

1988

Mont R. Anderson, Personal Representative of the
Estate of Cloyd H. Brinkerhoff, Lena Brinkerhoff,
and Mark J. Brinkerhoff v. Elsie Brinkerhoff, Golda
B. Adair, Warren Brinkerhoff, Arlene B. Goulding,
John Does I through V : Brief of Respondent

Utah Court of Appeals

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH
DOCKET NO. **880122-CA**

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF, LENA
BRINKERHOFF, and MARK J.
BRINKERHOFF,

Plaintiffs/Respondents,

vs.

ELSIE BRINKERHOFF, GOLDA B.
ADAIR, WARREN BRINKERHOFF,
ARLENE B. GOULDING, JOHN
DOES I through V,

Defendants/Appellants.

RESPONDENTS' BRIEF

Case No. 860165

88-0122-CA

APPEAL FROM JUDGMENT
OF THE SIXTH JUDICIAL DISTRICT COURT
IN AND FOR KANE COUNTY, STATE OF UTAH

BRIEF OF PLAINTIFFS/RESPONDENTS

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FILED

DEC 11 1986

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

	<u>PAGE NO.</u>
<u>TABLE OF AUTHORITIES</u>	vi
<u>STATEMENT OF ISSUES PRESENTED ON APPEAL</u>	1
<u>STATEMENT OF THE CASE</u>	2
<u>STATEMENT OF FACTS</u>	4
<u>ARGUMENT</u>	9
<u>POINT I</u> THE JUDGMENT OF THE TRIAL COURT IS PROPERLY WITHIN THE BOUNDS OF THE LAW AND HAS ACHIEVED EQUITABLE RESULTS IN DISTRIBUTING THE SUBJECT PROPERTY.....	9
<u>POINT II</u> THE 1966 CONTRACT ENTERED BETWEEN ELSIE AND HER TWO SONS, CLOYD AND MARK, HAS REMAINED A VALID CONTRACT FROM ITS EXECUTION TO THE PRESENT.....	12
A. At no time did Elsie Brinkerhoff give her two sons notice that she considered them to be in default of their obligations under the contract.....	14
B. Utah law requires that a seller allow a reasonable period of time for buyers to cure their breach prior to enforcing the forfeiture clause provisions of installment land sales contracts.....	16
C. Elsie Brinkerhoff as seller under the 1966 contract waived her right to demand strict compliance with the contract's installment payment terms without giving prior notice.....	17
D. There is no indication that the parties to the 1966 contract ever intended to abandon all of their rights and obligations thereunder.....	19
E. At this time, all remaining parties (to the 1966 contract) desire that the contract continue on full force and effect. Reaching a contrary	

	conclusion will frustrate the purpose of the contract and deny all parties the benefit thereto.....	21
<u>POINT III</u>	THE DETERMINATION THAT ELSIE BRINKERHOFF WAS INCOMPETENT IN HANDLING HER LEGAL AFFAIRS FROM ABOUT 1970 ON WAS A MATTER CLEARLY WITHIN THE COMPETENCE OF THE TRIAL COURT, OR AT THE VERY LEAST WAS NOT REVERSIBLE ERROR.....	22
<u>POINT IV</u>	THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY ASSUMING THE RESPONSIBILITY OF PROTECTING THE INTERESTS OF ELSIE BRINKERHOFF.....	26
<u>POINT V</u>	ABSENT ANY FINDING OF INCOMPETENCE, THE FACT THAT ELSIE DID NOT UNDER- STAND THE NATURE OF THE DEEDS TRANSFERRING TITLE IS SUFFICIENT TO INVALIDATE THE 1981 DEEDS.....	27
<u>POINT VI</u>	THE "PERFECT TENDER RULE" HAS NO APPLICATION TO THIS CASE.....	30
<u>POINT VII</u>	ABSENT ALL OTHER FINDINGS AND CONCLUSIONS, THE DETERMINATION THAT ALL AGREEMENTS ENTERED BY ELSIE BRINKERHOFF FOLLOWING 1970 WERE THE RESULT OF UNDUE INFLUENCE IS SUFFICIENT SUPPORT THE TRIAL COURT'S HOLDING.....	32
<u>CONCLUSION.</u>		35
<u>ADDENDUM.</u>		A-1
<u>A. RECORD AND OTHER DOCUMENTS</u>		
1.	Complaint (R.1).....	A-1
2.	Answer, Crossclaim and Counterclaim (R.16)....	A-16
3.	Amended Counterclaim of Elsie Brinkerhoff and Crossclaim Against Mark J. Brinkerhoff, and Amended Counterclaim, etc. (R.65).....	A-28
4.	Notice of Dismissal as to Defendants Charles Brinkerhoff and Betty B. Esplin (R.74).....	A-37
5.	Withdrawal of Attorney for Charles A. Brinkerhoff and Betty B. Esplin (R.78).....	A-39

6.	Second Amended Counterclaim of Elsie Brinkerhoff and Crossclaim Against Mark J. Brinkerhoff, and Second Amended Counterclaim of Golda B. Adair, etc. (R.88)...	A-41
7.	Letter from Elsie J. Brinkerhoff to Hans Q. Chamberlain (Exhibit P-11).....	A-53
8.	Defendants' First Interrogatories to Plaintiff (R.46).....	A-54
9.	Answer of Mark J. Brinkerhoff to Second Amended Counterclaim and Cross-Claims of Defendants (R.341).....	A-73
10.	Order (R.350).....	A-77
11.	Second Amended Complaint (R.351).....	A-78
12.	Notice to Appoint Counsel (R.388).....	A-99
13.	Cross-Claim of Golda B. Adair, Warren Brinkerhoff and Arlene B. Goulding Against Co-Defendant, ELSIE Brinkerhoff (R.393).....	A-101
14.	Notice to Appoint Successor Attorney, Notice of Pending Litigation Against You and Notice of Taking Deposition (R.400)..	A-108
15.	Stipulation (R.403).....	A-111
16.	Answer of Elsie Brinkerhoff to Cross-Claim (R.421).....	A-124
17.	Pretrial Order (R.428).....	A-130
18.	First Amended Findings of Fact and Conclusions of Law (R.629).....	A-148
19.	First Amended Judgment and Decree Quieting Title (R.652).....	A-180
20.	Exhibit P-1.....	A-191
21.	Exhibit P-2.....	A-196
22.	Exhibit P-3.....	A-201
23.	Exhibit P-4.....	A-202
24.	Exhibit D-5.....	A-203
25.	Exhibit D-6.....	A-205

26.	Exhibit D-7.....	A-207
27.	Exhibit D-8.....	A-211
28.	Exhibit P-11.....	A-212
29.	Exhibit P-12.....	A-213
30.	Exhibit D-20.....	A-214
31.	Exhibit D-22.....	A-229
32.	Exhibit P-40.....	A-233
33.	Exhibit P-41.....	A-246

B. STATUTES

61A AmJur2d, Pleading, Section 382.....	A-247
71 AmJur2d, Specific Performance, § 62.....	A-250
Rule 16, Utah Rules of Civil Procedure.....	A-252
Rule 17(b), Utah Rules of Civil Procedure.....	A-253
Utah Code Annotated, 68-3-2 (1953, as amended).....	A-255

C. CASES CITED

<u>Tanner vs. Bandsgaard</u> , 612 P.2d 345 (Utah 1980).....	A-256
<u>Fuhrman v. Bissenger</u> , 375 P.2d 27 (Utah 1962).....	A-259
<u>Hansen v. Christensen</u> , 545 P.2d 1152, 1154 (Utah 1976).....	A-261
<u>Morris v. Sykes</u> , 624 P.2d 681 (Utah 1981).....	A-264
<u>Call v. Timber Lakes Corp.</u> , 567 P.2d 1108 (Utah 1977).....	A-269
<u>Lamont v. Eviien</u> , 508 P.2d 532, 534 (Utah 1973).....	A-271
<u>Udevco, Inc. v. Wagner</u> , 678 P.2d 679, 682 (Nev. 1984).....	A-274
<u>Angus Hunt Ranch, Inc. v. Reb, Inc.</u> , 577 P.2d 645, 650 (Wyo. 1978).....	A-278
<u>Timpanogos Highlands, Inc., v. Harper</u> , 544 P.2d 481, 484 (Utah 1975).....	A-286

<u>Pitcher v. Lauritzen</u> , 423 P.2d 491, 493 (Utah 1967)	A-292
<u>Whitney v. Walker</u> , 479 P.2d 469, 471 (Utah 1971) ...	A-297
<u>Trolinger v. Cluff</u> , 57 P.2d 332, 335 (Idaho 1936)	A-301
<u>Redevelopment Agency of Salt Lake City v. Barrutia</u> , 526 P.2d 47, 51 (Utah 1974)	A-310
<u>Simpson v. General Motors Corp.</u> , 470 P.2d 399, 402 (Utah 1970)	A-315
<u>Baker v. Pattee</u> , 684 P.2d 632, 635 (Utah 1984)	A-319
<u>Seequist v. Seequist</u> , 524 P.2d 598, 599 (Utah 1974)	A-326
<u>Pack v. Hull Development Co., Inc.</u> , 667 P.2d 39, 40 (Utah 1983)	A-328
<u>Singleton v. Pichon</u> , 635 P.2d 254, 255 (Idaho 1981)	A-331
<u>Bradbury v. Rasmussen</u> , 401 P.2d 710, 713 (Utah 1965)	A-334
<u>Cunningham v. Cunningham</u> , 690 P.2d 549, 553 (Utah 1984)	A-340

TABLE OF AUTHORITIES

<u>STATUTES CITED</u>	<u>PAGE NO.</u>
61A AmJur2d, Pleading, Section 382.....	23
71 AmJur2d, Specific Performance, § 62.....	31
Rule 16, Utah Rules of Civil Procedure.....	23
Rule 17(b), Utah Rules of Civil Procedure.....	26
Utah Code Annotated, 68-3-2 (1953, as amended).....	10
 <u>CASES CITED</u>	
<u>Tanner vs. Bandsgaard</u> , 612 P.2d 345 (Utah 1980).....	10, 14, 31
<u>Fuhrman v. Bissenger</u> , 375 P.2d 27 (Utah 1962).....	14, 31
<u>Hansen v. Christensen</u> , 545 P.2d 1152, 1154 (Utah 1976).....	14, 17
<u>Morris v. Sykes</u> , 624 P.2d 681 (Utah 1981).....	15
<u>Call v. Timber Lakes Corp.</u> , 567 P.2d 1108 (Utah 1977).....	16
<u>Lamont v. Evien</u> , 508 P.2d 532, 534 (Utah 1973).....	17
<u>Udevco, Inc. v. Wagner</u> , 678 P.2d 679, 682 (Nev. 1984).....	17
<u>Angus Hunt Ranch, Inc. v. Reb, Inc.</u> , 577 P.2d 645, 650 (Wyo. 1978).....	18
<u>Timpanogos Highlands, Inc., v. Harper</u> , 544 P.2d 481, 484 (Utah 1975).....	19
<u>Pitcher v. Lauritzen</u> , 423 P.2d 491, 493 (Utah 1967).....	20
<u>Whitney v. Walker</u> , 479 P.2d 469, 471 (Utah 1971).....	26
<u>Trolinger v. Cluff</u> , 57 P.2d 332, 335 (Idaho 1936).....	26
<u>Redevelopment Agency of Salt Lake City v. Barrutia</u> , 526 P.2d 47, 51 (Utah 1974).....	27
<u>Simpson v. General Motors Corp.</u> , 470 P.2d 399, 402 (Utah 1970).....	27
<u>Baker v. Pattee</u> , 684 P.2d 632, 635 (Utah 1984).....	28

<u>Seequist v. Seequist</u> , 524 P.2d 598, 599 (Utah 1974).....	29
<u>Pack v. Hull Development Co., Inc.</u> , 667 P.2d 39, 40 (Utah 1983).....	31
<u>Singleton v. Pichon</u> , 635 P.2d 254, 255 (Idaho 1981).....	31
<u>Bradbury v. Rasmussen</u> , 401 P.2d 710, 713 (Utah 1965).....	34
<u>Cunningham v. Cunningham</u> , 690 P.2d 549, 553 (Utah 1984).....	35

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Was the trial court correct in upholding a contract entered between Elsie Brinkerhoff and her two sons, Cloyd and Mark, in 1966?

2. Was there any indication that Elsie Brinkerhoff complied with the terms of the contract or the law in giving notice of default of the 1966 contract or her intent to discover the same?

3. Did Elsie Brinkerhoff allow her two sons or their successors in interest any period of time to cure any alleged default under the 1966 contract?

4. Is there any indication that the parties to the 1966 contract intended to abandon the same and treat all contractual rights and obligations as a nullity having no effect whatsoever?

5. Has the trial court operated within the bounds of equity in reaching a conclusion that the 1966 contract should remain in full force and effect in accordance with the current desires of the parties thereto?

6. Did Elsie Brinkerhoff waive strict compliance with the terms of the 1966 contract relating to Plaintiffs' payment obligations?

7. Was the trial court's determination that Elsie Brinkerhoff was incompetent as to legal affairs from about 1970 a matter lying outside the court's competence so as to constitute reversible error?

8. Was the trial court operating within the bounds of law and equity when assuming the responsibility of protecting the interests of Elsie Brinkerhoff during the trial?

9. Absent any finding of incompetence, is the fact that Elsie Brinkerhoff failed to understand the nature of deeds executed transferring title after 1970, sufficient to invalidate such deeds?

10. Is the "perfect tender" rule appropriate to this case?

11. The trial court specifically found that all contracts entered by Elsie Brinkerhoff following 1970 were the result of undue influence. Absent all other findings of fact and conclusions of law, is this finding sufficient on its own to support the trial court's holding?

STATEMENT OF THE CASE

On June 21, 1982, Respondent Mont R. Anderson, Personal Representative of the Estate of Cloyd H. Brinkerhoff filed suit on the Sixth Judicial District Court in and for Kane County, Civil No. 1826, seeking to clarify title to property located in Kane County, Utah. (R.1)

On July 16, 1982, Appellants along with Charles A. Brinkerhoff, Betty B. Esplin, and Darlos T. Brinkerhoff answered Respondent Anderson's Complaint. (R.16) By the same instrument, these parties counterclaimed against Respondent Anderson and crossclaimed against fellow defendant Mark J. Brinkerhoff. On September 7, 1982, an Amended Counterclaim and Crossclaim was filed. (R.65)

On September 13, 1982, a Notice of Dismissal as to Defendants Charles Brinkerhoff and Betty B. Esplin was filed (R.74) followed by the filing of a Withdrawal of Attorney for the same parties on December 6, 1982. (R.78)

On February 22, 1983, a Second Amended Counterclaim and Crossclaim was filed on behalf of all remaining defendants against co-defendant Mark J. Brinkerhoff. (R.88)

On September 23, 1983, a Motion to Withdraw as Attorney for Elsie Brinkerhoff was filed by Appellants' attorney Hans. Q. Chamberlain, at the request of Elsie Brinkerhoff. (R.334, Exhibit P-11)

Mark J. Brinkerhoff answered Appellants' Second Amended Counterclaim and Crossclaims on September 27, 1983. (R. 341). By order of the Court, dated December 2, 1983, Respondent Anderson was allowed to file a Second Amended Complaint with substitution of parties whereby defendant Mark J. Brinkerhoff and heretofore unnamed party Lena Brinkerhoff were made Plaintiffs in the action. (R.350 and R. 351)

On September 13, 1984, Plaintiffs placed on file a Notice to Appoint Counsel directed to Elsie Brinkerhoff (R.388) and on October 1, 1984, all remaining co-defendants, through Hans Q. Chamberlain, who previously represented Elsie Brinkerhoff, filed a Crossclaim against Elsie Brinkerhoff. On this same date co-defendants filed a Notice to Appoint Successor Attorney, also directed to Elsie Brinkerhoff. (R.400)

By stipulation recorded September 11, 1984, Elsie Brinkerhoff stated that she recognized the original contract as still in force and that her actions in attempting to convey property covered thereby at a subsequent date were repudiated. (R.403)

On February 19, 1985, Elsie Brinkerhoff, acting through attorney Willard R. Bishop, answered the Crossclaim which had been filed against her. (R. 421)

On February 21, 1985, a Pretrial Order was recorded and signed by Willard R. Bishop on behalf of Plaintiffs and Defendant Elsie Brinkerhoff and by Hans Q. Chamberlain on behalf of Defendants Adair, Goulding and Warren Brinkerhoff. (R.428)

The case was tried before the Honorable Judge Don V. Tibbs, sitting without jury on February 22, 1985, and a Transcript of the proceedings was obtained. On February 20, 1986, the trial court entered its First Amended Findings of Fact and Conclusions of Law (R.629) as well as its First Amended Judgment and Decree Quieting Title (R.652) on behalf of Plaintiffs upholding the 1966 contract and requiring Plaintiffs to make up past due payments with interest. The First Amended Judgment also voided all documents signed by Elsie Brinkerhoff from 1970 forward, declaring all such documents the result of undue influence, among other things.

STATEMENT OF FACTS

Plaintiff, Mont R. Anderson, is the personal representative of the estate of Cloyd H. Brinkerhoff, also known as "Tine" Brinkerhoff. He is the son-in-law of Plaintiff Lena Brinkerhoff. Lena Brinkerhoff was married to Cloyd H. Brinkerhoff at the time of his death in October of 1979. Mark J. Brinkerhoff is the son of Elsie Brinkerhoff and the brother-in-law of Lena Brinkerhoff. Elsie Brinkerhoff is the Mother of Mark Brinkerhoff, Cloyd Brinkerhoff, Golda B. Adair, Warren ("Tink") Brinkerhoff, Arlene B. Goulding, Charles Brinkerhoff and Betty B. Esplin.

The real property which is the subject of this action consists of 1,956.17 acres of grazing ground and 18.01 acres of farm land. The property is located north and east of Glendale,

Kane County, Utah. All of the subject property passed through the estate of Merle Brinkerhoff to Elsie Brinkerhoff upon Merle's death. The Brinkerhoff property also consists of some water rights in the Arizona Strip area and additional grazing and water rights.

For sometime following their father's death Cloyd and Mark had been taking care of the property and the livestock located thereon. (Tr. 67) During this period it became apparent that Elsie's other children were not interested in the farming and ranching opportunities present by the land and an agreement to sell the land was established whereby Cloyd and Mark agreed to purchase the land from their mother. In 1966, this agreement was formalized by a contract prepared by Ken Chamberlain, Attorney at Law, who resided in Richfield, Utah. (Exhibit P-1, P-2)

The contract provided that Cloyd and Mark, as buyers, were to pay \$53,388.00 as consideration for the purchase of the real property which is the subject of this action. The terms of payment were outlined as follows: (1) Mark and Cloyd were to pay Elsie \$2,000 each year for the rest of her life retroactive to November 1, 1964; (2) receipt of payments for 1964 and 1965 was acknowledged; (3) all interest on the principal balance was waived in consideration for the agreement to pay the yearly installment with Elsie's death regardless of the total amount paid; and (4) if the total recited principal was not paid prior to Elsie's death, two-sevenths of the remaining portion was to be paid in annual installments divided equally between Warren and Charley Brinkerhoff. The contract also provided for the establishment of

an escrow along with instructions pertinent thereto. (Exhibits P-1, P-2)

The default provisions of the contract are particularly important. These provisions give Elsie the option to demand a redelivery to her of all escrowed documents in the event of default in the payment of principal and interest or any other term following a 30-day remedy period. All defaults other than payments of principal and interest required specific notice to commence the 30-day period. Once the demand was made for redelivery of escrowed documents, Mark and Cloyd would be required to peaceably surrender the premises, allowing Elsie to re-enter without further process. (Exhibits P-1, P-2)

From the time the contract was executed it was treated primarily as a formality by all parties. Prior to the signing of the agreement, Mark and Cloyd had been in possession of the land and were taking care of their mother's needs. (Tr. 67) This same pattern of behavior continued following execution of the written document. The precise terms of the contract were never fully followed. All documents were not placed in escrow and payments were made to Elsie in a manner other than that specifically outlined. (Tr. 68-69) Such payments were made by paying Elsie's bills, giving her money directly or by depositing money directly into her checking account rather than into escrow. (Exhibit D-22) All these procedures were acceptable to Elsie. (TR 303:4-25; 304:1-14; 327:8-13; 328:1-25; 337:1-18; 349:12-19; 367:12-25; 411-412)

The trial court reached a conclusion that some of the payments made to Elsie in the above described manner constituted payments on the contract while others were in the nature of gifts and support which sons would normally provide to their widowed mother. (Tr. 536, F of F 9 and 10) Though actual payments were determined to be less than required under the terms of the contract, the court specifically found that at no time did Elsie ever declare herself dissatisfied with the performance, nor did she declare the contract in default or attempt to terminate the contract. (R. 537, F of F 11) The court specifically found that the 1966 contract was still in force, despite some delinquencies in payment.

Beginning in about 1971, Elsie Brinkerhoff executed a number of documents bearing on this case. In 1971, Elsie signed an affidavit declaring her intention to defend the rights of ownership to the subject property in Mark and Cloyd. (Exhibit P-3) In 1977, a receipt for \$23,000 was signed by Elsie recognizing payments received from Mark and Cloyd in the contract. (Exhibit P-4) Elsie continued to recognize the receipt of that amount up to and including the time of trial, and was satisfied with how things were handled. (TR 303:4-25; 304:1-14; 327:8-13; 328; 327:10-18; 349:12-19; 367:12-25; 411-412; 338:21-25; 339)

In 1979, a joint tenancy deed was prepared by Brad Adair (Elsie's grandson and a son to Defendant Golda Adair) and signed by Elsie Brinkerhoff. (TR. 439) The deed purportedly transferred title from Elsie to Elsie, Cloyd and Mark as joint tenants with full rights of survivorship. (Exhibit D-5) The deed did not

conform to the contract, was not properly notarized, and was never delivered or accepted. (TR 76-79, 440) The origin of this deed has not been clearly established. Brad Adair's "evidence" concerning origin was not allowed. (TR 436:17-23; 438:22-25; 439:1-9) Neither Elsie nor Mark have any recollection whatsoever of the deed's inception or the events attending its execution. (TR. 73, 295-307)

In 1979 Cloyd Brinkerhoff died and his property passed into his estate which is being administrated by Mont R. Anderson. Mr. Anderson filed the original Complaint seeking to clarify the ownership of the real estate in question. (Exhibit P-12; R.1)

Prior to filing this suit, after the 1979 deed surfaced purportedly changing title in the subject property to a joint tenancy, Defendants (excluding Elsie) caused a warranty deed to be prepared which would transfer Elsie's purported interest in the property to Arlene Goulding, Charles Brinkerhoff, Betty Esplin, Warren Brinkerhoff, and Golda Adair in equal portions. (Exhibit D-6; TR. 307) Elsie's signature was obtained on the document even though the document was never read to her, she did not understand it, never appeared before a notary, was never paid any consideration, and she was never advised to seek independent counsel. (TR. 307-310)

The original suit was filed against Elsie and each of her children specifically mentioned in the immediately preceding paragraph, as well as Mark Brinkerhoff.

Hans Q. Chamberlain, was initially contacted personally by Golda, Warren, Arlene, Charles and Betty and was asked to serve as

counsel. On August 13th, 1983, Elsie indicated that she did not want to remain a party to the action and requested that her attorney, Hans Q. Chamberlain, withdraw, which he did. (Exhibit P-11). Elsie Brinkerhoff thereafter remained unrepresented until Willard R. Bishop, at her written request, entered an appearance on her behalf on February 14, 1985. (Exhibits P-40, P-41; R.421)

Therefore, at the beginning of the trial, Willard R. Bishop represented Mont R. Anderson, Lena, Elsie and Mark. During the course of the trial, because Elsie could not remember asking Mr. Bishop to represent her, the court decided that in the interest of judicial economy it would look after Elsie's interests and appoint counsel only if her interests were being abused. (TR. 347) Hans Q. Chamberlain, who formerly represented Elsie, continued the legal action against her.

When the trial court determined that \$50,655.11 was owed to Elsie, Plaintiffs promptly paid that amount, in full. (R.611, R.663, and R.670, Notice of Payments, Notice of Final Payment, Receipt of Funds and Initial Inventory)

ARGUMENT

POINT I

**THE JUDGMENT OF THE TRIAL COURT IS PROPERLY
WITHIN THE BOUNDS OF THE LAW AND HAS ACHIEVED
EQUITABLE RESULTS IN DISTRIBUTING THE SUBJECT
PROPERTY.**

All of the facts and circumstances surrounding the above-entitled action indicate that the trial court's First Amended Findings of Fact and Conclusions of Law and First Amended Judgment have achieved results which are clearly within the powers

of the Court, are in the best interests of all parties, and should not be overturned on appeal.

In matters requiring the trial court to exercise its powers of equity, such as specific performance of contractual obligations in the present case, the Utah Supreme Court has ruled that great deference should be accorded the trial court. In Tanner vs. Bandsgaard, 612 P.2d 345 (Utah 1980), a case substantially similar to the present, the high court stated:

As is so often true in such controversies, there is sharp conflict in the evidence as to material and controlling facts. Notwithstanding the correctness of Defendants' urgency that this Court may review the evidence because it is a case in equity, it is our well-established rule that due to the prerogatives and advantaged position of the trial judge, we indulge considerable deference to his findings. Where evidence is in dispute, we assume that he believed that which is favorable to his findings, and we do not disturb them unless it clearly preponderates to the contrary.

Id. at 346.

Appellants' statement of factss does not comply with this rule and is really an argument by them, not the facts as found by the trial court or as they support the lower court's findings and rulings.

Furthermore, Utah law grants a preference to the court's powers of equity whenever the same come into conflict with inconsistent provisions in the common law:

Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail.

Utah Code Annotated, 68-3-2 (1953, as amended).

In the present case Plaintiffs have successfully sought to reassure their position under a contract entered in 1966 between a mother and her two sons. The original purpose of the contract was to provide for the material well-being of Elsie Brinkerhoff throughout the remaining days of her life. All parties to this action were aware of the initial arrangements and for many years expressed no dissatisfaction with the manner in which business was transacted between Elsie and her two sons. At no time under the 1966 contract has Elsie ever wanted for the necessities or desires of her life. In fact, to this very day Elsie continues to express her desire that the contract remain in force, a position entirely consistent with the trial court's Judgment and the desires of all parties to the original contract. (TR 295-307; 359:9-15; Exhibits P-11 and P-40)

Any conclusion other than that reached by the trial court would frustrate the intent of the parties and work an injustice upon Elsie Brinkerhoff, as well as Plaintiffs, in this action. Plaintiffs stood ready to fully perform the obligations placed upon them by the trial court in making up any deficits in their performance, and paid the full amount found due by the Court. (R.611, R.670; Notice of Payment; Receipt of Funds and Initial Inventory, and R.663, Notice of Final Payment TR 126:7-10; 144:6-17) In fact, Plaintiffs have paid the entire remaining unpaid balance, as found by the Court, into trust for Elsie as ordered by the Court in order to assure that she is well provided for during the remaining days of her life.

Defendants, on the other hand, seek to abrogate all of the rights and interest Elsie has to receive payment under the 1966 contract and substitute their own 1981 agreements. The result of such actions would have the effect of leaving Elsie without the funds to which she is entitled and has received under the contract, which funds are hers. As a replacement, Defendants propose to pay a lesser amount over a period extending the rest of Elsie's natural life. Defendants would then become the owners of land which they have never used or worked in recent years and for which they had no interest or concern at the time of the original 1966 agreement. All such arrangements would be made to the distinct and unconscionable disadvantage of the Plaintiffs and Elsie Brinkerhoff.

The remainder of this brief will indicate that on the facts and on the merits of the law the trial court achieved a just and equitable result which is clearly within the recognized limits of its jurisdiction.

POINT II

THE 1966 CONTRACT ENTERED BETWEEN ELSIE AND HER TWO SONS, CLOYD AND MARK, HAS REMAINED A VALID CONTRACT FROM ITS EXECUTION TO THE PRESENT.

The trial court specifically found that the contract entered between Elsie Brinkerhoff and her two sons, Mark and Cloyd, was the result of arms' length bargaining conducted with the advice of counsel by fully competent parties. (R. 629, F. of F. No. 4). Furthermore, Appellants make no claim and present no evidence to the contrary. In fact, all parties to the contract continue to

recognize its validity and existence. Appellants, non-parties to the contract, are the only ones who fail to recognize the binding nature of the contract's provisions.

The facts and evidence presented at trial have given no indication that Elsie, as seller of the subject property, acted in any manner, either under the contract or by law, which would operate to terminate the contract. The contractual terms pertaining to default and termination are as follows:

In the event of a default in the payment of any installment of principal or interest and in the event of a default in any other term or condition herein and in the event notice of a default other than for payment of principal and interest shall be given to buyers by the seller and a subsequent failure to remedy the same shall continue for a period of thirty (30) days, then the seller may at her option demand a redelivery to her of all of the escrowed documents...

(Exhibits P-1, P-2)

These provisions, while somewhat ambiguous as to the circumstances under which notice will be required, clearly demonstrate that action is required on the part of the seller before the contract will be considered in default. Whether notice is required or not, seller must exercise her option to "demand a redelivery to her of all of the escrowed documents," as an indication that she considered the buyers to be in default. At no time has Elsie Brinkerhoff ever made such a demand, or anything akin thereto, upon Mark or Cloyd. (TR 295-307; R.633, F. of F. 11)

The contract also provides for alternative remedies such as reducing the agreement to judgment or foreclosing as a mortgage.

All of these alternatives require definite action on the part of the seller prior to any action buy seller. (Exhibits P-1, P-2)

Forfeitures under installment land sales contracts have long been disfavored under the law. The Utah Supreme Court has held that affirmative action is required to exercise the forfeiture option. Fuhriman v. Bissenger, 375 P.2d 27 (Utah 1962); see also, Tanner, supra at 346; and Hansen v. Christensen, 545 P.2d 1152, 1154 (Utah 1976). Elsie never did take any action to terminate the contract, and in fact, has always recognized its validity. (Exhibits P-11, P-40; TR 359:9-15; 295-307; 367:12-25)

A. At no time did Elsie Brinkerhoff give her two sons notice that she considered them to be in default of their obligations under the contract.

The facts and circumstances surrounding execution and performance under the 1966 contract clearly demonstrate the importance and necessity of requiring notice prior to declaring default. The written contract in this instance was the mere formalization of a relationship that had existed since the death of Merle Brinkerhoff, Elsie's husband, two years earlier. Since that time Mark and Cloyd had been in possession of the real property and were in the process of farming the land and grazing sheep thereon. In addition, the two sons were caring for their mother's needs by seeing that her bills were paid, as well as making annual payments of \$2,000.00. (TR 64-68; Exhibits P-1, P-2)

When the contract was executed, the parties' mode of operation was altered very little. It is true that documents were

signed with all the specificities enumerated above, but the history surrounding the execution clearly indicates that the parties had no intention of demanding exact compliance. For many years thereafter, even to the present day, Mark and Cloyd continued to care for their mother's needs. Elsie was never dissatisfied with their performance and never requested anything from her boys that was not forthcoming. (TR 295-307)

These facts demonstrate that none of the parties to the 1966 contract believed that Mark and Cloyd were in default. Without notice it would have been impossible to know at what point Elsie considered her sons to be in default of their obligations, or, if they were, what remedy she might choose. In a case with facts very similar to the present the Utah Supreme Court has exacted a requirement that notice be given. In Morris v. Sykes, 624 P.2d 681 (Utah 1981), the Plaintiff had made a down payment on the purchase price of certain real property, but the monthly and periodic payments were made sporadically, and in amounts different than called for by the contract. Nevertheless, the Court required the defendant to supply notice of default prior to reselling the same property to a third party.

In the present case, a long history of accepting payments other than those specifically required by the contract was in evidence. This Court should reach a conclusion which is in accordance with reason and the Morris case noted above by finding that the 1966 contract is still in effect and that termination requires that the buyers be given notice and an opportunity to cure their default prior to suffering an unjust forfeiture. As

shown by the record, when given an amount due by the trial court, it was forthwith paid in full.

It is evident that the contract itself anticipates the necessity of notice under circumstances where the buyers would not have knowledge of their default, or of any remedy chosen by the seller. The contract specifies that default for circumstances other than payment of principal and interest requires notice. These provisions allow the buyers to respond prior to incurring forfeiture. Mark and Cloyd Brinkerhoff or their successors in interest should be granted no less opportunity.

B. Utah law requires that a seller allow a reasonable period of time for buyers to cure their breach prior to enforcing the forfeiture clause provisions of installment land sales contracts.

As noted above, Utah law is clearly hostile to allowing forfeiture under installment land sales contracts. The Court has reached this conclusion despite specific contractual provisions calling for forfeiture and treating all earlier payments as liquidated damages. Call v. Timber Lakes Corp., 567 P.2d 1108 (Utah 1977).

In order to avoid the harsh results of forfeiture, sellers are required to allow a reasonable time in which buyers can cure their defaults:

It can be seen that the provisions of the contract, designed to terminate contractual relations, are not self-executing. They require some affirmative act on the part of the seller. Therefore, the contractual relations between seller and buyer are in existence until such time as the seller chooses to notify the defaulting buyer of its election to proceed under one, or all, of its options. In so doing, seller must give the

defaulting buyer a reasonable time within which to cure the default. Without this notice the defaulting buyer would not know what to do. He would not have certain knowledge his tenancy was at an end. He could assume the seller may have waived default, or would elect to enforce the contract rather than forfeit it; or he could assume he would be permitted to perform. (Emphasis supplied.)

Hansen, supra at 1154. The Court has held this rule "especially applicable" in cases where the default has been overlooked for substantial periods of time. Lamont v. Eyjen, 508 P.2d 532, 534 (Utah 1973).

In the present case it has never been shown that seller was dissatisfied with buyers performance under the contract. For this reason no notice and no period for cure has ever been accorded buyers under the contract. To enforce the forfeiture provisions would work a double injustice. Buyers would lose the land and seller would lose the funds which she has received. All of this would be accomplished under Appellants' supposed concern for Elsie's well-being.

C. Elsie Brinkerhoff as seller under the 1966 contract waived her right to demand strict compliance with the contract's installment payment terms without giving prior notice.

The contract doctrine of waiver has been defined in the following manner:

[T]he voluntary and intentional relinquishment of a known right [which] may be either express or implied. Waiver can be implied from conduct such as making payments for or accepting performance which does not meet contract requirements; waiver can also be expressed verbally or in writing. Express waiver, when supported by reliance thereon, excuses non-performance of the waived condition.

Udevco, Inc. v. Wagner, 678 P.2d 679, 682 (Nev. 1984).

The evidence clearly demonstrates that Elsie Brinkerhoff waived strict compliance with the payment terms under the 1966 contract. Elsie never demanded, nor expected, more from her boys than that which was immediately forthcoming. Her desires were simply that some of her bills be paid and money be given when she found herself in need. Indeed on some occasions when funds were tendered, Elsie rejected them along with a declaration that there was no need. Such declarations may rise to the level of express waiver, but at the very least Elsie's conduct impliedly waived the necessity of complying with strict payment requirements. (TR 295-307)

The only way Elsie's waiver could be overcome and strict compliance demanded is through notice of her intention to do the same. Such a requirement is readily understood in cases considering forfeiture under installment land sales contract provisions.

Most litigation in this area concerns itself with failure to make timely payments under a land contract...In order to establish a prima facie case of waiver, the vendee must show that the vendor has condoned or assented to previous defaults and has not given notice of his intention to insist on strict compliance in the future.

Angus Hunt Ranch, Inc. v. Reb, Inc., 577 P.2d 645, 650 (Wyo. 1978). Furthermore, because forfeitures are not favored under the law it has been held that "slight evidence" of the intention to relinquish a right is sufficient to warrant the finding of waiver. *Id.* at 650.

In the present case the evidence is overwhelmingly in favor of finding a waiver. Therefore, the 1966 contract should be upheld and the judgment of the trial court sustained.

D. There is no indication that the parties to the 1966 contract ever intended to abandon all of their rights and obligations thereunder.

Appellants contend that Elsie Brinkerhoff and her two sons, Mark and Cloyd, had abandoned their 1966 contract at the time Elsie signed later documents transferring a partial interest in the subject property to them. The contention is, nevertheless, unfounded in the facts and under the law.

The term "abandonment" in the sense involved here means the intentional relinquishment of one's rights in the contract; and in order to nullify such rights, there must be a clear and unequivocal showing of such abandonment. Where there is dispute as to whether this has occurred, it is usually a question of fact, to be determined from the circumstances of the particular case, which include not only nonperformance, but also expressions of intent and other actions of the parties.

Timpanogos Highlands, Inc., v. Harper, 544 P.2d 481, 484 (Utah 1975). Furthermore, on questions of abandonment reversal should not be granted unless the evidence "clearly preponderates" against the findings. Id. at 484.

While it is true that the Supreme Court in Timpanogos Highlands found the contract had been abandoned, it is also true that the facts in the present case are clearly distinguishable. In Timpanogos Highlands buyers had been making sporadic payments on their land purchase when seller leased the same property for a ten year period to a third party. The Court upheld the decision for abandonment of the contract. Timpanogos Highlands is

distinguishable in that buyers had never entered into possession or used the property in any way, other than with Plaintiffs' permission, nor did they pay the taxes thereon. Furthermore, the parties had been in continual negotiations concerning buyer's failure to make adequate payments under the contract, none of which is true under the present case. Here, as soon as Appellants' claims were discovered, suit was filed.

The Utah Court has also defined abandonment as the voluntary relinquishment of a "right to a benefit" due from another. Pitcher v. Lauritzen, 423 P.2d 491, 493 (Utah 1967). In the present case there is no indication that any of the parties intended or pretended to give up their rights under the 1966 contract. Mark and Cloyd remained continually in possession of the land, used the same for their grazing and farming operation, and paid the applicable taxes on a yearly basis. Elsie has stated consistently that she expected "her boys" to take care of her by paying her bills and seeing that she had the money she needed. Indeed, even one of the Appellants, Golda B. Adair, expected Mark to continue making payments on his portion of the land. (Tr. 265) Such an obligation could have only arisen under the 1966 contract.

Appellants assert that Mark or Cloyd had persuaded Elsie to issue the 1979 Warranty Deed, transferring Elsie's interest in the land to a joint tenancy, as proof of abandonment. The evidence that such a persuasion occurred was minimal, at best, in that it is "supported" solely by the testimony of one individual, which testimony was not admitted because it was in contravention of a timely objection based on hearsay rules. (TR. 434; 435, 437, 438

and 439) Furthermore, the trial court apparently chose not to believe such information or found it unnecessary in deciding the case. Whatever the case may be, Appellants have failed to demonstrate that the facts clearly preponderate against the trial court's findings and, therefore, reversal on the issue of abandonment is entirely inappropriate.

E. At this time, all remaining parties (to the 1966 contract) desire that the contract continue on full force and effect. Reaching a contrary conclusion will frustrate the purpose of the contract and deny all parties the benefit thereto.

All parties to the 1966 contract or their successors in interest desire that the instrument be maintained and the benefits be realized. Mark Brinkerhoff and Mont R. Anderson, Personal Representative for the Estate of Cloyd Brinkerhoff, have sought specific performance of the contract. Elsie Brinkerhoff has continually repeated her desire to uphold the contract's provisions. She has stated, "I had no idea of ever breaking that contract," and in response to the direct question by the court as to whether she wanted the contract in existence she added, "Yes, I did...I want that money to live on. That's all I would have to live on." (TR. 300 and 367). At every opportunity, Elsie reaffirmed the contract. (Exhibits P-11, P-40; TR 318:11-17; 362-363; 295-307) Even Appellants would expect Mark to continue making payments under obligations which could have only arisen from the 1966 contract. (TR. 265).

A decision which would abrogate the contract under consideration by reversing the trial court's Judgment will

frustrate the document's original purpose: the assurance that Elsie Brinkerhoff will have the support she needs for the remainder of her earthly life. It is hard to understand how Appellants can claim to have only their mother's best interests at heart when the result of their actions would deprive her of the same level of support to which is rightfully due. Even ignoring the amount the court has awarded in back payments and interest, the Appellants' offer of support would amount to \$200 a year less than that to which Elsie is entitled under the contract. For this reason, the Plaintiffs respectfully implore the Court to recognize the just and equitable decision of the trial court and refuse to reverse on appeal.

POINT III

THE DETERMINATION THAT ELSIE BRINKERHOFF WAS INCOMPETENT IN HANDLING HER LEGAL AFFAIRS FROM ABOUT 1970 ON WAS A MATTER CLEARLY WITHIN THE COMPETENCE OF THE TRIAL COURT, OR AT THE VERY LEAST, WAS NOT REVERSIBLE ERROR.

Appellants' major contention on appeal is that the trial court committed reversible error when it found that Elsie Brinkerhoff was incompetent in her legal affairs from about 1970, and failed to require that she be represented by independent legal counsel. Such a position is unsupported by the facts and procedural history of this case.

As to the argument that Elsie's competency was never properly raised as an issue, Appellants are clearly in error. Indeed, long before trial Appellants themselves, acting through counsel, had questioned Elsie's competence in handling her legal affairs. In Defendants' First Interrogatories to Plaintiff (R. 46),

Interrogatory 23(i) Appellants ask: "At the time Elsie Brinkerhoff signed the [1977 receipt], please describe in detail her mental and physical condition and state whether or not she was under the influence of any person present at the signing." (R. 51) Also, in the Pretrial Order, signed by Appellants' Attorney, Issue of Fact, No. 4(F) reads: "At all times relevant herein, was Elsie Brinkerhoff competent to act for and on her behalf, and sign all documents relevant to this action?" (R. 436) And finally, Appellants directly questioned Elsie's competence at trial when counsel queried: "Mrs. Brinkerhoff, do you remember in 1982, or let me back up: In 1979, do you think you were competent?" (TR. 325)

It has been held that "decrees in equity and judgments at law must have a basis in the pleadings and the evidence." 61A AmJur2d, Pleading, Section 382. However, it must not be forgotten that "whether a judgment is supported by the pleadings depends, not on the allegations in the complaint alone, but on a reasonable construction of all the pleadings when considered together." Id. The primary importance of the rules of pleading are that the parties have every opportunity to be heard on all relevant issues. What constitutes a pleading is generally an issue defined by statute or rules such as the Rules of Civil Procedure. Id. at Section 1.

In this case the Utah Rules of Civil Procedure is the controlling authority. Under Part III, Pleadings, Motions, and Orders, of the Rules, Rule 16 states that a Pretrial Order "limits the issues for trial to those not disposed of by admissions or

agreements of counsel; and such order when entered controls the subsequent course of action, unless modified at the trial to prevent manifest injustice." As noted above, the question of Elsie's competence was properly before the court under the Pretrial Order which was signed by counsel for Appellants.

Appellants' brief points out numerous statements made at trial as to Elsie's general state of mind in an effort to persuade the Court that there was no evidence of incompetence. It should be pointed out that most of these statements were elicited by counsel for the Plaintiffs. Plaintiffs have never believed their case rested upon a determination of Elsie's competence, but that is not to say that there was less than ample evidence upon which the trial court could base a finding of incompetence. A review of the transcript clearly shows that the trial court has ample support for its finding; Appellant Golda B. Adair herself recognized the problem when she stated that Elsie "would sign anything" (TR 243:2-13), and became concerned about competency when she believed Elsie began signing any documents handed to her regardless of their legal effect. (TR 267, 268, and 268A:1-13). It is instructive that after Elsie signed documents in Appellants' favor, Golda told Elsie not to sign any more! (TR 243:6-13)

It is particularly important that the court's finding on competence related to Elsie's ability to understand the legal significance of documents placed before her by well-meaning children. The court specifically stated that "from and after 1970, Elsie Brinkerhoff signed documents that were presented to her without understanding the legal or other significance of such

documents. She lacked sufficient power to comprehend the subject of such documents...and was not able to act with discretion thereto." (R.634, 635; F. of F. 15) All of the statements offered by Appellants as proof of Elsie's competence relate to her ability to take care of herself in the regular affairs of life and not to her understanding of the legal transactions to which she was subjected.

Indeed, there is ample evidence to support the trial court's finding of incompetence in the consistent statements of Elsie that she never read documents that were placed before her for signature. (TR. 304, 305, 308, 311, 312) Each such statement indicates that Elsie signed documents on the basis of trust reposed in her children and family, upon influence exercised by them, and not on the understanding that she was altering her legal or financial affairs. She never evinced any intent to alter her affairs.

The court's finding of incompetence should in no way constitute reversible error. As demonstrated above the issue had been placed before the court and there was ample evidence to show that Elsie failed to understand the nature and consequences of her legal transactions. In addition, the record clearly supports the court's finding that the 1966 contract was in full force and effect as demonstrated above. Appellants had full knowledge of this contract and were under no circumstances bona fide purchasers for value. (R.631, F. of F. 5) And, finally, in light of the court's specific finding of undue influence, as discussed in detail below, there is no justification for reversal.

POINT IV

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY ASSUMING THE RESPONSIBILITY OF PROTECTING THE INTERESTS OF ELSIE BRINKERHOFF.

Appellants argue that the trial court was required by Rule 17(b), Utah Rules of Civil Procedure, to provide Elsie Brinkerhoff with a guardian ad litem, rather than assuming this responsibility, and that such an assumption constitutes reversible error. This argument, however, misconceives the essential purpose of Rule 17(b).

Rule 17(b) states:

When an infant or an insane or incompetent person is a party, he must appear either by his general guardian ad litem appointed in the particular case by the court in which the action is pending.

In considering the effect which should be given to such a rule, the Utah Supreme Court has sought to respect its essential purpose which is to assure that all meritorious defenses are heard and that the party is not deprived of any benefit she might otherwise have obtained. Whitney v. Walker, 479 P.2d 469, 471 (Utah 1971); see also Trolinger v. Cluff, 57 P.2d 332, 335 (Idaho 1936).

In the present case there is no indication on the record or in Appellant's Brief that Elsie has been denied any defenses or benefits to which she is entitled. The only outcomes which could have been adopted by the court were those presented by either Plaintiffs or Appellants and each of these positions were fully represented.

The only explanation for Appellants' heavy reliance on such a technical view of the rule is that they are attempting to protect their own selfish interests. As pointed out above, under Appellants' view on this case, Elsie would be required to forego her substantial interest in the 1966 contract for the lesser payments promised by Appellants. Such a result would work a significant disadvantage upon Elsie and would operate in direct contravention of her stated desires today, particularly where she has received \$50,665.11. (R.611, R.663, Notice of Payment, and Notice of Final Payment) For this reason Appellants should fail in their attempt at reversal in order to obtain a technical compliance with the rule.

Furthermore, the Supreme Court has maintained that Appellants have the burden of showing that the error was substantial and prejudicial and that they were thereby deprived of the opportunity for a full and fair presentation of the issues. Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47, 51 (Utah 1974), and Simpson v. General Motors Corp., 470 P.2d 399, 402 (Utah 1970) Appellants have failed to make the required showing.

POINT V

ABSENT ANY FINDING OF INCOMPETENCE, THE FACT THAT ELSIE DID NOT UNDERSTAND THE NATURE OF THE DEEDS TRANSFERRING TITLE IS SUFFICIENT TO INVALIDATE THE 1979 AND LATER 1981 DEEDS.

In order to transfer a valid interest in real property the grantor must have a present intent to effect such a transfer. In order for the grantor to possess the requisite intent she must understand the nature of the transaction being placed before her.

The facts surrounding the execution of the deeds in 1979 and later, to Appellants and others indicate that Elsie lacked understanding and, any intent to transfer property, or to alter existing legal relationships.

At trial the following series of questions and responses clearly indicated that Elsie did not understand the nature of the documents she was asked to sign:

Mr. Bishop: At the time the [1980 Warranty Deed, Exhibit D-6] was brought to you, did you read it?

Elsie Brinkerhoff: No, I didn't read it, he just said -- Well I said, "Oh, you came early in the morning," and he says "Here Grandma are some papers I'd like you to sign," and I says, "What's that for," and he says, "Oh, to see if we can get a little money for you."

Mr. Bishop: Did anybody read it to you before you signed it?

Elsie Brinkerhoff: No.

Mr. Bishop: Why did you sign it?

Elsie Brinkerhoff: Because he brought it and said he wanted me to sign it, and I didn't know what the deal was. They never asked me anything about it.

(TR. 308).

The Utah Supreme Court has held that "where a deed is executed with no intent to transfer a present interest, it will be invalidated by a court in equity," and that "a conveyance is valid only upon delivery of a deed with present intent to transfer." Baker v. Pattee, 684 P.2d 632, 635 (Utah 1984). It is clear that Elsie did not possess the necessary intent to effectuate the transfer.

Furthermore, there was no attempt on the part of the Appellants or any other party to secure independent counsel for their mother. In other words the grantees had the document prepared and then secured signature from the grantor without suggesting that she obtain independent counsel. They did not even bother to read the document to Elsie prior to securing her signature.

In a similar case, the Supreme Court has held that fiduciaries and persons having a confidential relationship with the grantor have a "duty to act fairly, make a disclosure of material information, and to take no unfair advantage of superior position." Seequist v. Seequist, 524 P.2d 598, 599 (Utah 1974). In Seequist the court expressed its displeasure that a grantee child had made no attempt to secure independent advice or representation, even though he was aware that his mother had no independent knowledge of the facts surrounding the transfer. Id. at 599.

On this basis alone the Court should find ample evidence to uphold the trial court's position which refuses to recognize the 1979 and later deeds, including those purportedly transferring real property interests to the Appellants.

Elsie J. Brinkerhoff never had any intent to do anything but adhere to her 1966 contract. (TR 295-307)

POINT VI

THE "PERFECT TENDER RULE" HAS NO APPLICATION TO THIS CASE.

Appellants contend that Plaintiffs are not entitled to specific performance of the 1966 contract because they failed to tender their own performance prior to initiating suit. The context of this case makes it clear that the demands of the "perfect tender" rule do not apply. The above-outlined argument has demonstrated that Elsie had waived her right to strict compliance with the contract's payment terms. (See Point II above.) None of the parties to the contract ever considered the instrument to be in default. It would be inappropriate to demand that the Plaintiffs tender perfect performance when it was entirely unclear that there had been a failure of performance at all, and if there had been, what the nature and extent of the failure were. Under the circumstances of this case, it was impossible to make a "perfect tender". Nevertheless, Plaintiffs told the trial court they would immediately pay any amounts found due, and did so. (TR 126:7-10; 144:6-17)

Where a buyer believes in good faith that he has complied with the terms of the agreement, specific performance may be awarded, particularly where an unjust forfeiture would occur.

Literal and exact performance is not always necessary. Under certain circumstances, specific performance of a contract will be decreed in spite of the fact that the complainant has not wholly performed his part of the agreement, or where there has been substantial compliance with the terms of the contract, as where a party in good faith seasonably offers and continues ready to comply with the stipulations of the contract although he may err in estimating the extent

of the obligation. Generally, where the plaintiff has made a conscientious effort fully and fairly to comply with his contract to purchase land, specific performance will be granted. . . .

In administering equity in a specific performance case, a technical forfeiture of rights under a contract, in the absence of bad faith, is not favored where a preservation of the contract through specific performance will yield to each party that to which he is justly entitled. A court in equity has the power to relieve a defaulting purchaser from a forfeiture and to compel specific performance by the seller when, in the court's judgment, to do otherwise would result in an unreasonable forfeiture.

71 AmJur2d, Specific Performance, § 62.

Indeed, the Court has granted specific performance in many cases where there has been no indication that a "perfect tender" was extended by the buyers in land sale contracts. See, Tanner, supra; and Fuhriman, supra. In such cases, the Court has often focused on the behavior of the seller to justify an award of specific performance. For example, in Pack v. Hull Development Co., Inc., 667 P.2d 39, 40 (Utah 1983), the Court, in awarding specific performance, took particular notice of the fact that seller had waived its right to forfeiture by consistently accepting buyers' late and sporadic payments. The Idaho Supreme Court has also taken this position where seller failed to comply with provisions of a contract pertaining to default. A grant of specific performance was awarded even though a payment was tendered many years later. Singleton v. Pichon, 635 P.2d 254, 255 (Idaho 1981).

All of the cases cited by Appellants to support their contentions that perfect tender was required of the Plaintiffs can be distinguished on the facts. In none of these cases is there any indication that sellers had expressly or impliedly waived the requirements of strict performance under their contracts. Furthermore, none of the buyers had yet taken possession of the land being transferred. In the present case, however, the transactions had progressed to a much further extent. Buyers had been in possession for many years and a significant history of dealing was in evidence. This history made it clear that the seller did not expect strict compliance with the terms of the written agreement. Sellers must elect and give notice of the remedies they seek. It would be unjust to require forfeiture for failure to comply with the technical rules regarding perfect tender, particularly where, as here, payment in full has been made by Plaintiffs and accepted by Elsie J. Brinkerhoff. (R.611, Notice of Payment; R.663, Notice of Final Payment; and R.670, Receipt of Funds and Initial Inventory) Finally, Elsie Brinkerhoff has accepted the benefits flowing to her and has determined not appeal. If Appellants claim anything, their proper relief is a claim for damages against Elsie.

POINT VII

ABSENT ALL OTHER FINDINGS AND CONCLUSIONS, THE DETERMINATION THAT ALL AGREEMENTS ENTERED BY ELSIE BRINKERHOFF FOLLOWING 1970 WERE THE RESULT OF UNDUE INFLUENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT'S HOLDING.

The trial court, independent of all other findings, determined that all contracts and agreements entered by Elsie Brinkerhoff following 1970 were the result of undue influence:

19. The Court finds that all of the children and certain grandchildren of ELSIE J. BRINKERHOFF, from their respective viewpoints, and because of what they perceived as being others taking advantage of their mother or grandmother by such other parties, used their own influence to convince ELSIE BRINKERHOFF to execute documents and take legal positions in order to accomplish what they, the children and/or grandchildren or other relatives, thought was for ELSIE BRINKERHOFF's best interest.

20. The Court finds that the children and grandchildren who prevailed upon ELSIE BRINKERHOFF to execute documents and take legal stands after 1970 did not intend to take advantage of her for their own purposes. Nevertheless, they did take advantage of ELSIE BRINKERHOFF for the purpose of benefiting her in their own minds, from their own points of view. As a result, those persons who persuaded and induced ELSIE BRINKERHOFF to sign contractual, legal and financial documents, including deeds, and to take certain legal positions from and after 1970 used improper constraint or urgency of persuasion, whereby the will of ELSIE BRINKERHOFF was overpowered, and she was induced to do or forebear an act which she otherwise would not do, or otherwise would do if left to act freely.

21. The unfair persuasion of ELSIE BRINKERHOFF on various occasions from and after 1970 generally took place in private. The persons persuading her to sign legal and financial documents were able to obtain her signature because of her age, psychological dependency, and existing confidential and/or family relationships.

22. The transactions leading to the signing of financial and legal documents by ELSIE BRINKERHOFF were initiated by her family members, not by herself, under circumstances in which ELSIE BRINKERHOFF lacked reasonable access to independent, non-confidential advice.

(R. 640-641, F. of F. 19-22; see also, First Amended Judgment and Decree Quieting Title, Paragraph 1, R. 653-655)

The Utah Supreme Court has defined "undue influence" in the following manner:

The mere relationship of parent and child does not constitute evidence of such confidential relationship as to create a presumption of fraud or undue influence. While kinship may be a factor in determining the existence of a legally significant confidential relationship, there must be a showing, in addition to the kinship, of a reposal of confidence by one party and the resulting superiority and influence on the other party. The relationship must be such as would lead an ordinarily prudent person in the management of his business affairs to repose that degree of confidence in the other party which largely results in the substitution of the will of the latter for that of the former in the material matters involved in the transaction. The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other.

Bradbury v. Rasmussen, 401 P.2d 710, 713 (Utah 1965).

The facts outlined above, as well as the findings of the court, indicate that undue influence has clearly been established in this proceeding. Elsie's children and grandchildren have occupied a position of superiority in their understanding and knowledge of the legal and financial transactions which were placed before her following 1970. The record demonstrates that Elsie's dependency on her family led to trust, unjustifiably reposed, which resulted in the signing of documents Elsie knew nothing about.

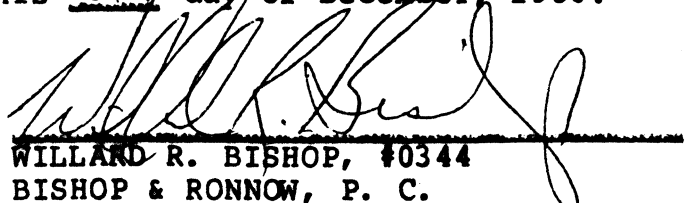
The Court has indicated that once a confidential relationship is shown and a transaction occurs which benefits the party in whom confidence is placed, the burden is shifted to the benefitting party to show that no fraud or undue influence has occurred.

Cunningham v. Cunningham, 690 P.2d 549, 553 (Utah 1984). The Appellants have failed to meet their burden and the fact that they were acting in "somewhat good faith is not enough to free them from the consequences of their actions." Id. at 553.

CONCLUSION

All of the facts and circumstances surrounding this case point to the unfortunate occurrence of a family in distress. Many well-intentioned parties have tried to protect their mother and grandmother from perceived injustice. The trial court was called upon to sort out a variety of transactions taking place over a substantial period of time. Exercising its power to do equity, the court has fashioned a remedy to preserve the stated intention of all parties: to assure that Elsie Brinkerhoff has sufficient funds to meet her financial needs during the remaining period of her life. The court has achieved this result while remaining well within the bounds of the law. Plaintiffs simply request that the Supreme Court affirm the First Amended Findings and Fact and Conclusions of Law by sustaining the First Amended Judgment formulated by the trial court.

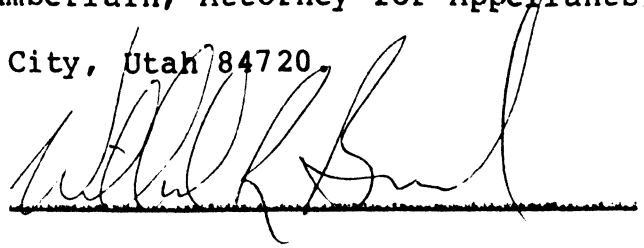
RESPECTFULLY SUBMITTED this 10th day of December, 1986.


WILLARD R. BISHOP, #0344
BISHOP & RONNOW, P. C.
Attorney for Plaintiffs/Respondents

CERTIFICATE OF DELIVERY

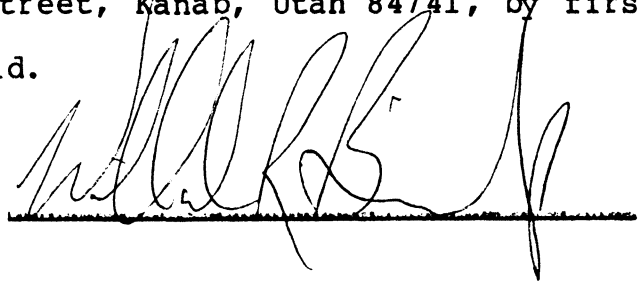
I HEREBY CERTIFY that on the 10th day of December, 1986, four (4) copies of the foregoing Respondents' Brief were delivered

to the office of Mr. Hans Q. Chamberlain, Attorney for Appellants,
at 250 South Main Street, Cedar City, Utah 84720.

A handwritten signature in dark ink, appearing to be "Hans Q. Chamberlain", written over a horizontal line.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 10th day of December, 1986, one
(1) copy of the foregoing Respondents' Brief was mailed to Mr.
F. Kirk Heaton, Attorney at Law, Guardian for Elsie J.
Brinkerhoff, at 70 North Main Street, Kanab, Utah 84741, by first
class mail, postage fully prepaid.

A handwritten signature in dark ink, appearing to be "Hans Q. Chamberlain", written over a horizontal line.

WILLARD R. BISHOP, P.C.
WILLARD R. BISHOP
Attorney for Plaintiff
P.O. Box 279
Cedar City, Utah 84720
Telephone: 586-9483

(FILED FOR RECORD)
31 July 1966
W.R.B.
Clerk of the District Court.

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

MONT R. ANDERSON, Personal
Representative of the Estate of
CLOYD H. BRINKERHOFF,

Plaintiff,

vs

ELSIE BRINKERHOFF, MARK J.
BRINKERHOFF, GOLDA B. ADAIR,
WARREN BRINKERHOFF, ARLENE
B. GOULDING, CHARLES A.
BRINKERHOFF, BETTY B. ESPLIN,
DARLOS T. BRINKERHOFF, and
JOHN DOES I through V,

Defendants.

COMPLAINT

Civil No. 1826

Comes now Plaintiff, by and through counsel, who complains
of Defendants, and for cause of action alleges:

FIRST CAUSE OF ACTION

ACTION FOR DECLARATORY JUDGMENT

1. The real property which is the subject of this
action is located in Millard and Kane Counties, State of
Utah, and this action arises out of the ownership, use, and
possession of said real property.

2. On or about 26 October 1966, a certain "Agreement"
was entered into by ELSIE BRINKERHOFF, as SELLER, and CLOYD
H. BRINKERHOFF and MARK J. BRINKERHOFF, BUYERS, covering the
sale of certain real properties, located in Millard and Kane
Counties, State of Utah. A copy of said "Agreement" is
attached hereto, marked as Exhibit "A", and incorporated by
this reference. The real property which is the subject
matter of this action is more particularly described as
follows:

PROPERTY LOCATED IN KANE COUNTY UTAH

- I. West 1/2 Section 25, Township 39 South, Range 4 1/2 West, containing 320 acres.
- II. NW 1/4 SE 1/4, S 1/2 NE 1/4 Section 26, Township 39 South, Range 4 1/2 West, containing 400 acres.
- III. Lots 1, 2, 3, 4, SE 1/4 NW 1/4, NE 1/4 SW 1/4, E 1/2 E 1/2, SE 1/4 NE 1/4, NW 1/4 SE 1/4; Section 27, Township 39 South, Range 4 1/2 West, Salt Lake Meridian, containing 478.80 acres.
- IV. East 1/2 NE 1/4, S 1/4 SE 1/4, NW 1/4 SE 1/4, Section 35, Township 39 South, Range 4 1/2 West, containing 200 acres.
- V. SW 1/4 NE 1/4, W 1/2 SE 1/4, SE 1/4 SW 1/4, Section 29, Township 40 South, Range 4 1/2 West, containing 160 acres.
- VI. NW 1/4, E 1/2 SW 1/4, Section 30, Township 40 South, Range 4 1/2 West, containing 238.99 acres.
- VII. Lot 2, Section 5, Township 40 South, Range 4 1/2 West, containing 39.08 acres.
- VIII. SW 1/4 NW 1/4, of Section 8, Township 40 South, Range 4 West, Salt Lake Meridian, containing 40 acres.
- IX. Lot 1, Northeast Quarter of the Northwest Quarter of Section 31, Township 40 South, Range 4 1/2 West, containing 79.30 acres.
- X. Beginning at the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwesterly along the middle of the channel of said creek to the North Line of said Northwest Quarter of the Northeast Quarter; thence West 11.23 chains to the place of beginning, containing 11.77 acres.

ALSO

Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian, and running thence South 70° East 15 chains to the middle of the channel of the creek; thence Southerly along the middle of the channel of said creek to the South line; thence North 73°45' West 14.60 chains; thence North 4.30 chains to the place of beginning, containing 5.60 acres.

- XI. Beginning at the S 1/4 corner of Section 23, Township 40 South, Range 6 West, thence East 10.23 chains, N 80°W 6.36 chains, West 3.63 chains, S 1 chain to beginning, containing .74 acres.

PERSONAL PROPERTY:

- XII. A one-fourth (1/4) interest in Hobbie Canyon Reservoir (9-36-12) in Mohave County, Arizona.
- XIII. A one-half (1/2) interest in Sullivan Reservoir in Mohave County, Arizona.

TOGETHER WITH all grazing privileges and permits annexed

to or based upon any of the foregoing real, personal, reservoir, or water rights as commensurate.

- XIV. Glendale Irrigation Company certificate No. 204, for 9.1 shares of East Ditch Water, to ELSIE J., CLOYD H., and MARK J. BRINKERHOFF, dated 29 April 1967.
- XV. Glendale Irrigation Company, certificate No. 354, for 10.4 shares of West Ditch Water, to ELSIE J., CLOYD H., and MARK J. BRINKERHOFF, dated 29 April 1967.

MILLARD COUNTY UTAH

XVI. Lots 1, 2, 3, and 4, Block 25, Plat "A", Delta Townsite.

XVII. Lot 2, Block 26, Plat "A", Delta Townsite.

3. Defendant ELSIE BRINKERHOFF received and accepted payments as specified in Exhibit "A", thereby acknowledging the existence of said "Agreement".

4. The "Agreement" was never recorded and all payments were made directly to Defendant ELSIE BRINKERHOFF, rather than into the established escrow.

5. On or about 13 April 1971, Defendant ELSIE BRINKERHOFF, signed a certain "Affidavit", setting forth the sale of certain property to CLOYD H. BRINKERHOFF and MARK J. BRINKERHOFF, and further stating that she would defend and protect the rights of Mark J. Brinkerhoff and Cloyd H. Brinkerhoff. A copy of said Affidavit is attached hereto, marked as Exhibit "B", and incorporated by this reference.

6. On or about 6 April 1977, Defendant ELSIE BRINKERHOFF signed a certain statement, having the statement duly notarized, stating that she had received the sum of \$23,000.00 in payments on said property from Cloyd and Mark Brinkerhoff. A copy of the statement is attached hereto, marked as Exhibit "C", and is incorporated by this reference.

7. After the death of CLOYD H. BRINKERHOFF, Defendant ELSIE BRINKERHOFF executed and recorded various deeds covering the above-described real property, to other individuals, in an attempt to cloud title to the above-described real property in passing to the Decedent's rightful heirs.

8. By virtue of the execution and recordation of these subsequent deeds, Defendants' claims are adverse or hostile

to and in conflict with the interest of Plaintiff, and a dispute has arisen with respect to the parties' rights.

9. The true names of Defendants DOE are unknown to Plaintiff. Upon discovery of such true names, Plaintiff reserves the right to substitute the same in place of the fictitious names used herein.

SECOND CAUSE OF ACTION

SPECIFIC PERFORMANCE

10. The allegations of paragraphs 1 through 8, above, are incorporated by this reference as though fully set forth herein.

11. On or about 26 October 1966, ELSIE BRINKERHOFF, as SELLER, and CLOYD H. BRINKERHOFF and MARK BRINKERHOFF, as BUYERS, entered into a contract, wherein certain real property, grazing privileges, and water and reservoir rights in the States of Utah and Arizona were sold, in consideration of BUYERS paying to SELLER, the sum of FIFTY THREE THOUSAND THREE HUNDRED EIGHTY-EIGHT (\$53,388.00) DOLLARS, payable at the rate of TWO THOUSAND (\$2,000.00) DOLLARS per year, beginning November 1, 1968, BUYERS having paid the sum of FOUR THOUSAND DOLLARS (\$4,000.00) for the years of 1966 and 1967 at the time of execution of the contract. As a further condition to the contract, BUYERS agreed to pay to SELLER, for the entire remainder of SELLER'S life, irrespective of the amount to be paid under this contract, the sum of TWO THOUSAND DOLLARS per year, and if the contract was not paid in full at the time of the death of ELSIE BRINKERHOFF, the remainder would be paid to her heirs, equally, share and share alike.

12. Plaintiff has duly performed all of its obligations under said contract, except payments for the last two (2) years, and as to such obligation, Plaintiff has offered and tendered full performance thereof, but Defendant ELSIE BRINKERHOFF has wrongfully refused and still refuses to accept the same.

13. Defendant failed and refused, and still fails and

refuses to perform her obligations under said contract.

14. Plaintiff has no adequate legal remedy in that the real property is unique, having special value to Plaintiff, and is the type of which Plaintiff cannot obtain a duplicate.

15. The contract, which is the subject matter of this action, is fair and equitable, and is supported by consideration as is shown by the above facts and by the fact that Defendant ELSIE BRINKERHOFF, signed a certain notarized statement, Exhibit "C", stating that she had received, as of 6 April 1977, the sum of \$23,000.00 in payments on said property from Cloyd and Mark Brinkerhoff.

16. By reason of Defendant ELSIE BRINKERHOFF's failure to perform the remainder of said contract according to its terms, Plaintiff has sustained damages in the amount of the fair market value of said property.

THIRD CAUSE OF ACTION

ANTICIPATORY BREACH

17. The allegations of paragraphs 1 through 8, above, are incorporated as though fully set forth herein.

18. In late fall of 1979, Plaintiff was informed that Defendant ELSIE BRINKERHOFF had executed and recorded various deeds covering the property which she previously sold to Plaintiff, in an attempt to pass title to other individuals not entitled thereto.

19. Plaintiff has performed all conditions to be performed in the contract, and stands ready, willing, and able to continue said performance.

20. The actions of the above-named Defendants in accepting and recording the various deeds covering the above-described real properties, when they were fully aware of the existence of the contract with Plaintiff, were done in anticipatory breach of Plaintiff's rights in and to the said property.

FOURTH CAUSE OF ACTION

QUIET TITLE

21. The allegations of paragraphs 1 through 8, above,

are incorporated as though fully set forth herein.

22. Plaintiff's interest in and to the above-described real property is prior in time and right to those alleged claims of Defendants.

23. The Estate of CLOYD H. BRINKERHOFF, at all times pertinent to this action, had, and still has, an interest in and to certain real properties as above-described.

24. By virtue of Defendant ELSIE BRINKERHOFF executing and recording subsequent deeds to the above-named Defendants, the claims are adverse or hostile to and in conflict with the interest of Plaintiff, and Plaintiff is entitled to an order of this Court, declaring and adjudging Plaintiff to be the owner, in fee simple, of his undivided one-half interest in and to the real property, and ordering Defendants, and each of them, and all persons claiming by, through, or under them, to have no estate, right, title, lien, or interest in and to Plaintiff's interest.

FIFTH CAUSE OF ACTION

DAMAGES

25. The allegations of paragraphs 1 through 8, above, are incorporated as though fully set forth herein.

26. Alternatively, in the event the Court does not grant relief under the First through the Fourth Causes of Action, above, Plaintiff is entitled to damages for the current market value of the above-described real properties as may be determined by the Court.

WHEREFORE, Plaintiff prays for Judgment against Defendants as follows:

ON THE FIRST CAUSE OF ACTION:

1. That the above-entitled Court determine and enter a declaratory Judgment determining the rights of the parties to this action to terminate the controversy or remove any uncertainty as to ownership of the above-entitled property.

2. For Plaintiff's costs of Court incurred in this action.

3. For such other and further relief as the Court deems appropriate in this action.

ON THE SECOND CAUSE OF ACTION:

4. That Defendant ELSIE BRINKERHOFF be required to specifically perform said contract by accepting the payments as set forth in said contract.

5. If specific performance cannot be granted, for damages in the amount of the fair market value of the property.

6. For costs of Court incurred in this action.

7. For such other and further relief as the Court deems appropriate in the premises.

8. That the Court declare the deeds executed and recorded after the death of Cloyd H. Brinkerhoff to be null, void, and of no effect.

ON THE THIRD CAUSE OF ACTION:

9. That the above-entitled Court declare Defendant ELSIE BRINKERHOFF to be in anticipatory breach of her contract and award Plaintiff damages for the current market value of the above-described property.

ON THE FOURTH CAUSE OF ACTION:

10. That Defendants, and all persons claiming by, through, or under them be required to set forth the nature of their claims to the above-described real property.

11. That all adverse claims of said Defendants to the real property be determined by this Court.

12. That this Court declare and adjudge that Plaintiff is the owner, in fee simple, of his undivided one-half (1/2) interest in and to said real property; and that Defendants, and each of them, and all persons claiming by, through, or under them, have no estate, right, title, lien, or interest in and to Plaintiff's interest.

13. That this Court permanently enjoin and restrain Defendants, and each of them, and all persons claiming by, through, or under them, from asserting any claim whatsoever to Plaintiff's interest.

14. For Plaintiff's costs incurred in this action.

15. For such other and further relief as the Court deems appropriate.

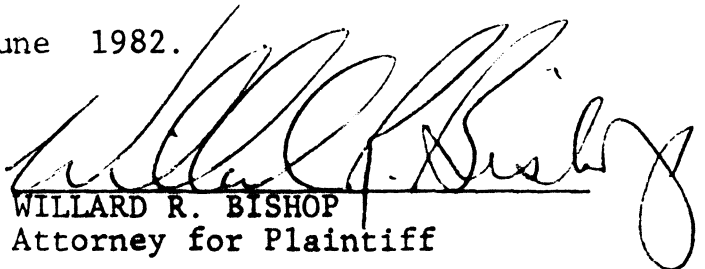
ON THE FIFTH CAUSE OF ACTION

16. That this Court determine the current market value of the above-described property and award Plaintiff damages accordingly.

17. For Plaintiff's costs incurred in this action.

18. For such other and further relief as the Court deem appropriate in the premises.

DATED: 17 June 1982.


WILLARD R. BISHOP
Attorney for Plaintiff

Plaintiff's Address:

Sahara Rancho Medical Center, Suite 201
2320 South Rancho Drive
Las Vegas, Nevada 89102

A G R E E M E N T

THIS AGREEMENT, made and entered into by and between ELSIE BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTY OF THE FIRST PART, herein-after referred to as the "SELLER" and CLOYD H. BRINKERHOFF and MARK BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTY OF THE SECOND PART, herein-after referred to as the "BUYERS",

W I T N E S S E T H

THAT WHEREAS, the SELLER is the owner of the real property, grazing privileges and water rights in the States of Utah and Arizona;

AND WHEREAS, the BUYERS desire to purchase the same;

AND WHEREAS, the parties have agreed upon terms and conditions for the sale thereof;

NOW THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set out the parties hereinafter agree with and between one another as follows:

1. That for and in consideration of the total sum of FIFTY THREE THOUSAND THREE HUNDRED EIGHTY-EIGHT (\$53,388.00) DOLLARS, as the full consideration therefor, the SELLER covenants and agrees to sell and the BUYERS covenant and agree to buy the following described real property, grazing privileges and water and reservoir rights in the States of Utah and Arizona:

REAL PROPERTY IN MILLARD COUNTY, UTAH:

Lot 1, 2, 3, and 4, Block 25, Plat 141, Delta Township.

Lot 1, Block 25, Plat 141, Delta Township.

REAL PROPERTY IN KANE COUNTY, UTAH:

Township 39 South, Range 4½ West, Salt Lake Meridian:

West Half of Section 25, containing 320 acres.

Northwest Quarter, Southeast Quarter and The South Half of the Northeast Quarter containing 400 acres, all in Section 25, Township 39 South, Range 4½ West, Salt Lake Meridian, containing 400 acres, more or less.

Lot 1, 2, 3, and 4; Southeast Quarter of the Northwest Quarter, North Township 39 South, Range 4½ West, Salt Lake Meridian, containing 400 acres, more or less.

East Half of the Northeast Quarter; South Half of the Southeast Quarter; Northwest Quarter of the Southeast Quarter of Section 35, containing 200 acres.

Township 40 South, Range 4½ West, Salt Lake Meridian:

Section 34: Southwest Quarter; East Half of the Northwest Quarter of the Southwest Quarter, containing 161 acres.

Section 34: Northwest Quarter; East Half of the Southwest Quarter, containing 258.99 acres.

Section 35: Lot 2, containing 39.03 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Southwest Quarter of the Northwest Quarter of Section 35, containing 40 acres.

Township 40 South, Range 7 West, Salt Lake Meridian:

Beginning at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Meridian and running thence East 10.03 chains to the North line of said quarter section; thence North 10.03 chains to the North line of said quarter section; thence South 10.03 chains to the beginning, containing 1.77 acres.

Beginning at the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwesterly along the middle of the channel of said creek to the North Line of said Northwest Quarter of the Northeast Quarter; thence West 11.23 chains to the place of beginning.

Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian and running thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwesterly along the middle of the channel of said creek to the North Line of said Northwest Quarter of the Northeast Quarter; thence West 11.23 chains to the place of beginning, containing 5.60 acres.

The above three tracts being part of land situated in Sections 23 and 26 of said township and range, sometimes referred to unofficially as Lot "A".

Township 40 South, Range 4½ West, Salt Lake Meridian:

Lot 1: Northeast Quarter of the Northwest Quarter of Section 31, containing 70.00 acres.

LAW OFFICES
OLSEN AND CHAMBERLAIN
76 SOUTH MAIN
RICHFIELD, UTAH 84701

PERSONAL PROPERTY:

The following described water and reservoir rights:

1. An undivided interest in 5000 ft. of water in the ...
...
...

And all grazing privileges and permits annexed to be used
upon any of the foregoing real, personal, reservoir, or water
rights as commensurate.

2. The parties agree that for and in consideration of the sale by the
SELLER to the BUYERS of the foregoing real and personal property, water and
reservoir rights and grazing privileges, the BUYERS will pay to the SELLER the
sum of TWO THOUSAND (\$2,000.00) DOLLARS, each year, beginning with the 1st day
of November, 1964, of which payments due on November 1, 1964 and November 1,
1965, shall be paid in full. The BUYERS shall also pay to the SELLER the sum of
\$2,000.00 per year thereafter beginning November 1, 1966 and thereafter during the entire
life of the SELLER.

The BUYERS agree that they will pay the sum of \$2,000.00 per year to
the SELLER for the entire remainder of SELLER'S life irrespective of the amount
which may be paid under this contract whether it exceeds the total consideration
hereinabove set out or whether that total amount shall not be paid by applying
the sum of \$2,000.00 per year to the consideration hereinafter set out. If the
total consideration hereinafter set out shall be less than the sum of \$2,000.00
per year for the life of the SELLER, the BUYERS shall pay the
amount of \$2,000.00 per year for the life of the SELLER irrespective of the
amount which may be paid, the SELLER waives interest upon the unpaid balances.

It is provided, however, that should the total consideration herein-
above provided not be paid by the BUYERS to the SELLER during SELLER'S lifetime,
then upon the death of the SELLER the amount remaining under this Agreement
after crediting all payments which have been made hereunder, shall be paid
equally, as provided herein in equal shares, shares and some like, to

LAW OFFICES
OLSEN AND CHAMBERLAIN
24 SOUTH MAIN
RICHFIELD, UTAH 84701

LAW OFFICES
OLSEN AND CHAMBERLAIN
700 SOUTH MAIN
RICHFIELD, UTAH 84701

Warren Brinkerhoff and Charles Alfred Brinkerhoff, the Buyers (hereinafter referred to as the BUYERS) of the

to each) of the balances due (it being stipulated that the BUYERS together with

the SELLER, Charles Alfred Brinkerhoff, the Seller, shall pay to the BUYERS

the sum of \$10,000.00 (Ten Thousand Dollars) in cash or by check.

The SELLER shall pay to the BUYERS the sum of \$10,000.00 (Ten Thousand Dollars) in cash or by check.

Interest of four (4%) per cent per annum on the deferred debt balance.

To PAYEE, the sum of five (5%) per cent per annum on the remaining

principal balance under this contract.

The SELLER shall pay to the BUYERS the sum of \$10,000.00 (Ten Thousand Dollars) in cash or by check.

The SELLER shall pay to the BUYERS the sum of \$10,000.00 (Ten Thousand Dollars) in cash or by check.

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The SELLER shall pay to the BUYERS the sum of \$10,000.00 (Ten Thousand Dollars) in cash or by check.

ESCROW INSTRUCTIONS

If the BUYERS shall pay all expenses of principal and interest herein

provided and perform all the other covenants and agreements herein contained,

then upon payment of the final installment due hereunder the Escrow Depository

shall deliver to the BUYERS all the escrowed documents.

In the event of a default in the payment of any installment of principal

or interest on this loan, the SELLER shall be liable for the same and shall

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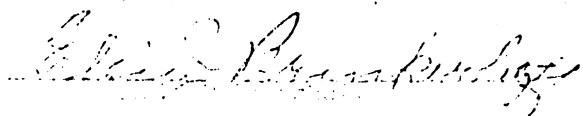
As an alternative remedy the SELLER may elect to reduce any payment ~~on all payments, accelerating and maturing the entire balance of principal and~~ ~~interest~~ or in sufficient pecuniary sum to meet the said indebtedness and to make and mortgage passing title through to the BUYERS and thereafter the same in the manner provided by law.

During the period the BUYERS are complying with the terms of this Agreement, they shall be entitled to the sole, exclusive, and beneficial use, occupancy, and enjoyment of the above described premises subject only to the rights of the SELLER to inspect the same at reasonable times.

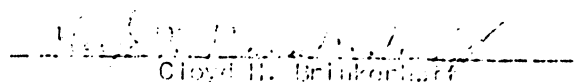
4. The BUYERS have inspected said premises and find the same in a ~~manner satisfactory to them and there are no covenants or warranties other~~

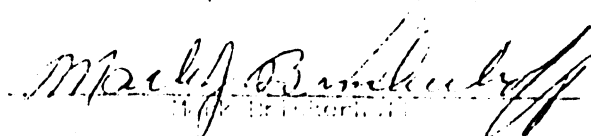
5. This shall be of the essence as to all the terms and conditions of this Agreement which shall bind and inure to the benefit of the heirs, successors, and assigns of the parties hereto and the party in default agrees to pay all costs and a reasonable attorney's fee in the event enforcement of this contract is required.

WITNESS the hands of the parties hereto this 26 day of October, 1966.



SELLER


Cloyd H. Brinkhoff


Mary J. Brinkhoff

BUYERS

LAW OFFICES
OLSEN AND CHAMBERLAIN
75 SOUTH MAIN
RICHFIELD, UTAH 84701

A F F I D A V I T

TO WHOM IT MAY CONCERN:

STATE OF UTAH)
 : ss
COUNTY OF KANE)

BEFORE ME, the undersigned Notary Public, personally appeared
ELSIE BRINKERHOFF, who stated under oath, as follows:

That she has sold Real Property described hereinafter to Mark J.
Brinkerhoff and Cloyd H. Brinkerhoff, and that she will defend the rights of own-
ership and also any rights of way of ingress or egress to the said Real Property.
That she will enter into a lawsuit or any other procedure needed to protect these
rights of ingress or egress, to said property.

The real property is described as follows:

BEGINNING at the South Quarter Corner of Section 23, Township 40 South, Range 7
West, Salt Lake Meridian, Utah, and running thence East 10.23 chains; thence North
80° West 6.36 cahins; thence West 3.68 chains; thence South 1 chain to the point
of beginning.

ALSO BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range
7 West, Salt Lake Meridian, Utah, and running thence South 8.6 chains; thence South
73°45' East 14.6 chains; thence Northwesterly along the middle of the channel of
the creek to the North boundary line of said Section 26; thence West 11.23 chains
to the point of beginning. Containing 11.77 acres

Total acres: 12.51

That the Affiant will at any time help to defend and protect the
rights of Mark J. Brinkerhoff and Cloyd H. Brinkerhoff as far as the Real Property
is concerned.

Elsie Brinkerhoff
Elsie Brinkerhoff

SUBSCRIBED AND SWORN to before me this 13 day of April, A.D. 1971.

Kane Chamberlain
Notary Public
Residing at Orderville Utah

My commission expires

Feb. 26, 1972

To whom it may concern:

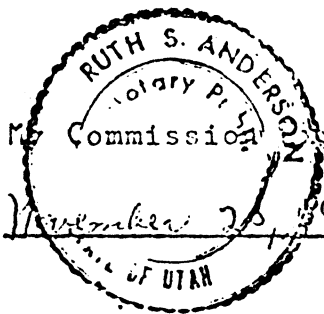
I, Elsie Brinkerhoff, have received from Cloyd
and Mark Brinkerhoff, as payment on property,
\$23,000.

Signed: Elsie Brinkerhoff

STATE OF UTAH } SS.

County of Kane

On this 6th day of April 1977, personally
appeared before me Elsie Brinkerhoff, the signer
of the above and foregoing instrument, who duly acknowledged
to me that she executed the same.



Ruth S. Anderson

Notary Public

Residing at Glendale, Utah

FILED FOR RECORD
16 JUL 1962
M. H. ...
Clerk of the District Court.

1 HANS Q. CHAMBERLAIN
2 CHAMBERLAIN & CORRY
3 Attorneys for Elsie Brinkerhoff,
4 Golda B. Adair, Warren Brinkerhoff,
5 Arlene B. Goulding, Charles A.
6 Brinkerhoff, Betty B. Esplin,
and Darlos T. Brinkerhoff
110 North Main Street, Suite G
Cedar City, Utah 84720
Telephone: (801) 586-4404

7 IN THE SIXTH JUDICIAL DISTRICT COURT
8 IN AND FOR KANE COUNTY, STATE OF UTAH

9
10 MONT R. ANDERSON, Personal)
11 Representative of the Estate)
12 of CLOYD H. BRINKERHOFF,)
13 Plaintiff,) ANSWER, CROSSCLAIM AND
14 vs.) COUNTERCLAIM
15
16 ELSIE BRINKERHOFF, MARK J.)
17 BRINKERHOFF, GOLDA B. ADAIR,)
18 WARREN BRINKERHOFF, ARLENE)
19 B. GOULDING, CHARLES A.)
20 BRINKERHOFF, BETTY B. ESPLIN,)
21 DARLOS T. BRINKERHOFF, and)
22 JOHN DOES I through V,)
23 Defendants.) Civil No. 1826

24 Comes now Defendants, Elsie Brinkerhoff, Golda B. Adair,
25 Warren Brinkerhoff, Arlene B. Goulding, Charles A. Brinkerhoff,
26 Betty B. Esplin, and Darlos T. Brinkerhoff by and through
27 counsel, and hereby answer Plaintiff's Complaint as follows:

28 FIRST DEFENSE

29 Plaintiff's Complaint fails to state a cause of action upon
30 which relief can be granted.

31 SECOND DEFENSE

32 Darlos T. Brinkerhoff is not a proper party to this action,
and said Defendant reserves the right to move to have Plain-
tiff's Complaint dismissed against her at the appropriate time.

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THIRD DEFENSE

1. Answering paragraph one of Plaintiff's Complaint, Defendants admit that the real property which is the subject of this action is located in Kane County, Utah, but upon information and belief, allege that the Millard County property was not and is not owned by Elsie Brinkerhoff, and for many years last past, has not been used or possessed by any of the parties named above.

2. Answering paragraph two of Plaintiff's Complaint, Defendants admit that said Agreement was in fact entered into, but allege that the legal description outlined in Plaintiff's Complaint is in error as follows:

a. Parcel No. II should be described as follows:

NW $\frac{1}{4}$, SE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$ Section 26,
Township 39 South, Range 4 $\frac{1}{2}$
West, containing 400 acres.

b. Parcel No. III should be described as follows:

Lots 1, 2, 3, 4, SE $\frac{1}{4}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, E
 $\frac{1}{2}$ E $\frac{1}{2}$, SW $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$; Section 27,
Township 39 South, Range 4 $\frac{1}{2}$ West, Salt
Lake Meridian, containing 478.80 acres.

c. Parcel No. IV should be described as follows:

East $\frac{1}{2}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$, NW $\frac{1}{4}$ SE $\frac{1}{4}$, Section
35, Township 39 South, Range 4 $\frac{1}{2}$ West,
containing 200 acres.

d. Parcel No. XI should be described as follows:

Beginning at the S $\frac{1}{4}$ corner of Section
23, Township 40 South, Range 7 West,
thence East 10.23 chains, N 80° W 6.36
chains, West 3.63 chains, S 1 chain to
beginning, containing .74 acres.

e. Parcel No. XIV was not described in said Agreement designated as Exhibit "A". Defendant Charles A. Brinkerhoff specifically alleges that he is the owner of the property described in Parcel XIV, and that Plaintiff has no right, title or interest in and to the same.

f. Parcel No. XV, is not particularly described in said Agreement designated as Exhibit "A", but is

appropriately part of this action inasmuch as it was part of the water right originally owned by Merle Brinkerhoff, deceased, husband of Elsie Brinkerhoff, Defendant herein.

- g. Parcel Nos. XVI and XVII, while legally described in said Agreement, are not, and have not been for many years last past, owned by any of the parties to this litigation. Upon information and belief, Defendant believe that said property was lost by reason of non-payment of taxes prior to the time the Agreement designated as Exhibit "A" was executed.

3. Defendant Elsie Brinkerhoff admits that she received and accepted some of the payments required by Exhibit "A", but denies that she received all payments required thereunder, specifically alleging that payments were not made by buyers therein, Cloyd H. Brinkerhoff and Mark J. Brinkerhoff.

4. Defendants admit that said Agreement was not recorded but specifically deny that all payments were made directly to Defendant Elsie Brinkerhoff. Defendants specifically allege that buyers therein, Cloyd H. Brinkerhoff and Mark J. Brinkerhoff were under an obligation to pay directly to the escrow as per the terms set forth in the Escrow Agreement.

5. Defendant Elsie Brinkerhoff admits that her signature is upon the Affidavit referred to in Paragraph No. 5 of Plaintiff's Complaint. However, said Defendant alleges that said Affidavit was to be effective only so long as Mark J. Brinkerhoff and Cloyd H. Brinkerhoff complied with the terms of said Agreement.

6. Defendant Elsie Brinkerhoff admits that she signed a certain statement which was notarized. However, she does not believe that at the time she signed said statement, the sum of \$23,000.00 was filled in as now written. Furthermore, the same was not signed before a Notary Public even though the document bears a Notary's signature and seal. Said Defendant specifically alleges that she has not received the sum of \$23,000.00 as payment from Cloyd and Mark Brinkerhoff.

1 7. Defendant Elsie Brinkerhoff admits that on June 4th,
2 1979, a Warranty Deed was prepared from herself, as grantor, to
3 Elsie Brinkerhoff, a widow, Mark J. Brinkerhoff, a married man,
4 and Cloyd H. Brinkerhoff, a married man, all as joint tenants
5 with full rights of survivorship, and not as tenants in common.
6 However, said Defendant denies that said Deed was prepared,
7 executed and recorded after the death of Cloyd H. Brinkerhoff
8 inasmuch as it was prepared prior to the death of Cloyd H.
9 Brinkerhoff. Said Deed was in a prepared state and brought to
10 Elsie Brinkerhoff by Cloyd H. Brinkerhoff who requested that she
11 sign the same which she did, and the Deed was thereafter appar-
12 ently recorded by Cloyd H. Brinkerhoff. Said Defendant specif-
13 ically denies that the Deed was an attempt to cloud title to the
14 above-described real property.

15 Upon the death of Cloyd H. Brinkerhoff, Defendant herein,
16 Elsie Brinkerhoff and co-defendant Mark J. Brinkerhoff, owned or
17 became entitled to said real property as surviving joint ten-
18 ants, each as to an undivided one-half interest. Thereafter,
19 and on August 15th, 1980, Elsie Brinkerhoff executed a Warranty
20 Deed to her undivided one-half interest in the subject property
21 to Golda B. Adair, a married women, as to an undivided one-fifth
22 interest, Warren Brinkerhoff, a married man, as to an undivided
23 one-fifth interest; Arlene B. Goulding, a married women, as to
24 an undivided one-fifth interest; Charles A. Brinkerhoff, a
25 married man, as to an undivided one-fifth interest, and Betty B.
26 Esplin, a married women, as to an undivided one-fifth interest.
27 Simultaneously, each of said named grantees executed individual-
28 ly a Trust Deed Note in favor of Elsie Brinkerhoff with a
29 principal sum of \$10,000.00, and collectively a Trust Deed with
30 a principal sum of \$50,000.00 to secure payment of said
31 obligation. Therefore the real property which is the subject of
32

1 this action is now subject to the Deed of Trust in favor of
2 Defendant Elsie Brinkerhoff.

3 8. Defendants admit that the execution and recordation of
4 these Deeds and recorded instruments are adverse to the interest
5 of Plaintiff.

6 9. Defendants are without sufficient information to answer
7 paragraph nine of Plaintiff's Complaint, and for lack of such
8 information, specifically deny the same.

9 10. Defendants incorporate by reference their answers to
10 paragraphs one through nine as more specifically set forth
11 herein.

12 11. Defendants admit that said contract was entered into,
13 but specifically allege that the first annual payment was to
14 commence on November 1st, 1966, not November 1st, 1968. Like-
15 wise, said Agreement provides that the sum of \$4,000.00 was to
16 constitute payment for the years 1964 and 1965, and not 1966 and
17 1967 as set forth in Plaintiff's Complaint. The balance of
18 paragraph no. 11 is admitted.

19 12. Defendants deny that Plaintiff has duly performed all
20 of the obligations required by Cloyd H. Brinkerhoff and Mark J.
21 Brinkerhoff. Defendant Elsie Brinkerhoff admits that two annual
22 payments have been refused, inasmuch as said Agreement terminat-
23 ed many years last past by reason of said non-payment and
24 non-performance by Cloyd H. Brinkerhoff and Mark J. Brinkerhoff.

25 13. Defendant Elsie Brinkerhoff admits that she has refused
26 to perform her obligations under said contract, but for the
27 reason that said contract is terminated and without legal
28 effect.

29 14. Paragraph fourteen is denied.

30 15. Defendants admit that when said contract was written it
31 was intended to be fair and equitable to all parties. However,
32 Cloyd H. Brinkerhoff and Mark J. Brinkerhoff failed to abide by

1 the terms of said contract, and pursuant to the escrow in-
2 structions set forth on paragraph four of said Agreement, Elsie
3 Brinkerhoff, as seller, was not under any obligation to provide
4 Notice of Default by reason of non-payment, and therefore, by
5 operation of law, said contract terminated and became of no
6 further force or effect when Cloyd H. Brinkerhoff and Mark J.
7 Brinkerhoff as buyers, failed to perform and make payments
8 according to the terms therein set forth.

9 16. Paragraph sixteen is denied.

10 17. Defendants incorporate by reference paragraphs one
11 through eight as more specifically set forth herein.

12 18. Defendants are without sufficient information to answer
13 paragraph eighteen, and for lack of such information, specif-
14 ically deny the same.

15 19. Paragraph nineteen is denied.

16 20. Paragraph twenty is denied.

17 21. Defendants incorporate their answers to paragraphs one
18 through eight as more specifically set forth herein.

19 22. Paragraph twenty-two is denied.

20 23. Paragraph twenty-three is denied, Defendants specif-
21 ically alleging that the contract terminated by operation of
22 law, and that thereafter, the estate of Cloyd H. Brinkerhoff
23 lost any interest in the subject project by reason of his
24 ownership as a joint tenant and his subsequent death.

25 24. Paragraph twenty-four is denied.

26 25. Defendants incorporate their answers to paragraphs one
27 through eight as more specifically set forth herein.

28 26. Paragraph twenty-six is denied.

29 FIRST AFFIRMATIVE DEFENSE

30
31 The contract upon which Plaintiff relies is void by reason

1 of the failure on the part of Cloyd H. Brinkerhoff and Mark J.
2 Brinkerhoff to perform according to the terms thereof. Defen-
3 dants specifically allege that said persons, as buyers therein,
4 failed to pay according to the terms of said contract, and upon
5 non-payment on a timely basis, the contract terminated by
6 operation of law and without further notice to said persons.

7 SECOND AFFIRMATIVE DEFENSE

8
9 Elsie Brinkerhoff, as the seller, and Cloyd H. Brinkerhoff
10 and Mark J. Brinkerhoff as buyers, all recognizing the failure
11 on the part of the buyers to perform according to the terms of
12 the contract, including timely payments, voluntarily terminated
13 said contract and became joint tenants of the subject property
14 presumably as a means to settle any disputes created by said
15 contract. Upon the death of Cloyd H. Brinkerhoff, the joint
16 tenancy previously in existence was severed, and Elsie
17 Brinkerhoff became entitled to an undivided one-half interest in
18 the subject property and Mark J. Brinkerhoff became entitled to
19 the remaining one-half interest. By reason of the same, Cloyd
20 H. Brinkerhoff and his heirs and successors in interest, ceased
21 to own any interest in the subject property.

22 THIRD AFFIRMATIVE DEFENSE

23
24 This Plaintiff is precluded from recovery under the doc-
25 trines of waiver, estoppel, laches and the doctrine of unclean
26 hands.

27 FOURTH AFFIRMATIVE DEFENSE

28
29 Plaintiff has failed to mitigate damages.
30
31
32

1 COUNTERCLAIM OF DEFENDANT ELSIE BRINKERHOFF AGAINST PLAINTIFF,
2 AND CROSSCLAIM OF SAID DEFENDANT AGAINST MARK J. BRINKERHOFF.
3

4 Comes now Defendant Elsie Brinkerhoff, and counterclaims
5 against Plaintiff and crossclaims against co-defendant Mark J.
6 Brinkerhoff as follows:

7 1. Elsie Brinkerhoff, Cloyd H. Brinkerhoff and Mark J.
8 Brinkerhoff entered into the Agreement as more particularly
9 described as Exhibit "A" attached to Plaintiff's Complaint.

10 2. In the event the Court determines that said Agreement
11 is enforceable, Defendant Elsie Brinkerhoff is entitled to an
12 accounting from the estate of Cloyd H. Brinkerhoff and from Mark
13 J. Brinkerhoff, and payment of all unpaid amounts, together with
14 interest on each unpaid payment at the highest legal rate.

15 3. Plaintiff above-named claims an interest in the subject
16 property adverse to the claim of Elsie Brinkerhoff. Said claim
17 is without merit, and the Court should quiet title to an undi-
18 vided one-half interest in the subject property in the succes-
19 sors of Elsie Brinkerhoff, namely, Golda B. Adair, Warren
20 Brinkerhoff, Arlene B. Goulding, Charles A. Brinkerhoff and
21 Betty B. Esplin.

22 4. Upon information and belief, Defendant Elsie
23 Brinkerhoff alleges that the grazing permits may have been
24 unlawfully transferred from her name into the names of Cloyd H.
25 Brinkerhoff and/or Mark J. Brinkerhoff. In the event the Court
26 determines that the contract was terminated and is of no legal
27 force or effect, Defendant Elsie Brinkerhoff is entitled to an
28 accounting and judgment against said persons or estates for all
29 rents and/or other monies deprived from the use of said permits.

30 5. Upon information and belief, Elsie Brinkerhoff alleges
31 that Cloyd H. Brinkerhoff and/or Mark J. Brinkerhoff obtained
32

1 rents from coal or other mineral leases upon the subject proper-
2 ty, and she is entitled to an accounting of the same, and
3 judgment for any amounts that may be due her according to law.

4 6. At the time of the death of Merle Brinkerhoff, husband
5 of Elsie Brinkerhoff, in 1960, he was the owner of sheep and
6 other personal property. Upon information and belief, Defendant
7 Elsie Brinkerhoff alleges that Cloyd H. Brinkerhoff and Mark J.
8 Brinkerhoff unlawfully converted said sheep and other personal
9 property to their own use without compensation to Elsie
10 Brinkerhoff, and by reason of the same, she is entitled to a
11 judgment over and against said individuals for the reasonable
12 value of said property.

13 7. By reason of the Agreement designated Exhibit "A",
14 Defendant Elsie Brinkerhoff is entitled to a reasonable attor-
15 ney's fee rendered in the prosecution of this action, together
16 with Court costs incurred.

17
18 COUNTERCLAIM OF REMAINING DEFENDANTS AGAINST PLAINTIFF, AND
19 CROSSCLAIM OF REMAINING DEFENDANTS AGAINST CO-DEFENDANT, MARK J.
20 BRINKERHOFF.
21

22 Comes now Defendants Golda B. Adair, Warren Brinkerhoff,
23 Arlene B. Goulding, Charles A. Brinkerhoff and Betty B. Esplin,
24 and counterclaims against Plaintiff and crossclaims against
25 Defendant, Mark J. Brinkerhoff as follows:

26 1. Plaintiff claims an interest in the subject property
27 which is adverse to the ownership of said Defendants. Said
28 claim is without merit, and the Court should quiet title in said
29 named Defendants in the subject property as to their collective
30 undivided one-half interest.
31
32

1 2. From and after the Deed from Elsie Brinkerhoff to said
2 Defendants on August 15th, 1980, said Defendants became entitled
3 to an undivided one-half interest ownership in said property,
4 and became entitled to one-half of all rents, profits or other
5 monies deprived from the use of said property. Upon information
6 and belief, said Defendants allege that Defendant Mark J.
7 Brinkerhoff has collected all rents and other profits. By
8 reason of the same, said Defendants are entitled to an account-
9 ing from said Defendant and a judgment thereafter for one-half
10 of any and all proceeds generated by or through the use of said
11 property.

12 3. Upon information and belief, said Defendants allege
13 that Plaintiff and/or Mark J. Brinkerhoff have unlawfully
14 obtained the grazing permits and water rights and that the same
15 are now in their names. Defendants are entitled to one-half of
16 all proceeds generated by or through the use of said permits,
17 together with an accounting for the same, and are entitled to an
18 undivided one-half ownership interest in said permits.

19 4. The interest of Plaintiff is inferior to the collective
20 undivided one-half interest owned by Defendants. By reason of
21 the same, the Court should quiet title in favor of said Defen-
22 dants and against Plaintiff, and its heirs, successors, and
23 assigns.

24 WHEREFORE, Defendant, Elsie Brinkerhoff, prays judgment as
25 follows:

26 1. For judgment against Plaintiff, no cause of action.

27 2. That in the event it is determined by the Court that
28 the contract is still valid and binding, that the Court award to
29 said Defendant all unpaid sums owed pursuant to said contract,
30 together with interest at the highest legal rate.

31 3. For an Order determining that Plaintiff has no right,
32 title or interest in the subject property.

1 4. For an accounting as against Plaintiff and
2 co-defendant, Mark J. Brinkerhoff, and a judgment for all sums
3 due said Defendant.

4 5. For an Order determining that, as a matter of law, said
5 Agreement upon which Plaintiff relies is void and without legal
6 effect.

7 6. That the rights of each party be determined by the
8 Court.

9 7. This Court permanently enjoin and restrain Plaintiff,
10 and all persons claiming by, through, or under them, from
11 asserting a claim whatsoever to Defendant's interests as deter-
12 mined by the Court.

13 8. For a reasonable attorney's fee rendered in the prose-
14 cution of this action, together with Court costs incurred.

15 9. For such other and further relief as to the Court deems
16 just and equitable.

17 DEFENDANTS, GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B.
18 COULDING, CHARLES A. BRINKERHOFF AND BETTY B. ESPLIN PRAY FOR
19 JUDGMENT AS FOLLOWS:

20 1. For judgment against Plaintiff, no cause of action.

21 2. That the Court determine the rights of all parties to
22 this action.

23 3. That this Court award to said Defendants their respec-
24 tive one-fifth interest of an undivided one-half interest in and
25 to said real property.

26 4. That this Court determine that Plaintiff has no estate,
27 right, title, lien or interest in the subject property.

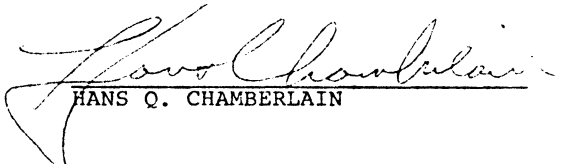
28 5. For an accounting from Plaintiff and co-defendant Mark
29 J. Brinkerhoff, and for any judgment to which said Defendants
30 may be entitled arising out of their ownership in the subject
31 property.
32

1 6. That this Court permanently enjoin and restrain Plain-
2 tiff, and all persons claiming by, through or under him, from
3 asserting any claim whatsoever to the interests of Defendants.

4 7. For costs of Court incurred herein.

5 8. For such other and further relief as to the Court deems
6 just and equitable.

7
8 DATED this 14th day of July, 1982.

9
10
11 
12 HANS Q. CHAMBERLAIN

13
14 MAILING CERTIFICATE

15 This is to certify that I mailed a true and correct copy of
16 the within and foregoing ANSWER, CROSSCLAIM AND COUNTERCLAIM to
17 Mr. Willard R. Bishop, Attorney for Plaintiff, P.O. Box 279,
18 Cedar City, Utah 84720, and to Mr. Mark J. Brinkerhoff,
19 Glendale, Utah, 84729, first class postage prepaid on this
20 14th day of July, 1982.

21 
22 Secretary

HANS Q. CHAMBERLAIN
CHAMBERLAIN & CORRY
Attorneys for Defendants
110 North Main St., Suite G
P. O. Box 726
Cedar City, Utah 84720
(801) 586-4404

FILED FOR RECORD
7 September 1982
M. McLean
Clerk of the District Court

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

MONT R. ANDERSON, Personal)	
Representative of the Estate)	
of CLOYD H. BRINKERHOFF,	)	AMENDED COUNTERCLAIM OF ELSIE
	)	BRINKERHOFF AND CROSSCLAIM
Plaintiff,	)	AGAINST MARK J. BRINKERHOFF
	)	AND
vs.	)	AMENDED COUNTERCLAIM OF GOLDA
ELSIE BRINKERHOFF, MARK J.	)	B. ADAIR, WARREN BRINKERHOFF,
BRINKERHOFF, GOLDA B. ADAIR,	)	ARLENE B. GOULDING, CHARLES A.
WARREN BRINKERHOFF, ARLENE	)	BRINKERHOFF AND BETTY B.
B. GOULDING, CHARLES A.	)	ESPLIN, AND AMENDED CROSSCLAIM
BRINKERHOFF, BETTY B. ESPLIN,	)	OF SAID DEFENDANTS AGAINST CO-
DARLOS T. BRINKERHOFF, and	)	DEFENDANT, MARK J. BRINKERHOFF
JOHN DOES I through V,)	
)	
Defendants.	)	Civil No. 1826

Comes now Defendant Elsie Brinkerhoff, and counterclaims
against Plaintiff and crossclaims against Co-Defendant Mark J.
Brinkerhoff as follows:

FIRST CAUSE OF ACTION

1. Elsie Brinkerhoff, Cloyd H. Brinkerhoff and Mark J.
Brinkerhoff entered into the Agreement as more particularly
described as Exhibit "A" attached to Plaintiff's Complaint.

2. In the event the Court determines that said Agreement
is enforceable, Defendant Elsie Brinkerhoff is entitled to an
accounting from the estate of Cloyd H. Brinkerhoff and from Mark

1 J. Brinkerhoff, and payment of all unpaid amounts, together with
2 interest on each unpaid payment at the highest legal rate.

3 3. Plaintiff and Cross-Defendant Mark J. Brinkerhoff,
4 claim an interest in the subject property adverse to the claim
5 of Elsie Brinkerhoff. Said claim is without merit, and the
6 Court should quiet title to all of said real property, personal
7 property and water rights in the successors of Elsie
8 Brinkerhoff, namely, Golda B. Adair, Warren Brinkerhoff, Arlene
9 B. Goulding, Charles A. Brinkerhoff and Betty B. Esplin.

10 4. Upon information and belief, Defendant Elsie
11 Brinkerhoff alleges that the grazing permits described in the
12 Purchase Agreement may have been unlawfully transferred from her
13 name into the names of Cloyd H. Brinkerhoff and/or Mark J.
14 Brinkerhoff. Said transfer was without authority from Elsie
15 Brinkerhoff, and the estate of Cloyd H. Brinkerhoff and Mark J.
16 Brinkerhoff have no right, title or interest in said grazing
17 permits. In the event the Court determines that the contract
18 (Exhibit "A") was terminated and is of no legal force or effect,
19 Defendant Elsie Brinkerhoff, her successors and assigns, are
20 entitled to the return of said permits, or for the reasonable
21 value thereof as damages, and to an accounting and judgment
22 against said persons or estates for all rents and/or other
23 monies derived from the use or transfer of said permits.

24 5. Upon information and belief, Elsie Brinkerhoff alleges
25 that Cloyd H. Brinkerhoff and/or Mark J. Brinkerhoff obtained
26 rents from coal or other mineral leases upon the subject
27 property, and she is entitled to an accounting of the same, and
28 judgment for any amounts that may be due her according to law.

1 6. At the time of the death of Merle Brinkerhoff, husband
2 of Elsie Brinkerhoff in 1960, he was the owner of sheep and
3 other personal property. Upon information and belief, Defendant
4 Elsie Brinkerhoff alleges that Cloyd H. Brinkerhoff and Mark J.
5 Brinkerhoff unlawfully converted said sheep and other personal
6 property to their own use without compensation to Elsie
7 Brinkerhoff, and by reason of the same, she is entitled to a
8 judgment over and against said individuals for the reasonable
9 value of said property.

10 7. By reason of the Agreement designated Exhibit "A",
11 Defendant Elsie Brinkerhoff is entitled to a reasonable
12 attorney's fee rendered in the prosecution of this action,
13 together with Court costs incurred.

14
15 SECOND CAUSE OF ACTION

16 8. Defendant Elsie Brinkerhoff incorporates by reference
17 Paragraphs 1 through 7 of her First Cause of Action, and for an
18 additional cause of action alleges and contends as follows:

19 9. On August 15th, 1980, Elsie Brinkerhoff conveyed by
20 Warranty Deed, all her right, title and interest in the subject
21 property to Golda B. Adair, Warren Brinkerhoff, Arlene B.
22 Goulding, Charles A. Brinkerhoff and Betty B. Esplin.

23 10. In the event it is determined that said Warranty Deed
24 did not cover water rights and personal property as more
25 particularly described in the Agreement dated October 26th,
26 1966, between herself as Seller and Cloyd H. Brinkerhoff and
27 Mark J. Brinkerhoff, as Buyers, then and in that event,
28

1 Defendant Elsie Brinkerhoff is entitled to all interest in the
2 same by reason of the termination of said Purchase Agreement.

3 11. By reason of the foregoing, the Court should quiet
4 title in Elsie Brinkerhoff, her successors and assigns to all
5 real
6 property, personal property and water rights described in said
7 Purchase Agreement and to determine as a matter of law, that
8 Plaintiff and Mark J. Brinkerhoff have no right, title or
9 interest in the same, and that they should be permanently
10 enjoined from claiming any interest in said property.

11
12 AMENDED COUNTERCLAIM OF DEFENDANTS
13 GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING,
14 CHARLES A. BRINKERHOFF AND BETTY B. ESPLIN AGAINST
PLAINTIFF AND AMENDED CROSSCLAIM OF SAID DEFENDANTS
AGAINST CO-DEFENDANT MARK J. BRINKERHOFF

15 Comes now Defendants Golda B. Adair, Warren Brinkerhoff,
16 Arlene B. Goulding, Charles A. Brinkerhoff and Betty B. Esplin,
17 and counterclaims against Plaintiff and crossclaims against
18 Defendant Mark J. Brinkerhoff, as follows:

19
20 FIRST CAUSE OF ACTION

21 1. By reason of the failure on the part of Plaintiff and
22 Cross-Defendant Mark J. Brinkerhoff, to pay and perform
23 according to the terms of the Agreement dated October 26th,
24 1966, all real and personal property described in said Agreement
25 became the sole, separate and absolute property of Defendant
26 Elsie Brinkerhoff.

27 2. On August 15th, 1980, Elsie Brinkerhoff, a widow,
28 conveyed to Golda B. Adair, Warren Brinkerhoff, Arlene B.

1 Goulding, Charles A. Brinkerhoff and Betty B. Esplin, said
2 property, each as to an undivided one-fifth interest.

3 3. By reason of the same, said Grantees own said real
4 property, personal property and water rights described therein,
5 to the exclusion of Plaintiff and Cross-Defendant Mark J.
6 Brinkerhoff.

7 4. By reason of the foregoing, the Court should quiet
8 title to all real property, personal property and water rights
9 in Golda B. Adair, as to an undivided one-fifth interest; Warren
10 Brinkerhoff, as to an undivided one-fifth interest; Arlene B.
11 Goulding, as to an undivided one-fifth interest; Charles A.
12 Brinkerhoff, as to an undivided one-fifth interest and Betty B.
13 Esplin, as to an undivided one-fifth interest.

14
15 SECOND CAUSE OF ACTION

16 5. Said Defendants incorporate by reference Paragraphs 1,
17 3, 3 and 4, of their First Cause of Action, and for an
18 additional cause of action allege and contend as follows:

19 6. From and after the conveyance of the Warranty Deed from
20 Elsie Brinkerhoff to said Defendants on August 15th, 1980, said
21 Defendants became entitled to the entire ownership of said
22 property, and became entitled to all rents, profits or other
23 monies derived from the use of said property. Upon information
24 and belief, said Defendants allege that Defendant Mark J.
25 Brinkerhoff has collected all rents and other profits. By
26 reason of the same, said Defendants are entitled to an
27 accounting from said Defendant and a judgment thereafter for all
28 proceeds generated by or through the use of said property.

1 7. Upon information and belief, said Defendants allege
2 that Plaintiff and/or mark J. Brinkerhoff have unlawfully
3 obtained the grazing permits and water rights and that the same
4 are now in their names. Defendants are entitled to all proceeds
5 generated by or through the use of said property, together with
6 an accounting for the same, and are entitled to the ownership
7 interest in said property.

8 8. The interests of Plaintiff and Mark J. Brinkerhoff are
9 inferior to the collective interests owned by Defendants. By
10 reason of the same, the Court should quiet title in favor of
11 said Defendants and against Plaintiff and Mark J. Brinkerhoff
12 and their heirs, successors, and assigns.

13 WHEREFORE, Defendant Elsie Brinkerhoff prays for judgment
14 as follows:

15 1. For judgment against Plaintiff, no cause of action.

16 2. That in the event it is determined by the Court that
17 the contract is still valid and binding, that the Court award to
18 said Defendant all unpaid sums owed pursuant to said contract,
19 together with interest at the highest legal rate.

20 3. For an order determining that Plaintiff and
21 Co-Defendant Mark J. Brinkerhoff, have no right, title or
22 interest in the subject property.

23 4. For an accounting as against Plaintiff and Co-Defendant
24 Mark J. Brinkerhoff, and a judgment for all sums due said
25 Defendant.

26 5. For an order determining that, as a matter of law, said
27 Agreement upon which Plaintiff and Mark J. Brinkerhoff rely, is
28 void and without legal effect.

1 6. That the rights of each party be determined by the
2 Court.

3 7. That this Court permanently enjoin and restrain
4 Plaintiff, and Defendant Mark J. Brinkerhoff, and all persons
5 claiming by, through or under them, from asserting a claim
6 whatsoever to Defendant Elsie Brinkerhoff's interest as
7 determined by this Court.

8 8. For a reasonable attorney's fee rendered in the
9 prosecution of this action, together with court costs incurred.

10 9. For such other and further relief as to the Court deems
11 just and equitable.

12 DEFENDANTS, GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B.
13 GOULDING, CHARLES A. BRINKERHOFF AND BETTY B. ESPLIN PRAY FOR
14 JUDGMENT AS FOLLOWS:

15 1. For judgment against Plaintiff, no cause of action.

16 2. That the Court determine the rights of all parties to
17 this action.

18 3. That this Court award to said Defendants all of the
19 real property, personal property and water rights which are the
20 subject of this action pursuant to the deed from Elsie
21 Brinkerhoff to them as grantees, said deed dated August 15th,
22 1980.

23 4. As an alternative remedy, that this Court award to said
24 Defendants their respective one-fifth interest of an undivided
25 one-half interest in and to said real property.

26 5. That this Court determine that Plaintiff and Mark J.
27 Brinkerhoff have no estate, right, title, lien or interest in
28 the subject property.

1 6. For an accounting from Plaintiff and Co-Defendant Mark
2 J. Brinkerhoff, and for any judgment to which said Defendants
3 may be entitled arising out of their ownership in the subject
4 property.

5 6. That this Court permanently enjoin and restrain
6 Plaintiff, and Defendant Mark J. Brinkerhoff, and all persons
7 claiming by, through or under them, from asserting any claim
8 whatsoever to the interests of said Defendants.

9 7. For a reasonable attorney's fee rendered in the
10 prosecution of this action, together with costs of court
11 incurred herein.

12 8. For such other and further relief as to the Court deems
13 just and equitable.

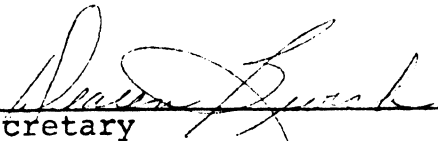
14 DATED this 3rd day of September, 1982.

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17 HANS Q. CHAMBERLAIN
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22 CERTIFICATE OF MAILING

23 This is to certify that I mailed a true and correct copy of
24 the within and foregoing AMENDED COUNTERCLAIM OF ELSIE
25 BRINKERHOFF AND CROSSCLAIM AGAINST MARK J. BRINKERHOFF AND
26 AMENDED CROSSCLAIM OF GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE
27 B. GOULDING, CHARLES A. BRINKERHOFF AND BETTY B. ESPLIN, AND
28 AMENDED CROSSCLAIM OF SAID DEFENDANTS AGAINST CO-DEFENDANT, MARK

1 J. BRINKERHOFF to Mr. Willard R. Bishop, Attorney for Plaintiff,
2 P. O. Box 279, Cedar City, Utah 84720, and to Mr. Mark J.
3 Brinkerhoff, Glendale, Utah 83729, first class postage prepaid
4 on this 3rd day of September, 1982.

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7 Secretary
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WILLARD R. BISHOP, P.C.
Attorney for Plaintiff
36 North 300 West
P.O. Box 279
Cedar City, UT 84720
Telephone: 586-9483

(FILED FOR RECORD)
13 Sept 1982
M. M. M.
Clerk of the District Court.

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF,
Plaintiff,

vs.

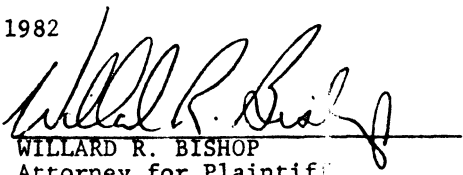
ELSIE BRINKERHOFF, MARK J.
BRINKERHOFF, GOLDA B. ADAIR,
WARREN BRINKERHOFF, ARLENE
B. GOULDING, CHARLES A.
BRINKERHOFF, BETTY B. ESPLIN,
DARLOS T. BRINKERHOFF, and
JOHN DOES I through V,
Defendants.

NOTICE OF DISMISSAL
AS TO DEFENDANTS CHARLES
BRINKERHOFF AND BETTY B.
ESPLIN

Civil No. 1826

Comes now Plaintiff, by and through counsel, and pursuant
to the provisions of URCP 41(a)(1), prior to the service by
Defendants CHARLES BRINKERHOFF and BETTY B. ESPLIN of an Answer
or of a Motion for Summary Judgment, and gives notice of
dismissal of the Complaint in this action as to said Defendants
CHARLES BRINKERHOFF and BETTY B. ESPLIN.

DATED: 8 September 1982


WILLARD R. BISHOP
Attorney for Plaintiff

CERTIFICATE OF MAILING

SERVED the within and foregoing NOTICE OF DISMISSAL AS TO
DEFENDANTS CHARLES BRINKERHOFF AND BETTY B. ESPLIN upon the
following:

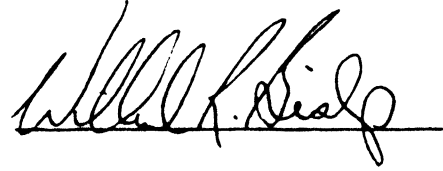
Mr. Hans Q. Chamberlain
Attorney at Law
P.O. Box 726
Cedar City, UT 84720

Mr. Mark J. Brinkerhoff
Glendale, UT 84729

Mr. Charles A. Brinkerhoff
P.O. Box 64
Orderville, UT 84758

Mrs. Betty B. Esplin
P.O. Box 85
Orderville, UT 84758

first class postage fully prepaid this 8th day of September
1982.

A handwritten signature in dark ink, appearing to read "William F. Bialy", is written over a horizontal line.

HANS Q. CHAMBERLAIN
CHAMBERLAIN & CORRY
Attorneys for Defendants
110 North Main St., Suite G
P. O. Box 726
Cedar City, Utah 84720
Telephone: (801) 586-4404

FILED FOR RECORD
6 December 1982
M. M. Mearns
Clerk of the District Court.

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF,

Plaintiffs,

vs.

ELSIE BRINKERHOFF, MARK J.
BRINKERHOFF, GOLDA B. ADAIR,
WARREN BRINKERHOFF, ARLENE
B. GOULDING, CHARLES A.
BRINKERHOFF, BETTY B. ESPLIN,
DARLOS T. BRINKERHOFF, and
JOHN DOES I through V,

Defendants.

WITHDRAWAL OF ATTORNEY FOR
CHARLES A. BRINKERHOFF AND
BETTY B. ESPLIN

Civil No. 1826

Comes now Hans Q. Chamberlain, and hereby gives notice that
he withdraws as counsel of record for Defendants, Charles A.
Brinkerhoff and Betty B. Esplin.

DATED this 2nd day of December, 1982.



HANS Q. CHAMBERLAIN

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of
the within and foregoing WITHDRAWAL to Mr. Willard R. Bishop,
Attorney for Plaintiffs, P. O. Box 279, Cedar City, Utah 84720,

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first class postage prepaid on this 2nd day of December,
1982.


Secretary

1 HANS Q. CHAMBERLAIN
2 CHAMBERLAIN & CORRY
3 Attorneys for Defendants
4 110 North Main St., Suite G
5 P. O. Box 726
6 Cedar City, Utah 84720
7 (801) 586-4404

FILED FOR RECORD
22 February 1982
VJ/MJ
Clerk of the District Court.

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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

8 MONT R. ANDERSON, Personal)
9 Representative of the Estate)
10 of CLOYD H. BRINKERHOFF,)
11 Plaintiff,)
12 vs.)
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SECOND AMENDED COUNTERCLAIM
OF ELSIE BRINKERHOFF AND
CROSSCLAIM AGAINST MARK J.
BRINKERHOFF
AND
SECOND AMENDED COUNTERCLAIM
OF GOLDA B. ADAIR, WARREN
BRINKERHOFF, ARLENE B.
GOULDING, CHARLES A.
BRINKERHOFF AND BETTY B.
ESPLIN, AND AMENDED CROSSCLAIM
OF SAID DEFENDANTS AGAINST CO-
DEFENDANT, MARK J. BRINKERHOFF
Civil No. 1826

18 Comes now Defendant Elsie Brinkerhoff, and counterclaims
19 against Plaintiff and crossclaims against Co-Defendant Mark J.
20 Brinkerhoff as follows:

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FIRST CAUSE OF ACTION

1. Elsie Brinkerhoff, Cloyd H. Brinkerhoff and Mark J.
Brinkerhoff entered into the Agreement as more particularly
described as Exhibit "A" attached to Plaintiff's Complaint.

1 2. In the event the Court determines that said Agreement
2 is enforceable, Defendant Elsie Brinkerhoff is entitled to an
3 accounting from the estate of Cloyd H. Brinkerhoff and from Mark
4 J. Brinkerhoff, and payment of all unpaid amounts, together with
5 interest on each unpaid payment at the highest legal rate.

6 3. Plaintiff and Cross-Defendant Mark J. Brinkerhoff,
7 claim an interest in the subject property adverse to the claim
8 of Elsie Brinkerhoff. Said claim is without merit, and the
9 Court should quiet title to all of said real property, personal
10 property and water rights in the successors of Elsie
11 Brinkerhoff, namely, Golda B. Adair, Warren Brinkerhoff, Arlene
12 B. Goulding, Charles A. Brinkerhoff and Betty B. Esplin.

13 4. Upon information and belief, Defendant Elsie
14 Brinkerhoff alleges that the grazing permits described in the
15 Purchase Agreement, or Taylor-Grazing Rights, BLM Grazing Rights
16 and Forest Service Grazing Rights which were not described in
17 said Agreement, but were appertenant to and used collectively
18 with the real property which is the subject of this action, may
19 have been unlawfully transferred from her name into the names of
20 Cloyd H. Brinkerhoff and/or Mark J. Brinkerhoff. Said transfer
21 was without authority from Elsie Brinkerhoff, and the estate of
22 Cloyd H. Brinkerhoff and Mark J. Brinkerhoff have no right,
23 title or interest in said grazing permits. In the event the
24 Court determines that the contract (Exhibit "A") was terminated
25 and is of no legal force or effect, Defendant Elsie Brinkerhoff,
her successors and assigns, are entitled to the return of said

1 permits, or for the reasonable value thereof as damages, and to
2 an accounting and judgment against said persons or estates for
3 all rents and/or other monies derived from the use or transfer
4 of said permits.

5 5. Upon information and belief, Elsie Brinkerhoff alleges
6 that Cloyd H. Brinkerhoff and/or Mark J. Brinkerhoff obtained
7 rents from coal or other mineral leases upon the subject
8 property, and she is entitled to an accounting of the same, and
9 judgment for any amounts that may be due her according to law.

10 6. At the time of the death of Merle Brinkerhoff, husband
11 of Elsie Brinkerhoff in 1960, he was the owner of sheep and
12 other personal property. Upon information and belief, Defendant
13 Elsie Brinkerhoff alleges that Cloyd H. Brinkerhoff and Mark J.
14 Brinkerhoff unlawfully converted said sheep and other personal
15 property to their own use without compensation to Elsie
16 Brinkerhoff, and by reason of the same, she is entitled to a
17 judgment over and against said individuals for the reasonable
18 value of said property.

19 7. By reason of the Agreement designated Exhibit "A",
20 Defendant Elsie Brinkerhoff is entitled to a reasonable
21 attorney's fee rendered in the prosecution of this action,
22 together with Court costs incurred.

23
24 SECOND CAUSE OF ACTION

25 8. Defendant Elsie Brinkerhoff incorporates by reference

1 Paragraphs 1 through 7 of her First Cause of Action, and for an
2 additional cause of action alleges and contends as follows:

3 9. On August 15th, 1980, Elsie Brinkerhoff conveyed by
4 Warranty Deed, all her right, title and interest in the subject
5 property to Golda B. Adair, Warren Brinkerhoff, Arlene B.
6 Goulding, Charles A. Brinkerhoff and Betty B. Esplin.

7 10. In the event it is determined that said Warranty Deed
8 did not cover water rights, grazing rights, and personal
9 property as more particularly described in the Agreement dated
10 October 26th, 1966, between herself as Seller and Cloyd H.
11 Brinkerhoff and Mark J. Brinkerhoff, as Buyers, then and in that
12 event, Defendant Elsie Brinkerhoff is entitled to all interest
13 in the same by reason of the termination of said Purchase
14 Agreement.

15 11. By reason of the foregoing, the Court should quiet
16 title in Elsie Brinkerhoff, her successors and assigns to all
17 real property, personal property, grazing rights, and water
18 rights described in said Purchase Agreement, or which belonged
19 to her as a matter of law or were used in conjunction with the
20 real property which is the subject of this action, and to
21 determine as a matter of law, that Plaintiff and Mark J.
22 Brinkerhoff have no right, title or interest in the same, and
23 that they should be permanently enjoined from claiming any
24 interest in said property.
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THIRD CAUSE OF ACTION

12. Defendant Elsie Brinkerhoff incorporates by reference paragraphs 1 through 7 of her First Cause of Action and paragraphs 9 through 11 of her Second Cause of Action, and for an additional cause of action alleges and contends as follows:

13. On or about June 4th, 1979, Defendant Elsie Brinkerhoff, by Warranty Deed, conveyed real property more particularly described therein, to herself, Mark J. Brinkerhoff and Cloyd H. Brinkerhoff, as joint tenants with full rights of survivorship and not as tenants in common. Said Deed has been recorded in the Office of the Kane County Recorder, and the claims of Plaintiff and Defendant Mark J. Brinkerhoff, are in part based upon said Warranty Deed.

14. At the time said Deed was presented to Defendant Elsie Brinkerhoff for signature, it was represented to her by Mark J. Brinkerhoff and Cloyd H. Brinkerhoff, that they were entitled to the real property more particularly described therein, when in fact they were not for the reason that they have not paid to Elsie Brinkerhoff all sums required of them.

15. Said Deed was signed by Elsie Brinkerhoff based upon the fraud and misrepresentation of Mark J. Brinkerhoff and Cloyd H. Brinkerhoff, and by reason of the same, the Court should declare null and void and without legal force or effect, said Warranty Deed, and order the same stricken from the records of Kane County, Utah, and order all property described therein to be quieted in Elsie J. Brinkerhoff.

1 16. As an alternative request for relief, Defendant Elsie
2 J. Brinkerhoff alleges upon information and belief, that
3 herself, as the grantor, and Mark J. Brinkerhoff and Cloyd H.
4 Brinkerhoff, as grantees, were mutually mistaken as to the facts
5 which would require Elsie J. Brinkerhoff to execute said Deed or
6 facts which would entitle Mark J. Brinkerhoff and Cloyd H.
7 Brinkerhoff to receive said real property. By reason of said
8 mutual mistake of fact, said Deed is void and without legal
9 effect, and the Court should order the same stricken and removed
10 from the records of Kane County, Utah.

11 17. Said Deed is also invalid for lack of consideration and
12 said grantees named therein should not be entitled to benefit
13 from said Deed under the Doctrine of Unclean Hands.

14 18. The Court should rule, as a matter of law, that all
15 real property described in said Warranty Deed is therefore
16 vested in Defendant Elsie J. Brinkerhoff, or her successors, or
17 her successors and assigns.

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20 SECOND AMENDED COUNTERCLAIM OF DEFENDANTS
21 GOLDA B. ADAIR, WARREN BRINKERHOFF AND ARLENE B. GOULDING,
22 AGAINST PLAINTIFF AND AMENDED CROSSCLAIM OF SAID
23 DEFENDANTS AGAINST CO-DEFENDANT MARK J. BRINKERHOFF

24 Comes now Defendants Golda B. Adair, Warren Brinkerhoff,
25 and Arlene B. Goulding, and counterclaims against Plaintiff and
crossclaims against Defendant Mark J. Brinkerhoff, as follows:

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FIRST CAUSE OF ACTION

1. By reason of the failure on the part of Plaintiff and Cross-Defendant Mark J. Brinkerhoff, to make payments and perform according to the terms of the Agreement dated October 26th, 1966, all real property, water rights, personal property, Taylor-Grazing Rights, BLM Grazing Rights and Forest Service Grazing Rights became the sole, separate and absolute property of Defendant Elsie Brinkerhoff.

2. On August 15th, 1980, Elsie Brinkerhoff, a widow, conveyed to Golda B. Adair, Warren Brinkerhoff, Arlene B. Goulding, Charles A. Brinkerhoff and Betty B. Esplin, said property, each as to an undivided one-fifth interest.

3. By reason of the same, said Grantees own said real property, personal property, grazing rights, and water rights described therein, to the exclusion of Plaintiff and Cross-Defendant Mark J. Brinkerhoff.

4. By reason of the foregoing, the Court should quiet title to all real property, personal property, Taylor-Grazing Rights, BLM Grazing Rights and Forest Service Rights, and water rights, in Golda B. Adair, as to an undivided one-fifth interest; Warren Brinkerhoff, as to an undivided one-fifth interest; Arlene B. Goulding, as to an undivided one-fifth interest; Charles A. Brinkerhoff, as to an undivided one-fifth interest and Betty B. Esplin, as to an undivided one-fifth interest.

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SECOND CAUSE OF ACTION

5. Said Defendants incorporate by reference Paragraphs 1, 2, 3 and 4, of their First Cause of Action, and for an additional cause of action allege and contend as follows:

6. From and after the conveyance of the Warranty Deed from Elsie Brinkerhoff to said Defendants on August 15th, 1980, said Defendants became entitled to the entire ownership of said property, and became entitled to all rents, profits or other monies derived from the use of said property. Upon information and belief, said Defendants allege that Defendant Mark J. Brinkerhoff has collected all rents and other profits. By reason of the same, said Defendants are entitled to an accounting from said Defendant and a judgment thereafter for all proceeds generated by or through the use of said property.

7. Upon information and belief, said Defendants allege that Plaintiff and/or Mark J. Brinkerhoff have unlawfully obtained the grazing permits and water rights and that the same are now in their names. Defendants are entitled to all proceeds generated by or through the use of said property, together with an accounting for the same, and are entitled to the ownership interest in said property.

8. The interests of Plaintiff and Mark J. Brinkerhoff are inferior to the collective interests owned by Defendants. By reason of the same, the Court should quiet title in favor of said Defendants and against Plaintiff and Mark J. Brinkerhoff and their heirs, successors, and assigns.

1 WHEREFORE, Defendant Elsie Brinkerhoff prays for judgment
2 as follows:

3 1. For judgment against Plaintiff, no cause of action.

4 2. That in the event it is determined by the Court that
5 the contract is still valid and binding, that the Court award to
6 said Defendant all unpaid sums owed pursuant to said contract,
7 together with interest at the highest legal rate.

8 3. For an order determining that Plaintiff and
9 Co-Defendant Mark J. Brinkerhoff, have no right, title or
10 interest in the real property, water rights and grazing rights
11 (whether described in the Purchase Agreement or not), as more
12 particularly set forth above.

13 4. For an accounting as against Plaintiff and Co-Defendant
14 Mark J. Brinkerhoff, and a judgment for all sums due said
15 Defendant.

16 5. For an order determining that, as a matter of law, said
17 Agreement upon which Plaintiff and Mark J. Brinkerhoff rely, is
18 void and without legal effect.

19 6. That the rights of each party be determined by the
20 Court.

21 7. That this Court permanently enjoin and restrain
22 Plaintiff, and Defendant Mark J. Brinkerhoff, and all persons
23 claiming by, through or under them, from asserting a claim
24 whatsoever to Defendant Elsie Brinkerhoff's interest as
25 determined by this Court.

1 8. For an order declaring that a certain Warranty Deed
2 dated June 4th, 1979 is void and of no legal effect, and
3 ordering the same stricken from the records of Kane County, Utah
4 and declaring that Defendant Elsie J. Brinkerhoff, her
5 successors and assigns, are entitled to all property as more
6 particularly described therein.

7 9. For a reasonable attorney's fee rendered in the
8 prosecution of this action, together with court costs incurred.

9 10. For such other and further relief as to the Court deems
10 just and equitable.

11 DEFENDANTS, GOLDA B. ADAIR, WARREN BRINKERHOFF, AND ARLENE
12 B. GOULDING, PRAY FOR JUDGMENT AS FOLLOWS:

13 1. For judgment against Plaintiff, no cause of action.

14 2. That the Court determine the rights of all parties to
15 this action.

16 3. That this Court award to said Defendants all of the
17 real property, water rights, personal property, Taylor-Grazing
18 Rights, BLM Grazing Rights and Forest Service Rights which are
19 the subject of this action pursuant to the deed from Elsie
20 Brinkerhoff to them as grantees, said deed dated August 15th,
21 1980.

22 4. As an alternative remedy, that this Court award to said
23 Defendants their respective one-third interest of an undivided
24 one-half interest in and to said real property.
25

1 5. That this Court determine that Plaintiff and Mark J.
2 Brinkerhoff have no estate, right, title, lien or interest in
3 the subject property.

4 6. For an accounting from Plaintiff and Co-Defendant Mark
5 J. Brinkerhoff, and for any judgment to which said Defendants
6 may be entitled arising out of their ownership in the subject
7 property.

8 7. That this Court permanently enjoin and restrain
9 Plaintiff, and Defendant Mark J. Brinkerhoff, and all persons
10 claiming by, through or under them, from asserting any claim
11 whatsoever to the interests of said Defendants.

12 8. For a reasonable attorney's fee rendered in the
13 prosecution of this action, together with costs of court
14 incurred herein.

15 9. For such other and further relief as to the Court deems
16 just and equitable.

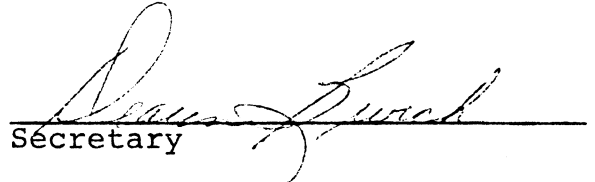
17 DATED this 18th day of February, 1983.

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19 
20 HANS Q. CHAMBERLAIN
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24 CERTIFICATE OF MAILING

25 This is to certify that I mailed a true and correct copy of
the within and foregoing SECOND AMENDED COUNTERCLAIM OF ELSIE
BRINKERHOFF AND CROSSCLAIM AGAINST MARK J. BRINKERHOFF AND

1 SECOND AMENDED COUNTERCLAIM OF GOLDA B. ADAIR, WARREN
2 BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF AND
3 BETTY B. ESPLIN, AND AMENDED CROSSCLAIM OF SAID DEFENDANTS
4 AGAINST CO-DEFENDANT, MARK J. BRINKERHOFF to Mr. Willard R.
5 Bishop, Attorney for Plaintiff, P. O. Box 279, Cedar City, Utah
6 84720, and to Mr. Mark J. Brinkerhoff, Glendale, Utah 83729,
7 first class postage prepaid on this 18th day of February,
8 1983.
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12 Secretary
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August 13, 1983

Mr. Hans Q Chamberlain
Attorney at Law
F.O. Box 726
Cedar City, Utah 84720

RE: Brinkerhoff vs Brinkerhoff Civil No. 1826

Dear Mr. Chamberlain:

Based on the following facts and provisions, I am writing to inform you of my intent to withdraw completely from the suit in question.

A- This action has caused such a division in my family because of the underhanded manner in which the deeds were changed, that the feeling may be impossible to reconcile.

B- Because the outcome of this action will be of no financial advantage to me, I will not assume any financial obligation that may arise from continued involvement.

C- It is my intent and desire to restore all Property, Permits and Water Rights to their rightful owners, Mr. Mark J. and Mrs. Lena A. Brinkerhoff. That the annual payment of Two Thousand be due and payable outlined in the original agreement.

D- That my son Warren may, with prior approval, have enough space to plant a garden and provide for the needs of his family.

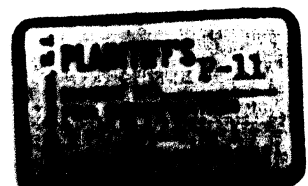
E- That all family members try to resolve their differences and reunite as a family group.

F- I also express my displeasure at the allegation of financial wrong doing against my son Mark, they are false and without base.

The record will show that this action is done of my own free will and choice, and represents my complete and total separation from any and all future involvement in this suit.

Elsie J. Brinkerhoff
Elsie J. Brinkerhoff

cc: Mr. Willard R. Bishop



HANS Q. CHAMBERLAIN
CHAMBERLAIN & CORRY
Attorney for Defendants
110 North Main, Suite G
P.O. Box 726
Cedar City, Utah 84720
(801) 586-4404

(FILED FOR RECORD)
3 September 19 52
M. M. M.
Clerk of the District Court.

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

MONT R. ANDERSON, Personal)	
Representative of the Estate)	
of CLOYD H. BRINKERHOFF,)	
)	
Plaintiff,	)	DEFENDANTS' FIRST
	)	INTERROGATORIES TO
vs.	)	PLAINTIFF
)	
ELSIE BRINKERHOFF, MARK J.)	
BRINKERHOFF, GOLDA B. ADAIR,)	
WARREN BRINKERHOFF, ARLENE)	
B. GOULDING, CHARLES A.)	
BRINKERHOFF, BETTY B. ESPLIN,)	
DARLOS T. BRINKERHOFF, and)	
JOHN DOES I through V,)	
)	
Defendants.	)	Civil No. 1826

Comes now Defendants, and pursuant to Rule 33 of the Utah Rules of Civil Procedure, propound the following Interrogatories to Plaintiff, to be answered according to Utah law:

(For purposes of these Interrogatories, Plaintiff means Cloyd H. Brinkerhoff and/or his Personal Representative.)

INTERROGATORY NO. 1: Please state when Plaintiff was appointed as the Personal Representative of Cloyd H. Brinkerhoff.

INTERROGATORY NO. 2: Please state all assets in the estate of Cloyd H. Brinkerhoff which Plaintiff is administering.

INTERROGATORY NO. 3: Please state whether or not Cloyd H. Brinkerhoff and Mark J. Brinkerhoff conducted business as a

1 partnership. If so, please state the inclusive dates of the
2 partnership.

3 INTERROGATORY NO. 4: If said parties operated as a
4 partnership, please state whether or not the partnership ever
5 filed a partnership income tax return. If so, please attach to
6 these Interrogatories, copies of all partnership returns filed by
7 said parties from and after 1966.

8 INTERROGATORY NO. 5: Concerning a certain agreement for
9 the purchase of real estate dated October 26, 1966, and for all
10 payments required to be paid therein, please provide the
11 following:

12 (a) The date of each payment, including the down
13 payment.

14 (b) By whom.

15 (c) The amount paid.

16 (d) To whom said payment was made.

17 (e) The form of the payment (i.e., cash, check,
18 etc.).

19 (f) Whether or not any other consideration was paid
20 or delivered in lieu of the payment required. If so,
21 provide details of the consideration paid on each
22 occasion.

23 INTERROGATORY NO. 6: Do you have knowledge of any
24 records, documents, books of account, or other memoranda in which
25 a record has been kept of these transactions?

26 INTERROGATORY NO. 7: If so, state:

27 (a) The nature of the records, documents, books of
28 account or other memoranda.

1 (b) The date the records, documents, books of
2 account or other memoranda were written or the date the
3 last entry was made in them.

4 (c) The present location of the records, documents,
5 books of account or other other memoranda.

6 (d) Who has possession and control of the records,
7 documents, books of account or other memoranda.

8 (e) Please produce a copy of said documents.

9 INTERROGATORY NO. 8: According to the records, documents,
10 books of account or other memoranda, or the personal knowledge of
11 Plaintiff, what is the total amount of money or other
12 consideration paid by Plaintiff or Mark J. Brinkerhoff pursuant
13 to the agreement of October 26, 1966?

14 INTERROGATORY NO. 9: According to such records,
15 documents, books of account or other memoranda, what is the
16 amount of any balance still due Elsie Brinkerhoff?

17 INTERROGATORY NO. 10: Has Elsie Brinkerhoff ever
18 demanded that you render an account for transactions which you
19 made pursuant to the agreement of October 26, 1966?

20 INTERROGATORY NO. 11: If so, how was that demand made
21 (i.e. letter, telegram, telephone, personal meeting)?

22 INTERROGATORY NO. 12: Pursuant to any letter, telegram,
23 or other conversation, have you rendered an account to Elsie
24 Brinkerhoff?

25 INTERROGATORY NO. 13: If so, state:

26 : (a) Date rendered to Elsie Brinkerhoff.

27 (b) Present location of account.

28 (c) Amount account shows due Elsie Brinkerhoff.

1 INTERROGATORY NO. 14: In the event Plaintiff claims that
2 consideration other than money was paid or given to Elsie
3 Brinkerhoff, please state whether or not there was any conversa-
4 tion whereby Elsie Brinkerhoff agreed to accept the same in
5 lieu of the payment due:

6 (a) If so, please state the date of the
7 conversation, who was present, and who spoke and what was
8 said.

9 INTERROGATORY NO. 15: In the event Plaintiff claims that
10 money was deposited into the account of Elsie Brinkerhoff in
11 lieu of paying her directly, please state the following:

12 (a) The account to which said money was deposited.

13 (b) The date of the deposit.

14 (c) The form of the payment made in making the
15 deposit.

16 (d) Whether or not Elsie Brinkerhoff was notified
17 of the payment.

18 INTERROGATORY NO. 16: In connection with Plaintiff's
19 Complaint, please state the status of the real property which is
20 located in Millard County, Utah, that is, please state whether or
21 not Plaintiff has been in possession of said property during the
22 past ten years.

23 INTERROGATORY NO. 17: Please state in whose name the
24 Hobbie Canyon Reservoir interest is now vested.

25 INTERROGATORY NO. 18: If the Hobbie Canyon Reservoir
26 interest has been transferred, to Plaintiff or Mark J.
27 Brinkerhoff or other third-party persons, please state when said
28

1 transfer was made, by whom, to what person, and the amount of
2 consideration received by reason of the transfer.

3 INTERROGATORY NO. 19: Please state in whose name the
4 Sullivan Reservoir interest is now vested.

5 INTERROGATORY NO. 20: If the Sullivan Reservoir interest
6 has been transferred, to Plaintiff or Mark J. Brinkerhoff or
7 other third-party persons, please state when said transfer was
8 made, by whom, to what person, and the amount of consideration
9 received by reason of the transfer.

10 INTERROGATORY NO. 21: Please state upon what basis
11 Plaintiff claims an interest in the Glendale Irrigation Company
12 Reservoir Certificates.

13 INTERROGATORY NO. 22: Concerning the Affidavit signed by
14 Elsie Brinkerhoff on April 13, 1971, please state the
15 following:

16 (a) Who prepared said Affidavit.

17 (b) Why was said Affidavit prepared or for what
18 purpose.

19 (c) Who requested that Elsie Brinkerhoff sign the
20 Affidavit.

21 (d) Does Plaintiff maintain that such an affidavit
22 was required by reason of the original agreement entered
23 into between Plaintiff, Mark J. Brinkerhoff and Elsie
24 Brinkerhoff in October of 1966.

25 (e) Why was only a portion of the real property
26 described in said Affidavit as compared to all of the real
27 property purchased from Elsie Brinkerhoff.

(f) Has the real property described in said Affidavit been sold or conveyed to any third-party purchaser. If so, please state the date of the conveyance, the reason for the conveyance and the amount of the consideration received for such conveyance.

INTERROGATORY NO. 23: Concerning the statement signed by Elsie Brinkerhoff designated Exhibit "C" to Plaintiff's Complaint, please state the following:

(a) Who prepared the statement.

(b) Why was the same prepared.

(c) Was the statement prepared for any income tax purpose. If so, for what purpose.

(d) Was the sum of \$23,000 filled in at the time Elsie Brinkerhoff signed the same.

(e) Was the document signed by Elsie Brinkerhoff in front of the notary public indicated therein, to-wit: Ruth S. Anderson.

(f) Who else was present when Elsie Brinkerhoff signed said statement.

(g) If there was any conversation at the time Elsie Brinkerhoff signed the same, please state in substance and effect who spoke and what was said.

(h) How was the sum of \$23,000 arrived at prior to the time the same was inserted in said statement.

(i) At the time Elsie Brinkerhoff signed the same, please describe in detail her mental and physical condition and state whether or not she was under the influence of any person present at the signing.

(j) In the event Plaintiff or Mark J. Brinkerhoff had not paid to Elsie Brinkerhoff the sum of \$23,000 at the time she signed said document, please state why she agreed to indicate that she had, in fact, received \$23,000.

(k) Since the escrow agreement requires payments to be made to the escrow at the bank located in Hurricane, Utah, please state why Plaintiff did not request the bank to sign a statement that the sum of \$23,000 had been paid to Elsie Brinkerhoff.

INTERROGATORY NO. 24: Concerning Paragraph 12 of Plaintiff's Complaint which indicates that Elsie Brinkerhoff refused to accept the last two payments tendered to her, please state the following:

(a) When the first payment was tendered to her.

(b) When the second payment was tendered to her.

(c) The form of the payment tendered on each occasion.

(d) Who was present on each occasion when the tender was made.

(e) Why Elsie Brinkerhoff refused to accept the same on those occasions.

(f) Why Plaintiff or Mark J. Brinkerhoff did not deposit said monies to her account instead of delivering them to her personally since she refused to accept the same.

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(g) If any conversation took place when the tender was made, please state each and every person present and state in substance and effect who spoke and what was said.

INTERROGATORY NO. 25: In reference to Paragraph 16 of Plaintiff's Complaint concerning damages, please state what Plaintiff maintains is the fair market value of said property on each of the following dates:

- (a) The date that the contract was signed.
- (b) The date of the alleged breach by Elsie Brinkerhoff.
- (c) The date these Interrogatories are answered.

INTERROGATORY NO. 26: Please state the date that Plaintiff first became aware that Elsie Brinkerhoff had executed and conveyed the real property which is the subject of this action to the other named Defendants herein.

INTERROGATORY NO. 27: When Plaintiff became aware of the existence of said documents, please state what Plaintiff did in relation thereto. Also state what other conversation, if any, Plaintiff had with Mark J. Brinkerhoff on that occasion.

INTERROGATORY NO. 28: Please state whether Plaintiff has ever recorded any Notice of Interest in the real property which is the subject of this action. If so, please state the date of the same, why the same was recorded and who prepared the document recorded.

INTERROGATORY NO. 29: Attached hereto is a Warranty Deed (designated Exhibit "A") from Elsie Brinkerhoff, Grantor, to Mark J. Brinkerhoff and Leah Brinkerhoff, husband and wife. In connection with said Deed, please state the following:

1 (a) When was said Warranty Deed prepared.

2 (b) Who prepared said Warranty Deed.

3 (c) Why does said Deed convey the property described
4 therein only to Mark J. Brinkerhoff and Leah Brinkerhoff
5 when the contract which is the subject of this action
6 requires the property to be conveyed to both Cloyd H.
7 Brinkerhoff and Mark J. Brinkerhoff and their respective
8 wives.

9 INTERROGATORY NO. 30: Attached hereto is a Quit-Claim
10 Deed (designated Exhibit "B") from Elsie Brinkerhoff to Mark J.
11 Brinkerhoff and Leah Brinkerhoff, husband and wife. In
12 connection with said Quit- Claim Deed, please state the
13 following:

14 (a) When was said Quit-Claim Deed prepared.

15 (b) Who prepared said Quit-Claim Deed.

16 (c) Why does said Deed convey the property described
17 therein only to Mark J. Brinkerhoff and Leah Brinkerhoff
18 when the contract which is the subject of this action
19 requires the property to be conveyed to both Cloyd H.
20 Brinkerhoff and Mark J. Brinkerhoff and their respective
21 wives.

22 INTERROGATORY NO. 31: Please state whether or not the
23 Deeds described in the previous Interrogatories, or any other
24 deeds, have ever been deposited to the Hurricane Branch of the
25 Bank of St. George. If so, please state:

26 (a) Who prepared said deeds.

27 (b) When were said deeds prepared.

28 (c) When were said deeds deposited to the escrow.

1 INTERROGATORY NO. 32: In connection with the escrow
2 instructions which are found in the agreement which is the
3 subject of this action, please state the following:

4 (a) Was Plaintiff or Mark J. Brinkerhoff ever
5 notified of any default by Elsie Brinkerhoff or the escrow
6 agent. If so, please state the date of the notice of the
7 default, who sent the same, and what was the response of
8 Plaintiff or Mark J. Brinkerhoff.

9 (b) Does Plaintiff admit that Elsie Brinkerhoff was
10 not under any obligation to provide to Plaintiff notice of
11 default in the event the payment of principal and/or
12 interest was not paid?

13 (c) If your answer to the preceding Interrogatory is
14 in the negative, please state why notice of the default
15 for failure to pay principal and/or was required by Elsie
16 Brinkerhoff.

17 INTERROGATORY NO. 33: Please state whether Plaintiff or
18 Mark J. Brinkerhoff have paid the taxes on the real property
19 which is the subject of this action for each year since 1966. If
20 all taxes have been paid, please provide the date that taxes were
21 paid for each year from 1966 through and including 1981.

22 INTERROGATORY NO. 34: Please state whether Plaintiff or
23 Mark J. Brinkerhoff has always been in total and exclusive
24 possession of the real property which is the subject of this
25 action. If the same has not occurred, please provide the dates
26 when said persons did not occupy said property and for what
27 reason they failed to do so.

1 INTERROGATORY NO. 35: Attached hereto is a Warranty Deed,
2 designated as Exhibit "C", dated June 4, 1979. In connection
3 with said Deed, please state the following:

4 (a) Who prepared said Deed.

5 (b) Why was said Deed prepared.

6 (c) Where did you obtain the legal description that
7 is found on the back of the Deed?

8 (d) What was the actual consideration that passed at
9 the time the Deed was executed and delivered?

10 (e) Why does said Deed fail to convey the personal
11 property that is described on page 3 of the Agreement
12 dated October 26, 1966?

13 (f) Who requested Elsie Brinkerhoff to sign the
14 same.

15 (g) Who was present when Elsie Brinkerhoff signed
16 said Deed, and who spoke and what was said.

17 (h) Why was the Warranty Deed prepared as a joint
18 tenancy deed as compared to a deed to create a tenancy in
19 common.

20 (i) What was the purpose of the Deed since other
21 deeds, to-wit, Exhibit "A" and Exhibit "B", had been
22 previously prepared.

23 (j) Prior to the creation of the Deed, was there any
24 conversation between Plaintiff, Mark J. Brinkerhoff and
25 Elsie Brinkerhoff concerning the need to prepare, execute
26 and record the Deed.

27 (k) At whose request was said Deed recorded, and who
28 paid for the recording.

(1) Why was said Deed recorded as compared to being deposited to the escrow which was created if it is Plaintiff's position that the agreement which is the subject of this action was still in effect at the time the joint-tenancy Deed was prepared.

(m) At the time said Deed was prepared, was Plaintiff or Mark J. Brinkerhoff aware of the difference between a joint-tenancy deed and a deed which creates a tenancy in common.

INTERROGATORY NO. 36: In connection with all grazing permits which are in part the subject of this action, please state the following:

(a) When Plaintiff and Mark J. Brinkerhoff obtained said permits in their own name, and by what authority.

(b) Whether or not said permits have been transferred onto third parties, and if so, the date when said transfer was made, and the name of the transferees.

(c) If said grazing permits have been leased to third parties, please state the amounts received, from whom received, the date the payment was received and the reason for leasing the permits as compared to utilizing the same themselves.

INTERROGATORY NO. 37: Please state whether or not Plaintiff or Mark J. Brinkerhoff have ever obtained any rents from coal or other mineral leases upon the subject property. If so, please state the following:

(a) The date of the lease agreements.

(b) The amount of each payments.

1 (c) Who made the payment.

2 (d) Under what authority the lease was executed in
3 as much as record title to the subject property has always
4 been in the name of Elsie Brinkerhoff.

5 INTERROGATORY NO. 38: Please state whether or not
6 Plaintiff or Mark J. Brinkerhoff ever came into possession of
7 certain sheep and other personal property that were owned by
8 Merle Brinkerhoff prior to his death. If so, please state the
9 following:

10 (a) Describe the sheep and personal property.

11 (b) How many sheep were obtained.

12 (c) When possession of the sheep was obtained.

13 (d) Whether or not any consideration was paid for
14 the same.

15 (e) What happened to the sheep or other personal
16 property.

17 (f) If any money was received when the sheep or
18 personal property was sold, state the amount of the
19 proceeds.

20 INTERROGATORY NO. 39: Please state why Darlos T.
21 Brinkerhoff was joined as a party Defendant to this action.

22
23 DATED this 2nd day of September, 1982.

24 CHAMBERLAIN & CORRY

25
26 
27 HANS Q. CHAMBERLAIN
28

CERTIFICATE OF MAILING

This is to certify that I mailed a true and correct copy of the within and foregoing DEFENDANTS' FIRST INTERROGATORIES TO PLAINTIFF to Mr. Willard R. Bishop, Attorney for Plaintiff, P.O. Box 729, Cedar City, Utah 84720, and to Mr. Mark J. Brinkerhoff, Glendale, Utah 84729, first-class postage prepaid, on the 2nd day of September, 1982.

Jennifer Esplin
Secretary

WARRANTY DEED

ELSIE BRINKERHOFF, GRANTOR, of Glendale, County of Kane, State of Utah, hereby CONVEYS and WARRANTS to MARK BRINKERHOFF and LEAH BRINKERHOFF, husband and wife as joint tenants with rights of survivorship and not as tenants in common, GRANTEES, of Glendale, County of Kane, State of Utah, the sum of _____ DOLLARS, and other good, valuable, and adequate consideration, an undivided one-half interest in and to the following described real property in Millard and Kane Counties, State of Utah:

Lots 1, 2, 3, and 4, Block 25, Plat "A", Delta Townsite

Lot 2, Block 26, Plat "A", Delta Townsite

REAL PROPERTY IN KANE COUNTY, STATE OF UTAH:

Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Meridian:

Section 25: West Half, containing 320 acres.

~~Section 26: Northwest Quarter, Southeast Quarter, and South Half of the Northeast Quarter, containing 478.80 acres, more or less.~~

~~Section 34: Sections 1, 2, 3, and 4, Northwest Quarter of the Southwest Quarter, East Half of the East Half; Southwest Quarter of the Northeast Quarter and the Northwest Quarter of Southeast Quarter, containing 478.80 acres.~~

Section 35: East Half of the Northeast Quarter; South Half of the Southeast Quarter; Northwest Quarter of the Southeast Quarter, containing 200 acres.

Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Meridian:

Section 29: Southwest Quarter of the Northeast Quarter; West Half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter, containing 160 acres.

Section 30: Northwest Quarter; East Half of the Southwest Quarter, containing 160 acres.

Section 5: Lot 2, containing 39.08 acres.

EXHIBIT A

Township 40 South, Range 7 West, Salt Lake Meridian:

Beginning at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Meridian and running thence East 10.23 chains; thence North 80° West 6.50 chains; thence West 3.60 chains; thence South 1 chain to beginning, containing .74 acres.

Beginning at the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26 and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwesterly along the middle of the channel of said creek to the North Line of said Northwest Quarter of the Northeast Quarter; thence West 11.23 chains to the place of beginning.

Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26 and running thence South 70° East 15 chains to the middle of the channel of the creek; thence Southerly along the middle of the channel of said creek to the South Line; thence North 73°45' West 14.60 chains; thence North 4.30 chains to the point of beginning, containing 54.30 acres.

The above three tracts being part of land situated in Sections 25 and 26 of said township and range, sometimes referred to unofficially as Lot "A".

Township 40 South, Range 4 West, Salt Lake Meridian:

Southwest Quarter of the Northwest Quarter of Section 26, cont. 40 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Lot 1; Northeast Quarter of the Northwest Quarter of Section 31, containing 79.30 acres.

Together with all improvements and appurtenances thereto annexed or in any way appertaining.

WITNESS the hand of said GRANTOR this 26 day of Oct, 1966.

Elsie Brinkerhoff
Elsie Brinkerhoff

STATE OF UTAH)
 : SS.
COUNTY OF KANE)

On this 26 day of Oct, 1966, personally appeared before me
ELSIE BRINKERHOFF, the signer of the within and foregoing instrument, who duly acknowledged to me that she executed the same.

Paul H. Blanchard
Notary Public

Residing at: 1000 N. 1st St., Salt Lake City, Utah

My Commission Expires: 2-1-26-1968

QUITCLAIM DEED

ELSIE BRINKERHOFF, GRANTOR, of Glendale, County of Kane, State of Utah,
hereby QUITCLAIMS to MARK BRINKERHOFF and LEAN BRINKERHOFF, husband and wife, as
GRANTEES, of Glendale, County of Kane, State of Arizona, the sum of \$10,000.00
DOLLARS, and other good, valuable, and adequate consideration, an undivided one-
half interest in and to the following described water and reservoir rights in
Mohave County, State of Arizona:

A one fourth interest in Hobbie Canyon Reservoir (9-36-12) in
Mohave County, State of Arizona.

A one half interest in Sullivan Reservoir in Mohave County, Arizona

WITNESS the hand of said GRANTOR this 26 day of Oct, 1966.

STATE OF UTAH)
 : SS.
COUNTY OF KANE)

On this 26 day of Oct, 1966, personally appeared before me
ELSIE BRINKERHOFF, the signer of the within and foregoing instrument, who duly
acknowledged to me that she executed the same.

James Chamberlain
Notary Public

My Commission Expires: 11/1/67

EXHIBIT B

Recorded at Request of _____
at _____ M. Fee Paid \$ _____ County Recorder
By _____ Dep. _____ Book _____ Page _____ Ret.: _____
Mail tax notice to _____ Grantees _____ Address _____ Glendale, Utah 84729

WARRANTY DEED

Elsie Brinkerhoff, a widow, grantor
of Glendale, County of Kane, State of Utah, hereby
CONVEY and WARRANT to ELSIE BRINKERHOFF, a widow, MARK J. BRINKERHOFF, a
married man, and CLOYD H. BRINKERHOFF, a married man,
all as Joint Tenants with full rights of survivorship,
and not as Tenants in Common,

of Glendale, Utah 84729 grantees
for the sum of
\$10.00 & other valuable consideration-----DOLLARS,
the following described tracts of land in KANE County,
State of Utah:

SEE SCHEDULE "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

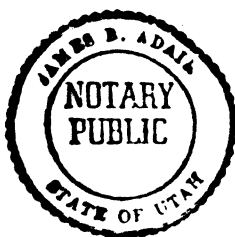
WITNESS, the hand of said grantor, this 4th day of June, A. D. 1979.

Signed in the Presence of

Elsie Brinkerhoff
Elsie Brinkerhoff

STATE OF UTAH
County of Kane

SS.



On the 4th day of June, A. D. 1979, personally
appeared before me Elsie Brinkerhoff, a widow,

the signer of the within instrument who duly acknowledged
to me that she executed the same.

James B. Adair
James B. Adair

Notary Public

My Commission expires June 19, 1979 My residence is Orderville, Utah

SOUTHERN UTAH TITLE COMPANY - P. O. Box 7 - KANE, UTAH 84701

EXHIBIT C

FILED IN 12261 RECORDED AT 1200 PM 05
JUN 11 1979
KANE COUNTY RECORDS

PARCEL 3: Lots 1, 2, 3, and 4; the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$); the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}SW\frac{1}{4}$); the East Half of the East Half ($E\frac{1}{2}E\frac{1}{2}$); the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}NE\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section 27, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 478.80 acres, more or less.

PARCEL 4: The East Half of the Northeast Quarter ($E\frac{1}{2}NE\frac{1}{4}$); the South Half of the Southeast Quarter ($S\frac{1}{2}SE\frac{1}{4}$) and Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section 35, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 200.0 acres, more or less.

PARCEL 5: The Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}NE\frac{1}{4}$); the West Half of the Southeast Quarter ($W\frac{1}{2}SE\frac{1}{4}$) and the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of Section 29, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 160.0 acres, more or less.

PARCEL 6: The Northwest Quarter ($NW\frac{1}{4}$) and the East Half of the Southwest Quarter of Section 30, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 238.99 acres, more or less.

PARCEL 7: Lot 2, Section 5, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 39.08 acres, more or less.

PARCEL 8: The Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}NW\frac{1}{4}$) of Section 8, Township 40 South, Range 4 West, Salt Lake Base and Meridian, containing 40.0 acres, more or less.

PARCEL 9: Lot 1 and the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section 31, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 79.30 acres, more or less.

PARCEL 10: BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence South 0°35' West 567.60 feet; thence South 78°00' East 963.6 feet; thence Northwesterly along the creek bed, 808.0 feet, more or less, to the North line of Section 26; thence South 89°57' West 741.18 feet to the point of beginning. Containing 11.77 acres, more or less.

PARCEL 11: BEGINNING at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1.0 chain to the point of beginning. Containing 0.74 acres, more or less.

++ ++ ++ ++ ++ ++ ++

WILLARD R. BISHOP, P.C.
Attorney for Plaintiff
P.O. Box 279
Cedar City, Utah 84720

Telephone: 586-9483

FILED FOR RECORD
27 Sept 1983
Holly Chamberlain
Clerk of the District Court.

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF,

Plaintiff,

vs

ELSIE BRINKERHOFF, MARK J.
BRINKERHOFF, GOLDA B.
ADAIR, WARREN BRINKERHOFF,
ARLENE B. GOULDING, CHARLES
BRINKERHOFF, BETTY B.
ESPLIN, DARLOS T. BRINKER-
HOFF, and JOHN DOES I
through V,

Defendants.

ANSWER OF MARK J.
BRINKERHOFF TO SECOND
AMENDED COUNTERCLAIM
AND CROSS-CLAIMS OF
DEFENDANTS

Civil No. 1826

Comes now Defendant MARK J. BRINKERHOFF, and answers
Defendant ELSIE BRINKERHOFF'S SECOND AMENDED COUNTERCLAIM
AND CROSS-CLAIM as follows:

FIRST DEFENSE

Defendant ELSIE BRINKERHOFF'S SECOND AMENDED COUNTERCLAIM
AND CROSS-CLAIM fails to state a claim against Defendant
MARK J. BRINKERHOFF, upon which relief may be granted.

SECOND DEFENSE

1. This Defendant admits the allegations of paragraphs

1 and 13.

2. This Defendant denies the allegations of paragraphs 2, 4, 5, 6, 7, 10, 11, 14, 15, 16, 17 and 18.

3. Answering paragraph 3 of Defendant ELSIE BRINKERHOFF'S SECOND AMENDED COUNTERCLAIM AND CROSS-CLAIM, this Defendant ~~admits that~~ he claims an interest in the subject property adverse to the claim of ELSIE BRINKERHOFF, and denies each and every other allegation contained in paragraph 3.

4. Answering paragraph 9 of said counterclaim and cross-claim, this answering Defendant admits that ELSIE BRINKERHOFF purported to convey certain rights and property in a Warranty Deed dated 15 August 1980, but denies that the Warranty Deed actually conveyed any right, title, and interest whatever in the subject property to others named in paragraph 9.

5. This answering Defendant denies each and every allegation of said Counterclaim and Cross-Claim not specifically admitted herein.

THIRD DEFENSE

6. As a separate and affirmative defense, this answering Defendant states that he has, or may have, further and additional affirmative defenses which are not yet known to this Defendant, but which may become known through further discovery, including, but not limited to, accord and satisfaction, arbitration, award, discharge in bankruptcy, estoppel, failure of consideration, fraud, illegality, license, payment,

release, res judicata, statute of frauds, statute of limitations, waiver, and other matters constituting an affirmative defense.

7. This answering Defendant asserts each and every affirmative defense as may be ascertained through future discovery.

WHEREFORE, having fully answered Defendant ELSIE BRINKERHOFF'S SECOND AMENDED COUNTERCLAIM AND CROSS-CLAIM, this Defendant prays that the same be dismissed without more, and that he be awarded his costs incurred herein.

Comes now Defendant, MARK J. BRINKERHOFF, and answers the Second Amended Counterclaim and Cross-Claim of Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING, as follows:

FIRST DEFENSE

1. Defendants' Second Amended Counterclaim and Cross-Claim fails to state a claim against this Defendant upon which relief may be granted.

SECOND DEFENSE

2. Defendant MARK J. BRINKERHOFF denies each and every other allegation of Defendants' Second Amended Counterclaim and Cross-Claim.

THIRD DEFENSE

3. As a separate and affirmative defense, this answering Defendant states that he has, or may have, further and additional defenses which are not yet known to this Defendant,

but which may become known through further discovery, including, but not limited to, accord and satisfaction, arbitration, award, discharge in bankruptcy, estoppel, failure of consideration, fraud, illegality, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and other matters constituting an avoidance or affirmative defense.

4. This Defendant asserts each and every affirmative defense as may be ascertained through future discovery.'

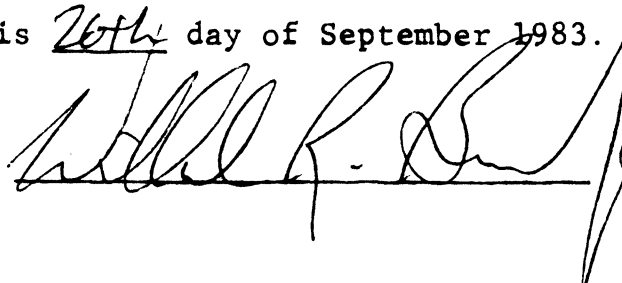
WHEREFORE, having fully answered Defendants' Second Amended Counterclaim and Cross-Claim, Defendant MARK J. BRINKERHOFF prays that the same be dismissed without more and that he be awarded his costs incurred herein.

DATED: 26 September 1983.


WILLARD R. BISHOP

CERTIFICATE OF MAILING

SERVED the within and foregoing document upon the Defendants above-named, by mailing a full, true and correct copy to Mr. Hans Q. Chamberlain, Attorney for Defendants, at 110 N. Main Street, Cedar City, Utah 84720, first class postage fully prepaid this 26th day of September 1983.



BISHOP & RONNOW, P.C.
Willard R. Bishop
Attorney for Plaintiff
36 North 300 West
P. O. Box 279
Cedar City, UT 84720
Telephone: (801) 586-9483

(FILED FOR RECORD)
12
Kathy Chamberlain
Clerk of the District Court

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,

STATE OF UTAH.

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF,

Plaintiff,

vs.

ELSIE BRINKERHOFF, MARK J.
BRINKERHOFF, GOLDA B. ADAIR,
WARREN BRINKERHOFF, ARLENE B.
GOULDING, CHARLES BRINKERHOFF,
BETTY B. ESPLIN, DARLOS T.
BRINKERHOFF, and JOHN DOES I
through V,

Defendants.

ORDER

Civil No. 1826

Based upon the motion of Willard R. Bishop, Attorney for
Plaintiffs, and the stipulation of Hans Q. Chamberlain, Attorney for
Defendants,

IT IS HEREBY ORDERED, that Plaintiff be granted leave to
file a second amended complaint and substitute parties in the above-
captioned case.

DATED this 2nd day of December, 1983.

BY THE COURT:

[Signature]
DON V. TIBBS
District Judge

N-44

BISHOP AND RONNOW, P.C.
Attorneys for Plaintiff
P.O. Box 279
Cedar City, Utah 84720

Telephone: 586-9483

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

LENA BRINKERHOFF and MARK
J. BRINKERHOFF,

Plaintiffs,

vs

ELSIE BRINKERHOFF, GOLDA
B. ADAIR, WARREN
BRINKERHOFF, ARLENE B.
GOULDING, CHARLES
BRINKERHOFF, BETTY B.
ESPLIN, DARLOS T. BRINKER-
HOFF, and JOHN DOES I
through V,

Defendants.

SECOND AMENDED
COMPLAINT

Civil No. 1826

Come now Plaintiffs, by and through counsel, who
complain of Defendants, and for cause of action allege:

FIRST CAUSE OF ACTION

QUIET TITLE

1. This action arises out of the ownership, use, and
possession of real property located in Millard and Kane
Counties, State of Utah.

2. On or about 26 October 1966, a certain "Agreement"
was entered into by ELSIE BRINKERHOFF, as SELLER, and CLOYD

FILED
2 Dec 1966
Kathy Chamberlain
Clerk of the Court

H. BRINKERHOFF and MARK J. BRINKERHOFF, BUYERS, covering the sale of certain real and personal properties, located in Millard and Kane Counties, State of Utah. A copy of said "Agreement" is attached hereto, marked as Exhibit "A", and incorporated by this reference. The real property which is the subject matter of this action is more particularly described as follows:

PROPERTY LOCATED IN KANE COUNTY, UTAH

- I. West 1/2 Section 25, Township 39 South, Range 4 1/2 West, containing 320 acres.
- II. NW 1/4 SE 1/4, S 1/2 NE 1/4 Section 26, Township 39 South, Range 4 1/2 West, containing 400 acres.
- III. Lots 1, 2, 3, 4, SE 1/4 NW 1/4, NE 1/4 SW 1/4, E 1/2 E 1/2, SW 1/4 NE 1/4, NW 1/4 SE 1/4; Section 27, Township 39 South, Range 4 1/2 West, Salt Lake Meridian, containing 478.80 acres.
- IV. East 1/2 NE 1/4, S 1/2 SE 1/4, NW 1/4 SE 1/4, Section 35, Township 39 South, Range 4 1/2 West, containing 200 acres.
- V. SW 1/4 NE 1/4, W 1/2 SE 1/4, SE 1/4 SW 1/4, Section 29, Township 40 South, Range 4 1/2 West, containing 160 acres.
- VI. NW 1/4, E 1/2 SW 1/4, Section 30, Township 40 South, Range 4 1/2 West, containing 238.99 acres.
- VII. Lot 2, Section 5, Township 40 South, Range 4 1/2 West, containing 39.08 acres.
- VIII. SW 1/4 NW 1/4, of Section 8, Township 40 South, Range 4 West, Salt Lake Meridian, containing 40 acres.
- IX. Lot 1, Northeast Quarter of the Northwest Quarter of Section 31, Township 40 South, Range 4 1/2 West, Containing 79.30 acres.
- X(a). Beginning at the Northwest Corner of the Northwest

Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwesterly along the middle of the channel of said creek to the North Line of said Northwest Quarter of the Northeast Quarter; thence West 11.25 chains to the place of beginning, containing 11.77 acres.

X(b). Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian, and running thence South 70° East 15 chains to the middle of the channel of the creek; thence Southerly along the middle of the channel of said creek to the South line; thence North 73°45' West 14.60 chains; thence North 4.30 chains to the place of beginning, containing 5.60 acres.

XI. Beginning at the Southwest corner of the SW 1/4 SE 1/4 of Section 23, Township 40 South, Range 7 West, Salt Lake Base & Meridian, and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1 chain to the point of beginning. Containing .74 acres.

PERSONAL PROPERTY:

XII. A one-fourth (1/4) interest in Hobble Canyon Reservoir (9-36-12) in Mohave County, Arizona.

XIII. A one-half (1/2) interest in Sullivan Reservoir in Mohave County, Arizona.

TOGETHER WITH all grazing privileges and permits annexed to or based upon any of the foregoing real, personal, reservoir, or water rights as commensurate.

XIV. Glendale Irrigation Company certificate No. 204, for 9.1 shares of East Ditch Water, to ELSIE J., CLOYD H., and MARK J. BRINKERHOFF, dated 29 April 1967.

XV. Glendale Irrigation Company, certificate No. 354, for 10.4 shares of West Ditch Water, to ELSIE J. CLOYD H., and MARK J. BRINKERHOFF, dated 29 April 1967.

MILLARD COUNTY, UTAH:

XVI. Lots 1, 2, 3, and 4, Block 25, Plat "A", Delta

Townsite.

XVII. Lot 2, Block 26, Plat "A", Delta Townsite.

3. Defendant ELSIE BRINKERHOFF received and accepted payments as specified in Exhibit "A", thereby acknowledging the existence of said "Agreement".

4. The "Agreement" provides that "the SELLER shall execute a Warranty Deed to the real property hereinabove described and quitclaim conveyances to the water and reservoir rights hereinabove described, of an undivided one half interest to each BUYER and his wife as joint tenants with full rights of survivorship,".

5. The "Agreement" was never recorded and all payments were made directly to Defendant ELSIE BRINKERHOFF, rather than into the established escrow.

6. On or about 13 April 1971, Defendant ELSIE BRINKERHOFF, signed a certain "Affidavit" setting forth the sale of certain property to CLOYD J. BRINKERHOFF and MARK J. BRINKERHOFF, and further stating that she would defend and protect the rights of Mark J. Brinkerhoff and Cloyd H. Brinkerhoff. A copy of said Affidavit is attached hereto, marked as Exhibit "B", and incorporated by this reference.

7. On or about 6 April 1977, Defendant ELSIE BRINKERHOFF signed a certain statement, having the statement duly notarized, stating that she had received the sum of \$23,000.00 in payments on said property from Cloyd and Mark Brinkerhoff. A copy of the statement is attached hereto, marked as Exhibit

"C", and is incorporated by this reference.

8. On or about 4 June 1979, ELSIE BRINKERHOFF, executed a Warranty Deed (attached as Exhibit "D"), purporting to convey to herself, Plaintiff MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF as joint tenants, the same property conveyed under the "Agreement", (Exhibit "A"). ELSIE BRINKERHOFF executed the warranty deed without the knowledge of either MARK J. BRINKERHOFF or CLOYD H. BRINKERHOFF.

9. After the death of CLOYD H. BRINKERHOFF, Defendant ELSIE BRINKERHOFF executed and recorded various deeds covering the above-described real property, to other individuals, in an attempt to cloud title to the above described real property in passing to Decedent CLOYD H. BRINKERHOFF's surviving joint tenant.

10. By virtue of the execution and recordation of these subsequent deeds, Defendants' claims are adverse or hostile to and in conflict with the interest of Plaintiffs, and a dispute has arisen with respect to the parties' rights.

11. The true names of Defendants DOE are unknown to Plaintiffs. Upon discovery of such true names, Plaintiffs reserve the right to substitute the same in place of the fictitious names used herein.

12. Plaintiffs' interest in and to the above-described real property is prior in time and right to those alleged

claims of Defendants.

13. Plaintiffs, at all times pertinent to this action, had, and still have, an interest in and to the real properties as above-described.

14. By virtue of Defendant ELSIE BRINKERHOFF executing and recording subsequent deeds to the above-named Defendants, the claims are adverse or hostile to and in conflict with the interest of Plaintiffs and said Plaintiffs are entitled to an order of this Court, declaring and adjudging said Plaintiffs to be the owners, in fee simple, of their undivided one-half interest each in and to the real and personal property, and ordering Defendants, and each of them, and all persons claiming by, through, or under them, to have no estate, right, title, lien, or interest in and to Plaintiffs' interest.

WHEREFORE, Plaintiffs pray for Judgment against Defendants as follows:

ON THE FIRST CAUSE OF ACTION:

1. That the above-entitled Court determine and enter a declaratory judgment determining the rights of the parties to this action to terminate the controversy or remove any uncertainty as to ownership of the above-entitled property.

2. That Defendants, and all persons claiming by, through, or under them be required to set forth the nature of their claims to the above-described real property.

3. That all adverse claims of said Defendants to the real property be determined by this Court.

4. That this Court declare and adjudge that Plaintiffs are the owners, in fee simple, of their undivided one-half (1/2) interest each in and to said real and personal property; and that Defendants, and each of them, and all persons claiming by, through, or under them, have no estate, right, title, lien, or interest in and to Plaintiffs' property....

5. That this Court permanently enjoin and restrain Defendants, and each of them, and all persons claiming by, through, or under them, from asserting any claim whatsoever adverse to Plaintiffs' interest.

6. For Plaintiffs' costs incurred in this action.

7. For such other and further relief as the Court deems appropriate.

SECOND CAUSE OF ACTION

SPECIFIC PERFORMANCE

1. The allegations of paragraphs 1 through 14, above, are incorporated by this reference as though fully set forth herein.

2. On or about 26 October 1966, ELSIE BRINKERHOFF, as SELLER, and CLOYD H. BRINKERHOFF and MARK BRINKERHOFF, as BUYERS, entered into a contract (Exhibit "A"), wherein certain real property, grazing privileges, and water and reservoir rights in the States of Utah and Arizona were sold, in consideration of BUYERS paying to SELLER, the sum

of FIFTY THREE THOUSAND THREE HUNDRED EIGHTY-EIGHT (\$53,388.00) DOLLARS, payable at the rate of TWO THOUSAND DOLLARS (\$2,000.00) per year, beginning November 1, 1968, BUYERS having paid the sum of FOUR THOUSAND DOLLARS (\$4,000.00) for the years of 1966 and 1967 at the time of execution of the contract. As a further condition to the contract, BUYERS agreed to pay to SELLER, for the entire remainder of SELLER'S life, irrespective of the amount to be paid under this contract, the sum of TWO THOUSAND DOLLARS (\$2,000.00) per year, and if the contract was not paid in full at the time of the death of ELSIE BRINKERHOFF, the remainder would be paid to her heirs, equally, share and share alike.

3. Plaintiffs have duly performed all of their obligations under said contract, except payment for the last several years has been tendered and offered in full performance thereof, but Defendant ELSIE BRINKERHOFF has wrongfully refused and still refuses to accept the same.

4. Defendant ELSIE BRINKERHOFF has at no time declared the "Agreement" in default, but has failed and refused, and still fails and refuses to perform her obligations under said contract.

5. Plaintiffs have no adequate legal remedy in that the real property is unique, having special value to Plaintiffs and is the type of which Plaintiffs cannot obtain a duplicate.

6. The contract, which is the subject matter of this

action, is fair and equitable, and is supported by consideration as is shown by the above facts and by the fact that Defendant ELSIE BRINKERHOFF, signed a certain notarized statement, (Exhibit "C"), stating that she had received, as of 6 April 1977, the sum of \$23,000.00 in payments on said property from CLOYD and MARK BRINKERHOFF.

7. By reason of Defendant ELSIE BRINKERHOFF's failure to perform the remainder of said contract according to its terms, Plaintiffs have sustained damages in the amount of the fair market value of said property.

WHEREFORE, Plaintiffs pray for judgment on the Second Cause of Action as follows:

1. That Defendant ELSIE BRINKERHOFF be required to specifically perform said contract by accepting the payments as set forth in said contract.

2. If specific performance cannot be granted, for damages in the amount of the fair market value of the property.

3. For costs of court incurred in this action.

4. For such other and further relief as the Court deems appropriate in the premises.

5. That the Court declare the deeds executed and recorded after the death of Cloyd H. Brinkerhoff to be null, void, and of no effect.

THIRD CAUSE OF ACTION

ANTICIPATORY BREACH

1. The allegations of paragraphs 1 through 14, above, are incorporated as though fully set forth herein.

2. In late fall of 1979, Plaintiffs were informed that Defendant ELSIE BRINKERHOFF had executed and recorded various deeds covering the property which she previously sold to Plaintiffs, in an attempt to pass title to other individuals not entitled thereto.

3. Plaintiffs have performed all conditions to be performed in the contract, and stand ready, willing, and able to continue said performance.

4. The actions of the above-named Defendants in accepting and recording the various deeds covering the above-described real properties, when they were fully aware of the existence of the contract with Plaintiffs, were done in anticipatory breach of said Plaintiffs' rights in and to the said property.

WHEREFORE, Plaintiffs pray for relief on their Third Cause of Action as follows:

1. That the Court declare Defendant ELSIE BRINKERHOFF to be in anticipatory breach of her contract and award Plaintiffs' damages for the current market value of the above-described property.

2. For Plaintiffs' costs incurred herein.

3. For such other relief as the court deems appropriate.

FOURTH CAUSE OF ACTION

DAMAGES

1. The allegations of paragraphs 1 through 14, above, are incorporated as though fully set forth herein.

2. Alternatively, in the event the Court does not grant relief under the First through Third Causes of Action, above, Plaintiffs are entitled to damages for the current market value of the above-described real properties as may be determined by the Court, together with interest thereon at the legal rate.

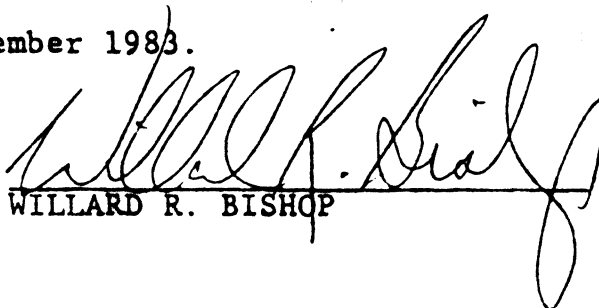
WHEREFORE, Plaintiffs pray for relief on their Fourth Cause of Action as follows:

1. That this Court determine the current market value of the above-described property and award Plaintiffs damages accordingly.

2. For Plaintiffs' costs incurred in this action.

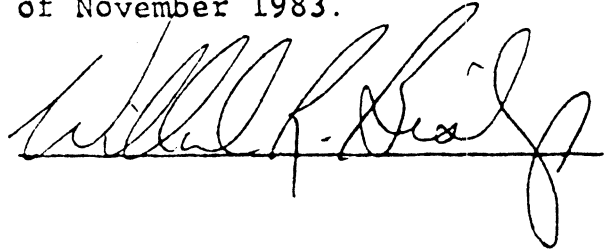
3. For such other and further relief as the Court deems appropriate in the premises.

DATED: 29 November 1983.


WILLARD R. BISHOP

CERTIFICATE OF MAILING

SERVED the within and foregoing document upon the Defendants above-named, by mailing a full, true and correct copy to Mr. Hans Q. Chamberlain, Attorney for Defendants, at 110 N. Main Street, Cedar City, Utah 84720, and to Elsie Brinkerhoff, Glendale, Utah, all mailings first class postage fully prepaid this 29th day of November 1983.

A handwritten signature in cursive script, appearing to read "William F. Bailey", is written over a horizontal line.

AGREEMENT

THIS AGREEMENT, made and entered into by and between ELSIE BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTY OF THE FIRST PART, hereinafter referred to as the "SELLER" and CLOYD H. BRINKERHOFF and MARK BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTIES OF THE SECOND PART, hereinafter referred to as the "BUYERS",

WITNESSETH:

THAT WHEREAS, the SELLER is the owner of the real property, grazing privileges and water rights in the States of Utah and Arizona;

AND WHEREAS, the BUYERS desire to purchase the same;

AND WHEREAS, the parties have agreed upon terms and conditions for sale thereof;

NOW THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set out the parties hereby agree and bind themselves and their heirs and assigns as follows:

1. That for and in consideration of the total sum of FIFTY THREE THOUSAND THREE HUNDRED EIGHTY-EIGHT (\$53,388.00) DOLLARS, as the full consideration therefor, the SELLER covenants and agrees to sell and the BUYERS covenant and agree to buy the following described real property, grazing privileges and water and reservoir rights in the States of Utah and Arizona:

REAL PROPERTY IN MILLARD COUNTY, UTAH:

Lots 1, 2, 3, and 4, Block 25, Plat 1A Delta Township.

Lot 1, Block 25, Plat 1A, Delta Township.

REAL PROPERTY IN KANE COUNTY, UTAH:

Township 39 South, Range 4½ West, Salt Lake Meridian:

West Half of Section 25, containing 80 acres.

Northwest Quarter; Southeast Quarter and the South Half of the Northeast Quarter containing 80 acres, all in Section 26, Township 39 South, Range 4½ West, Salt Lake Meridian, containing 400 acres, or less.

Lots 1, 2, 3, and 4; Southeast Quarter of the Northwest Quarter; Northeast Quarter of the Southwest Quarter; East Half of the East Half; Southwest Quarter of the Northeast Quarter; Northwest Quarter of the Southeast Quarter of Section 27, Township 39 South, Range 4½ West, containing 479.30 acres.

EXHIBIT "A"

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RICHFIELD, UTAH 84701

East Half of the Northeast Quarter; South Half of the Southeast Quarter; Northwest Quarter of the Southeast Quarter of Section 35, containing 200 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Section 10: Southwest Quarter of the Northwest Quarter; East Half of the Southeast Quarter and the Southwest Quarter of the Southwest Quarter, containing 160 acres.

Section 30: Northwest Quarter; East Half of the Southwest Quarter, containing 238.90 acres.

Section 5: Lot 2, containing 39.08 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Southwest Quarter of the Northwest Quarter of Section 8, containing 40 acres.

Township 40 South, Range 7 West, Salt Lake Meridian:

Beginning at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Meridian, and running thence East 12.73 chains to the North Line of said Southeast Quarter; thence North 70° East 15 chains to the middle of the channel of the creek; thence South 1 chain to beginning, containing 1.00 acres.

Beginning at the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwesterly along the middle of the channel of said creek to the North Line of said Northwest Quarter of the Northeast Quarter; thence West 11.23 chains to the place of beginning.

Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian, and running thence South 70° East 15 chains to the middle of the channel of the creek; thence Southwesterly along the middle of the channel of said creek to the South Line; thence North 70° West 11.60 chains; thence North 4.30 chains to the place of beginning, containing 5.60 acres.

The above three tracts being part of land situated in Sections 23 and 26 of said township and range, sometimes referred to unofficially as Lot "A".

Township 40 South, Range 4 West, Salt Lake Meridian:

Lot 1: Northeast Quarter of the Northwest Quarter of Section 11, containing 79.20 acres.

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74 SOUTH MAIN
RICHFIELD, UTAH 84701

PERSONAL PROPERTY:

The following described her and her interest in the following described property, Arizona:

A one half interest in Sullivan Reservoir in Mohave County, Arizona.

And all grazing privileges and permits annexed to or based upon any of the foregoing real, personal, reservoir, or water rights as commensurate.

2. The parties agree that for and in consideration of the sale by the SELLER to the BUYERS of the foregoing real and personal property, water and reservoir rights and grazing privileges, the BUYERS will pay to the SELLER the sum of TWO THOUSAND (\$2,000.00) DOLLARS, each year, beginning with the 1st day of November, 1964, of which payments due on November 1, 1964 and November 1, 1965 have been paid in full by the BUYERS and the BUYERS will continue to pay annual installments of \$2,000.00 on the 1st day of November in each year thereafter beginning November 1, 1966 and continuing during the entire life of the SELLER.

The BUYERS agree that they will pay the sum of \$2,000.00 per year to the SELLER for the entire remainder of SELLER'S life irrespective of the amount which may be paid under this contract whether it exceeds the total consideration hereinabove set out or whether that total amount shall not be paid by applying amount of a sum of \$2,000.00 against the purchase price during the life time of the SELLER and in consideration of an undertaking by the BUYERS to pay the amount of \$2,000.00 per year for the life of the SELLER irrespective of the amount which may be paid, the SELLER waives interest upon the unpaid balances.

It is provided, however, that should the total consideration hereinabove provided not be paid by the BUYERS to the SELLER during SELLER'S lifetime then upon the death of the SELLER any amounts remaining under this Agreement after crediting all payments which have been made hereunder, shall be paid equally, as provided herein in equal shares, shares and share alike, to

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74 SOUTH MAIN
RICHFIELD, UTAH 84701

Warren Brinkerhoff and Charley Arland Brinkerhoff two-sevenths (2/7ths) (1/7th to each) of the balances due (it being stipulated that the BUYERS together with Warren Brinkerhoff, Charley Arland Brinkerhoff, Betty S. Brinkerhoff, and the other provision has been made for the better three named herein), together with interest at four (4%) per cent per annum on the deferred declining balance.

The BUYERS may, at any time, prepay all or any part of the remaining principal due under this contract.

5. The SELLER shall execute a Warranty Deed to the real property hereinabove described and quitclaim conveyances to the water and riparian rights hereinabove described, of an undivided one half interest to each BUYER and his wife as joint tenants with full rights of survivorship, and shall execute and deliver to the BUYERS a deed of trust in and to the property hereinabove described which shall hold these documents in trust and in escrow subject to the following

ESCROW INSTRUCTIONS

If the BUYERS shall make all payments of principal and interest hereunder provided and perform all the other covenants and agreements herein contained, then upon payment of the final installment due hereunder the Escrow Depositor shall deliver to the BUYERS all the escrowed documents.

In the event of a default in the payment of any installment of principal or interest and in the event of a default in any other term or condition hereunder and in the event of a default in the payment of any installment of principal and interest shall be given to the BUYERS by the SELLER and a subsequent failure to remedy the same shall continue for a period of thirty (30) days, then the SELLER may, at her option, demand a redelivery to her of all of the escrowed documents whereupon the BUYERS will vacate and possibly surrender all of the premises hereinabove described and the SELLER may re-enter into possession of the same without further process and may retain as rent and liquidated damages all sums heretofore paid by BUYERS under this agreement.

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75 SOUTH MAIN
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As an alternative remedy the SELLER may elect to reduce any payment or all payments, acceleration and returning the entire balance of principal and interest to the SELLER, or may elect to treat this Agreement as a lease on intermittent occasions or may elect to treat this Agreement as a note and mortgage passing title through to the BUYERS and perfecting the same in the manner provided by law.

During the period the BUYERS are complying with the terms of this Agreement, they shall be entitled to the sole, exclusive, and beneficial use, occupancy, and enjoyment of the above described premises subject only to the rights of the SELLER to inspect the same at reasonable times.

4. The BUYERS have inspected said premises and find the same in a manner satisfactory to them and there are no covenants or warranties other than those herein.

5. This shall be of the essence as to all the terms and conditions of this Agreement which shall bind and inure to the benefit of the heirs, successors, and assigns of the parties hereto and the party in default agrees to pay all costs and a reasonable attorney's fee in the event enforcement of this contract is required.

WITNESS the hands of the parties hereto this 26 day of October, 1966.

Edith R. Brinkerhoff
SELLER

Clyde R. Brinkerhoff
Clyde R. Brinkerhoff
Mary J. Brinkerhoff
Mary J. Brinkerhoff
BUYERS

OLSEN AND CHAMBERLAIN
LAW OFFICES
75 SOUTH MAIN
RICHFIELD, UTAH 84701

A F F I D A V I T

TO WHOM IT MAY CONCERN:

STATE OF UTAH)
 : ss
COUNTY OF KANE)

BEFORE ME, the undersigned Notary Public, personally appeared
ELSIE BRINKERHOFF, who stated under oath, as follows:

That she has sold Real Property described hereinafter to Mark J.
Brinkerhoff and Cloyd H. Brinkerhoff, and that she will defend the rights of own-
ership and also any rights of way of ingress or egress to the said Real Property.
That she will enter into a lawsuit or any other procedure needed to protect these
rights of ingress or egress, to said property.

The real property is described as follows:

BEGINNING at the South Quarter Corner of Section 23, Township 40 South, Range 7
West, Salt Lake Meridian, Utah, and running thence East 10.23 chains; thence North
80° West 6.36 chains; thence West 3.68 chains; thence South 1 chain to the point
of beginning.

ALSO BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range
7 West, Salt Lake Meridian, Utah, and running thence South 8.6 chains; thence South
73°45' East 14.6 chains; thence Northwesterly along the middle of the channel of
the creek to the North boundary line of said Section 26; thence West 11.23 chains
to the point of beginning. Containing 11.77 acres

Total acres: 12.51

That the Affiant will at any time help to defend and protect the
rights of Mark J. Brinkerhoff and Cloyd H. Brinkerhoff as far as the Real Property
is concerned.

Elsie Brinkerhoff
Elsie Brinkerhoff

SUBSCRIBED AND SWORN to before me this 13 day of April, A.D. 1971.

Franc Chamberlain
Notary Public
Residing at Orderville, Utah

My commission expires

Feb. 26, 1972

EXHIBIT "B"

To whom it may concern:

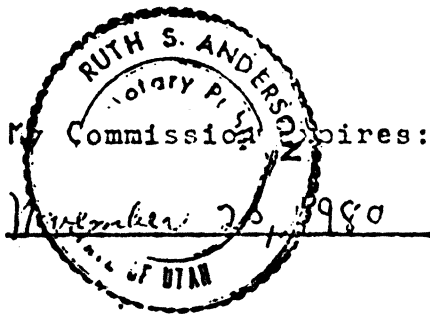
I, Elsie Brinkerhoff, have received from Cloyd
and Mark Brinkerhoff, as payment on property,
\$23,000.

Signed: Elsie Brinkerhoff

STATE OF UTAH } SS.

County of Kane

On this 6th day of April 1977, personally
appeared before me Elsie Brinkerhoff, the signer
of the above and foregoing instrument, who duly acknowledged
to me that she executed the same.



Ruth S. Andersen

Notary Public

Residing at Glendale, Utah

Recorded at Request of _____
at _____ M. Fee Paid \$ _____ County Recorder
By _____ Dep. _____ Book _____ Page _____ Ret.: _____
Mail tax notice to _____ Grantees _____ Address _____ Glendale, Utah 84729

WARRANTY DEED

Elsie Brinkerhoff, a widow, grantor
of Glendale, County of Kane, State of Utah, hereby
CONVEY and WARRANT to ELSIE BRINKERHOFF, a widow, MARK J. BRINKERHOFF, a
married man, and CLOYD H. BRINKERHOFF, a married man,
all as Joint Tenants with full rights of survivorship,
and not as Tenants in Common,

of Glendale, Utah 84729
\$10.00 & other valuable consideration-----grantees
the following described tracts of land in KANE for the sum of
State of Utah: _____ DOLLARS,
County, _____

SEE SCHEDULE "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

WITNESS, the hand of said grantor, this 4th day of June, A. D. 1979.

Signed in the Presence of

Elsie Brinkerhoff
Elsie Brinkerhoff

STATE OF UTAH
County of Kane

SS.

On the 4th day of June, A. D., 1979 personally
appeared before me Elsie Brinkerhoff, a widow,

the signer of the within instrument who duly acknowledged
to me that she executed the same.

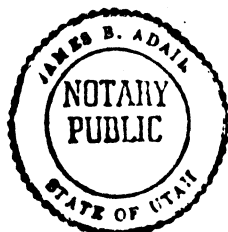
James B. Adair
James B. Adair

Notary Public

My Commission expires June 19, 1979 My residence is Orderville, Utah

SOUTHERN UTAH TITLE COMPANY - P.O. Box 7 - Hatch, Utah 84701

FILED IN 22413 RECORDED AT HOUSE OF
KANE COUNTY RECORDS
JUN 19 1979
CLERK OF COURT
DEPUTY CLERK



SCHEDULE "A"

PARCEL 1: The West Half of Section 25, Township 39 South, Range 4½ West, Salt Lake Base and Meridian, containing 320.0 acres, more or less.

PARCEL 2: The Northwest Quarter (NW¼); the Southeast Quarter (SE¼) and the South Half of the Northeast Quarter (S½NE¼) of Section 26, Township 39 South, Range 4½ West, Salt Lake Base and Meridian, containing 400.0 acres, more or less.

PARCEL 3: Lots 1, 2, 3, and 4; the Southeast Quarter of the Northwest Quarter (SE¼NW¼); the Northeast Quarter of the Southwest Quarter (NE¼SW¼); the East Half of the East Half (E½E½); the Southwest Quarter of the Northeast Quarter (SW¼NE¼) and the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 27, Township 39 South, Range 4½ West, Salt Lake Base and Meridian, containing 478.80 acres, more or less.

PARCEL 4: The East Half of the Northeast Quarter (E½NE¼); the South Half of the Southeast Quarter (S½SE¼) and Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 35, Township 39 South, Range 4½ West, Salt Lake Base and Meridian, containing 200.0 acres, more or less.

PARCEL 5: The Southwest Quarter of the Northeast Quarter (SW¼NE¼); the West Half of the Southeast Quarter (W½SE¼) and the Southeast Quarter of the Southwest Quarter (SE¼SW¼) of Section 29, Township 40 South, Range 4½ West, Salt Lake Base and Meridian, containing 160.0 acres, more or less.

PARCEL 6: The Northwest Quarter (NW¼) and the East Half of the Southwest Quarter of Section 30, Township 40 South, Range 4½ West, Salt Lake Base and Meridian, containing 238.99 acres, more or less.

PARCEL 7: Lot 2, Section 5, Township 40 South, Range 4½ West, Salt Lake Base and Meridian, containing 39.08 acres, more or less.

PARCEL 8: The Southwest Quarter of the Northwest Quarter (SW¼NW¼) of Section 8, Township 40 South, Range 4 West, Salt Lake Base and Meridian, containing 40.0 acres, more or less.

PARCEL 9: Lot 1 and the Northeast Quarter of the Northwest Quarter (NE¼NW¼) of Section 31, Township 40 South, Range 4½ West, Salt Lake Base and Meridian, containing 79.30 acres, more or less.

PARCEL 10: BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence South 0°35' West 567.60 feet; thence South 78°00' East 963.6 feet; thence Northwesterly along the creek bed, 808.0 feet, more or less, to the North line of Section 26; thence South 89°57' West 741.18 feet to the point of beginning. Containing 11.77 acres, more or less.

PARCEL 11: BEGINNING at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1.0 chain to the point of beginning. Containing 0.74 acres, more or less.

++ ++ ++ ++ ++ ++ ++

BISHOP AND RONNOW, P.C.
WILLARD R. BISHOP
Attorney for Plaintiffs
P.O. Box 279
Cedar City, UT 84720

Telephone: 586-9483

(FILED FOR RECORD)

13 Sept 1984

Nabrina Boardman

Clerk of the District Court.

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,

STATE OF UTAH

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF,
LENA BRINKERHOFF, and MARK J.
BRINKERHOFF,

Plaintiffs,

vs.

ELSIE BRINKERHOFF, GOLDA B.
ADAIR, WARREN BRINKERHOFF,
ARLENE B. GOULDING, and JOHN
DOES I through V,

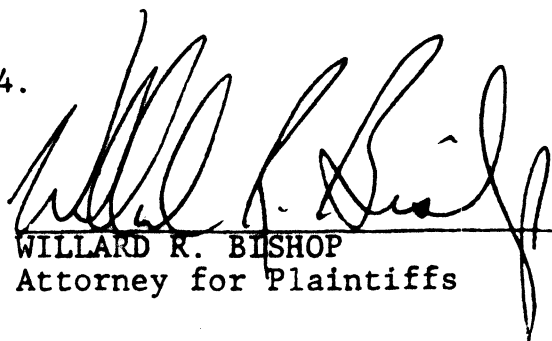
Defendants.

NOTICE TO APPOINT COUNSEL

Civil No. 1826

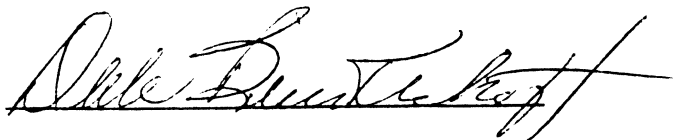
Come now Plaintiffs, by and through counsel, and hereby
give notice to Defendant ELSIE BRINKERHOFF, to appoint
counsel or appear personally to represent herself in these
proceedings.

DATED: 12 September 1984.


WILLARD R. BISHOP
Attorney for Plaintiffs

CERTIFICATE OF DELIVERY

I HEREBY certify that I delivered a full, true and correct copy of the above and foregoing NOTICE TO APPOINT COUNSEL to Mrs. Elsie Brinkerhoff, Glendale, Utah on this 15 day of September 1984.

A handwritten signature in cursive script, appearing to read "Elsie Brinkerhoff", written over a horizontal line.

FILED FOR RECORD
1984
Clerk of the District Court.

HANS Q. CHAMBERLAIN
CHAMBERLAIN & HIGBEE
Attorneys for Defendants and Cross-Claimaints,
Golda B. Adair, Warren Brinkerhoff and
Arlene B. Goulding
110 North Main St., Suite G
P. O. Box 726
Cedar City, Utah 84720
Telephone: (801) 586-4404

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

MONT R. ANDERSON, Personal)	
Representative of the Estate)	
of CLOYD H. BRINKERHOFF,)	
)	
Plaintiff,	)	CROSS-CLAIM OF GOLDA B.
	)	ADAIR, WARREN BRINKERHOFF
vs.	)	AND ARLENE B. GOULDING
	)	AGAINST CO-DEFENDANT,
ELSIE BRINKERHOFF, MARK J.	)	ELSIE BRINKERHOFF
BRINKERHOFF, GOLDA B. ADAIR,)	
WARREN BRINKERHOFF, ARLENE B.)	
GOULDING, CHARLES A.)	
BRINKERHOFF, BETTY B. ESPLIN,)	
DARLOS T. BRINKERHOFF, and	)	Civil No. 1826
JOHN DOES I through V,)	
)	
Defendants.)	

Comes now Defendants, Golda B. Adair, Warren Brinkerhoff
and Arlene B. Goulding, and hereby cross-claim against Co-
Defendant, Elsie Brinkerhoff, as follows:

GENERAL ALLEGATIONS

1. The real property, water rights and grazing rights
which are the subject of this action are located in Kane County,
Utah.

1 2. Cross-Defendant, Elsie Brinkerhoff, is the mother of
2 Cross-Claimants, Golda B. Adair, Warren Brinkerhoff and Arlene
3 B. Goulding, and she is also the mother of Cross-Defendant, Mark
4 J. Brinkerhoff and the mother-in-law of Lena Brinkerhoff, who is
5 the surviving widow of Cloyd H. Brinkerhoff.

6 3. On or about October 26, 1966, Elsie Brinkerhoff
7 executed a certain agreement covering the sale of certain real
8 and personal property which is the subject of this action to
9 Mark J. Brinkerhoff and Cloyd H. Brinkerhoff.

10 FIRST CAUSE OF ACTION

11 1. After the agreement entered into between Elsie
12 Brinkerhoff as seller and Mark J. Brinkerhoff and Cloyd H.
13 Brinkerhoff, as buyers, was executed, the buyers therein failed
14 to pay to the seller therein all sums due under said agreement.

15 2. Upon information and belief, Cross-Claimants allege
16 that Elsie Brinkerhoff demanded of Mark J. Brinkerhoff and Cloyd
17 H. Brinkerhoff the payments to which she was entitled, but they
18 refused to pay to her all sums due and owing. By reason of the
19 same, Elsie Brinkerhoff declared the agreement entered into on
20 October 26, 1966, to be null and void, or it became null and
21 void by operation of law.

22 3. On or about June 4, 1979, Elsie Brinkerhoff deeded the
23 real and personal property which is the subject of this action
24 to herself, Mark J. Brinkerhoff and Cloyd H. Brinkerhoff, as
25 joint tenants. Said deed was thereafter recorded in the office
of the Kane County Recorder.

1 4. Cloyd H. Brinkerhoff died unexpectedly on October 14th,
2 1979, and the joint tenancy created by the June 4, 1979 deed was
3 severed. By reason of the same, Elsie Brinkerhoff owned
4 one-half of said real and personal property and Mark Brinkerhoff
5 owned the other one-half of said property.

6 5. Cross-Claimants knew that their mother, Elsie
7 Brinkerhoff, was not getting paid by the two sons who had
8 purchased the subject property, and likewise knew that she was
9 in need of funds, being rather aged and with little or no
10 income. Cross-Claimants also became aware of the fact that
11 Elsie Brinkerhoff owned one-half of the subject property by
12 reason of the severing of the joint tenancy, and to assist their
13 mother, entered into an agreement with her whereby they (Golda
14 B. Adair, Warren Brinkerhoff, Arlene B. Goulding, Betty B.
15 Esplin and Charles A. Brinkerhoff) would purchase Elsie
16 Brinkerhoff's one-half interest from her for the total sum of
17 \$50,000, payable at the rate of \$150.00 per month, with each of
18 said five children to pay to Elsie Brinkerhoff the sum of \$30.00
19 per month.

20 6. Pursuant to that agreement, Elsie Brinkerhoff deeded to
21 said five children her undivided one-half interest in the
22 subject property, and the five children executed back to Elsie
23 Brinkerhoff a Trust Deed Note and Trust Deed on the subject
24 property, and established an escrow at State Bank of Southern
25 Utah in Orderville, Utah. Payments pursuant to said Purchase

1 Agreement were thereafter made and have continued to be made
2 since the date the escrow was established.

3 7. Mark J. Brinkerhoff and Lena Brinkerhoff, as the
4 surviving widow of Cloyd H. Brinkerhoff, attempted to reinstate
5 the contract entered into in 1966 by making payments to Elsie
6 Brinkerhoff. Elsie Brinkerhoff refused said payments, taking
7 the position that the contract had been terminated and that Mark
8 J. Brinkerhoff, as a surviving joint tenant, owned an undivided
9 one-half interest in the subject property. Elsie Brinkerhoff
10 continued to receive payments from Cross-Claimants and at all
11 times has recognized the existence of the agreement entered into
12 between herself and Cross-Claimants.

13 8. In June of 1982, Lena Brinkerhoff caused to be filed
14 the above-entitled action.

15 9. At that time, Elsie Brinkerhoff resisted the attempt of
16 Lena Brinkerhoff to enforce the 1966 contract, and engaged the
17 services of Hans Q. Chamberlain, Attorney at Law. Likewise, the
18 five children to whom she had deeded the property were initially
19 represented by the same attorney, who prepared numerous
20 pleadings on behalf of said Elsie Brinkerhoff to deny the
21 allegations made by Plaintiff.

22 10. Defendants, Charles A. Brinkerhoff and Betty B. Esplin,
23 thereafter elected not to remain in the litigation, and executed
24 warranty deeds covering the interest acquired from their mother
25 to Mark J. Brinkerhoff and Lena Brinkerhoff.

1 11. Thereafter, Elsie Brinkerhoff requested Hans Q.
2 Chamberlain to withdraw as her attorney of record. At that time
3 she was apparently being unduly influenced by Dale Brinkerhoff,
4 the son of Mark J. Brinkerhoff.

5 12. In September of 1984, Elsie Brinkerhoff entered into a
6 stipulation under duress and pursuant to undue influence
7 exercised upon her by Dale Brinkerhoff, the son of Mark
8 Brinkerhoff, and other parties to this action, whereby she now
9 attempts to recant the agreement entered into between herself
10 and her five children in 1980, and to reinstate the 1966
11 contract between herself and Mark J. Brinkerhoff and Cloyd H.
12 Brinkerhoff.

13 13. That said stipulation is void and of no legal effect.

14 14. The deed under which Cross-Claimants claim ownership is
15 entitled to be enforced and given legal effect by this Court,
16 and Cross-Defendants are entitled to an order quieting title to
17 them, as their interest may appear, in and to the real property,
18 water rights, and grazing rights pursuant to the warranty deed
19 from Elsie Brinkerhoff to them dated June 4, 1979, and pursuant
20 to all rights acquired pursuant to a Quit-Claim Deed dated
21 September 9, 1980, with Elsie Brinkerhoff as grantor and
22 Cross-Claimants as grantees.

23 SECOND CAUSE OF ACTION

24 Cross-Claimants incorporate by reference Paragraphs 1
25 through 14, and further allege and contend as follows:

1 15. In the event the Court finds that Elsie Brinkerhoff is
2 entitled to recant, withdraw and cancel the agreement entered
3 into between herself and her five children in 1980, then Cross-
4 Claimants, Golda B. Adair, Warren Brinkerhoff and Arlene B.
5 Goulding, will be damaged and will have lost the benefit of the
6 bargain made by them in 1980. In that event, Cross-Claimants
7 are entitled to damages over and against Elsie Brinkerhoff in an
8 amount to be proven at the time of trial based on the loss of
9 the benefit of the bargain.

10 16. Cross-Claimants are also entitled to damages over and
11 against Elsie Brinkerhoff for breach of warranty of title and
12 such other damages as may be proved at the time this matter is
13 heard on the merits.

14 WHEREFORE, Cross-Claimants pray judgment against
15 Cross-Defendant Elsie Brinkerhoff as follows:

16 1. For an order determining the stipulation signed by
17 Elsie Brinkerhoff in September of 1984 to be null and void and
18 of no legal effect.

19 2. For an order of this Court quieting title to said
20 individuals to the real property, water rights and personal
21 property which are the subject of this action as their
22 respective interests may appear over and against Mont R.
23 Anderson, Personal Representative of the Estate of Cloyd H.
24 Brinkerhoff, Lena Brinkerhoff, Mark J. Brinkerhoff, Elsie
25 Brinkerhoff, Charles A. Brinkerhoff and Betty B. Esplin.

3. As an alternative relief, for judgment over and against Elsie Brinkerhoff for damages in an amount to be proven at the time of trial based on breach of contract, breach of warranty of title, loss of benefit of the bargain, unjust enrichment, together with all other damages as may be proven at the time of trial.

4. For a reasonable attorney's fee, for costs of court incurred herein and for such other and further relief as to the Court may appear just and proper.

DATED this 28th day of September, 1984.

CHAMBERLAIN & HIGBEE

~~Hans Q. Chamberlain~~
~~Attorney for Cross-Claimants~~

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the within and foregoing CROSS-CLAIM OF GOLDA B. ADAIR, WARREN BRINKERHOFF AND ARLENE B. GOULDING AGAINST CO-DEFENDANT, ELSIE BRINKERHOFF, to Mr. Willard R. Bishop, BISHOP & RONNOW, attorney for Mont R. Anderson, Lena Brinkerhoff and Mark J. Brinkerhoff, first class postage prepaid on this 22nd day of September, 1984.

~~Secretary~~

(FILED FOR RECORD)
1 Oct 1964
Clara Boardman
Clerk of the District Court.

HANS Q. CHAMBERLAIN
CHAMBERLAIN & HIGBEE
Attorneys for Defendants and Cross-Claimants,
Golda B. Adair, Warren Brinkerhoff and
Arlene B. Goulding
110 North Main St., Suite G
P. O. Box 726
Cedar City, Utah 84720
Telephone: (801) 586-4404

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR
KANE COUNTY, STATE OF UTAH

MONT R. ANDERSON, Personal)
Representative of the Estate)
of CLOYD H. BRINKERHOFF,)
Plaintiff,)
vs.)
ELSIE BRINKERHOFF, MARK J.)
BRINKERHOFF, GOLDA B. ADAIR,)
WARREN BRINKERHOFF, ARLENE B.)
GOULDING, CHARLES A.)
BRINKERHOFF, BETTY B. ESPLIN,)
DARLOS T. BRINKERHOFF, and)
JOHN DOES I through V,)
Defendants.)

NOTICE TO APPOINT SUCCESSOR
ATTORNEY, NOTICE OF PENDING
LITIGATION AGAINST YOU AND
NOTICE OF TAKING DEPOSITION

Civil No. 1826

TO: ELSIE BRINKERHOFF, GLENDALE, UTAH

YOU ARE HEREBY NOTIFIED that you are still a party
Defendant to the above-entitled action, and by reason of the
same, your legal rights may be affected in the lawsuit that is
pending against you.

By reason of the fact that you have asked Hans Q.
Chamberlain, Attorney at Law, to withdraw as your attorney, you

1
2 are hereby requested to appoint another attorney to represent
3 you in this matter, and that you should do so within ten (10)
4 days from receipt of this document.

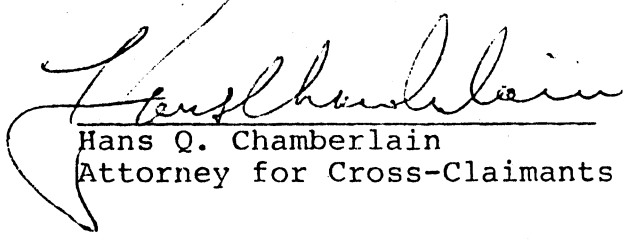
5 You are further hereby notified that Golda B. Adair,
6 Warren Brinkerhoff and Arlene B. Goulding, have caused to be
7 filed against you a Cross-Complaint seeking to enforce a deed
8 you signed and executed with yourself as grantor and them as
9 grantees, said deed dated August 15, 1980; or in the
10 alternative, for damages over and against you for breach of
11 contract, breach of warranty of title, unjust enrichment and
12 such other damages as may be proven at the time of trial. A
13 copy of this Cross-Claim is being served upon you at the same
14 time this document is being served upon you. Your legal rights
15 could be affected by this Cross-Complaint and you should
16 consult with an attorney concerning the same.

17 You are further hereby notified that your deposition will
18 be taken by Hans Q. Chamberlain, Attorney at Law, (the attorney
19 for Golda B. Adair, Warren Brinkerhoff and Arlene B. Goulding),
20 in the immediate near future. You will be given notice of the
21 time, place and date of said deposition in writing. You are,
22 however, required to appear pursuant to that Notice of Taking
23 Deposition by reason of the fact that you are a party to the
24 lawsuit now pending.
25

1 PLEASE GOVERN YOURSELF ACCORDINGLY.

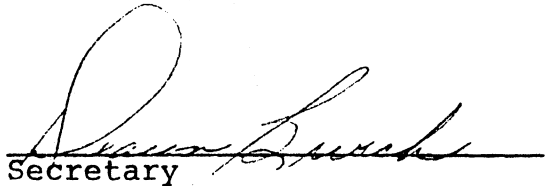
2 DATED this 28th day of September, 1984.

3 CHAMBERLAIN & HIGBEE

4 
5 Hans Q. Chamberlain
6 Attorney for Cross-Claimants
7
8
9

10 CERTIFICATE OF MAILING

11 I hereby certify that I mailed a true and correct copy of
12 the within and foregoing NOTICE TO APPOINT SUCCESSOR ATTORNEY,
13 NOTICE OF PENDING LITIGATION AGAINST YOU AND NOTICE OF TAKING
14 DEPOSITION to Mr. Willard R. Bishop, BISHOP & RONNOW, attorney
15 for Mont R. Anderson, Lena Brinkerhoff and Mark J. Brinkerhoff,
16 first class postage prepaid on this 28th day of September,
17 1984.
18
19

20 
21 Secretary
22
23
24
25

BISHOP & RONNOW, P.C.
Willard R. Bishop
Attorney for Plaintiff
P. O. Box 279
Cedar City, UT 84720
Telephone: (801) 586-9483

(FILED FOR RECORD)
11 September 1984
Catherine Boardman
Clerk of the District Court.

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,

STATE OF UTAH

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF,
LENA BRINKERHOFF, and MARK J.
BRINKERHOFF,

Plaintiff,

vs.

ELSIE BRINKERHOFF, GOLDA B.
ADAIR, WARREN BRINKERHOFF,
ARLENE B. GOULDING, and JOHN
DOES I through V,

Defendants.

STIPULATION

Civil No. 1826

ELSIE BRINKERHOFF, Defendant in the above-entitled action,
agrees and stipulates as follows:

1. That the certain agreement dated October 26, 1966
(hereinafter "Agreement" attached as Exhibit "A"), executed by
ELSIE BRINKERHOFF, Seller, and CLOYD H. BRINKERHOFF and MARK J.
BRINKERHOFF, Buyers, together with any other agreement containing
substantially the same terms, is a valid and binding contract
which she executed without coercion, and with full knowledge and
understanding of its provisions and duties.

2. That she agrees to conform to the terms of the Agreement,
and perform all conditions and duties provided and imposed
thereunder, including specific performance on her part.

103

3. That she recognizes she improperly attempted to convey land to others contrary to the terms of the Agreement, and hereby repudiates a certain Warranty Deed dated June 4, 1979, (Exhibit "B") purporting to convey to ELSIE BRINKERHOFF, MARK J. BRINKERHOFF, and CLOYD H. BRINKERHOFF, as Joint Tenants, the same property conveyed under the Agreement, and further repudiates any other deeds or instruments of conveyance which have the effect of divesting or in any way diminishing the right, title, and interest of buyers and their wives, in the property specified in the Agreement.

4. That she acknowledges the receipt of \$2,000 from the Buyers, and/or their heirs, MARK J. BRINKERHOFF and LENA A. BRINKERHOFF, for the 1983 payment pursuant to the terms of the Agreement.

5. That she forgives and waives all rights to any and all delinquent amounts currently due under the Agreement.

6. That she recognizes the validity of a certain affidavit dated April 13, 1971, (attached as Exhibit "C"), and reaffirms the statements contained therein and further agrees to cooperate and assist Plaintiffs in the litigation of their claims against other named Defendants in the above-entitled action.

7. That her Amended Counterclaim against the Plaintiffs and her Crossclaim against MARK J. BRINKERHOFF, as filed in this action, shall be dismissed with prejudice and upon the merits.

8. That the Court shall enter a decree of specific performance against her.

In consideration for the Stipulation specified above, Plaintiffs hereby stipulate as follows:

1. Plaintiffs will not seek any award of damages against ELSIE BRINKERHOFF under their Second Amended Complaint.

2. Plaintiffs will reimburse Defendants, GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING for the amounts paid to ELSIE BRINKERHOFF for the purported transfer of properties specified under the Warranty Deed dated June 4, 1979, Exhibit "B", in return for the said Defendants' Agreement to drop all their claims filed in the above-entitled lawsuit and dismiss the same with prejudice. If said Defendants do not dismiss said claims before 20 September 1984, Plaintiffs shall be under no obligation of reimbursement.

3. That the above-entitled Court may enter its Order and judgment in conformance with this Stipulation and Plaintiff's prayer for relief as specified in their Second Amended Complaint.

DATED this 9th day of September, 1984.

Elsie Brinkerhoff
ELSIE BRINKERHOFF

STATE OF UTAH

County of

)
:ss.
)

On the 9th day of September, 1984, personally appeared before me ELSIE BRINKERHOFF, Defendant named in the

above-entitled action, the signer of the above and foregoing instrument, who duly acknowledged to me that she executed the same.



Rex Michie
NOTARY PUBLIC, residing at:
Cedar City, Utah

DATED this 10th day of September, 1984.

Willard R. Bishop
WILLARD R. BISHOP
Attorney for Plaintiffs

STATE OF UTAH)
):SS.
County of)

On the 10th day of September, 1984, personally appeared before me WILLARD R. BISHOP, attorney for Plaintiff ANDERSON in the above-entitled action, the signer of the above and foregoing instrument, who duly acknowledged to me that he executed the same.

Linda Seltnova
NOTARY PUBLIC, residing at:
Cedar City, Ut 84720

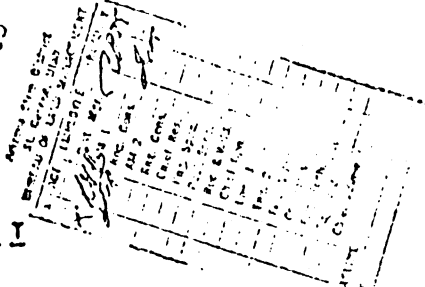
My Commission expires:

22 February 87

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a full, true and correct copy of the above and foregoing STIPULATION to Mr. Hans Q. Chamberlain, CHAMBERLAIN & HIGBEE, Attorneys at Law, 110 North Main Street, Suite G, Cedar City, Utah 84720, by first class mail, postage fully prepaid this _____ day of _____, 1984.

RECEIVED
JUL 28 1935



AGREEMENT

THIS AGREEMENT, made and entered into by and between ELSIE BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTY OF THE FIRST PART, hereinafter referred to as the "SELLER" and CLOYD H. BRINKERHOFF and MARK BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTIES OF THE SECOND PART, hereinafter referred to as the "BUYERS",

WITNESSETH:

THAT WHEREAS, the SELLER is the owner of the real property, grazing privileges and water rights in the States of Utah and Arizona;

AND WHEREAS, the BUYERS desire to purchase the same;

AND WHEREAS, the parties have agreed upon terms and conditions for the sale thereof;

NOW THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set out the parties hereinafter agree with and between one another as follows:

1. That for and in consideration of the total sum of FIFTY THREE THOUSAND THREE HUNDRED EIGHTY-EIGHT (\$53,388.00) DOLLARS, as the full consideration therefor, the SELLER covenants and agrees to sell and the BUYERS covenant and agree to buy the following described real property, grazing privileges and water and reservoir rights in the States of Utah and Arizona:

REAL PROPERTY IN MILLARD COUNTY, UTAH:

Lots 1, 2, 3, and 4, Block 25, Plat "A", Delta Township.

Lot 2, Block 26, Plat "A", Delta Township

REAL PROPERTY IN KANE COUNTY, UTAH:

Township 32 South, Range 4 West, Salt Lake Meridian:

West Half of Section 25, containing 320 acres.

Northwest Quarter; Southeast Quarter and the South Half of the Northeast Quarter containing 400 acres, all in Section 26, Township 32 South, Range 4 West, Salt Lake Meridian, containing 400 acres, more or less.

Lots 1, 2, 3, and 4; Southeast Quarter of the Northwest Quarter; Northeast Quarter of the Southwest Quarter; East Half of the East Half; Southwest Quarter of the Northeast Quarter; Northwest Quarter of the Southeast Quarter of Section 27, Township 32 South, Range 4 West, containing 470.00 acres.

LAW OFFICES
OLSEN AND CHAMBERLAIN
74 SOUTH MAIN
RICHFIELD, UTAH 84701

East Half of the Northeast Quarter; South Half of the Southeast Quarter; Northwest Quarter of the Southeast Quarter of Section 35, containing 200 acres.

Township 40 South, Range 4½ West, Salt Lake Meridian:

Section 29: Southwest Quarter of the Northeast Quarter; West Half of the Southeast Quarter and the Southwest Quarter of the Southwest Quarter, containing 160 acres.

Section 30: Northwest Quarter; East Half of the Southwest Quarter, containing 239.99 acres.

Section 5: Lot 2, containing 32.03 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Southwest Quarter of the Northwest Quarter of Section 8, containing 40 acres.

Township 40 South, Range 7 West, Salt Lake Meridian:

Beginning at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Meridian and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1 chain to beginning, containing .74 acres.

Beginning at the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwest along the middle of the channel of said creek to the North Line of said Northwest Quarter of the Northeast Quarter; thence West 11.23 chains to the place of beginning.

Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian and running thence South 70° East 15 chains to the middle of the channel of the creek; thence Southerly along the middle of the channel of said creek to the South Line; thence North 73°45' West 14.60 chains; thence North 4.30 chains to the place of beginning, containing 5.60 acres.

The above three tracts being part of land situated in Sections 23 and 26 of said township and range, sometimes referred to unofficially as Lot "A".

Township 40 South, Range 4½ West, Salt Lake Meridian:

Lot 1; Northeast Quarter of the Northwest Quarter of Section 31, containing 72.30 acres.

LAW OFFICES
OLSEN AND CHAMBERLAIN
76 SOUTH MAIN
RICHFIELD, UTAH 84701

8.43 ac

409

PERSONAL PROPERTY:

The following described water and reservoir rights:

A one-fourth interest in Hobble Canyon Reservoir (9-36-12)
in Mohave County, Arizona.

A one half interest in Sullivan Reservoir in Mohave County,
Arizona.

And all grazing privileges and permits annexed to or based
upon any of the foregoing real, personal, reservoir, or water
rights as commensurate.

2. The parties agree that for and in consideration of the sale by the
SELLER to the BUYERS of the foregoing real and personal property, water and
reservoir rights and grazing privileges, the BUYERS will pay to the SELLER the
sum of TWO THOUSAND (\$2,000.00) DOLLARS, each year, beginning with the 1st day
of November, 1964, of which payments due on November 1, 1964 and November 1,
1965 are hereby acknowledged by the SELLER from the BUYERS and the BUYERS will
continue to pay annual installments of \$2,000.00 on the 1st day of November in
each year thereafter beginning November 1, 1966 and continuing during the entire
life of the SELLER.

The BUYERS agree that they will pay the sum of \$2,000.00 per year to
the SELLER for the entire remainder of SELLER'S life irrespective of the amount
which may be paid under this contract whether it exceeds the total consideration
hereinabove set out or whether that total amount shall not be paid by applying
annual payments of \$2,000.00 against the purchase price during the life time of
the SELLER and in consideration of an undertaking by the BUYERS to pay the
amount of \$2,000.00 per year for the life of the SELLER irrespective of the
amount which may be paid, the SELLER waives interest upon the unpaid balances.

It is provided, however, that should the total consideration herein-
above provided not be paid by the BUYERS to the SELLER during SELLER'S lifetime,
then upon the death of the SELLER any amounts remaining under this Agreement
after crediting all payments which have been made hereunder, shall be paid
annually as provided herein in equal shares, shares and share alike, to

LAW OFFICES
OLSEN AND CHANDLER
74 SOUTH MAIN
RICHFIELD, UTAH 84701

Warren Brinkerhoff and Charley Arland Brinkerhoff two-sevenths (2/7ths) (1/7ths to each) of the balances due (it being stipulated that the BUYERS together with Warren Brinkerhoff, Charley Arland Brinkerhoff, Betty B. Espin, Golda B. Adair, and Arlene B. Goulding constitute all the heirs at law of the SELLER and that other provision has been made for the latter three named heirs), together with interest at four (4%) per cent per annum on the deferred declining balances.

The BUYERS may, at any time, prepay all or any part of the remaining principal due under this contract.

3. The SELLER shall execute a Warranty Deed to the real property heretofore described and quitclaim conveyances to the water and reservoir rights heretofore described, of an undivided one half interest to each BUYER and his wife as joint tenants with full rights of survivorship, and shall deposit said instruments in the Hurricane Branch of the Bank of St. George which shall hold those documents in trust and in escrow subject to the following:

ESCROW INSTRUCTIONS

If the BUYERS shall make all payments of principal and interest herein provided and perform all the other covenants and agreements herein contained, then upon payment of the final installment due hereunder the Escrow Depository shall deliver to the BUYERS all the escrowed documents.

In the event of a default in the payment of any installment of principal or interest and in the event of a default in any other term or condition herein and in the event notice of a default other than for payment of principal and interest shall be given to the BUYERS by the SELLER and a subsequent failure to remedy the same shall continue for a period of thirty (30) days, then the SELLER may, at her option, demand a redelivery to her of all of the escrowed documents whereupon the BUYERS will vacate and peaceably surrender all of the premises heretofore described and the SELLER may re-enter into possession of the same without further process and may retain as rent and liquidated damages all sums theretofore paid by BUYERS under this Agreement.

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75 SOUTH MAIN
RICHFIELD, UTAH 84701

As an alternative remedy the SELLER may elect to reduce any payment or all payments, accelerating and maturing the entire balance of principal and interest immediately, to judgment or may have sold remedy on one or more successive or intermittent occasions or may elect to treat this Agreement as a note and mortgage passing title through to the BUYERS and foreclosing the same in the manner provided by law.

During the period the BUYERS are complying with the terms of this Agreement, they shall be entitled to the sole, exclusive, and beneficial use, occupancy, and enjoyment of the above described premises subject only to the rights of the SELLER to inspect the same at reasonable times.

4. The BUYERS have inspected said premises and find the same in a manner satisfactory to them and there are no covenants or warranties other than expressly set forth herein.

5. Time shall be of the essence as to all the terms and conditions of this Agreement which shall bind and inure to the benefit of the heirs, successors, and assigns of the parties hereto and the party in default agrees to pay all costs and a reasonable attorney's fee in the event enforcement of this contract is required.

WITNESS the hands of the parties hereto this 10 day of Dec., 1967

1967
1968

Elsie J. Brinkerhoff
Elsie Brinkerhoff

SELLER

Cloyd H. Brinkerhoff
Cloyd H. Brinkerhoff

Mark Brinkerhoff
Mark Brinkerhoff

BUYERS

div. lawyer call

LAW OFFICES
OLSEN AND CHAMBERLAIN
75 SOUTH MAIN
RICHFIELD, UTAH 84701

Recorded at Request of _____
at _____ M. Fee Paid \$ _____ County Recorder
By _____ Dep. _____ Book _____ Page _____ Ret.: _____
Mail tax notice to _____ Grantees _____ Address _____ Glendale, Utah 84729

WARRANTY DEED

Elsie Brinkerhoff, a widow, grantor
of Glendale, County of Kane, State of Utah, hereby
CONVEY and WARRANT to ELSIE BRINKERHOFF, a widow, MARK J. BRINKERHOFF, a
married man, and CLOYD H. BRINKERHOFF, a married man,
all as Joint Tenants with full rights of survivorship,
and not as Tenants in Common,
of Glendale, Utah 84729
\$10.00 & other valuable consideration-----grantees
for the sum of
the following described tracts of land in KANE DOLLARS,
State of Utah: County,

SEE SCHEDULE "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

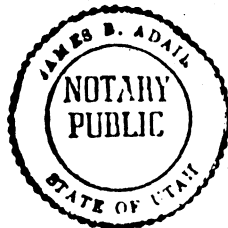
WITNESS, the hand of said grantor, this 4th day of June, A. D. 1979.

Signed in the Presence of

Elsie Brinkerhoff
Elsie Brinkerhoff

STATE OF UTAH
County of Kane

SS.



On the 4th day of June, A. D., 1979 personally
appeared before me Elsie Brinkerhoff, a widow,

the signer of the within instrument who duly acknowledged
to me that she executed the same.

James B. Adair
James B. Adair

Notary Public

My Commission expires June 19, 1979 My residence is Orderville, Utah

SOUTHERN UTAH TITLE COMPANY - P. O. Box 1 - Kanab, Utah 84701

FILED
1979 JUN 12 12:43 PM
RECORDED AT REQUEST OF
JAMES B. ADAIR
KANE COUNTY RECORDS

SCHEDULE "A"

PARCEL 1: The West Half of Section 25, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 320.0 acres, more or less.

PARCEL 2: The Northwest Quarter (NW $\frac{1}{4}$); the Southeast Quarter (SE $\frac{1}{4}$) and the South Half of the Northeast Quarter (S $\frac{1}{2}$ NE $\frac{1}{4}$) of Section 26, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 400.0 acres, more or less.

PARCEL 3: Lots 1, 2, 3, and 4; the Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$); the Northeast Quarter of the Southwest Quarter (NE $\frac{1}{4}$ SW $\frac{1}{4}$); the East Half of the East Half (E $\frac{1}{2}$ E $\frac{1}{2}$); the Southwest Quarter of the Northeast Quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 27, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 478.80 acres, more or less.

PARCEL 4: The East Half of the Northeast Quarter (E $\frac{1}{2}$ NE $\frac{1}{4}$); the South Half of the Southeast Quarter (S $\frac{1}{2}$ SE $\frac{1}{4}$) and Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 35, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 200.0 acres, more or less.

PARCEL 5: The Southwest Quarter of the Northeast Quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$); the West Half of the Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$) and the Southeast Quarter of the Southwest Quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of Section 29, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 160.0 acres, more or less.

PARCEL 6: The Northwest Quarter (NW $\frac{1}{4}$) and the East Half of the Southwest Quarter of Section 30, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 238.99 acres, more or less.

PARCEL 7: Lot 2, Section 5, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 39.08 acres, more or less.

PARCEL 8: The Southwest Quarter of the Northwest Quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 8, Township 40 South, Range 4 West, Salt Lake Base and Meridian, containing 40.0 acres, more or less.

PARCEL 9: Lot 1 and the Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 31, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 79.30 acres, more or less.

PARCEL 10: BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence South 0°35' West 567.60 feet; thence South 78°00' East 963.6 feet; thence Northwesterly along the creek bed, 808.0 feet; more or less, to the North line of Section 26; thence South 89°57' West 741.18 feet to the point of beginning. Containing 11.77 acres, more or less.

PARCEL 11: BEGINNING at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1.0 chain to the point of beginning. Containing 0.74 acres, more or less.

++ ++ ++ ++ ++ ++ ++

A F F I D A V I T

TO WHOM IT MAY CONCERN:

STATE OF UTAH)
 : ss
COUNTY OF KANE)

BEFORE ME, the undersigned Notary Public, personally appeared
ELSIE BRINKERHOFF, who stated under oath, as follows:

That she has sold Real Property described hereinafter to Mark J. Brinkerhoff and Cloyd H. Brinkerhoff, and that she will defend the rights of ownership and also any rights of way of ingress or egress to the said Real Property. That she will enter into a lawsuit or any other procedure needed to protect these rights of ingress or egress, to said property.

The real property is described as follows:

BEGINNING at the South Quarter Corner of Section 23, Township 40 South, Range 7 West, Salt Lake Meridian, Utah, and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1 chain to the point of beginning.

ALSO BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian, Utah, and running thence South 8.6 chains; thence South 73°45' East 14.6 chains; thence Northwesterly along the middle of the channel of the creek to the North boundary line of said Section 26; thence West 11.23 chains to the point of beginning. Containing 11.77 acres

Total acres: 12.51

That the Affiant will at any time help to defend and protect the rights of Mark J. Brinkerhoff and Cloyd H. Brinkerhoff as far as the Real Property is concerned.

Elsie Brinkerhoff
Elsie Brinkerhoff

SUBSCRIBED AND SWORN to before me this 13 day of April, A.D. 1971.

Rene Chamberlain
Notary Public
Residing at Orderville Utah

My commission expires

Feb. 26, 1972

EXHIBIT "C"

BISHOP & RONNOW, P.C.
Willard R. Bishop
Attorney for Plaintiffs
P. O. Box 279
Cedar City, UT 84720
Telephone: (801) 586-9483

(FILED FOR RECORD)

19 Feb. 1985

Sabrina Boardman
Clerk of the District Court.

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY

STATE OF UTAH

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF, LENA
BRINKERHOFF, and MARK J.
BRINKERHOFF,

Plaintiffs,

vs.

ELSIE BRINKERHOFF, GOLDA B.
ADAIR, WARREN BRINKERHOFF,
ARLENE B. GOULDING, and
JOHN DOES I through V,

Defendants.

**ANSWER OF ELSIE BRINKERHOFF
TO CROSS-CLAIM**

Civil No. 1826

COMES NOW ELSIE J. BRINKERHOFF, by and through counsel, who answers the Cross-claim of Defendants ADAIR, WARREN BRINKERHOFF and GOULDING, admitting, alleging and denying as follows:

FIRST DEFENSE

1. The allegations of paragraph 1 of the General Allegations are admitted upon information and belief.

2. Paragraphs 2 and 3 of the General Allegations are admitted.

3. Paragraph 1 of the First Cause of Action is denied. In any event, even if certain sums were not paid, they were forgiven by ELSIE BRINKERHOFF, and Cross-claimants have no standing to assert otherwise.

4. Paragraph 2 of the First Cause of Action is emphatically denied. At no time did ELSIE BRINKERHOFF demand payment of alleged past due sums, nor did she ever declare any default or give any notice, orally or in writing, of any alleged default of MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF, giving any time, reasonable or otherwise, in which to cure any alleged default.

5. Answering paragraph 3 of the First Cause of Action, ELSIE BRINKERHOFF admits that on or about June 4, 1979, someone improperly induced her to place a signature on a deed, without informing her that it was a deed and without telling her the purpose for requesting her signature. ELSIE BRINKERHOFF affirmatively asserts that she did not read the document signed by her, that she did not intend the document to convey real or personal property, and that the document was never delivered by her to any one or more of the named grantees. Likewise, no consideration supported the document. The document was later recorded, but not by reason of any request of ELSIE, CLOYD H., or MARK J. BRINKERHOFF.

6. Answering paragraph 4 of the First Cause of Action, this Defendant admits that CLOYD H. BRINKERHOFF died on or about October 14, 1979. All other allegations of said paragraph 4 are denied, the June 4 1979 "deed" having no legal effect, being invalid for the reasons stated above, among others.

7. The allegations of paragraph 5 of the First Cause of Action are denied. Any documents relied upon by Cross-claimants were obtained without the knowledge, intent or agreement of ELSIE BRINKERHOFF, and in full knowledge of the existence of the 1966

or 1967 contract conveying the land to CLOYD H. and MARK J. BRINKERHOFF which had never been terminated by ELSIE J. BRINKERHOFF.

8. Answering paragraph 6 of the First Cause of Action, ELSIE BRINKERHOFF admits that one CLYDE GOULDING, or other individuals, obtained her signature on various documents which are relied upon by Cross-claimants, but asserts that she had no intent to convey property, which intent is required by law, that she did not read the documents, that no one told her what they were, that there never was a meeting of minds, and that had she been told the Cross-claimants would claim her signature would have the effect they now claim to have, she would never have signed said documents. All other allegations in paragraph 6 are denied.

9. Answering paragraph 7, ELSIE BRINKERHOFF admits that upon the incorrect and bad advice of some unknown person, she refused one or two contract payments. All other allegations of paragraph 7 are denied.

10. Paragraph 8 of the First Cause of Action is admitted upon information and belief.

11. Answering paragraph 9, ELSIE BRINKERHOFF admits that she attended one meeting in the office of Hans Q. Chamberlain. All other allegations of said paragraph 9 are denied, ELSIE BRINKERHOFF never having been given any opportunity to object to, or to approve, any actions taken by Hans Q. Chamberlain, who was actually acting for Cross-claimants.

12. Answering paragraph 10, ELSIE BRINKERHOFF admits upon information and belief that CHARLES A. BRINKERHOFF and BETTY B. ESPLIN executed certain deeds in favor of MARK J. and LENA BRINKERHOFF. All other allegations of paragraph 10 are denied.

13. Answering paragraph 11 of the First Cause of Action, ELSIE BRINKERHOFF admits that she terminated the services of Hans Q. Chamberlain, but denies all other allegations in said paragraph 11.

14. Answering paragraph 12, ELSIE BRINKERHOFF admits that in September of 1984, she executed a certain Stipulation in order to resolve any differences with Plaintiffs on the terms therein contained. All other allegations of paragraph 12 are denied.

15. The allegations of paragraph 13 are denied, and Cross-claimants have no standing to assert that the Stipulation is void and of no legal effect.

16. Paragraph 14 of the First Cause of Action is denied.

17. Answering paragraphs 15 and 16 of the Second Cause of Action, ELSIE BRINKERHOFF denies the same.

SECOND DEFENSE

18. The Cross-claim fails to state a claim upon which relief may be granted.

THIRD DEFENSE

19. The documents upon which Defendants rely were obtained through misrepresentation and/or fraud.

FOURTH DEFENSE

20. Cross-claimants have not done equity, have unclean hands, and are not entitled to any equitable relief.

FIFTH DEFENSE

21. Cross-claimants have no standing to contest the September, 1984 Stipulation.

SIXTH DEFENSE

22. Any deeds relied upon by Cross-claimants were and are void and of no legal effect for the following reasons, among others:

- A. No intent to convey title to real or personal property on the part of the grantor, or on the part of the grantees with respect to the June, 1979 deed.
- B. No delivery to all named grantees, or any of them, as applicable.
- C. No acceptance by named grantees.
- D. Lack of proper attestation and/or acknowledgment.
- E. U.C.A. 57-3-3, et seq (1953, as amended).
- F. Actual notice on the part of Cross-claimants of the conveyance to MARK J. and CLOYD H. BRINKERHOFF by ELSIE BRINKERHOFF.
- G. Constructive and "inquiry" notice through the actual possession of MARK J. and CLOYD H. BRINKERHOFF, and his successors.
- H. Lack of any termination of the 1966 or 1967 contract.
- I. Mistake.
- J. Lack of consideration.

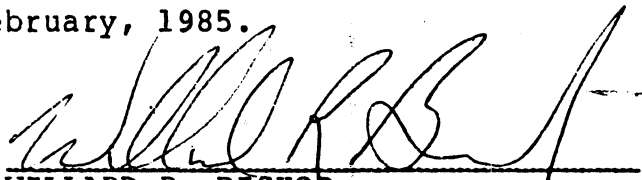
SEVENTH DEFENSE

23. Cross-claimants are barred and estopped by their actions from maintaining their Cross-claim against ELSIE BRINKERHOFF.

EIGHTH DEFENSE

WHEREFORE, having fully answered the Cross-claim, ELSIE BRINKERHOFF prays that the same be dismissed, and that she be awarded her costs and such other relief as the Court deems appropriate.

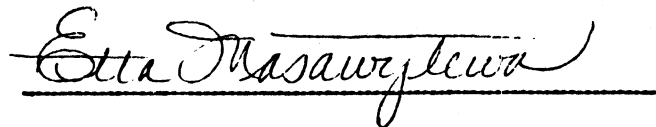
DATED this 14th day of February, 1985.



WILLARD R. BISHOP
Attorney for ELSIE BRINKERHOFF

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 14TH day of February, 1985, I mailed a full, true and correct copy of the above and foregoing instrument to Mr. Hans Q. Chamberlain, CHAMBERLAIN & HIGBEE, Attorneys at Law, 110 North Main Street, Suite G, Cedar City, Utah 84720, by first-class mail, postage fully prepaid.



Etta Masawyle

BISHOP AND RONNOW, P.C.
WILLARD R. BISHOP
Attorney for Plaintiffs
P.O. Box 279
Cedar City, UT 84720

Telephone: 586-9483

(FILED FOR RECORD)

21 February 1985

Sabrina Boardman

Clerk of the District Court.

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,

STATE OF UTAH

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF, LENA
BRINKERHOFF, and MARK J.
BRINKERHOFF,

Plaintiffs,

vs.

ELSIE BRINKERHOFF, GOLDA B.
ADAIR, WARREN BRINKERHOFF,
ARLENE B. GOULDING, and
JOHN DOES I through V,

Defendants.

PRETRIAL ORDER

Civil No. 1826

This matter came before the Court on Friday, 2 December 1983, for pretrial conference. Plaintiffs were represented by their attorney, Mr. Willard R. Bishop. Defendants other than ELSIE BRINKERHOFF were represented by Mr. Hans Q. Chamberlain. Defendant ELSIE BRINKERHOFF was not represented by counsel. The matter was again treated by the Court on Wednesday, 12 September 1984, during a telephonic conference between the Court and counsel. The status of the case was reviewed, and the following actions were taken and noted:

1. JURISDICTION AND VENUE were admitted by counsel, and were found by the Court to be proper.

2. GENERAL NATURE OF THE CASE AND CLAIMS OF THE PARTIES:

A. Plaintiffs' Second Amended Complaint, and Stipulation:

(1) Plaintiffs brought this action against Defendants seeking to quiet title to certain real property, water and grazing rights, and personal property in Plaintiffs, claiming ownership of the same under an Agreement dated 26 October 1966 or 10 December 1967 between Defendant ELSIE BRINKERHOFF as seller, and MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF as buyers. As against ELSIE BRINKERHOFF, Plaintiffs seek an order requiring specific performance of the Agreement and recognition of the same, and originally sought an award of damages as alternative relief against ELSIE BRINKERHOFF. Plaintiffs and ELSIE BRINKERHOFF have composed their differences, however, in the form of a Stipulation over the duly-verified signatures of ELSIE BRINKERHOFF and counsel for Plaintiffs, which Stipulation has been filed. In the event Defendants ADAIR, WARREN BRINKERHOFF and GOULDING prevail as to title, Plaintiffs seek an award of damages against them for interference with contract.

(2) Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF and ARLENE B. GOULDING are deemed to have answered Plaintiffs' Second Amended Complaint, and have denied that Plaintiffs

129

are the owners of the property in dispute, claiming that the Agreement of 26 October 1966 or 10 December 1967 is void as a matter of law, with or without notice; that the Agreement of 26 October 1966 or 10 December 1967 was voluntarily terminated, abandoned, rescinded, or reformed by the parties to it, the same becoming joint tenants in the property involved; that the death of CLOYD H. BRINKERHOFF severed the joint tenancy, leaving MARK J. BRINKERHOFF and ELSIE BRINKERHOFF as equal tenants in common; and assert waiver, estoppel, laches, accord and satisfaction, perfect tender rule and the doctrine of unclean hands as affirmative defenses, along with failure to mitigate damages and any other defense to which the Court deems them entitled.

B. Second Amended Counterclaim of Elsie Brinkerhoff and Crossclaim Against Mark J. Brinkerhoff: All claims and issues raised in the Second Amended Counterclaim of ELSIE BRINKERHOFF and Cross-claim Against MARK H. BRINKERHOFF are claimed to have been resolved by the Stipulation now on file, between Plaintiffs and ELSIE BRINKERHOFF.

C. Second Amended Counterclaim of Golda B. Adair, Warren Brinkerhoff and Arlene Goulding, and Amended Crossclaim of Said Defendants Against Mark J. Brinkerhoff:

(1) Defendants ADAIR, WARREN BRINKERHOFF and GOULDING seek a decree quieting title in them as to their claimed interests in the property which is the subject of

this action, including water and grazing rights, said interests to be determined by the Court, and also seek an accounting from MARK J. BRINKERHOFF, and judgment against him for any amount allegedly due to Defendants ADAIR, GOULDING and WARREN BRINKERHOFF by reason of their alleged ownership interests, from rents, profits, or proceeds from the property.

(2) Plaintiffs deny the allegations made by ADAIR, GOULDING and WARREN BRINKERHOFF, and assert as defenses those matters set forth in their Second Amended Complaint, together with lack of standing to attack the Agreement of 26 October 1966 or 10 December 1967; knowledge of the existence of said Agreement; lack of any lawful termination of said Agreement, including lack of any sufficient notice or reasonable time to cure alleged defects in performance; waiver of conditions by ELSIE BRINKERHOFF; accord and satisfaction between Plaintiffs and ELSIE BRINKERHOFF; lack of intent, lack of delivery, mistake, and lack of acceptance in connection with a Warranty Deed dated 4 June 1979; the same defenses with respect to a Warranty Deed of 15 August 1980 and a Quitclaim Deed of 9 September 1980; actual and constructive notice and knowledge of Plaintiffs' claims, interest, use and possession of the land, and of the Agreement of 26 October 1966 or 10 December 1967; laches; estoppel; waiver; lack of proper acknowledgement and recordation; and any other defense to which the Court may deem them entitled.

D. Cross-claim of Defendants GOULDING, ADAIR and WARREN BRINKERHOFF Against ELSIE BRINKERHOFF: As a result of the position taken by ELSIE BRINKERHOFF in the Stipulation recently filed in this matter, Defendants assert the following claims against ELSIE BRINKERHOFF, and seek the relief indicated:

(1) That the Agreement of 26 October 1966 or 10 December 1967 become null and void as a matter of law.

(2) That ELSIE BRINKERHOFF agreed to convey to Defendants her 1/2 interest in the property in exchange for Defendants promise to pay her as per the terms of the Trust Deed and Trust Deed Note.

(3) That the Stipulation entered into by ELSIE BRINKERHOFF and MARK J. BRINKERHOFF is void and of no legal effect.

(4) That the deed under which Defendants claim should be given legal effect.

(5) That in the event ELSIE BRINKERHOFF is entitled to recant, withdraw and cancel the deed she issued to Defendants, the Defendants have lost the benefit of their bargain and are entitled to damages over and against ELSIE BRINKERHOFF in an amount to be proven at the time of trial.

(6) For damages against ELSIE BRINKERHOFF for breach of contract, breach of warranty of title, and unjust enrichment.

Defendant ELSIE BRINKERHOFF has generally and specifically

denied the operative allegations of the Cross-claim against her, and has asserted affirmative defenses, including failure to state a claim, misrepresentation and/or fraud, failure to do equity, unclean hands, lack of standing, mistake induced by Cross-claimants, no intent to convey title, no delivery, no acceptance, lack of proper attestation or acknowledgement; actual, constructive and inquiry notice to Cross-claimants; no termination of 1966 or 1967 contract, lack of consideration, estoppel and such other defenses to which the Court deems her entitled.

3. UNCONTROVERTED FACTS as established by admissions in the pleadings or otherwise, are as follows:

A. ELSIE BRINKERHOFF is the widowed mother of MARK J. BRINKERHOFF, CLOYD H. BRINKERHOFF, deceased; WARREN BRINKERHOFF, ARLENE GOULDING, CHARLES BRINKERHOFF and BETTY ESPLIN. She is the mother-in-law of LENA BRINKERHOFF.

B. On or about 26 October 1966, or 10 December 1967, ELSIE BRINKERHOFF executed a certain Agreement covering the sale of certain real and personal property to MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF. All the family members were and are aware of the existence of the contract. The purchasers went into and remained in possession.

C. Upon completion of the contract, MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF were to be given title to an undivided one-half (1/2) interest each in the property

covered by the Agreement, as joint tenants with right of survivorship with their respective spouses.

D. At various times and places, and in various forms, payments were made to ELSIE BRINKERHOFF, the amounts and manner of payments of which are in dispute by Defendants.

E. On or about 4 June 1979, ELSIE BRINKERHOFF issued a deed to herself, MARK J. BRINKERHOFF, and CLOYD H. BRINKERHOFF, covering certain real property also included in the Agreement. The deed did not include all items covered in the Agreement, nor did it name the wives of MARK J. and CLOYD H. BRINKERHOFF. The deed was subsequently recorded in the office of the Kane County Recorder, and purported to create a joint tenancy with right of survivorship in the three.

F. CLOYD H. BRINKERHOFF died 14 October 1979, rather unexpectedly.

G. On or about 15 August 1980, ELSIE BRINKERHOFF issued a deed to GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, BETTY B. ESPLIN and CHARLES A. BRINKERHOFF, in undivided one-fifth (1/5) interests. This deed was subsequently recorded.

H. On or about 15 August 1980, GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF and BETTY B. ESPLIN issued a Trust Deed With Assignment of Rents, in favor of ELSIE BRINKERHOFF which was later recorded.

I. On or about 9 September 1980, ELSIE BRINKERHOFF issued a Quit-Claim Deed covering certain water rights, to GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, BETTY B. ESPLIN and CHARLES A. BRINKERHOFF. This deed was also recorded later.

J. Later, CHARLES A. BRINKERHOFF and BETTY B. ESPLIN delivered Warranty Deeds covering their interests, to MARK J. BRINKERHOFF and LENA BRINKERHOFF.

K. On 9 September 1984, ELSIE BRINKERHOFF executed a certain "Stipulation".

4. ISSUES OF FACT, including any implicitly raised in paragraphs 2 and 3, above, remain for trial as follows:

A. Did Plaintiffs comply with the contract dated 26 October 1966 or 10 December 1967, including payment of all sums required thereunder?

B. Did ELSIE BRINKERHOFF demand full compliance with the contract, including payment of all sums due and owing?

C. Was there any type of understanding between the parties to the 26 October 1966 or 10 December 1967 contract whereby full payment was not required by the buyers on a timely basis?

D. Did Plaintiffs obtain title to some of the property sold under the 26 October 1966 or 10 December 1967 contract in violation of the terms of said contract, and if

so, what were the circumstances surrounding the same?

E. Was an escrow ever properly established at a financial institution and were deeds properly deposited therein, if so, were said deeds ever removed from said escrow, and if so, by whom and under what authority?

F. At all times relevant herein, was ELSIE BRINKERHOFF competent to act for and on her behalf, and to sign all documents relevant to this action?

G. At all times herein, was ELSIE BRINKERHOFF under the undue influence of any party or family member, and if so, whom?

H. With respect to the Warranty Deeds dated 4 June 1979 and 15 August 1980:

(1) What was the understanding and intent of the grantor?

(2) Who caused it to be prepared, and under what circumstances?

(3) Was it ever delivered, and if so, when and to whom?

(4) Was it ever accepted, and if so, when and by whom?

(5) Was it properly acknowledged and recorded?

I. With respect to the Trust Deed dated 15 August 1980:

(1) Who caused it to be prepared?

(2) Was it ever delivered, and if so, to whom?

(3) Was it ever accepted, and if so, by whom and when?

(4) Was it properly acknowledged and recorded?

J. With respect to the Quit-Claim Deed dated 9 September 1980:

(1) What consideration, if any, was given the grantor?

(2) Who caused it to be prepared, and why?

(3) Was it ever delivered, and if so, when and to whom?

(4) Was it ever accepted, and if so, when and by whom?

(5) Was it properly acknowledged and recorded?

K. What properties and rights covered by the Agreement were not included in the deeds of 4 June 1979, 15 August 1980, and 9 September 1980?

L. What actions, if any, were taken by the parties, to terminate it?

M. Have Defendants ADAIR, WARREN BRINKERHOFF and GOULDING wrongfully interfered with Plaintiffs' contract with ELSIE BRINKERHOFF, and if so, how?

N. If so, have Plaintiffs' been damaged, and in what amount?

O. If Plaintiffs have suffered damages, have they failed to mitigate the same, and if so, how?

P. Did Plaintiffs or their successors in interest wrongfully obtain title to grazing and water rights, and if so, when and in what manner?

Q. If Defendants ADAIR, GOULDING and WARREN BRINKERHOFF own an interest in the real property in this action, what use has been made of the property by MARK J. BRINKERHOFF since 15 August 1980?

R. What rents, profits, proceeds or other monies has MARK J. BRINKERHOFF received from the real property which is the subject of this action, since 15 August 1980?

S. Did ELSIE BRINKERHOFF declare the Agreement in default, or did she ever give notice, verbally or in writing, to MARK J. BRINKERHOFF and/or CLOYD H. BRINKERHOFF, or their respective spouses, of any alleged default and its nature, or did she grant any reasonable time for cure?

T. Have Cross-claimants been damaged by any improper acts of ELSIE BRINKERHOFF, and if so, in what amount.?

5. ISSUES OF LAW, including those implicitly raised by the matters set forth in paragraphs 2, 3 and 4, above, remain for disposition as follows:

A. Are Defendants entitled to the benefit of any affirmative defenses against Plaintiffs' claims, and if so, what?

B. Are Plaintiffs entitled to the benefit of any affirmative defenses against Defendants' claims, and if so, what?

C. Is ELSIE BRINKERHOFF entitled to any affirmative defenses against the Cross-claim, and if so, what?

D. Are Plaintiffs entitled to a judgment and decree quieting title as against Defendants ADAIR, GOULDING and WARREN BRINKERHOFF?

E. Are Plaintiffs entitled to judgment against Defendants for interference with contract, and if so, in what amount?

F. Are Defendants ADAIR, GOULDING and BRINKERHOFF entitled to a judgment and decree quieting title as against Plaintiffs, and if so, to what interests in what property and/or rights, if any?

G. Are Cross-claimants entitled to judgment setting aside the September 1984 Stipulation signed by ELSIE BRINKERHOFF?

H. Are Defendants ADAIR, GOULDING and WARREN BRINKERHOFF entitled to judgment against Plaintiff MARK J. BRINKERHOFF for rents, profits or proceeds from real property since 15 August 1980, and if so, in what amount?

I. Are Cross-claimants entitled to a judgment against ELSIE BRINKERHOFF for damages, and if so, in what amount?

J. Is any party entitled to an award of costs?

K. Are any parties entitled to judgment against any other parties, and if so, upon what theories?

6. EXHIBITS were marked, offered and received as follows:

<u>EXHIBIT NUMBER</u>	<u>DESCRIPTION</u>	<u>OFFERED BY</u>	<u>RECEIVED</u>
P-1	Copy of Agreement dated 26 October 1966, between ELSIE BRINKERHOFF as seller, and MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF, as buyers.	Plaintiffs	Yes
P-2	Copy of Agreement dated 10 December 1967, between ELSIE BRINKERHOFF as seller, and MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF as buyers.	Plaintiffs	Yes
P-3	Affidavit signed by ELSIE Brinkerhoff, dated 13 April 1971.	Plaintiffs	Yes
P-4	Copy of document dated 6 April 1977, signed by ELSIE BRINKERHOFF, acknowledging payment to her of \$23,000.00.	Plaintiffs	Yes
D-5	Copy of Warranty Deed dated 4 June 1979, running from ELSIE BRINKERHOFF to ELSIE BRINKERHOFF, MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF.	Defendants	Yes
D-6	Copy of Warranty Deed dated 15 August 1980, running from ELSIE BRINKERHOFF to GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF and BETTY B. ESPLIN.	Defendants	Yes

D-7	Copy of Trust Deed dated 15 August 1980, running from GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF and BETTY B. ESPLIN to Southern Utah Title Company, Trustee, for ELSIE BRINKERHOFF, Beneficiary.	Defendants	Yes
D-8	Copy of Quit-Claim Deed dated 9 September 1980, running from ELSIE BRINKERHOFF to GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF and BETTY B. ESPLIN.	Defendants	Yes
P-9	Warranty Deed dated 24 August 1982, running from BETTY ESPLIN to MARK J. BRINKERHOFF and LENA BRINKERHOFF.	Plaintiffs	Yes
P-10	Warranty Deed dated 24 August 1982, running from CHARLES A. BRINKERHOFF to MARK J. BRINKERHOFF and LENA BRINKERHOFF.	Plaintiffs	Yes
P-11	Copy of letter from ELSIE J. BRINKERHOFF to Hans Q. Chamberlain, dated 13 August 1983.	Plaintiffs	
P-12	Certificate of Death of CLOYD H. BRINKERHOFF.	Plaintiffs	Yes
D-13	Last Will & Testament of ELSIE BRINKERHOFF.	Defendants	
(D-14	Accounting from State Bank of Southern Utah re: payments made by Defendants to ELSIE BRINKERHOFF pursuant to Trust Deed.	Defendants	Yes
P-15	Copy of deposit slip for \$706.00, and of check for \$1,300.00, dated 13 November 1979 and 24 February 1980, constituting 1979 contract payment.	Plaintiffs	Yes

P-16	Envelope and check to ELSIE BRINKERHOFF, FOR \$2,000.00, for 1980 payment on contract.	Plaintiffs	Yes
P-17	Letter dated 14 October 1981 from Willard R. Bishop to ELSIE BRINKERHOFF, with check for \$2,000.00 for 1981 contract payment, with envelope by which check was returned.	Plaintiffs	Yes
P-18	Copy of letter dated 29 October 1982, from Willard R. Bishop to ELSIE BRINKERHOFF, with letter from Hans Q. Chamberlain to Willard R. Bishop dated 2 December 1982, with check in the amount of \$2,000.00 for 1982 contract payment.	Plaintiffs	Yes
D-19	Copy of Entry Book, Kane County showing recordation of Exhibit D-5, and of warranty deed from ELSIE BRINKERHOFF to CHARLES A. BRINKERHOFF.	Defendants	Yes
D-20	Copies of Promissory Notes (5), and Escrow Agreements (5) running to ELSIE BRINKERHOFF, signed by GOLDA B. ADAIR, CHARLES A. BRINKERHOFF, WARREN BRINKERHOFF, BETTY B. ESPLIN, and ARLENE B. GOULDING.	Defendants	Yes
D-21	Copy of Affidavit of surviving joint tenant, dated 9 September 1980, signed by ELSIE BRINKERHOFF.	Defendants	Yes
D-22	Schedule of payments to ELSIE BRINKERHOFF, prepared by MONT ANDERSON.	Defendants	Yes

If other exhibits are proposed, copies shall be provided to opposing counsel prior to trial.

7. WITNESSES at trial will be called as follows:

<u>NAME</u>	<u>PARTIES CALLING</u>
MARK J. BRINKERHOFF	Plaintiffs
ELSIE BRINKERHOFF	Plaintiffs/Defendants
LENA BRINKERHOFF	Plaintiffs
CHARLES A. BRINKERHOFF	Plaintiffs
GOLDA B. ADAIR	Defendants
WARREN BRINKERHOFF	Defendants
ARLENE B. GOULDING	Defendants
JAMES B. ADAIR	Defendants
DALE BRINKERHOFF	Defendants/Plaintiffs
MONT ANDERSON	Defendants
WEB ADAIR	Defendants
BARRY JUDD	Defendants

Witnesses MONT ANDERSON, MARK J. BRINKERHOFF, LENA BRINKERHOFF, GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, JAMES B. ADAIR and DALE BRINKERHOFF will be present to testify at trial without the necessity of issuing and serving subpoenas.

In the event that other witnesses are to be called at trial, a statement of the names and addresses of such witnesses

and of the general subject matter of their expected testimony shall be provided to opposing counsel prior to trial.

8. DISCOVERY shall continue until the time of trial.

9. AMENDMENTS to the pleadings may be made, if desired, in order to conform them to this Pretrial Order, or may be made by agreement or upon application to the Court, good cause being shown.

10. MODIFICATION AND INTERPRETATIONS: This Pretrial Order will control the course of trial, but may be amended by consent of the parties or by order of the Court in the interests of justice. The pleadings are deemed merged herein. In the event of any ambiguity of this order, reference may be made to the record of the Pretrial Conference to the extent reported by stenographic notes and to the pleadings.

11. TRIAL: This matter has been set for non-jury trial before the Honorable Don V. Tibbs, on 21 and 22 February 1985.

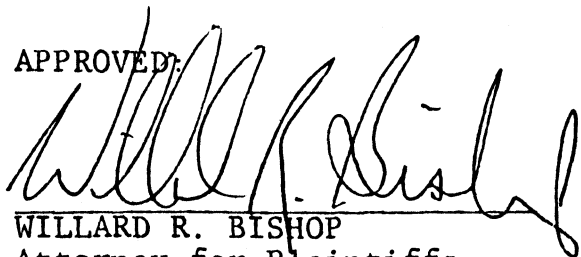
12. POSSIBILILITY OF SETTLEMENT is considered remote.

DATED: _____ February 1985.

BY THE COURT:

DON V. TIBBS, District Judge

APPROVED:



WILLARD R. BISHOP
Attorney for Plaintiffs
and Defendant ELSIE BRINKERHOFF



HANS Q. CHAMBERLAIN
Attorney for Defendants
ADAIR, GOULDING, and
WARREN BRINKERHOFF

WILLARD R. BISHOP
BISHOP & RONNOW, P.C.
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Cedar City, UT 84720
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27 Feb. 85
Sabrina Chamberlain

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY

STATE OF UTAH

MONT R. ANDERSON, personal
representative of the Estate
of CLOYD H. BRINKERHOFF,
LENA BRINKERHOFF, and MARK J.
BRINKERHOFF,

Plaintiffs,

vs.

ELSIE BRINKERHOFF, GOLDA B.
ADAIR, WARREN BRINKERHOFF,
ARLENE B. GOULDING, and JOHN
DOES I through V,

Defendants.

FIRST AMENDED FINDINGS OF
FACT AND CONCLUSIONS OF LAW

Civil No. 1826

The above-entitled matter came on regularly for trial to the Court, sitting without a jury, on Thursday and Friday, February 21 and 22, 1985. Plaintiffs MONT R. ANDERSON, as personal representative of the Estate of CLOYD H. BRINKERHOFF, LENA BRINKERHOFF, and MARK J. BRINKERHOFF appeared personally and were represented by their counsel of record, Mr. Willard R. Bishop. Defendant ELSIE BRINKERHOFF appeared personally and was represented by her attorney of record, Mr. Willard R. Bishop. Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING also appeared personally, and were represented by their attorney of record, Mr. Hans Q. Chamberlain. CHARLES A. BRINKERHOFF and BETTY B. ESPLIN were present. The Court noted

that originally, CHARLES A. BRINKERHOFF and BETTY B. ESPLIN had been named as Defendants, but had been dismissed from the lawsuit by reason of having settled their differences with Plaintiffs. Witnesses were sworn and evidence was presented. Argument was had. Based upon the evidence, good cause appearing, the Court now makes and enters its:

FINDINGS OF FACT

1. Prior to to August of 1960, MERLE BRINKERHOFF and ELSIE J. BRINKERHOFF were husband and wife, residing in Kane County, Utah. MERLE BRINKERHOFF was a farmer and rancher, and accumulated various farming and ranching properties in Kane County, Utah, and in Northern Arizona.

2. MERLE and ELSIE BRINKERHOFF were the parents of MARK J. BRINKERHOFF, CLOYD H. BRINKERHOFF, now deceased; WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES BRINKERHOFF, BETTY B. ESPLIN, and GOLDA B. ADAIR. Plaintiff LENA BRINKERHOFF is the surviving widow of CLOYD H. BRINKERHOFF.

3. In or about August of 1960, MERLE BRINKERHOFF died. As a result of the normal probate process, the farming and ranching property owned by MERLE BRINKERHOFF passed to Defendant ELSIE J. BRINKERHOFF.

4. On or about October 26, 1966, or December 10, 1967, ELSIE BRINKERHOFF executed a certain agreement covering the sale of certain of the farm and ranch real and personal property to MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF. The contract was the result of arm's length bargaining, and was entered into by ELSIE BRINKERHOFF with the advice of counsel. At the time of entering

into the agreement, ELSIE BRINKERHOFF was fully competent, legally and in every other sense.

5. Prior to, concurrent with, and subsequent to the execution of the agreement between ELSIE BRINKERHOFF, MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF, all the family members were and still are aware of the existence of the contract.

6. Upon execution of the contract, the purchasers, MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF went into and remained in possession of the real property covered by the agreement. As of the date of trial, MARK J. BRINKERHOFF, and the personal representative and heirs of CLOYD H. BRINKERHOFF, still remained in possession of the real property, including grazing and water rights. If any other children of ELSIE J. BRINKERHOFF desired to use or graze livestock upon the property, they were permitted to do so without objection.

7. Basically, the agreement provided that in return for conveyance of the personal and real property to MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF, the buyers would pay the minimum sum of \$53,388, payable at the rate of \$2,000 per year, without interest, during the lifetime of ELSIE BRINKERHOFF. In the event that the total minimum price of \$53,388 was not paid by the time of the death of ELSIE BRINKERHOFF, the contract was ambiguous with respect to the disposition and payment of the unpaid, amount of the minimum. The contract provided that it and documents of conveyance were to be placed in escrow in the Hurricane Branch of the Bank of St. George, so that upon full performance by the purchasers, MARK J. BRINKERHOFF and LEAH

BRINKERHOFF, his wife, would receive legal title to an undivided one-half ($\frac{1}{2}$) interest in the property, as joint tenants; and CLOYD H. BRINKERHOFF and LENA BRINKERHOFF, his wife, would receive an undivided one-half ($\frac{1}{2}$) interest in the properties, as joint tenants. Payments were to be made to the Hurricane Branch of the Bank of St. George.

8. The only documents which were ever actually deposited with the escrow agent, consisted of a Warranty Deed from ELSIE BRINKERHOFF to MARK and LEAH BRINKERHOFF, and a Quit Claim Deed from ELSIE BRINKERHOFF to MARK and LEAH BRINKERHOFF. No other documents were ever deposited into the bank escrow, and no payments were made to the escrow holder.

9. Payments were made by the purchasers to ELSIE BRINKERHOFF outside the escrow, as follows:

- A. \$2,000.00 paid on or before November 1, 1964.
- B. \$2,000.00 paid on or before November 1, 1965.
- C. \$430.75 paid June 17, 1972.
- D. \$780.00 paid November 17, 1972.
- E. \$500.00 paid March 19, 1973.
- F. \$500.00 paid October 26, 1973.
- G. \$780.00 paid November 28, 1973.
- H. \$500.00 paid May 13, 1974.
- I. \$600.00 paid January 20, 1975.
- J. \$500.00 paid December 15, 1975.
- K. \$400.00 paid in December of 1976.
- L. \$706.00 paid November 13, 1979.
- M. \$1,300.00 paid on November 13, 1979.

N. \$2,000.00 paid November 6, 1983.

O. \$2,000.00 paid November 4, 1984.

As of the date of trial, contract payments totalled \$14,996.75.

10. On various occasions and at various times, Plaintiff MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF, now deceased, claimed to have made additional payments to ELSIE BRINKERHOFF in the nature of support and assistance, as required and requested by ELSIE BRINKERHOFF. The Court finds that such additional payments and contributions were not intended to be payments under the contract by which MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF were purchasers, but were supplied to ELSIE BRINKERHOFF in the nature of gifts and support which sons would normally provide to their widowed mother.

11. At no time from and after the inception of the agreement between ELSIE J. BRINKERHOFF, MARK J. BRINKERHOFF, and CLOYD H. BRINKERHOFF and the time of trial, did ELSIE BRINKERHOFF ever declare herself dissatisfied with the performance of the purchasers under the contract, nor did she declare the contract in default or attempt to terminate the contract. That contract is still in existence, in full force and effect.

12. Although the agreement provided for no interest on delinquent amounts, the Court finds that ELSIE BRINKERHOFF was and is entitled to receive interest at 6% per annum on delinquent amounts accruing prior to May 14, 1981, and is entitled to receive interest at 10% per annum on delinquent amounts accruing after May 14, 1981.

13. The Court finds the following to be a true and correct accounting of amounts due, payments made, and the balance due through January 31, 1986, on the contract between ELSIE BRINKERHOFF, MARK J. BRINKERHOFF, and CLOYD H. BRINKERHOFF:

CONTRACT ACCOUNTING
(6% interest on delinquent amounts
accruing prior to May 14, 1981)

NOV 1, 1964	Payment due	\$ 2,000.00	
	Payment made	- 2,000.00	
		-0-	
NOV 1, 1965	Payment due	2,000.00	
	Payment made	- 2,000.00	
		-0-	
NOV 1, 1966	Payment due	2,000.00	
NOV 1, 1967	1 year interest at 6% on \$2,000	120.00	
	Payment due	2,000.00	
		4,120.00	\$120 accrued interest, \$4,000 principal
NOV 1, 1968	1 year interest at 6% on \$4,000	240.00	
	Payment due	2,000.00	
		6,360.00	\$360 accrued interest, \$6,000 principal
NOV 1, 1969	1 year interest at 6% on \$6,000	360.00	
	Payment due	2,000.00	
		8,720.00	\$720 accrued interest, \$8,000 principal
NOV 1, 1970	1 year interest at 6% on \$8,000	480.00	
	Payment due	2,000.00	
		11,200.00	\$1,200 accrued interest, \$10,000 principal

NOV 1, 1971	1 year interest at 6% on \$10,000	600.00	
	Payment due	<u>2,000.00</u> 13,800.00	\$1,800 accrued in- terest, \$12,000 principal
JUN 17, 1972	229 days interest at 6% on \$12,000	451.72	
	Payment made	<u>- 430.75</u> 13,820.97	\$1,820.97 accrued interest, \$12,000 principal
NOV 1, 1972	137 days interest at 6% on \$12,000	270.25	
	Payment due	<u>2,000.00</u> 16,091.22	\$2,091.22 accrued interest, \$14,000 principal
NOV 17, 1972	16 days interest at 6% on \$14,000	36.82	
	Payment made	<u>- 780.00</u> 15,348.04	\$1,348.04 accrued interest, \$14,000 principal
MAR 19, 1973	122 days interest at 6% on \$14,000	280.76	
	Payment made	<u>- 500.00</u> 15,128.80	\$1,128.80 accrued interest, \$14,000 principal
OCT 26, 1973	221 days interest at 6% on \$14,000	508.60	
	Payment made	<u>- 500.00</u> 15,137.40	\$1,137.40 accrued interest, \$14,000 principal
NOV 1, 1973	6 days interest at 6% on \$14,000	13.81	

	Payment due	<u>2,000.00</u> 17,151.21	\$1,151.21 accrued interest, \$16,000 principal
NOV 28, 1973	27 days interest at 6% on \$16,000	71.01	
	Payment made	<u>- 780.00</u> 16,442.22	\$442.22 accrued interest, \$16,000 principal
MAY 13, 1974	166 days interest at 6% on \$16,000	436.60	
	Payment made	<u>- 500.00</u> 16,378.82	\$378.82 accrued interest, \$16,000 principal
NOV 1, 1974	172 days interest at 6% on \$16,000	452.38	
	Payment due	<u>2,000.00</u> 18,831.20	\$831.20 accrued interest, \$18,000 principal
JAN 20, 1975	80 days interest at 6% on \$18,000	236.71	
	Payment made	<u>- 600.00</u> 18,467.91	\$467.91 accrued interest, \$18,000 principal
NOV 1, 1975	285 days interest at 6% on \$18,000	843.28	
	Payment due	<u>2,000.00</u> 21,311.19	\$1,311.19 accrued interest, \$20,000 principal
DEC 15, 1975	44 days interest at 6% on \$20,000	144.66	
	Payment made	<u>- 500.00</u> 20,955.85	\$955.85 accrued interest, \$20,000 principal
NOV 1, 1976	321 days interest at 6% on \$20,000	1,055.34	

	Payment due	<u>2,000.00</u> 24,011.19	\$2,011.19 accrued interest, \$22,000 principal
DEC 1, 1976	30 days interest at 6% on \$22,000	108.49	
	Payment made	<u>- 400.00</u> 23,719.68	\$1,719.68 accrued interest, \$22,000 principal
NOV 1, 1977	335 days interest at 6% on \$22,000	1,211.51	
	Payment due	<u>2,000.00</u> 26,931.19	\$2,931.19 accrued interest, \$22,000 principal
NOV 1, 1978	1 year interest at 6% on \$24,000	1,440.00	
	Payment due	<u>2,000.00</u> 30,371.19	\$4,371.19 accrued interest, \$26,000 principal
NOV 1, 1979	1 year interest at 6% on \$26,000	1,560.00	
	Payment due	<u>2,000.00</u> 33,931.19	\$5,931.19 accrued interest, \$28,000 principal
NOV 13, 1979	12 days interest at 6% on \$28,000	55.23	
	Payment made	- 706.00	
	Payment made	<u>- 1,300.00</u> 31,980.42	\$3,980.42 accrued interest, \$28,000 principal
NOV 1, 1980	353 days interest at 6% on \$28,000	1,624.77	
	Payment due	<u>2,000.00</u> 35,605.19	\$5,605.19 accrued interest, \$30,000 principal

JAN 31, 1986	5 years, 92 days interest at 6% on \$30,000	9,453.69
	Payment made post-trial after ruling by Court	-50,262.95
	CREDIT (Applied below)	<u>(5,204.07)</u>

CONTRACT ACCOUNTING
(10% interest on delinquent amounts
accruing after May 14, 1981)

NOV 1, 1981	Payment due	\$ 2,000.00	
NOV 1, 1982	1 year interst at 10% on \$2,000.00	200.00	
	Payment due	<u>2,000.00</u> 4,200.00	\$200.00 accrued interest, \$4,000 principal
NOV 1, 1983	1 year interest at 10% on \$4,000.00	400.00	
	Payment due	<u>2,000.00</u> 6,600.00	\$600.00 accrued interest, \$6,000 principal
NOV 6, 1983	5 days inteest at 10% on \$6,000.00	8.22	
	Payment made	<u>- 2,000.00</u> 4,608.22	\$4,608.22 principal
NOV 1, 1984	360 days interest at 10% on \$4,608.22	454.51	
	Payment due	<u>2,000.00</u> 7,062.73	\$454.51 accrued interest \$6,608.22 principal
NOV 4, 1984	3 days interest at 10% on \$6,608.22	5.43	
	Payment made	<u>- 2,000.00</u> 5,068.16	\$5,068.16 principal

NOV 1, 1985	361 days interest at 10% on \$5,068.16	501.26	
	Payment due	<u>2,000.00</u> 7,569.42	\$501.26 interest, 7,068.16 principal
NOV 15, 1985	14 days interest at 10% on \$7,068.16	27.11	
	Payment made	<u>- 2,115.00</u> 5,481.53	\$5,481.53 principal
JAN 31, 1986	77 days interest at at 10% on \$5,481.53	115.64	
	CREDIT APPLIED	<u>- 5,204.07</u> <u>\$ 399.10</u>	\$399.10 principal

14. As of the date of trial in February of 1985, ELSIE BRINKERHOFF was 86 years of age, and is a wonderful and beautifully aged lady.

15. The Court finds by the clear and convincing weight of the evidence presented at trial that, although ELSIE BRINKERHOFF was fully competent in all senses of the word at the time she entered into the agreement between herself as seller and MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF as buyers, in 1966 or 1967, because of her age, and beginning in or about 1970, ELSIE BRINKERHOFF had to rely on others to do things for her, especially concerning her financial and legal affairs, and she has relied upon her sons, daughters, members of her family, and grandsons, and that from and after 1970, ELSIE BRINKERHOFF signed documents that were presented to her without understanding the legal or other significance of such documents. She lacked sufficient power to comprehend the subject of such documents, including will, deeds, contracts and promissory notes, their

nature, and their probable consequences, and was not able to act with discretion in relation thereto. From and after 1970, ELSIE J. BRINKERHOFF was and still is, legally incompetent.

17. From and after 1970, when ELSIE BRINKERHOFF signed any contractual, financial or legal documents, or took certain legal stands and positions, she did so in total and strict reliance upon her sons, daughters, grandsons or whomever else came to her requesting her signature or requesting that she take certain legal positions, all without knowing the nature and probable consequences of such documents, and without knowing the nature and probable consequences of the legal positions she was requested to take.

18. The Court finds that the purpose of the 1966 or 1967 Agreement was to furnish ELSIE BRINKERHOFF with support for as long as she lived, and that Agreement and that purpose were never abandoned.

19. The Court finds that all of the children and certain grandchildren of ELSIE J. BRINKERHOFF, from their respective viewpoints, and because of what they perceived as being others taking advantage of their mother or grandmother by such other parties, used their own influence to convince ELSIE BRINKERHOFF to execute documents and take legal positions in order to accomplish what they, the children and/or grandchildren or other relatives, thought was for ELSIE BRINKERHOFF's best interest.

20. The Court finds that the children and grandchildren who prevailed upon ELSIE BRINKERHOFF to execute documents and take legal stands after 1970 did not intend to take advantage of her

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for their own purposes. Nevertheless, they did take advantage of ELSIE BRINKERHOFF for the purpose of benefiting her in their own minds, from their own points of view. As a result, those persons who persuaded and induced ELSIE BRINKERHOFF to sign contractual, legal and financial documents, including deeds, and to take certain legal positions from and after 1970, used improper constraint or urgency of persuasion, whereby the will of ELSIE BRINKERHOFF was overpowered, and she was induced to do or forebear an act which she otherwise would not do, or otherwise would do if left to act freely.

21. The unfair persuasion of ELSIE BRINKERHOFF on various occasions from and after 1970 generally took place in private. The persons persuading her to sign legal and financial documents were able to obtain her signature because of her age, psychological dependency, and existing confidential and/or family relationships.

22. The transactions leading to the signing of financial and legal documents by ELSIE BRINKERHOFF were initiated by her family members, not by herself, under circumstances in which ELSIE BRINKERHOFF lacked reasonable access to independent, non-confidential advice.

23. Following 1970, ELSIE BRINKERHOFF executed the following financial and legal documents, among others:

- A. On or about April 13, 1971, ELSIE BRINKERHOFF executed a certain affidavit, admitted in evidence as Exhibit P-3.

- B. On or about April 6, 1977, ELSIE BRINKERHOFF signed a document acknowledging that she had received \$23,000 from MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF as of that date. The receipt was prepared by Plaintiff MONT ANDERSON, ELSIE BRINKERHOFF'S grandson-in-law, who was and is a Certified Public Accountant. The receipt was prepared by him for the benefit of giving MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF certain "tax breaks", and the receipt was prepared and obtained without regard to the tax consequences for ELSIE BRINKERHOFF. The receipt was admitted as Exhibit P-4.
- C. On or about June 4, 1979, ELSIE BRINKERHOFF executed a Warranty Deed running from herself, as grantor, to herself, MARK J. BRINKERHOFF, and CLOYD H. BRINKERHOFF, as joint tenants. This document was admitted as Exhibit D-5.
- D. On or about August 15, 1980, ELSIE BRINKERHOFF was induced to execute a Warranty Deed running from herself, as grantor, to GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF, and BETTY B. ESPLIN, each as to an undivided 1/5 interest. See Exhibit D-6.
- E. On or following August 15, 1980, GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF, and BETTY B. ESPLIN executed a Trust

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Deed in favor of ELSIE BRINKERHOFF as beneficiary. See Exhibit D-7. The Trust Deed was to secure notes running to ELSIE BRINKERHOFF, one being executed by each of the grantors named in the Trust Deed. See Exhibit D-20.

- F. Also on or about August 15, 1980, ELSIE BRINKERHOFF was induced to execute certain "Escrow Agreements". See Exhibit D-20.
- G. On or about September 9, 1980, ELSIE BRINKERHOFF was induced to execute a Quit Claim Deed, conveying interests in water rights to GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF, and BETTY B. ESPLIN, each as to an undivided 1/5 interest. See Exhibit D-8.
- H. On or about September 9, 1980, ELSIE BRINKERHOFF was induced to execute a certain affidavit. See Exhibit D-21.
- I. On or about April 23, 1982, ELSIE BRINKERHOFF executed a document entitled "Last Will and Testament of ELSIE BRINKERHOFF".
- J. On or about September 9, 1984, ELSIE BRINKERHOFF was induced to execute a certain "Stipulation". See Exhibit P-40.

24. The Court specifically finds that with respect to each and all of the documents listed in the preceding paragraph, the same were signed by ELSIE BRINKERHOFF when she was legally incompetent, and was acting and functioning under the undue

influence of the persons who obtained her signature, or who requested her to take the legal positions indicated by said documents. As a result, the Court finds that all legal, contractual financial and testamentary documents executed by ELSIE J. BRINKERHOFF from and after 1970, as between and as related to the parties to this action, are null, void, and of no force or effect whatever, and should be declared cancelled.

25. On or about August 15, 1980, GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF and BETTY B. ESPLIN executed notes in favor of ELSIE J. BRINKERHOFF in connection with the Warranty Deed, Trust Deed, and Escrow Agreement mentioned in paragraphs 23D, 23E, and 23F, above. Thereafter, certain payments were made by the promisors to ELSIE J. BRINKERHOFF. The notes bore interest at the rate of "NONE percent (0%) per annum".

26. At trial, the Court inquired of GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF, and BETTY B. ESPLIN whether they desired the return of funds paid by them to ELSIE J. BRINKERHOFF under the transactions mentioned in light of the Court's ruling that said transactions were null, void, and of no effect. CHARLES A. BRINKERHOFF and BETTY B. ESPLIN informed the Court that they did not desire any repayment. Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING requested that their money be returned to them by ELSIE J. BRINKERHOFF, who requested that the Court grant her the privilege of repaying said Defendants. The Court finds that the notes to ELSIE J. BRINKERHOFF, the Trust Deed, the Escrow

Agreement and all other documents related to the transactions described above are null, void, of no effect and should be cancelled and set aside.

27. As of February 28, 1985, ELSIE J. BRINKERHOFF is indebted to Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, AND ARLENE B. GOULDING in the principal amount of \$1,620.00 plus accrued interest at the rate of 10% per annum in the amount of \$356.40, for a total amount of \$1,976.40, each.

28. As stated in paragraph 7, above, the contract between ELSIE J. BRINKERHOFF, MARK J. BRINKERHOFF, and CLOYD H. BRINKERHOFF was and is vague and ambiguous with respect to disposition of any portion of the \$53,388.00 minimum which might remain unpaid as of the date of death of ELSIE J. BRINKERHOFF. The Court finds that it was the intent of the parties to the contract that any part of the minimum amount remaining unpaid as of the death of ELSIE J. BRINKERHOFF be paid and divided equally between her children, or any surviving heirs if any child predeceased her, and the contract should be reformed to express clearly this disposition and intent. As of the dates of trial, all children of ELSIE J. BRINKERHOFF, including the surviving spouse of CLOYD H. BRINKERHOFF, consented to such reformation, with the exception of Defendants ADAIR, WARREN BRINKERHOFF, and GOULDING, who originally agreed to such reformation but changed their minds. Likewise as of the time of trial, all children of ELSIE J. BRINKERHOFF except Defendants ADAIR, WARREN BRINKERHOFF, and GOULDING were in agreement that any and all funds left in a trust account mentioned below, as of the date of death of ELSIE

J. BRINKERHOFF, be divided and distributed equally between them and LENA BRINKERHOFF. Defendants ADAIR, WARREN BRINKERHOFF and GOULDING originally agreed, but changed their minds. The Court finds that all funds referred to in this paragraph should be distributed, upon the death of ELSIE J. BRINKERHOFF, equally to her children, with LENA BRINKERHOFF receiving the share allocable to her deceased husband, CLOYD H. BRINKERHOFF.

29. Any amounts awarded to ELSIE J. BRINKERHOFF should be paid to Mr. Kirk Heaton in trust for the benefit of ELSIE J. BRINKERHOFF, and for the use and benefit of her now-surviving children and LENA BRINKERHOFF. Mr. Heaton was present in Court at the time of the Court's ruling and consented to be appointed as trustee and guardian of the financial, business and legal affairs of ELSIE J. BRINKERHOFF, under the supervision of the Court. Mr. Kirk Heaton should be appointed as such trustee and guardian for the purpose of receiving such funds awarded to ELSIE J. BRINKERHOFF, depositing them in a trust account at Zion's First National Bank, and disbursing them appropriately, but not to any of ELSIE J. BRINKERHOFF'S children except as specifically ordered by the Court. He should qualify by taking the appropriate oath, and should serve without bond or any stated fee, but should be permitted to apply to the Court for reasonable fees upon appropriate showing and notice.

30. When this action was originally commenced, Willard R. Bishop, attorney for Plaintiffs, brought suit against ELSIE BRINKERHOFF and other named Defendants. Thereafter, the interests of ELSIE BRINKERHOFF were represented by Hans Q.

Chamberlain, who also represented other named Defendants. ELSIE BRINKERHOFF then requested in writing that Hans Q. Chamberlain withdraw as her attorney of record, which he did in September of 1983. The letter wherein she requested Hans Q. Chamberlain to withdraw as her attorney was prepared by her grandson, DALE BRINKERHOFF. Thereafter, following signing of the September 9, 1984 Stipulation by ELSIE J. BRINKERHOFF, and following receipt of a written request from ELSIE J. BRINKERHOFF dated October 16, 1984, Willard R. Bishop, entered an appearance on her behalf and represented ELSIE J. BRINKERHOFF even though he had originally sued her on behalf of Plaintiffs in the first instance. Hans Q. Chamberlain had by then sued ELSIE J. BRINKERHOFF in behalf of the other named Defendants even though he originally represented her, by a Crossclaim dated September 28, 1984.

31. During the first day of trial, to-wit, February 21st, 1985, the Court determined that the interests of ELSIE BRINKERHOFF were not being fully protected, and by reason of that fact, she needed separate counsel to represent her interests. The Court determined that it would watch out for the interests of ELSIE BRINKERHOFF, and that the trial would continue without obtaining counsel to represent her during the course of the trial. Therefore, during part of the first day of trial and during the entire second day of trial, ELSIE BRINKERHOFF was not represented by counsel.

From the foregoing Findings of Fact, the Court now makes and enters its:

CONCLUSIONS OF LAW

1. That any and all legal, financial, testamentary, contractual and/or other documents executed by ELSIE J. BRINKERHOFF from and after the year 1970, as between and as related to the parties to this action, were and are null, void and of no effect by reason of the legal incompetency of ELSIE J. BRINKERHOFF and the exercise of undue influence over her in connection with the execution of said documents, by certain of her children and grandchildren, and should be declared to be null, void, cancelled terminated, and of no effect whatever, as should any promissory notes, trust deeds, escrow agreements and any other documents executed by others, but related thereto.

2. The Agreement between ELSIE J. BRINKERHOFF as seller, and MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF, deceased, dated October 26, 1966 or December 10, 1967, is and at all times pertinent has been, in existence, and in full force and effect.

3. That the vague and ambiguous terms of said Agreement pertaining to disposition of any part of the minimum amount of \$53,388.00 remaining unpaid as of the death of ELSIE J. BRINKERHOFF, should be reformed to provide for an equal division of any amounts so remaining between MARK J. BRINKERHOFF, LENA BRINKERHOFF, CHARLES A. BRINKERHOFF, BETTY B. ESPLIN, GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING, share and share alike.

4. Plaintiffs are entitled to judgment and a decree quieting title with appropriate injunctive relief in favor of LENA BRINKERHOFF and MARK J. BRINKERHOFF in the real and personal

reasonable costs incurred for his administration of the account, from the account.

6. That Plaintiffs should be required to pay to Kirk Heaton, in trust for the use and benefit of ELSIE J. BRINKERHOFF, the amounts due on the Agreement as stated above, plus any accrued interest, said amounts to be paid within ninety (90) days of the execution of any judgment by the Court in this matter.

7. That from amounts received by Mr. Kirk Heaton for the benefit of ELSIE J. BRINKERHOFF, Mr. Heaton should be required to disburse to Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING, the amount of \$1,976.40 each, together with interest upon said amount at the rate of twelve percent (12%) per annum from and after March 1, 1985, all without further order of this Court.

8. That upon the death of ELSIE J. BRINKERHOFF, Kirk Heaton, in his capacity as trustee, should be required to pay and distribute any and all funds still being held by him in trust for ELSIE J. BRINKERHOFF, together with any funds received by him thereafter in connection with the Agreement of October 26, 1966 or December 10, 1967, to MARK J. BRINKERHOFF, LENA BRINKERHOFF, BETTY B. ESPLIN, CHARLES A. BRINKERHOFF, GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING equally, share and share alike.

9. That all other claims and pleadings of any party requesting affirmative relief other than or inconsistent with the above conclusions, should be dismissed, with prejudice and upon the merits.

10. The parties should be required to bear their own costs and attorney fees.

LET JUDGMENT BE ENTERED ACCORDINGLY.


DATED this 30th day of February, 1986.

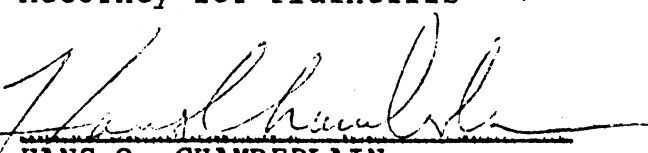
BY THE COURT:


DON V. TIBBS, District Judge

P-109


APPROVED AS TO FORM:


WILLARD R. BISHOP
Attorney for Plaintiffs


HANS Q. CHAMBERLAIN
Attorney for Defendants ADAIR,
GOULDING, and WARREN BRINKERHOFF

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a full, true and correct copy of the above and foregoing FIRST AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW to Mr. Hans Q. Chamberlain, of CHAMBERLAIN & HIGBEE, Attorneys at Law, 250 South Main Street, Cedar City, Utah 84720; to Mr. Kirk Heaton, Attorney at Law, 70 North Main Street, Kanab, Utah 84741; and to Mrs. Elsie J. Brinkerhoff, Glendale, Utah 84729, all by first class mail, postage fully prepaid this 25th day of FEBRUARY, 1986.


Ester Marawytowa

WILLARD R. BISHOP
BISHOP & RONNOW, P.C.
Attorney for Plaintiffs
P. O. Box 279
Cedar City, UT 84720
Telephone: (801) 586-9483

27 Feb. 86
Subm. Chamberlain

IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY

STATE OF UTAH

MONT R. ANDERSON, personal
representative of the Estate
of CLOYD H. BRINKERHOFF,
LENA BRINKERHOFF, and MARK J.
BRINKERHOFF,

Plaintiffs,

vs.

ELSIE BRINKERHOFF, GOLDA B.
ADAIR, WARREN BRINKERHOFF,
ARLENE B. GOULDING, and JOHN
DOES I through V,

Defendants.

**FIRST AMENDED JUDGMENT AND
DECREE QUIETING TITLE**

Civil No. 1826

The above-entitled matter came on regularly for trial to the Court, sitting without a jury, on Thursday and Friday, February 21 and 22, 1985. Plaintiffs MONT R. ANDERSON, as personal representative of the Estate of CLOYD H. BRINKERHOFF, LENA BRINKERHOFF and MARK J. BRINKERHOFF all appeared personally and were represented by their counsel of record, Mr. Willard R. Bishop. Defendant ELSIE BRINKERHOFF appeared personally and was represented by her attorney of record, Mr. Willard R. Bishop. Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING also appeared personally, and were represented by their attorney of record, Mr. Hans Q. Chamberlain. CHARLES A. BRINKERHOFF and BETTY B. ESPLIN were present. The Court noted

652

hat originally, CHARLES A. BRINKERHOFF and BETTY B. ESPLIN had been named as Defendants, but had been dismissed from the lawsuit by reason of having settled their differences with Plaintiffs. Witnesses were sworn and evidence was presented. Argument was had. The Court being fully advised in the premises, and having heretofore made and entered its Findings of Fact and Conclusions of Law, and good cause appearing,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That any and all legal, financial, testamentary, contractual and/or other documents executed by ELSIE J. BRINKERHOFF from and after 1970, as between and as related to the parties to this action, were and are now, null, void, and of no effect whatever, by reason of the legal incompetency of ELSIE J. BRINKERHOFF and by reason of the exercise of undue influence over her in connection with the execution of said documents, by certain of her children and grandchildren, and said documents should be and they hereby are, declared to be null, void, cancelled, terminated, and of no effect whatever, together with any and all related promissory notes, trust deeds, escrow agreements, and any and all other documents executed by others related to in any way to the null and void documents executed by ELSIE J. BRINKERHOFF. The documents which are hereby declared, null, void and of no effect include, but are not limited to, the following:

- A. A certain affidavit executed by ELSIE J. BRINKERHOFF on or about April 13, 1971.

- B. A certain document executed by ELSIE J. BRINKERHOFF on or about April 6, 1977, acknowledging that she had received \$23,000.00 from MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF as of that date.
- C. A certain Warranty Deed dated June 4, 1975, running from ELSIE J. BRINKERHOFF, as grantor, to herself, MARK J. BRINKERHOFF, and CLOYD H. BRINKERHOFF, as joint tenants.
- D. A certain Warranty Deed dated August 15, 1980, running from ELSIE J. BRINKERHOFF, as grantor, to GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF, and BETTY B. ESPLIN, each as to an undivided one-fifth (1/5) interest.
- E. A certain Trust Deed executed by GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF, and BETTY B. ESPLIN, running to ELSIE J. BRINKERHOFF, as beneficiary, together with certain trust deed notes running to ELSIE J. BRINKERHOFF from GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF, and BETTY B. ESPLIN, executed on or about August 15, 1980.
- F. Certain "Escrow Agreements" dated August 15, 1980, executed by ELSIE J. BRINKERHOFF, and by GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF, and BETTY B. ESPLIN.

- G. A certain Quit-Claim Deed, purporting to convey interests in water rights to GOLDA B. ADAIR, WARREN BRINKERHOFF, ARLENE B. GOULDING, CHARLES A. BRINKERHOFF, and BETTY B. ESPLIN, each to an undivided one-fifth (1/5) interest, executed by ELSIE BRINKERHOFF on or about September 9, 1980.
- H. A certain affidavit, executed by ELSIE BRINKERHOFF on or about September 9, 1980.
- I. A certain "Last Will and Testament of ELSIE BRINKERHOFF", executed by ELSIE BRINKERHOFF on or about April 23, 1982.
- J. A certain "Stipulation" executed by ELSIE BRINKERHOFF on or about September 9, 1984.

2. That the agreement between ELSIE J. BRINKERHOFF as seller, and MARK J. BRINKERHOFF and CLOYD H. BRINKERHOFF, deceased, dated October 26, 1966 or December 10, 1967, should be and it hereby is, declared to be in existence, and in full force and effect.

3. That the terms of said agreement pertaining to disposition of any part of the minimum amount of \$53,388.00 remaining unpaid as of the death of ELSIE J. BRINKERHOFF, should be and they hereby are, reformed, to provide for an equal division of any amounts so remaining between MARK J. BRINKERHOFF, LENA BRINKERHOFF, CHARLES A. BRINKERHOFF, BETTY B. ESPLIN, GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING, share and share alike.

4. That Plaintiffs LENA BRINKERHOFF and MARK J. BRINKERHOFF, own in fee simple and are entitled to the quiet and peaceful use, possession and enjoyment of that certain real and personal property, including grazing rights and water rights, as tenants in common, each owning an undivided one-half ($\frac{1}{2}$) interest therein, subject to the terms of the Agreement dated October 26, 1966, or December 10, 1967, as reformed, running to ELSIE J. BRINKERHOFF as seller, said real and personal property, including grazing and water rights, being more particularly described as follows:

REAL PROPERTY IN MILLARD COUNTY, UTAH:

Lots 1, 2, 3, and 4, Block 25, Plat "A", Delta Townsite.

Lot 2, Block 26, Plat "A", Delta Townsite.

REAL PROPERTY IN KANE COUNTY, UTAH:

Township 39 South, Range $4\frac{1}{2}$ West, Salt Lake Meridian:

West Half of Section 25, containing 320 acres.

Northwest Quarter; Southeast Quarter and the South Half of the Northeast Quarter containing 400 acres, all in Section 26, Township 39 South, Range $4\frac{1}{2}$ West, Salt Lake Meridian, containing 400 acres, more or less.

Lots 1, 2, 3, and 4; Southeast Quarter of the Northwest Quarter; Northeast Quarter of the Southwest Quarter; East Half of the East Half; Southwest Quarter of the Northeast Quarter; Northwest Quarter of the Southeast Quarter of Section 27, Township 39 South, Range $4\frac{1}{2}$ West, containing 478.80 acres.

East Half of the Northeast Quarter; South Half of the Southeast Quarter; Northwest Quarter of the Southeast Quarter of Section 35, containing 200 acres.

Township 40 South, Range 4½ West, Salt Lake Meridian:

Section 29: Southwest Quarter of the Northeast Quarter; West Half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter, containing 160 acres.

Section 30: Northwest Quarter; East Half of the Southwest Quarter, containing 238.99 acres.

Section 5: Lot 2, containing 39.08 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Southwest Quarter of the Northwest Quarter of Section 8, containing 40 acres.

Township 40 South, Range 7 West, Salt Lake Meridian:

Beginning at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Meridian and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1 chain to beginning, containing .74 acres.

Beginning at the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwesterly along the middle of the channel of said creek to the North line of said Northwest Quarter of the Northeast Quarter; thence West 11.23 chains to the place of beginning.

Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian and running thence South 70° east 15 chains to the middle of the channel of the creek; thence Southerly along the middle of the channel of said creek to the South Line; thence North 73 45' West 14.60 chains; thence North 4.30 chains to the place of beginning, containing 5.60 acres.

The above three tracts being part of land situated in Sections 23 and 26 of said township and range, sometimes referred to unofficially as Lot "A".

Township 40 South, Range 4½ West, Salt Lake Meridian:

Lot 1; Northeast Quarter of the Northwest Quarter of Section 31, containing 79.30 acres.

PERSONAL PROPERTY:

The following described water and reservoir rights:

A one-fourth interest in Hobble Canyon Reservoir (9-36-12) in Mohave County, Arizona.

A one-half interest in Sullivan Reservoir in Mohave County, Arizona.

And all grazing privileges and permits annexed to or based upon any of the foregoing real, personal, reservoir, or water rights as commensurate.

5. That the claims of Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING, and the claims of any and all persons claiming with, by, through or under said Defendants, are without any right whatever, and Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING and any and all persons claiming with, by, through or under them, have no estate, right, title, lien or interest in or to said property or any part thereof.

6. That Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING, and any and all persons claiming with, by, through or under them, should be and they hereby are, permanently enjoined and restrained from claiming any estate, right, title, lien or interest in or to the described property or any part

thereof adverse to the interests and title of MARK J. BRINKERHOFF and LENA BRINKERHOFF.

7. That because of the legal incompetency of ELSIE J. BRINKERHOFF and the fact that a complete set of documents of conveyance was never deposited into the escrow anticipated by the agreement dated October 26, 1966 or December 10, 1967, this Judgment and Decree Quietening Title shall, upon the death of ELSIE J. BRINKERHOFF, function and operate as a judicial deed conveying to MARK J. BRINKERHOFF and LENA BRINKERHOFF the interests stated above. In the event that MARK J. BRINKERHOFF and/or LENA BRINKERHOFF deem it necessary, a judicial deed shall issue upon appropriate application and notice.

8. That Mr. Kirk Heaton, Attorney, of Kanab, Utah, should be and he hereby is, appointed as guardian of the financial, business and legal affairs of ELSIE J. BRINKERHOFF, and as trustee of all funds flowing to ELSIE J. BRINKERHOFF from the Agreement of October 26, 1966 or December 10, 1967, for the use and benefit of ELSIE J. BRINKERHOFF, and also for the use and benefit of MARK J. BRINKERHOFF, LENA BRINKERHOFF, BETTY B. ESPLIN, CHARLES A. BRINKERHOFF, GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING, said appointments being subject to the supervision of this Court. Mr. Kirk Heaton shall take the appropriate oath and shall serve without bond or stated fee. As such trustee, Mr. Heaton shall receive all amounts awarded ELSIE J. BRINKERHOFF herein, together with any proceeds from the agreement dated October 26, 1966 or December 10, 1967, as reformed above, and shall deposit them into a trust account at

Zion's First National Bank, and shall hold and disburse such funds for the use and benefit of ELSIE J. BRINKERHOFF, but not to her children, except as such disbursements to children may be specifically authorized herein, or otherwise ordered by the Court. Upon appropriate application and notice, Mr. Kirk Heaton shall be permitted to apply for reasonable fees in connection with his administration of the trust, and in connection with his guardianship of the financial, business and legal affairs of ELSIE J. BRINKERHOFF. Mr. Kirk Heaton shall be permitted to deduct his reasonable and normal costs incurred in connection with his administration of the trust, from the trust corpus.

9. That Plaintiffs should be and they hereby are, required to pay to Kirk Heaton, as trustee, for the use and benefit of ELSIE J. BRINKERHOFF and for the use and benefit of MARK J. BRINKERHOFF, LENA H. BRINKERHOFF, BETTY B. ESPLIN, CHARLES A. BRINKERHOFF, GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING, the sum of \$399.10, being the amount due and unpaid on the agreement as of January 31, 1986, plus any accrued interest at ten percent (10%) per annum upon principal, and less any payments made after January 31, 1986, said amount to be paid within ninety (90) days of the execution of this First Amended Judgment, Plaintiffs having already paid the sum of \$50,262.95 on January 31, 1986, and \$2,115.00 on November 15, 1985, after the initial ruling by the Court.

10. That from amounts received by Mr. Kirk Heaton as stated above, and as received by him prior to February 1, 1986, Mr. Heaton should be and he hereby is, required to disburse forthwith

to Defendant GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING, the amount of \$1,976.40 each, together with interest upon said amounts at the rate of twelve percent (12%) per annum from and after March 1, 1985, all without further order of this Court.

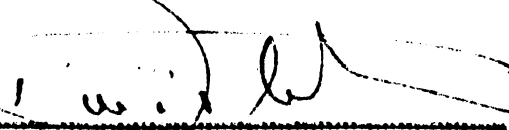
11. That upon the death of ELSIE J. BRINKERHOFF, Mr. Kirk Heaton, in his capacity as trustee, should be and he hereby is, required to pay and distribute any and all funds still being held by him in trust at the death of ELSIE J. BRINKERHOFF, together with any funds received by him thereafter in connection with the agreement of October 26, 1966 or December 10, 1967, to MARK J. BRINKERHOFF, LENA BRINKERHOFF, BETTY B. ESPLIN, CHARLES A. BRINKERHOFF, GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING equally, share and share alike.

12. That any and all other claims and pleadings of any party in this action requesting affirmative relief, other than or inconsistent with the above, should be and they hereby are, dismissed with prejudice and upon the merits.

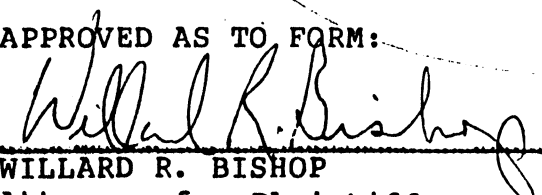
13. That the parties should be and they hereby are, required to bear their own costs and attorney fees.

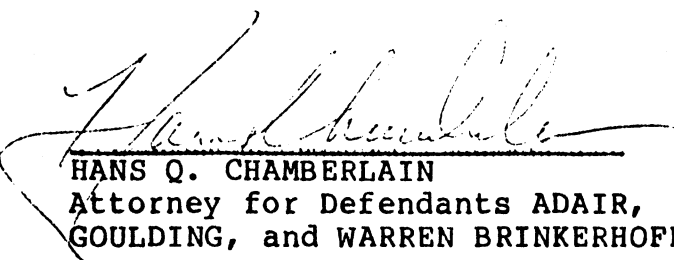
DATED this 20th day of February, 1986.

BY THE COURT:


DON V. TIBBS, District Judge *MS*

APPROVED AS TO FORM:


WILLARD R. BISHOP
Attorney for Plaintiffs


HANS Q. CHAMBERLAIN
Attorney for Defendants ADAIR,
GOULDING, and WARREN BRINKERHOFF

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a full, true and correct copy of the above and foregoing FIRST AMENDED JUDGMENT AND DECREE QUIETING TITLE, to Mr. Hans Q. Chamberlain, of CHAMBERLAIN & HIGBEE, Attorneys at Law, 250 South Main Street, Cedar City, Utah 84720; to Mr. Kirk Heaton, Attorney at Law, 70 North Main Street, Kanab, Utah 84741; and to Mrs. Elsie J. Brinkerhoff, Glendale, Utah 84729, all by first class mail, postage fully prepaid this 25TH day of FEBRUARY, 1986.


Eric Mawzyk

A G R E E M E N T

THIS AGREEMENT, made and entered into by and between ELSIE BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTY OF THE FIRST PART, hereinafter referred to as the "SELLER" and CLOYD H. BRINKERHOFF and MARK BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTIES OF THE SECOND PART, hereinafter referred to as the "BUYERS",

W I T N E S S E T H:

THAT WHEREAS, the SELLER is the owner of the real property, grazing privileges and water rights in the States of Utah and Arizona;

AND WHEREAS, the BUYERS desire to purchase the same;

AND WHEREAS, the parties have agreed upon terms and conditions for sale thereof;

NOW THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set out the parties hereinafter agreed with and between one another as follows:

1. That for and in consideration of the total sum of FIFTY THREE THOUSAND THREE HUNDRED EIGHTY-EIGHT (\$53,388.00) DOLLARS, as the full consideration therefor, the SELLER covenants and agrees to sell and the BUYERS covenant and agree to buy the following described real property, grazing privileges and water and reservoir rights in the States of Utah and Arizona:

REAL PROPERTY IN MILLARD COUNTY, UTAH:

Lots 1, 2, 3, and 4, Block 25, Plat "A", Delta Township.

Lot 1, Block 26, Plat "A", Delta Township.

REAL PROPERTY IN KANE COUNTY, UTAH:

Township 39 South, Range 4½ West, Salt Lake Meridian:

West Half of Section 25, containing 320 acres.

Northwest Quarter; Southeast Quarter and the South Half of the Northeast Quarter containing 400 acres, all in Section 26, Township 39 South, Range 4½ West, Salt Lake Meridian, containing 400 acres, more or less.

Lots 1, 2, 3, and 4; Southeast Quarter of the Northwest Quarter; Northeast Quarter of the Southwest Quarter; East Half of the East Half; Southwest Quarter of the Northeast Quarter; Northwest Quarter of the Southeast Quarter of Section 27 Township 39 South

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East Half of the Northeast Quarter; South Half of the Southeast Quarter; Northwest Quarter of the Southeast Quarter of Section 35, containing 200 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Section 29: Southwest Quarter of the Northwest Quarter; West Half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter, containing 160 acres.

Section 30: Northwest Quarter; East Half of the Southwest Quarter, containing 238.99 acres.

Section 5: Lot 2, containing 39.08 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Southwest Quarter of the Northwest Quarter of Section 8, containing 40 acres.

Township 40 South, Range 7 West, Salt Lake Meridian:

Beginning at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Meridian and running thence East 12.23 chains; thence North 72° 15' 00" West 11.00 chains; thence West 11.00 chains; thence South 1 chain to beginning, containing .74 acres.

Beginning at the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwesterly along the middle of the channel of said creek to the North Line of said Northwest Quarter of the Northeast Quarter; thence West 11.23 chains to the place of beginning.

Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian and running thence South 70° East 15 chains to the middle of the channel of the creek; thence Southwesterly along the middle of the channel of said creek to the South Line; thence North 72° 15' West 11.00 chains; thence North 4.30 chains to the place of beginning, containing 5.60 acres.

The above three tracts being part of land situated in Sections 23 and 26 of said township and range, sometimes referred to unofficially as Lot "A".

Township 40 South, Range 4½ West, Salt Lake Meridian:

Lot 1; Northeast Quarter of the Northwest Quarter of Section 31, containing 79.50 acres.

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PERSONAL PROPERTY:

The following described water and reservoir rights:

A one-fourth interest in the ... Reservoir (14-1-10)
in Mohave County, Arizona.

A one-half interest in Sullivan Reservoir in Mohave County,
Arizona.

And all grazing privileges and permits annexed to or based
upon any of the foregoing real, personal, reservoir, or water
rights as commensurate.

2. The parties agree that for and in consideration of the sale by the
SELLER to the BUYERS of the foregoing real and personal property, water and
reservoir rights and grazing privileges, the BUYERS will pay to the SELLER the
sum of TWO THOUSAND (\$2,000.00) DOLLARS, each year, beginning with the 1st day
of November, 1964, of which payments due on November 1, 1964 and November 1,
1965 are hereby acknowledged by the BUYERS and the BUYERS will
continue to pay annual installments of \$2,000.00 on the 1st day of November in
each year thereafter beginning November 1, 1965 and continuing during the entire
life of the SELLER.

The BUYERS agree that they will pay the sum of \$2,000.00 per year to
the SELLER for the entire remainder of SELLER'S life irrespective of the amount
which may be paid under this contract whether it exceeds the total consideration
hereinabove set out or whether that total amount shall not be paid by applying
annual payments of \$2,000.00 against the purchase price during the life of the
SELLER and in consideration of an undertaking by the BUYERS to pay the
amount of \$2,000.00 per year for the life of the SELLER irrespective of the
amount which may be paid, the SELLER waives interest upon the unpaid balances.

It is provided, however, that should the total consideration herein-
above provided not be paid by the BUYERS to the SELLER during SELLER'S life then
upon the death of the SELLER any amounts remaining under this Agreement
after crediting all payments which have been made hereunder, shall be paid
annually, as provided herein in equal shares, shares and share alike, to

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RICHFIELD, UTAH 84701

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76 SOUTH MAIN
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Warren Brinkerhoff and Charley Arland Brinkerhoff two-sevenths (2/7ths) (1/7th to each) of the balances due (it being stipulated that the BUYERS together with Warren Brinkerhoff, Charley Arland Brinkerhoff, Betty B. Fentim, Golda G. Fentim and Arland B. Fentim constitute all the heirs of the said Warren Brinkerhoff, if other provision has been made for the latter three named herein), together with interest at four (4%) per cent per annum on the deferred declining balances.

The BUYERS may, at any time, prepay all or any part of the remaining principal due under this contract.

3. The SELLER shall execute a Warranty Deed to the real property hereinabove described and quitclaim conveyances to the water and reservoir rights hereinabove described, of an undivided one half interest to each BUYER and his wife as joint tenants with full rights of survivorship, and shall execute a deed to the same to the Escrow Depositor of the Bank of Utah, Salt Lake City, Utah, which shall hold these documents in trust and in escrow subject to the following

ESCROW INSTRUCTIONS

If the BUYERS shall make all payments of principal and interest herein provided and perform all the other covenants and agreements herein contained, then upon payment of the final installment due hereunder the Escrow Depositor shall deliver to the BUYERS all the escrowed documents.

In the event of a default in the payment of any installment of principal or interest and in the event of a default in any other term or condition herein and in the event of a default in the time for payment of principal and interest shall be given to the BUYERS by the SELLER and a subsequent failure to remedy the same shall continue for a period of thirty (30) days, then the SELLER may, at her option, demand a redelivery to her of all of the escrowed documents whereupon the BUYERS will vacate and peacefully surrender all of the premises hereinabove described and the SELLER may re-enter into possession of the same without further process and may retain as rent and liquidated damages all sums theretofore paid by BUYERS under this agreement.

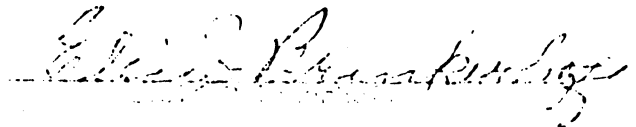
As an alternative remedy the SELLER may elect to reduce any payment for all payments, accelerating and maturing the entire balance of principal and interest immediately, or may elect to foreclose on the property on any successive or intermittent occasions or may elect to treat this Agreement as note and mortgage passing title through to the BUYERS and foreclosing thereon in the manner provided by law.

During the period the BUYERS are complying with the terms of this Agreement, they shall be entitled to the sole, exclusive, and beneficial use, occupancy, and enjoyment of the above described premises subject only to the rights of the SELLER to inspect the same at reasonable times.

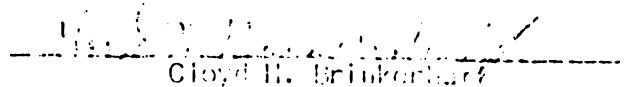
4. The BUYERS have inspected said premises and find the same in a manner satisfactory to them and there are no covenants or warranties other than those set forth in this Agreement.

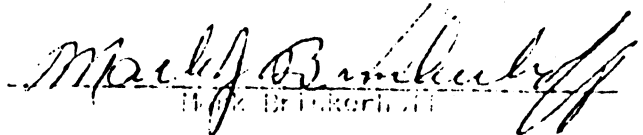
5. This shall be of the essence as to all the terms and conditions of this Agreement which shall bind and inure to the benefit of the heirs, successors, and assigns of the parties hereto and the party in default agrees to pay all costs and a reasonable attorney's fee in the event enforcement of this contract is required.

WITNESS the hands of the parties hereto this 26 day of October 1966.



SELLER


Cloyd H. Brinkhoff


M. J. Brinkhoff

BUYERS

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OLSEN AND CHAMBERLAIN
76 SOUTH MAIN
RICHFIELD, UTAH 84701

[illegible]

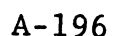
THIS AGREEMENT, made and entered into by and between ELSIE BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTY OF THE FIRST PART, herein-after referred to as the "SELLER" and CLOYD H. BRINKERHOFF and MARK BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTIES OF THE SECOND PART, herein-after referred to as the "BUYERS",

THAT WHEREAS, the SELLER is the owner of the real property, grazing privileges and water rights in the States of Utah and Arizona;

AND WHEREAS, the parties have agreed upon terms and conditions for the sale thereof;

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Lots 1, 2, 3, and 4; Southeast Quarter of the Northwest Quarter; Northeast Quarter of the Southwest Quarter; East Half of the East Half; Southwest Quarter of the Northeast Quarter; Northwest Quarter of the Southeast Quarter of Section 27, Township 39 South, Range 41 West, containing 473.85 acres.



East Half of the Northeast Quarter; South Half of the Southeast Quarter; Northwest Quarter of the Southeast Quarter of Section 35, containing 200 acres.

Township 40 South, Range 4½ West, Salt Lake Meridian:

Section 29: Southwest Quarter of the Northeast Quarter; West Half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter, containing 160 acres.

Section 30: Northwest Quarter; East Half of the Southwest Quarter, containing 239.99 acres.

Section 5: Lot 2, containing 32.03 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Southwest Quarter of the Northwest Quarter of Section 8, containing 40 acres.

Township 40 South, Range 7 West, Salt Lake Meridian:

Beginning at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Meridian and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.60 chains; thence South 1 chain to beginning, containing .74 acres.

Beginning at the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwest along the middle of the channel of said creek to the North Line of said Northwest Quarter of the Northeast Quarter; thence West 11.25 chains to the place of beginning.

Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian and running thence South 70° East 15 chains to the middle of the channel of the creek; thence Southerly along the middle of the channel of said creek to the South Line; thence North 73°45' West 14.00 chains; thence North 4.30 chains to the place of beginning, containing 5.60 acres.

8.43 ac

The above three tracts being part of land situated in Sections 23 and 26 of said township and range, sometimes referred to unofficially as Lot "A".

Township 40 South, Range 4½ West, Salt Lake Meridian:

Lot 1; Northeast Quarter of the Northwest Quarter of Section 31, containing 72.30 acres.

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PERSONAL PROPERTY:

The following described water and reservoir rights:

A one-fourth interest in Hobble Canyon Reservoir (9-36-12)
in Mohave County, Arizona.

A one half interest in Sullivan Reservoir in Mohave County,
Arizona.

And all grazing privileges and penalties annexed to or based
upon any of the foregoing real, personal, reservoir, or water
rights as commensurate.

2. The parties agree that for and in consideration of the sale by the
SELLER to the BUYERS of the foregoing real and personal property, water and
reservoir rights and grazing privileges, the BUYERS will pay to the SELLER the
sum of TWO THOUSAND (\$2,000.00) DOLLARS, each year, beginning with the 1st day
of November, 1964, of which payments due on November 1, 1964 and November 1,
1965 are hereby acknowledged by the SELLER from the BUYERS and the BUYERS will
continue to pay annual installments of \$2,000.00 on the 1st day of November in
each year thereafter beginning November 1, 1966 and continuing during the entire
life of the SELLER.

The BUYERS agree that they will pay the sum of \$2,000.00 per year to
the SELLER for the entire remainder of SELLER'S life irrespective of the amount
which may be paid under this contract whether it exceeds the total consideration
hereinabove set out or whether that total amount shall not be paid by applying
annual payments of \$2,000.00 against the purchase price during the life time of
the SELLER and in consideration of an undertaking by the BUYERS to pay the
amount of \$2,000.00 per year for the life of the SELLER irrespective of the
amount which may be paid, the SELLER waives interest upon the unpaid balances.

It is provided, however, that should the total consideration herein-
above provided not be paid by the BUYERS to the SELLER during SELLER'S lifetime,
then upon the death of the SELLER any amounts remaining under this Agreement
after crediting all payments which have been made hereunder, shall be paid
annually as provided herein in equal shares, shares and share alike, to

Warren Brinkerhoff and Charley Arland Brinkerhoff two-sevenths (2/7ths) (1/7ths to each) of the balances due (it being stipulated that the BUYERS together with Warren Brinkerhoff, Charley Arland Brinkerhoff, Betty B. Esplin, Golda B. Adair, and Arlene B. Goulding constitute all the heirs at law of the SELLER and that other provision has been made for the latter three named heirs), together with interest at four (4%) per cent per annum on the deferred declining balances.

The BUYERS may, at any time, prepay all or any part of the remaining principal due under this contract.

3. The SELLER shall execute a Warranty Deed to the real property heretofore described and quitclaim conveyances to the water and reservoir rights heretofore described, of an undivided one half interest to each BUYER and his wife as joint tenants with full rights of survivorship, and shall deposit said instruments in the Hurricane Branch of the Bank of St. George which shall hold those documents in trust and in escrow subject to the following:

ESCROW INSTRUCTIONS

If the BUYERS shall make all payments of principal and interest herein provided and perform all the other covenants and agreements herein contained, then upon payment of the final installment due hereunder the Escrow Depository shall deliver to the BUYERS all the escrowed documents.

In the event of a default in the payment of any installment of principal or interest and in the event of a default in any other term or condition herein and in the event notice of a default other than for payment of principal and interest shall be given to the BUYERS by the SELLER and a subsequent failure to remedy the same shall continue for a period of thirty (30) days, then the SELLER may, at her option, demand a redelivery to her of all of the escrowed documents whereupon the BUYERS will vacate and peaceably surrender all of the premises heretofore described and the SELLER may re-enter into possession of the same without further process and may retain as rent and liquidated damages all sums theretofore paid by BUYERS under this Agreement.

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78 SOUTH MAIN
RICHFIELD, UTAH 84701

As an alternative remedy the SELLER may elect to reduce any payment or all payments, accelerating and maturing the entire balance of principal and interest immediately, to judgment or may have said remedy on one or more successive or intermittent occasions or may elect to treat this Agreement as a note and mortgage passing title through to the BUYERS and foreclosing the same in the manner provided by law.

During the period the BUYERS are complying with the terms of this Agreement, they shall be entitled to the sole, exclusive, and beneficial use, occupancy, and enjoyment of the above described premises subject only to the rights of the SELLER to inspect the same at reasonable times.

4. The BUYERS have inspected said premises and find the same in a manner satisfactory to them and there are no covenants or warranties other than expressly set forth herein.

5. Time shall be of the essence as to all the terms and conditions of this Agreement which shall bind and inure to the benefit of the heirs, successors, and assigns of the parties hereto and the party in default agrees to pay all costs and a reasonable attorney's fee in the event enforcement of this contract is required.

WITNESS the hands of the parties hereto this 10 day of Dec.

1967
1968.

Elio J. Brinkerhoff
Elio Brinkerhoff
SELLER

Cloyd H. Brinkerhoff
Cloyd H. Brinkerhoff

Mark Brinkerhoff
Mark Brinkerhoff

BUYERS

the buyer's

LAW OFFICES
OLSEN AND CHAMBERLAIN
70 SOUTH MAIN
RICHFIELD, UTAH 84701

: ss
COUNTY OF KANE)

BEFORE ME, the undersigned Notary Public, personally appeared
ELSIE BRINKERHOFF, who stated under oath, as follows:

That she has sold Real Property described hereinafter to Mark J.
Brinkerhoff and Cloyd H. Brinkerhoff, and that she will defend the rights of own-
ership and also any rights of way of ingress or egress to the said Real Property.
That she will enter into a lawsuit or any other procedure needed to protect these
rights of ingress or egress, to said property.

The real property is described as follows:

BEGINNING at the South Quarter Corner of Section 23, Township 40 South, Range 7
West, Salt Lake Meridian, Utah, and running thence East 10.23 chains; thence North
80° West 6.36 cahins; thence West 3.68 chains; thence South 1 chain to the point
of beginning.

ALSO BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range
7 West, Salt Lake Meridian, Utah, and running thence South 8.6 chains; thence South
73°45' East 14.6 chains; thence Northwesterly along the middle of the channel of
the creek to the North boundary line of said Section 26; thence West 11.23 chains
to the point of beginning. Containing 11.77 acres

Total acres: 12.51

That the Affiant will at any time help to defend and protect the
rights of Mark J. Brinkerhoff and Cloyd H. Brinkerhoff as far as the Real Property
is concerned.

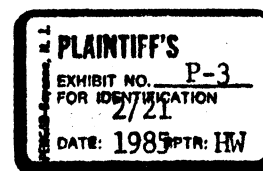
Elsie Brinkerhoff
Elsie Brinkerhoff

SUBSCRIBED AND SWORN to before me this 13 day of April, A.D. 1971.

Dana Chamberlain
Notary Public
Residing at Orderville Utah

My commission expires

Feb. 26, 1972



To whom it may concern:

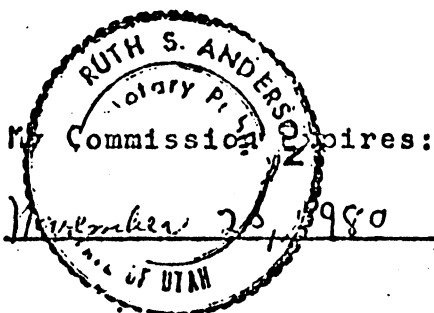
I, Elsie Brinkerhoff, have received from Cloyd
and Mark Brinkerhoff, as payment on property,
\$23,000.

Signed: Elsie Brinkerhoff

STATE OF UTAH } SS.

County of Kane

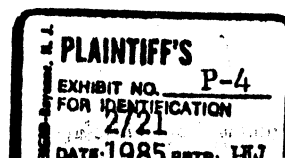
On this 6th day of April 1977, personally
appeared before me Elsie Brinkerhoff, the signer
of the above and foregoing instrument, who duly acknowledged
to me that she executed the same.



Ruth S. Anderson

Notary Public

Residing at Glenade, Utah



Recorded at Request of _____
at _____ M. Fee Paid \$ _____ County Recorder
By _____ Dep. _____ Book _____ Page _____ Ret. _____
Mail tax notice to _____ Grantees _____ Address _____ Glendale, Utah 84729

WARRANTY DEED

Elsie Brinkerhoff, a widow, grantor
of Glendale, County of Kane, State of Utah, hereby
CONVEY and WARRANT to ELSIE BRINKERHOFF, a widow, MARK J. BRINKERHOFF, a
married man, and CLOYD H. BRINKERHOFF, a married man,
all as Joint Tenants with full rights of survivorship,
and not as Tenants in Common,
of Glendale, Utah 84729 grantee;
\$10.00 & other valuable consideration-----for the sum of
the following described tracts of land in KANE DOLLARS,
State of Utah: County,

SEE SCHEDULE "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

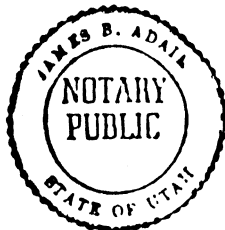
WITNESS, the hand of said grantor, this 4th day of June, A. D. 1979.

Signed in the Presence of

Elsie Brinkerhoff
Elsie Brinkerhoff

STATE OF UTAH
County of Kane

SS.



On the 4th day of June, A. D., 1979 personally
appeared before me Elsie Brinkerhoff, a widow,

the signer of the within instrument who duly acknowledged
to me that she executed the same.

James B. Adair

Notary Public

My Commission expires June 19, 1979 My residence is Orderville, Utah

FILED
JUN 12 1979
KANE COUNTY RECORDS
BY [illegible]

SCHEDULE "A"

PARCEL 1: The West Half of Section 25, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 320.0 acres, more or less.

PARCEL 2: The Northwest Quarter (NW $\frac{1}{4}$); the Southeast Quarter (SE $\frac{1}{4}$) and the South Half of the Northeast Quarter (S $\frac{1}{2}$ NE $\frac{1}{4}$) of Section 26, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 400.0 acres, more or less.

PARCEL 3: Lots 1, 2, 3, and 4; the Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$); the Northeast Quarter of the Southwest Quarter (NE $\frac{1}{4}$ SW $\frac{1}{4}$); the East Half of the East Half (E $\frac{1}{2}$ E $\frac{1}{2}$); the Southwest Quarter of the Northeast Quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 27, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 478.80 acres, more or less.

PARCEL 4: The East Half of the Northeast Quarter (E $\frac{1}{2}$ NE $\frac{1}{4}$); the South Half of the Southeast Quarter (S $\frac{1}{2}$ SE $\frac{1}{4}$) and Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 35, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 200.0 acres, more or less.

PARCEL 5: The Southwest Quarter of the Northeast Quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$); the West Half of the Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$) and the Southeast Quarter of the Southwest Quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of Section 29, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 160.0 acres, more or less.

PARCEL 6: The Northwest Quarter (NW $\frac{1}{4}$) and the East Half of the Southwest Quarter of Section 30, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 238.99 acres, more or less.

PARCEL 7: Lot 2, Section 5, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 39.08 acres, more or less.

PARCEL 8: The Southwest Quarter of the Northwest Quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 8, Township 40 South, Range 4 West, Salt Lake Base and Meridian, containing 40.0 acres, more or less.

PARCEL 9: Lot 1 and the Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 31, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 79.30 acres, more or less.

PARCEL 10: BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence South 0°35' West 567.60 feet; thence South 78°00' East 963.6 feet; thence Northwesterly along the creek bed, 808.0 feet, more or less, to the North line of Section 26; thence South 89°57' West 741.18 feet to the point of beginning. Containing 11.77 acres, more or less.

PARCEL 11: BEGINNING at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1.0 chain to the point of beginning. Containing 0.74 acres, more or less.

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848

Recorded at Request of _____
at _____, M. Fee Paid \$ _____ County Recorder
By _____ Dep. _____ Book _____ Page _____ Ret. _____
Mail tax notice to _____ Address _____

WARRANTY DEED

Elsie Brinkerhoff, a widow, _____ grantor
of Glendale _____, County of Kane _____, State of Utah, hereby

CONVEY and WARRANT to - GOLDA B. ADAIR, a married woman, as to an undivided 1/5
interest; _____ WARREN
BRINKERHOFF, a married man, as to an undivided 1/5 interest; ARLENE B. GOULDING,
a married woman, as to an undivided 1/5 interest; CHARLES A. BRINKERHOFF, a
married man, as to an undivided 1/5 interest and BETTY B. ESPLIN, a married
woman, as to an undivided 1/5 interest, _____ grantors
of Orderville, Utah _____ for the sum of

\$10.00 & other valuable consideration-----DOLLARS.
the following described tract of land in KANE County,
State of Utah:

SEE SCHEDULE "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF:

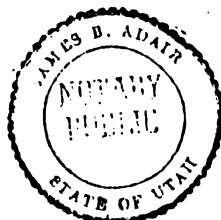
WITNESS, the hand _____ of said grantor, this 15th day of August, A. D. 19 30.

Signed in the Presence of

Elsie Brinkerhoff
Elsie Brinkerhoff

STATE OF UTAH
County of Kane

SS.



On the 15th day of August, A. D., 19 30, personally
appeared before me Elsie Brinkerhoff, a widow,

the signer _____ of the within instrument who duly acknowledged
to me that She executed the same.

James B. Adair
James B. Adair

Notary Public

My Commission expires JUNE 19, 1933

My residence is Orderville, Utah

DEFENDANTS

RECORDED AT 10:15 A.M. 1930
FILED IN 22-1000 AT 10:15 A.M. 1930
CLERK COUNTY RECORDER

AN UNDIVIDED ONE-HALF (1/2) INTEREST IN AND TO THE FOLLOWING PROPERTY:
SCHEDULE "A"

- PARCEL 1: The West Half of Section 25, Township 39 South, Range 4½ West, Salt Lake Base and Meridian, containing 320.0 acres, more or less.
- PARCEL 2: The Northwest Quarter (NW¼); the Southeast Quarter (SE¼) and the South Half of the Northeast Quarter (S½NE¼) of Section 26, Township 39 South, Range 4½ West, Salt Lake Base and Meridian, containing 400.0 acres, more or less.
- PARCEL 3: Lots 1, 2, 3, and 4; the Southeast Quarter of the Northwest Quarter (SE¼NW¼); the Northeast Quarter of the Southwest Quarter (NE¼SW¼); the East Half of the East Half (E½E½); the Southwest Quarter of the Northeast Quarter (SW¼NE¼) and the Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 27, Township 39 South, Range 4½ West, Salt Lake Base and Meridian, containing 478.20 acres, more or less.
- PARCEL 4: The East Half of the Northeast Quarter (E½NE¼); the South Half of the Southeast Quarter (S½SE¼) and Northwest Quarter of the Southeast Quarter (NW¼SE¼) of Section 25, Township 39 South, Range 4½ West, Salt Lake Base and Meridian, containing 200.0 acres, more or less.
- PARCEL 5: The Southwest Quarter of the Northeast Quarter (SW¼NE¼); the West Half of the Southeast Quarter (W½SE¼) and the Southeast Quarter of the Southwest Quarter (SE¼SW¼) of Section 29, Township 40 South, Range 4½ West, Salt Lake Base and Meridian, containing 160.0 acres, more or less.
- PARCEL 6: The Northwest Quarter (NW¼) and the East Half of the Southwest Quarter of Section 30, Township 40 South, Range 4½ West, Salt Lake Base and Meridian, containing 238.99 acres, more or less.
- PARCEL 7: Lot 2, Section 5, Township 40 South, Range 4½ West, Salt Lake Base and Meridian, containing 39.08 acres, more or less.
- PARCEL 8: The Southwest Quarter of the Northwest Quarter (SW¼NW¼) of Section 8, Township 40 South, Range 4 West, Salt Lake Base and Meridian, containing 40.0 acres, more or less.
- PARCEL 9: Lot 1 and the Northeast Quarter of the Northwest Quarter (NE¼NW¼) of Section 31, Township 40 South, Range 4½ West, Salt Lake Base and Meridian, containing 79.30 acres, more or less.
- PARCEL 10: BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence South 0°35' West 567.60 feet; thence South 78°00' East 963.6 feet; thence North-westerly along the creek bed, 808.0 feet, more or less, to the North line of Section 26; thence South 89°57' West 741.18 feet to the point of beginning. Containing 11.77 acres, more or less.
- PARCEL 11: BEGINNING at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1.0 chain to the point of beginning. Containing 0.74 acres, more or less.

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848

Elsie Brinkerhoff
Elsie Brinkerhoff

355

WHEN RECORDED, MAIL TO

Southern Utah Title Company

P. O. Box "T"

Kanab, Utah 84741

Space Above This Line For Recorder's Use

TRUST DEED

With Assignment of Rents

THIS TRUST DEED, made this 15th day of August, 1980

between Golda B. Adair, a married woman; Warren Brinkerhoff, a married man; Arlene G. Goulding, a married woman; Charles A. Brinkerhoff, a married man & Betty B. Esplin, a married woman as TRUSTOR,

whose address is Orderville & Glendale Utah
(Street and number) (City) (State)

SOUTHERN UTAH TITLE COMPANY, a Utah Corporation as TRUSTEE,* and

Elsie Brinkerhoff, a widow, as BENEFICIARY,

WITNESSETH: That Trustor CONVEYS AND WARRANTS TO TRUSTEE IN TRUST,

WITH POWER OF SALE, the following described property, situated in KANE County, State of Utah:

SEE SCHEDULE "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF:

Together with all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with said property, or any part thereof, SUBJECT, HOWEVER, to the right, power and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

FOR THE PURPOSE OF SECURING (1) payment of the indebtedness evidenced by 5 promissory notes of even date herewith, in the principal sum of \$ 50,000.00, made by Trustor, payable to the order of Beneficiary at the times, in the manner and with interest as therein set forth, and any extensions and/or renewals or modifications thereof; (2) the performance of each agreement of Trustor herein contained; (3) the payment of such additional loans or advances as hereafter may be made to Trustor, or his successors or assigns, when evidenced by a promissory note or notes reciting that they are secured by this Trust Deed; and (4) the payment of all sums expended or advanced by Beneficiary under or pursuant to the terms hereof, together with interest thereon as herein provided.

*NOTE: Trustee must be a member of the Utah State Bar; a bank, building and loan association or savings and loan association authorized to do such business in Utah; a corporation authorized to do a trust business in Utah; or a title insurance or abstract company authorized to do such business in Utah.

RECORDED AT REC'D IN
KANE COUNTY, UTAH
AUG 24 1980

A-207

TO PROTECT THE SECURITY OF THIS TRUST DEED, TRUSTOR AGREES:

1. To keep said property in good condition and repair; not to remove or demolish any building thereon, to complete or restore promptly and in good and workmanlike manner any building which may be constructed, damaged or destroyed thereon, to comply with all laws, covenants and restrictions affecting said property, not to commit or permit waste thereof, not to commit, suffer or permit any act upon said property in violation of law, to do all other acts which from the character or use of said property may be reasonably necessary, the specific enumerations herein not excluding the general, and, if the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor further agrees:

(a) To commence construction promptly and to pursue same with reasonable diligence to completion in accordance with plans and specifications satisfactory to Beneficiary, and

(b) To allow Beneficiary to inspect said property at all times during construction

Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

2. To provide and maintain insurance, of such type or types and amounts as Beneficiary may require, on the improvements now existing or hereafter erected or placed on said property. Such insurance shall be carried in companies approved by Beneficiary with loss payable clauses in favor of and in form acceptable to Beneficiary. In event of loss, Trustor shall give immediate notice to Beneficiary, who may make proof of loss, and each insurance company concerned is hereby authorized and directed to make payment for such loss, directly to Beneficiary instead of to Trustor and Beneficiary jointly; and the insurance proceeds, or any part thereof, may be applied by Beneficiary, at its option, to reduction of the indebtedness hereby secured or to the restoration or repair of the property damaged.

3. To deliver to, pay for and maintain with Beneficiary until the indebtedness secured hereby is paid in full, such evidence of title as Beneficiary may require, including abstracts of title or policies of title insurance and any extensions or renewals thereof or supplements thereto.

4. To appear in and defend any action or proceeding purporting to affect the security hereof, the title to said property, or the rights or powers of Beneficiary or Trustee, and should Beneficiary or Trustee elect to also appear in or defend any such action or proceeding, to pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

5. To pay at least 10 days before delinquency all taxes and assessments affecting said property, including all assessments upon water company stock and all rents, assessments and charges for water, appurtenant to or used in connection with said property, to pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior hereto, to pay all costs, fees, and expenses of this Trust.

6. Should Trustor fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee, but without obligation so to do and without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: Make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon said property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

7. To pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate of ten per cent (10%) per annum until paid, and the repayment thereof shall be secured hereby.

IT IS MUTUALLY AGREED THAT:

8. Should said property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, award, damages, rights of action and proceeds, including the proceeds of any policies of fire and other insurance affecting said property, are hereby assigned to Beneficiary, who may, after deducting therefrom all its expenses, including attorney's fees, apply the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages, and rights of action and proceeds as Beneficiary or Trustee may require.

9. At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Trust Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness secured hereby, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement affecting this Trust Deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of said property. The grantee in any reconveyance may be described as "the person or persons entitled thereto", and the recitals therein of any matters or facts shall be conclusive proof of truthfulness thereof. Trustor agrees to pay reasonable Trustee's fees for any of the services mentioned in this paragraph.

10. As additional security, Trustor hereby assigns Beneficiary, during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Trust Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time or from time to time to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Trust Deed to any such tenancy, lease or option.

11. Upon any default by Trustor hereunder, Beneficiary may at any time without notice, either in person, by agent, or by a receiver to be appointed by a court (Trustor hereby consenting to the appointment of Beneficiary as such receiver), and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name or for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

12. The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies or compensation or awards for any taking or damage of said property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

13. The failure on the part of Beneficiary to promptly enforce any right hereunder shall not operate as a waiver of such right and the waiver by Beneficiary of any default shall not constitute a waiver of any other or subsequent default.

14. Time is of the essence hereof. Upon default by Trustor in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, all sums secured hereby shall immediately become due and payable at the option of Beneficiary. In the event of such default, Beneficiary may execute or cause Trustee to execute a written notice of default and of election to cause said property to be sold to satisfy the obligations hereby secured, and Trustee shall file such notice for record in each county wherein said property or some part or parcel thereof is situated. Beneficiary also shall deposit with Trustee, the note and all documents evidencing expenditures secured hereby.

15. After the lapse of such time as may then be required by law following the recording of said notice of default, and notice of default and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property on the date and at the time and place designated in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine that subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold, at public auction to the highest bidder, the purchase price payable in lawful money of the United States at the time of sale. The person conducting the sale may, for any cause he deems expedient, postpone the sale from time to time until it shall be completed and, in every case, notice of postponement shall be given by public declaration thereof by such person at the time and place last appointed for the sale, provided, if the sale is postponed for longer than one day beyond the day designated in the notice of sale, notice thereof shall be given in the same manner as the original notice of sale. Trustee shall execute and deliver to the purchaser its Deed conveying said property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Beneficiary, may bid at the sale. Trustee shall apply the proceeds of the sale to payment of (1) the costs and expenses of exercising the power of sale and of the sale, including the payment of the Trustee's and attorney's fees; (2) cost of any evidence of title procured in connection with such sale and revenue stamps on Trustee's Deed; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at 10% per annum from date of expenditure; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto, or the Trustee, in its discretion, may deposit the balance of such proceeds with the County Clerk of the county in which the sale took place.

16. Upon the occurrence of any default hereunder, Beneficiary shall have the option to declare all sums secured hereby immediately due and payable and foreclose this Trust Deed in the manner provided by law for the foreclosure of mortgages on real property and Beneficiary shall be entitled to recover in such proceeding all costs and expenses incident thereto, including a reasonable attorney's fee in such amount as shall be fixed by the court.

17. Beneficiary may appoint a successor trustee at any time by filing for record in the office of the County Recorder of each county in which said property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the powers, duties, authority and title of the trustee named herein or of any successor trustee. Each such substitution shall be executed and acknowledged, and notice thereof shall be given and proof thereof made, in the manner provided by law.

18. This Trust Deed shall apply to, inure to the benefit of, and bind all parties hereto, their heirs, legatees, devisees, administrators, executors, successors and assigns. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including any pledgee, of the note secured hereby. In this Trust Deed, whenever the context requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

19. Trustee accepts this Trust when this Trust Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Trust Deed or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

20. This Trust Deed shall be construed according to the laws of the State of Utah.

21. The undersigned Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address hereinbefore set forth.

Signature of Trustor

Golda B. Adair, Betty B. Esplin,
Charles A. Brinkerhoff, Arlene B. Goulding

Warren Brinkerhoff

(If Trustor an Individual)

STATE OF UTAH
COUNTY OF Kane ss.

On the 15th day of August, A.D. 1980, personally
Golda B. Adair, Betty B. Esplin, Charles A. Brinkerhoff,
appeared before me Arlene B. Goulding, & Warren Brinkerhoff,
the signer(s) of the above instrument, who duly acknowledged to me that they executed the
same.

My Commission Expires:
June 19, 1983

James B. Adair
Notary Public residing at
Orderville, Utah

357
(If Trustor a Corporation)

STATE OF UTAH
COUNTY OF ss.

On the _____ day of _____, A.D. 19____, personally
appeared before me _____, who being by me duly sworn,
says that he is the _____ of _____,
the corporation that executed the above and foregoing instrument and that said instrument was
signed in behalf of said corporation by authority of its by-laws (or by authority of a resolution
of its board of directors) and said _____ acknowledged
to me that said corporation executed the same.

A-209

acres, more or less.

PARCEL 4: The East Half of the Northeast Quarter ($E\frac{1}{2}NE\frac{1}{4}$); the South Half of the Southeast Quarter ($S\frac{1}{2}SE\frac{1}{4}$) and Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section 35, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 200.0 acres, more or less.

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PARCEL 6: The Northwest Quarter ($NW\frac{1}{4}$) and the East Half of the Southwest Quarter of Section 30, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 238.99 acres, more or less.

PARCEL 7: Lot 2, Section 5, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 39.08 acres, more or less.

PARCEL 8: The Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}NW\frac{1}{4}$) of Section 8, Township 40 South, Range 4 West, Salt Lake Base and Meridian, containing 40.0 acres, more or less.

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Recorded at Request of.....

at M. Fee Paid \$.....

by..... Dep. Book..... Page..... Ref.:.....

Mail tax notice to..... Address.....

QUIT-CLAIM DEED

Elsie Brinkerhoff, a widow, grantor
of Glendale, County of Kane, State of Utah, hereby
QUIT-CLAIM to GOLDA B. ADAIR, a married woman, as to an undivided 1/5
interest; WARREN BRINKERHOFF, a married man, as to an undivided 1/5 interest;
ARLENE B. GOULDING, a married woman, as to an undivided 1/5 interest; CHARLES
A. BRINKERHOFF, a married man, as to an undivided 1/5 interest; and BILLY E.
ESPLIN, a married woman, as to an undivided 1/5 interest, grantees
of Glendale & Orderville, Utah for the sum of
\$10.00 & other valuable consideration--\$ DOLLARS.

the following described ~~water xxxxx~~ water rights in Kane County,
State of Utah:

All of Water Users Claim Numbers 234, 235, 236, 237, 238, 239, 240, 241,
242, 243 and 244.

RECEIVED AT REQUEST OF
DAIRY CO. 4/24/41
KANE COUNTY RECORDS
4/24/41
25/

WITNESS the hand of said grantor, this 9th day of
September, A. D. one thousand nine hundred and eighty

Signed in the presence of

Elsie Brinkerhoff

STATE OF UTAH,

County of Kane

} ss.

On the 9th,
thousand nine hundred and eighty

day of September
personally appeared before me

A. D. one

Elsie Brinkerhoff, a widow

the signer of the foregoing instrument, who duly acknowledge to me that
ame.



August 13, 1983

Mr. Hans Q Chamberlain
Attorney at Law
F.O. Box 726
Cedar City, Utah 84720

RE: Brinkerhoff vs Brinkerhoff Civil No. 1826

Dear Mr. Chamberlain:

Based on the following facts and provisions, I am writing to inform you of my intent to withdraw completely from the suit in question.

A- This action has caused such a division in my family because of the underhanded manner in which the deeds were changed, that the feeling may be impossible to reconcile.

B- Because the outcome of this action will be of no financial advantage to me, I will not assume any financial obligation that may arise from continued involvement.

C- It is my intent and desire to restore all Property, Permits and Water Rights to their rightful owners, Mr. Mark J. and Mrs. Lena A. Brinkerhoff. That the annual payment of Two Thousand be due and payable outlined in the original agreement.

D- That my son Warren may, with prior approval, have enough space to plant a garden and provide for the needs of his family.

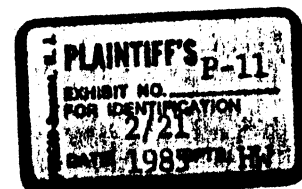
E- That all family members try to resolve their differences and reunite as a family group.

F- I also express my displeasure at the allegation of financial wrong doing against my son Mark, they are false and without base.

The record will show that this action is done of my own free will and choice, and represents my complete and total separation from any and all future involvement in this suit.

Elsie J. Brinkerhoff
Elsie J. Brinkerhoff

cc: Mr. Willard R. Bishop



DEPARTMENT OF SOCIAL SERVICES
DIVISION OF HEALTH
VITAL STATISTICS

CERTIFICATE OF DEATH

STATE OF UTAH — DIVISION OF HEALTH

Classified as
under the Utah
Practices Act.

LOCAL FILE NUMBER

STATE FILE

EDENT SONAL ATA	NAME OF DECEDENT FIRST MIDDLE LAST 1. Cloyd Harris Brinkerhoff			SEX 2. Male	RACE (White, Black, Am. Indian, etc.) 3. white	DATE OF DEATH (Mo., Day, Year) 4. October 14, 1979	
	WAS DECEDENT OF SPANISH ORIGIN? YES <input type="checkbox"/> NO <input checked="" type="checkbox"/> If yes, indicate type: Mexican <input type="checkbox"/> Puerto Rican <input type="checkbox"/> Cuban <input type="checkbox"/> Other (If other, specify)			DATE OF BIRTH (Mo., Day, Year) 5. July 13, 1923		AGE (Last Birthday) 6. 56 Yrs.	IF UNDER 1 year Months Days Hours
	BIRTHPLACE (State or foreign country) 7. Utah		CITIZEN of what country 8. U.S.A.		EDUCATION—(Specify only highest grade completed) Elementary or Secondary (10-12) College (13-16 or 17+) 11. 12		SOCIAL SECURITY NUMBER 12.
	USUAL OCCUPATION (Give kind of work done during most of working life, even if retired.) 13a. Wood Superintendant		KIND OF BUSINESS OR INDUSTRY 13b. Kaibab Industries		NAME of surviving spouse (If, wife, enter maiden name.) 14. Lena Adair		
UAL DENCE	NAME OF FATHER 15. Merle Brinkerhoff			MAIDEN NAME OF MOTHER 16. Elsie Jones		Was decedent ever in Armed Forces? 17. YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	
	USUAL RESIDENCE—(Street and number or location and zip code) 18a. 21 South 200 East 84729			INSIDE CITY LIMITS? 18b. YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	NAME & MAILING ADDRESS OF INFORMANT 19. Lena A. Brinkerhoff P.O. Box 21 Glendale, Utah 84729		
	CITY OR TOWN 18c. Glendale	COUNTY 18d. Kane	STATE 18e. Utah				
	CE OF ATH 20a. Garfield Memorial Hospital			<input checked="" type="checkbox"/> In patient <input type="checkbox"/> E.D. patient <input type="checkbox"/> DOA	CITY OR TOWN 20b. Panguitch	COUNTY 20c. Garfield	
DICAL MINER OR ICIAN'S RTIFI- TION	MEDICAL EXAMINER: I hereby certify that to the best of my knowledge the death occurred at the hour, date and place stated above from the causes stated below based on examination of the body and/or investigation of the circumstances. 21a. Decedent was pronounced dead at: HOUR: DATE:			PHYSICIAN OR MEDICAL EXAMINER SIGNATURE 21b. [Signature]		TIME of death (24 hours) 21c. 1:20	
	PHYSICIAN: I hereby certify that to the best of my knowledge the death occurred at the hour, date and place stated above from the causes stated below, that I attended the decedent, and I last saw the decedent alive on: 21d. month 10 day 14 year 1979			CERTIFIER'S name and title (Type or print) 21e. Brian Handley M.D.		DATE SIGNED (Mo., Day, Year) 21f. 10/15/79	
	If not certified by medical examiner, was death reported to him? YES <input checked="" type="checkbox"/> NO <input type="checkbox"/> If yes, enter the date and hour reported: (24 hour clock) 22. HOUR: MO. 10 DAY 15 YEAR 79			CERTIFIER'S address and zip code 22a. Garfield Clinic 200 N. 400 E. Panguitch, UT 84759		UTAH PHYSICIAN LICENSE NO. 22b. 57	
	GENERAL ECTOR LOCAL ISTRAR			SIGNATURE of Funeral Director 24. [Signature]		FUNERAL HOME—Name, address and license number 25. Spilsbury & Graff Mortuary, Kane	
CAUSE OF DEATH	NAME AND LOCATION OF CEMETERY OR CREMATORY 26. Glendale Cemetery, Glendale, Utah			LOCAL REGISTRAR—Signature 27. [Signature]		Date accepted for registration (local registrar) 28. OCT 22 1979	
	PART I. DEATH WAS CAUSED BY: IMMEDIATE CAUSE: (Enter only one cause per line for A, B and C) (A) CAZINO-Respiratory arrest (B) DUE TO, OR AS A CONSEQUENCE OF (C) DUE TO, OR AS A CONSEQUENCE OF			Interval between onset and death (24 hours) 29.			
	CONDITIONS IF ANY WHICH GAVE RISE TO THE IMMEDIATE CAUSE (A). STATING THE UNDERLYING CAUSE LAST.						
	PART II. OTHER SIGNIFICANT CONDITIONS—CONTRIBUTING TO DEATH, BUT NOT RELATED TO THE IMMEDIATE CAUSE GIVEN IN PART I.						
INJURY INFOR- MATION	DATE OF INJURY (Mo., Day, Year) 33a. NA			TIME OF INJURY (24 Hour Clock) 33b. NA	INJURY AT WORK? 34. YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	PLACE OF INJURY (Specify home, farm, factory, street, office buildings, etc.) 35. NA	
	LOCATION OF INJURY—STREET AND NUMBER OR LOCATION AND CITY OR TOWN. 36a. NA			Distance from place of injury to usual residence (Item 18) 36b. NA Miles	Were laboratory tests done for drugs or toxic chemicals? 37. YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	Were laboratory tests done for alcohol? 38. YES <input checked="" type="checkbox"/> NO <input type="checkbox"/>	
	DESCRIBE HOW INJURY OCCURRED (enter sequence of events which resulted in injury, NATURE OF INJURY SHOULD BE ENTERED IN ITEM 29) 39. NA					If motor vehicle accident, specify if decedent was driver, passenger or pedestrian. 40. NA	

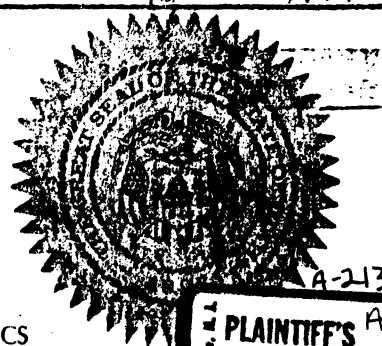
BHS - 12 Rev. 1/78

This is to certify that this is a true copy of the certificate on file in this office. This certified copy is issued under authority of Section 26-15-26 of the Utah Code Annotated, 1953 as Amended.

Date Issued: OCT 23 1979

COUNTY: SOUTHWESTERN UTAH
DIST. HEALTH DEPT.

John E. Brockert
John E. Brockert
DIRECTOR OF VITAL STATISTICS



PLAINTIFF'S

TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

\$ 10,000.00

Orderville, Utah

August 15, 1980

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of
Elsie Brinkerhoff, a widow

The Sum of

Ten Thousand and no/100-----DOLLARS (\$ 10,000.00),

together with interest from date at the rate of NONE per cent (0 %) per annum on the unpaid principal, said principal and interest payable as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980, and a like amount on the 15th day of each and every month thereafter, until the entire balance is paid in full.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any such installment not paid when due shall bear interest thereafter at the rate of NONE per cent (0 %) per annum until paid.

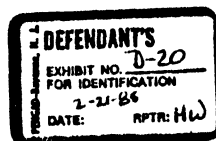
If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.

Golda B. Adair
Golda B. Adair



ESCROW AGREEMENT

Escrow No.

August 15 1980

STATE BANK OF SOUTHERN UTAH
Orderville, Utah

Gentlemen:

The undersigned, (Seller) Elsie Brinkerhoff, a widow
hereinafter called "Grantor", whose address is Glendale, Utah 84729
and (Buyer) Golda B. Adair, a married woman,
hereinafter called "Grantee", whose address is Orderville, Utah 84758
herewith deliver to you in escrow, the documents and property hereinafter described, to be held and dis-
posed of by you in accordance with the following instructions and upon the terms and conditions herein-
after set forth, to which the undersigned hereby agree.

PAPERS, INSTRUMENTS, MONEY and/or PROPERTY DEPOSITED:

1. Trust Deed Note

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YOUR INSTRUCTIONS ARE AS FOLLOWS:

You are hereby authorized and directed to deliver the above described documents and property to
Grantee upon payment to you, at your above address, for the Grantor of the total sum of \$XXXXXXXXXX
principal, (\$N/A having already been paid by the Grantee to the Grantor on an original prin-
cipal amount of \$N/A) and interest on the unpaid balance thereof at None per cent per
annum from N/A, 19 to be paid as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980, and a like amount on
the 15th day of each and every month thereafter, until the sum of \$10,000.00
has been paid or until the death of the Grantor above named, whichever occurs
first.

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Remit payment to the account of the Grantor at State Bank of Southern Utah,
Orderville, Utah.

The undersigned hereby agree as follows:

1. The _____ State Bank of Southern Utah _____ (hereinafter called the "bank"), is not a party, or bound by any agreement which may be evidenced by or arise out of the foregoing instructions.

2. The bank is hereby authorized to receive any or all such payments or any part thereof at any time after the dates herein specified therefor and prior to receipt of notice of default delivered to the bank in writing by Grantor.

3. The bank acts hereunder as a depository only, and is not responsible or liable in any manner whatever for the sufficiency, correctness, genuineness or validity of any instrument deposited with it hereunder, or with respect to the form or execution of the same, or the identity, authority, or rights of any person executing or depositing the same.

4. The bank shall not be required to take or be bound by notice of any default of any person, or to take any action with respect to such default involving any expense or liability, unless notice in writing is given an officer of the bank of such default by the undersigned or any of them, and unless it is indemnified in a manner satisfactory to it against any such expense or liability.

5. The bank shall be protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by the bank to be genuine and to be signed by the proper party or parties.

6. The bank shall not be liable for any error of judgment or for any act done or step taken or omitted by it in good faith, or for any mistake of fact or law, or for anything which it may do or refrain from doing in connection herewith, except its own wilful misconduct.

7. The bank shall not be answerable for the default or misconduct of any agent, attorney or employee appointed by it if such agent or employee shall have been selected with reasonable care.

8. The bank may advise with legal counsel in the event of any dispute or question as to the construction of the foregoing instructions, or the bank's duties thereunder and the bank shall incur no liability and shall be fully protected in acting in accordance with the opinion and instructions of such counsel.

9. The bank shall have a first lien on the property and papers held by it hereunder, for its compensation and for any costs, liability, expense or counsel fees it may incur.

10. In the event of any disagreement between the undersigned or any of them, and/or the person or persons named in the foregoing instruction, and/or any other person, resulting in adverse claims and demands being made in connection with or for any papers, money or property involved herein or affected hereby, the bank shall be entitled at its option to refuse to comply with any such claim or demand, so long as such disagreement shall continue, and in so refusing the bank may make no delivery or other disposition of any money, papers or property involved herein or affected hereby and in so doing the bank shall not be or become liable to the undersigned or any of them or to any person named in the foregoing instructions for its failure or refusal to comply with such conflicting or adverse demands; and the bank shall be entitled to continue so to refrain and refuse so to act until:

(1) The rights of the adverse claimants have been finally adjudicated in a court assuming and having jurisdiction of the parties and the money, papers and property involved herein or affected hereby; and/or

(2) All differences shall have been adjusted by agreement and the bank shall have been notified thereof in writing signed by all of the persons interested.

11. No assignment or transfer of this escrow agreement or of any documents or property, including money, held in this escrow or of any interest therein can be made, but said documents and property may be withdrawn and this escrow agreement terminated by mutual consent.

12. The undersigned agree to pay to the bank the sum of \$_____ as an acceptance fee with respect to its services hereunder for one year from the date hereof and further hereby agree to pay the bank an additional fee of one-tenth of one per cent of all funds received hereunder, provided however, that a minimum fee of \$_____ shall be charged for each payment received. It is also agreed that additional compensation shall also be paid to the bank for any additional or extraordinary services it may be required to render hereunder. Should any money, document or property remain in escrow after one year from date hereof, the undersigned hereby agree to pay the bank the sum of \$_____ for each year or fraction of year that such money, document or property is held by the bank hereunder; and in the event such annual charge remains unpaid for a period of one year, the bank shall have the right and is hereby authorized and directed to close its records with respect hereto and destroy any documents held by it hereunder.

_____ *E. Isaac B. Keady* _____

GRANTOR

_____ *Golda B. Adair* _____

GRANTEE

The _____ State Bank of Southern Utah _____ hereby acknowledges receipt of the letter of instructions of which the foregoing is a copy and of the papers, money or property therein referred to and agrees to hold and dispose of the same in accordance with said instructions and upon the terms and conditions above set forth.

STATE BANK OF SOUTHERN UTAH

Date: _____ 19 _____

By: _____

Received from The _____ State Bank of Southern Utah _____ all of the papers and documents referred to above.

Date: _____ 19 _____

TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

\$ 10,000.00

Orderville, Utah

August 15, 1980

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of

Elsie Brinkerhoff, a widow

The Sum of

TEN THOUSAND AND NO/100-----DOLLARS (\$ 10,000.00),

together with interest from date at the rate of NONE per cent (0 %) per annum on the unpaid principal, said principal and interest payable as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980 and a like amount on the 15th day of each and every month thereafter, until the entire balance is paid in full.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any such installment not paid when due shall bear interest thereafter at the rate of NONE per cent (0 %) per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.


Charles A. Brinkerhoff

ESCROW AGREEMENT

Escrow No.
August 15 19 80

STATE BANK OF SOUTHERN UTAH
Orderville, Utah

Gentlemen:

The undersigned, (Seller)..... Elsie Brinkerhoff, a widow
hereinafter called "Grantor", whose address is Glendale, Utah 84729
and (Buyer) Charles A. Brinkerhoff, a married man,
hereinafter called "Grantee", whose address is Orderville, Utah 84758
herewith deliver to you in escrow, the documents and property hereinafter described, to be held and dis-
posed of by you in accordance with the following instructions and upon the terms and conditions herein-
after set forth, to which the undersigned hereby agree.

PAPERS, INSTRUMENTS, MONEY and/or PROPERTY DEPOSITED:

1. Trust Deed Note.

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YOUR INSTRUCTIONS ARE AS FOLLOWS:

You are hereby authorized and directed to deliver the above described documents and property to
Grantee upon payment to you, at your above address, for the Grantor of the total sum of \$ ~~10,000.00~~
principal, (\$ ^{N/A}..... having already been paid by the Grantee to the Grantor on an original prin-
cipal amount of \$ ^{N/A}.....) and interest on the unpaid balance thereof at ^{None}..... per cent per
annum from ^{N/A}....., 19....., to be paid as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980, and a like amount on the
15th day of each and every month thereafter, until the sum of \$10,000.00 is paid
full or until the death of the Grantor above named, which ever occurs first.

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Remit payment to the account of the above named Grantor in the office of State
Bank of Southern Utah, Orderville, Utah.

(OVER)

1. The _____ State Bank of Southern Utah _____ (hereinafter called the "bank"), is not a party, or bound by any agreement which may be evidenced by or arise out of the foregoing instructions.

3. The bank acts hereunder as a depository only, and is not responsible or liable in any manner whatever for the sufficiency, correctness, genuineness or validity of any instrument deposited with it hereunder, or with respect to the form or execution of the same, or the identity, authority, or rights of any person executing or depositing the same.

5. The bank shall be protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by the bank to be genuine and to be signed by the proper party or parties.

7. The bank shall not be answerable for the default or misconduct of any agent, attorney or employee appointed by it if such agent or employee shall have been selected with reasonable care.

9. The bank shall have a first lien on the property and papers held by it hereunder, for its compensation and for any costs, liability, expense or counsel fees it may incur.

(1) The rights of the adverse claimants have been finally adjudicated in a court assuming and having jurisdiction of the parties and the money, papers and property involved herein or affected hereby; and/or

11. No assignment or transfer of this escrow agreement or of any documents or property, including money, held in this escrow or of any interest therein can be made, but said documents and property may be withdrawn and this escrow agreement terminated by mutual consent.

[illegible]

Charles A. Brinkerhoff

GRANTEE

STATE BANK OF SOUTHERN UTAH

By _____

Date:.....19.....

TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

\$ 10,000.00

St. George, Utah

August 15, 19 80

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of
Elsie Brinkerhoff, a widow

The Sum of

Ten Thousand and no/100-----DOLLARS (\$10,000.00),

together with interest from date at the rate of None per cent (0%) per annum on the unpaid principal, said principal and interest payable as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980 and a like amount on the 15th day of each and every month thereafter, until the entire balance is paid in full.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any such installment not paid when due shall bear interest thereafter at the rate of None per cent (0%) per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.

Warren Brinkerhoff
Warren Brinkerhoff

ESCROW AGREEMENT

Escrow No.

August 15 1980

STATE BANK OF SOUTHERN UTAH
Orderville, Utah

Gentlemen:

The undersigned, (Seller) Elsie Brinkerhoff, a widow
hereinafter called "Grantor", whose address is Glendale, Utah 84729
and (Buyer) Warren Brinkerhoff, a married man,
hereinafter called "Grantee", whose address is 295 South 300 West, St. George, Utah 84770
herewith deliver to you in escrow, the documents and property hereinafter described, to be held and dis-
posed of by you in accordance with the following instructions and upon the terms and conditions herein-
after set forth, to which the undersigned hereby agree.

PAPERS, INSTRUMENTS, MONEY and/or PROPERTY DEPOSITED:

1. Trust Deed Note

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YOUR INSTRUCTIONS ARE AS FOLLOWS:

You are hereby authorized and directed to deliver the above described documents and property to
Grantee upon payment to you, at your above address, for the Grantor of the total sum of \$ XXXXXXXXXX,
principal, (\$ N/A having already been paid by the Grantee to the Grantor on an original prin-
cipal amount of \$ N/A) and interest on the unpaid balance thereof at None per cent per
annum from N/A, 19, to be paid as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980, and a like amount on the
15th day of each and every month thereafter, until the sum of \$10,000.00 is paid
or until the death of the Grantor above named whichever occurs first.

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Remit payment to the account of the above named Grantor at State Bank of Southern
Utah, Orderville, Utah

1. The _____ State Bank of Southern Utah _____ (hereinafter called the "bank"), is not a party, or bound by any agreement which may be evidenced by or arise out of the foregoing instructions.

3. The bank acts hereunder as a depositary only, and is not responsible or liable in any manner whatever for the sufficiency, correctness, genuineness or validity of any instrument deposited with it hereunder, or with respect to the form or execution of the same, or the identity, authority, or rights of any person executing or depositing the same.

5. The bank shall be protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by the bank to be genuine and to be signed by the proper party or parties.

7. The bank shall not be answerable for the default or misconduct of any agent, attorney or employee appointed by it if such agent or employee shall have been selected with reasonable care.

9. The bank shall have a first lien on the property and papers held by it hereunder, for its compensation and for any costs, liability, expense or counsel fees it may incur.

(1) The rights of the adverse claimants have been finally adjudicated in a court assuming and having jurisdiction of the parties and the money, papers and property involved herein or affected hereby; and/or

(2) All differences shall have been adjusted by agreement and the bank shall have been notified thereof in writing signed by all of the persons interested.

12. The undersigned agree to pay to the bank the sum of \$..... as an acceptance fee with respect to its services hereunder for one year from the date hereof and further hereby agree to pay the bank an additional fee of one-tenth of one per cent of all funds received hereunder, provided however, that a minimum fee of \$..... shall be charged for each payment received. It is also

[illegible]

Warren Brinkerhoff

Warren Brinkerhoff

GRANTEE

STATE BANK OF SOUTHERN UTAH

By.....

Date: 10/19/2011

TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

\$ 10,000.00

Orderville, Utah

August 15, 1980

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of

Elsie Brinkerhoff, a widow

The Sum of

TEN THOUSAND AND NO/100-----DOLLARS (\$10,000.00),

together with interest from date at the rate of NONE per cent (0%) per annum on the unpaid principal, said principal and interest payable as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980 and a like amount on the 15th day of each and every month thereafter, until the entire balance is paid in full.

Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any such installment not paid when due shall bear interest thereafter at the rate of NONE per cent (0%) per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.

Betty B. Esplin
Betty B. Esplin

ESCROW AGREEMENT

Escrow No.
August 15, 19 80

STATE BANK OF SOUTHERN UTAH

Orderville, Utah

Gentlemen:

The undersigned, (Seller) Elsie Brinkerhoff, a widow
hereinafter called "Grantor", whose address is Glendale, Utah 84729
and (Buyer) Betty B. Esplin, a married woman,
hereinafter called "Grantee", whose address is Orderville, Utah 84758
herewith deliver to you in escrow, the documents and property hereinafter described, to be held and dis-
posed of by you in accordance with the following instructions and upon the terms and conditions herein-
after set forth, to which the undersigned hereby agree.

PAPERS, INSTRUMENTS, MONEY and/or PROPERTY DEPOSITED:

1. Trust Deed Note.

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YOUR INSTRUCTIONS ARE AS FOLLOWS:

You are hereby authorized and directed to deliver the above described documents and property to
Grantee upon payment to you, at your above address, for the Grantor of the total sum of \$ XXXXXXXXXX,
principal, (\$ N/A having already been paid by the Grantee to the Grantor on an original prin-
cipal amount of \$ N/A) and interest on the unpaid balance thereof at NONE per cent per
annum from N/A, 19....., to be paid as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980, and a like amount on
the 15th day of each and every month thereafter, until the sum of \$10,000.00 is
paid in full or until the death of the Grantor above named, which ever occurs
first.

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Remit payment to the account of the above named Grantor in the office of State
Bank of Southern Utah, Orderville, Utah.

1. The _____ State Bank of Southern Utah _____ (hereinafter called the "bank"), is not a party, or bound by any agreement which may be evidenced by or arise out of the foregoing instructions.

3. The bank acts hereunder as a depositary only, and is not responsible or liable in any manner whatever for the sufficiency, correctness, genuineness or validity of any instrument deposited with it hereunder, or with respect to the form or execution of the same, or the identity, authority, or rights of any person executing or depositing the same.

4. The bank shall not be required to take or be bound by notice of any default of any person, or to take any action with respect to such default involving any expense or liability, unless notice in writing is given an officer of the bank of such default by the undersigned or any of them, and unless it is indemnified in a manner satisfactory to it against any such expense or liability.

5. The bank shall be protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by the bank to be genuine and to be signed by the proper party or parties.

6. The bank shall not be liable for any error of judgment or for any act done or step taken or omitted by it in good faith, or for any mistake of fact or law, or for anything which it may do or refrain from doing in connection herewith, except its own wilful misconduct.

7. The bank shall not be answerable for the default or misconduct of any agent, attorney or employee appointed by it if such agent or employee shall have been selected with reasonable care.

8. The bank may advise with legal counsel in the event of any dispute or question as to the construction of the foregoing instructions, or the bank's duties thereunder and the bank shall incur no liability and shall be fully protected in acting in accordance with the opinion and instructions of such counsel.

9. The bank shall have a first lien on the property and papers held by it hereunder, for its compensation and for any costs, liability, expense or counsel fees it may incur.

10. In the event of any disagreement between the undersigned or any of them, and/or the person or persons named in the foregoing instruction, and/or any other person, resulting in adverse claims and demands being made in connection with or for any papers, money or property involved herein or affected hereby, the bank shall be entitled at its option to refuse to comply with any such claim or demand, so long as such disagreement shall continue, and in so refusing the bank may make no delivery or other disposition of any money, papers or property involved herein or affected hereby and in so doing the bank shall not be or become liable to the undersigned or any of them or to any person named in the foregoing instructions for its failure or refusal to comply with such conflicting or adverse demands; and the bank shall be entitled to continue so to refrain and refuse so to act until:

(1) The rights of the adverse claimants have been finally adjudicated in a court assuming and having jurisdiction of the parties and the money, papers and property involved herein or affected hereby; and/or

(2) All differences shall have been adjusted by agreement and the bank shall have been notified thereof in writing signed by all of the persons interested.

11. No assignment or transfer of this escrow agreement or of any documents or property, including money, held in this escrow or of any interest therein can be made, but said documents and property may be withdrawn and this escrow agreement terminated by mutual consent.

12. The undersigned agree to pay to the bank the sum of \$..... as an acceptance fee with respect to its services hereunder for one year from the date hereof and further hereby agree to pay the bank an additional fee of one-tenth of one per cent of all funds received hereunder, provided however, that a minimum fee of \$..... shall be charged for each payment received. It is also agreed that additional compensation shall also be paid to the bank for any additional or extraordinary services it may be required to render hereunder.

Betty B. Esplin
Betty B. Esplin

Eric Benkerhof

GRANTOR

GRANTEE

The _____ State Bank of Southern Utah _____ hereby acknowledges receipt of the letter of instructions of which the foregoing is a copy and of the papers, money or property therein referred to and agrees to hold and dispose of the same in accordance with said instructions and upon the terms and conditions above set forth.

STATE BANK OF SOUTHERN UTAH

Date:.....19.....

By.....

Received from The _____ State Bank of Southern Utah _____ all of the papers and documents referred to above.

Date:.....19.....

TRUST DEED NOTE

DO NOT DESTROY THIS NOTE: When paid, this note, with Trust Deed securing same, must be surrendered to Trustee for cancellation, before reconveyance will be made.

\$ 10,000.00

Glendale, Utah

August 15, 19 80

FOR VALUE RECEIVED, the undersigned, jointly and severally, promise to pay to the order of

Elsie Brinkerhoff, a widow

The Sum of

TEN THOUSAND AND NO/100-----DOLLARS (\$10,000.00),

together with interest from date at the rate of NONE per cent (0%) per annum on the unpaid principal, said principal and interest payable as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980 and a like amount on the 15th day of each and every month thereafter, until the entire balance is paid in full.

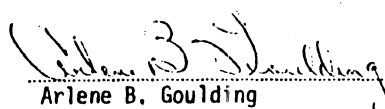
Each payment shall be applied first to accrued interest and the balance to the reduction of principal. Any such installment not paid when due shall bear interest thereafter at the rate of NONE per cent (0%) per annum until paid.

If default occurs in the payment of said installments of principal and interest or any part thereof, or in the performance of any agreement contained in the Trust Deed securing this note, the holder hereof, at its option and without notice or demand, may declare the entire principal balance and accrued interest due and payable.

If this note is collected by an attorney after default in the payment of principal or interest, either with or without suit, the undersigned, jointly and severally, agree to pay all costs and expenses of collection including a reasonable attorney's fee.

The makers, sureties, guarantors and endorsers hereof severally waive presentment for payment, demand and notice of dishonor and nonpayment of this note, and consent to any and all extensions of time, renewals, waivers or modifications that may be granted by the holder hereof with respect to the payment or other provisions of this note, and to the release of any security, or any part thereof, with or without substitution.

This note is secured by a Trust Deed of even date herewith.


Arlene B. Goulding

ESCROW AGREEMENT

Escrow No.

..... August 15 1980

STATE BANK OF SOUTHERN UTAH
Orderville, Utah

Gentlemen:

The undersigned, (Seller) Elsie Brinkerhoff, a widow
hereinafter called "Grantor", whose address is Glendale, Utah 84729
and (Buyer) Arlene B. Goulding, a married woman,
hereinafter called "Grantee", whose address is Glendale, Utah 84729
herewith deliver to you in escrow, the documents and property hereinafter described, to be held and dis-
posed of by you in accordance with the following instructions and upon the terms and conditions herein-
after set forth, to which the undersigned hereby agree.

PAPERS, INSTRUMENTS, MONEY and/or PROPERTY DEPOSITED:

1. Trust Deed Note.

++ ++ ++ ++ ++ ++ ++ ++

YOUR INSTRUCTIONS ARE AS FOLLOWS:

You are hereby authorized and directed to deliver the above described documents and property to
Grantee upon payment to you, at your above address, for the Grantor of the total sum of \$.....XXXXXXXXXX
principal, (\$.....N/A..... having already been paid by the Grantee to the Grantor on an original prin-
cipal amount of \$.....N/A.....) and interest on the unpaid balance thereof atNone.....per cent per
annum fromN/A....., 19....., to be paid as follows:

The Sum of \$30.00 monthly, beginning September 15, 1980, and a like amount on
the 15th day of each and every month thereafter, until the sum of \$10,000.00
has been paid or until the death of the Grantor above named, whichever occurs
first.

++ + ++ ++ ++ ++

Remit payment to the account of the Grantor above named at State Bank of Southern
Utah, Orderville, Utah.

1. The _____ State Bank of Southern Utah _____ (hereinafter called the "bank"), is not a party, or bound by any agreement which may be evidenced by or arise out of the foregoing instructions.

3. The bank acts hereunder as a depositary only, and is not responsible or liable in any manner whatever for the sufficiency, correctness, genuineness or validity of any instrument deposited with it hereunder, or with respect to the form or execution of the same, or the identity, authority, or rights of any person executing or depositing the same.

5. The bank shall be protected in acting upon any notice, request, waiver, consent, receipt or other paper or document believed by the bank to be genuine and to be signed by the proper party or parties.

7. The bank shall not be answerable for the default or misconduct of any agent, attorney or employee appointed by it if such agent or employee shall have been selected with reasonable care.

9. The bank shall have a first lien on the property and papers held by it hereunder, for its compensation and for any costs, liability, expense or counsel fees it may incur.

(1) The rights of the adverse claimants have been finally adjudicated in a court assuming and having jurisdiction of the parties and the money, papers and property involved herein or affected hereby; and/or

11. No assignment or transfer of this escrow agreement or of any documents or property, including money, held in this escrow or of any interest therein can be made, but said documents and property may be withdrawn and this escrow agreement terminated by mutual consent.

ever, that a minimum fee of \$..... shall be charged for each payment received. It is also agreed that additional compensation shall also be paid to the bank for any additional or extraordinary services it may be required to render hereunder.

Arlene B. Goulding

GRANTEE

STATE BANK OF SOUTHERN UTAH

By.....

Date:.....19.....

DEFENDANTS
SERIAL NO. D-22
FOR CERTIFICATION
2-21-66
DATE 1976 (16)

[illegible]

A-229

Bank of Hurricane
 Dear Sir - I'm sorry but of this
 there must be a mistake, the
 \$460.00 for the oil lease is to be
 credited to Mrs. Merle Brinkerhoff
 account please.

Respectfully
 Mrs. Merle Brinkerhoff

DEPOSITED IN THE		
HURRICANE BANK		
Hurricane, Utah,	Feb 5	1964
TO THE CREDIT OF		
By <u>Mrs. Merle Brinkerhoff</u>		
ALL CHECKS CREDITED SUBJECT TO FINAL PAYMENT		
<small>In receiving funds for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment at such or future credits. This bank will not be liable for default or misapplication of its duly collected remittances nor for losses in transit, and such endorsement: no service fees, and no other except for its own negligence. This bank or its officers, agents or employees, directly or indirectly, in any bank accepting the paper, and accept to arrive or credit as conditions, payment in full of cash; it may charge back any item at any time before final payment, whether returned or not, and may then draw on this bank and close at close of business on any deposit.</small>		
CURRENCY	DOLLARS	CENTS
SILVER		
CHECKS AS FOLLOWS		
Elsie Brinkerhoff	460	
to correct deposit		
of Oct. 29-1963		
Total	460	
NOT NEGOTIABLE		
DUPLICATE DEPOSIT TICKET		
Received by <u>33</u>		

HURRICANE BRANCH OF BANK OF ST. GEORGE HURRICANE, UTAH		Feb. 5, 1964
WE CHARGE YOUR ACCOUNT FOR THE FOLLOWING UNPAID ITEMS:		AMOUNT
DRAWN BY		RETURNED FOR
DRAWN ON		\$460.00

We charge your account for deposit of October 29, 1953 and Credit same to Mrs. Merle Brinkerhoff A/G.

NAME: Elsie Brinkerhoff & Sons	
ADDRESS: Glendale, Utah.	

RETURN CHARGE @ \$.15 PER ITEM.	TOTAL CHARGE
-------------------------------------	--------------

Correspondence by Seller to bank RE:
 oil land lease property record directly
 by Seller.

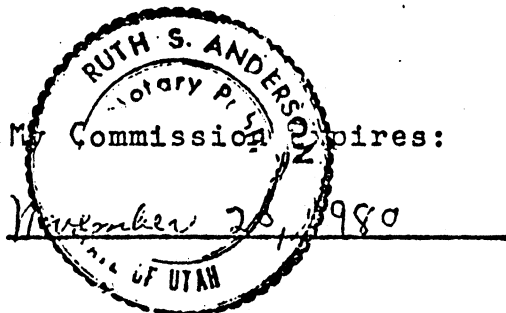
To whom it may concern:

I, Elsie Brinkerhoff, have received from Cloyd
and Mark Brinkerhoff, as payment on property,
\$23,000.

Signed: Elsie Brinkerhoff

STATE OF UTAH }
County of Kane } SS.

On this 6th day of April 1977, personally
appeared before me Elsie Brinkerhoff, the signer
of the above and foregoing instrument, who duly acknowledged
to me that she executed the same.



Ruth S. Andersen

Notary Public

Residing at Glendale, Utah

126.56

CLOYD & MARK BRINKERHOFF
GLENDALE, UTAH 84729

486

Jan 24 1971 97-120
1243

PAY TO THE ORDER OF James Motor Co \$ 83⁸⁶/₁₀₀

Circuit Price DOLLARS

HURRICANE BRANCH OF
BANK OF ST. GEORGE
HURRICANE, UTAH

FOR Cloyd Mark Brinkerhoff

⑆1243⑆0120⑆07472⑆⑆000000838⑆

CLOYD & MARK BRINKERHOFF
GLENDALE, UTAH 84729

498

Mar 18 1971 97-120
1243

PAY TO THE ORDER OF James Motor \$ 42⁷⁵/₁₀₀

Dolly Rust DOLLARS

HURRICANE BRANCH OF
BANK OF ST. GEORGE
HURRICANE, UTAH

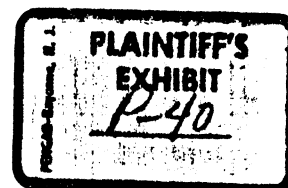
FOR Repair Cloyd Mark Brinkerhoff

⑆1243⑆0120⑆07472⑆⑆0000004275⑆

Payment prior to 1972 - appears to be for Elsie's

Receipt - VAD repairs -

BISHOP & RONNOW, P.C.
Willard R. Bishop
Attorney for Plaintiff
P. O. Box 279
Cedar City, UT 84720
Telephone: (801) 586-9483



IN THE SIXTH JUDICIAL DISTRICT COURT OF KANE COUNTY,
STATE OF UTAH

MONT R. ANDERSON, Personal
Representative of the Estate
of CLOYD H. BRINKERHOFF,
LENA BRINKERHOFF, and MARK J.
BRINKERHOFF,

Plaintiff,

vs.

ELSIE BRINKERHOFF, GOLDA B.
ADAIR, WARREN BRINKERHOFF,
ARLENE B. GOULDING, and JOHN
DOES I through V,

Defendants.

STIPULATION

Civil No. 1826

ELSIE BRINKERHOFF, Defendant in the above-entitled action,
agrees and stipulates as follows:

1. That the certain agreement dated October 26, 1966
(hereinafter "Agreement" attached as Exhibit "A"), executed by
ELSIE BRINKERHOFF, Seller, and CLOYD H. BRINKERHOFF and MARK J.
BRINKERHOFF, Buyers, together with any other agreement containing
substantially the same terms, is a valid and binding contract
which she executed without coercion, and with full knowledge and
understanding of its provisions and duties.

2. That she agrees to conform to the terms of the Agreement,
and perform all conditions and duties provided and imposed
thereunder, including specific performance on her part.

3. That she recognizes she improperly attempted to convey land to others contrary to the terms of the Agreement, and hereby repudiates a certain Warranty Deed dated June 4, 1979, (Exhibit "B") purporting to convey to ELSIE BRINKERHOFF, MARK J. BRINKERHOFF, and CLOYD H. BRINKERHOFF, as Joint Tenants, the same property conveyed under the Agreement, and further repudiates any other deeds or instruments of conveyance which have the effect of divesting or in any way diminishing the right, title, and interest of buyers and their wives, in the property specified in the Agreement.

4. That she acknowledges the receipt of \$2,000 from the Buyers, and/or their heirs, MARK J. BRINKERHOFF and LENA A. BRINKERHOFF, for the 1983 payment pursuant to the terms of the Agreement.

5. That she forgives and waives all rights to any and all delinquent amounts currently due under the Agreement.

6. That she recognizes the validity of a certain affidavit dated April 13, 1971, (attached as Exhibit "C"), and reaffirms the statements contained therein and further agrees to cooperate and assist Plaintiffs in the litigation of their claims against other named Defendants in the above-entitled action.

7. That her Amended Counterclaim against the Plaintiffs and her Crossclaim against MARK J. BRINKERHOFF, as filed in this action, shall be dismissed with prejudice and upon the merits.

8. That the Court shall enter a decree of specific performance against her.

In consideration for the Stipulation specified above, Plaintiffs hereby stipulate as follows:

1. Plaintiffs will not seek any award of damages against ELSIE BRINKERHOFF under their Second Amended Complaint.

2. Plaintiffs will reimburse Defendants, GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING for the amounts paid to ELSIE BRINKERHOFF for the purported transfer of properties specified under the Warranty Deed dated June 4, 1979, Exhibit "B", in return for the said Defendants' Agreement to drop all their claims filed in the above-entitled lawsuit and dismiss the same with prejudice. If said Defendants do not dismiss said claims before 20 September 1984, Plaintiffs shall be under no obligation of reimbursement.

3. That the above-entitled Court may enter its Order and judgment in conformance with this Stipulation and Plaintiff's prayer for relief as specified in their Second Amended Complaint.

DATED this 9th day of September, 1984.

Elsie Brinkerhoff
ELSIE BRINKERHOFF

STATE OF UTAH)

:ss.

County of)

On the 9th day of September, 1984, personally appeared before me ELSIE BRINKERHOFF, Defendant named in the

above-entitled action, the signer of the above and foregoing instrument, who duly acknowledged to me that she executed the same.



Commission expires:

[Signature]
NOTARY PUBLIC, residing at:
Cedar City, Utah

DATED this 10th day of September, 1984.

[Signature]
WILLARD R. BISHOP
Attorney for Plaintiff

STATE OF UTAH)
County of) : ss.

On the 10th day of September, 1984, personally appeared before me WILLARD R. BISHOP, attorney for Plaintiff ANDERSON in the above-entitled action, the signer of the above and foregoing instrument, who duly acknowledged to me that he executed the same.

[Signature]
NOTARY PUBLIC, residing at:
Cedar City, Ut 84720

My Commission expires:

22 February 87

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I mailed a full, true and correct copy of the above and foregoing STIPULATION to Mr. Hans Q. Chamberlain, CHAMBERLAIN & HIGBEE, Attorneys at Law, 110 North Main Street, Suite G, Cedar City, Utah 84720, by first class mail, postage fully prepaid this _____ day of _____, 1984.

RECEIVED
JUL 2 1935

AGREEMENT

THIS AGREEMENT, made and entered into by and between ELSIE BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTY OF THE FIRST PART, hereinafter referred to as the "SELLER" and CLOYD H. BRINKERHOFF and MARK BRINKERHOFF of Glendale, County of Kane, State of Utah, PARTIES OF THE SECOND PART, hereinafter referred to as the "BUYERS",

W I T N E S S E T H

THAT WHEREAS, the SELLER is the owner of the real property, grazing privileges and water rights in the States of Utah and Arizona;

AND WHEREAS, the BUYERS desire to purchase the same;

AND WHEREAS, the parties have agreed upon terms and conditions for the sale thereof;

NOW THEREFORE, in consideration of the premises and of the mutual covenants and agreements hereinafter set out the parties hereinafter agree with and between one another as follows:

1. That for and in consideration of the total sum of FIFTY THREE THOUSAND THREE HUNDRED EIGHTY-EIGHT (\$53,388.00) DOLLARS, as the full consideration therefor, the SELLER covenants and agrees to sell and the BUYERS covenant and agree to buy the following described real property, grazing privileges and water and reservoir rights in the States of Utah and Arizona:

REAL PROPERTY IN HILLARD COUNTY, UTAH:

Lots 1, 2, 3, and 4, Block 25, Plat "A", Delta Township.

Lot 2, Block 26, Plat "A", Delta Township

REAL PROPERTY IN KANE COUNTY, UTAH:

Township 39 South, Range 41 West, Salt Lake Meridian:

West Half of Section 25, containing 320 acres.

Northwest Quarter; Southeast Quarter and the South Half of the Northeast Quarter containing 400 acres, all in Section 26, Township 39 South, Range 41 West, Salt Lake Meridian, containing 400 acres, more or less.

Lots 1, 2, 3, and 4; Southeast Quarter of the Northwest Quarter; Northeast Quarter of the Southwest Quarter; East Half of the East Half; Southwest Quarter of the Northeast Quarter; Northwest Quarter of the Southeast Quarter of Section 27, Township 39 South, Range 41 West, containing 470.00 acres.

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74 SOUTH MAIN
RICHFIELD, UTAH 84701

East Half of the Northeast Quarter; South Half of the Southeast Quarter; Northwest Quarter of the Southeast Quarter of Section 35, containing 200 acres.

Township 40 South, Range 4½ West, Salt Lake Meridian:

Section 29: Southwest Quarter of the Northeast Quarter; West Half of the Southeast Quarter and the Southeast Quarter of the Southwest Quarter, containing 160 acres.

Section 30: Northwest Quarter; East Half of the Southwest Quarter, containing 239.99 acres.

Section 51: Lot 2, containing 30.03 acres.

Township 40 South, Range 4 West, Salt Lake Meridian:

Southwest Quarter of the Northwest Quarter of Section 8, containing 40 acres.

Township 40 South, Range 7 West, Salt Lake Meridian:

Beginning at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Meridian and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.66 chains; thence South 1 chain to beginning, containing .74 acres.

Beginning at the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, and running thence South 4.30 chains; thence South 70° East 15 chains to the middle of the channel of the creek; thence Northwest along the middle of the channel of said creek to the North Line of said Northeast Quarter of the Northeast Quarter; thence West 11.25 chains to the place of beginning.

Beginning 4.30 chains South of the Northwest Corner of the Northwest Quarter of the Northeast Quarter of Section 26, Township 40 South, Range 7 West, Salt Lake Meridian and running thence South 70° East 15 chains to the middle of the channel of the creek; thence Southerly along the middle of the channel of said creek to the South Line; thence North 73°45' West 14.60 chains; thence North 4.30 chains to the place of beginning, containing 5.60 acres.

The above three tracts being part of land situated in Sections 23 and 26 of said township and range, sometimes referred to unofficially as Lot "A".

Township 40 South, Range 4½ West, Salt Lake Meridian:

Lot 1; Northeast Quarter of the Northwest Quarter of Section 51, containing 70.30 acres.

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78 SOUTH MAIN
RICHFIELD, UTAH 84701

8.43 a

PERSONAL PROPERTY:

The following described water and reservoir rights:

A one-fourth interest in Hobbie Canyon Reservoir (9-36-12)
in Mohave County, Arizona.

A one half interest in Sullivan Reservoir in Mohave County,
Arizona.

And all grazing privileges and ponds annexed to or based
upon any of the foregoing real, personal, reservoir, or water
rights as appurtenant.

2. The parties agree that for and in consideration of the sale by the
SELLER to the BUYERS of the foregoing real and personal property, water and
reservoir rights and grazing privileges, the BUYERS will pay to the SELLER the
sum of TWO THOUSAND (\$2,000.00) DOLLARS, each year, beginning with the 1st day
of November, 1964, of which payments due on November 1, 1964 and November 1,
1965 are hereby acknowledged by the SELLER from the BUYERS and the BUYERS will
continue to pay annual installments of \$2,000.00 on the 1st day of November in
each year thereafter beginning November 1, 1966 and continuing during the entire
life of the SELLER.

The BUYERS agree that they will pay the sum of \$2,000.00 per year to
the SELLER for the entire remainder of SELLER'S life irrespective of the amount
which may be paid under this contract whether it exceeds the total consideration
hereinafter set out or whether that total amount shall not be paid by applying
annual payments of \$2,000.00 against the purchase price during the life time of
the SELLER and in consideration of an undertaking by the BUYERS to pay the
amount of \$2,000.00 per year for the life of the SELLER irrespective of the
amount which may be paid, the SELLER waives interest upon the unpaid balances.

It is provided, however, that should the total consideration hereinafter
above provided not be paid by the BUYERS to the SELLER during SELLER'S lifetime,
then upon the death of the SELLER any amounts remaining under this Agreement
after crediting all payments which have been made hereunder, shall be paid
annually as provided herein in equal shares, shares and share alike, to

LAW OFFICE
OLSEN AND CHAMBERLAIN
78 SOUTH MAIN
RICHFIELD, UTAH 84701

Warren Brinkerhoff and Charley Arland Brinkerhoff two-sevenths (2/7ths) (1/7ths to each) of the balances due (it being stipulated that the BUYERS together with Warren Brinkerhoff, Charley Arland Brinkerhoff, Betty B. Espin, Golda B. Adair, and Arlene B. Goulding constitute all the heirs at law of the SELLER and that other provision has been made for the latter three named heirs), together with interest at four (4%) per cent per annum on the deferred declining balances.

The BUYERS may, at any time, prepay all or any part of the remaining principal due under this contract.

3. The SELLER shall execute a Warranty Deed to the real property heretofore described and quitclaim conveyances to the water and reservoir rights heretofore described, of an undivided one half interest to each BUYER and his wife as joint tenants with full rights of survivorship, and shall deposit said instruments in the Hurricane Branch of the Bank of St. George which shall hold those documents in trust and in escrow subject to the following:

ESCROW INSTRUCTIONS:

If the BUYERS shall make all payments of principal and interest herein provided and perform all the other covenants and agreements herein contained, then upon payment of the final installment due hereunder the Escrow Depository shall deliver to the BUYERS all the escrowed documents.

In the event of a default in the payment of any installment of principal or interest and in the event of a default in any other term or condition herein and in the event notice of a default other than for payment of principal and interest shall be given to the BUYERS by the SELLER and a subsequent failure to remedy the same shall continue for a period of thirty (30) days, then the SELLER may, at her option, demand a redelivery to her of all of the escrowed documents whereupon the BUYERS will vacate and peaceably surrender all of the premises heretofore described and the SELLER may re-enter into possession of the same without further process and may retain as rent and liquidated damages all sums theretofore paid by BUYERS under this Agreement.

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75 SOUTH MAIN
RICHFIELD, UTAH 84701

As an alternative remedy the SELLER may elect to reduce any payment or all payments, accelerating and maturing the entire balance of principal and interest immediately, to judgment or may have said remedy on one or more successive or intermittent occasions or may elect to treat this Agreement as a note and mortgage passing title through to the BUYERS and foreclosing the same in the manner provided by law.

During the period the BUYERS are complying with the terms of this Agreement, they shall be entitled to the sole, exclusive, and beneficial use, occupancy, and enjoyment of the above described premises subject only to the rights of the SELLER to inspect the same at reasonable times.

4. The BUYERS have inspected said premises and find the same in a manner satisfactory to them and there are no covenants or warranties other than expressly set forth herein.

5. Time shall be of the essence as to all the terms and conditions of this Agreement which shall bind and inure to the benefit of the heirs, successors, and assigns of the parties hereto and the party in default agrees to pay all costs and a reasonable attorney's fee in the event enforcement of this contract is required.

WITNESS the hands of the parties hereto this 10 day of Dec.

1967
1968.

Elsie J. Brinkerhoff
Elsie Brinkerhoff
SELLER

Cloyd H. Brinkerhoff
Cloyd H. Brinkerhoff

Mark Brinkerhoff
Mark Brinkerhoff

BUYERS

the buyer's

LAW OFFICES
OLSEN AND CHAMBERLAIN
78 SOUTH MAIN
RICHFIELD, UTAH 84701

Elsie Brinkerhoff, a widow, grantor
of Glendale, County of Kane, State of Utah, hereby

CONVEY and WARRANT to ELSIE BRINKERHOFF, a widow, MARK J. BRINKERHOFF, a married man, and CLOYD H. BRINKERHOFF, a married man, all as Joint Tenants with full rights of survivorship, and not as Tenants in Common,

of Glendale, Utah 84729

\$10.00 & other valuable consideration-----DOLLARS,
the following described tracts of land in KANE County,
State of Utah:

SEE SCHEDULE "A" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

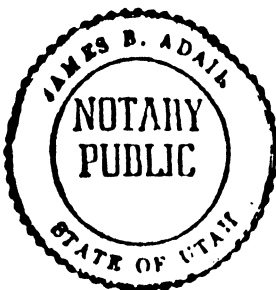
WITNESS, the hand of said grantor, this 4th day of June, A. D. 19 79.

Signed in the Presence of

Elsie Brinkerhoff
Elsie Brinkerhoff

STATE OF UTAH
County of Kane

SS.



On the 4th day of June, A. D., 1979 personally
appeared before me Elsie Brinkerhoff, a widow,

the signer of the within instrument who duly acknowledged
to me that she executed the same.

James B. Adair

Notary Public

My Commission expires June 19, 1979 My residence is Orderville, Utah

SOUTHERN UTAH TITLE COMPANY - P.O. Box 7 - Kanab, Utah 84701

RECORDED AT RECORDS ON
KANE COUNTY RECORDS
JUN 20 1979
JUN 20 1979
JUN 20 1979

of the East Half (E $\frac{1}{2}$ SE $\frac{1}{4}$), the Southwest Quarter of the Northeast Quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 27, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 478.80 acres, more or less.

PARCEL 4: The East Half of the Northeast Quarter (E $\frac{1}{2}$ NE $\frac{1}{4}$); the South Half of the Southeast Quarter (S $\frac{1}{2}$ SE $\frac{1}{4}$) and Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 35, Township 39 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 200.0 acres, more or less.

PARCEL 5: The Southwest Quarter of the Northeast Quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$); the West Half of the Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$) and the Southeast Quarter of the Southwest Quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of Section 29, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 160.0 acres, more or less.

PARCEL 6: The Northwest Quarter (NW $\frac{1}{4}$) and the East Half of the Southwest Quarter of Section 30, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 238.99 acres, more or less.

PARCEL 7: Lot 2, Section 5, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 39.08 acres, more or less.

PARCEL 8: The Southwest Quarter of the Northwest Quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 8, Township 40 South, Range 4 West, Salt Lake Base and Meridian, containing 40.0 acres, more or less.

PARCEL 9: Lot 1 and the Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 31, Township 40 South, Range 4 $\frac{1}{2}$ West, Salt Lake Base and Meridian, containing 79.30 acres, more or less.

PARCEL 10: BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence South 0°35' West 567.60 feet; thence South 78°00' East 963.6 feet; thence Northwesterly along the creek bed, 808.0 feet, more or less, to the North line of Section 26; thence South 89°57' West 741.18 feet to the point of beginning. Containing 11.77 acres, more or less.

PARCEL 11: BEGINNING at the Southwest Corner of the Southwest Quarter of the Southeast Quarter of Section 23, Township 40 South, Range 7 West, Salt Lake Base and Meridian, and running thence East 10.23 chains; thence North 80° West 6.36 chains; thence West 3.68 chains; thence South 1.0 chain to the point of beginning. Containing 0.74 acres, more or less.

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848

COUNTY OF KANE)

BEFORE ME, the undersigned Notary Public, personally appeared
ELSIE BRINKERHOFF, who stated under oath, as follows:

That she has sold Real Property described hereinafter to Mark J.
Brinkerhoff and Cloyd H. Brinkerhoff, and that she will defend the rights of own-
ership and also any rights of way of ingress or egress to the said Real Property.
That she will enter into a lawsuit or any other procedure needed to protect these
rights of ingress or egress, to said property.

The real property is described as follows:

BEGINNING at the South Quarter Corner of Section 23, Township 40 South, Range 7
West, Salt Lake Meridian, Utah, and running thence East 10.23 chains; thence North
80° West 6.36 chains; thence West 3.68 chains; thence South 1 chain to the point
of beginning.

ALSO BEGINNING at the North Quarter Corner of Section 26, Township 40 South, Range
7 West, Salt Lake Meridian, Utah, and running thence South 8.6 chains; thence South
73°45' East 14.6 chains; thence Northwesterly along the middle of the channel of
the creek to the North boundary line of said Section 26; thence West 11.23 chains
to the point of beginning. Containing 11.77 acres

Total acres: 12.51

That the Affiant will at any time help to defend and protect the
rights of Mark J. Brinkerhoff and Cloyd H. Brinkerhoff as far as the Real Property
is concerned.

Elsie Brinkerhoff
Elsie Brinkerhoff

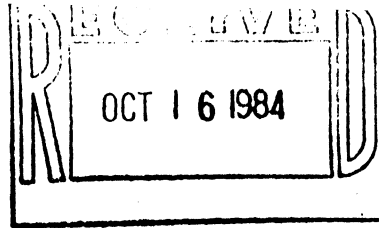
SUBSCRIBED AND SWORN to before me this 13 day of April, A.D. 1971.

Frank Chamberlain
Notary Public
Residing at Orderville Utah

My commission expires

Feb. 26, 1972

EXHIBIT "C"



Glendale, Utah
October 7, 1984

Willard R. Bishop
36 No 300 West
Cedar City, Utah 84720

Dear Mr. Bishop,

Request is hereby made to Mr. Willard R. Bishop to act
as counsel for and in behalf of Elsie J. Brinkerhoff.

Yours sincerely,

Elsie J. Brinkerhoff

Elsie J. Brinkerhoff



variance would result where the precise nature of the defect in the machinery or apparatus causing the injury is within the defendant's knowledge and any surprise which might exist from the defect proved would be to the plaintiff.⁵⁶

A variance as to the cause of the death of a person⁵⁷ or an animal⁵⁸ from the wrongful acts of others may not be fatal.

As hereinafter shown,⁵⁹ a party cannot generally declare in tort and recover on proof of a contract. In such cases, of course, there is a variance between the allegations and the proof. But no variance arises in an action in tort where the evidence discloses a written contract, although the complaint merely alleges a contract in general terms by way of inducement.⁶⁰

XIX. CONFORMITY OF JUDGMENT TO PLEADINGS [§§ 382-388]

A. IN GENERAL [§§ 382, 383]

§ 382. Generally.

Decrees in equity⁶¹ and judgments at law⁶² must have a basis in the pleadings and the evidence. A party's proof cannot materially vary from his allegations,⁶³ and the verdict⁶⁴ and judgment⁶⁵ must respond to the issues as raised by the pleadings. The parties should be confined in their recovery to that to which they are entitled within their allegations.⁶⁶ It is not upon the evidence alone, but upon the pleadings and the evidence applicable to the pleadings, that the plaintiff can in any case recover.⁶⁷ This seems to be a principle necessary to the due administration of justice in the courts,⁶⁸ and its observance is necessary in order to give the judgment the merit of finality of an adjudication between the parties.⁶⁹

56. *Willey v Boston Electric Light Co.*, 168 Mass 40, 46 NE 395.

57. *In Clinkenbeard v Reinert*, 284 Mo 569, 225 SW 667, 13 ALR 485. it was held that there was no variance between an allegation that a person died from the effects of the bite of a vicious dog and proof that he died of rabies caused by such bite.

58. *McKee v Trisler*, 311 Ill 536, 143 NE 69, 33 ALR 1298.

59. § 387, *infra*.

60. *Lake S. & M. S. R. Co. v Teeters*, 166 Ind 335, 77 NE 599.

61. See 27 Am Jur 2d, *Equity* § 247.

62. *American De Forest Wireless Tel. Co. v Superior Court of San Francisco*, 153 Cal 533, 96 P 15; *Beckett v Cuenin*, 15 Colo 281, 25 P 167; *Citizens State Bank v E. A. Tessman & Co.*, 121 Minn 34, 140 NW 178; *State ex rel. McManus v Muench*, 217 Mo 124, 117 SW 25; *Branz v Hylton*, 130 Neb 385, 265 NW 16; *Haney v Neace-Stark Co.*, 109 Or 93, 216 P 757, reh den 109 Or 119, 219 P 190; *Ft. Worth v Gause*, 129 Tex 25, 101 SW2d 221; *Roy v Bennett*, 141 W Va 260, 89 SE2d 843.

63. §§ 368 et seq., *supra*.

64. As to conformity of the verdict to the pleadings and proof, see 76 Am Jur 2d, *TRIAL* §§ 1133 et seq.

65. *United States v Seminole Nation*, 299 US 417, 81 L Ed 316, 57 S Ct 283; *White v Ward*, 157 Ala 345, 47 So 166; *White v Hamilton*, 38 Ariz 256, 299 P 124; *Tarien v Katz*, 216 Cal 554, 15 P2d 493, 85 ALR 334; *Angel v Mellen*, 48 Idaho 750, 285 P 461; *Bloom v Nathan Vehon Co.*, 341 Ill 200, 173 NE 270, 72 ALR 232; *Samuels v Weikel*, 195 Ky 552, 242 SW 836; *Bank of Monroe v E. C. Drew Inv. Co.*, 126 La 1028, 53 So 129; *Bemis v Bradley*, 126 Me 462, 139 A 593, 69 ALR 1399; *Farrell v Manhattan Market Co.*, 198 Mass 271, 84 NE 481; *State v Black Bros.*, 116 Tex 615, 297 SW 213, 53 ALR 1181.

66. *The Schooner Hoppet v United States*, 11 US 389, 3 L Ed 380; *Benedict v Bray*, 2 Cal 251.

67. *Hetzel v Baltimore & O. R. Co.*, 169 US 26, 42 L Ed 648, 18 S Ct 255.

68. *The Schooner Hoppet v United States*, 11 US 389, 3 L Ed 380.

69. *Reynolds v Stockton*, 140 US 254, 35 L Ed 464, 11 S Ct 773.

Whether a judgment is supported by the pleadings depends, not on the allegations in the complaint alone, but on a reasonable construction of all the pleadings when considered together.⁷⁰ It is the facts pleaded, and not the technical designation of the action, that constitute grounds of recovery.⁷¹ A judgment upon a matter outside of the issues raised by the pleadings must, of necessity, be altogether arbitrary and unjust, as it attempts to conclude a point upon which the parties have not been heard.⁷² Such a judgment cannot be saved by the fact that it conforms to the findings, the findings themselves being upon questions foreign to the issues.⁷³

§ 383. Restriction to relief claimed.

As a general rule, in the absence of statute or rule, the relief awarded by the judgment will be restricted to that claimed by the party in his pleading.⁷⁴ Irrespective of what may be proved, a court cannot, without statutory authority, adjudge to the plaintiff more than he claims in his pleadings.⁷⁵ However, where judgment is improperly entered for more than the amount permitted under the rule requiring conformity to the pleadings and issues, the excess may be remitted and the remainder of the judgment will stand.⁷⁶

Relief proper under the pleadings and the facts may be granted although it is less than that which the plaintiff demands in his pleading.⁷⁷

The Federal Rules of Civil Procedure provide that except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.⁷⁸

B. RESTRICTION TO CAUSE OF ACTION OR THEORY PLEADED [§§ 384-388]

§ 384. Generally.

A material variance arises where a party pleads one cause of action or defense and attempts to prove another and different one.⁷⁹ It follows that a

70. *Hamm v Hamm*, 30 *Tenn App* 122, 204 SW2d 113, 175 ALR 523; *Chesney v Chesney*, 33 *Utah* 503, 94 P 989.

71. *Thomas v Taylor*, 224 *US* 73, 56 *L Ed* 673, 32 *S Ct* 403.

72. *Reynolds v Stockton*, 140 *US* 254, 35 *L Ed* 464, 11 *S Ct* 773; *Falls v Wright*, 55 *Ark* 562, 18 *SW* 1044.

73. *White v Hamilton*, 38 *Ariz* 256, 299 *P* 124.

74. *United States v Seminole Nation*, 299 *US* 417, 81 *L Ed* 316, 57 *S Ct* 283; *England v Valley Nat. Bank*, 94 *Ariz* 267, 383 *P2d* 183; *Angel v Mellen*, 48 *Idaho* 750, 285 *P* 461; *Fi. Jefferson Imp. Co. v Dupoyster*, 112 *Ky* 792, 66 *SW* 1048; *Branz v Hylton*, 130 *Neb* 385, 265 *NW* 16; *Tulsa Red Ball Transfer Co. v Whittaker*, 176 *Okla* 29, 54 *P2d* 626; *Re Seattle*, 59 *Wash* 41, 109 *P* 1052.

As to the effect of the prayer on the scope of relief, see §§ 123, 124, *supra*.

75. *Cox v United States*, 31 *US* 172, 8 *L Ed* 359; *Ex parte United States Cast Iron Pipe & Foundry Co.*, 211 *Ala* 159, 99 *So* 912; *Meisner v McIntosh*, 205 *Cal* 11, 269 *P* 612; *Sache v Gillette*, 101 *Minn* 169, 112 *NW* 386; *Charles v White*, 214 *Mo* 187, 112 *SW* 545; *Tulsa Red Ball Transfer Co. v Whittaker*, 176 *Okla* 29, 54 *P2d* 626; *Seamster v Blackstock*, 83 *Va* 232, 2 *SE* 36.

76. *Curtis v Herrick*, 14 *Cal* 117; *Tulsa Red Ball Transfer Co. v Whittaker*, 176 *Okla* 29, 54 *P2d* 626.

77. *Hughes v Union Ins. Co.*, 21 *US* 294, 5 *L Ed* 620; *Murphy v Portrum*, 95 *Tenn* 605, 32 *SW* 633.

78. § 123, *supra*.

79. § 373, *supra*.

§ 62. Sufficiency of performance; avoidance of inequitable forfeiture.

Literal and exact performance is not always necessary. Under certain circumstances, specific performance of a contract will be decreed in spite of the fact that the complainant has not wholly performed his part of the agreement,⁷⁴ or where there has been substantial compliance with the terms of the contract,⁷⁵ as where a party in good faith seasonably offers and continues ready to comply with the stipulations of the contract although he may err in estimating the extent of his obligation.⁷⁶ Generally, where the plaintiff has made a conscientious effort fully and fairly to comply with his contract to purchase land, specific performance will be granted,⁷⁷ as, for example, in a case in which compensation may be made for the injury occasioned by the complainant's noncompliance with the strict terms of the contract.⁷⁸

In administering equity in a specific performance case, a technical forfeiture of rights under a contract, in the absence of bad faith, is not favored where a preservation of the contract through specific performance will yield to each party that to which he is justly entitled.⁷⁹ A court of equity has the power to relieve a defaulting purchaser from a forfeiture and to compel specific performance by the seller when, in the court's judgment, to do otherwise would result in an unreasonable forfeiture.⁸⁰ Specific performance may be granted despite a minor breach by the plaintiff, but the court should condition its decree on the performance of that matter by the plaintiff.⁸¹ Specific performance may properly be decreed despite a minor breach by the plaintiff involving no substantial failure, and in such a case the defendant has a right to compensation for the breach, which may be given either by an abatement in

74. *Breckenridge v Clinkinbeard*, 2 Litt (Ky) 127; *Landau v St. Louis Public Service Co.* 364 Mo 1134, 273 SW2d 255, 48 ALR2d 1200; *Albachten v Miller*, 216 Or 379, 339 P2d 427, 72 ALR2d 1122.

75. Vendees under a land contract who have substantially complied with the terms of the contract are entitled to a decree for the specific performance thereof. *Moore, K. & Co. v Ward*, 71 W Va 393, 76 SE 807.

76. *Willard v Tayloe*, 8 Wall (US) 557, 19 L Ed 501 (tender of United States notes when contract called for gold or silver coin).

77. *Northern Illinois Coal Corp. v Cryder*, 361 Ill 274, 197 NE 750, 101 ALR 1420; *Clayten v Proutt*, 227 Md 198, 175 A2d 757; *Four-G Corp. v Ruta*, 25 NJ 503, 138 A2d 18; *Albachten v Miller*, 216 Or 379, 339 P2d 427, 72 ALR2d 1122.

Where more than half the purchase price of land was paid in advance, and possession continued in the purchaser until after the balance was due, and valuable improvements were made by him with the consent of the seller, and without any intimation of an intent to insist on the strict performance of the contract as to time of payment, the purchaser was held entitled to specific performance. *Ahl v Johnson*, 20 How (US) 51, 15 L Ed 1005.

78. *Hyde v Booraem*, 16 Pet (US) 169, 10 L Ed 925; *Wynn v Garland*, 19 Ark 23.

79. *Henschke v Young*, 224 Minn 339, 28 NW2d 766.

80. *Rothenberg v Follman*, 19 Mich App 383, 172 NW2d 845 (where there was a default in an instalment, the property was purchased for \$40,000, and the balance of the principal was only \$7,500).

The trial court may award a vendee specific performance and deny to the vendor the right to forfeit the contract according to its provisions, where it appears that the vendee made a down payment of \$7,500—nearly one-fourth of the total purchase price—and made "quite regular" monthly payments of \$150 each on the balance of the principal and interest, and there was only \$575.95 owing on the purchase price, and where the buyer had made valuable improvements of the property, which had appreciated greatly in value after the execution of the contract. *Williams v De Lay (Alaska)* 395 P2d 839, the court saying that it would be inequitable to enforce the forfeiture provision.

81. *Clayten v Proutt*, 227 Md 198, 175 A2d 757.

Specific performance will not be decreed if the plaintiff has himself committed a material breach, unless refusal of the decree will effectuate an unjust penalty or forfeiture, but specific performance may properly be decreed in spite of a minor breach or innocent misrepresentation by the plaintiff involving no substantial failure of the exchange. *Landau v St. Louis Public Service Co.* 364 Mo 1134, 273 SW2d 255, 48 ALR2d 1200.

the price or by making the decree conditional on the payment of reasonable compensation.⁸² And to defeat specific performance because of the plaintiff's nonperformance, it should appear that some injury has resulted to the defendant from such nonperformance. If the defendant has taken possession of land which is the subject matter of the contract, and has likewise executed the agreement in part, the court may consider him as having waived his objections to the complainant's default, and may decree a specific performance of the contract.⁸³

§ 63. Time of performance.

The well-established general principle in equity, that time is not ordinarily regarded as of the essence of contracts unless it is so stipulated by the express terms thereof or it is necessarily to be so implied from the character of the obligations assumed,⁸⁴ has been frequently reiterated and applied in actions for specific performance.⁸⁵ This is especially true as regards executory contracts for the sale of land which are considered in equity as vesting the equitable title in the purchaser subject to the claim of the vendor for the purchase money.⁸⁶ Therefore, in the ordinary cases of sales of realty, the general object being to make a sale for an agreed sum, the time of payment is regarded in equity as formal, and as meaning only that the purchase shall be completed within a reasonable time, and substantially according to the contract, regard being had to all the circumstances.⁸⁷ Hence, specific performance may be decreed in cases where justice requires it, even though literal terms of stipulations as to time have not been observed.⁸⁸ Thus, under an option agreement giving the optionee an option to purchase certain property on a specified date, but not prior thereto, upon giving the optionor not less than 30 days' notice in writing of an intention to exercise the option on the specified date, the optionee may obtain specific performance notwithstanding a failure to give notice strictly in accordance with the contract, where the optionee attempted literal compliance in good faith, and where the optionor was not prejudiced or damaged by reason of the delay.⁸⁹ Where a contract for the sale of lands fixes no time for its performance, and by its terms the payment of the price and the transfer of title are to be concurrent acts, a vendee does not lose his right to specific performance by any delay short of the period fixed by the

82. *Clayten v Proutt*, 227 Md 198, 175 A2d 757, wherein the plaintiff purchasers failed to remove certain underbrush and loose limbs from the property.

83. *Ramsay v Brailsford*, 2 SC Eq 582.

84. See 17 Am Jur 2d, *CONTRACTS* § 332.

85. *Taylor v Longworth*, 14 Pet (US) 172, 10 L Ed 405; *Brashier v Gratz*, 6 Wheat (US) 528, 5 L Ed 322; *Russell v Ferrell*, 181 Kan 259, 311 P2d 347; *Wimer v Wagner*, 323 Mo 1156, 20 SW2d 650, 79 ALR 1231; *Strasbourg v Hesu Realty Co.* 198 App Div 805, 191 NYS 133; *Meineke v Schwepe*, 93 Ohio App 111, 50 Ohio Ops 244, 111 NE2d 765; *Albachten v Miller*, 216 Or 379, 339 P2d 427, 72 ALR2d 1122.

86. *Taylor v Longworth*, 14 Pet (US) 172, 10 L Ed 405; *Bank of Columbia v Hagner*, 1 Pet (US) 455, 7 L Ed 219; *Brashier v Gratz*, 6 Wheat (US) 528, 5 L Ed 322; *Russell v Ferrell*,

181 Kan 259, 311 P2d 347; *Wimer v Wagner*, 323 Mo 1156, 20 SW2d 650, 79 ALR 1231; *Meineke v Schwepe*, 93 Ohio App 111, 50 Ohio Ops 244, 111 NE2d 765.

Annotation: 79 ALR 1240.

87. *Russell v Ferrell*, 181 Kan 259, 311 P2d 347; *Jones v Robbins*, 29 Me 351; *Meineke v Schwepe*, 93 Ohio App 111, 50 Ohio Ops 244, 111 NE2d 765.

88. *Stinson v Dousman*, 20 How (US) 461, 15 L Ed 966; *Taylor v Longworth*, 14 Pet (US) 172, 10 L Ed 405; *Bank of Columbia v Hagner*, 1 Pet (US) 455, 7 L Ed 219; *Brashier v Gratz*, 6 Wheat (US) 528, 5 L Ed 322; *Wimer v Wagner*, 323 Mo 1156, 20 SW2d 650, 79 ALR 1231; *Young v Rathbone*, 16 NJ Eq 224; *Beckett v Kornegay*, 150 Va 636, 143 SE 296.

89. *Albachten v Miller*, 216 Or 379, 339 P2d 427, 72 ALR2d 1122.

of motion to amend the pleadings to conform to evidence of estoppel would not be overturned absent a showing of abuse of discretion. *Big Butte Ranch, Inc. v. Holm*, 50 P.2d 690 (Utah 1977).

IV. RELATION BACK OF AMENDMENTS

Relation back despite intervening statute of limitations. Amendments are allowed to complaints and process, even though the amendment relates back to the time of original filing and even though, but for the right to amend, the statute of limitations period would have run. *Meyers v. Interwest Corp.*, 632 P.2d 879 (Utah 1981).

The amendment of a complaint dismissed for untimely service must also be dismissed. *Cook v. Starkey*, 548 P.2d 1268 (Utah 1976).

Subdivision (c) does not apply to an amendment which substitutes for or adds new parties to those brought before the court

by the original pleadings, whether plaintiff or defendant; but an exception to this Rule operates where there is a relation back, as to both plaintiff and defendant, when new and old parties have an identity of interest, so that it can be assumed or proved that the relation back is not prejudicial. *Doxey-Layton Co. v. Clark*, 548 P.2d 902 (Utah 1976).

Inapplicable to amended third-party complaint. The relation-back doctrine does not apply to amended third-party complaint where there was no identity of interest with the existing parties other than privity of contract, since privity of contract is insufficient identity of interest for purpose of subsection (c) of this Rule. *Perry v. Pioneer Whse. Supply Co.*, 681 P.2d 214 (Utah 1984).

V. SUPPLEMENTAL PLEADINGS

Permitting supplemental pleadings is largely discretionary with the trial court. *Rowley v. Milford City*, 10 Utah 2d 299, 352 P.2d 225 (1960).

Rule 16. Pre-Trial Procedure; Formulating Issues.

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided.

- I. General Consideration.
- II. Pretrial Order.

I. GENERAL CONSIDERATION

Cited in *Rasbury v. Bainum*, 15 Utah 2d 62, 387 P.2d 239 (1963); *Rumsey v. Salt Lake City*, 16 Utah 2d 310, 400 P.2d 205 (1965).

II. PRETRIAL ORDER

Issues of law may be decided in order. Subdivision (5) permits and contemplates that disputed issues of law should be recognized and

ruled upon, if possible, before a case is called for trial; this will assist counsel in their attempts to settle the matter and, if settlement cannot be effected, then the parties will know better how to marshal the evidence for trial. *DiEnes v. Safeco Life Ins. Co.*, 21 Utah 2d 147, 442 P.2d 468 (1968).

The pretrial order controls the issues of the case where it is made without objection and no motion is made to change it, unless it is modified at the trial to prevent a manifest injustice. *Citizens Cas. Co. v. Hackett*, 17 Utah 2d 304, 410 P.2d 767 (1966).

But this rule is not to be read as precluding modifications thereof prior to trial for good cause shown. *Lewis v. Moultrie*, 627 P.2d 94 (Utah 1981).

Pretrial orders are blueprints for the trial which ought not to be relaxed in the absence of good cause, but they are not hoops of steel and may always be modified in the interest of the administration of justice. *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980).

This Rule must be read in conjunction with U.R.C.P. 15(b), which provides for liberality in allowing amendment of the pleadings to conform to the evidence. *Stubbs v. Hemmert*, 567 P.2d 168 (Utah 1977).

But amendment of order to be less liberal than amendment of pleadings. Where objection is made to evidence on the ground it is outside the pretrial order, the court should be somewhat less liberal in amending the order than it would be if mere pleadings were involved. *Kaiser Aluminum & Chem. Sales, Inc. v. Lords*, 23 Utah 2d 152, 460 P.2d 321 (1969).

Prejudicial effect of order to be factor in considering modification of order. In determining whether to modify a pretrial order in

the interest of justice, the court should consider the possible prejudicial effects of its enforcement of the order. *Dugan v. Jones*, 615 P.2d 1239 (Utah 1980).

Amendment of order may be allowed prior to trial. If plaintiff is given ample opportunity to meet the issue, defendant may be allowed to raise a new issue and amend the pretrial order after the pretrial conference, but before trial. *Page v. Utah Home Fire Ins. Co.*, 15 Utah 2d 257, 391 P.2d 290 (1964).

Order may be amended to conform to evidence. A pretrial order may be amended, even after trial, to conform the order to the evidence to be, or already, presented. *Reich v. Christopulos*, 123 Utah 137, 256 P.2d 238 (1953).

Order deemed modified to conform to evidence. Where no objection has been made to the introduction of evidence outside a pretrial order, it is deemed that the court modified the pretrial order as a matter of its own discretion. *Stubbs v. Hemmert*, 567 P.2d 168 (Utah 1977).

No abuse of discretion in refusing modification of order. It was not an abuse of discretion for the trial court to rule that defendants could not inject a wholly inconsistent issue they had failed to assert and have included in the pretrial order. *Kaiser Aluminum & Chem. Sales, Inc. v. Lords*, 23 Utah 2d 152, 460 P.2d 321 (1969).

No error in allowing evidence outside scope of order. It is not error for the trial court to refuse to admit evidence on issues outside the scope of the pretrial order even upon objection thereto by the opposing party. *Stubbs v. Hemmert*, 567 P.2d 168 (Utah 1977).

PART IV.

PARTIES.

Rule 17. Parties Plaintiff and Defendant.

(a) *Real Party in Interest.* Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of,

the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) *Infants or Incompetent Persons.* When an infant or an insane or incompetent person is a party, he must appear either by his general guardian, or by a guardian ad litem appointed in the particular case by the court in which the action is pending. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted expedient to represent the infant, insane or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. In an action in rem it shall not be necessary to appoint a guardian ad litem for any unknown party who might be an infant or an incompetent person.

(c) *Guardian Ad Litem; How Appointed.* When a guardian ad litem is appointed by a court, he must be appointed as follows:

(1) When the infant is plaintiff, upon the application of the infant, if he is of the age of fourteen [14] years, or if under that age, upon the application of a relative or friend of the infant.

(2) When the infant is defendant, upon the application of the infant if he is of the age of fourteen [14] years and applies within 20 days after the service of the summons, or if under that age or if he neglects so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action.

(3) When an infant defendant resides out of this state, the plaintiff, upon motion therefor, shall be entitled to an order designating some suitable person to be guardian ad litem for such infant defendant, unless the defendant or someone in his behalf within 20 days after service of notice of such motion shall cause to be appointed a guardian for such infant. Service of such notice may be made upon the general or testamentary guardian of such defendant, if he has one in his state; if not, such notice, together with the summons in the action, shall be served in the manner provided for publication of summons upon such infant, if over fourteen [14] years of age, or, if under fourteen [14] years of age, by such service on the person with whom such infant resides. The guardian ad litem for such nonresident infant defendant shall have 20 days after his appointment in which to plead to the action.

(4) When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person, or of any other party to the action or proceeding.

(d) *Associates May Be Sued by Common Name.* When two or more persons associated in any business either as a joint-stock company, a partnership or other association, not a corporation, transact such business under a common name, whether it comprises the names of such associates or not, they may be sued by such common name; and any judgment obtained against the defendant in such case shall bind the joint property of all the associates in the same manner as if all had been named defendants and had been sued upon their joint liability.

68-2-9. Effect on suits and prosecutions pending.

No suit or prosecution, pending when this repeal takes effect, for an offense committed, or for the recovery of a penalty or forfeiture incurred, shall be affected by the repeal, but the proceedings may be conformed to the provisions of these revised statutes as far as consistent. 1953

68-2-10. "Heretofore" and "hereafter" defined.

The terms "heretofore" and "hereafter" as used in these revised statutes, have relation to the time when the same take effect. 1953

Chapter 3. Construction

68-3-1. Common law adopted.

68-3-2. Statutes in derogation of common law liberally construed - Rules of equity prevail.

68-3-3. Revised statutes not retroactive.

68-3-4. Civil and criminal remedies not merged.

68-3-5. Effect of repealing a statute.

68-3-6. Identical provisions deemed a continuation, not new enactment.

68-3-7. Time, how computed.

68-3-8. When a day appointed is a holiday.

68-3-9. Seal, how affixed.

68-3-10. Joint authority is authority to majority.

68-3-11. Rules of construction as to words and phrases.

68-3-12. Rules of construction as to these statutes.

68-3-1. Common law adopted.

The common law of England so far as it is not repugnant to, or in conflict with, the Constitution or laws of the United States, or the Constitution or laws of this state, and so far only as it is consistent with and adapted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state. 1953

68-3-2. Statutes in derogation of common law liberally construed - Rules of equity prevail.

The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. Whenever there is any variance between the rules of equity and the rules of common law in reference to the same matter the rules of equity shall prevail. 1953

68-3-3. Revised statutes not retroactive.

No part of these revised statutes is retroactive, unless expressly so declared. 1953

68-3-4. Civil and criminal remedies not merged.

When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other. 1953

68-3-5. Effect of repealing a statute.

The repeal of a statute does not revive a statute previously repealed, or affect any right which has accrued, any duty imposed, any penalty incurred, or any action or proceeding commenced under or by virtue of the statute repealed. 1953

68-3-6. Identical provisions deemed a continuation, not new enactment.

The provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such provisions, and not as a new enactment. 1953

68-3-7. Time, how computed.

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last is a holiday, and then it also is excluded. 1953

68-3-8. When a day appointed is a holiday.

Whenever any act of a secular nature, other than a work of necessity or mercy, is appointed by law or contract to be performed upon a particular day, which day falls upon a holiday, such act may be performed upon the next succeeding business day with the same effect as if it had been performed upon the day appointed. 1953

68-3-9. Seal, how affixed.

When the seal of a court or public officer is required by law to be affixed to any paper, the word "seal" includes an impression of such seal upon the paper alone, as well as upon wax or a wafer affixed thereto. In all other cases the word "seal" may include a scroll printed or written. 1953

68-3-10. Joint authority is authority to majority.

Words giving a joint authority to three or more public officers, or other persons, are to be construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority. 1953

68-3-11. Rules of construction as to words and phrases.

Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such peculiar and appropriate meaning or definition. 1953

68-3-12. Rules of construction as to these statutes.

In the construction of these statutes the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the Legislature or repugnant to the context of the statute:

(1) "Month" means a calendar month, unless otherwise expressed, and the word "year," or the abbreviation "A.D." is equivalent to the expression "year of our Lord."

(2) "Oath" includes "affirmation," and the word "swear" includes "affirm." Every oral statement under oath or affirmation is embraced in the term "testify," and every written one, in the term "depose."

(3) "Signature" includes any name, mark, or sign written with the intent to authenticate any instrument or writing.

(4) "Writing" includes printing, handwriting, and typewriting.

(5) "Person" includes individuals, bodies politic and corporate, partnerships, associations, and companies.

(6) The singular number includes the plural, and the plural the singular.

(7) Words used in one gender comprehend the other.

(8) Words used in the present tense include the future.

(9) "Property" includes both real and personal property.

(10) "Land," "real estate," and "real property" include land, tenements, hereditaments, water rights, possessory rights, and claims.

Paul TANNER, Plaintiff and
Respondent,

v.

Esbern BAADSGAARD, Defendant
and Appellant.

No. 16569.

Supreme Court of Utah.

May 27, 1980.

Assignee of purchasers brought action for specific performance of contract for sale of one and one-half lots of undeveloped property. The Fourth District Court, Utah County, J. Robert Bullock, J., entered judgment awarding specific performance, and vendor appealed. The Supreme Court, Crockett, C. J., held that: (1) evidence warranted a finding that assignee had not abandoned contract and supported finding that vendor had waived strict compliance with the provisions relating to time of payment, and (2) trial court was justified in finding that fact that parties had agreed that interest would be paid for the time it took to complete the transaction, but had not agreed on a definite amount, did not result in any such uncertainty as to prevent specific performance.

Affirmed.

1. Appeal and Error ⇐ 931(1), 1009(4)

Though Supreme Court may review the evidence in a case in equity, Court will indulge considerable deference to trial judge's findings, and, where the evidence is in dispute, the Supreme Court will assume that trial judge believed that which is favorable to his findings, and the Supreme Court will not disturb the findings unless it clearly preponderates to the contrary.

2. Vendor and Purchaser ⇐ 101

After waiver of strict compliance with dates of payment stated in earnest money agreement, vendor must give notice and a reasonable time to perform before he may insist on holding purchaser strictly to the time requirements.

3. Vendor and Purchaser ⇐ 315(1), 350

When parties have entered into formal contract, such as for purchase of real property, it is to be assumed that they will cooperate with each other in good faith for its performance, and one refusing to so perform, or claiming a forfeiture thereof, has burden of showing justification for doing so.

4. Specific Performance ⇐ 121(11)

In purchasers' assignee's action for specific performance of contract for sale of one and one-half lots of undeveloped property, evidence warranted determination that assignee had not abandoned contract and supported finding that vendor waived strict compliance with provisions relating to time of payment.

5. Specific Performance ⇐ 28(1)

To warrant specific performance, essential terms of the contract must be sufficiently definite to enable parties to understand what their obligations are, but proper application of such rule is as a shield to protect from injustice, and not as a weapon with which to work an injustice.

6. Specific Performance ⇐ 121(8)

In purchasers' assignee's action for specific performance of contract for sale of one and one-half lots of undeveloped property, trial court was justified in finding that fact that parties had agreed that interest would be paid for the time it took to complete the transaction, but had not agreed on a definite amount, did not result in any such uncertainty as to prevent specific performance.

Jeril B. Wilson, Provo, for defendant and appellant.

M. Dayle Jeffs, Provo, for plaintiff and respondent.

CROCKETT, Chief Justice:

Plaintiff Paul Tanner brought this action against the defendant Esbern Baadsgaard, seeking specific performance of a real es-

tate contract providing for the sale of one and one-half lots of undeveloped property in Spanish Fork. From a judgment awarding that relief, the defendant appeals.

[1] As is so often true in such controversies, there is sharp conflict in the evidence as to material and controlling facts. Notwithstanding the correctness of defendant's urging that this Court may review the evidence because it is a case in equity,¹ it is our well-established rule that due to the prerogatives and advantaged position of the trial judge, we indulge considerable deference to his findings.² Where the evidence is in dispute, we assume that he believed that which is favorable to his findings, and we do not disturb them unless it clearly preponderates to the contrary.³

On March 19, 1977, the plaintiff and his brother and sister-in-law, Dwight and Velma Blood, went with the defendant and inspected the property. Later that day, the Bloods and the defendant signed an earnest money agreement of sale for \$40,000, \$500 down, for which Mr. Blood gave a check. Further payments were to be: \$14,500 upon delivery of a deed to half of the whole lot on May 1, 1977, \$12,500 on April 1, 1978, and \$12,500 on April 1, 1979, the latter two payments to also include 8.5 percent interest from April 1, 1977.

The \$14,500 payment, which was due on May 1, 1977, was not made. Mr. Blood testified that shortly thereafter, he contacted the defendant and informed him that he had not been able to obtain the necessary financing to make the payment, but told him that he would continue to attempt to do so. About two months later, near the end of June, 1977, the defendant contacted Mr. Blood and told him that he had lost the \$500 check. Mr. Blood said they agreed that he should mail a check for \$1,200, both

to replace the lost check and the rest to apply on the interest which had accrued to the defendant.⁴ In the letter accompanying the check, Mr. Blood stated that he appreciated the defendant's patience and that if "circumstances change, necessitating that we move more quickly or arrange separate financing on the land before we get our construction loan, please advise." He received no response, nor any complaint about delay.

The plaintiff Tanner testified that he spoke with the defendant several times during the next six months about the fact that Mr. and Mrs. Blood had assigned their interest in the contract to him and he was still having difficulty in obtaining financing. The defendant still made no complaint about the delay. But he did tell plaintiff Tanner that it would be necessary to charge a higher interest rate. In response thereto, the parties agreed that interest was to be paid "in full for all of the time it took until we closed the transaction."

Just prior to December 25, 1977, the plaintiff, who could not then obtain the financing, told the defendant that there was an individual who was very interested in beginning construction on the lots and that financing for the project would be arranged in January or, at the latest, February. According to the plaintiff, the defendant again reminded him that "all of the interest would be due when the transaction was closed."

On February 21, 1978 the plaintiff contacted the defendant to inform him that financing had been obtained and to arrange for a time to close the transaction. The defendant then told plaintiff Tanner for the first time that he had arranged the sale of the property to another. Two days later, the plaintiff again approached the defend-

1. *Timpanogos Highlands, Inc. v. Harper*, Utah, 544 P.2d 481 (1975).

2. *Id.*; *Pagano v. Walker*, Utah, 539 P.2d 452 (1975); *McBride v. McBride*, Utah, 581 P.2d 997 (1978).

3. See *Kier v. Condrack*, 25 Utah 2d 139, 478 P.2d 327 (1970); *McBride v. McBride*, *supra*, note 2.

4. The defendant testified that, at the time, he told Mr. Blood: "I'll sell you the property at the same price you bought it for, providing you pay me interest by the month until you get your financing together."

ant, but was told that no money would be accepted for the purchase of the property.

[2] Based on the foregoing, the trial court found that, by his conduct, the defendant had waived requirement of strict compliance with the dates of payment stated in the earnest money agreement, which waiver had been relied upon by the plaintiff. The court applied the rule that after such a waiver, the seller must give notice and a reasonable time to perform before he may insist upon holding the buyer strictly to the time requirements.⁵ The trial court concluded that the plaintiff would be entitled to specific performance of the contract upon the payment of the stated purchase price, plus the interest as agreed upon.

The defendant contends that the trial court erred because the only reasonable finding from the evidence should be that the plaintiff had abandoned the contract before he attempted to complete the transaction in February, 1978; and that the plaintiff was not entitled to specific performance because he had not met the conditions nor made the payments as required under the contract.

[3, 4] As to that contention, these observations are pertinent: When parties have entered into a formal contract, such as for the purchase of real property, it is to be assumed that they will cooperate with each other in good faith for its performance,⁶ and one refusing to so perform, or claiming a forfeiture thereof, has the burden of showing justification for doing so.⁷ Proceeding on that premise, it is our opinion that there is a reasonable basis in the evidence for the trial court's refusal to believe that the plaintiff had abandoned the contract, and for finding that the defendant had waived strict compliance with the provisions as to time of payment.

5. 17 C.J.S. Contracts § 506(b). See statements in *Fuhrman v. Bissegger*, 13 Utah 2d 379, 375 P.2d 27 (1962); *Hansen v. Christensen*, Utah, 545 P.2d 1152 (1976); *Harrison v. Puga*, 4 Wash.App. 52, 480 P.2d 247 (1971); *Angus Hunt Ranch, Inc. v. Reb, Inc.*, Wyo., 577 P.2d 645 (1978).

6. *Ferris v. Jennings*, Utah, 595 P.2d 857 (1979).

[5, 6] The defendant also contends that the terms of the contract had become uncertain when the parties had agreed on an increase of the interest, but had not agreed upon a definite amount. We have no doubt as to the correctness of defendant's assertion that, in order to warrant specific performance, the essential terms of the contract must be sufficiently definite to enable the parties to understand what their obligations are.⁸ But the proper application of that rule is as a shield to protect from injustice, and not as a weapon with which to work an injustice.⁹ In regard to the defendant's claim of uncertainty: We think the trial court was also justified in finding that the agreement that interest would be paid for the time it took to complete the transaction did not result in any such uncertainty as to prevent specific performance. Whatever else may be said about uncertainty as to the payment of interest, we observe that this claim of error is also governed by the rule alluded to above: that the parties are duty bound to cooperate in good faith to carry out their original intent.

In the light of what has been said herein, we see no reason to disagree with the conclusion of the trial court that the plaintiff is entitled to specific performance of the contract upon payment of the purchase price and the accrued interest thereon.

Affirmed. Costs to plaintiff (respondent).

MAUGHAN, WILKINS, HALL and STEWART, JJ., concur.



7. That the law does not generally favor forfeitures, see *Fullmer v. Blood*, Utah, 546 P.2d 606 (1976) and cases therein cited.

8. 81 C.J.S. Specific Performance § 36(b); *Pitcher v. Lauritzen*, 18 Utah 2d 368, 423 P.2d 491 (1967); *Eckard v. Smith*, Utah, 527 P.2d 660 (1974).

9. *Kier v. Condrack*, supra, note 3.

13 Utah 2d 379

**Festus M. FUHRIMAN, Plaintiff and
Appellant,**

v.

**Alfred BISSEGGER and LaRene Bissegger
Carlsen, formerly LaRene Bissegger,
Defendants and Respondents.**

No. 9590.

Supreme Court of Utah.

Oct. 15, 1962.

Suit by vendor to recover realty sold under a real estate contract wherein the vendee counterclaimed for specific performance. The First District Court, Cache County, Lewis Jones, J., granted specific performance, and the vendor appealed. The Supreme Court, Wade, C. J., held that contractual provision giving the vendor the option to forfeit rights of vendee if he failed to make payments within 30 days after they became due was not self-executory, and it was incumbent upon vendor to give sufficient notice of election to terminate contract and forfeit vendee's rights therein.

Affirmed.

1. Vendor and Purchaser ⇐101

Provision in real estate contract giving vendor option to forfeit rights of vendee if he failed to make payments within 30 days after they became due was not self-executory, and it was incumbent upon vendor to give sufficient notice of election to terminate contract and forfeit vendee's rights therein.

2. Vendor and Purchaser ⇐104

Evidence sustained finding that vendor led vendee to believe that strict performance with respect to making of payments was not required, and that vendor had not given vendee, who was of sub-normal intelligence, sufficient notice of intent to forfeit the agreement.

Olson & Calderwood, Logan, for respondents.

WADE, Chief Justice.

Festus M. Fuhriman, appellant herein, brought this suit to recover real property he was selling under a real estate contract entered into in 1946 between him and Alfred Bissegger and his then wife, LaRene Bissegger, now LaRene Bissegger Carlsen, respondents herein, on the ground that their rights in the contract had been forfeited. Respondents counterclaimed for specific performance. After trial of the case before the court, sitting without a jury, the court found the issues in favor of the respondents and granted the counterclaim, provided that all amounts due under the contract were deposited with the court within 60 days.

[1] The contract provided that if the buyers failed to make payments as they became due, or within 30 days thereafter, the seller at his option could forfeit their rights and retake possession. This type of forfeiture provision not being self-executory, it was incumbent upon Fuhriman to have exercised his option to forfeit their rights by giving Alfred Bissegger, who had succeeded to his divorced wife's interest, sufficient notice of his election to terminate the contract and forfeit his rights therein.¹

[2] From the record it is clear that almost from the inception respondents failed to make the required payments, and the decisive question to be determined is whether Fuhriman, before the commencement of this suit, had given Alfred Bissegger sufficient notice of forfeiture.

It appears that Alfred Bissegger is of sufficiently low intelligence to be classed as feeble-minded and has been a recipient of welfare since 1955. In 1956, Fuhriman told Bissegger that he "figured" the contract "wasn't any good anymore" and suggested that Bissegger could probably get the Welfare Department to pay rent. Mr. Bissegger thereupon informed the welfare worker in charge of his case that he no longer

Daines & Thomas, Logan, for appellant.

1. Leone v. Zaniga, 84 Utah 417, 34 P.2d 609, 94 A.L.R. 1232.

owned the real property in question because the owner had "upped the price" on him and asked that he be allowed \$10.00 a month to pay rent. This was the exact amount due for monthly payments provided in the contract. He was given \$10.00 a month to pay for rent, but he never paid this to Mr. Fuhriman. Mr. Fuhriman, during the next four years before the commencement of this action, allowed Mr. Bissegger to remain on the property, and on occasions when he would see him would ask him when he would pay something. In the meantime Mr. Fuhriman was making some effort to sell the property to others. In 1960, he commenced this action to evict Mr. Bissegger. When Mr. Bissegger received the summons he consulted his attorney and immediately thereafter a tender was made to Mr. Fuhriman of all moneys due under the contract. This tender was refused.

The court found that Fuhriman's conversations with Bissegger about the delinquent payments and their effect on the contract were of an uncertain nature as to what he might do in the vague future, and were also uncertain as to what he would require Bissegger to do to avoid termination of the contract; and that this behavior led Bissegger to believe that strict performance was not required. The court further found that Bissegger "is an adult of sub-normal intelligence, having the intelligence of a child of approximately 7 years old and although reasonably capable of caring for his physical needs is not of sufficient intelligence to transact business affairs such as the agreement with plaintiff without being furnished with emphatic, clear, definite and detailed instructions." The court then found that Fuhriman had, from the beginning, waived strict or substantial compliance with the agreement, and that he had failed to notify Bissegger that unless payments were made within a reasonable time, there would be a forfeiture of the agreement.

We are of the opinion that the evidence was sufficient to sustain the court's findings that no actual and sufficient notice of intent

to forfeit the agreement was given Bissegger before the suit was commenced and therefore the court did not err in granting specific performance on respondents' counterclaim.

Affirmed. Costs to respondents.

HENRIOD, McDONOUGH, CALLISTER and CROCKETT, JJ., concur.



13 Utah 2d 382

Norman W. KETTNER, Administrator of the Estate of Elizabeth Herdman, deceased, and Howard Herdman, Plaintiffs,

v.

Hon. Marcellus K. SNOW, Judge; The District Court Of The Third Judicial District In And For Salt Lake County, State of Utah; Alvin Keddington, Clerk of the District Court of Salt Lake County; Leona A. Watkins and John Watkins, Defendants.

No. 9659.

Supreme Court of Utah.

Oct. 5, 1962.

Original proceeding by defendants to prohibit a district court from further proceeding after it had granted a new trial. The Supreme Court, Crockett, J., held that a motion for new trial was improperly granted where motion therefor was not served within 10 days after entry of judgment and there was no showing of diligence or likelihood that claimed newly discovered evidence would produce a different result.

Alternative writ made permanent.

1. Courts ⇐114

A court has power to act nunc pro tunc in proper circumstances, but such device cannot be used to revive time for taking a required step in a legal proceeding after statutory time for doing it has elapsed.

scope is limited to a determination of whether or not the action of the Board of County Commissioners as a legislative body is illegal, arbitrary, discriminatory or capricious. No contention is made that the county did not act within its grant of powers from the legislature in its adoption of the original zoning ordinance. The prior decisions of this court without exception have laid down the rule that the exercise of the zoning power is a legislative function to be exercised by the legislative bodies of the municipalities. The wisdom of the zoning plan, its necessity, the nature and boundaries of the district to be zoned are matters which lie solely within that discretion. It is the policy of this court as enunciated in its prior decisions² that it will avoid substituting its judgment for that of the legislative body of the municipality. We are of the opinion that the Board of Commissioners of Salt Lake County acted within the scope of its legislative powers, and that the reclassification ordinance was adopted pursuant to a planning scheme developed for that portion of the county we are here concerned with. A careful review of the evidence leads us to the conclusion that the plaintiffs have failed to sustain their burden that the action of the county was arbitrary, unreasonable or capricious.

The decision of the court below is reversed and the matter is remanded directing the court to dismiss the plaintiffs' complaint. No costs awarded.

HENRIOD, C. J., and ELLETT, CROCKETT and MAUGHAN, JJ., concur.

2. *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704; *Phi Kappa Iota Fraternity v. Salt Lake City*, 116 Utah 536, 212 P.2d 177; *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723; *Naylor v. Salt Lake*

Collin L. HANSEN, the duly appointed, acting and qualified administrator of the Estate of Bernard Hansen, Deceased, Plaintiff and Respondent,

v.

Della A. CHRISTENSEN, the duly appointed and acting and qualified administratrix of the Estate of Arnold Christensen, Deceased, and Della A. Christensen, Individually, Defendant and Appellant.

No. 14112.

Supreme Court of Utah.

Jan. 29, 1976.

Administrator of estate of purchaser brought action against administrator of estate of vendor, in her representative capacity and individually, seeking specific performance of written contract for sale and purchase of realty. The First District Court, Box Elder County, VeNoy Christoffersen, J., entered judgment enforcing conveyance, and vendor's administrator appealed. The Supreme Court, Maughan, J., held, inter alia, that purchaser's tender of balance due under contract was sufficient.

Affirmed.

1. Vendor and Purchaser ⇨101

Contract for purchase of realty providing that after continuance of default for 90 days vendor had right to accelerate and foreclose, or enter, take possession and forfeit purchaser's interest, or take advantage of any other remedy provided by law, required some affirmative act on part of vendor and therefore contractual relations between vendor and purchaser were in ex-

City Corp., 17 Utah 2d 300, 410 P.2d 764. See also *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R. 1016; *Wakefield v. Kraft*, 202 Md. 136, 96 A.2d 27.

istence until such time as vendor chose to notify defaulting purchaser of its election to proceed under one or all of its options; having decided to so proceed, vendor was required to give defaulting purchaser reasonable time within which to cure default since purchaser could otherwise assume that vendor had waived default, or had elected to enforce contract rather than forfeit it, or that purchaser would be permitted to perform.

2. Tender \Rightarrow 11

Tender of balance due under sales contract for purchase of certain property by defaulting purchaser, who, having received no notice that vendor had elected to proceed under any of its options under sales contract upon such default, had decided to proceed with contract by placing on deposit to vendor's order cashier's check in total amount due under contract constituted sufficient tender where vendor had refused purchaser's "present physical offer."

3. Tender \Rightarrow 16(2)

Where unreasonable conduct of obligee would make actual tender fruitless gesture, offer to comply with terms of contract by obligor is sufficient.

4. Tender \Rightarrow 15(3)

Where vendor did not object to amount of purchaser's tender of balance due under sales contract and place of delivery at time tender was made, those objections were deemed waived. U.C.A. 1953, 78-27-3.

Omer J. Call, Brigham City, for defendant-appellant.

Walter G. Mann, of Mann, Hadfield & Thorne, Brigham City, for plaintiff-respondent.

MAUGHAN, Justice:

The seller under a written contract for the sale and purchase of realty appeals from a judgment enforcing conveyance.

We affirm the judgment. Parties to bear their own costs.

This is an action for specific performance, initiated by the administrator of the estate of the buyer (hereafter plaintiff or buyer) against the administrator of the estate of the seller (hereafter defendant or seller) in her representative capacity, and individually. The contract was engaged in in January of 1958. The contract price was \$4,000; the buyer paid \$1,200 down and took possession. Annual installments of \$900 were to be made January 1st, in the years 1959 and 1960, with a final installment of \$1,000, to be made January 1, 1961—all with interest. All taxes and assessments, after January 1, 1958, were to be paid by buyer. In July of 1958, defendant's joint seller died. The annual payment due January 1, 1958, together with \$168 interest, was tendered to and accepted by defendant, Della Christensen, on September 8, 1959.

In October, 1960, the buyer died, and there was no contact or communication between the parties, until plaintiff went to the home of defendant on October 31, 1962, and offered to make full payment. Defendant refused payment, informed plaintiff the contract was in default and she was repossessing the land. The next day plaintiff left a cashier's check, in the amount of \$2,422.02, with First Security Bank, in Brigham City; and defendant received notice the money was available to her, in exchange for a deed.

The trial court found the amount of the cashier's check represented the balance due under the contract, together with taxes and interest, up to November 1, 1962; and since that time, the money had remained available for defendant. The court also found plaintiff to have been in possession of the realty, since the inception of the contract in 1958. Defendants were reimbursed in the amount of \$115.47, plus \$6.70 interest, for the taxes defendant had paid from 1962 to 1974. Pursuant to stipulation of counsel, the court was to determine a

reasonable attorney's fee if one were to be awarded. Plaintiff was awarded an attorney's fee determined by the court.

Although the contract was not what is known in this jurisdiction as a Uniform Real Estate Contract, it provided that after the continuance of a default for ninety days the seller had a right to exercise three options. The seller could accelerate and foreclose; or enter, take possession, and forfeit the buyer's interest; or take advantage of any other remedy provided by law. All remedies were cumulative.

[1] It can be seen that the provisions of the contract, designed to terminate contractual relations, are not self-executing. They require some affirmative act on the part of the seller. Therefore, the contractual relations between seller and buyer are in existence until such time as the seller chooses to notify the defaulting buyer of its election to proceed under one, or all, of its options. In so doing, seller must give the defaulting buyer a reasonable time within which to cure the default. Without this notice the defaulting buyer would not know what to do. He would not have certain knowledge his tenancy was at an end. He could assume that the seller may have waived default, or would elect to enforce the contract rather than forfeit it; or he could assume he would be permitted to perform.¹

At trial the matter of *Lamont v. Evjen*² was cited and considerable reliance placed on the holding in that matter. However,

1. *Leone et al. v. Zuniga et al.*, 84 Utah 417, 34 P.2d 699 (1935).

2. 29 Utah 2d 266, 508 P.2d 532 (1973).

that case dealt with a Uniform Real Estate Contract, a contract which contains provisions significantly different from those in the contract before us.

[2,3] Here plaintiff made a tender of all sums due under the contract, prior to the exercise of any option by the seller. Seller challenges this tender on the ground it did not meet the requirements of a "present physical offer." The court found a "present physical offer" to pay was refused by seller, and buyer did the next best thing, viz. place on deposit to seller's order a cashier's check, in the total amount due under the contract. After defendant's refusal, it would have been fruitless for the buyer to have included a cashier's check in the letter sent to the seller informing her the money was available. Where the unreasonable conduct of the obligee would make an actual tender a fruitless gesture, an offer to comply with the terms of the contract by the obligor is sufficient.³

[4] After trial there were some objections to the amount of the tender and the place of delivery. There is nothing in the record to indicate that these objections to the tender were made at the time the tender was made. Our law is that the person to whom a tender is made must, at the time, specify the objections to it, or they are waived.⁴

HENRIOD, C. J., and ELLETT, CROCKETT and TUCKETT, JJ., concur.

3. *Romero v. Schmidt*, 15 Utah 2d 300, 302 P.2d 37 (1964).

4. 78-27-3, U.C.A.1953; 74 Am.Jur.2d, Tender, Sec. 10.

The foregoing is consistent with cases of other jurisdictions which hold that a true lease can only be negated where there is an *explicit obligation* on the part of the lessee to pay an amount substantially equal to the purchase price.⁸ In the instant case, both parties had the right to cancel the lease at any time after June 30, 1978. The lease provided that the lease would run "for a minimum period of six months and thereafter until the equipment is returned or until lessor terminates the lease." After the initial period, the lease therefore became a month-to-month rental.

[1,2] The trial court interpreted the lease provision (quoted *supra*) as meaning that the lessor could terminate the lease only "according to the terms and provisions hereinafter stated," i. e., for cause. It is our considered opinion⁹ that said phrase refers not to the right of termination by the lessor but to the agreement itself—to wit, "Arnold Machinery . . . hereby leases to Utah Excavating . . . the equipment hereinafter described, according to the terms and provisions hereinafter stated . . ." Any other interpretation of the disputed phrase would render the lease perpetual in duration, which was clearly not intended by the parties.

In light of the foregoing, we conclude that the lease was not intended as a security interest and that plaintiff is entitled to recover the unpaid rentals. The lower court's judgment is reversed and the case is remanded for further proceedings consistent with this opinion. Costs to plaintiff.

STEWART, HOWE, and CROCKETT,*
JJ., and MAURICE HARDING, Retired
District Judge, concur.

MAUGHAN, C. J., does not participate
herein; HARDING, District Judge, sat.

8. See Bender's Uniform Commercial Code Service, Secured Transactions, Volume 1, § 4A.06[9][d], and cases cited therein.

9. In reviewing the interpretation of a written document, we need not defer to the views of

Melville L. MORRIS, Plaintiff
and Respondent,

v.

Dwane J. SYKES and Patricia Sykes,
Defendants and Appellants.

No. 16838.

Supreme Court of Utah.

Jan. 21, 1981.

Purchaser sued for specific performance of a contract to purchase undeveloped land in Alaska by compelling vendors to accept balance thereon or, in alternative, to relieve purchaser from unjust and inequitable forfeiture of amount he had paid on contract. The Fourth District Court, Utah County, J. Robert Bullock, J., found against purchaser on issue of requiring defendants to convey property, but decreed an equitable reimbursement to purchaser. Vendors appealed. The Supreme Court, Crockett, J., held that: (1) in view of fact that parties were negotiating a reinstatement of contract up to time of unilateral termination by vendors, fairness would require definite notice to purchaser that he must pay up or forfeit payments he had made and his rights under contract, and of vendors' intention to sell property to someone else, and (2) trial court did not abuse its discretion in finding for vendors but decreeing equitable reimbursement.

Affirmed.

Hall, J., filed concurring statement.

1. Contracts ⇐ 325

Where a contract is entered into and is to be performed in a foreign jurisdiction,

the trial court. *Ephraim Theater Company v. Hawk*, 7 Utah 2d 163, 321 P.2d 221 (1958).

* CROCKETT, Justice, concurred in this case before his retirement.

law of such jurisdiction should be applied, particularly when contract deals with land in such jurisdiction.

2. Contracts ⇌ 325

Matters of procedure in a contract action are governed by law of forum.

3. Vendor and Purchaser ⇌ 2

Where, in action for specific performance of contract for sale of realty, there was no significant difference between law of Alaska, which was situs of property, and law of Utah in regard to enforceability of contract and forfeiture clause therein, court could properly apply Utah law in absence of any affirmative showing that law of Alaska was different.

4. Damages ⇌ 81

Where parties to a land-sale contract stipulate to a forfeiture and liquidated damages, such stipulation will generally be enforceable.

5. Damages ⇌ 81

Where a forfeiture under literal terms of a contract results in awarding to a party a sum so entirely disproportionate to any damages he may have suffered that it shocks the conscience of the court, a court of equity will neither approve nor enforce such a penalty.

6. Vendor and Purchaser ⇌ 101

In view of fact that parties to contract for sale of realty were negotiating a reinstatement up to time of unilateral termination of contract by vendors, fairness would require definite notice to purchaser in default that he must pay up or forfeit payments he had made and his rights under contract, and of vendors' intention to sell property to someone else.

7. Appeal and Error ⇌ 949

Specific Performance ⇌ 1, 8

Specific performance is a remedy of equity which is addressed to sense of justice and good conscience of court, and, accordingly, considerable latitude of discretion is allowed in court's determination as to whether it shall be granted and what judg-

ment should be entered in respect thereto; court's ruling thereon should not be upset on appeal unless it clearly appears that court has abused its discretion.

8. Specific Performance ⇌ 127(1)

In action for specific performance of contract for sale of realty, trial court did not abuse its discretion in finding against purchaser on issue of requiring vendors to convey property but as a part of judgment decreeing an equitable reimbursement to purchaser.

M. Dayle Jeffs of Jeffs & Jeffs, Provo, for defendants and appellants.

A. H. Boyce, Salt Lake City, for plaintiff and respondent.

CROCKETT, Justice: *

Plaintiff Morris sued for specific performance of a contract to purchase some undeveloped land in Alaska by compelling defendants Sykes to accept the balance thereon and convey the land to the plaintiff, or in the alternative, to relieve the plaintiff from an unjust and inequitable forfeiture of the \$23,216 plaintiff had paid on the contract. Upon a trial to the court, it found against the plaintiff on the issue of requiring defendants to convey the property to the plaintiff, but as a part of that judgment permitting the defendants to keep their property, the court decreed an equitable reimbursement of \$14,121 to the plaintiff. Defendant appeals.

On October 3, 1974, the plaintiff entered into a contract to purchase from the defendant a vacant parcel of land of approximately 27 acres known as Tract B of the Musk Ox Subdivision, located near Fairbanks, Alaska. The purchase price was \$40,000, to be paid \$2,000 down, with monthly payments of \$350 beginning December 1, 1974. The contract further provided that plaintiff was to pay \$1,000 on November 1, 1974, \$5,000 on February 1, 1975, \$5,000 on August 1, 1975, and \$3,000 on each succeeding February 1 and August

* Justice Crockett wrote this opinion prior to his retirement.

1 until November 1, 1979, when the contract balance was to be paid in full. The rate of interest on the unpaid balance was ten percent.

The payments were to be made to the First National Bank of Fairbanks, Alaska, the same bank which held a trust deed on the property previously executed by the defendant. The bank was instructed by the parties that all money received from plaintiff on the contract was to be applied on the debt.

Plaintiff made the down payment, but the monthly and periodic payments were made sporadically, and in amounts different than called for by the contract. As a result, plaintiff was continually in default under the contract. The defendant sent written notices to the plaintiff advising him that as of January 1, 1976, he would be five months delinquent in the sum of \$1,750. These communications further advised the plaintiff that defendant was depending on the payments to meet his obligations to the First National Bank of Fairbanks on the underlying mortgage.

During December, 1975, defendant offered to sell plaintiff two additional parcels in the Musk Ox Subdivision. These negotiations, however, were not fruitful.

The defendant continued to accept late and partial payments on the contract and between the date of purchase and by August 2, 1976, plaintiff had made payments totaling \$23,216, \$3,507 interest to August 2, 1976, and \$19,709 principal. On September 2, 1976, offered to prepay the remaining principal if defendant would give him a "good discount" for so doing. Defendant refused and on November 11, 1976, pursuant to the terms of the contract, defendant caused a notice of termination to be issued and served upon the plaintiff. Defendant then recorded the quitclaim deed from plaintiff to defendant and retained all payments made by the plaintiff. Various offers of reinstatement were made by defendant to plaintiff but these offers were refused by plaintiff because they were conditioned on plaintiff's purchase of additional

property and the payment of a reinstatement fee.

On February 9, 1977, the bank informed the defendant that unless he paid the \$3,318 delinquency on the underlying mortgage within 30 days, the entire unpaid balance on the mortgage would be declared due. Thereafter, on February 15, 1977, the defendant entered into a contract for the sale of the property to Johnny M. Iverson, his brother-in-law, for \$20,663, approximately the amount defendant would have received had plaintiff performed on the contract. Plaintiff was not given any advance notice of the defendant's plan to sell the property to Iverson. The parties are in agreement that at that time it would have been quite impractical to sell the property on the market because it was under heavy snows and therefore inaccessible.

Upon its analysis of the total situation, it was the judgment of the trial court that the plaintiff should not be granted specific performance, but nevertheless, that to permit the defendant to retain the entire \$23,216 which plaintiff had paid would constitute a forfeiture so unconscionable that the court could not approve it; and therefore ordered the defendant to return \$14,121 as a condition to exonerating himself and his property from plaintiff's claim.

On appeal, the defendant urges enforcement of the forfeiture provision of the contract and seeks reversal of the judgment on the grounds that the trial court: 1) misapplied the Alaska law on forfeiture and damages, 2) wrongfully held that there was an unconscionable forfeiture which the court would not enforce, 3) erroneously ruled that the plaintiff should have been given definite notice, and opportunity to remedy any defaults, before the sale to Iverson.

[1-3] Defendant's argument that the trial court misapplied the law of Alaska in regard to forfeitures gives us no grave concern here. We have no disagreement with the proposition that where a contract is entered into and is to be performed in a foreign jurisdiction the law of that jurisdic-

tion should be applied;¹ and this is particularly so when the contract deals with land in that jurisdiction.² Therefore, it is our duty to apply the substantive law of Alaska to this controversy.³ However, as correctly stated by the trial court, we see no significant difference between the law of Alaska and our own in regard to the enforceability of such a contract and the forfeiture clause therein. Under such circumstances, the court may properly apply Utah law in the absence of an affirmative showing that the law of Alaska is different.⁴

[4, 5] Defendant's attack upon the requirement that he repay \$14,121 of the \$23,216 which plaintiff had paid him is premised upon a forfeiture provision that upon the buyer's default the seller may retain all amounts paid on the contract and terminate plaintiff's interest in the property. It is true that where the parties to a contract stipulate to a forfeiture and liquidated damages, such stipulation will generally be enforceable.⁵ It is, however, well established in Utah,⁶ as well as Alaska,⁷ that where a forfeiture under the literal terms of a contract results in awarding to a party a sum so entirely disproportionate to any damages he may have suffered that it shocks the conscience of the court, a court of equity will neither approve nor enforce such a penalty.

[6] Defendant's final contention is that the court erroneously ruled that he should have given more definite notice of his intent to forfeit the contract, and of his intended sale to Iverson. The decision of the trial court indicates that he was not convinced that the defendant gave plaintiff definite notice that he must pay up, or

forfeit the payments he had made and his rights under the contract. We agree with the trial judge that fairness would require such a notice, and of the defendant's intention to sell the property to someone else. He noted that the parties were negotiating a reinstatement up to the time of the unilateral termination of the contract by the defendant.

[7, 8] Specific performance is a remedy of equity which is addressed to the sense of justice and good conscience of the court, and accordingly, considerable latitude of discretion is allowed in his determination as to whether it shall be granted and what judgment should be entered in respect thereto; and his ruling thereon should not be upset on appeal unless it clearly appears that he has abused his discretion,⁸ a circumstance we have not perceived as being present here.

Affirmed. No costs awarded.

STEWART, J., and HENRIOD, Retired Justice, concur.

MAUGHAN, C. J., does not participate herein; HENRIOD, Retired Justice, sat.

WILKINS, J., heard the arguments but resigned before the opinion was filed.

HALL, Justice (concurring):

My review of the record does not disclose the evidence, if any there was, of actual damage which the trial court weighed in reaching its determination that enforcement of the liquidated damage provision of

1. See, e. g., *Aetna Casualty & Surety Co. of Hartford, Conn. v. Gentry*, 191 Okl. 659, 132 P.2d 326 (1942); *Catchpole v. Narramore*, 102 Ariz. 248, 428 P.2d 105 (1967).

2. *Conant v. Deep Creek & Curlew Valley Irr. Co.*, 23 Utah 627, 66 P. 188 (1901).

3. Matters of procedure in a contract action are, of course, governed by the law of the forum. See, e. g., *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964).

4. See *Booth v. Crompton*, Utah, 583 P.2d 82 (1978), and cases cited therein.

5. See *Perkins v. Spencer*, 121 Utah 468, 243 P.2d 446, 449 (1952), and cases cited therein.

6. See, e. g., *Jacobson v. Swan*, 3 Utah 2d 59, 278 P.2d 294 (1954).

7. See, e. g., *Moran v. Holman*, Alaska, 501 P.2d 769 (1972).

8. *Ferris v. Jennings*, Utah, 595 P.2d 857 (1979), and cases cited therein.

the contract would be unconscionable.¹ Nevertheless, the issue was not raised below, nor on this appeal. Consequently, I concur in affirming the judgment.



Clarice DUPUIS (Heater), Plaintiff and
Appellant and Cross-Respondent,

v.

Edwin Cyril NIELSON, Defendant and
Respondent and Cross-Appellant.

No. 16865.

Supreme Court of Utah.

Jan. 21, 1981.

Driver of car, upon recovery against driver of pickup in personal injury action based on automobile accident, filed motion for additur or new trial based on inadequate damages. The Third District Court, Salt Lake County, Ernest F. Baldwin, Jr., J., denied motion, and driver of car appealed. Pickup driver cross-appealed claiming right of setoff. The Supreme Court, Stewart, J., held that: (1) evidence did not compel finding that reasonable persons would have reached different measure of damages which would have enabled court to grant motion for additur, and (2) pickup driver was not entitled to reduction of car driver's award of general damages to offset no-fault insurance payment for household service benefits.

Affirmed.

1. New Trial ⇌ 161(1)

When damages are not so inadequate as to indicate disregard of evidence by jury, court is not empowered to entertain motion for additur. Rules of Civil Procedure, Rule 59.

1. See *Perkins v. Spencer*, 121 Utah 468, 243 P.2d 446 (1952).

2. New Trial ⇌ 161(1)

Evidence, in personal injury action arising from automobile accident, including evidence that injured party was under stress for reasons unrelated to accident, did not compel finding that reasonable persons would have reached different measure of damages such as would empower court to entertain motion for additur. Rules of Civil Procedure, Rule 59.

3. Automobiles ⇌ 251.12

Basic principle of No-Fault Act is to prevent double recovery by no-fault insured. U.C.A.1953, 31-41-1 et seq.

4. Automobiles ⇌ 251.17

Where jury award to car driver in personal injury action based on automobile accident did not include award for household service benefits, pickup driver involved in accident was not entitled to reduction of car driver's award of general damages to offset no-fault insurance payments made for household service benefits. U.C.A.1953, 31-41-11.

Samuel King and James E. Hawkes, Salt Lake City, for plaintiff and appellant and cross-respondent.

Frank N. Karras, Salt Lake City, for defendant and respondent and cross-appellant.

STEWART, Justice:

Plaintiff, upon recovering against defendant in a personal injury action, filed a motion for an additur or new trial based on inadequate damages. It is from the lower court's denial of that motion that plaintiff herein appeals.

The accident in which the alleged damages were sustained occurred when defendant was driving his pick-up truck and struck the rear of plaintiff's car which had stopped at an intersection for a red light. A directed verdict on the issue of liability was entered in favor of plaintiff at the conclusion of all evidence.

Robert E. CALL, Everett H. Call and
Ann D. Call, Plaintiffs and
Respondents,

v.

TIMBER LAKES CORPORATION,
Defendant and Appellant.

No. 14839.

Supreme Court of Utah.

July 29, 1977.

Suit was brought by purchaser for a declaratory judgment to determine validity of written contract for sale of three mountain lots calling for down payment and monthly payments. The Fourth District Court, Wasatch County, J. Robert Bullock, J., entered decree holding contract to be valid and in full force and the vendor appealed. The Supreme Court, Ellett, C. J., held that notwithstanding delinquency in payment under contract allowing vendor to declare all sums previously paid forfeited, trial court did not abuse its discretion in reinstating contract upon purchaser's tender of all delinquent payments under contract plus accrued interests and costs within 15 days.

Affirmed.

Vendor and Purchaser ⇌ 185

Although contract for sale of mountain lots stated that time was of the essence and that upon any default vendor could at its option terminate all rights and retain all moneys previously paid, where purchaser had made a total payment of \$3,181.07 toward the purchase of lots, the ten days specified in vendor's letter by which contract was to be brought current was not a reasonable time and 22 days was not an unreasonable time for purchaser to tender performance after notice, and there was no abuse of discretion to provide that upon purchaser's tender of all delinquent payments plus accrued interest and costs within 15 days contract would be reinstated.

John S. Adams of Adams, Kasting & Anderson, Salt Lake City, for defendant-appellant.

Russell C. Harris, Salt Lake City, for plaintiffs-respondents.

ELLETT, Chief Justice:

This is a suit for declaratory judgment to determine the validity of a written contract, for the sale of real property, dated November 6, 1971. The respondents, hereafter referred to as "Calls," were the purchasers and the appellant was the seller. The trial court held the contract to be valid and in full force and effect. This appeal is from that ruling.

The contract provided for a down payment of \$1,000 and the balance to be paid at the rate of \$155.89 per month. The Calls made numerous late payments and missed several but were permitted to make up the missed payments.

On or about December 12, 1974, Timber Lakes notified Calls in writing that they were in arrears in their payments in the amount of \$1,558.90 and unless the same was paid by December 22, 1974, the contract would be terminated. The contract provided as follows:

Time is of the essence of this contract, and should the BUYER fail or make default in any of the payments to be made hereunder, or fail to comply with each and all of the covenants, conditions and restrictions herein described, then, at the option of the Seller, the whole sum of the purchase price of said lots and all interest thereon remaining unpaid shall immediately become due and payable to the Seller, or the SELLER may, at its option, terminate all of the rights and privileges of the BUYER hereunder, and all monies therefor paid shall be retained by the SELLER and no part of such money shall be repaid to the BUYER. [Emphasis added.]

The evidence is in dispute regarding the efforts made to make the payments as demanded; but the court could find from the testimony given: (1) that the Calls contact-

ed Timber Lakes and were informed that if they brought the delinquent interest up-to-date, amounting to over \$600, by January 3, 1975, the contract would not be forfeited; (2) Calls took the check made out for the delinquent interest to appellant's office, but instead of tendering it, they offered a check for the entire amount of the arrearage demanded in the notice, to wit: \$1,558.90; (3) that the check was refused and demand made for payment of the contract in full in the amount of some \$7,400 plus \$1,800 for a water hookup; (4) that there was no agreement to have a water hookup included in the contract.

In its brief, Timber Lakes admits that in addition to the down payment, the Calls also made monthly payments totaling \$2,181.07. This makes a total of \$3,181.07 paid towards the purchase of three mountain lots fit only for camping out or for building a cabin. There was no income from the ownership of the lots. The original contract price for the lots was \$10,000 plus a finance charge of \$4,095.

This Court has had occasion to consider the question of forfeiture provisions in real estate contracts, and as to such provisions we held in *Jacobson v. Swan*:¹

The parties have a right to so contract and such right should not be lightly interfered with. It is only when the forfeiture would be so grossly excessive as to be entirely disproportionate to any possible loss that might have been contemplated, so that to enforce it would shock the conscience, that a court of equity will refuse to enforce the provision. When the trial judge has made such determination, we will regard it as prima facie correct and will not disturb it unless it is plainly erroneous.

It is now established in this state that where a forfeiture provision allows an unconscionable and exorbitant benefit to be retained by the seller which bears no relationship to the damages which have been sustained or reasonably could have been contemplated, it provides

for a penalty or punitive damages which courts of equity will not enforce.

After a full hearing of the matter, the trial court found the following:

On January 3, 1975 plaintiff offered to then bring the contract current by paying all delinquent payments and accumulated interest, and were ready and able to do so, but such offer was refused by defendant.

By accepting different amounts and at different times than called for by the contract and permitting a delinquency to exist for several months, plaintiff waived strict performance of the contract.

Under all of the circumstances, the ten days specified in the letter of December 12, 1974 on which the contract was to be brought current was not a reasonable time, and twenty-two days was not an unreasonable time for defendant to tender performance after notice.

The court ruled that upon tender to the appellant of all delinquent payments under the contract, plus accrued interest and costs, within fifteen days from the date of the judgment, "the contract will be and is ordered reinstated."

We see no abuse of discretion or error in the ruling made and, therefore, we affirm the judgment. Costs are awarded to the respondents on this appeal.

CROCKETT, MAUGHAN, WILKINS
and HALL, JJ., concur.



1. 3 Utah 2d 59, 65, 278 P.2d 294 (1954).

to the child Lonnie, but at the same time she is not able to forecast for me that a change in custody would necessarily be beneficial to that child.

I therefore conclude and hold that the best interests of the children require me to indulge in the statutory presumption that children of young years are best off in their mother's care, and the Petition to Change Custody is denied.

Counsel for Mr. S. takes a personal, philosophical and asserted moral exception to two cases decided by this Court,—both by unanimous opinions. These are *Stuber v. Stuber*¹ and *Dearden v. Dearden*,²—wherein the authors' bona fides are not at all challenged,—but where it is suggested that there is such a person as an attentive, affectionate, fit and proper mother who nonetheless might have done something that comes naturally, but perhaps without established legal sanction, but possibly born of some kind of explainable emotion or influence or maybe even economics,—or other reason about which an irate ex-husband, or a child psychologist, or even a priest or a lawyer might express some kind of compunction.

We are not unmindful of the apparent sincerity of counsel's negative appraisal of the *Stuber* and *Dearden* cases, nor his criticism of about 17 District Judges on the Wasatch Front,—comprising four counties out of 29, in which such judges serve about 80 per cent of the people in Utah, when he volunteers the following gratuity which we consider to be an inaccurate appraisal and condemnation of those robed gentlemen:

The preoccupation of this trial court, and indeed all other trial courts, along the Wasatch Front, with the principles enunciated in *Stuber v. Stuber*, supra, and *Dearden v. Dearden*, supra, is extremely unfortunate,—which commentary now may include the decision here,—with which quotation others,

1. 121 Utah 632, 244 P.2d 650 (1962).

including us, may exercise a prerogative to disagree.

CALLISTER, C. J. and ELLETT, CROCKETT, and TUCI, JJ., concur.



29 Utah 2d 266

James H. LAMONT and Lotte Lamont, his wife, Plaintiffs and Appellants,

v.

Ivar Th. EVJEN and Aslaugh S. Evjen, his wife, Defendants and Respondents.

No. 13077.

Supreme Court of Utah.

April 5, 1973.

Action by vendors to foreclose a uniform real estate contract. The Third District Court, Salt Lake County, Gordon R. Hall, J., entered judgment for purchasers and vendors appealed. The Supreme Court, Ellett, J., held that where purchasers, who had missed payments on uniform real estate contract, were advised by letter from vendors on March 6, 1972, that all past due payments should be made current and on April 3, 1972, purchasers received letter stating that vendors were electing to treat contract as note and mortgage and foreclose the same and on April 3, 1972, purchasers tendered all past due installments to vendors, purchasers were not given reasonable time in which to make good the delinquent installment.

Affirmed.

1. Vendor and Purchaser ⇄ 185

Before seller of land under a uniform real estate contract can exercise any of the options given him because of failure on part of purchaser to pay an installment as promised, he must give the purchaser no-

2. 15 Utah 2d 105, 388 P.2d 230 (1964).

tice of the default and a reasonable time in which to bring the contract current.

2. Vendor and Purchaser — 299(2)

Where purchasers, who had missed payments on uniform real estate contract, were advised by letter from vendors on March 6, 1972, that all past due payments should be made current and on April 3, 1972, purchasers received letter stating that vendors were electing to treat contract as note and mortgage and foreclose the same and on April 3, 1972, purchasers tendered all past due installments to vendors, purchasers were not given reasonable time in which to make good the delinquent installment.

Morgan, Scalley, Lunt & Kesler, Grant S. Kesler, Robert S. Howell, Salt Lake City, for plaintiffs and appellants.

James A. McIntyre, Salt Lake City, for defendants and respondents.

ELLETT, Justice:

This is an appeal from a judgment rendered in favor of the defendants in an action to foreclose a uniform real estate contract by treating it as a mortgage pursuant to paragraph 16(c), which reads:

In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within thirty days thereafter, the Seller, at his option shall have the following alternative remedies:

A. . . .

B. . . .

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, . . .

The contract was signed February 15, 1960, and defendants made regular payments of \$110.00 per month to the First Federal Savings & Loan Association as collecting agent for the plaintiffs, the sellers. The payment for December, 1970, was not made until January 4, 1971, and thereafter the defendants as buyers made regular monthly payments. Neither the First Federal Savings, the sellers (plaintiffs), nor the buyers (defendants) knew a payment had been missed for over one year. On February 2, 1972, the chief accountant of the collecting agency wrote a letter to the defendants stating that the payment for December, 1970, had been missed and that all payments subsequent thereto were made late. The letter requested the defendants "to please see if you cannot arrange to bring your contract payments up to date."

Under date of February 29, 1972, the lawyer for the plaintiffs wrote a letter which was delivered to the defendants March 6, 1972. The letter contained the following language:

. . . [I]t is necessary at this time that you bring all past due payments current and begin making payments on the first of each month when they are due. No further periods of delinquency [sic] will be tolerated.

On March 31, 1972, the plaintiffs mailed a certified letter to the defendants stating that they were electing to treat the uniform real estate contract "as a note and mortgage and foreclose upon the same immediately, the entire unpaid balance becoming due and payable." In their briefs both counsel state that this letter was received for by the defendants April 3, 1972.

On April 3, 1972, the defendants tendered all past due installments to the plaintiffs. The evidence does not show whether the tender was made before or after the receipt of the letter by the defendants.

The trial court found as a fact:

1. . . .

2. . . .

3. Plaintiffs had never given defendants notice that a payment had been missed in December of 1970.

And then concluded as a matter of law:

1. Plaintiffs' failure to notify defendants of their default constitutes a material omission in the facts necessary to establish plaintiffs' claims and defendants are entitled to an Order of Dismissal.

In the case of *Romero v. Schmidt*¹ the question of the effect of a tender upon the right of a plaintiff to foreclose pursuant to the option in a uniform real estate contract was before this court. We there held that a valid tender prevented the plaintiff from foreclosing on the contract as a note and mortgage. See *Home Owners' Loan Corporation v. Washington*, 108 Utah 469, 161 P.2d 355 (1945); also see 52 Am.Jur., Tender, § 41.

[1] Before a seller of land under a uniform real estate contract can exercise any of the options given him because of a failure on the part of the purchaser to pay an installment as promised, he must give the purchaser notice of the default and a reasonable time in which to bring the contract current. The reason for the rule is set forth in 52 Am.Jur., Tender, § 41, as follows:

. . . This is so because the debt does not become due on the mere default in payment, but by affirmative action by which the creditor makes it known to the debtor that he intends to declare the whole debt due. The creditor is entitled to a reasonable time after default in which to exercise the option, but the option itself does not outlive the default. Such acceleration stipulations should be so construed, if possible and consistent with the language employed, as to give the protection intended thereby to both the debtor and the creditor. . . .

The rule is especially applicable in cases like the instant one where the default was overlooked by all parties for some fifteen months.

[2] It appears that the plaintiffs failed to establish that they gave notice to the defendants of their election to treat the contract as a note and mortgage prior to a full tender of the amount due. Besides, the defendants were not given a reasonable time in which to make good the delinquent installment.

The judgment of the trial court is affirmed. Costs are awarded to the respondents.

CALLISTER, C. J., and CROCKETT, HENRIOD and TUCKETT, JJ., concur.



29 Utah 2d 269

The STATE of Utah, Plaintiff and Respondent,

v.

Tino BIII TORRES, Defendant and Appellant.

No. 13036.

Supreme Court of Utah.

March 28, 1973.

Defendant was convicted in the Third District Court, Salt Lake County, Joseph G. Jeppson, J., of robbery and he appealed. The Supreme Court, Crockett, J., held that police officer who received radio report that young man had robbed service station and had run away from service station in northwesterly direction acted lawfully in stopping car occupied by two young men at intersection three blocks northwest of robbery scene about ten minutes after robbery.

Affirmed.

Arrest ⇐63.1

Police officer who received radio report that young man had robbed service station and had run away from service sta-

1. 15 Utah 2d 300, 392 P.2d 37 (1964).

ary. Stanley's present wife, Constance Johnson, also occupies a seat on the board of directors, though she personally does not own any shares in the corporation. The complaint alleges that she knew of and acquiesced in the unauthorized appropriations by Stanley Johnson. As Stanley's wife, Constance would stand to benefit by any misappropriations by her husband. It is doubtful that she would vigorously pursue any action on behalf of the corporation to seek reimbursement for the unauthorized payments. Finally, Sophie Weiner, who owns over 10 percent of the corporation, is the remaining director on the board. Ms. Weiner, along with Stanley Johnson, is an officer of another corporation which allegedly has been allowed to use Steel Inc.'s equipment and property without having to pay for that use. It is apparent that Ms. Weiner's business relationships with Mr. Johnson and the competing corporation would prevent her from fairly pursuing an action on behalf of the minority shareholders.

[7] Since a quorum of disinterested directors or shareholders cannot be assembled to appraise the merits of Joyce Johnson's claims, notice upon the board of directors would be a futile and ritualistic act. The district court's granting of a motion to dismiss for failure to make such a demand was therefore in error. Accordingly, the district court's order is reversed and the matter remanded with leave being granted to Johnson to amend her complaint if she so wishes.

MANOUKIAN, C.J., SPRINGER and GUNDERSON, JJ., and FONDI,³ District Judge, concur.



3. The Governor designated the Honorable Michael E. Fondi, Judge of the First Judicial Dis-

UDEYCO, INC., a California corporation; John Long; Long Construction Company; Dale Poe Development Corporation, a Nevada corporation, Appellants and Cross-Respondents.

v.

Rocky WAGNER, d/b/a Rocky Wagner Excavating, Respondent,

and

Joe Wosser, d/b/a Wosserlaster Enterprises, Respondent and Cross-Appellant.

No. 14495.

Supreme Court of Nevada.

March 29, 1984.

Subcontractors brought actions on contract and equitable theories against developer and others to recover on perfected liens. The Second Judicial District Court, Washoe County, Roy L. Torvinen, J., entered judgments in favor of subcontractors but denied one subcontractor's asserted right to recover for extracontractual work performed, and appeal and cross appeal were taken. The Supreme Court held that: (1) findings that subcontractor's rough grading duties did not include drainage swale construction, cost of which developer and others sought to offset against amount owing subcontractor, and that other subcontractor's billings for siding and trim work were correct were supported by substantial evidence; (2) whether developer made payments for extra work was not controlling of whether it waived contractual written change order requirement; and (3) parties mutually intended to waive written change order condition.

Affirmed in part, reversed in part and remanded.

trict Court, to sit in the place of the Honorable John Mowbray. Nev. Const., art. 6 § 4.

1. Mechanics' Liens \S 281(1)

In multiparty action to enforce perfected liens under construction contract, findings that one subcontractor's rough grading duty did not include drainage swale construction, cost of which developer and others sought to offset against amount owing subcontractor, and that second subcontractor's billings for siding and trim work were correct were supported by substantial evidence.

2. Contracts \S 316(1)

Waiver of contractual right can be implied from conduct such as making payments or accepting performance which does not meet contract requirements and can also be expressed verbally or in writing.

3. Contracts \S 316(6)

Express waiver, when supported by reliance thereon, excuses nonperformance of waived contractual condition.

4. Contracts \S 232(4)

Whether developer made payments for extra work was not solely controlling of whether it waived contractual requirement of written change order for extra work.

5. Contracts \S 232(4)

Where developer made express oral waiver of contractual written change order requirement for extra work and subcontractor performed extra work in reliance thereon, parties mutually intended to waive written change order condition and subcontractor was entitled to recover for extra work performed.

Hoy & Miller, McDonald & Kafchinski, Reno, Stephen L. Rishoff, Wooland Hills, Cal., for appellants and cross-respondents.

Robison, Lyle, Belaustegui & Robb, and Bruce T. Beesley, Hale, Lane, Peek, Dennison & Howard, and Richard L. Elmore, Reno, for respondents and cross-appellant.

OPINION**PER CURIAM:**

Two subcontractors, who brought actions under contract and equitable theories against a developer and others to recover on their perfected liens, received favorable judgments in district court. The developer and the others against whom judgments were entered, now appeal. One subcontractor also cross-appeals from the district court's denial of his asserted right to recover for extra-contractual work performed. For the reasons set forth hereinafter, we affirm the judgments in favor of the subcontractors and reverse the order denying relief to cross-appellant for the performance of work unspecified in the subcontractor's contract.

The facts as they pertain to each subcontractor are as follows:

Wagner: Rocky Wagner Excavating (Wagner) entered into a written agreement with Udevco and John Long to perform specific rough grading work on the appellants' condominium project. Common area grading, drainage swale construction and finish grading were not a part of the parties' agreement, according to the contract, testimony and the district court's findings of fact. The agreement provided that extra-contractual work would require a written change order. While performing his contract work, Wagner also performed "extra work" without obtaining a written change order, for which he was paid by Udevco. Wagner's last invoice, totalling \$6,777.33 for contract and "extra work," was not paid by Udevco. Wagner recorded and perfected a lien. The district court found that the parties, by their past practices, had waived the written change order provision and that \$6,777.33 was the reasonable value of the work performed. As a result, the district court entered judgment for Wagner and awarded him \$6,777.33 plus interest at 12% from the date the invoice was due, costs and attorney's fees, according to NRS 108.237. Appellants appeal from that judgment.

Wosser: Wosser-Laster Enterprises (Wosser) entered into a second written agreement with Udevco and John Long to perform framing work, as well as future siding and trim work, if required, on a cost basis. The agreement, which settled differences relating to a prior contract, provided that extra-contractual work would require a written change order. Wosser did perform and bill Udevco for siding and trim work which was completed after the date of the second agreement. After it was discovered that Wosser also had billed for some siding and trim work completed before the second contract date, Wosser's next invoice contained a credit for the inadvertent billing.

Wosser also performed "extra work" related to the framing duties. Due to an error in the appellants' plans and specifications, the prefabricated roof trusses did not fit. Wosser, as a result, had to cut and stack the roofs to complete the framing. Wosser additionally was told to perform "extra work," such as dropping ceilings to meet cabinet tops and "furring down" (framing in gaps above) door openings, because materials received such as cabinets and doors did not match the plans and specifications. Wosser also altered completed framing because appellants requested subsequent design changes. Wosser did not obtain written change orders for this "extra work," although Joe Wosser was told by Udevco's superintendent to go ahead with the work and was assured he would be paid for it. Wosser sent Udevco invoices totalling \$13,195.00 for "extra work" on three occasions. Udevco never made any payments for the extra work performed by Wosser after the date of the second agreement. Udevco also refused to pay for certain framing, siding and trim work valued at \$11,976.75.

Wosser recorded and perfected a lien and brought an action against appellants as an intervenor in Wagner's case. The district court found that, because Udevco had never paid Wosser for extra work performed without a written change order, appellants had not waived that contract requirement. As a result, the district court entered judg-

ment compensating Wosser only for the framing, siding and trim work, and awarded him \$11,976.75 plus interest at 12% from the date the invoices were due, costs and attorney's fees. Appellants appeal from that judgment. Wosser cross-appeals the district court's denial of any recovery for the extra work performed.

[1] Appellants contend that the facts do not support the trial court's awards in favor of respondents. As concerning Wagner, appellants primarily contend that industry standards define rough grading to include construction of drainage swales. Because Wagner did not perform such construction, appellants argue that they are entitled to offset against the award the amount spent to have other subcontractors do the work. As concerning Wosser, appellants contend that they are entitled to offset against the award the amount they were over-billed for siding and trim work completed before the parties' second agreement was signed. The district court heard these same arguments below and made findings of fact that: Wagner's duties did not include drainage swale construction; and, Wosser's billings for siding and trim work were correct. This Court's standard for review is set forth in *Pace v. Linton*, 97 Nev. 103, 625 P.2d 84 (1981).

Findings of fact shall not be set aside unless *clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. NRCP 52. Our task when reviewing the appropriateness of findings and judgments rendered by district courts is to "... determine whether there is substantial evidence in the record to support the findings and judgment of the district court."

Id. at 103-04, 625 P.2d at 85 (emphasis added and citations omitted). We conclude that the record reflects substantial evidence supporting the district court's findings of fact and judgments. We have considered appellants' other contentions and determined that they are without merit. In

this regard we affirm the judgment of the district court.

As cross-appellant, Wosser's sole contention is that the district court improperly denied any recovery from cross-respondents for extra work performed. It is undisputed that Wosser was required to cut and stack roofs because the prefabricated roof trusses would not fit the framing due to incorrect plans and specifications. Our review of the record also reveals that after framing was completed according to original plans and specifications, cross-respondents orally requested that Wosser make further alterations to accommodate subsequent design changes and incorrectly sized cabinets and doors. The extra work was necessary, properly performed, and accepted. The district court concluded as a matter of law that Wosser was not entitled to judgment for extra work, reasoning that Udevco did not waive its right to require written change orders because it did not pay for any such extra work after it had been performed without written authorization. We disagree.

[2-5] Waiver is usually defined as "the voluntary and intentional relinquishment of a known right" and may be either express or implied. 5 *Williston On Contracts* § 678 (3d ed. 1961). Waiver can be implied from conduct such as making payments for or accepting performance which does not meet contract requirements; waiver can also be expressed verbally or in writing. 17 *Am.Jur.2d Contracts* §§ 393, 396 (1964). Express waiver, when supported by reliance thereon, excuses nonperformance of the waived condition. 5 *Williston On Contracts* § 679 (3d ed. 1961); 17 *Am.Jur.2d Contracts* § 392 (1964); *Restatement (Second) of Contracts* § 84(1) (1981). Whether Udevco made payments or not for extra work, therefore, is not solely controlling of whether it waived the written change order requirement. Presenting evidence of such payments would have been merely one alternative for proving waiver, had those facts occurred. Wosser, instead, chose to

employ the instant facts to prove that express waiver and reliance occurred. After Udevco's express oral waiver and Wosser's reliance thereon, Udevco *at that time* was bound to pay for the extra work, regardless of whether it later failed to pay. Udevco apparently has not controverted the facts that express oral waiver was pronounced and extra work performed in reliance thereon.¹ We conclude, under these facts, as a matter of law, that the parties mutually intended to waive the written change order condition. Here, Wosser performed—*after* completing framing according to plans and specifications—extra work of such character and magnitude that the idea that the parties intended him to do so without additional compensation would be highly unreasonable. No witnesses testified for Udevco to controvert Wosser's testimony that \$13,195.00 represented the reasonable value of the extra work performed. The district court made no finding regarding such value. We therefore remand this case for a determination and judgment that \$13,195.00 represents the reasonable value of the extra work performed by Wosser, unless the district court finds that the evidence justifies a lower sum.

The district court judgments awarding respondents recovery for contractual work is hereby affirmed. The district court's judgment denying cross-appellant recovery for extra work is hereby reversed. This case is remanded for determination of the value of extra work performed by Wosser and judgment thereon consistent with this opinion.



1. Udevco's superintendent, Dick Claus, testified that "I don't recall [telling Wosser personnel to

perform extra work], but that doesn't necessarily mean I didn't say it. I mean, I don't recall."

ANGUS HUNT RANCH, INC., a Montana Corporation, and Charles L. Carlson and Jeanne H. Carlson, husband and wife, Appellants (Plaintiffs below),

v.

REB, INC., a Wyoming Corporation, and the First National Bank and Trust Company of Wyoming, a National Banking Association, Appellees (Defendants below).

No. 4843.

Supreme Court of Wyoming.

April 24, 1978.

After receiving notice by letter of vendor's election to declare a forfeiture under terms of contract for sale of land, purchasers instituted action for declaratory judgment asking court to make certain declarations with respect to contract and for injunction against bank as escrow agent. Vendor filed counterclaim for a declaration of forfeiture. The District Court, Laramie County, Vernon G. Bentley, J., granted vendor's motion to dismiss and sustained its counterclaim and instructed bank to deliver escrow papers to it. Purchasers appealed. The Supreme Court, Rose, J., held that: (1) presence of right of redemption provision, without further evidence of parties' intention and without any further indications arising from contract itself, was not sufficient, as matter of law, to convert installment land contract into equitable mortgage, and (2) vendor was entitled to declare a forfeiture on basis of breach of material condition of contract that purchasers agreed to maintain an accredited swine herd of not less than 170 sows and a total animal population of not less than 750 animals, inasmuch as there was no evidence that vendor had condoned animal reduction or had prior knowledge thereof.

Affirmed.

1. Trial ⇐ 384

Under federal weighing of evidence test, trial court in considering defendant's

motion to dismiss need not consider evidence in a light most favorable to plaintiff. Rules of Civil Procedure, rules 41(b), 52(a).

2. Trial ⇐ 384

If plaintiff has presented a prima facie case based on unimpeached evidence, trial judge should not grant defendant's motion to dismiss, even though he is trier of fact and may not himself feel at that point in trial that plaintiff has sustained his burden of proof; fact that applicable civil procedure rule was amended to follow federal rule requiring findings was no reason to depart from such prima facie test, since such test was more likely to achieve justice and reduce number of appeals resulting from application of rule. Rules of Civil Procedure, rules 41(b), 52(a).

3. Appeal and Error ⇐ 1177(8)

If properly raised, a remand may be required because of failure to comply with requirement in civil procedure rule governing motion to dismiss that trial court shall make findings if it renders judgment on merits against plaintiff. Rules of Civil Procedure, rules 41(b)(1), 52(a).

4. Appeal and Error ⇐ 927(3)

In determining if plaintiff presented a prima facie case based on unimpeached evidence which would have result that trial court erred in granting defendant's motion to dismiss, Supreme Court viewed evidence in a light most favorable to plaintiff, just as trial court should have done, and presumably did, in considering defendant's motion. Rules of Civil Procedure, rules 41(b), 52(a).

5. Mortgages ⇐ 27

In action arising out of vendor's attempted forfeiture and cancellation of a contract for sale of land, purchasers, in order to establish a prima facie case on their equitable mortgage theory, were required to show that parties intended transaction to be a mortgage, rather than an installment land contract, as construed from their written agreement and surrounding circumstances; there must have been an attempt to create a security or, in

other words, there must be proof that maker intended property to be held, given or transferred as security.

6. Mortgages ⇌ 32(1)

Vendor and Purchaser ⇌ 95(1)

While it may be conceded, *arguendo*, that a vendor may waive his right to declare an automatic forfeiture through conduct which had been characterized as acquiescence, it cannot be said that such acquiescence discloses an intention to treat transaction as creating a mortgage; primary effect of such conduct is to preclude vendor from exercising its right to forfeiture until purchaser is put on notice that future defaults will not be countenanced and strict compliance will be required.

7. Mortgages ⇌ 33(1), 39

Presence of right of redemption provision, without further evidence of parties' intention and without any further indications arising from contract itself, was not sufficient, as matter of law, to convert installment land contract into an equitable mortgage, inasmuch as, at most, such provision was a contingency placed in contract for purchasers' benefit, aimed at lessening harshness of a forfeiture; to provide for such a revivor possibility did not mean that purchasers were entitled to same or all the protections afforded by a mortgage.

8. Vendor and Purchaser ⇌ 104

In actions arising out of attempted forfeiture and cancellation of an installment land contract by vendor against purchaser, fact that purchaser fails to establish a *prima facie* case with respect to his equitable mortgage theory does not mean that, in appropriate cases, purchaser will not be entitled to equitable remedies, such as restitution.

9. Vendor and Purchaser ⇌ 95(1)

In order to establish a *prima facie* case of waiver, purchaser must show that vendor has condoned or assented to previous default and has not given notice of his intention to insist on strict compliance in future.

10. Vendor and Purchaser ⇌ 95(1)

Effect of vendor's conduct condoning or assenting to previous defaults and not giving notice of his intention to insist on strict compliance in future is not a waiver of such vendor's rights to declare a forfeiture for future defaults.

11. Vendor and Purchaser ⇌ 101

Vendor could not legally declare a forfeiture of installment land contract because purchasers had not paid interest, taxes and insurance without first giving purchasers notice of its intention to insist on strict compliance and additionally giving purchasers a reasonable time within which to perform or cure continuing defaults.

12. Vendor and Purchaser ⇌ 95(1)

In action arising out of an attempted forfeiture and cancellation of installment land contracts by vendor against purchasers, vendor was entitled to declare a forfeiture on basis of breach of material condition of such contract that purchasers maintain an accredited swine herd of not less than 170 sows and a total animal population of not less than 750 animals, inasmuch as there was no evidence that vendor had authorized or had prior knowledge of drastic animal reductions to only 114 animals of which only 44 to 50 were sows, even though vendor was aware that purchasers had changed from farrow-to-finish operation to a feeder-pig operation.

13. Vendor and Purchaser ⇌ 104

In action arising out of an attempted forfeiture and cancellation of an installment land contract by vendor against purchasers, it was appropriate to grant a six-month redemption period to defaulting purchasers since this was an agreed to provision of contract.

Bernard Q. Phelan, Cheyenne, for appellants.

Jerome F. Statkus, of Carmichael & Statkus, Cheyenne, for REB, Inc., appellee.

James O. Wilson, of Loomis, Lazear, Wilson & Pickett, Cheyenne, for The First National Bank and Trust Company of Wyoming, appellee.

Before GUTHRIE, C. J., and McCLINTOCK, RAPER, THOMAS and ROSE, JJ.

ROSE, Justice.

This appeal arises out of an attempted forfeiture and cancellation of a Contract for Sale of land by appellee, REB, Inc., the seller, against the appellants, Angus Hunt Ranch, Inc., and Charles L. Carlson and Jeanne H. Carlson, the buyers. After receiving notice by letter, dated March 3, 1977, of the seller's election to declare a forfeiture under the terms of the contract, appellants instituted an action for a declaratory judgment, asking the court to make certain declarations with respect to the contract, and for an injunction against the appellee-bank, as escrow agent. Appellants subsequently moved and were allowed to amend their complaint, adding a claim for restitution in the event seller's counterclaim for a declaration of forfeiture was granted. A trial on the merits was held on April 4, 1977, before the district court, sitting without a jury. At the close of buyers'-appellants' evidence, the seller's motion to dismiss, for failure of appellants to sustain the burden of proof required, was granted; its counterclaim was sustained and the bank was instructed to deliver the escrow papers to the seller. We will affirm this disposition of the case.

On June 8, 1973, a Contract of Sale was entered into between the seller and the buyers. The contract generally provided for the sale to the buyers of real property, buildings, improvements, equipment and animals, comprising the seller's swine operation, for a total purchase price of \$215,000.00. Under the relevant contract provisions regarding payment, the buyers were to: (1) make a down payment of \$20,000.00; (2) assume and pay a \$95,448.39 note, secured by a mortgage executed by the sellers, to the First National Bank and Trust Company of Wyoming; (3) assume and pay an \$8,837.66 note and mortgage to Capitol Savings and Loan Association; (4) make annual installment payments on principal and interest at seven percent (7%) per annum on the unpaid balance of \$83,623.75, beginning on April 1, 1974, and continuing

thereafter on each April 1, until April 1, 1983, when the entire principal balance, together with interest, had been paid in full. A "time is of the essence" clause was included in the contract. In addition, the buyers agreed to: provide annual, audited financial statements; maintain an accredited swine herd of not less than 170 sows, and a total animal population of not less than 750 animals; furnish monthly animal inventories; maintain improvements in good order and repair; not further encumber the property; pay all taxes and assessments; and maintain adequate insurance on the assets purchased.

The contract provides that if relevant payments are not timely made, forfeiture penalties may be imposed within 60 days of due date. If any of the other material covenants are not performed, the seller is, by the contract, released from all obligations, whereupon buyers shall forfeit all rights to the property, with seller's immediate right to take possession, and prior payments are to be retained as liquidated damages. In lieu of the seller's rights described above, seller could declare due and payable the then unpaid balance. The buyers were given a "right of redemption," consisting of an obligation to pay all remaining principal and interest within six months in the event forfeiture had been declared.

As part of its March 3, 1977, forfeiture letter to the buyers, the seller alleged the following acts of default: The contract had been breached by the buyers in that the interest, taxes and insurance had not been paid. It was further alleged that financial statements and animal inventories had not been furnished and that the animal level had, without authority, been permitted to drop below the agreed-upon levels. Lastly, it was further contended that the buyers had permitted the property to run down—all in violation of the contract provisions.

At trial, the buyers' own evidence disclosed that they had not complied with the contract in several respects. Nevertheless, it was the buyers' position in the trial court, and now on appeal, that:

1. The Contract of Sale should be construed to be an equitable mortgage, and
2. The seller, by its conduct, has waived its right to declare a forfeiture on the basis of the alleged acts of default.

MOTION TO DISMISS

[1-4] Before we discuss these issues, it is necessary to generally consider the propriety of granting a motion to dismiss and the standards by which we will review such a disposition. It is conceded by the parties that the trial court treated the seller's motion to dismiss as a motion made pursuant to Rule 41(b)(1), W.R.C.P.¹ Prior to the amendment of this rule in 1970—at which time the fourth sentence of the relevant subsection was added—we considered the quantum and quality of the evidence which would justify a court's granting such a motion. In *Arbenz v. Bebout*, Wyo., 444 P.2d 317, we embraced the so-called Alaskan rule by quoting from *Rogge v. Weaver*, Alaska, 368 P.2d 810, 813, as follows:

"Where plaintiff's proof has failed in some aspect the motion should, of course, be granted. Where plaintiff's proof is overwhelming, application of the rule is made easy and the motion should be denied. *But where plaintiff has presented a prima facie case based on unimpeached evidence* we are of the opinion that the trial judge should not grant the motion

even though he is the trier of the facts and may not himself feel at that point in the trial that the plaintiff has sustained his burden of proof. We believe that in the latter situation the trial judge should follow the alternative offered by the rule wherein it is provided that he " * * * may decline to render any judgment until the close of all the evidence", and deny the motion * * *." [Emphasis supplied]

In doing so, we said:

" * * * Such disposition, undoubtedly meritorious in jurisdictions such as Alaska, which follow exactly the federal rule requiring findings, becomes particularly essential in Wyoming where findings are not obligatory." 444 P.2d at 319.

We went on to hold that in reviewing the grant of such a motion, the entire evidence must be viewed most favorably to plaintiff, giving him the benefit of all reasonable inferences which may be deduced therefrom. *Arbenz v. Bebout*, supra. Implicit in adoption of the Alaskan rule was our recognition of the "prima facie"² test, as opposed to the federal weighing-of-evidence standard³, which was to be applied by trial judges seeking to resolve Rule 41(b) motions. We find no reason to depart from the *Rogge* prima facie test, merely because our rule now follows the federal rule requiring findings, since this test is "more

1. Rule 41(b)(1), W.R.C.P., provides:

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. *If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).* Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided

for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." [Emphasis supplied]

The emphasized portion of the rule was added by amendment in 1970.

2. "Prima facie case" is defined by Black's Law Dictionary 4th Ed.Rev. (1968), at 1353, as "such as will suffice until contradicted and overcome by other evidence (case cited)."
3. Under the federal test, the trial court need not consider the evidence in a light most favorable to the plaintiff. *Woods v. North American Rockwell Corporation*, 10 Cir., 480 F.2d 644. See, generally, 5 Moore's Federal Practice, § 41.13; 9 Wright and Miller, Federal Practice and Procedure: Civil § 2371; and 55 A.L.R.3d 272.

likely to achieve justice and reduce the number of appeals resulting from the application of Rule 41(b)." *Trusty v. Jones*, Alaska, 369 P.2d 420, 422. Accord, *Tillman v. Baskin*, Fla., 260 So.2d 509; and *King v. Alaska State Housing Authority*, Alaska, 512 P.2d 887. As a result, if the appellants-plaintiffs in the instant case "presented a prima facie case based on unimpeached evidence," then the trial court erred in dismissing their action under Rule 41(b).⁴ In making this determination, this court will view the evidence in a light most favorable to the plaintiffs, just as the trial court should have done, and presumably did, in considering the seller's motion.

EQUITABLE-MORTGAGE THEORY

[5] In order to establish a prima facie case on their equitable-mortgage theory, the buyers were required to show that the parties intended the transaction to be a mortgage, rather than an installment land contract, as construed from their written agreement and the surrounding circumstances. *Baldwin v. McDonald*, 24 Wyo. 108, 156 P. 27; and 59 C.J.S. Mortgages § 10a. There must have been an intent to create a security or, in other words, there must be proof that the maker intended the property to be held, given or transferred as security. 1 Jones on Mortgages, § 225, at 262-263. It has been observed that there is little possibility that a court will construe an installment land contract as a mortgage, assuming that it does not depart too far from the usual contract terms and provisions. Rudolph, *The Wyoming Law of Real Mortgages*, at 147.

[6-8] Appellants contend that they made the requisite showing by virtue of the contract provisions, which grant them a "right of redemption" for a period of six months after default, and the seller's con-

duct allegedly waiving its right to forfeiture. While it may be conceded, arguendo, that a seller may waive his right to declare an automatic forfeiture through conduct which has been characterized as acquiescence, it cannot be said that such acquiescence discloses an intention to treat the transaction as creating a mortgage. The primary effect of such conduct, as pointed out by appellants in their waiver argument, is to preclude the vendor from exercising its right to forfeiture until the vendee is put on notice that future defaults will not be countenanced and strict compliance will be required. *Baker v. Jones*, 69 Wyo. 314, 240 P.2d 1165, 1171. Furthermore, we fail to see how the language of this contract converts it into an equitable mortgage. See, *Bishop v. Beecher*, 67 N.M. 339, 355 P.2d 277. The presence of the right-of-redemption provision, without further evidence of the parties' intention and without any further indications arising from the contract itself, is not sufficient—as a matter of law—to convert this installment land contract into an equitable mortgage. At most, this provision was a contingency placed in the contract for the buyers' benefit, aimed at lessening the harshness of a forfeiture. To provide for such a revivor possibility does not mean that the buyers are entitled to the same or all of the protections afforded by a mortgage. We hold the buyers failed to establish a prima facie case with respect to their equitable-mortgage theory. This does not mean that, in appropriate cases, buyers will not be entitled to equitable remedies, such as restitution. Cf., *Quinlan v. St. John*, 28 Wyo. 91, 201 P. 149, reh. den. 28 Wyo. 91, 203 P. 1088; and *Lawrence v. Demos*, 70 Wyo. 56, 244 P.2d 793.⁵

WAIVER THEORY

[9,10] We must also determine whether the appellants established a prima facie

4. It is noted that our present Rule 41(b)(1) requires that in cases like the present, findings shall be made under Rule 52(a), W.R.C.P. Although not properly raised in this case, it is apparent that, in appropriate cases, the failure to comply with this requirement may require a remand. *Denofre v. Transportation Ins. Rating Bureau*, 7 Cir., 532 F.2d 43.

5. While the buyers amended their complaint to seek such equitable relief, the trial court found that the seller was entitled to retain all sums paid by the buyers since such sums were reasonably related to the seller's actual damages. The appellants did not challenge that finding on appeal.

case in support of their waiver theory. Most litigation in this area concerns itself with failure to make timely payments under a land contract, but we see no reason why the pertinent rules are not equally applicable to any failure to strictly comply with other material contract provisions. In order to establish a prima facie case of waiver, the vendee must show that the vendor has condoned or assented to previous defaults and has not given notice of his intention to insist on strict compliance in the future. See, *Baker v. Jones*, supra; and *Jones v. Clark*, Wyo., 418 P.2d 792, 797. See, also, *Nelms v. Miller*, 56 N.M. 132, 241 P.2d 333, 348; 77 Am.Jur.2d, Vendor and Purchaser, § 588; and 17A C.J.S. Contracts § 409. The effect of such conduct is not, however, a waiver of a vendor's right to declare a forfeiture for future defaults. *Jones v. Clark*, supra.

We said in *Baker v. Jones*, at 240 P.2d 1171-1172:

"It is now well established in law and in equity that forfeitures are not favored. Before one can declare a forfeiture it must appear that he has a clear right and then too he himself must be free from blame in the premises. Every reasonable presumption is against a forfeiture and every intendment and presumption is against a person seeking to enforce it. 17 C.J.S. Contracts, § 407 page 896. 'Provisions for forfeiture may be waived and the courts are quick to take advantage of circumstances indicating such an intention.' 17 C.J.S. Contracts § 409, page 897. And, 'So where the time fixed by the contract for performance is permitted to pass, both parties concurring, the time of performance thereafter becomes indefinite, and one party cannot rescind until full notice and a reasonable time for performance is given.' 17 C.J.S. Contracts § 506, page 1081. . . .

"In line with the holdings of other courts, this court has taken the opportunity to say that, 'Forfeitures are not favored, and it is said that slight evidence of the lessor's intention to relinquish his right is sufficient to warrant the finding of waiver.'

"*Investors Guaranty Corp. v. Thomson*, 31 Wyo. 264-273, 225 P. 590, 592, 32 A.L.R. 1071; *Pacific-Wyoming Oil Co. v. Carter Oil Co.*, 31 Wyo. 314-329, 226 P. 193, and in the late case of *Larsen Sheep Co. v. Sjogren*, 67 Wyo. 447-465, 226 P.2d 177, 178, this court states, 'Forfeiture of lease for breach of covenant or condition therein may be waived and, forfeiture not being favored, slight circumstances will at times suffice to constitute a waiver.'"

[11] Viewing the evidence in a light most favorable to the appellants-buyers, it is apparent that buyers did establish a prima facie case of waiver concerning most of the alleged acts of default. With respect to the buyers' obligation to make interest payments to the seller, the evidence discloses that the buyers made one interest payment, of \$5,853.66, on April 30, 1974, and, although no interest payments were made in 1975 or 1976, the seller gave no notices of default until the letter of March 3, 1977. Even then, the seller did not demand that the buyers become current on or within a reasonable time after the April, 1977, payment date. Rather, it demanded that buyers vacate the premises by March 18, 1977, or be subject to eviction. Furthermore, the evidence discloses that the seller made no demands with respect to past due taxes, the annual audits, the monthly inventories, or the condition of the premises. The seller could not legally declare a forfeiture on any of these grounds without first giving the buyers notice of its intention to insist on strict compliance, and additionally giving the buyers a reasonable time within which to perform or cure continuing defaults.

[12, 13] The matter of the reduction in the number of animals is an entirely different fact situation. The buyers' evidence disclosed that by February, 1977, there were only 114 animals on the property, of which only 44 to 50 were sows. There is no evidence that the seller had authorized or had prior knowledge of these drastic animal reductions, even though seller and the bank were aware that the buyers had changed

ANGUS HUNT RANCH, INC. v. REB, INC.

Wyo. 651

Cheas, Wyo., 577 P.2d 645

from a farrow-to-finish operation to a feeder-pig operation. Plaintiff, Charles L. Carlson, acknowledged the importance of maintaining adequate numbers of animals. There being no evidence that the seller had condoned the animal reduction, or had prior knowledge thereof, the seller was entitled to declare a forfeiture on the basis of the breach of this material condition of the contract.

We hold, therefore, that the appellants failed to establish a prima facie case of waiver with respect to all of the alleged acts of default, and particularly with respect to the reduction of the animal population without seller's knowledge or acquiescence. Failing this, the trial court correctly

found that the seller was entitled to rescind the contract and to retake possession under its provisions. There was no necessity for the seller to put on further evidence in order to sustain its counterclaim. Finally, it was appropriate to grant a six-month redemption period to the appellants since this was an agreed-to provision of the contract.

Affirmed.



chief concern of the trial judge was the welfare of the minor child, whose custody was decided by the court on conflicting evidence.

[6,7] The court had the benefit of testimony of psychiatrists, who gave their expert opinions, based on the appraisals they were able to make of the parties, the minor child, and the situation in which they were involved. Their opinions are worthy of careful consideration by the court, but are advisory only, and in no sense controlling. The parties appeared and testified. The court had the opportunity to observe their appearance and demeanor and to evaluate to a limited degree their personalities, attitudes and emotional stability, and to make a judgment in reliance on all the evidence produced at the trial as to what appeared to be in the best interest of the minor child. The ultimate decision was for the trial judge, who was in a more favorable position than we are to weigh the evidence as it came from the mouths of the witnesses before him, and to make a proper determination of the issues presented.

In *Johnson v. Johnson*, 7 Utah 2d 263, 323 P.2d 16, our court said:

Due to the equitable nature of such proceedings, the proper adjudication of which is highly dependent upon personal equations which the trial court is in an advantaged position to appraise, he is allowed considerable latitude of discretion and his orders will not be disturbed unless it appears that there has been a plain abuse thereof.

We have carefully read the transcript and hold that the trial judge's decision was fairly sustained by the evidence and that there was no abuse of discretion.

Affirmed. No costs awarded.

JAMES S. SAWAYA, VENOY CHRISTOFFERSON, EDWARD SHEYA, Jr. and DON V. TIBBS, District Judges, concur.

TIMPANOGOS HIGHLANDS, INC.,
Plaintiff and Appellant,

v.

Emily D. HARPER and Max D. Harper,
Defendants and Respondents.

No. 13936.

Supreme Court of Utah.

Dec. 3, 1975.

Assignee of contract for sale of real estate brought action against vendors for specific performance of contract and vendors counterclaimed, alleging that assignee had slandered their title by recording abandoned contract. The Fourth District Court, Provo County, Allen B. Sorensen, J., entered judgment in favor of vendors, except that it dismissed defendants' counterclaim for slander of title, and parties cross-appealed. The Supreme Court, Crockett, J., held that evidence supported trial court's conclusion that original contract had been abandoned; that dead man's statute did not preclude admission of evidence of statement of original party to contract for sale of real estate, now deceased, concerning abandonment of contract; and that assignee's partial tender of amount due did not constitute a valid tender.

Affirmed.

1. Appeal and Error ⇨847(1)

In action for specific performance in equity, appellate court may review law and facts.

2. Appeal and Error ⇨1009(4)

In action for specific performance in equity appellate court will reverse only if persuaded that evidence clearly preponderates against findings.

3. Contracts ⇨256

Term "abandonment" means intentional relinquishment of one's rights in contract; and in order to nullify such rights,

there must be a clear and unequivocal showing of such abandonment.

See publication Words and Phrases for other judicial constructions and definitions.

4. Contracts ⇨352(6)

Dispute as to whether contract has been abandoned is usually question of fact to be determined from circumstances of particular case, which circumstances include not only nonperformance, but also expressions of intent and other actions of parties.

5. Specific Performance ⇨121(11)

Evidence, in action for specific performance of contract for sale of real estate, including purchasers' delinquent and erratic payments on contract and their failure to pay taxes or to take possession or in any manner to improve or exercise dominion over real estate, supported findings of trial court that contract had been abandoned.

6. Witnesses ⇨126

Dead man's statute excluding otherwise proper evidence should be construed and applied strictly according to its terms. U.C.A.1953, 78-24-2(3).

7. Witnesses ⇨159(8)

Dead man's statute did not preclude admission of vendor's testimony, in action for specific performance of contract, concerning fact that original purchaser under contract for sale of real estate, now deceased, told him he would have to let property go due to financial difficulties. U.C.A.1953, 78-24-2(3).

8. Tender ⇨12(2)

To constitute a valid tender of money for purposes of fulfilling obligations due under contract, there must be actual and bona fide offer to pay whole amount of money due. U.C.A.1953, 70A-2-511.

9. Vendor and Purchaser ⇨170

Real estate purchaser's tender of \$30,384.25 when amount of payment past due under purchase contract, together with

unpaid taxes and water assessments, totaled \$36,677.71, did not constitute valid tender. U.C.A.1953, 70A-2-511.

10. Tender ⇨15(1)

In usual circumstances, one who refuses to accept tender should state basis of his refusal. U.C.A.1953, 70A-2-511.

11. Specific Performance ⇨121(11)

Assignee in action for specific performance of contract for sale of real estate failed to meet burden of proving it had live and viable contract by showing either that it had performed its obligations or had made valid tender to do so.

12. Libel and Slander ⇨131

In action by assignee for specific performance of land sale contract, in which vendors counterclaimed, alleging assignee had slandered their title by recording abandoned contract, assignee had sufficient basis for believing it had rights under contract and thus did not willfully and knowingly record false or fraudulent instrument for purpose of slandering title of those ultimately found to be owners.

Gary A. Sargent, of Backman, Clark & Marsh, Salt Lake City, for plaintiff and appellant.

Jackson B. Howard, of Howard, Lewis & Petersen, Provo, for defendants and respondents.

CROCKETT, Justice:

Plaintiff, Timpanogos Highlands, Inc., sued defendants, Max D. Harper and Emily D. Harper (now deceased), for specific performance of a contract for the purchase of a tract of 71 acres of unimproved property east of Lindon in Utah County. Defendants acknowledged execution of the contract, but averred that it had been abandoned; and also counterclaimed, alleging plaintiff had slandered their title by recording the abandoned contract. The action for specific performance being in eq-

unity, an advisory jury was used.¹ Its findings were in favor of the defendants: that the contract had been abandoned. The trial court made findings accordingly and entered judgment against the plaintiff and in favor of the defendants, except that it dismissed defendants' counterclaim for slander of title. Plaintiff appeals. Defendant cross-appeals.

Plaintiff states its contentions: (1) That the finding of abandonment "is against a fair preponderance of the evidence"; (2) That a tender it made to reinstate the contract should have been accepted; (3) That the court erred in admitting evidence of a statement of Karl B. Hale, one of plaintiff's predecessors, who is now deceased, concerning abandonment of the contract.

The original parties, Perry W. and Emily D. Harper, as sellers, and Karl B. Hale and Roy A. Barrett, buyers (each predecessors to the parties to this action), used a uniform real estate contract form. It was dated September 18, 1957, and provided for a total price of \$35,000 (about \$500 per acre) to be paid: \$500 for the option to purchase; \$2,500 on the exercise of the option; and \$3,000 per year, with five per cent interest on the deferred balance, until the total amount was paid. After the initial payments, and the following year, 1959, the purchasers made sporadic but inadequate payments until November, 1968. During that time they had paid a total of \$24,150, of which \$14,650 had been applied on interest, and \$9,500 (thus a little more than one-fourth of the total price) on principal.

Other significant facts are: that the buyers never entered into the possession of the property, or in any way used or exercised dominion over it. Nor did they pay the taxes thereon. For several years prior to 1968 the buyers had been making two payments a year of \$500 each. The last such payment was made in November,

1968. A few days later, Max Harper called Karl B. Hale on the telephone and told him that the payment was not enough, that it would not even cover the interest and taxes. Whereupon Mr. Hale told him that due to financial difficulties he could not pay for the property and would have to let it go. The evidence is further that upon a subsequent occasion Mr. Hale made a similar statement to Ruby Harper West, Max's sister. Shortly after these occurrences, the defendants leased the property for a term of ten years to a third party.

Karl B. Hale died May 24, 1969. There is some dispute as to what happened between that time and April, 1973, when the events occurred which precipitated this lawsuit. However, there was some contact between the parties and conversations about paying off the contract; but no agreement was arrived at and no payments were made. In late April, 1973, plaintiff tendered the amount of \$30,384.25 to defendants to pay off the contract. The amount then owing, together with the sum of unpaid taxes and water assessments, totalled \$36,677.71. When defendants refused to accept the tender, this suit for specific performance was initiated.

[1,2] In support of its attack upon the findings and judgment, the plaintiff relies on certain principles: The first, it correctly states: that this action for specific performance being in equity, this court may review the law and the facts.² But its further contention: that "the finding of abandonment of the contract is against a fair preponderance of the evidence," represents a misconception of the nature of this review. Even though we may review the facts, the well-established and long-followed rule is that due to the prerogative of the trial court as the initial trier of the facts, and his advantaged position to judge the credibility of the witnesses and the evidence presented, we indulge the trial court

1. See *Kesler v. Rogers*, Utah, 542 P.2d 354 (1975).

2. See *Allen v. Allen*, 100 Utah 99, 165 P.2d 872, and see *Stanley v. Stanley* 97 Utah 520, 94 P.2d 465, particularly concurring opinion of Wolfe and authorities therein cited.

with considerable latitude in those matters. Therefore, we do not review in the manner plaintiff suggests: to determine whether we would agree that "the evidence fairly preponderates in favor of the findings." But due to the tolerance indulged as just stated, we do not reverse unless we are persuaded that the evidence clearly preponderates against the findings.³

[3,4] The term "abandonment" in the sense involved here means the intentional relinquishment of one's rights in the contract; and in order to nullify such rights, there must be a clear and unequivocal showing of such abandonment.⁴ Where there is dispute as to whether this has occurred, it is usually a question of fact,⁵ to be determined from the circumstances of the particular case, which include not only nonperformance, but also expressions of intent and other actions of the parties.

The facts which the plaintiff marshals to demonstrate that the contract should be regarded as alive and subject to specific performance are: that the defendants did not make demands about the inadequate and delinquent payments, or the nonpayment of taxes; and that they never gave any notice of election to forfeit the contract. Further, that the defendants (sellers) had entered into a collateral oral agreement by which the defendants were allowed to remain in possession of the property in consideration for which they would pay the taxes; and that during that four and one-half year period, plaintiff's "predecessor" made several contacts with the defendants for the purpose of ascertaining the contract balance and negotiating a payment schedule, to which the defendants did not give a definite response, so that it was the defendants' fault that nothing definite was

not arrived at about reinstating and paying out the contract.

In opposition to plaintiff's arguments, the defendants point to the facts hereinabove recited as justifying the finding of abandonment: the always delinquent and erratic payments; the failure to pay taxes, or to take possession or in any manner improve or exercise dominion over the property. They combine this with the fact that both by the statements made and the subsequent conduct for four and a half years indicate an intention to abandon the contract. The defendants' version of what happened during that period was that on two occasions when the matter was discussed, plaintiff made proposals to do something less than the contract required, neither of which they were willing to accept.

In addition to the other factors concerning abandonment hereinabove recited, there is another one which the jury could well regard as having caused a change of mind by plaintiff as to abandoning the contract. As is not uncommon in these days of inflation and rapidly increasing land values, especially in some suburban areas, there had occurred a dramatic increase in the value of the property. While it is not shown just what the value was in 1968 when the intention to abandon the contract was expressed, it is shown that by 1973 when this plaintiff made the tender and desired to reinstate the contract, the land had a value of about \$5,500 an acre, over ten times its value when the original contract was entered into.

[5] It was the prerogative and the duty of the jury and of the trial court to analyze the foregoing contentions of the parties and to arrive at their conclusions

3. Ibid.

4. *Grossman v. Liedeker*, Tex.Civ.App., 202 S.W.2d 267, 271; *North Bergen Tp. v. Thomas N. Lee Enterprises, Inc.*, 75 N.J. Super. 17, 182 A.2d 137, 139; 1 Am.Jur.2d p. 14; 68 A.L.R.2d 581.

5. *Asher v. Hull*, 207 Okl. 478, 250 P.2d 866 (1952); *Tucker v. Edwards*, 376 P.2d 253. This is subject to the standard rule that if the evidence is such that all reasonable minds must necessarily so find one way or the other, the court should rule as a matter of law.

thereon in accordance with their views of the evidence. In that regard and in support of the conclusion they reached, we make these further observations: (1) Inasmuch as the plaintiff's obligations were clearly set forth in the existing contract, which the plaintiff insists was in force and effect, all it had to do was to perform that contract, and there would seem to have been no particular need for negotiating new terms. (2) Plaintiff's opposition to the finding of abandonment is based upon a claimed collateral agreement excusing it from performance of the contract. This would be in controversion of the expressed terms of the written contract, and in order to prevail thereon, it could only do so by clear and convincing evidence.⁶ The jury and the trial court not having been so convinced, we would not reverse unless the evidence was so clear and persuasive that all reasonable minds must necessarily so find,⁷ a circumstance which we do not find present here.

[6] Plaintiff's claim of error in admitting evidence of the statement of Karl B. Hale about abandonment of the contract is based on the ground that it should be barred by the so-called dead man's statute.⁸ That statute excludes testimony of persons who "sue or defend, as . . . executor or administrator, heir, legatee or devisee of . . . a deceased person" and continues the exclusion to a ". . . guardian, assignee or grantee . . . of such heir, legatee or devisee, . . ." Plaintiff concedes that it is not the assignee nor any of those three, but is an assignee of the deceased person (Karl B. Hale) himself and that thus the terms of the statute do not literally apply to its relationship to Karl B. Hale. But it argues that in logic and fairness the statute should be broadly

construed in accordance with its general purpose and thus include an assignee of the deceased person. Conceding that such an argument may have validity in some statutory situations, it is not of concern here. This is so for the reason that, as this court has previously ruled, because this statute is one of exclusion of otherwise proper evidence, it should be construed and applied strictly according to its terms.⁹

[7] In so doing the trial court correctly ruled that it did not prohibit the testimony concerning Mr. Hale's statement. In regard to that statement, it is further pertinent to observe that what was done about the contract, as recited herein, or, perhaps better stated, what was not done about the contract, during the next four years, is in harmony with the statement and perhaps even more cogent indication of the intent to abandon it.

[8-11] Although it is not of controlling importance to the decision in this case, it is appropriate to make some observations about the tender by which plaintiff sought to reinstate the contract; and which may also have been regarded as tending to justify the conclusion arrived at by the jury and the trial court. To constitute a valid tender, there must be an actual and bona fide offer to pay the whole amount of money due.¹⁰ Applying this rule, the plaintiff's tender of \$30,384.25 in April of 1973 when the amount of payments past due, together with unpaid taxes and water assessments, total \$36,677.71, did not constitute a valid tender. It is to be conceded that in usual circumstances, one who refuses to accept a tender should state the basis of his refusal. However, also to be considered are these propositions: that the plaintiff had the burden of proving that it had a live and

6. See *Pagano v. Walker*, 539 P.2d 452, 454 (Utah, 1975), and authorities therein cited.

7. Cf. *Statement in Howarth v. Ostergaard*, 30 Utah 2d 183, 515 P.2d 442.

8. Sec. 78-24-2(3), U.C.A.1953.

9. *Maxfield v. Sainsbury*, 110 Utah 280, 172 P.2d 122 (1946); *Morrison v. Walker Bank*

and Trust Co., 11 Utah 2d 416, 360 P.2d 1015 (1961).

10. See 74 Am.Jur.2d, p. 545, *Zion's Properties, Inc. v. Holt*, 538 P.2d 1319 (Utah, 1975); Sec. 70A-2-511, U.S.A.1953.

viable contract which included either that it had performed its obligations, or that it had made a valid tender to do so, neither of which the plaintiff had done here.

[12] In defendants' cross-appeal they assail the trial court's dismissal of the asserted cause of action against the plaintiff for slander of title by recording the contract and assignments relating thereto. It is our opinion that the trial court was justified in concluding that plaintiff had sufficient basis for believing that it had rights under the contract, that there is no foundation upon which it could be found that it wilfully and knowingly recorded a false or fraudulent instrument for the purpose of slandering the defendants' title.¹¹ The cross-appeal is without merit.

Affirmed. In view of the fact that both parties appealed, each should bear his own costs.

HENRIOD, C. J., and ELLETT, TUCKETT and MAUGHAN, JJ., concur.



CONSOLIDATED SERVICES, INC., a Utah Corporation, et al., Plaintiffs and Appellants,

v.

FMA LEASING COMPANY, a Utah Corporation, and Barbara Jensen Interiors, a Utah Corporation, Defendants and Respondents.

No. 14039.

Supreme Court of Utah.

Dec. 19, 1975.

The Second District Court, Weber County, Jay E. Banks, J., dismissed action brought by lessees of furniture, seeking to recover lease payments to lessor on the grounds of unjust enrichment and lack of

consideration, and the lessees appealed. The Supreme Court, Henriod, C. J., held that evidence was sufficient to support finding that plaintiffs breached the lease contract.

Affirmed.

Ballment ⇨ 31(3)

Evidence was sufficient to support finding that lessees of furniture breached lease contract.

George B. Handy, Ogden, for plaintiffs and appellants.

Robert C. Liljenquist, Piercey, Bradford & Marsden, Salt Lake City, for defendants and respondents.

HENRIOD, Chief Justice:

Appeal from the dismissal of an action brought by Campions, Lessees, involving a furniture lease. Affirmed with no costs.

In October, 1970, Campions purchased furniture from Barbara Jensen Interiors, half the purchase price of which was being financed by defendant Lessor, FMA Leasing. An argument ensued between Campions and Interiors. The former advised FMA not to make payments to Interiors until further notice. Interiors sued Campions for the price, but the latter, nonetheless, paid FMA the commitment fee (the first and last installments) anyway, in accordance with the terms of the lease. Thereafter they also paid five more monthly payments (totalling \$4,156.36) while the suit was pending. Interiors obtained a judgment against Campions who, about three years later, in December, 1973, on the ground of unjust enrichment and lack of consideration, sued FMA to recover the payments theretofore made under the contract.

Believable evidence indicated that FMA already had paid a lending bank \$1,600.00 interest for the finance money, incurred \$900.00 accrued handling charges and may

11. *Pender v. Dowse*, 1 Utah 2d 283, 265 P.2d 644; 50 Am.Jur.2d, Libel and Slander, Sec. 549.

deed." During the time Nordell had acquired the grazing rights from Jorgensens he paid taxes as stipulated in the deed. During the years 1942, 1943, 1944 The Bothwell Corporation, then the owner of the mining rights, accepted those payments without any questions. Certainly The Bothwell Corporation in accepting these taxes was recognizing an interest under the "Jorgensen deed" which had been transferred to Nordell.

For the foregoing reasons we hold that there is ample evidence in the record to support the findings and judgment of the trial court.

Affirmed. Costs to plaintiff.

CROCKETT, C. J., HENRIOD, J., and LEONARD ELTON, District Judge, concur.

TUCKETT, J., being disqualified did not participate herein.

McDONOUGH, J., heard the arguments but died before the opinion was filed.



18 Utah 2d 308

Marcell PITCHER, Plaintiff and Respondent,

v.

C. W. LAURITZEN, Defendant
and Appellant.

No. 10563.

Supreme Court of Utah.

Feb. 7, 1967.

After earnest money agreement and offer to purchase land had been signed and purchaser had deposited \$100, and before full payment was made on contract, purchaser took about \$3,500 worth of hay and straw from land, and vendor brought action for value of crops taken. Purchaser counterclaimed for specific performance of the contract to purchase. The First District

Court of Cache County, Lewis Jones, J., rendered judgment for vendor, and purchaser appealed. The Supreme Court, Ellett, J., held that competent evidence, including fact that nothing was done by either party to earnest money agreement and offer to purchase agreement prior to date when final contract was to be entered into and that no final contract was ever entered into by the parties, supported finding that parties had mutually abandoned their contract.

Affirmed.

1. Contracts ⇨313(1)

"Repudiation" of contract by one party is refusal to perform duty or obligation owed to other party.

See publication Words and Phrases for other judicial constructions and definitions.

2. Contracts ⇨256

"Abandonment" of contract by one party is giving up of right to benefit due from another party.

See publication Words and Phrases for other judicial constructions and definitions.

3. Vendor and Purchaser ⇨86

Competent evidence, including fact that nothing was done by either party to preliminary earnest money agreement and offer to purchase agreement prior to date when final contract to convey real estate was to be entered into, and that no final contract was ever entered into by the parties, supported finding that parties had mutually abandoned their contract.

4. Appeal and Error ⇨1010(1)

Where there is competent evidence to support finding of abandonment of contract, Supreme Court cannot substitute its judgment for that of lower court even if it disagrees with finding of lower court.

5. Specific Performance ⇨28(1)

Specific performance cannot be required unless all terms of agreement are clear, since court cannot compel perform-

ance of contract which parties did not mutually agree upon.

6. Specific Performance ⇨ 29(3), 30

Even if parties had not mutually abandoned their contract, specific performance could not have been required of vendor of realty, where earnest money receipt and offer to purchase agreement failed to specify which 30 acres of the 189 acres owned by purchaser were to be conveyed to vendor as part payment, and where contract ambiguously stated that final balance of \$25,000 was to be carried by vendor "on contract or second mortgage."

7. Vendor and Purchaser ⇨ 191

Where contract is silent as to when possession of land is to be given to purchaser, vendor should have that possession as means of compelling performance on part of purchaser.

8. Vendor and Purchaser ⇨ 191, 194

Purchaser of land is not entitled to possession of land nor to crops growing thereon, especially where purchaser has not contributed to cultivation and harvesting of such crops, until full payment is made to vendor, or if terms are given by contract, until compliance therewith is made by purchaser so as to entitle him to possession of land.

9. Vendor and Purchaser ⇨ 194

Party who signed earnest money agreement and offer to purchase agreement and deposited \$100 on contract to purchase, which was later mutually abandoned, was liable for \$3,500 worth of hay and straw which he took from the realty before making any further payment and while vendor was still entitled to possession.

E. J. Skeen, Salt Lake City, for appellant.
Harris & Harris, Logan, for respondent.

ELLETT, Justice.

Between April 16 and 20, 1962, the plaintiff as seller and the defendant as purchaser signed an earnest money receipt

and offer to purchase, containing, among other things, the following language:

The total purchase price of \$100,000.00 shall be payable as follows: \$100.00 which represents the aforescribed deposit, receipt of which is hereby acknowledged by you: on delivery of deed or final contract of sale which shall be on or before May 1, 1962, and balance of purchase price to be paid as follows: 30 acres in North Logan as indicated by map valued at \$50,000.00, \$25,000.00 cash from loan on seller's farm and seller to carry balance on contract or second mortgage at 5% interest. * * * All other taxes and all assessments, mortgages, chattel liens and other liens, encumbrances or charges against the property of any nature shall be paid by the seller except * * * none. (Emphasis added.)

There was no map in existence at the time the parties signed the agreement. At least it was not shown to the plaintiff if any there was. The defendant had given to the real estate salesman with whom plaintiff had his land listed for sale a rough sketch showing where a tract of land containing 189 acres of land lay out of which the 30 acres were to be taken. This sketch was not shown to the plaintiff either.

The plaintiff already had a mortgage of \$23,000.00 on his land, and the title to one of the tracts being sold was in escrow and would be his when he paid some \$6,000.00 balance due on it.

No transfer of possession was ever made as to either tract of land, and the plaintiff lost his enthusiasm for the deal when he learned that he could not sell the North Logan property for anything near \$50,000.00 nor mortgage his own land for more than \$12,600.00.

The parties never talked to each other about the deal prior to the signing of the purported agreement, and it was the real estate salesman who secured the signatures of each party. It is quite apparent from

reading the record that the plaintiff wanted and needed money and that defendant wanted and needed hay for his dairy operation. Numerous efforts on the part of the real estate salesman to get the parties together proved fruitless.

The real estate salesman was instrumental in causing the defendant to go to the plaintiff's land and get about \$3500.00 worth of hay and straw during the late summer and fall of 1962. The plaintiff says it was a sale, while the defendant claims that he took the hay and straw as a matter of right by reason of the earnest money agreement which the parties had signed.

No payment was ever made for the hay or straw, and in March of 1964 plaintiff sued the defendant for the value thereof. The defendant apparently thinking his best defense was a vigorous offense counter-claimed for specific performance of the signed document entitled "Earnest Money Agreement and Offer to Purchase" above referred to.

A trial was had partly to the court and partly to a jury. The jury found by a special verdict the value of the hay and straw, which defendant admits to be sustained by the evidence. The jury also found that neither party had repudiated the earnest money agreement and offer to purchase. The court found the agreement to be valid and binding at its inception but that it had been abandoned by the parties.

[1,2] The finding of the court is not in conflict with the finding of the jury. *Repudiation* is the refusal to perform a *duty* or *obligation* owed to the other party, while *abandonment* is the giving up of the *right* to a *benefit* due from another.

By his finding of abandonment the court disposed of the issues raised by the defendant on his counterclaim for specific performance.

[3,4] It will be noted that nothing was done by either party prior to May 12, 1962, the date when a *final contract* was to be entered into, and no final contract was ever

entered into by the parties. The trial court found under disputed competent evidence that the parties had mutually abandoned the contract; and when there is competent evidence to support such a finding, we are not permitted to substitute our judgment for that of the trial court even if we should disagree with his finding.

But even if there had been no finding of mutual abandonment, there were ample reasons why specific performance should not have been required of the plaintiff.

[5] Specific performance cannot be required unless all terms of the agreement are clear. The court cannot compel the performance of a contract which the parties did not mutually agree upon. See *Bowman v. Rayburn*, 115 Colo. 82, 170 P.2d 271.

In speaking of certain terms required for specific performance, the author in 49 Am.Jur., Specific Performance, Section 22, at page 35 uses this language:

The contract must be free from doubt, vagueness, and ambiguity, so as to leave nothing to conjecture or to be supplied by the court. It must be sufficiently certain and definite in its terms to leave no reasonable doubt as to what the parties intended, and no reasonable doubt of the specific thing equity is called upon to have performed, and it must be sufficiently certain as to its terms so that the court may enforce it as actually made by the parties. A greater degree of certainty is required for specific performance in equity than is necessary to establish a contract as the basis of an action at law for damages.

[6] We think the earnest money receipt and offer to purchase lacks certainty in two respects, either of which would prevent the court from granting specific performance: First, it was not certain which 30 acres out of the 189 acres owned by the defendant were to be conveyed to plaintiff. The document says, "as indicated by map," but no map was ever shown to the plaintiff. Second, the final balance of \$25,000.00 was to be carried by the seller on *contract* or

second mortgage. Which would the court require? A mortgage was already on the plaintiff's land. He was to get another loan on the land. Does that become the second mortgage? If second mortgage means third mortgage, what are the terms: 10 years, 15 years, or 5 years? How are the payments to be made: annually, semiannually, or lump sum at the end of the term? How was interest to be paid: annually, semiannually, or monthly? Should the court require a contract for \$25,000.00 balance instead of the mortgage, and if so, would not the same problems arise as to its terms as are indicated above for those of the mortgage?

Since plaintiff needed money and believed defendant's North Logan land could be sold promptly for cash, the court could consider the hardship which might ensue in determining what to do, and it does not matter that the defendant was not the one who made plaintiff believe the land would sell for \$50,000.00. The court could consider the fact that only \$12,600.00 could be borrowed on the plaintiff's land instead of the expected \$25,000.00 in making his ruling regarding specific performance.

But what about the hay and straw? The findings of the court do not tell us when the parties abandoned the purported agreement. If we assume the hay and straw were taken before the final abandonment, would the defendant then have to pay for it?

[7,8] Where a contract is silent as to when possession of land is to be given to a purchaser, the seller should have that possession as a means of compelling performance on the part of the purchaser. Until payment is made, or if terms are given by a contract, until compliance therewith so as to entitle the purchaser to the possession of the land, the purchaser would not be entitled to the possession nor to the crops growing thereon, and especially is this so where he has not contributed to the cultivation and harvesting of such crops.

In the Idaho case of *Nuquist v. Bauscher*, 71 Idaho 89, 227 P.2d 83, it is said at page 85:

The general rule is, subject to exceptions not herein necessary to discuss, that if there is no agreement, expressed or implied, in a contract for the sale of real estate, the purchaser is not entitled to possession until the full payment of the purchase price has been made, and if the purchaser complies * * * and receives the deed to the premises, he is then, and not until then, entitled to possession of the property sold.

In 55 Am.Jur., *Vendor and Purchaser*, Section 385, at page 808, the following statement is made:

While the vendee under such a contract is considered to be the equitable owner, the legal title is in the vendor until the contract is performed and a conveyance executed, and many cases support the general rule that the right to possession follows the legal title; that if there is no agreement, express or implied, in a contract for the sale of real estate, that the vendor shall deliver possession of the premises before the full payment of the purchase price, the purchaser is not entitled to the possession; and that a mere contract for the sale of real estate which provides that if the purchaser complies with his part of the contract and pays the purchase price as agreed, the vendor will then deed the property, raises no legal inference that possession of the property is to be given before the deed is to be executed.

A specific statement is made relative to growing crops in 15 Am.Jur., *Crops*, Section 11, at page 202:

The general rule that growing crops pass with a transfer of the title to the land ordinarily applies where the title to the land is transferred by virtue of a contract of sale. Thus, on the theory that equity treats things agreed to be done as actually performed, when real estate is agreed to be conveyed by a valid contract

of sale, without reservation, and the vendee has the right to possession, the equitable title passes at once to the vendee and with it title to all crops growing on the land. If, however, the purchaser is given no right to the possession until the time for conveyance arrives, he acquires no interest in the growing crops which mature and are harvested before the time for the conveyance and his right to possession arrives.

[9] It would seem that the court was amply justified in rendering judgment against the defendant for the value of the hay and the straw and in refusing to order the plaintiff to specifically perform the contract. (See *Valcarce v. Bitters*, 12 Utah 2d 61, 362 P.2d 427.)

The judgment is affirmed with costs to the plaintiff.

CROCKETT, C. J., and CALLISTER, TUCKETT, and HENRIOD, JJ., concur.

did not apply in this case.¹ We are of the opinion that the trial court was correct in that determination and the judgment of the court is affirmed. The plaintiff is entitled to costs.

CROCKETT, C. J., and HENRIOD, CALLISTER and ELLETT, JJ., concur.



25 Utah 2d 202

Garth WHITNEY, Plaintiff and Respondent,

v.

Dave WALKER and Chanae Marie Walker, Defendants and Appellants.

No. 11959.

Supreme Court of Utah.

Jan. 12, 1971.

Action for personal injuries suffered as result of automobile accident. The District Court, Salt Lake County, Marcellus K. Snow, J., found adversely to defendants, and defendants appealed. The Supreme Court, Tuckett, J., held that proceeding without appointing guardian ad litem for 15-year-old defendant motorist did not entitle defendant to reversal where defendant had not been deprived of any meritorious defense, had not been misled, and had not been denied any benefits which she might have had through assistance of guardian ad litem. The Court further held that award of \$1,351.40 special damages and \$37,500 general damages to plaintiff, who was 40-year-old real estate salesman, who suffered laceration of calf and painful injuries to groin area, including six-inch tear in scrotum and injury to penis that allegedly rendered him permanently partially impotent, who was hospitalized for 16 days, who was unable to work for six

months, and who suffered loss of earnings in sum of \$7,536.66, was not excessive or so disproportionately large as to indicate that it had been given under influence of passion or prejudice.

Judgment affirmed.

Callister, C. J., concurred in result.

1. Infants ⇐77

Defendant and plaintiff have equal responsibility for having guardian ad litem appointed for minor defendant. Rules of Civil Procedure, rule 17(b, c).

2. Infants ⇐87

In action for personal injuries suffered as result of automobile accident, proceeding without appointing guardian ad litem for 15-year-old defendant motorist did not entitle defendant to reversal where defendant had not been deprived of any meritorious defense, had not been misled, and had not been denied any benefit that she might have had through assistance of guardian ad litem. Rules of Civil Procedure, rule 17(b, c); U.C.A.1953, 41-2-22.

3. Infants ⇐94

Plea of infancy is personal privilege which can be waived.

4. Infants ⇐110

Without showing of fraud, collusion, or other substantial error going to merits of case, minor defendant is not entitled to be relieved of judgment against her on plea of infancy.

5. Appeal and Error ⇐1064(1)

Instruction that life expectancy of plaintiff, who was 41 years of age, was 31.4 years was not prejudicial, though plaintiff's injuries, for which recovery was sought, were allegedly not shown to have effect on plaintiff's future earnings.

6. Damages ⇐132(1)

Award of \$1,351.40 special damages and \$37,500 general damages to plaintiff, who was 40-year-old real estate salesman,

1. Thomas v. Braffet's Heirs, 6 Utah 2d 57, 305 P.2d 507; Crump v. Gold House Restaurants, Inc., (Fla.), 96 So.2d 215,

65 A.L.R.2d 637 Robertshaw-Fulton Controls Co. v. Noma Electric Co., 10 F.R.D. 32.

who suffered laceration of calf and painful injury to groin area, including six-inch tear in scrotum and injury to penis that allegedly rendered him permanently partially impotent, who was hospitalized for 16 days, who was unable to work for six months, and who suffered loss of earnings in sum of \$7,536.66, was not excessive or so disproportionately large as to indicate that it had been given under influence of passion or prejudice.

L. E. Midgley, Salt Lake City, for defendants-appellants.

Armstrong, Rawlings, West & Schaerer, David E. West and Neil D. Schaerer, Salt Lake City, for plaintiff-respondent.

TUCKETT, Justice:

The plaintiff, Garth Whitney, filed his action in the court below to recover for personal injuries suffered by him as a result of an automobile accident. On the evening of September 19, 1968, the plaintiff had parked his automobile in a driveway adjacent to a church in Salt Lake County. After parking the automobile, the plaintiff was in the process of locking it when he was struck by a vehicle being operated by Chanae Walker who was accompanied by her father, Dave Walker. Chanae was age 15 years and her driving experience had been very limited. The automobile had only just been purchased by the defendant Dave Walker and it was the first time that Chanae had operated it. The facts would indicate that Chanae was unable to control the movement of the car or to stop the same prior to its collision with the plaintiff.

The negligence of Chanae was admitted and the issue of liability was submitted to the jury solely upon the claimed contributory negligence on the part of the plaintiff. The jury returned a verdict adverse to the defendants and they have appealed to this court.

As a result of the collision the plaintiff, a 40-year-old real estate salesman, suffered

painful injuries to the groin area for which he was hospitalized for a period of 16 days. The plaintiff was also unable to work for a period of six months. He received a laceration of the calf of his leg and his other injuries were confined to the pelvic region. His injuries included a six-inch tear in the scrotum and an injury to the penis which has rendered him partially impotent. In the opinion of a medical expert called by the plaintiff, the injury to the penis is permanent and cannot be corrected by surgical or medical treatment.

The jury awarded the plaintiff special damages in the sum of \$1,351.40 and general damages in the sum of \$37,500. The evidence shows that the plaintiff suffered loss of earnings in the sum of \$7,536.66, which were included in the award of general damages.

[1-4] The defendants on appeal seek a reversal of the verdict and judgment found against them in the court below on three principal grounds. Firstly, the defendants claim that it was error for the court to proceed without first having appointed a guardian ad litem for the defendant Chanae Walker. The defendants call our attention to the provisions of Rule 17(b), Utah Rules of Civil Procedure, which provides:

When an infant * * * is a party, he must appear either by his general guardian, or by a guardian ad litem appointed in the particular case by the court in which the action is pending.

Our attention is also directed to Rule 17(c), which provides:

When a guardian ad litem is appointed by a court, he must be appointed as follows:

* * * * *

(2) When the infant is defendant, upon the application of the infant if he is of the age of fourteen years and applies within 20 days after the service of the summons, or if under that age or if he neglects so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action.

It does not appear that the language of the rules above quoted has been construed by this court. However, similar language contained in the rules and statutes of other states have been before the appellate courts in a number of jurisdictions.

In the case before us it appears that the defendant Chanae Walker appeared and filed her answer to the complaint of the plaintiff, went to trial, and was defended by able and experienced counsel, and it would appear that it was only after the verdict was returned against her that she raised the matter of her minority as a defense. It should be noted that the rule above referred to does not place the responsibility of having a guardian appointed upon the plaintiff alone. It would seem that the responsibility is equally upon the defendant to have a guardian ad litem appointed at her own instance to render any assistance which might be necessary in the conduct of her defense. A survey of the record fails to disclose that Chanae had been deprived of any meritorious defense, nor does it disclose that she has been misled or in any way deprived of any benefit she might have had through the assistance of a guardian ad litem. We are in accord with the rule from other jurisdictions that the plea of infancy is a personal privilege which may be waived and without a showing of fraud, collusion, or other substantial error going to the merits of the case the minor defendant is not entitled to be relieved of the judgment against her.¹ Under the statute the defendant Dave Walker was responsible for the negligent operation of the automobile.²

[5] Secondly, the defendants' claim that the court's instructing the jury that

the life expectancy of one aged 41 years is 31.4 years was reversible error. The defendants contend that the record in this case does not indicate that the plaintiff's injuries will in any way affect his future earnings. The defendants call our attention to prior decisions of this court which have dealt with the subject, but it should be noted in most cases that both mortality tables and annuity tables or combinations of the two were admitted for the purpose of aiding the jury in determining probable loss of future earnings. In the instant case the court in its instruction only referred to life expectancy. While the giving of the instruction would appear to be unnecessary, nevertheless, the jury would in any event have some knowledge as to life expectancy of persons in the age group of the plaintiff. Cases from other jurisdictions follow the rule that life expectancy is pertinent in cases where there are permanent injuries.³ We are of the opinion that the giving of the instruction was not prejudicial.

[6] Thirdly, the defendants contend that the verdict was excessive and appeared to have been given under the influence of passion or prejudice. The defendants fail to direct our attention to anything in the record except the size of the verdict which would indicate passion or prejudice. Courts in other jurisdictions have approved awards similar to the award in this case.⁴ Reasonable minds may differ on the amount of compensation adequate to compensate the plaintiff in this case for the injuries he has sustained. The amount awarded here is not so disproportionate as to indicate that passion or prejudice influenced the jury's decision.⁵

1. *King v. Wilson*, 110 Cal.App. 191, 2 P.2d 833; *Carver v. Donin*, 139 Cal.App. 395, 33 P.2d 841; *Trolinger v. Cluff*, 56 Idaho 570, 57 P.2d 332, 337

2. Section 41-2-22, U.C.A.1953.

3. *City of Okmulgee v. Clark (Okl.)*, 425 P.2d 457; *Roberts Const. Co. v. Henry*, 265 Ala. 608, 93 So.2d 498.

4. *Norton Company v. Harrelson*, 278 Ala. 85, 176 So.2d 18; see also 12 A.L.R.3d 657.

5. *Weber Basin Water Conservancy Dist. v. Skeen*, 8 Utah 2d 79, 328 P.2d 730; *Schneider v. Suhrmann*, 8 Utah 2d 35, 327 P.2d 822.

The other points on appeal urged by the defendants do not appear to justify reversal. The judgment of the court below is affirmed. Respondent is entitled to costs.

HENRIOD, ELLETT, and CROCKETT, JJ., concur.

CALLISTER, C. J., concurs in result.



25 Utah 2d 206

Lee W. HOBBS, as Administrator with will annexed of the Estate of Joseph Buhler, Deceased, Plaintiff and Appellant,

v.

Ethel Jeanne Buhler FENTON and James E. Fenton, Defendants and Respondents.

No. 12105.

Supreme Court of Utah.

Jan. 12, 1971.

Action by administrator of decedent's estate to recover stocks and checking account from decedent's daughter, who claimed such property as surviving joint tenant. The Third District Court, Salt Lake County, Stewart M. Hanson, J., rendered judgment for defendant, and plaintiff appealed. The Supreme Court, Callister, C. J., held that where father understood that by placing title to his stocks and bank account in joint tenancy with his daughter, with full rights of survivorship, the same would automatically vest full title in property in daughter on father's death, father was shown to have desired and intended such result, and there was no claim or evidence to indicate any fraud, mistake or undue influence on part of daughter, property passed to daughter on father's death.

Affirmed.

Crockett, J., concurred specially and filed opinion.

Joint Tenancy ¶6

Where father understood that by placing title to his stocks and bank account in joint tenancy with his daughter with full rights of survivorship, the same would automatically vest full title in daughter on father's death, father was shown to have desired and intended such result, and there was no claim or evidence to indicate any fraud, mistake or undue influence on part of daughter, property passed to daughter on father's death.

Richards & Richards, Edward F. Richards, Gary A. Frank, Salt Lake City, for plaintiff and appellant.

Edward W. Clyde, Salt Lake City, for defendants and respondents.

CALLISTER, Chief Justice:

Plaintiff, the duly qualified administrator of the estate of Joseph Buhler, who died testate in March of 1968, initiated this action to recover certain personal property, namely, stocks and a checking account from defendant, who claims the property as the surviving joint tenant. Plaintiff alleged that the property was held in joint tenancy with the decedent's daughter, the defendant, for the purpose of convenience. Plaintiff demanded that he, as administrator, be adjudged the owner of the personal property and entitled to the possession thereof, that defendant be declared to hold the property in trust and be required to make an accounting of all the transactions which occurred from the time that Joseph Buhler placed the first property in joint tenancy, and that defendant be compelled to execute such instruments as might be necessary to pass legal title to plaintiff. By answer, defendant asserted her ownership of the property and denied that plaintiff or the heirs of the estate possessed any rights thereto.

At the conclusion of a trial upon the merits, the court granted defendant's motion to dismiss and decreed that the properties which constituted the subject matter of the complaint were defendant's sole property and that plaintiff had no right, title,

TROLINGER v. CLUFF.

No. 6256.

Supreme Court of Idaho.

April 21, 1936.

1. Infants ⇨78(1)

Statute providing that infant party must appear either by general guardian or by guardian ad litem is not applicable unless court has acquired jurisdiction of infant (Code 1932, §§ 5-306, 5-307, 5-507).

2. Infants ⇨87

Failure to appoint guardian ad litem for infant defendant, while irregular, does not of itself defeat jurisdiction of court (Code 1932, §§ 5-306, 5-307).

3. Infants ⇨87

Failure to appoint guardian ad litem for infant defendant does not warrant setting aside, reversing, or vacating judgment unless substantial rights of infant were affected by such failure (Code 1932, § 5-306).

4. Infants ⇨88

Infant aged twenty years and three months at time of trial who was duly served with process, who appeared in person and by counsel and filed answer and other pleadings and went to trial without setting up infancy, could not upon reaching his majority have judgment vacated for failure to appoint guardian ad litem as required by statute, in absence of showing of fraud, collusion, or duress, or that infant had meritorious defense, or that he was not properly and ably represented (Code 1932, §§ 5-306, 5-307, 5-507).

MORGAN, J., dissenting.

Appeal from District Court, Twin Falls County, Eleventh District; William A. Babcock, Judge.

Action to vacate judgment by Huston Trolinger against Conna Cluff. From a judgment for the defendant, the plaintiff appeals.

Affirmed.

James R. Bothwell, Harry Povey, and Andy Myers, all of Twin Falls, for appellant.

Chapman & Chapman, of Twin Falls, for respondent.

BUDGE, Justice.

This action was brought by appellant seeking to cancel, annul, and set aside a judgment entered against him, the sole reason urged being that when the judgment was entered appellant was a minor and did not appear by general guardian and no guardian ad litem was appointed in the action in which the judgment was entered.

The findings of the court, which are sustained by the evidence, clearly relate the situation: May 9, 1933, respondent herein instituted an action against appellant to recover damages. Summons was served upon appellant and he then appeared in said action by demurrer, amendment to demurrer, motion to require plaintiff to separately state and number, amendment to motion to require plaintiff to separately state and number, motion to strike, motion to elect, and demand for bill of particulars. On August 2, 1933, appellant filed his answer in said action, appearing by three members of the bar, being the same attorneys who are his counsel in the instant action. The damage action was tried before the court with a jury and was concluded on October 11, 1933, the jury returning a verdict in favor of respondent herein. Appellant appeared in the damage action in person; his father was present at the trial and assisted him in the employment of counsel; appellant, his father, and numerous other witnesses in appellant's behalf were called, sworn, and examined; the cause was vigorously contested; instructions were requested by appellant; the cause argued by appellant's counsel; and judgment was duly entered in favor of respondent. Thereafter appellant filed his motion to retax costs, which said motion was denied; the judgment was recorded; there was no motion for new trial nor to vacate said judgment, and no appeal to this court. The judgment has not been satisfied, and the same now appears as a binding judgment and obligation against appellant. It was further found by the court that in none of the pleadings filed by appellant in said action was the age of appellant mentioned or alleged, that appellant did not in that action at any time make application for the appointment of a guardian ad litem. Likewise respondent made no application for the appointment of a guardian ad litem and none was appointed in said action at any time. The court further found that appellant's counsel were and are

members of the bar of this court and that appellant's defense was fully and ably presented both as to questions of law and fact to said court and jury and was fully and ably argued by his counsel to said jury and that said judgment was and is the result of a complete judicial investigation resulting from a trial before a court and jury, extending over a period of six days. The court found that during the progress of the trial appellant testified he was under the age of twenty-one years, and that his twenty-first birthday would occur on July 28, 1934, and that respondent testified upon the trial that appellant had denied his said age to her and had stated to her that he was older.

The trial court entered judgment for respondent, upholding the former judgment, and this appeal was taken.

The question presented is: Under the foregoing facts, briefly, after a minor of the age of more than fourteen years has been duly served with process, appears in person and by counsel, files an answer and other pleadings, goes to trial, is represented therein, awaits the return of the verdict and judgment without setting up his infancy, can he, after judgment against him, upon reaching majority interpose his minority as a sole ground for setting aside the verdict and judgment?

The statutes indicate a distinction is to be drawn between infants under the age of fourteen years and those who have reached the age of fourteen years or more, I.C.A. § 5-307 providing: "When a guardian ad litem is appointed by the court or judge he must be appointed as follows: * * * When the infant is defendant; *upon the application of the infant if he be of the age of fourteen years* and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend of the infant." (Italics added.)

Probably the greatest distinction recognized between infants under and over the age of fourteen years is with relation to the manner of service of summons in order for the court to acquire jurisdiction, I.C.A. § 5-507, providing that in order to acquire jurisdiction of an infant under the age of fourteen years, service must be had on another person as provided in the statute in addition to the minor, while if the minor be of the age of fourteen years or

more, the court acquires jurisdiction by personal service on such minor only, the statute reciting in part:

"The summons must be served by delivering a copy thereof as follows: * * *

"4. If against a minor *under* the age of fourteen years residing within this state, to such minor personally and also to his father, mother or guardian, or if there be none in this state, then to any person having the control or care of such minor or with whom the minor resides, or in whose service he is employed. * * * *In all other cases to the defendant personally.*" (Italics added.) Brown v. Lawson, 51 Cal. 615; Bolling v. Campbell, 36 Okl. 671, 128 P. 1091; Bolling v. Gibson, 36 Okl. 678, 128 P. 1093.

After jurisdiction has been acquired by the court by service upon the minor of the age of fourteen years or more, the further question presents itself as to the effect of the provisions of I.C.A. § 5-306, providing: "When an infant * * * is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending in each case, or by a judge thereof, or a probate judge. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient, to represent the infant, * * * in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him."

[1] As will appear from a reading of the foregoing section, it presupposes that there be an action pending, i. e., the infant must have been duly and regularly served with process before the appointment of a guardian. The court must have acquired jurisdiction of the infant party before I.C.A. § 5-306 becomes applicable. The situation thus presented in the instant action is, what is the effect of a judgment rendered in an action in which the defendant is a minor over the age of fourteen years, has been duly and regularly served with process as provided by law in a pending action, but who does not appear by a guardian or guardian ad litem, but in which action the minor did appear in his own behalf as heretofore set forth? California Code Civ.Proc. § 372, provides in the identical terms as the above statute (I.C.A. § 5-306) that "When an infant * * * is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in

which the action is pending, in each case." It has been uniformly held by the courts of California under the foregoing statute, and by the overwhelming weight of authority in other jurisdictions under the identical or similar provisions, that, notwithstanding such provision, where the court has jurisdiction, a judgment or decree rendered against an infant, in a case in which no guardian was appointed for him and in which he did not appear by his general guardian or guardian ad litem, is not for that reason void, and while it may be erroneous, and subject to be reversed or set aside, it is at most only voidable.

"The weight of authority is to the effect that, where the court has otherwise jurisdiction, a judgment or decree rendered against an infant without the appointment of a guardian ad litem, while it may be erroneous, and subject to be reversed or set aside, or to be ground for a new trial, at most is only voidable, but not absolutely void; and it may not be even necessarily erroneous and subject to reversal; the error may be amended or cured. It remains in full force and effect until it is reversed on appeal or error or set aside by direct proceedings and is not subject to collateral attack; and this rule applies to decrees in equity as well as judgments at law. Where it clearly appears that a decree is in favor of the infant defendant, the failure to appoint a guardian ad litem for him is not reversible error. Where the court has not obtained jurisdiction of the infant by service of process and no guardian ad litem has been appointed for him then the judgment is void. It is not an absolute prerequisite to jurisdiction of an action by an infant that he should sue by guardian ad litem or next friend, and the suit or action is not void on that ground alone; it merely affects the regularity of the proceedings, and the defect is amendable, the judgment or decree is not void." 31 C.J. 1121, § 266, citing many cases.

"The appointment of a guardian ad litem for an infant defendant, like the appearance of a next friend for an infant plaintiff, is a matter of procedure and not of jurisdiction. That either plaintiff or defendant was without such representative makes the judgment erroneous, but not void." 14 R.C.L. p. 286, § 54.

[2] Childs v. Lanterman, 103 Cal. 387, 37 P. 382, 42 Am.St.Rep. 121; Emeric v. Alvarado, 64 Cal. 529, 2 P. 418; Foley v.

California Horseshoe Co., 115 Cal. 184, 47 P. 42, 56 Am.St.Rep. 87; In re Cahill's Estate, 74 Cal. 52, 15 P. 364; Kemp v. Cook, 18 Md. 130, 79 Am.Dec. 381; Millard v. Marmon, 116 Ill. 649, 7 N.E. 468; Drake v. Hanshaw, 47 Iowa, 291; Myers v. Davis, 47 Iowa, 325; Hoover v. Kinsey Plow Co., 55 Iowa, 668, 8 N.W. 658; Rice v. Bolton, 126 Iowa, 654, 100 N.W. 634, 102 N.W. 509; McBride v. State, 130 Ind. 525, 30 N.E. 699; Levystein v. O'Brien, 106 Ala. 352, 17 So. 550, 30 L.R.A. 707, 54 Am.St.Rep. 56; Holloway v. McIntosh, 7 Kan.App. 34, 51 P. 963; Walkenhorst v. Lewis, 24 Kan. 420; Balbridge v. Smith, 76 Okl. 36, 184 P. 153; Slomp v. City of Tulsa, 139 Okl. 76, 281 P. 280, appeal dismissed and certiorari denied 281 U.S. 703, 50 S.Ct. 407, 74 L.Ed. 1127; First Nat. Bank of Titonka v. Casey, 158 Iowa, 349, 138 N.W. 897; Ryan v. Fielder, 99 Ark. 374, 138 S.W. 973; Kelly v. Kelly (Tex.Civ.App.) 178 S.W. 686; Austin v. First State Bank & Trust Co. (Tex.Civ.App.) 275 S.W. 156; Reynolds v. Steel, 170 Ky. 153, 185 S.W. 820; Harrod v. Harrod, 167 Ky. 308, 180 S.W. 797; Parker v. Starr, 21 Neb. 680, 33 N.W. 424; Charley v. Kelley, 120 Mo. 134, 25 S.W. 571; Eubanks v. McLeod, 105 Miss. 826, 63 So. 226; Eubanks v. McLeod (Miss.) 69 So. 289; Eisenmenger v. Murphy, 42 Minn. 84, 43 N.W. 784, 18 Am.St.Rep. 493; Schimpf v. Rohmert, Wayne Circuit Judge, 129 Mich. 103, 88 N.W. 384; Linn v. Collins, 77 W.Va. 592, 87 S.E. 934, Ann.Cas.1918C, 86. It appears that in this jurisdiction this court has recognized the general rule and applied it that while the failure to appoint a guardian ad litem is irregular if not erroneous, it does not defeat the jurisdiction of the court. In Trask v. Boise King Placers Co., 26 Idaho, 290, 142 P. 1073, 1074, the mother of W. E. Trask, a minor, sued upon the theory that she was suing for herself and the minor, the opinion reciting in part as follows:

"A motion for a new trial was made, and on the hearing of this motion, defendants raised for the first time the proposition that the minor was not bound by the judgment, and that the defendants could not be bound. At that time W. E. Trask applied to the court for the appointment of a guardian ad litem by an order nunc pro tunc, as of the date of the beginning of the trial. Thereupon the court issued the order authorizing the minor to apply for the appointment of some suitable person as guardian ad litem, which appointment was made. * * *

"It must also be conceded that the action of the court was irregular, if not erroneous, in appointing a guardian after the case had been tried.

"In *Rima v. Rossie Iron Works*, 120 N.Y. 433, 24 N.E. 940, it was held that the omission to appoint a guardian ad litem of an infant plaintiff before the bringing of an action is not a jurisdictional defect, but is an irregularity merely. To the same effect, see *Clowers v. Wabash, etc., Ry. Co.*, 21 Mo.App. 213; *Wolford v. Oakley*, 43 How. Prac.(N.Y.) 118. * * *

"Both the mother and the minor are bound by the judgment as it comes here."

The recent case of *Hutton v. Davis* (Idaho) 53 P.(2d) 345, 346, is not out of harmony with the foregoing cases. Therein the minor was of the age of two years and with relation to service of process is governed by that part of I.C.A. § 5-507 relating to minors under the age of fourteen in which case service must be made upon some one in addition to the minor. The case in effect recognizes the validity of the judgment secured by the minor, but hold that the appeal must be dismissed because of lack of jurisdiction of the appeal, reciting:

"No effort appears to have been made to conform to the statute requiring the infant to appear by guardian. The stipulation shows the probate court appointed his mother guardian for him and that she qualified as such. This appointment was probably made pursuant to the provisions in the award requiring that the money therein mentioned be paid to a guardian for the minor. It is the duty of the guardian to collect and receive that money for the ward. Therefore she is, in her capacity as guardian for her son, an indispensable party to this proceeding and is an adverse party within the meaning of I.C.A. § 11-202, above quoted. The notice of appeal was not served on her, nor was it addressed to her, nor is she therein named as respondent. * * *

"The notice of appeal not having been served on the guardian for the infant respondent, and he not being represented here by any one having authority to represent him, we are without jurisdiction of the appeal and it is, therefore, dismissed."

It will be observed that the appeal was dismissed because of a failure to serve the guardian or any one having authority to represent the infant.

[3] While the judgment rendered in the damage action may have been irregular and erroneous, the rule supported by the great weight of authority is that the failure to appoint a guardian ad litem must affect the substantial rights of the infant before the judgment will be set aside, reversed, or vacated. It must be made to appear that substantial rights of the infant were affected by the failure to appoint a guardian ad litem, such as that the infant had a valid defense to the action, fraud, collusion, duress, or the same grounds upon which an adult might have disputed the judgment. In *King v. Wilson*, 116 Cal.App. 191, 2 P. (2d) 833, a judgment was rendered against Ralph Wilson for damages and the opinion therein recites in part:

"The first error assigned by appellant is that at the time of the trial he was under the age of 21 years and that no guardian ad litem was appointed in said action in his behalf. The minority of defendant Wilson was not brought to the attention of the court until the hearing of a motion for new trial. The record in this case discloses that the defendant was past 20 years of age at the time of the trial and had no guardian ad litem appointed as provided by the code.

"The first question which naturally arises is: Does such failure to have a guardian ad litem appointed go to the jurisdiction of the court? * * *

"The most that can be said is that the failure to appoint a guardian ad litem was an irregularity. * * *

"The courts in many jurisdictions have held that the failure to appoint a guardian ad litem must affect the substantial rights of the infant. *Harris v. Bennett*, 160 N. C. 339, 76 S.E. 217; *Grauman, etc., Co. v. Krienitz*, 142 Wis. 556, 126 N.W. 50; *Martin v. Gwynn*, 90 Ark. 44, 117 S.W. 754. What loss of substantial rights did the defendant in this case suffer? He was ably represented by counsel in every stage of the proceedings. A trial was had by jury, before whom he submitted his evidence, and his case is ably presented on appeal. Wherein are his rights affected and what different judgment would have been rendered, had he been represented by a guardian ad litem? None is pointed out. It is said in *Childs v. Lanterman*, 103 Cal. 387, 390, 37 P. 382, 383, 42 Am.St.Rep. 121: 'Although it is provided in section 372, Code Civ.Proc., that, when an infant is a party, he must appear either by his general

guardian or by a guardian ad litem appointed by the court, yet a judgment rendered against an infant in which no guardian ad litem has been appointed is not for that reason void (citing cases); and a judgment rendered against him in an action in which he has appeared by an attorney will be upheld as fully as though he had appeared in person (*Barber v. Graves*, 18 Vt. 290; *Marshall v. Fisher*, 1 Jones (46 N.C.) 111; *Townsend v. Cox*, 45 Mo. 401).'

"The failure to be represented by a guardian was no such error as would warrant the court in reversing the trial court on this ground."

In *Smith v. Wagner*, 137 Cal.App. 556, 30 P.(2d) 1020, 1021, the same proposition was again considered, the court saying:

"Appellant's first contention is that he was a minor at the time the trial of the action occurred and that the failure of the trial court to appoint a guardian ad litem for him rendered the judgment voidable, and that by reason of the failure to appoint a guardian appellant was entitled to disaffirm the judgment, and that appeal from the voidable judgment is a proper method of disaffirmance.

"The record on appeal fails to disclose that appellant applied to the trial court for the appointment of a guardian ad litem. It does disclose that through his counsel he filed an answer verified by himself to the amended complaint; that on the date appointed for the trial of the action he appeared in court and through his counsel he announced that he was ready for trial; that he proceeded to trial; that he testified as a witness in his own behalf and that another witness testified for him; that he did not specifically direct the court's attention to the fact that he was a minor; that the only information respecting appellant's age which was conveyed to the court during the trial of the action was presented by appellant when he was called by respondents as a witness under section 2055 of the Code of Civil Procedure and during his cross-examination by respondents' counsel was asked, 'How old are you?' to which he replied, 'I am 19 now'; that at no time during the proceedings did he make any further reference to his minority; that after judgment was rendered against him he then for the first time formally advised the court of the fact of his minority on his motion for a new trial.

"The above-narrated facts are so similar to those which appear in *King v. Wilson*, 116 Cal.App. 191, 2 P.(2d) 833, that we consider the opinion therein decisive of appellant's contention in this regard. *If it be conceded that the failure to appoint a guardian ad litem was an irregularity it was not, under the circumstances disclosed by the record, such an irregularity as affected the substantial rights of appellant and does not constitute an error of such importance that of itself requires a reversal of the judgment.*" (Italics ours.)

In *Carver v. Donin*, 139 Cal.App. 395, 33 P.(2d) 841, the question again arose on a motion to vacate a judgment:

"On January 11, appellant, Cirino, duly and regularly filed in said action a document entitled disaffirmance of judgment, wherein she stated that she thereby disaffirmed the judgment 'on the ground that at the time of the trial of said action said defendant was a minor of the age of twenty years, and that said defendant did not become of the age of twenty-one years until December 25, 1933, and that at the time of the trial of said action said minor was not represented by any guardian or guardian ad litem.' On the same day, January 11, defendant served and filed notice of motion to vacate the judgment on the same grounds above stated. This motion was made upon the records and files of the action and the affidavit of appellant attached to the notice of motion. In the affidavit appellant stated that she was born on December 25, 1912; that she was not represented at the trial of the action by any guardian or guardian ad litem; that at the time of the trial, and also in a deposition given prior to the trial, she testified that she was of the age of 20 years; that plaintiff at all times had knowledge of said facts through his attorney and took no steps to have any guardian or guardian ad litem appointed for said defendant; that for said reasons affiant was desirous of having the judgment set aside.

"The said motion having been * * * heard * * * without any counter affidavits on the part of the plaintiff, the motion was denied. The present appeal is from the order denying said motion. * * * The plaintiff now moves that the appeal be dismissed, or the order affirmed, on the ground that the appeal is without merit and that the questions on which

the decision of the cause depends are so unsubstantial that they need no further argument. [Italics added.]

"From the bill of exceptions it further appears that the action was brought to trial on December 21, 1933, and was submitted for decision on December 22, and so remained until findings of fact and conclusions of law were filed on January 5, 1934, followed by entry of judgment on January 8; that the appellant was not represented by any guardian or guardian ad litem; that after December 25, 1933, and before the decision of the court or entry of judgment the attorneys of record for appellant communicated additional points and authorities on behalf of appellant to the court, and to counsel for plaintiff, and at such time duly represented the appellant as her attorneys in said action; that at all times up to and including January 8, 1934, appellant did not raise any question as to her minority; that the only reference thereto was the statement of her age in response to a question propounded therefor; that she attended throughout the trial of said action, and aided and assisted her said counsel, both as a witness and in marshaling other witnesses.

"It is provided by section 372 of the Code of Civil Procedure that, when an infant is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending. Appellant relies upon various decisions which establish the rule that a judgment against an infant in an action in which no guardian or guardian ad litem had ever been appointed may be disaffirmed by the infant after reaching majority provided he acts promptly and without laches, but that the judgment is not void. * * * The subject is reviewed at some length in *King v. Wilson*, 116 Cal.App. 192, 2 P.(2d) 833. * * * The court held that under the circumstances shown by the record appellant suffered no loss of substantial rights, and the judgment was affirmed. The facts in that case were very similar to those presented in the case at bar, although we have here the additional facts that the decision was not filed and the judgment was not entered until after appellant attained her majority, and that, after appellant became of age and prior to the decision of the cause, attorneys properly representing her acted in her behalf by presenting to the court

additional points and authorities upon the matters submitted, which matters did not include any item relating to the minority of appellant.

"From the foregoing it plainly appears that the ground of appeal relied upon by appellant is without merit, and that the question presented required no further argument.

"The order is affirmed."

In *Sams v. Covington Buggy Co.*, 10 Ga. App. 191, 73 S.E. 18, 19, the court says that the court very properly refused to set aside such a judgment: "The minor having brought or filed the suit by his counter-affidavit and made the issue * * * should have been represented therein by his statutory guardian or guardian ad litem; and if the matter had been called to the court's attention, or to the attention of the other party, this formal requirement of the statute would doubtless have been complied with by proper amendment. But the minor, in his defense to the suit originally, did not disclose his minority. He silently permitted a judgment to be entered against him without disclosing the fact, and therefore *the irregularity was cured by the verdict. For this reason we think the court very properly refused to set aside the judgment.*" (Our italics.)

"It is the generally accepted doctrine that an infant cannot avoid a judgment or decree against him merely on the ground of infancy, and that he cannot impeach such a judgment or decree by an original bill except upon grounds that would be available to an adult, such as fraud." *Robison v. Floesch Const. Co.*, 291 Mo. 34, 236 S.W. 332, 336, 20 A.L.R. 1239.

In *Watson v. Wrightsman*, 26 Ind.App. 437, 59 N.E. 1064, 1065, the appellate court of Indiana considered a situation almost identical with that herein and a portion of the court's opinion appears to be particularly appropriate:

"The question thus presented is simply this: After a minor has been duly served with process, appears in person and by counsel, files an answer, goes to trial, and awaits the return of a verdict, without setting up his infancy as a defense, can he then interpose his minority as a ground for setting aside the verdict? It is a familiar rule of law that the plea of infancy is a personal privilege, and must be pleaded by the defendant in case the record does not disclose his infancy. *Blake v. Doug-*

lass, 27 Ind. 416; *Cohce v. Baer*, 134 Ind. 375, 32 N.E. 920 [39 Am.St.Rep. 270]; 1 Black Judgm. § 196; *Winer v. Mast*, 146 Ind. 177, 45 N.E. 66; *Freem.Judgm.* (3d.Ed.) §§ 151, 513. * * * In *Winer v. Mast*, supra, it is said: 'It is true that infancy may be pleaded either in abatement or in bar, depending on the facts shown. In case the facts pleaded show, or do not deny, a good cause of action, but merely disclose that the party is a minor, and therefore cannot maintain or defend the action, then the plea, if made, would be in abatement. Doubtless, however, the court, in such case, would appoint a guardian ad litem for a minor defendant, and the trial would proceed, and even if judgment should be entered without such appointment, if not attacked on its merits, would stand.' In the same case it was held that a meritorious defense must be shown by the party who seeks relief, and that the defense must be one of substantial nature, affecting the merits of the case.

"In the case we are considering, the appellant has not made any showing that he had any meritorious defense to the action. He has not shown a substantial fact affecting the merits of the case. He has not shown fraud, collusion, or error, as suggested by *Freeman*, supra. 1 Black, Judgm. § 196, says: 'The general disposition of the authorities is to regard the plea of infancy as a personal privilege, that may be waived, and, if it is not pleaded, a judgment against the infant is binding upon him.' * * *

"In this case, appellee founded her cause of action upon the fact of an assault upon her by appellant, in which he was charged with intending to carnally know her. This was a wrongful act, and for injuries resulting therefrom he was liable to respond in damages, as declared by the authorities. The record does not disclose any fact that even tends to excuse him for the act, and, as we have seen, no defense whatever is shown. Upon service of process, he came into court with counsel and his legal guardian, filed an answer in denial, went to trial, and not until after a verdict was returned against him did he attempt to shield himself behind his infancy. As the defense of infancy is a personal privilege it seems to us that appellant waived that privilege by going to trial without pleading it. But what would it have availed him, in the first instance, if he had applied

for the appointment of a guardian ad litem? The guardian could have done no more than to have filed an answer and conducted the defense. This, in fact, was done by able counsel. After verdict, what could such guardian have done other than what was in fact done? Nothing; for a motion for a new trial and in arrest of judgment were duly made, and the appeal to this court was properly prosecuted, and the questions raised fully and ably discussed. We are unable to see how appellant was injured. In the case of *Evans v. State*, 58 Ind. 587, it was held that the failure to appoint a guardian ad litem for an infant defendant in a bastard suit, where such appointment had not been requested before the trial of the cause, was not a cause for a new trial. See, also, *Rawles v. State*, 56 Ind. 433, and *De Priest v. State*, 68 Ind. 569. Judgment affirmed."

"While the evidence shows that appellant knew appellee was a minor, and it is not shown that a guardian ad litem was appointed for him, the record shows that he appeared by attorney, filed a general denial to each paragraph of the complaint, and participated in the trial up to the close of appellant's testimony when he moved for and obtained a peremptory instruction in his favor. * * * *Winer v. Mast*, 146 Ind. 177, on page 183, 45 N.E. 66. * * *

"We do not think the suggestion in the motion of the minority of the defendant and the failure to appoint a guardian ad litem for him authorized the court to direct a verdict in his favor." (*Daugherty v. Reveal*, 54 Ind.App. 71, 102 N.E. 381, 384.)

In *Curtis v. Curtis*, 250 Mich. 105, 229 N.W. 622, the Supreme Court of Michigan announces the rule that when a decree is voidable for error in procedure, it is a matter of judicial discretion whether it shall be vacated or not when questioned in a direct proceeding: "The statute * * * provides that, after service of process upon an infant defendant the suit shall not be further prosecuted until a guardian ad litem is appointed. The court had jurisdiction of the subject-matter and of the parties. Defendant, though an infant, was before the court by summons, duly served upon her. * * * Failure to do so [appoint a guardian], however, did not oust the court of jurisdiction, for the statute mentioned is procedural only, but did render the decree voidable if questioned in a

direct proceeding such as this. *When a decree is voidable for error in procedure, it is a matter of judicial discretion whether it shall be vacated.* * * * That the failure to appoint a guardian ad litem does not render the decree void is well settled. * * * We find no abuse of discretion in refusing to vacate the decree for want of appointment of a guardian ad litem."

In *Trask v. Boise King Placers Co.*, supra, this court said:

"Section 4231, Rev. Codes [I.C.A. § 5-907] provides that: 'The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties and no judgment shall be reversed or affected by reason of such error or defect.'

"It does not appear that any substantial rights of the appellants have been materially affected by any error or defect that occurred in the proceedings or trial of this case. [Citing cases.]"

[4] It appears that at the time of the trial of the damage action appellant was of the age of approximately twenty years and three months, and was before the court by summons duly served upon him. The court had jurisdiction of the parties and of the subject-matter. Appellant has made no attempt to show, nor has he suggested, that he had any meritorious defense, and no fact is presented tending to show fraud, collusion, duress, or that appellant was not properly and ably represented, or any single instance wherein his rights were substantially affected by reason of the procedural fact that no guardian ad litem was appointed for him, in fact, the record negatives any such suggestion.

It will be remembered that appellant's father, his natural guardian (I.C.A. § 15-1805) was in constant attendance with appellant during the trial, participated therein, testified as a witness and assisted in the employment of counsel. It has been held that the appearance in, and defense of, a suit by the natural guardian need not be a matter of record and may be shown by parol. In *Fuller v. Smith*, 49 Vt. 253, it is said:

"The case shows that at the time the writ was served upon the complainant, and the trial had which resulted in the judgment sought to be vacated, he was a minor; * * * that no guardian ad litem was appointed by the justice on said trial; and

that the question of the minority of the complainant was not raised before the justice at all during the trial. It further appeared * * * Willard Fuller, the father of the complainant * * * was present at the trial, and testified as a witness upon material points in the case, and that he attended as such witness at the suggestion of the counsel for the complainant; that he assisted his son and his counsel in the impaneling of the jury, and was present during the entire trial, and interested himself in the case to its close. * * *

"The question presented is, whether, upon the above facts, the judgment sought to be vacated is a valid, binding judgment, or whether it is voidable by the complainant. * * * But where the party who is legally competent to appear in behalf of the infant has notice of the pendency of the suit, and opportunity to appear and defend the same, and actually does appear and participate in the defence, the infant has his day in court, and has opportunity to make defence by one having legal capacity to make it. Where a guardian ad litem is appointed for an infant, the appointment should appear of record. But the appearance in, and defence of, the suit by the natural guardian, need not be made a matter of record, and may be shown by parol. The cases of *Priest v. Hamilton*, 2 Tyler, 44, and *Wrisley & Wrisley v. Kenyon*, 28 Vt. 5, are full authorities in support of both of these propositions. See also 1 Am. Lead.Cas. 265, marginal paging, and cases there cited. Judgment affirmed."

It seems to us that in a case such as the one at bar, unless the minor, who has reached his majority, makes some showing, to the effect that he has a meritorious defense or that he has been misled, deceived, or in some way deprived of some benefit of an independent and unhampered defense, he should not be allowed to disaffirm a judgment obtained in the manner this judgment was obtained, or have the same vacated. After a most diligent investigation of the authorities and a careful consideration of the record in this case, taking into consideration all of the facts and circumstances, we have concluded that sufficient grounds were neither alleged nor established to warrant vacating the judgment. No substantial rights of appellant were denied him.

Judgment affirmed. Costs awarded to respondent.

GIVENS, C. J., and HOLDEN and AILSHIE, JJ., concur.

MORGAN, J., dissents.



JENSEN v. WOOTERS.

No. 6266.

Supreme Court of Idaho.

April 23, 1936.

1. Sales ⇨417

Evidence held to sustain verdict for buyer suing seller for breach of contract for sale of restaurant in withdrawing service deposit with utility companies contrary to agreement.

2. Trial ⇨252(20)

In buyer's action for seller's breach of contract, refusal to instruct that buyer's failure to establish amount of damages in dollars and cents limited recovery to nominal damages held proper, where there was evidence from which actual damages could be computed.

3. Sales ⇨421

In buyer's action for seller's breach of contract, refusal to instruct that buyer could recover only nominal damages held proper, where buyer established actual damages which were natural and proximate consequences of breach of contract.

4. Damages ⇨117

In action for breach of contract, only such damages will be allowed as fairly compensate injured party for his loss.

Appeal from District Court, Bannock County, Fifth District; L. E. Glennon, Acting Judge.

Action by Marie Jensen against Otis Wooters for damages for breach of oral agreement. From a judgment for plaintiff, defendant appeals.

Affirmed.

C. M. Jeffery, of Pocatello, for appellant.

F. E. Tydeman and B. W. Davis, both of Pocatello, for respondent.

BUDGE, Justice.

This is an action brought by respondent against appellant for damages upon an alleged breach of an oral agreement growing out of the purchase of a certain restaurant known as the Circle Shop owned by or held in the name of Ora Ball, an employee of appellant.

From the facts it appears that appellant offered to sell the restaurant to respondent. Respondent was not financially able to place with the Idaho Power Company and the Public Utilities Consolidated Corporation, referred to in the proceedings as the gas company, the necessary and required deposits to secure the services rendered by said companies and which were necessary in carrying on the restaurant business. The accounts of the Circle Shop with the gas company and the Idaho Power Company were at the time carried in the name of appellant, and appellant had on deposit with the Idaho Power Company, as required by its rules and regulations, \$100, and also had a credit with the gas company to insure payment for service rendered to said restaurant. For the purpose of promoting and inducing respondent to enter into an agreement of purchase of the furniture, fixtures, and equipment of the Circle Shop, appellant agreed with respondent that he would permit the accounts to remain in his name, permit the deposit to remain in the hands of the Idaho Power Company, and permit the credit to remain with the gas company, and would also leave in the cash register \$20 in change, thereby making it possible for respondent to carry on the business. In pursuance to the agreement entered into between respondent and appellant and an agreement of purchase thereafter entered into between respondent and Ora Ball, appearing as the record owner of the restaurant, respondent delivered on the purchase price of the fixtures and equipment a note signed by one H. C. Nelson, which she then owned, and further agreed to pay the sum of \$8 a day, \$2 thereof to be applied on the purchase price and \$6 a day to pay general expenses such as gas, electricity, rent, etc.; the aforementioned amounts to be paid each day to Ora Ball and by her distributed. Respondent went into possession of the restaurant July 9, 1932, and continued in possession until November 3, 1932, during which time she made the payments stipulat-

REDEVELOPMENT AGENCY OF SALT LAKE CITY, Plaintiff and Respondent,**v.****Tony R. BARRUTIA et al., Defendants and Appellants.****No. 13360.****Supreme Court of Utah.****Aug. 29, 1974.**

City Redevelopment Agency commenced condemnation suit to take defendants' land which was improved with a three-story building. The Third District Court, Salt Lake County, Joseph G. Jeppson, J., entered judgment on jury verdict for defendants in the amount of \$93,000, and defendants appealed contending that court committed prejudicial error in its rulings on admissibility of certain evidence and in giving certain jury instructions. The Supreme Court, Callister, C. J., held that trial court properly excluded offered testimony as to the value in use of property following testimony by same witness as to fair market value of the property; that trial court properly admitted into evidence testimony by deposition of witness with heart condition relating to comparable sale; that defendants' objection to testimony on comparable sale based on fact that sale had been made under advice of property manager to sell so as to avoid costs of condemnation litigation went to weight of the evidence rather than competency; and that instruction to jury not to consider interest, attorney's fees or costs of proceedings in assessing value of subject property was properly given so as to direct attention of jury to sole issue they were to decide.

Affirmed.

1. Eminent Domain ⇨202(1)

Trial court properly excluded offered testimony of appraisal witness in condemnation action as to the use value of subject property to new owner following testimony of same witness that present structure on parcel had reached end of its economic life

and that highest and best use of the property would be to tear down the old building and construct a new development. U.C. A.1953, 11-19-23.9.

2. Depositions ⇨107(10)

Where trial court in eminent domain proceedings ordered taking of testimony of witness with heart condition by deposition and defendants objected to admission of such deposition on grounds that they were materially hampered in making objections to testimony by sensitive health of witness, defendants' asserted objections that testimony was highly prejudicial, based on hearsay, and fraught with conclusions without adequate foundation could have been made at trial and were not waived by failure to make them during course of deposition. Rules of Civil Procedure, rule 32(a)(3)(C), (b), (d)(3)A).

3. Trial ⇨83(1)

Defendants' asserted objections that testimony was highly prejudicial, based on hearsay, and fraught with conclusions without adequate foundation failed to state clearly specific ground of objection as required by rules of evidence. Rules of Evidence, rule 4(a).

4. Evidence ⇨142(1)

In condemnation proceedings, landowners' objection to admission into evidence of testimony concerning alleged comparable sale based on fact that sellers were nonresidents and had been advised to make sale prior to condemnation to avoid costs of litigation affected weight rather than competency of evidence.

5. Eminent Domain ⇨262(5)

Trial court's instruction to jury in eminent domain proceedings that jury was not to consider interest, attorney's fees, or costs of the proceedings in assessing value of subject property was not prejudicial error since such instruction did not affect substantial rights of parties and was wisely given in case wherein landowners had emphasized costs of litigation involved in condemnation action in their objections to admission of comparable sale testimony. Rules of Civil Procedure, rule 61.

6. Eminent Domain ⇨255

Landowners' objection to jury instruction in condemnation action on grounds that it was confusing, misleading, and did not comport with evidence was not considered on appeal since it failed to point out with a requisite degree of particularity wherein the instruction was not supported by the law. Rules of Civil Procedure, rule 61.

7. Appeal and Error ⇨1032(1)

Upon appeal, appellant had burden of showing that there was substantial and prejudicial error which deprived him of opportunity for full and fair presentation and consideration of disputed issues since there is a presumption in favor of the verity of the verdict and judgment, including all aspects of the conduct of the proceedings and rulings of the trial court.

Brant H. Wall, Salt Lake City, for defendants and appellants.

B. Lloyd Poelman and H. Reese Hansen, of Strong, Poelman & Fox, Salt Lake City, for plaintiff and respondent.

CALLISTER, Chief Justice:

Plaintiff, pursuant to the power of eminent domain conferred by Sec. 11-19-23.9, U.C.A.1953, as amended 1971, initiated this action of condemnation to take defendants' property. Defendants' property was a parcel of land measuring 49 by 156 feet, situated on the east side of West Temple Street between Second and Third South in Salt Lake City. Located upon the property was a three story building with an improved basement for storage facilities. The sole factual issue in dispute was the amount that would constitute just compensation. Upon trial, the matter was submitted to a jury, which rendered a verdict finding that the fair market value for land and improvements was \$93,000. The trial court rendered judgment in accordance with the verdict and denied defendants' motion for a new trial or a judgment notwithstanding the verdict in the form of an additur. Defendants appeal therefrom as-

serting that the trial court committed prejudicial error in regard to its rulings on the admissibility of certain evidence and certain jury instructions.

The date of the taking of the subject property was February 2, 1972. One of the landowners testified that the fair market value on the date of the taking was \$165,000 to \$170,000. Defendants' three expert witnesses testified as to the following as the fair market value: Memory H. Cain, \$165,000; Ray Williams, \$149,000; and Edward P. Westra, \$87,140. Plaintiff's expert witness was of the opinion that the value of the property was \$72,765. The experts were of the opinion that the building situated on the premises was obsolete and at the end of its economic life. The two upper stories of the building had been utilized as a hotel but it had been vacant since January 1971, and would require remodeling to conform with fire regulations. The basement area had been last rented in 1965. The main floor was divided into two areas. The southern portion had been rented for \$125 per month as a secondhand furniture store; it had been vacant since June, 1968. The northern portion had been extensively renovated in 1967 and had been operated by the landowners as a tavern called the "Downtown Lounge"; it had a rental value of approximately \$300 per month.

The highest and best use of the property was commercial and it was so zoned. The neighborhood had undergone a dramatic revitalization by the construction of the Salt Palace Complex, which increased both pedestrian and vehicular traffic. Several new motels were being constructed in the area, and a shopping mall called "Arrow Press Square" was being completed. These new commercial enterprises stimulated an increment in the property values of the area.

[1] On appeal, defendants contend that the trial court erred in striking the testimony of witness Cain concerning the interim value of the building on the land. The witness testified that the structure had

reached the end of its economic life and the highest and best use of the property would be to tear down the old building and construct a new type of development, such as, an office building or retail stores. The witness testified that in appraising the subject property, he had rejected the cost and income approaches and utilized the market approach which involves locating comparable sales of similar property in the area. He testified that the fair market value of the land was \$153,615; this opinion was based on the sales of four parcels that he considered comparable. All of these four other properties had old buildings situated thereon, but the witness ascribed no value to the improvements; although the vendees were presently utilizing the buildings—some after extensive renovation. Witness Cain further testified that in addition to the value of the land, the willing buyer would pay a nominal value for the building. He explained that even though the building had reached the end of its economic life and was not producing sufficient income to pay the interest on the land, a buyer would pay a nominal sum since the building was producing some income to the owner, which could be collected while the plans and financing for a new structure were being completed. To determine this interim use value, Mr. Cain utilized a formula he characterized as a modified income approach.

Mr. Cain testified that the property could generate \$685 per month rent, i. e., \$300 for the tavern, \$100 for the basement, \$160 for the hotel, and \$125 for the store. The sole expenses he deducted were for taxes and insurance. He did not deduct for management, vacancy and credit loss, repairs and replacement and other standard expenses. He determined a net income of \$6,275 for each of the two years interim use of the building. He used the Inwood Tables to find the present use of future income. He testified that the building had a nominal value of \$11,200 interim use. He explained that he could not use the stand-

ard income approach, i. e., capitalized net income to determine the fair market value because the property was not being put to its highest and best use.

While the jury was not present in the courtroom, plaintiff made a motion that the testimony of witness Cain concerning the \$11,200 interim use of the building be stricken. The court granted the motion and ruled that the jury would be limited to a maximum finding of value of \$153,615, the amount to which witness Cain testified as to the fair market value of the property. Subsequently, the jury was never so informed or so instructed by the court. However, defendants claim the ruling of the court precluded counsel from arguing this point to the jury or from presenting further testimony concerning the value of this interim use.

The trial court did not err in its ruling. Market value is not a multiple, for the value *in use* of property for a particular purpose is not market value but merely a factor in determining such value. It is generally improper to express an opinion of value *in use* in terms of so much money. There is a clear distinction between *value in use* and market value; a given piece of land has only one market value and not a certain market value for one purpose and a different market value for another purpose. The market value of land is determined by considering the highest possible use to which the land is or reasonably may be adapted and the price which the willing purchaser would be willing to offer in view of such highest possible use. While there is a clear distinction between evidence of the value *in use* of land in terms of money for a particular purpose and opinions of market value in terms of money, based upon a consideration of the highest available use of the land of which the witness has knowledge, the evidence must be scrutinized to determine whether the testimony falls within the first or inadmissible category or the second or admissible category.¹ The testimony of witness Cain

1. Metropolitan Water District of Southern California v. Adams, 116 P.2d 7, 16-17 (Cal. 1941); 4 Nichols on Eminent Domain (3d

Ed.), Sec. 12.2(2), pp. 12-80, and Sec. 12.312, pp. 12-146 to 12-149.

was inadmissible since he stated the monetary value of the land for a particular purpose; the effect thereof was not to aid in determining the market value of the property, but to add a separate item of damage.²

[2,3] Defendants contend that the trial court erred in admitting the testimony by means of a deposition of witness Edwin Whitney. During the course of the trial defendants' expert witness, Cain, was interrogated about the sale of a parcel of land identified as the "Weir Sale." Mr. Cain testified that he had conferred with Edwin Whitney, the manager of the property, who had advised him that the owners of the property were uninformed as to its value and didn't receive market value. Mr. Cain concluded that the Weir sale was not comparable. The Weir transaction was a key sale in plaintiff's case to establish fair market value. Mr. Whitney had suffered a serious heart attack and had been recently released from the hospital. Plaintiff moved for an order permitting the deposition of Mr. Whitney for use at trial to impeach the testimony of Mr. Cain. Mr. Whitney was advised by his doctor that he could be interviewed in the office but could not make a court appearance. Defendants objected to the deposition being taken on the ground that the Weir sale was not comparable to the subject property.

Thereafter the deposition of witness Whitney was taken and recorded simultaneously by the court reporter and a cassette recorder. Defendants had ample opportunity to conduct cross-examination. The deposition of Mr. Whitney was admitted at the trial under Rule 32(a)(3)(C), U.R.C.P., as amended 1972. The tape recording was played to the jury. The record indicates that prior to playing the cassette, counsel argued their objections to the content of the recording, that the court ruled thereon, and that it was agreed between counsel that exceptions could be dictated to the reporter while the jury was

deliberating. Thereafter, defendants excepted to the ruling of the court on the ground that the admission of the testimony was highly prejudicial, was largely based on hearsay, was fraught with conclusions without adequate foundation. Defendants further claimed that the testimony as elicited did not afford or give to the landowners the opportunity to interpose appropriately the objections that would have been so interposed but for the fact that the witness was in delicate health and that their cross-examination and objections were substantially and materially hampered by the sensitive health of the witness.

There is nothing in the record to indicate that defendants were inhibited in their cross-examination of Mr. Whitney. Under Rule 32(b) and (d)(3)(A), U.R.C.P., as amended 1972, defendants asserted objections could have been made at the trial and they were not waived by failure to make them during the course of the deposition. The record does not indicate that defendants objected to the use of the cassette record, which would undoubtedly interfere with the assertion of an objection. Defendants' generalized objections directed to the entire deposition do not comport with the requirements of Rule 4(a), U.R.E., that there appear of record an objection to the evidence timely interposed and so stated as to make clear the specific ground of objection.

[4] Defendants further contend that the trial court erred in admitting evidence of the "Weir Sale" on the ground that it was not a comparable sale. Defendants urge that the Weirs were acting under duress, in that they were nonresidents and had been advised by their property manager to make the sale prior to condemnation to avoid costs of litigation. Under such circumstances, defendants claim that the trial court abused its discretion in admitting such highly prejudicial evidence.

A review of the instant record indicates that there was a substantial basis in the evidence for the trial court to rule that the

2. State v. Noble, 6 Utah 2d 40, 305 P.2d 495 (1957).

test of "reasonable comparability" had been met, and the evidence was properly admitted. The differences urged and emphasized by defendants affected the weight of the evidence more than its competency and were properly submitted to the jury.³

[5] Defendants contend that the trial court erred in giving Instruction No. 8, wherein the jury was instructed that they were not to consider interest, attorney's fees, or costs of the proceedings in assessing the value of the subject property; that these items would be dealt with by the court in accordance with the law. Defendants claim that the instruction went beyond the scope of the issues presented in the trial and constituted prejudicial error.

This instruction properly directed the attention of the jury to the sole issue they were to decide and that they were not at liberty to enhance the award by calculating any other costs. Within the context of the record of this case, this admonition to the jury was wise since defendants had emphasized the "Weir Sale" was not comparable but under duress to avoid the costs of litigation involved in a condemnation action. Furthermore, the instruction could not be considered a defect which affected the substantial rights of the parties and must therefore be considered harmless error under Rule 61, U.R.C.P.

[6] Finally, defendants contend that the trial court erred by its Instruction No. 22. The record indicates that defendants excepted thereto as being contrary to the law and on the grounds that it is confusing, misleading, and does not comport with the evidence and testimony in the trial.

Rule 51, U.R.C.P., provides that in objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds of his objection. The purpose of this rule is to direct the attention of the court to the claimed errors in the instruction so that he might have an opportunity to correct them if he deems it proper. The objection must be sufficiently specific to give the trial court notice of the claimed error in the instruction. An objection that an instruction is not supported by, and is contrary to the law lacks that degree of specificity so as to direct the court's attention to a particular matter. Since defendants failed to point out with the requisite degree of particularity wherein the instruction was not supported by the law, this court will not consider the instruction on its merits.⁴

[7] A survey of the entire record clearly reveals that the parties had a fair opportunity to present their respective claims to the court and jury for determination. Thereafter, there is a presumption in favor of the verity of the verdict and judgment, including all aspects of the conduct of the proceedings and rulings of the court. Upon appeal, appellant has the burden of showing that there was substantial and prejudicial error which had the effect of depriving him of the opportunity of a full and fair presentation and consideration of the disputed issues.⁵ No such error emerges in the instant record.

The judgment of the trial court is affirmed. Costs are awarded to plaintiff.

HENRIOD, ELLETT, CROCKETT
and TUCKETT, JJ., concur.

3. State Road Commission v. Wood, 22 Utah 2d 317, 452 P.2d 872 (1969).

4. Employers Mutual Liability Insur. Co. of Wis. v. Allen Oil Company, 123 Utah 253, 263, 258 P.2d 445 (1953).

5. Redevelopment Agency of Salt Lake City v. Mitsui Investment, Inc. (Utah), 522 P.2d 1370, 1374 (1974).

In addition to the foregoing, and even more important, is the fact that I cannot see any basis whatsoever in the evidence to justify submitting the question of plaintiff's negligence to the jury. It is my opinion that in observing his older brother, who preceded him under the wire, and in making inquiry before he attempted to pass, he exercised at least the degree of care which a boy ten years of age should be expected to observe. (The main opinion makes no suggestion to the contrary). It was therefore error for the defendant to request, and for the trial court to submit, the issue of the plaintiff's contributory negligence to the jury.

In fairness to the decision of this court, I must concede that the main opinion is correct as to these aspects of procedure: (1) that plaintiff's requested instruction No. 12 did deal with the duty of care imposed upon a child, which would seem to indicate an assumption on the part of plaintiff's counsel that the issue of plaintiff's contributory negligence would be submitted; (2) that he did not make a motion for a directed verdict on that issue; (3) nor did he ask for a new trial. Nevertheless, under the particular circumstances of this case, I do not think that the trial court and this court should consider themselves powerless to rectify an injustice.

My conclusion is consistent with the spirit and purpose of our rules of procedure.

Rule 1(a), U.R.C.P., provides in part that:

* * * they shall be liberally construed to secure the just, speedy, and inexpensive determination of every action;

1. See 4 C.J.S. Appeal and Error § 332, p. 1077, noting exception to the general rule, stating that, "notwithstanding the absence of exceptions in the trial court, alleged errors in submitting issues to a jury may be considered on appeal when required in the interest of justice." Citing, N. Y. Con. R. R. Co. v. Mass. Bonding & Ins. Co., 184 N.Y.S. 243, 193 App.Div. 438, affirmed 135 N.E. 912, 233 N.Y. 547, wherein the court states that "if it was error to submit to a

and Rule 51 states that:

* * * Notwithstanding the foregoing requirement, [stating objections and the grounds therefor] the appellate court, in its discretion and in the interests of justice, may review the giving or failure to give an instruction.

There is both text and case law supporting this practical view of doing justice.¹

For the reasons discussed above: (1) there was an obvious impropriety in giving the instruction and in submitting the question of the plaintiff's contributory negligence where there was no evidence to justify doing so; (2) the special verdicts arrived at were themselves inconsistent; which (3) seem to indicate that the jury was confused by the verdicts, it is my opinion that the interests of justice would best be served by remanding this case for a retrial upon all issues.



24 Utah 2d 301

Stephen SIMPSON, Plaintiff and Appellant,

v.

GENERAL MOTORS CORPORATION,
Defendant and Respondent.

No. 11630.

Supreme Court of Utah.

June 5, 1970.

Action by automobile body painter against automobile manufacturer for injuries received while painter was struck in forehead by torque tension rod which re-

jury a question of the defendant insurer's liability * * * the appellate court may reverse under its plenary power, although no exception was taken below, * * * because a fair trial was not had." And cf. Sutton v. Otis Elevator Co., 68 Utah 85, 249 P. 437, where the court held that in special circumstances in the interest of justice failure to give proper instructions was reviewable on appeal, though no such instructions were requested.

leased while he was conditioning tail gate assembly on station wagon for painting. The Third District Court, Salt Lake County, D. Frank Wilkins, J., entered judgment on verdict of no cause of action in favor of manufacturer, and painter appealed. The Supreme Court, Crockett, C. J., held that testimony that job in question did not ordinarily involve disassembly of tail gate, together with fact that reasonable minds may well have believed that one who relies on his own judgment to deviate from ordinary and usual procedure should take into consideration possibility of any increased risk in doing so, justified submission to jury of question as to whether painter was contributorily negligent in disassembling tail gate, thereby allowing torque tension rod to release and strike him in forehead.

Affirmed.

1. Appeal and Error ⇨172(1)

Plaintiff's contention relating to strict liability would not be considered by Supreme Court where it was raised for first time on appeal.

2. Negligence ⇨136(9)

Issue of contributory negligence may be submitted to jury if there is basis in evidence upon which reasonable minds could conclude that plaintiff was negligent in that he failed to exercise that degree of care which an ordinary, reasonable and prudent person would have observed under the circumstances.

3. Automobiles ⇨16

Testimony that station wagon paint job did not ordinarily involve disassembly of tail gate, together with fact that reasonable minds may well have believed that one who relies on his own judgment to deviate from the ordinary and usual procedure should take into consideration possibility of any increased risk in doing so, justified submission to jury of question as to whether painter was contributorily negligent in disassembling tail gate for purposes of painting it, thereby allowing torque tension

rod of tail gate to release and strike him in forehead.

4. Automobiles ⇨16

Admission in evidence of service manual showing procedure involved in removing tail gate was not error, in action against automobile manufacturer by automobile body painter for injury sustained when torque tension rod released and struck painter in forehead while he was disassembling station wagon tail gate for painting, where facts of existence of service manual, its availability to painter if he had asked for it, and its contents, could be considered as having some bearing both upon issue whether manufacturer had taken reasonable precautions for safety of those who would be concerned with that assembly and whether painter observed reasonable care for his own safety in connection with its removal.

5. Trial ⇨295(1)

Specific jury instruction should be considered in its entirety along with all other instructions.

6. Trial ⇨296(4)

Phrase "against misuse by careless persons" in instruction of defendant manufacturer's standard of care was not an imputation of carelessness to plaintiff where jury was properly instructed that they should consider all instructions together, and another instruction adequately safeguarded plaintiff's interests as to standard of care imposed upon him.

7. Appeal and Error ⇨930(1), 1032(1)

All presumptions favor validity of verdict and judgment and they will not be overturned unless attacker shows that there is error which is substantial and prejudicial in sense that there is reasonable likelihood that in its absence, result would have been different.

Woodrow D. White, Salt Lake City, for plaintiff and appellant.

Harold G. Christensen, Salt Lake City, for defendant and respondent.

CROCKETT, Chief Justice.

The plaintiff Stephen Simpson, an auto body painter for Capital Chevrolet Company in Salt Lake City, sues for injuries he received on being struck in the forehead by a torque tension rod which released while he was conditioning the tail gate assembly on a Chevrolet station wagon for painting. His complaint charged negligence against defendant General Motors in the design of the tail gate assembly, particularly that as it was lowered an apparently harmless tension rod slipped out of its holder and struck him; and that the construction constituted a hidden danger which the defendant should have foreseen and guarded against, and/or given warning about. The case was submitted to a jury upon the issues of defendant's negligence and the plaintiff's contributory negligence. They returned a verdict of no cause of action in favor of the defendant.

On appeal plaintiff contends that the issue of contributory negligence should not have been submitted (a) because of the doctrine of strict liability where an inherently dangerous instrumentality is involved, and (b) that the evidence would not justify a finding of contributory negligence. He also assigns error in rulings on evidence and the giving of instructions.

[1] The contention relating to strict liability is an attempt to inject that doctrine into this case for the first time on appeal. It was dealt with neither in the plaintiff's complaint, nor in the pretrial conference, nor at the trial. It is therefore not appropriate to address such a contention to this court. Orderly procedure, whose proper purpose is the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial court; and having done so, he cannot thereafter change to some different theory and thus

attempt to keep in motion a merry-go-round of litigation.¹

Contributory Negligence

[2] Consideration of the justification for submitting the issue of contributory negligence is analogous to making the same determination as to primary negligence: whether there is a basis in the evidence upon which reasonable minds could conclude that the plaintiff was negligent in that he failed to exercise that degree of care which an ordinary, reasonable and prudent person would have observed under the circumstances.²

[3] The evidence is to the effect that the usual procedure in doing the job assigned plaintiff did not involve any taking apart of the tail gate, but that he elected to do so upon his own initiative, believing it would be easier to do a more thorough and better job. That doing the paint job in question did not ordinarily involve undoing the tail gate assembly was supported by the testimony of three other auto body painters. This testimony, together with the fact that reasonable minds may well believe that one who relies on his own judgment to deviate from the ordinary and usual procedure should take into consideration the possibility of any increased risk in doing so, justified the trial court in submitting to the jury the question as to whether the plaintiff was contributorily negligent under the standard above set forth.³

Ruling on Evidence

[4] Defendant assigns as error the admission in evidence of a service manual of the defendant which showed the procedure involved in removing the tail gate when necessary. An essential part of the plaintiff's case was his contention that he had no knowledge and no warning of danger

1. That matters raised for the first time on appeal will not be considered see *Hamilton, et al. v. Salt Lake County Sewerage Imp. Dist., et al.*, 15 Utah 2d 216, 392 P.2d 235, and cases therein cited.

2. See *Stickle v. Union Pacific R. Co.*, 122 Utah 477, 251 P.2d 867.

3. *Ibid.*

hidden in the tail gate assembly. The facts of the existence of the service manual, its availability to the plaintiff if he asked for it, and its contents, could well be considered as having some bearing both upon the issue whether the defendant had taken reasonable precautions for the safety of those who would be concerned with that assembly, and whether the plaintiff observed reasonable care for his own safety in connection with its removal. Inasmuch as the service manual had some logical relevancy as proof on an essential issue, we do not see any impropriety in admitting it in evidence.⁴

Instructions

[5,6] Plaintiff's complaint about instructions to the jury includes one about a portion of Instruction No. 16:

* * * A manufacturer is not required to foresee all possible ways in which a person may injure himself nor to protect against all such possibilities or *against misuse by careless persons.* [Emphasis added.]

It is urged that the emphasized phrase is an imputation of carelessness to the plaintiff. It is neither fair nor realistic to excerpt a single phrase from an instruction, nor one instruction from the rest, and assume that the jury regarded it in isolation. They were properly instructed that they should not do so, but that they should consider all of the instructions together.⁵ In addition, Instruction No. 19 adequately

safeguarded the plaintiff's interests as to the standard of care imposed upon him:

* * * A person is not required to guard against danger in places where it is not expected to be, and if you shall find that the plaintiff exercised ordinary care in the performance of such work, and in the exercise of such ordinary care was unaware of the function of the torque rod assembly and any danger inherent therein, then the plaintiff could not be charged with contributory negligence.

[7] The parties have had a full and fair opportunity to present their evidence and arguments upon the issues to the court and the jury, who after due consideration and deliberation have made their determinations thereon. This is the objective of a trial. When it has been accomplished the administering of evenhanded justice to both sides demands that there should be some solidarity in the result so that it can be relied upon. Accordingly, the established rule is that all presumptions favor the validity of the verdict and judgment; and they will not be overturned unless the attacker shows that there is error which is substantial and prejudicial in the sense that there is a reasonable likelihood that in its absence the result would have been different. We have found no such error here.

Affirmed. Costs to defendant (respondent).

CALLISTER, TUCKETT, HENRIOD
and ELLETT, JJ., concur.

4. As to the admissibility of evidence depending on logical relevancy to prove an issue, see 31A C.J.S. Evidence 426 et seq.; see *Foster v. Keating*, 120 Cal. App.2d 435, 261 P.2d 529 (1953); and *Sumrall v. Butler*, 102 Cal.App.2d 515, 227 P.2d 881 (1951).

5. That an instruction should be considered in its entirety, and along with all of the other instructions, see *Badger v. Clayson*, 18 Utah 2d 329, 422 P.2d 665; and see *Walkenhorst v. Kesler*, 92 Utah 312, 67 P.2d 654.

Carol K. BAKER, Personal Representative, In the Matter of the Estate of Leda K. Wickel Little, aka Leda K. Wickel, Plaintiff and Appellant,

v.

Dwight G. PATTEE and Vella M. Pattee, Defendants and Respondents.

No. 18277.

Supreme Court of Utah.

June 1, 1984.

Personal representative of grantor's estate brought action to cancel warranty deed and to quiet title to property described in deed. The Third District Court, Salt Lake County, Dean E. Conder, J., entered judgment for grantees, and personal representative appealed. The Supreme Court, Howe, J., held that: (1) actions based on lack of consideration and undue influence are equitable actions governed by four-year statute of limitations; (2) date of delivery of date set period of limitations in motion and those actions were therefore barred years before grantor's death; (3) consideration paid by grantees in 1964 was adequate and fully performed; (4) no confidential relationship existed between grantees and grantor so burden remained upon personal representative to prove by clear and convincing evidence that conveyance should be set aside; and (5) no resulting trust was shown where personal representative did not prove that grantor intended anything but unconditional conveyance of her property.

Affirmed.

1. Deeds ⚡211

Party attacking validity of written instrument such as a deed must do so by clear and convincing evidence.

2. Appeal and Error ⚡1009(4)

Supreme Court will disturb findings of fact in equity cases only where evidence clearly preponderates against them.

3. Appeal and Error ⚡1009(1)

Supreme Court is not bound to substitute its judgment for that of a trial court in equity cases and because of trial court's advantaged position, Supreme Court gives considerable deference to its findings and judgment.

4. Deeds ⚡68(1)

Where deed is executed with no intent to transfer present interest, it will be invalidated by court in equity.

5. Deeds ⚡194(5)

Presumption of valid delivery arises where deed has been executed and recorded but this presumption may be overcome by clear and convincing evidence to the contrary.

6. Trusts ⚡62

Essential element of resulting trust is intent of creator that res be held in trust.

7. Limitation of Actions ⚡60(5)

Where there was testimony that grantor knew that she had conveyed her property to grantees with full understanding that she had no further claim to it, where liens she executed encumbering the property were discharged by her repayment of all sums received through welfare assistance, and where in 14 years that she lived after conveying property she never once attempted to obtain property's return nor told anyone that she still owned property, requisite statute of limitations began to run no later than date deed was delivered and thus grantor's personal representative's claim of a trust was barred. U.C.A. 1953, 78-12-25(2).

8. Deeds ⚡17(4)

Grantees, who paid property taxes and assessments over period of 14 years, provided grantor a home for the remainder of her life and fully performed terms of their agreement with grantor, gave adequate and substantial consideration for property.

9. Cancellation of Instruments ⚡32, 34(4)

An action demanding cancellation of deed for failure of consideration is an equi-

table action and governed by four-year statute of limitations for actions for relief not otherwise provided by law. U.C.A. 1953, 78-12-25(2).

10. Limitation of Actions ⇐60(5)

Regardless of whether deed was delivered when executed in 1964 or when it was recorded in 1965, the four-year statute of limitations for actions for relief not otherwise provided by law had expired before action demanding cancellation of deed for failure of consideration was brought by grantor's estate following her death in 1978. U.C.A. 1953, 78-12-25(2).

11. Limitation of Actions ⇐97

In cases of undue influence and duress, limitation period begins with termination of influence.

12. Fraud ⇐50

Confidential relationship is presumed between parent and child, attorney and client and trustee and cestui que trust; same holds true between spiritual advisor and a dying man.

13. Fraud ⇐50

Where confidential relationship exists, presumption of unfairness arises which must be overcome by countervailing evidence, and burden shifts to defendant to prove absence of unfairness by preponderance of the evidence; in all other relationships, existence of confidential relationship becomes question of fact.

14. Trusts ⇐110

Where trial court found that no confidential relationship existed between grantor and one grantee and that grantee, a real estate agent, was not serving as her agent at time of conveyance, burden was on grantor's personal representative to establish by clear and convincing evidence that grantor conveyed her property as result of grantee's undue influence and that influence continued until time of grantor's death.

15. Deeds ⇐211(4)

Trusts ⇐110

Where grantees recorded deed in 1964 and grantor took no action against them in 14 years she lived thereafter, and where grantor validated and acknowledged original transaction through subsequent inaction for well over a decade after initiating conveyance, no undue influence was proven in execution of deed, and thus no constructive trust could be impressed upon property.

Robert M. Anderson, Danny C. Kelly, Salt Lake City, for plaintiff and appellant.

Richard A. Rappaport, Salt Lake City, for defendants and respondents.

HOWE, Justice:

Plaintiff, personal representative of the estate of Leda K. Wickel Little, deceased, brought this action against defendants to cancel a warranty deed executed by the deceased in 1964 and to quiet title to the real property described in the deed. She alleged lack of intent to deliver the deed, conveyance in trust, undue influence by one in a confidential relationship and failure of consideration or grossly inadequate, unconscionable and unfair consideration. Defendants counterclaimed, seeking to quiet title in themselves, generally denying the allegations of the complaint and further defending on the grounds that the action was barred by applicable statutes of limitation. The trial court entered judgment for the defendants and plaintiff appeals.

Leda Little and her first husband were the owners of three homes, No. 1909, No. 1911 and No. 1915 East 4500 South in Salt Lake County, Utah, on property roughly 1½ acres in size. They moved into No. 1909 in 1940 and built No. 1915 in 1957, but he died before she moved into it in 1958. No. 1911 was a modular home moved onto the property in 1950.

Little had met Clyde Bradshaw, a realtor, through her first husband. Both she and Bradshaw were from Minersville,

Utah, and became good friends. Three years after her husband died, Little asked Bradshaw to sell the property, as there were delinquent property taxes owing and she was having difficulty maintaining it. When Bradshaw was unable to sell it for cash as she requested, she offered to convey the property to him in return for his paying the taxes and providing her a place to live for the rest of her life. Bradshaw did not want to shoulder that responsibility but put her in touch with his daughter and her husband, Dwight and Vella Pattee, the defendants herein. Mr. Pattee, also a realtor, attempted to sell Nos. 1909 and 1911 over a period of six months, but was unable to find purchasers for cash. The listing agreement expired in January of 1964. At about that time, Little extended the same proposal to Pattee that she had earlier made to Bradshaw. Pattee was reluctant at first, thinking that it was too much responsibility for him and his wife. Little was 59 years old and wanted defendants' assurance that she would always have a place to live in comfort in return for deeding the property to them. Both parties consulted a lawyer for advice, but did not transact any business through him. Instead, Pattee prepared a warranty deed and on September 30, 1964, went to Little's home with his brother-in-law, a notary public, where Little executed the deed conveying the three homes to defendants. Pattee took the deed with him and thenceforth assumed and paid the taxes on the property. Little continued to live in No. 1915 and to receive \$50 a month rent from one of the other houses until her death in 1978.

On February 17 and April 21, 1965, Little executed two separate public welfare lien agreements with the Salt Lake County Public Welfare Department, pledging the property as collateral. Defendants had no knowledge of that transaction. They recorded their deed on March 22, 1965. Some time later, Little remarried and continued to live in the home at No. 1915 with her second husband. Both of them repaid the amounts received from the Department of Public Welfare and the lien on the property was fully discharged in December of 1971.

In early October 1978, Little and her husband were admitted to a nursing home, where she died later that month, never having by word or action attempted to repudiate the conveyance. She had no children and both her parents and siblings had predeceased her. Plaintiff is Little's niece and her closest surviving relative.

[1-3] Plaintiff urges us to conduct a new and independent review of both questions of law and questions of fact. A party attacking the validity of a written instrument must do so by clear and convincing evidence. *Pagano v. Walker*, Utah, 539 P.2d 452 (1975) (joint bank account); *First Security Bank of Utah, N.A. v. Hall*, 29 Utah 2d 24, 504 P.2d 995 (1972) (stock certificates); *Controlled Receivables, Inc. v. Harman*, 17 Utah 2d 420, 413 P.2d 807 (1966) (deed); *Haywood v. Gill*, 16 Utah 2d 299, 400 P.2d 16 (1965) (joint bank account); *Northercrest, Inc. v. Walker Bank & Trust Co.*, 122 Utah 268, 248 P.2d 692 (1952) (deed). This Court will disturb the findings of fact in equity cases only where the evidence clearly preponderates against them. *Bown v. Loveland*, Utah, 678 P.2d 292 (1984); *Del Porto v. Nicolo*, 27 Utah 2d 286, 495 P.2d 811 (1972); *First Security Bank of Utah, N.A. v. Hall*, supra. We are not bound to substitute our judgment for that of the trial court, and because of its advantaged position, we give considerable deference to its findings and judgment. *Gillmor v. Gillmor*, Utah, 657 P.2d 736 (1982); *Jensen v. Brown*, Utah, 639 P.2d 150 (1981); *Pagano v. Walker*, supra. The trial court, after addressing the substantive issues, found all of plaintiff's claims to be barred by U.C.A., 1953, §§ 78-12-25, 78-12-26, 78-12-5 and/or -6. We shall address the pertinent statutes of limitation in conjunction with the respective claims on appeal before us.

I.

[4,5] Plaintiff contends that the deed was not delivered and accepted with the requisite legal intent and that at best it must be viewed to be a conveyance in trust.

Where a deed is executed with no intent to transfer a present interest, it will be invalidated by a court in equity. *Curtiss v. Ferris*, 168 Colo. 480, 452 P.2d 38 (1969). This Court has held that a conveyance is valid only upon delivery of a deed with present intent to transfer, *Givan v. Lambeth*, 10 Utah 2d 287, 351 P.2d 959 (1960). A presumption of valid delivery arises where the deed has been executed and recorded, *Kresser v. Peterson*, Utah, 675 P.2d 1193 (1984); *Controlled Receivables, Inc. v. Harman*, supra, but such a presumption may be overcome by clear and convincing evidence to the contrary. *Gold Oil Land Development Corp. v. Davis*, Utah, 611 P.2d 711 (1980).

The recording of a deed and placing the names of others on the property is somewhat in the nature of a public declaration that [the grantor] intended the instrument to become effective immediately. People as a rule do not deliberately put a flaw in the title to their property, thereby handicapping its later disposal, unless they really intend to transfer some interest to the person whose name is thus placed in the record.

Allen v. Allen, 115 Utah 303, 204 P.2d 458 (1949).

[6, 7] Plaintiff contends that Little did not deliver the deed with the requisite intent to divest herself of all right, title and interest in the property, and that her estate should therefore be permitted to enforce a resulting trust. An essential element of a resulting trust is the *intent* of the creator that the res be held in trust. *Parks v. Zions First National Bank*, Utah, 673 P.2d 590 (1983); *Jones v. Jones*, Okla., 459 P.2d 603 (1969). Had that been the finding in the instant case, the statute of limitations would not begin to run until the trustees affirmatively repudiated the trust. Therefore, this action would not be barred. *Parks*, supra. Plaintiff attempted to show that about the time Little conveyed the property to Pattee she was the defendant in a suit for alienation of affections and that she wanted to remove her assets from the reach of a potential judgment creditor. However, the trial court found the convey-

ance to have been absolute and unconditional and not in trust. That finding was supported by testimony that Little knew that she had conveyed her property to defendants with the full understanding that she had no further claim to it. There was evidence that she may not have understood the nature of the lien agreements she executed encumbering the property. Documents proved that she repaid all sums received through welfare assistance and that the liens were subsequently discharged. In the 14 years Little lived after conveying her property, she never once attempted to obtain its return or told anyone that she still owned what she had conveyed away. Under those circumstances, we are disinclined to upset the trial court's finding in the absence of any clear weight of evidence to the contrary. Plaintiff's claim of a trust was thus barred as the requisite statute of limitations, U.C.A., 1953, § 78-12-25(2) (actions for relief not otherwise provided for by law), began to run no later than the date the deed was delivered.

II.

[8] Plaintiff also claims that there was failure of consideration for the deed, or to the extent consideration was given, the same was grossly unfair and inadequate. Specifically, plaintiff relies upon a letter written by Pattee to Little two years after the conveyance. The letter confirmed that an agreement had been reached at the time of the conveyance and then continued:

I will permit you to live at 1915 East 4500 South for as long as the property is in my possession. I will try to sell [the other homes on the property], but you may stay in your present home as long as you wish, provided only that you pay the expenses thereto, i.e., all utilities, water, gas, electricity, taxes, etc. as may become due thereon.

Pattee testified that he wrote that letter at Little's request at a time when he was piloting planes to Southeast Asia and all over the world. Little was concerned lest his family should fail to follow through on

the agreement if something happened to him. He stated that he wrote the proviso on expenses because he was afraid that in the event of his death, his wife would not have the income to pay them. Nonetheless, the evidence is undisputed that he continued to pay taxes on the property throughout Little's remaining years. At the time of her death he had paid a total of \$12,581.33. In addition, Little received a monthly income of \$50 from one of the other homes through the period at issue here, approximately 15 years. Furthermore, she lived rent-free in her home until a month before she died.

Plaintiff claims that the value of the property was stated to be \$35,000 in 1957 in the probate proceedings of the estate of Little's first husband. The record is totally barren of any support for that assertion. The present value of the property is claimed to be far in excess of that amount. We are here concerned, of course, only with what the value of the property was in 1964 at the time of conveyance. The trial court found that defendants gave adequate and substantial consideration for the subject property. They paid property taxes and assessments over a period of 14 years, provided Little a home for the remainder of her life, and fully performed the terms of their agreement with her. The weight of the evidence does not clearly preponderate against that finding, and we will not disturb it.

[9,10] An action demanding cancellation of a deed for failure of consideration is an equitable action and governed by § 78-12-25(2). Without deciding here whether the deed was delivered when signed by Little or when recorded by Pattee, an issue not before us, we hold that the period of limitations had run long before this action was instituted.

III.

[11] Plaintiff's position with respect to the issue of undue influence is essentially two-fold: (1) a confidential relationship existed between Pattee and Little, and the burden shifted to him to prove that he did

not procure the deed by undue influence; and (2) even in the absence of a confidential relationship, the evidence clearly preponderated against the trial court's finding that the conveyance was not procured by undue influence. In cases of undue influence and duress the limitation period begins with the termination of the influence. Developments in the law—Statute of Limitations (1950) 63 Harv.L.Rev. 1177. See also *Baker v. Massey*, Okla., 569 P.2d 987 (1977) for a discussion of the applicable statute of limitations for equitable actions based on undue influence.

[12,13] A confidential relationship is presumed between parent and child, attorney and client, and trustee and cestui que trust. *Blodgett v. Martsch*, Utah, 590 P.2d 298 (1978). The same holds true between a spiritual advisor and a dying man. *Corporation of the Members of the Church of Jesus Christ of Latter-day Saints v. Watson*, 25 Utah 45, 69 P. 531 (1902). Where a confidential relationship exists, a presumption of unfairness arises which must be overcome by countervailing evidence, and the burden shifts to the defendant to prove absence of unfairness by a preponderance of the evidence. *Robertson v. Campbell*, Utah, 674 P.2d 1226 (1983) (finding of undue influence in execution of trust shifted burden to defendant to prove absence of undue influence in a subsequent alleged ratification of the trust); *Johnson v. Johnson*, 9 Utah 2d 40, 337 P.2d 420 (1959); *In re Swan's Estate*, 4 Utah 2d 277, 293 P.2d 682 (1956). In all other relationships the existence of a confidential relationship becomes a question of fact. *Blodgett v. Martsch*, supra.

[14] The plaintiff contends that Pattee received the deed as Little's real estate agent while in a confidential relationship with her. In support, plaintiff cites cases showing a breach of fiduciary duty where real estate agents failed to disclose to their principals that they had ownership interests as buyers. *M.S.R., Inc. v. Lish*, 34 Colo.App. 320, 527 P.2d 912 (1974). See also *Ornamental and Structural Steel*,

Inc. v. BBG, Inc., 20 Ariz.App. 16, 509 P.2d 1053 (1973); *Batson v. Strehlow*, 68 Cal.2d 662, 68 Cal.Rptr. 589, 441 P.2d 101 (1968). Under those circumstances a court will not uphold a transaction between a principal and his agent. No such failure to disclose has been claimed here. "The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person by another is not sufficient alone to constitute such a relationship." *Bradbury v. Rasmussen*, 16 Utah 2d 378, 401 P.2d 710 (1965). The trial court found that no confidential relationship existed between Little and Pattee and that Pattee was not serving as her agent at the time of the conveyance. The burden thus was plaintiff's to establish by clear and convincing evidence that Little conveyed her property as a result of Pattee's undue influence and that that influence continued until the time of her death.

To buttress her claim that Little acted under the undue influence of Pattee, plaintiff points to Little's commitment to a mental hospital and attendant emotional disorders some ten years before she executed the deed. She emphasizes that Little never went to school until she was 16 years of age. Countervailing evidence was submitted at trial that Little remarried subsequent to the execution of the deed, continued occupying her home, managed her own financial affairs and never concealed the fact that she had deeded away her property. Though she had bouts with physical illness, no evidence was adduced that Pattee at any time overpowered her volition to the extent that she was impelled to do—or refrain from undoing—that which she would not have done had she been free from such controlling influence so that the conveyance represented the desire of Pattee rather than that of Little. See undue influence defined in *In re LaVelle's Estate*, 122 Utah 253, 248 P.2d 372 (1952). There was no such dominance shown in any of the evidence before the trial court, and particularly no evidence that in the execution of the deed, Little acted under the undue in-

fluence of Pattee. In *In re Woodward*, Okla., 549 P.2d 1207 (1976), the nieces of a decedent attempted to set aside a joint tenancy deed in favor of their brothers on grounds of fraud, undue influence and lack of mental capacity. In holding that the statute of limitations had expired on the claims of fraud and undue influence, the court stated that the means of discovering fraud and undue influence came into the hands of the plaintiffs when the deed was filed of record and that they failed to exercise ordinary diligence in discovering it. See also *Mollendorf v. Derry*, 95 Idaho 1, 501 P.2d 199 (1972) (upholding transfer of property made by a man of little education to his niece, an experienced businesswoman); *Haywood v. Gill*, 16 Utah 2d 299, 400 P.2d 16 (1965) (upholding a joint bank account created by decedent five years before his death in favor of his daughter).

[15] Pattee recorded the deed on March 22, 1965. Little took no action against him in the 14 years she lived thereafter. This case is distinguishable from *Robertson v. Campbell*, supra. There the father conveyed property into a trust that the court found had been earlier created by him under the undue influence of his daughter, who was the principal beneficiary. As a result, any ratification of the trust by the subsequent conveyance of property into the trust was held to be presumptively tainted. Here, by contrast, no further transaction took place, and Little validated and acknowledged the original transaction through subsequent inaction for well over a decade. The trial court found that Little initiated the conveyance and that the evidence was insufficient to show any undue influence on the part of Pattee in the execution of the deed, let alone subsequent to the transaction. The weight of the evidence does not clearly preponderate against that finding, and we will not disturb it.

In conclusion, we summarize our holdings on the various issues before us. No confidential relationship existed between Pattee and Little, so the burden remained upon the plaintiff to prove by clear and

convincing evidence that the conveyance should be set aside. That burden was not met. No resulting trust could come into being, as the plaintiff did not prove that Little intended anything but an unconditional conveyance of her property. No constructive trust could be impressed upon the property by the Court, as no lack of consideration or undue influence was proven in the execution of the deed. The consideration paid by plaintiffs in 1964 was adequate and fully performed. Actions based on lack of consideration and undue influence are equitable actions governed by the four-year statute of limitations. The date of delivery of the deed set the period of limitations in motion and those actions were barred years before Little's death.

The judgment of the trial court is affirmed with costs to defendants.

HALL, C.J., and STEWART and DURHAM, JJ., concur.

OAKS, J., having resigned, does not participate herein.



UPLAND INDUSTRIES CORPORATION, Plaintiff and Appellant,

v.

PACIFIC GAMBLE ROBINSON COMPANY, a corporation, Defendant and Respondent.

No. 18850.

Supreme Court of Utah.

June 20, 1984.

Lessor brought action requesting adjudication of respective rights and duties of parties under lease, and lessee counter-claimed for specific performance of option to purchase. The Third District Court, Salt

Lake County, David B. Dee, J., found lessor in breach of agreement and ordered it to convey property to lessee, and lessor appealed. The Supreme Court, Hall, C.J., held that: (1) lessee's notice letter constituted effective and timely exercise of option to extend lease, and (2) lessor's assertion in 1970, as well as that in 1971 with respect to expiration of purchase option, was at most anticipatory breach or repudiation of lease agreement, and lessee therefore had right to elect either to treat repudiation as effective and bring suit at once or continue to treat repudiation as ineffective and bring suit if and when actual breach occurred.

Affirmed.

1. Landlord and Tenant ⇐86(2)

Where lessee's intention to exercise option to extend lease without any reservation or condition was evident in language used in notice letter, where lessor's correspondence demonstrated that it understood cancellation proposal to be nothing more than request and recognized notice letter to be effective exercise of option, and where both parties continued to perform under terms of lease for nearly two and one-half years, lessee's notice letter constituted effective and timely exercise of option to extend lease.

2. Limitation of Actions ⇐46(6)

Cause of action on contract accrues, thus causing statute of limitations to commence, only upon breach of contract.

3. Limitation of Actions ⇐46(6)

Lessor's mere assertion in 1970 and 1971 with respect to status of lessee's tenancy did not constitute actual breach of lease agreement but, rather, breach did not occur until 1978 when lessor actually refused to convey property to lessee as required under purchase option provision of lease.

4. Limitation of Actions ⇐46(6)

Lessor did not commit actual or present breach by merely asserting invalidity of lease, especially considering its continuing performance under lease terms,

CALLISTER, C. J., and CROCKETT, J., concur.

HENRIOD, J., does not participate herein.

TUCKETT, Justice (concurring and dissenting):

I concur in the decision of the majority insofar as it affirms the judgment of the lower court on the question of damages sustained by the plaintiff on his claim for the loss of certain sheep. I respectfully dissent to that portion of the majority decision which reverses the lower court on its determination that the Grass Creek road was not a public way. I particularly object to that portion of the decision which states that:

Due to a landslide in the early 1950's and the failure of the county to keep the road in repair, the public departed from the road in places and traveled along an old abandoned railroad right of way. There was no objection by the railroad company to the use being made, and since this deviation continued for more than ten years, that part of the railroad right of way which was used by the public became the Grass Creek road.

The record shows and the court found that for approximately 40 years the defendants and their predecessors in interest had leased the right of way from the railroad company, and it thus appears that the railroad had no right to object nor to concur in the use of the right of way by members of the public. The record further shows that segments of the railroad right of way had been improved by defendants and their predecessors to enable them to use it as a private way. Defendants had the right to exclude the public from those segments of the right of way. Even though the defendant Ralph Judd and his father before him permitted others owning property in the area to use that portion of the right of way this does not support the majority's determination that the entire way was public. It should be noted that the majority opinion deals with rights of the railway company even though it was not made a party.

James W. SEEQUIST and Joan W. Seequist, his wife, Plaintiffs and Appellants,

v.

Gladys R. SEEQUIST et al., Defendants and Respondents.

No. 13569.

Supreme Court of Utah.

July 11, 1974.

Appeal to review a judgment of the Second District Court, Davis County, John F. Wahlquist, J., dismissing plaintiffs' complaint and defendants' counterclaim and quieting title to the properties involved in defendant mother. The Supreme Court, Henriod, J., held that the finding that mother, who first executed a warranty deed on property to her son and daughter-in-law and then, a few days later, executed a warranty deed on the same property to her daughter by a second marriage, did not have the mental capacity to comprehend the effect of the transactions was supported by the evidence; furthermore, the Court correctly found that the son, as a fiduciary and a person having a confidential relationship with his mother, had a duty to act fairly, disclose material information, and take no unfair advantage of his superior position, but that he breached such duty in view of, inter alia, the extreme disparity between the market value of the property and the amount he paid his mother for it.

Affirmed.

Deeds \S 68(1 $\frac{1}{2}$), 72(7)

Finding that mother, who first executed a warranty deed on property to her son and daughter-in-law and then, a few days later, executed a warranty deed on the same property to her daughter by a second marriage, did not have the mental capacity to comprehend the effect of the transactions was supported by the evidence; furthermore, the court correctly found that the son, as a fiduciary and a person having a confidential relationship with his mother,

had a duty to act fairly, disclose material information, and take no unfair advantage of his superior position, but that he breached such duty in view of, inter alia, the extreme disparity between the market value of the property and the amount he paid his mother for it.

P. Keith Nelson, of Brandt, Miller, Nelson & Christopherson, Salt Lake City, for appellants.

George K. Fadel, Bountiful, for respondents.

HENRIOD, Justice:

Appeal to review the dismissal of plaintiffs' complaint and defendants' counterclaim and quieting title to the properties involved in defendant Gladys R. Seequist. Affirmed. No costs awarded.

Plaintiffs James W. and Joan W. Seequist are husband and wife. James is the son of defendants A. W. Seequist and Gladys R. Seequist and the half-brother of Jean M. King. On March 27, 1973, Gladys executed a warranty deed on property to James and Joan Seequist. The deed was properly recorded April 6, 1973. On April 2, 1973, Gladys executed a warranty deed on the same property to Jean M. King, which deed was properly recorded the same day.

The trial court found that Gladys did not have the mental capacity to comprehend the effect of the transactions. We think appellants have failed to show an abuse of discretion of the court absent a clear showing of such an abuse.

Based on Gladys' testimony, the trial court found that the requirements necessary to show the existence of a confidential relationship between James and Gladys R. Seequist¹ were present when the transactions took place. Counsel for appellants argue that no evidence was presented which would show a reposal of confidence by Gladys in James, but we think her testimo-

ny which was relied upon by the trial court clearly reflects such confidence.

The court found that, as fiduciary and a person having confidential relationship with Gladys, James had a duty to act fairly, make a disclosure of material information, and to take no unfair advantage of his superior position. We think it was correct in finding that James breached his duty and also in its reliance upon both the extreme disparity between the market value of the property, somewhere between \$62,500 and \$91,250, and the amount paid by the plaintiff, \$28,000, and the fact that plaintiff made no attempt to secure for defendant Gladys any independent advice or representation even though he was aware that she had no independent knowledge of the value of the property involved.

CALLISTER, C. J., and ELLETT, CROCKETT and TUCKETT, JJ., concur.



Grace BERGERA, Plaintiff and Appellant,
v.
IDEAL NATIONAL LIFE INSURANCE
COMPANY, Defendant and Respondent.
No. 13525.

Supreme Court of Utah.
July 16, 1974.

Suit by beneficiary of life policy, containing a double indemnity provision in case of accidental death of insured and containing an exclusionary clause if death resulted directly or indirectly from war, to recover on the policy for death of insured soldier who was fatally injured when he accidentally detonated a mechanical ambush device while returning to a night defensive position in Vietnam. The Seventh District Court, Carbon County, Edward

1. See Bradbury v. Rasmussen, 16 Utah 2d 378, 401 P.2d 710 (1965).

Devar C. PACK and Carolyn Pack,
Plaintiffs and Respondents,

v.

HULL DEVELOPMENT CO., INC., a
Utah corporation, Defendant
and Appellant.

No. 18136.

Supreme Court of Utah.

June 30, 1983.

Purchasers brought action against vendor seeking specific performance of real estate contracts. The Fourth District Court, Utah County, George E. Ballif, J., entered judgment for purchasers and vendor appealed. The Supreme Court held that: (1) evidence of the receipt and retention of purchasers' late payments by vendor sustained finding that vendor had effectively waived the right of forfeiture for late payment and that the notice of forfeiture was ineffective to trigger vendor's right to foreclose all of the purchasers' rights under the agreement, and (2) where purchasers took possession of property in July 1977 and real estate contract provided that purchasers were liable to pay interest at the rate of 9% per annum after that date, and parties stipulated that as of July 12, 1979, the total sum owed by the purchasers under the agreement, including interest, was \$11,392.93, and in July 1981, trial court ordered purchasers to pay vendor that amount, purchasers were liable to vendor for interest on that amount for the additional two years, and vendor's refusal to accept the tender of two checks at about the time of vendor's attempted rescission did not preclude its recovery of interest.

Affirmed in part and remanded.

1. Specific Performance ⇐121(11)

In purchasers' suit for specific performance of real estate contract, evidence of the receipt and retention of purchasers' late payments by vendor sustained finding that vendor had effectively waived the right of

forfeiture for late payment and that the notice of forfeiture was ineffective to trigger vendor's right to foreclose all of the purchasers' rights under the agreement.

2. Interest ⇐39(1), 50

Vendor and Purchaser ⇐172

Where purchasers took possession of property in July 1977 and real estate contract provided that purchasers were liable to pay interest at the rate of 9% per annum after that date, and parties stipulated that as of July 12, 1979, the total sum owed by purchasers under the agreement, including interest, was \$11,392.93, and in July 1981, trial court ordered purchasers to pay vendor that amount, purchasers were liable to vendor for interest on that amount for the additional two years, and vendor's refusal to accept the tender of two checks at about the time of vendor's attempted rescission did not preclude its recovery of interest.

Robert D. Lamoreaux, Payson, for defendant and appellant.

John G. Mulliner, El Ray F. Baird, Provo, for plaintiffs and respondents.

PER CURIAM:

On July 25, 1977, an Earnest Money Receipt and Offer to Purchase a lot was executed between the parties, which included a provision that if the purchasers, Packs, did not make payments or complete the purchase as required, the defendant, Hull, at its option could retain payments theretofore made as "liquidated and agreed" damages.

The Earnest Money agreement called for a purchase price of \$17,500 at 9%, with \$2,000 down and \$250 per month. The final contract to incorporate the terms of the Earnest Money agreement was prepared by Hull, the seller, and presented to the Packs for execution. They refused to sign it since the Earnest Money agreement provided that Hull would install the sewer, while the proposed final contract required the Packs to assume the obligation for the installation of the sewer. No further offer to finalize

has been made. Irrespective of this attempted switch of obligation, the Packs, nonetheless, made numerous payments, but at times were delinquent according to the terms of the agreement.

Hull warned the Packs of the delinquencies, and threatened action to assert its rights *under the contract*. By letter dated February 28, 1979, Hull gave the Packs until March 25, 1979, to bring the payments current. Payments were made in response thereto apparently to Hull's satisfaction. On October 23, 1979, Hull again wrote the Packs, enclosing a check for \$5,666.42 "which represents all the money which you paid toward the purchase [less interest]." The letter continued by saying that Hull "hereby exercises the right it has under the terms of its agreement to *cancel* the transaction for your failure to carry out its terms." The agreement had no term for "cancellation" or any other right to rescind, but only a right to retain payments already made if the buyers did not complete the payments and purchase of the lot.

Packs brought this suit for specific performance. Hull bases its defense on the October 23, 1979, letter hereinabove mentioned. At that time it appeared that there were two payments delinquent. Hull contends that the court's findings as to waiver and notice were in error.

[1] The receipt and retention of late payments by Hull on a number of occasions are clearly reflected in the record, and the form of the notice of "cancellation" fully justifies affirmance of the trial court's findings. The court specifically found that there had been an effective waiver of the right of forfeiture for late payment, and that the notice of forfeiture was ineffective to trigger Hull's right to foreclose all of Packs' rights under the agreement.

Hull urges that the court should have set aside the judgment and granted a new trial

under Rule 60(b)(7), Utah Rules of Civil Procedure, because "many errors of law and fact were made by both the court and the attorneys." Assuming without deciding that Rule 60(b)(7) can be invoked in such instance, on the facts presented, we are not convinced that the trial court abused its discretion.

[2] Hull also contends that it should be awarded interest on all sums remaining unpaid on the Earnest Money agreement. The award of interest in a case such as this depends on who has possession of the property. If the seller has in some way prohibited the buyer from taking possession, no interest is allowed on the unpaid balance.¹ If, however, the buyer has possession, interest will generally be awarded.² In the instant case, by the terms of the parties' agreement as interpreted by the court, the Packs took possession of the property in July, 1977. They were therefore liable to pay interest at the rate of 9% per annum after that date, as specified in the agreement. The parties stipulated at trial that as of July 12, 1979, the total sum owed under the agreement (including interest) was \$11,392.93. This was the amount the trial court ordered the Packs to pay when judgment was rendered in July, 1981. The court therefore erred in failing to award interest for those additional two years.

The Packs seem to rely on the fact that Hull refused to accept the tender of two checks at about the time of the attempted rescission. Where the buyer has possession of the property, such tender is insufficient to avoid payment of interest. In such a case, the only legitimate way of avoiding interest would be for the buyer to tender into court or otherwise set aside the full amount due under the contract so that the buyer is excluded from all benefits and use of the funds.³

1. *Blomquist v. Bingham*, Utah, 652 P.2d 900 (1982); *Amoss v. Bennion*, 23 Utah 2d 40, 456 P.2d 172 (1969).

2. *Farnworth v. Jensen*, 117 Utah 494, 217 P.2d 571 (1950).

3. *Le Vine v. Whitehouse*, 37 Utah 260, 109 P. 2 (1910). See also Justice Wolfe's concurring opinion in *Farnworth v. Jensen*, *supra*.

Affirmed except as to the interest issue. For the limited purpose of awarding interest as explained in this opinion, the case is remanded. No costs awarded.



Garn L. BAUM, Plaintiff and Appellant,

v.

Harley GILLMAN, Defendant
and Respondent.

No. 17755.

Supreme Court of Utah.

June 30, 1983.

Causes of action for slander were dismissed by the Fourth District Court, Utah County, J. Robert Bullock, J., and plaintiff appealed. The Supreme Court, Hall, C.J., held that slander complaint did not allege defamation per se, where none of the allegations contained therein were such that the court could legally presume that plaintiff had been damaged; the allegations clearly did not impute criminal conduct, loathsome disease, conduct incompatible with the exercise of a lawful business, or unchastity; while the statements imputed poor business practices in the past, such had to be viewed and considered in light of the fact that plaintiff had been out of the subject business since 1974 and the allegedly defamatory incident did not appear until 1979, five years later; furthermore, the complaint contained no allegation that defendant's statements damaged plaintiff in any current business endeavor or pursuit.

Judgment affirmed.

Stewart, J., filed a dissenting opinion.

1. Libel and Slander ⇐89(1)

Inasmuch as complaint for slander contained no allegation of special damages, in

order to state a claim upon which relief could be granted the statements attributed to defendant had to constitute defamation per se.

2. Libel and Slander ⇐33

In order to constitute defamation per se, the defamatory words must charge criminal conduct, loathsome disease, conduct that is incompatible with the exercise of a lawful business, trade, profession, or office, or the unchastity of a woman.

3. Libel and Slander ⇐33

Whether defamatory words are actionable per se is to be determined from their injurious character; the words must be of such common notoriety that damage can be presumed from the words alone.

4. Libel and Slander ⇐80

Slander complaint did not allege defamation per se, where none of the allegations contained therein were such that the court could legally presume that plaintiff had been damaged; the allegations clearly did not impute criminal conduct, loathsome disease, conduct incompatible with the exercise of a lawful business, or unchastity; while the statements imputed poor business practices in the past, such had to be viewed and considered in light of the fact that plaintiff had been out of the subject business since 1974 and the allegedly defamatory incident did not appear until 1979, five years later; furthermore, the complaint contained no allegation that defendant's statements damaged plaintiff in any current business endeavor or pursuit.

5. Libel and Slander ⇐33

Statements which may be injurious only to some future happening do not give rise to a cause of action for either per se or per quod defamation.

Robert Macri, Salt Lake City, for plaintiff and appellant.

Jerry L. Reynolds, Dallas H. Young, Jr., Provo, for defendant and respondent.

102 Idaho 588

J. Sandy SINGLETON and Cay Singleton, Plaintiffs-Respondents,

v.

Mary PICHON, Defendant-Appellant,
and

Anita Foster, individually and heir or devisee of the Ned Foster Estate; and the Ned Foster Estate, Defendants-Respondents.

No. 13270.

Supreme Court of Idaho.

Oct. 5, 1981.

Vendees brought specific performance action on title retaining land sale contract. Upon remand, 98 Idaho 149, 559 P.2d 765, the District Court, Fifth Judicial District, Blaine County, James M. Cunningham, J., entered judgment in favor of vendees, and vendors' successor in interest appealed. The Supreme Court, Shepard, J., held that: (1) trial court's refusal to relieve counsel of stipulation agreeing to submit matter to court without trial and upon then existing record was within exercise of his discretion; (2) trial court did not err in vacating pretrial order, execution of which served no purpose whatsoever; (3) findings, conclusions and decision of trial court were supported by evidence; (4) cause of action did not accrue in vendees until tender of performance and successor's refusal of such tender; and (5) there was no evidence upon which trial court could have found vendees guilty of laches.

Affirmed.

Bakes, C. J., concurred in result.

1. Stipulations ⇌13

Where stipulation agreeing to submit matter to court for its decision without trial and upon then existing record was clear and without equivocation, trial court's refusal to relieve counsel of such stipulation was within exercise of his discretion.

2. Pretrial Procedure ⇌1

Where, pursuant to stipulation, matter had been submitted to and decided by trial court, trial court did not err in vacating pretrial order, execution of which at such point in proceeding served no purpose whatsoever.

3. Specific Performance ⇌121(11)

Findings, conclusions and decision of trial court in favor of vendees in action for specific performance brought by them on title retaining land sale contract were supported by evidence that neither vendors nor vendors' successor in interest ever prepared written notice of default and intention to terminate contract or mailed any such notices to vendees pursuant to terms of contract.

4. Limitation of Actions ⇌43

Statute of limitations only begins to run following accrual of cause of action and statute of limitations may only be asserted as bar after expiration of statutory period following accrual of cause of action.

5. Specific Performance ⇌105(1)

Cause of action did not accrue in vendees who brought action for specific performance on title retaining land sale contract until their tender of performance and refusal of such tender by vendors' successor in interest.

6. Specific Performance ⇌121(11)

There was no evidence in record of specific performance action brought by vendees on title retaining land sale contract upon which trial court could have found vendees guilty of laches.

Stanley Crow, Boise, for defendant-appellant.

E. Lee Schlender, Ketchum, for plaintiffs-respondents.

David B. Lincoln, Boise, for defendants-respondents.

SHEPARD, Justice.

This is an appeal from a judgment in favor of plaintiffs-respondents in an action

for specific performance brought by them as vendees in a title retaining land sale contract. We affirm.

The salient facts of the case are recited in the previous opinion of this Court in an earlier appeal, *Singleton v. Foster*, 98 Idaho 149, 559 P.2d 765 (1977). There the Court reversed the trial court which had, on the basis of the statute of limitations, dismissed the action.

Upon remand depositions of the various parties were taken and, following a pre-trial conference at which various exhibits were admitted, the matter was submitted for the decision of the court on the basis of the then existing record. The trial court made its findings of fact, conclusions of law and decision in favor of plaintiffs ordering and decreeing specific performance of the contract. Thereafter counsel for appellant Pichon submitted a form of pre-trial order to the court which was evidently inadvertently signed by the trial judge. Singleton moved to vacate the "pre-trial" order. Appellant Pichon moved to set aside the findings, conclusions and judgment and to be relieved from her stipulation which submitted the matter for the decision of the court without trial and further moved that the cause be set for trial upon its merits. The court granted respondent Singleton's motion to vacate the pre-trial order and denied all motions of appellant Pichon.

[1] Appellant Pichon asserts that the court erred in failing and refusing to grant Pichon's request for a trial of the cause. We find such assertion to be totally without merit. The stipulation agreeing to submit the matter to the court for its decision without trial and upon the then existing record is clear and without equivocation. The trial court's refusal to relieve counsel of that stipulation was within the exercise of his discretion and we find no abuse of that discretion. *Thompson v. Turner*, 98 Idaho 110, 558 P.2d 1071 (1977); *Loughrey v. Weitzel*, 94 Idaho 833, 498 P.2d 1306 (1972).

[2] Similarly, we find no merit to Pichon's assertion that the trial court erred in

vacating the pre-trial order. At that point in the proceeding the execution of such a pretrial order served no purpose whatsoever. Pursuant to stipulation the matter had been submitted to and decided by the trial court.

[3] Appellant Pichon next contends that the findings, conclusions and the decision of the trial court are not supported by the evidence. We disagree. The contract instrument between the Singletons and the Fosters provided that:

"Before purchaser's interest may be terminated or cancelled, vendor shall give purchaser written notice specifying the particulars in which purchaser is in default * * * if purchaser fails to comply with the then due terms of this contract as required by said notice within such thirty day period, then this contract will be subject to final and complete termination and cancellation by vendor. * * * Advice of cancellation may be given in the same manner as written notices."

At the heart of the findings of the trial court are those which found that neither the Fosters nor Pichon ever prepared a written notice of default and intention to terminate the contract, much less mailed any such notices to the Singletons.

The Singletons at all times lived in Hawaii and during the eleven years in question maintained various residences and/or business addresses at from three to six locations. It appears to be the principal contention of Pichon that the Singletons were somehow obligated to furnish their then current addresses to the Fosters and/or Pichon. It is sufficient to note that no such obligation is contained in the contract. Rather, if the Fosters or their assignee desired to exercise the default provisions of the contract, they needed only to mail such notices by certified mail to that address of the Singletons as stated in the contract. This the trial court found they did not do and that finding is clearly sustained by the evidence. Hence, we hold that since the Fosters and Pichon failed to comply or even attempt to comply with the express provisions of the contract, their contentions re-

garding post office regulations, changes of the Singletons' address and the Singletons' failure to give the vendors notice of the change of address are all irrelevant.

[4,5] Although the issue before this Court in *Singleton v. Foster, supra*, involved the statute of limitations, such was not ruled upon by the court below and that issue is raised only peripherally on this appeal. A statute of limitations only begins to run following the accrual of a cause of action and a statute of limitations may only be asserted as a bar after the expiration of the statutory period following the accrual of the cause of action. *City of St. Anthony v. Mason*, 49 Idaho 717, 291 P. 1067 (1930); *Little v. Emmett Irr. Dist.*, 45 Idaho 485, 263 P. 40 (1928). See 54 C.J.S. *Limitations of Action* § 108 (1948). Here there is no indication that the cause of action accrued in the Singletons until their tender of performance and Pichon's refusal of such tender. See *Stockmen's Supply Co. v. Jenne*, 72 Idaho 57, 237 P.2d 613 (1951).

[6] Likewise, Pichon only asserts peripherally that the trial court failed to give consideration to the doctrine of laches. The trial court made no finding regarding lach-

es and we find no indication in the record of a request, motion or demand by Pichon that the trial court consider and rule upon laches. Nevertheless, on the basis of the record before the trial court and here, we find no evidence upon which the trial court could have found the Singletons guilty of laches in the instant circumstances. Pichon was aware of the contract interest of the Singletons in and to the property since the quitclaim deed issued to Pichon was made specifically subject to the interest of the Singletons in the property.

We have considered appellant's remaining assignments of error and find them to be without merit. The judgment of the trial court is affirmed. Costs to respondents.

McFADDEN, BISTLINE and DONALDSON, JJ., concur.

BAKES, C. J., concurs in the result.



10 Utah 2d 378

R. George BRADBURY, Administrator of the Estate of George R. Bradbury, deceased, and Althea Bradbury, Plaintiffs and Respondents,

v.

Gordon L. RASMUSSEN and Yora Gene Rasmussen, his wife, Defendants and Appellants.

No. 10055.

Supreme Court of Utah.

May 7, 1965.

Action by husband and wife to have declared null and void a warranty deed, a lease agreement, and a transfer of water stock certificates to a niece and her husband. The husband died during the course of the litigation and his administrator was substituted as a party plaintiff. The Sixth District Court, Sevier County, Ferdinand Erickson, J., entered a judgment in favor of the plaintiffs and the defendants appealed. The Supreme Court, Callister, J., held that the evidence failed to establish undue influence on the part of niece and her husband and that the plaintiffs failed to sustain their burden of proving that they thought that the documents they had signed were for a contract of sale rather than a deed reserving life estate.

Reversed.

1. Jury ⇨28(5)

Defendants in action to declare null and void a warranty deed, lease agreement and a transfer of water stock certificates were not entitled to a jury trial where jury trial which was originally demanded by plaintiffs was waived by them at pretrial.

2. Deeds ⇨196(3)

Landlord and Tenant ⇨22(4)

Waters and Water Courses ⇨234

Undisputed evidence that there existed among the parties sincere affection, trust and confidence was not legally sufficient to constitute a confidential relationship giving rise to presumption of unfairness of transaction involving a warranty deed, a lease

agreement and a transfer of water stock certificates from a husband and wife to a niece, whom they had reared as their own daughter, and her husband.

3. Deeds ⇨196(3)

Gifts ⇨47(3)

If a confidential relationship is shown to exist and a gift or conveyance is made to a party in a superior position, a presumption arises that the transaction was unfair; this presumption has the force of evidence and will itself support a finding, if not overcome by countervailing evidence.

4. Deeds ⇨196(3)

Where a confidential relationship is shown to exist, burden is upon superior party to convince court by preponderance of evidence that transaction was fair.

5. Deeds ⇨196(2, 3)

Mere relationship of a parent and child does not constitute evidence of such confidential relationship as to create a presumption of fraud or undue influence.

6. Deeds ⇨211(4)

While kinship may be a factor in determining existence of a legally significant confidential relationship, there must be a showing, in addition to kinship, of a reposal of confidence by one party and resulting superiority and influence on other party.

7. Deeds ⇨72(3)

A relationship to constitute a confidential relationship must be such as would lead an ordinarily prudent person in management of his business affairs to repose that degree of confidence in other party which largely results in substitution of the will of latter for that of former in material matters involved in transaction.

8. Deeds ⇨72(3)

Doctrine of confidential relationship rests upon principle of inequality between the parties and implies a position of superiority occupied by one of parties over the other.

9. Deeds ⇨72(3)

Mere confidence in one person by another is not sufficient alone to constitute a

confidential relationship; the confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon part of other to observe confidence and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other.

10. Deeds ⇨211(4)

Landlord and Tenant ⇨22(4)

Waters and Water Courses ⇨234

Evidence in proceedings to set aside a warranty deed, a lease agreement, and a transfer of water stock certificates by a husband and wife failed to establish undue influence on part of a niece, whom husband and wife had reared as their own daughter, and her husband.

11. Deeds ⇨211(4)

Undue influence must be established by clear and convincing evidence.

12. Deeds ⇨211(2)

Landlord and Tenant ⇨22(4)

Waters and Water Courses ⇨234

Evidence in action by husband and wife to have declared null and void a warranty deed, a lease agreement and a transfer of water stock certificates to a niece and her husband failed to establish that transfer of property was made subject to a mistake of fact on part of husband and wife who claimed that they thought the documents they had signed were for a contract of sale rather than a deed reserving a life estate.

13. Deeds ⇨196(1½)

Landlord and Tenant ⇨22(4)

Waters and Water Courses ⇨234

Husband and wife who brought an action to have declared null and void a warranty deed, a lease agreement and a transfer of water stock certificates to a niece and her husband had burden of proving that transfer of property was made subject to mistake of fact on part of husband and wife who claimed that they thought the documents they had signed were for a contract

of sale rather than a deed reserving a life estate.

Nielsen, Conder & Hansen, Salt Lake City, for appellants.

Dan S. Bushnell, Little America, Wyo., for respondents.

CALLISTER, Justice:

Defendants appeal from a judgment in favor of plaintiffs wherein the lower court declared null and void a warranty deed, a lease agreement, and a transfer of water stock certificates.

Plaintiffs, George R.¹ and his wife, Althea Bradbury, were the owners of farm land and appurtenant water rights in Sevier County, Utah. They had only one child, R. George Bradbury. However, they had reared as their daughter, defendant Yora Rasmussen, who was the natural child of a niece, whom they had also reared. After Yora's marriage to defendant Gordon Rasmussen, she moved away, but the close familial relationship continued.

For several years prior to 1960, the farm had been leased to other individuals. The son, R. George, at one time operated the farm but left to seek employment elsewhere. From 1957 through 1959, M. D. Foreman, a brother of Mrs. Bradbury, operated the farm. He advised the Bradburys that he could not continue and advised them to sell their holdings. They declined this suggestion.

In October of 1959, the Rasmussens visited the Bradburys at the farm, and there was a discussion about a possible sale of the farm to the Rasmussens for \$300 per acre. Mr. Rasmussen stated that he would have to think the matter over. From here on the testimony of the parties as to what transpired differs substantially.

However, in the early part of 1960, the parties consulted Mr. Tex R. Olsen, an at-

1. George R. Bradbury was originally a party plaintiff along with his wife, Althea, but died during the course of the litigation,

and his son, R. George Bradbury, as administrator of his father's estate, was substituted as a party plaintiff.

torney, at his office in Richfield, Utah. What took place at this consultation is in dispute as between the parties. After meeting with the attorney, the Rasmussens returned to their home in Orem, Utah and the Bradburys to their farm. On a subsequent date, Mrs. Bradbury delivered to the attorney some tax notices which contained a description of the property. She had a discussion at this time with Mr. Olsen. On February 18, 1960, the Bradburys went to the office of Mr. Olsen and executed the papers which he had prepared. The Bradburys testified that the attorney merely read the papers to them and they signed the same without realizing their significance.

The papers executed by the Bradburys consisted of a warranty deed conveying their real property to the Rasmussens, but reserving a life estate to them, and a farm lease agreement wherein the Bradburys leased the property to the Rasmussens for the term of the life of the survivor of the lessors unless sooner terminated by mutual agreement.

The following day the deed and lease, together with copies thereof, were mailed to the Rasmussens. They signed the original lease and mailed it back to the attorney. About two weeks later, the Rasmussens gave the Bradburys a check for the one dollar consideration which was recited in the deed.

Shortly thereafter, Mr. Rasmussen moved to the farm and undertook its operation. His wife and family joined him at the close of the school term, and the family moved into one of the homes on the farm. The Rasmussens terminated their employment and disposed of their home in Orem.

Later, the Bradburys gave the Rasmussens three water stock certificates, together with assignments thereto which were taken by Gordon Rasmussen to the secretary of the water company who issued new certificates in the name of the Rasmussens.

These certificates were turned over to the Bradburys and held by them.

The trial court made findings of fact substantially in accord with the facts outlined up to this point. It made additional findings which will be discussed subsequently.

The parties evidently lived side by side in harmony during 1960, cooperating with and assisting one another. The Bradburys financed the purchase of some cattle by the Rasmussens.

Sometime in 1961 a conflict arose between the parties. According to the Rasmussens it was in the spring that the son, R. George, learned of the transaction and shortly thereafter his parents informed the Rasmussens that there would have to be some changes made. According to the Bradburys, the dispute arose in August when a man from the bank came to check the property and they became aware of the import of the papers which they had signed. However, M. D. Foreman testified that in July he had driven the Bradburys to St. George, Utah to visit their son, and that he had heard the son tell his parents that they should "fight it all the way" to get the property back.

[1] It was the contention of the Bradburys that they thought the documents they had signed were for a contract of sale rather than a deed reserving a life estate. The case was tried before the lower court without a jury.² It made, among others, a finding of fact that the deed, lease and transfer of water stock were null and void for the following reasons:

(a) A confidential relationship existed between the parties thereto.

(b) The plaintiff, Althea Bradbury, and her husband, George R. Bradbury, deceased, were elderly people, with infirmities incident to age.³

(c) The defendants represented the transaction as being one for the sale of the

2. A jury trial was originally demanded by the Bradburys but waived by them at pre-trial. However, defendants refused to agree and insisted upon the case being tried to a jury. Defendants cite this as

error. However, see *Johnson v. Johnson*, 9 Utah 2d 40, 337 P.2d 420 (1959).

3. George R. was 83 years of age, with failing eyesight, and Althea was 73 at the time the documents were executed.

farm and water stock, when, in fact, the documents purported to make a gift of such property.

(d) The transferors at no time intended to make a gift of said property.

(e) The alleged transfer of the above mentioned property was made subject to a mistake of fact on the part of the plaintiffs as to the nature of the transaction and the transfers involved.

(f) The plaintiffs were of the opinion and understanding that said transactions were for the purpose of consummating the negotiations for the sale of the property.

(g) That the transferors did not have the benefit of independent advice in connection with said transaction.

(h) By virtue of the alleged transfers of the property mentioned above, the transferors has substantially disinherited their natural born heir, being their only son, R. George Bradbury.

(i) The defendants failed to prove by clear and convincing evidence that the alleged gifts were fair, equitable, valid and free from any fraud or undue influence arising from the faith and trust reposed in them because of the confidential relationship.

Based upon the foregoing findings, the court concluded as a matter of law that the defendants in their confidential relationship, exerted undue influence upon the Bradburys and entered judgment accordingly.

[2-4] The first question to be resolved is whether the lower court erred in its determination that a confidential relationship existed between the parties, as that term

is considered in its legal significance. The evidence is undisputed that there existed among the parties sincere affection, trust and confidence, but is this legally sufficient to constitute a confidential relationship giving rise to a presumption that the transaction was unfair?⁴ We think not.

[5-9] The mere relationship of parent and child does not constitute evidence of such confidential relationship as to create a presumption of fraud or undue influence.⁵ While kinship may be a factor in determining the existence of a legally significant confidential relationship, there must be a showing, in addition to the kinship, a reposal of confidence by one party and the resulting superiority and influence on the other party.⁶ The relationship must be such as would lead an ordinarily prudent person in the management of his business affairs to repose that degree of confidence in the other party which largely results in the substitution of the will of the latter for that of the former in the material matters involved in the transaction. The doctrine of confidential relationship rests upon the principle of inequality between the parties, and implies a position of superiority occupied by one of the parties over the other. Mere confidence in one person by another is not sufficient alone to constitute such a relationship. The confidence must be reposed by one under such circumstances as to create a corresponding duty, either legal or moral, upon the part of the other to observe the confidence, and it must result in a situation where as a matter of fact there is superior influence on one side and dependence on the other.⁷

4. If a confidential relationship is shown to exist, and a gift or conveyance is made to a party in a superior position, a presumption arises that the transaction was unfair; this presumption has the force of evidence and will itself support a finding if not overcome by countervailing evidence. The burden is upon the superior party to convince the court by a preponderance (not clear and convincing) of the evidence that the transaction was fair. *Johnson v. Johnson*, 9 Utah 2d

40, 337 P.2d 420 (1959); *In re Swan's Estate*, 4 Utah 2d 277, 293 P.2d 682 (1956).

5. *Froyd v. Barnhurst*, 83 Utah 271, 28 P. 2d 135 (1934).

6. *Newell v. Halloran*, 68 Utah 407, 250 P. 986 (1926).

7. *Renshaw v. Tracy Loan & Tr. Co.*, 87 Utah 304, 49 P.2d 403, 100 A.L.R. 872 (1934). See also *Bogert, Trusts and Trustees*, 2d Ed., § 482, pp. 135-139.

The extensive testimony of the attorney, Tex R. Olsen, contributes significantly to the determinative question as to whether there was a superior influence exerted by the Rasmussens and a corresponding dependence by the Bradburys.

The first consultation with Mr. Olsen was arranged by Gordon Rasmussen and held in Olsen's office on a Sunday afternoon. It lasted one and a half to two hours and both parties were present. According to Olsen, the following transpired:

Gordon Rasmussen told him that he and his family were going to move down to the farm to operate it, and that they wanted an arrangement whereby they would be assured that the farm would not go to anyone else upon the death of the Bradburys. The Rasmussens both emphasized their desire for security if they made the move and undertook to operate the farm. The Bradburys stated that they had a general plan in mind, but nothing specific. The attorney suggested several alternatives to accomplish the desired result; one of which was a testamentary disposition, which was rejected by the parties because of its ambulatory nature. Mrs. Bradbury stated that she wanted to give "these kids" some security if they made the move. Mr. Olsen suggested the giving of a deed, reserving a life estate to the Bradburys so that the latter would be entitled to the use and income from the property so long as they lived. The attorney explained to the parties the meaning and effect of such a transaction. The "Bradburys thought this would be agreeable with them because they wanted the property to go to the Rasmussens and they wanted some assurance that they would get something out of it during their lifetime." The consultation concluded with Mr. Olsen agreeing to prepare the papers and mail them to the Rasmussens after they were signed by the Bradburys.

About two days later Mrs. Bradbury came to Mr. Olsen's office and delivered to him some tax notices which contained the legal descriptions of the farm property. At that time she asked the attorney if Yora were an

heir, to which he replied in the negative. She then remarked that the other property which they might have in their names would go to their son. Mr. Olsen told Mrs. Bradbury that he would call her when the papers were ready.

At a later date, the attorney notified the Bradburys that the papers were ready to be signed. They came to his office and went over the documents with him. After telling him what they had in mind, they signed the deed and lease agreement and received copies. On this occasion, according to Mr. Olsen, the papers were discussed in detail prior to the signing with particular emphasis on the provisions concerning the life estate which the Bradburys again requested an explanation of its meaning.

Mr. Olsen also testified as to the general health and alertness of the Bradburys. He stated that Mrs. Bradbury was very alert, but that Mr. Bradbury was advanced in years and limited in his ability to move about. Both of them participated in the discussions and advised Mr. Olsen what they desired to accomplish. Mr. Bradbury responded readily with information when so requested and helped make the decision on the instruments to be prepared.

Mr. Olsen testified that at no time during his discussion with the parties was mention made of a sale of the property for \$300 per acre.

In the instant case there is no fact or circumstance to indicate a situation of trust or confidence wherein one of the parties had a commanding influence over the other; nothing indicating dominance, either personal, social, or moral. On the contrary, the evidence indicates that there was no inequality of influence in the circumstances of the transaction. Each party was free to act, and did act, upon his independent volition and will. The terms of the deed and lease appear to have been fixed and agreed upon by the Bradburys upon their independent judgment after complete appraisal by Mr. Olsen of their legal significance and the consequences thereof. The insistence by the Rasmussens that they be protected is not

indicative of any weakness or dependence on the part of the Bradburys.

The fact that both parties testified that the Bradburys had confidence and trust in the Rasmussens is not sufficient to establish such a confidential relationship as to raise a presumption of unfairness in the transaction. The parties lived in distant towns and visited only occasionally. There is no evidence that the Rasmussens ever participated in the conduct of the Bradburys' business affairs prior to the transaction here in question, or in any way exerted a dominant influence in their lives.

[10, 11] From the facts heretofore outlined it is evident that a finding of undue influence cannot be sustained. Undue influence must be established by clear and

convincing evidence.⁸ On the contrary, such a finding is against the clear weight of the evidence.

[12, 13] It also follows from the evidence that the finding that the transfer of the property was made subject to a mistake of fact on the part of the Bradburys as to the nature of the transaction cannot be sustained. The burden of proving such a mistake was upon the Bradburys. The testimony of Mr. Olsen and the conduct of the Bradburys completely negative the possibility of a mistake.

Reversed. Costs to defendants.

HENRIOD, C. J., and McDONOUGH, CROCKETT and WADE, JJ., concur.

8. Richmond v. Ballard, 7 Utah 2d 341, 325 P.2d 839 (1958).

HOWE, Justice (concurring):

I concur except that in Part IV of the opinion of the Court, I cannot subscribe to the conclusion that Provo's objection to Instruction No. 23 failed to meet the requirements of Rule 51, Utah R.Civ.P. In my opinion, the objection adequately alerted the trial court to Provo's claim that Instruction No. 23 did not follow U.C.A., 1953, § 58A-3-20(2) which adopts by reference the provisions of the National Electric Safety Code.

In the pre-trial order prepared by plaintiff's counsel, one of plaintiff's contentions was that provisions of the NESC and § 58A-3-20 had been violated rendering Provo negligent. One of Provo's defenses enumerated in that pre-trial order was that it had complied with all applicable standards of the NESC and with the provisions of § 58A-3-20. Compliance and noncompliance with NESC were again the subjects of requested jury instructions submitted by both plaintiff and Provo. Consequently, it appears to me that the trial court was readily aware of what Provo was referring to in its objection to Instruction No. 23. Provo made its objection during the stress and pressure of the trial and should not be held to the standard of a textbook model. The objection went to the whole of the instruction and not just to the third paragraph.

However, I do not believe that it was prejudicial error to fail to instruct the jury that compliance with the NESC was prima facie evidence that an installation was reasonably safe. Since compliance does not create a substantive presumption, as the majority opinion correctly points out, the failure of the instruction to mention "prima facie" was harmless. The instruction informed the jury that compliance was "evidence which would support a finding" that the installations were reasonably safe. It would have added nothing to have instructed the jury that compliance was "prima facie evidence." Either way, the plaintiff was entitled to present evidence of noncompliance to be weighed by the jury.

Evona Hanna CUNNINGHAM, Plaintiff,
Respondent and Cross-Appellant,

v.

Franklin E. CUNNINGHAM and Lola
M. Cunningham, Defendants.
Appellants and Cross-Respondents.

No. 19212.

Supreme Court of Utah.

Sept. 19, 1984.

Sister-in-law brought action against brother-in-law to void two deeds to property given to brother-in-law. The Second District Court, Weber County, Calvin Gould, J., entered judgment that found that brother-in-law was in confidential relationship with sister-in-law and had overreached, and voided deed to one property, but allowed brother-in-law to keep property in which he lived and awarded money judgment to sister-in-law. Brother-in-law appealed, and sister-in-law cross-appealed award of money judgment instead of voiding the transaction. The Supreme Court, Zimmerman, J., held that: (1) evidence supported finding one deed was void for nondelivery; (2) evidence was sufficient to support findings that brother-in-law was in confidential relationship and was guilty of abuse of that relationship in other transaction; (3) voiding deed as to latter property was the correct remedy; and (4) trial court abused its discretion in fashioning an equitable remedy of money judgment rather than voiding of the second deed given its finding that brother-in-law had overreached.

Affirmed in part, and reversed and remanded in part.

1. Appeal and Error \S 179(1)

Supreme Court could not reach issue as to whether property transaction violated statute of frauds where issue was first

raised below in posttrial memorandum and there was no indication that trial court reached or ruled on issue. U.C.A.1953, 25-5-1 et seq.

2. Deeds \S 208(1)

In action brought by sister-in-law against brother-in-law seeking to void a deed transferring property to brother-in-law, evidence was sufficient to support finding that deed was void due to nondelivery.

3. Reformation of Instruments \S 4

Court does not have carte blanche to reform any transaction to include terms that it believes are fair; its discretion is narrowly bounded.

4. Reformation of Instruments \S 16

Reformation may be appropriate if both parties were mistaken as to a term of contract, or if one party is mistaken and other party is guilty of inequitable conduct, but it is not available to rewrite contract to include terms never contemplated by parties.

5. Deeds \S 211(4)

Voiding of deed to real property was required, rather than reformation of contract for transaction, due to overreaching and a violation of trust and confidence reposed in grantee of deed by grantor, where there was no evidence that parties had agreed to sale for fair market value at time of transaction and evidence did not show mistake about any term of the sale.

6. Deeds \S 196(3)

When confidential relationship exists between the parties, and the transaction occurred that benefits one in whom confidence is placed, presumption arises that transaction is unfair and shifts burden to benefiting party to persuade court that there was no fraud or undue influence exercised toward the other.

7. Deeds \S 72(3)

Transaction in which brother-in-law of grantor received deed to property for less than fair market value was a result of overreaching and violation of trust and con-

fidence reposed in brother-in-law by sister-in-law and was properly remedied by voiding the deed, even though transaction was carried out in "somewhat good faith."

8. Deeds \S 72(3)

Mere fact that two individuals were brother-in-law and sister-in-law was not enough to prove that confidential relationship existed between them.

9. Deeds \S 72(3)

Confidential relationship existed between brother-in-law and sister-in-law, thus warranting voiding of deed from sister-in-law to brother-in-law for less than fair market value, where sister-in-law actually reposed a great trust and confidence in brother-in-law, was an alcoholic, and 64 years old.

10. Cancellation of Instruments \S 57

In action seeking to void deed on grounds of confidential relationships and exercise of undue influence by purchaser, trial court was not empowered to affirm sale of residence on modified terms, rather than voiding deed or enforcing original contract, because laches was almost, but not quite, proven by purchaser, where vendor was otherwise entitled to have the transaction voided.

Pete N. Vlahos, Ogden, for defendants, appellants and cross-respondents.

C. DeMont Judd, Jr., Ogden, for plaintiff, respondent and cross-appellant.

ZIMMERMAN, Justice:

Defendants appeal from an order of the district court adjudicating interests of the parties in several parcels of real property located in Ogden, Utah. We affirm in part and reverse and remand in part.

In 1975, the plaintiff, who was then 64 years old, owned a savings account and two pieces of real property in Ogden—a home on 34th Street and a home on Polk Avenue. Although she was married, her husband was in very poor health and in a rest home. (He died in October of 1975.) Sometime prior to the fall of 1975, defendant Franklin

Cunningham, plaintiff's brother-in-law, and his wife, Lola Cunningham, expressed a desire to help the plaintiff with her affairs. They induced her to place her savings account in joint tenancy with Franklin. Franklin then withdrew \$13,000 and placed it in his own account.¹ Thereafter, defendants caused the plaintiff to be hospitalized for chronic alcoholism.

On September 9, 1975, immediately after plaintiff was released from the hospital, Franklin took plaintiff to a friend who was a realtor to effect a "sale" of the Polk Avenue property. The realtor prepared a warranty deed that purported to convey the property to defendants. The deed did not describe any terms of the "sale." And other than the deed, no writing was prepared to reflect the terms of the transaction. At the time plaintiff signed the deed, Franklin Cunningham orally informed her that he would pay her \$1,000 immediately and \$100 per month until her death. This is the only evidence that related to the terms of the transaction.

A little over a year later, on November 17, 1976, Franklin once again took plaintiff to the same realtor's office where she signed a deed conveying the 34th Street house to defendants. Plaintiff testified that she kept this deed in a drawer in her home and that she intended the title to vest in defendants at the time of her death. Defendant Franklin conceded that this was the understanding, but admitted that he took the deed and recorded it approximately three years later because he was concerned that she might deed the property to someone else.

Defendants have paid plaintiff \$100 per month on the Polk Avenue property since 1975 and, in addition, have expended some time and effort fixing up the property. Defendants have been living in the Polk Avenue dwelling.

In 1982, plaintiff sued defendants claiming no delivery on the 34th Street deed and undue influence on the Polk Avenue deed

and seeking reconveyance of both properties to plaintiff or invalidation of both deeds. After a bench trial, the court issued its memorandum decision. It found that the deed for the 34th Street property was void for nondelivery and ordered it vacated. With respect to the Polk Avenue property, the court found that plaintiff reposed great trust and confidence in Franklin and a confidential relationship existed between plaintiff and defendant Franklin, that for this reason she did not question the transaction or seek independent advice, that there were no negotiations regarding purchase price or terms, only Franklin's statement of what he would pay plaintiff, and that he substituted his will for hers in the transaction. The court noted the general rule that under such circumstances a presumption of undue influence arises and found it not to be rebutted; therefore, "this transaction must ... fail." However, it also found that Franklin did not "fully appreciate that his actions were wrongful ... and has made some improvements to the Polk property." The court stated that it was "unclear as to its authority" with respect to the proper remedy and asked for further briefs by the parties.

After further briefing, the court filed a supplemental memorandum decision. The findings reflected in the earlier memorandum were not disturbed. The court found that in 1975, the Polk Avenue property was worth approximately \$42,000 and had a fair rental value of \$300 per month. It also found that since 1975 defendants had paid plaintiff approximately \$10,000 in the form of a down payment and monthly payments and that plaintiff had "sat on her rights for a period of time and accepted payments from defendants." The court stated that while plaintiff was not guilty of laches, these circumstances could be taken into account in fashioning a remedy. It concluded that:

the equitable resolution of this case would be to leave defendants in posses-

not at issue in this appeal.

1. In 1982, after this suit was filed, the \$13,000 was returned to plaintiff. This transaction is

sion and award plaintiff a money judgment for the approximate actual value [of the property] at the time of the deed and not credit payments made [by defendants] because [the] payments did not exceed reasonable rental value.

It summarized by stating the defendants were left in possession for three reasons: (i) plaintiff's delay in asserting her rights; (ii) defendants' having put much time and effort into improvement and upkeep of the property, "which cannot reasonably be accounted for;" and (iii) defendants' "some-what good faith" belief in the validity of the transaction. Judgment was entered vesting title in defendants and granting plaintiff a judgment in the amount of \$42,000.

[1] Both parties appealed, plaintiff seeking to void the Polk Avenue deed and defendants seeking to confirm the 34th Street deed and overturn the \$42,000 judgment. Plaintiff asserts that since the trial court found her not barred by laches, it should not have considered the post-transaction delay in fashioning a remedy and should have voided the Polk Avenue deed both as violative of the statute of frauds and because of defendants' undue influence. Defendants contend that the statute of frauds is avoided by part performance;² that the trial court's finding of undue influence is based on the finding of a confidential relationship which, in turn, is founded largely on the brother/sister-in-law relationship between Franklin and plaintiff, and that this is not sufficient to support the finding of a confidential relationship; and, finally, that the court's equity powers do not permit it to fashion a remedy without reference to the terms of the underlying transaction.

[2] As to the 34th Street property, we reject defendants' contentions and find that the conclusion of the trial court that the deed is invalid for nondelivery is amply

supported by the record evidence. We therefore affirm the judgment voiding the 34th Street deed.

As for the Polk Avenue property, the judgment must be reversed. Rather than void the deed based on the finding of a confidential relationship and an un rebutted presumption of undue influence, as well as actual evidence of overreaching, the trial court appears to have attempted to use its equitable powers to recast the "sale" in terms that it thought would reflect an arm's-length transaction. Although we sympathize with the trial judge's effort to do equity, that effort must fail for several reasons.

First, the final judgment of the court conflicts with its findings. In its initial memorandum decision, the court specifically found that the "sale" of the Polk Avenue property was the result of undue influence by defendants, and therefore, it must fail. These findings were not disturbed by the supplemental memorandum. Yet in the final judgment, the sale was affirmed.

[3-5] Second, we are aware of no authority that can support the trial court's attempted exercise of its equitable powers under the circumstances of this case. A court does not have carte blanche to reform any transaction to include terms that it believes are fair. Its discretion is narrowly bounded. Reformation may be appropriate where both parties were mistaken as to a term of the contract, or where one party is mistaken and the other party is guilty of inequitable conduct, *see Bown v. Loveland*, 678 P.2d 292 (Utah 1984), but it is not available to rewrite a contract to include terms never contemplated by the parties. *Isaak v. Massachusetts Indemnity Life Insurance Co.*, 127 Ariz. 581, 584, 623 P.2d 11, 14 (1981). Here the record does not reflect that the parties agreed to a sale for fair market value at the time of the transaction, nor does it show that plaintiff was

2. In their arguments to this Court, both parties focus principally on whether our Statute of Frauds, U.C.A., 1953, § 25-5-1, *et seq.*, invalidates the sale of the Polk Avenue property. We do not reach the issue because the record indi-

cates plaintiff first raised this issue below in a post-trial memorandum. There is no indication that the trial court reached or ruled on the issue. *Cf. In re Estate of Ekker*, 19 Utah 2d 414, 432 P.2d 45 (1967).

mistaken about any term of the sale; rather, it supports the trial court's initial finding that defendant Franklin overreached and violated the trust and confidence reposed in him by plaintiff. Under Utah law, this required a voiding of the deed.

[6, 7] When a confidential relationship exists between parties, and a transaction occurs that benefits the one in whom confidence is placed, a presumption arises that the transaction is unfair. *E.g., Bradbury v. Rasmussen*, 16 Utah 2d 378, 383, 401 P.2d 710, 713 (1965). This shifts to the benefiting party the burden to persuade the court that there was no fraud or undue influence exercised toward the other. *In re Swan's Estate*, 4 Utah 2d 277, 293, 293 P.2d 682, 693 (1956). From the findings of the trial court, which are amply supported by the evidence, the burden was properly shifted to defendants, and they wholly failed to carry it. The fact that they were in "somewhat good faith" is not enough to free them from the consequences of their actions. The deed should have been voided. *Seequist v. Seequist*, 524 P.2d 598 (Utah 1974); *Albright v. Medoff*, 54 Or. App. 143, 634 P.2d 479 (1981).

[8, 9] Defendants are correct in arguing that the mere fact that plaintiff and defendant Franklin were brother and sister-in-law is not enough to prove that a confidential relationship existed. *See Nelson v. Nelson*, 30 Utah 2d 80, 83, 513 P.2d 1011, 1013 (1973); *Bradbury v. Rasmussen*, 16 Utah 2d at 383, 401 P.2d at 713. However, the trial court did not rely on that fact alone; rather, it specifically found that plaintiff actually reposed great trust and confidence in Franklin, that because of this she did not question the terms of the transaction or seek outside advice, that there were no negotiations over the terms of the transaction, and that Franklin substituted his will for that of the alcoholic plaintiff. Plaintiff, then 64 years old, conveyed away a \$42,000 piece of property with a rental value of \$300 per month for \$1,000 plus an expectation of \$100 per month for the remainder of her life. To realize the 1975 fair market value of her property, plaintiff would have had to live an additional 34 years, and this does not take into account

the substantial additional amount in interest that would have been due had plaintiff's financing of defendants' "purchase" been at fair market interest rates.

[10] A final problem with the trial court's ruling is that it specifically found that plaintiff's conduct did not amount to laches, but it refused to void the deed because the plaintiff "sat on her rights for a period of time and accepted payments from defendants." If the plaintiff was not guilty of laches, then that defense failed, and the trial court should not have affirmed the sale. If plaintiff was guilty of laches, or was estopped from denying the transaction, or if she somehow ratified the sale on defendants' original terms, the court should have enforced the original contract as dictated by Franklin. It was not free to affirm the sale on modified terms because laches was almost, but not quite, proven.

In sum, on the record and findings we have before us, the judgment of the trial court as to the Polk Avenue property cannot stand. We therefore reverse that portion of the judgment and remand for entry of a judgment voiding the Polk Avenue deed.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.



**Wilbur H. BERRETT and Doris H. Berrett, husband and wife, Plaintiffs
and Respondents,**

v.

**R. Michael STEVENS, Robert W. Denning, and Jerrold S. Jensen, Trustee,
Defendants and Appellants.**

No. 18905.

Supreme Court of Utah.

Sept. 27, 1984.

Vendors sued purchasers to enjoin foreclosure of trust deed given in connec-