

1949

# Leonard Howe v. Maurice R. Michelsen and June H. Michelsen : Brief of Appellants

Utah Supreme Court

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O. A. Tangren; E. D. Sorensen; Attorneys for Plaintiff;

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF UTAH**

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LEONARD HOWE,  
*Plaintiff and Appellant,*

vs.

MAURICE R. MICHELSEN and  
JUNE H. MICHELSEN,  
*Defendants*

and MAURICE R. MICHELSEN,  
*Respondent.*

**FILED**

OCT 11 1949

CLERK, SUPREME COURT, UTAH

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**BRIEF OF APPELLANTS**

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LEONARD HOWE,  
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JUNE H. MICHELSEN,  
*Defendants*  
and MAURICE R. MICHELSEN,  
*Respondent.*

---

BRIEF OF APPELLANTS

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STATEMENT

This action was filed by Leonard Howe against the defendants Maurice R. Michelsen and June H. Michelsen, his wife, to recover the purchase price of certain hay, grain and other livestock feed sold. Defendants demurred to plaintiff's complain and that demurrer was sustained. The action was tried upon plaintiff's Amended

Complaint, defendants' Separate Answers and Plaintiff's Reply. The action was dismissed as to defendant June H. Michelsen and no appeal is taken from that part of the judgment.

The plaintiff in his amended complaint (Tr. 8-9) alleges that on or about the 5th day of January, 1948, the plaintiff sold to the defendants 3,306 pounds of wheat at \$3.50 cwt.; 11,513 pounds of barley at \$3.25 cwt.; 19,585 pounds of mixed barley and oats at \$3.25 cwt.; 9 tons 1115 pounds of hay at \$20.00 per ton; 33 tons of hay at \$22.00 per ton; 3662 cubic feet of straw valued at \$36.62; approximately 266 pounds of rolled barley valued at \$4.66; approximately 500 pounds of Laying Mash valued at \$14.00; approximately 500 pounds of bone meal valued at \$23.00 and approximately 250 pounds of cottonseed meal valued at \$12.75 for a total of \$2,178.89. That the terms of the sale was immediate cash That demand had been made for payment and payment refused. In the prayer plaintiff asks for judgment for \$2,178.89, plus interest and costs.

To plaintiffs amended complaint, defendant Maurice R. Michelsen, filed a separate answer (Tr. 12-25) the material substance of the allegations of which are that plaintiff and his wife entered into a preliminary listing agreement on September 4, 1947, with the defendants whereby the plaintiff agreed to sell and the defendants agreed to buy a rather large dairy farm in Wasatch County (the exact description of which is set out in said answer) plus a long list of machinery and other personal property including (Tr. 14) "50% of all hay and grain



produced (Estimate total 150 tons of hay, approximately 1250 bushels of grain (total 2500 bushels). That thereafter on November 7, 1947, and in pursuance of the said List Agreement a Purchase and Sale Agreement was entered into between the same parties (Tr. 21-24) covering the same land and same long list of machinery and other personal property including (Tr. 22) "One-half of all hay and grain produced on the above described farm during the year 1947, estimated at total hay raised, 150 tons; total grain so raised 2500 bushels." On the same said day of November 7, 1947, plaintiff and his wife, in pursuance of said Purchase and Sale Agreement executed a Bill of Sale (Tr. 25), covering a long list of personal property conveyed, including "one-half of all hay and grain produced on the farm described in said contract during the year 1947, estimated at 150 tons of hay and 2500 bushels of grain."

That hay and grain mentioned in the Preliminary Agreement, the Purchase and Sale Agreement and the Bill of Sale are the only items of personal property mentioned which is material to this action.

Defendant Maurice R. Michelsen alleges in paragraph V of his answer (Tr. 15) that plaintiff sold and delivered to defendants not less than 75 tons of hay and 2500 bushels of grain.

Defendant alleges in paragraph VIII of his answer (Tr. 16) that when the hay and grain on said premises were measured by defendant and plaintiff on the 15th day of November, 1947, there was the following amounts:

“Total hay 85 tons, one-half being  $42\frac{1}{2}$  tons;  
Total barley 23,267 pounds, one-half being  
11,633½ pounds;

Total wheat 6,613 pounds, one-half being  
3,306½ pounds;

Total oats and barley mixed 39,170 pounds,  
one-half being 19,585 pounds and total straw 7324  
cu. ft. with total value of \$73.24.”

Defendant also admits in the same paragraph (Tr. 17) that in addition to the crops so raised on said premises plaintiff owned the following additional property which he sold to defendants: “500 lbs. of laying mash of the value of \$14.00; 266 lbs. of rolled barley, valued at \$4.66 and 250 lbs. cottonseed meal of the value of \$12.75, all on the premises aforesaid,” and further on in the same paragraph (Tr. 18) admits also 500 lbs. bone meal, valued at \$23.00.

Defendant, in the same paragraph (Tr. 17), assumes that defendant should have half of 150 tons of had and one-half of 2500 bushels of grain and then by circuitous reasoning and figuring computes that after satisfying defendant’s demands plaintiff should receive from defendant, for the personal property sold on January 5, 1948, only the sum of \$556.00 (Tr. 18) which amount defendant proffered by his answer to pay.

At paragraph X of his answer defendant alleges (Tr. 18-19) that he is entitled to attorney’s fees.

In the prayer of said answer defendant proffers to pay plaintiff \$556.00 less \$250.00 attorney’s fees, costs and expenses of the action.

Plaintiff in his reply to the separate answer of said



defendant denies that he ever agreed to deliver not less than 75 tons of hay and not less than 1250 bushels of grain to the defendants under the agreement of November 7, 1947, and alleges that he agreed to deliver to defendant as part of said agreement only one-half of whatever crops might be raised on the said premises. The reply also alleges the respective values of the different items of the crops and that one-half of that plus the other items sold on January 5, 1948, altogether totaled \$2,179.89. The reply also denies all the other material allegations of said separate answer not otherwise admitted or denied.

## EVIDENCE OF PROOF

The evidence showed that, on November 7, 1947, the plaintiff and his wife entered into an agreement with the defendants whereby plaintiff sold to the defendants a dairy ranch and personal property including one-half of all hay and grain raised on said premises during the year 1947 (Reporter's Tr. of Ev. 10 and 54). The crops were measured by the plaintiff and the defendant, Maurice R. Michelsen, on the 16th day of November, 1947, and they mutually found and agreed said crops to be: 85 tons of hay; 23,267 pounds of barley; 6,613 pounds of wheat; 39,170 pounds of oats and barley mixed and 7,324 cubic feet of straw and that at the time of the measurement defendant told plaintiff he would purchase plaintiff's portion of the crop (Reporter's Tr. of Ev. 20).

The evidence further showed that no agreement as to the price of said property was finally arrived at until

January 5, 1948 (Reporter's Tr. of Ev. 20, 24 and 25) when plaintiff and defendant agreed that the total items sold by plaintiff was worth \$2,129.32 (Reporter's Tr. of Ev. 25 and Plaintiff's Exhibit "A"). Defendant admitted executing Plaintiff's Exhibit "A" (Reporter's Tr. of Ev. 43).

That plaintiff was to take plaintiff's Exhibit "A" to defendant's father at Utah Savings and Trust Bank in Salt Lake City and give a bill of sale for the property sold and get a check for \$2129.32 (Reporter's Tr. of Ev. 25 and 43).

That plaintiff within the next day or two after January 5, 1948, presented the said Exhibit "A" to defendant's father and said "write that bill of sale and I will sign it; and you give me the check. And he says he would have his girl write it up and mail it to me; and that is all that was done." (Reporter's Tr. of Ev. 27.)

After presenting the instrument, Plaintiff's Exhibit "A" to Fred M. Michelsen in Salt Lake City, plaintiff waited about a week and receiving no check went to defendant at the ranch and asked about the check to which defendant replied there was a mistake there (Reporter's Tr. of Ev. 27). Finally when no check was received plaintiff brought this action the 6th day of February, 1947.

During the preliminary negotiations at the ranch when the Listing Agreement of September 4, 1947, was made Fred M. Michelsen, father of the defendant, who had had forty-five to fifty years experience dealing in

real estate, purchase and sale of farms and cattle and items of the like nature, was present and advised his son. (Reporter's Tr. of Ev. 44.) The Listing Agreement, the Purchase and Sale Agreement of November 7, 1947, and the Bill of Sale are all in evidence and stipulated to by counsel for the respective parties as correct in their entirety but the only parts thereof which are material here or would throw any light on this case are the two following quotations from page 2 of the Purchase and Sale Agreement, and similar statements in the Listing Agreement and bill of Sale. The quotations are as follows:

“One-half of all hay and grain produced on the above described premises during the year 1947, estimated at total hay raised 150 tons, total grain so raised 2500 bushels” and

“(b) That the hay and grain aforesaid shall be equally divided between the seller and the buyer immediately upon and following the execution of this agreement, and delivery shall be mutually made.” (Tr. 2.)

## FINDINGS OF FACT

1. The court found that the plaintiff and his wife as sellers and the defendants as buyers entered into the purchase and sale agreement Defendant's Exhibit “A” (Attached to and made a part of defendant's separate answer) Tr. 43-44.

2. That under said contract the buyers were to receive a full one-half of all hay and grain raised on the

January 5, 1948 (Reporter's Tr. of Ev. 20, 24 and 25) when plaintiff and defendant agreed that the total items sold by plaintiff was worth \$2,129.32 (Reporter's Tr. of Ev. 25 and Plaintiff's Exhibit "A"). Defendant admitted executing Plaintiff's Exhibit "A" (Reporter's Tr. of Ev. 43).

That plaintiff was to take plaintiff's Exhibit "A" to defendant's father at Utah Savings and Trust Bank in Salt Lake City and give a bill of sale for the property sold and get a check for \$2129.32 (Reporter's Tr. of Ev. 25 and 43).

That plaintiff within the next day or two after January 5, 1948, presented the said Exhibit "A" to defendant's father and said "write that bill of sale and I will sign it; and you give me the check. And he says he would have his girl write it up and mail it to me; and that is all that was done." (Reporter's Tr. of Ev. 27.)

After presenting the instrument, Plaintiff's Exhibit "A" to Fred M. Michelsen in Salt Lake City, plaintiff waited about a week and receiving no check went to defendant at the ranch and asked about the check to which defendant replied there was a mistake there (Reporter's Tr. of Ev. 27). Finally when no check was received plaintiff brought this action the 6th day of February, 1947.

During the preliminary negotiations at the ranch when the Listing Agreement of September 4, 1947, was made Fred M. Michelsen, father of the defendant, who had had forty-five to fifty years experience dealing in

real estate, purchase and sale of farms and cattle and items of the like nature, was present and advised his son. (Reporter's Tr. of Ev. 44.) The Listing Agreement, the Purchase and Sale Agreement of November 7, 1947, and the Bill of Sale are all in evidence and stipulated to by counsel for the respective parties as correct in their entirety but the only parts thereof which are material here or would throw any light on this case are the two following quotations from page 2 of the Purchase and Sale Agreement, and similar statements in the Listing Agreement and bill of Sale. The quotations are as follows:

“One-half of all hay and grain produced on the above described premises during the year 1947, estimated at total hay raised 150 tons, total grain so raised 2500 bushels” and

“(b) That the hay and grain aforesaid shall be equally divided between the seller and the buyer immediately upon and following the execution of this agreement, and delivery shall be mutually made.” (Tr. 2.)

## FINDINGS OF FACT

1. The court found that the plaintiff and his wife as sellers and the defendants as buyers entered into the purchase and sale agreement Defendant's Exhibit “A” (Attached to and made a part of defendant's separate answer) Tr. 43-44.

2. That under said contract the buyers were to receive a full one-half of all hay and grain raised on the

premises described in the Purchase and Sale Agreement, together with other personal property. Tr. 44.

3. That the defendants went into possession of the real property on November 10, 1947, and received their one-half of said crops.

4. That the plaintiff was to receive from the defendant for the property sold to defendant on January 5, 1948, only the sum of \$556.00. Tr. 44-45.

5. That it had been necessary for the defendant to bring into the action and rely upon the Purchase and Sale Agreement of Nov. 7, 1947, and that said agreement provided for "all costs and expenses that may arise from any enforcement of this contract either by suit or otherwise, including a reasonable attorney's fee." That defendant be allowed to recover \$250.00 as a reasonable attorney's fee. Tr. 45.

6. That June H. Michelsen was not a party to the agreement of January 5, 1948. Tr. 45.

7. That all the hay and grain actually sold to Maurice R. Michelsen by planitiff on January 5, 1948, was and were parts of the crops raised upon the premises described in Exhibit "A" during the year 1947. Tr. 46.

8. That all allegations set out or contained in the pleadings upon which trial was had, contrary to or inconsistent with the foregoing Findings of Fact is and are either not true or is and are without merit or probative value and so immaterial to the determination of the cause.



## CONCLUSIONS OF LAW.

The Court concluded that the plaintiff was entitled to a judgment against Maurice R. Michelsen alone for \$556.00 and that defendant was entitled to a judgment against plaintiff for \$250.00 as attorney's fees and that each should be offset against the other leaving a balance due plaintiff of \$306.00. That each party should pay his own costs. Tr. 46.

## JUDGMENT

On the 18th day of September, 1948, the court entered its Judgment dismissing the action as to defendant, June H. Michelsen, gave plaintiff judgment against defendant, Maurice R. Michelsen, for \$556.00, less \$250.00 allowed defendant against plaintiff as attorney's fees, for a net total judgment to plaintiff of \$306.00. (Tr. 51-52.)

## STATEMENT OF ERRORS

1. The Court erred in not finding the sale of January 5, 1948, an independent, completed agreement entitling plaintiff to the sum of \$2,129.32 as shown by plaintiff's Exhibit "A."

2. That Court erred in finding that plaintiff was entitled to only \$556.00 by reason of the sale of January 5, 1948, instead of the sum of \$2,129.32.

3. That Court erred in finding that defendants were entitled to one-half of the estimated 150 tons of

hay and estimated 2500 bushels of grain under the Purchase and Sale Agreement.

4. The Court erred in entering Finding of Fact number IV.

5. The Court erred in finding that defendant was entitled to the sum of \$250.00 as attorney's fees.

6. The Court erred in entering its Finding of Fact number VII.

7. The Court erred in entering its Finding of Fact number VIII.

8. The Findings IV and VII are inconsistent with and at variance to Finding No. II and said Findings IV and VIII are not supported by the evidence and are contrary to the evidence.

9. The Court erred in entering any judgment in favor of defendant for attorney's fees.

10. The Court erred in not entering judgment in favor of plaintiff for the sum of \$2,120.32 plus interest from January 5, 1948, and for plaintiff's costs.

11. There is a variance between defendants' pleadings and the proof.

12. That the Conclusion that plaintiff is entitled to a judgment against, Maurice R. Michelsen, for only \$556.00 instead of \$2,129.32 is not supported by the Findings of the proof and is against Finding No. II.

13. That the Conclusions of Law and the Judgment are contrary to law.

## ARGUMENT.

1. THE COURT ERRED IN NOT FINDING THE SALE OF JANUARY 5, 1948, AN INDEPENDENT, COMPLETED AGREEMENT ENTITLING PLAINTIFF TO THE SUM OF \$2,129.32 AS SHOWN BY PLAINTIFF'S EXHIBIT "A."

The amended complain alleges that the plaintiff sold and delivered to the defendants and the defendants accepted and agreed to pay for 3,306 pounds of wheat at \$3.50 cwt.; 11,513 pounds of barley at \$3.25 cwt.; 19,585 pounds of mixed barley and oats at \$3.25 cwt.; 9 tons 1115 pounds of hay at \$20.00 per ton; 33 tons of hay at \$22.00 per ton; 3,662 cubic feet of straw valued at \$36.62; approximately 500 pounds of laying mash valued at \$14.00; approximately 266 pounds of rolled barley valued at \$4.66; approximately 500 pounds of bone meal valued at \$23.00 and approximately 250 pounds of cottonseed meal valued at \$12.75, making a total of \$2,178.89 (Tr. 8). The actual proof showed a slightly smaller figure to have been arrived at e.g. \$2,129.32.

The memorandum testified to by plaintiff and admitted by defendant, plaintiff's Exhibit "A" shows as follows: (Plaintiff's Exhibit "A")

Wheat 6613-3306	at 3.50	101.71
Barley 23267-11633	at 3.25	378.07
Barley Oats 39170-19585	at 3.25	636.51
Bone Meal 500	at 4.60	23.00
Cottonseed 250	5.10	12.75
Rolled Barley 260		4.66
Lay Mash		14.00

Hay 19 tons $\frac{1}{2}$ 230	at	21	196.00
Hay 66 tons $\frac{1}{2}$ 33	at	22	726.00
Straw			36.62

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2129.32

(Signed) M. R. MICHELSEN.

What could show a plainer meeting of minds and a more complete intention on the part of the defendant to pay plaintiff \$2,129.32? If defendant was to have one-half of 75 tons of day why was one-half of 19 tons and one-half of 66 tons listed and why was the value of one-half of those amounts carried out for a total of the value of the hay? Likewise if defendant thought he was to have one-half of 2500 bushels of grain why was the total measurements of the barley, barley and oats mixed and wheat and straw listed and one-half of each at the respective values carried to the totals column and why the final figure of \$2,129.32 with defendants named signed below? Nowhere on that instrument is there any figure of \$556.00 or anythings that resembles it nor is there any reservation concerning the total of \$2,129.32. Further the court found in Finding No. IV and Finding No. VI that there was an agreement of sale and purchase of the items enumerated in plaintiff's Exhibit "A." If there was any agreement made on that day then it certainly was to the effect that plaintiff was entitled to have pay for one-half of the crops plus the agreed value of the other small items which altogether totaled \$2,129.32. Defendant admits these measurements shown in Exhibit "A" are correct and that the prices are correct. Then

how can he deny that the one-half is not correct or that the total of \$2,129.32 is not correct?

Also defendant stipulated as follows: (Tr. 21.)

“The Court: That the hay and grain aforesaid shall be equally divided between the seller and the buyer immediately upon and following the execution of this agreement, and delivery of the same mutually made. Now don’t you both stand on that?

Mr. Tangren. Yes.

Mr. Hatch. Yes.”

Certainly from that evidence and that stipulation to court should have rendered judgment for the plaintiff for the sum of \$2,129.32 and interest and costs. The contract was made and the proof is there. The court cannot make a new and different contract for the parties.

2. THE COURT ERRED IN FINDING THAT PLAINTIFF WAS ENTITLED TO ONLY THE SUM OF \$556.00 BY REASON OF THE SALE OF JANUARY, 1948, INSTEAD OF \$2,129.32.

There is absolutely no justification in the pleadings or the proof for limiting plaintiff’s judgment to \$556.00. Absolutely the only argument defendant has is his own statement “there was a mistake” (Reporter’s Tr. of Ev. 27). But was there a mistake? We say there was no mistake in the figures compiled on January 5, 1948, and agreed to by plaintiff and defendant. Plaintiff’s Exhibit “A” nor in the stipulation entered into in open court as show on page 21 of the Transcript as set forth

in the assignment No. 1. Further it is agreed and stipulated that there was crops raised, 85 tons of hay, 23,269 pounds of barley; 6,613 pounds of wheat; 39,170 pounds of mixed barley and oats and 7,324 cubic feet of straw. (Reporter's Tr. of Ev. 22-23.) In addition to plaintiff's part of the crops sold to this defendant there was also sold to him the following other stock feeds not raised on the premises, e. g. 500 pounds of bone meal, laying mash, approximately 250 pounds of cottonseed meal and approximately 260 pounds of rolled barley. The parties agreed on the price of each unit. (Plaintiff's Exhibit "A" and Tr. 18.)

One-half of the crops was agreed, according to these unit prices, to be worth \$2,074.91. In addition to half of the crop to which plaintiff was entitled by plaintiff's Exhibit "A," the original Listing Agreement, the Purchase and Sale Agreement, the Bill of Sale and defendant's stipulation with plaintiff in open court as shown at page 21 of the Transcript, the plaintiff sold bone meal, cottonseed meal, rolled barley and lay mash bringing the total of \$2,129.32. Nothing but twisted and distorted reasoning can bring the total sum of \$556.00 out of those figures.

3. THE COURT ERRED IN FINDING THAT DEFENDANTS WERE ENTITLED TO ONE-HALF OF THE ESTIMATED 150 TONS OF HAY AND ESTIMATES 2500 BUSHELS OF GRAIN UNDER THE PURCHASE AND SALE AGREEMENT.

Certainly there is nothing in the evidence to justify



this Finding. The Purchase and Sale Agreement is pleaded in defendant's separate answer where it is set forth in full and the same is admitted to be correct by the plaintiff. The only sections in said Agreement to throw any light on the transaction of January 5, 1948, are the two sections hereinbefore mentioned that the crops were estimated by both parties to be 150 tons of hay and 2500 pounds of grain but actual measurements showed both to be much less, and the other section, which is the paramount and important one as it is the actual yard stick for measurement and the one which required something to be done under the contract, "the hay and grain aforesaid shall be equally divided between the seller and the buyer immediately upon and following the execution of this agreement and delivery mutually made." We take it that the clause "and delivery mutually made" means that whichever of the parties was in possession at the time of measurement should deliver to the other one-half of the crops produced and not one-half of anyone's estimate of what was going to be produced or what had been produced and stored. Then to show how both parties interpreted the said clauses in the Purchase and Sale Agreement they met on January 5, 1948, and divided the crops equally, one-half to each and fixed a unit price on each respective kind of crops. (Plaintiff's Exhibit "A."

That no consideration should be given to the estimates of crops made prior to the measurement is well expressed in 13 C. J. at page 538, Section 502, which reads:

“\* \* \* but while recitals may have a ma-

terial influence on the construction of the instrument of the intent of the parties they are not strictly any part of the contract. Hence recitals where wider than the contractual stipulations cannot extend them."

See also *Wyoming Abstract & Title Co. vs. Wallick*, 196 Pac. 2nd 384 (Wyoming), where the court said:

"Where parties to a contract have given a practical construction thereto by their conduct, such construction is entitled to great, if not controlling weight."

To the same effect is *Strange vs. Hicks*, 188 Pac. 347 (Okl.).

This principle is also well explained in 12 Am. Jur., Section 249, at page 787.

We say there is no ambiguity in the Purchase and Sale Agreement and that the same definitely and surely requires such crops as shall be raised to be evenly divided between the parties and does not require that either party shall be given one-half of the estimate placed on the amount. Our interpretation was carried out by both parties in the agreement of January 5, 1948, and that was the definite understanding of both parties until the memorandum of the trade was brought to the Elder Michelsen who, likely with the urging of counsel, concluded for the first time to make a new contract for his son and decided that the defendant should have not "one-half of the crops raised on said premises during the year 1947" as called for in the Purchase and Sale Agreement, but one-half of the estimated crop. This proposition,

if it could conceivably be said to have any merit is properly laid at rest by the general principle of law on this point so aptly stated in 12 Am. Jur., Section 244, at page 779, as follows:

“Where a repugnancy is found between two clauses, the one which essentially requires something to be done to effect the general purpose of the contract is entitled to greater consideration than the other.”

See also *Anderson vs. Great Eastern Casualty Co.*, 51 Utah 78, 168 Pac. 966.

#### 4. THE COURT ERRED IN ENTERING FINDING OF FACT NUMBER IV.

This Finding is to the effect that plaintiff sues for an overage and further that such claim of plaintiff is for hay and grain in excess of said overage, and that defendant's answer is correct and plaintiff is entitled to only \$556.00 by reason of said sale of January 5, 1948.

One glance at plaintiff's amended complaint (Tr. 8-9) will show the fallacy of such Finding. The said complaint is very brief and easy of understanding. There is not one word therein that mentions any *overage* or that can be remotely construed as suggesting any overage. It is a concise statement of what is due and owing under the agreement shown by plaintiff's Exhibit “A.” That Exhibit most certainly does not say or suggest anything about any overage or does it remotely approach any such figure as \$556.00. Where does the defendant get his prices for the personal property sold by plaintiff

to him? He gets them from nowhere except plaintiff's Exhibit "A." If Exhibit "A" is controlling as to the prices why is it not controlling as to the division of the quantities and the total? We say it is and we further say that defendant cannot say one part of that instrument is correct and that the other is incorrect and still be consistent.

##### 5. THE COURT ERRED IN FINDING THAT DEFENDANT WAS ENTITLED TO THE SUM OF \$250.00 ATTORNEY'S FEES.

That Finding is erroneous for two reasons: 1st, It was never necessary for defendant to bring in and set up in his answer the Purchase and Sale Agreement because that Agreement and the Agreement of January 5, 1948, were separate and independent transactions and even after the Purchase and Sale Agreement was brought in by answer it exactly corroborated the plaintiff's Exhibit "A" in that both showed that plaintiff was entitled to have one-half of the crops raised in 1947. 2nd, There is not one iota of evidence in the record to show the amount of work done by defendant's attorney, the circumstances of the case, the time required in either the preparation or the trial or the value of the services.

On this point it will be remembered that plaintiff denied that \$250.00 was a reasonable attorney's fee and denied that it was necessary to bring the Purchase and Sale Agreement into this case. (Tr. 29-31.)

22 C. J. Section 14, Page 68, Edivence.

"Burden of Proof Properly So-Called—1—

In General: The general rule is that the burden of proof rests upon the party who has the affirmative of the issue as determined by the pleadings  
\* \* \*” Citing a long list of cases.

Also *Miller v. Stuart*, 69 Utah 250, 253 Pac. 900, holds that “In a suit on a promissory note providing for a reasonable attorney’s fee, general denial puts in issue amount of fee claimed.”

#### 6. THE COURT ERRED IN ENTERING FINDING OF FACT NUMBER VII.

This Finding is to the effect that all the hay and grain sold to the defendant on January 5, 1948, was part of the crops raised on the premises in 1947.

This Finding is obviously erroneous. One glance at the evidence plainly shows that the rolled barley, the lay mash, the bone meal and the cottonseed meal was not raised on the premises. (Reporter’s Tr. of Ev. 23-24.)

#### 7. THE COURT ERRED IN ENTERING FINDING OF FACT NUMBER VIII.

This Finding is to the effect that all allegations set out in the pleadings, contrary to or inconsistent with the other FINDINGS OF FACT were either not true or without merit or probative value.

If Findings of Fact Numbers IV, V, VII, or either of them, are erroneous, as we believe they all are, it follows as a matter of course that Finding Number VIII must be erroneous. That premise needs no argument.

#### 8. FINDINGS OF FACT NUMBERS IV AND VII ARE AT VARIANCE WITH AND CONTRARY TO

THE EVIDENCE AND ARE CONTRARY TO FINDING NUMBER II AND CONTRARY TO THE EVIDENCE.

Finding Number II is to the effect that defendant was to receive one-half of the hay and grain raised on the premises. That Finding is borne out by the evidence, plaintiff's Exhibit "A" and by the Purchase and Sale Agreement. Plaintiff's Exhibit "A" sets forth the amount and values of the crop.

Finding IV then sets forth that plaintiff is entitled to only \$556.00 which is clearly contrary to the Finding that each is entitled to one-half the crop. One-half the crop being the total set out in plaintiff's Exhibit "A" less the value of the other items sold by plaintiff to defendant on January 5, 1949, which is \$2,074.91.

Finding VII is to the effect that all property sold by plaintiff to defendant on January 5, 1948, was part of the crops raised on the premises in 1947 and is clearly erroneous and at conflict with Finding II and the evidence. (Reporter's Tr. of Ev. 23-24.)

9. THE COURT ERRED IN ENTERING ANY JUDGMENT IN FAVOR OF DEFENDANT FOR ATTORNEY'S FEES.

See plaintiff's argument under Assignment number 5.

10. THE COURT ERRED IN ENTERING ANY JUDGMENT IN FAVOR OF PLAINTIFF FOR \$2,129.32 (PLUS INTEREST AND COSTS).

See arguments under assignments 1, 2 and 3.



11. THERE IS A VARIANCE BETWEEN DEFENDANTS' PLEADINGS AND THE PROOF.

12. THE CONCLUSION THAT PLAINTIFF IS ENTITLED TO A JUDGMENT AGAINST DEFENDANT FOR ONLY \$556.00 IS NOT SUPPORTED BY THE PROOF AND IS AGAINST FINDING NUMBER II.

13. THAT THE CONCLUSION OF LAW AND JUDGMENT ARE CONTRARY TO LAW.

The last three assignments have been fully covered by the arguments under the other assignments.

### CONCLUSION.

In conclusion we insist that it is apparent that plaintiff is entitled to a judgment against the defendant for the property sold by plaintiff to defendant on January 5, 1948, for the sum of \$2,129.32 plus interest and costs and that defendant is not entitled to any attorney's fees herein. We also insist that both of these propositions are so clearly borne out by the evidence and the stipulations of counsel that this court should remand the case to the District Court of Wasatch County, Utah, with instructions to enter judgment for the plaintiff as prayed for in his amended complaint without further proceedings.

Respectfully submitted,

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