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R. Michael Anderson and Robert H. Anderson v. Wilshire Investments, L.L.C. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPLEALS

R. MICHAEL ANDERSON and ROBERT H. ANDERSON, **Petitioners, Appellants,** **vs.** **WILSHIRE INVESTMENTS, L.L.C.,** **Respondent, Appellee.**	**Appellate Court No. 20020726** **PRIORITY NO. 14**

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE FOURTH DISTRICT COURT, WASATCH COUNTY, THE HONORABLE DONALD J. EYRE PRESIDING, ENTERED AUGUST 9, 2002

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I. JURISDICTIONAL STATEMENT

R. Michael Anderson and Robert H. Anderson appeal the August 9, 2002 order of the district court denying their petition for removal as a wrongful lien the respondent Wilshire Investments, L.L.C. $4.9 million trust deed filed against the Andersons' 61 acre property, and denial of the Andersons' request for attorney's fees and costs. The Supreme Court had jurisdiction over this appeal under Utah Code Ann. §78-2(3)(j), then transferred this case to the Court of Appeals under Utah Code Ann. §78-2-2(4). This Court acquired jurisdiction under Utah Code Ann. § 78-2a-3(2)(j).

II. STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue #1: Whether in a summary disposition proceeding under the *Wrongful Lien Act,* Utah Code Ann. §38-9-1 et seq, a trial court adjudicating a petition to remove a lien as wrongful, has subject matter jurisdiction under Utah Code Ann. §38-9-4(3) to nullify recording of a trust deed as wrongful, when by uncontroverted evidence it is shown at the time of its recording that a trust deed was:

--groundless; or

--contains a material misstatement of fact; or

--contains a false claim.

This issue of statutory interpretation is a question of law for which the Court of Appeals shall grant the District Court no deference, applying a correction of error standard. (*Russell v. Thomas,* 2000 UT App 82*)* Andersons preserved this issue for appeal by their argument

before the court on May 8, 2002, their notice of objection to the proposed order from the May 8, 2002 hearing, their reply memorandum in support of that objection; their argument before the court on July 17, 2002, their notice of objection to the order proposed order from the July 17, 2002 hearing and their amended reply memorandum in support of that objection.

Issue #2: Where in a summary disposition proceeding a court hearing a petition to remove a lien as wrongful refuses to weigh or consider the affidavit evidence presented to it, because the court determines that without full discovery under the Utah Rule of Civil Procedure it cannot properly adjudicate the claims before it; can the court nevertheless make findings of fact that disposes of those claims with prejudice?

This is a question of law for which the Supreme Court shall grant the District Court no deference, applying a correction of error standard. *Hunsaker v. State,* 870 P. 2d 893, 896 (Utah 1993). Andersons preserved this issue for appeal by the arguments made in their notice of objection to the proposed order from the May 8, 2002 hearing, their reply memorandum in support of that objection; their argument before the court on July 17, 2002, their notice of objection to the order proposed order from the July 17, 2002 hearing and their amended reply memorandum in support of that objection. In any event, Rule 52(b) Ut.R.Civ.P. provides fo review of the sufficiency of the court's findings in a bench trial.

Issue #3: Where in a summary disposition proceeding the only evidence presented to a court is by affidavit; does the failure of the respondent lien holder to controvert the petitioner's averments on facts that are dispositive of the merits of the case, require a court

to grant the petition for removal of the lien?

The uncontroverted facts before this Court present questions of purely statutory construction, which are reviewed for correctness. *St. Benedict's Dev. Co. v. St. Benedict's Hosp.,* 811 P.2d 194, 196 (Utah 1991). The court only applied the law to one fact (the Andersons' signature on the trust deed), but in the event this involves the application of law to the facts, it is reviewed for abuse of discretion. *Platts v. Parents Helping Parents*, 947 P.2d 658, 661 (Utah 1997). Andersons preserved this issue for appeal by the arguments made in their memorandum in chief to the court; their argument before the court on May 8, 2002, their notice of objection to the proposed order from the May 8, 2002 hearing, their reply memorandum in support of that objection; their argument before the court on July 17, 2002, their notice of objection to the order proposed order from the July 17, 2002 hearing and their amended reply memorandum in support of that objection.

III. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES

The constitutional provisions, statutes, ordinances and rules which pertain to this appeal are fully set forth in the addenda hereto where not fully set forth in the body of this brief. At Addendum C the *Wrongful Lien Act,* located at Utah Code Annotated Sections 38-9-1 through 38-9-7, at Addendum D the *Effect of Recording Act*, located at Utah Code Annotated Sections 57-4a-1 through 57-4a-4 and at Addendum E the *Conveyances Act*, located at Utah Code Annotated Sections 57-1-1 through 57-1-44 are fully set forth in the addenda hereto.

IV. STATEMENT OF THE CASE

On August 29, 2001 Wilshire instructed the recording of a $4.9 million trust deed against the Andersons' 61 acre parcel of land in Midway, Utah. Wilshire's refusal to advance at the time of closing $1.5 million of the $3.9 million loan secured by the Andersons' 61 acre property[1], caused the Andersons to petition (R.1- 11) under Utah Code Ann. §38-9-1 et seq (*The Wrongful Lien Act*) alleging that the deed of trust in favor of Wilshire Developments was wrongful. Wilshire Investments filed a cross-petition and supporting affidavits (R. 32-36; R.141-148).

The court ruled the Andersons' signatures on the $4.9 million trust deed to Wilshire conclusively proved the trust deed was expressly authorized under other sections of the *Wrongful Lien Act* and other State statutes, and so denied the Andersons' petition for summary nullification. (R. 469 @37) But the court also ruled that the Andersons' claims under Utah Code Ann. §38-9-4(3) were viable and that the Andersons could prosecute those claims. (R. 469@37)

After the Andersons objected to Wilshire's form of order. (R. 163-166) On May 22, 2002 the court, in response to those objections, signed a minute entry stating,

> *"The Court received a fax from Mr. Ady entitled Order Denying Petition for Nullification of Wrongful Lien. There is nothing for the Court to rule upon at this time. There appears to be a disagreement as to the form of the proposed order."* (R. 168)

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[1]The remaining $1 million in vigorish on the Andersons' trust deed to Wilshire apparently being claimed by it as a part of its loan origination fee.

Appellants, in an attempt to obtain a ruling from the court and in an effort to avoid appeal, filed a Motion for New Trial (R. 238-239), supporting memorandum (R. 225-237) and affidavit (R. 220-223), asserting that a trust deed is not expressly authorized by statute if it violates the express prohibitions in subsection 38-9-4(3) of the *Wrongful Lien Act*. A Motion/Objection Hearing was scheduled for July 17, 2002.

Preliminary to the rehearing Appellants served Wilshire with a subpoena duces tecum returnable before the court at the July 17, 2002 hearing. (R. 268-269) Among the documents subpoenaed were those relating to:

-- Wilshire's claim it waived recordation of mortgage documents required for the advance of the $1.5 million loan principal it withheld from the Andersons, and

-- Wilshire's admission it withheld $1.5 million of the loan principal, authorized release of $2.05 million of the escrowed funds and unilaterally instructed recordation of the trust deed against the Andersons' property, because it "suspected" the the Springs of St. Moritz Resort, L.L.C. was not acting in good faith. (R. 262-267)

Wilshire Investments entirely refused to produce at the July 17, 2002 hearing (or otherwise) any of the documents subpoenaed. (R. 470 @26)

At the second hearing, the court denied Petitioners' motion for a new hearing and re-affirmed its May 8, 2002 verbal rulings including its finding that the Andersons had an action against Wilshire under section 38-9-4(3) of the *Wrongful Lien Act*. (R.470@5; R.470@8; R.470@51; R.470@52) When in its proposed form of order Wilshire substituted

a reference to Section 38-9-7(4) for Section 38-9-4(3) of the *Act*, Andersons again objected. (R. 280-282)

After further briefing on these objections[2], including reference to the court's repeated statements it would not weigh the evidence without further discovery[3], the court overruled the Andersons' objections. Appellants appeal the entire August 9, 2002 order, which purports to dismiss only a "portion" of the Andersons' wrongful lien claim, but concludes the Wilshire lien was expressly authorized by Utah law and that it was not a wrongful lien. (R. 304-306) Also appealed is the order denying Appellants' Motion for New Trial or Re-Hearing under Rule 59(a) Ut.R.Civ.P. and its denial of Petitioners' claim for attorney's fees and costs. (R. 470@ 11; R.470@ 12; R.470@ 15; R.470@ 54)

V. STATEMENT OF FACTS

1. All evidence before the district court was submitted by affidavit. The Andersons' evidence on dispositive issues was uncontroverted.

2. In June of 2001 the Andersons agreed to sell for $9.4 million their 61 acre property, known as the Resort property, in Midway, Utah (which appraised at $9.2 million dollars in 2000), to a development company, the Springs of St. Moritz Resort, L.L.C. (the "Springs"). (R. 442) Because the Springs did not have the funds to complete the purchase of the Andersons' 61 acres, it brought in an Idaho investor, Jay Hulet, as an additional equity

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[2]See the Petitioners Notice of Objections and Amended Reply Memorandum (R.273-277; R.292-298).

[3] See R.469@26; R.469@ 36 and 470 @ 9; R.470@ 46.

interest and acquired rights to purchase with a down payment of $1.5 million, Jay Hulet's lands in Idaho. (R. 441) These lands were valued at $15 million.

3. The Springs also acquired the rights to purchase for $2.365 million, twenty plus acres adjacent to the Andersons' Midway, Utah property (R. 440-441). This adjacent parcel was known as the Johnson property.

4. Once the Springs had acquired the right to purchase the Anderson, Johnson and Hulet properties, it brought in a purported hard money lender, Wilshire Investments, L.L.C. (Wilshire). Wilshire was to front the $3.953 million necessary to complete the Springs' purchase of the Johnson and Hulet properties. These funds would be advanced to the Springs under the terms of a promissory note with a face value of $4.9 million, secured by mortgages or trust deeds for the same value on the Johnson and Hulet properties (R. 440-441).

5. Because the Hulet properties would have a loan to value ratio of less than 33%, the Springs would then obtain construction financing to take out the Wilshire hard money loan, commence construction on the Johnson property and then complete the purchase of the Andersons' 61 acres (R. 440-441).

6. On August 16, 2001 as an inducement to the Andersons to permit the recording of the Wilshire trust deed for $4.9 million on the Andersons' 61 acres, Wilshire advised R. Michael Anderson that Wilshire was also requiring a trust deed on the Andersons' property because:

i. the Andersons would benefit from Wilshire providing the loans to the Springs

of St. Moritz for the purchase of the **Johnson and Hulet properties**, so that the Springs would be able to use those properties as collateral to obtain construction financing to take out the Wilshire $4.9 million loan and purchase the Andersons' 61 acres; and

ii. Wilshire was requiring the trust deed on the Andersons 61 acres to ensure they would sell it to the Springs; and

iii. In the event of default Wilshire would foreclose upon the Johnson and Hulet properties, but not upon the Andersons land (R. 438-441).

7. By a letter dated August 16, 2001 , David Turcotte, a Salt Lake attorney and one of the principals of the Springs, confirmed the substance of Wilshire's representations to the Andersons (R. 438-439). Before the Andersons would provide Wilshire with the trust deed on the 61 acres, they required cross-collateralization on the Hulet properties in Idaho. To fulfill this requirement the Springs executed a mortgage for $9.4 million to the Andersons, to be recorded as a second mortgage (behind the Wilshire $4.9 million mortgage) on the Hulet properties in Idaho (R. 438).

8. On August 20, 2001 Wilshire paid $2.365 million into the trust account of Security Title, the escrow agent, for the purchase of the Johnson property (R. 437). Security Title was also the escrow agent on the closing on the Hulet properties in Idaho, and both the Utah and Idaho closing were to occur simultaneously. The $2.365 million in funds were to be dealt with pursuant to Wilshire's escrow instructions of August 21, 2001. (R. 436; R.444, ex. G)

On August 21, 2001 the Andersons deposited with Security Title their trust deed for $4.9 million to Wilshire on the 61 acres in Midway, Utah. (R. 438)

9. On August 22, 2001 Wilshire amended the closing instructions in its letter of August 21, 2001 (R. 437-438, R.444, ex. G). In substance, the amendment provided that so long as the $2.365 million for the Utah closing was not released into the Utah closing until the $1.5 million for the Idaho closing was in place, documents could be recorded in Utah independent of the recording of documents in Idaho.

10. The Andersons were notified of this change and their concurrence requested. Specifically relying on Wilshire's August 22, 2001 amended closing instructions that the $2.365 million in Utah would not be released until the $1.5 million had been advanced and documents had recorded in Idaho; on August 24, 2001 the Andersons' amended their closing instructions to allow the recording of the trust deed to Wilshire on the 61 acres, independent of the Idaho closing (R. 436; R.444, ex.H).

11. After August 24, 2001 but prior to August 29, 2001, Wilshire, without notice to the Andersons, discharged Security Title as the escrow agent on the Idaho closing. Then, on August 29, 2001 Wilshire, again without notice to the Andersons, reversed its August 22, 2001 closing instructions to Security Title and instructed the immediate recording of documents in Utah and the release of most of the $2.365 million to the Utah payees (R. 435). The Andersons' trust deed to Wilshire on the 61 acres was recorded on August 29, 2001. Security Title released funds the next day (R. 435; R.444, ex.I).

12. Wilshire's deliberate refusal to advance the $1.5 million for the Springs purchase of the Hulet properties, deprived the Andersons of all consideration Wilshire promised in return for a trust deed on their 61 acres; which included the collateral for the Springs to obtain construction financing and purchase the Andersons' 61 acres and also deprived Andersons of the $9.4 million cross-collateralization for the $4.9 million trust deed to Wilshire on the Andersons' 61 acres.

13. On February 8, 2002 the Andersons served Wilshire with notice that their trust deed on the 61 acres was a wrongful lien and must be removed. (R. 443) Wilshire refused and on June 28, 2002 Barnes Bank, the holder of $4.5 million in prior security on the 61 acres, foreclosed the Andersons off the 61 acre property. But for Wilshire's refusal to remove their lien, the Andersons would have sold the 61 acres to other buyers or re-financed it . (R. 429)

VI. SUMMARY OF ARGUMENT

Section 38-9-1(6) of the *Wrongful Lien Act* defines a wrongful lien. Subpart (a) of that definition requires that at the time of recording a lien be expressly authorized by some other provision of the *Wrongful Lien Act*, by some other State statute or by a Federal statute. Clearly, if something is expressly prohibited by statute it is not expressly authorized by statute and Section 38-9-4(3) of the *Act* categorically outlaws certain kinds of liens. In particular, it defines as wrongful trust deeds that at the time of recording are groundless, contain a material misstatement or assert a false claim. That such liens are included within

the definition of wrongful lien recited in Section 38-9-1(6) of the *Act,* is made explicit by the operative language in section 38-9-4(3) of the *Act* that: "*...who records ... a wrongful lien as defined in Section 38-9-1 ... having reason to know that the document ... (b) is groundless; or (c) contains a material misstatement or false claim.*" is liable for treble damages.

Referring again to the language in Section 38-9-1(6)(a), Utah Code Ann. §57-4a-4 is one of the State statutes incorporated into the requirements of the *Wrongful Lien Act.* Rebuttal of any of the presumptions set up by §57-4a-4 of the *Effects of Recording Act* (i.e. Subsection (d) proper delivery of document, Subsection (e) necessary consideration given, Subsection (f) beneficiary acted in good faith at all times, Subsection (j) recitals in document are true), removes from a document the benefit of the express authority for its recording provided by the presumptions imposed by that Act.

In effect, the court below disavowed Section 38-9-1(6)(a) and instead relied solely upon Section 38-9-1(6)(c) of the *Act.* By reading down (or effectively entirely reading out) one Subsection of the *Act* that is in *pari materia* with another Subsection, the court violated longstanding rules of statutory construction. Furthermore, when the statutory definition of wrongful lien incorporates other Sections of that statute and other statutes of this State, a court lacks jurisdiction to construe that definition so that its explicit reference to other parts of the same statute or to other statutes of this State, is mooted.

Appellants' averments on essential and dispositive facts were uncontroverted (i.e. the specific representation by Wilshire to Andersons that it would finance the purchase of the

Hulet property, Andersons reliance on those representations, Wilshire's issuance of closing instructions consistent with those representations, Wilshire's secret reversal of those closing instructions to obtain recording of the $4.9 million trust deed against the Andersons' 61 acre property, the resulting deprivation of the Andersons $9.4 million cross-collateralization against the Hulet property and the loss of the $9.4 million sale of the 61 acres to the Springs). In fact, Wilshire in its affidavit admitted that it refused to advance the $1.5 million in funding because of suspicions that the developer, the Springs of St. Moritz Resort, L.L.C. (owned by David G. Turcotte and Brent B. Woodson) was not acting in good faith. Yet Wilshire's motives are belied by the fact that until September 10, 2002 it never took any action against the Springs or its principals to recover amounts purportedly owed to Wilshire by them and to this day has not served the Springs with any notice of default.

On these uncontroverted facts, Wilshire's intentional and knowing acts causing the wrongful recording of its trust deed on the Andersons' 61 acre property, causing the Springs to default in its purchase of Andersons 61 acre property and depriving the Springs of the Hulet properties (the collateral for the construction financing that would pay out the monies owing to Wilshire on its trust deed on the Andersons' 61 acres); show Wilshire's lien was not only groundless (it was overstated by at least $1.5 million and probably $2.5 million), it also proves that lien contained material misstatements and false claims. These same uncontroverted facts rebut the presumptions raised by Utah Code Ann. §57-4a-4 and show Wilshire's trust deed was not authorized for recording because of mis-delivery of the trust

deed from the Andersons, because of lack of consideration for that trust deed, and because of bad faith by Wilshire and because of false recitals in that trust deed.

The Andersons were and are entitled to a judgment nullifying the Wilshire trust deed as a wrongful lien.

VII. ARGUMENT

A. The Wrongful Lien Act is Remedial

1. Wilshire's mala fides is declared out of its own mouth. In a letter dated February 25, 2002, its legal counsel asserts,

> "*...Wilshire never had possession of the Trust Deed, did not record the Trust Deed, and did not even direct or instruct any party to record the Trust Deed. ...Wilshire played no role whatsoever in the arrangement between Springs and your clients or in the recordation of the Trust Deed.*" (R. 444, ex. S)

This letter was written by Eric Pearson, the legal counsel that handled the escrow transaction for Wilshire. After disavowing all dealings between Wilshire and the Andersons, he then asserts,

> "*...the Andersons ... will find themselves liable for any damages incurred by Wilshire as a result of any improper delay, hindrance or impediment to Wilshire's exercise of* ***its remedies as beneficiary under the Trust Deed****.*" [emphasis added]

Wilshire in it's first response to the Andersons' claim of wrongful lien reveals its true colors. It claimed the full benefit of the trust deed (including the $1.5 million it never advanced) while at the same time denying any contact with the Andersons. Apparently, Mr. Pearson did not bother to read paragraph 6 of the Promissory Note from the Springs to Wilshire.

(R.444, ex. O) It specifically recites a trust deed on the Andersons' 61 acres as security for the note.

2. In a Notice of Default filed with the Wasatch County Recorder on September 10, 2002 as Entry 248503, Book 0576, Page 0287-0289, Wilshire claims $8,546,106.60 as owing on the note, with interest accruing at 38% per annum on at least $6,572,902.40 of that amount. See Addendum G. But see exhibit P at page 332 of the Record which contains a letter dated January 25, 2002 faxed to this counsel by Mr. Pearson in response to a request for a pay-off amount on the Wilshire trust deed. This recites a loan balance of $7,099,814.94 plus the value of one condominium unit which brings it to approximately $8,500,000.00 with interest accruing at $8,849.31 per day. As of September 10, 2002 that would put the amount due in excess of $10,000,000.00. It appears that under either balance, Wilshire is still claiming for the $1.5 million it defaulted in advancing, the $1 million in vigorish it never earned and perhaps the condominium it defaulted in funding.

3. Paragraph 5 of the January 25, 2002 letter contains the amazing assertion that Wilshire has waived its own default (i.e. its refusal to advance the $1.5 million for the purchase of the Hulet property).

4. This is a case of first impression regarding a trust deed signed by the owners of land, claiming that a trust deed signed by them was wrongfully recorded and therefore a wrongful lien. However, in the larger context of cases contesting the validity of deeds for land, on numerous occasions courts have applied the bona fide purchaser rule even where

there was no overt misconduct. For example, in *Grahn v. Gregory*, 800 P.2d 320 (Ut.App. 1990) this Court cut off a purchaser's claim to land because it was not a bona fide purchaser and in *Luddington v. Bodenvest Ltd.,* 855 P.2d 204 (Utah 1993) the Court nullified a trust deed where the lender advanced funds that were used for the benefit of the general partner but not the limited partners.

5. Appellants, the Andersons, argue the *Wrongful Lien Act* must be applied remedially so that:

i. Whether a trust deed is authorized by statute (*see* Utah Code §38-9-1(6)(a)) requires reference to §57-1-19(3) and §57-4a-4 Utah Code Ann.; and

ii. The incorporation by reference into §38-9-1(6) of the terms found in sub-paragraph (a), (b) or (c) of §38-9-4(3) Utah Code Ann., is given full scope and effect, thus requiring the obligation underlying a trust deed to be valid;

6. But Appellee Wilshire Investments, L.L.C. argues for a superficial construction that limits a court's review to the face of the trust deed, so that Utah Code Ann. §38-9-1(6)(c), requiring that a trust deed be signed by an owner of the liened land, supersedes all other terms in the *Wrongful Lien Act,* negates Utah Code Ann. §38-9-1(6)(a), moots its reference to §57-1-19(3), ignores and renders surplus the provisions in §38-9-4(3)(b) and (c) (imposing treble damages liens that are groundless, contain a material misstatement or false claim) and in the result provides the sole criteria for finding a trust deed a wrongful lien.

7. Wilshire's stance should not be understated: at the summary trial the court opined

that even if a trust deed signed by an owner was stolen at gunpoint and recorded, it could not be a wrongful lien (R.469 @ 35, R.469 @ 36).

8. The correct construction of Subsection 38-9-7(4) of the *Act* , argued for by Appellants, provides a court with jurisdiction to examine the circumstances of a trust deed's delivery and of the creation of the obligation underlying a lien. Utah Code Ann. §38-9-7(4), which controls removal of recorded liens, is paralleled by Utah Code Ann. §38-9-6(4) which controls recording of proposed liens. In reviewing a proposed lien instrument, a court is restricted to review of the face of the document, excepting that it may determine the truth of the contents of the lien document or determine the legal rights of the parties; but only to the extent necessary to determine whether the lien instrument is recordable.

9. At the back end of the process, the drafters of the *Wrongful Lien Act* dropped the language restricting a court to review of the face of the lien document. Subsection 38-9-7(4) of the *Act* instead only denies a summary disposition court jurisdiction to determine any **other** property or legal rights of the parties, that is, other than those property or legal rights which determine whether the lien is wrongful (ie. groundless, contains a material misstatement or false claim). Such a construction is remedial and in compliance with Utah Code Ann. §68-3-2 . *See Homeside Lending, Inc. v. Miller,* 2001 UT App 247, ¶25 and cases cited therein for the proposition that a statute must be construed as a whole and not in a piecemeal fashion.

10. Interpreting Utah Code Ann. §38-9-7(4) this way makes full use of Utah Code

Ann. §38-9-4(3) and avoids the prohibition in *Lund v. Brown*, 2000 UT 75, ¶23, where the Court affirmed: "'*[A]ny interpretation which renders parts or words in a statute inoperative or superfluous is to be avoided.*'" citing *State v. Hunt*, 906 P.2d 311, 312 (Utah 1995).

11. Appellee, Wilshire Investments, L.L.C., argues that the *Wrongful Lien Act* is an insular code, complete unto itself, and must be construed by reference only to its own internal parts[4]. But Appellee's strained construction is contrary to *Lyon v. Burton*, 2000 UT 19, ¶17, where the Court ruled that where a statute's terms are clear and unambiguous legislative intent is best inferred from the plain language of the statute.

12. Accordingly, the rule invoked by *Utah County v. Orem City* 699 P.2d 707, 709 (Utah 1985) that,

> "*If it is natural or reasonable to think that the understanding of the legislature or of persons affected by the statute would be affected by another statute, then those statutes should be considered to be in pari materia, construed with reference to one another and harmonized if possible.*",

citing *Sands, Sutherland Statutory Construction* §51.03 at 468 (4th Ed. 1984), controls in this case and requires reference to Utah Code Ann. §57-1-19(3) and reference to Appellants' rebuttal of the presumptions in Utah Code Ann. §57-4a-4.

13. Only if a statute is ambiguous will the Court resort to other modes of construction. *See O'Keefe v. Utah State Retirement Board*, 956 P.2d 279, 281 (Utah 1998).

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[4]This claim is belied by Section 38-9-2(1)(a)&(b) of the Utah Code Annotated which make the *Act* generally applicable to all real property liens. Contrast this with Section 38-9-2(3)'s exception from the *Act's* operation of Mechanics' Liens, which liens are governed by provisions specific to Title 38, Chapter 1 of the Utah Code.

The same analysis requires that § 38-9-1(6)(a) and §38-9-1(6)(c) of the Utah Code Ann. be granted equal dignity and considered *in pari materia*. Nothing in this *Act* suggests that these two sub-paragraphs should be construed otherwise and case law (*see Lyon* @ ¶17) holds that both sub-paragraphs are to be given full effect.

14. Addendum F to Appellant's brief is the Bill Summary for the Wrongful Lien Amendment Act of 1997, prepared by legislative counsel assisting with this bill. Paragraph 2 of the Bill Summary makes specific reference to good faith liens. Such liens by definition do not fall within the class of crank filings, such as purported "common law" liens to which Appellee would limit the *Act*. Instead, the Bill Summary's reference to removing a cloud on title signifies an intent that the amendments were to be remedial.

15. Wilshire's strained interpretation is inconsistent with other legislative enactments dealing with the same subject matter. Utah Code Ann. §57-1-32 finds the legislature imposing treble damages on beneficiaries of trust deeds signed by owners of land, lawfully and properly recorded. *A fortiori*, where a trust deed signed by owners is not properly recorded the treble damages remedy in Utah Code Ann. §38-9-4(3)is even more applicable.

16. Bearing in mind Appellants rebuttal of Utah Code Ann. §57-4a-4(d)&(e)'s presumption of valid delivery for recording of that instrument and rebuttal of the claim that promised consideration was given for it, applying Utah Code Ann. §38-9-4(3)(b) and Utah Code Ann. §38-9-4(3)(c) to the facts of this case manifests the proper reading of the *Wrongful Lien Act:*

i. where a trust deed recites $4.9 million as the amount it secures, but $1.5 million of the $3.9 million to be advanced under that trust deed was unilaterally withheld, then there is a material misstatement of the amount secured; and

ii. where a trust deed asserts an interest in land but its beneficiary has refused to perform the conditions precedent to its acquiring an interest in that land, then the trust deed recites a false claim.

In either case the trust deed is groundless.

17. Only by applying Utah Code Ann. §38-9-4(3) to this case in this manner does one avoid the prohibition in paragraph 23 of the *Lund* decision against making sub-paragraphs (b) and (c) superfluous.

18. Another wrongful lien case, *Commercial Investment Corp. v. Siggard*, 936 P.2d 1105, 1111 (Ut.App.1997) defines the term groundless. In *Siggard*, the purchaser filed a notice of interest against the seller's entire 38 acres, rather than the 16 acres (part of the 38) being purchased. The trial court found such a lien to be groundless. Although *Siggard* pre-dates the 1997 amendments, the pre-amendment *Act* required that a lien claimant not file a lien document knowing it was, "forged, groundless, or contain[ed] a material misstatement or false claim."(*cf.* Section 38-9-4(3)). Similarly, in *Gold Oil Land Development Corporation v. Davis*, 611 P.2d 711 (Utah 1980) recordation of a deed that was improperly delivered and recorded without full consideration was canceled.

19. Appellants do not dispute that the evidentiary burden is upon them to prove that the trust deed, although facially valid, is unsupported by an underlying obligation. However, once that burden is met the prohibitions in Utah Code Ann. §38-9-4(3), rebuttal of the presumptions in Utah Code Ann. §57-4a-4 and the requirements in Utah Code Ann. §57-1-19(3) , are controlling. Rejecting this authority (R.292-298; R.273-277) the court below refused to even consider Appellants uncontroverted evidence, and instead held as a matter of law that the statute was designed exclusively for trust deeds which were not signed by the owners of the land as required by Section 38-9-1(6)(c) of the *Act*.

20. Although the court ruled on whether the trust deed was authorized by statute (*see Spear v. Warr*, 2002 UT 24, ¶11), it refused to reference the statutes relevant to that conclusion and would not find on the facts proffered to it that bore directly on that issue. It is error for a court to make a finding on an issue controlled by a statute without specifically referencing relevant statutory criteria, *see Young v. Young*, 979 P.2d 338 (Utah 1999). No explanation was offered for the court's use of Section 38-9-1(6)(c) to entirely supplant the operation of Section 38-9-1(6)(a) .

21. Similarly, the court's failure to make factual findings in a proceeding where it must determine the validity of the obligation underlying the lien and under Rule 52(a) Ut.R.Civ.P. weigh the evidence to determine that validity, renders its decision erroneous, *Woodward v. Fazzio,* 823 P.2d 474, 478 (Ut.App. 1991). This is especially so where the proceeding below invoked the equitable powers of the court, the *Wrongful Lien Act* in effect

providing a scheme for statutory injunctive relief or reformation, *cf. Dugan v. Jones*, 615 P.2d 1239, 1243 (Utah 1980).

B. The Court below refused to consider dispositive uncontroverted facts

1. Because the court below dealt only with issues of law flowing from one fact (the Andersons' signature on the trust deed to Wilshire), at both the May 8, 2002 and the July 17, 2002 hearing the court opined that the Andersons claims under Utah Code Ann. §38-9-4(3) would have to be dealt with by a full trial on the merits of the claims arising under that subsection of the *Act*.(R.469 p. 36; R.470 p. 9) The court's single finding of fact , resulting from the Andersons' admission in their affidavit that they signed the trust deed, could only support conclusions of law construing in isolation Subsection §38-9-1(6)(c) of the *Wrongful Lien Act*. However, by quashing the Andersons' cause of action under Utah Code Ann. §38-9-4(3) , the court disposed of their entire wrongful lien claim.

2. Initially, the court framed its concerns about summary disposition in terms of lack of discovery (R.469 @ 25, R.469 @ 36; R.470 @ 9). The court noted a number of times that a summary disposition proceeding did not provide opportunity for discovery and that the facts presented by this case were simply too complex (despite the fact that Appellants key averments were undisputed) to be resolved without further discovery.

3. Although in both hearings the court adopted an insular construction of Section 38-9-1(6) of the *Act* to define "wrongful lien" without reference to external statutes, it did recognize that Utah Code Ann. §38-9-4(3) (b) & (c) set up causes of action that the

Andersons could prosecute, not by way of summary disposition, but by way of discovery and trial (R.470 @ 9, R.470@ 46).

4. Thus, before the Court on this appeal is an order from the court below which contains only one finding of fact and that finding does not support its conclusion of law that the trust deed was not a wrongful lien. The other finding of fact in that final order, that the trust deed was expressly authorized by Utah Statute, is more properly cast as a conclusion of law (*cf. Russell v. Thomas*, 2000 UT App 82, FN6). Contrary to the holding in the *Young* decision and despite the Andersons' specific objection (R.292-298; 273-277), the court below entirely failed to deal with the issues raised by Utah Code Ann. §57-4a-4 and §57-1-19(3) . Uncontroverted evidence proving that the trust deed was mis-delivered and was taken without promised consideration being given, exposes the complete lack of factual foundation for the court's conclusion the trust deed was expressly authorized by Utah law.

5. The submission of evidence by affidavit evidence and the Andersons admission of the court's single finding of fact removes the need to marshal the evidence supporting that finding (*cf. Woodward* @ 478). This Court is fully competent to decide issues of statutory construction, granting no deference to the court below. *See Russell,* ¶8. As the analysis in part VIII.A. above makes clear, the court erred in its statutory construction of the *Wrongful Lien Act*, that error is dispositive of this appeal and proper construction of the *Act* entitles Appellants to nullification of the Wilshire lien.

C. Appellants are entitled to a judgment of wrongful lien as a matter of law

i. The Andersons' evidence is undisputed

1. At the summary disposition hearing, the Andersons' evidence of wrongful lien was undisputed on all essential averments. Whether on those facts they made out a prima facie case requiring the trial court to make a finding of wrongful lien, is a question of law which this Court will review for correctness, affording no deference to the trial court's judgment. *See Bair v. Axiom Design, L.L.C.*, 2001 UT 20, ¶13.

2. Because Wilshire failed to present evidence rebutting the Andersons' factual averments that are dispositive of their claims of wrongful lien, the rule in *Girard v. Appleby*, 660 P.2d 245, 247 (Utah 1982) overruled on other grounds by *MeadowBrook, L.L.C. v. Flower*, 959 P.2d 115 (Utah 1998), results in Wilshire's waiver of any such defense.

3. In paragraph 12 of his affidavit R. Michael Anderson avers that on August 16, 2001 he had a telephone conversation with Marc S. Jenson and David G. Turcotte. (R.439) Details of that conversation are also recited in paragraph 6 of the Statement of Facts above. Marc S. Jenson as an inducement to the Andersons to allow the recording of the trust deed on their 61 acres of land, affirmatively represented to R. Michael Anderson that Wilshire would fund the Springs purchase of both the Hulet and the Johnson properties. Later that conversation was confirmed to Mr. Anderson by a letter from David Turcotte dated August 16, 2001 (R.398).

4. In response, on May 6, 2002 Marc S. Jenson swore an affidavit on behalf of

Wilshire, which in paragraph 11 and 12, replies to Mr. Anderson's averments (R.145). Mr. Jenson disputes only one averment by Mr. Anderson. Mr. Jenson denies that he told Mr. Anderson that Wilshire would not foreclose. However, Mr. Jenson does not deny that he told Mr. Anderson that Wilshire would fund the purchase of both the Hulet and Johnson properties and in fact, at paragraphs 5 and 6 of his affidavit, Mr. Jenson admits that the purchase of both the Hulet and the Johnson properties was a requirement for Wilshire to provide financing. (R.147)

5. In the result, Mr. Anderson's averment that Wilshire represented to him that it would provide funding for the purchase of both the Hulet and Johnson properties, is undisputed, as are Mr. Anderson's averments regarding the reasons for the purchase of the Hulet property. (R.439-440)

6. Even more damning is the admission in paragraph 20 of the Jenson affidavit, that Wilshire breached its obligation to provide the $1.5 million for the purchase of the Hulet properties because of mere suspicion that the Springs was not dealing in good faith. (R.143) The bona fides of that suspicion is rebutted by Mr. Jenson's own averments in paragraphs 21 and 22 (R.142). There Wilshire admits that although the Springs had been in default for over seven months, Wilshire had taken no steps against the Springs to enforce its security interests.

7. The most glaring omission from Mr. Jenson's affidavit is any credible evidence rebutting the Andersons' evidence that Wilshire secretly released Security Title as escrow

agent for the closing on the Hulet properties, and then secretly reversed its closing instructions to Security Title. Mr. Jenson attempts to deal with this issue at paragraphs 15 and 16 of his affidavit. (R.144). Yet this part of Mr. Jenson's affidavit contains nothing more than erroneous legal conclusion and irrelevant recitation of dealings with the Springs.

8. Analysis of the actual closing instructions (R.431; R. 449) confirms that it was not until August 29, 2001 that Wilshire (without notice to the Andersons) gave instructions to release $2.05 million of the funds into the Utah closing, even though the $1.5 million for the Idaho closing was not being advanced.

9. In response, Wilshire makes the baseless legal conclusion in paragraph 16 of the Jenson affidavit, that the terms of the trust deed preclude any claim for Wilshire's failure to fund the Hulet purchase. Yet without valid delivery of that trust deed, *see Wiggill v. Cheney*, 597 P.2d 1351, 1352 (Utah 1979), those terms cannot operate. Furthermore, the ambiguous language in the trust deed relied upon by Wilshire, "**regardless of whether Beneficiary obtains collateral or any guaranties from others or takes any other action contemplated by Trustor or Borrower**", says nothing about Wilshire's obligation to advance the principal balance secured by the trust deed note. (R.444, ex. B)

10. So far as the Andersons were aware Wilshire was not to obtain any collateral or guaranties from others, but was merely to advance funds to the Springs so it could obtain collateral. (R.439) Similarly, the phrase "... any other action contemplated by Trustor or Borrower...", is at best ambiguous, but must refer to action other than Wilshire funding the

$4.953 million loan, otherwise there is no obligation to secure and the trust deed is illusory. As to the merger doctrine, *Spear*s @ ¶13 makes clear that the merger doctrine operates for the benefit of the seller (i.e. the Appellants). Any assertion by Wilshire, as the buyer (and especially where it is not a bona fide purchaser -- see the cases cited at ¶15 of *Spears*), of the merger doctrine is inapt.

11. Wilshire's wrongful conduct in obtaining delivery of the trust deed puts this case on the same footing as the grantors of a deed in *Gold Oil* @ 713. There the court set aside a conveyance that occurred without valid delivery of the deed and without full consideration being given for the property.

12. Even more incriminating is Wilshire's omission of Mr. Jenson's admission that Wilshire purposely refused to provide the $1.5 million for the Hulet purchase, from the materials it presented to this Court on Wilshire's motion for summary disposition. (R.143).

13. Furthermore, prior to the July 17, 2002 hearing, the Andersons subpoenaed into court the records referred to in Mr. Jenson's affidavit. (R.262-267) Wilshire refused to comply. A party failing to testify or produce evidence creates an inference that the evidence, if produced, would be unfavorable to that party. This is the rule relied upon in *Gerard v. Young*, 432 P.2d 343, 346 (Utah 1967) where the Court cites McCormick on Evidence, page 163, section 80: "*Under familiar principles an unfavorable inference may be made against a party not only for destroying evidence, but for the mere failure to produce witnesses or documents within his control.*" *cf. State v. Smith*, 706 P.2d 1052, 1057 (Utah 1985).

14. In summary, the Andersons presented to the trial court undisputed evidence that:

i. Wilshire induced the Andersons to execute the trust deed by representing to the Andersons that it would fund the Springs purchase of both the Johnson and Hulet properties;

ii. The Andersons delivered that trust deed to Wilshire's escrow agent on the strength of those representations. *See New West Federal Savings and Loan Association v. Guardian Title Company of Utah*, 818 P.2d 585, 589 (Ut.App. 1991) for authority that Security Title Company in Provo acted as Wilshire's escrow agent in its trust deed transaction with the Andersons;

iii. Wilshire through its August 22, 2001 closing instructions then represented to the Andersons, through its escrow agent, that although recordation of the documents in the Utah closing would proceed independent of the Idaho closing, none of the $2.365 million deposited with Wilshire's escrow agent would be released for use in Utah unless and until Wilshire provided the $1.5 million to fund the Springs' closing on its purchase of the Hulet property in Idaho;

iv. The Andersons relying upon those closing instructions, released their trust deed to Wilshire's escrow agent for recording on the Andersons 61 acres in Utah;

v. Wilshire on August 29, 2001, without any notice to the Andersons, reversed

its August 22, 2001 closing instructions and instead instructed its escrow agent to record the Andersons trust deed and release $2.05 million of the funds to be applied to the Utah closing.

15. By this subterfuge, Wilshire was able to get the Andersons' trust deed recorded without providing the $1.5 million for the purchase of the Hulet property. Wilshire's conversion of the Andersons' trust deed deprived them of $9.4 million cross-collateralization security on the Hulet properties and deprived the Springs of the collateral with which to obtain construction financing. Without those funds the Springs could not pay off the Wilshire trust deed and remove it from the Andersons 61 acres. Nor could the Springs purchase the Andersons' property for $9.4 million. Instead, that property was foreclosed upon and the Andersons lost their $5 million in equity in that property.

ii. At the time its lien was recorded Wilshire knew its lien was wrongful

1. All that Section 38-9-4(3) of the *Act* requires for its provisions to operate is that at the time of the trust deed's recording Wilshire have knowledge that the amount of the trust deed was materially misstated (in this case by some $2.5 million) or asserted a false claim (Wilshire already knew that it would not be advancing the $1.5 million). No other cause of action, independent of Section 38-9-4(3)(c) of the *Act*, must be proven. If Wilshire had knowledge of those facts that cause of action is proven. Undisputed evidence proves that at the time Wilshire instructed its escrow agent to record the trust deed on the Andersons 61 acres, Wilshire knew:

i. It was not going to provide the additional $1.5 million to fund the purchase of the Hulet properties (R.143). The Andersons had never waived this requirement (R.329); or

ii. It should have known that the Andersons did not know about Wilshires release of Security Title as its agent on the Idaho closing and knew or should have known that the Andersons were unaware of the reversal of its recording instructions. (R.331).

2. *See* the analysis of imputation of an agent's knowledge to a principal in part II. of *Wardley Better Homes & Gardens v. Tracy Cannon*, 2002 UT 99, for authority that Security Title's knowledge of these facts must be imputed to the Wilshire. Apart from any such imputation, Wilshire's failure to controvert the Andersons' evidence that they were not informed of these matters also establishes this knowledge (*Girard @ 247; Smith @ 1057*).

3. The single fact that on April 16, 2002 Wilshire specifically represented to the Andersons it would be funding the purchase of both the Hulet and Johnson properties for the express purpose of having the Andersons rely on that statement also proves knowledge. Wilshire never took any steps to disabuse the Andersons of this belief. Any one of these three separate grounds prove, prima facie, that at the time Wilshire instructed the recording of the trust deed on the Andersons' 61 acres, it had the knowledge required by Utah Code Ann. §38-9-4(3)(c)[5], that the document contained a false claim or material misstatement or

[5]At the summary disposition hearing the Andersons argued this provision not because they sought damages but because this sub-paragraph clearly showed that the

both. Proof of either one of these claims is sufficient to find Wilshire's lien groundless.

iii. When informed its' lien was wrongful, Wilshire would not remove its lien

1. From another perspective, regardless of Wilshire's bad faith, the wrongful lien definition in Section §38-9-1(6)(a) of the *Act* was also satisfied by the Andersons. Assuming arguendo, that Wilshire at the time of the escrow transaction was ignorant of the wrongful recording of the trust deed, once Wilshire knew that:

i. The Andersons had never been timely informed of Wilshire's decision not to provide the $1.5 million for the purchase of the Hulet properties; or

ii. that the trust deed had been recorded contrary to the Andersons instructions; Wilshire then became aware that the presumption under Utah Code Ann. §57-4a-4(d) had been rebutted and the trust deed recorded improperly. Note that unlike §38-9-4(3), §38-9-1(6)(a) of the Utah Code Ann is an objective standard that contains no knowledge requirement. As soon as a lien claimant is served with notice that §38-9-1(6) of the *Act* was violated, it has 20 days to remove its lien.

2. In this case, the Andersons petition for wrongful lien and supporting affidavit provided Wilshire with the notice required under Utah Code Ann. §38-9-4(2). Even though Wilshire was made fully aware of the facts showing it had no authority to record the trust deed -- facts which it failed to controvert at the summary disposition hearing, it ignored

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definition of wrongful lien in Utah Code Ann. 38-9-1-6 required the court to find the trust deed wrongful lien if a material misstatement or false claim was proven

Utah Code Ann. §38-9-4(2) and insisted upon maintaining its lien on the Andersons' land.

3. It was plain error for the court below not to so rule, *cf. State v. Beltran-Felix*, 922 P.2d 30, 37 (Ut.App. 1996). This error was the direct result of the trial court refusing to consider any of the uncontroverted evidence presented by the Appellants. The need for such findings was repeatedly drawn to the court's attention (R.470 @ 34, R.470@ 35; R.293; R.276). At trial the court responded to these objections by stating it was dismissing only a "portion" of the petition (R.470 @ 51) and that it was not disposing of the Andersons' claims under Utah Code Ann. §38-9-4(3) . Yet it then proceeded to dispose of the entire wrongful lien claim.

4. Despite the great prejudice to the Andersons resulting from the discrepancy between the court's verbal ruling and the proposed written order being drawn to its attention, the court signed the written order. By intentionally ruling contrary to uncontroverted facts presented by the Appellants, giving rise to the claim explicated in part VIII.C.i. above, plain error should have been obvious to the court.

5. Under either of the theories argued in part VIII.C.i. or part VIII.C.ii above, at the summary disposition hearing the Andersons made out a prima facie case for wrongful lien that was uncontroverted. They were and are entitled to judgment on that basis.

iv. A Wrongful Lien proceeding is equitable and equity can provide relief

1. Another ground for removal of the wrongful lien was established at the summary disposition hearing. Applying the rule in the *Gold Oil* and *Wiggill* cases to the

uncontroverted facts of this case requires that equity be used to rescind the mis-delivered deed or that the signatures of the party's to it be stricken and the recording of the deed canceled. Wilshire argues that the prohibition in Utah Code Ann. §38-9-7(4) against the court's determining, "...any other property or legal rights or the parties...", denies the court jurisdiction to exercise its equitable powers to this end[6].

2. Such argument ignores the fact that Appellants' evidence on such issues was uncontroverted[7]. Having failed to controvert Appellants' averments (or having admitted facts) disposing of key issues, Wilshire has rendered the question of "other property or legal rights of the parties", irrelevant. Only if Wilshire asserted that determination of other legal rights was a necessary predicate to a finding of wrongful lien and then proffered facts supporting that claim, could the the determination of "other ... legal rights" come into issue. Admission of the facts disposing of those rights relieves the court from the need to determine those other legal rights. *Cf.. Dupler v. Yates*, 351 P.2d 624, 629 (Utah 1960) citing 6 Moore, Federal Practice (2d.Ed.), p. 2006 for the proposition that:

> "*The primary purpose of the summary judgment procedure is to pierce allegations of the pleadings, to show that there is no genuine issue of fact, although an issue may be raised by the pleadings, and to establish that the moving party is entitled to judgment as a matter of law.*"

3. Proper delivery of a trust deed is a predicate to its valid recording. Rebuttal by

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[6]Also relevant to this issue is the argument made in ¶21 of Part VIII.A above that wrongful lien proceedings are inherently equitable.

[7]Paragraph 9 in part VIII.A above also disposes of Wilshire's argument.

uncontroverted evidence of the presumption of valid delivery stated in Utah Code Ann. §57-4a-4(d) is simply one of many possible legal grounds under which one may show that a lien is groundless or asserts a false claim. Once it was shown Wilshire was not entitled to the presumptions in this statute, the court's equitable powers could be used to remove the Wilshire lien as wrongful.

4. In that case, *Horton v. Horton*, 695 P.2d 102 (Utah 1984), where the Court canceled a mis-delivered quitclaim deed, noting at page 105 that, "*an action to avoid a deed is one in equity*", and at page 106 that, "*delivery or its absence is a question of fact*", becomes relevant. *Guardian State Bank v. Stangl*, 778 P.2d 1 (Utah 1989), where a bank negligently endorsed a note for $132,000 00 for which it received no value, is also authoritative. At page 5 of that decision the Court quoted *Corbin on Contracts,* §610 at 692 (1960) for the rule:

> "*There is practically universal agreement that, if the material mistake of one party was caused by the other, either purposely or innocently, or was known to him, or was of such character and accompanied by such circumstances that he had reason to know of it, the mistaken party has a right to rescission.*"

5. Given Wilshire's expansive admissions regarding the August 16, 2001 conversation with Mr Anderson, its' admission that it represented to the Andersons that Wilshire would fund the purchase of the Hulet and Johnson properties, its' admission that this representation was given in exchange for the Andersons signature on the trust deed and its delivery to Wilshire's escrow agent, privity has been proven. This provides grounds for applying the rule stated at page 6 by the Court in *Guardian* that, "*a mistake in the*

recordation or memorialization of an agreement or document may not be exploited by one party to take advantage of the other."

6. On the same principle, rules established under other theories of recovery were applicable to the Andersons' wrongful lien claims. For example, regardless of the question of privity, *Culp Constr. Co. v. Builders Mall*, 795 P.2d 650, 659 (Utah 1990) establishes that when a first party to a real estate transaction knows that a third party to that same transaction will rely upon representations made by the first party that are not true, the first party is liable for negligent misrepresentation. One does not have to be in privity to establish a claim for negligent misrepresentation. Applying *Culp* to the facts of this case proves negligent misrepresentation by Wilshire caused delivery of the trust deed for recording and so violated Utah Code Ann. §38-9-4(3).

7. For the same reason , a claim for fraudulent concealment under the holding in *Elder v. Clawson*, 384 P.2d 802, 804 (Utah 1963) also become relevant, as does the use of undisputed facts to show the elements of fraud delineated in *Schuhman v. Green River Motel*, 835 P.2d 992 (Ut. App. 1992). Proof of any one of these causes of action invalidates the delivery of the trust deed to Wilshire's escrow agent for recording.

8. *Berkeley Bank for Cooperatives v. Meibos,* 607 P.2d 798 (Utah 1980), presents a case where signers to promissory notes guaranteeing the obligation of their milk cooperative to the bank, were induced to sign those notes by representations from the bank that the notes would never be enforced. As in the *Gold Oil, Horton* and *Wiggill* cases, the Court in

Berkeley upheld the cancellation of the signatures on the instrument in question. Once the circumstances of the execution and recording of the trust deed are proven, the fact that at the time of its recording the Wilshire lien was not authorized by Utah Code Ann. §38-9-4(3) is established (*see* §38-9-1(6)(a) of the *Act*).

9. As the above argument demonstrates, not only does the Andersons' case present substantial grounds for appeal, as a matter of law they are entitled to a judgment that the trust deed in question was a wrongful lien.

v. If remanded, the Court should discuss matters relevant on remand

10. Should this Court instead remand this case back to the court below for adjudication of the Andersons' wrongful lien claim according to the construction of the *Wrongful Lien Act* adopted by this Court, Appellants respectfully request that the Court exercise its discretion to discuss, "*...matters that may become material on remand.*" *See Bair* @¶22. If remanded for a new hearing, the central issue will be the effect that Wilshire's failure to contest essential averments in R. Michael Anderson's affidavit has on Wilshire's ability to assert defenses to Appellants wrongful lien claim. *See Girard* @ 247.

D. **An award of Attorney's fees to the Andersons is in order**

1. Utah Code Ann. §38-9-7(5) provides for an award of attorney's fees for wrongful lien. Undisputed evidence thatWilshire at the time of recording knew the trust deed contained a material misstatement and false claim entitles the Andersons to judgment as a matter of law. In that event, attorney's fees and costs to the Andersons should follow, both

at appeal and in the court below.

2. Alternatively, Utah Code Ann. §78-27-56.5 provides for attorney's fees where the opposing party's documents provides for an award of attorney's fees. The trust deed provided at paragraph 12 provides for attorney's fees to Wilshire in the event of default by the Andersons. Although the trust deed's improper recording prevents the operation of that provision against the Andersons, its' wrongful recording and Wilshire's refusing to remove it, estops Wilshire from asserting its own misconduct in that recording as a defense to that provision's application against them, *Perkins v. Great-West Life Assur. Co.,* 814 P.2d 1125, 1129 (Ut. App. 1991). *See also Blackhurst v. Transamerica Ins. Co.,* 699 P.2d 688, 691 (Utah 1985); *Colman v. Colman*, 743 P.2d 782, 790 (Utah App. 1987) where the elements of estoppel (i.e. false representation or concealment of facts, made with real or constructive knowledge, to a party who is without knowledge of the real facts, with the intent that the false representation be acted upon, and reliance by that party to his prejudice) applicable to this issue are recited.

VIII. CONCLUSION

Appellants respectfully request that this Court set aside the August 9, 2002 judgment of the trial court, granting no deference to the trial court's construction of the *Wrongful Lien Act,* that the Court fully apply Sections 38-9-1(6)(a) and 38-9-4(3) of the Utah Code Annotated to the uncontroverted facts in evidence before the trial court and find that the trust deed filed by the Appellee Wilshire Investments, L.L.C. against the Appellant Andersons

61 acre property, was a wrongful lien and award the Appellants costs and attorney's fees in this proceeding and the proceeding below.

DATED this 2nd day of ~~May~~ June, 2003.

RONALD ADY

IX. ADDENDUM

A. Order entered August 9, 2002

B. Correspondence between counsel regarding Andersons' Subpoena Duces Tecum

C. *The Wrongful Lien Act*

D. *The Effects of Recording Act*

E. *The Conveyances Act*

F. Bill Summary for *The Wrongful Lien Act*

G. Notice of Default

Tab A

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IN THE FOURTH JUDICIAL DISTRICT COURT OF WASATCH COUNTY

STATE OF UTAH

R. MICHAEL ANDERSON and ROBERT H. ANDERSON, Petitioners/Plaintiffs, vs. WILSHIRE DEVELOPMENT, L.L.C., Respondent.	**FINDINGS, CONCLUSIONS, AND ORDER DISMISSING PETITIONERS' PETITION FOR REMOVAL OF WRONGFUL LIEN AND DENYING MOTION FOR RECONSIDERATION OR NEW TRIAL** Civil No. 020500229 Judge Donald J. Eyre

On Wednesday, May 8, 2002, the Court conducted a hearing on Petitioners' Petition seeking removal of a lien in the form of a Deed of Trust recorded in favor of Wilshire Investments, LLC,[1] as beneficiary of the Deed of Trust, on property located in Wasatch County, Utah. Ronald Ady appeared as counsel for Petitioners. Mark F. James of the law firm of Hatch, James & Dodge and Eric Pearson of Argue, Pearson, Harbison and Myers appeared as counsel for Respondent.

[1] Although the caption references "Wilshire Development, L.L.C.," the Court was informed at the May 8, 2002, hearing on the Petition that Respondent's correct name is "Wilshire Investments, LLC."

On Wednesday, July 17, 2002, the Court conducted a hearing on Petitioners' Objections to Proposed Form of Order relating to the May 8, 2002 hearing as well as on Petitioners' Motion for New Trial or for Reconsideration. At the July 17, 2002, hearing, Ronald Ady appeared as counsel for Petitioners, and Mark F. James of the law firm of Hatch, James & Dodge and Eric Pearson of Argue, Pearson, Harbison and Myers appeared as counsel for Respondent.

The Court, having reviewed the file in this matter, including the memoranda and affidavits provided to the Court, and having considered the evidence before it and the arguments from respective counsel, good cause appearing,

HEREBY FINDS, ORDERS AND DECREES as follows:

FINDINGS OF FACT

1. The trust deed at issue in this matter that was recorded in the Wasatch County Recorder's Office and which Petitioners claim to be a wrongful lien (the "Trust Deed") is expressly authorized by Utah Statute.

2. The Trust deed was signed by the owners of the real property to which the Trust Deed pertains.

CONCLUSIONS OF LAW

The Trust Deed does not constitute a wrongful lien as that term is defined in Utah Code Ann. § 38-9-1(6).

ORDER

1. That portion of Petitioners' Petition that asserts a wrongful lien under Utah Code Ann. §§ 38-9-1, *et seq.* is hereby dismissed;

2. Petitioners' Motion for a New Trial and/or to Reconsider filed in connection with the Court's ruling at the conclusion of the May 8, 2002 hearing in this matter is denied. The Court reaffirms its prior rulings in this matter;

3. Respondent's request for an award of costs and attorney's fees is denied at this time. The request is reserved for consideration by the Court at a later date should this case continue;

4. Petitioners are granted leave to amend their Petition to correct the name Wilshire to Wilshire Investments, LLC, rather than Wilshire Developments; and

5. A legal description of the real property at issue, which is located in Wasatch County, State of Utah, is as follows:

> Commencing at the North ¼ Corner of Section 27, Township 3 South, Range 4 East, Salt Lake Base and Meridian; thence South 00 degrees 27' 01" East 1348.29 feet; thence West 766.89 feet; thence South 396.00 feet; thence West 594.06 feet; thence North 12 degrees 24' 36" West 55.01 feet; thence North 00 degrees 00' 00" East 324.50 feet; thence South 89 degrees 12' 00" East 50.69 feet; thence North 01 degrees 00' 00" East 330.00 feet; thence North 89 degrees 12' 00" West 664.77 feet; thence North 00 degrees 30' 42" East 974.77 feet; thence North 52 degrees 54' 34" East 71.27 feet; thence north 89 degrees 42' 53" East 1904.86 feet to the point of beginning.

DATED this 9th day of Aug., 2002.

BY THE COURT:

Honorable Donald J. Eyre
Fourth District Court Judge

STATE OF UTAH
FOURTH DISTRICT COURT
WASATCH COUNTY

Tab B

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July 16, 2002

Hand-Delivered

Ronald Ady
10 West 100 South, Suite 425
Salt Lake City, Utah 84101

Re: *Anderson, et al. vs. Wilshire Investments, LLC – Petition for Removal of Wrongful Lien*

Dear Ron:

I received by hand-delivery your letter to me dated July 9, 2002, which enclosed a subpoena duces tecum addressed to Wilshire Investments, L.L.C.. Unfortunately, the letter arrived late in the afternoon, shortly before I was required to leave my office, and I was out-of-town the remainder of the week. Marc Jenson, manager of Wilshire Investments, LLC ("Wilshire"), is out-of-town this week, and therefore I have not spoken with Mr. Jenson about the subpoena duces tecum delivered to my office.

On behalf of Wilshire, I make the following objections to the subpoena:

1. Service of a subpoena on me or my office does not constitute service of process on my client, absent my agreement to accept service on behalf of my client. You have not asked that I accept service of the subpoena, nor did I agree to accept service.

2. The subpoena was delivered to my office on July 9, 2002, less than 14 days prior to the purported date and time of production (July 17 at 10:00 a.m.). As set forth in the "Notice to persons Arranging to Service a Subpoena" attached to the purported subpoena, a person or entity to whom the subpoena is directed has the right to object if the subpoena "does not allow you at least 14 days to comply, unless the party service the subpoena has obtained a court order requiring an earlier response." No such order has been obtained to my knowledge.

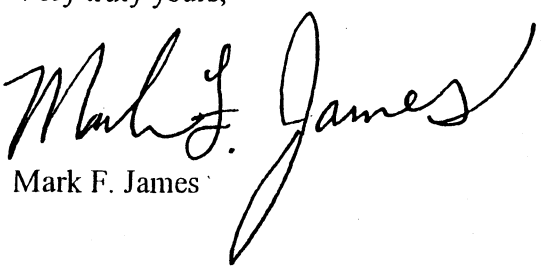
3. The subpoena improperly purports to require my client, who resides in Salt Lake County, to produce documents in Wasatch County.

4. The Court dismissed your clients' petition for wrongful lien. If your clients desire to conduct discovery against my client, such discovery must be conducted in compliance with the applicable Rules of Civil Procedure. The purported attempt to engage in discovery through the subpoena does not comport with the applicable rules.

5. The subpoena is overbroad and seeks production of documents that are irrelevant, including, without limitation, requests A and C.

For the foregoing reasons, my client objects to the purported subpoena that was sent to my office and will not be producing documents in response to the subpoena.

Very truly yours,



Mark F. James

cc. Mr. Marc S. Jenson
Eric Pearson, Esq.

RONALD ADY
ATTORNEY AT LAW

July 16, 2002

Mark F. James
Hatch James & Dodge
Attorneys at Law
10 W. Broadway
Suite 400
Salt Lake City, Utah
84101

Re: **Andersons v. Wilshire Investments**

Dear Mr. James:

Neither Rule 45 or its advisory committee notes indicate that a subpoena cannot be served upon a party. Numerous cases have held that a subpoena can be served on a party and the text of the Rule, by continually imposing specific requirements for service upon or setting up exceptions for non-parties, makes clear that parties are subject to its terms.

The relief provided for in a summary disposition proceeding is injunctive type relief (i.e. an order providing for a mandatory injunction requiring the removal of a lien from real property). Thus, such a proceeding falls within the exemption in Rule 26(2)(A)(iii). Note that U.C.A. 38-9-6(4) specifically recognizes the nature of a summary disposition proceeding, when it explicitly allows pursuit of other injunctive relief notwithstanding a Court's summary disposition determination.

Furthermore, Rule 26(d) and 26(f), by their own terms, cannot apply to a summary disposition proceeding. It is self evident that the Rule 26 discovery timelines cannot operate within the time allowed by U.C.A. 38-9-1 et seq. We appear tomorrow at the re-hearing of such a truncated proceeding. It is only because of the Rule 26 timelines imposed upon parties that Rule 45(b)(4) excepts only subpoenas served on non-parties from the discovery timelines imposed by Rule 26 (hence the "otherwise provided for by these Rules" exception in Rule 26(d)). Thus, only in cases where Rule 26(d) can operate do your contentions have any substance.

With respect, your refusal to properly brief coupled with the invective you needlessly and flagrantly injected into your memoranda will, regardless of the Court's determination of the ultimate merits of this case, expose your client to attorney's fees sanctions.

Yours truly,

RONALD ADY

10 West 100 South, Suite 425, Salt Lake City, Utah 84101
Tel. (801) 539-1900 • Telecopier (801) 322-1054 • E-mail: r80barr@msn.com

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July 16, 2002

Via Facsimile (322-1054)

Ronald Ady
10 West 100 South, Suite 425
Salt Lake City, Utah 84101

Re: *Anderson, et al. vs. Wilshire Investments, LLC – Petition for Removal of Wrongful Lien*

Dear Ron:

I received your undated letter faxed to me earlier today a short time ago. Although I disagree with virtually every assertion contained in your letter, I will simply note as follows. Although you state that Rule 45(b)(4) and 45(c)(2)(A) "make it clear that the 14 day requirement applies only to non-parties," Rule 45 and the advisory comments thereto indicate that subpoenas in general relate to non-parties – not to parties. Utah Rule of Civil Procedure 26(6), which provides the specific methods to discover additional matters from parties, does not include subpoenas as an identified method. Moreover, Rule 26(d) specifically provides, except with respect to certain specific exceptions not applicable here, "a party may not seek discovery from any source before the parties have met and conferred as required by Subdivision (f). As you know, no meet and confer has occurred in this case – nor would such meeting be appropriate in light of the Court's ruling dismissing your clients' Petition. In addition to the objectionable nature of your subpoena for the reasons set forth in my prior letter to you, your subpoena constitutes a clear and abusive attempt to circumvent the requirements of Rule 26 as well as those set forth in Utah Rule of Civil Procedure 34, which provides the specific method for one party to a lawsuit to acquire documents from another party to the lawsuit.

While I appreciate your efforts to instruct me regarding what you believe I should advise my client, I consider myself fully capable of providing that advice which I believe appropriate. My client has incurred significant costs and attorneys fees responding to your baseless allegations and meritless arguments asserted in this matter, including misrepresentations to the Court regarding the plain meaning of Utah's Wrongful Lien Statute, the legislative history of that statute, and regarding Utah case law. I anticipate addressing these issues with the Court at tomorrow's hearing.

Very truly yours,

Mark F. James

cc. Mr. Marc S. Jenson
Eric Pearson, Esq.

RONALD ADY
ATTORNEY AT LAW

Mark F. James
Hatch James & Dodge
Attorneys at Law
10 W. Broadway
Suite 400
Salt Lake City, Utah
84101

Re: **Andersons v. Wilshire Investments**

Dear Mr. James:

I am in receipt of your letter specifying the objections to my clients' subpoena. That letter was hand-delivered to my office about an hour ago.

Enclosed for service upon you is our affidavit of service for the above referenced subpoena. Your client, a party to the action, was provided with a full week to comply with this subpoena. Everything we have requested relates to Mr. Jenson's affidavit already filed in this action. If he has acted with due diligence, he should have already reviewed these documents before swearing his earlier affidavit. We have plowed no new ground with this subpoena.

You advise that you left on vacation the day following service of the subpoena on you. Is it not the case that there are secretaries or paralegals in your office that could have timely forwarded this subpoena to Wilshire? There is no reason that the only timely action **then** required of your office in regard to this subpoena -- the immediate forwarding of the subpoena to Wilshire -- could not have been done in your absence. Upon your return, Wilshire would have assembled all of the documents requested and it would only remain for you to deal with the issue of determining whether there was a proper objection to the subpoena. The fact that proper instructions were not left with your staff for action on pressing litigation matters that had to be dealt with in your absence, should not prejudice my clients.

Dealing with the objections stated in your letter of today's date in order, I can advise:

1. Rule 5(b)(1) Ut. R. Civ.P. requires that we serve your office with the subpoena. In conjunction with Rule 4(e)(5), it qualifies your office as an agent for service of the subpoena. U.C.A. 48-2b-113 provides for service in this manner. Service upon your office was valid;

2. Rule 45(b)(4) & 45(c)(2)(A) make it clear that the 14 day requirement applies only to non-parties. Your client is a party to this action and in that case only a "reasonable" time is required;

3. Your client is a resident of this State and so Rule 45(c)(3)(B)(iii) controls. As a party to the action your client is required to produce documents in Wasatch County. In any event, we offered to accept production in Salt Lake County;

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4. This is a motion for new trial and all matters previously before the Court are still in issue. Also, no order was entered on the Court's alleged dismissal of this action and until that order is entered, my clients' action against your client survives and may be proceeded upon;

5. Without prejudice to my clients' claims for production of documents under parts A and C of the subpoena, I urge you to produce forthwith the documents requested in parts B and D of the subpoena. As to parts A and C of the subpoena, part C merely requests production of documents for those matters specifically averred to in Mr. Jenson's affidavit. Having put these matters into issue and having relied upon them for your client's benefit, it is not open to you to now argue that they are irrelevant. As to Part A, Wilshire was organized and registered in the State in late July 2001. We have limited our request to the 40 days subsequent to that date of registration. Whether Wilshire had the ability to fund the purchase of the Hulet property on August 21, 2001 when it gave its first set of closing instructions to Security Title, whether on August 28, 2001, when Wilshire unilaterally and without notice to the Andersons changed those instructions, had those funds and whether on September 6, 2001 it had those funds (when Wilshire gave another set of closing instrucitons to Security Title), is highly relevant and very material to my clients' claims against your client in this action. As I am sure you are aware, your client's claims do not control the scope of discovery.

Accordingly, your objection are without merit and you should advise your client it must forthwith comply with the subpoena.

Yours truly,

RONALD ADY

Tab C

38-8-4. Posting of notice.

Each owner acting under this chapter shall keep posted in a prominent place in his office at all times a notice which reads as follows:

"All articles stored by a rental agreement, and charges not having been paid for 30 days, will be sold or otherwise disposed of to pay charges."

History: C. 1953, 38-8-4, enacted by L. 1981, ch. 171, § 4.

38-8-5. Other liens unaffected.

Nothing in this section shall be construed as in any manner impairing or affecting the right of parties to create liens by special contract or agreement, nor shall it in any manner affect or impair other liens arising at common law or in equity, or by any statute of this state.

History: C. 1953, 38-8-5, enacted by L. 1981, ch. 171, § 5.

CHAPTER 9
WRONGFUL LIEN

38-9-1. Definitions.

As used in this chapter:

(1) "Interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, title holder, mortgagee, trustee, or beneficial owner.

(2) "Lien claimant" means a person claiming an interest in real property who offers a document for recording or filing with any county recorder in the state asserting a lien or other claim of interest in certain real property.

(3) "Owner" means a person who has a vested ownership interest in certain real property.

(4) "Record interest holder" means a person who holds or possesses a present, lawful property interest in certain real property, including an owner, titleholder, mortgagee, trustee, or beneficial owner, and whose name and interest in that real property appears in the county recorder's records for the county in which the property is located.

(5) "Record owner" means an owner whose name and ownership interest in certain real property is recorded or filed in the county recorder's records for the county in which the property is located

(6) "Wrongful lien" means any document that purports to create a lien or encumbrance on an owner's interest in certain real property and at the time it is recorded or filed is not:

(a) expressly authorized by this chapter or another state or federal statute;

(b) authorized by or contained in an order or judgment of a court of competent jurisdiction in the state; or

(c) signed by or authorized pursuant to a document signed by the owner of the real property.

History: C. 1953, 38-9-1, enacted by L. 1997, ch. 125, § 2.

Repeals and Reenactments. — Laws 1997, ch. 125, § 2, repeals former § 38-9-1, as enacted by Laws 1985, ch. 182, § 1, relating to the liability of a person filing a wrongful lien, and enacts the present section. See §§ 38-9-4 and 38-9-5 for present liability provisions.

NOTES TO DECISIONS

Wrongful lien.

A notice of termination of restrictive covenants recorded in the office of the county recorder was not a wrongful lien. Swenson v. Erickson, 2000 UT 16, 998 P.2d 807.

Plaintiffs were entitled to summary relief where the parties' sales agreement did not convey defendants an interest in property, but only a qualified promise to do so at a later time, and therefore defendants' notice of interest was a wrongful lien as defined in this section. Russell v. Thomas, 2000 UT App 82, 999 P.2d 1244.

38-9-2. Scope.

(1) (a) The provisions of Sections 38-9-1, 38-9-3, 38-9-4, 38-9-5, and 38-9-6 apply to any recording or filing or any rejected recording or filing of a lien pursuant to this chapter on or after May 5, 1997.

(b) The provisions of Sections 38-9-1 and 38-9-7 apply to all liens of record regardless of the date the lien was recorded or filed.

(2) The provisions of this chapter shall not prevent a person from filing a lis pendens in accordance with Section 78-40-2 or seeking any other relief permitted by law.

(3) This chapter does not apply to a person entitled to a lien under Section 38-1-3 who files a lien pursuant to Title 38, Chapter 1, Mechanics' Liens.

History: C. 1953, 38-9-2, enacted by L. 1997, ch. 125, § 3; 1999, ch. 122, § 1.

Repeals and Reenactments. — Laws 1997, ch. 125, § 3 repeals former § 38-9-2, as enacted by Laws 1985, ch. 182, § 2, relating to an unauthorized lien as invalid, and enacts the present section. For present comparable provision, see § 38-9-7.

Amendment Notes. — The 1999 amendment, effective May 3, 1999, added the Subsection (1)(a) designation; substituted the list of sections in Subsection (1)(a) for "this chapter"; added Subsection (1)(b); and added "Mechanics' Liens" in Subsection (3).

38-9-3. County recorder may reject wrongful lien within scope of employment — Good faith requirement.

(1) A county recorder may reject recording of a lien if the county recorder determines the lien is a wrongful lien as defined in Section 38-9-1. If the county recorder rejects the document, the county recorder shall immediately return the original document together with a notice that the document was rejected

pursuant to this section to the person attempting to record or file the document or to the address provided on the document.

(2) A county recorder who, within the scope of the county recorder's employment, rejects or accepts a document for recording or filing in good faith under this section may not be liable for damages except as otherwise provided by law.

(3) If a rejected document is later found to be recordable pursuant to a court order, it shall have no retroactive recording priority.

(4) Nothing in this chapter shall preclude any person from pursuing any remedy pursuant to Utah Rules of Civil Procedure, Rule 65A, Injunctions.

History: C. 1953, 38-9-3, enacted by L. 1997, ch. 125, § 4.

Repeals and Reenactments. — Laws 1997, ch. 125, § 4 repeals former § 38-9-3, as enacted by Laws 1985, ch. 182, § 3, relating to liability for refusing to correct a document containing a wrongful lien, and enacts the present section.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

County recorder, powers and duties, § 17-21-1 et seq.

38-9-4. Civil liability for filing wrongful lien — Damages.

(1) A lien claimant who records or files or causes a wrongful lien as defined in Section 38-9-1 to be recorded or filed in the office of the county recorder against real property is liable to a record interest holder for any actual damages proximately caused by the wrongful lien.

(2) If the person in violation of this Subsection (1) refuses to release or correct the wrongful lien within 20 days from the date of written request from a record interest holder of the real property delivered personally or mailed to the last-known address of the lien claimant, the person is liable to that record interest holder for $1,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs.

(3) A person is liable to the record owner of real property for $3,000 or for treble actual damages, whichever is greater, and for reasonable attorney fees and costs, who records or files or causes to be recorded or filed a wrongful lien as defined in Section 38-9-1 in the office of the county recorder against the real property, knowing or having reason to know that the document:

(a) is a wrongful lien;

(b) is groundless; or

(c) contains a material misstatement or false claim.

History: C. 1953, 38-9-4, enacted by L. 1997, ch. 125, § 5.

Repeals and Reenactments. — Laws 1997, ch. 125, § 5 repeals former § 38-9-4, as enacted by Laws 1985, ch. 182, § 4, relating to venue, costs, and attorney fees, and enacts the present section. For present provisions, see § 38-9-6.

38-9-5. Criminal liability for filing a wrongful lien — Penalties.

(1) A person who intentionally records or files or causes to be recorded or filed a wrongful lien with a county recorder is guilty of a class B misdemeanor. Under this Subsection (1), it is an affirmative defense to this offense that the person recorded or filed a release of the claim or lien within 20 days from the date of written request from a record interest holder that the wrongful lien be

released. The accused person shall prove this affirmative defense by a preponderance of the evidence.

(2) A person who intentionally records or files or causes to be recorded or filed a wrongful lien with the county recorder is guilty of a third degree felony if, at the time of recording or filing, the person knowingly had no present, lawful property interest in the real property and no reasonable basis to believe he had a present, lawful property interest in the real property.

(3) Nothing in this section shall bar a prosecution for any act in violation of Section 76-8-414.

History: C. 1953, 38-9-5, enacted by L. 1997, ch. 125, § 6.

Effective Dates. — Laws 1997, ch. 125 became effective on May 5, 1997, pursuant to Utah Const., Art. VI, Sec. 25.

Cross-References. — Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301.

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

38-9-6. Petition to file lien — Notice to record interest holders — Summary relief — Contested petition.

(1) A lien claimant whose document is rejected pursuant to Section 38-9-3 may petition the district court in the county in which the document was rejected for an expedited determination that the lien may be recorded or filed.

(2) (a) The petition shall be filed with the district court within ten days of the date notice is received of the rejection and shall state with specificity the grounds why the document should lawfully be recorded or filed.

(b) The petition shall be supported by a sworn affidavit of the lien claimant.

(c) If the court finds the petition is insufficient, it may dismiss the petition without a hearing.

(d) If the court grants a hearing, the petitioner shall serve a copy of the petition, notice of hearing, and a copy of the court's order granting an expedited hearing on all record interest holders of the property sufficiently in advance of the hearing to enable any record interest holder to attend the hearing and service shall be accomplished by certified or registered mail.

(e) Any record interest holder of the property has the right to attend and contest the petition.

(3) Following a hearing on the matter, if the court finds that the document may lawfully be recorded, it shall issue an order directing the county recorder to accept the document for recording. If the petition is contested, the court may award costs and reasonable attorney's fees to the prevailing party.

(4) A summary proceeding under this section is only to determine whether or not a contested document, on its face, shall be recorded by the county recorder. The proceeding may not determine the truth of the content of the document nor the property or legal rights of the parties beyond the necessary determination of whether or not the document shall be recorded. The court's grant or denial of the petition under this section may not restrict any other legal remedies of any party, including any right to injunctive relief pursuant to Rules of Civil Procedure, Rule 65A, Injunctions.

(5) If the petition contains a claim for damages, the damage proceedings may not be expedited under this section.

History: C. 1953, 38-9-6, enacted by L. 1997, ch. 125, § 7.
Effective Dates. — Laws 1997, ch. 125 became effective on May 5, 1997, pursuant to Utah Const., Art. VI, Sec. 25.

38-9-7. Petition to nullify lien — Notice to lien claimant — Summary relief — Finding of wrongful lien — Wrongful lien is void.

(1) Any record interest holder of real property against which a wrongful lien as defined in Section 38-9-1 has been recorded may petition the district court in the county in which the document was recorded for summary relief to nullify the lien.

(2) The petition shall state with specificity the claim that the lien is a wrongful lien and shall be supported by a sworn affidavit of the record interest holder.

(3) (a) If the court finds the petition insufficient, it may dismiss the petition without a hearing.

(b) If the court finds the petition is sufficient, the court shall schedule a hearing within ten days to determine whether the document is a wrongful lien.

(c) The record interest holder shall serve a copy of the petition on the lien claimant and a notice of the hearing pursuant to Rules of Civil Procedure, Rule 4, Process.

(d) The lien claimant is entitled to attend and contest the petition.

(4) A summary proceeding under this section is only to determine whether or not a document is a wrongful lien. The proceeding shall not determine any other property or legal rights of the parties nor restrict other legal remedies of any party.

(5) (a) Following a hearing on the matter, if the court determines that the document is a wrongful lien, the court shall issue an order declaring the wrongful lien void ab initio, releasing the property from the lien, and awarding costs and reasonable attorney's fees to the petitioner.

(b) (i) The record interest holder may record a certified copy of the order with the county recorder.

(ii) The order shall contain a legal description of the real property.

(c) If the court determines that the claim of lien is valid, the court shall dismiss the petition and may award costs and reasonable attorney's fees to the lien claimant. The dismissal order shall contain a legal description of the real property. The prevailing lien claimant may record a certified copy of the dismissal order.

(6) If the district court determines that the lien is a wrongful lien as defined in Section 38-9-1, the wrongful lien is void ab initio and provides no notice of claim or interest.

(7) If the petition contains a claim for damages, the damage proceedings may not be expedited under this section.

History: C. 1953, 38-9-7, enacted by L. 1997, ch. 125, § 8.
Effective Dates. — Laws 1997, ch. 125 became effective on May 5, 1997, pursuant to Utah Const., Art. VI, Sec. 25.

Tab D

(3) In the absence of a statement identifying which provision is to be incorporated as described in Subsection (2)(b)(iii), the entire referenced master form is considered incorporated.

(4) A party may not incorporate by reference the legal description of the real property affected by the mortgage or trust deed being recorded.

History: C. 1953, 57-3-203, enacted by L. 1998, ch. 61, § 10.

Effective Dates. — Laws 1998, ch. 61, § 12 makes the act effective on July 1, 1998.

57-3-204. Constructive notice — Effect as between direct parties to mortgage or trust deed.

(1) The recording of a mortgage or trust deed that incorporates a provision of a master form in accordance with Section 57-3-203, operates as constructive notice of the mortgage or trust deed, including all incorporated provisions of the referenced master form.

(2) Nothing in this part modifies the law regarding the effectiveness of a mortgage, trust deed, or contract as between:

(a) the mortgagor and mortgagee of the mortgage; or

(b) the trustor, beneficiary, and trustee under a trust deed.

History: C. 1953, 57-3-204, enacted by L. 1998, ch. 61, § 11.

Effective Dates. — Laws 1998, ch. 61, § 12 makes the act effective on July 1, 1998.

CHAPTER 4

VALIDATING CERTAIN CONVEYANCES [REPEALED]

57-4-1 to 57-4-4. Repealed.

Repeals. — Laws 1988, ch. 155, § 24 repeals §§ 57-4-1 to 57-4-4, Utah Code Annotated 1953, validating deeds of mayors and territorial probate judges under the Townsite Act, mayor's deeds executed before 1913, deeds of mayors or probate or district judges acknowledged before recorders or clerks, and all instruments recorded before 1943, effective July 1, 1988.

CHAPTER 4a

EFFECTS OF RECORDING

57-4a-1. Document recordable despite defects.

Each document executed and acknowledged on or before July 1, 1988, may

History: C. 1953, 57-4a-1, enacted by L. 1988, ch. 155, § 19.

COLLATERAL REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d Records and Recording Laws §§ 122 to 128.

C.J.S. — 92 C.J.S. Vendor and Purchaser § 341.

57-4a-2. Recorded document imparts notice of contents despite defects.

A recorded document imparts notice of its contents regardless of any defect, irregularity, or omission in its execution, attestation, or acknowledgment. A certified copy of a recorded document is admissible as evidence to the same extent the original document would be admissible as evidence.

History: C. 1953, 57-4a-2, enacted by L. 1988, ch. 155, § 20.

NOTES TO DECISIONS

Effect on existing documents.

When this section took effect on July 1, 1988, it operated to cure any existing defective recorded document. First Sec. Bank v. Styler, 147 Bankr. 248 (D. Utah 1992).

This section does not say that a defective document is valid only if recorded after July 1, 1988. First Sec. Bank v. Styler, 147 Bankr. 248 (D. Utah 1992).

Section 68-3-3, prohibiting retroactive effect unless expressly declared, has no application to the operation of this section. This section cured existing defective recorded documents when it took effect; it did not retroactively cure any defective instruments. First Sec. Bank v. Styler, 147 Bankr. 248 (D. Utah 1992).

57-4a-3. Document recordable without acknowledgment.

A document or a certified copy of a document may be recorded without acknowledgment if:

(1) it was executed under law existing at the time of execution;

(2) it evidences or affects title to real property; and

(3) it was issued under the authority of:

(a) the United States, another state, a court of record, a foreign government, or an Indian tribe; or

(b) this state or any of its political subdivisions but, any document executed under the authority of this state or any of its political subdivisions after July 1, 1988, may not be recorded unless it includes a certificate of acknowledgement or jurat.

History: C. 1953, 57-4a-3, enacted by L. 1988, ch. 155, § 21; 1989, ch. 88, § 10.

Cross-References. — "Acknowledgement" and "jurat" defined, § 46-1-2.

57-4a-4. Presumptions.

(1) A recorded document creates the following presumptions regarding title to the real property affected:

(a) the document is genuine and was executed

(b) the person executing the document and the person on whose behalf it is executed are the persons they purport to be;

(c) the person executing the document was neither incompetent nor a minor at any relevant time;

(d) delivery occurred notwithstanding any lapse of time between dates on the document and the date of recording;

(e) any necessary consideration was given;

(f) the grantee, transferee, or beneficiary of an interest created or described by the document acted in good faith at all relevant times;

(g) a person executing a document as an agent, attorney in fact, officer of an organization, or in a fiduciary or official capacity:

(i) held the position he purported to hold and acted within the scope of his authority;

(ii) in the case of an officer of an organization, was authorized under all applicable laws to act on behalf of the organization; and

(iii) in the case of an agent, his agency was not revoked, and he acted for a principal who was neither incompetent nor a minor at any relevant time;

(h) a person executing the document as an individual:

(i) was unmarried on the effective date of the document; or

(ii) if it otherwise appears from the document that the person was married on the effective date of the document, the grantee was a bona fide purchaser and the grantor received adequate and full consideration in money or money's worth so that the joinder of the nonexecuting spouse was not required under Sections 75-2-201 through 75-2-207;

(i) if the document purports to be executed pursuant to or to be a final determination in a judicial or administrative proceeding, or to be executed pursuant to a power of eminent domain, the court, official body, or condemnor acted within its jurisdiction and all steps required for the execution of the document were taken; and

(j) recitals and other statements of fact in a document, including without limitation recitals concerning mergers or name changes of organizations, are true.

(2) The presumptions stated in Subsection (1) arise even though the document purports only to release a claim or to convey any right, title, or interest of the person executing it or the person on whose behalf it is executed.

History: C. 1953, 57-4a-4, enacted by L. 1988, ch. 155, § 22; 1989, ch. 88, § 11.

NOTES TO DECISIONS

ANALYSIS

Evidence to overcome presumption.

The presumption of valid delivery when a deed has been executed and recorded may be overcome only by clear and convincing evidence that the deed was in fact not delivered. Jacobs v. Hafen, 875 P.2d 559 (Utah Ct. App. 1994).

Cited in Reinbold v. Utah Fun Shares, 850 P.2d 487 (Utah Ct. App. 1993).

Tab E

TITLE 57

REAL ESTATE

Chapter

CHAPTER 1

CONVEYANCES

Section

57-1-1. Definitions.

As used in this title:

(1) "Certified copy" means a copy of a document certified by its custodian to be a true and correct copy of the document or the copy of the document maintained by the custodian, where the document or copy is maintained under the authority of the United States, the state of Utah or any of its political subdivisions, another state, a court of record, a foreign government, or an Indian tribe.

(2) "Document" means every instrument in writing, including every conveyance, affecting, purporting to affect, describing, or otherwise concerning any right, title, or interest in real property, except wills and leases for a term not exceeding one year.

(3) "Real property" or "real estate" means any right, title, estate, or interest in land, including all nonextracted minerals located in, on, or under the land, all buildings, fixtures and improvements on the land, and all water rights, rights-of-way, easements, rents, issues, profits, income, tenements, hereditaments, possessory rights, claims, including mining claims, privileges, and appurtenances belonging to, used, or enjoyed with the land or any part of the land

(4) "Stigmatized" means:

(a) the site or suspected site of a homicide, other felony, or suicide; or

(b) the dwelling place of a person infected, or suspected of being infected, with the Human Immunodeficiency Virus, or any other infectious disease that the Utah Department of Health determines cannot be transferred by occupancy of a dwelling place.

History: R.S. 1898 & C.L. 1907, § 1969; C.L. 1917, § 4869; R.S. 1933 & C. 1943, 78-1-1; L. 1988, ch. 155, § 1; 1990, ch. 308, § 1; 1991, ch. 10, § 2.

Cross-References. — Husband and wife, property rights, § 30-2-2 et seq.

Statute of frauds generally, § 25-5-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Construction of deeds.

—"Convey and warrant."

Words "convey and warrant" suffice to pass an estate in lands. Haynes v. Hunt, 96 Utah 348, 85 P.2d 861 (1939).

—Parties' intent.

A deed should be construed so as to effectuate the intentions and desires of the parties as manifested by the language in the deed. Wood v. Ashby, 122 Utah 580, 253 P.2d 351 (1952).

Easements.

—Restrictive or general.

When a deed creates an easement the circumstances attending the transaction, the situation of the parties, and the objects to be attained are to be considered in determining whether it is a restricted or a general reservation. Wood v. Ashby, 122 Utah 580, 253 P.2d 351 (1952).

—Size.

The grant of a right of way where no [illegible] ment of the easement granted. Salt Lake City v. J.B. & R.E. Walker, Inc., 123 Utah 1, 253 P.2d 365 (1953).

Effect of testamentary intent.

Where decedent intended that deed and bill of sale pass property upon his death, deed was testamentary in character and intent and was inoperative since it did not conform to statutory requirements for testamentary disposition. First Sec. Bank v. Burgi, 122 Utah 445, 251 P.2d 297 (1952).

Illustrative cases.

—Conveyance made.

Written instrument signed by equitable owner of premises under contract, reciting that certain sum had been received from purchaser as deposit on purchase of premises and specifying purchase price and terms, when considered in connection with full payment by purchaser to both equitable and legal owners together with warranty deed executed by latter, was "conveyance" within meaning of this section. Stucki v. Ellis, 114 Utah 486, 201 P.2d 486 (1949).

—Conveyance not established.

Mutual agreements of lessor and lessee that defendant act as marketing agent for distribution of topsoil could not be construed as a conveyance of an interest in real estate, since the agreements failed to identify defendant as grantee, specify the interest granted or describe in sufficient detail the boundaries of the property involved. Wasatch Mines Co. v. Hopkinson, 24 Utah 2d 70, 465 P.2d 1007 (1970).

"Interest" in real estate.

A transfer of a right to possession would be the conveyance of an interest in real estate within the meaning of this section. Tarpey v. Desert Salt Co., 5 Utah 205, 14 P. 338 (1887), aff'd, 142 U.S. 241, 12 S. Ct. 158, 35 L. Ed. 999 (1891).

section, interest in real property may be conveyed without use of deed. Stucki v. Ellis, 114 Utah 486, 201 P.2d 486 (1949).

Oral agreements.

—Subsequent written contract.

Bank, drawing up contract for sale of realty and omitting therefrom oral agreement that no garage was to be erected thereon, could not, after accepting payments thereunder for two years and after erection of garage by purchaser, seek reformation of contract in answer to buyer's suit for specific performance, bank being guilty of laches and having acquiesced in and accepted benefits under contract after becoming aware of mistake. George v. Fritsch Loan & Trust Co., 69 Utah 460, 256 P. 400 (1927).

Quitclaim deeds.

Statutory form of quitclaim deed is permissive only, and use of words "remise, release and quitclaim" in deed to mining claim passed all of grantor's title. Ruthrauff v. Silver King W. Mining & Milling Co., 95 Utah 279, 80 P.2d 338 (1938).

Cited in South Sanpitch Co. v. Pack, 765 P.2d 1279 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Deeds § 2.

C.J.S. — 26 C.J.S. Deeds § 1; 73 C.J.S. Property § 16.

A.L.R. — Air-conditioning appliance, equipment, or apparatus as fixture, 69 A.L.R.4th 359.

Specificity of description of premises as affecting enforceability of lease, 73 A.L.R.4th 236.

Radio or television aerials, antennas, towers, or satellite dishes or discs as within terms of covenant restricting use, erection, or maintenance of such structures upon residential property, 76 A.L.R.4th 498.

Implied warranty of fitness or suitability in commercial leases — modern status, 76 A.L.R.4th 928.

Vendor's obligation to disclose to purchaser of land presence of contamination from hazardous substances or wastes, 12 A.L.R.5th 630.

Provision in land contract for liquidated damages upon default of purchaser as affecting right of vendor to maintain action for damages for breach of contract, 39 A.L.R.5th 33.

57-1-2. Words of inheritance not required to pass fee.

The term "heirs," or other technical words of inheritance or succession, are not requisite to transfer a fee in real estate.

History: R.S. 1898 & C.L. 1907, § 1970; C.L. 1917, § 4870; R.S. 1933 & C. 1943, 78-1-2.

NOTES TO DECISIONS

Words of conveyance.

Words "convey and warrant" suffice to pass an estate in lands. Haynes v. Hunt, 96 Utah 348, 85 P.2d 861.

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Deeds §§ 19, 20.

C.J.S. — 26 C.J.S. Deeds § 109.

57-1-3. Grant of fee simple presumed.

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.

History: R.S. 1898 & C.L. 1907, § 1971; C.L. 1917, § 4871; R.S. 1933 & C. 1943, 78-1-3.

NOTES TO DECISIONS

ANALYSIS

Condemnation judgment.

Fee simple title is presumed to be passed by a condemnation judgment. Olsen v. Board of Educ., 571 P.2d 1336 (Utah 1977).

Determination of scope of conveyance.

In determining whether a deed, absolute in its terms, is intended as a mortgage, elements to be considered are whether there was continuing obligation on part of grantor to pay debt which it is claimed deed was made to secure, question of relative values, contemporaneous and subsequent acts, declarations and admissions of parties, form of written evidences of transactions, nature and character of testimony relied upon, various business, social, or other relationship of parties, and apparent aims and purposes to be accomplished. Corey v. Roberts, 82 Utah 445, 25 P.2d 940 (1933).

Evidence.

—Admissible.

Extrinsic evidence of the parties' intent in making and delivering a quitclaim deed as part of an agreement was admissible because it was possible the grantor delivered the deed while not intending to convey title, and proof of that intent was necessary for the court to ascertain and enforce the agreement. Capital Assets Fin. Servs. v. Lindsay, 956 P.2d 1090 (Utah Ct. App. 1998), aff'd sub nom. Capital Assets Fin. Servs. v. Maxwell, 994 P.2d 201 (Utah 2000).

Mortgage or deed.

Whether an instrument is a deed or mortgage is a matter of the intention of the parties. Northcrest, Inc. v. Walker Bank & Trust Co., 122 Utah 268, 248 P.2d 692 (1952).

The elements a court must consider when determining whether an absolute deed was intended as a mortgage include: (1) whether there was a continuing obligation on the part of question of relative values, (3) contemporaneous and subsequent acts of the parties, (4) the parties' statements, (5) the form of the written evidence of the transactions, (6) the nature of the testimony on which the parties rely, (7) the relationship between the parties, and (8) the apparent aims and purposes of the transfer. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

A deed, absolute in any form, may be construed as a mortgage if it was only intended as security under a parol agreement rather than as an outright conveyance. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

The party claiming a warranty deed was a mortgage must show by clear and convincing evidence that the conveyance was actually intended as a mortgage. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

Parol evidence.

Where conveyances, clear, unambiguous, and unequivocal in their terms, are attacked by parol evidence seeking to establish a trust or give to documents a mortgage construction, the party so seeking must by clear, unequivocal and satisfactory proof establish the alleged trust or mortgage relationship. Corey v. Roberts, 82 Utah 445, 25 P.2d 940 (1933).

Quitclaim reserving rights.

Quitclaim of real estate was not presumed to have passed fee simple where clause in quitclaim deed reserve to grantors right to use surface of ground for grazing purposes; clause indicated that grantor intended to convey lesser estate than fee simple notwithstanding contention of owners of mining rights on land that clause created mere license which was personal and as such not transferable. Russell v. Geyser-Marion Gold Mining Co., 18 Utah 2d 363, 423 P.2d 487 (1967).

Words of conveyance.

—"Convey and warrant."

Words "convey and warrant" suffice to pass an estate in lands. Haynes v. Hunt, 96 Utah 348, 85 P.2d 861 (1939).

—"Title."

Although the word "title" normally refers to a fee simple estate in real estate transactions, it can also refer to other types of estates and interests, such as in this case of a uniform real

ranty deed, since the vendors did not own the property in fee simple. Hall v. Fitzgerald, 671 P.2d 224 (Utah 1983).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Deeds § 152 et seq.
C.J.S. — 26 C.J.S. Deeds § 181.
A.L.R. — Deed to railroad company as conveying fee or easement, 6 A.L.R.3d 973.

57-1-4. Attempted conveyance of more than grantor owns — Effect.

A conveyance made by an owner of an estate for life or years, purporting to convey a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.

History: R.S. 1898 & C.L. 1907, § 1972; C.L. 1917, § 4872; R.S. 1933 & C. 1943, 78-1-4.

NOTES TO DECISIONS

Cited in Drazich v. Lasson, 964 P.2d 324 (Utah Ct. App. 1998).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Deeds §§ 335, 336.
C.J.S. — 26 C.J.S. Deeds § 104.

57-1-5. Creation of joint tenancy presumed — Tenancy in common.

(1) (a) Beginning on May 5, 1997, every ownership interest in real estate granted to two persons in their own right who are designated as husband and wife in the granting documents is presumed to be a joint tenancy interest with rights of survivorship, unless severed, converted, or expressly declared in the grant to be otherwise.

(b) Every ownership interest in real estate which does not qualify for the joint tenancy presumption as provided in this Subsection (1)(a), is presumed to be a tenancy in common interest unless expressly declared in the grant to be otherwise.

(2) (a) Use of words "joint tenancy" or "with rights of survivorship" or "and to the survivor of them" or words of similar import means a joint tenancy.

(b) Use of words "tenancy in common" or "with no rights of survivorship" or "undivided interest" or words of similar import shall declare a tenancy in common.

(3) A sole owner of real property shall create a joint tenancy in himself and another or others:

(b) by conveying to another person or persons an interest in land in which an interest is retained by the grantor and by declaring the creation of a joint tenancy by use of the words as provided in Subsection (2)(a).

(4) In all cases, the interest of joint tenants shall be equal and undivided.

(5) A "joint tenancy" is converted into a "tenancy in common" by a joint tenant by making a bona fide conveyance of the joint tenant's interest in the property to himself and another which terminates the joint tenancy.

(6) This act has no retrospective operation and shall govern instruments executed and recorded on or after May 5, 1997.

History: R.S. 1898 & C.L. 1907, § 1973; C.L. 1917, § 4873; R.S 1933 & C. 1943, 78-1-5; L. 1953, ch. 93, § 1; 1997, ch. 124, § 1.

Amendment Notes. — The 1997 amendment, effective May 5, 1997, subdivided the section; added Subsections (1)(b), (2)(b), (5), and (6); in Subsection (1)(a) substituted "Beginning on May 5, 1997, every ownership interest" for "Every interest," "who are designated as husband and wife in the granting documents is presumed to be" for "shall be," and "joint tenancy interest with rights of survivorship" for "tenancy in common," deleted "or more" before "persons," and inserted "severed, converted, or"; substituted "in Subsection (2)(a)" for "herein" twice in Subsection (3); and made stylistic changes.

Meaning of "this act." — The phrase "This act" in Subsection (6) was added by L. 1997, ch. 124, which amended this section to add the presumption of a joint tenancy in married persons.

Cross-References. — Interparty agreements, § 15-3-1 et seq.

NOTES TO DECISIONS

Analysis

Joint tenancies.

—Alienation and execution.

The Supreme Court of the United States has said that it would assume that "Utah accepts the general common-law rules relating to joint tenancies, including the rules permitting alienation of the interest of a joint tenant, and making its property subject to execution and separate sale." Mangus v. Miller, 317 U.S. 178, 63 S. Ct. 182, 87 L. Ed. 169 (1942), rehearing denied, 317 U.S. 712, 63 S. Ct. 432, 87 L. Ed. 567 (1943).

—Judicial sales.

Where a joint tenant defaulted on her obligation to a mortgagee, her subsequent purchase of the property at a judicial sale was deemed to be for the benefit of all cotenants. Jolley v. Corry, 671 P.2d 139 (Utah 1983).

—Severance by conveyance or sale.

The rule that a joint tenancy is severed by one tenant's conveyance applies not only to voluntary conveyances, but also to involuntary conveyances pursuant to judicial sales. Jolley v. Corry, 671 P.2d 139 (Utah 1983).

—Severance by self-conveyance.

Since the Utah legislature has recognized that the use of a strawman to create a joint tenancy is unnecessary, continuing to require the use of a strawman to sever a joint tenancy would create a lopsided body of law wherein property owners are required to perpetrate legal fictions for one purpose but not for another; thus, a unilateral, recorded self-conveyance sufficiently demonstrates an intent to sever. Knickerbocker v. Cannon, 912 P.2d 969 (Utah 1996).

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Cotenancy and Joint Ownership § 36 et seq.

C.J.S. — 86 C.J.S. Tenancy in Common § 6 et seq.

A.L.R. — Severance or termination of joint tenancy by conveyance of divided interest directly to self, 7 A.L.R.4th 1268.

Judgment lien or levy of execution on one joint tenant's share or interest as severing joint tenancy, 51 A.L.R.4th 906.

57-1-5.1. Termination of an interest in real estate — Affidavit.

(1) A document evidencing the termination of joint tenancy, tenancy by the entirety, life estate, or determinable or conditional interest in real estate may not be recorded unless it is an affidavit that meets the requirements of Subsection (2).

(2) The affidavit required by Subsection (1) shall:

(a) cite the interest which is being terminated;

(b) contain a legal description of the real property that is affected;

(c) reference the entry number and the book and page of the instrument creating the interest to be terminated; and

(d) if the termination is the result of a death, have attached as an exhibit, a copy of the death certificate or other document witnessing the death.

History: C. 1953, 57-1-5.1, enacted by L. 2000, ch. 320, § 1.

Effective Dates. — Laws 2000, ch. 320 became effective on May 1, 2000, pursuant to Utah Const., Art. VI, Sec. 25

57-1-6 to 57-1-9. Repealed.

Repeals. — Laws 1988, ch 155, § 24 repeals §§ 57-1-6 to 57-1-9, Utah Code Annotated 1953, describing the effect of recording an instrument on notice to third persons and relating to the applicability of the chapter, powers of attorney, and revocation of instruments, effective July 1, 1988. For provisions comparable to those in § 57-1-6, see § 57-3-2.

57-1-10. After-acquired title passes.

If any person shall hereafter convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, his heirs, successors or assigns, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance.

History: R.S. 1898 & C.L. 1907, § 1979; C.L. 1917, § 4879; R.S. 1933 & C. 1943, 78-1-9.

NOTES TO DECISIONS

ANALYSIS

Conveyance without ownership.

ance, after grantor had purported to convey the entire fee of such property by warranty deed to grantee, gave grantor no rights under the outstanding lease and all such rights passed to grantee at time of the assignment. Cox v. Ney, 580 P.2d 1085 (Utah 1978).

—After-acquired title.

Where one who conveyed coal lands subsequently acquired title to lands by patent, after-acquired title inured to grantee. Ketchum v.

Ed. 1198 (1919), appeal dismissed, 254 U.S. 616, 41 S. Ct. 147, 65 L. Ed. 440 (1920).

—Title conveyed.

Under this section, one who conveys coal lands before he has applied to the government to purchase the same conveys a good title thereto. Ketchum Coal Co. v. Pleasant Valley Coal Co., 50 Utah 395, 168 P. 86 (1917).

Where grantor purporting to convey title to mining claims described them in his deed by name of claim and survey number, he was estopped from making any claim to property described in deed when he subsequently acquired title thereto. Wall v. Utah Copper Co., 277 F. 55 (8th Cir. 1921).

Cited in Barlow Soc'y v. Commercial Sec. Bank, 723 P.2d 398 (Utah 1986); Utah Farm Prod. Credit Assoc. v. Wasatch Bank, 734 P.2d 904 (Utah 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Deeds §§ 341, 342.

C.J.S. — 26 C.J.S. Deeds § 105.

A.L.R. — Property insurance, or public liability insurance, as covering, in absence of express provision, after-acquired premises or realty, or subsequent additions to described realty, 18 A.L.R.3d 795.

57-1-11. Claimant out of possession may convey.

Any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein in the same manner and with the same effect as if he were in the actual possession thereof.

History: R.S. 1898 & C.L. 1907, § 1980; C.L. 1917, § 4880; R.S. 1933 & C. 1943, 78-1-10.

COLLATERAL REFERENCES

C.J.S. — 14 C.J.S. Champerty and Maintenance §§ 15, 16.

57-1-12. Form of warranty deed — Effect.

Conveyances of land may be substantially in the following form:

WARRANTY DEED

_____ (here insert name), grantor, of _____ (insert place of residence), hereby conveys and warrants to _____ (insert name), grantee, of _____ (insert place of residence), for the sum of _____ dollars, the following described tract _____ of land in _____ County, Utah, to wit: (here describe the premises).

Witness the hand of said grantor this _____ (month/day/year).

A warranty deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named, together with all the appurtenances, rights, and privileges thereunto belonging, with covenants from the grantor, his heirs, and personal representatives, that he is lawfully seised of the premises; that he has good right to convey the same; that he guarantees the grantee, his heirs, and

will forever warrant and defend the title thereof in the grantee, his heirs, and assigns against all lawful claims whatsoever. Any exceptions to these covenants may be briefly inserted in the deed following the description of the land.

History: R.S. 1898 & C.L. 1907, § 1981; C.L. 1917, § 4881; R.S. 1933 & C. 1943, 78-1-11; L. 2000, ch. 75, § 20.

Amendment Notes. — The 2000 amendment, effective May 1, 2000, updated the date line in the waranty deed form and made stylistic changes.

NOTES TO DECISIONS

ANALYSIS

Actions for breach of warranty.

Where paramount title is in sovereign, purchaser may yield to that title, and such yielding constitutes constructive eviction which will support action on covenant of warranty. East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 65 Utah 560, 238 P. 280 (1925).

In an action by a grantee against his grantor for breach of warranty because in a quiet title action between the grantor and a third person, the title was quieted in the third person, the grantor cannot assert the defense that because the third party had filed no lis pendens the grantee was not bound by the earlier decree. Briggs v. Hess, 122 Utah 559, 252 P.2d 538 (1953).

—Irremediable easement.

In a rescission action for anticipatory repudiation of a real estate contract, summary judgment in buyers' favor was authorized, because an irremediable easement was not excepted from the property description in the contract. Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah Ct. App. 1990).

Appurtenances.

All easements of permanent character that have been created in favor of land sold, and which are open and plain to be seen, and are reasonably necessary for its use and convenient enjoyment, unless expressly reserved by grantees, pass as appurtenances to land; cement walk constructed in front of several lots which was used as easement in connection with use and occupation of lots passed as an appurtenance to lots on sale thereof. Rollo v. Nelson, 34 Utah 116, 96 P. 263, 26 L.R.A. (n.s.) 315 (1908).

A warranty deed conveys the fee simple title "together with all the appurtenances, rights and privileges thereunto belonging," by force of this section, unless some rights are reserved by the terms of the conveyance. Accordingly, deed conveyed prescriptive right to conduct water through ditch along the right of way without any mention of such right, because such easement for an appurtenant water right is an appurtenance to the land. Petrofesa v. Denver & R.G.W.R.R., 110 Utah 109, 169 P.2d 808 (1946).

—Parol evidence.

Where there was latent ambiguity as to the existence of a ditch and a right of way as an appurtenant to the land conveyed by a deed, parol evidence was admissible. Egelund v. Fayter, 51 Utah 579, 172 P. 313 (1918).

Where deed, while conveying appurtenances as matter of law, was silent as to just what appurtenances were, latent ambiguity existed which could be explained by parol testimony. Wade v. Dorius, 52 Utah 310, 173 P. 564 (1918).

Evidence is admissible to establish what was appurtenant to property under statutory form of deed, which has effect of passing all appurtenances to property, as not varying terms of written instrument. Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947).

—Water rights.

Deed of general warranty of quiet and peaceable possession does not warrant water rights unless they are appurtenant to land conveyed. George v. Robison, 23 Utah 79, 63 P. 819 (1901).

Covenant against encumbrances.

enant against encumbrances only "deed restrictions and easements of record," an open irrigation ditch which was a prescriptive easement and not of record was not excepted from the covenant. Jones v. Grow Inv. & Mtg. Co., 11 Utah 2d 326, 358 P.2d 909 (1961).

With the possible exception of public easements that are apparent, permanent and irremediable, mere knowledge of the encumbrance is not sufficient to exclude it from the operation of the covenant against encumbrances. Jones v. Grow Inv. & Mtg. Co., 11 Utah 2d 326, 358 P.2d 909 (1961).

Grantors by warranty deed were liable for breach of covenant against encumbrances when a special improvement district levied assessments against the property after its conveyance where at the time of the execution of the deed the grantors had actual knowledge of the creation of the special improvement district, knew of improvements in various stages of completion, knew that the cost of the improvements was to be assessed against the property transferred, and assured grantees that the purchase price of the property included the improvements, despite fact that at time of conveyance there had been neither any actual levy of any assessment for improvements nor any recordation of the improvement district with the county recorder. Brewer v. Peatross, 595 P.2d 866 (Utah 1979).

Grantees under a warranty deed are entitled to recover as damages for breach of covenant against encumbrances an amount which is fairly and necessarily paid to extinguish the encumbrance, not to exceed the purchase price paid by grantees for the property, interest, court costs, plus attorney fees reasonably incurred in contesting the encumbrance, but not for attorney fees incurred in breach of covenant action against grantor. Forrer v. Sather, 595 P.2d 1306 (Utah 1979).

Where sellers failed to list utility easements in warranty deed, and the deed was placed in escrow but not delivered, it was held that there was no breach of the covenant against encumbrances, but that rescission was an appropriate remedy since the encumbrances were irremediable and the sellers would not be able to fulfill the contract. Bergstrom v. Moore, 677 P.2d 1123 (Utah 1984).

Exception to covenants for quiet possession and freedom from encumbrances which stated "subject to fence line encroachment along east line" was inserted in order to insulate the grantor from a suit by the grantee, in the event claim of title to a strip of land by acquiescence proved to be valid, and there was no evidence to suggest that the grantor intended for any reason to reserve to herself title to the strip.

—Waiver.

Where there was no genuine dispute that a buyer of real property lacked knowledge of a pipeline across the property prior to executing a contract, the buyer did not waive any rights to title without encumbrances. Breuer-Harrison, Inc. v. Combe, 799 P.2d 716 (Utah Ct. App. 1990).

Covenants running with land.

The question as to what covenants run with the land is a matter of general real property law. It may be stated, however, that personal covenants do not pass to a subsequent grantee, except by assignment. H.T. & C. Co. v. Whitehouse, 47 Utah 323, 154 P. 950, 1916D L.R.A. 611 (1916).

A parol agreement in no event runs with the land. Knight v. Southern Pac. Co., 52 Utah 42, 172 P. 689 (1918).

Covenants of general warranty and for quiet enjoyment are covenants running with the land. Van Cott v. Jacklin, 63 Utah 412, 226 P. 460 (1924); East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co., 65 Utah 560, 238 P. 280 (1925).

Determination of character of instrument.

An instrument which contains the names of the parties to it, the consideration, and a description of the property is a deed, even if the description is not by metes and bounds or by numbers, but by reference to another deed then on record. These elements, taken with the words "gift" and "deed," are sufficient to constitute the writing of a deed of conveyance. Cereghino v. Einberg, 4 Utah 514, 11 P. 568 (1886).

Whether an instrument is a deed of conveyance or a power of attorney depends upon the intention of the parties as expressed therein. Coltharp v. Coltharp, 48 Utah 389, 160 P. 121 (1916).

"Encumbrances" construed.

The term "encumbrance," as used in deed of conveyance, means every right to or interest in land which may exist in third persons, to diminution of value of land, but consistent with passing of fee by conveyance. Boothe v. Wyatt, 54 Utah 550, 183 P. 323 (1919).

Formal requirements.

—Presumptions.

Possession under deed regular upon its face carries with it presumption of regularity notwithstanding it was not recorded until after death of grantor. In re Helin's Estate, 55 Utah 572, 188 P. 633 (1920).

—Signature of witness.

The signing of the deed by a witness is an

Desert Salt Co., 5 Utah 205, 14 P. 338 (1887), aff'd, 142 U.S. 241, 12 S. Ct. 158, 35 L. Ed. 999 (1891).

Interest conveyed.

Warranty deed absolute in form is presumed to convey fee-simple title, or at least whatever title grantor has. Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948).

Liability of grantor.

—Materialman's lien.

Grantor of warranty deed held liable for all damages sustained by grantee by reason of encumbrance of materialman's lien against premises. Boothe v. Wyatt, 54 Utah 550, 183 P. 323 (1919).

Limitation of actions.

In action on covenant of warranty, statute of limitations begins to run from time of eviction; action premised on fact that paramount title was in United States was timely where commenced within year after purchaser found that title was in sovereign. East Canyon Land & Stock Co. v. Davis & Weber Counties Canal Co , 65 Utah 560, 238 P. 280 (1925).

A covenant against encumbrances in warranty deed is, in effect, a covenant to indemnify where encumbrance is charge or lien against land which can be extinguished by payment, and hence statute of limitations begins to run when grantee is damnified so that action by grantee to recover amount paid to extinguish tax lien brought within six years from time of payment, but more than six years from time deed was given, was not barred by limitations. Soderberg v. Holt, 86 Utah 485, 46 P.2d 428, 99 A.L.R. 1041 (1935).

Vendor's lien.

In action by vendor against third-party purchaser of real estate which had been conveyed to original vendee by warranty deed, contention that vendor had vendors' lien to assert against third-party purchaser was without merit since warranty deed conveyed fee simple title. Pollei v. Burger, 23 Utah 2d 381, 464 P.2d 377 (1970).

Way of necessity.

Where subdivider of farm land into city lots conveys separate lots to different persons by warranty deeds, purchaser of second lot cannot assert right to use of irrigation ditch passing through first purchaser's lot, either on theory that subdivider reserved easement by implication or that second purchaser could assert "way of necessity" under common law for passage of waters over private lands, in view of §§ 73-1-6, and 78-34-1, giving right of eminent domain in such cases. Alcorn v. Reading, 66 Utah 509, 243 P. 922 (1926) (To the extent that this case holds that there can be no easement by implied grant because of right to condemn, it is overruled, *true test being reasonable necessity existing* therefor. Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947)).

One claiming "way of necessity" across another's lands has burden of showing that another way could not be had without unreasonable labor and expense. Alcorn v. Reading, 66 Utah 509, 243 P. 922 (1926), overruled on other grounds, Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947).

Reservation of easement of right of way in deed conveying land is equivalent for purpose of creation of easement to an express grant of easement by grantee of land, and latter and his successors in interest may be restrained from interfering with use of way by successors in interest of grantor. Brown v. Christopher, 67 Utah 278, 247 P. 503 (1926).

Cited in Webb v. Interstate Land Corp., 920 P.2d 1187 (Utah 1996).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law, 1980 Utah L. Rev. 649.

Am. Jur. 2d. — 23 Am. Jur. 2d Deeds § 17 et seq.

C.J.S. — 26 C.J.S. Deeds § 22.

A.L.R. — Validity, construction, and effect of contractual provision regarding future revocation or modification of covenant restricting use of real property, 4 A.L.R.3d 570.

Electronic computing equipment as fixtures, 6 A.L.R.3d 497.

Deed to railroad company as conveying fee or easement, 6 A.L.R.3d 973.

Construction of covenant or condition in conveyance of land relating to "permanent" main-

What constitutes a "building" within restrictive covenant, 18 A.L.R.3d 850.

Incidental use of dwelling for business or professional purposes as violation of covenant restricting use to residential purposes, 21 A.L.R.3d 641.

Covenant restricting use of land, made for purpose of guarding against competition, as running with land, 25 A.L.R.3d 897.

Parol exception of fixtures from conveyance or lease, 29 A.L.R.3d 1441.

Recovery of litigation expenses allegedly incurred as result of breach of covenant not to sue, 30 A.L.R.3d 1433.

exception or reservation clause, 38 A.L.R.3d 1419.

Validity and construction of restrictive covenant requiring consent to construction on lot, 40 A.L.R.3d 864.

Covenant in deed restricting material to be used in building construction, 41 A.L.R.3d 1290.

Validity and construction of restrictive covenant controlling architectural style of buildings to be erected on property, 47 A.L.R.3d 1232.

Specificity of description of premises as affecting enforceability of contract to convey real property — modern cases, 73 A.L.R.4th 135.

Title insurer's negligent failure to discover and disclose defect as basis for liability in tort, 19 A.L.R.5th 786.

57-1-13. Form of quitclaim deed — Effect.

Conveyances of land may also be substantially in the following form:

QUITCLAIM DEED

_____ (here insert name), grantor, of _____ (insert place of residence), hereby quitclaims to _____ (insert name), grantee, of _____ (here insert place of residence), for the sum of _____ dollars, the following described tract _____ of land in _____ County, Utah, to wit: (here describe the premises).

Witness the hand of said grantor this _____ (month/day/year).

A quitclaim deed when executed as required by law shall have the effect of a conveyance of all right, title, interest, and estate of the grantor in and to the premises therein described and all rights, privileges, and appurtenances thereunto belonging, at the date of the conveyance.

History: R.S. 1898 & C.L. 1907, § 1982; C.L. 1917, § 4882; R.S. 1933 & C. 1943, 78-1-12; L. 2000, ch. 75, § 21.

Amendment Notes. — The 2000 amendment, effective May 1, 2000, updated the date line in the quitclaim deed form and made stylistic changes.

NOTES TO DECISIONS

ANALYSIS

After-acquired title.
Conveyance to deceased person.
Dissolution of joint tenancy.
Effect of alteration.
Interest conveyed.
Noncompliance with law.
Release of participating interests.
Statutory and other forms.

After-acquired title.

Quitclaim deed operates to convey estate of grantor "at the date of such conveyance," and does not convey an after-acquired title. Duncan v. Hemmelwright, 112 Utah 262, 186 P.2d 965 (1947); Barlow Soc'y v. Commercial Sec. Bank, 723 P.2d 398 (Utah 1986).

An after-acquired title does not pass by a quitclaim deed. Dowse v. Kammerman, 122 Utah 85, 246 P.2d 881 (1952).

A quitclaim deed does not raise an estoppel as to an after-acquired title. Dowse v.

Conveyance to deceased person.

The recordation of an affidavit declaring that the person named as an additional grantee on an altered quitclaim deed was the affiant's late wife was ineffective to effect a conveyance, as the wife had died prior to the signing of the affidavit, and an attempted conveyance to a nonexisting entity, such as a deceased person, is void. Julian v. Petersen, 966 P.2d 878 (Utah Ct. App. 1998).

Dissolution of joint tenancy.

A wife's quitclaim deed to her son of her interest in property held jointly with her husband changed the husband's interest from a joint tenancy to a tenancy in common; the fact that the son delayed recording the deed did not affect its validity between him and his mother, and the husband did not qualify as a subsequent purchaser for purposes of the recording statute. Crowther v. Mower, 876 P.2d 876 (Utah Ct. App. 1994).

delivery to the grantee does not invalidate the conveyance from the grantor to the grantee. Julian v. Petersen, 966 P.2d 878 (Utah Ct. App. 1998).

Interest conveyed.

Quitclaim deeds do not imply the conveyance of any particular interest in the property. Grantee acquires only interest of his grantor, "be that interest what it may." Nix v. Tooele County, 101 Utah 84, 118 P.2d 376 (1941).

Noncompliance with law.

A quitclaim deed to which a name was added as an additional grantee after the deed was executed by the grantor and delivered to the grantee, and on which the grantee attempted to reconvey the property to himself and the additional grantee, did not validly convey an interest to the additional grantee, as the grantee never executed the deed after it was altered and there was no evidence of any delivery of the deed from the grantee to the additional grantee. Julian v. Petersen, 966 P.2d 878 (Utah Ct. App. 1998).

Release of participating interests.

Release of participating interests (RPI) was not a conveyance despite the use of the word "quitclaims," but was instead an acknowledgement that previous owner relinquished any continued interest in land. Hansen v. Stichting Mayflower Recreational Fonds, 898 F. Supp. 1503 (D. Utah 1995).

Statutory and other forms.

Statutory form of quitclaim deed is permissive only, and use of words "remise, release and quitclaim" in deed to mining claim passed all of grantor's title. Ruthrauff v. Silver King W. Mining & Milling Co., 95 Utah 279, 80 P.2d 338 (1938).

Our statute requires no word of art to quitclaim. In construing whether an instrument passes title, each case stands on its own words, combinations thereof, recitals, and other attendant facts, having in mind the rule that generally the instrument is construed in favor of the grantee. Meagher v. Uintah Gas Co., 123 Utah 123, 255 P.2d 989 (1953).

COLLATERAL REFERENCES

Am. Jur. 2d. — 23 Am. Jur. 2d Deeds § 32 et seq.

C.J.S. — 26 C.J.S. Deeds § 22.

A.L.R. — Specificity of description of premises as affecting enforceability of contract to convey real property — modern cases, 73 A.L.R.4th 135.

57-1-14. Form of mortgage — Effect.

A mortgage of land may be substantially in the following form:

MORTGAGE

_____ (here insert name), mortgagor, of _____ (insert place of residence), hereby mortgages to _____ (insert name), mortgagee, of _____ (insert place of residence), for the sum of _____ dollars, the following described tract _____ of land in _____ County, Utah, to wit: (here describe the premises).

This mortgage is given to secure the following indebtedness (here state amount and form of indebtedness, maturity, rate of interest, by and to whom payable, and where).

The mortgagor agrees to pay all taxes and assessments on said premises, and the sum of _____ dollars attorneys' fee in case of foreclosure.

Witness the hand of said mortgagor this _____ (month/day/year).

A mortgage when executed as required by law shall have the effect of a conveyance of the land therein described, together with all the rights, privileges and appurtenances thereunto belonging, to the mortgagee, his heirs, assigns, and legal representatives, as security for the payment of the indebtforth, with covenants from the mortgagor of general

previous to the day appointed for the sale of such lands for taxes; and may be foreclosed as provided by law upon any default being made in any of the conditions thereof as to payment of either principal, interest, taxes, or assessments.

History: R.S. 1898 & C.L. 1907, § 1983; C.L. 1917, § 4883; R.S. 1933 & C. 1943, 78-1-13; L. 2000, ch. 75, § 22.

Amendment Notes. — The 2000 amendment, effective May 1, 2000, updated the date line in the mortgage form and made a stylistic change.

Cross-References. — Foreclosure of mortgages, § 78-37-1 et seq.

Mortgage not deemed a conveyance, § 78-40-8.

Remedies for failure to discharge mortgage after satisfaction, § 57-1-38.

NOTES TO DECISIONS

ANALYSIS

"Conveyance" construed.

The term "conveyance," as used in this section, covers only transactions involving mortgages or encumbrances of land and not transfers of title or estate in view of § 57-1-1, so that a provision in this section that a mortgage in a statutory form "shall have the effect of a conveyance of the land" is not inconsistent with former § 104-57-7, Code 1943 (§ 78-40-8) providing that a mortgage "shall not be deemed a conveyance, whatever its terms," since the term "conveyance" is used in the latter section in its common-law meaning as a transfer of title or an estate in land. Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948).

Deed or mortgage.

A deed which is absolute in form, executed and delivered as security under a parol agreement, and with the understanding that it shall be so held, will be construed as a mortgage. Hess v. Anger, 53 Utah 186, 177 P. 232 (1918).

A deed, when intended as a mortgage, may be given to secure an unliquidated claim, or whatever indebtedness may thereafter be contemplated to be contracted between the parties under it, and the same foreclosed in a court of equity. Hess v. Anger, 53 Utah 186, 177 P. 232 (1918).

While a warranty deed which is absolute in form is presumed to convey a fee-simple title or at least whatever title the grantor has, where a written agreement between the parties contemporaneous with the deed shows that the deed mortgage. Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948).

A warranty deed, which was absolute in form and a contemporaneous written contract reciting the purpose of the conveyance, providing for reconveyance upon payment of the amount of the mortgage and giving the grantor the right to sell the land to a third person, constituted a formal mortgage cognizable in a court of law rather than a mere equitable mortgage cognizable only in equity such that the grantee did not acquire title but was a mere mortgagee. Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948).

Whether an instrument is a deed or a mortgage is a matter of the intention of the parties. Northcrest, Inc. v. Walker Bank & Trust Co., 122 Utah 268, 248 P.2d 692 (1952).

Destruction of mortgaged property.

A mortgage is an incident to the obligation which it is given to secure. Thus, the mortgagor and other obligors remain liable for the payment of the debt if the mortgaged property is destroyed. First Nat'l Bank v. Haymond, 89 Utah 151, 57 P.2d 1401 (1936).

Equitable mortgage.

An equitable mortgage is a lien which equity impresses on a property, but in order to obtain this mortgage, the mortgagee must resort to equity. Federal Land Bank v. Pace, 87 Utah 156, 48 P.2d 480, 102 A.L.R. 819 (1935).

In equity, a deed which is absolute upon its face may be shown by parol evidence to have been given for security purposes only and, upon such showing, equity will give effect to the intention of the parties. Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948).

Form.

It is not necessary that an instrument follow the form afforded by this section in order to be a real estate mortgage, since no particular form is necessary so long as the intention of the

A real estate mortgage need not be contained in one writing, but may consist of a warranty deed and a separate contract in writing. Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948).

Although this section sets forth a land mortgage form that includes spaces for insertion of the amount and terms of the debt, no particular form is necessary as long as the writing shows the intention of the parties to create a valid legal mortgage. The instrument need not show the amount of indebtedness as long as it sufficiently discloses the sources from which the specific amount may be ascertained. General Glass Corp. v. Mast Constr. Co., 766 P.2d 429 (Utah Ct. App. 1988).

Title to mortgaged property.

Under this section and former § 104-57-7, Code 1943 (§ 78-40-8), regardless of the form of instrument used to create a mortgage, the title to the mortgaged property remained in the mortgagor. First Nat'l Bank v. Haymond, 89 Utah 151, 57 P.2d 1401 (1936).

Utah is a "lien theory" state; thus, a real estate mortgage in this state does not vest title in mortgagee but merely creates a lien in his favor. Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948).

Water rights.

A mortgage which is in statutory form, but without a reservation of water, conveys whatever rights the grantor has to water appurtenant to the land. Thompson v. McKinney, 91 Utah 89, 63 P.2d 1056 (1937).

Water rights which were found to be appurtenant to the land, and which were not reserved to the mortgagor in the mortgage or otherwise separately conveyed to another, were included in the mortgage and passed with the land on foreclosure. Thompson v. McKinney, 91 Utah 89, 63 P.2d 1056 (1937).

COLLATERAL REFERENCES

Am. Jur. 2d. — 54A Am. Jur. 2d Mortgages § 12 et seq.

C.J.S. — 59 C.J.S. Mortgages § 93.

A.L.R. — Construction of provision in real estate mortgage, land contract or other security instrument for lease of separate parcels of land as payments are made, 41 A.L.R.3d 7.

Validity and construction of provision of mortgage or other real-estate financing contract prohibiting prepayment for a fixed period of time, 81 A.L.R.4th 423.

57-1-15. Effect of recording assignment of mortgage.

The recording of an assignment of a mortgage is not in itself considered notice of the assignment to the mortgagor, his heirs, or personal representatives so as to invalidate any payment made by them or either of them to the mortgagee.

History: C. 1953, 57-1-15, enacted by L. 1988, ch. 155, § 2.

Repeals and Reenactments. — Laws 1988, ch. 155, § 2 repeals former § 57-1-15, Utah Code Annotated 1953, relating to the revocation or termination of powers executed by persons in the armed forces, merchant seamen, and federal employees, and enacts the present section, effective July 1, 1988.

57-1-16 to 57-1-18. Repealed.

Repeals. — Laws 1994, ch. 172, § 2 repeals § 57-1-16, as repealed and reenacted by Laws 1988, ch. 155, § 3, establishing remedies for failure to discharge or release satisfied mortgage, effective May 2, 1994. For present comparable provisions, see § 57-1-38.

Laws 1988, ch. 155, § 24 repeals §§ 57-1-17 and 57-1-18, Utah Code Annotated 1953, relating to powers of attorney, effective July 1, 1988.

57-1-19. Trust deeds — Definitions of terms.

As used in Sections 57-1-20 through 57-1-36:

(1) "Beneficiary" means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his

(2) "Trustor" means the person conveying real property by a trust deed as security for the performance of an obligation.

(3) "Trust deed" means a deed executed in conformity with Sections 57-1-20 through 57-1-36 and conveying real property to a trustee in trust to secure the performance of an obligation of the trustor or other person named in the deed to a beneficiary.

(4) "Trustee" means a person to whom title to real property is conveyed by trust deed, or his successor in interest.

(5) "Real property" has the same meaning as set forth in Section 57-1-1.

(6) "Trust property" means the real property conveyed by the trust deed.

History: L. 1961, ch. 181, § 1; 1988, ch. 155, § 4.

NOTES TO DECISIONS

ANALYSIS

Mortgage distinguished.
Trustee must be identified in instrument.

Mortgage distinguished.

Unlike a trust deed, a mortgage in Utah is not a title-conveying instrument. The mortgagor retains legal title, and the mortgagee's interest is a lien on the property to secure payment of a debt. General Glass Corp. v. Mast Constr. Co., 766 P.2d 429 (Utah Ct. App. 1988).

A trust deed is similar to a mortgage in that it is given as security for the performance of an obligation. However, a trust deed is a conveyance by which title to the trust property passes to the trustee. Upon default, the trustee has power to sell the property to satisfy the trustor's debt to the beneficiary. First Sec. Bank v. Banberry Crossing, 780 P.2d 1253 (Utah 1989); Interstate Land Corp. v. Patterson, 797 P.2d 1101 (Utah Ct. App. 1990).

Trustee must be identified in instrument.

Purported deed of trust recorded by savings and loan association was ineffective as a title-conveying instrument where it did not identify or name the trustee, who was the grantee under the deed. General Glass Corp. v. Mast Constr. Co., 766 P.2d 429 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 54A Am. Jur. 2d Mortgages § 146 et seq.

C.J.S. — 59 C.J.S. Mortgages § 5 et seq.

57-1-20. Transfers in trust of real property — Purposes — Effect.

Transfers in trust of real property may be made to secure the performance of an obligation of the trustor or any other person named in the trust deed to a beneficiary. All right, title, interest and claim in and to the trust property acquired by the trustor, or his successors in interest, subsequent to the execution of the trust deed, shall inure to the trustee as security for the obligation or obligations for which the trust property is conveyed in like manner as if acquired before execution of the trust deed.

History: L. 1961, ch. 181, § 2.

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 6.

57-1-21. Trustees of trust deeds — Qualifications.

(1) (a) The trustee of a trust deed shall be:

(i) any member of the Utah State Bar;

(ii) any depository institution as defined in Section 7-1-103, or insurance company authorized to do business in Utah under the laws of Utah or the United States;

(iii) any corporation authorized to conduct a trust business in Utah under the laws of Utah or the United States;

(iv) any title insurance or abstract company authorized to do business in Utah under the laws of Utah;

(v) any agency of the United States government; or

(vi) any association or corporation which is licensed, chartered, or regulated by the Farm Credit Administration or its successor.

(b) Subsection (1) is not applicable to a trustee of a trust deed existing prior to the effective date of this chapter, nor to any agreement that is supplemental to that trust deed.

(2) The trustee of a trust deed may not be the beneficiary of the trust deed, unless the beneficiary is qualified to be a trustee under Subsection (1)(a)(ii), (iii), (v), or (vi).

History: L. 1961, ch. 181, § 3; 1963, ch. 110, § 1; 1969, ch. 162, § 1; 1985, ch. 64, § 1; 1996, ch. 182, § 25.

Amendment Notes. — The 1996 amendment, effective July 1, 1996, added the Subsection (1)(a) and (1)(b) designations, redesignating former Subsections (1)(a) to (f) as (1)(a)(i) to (vi); substituted "depository institution as defined in Section 7-1-103" for "bank, building and loan association, savings and loan association" in Subsection (1)(a)(ii); and made related and stylistic changes.

"Effective date of this chapter." — The phrase "effective date of this chapter," in Subsection (1)(b), first appeared in this section as amended by L. 1985, ch. 64, § 1. That act (L. 1985, ch. 64) took effect on April 29, 1985.

Cross-References. — Utah State Bar, § 78-51-1.

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages §§ 5, 78.

57-1-22. Successor trustees — Appointment by beneficiary — Effect — Substitution of trustee — Recording — Form.

(1) The beneficiary may appoint a successor trustee at any time by filing for record in the office of the county recorder of each county in which the trust property or some part thereof is situated, a substitution of trustee. From the time the substitution is filed for record, the new trustee shall succeed to all the power, duties, authority, and title of the trustee named in the deed of trust and of any successor trustee.

(2) The substitution shall:

(a) identify the trust deed by stating the names of the original parties thereto, the date of recordation, and the book and page where the same is recorded or the entry number;

(b) include the legal description of the trust property;

(d) be executed and acknowledged by all of the beneficiaries under the trust deed or their successors in interest.

(3) If not previously recorded, at the time of recording the notice of default, the successor trustee shall file for record the substitution of trustee, and a copy thereof shall be sent in the manner provided in Section 57-1-26 to all persons to whom a copy of the notice of default would be required to be mailed by Section 57-1-26. In addition thereto, a copy shall be sent to the prior trustee by regular mail to his last-known address.

(4) A substitution of trustee shall be sufficient if made in substantially the following form:

Substitution of Trustee

(insert name and address of new trustee)

is hereby appointed successor trustee under the trust deed executed by _____ as trustor, in which _____ is named beneficiary and _____ as trustee, and filed for record _____ (month/day/year), and recorded in Book _____, Page _____, Records of _____ County, (or filed for record _____ (month/day/year), with recorder's entry No. _____, _____ County), Utah.

(Insert legal description)

Signature _____

(Certificate of Acknowledgment)

History: L. 1961, ch. 181, § 4; 1981, ch. 100, § 1; 1989, ch. 88, § 1; 2000, ch. 75, § 23.

Amendment Notes. — The 2000 amendment, effective May 1, 2000, updated the date lines in the form in Subsection (4).

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 79.

57-1-23. Sale of trust property — Power of trustee — Foreclosure of trust deed.

A power of sale is hereby conferred upon the trustee which the trustee may exercise and under which the trust property may be sold in the manner hereinafter provided, after a breach of an obligation for which the trust property is conveyed as security; or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision therefor in the trust deed.

History: L. 1961, ch. 181, § 5.

NOTES TO DECISIONS

ANALYSIS

Joint tenancies.
Mortgage foreclosure method.
Procedural requirements.
Cited.

Joint tenancies.

The rule that a joint tenancy is severed by one tenant's conveyance applies not only to voluntary conveyances, but also to involuntary conveyances pursuant to judicial rules. Jolley v. Corry, 671 P.2d 139 (Utah 1983).

Where a joint tenant defaulted on her obligation to a mortgagee, her subsequent purchase of the property at a judicial sale was deemed to be for the benefit of all cotenants. Jolley v. Corry, 671 P.2d 139 (Utah 1983).

Mortgage foreclosure method.

Defendant could not claim error where plaintiff sought to foreclose on a trust deed in the manner provided for foreclosure of mortgages, even though, in selecting the alternative remedy, plaintiff obtained costs and attorney fees far in excess of those provided for in § 57-1-31. Security Title Co. v. Payless Bldrs. Supply, 17 Utah 2d 179, 407 P.2d 141 (1965).

Procedural requirements.

The detailed procedural requirements for a trustee's sale of real property under §§ 57-1-23 through 57-1-34 are intended to protect the debtor/trustor, and provide protections that substitute for the six-month right of redemption guaranteed in judicial mortgage foreclosures. Jones v. Johnson, 761 P.2d 37 (Utah Ct. App. 1988).

Cited in Timm v. Dewsnup, 1999 UT 105, 990 P.2d 942.

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages §§ 599, 600.
A.L.R. — Failure to keep up insurance as justifying foreclosure under acceleration provision in mortgage or deed of trust, 69 A.L.R.3d 774.

57-1-24. Sale of trust property by trustee — Notice of default.

The power of sale conferred upon the trustee may not be exercised until:

(1) the trustee first files for record, in the office of the recorder of each county where the trust property or some part or parcel thereof is situated, a notice of default, identifying the trust deed by stating the name of the trustor named therein and giving the book and page where the trust deed is recorded and a legal description of the trust property, and containing a statement that a breach of an obligation for which the trust property was conveyed as security has occurred, and setting forth the nature of that breach and of his election to sell or cause to be sold the property to satisfy the obligation;

(2) not less than three months has thereafter elapsed; and

(3) after the lapse of at least three months the trustee shall give notice of sale as provided in this act.

History: L. 1961, ch. 181, § 6; 1967, ch. 131, § 1; 1989, ch. 88, § 2.

Meaning of "this act." — Laws 1961, ch. 181 enacted §§ 57-1-19 through 57-1-36.

NOTES TO DECISIONS

ANALYSIS

Three-month time period.
Cited.

U.S.C. § 362), which provides that the filing of a bankruptcy petition shall operate as a stay of any act to enforce a lien against property in custody of the bankruptcy court, does not sus-

Lewis, 615 P.2d 1256 (Utah 1980).

Trustee's sale was upheld, even though notice of the sale was mailed only two months after an amended notice of default was recorded, because there was no showing that the procedural irregularity resulted from fraud or unfair dealing, and all parties were afforded the rights and protections the statutory requirements for a nonjudicial foreclosure were intended to ensure. Occidental/Nebraska Fed. Sav. Bank v. Mehr, 791 P.2d 217 (Utah Ct. App. 1990).

Cited in Nyman v. McDonald, 966 P.2d 1210 (Utah Ct. App. 1998).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 621 et seq.

57-1-25. Notice of trustee's sale — Description of property — Time and place of sale.

(1) The trustee shall give written notice of the time and place of sale particularly describing the property to be sold:

(a) by publication of the notice, at least three times, once a week for three consecutive weeks, the last publication to be at least ten days but not more than 30 days prior to the sale, in some newspaper having a general circulation in each county in which the property to be sold, or some part thereof, is situated; and

(b) by posting the notice, at least 20 days before the date of sale, in some conspicuous place on the property to be sold and also in at least three public places of each city or county in which the property to be sold, or some part thereof, is situated.

(2) The sale shall be held at the time and place designated in the notice of sale which shall be between the hours of 9 a.m. and 5 p.m. and at the courthouse of the county in which the property to be sold, or some part thereof, is situated.

(3) The notice of sale shall be sufficient if made in substantially the following form:

Notice of Trustee's Sale

The following described property will be sold at public auction to the highest bidder, payable in lawful money of the United States at the time of sale, at the _____ in _____, _____ County, Utah, on _____ (month/day/year), at ____.m. of said day, for the purpose of foreclosing a trust deed executed by _____ and _____, his wife, as trustors, in favor of _____, covering real property located at _____, and more particularly described as:

(Insert legal description)

(Certificate of Acknowledgment, if recorded)

Dated _____ (month/day/year).

_____

Trustee

History: L. 1961, ch. 181, § 7; 1981, ch. ment, effective May 1, 2000, updated the date

NOTES TO DECISIONS

Error in notice.

—Validity of sale.

Validity of a sale was not affected by a typographical error in a notice dated October 1, 1983, which indicated that the sale would take place on October 28, 1982, where the notice did not confuse bidders or result in an undervaluation of the property. Concepts, Inc. v. First Sec. Realty Servs., Inc., 743 P.2d 1158 (Utah 1987).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 608 et seq.

57-1-26. Requests for copies of notice of default and notice of sale — Mailing by trustee or beneficiary — Publication of notice of default.

(1) (a) Any person desiring a copy of any notice of default and of any notice of sale under any trust deed may, at any time subsequent to the filing for record of the trust deed and prior to the filing for record of a notice of default thereunder, file for record in the office of the county recorder of any county in which any part or parcel of the trust property is situated, a duly acknowledged request for a copy of any notice of default and notice of sale. The request shall set forth the name and address of the person or persons requesting copies of such notices and shall identify the trust deed by stating the names of the original parties thereto, the date of filing for record thereof, the book and page where the same is recorded or the recorder's entry number, and the legal description of the trust property. The request shall be in substantially the following form:

REQUEST FOR NOTICE

Request is hereby made that a copy of any notice of default and a copy of notice of sale under the trust deed filed for record _____ (month/day/year), and recorded in Book _____, Page _____, Records of _____ County, (or filed for record _____ (month/day/year), with recorder's entry number _____, _____ County), Utah, executed by _____ as trustor, in which _____ is named as beneficiary and _____ as trustee, be mailed to _____ (insert name) _____ at _____ (insert address) _____.

(Insert legal description)

Signature _____

(Certificate of Acknowledgement)

(b) Upon filing for record of a request for notice, the recorder shall index the request in the mortgagor's index, mortgagee's index, and abstract record. Except as provided in this section, the trustee under any such deed of trust is not required to send notice of default or notice of sale to any person not filing a request for notice as described herein.

prepaid, a copy of such notice with the recording date shown thereon, addressed to each person whose name and address are set forth in a request therefor which has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request. At least 20 days before the date of sale, the trustee shall mail, by certified or registered mail, with postage prepaid, a copy of the notice of the time and place of sale, addressed to each person whose name and address are set forth in a request therefor which has been recorded prior to the filing for record of the notice of default, directed to the address designated in the request.

(3) Any trust deed may contain a request that a copy of any notice of default and a copy of any notice of sale thereunder be mailed to any person a party thereto at the address of the person set forth therein, and a copy of any notice of default and of any notice of sale shall be mailed to each such person at the same time and in the same manner required as though a separate request therefor had been filed by each of such persons as provided in this section.

(4) If no address of the trustor is set forth in the trust deed and if no request for notice by the trustor has been recorded as provided in this section, a copy of the notice of default shall be published at least three times, once a week for three consecutive weeks, in a newspaper of general circulation in each county in which the trust property, or some part thereof, is situated, such publication to commence not later than ten days after the filing for record of the notice of default. In lieu of this publication, a copy of the notice of default may be delivered personally to the trustor within the ten days or at any time before publication is completed.

(5) No request for a copy of any notice filed for record pursuant to this section, nor any statement or allegation in any such request, nor any record thereof, shall affect the title to trust property or be considered notice to any person that any person requesting copies of notice of default or of notice of sale has or claims any right, title or interest in, or lien or claim upon, the trust property.

History: L. 1961, ch. 181, § 8; 1980, ch. 57, § 1; 1981, ch. 100, § 3; 1989, ch. 88, § 4; 2000, ch. 75, § 25.

Amendment Notes. — The 2000 amendment, effective May 1, 2000, updated the date lines in the form in Subsection (1)(a) and made stylistic changes.

NOTES TO DECISIONS

Cited in First Sec. Bank v. Felger, 658 F. Supp. 175 (D. Utah 1987); Hall v. NACM Intermountain, Inc., 1999 UT 97, 988 P.2d 942.

57-1-27. Sale of trust property by public auction — Postponement of sale.

(1) On the date and at the time and place designated in the notice of sale, the trustee or the attorney for the trustee shall sell the property at public auction to the highest bidder. The trustee, or the attorney for the trustee, may conduct the sale and act as the auctioneer. The trustor, or his successor in interest, if present at the sale, may direct the order in which the trust property shall be sold, if the property consists of several known lots or parcels which can

bid at the sale. Each bid is considered an irrevocable offer, and if the purchaser refuses to pay the amount bid by him for the property sold to him at the sale, the trustee, or the attorney for the trustee, may again sell the property at any time to the highest bidder. The party refusing to pay the bid price is liable for any loss occasioned by the refusal, including interest, costs, and trustee's and reasonable attorneys' fees. The trustee or the attorney for the trustee may thereafter reject any other bid of that person.

(2) The person conducting the sale may, for any cause he considers expedient, postpone the sale up to a period not to exceed 72 hours. If the last hour of the postponement falls on a Saturday, a Sunday, or a legal holiday, the sale may be postponed until the same hour of the next day which is not a Saturday, a Sunday, or a legal holiday. The person conducting the sale shall give notice of the postponement by public declaration at the time and place last appointed for the sale. No other notice of the postponed sale is required, unless the sale is postponed for longer than 72 hours beyond the date designated in the notice of sale. In the event of a longer postponement, the sale shall be cancelled and renoticed in the same manner as the original notice of sale is required to be given.

History: L. 1961, ch. 181, § 9; 1985, ch. 68, § 1; 1988, ch. 82, § 1.

NOTES TO DECISIONS

Fair market value bid.

A trust deed beneficiary's offer of "fair market value" for property sold at a trustee's sale was the equivalent of a fixed-dollar offer and was therefore a bid for purposes of Subsection (1). As the only bid, it was also the highest bid, and the trustee was required by the statute to accept it. Thus, the trustee was not permitted to postpone, cancel, or renotice the sale pursuant to Subsection (2). Thomas v. Johnson, 801 P.2d 186 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 622 et seq.
A.L.R. — Mortgagor's interference with property subject to order of foreclosure and sale as contempt of court, 54 A.L.R.3d 1242.

57-1-28. Sale of trust property by trustee — Payment of bid — Trustee's deed delivered to purchaser — Recitals — Effect.

(1) The purchaser at the sale shall pay the price bid as directed by the trustee and upon receipt of payment, the trustee shall execute and deliver his deed to such purchaser. The trustee's deed may contain recitals of compliance with the requirements of Sections 57-1-19 through 57-1-36 relating to the exercise of the power of sale and sale of the property described therein, including recitals concerning any mailing, personal delivery, and publication of the notice of default, any mailing and the publication and posting of the notice of sale, and the conduct of sale. These recitals constitute prima facie evidence of such compliance and are conclusive evidence in favor of bona fide purchasers and encumbrancers for value and without notice.

(2) The trustee's deed shall operate to convey to the purchaser, without right

or under them, in and to the property sold, including all such right, title, interest, and claim in and to such property acquired by the trustor or his successors in interest subsequent to the execution of the trust deed.

History: L. 1961, ch. 181, § 10; 1985, ch. 68, § 2.

NOTES TO DECISIONS

Cited in Concepts, Inc. v. First Sec. Realty Servs., Inc., 743 P.2d 1158 (Utah 1987).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 645 et seq.

57-1-29. Proceeds of trustee's sale — Disposition.

The trustee shall apply the proceeds of the trustee's sale, first, to the costs and expenses of exercising the power of sale and of the sale, including the payment of the trustee's and attorney's fees actually incurred not to exceed the amount which may be provided for in the trust deed, second, to payment of the obligation secured by the trust deed, and the balance, if any, to the person or persons legally entitled to the proceeds, or the trustee, in his discretion, may deposit the balance of the proceeds with the clerk of the district court of the county in which the sale took place. Upon depositing the balance, the trustee shall be discharged from all further responsibility and the clerk shall deposit the proceeds with the state treasurer subject to the order of the district court.

History: L. 1961, ch. 181, § 11; 1997, ch. 215, § 7.

Amendment Notes. — The 1997 amendment, effective July 1, 1997, deleted "county" before "clerk" and inserted "district court of the" near the end of the first sentence; substituted "state" for "county" in the second sentence; and made stylistic changes throughout.

NOTES TO DECISIONS

Duties of trustee.

A trustee under trust deed has an affirmative duty to uphold his statutory responsibilities, and may not ignore those responsibilities in order to assist certain interest holders at the expense of others. Randall v. Valley Title, 681 P.2d 219 (Utah 1984).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 664 et seq.

57-1-30. Sale of trust property by trustee — Corporate stock evidencing water rights given to secure trust deed.

Shares of corporate stock evidencing water rights used, intended to be used, or suitable for use on the trust property and which are hypothecated to secure an obligation secured by a trust deed may be sold with the trust property

History: L. 1961, ch. 181, § 12.
Meaning of "this act." — See note under same catchline following § 57-1-24.

57-1-31. Trust deeds — Default in performance of obligations secured — Reinstatement — Cancellation of recorded notice of default.

(1) Whenever all or a portion of the principal sum of any obligation secured by a trust deed has, prior to the maturity date fixed in the obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust deed, including a default in the payment of interest or of any installment of principal, or by reason of failure of the trustor to pay, in accordance with the terms of the trust deed, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with terms of the obligation or of the trust deed, the trustor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust deed, at any time within three months of the filing for record of notice of default under the trust deed, if the power of sale is to be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of the trust deed (including costs and expenses actually incurred in enforcing the terms of the obligation, or trust deed, and the trustee's and attorney's fees actually incurred) other than that portion of the principal as would not then be due had no default occurred, and thereby cure the default theretofore existing and, thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and trust deed shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

(2) If the default is cured and the trust deed reinstated in the manner provided in Subsection (1), the beneficiary, or his assignee, shall, on demand of any person having an interest in the trust property, execute and deliver to him a request to the trustee to execute, acknowledge, and deliver a cancellation of the recorded notice of default under the trust deed; and any beneficiary under a trust deed, or his assignee, who, for a period of 30 days after such demand, refuses to request the trustee to execute and deliver this cancellation is liable to the person entitled to such request for all damages resulting from this refusal. A release and reconveyance given by the trustee or beneficiary, or both, or the execution of a trustee's deed constitutes a cancellation of a notice of default. Otherwise, a cancellation of a recorded notice of default under a trust deed is, when acknowledged, entitled to be recorded and is sufficient if made and executed by the trustee in substantially the following form:

Cancellation of Notice of Default

The undersigned hereby cancels the notice of default filed for record _____ (month/day/year), and recorded in Book ____, Page ____, Records of _____ County, (or filed of record _____ (month/day/year), with recorder's entry No. _____, _____ County), Utah, which notice of default refers to the trust deed executed by _____ as trustor, in which _____ is named as

County, (or filed of record _____ (month/day/year), with recorder's entry No. _____, _____ County), Utah.

(legal description)

Signature of Trustee _____

History: L. 1961, ch. 181, § 13; 1967, ch. 131, § 2; 1981, ch. 100, § 4; 1985, ch. 68, § 3; 2000, ch. 75, § 26.

Amendment Notes. — The 2000 amendment, effective May 1, 2000, updated the date lines in the form in Subsection (2) and made stylistic changes throughout the section.

NOTES TO DECISIONS

ANALYSIS

Amendment.

—Applicability.

The 1985 amendment to this section could not be retroactively applied to a contractual transaction entered into before the amendment, where the amendment affected the debtor's substantive contractual rights by eliminating his right to cure a default under his trust deed and note by paying only the amount in default. Washington Nat'l Ins. Co. v. Sherwood Assocs., 795 P.2d 665 (Utah Ct. App. 1990).

—Effect.

The 1985 amendment of this section changed the law to require the debtor to pay the entire amount of the note in order to cure his default in a judicial foreclosure proceeding. Washington Nat'l Ins. Co. v. Sherwood Assocs., 795 P.2d 665 (Utah Ct. App. 1990).

Debt acceleration.

Debt acceleration is a substantive right because it provides a beneficiary with the power to bring a single foreclosure action upon default, thereby satisfying the entire obligation and discharging the note, rather than bringing repeated collection actions each time a trustor defaults. The beneficiary thereby avoids the burden of repeated foreclosures as well as the risk that the security for the debt, the property, will be consumed by legal fees, court costs, unpaid interest, etc., before the debt is satisfied. Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239 (Utah Ct. App. 1991).

"Deacceleration" is the undoing of the acceleration itself. The parties are returned to their preacceleration status as if the beneficiary of the trust deed had not opted to accelerate the entire debt. The default, however, remains unchanged and the notice of default would still be in effect. A beneficiary could still foreclose, but it would only be for the amount of the delinquent payments, costs, and so forth. The note would remain in effect to the extent not satisfied from the sale proceeds and the trustor would retain any property not sold to satisfy the delinquency. Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239 (Utah Ct. App. 1991).

Default not cured.

The plaintiff had no duty to fulfill his offer to treat the defendants' default as cured when that offer was predicated upon payment of the arrearage, taxes, and insurance, and only the arrearage had been paid. Grossen v. DeWitt, 1999 UT App 167, 982 P.2d 581.

Reinstatement.

"Reinstatement," as it is used in this section, is the curing of the default. In other words, the parties are returned to their former status as if the default had never occurred. If a trustor subsequently defaults again, the beneficiary must begin new foreclosure proceedings. It may not rely on the previous notice of default and declaration of acceleration. Progressive Acquisition, Inc. v. Lytle, 806 P.2d 239 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 547.

57-1-32. Sale of trust property by trustee — Action to recover balance due upon obligation for which trust deed was given as security — Collection of costs and attorney's fees.

At any time within three months after any sale of property under a trust deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the trust deed was given as security, and in such action the complaint shall set forth the entire amount of the indebtedness which was secured by such trust deed, the amount for which such property was sold, and the fair market value thereof at the date of sale. Before rendering judgment, the court shall find the fair market value at the date of sale of the property sold. The court may not render judgment for more than the amount by which the amount of the indebtedness with interest, costs, and expenses of sale, including trustee's and attorney's fees, exceeds the fair market value of the property as of the date of the sale. In any action brought under this section, the prevailing party shall be entitled to collect its costs and reasonable attorney fees incurred in bringing an action under this section.

History: L. 1961, ch. 181, § 14; 1985, ch. 68, § 4.

NOTES TO DECISIONS

Analysis

Attorney fees.

Trial court did not err in granting debtors attorney fees and costs as the prevailing party, because, although a judgment was entered against them, they prevailed on the only contested issue at trial. Occidental/Nebraska Fed. Sav. Bank v. Mehr, 791 P.2d 217 (Utah Ct. App. 1990).

Deficiency judgment.

When a creditor takes more than one item of security upon an obligation secured by a trust deed, the creditor is not precluded from making use of that additional security merely because the creditor has not sought a deficiency judgment within three months of a nonjudicial sale of one of the items covered by the trust deed to maintain its right to the additional security, so long as the security is applied toward the debt owed on the original loan. Phillips v. Utah State Credit Union, 811 P.2d 174 (Utah 1991).

A "sold out nonforeclosing junior lienor," who became unsecured by a senior lienor's foreclosure, was not pursuing a "deficiency judgment" and, therefore, was not limited by the fair market value provision of this section from pursuing its claim against the debtor personally. City Consumer Servs., Inc. v. Peters, 815 P.2d 234 (Utah 1991).

The protections of the Utah Trust Deed Act (§§ 57-1-19 to 57-1-36) apply to any action to recover the balance due on an obligation secured by a trust deed, following a nonjudicial foreclosure sale, and makes no distinction whether it is brought against the debtor or a guarantor; thus, the three-month statute of limitations applied to bar an action against the guarantors of an obligation and, even if the action had been timely filed, the fair value credit would have required plaintiff to credit the fair market value toward the deficiency, preventing a double recovery from defendants as either guarantors or debtors. Surety Life Ins. Co. v. Smith, 892 P.2d 1 (Utah 1995).

Exclusive remedy.

This section provides the exclusive remedy for securing a deficiency judgment following a sale of real property under a trust deed, thereby

P.2d 1207 (Utah 1985); Concepts, Inc. v. First Sec. Realty Servs., Inc., 743 P.2d 1158 (Utah 1987).

Multiple liens.

The burden of protecting property subject to multiple liens is on the debtor, not on the junior lienholder. Sanders v. Ovard, 838 P.2d 1134 (Utah 1992).

Notice.

The primary purpose of the three-month limitation period contained in this section is satisfied when the foreclosing party provides notice to the debtor that a deficiency will be sought by filing the action. Standard Fed. Sav. & Loan Ass'n v. Kirkbride, 821 P.2d 1136 (Utah 1991).

One-action rule.

A pretrial stipulation between a debtor and the debtor's junior lienholder to limit the junior lienholder's judgment to the difference between the debt owed and the fair market value of the property at the time of sale was meant to apply to the deficiency judgment after sale, as provided by this section, so when the trial court later ruled that the junior lienholders were entitled to collect against the underlying obligation, as their security had been extinguished through the intervening trustee's sale by the senior lienholder, the one-action rule (§ 78-37-1) did not limit the junior lienholder's judgment because defendants' conduct was not blameworthy. Sanders v. Ovard, 838 P.2d 1134 (Utah 1992).

Out-of-state lands.

Deficiency judgment protection requiring that fair market value of property at time of sale be used as setoff is not extended to debtors whose obligations are secured by trust deeds on land outside Utah. Bullington v. Mize, 25 Utah 2d 173, 478 P.2d 500, 44 A.L.R.3d 910 (1970).

Preemption by federal law.

The three-month limitation of this section could not be used to bar the Small Business Administration's post-foreclosure deficiency action against guarantor, as to do so would violate the well-established maxim that the United States is exempt from application of state statutes of limitation. United States v. Johnson, 946 F. Supp. 915 (D. Utah 1996).

Prevailing party.

If a party seeking a deficiency judgment can convince the court that the debt exceeds the fair market value of the property, then that party is entitled to a deficiency judgment and prevails under this section; however, if the party defending such an action successfully maintains that the fair market value of the property equals or exceeds the total indebtedness, then that party prevails. First S.W. Fin. v. Sessions, 875 P.2d 553 (Utah 1994).

Procedural failure.

This section, which gives a creditor three months after a sale of property under a trust deed to bring an action for any amounts remaining unpaid, does not permanently bar further proceedings any time some procedural failing results in the dismissal of a properly filed action. Standard Fed. Sav. & Loan Ass'n v. Kirkbride, 821 P.2d 1136 (Utah 1991).

Purpose of section.

The purpose of this section is to protect the debtor, who in a nonjudicial foreclosure has no right of redemption, from a creditor who could purchase the property at the sale for a low price and then hold the debtor liable for a large deficiency. First Sec. Bank v. Felger, 658 F. Supp. 175 (D. Utah 1987).

This section limits only the rights of the beneficiary under the trust deed that was foreclosed — it does not affect the rights and obligations of parties to other trust deeds. The statute does not purport to address the status of obligations secured by junior trust deeds following a trustee sale pursuant to a senior trust deed. G. Adams Ltd. Partnership v. Durbano, 782 P.2d 962 (Utah Ct. App. 1989).

By its terms and legislative history, this section provides a remedy for a creditor facing a defaulting debtor; where debtors did not default on creditor's mortgage, section was inapplicable. Associates Fin. Servs. v. Slaugh, 850 P.2d 1278 (Utah 1993).

Cited in Christenson v. Jewkes, 761 P.2d 1375 (Utah 1988); Thomas v. Johnson, 801 P.2d 186 (Utah Ct. App. 1990); Citicorp Mtg., Inc. v. Hardy, 834 P.2d 554 (Utah 1992); SLC Ltd. V v. Bradford Group W., Inc., 152 Bankr. 755 (Bankr. D. Utah 1993).

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 674 et seq.

A.L.R. — Excessiveness or adequacy of attorneys' fees in matters involving real estate, 10 A.L.R.5th 448.

57-1-33. Repealed.

Repeals. — Laws 1994, ch. 172, § 2 repeals § 57-1-33, as enacted by Laws 1961, ch. 181, § 15, requiring reconveyance of trust property upon satisfaction of an obligation secured by a trust deed, effective May 2, 1994.

57-1-33.1. Reconveyance of a trust deed.

(1) (a) When an obligation secured by a trust deed has been satisfied, the trustee shall, upon written request by the beneficiary, reconvey the trust property.

(b) At the time the beneficiary requests a reconveyance under Subsection (1)(a), the beneficiary shall deliver to the trustee or the trustee's successor in interest the trust deed and the note or other evidence that the obligation securing the trust deed has been satisfied.

(2) The reconveyance under Subsection (1) may designate the grantee as "the person or persons entitled thereto."

History: C. 1953, 57-1-33.1, enacted by L. 1995, ch. 185, § 1.

57-1-34. Sale of trust property by trustee — Foreclosure of trust deed — Limitation of actions.

The trustee's sale of property under a trust deed shall be made, or an action to foreclose a trust deed as provided by law for the foreclosure of mortgages on real property shall be commenced, within the period prescribed by law for the commencement of an action on the obligation secured by the trust deed.

History: L. 1961, ch. 181, § 16.

COLLATERAL REFERENCES

C.J.S. — 59A C.J.S. Mortgages § 603.

57-1-35. Trust deeds — Transfer of secured debts as transfer of security.

The transfer of any debt secured by a trust deed shall operate as a transfer of the security therefor.

History: L. 1961, ch. 181, § 17.

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 336 et seq.

57-1-36. Trust deeds — Instruments entitled to be recorded — Assignment of a beneficial interest.

property, and any instrument by which any trust deed is subordinated or waived as to priority, if acknowledged as provided by law, is entitled to be recorded. The recording of an assignment of a beneficial interest in the trust deed does not in itself impart notice of the assignment to the trustor, his heirs or personal representatives, so as to invalidate any payment made by any of them to the person holding the note, bond, or other instrument evidencing the obligation by the trust deed.

History: L. 1961, ch. 181, § 18; 1988, ch. 155, § 5.

Cross-References. — Recorder's fees, § 21-2-3.

NOTES TO DECISIONS

Cited in South Sanpitch Co. v. Pack, 765 P.2d 1279 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 194.

57-1-37. Failure to disclose not a basis for liability.

(1) The failure of an owner of real property to disclose that the property being offered for sale is stigmatized is not a material fact that must be disclosed in the transaction of real property.

(2) Neither an owner nor his agent is liable for failing to disclose that the property is stigmatized.

History: C. 1953, 57-1-37, enacted by L. 1990, ch. 308, § 2; 1991, ch. 5, § 55.

57-1-38. Release of security interest.

(1) As used in this section:

(a) "Secured lender" means:

(i) a mortgagee on a mortgage;

(ii) a beneficiary on a trust deed;

(iii) a person that holds or retains legal title to real property as security for financing the purchase of the real property under a real estate sales contract; and

(iv) any other person that holds or retains a security interest in real property to secure the repayment of a secured loan.

(b) (i) "Secured loan" means a loan or extension of credit, the repayment of which is secured by a mortgage, a trust deed, the holding or retention of legal title under a real estate sales contract, or other security interest in real property, whether or not the security interest is perfected.

(ii) A judgment award secured by a judgment lien is not of itself a secured loan. A subsequent written agreement between a judgment creditor and a judgment debtor concerning payment of the judgment is a secured loan if it otherwise qualifies under the definition

(c) "Security interest" means an interest in real property that secures payment or performance of an obligation. Security interest includes a lien or encumbrance.

(d) "Servicer" means a person that services and receives loan payments on behalf of a secured lender with respect to a secured loan.

(2) This section may not be interpreted to validate, invalidate, alter, or otherwise affect the foreclosure of a mortgage, the exercise of a trustee's power of sale, the exercise of a seller's right of reentry under a real estate sales contract, or the exercise of any other power or remedy of a secured lender to enforce the repayment of a secured loan.

(3) A secured lender or servicer who fails to release the security interest on a secured loan within 90 days after receipt of the final payment of the loan is liable to another secured lender on the real property or the owner or titleholder of the real property for:

(a) the greater of $1,000 or treble actual damages incurred because of the failure to release the security interest, including all expenses incurred in completing a quiet title action; and

(b) reasonable attorneys' fees and court costs.

(4) A secured lender or servicer is not liable under Subsection (3) if the secured lender or servicer:

(a) has established a reasonable procedure to release the security interest on a secured loan in a timely manner after the final payment on the loan;

(b) has complied with this procedure in good faith; and

(c) is unable to release the security interest within 90 days after receipt of the final payment because of the action or inaction of an agency or other person beyond its direct control.

History: C. 1953, 57-1-38, enacted by L. 1994, ch. 172, § 1; 1995, ch. 185, § 2.

NOTES TO DECISIONS

Compiler's Notes. — All of the following annotations were taken from cases decided under former statutory provisions.

ANALYSIS

Applicability of section.

nor common law permits recovery of damages for refusal to clear title. Jack B. Parson Cos. v. Nield, 751 P.2d 1131 (Utah 1988).

—Mortgagor-mortgagee relationship.

This section had no application to case where demand that release be executed was made by plaintiff, who was not a mortgagor, upon a mortgagee who had never occupied that position to plaintiff, or anyone in privity with plaintiff. Draper v. J.B. & R.E. Walker, Inc., 115 Utah 368, 204 P.2d 826 (1949).

Attorney's fee.

Attorney's fees incurred by mortgagor in bringing suit to cancel mortgage and note and to recover damages against mortgagee were proper item of damage to be assessed against mortgagee. Swaner v. Union Mtg. Co., 99 Utah 298, 105 P.2d 342 (1940).

Construction of section.

or declare a mortgage of record because he believes that there has been no full satisfaction. Hector, Inc. v. United Sav. & Loan Ass'n, 741 P.2d 542 (Utah 1987).

Defenses.

—Good faith.

Where a bank, relying upon the advice of attorney and honestly thinking it had valid and subsisting mortgages against appellant which had not been satisfied, refused to release the mortgages, it was acting in good faith and was not liable for damages under this section. Shibata v. Bear River State Bank, 115 Utah 395, 205 P.2d 251 (1949).

Form of release.

—Notation on deed.

A deed of trust to raise a fund to pay a debt could not be released on the margin of the record, as provided by former statute, in the case of a trust deed given as security for a debt. Dupee v. Rose, 10 Utah 305, 37 P. 567 (1894).

Inference created by reconveyance.

Trustee's reconveyance by deed of the trust property created an independent inference that the obligation secured by the trust deed had been satisfied rather than renewed. Peterson v. United States, 511 F. Supp. 250 (D. Utah 1981).

Liability of mortgagee.

—Breach of contract.

Mortgagee who refused to advance money for construction of house according to agreement, but who used position to coerce mortgagor in another transaction, could not claim that he was acting in good faith so as to escape liability under this section for failure to satisfy mortgage. Swaner v. Union Mtg. Co., 99 Utah 298, 105 P.2d 342 (1940).

Proof of damages.

Where there are both chattel mortgages and real estate mortgages which are not released it is not incumbent that the person damaged separate and prove separately his damages. Nalder v. Kellogg Sales Co., 4 Utah 2d 117, 288 P.2d 456 (1955).

Refusal to reconvey.

Mortgage lender's use of the leverage of refusing to reconvey land securing a trust deed in order to obtain security for another debt was not good faith on the part of the lender, notwithstanding its contention that it was industry practice to provide security for bonds and that the intent of the parties could not have been otherwise. Hector, Inc. v. United Sav. & Loan Ass'n, 741 P.2d 542 (Utah 1987).

Statutory construction.

This section is penal in nature and should be strictly construed. Shibata v. Bear River State Bank, 115 Utah 395, 205 P.2d 251 (1949).

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 479.

A.L.R. — Discharge of mortgage and taking back of new mortgage as affecting lien intervening between old and new mortgages, 43 A.L.R.5th 519.

57-1-39. Definitions.

As used in Sections 57-1-40 and 57-1-44:

(1) "Beneficiary" means the record owner of the beneficiary's interest under a trust deed, including successors in interest.

(2) "Mortgage" is as described in Section 57-1-14.

(3) "Mortgagee" means the record owner of the mortgagee's interest under a mortgage, including a successor in interest.

(4) "Satisfactory evidence of the full payment of the obligation secured by a trust deed or mortgage" means the original cancelled check or a copy of a check, including a voucher copy, payable to the beneficiary or a servicer, and reasonable documentary evidence that the check was intended to effect full payment under the trust deed or an encumbrance upon the property covered by the trust deed.

(5) "Servicer" means a person or entity that collects loan payments on

(6) "Title agent" means a title insurance agent licensed as an orga tion under Title 31A, Chapter 23, Part II, Licensing of Agents, Broker Consultants.

(7) "Title insurer" means a title insurer authorized to conduct busi in the state under Title 31A, Chapter 23, Part II, Licensing of Ag Brokers and Consultants.

(8) "Trust deed" is as defined in Subsection 57-1-19(3).

History: C. 1953, 57-1-39, enacted by L. 1995, ch. 185, § 3.

57-1-40. Reconveyance of trust deed or release of m gage — Procedures — Forms.

(1) A title insurer or title agent may reconvey a trust deed or rele mortgage in accordance with the provisions of Subsections (2) through (

(a) the obligation secured by the trust deed or mortgage has been paid by the title insurer or title agent; or

(b) the title insurer or title agent possesses satisfactory evidence full payment of the obligation secured by a trust deed or mortgage.

(2) A title insurer or title agent may reconvey a trust deed or rele mortgage under Subsection (1) regardless of whether the title insurer o agent is named as a trustee under a trust deed or has the authority to re a mortgage.

(3) No sooner than 30 days after payment in full of the obligation secur a trust deed or mortgage, the title insurer or title agent shall deliver t beneficiary, mortgagee, or servicer, or send by certified mail to the benefi mortgagee, or servicer at the address specified in the trust deed or mort at any address for the beneficiary or mortgagee specified in the last rec assignment of the trust deed or mortgage, and at any address fo beneficiary, mortgagee, or servicer specified in a request for notice rec under Section 57-1-26, a notice of intent to release or reconvey and a copy release or reconveyance to be recorded as provided in Sections (4) and (

(4) The notice of intent to release or reconvey shall contain the name beneficiary or mortgagee and the servicer if loan payments on the trust d mortgage are collected by a servicer, the name of the title insurer or title the date, and be substantially in the following form:

NOTICE OF INTENT TO RELEASE OR RECONVEY

Notice is hereby given to you as follows:

1. This notice concerns the (trust deed or mortgage) describ follows:

(Trustor or Mortgagor): _____
(Beneficiary or Mortgagee): _____
Recording information: _____
Entry Number: _____
Book Number: _____
Page Number: _____

2. The undersigned claims to have paid in full or possesses satis

3. The undersigned will fully release the mortgage or reconvey the trust deed described in this notice unless, within 60 days from the date stated on this notice, the undersigned has received by certified mail a notice stating that the obligation secured by the trust deed or mortgage has not been paid in full or that you otherwise object to the release of the mortgage or the reconveyance of the trust deed. Notice shall be mailed to the address stated on this form.

4. A copy of the (release of mortgage or reconveyance of trust deed) is enclosed with this notice.

(Signature of title insurer or title agent)

(Address of title insurer or title agent)

(5) (a) If, within 60 days from the day on which the title insurer or title agent delivered or mailed the notice of intent to release or reconvey in accordance with Subsections (3) and (4), the beneficiary, mortgagee, or servicer does not send by certified mail to the title insurer or title agent a notice that the obligation secured by the trust deed or mortgage has not been paid in full or that the beneficiary, mortgagee, or servicer objects to the release of the mortgage or reconveyance of the trust deed, the title insurer or title agent may execute, acknowledge, and record a reconveyance of a trust deed or release of a mortgage.

(b) A reconveyance of a trust deed under Subsection (5)(a) shall be in substantially the following form:

RECONVEYANCE OF TRUST DEED

(Name of title insurer or title agent), a (title insurer or title agent) authorized to conduct business in the state does hereby reconvey, without warranty, the following trust property located in (name of county) County, state of Utah, that is covered by a trust deed naming (name of trustor) as trustor, and (name of beneficiary) as beneficiary and was recorded on (date) in Book _____ at Page _____ as Entry Number _____: (insert a description of the trust property.)

The undersigned title insurer or title agent certifies as follows:

1. The undersigned title insurer or title agent has fully paid the obligation secured by the trust deed or possesses satisfactory evidence of the full payment of the obligation secured by the trust deed.

2. No sooner than 30 days after payment in full of the obligation secured by the trust deed, the title insurer or title agent delivered or sent by certified mail to the beneficiary or servicer at the address specified in the trust deed, at any address for the beneficiary specified in the last recorded assignment of the trust deed, and at any address for the beneficiary or servicer specified in a request for notice recorded under Section 57-1-26, a notice of intent to release or reconvey and a copy of the reconveyance.

3. The title insurer or title agent did not receive, within 60 days from the day on which the title insurer or title agent delivered or mailed the notice of intent to release or reconvey, a notice from the beneficiary or servicer sent by certified mail that the obligation secured by the trust deed has not been paid in full or that the

(Notarization)

(Signature of title insurer or title agent)

(c) A release of a mortgage under Subsection (5)(a) shall be in substantially the following form:

RELEASE OF MORTGAGE

(Name of title insurer or title agent), a (title insurer or title agent) authorized to conduct business in the state does hereby release the mortgage on the following property located in (name of county) County, state of Utah, that is covered by a mortgage naming (name of mortgagor) as mortgagor, and (name of mortgagee) as mortgagee and was recorded on (date) in Book _____ at Page _____ as Entry Number _____: (insert a description of the trust property.)

The undersigned title insurer or title agent certifies as follows:

1. The undersigned title insurer or title agent has fully paid the obligation secured by the mortgage or possesses satisfactory evidence of the full payment of the obligation secured by the mortgage.

2. No sooner than 30 days after payment in full of the obligation secured by the mortgage, the title insurer or title agent delivered to the mortgagee or sent by certified mail to the mortgagee or servicer at the address specified in the mortgage and at any address for the mortgagee specified in the last recorded assignment of the mortgage, a notice of intent to release or reconvey and a copy of the release.

3. The title insurer or title agent did not receive, within 60 days from the day on which the title insurer or title agent delivered or mailed the notice of intent to release or reconvey, a notice from the mortgagee or servicer sent by certified mail that the obligation secured by the mortgage has not been paid in full or that the mortgagee or servicer objects to the release of the mortgage.

(Notarization)

(Signature of title insurer or title agent)

(d) (i) A release of mortgage or reconveyance of trust deed that is executed and notarized in accordance with Subsections (5)(b) or (c) is entitled to recordation.

(ii) (A) Except as provided in Subsection (5)(d)(ii)(B), a reconveyance of a trust deed or release of a mortgage that is recorded under Subsection (5)(d)(i) is valid regardless of any deficiency in the release or reconveyance procedure not disclosed in the release of mortgage or reconveyance of trust deed.

(B) If the title insurer's or title agent's signature on a release of mortgage or reconveyance of trust deed recorded under Subsection (5)(d)(ii)(A) is forged, the release of mortgage or reconveyance of trust deed is void.

(6) A release of mortgage or reconveyance of trust deed under this section does not discharge an obligation that was secured by the trust deed or

History: C. 1953, 57-1-40, enacted by L. 1995, ch. 185, § 4.

57-1-41. Objections to reconveyance or release.

A title insurer or title agent may not record a reconveyance of trust deed or release of mortgage if, within 60 days from the day on which the title insurer or title agent delivered or mailed the notice of intent to release or reconvey in accordance with Subsections 57-1-40(3) and (4), the beneficiary, mortgagee, or servicer sends a notice that the obligation secured by the trust deed or mortgage has not been paid in full or objects to the release of the mortgage or reconveyance of the trust deed under Subsection (5)(a).

History: C. 1953, 57-1-41, enacted by L. 1995, ch. 185, § 5.

57-1-42. Liability of title insurer or title agent.

A title insurer or title agent purporting to act under the provisions of Section 57-1-40 who reconveys a trust deed or releases a mortgage is liable to the beneficiary or mortgagee for the damages suffered as a result of the reconveyance if:

(1) the obligation secured by the trust deed or mortgage has not been fully paid; and

(2) (a) the title insurer or title agent failed to comply with the provisions of Sections 57-1-40 and 57-1-41; or

(b) the title insurer or title agent acted with gross negligence or in bad faith in reconveying the trust deed.

History: C. 1953, 57-1-42, enacted by L. 1995, ch. 185, § 6.

57-1-43. Application of provisions.

The provisions of Sections 57-1-39 through 57-1-42 apply to any obligation secured by a trust deed or mortgage that was paid prior to, on, or after May 1, 1995.

History: C. 1953, 57-1-43, enacted by L. 1995, ch. 185, § 7.

57-1-44. Other sections not affected.

Sections 57-1-39 through 57-1-43 do not excuse a beneficiary, mortgagee, trustee, secured lender, or servicer from complying with the provisions of Section 57-1-38.

History: C. 1953, 57-1-44, enacted by L. 1995, ch. 185, § 8.

Tab F

NOV-26-08 TUE 08:09 AM SL COUNTY RECORDER FAX NO. 8014683335 P. 02/09

SUMMARY
WRONGFUL LIEN AMENDMENTS BILL

This bill amends Chapter 38-9, "Penalty for Wrongful Lien," and accomplishes the following:

Section 1. This simply clarifies that the existing criminal penalty in the mechanics' lien chapter (U.C.A. §38-1) applies to contractors, laborers and materialmen only. Any other persons who file wrongful liens are subject to Chapter 38-9.

Section 2. Existing law allows a person, even maliciously, to file a lien or notice that clouds the title of another person, then avoid liability for damages by correcting the record within 20 days after the owner tracks him down and serves a written demand. The amendments permit actual damages even if a wrongful lien is filed in good faith, then applies a treble damages penalty for an individual who files a lien on someone else's property without honestly believing he has a right to do so, or containing a forged signature or false information.

Section 3. Existing law does not recognize liens not authorized by statute or court order. This section declares such documents void *ab initio* and allows (although does not require) the county recorder to reject liens that don't match one of the statutory lien chapters. This section also makes it clear that the county recorder can't be sued and does not even have to go to court. Instead, the lien claimant must name the record owner of the property.

Section 4. This section amends the existing criminal penalties. Under current law, filing a lien is only a B misdemeanor, even if it is forged, false, or malicious. Forgery is usually a felony; filing a forged document with the county recorder shouldn't reduce the crime to a misdemeanor. Filing a wrongful lien is a B misdemeanor, unless the person releases the property within 20 days after notice.

Section 5. This section creates a remedy for a person whose document is rejected by the County Recorder. The remedy is to the court. The recorder is not a party; instead, notice goes to the property owner. If the court decides the document should be filed, it signs an order directing the filing. The source of this procedure is the Missouri "common law liens" statute. It is not necessary to add this legal procedure, since a person can seek relief under existing law. However, this establishes a summary procedure with a quick resolution for an unhappy person, and the County Recorder can inform a person of this procedure and let the court make the final decision.

Section 6. This section creates a similar summary remedy for a person who discovers a wrongful lien on his/her property. The summary procedure can result in a court order to be filed to nullify a cloud on the title.

Section 7. This section provides definitions for "wrongful lien," "record owner," and "lien claimant" in this chapter.

Tab G

WHEN RECORDED MAIL TO:

Pinnacle Title Insurance Agency, Inc.
Attn: David Stevenson
5505 South 900 East
Salt Lake City, Utah 84117

Ent 248503 Bk 0576 Pg 0287-0289
ELIZABETH PARCELL, Recorder
WASATCH COUNTY CORPORATION
2002 SEP 10 2:15pm Fee 17.00 MWC
FOR PINNACLE TITLE

NOTICE OF DEFAULT

NOTICE IS HEREBY GIVEN by Pinnacle Title Insurance Agency, Inc., a Utah corporation ("*TRUSTEE*"), that a default has occurred under that certain DEED OF TRUST WITH ASSIGNMENT OF RENTS dated as of August 10, 2001 (the "*Trust Deed*"), executed by Springs of St. Moritz Resort, L.L.C. ("*TRUSTOR*"), in favor of Pinnacle Title Insurance Agency, Inc., trustee ("*TRUSTEE*"), for the benefit of Wilshire Investments, LLC, a Utah limited liability company ("*BENEFICIARY*"), such Trust Deed having been recorded in the office of the County Recorder of Wasatch County, State of Utah, on August 29, 2001, as Entry 236421, Book 0519, Pages 0073 - 0081, and covering the real property situated in Wasatch County, State of Utah, particularly described as follows:

Commencing at a point located North 89° 20' 05" East along the section line 31.82 feet and South 1744.64 feet the North Quarter Corner of Section 27, Township 3 South, Range 4 East, Salt Lake Base and Meridian; thence South 00° 28' 17" East 215.65; thence South 69° 05' 09" East 62.36 feet; thence South 36° 55' 48" East 132.87 feet; thence South 32° 40' 16" East 244.09 feet; thence North 89° 25' 27" West 681.84 feet; thence South 00° 50' 36" East 0.78 feet; thence North 89° 25' 27" West 78.32 feet; thence South 00° 59' 11" East 1.59 feet; thence North 89° 25' 27" West 64.01 feet; thence North 01° 39' 40" East 28.64 feet; thence North 00° 24' 43" East 89.60 feet; thence South 87° 37' 06" West 104.75 feet; thence North 04° 47' 34" West 87.43 feet; thence North 00° 07' 37" West 82.44 feet; thence South 89° 52' 22" West 36.93 feet; thence North 00° 07' 25" West 9.27 feet; thence South 89° 52' 25" West 171.03 feet; thence South 07° 22' 52" West 83.98 feet; thence South 83° 08' 13" East 109.97 feet; thence South 05° 50' 20" West 19.19 feet; thence North 85° 32' 22" West 20.55 feet; thence South 31° 03' 32" West 69.32 feet; thence South 09° 53' 41" West 20.51 feet; thence South 14° 41' 20" East 10.13 feet; thence South 32° 37' 03" East 10.00 feet; thence South 44° 20' 02" East 20.18 feet; thence South 61° 02' 48" East 20.12 feet; thence South 76° 25' 40" East 13.32 feet; thence South 00° 00' 24" East 22.50 feet; thence South 00° 00' 35" West 37.53 feet; thence West 310.41 feet; thence North 49° 11' 05" West 62.40 feet; thence North 47° 34' 00" West 228.39 feet; thence North 08° 47' 06" West 131.20 feet; thence North 13° 30' 57" West 220.72 feet; thence North 12° 24' 36" West 11.61 feet; thence South 89° 59' 57" East 1382.17 feet to the point of beginning.

Area 16.05 acres

(OWC - 0319)
(OWC - 0322)
(OWC - 0322-6)
(OWC - 0322-7)

Together with all buildings all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, now or hereafter used or enjoyed with such property or any part thereof

Said Trust Deed secures certain obligations under a Secured Promissory Note executed by Trustor as of even date with the Trust Deed in the original principal amount of $4,953,000 (the "*Note*"), bearing interest at the rate of 25% per annum, and the beneficial interest under the Trust Deed and the obligations secured thereby are now owned by the BENEFICIARY.

That the default which has occurred is the breach of an obligation for which the trust property was conveyed as security and consists of the failure of Borrower to pay principal and interest payments under the Note since November 8, 2001 That there is now due and owing on the Note the sum of $8,546,106.60, at least $6,572,902.40 of such sum accruing interest at the rate of 38% per annum. There is also due all of the expenses and fees of these foreclosure proceedings.

That by reason of such default, the BENEFICIARY under such Trust Deed has executed and delivered to said TRUSTEE a written declaration of default and demand for sale, and has deposited with said TRUSTEE such Trust Deed and all documents evidencing the obligations secured thereby and has declared and does hereby declare all sums secured thereby immediately due and payable and has elected and does hereby elect to cause the trust property to be sold to satisfy the obligations secured by the Trust Deed The default is subject to reinstatement in accordance with the Statutes of the State of Utah

[Remainder of Page Intentionally Blank - Signature Page Follows]

DATED August 22, 2002.

Pinnacle Title Insurance Agency, Inc.

By: _____
Name David Stephenson
Title Vice President

5505 South 900 East
Salt Lake City, Utah 84117
(801) 270-9090

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

The foregoing instrument was acknowledged before me this 5 day of August, 2002, by David Stephenson, as Vice President of Pinnacle Title Insurance Agency, Inc., a Utah corporation, TRUSTEE.

_____
NOTARY PUBLIC

My Commission Expires: 6-9-05 Residing at: Salt Lake

CAMILLE GOTFREDSON
NOTARY PUBLIC - STATE of UTAH
5505 South 900 East - Suite 110
Salt Lake City, Utah 84117
COMM EXP 6-9-05

E 248503 B 0576 P 0289