

1968

Mary Ireta Crofts v. Josiah Hoyt Crofts : Plaintiff's Petition For Rehearing and Brief In Support Thereof

Utah Supreme Court

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Recommended Citation

Petition for Rehearing, *Crofts v. Crofts*, No. 11165 (Utah Supreme Court, 1968).
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IN THE SUPREME COURT
of the
STATE OF UTAH

MARY IRETA CROFTS,

Plaintiff and Appellant,

vs.

JOSIAH HOYT CROFTS,

Defendant and Respondent.

No. 11165

Plaintiff's Petition for Rehearing
and Brief in Support Thereof

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FILED

OCT 23 1968

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	Page
PETITION FOR REHEARING.....	1
PRELIMINARY STATEMENT	2
ARGUMENT	3
POINT I.	
THIS COURT OBVIOUSLY AND COMPLETELY IG- NORED THE RECORD ON APPEAL AND THE ADMISSION AND EXPRESS ORAL STIPULATION OF COUNSEL FOR DEFENDANT IN CONNEC- TION WITH POINT III SET FORTH IN PLAIN- TIF'S ORIGINAL BRIEF HEREIN RELATING TO THE INCORRECT AND UNSUPPORTABLE AL- LOWANCE OF \$350.00 AND \$1271.14 AS CREDITS ON THE AMOUNT AWARDED PLAINTIFF AS A SETTLEMENT OF HER RIGHTS IN DEFEND- ANT'S PROPERTY.	3
POINT II.	
THIS COURT HAS CITED IN SUPPORT OF ITS REFUSAL TO DIRECT THE ENTRY OF A PROPER AND CORRECT DECLARATORY JUDGMENT HEREIN WITH RESPECT TO "EQUITIES" IN THE PANGUITCH HOME A COMPLETELY INAPPLIC- ABLE UTAH STATUTE AND HAS IGNORED CON- TROLLING AND APPLICABLE STATUTES.	9
POINT III.	
THIS COURT HAS MISSTATED AND ENTIRELY MISCONSTRUED THE DECREE OF THE LOWER COURT WITH RESPECT TO SOURCES OF PAY- MENT OF THE \$10,000.00 THAT PLAINTIFF WAS AWARDED BY THE DIVORCE DECREE AND AS A RESULT HAS APPROVED INCORRECTLY AND WITHOUT JUSTIFICATION THE INADEQUATE AND INCOMPLETE ACCOUNTING SUBMITTED BY DEFENDANT.	14
CONCLUSION	16
APPENDIX (TRANSCRIPT OF EXCERPTS FROM ORAL ARGUMENT OF COUNSEL BEFORE UTAH SUPREME COURT)	19

INDEX OF CASES CITED

<i>Cole v. Cole</i> (1942), 101 Utah 355, 122 P. 2d 201.....	7
<i>Stieler v. Stieler</i> (Minn. 1955), 70 N.W. 2d 127.....	11, 14

AUTHORITIES CITED

26 <i>Am. Jur.</i> 665-6	7
26 <i>Am. Jur.</i> 681	7
12 <i>Am. Jur.</i> 570	8
12 <i>Am. Jur.</i> 573	8
Anderson's Declaratory Judgments, p. 600, para. 202.....	11

STATUTES CITED

<i>Utah Code Annotated</i> 1953, Section 78-32-2	9
<i>Utah Code Annotated</i> 1953, Section 78-33-1	10
<i>Utah Code Annotated</i> 1953, Section 78-33-5	10
<i>Utah Code Annotated</i> 1953, Section 78-33-12	10
<i>Utah Code Annotated</i> 1953, Section 30-3-5	13

UTAH CONSTITUTION PROVISION CITED

ARTICLE XXII, Section 2	7
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IN THE SUPREME COURT
of the
STATE OF UTAH

MARY IRETA CROFTS,

Plaintiff and Appellant,

vs.

No. 11165

JOSIAH HOYT CROFTS,

Defendant and Respondent.

PETITION FOR REHEARING

Mary Ireta Crofts, the plaintiff and appellant in the above-entitled case, respectfully petitions the court for a hearing of said case upon the following grounds and for the following reasons:

I. This court obviously and completely ignored the record on appeal and the admission and express oral stipulation of counsel for defendant in connection with Point III set forth in plaintiff's original brief herein relating to the incorrect and unsupportable allowance of \$350.00 and \$1271.14 as credits on the amount awarded plaintiff as a settlement of her rights *in defendant's property*.

II. This court has cited in support of its refusal to direct the entry of a proper and correct Declaratory Judgment herein with respect to "equities" in the Pangutch home a completely inapplicable Utah Statute and has ignored controlling and applicable Statutes.

III. This court has misstated and entirely misconstrued the decree of the lower court with respect to sources of payment of the \$10,000.00 plaintiff was awarded by the divorce decree and as a result has approved incorrectly and without justification the inadequate and incomplete accounting submitted by defendant.

MATTSSON, JACKSON &
McIFF
GUSTIN & RICHARDS
Attorneys for Plaintiff

PLAINTIFF'S BRIEF IN SUPPORT OF PETITION FOR REHEARING PRELIMINARY STATEMENT

The facts in this case have been stated quite fully in plaintiff's original Brief filed herein. However, in view of the fact that this court has misstated and misconstrued some of the facts involved, we will make further reference thereto in the following argument.

Emphasis and italics throughout this Brief are ours, unless indicated otherwise.

ARGUMENT

POINT I.

THIS COURT OBVIOUSLY AND COMPLETELY IGNORED THE RECORD ON APPEAL AND THE ADMISSION AND EXPRESS ORAL STIPULATION OF COUNSEL FOR DEFENDANT IN CONNECTION WITH POINT III SET FORTH IN PLAINTIFF'S ORIGINAL BRIEF HEREIN RELATING TO THE INCORRECT AND UNSUPPORTABLE ALLOWANCE OF \$350.00 AND \$1271.14 AS CREDITS ON THE AMOUNT AWARDED PLAINTIFF AS A SETTLEMENT OF HER RIGHTS IN DEFENDANT'S PROPERTY.

Two sums allowed by the lower court as credits on the \$10,000.00 amount awarded to plaintiff by the divorce decree were \$350.00 and \$1271.14 representing one-half of the amounts realized by the parties from the sale by them of a Panguitch pasture and a Salt Lake City home, respectively, held and owned by them as joint tenants. There is no justification for either of these allowances, both of which were allowed by this court when it did not disturb the lower court's findings on the accounting.

These amounts represent *plaintiff's one-half* of the net sale proceeds from the sale of two properties, both owned by the parties as joint tenants. When they were sold, the plaintiff was entitled to one-half of the net sale proceeds because she owned that one-half. How defendant could be granted credit for either of these amounts is beyond our comprehension. In effect, the two courts have ruled that plaintiff is required to pay herself out of her own money. The decree of divorce states that she is awarded the \$10,000.00 "as a perma-

ment, complete and final settlement of *her rights in the property of the Defendant . . .*” but the lower court and this Court has now said that she is required to apply her own property on the \$10,000.00.

The matter is so clear with respect to the \$350.00 amount that counsel for defendant conceded the point in oral argument before this court when he said:

“Now with respect to the \$350.00 on the pasture I assume — I assume that — being as Mrs. Crofts did have horses which were her own property — race horses — I assume that possibly the \$350.00 should not have been a credit, and we’ll stipulate to that.” (Appendix p. i.)

In order to remove any possible uncertainty as to the effect of the stipulation of counsel for defendant, counsel for plaintiff then said in oral argument before this court:

“Now I understand that Mr. Chamberlain has said here today, which hasn’t been admitted previously, that he will stipulate now that the \$350.00 should not have been a credit, realized from the sale of the Panguitch pasture which was owned jointly by the parties, and he will also stipulate that the equities will be determined *when* the Panguitch home is sold . . .” (Appendix p. i)

Counsel for defendant did not disagree with this statement of this stipulation on either point, but nevertheless this court proceeded to allow credit for the \$350.00 and refused to determine when (or how) equities in the Panguitch home would be determined.

With respect to the \$1271.14 claimed by defendant and allowed by the court as a credit on the \$10,000.00 amount awarded plaintiff, there is no stipulation by counsel for defendant that this was an improper credit. The evidence was contradictory as to whether or not the parties agreed this should be a credit, but as a matter of law we submit that the allowance of this sum as a credit is not supportable or permitted. Once again, if it is allowed as such credit, plaintiff is being made to pay from her own funds and property amounts due her by and from defendant out of his property. On the factual side, counsel for defendant misstated the record in oral argument before this court in saying:

“They came to Salt Lake City and rather than rent here they assumed the contract on a home. This again is in the record. They assumed the contract on a home and when they left Salt Lake City in 1956 they sold that contract to a third party.” (Appendix p. i)

We challenge counsel for defendant to find in the record one single word about assuming a contract on a home in Salt Lake City and selling that contract to a third party. There was no such testimony. The truth is that the record shows that the parties bought a home in Salt Lake City and it was conveyed to them as joint tenants, from which it would follow that Mrs. Crofts owned the entire estate for purposes of tenure and survivorship and a one-half interest for purposes of alienation. (R. 178-9, 258-9, 260, 302.) When they sold that home, each was entitled in his or her own right to one-half of the net

proceeds. When plaintiff received \$1271.14 representing *her one-half interest* IN THAT HOME (defendant also received and retained \$1271.14 for his one-half interest) she was receiving her own property. *She was not receiving property of the defendant or a payment by defendant from or out of his property.* In effect, the court has said to plaintiff: "You are required to pay this \$1271.14 to yourself out of your own property, and we are going to allow defendant credit for that sum on what he owes you out of his property." This is not what the divorce decree provides and this is not the law.

Furthermore, there was absolutely no consideration for any understanding, whatever it was and regardless of whether the lower court believed the plaintiff or the defendant as to the application of this \$1271.14 as a credit on the \$10,000.00. Defendant testified that the total paid for the parties' equity in the Salt Lake home was paid in two checks, each made payable to *both* of the parties, and that they endorsed "each other's check at that time. It was made in two checks, one for her and one for me." (R. 254). Plaintiff has now been required to pay to herself for the credit of the defendant the \$1271.14 represented by "her" check. If the sale proceeds did not belong to both plaintiff and defendant, why were the checks made payable to both of them and why did they include her as a payee?

The divorce decree *did not award* to defendant the plaintiff's one-half interest in these properties. It did not even mention these properties, but the court has

now taken them from her. It awarded plaintiff \$10,000.00 in settlement "of her interests in the property of the defendant." The court has taken from plaintiff a Constitutional right:

ARTICLE XXII, Section 2 of the *Constitution of Utah* reads as follows:

"Real and personal property of every female, acquired before marriage, and all property to which she may afterwards become entitled by purchase, gift, grant, inheritance or devise, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be conveyed, devised or bequeathed by her as if she were unmarried."

Despite this, the court has now required plaintiff to use her property to pay the debt of the defendant.

26 *Am. Jur.* 665-6 and 681 clearly states that a married woman's property includes the proceeds of a sale thereof. The *Cole v. Cole* case (1942) 101 Utah 355, 122 P2d 201) cited by counsel for both parties refers to certain property owned as community property by husband and wife, and points out that since it was not mentioned in the decree, findings or conclusions." . . . the decree could have no effect on the holding or ownership of the stock. . . ."

Even if the court believes defendant's testimony as opposed to that of plaintiff as to the claimed agreement that the \$1271.14 (and this would also apply to the \$350.-00) was to be a credit on the \$10,000.00, there was no

consideration to support any such agreement. It is fundamental and elementary law that there must be a benefit to the promisor or a detriment to the promisee. 12 *Am. Jur.* 570, Sec. 79. What benefit was there to Mrs. Crofts and what detriment was there to Mr. Crofts for any agreement such as that claimed by Mr. Crofts to the effect that Mrs. Crofts would allow these amounts she already owned and was entitled to as a credit on the amount Mr. Crofts already owed to her. The answer is obvious. There must be some right, interest, profits or benefit accruing to Mrs. Crofts or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by Mr. Crofts. Here, there was neither. As stated in 12 *Am. Jur.* 573 referred to above:

“ . . . Any benefit conferred or agreed to be conferred upon the promisor (Mrs. Crofts) by any other person to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by such person (Mr. Crofts) other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a sufficient consideration for the promise . . . ‘Benefit’ as used in this connection means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled; ‘detriment’ means that the promisee has, in return for the promise, forborne some legal right which he would otherwise have been entitled to exercise. . . . ”

In our case, the promisee (Mr. Crofts) did not forego any advantage or benefit or part with a right he might otherwise exert. He gave up nothing when Mrs. Crofts

received the proceeds from the sale of her own property. She received no benefit when she merely received that which she was already entitled to receive.

POINT II.

THIS COURT HAS CITED IN SUPPORT OF ITS REFUSAL TO DIRECT THE ENTRY OF A PROPER AND CORRECT DECLARATORY JUDGMENT HEREIN WITH RESPECT TO "EQUITIES" IN THE PANGUITCH HOME A COMPLETELY INAPPLICABLE UTAH STATUTE AND HAS IGNORED CONTROLLING AND APPLICABLE STATUTES.

In its opinion, this court has held that there cannot be a declaratory judgment upon a judgment and then proceeds to cite in support thereof two Utah Statutes. Neither one is applicable. Instead, the matter is controlled by other statutory sections not cited by the court:

This court states that "it is not included within the terms of the statute permitting declaratory judgments" and then cites Section 78-32-2, U.C.A. 1953, which reads as follows:

"Any person interested under a *deed, will or written contract*, or whose rights, status or other legal relations are affected by a *statute, municipal ordinance, contract or franchise*, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtained a declaration of rights, status or other legal relations thereunder." (Emphasis added — by the court.)

The quoted section does not have even the most remote connection with the matter before this court. It is clearly inapplicable. Instead, the matter is controlled by the following applicable statutes:

“78-33-1. *Jurisdiction of district courts — Form — Effect.* — The district courts within their respective jurisdictions shall have power to declare *rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceedings shall be open to objection on the ground that a declaratory judgment or decree is prayed for.* The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.” (Emphasis ours.)

“78-33-5. *Enumeration in preceding sections no restriction on court's general powers* — The enumeration in Sections 78-33-2, 78-33-3 and 78-33-4 *does not limit or restrict the exercise of the general powers conferred in Section 78-33-1 in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove the uncertainty.*” (Emphasis ours.)

“78-33-12. Chapter to be liberally construed. — This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and is to be liberally construed and administered.”

In the light of these three applicable statutes, which among other things make it more than clear that Section 78-33-2, cited by the court in its opinion and which obviously does not apply in any event because we are not concerned with any of the documents mentioned therein, does not limit or restrict the *power and duty* of the court to declare rights of the parties with respect to

"equities in the Panguitch home and to terminate the controversy and remove the uncertainty with respect thereto, we feel that this court will not want its original opinion herein to stand. The statutes are so clear that no citation of authority appears to be necessary, but we do refer the court to *Stieler v. Stieler* (Minn.) 70 N.W. 2d 127, a 1955 decision which holds that in a divorce case a party may move the court for an interpretation and clarification of the judgment where it is ambiguous or *uncertain* in its terms or is of doubtful meaning or open to diverse constructions, and *Anderson's Declaratory Judgments*, page 600, paragraph 202 states as follows:

"A declaratory judgment action will lie to construe and determine the meaning of a judgment rendered where the same is indefinite or uncertain, and a construction thereof is necessary for the stabilizing of the rights, liabilities and legal relations of the parties."

We wouldn't be before this court if the decree in this case did not require construction. By a further admission made in oral argument before the court (Appendix p. ii) counsel for defendant has now conceded that "equities" are to be determined *when the home is sold* — something he and his client had not conceded previously and which is not part of the determination of the lower court in its declaratory judgment herein — and that "equities" will *then* be determined by deducting the balance then *remaining due* on the note and mortgage on the home — something again not conceded previously

and which again is not part of the declaratory judgment herein. We sought a determination of this point and have been denied it. Because defendant was ordered to pay *all of the debts, including the mortgage on the family home at Panguitch*, we argued before the lower court and on appeal that only costs of sale were to be deducted in determining "equities" when the home was sold but that another *possible* interpretation was that "equities" should be determined by deducting from gross sale proceeds the costs of sale and the balance remaining due Federated Security Insurance Company *at the time of sale*, this being the only *mortgage* on the home when the decree was entered. Defendant in his accounting (R. 91, 92) introduced another "debt" which he claimed was an "encumbrance" on the home, but which obviously is not the case because all it consisted of was a promissory note signed by plaintiff and defendant to defendant's partnership, J. E. Crofts & Sons, and was therefore merely a "debt" he was ordered to pay under the terms of the divorce decree. Recognizing the weakness of this contention, counsel for defendant apparently has conceded in oral argument before this court that defendant must keep up the payments on the home according to the terms of the *one* note and mortgage thereon which existed when the divorce decree was entered and that "equities" will be *determined when the home is sold* by deducting from gross sale proceeds the expenses of sale and the *balance then remaining due* on the one and only mortgage debt (to Federated) *at that time*. The minimum we are entitled to is a declaratory judgment

to that effect, although we urge that the court is in error in not requiring defendant to pay the entire mortgage debt before determining equities. The divorce decree, in its uncertain and unsatisfactory language, resulted in differing constructions. The purpose of the Declaratory Judgments Act is to remove that uncertainty. We are not asking for a determination of what the "equities" will be when the home is sold. That cannot be determined until it is sold, but we are entitled to know the formula and the method of determining "equities" at that time, which items should be resolved now by this court in making an interpretation of the language of the divorce decree.

The next statute cited by the court in its opinion herein is Section 30-3-5, *U.C.A.* 1953. In support of its statement that the finality of judgments must be respected, the court quotes the following part of said Section:

"... Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of property as shall be reasonable and proper."

Here again, the statute quoted by the court is inapplicable. We are not attacking the finality of the judgment. Since a dispute has arisen as to the construction of the divorce decree, we are asking what it means. That is why we have a Declaratory Judgments Act. The lower court, under the guise of interpreting the decree and in defining "equities," modified and amended the decree by changing "note and mortgage" (one only) to "indebted-

nesses" — whatever that may mean — and did not even determine *when* "equities" were to be determined. A determination of that question now will accomplish exactly what the Declaratory Judgments statutes above quoted expressly declare to be their purpose. As stated in *Stieler v. Stieler, supra*.

POINT III.

THIS COURT HAS MISSTATED AND ENTIRELY MISCONSTRUED THE DECREE OF THE LOWER COURT WITH RESPECT TO SOURCES OF PAYMENT OF THE \$10,000.00 PLAINTIFF WAS AWARDED BY THE DIVORCE DECREE AND AS A RESULT HAS APPROVED INCORRECTLY AND WITHOUT JUSTIFICATION THE INADEQUATE AND INCOMPLETE ACCOUNTING SUBMITTED BY DEFENDANT.

In its opinion, this court, in approving the accounting and in not allowing interest on the \$10,000.00 or any part thereof, amended and modified the divorce decree by misstating its express terms as follows:

The divorce decree (Appellant's Brief p. 28) awarded the plaintiff \$10,000.00 and then continued:

" . . . which sum shall be paid by the defendant to the plaintiff out of profits arising from business interests held by the defendant and which profits are actually distributed and received by the defendant and shall be immediately due and payable out of the sale of business assets of the Defendant to third parties and actual receipt by the Defendant of said sale proceeds. Said amount shall be payable at the rate of 50 per cent of the gross sale proceeds until said \$10,000.00 has been paid in full . . . "

This clearly stated two sources of funds "*out of*" which the money was to be paid: (1) "out of profits" and (2) "out of the sale of business assets." The next sentence merely specified and limited the payments out of sale proceeds to 50% of the gross sale proceeds. The opinion of this court states in the third to the last paragraph thereof:

". . . That decree specifically provided that the amount was to be paid out of profits from business interests and profits from sale of business assets. . ."

We respectfully submit that the court's statement of what the decree specifically provided is a complete departure from what it actually said. There is not even a word stated about "profits from sale of business assets." The reference is to "gross sale proceeds" from the sale of business assets. The word "profits" is used in connection with "business interests held by the defendant and which profits are actually distributed and received by the Defendant." The court did go on to say that interest did not begin to run until plaintiff had a right to the money, which implies that she did have a right to interest from the date she had a right to the money. How can plaintiff determine what interest is due on the basis of the so-called accounting submitted by defendant (R. 87-8-9, 90-1) which says in effect that no profits have been realized and then makes no mention of gross sale proceeds but mentions certain small "capital gains." Plaintiff is not interested whether any sale resulted in capital gains or losses. She is entitled to

know what the "gross sale proceeds" were from any sale made, whether reported by defendant in his income tax returns as capital gains or losses or not reported because neither a capital gain or loss resulted. We have specified a number of times the accounting we are entitled to in order to determine just what interest is due plaintiff, assuming she was not entitled to interest on the \$10,000.00 award from date of judgment. It has been ordered that we be furnished with such an accounting, but instead of getting the same we have been given further assurances that we would be furnished a further accounting. We continue to wait for it — something definitive enough to show not only when and what profits were received "from interests held" but also when and what "gross sale proceeds" were received from "the sale of business assets to the defendant to third parties." Certainly, plaintiff is entitled to some interest. The amount cannot be determined until and unless defendant is required to make and does make a meaningful accounting covering both profits and gross sale proceeds. Plaintiff's Request and Notice (R. 148-149-150-151) sets forth what we feel she is entitled to.

CONCLUSION

We respectfully submit that even though we believe the court's opinion is erroneous in holding that plaintiff was not entitled to interest on the \$10,000.00 from the date of the divorce decree, because it constituted a judgment for a fixed amount and is clearly distinguishable under the rulings of this court and numerous other

courts from an alimony or support money award payable in monthly or other periodic sums, at least there is some basis for the court's ruling on this question. With respect to the other items, however, stated as Points herein, we submit that the court's determinations are clearly erroneous. Defendant, under the facts and law applicable to this case and the stipulation of his counsel, is not entitled to credit for the \$350.00 and \$1271.14 amounts on the \$10,000.00 he was required to pay to plaintiff. The court should determine when and how "equities" in the Panguitch home are to be determined when it is sold — and at the very least, should determine that *when* it is sold, "equities" are to be determined by deducting *at that time* two items and two only, namely, expenses of sale and the balance then remaining due on the only mortgage debt, that to Federated, which existed when the divorce decree was entered, and that in the meantime defendant be required to make all of the payments thereon in accordance with its terms. The court should require a meaningful accounting which would enable plaintiff and the court to determine just what interest she is entitled to on the \$10,000.00 amount awarded to her.

Defendant still owes plaintiff the sum of \$4,563.84 directed by the lower court to be paid to her and we urge that this be paid immediately and unconditionally, regardless of the court's ruling on this Petition, in order to avoid any additional accrual of interest thereon or any question with respect thereto.

We respectfully urge that this court grant a rehearing and upon such rehearing that it make and enter a new and revised opinion in conformity with plaintiff's contentions herein.

Respectfully submitted

MATTSSON, JACKSON &
McIFF
GUSTIN & RICHARDS

Attorneys for Plaintiff

APPENDIX

Excerpts from transcript made of arguments of Ken Chamberlain, counsel for defendant, and Carvel Mattson, counsel for plaintiff, before the Utah Supreme Court on September 12, 1968 — taken from verbatim transcript of recording made at that time:

Mr. Chamberlain:

"Going next to the matter of equities in the home, the decree provided that Mr. Crofts would pay a certain figure for alimony, a certain figure for support money, and he — that he would pay the mortgage payments on the home. Neither one of them happened to be living in Panguitch at the time. Later Mr. Crofts returned to Panguitch and two of the children came back from Arizona to live with Mr. Crofts in Panguitch. They never sold the home. They have not sold the home as yet, but the two provisions in the Decree are entirely consistent, one with the other, that if the home is sold then the equities will be decided, and I have cited in my brief a number of cases which hold that the definition of the term equity is the gross value of the sale price less any valid indebtednesses against the property, and I think it is premature here to determine what the indebtedness is going to be when it is sold. We admit that if Mr. Crofts stays in the home for the next ten years that Mrs. Crofts' equity is going to be considerably larger because he will have paid down the principal balance on the mortgage materially by the time it is sold. If Mr. Crofts stays there until the lawful indebtednesses are paid off on this property (record turned over at this point and a few words were missed) . . . provide that the property will be held in joint tenancy until it is sold as is hereinafter provided, so it is entirely — both of these provisions are entirely consistent Mr. Crofts has the obligation of keeping those payments up. They cer-

tainly didn't intend that Mr. Crofts would mature the entire obligation due on this mortgage and pay it immediately. He was to pay household obligations including the note and mortgage and all he has to do with respect to the note and mortgage is pay it according to its terms and according to those rates. . . .

"Now coming to the two — the last two matters that Mr. Mattsson mentioned, there was a home which Mr. and Mrs. Crofts owned in Salt Lake City. . . . They came to Salt Lake City and rather than rent here they assumed the contract on a home. This again is in the record. They assumed the contract on a home and when they left Salt Lake City in 1956 they sold that contract to a third party. . . . Now with respect to the \$350.00 on the pasture I assume — I assume that — being as Mrs. Crofts did have horses which were her own property — race horses — I assume that possibly the \$350.00 should not have been a credit, and we'll stipulate to that. . . ."
Mr. Carvel Mattsson:

"Now I understand that from what Mr. Chamberlain has said here today, which hasn't been admitted previously, that he will stipulate now that the \$350.00 should not have been a credit, realized from the sale of the Panguitch pasture which was owned jointly by the parties, and he will also stipulate that the equities will be determined *when* the Panguitch home is sold. It's been up in the air — it's been uncertain as to when equities would be determined. Of course, we don't — if only costs and expenses of sale are to be deducted, then that — that point is moot, but if the note and mortgage indebtedness which Mr. Crofts was ordered to pay is deducted, then that point can be important because he will be reducing the note and mortgage indebtedness as time goes on."