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Joseph R. Bagnall, and Florence Bagnall v. Suburbia Land Company : Reply Brief

Utah Supreme Court

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13753

IN THE SUPREME COURT

OF THE STATE OF UTAH

J. R. BAGNALL, aka JOSEPH BAGNALL, and FLORENCE BAGNALL, Plaintiffs and Respondents, vs. SUBURBIA LAND COMPANY, an Idaho corporation, et. al., Defendants and Counter Appellants,	Case No. 13753

REPLY BRIEF OF DEFENDANTS - APPELLANTS

Appeal from Judgment of the Sixth Judicial District
Court of Sanpete County, State of Utah,
Honorable Maurice Harding, Judge

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IN THE SUPREME COURT

OF THE STATE OF UTAH

J. R. BAGNALL, aka JOSEPH R. BAGNALL, and FLORENCE BAGNALL,	)	
. . . Plaintiffs and Respondents,	)	
vs.	)	Case No. 13753
SUBURBIA LAND COMPANY, an Idaho corporation, et. al.,	)	
. . . Defendants and Counter Appellants.	)	

REPLY BRIEF OF DEFENDANTS - APPELLANTS

STATEMENT OF NATURE OF THE CASE

This case involves an action to forfeit a real estate agreement for alleged failure to make the required installments, and to quiet title to some 570 acres of land in the plaintiffs.

DISPOSITION IN THE LOWER COURT

The Court denied the defendants' motion for judgment on the verdict, or, in the alternative, for a new trial, and granted judgment in favor of the plaintiffs, and against the defendants forfeiting the real estate agreement and quieting title in the plaintiss, except for an undivided 1/2 interest in 140. 15 acres, which the Court, by Summary Judgment and Decree of Quiet Title, awarded to United Paint and Colors. Plaintiff's appeal from the Summary

Judgment and Decree of Quiet Title is also pending before this honorable court.

RELIEF SOUGHT ON APPEAL

Appellants (defendants) seek reversal of the Judgment of Forfeiture, and seek to have judgment entered in their favor dismissing the complaint of the plaintiff and reinstating the contract. Defendants further seek an award and judgment for attorney fees and costs, and to have the matter remanded back to the District Court for a determination of damages, adjustments and offsets due defendants from the plaintiffs.

STATEMENT OF FACTS

The statement of facts contained in defendants' (Suburbias') appeal brief on file herein is incorporated by reference. Because plaintiffs in their so called "Editorial Note" and "Statement of Facts" contained in their brief have called into question the integrity of defendants and their counsel; and because they have characterized the defendants' Statement of Facts as "distorted", "astounding", shocking", and "more argument that fact", bearing "but a fleeting similarity" to the truth, and so on ad nauseum, defendants have reprinted herein as Appendix "A", their statement of facts as originally contained in their appeal brief, and have added citations to the record to substantiate each statement contained therein, and the Court is referred to Appendix "A", and asked to read it carefully.

The voluminous collection of distortions, half truths, agruments, and outright untruths (lies?), as contained in the Bagnalls' brief, written, by their attorney's own admission, strictly from memory, and masquerading as a Statement of Facts, are, for the most part, entirely unsupported by the evidence

and record, and, in many cases are contradicted by the record. Defendants feel it necessary to present the true facts and issues in some detail. The correct facts with respect to some of the more important distortions contained in the Bagnalls' Editorial Note and Statement of Facts are as follows:

1. Plaintiffs, in their Editorial Note, claim that they are unable to cite the appropriate pages of the record in support of their nonsensical version of the facts because the defendants failed to designate sufficient of the record. A careful review of the record will show the plaintiffs' position to be palpable nonsense. Plaintiffs, on page two of their brief set forth certain testimony which they allege to be designated by the defendants, and certain testimony which they claim was not designated. It is obvious that the writer of plaintiffs' brief did not even bother to look at defendants' designation. Had he done so he would have found that, in addition to the testimony which he says was designated, defendants also designated all of the testimony of Edgar Anderson, all of the cross examination of Don V. Tibbs, and the rebuttal testimony of J. R. Bagnall.

Plaintiffs go on to say that defendants failed to bring up the record consisting of the "entire testimony of Judge Don V. Tibbs, Mildred S. Maxfield LaVera Maxfield, Leleland Peterson, and John Brown". They neglected to tell the Court that defendants had, in fact, brought up all of the cross examination of Don Tibbs, or that LaVera Maxfield did not even testify. The whole implication of plaintiffs' editorial note is to the effect that vast portions of the testimony, relevant to the issues to be decided by this court, are missing. Such implication simply is not true! In addition to the testimony designated by defendants, certain additional testimony which was partially prepared by the reporter in

response to plaintiffs supplemental designation of the record are also before the court.

A careful examination of notes taken at the trial by the undersigned writer reveal that the only testimony not before the court is the direct examination of J. R. Bagnall (every point covered in direct was carefully re-examined on cross): the direct of Don V. Tibbs, (as with J. R. 's direct, every point covered on direct with Mr. Tibbs was re-covered on cross): the testimony of LeLand Peterson (who testified that he had not been an officer of Suburbia Land): the testimony of John Brown (who testified as to the appraised value of the ranch): and some cross of Reed Maxfield (the Court does have 68 pages of Maxfield's cross). Except for the testimony of LeLand Peterson which may have some bearing upon the credibility of Mr. Maxfield, none of the other ommitted testimony has any thing to add to that actually before the Court.

2. Plaintiffs, in their Editorial Note have further mistated even proceedings had before this honorable Court. The writer of plaintiffs brief writes about things of which he knows nothing. He states that plaintiffs were concerned about the status of the transcript and moved the court to compel defendants to designate the entire record. That much of their statement is undoubtedly true. Everything else they had to say about their motion and the proceedings had thereon is untrue. For instance, plaintiffs state that defendants' counsel (the undersigned writer) stated to the court that the record designated would sufficiently cover the disputed areas and that the court therefore acquiesed in appellants' assertion that the record was adequate. That is simply not what happened. The writer did say that, in his opinion, defendants had designated all of the record that they needed. Mr. Ron Boutwell, who was appearing as counsel for the plaintiffs made reference to the case of Mitchell

vs. Mitchell (case no. 13565, filed November 7, 1974) in which Mr. Boutwell's client lost for failure to designate any portion of the transcript. After some discussion between counsel and the court. Mr. Boutwell stated that he was ambivalent in his position and did not wish to pursue his motion. Based upon his withdrawl of the motion, the court had no choice but to deny it. Plaintiffs then withdrew their supplemental designation of record which had designated all but a small portion of the testimony not previously designated by defendants:

Plaintiffs further state in their editorial note that they had a portion of the balance of the record designated. That statement, without more, is technically correct, but to imply that the partial transcript of additional testimony on file with the court, and to which they make reference, was filed because they had designated only that particular portion, is untrue. They had designated more, but changed their minds and withdrew the designation totally. The partial testimony was apparently filed because the reporter had already transcribed it before plaintiffs changed their minds, had nothing else to do with it, and, therefore, sent it to the court to be filed. The Court will note that it was first sent to the clerk of this court without the proper certification from the Sanpete County Clerk and was returned to Sanpete for certification before it was accepted for filing.

3. On page five of their brief, plaintiffs state that "one cannot readily appreciate Mr. Maxfield's demeanore and conduct without seeing him in court and without reading the description of the transaction given by Judge Tibbs". Plaintiff then quotes a portion of the cross examination of Mr. Tibbs as contained on page 99 of the transcript. Plaintiff fails to inform the court that on the same page Mr. Tibbs states that his recollection is different from that of the other parties to the transaction (Tr. Bk. 1, p. 99) or that Mr. Reed Maxfield

testified that Mr. Tibbs was recalling not Reed Maxfield, but his father, E. R. Maxfield. (Maxfield direct, Tr. Bk 2, p. 188).

4. On page five of their brief, plaintiffs falsely state that Maxfield testified on cross examination that the suitcase full of money which he brought to the meeting and with which he made payment of the agreed delinquencies at the time, came from his transactions with the Unitah Finance Company; that the company was insolvent; that he preferred to take his interest in business transactions in cash; that he did not believe in bank accounts, checking books, or record keeping. Finally they actually make a factual statement, i. e. that none of those "facts" are contained in appellants' record. I should hope to shout they are not. The reason they are not is because the record flatly contradicts every one of them.

On cross examination (Tr. Bk 3, p. 65, 66) Maxfield stated that the Unitah Finance Company, rather than being insolvent, was in fact solvent and presently operating under a different name. There is no testimony that the money came from Maxfield's transactions with Unitah Finance Company. In fact, on direct (Tr. Bk. 2, p. 174) he stated that he sold his stock in Unitah Finance Company and other "Unitah" companies, for a combination of cash and other stock. He flatly denied that he "preferred" to take cash, (Maxfield cross Tr. Bk. 3, p. 66) or that he did not believe in banks or record keeping. (Cross of Maxfield, Tr. Bk. 3, p. 76 & 81).

5. The first two paragraphs of page six of plaintiffs' brief makes the point that plaintiffs assumed Maxfield had "all the outstanding interests" and was willing to take the title in whatever shape it happened to be. This contention will be discussed in detail in point I of the argument herein. Suffice

it to say that all objective evidence in the record is to the contrary.

These same two paragraphs make the point that Maxfield was very abrasive and threatening, thereby coercing the Bagnalls into signing the modification agreement. Again, the record is just the contrary. Mr. Tibbs, the Bagnalls then attorney, stated on cross examination (Tr. Bk. 1, p. 107) that Maxfield did not coerce the Bagnalls, and that the arrangement was purely voluntary and based upon his recommendation.

6. On page seven of their brief, plaintiffs state that Maxfield had come to the Bagnalls with complicated and fictional stories of title problems he was encountering and that none of those problems had any basis in fact. The writer will merely refer the court to the judgment in favor of United Paint and Colors quieting title to a 1/2 interest in 140.15 acres of the ranch. That title problem certainly seems to have a substantial basis in fact. Likewise, a persual of the abstract and other exhibits will demonstrate that Jean Nyberg also alienated .57 acres (which apparently also now belongs to United Paint and Colors) that 1.5 acres is in the name of Caroline Hansen, and that 8.06 acres are in the name of J. A. Bagnall, plaintiff's son.

7. On page 8 of their brief, plaintiffs make much of the point that the Suburbia Land Company of Nevada filed a qualification statement in Utah and attached articles that were different from those which had been filed in Nevada. The implication is, of course, that there is chicanery afoot. Again, the fraud and chicanery is being practised by plaintiffs' counsel. A careful examination of the documents submitted by the plaintiffs themselves to support this nonsense (Exhibits P 39, 41) will show that the articles attached to the Utah application inadvertently left off the first page of the articles, and that the copy of the

amendment changing the name to Suburbia, though providing for signatures by all responsible officers, was not actually signed by them all, although the original filed in Nevada was. It seems plaintiffs find it necessary to make mountains out of molehills and in fact are actively attempting to mislead the court.

8. Most of the "facts" contained on pages 7, 8, and 9 of plaintiffs brief are directed to the issue of alter-ego, and defendants will not attempt to correct them (since they do not contest the court's finding on that point) except to say that virtually everything contained therein is not supported anywhere in the record before the court, nor would it be supported if the few bits of missing testimony were available.

9. Plaintiffs' counsel on page 11 of their brief makes another false statement that the Bagnalls had always paid the taxes on the ranch. Even the most careless examination of Mr. Bagnall's testimony on cross (Tr. Bk. ~~100~~ 2, p, 100) will show that even Bagnall concedes that Suburbia paid the taxes in 1962, 1964, 1968, and 1969.

10. On page 11 plaintiffs make the statement that respondents (plaintiffs) never knew with whom they were dealing, that Maxfield had an elusive and transient air about him, and that he dealt with corporations that came and went like the wind. Such a statement is flatly contradicted by the record. Mrs. Bagnall on direct (Tr. Bk. 3, p. 43) stated that they dealt only with Reed Maxfield and had knowledge of only the one corporation. She flatly denied that they even knew of the Nevada or Utah corporations. Mr. Tibbs testified (Tr. Bk. 1, p. 83, 84) that transfer of the property into the name of the Nevada corporation was contemplated at the time of the signing of the modification agreement in July of 1962, and that

he may even have prepared the assignment at that time. If we assume that Bagnalls had knowledge of both the Idaho and the Nevada corporation, and then maybe forgot about the transfer to the Nevada corporation, there exists only one additional corporation with which they would have had to deal - Suburbia Land Company of Utah, incorporated in 1968. Does this convey to the reader any justification for plaintiffs' statement that corporations were coming and going like the wind?

11. Plaintiffs contend that the record shows that Mr. Maxfield claimed to have some $140,000 in cash in a duffle bag at the time he made the first tender in July, 1969. Again plaintiffs are distorting the facts. Maxfield never made any such claim. On page 99 of the transcript, Mr. Maxfield, on cross by Jackson Howard testified that he had in excess of $15,000 in cash on the premises. And again in book 2, p. 330 of the transcript he stated that he had approximately $20,000 on hand. Mr. Howard is obviously attempting to mislead the court, or his memory is totally untrustworthy.

12. On page 12 plaintiffs make the statement that the jury, as well as the court found that defendants' tenders were not made in good faith. This statement is also untrue. The fact of the matter is that the jury found the tenders to be in good faith, and the court overrulled the jury. (See jury verdict form, interrogatory no. 12).

13. On page 12, plaintiffs again indluge in their fantasies, making the assertion that defendants brief devotes a great deal of space showing that plaintiffs-respondents were to render a title opinion as soon as possible. Defendants brief devoted precisely 18 words in support of that proposition.

14. On page 13 plaintiffs make light of the defendants statement that the one-half interest in the 140.15 acres of land comprises the central portion of the ranch. They go on to say that it is one of the lesser parts of the land, poorly situated, and presently a bog. The testimony of Reed Maxfield (Tr. 234 et, seq.), the testimony of Lynn Nielsen (Tr. Bk. 2, p.204-225) and exhibit D-38, all clearly show the relationship of the said 140.15 acres to the rest of the ranch. There is no support in the record whatsoever for plaintiffs' characterization of the land.

15. On page 13, plaintiffs assert contrary to anything to be found in the record, that Phillips Oil Company had checked the title to the property, considered the title to be clear and took lease on the basis that the title was clear. Such statement is not supported by the record. The truth is, although this is not in the record either, that the title opinion rendered by Phillips attorney is replete with flaws and defects in title which Phillip's counsel recommends be corrected.

16. On page 15 of their brief, plaintiffs make much of the fact that defendants' counsel, in discussing the July 5, 1969 tender made by Reed Maxfield on behalf of Suburbua Land, referred to Mr. Maxfield as the "then president" of Suburbia. Counsel candidly admits that to be an error. Maxfield should have been characterized as "agent" or as "acting on behalf" of Suburbia as he was in the very next sentence. Apart from this one oversight, every other statement in defendants' Statement of Facts is true and supported by the record. The writer apologizes for this one misstatement.

17. On page 17 of their alleged "brief" plaintiffs make the statement that the $400 payment received by the Bank of Ephriam was received by virtue of

an order of the court that it be conditionally held in a separate account. The writer challanges plaintiffs to produce such an order, and will even stipulate that if such an order can be found by plaintiffs, that it be designated and made a part of the record in this case. The statement is simply false. No such order exists. Reference to Exhibit D-18 will demonstrate that the payment was accepted by the bank with no restrictions and was duly posted to interest. No amount of deception and argument to the contrary by the plaintiffs can alter the fact.

18. Counsel becomes weary with the necessity of responding to virtually every statement made by the plaintiffs intheir statement of facts. Virtually every statement made by the plaintiffs is either flatly untrue, is only partially true, or is unsupported by anything in the record. To quote the plaintiffs themselves:

> "It is particularly galling to the (defendants) to have an emotional appeal made on 'facts' that are unsupported or refuted by other witnesses in the record and which, as presented, can only constitute a fraud upon this court." Plaintiffs' brief, pp. 17 and 18, Emphasis added.

ARGUMENT

POINT I

RESPONDENTS' ATTEMPT TO VARY THE PLAIN MEANING OF THE MODIFICATION AGREEMENT BY PAROL EVIDENCE SHOULD NOT BE SUSTAINED

The Modification Agreement dated July 16, 1962, read in conjunction with the letter of July 18, 1962, (which the trial court ruled was a part of the Modification Agreement), tells the whole story. If read together and if given their obvious meaning, much of the folderol perpetrated by the plaintiffs simply disappears. These two documents were prepared by the sellers' attorney, and the meaning of the words is clear and unambiguous. If the Modification Agreement were ambiguous (which we deny), any ambiguity contained therein should be construed most strongly against the party selecting the words and drafting the Agreement. In other words, it should be construed most strongly against the Bagnalls. Bryant vs. Deseret News Publishing Co., 120 U. 241, 223 p. 2d. 355; 27 ALR 2d. 1131; Handley vs. Mutual Life Insurance Co., 106 U. 184, 147 p. 2d. 310, 152 ALR 1278; Restatement of Contracts, Vol. 1, Sec. 236; 12 Am. Jur. Contracts, Sec. 252.

This common sense rule of construction against the person who selected the language is particularly applicable in our case where Mrs. Bagnall had 10 years experience in the real estate business (Tr. Bk. 2, p. 57) during which time she (a) wrote contracts, (b) established escrows, (c) showed real properties, (d) negotiated contracts, (e) was aware of, and knew the importance of conveying good title, (f) was knowledgable about assignments and evidence of ownership. Mr. Bagnall had been superintendant of schools for Sanpete County and had been an administrator of schools in California (Tr. Bk. 3, p. 27). And, of course, Mr.

Tibbs, acting as attorney for the Bagnalls,was an experienced lawyer and fully aware of the consequences of what was said and done.

The modification agreement, drafted by sellers' attorney, Don V. Tibbs states:

> "This agreement is made to modify a certain Real Estate Agreement dated the lst day of September, 1952 * * * (the buyers interest having been, according to the Buyers herein, conveyed to Suburbia Land Company, an Idaho corporation), now designated as Buyers."

The modification agreement goes on to say that:

> "The Sellers agree to place a Warranty Deed conveying good and marketable title to the premises as described in said agreement, together with all shares of water stock owned by them in Escrow at the Bank of Ephriam, Utah."

57-1-12, Utah Code Annotated, 1953, sets forth the covenants that are part of the warranty deed:

> "Such deed when executed . . . (constitutes conveyance) with covenants from the grantor . . . that he is lawfully seized of the premises; that he has good right to convey the same; that he guarantees . . . the quiet possession thereof; that the premises are free from all emcumbrances . . . "

In the face of the clear and unambiguous language of the Modification Agreement, and in the face of the statute legislating the effect of a warranty deed, the Bagnalls attempt to change the plain meaning by their self serving statements that a total stranger (Reed Maxfield) verbaly represented to them that he had acquired all outstanding titles and had deeds for them. (Tr. Bk. 2, p. 24). Consistent with the Modification Agreement and the purport of the statute, Mr. Maxfield claimed that all he bought was the buyers interest under the contract, (Tr. Bk. 2, p. 239), and the sellers attorney said that he put the buyers

representations in the Modification Agreement. (Tr. Bk. 1, p. 103).

Not only is it inconsistent to believe that Mr. Maxfield represented he had acquired all outstanding titles and was willing to take the title from Bagnalls in whatever condition it should be found, but it is contradictory to the testimony of the plaintiffs themselves. During cross examination of J. R. Bagnall (Tr. Bk. 2, pp. 23-27), he stated that he asked Maxfield, at the time of the formation of the Modification Agreement, such questions as (a) What interest do you own? (b) What property do you own? (c) Who did you buy from? (d) What did you pay for the interests? (e) What documents do you have? and etc. To each of these questions, Mr. Maxfield purportedly replied; "None of your business". Further support for the appellants' position is garnered from the testimony of plaintiffs' own attorney, Don Tibbs, who stated (T-104, 105) that he thought there might be some minor defects which they would have to clear up.

If plaintiffs are to be believed, we must believe that a total stranger, carrying a suitcase full of money, walked unexpectedly into the office of Mr. Tibbs, where the Bagnalls just happened to be, demanded that he be recognized as the legitimate owner of the ranch claimed to have acquired all outstanding titles, refused to divulge any information whatsoever about his acquisition, and, based upon such representations by Maxfield, the Bagnalls, upon the advise of their attorney, agreed to deliver a warranty deed. (Tr. Bk. 2, p. 25).

Then, having resolved all questions of title (remember plaintiffs claim Maxfield had acquired all defects to his own satisfaction) the Modification Agreement, as supplemented by the letter of July 18, 1962 (Exhibit P-6) was prepared and makes the following declaration:

> "So, also, the undersigned agree to clear up any defects that may be shown in the title concerning the property as set forth in the Modification Agreement, within 18 months from date, it being understood that the Abstract shall be examined and a Title Opinion rendered as soon as possible." (Emphasis added.)

Where the contract is clear and unambiguous and all of the terms are explicit and certain, as in our case, the contract is not open to construction. Burt vs. Stringfellow, 45 U. 207, 143 p. 234. Bagnalls attempt to intruduce oral testimony to either (a) show that the contract is ambiguous, or (b) change the terms of the agreement, is clearly contrary to Utah law. 78-25-16, Utah Code Annotated, 1953 provides as follows: "There can be no evidence of the contents of a writing other than the writing itself, except . . . " Certain exceptions not pertinent herein are then enumerated. The Utah courts have long held that in the absence of fraud or mistake, parol evidence is not admissable to contradict, vary, add to, or subtract from the terms of a valid written instrument. Fox Film Corp. vs. Ogden Theatre Co., 82 U. 279, 17 P. 2d. 294, 90 ALR 1299; Last Chance Ranch Co. vs. Erickson, 82 U. 475, 25 P. 2d, 952.

One must either believe that the Modification Agreement, the July 18 letter, and the Warranty Deed set forth the understanding of the parties, or, one must believe that Mr. and Mrs. Bagnall, along with their attorney, Judge Tibbs, were incredibly stupid. It is simply impossible to believe their story that they accepted Maxfields alleged representations and, in reliance thereon, conveyed to him by warranty deed. Clearly they must have known, at that time, that when Maxfield conveyed the property, and defects in title was later discovered, they would be bound by their warranties to defend the title for the transferee. Both Tibbs and the Bagnalls would have been keenly aware of such possibility and one must conclude that they believed they had good title, not that they relied upon

Maxfield's representations. (cf Tibbs testimony Tr. Bk. 1, pp. 104-105; Bagnall Tr. Bk. 2, p. 23).

POINT II

RESPONDENTS FAILED TO ELICIT ANY BELIEVABLE PROOF THAT THE DEFENDANTS WERE UNABLE TO PERFORM THEIR TENDER

Pages 20 to 29 of the respondents arguments are so shot full of errors, untruths and outright fabrications that it is difficult for the writer to respond. Many of the more blatant errors and fabrications were referred to in the Statement of Facts herein. Others, but by no means not all, will be covered at this time.

Practically all of the alleged "facts" referred to on pages 20, 21, and 22 of the plaintiff's brief are, by their own admission unsupported by anything before the court. For that reason alone, the alleged "facts" cannot be considered by the court. On page 22, plaintiffs state that Maxfield was caught in one lie after another. Yet no examples are given except the dubious statement that he testified that he did not know that a corporation had to do such things as maintain its charter in good standing. Not one other "lie" is reported. It is the writer's firm belief that plaintiffs failed to enumerate Maxfield's "lies" because there were none of any consequence. Mr. Howard must have been thinking of his own client J. R. Bagnall who was in fact caught in one lie after another. (See defendants appeal brief, point IX).

Respondents' argument under their Point II is replete with factual inaccuracies, incorrect citations, and outright misstatement of the facts as disclosed by the record. On page 23 Mr. Howard states that the court and jury found the tenders to be made in ~~good~~ BAD faith. The truth of the matter is that the jury found for the defendants on this point (see special interrogatory number 12) and the court overrulled the jury and granted the plaintiffs' motion for judgment

not withstanding the verdict.

On page 24 of their brief, respondents go into some detail concerning the testimony of Bruce Watkins, Clearfield State Bank manager who testified on behalf of the appellants. Plaintiffs brief states that Mr. Watkins testimony was to the effect that the most the bank had before it was a loan application made out months prior and which had not been acted upon. The references given (Tr. Bk. 2, p. 232) makes it very clear that the bank had committed to make the loan and would have gone through with it if Maxfield had pursued it.

Mr. Howard writes that the loan was to be made upon the security of the land in Sanpete County. Again, this is contrary to the testified facts. On cross examination (Tr. Bk. 3, p. 51) Mr. Watkins unequivically stated that the loan was to be made upon the security of the corporate stock. He goes on to say that the value of the stock would depend upon the balance sheet, that a financial statement had been submitted and that it showed a net worth of $100,000 to $200,000. (Tr. Bk. 3, p. 49). Contrary to this cited testimony, Mr. Howard states that Watkins testified that he had not seen a financial statement.

Plaintiffs references to the record as contained on pages 24 and 25 of their brief do not support their statements, In fact, a close examination of the transcribed testimony of Bruce Watkins will show that Mr. Howard was deliberately trying to confuse the witness by asking such questions: "Suppose you found the corporation charter had been revoked in 1968?" (Tr. 55). Such a question was improper because the corporate charter had not, in fact, been revoked in 1968. That was the date the Utah corporation was formed, and it had not been suspended until after September 15, 1971. The court is invited to read Mr. Howard's cross examination of Mr. Watkins, and form its own conclusions.

Plaintiffs constantly, throughout their brief, poke fun at defendants testimony concerning the large amounts of cash which Mr. Maxfield kept around the house, and attempt to confuse the court with such statements as that found on page 22 of their brief wherein it is claimed that Maxfield claimed to have $140,000 in a duffle bag in his closet. As was earlier pointed out, such was not Maxfield's claim. He only claimed to have something in excess of $15,000 around the house. Such a claim is not unreasonable in view of the plaintiffs' own testimony that he had large amounts of money in a suitcase when they first met him, (Bagnall Tr. Bk. 2, pp. 21-22) and in light of Don Tibbs testimony that he had money coming out of his pockets, and everywhere. (Tibbs Tr. Bk. 1, p. 99).

If we examine carefully what was testified to at the trial we find the following:

1. 1962, Reed Maxfield, together with his brother Lindon and his father E. R. Maxfield, sold their stock interest in the "Uintahs" for $550,000. (Maxfield Tr. Bk. 2, pp. 174-177).

2. It was right after this sale that Mr. Maxfield was carrying large amounts of cash, and may have had as much as $140,000 in cash at the ranch, although he stated he did not remember having that much in the house. (Maxfield Tr. Bk. 2, p. 330).

3. By 1969, for reasons not entirely clear from the record, much of that cash had been spent or was otherwise unavailable to Maxfield. During the year 1969, Maxfield had found it necessary to borrow on two occasions from the Bank of Ephriam, and, at the time of the July 5, 1969 tender, had on hand $15,000 to $20,000, and one-half of that sum came from the loans from the Bank of Ephriam. (Maxfield Tr. Bk. 2, p. 330). Such amounts of cash on hand, and

the propriety of borrowing in limited amounts is entirely consistent with the testimony of Mr. Maxfield, and also the testimony of Bruce Watkins, Clearfield State Bank branch manager who testified that the Suburbia corporation had a net worth, according to the balance sheet of $100,000 to $200,000. (Watkins, Tr. Bk. 3, p. 49). There is nothing inconsistent with the testimony of Maxfield that the bank had committed a loan of $15,000 which, together with the $20,000 already on hand, was believed by Maxfield to be sufficient to pay off the contract in full. (Maxfield, Tr. Bk. 2, p. 232).

As can readily be seen, Maxfield did not, and does not, claim to have huge amounts of cash on hand during 1969, and the following years, but he does claim to have had sufficient to meet the tenders had they in fact been accepted.

POINT III

RESPONDENTS ACCEPTED A PAYMENT AFTER THEIR NOTICE OF MAY 25, 1970, AND, THEREFORE REINSTATED THE CONTRACT

Point V of the plaintiffs' brief makes the point that this writer, "in accordance with appellants usual candor . . . " failed to mention that the defendants' payment of $400 to the escrow, December 1, 1971 was surreptitously made to the escrow in a deliberate effort to develop a waiver. Even if that be true, the operative fact is, did the escrow, as agent for the plaintiff, accept the payment or did it not? It is quite evident as pointed out in Point V of defendants' brief that the payment was accepted.

On page 30 of plaintiffs' brief they again practice deception upon the court. Respondents state that the payment was held by the bank in a special account by order of Judge Erickson. This writer challanges respondents and their counsel to produce any such order by Judge Erickson or anyone else. It simply does not exist. They state that appellants did not designate such order. It is obvious that we could not designate a non-existant order. As further deception practised by the respondents, they refer to plaintiffs' Exhibit 11, as the record from the Bank of Ephriam. Exhibit 11 bears the following statement:

> "Not accepted. Court order by Judge Erickson to place in special fund."

Plaintiffs' attempt to foist this exhibit off on the court as genuine is contemptible. Exhibit 11 is a copy of the bank record and contains the above notation, written thereon by Bagnall himself. It is not, repeat, not on the original record from the bank (Exhibit 18). The plaintiffs' witness from the bank, Edgar Anderson stated (Tr. Bk. 1, p. 34) that defendants' Exhibit 18 was the correct record, and that the notation on plaintiffs' Exhibit 11 was undoubtedly placed there

by Bagnall himself. As is more fully pointed out under Point V of appellants; appeal brief, the $400 payment was accepted by the bank, credited to interest, the escrow fee withheld, and the balance forewarded to Bagnall, and ultimately deposited in his checking account. It is true that he then attempted to reject the payment, but such rejection obviously came too late, and the contract was therefore re-instated, if in fact, it had ever been validly forfeited at all.

POINT IV

THE RECORD AS DESIGNATED AND AS FILED WITH THE COURT IS MORE THAN SUFFICIENT FOR THE COURT TO OVERRULE THE TRIAL COURT AND TO AWARD JUDGMENT IN DEFENDANTS' FAVOR

Points I through VII of defendants' appeal brief are, for the most part, appeals on questions of law and do not depend, in most instances, upon any testimony. Where they may depend upon testimony, all revelant testimony is before this court. Respondents contend that there is not sufficient record before the court upon which to form a decision or upon which it can overrule the trial court. They then go through a little charade on pages 33 and 34 of their brief attempting to show that vast quantities of testimony and exhibits are missing. Appellants have, in their Statement of Facts herein, responded to some of the false implications of respondents' charade. Some additional comment is required at this time.

On the second line of page 34, plaintiffs point out that defendants designated "all testimony of Edgar R. Anderson", which is correct. Then on the first line up from the bottom on that same page they state that defendants failed to designate "all testimony of Edgar Anderson", which is, of course, incorrect. They cannot keep it straight themselves. On the eighth line up from the bottom they state that defendants did not designate the testimony of Lavera Maxfield. We certainly did not, and could not have done so since she did not testify. In their list of other testimony not designated, plaintiffs fail to point out to the court that the re-direct of J. R. Bagnall is in fact before the court; that the court has 68 pages of the cross of Reed Maxfield; that the court has the cross and re-direct of Lester R. Romero; that the court has all direct and re-direct of Florence Bagnall;

that the testimony of Lynn Nielson is before the court; that the testimony of Robert Lord (defendants' counsel) went only to the question of attorneys fees and is not questioned on appeal; nor that the direct testimony of J. R. Bagnall and Don V. Tibbs was fully explored on cross and that the cross fairly reflects the direct.

Likewise, plaintiffs do not tell the court that of the exhibits allegedly ommited from the designation, the court actually has plaintiffs' 8, 12, 13, 19 - 26, 28, 33, 35, 37, 38, 39, 41 - 48, and 54 - 58. Contrary to what plaintiffs are attempting to tell the court, even though appellants designation of exhibits did not include all of appellants exhibits only four (40, 41, 45 and 48) are not actually onfile with the court. Those few not before the court are duplicalted by other exhibits actually designated, or they had little if any probative value. It is the defendants' position, and it was so stated by the undersigned in appellants' motion to strike the plaintiffs' brief, that all relevent evidence is before the court.

Rule 75 (a), Utah Rules of Civil Procedure provides that the appellant shall, within ten days after filing of the notice of appeal, file his designation. Within ten days thereafter, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence. The obvious purport of the rule is to allow the appellant to designate those portions of the record he feels he needs for his appeal. Then, any other party who feels that the designated portion may shortchange him, may file a designation for additional portions. If the appellant must designate the entire record, then why Rule 75 (a)? And if appellant states that the record as designated fairly reflects the trial testimony, and respondent disagrees, he (respondent) should designate such additional as he feels necessary. Rule 75 (e) requires that the record be

abbreviated and that all matter not essential to the decision of the questions presented by the appeal be omitted. That is precisely what appellants have done. If plaintiffs do not like it, they should have designated whatever else they felt necessary as provided by 75 (a).

Two varieties of cases have come before the Utah Supreme Court in which the failure to provide a complete transcript of the proceedings below has been stated as a ground for disposition of the appeal, i. e. (a) those in which no transcript at all was provided; and (b) those in which only a partial transcript was designated.

NO TRANSCRIPT PROVIDED. Respondents refer to the case of Buchanan vs. Crites, 106 Utah 428, 150 P 2d. 100 (1944) in support of their proposition that appellants' appeal should be dismissed because the entire record was not designated. In fact the case is not directly in point because no transcript was designated in that case. Even so, the ruling of the court is instructive:

> "On appeal the appellant has the burden of showing wherein the trial court erred. If the record is not sufficient to determine a material question because of the fact that the appellant failed to bring enough of it before us, the doubts should be resolved in favor of sustaining the judgment." (Emphasis added.)

The reader will note that the court clearly stated that if the record were sufficient to determine the question, or if enough of the record were before it, it could overrule the trial court. Such a principle is also set forth in the case of Watkins vs. Simonds, 385 P. 2d. 154, 14 U. 2d. 406 (1963) in which the Utah court said:

> "Judgments of courts are presumed to be correct if nothing in the record appears to the contrary, and all doubts are resolved in their favor. The record on appeal in this case, being devoid of any and all evidence, it must be assumed that the proceedings in

> the court below established a sufficient basies to support and justify the court's findings, conclusions and judgment." (Emphasis added.)

In other words, where no transcript is provided, the court, quite properly can make no determination as to whether the record sustains the trial court or not.

PARTIAL TRANSCRIPT PROVIDED. The recent case of Nagle vs. Club Fontainbleu, 17 U. 2d. 125, 405 P. 2d. 346 (1965) is instructive on this point. In that case the court stated:

> "Only a partial transcript of the trial, containing exerpts from the testimony has been brought here. Upon reading it we perceive therein nothing which would compel a determination contrary to that made by the trial court." (Emphasis added.)

Again the court pays homage to the principle that it could reverse the court below if there were compelling evidence, even though all had not been designated. This writer submits that the problem will be discussed by the court only in cases involving a partial transcript where there has been insufficient evidence before the court to reverse the decision below. The majority opinion would likely never discuss the problem where they felt there was enough evidence before them to reverse.

Even Rule 10 of the Federal Rules requires only the inclusion of all evidence relevent to the findings and conclusion. The writer again states that, in his opinion, all such relevent testimony is before the court. If respondents feel that additional testimony is necessary, they had every opportunity virtually to bring it up. In fact they did designate-all testimony and exhibits not designated by the appellants, and then changed their minds and un-designated the remainder. The court starts with the presumption that the judgment of the trial court is

sustained by the evidence. When the court has sufficient of the record before it to compel a contrary finding, then the presumption that the trial court was correct must fall.

POINT V

PLAINTIFFS FAILED TO GIVE APPELLANTS AN ACCOUNTING

Plaintiffs' brief states in point III, that "respondents never refused to give an accounting to the appellants." A quick look at the testimony of Mr. Bagnall himself will put the lie to the above statement. For instance, Mr. Barker, attorney for Reed Maxfield, was questioning Mr. Bagnall on the feasibility of the buyers obtaining the amount of delinquencies from the bank:

Q. When you received these requests for an accounting, did you ever write back and say, Here's the information I have that the bank doesn't have, you can get the rest of the information from the bank, or something to that effect?

A. No. We were too busy trying to get them to pay something. (Bagnall, Tr. Bk. 2, P. 101).

Again, on page 103, Mr. Howard asks Mr. Bagnall the following question:

MR. HOWARD: The question is, did you call them up and tell them what the accounting was:

THE WITNESS: No.

MR. HOWARD: I suppose that's it.

From the foregoing direct testimony, and the implications drawn from the testimony as a whole, one can only conclude that no accounting was given as requested.

POINT VI

DEFENDANTS WERE ENTITLED TO AN ACCOUNTING BOTH BEFORE AND AT THE TIME OF THEIR TENDERS

Plaintiffs, on page 10 of their brief, lists a so called ommission of facts not disclosed by the appellants in their appeal brief. Basically they say that appellants did not disclose that on the date of the modification agreement (July 16, 1962), the balance owing on the contract was $54,142.14, and by the time of trial, April 22, 1974, the balance had increased to $63,298.64. The writer admits that the modification agreement states that:

> 3" It is believed by the undersigned that as of August 1, 1962, there is a balance due on the principal of $54,142.14, which principal balance is subject to auditing and adjustment by either party. This takes into consideration a payment of $2,800 made this date. The undersigned acknowledges that there is no present default in the contract payments and that the parties are hereafter bound strictly in accordance with the terms of this agreement." (Exhibits D-20, P-5)

The writer further acknowledges that plaintiffs exhibit 12 shows a total balance due under the contract of $63,298.64 Defendants do not acknowledge that these are the true facts so far as the actual balances due are concerned. As quoted above, the modification agreement states that the parties believe the balance to be $54.142.14. The contract itself acknowledges that there is some doubt and provides for an audit and adjustment of the balance by either party. The agreement further provides that with the receipt of a payment of $2,800, there are no defaults in the contract payments. The testimony of the plaintiffs themselves will demonstrate that the correct balance should have been $30,954.72.

Mrs. Bagnall testified on direct examination (Tr. Bk. 3, p.32) concerning the $54,142.14 balance referred to in the modification agreement, and

the method by which they arrived at the balance, as follows:

Q. All right. Now, how did you arrive at the figure for the assumption, the debt, the amount of the contract, the contract figure?

A. Well, we had records then of the payments of the delinquencies, and with help of our attorney, we arrived at this figure.

On cross examination (Tr. Bk. 2, p. 91) Mr. Barker asked Mr. Bagnall, Paragraph three says: It is believed by the undersigned that as of August 1, 1962, there is a balance due on the principal of $54. 142. 14, which principle balance is subject to auditing and adjustment by either party. "Now what does the word "auditing" mean to you."

A. It meant a check might be made of it according to the --- to the records that we had and so forth, I suppose. I don't know.

On cross examination (Tr. Bk. 2, p. 89) Mr. Bagnall admits that the payment records prior to July 16, 1962, are not available and that an audit would be impossible without them. On page 90 he states that there was never any request for an audit. Such statement is not very pursuasive, however, since he could not even remember the request for an accounting contained in the tender letters. (pp. 90)

And finally, a look at the testimony of Don Tibbs (Tr. Bk. 1, pp. 104, 105) reveals the following colloquy:

Q. Wheren't you concerned about dealing with somebody who didn't present any documents?

A. I figured if we could get the money out of them and bring that contract up to date that I would let them worry about it.

Then further down on the page he says:

> " . . . but I thought that if he could bring that contract current and the persons claiming under the purchaser would pay, that's all Mr. Bagnall wanted. He wanted the money that was due him under the contract and that was all and I thought this was the best way of getting it to that point and frankly, when Mr. Maxfield showed up with so much money, I thought it was a good deal, I thought the deal was over. I dismissed my lawsuit and he paid the money and he paid me my attorney's fee and I thought it was all said and done except for some miscellaneous things that there was something wrong with the title which wouldn't show up until the abstract was completed."

Plaintiffs, on page five of their brief state that Maxfield made payment of the delinquencies in small denomination bills, and Maxfield testified on direct that he was not satisfied with the $54. 142. 14 balance and Mr. Tibbs said that in order to get the matter settled he could audit the account. (Tr. Bk. 2, p. 236). Put this all together, and what do we have? We simply have a contract that was only seven months delinquent in 1962. Payment of that delinquency in the amount of $2, 800 was made and all parties acknowledged that all delinquent payments had been made. That state of facts was inconsistent with the stated balance due, and the account was to be reviewed and adjusted. How could this be done? Mr. Bagnall states that the records were subsequently lost and that without them an audit could not be performed. If that be true, then we must "audit" from the documents and the testimony of the parties.

If payment of the $2, 800 paid all delinquent payments (the parties and the agreement itself say that it does), then the $400 monthly payments must be considered to have been made between September 1, 1952, and July 16, 1962. Apportioning those payments to principal and interest we discover that the total sum of $21, 277. 34 has been paid in interest, and the total sum of $24, 277. 66 paid

on the principal, bringing the balance due, as of August 1, 1962, to $30,954.72. With this state of affairs, the Court will readily see that defendants clearly needed an accounting before they could effect their tenders, and the court will see why defendants did not make reference in their appeal brief to the amounts plaintiffs claimed to be due and owing.

POINT VII

THE OVERWHELMING WEIGHT OF THE LEGAL PRINCIPLES AND ARGUMENTS OF APPELLANTS BRIEF COMPEL A JUDGMENT FOR THE APPELLANTS

Appellants have tried, consistently to base their arguments upon the legal and factual issues as they developed before, during, and after the trial. Respondents, for the most part, have attacked the character and integrity of appellants as well as their counsel. Except for their point number 10, which was a straight foreward legal argument, virtually everything else in their brief boils down to the position that the appellants are conniving, lieing, cheating, disreputable characters and therefore judgment for the plaintiffs, who are honest, hardworking, stalwart pillars of the community should be affirmed. In addition to all that has been said herein concerning the relative merits of plaintiffs and defendants positions, these final comments will help illuminate the shallowness of the plaintiffs arguments.

1. Point 1 of appellants appeal brief lists 10 major defects in the title to the land the sellers were supposed to deliver to the buyers. Those defects consisted of the following:

1) Encroachment of the railroad right of way.

2) Encroachment of the county road.

3) Loss of 1/2 interest in 140.15 acres.

4) Loss of the fee simple interest in .57 acres containing the residences.

5) Property in the name of sellers' son J. A. Bagnall.

6) Private easements.

7) Unreleased lis pendens.

8) 1.5 acres in name of Sharp and Hansen.

9) Oil and gas leases.

10) Failure to deposit water stock within the time allowed by the contract.

In response to appellants' argument about these defects, the plaintiffs' brief responds to only two of the admitted defects, i. e. the oil and gas leases. and the problem concerning the 140.15 acres. In attempting to justify or excuse the defect evident in the title to the 140.15 acres, plaintiffs state on page 18 of their brief that:

> "Contrary to the assertions of the appellants, the question of marketable title was never a point of issue since Maxfield represented to Mr. Tibbs and to the sellers that he had acquired all of the balance of the outstanding interest of the parties." (Emphasis added.)

Even if that were true, which it is not, the defects caused by the railroad right of way, the county, road, the property in J. A. Bagnall's name, the unreleased lis pendens, the private easements, and the acreage in the name of Sharp and Hansen, still must be contended with.

2. Point II of appellants appeal brief discusses the written tender made by defendants, and the legal effects thereof. Appellants raised the following considerations, among others, in support of the validity of their tenders:

1) Written tenders terminated sellers right to default.

2) Sellers demanded the accelerated balance which they had no right to do.

3) Statute makes proof of ability to pay irrelevant.

4) Test of ability to pay would have been for sellers to accept tender.

5) Legal meaning of the Hymas, Bamberger, and Seiverts cases.

6) Weight of evidence shows ability to pay.

7) Sellers stipulated that tenders were never accepted.

In response to appellants brief, plaintiffs argue only that the weight of evidence shows the buyers were unable to perform their tenders. All of the other six arguments raised by appellants are unanswered by the plaintiffs, and in fact plaintiff specifically refuses to be drawn into a response to defendants argument that the tenders are effective regardless of any showing, at this late date, of buyers ability or lack of ability to perform. They state on page 24 that "it seems futile for respondents to argue the law". The writer quite agrees with that last statement, inasmuch as the law, in writer's opinion, completely supports the defendants' position.

3. In response to the arguments made by appellants in their point III, plaintiffs make the false statement that sellers never refused to give an accounting. Point V contained herein shows by the plaintiffs own testimony that an accounting was, in fact, never given. Plaintiffs make no response to the authorities cited by defendants to support the legal requirement of an accounting when requested by the buyer.

4. In point IV, appellants, in their appeal brief, discussed the reasons why the sellers notice of default was defective, raising at least the following questions:

1) The wording of the notice is ambiguous.

2) Demands more than is due, improperly accelerating the balance due under the contract.

3) Reasons the amounts could not be known to the defendants.

4) Citation of authorities and their effect on this case.

Plaintiffs' response, when all of the chaff is blown away, is to the effect that the trial court found the notice valid, and that is that.

5. In point V of defendants' appeal brief the effect of the payment of $400 to the escrow by the buyers after the service of the sellers notice of default was discussed. The following arguments were presented by defendants:

1) The bank, for purposes of receiving the payments, was the agent of the sellers only.

2) The notice to quit was inconsistent with the notice of default, thereby, waiving the default.

3) Bagnalls affirmation of the authority of the escrow, after default.

4) The legal effect of the acceptance of the payment by the bank.

In response to these arguments, plaintiffs refer to the spurious Exhibit D-11, and the non-existent order of Judge Erickson, to show that the payment was never accepted. They then go on to allege that because Erickson ruled against defendants on this point, the affidavit of prejudice was filed by defendants thereby obtaining a new judge. The writer can only say that the affidavit speaks for itself, and was filed by counsel only after much soul searching, and because of the firm belief that the judge had already determined how he wanted the case to go as evidenced by his prediliction to rule adversely to the defendants on motions before they had been heard, and his tendency to make rulings on matters not even raised or argued by counsel.

For all practical purposes, plaintiffs make no meaningful response to any of the arguments raised by defendants on this point.

6. In point VI of the appeal brief, appellants make the point that their proffers of proof before Judge Erickson and their offer to pay the money into court should waive any default and reinstate the contract. Defendants make the following points:

1) Proffer of $80,000 worth of savings certificates to Judge Erickson, who refused the proffer.

2) Offer to pay $65,000 into the registry of the court, and Judge Hardings response that it would not be necessary.

3) The setting up, by defendants, of an independant escrow of $65,000 for payment to the plaintiffs.

4) The buyers rights of redemption.

The only response plaintiffs make to any of this is the tacit admission that payment into the registry of court, or its equivalent, would reinstate the contract, and then they simply say that payment should have been made to the court. All other matters raised by defendants are simply ignored in the plaintiffs brief.

7. In point IX of appellants appeal brief, the following contradictions in the plaintiffs' testimony were listed:

1) Mr. Bagnall testified that the beginning balance set forth in the modification agreement was arrived at from the sketchy records which they had. Mrs. Bagnall testified that they had complete and well kept records prepared by a C. P. A.

2) J. R. Bagnall denied ever using his son's name, yet he did use it as one of his own in a warranty deed which he stated in his deposition was an attempt to clear the title.

3) Plaintiffs claimed they never heard of any corporation other than the Idaho corporation. Tibbs, their then attorney, testified that they knew of the Nevada corporation and authorized the assignment from the Idaho to the Nevada corporation. In addition they executed a deed to the Nevada corporation.

4) Bagnall claimed ownership to a tract of 17.45 acres and said, in his deposition that he had never been paid for it. After the defendants conclusively proved that plaintiffs had no claim to the 17.45 acres and had been paid in full therefore in 1962, Mr. Howard stipulated to the court that they were making no claim thereto.

5) Mr. Bagnall testified at the trial, as a rebuttal witness, that Mr. Maxfield had made only one trip to Bagnalls' home in California. In his deposition, Bagnall testified to three trips.

6) Bagnalls and their attorney, stipulated at pre-trial that none of the tender had been accepted. At the trial, Bagnall testified that he orally accepted the July 5, 1969, tender.

7) Mr. Bagnall testified that she had never stated they would not take payments, but were determined to get the ground back. Mr. Bagnall testified that she in fact made such a statement.

In response to these listed discrepencies, plaintiffs only ~~assert~~ ASSERT that they are minor and inconsequential. Minor and inconsequential?! Had plaintiffs had their way, they would have sought, and obtained, judgment granting them title to 17.45 acres to which they clearly had no right. Certainly the question of whether they accepted or rejected the defendants' tender offers is more than a minor and inconsequential discrepency. What credence can be given to Bagnalls testimony (unbelieveable in itself) that he relied upon Mr. Maxfields representations

when he issued a warranty deed to property subject to defects of title, when he cannot even remember whether he had been paid for the 17.45 acres, cannot remember whether the defendants tenders had ever been accepted, cannot even recall a corporation (Nevada) to which he had issued deeds, and authorized the assignment of the contract, and etc.

CONCLUSION

The very flagrant manner in which the respondents, through their counsel, have sought to mislead the court by means of their erroneous and fabricated "statement of facts" constitutes a gross abuse of counsel's obligations and responsibilities to the court, and should be sufficient to warrant the court in disregarding plaintiffs' brief in its entirety. The writer does not lightly attack counsel for the other side, however, the direct attack upon the integrity of the writer by counsel for the plaintiffs leaves this writer no alternative but to point out the errors and defalcations perpetrated by the writer of plaintiffs' brief.

After all the smoke and noise of battle has cleared away in this case, at least one thing remains crystal clear. That is the fact that the written documents, i. e. the modification agreement, the 1952 contract, the warranty deed put into escrow, and the letter of July 18, all explicitly require the plaintiffs to deliver a marketable title free of encumbrances, liens, easements, encroachments, adverse claims, and etc. This the plaintiffs were just as clearly unable to do. Their sole defense is that Mr. Maxfield, at the time the modification agreement was signed stated to them that he had all the outstanding titles and had deeds to them. As was argued above, such a defense is unbelieveable, and is itself at variance with the modification agreement which clearly states that he represented

to them that he had acquired the buyers interest under the contract.

Their attempt to vary the plain meaning of the written instruments by parol evidence should not be allowed.

The Bank of Ephriam, acting solely as agent for the Bagnall, so far as the receipt and disbursement of the payments was concerned, and before any notice was given to them to terminate their agency, accepted a regular monthly payment of $400, and, thereby, waived and invalidated the Notice of Forfeiture. The use of the escrow by the Bagnalls thereafter, reinforced the fact that the escrow was still operative and had authority to act.

The court has before it, all necessary portions of the record and the transcript of testimony. The testimony and the exhibits compel the court to make a finding in favor of the defendants.

Contrary to respondents assertions that they never refused to give the appellants an accounting, it is clear from the testimony that they in fact did not do so after buyers request as contained in their letters of tender. As was discussed in point VI herein, an accounting or statement of some kind from the plaintiffs was necessary before the defendants could determine what amount of money would be required to clear the delinquencies. The courts have held, in the proper circumstances, that failure to give an accounting when requested is sufficient grounds to prevent the buyers default for failure to pay.

It appears to the writer that the plaintiffs, in their reply brief, are grasping at straws and have chosen to attack the defendants in the areas which they consider to be the weakest, and to ignore all arguments for which they have no answer. Their failure to respond to many of the issues presented by appellants' appeal brief, constitutes a tacit admission of the validity of the points made by

appellants.

For all of the foregoing reasons, and for the reasons set forth in appellants appeal brief on file herein, the judgment should be reversed, the complaint dismissed, the contract reinstated, and the matter remanded to the district court for determination of the balance due under the contract, the amount of the delinquencies, the amount of credits and offsets due appellants, and for such other relief as may be appropriate.

Costs and attorney fees should be awarded to the appellants-defendants.

Respectfully submitted,

Robert L. Lord
118 Metro Building
Salt Lake City, Utah 84111

Attorney for Defendant-Appellants

I here by certify that I mailed two copies of the foregoing, postage prepaid, to Jackson Howard, for : HOWARD, LEWIS & PETERSON, 120 East 300 North, Provo, Utah 84601, Attorneys for Plaintiffs-Respondents, this 5th day of September, 1975.

ROBERT L. LORD

APPENDIX "A"

RESTATEMENT OF FACTS

On September 1, 1952, a real estate agreement was entered into between Hannah Bagnall and J. R. Bagnall, as sellers, and Wallace J. Nyberg, Jean B. Nyberg, and Glenna A. Nyberg, as buyers. (Exhibits P-3 and P-4) The agreement appears to have been part of an overall settlement of the estate of Hannah Bagnall, with the apparent motive being to divide up the estate at that time, and as it later turned out, to avoid a probate. (Tibbs cross examination Tr. Bk. 1, pp. 71-72; Bagnall deposition pp. 6 and 7; Maxfield direct, Tr. Bk. 2, p. 278) Jean Nyberg, adopted daughter to Hannah, and one of the purchasers under the agreement, was the owner in fee, apart from any interest acquired under the contract, of .57 acres on which one of the two homes on the property was located, by virtue of a warranty deed dated January 20, 1939, from Joseph and Hannah Bagnall. (Abst. vol. 107, p. 112, Exhb. P-8). She was also the owner of an undivided 1/2 interest in 140.15 acres of the land covered by the real estate agreement. She held that interest as co-tenant with her brother, J. R. Bagnall, by virtue of a warrancy deed dated January 30, 1939, by which Joseph F. Bagnall, and Hannah Bagnall conveyed to the plaintiff, J. R. Bagnall, and to his sister, Jean B. Nyberg, an undivided 1/2 interest in the said 140.15 acres. (Stipulated and included in pre-trial order, R-55, 56). The real estate agreement also provided that Jean had been given a $32,000 interest out of Hannah's share, leaving a balance of $80,000 equally divided between the two sellers, Hannah and J. R. Bagnall. (Real Estate Agreement, P-4)

The real estate agreement was subsequently assigned to various parties, until it was acquired by Suburbia Land Company of Idaho in July, 1962.

(See Bagnall testimony, Tr. Bk. 2, pp. 7, 115). At that time, a modification agreement was entered into between J. R. Bagnall and his wife, Florence as the sellers, and Suburbia Land Company as buyer. (Exhibits P-5 and D-20) The modification agreement incorporated the original September 1, 1952, agreement and made certain modifications therein. Among other changes, the sellers agreed to place a warranty deed conveying good and marketable title, together with all shares of water stock owned by them, in escrow at the Bank of Ephriam. They also agreed to deliver to the defendants an up-to-date abstract "as soon as possible", and to clear up any defects that may be shown in the title within 18 months from the date of the modification agreement. (See modification agreement, P-5, and Bagnall's letter of July 18, D-20) The defendants herein contend that the sellers were to render a title opinion "as soon as possible" also. (See defendants Answer to Amended Complaint; Maxfield testimony Tr. Bk. 2, p. 236.)

On March 3, 1962 , four and one-half months prior to the assignment to Suburbia and the execution of the modification agreement, Jean Nyberg, by warranty deed, deeded the aforementioned 140.15 acres and the .57 acres to Utah Valley Land and Development Corporation. (See R-72 and Exhibit P-56). The deed purported to convey a fee simple title to all of the land. (P-56, R-72). Mrs. Nyberg held the .57 acres (upon which the main residence was located) in fee, but had only an undivided one-half interest in the 140.15 acres. (Exhibit D-38; Nielsen Tr. Bk. 2, p. 217; Maxfield Tr. Bk. 2, pp. 234 et. pretrial stipulations, R-55, 56), The milking barn, tack room, corrals, and the bulk of all other improvements, with the exception of the two residences, were located on the 140.15 acre tract. (Maxfield Tr. Bk. 2, pp. 233, 234; Exhibit D-38)

On October 5, 1971, Utah Valley Land conveyed those same interests, by warranty deed, to United Paint and Colors Company, one of the defendants named in plaintiffs' amended, amended complaint. (Exhibit P-55) An order of Summary Judgment and Decree of Quiet Title was granted in favor of United Paint and Colors Company on March 26, 1974. by the above entitled court, thereby effectively depriving the appellants of a 1/2 interest in the central part of the ranch containing 70% of the improvements. (R-73-75; Maxfield Tr. Bk. 2, pp. 234 et. seq.) The matter of the .57 acres has not yet been litigated.

One of the major concerns of Suburbia as buyer was the ability of the sellers to deliver an unclouded title. The sellers agreed to take upon themselves the burden of preparing an abstract and clearing any defects in the title. (Exhibit P-6; Tibbs Tr. Bk. 1, pp. 88, 89) It was the contention of the buyers that sellers were to render the title opinion also. That contention was disputed by the plaintiffs at the trial. (Bagnall deposition, p. 35; Maxfield Tr. Bk. 2, p. 202; Appellants Answer to Amended Complaint R-252) In any event, the Modification Agreement (which consisted of the Agreement dated July 16, 1962, in conjunction with a letter from seller to buyer dated July 18, 1962), provided that the sellers were to complete their obligations within 18 months. (Exhibits P-5 and P-6; Pre trial order R-53) The abstract was not completed until sometime in 1965, according to the testimony elicited from the plaintiffs and their former attorney and was never delivered to the defendants. (Tibbs Tr. Bk. 1, pp. 102, 103; Pre trial stipulations R-56).

Plaintiffs took no action to clear any defects, maintaining that they had an unclouded title, even to the 140.15 acres and the .57 acres, and that if was fully marketable and complied with their obligations under the Real Estate Agreement and

the Modification Agreement. (Tibbs, Tr. Bk. 1, p. 69; Bagnall deposition p. 15). Throughout much of 1962 and through 1965, at least, Mr. Maxfield made constant and repeated efforts to obtain the abstract from the plaintiffs or their attorney, Don V. Tibbs. (Tibbs Tr. Bk. 1, p. 102). Beginning in 1963, and continuing throughout 1965, Mr. Maxfield advised the plaintiffs of numerous title deficiencies. (Tibbs, Tr. Bk. 1, pp. 91-94; Exhibit D-21; Maxfield Tr. Bk. 2, p. 273) He advised them of claims made by third parties to the 140.15 acres which Jean Nyberg had deeded away. (Defendants were not then aware of the problem with the .57 acres). He advised them of claims made by a Mr. Don Powell to a 63 acre tract and to a 76.94 acres tract, and so forth. It was undisputed that Maxfield obtained deeds from Mr. Powell, that he deeded the property therein to the Bagnalls, and that they, in turn deeded it back to Suburbia of Nevada (one of the successor corporations). (Maxfield Tr. Bk. 2, pp. 274-277; Bagnall deposition pp. 57, 59) There was dispute at the trial as to the reasons therefore, and the effect thereof. Defendants maintained that it was to clear up some of the title defects and that plaintiffs agreed to a moratorium on payments until December, 1971. Plaintiffs disagreed with that contention, denying that there had been any moratorium. (Maxfield Tr. Bk. 2, p. 279; Exhibit D-30; Tr. 93-105).

During much of this time, and especially beginning in 1964, the defendants were not making all of their payments. It was their contention that many of those payments were missed with approval of the plaintiffs because of their failure to obtain the abstract and to clear up the title defects. (Bagnall deposition p. 89; Maxfield Tr. Bk. 3, pp. 93-105) Also the plaintiffs were in default. As stated, they did not obtain the abstract until 1965. (Tibbs, Tr. Bk. 1, pp. 102,103) They did not deliver it to the defendants. (Pre-trial stipulations, R-56)

They did not render a title opinion. They did not have all of the water stock in the escrow as agreed until 1973! (Exhibit D-13; Bagnall, Tr. Bk. 3, p. 54; Anderson Tr. Bk. 1, p. 24). Joseph Albert Bagnall, son of the plaintiff, is the owner of record of approximately 5.56 acres of the ground. (Abst. vol.105,p.37) the Denver and Rio Grande Western Railway is the owner in fee simple of a strip one chain by 40 chains along the eastern boundary and has an easement continuing along the balance of the eastern boundary of the ranch, all taking about 3 acres. There is a county road running through the middle of the ranch not mentioned in the contract or the warranty deed consuming 2 acres. (P-7 Wanlass, Tr. Bk. 2, p. 345-359) Defendants allege a private easement consuming about one acre also runs through the ranch and is not mentioned in any of the conveyances of agreements.

On April 25, 1962, suit was commenced to forfeit the agreement and a lis pendens was recorded. (Abstract p. 183). That lis pendens has not been removed of record and constitutes a cloud on the title. On February 18, 1970, plaintiff entered into an oil and gas lease to Phillips Petroleum which included all of the property contemplated in the Real Estate Agreement (which even included the property belonging to J. A. Bagnall and 17.54 acres of land which the buyers had purchased outright at the time of the signing of the modification agreement in 1962), wherein they purported to lease all of the oil and gas rights to the property, as well as all of the water rights with the exception of well waters. (Exhibit D-34; Exhibit D-33; Bagnall Tr. Bk. 2, p. 77, 83) This, of course, constituted a deliberate cloud upon the title, even though Phillips probably could not prevail in a suit with the buyers. (See ruling in the pre-trial order)

During the latter part of June, 1969, it became apparent to Reed R. Maxfield, acting on behalf of Suburbia Land Company, of Utah, that the plaintiffs

could not comply with their agreement and were about to attempt forfeiture of the contract. On July 5, 1969, Mr. Maxfield, acting on behalf of Suburbia, made a written tender to plaintiff, J. R. Bagnall, of "any and all amounts that are due . . . under the terms of . . .(the) real estate contract." As part of that tender Suburbia asked the plaintiffs to tell them how much was due. There were no restrictions or conditions attached to the tender. (Exhibit P-15) Plaintiffs rejected the tender and asked, instead, not for the delinquencies due under the contract, but demanded the full accelerated balance due in two separate letters. (Pre-trial order, R-52; Exhibits P-16 and P-17) There was no provision in the contract for an acceleration. (Tr. Bk. 2, p. 166; Exhibit P-4) Defendants again tendered, in writing, payment of the delinquencies, without acceleration, and asked the plaintiffs to set forth the amount. (Exhibit P-18). That tender was never accepted by the plaintiffs either (Pre-trial stipulation, R-57).

Within a few days of the July 5 tender, Mr. and Mrs. Bagnall went to the Maxfields' house on the ranch at Chester. They testified that they came to accept the tender (a position wholly contrary to their stipulation that they never accepted the tender), while the defendants testified that they were told by the Bagnalls at that time that they did not want the money, they were determined to take the ranch back. (Bagnall Tr. Bk. 2, p. 109; Maxfield Tr. Bk. 2, p. 299; Pre-trial stipulation R-57)

On July 31, 1970, a notice of default was served upon Reed R. Maxfield, demanding the whole of the accelerated balance due under the agreement, together with interest and penalties in an unspecified amount, and taxes. (P-31) Lester Romero, then president of Suburbia of Utah, the only surviving corporation, was advised of the notice and contacted plaintiffs' attorney, Merlin O. Baker, and

once again tendered payment in writing of all amounts actually due on the contract and asked the plaintiffs to specify the amount due. (Exhibit P-32). The trial court ruled this tender to be timely and within the time allotted by the plaintiffs in their notice of forfeiture. (R-53) The notice of forfeiture was obviously in error, having asked for the accelerated balance ($48,535.70 plus taxes and interest) contrary to the provisions of the contract. There were various letters back and forth thereafter, Suburbia each time tendering payment of the delinquencies. (Exhibits P-34, 35, 36). Plaintiffs refused to acknowledge that Suburbia of Utah, or Lester Romero, had anything to do with the agreement and proceeded with suit against the Idaho corporation filed about November 4, 1970. (R-1). It was not until October, 1971, that the Nevada and Utah corporations, together with Lester R. Romero were joined as defendants. (See plaintiffs' amended complaint filed October 28, 1971).

Then on August 19, 1971, the plaintiffs completely reversed themselves, repudiated the contract,(and, defendants believe, waived their notice of default) by mailing a Notice to Quit to the defendants Maxfield, advising them that the Modification Agreement was void and that they were considered tenants at will and giving them five days to quit the premises. (P-46).

On December 1, 1971, defendants delivered to the escrow, the Bank of Ephriam, a regular monthly payment for $400, which sum the bank accepted, receipted, and posted to interest on December 1, 1971. (Exhibit D-18; Anderson Tr. Bk. 1, p. 53). It should be noted that the plaintiffs had never notified the escrow of their notice of forfeiture, It is the defendants' position that the acceptance of this payment, after notice of default, effectively waived the default and the contract must be re-instated, if indeed, it ever was in default.

After many motions and countermotions -- After long and involved pre-trial hearings, and after much pain and suffering on both sides, the trial herein commenced in the Sanpete County Courthouse on April 22, 1974, before the Honorable Maurice Harding, Judge pro-tem. It is from the results of that trial that defendants take this appeal.