IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

BOLLING M. MORRIS, SR.,
and
BOLLING M. MORRIS, JR.,
PLAINTIFFS IN ERROR,

v.

D. P. BRAGG, TRADING UNDER THE FIRM NAME AND STYLE OF BRAGG BROS. & CO.,
DEFENDANT IN ERROR.

Record No. 859.

PETITION FOR REHEARING

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Appeals Press, Inc., Richmond, Va.

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To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Your petitioners, Bolling M. Morris, Sr., and Bolling M. Morris, Jr., respectfully petition and pray you to rehear and reverse the majority opinion handed down and the order entered in this case on January 15, 1931, by three

out of five of the Judges sitting and out of seven of the entire Court, affirming the judgment of the Law and Equity Court, Part II, of the City of Richmond, rendered against them on February 18, 1929, on the verdict of the jury for $900.00, with interest thereon from July 5, 1928, and costs (R. 49).

The grounds to rehear are:

I.

The facts, law and reasons stated in the minority opinion of the court rendered by Justice Epes and concurred in by Justice Hudgins, which is hereby referred to and made a part of this petition as if set out *in totidem verbis.* This opinion states the facts and law with accuracy, and its logic, reasons and conclusions are so clearly right that they seem unanswerable, and to show that the majority opinion is erroneous.

At the top of page 2 of the typewritten majority opinion of this court it was stated:

> "This proceeding by motion is based upon a *written contract,* under seal, which * * * *provided for the payment of ten per cent commission to Bragg in consideration of his efforts to find a purchaser."*

Your petitioner represents that this statement was erroneous, because:

(a) *The writing was not a contract; it was not signed by Bragg; it did not bind or obligate Bragg to make any "efforts,"* or to do anything, or to perform or render any service whatever, *or to make a sale. It was at most a mere naked authority to Bragg to try to* make a sale, and *this*

authority was not coupled with an interest, and was, therefore, *revocable* by your petitioners at will at any time *before Bragg had found a purchaser,* or *before he had made a sale at the price and upon the terms authorized in the writing; and the one made by your petitioners themselves to Dr. W. A. R. Goodwin was such revocation.* The *law is thus written by your Honorable Court.*

See: *Perrow* v. *Rixey,* 119 Va. 192, 89 S. E. 101;
Barnard v. *Gardner Inv. Corp.,* 129 Va. 346;
Dyer v. *Duffy,* 39 W. Va. 148, 19 S. E. 540;

Also authorities cited in Petition for Writ of Error, R., bottom page 8 to bottom page 15.

(b) **The writing did not provide "for the payment of 10% commission to Bragg in consideration of his" efforts to find a purchaser.**

The majority opinion obviously misapprehended the writing and its terms.

See the writing set out in the Record at pp. 37-38, excerpts of which were quoted in the opinion of the trial court at bottom of typewritten page 9 and at top of page 10 of the majority opinion of this court, and quoted in the minority typewrittn opinion at pp. 1-2, and which is also quoted, referred to and discussed in the reply brief of counsel for your petitioners at pp. 3-11, *where the cases cited in brief of counsel for Bragg, defendant in error, and also cited and relied upon in the majority opinion of the court, to-wit:*

Owens v. *Wehrle,* 14 Pa. Sup. Ct. 536;
Kimmell v. *Skelly,* 130 Cal. 555;
Goward v. *Waters,* 98 Mass. 596,

are discussed and distinguished from the case at bar.

The writing itself shows on its face that your petitioners did not agree, as is stated by the trial court in its Instruction No. 1, R. 98-99, and as, in effect, is stated in the majority opinion of your Honorable Court, **"to pay Bragg a commission of 10% for efforts (unsuccessful efforts) to find a purchaser." The offer to pay the 10% commission set out in the writing is as follows:**

> *** * * "It is hereby agreed, should a contract of sale or exchange acceptable to the undersigned be made by you * * * within or during the life of this contract to any person to whom you have presented said property; or, should a sale or exchange of said property be made in any other manner, through or by you, or any other person or persons, then a commission of 10% of said sale becomes payable to you on demand."**

This quotation from the writing shows as an obvious certitude that the trial court, in its Instruction No. 1, and your Honorable Court in its majority opinion, clearly **misapprehended the language, the premises, the basis and the conditions of the offer to pay a commission,** and shows that your petitioner did not agree to pay Bragg for merely making an *"effort to find a purchaser,"* but only to pay *"should a contract of sale or exchange acceptable to your petitioner be made by or through Bragg or some other (third) person of the entire* 418 *acres at the price of* $25,000.00, *and on the terms set out in the writing.*

As pointed out in the reply brief of counsel for your petitioners at pp. 4-5, the evidence in the case at bar showed:

(1) That no sale at all was ever made by Bragg of any part of the land.

(2) That Bragg never at any time complied with the terms and conditions precedent to the offer set out in the writing, which he had to comply with in order to become entitled to the 10% commission named in the writing; that at the time of the sale of the 20 acres of land by your petitioner, Bragg never had a purchaser who was then ready, willing and able to purchase the 418 acres of land, or any part thereof; nor was he at that time attempting or trying to make a sale of the 418 acres of land, or any part thereof, and there is no evidence that Bragg would have ever made a sale of the entire tract of land at the price of $25,000.00 and on the terms set out in the writing;

(3) The uncontradicted evidence is that the sale of the 20 acres was made solely by your petitioners themselves to Dr. Goodwin, who made the purchase through his son, T. R. Goodwin, who was the agent of and representing his father, and who was in no sense or in fact or law, the agent of or representing your petitioners.

See evidence, R. 83, 86, where **T. R. Goodwin testified: That he acted for his father in securing the option to buy (R. 82); that he never knew or heard of Bragg until he was summoned as a witness to testify in the trial of this case (R. 83); and that he made the purchase (R. 82, 86), for his father; and the deed was later made directly from your petitioners to Dr. Goodwin, (R. 67-69, 86).**

Also see the evidence of Morris, Sr., (R. 88), where he testified:

> **"Q. Did anyone represent you in making this sale to Mr. Goodwin?**
> **"A. No one at all, sir.**
> **"Q. You sold it yourself?**
> **"A. Myself."**

See Bragg's evidence, R. 72, where he testified:

> **"Q. You didn't make this sale to Goodwin, did you?**
> **"A. No, sir.**
> **"Q. You had nothing to do with negotiating it yourself?**
> **"A. No, sir.**
> **"Q. So far as you know, the sale was entirely made by the two defendants who are the owners of the property?**
> **"Mr. White: I object.**
> **"A. I don't know a thing about the sale.**
> **"Q. But you had nothing to do with making that sale?**
> **"A. Not a thing did I know about it, sir."**

Also see Barker's evidence, R. 80, where he testified:

> **"Q. You had nothing to do with making this sale to Goodwin?**
> **"A. Absolutely not.**
> **"Q. You know nothing about it?**
> **"A. Absolutely not."**

The evidence thus conclusively shows that Bragg never sold the 20 *acres of land either directly or indirectly, or*

caused or procured it to be sold to Dr. Goodwin, or to any other person; nor is there a scintilla of evidence in the record which shows that Bragg directed attention of Dr. Goodwin to this property, and the intimation in the majority opinion, page 8, to the effect that Bragg may have done so is negatived by Bragg's evidence and also Barker's evidence, quoted supra, and under the law Bragg cannot recover.

See *Leicht-Benson Corp.* v. *Stone,* 138 Va. 517, 121 S. E. 883, esp. 884, clauses 1, 3 and 4, where Judge Prentis writing the opinion declared the law to be:

> **"A broker is never entitled to commissions for failing to perform his contract. To entitle him to his commissions he must succeed, and he takes the entire risk of failure, for his reward comes only as a consequence of his success. He may devote his time and labor and expend his money with ever so much devotion to the interests of the owner, and yet, if he fails to procure a purchaser, abandons his efforts, or his authority is fairly and in good faith terminated, he does not earn his commissions."**

The court there cited and quoted from and approved the law stated in *Sibbard* v. *Bethlehem Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441, 9 A. L. R. 1199.

Long v. *Flournoy,* 112 Va. 721, 72 S. E. 723, and after discussing those cases stated:

> **"Applying these principles to the facts of this case, we find nothing to indicate that the owner ever modified its contract with the broker, or ever**

> **conferred any authority whatever, except authority to sell the property for $14,000.00. Nor do we find that the owner either wrongfully, or otherwise prevented the making of such a sale at such a price, nor do we find anything from which it can be inferred that the owner has ever in any way waived the strict performance of its contract with the broker. All this being true, we are of opinion that the court erred, both in giving the instruction which permitted the jury to award the broker commissions under the contract, and also in refusing to set aside the verdict and enter judgment for the defendant owner."**

It is respectfully submitted that the sound reasoning, logic and legal conclusions so ably and clearly stated in the above *Leicht-Benson Case* by Judge Prentis shows that the majority opinion of your Honorable Court in your petitioner's case is obviously wrong, for applying those principles of law to the case at bar the evidence shows:

(1) That Bragg failed to perform any part of the writing of May 4, 1926; he failed to make a sale; he had no one ready, willing and able to purchase the property or any part of it; he offered no evidence to show that he could have sold at any time the *entire tract of land for* $25,000, *the price named in the writing, and on the terms stated therein;* and

(2) He offered no evidence to show that the owners, your petitioners, had ever modified the writing of May 4, 1926, *as to the price or terms or had ever conferred any authority whatever on Bragg to sell, except the authority to sell the entire tract for* $25,000.00. There was no evidence that

your petitioner either wrongfully or otherwise prevented Bragg from making such a sale at such a price; nor is there any evidence in the record from which it can be inferred that your petitioner, the owners, ever in any way waived the strict performance by Bragg of the terms set out in the writing of May 4, 1926, in order to entitle him to claim a commission.

In the language of your Honorable Court:

> **"All this being true * * * the court erred, both in giving instructions which permitted the jury to award the broker (Bragg) commissions under the contract, and also in refusing to set aside the verdict and enter judgment for the * * * owner," your petitioners.**

The evidence here presents a case where Bragg is trying to get something for nothing and to reap the benefits of the efforts made by your petitioners in making a sale of 20 acres of their own property at a time when both Bragg and Barker, his associate, had abandoned all efforts to make a sale. See Barker's evidence, R., bottom page 78, where he testified:

> "A. No, I haven't been down there since, haven't made any further efforts but that was the last effort I made." (Referring to the summer of 1927).

Id. R. page 79.

See Bragg's evidence, bottom pages 72-73, where he testified, that he and Barker had tried to make a sale in the summer of 1927. The evidence thus shows that neither

one of them had attempted or tried to make any sale since 1927, while the sale by your petitioners of the 20 acres *was made the latter part of June,* 1928, *and the deed was acknowledged and delivered on July* 3, 1928. *The jury could, therefore, have found,* if they had been allowed to do so by the trial court, **that Bragg had ceased and abandoned all efforts to make a sale; and your petitioners respectfully submit that the trial court erred in not submitting this question of fact to the jury under the instructions asked for by your petitioners, R. 102.**

II.

Your petitioners further represent that your Honorable Court also erred and was misled in the majority opinion by the misapprehensions of the issues and erroneous statements of law and conclusions in the opinion of the trial court, which your majority opinion adopted, in this:

> **The trial court in its Instruction No. 1, R. 98-99, treated this case as if it were a suit to recover commissions for a sale made by Bragg, or to recover on a quantum meruit basis; whereas the notice and amended notice of motion show that this action was one to recover alleged damages claimed by Bragg for an alleged breach of the writing of May 4, 1926, by your petitioners.**

That this was reversible error, see the case of *Leicht-Benson Corp.* v. *Stone & Co.,* 138 Va. 517, at page 518, where this court, **distinguished an action brought to recover under the contract on a quantum meruit basis**

from a suit or action brought to recover damages for breach of contract, and said:

> "It is not necessary for us to consider that line of cases in which recovery has been permitted upon a *quantum meruit, because neither in the pleadings nor in the conduct of the case before the trial court was this question ever raised.* The broker sued upon the express contract alone, and has been allowed to recover the commissions specified in the contract, and this without having performed it. A recovery was denied under similar circumstances in *Payseno* v. *Swenson* (C. C.), 178 Fed. 999."

In the case at bar the trial court allowed Bragg to recover $900.00 as commissions due him as if upon a *quantum meruit* without his having proved that he had performed the writing of May 4, 1926, or was ready, willing and able to perform it when the 20 acres of land was sold, or that he could and would have sold the entire tract at the price of $25,000.00 and on the terms set out in the writing, had not your petitioner sold the 20 acres.

This action of the trial court itself in fixing the damages at $900.00 in its instruction No. 1, (R. 98-99), instead of leaving it to the jury to determine:

(1) If Bragg had accepted the writing; and,

(2) If so, had he performed it; or,

(3) If not, was he ready, willing and able to perform it at the time; or,

(4) Had your petitioners prevented Bragg from performing his part of the writing; and

(5) If so, what, if any, damages Bragg had sustained?

Yet the trial court refused to submit these questions of fact to the jury, and by its instruction No. 1 erroneously treated this suit as if it were to recover on the writing for services or efforts made by Bragg in spite of the fact that he wholly failed to prove that he had, could or would have ever made a sale or performed the conditions of the writing.

The writing itself, as does the law laid down in the *Leicht-Benson Case, supra,* shows on its face that Bragg, as a condition precedent to his right to recover on any ground or basis, either had to prove; (1) that had *made a sale of the entire tract of land,* or (2) that he had a purchaser ready, willing and able to buy the entire tract of land at the price and on the terms set out in the writing, or could have secured such purchaser, but that he was prevented from doing so by the act of your petitioners. *He wholly failed to prove any of these things.* He was, therefore, not entitled to recover on the writing on a *quantum meruit* basis, or for damages for breach of the writing.

Instruction No. 1 of the trial court was erroneous, and the verdict of the jury was contrary to both the law and the evidence.

III.

Your Honorable Court also was lead into error in its majority opinion by the opinion of the learned trial court, which held that because the writing was under seal that this entitled Bragg, defendant in error, to recover.

This was error, because:

The writing is only under seal as to the Morrises,

the owners of the property. See the writing, (R. 37-38. While it is true that the seal imports a consideration as to the Morrises who signed it, it does not make a promise or import or imply a promise on the part of Bragg to do anything; and even though the writing is under seal as to your petitioners who signed it, and imports a valuable consideration as to them, *still it must affirmatively appear from the writing itself* that Bragg, who is claiming the benefit of the writing, obligated himself to do something under the writing itself, and that he had performed that part of the writing, which if performed, would have entitled him to the 10% commission specified therein. The Morrises, who signed the writing, by virtue of the terms of the writing, had no claim against Bragg—had no right to demand of him his performance of the contract; in other words, the presumption of consideration from the sale as to the Morrises *did not obligate Bragg in any manner whatsoever;* and there was nothing in the writing obligating Bragg in any way to do anything, *and the writing evidences no obligation on his part. He made no promise in the writing; and he made no sale of the land or any part thereof under the writing,* and the writing was wholly *illusory and a mere nudum pactum as to him,* and was not performed by him, which he had to do to earn his commissions, or he had to prove that he could and would have sold the property, but that he was prevented from so doing by your petitioners. There is no such proof or evidence in this case.

See Williston on Contracts, Sec. 140, p. 315, where it is said:

> "If the (writing) option (or instrument) go so far as to render illusory the promise of the party given the option, there is indeed no *valid consideration, and, therefore, no contract*" * * *. (Parenthesis ours.)

The writing negatives a consideration on Bragg's part.

See also 6 R. C. L., Sec. 65, p. 652, where it is said:

> **"It has been said that the solemnity of a sealed instrument imports consideration, or, to speak more accurately, it estops a covenantor from denying a consideration except for fraud. On the other hand it has been stated that it cannot be claimed that a sealed instrument imports a valid consideration when it shows by its own conditions and recitations, that it is in fact not founded upon a consideration. In other words the presumption of consideration arising from a seal will not overcome the express language and conditions of a sealed instrument, showing that it is without consideration."**

As we have pointed out, *supra,* the offer contained in the writing of May 4, 1926, *was only to pay Bragg for making the sale of the entire tract of land on the terms and conditions set out in the writing.* The making of a sale was the consideration which was to entitle him to a commission. The evidence shows that Bragg made no such sale, and he never proved that he had a purchaser, or that

he was trying to make any sale at the time of the sale of the 20 acres of land, and he never proved that he had a purchaser, ready, willing or able to buy the property, or that he could or would have made a sale in accordance with the terms of the contract, had not your petitioners sold the 20 acres of land. Under these circumstances, he is not entitled to recover a commission on the sale of the 20 acres of land made by your petitioners, because while there was a seal after the names of your petitioners, this did not entitle Bragg to recover *without performing his part of the writing and complying with the conditions of the promise to pay made in the writing.* The trial court seemed to wholly misapprehend the effect of the seal after the signatures of your petitioners' names in this case.

A *seal does not import or imply Bragg has performed his part of the contract,* or complied with the terms thereof or earned his commission, or is entitled to a commission or to damages for not performing the conditions of the writing.

IV.

THE CASES CITED IN THE MAJORITY OPINION DO NOT SUSTAIN THE FINDINGS OR CONCLUSIONS DRAWN THEREFROM.

The case of *Owens* v. *Wehrle,* 14 Pa. Sup. Ct. 536, cited in the majority opinion on page 4 of the typewritten opinion, has been clearly distinguished from the case at bar on pages 4-6 of reply brief of counsel for your petitioners.

There Wehrle agreed to pay Owens a commission *in case a* sale was made *"within period of twelve months specified"* in the writing.

The uncontradicted evidence in that case showed that

the sale was made within the twelve months period fixed in the writing. The *commission became due there by express provision of the writing* which bound Wehrle to pay upon proof that a sale was made within the twelve months.

There is no such provision contained in the writing signed by your petitioners in the case at bar; nor did Bragg prove that he made or caused a sale to be made, or could or would have complied with these provisions of the writing, which if he had complied with would have entitled him to the commissions.

In *Kimmell* v. *Skelly*, 130 Cal. 555, cited and quoted from on pages 6 and 7 of the typewritten majority opinion, the writing provided:

> "I hereby employ them as my *sole and exclusive agents* to sell for me that certain real property * * *. This employment and authority shall continue for the full period of thirty days from the date hereof and thereafter until withdrawn by me in writing; and *I agree to pay * * * in the event of sale * * ** by them or by anyone else, *including myself*, while this contract is in force * * *."

It is thus seen in the *Skelly Case* that the *contract expressly provided that the owner agreed to pay the compensation specified "in the event of a sale by anyone * * * including himself."*

The evidence in that case showed that the sale was made while this contract was in force, and by the *express terms of the contract* he was obligated to pay the agent the *compensation in the event of a sale made by the owner.*

There is no such provision as this in the case at bar.

In the case of *Goward* v. *Waters,* 98 Mass. 586, cited and discussed in the majority opinion on pp. 7-8, the owner fixed the price and agreed to pay the agent any amount which the agent might secure in excess of that price, and then agreed that *in case he, the owner, should sell it at the fixed price or at a greater or less price, then he would pay the agent* 3% *of the amount paid him for the property.*

The evidence in that case showed that a *sale was made by the owner while the contract was in force,* and the agent *sued upon the terms of the contract for the amount which the owner had agreed to pay him* in the event the owner sold the property himself; and the court held he was entitled to recover by and under the express terms of the contract. The action there was for money due by contract *and not as here for damages for breach of contract.*

There was no such provision in the case at bar—no such contract, and the suit here is for damages for breach of contract and *not for money due under a contract.*

The majority opinion on typewritten page 8, recognizes that the contracts in the above three cases *are not like the writing in the case at bar,* and your petitioners are advised and represent that for the above reasons those cases are not applicable to the case at bar; and neither the pertinent language, nor the agreement to pay, in the writing in the case at bar, was to pay for "mere efforts" of Bragg to find a purchaser. As we have pointed out, *supra,* the agreement to pay the 10% commission specified in the writing *was not for unsuccessful efforts of Bragg to make a sale,* but was, *"should a contract of sale be made by Bragg* or through or by Bragg or other (third) person;" and the evidence showed that no sale was ever made by Bragg or through or by any third person as to your petitioners.

It is respectfully submitted that the construction placed upon the writing in this case by the minority opinion was and is the true construction of the writing, and that this Honorable Court should so hold.

V.

The court further erred in holding in its majority opinion, typewritten page 8, "while we do not know whether the sale was actually made to Dr. Goodwin as a consequence of the advertisement, or through Mrs. Lightfoot, an intermediary, and as a consequence of its presentation by the brokers to her, there is, nevertheless, good reason for supposing either or both may have influenced the sale, and there is nothing upon which to base a conclusion that the brokers were not thus directly or indirectly the procuring cause of the ultimate sale; and even though neither of these suggestions be true, the result would be the same under this contract."

Your petitioners represent that this statement and conclusion in the majority opinion is both erroneous as a statement of fact and law, for T. R. Goodwin, who was the agent of Dr. Goodwin in procuring the option and in securing the deed for the property, testified (R. 83):

> **"I secured the option on the property mentioned here for W. A. R. Goodwin and the interests which he represents."**

That he was not employed in any way by the defendants (your petitioners) to effect that sale * * *; that Bragg Bros. had nothing to do with the Goodwin purchase of that property; that he did not know them in

the transaction at all, and had never heard of them until he was summoned as a witness in this case. (R. 83, 87).

(R. 86), Goodwin was asked if he did not make the sale, and testified in answer thereto:

> "I wouldn't say so. I think I made the purchase * * * I made the preliminary negotiations for the purchase."

Bragg testified (R. 72), that he had nothing to do with making the sale; and Barker testified, (R. 80), that he had absolutely nothing whatever to do with making the Goodwin sale. See evidence quoted *supra.*

There is therefore, not a scintilla of evidence in the record that T. R. Goodwin or Dr. W. A. R. Goodwin were in any way influenced, induced or caused to make the purchase of the property by anything that Bragg ever did. So, that the statement made in the majority opinion *"that there is good reason for supposing that the sale was either made or influenced by Bragg"* is not only wholly unsupported by the evidence, but is contrary to the evidence of Goodwin, Bragg, Barker, and Morris, Sr. *It is without evidence to support it, whereas, the law requires it to be proven by a preponderance of the evidence.* Your Honorable Court says in the quotation above from the majority opinion that it did not know whether the sale was made or influenced by anything Bragg had done. *Lack of proof and knowledge will not support a verdict for a plaintiff. The law requires a preponderance of evidence—required that Bragg prove that he had complied with the writing, or that he was ready, willing and able to make a sale, but was pre-*

vented from so doing by your petitioners before he could recover.

The learned Trial Judge did not allow the jury to pass upon this question, but told the jury in the instruction given (R. 98-99), that if your petitioners sold the land, that Bragg was then *entitled to recover* 10% *commission on the amount of the sale,* and this even though the evidence showed that Bragg had made no sale, or that he had a purchaser ready, willing and able to buy.

The above statement in the majority opinion *that it does not know how the sale was actually made to Dr. Goodwin, shows that the evidence failed to prove the plaintiff's case.* If this Honorable Court does not know, it is obvious the trial court could not have known; and the trial court did not permit the jury to pass upon the evidence on this phase of the case, but permitted a verdict upon proof of a single fact—namely, that a sale of 20 acres had been made by your petitioners to Dr. Goodwin.

Your petitioners, therefore, for the above reasons and for those stated in the Petition for Writ of Error, pray that your Honorable Court will grant this Petition to Rehear this case and reverse the judgment entered against your petitioners, and grant a new trial or enter judgment for your petitioners. And they will ever pray.

BOLLING M. MORRIS, SR., and
BOLLING M. MORRIS, JR.,
Petitioners,

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