

1940

## Gertrude Erickson v. G. A. Bastian and Roean Bastian : Abstract of Record

Utah Supreme Court

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A. H. Hougaard; Attorney for Plaintiff and Appellant;

Henry E. Real; Attorney for Defendants and Respondents;

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No. 6209

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In  
The Supreme Court  
of the  
State of Utah

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GERTRUDE ERICKSON,  
Plaintiff and Appellant,

vs.

G. A. BASTIAN AND  
ROEAN BASTIAN,  
Defendants and Respondents.

---

Appeal From Sixth Judicial District,  
Wayne County  
Honorable Henry D. Hayes, Judge

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**ABSTRACT OF RECORD**

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A. H. HOUGAARD,  
Attorney for Plaintiff  
and Appellant.

HENRY E. BEAL,  
Attorney for Defendants  
and Respondents.

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## INDEX

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Assignments of Error .....	68-79
Affidavit of Mailing .....	31
Answer .....	10-13
Bill of Exceptions .....	31-68
Complaint (Supplemental) .....	1-9
Conclusions of Law .....	29-30
Clerk's Certificate to Transcript .....	79
Decree .....	30a
Exhibit A .....	9, 14-17
Exhibit B .....	21-23
Exhibit C .....	23-25
Exhibit D .....	9
Findings of Fact .....	13-29
Findings and Conclusions .....	13-30
Notice of Appeal .....	31
Order Extending Time .....	30

(Index Continued)

**I N D E X**  
**(A Continuation)**

**TESTIMONY**

Bastian, G. A. ....	44, 46-49
Cross-Examination .....	49-54
Redirect Examination .....	54
Recross Examination .....	54
Bastian, Roean .....	58
Cross-Examination .....	59-60
Redirect Examination .....	60
Recross Examination .....	60
Bryan, Arthur .....	61-63, 67
Cross-Examination .....	63-64, 68
Eckersley, Elsie .....	31-33, 54-55
Cross-Examination .....	56-57
Redirect Examination .....	57
Recross Examination .....	57
Erickson, Gertrude .....	33-36
Cross-Examination .....	36-37, 66
Redirect Examination .....	37
Recross Examination .....	37
Recalled .....	45-46, 64-66
Erickson, L. H. ....	38-40
Cross-Examination .....	40-41
Redirect Examination .....	41
Ernstsen, Ivan .....	41-44
Cross-Examination .....	44

In  
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GERTRUDE ERICKSON,  
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G. A. BASTIAN      AND  
ROEAN BASTIAN,  
Defendants and Respondents.

---

**ABSTRACT OF RECORD**

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SUPPLEMENTAL COMPLAINT  
(TITLE OF COURT AND CAUSE).

11      Plaintiff complains of the defendants and  
for cause of action alleges:

1.

That the defendants are husband and wife  
and reside in Wayne County, State of Utah.

2.

That on or about the 25th day of September,  
1938, the plaintiff and defendants entered into  
a certain agreement by the terms of which the

plaintiff agreed to sell and the defendants agreed to purchase approximately 100 acres of agricultural lands situated in Wayne County, State of Utah, more particularly described in a copy of said agreement, hereunto attached, marked Exhibit A and made a part of this complaint, together with 64 shares of water in the Fremont Irrigation Company and the personal property also more particularly described in the attached exhibit.

## 3.

That said defendants agreed to pay for said real and personal property the sum of \$14,000.00, payable as follows, to wit: \$2,000.00 on or before February 1, 1939 and \$1,000.00 each year thereafter, payable on the first day of February, together with interest at the rate of four per cent per annum, payable annually at the time of the aforesaid principle payments and it was further provided, by said agreement that the defendants should have 30 days grace in making the above payments in the event the defendants' lamb crop or other crops could not be sold by February 1 of any year, and that said defendants would pay all taxes and assessments against said land and water commencing with the year 1938.

## 4.

Plaintiff further alleges that said contract also provided that in the event the parties of the second part should default in the payment of either principal or interest, the plaintiff would have the right to reenter and take the peaceable possession of said land and improvements, and that said agreement, the warranty deed and other papers which were

deposited in escrow with the clerk of the District Court of Wayne County, State of Utah, should thereupon be immediately delivered by the clerk of said court to said plaintiff.

## 5.

- 12 Plaintiff further alleges that said defendants, upon the execution of said agreement, entered into the possession of said lands and premises and received all of the personal property mentioned in said contract and ever since said time have been in the possession thereof and have used, occupied and enjoyed the same, and that in order to carry out the terms of said agreement, the plaintiff herein duly deposited with Elsie Eckersley, clerk of the District Court of Wayne County, State of Utah, an executed copy of said agreement, together with a warranty deed from the plaintiff to the defendants, which said deed was to be delivered to said defendants when said contract had been fully complied with, and the purchase price therein mentioned paid; that plaintiff has duly performed on her part all of the terms and conditions of said agreement, but alleges that said defendants, or either of them, have not paid the sum of \$2,000.00 due and owing on the 1st day of February, 1939 or within the grace period provided by said contract or any part thereof, and have failed and neglected and do now fail and neglect to pay or discharge the taxes levied and assessed against said real and personal property and the water assessments due and owing on the shares of stock in said Fremont Irrigation Company and are now and ever since the 3d day of March, 1939 have been in default in performance of the terms of said

contract, and alleges that by reason thereof, plaintiff herein is entitled to reenter and take possession of said lands and improvements and to have said agreement cancelled and declared null and void and to have said agreement and said warranty deed, on deposit with Elsie Eckersley as clerk of said District Court, delivered to the plaintiff herein and the same cancelled and declared null and void.

## 6.

Plaintiff further alleges that on the 6th day of March, 1939, she served or caused to be served upon the defendants a notice that said defendants had failed to perform the terms of said contract and were then and there in default in respect to the performance thereof and then and there demanding the immediate possession of said real estate and said personal property and requiring said defendants to immediately vacate said premises and that plaintiff be permitted peaceably to reenter and take possession thereof and for the delivery to plaintiff of said agreement and warranty deed on deposit with the clerk of said District Court, a copy of which said notice is hereunto attached, marked Exhibit B and made a part hereof.

## 7.

13 Plaintiff further alleges that after the service of the foregoing notice mentioned and described in paragraph 6 hereof, was made known to the plaintiff that a writ of garnishment had been served upon the defendants in a certain action then pending in the District Court of Sanpete County, State of Utah, entitled J. S. Peterson plaintiff v. Gertrude Erickson, defendant, and that by said writ of



garnishment so issuing out of said court and cause, said defendants had been required not to pay to the plaintiff any moneys due and owing to the said Gertrude Erickson and to keep in his possession all property belonging to said plaintiff, and that by reason of said writ of garnishment, as plaintiff is informed and believes, and therefore alleges, said defendants and each of them claimed immunity from the payment of the amounts due to said plaintiff as aforesaid and claimed and asserted that they were relieved from any obligations to pay the amount due and owing to the plaintiff under the terms of said contract as aforesaid.

## 8.

That on the 3rd day of April, 1939 the aforesaid writ of garnishment was, by order of the District Court in and for Sanpete County, State of Utah, released and discharged and said defendants, and each of them, were by such order released and discharged as garnishees in said action and said garnishment proceeding was dismissed and said writ vacated, and said defendants released and discharged from all liability by virtue of said writ and that thereafter on to wit: the 11th day of April, 1939, said original release and discharge of said writ of garnishment was served upon the defendants and each of them, together with a further notice requiring the performance of the terms of said contract providing for the sale and purchase of said property hereinbefore described, a copy of which said notice, together with a copy of the order discharging said writ of garnishment is hereunto annexed,

marked respectively Exhibits C and D and made a part hereof.

## 9.

That notwithstanding the default of said defendants as aforesaid and the service of the notices aforesaid, said defendants have failed, neglected and refused and do now fail, neglect and refuse to vacate said premises or to surrender to the plaintiff the possession thereof or to deliver said agreement and said warranty deed to the plaintiff or to otherwise perform the terms and provisions of said agreement, and alleges that said defendants now wrongfully and unlawfully hold the possession of said real and personal property and are now using, occupying and enjoying the same wrongfully and unlawfully to the great detriment and damage of the plaintiff.

## 10.

14 Plaintiff further alleges that at the time of the making of said contract and the delivery of the possession of said premises and said personal property to the defendants, there was growing thereon large and bounteous crops which had been practically matured through the sole efforts of plaintiff and a son of plaintiff, and that said defendants have had the use and benefit of all of said crops and did in fact harvest the same and realized all of the benefits therefrom and caused a large part of said crops to be fed to livestock and said livestock to be grown and fattened therefrom and subsequently sold, from which said defendants have realized large profits, and that said property is now denuded of all its vegetation and crops and if when plaintiff is given the pos-

session thereof, it will be necessary for plaintiff to cultivate and replant the same, and that the value of said lands and premises and said personal property has depreciated in value, and that whereas the reasonable market value of said lands, premises and personal property was, at the date of said contract, the sum of \$14,000.00, the same has now depreciated and is not now worth in excess of the sum of \$12,000.00 and that plaintiff has by reason thereof been injured and damaged in the sum of \$3,000.00.

## 11.

14 Plaintiff further alleges that it is necessary that said lands and premises be given immediate attention and the same cultivated and seeded so that crops may be grown thereon during the present season, and that plaintiff is informed and she verily believes, and therefore alleges that said defendants will not cultivate and seed the same or take care of said lands and premises in a good and farmer-like fashion and that said property is in danger of losing a material part of its value and of being materially damaged and injured, and that the conditions of said contract have not been complied with or performed by said defendants; that said defendants have obtained large profits therefrom and have wholly failed to make a payment of the moneys derived therefrom to the plaintiff; that said defendants, and each of them, are insolvent and unable to make payment of the moneys due and owing upon said contract and have committed wastes upon said property and have sold a part of the personal property mentioned and described in said agreement, towit: certain of the livestock and machinery mentioned therein; and that it is

necessary that a receiver be appointed to properly care for, cultivate and seed said premises and to preserve said property, and that unless such an order is made, the value of said lands and premises will further greatly depreciate in value.

WHEREFORE, plaintiff prays for a judgment and decree of this court:

1.

That the defendants are in default in the performance of the terms of the agreement for the purchase of said real and personal property, and that by reason of such default, the plaintiff is entitled to the immediate possession of all of said real and personal property, and that said defendants be, by the order, judgment and decree of this Court, required to immediately vacate said premises and to return all of said personal property without let or hindrance.

2.

- 15 That plaintiff have and recover from the defendants the sum of \$3,000.00 as damages for the breach of said contract.

3.

That during the pendency of this action, a receiver be appointed by this Court and that such receiver be authorized and empowered, during the pendency of said cause, to take over, farm, run and operate all of said agricultural lands and all of said personal property and to use and enjoy the same and to exercise all of the usual and ordinary powers of a receiver and to do and perform all acts and things

necessary essential, or convenient for the operation of said property, and to cultivate, plant, seed and otherwise care for said agricultural lands so that the same may be productive during the present season.

## 4.

For such other, further and additional relief as to the Court may seem just, meet or equitable in the premises.

A. H. HOUGAARD,  
SHIELDS & SHIELDS,  
Attorneys for Plaintiff

Duly verified.

Filed April 26, 1939.

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EXHIBIT A

- 16 Agreement between plaintiff and defendants, as recited in complaint.

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EXHIBIT B

- 17 Notice by plaintiff to defendants, of default in agreement.

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EXHIBIT C

- 18 Second Notice by plaintiff to defendants of default in agreement, etc.

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EXHIBIT D

- 19 Order discharging garnishee and releasing liability.

## DEMURRER

20 To Supplemental Complaint filed May 6,  
1939.

---

## ORDER OVERRULING

24 Order overruling demurrer to Supplemental Complaint made and filed May 17, 1939.

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## ANSWER

(TITLE OF COURT AND CAUSE).

21 Come now the defendants and answering the Complaint of the plaintiff filed herein admit, deny, and allege as follows, towit:

1.

Answering the allegations of Paragraphs I and II of plaintiff's Supplemental Complaint defendants admit the same.

2.

Answering Paragraph III, defendants admit the allegations in said paragraph contained save and except that in the second line of said paragraph immediately following the figures "\$2,000.00" the words "more or less" should be inserted.

3.

Answering Paragraph IV defendants admit the same insofar as the contents coincide with the terms of the written agreement.

4.

Answering Paragraph V, defendants admit that they entered into possession of the

said lands and premises. Defendants deny that they have violated any of the covenants in said agreement and contend that they have paid according to the terms of the agreement and that they are not in default in the performance of any of the terms of said contract. Defendants deny that the plaintiff has performed the terms and conditions to be, by her, performed according to the terms of the contract.

## 5.

22      Answering Paragraph VII, defendants admit that they had been served with a Writ of Garnishment as therein described, but defendants deny all matters and things in said paragraph contained not herein admitted.

## 6.

Answering the allegations of Paragraph VIII of said Supplemental Complaint, defendants admit the same but allege that plaintiff in order to secure said release had wilfully and flagrantly violated the terms of the agreement by executing a mortgage to the plaintiff in the action mentioned in paragraph VII, to J. S. Peterson. That the said mortgage covered the property sold to the defendants; which mortgage was caused to be recorded in Book E of Mortgages, Wayne County, Utah, page 307 thereof, on the 3rd day of April, 1939.

## 7

Answering the allegations of Paragraph IX, defendants admit that they refuse to vacate the premises or surrender possession thereof to plaintiff but deny that the possession and

occupancy of the premises is wrongful and unlawful or detrimental to plaintiff.

8.

Answering the allegations in Paragraph X of the said Supplemental Complaint, defendants admit that crops were growing on the premises when delivered to them. That the said crops were matured and fed to livestock. The livestock in turn, were sold and the proceeds applied to the payment of the contract obligation. Defendants deny that the property is now denuded of its vegetation and crops but allege that the property has been carefully tilled and planted and is in a better and more satisfactory condition than it ever has been in the past. Defendants deny that plaintiff has sustained any damage whatsoever as in said paragraph alleged.

9.

Answering the allegations contained in Paragraph XI, defendants deny the same and the whole thereof and allege that the personal property has not been sold or disposed of. That no waste has been committed. That the farm and lands have been cultivated, tilled, and seeded; that new lands have been placed under cultivation; that substantial improvements have been made; that defendants have complied with the contract in spirit and in letter; that it is their manifest intention to fully conform to, and comply with, the contract in its entirety and to fully and completely perform the covenants in said agreement contained.

10.

23 Defendants further deny each and every



material allegation in said Supplemental Complaint contained not herein above admitted.

WHEREFORE, defendants having fully answered the said Supplemental Complaint, pray that the same may be held at naught and that they may go hence with their costs.

HENRY E. BEAL,  
Attorney for Defendants.

Duly verified.

Filed May 25, 1939.

---

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### (TITLE OF COURT AND CAUSE).

- 25      This cause came on regularly for trial on the 27th day of June, 1939 before the Honorable Henry D. Hayes, judge of the above named court, upon the supplemental complaint of the plaintiff herein filed and the answer of the defendants thereto, the plaintiff appearing in person and by her counsel, A. H. Hougaard, and the defendants appearing in person and by their counsel, Henry E. Beal, and the parties having announced themselves ready for trial and the court having listened to the testimony and having duly considered the documentary evidence and exhibits received in evidence during the progress of said trial and counsel for the respective parties having submitted written briefs and the court being now fully advised in the premises makes these, its findings of fact and conclusions of law as follows, towit:

## FINDINGS OF FACT

### 1.

The court finds that the defendants are husband and wife and reside at Loa, Wayne County, State of Utah; that the plaintiff is a resident of Loa, Wayne County, State of Utah, temporarily residing at Salt Lake City, Utah; that the plaintiff is a sister of the defendant G. A. Bastian.

### 2.

That on or about the 15th day of August, 1938, plaintiff and defendants entered into a certain agreement in writing, by the terms of which the plaintiff agreed to sell and the defendants agreed to purchase approximately 100 acres of agricultural lands situated in Loa, Wayne County, State of Utah, together with 64 shares of water in the Freemont Irrigation Company and certain personal property consisting of livestock, farming implements and household furniture and other personal property, a copy of which said agreement and a full description of said real estate and personal property is as follows:

## AGREEMENT

This agreement, made and entered into by and between Gertrude B. Erickson, of Loa, Utah, party of the first part, and G. A. Bastian and Roean Bastian, his wife, of Loa, Utah, parties of the second part, WITNESSETH:

That party of the first part agrees to sell and parties of the second part agree to buy the following described real estate:

Lot 1 (NE $\frac{1}{4}$  NE $\frac{1}{4}$ ) of Section 1, Twp. 28 South, Range 2 East, containing 40 acres; also commencing 6 rod East of SW corner lot 4, Section 31, to 27 South, Range 3 East, thence North 48 rods, East 71 rods, South 48 rods; west 71 rods to beginning, containing 21 acres; also Lot 4 of Section 6, Twp. 28 South, Range 3 East, S. L. M., containing 36.53 acres, together with all improvements thereon and all water rights thereunto pertaining, consisting of 64 shares in the Freemont Irrigation Company, 1 water tap in the Loa Water Works Co.; 1 light attachment in the Peoples Light & Power Co., also all farm implements and machinery, 1 team and harness, 4 cows, 6 brood sows and 10 small pigs, also all floor coverings and 1 heatrola, by consent of both parties.

for the sum of \$14,000.00, payable as follows: \$2,000.00 more or less payable on or before February 1, 1939, and \$1,000.00 each year payable on February 1 of each year until the entire sum is paid, together with interest at the rate of 4 percent per annum payable annually at the time the principal is paid;

It is understood that this land above described is mortgaged to the California Western States Life Insurance Company, and it is understood between both parties that whatever the amount of this mortgage is, the parties of second part agree to assume and pay and the amount so paid shall be deducted from the purchase price of \$14,000.00 and the balance shall be payable to party of first part as above outlined.

The parties of the second part are entitled

to all the crop on said land just as it stands this day, and they are allowed to take possession on this date of the land, improvements and water rights.

The parties of the second part agree that no water, land or improvements shall be disposed of by them until this contract is paid in full.

The parties of the second part shall be allowed 30 days grace in making the above payments, in the event that their lamb crop or other crops cannot be disposed of by February 1 of each year.

The parties of the second part agree to pay all taxes and assessments against said land and water commencing with the year 1938.

In the event that the parties of the second part shall default in the payment of either principal or interest as above outlined, the first party shall have the right to re-enter and take peaceable possession of said land and improvements, and of this agreement and the warranty deed and all other papers pertaining to this agreement.

This agreement and the warranty deed shall be held in escrow in the Clerk's Office, inasmuch as it is understood that the abstract of title and water certificate are now held by the California Western States Life Insurance Company.

It is understood that there is a second mortgage to State Bank of Wayne on said land and water, which parties of second part agree to complete the payment of, and the amount so paid shall be deducted from the first \$2,000.00

payment to party of the first part, payment to bank to be made out of the 1938 crop on land.

GERTRUDE ERICKSON,  
Party of the First Part

G. A. BASTIAN,  
ROEAN BASTIAN,  
Parties of Second Part.

WITNESSES:

ELSIE ECKERSLEY  
ARTHUR BRIAN.

### 3.

The court finds that upon the execution of said agreement, the plaintiff delivered to the defendants the possession of all of the above described real and personal property, together with a new, modern home which had recently been constructed upon said real estate; that the defendants did not pay to the plaintiff anything at the time of the delivery of the possession of said real and personal property and finds that at the date of said contract and the time of delivery of possession thereof there were large and bounteous crops growing upon said agricultural lands consisting of alfalfa hay, grain and potatoes, and that said crops at said time were of the reasonable value of approximately \$1500.00;

That the reasonable rental value of the home on said premises was at said time and during the occupation of said property by the defendants has been \$25.00 per month and that said defendants received all of said personal property including one water tap share in the Loa Water Works Company which entitled the defendants to receive culinary water for use in

said home; also one light attachment in the Peoples Light & Power Company, all of the farm implements and machinery then on said farm, including: new mower, new rake, one disk harrow, one two-way plow, one hand-plow, a Utah lay-off machine, new manure spreader, one rubber tired wagon and various extras for farm machinery, a large number of logs and shed posts, a large pile of fire wood, together with one team of horses and harness, 3 cows, 5 brood sows and 8 small pigs, together with floor coverings in said home and one heatrola, and the court finds that ever since the date of said contract the defendants have used, occupied and enjoyed all of said property, including all of the crops growing on said premises.

## 4.

That a copy of the agreement aforesaid together with a warranty deed to said premises was deposited with Elsie Eckersley, clerk of the District Court of Wayne County at her office in Loa, Utah, and that said agreement was prepared by the said Elsie Eckersley at the request of plaintiff and said defendants; That the plaintiff and defendants had certain conversations relating to the sale of said property a few days before said contract was prepared and also at the time said contract was being prepared and written by the said Elsie Eckersley and agreed upon the terms of said sale, and that said contract was thereafter prepared as aforesaid.

## 5.

That by the terms of said contract the defendants agreed to pay to the plaintiff the sum

of \$14,000.00 representing the purchase price of said property; that said amount was payable as follows: \$2,000.00 more or less on or before February 1, 1939 and \$1,000.00 payable on the 1st day of February of each and every year thereafter and that it was agreed that the defendants should pay to the plaintiff interest on the unpaid principal sums at the rate of 4 percent per annum, said interest to be paid on the 1st day of February of each and every year commencing with the 1st day of February, 1939;

That it was further agreed between the parties and incorporated in said written agreement that the defendants should be allowed 30 days grace in making the above payments in the event that their lamb crop or other crops could not be disposed of by February 1st of any year and the defendants agreed to pay all taxes and assessments against said land and water right for the year 1938 and each year thereafter; that at the time of entering into said contract, the plaintiff was indebted to the State Bank of Wayne in the amount of approximately \$900.00, which said obligation was evidenced by a second mortgage on said lands and premises to secure the payment of said amount; that the defendants agreed to pay the amount of said obligation and were to receive credit for such payment upon the \$2,000.00 payable by defendants to the plaintiff on the 1st day of February, 1939 and said payment was to be made out of the 1938 crop on said lands, and the court further finds that at the time of entering into said agreement the defendants knew that the plaintiff was indebted to the California Western States Life Insur-

ance Company upon a certain first mortgage given by plaintiff to said Western States Life Insurance Company, and that the defendants agreed to assume and pay said mortgage and that any amounts paid upon said mortgage by the defendants was to be credited upon the purchase price of said property.

## 6.

That the defendants on the date of said contract went into the possession of said property and harvested all of the crops growing on said agricultural lands and ever since said time have occupied the home on said lands and that all of said personal property was delivered by the plaintiff to the defendants and that the defendants ever since said time have been in the possession thereof and enjoyed all of the benefits arising therefrom;

That the defendants have not paid to the plaintiff the sum of \$2,000.00 payable on February 1, 1939 except this: that the defendants paid to the State Bank of Wayne approximately the sum of \$900.00 to which they were entitled to credit upon said payment of \$2,000.00; that the defendants have not paid the interest, or any part thereof, upon the sum of \$14,000.00 or upon any other sum and have paid no interest whatsoever; that the defendants failed and neglected to pay the taxes upon said property for the year 1938.

That on the 6th day of March, 1939, the plaintiff served upon each of the defendants personally a certain notice in writing of which the following is a copy:



## NOTICE

TO G. A. BASTIAN and  
ROEAN BASTIAN,  
LOA, UTAH.

YOU, AND EACH OF YOU, will please take notice that you are in default in the performance of the terms and conditions of that certain agreement between yourselves, as parties of the second part, and the undersigned, Gertrude Erickson, party of the first part, which said contract relates to the sale of certain real and personal property situated in Wayne County, State of Utah, said real estate consisting of approximately 100.00 acres, together with 64 shares of water in the Fremont Irrigation Company, and said personal property consisting of certain farm machinery, livestock and other property.

You are hereby notified that said contract provides, among other things as follows: "In the event that the parties of the second part shall default in the payment of either principal or interest as above outlined, the first party shall have the right to reenter and take peaceable possession of said land and improvements and of this agreement and the warranty deed and all other papers pertaining to this agreement."

One of the provisions of said contract provides that the price to be paid for the property described therein shall be \$14,000.00, payable \$2,000.00 on or before February 1, 1939, together with four percent interest payable at the time the principal sum thereunder become due and owing. Also providing for a 30 day grace period in the event the lamb crop or other

crops cannot be disposed of by February 1st of each year.

You have failed to pay the sum of \$2,000.00 principal sum payable, with grace period allowed, March 3, 1939, and have likewise failed to pay the interest due and owing on said principal sum of \$14,000.00, and because of such defaults you are hereby notified that the undersigned hereby require the immediate possession of said real estate and said personal property described in said contract, and all of it, and that you immediately vacate from said premises and that the undersigned be permitted to peaceably reenter and take possession thereof, and that the agreement and warranty deed and all other papers pertaining to said sale or said contract be immediately delivered over to the undersigned.

In the event you fail to comply with the requirements of this notice that suit will be instituted against you for the recovery of the possession of all of said property mentioned and described in said agreement.

Dated this 6th day of March, 1939.

GERTRUDE ERICKSON,  
IVAN ERNSTSEN

that at the time of the service of said notice, a writ of garnishment had been served upon the defendants in a certain action then pending in the District Court of Sanpete County, State of Utah, wherein J. S. Peterson was plaintiff and the said Gertrude Erickson was defendant and by said writ of garnishment the defendants had been required not to pay to the plaintiff any moneys due and owing to the

said Gertrude Erickson; that on the 3rd day of April, 1939, the said writ of garnishment was by order of the District Court in and for Sanpete County, State of Utah, released and discharged and said defendants were released and discharged as garnishees in said action and said garnishment proceeding was dismissed and said writ vacated and said defendants by such order were released and discharged from all liability by virtue of said writ and the service thereof, and that a certified copy of the original order discharging said writ of garnishment and discharging said defendants as garnishees therein was served upon the defendants and each of them personally on the 11th day of April, 1939, and that on the 6th day of April, 1939, the plaintiff served upon the defendants and each of them a notice of which the following is a copy:

### NOTICE

TO G. A. BASTIAN and  
ROEAN BASTIAN,  
LOA, UTAH.

YOU, AND EACH OF YOU, will please take notice that you are in default in the performance of the terms and conditions of that certain agreement between yourselves, as parties of the second part and the undersigned, Gertrude Erickson, party of the first part, which said contract relates to the sale of certain real estate and personal property situated in Wayne County, State of Utah, said real estate consisting of approximately 100.00 acres, together with 64 shares of water in the Fremont Irrigation Company, and said personal

property consisting of certain farm machinery, livestock and other property.

You are hereby notified that said contract provides, among other things, as follows: "In the event that the parties of the second part shall default in the payment of either principal or interest as above outlined, the first party shall have the right to re-enter and take peaceable possession of said land and improvements and of this agreement and the warranty deed and all other papers pertaining to this agreement."

One of the provisions of said contract provides that the price to be paid for the property described therein shall be \$14,000.00, payable \$2,000.00 on or before February 1, 1939, together with four percent interest payable at the time the principal sums thereunder become due and owing. Also providing for a 30 day grace period in the event the lamb crop or other crops cannot be disposed of by February 1st of each year.

You have failed to pay the sums of \$2,000.00 principal sum payable, with grace period allowed, March 3, 1939, and have likewise failed to pay the interest due and owing on said principal sum of \$14,000.00.

You are further notified that the writ of garnishment served upon you by Martin Baker, Sheriff of Wayne County on the 17th day of November, 1938, in the case of J. S. Peterson, plaintiff, v. Gertrude Erickson, defendant, pending in the District Court in and for Sanpete County, State of Utah, has been fully released and discharged and you are hereby

served with a certified copy of the order discharging said writ of garnishment and the order discharging you as garnishee in said action.

And Whereas at the time of the service of the former notice upon you to vacate the premises above described, said garnishment was in full force and effect, but the same has now been discharged as aforesaid. This notice is now served upon you to demand the immediate payment or possession of all of the property and premises above described and covered by the aforesaid contract, and you are hereby notified to pay within a period of 10 days the sum of \$2,000.00 as provided in said agreement, together with interest due and owing upon the sum of \$14,000.00 from the date of said contract and as provided therein and to pay and discharge the 1938 taxes upon all of said property and in the event of your failure to make said payment as above provided, then you are hereby required to immediately surrender said premises and all of said personal property covered by said contract, and are further notified that in the event of your failure so to do, that all of your rights in and to said property will thereupon become forfeited and that the said Gertrude Erickson will proceed by suit to recover the possession of said lands and premises.

Dated this 6th day of April, 1939.

GERTRUDE ERICKSEN,

IVAN ERNSTSEN

that after the service of the above notice, the defendants failed and refused to surrender the possession of said premises and paid

nothing whatsoever upon said contract and did not pay said taxes for the year 1938 or any interest upon the purchase price or at all.

## 8.

That the plaintiff, a few days prior to the service of said order releasing said writ of garnishment, placed a certain mortgage on said agricultural lands and premises in the amount of \$231.61, and said mortgage was filed in the office of the County Recorder of Wayne County, State of Utah, on the 3rd day of April, 1939 in Book E of Mortgages at page 307.

## 9.

The court finds from the testimony and evidence in this cause that at the time of the execution of said agreement for the sale by plaintiff and the purchase by the defendants of the property described in said agreement, that there was an understanding that if the defendants would feed lambs upon said property that the plaintiff would look to the net proceeds from the sale of said lambs for the first payment on said contract to be paid on February 1, 1939 and would also look to the net proceeds from the sale of said lambs for the payment of interest at the rate of 4 percent upon the sum of \$14,000.00 payable on February 1, 1939, and finds that the plaintiff and defendants agreed that if the net profits from the feeding of lambs was insufficient to pay the full amount of \$2,000.00 and said interest, that the defendants would be relieved from the payment on February 1, 1939 of any balance remaining unpaid upon said \$2,000.00 and said

interest, and that such payment as should be made on said principal sum and interest arising from the net proceeds from said lamb feeding venture would be a payment pro tanto on said \$2,000.00 and interest; that for the payment on February 1, 1939, the plaintiff assumed the whole risk that the lamb proceeds would pay the full amount of \$2,000.00 and interest and in the event the profits from the feeding of lambs was insufficient to pay said sum of \$2,000.00 and interest, the plaintiff agreed to and did waive her right to re-enter and take possession of said property, and that after applying the profits of the said lamb feeding venture, which the court finds to be the sum of \$900.00, the balance of said \$2,000.00 and interest at 4 percent on the sum of \$14,000.00 was agreed to be paid, and the court finds that the same is payable, on February 1, 1940 with a grace period of 30 days as provided in said contract; that the entire proceeds from the sale of lambs amounted to \$3,736.04 and that said amount was applied to the payment of said \$900.00 note and interest and by the payment of a \$1900.00 loan made by the defendants from  
 31 said State Bank of Wayne for the purpose of purchasing lambs and that further payments were made to said State Bank of Wayne on account of advances made for purchasing feed for said lambs and for expenses entailed in the shipping and marketing of said lambs.

## 10.

The court finds that the plaintiff and defendants entered into said contract with a perfect understanding of the financial circumstances of each other; that the plaintiff knew

that defendants had nothing and would have to rely upon the proceeds of said farm and lamb crop for any payment that might be made on said contract and that plaintiff knew that she could not demand, and the defendants could not make any down payment; that defendants were likewise aware of the financial condition and needs of the plaintiff and knew that plaintiff was indebted to the California Western States Life Insurance Company in the amount of approximately \$2,000.00 and that payments on said mortgage were delinquent and that said Insurance Company was threatening to foreclose said mortgage and knew that plaintiff was indebted to a Mrs. Brinkerhoff in a substantial sum for a balance due on materials furnished in connection with the construction of the new modern home on said farm and knew that the plaintiff was also indebted to the said John S. Peterson, and the court finds in view of all the foregoing facts and circumstances under which said contract was entered, that the plaintiff was willing to and did assume every risk incident to placing all of said property, including all of said growing crops, in the hands of the defendants and assumed each and every risk incident to the feeding of lambs and whether there would be any profits arising therefrom, and that the parties in the use of the words "more or less" intended thereby to so limit the liability of the defendants that said \$2,000.00 and interest on \$14,000.00 payable on February 1, 1939 should be paid at the time only in the event said amount was realized as profits from feeding said lambs on said farm and that the defendants fully performed their obligations under



said contract by paying to the plaintiff the profits realized from said lamb feeding venture, and that any balance remaining after applying said profits to the discharge of said \$2,000.00 payment and interest would be paid by the defendants on or before February 1, 1940, or within the grace period thereafter mentioned in said agreement, and that the use of said words "more or less" following the agreement to pay \$2,000.00 meant and was intended to mean that the defendants should pay and the plaintiff should accept the profits realized from said lamb feeding venture to apply upon said payment and interest and with the understanding that plaintiff would waive her right to re-enter and take possession of said premises upon payment of said amount.

### CONCLUSIONS OF LAW

The court concludes from the foregoing facts:

#### 1.

That the defendants by payment of the sum of \$900.00 in discharge of the obligation of the note of the plaintiff at the State Bank of Wayne for said amount have fully performed on their part all of the terms and conditions of said agreement which provided for the payment of \$2,000.00 more or less on or before February 1, 1939, and by said payment fully performed their obligations for the payment of interest on the sum of \$14,000.00 at the rate of 4 percent per annum payable at the time said principal sum was payable; that the defendants were not in default by reason of their failure to pay the taxes on said prop.

erty for the year 1938 for the reason that no time was specified or agreed upon by the parties as to when said taxes should be paid, and that the defendants were not in default in paying anything to the California Western States Life Insurance Company.

2.

That the plaintiff is not entitled to the recovery of possession of said real or personal property or any part thereof and that the defendants are entitled to retain the possession thereof and to use, occupy and enjoy the same and that said defendants are not in any manner whatsoever indebted to the plaintiff for any sum whatsoever and that plaintiff is entitled to no relief whatsoever by reason of her said supplemental complaint, or at all.

33 Dated this 12th day of Sept., 1939.

BY THE COURT

HENRY D. HAYES, Judge.

I hereby consent to the settling and signing of the above and foregoing Findings of Fact and Conclusions of Law this 12th day of September, 1939.

HENRY E. BEAL,  
Attorney for Defendants.

Filed September 22, 1933.

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### ORDER EXTENDING TIME

36 Order of court extending time, in which to prepare, serve, sign and settle Bill of Exceptions to November 15, 1939.

## DECREE

(TITLE OF COURT AND CAUSE).

34        This cause came on regularly for trial on the 27th day of June, 1939 before the Honorable Henry D. Hayes, Judge of the above court, upon the supplemental complaint of the plaintiff herein filed and the answer of the defendants thereto; the plaintiff appearing in person and by her counsel, A. H. Hougaard, and the defendants appearing in person and by their counsel, Henry E. Beal, and the parties having announced themselves ready for trial, and the court having listened to the testimony and having duly considered the documentary evidence and exhibits received in evidence during the progress of said trial and counsel for the respective parties having submitted written briefs and the court being now fully advised in the premises and having made and entered herein its findings of fact and conclusions of law, reference to which is hereby made;

NOW THEREFORE, on motion of Henry E. Beal, counsel for said defendants, it is Ordered, Adjudged and Decreed:

## 1.

That the defendants have fully performed on their part all of the terms and conditions of the contract made and entered into by plaintiff and said defendants on or about the 15th day of August, 1938 whereby the plaintiff agreed to sell and the defendants agreed to purchase the real estate, water rights and personal prop.

erty referred to and described in said contract, and which contract is fully set forth in the court's findings of fact and conclusions of law, reference to which is hereby made.

## 2.

It is further Ordered, Adjudged and Decreed that \$900.00 has been paid to apply upon the principal sum of \$2,000.00 and interest on \$14,000.00 provided by said contract to be paid on February 1, 1939, and it is further Ordered, Adjudged and Decreed, that the understandings, agreements and circumstances of the parties were such, as fully made to appear in the court's findings, reference to which is hereby made, that the defendants are not in default in the performance of said contract, and that in view of said understandings and all of the circumstances, plaintiff waived her right to repossess said real or personal property or any part thereof; that the balance of said \$2,000.00 payment and said interest is not payable until February 1, 1940 with a grace period of 30 days as provided in said agreement.

## 3.

35 It is hereby Ordered, Adjudged and Decreed that plaintiff take nothing by her said complaint, and that the same be dismissed.

Dated this 12th day of Sept., 1939.

BY THE COURT

HENRY D. HAYES, Judge.

Filed September 22, 1939.

## NOTICE OF APPEAL

37 Notice of appeal in due form, served November 8, 1939.

Filed November 9, 1939.

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## AFFIDAVIT OF MAILING

38 Affidavit of mailing Notice of Appeal.

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## BILL OF EXCEPTIONS

(TITLE OF COURT AND CAUSE).

BE IT REMEMBERED, That the above cause came on for trial at Loa, Wayne County, Utah at 10:00 o'clock a. m., June 27, 1939 before the Honorable Henry D. Hays, Judge of said court, sitting without a jury; A. H. Hougaard appearing as counsel for plaintiff and Henry E. Beal appearing as counsel for the defendants, and thereupon the following proceedings were had.

ELSIE ECKERSLEY, being duly sworn, testified as follows:

## DIRECT EXAMINATION

By Mr. Hougaard

My name is Elsie Eckersley. I reside at Loa, Utah. I am Clerk of the District Court of Wayne County; I am acquainted with Gertrude Erickson and Mr. Bastian; I have known them for many years; I prepared the contract in controversy in this case; I have all of the papers with me in court this morning.

2 The witness then identified plaintiff's

Exhibit A as the contract which she prepared for Mrs. Erickson and Mr. Bastian. The contract and deed were made on the 25th day of August, 1938. Exhibit A was received in evidence without objection. There was also deposited in escrow a warranty deed, a certificate for light attachment, and 20 shares of water in the Loa Water Works.

- 3 Since the contract was prepared certain receipts have been deposited with me. These receipts were marked Exhibit B and received in evidence, showing payment of \$500 and \$400 respectively, to the State Bank of Wayne on the account of Gertrude Erickson; also one receipt for \$24.98.
- 4 It was thereupon stipulated between counsel that the contract attached to the complaint is a true copy of the contract between the parties; that the notice attached to the supplemental complaint and marked Exhibit B is a true copy of the notice served on Mr. and Mrs. Bastian on the 6th day of April, 1939, that Exhibit C attached to plaintiff's complaint is a true copy of the notice served on Mr. and Mrs. Bastian on the 6th day of April, 1939, and Exhibit D is a true copy of the original order discharging the garnishee in the case of J. S. Peterson v. Gertrude Erickson and was served on the defendants on April 6, 1939; that no payments were made by either of the defendants to Mrs. Erickson except the payment of \$900 shown by the receipts, Exhibit B.
- 5 It was further stipulated that on March 3, 1939 Mr. Bastian paid to Charles Taylor the sum of \$40 which Taylor claimed was due and owing from Mrs. Erickson for cutting of grain

before Bastian took possession of the property. The propriety of said payment was not stipulated; that Bastian also paid \$10.20 for a blacksmith bill to Myron Guymon, and \$4.50 for a back assessment on water tap and \$19.00 on an old account to the Peoples Light and  
6 Power Company.

GERTRUDE ERICKSON, testified as follows:

DIRECT EXAMINATION:

By Mr. Hougard

7 My name is Gertrude Erickson. For the present I am living in Salt Lake City. I am plaintiff in this case. Mr. G. A. <sup>Bastian</sup> Peterson is my brother. I remember the occasion when Mr. and Mrs. <sup>Bastian</sup> Peterson and myself came down to Mrs. Eckersley's office in Loa and executed the agreement in this case. Before the agreement was executed I had certain conversations with Mr. Bastian about his wanting to purchase the property. The first conversation was at my home. We had a number of conversations for some period of time before the contract was signed. We had the first conversation several days before the contract was drawn. We talked of the place and the amount he would pay for it, and the amount he should pay down and the payments he would make annually.

8 I went over the farm with him and looked at the crops. There were growing crops on the farm at that time. We had a large crop of potatoes, a crop of grain and alfalfa, and a number of the crops had been harvested at the time of these conversations. We talked about the amount he was to pay on the property; that he

would pay me \$14,000 for the property; Bastian said he could not make a down payment until he fed the crops to lambs; that he intended to feed lambs and that he would pay me \$2,000 the first payment and interest on the balance of the principal at the rate of 4 percent per annum. We agreed on that. I told him I could not make it less than that to meet my obligations. I told him I was owing the California Western States Life Insurance Company, that I owed \$900 and interest to the State Bank of Wayne and had given the bank a chattel mortgage. The obligation due the insurance company was secured by a mortgage on the farm. The bank was secured by a chattel mortgage on personal property, livestock, machinery, and crops.

- 10 I told him I owed J. S. Peterson of Gunnison and Mr. George C. Brinkerhoff and that these accounts must be paid out of the \$2,000 and balance of the principal. He said he wouldn't pay less than that; that he had a beautiful potato crop and that he would pay me \$4,000 at least when the first payment was due; that he would pay the \$2,000 and interest so I could meet my obligations. He couldn't
- 11 pay me anything when I turned the property over to him. I turned the farm over to him. I turned the farm over to him, including all of the crops just as they were on the 25th day of August. When we went down to see Mrs. Eckersley we had some further conversation about the contract. Mrs. Eckersley explained the contract to us as she went along writing it.
- 12 I remember the conversation about the use of the words, "more or less." I asked



what that clause meant. As I understood it he could pay more if he wanted to or in the event he did fall down a few dollars he could pay less if he wanted to. There was nothing said about him paying less than \$2,000. There was very little said at the time the contract was prepared. As I remember it I asked the question what that "more or less" meant and Mr. Bastian answered that it didn't mean anything only if he did fall down for a few dollars that I could accept it if I wanted to but he thoroughly understood he would pay \$2,000 and interest on the principal; that he might be a few dollars less than his payment and that I wouldn't take the property back if he was a few dollars under the \$2,000. Mr. Bastian and I indicated to Mrs. Eckersley what we had agreed on and it was placed in the contract. Mr. Bastian has not paid me anything on the agreement.

- 13 I did not know he had paid \$19.00 to the Peoples Light & Power Company. I know I owed an account to this company which I intended to pay when I got my money. I do not recall owing \$4.50 for a back assessment on water tap. I owed an account to Charles Taylor for ploughing and cutting grain, but I don't remember the amount. I did not owe Myron Guymon a blacksmith bill. I never authorized Mr. Bastian to pay any of these accounts. I told him that I must have this \$2,000 and interest to pay my bills. When Mr. Bastian talked to me about buying the farm I was delinquent on my bill to the California-Western States Life Insurance Company, and they had extended my payment until I could get money on my crop. I wrote the company that I had disposed of the property and would meet the

payment as soon as I was paid the \$2,000 and interest.

- 14        There was a new brick home on my farm that I had recently built. It was built in 1937. It was a modern five-room home. The money I owe to Mr. Brinkerhoff was a balance on the material for this home. Mr. Brinkerhoff had been threatening to foreclose a mechanic's lien in order to get his money. I explained this situation to Mr. Bastian when we were discussing the matter, and the necessity of my paying Mr. Brinkerhoff. I also told him at a later time about owing John S. Peterson and that
- 15        Mr. Peterson had a judgment against me.

#### CROSS - EXAMINATION:

By Mr. Beal

- 16        The Peterson judgment was taken against me before the payment was due on my contract. I placed a mortgage for \$230 on my farm in favor of John S. Peterson for this obligation. The \$2,000 payment was to be made to me and he was to pay the bank. I was also going to pay Mr. J. S. Peterson and Mr. Brinkerhoff and the Western States Life Insurance Company. Mr. Bastian was to pay the taxes. I was not to pay the taxes from the \$2,000. Mr. Bastian was to pay me \$2,000 and interest on the balance of the principal and he agreed to pay it on February 1 and I should
- 17        have had it then, but in the event he hadn't disposed of his lambs, we agreed on a 30-day grace period. They were not to pay the \$2,000 and pay in addition the amount of the mortgage to the insurance company. We may have changed the contract some after we got down to have it drawn up but our conversation at home was that I would pay all of these ob-

ligations and he would pay direct to me. Mrs. Eckersley explained some things while she was preparing the contract. Mr. Bastian did  
 18 not say at the time the contract was being prepared that we have "\$2,000 more or less" but it will make \$1,000; that it would depend on the progress he could make on the farm.

### RE-DIRECT EXAMINATION:

By Mr. Hougaard

19 I have calculated the amount of the bills I was to pay, but I do not remember the amount at the present time. Mr. Brinkerhoff has now brought suit against me to foreclose his lien and this case is pending in this court. I have been unable to pay the delinquent interest to the California Western States Life and I know Mr. Bastian has not paid them anything. The mortgage has been placed in the hands of Salt Lake attorneys and they have written giving me a certain time to meet the delinquency. I just received this notice a day  
 20 or two ago, notifying me that unless these delinquencies were taken care of the property would be foreclosed and I haven't had a cent paid on the property so I could pay the interest. At this time Exhibit C was offered and received in evidence. I had been trying to  
 21 work with Mr. Brinkerhoff on his foreclosure case to see if I could get the farm back.

### RE-CROSS EXAMINATION:

By Mr. Beal

The claim of Mr. Brinkerhoff is a lien on the property covered by the agreement with Mr. Bastian.

L. H. ERICKSON was called as a witness for the plaintiff and testified as follows:

**DIRECT EXAMINATION:**

By Mr. Hougaard

22 My name is L. H. Erickson. At the present I am living with my wife, Gertrude Erickson, at Salt Lake City. My wife and I formerly lived at Loa. I am acquainted with G. A. Bastian and his wife. I remember an occasion when Mrs. Erickson and Mr. Bastian were discussing this contract for the sale of Mrs. Erickson's farm to Mr. Bastian. It was a day or two before the contract was signed. They were sitting on the steps of the porch out from the kitchen facing south. They were sitting and talking about the deal. I had been over doing the morning chores at the corral and came over there. As I came over Mr. Bastian said, "I will pay you \$2,000 and interest on the principal" and he threwed his hand out toward his potato patch and he said, "I believe I will be able to pay you \$4,000 and interest," and then Mrs. Erickson said, "Well, I have to have \$2,000 and interest on the principal."

The next morning, or the second morning after this conversation, I met Mr. Bastian in front of the granary on the property and he said, "Well, Ivan wants \$1,000 of that money." Ivan is a son of Mrs. Erickson by a former marriage. He said, "Well, I do not see how he can expect that because it will take most of that to help her meet her obligations" and Bastian said, "That is what he asks;" that some further conversation was had regarding the potato cellar.

23 I was familiar with the crop growing on

the property on August 25, 1938. I was living on the property with Mrs. Erickson. I helped to take care of the crops. I cut practically all of the hay with the mower. The first cutting of hay was already harvested and in the stacks on the property. There was between 45 and 50 tons in the first cutting in the stacks. The market price of hay at that time was about

24 \$8.00 per ton. Mr. Bastian had rented approximately 14 acres of ground from Mrs. Erickson which he planted to potatoes that year, and he was to have half of the potato crop and Mrs. Erickson the other half. There was a good crop of potatoes. I would say that Mrs. Erickson's portion of the potatoes would be at the rate of 200 bushels to the acre. Her share would be approximately 1400 bushels. The seven acres of potatoes belonging to Mrs. Erickson were left with Mr. Bastian along with the other crops. There would be considerable more in the second crop of alfalfa hay than the first. The first crop was a short hay.

25 At the time the contract was made the second crop was practically ready to cut. There was 40 acres or more of alfalfa hay. There would be considerable more second crop than first crop hay. The second crop was considerably taller. There was a heavy stand. I think there would be not less than 60 tons of second crop hay at \$6.00 per ton uncut.

26 There was also a crop of barley and oats. The barley was all cut and part of it shocked. The oats was about ready to be cut. I saw the

- grain in the fields. The year before we had about 1400 bushels of grain. There wouldn't be quite that much this year. The barley was shrunk a little. There was a garden plot about 30 steps each way in size with ordinary garden vegetables. There was a large pile of wood that had been brought off from the hills. The
- 27 wood would cost better than \$50.00. There is a five-room modern home on the farm and the reasonable rental value of the home would be \$25.00 per month. There was also three milk cows turned over to Mr. Bastian, also two calves, six brood sows and eight weaners. There would also be by the pasture, after the grain and alfalfa was cut, we usually get between \$75 and \$80 for the pasture. There was
- 28 a team of horses turned over to Mr. Bastian, a wagon, a new mower, and a new rake, a harrow, a plough, a new manure spreader, a rubber tired wagon and different extras for the machinery used on the farm and a pile of shed posts and logs.

#### CROSS EXAMINATION:

By Mr. Beal

- 29 My present occupation is farming. I have farmed this property since 1917. I saw the property some time ago and noticed there was a lot of hay ploughed up at the northeast corner. I heard a conversation between Mrs. Erickson and Mr. Bastian about the agree-
- 30 ment. I think it was on the day they made the deal. I was not a party to the deal and did not enter into a discussion of the terms. I just heard this conversation between my wife and Mr. Bastian. I heard nothing mentioned about 4 percent interest. The total purchase price was not mentioned in my presence. I only

heard part of the conversation. I did not make a notation of it. I may have mentioned it to other parties.

- 31 I think there was about 110 tons of hay grown in 1938. I have a pretty good idea as to the amount of hay on the farm. There was 14 acres of potatoes and I figured 200 bushels  
32 per acre. I walked down through them but I did not spade a hill. I am making my estimate on what appeared to me from the tops. I don't know of any sale of alfalfa in Wayne County between August and January of 1938. I know persons have told me of sale of hay and the price obtained but I don't remember the amount they received. I have heard \$8.00 per ton talked of. I didn't sell any myself.

#### RE-DIRECT EXAMINATION:

By Mr. Hougaard

- 33 I have grown potatoes on this same ground other years, and I had over 500 bushels on just a trifle over an acre. They were extra large Uncle Sam potatoes. I figured there would be over 50 tons of hay on the second crop.  
34 This is my best judgment. There was an extra heavy stand and I judged it from the first crop because it was better. I do not know whether  
35 all of the cows are there that were turned over to Mr. Bastian.

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IVAN ERNSTSEN, called as a witness for the plaintiff:

#### DIRECT EXAMINATION:

By Mr. Hougaard

My name is Ivan Ernstsens. I am a son of Mrs. Erickson. I lived at Loa six or seven

- years before my mother sold her farm. I worked on the farm six or seven years. I was working there in 1938. My mother was to have seven acres of the potatoes to be delivered to her by Bastian. She was to have half the crop. I looked over the potatoes. I went into the potato crop and know the condition of it.
- 36 I was on the farm all the time they were growing. Mr. Bastian and I were there together when they were small and there was as high as 12 potatoes under a vine. We went there to figure how they would do. I would say there was a good crop. They generally start harvesting on the 10th or 15th of October. Based on my experience as a farmer and having raised potatoes on this same ground and having checked this crop I would say they would have produced at least 200 bushels to the acre. The market price in 1938 would be about 50c per bushel. They would be about 60c per hundred for No. 1 potatoes and about 40c per bushel around Loa.
- 37 I helped harvest the first crop of hay in 1938. It would go about one ton to the acre and there was 45 acres. The market price of hay that year was \$8.00 per ton. I saw the second crop of hay about the time it was turned over to Mr. Bastian. There was an awfully good stand. It was blighted a little but it was an awful good stand, the best I have ever seen. As an experienced farmer and seeing the crop I would say it would go a ton and a half per acre. As it stood in the field on the 25th day of August, 1938, it would be worth \$6.00 per
- 38 ton. That would be a fair market value. After



it was settled in the stack it would be worth more. Mr. Bastian was cutting and raking it when I saw it. There were about 25 acres of barley and oats growing on the farm. Some was very good and some not so good. Some of it was shrunk. I have grown barley and oats on the farm and know what the average yield is. I know what the weather conditions were compared with the year before. There was not quite as good a crop as the year before and we raised 1,413 bushels that year on  
 39 the same ground. I would say there would be about 1,000 bushels last year. That is my best judgment. All the grain was cut and shocked but about 4 acres. The market price for barley and oats last year was about \$1.00 a hundred.

40 There was a garden on the farm having the usual garden vegetables and the garden crop was matured pretty well. There was an awful large pile of wood which was left on the place for Mr. Bastian. There was a new modern five-room home and we left certain furniture in it. The home would be worth \$25.00 per month at Loa with the furniture we left there. We also delivered to Mr. Bastian three milk cows. One of the cows calved a week after he took it over and there were two other producing cows. They were very good milk cows. We turned over six brood sows and eight weaners to Mr. Bastian. The pig we got back that Mr. Bastian paid me for was not one of the eight weaners. That is one of the brood sows.

41 I saw the pasturage on the place after the second crop and it was extra good; it was worth at least \$100 for the wild hay and straw. We turned over one wagon, a team of horses and

harness; a new mower, a rake and harrow and a plow and a hand plow, a new manure spreader and rubber-tired wagon. The machinery was either new or in good shape. Some of it had just recently been purchased. We also left him extras for the machinery; also 16 nice posts, some shed posts and some fence posts and a few logs. The posts cost 50c each. The logs were worth 50c to 75c apiece. All of the crops and personal property were delivered to Mr. Bastian.

# CROSS - EXAMINATION:

By Mr. Beal

43 I am living in Salt Lake City at the present time. I am a farmer by occupation. I have not been farming since I left Loa. I am not doing anything at the present time. I went by the farm in October, 1938, and saw the feed on the farm. The lucern was a foot and a half high all over and very good. This was about the 18th of October, 1938.

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G. A. BASTIAN, called as a witness for the plaintiff:

# DIRECT EXAMINATION:

By Mr. Hougaard

44 I was served with a writ of garnishment in the case of John S. Peterson v. Gertrude Erickson. I am the defendant in this case. I was required to hold the money owing to Mrs. Erickson. An order of court was later served on me releasing the writ of garnishment and at about the same time a notice was served on me to vacate the premises. Counsel stipulated

that Mrs. Erickson placed a mortgage on the property in favor of John S. Peterson  
45 for \$231.61. This mortgage was recorded April 3, 1939.

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MRS. GERTRUDE ERICKSON recalled.

DIRECT EXAMINATION:

By Mr. Hougaard

46 I paid at least \$50.00 for the wood that I had on the property. The wood had been provided for our winter's fuel supply. I discussed with Mr. Bastian my obligation to Mr. Brinkerhoff. This was discussed during our negotiations. The witness was shown Case No. 199, Brinkerhoff v. Erickson, claiming a balance in the complaint of \$831.32. This suit was commenced against me November 16, 1938. All of the property was delivered to Mr. Bastian on the date of the contract. I have never  
47 received any money from Mr. Bastian except the payment he made to the bank. He has never called to see me or made any statement as to what he might be able to do or how he intended to take care of the payments. He has never written to me about what he expected to do since the contract was made.

CROSS - EXAMINATION:

By Mr. Beal

48 I have written him a number of letters about this contract, and sent him certain papers to sign. The contract doesn't mention the amount owing to Mr. Brinkerhoff. He wasn't to pay this obligation. I do not know how much wood there was in the pile. I do not know how much a cord of wood is. There were several

loads. There was more than three loads. I bought wood from several people. There was  
 49 very little of this wood left to be paid. I paid the Taylor boy within \$2.00 of what I owed him. I paid Mr. Lee so much cash and he got a good lay-off machine from Ivan. I don't admit there was any obligation due on this wood. Thereupon the plaintiff rested.

At this time it was stipulated that the taxes for 1938 which the defendant agreed to pay and had not paid amounted to \$89.47 on one tract; \$20.16 on another tract and \$33.12 on another tract.

MR. BEAL: It may be so stipulated but we should show the taxes for 1937 and 1936 have not been paid.

MR. HOUGAARD: I dont' think it makes a bit of difference but if Mr. Beal thinks it is important, we will agree that Mrs. Erickson was owing the following taxes for 1936 and 1937: \$24.49 unpaid on 1936 and 1937 taxes; the following amounts: \$41.94, \$20.79, \$43.92. The record may so show.

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G. A. BASTIAN, called as a witness on his own behalf :

# DIRECT EXAMINATION

By Mr. Beal

51 My name is G. A. Bastian. I am one of the defendants in this case. Mrs. Erickson first mentioned selling the place about the day before I bought it. She said to me that Ivan has given her and Mr. Erickson their last lick-

ing and I have decided to sell the place. She asked me if I didn't want to buy it and I told her I couldn't buy it and I didn't have anything to buy it with. She said she would rather see me get the place than anyone else. She suggested I see Mr. Mortensen, the Government man that I have a loan with, and see if he would loan me \$1,000, and if he would, she would let me have the place. I asked how much she wanted and she said \$14,000, and if I could borrow \$1,000.00 and pay \$1,000.00 each year, she would let me have it. I said I would see him and went to see Mr. Mortenson. He said he couldn't let me have the money.

52 I went back and told Mrs. Erickson Mortenson would not let me have the money and she said she was going to sell the place; that Will Taylor in Fremont and another party wanted a place. I went home and in about thirty minutes one of the boys came to me and said, "Aunt Gertie wants you." I went to her home and she said she had been thinking it over and decided to turn everything over to me if I wanted it with the understanding that I would feed lambs. She said, "Whatever the lamb crop brings I want out \$1,000 or \$2,000 or whatever they will bring, and you are able to pay." I said, "If you want to go down to the bank and fix it up to that effect I will take a chance, but it is more than the place is worth but I will take a chance on it." We went down to the bank and got Mrs. Eckersley to draw up a contract. When she drew up the contract she wrote down \$2,000. I mentioned that that was to be \$2,000 more or less, with the understanding that whatever the lamb crop was

would be the down payment. Mrs. Erickson accepted that.

53 When the contract was being written there were several items mentioned, the machinery and the cow. I went down the next day and the cow wasn't there, and there was the furniture in the house. She said, "I am owing some on it but I will have it paid up right away." There was a new range that at one time belonged to Ivan. I asked if Ivan owned the stove and she said 'no.' Ivan said I could sell the stove and when he got straightened in Salt Lake I could buy him a new one and save him the freight. Ivan put in a claim for the stove and she wanted to scratch it off the contract with the understanding she would buy me a new stove just like it or give me credit for it and I told her yes, it was all right. There were six brood sows she sold me, which she claimed was here and after a while Ivan claimed one and rather than see the pig leave the place I gave him \$10.00. I bought eight weaner pigs a few days later. There were only six and I wanted to know where the other two pigs were and she said she let the Ranger Dairy have two of them and I said what business did you have selling them to him after selling them to me? She said she forgot about selling them. There was about three loads of wood there. I understood she got another load from Mr. Lee.

54 I heard my sister testify this morning about discussing with me certain obligations she had to meet, and that she had to have payment of at least \$2,000. I didn't hear that conversation. There was no such conversation.

She didn't talk about the Brinkerhoff obligation. I paid all the proceeds to Mrs. Erickson on the lambs which I fed. That was the way I construed the contract, that I was to pay the proceeds from the sale of the lambs and I have  
 55 done that. Mrs. Erickson has not spoken to me since just a few days after I bought the  
 56 place. She has been in Loa three times since that. Mrs. Erickson has not talked to me or called at my home. There was about 55 tons of hay on the farm in 1938, including both crops. There was 875 bushels of barley and oats. I had 21 acres of potatoes. I don't know what the yield was per acre.

57 I cannot estimate what was produced on the 21 acres. There was some good potatoes. Twelve acres were on the farm I purchased from Mrs. Erickson. I had no way of measuring the number of bushels per acre. The potatoes were mortgaged. Mrs. Erickson knew about this. I fed all of the hay and grain to the lambs which I fed on the farm. Besides four acres of rented land and 25 tons of hay that I bought from Brother Webster and three tons that I bought from Wayne Patterson. All of this was fed to the lambs, together with about \$400 worth of barley. I still owe on the potato crop, for labor performed. I lost about  
 58 \$150.00 on the potato crop. All the profits from the lambs was applied on Mrs. Erickson's obligation.

#### CROSS EXAMINATION:

By Mr. Hougaard

59 I fed 500 head of lambs. They were sold about March 15 to Mr. Keller at Salina. He represents the Keller Brothers Company. I

sold the lambs all at one time and they were delivered in two bunches. I don't know exactly how much I received. I couldn't say approximately how much I received. I might miss it \$200 or \$300. It was a complicated affair. I had to buy hay and grain. I received one check of \$1700 from the bank and another one for about \$1800.00, about \$3500 for the lambs. The bank loaned me the money to buy the lambs. It was about \$2100. I had about \$1400 profit but I had to buy 25 tons of hay which came out of the profit. I paid Mr. Webster \$6.00 a ton for 25 tons; William Peterson \$10.00 a ton for three tons. I fed part of the hay to the horses. \$3500 is substantially what I received for the lambs. That was about the usual price.

61 I bought \$400 worth of barley along as I needed it. I paid this out of the money I received for the lambs. I owe the Utah Poultry Company money on an old account. The potatoes were mortgaged to the Utah Poultry. Many of the potatoes were not as good last year as the year before. I think they would go about 200 bushels to the acre, but about 80 percent were No. 2's. There was about 1400 bushels grown on Mrs. Erickson's part of the ground. I couldn't raise the potatoes for 40c a bushel. I didn't get that much per bushel out of them. I sold the last of the potatoes for 20c a hundred, No. 2's and I furnished the  
62 bags. There wasn't a good market for potatoes last year. I think I paid \$50.00 on my mortgage out of the potatoes. I got 20c a hundred for the last potatoes I sold and paid the money  
63 for the digging and sorting. I did not dig



them myself. They were poor potatoes because of lack of water.

- 64 I only talked with Mrs. Erickson about the farm one day before the contract was made. She asked me if I wanted to buy the farm. She asked me several times if I would like to get the place and I told her I would I don't remember discussing it until about the time the contract was made. I understood there had been some family trouble. Mrs. Erickson said she had concluded to sell the property. I figured it was too high, \$14,000.00. She didn't compel me to buy it, I took a chance on it. It wouldn't make any difference to me whether there was any family trouble or not. I do not recall any conversation with Mrs. Erickson except as I have related until we got down to
- 65 Mrs. Eckersley's office. I told her I couldn't buy it and I went home as I said and started working and she came down in about 30 minutes and put the proposition up to me and asked if I wanted to accept it. She said she had decided to let us have the place if we wanted it for \$14,000.00 and provided we feed lambs. I went to see Mr. Mortensen to see if I could borrow a thousand dollars. I couldn't and told her so and went home. This conversation was had in the presence of myself and
- 66 wife. She said she would let me have it if I would feed lambs and give her what I made from them. I did not discuss the money she would need to pay her obligations. She did mention the first mortgage, I believe it was to the California Western States Life Insurance Company, and said she owed the bank \$200.00. I didn't know she had any other bills. She said the California States Life had

67 a first mortgage, and the bank had a second mortgage. I knew there was a first mortgage and I knew the amount of it. She told me there was a payment of \$250.00 to be made in February. I knew she hadn't paid her taxes. I didn't know but what she had money other places. I knew she owed the bank \$900.00 and interest, and \$250.00 and interest to the insurance company and that she owed back taxes.

68 She agreed to pay the taxes up to 1938 and I agreed to pay them for 1938 and after that time. Mrs. Erickson and I went down to see Mrs. Eckersley for the purpose of having the contract prepared. I do not remember telling Mrs. Eckersley my obligation was limited to what I would get out of the lamb crop.

69 Mrs. Eckersley dictated most of the contract. I remember the provision about money being due to the bank and that I was to pay this and deduct it from the \$2,000.00 payment due in March. I understood that I was to pay Mrs. Erickson what the lambs brought. Mrs. Eckersley understood that. It was agreed

70 upon before Mrs. Erickson. I do not claim Mrs. Eckersley wrote something into the contract different than what Mrs. Erickson and I told her. I remember something being said about the words, "more or less" in the agreement. I don't remember now what I told Mr. Beal about it or whether I said anything about it on my direct examination.

I remember she was to get what those lambs brought and that was to be the down payment.

She told me, make it \$2,000.00 more or less and if you cannot make it I do not want to

take the place but whatever those lambs make. I want.

72 I told Mrs. Erickson I wouldn't sign any papers stipulating \$2,000.00, but if she would put in \$2,000.00 more or less, I would sign it. Mrs. Erickson took the chance with me that I might not have made anything. She knew I  
73 didn't have any other money. It wasn't long after I got the place until I heard Mrs. Erickson was going to get it back. She wrote me a letter that would have gotten me into trouble if I had signed it. The witness was asked several questions about the paper he was requested to sign and whether or not this paper was an assignment of money to Ivan Ernstsén, Mrs. Erickson's son and the witness answered by referring to trouble he would get into had  
74 he signed the paper. The paper she sent me was an assignment of money to Ivan. I still have the paper, I remember it now. That is  
75 the first time she had written me about the contract. Even though she turned all of the crops over to me that were on the farm without anything down, I decided she was trying to get me into trouble, and so I did not answer the letter. When I didn't sign the papers she sent me a letter a few days afterward asking that if I did not sign it to please send it back. I did not return it to her. I tore it up and then decided to put it together again.

76 Mrs. Eckersley told me Mrs. Erickson had been at Loa to see her and that she claimed I had broken the contract and she wanted her papers out of escrow. I haven't bought any liquor for over a year. I did not know there was a provision in the contract that she was entitled to get her papers back if I did not

- 77 pay. I know she claimed she had the right to get them.

**RE-DIRECT EXAMINATION:**

By Mr. Beal

- 78 The farm is in much better condition at the present time. I hold the farm under the terms of the contract, as I understand it. There has been no inclination on my part to avoid complying with the contract, as I understand it. When Mrs. Erickson was in Loa it was pretty close to the time that the 30 day grace period had expired. I do not know whether it was before or after. She did not call on me at my residence. She left town without discussing the matter with me.

**RE-CROSS EXAMINATION:**

By Mr. Hougard

- 79 All the crops that was on the place I fed to the lambs. I sold a little grain that was raised on Mr. Bryan's place and I let Mr. Axel Ernstsens have some of the grain raised on Mr. Bryan's place.

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**ELSIE ECKERSLEY** called as a witness and testified as follows:

**DIRECT EXAMINATION:**

By Mr. Beal

- 80 My name is Elsie Eckersley. I am the County Clerk of Wayne County. I typed the agreement for Mrs. Erickson and Mr. Bastian. They told me what they wanted in the agreement and I wrote what they wanted. I am

familiar with the agreement. I remember some of the discussion that was had at the time the words "more or less" were placed in the agreement. This agreement was written up completely with \$2,000.00 put in it at first before anything was said about the lamb crop and after it was written up and read over by its parties the lamb crop was discussed between the two of them and I was instructed to insert this clause "more or less" right after the \$2,000.00 and I took all three copies of this agreement and put it in the machine and wrote it \$2,000.00 more or less. They had been discussing the lamb crop and Mrs. Erickson said: "I do not want to be hard on you and we will put 'more or less' if what you make on the lamb crop doesn't quite reach the \$2,000.00."

Q. Is that about all of the conversation you recall about this part of the agreement?

A. Well, I don't remember exactly what they said about lambs but I know they stopped  
81 to talk about it and I had to insert this in it.

Q. And that was accepted after the agreement was prepared and after it was read over?

A. Yes, sir.

Q. Who raised the question?

A. I don't remember but I believe Mr. Bastian mentioned something about lambs, whether he would be able to make that much off of the lambs or not. I don't remember the exact words but Mrs. Erickson had that written to eliminate any trouble in case he didn't make enough to make the payment — that

82 would be more or less and she would accept what he made on the lambs.

CROSS-EXAMINATION:

By Mr. Hougaard

Q. You stated that Mrs. Erickson said, when they were discussing this insertion in the contract "more or less" that if the lamb crop didn't come quite up to the \$2,000 you will be protected?

A. Yes, she said she didn't want any trouble over it.

Q. That is the remark she used if the lamb crop doesn't come quite up to \$2,000.00 — I didn't say the exact words but if he couldn't make \$2,000 on the lamb crop she would take the rest on the first payment.

A. Yes, sir.

Q. You do not recall what their discussion was about the lamb crop?

A. Not exactly.

Q. All you remember was that they were discussing by themselves about lambs that he would feed on the property?

A. Yes, and the possibility that he might not be able to make the entire payments and that is why the words "more or less" were inserted.

83 I don't remember what time of day they came to see me about the contract. It was during business hours. They first told me in substance what they wanted to do. They dictated the agreement. When I first wrote the contract I wrote in the \$2,000 payable on February 1; that is what they told me to write and I

wrote it as they told me. They were in the same room while I was writing the contract. They were discussing the matter back and forth. I didn't pay much attention to their discussion while writing the contract. I sat down to the machine and wrote it up as they dictated it to me. As they told me what they wanted I placed it in my own language in order to get what they wanted. They discussed the matter with me about fifteen minutes before

84 I started to write the contract. When I wanted further information I would ask them for it. After the contract was finished a suggestion was made that there ought to be something about the \$2,000. I put a caret in the original contract and wrote in the words, "more or less."

#### RE-DIRECT EXAMINATION:

By Mr. Beal

85 About February 4, Mrs. Erickson called on me and asked that the papers be returned to her. I declined to surrender the papers and still have them in my possession. Mrs. Erickson said that she figured Mr. Bastian had fallen down on his contract and she demanded the papers and said she could not see him and talk to him because he was intoxicated. Later on the same day I went to Mr. Bastian's place.

86 He wasn't intoxicated at that time. He seemed tired from hard work.

#### RE-CROSS EXAMINATION:

By Mr. Hougaard

87 I understood Mrs. Erickson meant Mr. Bastian was intoxicated at that time. I told her to get him and bring him down and she said she couldn't because he was intoxicated.

She told me something about his having been intoxicated and having been in jail in Salina; that she had been informed that when he took the lambs over to Salina he became intoxicated and was put in jail. She said that is what she had been told. I hadn't seen him intoxicated. I didn't know he had been at Salina.

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ROEAN BASTIAN, called as a witness for the defendant, testified as follows:

DIRECT EXAMINATION:

By Mr. Beal

88        My name is Roean Bastian. I am the wife of G. A. Bastian. I have been in court during the progress of the trial. There was a conversation the latter part of August between Mrs. Erickson and my husband. It was the day we went to the bank and had the contract drawn up. There was no conversation in my presence about the property prior to the time we went to the bank. The first time I talked to Mrs. Erickson was when she called at our residence in Loa. That is the first time I talked to her about it. It was the same day the agreement was drawn up. At that time Mrs. Erickson wanted to sell her place and offered it to us by fixing up a contract provided we would feed lambs and turn what was made out of the lamb crop for the first payment. They discussed the terms of the contract before we went to the bank. I was present when the contract was signed. At that time as nearly as I recall we worded it "what the lamb crop brought" and we didn't know what



it would be. Neither did she. But she said, let's make it \$2,000 more or less and that was what we agreed upon. It was just a convenient way to represent the proceeds from the sheep.

## CROSS - EXAMINATION:

By Mr. Hougaard

90 I understood Mrs. Erickson and Mr. Bastian had talked about the property before they came to our place. I did not talk with her. She came down to our place and there was some discussion about the price. It was agreed that \$14,000 should be paid for the property. She offered it to us provided we would raise lambs. That was about the extent of the conversation. Feeding lambs has been one of the most profitable things to do in farming at Loa. Most of the farmers have succeeded in feeding lambs. Mrs. Erickson felt if we bought the property we should feed lambs. We gave Mrs. Eckersley the information about how much we would pay, the description of the property, and she wrote all of these things down. She wrote in the contract that we were to pay fourteen thousand dollars for the property — two thousand dollars to be payable the first of February, 1938. That is the way she wrote it after getting information from myself and Mr. Bastian. Two thousand dollars to be paid on or about February 1, 1939.

91 She also wrote in the contract that for the sum of fourteen thousand dollars, payable as follows: two-thousand dollars payable on or before February 1, 1939, and one-thousand dollars payable on February 1st of each year until the entire sum was paid, together with

interest at the rate of 4 percent per annum payable annually at the time the principal is paid.

- 92 I remember at that time that was what we had to pay, two-thousand dollars, and then 4 percent interest on the unpaid balance. She also wrote in, we were to pay taxes for 1938. After the contract was written up there was a suggestion made to make it two-thousand dollars, more or less, because Mrs. Erickson wanted all that was made out of the lambs. This was agreed upon but I do not know whether it was suggested by Mrs. Erickson, 92 myself, or Mr. Bastian. Mrs. Eckersley went back and inserted the caret after the words "two thousand dollars" and wrote "more or less."

#### RE - DIRECT EXAMINATION:

By Mr. Beal

Mr. Bastian said "you failed last year and suppose I do not get out of the lamb crop two thousand dollars" and Mrs. Erickson said, "Well, I do not want to hold you this year except whatever the lamb crop brings" and that is why "more or less" was added.

#### RE - CROSS EXAMINATION

By Mr. Hougaard

- 94 I remember we had a discussion about the contract right after it was completed. We decided it would not be a safe thing to write up a contract and sign it for two thousand dollars when we didn't know what the lamb crop would bring, and Mrs. Erickson said she wouldn't penalize us but would accept what the lambs brought. We decided to make a good payment. We were willing to take all

the chances and make it whatever we could make. The only condition was that if we didn't quite make two thousand dollars we would still be able to go on and try to work out; that is what she agreed to do. We knew Mrs. Erickson had obligations but we didn't have anything to do with those. We didn't pay a nickel to the insurance company, but we did write them a letter about it and made a trip to Salt Lake City.

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ARTHUR BRYAN, called as a witness on behalf of the defendant, testified as follows:

# DIRECT EXAMINATION

By Mr. Beal

- 95 My name is Arthur Bryan and I reside at Loa, Utah. I am cashier of the State Bank of Wayne and have been for some years. I am acquainted with Gertrude Erickson, the plaintiff, and Mr. G. A. Bastian and his wife, Roean Bastian. I am familiar with the property now occupied by the Bastians where this farm and new home are located. We made a lamb feeding loan last year and made an estimation of the amount of alfalfa we figured was there. I would estimate there was sixty tons, judging from the way the crop fed out and the number of lambs they had there. I did observe the amount of forage, consisting of alfalfa. My opinion as to the amount that was stacked or stored on the premises would be sixty tons. We generally try to see that we take a chattel mortgage unless there is sufficient feed. The amount of grain grown on

the premises was between eight and nine hundred bushels, it was reported to us.

Q. That is just hearsay, a report, and you do not have any knowledge yourself?

A. No, sir.

97 I do not know of any other crops grown on the premises last year. I did make a loan to Mr. Bastian in the amount of \$1900 for the purpose of feeding lambs, which represented the purchase price of the lambs. I made further advances, also for the procurement of feed to feed them in the amounts of \$50, \$100, \$103, \$110, and \$100. These amounts were taken from the records and books of the bank, making a total of \$2,363, including the original loan of \$1900. That represents the advances I made both for the original purchase and for seed. We advanced \$400 to pay on the note of Mrs. Erickson, also, which money was applied on the note of Mrs. Erickson with our bank. There were no other items. There was \$500 paid to us by Mr. Bastian on Mrs. Erickson's note. This was paid when he sold the lambs.

98 The lamb sale checks were deposited at the bank. I have the figures on the sale. There was a \$500 advance as down payment in January. On February 21st there was \$1,589.67; on March 20, \$1,646.37. The total received then was \$3,736.04. Mr. Bastian paid to us on behalf of Mrs. Erickson a \$900 note and interest. There was one receipt filed with the escrow and one for \$29.33. There were two different  
99 interest payments, one for \$24.58; and another for \$29.33. The loans that were made by Mr. Bastian to pay for feed have been repaid to

the bank. We generally see that we get our pay out of the lamb checks. I do not believe  
 100 I have seen the farm in better shape.

### CROSS - EXAMINATION:

By Mr. Hougaard

101 The alfalfa was frozen a little bit. The alfalfa has been damaged some. I saw the crops last year and I don't think they were damaged by frosts nearly so much as this year. I do not know whether the hay crop would be as good this year, a lot of first crop hay last year burned up. I should say maybe twenty-five tons of hay in the first crop last year. My estimation would be that there would be altogether about sixty tons. When a banker goes out to look at crops with the idea of advancing money to a farmer to buy lambs, he wants to know pretty closely how much there is and how many lambs they can feed. I didn't figure there was enough to feed the lambs with the money we advanced, but he argued me into it. I figure there was as much as our estimate.

102 The first \$50 was advanced to make the first payment to Mr. Webster for alfalfa hay. The next payment was to make the next payment. All of these items were not for alfalfa; part was for grain. The only advances we made for hay was \$150. The rest was for grain, that is what he told me. The lamb sales were \$3,736.04 and the advances we made were \$2,363.00. I understand the freight had not been paid on those lambs and that would be about 25c per head, figuring the lambs at one hundred pounds. We do not pay the bills of any of the farmers. Ordinarily we would not

let the freight go unpaid but he told me he was going to pay.

103 All the money for the lambs came to the bank in the form of checks. They came jointly to both of us. The checks are put in my name and Mr. Bastian's name so that when a check comes he cannot use it until he runs it through the bank. I gave Mr. Bastian enough of that money to pay the freight.

104 I didn't see that it was paid but he said he would pay it. There was some money turned over to Mr. Bastian. There would not be any paid out to him unless he wanted to buy feed, as long as there was any money due. We loaned him the \$400 to make a payment on Mrs. Erickson's obligation but there was \$400 besides that. We loaned him \$463. There was no obligation to our bank so far as this transaction was concerned. We did not have a crop mortgage but when these lambs were sold these notes were all cleared, including  
105 Mrs. Erickson's note.

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GERTRUDE ERICKSON, the plaintiff, recalled, testified as follows:

#### DIRECT EXAMINATION

By Mr. Hougaard

106 I have been in court all during the time Mr. Bastian, his wife and also Mrs. Eckersley have been testifying. I have never at any time stated to Mr. Bastian that Ivan had beaten or licked me for the last time and that I was going to sell the farm. I have had a little difficulty in my own immediate family. It did not

have anything to do with my decision about selling the farm. Ivan was not at home when this transaction was had. He had been at Fish Lake with some friends for several days. I never at any time said to Mr. and Mrs. Bastian that I would be satisfied to let them take possession of the farm and purchase it for \$14,000 if they would pay just what they were able to make from their lamb crop. The year before I suffered a loss in feeding lambs on my farm. There was no conversation about the first payment on the contract being discharged from lamb payments when I was first talking about the deal with my brother.

- 107 We agreed that he would pay me \$2,000 and interest on the balance of the principal at the rate of 4 percent per annum, this interest to be paid annually when the principal payment came due. I did not state to Mr. Bastian that if he paid me what he could realize from the feeding of lambs that that was all I would require him to do. I did not have any such conversation. We had a conversation during this period of time regarding the feeding of lambs. I never said anything in any discussion that if he didn't make any money feeding lambs he wouldn't have to pay anything on the contract. There was some discussion about feeding lambs when we were talking with Mrs. Eckersley about the contract. The substance of this conversation was that if the lamb crop didn't come up to quite the \$2,000 I wouldn't make any fuss about it. We talked about the payment being made February 1 and we discussed the lambs being ready for market and I said we would give 30 days grace if the lambs had not been sold. I knew we would
- 108

have to wait for him until he sold the lambs and this was written into the contract.

- 109 I do not recall just how the conversation was worded but it was my best understanding that if he didn't get quite \$2,000 and interest on the balance of the principal, if he fell down a few dollars I would accept it. I saw Mrs. Eckersley at Loa after the 30-day grace period had gone by. This is the first time I had been at Loa since I left. This was about the 4th of March. This was the occasion when I asked  
 110 Mrs. Eckersley for the papers. At that time I had written Mr. Bastion sending him some papers I wanted him to sign. Thereupon a  
 111 certain letter written by Mrs. Erickson to Mr. Bastian was received in evidence by stipulation of counsel.

# CROSS - EXAMINATION:

By Mr. Beal

- 112 I don't remember who first mentioned about feeding lambs. We talked it over. Mr. Bastian told me he was going to feed the crop in the event the bank would loan him money to buy lambs. Mr. Bastian and I talked about feeding lambs and decided it would be the best thing he could do. I did not recommend that it was the best thing for him to do. I don't remember whether I advised him to feed lambs but we did discuss feeding lambs. I did not recommend that Mr. Bastian grow other crops  
 113 on the farm. I did not recommend that he raise so many acres of barley, wheat, or alfalfa. I think the only thing we talked about was feeding lambs. I don't think I could be mistaken about that. We had some domestic difficulties



114 in our family which does not concern this court.

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MR. BRYAN further examined:

# DIRECT EXAMINATION

By Mr. Hougaard

115 The first check Mr. Bastian received for the lambs was \$1,589.67. From this check he paid the bank the following amounts: \$1,357, \$500 of which was a payment on Mrs. Erickson's note, \$353 payment on moneys advanced and \$500 payment on the lamb note. The balance of this payment of \$232.67 was applied to Bastian's account. He received another payment of \$1,646.37. \$1,407.67 was applied on his note and interest and we deducted \$29.33 interest on Mrs. Erickson's note. A balance of 115 \$209.37 was deposited to Bastian's account. The \$353 taken from the first payment was to cover his advance notes. Mr. Bastian made a payment of \$400 on Mrs. Erickson's note out of the \$1,589.67 payment. We split up the \$1,357 payment into the items which I have already stated. This included \$500 on Mrs Erickson's note and \$353 on the small advance 116 notes and \$500 on the lamb note and \$4.00 interest. This left a balance to the account of Mr. Bastian in the bank of \$232.67. I am unable to find what amount was paid on freight on the lambs. I do not have such a record. I believe he paid 20c per hundred as freight.

# CROSS - EXAMINATION:

By Mr. Beal

117 The \$1,646.37 was the final payment on the lambs. That was applied as follows: \$1,407.67

on principal and interest; \$29.33 on Mrs. Erickson's note, which left for deposit to Bastian's account, \$209.37. There is still a \$100  
118 note that Mr. Bastian owes us at the bank.

119 Thereupon both sides rested and written  
briefs were subsequently filed.

## ASSIGNMENTS OF ERROR

### (TITLE OF COURT AND CAUSE).

Comes now the appellant, Gertrude Erickson, and assigns the following errors upon which she will rely for a reversal of the judgment and decree of the court entered in said cause by the Honorable Henry D. Hayes, judge of the District Court of Wayne County, State of Utah, and hereby assigns the following errors in the findings of fact, conclusions of law, judgment and decree which appellant avers are not supported by the evidence and which were made and entered by the court contrary to the substantial rights of the appellant, and upon the errors thus assigned respectfully prays that the judgment of the court in the respects assigned be reversed and set aside.

### I.

That the court erred in making the finding of fact included in finding No. 9 wherein the court found:

“The court finds from the testimony and evidence in this cause that at the time of the execution of said agreement for the sale by plaintiff and the purchase by the defendants of the property described in said agreement, that there was an under-

standing that if the defendants would feed lambs upon said property, that the plaintiff would look to the net proceeds from the sale of said lambs for the first payment on said contract to be paid on February 1st, 1939 and would also look to the net proceeds from the sale of said lambs for the payment of interest at the rate of 4 percent upon the sum of \$14,000.00 payable on February 1, 1939, and finds that the plaintiff and defendants agreed that if the net profits from the feeding of lambs was insufficient to pay the full amount of \$2,000.00 and said interest, that the defendants would be relieved from the payment on February 1, 1939 of any balance remaining unpaid upon said \$2,000.00 and said interest, and that such payment as should be made on said principal sum and interest arising from the net proceeds from said lamb feeding venture would be a payment pro tanto on said \$2,000.00 and interest;

That for the payment on February 1st, 1939 the plaintiff assumed the whole risk that the lamb proceeds would pay the full amount of \$2,000.00 and interest and in the event the profits from the feeding of lambs was insufficient to pay said sum of \$2,000.00 and interest, the plaintiff agreed to and did waive her right to reenter and take possession of said property,"

for the reason that there is no testimony or evidence in said cause which establishes or reasonably tends to establish the finding of the court as hereinbefore set forth; that the evidence is insufficient to show that there was any understand-

ing or agreement that the defendants would feed lambs nor were the defendants in any way obligated to feed lambs upon the farm property sold by appellant to the respondents and there is no evidence which shows or reasonably tends to show that the appellant had an understanding with the respondents or that there was any agreement of any kind which obligated the respondents to feed lambs upon said property or that the plaintiff would not require the performance of her contract unless the respondents were able to pay the amount due on the contract from the net proceeds from the sale of lambs;

And there is no evidence whatsoever that the appellant agreed that she would not require the payment of the interest on the purchase price unless the respondents obtained a sufficient sum from the net proceeds of said feeding of lambs to pay said interest and that there is no evidence whatsoever or any evidence of any kind from which a legal inference could be drawn that the appellant would waive her right to reenter and take possession of said property if the respondents did not obtain sufficient money from the lamb feeding venture to meet the interest on said principal sum and that there is no evidence whatsoever to support the finding of the court that the plaintiff assumed the whole risk that the lamb proceeds would pay the full amount of \$2,000.00 and interest on said principal sum and that on the contrary the preponderance of the evidence shows that no agreement was made or entered into whereby the appellant agreed to assume the risk that the lamb proceeds would pay the sum of \$2,000.00 or the interest on said principal sum and that the preponderance of the evidence shows that no agreement of any kind or character was entered into whereby the defendants

would feed lambs or that they were under any obligation whatsoever to feed lambs upon the farm property belonging to the appellant or that appellant would look to the net proceeds from the sale of lambs for the first payment on said contract;

And that the preponderance of the evidence shows, in fact the evidence shows without conflict, that there was no agreement whatsoever whereby appellant agreed to look to the net proceeds from the feeding of lambs for the payment of interest on the principal sum of \$14,000.00 and that the preponderance of the evidence is against the finding of the court that the defendants would be relieved from the payment on February 1, 1939 of any balance remaining unpaid upon said \$2,000.00 and said interest after applying the net proceeds from the feeding of said lambs.

## II.

The court erred in finding in paragraph No. 10 of the findings of fact as follows:

“The court finds that the plaintiff and defendants entered into said contract with a perfect understanding of the financial circumstances of each other; that the plaintiff knew that defendants had nothing and would have to rely upon the proceeds of said farm and lamb crop for any payment that might be made on said contract and that plaintiff knew that she could not demand, and the defendants could not make any down payment;”

And erred in making a finding in that part of finding No. 10 as follows:

“That the plaintiff was willing to and did assume every risk incident to placing all of

said property, including all of said growing crops, in the hands of the defendants and assumed each and every risk incident to the feeding of lambs and whether there would be any profits arising therefrom, and that the parties in the use of the words "more or less" intended thereby to so limit the liability of the defendants that said \$2,000.00 and interest on \$14,000.00 payable on February 1, 1939, should be paid at this time only in the event said amount was realized as profits from feeding said lambs on said farm and that the defendants fully performed their obligations under said contract by paying to the plaintiff the profits realized from said lamb feeding venture, and that any balance remaining after applying said profits to the discharge of said \$2,000.00 payment and interest would be paid by the defendants on or before February 1, 1940, or within the grace period thereafter mentioned in said agreement, and that the use of said words "more or less" following the agreement to pay \$2,000.00 meant and was intended to mean that the defendants should pay and the plaintiff should accept the profits realized from said lamb feeding venture to apply upon said payment and interest and with the understanding that plaintiff would waive her right to reenter and take possession of said premises upon payment of said amount."

That the foregoing findings of the court are not supported by the evidence in said cause and that there is no evidence supporting or reasonably tending to support the finding of the court that

appellant knew or understood the financial circumstances of the respondents or that the appellant knew that the respondents had nothing or that she would have to rely upon the proceeds of said farm and lamb crop for any payment that might be made on said contract; that there is no testimony supporting or reasonably tending to support the finding of the court that the plaintiff was willing to or did assume every risk incident to the placing of her farm property including all of the growing crops thereon in the hands of the defendants or that she assumed each and every risk incident to the feeding of lambs or whether there would be any profits arising therefrom, and that the court erred in finding that the parties in the use of the words "more or less" intended thereby to so limit the liability of the defendants that said \$2,000.00 and interest on \$14,000.00 payable on February 1, 1939 should be paid at that time only in the event said amount was realized as profits from feeding lambs on said farm;

And that there is no evidence to show or reasonably tending to show that the defendants fully performed their obligation under said contract by paying to the plaintiff the profits realized from said lamb feeding venture and that there is no substantial evidence showing or reasonably tending to show that in the use of the words "more or less" the parties intended that the defendants should pay and the plaintiff should accept the profits realized from said lamb feeding venture to apply upon said payment and interest and with the understanding that the plaintiff would waive her right to reenter and take possession of said premises upon payment of said amount; that the preponderance of the evidence on the contrary shows that the appellant had



no knowledge as to whether respondents were solely dependent upon feeding lambs to meet their obligation under said contract and that a preponderance of the evidence shows that plaintiff did not assume the risk incident to placing said farm property and said personal property in the hands of the defendants and did not assume each and every risk incident to the feeding of lambs by respondents and whether profits would be realized therefrom, but on the other hand the appellant provided in her contract that if the defendants failed to make payments as provided in said contract, including interest and principal, that she would be entitled under the provisions of said contract to immediately take possession thereof for want of such payment;

That the testimony and evidence is insufficient to support the findings of the court that the parties by the term "more or less" in said contract intended thereby to limit the liability of the respondents as found by the court in finding No. 10 and no evidence whatsoever to support the finding that the payment of interest on the principal sum of \$14,000.00 was in any way contingent either upon said lamb feeding venture or otherwise, and that the preponderance of the evidence shows that any conversations that may have been had by the parties prior to having said contract prepared were incorporated into the provisions of said contract, and that the only limitation or contingency whatsoever with respect to the payment of said principal sum of \$2,000.00 was the possibility that respondents might be short a small amount in the payment of said amount in full and in that event there should not be a forfeiture of the respondents' rights or a repossession of the property and no evidence whatsoever that the appellant would waive any right



under the terms of said contract except as aforesaid.

### III.

That the court erred in its conclusions of law wherein the court concluded:

“That the defendants by payment of the sum of \$900.00 in discharge of the obligation of the note of the plaintiff at the State Bank of Wayne for said amount have fully performed on their part all of the terms and conditions of said agreement which provided for the payment of \$2,000.00 more or less on or before February 1, 1939, and by said payment fully performed their obligation for the payment of interest on the sum of \$14,000.00 at the rate of 4 percent per annum payable at the time said principal sum was payable; that the defendants were not in default by reason of their failure to pay the taxes on said property for the year 1938 for the reason that no time was specified or agreed upon by the parties as to when said taxes should be paid, and that the defendants were not in default in paying anything to the California Western States Life Insurance Company,”

for the reasons specifically assigned in assignments Nos. 1 and 2 which by reference are hereby made a part of this assignment of error and for the further reason that there is no testimony or evidence which supports or reasonably tends to support the aforesaid conclusions of law, and that said conclusion of law is contrary to the findings of the court in finding No. 6 wherein the court finds that the defendants have not paid the interest

or any part thereof upon the sum of \$14,000.00 or upon any other sum and have paid no interest whatsoever; that the defendants failed and neglected to pay the taxes upon said property for the year 1938 and that part of finding No. 7 wherein the court finds that notwithstanding the service of the notices referred to in said paragraph, the defendants paid nothing whatsoever upon said contract, and did not pay taxes for the year 1938, or any interest upon the purchase price or at all;

And that it appears without dispute that the defendants were in default by reason of their failure to pay the taxes on said property for the year 1938 and that said defendants agreed in said contract to pay all taxes and assessments against said land and water, commencing with the year 1938 and agreed to pay interest at the rate of 4 percent per annum payable annually at the time principal payments were due, and that said conclusions of law are not supported by the evidence and are contrary to the preponderance of the evidence; and that the respondents have paid nothing upon the obligation due and owing to the California Western States Life Insurance Company, and that by reason of the failure of the respondents to make any payment to appellant for said purpose or to pay any sum direct to said California Western States Life Insurance Company, said obligation evidenced by the note of appellant and secured by a mortgage upon said property is in default and said mortgage about to be foreclosed, and that it affirmatively appears by the preponderance of the evidence that the respondents were in default under the terms of said contract.

#### IV.

That the court erred in making its conclusion of law No. 2 wherein the court found that the plain-

tiff is not entitled to the recovery of the possession of said real and personal property and that the respondents were entitled to retain the possession thereof and to use, occupy and enjoy the same, and that said defendants were not in any manner whatsoever indebted to the plaintiff for any sum whatsoever and that plaintiff is entitled to no relief whatsoever by reason of her said supplemental complaint, or at all. That said conclusion is not supported by the testimony and evidence in said cause and is not supported by the findings of fact as found by the court, and that the aforesaid conclusions of the court are contrary to the evidence and testimony and the findings of the court, and appellant assigns as reasons therefor all of the matters assigned as errors in assignments Nos. 1, 2 and 3.

## V.

That the court erred in making its decree herein wherein the court decreed in paragraph 1 thereof:

“That the defendants have fully performed on their part all of the terms and conditions of the contract made and entered into by plaintiff and said defendants on or about the 15th day of August, 1938 whereby the plaintiff agreed to sell and the defendants agreed to purchase the real estate, water rights and personal property referred to and described in said contract, and which contract is fully set forth in the court’s findings of fact and conclusions of law, reference to which is hereby made,”

And that portion of paragraph 2 wherein the court decreed reading as follows:

“And it is further ORDERED, ADJUDGED and DECREED, that the under-

standings, agreements and circumstances of the parties were such as fully made to appear in the court's findings, reference to which is hereby made, that the defendants are not in default in the performance of said contract, and that in view of said understandings and all of the circumstances, plaintiff waived her right to repossess said real or personal property or any part thereof; that the balance of said \$2,000.00 payment and said interest is not payable until February 1, 1940 with a grace period of 30 days as provided in said agreement;"

And further erred in paragraph 3 of said decree wherein it is Ordered, Adjudged and Decreed, that the plaintiff take nothing by her said complaint and that the same be dismissed.. That the Order, Judgment and Decree of the court as aforesaid is erroneous and not supported by the evidence and testimony in said cause and is not supported by the findings of the court, and that the preponderance of the evidence in said cause shows that the defendants did not fully perform nor did they substantially perform on their part all of the terms and conditions of the contract, but were in default in the performance of the terms thereof, and that by the decree of said court, the appellant has been deprived of her substantial rights growing out of said contract and said respondents have received crops which the court finds to be of the value of at least \$1500.00, and have had the use of said property, real and personal, ever since the date of said contract, and have likewise had the benefit of all of the crops grown and harvested during the years 1938 and 1939 and the use of the new home situated on said premises without payment of anything to

the appellant except the discharge of a \$900.00 obligation due and owing to the State Bank of Wayne, and failed and neglected to pay the interest on the principal sum of \$14,000.00 and failed and neglected to pay the taxes for the year 1938 and failed and neglected to pay anything whatsoever to the California Western States Life Insurance Company;

And that notwithstanding said facts, the court erroneously ordered and decreed that the defendants were not in default in the performance of said contract and have waived their right to repossess said real and personal property or any part thereof and hereby re-assigns as error with respect to the provisions of said decree all of the errors assigned in findings Nos. 1, 2, 3, and 4, reference to which is hereby made.

WHEREFORE, appellant prays in view of the manifest errors of the court committed as aforesaid and herein assigned, that the record in this cause be reviewed by said Supreme Court and that the judgment of the lower court be reversed and that said District Court be required to modify the findings, conclusions of law and decree so as to provide for the repossession of the real and personal property described in said contract by the appellant, and that said District Court be directed to enter a judgment in accordance with the findings and conclusions of this Court.

A. H. HOUGAARD,  
Attorney for Appellant.

Affidavit of, mailing, in due form, dated December 19, 1939.

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124 Clerk's Certificate to Transcript.