

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 Appellant

Utah Court of Appeals

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DOCKET NO.

IN THE SUPREME COURT OF THE STATE OF UTAH

880122-CA
MONT R. ANDERSON, Personal)
Representative of the Estate)
of CLOYD H. BRINKERHOFF,)
LENA BRINKERHOFF, and MARK J.)
BRINKERHOFF,)

Plaintiff's/Respondents,)

vs.)

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

Defendants/Appellants.)

Case No. 860165

88-0122-CA

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

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Respondents Mont R. Anderson,
Lena Brinkerhoff and Mark J.
Brinkerhoff

Elsie Brinkerhoff is not
represented by counsel

FILED
OCT 8 1986

Clerk, Supreme Court, Utah

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does the evidence support a finding that Elsie Brinkerhoff has been incompetent since 1970, and if so, does the evidence support a finding that all documents signed by her thereafter should be canceled and declared to be null and void?

2. What is the legal effect of the fact that during the first day of trial, the court determined that the interests of Elsie Brinkerhoff were not being fully protected by her legal counsel, Willard R. Bishop, that she needed separate counsel to represent her interests, and that the court thereafter continued the trial without obtaining counsel to represent Elsie Brinkerhoff during the course of the trial?

3. Assuming the incompetency of Elsie Brinkerhoff in 1970, does the record support a finding that Elsie Brinkerhoff thereafter remained incompetent, including the years 1979, 1980 and 1982 when she signed documents of conveyance?

4. Did the 1966 contract terminate by operation of law, abandonment, rescission or mutual agreement by reason of the buyers' failure to make payments thereunder from 1966 through 1971 and thereafter executing documents of conveyance?

5. Does the fact that Plaintiffs failed to tender at the time of trial the \$30,000 that they acknowledged to be due and owing, prohibit the trial court from granting a Decree of Specific Performance under the contract and against an incompetent person.

STATEMENT OF THE CASE

This is an appeal by Defendants/Appellants, Golda B. Adair, Warren Brinkerhoff and Arlene B. Goulding (hereinafter "Defendants") from a judgment rendered after a trial on the merits by the Honorable Don V. Tibbs, District Court Judge of the Sixth Judicial District Court in and for Kane County, State of Utah, dated February 20th, 1986. The judgment was in favor of Plaintiffs, Mont R. Anderson, Lena Brinkerhoff and Mark J. Brinkerhoff (hereinafter "Plaintiffs") and against Defendants specifically enforcing a 1966 contract and allowing Plaintiffs to make up past due payments of principal and interest in excess of \$50,000 of an original contract wherein the total purchase price was \$53,388, without interest. The judgment also voided all documents signed by Defendant Elsie Brinkerhoff, including those running in favor of Defendants.

STATEMENT OF FACTS

THE PARTIES

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. He was also the accountant for the partnership consisting of Mark Brinkerhoff and Cloyd 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, Cloyd, Golda B. Adair, Warren ("Tink") Brinkerhoff, Arlene B. Goulding, Charles Brinkerhoff and Betty B. Esplin. Defendant, Golda B. Adair is married to Webster Adair. They are the parents of Brad Adair. Webster Adair and Plaintiff, Lena Brinkerhoff, are brother and sister.

THE PROPERTY IN QUESTION

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 ground. The property is located north and east of Glendale, Kane County, Utah, and has been in the Brinkerhoff family for many years. At the time of trial the property had an appraised value of \$409,999. (Exhibit 37). Elsie Brinkerhoff received the property from the estate of her husband, Merle Brinkerhoff. The Brinkerhoff property also consists of some water rights in the Arizona Strip area and additional grazing and water rights.

FACTS

After Elsie Brinkerhoff received the property from her husband's estate, she entered into an agreement in 1966 between herself as the seller and her sons, Cloyd H. Brinkerhoff and Mark Brinkerhoff, as buyers. (Exhibit 1, attached). The contract was prepared by Ken Chamberlain, Attorney at Law, of Richfield, Utah. The contract requires the buyers (Mark and Cloyd) to pay to seller (Elsie) minimally the sum of \$53,388,

at the rate of \$2,000 per year for her life without interest and is an annuity contract based on the life expectancy of Elsie who was 65 years old at the time the contract was entered into. The contract required that an escrow be established and that deeds be deposited in the escrow. Only some of the deeds required by the 1966 contract were deposited into escrow, and the location or existence of all the original deeds was never established. The escrow, as per the agreement, was to be established in the Hurricane Branch of the Bank of St. George.

In the event of a default, the contract does not require the seller to provide notice to the buyer of the default, but simply allows the seller to demand a redelivery to her of all the escrow documents, thus requiring the buyer to vacate and peaceably surrender all of the property described in the contract, with all sums paid to date to be forfeited as liquidated damages. The contract only requires prior notice for a default of the contract other than payment of principal and interest, and in that event, the buyer has a thirty (30) day grace period. However, as to payment of principal and interest, no prior written notice to cure is required.

The contract also provides that the buyers are entitled to possession of the subject property only if they are in compliance with the terms of the agreement, including payment of principal and interest. (Exhibit 1).

Even though the contract was not signed until 1966, an

annual payment for both 1964 and 1965 was required under the contract. The trial court gave the buyers credit for these two annual payments inasmuch as the contract recites that the seller therein acknowledged payment of the same.

The court found that all payments were made outside the escrow and that payments should have been made from 1964 in the sum of \$2,000 per year. Including the 1985 payment, the court found that principal payments should have totaled \$44,000 (22 years at \$2,000 per year), and the court, even though the contract waives interest, assessed interest. The court found that from 1964 through trial, Plaintiffs had only paid \$14,996.75 of the \$44,000 which was due. Of the \$14,996.75 paid, \$4,000 was paid after the litigation was filed. (Findings of Fact, No. 9, attached, R. 633). The court found that payments were made as follows:

<u>Date Paid</u>	<u>Amount</u>	<u>Date Paid</u>	<u>Amount</u>
1964	\$ 2,000.00	1975	\$ 1,100.00
1965	2,000.00	1976	400.00
1966	-0-	1977	-0-
1967	-0-	1978	-0-
1968	-0-	1979	2,006.00
1969	-0-	1980	-0-
1970	-0-	1981	-0-
1971	-0-	1982	-0-
1972	1,210.75		
1973	1,780.00	SUBTOTAL:	\$ 10,996.85
1974	500.00		
		1983 (after litigation filed)	2,000.00
		1984 (after litigation filed)	2,000.00
			<u>2,000.00</u>
		TOTAL PAID AT TIME OF TRIAL:	\$ 14,996.75

The trial court found that Mark Brinkerhoff and the estate of Cloyd Brinkerhoff were indebted to their mother, Elsie Brinkerhoff, in the sum of \$50,262.95 including interest and allowed them to reinstate the contract upon payment of said amount. (Finding of Fact No. 13, R. 638).

From 1964 through 1977, Elsie should have been paid \$28,000. During that period of time, the court found that she was only paid \$8,990.75, or thirty-two (32%) percent of the amount the trial court found was due and owing. Of significance is the fact that in 1977, Cloyd deceived his mother and had her sign a receipt stating that she had received \$23,000 (Exhibit 4, attached), even though he knew in reality that less than one-third of the amount owed at that time had been paid. (Tr. 208-209). Cloyd was told by Mont Anderson, a Certified Public Accountant, that he needed evidence that payment in that amount had been made, presumably to insulate himself and Mark from attack by the Internal Revenue Service. (Tr. 208).

From 1966 through 1979, Mark and Cloyd operated as a partnership and have filed income tax returns as a partnership for that period of time. (Exhibits 26 and 39, Partnership Accounting Records; Tr. 96; 165). Cloyd died on October 14th, 1979 of a sudden heart attack.

Plaintiff Mont R. Anderson, is a Certified Public Accountant as well as the personal representative of the estate of Cloyd H. Brinkerhoff. Mr. Anderson tried to convince the

trial court that Plaintiffs should have received credit for \$38,012.34 (Tr. 166; Exhibit 22), under highly questionable accounting practice, but even assuming that amount of credit, he testified that the sum of \$15,000 was still past due and owing. At trial, Mark testified he owed his mother about \$30,000 but had never offered to pay her any amount toward the past due payments. (Tr. 90-91, Tr. 166-167). None of the Plaintiffs, prior to or at the time of trial, tendered to the court or Elsie Brinkerhoff any amount of arrearage, and specifically not the sum of \$30,000 that even Plaintiffs acknowledged was due and owing.

In 1979 Mont Anderson recommended that Cloyd consult with an attorney in Nevada to get his affairs in order (Tr. 221), and Cloyd consulted with a law firm in Las Vegas, Nevada where Plaintiff Mont Anderson, resides. At the same time, Mont R. Anderson, recommended to Cloyd that he obtain a deed for the subject property and get it recorded. (Tr. 220). Mark knew that Cloyd was having this legal work done. (Tr. 119).

Apparently, someone suggested to Cloyd that he have a joint tenancy deed prepared between his mother, himself and his brother, Mark, for the subject property. Some time prior to June of 1979, Cloyd contacted Brad Adair (Elsie's grandson) who was employed by Southern Utah Title Company in Kanab, Utah. Cloyd asked Brad Adair to prepare a deed for the subject property from Elsie as the grantor to Elsie, Cloyd, and Mark as

joint tenants. (Tr. 434-441). Brad complied with that request, took the deed to Elsie who signed the same and Brad notarized her signature. (Exhibit 5, attached). At the same time, Brad Adair also prepared another deed from Elsie to her son Charles, for property not related to the subject property. These two deeds were recorded one right after the other in the official records of Kane County, Utah. (Tr. 434-444; see also Exhibit 19, Entry Book, Recorder's Office, Kane County, Utah). The cost of \$18.00 to record the joint tenancy deed was paid by partnership funds (Exhibits 19 and 39; see discussion, infra). Mr. Adair also testified that he believed his grandmother, Elsie Brinkerhoff, was competent on June 4th, 1979 and likewise in 1980. (Tr. 447-448).

While Mark Brinkerhoff denied having knowledge of the preparation and recordation of the joint tenancy deed, it is obvious that both Cloyd and Mark were anticipating that their aged mother, Elsie, would predecease them and title would be vested in them as the surviving joint tenants. As sometimes happens, the events did not occur as anticipated, and on October 14th, 1979, just four months after the execution and recordation of the joint tenancy deed, Cloyd Brinkerhoff died of a sudden heart attack. Within three or four months after Cloyd's death in 1979, Elsie gave Mark a copy of the joint tenancy deed (Tr.118), but Mark took no action to have it set aside until 1982 when this lawsuit was filed naming him as a Defendant. In

1979 record title was vested in Elsie Brinkerhoff and Mark Brinkerhoff each with an undivided one-half interest.

At the beginning of trial and when he testified, Mark took the position that he was entitled to a one-half interest in the subject property either by reason of the joint tenancy deed, or the 1966 Contract of Sale. (Tr. 104; 131). He essentially had nothing to lose by taking that position. Of significance is the fact that Mark has always recognized the validity of the joint tenancy deed. It is evident that he and his sister-in-law, Lena Brinkerhoff, had trouble over the ownership of the property by reason of that claim. (Tr. 112). This is evidenced by the fact that in the original complaint, Lena brought suit against Mark J. Brinkerhoff, Elsie Brinkerhoff and the remaining children as named Defendants, to cancel the joint tenancy deed that Mark and the other family members were relying on. (R. 1-8 Complaint; R.351-370 Seconded Amended Complaint).

Both before and after Cloyd's death, it was evident to the other family members that their mother, Elsie Brinkerhoff, was not being paid the sum of \$2,000 per year, and that she had not been paid that amount for many years. (Tr. 276).

Some of the family members knew of the joint tenancy deed so after Cloyd's death, a family meeting was called. Since it was evident at that time that Elsie could not rely upon the \$2,000 annual payment she was supposed to be receiving from her

two eldest sons, Defendants Golda, Warren, Arlene, Charles and Betty talked with their mother and they decided upon a method whereby Elsie would be guaranteed a minimum sum per month to supplement her social security payment by selling her one-half interest to these five children. (Tr. 277; 288).

The five brothers and sisters agreed that they could each afford to pay Elsie \$30.00 per month, and Elsie would therefore receive the sum of \$150.00 per month, or \$1,800 per year, to supplement to her social security payment.

Brad Adair, at Southern Utah Title, was asked to research the status of the title of the subject property. (Tr. 445). He, of course, knew that the joint tenancy deed had been recorded in June of 1979, and confirmed that no other deeds were of record. He prepared an affidavit for Elsie to sign to sever the joint tenancy, which she did, and the joint tenancy was severed by the recordation of the affidavit and death certificate. However, the joint tenancy was not severed until August 15th, 1980, or ten months after the death of Cloyd Brinkerhoff. (Exhibit 21). Prior to the execution of any other documents, Brad Adair inquired of his grandmother as to whether or not she wanted to deed the other one-half interest to her five children. The following is an excerpt from his testimony

Q. MR. CHAMBERLAIN: Did you prepare the deed from your grandmother to the five children for her one-half interest?

A. MR. ADAIR: Yes, I did.

Q. And did you discuss that with your grandmother?

A. Yes, I did.

Q. And describe that discussion, if you will?

A. Well it took quite awhile for her to decide that this is the way she wanted to go, you know, so that she would get the money and the other five children would have something also, and so I did go ahead and prepare the document and the way I remember, I took them to my mother's home, I left them there, and I discussed this several times with my grandma.

Q. What did you discuss with grandma on these several occasions?

A. Well I told her what the effect of it would be, you know, and also that if the joint tenancy deed held and if she died Mark would have all the property and that, you know, under that she would be conveying her interest to the other five children, that in turn would receive \$30.00 a month each from the other five children.

Q. Did she appear to understand that transaction?

A. Yes she did.

Q. Did she at any time tell you she didn't want to deed her one-half interest?

A. No. (Tr. 446-447).

Elsie then executed a deed from herself to Golda, Warren, Arlene, Charles and Betty, each as to an undivided one-fifth interest for the one-half ownership she still maintained in the subject property. (Exhibit 6, attached). Mark Brinkerhoff, of course, owned the other one-half interest by reason of the 1979 joint tenancy deed.

At the request of these five children and with Elsie's understanding, Brad Adair also prepared a separate Trust Deed

Note for each to sign. These notes were for \$10,000 each, payable at the rate of \$30.00 per month and were secured by a Trust Deed on the property deeded by Elsie. The Trust Deed was signed by all five children evidencing a total obligation to Elsie in the sum of \$50,000. (Exhibit 7, Trust Deed and Exhibit 20, Trust Deed Note and Escrow Agreements). Each of these five children also signed an Escrow Agreement designating the Orderville Branch of State Bank of Southern Utah as the escrow depository to receive the \$30.00 per month payment from each child. The Trust Deed was thereafter recorded and the escrow established. Payments were made by the five children on a regular basis, and have been paid by Defendants, Golda Adair, Arlene B. Goulding, and Warren Brinkerhoff, each and every month since September 1980. (Exhibit 14, ledger sheet from State Bank of Southern Utah).

Since 1981 the taxes have been paid by both Plaintiffs and Defendants based on county ownership records and Mark specifically knew that he had been paying only one-half of the taxes and that his five brothers and sisters claimed ownership of one-half of the property. (Tr. 115).

Prior to Cloyd's death in 1979, the last payment made to Elsie on the 1966 contract was a \$400.00 payment in December of 1976. (Finding of Fact 9, R. 632). After Cloyd's death in October of 1979, Mark became concerned that the true facts would surface and it would become known that he had not been paying

his mother as promised, and Lena was apparently asking questions. In November of 1979, Mark deposited directly into his mother's account, the sum of \$706.00. (Exhibit 15).

On December 8, 1980, Mark tendered to Elsie a check in the sum of \$2,000, apparently in an attempt to reinstate the contract. This payment was refused by Elsie. (Tr. 81). On October 14,, 1981, Mark and Lena again tendered a check in the sum of \$2,000 to Elsie and that tender was likewise refused by Elsie. (Tr. 107, Exhibit 17). These payments were rejected by Elsie because she knew she had deeded her one-half interest in the property to her five children, that she was receiving money from them and that Mark already owned the other one-half interest in the property by reason of the joint tenancy deed and Cloyd's subsequent death. It only seems logical that Elsie felt the partnership operated by Mark and Cloyd was only entitled to a one-half interest in the property - they had paid far less than one-half of the payments due to her through 1980 (\$10,996.75 paid of \$28,000 due and owing).

On June 21st, 1982, an action was filed by Lena, against Elsie, Mark, and the five other brothers and sisters. On November 1st, 1982, Mark again tendered a check in the sum of \$2,000, but that payment was likewise refused by Hans Q. Chamberlain, who at that time represented Elsie Brinkerhoff.

After this litigation arose and an Answer and Counterclaim had been filed on their behalf, Charles Brinkerhoff and Betty

Esplin decided that in the interests of family harmony, they did not want to participate in the litigation. At that time they deeded their one-fifth interest of the one-half interest they received from Elsie, to Mark and Lena (Exhibits 9 and 10), who by that time had entered into an agreement between themselves to evidence a unified front.

Therefore, at the time of trial, the record title indicated that Mark owned a six-tenths interest, Lena a one-tenth interest, Golda a one-tenth interest, Arlene a one-tenth interest, and Warren a one-tenth interest.

Since Defendants claim that the trial court committed reversible error when it determined that Elsie Brinkerhoff has been incompetent since 1970, it is important for this court to understand how the issue of competency arose at the time of trial. As discussed in more detail, below, the issue of Elsie's competency was not raised by Plaintiffs in their complaint, amended complaint, discovery, or in the pretrial order prepared by Plaintiffs' counsel. Likewise, Defendants have always maintained that Elsie was competent until she signed a Stipulation on September 9th, 1984 when she was not represented by counsel. Likewise, in this appeal, Elsie Brinkerhoff is not represented by counsel. Even though the trial court appointed Kirk Heaton, Attorney at Law, Kanab, Utah, as the guardian of Elsie Brinkerhoff, he has apparently elected not to participate in this appeal on Elsie's behalf.

On the first day of trial, Elsie Brinkerhoff was called by Plaintiff, but not until Defendants' counsel cross-examined her did the court sua sponte, raise the issue of her incompetency.

On August 13, 1983, Elsie requested the undersigned, Hans Q. Chamberlain, who initially represented, to withdraw as her attorney of record as per a document prepared by Mark's son, Dale Brinkerhoff. (Exhibit 11). Said attorney did withdraw, and did not see Elsie again until her deposition was taken on February 11th, 1985, ten days prior to trial. Because the undersigned noticed a significant change in her mental condition at the time of deposition, and because she had signed a Stipulation prepared when she was unrepresented by counsel on September 9th, 1984, the following dialogue took place at the time of trial:

Q. MR. CHAMBERLAIN: Now before we go to that, let me just ask you a couple of these questions; are you represented by an attorney in this case?

A. ELSIE BRINKERHOFF: No.

Q. You're not?

A. No.

Q. Alright.

A. I never had to have an attorney for anything.

Q. Were you represented by me on one occasion?

A. Well until I called you or sent word to you that I didn't want to be in on it anymore.

Q. Alright. So right now you don't think you are represented by an attorney?

A. No.

Q. Do you know that you are being sued in this lawsuit today?

A. No. I've heard about it, but I don't know anything about it.

Q. You don't know that you're being sued?

A. No. I asked Lena what I was being sued for, and she said I wasn't being sued.

Q. Did you ever ask Lena why she sued you in the first place?

A. No, I never have. I don't know why.

Q. Okeh. When you testified at this deposition that we took were you represented by an attorney?

A. You were the only one I have ever had anything to do with, 'til we got in with this Mr. Bishop there.

Q. Okey. So does Mr. Bishop represent you now?

A. I don't know whether he does nor not. I never asked him. He never told me anything about it so --

Q. Alright.

THE COURT: Do you represent her Mr. Bishop?

MR. BISHOP: I do, your Honor. I received a letter on the 16th of October from Mrs. Brinkerhoff asking me to do so. It looks like her signature on the other documents I've seen.

THE COURT: She doesn't know that she asked you.

Q. Did you --

THE COURT: Go ahead. I will look after her interests. How's that.

Q. Did you ever write to Mr. Bishop and ask him to represent you?

A. No.

Q. If you'd give me a minute, okeh?

A. Sure, go ahead.

Q. Mrs. Brinkerhoff, would you turn to Page 11. I'm sorry, let's go to Page 11. Can I help you there just a little?

A. Well --

THE COURT: Let me just make a record at this point: The record shall indicate that the Court is of the opinion that Mrs. Brinkerhoff should have representation, but because of the timing of this matter, that the Court will look after her interests and I'm not going to hold up the trial for the purpose of bringing in independent counsel and the Court will attempt to look out after her interests, but it's the Court's opinion that she does not fully understand the consequences of the matter before the Court, and she has not and the Court finds she is not fully understood at this point and for a considerable period of time, but the Court will allow the proceedings to go forward and the Court will try to look out for her interests, but at the same time, reserves the right to stop the proceedings if I feel that her interests are not (sic) being abused.

I'm making that so that there's no question on the record why I am doing what I am doing, but I think that in the interest of judicial economy, I should go forward with the proceedings. You may proceed counsel. (Tr. 345-348).

Because the trial court ruled early in the trial that Elsie had been incompetent "for a considerable period of time," and without any evidence presented by Plaintiffs concerning competency (apparently relying only upon the testimony of Elsie Brinkerhoff at time of trial), Defendants were put in the position of having to rebut the finding by the trial court that Elsie was incompetent when she executed the joint tenancy deed in 1979, and the deed from herself to her five children in 1980.

After that finding by the trial court, each witness, including both Plaintiffs' and Defendants', was asked if they thought Elsie was competent in 1979 and in 1980, and each witness answered without hesitation that she was in fact competent. (See discussion under Point I, below). The trial court's ruling that Elsie became incompetent in 1970 was clearly contrary to all evidence presented.

HOW THE PARTIES WERE INITIALLY REPRESENTED, THE CHANGES
THAT OCCURRED DURING DISCOVERY AND THE TRIAL ITSELF,
AND THE INCONSISTENCY IN PLAINTIFFS' POSITION

When this action was filed on June 22, 1982, Lena, acting through the personal representative of the estate of Cloyd Brinkerhoff, sued Elsie, Mark, Golda, Warren, Arlene, Charles and Betty, seeking to specifically enforce the 1966 contract and cancel all other deeds executed by Elsie. (R. 1-8, 351-170). Defendants' attorney herein, Hans Q. Chamberlain, was initially contacted personally by Elsie, Golda, Warren, Arlene, Charles and Betty. An extensive Answer and Counterclaim was prepared on behalf of those parties, including Elsie Brinkerhoff, alleging, in part, (1) forfeiture under the 1966 contract, (2) a request for an accounting from her two sons who signed the purchase agreement, and (3) damages for conversion of personal property. (R. 16-27). Interrogatories were thereafter submitted by Defendants to Plaintiffs. On August 13th, 1983, Elsie requested 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 11). However, Elsie was advised in writing that she was still a party litigant to this lawsuit and that she should have other counsel. (Exhibit 6, attached). Elsie Brinkerhoff thereafter remained unrepresented until Willard R. Bishop, the attorney who had sued her in the first instance, entered an appearance on her behalf and did so on February 14th, 1985 one week prior to trial. (R. 421-426). However, prior to that time, on September 7th, 1984, Willard R. Bishop, as attorney for Mont R. Anderson, Lena and Mark prepared a Stipulation (Exhibit 40, attached), which Elsie signed. That Stipulation (1) reaffirms the 1966 contract, (2) repudiates other deeds signed by Elsie, (3) waives all delinquent amounts owed to her and (4) dismissed the Counterclaim filed by Hans Q. Chamberlain on behalf of Elsie against Mark J. Brinkerhoff and Cloyd's estate. After the Stipulation was signed by Elsie, a copy was submitted by Plaintiffs to the court together with a proposed judgment running in favor of Plaintiffs. A telephone conference call was held between the court and counsel wherein the subject of the Stipulation was discussed, at which time the court refused to sign the proposed judgment.

Therefore, at the beginning of the trial, Willard R. Bishop represented Lena, Elsie and Mark, even though he had originally sued Elsie and Mark on behalf of Lena. However, because of the court's ruling, during a part of the first day of trial and

during the entire second day of trial, Elsie was not represented by counsel, (Finding of Fact No. 31, R. 647), and no one has entered an appearance on her behalf at this time.

It is evident that the trial court determined that the easy way to resolve this dispute was to simply rule that Elsie Brinkerhoff became legally incompetent in 1970 and allow all past due payments to be paid, post-trial. The court, however, failed to recognize the legal significance of that ruling as it relates to Elsie's interests (see discussion, below).

SUMMARY OF ARGUMENT

POINT ONE:

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT ARBITRARILY FOUND THAT ELSIE BRINKERHOFF HAS BEEN LEGALLY INCOMPETENT SINCE 1770.

The trial court determined the only way to find in favor of Plaintiffs was to declare the seller, Elsie Brinkerhoff, legally incompetent from and after 1970. The effect of that ruling was to void all documents she executed after 1970 including her last will and testament, deeds, affidavits and a Trust Deed running in her favor for \$50,000. However, all testimony presented was clear and convincing that she was competent on each occasion when she executed those documents in 1979, 1980 and 1982.

POINT TWO:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO APPOINT A GUARDIAN AD LITEM FOLLOWING ITS DETERMINATION THAT ELSIE BRINKERHOFF WAS INCOMPETENT.

The trial court found that Defendant Elsie Brinkerhoff became legally incompetent in 1970 and did so on the first day of trial even though her competency was never at issue. The court simultaneously found that she was not being properly represented by her counsel, Willard R. Bishop, but failed to recess trial and appoint a general guardian or guardian ad litem to protect her interests. That ruling was clearly contrary to all evidence presented and the court thereafter failed to protect the interests of Elsie Brinkerhoff.

POINT THREE:

THE TRIAL COURT'S DETERMINATION THAT ELSIE BRINKERHOFF WAS INCOMPETENT IN 1970 DOES NOT NECESSARILY MEAN THAT SHE WAS NOT SUFFICIENTLY COMPETENT TO EXECUTE BINDING DEEDS AND CONTRACTS IN 1979 and 1980.

Even assuming arguendo that the trial court was correct in ruling that Elsie Brinkerhoff was incompetent in 1970 and that it could properly represent her best interests during the course of the trial, there is ample evidence to indicate that Elsie Brinkerhoff was competent when she executed documents in 1979, 1980 and 1982, as well as on other occasions.

POINT FOUR:

THERE IS AMPLE EVIDENCE THAT THE 1966 CONTRACT TERMINATED BY OPERATION OF LAW.

The evidence clearly indicates the intent to abandon the contract by the parties because no payments were made for 1966, 1967, 1968, 1969, 1970, and 1971; the escrow required by the contract was never fully established and all the deeds called for in the contract were never deposited.

POINT FIVE:

THE TRIAL COURT FAILED TO RECOGNIZE THE PERFECT TENDER RULE IN SPECIFICALLY ENFORCING THE 1966 CONTRACT.

By declaring Elsie incompetent, the court allowed the 1966 Purchase Agreement to be reinstated on the Plaintiffs' payment of \$50,000, post-trial. The Plaintiffs had in fact acknowledged arrearages in payments of \$30,000 at the time of trial. Since Plaintiffs as buyers, failed to tender that amount prior to or at the time of trial, the trial court erred in granting a Decree of Specific Performance in favor of Plaintiffs by reason of "The Perfect Tender Rule".

POINT SIX:

MARK AND CLOYD OPERATED AS A PARTNERSHIP AND THE ACT OF ONE PARTNER BINDS THAT PARTNERSHIP.

When Cloyd had the joint tenancy deed prepared in 1979 and paid to have it recorded with partnership funds, he did so on behalf of the partnership.

ARGUMENT

POINT ONE

THE COURT COMMITTED REVERSIBLE ERROR WHEN IT ARBITRARILY FOUND THAT ELSIE BRINKERHOFF HAS BEEN LEGALLY INCOMPETENT SINCE 1970.

Without any supporting evidence, the court arbitrarily ruled that Elsie Brinkerhoff has been legally incompetent since 1970. (Finding of Fact 15, R. 640). There is not one shred of evidence in the record to support a finding of incompetency even

as early as 1979. All witnesses who were asked about Elsie's competency testified that she was competent in both 1979 and 1980 when she executed the joint tenancy deed and in 1980, when she executed the deed conveying her one-half interest.

Such a ruling with all available evidence being contrary is repugnant to the law and the presumptions created thereby.

In 28 Am.Jur., Insane and Other Incompetent Persons § 121, (1962), p.751, it states:

"It is well settled that the law will presume sanity rather than insanity, competency rather than incompetency; it will presume that every man is sane and fully competent until satisfactory proof to the contrary is presented."

* * *

This statement of the law was cited with approval by the Oregon Supreme Court in First Christian Church in Salem v. McReynolds, 241 P.2d 135, 138 (Or. 1952). The Oregon Court went on to add:

In accord with the general presumption of sanity, there is a presumption that every man is capable of managing his own affairs, and is responsible for his own acts. Likewise, it is presumed that every man is capable of understanding the nature and effect of his contracts, and that he comprehends the effect and result of legal proceedings. Accordingly, it may be stated that as a general rule, all proceedings testing the competency of a person, or involving the competency of an individual to perform a certain act, as to execute a valid conveyance of property or a contract, start with the presumption of competency, and that this presumption may be relied upon until the contrary is shown."

* * *

First Christian Church in Salem v. McReynolds, 241 P.2d at 138.

See also Roybal v. Morris, 669 P.2d 1100 (N.M. 1983).

The foregoing presumption is guarded by a heightened standard or burden of proof which requires the presentation of "clear and convincing evidence" to rebutt it. The presumption and the burden of proof are concisely stated in Binder v. Binder, 309 P.2d 1050 (Wash. 1957):

"Mental competency is presumed; and in order to establish mental incompetency, fraud, or undue influence, the evidence must be clear, cogent, and convincing."

Binder v. Binder, 309 P.2d at 1053.

Recognizing that a finding of incompetence requires a balancing of the State's interest in protecting the person from himself and the effect such a finding may have on a person's individual liberties, the Utah Supreme Court embraced the "clear and convincing" evidence test in In re Boyer, 636 P.2d 1092 (Utah 1981). In that case the court reasoned as follows:

"In the absence of a legislative directive on the issue, we think those interests are best accommodated by requiring evidence of incompetency by clear and convincing evidence."

* * *

In re Boyer, 636 P.2d at 1092. See also Rawson v. Hardy, 48 P.2d 473 (Utah 1935).

The court made a finding of incompetence even though Plaintiffs never alleged that Elsie Brinkerhoff was ever incompetent. (See Plaintiffs' Complaint, R. 1-8; Amended Complaint R. 351-370; Pretrial Order prepared by Plaintiffs' counsel, R. 428-445; Trial Brief of Defendants, R. 472-523). Believing that the competency of Elsie had never been

challenged, in their Trial Brief, filed the first day of trial, Defendants state as follows:

Of significance is the fact that Plaintiffs have not plead fraud, undue influence, incompetency, or mistake on the part of Elsie Brinkerhoff in connection with the preparation of the 1979 joint tenancy deed or the preparation of the 1980 transaction where Elsie deeded to her five children.

Instead of making those claims, Plaintiffs have elected to have Elsie sign a Stipulation whereby she supposedly reaffirms the 1966 contract, disclaims the 1979 joint tenancy deed, disclaims the 1980 deeds from herself to her five children, and waives any delinquent amounts owed to her by Mark or the estate of Cloyd Brinkerhoff. (R. 488).

The court simply searched for a way to find in favor of Plaintiffs and did so by ignoring the presumption in favor of competency, the fact that competency was not properly at issue, and the fact that there was no evidence rebutting the presumption which prevented any possibility of meeting the required burden of proof. Such a finding is clearly an abuse of the trial court's discretion and fails in every way to protect the interests of Elsie Brinkerhoff as the court tried to do in its justification for so ruling. (See discussion infra).

A summary of the testimony and even the statement of Elsie's counsel clearly indicates the error made by the trial court in ruling that Elsie Brinkerhoff has been incompetent since 1970.

STATEMENT OF WILLARD R. BISHOP, COUNSEL FOR ELSIE BRINKERHOFF.

In Plaintiffs' opening statement, Mr. Bishop stated as follows:

MR. BISHOP: The evidence will show, and I didn't cover this but, the evidence will show that she (meaning Elsie Brinkerhoff) is very alert, and maintains her own home, and maintains her own checking account, pays her bills, drives herself around and does all things that we normally expect people to do in maintaining their daily lives. (Tr. 26).

TESTIMONY OF PLAINTIFF MARK BRINKERHOFF.

Plaintiff Mark Brinkerhoff testified that in 1980 he had a conversation with his mother, Elsie, concerning the fact that she had refused to accept a check tendered by him in the sum of \$2,000. That at that time, he believed his mother to be competent and that she was likewise competent in 1979. (Tr. 79-81).

TESTIMONY OF DEFENDANT GOLDA B. ADAIR.

Golda B. Adair is the daughter of Elsie Brinkerhoff. She testified that in 1979, she saw her mother once or twice a week and would call her about every day. That she believed her to be competent in 1979 and 1980, that she was able to handle her own affairs, that she wrote checks at that time, that she paid her own bills, that she cleaned her own home and that there was no change in her condition from 1979 to 1980. (Tr. 477-478).

TESTIMONY OF DEFENDANT ELSIE BRINKERHOFF.

At the time of trial Elsie Brinkerhoff was 86 years old. She testified that she lives alone, that she reads at home on a daily basis, that she gets around by herself, that she still drives an automobile, has a drivers license, does some of her own shopping, that she has a checking account and manages it herself, that she has a savings account, but that it is handled by her daughter Betty, that she participates in senior citizens' outings, that she does her own sewing, washing, ironing, and cooking. (Tr. 318-321).

Elsie Brinkerhoff also testified that in her opinion, she is now competent to handle her own affairs. (Tr. 326).

TESTIMONY OF DEFENDANT CHARLES BRINKERHOFF.

Charles Brinkerhoff is the son of Elsie Brinkerhoff and was an original Defendant when the action was filed. He testified that his mother was competent in 1979 and 1980, and when asked if he thought she was competent at the

time of trial, answered "Yes, to a certain extent, I do." He also testified that he thought his mother was as competent today as he was and that he can't remember any more than she can. (Tr. 394-395).

TESTIMONY OF DALE BRINKERHOFF.

Dale Brinkerhoff is the son of Plaintiff, Mark Brinkerhoff, and the grandson of Elsie Brinkerhoff. Dale Brinkerhoff's belief that his grandmother was competent is evidenced by both his testimony and the fact that he had his grandmother sign a document he prepared on August 13th, 1983 (Exhibit 11) and the Stipulation whereby Elsie reaffirmed the 1966 contract (Exhibit 40, attached).

Mr. Brinkerhoff testified that he visited regularly with his grandmother, and that she was competent in 1979, 1980, and that she was competent at the time of trial. (Tr. 420).

TESTIMONY OF BRAD ADAIR.

Brad Adair is the son of Golda Adair and the grandson of Elsie Brinkerhoff. He is employed by Southern Utah Title Company in Kanab, Utah. He testified that after he prepared the joint tenancy deed (as well as a deed from Elsie to Charles for property unrelated to this transaction), he delivered them to Charles who obtained the signature of Elsie and returned them to him for recordation, that he had a conversation with Elsie wherein she indicated that she signed the deeds, that the deeds were delivered back to him by Charles for recordation and the deeds were both recorded, one right after the other. (Tr. 438-443). He also testified that the cost for recording the joint tenancy deed was the sum of \$18.00 and that it was paid by his employer, Southern Utah Title. (Tr. 444). Southern Utah Title was reimbursed the recording costs for the joint tenancy deed by a check from the partnership on December 31, 1979. (See Exhibit 19, Entry Book, Kane County Recorder showing recordation costs for joint tenancy deed in the sum of \$18.50 and compared to the last page of Exhibit 39, check records for Mark J. and Cloyd H. Brinkerhoff Partnership, indicating that a check was made payable to Brad Adair on December 31st, 1979 for the sum of \$18.00).

As to the competency of Elsie Brinkerhoff, Brad Adair testified that he thought his grandmother, Elsie, was competent in 1979 and 1980, that he explained to her the

fact that she would be deeding her one-half interest when she executed the deed to her five children and that she would receive back a Trust Deed for \$50,000. (Tr. 447-448).

TESTIMONY OF WILLIAM WEBSTER ADAIR.

Webster Adair is the husband of Golda Adair, and the Kane County Recorder. He testified that Elsie came to his home about every Sunday for dinner until this litigation started and Dale Brinkerhoff had told her not to have anything to do with his family any more, that he had a conversation with Elsie two or three weeks after Cloyd's death and when he inquired as to whether or not she wanted Mark to have all of the property, she said no. He also testified that he was present when the Trust Deed, Trust Deed Notes and Warranty Deed from Elsie to her five children were discussed and explained to her, that she raised no objection to the same, and that she was competent in June of 1979 and in 1980. (Tr. 466-472).

TESTIMONY OF PLAINTIFF LENA A. BRINKERHOFF.

Lena Brinkerhoff is the widow of Cloyd Brinkerhoff, the sister of Webster Adair, and a Plaintiff herein. She testified that during the summer of 1979, she saw Elsie Brinkerhoff a couple of times a week, that in June of 1979, she thought Elsie Brinkerhoff to be competent, that she thought that when her husband took anything to Elsie for signature, that he explained to her the things she would need to know when she had to sign something, including a deed. That she also thought Elsie Brinkerhoff to be competent in 1980, that if documents were taken to her, they were explained to her and that in her opinion, her husband, Cloyd, believed that Elsie understood what she was signing. (Tr. 480-483).

A careful review of the transcript indicates that Plaintiff's counsel never once asked any witness whether or not he or she believed Elsie Brinkerhoff to be competent or incompetent. The reason is obvious: How can you allege and prove the incompetency of your own client (Elsie) when a few months prior to that time, you prepared a Stipulation for her to sign (without counsel) that did away with the claims

of the Defendants, waived any past due payments owed to by her Co-Plaintiffs, and requested the court to enter a Decree of Specific Performance against her. (Exhibit 40, attached).

As indicated above, on the first day of trial, the court determined that the interests of Elsie Brinkerhoff were not being fully protected, and that even though she needed separate counsel to represent her interests, the court would not hold up the trial for the purpose of bringing in independent counsel, but instead would look out for her interests. (Tr. 347, Finding of Fact No. 31, R. 647). However, the court actually failed to look out for the interests of Elsie Brinkerhoff, where, with all evidence to the contrary, it found Elsie to have been incompetent since 1970. Using that same reasoning, the court could have just as easily determined that Elsie was incompetent in 1966 when the purchase contract (Exhibit 1) was signed, thereby voiding the entire transaction. The effect of that would have been to return all of the property to Elsie, said property having a value at the date of trial of approximately \$410,000. (Exhibit 37). The evidence, or lack thereof, as to Elsie's incompetency is just as strong for 1966 as it was in 1970. If the court was trying to find some evidence of incompetency to support its finding, the fact that no payments were made to Elsie by her sons for 1966, 1967, 1968, 1969, 1970 and 1971, could just as easily have evidenced her incompetency for the reason that she apparently made no claim against them by

reason of nonpayment. Using what appears to be the trial court's logic, the failure to request payment on the part of Elsie would manifest her incompetence as early as 1966, if any finding at all of her incompetency is justified.

Further indication of the trial court's failure to protect Elsie Brinkerhoff is the fact that the court declared the Last Will and Testament of Elsie Brinkerhoff dated April 23, 1982, (Exhibit 13, attached) to be null and void, even though said will was prepared by the law offices of Olsen and Chamberlain, Richfield, Utah, attested to by two independent witnesses who each verified that in their opinions, Elsie Brinkerhoff was of sound and disposing mind and memory and not acting under any menace, fraud or undue influence. Furthermore, that will is notarized as required by Utah law, and pursuant to Utah Code Annotated 75-2-504, constitutes a self-proved will.

The issue of competency was not plead and was not before the court prior to the time of trial. However, because Defendants needed to rebut the finding by the court on the first day of trial, the foregoing testimony substantiating the competency of Elsie Brinkerhoff was taken and remains unrebutted in the record. There is no "clear and convincing evidence" of any peculiar act or event occurring in 1970, or otherwise, upon which the trial court could have based its finding that Elsie became incompetent at that time.

In Cornia v. Cornia, 546 P.2d 890 (Utah 1976), the court dealt with a factual situation somewhat "reciprocal" to the foregoing and held that the trial court had abused its discretion in going beyond the issues before it.

In Cornia, the court was involved in a proceeding to have a guardian appointed for an 81-year-old woman. The issue of competency was paramount and properly before the court. The trial court ruled that the woman was sufficiently incompetent to warrant the appointment of a guardian. There were additional indications that during a period prior to the adjudicated incompetency, the woman had executed a will and a trust deed conveying away a certain portion of her property. The trial court therefore included in its ruling an order declaring the will and the trust deed to be null and void. The Supreme Court affirmed the competency ruling but held that "the trial court erred in declaring null and void the will and trust deed [that the woman] had executed. Cornia, 546 P.2d at 893. The Supreme Court observed that the only issue before the trial court was the issue of competency at the time of trial and not two years prior thereto. The Supreme Court went on to state:

While it is true that our rules provide for liberality in procedure and the granting of relief to which the evidence shows a party entitled, this does not go so far as to authorize the granting of relief on issues neither raised nor tried.

Cornia v. Cornia, 546 P.2d at 893.

In the present case, the trial court was presented with the

parties' dispute over enforcement of a 1966 Real Estate Contract or a subsequently joint tenancy deed recorded on the same real property, with collateral issues of waiver, abandonment, rescission, forfeiture, payment, etc. Where neither Plaintiff nor Defendant had raised the issue of incompetency, the grantor was entitled to the benefit of her presumed competency. However, without an actionable issue before it, without allowing for the grantor to be represented by competent counsel, and in the face of unrebutted evidence to the contrary, the trial court attempted to resolve the law suit by declaring the grantor incompetent from some prior and arbitrary point in time, and relying on that declaration, nullifying and voiding all of the incompetent's subsequent contracts and conveyances.

The Cornia court used a proper determination of competency to void a prior executed deed and was reversed as to the avoidance; the trial court in the present case used an improper determination of incompetency to "boot-strap" its way into a later avoidance of both a joint tenancy deed, a subsequent severance of the tenancy and an even later conveyance of a one-half interest in the same property. Such "boot-strapping" at the expense of an individual's competency when neither the pleadings nor the evidence so indicates is an unquestionable abuse of discretion and, at a minimum, constitutes reversible error.

POINT TWO

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO APPOINT A GUARDIAN AD LITEM FOLLOWING ITS DETERMINATION THAT ELSIE BRINKERHOFF WAS INCOMPETENT.

Rule 17(b) of the Utah Rules of Civil Procedure provides in pertinent part:

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. (Emphasis added.)

* * *

Nowhere in the rule is there a provision for the trial court to "look after someone's interest", particularly during a trial. The rule specifically states that an incompetent person can only appear by his guardian and that absent a general guardian, the court must appoint for the incompetent person a guardian ad litem. By acting as it did, the trial court has obviously exceeded its statutory authority.

By analogy, in Matter of Estate of Anderson, 671 P.2d 165 (Utah 1983), the Utah Supreme Court held that the trial court had exceeded its statutory power and the rationale for reversal is somewhat applicable to the situation present in this case. The court stated:

In the case under review the [court's] order attempted to void testamentary dispositions made by a protected person who had not been declared incompetent. The applicable statutes did not give the court the power to make that order.

* * *

Matter of Estate of Anderson, 671 P.2d at 169.

In the instant case the court also failed to address in its decision or its Findings of Fact, Elsie's Counterclaim that the 1966 contract had been rescinded, abandoned, terminated by operation of law or terminated by reason of nonpayment, thus restoring the entire property to her. Likewise, the court failed to address any of the other claims of Elsie set forth in the pretrial order. (R. 428-444). Instead the court found she had been incompetent for 15 years, contrary to all evidence presented.

In the case at bar, the trial court exceeded its statutory power by failing and refusing to appoint a guardian ad litem. It is inconceivable that in the same breath the court could declare a person incompetent and assert that it would thereafter be "looking out for the incompetent's best interests." In presuming to represent the interest of the incompetent person the court prejudiced itself, contravened the express provisions of the rule, worked an injustice to the alleged incompetent, and committed reversible error.

POINT THREE

THE TRIAL COURT'S DETERMINATION THAT ELSIE BRINKERHOFF WAS INCOMPETENT IN 1970 DOES NOT NECESSARILY MEAN THAT SHE WAS NOT SUFFICIENTLY COMPETENT TO EXECUTE BINDING DEEDS AND CONTRACTS IN 1979 AND 1980.

Even assuming arguendo that the trial court was correct in ruling that Elsie Brinkerhoff was incompetent in 1970 and that

it could properly represent her best interests during the course of trial, the trial court's ruling of incompetency in 1970 does not necessarily preclude the possibility of Elsie experiencing periods of lucidity in which she possessed the requisite mental capacity to enter into a binding contract or execute a valid deed. While it is recognized that such a ruling of incompetency carries with it some presumption of constancy, it must be remembered that the ruling was made in 1985, several years after the most recent conveyances. Therefore, the subject conveyances having occurred prior to the adjudication of incompetency are entitled to a presumption that the grantor was competent and that the conveyances are valid.

In Tate v. Murphy, 217 P.2d 177 (Okla. 1949), the Oklahoma Supreme Court wrestled with a factual situation as complicated and convoluted as that in the present case. The court in Tate dealt with an aging widow who sought to provide for a foster child who had provided care and companionship in her final years. The testimony on the elderly woman's mental capacity was plentiful; however, contrary to the present case, there were a few witnesses who expressed concern over her apparent lack of capacity. Such concern was generally couched in terms derived from her aged and feeble condition. In addressing the issues, testimony, and evidence before it, the court in Tate stated:

[T]o render a contract voidable on account of the mental incapacity of one of the parties to it, it is not enough that such party was at times, from whatever cause, lacking in sufficient sanity to understand what he was doing, but the evidence of his defective intelligence must relate to the immediate time of making the contract. A deed, mortgage, or other conveyance or contract made by an insane person, but during a lucid interval before his incapacity has been judicially determined, is valid and enforceable. (Emphasis added.)

* * *

Tate v. Murphy, 217 P.2d at 185, citing Mullen v. First Guaranty State Bank of Crossplains, Texas, 113 Okl. 84, 239 P. 161, 162 (1925).

The court in Uribe v. Olson, 42 Or.App. 647, 601 P.2d 818 (1979), held similarly:

Even where there are substantial indications of mental incompetence, it is possible that a person may have "lucid intervals" during which he possesses the requisite capacity. Capacity includes the ability to reason and exercise judgment and, in essence, to bargain with the other party. Neither old age, illness, or extreme emotional distress is sufficient of itself to negate such capacity. (Parenthesis in original; Citations omitted.)

Uribe v. Olson, 601 P.2d at 820; See also Hatch v. Hatch, 148 P. 433 (Utah 1914).

In the case at bar, Brad Adair testified that Elsie Brinkerhoff gave serious consideration to the deeds which she executed in both 1979 and 1980. Furthermore, he gave specific testimony that Elsie was competent at the time the deeds were executed and notarized. Likewise, every witness who was asked concerning Elsie's competency testified that she was competent

in both 1979 and 1980. With no testimony to the contrary, and with the benefit of the presumption in favor of competency as set forth in Point One, above, there is absolutely no reason why the joint tenancy deed of 1979 and the conveyance of Elsie's one-half interest by Trust Deed in 1980, should have been declared null and void by the trial court.

None of the Defendants had anything to do with the actual preparation, execution and recordation of the joint tenancy deed prepared in June of 1979. That deed was prepared, executed and recorded at the request of Cloyd Brinkerhoff. The cost to record the joint tenancy deed was paid by the partnership. The record provides no evidence of undue influence on the part of Plaintiffs or Defendants when that deed was executed by Elsie, and the only testimony before the trial court was that Elsie Brinkerhoff was competent in 1979 and 1980.

Utah law is very clear that absent fraud, duress, mistake or the like attributable to the grantee (i.e., Mark, Cloyd or Elsie) a competent grantor will not be permitted to act or impeach his own deed. Desert Centers, Inc. v. Glen Canyon, Inc., 356 P.2d 286 (Utah 1960). Furthermore, a grantor of a deed is presumed to be legally competent to make a conveyance and, there is no presumption of incompetency where the grantor's mind is weakened by "trouble and old age", or where the grantor was once proved insane. First Christian Church in Salem v. McReynolds, supra; Grover v. Garn, 464 P.2d 598 (Utah 1970),

Hatch v. Hatch, 46 Utah 218, 178 P. 433 (1914). See also Watson v. Johnson, 411 P.2d 498 (Okla. 1967), which indicate that contracts and deeds are not invalid merely because one party may be infeeblled by old age and/or disease in such a way that some of his mental processes are affected if at the time the deed is executed and delivered the party understands the nature and effect of the execution of the instruments.

POINT FOUR

THERE IS AMPLE EVIDENCE THAT THE 1966
CONTRACT TERMINATED BY OPERATION OF LAW

The evidence strongly suggests that Elsie as the seller and Mark and Cloyd as the buyers simply abandoned their interests in the 1966 contract. In Forsyth v. Pendleton, 617 P.2d 358 (Utah 1980), the court adopted the language from Timpanogos Highlands, Inc. v. Harper, 544 P.2d 481, 484 (Utah 1975), which stated:

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 had occurred, it is usually a question of fact, to be determined from the circumstances of the particular case, which includes not only nonperformance, but also expressions of intent and other actions.

Regarding the specific intention to abandon, the following is stated in 1 Am. Jur. 2d, Abandoned, Lost, etc., Property, §40 (1962), p. 32:

Intention to abandon property may be shown by the declarations or conduct of the party who, it is

claimed, abandoned the right. But it is not necessary to prove intention to abandon by express declarations or by other direct evidence; intent to abandon property or rights of property is to be determined, . . . from all the surrounding facts and circumstances . . . by which that fact may be established.

* * *

Consistent with the foregoing, the court in Forsyth recognized that while the intent to abandon must be clear and unequivocal, that intention need not be shown by the positive testimony of the purchaser but may be inferred from his acts and conduct, i.e., non payment. Forsyth, 617 P.2d at 361. The court in Forsyth further pointed out that a such an intent to abandon by both parties to an agreement may be found to work a rescission of the contract. 617 P.2d at 361.

Such a mutual rescission was found by the court in Wallace v. Build, 16 Utah 2d 401, 402 P.2d 699 (1965). There the court observed that the facts presented a "situation where the defendant had shown by unequivocal acts that he regarded the agreement as abandoned, and that the plaintiff had acquiesced in this" 402 P.2d at 701.

The facts in the present case evince an aging seller, mother of the buyers, who for apparent want of family harmony and sound legal advice regarding her contract rights and responsibilities, failed to give effective demand for payment and notice of default; and sellers who possessed and used the subject property to their apparent financial benefit, but who routinely failed to make their agreed payments and for whatever

reason continued to take advantage of the familial situation and their mother's apparent reluctance to act against them. Indeed, the parties began the contractual relationship on a note of abandonment by agreeing to execute deeds and set up an escrow, neither of which was ever fully accomplished. Perhaps most illustrative of the mutual abandonment or rescission of the 1966 contract is the joint tenancy deed of 1979 wherein Elsie, as sole grantor conveyed fee title to the subject property to herself, Mark and Cloyd, as joint tenants. It is particularly notable that this conveyance was done at the instance and with the acquiescence of Mark and Cloyd.

Technically, this was something of a two-step transaction. Presumably, Elsie had only "legal" title to the subject property as a result of the 1966 contract; also, Mark and Cloyd presumably had acquired some quantum of "equitable" title by virtue of the same transaction. Therefore, Elsie could not have conveyed fee title via the 1979 joint tenancy deed without Mark and Cloyd having first waived and surrendered their "equitable" title back to her. There was obviously no documentation to support such a "fictional reconveyance;" however, as stated, the very creation of the joint tenancy deed requires such a hypothetical result; and the acquiescence of Mark and Cloyd in its documentation and recording seems to be conclusive with respect to the parties' mutual understanding and intent.

Not to be overlooked in this transaction is Elsie's obvious reliance on the contractual provisions which required payment in full prior to actual conveyance to the buyers. There is little doubt but what Elsie believed that the buyers' failure to pay meant that she retained complete ownership of the property. Equally as persuasive is the apparent mutual assumption of Mark and Cloyd that with the joint tenancy in place, their mother would predecease them and they would then end up with the property "free and clear," having paid next to nothing for it.

The historical lack of enforcement and lack of performance in this case, together with the uncontested "reconveyance" and subsequent joint tenancy deed, creates an overwhelming presumption of mutual abandonment or mutual rescission of the 1966 contract. However, because the court elected to arbitrarily find Elsie to be incompetent since 1970, the court failed to even address those issues on behalf of the incompetent that the court undertook to represent. The trial court has created a "Catch 22" situation. If Elsie was incompetent in 1970, she had no capacity to declare a forfeiture or demand payment since that time.

From 1970 to 1982 when this litigation was filed, Mark and Cloyd had only paid their mother \$6,996.75 and to allow them to come in 16 years later and reinstate the contract is a gross miscarriage of justice. Assuming Elsie's incompetency in 1970, the trial court should have at least addressed the issues of

forfeiture, nonpayment, rescission and abandonment on behalf of Elsie prior to that time. That evidence clearly indicates intent to abandon by the buyers because no payments were made for 1966, 1967, 1968, 1969, 1970 and 1971; the escrow was never established and deeds called for in the contract were never deposited.

If the trial court was really trying to protect Elsie in her aging years, the court could have ruled the 1979 joint tenancy deed constituted a reformation of the 1966 contract based on mutual agreement and ordered Mark, after Cloyd's death, to pay his mother one-half of the purchase price originally bargained for in 1966. Using that reasoning, the 1980 deed from Elsie to her children and the Trust Deed back to Elsie for \$50,000 would likewise become valid. Hence, Elsie would have benefited by several thousand dollars. Furthermore, if Lena had any claim at all, it was against Mark as the surviving partner and they have now agreed to share equally in whatever property Mark receives. (Tr. 125).

POINT FIVE

THE TRIAL COURT FAILED TO RECOGNIZE THE
PERFECT TENDER RULE IN SPECIFICALLY
ENFORCING THE 1966 CONTRACT

Prior to filing the lawsuit, Plaintiffs, by their own admission, were in default of the terms of the 1966 contract and delinquent approximately \$30,000 in payments. In filing,

Plaintiffs sought specific performance of the contract. This continuing, uncured default should have precluded the trial court from ordering that the contract be specifically enforced, which was essentially the precise effect of the courts decision. (Judgment and Decree Quieting Title, paragraph 2, R. 655).

The Utah Supreme articulated and relied on the "Perfect Tender Rule" in Century 21 All Western Real Estate and Investment, Inc. v. Webb, 645 P.2d 52 (Utah 1982). The court dismissed the purchaser's suit for specific performance for their failure to tender their own performance before or at the time of bringing suit. In so holding, the court stated:

[N]either party can be said to be in default (and thus susceptible to a judgment for damages or a decree of specific performance) until the other party has tendered his own performance. In other words, the party who desires to use legal process to exercise his legal remedies under such a contract must make a tender of his own agreed performance in order to put the other party in default.

To qualify under this rule, a tender, such as an offer to pay money, must be complete and unconditional. (Citations omitted.)

* * *

Century 21 All Western Real Estate and Investment, Inc. v. Webb, 645 P.2d at 56.

In Fischer v. Johnson, 525 P.2d 45 (Utah 1974), the Supreme Court reversed the trial court's Decree of Specific Performance because the purchasers failed to tender the sum of \$3,000. The court stated:

But it is also true that specific performance is a remedy of equities; and one who invokes it must have clean hands in having done equity himself. That is, he must take care to discharge his own duties under the contract; and he cannot rely on any mere inconvenience as an excuse for so doing. Even if inconvenience or difficulty is encountered, he must make an effort to perform, or to tender performance, which manifests unreasonable diligence and bona fide desire to keep his own promises.

Fischer v. Johnson, 525 P.2d at 46. See also Lincoln Land and Development Company v. Thompson, 489 P.2d 426 (Utah 1971), which also reversed the trial court that had entered a Decree of Specific Performance wherein the balance of the down payment in the sum of \$5,800 was not tendered. The court stated:

Before the plaintiff was entitled to a decree of performance it had the burden of showing that it had exercised the option in accordance with its terms. The plaintiff had the burden of establishing that it had paid or tendered the amount specified in the option within the prescribed time. It is clear from the record that the plaintiff failed to tender the sum agreed upon within the time specified in the option. It would thus appear that the trial court erroneously granted the Decree of Specific Performance.

Lincoln Land and Development Company v. Thompson, 489 P.2d at 428.

The trial court's acceptance of Plaintiffs' imperfect tender and its subsequent ruling providing that the 1966 contract be specifically performed is in direct conflict with the Utah Supreme Court's clear and concise statement of the law. Such misapplication of the law should be appropriately rectified by this Court on review.

POINT SIX

MARK AND CLOYD OPERATED AS A PARTNERSHIP
AND THE ACT OF ONE PARTNER BINDS THAT
PARTNERSHIP.

There is no dispute that since 1966, Mark and Cloyd operated as a partnership.

When Cloyd had the joint tenancy deed prepared in 1979 and paid to have it recorded with partnership funds, he did so on behalf of the partnership. Those acts binds not only himself, but his partner, Mark Brinkerhoff, as well. See Utah Code Annotated §§ 48-1-6 and 48-1-9 (1953), attached.

CONCLUSION

The trial court's arbitrary ruling that Elsie Brinkerhoff has been legally incompetent since 1970, has no basis either in the evidence presented or in the applicable law. The trial court ignored the time honored presumption that a person is presumed competent until clear and convincing evidence is produced to the contrary. Such a ruling without any legal or factual basis whatsoever required the court to reach far beyond its discretionary bounds and such an abuse of discretion constitutes reversible error.

Likewise, the trial courts contravention of the statutory requirement that an incompetent person be represented by a guardian ad litem is also highly inappropriate. Even more inappropriate is the court's effort to remain independent and

objective while taking upon itself the additional burden of "looking out for the alleged incompetent's interests" during the trial. Such acts, even though well intentioned, fall well outside the bounds of the court's statutory authority and judicial calling. Such acts are far from harmless, particularly to the alleged incompetent, and such a misuse of judicial authority is so erroneous as to demand reversal.

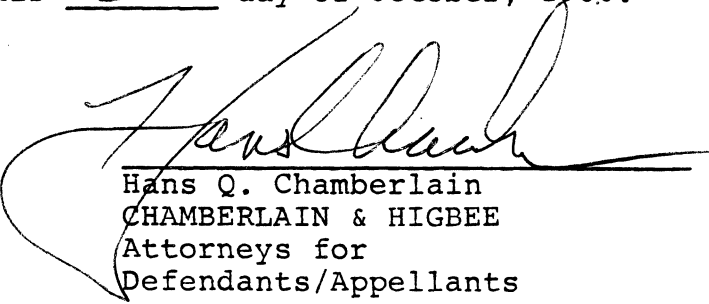
Simply because the grantor was arguably weakened and enfeebled by age, and practically because contracts and conveyances had been executed long before any judicial attention was drawn to the grantor's mental state, the grantor's business dealings, as a matter of law are presumed valid. This being the case, the deeds, affidavits, and agreements entered into by Elsie Brinkerhoff prior to the time of trial, are all valid, effective and binding on her and those with whom she dealt in the absence of fraud, coercion, duress, or undue influence. All such influences being absent, such deeds, conveyances and contracts, and specifically those in 1979 and 1980 are entitled to a positive presumption, and in fact should and do continue in full legal force and effect.

Even assuming that the 1966 contract may have some lingering validity, the Plaintiff's tardy effort to breathe life back into it suffered a fatal shortfall. Plaintiff's imperfect tender should have precluded the trial court from considering specific enforcement as a viable remedy. However,

consistent with the trial court's misguided handling of the other aspects of this suit, specific performance was in fact ordered in direct contradiction of the facts and the applicable law. Again, even with the appropriate presumptions in favor of the trial court's ruling, there is ample room for this Court to intercede on behalf of the facts and the law, which to this point have been misaligned.

This court should reverse the trial court in all respects and declare the 1979 joint tenancy deed and the 1980 conveyances from Elsie to her five children binding and enforceable. Likewise, this court should enforce the Trust Deed Notes and Trust Deed running in favor of Elsie Brinkerhoff. Such a holding would leave Mark and Lena still owning seven-tenths of the subject property which is far more than they are entitled to receive. However, if this court sustains the finding that Elsie was incompetent at an early date, that date should be 1964 or 1965 and the 1966 contract of sale consequently declared null and void.

RESPECTFULLY SUBMITTED this 8th day of October, 1986.



Hans Q. Chamberlain
CHAMBERLAIN & HIGBEE
Attorneys for
Defendants/Appellants

CERTIFICATE OF DELIVERY

I hereby certify that on this 8th day of October, 1986, ten (10) copies of the within and foregoing APPELLANTS' BRIEF were delivered to the Clerk of the Supreme Court, four (4) copies of the within and foregoing BRIEF were delivered to Willard R. Bishop, BISHOP & RONNOW, P.C., 36 North 300 West, Cedar City, Utah, 84720 and one copy to F. Kirk Heaton, Attorney at Law, General Guardian for Elsie Brinkerhoff, 70 North Main, Kanab, Utah 84741.


HANS Q. CHAMBERLAIN

ADDENDUM

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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,

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. BRINKERBOFF 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. ^{217.75} \$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	<u>- 2,000.00</u>	
		-0-	
NOV 1, 1965	Payment due	2,000.00	
	Payment made	<u>- 2,000.00</u>	
		-0-	
NOV 1, 1966	Payment due	2,000.00	
NOV 1, 1967	1 year interest at 6% on \$2,000	120.00	
	Payment due	<u>2,000.00</u>	
		4,120.00	\$120 accrued in- terest, \$4,000 principal
NOV 1, 1968	1 year interest at 6% on \$4,000	240.00	
	Payment due	<u>2,000.00</u>	
		6,360.00	\$360 accrued in- terest, \$6,000 principal
NOV 1, 1969	1 year interest at 6% on \$6,000	360.00	
	Payment due	<u>2,000.00</u>	
		8,720.00	\$720 accrued in- terest, \$8,000 principal
NOV 1, 1970	1 year interest at 6% on \$8,000	480.00	
	Payment due	<u>2,000.00</u>	
		11,200.00	\$1,200 accrued in- terest, \$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 interest 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

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

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

property, grazing rights and water rights which are the subject matter of this action, as tenants in common, each owning an undivided one-half (½) 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, free and clear of any claim whatever on the part of Defendants GOLDA B. ADAIR, WARREN BRINKERHOFF, and ARLENE B. GOULDING. Because of the legal incompetency of ELSIE J. BRINKERHOFF, upon payment of all amounts due under said Agreement, any judgment and decree issued in this matter should function and operate as a judicial deed conveying to Plaintiffs MARK J. BRINKERHOFF and LENA BRINKERHOFF, the interests stated above. In the event that Plaintiffs deem it necessary, a judicial deed should issue upon appropriate application and notice.

5. That Mr. Kirk Heaton should be appointed as trustee and guardian of the financial, business and legal affairs of ELSIE J. BRINKERHOFF, under the supervision of the Court, he to take the appropriate oath and to serve without bond or stated fee. As such trustee and guardian, Mr. Heaton should receive amounts awarded ELSIE J. BRINKERHOFF, should deposit them in a trust account at Zion's First National Bank, and should disburse such funds for the benefit of ELSIE J. BRINKERHOFF, but not to her children, except as such disbursements to children may be ordered by the Court. Upon appropriate notice, Mr. Heaton should be permitted to apply for reasonable fees in his capacity as trustee and guardian of the financial business and legal affairs of ELSIE J. BRINKERHOFF. Mr. Heaton should be permitted to pay his

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.

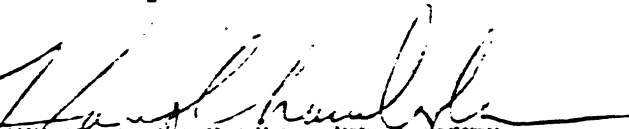
DATED this 20th day of February, 1986.

BY THE COURT:


DON V. TIBBS, District Judge

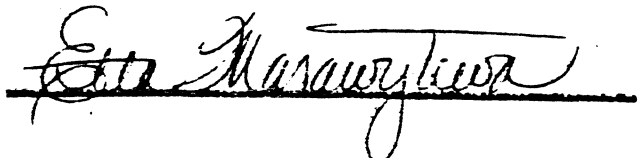
APPROVED AS TO FORM:


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.


Elsie J. Brinkerhoff

WILLARD R. BISHOP
BISHOP & RONNOW, P.C.
Attorney for Plaintiffs
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,

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

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 Quieting 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.

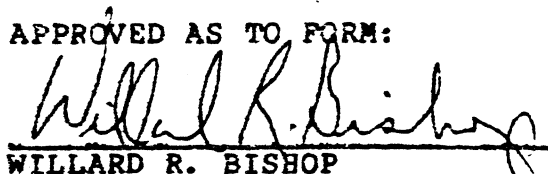
13. That the parties should be and they hereby are, required to bear their own costs and attorney fees.

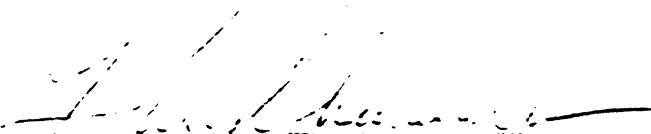
DATED this 20 day of February, 1986.

BY THE COURT:


DON V. TIBBS, District Judge

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.



Elsie J. Brinkerhoff

RECEIVED
JUL 2 1935

Mr. Tolson	
Mr. Clegg	
Mr. Glavin	
Mr. Ladd	
Mr. Nichols	
Mr. Rosen	
Mr. Tracy	
Mr. Carson	
Mr. Egan	
Mr. Gurnea	
Mr. Hendon	
Mr. Jones	
Mr. Quinn	
Mr. Nease	
Mr. Gandy	

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 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 Townsite.

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

REAL PROPERTY IN KANE COUNTY, UTAH:

Township 39 South, Range 4 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 25, Township 39 South, Range 4 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 1/2 West, containing 479.00 acres.

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

**PLAINTIFF'S
EXHIBIT**

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 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 3.68 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 Northeast 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.

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

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 permits 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
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 CHAMBERLAIN
75 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. Adsie, 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 say, 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 herelineabove described and quitclaim conveyances to the water and reservoir rights herelineabove 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 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 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 say, 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 herelineabove described and the SELLER say 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 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
1964

Elsie J. Brinkerhoff
Elsie Brinkerhoff
SELLER

Cloyd H. Brinkerhoff
Cloyd H. Brinkerhoff
Mark Brinkerhoff
Mark Brinkerhoff
BUYERS

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

the buyer will

To whom it may concern:

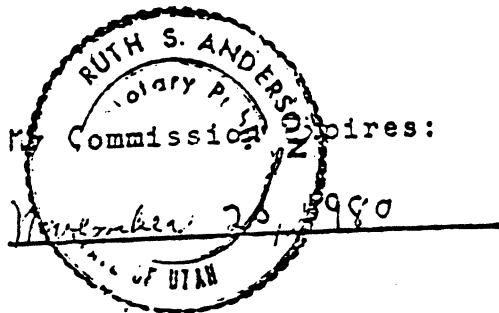
I, Elsie Brinkerhoff, have received from Cloyd
and Mark Brinkerhoff, as payment on property,

\$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 Alameda, Utah

PLAINTIFF'S
EXHIBIT

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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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;
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, grantees
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 80.

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 80 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, 1983 My residence is Orderville, Utah

**DEFENDANT'S
EXHIBIT**

6

RECORDED IN BOOK 1125
PAGE 1125
JUL 19 1980
KANE COUNTY RECORDER
OFFICE

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, 803.0 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

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

LAST WILL AND TESTAMENT OF

ELSIE BRINKERHOFF

* * * * *

I, ELSIE BRINKERHOFF being an actual bona fide resident of Glendale, County of Kane, State of Utah, being of sound and disposing mind and memory, knowing the objects of my bounty and not acting under any menace, fraud or undue influence, do hereby and by these presents make, publish and declare this instrument as and to be my Last Will and Testament, hereby revoking any and all former Wills and Codicils thereto made by me at any time.

FIRST

I nominate Betty Esplin, Orderville, Utah, my daughter to act as Personal Representative of this Will to serve without bond.

SECOND

I direct that my Personal Representative as soon after my demise as is practicable, to pay all my lawfully enforceable debts and all expenses of my last illness, funeral, and burial.

THIRD

I direct that my estate shall be distributed in seven (7) equal shares, one share to be distributed to each of my six children and one share to my daughter-in-law, Lena Brinkerhoff.

My children are: Mark Brinkerhoff, Glendale, Utah; Golda Adair, Orderville, Utah; Warren Brinkerhoff, St. George, Utah; Arlene Golding, Glendale, Utah; Charles Brinkerhoff, Orderville, Utah; Betty Esplin, Orderville, Utah and my daughter-in-law is Lena Brinkerhoff, surviving wife of Cloyd Brinkerhoff deceased.

I direct that in any event that any one of the foregoing shall predecease me then the share that they would have taken shall go to their lineal descendants by right of representation per stirpes, and not per capita.

**DEFENDANT'S
EXHIBIT**

FOURTH

I also represent that I may at some time in the future prepare a written list of items of personal use, ornament, or effect which may dispose of items of a personal nature but will not include real estate, securities, money deposits or receivables but will only dispose of items of personal property exclusive of the enumerated exceptions foregoing. I direct that if such a list is prepared by me dated and signed than the articles of personal property which are thus disposed shall be distributed to the recipient without any further direction or proceeding.

IN WITNESS WHEREOF I have made, published and declared this instrument as and to be my Last Will and Testament in the presence of Phyllis C. Esplin and Cecelia H. Chamberlain, attesting witnesses, who witness and attest the same in my sight and in my presence at Orderville, Utah, this 23rd day of April, 1982.

Elsie Brinkerhoff

On this 23rd day of April, 1982, the foregoing instrument, consisting of TWO (2) pages, including this page, was in the presence of us, and each of us, made, signed, published and declared by the TESTATRIX, ELSIE BRINKERHOFF, as and to be her Last Will and Testament, who in the sight and presence of each other, do hereby subscribed our names as attesting witnesses, which said Last Will and Testament was executed by the TESTATRIX ELSIE BRINKERHOFF in our sight and in our presence and declared by said TESTATRIX ELSIE BRINKERHOFF to be her Last Will and Testament, she requesting that we act as subscribing witnesses and we, and each of us, do hereby certify and declare that in our opinion the TESTATRIX ELSIE BRINKERHOFF

is of sound and disposing mind and memory and not acting under any menace, fraud, or undue influence.

Address: _____

Address: _____

I, ELSIE BRINKERHOFF, the TESTATRIX, sign my name to this instrument this 23rd day of April, 1982, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my Last Will and Testament and I sign it willingly; that I execute it as my free and voluntary act for the purposes therein expressed and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Elsie Brinkerhoff
Elsie Brinkerhoff

WE, Phyllis C. Esplin and Cecelia H. Chamberlain, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the TESTATRIX ELSIE BRINKERHOFF signs and executes this instrument as her Last Will and Testament and she signs it willingly and each of us, in the presence and hearing of the TESTATRIX ELSIE BRINKERHOFF and of each other, hereby sign this Will as witnesses to the TESTATRIX'S signing, and that to the best of our knowledge the TESTATRIX ELSIE BRINKERHOFF is eighteen

years of age or older, of sound mind, and under no constraint or undue influence.

STATE OF UTAH)
 : ss.
COUNTY OF ~~SEVIER~~ Kane)

Subscribed, sworn to and acknowledged before me by
ELSIE BRINKERHOFF, the TESTATRIX, and subscribed and sworn to
before me by Phyllis C. Esplin and Cecelia H. Chamberlain,
witnesses, this 23rd day of April, 1982.

Notary Public

Residing At: Orderville, Utah

My Commission Expires: May 7, 1985

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.

PLAINTIFF'S
EXHIBIT

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.

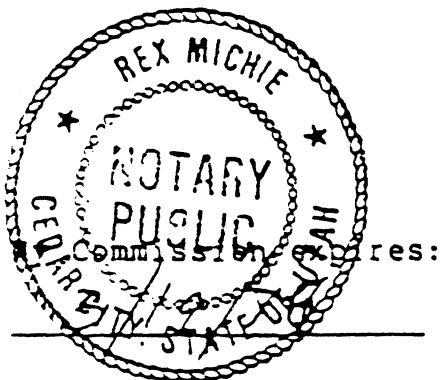
Elsie Brinkerhoff
ELSIE BRINKERHOFF

STATE OF UTAH

County of

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 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.

Linda S. Thompson
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 22 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 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 25, 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 Northwest Quarter; Northwest Quarter of the Southeast Quarter of Section 27, Township 39 South, Range 41 West, containing 478.50 acres.

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714 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 5: Lot 2, containing 32.23 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 11.23 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 (9-36-17)
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 coextensive.

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

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70 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, Datty 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 herelineabove described and quitclaim conveyances to the water and reservoir rights herelineabove 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 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 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 herelineabove 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 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

1967
1967

Elsie J. Brinkhoff
Elsie Brinkhoff
SELLER

Cloyd H. Brinkhoff
Cloyd H. Brinkhoff
Mark Brinkhoff
Mark Brinkhoff
BUYERS

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

the legal work

SCHEDULE "A"

PARCEL 1: The West half of Section 25, Township 39 South, Range 45 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 45 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 45 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 45 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 45 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 45 West, Salt Lake Base and Meridian, containing 238.99 acres, more or less.

PARCEL 7: Lot 2, Section 5, Township 40 South, Range 45 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 45 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 09°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.

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

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 M. 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 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 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 Codyville, Utah

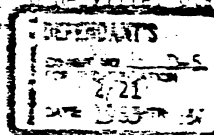
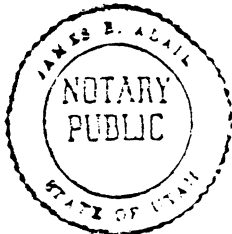


Exhibit B
to Exhibit 40

PARTNERSHIP STATUTES

Utah Code Annotated 48-1-6 (1953).

PARTNER AGENT OF PARTNERSHIP AS TO PARTNERSHIP BUSINESS -- Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership of any instrument for apparently carrying on in the usual way the business of the partnership of which he is a member, binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Utah Code Annotated 48-1-9 (1953).

PARTNERSHIP CHARGED WITH KNOWLEDGE OF OR NOTICE TO PARTNER -- Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operates as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.