

1953

# George H. Patterson and Wilana C. Patterson v. James Blair and Neta Blair : Brief of Appellants

Utah Supreme Court

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Allen L. Hodgson; Attorney for Respondents;

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Case No. 7948

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

MAR 1 1963

GEORGE H. PATTERSON, Official  
Broker of Intermountain Land and  
Livestock Company, and WILLANA  
C. PATTERSON, doing business as  
Intermountain Land and Livestock  
Company,

Plaintiffs and Appellants,

vs.

JAMES BLAIR and NETA BLAIR,  
his wife,

Defendants and Respondents

Case No.  
7948

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BRIEF OF RESPONDENTS

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ALLEN L. HODGSON,  
Attorney for Respondents.

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## BRIEF OF RESPONDENTS

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## STATEMENT OF FACTS

Respondents do not agree with the statement of facts made by the appellants, except in the following particulars: It is not disputed that the defendants executed the agreement, (Plaintiff's Exhibit "A"), thereby listing their farm property near Payson, Utah, for sale by the plaintiffs, through Mr.

Eckersley, agent of the plaintiffs, nor is it disputed that Mr. Paul Hurst, who later bought the farm of the defendants, and who bought it less than 12 months after the listing had expired, knew that Mr. Eckersley was a real estate agent. Mr. Hurst also learned from Mr. Eckersley that he had the farm of the defendants for sale.

The point of the case is not, as appellants view it, that the plaintiffs, by the casual comment to Mr. Hurst by their agent that the Blair place was for sale, thereby offered it to him. The precise point of the case is whether there was sufficient evidence before the jury, from the manner in which, and the circumstances under which, the claimed offer was communicated to Mr. Hurst, together with all the other evidence presented to the jury, by which they could properly find, as they did, that the place was not offered for sale to Mr. Hurst.

The evidence clearly shows:

(1) That in such efforts as the plaintiffs made to sell the Blair place they considered it and referred to it as a farm. (a) It is listed in the listing agreement as, "This is a farm with extra good cows. With A milk base" (Plaintiff's Exhibit "A"); (b) It was referred to in the plaintiff's advertising in the newspapers as a farm (Tr. 9, line 12, et seq.).

(2) The efforts of the plaintiff's to sell property to Mr. Hurst were directed toward selling him a "ranch". (a) Mr. Patterson testified of Mr. Eckersley's efforts to sell Mr. Hurst a "ranch" in Montana (Tr. 11, Lines 1 through 15): (b) Plaintiff's brought out on cross-examination of Mr. Hurst that Mr. Eckersley had taken him to Montana (Tr. 37,

line 3 and 4) and Wyoming (Tr. 37, lines 23 through 30) to sell him a ranch.

(3) The plaintiffs made no real effort to sell Mr. Hurst the Blair farm, nor to interest him in it. (a) Mr. Eckersley did not even recall having taken Mr. Hurst to the Blair farm (Tr. 20, lines 3 and 4, lines 23 through 30); (b) When mention was made by Mr. Eckersley of the fact that the Blair place was for sale it was not done for the purpose of favorably interesting Mr. Hurst in the property. The mention of its being for sale was made in a negative and derogatory manner (Tr. 29, line 20, et seq.).

(4) The testimony of Mr. Eckersley attempting to connect his listing of Mr. Hurst's store for sale with efforts to sell the Blair place to him is so sketchy, general, and nebulous that it does not really controvert the clear cut testimony of Mr. Hurst that no offer was made to sell him the Blair place. (a) Mr. Eckersley said Mr. Hurst "intimated" (Tr. 19, lines 17, 18, and 19) that if he could sell the store he would be interested in other properties Mr. Eckersley had listed; (b) Mr. Eckersley would not even forthrightly say Mr. Hurst knew he was in the real estate business (Tr. 23, lines 13 through 17); (c) Mr. Eckersley was almost apologetic that the matter had gotten into a lawsuit (Tr. 23, lines 20 and 21).

(5) Counsel for plaintiffs mis-states the facts in the final paragraph of his brief when he represents that the defendants left the state when they learned they were about to be sued. The transcript shows that the defendants left to get Mr. Blair's wife away to a drier climate (Tr. 25, lines 27 and 28). They left Payson on account of Mrs. Blair's rheumatism

(Tr. 43, line 30). They were in San Fernando when they received word of the claim of plaintiffs for a commission (Tr. 44, lines 24 through 27).

## ARGUMENT

### I.

The "distress" which the plaintiffs would have us feel for them as real estate brokers would be much more real if this were an action to recover from some Wyoming or Montana rancher, over whose place they had flown Mr. Hurst, the commission to which they would be entitled if Mr. Hurst had thereafter surreptitiously gone back to the rancher and bought the ranch they had, with so much expenditure for food, automobile rides and hotel lodgings, offered to him. That is not the situation before us.

Plaintiffs would have us believe that the proper technique and psychology in selling a ranch where a \$5,000.00 commission, or more, is involved is to make it as attractive, and as pleasantly and completely viewed and explained, as possible, but, in trying to sell a little 70 acre farm in the Payson area the surest way to interest a man in it is to assume that because he once threshed some grain on it 30 years ago he knows all about it, and to then advise him that it is a man-killer. They would have us believe that in their efforts to sell ranches they go to vast expense "to please the prospective purchaser", they take him for airplane rides to exhibit to him the grazing "rights", the affirmative virtues of the place, but, in trying to sell the Blair place they "offer" it to Mr. Hurst by that "challenging" expedient of telling him it is a man-killer. This

left-handed method of making an offer was apparently not found necessary until after they were confronted with the uncontroverted testimony of Mr. Hurst that such was the manner in which they communicated to him that the Blair place was for sale. As to the citation from Shakespeare, we do not know whether the character who is quoted as saying, "We offer faire, take it advisedly", was making an offer which he "advised" or recommended the offeree to accept, or whether he was trying to rephrase "Caveat Emptor". In either case it is not a citation of authority which gives us any help in this matter.

It is not controverted that Mr. Hurst knew that Mr. Eckersley had the Blair place listed for sale. The only question which must be decided is this: Was there sufficient evidence that Mr. Eckersley did not offer the Blair place for sale to Mr. Hurst upon which the jury could find as they did? Clearly not "all" of the evidence is as counsel for plaintiffs views it. The transcript reveals ample evidence that Mr. Eckersley did not offer the place to Mr. Hurst.

The trial Court instructed the jury that, "it is an offer of property for sale if the property is presented for sale, or for acceptance of a sale, or for rejection of an offer of sale". Neither appellants nor respondents question that instruction. There was ample evidence for the jury to fairly determine that Mr. Eckersley, when he said, "This place is for sale. I don't believe you want this place. It is a man-killer. It is killing Mr. Blair.", was not presenting the Blair place for sale to Mr. Hurst. There was enough evidence for them to fairly determine that such a statement was not presenting it for acceptance of a sale. There was enough evidence for them to



fairly determine that Mr. Eckersley, in that statement, and by the way he made it, and in view of the circumstances under which he made it, ruled out the likelihood that Mr. Hurst would even consider it to be an offer which he need even bother to reject.

If there is any credible evidence upon which the jury could have found as they did this Court will not disturb their verdict.

Surely the jury were entitled to believe either Mr. Eckersley or Mr. Hurst on matters in which their testimony conflicted. They could consider and compare the demeanor and manner of testimony of Mr. Hurst, in his straightforward manner, with that of Mr. Eckersley, with his "intimations" that Mr. Hurst was interested, his "feeling" that Mr. Hurst knew certain things, his apologetic volunteering, on examination by his own counsel, that "This is a sad occasion.", in determining whether they should find, as they did, that he did not offer to sell this property to Mr. Hurst.

There was ample evidence before the jury, introduced by the plaintiffs themselves, that the efforts of the plaintiffs were directed not to interesting Mr. Hurst in the Blair property, but to selling him a ranch in Wyoming or Montana. The jury could properly consider, and apparently did consider, the whole of the conduct of the plaintiffs in that regard in evaluating the casual remark of Mr. Eckersley that the Blair Place was for sale, coupled with his negative comment that the place was a man-killer, in their determination that Mr. Eckersley did not offer it for sale to Mr. Hurst.

The listing agreement presupposes that any "offer by the plaintiffs to sell this property would be made in a manner which would at least interest a buyer who is ready, able and willing to buy. It does not carry the loophole that the communication of such information as the defendants gave could be made in a manner to deter the supposed offeree from even giving favorable consideration to the purported offer. The consideration for the defendant's binding themselves to pay a commission to the plaintiffs is the undertaking on the part of the plaintiffs that they will use their skill, training, experience and abilities to try to sell the property, and that is as much a part of the listing agreement as the provision for payment of commission in the event of a sale within 12 months to someone to whom they have "offered" it. The jury could properly consider the whole intendment of the listing agreement, and not just that portion which counsel for plaintiffs sought to emphasize, in determining that the manner of acquainting Mr. Hurst with the fact that the property was for sale was not in keeping with, and would not implement, the purpose of the listing, that of the sale of the Blair property. In view of all the evidence before them, the jury properly found that plaintiffs did not offer the Blair place for sale to Mr. Hurst, and the trial Court did not err in denying the motion for a new trial.

Respectfully submitted,

ALLEN L. HODGSON,  
Attorney for Respondents.