New Jersey
Court of Errors and Appeals

SIMON HEYMAN, Plaintiff and Appellant, vs. CHARLES STOPPER, Defendant and Respondent.	On Contract. On Appeal from Supreme Court.

BRIEF FOR PLAINTIFF-APPELLANT

Facts

This is an appeal from the Supreme Court reversing a judgment of the Second District Court in an action instituted in the Second District Court of the City of Newark, to recover the sum of Two hundred and fifty-six dollars and twenty-five cents ($256.25) with interest thereon and in which judgment was entered in favor of the plaintiff and against the defendant, for the sum of Two hundred and fifty-six dollars and twenty-five cents ($256.25) damages and costs in the Second District Court of Newark, being the amount of commission due the plaintiff as broker for the sale of the defendant's real estate, No. 53 South Orange Avenue, Newark, New Jersey, to one Alfred J. Stern, a *bona fide* purchaser procured through the efforts of the plaintiff.

The evidence shows that on the twenty-eight day of February, nineteen hundred and twelve, the defendant engaged the plaintiff to procure a customer for the above mentioned premises for the sum of ten thousand, two hundred and fifty dollars ($10,250) and at the same time executed and delivered to the plaintiff the following writing:

"Feb. 28, 1912.

"This is to certify that I will pay two and one-half (2 1/2) per cent commission on the sale of property 53 South Orange Avenue, Newark, N. J.

CHAS. STOPPER."

As a result of the efforts of the plaintiff, on the 8th day of March, 1912, the plaintiff procured a purchaser by the name of Alfred J. Stern whom he introduced to the defendant, and who subsequently entered into a valid and enforceable written agreement with the defendant bearing date the said day and year, wherein Charles Stopper, the defendant, agreed to sell and convey the said premises at 53 South Orange Avenue, Newark, N. J., to the said Alfred J. Stern for the sum of Ten thousand two hundred and fifty dollars ($10,-250) a copy of which agreement is annexed to the state of the case and made part thereof.

The proposed purchaser, Alfred J. Stern, paid to the said defendant, Charles Stopper, the sum of Two hundred and fifty dollars ($250) in cash as part consideration of said sale in accordance with the terms of said written agreement, and although subsequently the transaction was not completed by the delivery of the deed of conveyance because, as the evidence showed, the defendant, Charles Stopper, could not convey said premises free and clear of all encumbrances as stipulated in said written agreement, it was also established, and the Court found as a fact, that

the said Alfred J. Stern on his part was ready, able and willing to carry out the terms of the proposed agreement. It was also clearly established that it was through no fault of the agent that the said deal was not actually consummated, and the defendant retained the Two hundred and fifty dollars ($250) paid on account of said agreement.

POINT I

1. The Supreme Court erred in its construction of the paper writing offered in evidence at the trial of the case, in holding that it was not a sufficient compliance with the Statute of Frauds.

Upon a careful consideration of the opinion of the Supreme Court, which is inserted in the state of the case on page 16, it is apparent that the Court erroneously construed the paper writing upon which the plaintiff based his action, which paper writing reads as follows:

> "February 28, 1912.
>
> "This is to certify that I will pay two and a half (2 1/2) per cent commission on the sale of property 53 South Orange Avenue, Newark, N. J.
>
> CHARLES STOPPER."

which interpretation did not recognize the spirit and purpose of the Statute of Frauds, as amended by Pamphlet Laws 1911, page 703, which reads as follows:

> "No broker or real estate agent *selling* or exchanging land for or on account of the owner shall be entitled to any commission for the sale or exchange of any real estate,

unless the authority for selling or exchanging such land is in writing, and signed by the owner or his authorized agent, *or the authority of the broker or real estate agent to make a sale or exchange of such land is recognized in writing or memorandum signed by the owner or his authorized agent, whether or not such writing or memorandum is signed by said owner or agent before or after such sale or exchange has been effected*, and the rate of commission on the dollar shall have been stated therein."

Under the common law an agent was entitled to recover commission for the sale of real estate without any writing whatsoever from the owner, and this is still the law in a number of jurisdictions, including the State of Massachusetts. The statute as will hereinafter appear did not change the situation, it simply introduced a new rule of evidence.

The fundamental canon of construction of statutes that vary, change or alter the common law is to ascertain their spirit and purpose, and in the consideration of that question the occasion and necessity of the statutory enactment, the defects or evils in the former law, and the remedy provided in the new one, must be considered, and the statute should be given that construction which is best calculated to advance the remedy provided by it and suppress the mischief which preceded its passage; but the operation of the statute should never be extended further than necessary to make its spirit and purpose effective.

In order to ascertain the real spirit and purpose of the legislature, it would be well to recall that the tenth section of the Statute of Frauds and Perjuries first became a part of our Statute law in 1873, and the act then passed was entitled

"An act to regulate the commissions of brokers and real estate agents in the sale of land," and the language of the act was as follows:

> "That no broker or real estate agent selling land on account of the owner shall be entitled to receive any commission for the sale or exchange of any real estate unless the authority for selling is in writing and signed by the owner, or his authorized agent, and the rate of commission on the dollar shall have been stated in said authority."

In 1874 that act was included in the "Statute for Prevention of Frauds and Perjuries" in the revision of that year (Rev., p. 446) constituting Section 10 of that act, and is substantially identical with the act above quoted.

The case of *Stout vs. Humphrey*, 40 Vr., 439, adopts the view of Justice Pitney who heard the case at Nisi Prius, and wherein he stated:

> "The tenth section of the Statute of Frauds does not merely say that 'no action shall be maintained,' but that no broker or real estate agent selling or exchanging land for or on account of the owner shall be entitled to any commission, etc."

It was also held by the trial judge in this same case that:

> "The Statute declared a public policy, *viz.*: *In the absence of a written contract, there shall be an absence of right to compensation for services,* and so where there is not a written contract, a subsequent express promise to pay for the services is entirely devoid of consideration."

It further follows that the manifest purpose of the statute was to protect owners of real estate against doubtful and conflicting claims for

services presented by alleged agents in connection with real estate sales, and to fix as a certainty, the compensation which they were to receive for their services.

Furthermore, in construing writings which come under this section of the Statute of Frauds, it must be remembered that the writing does not have to be an enforceable contract or agreement between the owner and the broker; all the statute calls for is *"an authority for selling in writing signed by the owner or his agent, or an authority to make a sale recognized in a writing or memorandum signed by the owner or his agent,"* so that all the cases bearing on contracts which have been construed as being insufficient to comply with various sections of the Statute of Frauds, or similar statutes, or even cases on ordinary contracts as to whether the essential features of a binding or valid contract are contained in the writing are really not applicable to the case at bar. There is absolutely only one question, and that is, does the writing comply (subject to the rules of construction here set forth) with the Statute of Frauds, as amended in Statute Law 1911, page 703.

In this connection the remarks of Justice Reed in the case of *Adams vs. Grady,* 72 At. Rep., 55, are very pertinent:

> "The right to bring an action for services in negotiating the sale of property at the request of the owner was not created by this statute. It existed at common law. The Statute only required that *evidence of the request and authorization must be in writing and that the rate of compensation shall also be fixed by the writing* * * *. The Statute of Frauds merely introduces a new rule of evidence and does not alter or effect the rule of

pleading, nor is it perceived how the requirement of authority to act for the defendant as agent or broker shall be in writing differs from the requirement than any other contract shall be evidenced by writing. *The suggested distinction that the statute requires a written authority as a condition precedent to the contract is not substantial.* The writing is evidence of the contract itself which consists of the employment of an agent to do certain work for his employer and the amount he is to be paid for that work when executed."

POINT II

The Supreme Court erred in its construction of the paper writing offered in evidence at the trial of the case, in holding that it was not a sufficient recognition of the authority of the broker to sell to comply with the Statute of Frauds.

The Nineteen hundred and eleven amendment to the tenth section of the Statute of Frauds evinces a New Legislative intention with regard to statutary limitation upon the right of a broker to recover.

The Statute formerly was so phrased that it may have been a necessary interpretation to hold that the instrument which formed the broker's basis of recovery should contain an *express* authority from the principal to his broker to make sale of the land.

The manner in which the 1911 amendment to the statute is phrased indicates a legislative determination that with regard to these writings purely technical constructions should be avoided. This is clearly apparent from the use of the word "recognized" in the amendment.

It would seem that an expression in the broker's agreement from which can be gathered the principal's intention to empower his broker to sell should be sufficient. In the instrument in question, the principal agrees to pay commission "on the sale" of his property. It requires no violent wrenching of the present statute to assert that this is an authority from the principal to his broker to sell, and to hold otherwise would be to substitute formalism of expression for evident intention and contemplation of the parties. It is therefore respectfully urged that the 1911 amendment is completely satisfied by the writing in the case at bar, and that in the words of the statute, the principal has "recognized" the authority of the broker and even if it is argued that this section of the Statute of Frauds can only be satisfied by a strict adherence to the words of the statute, the instrument is absolutely sufficient for this purpose.

The indispensibility of a verbatim repetition of the words of a statute, has been a rule of construction most studiously avoided by modern judicial trend of thought. That the course will not be governed by mere subserviency of language is exemplified by the case of *Lustig v. Meirick*, 53 Vr., 498, (following *Mendel vs. Danish*) in which this Court held, that although this section of the Statute of Frauds required that the rate of commission on the dollar be specified, the statute would be satisfied where the principal promised the broker a lump sum, without specifying the rate of commission. This is in accordance with the fundamental rule of the common law that a remedial statute should be benignly construed, so as to remedy the evil and carry out the intention and policy of the legislature. It may be true that the contention that inconvenience arising from strict statutory construction

should be addressed to the Legislature and not to the Court. But it is not necessary for the Court to go to that length in the case at bar, in view of the fact that the 1911 amendment obviates the necessity of strict adherence to the words of the statute. It is rational to presume that when the legislature declared that the broker's paper shall be enforceable if his authority was "recognized" in the instrument, it intended that the greatest dissimilarity of expressions could be used in this connection; otherwise the Legislature would not have softened the sterner expression of the old statute.

If the Court should hold, that notwithstanding the evident permissibility of free expression under the amendment, the writing at bar does not comply with the statute as amended, it is contended that there is sufficient in the writing from which this statutory element can be inferred.

That the Court will lend inference to sustain the writing is apparent in the case of *Stout vs. Humphrey* (*supra*) in which Justice Pitney says:

> "The statute declared a public policy, *viz.*, in the absence of a written contract, there shall be an absence of right to compensation for services."

The prime element and enforcibility of the broker's right of action is that he has a writing; not that it absolutely accords with the exact wording of the statute.

> "Courts may resort to an implication to sustain a statute, but not to destroy it."
>
> Atlantic City Co. vs. Consumers Water Co., 17 Stewart, 427.

In the case at bar, where the broker has performed the services, and the statute is raised as a defence which is not a shield against, but an advancement of fraud, the Court should interfere by liberal construction, and if there is enough in

the instrument from which fair inference of authority can be gleaned, the instrument should be upheld as complying with the statute. Otherwise, a just debt will be escaped by ascribing sovereignty to the letter and not to the spirit of the law. This statutory construction by implication does not involve the opprobrium of fostering any of the evils which the statute intended to remedy. The principal is not taken advantage of by a false or imaginary claim, but is merely barred from taking the benefits of his agent's service without compensation by the unmeritorious insistment that the agreement which induced the broker to expend effort in his behalf did not constitute absolute similitude with the words of a statute. The Statute of Frauds was enacted to protect the owners of real estate against the imposition of fraud of real estate agents not to enable the owners of real estate to commit such fraud and imposition against such agents.

POINT III

The Supreme Court erred in its construction of the paper writing offered in evidence at the trial of the case, in holding that the same was not a sufficient authority to any broker to sell the land in compliance with the Statute of Frauds.

In the case of *Carr vs. Lynch* (1899), L. R. (1900), 1 Chancery, 613, in an agreement in writing signed by the lessor he agreed as follows:

> "Dear Sir: In consideration of you having this day paid me the sum of 50£ I hereby agree to grant you or your assigns a further lease, etc."
>
> "The agreement contained no other description identifying the person to whom

> the further lease was to be granted. *Held* that there was a sufficient description of the parties to satisfy the statute. Court citing the maxim: '*Id certum est quod certum reddi pontest*' (That is certain which can be made certain), citing case of *Plaut vs. Bourne*, L. R. (897), 2 Chan., 281, which held that parol evidence was admissible to show what was the subject-matter of the contract.''

The fact that the paper writing was not addressed to the broker is not at all material. The agreement was made with and the broker was engaged by the defendant and was the procuring cause of the sale.

It is not at all necessary that the writing contain all the elements of a valid and subsisting agreement, the writing being merely required as evidence, the proof being that the writing was delivered to the broker with whom the agreement for commission and for the sale of this property was made; it is not fatal to the writing that the broker's name does not appear on the same.

The other question raised by the defendant, that the rate of commission was not expressed in the paper writing, has been settled by the authorities in this State.

> Mendles vs. Danish, 45 Vr., 333 (February 25, 1907).
>
> Lustig vs. Meirick, 53 Vr., 498 (March 4, 1912) Court of Errors and Appeals.

Justice Kalisch, speaking for the Court of Errors and Appeals, in the last cited case, page 501, states:

> ''As to the first ground relied upon by the plaintiff-in-error for a reversal of the judgment, involving an attack upon the validity of the agreement because it fails

to set out the rate of the commission on the dollar, suffice it to say that this contention is without real merit. The real purport of the statute was to definitely fix the compensation of real estate agents and brokers, and therefore it requires the rate of commission to be paid to be stated in their written authority. It is obvious that the requirement to state the rate of commission is only a method to ascertain the compensation to be made. It was partly upon this theory that it was held by the Supreme Court, in *Mendles vs. Danish,* 45 Vr., 333, that if the price and compensation were both fixed by the agreement with the real estate agent it was not necessary to state the rate of commission. Although the Court there says that the reason this is not necessary is because the rate of commission can be computed with the sums thus fixed, the better view would seem to be that where the amount of compensation is definitely fixed by the agreement, it becomes wholly unnecessary to state the rate of commission, as the only purpose in doing it is to provide a means of ascertaining what in such instance is already fixed, and the precise means thus prescribed can not be resorted to where land is exchanged for land without any valuation in 'dollars' or their equivalent.''

It is also urged that the reason assigned for a reversal that the written agreement to pay does not state the puchase price, terms of sale, or the agent or person to whom it is directed, is without any force. The proof is clear and convincing that the paper writing was delivered to the plaintiff, Simon Heyman, by the defendant, Charles Stopper; that it bears the defendant's signature;

that the proposed purchase was procured solely through the efforts of the plaintiff and an agreement of sale entered into. It is not necessary that the price be stated where the rate is fixed.

In the case of *Rauchwanger vs. Katzin,* 53 Vr., 339 (March 8, 1912), the Court held:

> "The agreement which stated that the defendant was to pay as services for their commission two and a half per cent on the purchase price should the same property be sold through efforts or with their aid and to be paid on the day of settlement, was sufficient. The purchase price was not fixed in the agreement, but it was demonstrated as a matter of evidence what the purchase price was and that the terms of sale were satisfactory to the defendant."

This is the situation in the case now under consideration, so that reason assigned for disturbing the judgment of the Second District Court of Newark, is without merit and the judgment of the Supreme Court should be reversed.

There are numerous adjudications in this State sustaining, as sufficient within the Statute of Frauds, brokers agreements which do not in so many words authorize or empower them to sell. (See form of writings upon which brokers recovered).

> Albert W. Dresser v. Samuel R. Gilbert, 52 Vr., p. 358, June Term, 1911.
>
> "I agree to pay said agent one hundred dollars commission or all above $3,000 for selling said property upon sale thereof by him, me, or any other person, commission not to be less than $100 on any price accepted by the owner."
>
> James S. Payne, Appellee v. William S. Twitchell, Appellant, 52 Vr., p. 193, June Term, 1911.

"Wortendyke, N. J., August 18th, 1909.

"I have a description of my property 20 acres farm at Wortendyke, N. J., entered on the books of James S. Payne, and I agree to pay him a commission of Five per cent if he secures a buyer for the same at a price satisfactory to me.

"WILLIAM S. TWITCHELL."

Oscar Lustig, *et al.*, Defendants in Error v. Julius Meirick, Plaintiff in Error June Term, 1911, 53 Vr., p. 500.

"Newark, N. J., November 22, 1909.

"I hereby agree to pay to Lustig & Marx, as commission for their services in the exchange of property of the Success Realty Company on Garside Street in this city, the sum of two hundred and fifty dollars; said payment to be made by means of my promissory note to them for three months from December 1, 1909, for that amount.

(Signed) SUCCESS REALTY COMPANY.
Julius M. Meirick, President."

(Note referred to in contract for commission.)

"Newark, N. J., Dec. 2d, 1909.

"$250.00. Three months after date I promise to pay to the order of Lustig & Marx two hundred fifty and no/100 dollars, at my office, Metropolitan Building, Newark, N. J.

(Signed) J. M. MEIRICK,

(*Endorsed*)
Lustig & Marx."

John MacBride vs. Peter F. Rogers, 54 Vr., 408, November Term, 1912.

"Kearny, N. J., Jan'y 27, 1910.

"Mr. John MacBride,

"95 Roseville Avenue, Newark, N. J.

"Dear Sir: Replying to your note of 17th relating to property at 557 and 559 Orange Street, Newark, N. J., would state that I am prepared to receive an offer for same, and if satisfactory, would sell.

"If you secure a purchaser, at a price which I consider proper, I will allow the usual commission of 2 1/2 per cent.

Very respectfully,
PETER F. ROGERS."

Thus the Court will observe that the forms of the brokers' writings are subject to the spirit and purpose of the act and the said writings are of a most informal character.

The Supreme Court in its opinion creates a sort of personal flavor in the construction of the act, holding that the act reads: "No person shall be entitled to any commission, unless his authority for selling is in the writing and his authority to make a sale is recognized in the writing" (see opinion, state of the case, p. 17). The act itself does not use the personal pronoun "his," but on the contrary the act says, "*The* authority for selling is in writing and *the* authority to make a sale is recognized in the writing." The Court seemed to hold that the writing is fatally defective unless, in the body thereof, is contained the name of the person who is the broker. The statute does not require, by its express term or by implication, that it shall contain the name of the broker, and futility of adding this element to it is apparent; this seeks to make the paper writing in its terms a completed contract, whereas the legislative purpose was merely to have evidence of a contract, and as Justice Pitney so well said in the case of *Stout vs. Humphrey*, 40 Vr., 439, (*supra*):

> "The statute declared a public policy, *viz., in the absence of a written contract, there shall be an absence of right to compensation for services.*"

It seems to us that the technical and forced construction of the paper writing adopted by the Supreme Court makes for fraud, instead of preventing it; that is a wide departure from the usual and ordinary rules of construction governing remedial statutes, that it ignores the salutory rule of equitable construction, that if sustained it will be the means of destroying the statute, rather than sustaining it, that a precedent would be established that could only be injurious and be productive of much unnecessary litigation and create a great state of uncertainty, while on the other hand, if the judgment of the District Court is affirmed and the judgment of the Supreme Court reversed, the spirit and the purpose of the legislative enactment of 1911, would be recognized and reaffirmed judicially, ample and complete justice afforded to the parties, and the salutory and well-established maxims respecting statutory construction followed; therefore it is urged with all vigor and emphasis, that in order that rule in harmony with reason, authority and equity may be adopted, the judgment of the Supreme Court must be reversed and the judgment of the Second District Court affirmed.

March Term, 1914.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

SIMON HEYMAN, *Plaintiff-Appellant,* vs. CHARLES STOPPER, *Defendant-Respondent.*	*On Contract.*

Brief for Respondent.

This action was brought in the Second District Court of Newark by the appellant, a broker against the respondent, to recover commission for the sale of the real estate of the later. Judgment was rendered by said Court in favor of the appellant against the respondent for the sum of two hundred and sixty-one dollars and sixty-two cents ($261.62). This judgment was reversed by the Supreme Court and a new trial ordered.

The respondent relied on two defences to the said action.

FIRST. That the agreement to pay commissions upon which the said action is based is in violation of the tenth section of the statute of frauds and perjuries, as amended, Phamphlet Laws, 1911, page 703, because

1. It is not directed to the appellee.

2. It does not contain any authority to sell the lands therein described, nor is such authority of the broker to make the sale recornized in said writing.

3. It does not state for what price or upon what terms the agent is authorized, if at all, to sell the said lands.

4. It does not state the amount of commissions which are to be paid or the means of ascertaining the same.

SECOND. There was no sale within the meaning of the said writing.

The following is a copy of the writing upon which the judgment of the court below is based:

"February 28, 1912.

"This is to certify that I will pay two and one-half

(2½) per cent. commission on the sale of property, 53 South Orange avenne, Newark, N. J."

"CHARLES STOPPER."

The following is the statute affecting this action:

"No broker or real estate agent, selling or exchanging land for or on account of the owner, shall be entitled to any commissions for the sale or exchange of any real estate, unless

a. The authority for selling or exchanging such land is in writing and signed by the owner or his authorized agent, or

b. The authority of the broker or real estate agent to make a sale or exchange of such lands is recognized in a writing or memorandum signed by the owner or his authorized agent, whether or not such writing or memorandum is signed by said owner or agent before or after such sale or exchange has been effected, and

c. The rate of commission on the dollar shall have been stated therein.

Section 10 of the "Act for the prevention of frands and perjuries," as amended, Phamphlet Laws, 1911, page 703.

It will undoubtedly be conceded that the writing in this case does not comply with the letter of the act in that it does not contain within its four corners a written authority to sell land or a written recognition of such authority, and in that the amount of commissions cannot be ascertained from the said writing. This brief will therefore concern itself with a discussion of the fact whether the spirit of the act requires the court to imply into the contract the missing elements which the statute says shall be in writing.

FIRST POINT.

1. The writing is not directed to the appellee.

"A written authority to sell (real estate) must expressly authorize the particular broker to sell."

Kleinsorge, et al., vs. Liness, 120 Pac. 444.
Sprankle vs. Truelove, 54 N. E. 461.
Olcott vs. McClure, 98 N. E. 82.
Kennedy vs. Merickel, 97 Pac. 81.
Keith vs. Smith, 89 Pac. 473.
Swartswood vs. Naslin, 106 Pac. 770.

In Crowley vs. Meyer, 69 N. J. L. 245 the Court of Errors and Appeals, while not passing upon the direct point here made, states as one of the essential elements of a writing to comply with the statute, that, "It must give authority to the broker or real estate agent to sell."

The above principle also complies with the rule of contract that there must be an offeree and that the offer must be made to him. The statute only requires one additional element and that is that the offer must be in writing and it would necessarily seem to follow that the offer should be directed to the offeree, especially in those cases, such as the one in hand, where an agent is authorized to sell or exchange real estate.

This construction would also seem to comply with the statute, for in subdivision b, as I have divided the statute, the legislature in amending the act requires that the authority of "the broker or real estate agent" to make a sale or exchange of such lands must be recognized in a writing.

The above construction is neither harsh nor unreasonable, for if this judgment was sustained there would be nothing to prevent the plaintiff from passing the writing on to another broker who might also sue and claim that he was the procuring cause of the sale, and while it is true that the defendant could probably successfully defend such an action it would nevertheless create a situation which the statute is expressly designed to prevent, viz., the substitution of parol evidence for written evidence.

2. The writing does not contain authority to sell or a recognition of such authority.

3. It does not state for what price or upon what terms the agent is authorized to sell.

"The effect of the code, then, was to require that the authorization or fact of employment should appear from a writing subscribed by the party to be charged.

"The provision that the employment or authorization shall be in writing does not require that it be a written contract intended by the parties as an obligation. It may be merely a note or memorandum."

Kennedy vs. Merickel, 97 Pac. 81 supra.
Crowley vs. Meyer, 69 N. J. L. 245.

The court in Cohen vs. Boccuzzi, 86 N. Y. Supplement 187 says: "The memorandum, too, is insufficient to show any authority to sell at any price. If such a memorandum can be construed as giving authority to sell, then could any person, upon merely calling upon an owner, and getting him to write a figure on a piece of paper at which he is willing to sell, and sign his name thereto, argue from that simple circumstance that he was authorized to sell the property, and base a claim for commission thereon."

The writing in that case read "Property 76, Mangin Street, $9,000.00, no less, Felice Boccuzzi."

It seems to me that the reason of the court in that case applies to the one in hand. If the court will not construe a writing which merely fixes a price as an authority to sell, why should it construe a writing which merely states an agreement to pay commissions as an authority to sell.

In Patterson vs. Torrey, 123 Pac. 224, a writing reading, "At your request I will give you price wanted for my house," stating same, was not a compliance with a statute requiring agreements employing or authorizing agents or brokers to sell or exchange lands to be in writing.

In Stewart vs. Pickering, 35 N. W. 690 the court held

that the following letters, one from real estate agent to defendant's attorney in fact, "Do you have charge of lands * * * belonging to the estate of Hon. S.? If so, are they for sale? * * * If the title is right we can possibly find a purchaser for the list this year. Let us hear from you as to prices, etc." The answer was, "I herewith enclose you a price list of our lands * * * * My mother is the widow of the Hon. S. and is the sole devisee. * * * I am the executor of my father's estate and attorney in fact of my mother. The titles are strictly clear and good." Attached to letters were, "Western lands for sale, Winnebago County, Iowa," with list of lands, terms and prices, "and apply to D. S." did not contain authority to sell lands. It amounts simply to an offer with directions to apply to persons named.

In Foote vs. Robbins, 97 Pac. 103 it was held that a written contract employing a broker to procure a purchaser of real estate for a fixed price net, containing no stipulation for the payment of a commission and showing the erasure in the printed form used of the words providing for the payment of a commission, is not a sufficient compliance with a statute requiring contracts for the employment of a broker to sell real estate for a commission to be in writing.

The court says, "If by the written agreement the payment of a commission by respondent was contemplated, resort must be had to parol evidence for the purpose of showing the amount of such commissions and that it was to be paid by the appellant as vendor and not by the purchaser as vendee.

The unmistakable purpose of the statute was to avoid any such method of fixing the extent of the liability or the liability itself, of either a vendor or vendee for the payment of a commission.

If we were to hold that such a liability may be shown by parol simply because the appellant had the written authority to make a sale, although such authority neither mentions or provides for the payment of, or amount of, a commission, we should so construe the statute as to

invite and promote the identical frauds, which it was intended to avoid."

In Philipps vs. Jones, 80 N. E. 555 an instrument which recited that defendants had placed certain specified real estate in plaintiff's hands for sale at a specified price and agreed to convey by warranty deed free from all encumbrances, giving agent control for 30 days, the contract "to be a lien during continuance," but which did not contain any provision for the payment of commission held no compliance with statute.

In Crouch vs. Forbes, 116 Pac. 14 (Washington, 1911) it was held that an agent could not recover commissions under a letter reading, "If you sell my farm I want $12,000 net. You may keep this letter as a contract until you come," contained within itself no agreement to pay commissions and was not a compliance with the statute making "agreements authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission void unless in writing.

It seems to me as though the cases above cited completely disposes of the idea which seems so prevalent, that because one requirement required to be in writing is present the court can imply the rest of them. It seems to be thought that the legislature did not mean what it says and that justice is being done when a court is able to give judgments in spite of a statute of our legislature.

If the courts will not imply authority to sell from a writing giving the price wanted for property or the giving of a list of lands with prices in answer to a query whether they were for sale or the fact that commissions were to be paid from the fact that the plaintiff was authorized to sell, why should the fact that an agent is authorized to sell be implied from the fact that commissions were agreed to be paid?

4. The writing does not show the amount of commissions to be paid or the means of ascertaining the same.

"The real purpose of the statute was to definitely fix the compensation of real estate agents and brokers.

It is obvious that the requirement to state the rate of commission is only a method to ascertain the compensation to be made."

Lustig vs. Meirick, 82 At. 867 Court of Errors and Appeals.

Crowley vs. Meyer, 69 N. J. L. 245.

The difficulty with the writing in this case is not so much with the wording of the particular words relating to the commissions as it is with the method of computing those commissions. The writing does not state the amount upon which the rate is to be figured.

It leaves the amount at which the agent was authorized to sell and upon which the commissions would be figured to parol evidence, which is the thing the statute is expressly designed to prohibit.

CONSTRUCTION OF STATUTE.

At common law a contract employing a broker for the purchase or sale of real estate need not be in writing.

19 Cyc., 219-220.

"The famous statute of frauds and perjuries, 29 Car. II. c. 3, was enacted in England in 1677, during the reign of Charles the Second, and as stated in its recital, had for its object the 'prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and and subornation of perjury.'"

Clark on Contracts, page 90.

In Corey vs. Henry, 71 Neb. 118, at pages 123-124, the court states the reason for the passing of the statute as follows: "The section of the statute above set forth is plain and unambiguous. The reasons which impelled the legislature to pass that act are well known to the courts and to the profession generally. Innumerable suits were being instituted, from time to time, by agents and brokers, after the owners of land had sold the same, claiming a commission on the ground that they had been

instrumental in securing the purchaser, and, in many cases, owners of land were compelled to pay double commissions on account of such claims."

The legislatures of most States, including our own, have passed statutes requiring the employment of the broker to be in writing in order to enable him to recover his commissions and some States have even made it a penal offense for the broker to sell without such authority.

The reason for these enactments must have been very serious in order to justify such drastic legislation. The manifest object of the legislature was to protect the owner against the assertion of false, doubtful and conflicting and exorbitant claims. Is it, therefore, not proper to hold the agent to a strict compliance with the statute?

"It is always in the agent's power to make the contract or memorandum certain in every particular." McCrea vs. Ogden, 103 Pac. 788, in which the court reversed itself on a rehearing.

The effect of such written contract is to be collected from "all within the four corners" of the several letters or writings which go to make up the same.

Olcott vs. McClure, 98 N. E. Rep. 82.

"The statute declares a public policy and cannot be waived as can that part of the statute which says, 'no action shall be maintained.'"

Bagnole vs. Madden, 76 N. J. L. 255.

"The provisions of the statute enumerate a rule of public policy which is mandatory in form and character."

Ryer vs. Winter, 77, N. J. L. 441.

"The contract here sued upon, therefore having been in contravention of the statute was not *voidable* but *void*."

Stout vs. Humphrey, 69 N. J. L. 436.

Another reason for requiring a full and unqualified compliance by the broker with the requirements of the

statute is set forth in Zimmerman vs. Zehender, 73 N. E. 920 as follows: "A contract partly written and partly verbal is a parol contract, and contracts required by law to be in writing must be wholly written to be enforceable. A material part of the contract being verbal, it must be held to be an oral contract and therefore invalid."

For all the above reasons this appellant contends that the agent should be required to fulfill all the requirements of the statute in the writing presented by him.

POINT TWO.

There was no sale within the meaning of the said writing.

The case of Leschznier vs. Bauman, decided in the Court of Errors and Appeals in 1912, 85 At. 205, is directly in point.

The court says: 'It will be observed that the agreement is based upon two assumptions as conditions precedent to its enforcement. * * * The second that there shall be a sale of defendant's apartments to the Home Coupon Co.' "

"It is also conceded that there was no sale of the property in the ordinary merchantile sense in which the term is used in such agreements, and according to which we are bound to construe the language of the contract."

"The language of the contract makes it manifest that until title shall have passed as the result of a sale to the proposed purchaser the contingency or condition upon which the legal right to a claim for commissions is based has not arisen, and upon this aspect of the case of Hinds vs. Henry is controlling and presents the legal rule which justifies the direction of the circuit." (In favor of def't.).

In that case, too, the transaction failed because one of the parties was unable to furnish a marketable title, although it was not the defendant's title which was de-

fective. The sale failed in our case "for valid reasons," *i. e.,* a title which was claimed to be unmarketable.

With the approval of the court, the ~~appellant~~ respondent reserves the right to make such motions as may be necessary to do justice on the appeal in this cause.

Respectfully submitted,

HUGO WOERNER,
Attorney of Respondent.

INDEX

Notice of Appeal.

NEW JERSEY SUPREME COURT.

SIMON HEYMAN,
Plaintiff-Appellant.

vs.

CHARLES STOPPER,
Defendant-Respondent.

On Contract.

Notice of Appeal.

Take notice, the ~~defendant~~ plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment recovered in the above stated cause.

JACOB L. NEWMAN,
Attorney for ~~Defendant~~ Plaintiff-Appellant.

To Hugo Woerner, Esq.,
Attorney for Defendant-Respondent.

Dated, Newark, N. J.,
December 3, 1913.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

SIMON HEYMAN,
Plaintiff-Appellant.

vs.

CHARLES STOPPER,
Defendant-Respondent.

On Contract.
Grounds of Appeal.

The appellant states the following grounds of appeal:

FIRST:—Because the Supreme Court reversed the judgment of the Second District Court of Newark in favor of the defendant-respondent against the plaintiff-appellant.

SECOND:—Because the Court held that the paper writing offered in evidence by the plaintiff was not sufficient compliance with the Statute of Frauds.

THIRD:—Because the Court held that the paper writing offered in evidence by the plaintiff did not contain sufficient authorization to comply with the Statute of Frauds.

FOURTH:—Because the Court held that said writing was no authority for any broker or real estate agent to sell the lands mentioned therein.

FIFTH:—Because the Court held that said paper writing contained no written authority for any broker to sell the land mentioned therein.

SIXTH:—Because the Court held that such writing, being delivered to a certain broker, was not sufficient compliance with the Statute of Frauds.

SEVENTH:—Because the Supreme Court reversed the judgment of the trial court in favor of the defendant when the said judgment should have been affirmed.

JACOB L. NEWMAN,
Attorney of Plaintiff-Appellant.

Dated, December 3, 1913.

State of the Case.

SECOND DISTRICT COURT OF THE CITY OF NEWARK

SIMON HEYMAN, *Plaintiff.* *vs.* CHARLES STOPPER, *Defendant.*	*On Contract* *Agreed State of the Case on Appeal.*

The parties hereto, by their respective attorneys, submit the following as the State of the Case for appeal:

The action was brought to recover the sum of two hundred and fifty-six dollars and twenty-five cents ($256.25) being the amount of commission claimed to be due the plaintiff as broker for the sale of defendant's real estate, known as 53 South Orange Avenue, Newark, N. J., to Alfred J. Stern, for the sum of ten thousand, two hundred and fifty dollars ($10,250).

The Case was tried before the Court without a jury.

On February 28th, 1912, the defendant engaged the plaintiff to sell defendant's premises for the sum of $10,250 and contemporaneously therewith, defendant executed and delivered to the plaintiff the following writing.

February 28, 1912."

"This to certify that I will pay two and one-half (2½) per cent. commission on the sale of property 53 South Orange Avenue, Newark, N. J."

"Chas. Stopper."

On March 8th, 1912, the plaintiff procured Alfred J. Stern, who was willing to buy the said premises upon the terms upon which plaintiff was authorized to sell the same, and as a result of plaintiff's efforts, defendant and wife, and said Alfred J. Stern entered into a written agreement for the sale and purchase of said premises for the sum of ten thousand, two hundred and fifty dollars, a copy of which is hereto annexed.

Articles of Agreement.

The said Alfred J. Stern paid to the defendant the sum of two hundred and fifty dollars ($250.) in cash as part of the consideration of said sale, and it was shown that subsequently, on April 15th, 1912, the said Alfred J. Stern, although ready and able to carry out the provisions of his written agreement for the sale and purchase of said premises, and through no fault of the plaintiff, refused to take title to the same, claiming that defendant could not well and sufficiently convey the aforesaid premises to him by warranty deed, free from encumbrances as agreed in his said agreement.

The said defendant still retains the said $250.00 paid to him by the said Alfred J. Stern.

The Court on March 12th, 1913, gave judgment in favor of the plaintiff for the sum of two hundred and sixty-one dollars and sixty-two cents ($261.62) being the amount of brokerage commission claimed by the plaintiff, together with interest.

SELICK J. MINDES,
Attorney for Plaintiff.
HUGO WOERNER,
Attorney for Defendant.

Filed March 26, 1913.

Articles of Agreement.

CHARLES STOPPER AND WIFE
and
ALFRED J. STERN

Agreement for the Sale of Property.
Dated, March 8th, 1912.

Articles of agreement, made the eighth day of March, in the year of Our Lord one thousand nine hundred and twelve, between Charles Stopper and Elise A. Stopper, his wife, of the City of Newark, in the County of Essex and State of New Jersey, of the first part; and Alfred J. Stern, of the City of Newark, in the County of Essex, and

State of New Jersey, of the second part; witnesseth, that the said party of the first part, for and in consideration of the sum of ten thousand two hundred and fifty dollars, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he, the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by deed of warranty free from all encumbrance and all tenement house violation of the State of New Jersey, on or before the fifteenth day of April, next ensuing the date hereof, all that lot, tract, or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex, and State of New Jersey.

Beginning in the northerly line of South Orange Avenue, forty-six feet five inches westerly from Howard street, and in the middle of the partition wall between the houses, numbers 53 and 55 on said avenue; thence northerly through the middle of said wall thirty-nine feet three inches; thence northerly along the land of William Kean, fifty-four feet four inches to an alley; thence easterly along the same twenty-five feet more or less to a lot situate on the northwest corner of said avenue and street; thence southerly along said lot ninety-three feet two inches to said avenue; thence westerly along same twenty-one feet five inches to the place of beginning. The above described premises are also conveyed subject to the encroachment of the premises situate on the premises adjoining on the east.

Also agrees to convey right, title, interest in alley adjoining premises in rear.

The premises above described are known as number 53 South Orange Avenue, Newark, N. J.

And the said, Alfred J. Stern, for himself, his heirs,

executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and asigns, that the the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part the said sum of ten thousand two hundred and fifty dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Two hundred and fifty dollars in cash upon the date of the signing of this agreement, the receipt whereof is hereby acknowledged.

Five thousand dollars by taking the property subject to a mortgage thereon.

Thirty-five hundred dollars by executing a purchase money bond and mortgage on the said premises payable in installments of one thousand dollars in one year from the date thereof, and the balance of twenty-five hundred dollars in five years from the date thereof. The same to bear interest at the rate of five per cent. per annum for the first three years and six per cent. per annum for the other two years, payable semi-annually. The said bond and mortgage to contain the usual sixty days interest default clause, ninety days tax default clause. Clause to keep said premises insured against loss or damage by fire, and to assign the policy to the party of the first part, and to be in an amount two thousand dollars. The party of the second part to have the privilege of paying off the said mortgage at any time during said term.

The balance of fifteen hundred dollars to be paid in cash at the time of passing title. Taxes to be adjusted on the basis of the year nineteen hundred and eleven to the date of settlement. Water rents, insurance, interest on mortgages and rents to be adjusted to date of settlement.

Subject to all existing monthly tenancies.

The said party of the first part, for himself, his heirs,

executors and assigns, agree that the aforesaid mortgage of thirty-five hundred dollars, executed by the party of the second part, shall at all times be second in priority to a mortgage not exceeding the sum of five thousand dollars, with interest at six per cent. per annum, to be placed upon said premises; and the party of the first part will duly execute and deliver all necessary instruments requisite to the postponement of the said mortgage of $3,500.00 upon demand by the party of the second part, his heirs and assigns.

And it is further agreed, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the fifteenth day of April next ensuing the date hereof, and from thence take the rents, issues and profits to him and their use.

And it is further agreed, by the parties hereto, that the said deed of warranty and bond and mortgage shall be delivered and received at the office of Selick J. Mindes, Firmen's building, Newark, N. J., between the hours of ten in the forenoon and three o'clock in the afternoon on the said fifteenth day of April next ensuing the date hereof.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Signed, sealed and delivered in the presence of

Charles Stopper (L. S.)
Alfred Stern (L. S.)
Elise A. Stopper (L. S.)

As to all except Elise A. Stopper.
Selick J. Mindes
As to all.
Hugo Woerner.

Articles of Agreement.

STATE OF NEW JERSEY
COUNTY OF ESSEX } *ss.*

BE IT REMEMBERED, that on this eighth day of March, in the year of Our Lord, one thousand, nine hundred and twelve, before me, the subscriber, an attorney at law of the State of New Jersey, personally appeared Charles Stopper and Elise A. Stopper, his wife, who, I am satisfied, are the grantors in the within agreement named; and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. And the said Elsie A. Stopper, being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely, and without any fear, threats or compulsion of her said husband.

HUGO WOERNER,
An Attorney at Law of the State of New Jersey.

SECOND DISTRICT COURT OF THE CITY OF NEWARK.

SIMON HEYMAN, *vs.* CHARLES STOPPER } *Docket* 88. *Pages* 34, 164. *On Contract.*

Plaintiff's costs:
Summons, $2.10.
Mileage, .08.
Listing fee, $1.50.
Attorney's fees, $13.08
Total costs, $16.76.

SELICK J. MINDES,
Plaintiff's Attorney.

A summons in the above cause was issued on the sixteenth day of December, 1912, returnable on the twenty-third day of December, 1912, wherein the plaintiff demands of the defendant the sum of five hundred dollars.

The plaintiff filed a state of demand December 16th, 1913.

The summons was served and returned as follows:

The said defendant not being found, I served the within summons December 18th, 1912, by leaving a copy thereof at his residence, with a member of his family above the age of fourteen years, informing her of its contents.

DANIEL J. LYNCH,
Sergeant-at-Arms of the Second District Court.

Dec. 23, 1912.—The case was adjourned by the plaintiff to December 30th, and from time to time thereafter until January 29th, 1913.

Jan. 29, 1913.—The plaintiff and defendant appeared and the cause was tried at this time.

The plaintiff was sworn also Alfred J. Stern.

The defendant was sworn.

The evidence being closed the Court reserved his decision.

March 12, 1913.—The Court rendered his decision in favor of the plaintiff and against the defendant in the sum of two hundred sixty-one dollars and sixty-two cents damages and costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of two hundred sixty-one dollars and sixty-two cents damages and costs.

March 12, 1913.—Execution issued.

March 17, 1913.—Notice of appeal and bond filed.

Summons.

ESSEX COUNTY, SS:

The State of New Jersey, to any Constable of said County or to the Sergeant-at-Arms of the Second District Court,

SUMMON

Charles Stopper to appear before the Second District Court of the City of Newark, to be held on the ground floor of the City Hall, on Broad street, between Green and Franklin streets, in the said city, on the twenty-third day of December, nineteen hundred and thirteen, at half-past nine o'clock in the forenoon, to answer unto Simon Heyman in an action upon contract to the damage of the plaintiff, five hundred dollars. Hereof fail not.

WITNESS, Thomas J. Lintott, Esq., Judge of said Court at Newark, aforesaid, the sixteenth day of December, in the year one thousand nine hundred and twelve.

JOHN H. O'CONNOR,
Clerk.

SECOND DISTRICT COURT.

Take notice, that the plaintiff's state of demand in the within action has been filed with the Clerk of the Court,

State of Demand.

and that a trial will be demanded upon the return day of this summons.

Yours, &c.,

SELICK J. MINDES,
Attorney for Plaintiff.

To the within named defendant, or to whom it may concern.

Newark, N. J., December 16th, 1912.

SECOND DISTRICT COURT OF THE CITY OF NEWARK.

SIMON HEYMAN,
vs.
CHARLES STOPPER } *On Contract.*

State of Demand.

The plaintiff demands of the defendant the sum of five hundred dollars due him as follows:

For that the defendant authorized and employed the plaintiff to procure a purchaser for defendant's property, known and designated as No. 53 South Orange avenue, Newark, New Jersey, and agreed to pay him two and one-half per cent. commission on the purchase price, for procuring such purchaser, and for that the plaintiff procured a purchaser for the said lands and premises who purchased the same for the sum of ten thousand, two hundred and fifty dollars, and thereupon the plaintiff was entitled to receive the sum of two hundred and fifty-six dollars and twenty-five cents ($256.25); yet the said defendant has failed and refused to pay the plaintiff the said sum of money, although often requested so to do.

Judgment for the sum of two hundred and fifty-six dollars and twenty-five cents ($256.25), besides lawful interest from March 8th, 1912, together with cost of suit, &c., will be demanded.

SELICK J. MINDES,
Attorney of Plaintiff.

State of Demand.

ENDORSEMENT.

To the within named defendant :

You are hereby required to file a specification of the defenses you intend to make to the within entitled cause of action, on or before the return day of the summons, as provided by statute. The plaintiff will demand a trial on the return day of the summons in the within named action.

SELICK J. MINDES,
Attorney for Plaintiff.

Specification of Defenses.

SECOND DISTRICT COURT OF THE CITY OF NEWARK.

SIMON HEYMAN,
Plaintiff.
vs.
CHARLES STOPPER,
Defendant.
} *On Contract.*

Specification of Defenses.

To Selick J. Mindes, Attorney for the plaintiff in the above entitled cause:

SIR:

The following is a specification of defenses intended to be made by the defendant, Charles Stopper, to the suit of the plaintiff.

FIRST:—The defendant says that the state of demand of the plaintiff does not set forth a cause of action in that it does not show any written authorization, or written recognition of authority, to sell the premises therein described, as required by law.

SECOND:—The defendant denies that he authorized and employed the plaintiff to procure a purchaser for defendant's property, known and designated as No. 53 South Orange avenue, Newark, New Jersey, and denies that he agreed to pay him two and one-half per cent. commission on the purchase price for procuring such purchaser.

THIRD:—The defendant denies that the plaintiff procured a purchaser for the said lands and premises, who purchased the same for the sum of ten thousand, two hundred and fifty dollars, and denies that thereupon the plaintiff was entitled to receive the sum of two hundred and fifty-six dollars and twenty-five cents ($256.25).

FOURTH:—The defendant denies that any one pur-

chased the said premises described in the plaintiff's state of demand and says that the legal title to the same is still in him.

FIFTH:—This defendant denies that the authority for selling the said lands described in the plaintiff's state of demand is or was in writing, signed by this defendant, the owner, or his authorized agent, and further denies that the authority of the plaintiff to sell said lands was recognized in writing signed by this defendant, the owner, or his authorized agent, and further denies that the rate of commission on the dollar was stated in any authority or writing or memoradum.

SIXTH:—The defendant denies that there was any written authorization to the defendant to sell said lands, or any written recognition of same as required by statute.

SEVENTH:—The defendant denies that there was a sale of the premises described in the state of demand.

EIGHTH:—The defendant denies that he owes the plaintiff the sum of two hundred and fifty-six dollars and twenty-five cents, or any other sum.

Dated December 21, 1912.

Yours respectively,

HUGO WOERNER,
Attorney for Defendant.

ACKNOWLEDGEMENT OF SERVICE.

Service of a copy of the within specifications of defense is hereby acknowledged, this twenty-third day of December, A. D., 1912.

SELICK J. MINDES,
Attorney for Defendant.

Filed December 23, 1912.

JOHN H. O'CONNOR,
Clerk.

Certificate of Clerk.

SECOND DISTRICT COURT OF THE CITY OF NEWARK.

In the County of Essex and State of New Jersey.

I, the subscriber, do certify that the within transcript is a true copy of the record and proceedings in the case of Simon Heyman vs. Charles Stopper, held in the Second District Court of the city of Newark, County of Essex and State of New Jersey, entered upon page number 34, 164, and Second District Court Docket number 88. Said transcript is a true copy of all records of said Court existing therein, and relating to said case.

IN WITNESS WHEREOF I, John H. O'Connor, Clerk of said Court, at Newark aforesaid, have hereto set my hand and seal of said Court, this twenty-sixth day of March, A. D., 1913.

[COURT SEAL]

JOHN H. O'CONNOR,
Clerk.

Filed March 26, 1913.

Points of Appeal.

NEW JERSEY SUPREME COURT.

SIMON HEYMAN, *Appellee.* vs. CHARLES STOPPER, *Appellant.*	*On Contract. On Appeal from the Second District Court of the City of Newark.*

Specifications of Points on Appeals.

The above named Charles Stopper, the appellant herein and defendant below, hereby specifies the determination and directions of the Second District Court of the City of Newark, in the above stated cause, with respect to which he, the appellant, is dissatisfied in point of law.

FIRST:—The plaintiff below, a broker, was not entitled to any commissions for the sale of the lands described in the agreed state of facts herein because his authority for selling said lands is not in writing, signed by the owner or his authorized agent, nor was the authority of said plaintiff below to make such sale recognized in a writing or a memoradum signed by the owner or his authorized agent, either before or after such sale was affected, nor was the commission on the rate of dollar stated therein, as required by statute "An act for the prevention of Frauds and Perjuries" (Revision), approved March 27, 1874, section 10; Amended May 1, 1911; see Pamphlet Laws, 1911, page 703,; judgment should therefore have been entered in favor of the defendant below instead of the plaintiff below.

SECOND:—The writing or memoradum given by the defendant below to the plaintiff below, and in evidence in this case, is not written authorization to the latter to sell the lands therein described, nor is it a written recognization of such authority to sell, nor does it state the rate of commission on the dollar as required by statute. Neither does it state the purchase price, terms

of sale or the agent or person to whom it is directed. It is indefinite and no contract. Judgment should therefore have been entered in favor of defendant below.

THIRD:—There was no sale of the lands described in the agreed state of the case in this cause.

FOURTH:—The plaintiff below had no written authorization or written recognition of authority to sell the said lands and premises as required by law.

FIFTH:—There is no evidence in the case to support the judgment of the court below.

SIXTH:—The judgment of the court below is contrary to the evidence.

SEVENTH:—The court should have given judgment in favor of the defendant below.

Dated March 31st, 1913.

HUGO WOERNER,
Attorney of Appellant.

Filed March 31st, 1913.

Opinion.

NEW JERSEY SUPREME COURT.

JUNE TERM, 1913.

SIMON HEYMAN,
Appellee,
vs.
CHARLES STOPPER,
Appellant.

Submitted June Term, 1913. Decided Nov. 10, 1913.

That section of the Statute of Frauds respecting real estate brokers' commissions to be recovered from the owner of lands, requires a writing signed by the owner, granting authority to a broker for selling, and recognizing the authority of such broker to make the sale.

On Appeal from the Second District Court of the City of Newark.

For the appellant, Mr. Hugo Woerner.

For the appellee, Mr. Selick J. Mindes and Mr. Jacob L. Newman.

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

This is an appeal from the Second District Court of Newark. The point raised is that the Statute of Frauds, with reference to a real estate broker's commissions, does not permit a recovery by the agents under the facts set forth in this case.

The Statute of Frauds was undoubtedly an act for the benefit of real estate owners. It provides that "No person selling land for the owner shall be entitled to commissions unless, (a) the authority for selling is in writing, signed by the owner; (b) the authority of the broker to make a sale is recognized in the writing, signed by the owner, and (c) the rate of commissions on

the dollar shall have been stated therein." This section, of course, is applicable to the owner alone.

The following is a copy of the writing entered into:

"February 23, 1912.

"This is to certify that I will pay two and one half per centum (2½%) commission on the sale of the property, No. 53 South Orange avenue, Newark."

I find no authority in it for selling or exchanging this land, or authorizing its sale, nor is the authority of any broker or real estate agent recognized by it. There is, in my opinion, no written authority for any broker to sell the land. Is this made good by the fact that the writing was delivered to a certain broker? It strikes me not, for the act says that "no person shall be entitled to any commission, unless his authority for selling is in the writing, and his authority to make a sale is recognized in the writing." I fail to find these necessary preliminary steps in the writing thus examined.

The judgment must be reversed in order that a new trial may be had.

Filed Nov. 18, 1913.

NEW JERSEY SUPREME COURT.

SIMON HEYMAN, *Plaintiff-Appellee.* *vs.* CHARLES STOPPER, *Defendant-Appellant.*	*Order of Reversal.* *On Appeal &c.*

Order of Reversal.

This cause having been argued at the last November Term of this court, on the specifications filed, and the Court having considered the same, and being of opinion that there is an error in said judgment of the proceedings in said Court below, it is *ordered* that the judgment of the Second District Court of Newark, be and is in all things reversed and set aside, and a new trial granted with costs to the appellant.

And it is *further ordered* that execution issue out of this Court therefore.

Entered the day of December, A. D., 1913.

On motion of

HUGO WOERNER,
Attorney of Appellant.