New Jersey Court of Errors & Appeals

THOMAS A. RYER, Defendant in Error, vs. ADOLPH TURKEL, Plaintiff in Error.	On Contract.

BRIEF OF PLAINTIFF IN ERROR.

The entire facts in this case will be found on pages 16 to 21, both inclusive, of the printed book.

The facts, briefly stated, are these. The plaintiff in error employed the defendant in error as a broker to secure a purchaser for certain real estate in Jersey City then owned by the plaintiff in error. The contract of the employment is found on page 19, the contract itself being printed on one side of the card and the location and description of the property being printed on the reverse side. The evidence is all documentary with the exception of the fact that the plaintiff in error testified that he instructed the defendant in error to sell the premises in question for cash and this was not contradicted.

The plaintiff in error contends that the judgment rendered against him in the District

Court and the affirmance of that judgment by the Supreme Court are erroneous.

I.

Because the evidence did not show that the said defendant in error had produced a purchaser ready and willing to enter into a contract on the terms designated in said agreement in writing, between said plaintiff and defendant.

The plaintiff in error insists that even if there was no evidence to show on what terms he was willing to sell the property outside of the card of authorization, a copy of which is found on page 19, that there it will be found that the price is stated at ninety-five hundred dollars, and as the terms of the sale are not given in any particular the only conclusion which can be legally drawn from the authorization is, that the price was ninety-five hundred dollars in cash. This is placing a construction upon the card aside from the testimony of the plaintiff in error, that he instructed the defendant in error to sell for cash. It is true that there is mentioned an encumbrance of six thousand dollars mortgage, but this, as well as all the other facts in relation to the property, is merely descriptive of the premises.

If this contention is found to be good, the judgment must be reversed, because the evidence shows that the purchaser, whom the defendant in error produced was not ready, willing and able to purchase on the terms prescribed by the plaintiff in error, but that the purchaser was to assume the present mortgage,

paying the difference of thirty-five hundred dollars in cash (see Exhibit B, page 19, &c.). There are a number of reasons why one who is desirous of selling real estate on which there is a mortgage given in the usual way to secure the bond accompanying it, should insist upon the payment in cash in order that his mortgage may be cancelled and his bond be returned to him.

When the seller parts with title to the property it would be but natural for him to desire to be relieved from all liability upon any bond and mortgage which had been executed by him. Should he sell subject to the bond and mortgage his liability would still remain, while if he sold for cash the bond and mortgage would be necessarily paid off and all liability of the seller thereunder would be terminated. Therefore it is but a reasonable inference that the plaintiff in error in this case desired to sell the property for cash; the evidence shows that he so stated, and the authority for selling very significantly omits to state what the terms were, although there was a particular space on the card alloted for that purpose.

The principle involved in this first contention has been so well established that we do not think it necessary to cite but one authority.

Am. & Eng. Ency. Law (1st Ed.), Vol. 2, pages 578-587.

2.

Because said defendant in error never brought the plaintiff in error and the alleged purchaser

to an agreement on the terms mentioned in the authority of sale.

Placing the construction on the contract given to it by the plaintiff in error there is no question but what the vendor and vendee were never brought to an agreement, and as a matter of fact no agreement has ever been reached between them.

A sale by a broker on different terms than those specified is not binding on the principal; neither is the broker entitled to commissions where he modifies the contract without the knowledge and consent of his principal.

Am. & Eng. Ency. Law (2nd Ed) Vol. 4, 971-975.

The employment in this case being by special agreement in writing the rights and liabilities of the parties will be determined by the terms of the agreement exclusively.

Hinds vs. Henry 7 Vr. page 330.

A case exactly on all fours with the one under consideration is Crowley Co., vs. Myer 40 Vr. page 245. There, as in this case, there was an authority in writing authorizing the agent to sell the property for seventy thousand dollars. The amount to be paid in cash was blank and the amount to remain on mortgage at the rate of six per cent. was blank. A purchaser was found who was willing to buy the land at the price fixed, not all in cash but partly by the exchange of lands, and balance in cash. The court held, however, that when the consideration is fixed by the owner in the authority given to the agent at a certain price

in dollars, the owner may reject a purchaser provided by the agent who offers to pay the price, not in dollars but in other property. The court however decided in that case that inasmuch as the owner accepted the offer made by the purchaser even though it was not in the terms provided in the authority given the agent, nevertheless the agent was entitled to his commissions. In the case at bar if the plaintiff in error had accepted the contract offered by the purchaser procured by the agent, the agent would have been entitled to his commission, but inasmuch as the owner refused to accept the purchaser and did not afterward convey the property to said purchaser, the agent is not entitled to his commissions.

The Supreme Court in the case at bar held that the authority to sell was susceptible of the construction that a sale for thirty-five hundred dollars in cash and purchaser assuming the mortgage of six thousand dollars fulfilled its terms, although the contract states a money consideration only; and that the District Court having found under the agreement and *oral proof* that such was the intention of the parties, the judgment would not be reversed.

We admit the rule to be that where there is any evidence to warrant the findings of the court below as to facts the Appellate Court will not reverse such findings, but we insist that there was no evidence which would warrant such a finding of fact.

There was no evidence whatever before the Supreme Court showing that the District

Court found any such intention in the minds of the parties.

There was no evidence whatever before the Supreme Court that there was any oral proof taken before the District Court on behalf of the plaintiff respecting the terms of sale or any oral proof whatever excepting the testimony of the defendant that he told the defendant in error to sell for cash which is uncontradicted.

As we understand the practice, the Supreme Court in these cases is confined to the record before it, and it cannot assume that oral proofs were taken concerning a fact in issue where none appear in the record certified by the court below.

We then are confined in this case to this single question. Does the authority to sell, Exhibit A, confer upon the defendant in error the right to sell the premises mentioned therein upon the terms set forth in Exhibit B, thereby entitling defendant in error to his commission? This is purely a question of law, properly reviewable by the Supreme Court under all circumstances, and we contend it must be answered in the negative.

We therefore submit that the judgment of said District Court was erroneous and also the judgment of affirmance of the Supreme Court, and that they should be reversed and judgment directed to be entered in favor of the plaintiff in error and the defendant below.

Respectfully submitted,

MELOSH & MORTEN,

Attorneys for plaintiff in Error.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS A. RYER, Defendent in Error.	
vs.	IN ERROR.
ADOLPH TURKEL, Plaintiff in Error.	

BRIEF FOR DEFENDANT IN ERROR.

This action was tried and judgment given in favor of the plaintiff in the Second District Court of Jersey City and from there, certiorari was taken to the Supreme Court. Argument was heard by a single Justice pursuant to the statute and the said judgment was in all things affirmed. The matter now comes before this court upon a writ of error.

A careful reading of the State of Case will disclose that the plaintiff in certiorari in the Supreme Court relied entirely upon questions of fact and not of law, and that he brings before this court pure questions of fact.

Decisions of fact were made by the Second District Court of Jersey City, which decisions of fact were binding upon the Supreme Court if there is sufficient evidence to sustain the conclusions of the trial court.

Marcus vs. Graver, 43 Vr., 95.

And it is the settled law of this forum that facts found by the District Court will be presumed to rest upon competent proof.

Gore vs. Herring, 43 Vr., 423.

Following these decisions, the Supreme Court found there was sufficient evidence to sustain the judgment of the Second District Court of Jersey City and accordingly the judgment was affirmed.

Briefly condensed the plaintiff in error, in this Court, assigns error that there were not sufficient facts before the Supreme Court whereby that Court could justify the findings of the trial judge. Absolutely no questions of law were brought, by certiorari, before the Supreme Court and there are no questions of law in this Court. They are purely questions of fact, and it is well established law that a decision of fact decided by the Supreme Court upon certiorari is binding upon this Court.

State vs. Mayor, &c., of Vailsburgh, 53 Atl., 388, Garrison, J.

Resting upon this law the assignments of error of the plaintiff in error will be taken up in order though there is but one question presented in all three, and that is one of fact and not of law, and is therefore not properly before this Court.

1. "Because the said Supreme Court decided that the defendant in error had produced a purchaser ready and willing to enter into a contract on the terms designated in the agreement in writing, between the plaintiff and defendant in error."

Although the broadness of this assignment will allow many arguments, the plaintiff in error confined himself in his proof to the one point; that the sale was not made in accordance with the terms of the agreement in writing, given by the plaintiff in error to the defendant in error, so only that point will be

considered here. (Agreement is found State of Case, p. 18, l. 29, and p. 19.)

In the first place, the trial judge found "that the defendant, Adolph Turkel, at the time of signing Exhibit A, instructed the plaintiff, Ryer, to sell the premises at the price and on the terms named on Exhibit A, heretofore annexed." Case, p. 18, l. 1 to 4. Further the trial court found that the sale was made to Harriet E. Phelps (who was produced by the plaintiff at the trial, case, p. 13, l. 40) and the terms of the sale are in a contract which was in evidence, marked Exhibit B. (Case, p. 19, l. 39, and pp. 20 and 21); see case, page 17, l. 1 to 15. The fact is then that the trial court from the evidence there produced, decided that the sale was made according to the agreement between the plaintiff and defendant in error. fact and this court is also bound by them. Gore v. The Supreme Court was bound by these findings of Herring, supra; State vs. Mayor, &c., Vailsburgh, supra.

It was proven at the trial that the defendant below signed the agreement there marked "Exhibit A," which was on a card, after the reverse side of the card had been filled out. The defendant below testified, as the return shows, that he "told Ryer, the plaintiff, that the property was to be sold for cash." The plaintiff below by his counsel objected to the admission of this evidence and objection is made at this time to any consideration being given to this evidence by this court as it is oral testimony tending to vary the written instrument. Evidence was brought out in rebuttal that no such statement was made. The trial judge, who is a proper judge of the veracity of the witnesses, taking into account the showing made by the witnesses on the stand, decided the facts to be, that no such statement was made, and that the terms were as stated on the contract, that is; the property was to be sold subject to the mortgage for six thousand dollars. See contract, case, p. 20, l. 22-27.

No objection was ever made before the trial that the defendant below objected to the terms upon which the property was sold. His objections were: first, that his wife would not sign; second, as to some taxes and water rents which he desired the purchaser to pay. Consider the absurdity of a man, who owns property encumbered by a mortgage, which is not yet due, having still three years to run, telling a real estate agent to get all cash for him, and even if the trial judge had believed the defendant below the only construction that any man could put upon the statement would be that "to sell the property for cash" means to secure for the vendor his equity in cash.

The trial judge decided as a matter of fact that the terms were on the card, and that the proofs before him showed that a purchaser was obtained ready, willing and able to contract on those terms. There is then no question of law and this court is bound by these facts.

2. "Because the said Supreme Court decided that the findings of the trial judge were based upon the agreement in question and oral proof that would warrant such findings, although there was nothing before the Supreme Court showing that any oral proof had been taken or received by the trial judge, which would justify such a finding."

Here again a question of fact is raised and this court is bound by the decision of the Supreme Court upon the authority of State vs. Mayor, &c., Vailsburgh, supra; case, p. 22, l. 40; p. 23, l. 1-20.

Defendant below did not take advantage of his right to an appeal whereby a complete State of Case might have been obtained from the trial judge, but, for his own reasons, brought the matter to the Supreme Court by certiorari. In the return of the trial judge all the facts are not certified but the conclusions of the trial judge are certified, and although insufficiently, yet there was sufficient to show there

was evidence in the trial court to sustain the conclusions of the court.

In certiorari the Supreme Court will not inquire into or weigh the evidence except to see if there be evidence to sustain the conclusions of the District Court. Marcus vs. Graver, 42 Vr., 95, 96.

Evidence is found in the return to the writ of certiorari which shows clearly that the proof before the trial court was that the plaintiff in error instructed the defendant in error to sell the property according to the terms in written authority to sell, (case, p. 16, l. 38-41), which agreement shows among its terms an encumbrance against the property of a mortgage for six thousand dollars. (Case, p. 19, l. 18); that a purchaser was found, ready, willing and able to buy on those terms (case, p. 17, l. 1-14), and the contract by which sale was to be completed was in evidence showing the terms of sale were identical with those in the authority to sell (case. p. 20, l. 22-30).

There was evidence before the Supreme Court to sustain the conclusions of the District Court. (Case, p. 13, l. 38-40).

3. "Because the said Supreme Court in and by its decision aforesaid in affirming the judgment aforesaid, decided that it appeared from the evidence that the defendant in error brought the plaintiff in error and the alleged buyer, Harriet E. Phelps, to an agreement on the terms mentioned in the authority to sell given by the plaintiff in error to the defendant in error, whereas there was no legal evidence before either the trial court or the Supreme Court which would justify such a finding and decision."

This assignment involves both of the former assignments and presents no applicable questions of law.

It is admitted to be well established as a matter of law, that a broker has nc right to sell property contrary to the terms of this authority to sell, and this

defendant in error relies on the fact that in this case there was no change, but that a purchaser was found who was ready, willing and able to purchase in exact accordance with the terms of the authority. So a pure question of fact is before this court.

In the District Court and before the Supreme Court, counsel for the plaintiff in error relied on the case of Crowley vs. Meyers, 40 Vr., 245, and attempted to apply it to this present case. That case clearly shows that the agreement between the person and broker was for a stipulated price, which might be part cash and part mortgage, and there is no doubt, that the broker had no right to sell for property instead of money or mortgage, as that would certainly change the terms, but in the case before this court there is no change of terms, as the trial court has certified, that the sale was made according to the terms of the agreement, and for that reason there is no possible application of the decision cited.

Concluding, then, it is clear that the plaintiff in error is relying upon questions of fact and strictly this court should not consider this Writ of Error, as it is well laid down in an opinion of this court by Justice Van Syckel in Doolittle vs. Willett, 28 Vr., 398, that "this court will not review the finding of facts; if there is any view of the evidence which will sustain the finding, the judgment will not reversed." And in Myers vs. Edison, 30 Vr., 153, 155. "Finding of the judge upon conflicting evidence which will admit of his conclusion is not subject to review upon error."

It is respectfully submitted that there is no error in the Supreme Court and that the judgment of the said Court should be affirmed.

HERMANN & STEELMAN,
Attorneys of Defendant in Error.

AUGUSTUS ZABRISKIE,
Of Counsel.

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New Jersey Court of Errors & Appeals

WRIT OF ERROR.

Filed Dec. 29, 1906.

New Jersey, ss.

[SEAL]

The State of New Jersey to the Chief Justice and other Justices of our Supreme Court of Judicature, Greeting: Forasmuch as in the record and proceedings, and also in the giving of judgment in a certain plaint, which was in our said Supreme Court of Judicature, before you, between Thomas A. Ryer, defendant in certiorari, and Adolph Turkel, plaintiff in certiorari, in an action upon contract, manifest error hath intervened, to the great damage of the said plaintiff in certiorari, as it is said; we being willing that the error, if any there be, should, in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching same, to our Judges of our Court of Errors and Appeals in the last resort in all cases, at Trenton, on January 3rd next, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and, according to the law and custom of the State of New Jersey, ought to be done.

Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the fifteenth day of December, A. D. nineteen hundred and six.

MELOSH & MORTEN, Attorneys.

S. D. DICKINSON, Clerk.

RETURN TO WRIT OF ERROR.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE,
C. J.

NEW JERSEY SUPREME COURT.

November Term, 1906.

THOMAS A. RYER, Defendant in Certiorari, vs. ADOLPH TURKEL, Plaintiff in Certiorari.	On Certiorari. Rule.

The Court having inspected the transcript and proceedings of the Second District Court of the City of Jersey City, returned with the certiorari in this cause, the reasons for reversing the Judge below, and heard the argument of counsel therein, and having duly considered the same, does order that the said judgment of the said Second District Court of Jersey City, be in all things affirmed with costs, and that the record be remitted to the said Court below to be proceeded in according to law.

On motion of

L. EDWARD HERRMANN,

Attorney of Plaintiff below, and Defendant in Certiorari.

Entered December 10, 1906.

ALLEGATION OF DIMINUTION, ETC.

Filed Dec. 29, 1906.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS A. RYER. Defendant in Error, vs. ADOLPH TURKEL, Plaintiff in Error.	In Error. Allegation of diminution of Record and Prayer for Certiorari.

Afterwards, to wit, on the twenty-ninth day of December, in the same term, before the Judges of the said Court of Errors and Appeals, in the last resort in all cases, at Trenton, comes the said plaintiff in error, in his proper person and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error in this, to wit, that by record aforesaid, it appears that the judgment in form aforesaid was given for the said defendant in error against the said plaintiff in error, whereas by the law of the land judgment ought to have been given for the said plaintiff in error and against the said defendant in error, which said plea, affidavits, papers, rules or orders are not certified and returned with the writ of error depending in this Court. And the said plaintiff in error prays that a writ of the State of New Jersey be directed to the Justices of the Supreme Court of said State to certify to the said Court of Errors and Appeals the truth of the same. And it is granted to him, etc.

And the said plaintiff in error prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing and that he may be restored to all things which he hath lost by occasion of the said judgment, etc.

MELOSH & MORTEN,

Of Counsel with Plaintiff in Error.

CERTIORARI ON ALLEGATION OF DIMINUTION.

Filed Jan. 2, 1907.

New Jersey, ss.

The State of New Jersey to our Justices
[L. S.] of our Supreme Court, Greeting:

We being willing, for certain reasons, to be certified of a certain judgment by you lately made and rendered, on a writ of certiorari issued out of our said Supreme Court to review a judgment obtained before James S. Erwin, Esq., Judge of the Second District Court of Jersey City, in an action upon contract, wherein Thomas A. Ryer was defendant in certiorari and Adolph Turkel plaintiff in certiorari, do hereby command you that you send under your seals to our Judges of our Court of Errors and Appeals, at Trenton, on Tuesday the eighth day of January, next, as well the judgment aforesaid, as the writ of certiorari, judgment, order and proceedings made and given by the said James S. Erwin, Esq., all as returned in obedience to said writ of certiorari, with all things touching and concerning the same, as fully and entirely as they remain in our said Supreme Court, by whatsoever names the parties may be called therein, together with this, our writ, that we may further cause to be done thereupon what of right we shall see fit to be done.

Witness, Our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton aforesaid, the twenty-ninth day of December, in the year of our Lord, one thousand nine hundred and six.

S. D. DICKINSON,
Clerk.

MELOSH & MORTEN,
Attorneys.

RETURN OF WRIT OF CERTIORARI.

I do herewith send to the Court of Errors and Appeals of the State of New Jersey, the proceedings as

within I am commanded under the seal of Supreme Court of the State of New Jersey and my hand.

WILLIAM RIKER, JR.
Clerk.

Dated January 2, 1907.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI.

NEW JERSEY SUPREME COURT.

THOMAS A. RYER, Defendant in Certiorari, vs. ADOLPH TURKEL, Plaintiff in Certiorari.	On Certiorari. Reasons for Allowance of Writ.

The reasons for the allowance of the writ applied for by the prosecutor in this case are as follows:

The facts admitted at the trial by both plaintiff and defendant were these: On or about the twenty-third day of August, nineteen hundred and five, the prosecutor gave the defendant an authority to sell certain premises in Jersey City, known as numbers 131 Manning Avenue and 575 Grand Street, for the price of ninety-five hundred dollars, agreeing to pay him therefor in writing signed by the prosecutor, a commission of two and one-half per cent. of the gross amount of the sale. In stating to the defendant a description of the property and all its encumbrances the prosecutor stated that the present encumbrance was a mortgage of six thousand dollars with interest at five per cent., but made no agreement to allow said mortgage to remain on said property, in fact, nothing whatever was said about allowing any encumbrance to remain thereon.

Sometime later and previous to March 9, 1906, a certain Frank E. Older, claiming that he represented the

defendant, produced to the prosecutor a contract purporting to be signed by a certain Harriet E. Phelps, wherein said Harriet E. Phelps agreed to purchase said premises on the following basis:

(1) By assuming the present mortgage encumbrance of six thousand dollars; (2) by paying the balance of thirty-five hundred dollars in cash.

The prosecutor refused to accept such contract or to sell the premises on such conditions, whereupon the defendant brought suit for his commissions.

The cause came to trial on March 9, 1906, and the evidence on behalf of the plaintiff was, that the plaintiff himself had nothing to do with the securing of the purchaser for the premises in question, but that one, Mr. Older, who was in his employ, had entire charge of the sale thereof. The contract to pay commissions above mentioned was proved, and the contract whereby said Harriet E. Phelps agreed to purchase said premises for the price of ninety-five hundred dollars, by assuming the mortgage thereon of six thousand dollars and paying the balance of thirty-five hundred dollars in cash, was also produced and received in evidence.

Said Harriet E. Phelps also testified that she had paid to the defendant as a deposit the sum of two hundred and fifty dollars, and that she was ready, able and willing to close the contract by paying the sum of thirty-five hundred dollars in cash and assuming the present six thousand dollar mortgage.

At the close of the plaintiff's case the defendant moved for a non-suit on the following grounds:

(1) Because the evidence showed that the said Thomas A. Ryer did not procure a purchaser ready and willing to enter into a contract on the terms designated by the said Adolph Turkel.

(2) Because when the said Adolph Turkel employed the said Thomas A. Ryer to sell said premises and gave the said Thomas A. Ryer authority in writing so to do, the said Thomas A. Ryer had no legal right

to delegate his authority to another, and inasmuch as the testimony showed that the alleged sale was brought about through one, Frank E. Older, and not through the said Thomas A. Ryer, that therefore the said Thomas A. Ryer had no right to the commissions designated in the authority given him by said Turkel.

(3) Because the said Thomas A. Ryer never brought the seller, Adolph Turkel, and the alleged buyer, Harriet E. Phelps, to an agreement, and therefore was not entitled to his commissions.

The District Court refused the motion of the said Adolph Turkel for a non-suit, whereupon the said Adolph Turkel was sworn and his testimony admitted all the facts proven by the plaintiff, but in addition was that he instructed the said Thomas A. Ryer to sell said premises for ninety-five hundred dollars in cash, and that the reason he did not accept the contract offered by said Frank E. Older was, because it did not provide for the payment of ninety-five hundred dollars in cash, but provided that the mortgage then on said premises should remain as a lien thereon and be considered as part of the purchase price therefor.

At the close of the case the said Adolph Turkel through his attorneys moved for a judgment in his favor on the same grounds as those urged on the motion for non-suit. The court denied this motion as well, and thereupon gave judgment for the said Thomas A. Ryer for the sum of two hundred and thirty-seven dollars and fifty cents.

The prosecutor insists that the judgment of the said Second District Court of Jersey City in the suit in which Thomas A. Ryer is plaintiff, and the prosecutor Adolph Turkel is defendant, is illegal, erroneous and unlawful for the following reasons:

1. Because said Second District Court erred in denying the motion of the prosecutor (defendant below) for a non-suit at the close of the case of the plaintiff below.

2. Because said Second District Court erred in denying the motion of the prosecutor (defendant below) for a judgment in favor of the defendant below, at the close of the case.

3. Because said Second District Court gave judgment for the plaintiff below and against the defendant below for the sum of two hundred and thirty-seven dollars and fifty cents.

4. Because said judgment of said District Court is illegal, erroneous and unlawful for divers other reasons.

MELOSH & MORTEN,

Attorneys of Prosecutor.

WRIT OF CERTIORARI (Supreme Court.)

[SEAL]

The State of New Jersey, to the Judge of the Second District Court of Jersey City, Greeting: We being willing for certain reasons to be certified of a judgment order and proceedings given and made in the said Second District Court of Jersey City in an action brought by Thomas A. Ryer, plaintiff, against Adolph Turkel and Annie Turkel, defendants, do command you that you send under your hand and seal to our New Jersey Supreme Court, at Trenton, on the first Tuesday of November, next, the judgment, order and proceedings aforesaid, with all things attached concerning the same as fully and entirely as they remain in said Court, before you, together with this writ, that we may further cause to be done thereupon what of right should be done.

Witness, William S. Gummere, chief justice of the New Jersey Supreme Court, at Trenton, the twenty-first day of July, nineteen hundred and six.

WILLIAM RIKER, JR.,

Clerk.

I allow the within writ: let it be sealed.

J. FRANKLIN FORT,
Just. Sup. Ct.

In obedience to the command of this writ to me, James S. Erwin, Judge of the Second District Court of Jersey City, directed, I do hereby certify to the Honorable Justices of the Supreme Court of Judicature of New Jersey the judgment order and proceedings with all things attached concerning the same as fully and entirely as they remain before me.

In witness whereof I have hereunto set my hand and seal, this third day of August, A. D. 1906.

JAMES S. ERWIN,
Judge of the Second District Court of the City of Jersey City.

RETURN TO WRIT OF CERTIORARI OF SUPREME COURT.

SUMMONS.

State of New Jersey,
Hudson County, ss.
City of Jersey City,

The State of New Jersey, to any Constable or Sergeant-at-Arms of said County:

Summon

[L. S.]

Adolph M. Turkel and Annie Turkel his wife, to appear before the (Second) District Court of Jersey City, James S. Erwin, Judge, to be held at the Court Room, No. 586 Newark Avenue, in said City on the twenty-first day of February, one thousand nine hundred and six at ten o'clock in the forenoon, to answer unto Thomas A. Ryer in an action upon contract, damages three hundred dollars, hereof fail not.

Witness, James S. Erwin, Esq., Judge of said (Second) District Court at Jersey City aforesaid the ninth day of February in the year one thousand nine hundred and six.

HOWARD R. CRUSE,

L. EDWARD HERRMANN, JR., Clerk.
Plaintiff's Attorney.

SECOND DISTRICT COURT OF JERSEY CITY.

JAMES S. ERWIN, ESQ., Judge.

THOMAS A. RYER, Plaintiff, and ADOLPH A. TURKEL and ANNIE TURKEL, Defendants.	On Contract.

The plaintiff demands of the defendants, three hundred dollars, for that, whereas the said defendants are indebted to the plaintiff in the sum of two hundred and thirty-seven and fifty one-hundredths dollars, for the price and value of goods sold and delivered by the plaintiff to the defendants at their request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendants at their request; and in the like sum of money for the price and value of work done, and materials for the same provided by the plaintiff for the defendants at their request; and in the like sum of money for money lent by the plaintiff to the defendants at their request; and in the like sum of money for money received by the defendants for the use of the plaintiff and in the like sum of money for money paid by the plaintiff, for the use of the defendants at their request; and in the like sum of money for interest due from the defendants

to the plaintiff for the plaintiffs having forborne moneys due from the defendants to the plaintiff at the defendants' request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendants to the plaintiff on an account then and there stated between them; and the defendants afterwards, on the eighteenth day of January, A. D. nineteen hundred and six, in the City of Jersey City, County of Hudson, in consideration of the premises, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendants disregarded their promises, and have not paid any of the said moneys or any part thereof, to the plaintiff's damage two hundred and thirty-seven and fifty one-hundredths dollars.

That hereunto annexed is the bill of particulars of the demand, and a copy of the agreement upon which the demand is founded.

Judgment will be claimed for the aforesaid sum of two hundred and thirty-seven and fifty one-hundredths dollars with lawful interest and cost of suit.

L. EDWARD HERRMANN,

Attorney of Plaintiff.

January 18, 1906.

ADOLPH M. TURKEL, and ANNIE TURKEL,

TO THOMAS A. RYER:

Commission two and a half per cent. on ninety-five hundred dollars $237.50

Mr. A. M. Turkel Ad. No. 305 Railroad Avenue.

I hereby authorize THOMAS A. RYER to sell or exchange the premises described on the other side of this card, at the price and upon the terms hereon named, and hereby agree to pay him TWO AND ONE-HALF

PER CENT. of the gross amount of the sale, the amount in no case to be less than twenty-five dollars.

A. M. TURKEL,
Owner.

Witness: CHARLES L. CAST.

LOCATION.

Premises			
2-6 Family Flats	131 Manning Ave., 575 Grand Street,		Roof Tin

Size	Stories	Material	Heat
House 25 x 100	3	Frame	Stove
Lot 25 x 100	4		

No. Rooms			Rent
3 Rooms to a floor	Water	Light	$104 a month
4 Rooms to floor	Tubs	Gas	$1,248 a year

Sewer	Stable	W. C.	Bath	Encumbrance
Yes	No	Cellar	No	$6,000.00
		Yes		5%

Taxes	Price	Trade	Terms, Etc.	R. B.
Water Rents	$9,500.00			

Date,
August 23rd.

Remarks,

10 20 30 40

SECOND DISTRICT COURT OF JERSEY CITY,

BEFORE JAMES S. ERWIN, ESQ., Judge.

State of New Jersey,
Hudson County, } ss.
City of Jersey City,

No. 23726

THOMAS A. RYER, vs. ADOLPH M. TURKEL and ANNIE TURKEL, his wife.	In Contract. Demand $300.

EDWARD HERMANN, Plff's Atty.

L. MORTEN, Deft's Atty.

A summons was issued tested Feb. 9, A. D. 1906. Returnable Feb. 21, A. D. 1906, at 10 o'clock in the forenoon. The Constable or Sergeant-at-Arms returned the summons as follows, viz.: I served the within summons Feb. 10, 1906, on Annie Turkel, one of the defendants, by reading the same to her and delivering to her a copy thereof. The defendant Adolph M. Turkel could not be found, and I served the within summons on him the 10th day of Feb., 1906, by leaving a copy thereof at his usual place of abode in presence of a person of his family over the age of fourteen years, who I informed of the contents thereof.

JOSEPH LOCKE,
Constable or Sergeant-at-Arms.

Plaintiff's demand was filed Feb. 21, A. D. 1906. On Feb. 21, A. D. 1906, this cause was called for trial at ten o'clock in the forenoon, and adjourned by defendants to Feb. 28, 1906. Adjourned to March 9, 1906.

On the part of the plaintiff, Thomas A. Ryer, Charles L. Cast, Frank E. Older, Harriet E. Phelps were sworn and testified. Three exhibits were offered in evidence.

On the part of the defendant Adolph Turkel was sworn and testified. The court ordered non-suit as to Annie Turkel.

Whereupon it is on this 9th day of March, A. D. 1906, by this Court considered and adjudged that said Thomas A. Ryer, plaintiff, recover against said Adolph M. Turkel, defendant, the sum of two hundred and thirty-seven dollars and fifty-one cents ($237.51) damages and sixteen dollars and seven cents costs of suit.

March 10, 1906, Transcript was issued to plaintiff's attorney.

ALLEGATION OF DIMINUTION IN RECORD.

NEW JERSEY SUPREME COURT.

THOMAS A. RYER. Defendant in Certiorari. vs. ADOLPH M. TURKEL, Plaintiff in Certiorari.	On Certiorari to Second District Court of Jersey City.

On allegation of diminution in the record and return of the said James S. Erwin, Judge of the Second District Court of Jersey City, to the writ of certiorari issued herein:

It is ordered that he, the said James S. Erwin, do certify to this court by the twenty-eighth day of August, nineteen hundred and six, as to the following points in regard to which a return is desired:

1. Was there any agreement in writing between the parties to pay commissions on sale of lands mentioned, in state of demand, and if so, return the same in full.

2. Did the said Thomas A. Ryer make sale of said premises, and if so upon what terms and conditions,

and if the terms and conditions of said sale were in writing return same in full.

3. Was any motion made for non-suit at the close of plaintiff's case, respecting the defendant, Adolph Turkel, and if so upon what grounds, and how was it disposed of.

4. What did you find the fact to be as to whether or not the defendant, Adolph Turkel, instructed the plaintiff to sell said premises for cash or otherwise.

5. Was any motion made for any judgment in favor of the defendant at the close of the entire case, and if so, upon what grounds and how was it disposed of.

Dated August 4th, 1906.

On motion of

MELOSH & MORTEN,
Atty's of Pltff. in Cert.

Let the above be entered on the minutes.

J. FRANKLIN FORT,
Just. Sup. Ct.

NEW JERSEY SUPREME COURT.

THOMAS A. RYER, Defendant in Certiorari, vs. ADOLPH TURKEL, Plaintiff in Certiorari.	On Contract. Order extending time for filing reasons.

The plaintiff having alleged diminution in the record and return to the writ of certiorari issued herein, and having obtained an order directing James S. Erwin, Judge of the Second District Court of Jersey City,

to whom said writ of certiorari was directed, to make return regarding certain points therein set forth.

It is ordered that said plaintiff in certiorari have until ten days after the return is made to said last mentioned order and filed, within which to file his reasons for reversal of the judgment brought up by said writ of certiorari.

Dated August 6, 1906.

Entered August 7, 1906,

On motion of

MELOSH & MORTEN,
Attys. of Pltff. in Cert.

Let the above be entered on the minutes.

J. FRANKLIN FORT,
Just. Sup. Ct.

RETURN TO RULE.

NEW JERSEY SUPREME COURT.

THOMAS A. RYER, Defendant in Certiorari, vs. ADOLPH TURKEL, Plaintiff in Certiorari.	On Certiorari. Return to Rule.

In obedience to an order of the Supreme Court made on August fourth, 1906, directing that I certify what facts were found by me in regard to certain points therein set forth, I do hereby certify as follows:

1. I found that there was an agreement in writing made by the defendant Adolph Turkel with the plaintiff Thomas A. Ryer, a copy of which is hereto annexed and marked Exhibit A.

2. I found that the negotiations for sale of said premises were had and the proposed purchaser produced by one Frank E. Older, an employee of the plaintiff Thomas A. Ryer and acting for him, and that the terms and conditions upon which the proposed purchaser, one Harriet E. Phelps, was willing to purchase said premises, were in writing, a copy of which is hereto annexed marked Exhibit B. I further found that said Harriet E. Phelps paid to said plaintiff Thomas A. Ryer a deposit of the sum of two hundred and fifty dollars, on account of the purchase price of ninety-five hundred dollars.

3. At the close of the plaintiff's case a motion was made for a non-suit in favor of the defendant Adolph Turkel, upon the following grounds:

(A) Because the evidence did not show that the said Thomas A. Ryer had produced a purchaser, ready and willing to enter into a contract on the terms designated in said agreement in writing between the plaintiff and defendant.

(B) Because when the said Adolph Turkel employed said Thomas A. Ryer to sell premises and gave the said Thomas A. Ryer authority in writing so to do, the said Thomas A. Ryer had no legal right to delegate his authority to another and inasmuch as the testimony showed that the alleged sale was brought about through one, Frank E. Older, and not through said Thomas A. Ryer, that therefore the said Thomas A. Ryer had no right to the commissions designated in the authority given him by said Turkel.

(C) Because said Thomas A. Ryer never brought the seller Adolph Turkel and the alleged buyer Harriet E. Phelps to an agreement, on the terms mentioned in the authority to sell, given said Ryer by said Turkel, and therefore was not entitled to his commissions.

I denied the motion for a non-suit. The defendant prayed an exception, and the same was allowed and sealed accordingly.

(4) I found that the defendant Adolph Turkel at the time of signing Exhibit A, instructed the plaintiff Ryer, to sell the premises at the price and on the terms named on Exhibit A, hereto annexed. The defendant Turkel testified that he told Ryer the plaintiff that the property was to be sold for cash.

(5) At the close of the entire case a motion was made for judgment in favor of the defendant Adolph Turkel upon the same grounds as those urged for a non-suit, and herein above set forth.

I denied that motion also, and the defendant prayed an exception, and the same was allowed and sealed accordingly.

I thereupon gave judgment for the plaintiff as set forth in the record.

JAMES S. ERWIN,

Judge of the Second District Court of Jersey City.

Attest:

HOWARD R. CRUSE,

[Seal.] Clerk.

EXHIBIT A.

(Face of Card.)

January 18, 1906.

ADOLPH M. TURKEL AND ANNIE TURKEL

To THOMAS A. RYER:

Commission two and a half per cent. on ninety-five hundred dollars $237.50

Mr. A. M. Turkel Ad. No. 305 Railroad Avenue.

I hereby authorize THOMAS A. RYER to sell or exchange the premises described on the other side of this card, at the price and upon the terms hereon named, and hereby agree to pay him TWO AND ONE-HALF

PER CENT. of the gross amount of the sale, the amount in no case to be less than twenty-five dollars.

A. M. TURKEL,
Owner.

Witness: CHARLES L. CAST.

(Back of Card.)

LOCATION.

Premises 2-6 Family Flats	131 Manning Ave., 575 Grand Street,		Roof Tin
Size House 25 x 100 Lot 25 x 100	Stories 3 4	Material Frame	Stove Heat
No. Rooms 3 Rooms to a floor 4 Rooms to a floor	Water Tubs	Light Gas	Rent $104 a month $1248 a year
Sewer Yes	Stable No	W. C. Cellar Yes	Bath No	Encumbrances $6000.00 5%
Taxes Water Rents	Price $9,500.00	Trade	Terms, Etc.	R. B.

Date,
August 23rd.

Remarks

EXHIBIT B.

AGREEMENT made the eighteenth day of January in the year one thousand nine hundred and six.

Between ANNIE TURKLE and A. M. TURKEL her husband, of the City of Jersey City, County of Hudson and State or New Jersey, party of the first part, and HARRIET E. PHELPS of the same place, party of the second part, in manner following: The said party of the first part, in consideration of the sum of NINETY-FIVE HUNDRED DOLLARS to be fully paid as hereinafter mentioned, hereby agrees to sell unto the said party of the second part, all that certain lot, plot or parcel of land and premises, situate, lying and being in the City of Jersey City, County of Hudson and State of New Jersey, and known as 575 Grand Street, and 131 Manning Avenue, new number, these properties running through from street to street.

And the said party of the second part hereby agrees to purchase said premises at the said consideration of ninety-five hundred dollars, and to pay the same as follows:

Jan. 18th Deposit to be held by Thos. A. Ryer in trust until passing of title.....	$250
On or before March 1st on delivery of deed party of the 2nd part to assume a straight mortgage now on the premises bearing interest at 5 per cent. per annum for 3 years	6,000
On or before March 1st on delivery of deed cash	3,250
	$9,500

And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall at their own proper costs and expenses, execute, acknowledge and deliver, to said party of the second part, or to her assigns, a proper deed containing a general warranty and the usual full covenants for the conveying and assuring to them, the fee simple of the said premises, free from all encumbrances, except above mentioned mortgage, and which deed shall be delivered on or before the first day of March, 1906, at 11 o'clock a. m., at the office of Thos. A. Ryer, No. 688 Ocean Avenue, in the City of Jersey City, N. J., Thos.

A. Ryer having made this sale is entitled to a commission of 2½ per cent. on the gross amount of sale to be paid by party of the 1st part.

THE RISK OF LOSS or damage by fire prior to the completion of this contract is hereby assumed by the party of the first part. The rents and taxes of the said premises (if any) shall be adjusted, apportioned and allowed up to the day of taking title.

AND IT IS UNDERSTOOD that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written in duplicate.

HARRIET E. PHELPS.

Sealed and delivered in the presence of

F. E. OLDER
as to H. E. Phelps.

REASONS FOR REVERSAL OF JUDGMENT.

NEW JERSEY SUPREME COURT.

THOMAS A. RYER, Defendant in Certiorari. vs. ADOLPH TURKEL, Plaintiff in Certiorari.	On Contract. On Certiorari to Second District Court of Jersey City. Reasons for reversal of judgment.

Adolph Turkel, the said plaintiff in certiorari, by Melosh & Morten, his attorneys, comes and prays that the judgment of the Second District Court of Jersey City rendered against him in an action upon contract, wherein the said Thomas A. Ryer was plaintiff and the

said Adolph Turkel and Annie Turkel his wife were defendants, may be reversed and set aside for the following reasons, to wit:

1. Because when the said plaintiff below rested his case the said Second District Court refused to non-suit said plaintiff on the motion of said defendant for the reasons at that time urged by said defendant.

2. Because at the close of the entire case the said Second District Court refused to give judgment in favor of the defendant below when moved for by the said defendant on the grounds at that time given.

3. Because said Second District Court erred in giving judgment in favor of said plaintiff and against said defendant.

4. Because the said judgment of the said Second District Court of Jersey City was and is in divers other respects illegal, unjust, oppressive, and contrary to law.

MELOSH & MORTEN,
Attorneys for Plaintiff in Certiorari.

NEW JERSEY SUPREME COURT.

(HUDSON COUNTY.)

THOMAS A. RYER, Defendant in Certiorari, vs. ADOLPH TURKEL, Plaintiff in Certiorari.	On Certiorari.

HEARD BEFORE A SINGLE JUDGE PURSUANT TO STATUTE.

L. Edward Herrmann, Jr., for the Deft. in Certiorari.
Melosh & Morten, for the Pltff. in Certiorari.

FORT, J.: Under the findings of fact in this case the Judgment of the District Court must be affirmed.

The agreement of authority to the plaintiff, given by the defendant, to sell the real estate in question, was in writing, and fixed the rate of commission to be paid therein. The District Court found that a contract of sale was made with a purchaser on the terms fixed in that agreement. The Judge, construing the contract to have been fulfilled, according to its terms, by the securing of a purchaser who would pay the ninety-five hundred dollars, the agreed sale price named in the authorization of sale, by assuming the six thousand dollar mortgage upon the premises, which was not yet due, having some three years to run, and paying thirty-five hundred dollars in cash.

I think the agreement is susceptible of this construction. It must have been the intention of the parties, and the trial Judge having so found under the agreement and the oral proof, this Court will not reverse it. There was evidence from which he could so find.

GORE vs. HERRING, 43 Vr. 423.

The suggestion that one Older, an employe of the plaintiff, had actually secured the purchaser, and not the plaintiff, is without force. The facts found by the Judge, on this point, as certified, are, "that the negotiations for the sale of the premises were had and the purchase procured by one Frank E. Older, an employee of the plaintiff, Thomas A. Ryer, and acting for him." The offer to purchase was made to the defendant through the plaintiff. Older makes no claim of being an independent agent. He admits that what he did in the negotiations was done for the plaintiff.

The judgment of the District Court is affirmed.

ASSIGNMENT OF ERRORS.

Filed February 2, 1907.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS A. RYER. Defendant in Error. vs. ADOLPH TURKEL, Plaintiff in Error.	In Error. Assignment of Errors.

Afterward, to wit, on the first day of February, in this same term the plaintiff assigns the following causes:

1. There is error because the said Supreme Court in and by its decision aforesaid, in affirming the judgment of the Second District Court of Jersey City aforesaid, decided that the defendant in error had produced a purchaser ready and willing to enter into a contract on the terms designated in the agreement in writing, between the plaintiff and defendant in error.

2. There is error because the said Supreme Court, decided that the findings of the trial judge were based upon the agreement in question and oral proof that would warrant such findings, although there was nothing before the Supreme Court, showing that any oral proof had been taken or received by the trial judge, which would justify such a finding.

3. There is error because the said Supreme Court in and by its decision aforesaid in affirming the judgment aforesaid, decided that it appeared from the evidence that the defendant in error brought the plaintiff in error and the alleged buyer Harriet E. Phelps to an agreement on the terms mentioned in the authority to

sell given by the plaintiff in error to the defendant in error, whereas there was no legal evidence before either the trial court or the Supreme Court, which would justify such a finding and decision.

MELOSH & MORTEN,
Attys. for and of Counsel with Plaintiff in Error.

JOINDER IN ERROR.

Filed Feb. 15, 1907.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS A. RYER. Defendant in Error. vs. ADOLPH TURKEL, Plaintiff in Error.	Joinder in Error.

And hereupon, afterwards, to wit, on the seventh day of February, nineteen hundred and seven, the said Thomas A. Ryer, by Herrmann & Steelman, his attorneys, comes into court and says—that there is no error either in the record and proceedings aforesaid, or in giving the judgment aforesaid, and he prays here that the court here may proceed to examine as well the record and proceedings aforesaid, as the matters aforesaid assigned for error, and that the judgment aforesaid, in manner aforesaid given, may in all things be affirmed, etc.

HERRMANN & STEELMANN,
Attorneys for Defdt. in Error.