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J. R. Bagnall, aka Joseph R. Bagnall, and Florence Bagnall v. Suburbia Land Company, an Idaho Corporation, et al. : Brief of Appellant

Utah Supreme Court

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Robert L. Lord; Attorney for Respondents.

Jackson Howard; Howard, Lewis & Petersen; Attorneys for Respondents.

Recommended Citation

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IN THE SUPREME COURT
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30 MAR 1975

J. R. BAGNALL, aka JOSEPH
R. BAGNALL, and FLORENCE
BAGNALL,

Plaintiffs and Respondents,

vs.

SUBURBIA LAND COMPANY, an
Idaho Corporation, et al.,

Defendants and Counter Appellants.

BRIGHAM YOUNG UNIVERSITY
Reuben Clark Law School

Case No.
13753

Brief of Defendants-Appellants

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

ROBERT L. LORD
118 Metro Building
431 South 3rd East
Salt Lake City, Utah 84111
*Attorney for
Defendant-Appellants*

JACKSON HOWARD, FOR:
HOWARD LEWIS & PETERSEN
120 East 300 North
Provo, Utah 84601

Attorney for Plaintiff-Respondents

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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.

SUBURBIA LAND COMPANY, an
Idaho Corporation, et al.,

Defendants and Counter Appellants.

Case No.
13753

Brief of Defendants-Appellants

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 plaintiffs, except for an undivided $\frac{1}{2}$ interest in 140.15 acres, which the court, by Summary Judgment and Decree of Quiet Title, awarded to United Paint and Colors. Plaintiffs' appeal from the order 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 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

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. 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. Jean Nyberg, step 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 were located, by virtue of a warranty deed dated January 20, 1939, from Joseph and Hannah Bagnall, (Abstract P. 112.) She was also the owner of an undivided $\frac{1}{2}$ 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 warranty 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 one-half interest in the said 140.15 acres. (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.

The real estate agreement was subsequently assigned to various parties, until it was acquired by Suburbia Land Company of Idaho in July, 1962. 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 the buyer. 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 Ephraim. 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. The defendants herein contend that the sellers were to render a title opinion "as soon as possible" also.

On March 3, 1962, 4 and ½ 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 (R. 72)

The deed purported to convey a fee simple title to all of the land. 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. 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.

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. An order of Summary Judgment and Decree of Quiet Title was granted in favor of United Paint & Colors Company on March 26, 1974, by the above entitled court, thereby effectively depriving the defendants of a $\frac{1}{2}$ interest in the central part of the ranch containing 70% of the improvements. 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. 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. 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), (Exhibits P. 5 and P. 6), provided that the sellers were to complete their obligations within 18 months. The abstract was not completed until sometime in 1965, according to testimony elicited from the plaintiffs and their former attorney, and was never delivered to the defendants.

Plaintiffs took no action to clear any defects, maintaining that they had an unclouded title, even to the 140.15 and the .57 acres, and that it was fully marketable and complied with their obligations under the Real Estate Agreement and the Modification Agreement. 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. Beginning in 1963, and continuing throughout 1965, Mr. Maxfield advised the plaintiffs of numerous title deficiencies. 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). 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.

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 the approval of the plaintiffs because of their failure to obtain the abstract and to clear

up the title defects. Also, the *plaintiffs* were in default. As stated, they did not obtain the abstract until 1965. They did not deliver it to the defendants. They did not render a title opinion. They did not have all of the water stock in the escrow as agreed until 1973! Joseph Albert Bagnall, son of the plaintiff, is the owner of record of approximately 5.56 acres of the ground. The Denver and Rio Grande Western Railway is the owner in fee simple of a strip 1 chain by 40 chains along the eastern boundary and has an easement containing 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. Defendants allege a private easement consuming about one acre also runs through the ranch and is not mentioned in any of the conveyances or agreements.

On April 25, 1962, suit was commenced to forfeit the agreement and a *lis pendens* was recorded. 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. This, of course, constituted a deliberate cloud upon the title, even though Phillips probably could not prevail in a suit with the buyers.

During the latter part of June, 1969, it became apparent to Reed R. Maxfield, then president of Suburbia Land Company, of Utah, that the plaintiff 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. 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. There was no provision in the contract for an acceleration. Defendants again tendered, in writing, payment of the delinquencies, without acceleration, and asked the plaintiffs to set forth the amount. That tender was never accepted by the plaintiffs either.

Within a few days of the July 5 tender, Mr. and Mrs. Bagnall went to the Maxfield's 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.

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. 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. The trial court ruled this tender to be timely and within the time allotted by the plaintiffs in their notice of forfeiture. 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. 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. It was not until October, 1971, that the Nevada and Utah corporations, together with Lester R. Romero were joined as defendants.

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.

On December 1, 1971, defendants delivered to the escrow, the Bank of Ephraim, a regular monthly payment for \$400.00, which sum the bank accepted, receipted, and posted to interest on December 1, 1971. 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 was ever in doubt.

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.

ARGUMENT

POINT I

PLAINTIFFS ARE IN DEFAULT UNDER THE TERMS OF THE MODIFICATION AGREEMENT AND MUST CORRECT THEIR OWN DEFAULTS BEFORE THEY CAN DEFAULT THE DEFENDANTS

FAILURE TO ACQUIRE AND MAINTAIN MARKETABLE TITLE. The testimony and evidence produced by the defendants at the trial that plaintiffs did not have title to all of the land, and could not convey according to the tenor of the Modification Agreement, and the Warranty Deed, stands uncontroverted. The testimony of Jackson Wanless (T-354) shows that the railroad right of way encroaches 33 feet along the entire east side of the ranch taking three acres (T-353); that a minimum of two acres is taken up by county roads (T-356), and one acre is consumed by a private easement. Whether the private easement exists was subject to some dispute. The other matters are uncontroverted. A reading of the Real Estate Agreement (Ex-

hibit P-4), the Modification Agreement and the letter of July 18 (Exhibits P-5 & 6), and the Warranty Deed placed into the escrow (Exhibit P-7) reveal that nothing was said about the railroad, the county roads, or the private easement.

The Modification Agreement provided as follows:

“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 Ephraim, Utah.”

They placed the warranty deed in the escrow, but there was no mention in either the deed or the modification agreement of the railroad, the county road, or the private easement. In addition, and even more importantly, there was no mention of an undivided $\frac{1}{2}$ interest in 140.15 acres of the land contemplated by the agreement which plaintiffs could not convey. As heretofore stated in the statement of facts, Jean B. Nyberg, one of the purchasers under the terms of the September 1, 1952, agreement, had, apart from any interest under the agreement, an undivided $\frac{1}{2}$ interest in 140.15 acres contained in the agreement. This 140.15 acres contains virtually all of the improvements on the ranch, with the exception of the two homes. (See testimony of Reed Maxfield, T-325, & Exhibit D-38). On March 3, 1962, prior to the assignment of the contract to defendants, Mrs. Nyberg, by warranty deed, conveyed the same 140.15 acres to Utah Valley Land and Development Corporation. Utah Valley subsequently conveyed by warranty deed to United Paint and Colors, a Utah corporation. The trial court ruled that this constituted a defect upon the title, that plaintiffs had not cleared the

defect prior to the notice of default, and that the defendants were entitled to damages therefore. (Pre-trial order, pages 6 and 7, paragraph 12, R-....). Furthermore, the trial court granted a summary judgment quieting title to an undivided $\frac{1}{2}$ interest thereto in United Paint and Colors, effectively depriving both the vendors and the purchasers of any interest therein.

In February, 1970, prior to service of the notice of default, plaintiffs leased the oil and gas and water rights to the property. The trial court ruled this a defect for which defendants were entitled to damages.

J. R. Bagnall testified that he had a son named Joseph A. Bagnall (T-7), and that he (J. R. Bagnall) had never used that name. He was then shown Exhibit D-22, a warranty deed wherein plaintiffs, J. R. Bagnall and Florence Bagnall deeded the ranch property to themselves as tenants in common. The deed, however, recites that Joseph R. Bagnall is also known as J. A. Bagnall, and the said J. A. Bagnall purports to be a grantor. On page 9 of the transcript, Mr. Bagnall admits that "possibly Joseph should have signed this too. I don't know. I have never used the name Joseph A. Bagnall. That is sacred to my son." On page 14, reading from the deposition of J. R. Bagnall, the following colloquy took place concerning the interest of Joseph Albert Bagnall in the property, and the reason for the deed:

"A Answer: 'He had interest in approximately two acres or two point something acres, and in order to make this so that we could make a clear transaction — if this was ever completed, that he deeded that to myself so that to clear the title so that we could furnish clear title to —' "

“Q Then the question: ‘To whom?’

“A ‘To whom?’ Answer: ‘To whoever paid for this contract, if and when this was ever paid for. That was part of clearing up the —’ Then I should have said titles.”

On page 34 of volume 105 of the abstract (Exhibit P-8), we find a deed from Mary Ellen Allred aka Mary Ellen Acord to Joseph A. Bagnall, deeding three small pieces of property located in the Moroni Meadows (a part of the ranch) containing a total of 2.5 acres. This is undoubtedly the property referred to by plaintiff as belonging to his son. The abstract shows that even today, the said property is still in the name of Joseph A. Bagnall, and hence constitutes a defect in the title.

On page 37 of the abstract, under date of December 31, 1952, Frank D. and Faun T. Acord deed to Joseph A. Bagnall three pieces of property located in the Moroni Meadows. The acreage of the first tract is unspecified but clearly contains approximately 3.5 acres. The next two tracts contain 3.44, and 2.06 acres respectively. J. A. Bagnall subsequently conveyed the 3.44 acre tract to the plaintiffs, but the remaining two tracts containing approximately 5.56 acres remain in the name of J. A. Bagnall, constituting a defect in plaintiffs’ title.

On page 183 the abstract contains a notice of lis pendens dated April 25, 1962, stating that an action had been commenced in the Sanpete County Court by J. R. Bagnall and Florence Bagnall, against Wallace J. Nyberg, Jean B. Nyberg, Darwin Nyberg, Glenna A. Nyberg, Donald W. Denton, Edwin N. Mortinson, Mr. and Mrs. Guy Redmond, Virgil Redmond, and Waldo Harris as defendants for the purpose of terminating the 1952

real estate agreement and recovering possession of the lands covered thereby. That lis pendens has never been released.

Parcel number 11 as described in the real estate agreement (Exhibit P-4) is owned of record by Caroline M. Hansen, Eva Josephen Hansen, and Mark Sharp Hansen. There is no conveyance of record by which the plaintiffs obtained title to that 1.5 acres.

Thirty-three feet of the entire eastern boundary of the property is subject to the rights granted under a "Right of Way Warranty Deed" from Lars R. Christensen et. ux., to SanPete Valley Railway Company dated July 11, 1896. This same "easement" was discussed above, but it appears that rather than merely an easement, a fee simple interest was conveyed by the deed, together with the right of the railway to encroach upon the adjoining lands for the purpose of building and constructing a roadbed and railway. The assets of SanPete Valley Railway Company were subsequently acquired by the Denver & Rio Grande Western Railroad.

All of these defects in the title are substantial and material. There appears to be no way in which plaintiffs can acquire clear title thereto. Even if they can, it is their obligation to do so, and until they have done so, defendants are not obligated, under pain of default, to continue making their payments, at least not until a determination has been made of the damages suffered by the defendants.

In the case of *MacLeodd vs. Hamilton*, 236 N.W. 912 (Mich. 1931), the plaintiff vendor attempted to foreclose a land contract for default in the payment of installment payments and taxes. The buyer defended on

the ground (among others) that the seller did not have clear title by virtue of an easement for a drain granted to the county in 1876. The court dismissed the complaint and held that, even though the easement had, in all probability, been abandoned by the county and constituted an easily removable cloud on the title, the seller must clear the defect from the record *before* he could default the vendee, and *before* he could bring suit or foreclosure. The Court said:

“The mere record of the outstanding easement is sufficient to command assurances to defendant against the contingencies of a lawsuit. *Platt vs. Newman*, 71 Mich. 112, 38 N.W. 720. The easement is undoubtedly moribund, and under the evidence constitutes no justification for rescission by defendant, *but does require plaintiff, before exacting performance by defendant, to be in a position to tender a marketable title. The plaintiff can remove the cloud, now of record, and file a new bill to foreclose.*”

In other words, even though the cloud was, at most, merely technical and easily removable, the vendor *must* remove it before he can default the buyer and foreclose.

The sellers (Bagnalls) claimed they were aware of all of these defects (according to their own testimony), including the interest of Jean Nyberg, at the time of the making of the modification agreement. Yet they made no mention thereof in any of the descriptions — neither in the agreements nor in the warranty deed. The implied covenants in the September 1, 1952, agreement, and the modification agreement, that they could convey a fee simple title to all of the land, and especially the warranties contained in the warranty deed that they conveyed and warranted a fee simple without reservation, is binding upon the plaintiffs.

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

“Such deed when executed . . . (Constitutes conveyance) with covenants from the grantor . . . that he is lawfully seised 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 encumbrances . . .”

57-1-3, Utah Code Annotated, 1953, states:

“A fee simple title is *presumed* to be intended to pass by a conveyance of real estate, *unless it appears from the conveyance that a lesser estate was intended.*” (Emphasis added)

In *Van Cott vs. Jacklin*, 226 P. 460 (Utah 1924), the vendee sued the vendor for breach of the warranties and the covenant of quiet enjoyment. Vendor, by warranty deed, had conveyed land, some of which he apparently did not own, although the proper boundaries were clearly marked on the property, and vendee apparently had knowledge of the actual boundaries at the time he accepted the deed. *The vendee conceded that he had been excluded from only a small area.* The court held that, nevertheless, the warranties in the deed would control, and plaintiff was awarded damages for the property from which he was excluded. The importance of *Van Cott*, so far as *Bagnall vs. Suburbia* is concerned, is that *the warranties cover known defects as well as unknown.* Bagnall must clear the easements and other title defects even if defendants knew about them before he can default the defendants. Compare also *Leavitt vs. Blohm*, 357 P.2d 190 (Utah 1960); *Creason vs. Peterson*, 24 Utah 2d 305, 470 P.2d 402 (Utah 1970); *Schiff vs. Dixon* (Okla. 1951), 227 P.2d 639; *Platt vs. Newman* (Mich. 1888), 38 N.W. 720.

The Supreme Court of Oklahoma, in construing the effect of a statute outlining the warranties and effect of a warranty deed similar to the one in effect in Utah stated:

“If a deed contains an assurance to the purchaser that the grantors have the very estate in quality which they purport to convey, and in fact the grantors have a lesser estate, *such covenant is considered broken as of the time of execution and delivery of the conveyance.*” Emphasis added.

The defendants had sought to rely upon a statement in 14 Am. Jur., Covenants, Sec. 69, asserting that the covenants were prospective in nature and could only be broken by an eviction. The court rejected that argument upon the ground that the statute (57-1-3 and 57-1-13 in Utah) superseded the common law and was controlling. Whereupon the court said:

“Covenants of ‘seisin’ and ‘good right to convey’ are synonymous, and, *if broken at all, are broken when made*, and an actual eviction is unnecessary to consummate the breach.” Emphasis added.

“In an action for breach of the covenants of seisin and good right to convey, an eviction need not be alleged; but *it is sufficient in charging a breach to negative the words of the covenants generally.*” Emphasis added.

And finally, in the case of *Creason vs. Peterson*, 24 Utah 2d 305 (1970), 470 P.2d 403, the Utah court held that “There is a breach of warranty when it is shown that the grantor did not own the land that he purported to convey by warranty deed description; it is not necessary to show an actual eviction or threat thereof.” What more can be added!!

FAILURE TO TENDER ABSTRACT AS REQUIRED BY THE LETTER OF JULY 18, 1962. On page 5 of the pre-trial order, the trial court found, as a matter of law, that the July 18, 1962, letter from J. R. Bagnall to Suburbia Land Company constituted a part of the modification agreement. It was also stipulated in the pre-trial order that the abstract was never delivered to the defendants prior to the institution of the lawsuit herein. The letter provided as follows (Exhibit P-6):

“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.”

The testimony of both Mr. Bagnall and Don V. Tibbs was to the effect that it was the sellers obligation to render the abstract, that it was not even completed until sometime in 1965, and was never delivered.

FAILURE TO DEPOSIT NEGOTIABLE WATER STOCK INTO ESCROW. The record and testimony of plaintiffs' witnesses clearly demonstrate that all of the water stock was not in the escrow in the proper names until *April 4, 1973*. Even today, it has not all been properly endorsed! Of the total number of shares deposited in the escrow, 6 shares were deposited March 15, 1971, and ten shares were delayed until April 3, 1973.

EFFECT OF DEFAULT ON THE PART OF THE PLAINTIFFS. In the case of *Leavitt vs. Blohm* (1960), 11 Utah 2d 220, 357 P.2d 190, referred to above, the

court had occasion to determine the effect of the vendor's failure to perfect his title before attempting to default the purchaser. The court stated on page 193:

“It is to be kept in mind that the obligations of such contract run both ways. It is true that if the buyer fails to make his payments he cannot enforce his rights. By the same token, if the seller fails to meet his commitment he likewise cannot expect the buyer to perform. An important attribute of the ownership of real property and one of the things for which Mrs. Blohm was paying, was the right to the quiet and peaceable enjoyment of it. She had the right to look to the Leavitts not to leave her vulnerable to being disturbed therein. *Her responsibility to make payments to them was dependent upon their fulfillment of this duty to her.*” Emphasis added.

Leavitt was the assignee of the seller's interest, and Blohm the assignee of the buyers interest in a contract to purchase the El Rancho Motel in Heber, Utah. The series of conveyances are rather confusing, but the substance of the facts as they applied at the trial was that the assignee of the sellers interest, Leavitt, was apparently unable to extricate himself from difficulty and was about to be forfeited out of his interest by the original owner, thereby terminating any equitable interest Blohm had in the property. The court held that this potential was not an excuse for failure to pay on the part of the defendants, but that before Leavitt could default Blohm, Leavitt must clear title and tender a good deed to Blohm. *In other words, the failure on the part of one party did not excuse the failure on the part of the other, but that before either could enforce the contract, that party had to tender full and complete performance.*

In *Sorensen vs. Larue*, (Idaho 1927), 252 P. 494, the court stated that the vendor must furnish good title as of the date required by the contract, and failing to do so, even though the buyer was admittedly unable to make the payments, vendor could not default the vendee and bring suit for foreclosure. In other words, he must tender performance as required by the contract before he can default the vendee, even though the vendee be actually in default himself, and unable to make the payments. See also *Moter vs. Hershey*, (S.D. 1925), 205 N.W. 239; *Kessler vs. Pruitt* (Idaho 1908), 93 P. 965; *Roberts vs. Braffett* (Utah 1907), 22 Utah 51, 92 P. 789; *Ontjes vs. Thomas*, 187 N.W. 726 (S.D. 1922); *Major - Blakeney Corp. vs. Jenkins* (Calif. 1953), 263 P.2d 655; *Coy Brown vs. Harold H. and Clarice D. Griffin* (Mont. 1968), 436 P.2d 695; *Carroll vs. Scott* (Iowa 1919), 170 N.W. 790, all standing for the proposition that the vendor must tender merchantable title, as shown by the abstract, before he can default the vendee.

Although it is the general rule in most circumstances, that the vendor is obligated to make title only at the time fixed for the payment of the last installment, or at the time fixed by the contract, he is, nevertheless, by the authority of the preceding cases, required to make title, and cure all of his own defects, before he can default the purchasers. This is especially required of Bagnall where he has, in effect, demanded the last payment when he demanded the entire balance due under the contract. In addition, the courts uniformly hold that the covenants in the warranty deed are breached at the time the deed is executed and delivered. In the instant case, then, the time for Bagnall to make title would have been at the time the warranty deed was executed and

delivered to the escrow. The modification agreement supports this timing. The agreement could not possibly contemplate placing the deed in escrow at the time of the making of the last payment, else why the escrow. In addition, the letter of July 18 requires Bagnall to supply an up to date abstract, and (buyers contend) title opinion, neither of which was complied with before commencing suit herein, nor had they properly endorsed and deposited all of the water stock, and etc.

In the Idaho case of *Sorensen vs. Larue*, discussed briefly above, the contract called for the purchaser to make certain installment payments amounting to some \$36,370 plus interest. The last installment of \$8,000 was due March 5, 1922. The vendor was to furnish an abstract of title fifteen days before the last installment was paid showing title free and clear except for certain designated encumbrances. The vendor did not tender the abstract until after March 5, and the purchaser did not tender the final payment at all. In fact, on February 27, he advised the vendors that he could not make the payment and proposed alternate arrangements.

The vendor, after the time fixed by the agreement, tendered the abstract which the purchasers then objected to on the ground that there were defects in the title. The seller took no steps to clear the title and at all times insisted that the title offered was sufficient and in compliance with the contract. The buyers made no tender of the final payment at any time. Action was brought to forfeit, and the purchaser defended on the ground that the sellers had not tendered an abstract showing good and sufficient title as required by the contract.

After trial it was determined that there were, indeed, defects in title as shown by the abstracts, and the vendors were allowed a number of months to clear them up. The trial court thereafter determined that the title was good, and allowed the purchasers 7 months in which to raise the final payment. When payment was not made within the 7 months, the court entered a decree of forfeiture from which the defendant appealed. The entire decision is recommended to the Court for careful study. The decision, as it applies to *Bagnall vs. Suburbia*, can be summed up by two headnotes on page 494 as follows: "Purchaser need not tender payment if vendor is unable to furnish abstract required by contract" and "Counsel's admissions of purchaser's inability to make payments after purchaser had right to refuse to make payments are immaterial." The court further held that the vendor must furnish good title as of the date required by the contract, that the tender of such an abstract was a condition precedent to defaulting the purchaser, and that until the vendor had complied with his obligations under the contract, the purchaser was under no duty to tender payments, as such tender would be useless until the plaintiff had corrected his defaults.

In the case of *Roberts vs. Braffett* (Utah 1907), 22 Utah 51, 92 P. 789, the court held that:

"Where time is of the essence of a contract of sale of real estate, but neither party exercised his right to declare an end to the contract, the vendor cannot, when the stipulations of the contract are mutual, dependent, and concurrent, legally place the other party in default until he himself had tendered performance by tender of a deed, and accounting for the purchase money."

In *Tremonton Inv. Co. vs. Horn* (Utah 1921), 202 P. 547, the plaintiff contracted for the sale of certain real property to the defendant. As it later turned out, the vendor was himself the purchaser of the land under a prior real estate contract which ultimately went into default. When defendants realized the financial predicament of the seller-plaintiff, they refused to make any further payments and the vendor brought action to forfeit their contract. The court held that the purchaser should be relieved of his default.

In *Stewart Livestock Co. vs. Ostler* (Utah 1942), 144 P.2d 276, the plaintiff-seller had agreed to convey title by warranty deed and to deliver an abstract showing "perfect title". The court held that "perfect title" meant marketable title as shown by the abstract. As it turned out, the plaintiff didn't have title to over 600 acres of the property but alleged that the defendant's title was nevertheless good by reason of adverse possession, and that they had never been ejected. The court held that did not meet the seller's obligations to furnish good and sufficient tile, stating that "the mere fact that the grantee might actually prevail in litigation against the record owner or against any other person, would not satisfy the requirement that the grantor convey a marketable title".

There remains, of course, the very real problem of the .57 acres. United Paint and Colors is the record owner and will undoubtedly bring a quiet title action against the plaintiffs in the near future. It seems a foregone conclusion that they will prevail. Plaintiffs, therefore, cannot deliver the dwellings at all, and can only deliver a $\frac{1}{2}$ interest to the 140.15 acres. These two parcels contain all improvements of any significance on the property.

POINT II
THE DEFENDANTS MADE VALID AND
TIMELY TENDER TO THE PLAINTIFFS
OF ALL DELINQUENCIES DUE UNDER
THE CONTRACT

Under date of July 5, 1969, Reed R. Maxfield, on behalf of Suburbia Land Company, made a tender "of any and all amounts that are due J. R. Bagnall under the terms of that certain real estate contract dated September 1, 1962". (Exhibit P-15) Plaintiffs then attorney, Don V. Tibbs, responded by letter of July 9, 1969, (Exhibit P-16) demanding "full satisfaction of the indebtedness", and declaring that "your proposed partial payments will not be accepted". Again, on July 14, 1969, plaintiffs California counsel, Cree-L. Kofford, advised the defendants that the full accelerated balance of the contract amounting to \$48,535.70, together with taxes amounting to \$582.93, and certain unspecified sums of interest be paid within ten days. After receipt of Mr. Tibbs letter of July 9, and prior to receipt of Mr. Kofford's letter of July 14, Mr. Maxfield again made tender to Mr. Tibbs of all amounts now due and all installments which hereafter become due. (Exhibit P-18)

The trial court ruled that the July 5 letter from Maxfield on behalf of Suburbia constituted tender legally sufficient to prevent defendant's default and that the Tibbs' letter of July 9, 1969, and the Kofford letter of July 14, 1969, constituted rejection of the tender, and excused the defendants from further payments on the contract until acceptance thereof unless *plaintiffs* should be able to establish that the defendants were unable to perform at the time of the tender, or a reasonable time thereafter had the tender in fact been accepted. (Pre-trial order, page 4, paragraph 2, see R)

Just over one year after Maxfield's tender, the plaintiffs, on July 31, 1970, served notice upon Suburbia Land Company improperly demanding the entire accelerated balance of \$48,535.20, together with taxes and unspecified sum for interest. (Exhibit P-31) The reader will recall that the contract does not provide for acceleration of the balance upon default. On August 28, 1970, Mr. Lester Romero, president of Suburbia Land Company, again tendered, in writing, "all amounts actually due". (Exhibit P-32) The trial court ruled that this letter from Mr. Romero constituted tender within the 30 days provided in the plaintiff's notice of forfeiture and was legally sufficient to prevent the defendants' default unless the *plaintiffs* could establish that the defendants were unable to perform at the time of the tender or a reasonable time thereafter, had the tender in fact been accepted. (Pre-trial order, page 5, paragraph 3, R....)

As can readily be seen, defendants tendered, in writing payment of all delinquencies on July 5, 1969, and again on July 14, 1969. These tenders were rejected and an improper notice of default served upon Suburbia July 31, 1970. Thereafter, and within the 30 days provided in the notice, the defendants again tendered payment of all delinquencies. The only question left open for trial was the question of whether the tenders were made in "good faith". The burden of proof was upon the plaintiffs to prove that the defendants could not perform at the time of the tender or within a reasonable time thereafter.

THE COURT SHOULD HAVE RULED THE
TENDERS WERE MADE IN GOOD FAITH AND
VALID AS A MATTER OF LAW.

78-27-1, Utah Code Annotated, 1953, provides as follows:

“78-27-1. Tender — Offer in writing sufficient. — An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument or property.”

The Utah statute also provides the way in which the tenderee may protect himself from the effects of a written tender in the event the offer is not made in good faith, the offeror cannot produce the money, or the offeree has some other valid objection to the tender.

“78-27-3. Objection to tender — Must be specified or deemed waived. — The person to whom a tender is made must, *at the time*, specify any objection he may have to the money, instrument or property, or he is deemed to have waived it; and, if the objection is to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amounts, terms or kinds which he requires, or he precluded from objection afterwards.” Italics added.

In other words, defendants' offer, in writing to pay “any and all amounts that are due to J. R. Bagnall”, is equivalent to the tender of the actual money. There is no other way in which the statute can be read. Even if we concede, for the sake of argument, that the defendants could not produce the money if the tender had been accepted, there is no mischief done by accepting the statute on its face, i.e., that the defendants' written tender is equivalent to the actual production of the money, and that it is equivalent irrespective of their ability to produce it.

Under the Common Law, it was necessary to actually have the money in sight at the time the tender was made. Such a requirement, in the light of modern day business methods, is not only cumbersome and impractical, but completely contrary to the normal expectations and practice of the business community. The statute was designed to remedy this anomaly. Under the statute, a businessman, consistent with his normal expectations, can make an offer in writing. Such an offer fixes the legal rights of the parties until such time as it is accepted or rejected. In the event that it is accepted, normal business practice would dictate that the offeror be given enough time to produce the funds in the normal course of business. Or, if the offeree so chooses, he probably can insist upon virtual instant production upon acceptance. In the Bagnall case, however, not only was the offer not accepted, it was rejected and an improper demand made for the entire contract balance together with interest, taxes, and etc.

If plaintiffs had, in good faith, actually intended to extend to the defendants the opportunity to pay the valid delinquencies, or even the opportunity to pay the improper and excessive amounts demanded in their notice, it would have been simple enough for them to have accepted the defendants' tender. Upon acceptance, the financial condition and ability of the defendants to produce would have been almost instantaneously apparent. If they could produce, they would do so. If they could not, it would become immediately apparent.

On the other hand, had the plaintiffs found any reason to object to the tender, or if they believed the defendants unable to produce, they could have made objection as provided in 78-27-3. The cases of *Hymas vs.*

Bamberger (1894), 10 Utah 3, 36 P. 202, and *Sieverts vs. White* (1954), 2 Utah 2d. 351, 273 P.2d 974, support this contention. The Hymas court said that "To have the effect of a valid tender, the party tendering must have the ability to produce it, and must act in good faith". Without more, this statement would seem to belie the defendants' position herein, but it is actually supportive of the defendants when the entire decision is considered. Obviously a tender in writing cannot forever forestall the offeree from asserting his legal rights if the party making tender cannot produce. Everyone would agree to that. It is the application of the statute that is important however. The Hymas court goes on to state that if the offeree "accepts, and the debtor fails to produce the money, his tender will be of no avail". Certainly that is so, and the Hymas case charts the course which the two parties must follow.

In Hymas, the tender was made *and* accepted. *Thereafter*, the offerer was unable, even after an extended period of time, to produce the money. The court, quite naturally held that under such circumstances the tender failed. That is a long way from saying there was any obligation on the offeror to prove his ability to perform, if the tender was not accepted. What the court said was that if the offer was accepted and *THEN* he was unable to perform, the offer was void.

The Sieverts case appears at first blush to be contrary to the defendant's position until a more critical look is taken. Sieverts revolved around a tender made by check, and anything said therein is not necessarily pertinent to the offer made by the defendants to the Bagnalls in this case. It is clear that a check, unless accepted as payment in and of itself, is not the payment

of money, but is merely an order upon the bank instructing it to pay the money upon presentation. It is, in other words a promise to pay money in the future. This is completely different from the tender made to the Bagnalls, which was a tender under the statute to pay any and all amounts due. The statute says that such a tender is equivalent to the actual production and tender of the money. The statute does not say that the tender of a check is equivalent. 78-27-1 refers specifically to a particular manner of tender, and does not include the tender of a check or negotiable instrument, does not contemplate nor cover the physical tender of goods, and etc. It goes solely to the question of a *tender in writing to deliver* the money, check, negotiable instrument, physical goods, and etc. Section 3 of statute (78-27-3), however, has a broader and more general application. It refers, not only to the tender contemplated in Section 1, but to any and all tenders, and it specifically states that the objection *must* be made at the time of the offer or it is deemed waived.

The reader is referred to the concurring opinion of Justice Crockett in the Sieverts case. He takes the position that even where a tender is made by check, *there is no necessity that there be funds on deposit at the time the check is drawn and delivered*. Quoting from page 977 of the Pacific Reporter, Justice Crockett said:

“If such a check were refused there would be no practical use of arranging for the money or credit to cover it. This might entail considerable inconvenience, difficulty or even hardship, to no useful purpose. Serious injustices might result if the offeree in such a transaction could defeat proof of tender simply by showing that the offeror had not sufficient funds in the bank to cover the check at the time it was offered.”

“* * * If the offeree has failed to state an objection, or objects on other grounds, it would be manifestly unfair to permit him to defeat proof of tender by check on the sole ground that there were not sufficient funds to cover the check at the time tender was made, because the offeror may have arranged for payment of the check, if it had been accepted. This reasoning is reflected in our statute which requires the person to whom a tender is made to ‘specify any objection’ he has thereto or be ‘deemed to have waived it.’ ”

Justice Crockett’s concurring opinion is actually the opinion of the majority of the court. Justices Crockett, McDonough and Wade were in agreement as to the meaning of the statutes and the effect of the tender by check made in that case. Justice Worthen did not participate and Justice Henriod had disqualified himself. It appears that Judge Dunford, who wrote the opinion, was filling in for Henriod, and that the single remaining judge must have concurred with Dunford. It is the defendants’ contention that the two cases of *Hymas vs. Bamberger* and *Sieverts vs. White* definitely support the proposition that there is, and should be, no requirement that the defendants make any showing whatsoever that they had the ability to perform their tenders, especially at this late date, and after express rejection thereof by the plaintiffs. The fact that the written tender was made should be, in and of itself, sufficient to prevent the plaintiffs from putting the defendants into default and should, therefore, defeat their claims for relief.

In the case of *Bernice Ulibarri vs. Joseph Christenson, et al.*, (1954) 2 U.2d 367, 275 P.2d. 170, defendant accepted a check for \$300 in exchange for a release for the wrongful death of plaintiff’s 17 year old son. In at-

tempting to avoid the release, plaintiff claimed that the check was not legal tender and therefore no consideration had been given for the release. The Utah court made short shrift of that contention. Justice Crockett, writing for the court quoted 78-27-3, Utah Code Annotated, 1953, as follows:

“The person to whom a tender is made must, *at the time*, specify any objection he may have * * * or he is deemed to have waived it * * *.”

Justice Crockett goes on to say:

“It is well settled that a tender by check in lieu of cash is sufficient unless it is objected to on that ground. No objection was made to the check at the time it was delivered. *Had it been, the defendants would have had an opportunity to substitute cash to obviate the objection.* In the absence of such objection plaintiff cannot now complain of failure of consideration because it was a check instead of cash, unless the check had been presented for payment and dishonored. This was not done. From aught that appears, if she had presented the check for payment it would have been paid, and defendants now stand ready and willing to see that the check is paid so that their part of the bargain will be kept.”

So also in the instant case. It is well settled that a written offer to pay money is, if not accepted, the equivalent of the actual production and tender of the money. No objection was made to the defendants' tender at the time it was delivered. Had it been, the defendants would have had an opportunity to substitute cash to obviate the objection. In the absence of such objection, the Bagnalls cannot now complain that the tender was not made in good faith unless they actually

accepted the offer and the defendants did not perform on their tender. This was not done. From aught that appears, if Bagnalls had accepted the tender of payment, it would have been paid, and defendants now stand ready and willing to see that the tender is paid so that their part of the bargain will be kept.

EVEN ASSUMING THAT INABILITY OF THE DEFENDANTS TO PERFORM WOULD DEFEAT THEIR TENDERS, THE WEIGHT OF THE EVIDENCE CLEARLY DEMONSTRATES THAT THEY WERE FULLY CAPABLE OF PERFORMING HAD THEIR TENDERS BEEN ACCEPTED.

Special interrogatory number 12 of the Special Verdict of the Jury (R-684), asks the following:

“Do you find by clear and convincing evidence that the defendant Suburbia Land Company of Utah, or Reed R. Maxfield, or Lester R. Romero, was not ready, able and willing to pay the delinquencies on the contracts, marked Exhibits 3 and 5, on July 5, 1969, or August 28, 1970?”

As will be discussed later, the jury in this matter was a typical “home town” jury and demonstrated its prejudice in favor of their home town people, J. R. and Florence Bagnall. Even so, the jury was compelled by the evidence adduced at the trial to answer the foregoing interrogatory in favor of defendants. They *had* to find that the plaintiffs had not carried their burden of showing that the defendants could not perform their tender.

All documentary and testimonial evidence adduced at the trial shows beyond doubt that the defendants could have performed if their tenders had been accepted by the plaintiffs. Judge Don V. Tibbs was called as a

witness for the plaintiffs. He had acted as their lawyer at the time the Modification Agreement was signed in 1962. On cross examination he was asked about the money displayed by Mr. Maxfield during the negotiations, and responded as follows: (T-99)

“A My recollection is that Mr. Maxfield came in some bib overalls, farm overalls, and they were big and, of course, I didn't know him and he sat down and I told him that he was going to have to have some money and he started to bring out, as I recall, tens and twenty dollar bills in sacks.”

“Q Bringing them out of where?”

“A Oh, every place that you could imagine, out of those overalls and I didn't think that there was that much money that came in overalls, if I may put it that way.”

Mr. Bagnall, on cross examination (T 21, 22), testified that during the negotiations preceding the signing of the 1962 modification agreement, Mr. Maxfield came to the meeting in Mr. Tibbs office with a suitcase full of money. He states that the suitcase was longer, wider, and thicker than an attache case and appeared to be full of bills: “More bills than I had ever seen in my life, either before or since, in bundles about so large.” Mrs. Bagnall also verified that there had been such a suitcase full of money. (T-158)

What monies were available in 1962, of course, have no bearing upon what monies were available in 1969 and 1970. It is evident, however, that Maxfield was in the habit of keeping large sums of money in cash, and of dealing directly in cash rather than with checks or some of the more conventional means of handling large sums. Such a peculiarity is consistent with his testi-

mony, and the testimony of his wife Mildred, that they kept large sums of cash around the house, and that they, in fact, had sufficient cash on hand to pay the delinquencies of \$15,000.00 or more when the tenders were made. (T-329, 320)

Mr. Maxfield testified (T-330, 331) that in addition to other sums on hand in 1969, he had, prior to making the July 5 tender, obtained a loan commitment from the Clearfield State Bank for \$15,000.00 to be used along with the other funds to pay the contract off in full if necessary. Mr. Bruce Watkins, manager of the Sunset Branch of the Clearfield State Bank confirmed that a loan commitment had been made for the sum of \$15,000.00. (T-229)

Mr. Lester Ralph Romero testified that he was the owner of the Poor Boy Cafe (T-365) and the Airport Motel (T-365, 366) in Salt Lake City, and that his assets were available to back up the tenders, both in 1969, and in 1970. The objective evidence also leads inexorably to the conclusion that the defendants were able to produce the monies necessary to perform their tenders had such tenders ever been accepted. Exhibit D-46, a thrift certificate from Interlake Thrift dated October 23, 1969, in the amount of \$10,000.00, and Exhibit D-47, a thrift certificate from Interlake Thrift bearing the date of October 26, 1971, in the sum of \$9,000.00 amply verify the ability of Mr. Romero to meet the terms of the tender.

In contrast to the compelling evidence adduced by the defendants of their ability to perform their tenders, the plaintiffs produced only the unsubstantiated testimony of Mr. and Mrs. Bagnall that sometime between July 5, 1969, and July 9, 1969, they went out to the

ranch in Chester and talked to Reed and Mildred Maxfield, told them they were delighted to accept their tender, and had come for the money. Bagnalls testified that Reed Maxfield offered them cemetery lots and some wholesale grocer stamps, etc., and refused to pay the money. (T-150). Such testimony by them is unsupported by anything other than their naked word, and is in total contradiction to the written rejections by Tibbs and Kofford, and contrary to their stipulation that none of the tenders were ever accepted. This stipulation was made by them and by their counsel in their presence at one of the pre-trial conferences and was embodied in the pre-trial order on page 9, paragraph 15 as follows:

“Plaintiffs have not, at any time, accepted any of the various written tenders made on behalf of the defendants beginning with the July 5, 1969 letter of Mr. Maxfield to the present time.”

Faced with such contradictory positions by the plaintiffs, and in the light of the compelling evidence adduced by the defendants, the jury could only come to the conclusion they did, i.e., that the plaintiff had not proved the defendants unable to perform their tenders. The plaintiffs having failed to establish the defendants inability to perform, the finding *must* be that the tenders were good. The trial judge, however, had even more compelling evidence which mandated judgment in favor of the defendants rather than the plaintiffs. On September 27, 1972, the defendants made a proffer of proof to Judge Erickson at a hearing upon a motion for summary judgment. The proffer consisted of certain certificates of deposit in the name of Ralph Romero totaling \$80,000.00. The certificates antedated the tenders made by Mr. Romero of August 28, 1970. This proffer

is embodied in Judge Erickson's unsigned order of October 11, 1972. (R-....)

In other words, the record, as available to the trial judge *required* that he find the tenders good, and enter judgment for the defendants. To grant the plaintiffs' motion for Judgment notwithstanding the verdict was clearly wrong, contrary to all credible evidence, against the *weight* of the evidence, and an abuse of discretion, if indeed he had any discretion at all on this point.

POINT III

PLAINTIFFS WAIVED TENDER BY REFUSING TO GIVE DEFENDANTS AN ACCOUNTING, BY REJECTING THEIR WRITTEN TENDERS, AND BY DEMANDING THE ENTIRE CONTRACT BALANCE

On July 5, 1969, Reed R. Maxfield, on behalf of Suburbia Land Company, made a written tender of "any and all amounts that are due to J. R. Bagnall under the terms of that certain real estate contract dated September 1, 1962." (Exhibit P-15). In response thereto, plaintiff's attorney, Don V. Tibbs, notified the defendants that their partial payments would not be accepted and demanded full satisfaction of the indebtedness. (Exhibit P-16) Mr. Bagnall testified at the trial that "We were asking at that time for the entire contract." (Line 25, T-37). Plaintiff then enumerates some of the problems he was allegedly having over the property after which the following colloquy took place:

"Q In other words, at this point you were totally fed up, is that correct?

"A We were totally fed up. Thank you for furnishing that word for me.

"Q All right. And it was your desire to repossess the property at that time?"

"A That is true."

Then on pages 41 and 42 of the transcript, quoting from the questions and answers given at plaintiff's deposition, the following question was asked about the amount demanded by Tibbs' July letter and received the following answer:

"Q You don't know how much is being demanded here?"

"A The amount being demanded there would be the total amount of the contract, plus that which was in arrears plus the interest on the total contract plus the interest on the amount that was in arrears plus the default in taxes and so forth, that we had paid out. That comes roughly to what it would be."

Plaintiff then attempts to explain that he misinterpreted the letter when asked about it at the deposition. The fact remains, however, that even plaintiff assumed the letter was a demand for the entire balance due until he realized, in preparation for the trial, that such a demand was improper at that time, and then attempted to change his testimony. There is no question about Maxfield's interpretation that it was a demand for the entire contract balance. All parties testified that within a day or two after the July 5 letter, plaintiffs met with the Maxfields at the ranch in Chester. Plaintiffs claim that they came to accept the tender, defendants claim that they demanded the property back and refused to accept payment of the delinquent installments. It is quite evident the testimony given by J. R. Bagnall at his deposition more accurately depicts what happened, i.e. that

they wanted the entire contract balance. Exhibit P-18, a letter from Suburbia by Reed Maxfield dated July 15, 1969, again tenders the delinquencies and protests the attempt to accelerate.

"I do not believe under the circumstance and in view of the conversations, negotiations and agreements that Bagnall is entitled to declare the unpaid balance due and payable particularly without notice or reasonable opportunity to remedy any default that may exist. Please reconsider my tenders and advise."

Mrs. Bagnall testified on cross examination (R-166, lines 1 through 19) that after departing from the meeting with the Maxfields at the ranch and upon the advice of counsel, they determined not to accept anything less than the entire accelerated contract balance. It is also evident from the testimony of Mr. Bagnall on cross-examination (T-108 & 109) that the Maxfields were told by Mrs. Bagnall *that plaintiffs did not want the money, they wanted the land back*. That statement was made, according to J. R. Bagnall, at the ranch in Chester right after July 5, 1969, tender, or at the home of Mrs. Bagnall's brother in Midvale at about the time the 1970 notice of default was served, and is consistent with the testimony of Reed Maxfield that they refused to accept the money and demanded the land back. (T-299)

All of the foregoing, together with the fact that plaintiffs refused, without any justification, to give defendants an accounting or to tell them the amount of the delinquency, excuses the defendants from making any tender at all. Defendants could not make a tender of money because they had no way of knowing the amount due. Their written offer to pay the delinquencies if

plaintiffs would just tell them how much was rejected both verbally and in writing, and finally, plaintiffs rejected their obligations under the contract by refusing to accept payment of the delinquencies by demanding the entire contract balance, and by telling defendants that they did not want the money, but wanted the land back. Under such circumstances, any tender by the defendants, even if it had been a tender of the actual money would have been a vain and useless act. The law does not require the doing of a vain and useless thing. *Veigh Cummings et. al. vs. J. Elmo England, et al.*, (1961) 12 U.2d. 69, 362 P.2d 584. See also 52 AM. Jur. Tender, pages 216, 217, Sec. 4; *Thomas vs. Johnson* (1919) 55 Utah 424, 186 P. 437; *Evans vs. Houtz* (1920), 57 Utah 216, 193 P. 858.

In the case of *Evans vs. Houtz* (1920), 57 Utah 216, the court said: "Where defendants repudiated a contract for the sale of lands, and announced that they would not accept, such conduct was a waiver of formal tender." See also *Thomas vs. Johnson*, 186 P. 437; *Pool vs. Motter*, 185 P. 714; *Cummings vs. Nielson*, 42 Utah 169, 129 P. 619; *Obrecht vs. Land & Water Co.*, 44 Utah 270, 140 P. 117. In the *Evans* case, Houtz entered into a contract to sell certain land and water stock to Evans. When it came time for Evans to make the final payment, the land had increased in value and Houtz refused to allow the escrow to deliver the deed, stating that she would not accept the money and declaring that the land and the water stock belonged to her.

In *Cummings vs. England* (1961), 12 U.2d 69, 362 P. 2d 584, the plaintiffs entered into an agreement to purchase an undivided one-half interest in a ranch in Summit County which the defendants were purchasing

on contract. The agreement with plaintiffs provided for certain penalties upon default of payment, including the forfeiture of plaintiffs interest under the contract. Payments of \$1,500 were to be made semi-annually by the plaintiffs on the 1st of April and October, and provided for a 30 day grace period. Plaintiffs did not make the October payment when due, and on October 28 (still within the 30 day grace period) defendants informed plaintiffs that they were dissatisfied with the arrangement and would exercise their option under the contract to buy plaintiffs out, "unless conditions changed and the parties could come to some satisfactory solution." The grace period passed and the defendants then notified plaintiffs that they were terminating the contract for failure to make the October payment on time. Cummings then tendered the \$1,500 and took the position that the contract was still in force.

The supreme court agreed with the trial court taking the position that

"Under such circumstances it was reasonable for appellants to conclude that no further payments from them under the contract would be expected or accepted by respondents, and *appellants were therefore excused from making a tender of the payment within the 30-day grace period. It follows respondents therefore did not have the right to terminate the contract for failure to make this payment, since the law does not require the doing of a vain and useless thing.*" Italics added.

In other words, although appellants did in fact make a tender after the 30 day grace period, no tender was required at all, since the respondents had already made it clear they would not accept it in any event. See also the case of *Thomas vs. Johnson* (1919), 55 Utah 424,

186 P. 437, where the vendor refused to tender the required abstract and repudiated the contract. The court stated that a tender of the purchase price "would have been an idle ceremony. The law never compels a person to do that which is vain or useless."

In the case of *Aus vs. Rosenbaum* the vendor refused to give the vendee an accounting of the balance due. The vendees never made a formal tender and apparently brought an action against the sellers to compel an accounting. The vendors claimed forfeiture by failure to make a formal tender. The court found on page 558 of Vol. 21, Southern Reporter, that since the accounts had never been furnished to the purchasers "It was impossible for them to know what amount was due, and equally impossible for them to tender an unknown sum. Finding that tender had been waived by the sellers, the court asks: "Shall any man be required by any rule to perform an impossible act?" And so on ad infinitum.

POINT IV

THE PLAINTIFFS' NOTICE OF DEFAULT
IS DEFECTIVE AND CANNOT FORFEIT
OR TERMINATE THE INTEREST OF THE
DEFENDANTS UNDER THE CONTRACT.

STRICT PERFORMANCE HAD BEEN WAIVED.
The trial court ruled, and the evidence amply supports that ruling, that all parties to the contract and modification agreement waived the time of the essence provisions of the modification agreement and waived strict compliance with the terms of the agreement. Having once waived strict compliance, the plaintiffs are required to give the defendants reasonable notice to cure the de-

faults and to give them notice of their intention to hold them to strict compliance in the future. The Utah court has spoken conclusively on this question in the case of *Pacific Development Company vs. Stewart*, 113 U. 403, 195 P. 2d 745, wherein the court held that once having waived strict performance, the vendor had the *duty* of giving the purchasers a reasonable notice before they could insist on strict performance by the purchasers. The Bagnalls therefore cannot default the defendants until they have given them notice of their intention to hold them to strict performance in the future, and have afforded them a reasonable time in which to cure the defaults.

PLAINTIFFS NOTICE OF DEFAULT FATAL-
LY AMBIGUOUS. It is the defendant's position that the May 25, 1970 notice which the plaintiffs rely upon to establish their right to default the defendants was fatally ambiguous. As is evident from the pleading and testimony at the trial, the amount of any default was hotly contested and was, according to the defendant, no more than \$13,977.28 (R-370) or even nothing at all. Even after trial, the court was unable to establish what the amount of default was, finding only that it was "in excess of \$15,000 as of July 9, 1969." (R-713) Under such circumstances, plaintiffs certainly had an obligation to tell the defendants what amounts would satisfy their demand to cure the defaults.

Had the plaintiffs demanded something in the vicinity of \$14,000 to \$16,000, defendants would at least have had some idea what would be necessary in order to cure the "default" even if they were to pay it under protest. The contract and modification agreement contained no acceleration clause allowing for a demand for

the full purchase price upon default by the purchaser, yet the notice relied upon by the plaintiffs, indeed all of the demands by the plaintiffs, demanded the full balance of \$48,535.70, together with taxes and an unspecified sum of interest. The general rule is that a written notice should be clear, definite, and explicit, and not ambiguous. A notice that is ambiguous, misleading and unintelligible to the average person who is to be affected by it is insufficient. 55 Am. Jur., "Vendor and Purchaser" p. 505; *Holly Dev. Inc. vs. Board of County Commissioners*, 140 Colo. 95, 342 P.2d 1032; *Shuey vs. Hamilton*, (Montana, 1963) 381 P. 2nd 482. It is evident that the notice served by the Bagnalls did not apprise the defendants of what would be demanded of them in order to avoid default, and in fact, demanded over two and one-half times the amount actually due.

AMOUNT OF DEFAULTS UNKNOWN TO DEFENDANTS. It is equally obvious that defendants could not have obtained the amount of default from their own records, nor from the records of the escrow. Mr. Edgar Anderson, escrow officer for the bank, testified (T-45) that he could not tell the buyer what the taxes, insurance, and water assessments were. Apparently the buyer would have to check with Bagnalls, or make separate inquiries of the two water companies for the water assessments, inquiries of the county assessor for the taxes, and inquiries to Bagnall for the insurance premiums. In regard to any inquiries to Bagnall, it must be remembered that, by their tenders, and by other correspondence defendants had, in fact, inquired of Bagnalls and were met with an outright rejection and refusal to disclose the amount due. Taking even the most charitable view of the evidence, no one but the Bagnalls

could have told the defendants the amount of unpaid insurance, since only they themselves would know that. The Utah court, in the case of *Romero vs. Schmidt* (1969) 15 U2d 300, 392 P. 2d. 37 held that such an unreasonable refusal on the part of the vendor, excused the purchaser from even making a tender, and voided the vendor's notice of default.

Compounding these difficulties, however, is the fact that there is absolutely no way the defendants could determine the amount of unpaid installments, taxes, and etc., which would be necessary to forestall the notice of default by the plaintiffs. Even the plaintiffs themselves were unsure of the amount of default. In their amended complaint they pleaded default from and after March 20, 1968 (or apparently so), claimed the amount of delinquencies to be \$48,535.70, taxes of \$820.20 together with \$151.00 interest thereon, and an unspecified sum for taxes and for interest on the principal. Yet at the trial they introduced evidence of alleged delinquencies going all the way back to December of 1962, amounting to something "in excess of \$15,000.00" (Exhibit P-37 and R-713).

On the other hand, the defendants had every reason to believe that the obligation to make up many of the alleged delinquencies had been forgiven. The long lapse of time (from December, 1962 to July, 1969) alone would be sufficient reason to believe that many of the defaults had been forgiven. The plaintiffs' own objective evidence supports the defendants' contention that arrangements were made from time to time to reinstate the contract after admitted defaults. See for example Exhibit P-48, wherein the plaintiffs, by and through their attorney, Don V. Tibbs, state that they were "willing

to go along with the matter," provided the back taxes were paid and "the payments are made monthly promptly, as required by the contract." It is obvious from the content of the letter, written October 29, 1965, that plaintiffs were complaining about unpaid installments and unpaid taxes. Even a cursory glance at Exhibit P-11 and P-13 shows that the taxes were paid thereafter as requested and that regularly monthly payments were made in the succeeding months. In other words, the plaintiffs had waived their right to insist upon payment of installments prior to October 29, 1965. Even if they had not, they had put defendants into a position that they could not know, in July, 1969, and October, 1970, whether they would be required to pay those installments or not. With such uncertainty of the amount due, the defendants ought not to be required to pay an uncertain and unspecified amount at the risk of having that forfeited too if it should turn out that they had underpaid because of the uncertainty, or if it should later turn out that the plaintiffs demand for the accelerated balance was, in fact, correct. Under such uncertainty, the plaintiff's notice of default *must* properly set forth the amount they are demanding in order to avoid default.

The Montana court in the case of *Radar vs. Taylor*, 333 P. 2d 480 voided a notice of default which demanded the accelerated balance due when the contract did not provide for acceleration, and, among other reasons given for its decision stated at page 487:

"Furthermore, defendants ought not to be required to pay the \$13,000 which is admittedly due and which was correctly demanded in the notice at the risk of having it forfeited too, in the event

that it should finally be held as contended by plaintiffs that the contract contained an acceleration clause."

PLAINTIFFS' NOTICE OF DEFAULT INVALID BECAUSE IT DEMANDED MORE THAN WAS DUE. The plaintiffs notice of default is fatally defective and invalid for the reason that it makes an improper demand for payment of the accelerated balance amounting to a sum over two and a half times the amount actually found to be due by the court. It is true that the demand for taxes and interest may be correctly set forth therein, and it was this fact that the trial court relied upon when it found the notice to be effective (Pre-trial order Page 3, paragraph 1 R). Those amounts pale into insignificance, however, in comparison with the demand for the whole of the principal balance due. The Iowa court in the case of *Gibson vs. Thode*, 328 N.W. 91, enunciated the reason and the purpose for the notice:

"The real purpose of a notice of this kind is to bring home to the vendee the very reason for the notice of forfeiture, in other words, *to advise the vendee what he must do to avoid the forfeiture; * * **" (Emphasis added)

The defendants in the instant case certainly were not advised of what they must do. If they paid at all, they paid at their peril. If they miscalculated and paid too little, they ran the risk of having that amount also forfeited. If they paid too much, or paid as demanded, they would be making an admission of liability therefore, even if they did not owe it, and they could not recover it back even if they should later prevail in a lawsuit.

The courts are divided on the effect of such an excessive demand. The Utah court, however, has found

such a notice to be defective and insufficient to effect a default under the contract. The case of *Wayne E. Carroll vs. Phil M. Birdsoll* (1970) 24 U 2d 411, 473 P 2d 398, is self explanatory.

“The defendants, though questioning it, appear to have been in default and behind in their payments, at least during most of over 13 years, when, on March 12, 1968, the seller served a written notice on defendants to 1) pay up the delinquencies which the notice said amounted to \$2,175.00 (which defendants emphatically denied to be the case), for \$150 per month future monthly payments, for an unspecified sum for costs and expenses, and \$475.00 attorneys fees, all “in accordance with the terms” of the contract else suit would follow to recover under the statutes. *It is obvious that the notice given required the buyers to do something other than “In accordance with the contract,”* namely, that as a condition of keeping possession, the buyers would have to pay \$150, instead of \$100, per month in the future, would have to pay an unspecified amount of costs and expenses and \$475 attorney’s fees set by the sellers themselves. *It is equally obvious that such a notice could not possibly convert buyers into tenants at will, since it required the buyers to do more than that for which the contract called, including unascertained costs and pre-determined attorney’s fees before suit.”* (Italics added)

The Bagnall notice likewise required the buyers to do something other than in accordance with the terms of the contract, namely to pay the accelerated balance. And, similarly to *Carroll vs. Birdsall*, Bagnall demanded unspecified interest. It is equally obvious that Bagnalls’ notice could not possibly put the defendants into default, or as staed by the *Carroll vs. Birdsall* court, “convert

buyers into tenants at will." The judgment against the defendants should, therefore be reversed, and the plaintiffs' complaint dismissed.

POINT V

BY ACCEPTING PAYMENT ON THE CONTRACT AFTER NOTICE OF FORFEITURE AND COMMENCEMENT OF SUIT, PLAINTIFFS WAIVED THEIR NOTICE AND REINSTATED THE CONTRACT.

The modification agreement specifically provided that the payments were to be made to the Bank of Ephraim. In conformity therewith, the great majority of the payments made by defendants after the signing of the modification agreement were made to the Bank of Ephraim. The agreement provided that plaintiffs were to set up the escrow. This they did, by means of an "Escrow Receipt." (Exhibit P-14). The only instruction contained in that "receipt" is a provision that money is to be withheld from the last payment sufficient to pay for revenue stamps upon recording. The "receipt" acknowledges receipt of the real estate agreement, the modification agreement and the warranty deed (Exhibit P 7), and agrees to deliver the documents in escrow according to the terms of the agreements. Certain understanding of the payment terms is then set forth. The "Escrow Receipt" is signed on behalf of the Bank of Ephraim, and by J. R. Bagnall. Nowhere does the signature of the purchasers appear (Exhibit P-14).

Over the years, the bank received certain documents which were to be delivered to the defendants upon completion of the escrow. It received certain correspondence from the Bagnalls, and it received payments from the

defendants and forwarded them on to the Bagnalls. At no time did it ever receive any correspondence from the Buyers (Testimony of Edgar Anderson, T-15) or anything for delivery to the purchasers — at least nothing to be delivered prior to payment of all of the installments, and etc.

On December 1, 1971, long after plaintiffs had commenced their suit to recover possession of the real property, defendants delivered to the escrow, the Bank of Ephraim, a monthly payment for \$400.00, which sum the bank accepted, receipted, posted to interest, and forwarded to the plaintiffs. (Exhibit D-18). Plaintiffs refused the monies and returned them to the bank where they were deposited to a checking account opened by Bagnall. (Exhibit P-27). It is the defendants' position that the acceptance of this payment, after notice of default, is wholly inconsistent with a forfeiture, effectively waived the forfeiture, and reinstated the contract, even if it were conceded that there had been a valid forfeiture.

So also with the notice to quit served upon Reed and Mildred Maxfield by mail, August 19, 1971. (See Amended Complaint R-95 and Exhibit P-46). The election by the plaintiffs to treat the contract as void, evidenced by the notice to quit, was wholly inconsistent with the notice of forfeiture previously served. If the forfeiture notice was sufficient to terminate the defendants' interest in the contract it was effectively waived by the inconsistent notice to quit alleging the modification agreement void, and constituting a repudiation of the agreement.

The rule is obvious that a vendor cannot claim a forfeiture and at the same time receive the purchase money, and does not warrant a multiplication of authorities.

“Accordingly, there can be no doubt that a vendor by receiving money when past due is precluded from availing himself of any right of forfeiture which has arisen because of the failure to pay the same on time.” 55 Am Jur P. 1018.

See *Krell vs. Cohen* (1921), 214 Mich. 590, 183 N.W. 53; *Maday vs. Roth*, 160 Mich. 291, 125 N.W. 13; *Barber vs. Stone*, 104 Mich. 90, 62 N.W. 139; *Patterson vs. Carrel*, 171 Mich. 296, 137 N.W. 158; *Rubenstein vs. Powers* (1921), 215 Mich. 438, 184 N.W. 589; *Walter vs. Lieverman*, 214 Mich. 428, 183 N.W. 235.

In the case of *Christy vs. Guild* (Utah 1942), 121 P.2d 401, the Utah court found that there had been no waiver of the notice of forfeiture by acceptance of payments because of the special provision against such waiver contained in the contract. The court did agree with the principle of waiver however.

Although it has been stated that the escrow “agent” is the agent of both parties (and the trial court so ruled), it is clear that the “agent”, if an agent at all, is a very special kind of agent. 28 AM. Jur. 2d, Escrow, Sec. 11 states:

“In a broad sense, every depository of an escrow is the agent of both parties . . . and he may, therefore, be looked upon as a special agent of both parties, with powers limited only to those stipulated in the escrow agreement . . . the escrow holder is merely a conduit used in the transaction for convenience and safety.”

The Restatement of the Law of Agency 2d., Section 14 D, says that an “escrow holder is not, as such, an agent of either party to the transaction until the event occurs which terminates the escrow relation.” In other words,

the escrow is actually a fiduciary, having a fiduciary relationship to each party to the escrow until he comes into possession of something which he is obligated to deliver to one party or the other. At that time he becomes the agent of the party to whom he is obligated to make the delivery. It is obvious that the bank was the agent of the Bagnalls for the collection and disbursement of the installment payments. The bank never became the agent of the defendants as is demonstrated by determining on whom the loss would fall if the bank were to default in its obligations or to embezzle the documents or payments.

If, after delivering a payment to the bank, the money should be embezzled, it is clear that the loss would fall on the plaintiffs. Having delivered it to the bank, the buyers had done all that was required of them under the contract, hence the bank must be the agent for the Bagnalls, and the loss would fall on them.

On the other hand, suppose the bank were to embezzle the warranty deed. Whose loss would it be? Could the plaintiffs avoid executing and delivering another on the ground that the escrow was the agent of the buyers? Certainly not! The water stock? Suppose that were lost by the bank prior to payment of the contract in full. Obviously Bagnalls again must bear the loss. In what way, then, is the escrow an agent of the buyers herein. Prior to payment of the contract in full, have the Bagnalls delivered anything to the escrow the title of which passed to the buyers? No! What kind of an agent of the buyers is this that holds nothing belonging to them, that, up to the present time at least, owes them no duty, and has performed no service for them? The trial court was clearly in error when it determined as a finding of fact

that the escrow was the agent of both parties. As a matter of law, *it could only be the agent of the Bagnalls.*

By service of the May 25, 1970 Notice of Forfeiture, the plaintiffs attempted to terminate the real estate agreement and the modification agreement, thereby effectively terminating the authority of the escrow. They neglected to notify the escrow, however, or to in any way apprise the Bank of the purported termination of the agreements, and the termination of the escrow authority. Quite the contrary, long after such purported termination and after their refusal to acknowledge the receipt of the \$400.00 payment to the bank, the Bagnalls utilized the escrow to their own advantage by attempting to correct some of their own defaults, i.e., on or about March 15, 1971, they deposited with the escrow six shares of Moroni Irrigation stock, and on or about April 3, 1973, they deposited ten shares of Chester Irrigation stock. (Testimony of Edgar Anderson, T-24, Exhibit P-13, 14).

Such actions by them are totally inconsistent with their position that the contract was at an end and the authority of the escrow terminated. How can they make their payments to the escrow (or, in other words, how can they deposit their stock into the escrow), expect to bind the defendants thereby, and yet deny the buyers the same privilege of paying into the escrow and binding the sellers? The answer is that they cannot! The case of *State vs. Wallen* (Minn. 1932) is illustrative of the principle. The court said the principle's "intent not to ratify agent's unauthorized acts does not prevent ratification by acceptance of benefits with knowledge." The point to be made here is that even though he does not want to ratify (or acknowledge the authority of the escrow) he will be found to have done so where his actions are in-

consistent with an intent not to ratify. The court further stated that the "principal cannot avail himself of the unauthorized acts of his agent, so far as it is advantageous to him, and repudiate the obligations. In other words he must acknowledge the authority of the bank (as he has done by depositing the water stock) or he must deny (as he attempted to do by refusing to accept the defendants payments). He cannot have it both ways.

The Utah court has spoken loudly and clearly on the effect of acceptance of payment by the escrow after notice of default to the purchaser. In the case of *The United States of America vs. Colombine Coal Company*, No. 12459, filed February 3, 1972, the United States of America brought suit against the Colombine Coal Company for foreclosure on two notes and the securities given therefor. The Economic Development Administration was the holder for one note in the sum of \$325,000, and the S.B.A. was the holder of the second note for \$100,000. The S.B.A., was also the servicing agent for both notes.

The coal company defaulted in the payments on the notes, and on December 1, 1969, the plaintiff gave notice that pursuant to the provisions in the notes, it was accelerating all payments and would thereafter not accept past due payments on either of the notes. Apparently the plaintiff did not notify the S.B.A. On January 15, 1970, the coal company paid to the S.B.A. the sum of \$79,226.83 which was received by the S.B.A., credited to unpaid interest and installments on the E.D.A. note and the surplus applied to the S.B.A. loan.

The E.D.A. attempted to disclaim the application of the proceeds as credited by S.B.A. Justice Ellett, writing for the court, held that the E.D.A. was bound by the ac-

ceptance and application of the payment by its servicing agent the S.B.A. "By accepting payment on delinquent interest and principal after notice of acceleration, the plaintiff waived its notice and reinstated the loan."

"It may be that the Colombine Coal Company is now in such arrears that it will not be able to pay the two notes, or it might be that if permitted it could pay both notes in full. Until a new notice is served upon it, there is no way of knowing that. All that we now hold is that by accepting payment on delinquent interest and installments after notice of acceleration had been given, the plaintiff waived the notice it had given."

Clearly, then, the Bank of Ephraim acted as agent for the plaintiffs only. It never became the agent of the defendant, having only a fiduciary's obligation to deliver the deed when the contract was paid in full. The defendants herein, as did the defendant Colombine Coal Company, knew that the plaintiffs had declared a forfeiture at the time payment was made to the escrow. Even so, the plaintiff was, and should be, bound by the acceptance of the payment by the escrow, thereby waiving the notice of forfeiture. See also *Damiano vs. Finney* (Idaho 1970) 464 P. 2d 522

POINT VI

EVEN ASSUMING PLAINTIFFS HAD VALIDLY FORFEITED THE CONTRACT, DEFENDANTS' OFFER TO PAY THE ENTIRE CONTRACT BALANCE AND THEIR OFFER TO PAY THE SAME INTO THE REGISTRY OF THE COURT SHOULD REINSTATE THE CONTRACT.

On September 28, 1972, defendant Lester R. Romero appeared before Judge Fredinand Erickson to-

gether with his counsel, Robert L. Lord, for hearing on various motions, including defendants motion to dismiss the complaint upon the grounds that valid tender had been made. At that time, Mr. Romero had with him savings certificates of approximately \$80,000.00 which were proffered to the Court in support of the motion. Judge Erickson refused to allow defendant to be heard on the motion, and refused to accept the proffer of proof. (See Letter of Mr. Lord dated October 11, 1972, and accompanying unsigned Order prepared for Judge Erickson's signature).

Defendants did thereafter make written tender of the entire contract balance, together with interest, taxes, and other sums due under the contract (Pre-Trial Order pp. 1 & 2, R-....). Although it does not appear anywhere in the record, it should also be noted that at the pretrial conference of September 29, 1973, or possibly one of the preceding sessions, defendants' attorney, Robert L. Lord, offered on behalf of the defendants, to pay \$70,000 into the registry of the court to be used if and when the defendants tender of the entire contract balance should be accepted and if the court had granted defendants' motion for summary judgment. Judge Harding stated in effect that that would not be necessary. Thereafter an escrow agreement was entered into between G. T. Lisonbee and Sanpete Land & Livestock Company wherein \$65,000 worth of savings certificates were deposited with Valley Bank and Trust. (See affidavit of Kerry G. Judd dated February 13, 1975, on file with the Supreme Court). The escrow of the certificates was again for the purpose of backing up the tender of payment in full.

While there appears to be little if any functional difference between an installment land contract and a

purchase money mortgage (both secure payment of unpaid purchase money, and, until the debt is fully paid, the buyer's rights are encumbered by a lien in favor of the unpaid seller), nevertheless, seemingly mostly for historical reasons, the law of land contracts and the law of mortgages have developed along separate lines. As a result, the rights of the land contract purchaser are governed largely by contract principles, while the rights of the defaulting mortgagor are governed by equitable principles.

“Thus, while at one time the defaulting mortgagor appealed to equity's discretion to allow him to redeem, after a time, the mortgagor's ‘right’ of redemption became so well established that the defaulting mortgagors did not have to show any special equity to invoke equity's power, and instead it became necessary for the mortgagee to foreclose the mortgagor's equity of redemption because, unless terminated by a court of equity (or under a statutory procedure for foreclosure), the mortgagor's equity generally continues indefinitely unabated. In contrast, specific performances and *relief from a forfeiture in the case of a defaulting land contract purchaser are discretionary*, such purchaser generally having no absolute right of redemption which the vendor must foreclose. However, there is some indication of movement in the courts in the direction of treating an installment land contract as substantially the equivalent of a mortgage or deed of trust.” (55 ALR 3d 17, emphasis added)

See *H & L Land Co. vs. Warner* (1972, Fla. App.) 258 So. 2d 293, wherein the court took the position that the purchaser and vendor under an installment land contract were in essentially the same position as a mortgagor and mortgagee. Further on on page 16 of 55 ALR 3d the annotator states:

“Thus, it would appear that notwithstanding general recognition of the validity of the time-of-essence and forfeiture provisions of installment land contracts, the rights of purchasers to specific performance is denied, and forfeiture of past payments, and improvements permitted, only in those instances in which the purchaser cannot, under the particular facts of the case, make out a case for equitable relief. *In the relatively rare instances in which specific performance has been denied under circumstances in which the purchaser tenders the full amount due, the grounds have often been that the nature of the defaults of the purchaser indicated an abandonment of the contract.*” (emphasis added)

The courts of many states have seized on almost any excuse to avoid a forfeiture.

For example, the Court of Appeals of Washington held in the case of *Will Rogers Farm Agency, Inc. vs. Stafford* (1971) 482 P.2d. 336, that a purchaser in default could avoid forfeiture of title under certain circumstances by paying into the registry of court an amount sufficient to bring the contract payments up to date and reimburse plaintiff's reasonable attorney's fees and costs. The Washington court had previously held that “Forfeiture are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.” *Dill v. Zielbe*, 173 P. 2d 977 at 1946. See also *Knowles v. Anderson* 22 P. 2d 657.

The Utah court has never squarely faced the issue of whether a buyer in default will be relieved of a forfeiture solely because he tenders payment in full or deposits the required amount with the court. The basic rule was laid down in the case of *Kohler vs. Lundberg* (Utah 1919)

180 P. 2d, 590. The purchaser of land under an installment land contract had defaulted and the seller brought an action for forfeiture. There was a dispute as to whether the seller had granted an extension of time to make the payment. The court held that the forfeiture would not be allowed and stated:

“Courts of equity are loath to enforce a forfeiture, especially when refusal to do so, as in this case, gives to all parties to the agreement every right to which they are entitled, and this in no way works a hardship upon anyone.”

Two years later *Tremonton vs. Horne* (Utah 1921), 202 P. 2d 547, was decided. The purchaser had failed to make payments due to fear that the vendor could not deliver marketable title. The court refused to allow a forfeiture, finding that the defendant had been ready and willing to pay all amounts due under the terms of the contract and that the same had been declined or refused by the plaintiff.

In 1955 the Utah court refused to allow a forfeiture because “refusal to do so * * * works no hardship upon anyone.” *Swain vs. Salt Lake Real Estate*, 279 P. 2d 709.

And finally, in the case of *Strand vs. Mayne* (1963), 14 U. 2d 355, 384, P. 2d, 396, the Utah court allowed forfeiture when a buyer defaulted on his payments, vacated, and later brought suit to recover his down payment and installments already paid. But Justice Henriod pointed out in his concurring opinion that:

“Had Strand sought specific performances, tendering into court the amount of their delinquent payments, the cases cited in the main opinion might be apropos. This is not a case where a seller is seeking to forfeit out a necessitous buyer under a uniform real estate contract, but one where a

buyer, showing nothing in the way of excuse for not carrying out his part of the contract, seeks to recover something from a seller willing to perform. * * * (emphasis added)

For additional references to cases in support of the defendants position herein, see *Jameson vs. Wurtz* (Alaska) 396 P.2d 68, 74; *McCormick vs. Grove* (Alaska) 495 P. 2d 1268; *Moran vs. Holman* (Alaska) 50- P. 2d 769; *Stockman's Supply vs. Jeane* (Idaho 1951), 237 P. 613; *Slobe vs. Kirby Stone, Inc.* (Nevada 1968), 447 P. 2d 491; *Barkis vs. Scott* (Cal. 1949), 208 P. 2d 367.

As is readily seen from the above discussion, the trend of many modern and progressive courts is to treat the installment land contract and the mortgage the same way, allowing the defaulting purchaser to reinstate the contract or to remedy his default by tendering the delinquency, by tendering the entire balance due, or by paying the money therefore into the registry of the court. Defendants herein, beginning with the first written tender in July, 1969, have repeatedly tendered payment of the delinquencies. In each instance the plaintiffs refused the tender. As recently as September 28, 1972, defendants attempted to demonstrate ability to pay with the proffer to Judge Erickson, and finally, on July 26, 1973, defendants tendered the entire balance due, and offered to pay \$70,000 into court to back up the tender. It is evident that plaintiffs all along believed, and continue to believe that the defendants can, in fact produce the monies to pay their tenders, else why have they continually failed to accept?

Here is a perfect opportunity for the court to do equity. If the defendants be in default (and it is vehemently denied) they should be relieved of that for-

feiture. “ * * * To do so * * * works no hardship upon anyone.” and all parties will then receive the benefit of their bargain.

POINT VII

THE COURT ERRED BY ALLOWING THE PLAINTIFFS TO PLEAD ALTER EGO AND, AT THE SAME TIME, MAINTAINING INCONSISTENT PROVISIONS IN THE PRETRIAL ORDER.

The pretrial order (R-....) provided that the 1970 notice of forfeiture upon which the plaintiffs' complaint is based, was directed to the Idaho corporation and would not be sufficient to terminate the purchasers interest under the contract if the plaintiffs had notice of a valid transfer to any of the successor corporations or parties. That order stands unchanged to the present time and is in direct contradiction to the finding of alter ego by the trial court. At the conclusion of the plaintiffs' case, defendant Maxfield moved for judgment and to be dismissed from the action upon the failure of the plaintiffs to prove alter ego. The motion was granted. Defendants likewise moved for judgment and to have the plaintiffs' complaint dismissed for the same reason, and in reliance upon the pretrial order. For reasons unknown to the writer, that motion was denied. Yet in its findings of fact, the trial court found that Reed Maxfield was the central and dominating personality behind all of the corporate entities. (Findings of Fact, paragraph 9)

In paragraph 2 of page 4 of the pretrial order the trial court determined that the July 9, 1969 letter from Don V. Tibbs, and the July 14, 1969, letter from Cree-L Kofford constituted rejections of defendants July 5

tender. In addition the pretrial order stipulated that the tender was not accepted (paragraph 15, p. 9). Yet the court found in paragraph 14 of its findings of fact that the defendants *refused* to make payments. The pre-trial order and the findings are mutually contradictory.

Paragraph 7, page 5 of the pretrial order states that the transfers from the Idaho corporation were valid, yet makes a finding that they were void, voidable and illegal. (paragraph 8 of the Findings of Fact).

It was the responsibility of the plaintiffs to move to amend the pretrial order if they so desired. Not having done so, the pretrial order should have governed the course of the trial. After having pleaded *alter ego*, the plaintiffs should have been required to amend the pre-trial order to properly state the issues and the status of the case. Defendants, in reliance upon the order, which was then almost totally ignored at the trial were prejudiced and should be granted judgment in accordance with the provisions of the pretrial order.

POINT VIII

THE COURT ERRED IN GRANTING THE PLAINTIFFS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The verdict of the jury is confusing, contradictory, and contrary to the evidence. Even so, the jury found for the defendants upon the critical issue of ability to perform their tenders. Defendants moved for judgment upon the verdict (even though they were obviously being shortchanged on damages for loss of the $\frac{1}{2}$ interest in the 140.15 acres and etc.) or, in the alternative, a new

trial. The plaintiffs moved for judgment notwithstanding the verdict which judgment was granted by the trial court.

A whole brief could be written pointing out the obvious home town prejudice of the jury as evidenced by its wholly illogical answers to the special interrogatories. Four short examples will suffice.

1) In special interrogatory 3, the jury determined that the fair market value, as of July 16, 1962, of the undivided one-half interest in the 140.15 acre tract of land containing 70% of the improvements was \$5,600.00. By the most liberal interpretation of the 1952 contract in the plaintiffs favor, the cost of the raw ground itself, without any improvements would have been \$93.00 per acre in 1952, or a value of \$6,573, in 1952 and without any improvements. Defendants' evidence showed a value in 1962 of approximately \$27,000.00!

2) The jury was made aware of the summary judgment quieting title to the $\frac{1}{2}$ interest in the 140.15 acres in United Paint and Color. The jury was also aware that the trial court had ruled that to constitute a defect for which the defendants were entitled to damages. Yet, in the face of that, they found in an answer to special interrogatory number 4 that the plaintiffs had, in fact, acquired and maintained marketable title. Such a finding, in the face of the evidence and the court's ruling is sheer nonsense and is sufficient, in and of itself to show undue prejudice on the part of the jury and against the defendants.

The jury also found that the plaintiffs were not in default because of their failure to deposit all water stock with the escrow as required by the modification agree-

ment. For crying out loud! If the plaintiffs do not have to comply with their part of the bargain, why, in heavens name, must the defendants comply with theirs?

3) The jury found, in answer to interrogatory number 7, that the plaintiffs had no obligation to respond to the tender made by Les Romero, even though it was timely made and the court had determined it to be valid tender (except for the question of ability to perform). The law itself, requires a response to a tender, and it is so legislated in Utah Code Annotated, 1953, 78-27-3. In other words, the jury finding is contrary to the expressed will of the legislature.

4) The jury found (Interrogatories 13 and 14) that the railroad right of way and the county road easements did not constitute defects in Bagnalls' title. It is obvious that they do constitute defects as a matter of law, and again demonstrates the bias and prejudice of the jury.

Even so, the jury found that the plaintiffs had failed to show, by clear and convincing evidence, that the defendants were not able to perform their tenders. In other words, even granting the jury's bias in favor of them, the plaintiffs utterly failed to produce any substantial proof on that vital point. It is quite clear that, had they produced anything at all, the jury would have found in their favor.

It may well be that the Court should disregard the jury verdict in this matter. That is well within its province since the jury is advisory only. However, it cannot pick and choose. If it disregards any portion of it, it must consider anew, all issues raised by the pleadings and the testimony. This the court failed to do. Had it considered the very compelling evidence that the mod-

ification agreement should be adjusted downward, by some \$54,000, and had it made a determination of the amount of damages to be awarded for the loss of the $\frac{1}{2}$ interest, for the loss of the county roads, for the loss of the railroad right of way, and for the loss of land still in the name of J. A. Bagnall, and etc., it could very well have determined that, not only was the contract not in default, but that the defendants were entitled to the warranty deed.

POINT IX

PLAINTIFFS' TESTIMONY ON ALL CRUCIAL MATTERS IS CONTRADICTIONARY AND AT ODDS WITH THE OBJECTIVE EVIDENCE AND SHOULD BE DISREGARDED

A reading of the entire transcript of testimony reveals instances in which the plaintiffs themselves are in disagreement over simple objective facts. It is apparent that plaintiffs attempted to present their testimony on certain crucial matters in the way they conceived most helpful to their cause. For example, Mr. Bagnall testified that the 1962 balance on the contract was determined from the rather sketchy records available to all family members and parties to the contract (T-89, 116; Depo. 21, 22). Mrs. Bagnall, on the other hand, testified that they maintained a very good set of books which were kept by a C.P.A. (T-161, 162).

Mr. Bagnall positively and definitely stated that he had never used his son's name. (T-14, Depo. - 75). It turned out that he did, however, and his own documentary evidence contradicts him. The deed of August 13, 1966, (Exhibit D-22) states that he is sometimes known as J.A. Bagnall (his son's name). Plaintiff stated at

his deposition that he used that name to clear up the title to the land so that they could convey a marketable title, if and when the contract was paid (Depo. 75, T-14). He actually tried to clear his son's interest in the land by his own warranty deed!

Both Mr. and Mrs. Bagnall testified that they had never heard of any corporation other than Suburbia of Idaho. (T-32). On the other hand, Mr. Tibbs, their own lawyer at the time, testified quite definitely that they knew of the Nevada corporation at least, and approved the assignment from the Idaho Corporation to the Nevada corporation. (T-83, 84). In addition to Mr. Tibbs' testimony, is the simple and compelling fact that both plaintiffs signed a deed to the Nevada corporation in September, 1965. (Exhibit D-32). Mrs. Bagnall, a qualified real estate agent with ten years experience testified that she did not understand that the deed was to the Nevada corporation. Fantastic!

Plaintiffs claimed ownership to a parcel of 17.45 acres of land that had been paid for in full in 1962, and to which the plaintiffs had issued, and delivered a warranty deed. They entered into an oil lease including the 17.45 acres and received the rental payments therefore. (Exhibit D-34). They sought to forfeit defendants' interest therein as part of the law suit and made claim therefore in their amended complaint. (R-96, 117). Mr. Bagnall testified at his deposition that he had never signed a deed to the property. When shown the deed he then backtracked and said that although he had signed it he had never delivered it. He vehemently asserted that he had never been paid one red cent for the 17.45 acres. (Depo. 81). At the trial, however, plaintiff's counsel stipulated that they were making no claim

for the 17.45 acres, and the defendants, in fact, introduced receipts showing payment, together with the deed from the plaintiffs. (Exhibits D-33, D-39).

Mr. and Mrs. Bagnall maintained at the trial that Maxfield made only one trip to California to see them, and that was in 1965. Yet on his deposition he stated that Maxfield had been to his home on two or three occasions, and that he had no knowledge one way or the other whether he had visited them in 1963 as testified to by Maxfield. (T-370, 371, Depo. 70)

A rather ridiculous tale is told by the plaintiffs that they went to the ranch in Chester right after the July 5, 1969 letter of tender and announced that they were there for their money at which time Maxfield offered them some stamps in some type of wholesale grocery business together with some cemetery lots. (T-165). All of this in direct contradiction to their own stipulation, entered into by their counsel *and* them at pre-trial conference specifically stating that *none* of the tenders, including the July 5 tender had been accepted, and in contradiction to all written demands for payment which demanded the whole unpaid balance.

As was discussed earlier, Mr. Bagnall supports the defendants testimony that Mrs. Bagnall stated that they did not want the money, they wanted the land back. Mrs. Bagnall denied making any such statement.

And so on.

CONCLUSION

It is respectfully submitted that the facts in this case clearly demonstrate:

1) That the plaintiffs themselves were, and are, in substantial and serious default under the terms of the Real Estate Agreement and the Modification Agreement. They did not put all of the water stock into the escrow until 1973. They cannot deliver unencumbered title to the five acres consumed by the railroad and the county road. They cannot deliver title, of any kind, to the .57 acres on which the main dwelling is located. They cannot deliver more than a $\frac{1}{2}$ interest in the 140.15 acres on which all of the rest of the improvements of any significance are located. They cannot deliver title to the approximately 5 acres owned by J.A. Bagnall, plaintiffs' son. 1.5 acres is owned of record by Caroline M. Hansen, Eva Josephsen Hansen, and Mark Sharp Hansen. The railroad appears to be the fee simple owner of a strip of land 1 chain by 40 chains along the eastern boundary of the property. Outstanding oil and gas leases still appear of record, and, as of the time the plaintiffs notified defendants of their alleged default, plaintiffs had entered into a new oil and gas lease which was filed of record, and they had not cleared the lis pendens which they themselves had filed regarding a prior action of foreclosure against defendants' assignors.

Time was made of the essence for both sellers and buyers by virtue of the Modification Agreement. Both parties waived that provision as a result of their actions, once having waived, neither party could put the other into default until such party had fully performed all of his own obligations. Clearly the plaintiffs could not default the defendants herein, and the judgment of the trial court should be reversed, the complaint of the plaintiff dismissed, and the matter remanded back to the district court for a determination of the balance due

under the contract, the offsets and damages to be allowed the defendants, a determination of the amount of default, if any, on the part of the defendants, and the court instructed to allow a reasonable time for the defendants to pay such defaults, if, indeed they exist at all.

2) Defendants tender of July 5, 1969, coming before the notice of default, and the tender of August 28, 1970, coming within the time allowed by the plaintiffs' notice, constituted timely and valid tender and should, therefore, have prevented the plaintiffs' notice of default from becoming effective, even if they had a right to default the defendants, which they did not. Passing upon the weight of evidence in the record, as this Court must, the conclusion that the defendants tender was valid is inescapable.

3) After tender by the defendants, the plaintiffs rejected those tenders and demanded the whole of the accelerated balance which demand was improper. Having rejected the tender and making improper demand for payment, their notice was fatally defective and void.

4) After notice of forfeiture, the escrow, acting as agent for the plaintiffs, accepted a payment on the contract and receipted and disbursed the same. That money is, even yet, in an ordinary checking account under the sole control of plaintiff. Such action clearly waives any effect the notice of default may have had.

5) The defendants have tendered payment in full (if anyone can ever figure out what it should be), offered to pay into the registry of the court, were told by the trial judge that that would not be necessary, and thereafter established an escrow of their own, and de-

posited the necessary funds therein. If nothing else, this alone should be sufficient for the court to "re-instate" the contract.

6) Precedural errors committed by the trial court were serious and prejudicial to the defendants, and the court's judgment should be reversed. As pointed out in Point VII, many of the rulings made at pretrial were contradicted by rulings made at the trial. The pre-trial order should have governed rather than being simply ignored.

For each, and for all, of the above reasons, the judgment should be reversed, the complaint dismissed, and the matter remanded to the district court for further proceedings in accordance herewith.

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 Defendants
Suburbia & Romero