

1940

Gertrude Erickson v. G. A. Bastian and Roean Bastian : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

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

Recommended Citation

Brief of Appellant, *Erickson v. Bastian*, No. 6209 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/577

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

7209

No. 6209

In
The Supreme Court
of the
State of Utah

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

BRIEF OF APPELLANT

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

FILED

JAN 25 1940

INDEX

Agreement of Plaintiff and Defendants...	2-4
Argument	9-39
Court Erroneously Held Defendants Were Not in Default by Failing to Pay Inter- est and Taxes	16-19
Court Has Improperly Construed Contract With Respect to Use of Words "More or Less"	20-25
Defendants Were in Default, on Their Own Theory	38-39
Findings, Conclusions and Judgment Con- trary to Evidence and Obligations of the Contract	25-33
Plaintiff Was Entitled to Repossess, for Defendants' Default	33-37
Statement of Facts	1-9

(Index Continued)

INDEX

(A Continuation)

TABLE OF CITATIONS

Accumulator Co. v. Dubuque St. Ry. Co., 64 F. 70, 74; 12 C.C.A. 37, 41, 42; 27 U. S. App. 364, 372	33
Allen v. Bissinger, 62 Utah 226; 219 Pac. 539,	24
7 A.L.R., page 5,	23
27 A.L.R. 134, Subdivision 5.	23
70 A.L.R. 368.	23
12 A. Jur., Title Contracts, page 768, Sec- tion 236:	25

I N D E X
(A Continuation)

TABLE OF CITATIONS
(A Continuation)

Board of Education v. Wright-Osborne Co., 49 U. 453; 164 Pac. 1033,	23
Burt v. Stringfellow, 45 Utah 207; 143 Pac. 234,	30
Caine v. Hagenbarth, 37 Utah 69; 106 Pac. 945,	31
Constitution of Utah, Section 9, Article 8,	17
13 C.J. 265:	24
41 C. J., page 214,	22

(Table Continued)

TABLE OF CITATIONS

(A Continuation)

66 C.J., Sections 437-438, Title Vendor and Purchaser	37
Cummings v. Nielson, 42 Utah 157; 129 Pac. 619, the Court said:	24
Holm v. Holm, 44 Utah 242; 139 Pac. 937.	17
Imlay v. Bubler, 77 Utah 547; 298 Pac. 383	34
Little v. Stringfellow, 46 Utah 576; 151 Pac. 347.	17
Makris v. Malis, 50 Utah 544; 167 Pac. 802.	31

(Table Continued)

TABLE OF CITATIONS

McKellar Real Estate & Inv. Co. v. Paxton, 62 Utah 97; 218 Pac. 128.	17
Mosby v. Smith, 186 S.W. 49	23
Murphy v. Salt Lake City, 65 Utah 295; 236 Pac. 680,	25
North Point Consolidated Irrigation Co. v. Utah & S. L. Canal Co., 16 Utah 246; 52 Pac. 168.	17
Oakes v. DeLancy, 30 N.E. 974.	23
Penn Star Mining Co. v. Lyman, 64 Utah 343; 231 Pac. 107,	31
Volume 27, R.C.L. Under Title of Vender and Purchaser, Section 152,	21

(Table Continued)

TABLE OF CITATIONS

(A Continuation)

Revised Statutes of Utah, 1933, Section 104-41-23.	17
Salt Lake City v. Smith, 104 Fed. 462,	32
Utah Commercial Savings Bank v. Faux, 44 Utah 323; 140 Pac. 660.	17
Warner v. Tyng Warehouse Co., 71 Utah 303; 265 Pac. 748.	17
Wilson v. Rafter, 174 S.W. 137	23

In
The Supreme Court
of the
State of Utah

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

BRIEF OF APPELLANT
STATEMENT OF FACTS

This action was commenced to recover judgment and decree declaring the defendants to be in default in the performance of the terms of an agreement for the purchase of a farm, farm machinery and other personal property purchased by the defendants from the plaintiff and for the recovery of the possession of the property covered by the

contract. There was a judgment for the defendants. The court decreed that because of certain alleged conversations prior to and at the time the contract was entered into, the plaintiff had waived her right to repossession.

The testimony and findings of the court show that an agreement was entered into on August 25, 1938, by which the plaintiff agreed to sell and the defendants agreed to purchase 100 acres of agricultural lands situated in Loa, Utah, together with 64 shares of water in the Fremont Irrigation Company, a new, modern five room home, and certain personal property consisting of livestock, farming implements, household furniture and other personal property. A copy of this agreement is as follows: (Tr. 1-5; Ab. 31-32, 14).

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 0 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 Fremont 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 the 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 the Second Part

All of the personal property, together with the possession of the real estate, and growing and harvested crops were delivered by the plaintiff to the

defendants on the date of the contract. (Tr. 10-12; Ab. 34, 17). At the time the possession of the property was delivered there were large and bounteous crops growing thereon, consisting of alfalfa hay, grain and potatoes. The market value of the crops harvested and growing was approximately \$1500. The reasonable rental value of the home on the premises was \$25.00 per month. (Tr. 14-15; Ab. 36, 17). The plaintiff also delivered to the defendants one water tap share in the Loa Water Works Company which entitled the defendants to receive culinary water, also one light attachment in the People's Light & Power Company, which entitled the defendants to the use of light and power. The farm equipment consisted of a new mower, a new rake, a disc harrow, two-way plough, a hand plough, a Utah lay-off, a new manure spreader, a rubber tired wagon, various extras for farm machinery, a large number of logs and shed posts, a large pile of fire wood, a team of horses and harness, three cows, five brood sows and eighteen small pigs, also certain fixtures and furniture in the home. (Ab. 18).

Ever since the date of the contract the defendants have had the use of all of the real and personal property; have used and occupied the home thereon and received and applied to their own uses all of the crops grown on the property in 1938 and 1939 (Ab. 18). The defendants paid nothing to the plaintiff at the time the property was delivered. (Ab. 17).

It was stipulated between the parties that the contract attached to the complaint, Exhibit A, 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 March, 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 \$900.00 shown by the bank receipts, Exhibit B. (Tr. 4-6; Ab. 32).

By the terms of the agreement the defendants were to pay for the property \$14,000.00 as follows: \$2,000.00 more or less on or before February 1, 1939, and \$1,000.00 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. The defendants also agreed to pay all taxes and assessments against the land and water commencing with the year 1938. The contract also contained the following provision:

"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."

The agreement was prepared by Elsie Eckersley,

clerk of the District Court of Wayne County, and the agreement, together with the warranty deed to the premises was deposited with Mrs. Eckersley as escrow holder. (Tr. 2; Ab. 31, 18).

All of the foregoing facts are undisputed and the court found on undisputed testimony that the defendants have not paid the plaintiff the \$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 the \$2,000.00 payment. The fact is undisputed that the defendants did not pay the interest or any part thereof upon the principal sum of \$14,000.00, and failed and neglected to pay the taxes for the year 1938. The contract provided that the defendants should be allowed 30 days grace in making the payment of \$2,000.00 in the event their lamb crop or other crops had not been disposed of by February 1 of each year. (Ab. 16). The court found that on March 6, 1939, the plaintiff served upon each of the defendants, personally, a notice of their default and a demand for the surrender of the premises. This fact is undisputed. Plaintiff, in her complaint in addition to claiming her right to the possession of the property for the defendants' default, also asked for damages and for the appointment of a receiver. It was assumed at the time the complaint was filed that the defendants might fail properly to care for the property, and would take the crops for 1939 unless the case could be reached for trial before that time, and for these reasons it seemed expedient to ask for a receiver.

At the time of trial the plaintiff did not at-

tempt to prove the damage alleged in her supplemental complaint and prior thereto waived her application for the appointment of a receiver on the assurance of an early trial. The defendants' answer claimed performance according to the terms of the agreement. No affirmative defense was made on the ground of any modification of the agreement, but it was contended that because of the use of the words "more or less" following the provision for the payment of \$2,000.000, there was no obligation to pay that sum or any other sum except such amount as might be realized from the feeding of lambs on the farm during the fall and winter of 1938.

The court made findings upon all facts essentially as claimed by the plaintiff with the exception of the occurrences at the time of the negotiations and the conversations of the parties at the time the contract was prepared and signed. The findings, conclusions, and decree (Tr. 32; Ab. 29) will hereafter be discussed more fully with respect to these controverted matters. The court first came to the conclusion that because of these occurrences and conversations the plaintiff was not entitled to the \$2,000.00 payment and had waived her right to repossess. The court subsequently modified its decision restoring the \$2,000.00 payable on February 1, 1939, but fixed the time of payment as of February 1, 1940, and decreed that the defendants had fully performed all the terms and conditions of the contract; that plaintiff had waived her right to repossess, and ordered plaintiff's case dismissed. (Tr. 124-125).

ARGUMENT

Appellant has assigned five errors. Assignment No. 1, that the court erred in making its finding of fact No. 9 wherein the court finds that at the time of the execution of the agreement there was an understanding that if defendants would feed lambs upon the property, the plaintiff would look to the net proceeds from the sale of lambs for the first payment on said contract to be paid February 1, 1939, and would look to the net proceeds from the sale of said lambs for the payment of interest at the rate of 4 percent per annum upon the sum of \$14,000, and erred in finding that for the payment due on February 1, 1939, the plaintiff assumed the whole risk that the lamb proceeds would pay the amount of \$2,000.00 and interest and that if the profits from the feeding of lambs were insufficient to pay said sum and interest, the plaintiff would waive her right to re-enter and take possession of the property;

That the court erred in finding No. 10 wherein the court finds that the plaintiff knew the defendants had nothing and would have to rely upon the proceeds of the farm and lamb crop for payment upon the contract, and that plaintiff was willing to and did assume every risk incident to placing all of the property including the growing crop 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 that time only in the event said amount was

realized as profits from the feeding of lambs, and erred in finding 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 the use of the words "more or less" following the agreement to pay \$2,000.00 meant and was intended to mean that defendants should pay and the plaintiff should accept the profits realized from said lamb feeding venture;

That the testimony and evidence is insufficient to support said finding, and that there is no evidence supporting or reasonably tending to support said findings; and that there is no substantial evidence showing or reasonably tending to show that by 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, or that plaintiff would waive her right to re-enter and take possession of said premises upon payment of said amount, and that the preponderance of the evidence is to the contrary.

In Assignments of Error Nos. 3, 4 and 5 appellant alleges error in the conclusions of the court in respect to the same matters referred to in findings of fact Nos. 9 and 10, and that the conclusions and decree of the court are contrary to the findings of the court; that it appears from the testimony without dispute in said cause that the defendants were in default in the payment of interest and in the payment of taxes. The assignments of error fully set forth the insufficiency of the evidence to sustain the findings; that the findings, conclusions and

decree are contrary to the preponderance of the evidence and against law.

Before discussing the assigned errors, it will aid to refer briefly to the testimony of the parties regarding the conversations and occurrences prior to and at the time the contract was prepared and signed. Mr. and Mrs. Bastian testified as to these matters substantially as follows: That Mrs. Erickson mentioned selling the place to Bastian the day before the contract was signed (Tr. 51; Ab. 46); that she asked him if he wanted to buy the property, and he told her he didn't have anything to buy with; that she would rather see him get the place and suggested that he try and get a government loan; that she told him she wanted \$14,000.00 for the property; that he later told her he couldn't get the money; that she told him that Will Taylor in Fremont and another party wanted the place; that a little later Mrs. Erickson sent for him; that he went to her home, and she said she had been thinking it over and had decided to turn everything over to Bastian if he wanted it with the understanding that he would feed lambs; that she said whatever the lamb crop brings I want \$1,000.00 or \$2,000.00 or whatever they bring and you are able to pay; that Bastian said, if you want to go down to the bank and fix it up to that effect, I will take a chance; that they went to the bank and had Mrs. Eckersley draw up the contract. When she drew up the contract, she wrote down \$2,000.00; that Bastian mentioned that it was \$2,000.00 more or less. (Tr. 52; Ab. 47). On cross examination Mr. Bastian testified that Mrs. Erickson came down to his place and put the proposition up to him and asked if he wanted to accept it and said she had decided to let him have the place if he wanted it for

\$14,000.00 and provided that he feed lambs; that he remembered the provision in the contract about money being due to the bank, and that he was to pay that money and deduct it from the \$2,000.00 payment; that he understood he was to pay Mrs. Erickson what the lambs brought. (Tr. 64-68; Ab. 51-52); that he told Mrs. Erickson he wouldn't sign any paper stipulating \$2,000.00, but if she would put in \$2,000.00 more or less, he would sign the contract.

Mrs. Bastian testified that the first time she talked to Mrs. Erickson was when she called at the Bastian residence in Loa; that this was on the same day the agreement was drawn up; that at that time Mrs. Erickson wanted to sell her place and offered it to the Bastians providing they would feed lambs and turn over what was made out of the lamb crop for the first payment; that the parties discussed the terms of the contract before they went to the bank; that she was present when the contract was signed; that at that time as nearly as she could recall they agreed to pay "what the lamb crop brought" (Tr. 88; Ab. 58); that she understood Mrs. Erickson and Mr. Bastian had talked about the property before; that it was agreed \$14,000.00 should be paid for the property; that she offered it to Mr. and Mrs. Bastian, provided they would raise lambs; that that was about the extent of the conversation; that feeding lambs had been one of the most profitable things for the farmers at Loa;

That the parties gave Mrs. Eckersley the information about how much they were to pay, and she wrote all the things down (Tr. 90-91; Ab. 59); that she remembered they were required to pay \$2,000.00, and then 4 percent interest on the unpaid balance, and that they

were to pay the taxes for 1938; that after the contract had been written up, there was a suggestion made to make it \$2,000.00 "more or less"—because Mrs. Erickson wanted all that was made out of the lambs; that this was agreed upon; that she didn't know whether the suggestion was made by Mrs. Erickson or Mr. Bastian (Tr. 92; Ab. 60); that there was a discussion about the contract right after it was completed and they then decided it would not be a safe thing to write up a contract and sign it for \$2,000.00 when they didn't know what a lamb crop would bring, but Mrs. Erickson said she wouldn't penalize the Bastians but would accept what the lambs brought; that they were willing to take all the chances and make it whatever they could; the only condition was, that if they did not quite make \$2,000.00, they would still be able to go and try to work out; that is what Mrs. Erickson agreed to do; that they knew Mrs. Erickson had obligations (Tr. 89; Ab. 58-59).

Mrs. Erickson testified (Tr. 7-13; Ab. 33-35) that she had certain conversations with Mr. Bastian about his wanting to purchase the property; that they had a number of conversations for some period of time before the contract was signed. The first conversation was several days before the contract was drawn up; that they talked about the place and the amount Bastian was to pay for it and the amount he should pay down and the payments he would make annually; that she went over the farm with him and looked at the crops; that they agreed on \$14,000.00 for the property and Bastian said he could not make a down payment until he fed the crops to the lambs; that he intended to feed lambs, and that he would pay \$2,000.00 as first payment and interest on the balance of the principal at the rate of 4 percent per annum, and that was agreed

upon; that Mrs. Erickson told him that he could not make it less than that amount if she were to meet her obligations; that she told him she was owing the California Western States Life Insurance Company and was owing \$900.00 and interest to the State Bank of Wayne; that the obligation to the insurance company was secured by the mortgage on the farm and the bank secured by a chattel mortgage on the personal property; that she told him she owed J. S. Peterson of Gunnison and George C. Brinkerhoff, and that these accounts must be paid out of the \$2,000.00; that Bastian said he wouldn't pay less than that; that he had a beautiful crop of potatoes and would pay \$4,000.00 at least when the first payment was due and at all events would pay \$2,000.00 and interest so Mrs. Erickson could meet her obligations; that she turned everything over to him including all of the crops just as they were on the 25th day of August; that she remembered the conversation about the words "more or less;" that she asked the question what that more or less meant, and that Mr. Bastian said that it didn't mean anything only that if he did fall down for a few dollars that Mrs. Erickson would accept it; that he might be a few dollars less than his payment, and that Mrs. Erickson wouldn't take the property back for this reason; that they indicated to Mrs. Eckersley what they had agreed upon and it was placed in the contract.

Plaintiff's husband, L. H. Erickson, testified that he remembered the occasion when Mrs. Erickson and Mr. Bastian were discussing the contract for the sale of Mrs. Erickson's farm to Mr. Bastian; that it was a day or two before the contract was signed; that they were sitting on the steps of the porch out from the kitchen facing south, that he had been over doing the morning chores at the

corral and came over where they were; that as he came over Mr. Bastian said "I will pay the \$2,000.00 and interest on the principal," and he threwed his hands out toward the potato patch and said "I believe I will be able to pay you \$4,000.00 and interest" and then Mrs. Erickson said "I will have to have \$2,000.00 and interest on the principal;" that the next morning he talked to Mr. Bastian and Bastian said that Ivan (a son of Mrs. Erickson) wanted \$1,000.00 of that money; that he then told Mrs. Erickson that he did not see how Ivan could expect that because it would take most of the money to help Mrs. Erickson meet her obligations. (Tr. 22-23; Ab. 38).

Mrs. Eckersley testified that she is the County Clerk of Wayne County; that she typed the agreement at the request of Mrs. Erickson and Mr. Bastian; that they came down to her office and told her what they wanted in the agreement, and she wrote all they told her; that she remembered some of the discussions that were had at the time the words "more or less" were placed in the agreement; that the agreement was written up complete with \$2,000.00 put in it without the words "more or less" before anything was said about the lamb crop. After it was written up and read over, the lamb crop was discussed and she was instructed to put in the words "more or less" right after the \$2,000.00; that she took all three copies of the agreement and put each copy in the machine and wrote in the words "more or less" after they had discussed the matter; that Mrs. Erickson said "I do not want to be hard on you and will put more or less if what you make on the lamb crop doesn't quite reach the \$2,000.00." (Tr. 80-81; Ab. 54-55). On cross examination Mrs. Eckersley again testified that Mrs. Erickson said at the time they were discussing the insertion of the

words "more or less" in the contract, that if the lamb crop didn't come quite up to the \$2,000.00, you will be protected, and that she didn't want any trouble over it; that they were the words she used, "if the lamb crop doesn't quite come up to \$2,000.00;" that they were discussing the possibility that Bastian might not be able to make the entire payment, and that is why the words "more or less" were inserted. (Tr. 82; Ab. 56; Tr. 84; Ab. 57).

THE COURT ERRONEOUSLY HELD THAT
DEFENDANTS WERE NOT IN DEFAULT
BY FAILING TO PAY INTEREST AND
TAXES.

The foregoing testimony does not justify the findings, conclusions and decree of the court that there was no default on the part of the defendants in the performance of the contract or that the words "more or less" were used and intended to be used for the purpose of limiting the liability of the defendants to pay only that sum which should be realized from the profits arising from the feeding of lambs, and we submit that that preponderance of the evidence, when considered in connection with recognized rules of interpretation, shows that the parties did not intend that the Bastians should be released from the payment of the \$2,000.00 on condition that they pay the profits from the lambs. The record is without dispute that they did not even

pay the profits from the lambs. This matter will be subsequently discussed.

This being an equity case, the court will go behind the findings and weigh all the evidence and decide the issues according to its preponderance.

Constitution of Utah, Section 9, Article 8,
Revised Statutes of Utah, 1933, Section
104-41-23.

Holm v. Holm, 44 Utah 242; 139 Pac. 937.

Utah Commercial Savings Bank v. Faux, 44
Utah 323; 140 Pac. 660.

Little v. Stringfellow, 46 Utah 576; 151
Pac. 347.

North Point Consolidated Irrigation Co. v.
Utah & S. L. Canal Co., 16 Utah 246;
52 Pac. 168.

Warner v. Tyng Warehouse Co., 71 Utah
303; 265 Pac. 748.

McKellar Real Estate & Inv. Co. v. Paxton,
62 Utah 97; 218 Pac. 128.

The contract in this case required the defendants to pay to the plaintiff \$2,000.00 more or less on February 1st, 1939 and to pay interest at 4 percent per annum at the time of principal payments. It also required the defendants to pay all taxes and assessments against the land and water commencing with the year 1938. There is not a single word in anybody's testimony from which the inference could be drawn that the defendants were to be released from the payment of interest on the principal sum if the profits from the lambs were not sufficient to pay such interest. Neither Mr. or Mrs.

Bastian made any such claim, nor did they testify to any fact from which such an inference could be drawn. It is extremely difficult to understand how the court could make the finding (Ab. 26) "That there was an understanding that if the defendants would feed lambs upon said property, the plaintiff would look to the net proceeds from the sale of said lambs...for the payment of interest at the rate of 4 percent per annum upon the sum of \$14,000.00, payable February 1, 1939," or the finding that if the profits from the lambs was insufficient to pay said interest, the defendants would be relieved from such payment or that the plaintiff assumed the whole risk that the lamb proceeds would be sufficient to pay such interest or that by reason of any conversations or occurrences the plaintiff waived her right to re-enter and take possession because of the failure to pay such interest. To make a finding of fact not supported by any testimony whatsoever, and upon such fact base a conclusion of law and decree, is in effect to make a new contract and impair the obligation of the contract. Certainly no claim will be made, based upon any fact in evidence in this case, that there is any testimony from which any inference can be drawn that the defendants' obligation to pay interest on the principal sum was contingent in the slightest extent upon the profits from the feeding of lambs.

Another proposition equally uncontroverted is the obligation imposed upon the defendants to pay the taxes upon the land and water for the year 1938. (Ab. 29-30). The conclusion of the court that the defendants were not in default by reason of their

failure to pay taxes on said property for the year 1938 is contrary to the undisputed evidence.

The court made a finding (No. 6; Ab. 20) that the defendants did not pay the interest, or any part thereof, upon the sum of \$14,000.00 or upon any other sum and have paid no interest whatsoever, and that the defendants failed and neglected to pay the taxes upon said property for the year 1938. Notwithstanding such fact, the court concludes (Conclusion No. 1; Ab. 29) that the defendants were not in default by reason of their failure to pay taxes for the reason that no definite time was specified for the payment of said taxes and concludes in the same paragraph that the payment of interest was contingent upon the success of Bastian's lamb-feeding venture. There is not a word of testimony in support of either of these conclusions, the same are not only contrary to the evidence, but are not permissible under the findings. These matters seem so fundamental from any view of the record that further argument or citation of authorities would seem wholly unnecessary. It is certainly a fair construction of this or any contract that where one of the parties agrees to pay taxes for a certain year, it means that the taxes shall be paid in that year or at least shall be paid before the property is sold for non-payment. If there was any intention to the contrary, certainly it does not appear of record in this case.

We submit that the court has improperly construed the contract and failed to give any effect to the evidence or findings in concluding that there was no default by reason of the failure to pay interest and taxes.

THE COURT HAS IMPROPERLY CONSTRUED
THE CONTRACT WITH RESPECT TO
THE USE OF THE WORDS "MORE OR
LESS"

The evidence shows without conflict that when the parties talked to Mrs. Eckersley about the agreement, neither Mr. or Mrs. Bastian made any statement that the February 1st payment was to be in any way contingent upon profits from feeding lambs. Mrs. Eckersley testified that the parties spent about 15 minutes explaining to her what they had agreed upon. She then reduced to writing what they told her. Neither Mr. and Mrs. Bastian said anything to Mrs. Eckersley about the \$2,000.00 payment being contingent upon lamb profits. If there was any contingency about the payment of the \$2,000.00 or if there had been any agreement of that kind, certainly Mr. and Mrs. Bastian would have said something about it to Mrs. Eckersley. It is a good criterion by which to determine what occurred before. No suggestion was made as to any contingency until after the contract had been prepared and the papers removed from the typewriter. Then for the first time it was mentioned by Mr. Bastian (Tr. 52; Ab. 47) that the payment might be less than \$2,000.00. The testimony of Mrs. Eckersley supports almost without qualification what Mrs. Erickson said was the substance of the conversations before the contract was prepared, and what occurred after the contract had been prepared and the words "more or less" added thereto. Mrs. Eckersley said that Mr. and Mrs. Bastian and Mrs. Erickson had been discussing the agreement while she was writing it, but after the discussion, Mrs. Erickson said that she didn't want to be hard on Bastian and would be willing to put in the words

“more or less” if what he made on the lamb crop did not quite reach the \$2,000.00. This was again testified to by Mrs. Eckersley on direct examination when she was called as a witness for the defendant and again on cross examination she answered:

Q. All you remember was they were discussing by themselves about lambs fed on the property?

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

There is nothing to indicate that the parties intended by what was said and done to use the expression “more or less” in any other than its ordinary meaning. There is nothing which would justify the court in giving to the expression a different kind of meaning. The words “more or less” have a rather well accepted meaning in law. The phrase is ordinarily used as qualifying the exact number of acres in a piece of land, and the definition of the phrase as thus used is considered as covering inconsiderable or small differences one way or the other. The fact that the expression here refers to money would in no way change the meaning of the term. Its application is discussed in

Volume 27, R.C.L. Under Title of Vender and Purchaser, Section 152, as follows:

“It is the general view that this phrase, or others of like import, added to a statement of quantity can only be considered as covering inconsiderable or small differences one way or the other and do not in themselves determine the character of the

sale as one in gross or by the acre. As has been said the plain and sensible rule is that when land is sold by the acre as containing so many acres, 'more or less,' if the quantity on an actual survey and estimation, either overrunning or falling short of the contents named, be small, no compensation should be recovered by either party. The words 'more or less' must be intended to meet such a result. But if the variance be considerable, the party sustaining the loss should be allowed for it."

It is further indicated in this section that the same effect is to be given to the qualification of the statement of the quantity by such phrases as 'by estimation' or 'about,' and that the use of such expressions does not show an absolute contract of hazard was intended by the parties so as to deny the right to equitable relief. In

41 C. J., page 214, the term is defined as follows:

"Generally in its plain and most obvious meaning an expression which shows that the parties were to run the risk of gain or loss as there might happen to be an excess or deficiency in the estimated quantity; words of safety and precaution and *intended to cover some slight or unimportant inaccuracy*; words used in contracts or conveyances to qualify the representation of quality in such a manner that, if made in good faith, neither party should be entitled to any relief on account of deficiency or surplus." See Oakes

v. DeLancy, 30 N.E. 974. Also Wilson v. Rafter, 174 S.W. 137.

There are cases which such terms as 'about' and 'more or less' when used in contracts to qualify the stated quantity or number are given the meaning of an *approximation with the stated quantity or number as a fixed basis for such approximation* and there are other cases in which such terms are treated as a mere estimate of an unknown and indefinite quantity or number which the parties have agreed shall be the subject matter of the contract. Each definition may be soundly applied according to the intention of the parties which must be ascertained from all terms of the contract. See Mosby v. Smith, 186 S.W. 49."

We have been unable to find a case where the phrase has been applied following an agreement to pay a sum of money but the use of the phrase under varying situations is discussed in

27 A.L.R. 134, Subdivision 5.

7 A.L.R., page 5, and

70 A.L.R. 368.

No inference, we think, can reasonably be drawn that the parties intended the words "more or less" be given a construction other than their usual and ordinary meaning and certainly it can not be assumed from any testimony in this record that the parties intended anything different than what this language implies. This Court held in the case of

Board of Education v. Wright-Osborne
Co., 49 U. 453; 164 Pac. 1033,

that all the words used in a contract must, if possible, be given their usual and ordinary meaning

and effect, and that it will not be assumed that parties to contracts did not intend what their language implies.

And in the case of

Cummings v. Nielson, 42 Utah 157; 129 Pac. 619, the Court said:

“In determining the meaning that should be given to language used in an agreement in order to ascertain the intention of the parties, all the words or terms used must be given their ordinary and usual effect, when considered in the light of the subject-matter and the nature of the agreement.”

In the case of

Allen v. Bissinger, 62 Utah 226; 219 Pac. 539,

the Court quotes with approval the following language from

13 C.J. 265:

“The apparent mutual assent of the parties, essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of its words and acts. It judges of his intentions by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree to the matter in question, that agreement is established, and it is immaterial what

may be the real but unexpressed state of his mind upon the subject."

In the case of

Murphy v. Salt Lake City, 65 Utah 295;
236 Pac. 680, the Court said:

"Contracts are prepared and entered into for the convenience and protection of the parties, and unless waived the courts are bound to enforce them in accordance with the intention as the same is manifested by the language used by the parties to the contract."

To the same effect see

12 A. Jur., Title Contracts, page 768, Section 236:

"Words will be given their ordinary meaning when nothing appears to show that they are used in a different sense and no unreasonable or absurd consequences will result from doing so. Words chosen by the contracting parties should not be unnaturally forced beyond their ordinary meaning or given a curious, hidden sense which nothing but the exigency of a hard case and the ingenuity of a trained and acute mind can discover."

THE FINDINGS, CONCLUSIONS AND JUDGMENT ARE CONTRARY TO THE EVIDENCE AND THE OBLIGATIONS OF THE CONTRACT.

We respectfully submit that within recognized rules of construction the contract is neither ambiguous or uncertain. However, no objection was interposed to the introduction of parol testimony

tending to show the occurrences prior to the execution of the contract. The plaintiff first testified with respect to these occurrences, and no complaint could now be made that error was committed by the court in permitting such testimony. It is contended, however, that such oral testimony does not show an intention to pay any considerable sum less than \$2,000.00 as the February 1, 1939 payment. Respondents do not contend, or at least no contention was made at trial or in the pleadings, that the contract was in any way modified. Their claim is that they have performed the contract, not because of actual payment, not because of any modification of the contract, but because of the construction that respondents contend should be given to the contract and the use of the words "more or less." We think the testimony shows without serious conflict that there was no conversation or occurrence which justifies respondents' contention in this regard. The testimony of the plaintiff and the defendants as to what occurred prior to the time of the preparation of the contract may have been colored. We must have in mind their interest in the outcome of the litigation. A good yardstick by which to test the testimony of either party as to what occurred before they reached the office of Mrs. Eckersley is what they told her to place in the contract. The entire agreement was discussed and prepared without a word being said by either of the defendants that the obligation to pay \$2,000.00 on February 1, 1939, was in any way contingent upon the ability of Mr. Bastian to make profits from feeding lambs. If there had been such conversations or occurrences as were testified to by Mr. and Mrs. Bastian, certainly in the course of ordinary human events, the Bastians would have said some-

thing about it, and there would, at that time, have been included in the contract some limitation upon that liability or some intimation that the payment of said amount was contingent. There was nothing said concerning such contingency, nor was anything added to the contract after it had been prepared which created such contingency.

The testimony of Mrs. Eckersley fully supports the testimony of Mrs. Erickson that the only contingency of any kind was the possibility that Mr. Bastian's lamb profits might leave him short a small amount in discharging the entire \$2,000.00 obligation and only in this event, could Bastian avoid a default.

If we are to go beyond the terms of the contract, and construe it in the light of the testimony without giving effect to the foregoing rule of construction, we submit that there can be little question as to the actual intention of the parties. It would be repetitious again to call the Court's attention to the testimony of the various witnesses and what occurred prior to and at the time of the making and execution of the contract. We submit that this testimony clearly shows that the parties intended to excuse the defendants only in the event that the amount paid on February 1, 1939, or within the grace period of the contract, should be a sum only slightly less than the required payment of \$2,000.00.

In construing the contract resort must be had not only to the testimony but to all the provisions of the agreement. The seventh paragraph of the contract provides that the defendants shall be allowed thirty days grace in making the payments in the event their lamb crop or other crops can not

be disposed of by February 1st of each year. This grace period was for the benefit and protection of the defendants, not that they might pay less than \$2,000.00, but that they would be protected in the payment of this amount later than February 1st *if their lamb crop or other crops had not been disposed of*. There is no intimation in this paragraph, placed therein for the benefit of the defendants, that if the profits from the lambs did not equal or exceed a sum sufficient to pay \$2,000.00, that they would be relieved from payment at that time. If there had been any such intention, or if in the use of the words "more or less" the parties had in mind what the defendants now claim, certainly something would have been said about it in this provision of the contract. It is significant that when this provision of the contract was prepared, no conclusion had been reached by Mr. Bastian whether he would or would not feed lambs, and he was free to dispose of the crop on the farm in any way that he might choose, but if he had not disposed of it by February 1st, he was then granted an additional grace period of thirty days before he would be in default.

It also clearly appears that the defendants were fully advised concerning the obligations of Mrs. Erickson. Her testimony is to the effect that she fully advised the defendants as to the various obligations that she was owing, and that she would be unable to meet these obligations unless the full sum of \$2,000.00 was paid. The defendants admit that they knew of her obligation on the first mortgage held by the California Western States Life Insurance Company; that they knew of her obligation to the State Bank of Wayne for \$900.00, and in view of this situation the parties provided in paragraph 11 of the contract that the defendants would pay this obligation and deduct the amount of such

payment from the \$2,000.00 due on February 1st and then provided specifically "payment to bank to be made out of the 1938 *crop on land*." There is no ambiguity or uncertainty in this provision of the contract; no construction of its terms is necessary. It clearly appears that the parties intended that the crops on the farm would be used to pay the February payment of \$2,000.00.

Mrs. Erickson was to be protected by such application of the crops and no obligation was imposed upon the defendants to feed the crop to lambs. Mrs. Erickson would naturally want some protection as to the value of the crops already produced, and Mr. Bastian would ordinarily have no objection to a provision so manifestly fair. Crops had been produced upon the property of the reasonable market value at the time possession was delivered to the defendants in the amount of \$1500.00, and certainly Mrs. Erickson would insist upon a payment of that amount plus some additional sum to cover the use and occupation of her new modern five-room home, the value of the use of the personal property and the reasonable value of the marketable livestock. We submit that it is an inconsistent construction to say as the court found in finding No. 9:

"That 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 that 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."

Such finding we submit is not only contrary to the express provisions of the contract, but is con-

trary to the great preponderance of the evidence when viewed in the light of the circumstances under which the contract was made. We ask what fact is there in this case on which the court could find an intention on the part of either of the parties that the defendants should sell or feed all of the crops, should have the benefit and comfort of the plaintiff's home; use all the personal property, have the income of the milk cows, market the hogs, and otherwise enjoy the benefits of other property delivered by plaintiff to the defendants, and when called upon to answer to the performance of the agreement, be excused therefrom by the simple assertion that in the use of the words "more or less," the parties intended that the plaintiff should suffer the entire loss and assume all the risks and hazards of a venture to be conducted by the defendants and over which the plaintiff had no control.

The decision in this case has not only deprived the plaintiff of her crops and her property for the entire year of 1939, but it has deprived her of the crops and the use of her property for the year 1940. She has been placed in a position as shown by the exhibits in this case (Exhibit C; Tr. 130-132) where the first mortgage on her property has become delinquent and attorneys employed to foreclose said mortgage, and she has yet an obligation to Mr. Brinkerhoff upon which a foreclosure was pending at the time of the trial of this action. (Reporter's Tr. 20).

This Court in the case of

Burt v. Stringfellow, 45 Utah 207; 143 Pac.
234,

considered and construed an option to purchase land and had occasion to lay down certain cardinal rules in the construction of contracts where because

of ambiguity or uncertainty resort was had to parol testimony. It was held that where the language of a contract is clear and all of its terms are explicit and certain, it is not open to construction; that all of the words and expressions used by the parties must be given full force and effect, unless to do so leads to an absurdity or is contrary to the manifest purpose or intention of the parties; that the intention of the parties must be determined from the language used when applied to the subject-matter and the surrounding circumstances and conditions.

And in the case of

Caine v. Hagenbarth, 37 Utah 69; 106 Pac.
945,

where the Court construed an option to purchase a copper mine, the Court held that where the exact meaning of a written contract is in doubt, as where the language used is contradictory and obscure, and there are two interpretations possible, one of which establishes a comparatively equitable contract and the other, an unconscionable one, the former should prevail.

Makris v. Malis, 50 Utah 544; 167 Pac.
802.

The Court in this case construed a contract for the sale of shares of stock in a corporation and held that in construing a written contract it is the duty of the court to consider all the terms and the relationship of the parties existing at the time the contract was made, and if possible, to arrive at their intent. And in

Penn Star Mining Co. v. Lyman, 64 Utah
343; 231 Pac. 107,

the Court considers at length rules of interpretation to be applied in determining the intention of

the parties to written contracts. The Court quotes with approval from the case of

Salt Lake City v. Smith, 104 Fed. 462, where the following language was used by the Court:

“The purpose of a written contract is to evidence the terms on which the minds of the parties to it met when they made it, and the ascertainment of those terms, and the sense in which the parties to the agreement used them when they agreed to them is the great desideratum and the true end of all contractual interpretation. The express terms of an agreement may not be abrogated, nullified, or modified by parol testimony; but, when their construction or extent is in question, the meaning of the terms upon which the minds of the parties met when they settled them, and their intention in using them, must be ascertained, and, when ascertained, they must prevail in the interpretation of the agreement, however broad or narrow the words in which they are expressed. In the discovery of this meaning, the intention, the situation of the parties, and facts and circumstances which surrounded and necessarily influenced them when they made their contract, the reasonableness of the respective claims under it, and, above all, the subject-matter of the agreement and the purpose of its execution, are always conducive to, and often as essential and controlling in, the true interpretation of the contract as the mere words of its various stipulations. These are rules for the

construction of contracts which commend themselves to the reason and are established by repeated decisions of the courts, and they must not be permitted to escape attention in the consideration of the contract which this case presents. *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 F. 70, 74; 12 C.C.A. 37, 41, 42; 27 U. S. App. 364, 372."

The Court in this case held that extrinsic evidence may not be admitted to affect, vary, add to, or modify written instrument, but is admissible to show the true intention of parties, if the language of the instrument is obscure, uncertain or ambiguous; and that unless provisions of a contract are clearly independent, distinct and severable, all terms and provisions must be construed together.

PLAINTIFF WAS ENTITLED TO REPOSSESS FOR DEFENDANTS' DEFAULT.

The contract contains the following provision:

"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."

Respondents have made no claim that appellant was not entitled to repossess if they were in default. Their answer (Ab. 11) admits the contract as pleaded but "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," and allege that the plaintiff herself has violated the terms of the agreement, and set forth in paragraph 6 a claimed specific violation of the agreement in that Mrs. Erickson gave a mortgage to J. S. Peterson to secure the payment of an obligation for \$231.61. (Ab. 26). They deny that the respondents' occupation of the premises is wrongful or unlawful or contrary to the terms of the agreement. We can see no issue upon the right of the plaintiff to repossess if it is determined that plaintiff was entitled to the \$2,000.00 payment on February 1, 1939, or substantially that amount less, of course, the sum of \$900.00 paid by the defendants on behalf of the plaintiff to the State Bank of Wayne. The amount of the default on March 1, 1939, was the balance of the \$2,000.00 amounting to \$1,100.00, interest on \$14,000.00 amounting to \$280.00, and taxes. When the amount of the default is considered in connection with the value of crops and other property delivered to the defendants, repossession would certainly not be inequitable, and would not amount to the imposition of a penalty. The pure and simple issue, therefore, is performance v. non-performance. The right of the plaintiff to declare a forfeiture and to repossess is established by the decision of this Court in the case of

Imlay v. Bubler, 77 Utah 547; 298 Pac.
383.

Whatever uncertainty existed in this State arising out of prior decisions, was settled by the Imlay-Bubler case. The plaintiff there brought his action

to recover for the unpaid purchase price of real estate. There was a provision in the contract as follows:

But in case default be made in said payments or either of them or the taxes should not have been paid each year by the second party on the land and water rights herein described, then this contract shall become null and void and the rights and interests of said purchaser shall be declared forfeited and the party of the first part shall have the right to re-enter and take possession of said property without recourse to law.

The Court distinguishes the Cooley, Garn and Richards cases, refers to the leading case of Wilcoxson v. Stitt, which holds that such provisions are for the benefit of the vendor and concludes this phase of the decision in the following language:

"It further is to be noted that in both the Rose and Cooley cases this Court recognized and approved the well-settled doctrine that as a general proposition forfeiture clauses of contracts of the character considered by this Court are for the benefit of the vendor and not of the vendee, and that, on default of payments and non-compliance with the terms of the contract by the vendee, the vendor ordinarily has a choice of several remedies. He at his election may (1) specifically enforce the contract, or (2) sue at law to recover the purchase price remaining due, or (3) re-enter and take possession of the lands and recover damages for the breach of contract.

The contract here was not a mere option to purchase. It was one where the plaintiff agreed to sell and the defendant to purchase the real estate and water right at an agreed price which the defendant promised and agreed to pay as by the terms of the contract provided, and where he as well as the plaintiff was required to perform the covenants and conditions respectively imposed on each and as by the terms of the contract provided. We thus are of the opinion that the plaintiff had the right to maintain the action and to enforce the contract as was done, and that the demurrers were properly overruled; and, inasmuch as the defendant by his answer admitted the execution of the contract and expressly admitted that he had failed to make the payments as alleged in the complaint and as provided by the contract, judgment on the pleadings, was properly granted."

Nor is there any merit in the defense that plaintiff violated her contract by giving a mortgage to J. S. Peterson. The obligation due to J. S. Peterson was one of the accounts that Mrs. Erickson told Mr. Bastian must be paid out the \$2,000.00. J. S. Peterson had a judgment against Mrs. Erickson and had a writ of garnishment issued and served upon the defendant Bastian. By this writ the Bastians were required not to pay money due and owing to Mrs. Erickson. In order to release this writ of garnishment and to satisfy the claim of Mr. Peterson, the plaintiff gave Mr. Peterson a mortgage and procured a release of the writ of

garnishment. This release garnishment was served on the defendants on April 3, 1939, (Ab. 5).

The rule of law relating to incumbrances on land sold by a vendor is stated in

Sections 437-438, 66 C.J., Title Vendor and Purchaser, as follows:

“Generally, however, to justify rescission on the ground of encumbrances, it must appear that the vendee contracted for a title free of encumbrances; that he neither knew or was chargeable with knowledge of the encumbrance; that the alleged encumbrance is so in fact, is valid and legal, that it cannot be removed before the vendor is bound to convey, or before the offer of the purchaser to rescind, or has not been removed before decree in the suit to rescind, and that the vendor would not have removed it if the purchaser had been willing to complete the contract. The mere existence of a mortgage does not justify rescission of an installment contract where provision is made for discharge of the mortgage when the time for completion of the contract arrives, nor may the purchaser rescind where the charge on the property is less than the unpaid purchase money and may be set up as a defense pro tanto in an action to recover therefor.”

Section 438. Rule in United States.

“The American decisions have uniformly held that the vendor cannot be placed in default for defect of title or inability to convey, by tender of performance by the purchaser and demand for performance by

the vendor before the expiration of the time fixed by the contract for making a conveyance, unless the nature of the defect is such that the vendor cannot acquire title."

DEFENDANTS WERE IN DEFAULT ON THEIR OWN THEORY.

The testimony of Arthur Brian, cashier of the State Bank of Wayne (Tr. 95-102; Ab. 61-62; Tr. 115-118; Ab. 67-68), shows that Bastian received from the sale of lambs \$3736.04; that he paid out the following items: Purchase price of lambs, \$1900.00; feed advances, \$463.00. Total \$2363.00; that he paid to the bank on behalf of Mrs. Erickson, \$900.00 principal, \$53.91 interest; total expenditures \$3316.91, leaving a profit growing out of the lamb-feeding venture of \$419.13. It was further claimed, however, that Bastian paid 25c per head for freight on the lambs which was not paid by or through the bank. No showing was made, however, as to how many head of lambs were shipped, but there were 500 originally purchased. (Tr. 59; Ab. 49). On the assumption that as many were shipped out as were originally bought, the freight would not exceed \$125.00, so that it is manifestly apparent that Bastian did not even pay to Mrs. Erickson the amount realized as profits. However, Mr. Bastian claimed that he had paid some of Mrs. Erickson's bills and upon payment deposited the receipts with Mrs. Eckersley as escrow holder. These bills were stipulated (Reporter's Tr. 5; Ab. 32) as follows:

Charles Taylor, \$40.00 which Taylor claimed was due from Mrs. Erickson for cutting grain be-

fore Bastian took possession of the property; \$10.20 for a blacksmith bill claimed to be due from Mrs. Erickson to Myron Guymon; \$4.50 for a claim of back assessments on water tap; and \$19.00 on an alleged old account of the People's Light & Power Company. The total of these bills amounts to \$73.70, still leaving a profit not paid to Mrs. Erickson of \$220.43. There was no authority for Mr. Bastian to pay any accounts of Mrs. Erickson and he would not be entitled to any credit for so doing. We submit that the record is without any substantial dispute that the defendants did not even comply with what they claimed their agreement was, and that the finding of the court to the effect that the defendants had paid to the plaintiff all of the profits arising from the feeding of lambs is not supported by the evidence and in fact is contrary to the undisputed evidence.

We respectfully submit that the contract in this case has been improperly construed; that a very serious injustice has resulted to the appellant. The facts show a very great and unjust enrichment of the respondents at the expense of the appellant; that the judgment should be reversed with directions to the District Court of Wayne County to enter a decree for the repossession of all of the appellant's property and a forfeiture of all of the rights of respondents under the contract of purchase and an accounting by the respondents for all of the crops produced in the year 1940.

Respectfully submitted,

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