

1961

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

Utah Supreme Court

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Edward W. Clyde; Attorney for Respondent;

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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

JUN 10 1961

Supreme Court, Utah

Case  
No. 9290

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## BRIEF OF RESPONDENT

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE CASE

The statement of the case by the appellant adequately reflects the nature of the controversy. We consider it sufficient here to note that the appellant brought this action to recover a real estate commission. The respondent defended on the grounds that appellant did not procure a buyer ready and willing to purchase the

property, either on the terms set forth in the listing agreement (Ex. 1), or on any other terms to which the respondent agreed. As will be noted in the argument, there was a direct conflict in the evidence as to whether the prospective buyer, J. Holman Waters, and the respondent reached an agreement on the date of possession. Mr. Waters testified that they did, (R. 173, 183). The respondent testified that they did not, (R. 203, 208, 225). The matter was submitted to the jury on special interrogatories, and the jury found that Mr. Waters and respondent did not agree on the terms of a contract, (R. 83). The only issues now raised by appellant relate to the instructions.

By way of a cross-assignment of error, respondent contends that the court should have granted the respondent's request for a directed verdict, (R. 56). The basis for this contention is that the prospective purchaser never made a written offer which either met the terms of the listing contract or any other terms agreeable to the respondent seller. In fact, appellant testified that there was never a document even prepared, that either or both parties would sign, (R. 150). Respondent confirms this, (R. 215). The listing agreement provided for payment of a commission if the appellant real estate agent found a purchaser ready, willing and able to buy the property on the terms listed or on any other terms to which the respondent seller "agreed", (Ex. 1). The only written offer ever secured (dated February 20, 1959, Ex. 1) did not meet the terms of the listing agreement, (R. 116) and although under the plaintiff's version of the testimony, the prospective purchaser and seller

did reach an oral agreement on the terms of a sale, the seller never did sign nor deliver a written offer in accordance with the alleged oral agreement. By our cross-assignment of error, we contend that the commission was not earned because such a written offer was not secured, and our motion for non-suit (R. 189-190) and our request for directed verdict should have been granted. If we are right as to this, an error in the instructions, if there were any error, would be immaterial.

We will first endeavor to answer the appellant's points, and will then argue our cross-assignment of error.

## STATEMENT OF POINTS

### POINT I.

THERE WAS NO ERROR IN THE SPECIAL INTERROGATORY SUBMITTED TO THE JURY.

### POINT II.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THE AGREEMENT BETWEEN THE DEFENDANT AND WATERS WAS NOT ENFORCEABLE.

### POINT III.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THE WRITTEN OFFER OF FEBRUARY 20TH DID NOT COMPLY WITH THE LISTING AGREEMENT.

### POINT IV.

THERE WAS NO ERROR IN THE COURT'S REFUSAL TO INSTRUCT THE JURY THAT PLAINTIFF WAS ENTITLED TO A COMMISSION IF DEFENDANT CALLED THE TRANSACTION OFF.

### POINT V.

THERE WAS NO PREJUDICIAL ERROR IN SUBMITTING PROPOSITION NO. 2 TO THE JURY.

#### POINT VI.

THE UTAH CASES HOLD THAT EVEN IF AN INSTRUCTION IS EXTRANEOUS, THE VERDICT WILL NOT BE REVERSED UNLESS IT IS PREJUDICIAL.

#### POINT VII.

CROSS-ASSIGNMENT OF ERROR. IF THIS COURT WERE TO HOLD THAT THERE WAS NO PREJUDICIAL ERROR IN ANY OF THE INSTRUCTIONS GIVEN, THE JUDGMENT SHOULD NEVERTHELESS BE AFFIRMED, BECAUSE UNDER THE EVIDENCE THE COURT SHOULD HAVE GRANTED DEFENDANT'S REQUEST FOR A DIRECTED VERDICT.

### ARGUMENT

We believe that it will assist the court in analyzing the instructions and the points raised by appellant in regard thereto if we briefly review the fact issues which were presented by the evidence.

Appellant testified that he had known Mr. J. Holman Waters for about ten or twelve years; and in January of 1959 Mr. Waters requested appellant to help him find a ranch, (R. 101). The appellant drove to respondent's ranch near Park City on February 14, 1959, and secured a listing agreement, (R. 104, Ex. 1). Mr. Waters examined the ranch, (R. 106, 110) and on February 20th made a written offer, (R. 117, Ex. 4). The offer did not meet various terms of the listing contract, and it was rejected by respondent, (R. 122, 117).

The appellant, the respondent and Mr. Waters then discussed the various points wherein they differed, (R. 168) and as a result of this conversation the respondent and the appellant went to see respondent's lawyer, Mr. R. J. Hogan, to draw up a new contract. Mr. Waters testified:



“I said it would be all right with me to have his attorney draw up the contract, as long as I could see it and look at it before it was signed by either of us.” (R. 169). See also R. 180.

Attorney Hogan, who died prior to the trial, (R. 126) prepared a draft of a contract, which was introduced in evidence as Ex. 6, (R. 133). The respondent picked up the proposed draft from Attorney Hogan and without examining it, (R. 201) left a copy with Mr. Waters and took another copy home to study it. The contract as drafted by Mr. Hogan was not acceptable to Mr. Waters, (R. 170). It also was not acceptable to Mr. Loertscher, the respondent, (R. 207).

Thereafter, on a date which Mr. Loertscher says was near Easter, (R. 206) the respondent and Mr. Waters had another lengthy conversation. Both Mr. Waters and respondent indicated that this conversation lasted about two and one-half hours; that they started for Mr. Hogan’s office to keep an appointment; that Mr. Waters could see that they were not in agreement, and suggested that they have lunch and talk the matter out, (R. 207, 171-175). Mr. Waters specifically testified that they had reached an oral agreement to the effect that possession of the ranch would be delivered to Waters on May 1st, but that respondent would be permitted to live in the house while he was building his new one, (R. 173). Mr. Waters also testified that *the parties were not going to put the date of possession in the contract*, (R. 183).

The respondent testified unequivocally that they did not agree on the possession date, (R. 208, 211, 228).

He also said the contract (Ex. 6) which fixed a May 1st possession date, had to be corrected, (R. 225) but he never told Attorney Hogan to redraft it, because they never did agree on a possession date, (R. 228).

The primary issue of fact to be determined by the jury was whether or not Mr. Waters, the prospective purchaser, and the respondent reached an oral understanding concerning the terms of the sale, and in particular as to the date of possession. The court submitted this issue to the jury as a special interrogatory, and this brings us to appellant's first point.

#### POINT I.

THERE WAS NO ERROR IN THE SPECIAL INTERROGATORY SUBMITTED TO THE JURY.

The proposition submitted to the jury, (R. 76, 83) was as follows:

“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 instructed to answer this proposition “True”, “False”, or “No preponderance of the evidence either way.” The jury answered the proposition “False.” (R. 83).

The plaintiff here complains because the trial court did not give his requested Instruction No. 5. The proposition, as the plaintiff would have had it worded, was as follows:

“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?"

The proposition requested by plaintiff only asked the jury to determine whether the parties had reached agreement as to the items *which were to be placed in the written contract* for the sale of the property, (R. 52). This was not the issue. The sharp conflict in the testimony of Mr. Waters and respondent was related directly to the date of possession. As noted above, Mr. Waters testified that the parties had agreed on a May 1st possession date, but respondent could continue to use the house, (R. 173). More important still—as to this instruction—Mr. Waters also testified that this was not to be placed in the written contract. He said possession was to be given:

“No later than May 1st, to which he Respondent had agreed. *That was not to be included in the sales agreement.* That was something we could work out between us. . . .” (R. 183)

Respondent denied that agreement was ever reached on a possession date; (R. 208, 211, 218, 228) that the contract (Ex. 6) which fixed possession on May 1st had to be corrected, (R. 216); that the re-draft of the contract was never made, because the parties could not agree on the possession date, (R. 228) and that the deal fell apart because Mr. Waters would not yield on this point, (R. 216, 235, 218).

It thus would not have been sufficient merely to have the jury answer the question (requested by appellant) as to whether the parties had agreed on the things to

be put into the written contract. The issue was: Had the prospective buyer and the respondent reached an oral understanding as to all of the terms under which one would buy and the other would sell the property? This is exactly what the court asked the jury, and the jury answered that the parties had not reached agreement.

The plaintiff further contends that a clarifying instruction was, in any event, necessary. In this regard the appellant requested the court by his Request No. 3 to tell the jury that if the parties had agreed as to all matters which "should go into the written contract", then "complete agreement" was reached, even though other matters were left for future determination. This, of course, is not the law. Admittedly, the parties could have agreed that the written contract would cover everything but the possession date, and that they would work out the possession date, as Mr. Waters testified, (R. 183). If, however, they were unable to agree on the date of possession (as the respondent testified), (R. 218, 211, 228) there would be no agreement. In other words, both in the proposition proposed by appellant (Request 5, R. 52) and in the clarifying instruction, Request No. 3, the only thing the appellant wanted the jury to determine was whether the parties had reached an agreement as to the things which were to be reduced to writing. Neither the requested proposition nor the requested clarifying instruction told the jury that the parties had to reach agreement on all the terms under which Waters would buy and plaintiff would sell the property.

The court did give Instruction 9(g) which covered

in general the subject matter of appellant's Request No. 3. The jury was told that the parties could reach an agreement for the sale of the property without a determination of how the defendant's housing problem would be solved, and that if the jury believed that the parties had orally agreed to the terms of the sale, and both had intended for it to be drawn up and signed, but to leave for future determination the solution of the housing arrangement, they should answer the proposition, "True". The court then went on to tell the jury that if the parties had not orally agreed when possession would be delivered under the proposed contract, they should answer the proposition "False". We submit that there is no error in this regard.

## POINT II.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THE AGREEMENT BETWEEN THE DEFENDANT AND WATERS WAS NOT ENFORCEABLE.

The appellant contends that the trial court should not have given Instruction 9(f) (R. 78), which correctly told the jury that under Utah law an agreement to buy and sell real estate is not enforceable unless the agreement is in writing and is signed by the party to be bound.

Appellant does not contend that this instruction misstated the law. He merely claims that it was irrelevant. We submit that this instruction was entirely relevant, and indeed necessary to assist the jury in resolving the dispute in the testimony concerning the date of possession.

Respondent, throughout his testimony, gave as his reason for not agreeing to the May 1st possession date



the fact that he did not have the ranch sold—nothing in writing, and he could not sell his dairy until he knew the ranch was sold. For example, at R. 210:

“Q. And why hadn’t you sold your herd in February or earlier in March?

A. I couldn’t sell, because I didn’t have my farm sold. I had no firm agreement, no signed contract whatsoever, with Mr. Waters. Nothing had been presented to me by Mr. Smith, that I could sell my cows knowing that I definitely had a sale.”

Then at page 208 he testified:

“I was milking a large herd of cows, and I just couldn’t—I depend entirely upon the income from these cows for my income, and I just couldn’t go ahead and dispose of my dairy without definitely knowing I had a firm contract of sale.”

He then explained the problems of selling a dairy herd and Grade A milk base, (R. 209). Appellant’s counsel, on cross-examination of the respondent, asked at some length about offers on the cows, (R. 233).

All of the witnesses admit that they had reached a date near the middle of April, still without a draft of a contract which was acceptable to either respondent or Mr. Waters. Appellant so testified, (R. 150) and respondent (R. 215) and Mr. Waters (R. 177-8). Since the only reason respondent had given for his objection to the May 1st date was that he could not sell his dairy until he knew the ranch was sold and he could not sell a dairy overnight, it was proper for the jury to know that oral contracts for the sale of land are not enforceable and the reason he was giving was consistent with the law.

### POINT III.

THE COURT DID NOT ERR IN INSTRUCTING THE JURY THAT THE WRITTEN OFFER OF FEBRUARY 20TH DID NOT COMPLY WITH THE LISTING AGREEMENT.

The trial court by Instruction 9(c) (R. 75) told the jury that as a matter of law the written offer of February 20, 1959, did not comply with the listing agreement, and that by securing this offer, Mr. Smith, the appellant, had not earned his commission.

Appellant contends that this was a "red herring"; that no contention had been made that the written offer of February 20th complied with the listing agreement. Again, however, we point out to the court that the appellant introduced this written offer into evidence as Ex. 4. At the time the offer was made counsel for respondent inquired why this document was being put in, and the court noted that counsel had already admitted that this offer was at variance with the listing agreement. Counsel for appellant said he wanted to get it in for "background", and the court commented that this was part of the "path" which would lead the jury to the issue of whether the parties had agreed on the terms of a sale, (R. 117).

There had also been evidence introduced to the effect that shortly after the February 20th offer had been submitted and before respondent had even talked to the appellant about it, respondent overheard Mr. Smith talking on the telephone in the lobby of the Newhouse Hotel. Respondent testified:

"I heard Mr. Smith say that he is 'stalling for time, that it is a good deal and Holman is

ready and willing to buy and I think that I am entitled to my commission.'” (R. 195-7)

There also had been introduced in evidence as Ex. 7 a second copy of this offer of February 20th (R. 126) and nowhere had the jury been told that it was not sufficient in law for appellant to get an offer which was close to the terms of the listing agreement. Since these documents had come in evidence as “background”, it was entirely proper for the court to tell the jury that this written offer which had been introduced in evidence twice and which Mr. Smith thought was a “good” deal, and had earned him a commission was not effective to do that.

#### POINT IV.

THERE WAS NO ERROR IN THE COURT'S REFUSAL TO INSTRUCT THE JURY THAT PLAINTIFF WAS ENTITLED TO A COMMISSION IF DEFENDANT CALLED THE TRANSACTION OFF.

Without a general verdict having been submitted to the jury, there isn't any way that appellant's Requested Instruction No. 1 would have made sense. It is the type of instruction which could only have been given had the matter been submitted to the jury for a general verdict. It ends up by telling the jury that if it finds certain things, “then you should return a verdict in favor of the plaintiff and against the defendant for the sum of \$5,000.00.” (R. 48). But the court gave the jury no form (and appellant requested none) by which it could have returned a general verdict of \$5,000.00. The only thing submitted to the jury were the two propositions. The first proposition asked the jury to determine whether or not the parties had reached agree-



ment as to the terms of the sale, and the jury answered, "False", meaning that the parties had not reached agreement. In view of the fact that the matter was being submitted on special interrogatories, it would have been error to submit this instruction which called for a general verdict. No other request was submitted. No other exception was taken, (R. 240). The total exception is "Plaintiff excepts to the refusal of the court to give his Requested Instructions Nos. 1 and 2." Instruction No. 1 called for a general verdict and could not have been given in that form without a general verdict.

Further in answering the special interrogatory as it did—that the parties had not reached an agreement—the jury has found against appellant on the basic premise for this instruction, in any event.

#### POINT V.

THERE WAS NO PREJUDICIAL ERROR IN SUBMITTING PROPOSITION NO. 2 TO THE JURY.

One of the issues reserved at the pre-trial involved the question of whether a wife, who is a co-tenant, must sign the listing agreement in order that there be an enforceable agreement between the seller and the real estate broker, (R. 12). The respondent had testified that on the day the appellant got the listing he gave the appellant a copy of a tax notice, (Ex. 10) which showed the wife to be a co-owner, (R. 193). The appellant was a real estate agent with 42 years of experience and knew it would be necessary to have the wife co-sign the deed, (R. 158). It is true that respondent testified that he signed the listing and then at the conclusion of this particular meeting just as appellant was leaving,

the respondent got the tax notice for him, (R. 193). We do not believe that the mere fact that the signing of the listing preceded the delivery of the tax notice would have the legal effect of making this a separate transaction. The appellant came to the Loertscher home to get a listing. He as a part of this one visit got the listing and the tax notice. There is one Utah case, to-wit, *Stewart v. Lesin*, 5 Utah 2d 383, 302 P. 2d 714 (1946) and a line of cases from other jurisdictions, which indicate that knowledge of the wife's ownership and that she had not signed would void the agreement. See, for example, *Gray v. Blake* (Colo.), 283 P. 2d 1078, which holds that where a broker knows that he does not have a listing agreement from both owners, he can not recover his commission. Here the jury was simply asked to determine whether Mr. Smith knew that Mrs. Loertscher was a co-owner.

We can not see how this could have in any way prejudiced the appellant, even if the law were finally resolved to be in harmony with the other line of cases which hold that the wife's ownership makes no difference. The question became moot when the jury answered the first proposition "False". We do not believe that there was any error in letting the jury answer this question, but even if it were held that the proposition should not have been submitted, we can not see how the appellant possibly could have been prejudiced thereby.

#### POINT VI.

THE UTAH CASES HOLD THAT EVEN IF AN INSTRUCTION IS EXTRANEIOUS, THE VERDICT WILL NOT BE REVERSED UNLESS IT IS PREJUDICIAL.

We will not prolong this brief by discussing this in detail. The problem is discussed in *Moore v. Denver & Rio Grande Western RR.*, (1956), 4 Ut. 2d 255, 292 P. 2d 849; *Lemmon v. Denver & Rio Grande Western RR.*, (1959), 9 Ut. 2d 195, 341 P. 2d 215; *Bruner v. McCarthy*, (1943), 105 Ut. 399, 142 P. 2d 649. The court in these cases clearly lays down the rule that although an instruction might have been better omitted, a case will not be reversed unless there is a real showing of prejudice to the complaining party.

#### POINT VII.

CROSS-ASSIGNMENT OF ERROR. IF THIS COURT WERE TO HOLD THAT THERE WAS NO PREJUDICIAL ERROR IN ANY OF THE INSTRUCTIONS GIVEN, THE JUDGMENT SHOULD NEVERTHELESS BE AFFIRMED, BECAUSE UNDER THE EVIDENCE THE COURT SHOULD HAVE GRANTED DEFENDANT'S REQUEST FOR A DIRECTED VERDICT.

The court should have directed a verdict, because it is clear from the evidence that no written offer to purchase on the listed terms or on other terms agreed to by respondent was ever secured by the real estate agent. It is also clear that respondent did not agree in writing to any other terms than those listed.

It is clear from the evidence that Mr. Waters never signed any written offer except the offer of February 20th. In fact, both the appellant (R. 150) and the respondent (R. 215) testified expressly that there was never a contract drafted at any stage in these negotiations which was acceptable to either party. We believe that the real estate commission could only be earned under the listing agreement by either (a) presenting

a *written* offer to purchase in accordance with the listed terms, or by (b) presenting a *written* offer to purchase on other terms agreeable to the respondent. See *Lewis v. Dahl* (1945), 108 Utah 486, 161 P. 2d 362.

That case involved a suit by a real estate agent for his commission. The agreement there provided that if the property were sold by anybody during the term of the listing contract the broker would get his commission. The evidence disclosed some arrangement between the seller and the ultimate buyer made prior to the expiration of the listing agreement, but the deed of conveyance was dated after the listing expired: The question the court decided was: "When does a sale take place?" The court said:

"We are of the opinion, for reasons more fully disclosed hereinafter, that the word 'sale' in a real estate broker's listing contract, which renders the owner liable for payment of a commission in the event the owner himself makes a sale during the term of the listing, means the conveyance of title to the purchaser for a valuable consideration consisting of the purchase price, or the execution and delivery of a valid and *enforceable* contract of sale whereby some estate in the land, legal or equitable, passes to the purchaser. *Admittedly, if the broker presents only an oral offer to purchase, he is not entitled to a commission until or unless that offer is put in writing and the owner has a duty to accept such offer under the terms of the listing, or unless or until such transaction is consummated; for no one is bound by a mere oral offer.* If the owner enters into an oral agreement to sell which is not consummated by payment of the purchase price and delivery of the deed *or by execution of a*

*binding contract of sale, there is no assurance that the owner will ever collect the purchase price. Until the owner receives a written offer or a written acceptance which he can enforce as a valid and binding contract, or until there is a sale which is recognized by the statute of frauds, there is no sale within the meaning of the above quoted provision in the broker's listing contract."* (emphasis added).

See also *Curtis v. Mortensen*, 1 Utah 2d 354, 267 P. 2d 237 (1954). The court recognized that it had heretofore held that the broker must procure a legally enforceable written offer, which meets the terms of the listing contract or other terms to which the seller has agreed. In that case the offer was oral, but the buyer had brought a suit for specific performance of the seller's written offer, and the court held that this was tantamount to a written offer, and that the purchasers "just as effectively offered to buy the property" by bringing the action for specific performance as "they could have offered by signing a binding agreement." These two cases should be conclusive on this point.

If a real estate agent could earn his commission simply by finding somebody who would orally say that at a particular moment he was ready, willing and able to buy the property on the listed terms, the seller could really be hurt. If appellant's theory here is correct, his commission would be earned at that point, because he found somebody who would *orally* agree to buy the land at the listed terms. Then two or three weeks later the prospective purchaser could say, "I was ready, willing and able on April 1st, but now when the time has come for me to sign I have changed my mind and am no longer



willing.” The cases seem to be rather uniform in holding that this is not enough.

It should also be noted that Section 25-5-4, U.C.A. 1953, requires the listing agreement itself to be in writing before the agent can recover his commission. It is also provided by the general statute of frauds (Section 25-5-1) that a contract to convey an interest in real estate must be written and signed. The listing agreement in this case was prepared for the appellant. If it is ambiguous, it must be construed against him. If he had secured a written offer to buy at the listed price and on the listed terms, he, of course, would have earned his commission and would have been entitled to payment even though the seller declined to sell. See, for example, *Little v. Fleishman*, 35 Ut. 566, 101 P. 984 and *Ogden Savings Trust Co. v. Blakely*, 66 Ut. 229, 241 P. 221 (1925). But this did not happen here, and the appellant must base his claim in this case on the contention that he secured a buyer who had reached an “agreement” with seller on other terms. We believe that as a matter of law this “agreement” to terms other than those listed must be legally enforceable or the commission is not earned.

The seller can not be held to have “agreed” to some terms other than those listed, if the seller’s alleged “agreement” is only oral. The rationale of this line of cases is that to hold in the first instance that the real estate agent’s listing agreement must be written, and then to hold that the agent can collect his commission for procuring an offer to buy on some other terms (other than those listed) on testimony that the seller had orally

agreed to terms different from the written listing would be nonsense. This is elaborately discussed in *Roseberry v. Heckler*, (Arizona 1958), 326 P. 2d 365, and in *Augustine v. Trucco*, 268 P. 2d 780, (Calif. 1954).

Two short quotes from these may suffice. In the first case, the Arizona court said:

“We are constrained to hold that proof of other acceptable terms can not be made by testimony of oral statements only that the owner has agreed or will agree to such terms. Much evil which was intended to be prevented by Section 44-101 supra, [which requires real estate agent’s agreements to be written] potentially could result from permitting this class of oral proof....”

In the *Augustine* case the court said:

“No more backward step could be taken by the courts than to countenance an action for a broker’s commission founded on an alleged statement of an owner, perhaps over the telephone, that he would accept less for his property than the price stipulated in the broker’s written contract of employment. The security which the writing affords the parties would be taken from the very heart of the agreement, and there would be no protection against fraud and perjury.”

We believe that this is a sound rule. It was squarely raised here by the motion for a non-suit (R. 92) and by the request for a directed verdict (R. 56). It is admitted by everyone that the only written offer secured (Ex. 1) did not meet the terms of the listing agreement, (R. 117). No other written offer which the respondent seller could have accepted was ever secured, and respon-

dent never was in a position where he could have accepted and legally bound Mr. Waters to buy on any other terms. In fact no agreement acceptable to the parties was ever prepared, (R. 150). The cases cited above hold that this is fatally defective to the plaintiff's case.

Further, we submit that the language of the listing agreement (Ex. 1) which obligates payment of the commission if appellant finds a buyer willing to buy the property at the listed price and on the listed terms "*or at any other price or terms to which I or we may agree*" means legally "agree"; that the Arizona and California cases cited above correctly state the law; and that it is not competent merely to prove that the seller orally agreed to terms other than those listed. What possible sense could there be in our statute of frauds requiring that the real estate listing agreement be written, if after procuring a written listing setting forth the specific terms, the broker can then force the payment of a commission by showing that the seller *orally* agreed to terms different from those listed? If such were the law, the statute of fraud provision would be useless.

Thus, on two grounds the plaintiff can not prevail as a matter of law. First, he never procured a written offer either (a) in accordance with the listing agreement, or (b) in accordance with the alleged oral agreement from the seller to accept other terms. Secondly, in the face of a statute requiring a listing agreement to be written, the agent ought not to be permitted to collect a commission by proof that the seller orally agreed to terms different from those listed in the writing.



If we are right in this regard, then no instructions should have been given. The verdict should have been directed or the non-suit granted, and if there were any prejudicial error in the instructions as given, this would be immaterial.

## CONCLUSION

It is respectfully submitted that this is a case where there is direct and sharp conflict in the evidence on the issue of possession. That issue was submitted to the jury, and the jury found in favor of the defendant. The clarifying instructions were all of assistance to the jury, but even if appellant were correct that some were extraneous, there could still have been no prejudice therefrom. Finally, the plaintiff as a matter of law must fail because he never procured a written offer either in accordance with the alleged oral agreement, nor with the terms of the listing and in addition he should not in the face of a statute requiring a listing agreement to be written be permitted to show an oral agreement to different terms. The judgment should be affirmed and respondent should be awarded his costs.

Respectfully submitted,

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