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Notice of Appeal

New Jersey Supreme Court

WELLS H. HURLBUTT, *Plaintiff-Appellee,* vs. MAUSOLEUM COMPANY OF AMERICA, INC., a Corporation of New Jersey, *Defendant-Appellant.*	Notice of Appeal.

To William F. Burke, attorney for plaintiff-appellee.

Sir:—

TAKE NOTICE, That the defendant-appellant, The Mausoleum Company of America, Inc., appeals to the Court of Errors and Appeals of the State of New Jersey from the whole of the judgment entered in the above stated cause on the following grounds:

1. That the Supreme Court erroneously affirmed the judgment of the Second District Court of the City of Jersey City, whereas said Court should have reversed said judgment and ordered a new trial, because

a. The said trial court erroneously refused to enter judgment for the defendant.

b. The said trial court erroneously entered a judgment for the plaintiff and against the defendant.

c. The said trial court erroneously al-

lowed in evidence copy of contract, marked Exhibit P-1.

d. The said trial court erroneously ordered the answer of Mr. Thomas Hansberry to the question on direct examination, "What were the terms of Mr. Hurlbutt's employment?" to be stricken out.

e. The said trial court erroneously excluded proffered evidence of Mr. Schloeder that at no time did the plaintiff receive commissions under the terms of his alleged contract.

f. The said trial court erred in construing Exhibit D-1 as nothing more than the receipt for the amount paid at that time, because

(1) It is a correct and controlling statement of the terms of Mr. Hurlbutt's employment.

(2) It is a receipt importing a settlement upon an account stated and is conclusive evidence of all items contained therein.

(3) It is in effect an accord and satisfaction.

2. That the Supreme Court erroneously affirmed the judgment of the Second District Court of the City of Jersey City for the sum of Four hundred seventy-three dollars and forty-three ($473.43) cents, although the plaintiff-appellee in his brief before said court admitted that there was no evidence to support a judgment above the sum of Four hundred thirty-eight dollars and forty-three ($438.43) cents.

NICHOLAS S. SCHLOEDER,
Attorney for Appellant

Judgment of Affirmance

NEW JERSEY SUPREME COURT

June Term, 1923

WELLS H. HURLBUTT, *Plaintiff-Appellee,* vs. MAUSOLEUM COMPANY OF AMERICA, INC., a Corporation of New Jersey, *Defendant-Appellant.*	Action at Law. On Appeal from District Court. Rule on Affirmance.

This cause having been duly argued at the present term of this Court by William F. Burke of counsel for plaintiff-appellee, and Nicholas S. Schloeder, of counsel for defendant-appellant, and the Court having considered the same and finding no error in the records or proceedings in the Second District Court of the City of Jersey City.

It is thereupon ordered and adjudged that the Judgment of Second District Court of Jersey City be affirmed with costs and that the record be remitted to the Second District Court of the City of Jersey City, to be proceeded with in accordance with this Judgment and the practice of said Court.

On Motion of

WILLIAM F. BURKE,
Attorney of Plaintiff-Appellee.

Notice of Appeal

Served Feb. 3, 1923

Second District Court of the City of Jersey City

WELLS H. HURLBUTT, *Plaintiff*, vs. MAUSOLEUM COMPANY OF AMERICA, a corporation, *Defendant*.	Notice of Appeal

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To William F. Burke, attorney of Wells H. Hurlbutt.

Sir:—

TAKE NOTICE, That the defendant, Mausoleum Company of America, Inc., a corporation of New Jersey, hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court of the City of Jersey City, rendered in the above stated action on the 2nd day of February, 1923.

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NICHOLAS S. SCHLOEDER,
Attorney for Defendant.

Service of the within notice is acknowledged this 3rd day of February, 1923.

WILLIAM F. BURKE.

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Specification of Reasons for Reversal

Filed April 6, 1923

NEW JERSEY SUPREME COURT

WELLS H. HURLBUTT, *Plaintiff-Appellee,* vs. MAUSOLEUM COMPANY OF AMERICA, INC., a corporation of New Jersey. *Defendant-Appellant.*	On Appeal From District Court. Specification of Reasons for Reversal

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The following is a specification of the determinations or directions of the Second District Court of the City of Jersey City with respect to which the defendant is dissatisfied in point of law:

1. The trial court erroneously refused to nonsuit the plaintiff.

2. The trial court erroneously refused to enter judgment for the defendant.

3. The trial court erroneously entered a judgment for the plaintiff and against the defendant.

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4. The trial court erroneously allowed in evidence copy of contract, marked Exhibit P-1.

5. The trial court erroneously ordered the answer of Mr. Thomas Hansberry to the question on direct examination, "What were the terms of Mr. Hurlbutt's employment?" to be stricken out.

6. The trial court erroneously excluded proffered evidence of Mr. Schloeder that at no time did the plaintiff receive commissions under the terms of his alleged contract.

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7. The trial court erred in construing Exhibit D-1 as nothing more than the receipt for the amount paid at that time, because

(1) It is a correct and controlling statement of the terms of Mr. Hurlbutt's employment.

(2) It is a receipt importing a settlement upon an account stated and is conclusive evidence of the settlement of all items contained therein.

(3) It is in effect an accord and satisfaction.

NICHOLAS S. SCHLOEDER,
Counsel for Defendant-Appellant.

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Docket

Filed April 6, 1923

SECOND DISTRICT COURT OF JERSEY CITY

State of New Jersey, Hudson County } ss:

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No. 62010

Before Clyde D. Souter, Esq.

WELLS H. HURLBUTT, *Plaintiff.*

vs.

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MAUSOLEUM COMPANY OF AMERICA, INC., a corporation of New Jersey. *Defendant.*

} On Contract

William F. Burke, Plaintiff's Attorney.

Nicholas S. Schloeder, Defendant's Attorney.

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COSTS

	City	Al.
Summons, Copy, $1.50		
Service and Return,		.60
Mileage,		.40
Entering Suit,		
Oaths Administered,		
Venire, .		
Summoning Jury,		

40

A summons was issued January 18, 1923. Returnable January 26, 1923 at ten o'clock in the forenoon at the Court Room of said Court in the City of Jersey City. The Constable returned the summons as follows, viz: I served the within Summons and Demand on the with-

COSTS

	City	Al.
Swearing Jury,		
Attending Jury,		
Subpoenas,		
Service of Subpoenas,		
Witness Fees,		
Papers Filed,		
Recording Description of Papers Offered in evidence,		
Attorney Fees,		$23.67
Trial Fee,		1.50
Execution,		
Service and Return,		

in named Defendant, The Mausoleum Company of America, Inc., this 19th day of January, 1923, by reading the same to F. A. Garner, Vice-President of the defendant company.

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John Andes.

Plaintiff's Demand was filed on January 18, 1923.

Specification of Defenses was filed February 2, 1923.

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January 26, 1923, this cause was called for trial at ten o'clock in the forenoon and adjourned to February 2, 1923.

February 2, 1923, Parties appeared and proceeded to trial.

On the part of the Plaintiff Wells H. Hurlbutt, Charles McDonough, testified.

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On the part of the Defendant Thomas Hansberry, Mollie Cohn, George Philip and Nicholas S. Schloeder, testified.

Notice to Appeal and Bond filed February 7, 1923.

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Whereupon it is on this second day of February, 1923, by this Court considered and adjudged that said Wells H. Hurlbutt, Plaintiff, recover against said Mausoleum Company of America, Inc., Defendant, the sum of Four hundred seventy-three dollars and forty-three ($473.43) cents, and twenty-seven dollars and sixty-seven cents, costs of suit.

Witness, CLYDE D. SOUTER, Esq., Judge.

I do hereby certify that foregoing is a true copy of the record in the above case.

March 29, 1923.

RICHARD MCAGHON,
(Seal) *Clerk.*

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State of Demand

SECOND DISTRICT COURT OF THE
CITY OF JERSEY CITY

WELLS H. HURLBUTT, *Plaintiff*. vs. MAUSOLEUM COMPANY OF AMERICA, a corporation, *Defendant*	On Contract State of Demand.

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The plaintiff residing in the Township of North Bergen, Hudson County, New Jersey, demands of the defendant the sum of $500 for that:—

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FIRST COUNT.

1. On or about November 30, 1921, by its agreement in writing the defendant employed the plaintiff as a solicitor or Salesman to sell crypts or solicit contracts for sale of crypts in the Mausoleum of the defendant company. The plaintiff to be paid certain commissions on the sales made.

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2. Attached hereto marked Schedule "A" is a statement of sales made under said agreement and the amount due the plaintiff from the defendant for sales so made and for which no commissions have been paid.

3. Plaintiff demands on this count the sum of $500.

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SECOND COUNT.

1. Plaintiff on or about November 30, 1921, at the special instance and request of the defendant company performed services as a Solicitor and Salesman for the defendant company for which services the defendant company promised to pay a reasonable sum.

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2. Attached hereto marked Schedule "A" is a statement of sales made and services performed for said company and the prices charged for said services which charges are reasonable therefor.

3. Plaintiff demands on this count the sum of $500.

THIRD COUNT.

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1. On or about November 30, 1921 by its oral agreement made by its duly authorized agent the defendant employed the plaintiff as a Solicitor or Salesman to sell crypts or solicit contracts for sale of crypts in the Mausoleum of the defendant company. The plaintiff to be paid certain commissions on the sales made.

2. Attached hereto marked Schedule "A" is a statement of sales made under said agreement and the amount due the plaintiff from the defendant for sales so made and for which no commissions have been paid.

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3. Plaintiff demands on this count the sum of $500.

William F. Burke,
Attorney of Plaintiff.

TO THE WITHIN NAMED DEFENDANT, TAKE NOTICE:

That the plaintiff demands that you shall file

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a written specification of defenses intended to be made to said action on or before the time specified for appearance in the summons, and upon your failure so to do the plaintiff shall proceed according to law.

WILLIAM F. BURKE,
Attorney of Plaintiff.

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SCHEDULE A.

	Sale.	Com.
Muller	$1100.00	$110.00
Bounoure (Jackson ½)	350.00	17.50
Carlock	250.00	25.00
Mueller	600.00	60.00
		212.50
Slater	600.00	60.00
Smith	1100.00	84.37
Van Name	650.00	48.75
Lassig	950.00	47.50
		$240.62

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Total of above, $453.12.

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SECOND DISTRICT COURT OF THE CITY OF JERSEY CITY

WELLS H. HURLBUTT, *Plaintiff,* vs. MAUSOLEUM COMPANY OF AMERICA, a corporation, *Defendant.*	On Contract Specification of Defenses.

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20 The following is a specification of defenses intended to be made by the defendant, and filed in the above cause:

DEFENSE TO FIRST COUNT.

1. The defendant denies the allegations contained in paragraph 1.
2. The defendant denies the allegations contained in paragraph 2.

30 DEFENSE TO SECOND COUNT.

1. The defendant denies the allegations contained in paragraph 1.
2. The defendant denies the allegations contained in paragraph 2.

DEFENSE TO THIRD COUNT.

1. The defendant admits an oral agreement with the said plaintiff but says it has paid in full

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all commissions due thereunder, except the sum of $77.50 due A. Boumoure and J. Slater.

2. The defendant denies the allegations contained in paragraph 2.

NICHOLAS S. SCHLOEDER,
Attorney of Defendant.

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State of Case

Filed April 6, 1923

SECOND DISTRICT COURT OF THE CITY OF JERSEY CITY

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WELLS H. HURLBUTT, *Plaintiff-Appellee,* vs. MAUSOLEUM COMPANY OF AMERICA, a Corporation of New Jersey, *Defendant-Appellant.*	On Contract. State of Case on Appeal Agreed to by Parties.

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The parties hereto by their respective attorneys submit the following as the State of Case for the purpose of this appeal.

This action is to recover the amount due the plaintiff for commissions and compensation for services rendered by the plaintiff as a Solicitor or Salesman for the defendant.

The plaintiff's state of demand contained three Counts, but at the trial the plaintiff relied solely on the first Count, which alleged an agreement in writing, made by the defendant on or about November 30th, 1921, by which the defendant employed the plaintiff as a Solicitor or Salesman to sell crypts in the Mausoleum of the defendant. Plaintiff to be paid certain commissions on sales made.

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The defendant was served with a demand for a specification of the defenses intended to be made at the trial and the defendant filed such specification setting forth a general denial of the allega-

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tions contained in the first Count of the State of Demand.

The plaintiff served the defendant with a notice requiring it to produce at the trial of this cause, "a certain written agreement bearing date about November 1st, 1921, signed by the plaintiff herein and the defendant herein or either of them in and by which the plaintiff was employed as a Salesman by the defendant Company." 10

At the trial the plaintiff testified that around the latter part of October, 1921, he called at the office of the defendant Company and applied for employment as a Salesman. At that time he talked with Mr. F. Alson Garner, the general manager and vice-president of the defendant Company. That Mr. Garner outlined to the plaintiff his duties 20 and the terms of his employment, handing him a form of an agreement in writing which Mr. Garner said contained all the terms of his employment. That he took said form home and copied same and returned a day or so later and again saw Mr. Garner. That Mr. Garner asked him if the terms were satisfactory and that if he wished to work for the company he would be employed upon signing the agreement, which had been given to him a few days before, and that the plaintiff at that 30 time signed the agreement. Plaintiff then called upon the defendant to produce the agreement. The defendant did not produce same nor account for its non-production, but denied the existence of any such agreement.

The plaintiff then offered in evidence the copy of said agreement which he had made prior to the signing thereof. The defendant objected to the admission of this paper in evidence, on the ground that it was not the best evidence of the 40 agreement.

The objection was overruled and the paper was admitted in evidence and marked Exhibit P-1. Defendant prayed an exception, which was allowed.

It was admitted by counsel for the defendant
10 that Mr. Garner had full authority to bind the defendant Company in this particular case.

The plaintiff then testified to the sales made by him and the amount of commissions due him on said sales, according to his contract, Exhibit P-1.

Muller	$1,100.00	$110.00
Bounoure (Jackson ½)......	350.00	17.50
Garlock	250.00	25.00
Mueller	600.00	60.00
Slater	600.00	60.00
Smith	1,100.00	84.37
Van Name	650.00	48.75
Lassig	950.00	47.50
		$453.12

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It was admitted at the trial that the sum of Thirty-five ($35.00) dollars had been paid to the plaintiff as commission on the sale to Van Name.

The defendant admitted all the sales made by
30 the plaintiff and the amount of commissions, if due, for said sales, with the exception of one sale to "Lassig," which was disputed.

As to this sale plaintiff testified that he was called into the office and there met Mrs. Lassig and she then signed a contract for crypts, agreeing to pay $1,950. She then informed the plaintiff that she had already signed a contract for $1,000 and wanted that contract cancelled, which was done. The salesman who made the original sale
40 to Mrs. Lassig then claimed all the commission

for the second sale and the plaintiff said he would allow Mr. Philip his commission on $1,000, but claimed his commission on $950, and later on he agreed to accept one-half of his commission, or five per cent., and that Mr. Thomas Hansberry, assistant general manager of the defendant company, told him he was entitled to that. 10

Plaintiff received the total of $1,130 as a drawing account, in installments of $50 a week, which was subsequently charged against his commissions.

Plaintiff also testified that ground was broken for the Mausoleum on April 30th, 1922, and that on that day the commissions as set forth above became due and payable, ten per cent. having been paid on each sale as set forth above. 20

On these facts plaintiff rests his case.

The defendant moved for a non-suit, giving as its reason therefor that:

1. There is no legal evidence before the Court to support the allegations of the plaintiff's complaint.

2. Because the allegations of the complainant have not been proven, which motion was denied and an exception taken.

The defendant produced Mr. Thomas Hansberry, assistant general manager of the defendant company, as a witness. Mr. Hansberry was asked on direct examination, "What were the terms of Mr. Hurlbutt's employment?" The question was objected to for the reason that the contract was in evidence and spoke for itself. Objection was overruled, exception allowed. The answer was "That the Company did not pay commissions on cancelled sales and Hurlbutt received commission in full only upon the receipt of thirty-five per 40

cent. of the purchase price from crypt purchasers." Plaintiff moved to strike out the answer for the reason that it was parol evidence varying the terms of a written instrument, which motion was granted and exception prayed and allowed.

10 Defendant then offered Nicholas S. Schloeder as a witness, and he testified that he was Secretary of the defendant Company and that at no time was any contract, signed by the plaintiff, in the possession of the Company or in its files. He further offered to give testimony that at no time did the plaintiff receive commissions under the terms of the contract in evidence marked Exhibit P-1.

This testimony was objected to because it
20 tended to vary the terms of a written instrument and was excluded by the Court. Exception prayed and allowed.

Defendant offered in evidence a statement prepared in its office showing all sales made by the plaintiff and the amount of commission due for such sales, showing the money paid to the plaintiff on account of such commissions and attached thereto was a receipt signed by the plaintiff fo a sum of money paid on the day said statement
30 was rendered to the plaintiff. There being no objection the same was admitted in evidence and marked Exhibit D-1.

Mr. Garner was not produced at the trial.

On these facts the defendant rests its case.

Defendant moved for judgment on the grounds that:

(1) There was no legal evidence before the Court to support the allegations of the plaintiff's complaint.

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(2) Because the allegations have not been proven.

(3) That the statement and receipt marked Exhibit D-1 was in effect an accord and satisfaction and a bar to recovery.

The Court found: 10

1. That the plaintiff entered into an agreement in writing, as evidenced by Exhibit P-1, with the defendant Company whereby he was employed as a Solicitor or Salesman to be paid certain commissions, that he made the sales as set forth in Schedule "A" annexed to the State of Demand, that commissions were due plaintiff and that he was entitled to be paid the amount shown on said schedule.

As to Exhibit D-1, the Court construed it as 20 nothing more than a receipt for the amount paid at that time.

Judgment entered in favor of the plaintiff and against the defendant for the sum of $473.43.

General exception to findings prayed and granted.

William F. Burke,
Attorney of Plaintiff.

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Nicholas S. Schloeder,
Attorney of Defendant.

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Exhibit P-1

AGREEMENT, made this........ day of........, between the Mausoleum Company of America, Inc., a corporation of the State of New Jersey, party of the first part, and.................. ...., a salesman, party of
10 the second part;

In consideration of the mutual covenants, conditions, etc., hereinafter contained, the parties hereto agree as follows:

1. The said salesman shall enter into the services of the said corporation as a salesman for the purpose of obtaining purchases of crypts in the mausoleum located in the Fairview Cemetery, now about to be erected by the said corporation, for a period of .... years from..........,
20 subject to the general control of the said party of the first part.

2. The said salesman shall devote the whole of his time, attention and energy to the performance of his duties as such salesman and shall not either directly or indirectly, alone or in partnership, be connected with or concerned in any other business or pursuit whatsoever during the said term of two years, especially in connection with any other company engaged in the construction
30 or erection of any mausoleum. It is expressly agreed and understood that in any event, whether this agreement be terminated or not, or expires, that the said party of the second part shall not be connected directly or indirectly in any way with any other concern engaged in the promotion of mausoleums, for a period of two years after the signing of this agreement.

3. The salesman shall, subject to the control of the said party of the first part, make due an
40 correct daily reports of all crypts sold by him and

of all transactions and deals of and in relation to the said business and shall serve the said firm diligently and according to his best abilities in all respects.

4. The party of the first part agrees to instruct the said salesman in the method of selling crypts in the proposed mausoleum for a period of two weeks from the date of this agreement, during said time the said salesman shall receive a drawing account of fifty dollars per week; thereafter the said salesman shall be allowed a commission of ten per cent. of all sales made by him, twenty-five per cent. of which shall be paid to him upon receipt from the purchaser of ten per cent. of the purchase price and the balance of the said commission when the construction of the said building is begun.

5. It is expressly agreed and understood that the duration of this contract is conditioned upon the salesman making sales amounting to not less than ten thousand dollars per month. In the event that he fails to do so the contract may be terminated at the option of the said party of the first part. If, however, the said salesman shall succeed in making sales of crypts amounting to more than the said sum of ten thousand dollars, upon which an installment of ten per cent. of said purchase price has been received by the said Mausoleum Company of America, Inc., then and in that event the party of the first part agrees to pay the sum of $100.00 as a bonus.

6. The said party of the first part agrees to co-operate fully with the salesman and to furnish said salesman with all necessary stationery, circulars, advertising and printed matter.

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7. It is expressly agreed and understood that all contracts for the purchase of crypts shall be taken on blanks furnished by the said party of the first part and to be submitted to it for its approval.

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

Signed, sealed and delivered in the presence of

Mausoleum Company of America,

....

Attest. Vice President.

L. S.

Exhibit D-1

W. H. HURLBUTT

Total Amount of Sales Up to Date

Name of Customer	Amt. of Contract	%	Commissions	
D. H. Valentine	$1400.00	7½	$105.00	
Edwin P. Banta	800.00	10	80.00	
Otto A. Griesbach	850.00	5	42.50	
S. E. Hendricks	1650.00	7½	123.75	
Emil Hartleb	575.00	10	57.50	
John Meng	975.00	10	97.50	
Chas. F. Muller	1100.00	10	110.00	
Robt. Mueller	600.00	10	60.00	
Joseph Slater	800.00	7½	60.00	
Carl A. Stern	650.00	10	65.00	
Isabella Strong	300.00	10	30.00	
Howard Smith	1125.00	7½	84.37	
E. Van Name	650.00	7½	48.75	
	35% Paid			
Henry Brinkmann	3000.00	10	300.00	
Hubert J. Geenen	650.00	7½	48.75	
G. C. Lindauer	1000.00	10	100.00	
M. E. Mittelholzer	1100.00	10	110.00	
C. B. Fuller	300.00	10	30.00	
Louise M. Roth	375.00	10	37.50	
S. Hodkinson	1500.00	7½	112.50	
Herman Becker	725.00	10	72.50	(20% Pd.)
Henry Block	900.00	10	90.00	
J. Ellershaw	575.00	10	57.50	
John G. Gallina	550.00	10	55.00	
A. Himmelman	975.00	10	97.50	
Wm. Kempf	750.00	10	75.00	
Henry Kempf	750.00	10	75.00	
Louise E. Rambo	400.00	10	40.00	
Nancy M. Walmsley	550.00	10	55.00	
Theodore Weil	600.00	5	30.00	
Frank Holdsworth	250.00	10	25.00	
			1411.25	
Monthly or Irregular Payments				
A. M. Boumoure	350.00	5	17.50	
R. Van Santford	700.00	10	70.00	
	Cancellations			
E. Carlock	250.00			
A. Pardee	600.00			
J. A. Bauer	750.00			

Cash Received on Account of Commissions to Date....	$1130.00
Total Amount Commissions Due Upon Which 35% of Purchase Price Has Been Received..........	$1411.25
Total Amount Received on Commissions to Date......	1130.00
Amount due..........	$ 281.25

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Exhibit D-1

Received from The Mausoleum Company of America the sum of Two Hundred Eighty-One Dollars and Twenty-Five Cents ($281.25). Being the moneys in full now due me as commissions, as per foregoing statement which is hereby accepted by me as correct.

WELLS H. HURLBUTT (signed)

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Dated: June 6th, 1922

In presence of

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Opinion

NEW JERSEY SUPREME COURT

June Term, 1923

WELLS H. HURLBUTT, *Plaintiff-Appellee,* vs. MAUSOLEUM COMPANY OF AMERICA, INC., a Corporation of New Jersey, *Defendant-Appellant.*	Opinion.

Submitted June Term, 1923.

Decided November 7, 1923.

On Appeal from Second District Court of Jersey City.

Before Justices Kalisch and Katzenbach.

William F. Burke, Esq., for the Plaintiff-Appellee.

G. Frank Shanley, Esq., and John H. Sheridan, Esq., of counsel.

Nicholas S. Schloeder, Esq., for the Defendant-Appellant.

PER CURIAM:

This is an appeal from a judgment of the Second District Court of Jersey City. The plaintiff claimed to have been employed by the defendant company to sell on commission crypts in a mausoleum to be erected by the defendant.

The first ground of appeal argued relates to the admission of a copy of an agreement which the plaintiff contended was the contract of hiring, made between the defendant and himself. The

plaintiff testified that in the latter part of October, 1921, he called at the office of the defendant company and applied for employment as a salesman. He talked with Mr. Garner, the general manager and vice-president, who outlined his duties and handed him a form of agreement containing the terms of employment. The plaintiff took the form home and made a copy of it. Later he saw Mr. Garner who told him if the terms were satisfactory he would be employed upon signing the agreement, which the plaintiff then signed. The defendant was given notice to produce the agreement at the trial. The defendant did not produce the agreement or account for its non-production. It denied the existence of the agreement. The plaintiff offered the copy he had made which the defendant objected to on the ground that it was not the best evidence of the agreement. The Court admitted in evidence the copy. The appellant contends that because the existence of the agreement was denied and there was no corroboration of the plaintiff's testimony with reference to the existence of the agreement, it was error to admit secondary evidence of the contents of the agreement. This argument seems to us unsound. There was evidence which justified the finding made by the District Court that the plaintiff entered into the written agreement with the defendant. The plaintiff had testified with reference to the making of the agreement and the defendant did not call Mr. Garner to refute his testimony. This was evidence of the existence of the agreement. Where an original document is in possession or control of the adverse party and is not produced upon notice, a secondary evidence is admissible. *Toman* vs. *Toman,* 2 N. J. L., 153; *Durbrow* vs. *Hackensack Meadows Company,* 77 N. J. L., 89.

The second ground of appeal is the refusal of the Court to allow a Mr. Hansberry, Assistant General Manager of the defendant company to testify as to the terms of the plaintiff's agreement. This was the proper ruling as terms of the plaintiff's employment were embodied in the contract and could not be altered by the statement of Mr. Hansberry.

The third ground of appeal is the rejection by the trial court of the testimony of a Mr. Schloeder, who was the Secretary of the defendant company and testified that at no time was any contract signed by the plaintiff in the possession of the company or in its files. He further offered to give testimony that at no time did the plaintiff receive commissions under the terms of the contract in evidence. The state of the case states that this testimony was objected to because it tended to alter the terms of a written instrument. That part of the testimony of Mr. Schloeder to the effect that at no time did the plaintiff receive commissions under the terms of the contract in evidence was properly rejected, as it altered the terms of a written agreement. Mr. Schloeder should have been permitted to testify that there was no contract signed by the plaintiff in the possession of the company or in its files, in view of the fact that the defendant disputed the existence of the contract. As Mr. Schloeder's statement on this subject was received and the Court after consideration found as a fact that the contract did exist, we think the error harmless to the defendant.

The next ground of appeal argued is that the trial court misconstrued the effect of a receipt given by the plaintiff. The plaintiff had executed a receipt containing these words "Being the monies in full now due me as commissions as per foregoing statement, which is hereby accepted by

me as correct'' as nothing more than a receipt for the amount paid at that time. There was evidence that this receipt applied only to commissions upon which 35% of the purchase price had been received and not to all commissions to which the plaintiff might be entitled. Whether the receipt did or not was a question of fact. This fact was determined in favor of the plaintiff's contention. There being evidence to support this contention the finding will not be disturbed.

The appellant also contends that this receipt in full constituted an accord and satisfaction. The finding by the trial court that the receipt only applied to one class of commissions, precludes the receipt amounting to an accord and satisfaction. Moreover, the necessary elements to constitute an accord and satisfaction, namely, of a less amount, the acceptance by the creditor of the lesser amount with the intention that it shall operate as a satisfaction, are lacking in the present case. *Decker* vs. *Smith Co.,* 86 N. J. L., 630.

The judgment is affirmed.

34 MAR.1.1924

Court of Errors and Appeals of the State of New Jersey

WELLS H. HURLBUTT, *Plaintiff-Appellee,* vs. MAUSOLEUM COMPANY OF AMERICA, INC., a corporation of New Jersey, *Defendant-Appellant.*	On Appeal From New Jersey Supreme Court

BRIEF OF PLAINTIFF-APPELLEE

Statement of Facts.

This is an appeal taken by the defendant from the Judgment of the New Jersey Supreme Court, affirming a Judgment of the Second District Court of Jersey City in favor of the plaintiff, for the sum of $473.34, entered February 2nd, 1923, after trial before the Court without a jury. It is an action on contract for certain commissions due plaintiff from the defendant.

Plaintiff in his State of Demand (case p. 7, l. 24) alleges a written contract.

Defendant was served with due notice to produce the contract alleged (case p. 13, l. 3).

Plaintiff by his testimony proved to the satisfaction of the Court that such a contract existed and that he had a copy of the same. He called upon the defendant to produce the original, which

the defendant failed to do (case p. 13, ll. 31-35). Plaintiff then offered the copy in evidence, and it was admitted and marked Exhibit P-1 (case p. 13 and 14).

Defendant admitted the plaintiff made the sales set out in the schedule annexed to his State of Demand (case p. 14). Defendant also admitted the amount of commissions which would have been earned on such sales, if they were due.

In the computation of the amount due the plaintiff the Court erred in allowing to the plaintiff the sum of $48.75 for commissions due on sale to "Van Name," the plaintiff having admitted that there was only the sum of $13.75 due him.

Ground was broken for the Mausoleum on April 30th, 1922, and under the terms of Exhibit P-1 commissions became due (case p. 15). Plaintiff rests. Defendant moved for a non-suit and motion denied.

Defendant produced Mr. Thomas Hansberry as a witness and his testimony was stricken out (case p. 15, f. 30).

Defendant produced Mr. Nicholas S. Schloeder and upon objection his testimony was excluded (case p. 15, f. 35). Mr. Garner was not produced (case p. 16, f. 33).

Defendant then offered in evidence a statement, no objection being made, it was admitted in evidence and marked Exhibit D-1 (case p. 16, f. 30).

Defendant rests.

Court found as a fact that the plaintiff entered into an agreement in writing, as evidenced by Exhibit P-1, and that he made sales set forth in the schedule annexed to the State of Demand. That the commissions were due to the plaintiff and that the plaintiff was entitled to be paid the amount shown in said schedule (case p. 17, f. 10).

Point I.

The Judgment of the Supreme Court should be affirmed for the reasons set forth in the opinion of said Court.

Point II.

Exhibit P-1 is legal evidence and the Supreme Court was correct in its affirmance of the ruling of the Trial Court in admitting said agreement.

The plaintiff proved the existence of a written contract between him and the defendant by his testimony of his conversation with Mr. Garner, the duly authorized officer of the defendant, and he served due notice upon the defendant to produce the original of that contract; the defendant failed to produce the paper and the plaintiff offered in evidence a copy, made by himself a day or so before he signed the original, which was admitted in evidence. This evidence is not controverted in any way. Mr. Garner, the party who could deny the making of any such agreement, is not produced nor is any reason shown why he is not produced.

Where an original document is in possession or in control of the adverse party and is not produced upon notice, secondary evidence is admissible.

Truax vs. *Truax,* 2 N. J. L. 153.

Dubrow vs. *Hackensack Meadows Co.,* 77 N. J. L. 90, 91.

Benoliel vs. *Homac,* 94 Atl. 605, 87 N. J. L. 375.

There is not in this case a bit of evidence which would raise an issue as to the existence and execution of the contract alleged by the plaintiff. The evidence of the plaintiff being uncontroverted, the Trial Court was justified in its finding of fact that such a contract existed.

The defendant-appellant in his brief on page three and four thereof has attempted to mislead the court, for while admitting the Supreme Court has correctly applied the law, they then suggest that there was no evidence of the existence of the agreement on which the plaintiff relies. The state of the case (case p. 13) plainly states that the plaintiff had testified to the making of the agreement and as to the copy made by him which was admitted in evidence. All this testimony being uncontroverted, the Trial Court could not legally have found other than it did.

Point III

The answer of Mr. Thomas Hansberry and the proffered evidence of Mr. Schloeder was properly excluded by the Trial Court.

The question asked Mr. Hansberry was "What were the terms of Mr. Hurlbutt's employment?" timely objection was made but overruled. His answer was "That the company did not pay commissions on cancelled sales as Hurlbutt received commissions in full only upon receipt of 35% of the purchase price, from crypt purchasers." The defendant-appellant contends this question and the answer thereto does not refer to the terms of the plaintiff's *agreement* but only to his terms of *employment*. How can there be any difference? The defendant by not producing any evidence denying

the existence of the agreement, or showing why no such evidence is produced, by inference, admits such an agreement. Then they want to say in effect *this agreement is in existence, but it was never looked upon as the agreement of the parties but the parties worked under another agreement.* Is this not varying or altering the terms of the written agreement? It is exactly the same situation which brought the case of *Naumberg* vs. *Young*, 44 N. J. L. 331, into existence. Further, in attempting to show a change in this contract they do not produce Mr. Garner, the man who made the agreement for the corporation, but one of his subordinates. If this contract was not entered into or if it was abrogated after being made it would be a perfectly simple matter to controvert the testimony of the plaintiff.

As to the testimony of Mr. Schloeder, here again the defendant is attempting to mislead the court and garble the facts. The defendant states in its brief that the proffered testimony of Mr. Schloeder would have been properly rejected if the contract existed and then goes on to say, "but, at that stage of the trial this was still in dispute" (Brief Page 7). It will plainly appear by the state of the case that nowhere in the whole case is there any denial made of the existence of the contract except the statement of counsel for the defendant, in answer to the request of the plaintiff for the production of the original contract, when counsel stated he did not have the agreement but denied its existence. At the most this was only an indication of what the defense intended to, but did not, prove. This surely cannot arise to such dignity as to overcome the sworn testimony of the plaintiff.

Point IV

The construction placed upon Exhibit D-1 by the Trial Court is consistent with law.

The Court in construing the Exhibit D-1 properly construed the instrument as a whole. The exhibit consisted of two sheets of paper; upon the first sheet was a statement of the sales made by the plaintiff and the amount of commission due on such sales. For reasons unknown to the plaintiff and for which no explanation was made to the Trial Court, the sales were divided into four classes, one class upon which 35 per cent. of the purchase price had evidently been paid to the defendant, another where the payments had been made in monthly or irregular payments, and the third "cancellations," and the fourth which are listed without any descriptive heading. After this statement there is a summary showing cash received on account of commissions to date, viz., the sum of $1,130, being the weekly drawing account which the plaintiff admitted receiving. The next statement is significant of the plain intention of the defendant in preparing this statement. It shows "Total amount of commissions due upon which 35 per cent. of purchase price has been received, $1,411.25," showing the intention of the defendant at that time was to pay the plaintiff only for his commissions due, upon which 35 per cent. of the purchase price has been received by the defendant, and after crediting the payments received by the plaintiff showing a balance due, according to the way they wished to pay, of $281.25. The receipt, which is on the second sheet attached to this exhibit, states that the amount was received and goes on further to say

"Being the moneys in full, now due as commissions, as per foregoing statement, which is hereby accepted by me as correct." Even giving the defendant the most favorable construction that could be placed upon this exhibit, it can mean nothing more than a receipt for the sum of $281.25 for commissions due the plaintiff, as per the statement, according to the way the defendant wished to pay the plaintiff, and the statement as to cancellations and as to the amounts paid by the various purchasers is accepted as correct.

This exhibit having been drawn by the defendant it must be construed most favorable to the plaintiff. Nowhere in the evidence or in this exhibit is there any fact from which an inference could be drawn so as to contradict the terms of the contract proven by the plaintiff. This exhibit does not purport to be a full and complete statement of the account between the parties, for by its very wording it is shown to be only "as per foregoing statement."

Here again the defendant seeks to mislead the court as to the facts. The Supreme Court held, and correctly so, that there was evidence to support the contention that this receipt applied only to commissions upon which 35 per cent. of the purchase price had been received and not to all the commissions to which the plaintiff might be entitled. What was this evidence? The plaintiff testified to the sales made by him, and the defendant admitted the amount of commissions for said sales, if the same were due. All this is evidence to support Court's finding. The defendant did not attempt to explain the statement Exhibit D-1, nor did they attempt to show that any honest dispute had arisen which this statement was intended to settle. The defendant loses sight of the fact

that this statement was prepared by it in its office and for its use, and they having opportunity for a proper preparation of the same would certainly have drawn the statement so as to work an accord and satisfaction or to make a change in the contract between the parties, if that were their real intention.

Point V

The Judgment of the Trial Court in favor of the plaintiff against the defendant should be affirmed.

For the first time counsel for the defendant finds fault with the state of the case prepared and consented to by him. His contention may or may not be correct, there is no doubt a lot to be criticised in the state of the case. However, it is all that can be relied upon at this time. The defendant suggests that the Supreme Court has based its findings on evidence outside the record. On the contrary, the Supreme Court throughout its whole opinion refers to the state of the case and the inferences to be drawn from the facts therein stated.

Attention is called to an error in computation whereby the Judgment was entered in the sum of $473.43, instead of $438.43, the correct amount. This error is admitted by the plaintiff and the defendant does not press this error as a reason for reversal, for no doubt they realize it is an harmless error.

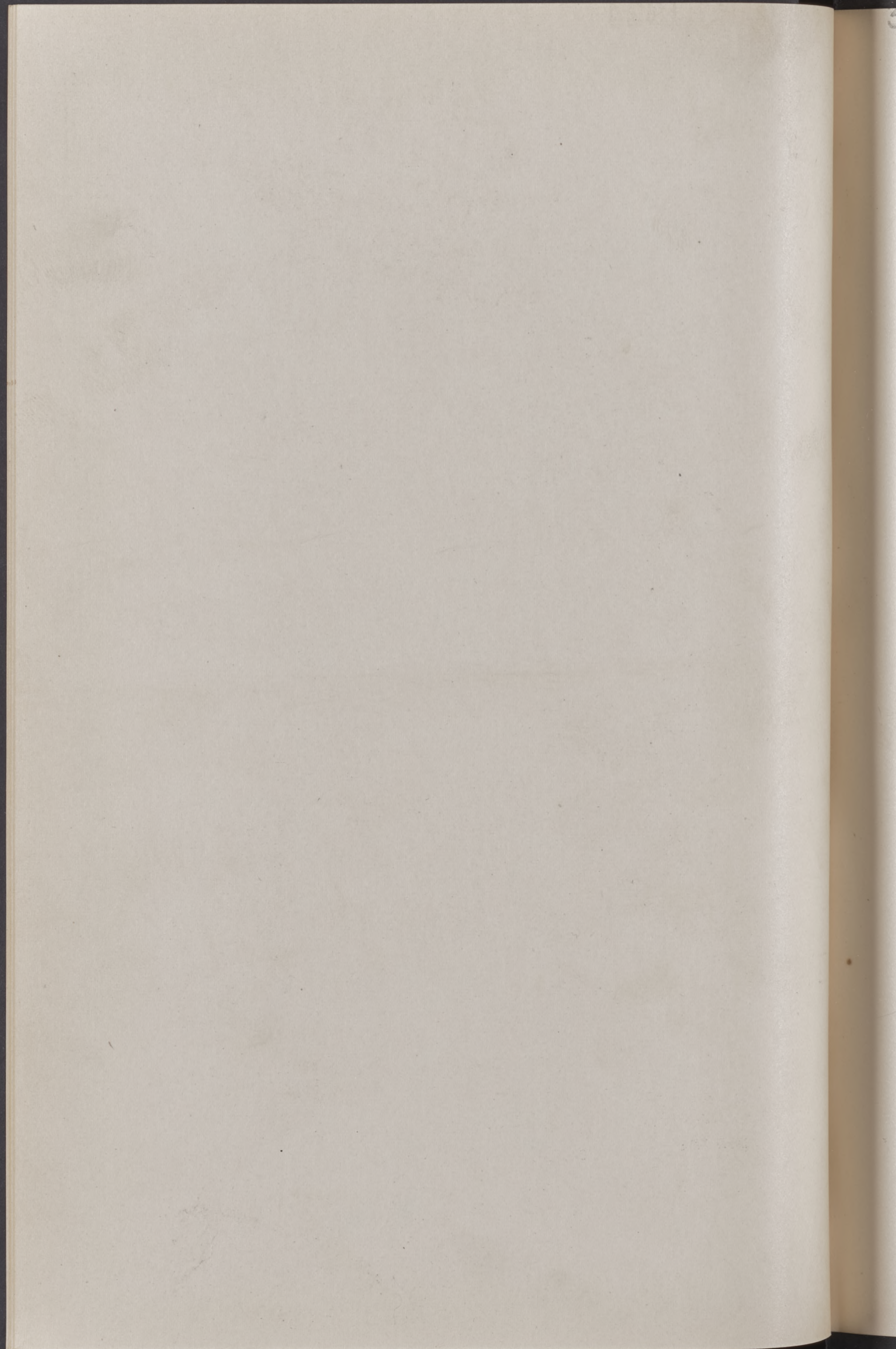
Attention is respectfully called to a recent case in point.

Cook vs. *American Smelting & Refining Co.,* 1 N. J. Advance Reports 1284, citing *Higgins* vs. *Egg,* 87 N. J. L. 185, 188 and also to Sec. 27 of the Practice Act of 1912.

It is respectfully submitted the Judgment of the Supreme Court should be affirmed.

WILLIAM F. BURKE,
Attorney of Plaintiff-Appellee.

JOHN H. SHERIDAN,
G. FRANK SHANLEY,
Of Counsel.



34 MAR. 1. 1924

New Jersey Court of Errors and Appeals

WELLS H. HURLBUTT, *Plaintiff-Appellee,* vs. MAUSOLEUM COMPANY OF AMERICA, INC., a corporation of N. J. *Defendant-Appellant.*	On Appeal From Supreme Court.

BRIEF FOR DEFENDANT-APPELLANT.

Statement of Facts.

This is an appeal taken by the defendant from a judgment of the Supreme Court, affirming a judgment of the Second District Court, of Jersey City, in favor of the plaintiff for the sum of $473.34 entered February 2, 1923, after trial before the Court without a jury. It is an action on contract for certain commissions alleged to be due plaintiff from defendant, who is a corporation of New Jersey engaged in the selling of crypts in a public mausoleum.

Plaintiff sued on three counts, but proceeded only on the first count (p. 7), setting out a written contract.

Plaintiff testified as to existence of this contract, which was denied by defendant (p. 13, f. 10, 35). Upon showing service of a notice to produce same, an alleged copy, Exhibit P-1 (p. 18.), was admitted into evidence over timely objection of defendant, without further testimony from either side.

Defendant admitted the making of the sales claimed by plaintiff (p. 9.), and the amount of sales which would have been due, if the right to them had accrued.

Plaintiff admitted that he was not allowed 10% of *all sales* as provided in section 4 of his alleged contract (Exhibit P-1, p. 19 f. 19), since the rate on the sale to Bounoure was 5%, to Smith 7½% and Vame 7½% (p. 14 f. 13). Nor did he receive 25% of his commissions upon the receipt from the purchaser of 10% of the purchase price, likewise provided therein, but on the contrary received a straight drawing account of $50.00 per week, totaling $1130.00, which was subsequently charged against his commissions (p. 15 f. 12).

Ground having been broken for the Mausoleum on April 30, 1922, the plaintiff claimed that all commissions became due immediately, by virtue of the provisions of Exhibit P-1. Plaintiff rests.

After denial of motion for non-suit, defendant produced Mr. Thomas Hansberry, assistant general manager of the company, and his testimony was stricken out. (pp. 15, 16). Defendant produced Mr. Nicholas S. Schloeder, and his testimony was excluded (p. 16 f. 10).

Statement signed by defendant, marked Exhibit D-1 (p. 21), was admitted into evidence without objection, and defendant moved for judgment, alleging in part that this statement was in effect an accord and satisfactions and a bar to recovery.

The motion was denied. The Court *construed* Exhibit D-1 as nothing more than a receipt for the amount paid at that time, and there being nothing further produced by defendant to controvert the allegations of plaintiff, gave judgment for the full amount claimed, including an error in computation of $35.00, since admitted by the plaintiff on brief before the Supreme Court.

Defendant appealed to the Supreme Court at the June term and on November 7, 1923, the said Court filed an opinion affirming the judgment of the District Court (p. 23).

Plaintiff thereupon filed judgment of affirmance (p. 3A), and from this judgment the defendant now appeals.

POINT I.

The Trial Court erroneously allowed in evidence a copy of the alleged contract marked Ex. P-1, the proper foundation for the introduction of secondary evidence not having been laid.

On this point the Supreme Court says (p. 24):

> "The appellant contends that because the existence of the agreement was denied and there was no corroboration of the plaintiff's testimony with reference to the existence of the agreement it was error to admit secondary evidence of the contents of the agreement. This argument seems to us unsound. There was evidence which justified the finding entered by the District Court that the plaintiff entered into a written agreement with the defendant."

This is unquestionably so, but I did not intend to limit my contention to the mere question of corroboration. That the trial judge failed to require corroboration was mentioned solely to indicate that he did not treat the question of admission based on a former existence, addressed to himself *a priori* as one of fact, but as one of

law, justified as a matter of right by the notice to produce.

As further evidence of this it was urged that he did not require proof of an endeavor to procure the instrument or make a diligent search for the same, analogous to that required when instruments are lost or destroyed.

> *Johnson* vs. *Arwine,* 42 N. J. L. 451.
> *Longstreet* vs. *Kork,* 64 Id. 112.

Now:

> "The non-production under demand of a contract, the existence of which was denied, will not justify proof of its contents without first proving its existence or proper execution of the instrument.
>
> *Dubrow* vs. *Hackensack Meadow Co.,* 77 N. J. L. 92.

It is true that the sufficiency of such proof is a primary question for the Court, but it is nevertheless a question of fact. The erroneous treatment of a point, even though to all intents and purposes the same practical result might otherwise be obtained, has on several occasions led to a reversal. Thus, in *Weston Co.* vs. *Benecke,* 82 N. J. L. 445, the trial judge, sitting both as judge and jury, non-suited the plaintiff, erroneously treating the evidence as a question of law instead of fact; in *Higgins* vs. *Goerke Kirch Co.,* 92 Id. 424, the judge indicated that he found no "negligence in Law" when he should have decided the question of negligence as one of fact; in *Hite* vs. *Dell,* 78 Id. 239, the judge signed an order which, properly without his discretion, he indicated that he deemed it mandatory for him to sign it.

Under ordinary circumstances such an error would have been rendered harmless by the introduction of subsequent testimony on that point, and an ultimate finding within the rule of such cases, as *Benobel* vs. *Homac,* 87 N. J. L. 375. But in the case sub judice, the trial judge admitted the copy of the alleged contract without *determining* the existence of the original, and once having admitted it, refused to hear anything further on the subject. Because of these peculiar circumstances such an error, I respectfully submit, was fatal

POINT II.

The Trial Court erred in striking out the answer of Mr. Thomas Hansberry and excluding proffered evidence of Mr. Schloeder, because the parol evidence rule is not applicable here.

The Supreme Court says (p. 25):

> "The second ground of appeal is the refusal of the Court to allow Mr. Hansberry, Assistant Manager of the defendant company, to testify as to the terms of the plaintiff's agreement."

The question asked Mr. Hansberry did not refer to the terms of the plaintiff's *agreement,* but to the terms of his *employment,* that is to say, the terms and conditions under which he had actually worked.

This is further indicated by the answer by Mr. Hansberry. He does not say that under our view of Hurlbutt's agreement he was not to get commissions on cancelled sales, nor to receive commissions in full until the receipt of 35%. On the

contrary, he used the past tense and states simply as a fact "that the company *did not* pay commissions on cancelled sales and Hurlbutt *received* commissions in full only upon receipt of 35% . . . ." (p. 15, f. 30).

The purpose of this testimony was not to vary the terms of a written instrument, for the Doctrine of *Naumberg* vs. *Young* is hornbook law, but to show (1) that it did not exist and (2) if it did (and Mr. Garner carried it somewhere in his vest pocket, so to speak) neither Hurlbutt nor the company recognized it as binding and operative in their long course of dealing. This brings it squarely within the doctrine of *Boulevard Lamp Co.* vs. *Kern Gaslight Co.*, 67 N. J. L. 279, where it was said:

> "The object of the oral testimony is not to alter, vary or contradict the legal import of the writing, but to show that the writing was not what on its face it seemed to be."

Also

> *Oakridge Co.* vs. *Toole,* 82 N. J. Eq., 541.
> *O'Brien* vs. *Paterson,* 69 Id. 117.

This rule is universally recognized, and a large number of cases are cited in support thereof in 22 C. J. 1213, 1214.

The testimony of Mr. Schloeder, which was excluded, was offered for the same purpose, and the same principles applied. Concerning the first part of Mr. Schloeder's testimony, the Supreme Court says:

> "That part of the testimony of Mr. Schloeder, to the effect that at no time did the plaintiff receive commissions, under the terms of the contract, in evidence, was

> properly rejected, as it altered the terms of the written instrument." (p. 25).

I respectfully submit that as an erroneous expression of opinion. This would be true only upon the assumption that such contract existed, but, at that stage of the trial, this was still in dispute.

"Where the immediate issue is whether there is or was a writing embodying the contract is erroneous to include parol evidence bearing on that issue upon the assumption that such a writing exists." 22 C. J. 987, 988. Such testimony would not *alter* but rather *negative* the terms of the alleged contract. Continuing the Court says:

> "As Mr. Schloeder's statement on the subject was received and the Court, after consideration, found as a fact that the contract did exist we think the error harmless to the defendant."

True, the Court found as a fact, that the contract did exist, and that such finding is not now reviewable, is beyond question.

I will go further and say that such finding was a necessary result *upon the only evidence which the trial Court chose to hear.* Far from being harmless error, the exclusion of this testimony, together with that of Mr. Hansberry, *left the defendant defenseless* except for the force and effect of Exhibit D-1, and as a result thereof, I respectfully submit that the *defendant did not have his day in Court.*

Point III

The Trial Court erred in construing Exhibit D-1 as nothing more than a receipt for the amount paid at that time, because it is a correct statement of the terms of Mr. Hurlbutt's employment.

The Supreme Court says (p. 26):

> "There was evidence that this receipt applied only to commissions upon which 35% of the purchase price had been received, and not to all commissions to which the plaintiff might be entitled. Whether the receipt did or not was a question of fact. This fact was determined in favor of the plaintiff's contention. There being evidence to support the contention, the finding will not be disturbed."

This reasoning is apparently based on the assumption that there was some evidence *aliunde* this instrument to support this finding. As a matter of fact there was no evidence, one way or the other, showing the circumstances of it execution. The instrument along furnished the basis of the Court's construction which was, therefore, necessarily one of law and not of fact, there being no ambiguity there. *McLaren* vs. *Marmon Oldsmobile Co.,* 95 L., 520.

If the instrument itself does not support this finding it must fail. Examining the same a most cursory inspection shows that it is a complete statement of Hurlbutt's commission account (p. 21). It begins with the caption "Total amount of Sales to Date." It divides the sales into four classes. Under the headings of CANCELLATIONS, no commissions are credited, including one to Garlock, upon which the trial court award-

ed plaintiff a commission of $25.00 (p. 21 f. 33.) It also reveals that no commissions were paid on the other classes, until 35% of the purchase price was received. This statement concludes with the unequivocal words "Amount Due $281.25" Then follow the words: "Being the moneys in full now due me as commissions, as per foregoing statement, which is hereby accepted by me as correct."

It is now urged that the *intent* of this instrument was to pay plaintiff only for commissions due upon which 35% of the purchase price had been received. This contention can only be supported upon the assumption that the company selected an arbitrary and fanciful percentage for its computations, which had absolutely no basis in any previous arrangement of the parties, and that this elaborate statement was prepared simply to show how this would work out.

It is also urged that the word "correct" applies, not to the whole statement, including its division into classes, its failure to credit commissions on cancellations, nor yet to that very intent which the Counsel for the plaintiff so strenuously urges, but only to its arithmetical computations, its names and the commission rates. Why any discrimination at all should be made simply to help the plaintiff's theory of the case I am at a loss to understand. I respectfully submit that when one testifies to the correctness of any statement it applies to all that the instrument embraces.

The construction placed upon it by the plaintiff would be subservient to dishonesty in business. It is untenable upon the face of it, for no reasonable man would execute something pertaining to his entire relation with the company which employed him, and relying on defeating it upon the interpretation that it meant nothing.

Point IV

Exhibit D-1 is effect an accord and satisfaction.

Owing to the absence of any testimony *aliunde* to this instrument, before alluded to, to establish an accord and satisfaction from a mere examination of the status of the parties at the time of its execution, from which the necessary elements of a disputed and unliquidated claim may be implied, is manifestly a difficult one. I will not now, therefore, elaborate on this point.

Point V

The Trial Court erroneously entered judgment for the Plaintiff and against the defendant.

Practically all of the law adduced by the plaintiff's brief before the Supreme Court, and indeed, the legal principles there upheld by that Court, are uncontrovertably correct. In fact, they were admitted before the appellant's brief was written. No attempt is made to dispute them now. The difficulty, then, has not arisen so much from a disagreement in principles nor what the facts really were, for that is not now reviewable, but as to the nature of the state of the case *sub judice*. Ordinarily a state of case on appeal from the judgment of the Court sitting alone as judge and jury should disclose not the *testimony*, but the *finding* of facts from the testimony, *Van Vechten* vs. *McGuire*, 70 N. J. L. 657.

But that very case furnishes certain exceptions which are noted, and the Court says, on page 659:

"It is only when it is alleged that there is no legal evidence produced in the District Court, upon which the findings of fact can be supported, or that there was error committed with admission or rejection of evidence, that the Supreme Court will receive and examine the testimony, and then it will receive only so much of the evidence as is material upon the alleged error which is made on the ground of appeal, and will examine it only for the purpose of ascertaining whether the allegation is well founded."

The precise points were raised by the specification of reasons for the reversal (pp. 2-3).

The state of the case contains the evidence and all the evidence on the points raised. There was no evidence *aliunde* the record except some immaterial points not raised or seriously urged, but everywhere the Supreme Court appears to assume that there was other evidence, not disclosed in the state of case, on the various material points. This, I respectfully submit, is the real ground for the Supreme Court's decision and that it erred in applying the general rule when the exceptions thereto were applicable to this case.

In conclusion attention is once more respectfully directed to an error in computation whereby the Trial Court entered judgment for the full amount of $473.43.

There is no evidence to support the judgment above the sum of $438.43, which is admitted by the respondent.

Point VI

I respectfully submit that the judgment of the Supreme Court affirming the judgment of the court below should be reversed and a new trial directed.

NICHOLAS S. SCHLOEDER,
Attorney and of Counsel with Defendant.

34 MAR.T.1924

Court of Errors and Appeals of the State of New Jersey

WELLS H. HURLBUTT, *Plaintiff-Appellee*, vs. MAUSOLEUM COMPANY OF AMERICA, INC., a Corporation of New Jersey, *Defendant-Appellant*.	On Appeal from New Jersey Supreme Court.

REPLY BRIEF

In view of the assertion that Appellant's brief attempts to mislead the Court (Appellee's brief, pages 4, 7) and garbles facts (p. 5), I respectfully request permission to reply to these remarks.

It is asserted "they then suggest that there is no evidence of the existence of the agreement" (Appellee's brief, page 4). Now, not only is it admitted that there was evidence to support the existence of the agreement, but the appellant said: "I will go further and say that such finding was a necessary result upon the only evidence which the Trial Court chose to hear" (Appellant's brief, page 7).

Again, the appellee's insistence, in varying words, that there was no evidence to contradict this finding is only too true, but that very fact furnishes the principal ground of appeal, for the Trial Court rigorously excluded all evidence tend-

ing to raise that issue on the theory that it varied the terms of a written instrument.

So, too, the evidence which he says supports the "finding" in regard to Exhibit P-1 has manifestly nothing to do with the *construction* of the instrument (Appellee's brief, page 7).

Furthermore, *I* do not complain of the state of the case. On the contrary, my complaint is that it has been assumed that certain findings are supported by evidence not in the state of the case.

Respectfully submitted,

NICHOLAS S. SCHLOEDER,
Attorney and of Counsel
with Defendant-Appellant.