage for five years at 6% with the privilege to paying off said mortgage at any interest bearing period. It is agreed and understood that there are to be unrestricted rights on both riparian right and cottages, on the terms and conditions following, to wit: on the signing of this agreement the sum of one thousand

30 sand dollars (\$1000.00) on or before sixty days from the above date the sum of nineteen thousand dollars (\$19,000.00) and the balance of twenty two thousand five hundred dollars (\$22,500.00) to remain on mortgage for five years.

Settlement to take place at the office of Sol Needles, 508 Washington Street, Cape May, N. J. on October 29th 1925

A policy insurance for.....

.....

The premises are to be conveyed clear of incumbrance taxes and water rent to be apportioned to date of settlement.

Possession is to be given on day of settlement.

The title is to be good and marketable and free of all judgment.

And the said parties hereby bind themselves, their heirs, executors and administrators, for the faithful performance of the above agreement.

10

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

Scaled and Delivered } MRS W [SEAL]
IN THE PRESENCE OF }
CATHERINE NEEDLES.

WALTER S. ENTRIKIN [SEAL]
[SEAL]
[SEAL]

20

Received the day of the date of the above agreement the sum of one thousand and 00/100.....Dollars, on account of the purchase money named therein.

WITNESS:

MRS W [SEAL]

D 2.

12/8/25 L.

Bell 37-J.

Keystone 167-D.

30

SOL NEEDLES

REAL ESTATE AND INSURANCE

508 Washington Street

Cape May, N. J.

August 18, 1925.

KNOW ALL MEN BY THESE PRESENTS, That I, Mrs. Jones Wister of the City and County of Philadelphia,

State of Pennsylvania, have made, constituted and appointed and by these presents, do make and appoint, Sol Needles, my agent and I authorize him to sell my property on the North West corner of Beach Ave. and Ocean Street, including 183 feet of Riparian Right, Cape May City, New Jersey, for the sum of Forty two thousand five hundred dollars (\$42,500.00) on the terms agreed to in the agreement of sale.

10 It is agreed and understood that I am to pay unto the said Sol Needles the sum of Two thousand one hundred and Twenty five dollars (\$2,125.00) for selling the above mentioned property on the day of settlement.

Settlement to take place at the office of Sol Needles, 508 Washington Street, Cape May, N. J.

Signed, sealed and delivered
in the presence of

.....

20

IN CHANCERY OF NEW JERSEY.

Between

WALTER S. ENTRIKEN,
Complainant,

and

SABINE W. WISTER,
Defendant.

}
On Bill, etc.

30

FINAL DECREE.

(Filed Dec. 31, 1925.)

This cause coming on to be heard on the eighth day of December, 1925, in the presence of Herbert R. Voorhees, Esq., solicitor for and of counsel with complainant, and Edward L. Katzenbach, Esq., solicitor for and of counsel with defendant, on Bill of Complaint, Answer and Replication and oral proofs taken in open

court; whereupon and upon duly considering the said pleadings and proofs and hearing and considering the arguments of counsel; and it appearing to the Court that the complainant is not entitled to the relief prayed for in his Bill of Complaint,

IT IS THEREUPON, on this 31st day of December, 1925, ORDERED, ADJUDGED AND DECREED, that the complainant's Bill of Complaint in the above cause be, and the same is hereby dismissed, with costs.

E. R. WALKER, 10

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Respectfully advised,

R. H. INGERSOLL,

V. C.

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New Jersey Court of Errors and Appeals

Between

WALTER S. ENTRIKIN,
Complainant-Appellant,

and

SABINE W. WISTER,
Defendant-Respondent.

} On Appeal

BRIEF OF DEFENDANT-RESPONDENT.

Complainant, Walter S. Entrikin, filed his bill of complaint to compel the specific performance of an alleged written contract for the sale of property in Cape May, New Jersey. In the bill of complaint, complainant set out and annexed as an Exhibit an alleged written memorandum of agreement dated August 18, 1925, purporting to have been signed by one Sol Needles, as agent for Sabine W. Wister, the defendant. (State of Case, page 6, lines 20-40). Paragraph one of the bill describes certain lands situate at the northwesterly corner of Beach Avenue and Ocean Street by metes and bounds, and also has reference to "also all that parcel of land flowed by tidewater lying in front thereof as described in Riparian Grant by the State of New Jersey to William Weightman, Jr., bearing date December 3, 1881, and duly recorded." (Case, page 4, line 33.). In paragraph two of the bill of complaint, complainant goes on to say, "On said date * * * **an agreement**

in writing was made between complainant and said Sabine W. Wister, acting by one Sol Needles, her duly authorized agent, and whose act she thereafter ratified, whereby she agreed to sell and convey to complainant and complainant agreed to purchase the above described land for the sum of * * *” (Case, page 5, lines 1-10). In short, the bill of complaint unequivocally fixed a certain alleged written memorandum upon which complainant based his right to relief.

By way of answer to said bill of complaint, defendant alleged that there was no contract or agreement for the sale of the lands, tenements and hereditaments in the bill of complaint described, or any memorandum or note thereof, in writing signed by the defendant, or by any person thereunto by her lawfully authorized; that Sol Needles, the person named in the bill of complaint to have been her agent, was not her agent to make a sale of the premises described in the bill of complaint, or to make and sign a written memorandum in behalf of the defendant; and that she at no time ratified any of the unauthorized acts of the alleged agent, Sol Needles. (Case, p. 8).

At the final hearing of this cause and in his brief on this appeal, complainant rested and now rests his claim to specific performance, **not** upon the alleged memorandum of agreement dated August 18, 1925, and annexed to the bill of complaint as an exhibit, but upon a series of letters which passed between Mr. Needles and certain persons. There has been a complete change of position on the part of the complainant, both at the final hearing of this cause and in his brief on this appeal. Complainant's present position is set out on page 5 of his brief, lines 10-19, wherein he states as follows:

"Mrs. Wister's signed letter under date of August 18th to her agent, Needles, together with the letter of her attorney, Mr. Stokes, dated August 17th, to her agent, and by him communicated to Entrikin, the purchaser, was an unqualified acceptance of the previous offer of the latter to purchase the property at a stated price on definite terms. That signed letter of Mrs. Wister, in connection with the other correspondence, constitutes a memorandum of the contract signed by the party to be charged sufficient to satisfy the statute of frauds."

Complainant, on page 6, line 15 of his brief, admits that there was no specific authority conferred by Mrs. Wister upon Sol Needles, the real estate broker, to sign a contract for the sale of land which would be binding on her, having reference to Exhibit C17. (Case, page 55). Complainant very feebly seeks to contend, however, that though originally without authority to bind his principal, his unauthorized act was ratified. Mr. Needles testified that he at no time informed Mrs. Wister or any one acting for her of the fact that he had signed a written memorandum in her behalf. (Case, page 46, lines 30-37). **The execution of Exhibit C17 seems never to have been brought to the attention of Mrs. Wister prior to the filing of the bill in this cause.** It is, therefore, impossible to understand how Mrs. Wister, as principal, could, as a matter of law and in fact, ratify an unauthorized act of an agent of which she had no direct or indirect knowledge. The learned Vice-Chancellor in his conclusions delivered at the final hearing of this cause sums up the situation so far as this claim of ratification is concerned in the following language (Case, page 51, lines 28-35):

"It is as clear that this contract which Needles made was not ratified. **The contract**

itself could not be ratified because it was unknown. I am speaking now of the specific contract set forth in the receipt signed by Needles as agent and I cannot find sufficient in the testimony to indicate that there was any ratification or any agreement between the parties to ratify any contract between them."

In the case of Lindley, et al. v. Keim, et al., 54 N. J. Eq. 418, 424, the court had before it a situation similar to that which appears in the case at bar. In that case, the real estate agent had, without authority, undertaken to execute a contract in writing for his principal, ^{and} the complainant, ~~and~~ not being able to establish authority, sought to establish ratification by the defendant as principal of the unauthorized act of the agent. It appeared that the principal had no knowledge of the act of the agent in signing the agreement. The language of Mr. Justice Magie, speaking for the Court of Errors and Appeals, and having reference to the particular facts of that case can well be applied to the facts appearing in the case at bar. (Page 424):

"It has not been seriously argued that there is sufficient proof of the ratification of this agreement by O'Reilly in the few months which elapsed before his death. Proof which is said to tend in that direction, fails to establish ratification for one obvious reason. It does not make it appear that O'Reilly had knowledge of the act of Gardner in signing this agreement. **Knowledge of the act which has been done without authority is an essential element of the ratification of the act.** If we may draw a reasonable inference that O'Reilly knew that Gardner had sold this land to Keim, and was satisfied with the sale, or that O'Reilly would have executed and delivered a deed therefor to Keim upon receipt

of the purchase price, those facts fall short of ratifying Gardner's act in executing for him a binding agreement of sale. There is not sufficient evidence that O'Reilly ever acquired knowledge of that act, and in the absence of proof of such knowledge, ratification could not be made out."

The requirement of actual knowledge in order to establish ratification of an authorized act is also set out in the cases of *Looschen Piano Case Co. v. Steinberg*, 76 N. J. L. 130, and in *Bodine v. Berg*, 82 N. J. L. 662, 669.

One of the earliest and perhaps the leading case in this State covering the situation of an agent seeking by his act to bind a defendant in an attempted sale of property is that of *Lindley et al. v. Keim, et al.*, 54 N. J. Eq. 418 (Court of Errors and Appeals). In this case, the Court laid down certain principles of law which have been followed to this day without exception. Two of these principles of law are the following: (1) The mere employment of an ordinary real estate broker to affect a sale of a parcel of land, even though the terms be prescribed, does not amount to giving present authority to such broker to conclude a binding contract for the same. Moreover, such authority is not usually to be inferred from the use by the principal and broker in that connection of the terms "for sale" or "to sell" and the like. These words in that connection usually mean no more than to negotiate a sale by finding a purchaser upon satisfactory terms. (2) Authority to sign a memorandum of agreement for the sale of lands may be conferred by parol. **But courts require proofs of authority conferred by parol in such case to be clear**

and decisive, or otherwise the wholesome provisions of the Statute of Frauds may be evaded. See also

Scull v. Brinton, 55 N. J. Eq. 480.

Yadwin v. Arnold, 94 N. J. Eq. 500.

Stengel v. Sergeant, 74 N. J. Eq. 20.

As above pointed out, complainant on this appeal seeks to contend that a memorandum sufficient to satisfy the Statute of Frauds can be developed in this case by piecing together certain letters which form part of the record of the case. The Statute of Frauds, in so far as it has reference to agreements for the sale of land, reads as follows: "That no action shall be brought *** (4) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, * * * unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." (2 C. S., page 2612, Sec. 5).

The New Jersey Supreme Court, in the case of Johnson and Miller v. Buck, 35 N. J. L. 338, has fixed the requirements of the Statute of Frauds in so far as the sufficiency of any memorandum to satisfy that Statute is concerned (page 343): "The memorandum must contain the full terms of the contract—that is, **the names of the buyer and seller, the subject of the sale**, the price, and terms of credit, and conditions of sale, if any there be * * *." On page 344, the Court goes on to say, "It is not essential that the whole bargain be contained in one memorandum. It will be sufficient to satisfy the statute if its terms can be gathered from two or more detached papers, **if the signed memorandum contains such reference to the other papers as to make the**

latter part of the former. The connection between the signed and the unsigned papers cannot be made by parol evidence that they were actually intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred. The connection between them must appear by internal evidence derived from the signed memorandum. Parol evidence will be received only for the purpose of interpretation or explanation, where technical terms are employed, or to identify papers which, by a reference in the signed memorandum, are made part of it."

Similarly, in the case of *Korflage v. Kahrs*, 94 N. J. Eq. 440, 120 Atl. 191, the Court said, "No specific performance of a contract can be decreed in equity unless the contract be actually concluded and be certain in all its parts. **If the matter still rests in treaty, or if the agreement, in any material particular, be uncertain or undefined, equity will not interfere.** * * * The bargain must be found completely determined between the parties and its terms definitely ascertained."

Applying the principles of law enunciated in the above cases to the facts disclosed in the case at bar, it is respectfully submitted that no memorandum sufficient to satisfy the Statute of Frauds appears from the letters which appear as Exhibits in this case. **It is to be noted that all of the letters upon which complainant now relies to establish his case were written to Sol Needles, who purported to act as agent for Mrs. Wister in the sale of her property. Not one letter was sent to Mr. Entrikin.** In fact, Mr. Entrikin's name does not appear in any of the letters until August 18. (Exhibit C8, Case, page 15). It is further submitted that in point of fact the writers of the letters in question had no intention nor

did Mr. Needles contemplate that the letters constitute offers to a prospective purchaser, who was entirely unknown to Mrs. Wister and the persons acting in her behalf. The letters were intended to contain instructions to the agent to guide him in his negotiations, and nothing more. In the case of *Stengel v. Sergeant*, 74 N. J. Eq., 20, on page 26, Vice-Chancellor Emery cited with approval the well considered case of *Potter v. Hollister*, 45 N. J. Eq. 508, 514, wherein Vice-Chancellor Van Fleet declined to give to communications by way of instructions between a principal and her agent the force of evidence in favor of the adverse party, where they were simply intended as a delegation of power or instruction to the agent, and no authority was given to deliver the communications to the other party. A similar situation appeared in the case of *Donnell v. Currie and Dohoney*, (Tex. Civ. App.) 131 S. W. 88, where the Court, on page 90, said, "Treating both Wills and Miller as appellant's agents, his letters to them referring to the price and terms upon which the land might be sold should be regarded as mere instructions for their guidance, and not as an offer of sale to a prospective purchaser. Viewed in that light those letters should not be considered as parts of a written contract because evidently they were not so intended." The Court similarly so held in the case of *Haydock v. Stow*, 40 N. Y. 363, under a written authorization of sale complete in all its terms by the principal to the broker.

It is also to be noted that only one letter appears in evidence signed by Mrs. Wister. (Exhibit C7, page 15). This letter states, "I got the Cape May deeds today from my deposit box and will give them to Mr. Thomas Stokes * * *." All the other letters are signed either by Mr. Stokes, Mrs. Wister's at-

torney or by Mrs. Mears, Mrs. Wister's daughter. Taking into consideration all the letters which appear as Exhibits, it is submitted that the requirements of a memorandum to satisfy the Statute of Frauds as laid down in the case of Johnson and Miller v. Buck, *supra*, are not met in that the letters signed by Mrs. Wister, Mrs. Mears and Mr. Stokes, contain no such reference to the other letters as to make the latter part of the former, and further, in that they fail adequately to contain the full terms of the contract in the following respects:—

1. The offer submitted by Mr. Needles to Mrs. Mears is contained in the letter of August 11, 1925 (Exhibit C3, Case, page 13) and provides for the sale of the property "**as is.**" (Case, page 24, line 5). Mrs. Mears answered this letter on August 13, 1925, saying, "My mother would leave the cottages fully furnished, **but reserves the right to remove certain family pieces that cannot be parted with and do not belong there.**" (Exhibit C4, page 13, line 34). On August 14, 1925, Mr. Needles states in his letter of that date, "* * * which stated that you would sell your entire property at Cape May, **including the contents with the exception of some personal belongings * * ***". (Exhibit C5, Case, page 14, line 7). In no writing is the matter of these articles of personal property determined. No mention whatsoever is made of them in the alleged memorandum purported to have been signed by Mr. Needles as attorney for Mrs. Wister, and which memorandum is relied upon exclusively in the bill of complaint. (Exhibit C17, Case, page 55). The draft of an agreement submitted by Mr. Needles to Mr. Stokes for his approval refers to these articles of furniture in the following language, "* * * including sufficient furniture to furnish both cottages with the ex-

ception of certain family articles that do not belong in the cottages * * *." (Exhibit D1, Case, page 56, line 14). **In short, the subject of the furniture was at no time determined.**

2. In his letter of August 14, 1925, Mr. Needles submitted a new condition which was at no time accepted by Mrs. Wister or any one acting in her behalf. In this letter he states, "* * * and the balance to remain on mortgage for five years with interest at six per cent payable semi-annually, **with the privilege of paying off said mortgage at any interest bearing period.**" (Exhibit C5, Case, page 14, line 11). A condition of this nature is generally regarded as a material one in so far as it makes it optional with the mortgagor to pay off a mortgage prior to the date of its maturity and thereby disturb what might otherwise be treated as an investment for a period of five years. All authorities agree that the tender of the amount of the mortgage before maturity is not a legal tender and does not discharge the lien, for the mortgagee, unless otherwise provided for, cannot be required to accept payment until the debt is due. 19 *R. C. L.* 446, *Sec.* 230. This option in the mortgagor of paying off the mortgage prior to the date of its maturity is omitted from the memorandum signed by the agent, (Exhibit C17, Case, page 55) and is contained in the formal agreement prepared by Mr. Needles and submitted by him to Mr. Stokes (Exhibit D1, Case, page 56, line 25). As to this material provision, the minds of the parties at no time met.

3. In his letter of August 14, 1925 (Exhibit C5, Case, page 14, line 27), Mr. Needles imposed a further condition making uncertain the selling-price of the land and promises in question. He writes, "P. S. My charge for selling is five per cent." The

matter of the amount of commission was at no time discussed and would, of necessity, be an important factor in the determination of the amount of the selling-price.

4. In none of the letters is there a sufficient description of the lands and premises to satisfy the Statute of Frauds. The best description contained in any of the letters is that in the letter of Mrs. Mears to Mr. Needles, dated August 4, 1925, (Exhibit C2, Case, page 13, line 5), wherein the property is described as "her Cape May property located at the corner of Ocean and Beach Avenues, including two cottages and riparian rights. * * *" In all the other letters, the property is spoken of as "The Wister property in Cape May." There was no testimony offered at the final hearing of this cause as to the number of corners at Ocean and Beach Avenues, in Cape May, and as to whether Mrs. Wister does or does not own any property on more than one of these corners. Furthermore, dimensions of the property in question are nowhere given, particularly as to the riparian rights which were always referred to as "riparian rights," except in the description of the lands and premises contained in the bill of complaint. (Case, page 4, lines 33-38). It is therefore submitted that a description of the lands and premises in question sufficient to satisfy the Statute of Frauds was at no time given in the letters which passed between the parties in this case.

In the case of *Weisenberger, et al. v. Huebner, et al.*, 264 Pa. 316, 107 Atl. 763, the Court had before it a receipt reading as follows: "South Bethlehem, Pa. Jan. 31, 1914. Received from Sam Weisenberger by hand of H. A. Cyphers, Esq., Two Thousand Dollars down money on account of purchase price for property at 3 & Spruce Total price \$18,500.

Balance to be paid on or before April 1st, 1914,
\$18,500 less \$2,000—\$16,500.

Gottlieb Huebner.”

As regards this receipt the Court said, “* * * and even if a court would be justified in assuming therefrom the property referred to was in South Bethlehem, and that ‘3 & Spruce’ meant Third and Spruce Streets in that city, the statute of frauds would still apply, for the receipt does not specify the size of the property, or whether it is at the corner of ‘3 & Spruce’ and, if it is, at which corner.”

It is further submitted that the parties contemplated that a formal agreement should be prepared and signed, and that the letters constituted steps in their negotiations. The letters were in fact intended merely as instructions to the broker, Mr. Needles, and were not intended to constitute by themselves any contract. The fact that Mr. Needles prepared the memorandum of August 17, 1925, which he signed as agent for Mrs. Wister (Exhibit C17, Case, page 55) and subsequently or simultaneously therewith forwarded to Mr. Stokes a draft of a formal agreement (Exhibit D1, Case, page 56) is most conclusive proof of the fact that the parties did contemplate the preparation and signing of a formal agreement.

If any further proof in this regard is required, it is contained in Mr. Needles’ letter to Mrs. Wister of August 14, 1925 (Exhibit C5, Case, page 14, lines 17-24) wherein he says: “* * I would like very much to prepare the agreements of sale * * *. Would it be possible for you to see me some time this week, having your attorney to meet me **so that we can close the deal?** * * * ”

The words “so that we can close the deal” are, without more, decisive; they indicate unequivocally

that the parties regarded all negotiations open until a formal agreement was prepared, approved of by Mrs. Wister's attorney and then signed by her. By way of further proof, we have the fact that Mr. Needles did on August 17 send to Mr. Stokes for his approval a formal written agreement which was in fact never approved. (Exhibit C8, Case, page 15, line 18).

The law in this regard is well stated in the case of *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266 (Court of Errors and Appeals) on page 273, wherein the Court said, "The fact that parties negotiating a contract contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding, and which, for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal written agreement." The learned Vice-Chancellor found as a fact that there was no contract made and entered into between the parties, his finding as to this fact being stated in the following language, "The minds must have met to have made a contract and I cannot find sufficient in the testimony or in the writings to say that there was a contract between the parties which is so evidenced as to be enforceable by specific performance of this contract." (Case, page 52, lines 10-14).

It is therefore respectfully submitted that the decree made in the Court below should be in all respects affirmed.

EDWARD L. KATZENBACH,
*Solicitor for and of counsel
with Defendant-Respondent.*



