

1975

# Geneva Meldrum v. Klarence Meldrum : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

UTAH VALLEY UNIVERSITY  
Reuben Clark Law School

**GENEVA MELDRUM**

**Plaintiff-Respondent**

**-vs.-**

**KLARENCE MELDRUM**

**Defendant-Appellant**

Case No.  
13684

**APPELLANT'S BRIEF**

**Appeal from Judgment of Fifth District Court  
Juab County  
Honorable J. Harlan Burns, Judge**

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**FILED**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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GENEVA MELDRUM

Plaintiff-Respondent

-vs.-

KLARENCE MELDRUM

Defendant-Appellant

} Case No.  
13684

## APPELLANT'S BRIEF

### NATURE OF CASE

This is an appeal by the defendant, Klarence Meldrum, from that part of a judgment which directed payment to plaintiff of \$23,714.58 from funds held in escrow under a contract of sale executed by plaintiff and defendant, and denying defendant relief which he claims to be entitled to under that contract. Defendant contends that the trial court erred in failing to give effect to the contract of sale and in interpretation of a written agreement for extension of time; also in rejecting evidence offered by defendant to show no default on the part of defendant; also in refusing to award defendant judgment as prayed for in his counterclaim.

### DISPOSITION IN THE LOWER COURT

After trial of issues the court directed counsel for defendant to submit proposed findings of fact, conclusions of law and judgment. This was done and counsel for plaintiff filed objections and a draft of proposed findings, conclusions and judgment, to which counsel for defendant filed objections. After further hearing the court took the

matter under advisement and thereafter signed and entered findings of fact, conclusions of law and judgment substantially as proposed by counsel for plaintiff. Defendant then filed motion for new trial. This was overruled and denied by the court and defendant then filed notice of appeal.

### RELIEF SOUGHT ON APPEAL

Defendant (appellant) prays for reversal of rulings of the trial court on points herein contended by defendant to be erroneous, and that the trial court be directed to render judgment as prayed for in defendant's counterclaim.

### STATEMENT OF FACTS

Under date of April 1, 1964, the plaintiff as seller entered into a contract of sale with her son Klarence Meldrum as buyer for sale of plaintiff's half interest in a ranch property in Juab County and in approximately 30 head of cattle and certain farm machinery and equipment. The other half interest in the ranch and personal property was owned by another son of plaintiff, viz. James R. Meldrum. The property was covered by two mortgages, one to Equitable Life Assurance Society and one to Ralph Meldrum as administrator of the estate of Reed Duke Meldrum. The contract between plaintiff and defendant called for a purchase price of \$40,000.00 to be paid in annual installments of \$2,500.00 on or before December 1 of each year and defendant was required to assume payment of plaintiff's portion of the mortgage debts mentioned but was to be given credit on the purchase price for such mortgage payments. Plaintiff was chargeable with 29 per

cent of the mortgage debt to Equitable Life Assurance Society and 50 per cent of the debt to Ralph Meldrum. The remaining portions of such mortgage debts were chargeable against James R. Meldrum. A copy of the 1964 contract between plaintiff and defendant is attached to plaintiff's complaint. (r.6-11)

After execution of the 1964 contract of sale, the defendant, together with his brother, James R. Meldrum, operated the ranch property until April 1969 and made payments required on the mortgage debts. Defendant also paid to plaintiff various installments aggregating \$8,004.11 prior to the execution of the Rasmussen contract hereinafter referred to. (r.165)

On or about September 1968 the defendant and his brother, James R. Meldrum, were solicited by a realtor for an option of sale of the ranch property and thereafter, on or about April, 1969, a contract of sale was executed by them. That contract, hereinafter referred to as the Rasmussen contract, (R.12) provided for sale of the ranch property to Lowell H. Rasmussen and wife, for a total purchase price of \$158,000.00. The plaintiff also signed that contract. The purchase price was to be paid \$5,000.00 down and \$20,000.00 on or before May 1, 1969, and the balance in annual installments of \$19,000.00 plus interest at 5½ per cent on May 1 in the years 1971, 1972, 1973, 1974, 1975 and 1976. The contract provided that a real estate agent's commission of \$7,900.00 should be paid to the realtor out of the first two installments of purchase price. The contract further provided that the sellers should execute and deposit in escrow with Walker Bank & Trust Company a deed of the property and that payments should be made to said escrow agent according to the terms of the contract. The contract did not specify how payments made to the

escrow agent were to be disbursed but did contain the following provisions: (R.21,22)

“19. Sellers agree to execute a statement of how and in what amounts the purchase price is to be disbursed to the Mortgagees and the Seller mentioned herein”

“25. The Seller agrees to furnish Walker Bank & Trust Company, the escrow agent in this matter, and the Buyer herein, with a statement of the portion each Seller is to receive from the purchase price to be paid hereunder.”

Concurrently with the signing of the Rasmussen contract two letters of instruction addressed to Walker Bank & Trust Company as escrow agent were signed by plaintiff and defendant and James R. Meldrum, copies of which letters are attached to defendant's Affirmative Answer and Counterclaim herein (R.32, R.34). These letters show that no agreement had been made between plaintiff and defendant as to allocation between them of funds to be received by said escrow agent but do contain the following recital: (R.33)

“The portion payable to Geneva Meldrum and Klarence Meldrum shall be divided between them as they may hereafter agree and notify said Walker Bank & Trust Company, or as may hereafter be determined by the court.”

The Rasmussen contract was deposited with Walker Bank & Trust Company at Provo, Utah, as escrow agent. A copy of same is attached to plaintiff's complaint herein (R.12). A copy of the 1964 contract of sale between plaintiff and defendant is also attached to plaintiff's complaint (R.6).



After deposit of the escrow, a disagreement developed between plaintiff and defendant as to distribution of funds received by the escrow agent. Plaintiff contended that she was entitled to 65.81 per cent of funds received and to be received for credit of plaintiff and defendant, and that the defendant was entitled to receive only 34.19 per cent of such funds. (See allegations of plaintiff's complaint) (R.5). Defendant disagreed with this contention but made offers in writing to permit plaintiff to receive one-half of funds received and to be received for credit of plaintiff and defendant until plaintiff should be fully paid in accordance with her 1964 contract with defendant. (Tr. A-57 and Exhibit D-1-A, D-2, D-3, D-4, D-5) Plaintiff rejected these offers and contended that the 1964 contract with defendant was superseded by the Rasmussen contract and that she was entitled to 65.81 per cent of funds payable under said contract for the half interest in the ranch property covered by her 1964 contract with defendant.

Prior to date for payment of the 1970 installment on the Rasmussen contract he requested consent of plaintiff and defendant and James R. Meldrum to an extension of time for making that payment, and offered to pay 8 per cent interest instead of 5½ per cent on the \$19,000.00 installment during such extension of time. The request was granted and an agreement for extension of time signed by the parties in language as follows: (R68)

“This agreement, entered into this.....day of April, 1970, by and between Geneva Meldrum, Klarence T. Meldru, and James R. Meldrum, hereinafter designated as the seller and Lowell H. Rasmusson and Barbara Frazier Rasmusson, husband and wife, hereinafter designated as the buyer.

WHEREAS, the seller desires to grant the buyer an extension in making one of the payment due on a Uniform Real Estate Contract, entered into between the parties relating to the real property in Juab County, State of Utah, and more particularly described in said Uniform Real Estate Contract as being dated November 1, 1968, with the above named persons as the parties thereto and.

WHEREAS, buyer desires to pay more interest for the extension as the consideration for the extension in one payment.

NOW THEREFORE, in consideration of the premises hereinafter set forth, the parties agree as follows.

1. Seller hereby grants to the buyer an extension of time to make the payment due on May 1, 1970, under Uniform Real Estate Contract, dated November 1, 1968, between sellers and buyer relating to property in Juab County, State of Utah, and sellers agree to extend the \$19,000.00 plus an accrued interest payment due on May 1, 1970, under said contract so that it will not be due until on or before September 15, 1970, and all other payments are to be as provided for in said Uniform Real Estate Contract.

2. In consideration of this extension, buyer agrees to increase the interest from  $5\frac{1}{2}$  per cent per annum to 8 per cent per annum on the \$19,000.00 payment and for the period from May 1, 1970, until said \$19,000.00 payment plus an accrued interest is paid on or before September 15, 1970, but it is understood that all other principle which is unpaid shall bear the  $5\frac{1}{2}$  per cent per annum rate provided for in said Uniform Real Estate Contract and all other payments provided under said contract shall be due and payable in the manner provided for in said Uniform Real Estate Contract.

3. Except as hereinbefore expressly stated, both seller and buyer agree that the Uniform Real Estate Contract, dated November 1, 1968, between them relating to the property in Juab County, shall

remain in full force and effect and the terms shall be as provided for therein."

The 1970 installment of principal and interest was not paid until May 5, 1971, at which time a payment was made in the amount of \$46,374.84. Counsel for plaintiff had notified Walker Bank as escrow agent not to pay anything to defendant except upon written stipulation or order signed by plaintiff or final adjudication by the court, and the bank had followed plaintiff's instructions. But during the impasse as to distribution of funds, several stipulations were signed at various dates between plaintiff and defendant for release of specified amounts to plaintiff and defendant respectively but with express provisions that such stipulations should not be construed as evidence as to the rights of either party in the final distribution of escrowed funds. Pursuant to these stipulations the escrow agent had paid out various amounts to plaintiff and defendant. The escrow agent also made payments on the Equitable Life mortgage and the Ralph Meldrum mortgage in accordance with original instructions given to it. (R.165,166)

On January 17, 1972 plaintiff commenced this action, setting forth in the complaint (R.6) the 1964 contract of sale executed by plaintiff and defendant, also the 1969 contract with Rasmussen (R.12) and alleging that the Rasmussen contract "constituted a form of novation" of the 1964 contract and that the Court should determine (R.5) that the plaintiff is entitled to receive 65.81 per cent of funds received and to be received from the Buyer under the Rasmussen contract. Also alleging that defendant should be required to pay plaintiff's attorney's fees and costs. The complaint also alleged that at the time of execution of the Rasmussen contract the defendant had

paid to the plaintiff \$11,509.79 leaving a balance of \$28,490.21 then due on the principal of the 1964 contract. The complaint prayed for judgment that plaintiff is entitled to receive 65.81 per cent of sums received and to be received by the parties under the Rasmussen contract and that the escrow agent be ordered to disburse to plaintiff 65.81 per cent of funds received by it under said contract, also that plaintiff should have judgment against defendant for any sums he had received in excess of 34.19 per cent; also that plaintiff have judgment for attorney fees and costs.

To this complaint the defendant filed his answer and counterclaim (r.25). In this the defendant admitted the execution of the 1964 contract with plaintiff and the execution on or about April 1, 1969 by plaintiff and defendant and James R. Meldrum of the Rasmussen contract. Defendant denied that he was at fault or in default on his 1964 contract with plaintiff at the time of execution of the Rasmussen contract or at any later time and denied that the plaintiff was entitled to judgment for attorney fees or costs and alleged that on the contrary defendant was entitled to his costs and attorney fee.

As a further and affirmative defence defendant specifically denied that the Rasmussen contract constituted any novation or substitute for his 1964 contract with plaintiff. Defendant alleged that his 1964 contract was in full force and effect and that at the time of execution of the Rasmussen contract defendant had paid to plaintiff on his 1964 contract the sum of \$8,004.11 and was then also entitled to credit for mortgage payments made by him on plaintiff's portion of mortgages to Equitable Life Assurance Society and Reed Meldrum required by said 1964 contract to be paid by defendant. Defendant further denied

that the Buyers under the Rasmussen contract had paid the sum of \$79,000.00 on defendant's equity under said contract and alleged that from amounts paid by said Buyers to the escrow holder the plaintiff had received \$14,867.95 and the defendant had received only \$16,367.96. Defendant further alleged that he was entitled to credits on his 1964 contract with plaintiff for payments made by the escrow agent on plaintiff's portion of the mortgages above mentioned.

As a further and affirmative defense and counterclaim the defendant alleged that the plaintiff signed the Rasmussen contract with defendant and James R. Meldrum by reason of the fact that the deed required to be executed by the terms of her 1964 contract with defendant had not then been delivered, and that plaintiff signed said Rasmussen contract without any agreement made by defendant for termination or surrender of his rights under his 1964 contract with plaintiff. Defendant also alleged that said Rasmussen contract contains no provision for allocation or division of payments to be made thereunder between plaintiff and defendant but does contain the following recital:

“25. The Seller agrees to furnish Walker Bank & Trust Company, the escrow agent in this matter, and the Buyer herein, with a statement of the portion each Seller is to receive from the purchase price to be paid hereunder.”

Also, that concurrently with execution of the Rasmussen contract, two letters of instruction addressed to said escrow agent were signed by plaintiff and defendant and James R. Meldrum and delivered to said bank, and that these letters of instruction to said escrow agent contained the following recital:

“The portion payable to Geneva Meldrum and Klarence Meldrum shall be divided between them as they may hereafter agree and notify said Walker Bank & Trust Company or as may be determined by court.”

Copies of said letters of instruction to said escrow agent are attached to defendant's answer and were incorporated by reference (R.32, R.34).

Defendant further alleged that plaintiff, by her attorney, had instructed said bank to refrain from disbursement of any funds to the defendant except upon written authorization signed by the plaintiff or upon a court order. Also that defendant had repeatedly requested the plaintiff to agree upon distribution of funds under said escrow in accordance with rights of plaintiff and defendant as fixed by their 1964 contract but plaintiff has refused and continues to refuse to agree to such distribution. Defendant further alleged that at the time of plaintiff's commencement of this action the total amount paid on the Rasmussen contract did not exceed \$42,464.73 of which one-half was allowable to James R. Meldrum and that plaintiff had then received from payments made by Rasmussen the sum of \$16,117.95, including \$1,250.00 paid direct to plaintiff by Rasmussen; also that defendant was entitled to credits on his contract with plaintiff for \$8,004.11 paid to plaintiff prior to the Rasmussen contract and other credits for payments made by defendant on plaintiff's share of mortgage debt to Reed Meldrum in the amount of \$3,000.00 and on plaintiff's share of mortgage debt to Equitable Life Assurance Society in the amount of \$2,407.00, making a total of credit then due defendant on his 1964 contract with plaintiff in the amount of at least \$32,840.08.

Defendant prayed for judgment and decree declaring that the Rasmussen contract did not annul or supersede or constitute a substitute for the 1964 contract of sale and that said contract was still in full force and effect and that defendant was not in default; also that Walker Bank & Trust Company, as escrow agent, be directed to disburse funds received by it in accordance with the decision of the court unless otherwise agreed to by plaintiff and defendant; also that defendant have his costs and a reasonable fee for services of his attorney.

Plaintiff filed a reply to defendant's counterclaim (R.37) admitting the execution of the 1964 contract of sale by plaintiff and defendant and that a disagreement had developed between plaintiff and defendant and that plaintiff had given notice to the bank as alleged by defendant, and denying generally the remaining allegations of the counterclaim.

## PROCEEDINGS BEFORE THE TRIAL COURT

On February 11, 1972, defendant made demand upon plaintiff for answers to interrogatories as show by the record herein. (R. 39) Plaintiff made answer (R.43) under date of February 22, 1972, to some of said interrogatories and therein admitted that plaintiff had received from defendant \$8,004.11 prior to the Rasmussen contract; also that defendant had then paid on plaintiff's portion of the mortgage debt to Equitable Life Assurance Society \$1,450.00; also \$2,055.69 on plaintiff's portion of the Reed Meldrum mortgage; also that plaintiff had received from the escrow agent, subsequent to the Rasmussen contract, \$4,502.50 in April or May 1969, \$1,000.00 on or about May 7,

1971, \$1,500.00 on or about June 1, 1971 and \$7,585.45 December 15, 1971, making a total admitted as then received by plaintiff from the escrow agent \$14,587.95; also that plaintiff had received direct payment from Rasmussen in amount \$1,250.00.

A pretrial hearing was had before the Court April 3, 1972, but no pre-trial order was made. (R.50)

A further hearing was had before the court on June 26, 1972 (R.52) and thereafter, under date of March 7, 1973 the Court signed and filed a Memorandum Decision (R.87) in which it was adjudged and declared that the rights, duties and obligations of the plaintiff and defendant should be determined from the 1964 contract of sale and that such agreement was "not modified, amended, merged or novated" by the contract with Rasmussen.

Subsequent to the filing of this decision to wit on March 25, 1973 the defendant filed a motion for allowance of interest to the defendant on funds found by the court to be due to defendant from the escrow holder, also for attorney fees. (R.93) Plaintiff also filed a motion for allowance of interest and attorney fee to plaintiff. (R.95) Counsel for defendant also submitted to the court proposed findings of fact, conclusions of law and judgment (Court Exhibit "A") and served a copy upon plaintiff's counsel and requested counsel for plaintiff to submit prior to July 10, 1973, a statement of points of disagreement if any with such proposed findings and conclusions.

A hearing was had before the court April 10, 1973 on defendant's proposed findings of fact and conclusions of law (Court Exhibit "A") Defendants Exhibit D-1-A was offered by defendant and received (R.99). At this hearing



counsel for plaintiff conceded the correctness of defendant's proposed findings of fact, but thereafter under date of April 17, 1973 filed a Supplemental Memorandum (R.105) alleging that plaintiff was in error in admitting a payment of \$3,369.60 claimed by defendant to have been made on the Equitable Life Assurance mortgage prior to the Rasmussen contract, and alleging that the correct amount was \$2,407.00 as set forth in defendant's answer and counterclaim. In plaintiff's memorandum it was admitted however, that except for the above item, defendant's statement of credits claimed in his proposed findings was correct. (R.105)

Thereafter, counsel for defendant prepared and submitted to the Court a revised draft of defendant's proposed findings of fact, conclusions of law and judgment (R.115) and served a copy upon plaintiff's counsel together with a renewal of defendant's demand made 22 March 1973 for answers to interrogatories. (R.125) In response to this counsel for plaintiff filed Objections to Defendant's Demand for Answers to Interrogatories and also submitted plaintiff's Proposed Findings of Fact and Conclusions of Law and Judgment (R.177) in which it was proposed that plaintiff have judgment directing the escrow agent to disburse \$23,014.11 to plaintiff and that each party should bear their own costs and attorney fees. Defendant filed objections to Plaintiff's proposed findings, conclusions and judgment. (R.182).

Under date of October 20, 1973 defendant filed a Motion for Ruling Upon Legal Issues (R.139) and on October 27, 1973, made a renewal of demand for answers to interrogatories dated July 26, 1973. (R.143)

On November 13, 1973 the case came on for hearing on pending motions and objections. (Tr A-1) Plaintiff's Exhibits P-1, P-2, P-3 and P-4 were offered by plaintiff and received. Defendant's Exhibits D-1, D-2, D-3, D-4 and D-5 were offered by defendant but objected to by plaintiff and the objection was sustained. The Court then directed counsel for plaintiff to submit revised findings of fact, conclusions of law and judgment and allowed defendant ten days after receipt of same to file objections. Plaintiff thereafter on November 28, 1973, submitted revised proposed findings, conclusions and judgment (R-159-168) and on December 5, 1973 defendant filed objections thereto (R-182).

Thereafter on December 11, 1973, the case came on for hearing on pending motions and objection (R. 156, Tr. B-1). The Court requested counsel for the respective parties to endeavor to agree upon pending issues and then, upon their announcement of failure to agree, the Court ordered the case set for trial at 1:30 p.m. of that day. Counsel for defendant then offered in evidence documentary exhibits D-6 and D-7 to which plaintiff objected and the Court sustained the objection (Tr. B-8, 11, 14). Defendant then moved for a continuance to permit defendant to produce further evidence as to receipts and disbursements made by the escrow agent. (Tr. B-16) Plaintiff objected to this and the Court denied defendant's motion and took the case under advisement.

On December 17, 1973, defendant filed a motion for the Court to make specific findings of fact upon all matters of fact referred to in defendant's objections to plaintiff's proposed findings of fact. (R.157)

Thereafter the court signed an order overruling defendant's objection (R.169) and signed findings of fact, conclusions of law and judgment substantially as proposed by counsel for plaintiff. (R.159) These were filed with the clerk and entered under date of March 4, 1974. Defendant then filed under date of March 12, 1974, a motion for new trial. (R.173) This was overruled by the Court April 9, 1974, (r.175) and defendant filed notice of appeal May 6, 1974. (R.176) Defendant filed his designation of record on appeal May 16, 1974 (R.203) and therein designated all pleadings, motions and objections filed by the parties and all exhibits and other papers and all orders of the court to be included in the record. Reporters transcript was ordered May 1, 1974. Bond for costs on appeal was filed May 20, 1974 (R.205). On June 14, 1974 an order was signed by the Honorable J. Harlan Burns, District Judge, extending time for filing record on appeal to and including August 6, 1974. On August 2, 1974 a further order was signed by the Honorable A. H. Ellett, Associate Justice, extending time for filing the record on appeal to and including August 20, 1974.

## ARGUMENT

### Point I

THE COURT FOUND AND ADJUDGED THAT THE RIGHTS OF PLAINTIFF AND DEFENDANT SHOULD BE DETERMINED FROM A 1964 CONTRACT OF SALE EXECUTED BY THEM. BUT THE COURT THEN RENDERED JUDGMENT INCONSISTENT WITH THAT CONTRACT AND WHICH DEPRIVED DEFENDANT OF A SUBSTANTIAL PORTION OF FUNDS TO WHICH HE WAS ENTITLED UNDER THE SAID CONTRACT.

The Court decided on March 7, 1973 that the 1964 contract signed by plaintiff and defendant constitutes the contract under which the rights of plaintiff and defendant herein should be determined—and that such contract was not modified or superseded by the Rasmussen contract. (R.87, R. 196). It must therefore be decided (a) what payments were required by that contract and when, and (b) what payments were made and when. The Court's findings show (R.165) that defendant had made payments to plaintiff in the amount of \$8,004.11 prior to the Rasmussen contract. Also that plaintiff had thereafter, and prior to commencement of this action, received from the escrow agent \$14,587.95 and from Lowell Rasmussen \$1,250.00 (R.43)—making a total thus found to have been received by plaintiff at that time to be \$15,837.95 (R.165). In addition to this, defendant had paid on plaintiff's portion of the mortgage debt to Equitable Life Assurance Society at least \$1,450.00 and at least \$2,055.69 on the plaintiff's portion of the mortgage debt to Reed Meldrum (R.43). By no reasonable view of the language of the 1964 contract can it be said that defendant was in default at the time of the commencement of this action. The contract called for payment of a maximum of \$2,500.00 per year to plaintiff—without interest—except that in event of default in payment of any installment the delinquency shall bear interest at 3 per cent per annum.

Not only was the defendant **not in default** at the time of commencement of this action but he had theretofore, in writing, several times, proffered to allow the plaintiff to receive from the escrow agent fifty per cent of payments made by Rasmussen on the portion of the ranch covered by defendant's contract with plaintiff until plaintiff should be

fully paid in accordance with the 1964 contract. See Exhibits offered by defendant—D-1, D-2, D-3, D-4, D-5. (Tr. 57) That proffer was continuously refused by plaintiff, and her counsel constantly contended that the Rasmussen contract superseded the 1964 contract and that plaintiff was entitled to 65.81 per cent of moneys becoming due from Rasmussen on defendant's portion of the purchase of the ranch property. (See plaintiff's complaint.) (R.5).

## POINT II

THE COURT ERRED IN FAILING TO MAKE A FINDING THAT DEFENDANT WAS NOT IN DEFAULT ON HIS CONTRACT WITH PLAINTIFF AT THE TIME OF COMMENCEMENT OF THIS ACTION OR AT ANY TIME THEREAFTER.

The defendant alleged in his Answer and Counterclaim that he had repeatedly requested plaintiff to agree upon distribution of funds held under escrow in accordance with the rights of plaintiff and defendant as fixed by the 1964 contract of sale and that plaintiff had at all times refused to agree to such distribution. (R.30) Defendant further alleged that the total amount of principal paid on the Rasmussen contract at date of said answer and counterclaim was \$42,464.73, of which  $\frac{1}{2}$  was allocable to James R. Meldrum, and that plaintiff had then received \$16,117.95 from funds paid under said contract, also that defendant had paid to plaintiff, prior to date of the Rasmussen contract \$8,004.11 and was further entitled to credit on account of payments made by him on plaintiff's portion of mortgage debt to Equitable Life Assurance Society in the sum of \$2,407.00 and \$3,000.00 on the Reed Meldrum mortgage prior to the Rasmussen contract,—also that there

had been paid by the escrow agent subsequent to the Rasmussen contract \$1,500.00 on the Reed Meldrum mortgage and \$1,548.52 on the Equitable mortgage—making a total of \$32,840.00 credits due to defendant on his contract with plaintiff (including \$262.50 paid on attorney fee).

The defendant prayed that the Court interpret and declare the effect of the 1964 contract and the Rasmussen contract and adjudge that the 1964 contract was not superseded by the Rasmussen contract but was still in full force and effect and that the defendant was not in default.

Plaintiff filed a Reply to defendant's counterclaim (R.37) admitting the execution of the 1964 contract with the defendant and denying generally defendants allegations as to payments received by plaintiff but without any specification as to what payments had been received.

Thereupon defendant under date of February 11, 1972 made demand upon plaintiff for answer to a series of interrogatories. (R.39) To these interrogatories plaintiff made answer under date of February 22, 1972 (R.43).

By these answers plaintiff admitted that she had received from defendant prior to the Rasmussen contract \$8,004.11, and that defendant had then paid \$1,450.00 on plaintiff's share of mortgage debt to Equitable Life and \$2,055.68 on her share of the Reed Meldrum mortgage; also that plaintiff had received from the escrow agent \$14,587.95 and \$1,250.00 direct from Rasmussen. This made a total of \$27,347.74 admitted by plaintiff to have been paid on the 1964 contract prior to institution of this suit.

These payments, thus admitted by plaintiff, exceeded by several thousand dollars the amount required by the terms of the 1964 contract. The contract called for payment of \$2,500.00 principal, without interest, on or before Decem-

ber 1 of each year beginning with the year 1964. That totals \$20,000.00 as of February 1972. But defendant was also to have credit for payments made by him on plaintiff's portion of mortgage debts which by plaintiff's admissions amounted then to \$3,505.68. All of which shows that by plaintiff's **admissions** defendant was **not in default** under the terms of the 1964 contract.

It is obvious that plaintiff's excuse for instituting this action in January 1972 was a mistaken theory that the Rasmussen contract superseded the 1964 contract—and a further mistaken theory that **plaintiff** was entitled to receive 65.81 per cent of all sums payable under the **Rasmussen contract** for defendant's half interest in the ranch property.

Plaintiff will probably argue that additional sums were due plaintiff by reason of the clause in the 1964 contract that, in case of sale of defendant's interest in the ranch for a sum in excess of \$40,000.00, then the plaintiff should receive one-half of such excess.

But what is the meaning of that sentence? Does it give plaintiff a right of action against defendant after he had consented to allow plaintiff to receive from the escrow agent one-half of all payments made on defendant's share of funds from the Rasmussen contract—until plaintiff was fully paid in accordance with the 1964 contract. Does it mean that at a time when plaintiff had in fact received several thousands of dollars more than was required by the 1964 contract, she could then put the defendant to the expense of defending an action on the contract? Does it mean that at a time when nothing in excess of \$40,000.00 had been paid on defendant's interest in the Rasmussen contract, the plaintiff could claim a default by defendant

on her contract with him? Defendant submits that the answer to these questions is obviously "NO".

### POINT III

#### THE COURT ERRED IN REJECTING EVIDENCE OF DEFENDANT'S OFFERS TO ALLOW PLAINTIFF TO RECEIVE FROM THE ESCROW AGENT PAYMENTS IN EXCESS OF INSTALLMENTS WHICH PLAINTIFF WAS ENTITLED TO RECEIVE UNDER THE 1964 CONTRACT.

Defendant offered documentary evidence (Tr. 57, D-1, D-2, D-3, D-4, D-5) showing offers made by defendant prior to institution of this action to allow plaintiff to receive one-half of installments received and to be received by the escrow agent for credit of defendant and plaintiff until plaintiff was fully paid under the terms of the 1964 contract. Counsel for Plaintiff objected to reception of such evidence upon the ground that it was irrelevant and the objection was sustained. (Tr. 59)

Defendant submits that that ruling was erroneous. The evidence went to the heart of issues raised by defendant's answer and counterclaim and the ruling cannot be reconciled with the Court's decision that the 1964 contract is controlling herein. The exhibits offered showed that at various times prior to the commencement of this action by plaintiff, the defendant offered to allow plaintiff to receive from the escrow agent one-half of payments received on defendant's portion of the ranch until plaintiff would be fully paid under the terms of the 1964 contract. Exhibit D-1 showed such offer made as early as September 1969. Exhibits D-2, D-3, D-4, D-5 showed that the offer was repeated at various times prior to the filing of plaintiff's complaint.



#### POINT IV

THE COURT ERRED IN FAILING TO MAKE SPECIFIC FINDINGS AS TO PAYMENTS MADE TO PLAINTIFF AND PAYMENTS MADE UPON MORTGAGES FOR WHICH DEFENDANT WAS ENTITLED TO CREDIT UNDER THE 1964 CONTRACT.

In proposed findings of fact submitted to the Court by defendant, it was meticulously set forth the amounts and times of payments made to plaintiff and upon mortgages for which defendant was entitled to credit. (R.115) Demand was made upon plaintiff to specifically state what objections, if any, plaintiff made to such proposed findings. (R.125) At the hearing before court on April 10, 1973, counsel for plaintiff accepted the recapitulation as set out in defendants proposed findings. (R.105) Thereafter, however, on April 17, 1973, counsel for plaintiff submitted to the court a Supplemental Memorandum (R.105) in which he stated that he had erred as to an item of \$3,369.60 which he asserted should be \$2,407.00. But in that memorandum he **accepted** defendant's recapitulation as to remaining items.

In spite of the foregoing admissions by plaintiff as to defendant's proposed findings of fact, the court failed to make specific findings on said matters and adopted findings of fact proposed by counsel for plaintiff (R.159) which fail to show essential facts and contain conclusions of law not supported by the evidence and which wholly fail to show offers made by defendant to allow plaintiff to receive from the escrow agent payments sufficient to fully comply with the 1964 contract.

## POINT V

### THE COURT ERRED IN ITS INTERPRETATION OF AN AGREEMENT FOR EXTENSION OF TIME AND IN AWARDING INTEREST TO PLAINTIFF TO WHICH SHE WAS NOT ENTITLED.

In paragraph 10 of plaintiff's proposed findings of fact (R.163) (and which were adopted by the Court over the objections of defendant) it is recited that in April 1970 an agreement was entered into between the sellers and purchasers under the Rasmussen contract whereby it was agreed that the 1970 payment under the Rasmussen contract was to be deferred and that the purchasers agreed that in consideration of such deferment they would pay eight per cent interest instead of five and one-half per cent. In the following paragraph, towit No. 10 of said proposed findings, it is recited that the payment made by Rasmussens on May 5, 1971 included \$14,825.23 as interest "of which \$3,323.03 represented the interest on the Plaintiff's aforesaid \$19,025.00 which sum of money is now being held in escrow by the Walker Bank and Trust Company of Provo, Utah and should be turned to the Plaintiff".

Defendant specifically objected to said proposed finding (R-182,183) (and also to finding Nos. 7, 9, 11 and 12) upon the ground that they erroneously assumed that plaintiff was entitled to interest not required by the 1964 contract. Defendant also contended that nothing in the 1970 extension agreement or in the Rasmussen contract required payment of interest to plaintiff except as provided by the language of the 1964 contract.

A reading of the 1970 extension agreement (R.68) clearly shows the merit of defendant's objection. There is **no word**

of agreement therein which calls for payment to plaintiff, nor any word of agreement between defendant and plaintiff as to whom the additional interest, or any interest accruing under the terms of the original Rasmussen contract shall be paid. And the Court had, by its Memorandum Decisions of March 7, 1973 ruled that the rights of plaintiff and defendant are to be determined by the 1964 agreement. The agreement specifically provides that no interest shall be charged except in case of default by defendant and then only at the rate of three per cent per annum.

The evidence herein which was offered by defendant (See exhibit D-1) shows that as early as September 1969 and at numerous times thereafter, (D-2, D-3, D-4, D-5) the defendant offered to allow plaintiff to receive one-half of payment made to the escrow agent on the portion of the ranch covered by the 1964 contract.

The admissions of plaintiff (R.105) further show that the plaintiff did in fact receive currently from the escrow agent one-half of each installment paid on the Rasmussen contract on defendant's portion of the ranch (excepting only the 1971 installment—and defendant offered to allow plaintiff to receive one-half of that—and she did receive \$7,585.45 of it). These payments so received by plaintiff were in addition to payments made by the escrow agent on mortgages referred to in the 1964 contract.

In Finding No. 11 (R.163) the Court erred in adopting a conclusion of law embodied in plaintiff's proposed finding No. 11 to the effect that \$3,323.03 of a payment made by Rasmussens on May 5, 1971 "represented" interest which should be turned to the plaintiff".

That conclusion is based upon a contention of plaintiff that plaintiff is entitled to interest on one-half of the excess

over \$40,000.00 for which defendant sold his interest in the property covered by his 1964 contract with plaintiff and that such interest should be computed **from the date of the Rasmussen contract**. In other words, plaintiff's counsel contends that a sale was made as soon as an executory contract of sale was signed—regardless of when payment was received—and regardless of when, or whether ever, defendant received his \$40,000.00 under the contract of sale.

Defendant submits that the language of the 1964 contract cannot be so construed. The agreement was that

“In the event the buyer sells his interest in the above described property or assigns this contract in the lifetime of the seller for a sum in excess of the purchase price herein, Forty Thousand Dollars, that in such event he will pay one-half of the excess to the seller from the first three payments under such sale.”

That cannot reasonably be construed to bind defendant to pay interest to plaintiff on the purchase price until it was received from his purchaser. And certainly not until the date the purchase was bound to pay. The Rasmussen contract called for a total price of \$158,000.00 for the ranch—including the James R. Meldrum half interest. The purchase price was to be payable in installments, viz; a down payment of \$5,000.00 (\$4,000.00 of which went to realtor's commission) and \$20,000.00 on or before May 1, 1969 and the balance in annual installments of \$19,000.00 plus interest at 5½ per cent per annum on the 1st day of May in the years 1971, 1972, 1973, 1974, 1975 and 1976.

It will readily be seen that if defendant should be chargeable for interest on one-half of the excess over \$40,000.00 of the sale price regardless of when the price would be paid, it would be an unconscionable burden for him.

The ruling, granting interest to plaintiff, and denying interest to defendant, fails to give consideration to the fact that defendant not only consented at all times to allow plaintiff to receive from the escrow agent one-half of payments received on the Rasmussen contract until plaintiff was fully paid under the 1964 contract—but also that plaintiff refused to let the escrow agent pay to defendant the balance due defendant. He was thereby deprived of interest from August 18, 1972 (when final payment was made to the escrow agent) until after the decision of this case on February 26, 1974.

Furthermore, counsel for plaintiff, in his proposed findings of fact, conclusions of law and judgment, which were adopted by the Court, claimed interested in the aggregate amount of \$4,122.96 (R.166) In arriving at that figure, counsel wholly failed to give consideration to the fact that plaintiff had currently received from the escrow agent payments which greatly exceed the instalments of \$2,500.00 per year required by the 1964 contract. The excess over that figure should have been credited on the \$19,025.00 claimed by plaintiff under the clause calling for payment to her of one-half of the excess over \$40,000.00 for which defendant's interest in the ranch was sold. But counsel, in his zeal to get the ultimate amount from the defendant, induced the Court to allow interest on the \$19,025.00 during the entire period from date of the Rasmussen contract until the date of judgment herin.

Defendant submits that he was not in default at the time of commencement of this action, nor at any time thereafter, and that the award of interest to plaintiff and denial of interest to defendant cannot be approved.

## POINT VI

### THE COURT ERRED IN DENYING DEFENDANT JUDGMENT FOR INTEREST AND FOR HIS COSTS AND ATTORNEY FEES.

Plaintiff's complaint was based upon the irrational and arbitrary contention that her 1964 contract with her son was superseded by the Rasmussen contract and that plaintiff was entitled to 65.81 per cent of all funds due and to become due under that contract on the interest in the ranch property covered by the 1964 contract. The trial court ruled against that contention (R.87)—and that ruling was obviously correct as a careful reading of both contracts will show. Also it seems obvious that the mother must have had some very bad advice or she would not have begun this lawsuit against her son when she had already received payments greatly in excess of installments due under her contract with him and when he had repeatedly offered to allow her to receive a greater percentage of funds paid and to be paid under the Rasmussen contract than was required under the 1964 contract. These points were fully set forth in defendant's answer and counterclaim and counsel was thereby charged with notice of defendant's rights. But in spite of this, and even after the Court had announced its decision that the 1964 contract was **not superseded or modified by the Rasmussen contract**, plaintiff's counsel continued to delay disposition of the case by dilatory motions and objections. Defendant repeatedly submitted to counsel for plaintiff demands for answers to interrogatories as to payments received by plaintiff and as to receipts and distribution of funds by the escrow agent—also as to offers made by defendant to allow

payments to be made to plaintiff. (R. 39, R. 91, R.125) But plaintiff inexcusably delayed answers to such interrogatories and failed to make specific answers. By these dilatory means a great and needless burden was put upon the Court and upon counsel for defendant—and an unconscionably lengthy and confusing record was needlessly accumulated.

Defendant further submits that the Court erred in rejecting defendants request for allow of costs and attorney fee. The Court indicated its reason for such action as follows: (R. 166)

“21. The Court further finds that each of the parties visited the same Attorney for the drafting of the original 1964 contract and that said parties were acting for their mutual interest and benefit under the Rasmussen contract, and that said Court's determination of the rights of the parties and obligations of said parties was not the fault of either of said parties, and therefore no attorneys fees or costs are awarded with each of said parties to bear their own costs and attorney's fees”.

Defendant submits that under the facts and circumstances of this case that conclusion of the court was clearly erroneous. The mere fact that the parties relied upon the same attorney for the drafting of the original contract between them ought not to be made a reason for denying costs and attorney fee to one of the parties who is needlessly put to expense and trouble of defending against a suit brought to attempt to force him payment from him of an amount greatly in excess of the amount called for by that contract. And if the attorney who drafted the original contract becomes attorney for one party against the other, and is succeeded by another attorney for the plaintiff, who institutes and action against defendant on an unjust claim, should that be any basis for denying costs and attorney fee

to the party who was **not at fault or in default**? Can it be said the plaintiff was not at fault in instituting this action where she claimed 65.81 percent of funds for which the contract property was sold when the contract clearly did not contemplate such a result?

And when if it is further shown that at the time of institution of this suit plaintiff had been paid far more than the installments required by the contract between the parties—and that defendant had theretofore repeatedly offered to allow plaintiff to continue to receive installments substantially in excess of installments required by their contract—can there be any basis for denying the defendant his costs and attorney fee under a contract which specifically provides that in case of a suit the party at fault shall pay to the other his costs and attorney fee?

## POINT VII

**THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR CONTINUANCE TO PERMIT DEFENDANT TO PRODUCE EVIDENCE OF PAYMENTS MADE BY THE ESCROW AGENT FOR WHICH DEFENDANT WAS ENTITLED TO CREDIT.**

On November 13, 1973, this case was called for hearing on defendant's motion for ruling upon legal issues and on plaintiff's objections to proposed findings of fact, conclusions of law and judgment proposed by defendant. (Tr. A-8) The Court on that day requested counsel for the parties to endeavor to agree upon remaining issues. Counsel discussed the matter and reported to the court that they could not agree. The Court then called upon counsel for plaintiff to state his points of objection to defendant's pro-



posed findings of fact. (Tr. A-page 8, 9, 10) Thereafter defendant offered documentary exhibits (D-1, D-2, D-3, D-4 and D-5) (Tr. A-p. 57, 58, 59, 60) to show offers by defendant to allow payments to be made to plaintiff by the escrow agent. Plaintiff object to this upon the ground that it was irrelevant and the Court sustained the objection. Defendant also offered in evidence Exhibits D-6 and D-7 to prove payments made to plaintiff and upon mortgages by the escrow agent. Plaintiff objected to this offer and the Court sustained the objection. (Tr. B-p.8-10) Defendant then moved for a continuance of the hearing to allow defendant to call witnesses to prove payments made by the escrow agent. (Tr. B-16) Plaintiff objected to this and the Court sustained the objection. The case was then taken under advisement by the Court.

Defendant then filed objections to proposed findings of fact and conclusions of law and judgment propped by plaintiff (R.182) and also filed a motion for the court to make specific findings on issues of fact referred to in defendant's objections. (R.157) Defendant's objections and motion were overruled and denied by the Court and Findings of Fact, Conclusions of Law and Judgment substantially as proposed by plaintiff were signed and entered. Defendant contends that these are erroneous in the matters set forth in defendant's objections on file herein. Defendant also contends that findings Nos. 7, 9, 10, 11, 19, 20 and 21 are not findings of fact but conclusions of law and are not supported by the evidence. Also that the court erred in refusing to show offers by defendant of documentary exhibits to show payments made by the escrow agent and offers made by defendant to permit payments to plaintiff in excess of payments required by the 1964 contract.

## CONCLUSION

In conclusion the defendant (appellant) submits that this court should reverse the rulings of the trial court on points herein contended by defendant to be erroneous, and direct judgment to be entered in favor of defendant as prayed for in his counterclaim.

The points referred to in this brief, and relied upon by defendant for redetermination by the appellate court, are so well established that it appears to counsel for defendant that citations of cases or authorities to support such points will be wholly needless. But if counsel for plaintiff questions this, and cites any legal authorities to the contrary, then counsel for defendant will reply thereto.

Respectfully submitted,

Will L. Hoyt

Attorney for

Defendant

(Appellant)