

1961

# George W. Smith v. D. W. Loertscher : Brief of Appellant

Utah Supreme Court

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Rawlings, Wallace, Roberts & Black; Counsel for Appellant;

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## Recommended Citation

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

GEORGE W. SMITH,

*Plaintiff and Appellant,*

—vs.—

D. W. LOERTSCHER,

*Defendant and Respondent.*

FILED

APR 20 1961

Clerk, Supreme Court, Utah

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BRIEF OF APPELLANT

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# IN THE SUPREME COURT of the STATE OF UTAH

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GEORGE W. SMITH,

*Plaintiff and Appellant,*

—vs.—

D. W. LOERTSCHER,

*Defendant and Respondent.*

Case No. 9290

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## BRIEF OF APPELLANT

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(The parties will be referred to as they appeared in the trial court. The numbers in parenthesis refer to page number of the record.)

### STATEMENT OF THE CASE

This is an appeal by plaintiff from a judgment in favor of defendant for no cause of action (85). The judgment was based upon a special verdict of a jury in which the jury answered two propositions (83, 84).

This action is on a written contract for a broker's commission (Exhibit 1). Plaintiff is the real estate

broker and defendant the seller and owner of the land involved. The contract provided that if plaintiff found a buyer who was ready, able and willing to buy certain ranch property located in Summit County, Utah, at the listed price and terms, or at any other price or terms to which defendant might agree during the life of the contract, then defendant agreed to pay plaintiff a \$5,000 commission. Plaintiff contends that he produced J. Holman Waters, a buyer ready, able and willing to buy said property, but defendant's refusal to go through with the transaction prevented the sale, but nevertheless entitled plaintiff to a commission.

Plaintiff is a real estate broker and had been attempting to locate a ranch for Mr. Waters where he could raise cattle (101). After considerable discussion defendant signed with plaintiff a listing agreement dated February 14, 1959 (103-106). The selling price was there listed at \$128,000, twenty-nine percent down and ten equal yearly payments, the buyer to assume the mortgage which was on the property, and interest at the rate of  $5\frac{1}{2}\%$  per annum (See Exhibit 1).

Thereafter, plaintiff brought Waters to the ranch and Waters looked it over and defendant pointed out the boundaries and generally showed Mr. Waters over the premises (106, 107).

On the 20th day of February, 1959, Mr. Waters made an offer in writing wherein he offered to pay \$125,000; Twenty Thousand (\$20,000) Dollars down, Twenty Three Thousand (\$23,000) Dollars being the unpaid balance

of a mortgage which was payable \$675.00 annually, and the balance of Seventy Seven Thousand (\$77,000) Dollars to be payable in 12 equal, annual payments together with interest on the unpaid balance at the rate of 5% per annum (Exhibit 4). Possession date was on or before March 20, 1959. The offer was delivered February 20 to defendant (119) and two or three days later he told plaintiff he was going to see a tax expert in connection with the transaction (119).

On February 26, 1959, defendant went to the hotel to see plaintiff and both of them went to Mr. Waters' office (122). After discussion plaintiff and defendant went to the office of R. J. Hogan, an attorney at law, who was asked to prepare a written contract for the signatures of defendant and Mr. Waters. He prepared the contract Exhibit 6 (199). On March 6th defendant left a copy of this contract on Mr. Waters' desk at his office in Salt Lake City (128, 200).

Therafter, on March 9th, Mr. Waters informed plaintiff he objected to the provision that defendant was to retain  $\frac{1}{2}$  of his water right (130, 170). After a  $2\frac{1}{2}$  hour discussion defendant and Mr. Waters went to the office of Mr. Hogan for the purpose of having him redraft the agreement (172-4, 228). After discussion with Mr. Hogan and defendant Mr. Waters left feeling that they had reached a complete agreement as to all things which were to be included in the contract (177). Defendant's testimony is to the contrary and that they had not resolved the question of the date of when possession was to be turned over to Mr. Waters (203).

Nothing further was done in connection with the contract until some time later, the estimates of time being anywhere from March 31st to the middle of April (140, 215). In any event, at that time defendant went to see Mr. Waters at his ranch here in Salt Lake City. There is a conflict in the testimony as to exactly what took place. Defendant asserts he asked Waters for another and later possession date (216). Waters testified defendant merely stated he did not want to go through with the deal (178).

The parties stipulated that Mr. Waters was able financially to perform any of the commitments mentioned in the testimony.

This briefly sets forth the facts and we will discuss at greater length the evidence under each particular point. The evidence in this case was sufficient to support a finding for either party. Defendant's testimony was to the effect that he and Mr. Waters had never resolved all of their differences, particularly with relation to delivery possession. On the other hand, Waters testified that complete agreement had been reached and he had been willing to accept all of the provisions suggested by defendant.

The contentions of plaintiff seeking reversal, attack instructions given and failure to give plaintiff's requested instructions.



## STATEMENT OF POINTS

## POINT I.

THE TRIAL COURT ERRED IN REFUSING PLAINTIFF'S REQUESTED INSTRUCTIONS THAT IF DEFENDANT AND WATERS AGREED TO THE PRICE AND TERMS OF SALE TO BE PLACED IN THE WRITTEN CONTRACT OF SALE THEN PLAINTIFF HAD PRODUCED A READY, ABLE AND WILLING BUYER.

## POINT II.

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT THE AGREEMENT BETWEEN DEFENDANT AND WATERS WAS NOT ENFORCEABLE.

## POINT III.

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT THE WRITTEN OFFER DID NOT COMPLY WITH THE LISTING AGREEMENT.

## POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IF THE PARTIES AGREED TO THE PRICE AND TERMS FOR THE SALE AND DEFENDANT LATER CALLED THE TRANSACTION OFF, PLAINTIFF WAS ENTITLED TO A VERDICT.

## POINT V.

THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY PROPOSITION NO. 2 AS TO WHETHER AT THE TIME THE LISTING AGREEMENT WAS SIGNED BY DEFENDANT PLAINTIFF KNEW THAT DEFENDANT'S WIFE WAS A CO-OWNER OF THE PROPERTY.

## ARGUMENT

## POINT I.

THE TRIAL COURT ERRED IN REFUSING PLAINTIFF'S REQUESTED INSTRUCTIONS THAT IF DEFENDANT AND WATERS AGREED TO THE PRICE AND TERMS OF SALE TO BE PLACED IN THE WRITTEN CONTRACT OF SALE THEN PLAINTIFF HAD PRODUCED A READY, ABLE AND WILLING BUYER.

After the trial court announced that the case was to be submitted to the jury on written interrogatories plaintiff sought to have the issues presented to the jury in clear and simple language that if defendant and Waters agreed to the price and terms which were to be put in the contract for the sale of the property, then plaintiff had produced a buyer who was ready and willing to purchase the property involved. Under such circumstances plaintiff would be entitled to judgment. *Curtis v. Mortensen*, 1 Utah 2d 354, 267 P.2d 237; *McCormick v. Life Insurance Co.*, 6 Utah 2d 170, 308 P.2d 949; *Hoyt v. Wasatch Homes, Inc.*, 1 Utah 2d 9, 261 P.2d 927; *Down v. DeGroot*, 83 Cal. App. 155, 256 Pac. 438. The express terms of the listing agreement is that plaintiff was to find a buyer, not to effect a sale.

That some provisions were to be left for future determination would be immaterial. Agreeing to the terms of the sale upon which they were willing to contract would constitute a meeting of the minds. That is the simple proposition which plaintiff sought to have presented to the jury by his requested Instruction No. 5 (52) as follows:

#### “INSTRUCTION NO. 5

“Did the defendant, as the seller, and J. Holman Waters, as the buyer, reach a complete oral, or verbal understanding as to the price and terms which should be placed in the written contract for the sale of the real estate?”

This proposition was also succinctly stated in plaintiff's requested instruction No. 3 (50) as follows:

### “INSTRUCTION NO. 3

“If the parties agreed as to what matters should go into the written contract for the sale of the real estate, then a complete agreement was reached even though other matters were left out, or the parties agreed to leave certain matters out of the contract, or agreed to leave certain matters for future determination.

“In other words, if the parties agreed to enter into an agreement for the sale of the property and agreed to the price and terms which shall go into agreement, then they have reached a complete understanding for the sale of the property.”

Instead of following this, the trial court submitted the following proposition (76, 83) :

#### “Proposition No. 1

“The defendant, as the seller, and J. Holman Waters, the buyer, reached a complete oral or verbal understanding as to the price and all other terms and conditions under which the defendant would sell and Mr. Waters would buy the listed property.”

The jury was told to either answer this false or true. Of course, this language needed further clarification for the reason that under the plain wording of this proposition if there were any terms left to future determination then all of the terms upon which the defendant and Waters would sell had not been agreed to. The court then attempted to shore up this inaccurate language by giving Instruction No. 9-G (79) wherein the jury were instructed concerning the meaning of this language. There are three obvious objections to this method of pre-

sentencing a case. In the first place, Instruction 9-G limits those things which could be left to the future when the evidence indicates there were a number of other items which the parties did not intend to place in the contract of sale, or at least the jury could have so found. In the second place, this instruction giving supposed meaning to the special verdict is inaccurate and misleading. In the third place the jury was going to answer a clearly worded proposition and you cannot change the true meaning of those words.

From the testimony introduced in this case a conclusion might be reached that defendant and Waters came to a complete agreement as to all things which were to be placed in the contract of sale. After the meeting with Attorney Hogan, defendant and Waters, Mr. Waters came away with the definite understanding that all terms had been agreed to which were to be included in the contract and the only formality left was to put the same in written form. He testified as follows (174):

“Q. As you left for Mr. Hogan’s office was there any areas in which there was any disagreement between you on this sale?

A. Not to be included in the sales contract.

Q. What was that?

A. No, not that were to be included in the sales contract.”

Defendant indicated in his testimony that there were some areas where complete agreement had not been reached. The jury could have found this to be true, but

also could have found that these areas of disagreement were not to be included in the contract of sale. Obviously, there was to be nothing put into the contract concerning the date defendant was to give up the occupation of the home (173). He was under the necessity of building a new home on the acre retained and was not exactly sure as to when this home would be ready for occupancy. Mr. Waters testified (172, 173) there was a discussion concerning the occupancy of the house. This seemed to be the main problem and Mr. Waters was only interested in having the house available so that his manager would be able to move in and permit his children to go to the Park City schools. They talked of occupancy by September 1st. Mr. Waters also testified that defendant said that he probably could assist in the operation of the ranch to pay for the occupancy of the home. Concerning the relationship of these matters to the contract of sale, Mr. Waters testified (173):

“A. The May first date was for possession, although allowing him to stay in the home, which was something which we talked between ourselves, having nothing to do with the sale, or selling agreement.”

Defendant, concerning his assistance to Mr. Waters in the operation of the ranch, testified there was some discussion as to whether he would be available to give Mr. Waters some advice and indicating that there had not been complete meeting of the minds on this subject, that as Mr. Waters was leaving Mr. Hogan's office he made the statement that defendant was to operate this



ranch for the use of living in the home. Defendant stated that he was upset by this because he was not in a position to operate his farm, build a home and carry on the other obligations that he had (217, 218).

Another area in which the jury could find there had not been complete agreement, but which was not to be included within the sales contract, was the discussion concerning rights of way for, and installation of, pipe lines from the well to the acre reserved by defendant. In regard to this pipe line situation defendant testified (203, 205) :

“Q. What did you resolve in regard to the pipeline from the spring to this building lot?

A. We discussed various ways of which we might construct this new pipeline, and we never did come to an agreement.”

\* \* \*

“A. We have a joint ownership of the present spring, with other people, and although we are not on the same pipeline, and taking another pipeline from this spring probably would enter into some problem with the other co-owners of the spring, which we had not discussed at this time, and so Mr. Waters and I talked this over.

“I wanted him to fully understand the conditions of the spring, and we discussed various ways we might get this share of the water that would go to me.

“And we had also the problem of the time of year which we would construct the new pipeline, inasmuch as we would have to go through growing

crops, and these all were problems that we discussed.

“Now we didn’t come to any specific understanding on what kind of an arrangement we would make. These were things that we tentatively set aside to talk about before we made our final agreement.”

Also, under the evidence the jury could find that no specific reference in the contract was to be made relative to the defendant being permitted to use the milking facilities if he needed them (173) or whether there was to be a specific reference in the contract to the fact that the heater was to be left in the milkhouse (185). With these subjects which the jury could have found were not to be in the sales contract but were to be left for future determination, the court unduly and incorrectly limited this field to the two specific propositions relating to possession date of the property as a whole and to the date of occupation of the home located on the ranch. Because of these other areas which could be left for future determination, the trial court’s method of submitting this proposition to the jury was inaccurate, incorrect and misleading.

Also, there was evidence that there was some question about the descriptions of the property which the jury under the instructions could have believed prevented an agreement on “all terms” (212, 228).

Analysis of Instruction 9-G (74) given by the trial court shows it to be confusing and misleading. There are only two distinct propositions considered in this instruction, one is the matter of the possession of the ranch

and the second is the occupancy of the home. The court stated to the jury in this instruction that if the housing problem was left to future determination but all other terms had been agreed to, then they should answer that the proposition submitted was true. Then comes the next paragraph in which the trial court states that if the defendant and Mr. Waters did not agree on when, under the proposed written contract of sale, either the possession of the ranch was to be taken or the house was to be taken by Mr. Waters, then they should answer the proposition No. 1 as false.

This is an incorrect statement of the law for the reason that if the parties wanted to agree that there would be a sale and they would enter into a contract for the sale and leave for future determination both the matter of possession and house occupancy, nevertheless the proposition should be answered true. The trial court should not be permitted to dictate to which terms of sale the parties were required to agree. The only issue was whether plaintiff had procured a person who was ready, able and willing to buy the property upon such price and terms as defendant and Mr. Waters might agree upon during the life of the listing contract.

We respectfully submit that the trial court committed error in not submitting the case to the jury in accordance with the requests above indicated made by plaintiff. We further submit that the trial court committed error in submitting the case to the jury under its Proposition 1 and Instruction 9-G for the reason that



these instructions constituted an inaccurate and incorrect statement of the law and in view of the evidence introduced the matter of what could be left to future determination was prejudicially limited by these instructions.

POINT II.

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT THE AGREEMENT BETWEEN DEFENDANT AND WATERS WAS NOT ENFORCEABLE.

The trial court instructed the jury in its Instruction No. 9-F (78) as follows:

“You are instructed that under the Utah statutes, an agreement to buy real estate is not enforceable unless such agreement is in writing and is signed by the party to be bound. Therefore, J. Holman Waters could not have been legally held by the defendant Loertscher and could not have been required in law to have complied with or performed any oral agreement, if any, which the buyer and seller may have made or reached.

“You are further instructed that in order for the parties to the sale to have reached a complete understanding it was unnecessary for the agreement to be binding on the seller and the buyer. There could be an agreement within the terms of the listing contract without said agreement being a binding agreement between the buyer and the seller.”

There was absolutely no issue joined on this subject. Of course, the contract between defendant and Mr. Waters was oral and therefore unenforceable against Mr. Waters or against defendant, but that was not the issue involved here. The issue was whether or not plain-

tiff had produced a person who was ready, able and willing to purchase the property.

This instruction of necessity was prejudicial to plaintiff because it informed the jury that defendant was not in a position to enforce the contract against Waters. The prejudicial nature of this becomes apparent when we turn to the testimony of defendant wherein he stated (236):

“Q. You had talked during this period of time—from January or February, up until this period of time—Let’s say February on—you talked to people about buying your property. I thought you testified to that?

A. I did attempt to try to make a deal. I couldn’t close the deal because I had no signed contract with Mr. Waters.”

The second paragraph does not eliminate the prejudicial nature of the first paragraph in the instruction.

We are unable to make any determination of what possible connection this instruction had with the case other than to give the jury the understanding that plaintiff’s effort had resulted in no legally enforceable rights bestowed upon defendant.

How could it possibly be proper for the trial court to say that the agreement is void but that makes no difference? If it makes no difference then nothing should be said about it. This red herring never should have been dragged across the path of this jury as they sought to decide this case.

In *Gray v. Blake*, 128 Colo. 381, 262 P.2d 741 (1953), an action was brought to recover a commission. Plaintiff claimed to have produced a purchaser for certain real estate. A jury returned a verdict for defendant. On appeal this was reversed. The court there instructed the jury as follows:

“The agreement attached to the complaint and marked Exhibit ‘A’ is not a contract of sale such as creates an obligation on the part of the defendant to sell or the *plaintiff* to buy, but is merely an option giving the right to purchase within a limited time without imposing any obligation to purchase.”

The word “plaintiff” obviously is in error and referred to the alleged purchaser. In holding this instruction reversible error the court stated:

“By Instruction No. 7, above quoted, the trial court in effect told the jury that Gray had not performed his part of the agreement with Blake and that the offer and tender of Kincheloe was without force or effect as regards the service plaintiff claimed he had performed. By telling the jury in Instruction No. 7 that Exhibit ‘A’ was not a contract of sale, in view of all the attendant facts shown by the records, the trial court erred. As an abstract proposition of law Instruction No. 7 doubtless is correct, yet it had no applicability to the facts in the instant case and could only serve to confuse the jury.”

The Utah Supreme Court has reversed cases because the trial court instructed the jury on matters having no relation to the genuine issues of the case. See, for ex-

ample: *Moore v. D&RGW RR Co.*, 4 Utah 2d 255, 292 P.2d 849 (1956).

We submit that prejudicial error was perpetrated when the trial court gave this wholly irrelevant instruction pointed toward giving the defendant an advantage to which he was not entitled.

### POINT III.

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT THE WRITTEN OFFER DID NOT COMPLY WITH THE LISTING AGREEMENT.

The trial court instructed the jury as follows (75):

“No. 9-C

“You are instructed that, as a matter of law, the evidence shows that the only written offer secured by the plaintiff from anyone to purchase the property listed by the defendant was the written offer, dated February 20, 1959, and signed by J. Holman Waters of Salt Lake City, Utah.

“You are further instructed that, as a matter of law, said written offer was not at the price nor in accordance with the terms of the listing agreement, and the Court, therefore, instructs you that, as a matter of law, the securing of this written offer would not comply with the listing agreement. The defendant was not required to accept it, and the defendant is not liable to the plaintiff for the plaintiff's having secured said written offer.”

Here, again, a red herring was inserted into the case. There was no contention at any time that the written offer of February 20, 1959, was in compliance with the terms of the listing agreement (117). This was not an

issue in this case and had nothing at all to do with the final result. Here, again, the instruction is pointed toward showing the plaintiff had not given the defendant an enforceable right and advised the jury concerning an issue which they could not even consider in connection with answering either of the propositions submitted to them. We rely on the cases cited in Point II to indicate that this constituted prejudicial error.

#### POINT IV.

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT IF THE PARTIES AGREED TO THE PRICE AND TERMS FOR THE SALE AND DEFENDANT LATER CALLED THE TRANSACTION OFF, PLAINTIFF WAS ENTITLED TO A VERDICT.

The plaintiff requested the trial court to instruct the jury as follows (48):

“Defendant, in the listing agreement of February 14, 1959, agreed to pay to plaintiff a \$5,000 commission if plaintiff found a buyer who was ready, able and willing to buy the real estate here involved at the price and terms set forth in the listing agreement or at any other price or terms which defendant might agree to.

“Therefore, if you find by a preponderance of the evidence, that defendant produced J. Holman Waters as a buyer, that the defendant and J. Holman Waters agreed to the price and terms for the sale of the real estate involved, and that defendant later called the transaction off, then you should return a verdict in favor of plaintiff and against defendant for the sum of \$5,000.00.”

That this is a correct statement of the law clearly

appears from *Curtis v. Mortensen*, 1 Utah 2d 354, 267 P. 2d 237; see annotation 169 A.L.R. 605.

Plaintiff requested this instruction because it followed the testimony of Mr. Waters and if the jury believed as Mr. Waters had testified then a verdict should have been returned in favor of plaintiff and against defendant. This instruction was given to emphasize the proposition that if the agreement had been reached and defendant called the transaction off, then and in that event, plaintiff was still entitled to recover. Certainly, in view of the fact that the court gave Instructions 9-C, 9-D, and 9-F expressing evidence favorable to defendant this instruction should have been given in all fairness to plaintiff.

We submit prejudicial error was committed in the refusal of the court to submit this instruction to the jury.

#### POINT V.

THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY PROPOSITION NO. 2 AS TO WHETHER AT THE TIME THE LISTING AGREEMENT WAS SIGNED BY DEFENDANT PLAINTIFF KNEW THAT DEFENDANT'S WIFE WAS A CO-OWNER OF THE PROPERTY.

By Instruction 9-E the court instructed the jury as follows (77):

“You are instructed that the defendant, Loertscher, contends that at the time the listing was given to the plaintiff Smith, Mr. Smith knew that the wife of Mr. Loertscher was a joint owner of the property. Mr. Smith denies that he had such knowledge. It is not necessary to your decision for the Court to instruct you on the legal



consequences of the existence or lack of such knowledge, but you are instructed to resolve this conflict by answering the following question

“At the time the listing agreement was signed by the defendant, did the plaintiff know that Mrs. Loertscher, the wife of the defendant, was a co-owner of the property?”

Also, the court submitted to the jury Proposition No. 2 as follows (84) :

“Proposition No. 2.

“At the time the listing agreement was signed by the defendant, the plaintiff knew that Mrs. Loertscher, the wife of the defendant, was a co-owner of the property.

There was no evidence which would justify a finding that at the time the listing agreement was signed plaintiff had any knowledge that defendant's wife was a co-owner of the property. Mr. Smith did not call for a legal description of the property and did not make any examination of the records until February 19th, five days after the listing contract was signed (162). Plaintiff also testified that he had no knowledge until the new plats had come out some time later that defendant's wife had any interest in this property (238).

Defendant testified he gave the valuation notice to plaintiff after the listing agreement had been signed (219). This is the only way that plaintiff could have received any notice of who owned the property and this shows it was after the agreement had been signed. Defendant testified as follows (218, 219) :

“Q. Mr. Loertscher, as I understand your testimony in connection with this valuation notice, you say you gave that to Mr. Smith, after the listing agreement had been signed?

A. That’s right. He asked me as he was leaving if I had some identification. I said ‘I have got a ‘Tax evaluation notice’ so I just went back in and gave it to him.

Q. Did you ever give him any other tax valuation notices?

A. No.”

Also, defendant conceded that on his deposition he testified that he did not turn over the valuation notice to plaintiff until after Mr. Waters had been up to the ranch. This was two or three days after the listing agreement had been signed and executed (219, 220). Also, this proposition was absolutely immaterial because there never was any contention at any time that defendant’s wife objected to the sale or would not sign the contract.

As a matter of fact she was cognizant of the fact that the property was being listed for sale. She was present when conversations were had at the attorney’s office (174, 214) She was consulted by her husband as to the time when possession should be given to Mr. Waters (168, 222). Never at any time did she object to the sale or indicate that she was displeased with it.

There are three versions as to the reason defendant gave in explaining why the transaction was not closed by written agreement. Plaintiff testified that on March 31 defendant stated to plaintiff that he had come down



to tell him that he was calling off the deal. He stated that he was not going to move down to the Peterson ranch and that he was going to sell all of it (140). Mr. Waters testified when defendant came to his place in the latter part of March, or the forepart of April, he stated: "Holman, I can't sell you the ranch." He gave as a reason that he couldn't get out of his cows and milk base what he had to get and he did not know what to do. Mr. Waters pointed out that he had been counting on moving his cattle on to this ranch and defendant replied that he did not want to put him on the spot and that if Mr. Waters had no place to send his cattle he might rent him some pasturage (178). Defendant testified he had come out to Mr. Waters to see if he could "get more time beyond the possession date" or else he could not go through with the deal and Mr. Waters refused to make any extension of time (216).

Thus it can be clearly seen that the defendant's wife's participation or refusal to participate in this sale has nothing at all to do with the issues. Again, we have an immaterial issue placed in the path of the jury and it could have no possible implication other than unfavorable to plaintiff in that it indicated he was attempting to sell somebody's land from whom he had no listing agreement.

In any event the weight of authority is to the effect that the fact that a wife is a co-owner of the property does not afford to the husband who has listed his property a defense against paying a commission. See *McAlinden v. Nelson*, 121 Cal. App. 2d 136, 262 P.2d 627,

*Schurz v. Gelber*, 117 A.C.A. 857, 256 P. 2d 634, *Traxler v. McLeran*, 116 Cal. App. 226, 2 P. 2d 553, *Russell v. Ramm*, 200 Cal. 348, 254 Pac. 532, *Johnson v. Krier*, 59 Cal. App. 330, 210 Pac. 966, *Pliler v. Thompson*, 84 Okla. 200, 202 Pac. 1016, *Kaufman v. Haney*, 80 Cal. App. 2d 249, 182 P. 2d 250. Also the listing agreement (Exhibit 1) showed only defendant as owner and to show ownership of another would violate the parole evidence rule. *Diamond v. Chiate*, 81 Ariz. 86, 300 P. 2d 583.

## CONCLUSION

In this case there was a decided conflict in the testimony of the witnesses. This being so, it became very important that careful and partial instructions should be given to the jury so that the case could be considered by the jury free of any influence from prejudicial instructions.

The case was not presented to the jury on a proposition which accurately set forth the issue to be determined.

On the other hand, the instructions given were not only confusing, but also misleading, as indicated by the foregoing arguments. Also, a number of instructions were given which slanted the jury's views toward the defendant and we submit did have a great influence upon the verdict returned. There was no reason for telling the jury that the oral agreement was unenforceable, that the written offer did not comply with the listing agreement and that the plaintiff was attempting to sell

property which did not belong to the person with whom he contracted. We submit that each of these errors were prejudicial to plaintiff and certainly the accumulation of errors in these instructions constituted prejudice to plaintiff.

We respectfully submit that this Court should reverse the judgment and remand the case for a new trial.

Respectfully submitted,

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