

1969

## **Beneficial Life Insurance Company v. John Ellwood Dennett : Appellant's Brief**

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Attorneys for Appellant

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IN THE SUPREME COURT

of the State of

STATE OF

OFFICIAL LIFE INSURANCE  
COMPANY, a corporation,

*Plaintiff*

vs.

W. ELWOOD DENNEY

*Defendant*

Appeal from

District Court

The Honorable

W. ELWOOD DENNEY

se

East 2100 South

Lake City, Utah

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

BENEFICIAL LIFE INSURANCE

COMPANY, a corporation,  
*Plaintiff and Appellant,*

vs.

JOHN ELWOOD DENNETT,

*Defendant and Respondent.*

Case No.

11865

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APPELLANT'S BRIEF

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STATEMENT OF THE NATURE OF THE CASE

This is an action wherein Plaintiff, Beneficial Life Insurance Company, sought to recover possession of real property in an unlawful detainer action against Defendant, John Elwood Dennett.

## DISPOSITION IN THE LOWER COURT

The Trial Court granted summary judgment in favor of Defendant.

## RELIEF SOUGHT ON APPEAL

Appellant asks that the judgment of the lower court be reversed and that its Motion for Partial Summary Judgment be granted.

## STATEMENT OF FACTS

On October 26, 1964, Defendant and his wife executed a mortgage on real property located at 2879 Millicent Drive, Salt Lake City, Salt Lake County, Utah, in favor of Doxey-Layton Company, which mortgage was assigned to the plaintiff. Plaintiff foreclosed its mortgage in the District Court of Salt Lake County and purchased the property at Sheriff's sale on August 5, 1966. (Case No. 160928 Supp. R. 1-64) Defendant subsequently commenced an action against the Plaintiff, which, among other things, dealt with the same property. This action was dismissed with prejudice as against the Plaintiff on September 7, 1967. (Case No. 174076 Supp. R. 1-33) In connection with the dismissal Defendant executed the following General Release: (R. 34, 35)

## GENERAL RELEASE

/s/ H. D.      /s/ J. E. D.

FOR VALUE RECEIVED, and for a reciprocal and mutual release the undersigned do, by these presents, release and discharge BENEFICIAL LIFE INSURANCE COMPANY and all of its officers, directors,

agents, representatives and employees, and Milan B. Robbins, Jay A. Meservey and Eugene Watkins, of and from all and all manner of actions and causes of action, judgments, executions, debts, dues, claims and demands of every kind and nature whatsoever, which against the said Beneficial Life Insurance Company, its officers, directors, agents, employees, and representatives, and Milan B. Robbins, Jay A. Meservey and Eugene Watkins they ever had, or now have, or which they or their heirs, executors, or administrators may now, or may hereafter, have by reason of any cause of action whatsoever involving the subject matter set forth in a Complaint filed with the District Court for Salt Lake County, State of Utah, entitled *John Elwood Dennett vs. Beneficial Life Insurance Co., Milan B. Robbins, Jay A. Meservey, Eugene Watkins, Melvin Teerlink, Doxey Layton Company, Newspaper Agency Corporation and The Salt Lake Tribune*, being Civil No. 174076, and by reason of any alleged wrongful foreclosure or other grievance or cause of action or problem whatsoever in connection with the taking of title and foreclosure proceedings by Beneficial Life Insurance Company relative to properties at 3879 Millicent Drive, Salt Lake City, Utah and the properties at 2359 East 3080 South, Salt Lake City, Utah, which at one time were owned by Mr. and Mrs. Bernard G. Schact, and any other cause whatsoever to date. It is the intent of this Release to be broad and all inclusive so that any cause of action whatsoever which the undersigned may have to date against the said Beneficial Life Insurance Company, its officers, directors, agents, repre-

sentatives, employees, and Milan B. Robbins, Jay A. Meservey and Eugene Watkins, shall be forever waived and released; *expressly reserving*, however, any cause of action which the undersigned may have against Doxey Layton Company and Melvin Teerlink by reason of the facts and matters alleged in an action which is pending in the District Court, Third Judicial District in and for Salt Lake County, State of Utah, entitled *John Elwood Dennett vs. Beneficial Life Insurance Co., Milan B. Robbins, Jay A. Meservey, Eugene Watkins, Melvin Teerlink, Doxey Layton Company, Newspaper Agency Corporation and The Salt Lake Tribune*, being Civil No. 174076.

Dated: September 6th, 1967.

/s/ John E. Dennett

John Elwood Dennett

/s/ Herta K. Dennett

Herta K. Dennett

On the same date, September 6, 1967, Plaintiff, as seller, and Defendant, as buyer, entered into a Uniform Real Estate Contract relative to the property which is the subject of this action, wherein Defendant agreed to pay the sum of \$34,613.59, was given conditional credit for a down payment of \$3,613.59 represented by a judgment note, and agreed to pay the balance of \$31,000.00 at the rate of \$266.00 per month, with the first payment due on October 1, 1967. (R. 51-58, 58-63, 309) The Uniform Real Estate Contract contained the following provisions:

16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within thirty days thereafter, the Seller at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land, become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorney's fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the



State of Utah and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a Complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

16D. The Buyers agree, if the attached Judgment Note is not paid strictly at maturity, that Seller may immediately and without notice declare a forfeiture under the provision of paragraph 16A herein, and Buyer shall lose all interest of any kind whatsoever in the said properties; and Seller shall be entitled to immediate possession.

*Addendum*

Remedies provided under Paragraph 16(A) of this contract shall not be available to Seller at any time after the attached Judgment Note has been paid. All other remedies shall be available at any time.

Defendant made the payment of \$266.00 that was due on October 1, 1967, but made no payments thereafter. No payment was made on the judgment note, and it was not paid at maturity. (R. 51-53, 75-77) Plaintiff is still the owner of the fee title, and is shown as the fee title owner on the records of the Salt Lake County Recorder. (R. 51-53, 75-77, 309)

Eight days later, on September 14, 1967, Defendant filed a Chapter XII proceeding in the United States District Court for the District of Utah. He was adjudged a bankrupt in that proceeding on December 4, 1967. (R. 335) His adjudication as a bankrupt was appealed to the United States Court of Appeals for the Tenth Circuit, where it was affirmed. (R. 38-40, 398-400) The Supreme Court of the United States denied certiorari on June 2, 1969, 23 L.Ed. 451.

On January 12, 1968, (R. 38-40, 398-400) the Referee in Bankruptcy executed the following Order, authorizing Beneficial Life Insurance Company to go forward in enforcing its rights under the Uniform Real Estate Contract, and ordering Beneficial Life Insurance Company to account to the Bankruptcy Court for the monies received from the sale of the property:

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

In the Matter of	Bankruptcy No. B-1153-67
JOHN ELWOOD DENNETT,	
Bankrupt.	ORDER

The petition of Beneficial Life Insurance Company came on regularly for hearing in the Bankruptcy Court on January 11, 1968, at 4:45 o'clock p.m., before the Honorable Bruce S. Jenkins, Referee in Bankruptcy, at Room No. 224, U.S. Courthouse, Salt Lake City, Utah, which hearing was held pursuant to notice duly given by the Clerk of the Bankruptcy Court on January 2, 1968, to

John Elwood Dennett, for himself, and to J. Thomas Greene, attorney for Petitioner. The Petitioner, Beneficial Life Insurance Company was represented by its attorneys, J. Thomas Greene and Milan B. Robbins. John Elwood Dennett was not present in Court, although the matter was held in abeyance for several minutes awaiting his arrival. It was observed in the record that written as well as actual notice of the hearing, was given to Mr. Dennett. The Court having fully reviewed the file, including an appraisal report submitted by a Court-appointed appraiser, Sterling Webber, under date of January 4, 1968, and having heard arguments and being fully advised, and good cause appearing therefor,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED:**

1. The petition of Beneficial Life Insurance Company for a disclaimer of any interest of the bankrupt or any representative of the bankrupt in and to real property described in the Uniform Real Estate Contract dated September 6, 1967, between Beneficial Life Insurance Company as Seller and John Elwood Dennett as Buyer, a copy of which Uniform Real Estate Contract is attached to the Petition herein, is held in abeyance pending further information and evidence relative to value and as to other liens on the property.

2. The Petition of Beneficial Life Insurance Company for leave to take judgment against the said John Elwood Dennett and Herta K. Dennett in an action pending in the District Court of Salt Lake County, State of

Utah, in accordance with the Waiver, Entry of Default and Stipulated Judgment attached to the Petition, and to reduce the Judgment Note attached to the Petition to judgment, is hereby granted.

3. The Petition of Beneficial Life Insurance Company for leave to serve a Notice of Forfeiture upon the said John Elwood Dennett pursuant to the terms of the Uniform Real Estate Contract dated September 6, 1967, a copy of which is attached to the Petition, and to pursue all of its rights and remedies thereunder, is hereby granted.

4. The Petitioner, Beneficial Life Insurance Company is required to account to the Court for any monies and values which may be derived from the sale of the premises over and above the unpaid balance due and owing to the Petitioner, Beneficial Life Insurance Company, under the said Uniform Real Estate Contract dated September 6, 1967, plus expenses and costs which may be added under the terms of the said Uniform Real Estate Contract, expenses and costs which may be incurred or taxable in proceedings to exercise rights pursuant to leave granted herein, and any expenses and costs which may be incurred in connection with obtaining possession, the sale and preparation for sale of the subject premises. The Petitioner, Beneficial Life Insurance Company, is further required to file a report with the court relative to the disposition of the properties in question together with an accounting relative thereto.

Dated: January 12, 1968.

BY THE COURT:

/s/ Bruce S. Jenkins

BRUCE S. JENKINS

Referee in Bankruptcy

Room No. 224, U. S. Courthouse

Salt Lake City, Utah 84101

Served a copy of the foregoing Order upon John Elwood Dennett by mailing a copy thereof, postage prepaid, c/o John Elwood Dennett at 1243 East 2100 South, Salt Lake City, Utah, and also at 2879 Millicent Drive, Salt Lake City, Utah, this 12th day of January, 1968.

/s/ J. Thomas Greene

On January 12, 1968, the following notice was mailed to Defendant by counsel for the Plaintiff: (R. 54, 55)

January 12, 1968

**CERTIFIED MAIL**

Mr. John Elwood Dennett

1243 East 2100 South

Salt Lake City, Utah

Dear Mr. Dennett:

As you know, this law firm represents Beneficial Life Insurance Company in connection with a certain Uniform Real Estate Contract dated September 6, 1967, entered into between Beneficial Life Insurance Company as Seller and John Elwood Dennett as Buyer, and covering properties at 2879 Millicent Drive, Salt Lake City, Utah. The said Uniform Real Estate Contract is in default and has been in default for some time. The amount in default which was due and payable as of January 1, 1968, is \$4,411.59.

You are hereby notified that the Seller, Beneficial Life Insurance Company,

ficial Life Insurance Company, elects to exercise all of its rights and remedies pursuant to Paragraphs 16A and 16D of the said Uniform Real Estate Contract. Accordingly, you are notified that:

Beneficial Life Insurance Company hereby declares a forfeiture of the contract, and of all interest of any kind whatsoever in the said properties which you ever had or might claim. You are further notified that Beneficial Life Insurance Company is entitled to immediate possession of the premises.

Beneficial Life Insurance Company elects to re-enter and take possession of the premises together with all improvements and additions thereon immediately.

If you fail within five days after receipt of this written notice to remedy the default, in lawful unencumbered monies of the United States, Beneficial Life Insurance Company shall be released from all obligations in law and in equity to convey said property to you, and the payment which has heretofore been made in the amount of \$266.00 shall be forfeited to Beneficial Life Insurance Company as liquidated damages for non-performance of the contract.

This notice is served pursuant to leave granted by the United States District Court by the Honorable Bruce S. Jenkins, Referee in Bankruptcy, as is evidenced by Order date January 12, 1968, a copy of which is enclosed herewith.

Please govern yourself accordingly.

Yours very truly,

/s/ J. Thomas Greene

J. Thomas Greene

A copy of the notice was served personally on Defendant on February 19, 1968. (R. 54, 55, 58-63)

At the time of the service of the January 12, 1968 notice, the sixty-day judgment note, which had matured and was in default, had not been paid and only the one \$266.00 contract installment had been paid. (R. 51-53, 75-77) The contract, therefore, had been in default since November 1, 1968, with the 30 day grace period having expired on December 1, 1968. Defendant made no tender, or attempt to make payment or to rectify the default and delinquency, as called for in the January 12, 1968 notice, within five days after service of the notice upon him. (R. 51-53, 75-77)

Defendant subsequently filed a petition with the Referee in Bankruptcy asking that the relief granted to Plaintiff in the order of January 12, 1968 be stayed until the matter was ruled upon by the Tenth Circuit Court of Appeals. The Referee in bankruptcy did not act immediately on this petition, in fact he took it under advisement for a period of several months. (R. 398-400)

On May 27, 1968, counsel for the Plaintiff mailed the following letter to the Defendant: (R. 144, 145)

Mr. John Elwood Dennett, Esq.  
1243 East 2100 South  
Salt Lake City, Utah  
Dear Mr. Dennett:

There is enclosed herewith a copy of a letter dated May 21, 1968 from Salt Lake City Corporation, City Board of Health, to Beneficial Life Insurance Company concerning a complaint re-

garding the property at 2889 Millicent Drive. As you can see, the City Board of Health insists that the properties be free of weeds and refuse at all times.

Beneficial Life Insurance Company, as the owner of the property, is vitally concerned that the ordinance be complied with, and that the grounds for the complaint be eliminated immediately. As you know, Beneficial Life has declared a forfeiture of your interest in the premises, and takes the position that you have no legal interest in the properties. We consider that your continued possession and occupation of the premises is wrongful, and that it is in violation of law. Accordingly, your continued insistence upon maintenance of possession pending judicial determination of your status as a bankrupt is, of course, subject to an accounting to Beneficial Life for loss of rentals, loss of value, unlawful detainer, costs and attorneys fees and damages. Naturally, anything you do or fail to do which harms the property or detracts from its value must be accounted for.

You should take immediate steps to comply with the Board of Health requirements. If you fail to do so, Beneficial Life will assert as a new and independent ground for dispossession and damages any failure to comply with Board of Health requirements in violation of the City ordinance.

Please govern yourself accordingly.

Yours very truly,

/s/ J. Thomas Greene

J. Thomas Greene

On July 15, 1968, the United States Court of Appeals



for the Tenth Circuit affirmed the decision of the United States District Court for the District of Utah, which had adjudged Defendant a bankrupt. (R. 36, 37) On September 30, 1968, the Referee in Bankruptcy denied Defendant's Motion to Reconsider the Order of January 12, 1968, which motion had been under advisement by the Referee for several months. On October 3, 1968, Defendant was served with a notice to vacate by mailing and posting, (R. 144, 145) and on October 21, 1968, Defendant was personally served with the same notice to vacate. (R. 58-63) The notice read as follows:

#### NOTICE TO VACATE

TO: John Elwood Dennett

1. You are hereby notified that because the default under that certain Uniform Real Estate Contract dated September 6, 1967, was not remedied pursuant to the Notice dated January 12, 1968, a copy of which is attached hereto and made a part hereof as though fully set forth herein, you are now a tenant at will of the premises located at 2879 Millicent Drive, Salt Lake City, Salt Lake County, Utah, said property being more specifically described as follows:

All of lot 1, OAK HILLS, Plat "H", except the Easterly 3 feet thereof. Also the Easterly 18 feet of the property next adjacent and on the West side of said lot, described as being 18 feet wide and having the same north-south dimensions as said Lot 1, the north-south bounds of which are either the same as or parallel to the western boundary of said Lot 1.

2. You are further notified to vacate said premises within five (5) days from service of this Notice upon you. If you fail to do so, you will be considered in unlawful detainer of said premises and legal proceedings will be commenced against you to recover possession of said premises and treble damages for the period of unlawful detention, together with all costs and expenses of said action.

Dated this 3rd day of October, 1968.

Cannon, Greene, Nebeker &  
Horsley

By /s/ J. Thomas Greene

/s/ Milan B. Robbins

Milan B. Robbins

Attorneys for Beneficial Life  
Insurance Company

400 Kennecott Building

Salt Lake City, Utah 84111

On October 23, 1968, Defendant tendered to the Plaintiff the sum of \$7,052.00. (R. 71) The tender was rejected. (R. 75-77) On October 28, 1968, Plaintiff filed an unlawful detainer complaint against Defendant in the District Court of Salt Lake County. (R. 1-15) In response to the Complaint Defendant initially filed only a Motion to Dismiss. (R. 20) He thereafter filed an Answer which contained only a general denial, (R. 50) and an Amended Answer. (R. 58-63) Defendant claimed in his Amended Answer, his Affidavits (R. 73-77) and in hearings before the Court, (R. 398-400) that he was no longer the owner of the property, but that he had conveyed it to C. Dwayne Harrison in January of 1968.

C. Dwayne Harrison also filed an Affidavit (R. 69) in which he alleged that he took possession of the property on January 1, 1968, and was still in possession. No document of transfer was ever produced, however. Notwithstanding the claim of transfer of ownership, at a hearing on September 25, 1969 (R. 384-386) Defendant admitted that he was then claiming to be the owner of the contract interest.

After an exchange of interrogatories and answers thereto, requests for admission of facts and answers thereto and the depositions of Defendant and C. Dwayne Harrison, each of the parties filed a Motion for Summary Judgment. (R. 56, 126) Plaintiff's Motion was a Motion for Partial Summary Judgment, asking for possession of the property. After hearings on the motions and after submission of memorandums, the Trial Court entered Findings of Fact and Conclusions of Law (R. 234-240) and entered a Summary Judgment in favor of Defendant and against the Plaintiff. (R. 233) After hearing a motion by Defendant to amend the Findings of Fact and Conclusions of Law, the Court entered an order on its own motion striking the Findings of Fact and Conclusions of Law, (R. 256-258) and entered another order denying Plaintiff's motion for Partial Summary Judgment and granting Defendant's Motion for Summary Judgment. (R. 259)

#### POINT I

DEFENDANT WAS GUILTY OF UNLAWFUL DETAINER ON THE DATE PLAINTIFF FILED ITS COMPLAINT, AND THE TRIAL COURT THERE-

# FORE ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

It appears that the Trial Court considered the only pertinent issue in the case to be the legal sufficiency of the notices served upon Defendant. This is evidenced by the comments of the Court at the hearing on May 20, 1969, (R. 329-381) his Memorandum Decision (R. 208-276) and the Findings of Fact and Conclusions of Law which he originally signed, (R. 234-240) then set aside. (R. 256-259) The Trial Judge stated his views about notices required under uniform Real Estate Contracts generally (R. 365 thru 380), and made the following statements concerning the contract in the instant case, and the notices which were served:

Now, the Supreme Court, as I understand their decisions, has stated that, first, five-day notice is given and if it isn't complied with, then you have the right to elect your remedy under 16(A) *and you've got to do that by another notice to the buyer that you have made that election, and it isn't until that second notice is given that he then becomes a tenant at will*, and then the Supreme Court says that it's only after a buyer becomes a tenant at will under Paragraph 16 of the contract that he is subject to the unlawful detainer provisions of the statute.

. . . Now, this notice of January the 12th says pay up within five days or else the company will be released from all obligation. Well, that notice isn't either quite in conformity with 16(A) or 16(D), and this gives me some real problems in this case because I don't think that your January 12th notice makes Mr. Dennett a tenant at will.

(R. 369) (Emphasis added)

. . . If you are relying on 16(D) your notice ought to be limited to that. If you are going to rely on 16(A), then first, if he doesn't comply after that first five-day notice *then you've got the right to elect to make him a tenant at will, and as I read the Supreme Court cases, to make him a tenant at will you've got to give him another notice*, and it isn't until he is a tenant at will that he's amenable to the unlawful detainer statutes. (R. 369, 370) (Emphasis added.)

. . . *In other words, you can't give him a five day notice and say: you pay up or else in five days you're a tenant at will. I think the Supreme Court doesn't go that far with it. It says that it's upon the failure to remedy the default within five days' written notice that you shall have the right to do something and that something is based upon an election that he is given notice of . . .* (R. 371) (Emphasis added)

Now, your notice of September '68 [sic October 3, 1968] didn't give him any choice to pay up or get out, it just says get out. Now, I think your notice may be deficient under the Supreme Court decisions with respect to making him guilty of unlawful detainer, and if he isn't guilty of unlawful detainer at the beginning of the action you can't make him guilty of unlawful detainer after the action is filed. It's his status at the time the complaint is filed that we've got to look to to decide whether or not your action is well taken. Now, those are things that trouble me in this case since I've taken the time to go through and digest everything in one look, if I can put it that way, which suggests to me that maybe they had a right — you served the notice on them on

October 21st and on October 23rd he tenders full payment of the note and full payment of the delinquent payments under the contract and they are refused. Now, you refuse his full tender of payment of both the note and the balance due on the contract and file a lawsuit. Now, whether or not I should grant his motion to dismiss is the question before me. *I'm going to decide it, I think, on the merits of that question, not on the problems pending in the Federal Court on the bankruptcy or the problems you both mention with respect to authority. This case will not be decided for or against either of you on those points . . .* (R. 372, 373) (Emphasis added)

. . . As I see it, the question as to whether or not you were entitled at the time you filed your complaint to maintain an unlawful detainer action depends upon whether or not the notices required by the contract and by the statutes have properly been given and complied with or not complied with. Now, that's as I see the problem.

Now, this is something that I don't want to decide now. I've simply been trying to give you the benefit of my thinking on this thing, both of you, with the thought in mind that you ought to both take a look at that and let's cut out the chaff in this case and *take a look at the guts of the thing and see whether or not under the facts in the record we've got the necessary requirements to maintain an unlawful detainer action.* If so, then I'll deny the motion, and I'm not too sure that that leaves us too much as far as issues of fact remaining to be tried in a trial is concerned. If you weren't entitled to maintain or file a complaint at the time you filed your complaint to start this case, then probably I've got to grant his motion for summary judgment of

dismissal and you've got to start over with respect to the *necessary notices required under the statute to put him in an unlawful detainer status*, (R. 374, 375) (Emphasis added)

. . . I think that a memorandum here ought to go to the guts of this case *and what are the statutory requirements with respect to unlawful detainer and were the notices that are required under the statute complied with*, so that when you filed your complaint on October 28th, five days after these checks are tendered, was he guilty of unlawful detainer, and in that respect consider the question as to whether or not he must — I think he must be guilty of unlawful detainer on October 28th, '68, for you to file your lawsuit. Whether or not he is under the contract and the statutes and the notices given is the real question as I see it in this case (R. 377) . . . I would like you to *concentrate on those points that I suggest because I think that's what the case ought to be decided on* . . . (R. 379) (Emphasis added)

The Trial Court's memorandum opinion recited:

In considering the default provisions of uniform real estate contracts, *I have had serious question in my mind that the notice of the exercise of the option to re-enter and take possession under 16(A) or to pursue 16(B) or to pursue 16(C), allowable upon failure to remedy the default within five days after written notice could be given in the same notice as the notice to remedy the default within the five day period that is required under 16(A) before the right to be released from all obligation to convey the property and to forfeit all payments arises. I am inclined to the view that a second notice should be required, but assuming that one notice can serve as*

the vehicle by which the seller can both make a demand to remedy the default within the five days and give notice of the option which the seller will follow, we must, it seems to me, under the strict compliance requirements in unlawful detainer actions required under Supreme Court decisions, at least require that such notice be clear, unambiguous and in conformity with the express provisions of Paragraph 16 of the contract.

*The notice of January 12, 1968, does not in my opinion, meet that requirement. The elections made are not based upon failing to meet the requirement of remedying the default, but rather upon the default itself. With the case law already having established that, notwithstanding the express provisions of Paragraph 16 of the Uniform Real Estate Contract, unconscionable forfeitures will not be allowed and repossession by force or otherwise without legal procedures will not be tolerated, the allowable remedy should be in accordance with the stated requirements of notice. (R. 208-216) (Emphasis added)*

In its Findings of Fact and Conclusions of Law, which the Court signed, but later set aside, the Court made the following conclusions of law: (R. 239)

1. The notice dated January 12, 1968, was not sufficient to make Defendant a tenant at will and thus subject to the five day notice to quit.

2. Under the terms of the Uniform Real Estate Contract a second notice is required after the default has not been remedied within five days, giving notice to the buyer of the seller's election to either take possession of the premises, sue for delinquent installments under Paragraph 16(B)



or foreclose the contract as a mortgage under Paragraph 16(C).

3. Plaintiff having failed to give the second notice, defendant was not a tenant at will when the five day notice to quit was served upon him, and is not in unlawful detainer.

4. Defendant is entitled to a judgment of dismissal.

The Utah Supreme Court has considered unlawful detainer actions commenced after forfeitures of real estate contracts on several occasions. All of the cases recognize a necessity for two clear notices *prior to the commencement of the action*. First, a *notice of election of forfeiture*, and second, a *notice to quit*. None of the cases require more than a notice of forfeiture, non-compliance therewith, a notice to quit, and subsequent unlawful detainer complaint. The Trial Court in the instant case, however, appears to require *three* notices preceding the filing of a complaint. First, a notice of intent to forfeit, second, a notice of election of forfeiture, and third, a notice to quit. This Court has recognized that *one* clear and unequivocal notice of election of the remedy of forfeiture is sufficient to constitute a buyer under a real estate contract as a tenant at will where forfeiture provisions are deemed to be non-self-executing. This Court has never required more than one clear notice to create such a tenancy at will.

#### *Applicable Unlawful Detainer Cases*

*Leone v. Zuniga*, 84 Utah 417, 34 P.2d 699 (1934) was an unlawful detainer action by a seller against the

buyer under a real estate contract wherein the seller had elected to forfeit the contract. No notice of forfeiture was served, the first action being the filing of a complaint asking restitution of the premises and attorney's fees. The contract contained the following provision:

In the event of a failure to comply with the terms hereof, by the Buyer, or upon failure to make any payments when the same shall become due, or within sixty days thereafter, the Seller shall, at his option, be released from all obligations in law and equity to convey said property and the said Buyer shall forfeit as liquidated damages, all payments which have been made theretofore on this contract, and the Buyer agrees that the Seller may, at his option re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land and become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller. It is agreed that time is of the essence of this agreement . . .

The court discussed cases involving self-executing forfeiture provisions and forfeiture provisions which were not self executing. In reaching the conclusion that the forfeiture provisions were not self executing and reversing the trial court's judgment granting possession to the Seller, the court said:

We are aided in reaching this conclusion by the provision of R.S. Utah 1933, 104-60-3. (now 78-36-3 Utah Code Annotated, 1953) It is there

provided that: "a tenant of real property, for a term less than life, is guilty of an unlawful detainer . . . In cases of tenancies at will, where he remains in possession of such premises after the expiration of a notice of not less than five days."

Where a contract contains a self-executing provision for forfeiture as in the case of *Bergman v. Lewis*, supra, the purchaser may well be said to know when his tenancy is at an end, and hence he is not entitled to notice. But when, as here, the forfeiture provision of the contract is not self-executing, but, on the contrary, vests in the seller a further option to either re-enter the premises or to continue to permit the purchaser to remain in possession thereof as a tenant at will, then in such case the purchaser in default is at a loss to know what is required of him. Unless advised to the contrary he may assume that he will be permitted to perform his contract. If he vacates the premises, he may be confronted with an action to enforce the contract. If he fails to vacate the premises he may be met with a suit for possession together with the expenses incident thereto.

*Forrester v. Cook*, 77 Utah 137, 292 Pac. 206 (1930), was an unlawful detainer action involving a real estate contract with a self-executing forfeiture provision. One of the points raised on appeal by the buyer was the fact that the notice served upon them requiring them to vacate did not give them the alternative of performing the condition of their agreement with respect to which they were in default. In rejecting that contention the court said:

. . . In other words, the notice should have been served, and subsequent action brought, pursuant to comp. laws Utah 1917, Section 7315, sbd. 5, whereas the plaintiff relied upon and proceeded under subdivision 2 of said section. This is without merit. The agreement under which defendants were in possession of the premises made them tenants at will of the plaintiff upon failure to comply with any of its terms "or upon failure to make any payment when the same shall become due or within sixty days thereafter." The notice to quit was served in accordance with subdivision 2 of Section 7315, which provides that a tenant at will of real property is guilty of an unlawful detainer "where he remains in possession of said premises after the expiration of a notice of not less than five days."

*Christy v. Guild*, 101 Utah 313, 121 P.2d 401 (1942) was an unlawful detainer action originally commenced in the City Court of Salt Lake City, appealed to the District Court of Salt Lake County and then to the Supreme Court of Utah. The Seller served the defaulting buyer with the following notice:

Unless you (comply by May 12) you shall, in accordance with the provisions of said contract, and by the election of said Sellers, forfeit as liquidated damages all payments heretofore made by you on said contract and will become a tenant at will . . .

The default was not remedied within the time specified and a five day notice to quit was served. The buyers did not quit the premises within the five days and an unlawful detainer action was commenced. After the notice to quit was served, the buyers tendered the contract

payments, but they were refused. In upholding this refusal and the trial court's granting restitution and treble damages to the seller the court said:

. . . What we do determine is that appellants defaulted in the performance of the terms of the contract, as a result of which after giving appellants an opportunity to perform respondents, in accordance with the specific terms thereof, terminated the same and declared appellants to be tenants at will; that in view of the evidence the trial court properly directed a verdict in favor of respondents determining that they have the right of possession of the promises involved.

*Jacobson v. Swan*, 3 Utah 2nd 59, 278 P. 2d 294 (1954) dealt also with a Uniform Real Estate Contract, and a situation where payments were tendered after notice to quit. The court rejected the contention that tender need be accepted where payments were delinquent, and said:

Even if there had been legal tender, which seems questionable in light of other evidence introduced, Jacobsons would not be compelled to accept such a late payment and thereby reinstate all of Swans' rights under the contract.

*Fuhrman v. Bissegger*, 13 Utah 2d 379, 375 P. 2d 27 (1952) was an unlawful detainer action involving a uniform real estate contract with terms very similar to the contract in the instant case. The contract gave the seller the option to forfeit if the buyer failed to make payments when they were due, or within thirty days thereafter. The original buyers were husband and wife. They were later divorced, leaving only the husband as

the buyer. He was a feeble-minded individual, having the intelligence of a child of approximately seven years. The payments were delinquent for over four years. No written notices were given during that time, however, the seller talked to the buyer on numerous occasions. The Supreme Court held that the forfeiture provision was not self-executory, and that it was incumbent upon the seller, in order to exercise his option to forfeit, to give sufficient notice of his election to the buyer. The court further held that the conversations were of such an uncertain nature that the buyer could not be held to have received any notice whatsoever.

The court regarded the "decisive question" as being whether before commencement of the action there had been "sufficient notice of forfeiture." In holding that no actual and sufficient notice of intent to forfeit the agreement was given the court stated:

The contract provided that if the buyers failed to make payments as they became due, or within thirty days thereafter, the seller *at his option* could forfeit their rights and retake possession. This type of forfeiture provisions, not being self-executory, it was incumbent upon Fuhrman to have exercised his option to forfeit their rights by giving Alfred Bissegger, who has succeeded to his divorced wife's interest, *sufficient notice of his election to terminate the contract and forfeit his right therein.* (Emphasis added)

*Pacific Development Co. v. Stewart*, 113 Utah 403, 195 P.2d 748 (1948) was an unlawful detainer action commenced under Section 104-60-3 Utah Code Annotated

1943 (now 78-36-3 Utah Code Annotated 1953). The agreement was a uniform real estate contract containing a twenty-day grace period, the only alternative remedy being, at the seller's option, the forfeiture provision, which was similar to the remedy provided in paragraph 16A of the contract in the instant case. After the buyer had been in default on numerous occasions, and numerous requests had been made to bring up the back payments the seller served a notice on the buyer which was also very similar to the notice in the instant case. It read as follows:

You are hereby notified that the real estate contract by and between the Pacific Development Co. as seller and yourselves as purchaser, for the purchase of the house and lot located at 1069 East 5th South, Provo, is now in default on your part by reason of nonpayment of principal and interest in the amount of five hundred fifty-seven dollars and fifty cents (\$557.50), and that unless the full amount of said payments and interest in default are paid to the undersigned attorney for the seller within seven days (7) from date the seller elects to declare said contract forfeited in accordance with the terms thereof.

Subsequent to the notice, negotiations began between the buyer and the seller, but the buyer could not come up with the full amount of unpaid payments. Approximately two weeks later a notice to quit was served on the buyers giving them five days in which to bring the contract up to date or return possession to the seller. Seven days after the notice was served the complaint was filed. The trial court rendered a no cause of action decree, and the

plaintiff appealed. The Supreme Court in its opinion indicated that the provisions of the contract contemplated a notice from seller to buyer that seller intended to exercise his option of forfeiture. Such notice was not given immediately upon any of the defaults first occurring, but that did not mean that the seller was going to continue such conduct forever. The trial court concluded that the notice and demand were not reasonable. The Supreme Court did not agree with the conclusion of the trial court, and in reversing the decision and ordering issuance of a writ of restitution said:

. . . The notice (quoted above) informed the defendants that the plaintiff intended, after many lenities, to insist upon its forfeiture rights under the contract at least to past due payments. That the defendants understood plaintiff's intentions is shown by their actions — they immediately began negotiations for further time in which to bring their payments up to date.

*Van Zyverden v. Farrar*, 15 Utah 2d 367, 393 P.2d 468 (1964) dealt with a uniform real estate contract with terms almost identical to the contract in the instant case, except that the contract in the instant case has a paragraph 16D and an Addendum. On December 1, 1961, the Vendor sent a notice to the Purchaser to remedy its default or quit the premises. On January 16, 1962, the Vendor commenced an unlawful detainer action. On February 10, 1962, the Vendor served another notice upon the Purchaser requiring him to pay or quit within five days. The trial court held that the Vendor had not given proper notice to satisfy the unlawful detainer



statute, Section 78-36-3 Utah Code Annotated, 1953. In discussing the contract the Supreme Court said:

The contract provides that for failure of the buyer to make payments when due, or within 30 days, the seller, *at his option* shall have alternative remedies including:

“... upon failure of the buyer to remedy the default within five days after written notice, to be released from all obligations . . . and forfeit all payments as liquidated damages . . . the buyer becoming at once a tenant at will . . .”

This provision requires the seller to make his election; and the buyer is entitled to notice that he has done so. It is not until this is accomplished that the buyer actually becomes a tenant at will. It is only after the buyer is in a status of a tenant at will that he is amenable to the notice provided by Section 78-36-3, which requires him to vacate within five days or be guilty of unlawful detainer . . .

The Court held that whether a cause of action for unlawful detainer exists is to be determined at the time the action is commenced, and that the notices were insufficient to impart notice of an election of the optional forfeiture remedy under Paragraph 16A.

#### *Legal Principles Relative to Forfeiture Notices*

In summary of the foregoing cases, it is only after a buyer is in the status of a tenant at will that he is amenable to the notice provided by Section 78-36-3, Utah Code Annotated, 1953, which requires him to vacate within five days or be guilty of an unlawful detainer.

When the forfeiture provision is not self-executing the seller must give the buyer clear and unequivocal notice of his election of the forfeiture remedy, and if the contract so requires, time in which to remedy the default. The notice to remedy the default and the notice of election of the remedy may be given in the same notice, and only one such notice need be given. If the notice is clear and unequivocal, and the default is not remedied, the buyer, pursuant to the terms of the contract, becomes a tenant at will.

*Application of Legal Principles to Instant Case*

In applying the foregoing legal principles to the contract in the instant case, it is necessary to consider Paragraph 16, 16A, 16B, 16C, 16D and the Addendum. These provisions have all been reproduced verbatim in the Statement of Facts.

The Addendum provides that the remedies under Paragraph 16A shall not be available to the seller at any time after the judgment note had been paid. Paragraph 16A is the forfeiture provision. Since the judgment note had not been paid at the time of the service of the first notice upon defendant, the forfeiture provision was still available to the plaintiff.

Paragraph 16D also dealt with the judgment note and provides that if it is not paid strictly at maturity the seller may immediately, and without notice, declare a forfeiture under the provision of 16A. Since the judgment note was not paid at maturity, and was not paid at the time of the first notice, the seller, the plaintiff,

was entitled to make election of the forfeiture provision. Paragraph 16D could be construed so as to render forfeiture self-executing without notice upon occurrence of the default in failing to pay the judgment note "strictly at maturity." In any event, it could only enlarge the rights of the seller where there was such a default. Since the paragraph expressly incorporates Paragraph 16A we shall proceed on the assumption that the rights of the seller under 16D and 16A are identical.

Because of the fact that neither the addendum nor Paragraph 16D prevented the use of Paragraph 16A, it is likely that they are of no legal significance, except as noted, and hence will not be considered in the further discussion.

The preliminary wording of Paragraph 16 provides that in the event of the failure of the buyer to comply with the terms of the contract or to make payment or payments when the same shall become due or within thirty days thereafter, the seller, at his option, has three alternative remedies. 16A is the forfeiture provision; 16B is a provision allowing the seller to sue for delinquent installments; and 16C allows the seller to pass title and foreclose the contract as if it were a mortgage. The notice of January 12, 1968, included the following language:

You are hereby notified that the Seller, Beneficial Life Insurance Company, elects to exercise all of its rights and remedies pursuant to Para-

graph 16A and 16D of the said Uniform Real Estate Contract.

This is a clear and unequivocal notification of election of the forfeiture remedy, as provided in Paragraph 16A. It does not state that the plaintiff will elect; it states that the plaintiff does and has elected that remedy.

Paragraph 16A is a non-self-executing provision, similar to those in *Christy v. Guild*, *Pacific Development Company v. Stewart* and *Van Zyverden v. Farrer*, *supra*. It provides that if the buyer fails to remedy the default within five days after written notice, the seller is released from all obligations to convey the property and all payments which have been made theretofore on the contract by the buyer shall be forfeited to the seller as liquidated damages for the non-performance of the contract and that the seller at his option, can re-enter and take possession of the premises, the buyer becoming at once a tenant at will of the seller. The trial court was concerned because of the fact that the preliminary wording of Paragraph 16 uses the term "at his option," as does Paragraph 16A. In this regard, and in apparent pre-supposition that an additional notice of election of forfeiture is contemplated under Paragraph 16A itself the Trial Court asked counsel what options the seller has under Paragraph 16A. The preliminary wording of Paragraph 16 gives the seller an option to select one of three remedies. There can be no retreat from this election of remedies. The option within Paragraph 16A is clearly explained in *Leone v. Zuniga*, *supra*, wherein

the Court construed a virtually identical provision, stating that it:

. . . Also vests in the seller the further option to either re-enter the premises or to continue to permit the purchaser to remain in possession thereof as a tenant at will . . .

The trial court in the instant case may have interpreted the *Van Zyverden* case, supra, as holding that two notices are required under the contract, before the purchaser becomes a tenant at will, and subject to a five day notice to quit. This idea may come from the fact that the Supreme Court discussed the words "at his option" in connection with the forfeiture remedy provided in Paragraph 16A of the contract. However, as discussed in *Van Zyverden*, these words are contained in the preliminary wording of paragraph 16, and refer to the three alternative remedies, Paragraphs 16A, 16B, or 16C. The holding of the case is that the vendor must make his election of the alternative and give clear notice to the purchaser of that election. If the remedy elected is the forfeiture remedy under Paragraph 16A, and the notice to remedy the default within five days is given and remains uncomplished with, the purchaser then becomes a tenant at will. It is only when he becomes a tenant at will that he is amenable to the five days notice to quit required to be served upon a tenant at will. In *Van Zyverden* each of the three notices was a notice to remedy the default or quit the premises, and the third was served after the filing of the unlawful detainer complaint. There was no clear notice given of an election of the remedy

of forfeiture, and that is the defect pointed out in that case. The written notices were insufficient because they did not contain reference to the forfeiture remedy. In *Fuhrman v. Bissegger*, supra, the oral notification was not sufficient.

No magic words are required in electing the forfeiture remedy. The crucial ingredient appears to be a clear and unequivocal expression that forfeiture has been elected. The cases do not require, in the presence of a clear and unequivocal notice of election of the forfeiture remedy, that a further notice be given. Such further notice would only be surplusage.

The notice of January 12, 1968, includes the following language:

Beneficial Life Insurance Company hereby declares a forfeiture of the contract, and of all interest of any kind whatsoever in the said properties which you ever had or might claim. You are further notified that Beneficial Life Insurance Company is entitled to immediate possession of the premises.

Beneficial Life Insurance Company elects to re-enter and take possession of the premise together with all improvements and additions thereon immediately.

If you fail within five days after receipt of this written notice to remedy the default, in lawful unencumbered monies of the United States, Beneficial Life Insurance Company shall be released from all obligations in law and in equity to convey said property to you, and the payment which has heretofore been made in the amount of

\$266.00 shall be forfeited to Beneficial Life Insurance Company as liquidated damages for non-performance of the contract.

This is a clear and unequivocal notice that the plaintiff had declared a forfeiture of the contract and had elected to take possession of the premises, but that the default could be remedied within five days after receipt of the notice. The notice also specified that the amount in default, the sum of \$4,411.59.

The notice of January 12, 1968, therefore, cannot be interpreted any way other than giving clear notice to the buyer that the seller had exercised his option to select remedy 16A, that the seller had declared a forfeiture, that the seller had exercised his option to re-enter and take possession of the premises, but that he would not do so if the default were remedied within five days after receipt of the notice. The terms of the contract made the buyer a tenant at will, and subject to a notice to vacate under the unlawful detainer action if the default was not remedied within five days. The legal effect of the notice is to put the buyer in the status of a tenant at will. The notice clearly elects the forfeiture remedy of Paragraph 16A, which provides that upon failure of the buyer to remedy the default within five days he becomes a tenant at will. Although the precise words "tenancy at will" are not found in the January 12, 1968, notice, such were incorporated by reference to Paragraph 16A. In any event, the status and the creation of a tenancy at will is a matter of law, being the legal effect of a valid forfeiture election.

If Defendant had any question whatsoever about Plaintiff's intentions, and the fact that it had elected the forfeiture remedy, and elected to take possession of the premises, such doubts should have been resolved by the letter mailed to him on May 27, 1968, which included the following language:

Beneficial Life Insurance Company, as the owner of the property, is vitally concerned that the ordinance be complied with, and that the grounds for the complaint be eliminated immediately. As you know, Beneficial Life has declared a forfeiture of your interest in the premises, and takes the position that you have no legal interest in the properties.

Even under the trial court's theory as to the necessity of two forfeiture-type notices before a notice to quit, this notice could qualify as a second notice. It is categorically affirmed, however, that only one clear notice of forfeiture is needed, and this letter is only evidence of the unequivocal and absolute election of that remedy.

The defendant, therefore being a tenant at will, was amenable to the five day notice to quit served upon him on October 21, 1968. Plaintiff had no obligation whatsoever to accept the tender of the payments that was made on October 25, 1968. Defendant's only course of action after being served with the notice to quit was to quit the premises.

Under familiar rules of contract law the entire agreement must be read and construed as a whole, and a construction must be placed thereon which would render



all of the provisions of the contract consistent and meaningful, if possible.

Time was of essence of the contract, and acceptance of a late tender would have been inconsistent with the absolute election of the forfeiture remedy previously made, and a waiver of past defaults.

Once the remedy of forfeiture is elected the seller is bound by the course taken, and all other remedies under the contract are lost. Without doubt the seller would be bound by the course of action taken in his election of remedies. He could not step backward and later decide to start over or elect one of the other optional remedies.

In light of the foregoing it is submitted that the trial court erred in its view that the notices of January 12, 1968 and May 27, 1968 did not constitute an election of remedies and give defendant notice of that election. It follows that the trial court erred in granting summary judgment against Plaintiff on that basis.

#### POINT II

#### THE TRIAL COURT ERRED IN NOT GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY

Rule 56, Utah Rules of Civil Procedure, provides:

(a) . . . A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

Following are the essential allegations of Plaintiff's Complaint, keyed to the paragraph numbers of the Complaint on file: (R. 1-15)

1. Plaintiff is a corporation, having its home office in Salt Lake City, Utah.

2. Plaintiff is the owner of the real property located at 2879 Millicent Drive, Salt Lake City, Utah.

3. Plaintiff, as seller, and Defendant, as buyer, entered into a Uniform Real Estate Contract dated September 6, 1967, relative to the property at 2879 Millicent Drive, Salt Lake City, Utah.

4. Defendant made only one payment to the Plaintiff under the terms of the Uniform Real Estate Contract, namely a payment in the amount of \$266.00, and has not paid the judgment note given as down payment.

5. On January 12, 1968 and February 19, 1968, the defendant was served with a notice requiring him to remedy the default within five days, electing the remedy of forfeiture and electing to take possession of the property. Defendant did not remedy the default within the five days.

6. On October 21, 1968, Defendant was personally served with a notice to vacate.

7. Defendant has failed to vacate the premises.

8. Plaintiff is entitled to immediate posses-

sion of the premises, and Defendant is in unlawful detainer of the premises.

The Complaint of the Plaintiff prayed for an order restoring it to possession of the premises, judgment for treble damages against Defendant and costs. Plaintiff's Motion for Partial Summary Judgment asked only for an order of possession, leaving the matter of treble damages to be decided at a later date. An analysis of each of the pertinent allegations of Plaintiff's Complaint will show that there is no genuine issue as to any material facts, and that Plaintiff is entitled to a judgment of possession as a matter of law.

**1. Plaintiff is a corporation having its home office in Salt Lake City, Utah.**

While this may not be an allegation essential to obtaining possession of the premises, it was the first allegation of the Complaint, and should therefore be considered. Paragraph 1 of the Second Defense in Defendant's Amended Answer (R. 58) may well be construed as an admission of this allegation. In addition, Paragraph 1 of the affidavit of Max E. Jenson (R. 51) states that Beneficial Life Insurance Company is a Utah corporation, having its home office in Salt Lake City, Utah. This affidavit was not controverted by Defendant.

**2. Plaintiff is the owner of that certain real property located at 2879 Millicent Drive, Salt Lake City, Utah.**

The Sheriff's return of sale in the mortgage foreclosure action (Supplemental R. 62) shows the sale of

the property to Beneficial Life Insurance Company. The affidavit of Max E. Jenson (R. 52) states that Beneficial Life Insurance Company is the fee title owner of the property. Paragraph 3 of Defendant's affidavit (R. 75) admits that Beneficial Life is the fee title holder of record. Also at the hearing before the trial court on January 9, 1969, on Plaintiff's Motion for Partial Summary Judgment defendant admitted upon questioning by the Court that Plaintiff is shown as the owner of the property in the office of the Salt Lake County Recorder. (R. 309)

**3. Plaintiff, as seller, and Defendant, as buyer, entered into a Uniform Real Estate Contract dated September 6, 1967, relative to the property at 2879 Millicent Drive, Salt Lake City, Utah.**

A copy of the Uniform Real Estate Contract was attached as an exhibit to Plaintiff's Complaint, (R. 1-15) and other copies appear in various places in the record. Defendant's amended answer (R. 58) admits all of the allegations of Paragraph 3 of Plaintiff's Complaint, which is the allegation relative to the contract.

**4. Defendant made only one payment to the Plaintiff under the terms of the Uniform Real Estate Contract, namely a payment in the amount of \$266.00, and has not paid the judgment note.**

The affidavit of Max E. Jenson (R. 52, 53) asserts that only one payment was made to Beneficial Life Insurance Company under the terms of the contract, that the records of the company show no payment or tender of payment within five days from February 19, 1968,

and no knowledge of any payment or tender of payments within that time. The affidavit of J. Thomas Greene (R. 55) asserts that he, as counsel for Beneficial Life Insurance Company, neither received payment nor tender of payment within five days from February 19, 1968. In his affidavit (R. 75, 76) Defendant admits that the only payments, other than the original \$266.00 payment were those payments which were tendered on October 23, 1968. As discussed in Point 1, Plaintiff was under no obligation whatsoever to accept the tender of payments subsequent to the election of forfeiture and subsequent to the notice to quit.

**5. On January 12, 1968 and February 19, 1968, the Defendant was served with a notice requiring him to remedy the default within five days, electing a remedy of forfeiture and electing to take possession of the property. Defendant did not remedy the default within the five days.**

Defendant's Answer (R. 59) admits these allegations. The notice is set out verbatim in Plaintiff's Complaint (R. 7), and is set forth verbatim in the Statement of Facts herein. Also the Affidavit of J. Thomas Greene (R. 54, 55) states that he mailed the notice to Defendant on January 12, 1968, and personally served Defendant with a copy thereof on February 19, 1968. As noted, and admitted by Defendant, payment was not made within five days.

**6. On October 21, 1968, Defendant was personally served with a notice to vacate.**

Defendant's Answer (R. 59) admits personal service

of this notice to vacate on October 21, 1968. In addition the Affidavit of J. Thomas Greene (R. 144, 147) shows that a copy of the notice was posted on the premises and mailed to Defendant on October 3, 1968, the date of the notice.

**7. Defendant has failed to vacate the premises.**

In Defendant's amended answer (R. 58, 63), his affidavits (R. 73-77) and in several hearings before the Court, (R. 398-400) Defendant asserted that he was in possession of the property, but that his possession was with the permission of C. Dwayne Harrison, the owner "by assignment" of the buyer's contract interest. However, the complete ineffectiveness and impropriety of this defense is shown by Defendant's admission before the Court during the hearing of September 25, 1969, at which time Defendant admitted that he was really claiming to be the owner at all times during the pendency of the proceeding, and where he also admitted that he did not vacate the premises after service of the notice to vacate. The following discussion took place during that hearing (R. 384-386):

MR. GREENE: It is absolutely clear you are the owner.

MR. DENNETT: Absolutely.

MR. GREENE: Not Mr. Harrison.

MR. DENNETT: Mr. Harrison was the owner in the interim, but I was originally the owner and I am the owner now . . .

MR. DENNETT: It says that, "Defendant

did not remedy the default or vacate the premises within the 5-day period." That is true, but it implies something that is false. It implies that it was vacated after the 5-day period, and that is a false inference . . .

**8. Plaintiff is entitled to immediate possession of the premises, and Defendant is in unlawful detainer of the premises.**

This allegation is a legal conclusion from the facts alleged and proved in the previous seven paragraphs. Plaintiff has established that it is the owner of the real property in question, that the parties entered into a Uniform Real Estate Contract dated September 6, 1967, that Defendant defaulted in the terms of the contract and that the notice of January 12, 1968 was served upon him. The notices gave him notice of the election of the remedy of forfeiture, gave him notice of the election of Plaintiff to take possession of the property and gave him notice that he could remedy the default within five days from service of the notice upon him. He did not remedy the default within the five days, and thereby became a tenant at will. He was served with a notice to vacate on October 21, 1968. He did not vacate within the five-day period. Even though he did tender payments to the Plaintiff subsequent to service of the notice to vacate on October 21, 1968, Plaintiff was not obligated to accept the tender, and it was therefore ineffectual. Defendant is therefore in unlawful detainer of the premises, and Plaintiff is entitled to a partial summary judgment, restoring it to possession. The matter of reasonable rental value, treble damages and any other

applicable matter can be considered at a subsequent proceeding in the case.

### CONCLUSION

Plaintiff-Appellant urges the Court to reverse the judgment of the Trial Court and order Plaintiff restored to possession of the property in question, granting its Motion for Partial Summary Judgment.

Respectfully submitted,

CANNON, GREENE, &  
NEBEKER

J. Thomas Greene

John H. Allen

Milan B. Robbins

400 Kennecott Building

Salt Lake City, Utah 84111

*Attorneys for Plaintiff and  
Appellant*