

1986

Vernon S. Cheever v. Joseph A. Seethaler : Reply Brief

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jackson Howard; Howard, Lewis & Peterson; attorney for respondent.

Kenneth F. Clarke; attorney for appellant.

Recommended Citation

Reply Brief, *Cheever v. Seethaler*, No. 860086.00 (Utah Supreme Court, 1986).

https://digitalcommons.law.byu.edu/byu_sc1/845

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
A
DOCKET NO. 860086

IN THE SUPREME COURT OF THE STATE OF UTAH

VERNON S. CHEEVER, MARTHA
T. CHEEVER, UTAH COUNTY
PACKING COMPANY, INC., and
COLES BROTHERS, INC.,

Plaintiffs-Appellants,

Supreme Court No. 20362

vs.

860086-CA

JOSEPH A. SEETHALER, MYRA
K. SEETHALER, and SECURITY
TITLE AND ABSTRACT COMPANY,

Defendants-Respondents.

REPLY BRIEF OF APPELLANTS

Appeal from Summary Judgment, November 30, 1984
Fourth Judicial District Court in and for Utah County
Honorable David Sam, presiding.

KENNETH F. CLARKE
ATTORNEY AT LAW
42 North University Ave, Suite 11
P.O. Box H
Provo, Utah 84601
(801) 375-2911
Attorney for Appellants

JACKSON HOWARD
HOWARD, LEWIS & PETERSON
120 East 300 North
P.O. Box 778
Provo, Utah 84601
(801) 373-6345
Attorney for Respondents

FILED
MAY 20 1985

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS/NATURE OF CASE. 1

REPLY TO RESPONDENTS POINTS. 3

APPELLANT, MRS. CHEEVER. 9

STIPULATED ADDITION TO BRIEF 10

CONCLUSION 12

TABLE OF AUTHORITIES

Sumitomo Bank of California v. Iwaski, 447 P2d 956,959. . . . 6

Financial Corporation of America v. Prudential Carbon
and Ribbon Company, 507 P2d 1026 (Utah 1973). 8

Jungk v. Holbrook, 49 Pac 305

Hidden Meadows Development v. Mills, 590 P2d 1244 (Utah,
1979) 11

Other Authority

74 Am. Jur. 2d Suretyship, §91. 7

74 Am. Jur. 2d Suretyship, §92. 7

Statutes

Utah Code Annotated, § 78-27-56 (1953 as amended) 12

IN THE SUPREME COURT OF THE STATE OF UTAH

VERNON S. CHEEVER, MARTHA
T. CHEEVER, UTAH COUNTY
PACKING COMPANY, INC., and
COLES BROTHERS, INC.,

Plaintiffs-Appellants,

No. 20,362

vs.

JOSEPH A. SEETHALER, MYRA
K. SEETHALER, and SECURITY
TITLE AND ABSTRACT COMPANY,

Defendants-Respondents.

REPLY BRIEF OF APPELLANTS

In responding to BRIEF OF RESPONDENTS Appellants will follow the format of the Respondent's Brief. All references will be to the numbered pages of the Respondent's Brief unless otherwise stated.

STATEMENT OF FACTS/NATURE OF CASE

On page 3, paragraph 1, it is a misstatement of fact that "as president of Utah County Packing, Vernon Cheever achieved a compromise with Seethaler in the price of the accounts receivable to off-set the equipment failures". The true fact is that they were having ongoing negotiations but there never was a "compromise". (see Affidavit of VERNON CHEEVER, Exhibit 9 and Affidavit of BRUCE

COLES, Exhibit 11, of Appellant Brief.)

Beginning the last paragraph of page 3 the Respondents claim that the Appellants action is an "...action seeking an injunction...". That is not the case, Appellants THIRD AMENDED COMPLAINT, (a copy of which is incorporated in this Brief as Exhibit 7, was inadvertently omitted from Appellants Brief) has several causes of action. The FIRST CAUSE OF ACTION is to have the Note and Deed of Trust reformed to be only in the amount of \$25,000.00 and not \$371,750.00. The SECOND CAUSE OF ACTION seeks a complete recession of the documents by reason of fraud.

On the last five lines of page 8 of Respondent's Brief they allege that the "Court ruled that the principal, Utah County Packing, after discovering all the facts upon which it now complained, had ratified or affirmed the contract between the buyer and the seller." Respondent does not say where in the record that occurs but even if it does occur it is not possible because the Court is ruling on a "question of fact" which is not proper on Summary Judgment. Further, the Affidavit of VERNON CHEEVER, Exhibit 9 of Appellant's Brief and of BRUCE COLES, Exhibit 11 of Appellant's Brief, are to the contrary. Those Affidavits clearly show that a question of fact still existed.

In the middle of page 9 of Respondent's Brief, the Respondent states as follows:

The Court further found that the Plaintiffs Complaint did not state a cause of action for fraud and that the Defendant had admitted that any claim by Utah County Packing is barred by the statute of limitations.

REPLY TO RESPONDENTS' POINTS

POINT I

APPELLANTS' BRIEF DOES NOT MEET THE STANDARDS
SET FORTH BY THE UTAH SUPREME COURT AND APPELLANTS'
CASE, AS STATED, CANNOT PREVAIL UPON APPEAL.

Respondent's POINT I, is not well taken, Appellant's Brief shows that Appellant argued all of the Respondent's Points in its MOTION FOR SUMMARY JUDGMENT (See Exhibit 4 of Appellants Brief). The arguments on the four points are contained in Appellant's Brief at page 9 et al. Other arguments are also incorporated.

POINT II

THE TRIAL COURT WAS CORRECT IN RULING THAT UTAH
COUNTY PACKING AND COLES BROTHERS, INC. WERE
NECESSARY AND INDISPENSIBLE PARTIES.

Under POINT II, Respondents, on page 16, state as follows:

One of the basis for that Ruling was that the cause of action for fraud, if any, belonged to the corporation, and not to the individual plaintiffs.

Before analyzing other incorrect positions of the Respondent, it should be made very clear that UTAH COUNTY PACKING, had a cause of action for fraud on its "contract" for the purchase of the meat packing business. That cause of action is a seperate and distinct cause of action apart from the cause of action that the CHEEVERS had. Their cause of action are set forth in the FIRST CAUSE OF ACTION, and SECOND CAUSE OF ACTION of the THIRD AMENDED COMPLAINT (Exhibit 7, filed herein and inadvertantly omitted from Appellant's Brief.). The cause of action of CHEEVERS has nothing to do with the purchase of the business. Their cause of action is to have de-

clared of no force and effect the TRUST DEED NOTE, and DEED OF TRUST Exhibit 1 and Exhibit 2 of Appellant's Brief at page 28 and 29 therein. The Trust Deed is on their residence.

Next is the statement by the Respondents on page 17 of their Brief

Utah County Packing Company has, therefore, elected to affirm the Contract and has waived any claim for damages.

Appellant asserts that it wouldn't matter whether or not Utah County Packing Company elected to affirm their contract or not. That contract has nothing to do with the Appellants causes of action to have the TRUST DEED NOTE and DEED OF TRUST, declared of no force and effect. Utah County Packing never signed the Deed of Trust.

Also in the middle of page 17 of their Brief they state that there was an "accord and satisfaction". That is not true. That would require a finding of fact on the part of the trial court which would not be possible upon Summary Judgment. (See Exhibit 9 and 11 of Appellant's Brief.)

In the next to the last paragraph of page 17 of Respondent's Brief they allege:

Where the existing plaintiff has failed to join other necessary plaintiffs, the entire case must be dismissed.

Appellant does not see the rational of this argument. The record is crystal clear that they were properly joined. (See THIRD AMENDED COMPLAINT, Exhibit 7 herein, showing their having been joined, R. 516-549; for the authority of having them joined see Exhibits 13,14, and 15 of APPELLANT'S BRIEF.)

Finally in disposing of Respondent's POINT II, the Appellants

asks, So what? The Record is clear that they were joined.

POINT III

AS CONCEDED BY APPELLANTS, ANY ACTION BY UTAH
COUNTY PACKING AND COLES BROTHERS, INC. WAS BARRED
BY THE APPLICABLE STATUTE OF LIMITATIONS.

Respondent's arguments herein are also MOOT. They were joined and its conceded that apparently that they were barred by the applicable Statute of Limitations. The effect of them being barred, satisfied the very need for joining "indispensable parties". That reason is to have a final determination as to all of the issues regarding those "indispensable parties"; the issues are finally resolved; this is particularly true in the fact that no appeal has been taken on those corporate "indispensable parties" and they cannot be of any hazard to the Respondents.

Throughout POINT III, there is also again the assertion that the claim of Utah County Packing Company had been "waived". Of course that is not true. (See Exhibit 9 and 11 of Appellant's Brief.)

POINT IV

CHEEVER, AS AN INDIVIDUAL AND GUARANTOR, HAD NO
STANDING TO BRING AN ACTION FOR RESCISSION WHEN ANY
ALLEGED DAMAGE WAS DONE TO UTAH COUNTY PACKING/COLES
BROTHERS AND CHEEVER, AS PRESIDENT OF UTAH COUNTY
PACKING ELECTED TO SEEK DAMAGES, AND THROUGH
COMPROMISE TO AFFIRM AND RATIFY THE CONTRACT.

Again, it is absolutely essential that it be understood that the cause of action of the Appellants has nothing to do with the purchase of the Meat Packing plant by Utah County Packing Company from the Defendants but has to do with the Plaintiffs rights as a guarantor. Their rights having nothing to do with the purchase of

the meat packing plant. Their rights are independent of any actions or rights of Utah County Packing.

On the bottom of page 23 of the Respondent's Brief they talk about the "principle obligation". The "principle obligation" in this case is the obligation between the defendants and Utah County Packing. The "principle obligation" has nothing to do with the "independent rights" of the Appellants, who are guarantors. At the top of page 24 Respondents state: "a guarantor may assert all defenses, with the exception of personal defenses available to the principle." A reading of that case indicates that the "principle defenses" are the defenses such as "infancy and incapacity". The Respondents are correct; the Guarantors, the Appellants, can raise any defenses that they have.

In SUMITOMO BANK OF CALIFORNIA v IWASAKI 447 P2d 956, 959, the Court stated:

In all suretyship relations, the creditor owes to the surety a duty of continuous good faith and fair dealing. (County of Glenn v. Jones (1905) 146 Cal. 518, 520, 80 P. 695; Ely v. Liscomb (1914) 24 Cal.App. 244, 228, 140 P. 1086; Hamlen v. Rednalloh Co. (1935) 291 Mass. 119, 197 N.E. 149, 153, 99 A.L.R. 1230; First Citizens Bank & Trust Co. of Utica v. Shermans Estate (1937) 250 App.Div. 339, 294 N.Y.S. 131, 139; Stearns, The Law of Suretyship (5th ed. 1951) §2.11, at p. 22; 1 Story, Equity Jurisprudence (14th ed. 1918) § 448, at p. 430.) Thus, the creditor must not misrepresent or conceal facts so as to induce or permit the surety to enter or continue in the relationship in reliance on a false impression as to the nature of the risk. As with other contracts, a creditor's fraud, which may consist of intentional or negligent misrepresentation or active suppression of the truth, will discharge the surety as to any subsequently incurred liability. (Arant, Law of Suretyship and Guaranty (1931) § 28, at p. 75; 1 Brandt, The Law of Suretyship and Guaranty (3rd ed. 1905) § 256, at p. 505; cf. 1 Corbin on Contracts (1963) § 6, at pp. 12-13.) (page 959.)

That rule imposes an absolute duty upon the obligee

to volunteer disclosure of all facts materially affecting the risk to the surety on a fidelity bond.....Irrespective of motive or intent, mere non-disclosure of facts known by the obligee which materially affect the surety's risk, such as prior dishonesty of the principal on the fidelity bond, therefore discharges the surety. (page 960)

The same concept is set forth in SURETYSHIP, 74 AM JUR 2d,

91:

Hence the slightest fraud on the part of the creditor touching the contract, annuls it. Accordingly, it has been said that if a creditor induces a surety to enter into the contract of suretyship by any fraudulent concealment of material facts, or by any express or implied misrepresentations of such facts or by taking any undue advantage of surety, either by surprise or by withholding proper information, there will be afforded a sufficient ground for the invalidation of the contract.

It should also be noted that because of the special relationship of Guarantor or Suretyship, that there be no necessity of any "positive affirmations".

Fraud on the part of the obligee such as will avoid the contract of suretyship is not confined to positive affirmations which are untrue, but may consist in the concealment or withholding by him from the surety, at the time the contract of suretyship is executed, of material facts affecting the risk, which contract of suretyship is executed, of material facts affecting the risk, which facts the obligee has the opportunity, and which it is his duty, to disclose.....However, if, in the circumstances, the concealment is fraudulent, the motive of the obligee is immaterial. (74 Am Jur 2d 92)

The ETTLINGER citation, bottom of page 24 of Respondent's Brief, is not in point. The "contract induced by fraud" referred to on the top of page 25 is referring, in this instance, to the "contract" for the purchase of the meat packing plant by Utah County Packing. We are not concerned with that contract; we are concerned with the contract of SURETYSHIP that is set forth in Exhibit 1 and 2 of the Appellant's Brief. That is the contract that was incurred

fraud; those are the contracts that privy only to the Appellants. Those contracts, Exhibit 1 and 2 have nothing to do with Utah County Packing.

On page 27 of Respondent's Brief, they claim that ".....any representations were made exclusively to the president of Utah Packing Company, and the plaintiffs, as guarantors, are without standing to assert the claims or defenses of Utah Packing Company." That is not true! The false representations were made to the President of Utah County Packing Company, but they were also made to the individual, Vernon Cheever. For the "seperate entity" doctrine, see page 20-23 of Appellant's Brief. Respondents would have us believe that like a stick of dynamite exploding, that it can only hurt one person; in this instance Vernon Cheever, President of Utah County Packing Company. The "exploding dynamite" are the fraudulent representations made by Seethaler. (see particularly the Affidavit of ARLIN DAVIS, Exhibit 21, page 90 of Appellant's Brief.) Cheever, as a personal guarantor heard it explode.

On page 28 of Respondent's Brief the statement is made:

The point of the Court's decision in this case is that Wilkerson, (citing FINANCIAL CORPORATION OF AMERICA v. PRUDENTIAL CARBON AND RIBBON COMPANY, 507 P2d 1026, Utah 1973,) the guarantor, could not raise a defense that had vested in the debtor.

That is true! Appellants are not raising the defense that had vested in the debtor (Utah County Packing) but rather the defense that had vested in the Appellants, the fraud committed on them in getting them to execute Exhibit 1 and Exhibit 2 of Appellant's Brief.

Finally on page 29 the Respondents would have us believe that the Appellants herein do not have "standing". Attached hereto as Exhibit 1, is the complete text of JUNGK vs. HOLBROOK (emphasis added). See also page 6 and 7 of this Brief.

POINT V

THE TRIAL COURT WAS CORRECT IN NOT REACHING ALLEGATIONS OF FRAUD IN THAT THE CORPORATIONS WERE BARRED AND CHEEVER, AS AN INDIVIDUAL, COULD NOT SEEK A REMEDY IN CONTRAST TO THAT SOUGHT AS A CORPORATE OFFICER; IN ANY EVENT, WHERE A GUARANTOR EXERCISING PROFESSIONAL EXPERTISE AS TO BUSINESS OPERATIONS INHERENT TO THE CONTRACT, INSPECTS PROPERTY PRIOR TO THE CONTRACT, THE DOCTRINE OF CAVEAT EMPTOR APPLIES AND RELIANCE UPON THE OPINIONS OF THE SELLER ARE UNJUSTIFIED.

All of Respondent's Arguments and cases under POINT V are inappropriate because they all relate to "questions of fact" which are to be determined at the time of trial and not by Summary Judgment, the basis of the appeal herein. Again, Appellant refers the Court to the Affidavit of Arlin Davis, Exhibit 21, page 90 of Appellant's Brief. See also page 6-8 herein.

POINT VI

EVEN WERE CHEEVER PERMITTED TO BRING A SEPARATE ACTION AS GUARANTOR, HIS ALLEGATIONS OF MISTAKE AS TO THE TRUST DEED FAILED TO ESTABLISH A SUFFICIENT BASIS FOR RESCISSION.

See p. 6-8 herein.

POINT VII

RESPONDENTS ARE ENTITLED TO ATTORNEYS FEES BY REASON OF APPELLANTS' FRIVOLOUS APPEAL.

Somebody ought to pay attorneys fees here when there is 815 pages of paginated record and the case is decided on Summary Judgment.

APPELLANT, MRS. CHEEVER

The thrust of all of these arguments raised by the Respondents have to do with spurious defenses that attempts to keep this case going to a Jury Trial. There is nothing in the record to indicate

that Mrs. Cheever was involved in any of these "compromises", "waivers", or "settlements".

STIPULATED ADDITION TO BRIEF

Attached hereto, as Exhibit F, is the Stipulation entered into by Appellants and Respondents for addition to Briefs filed herein.

Subsequent to the filing of the Brief herein, the Respondents sold the Appellants property pursuant to Notice of Trustee's Sale, a copy of which is attached hereto as Exhibit A, on the 9th day of April, 1985 at 11:00 a.m., as more fully set forth by the Trustee's Deed, a copy of which is attached hereto as Exhibit B.

Since the filing of appellants Brief, a new item of relief is sought in order to facilitate a final conclusion to this matter.

Appellant is fearful that if they are successful in this appeal that a remand to the Lower Court may result in the Lower Court refusing to allow amendment to the Pleadings to remove the "cloud" on the title of the Appellants by reason of Exhibit B if the Appellants are also successful in the cause of action in the Lower Court.

Page 26 should be substituted so that if the Appellants are successful in this Court, a remand will facilitate a "final disposition" without the expense and necessity of an additional appeal on the issue as to whether or not Appellant would be entitled to have the "cloud" removed if also successful in the Lower Court on remand on the original cause of action.

The right of Quiet Title would also effect the right to Quiet Title against any persons taking by reason of the Defendants Deed,

Exhibit B. This necessarily follows by reason of the fact that Appellants, filed a Lis Pendens on the 29th day of February, 1984 as set forth in Exhibit C. Pursuant to the holding in HIDDEN MEADOWS DEVELOPMENT COMPANY vs. MILLS 590 P2d 1244, (Utah, 1979), the filing of Exhibit C had the effect of giving Notice to the world of Appellants Cause of Action. A copy of the complete text is attached hereto as Exhibit E. Also attached hereto is Exhibit D, Amended Lis Pendens, which gives notice to the world that there is an active pending case even though Summary Judgment was entered against the Plaintiffs and in favor of the Defendants on the 30th day of November, 1984. (See bottom of page 2 of Exhibit D.) It should be noted that Exhibit D was not really necessary for the reason that HIDDEN MEADOWS DEVELOPMENT COMPANY vs. MILLS, stands for the proposition that the Lis Pendens filed in the first instance survives the Appeal. The Court stated:

The rule is well settled that, where a judgment is reversed and remanded with specific instruction or directions, the case stands in lower Court precisely as it did before a trial was had in the first instance. Hence, that very situation existed in the instant case as a result of our reversal and remand with directions to grant specific performance. Also, by so reversing, the Court has already recognized the full effectiveness of lis pendens pending appeal. (page 1248)

For the reasons cited, this Court should allow the substitution of page 26 in Appellants Brief and these arguments set forth herein should become a part of the Brief for the proposition that if the Appellants are successful on their Appeal herein, that the relief sought herein should include instructions to the Lower Court to follow the principles of law set forth in this Memorandum, page 9 and 10.

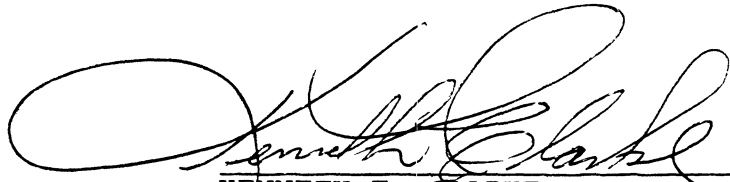
CONCLUSION

For the reasons stated, the Court should rule that Summary Judgment, was improperly granted, and the judgment of Lower Court reversed with all causes of action in place and that the Lower Court should seriously look to determining if the prevailing party should be awarded Attorney Fees pursuant to Section 78-27-56 of the Utah Code.

That in the event the Appellants are successful on Appeal, that Plaintiffs be allowed to file a Cause of Action for damages for the loss of the use of their property and for quieting Title to the Property in Plaintiffs by allowing amendments to Plaintiffs pleadings.

DATED this 15 day of May, 1985.

RESPECTFULLY SUBMITTED,


KENNETH F. CLARKE
Attorney for Appellants

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 17 day of May, 1985, ten true and correct copies of the REPLY BRIEF OF APPELLANTS was mailed to the Supreme Court and four true and correct copies of the same were mailed, postage prepaid, to JACKSON HOWARD, Howard, Lewis & Peterson, 120 East 300 North, Provo, Utah 84601.


KENNETH F. CLARKE

KENNETH F. CLARKE
MADSEN, JEPSON, SALLENBACK & CLARKE
Attorney at Law
One East Center, Suite 300
P. O. Box H
Provo, Utah 84603
Telephone 801-375-2911

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and MARTHA T.
CHEEVER, husband and wife, UTAH
COUNTY PACKING INC., a Utah
Corporation; COFFS BROTHERS, INC., THIRD AMENDED COMPLAINT
a Utah Corporation,

Plaintiffs,

vs.

JOSEPH A. SEETHALER and MYRA
K. SEETHALER, husband and wife
and SECURITY TITLE AND ABSTRACT
COMPANY,

Civil No. 64179

Defendants.

COME NOW the Plaintiffs, VERNON S. CHEEVER and MARTHA
T. CHEEVER, and for cause of action against the Defendants, com-
plain and allege as follows:

FIRST CAUSE OF ACTION

1. That on or about the 10th day of June, 1981, the Plain-
tiff, VERNON S. CHEEVER, individually, executed a TRUST DEED NOTE
wherein the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER,
were payees; a copy of which is attached hereto and made a part
hereof as if set forth herein at length and marked as Exhibit "A".

2. That on or about the 10th day of June, 1981, the Plain-
tiffs, VERNON S. CHEEVER and MARTHA T. CHEEVER, executed a DEED OF
TRUST WITH ASSIGNMENT OF RENTS, wherein the Defendants, JOSEPH A.
SEETHALER and MYRA K. SEETHLAER are listed as beneficiaries; a
copy of which is attached hereto and made a part hereof as if set
forth herein at length and marked as Exhibit "B".

3. That prior to the presentation of Exhibit "A" and "B" to the Plaintiffs, the Plaintiff, VERNON S. CHEEVER, had agreed with the Defendants, that he would be personally liable for the purchase from the Defendants, a meat packing business, limited to the extent of \$25,000.00; that it was the intent of the Plaintiffs and the Defendants that the individual liability of the Plaintiffs and the giving of collateral to secure that liability was to be limited to the extent of \$25,000.00; the particulars of which are set forth on Exhibit D, attached hereto based upon reasonable belief.

4. That the Plaintiff, at the time of the execution of Exhibits "A" and "B", did not read the contents thereof before signing the same but relied upon the representation of the Defendant, JOSEPH A. SEETHALER, that the said Exhibits did contain the express agreement of the parties theretofore agreed to, and the Plaintiffs did believe, based upon the said representation of the Defendant, JOSEPH A. SEETHALER, which representation was material and which was false, that the said documents did contain the agreement of the parties theretofore agreed to.

5. In fact, the documents referred to herein as Exhibits "A" and "B" did not contain the agreement of the parties theretofore agreed to, but in fact, contained terms entirely contrary to the expressed agreement of the parties, which fact was known to the said Defendant. and to the said defendants agent, Defendant, SECURITY TITLE AND ABSTRACT COMPANY, who prepared the said documents, or, if said fact was not known by Defendant, JOSEPH A. SEETHALER, constituted a mistake of fact on the part of said Defendant in executing Exhibits "A" and "B".

6. The Defendants failed to disclose to the Plaintiffs the material differences between the documents referred to herein as Exhibits "A" and "B" and the actual agreement entered into by the parties prior to execution of Exhibits "A" and "B".

7. That by reason of the mutual mistake of the Plaintiffs and the

Defendants, or by reason of the mistake of the Plaintiff or ignorance as to the contents of Exhibits "A" and "B", coupled with the fraud or material misrepresentation of the Defendants in concealing their knowledge of the contents thereof. Exhibits "A" and "B" completely failed to embody the actual agreement of the parties; with liability of the Plaintiff, VERNON S. CHEEVER, Individually, was to be limited to \$25,000.00 on Exhibit "A" and the collateral, the residence of the Plaintiffs, was given only to secure the individual liability of the Plaintiffs to the extent of \$25,000.00 and Exhibit "B" should have been a second trust deed to the Defendants in the amount of \$25,000.00 and no more, subject to a first trust deed in favor of any entity of Plaintiffs choosing at any time in the amount of \$44,000.00.

8. That the Plaintiffs executed Exhibits "A" and "B" in the belief that the same embodied the actual agreement theretofore made as hereinabove alleged.

9. That by reason of the fraud of the Defendant, JOSEPH A. SEETHALER, who acted at all times as agent for his wife, MYRA K. SEETHALER, the Plaintiffs have suffered great distress of body and mind and greatly injured and damaged in their credit standing and reputation by reason of the Defendants' acts in the amount of \$50,000.00 each.

10. The acts of Defendant, JOSEPH A. SEETHALER, were malicious and said Defendant is guilty of wanton disregard for the rights of and consequences to the Plaintiffs and by reason thereof, Plaintiffs demand exemplary and punitive damages against the said Defendant, JOSEPH A. SEETHALER, in the amount of FIFTY THOUSAND (\$50,000.00) DOLLARS each.

11. That the Plaintiffs have been required to obtain the services of an attorney to prosecute this action and that it would be inequitable not to grant the Plaintiff a reasonable attorney's fees and that the Court should enter an order granting to the Plaintiff a reasonable attorney's fees for the prosecution of this action and also as provided by Section 73-27-56.

12. That the Defendant, JOSEPH A. SEETHALER, in causing the exhibit A and B to be prepared with the figure of \$371,750.00, instead of the figure \$25,000.00 and in execution of the same without informing plaintiffs otherwise, made a representation that \$25,000.00 was on exhibit A and B instead of \$371,750.00 concerning presently existing material facts; which were false because the true figure which should have been \$25,000.00 instead of \$371,750.00; which he either knew to be false, or he made recklessly, knowing that he had insufficient knowledge upon which to base such representation; for the purpose of inducing the CHEEVERS to act upon his representation that exhibit A and B was only for \$25,000.00 and not for \$371,750.00; that the CHEEVERS, acted reasonably and in ignorance of the falsity of the said representation that exhibit A and B were for \$25,000.00 and not for \$371,750.00 that the CHEEVERS did in fact rely upon said false representations that its contents reflected \$25,000.00 and they had a right to rely upon the fact that the document prepared by the defendants, would literally conform to the agreement of \$25,000.00 if no notice of the contrary was given.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows on the FIRST CAUSE OF ACTION.

1. That the Court decree that Exhibit "A" be reformed to declare that VERNON S. CHEEVER is individually liable only to the extent of \$25,000.00 for any obligation owing to the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER.

2. That the Court decree that Exhibit "B" be reformed, to show that the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER, have a SECOND DEED OF TRUST limited to the extent of \$25,000.00 and no more and subject to a FIRST TRUST DEED in favor of an entity of plaintiffs choice at anytime in the amount of \$44,000.00 and/or that Plaintiffs are entitled to the first \$44,000.00 equity in the property.

3. In the alternative that the Court decree that Exhibits "A" and "B" be rescinded and that all parties be returned to their respective positions prior to execution of Exhibits "A" and "B".

4. That the Plaintiffs recover \$50,000.00 general damages each against the Defendants and each of them.

5. That the Plaintiff be awarded exemplary and punitive damages in the amount of \$50,000.00 each against the Defendant, JOSEPH A. SEETHALER.

6. That the Plaintiff be awarded a reasonable attorney's fees for the prosecution of this action.

7. For such other and further relief that is just and equitable.

SECOND CAUSE OF ACTION

As paragraphs 1 to 11 of this SECOND CAUSE OF ACTION, Plaintiffs reallege the allegations contained in paragraphs 1 to 11 of the FIRST CAUSE OF ACTION.

12. That prior to the 10th day of June, 1981, the Defendant, JOSEPH A. SEETHALER, acting for himself and as agent for his wife, MYRA K. SEETHALER, entered into negotiations for the sale of their meat packing plant to UTAH COUNTY PACKING, INC., a Utah Corporation.

- (h) Said Defendant represented that the electrical system in the plant was in good operating condition; that in truth in fact, before a business license was issued to the Plaintiffs at or about \$8,000.00 was spent as condition to get a business license for electrical repairs.
- (i) Said Defendant represented that telephone system was in good operating condition; that in truth in fact, a whole new phone system had to be installed; that prior to the replacement, it was always being repaired.
- (j) Said Defendant represented that all of the three smoke houses in the plant were in good operating condition except for one clogged drain; in truth in fact, only one worked and coils had to be replaced to get the second to work but the boiler was not sufficient capacity to run three at once.
- (k) The said Defendant represented that two of the three electric hoists in the plant were in good working and operating condition and that the third hoist had all new parts and that simply was in need of assembly; that in truth in fact, they did not work and had to be immediately repaired.
- (l) The said Defendant represented that the reason for the red tags on the equipment in the package room was merely that the set of equipment was in need of "a little cleaning"; that in truth in fact, moisture was dripping off the ceiling and drip pans and suction fans had to be installed at great expense in order to remove the red tag placed by the meat inspectors.
- (m) The said Defendant represented that the elevator in the building was in good operable condition and had a value of \$25,000.00; that in truth in fact, was in very poor condition and continually breaking down on numerous occasions and of little value.
- (n) The said Defendant represented that the roof on the building was in good condition and was "fine, no problem"; that in truth in fact, it leaked in several places and SEETHALER had been warned by the inspectors that water was dripping down the walls of the coolers and other places and did in fact so drip.
- (o) The said Defendant represented that four Dodge trucks which were included in the sale were refrigerated and in good working and operable condition; that in truth in fact, only two were refrigerated and one of the two did not work.
- (p) The said Defendant represented that all six of the scales in the operation were in good condition; that in truth in fact, none of them would pass inspection by the DEPARTMENT OF WEIGHTS AND MEASURES without repair at great expense; that repair was made at great expense.

- (q) The said Defendant represented that the Patty machines were in good operating condition except that "one of the machines needed a little repair"; that in truth in fact, neither worked, and a new one had to be purchased at an expense of \$36,000.00.
- (r) The said Defendant represented that the "meat chopper" was working and in good working order and in good operable condition; that in truth in fact, it needed new bearings, belts, and controls at great expense.
- (s) The said Defendant/^{represented}that the "Mince Master" was in good operable and working condition; that in truth in fact, it required numerous repairs and great time waiting for hard to find parts.
- (t) The said Defendant represented that the "Ham Blender" was in good working and operating condition; that in truth in fact, paddle bearings were worn out and the machine was leaking rusty water and grease.
- (u) The said Defendant represented that the lunch meat slicer was in good operable and working condition and specifically represented that the said machine was working and that it could be set for any adjustment needed for the amount of slices required; that in truth in fact, immediate repairs of at or about \$500.00 was required to have a new electrical control system and other repairs.
- (v) The said Defendant represented that the "weiner peeler" was in good operable and working condition; that in truth in fact, a new motor and vacuum and pulleys and controls had to be replaced at great expense.
- (w) The said Defendant represented that the "packaging machine" was in good operable and working condition and that in order to produce packages that would hang up on the walls for display that merely a die would need to be purchased.
- (x) The said Defendant represented that the "boiler" was in good operating and working condition and further represented, "that's a good old boiler; better than the new one"; that in truth in fact, a year prior to sale, the controls did not work and six months before it almost blew up. In order to keep it working, it had to be delined and new lines replaced. It was not of sufficient capacity to run the three "smoke houses" at once.
- (y) Said Defendant represented that he owned the "tipper ties" and that the "tipper ties" were included in the sale and further that the CO2 tank was owned by the said Defendant and included in the sale; that in truth in fact, Defendant did not own them.
- (z) Said Defendant represented that the "refrigeration system" was in good operable and working condition; that in truth in fact, the condensers were worn out; solenoid valves, coils, and pipes were

old and rusted and continually leaked ammonia. Many other replacements were made.

- (aa) Said Defendant represented that the "ice maker" was in good operable and working condition; that in truth in fact, it was junked after six months and after great expense and repair.
- (bb) The said Defendant represented that the "hand saw" was in good operating and working condition; that in truth in fact, the bottom shaft and bearings were worn out and finally completely had to be overhauled.
- (cc) The said Defendant represented that the "staple machines" were in good working and operating condition; that in truth in fact, they were worn out and had to be replaced within a few weeks.
- (dd) The said Defendant represented that the "hand slicer" was in good working and operating condition; that in truth in fact, it was worn out and bearing, blade, and motor had to be replaced.
- (ee) The said Defendant represented that the back metal steps, big oak desk, garage jack, an office typewriter, label addresser, a filing cabinet, a vise, several length of pipe, and several stainless steel buckets were all included in the sale agreement; that in truth in fact, defendant took them from the plant just prior to the sale.
- (ff) The said Defendant represented that the "packaging machine" was in good operable and working condition and that in order to produce packages that would hang up on the walls for display that merely a die would need to be purchased; that in truth in fact, it needed more than a new die; the machine was obsolete; the factory representative stated, "new parts could not be obtained"; CO2 leaked from the packages; the machine had to be replaced about 90 days from the purchase at an expense of at or about \$61,000.00.

That by reason of the aforesaid conduct, and the unmerchantable nature of the equipment, and breach of warranties of Defendants express and implied UTAH COUNTY PACKING COMPANY INC., a Utah Corporation, was unable to effectively carry on the business sold by the Defendants and was unable to

realize a profit, all to Plaintiffs' injury.

15. That the Plaintiffs, relying upon the fraudulent representations, warranties, and agreements of the Defendant, consented to guarantee the payment of \$25,000.00 of the purchase price and no more.

16. That the Plaintiffs would not have entered into guarantee \$25,000.00 of the purchase price but for the fraudulent representations of the Defendant, JOSEPH A. SEETHALER, and if the Plaintiffs would have been informed of the true facts they never would have entered into any guarantee of any payment individually and would not have signed Exhibit A or B. Plaintiff, VERNON S. CHEEVER, as President of Utah County Packing Co. Inc., wouldn't have purchased said business but for said representations which he relied upon which were false.

17. That by reason of the fraudulent conduct of the defendant, JOSEPH A. SEETHALER, the Plaintiffs have suffered great distress of body and mind and have been greatly injured and damaged in their credit standing and reputation and by reason thereof have been damaged in the sum of \$50,000.00 general damages each.

18. The fraudulent acts of the Defendant, JOSEPH A. SEETHALER, were malicious and he was guilty of wanton disregard of the rights and consequences of the Plaintiffs and by reason thereof Plaintiffs demand exemplary and punitive damages against said Defendant, JOSEPH A. SEETHALER, in the sum of \$50,000.00 each.

19. That by reason of the fraudulent conduct of the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER, the Court or jury should decree that it is not equitable that the Plaintiffs be bound personally liable for the debt of Utah County Packing, Inc., and enter an order releasing them from their personal liability and their collateral described on Exhibit B and decree that

Exhibit A & B are void and of no effect.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows on the SECOND CAUSE OF ACTION.

1. That the Court determine the amount of damages to be assessed against the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER, by reason of their fraudulent conduct as it applied to Utah County Packing Company Inc., and use the same as set-off against any obligation that may be determined to be owed by the Plaintiffs to the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER and to finally make a determination as to the obligations of the Plaintiffs and the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER.

2. That the Plaintiffs recover \$50,000.00 general damages each against the Defendants and each of them in addition to the foregoing paragraph.

3. That the Plaintiffs recover exemplary and punitive damages against the Defendant, JOSEPH A. SEETHALER, in the sum of \$50,000.00..

4. That the Court enter an order releasing plaintiffs from their collateral described on Exhibit B and decree that Exhibit A & B are void and of no effect.

5. That the Court award a reasonable attorney's fee in favor of the Plaintiffs and against the Defendants for the prosecution of this action.

6. For such other and further relief as to the Court is just and proper.

THIRD CAUSE OF ACTION

As paragraphs 1 to 19 of the THIRD CAUSE OF ACTION, Plaintiff realleges paragraphs 1 to 19 of the SECOND CAUSE OF ACTION.

20. That the negotiations between the Plaintiff and Defendant ~~were~~ not supported by consideration and not sufficient to constitute a contract between the parties in that there was no meeting of the minds and no agreement was reached and the Court should decree that Exhibit A & B are void and of no

effect.

WHEREFORE, Plaintiffs pray for judgment against the defendants as follows on the THIRD CAUSE OF ACTION.

1. That the Plaintiffs recover \$50,000.00 general damages each against the Defendant, JOSEPH A. SEETHALER.

2. That the Plaintiffs recover exemplary and punitive damages against the Defendant, JOSEPH A. SEETHALER, in the sum of \$50,000.00 each.

3. That the Court enter an order releasing Plaintiffs from their personal liability and their collateral described on Exhibit B and decree that Exhibit A & B are void and of no effect.

4. That the Court award a reasonable attorney's fee in favor of the Plaintiffs and against the Defendants for the prosecution of this action.

5. For such other and further relief as to the Court is just and proper.

FOURTH CAUSE OF ACTION

As to paragraphs 1-19 of the FOURTH CAUSE OF ACTION, plaintiff realleges paragraphs 1 to 19 of the SECOND CAUSE OF ACTION.

20. That the Defendants had notice of the true facts of the condition of the equipment and circumstances heretofore alleged.

21. That it would be inequitable for the Defendants to now claim any right or interest under Exhibits A or B and are therefore estopped from claiming any right or interest under Exhibits A or B and both should be declared void.

22. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs pray for Judgment against the Defendants as follows on the FOURTH CAUSE OF ACTION.

1. That the Court determine that it would be inequitable for the Defendants to claim any right or interest under Exhibit A or B and that they are estopped from claiming any right or interest to Exhibit A or B.

2. That the Plaintiffs recover \$50,000.00 general damages each against

the Defendants and each of them.

3. That the Plaintiffs recover exemplary and punitive damages against the Defendant, JOSEPH A. SEETHALER, in the sum of \$50,000.00 each.

4. That the Court enter an order releasing Plaintiffs from their collateral described on Exhibit B and decree that Exhibit A & B are void and of no effect.

5. That the Court award a reasonable attorney's fee in favor of the Plaintiffs and against the Defendants for the prosecution of this action.

6. For such other and further relief as to the Court is just and proper.

FIFTH CAUSE OF ACTION

As to paragraphs 1 to 19 of this FIFTH CAUSE OF ACTION, Plaintiffs re-allege the allegations contained in paragraphs 1 to 19 of the SECOND CAUSE OF ACTION.

20. That on or about the 30th day of March, 1983, the Defendant, SECURITY TITLE AND ABSTRACT COMPANY, filed a NOTICE OF DEFAULT, a copy of which is attached hereto as Exhibit "C" and made a part hereof as is set forth herein at length.

21. That no sale of the said property has yet been conducted pursuant to the said NOTICE OF DEFAULT.

22. That the Defendants, are threatening to, pursuant to section 57-1-25 of the Utah Code, to sell the said property at trustees sale; no NOTICE OF TRUSTEE SALE has yet been filed nor has any publication yet been made pursuant to the statute.

23. That an unfair advantage has been gained by the Defendants, SEETHALERS, through their fraud, and/or the mutual mistake of the parties, and that it is against good conscience to let the mistake stand and it would be inequitable to allow the foreclosure of the property set forth in

Exhibit "B" and the Court should issue an order enjoining the Defendants from continuing with the foreclosure including injunction, restraining order, temporary restraining order, preliminary injunction, or such other means as would be just and equitable.

24. That Section 57-1-23 of the Utah Code, which gives to a beneficiary an option to foreclose trust deeds as provided for foreclosure of mortgages of Real Property, without providing the same right to the Plaintiff, is a violation of the due process and equal protection clauses as provided by the 14th amendment of the U.S. Constitution; the Court should decree that the Plaintiff has the same right and the Court should decree that judicial foreclosure be made of the property in lieu of the statutory foreclosure undertaken by Defendants.

25.) That it is inequitable that Defendants should be allowed by non-judicial sale to foreclose the property; that the Court should decree that the property be foreclosed "in the manner provided by law for the foreclosure of mortgages on Real Property.

26. Plaintiff has no adequate remedy at law or otherwise to prevent the harm or damage threatened by the defendants by reason of their threat to sell the said property, without the Court hearing the case on its merits and this Court should restrain and prevent the foreclosure sale on said property until this action is resolved on the merits.

27. Plaintiff will suffer irreparable harm, damage, and injury, unless the acts and conduct of the Defendant above complained of or enjoined, because the property would be sold without the Plaintiffs being able to assert their defenses as herein set forth in this complaint.

28. The hereinmentioned property is the homestead of the Plaintiffs and

qualifies as exempt property under the Utah Homestead Act within the statute provisions of the act.

WHEREFORE, Plaintiff prays for Judgment against the Defendants as follows:

1. That a TEMPORARY RESTRAINING ORDER issue restraining Defendants, their servants and employees from proceeding with any TRUSTEE SALE, until a hearing is had on Plaintiffs application for a preliminary injunction and restraining the Defendants, their agents, servants, and employees, during the pending of this action from continuing the foreclosure of the property on Exhibit B of the Complaint or proceeding further under Exhibit C of the Complaint by sale or otherwise.

2. That a preliminary injunction issue enjoining the Defendants, their servants and employees from proceeding with any TRUSTEE SALE, or publishing notice of same, during the pendency of this action and restraining the Defendants, their agents, servants, and employees, during the pendency of this action from continuing the foreclosure of the property on Exhibit B of the Complaint or proceeding further under Exhibit C of the Complaint by sale or otherwise.

3. That on a final hearing, defendants, and their agents, servants and employees, be permanently enjoined from proceeding with any TRUSTEE SALE, or publication of notice thereof and restraining the Defendants their agents, servants, and employees, during the pendency of this action from continuing the foreclosure of the property on Exhibit B of the Complaint or proceeding further under Exhibit C of the Complaint by sale or otherwise.

4. That the Court issue an order that a Judicial Foreclosure "in the manner provided by law for the foreclosure of mortgages on Real Property" be made of the property in lieu of the summary and non-judicial foreclosure

undertaken by the Defendants.

5. That the Plaintiff receive costs and expenses incurred herein.

6. That the Plaintiff receives such other additional relief as may seem just and equitable to the Court.

SIXTH CAUSE OF ACTION

As paragraphs 1-28 of this SIXTH CAUSE OF ACTION, Plaintiffs reallege the allegations contained in paragraphs 1-28 of the FIFTH CAUSE OF ACTION.

29. That by reason of the allegations set forth herein, the affidavits on file herein, the deposition of JOSEPH A. SEETHALER, filed herein, a dispute and actual controversy now exists between the Plaintiffs and the Defendants as to the Plaintiffs rights, duties and obligations as to Exhibits A and B; until such dispute is settled, Defendant should not be allowed to proceed with foreclosure and the Plaintiffs cannot properly determine their rights and obligations under Exhibits A and B.

30. Plaintiffs have made an application with DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION of Salt Lake City, Utah to obtain a \$44,000.00 loan to be secured by a First Trust Deed to DESERET FEDERAL SAVINGS AND LOAN ASSOCIATION.

31. The specific matter in dispute is set forth herein and in the file herein.

32. This SIXTH CAUSE OF ACTION is brought under RULE 57 of the Utah Rules of Civil Procedure.

WHEREFORE, Plaintiff prays as follows:

1. For a judgment declaring the rights, duties and legal relations of the Plaintiff and Defendants with regards to Exhibit A and B so that the Plaintiff can determine their rights and duties thereunder, and if they can grant a FIRST TRUST DEED in the amount of \$44,000.00 to DESERET FEDERAL

SAVINGS AND LOAN ASSOCIATION.

2. That the Court decree that Exhibit "B" be reformed, to show that the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER, have a SECOND DEED OF TRUST limited to the extent of \$25,000.00 and no more and subject to a FIRST TRUST DEED in favor of an entity of Plaintiffs choice at anytime in the amount of \$44,000.00.

3. That the Plaintiffs recover \$50,000.00 general damages each against the Defendants, the SEETHALERS, and each of them.

4. That the Plaintiff be awarded exemplary and punitive damages in the amount of \$50,000.00 each against the Defendant, JOSEPH A. SEETHALER.

5. That the Plaintiff be awarded a reasonable attorney's fees for the prosecution of this action.

6. For such other and further relief that is just and equitable.

COME NOW the Plaintiff, UTAH COUNTY PACKING INC., a Utah Corporation, and for cause of action against the Defendants, complain and allege as follows:

FIRST CAUSE OF ACTION

1. That on or about the 10th day of June, 1981, VERNON S. CHEEVER, as President of the Plaintiff, Utah County Packing Inc., executed a TRUST DEED NOTE wherein the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER, were payees; a copy of which is attached hereto and made a part hereof as if set forth herein at length and marked as Exhibit "A".

2. That prior to the 10th day of June, 1981, the Defendant, JOSEPH A. SEETHALER, acting for himself and as agent for his wife, MYRA K. SEETHALER, entered into negotiations for the sale of their

meat packing plant to the Plaintiff, UTAH COUNTY PACKING, INC., a Utah Corporation.

3. That in the course of the negotiations, the Defendant, JOSEPH A. SEETHALER, made representations; concerning presently existing material facts; which were false; which he either knew to be false, or made recklessly, knowing that he had insufficient knowledge upon which to base such representations; for the purpose of inducing UTAH COUNTY PACKING INC. to act upon his representations; that the UTAH COUNTY PACKING INC., acted reasonably and in ignorance of the falsity of the said representations; that did in fact rely upon said false representations; that by reason thereby, it was induced to be liable on the sale; that by reason of agreeing to be liable on the sale it has been greatly injured and damaged. The representations referred to include, but are not limited to:

(a) The Defendant, JOSEPH A. SEETHALER, represented that the plant and all equipment therein was "in top working condition"; that in truth and fact, it was not for the reasons hereafter cited.

(b) Said Defendant represented that "everything was new or better than new because of the maintenance program"; that in truth in fact, he had no maintenance program other than to keep it running; there was no regular lubrication program; lubrication was not performed daily.

(c) The said Defendant represented that in order to operate the beef cooler that all was needed was to turn on a valve and that the coolers were all in good operating condition, and that the reason that the said coolers were not cold at the time of that conversation was because the said Defendant had turned them down, that he did not need them cold; that in truth in fact, the system was so worn out that the coil was ruptured and would not work and had to be replaced.

(d) Said Defendant represented that the electrical system in the plant was in good operating condition; that in truth in fact; before a business license was issued to the Plaintiffs at or about \$8,000.00 was spent as condition to get a business license for electrical repairs.

(e) Said Defendant represented that telephone system was in good operating condition; that in truth in fact, a whole new phone system had to be installed; that prior to the replacement, it was always being repaired.

(f) Said Defendant represented that all of the three smoke houses in the plant were in good operating condition except for one clogged drain; in truth in fact, only one worked and coils had to be replaced to get the second to work but the boiler was not sufficient capacity to run three at once.

(g) The said Defendant represented that two of the three electric hoists in the plant were in good working and operating condition and that the third hoist had all new parts and that simply was in need of assembly; that in truth in fact, they did not work and had to be immediately repaired.

(h) The said Defendant represented that the reason for the red tags on the equipment in the package room was merely that the set of equipment was in need of "a little cleaning"; that in truth in fact, moisture was dripping off the ceiling and drip pans and suction fans had to be installed at great expense in order to remove the red tag placed by the meat inspectors.

(i) The said Defendant represented that the elevator in the building was in good operable condition and had a value of \$25,000.00; that in truth in fact, was in very poor condition and continually breaking down on numerous occasions and of little value.

(j) The said Defendant represented that the roof on the building was in good condition and was "fine, no problem"; that in truth in fact, it leaked in several places and SEETHALER had been warned by the inspectors that water was dripping down the walls of the coolers and other places and did in fact so drip.

(k) The said Defendant represented that four Dodge trucks which were included in the sale were refrigerated and in good working and operable condition; that in truth in fact, only two were refrigerated and one of the two did not work.

(l) The said Defendant represented that all six of the scales in the operation were in good condition; that in truth in fact, none of them would pass inspection by the DEPARTMENT OF WEIGHTS AND MEASURES without repair at great expense; that repair was made at great expense.

(m) The said Defendant represented that the Patty machines were in good operating condition except that "one of the machines needed a little repair"; that in truth in fact, neither worked, and a new one had to be purchased at an expense of \$36,000.00.

(n) The said Defendant represented that the "meat chopper"

was working and in good working order and in good operable condition; that in truth in fact, it needed new bearings, belts and controls at great expense.

(o) The said Defendant represented that the "mince master" was in good operable and working condition; that in truth in fact, it required numerous repairs and great time waiting for hard to find parts.

(p) The said Defendant represented that the "ham blender" was in good working and operating condition; that in truth in fact, paddle bearings were worn out and the machine was leaking rusty water and grease.

(q) The said Defendant represented that the lunch meat slicer was in good operable and working condition and specifically represented that the said machine was working and that it could be set for any adjustment needed for the amount of slices required; that in truth in fact, immediate repairs of at or about \$500.00 was required to have a new electrical control system and other repairs.

(r) The said Defendant represented that the "weiner peeler" was in good operable and working condition; that in truth in fact, a new motor and vacuum and pulleys and controls had to be replaced at great expense.

(s) The said Defendant represented that the "packaging machine" was in operable and working condition and that in order to produce packages that would hang up on the walls for display that merely a die would need to be purchased.

(t) The said Defendant represented that the "boiler" was in good operating and working condition and further represented, "that's a good old boiler; better than the new one"; that in truth in fact, a year prior to sale, the controls did not work and six months before, it almost blew up. In order to keep it working, it had to be delimed and new lines replaced. It was not of sufficient capacity to run the three "smoke houses" at once.

(u) Said Defendant represented that he owned the "tipper ties" and that the "tipper ties" were included in the sale and further that the CO2 tank was owned by the said Defendant and included in the sale; that in truth in fact, Defendant not own them.

(v) Said Defendant represented that the "refrigeration system" was in good operable and working condition; that in truth in fact, the condensers were worn out; solenoid valves, coils, and pipes were old and rusted and continually leaked

amonia. Many other replacements were made.

(w) Said Defendant represented that the "ice maker" was in good operable and working condition; that in truth in fact, it was junked after six months and after great expense and repair.

(x) The said Defendant represented that the "band saw" was in good operating and working condition; that in truth in fact, the bottom shaft and bearings were worn out and finally completely had to be overhauled.

(y) The said Defendant represented that the "staple machines" were in good working and operating condition; that in truth in fact, they were worn out and had to be replaced within a few weeks.

(z) The said Defendant represented that the "hand slicer" was in good working and operating condition; that in truth and fact, it was worn out and bearing, blade, and motor had to be replaced.

(aa) The said Defendant represented that the back metal steps, big oak desk, garage jack, an office typewriter, lable addresser, a filing cabinet, a vise, several length of pipe, and several stainless steel buckets were all included in the sale agreement; that in truth in fact, defendant took them from the plant just prior to the sale.

(bb) The said Defendant represented that the "packaging maching" was in good operable and working condition and that in order to produce packages that would hang up on the walls for display that merely a die would need to be purchased; that in truth in fact, it needed more than a new die; the machine was obsolete; the factory representative stated, "new parts could not be obtained"; CO2 leaked from the packages; the machine had to be replaced about 90 days from the purchase at an expense of at or about \$61,000.00.

4: That by reason of the aforesaid conduct, and the unmerchantable nature of the equipment, and breach of warranties of Defendants express and implied UTAH COUNTY PACKING COMPANY INC., a Utah Corporation, was unable to effectively carry on the business sold by the Defendants and was unable to realize a profit, all to Plaintiffs' injury.

5. That the Plaintiffs, relying upon the fraudulent representations, warranties, and agreements of the Defendant, consented to agree to payment of Exhibit "A".

6. That the Plaintiffs would not have entered into Exhibit "A" but for the fraudulent representations of the Defendant, JOSEPH A. SEETHALER, and if the Plaintiffs would have been informed of the true facts, it never would have entered into Exhibit "A". VERNON S. CHEEVER, as President of Utah County Packing Co. Inc., wouldn't have purchased said business but for said presentations which he relied upon which were false.

7. That by reason of the fraudulent conduct of the Defendant, JOSEPH A. SEETHALER, the Plaintiffs have suffered great damage in the sum of \$150,000.00 general damages.

8. The fraudulent acts of the Defendant, JOSEPH A. SEETHALER, were malicious and he was guilty of wanton disregard of the rights and consequences of the Plaintiffs and by reason thereof Plaintiffs demand exemplary and punitive damages against said Defendant, JOSEPH A. SEETHALER, in the sum of \$50,000.00.

9. That by reason of the fraudulent conduct of the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER, the Court or jury should decree that it is not equitable that the Plaintiffs be bound liable on Exhibit "A" and enter an order releasing it from their liability on Exhibit "A" and decree that Exhibit "A" is of no effect.

10. That the Plaintiffs have been required to obtain the services of an attorney to prosecute this action and that it would be inequitable not to grant the Plaintiff a reasonable attorney's fees and that the Court should enter an order granting to the Plaintiff a reasonable attorney's fees for the prosecution of this action and also as provided by Section 78-27-56.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows on the FIRST CAUSE OF ACTION.

1. That the Plaintiffs recover \$150,000.00 general damages against the Defendants and each of them.

2. That the Plaintiff recover exemplary and punitive damages against the Defendant, JOSEPH A. SEETHALER, in the sum of \$50,000.00.

3. That the Court enter an order releasing Plaintiffs from liability on Exhibit "A" and decree that Exhibit "A" is void and of no effect.

4. That the Court award a reasonable attorney's fee in favor of the Plaintiffs and against the Defendants for the prosecution of this action.

5. For such other and further relief as to the Court is just and proper.

SECOND CAUSE OF ACTION

1. That on or about the 18th day of June, 1981, the Plaintiff paid to the Defendant, JOSEPH SEETHALER, the sum of \$10,822.70 as evidenced by a check, a copy of which is attached hereto as exhibit "F".

2. That the check was given by mistake, coercion, to the said defendant, JOSEPH A. SEETHALER, and without a valuable consideration and constituted an UNJUST ENRICHMENT for the reason that the said was paid to him for payment of accounts receivables which were sold with the business and for which the Defendant is now indebted to this Plaintiff for the sum of \$10,822.70, together with interest thereon at the rate of 10% per annum from June 18, 1981.

3. That the Plaintiff has been required to obtain the services of an attorney to prosecute this action and it would be inequitable not to grant the Plaintiff reasonable attorney's fees and that the Court should enter an order granting to the Plaintiff a reasonable attorney's fees for the prosecution of this action and also as provided by Section 78-27-56 of the UCA.

WHEREFORE, Plaintiff prays for judgment against the Defendant on the SECOND CAUSE OF ACTION in the amount of \$10,822.70, together with interest thereon at the rate of 10% from the 18th day of June, 1981, together with attorney's fees, costs of Court and such other and further relief as is just and equitable.

COME NOW THE Plaintiff, COLES BROTHERS, INC., a Utah Corporation, and for cause of action against the Defendants, complain and allege as follows:

1. That on or about the 10th day of June, 1981, BRUCE H. COLES, as Secretary/Treasurer of the Plaintiff, Utah County Packing, Inc., executed a TRUST DEED NOTE wherein the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER, were payees; a copy of which is

attached hereto and made a part hereof as if set forth herein at length and marked as Exhibit "A".

2. That prior to the 10th day of June, 1981, the Defendant, JOSEPH A. SEETHALER, acting for himself and as agent for his wife, MYRA K. SEETHALER, entered into negotiations for the sale of their meat packing plant to UTAH COUNTY PACKING, INC., a Utah Corporation.
3. That in the course of the negotiations, the Defendant, JOSEPH A. SEETHALER, made representations; concerning presently existing material facts; which were false; which he either knew to be false, or made recklessly, knowing that he had insufficient knowledge upon which to base such representations; for the purpose of inducing COLES BROTHERS, INC., to act upon his representations; that COLES BROTHERS, INC., acted reasonably and in ignorance of the falsity of the said representations; that did in fact rely upon said false representations; that by reason thereby, it was induced to be liable on the sale; that by reason of agreeing to be liable on the sale it has been greatly injured and damaged. The representations referred to include, but are not limited to:

(a) The Defendant, JOSEPH A. SEETHALER, represented that the plant and all equipment therein was "in top working condition"; that in truth and fact, it was not for the reasons hereafter cited.

(b) Said Defendant represented that "everything was new or better than new because of the maintenance program"; that in truth in fact, he had no maintenance program other than to keep it running; there was no regular lubrication program; lubrication was not performed daily.

(c) The said Defendant represented that in order to operate the beef cooler that all was needed was to turn on a valve and that the coolers were all in good operating condition, and that the reason that the said coolers were not cold at the time of that conversation was because the said Defendant had turned them down, that he did not need them cold; that in truth in fact, the system was so worn out that the coil was ruptured and would not work and had to be replaced.

14, said Defendant represented that the electrical system in the plant was in good operating condition; that in truth in fact; before a business license was issued to the Plaintiffs at or about \$8,000.00 was spent as condition to get a business license for electrical repairs.

(e) Said Defendant represented that telephone system was in good operating condition; that in truth in fact, a whole new phone system had to be installed; that prior to the replacement, it was always being repaired.

(f) Said Defendant represented that all of the three smoke houses in the plant were in good operating condition except for one clogged drain; in truth in fact, only one worked and coils had to be replaced to get the second to work but the boiler was not sufficient capacity to run three at once.

(g) The said Defendant represented that two of the three electric hoists in the plant were in good working and operating condition and that the third hoist had all new parts and that simply was in need of assembly; that in truth in fact, they did not work and had to be immediately repaired.

(h) The said Defendant represented that the reason for the red tags on the equipment in the package room was merely that the set of equipment was in need of "a little cleaning"; that in truth in fact, moisture was dripping off the ceiling and drip pans and suction fans had to be installed at great expense in order to remove the red tag placed by the meat inspectors.

(i) The said Defendant represented that the elevator in the building was in good operable condition and had a value of \$25,000.00; that in truth in fact, was in very poor condition and continually breaking down on numerous occasions and of little value.

(j) The said Defendant represented that the roof on the building was in good condition and was "fine, no problem"; that in truth in fact, it leaked in several places and SEETHALEP had been warned by the inspectors that water was dripping down the walls of the coolers and other places and did in fact so drip.

(k) The said Defendant represented that four Dodge trucks which were included in the sale were refrigerated and in good working and operable condition; that in truth in fact, only two were refrigerated and one of the two did not work.

(l) The said Defendant represented that all six of the scales in the operation were in good condition; that in truth in fact, none of them would pass inspection by the DEPARTMENT OF WEIGHTS AND MEASURES without repair at great expense; that repair was made at great expense.

(m) The said Defendant represented that the Patty machines were in good operating condition except that "one of the machines needed a little repair"; that in truth in fact, neither worked, and a new one had to be purchased at an expense of \$36,000.00.

(n) The said Defendant represented that the "meat chopper"

was working and in good working order and in good operable condition; that in truth in fact, it needed new bearings, belts and controls at great expense.

(o) The said Defendant represented that the "mince master" was in good operable and working condition; that in truth in fact, it required numerous repairs and great time waiting for hard to find parts.

(p) The said Defendant represented that the "ham blender" was in good working and operating condition; that in truth in fact, paddle bearings were worn out and the machine was leaking rusty water and grease.

(q) The said Defendant represented that the lunch meat slicer was in good operable and working condition and specifically represented that the said machine was working and that it could be set for any adjustment needed for the amount of slices required; that in truth in fact, immediate repairs of at or about \$500.00 was required to have a new electrical control system and other repairs.

(r) The said Defendant represented that the "weiner peeler" was in good operable and working condition; that in truth in fact, a new motor and vacuum and pulleys and controls had to be replaced at great expense.

(s) The said Defendant represented that the "packaging machine" was in operable and working condition and that in order to produce packages that would hang up on the walls for display that merely a die would need to be purchased.

(t) The said Defendant represented that the "boiler" was in good operating and working condition and further represented, "that's a good old boiler; better than the new one"; that in truth in fact, a year prior to sale, the controls did not work and six months before, it almost blew up. In order to keep it working, it had to be delimed and new lines replaced. It was not of sufficient capacity to run the three "smoke houses" at once.

(u) Said Defendant represented that he owned the "tipper ties" and that the "tipper ties" were included in the sale and further that the CO2 tank was owned by the said Defendant and included in the sale; that in truth in fact, Defendant not own them.

(v) Said Defendant represented that the "refrigeration system" was in good operable and working condition; that in truth in fact, the condensers were worn out; solenoid valves, coils, and pipes were old and rusted and continually leaked

amonia. Many other replacements were made.

(w) Said Defendant represented that the "ice maker" was in good operable and working condition; that in truth in fact, it was junked after six months and after great expense and repair.

(x) The said Defendant represented that the "band saw" was in good operating and working condition; that in truth in fact, the bottom shaft and bearings were worn out and finally completely had to be overhauled.

(y) The said Defendant represented that the "staple machines" were in good working and operating condition; that in truth in fact, they were worn out and had to be replaced within a few weeks.

(z) The said Defendant represented that the "hand slicer" was in good working and operating condition; that in truth and fact, it was worn out and bearing, blade, and motor had to be replaced.

(aa) The said Defendant represented that the back metal steps, big oak desk, garage jack, an office typewriter, lable addresser, a filing cabinet, a vise, several length of pipe, and several stainless steel buckets were all included in the sale agreement; that in truth in fact, defendant took them from the plant just prior to the sale.

(bb) The said Defendant represented that the "packaging maching" was in good operable and working condition and that in order to produce packages that would hang up on the walls for display that merely a die would need to be purchased; that in truth in fact, it needed more than a new die; the machine was obsolete; the factory representative stated, "new parts could not be obtained"; CO2 leaked from the packages; the machine had to be replaced about 90 days from the purchase at an expense of at or about \$61,000.00.

4: That by reason of the aforesaid conduct, and the unmerchantable nature of the equipment, and breach of warranties of Defendants express and implied UTAH COUNTY PACKING COMPANY INC., a Utah Corporation, was unable to effectively carry on the business sold by the Defendants and was unable to realize a profit, all to Plaintiffs' injury.

5. That the Plaintiffs, relying upon the fraudulent representations, warranties, and agreements of the Defendant, consented to agree to payment of Exhibit "A".

6. That the Plaintiffs would not have entered into Exhibit "A". but for the fraudulent representations of the Defendant, JOSPEH A. SEETHALER, and if the Plaintiffs would have been informed of the true facts, it never would have entered into Exhibit "A".

7. That by reason of the fraudulent conduct of the Defendant, JOSEPH A. SEETHALER, the Plaintiffs have suffered great damage in the sum of \$150,000.00 general damages.

8. The fraudulent acts of the Defendant, JOSEPH A. SEETHALER, were malicious and he was guilty of wanton disregard of the rights and consequences of the Plaintiffs and by reason thereof Plaintiffs demand exemplary and punitive damages against said Defendant, JOSEPH A. SEETHLAER, in the sum of \$50,000.00.

9. That by reason of the fraudulent conduct of the Defendants, JOSEPH A. SEETHALER AND MYRA K. SEETHALER, the Court or jury should decree that it is not equitable that the Plaintiffs be bound liable on Exhibit "A" and enter an order releasing it from their liability on Exhibit "A" and decree that Exhibit "A" is of no effect.

WHEREFORE, Plaintiffs pray for judgment against the Defendants as follows.

1. That the Plaintiffs recover \$150,000.00 general damages against the Defendants and each of them.

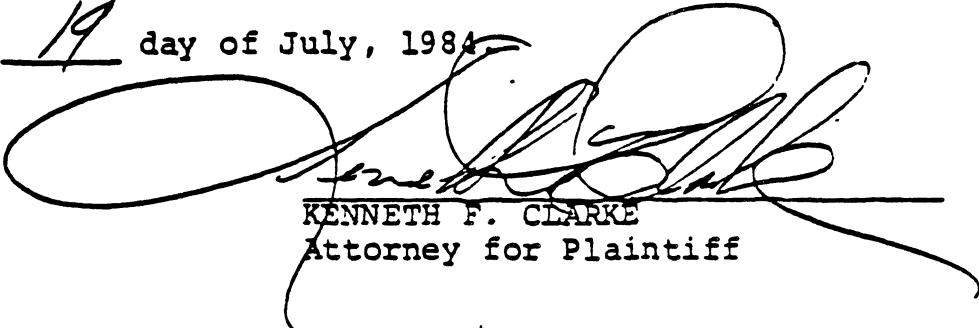
2. That the Plaintiff recover exemplary and punitive damages against the Defendant, JOSEPH A. SEETHALER, in the sum of \$50,000.00.

3. That the Court enter an order releasing Plaintiffs from liability on Exhibit "A" and decree that Exhibit "A" is void and of no effect.

4. That the Court award a reasonable attorney's fee in favor of the Plaintiffs and against the Defendants for the prosecution of this action.

5. For such other and further relief as to the Court is just and proper.

DATED this 19 day of July, 1984.



KENNETH F. CLARKE
Attorney for Plaintiff

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that a true and correct copy of the foregoing was hand delivered to the Law office of JACKSON HOWARD, 120 E. 300 No., Provo, Utah on the 19th day of July, 1984, and also to the law office of ROBERT MOODY, 55 East Center, Provo, Utah on the same date.



SECRETARY

Exhibit A

NOTICE OF TRUSTEE'S SALE

The following described property will be sold at public auction to the highest bidder on the 21st day of April, 1985 at 11:00 A.M. at the front door of the Utah County Court House at Provo, Utah in the County of Utah by SECURITY TITLE & ABSTRACT CO., as Trustee under the Deed of Trust made by Vernon S. Cheever and Martha T. Cheever, as Trustors, and recorded June 11, 1981 as Entry No. 16973 in Book 1918 at pages 696 of the Official Records of Utah County, Utah, given to secure an indebtedness in favor of Joseph A. Seethaler and Myra K. Seethaler, (now owned and held by Joseph A. Seethaler and Myra K. Seethaler by reason of the breach of certain obligations secured thereby.

Notice of Default was recorded March 29, 1984 as Entry No. 9269 in Book 2125 at page 202 of said Official Records. Trustee will sell at public auction to the highest bidder for cash, payable in lawful money of the United States at the time of sale, without warranty as to title, possession or encumbrances, the following described property at 1551 West 1100 North in the City of Provo, County of Utah, State of Utah:

All of Lot 3, Plat "A", Marjorie Manor Subdivision, Provo, Utah, according to the official plat thereof on file in the office of the Recorder, Utah County, Utah.

for the purpose of paying obligations secured by said Deed of Trust including fees, charges and expenses of Trustee, advances, if any, under the terms of said Deed, interest thereon and the unpaid principal of the Note secured by said Deed of Trust with interest thereon as in said Note and by law provided.

Dated: March 4, 1985

55 East Center
Provo, Utah 84601

SECURITY TITLE & ABSTRACT CO., Trustee

By [Signature]
Rex C. Hanson
Its President

SECURITY TITLE
 #28773
 NO

WHEN RECORDED MAIL TO

SECOND RECORDING

 Name Joseph A. Seethaler
 Street 3655 Foothill Drive
 Address
 City & State Provo, Utah 84604

9752

-9615-

SPACE ABOVE THIS LINE FOR RECORDER'S USE

 RECEIVED AT THE REQUEST OF
 SECURITY TITLE & ABSTRACT CO.
 1985 APR -9 PM 3:48
 N. J. & E. III
 UTAH COUNTY REC'D
 FR. 1-15-1985
 REF.

9615

2 pages

TRUSTEE'S DEED

AND ABSTRACT

THIS DEED, made by SECURITY TITLE/COMPANY as Trustee under the hereinafter mentioned Deed of Trust (herein called Trustee), and JOSEPH A. SEETHALER and MYRA K. SEETHALER (herein called Grantee), WITNESSETH

WHEREAS, Vernon S. Cheever and Martha T. Cheever

by Deed of Trust dated June 10, 1981, and Recorded June 11, 1981 as Entry No 16973 in Book 1918 at pages 696 of Official Records, in the office of the County Recorder of Utah County, State of Utah, did grant and convey to said Trustee upon the Trusts therein expressed, the property hereinafter described to secure, among other obligations, payment of a certain promissory note and interest, according to the terms thereof other sums of money advanced, and interest thereon, and,

WHEREAS, breach and default was made under the terms of said Deed of Trust in the particulars set forth in the Notice of Default duly served and recorded; and,

WHEREAS, the then Beneficiary or holder of said note did execute and deliver to Trustee written declaration of default and demand for sale, and,

WHEREAS, Trustee, in consequence of said declaration of default, election and demand for sale, and in compliance with the terms of said Deed of Trust did execute its Notice of Trustee's Sale stating that it, as such Trustee, by virtue of the authority in it vested, would sell at public auction to the highest bidder for cash, in lawful money of the United States, the property particularly therein and hereinafter described, said property being in the County of _____, State of Utah, and fixing the time and place of sale as April 9, 1985 at 11:00 A.M. of said day, and did cause copies of said Notice to be posted for not less than twenty days before the date of sale herein fixed, in three public places in the said City of Provo, wherein said property was to be sold, and also two in conspicuous places on the property to be sold and said Trustee did cause a copy of said Notice to be published once a week for three consecutive weeks before the date of sale therein fixed in The Daily Herald

a newspaper of general circulation, printed and published in the city or township in which said real property is situated, the first date of such publication being March 8, 1985, and the last date March 22, 1985 and

WHEREAS, all applicable statutory provisions of the State of Utah and all of the provisions of said Deed of Trust have been complied with as to acts to be performed and notices to be given, and

WHEREAS, Trustee did at the time and place of sale fixed as aforesaid, then and there sell, at public auction, to said Grantee, Joseph A. Seethaler and Myra K. Seethaler being the highest bidder therefor, the property hereinafter described, for the sum of \$ 10,000.00, paid in cash, lawful money of the United States by the satisfaction of a portion of the indebtedness then secured by said Deed of Trust

NOW, THEREFORE, Trustee, in consideration of the premises recited and of the sum above mentioned bid and paid by Grantee, the receipt whereof is hereby acknowledged, and by virtue of the authority vested in it by said Deed of Trust, does, by these presents, GRANT AND CONVEY unto Grantee, but without any covenant or warranty, express or implied, all that certain property situate in Utah County State of Utah, described as follows

All of Lot 3, Plat "A", Marjorie Manor Subdivision, Provo, Utah, according to the official plat thereof on file in the office of the Recorder, Utah County, Utah.

Re-Recorded to show correct date of sale.

 RECORDED AT THE REQUEST OF
 SECURITY TITLE & ABSTRACT CO.
 1985 APR 10 PM 3:44
 N. J. & E. III
 UTAH COUNTY REC'D
 FR. 1-15-1985
 REF.

9752

SECOND RECORDING

BOOK 2209 PAGE 504

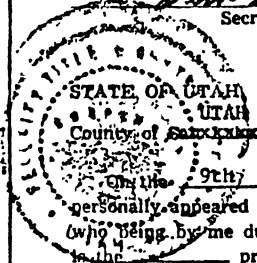
IN WITNESS WHEREOF, said SECURITY TITLE COMPANY, as Trustee, has caused its corporate name and seal to be hereto affixed this 9th day of April, 1985.

AND ABSTRACT
SECURITY TITLE/COMPANY, Trustee

Attest:

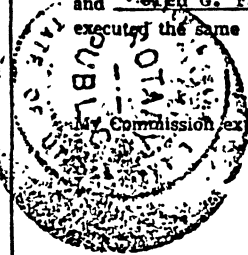
Glen G. Farrer
Secretary Glen G. Farrer

Rex C. Matson
Rex C. Matson President



} ss.

On this 9th day of April, A.D. 1985
personally appeared before me Rex C. Matson and Glen G. Farrer
who being by me duly sworn did say, each for himself, that he, the said Rex C. Matson
is the president, and he, the said Glen G. Farrer is the secretary
of SECURITY TITLE/COMPANY, the corporation that executed the foregoing instrument as such Trustee
by authority of a resolution of its board of directors and said Rex C. Matson
and Glen G. Farrer each duly acknowledged to me that said corporation
executed the same as such Trustee and that the seal affixed is the seal of said corporation.



Commission expires: 6/18/1986

James A. Chamberlain
Notary Public, Residing in Salt Lake City, Utah

BOOK 2209 PAGE 505

BOOK 2209 PAGE 210

9752

9615

Exhibit C

HERBERT P. CLARK
Attorney for Plaintiffs
One East Center, Suite 300
P.O. Box 11
Provo, Utah 84602
Telephone 375-8876

6318

FILED
FEB 23 PM 3 32
CLERK OF DISTRICT COURT
PROVO, UTAH

6318

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

VERNON S. CHEEVER and MARTHA
T. CHEEVER, husband and wife,
Plaintiffs,

LIS PENDENS

vs.

Civil No. 64179

JOSEPH A. SEETHALER and MYRA
K. SEETHALER, husband and wife
and SECURITY TITLE AND ABSTRACT
COMPANY,
Defendants.

NOTICE IS HEREBY GIVEN that an action has been commenced in THE
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, by the
above named Plaintiffs, VERNON S. CHEEVER and MARTHA T. CHEEVER, against
the Defendants, JOSEPH A. SEETHALER and MYRA K. SEETHALER, for the purpose
of having declared void that certain DEED OF TRUST, dated the 10th day of
June, 1981, wherein the Plaintiffs are TRUSTORS, and the Defendants,
JOSEPH A. SEETHALER and MYRA K. SEETHALER, are BENEFICIARIES; said Deed
of Trust was recorded on June 11, 1981, as entry number 16973 in book 1918
at pages 696, 697, and 698 of the Official Records of the County Recorder of
Utah County, State of Utah. THE OBJECT OF THE ACTION IS ALSO to have declared
by the terms of the DEED OF TRUST (immediately below the legal description)
"At the request of Trustor, the Beneficiary agrees to subordinate this Deed
of Trust to a First Trust Deed for a loan not exceeding \$44,000.00 - To be
a determination that the TRUSTORS have the secured interest themselves of the

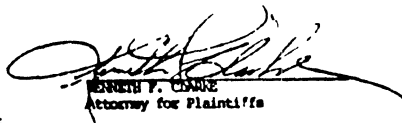
BOOK 2119 PAGE 49

first \$44,000.00 of value in the said property or in the alternative that they may at any time, pursuant to said DEED OF TRUST obtain a loan from any entity, or institution or anyone else in the amount of \$44,000.00 which shall always be superior to the interest of the Beneficiaries. THE OBJECT OF THE ACTION IS ALSO to have declared the duties and legal relations of the Plaintiffs and the Defendants with regards to the said DEED OF TRUST so that the Plaintiffs can determine their rights and duties thereunder. THE OBJECT OF THIS ACTION IS ALSO to have the DEED OF TRUST reformed or declared void based upon, including but not limited to, the FRAUD and or MISREPRESENTATIONS of the Beneficiaries; the particulars of which reference is made to the file in the above entitled Court and cause. The premises affected by this suit are situated in the County of Utah, State of Utah, and are described as follows, to wit:

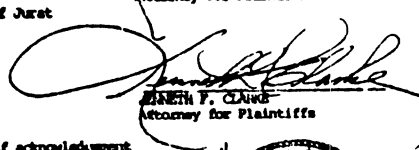
All of lot 3, Plat "A", MARJORIE HANOR SUBDIVISION, Provo, Utah, according to the official plat thereof on file in the office of the Recorder, Utah County, Utah.

WITNESSED this 29th day of February, 1984.

Signed for purpose of Jurat


KENNETH F. CLAUSS
Attorney for Plaintiffs

Signed for purpose of acknowledgment


KENNETH F. CLAUSS
Attorney for Plaintiffs

SUBSCRIBED AND SWORN TO BEFORE ME this 29th day of February, 1984.

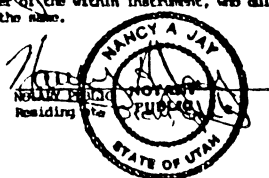


My commission expires: 10/11/87

BOOK 2119 PAGE 50

STATE OF UTAH
COUNTY OF UTAH

On the 27th day of February, 1984, personally appeared before me KENNETH F. CLARKE the signer of the within instrument, who duly acknowledged to me that he executed the same.



My commission expires: 11/11/87

6318

KENNETH F. CLARKE
ATTORNEY AT LAW
Attorney for Plaintiffs
42 North University, Suite 11
P.O. Box H
Provo, Utah 84603
Telephone 801-375-2911

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

VERNON S. CHEEVER and
MARTHA T. CHEEVER,
husband and wife,

Plaintiffs,

AMENDED
LIS PENDENS

vs.

JOSEPH A. SEETHALER and MYRA
K. SEETHALER, husband and
wife, and SECURITY TITLE
AND ABSTRACT COMPANY,

Civil No. 64179

Defendants.


NOTICE IS HEREBY GIVEN that an action has been commenced in the Fourth Judicial District Court of Utah County, State of Utah, by the above named Plaintiffs, Vernon S. Cheever and Martha T. Cheever, against the Defendants, Joseph A. Seethaler and Myra K. Seethaler, for the purpose of having declared void that certain DEED OF TRUST, dated the 10th day of June, 1981, wherein the Plaintiffs are TRUSTORS, and the Defendants, Joseph A. Seethaler and Myra K. Seethaler, are BENEFICIARIES; said Deed of Trust was recorded on June 11, 1981, as entry number 16973 in book 1918 at pages 696, 697, and 698 of the Official Records of the County Recorder of Utah County, State of Utah. THE OBJECT OF THE ACTION IS ALSO to have declared by the terms of the DEED OF TRUST (immediately below the legal description) "At the request of Trustor, the

Beneficiary agrees to subordinate this Deed of Trust to a First Trust Deed for a loan not exceeding \$44,000.00." To be a determination that the TRUSTORS have the secured interest themselves of the first \$44,000.00 of value in the said property or in the alternative that they may at any time, pursuant to said DEED OF TRUST obtain a loan from any entity, or institution or anyone else in the amount of \$44,000.00 which shall always be superior to the interest of the Beneficiaries. THE OBJECT OF THIS ACTION IS ALSO to have declared the duties and legal relations of the Plaintiffs and the Defendants with regards to the said DEED OF TRUST so that the Plaintiffs can determine their rights and duties thereunder. THE OBJECT OF THIS ACTION IS ALSO to have the DEED OF TRUST reformed or declared void based upon, including but not limited to, the FRAUD and or MISREPRESENTATIONS of the Beneficiaries; the particulars of which reference is made to the file in the above entitled Court and Cause. The premises affected by this suit are situated in the County of Utah, State of Utah, and are described as follows, to wit:


All of lot 3, Plat "A", MARJORIE MANOR SUBDIVISION, Provo, Utah, according to the official plat thereof on file in the office of the Recorder, Utah County, Utah.

*Summary Judgment was entered against Plaintiffs and in Favor of Defendants on the 30th of November, 1984. Plaintiffs have appealed to the Utah Supreme Court. The Case number of the Case on appeal is Supreme Court No. 20362. The case is active and pending.

*This paragraph is an amendment to the original IIS PENDING filed February 29, 1984 as Instrument #6318, Book 2119, Page 49 and 50, records of Utah County, State of Utah,


KENNETH F. CLARKE
Attorney for Plaintiffs


Signed for purpose of Jurat


KENNETH F. CLARKE
Attorney for Plaintiffs

Signed for purpose of acknowledgement

SUBSCRIBED AND SWORN to before me this 9th day of April,
1985.

My Commission Expires:
8-8-88


NOTARY PUBLIC
Residing at: Provo, Utah

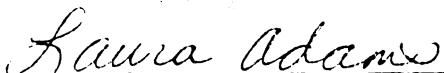
STATE OF UTAH)

:ss

County of Utah)

On the 9th day of April, 1985, personally appeared
before m KENNETH F. CLARKE the signer of the within instru-
ment, who duly acknowledged to me that he executed the same.

My Commission Expires: 8-8-88


NOTARY PUBLIC
Residing at: Provo, Utah

HIDDEN MEADOWS DEVELOPMENT COMPANY, Plaintiff and Respondent,
v.

Dee MILLS, Milton C. Christensen, aka Milton A. Christensen, Paradise Valley Estates, Inc., Lake Mills Company, a Limited Partnership, Carole Lee Christensen, Environmental Resources, Inc., et al., Defendants and Appellants.

No. 15027, 15157, and 15188.

Supreme Court of Utah.

Jan. 2, 1979.

Plaintiff filed action in equity seeking specific performance of an option to purchase realty. The Fourth District Court, Wasatch County, D. Frank Wilkins, J., dismissed action and plaintiff appealed. The Supreme Court, Ellett, J., 29 Utah 2d 469, 511 P.2d 737, reversed and directed granting of specific performance. On remand, the trial court ordered defendant to transfer property to plaintiff. When plaintiff was unable to enforce judgment against defendant due to interim conveyances, plaintiff filed supplemental complaint and joined as additional party defendants those persons who acquired interests in subject land subsequent to entry of initial judgment of trial court. The Fourth District Court, Wasatch County, Ernest F. Baldwin, J., entered judgment of specific performance in favor of plaintiff, subject to defendant's entitlement to compensation for improvement made as an occupying claimant, and defendants appealed. The Supreme Court, Hall, J., held that: (1) *lis pendens* continued to be effective after judgment and pending appeal, and thus defendants were thereby charged with constructive notice of plaintiff's claims prior to their acquisition of any interests in land; (2) record also supported trial court's conclusion that defendants had actual notice of plaintiff's appeal; (3) trial court's determination, in proceeding following remand, ordering specific performance was *res judicata* as to amount payable by plaintiff under option to

defendant, and defendant could not now attempt to alter that determination so as to recover value of improvements made as occupying claimant after date of plaintiff's option, and (4) occupying claimant having made no showing that it acted in good faith in making improvements on subject property, it was not entitled to compensation for said improvements.

Judgment affirmed in part and vacated in part.

Crockett, J., concurred but dissented in part and filed opinion.

1. *Lis Pendens* ⇐11(2)

Lis pendens continued to be effective after judgment and pending appeal. U.C.A.1953, 78-40-2.

2. *Lis Pendens* ⇐1

Term "*lis pendens*" signifies pending litigation and so-called "doctrine of *lis pendens*" confirms power of courts over property during pendency of legal proceedings. U.C.A.1953, 78-40-2.

See publication Words and Phrases for other judicial constructions and definitions.

3. *Lis Pendens* ⇐22(1)

Lis pendens charges public with notice of outstanding claims and causes one who deals with property involved in pending litigation to do so at his peril. U.C.A.1953, 78-40-2.

4. *Lis Pendens* ⇐1

Sole purpose of recording a *lis pendens* is to give constructive notice of pendency of proceedings which may be derogatory to an owner's title or right to possession. U.C.A. 1953, 78-40-2.

5. *Lis Pendens* ⇐22(2)

One who takes with full knowledge that property taken is subject of ongoing litigation acquires only grantor's interest therein, subject to whatever disposition court might make of it.

6. Appeal and Error ⇐1197

Where a judgment is reversed and remanded with specific instruction or di-

rections, case stands in lower court precisely as it did before a trial was had in the first instance.

7. *Lis Pendens* ⇐11(2)

Fact that plaintiff failed to furnish a supersedeas bond after filing an appeal from trial court's dismissal of its action for specific performance of an option to purchase realty did not render notice given by previously recorded *lis pendens* ineffectual. U.C.A.1953, 78-40-2; Rules of Civil Procedure, rule 73(d).

8. Records ⇐19

Those who deal in real property interests are bound by those matters that appear of record and one may not be penalized or deprived of effectiveness of such notice as is imparted by record simply because of some unrelated action or inaction of his or others.

9. Appeal and Error ⇐458(1)

Plaintiff, which appealed trial court's dismissal of its action for specific performance of an option to purchase realty, was not bound to furnish supersedeas; such was merely available to him. Rules of Civil Procedure, rule 73(d).

10. Appeal and Error ⇐485(1)

Purpose and effect of supersedeas is to restrain successful party and lower court from taking affirmative action to enforce a judgment or decree. Rules of Civil Procedure, rule 73(d).

11. *Lis Pendens* ⇐11(2)

Since *lis pendens* filed in connection with suit for specific performance of an option to purchase realty was still effective after judgment and pending appeal, parties which subsequently acquired interest in subject land subsequent to entry of initial judgment of trial court were thereby charged with constructive notice of plaintiff's claim prior to their acquisition of any interest in land. U.C.A.1953, 78-40-2.

12. Appeal and Error ⇐1214

Record supported trial court's conclusion, on supplemental complaint following remand, that defendants had actual knowl-

edge of plaintiff's appeal from trial court's original dismissal of its action for specific performance of an option to purchase realty and hence defendants, which acquired interests in subject land subsequent to entry of initial judgment of trial court, were charged with knowledge of fact that first judgment was subject to being reversed.

13. Judgment ⇐586(2)

Trial court's determination, in proceeding following remand, ordering specific performance of option to purchase realty in favor of plaintiff was *res judicata* as to amount payable by plaintiff under option to defendant, and defendant could not subsequently attempt to alter that determination so as to recover value of improvements made as occupying claimant after date of plaintiff's option. U.C.A.1953, 57-6-1 et seq.

14. Improvements ⇐3

"Occupying Claimants" statute ameliorates strict common-law rule that owner is entitled to improvements placed by another upon his property, and is based upon equitable doctrine of unjust enrichment. U.C.A. 1953, 57-6-1 et seq., 57-6-2.

15. Improvements ⇐4(1)

An occupying claimant is required by statute to establish two elements before he can recover for improvements placed on real property by him: (1) that he has color of title; and (2) that he placed improvements in good faith; if he fails to establish either one, he cannot recover. U.C.A.1953, 57-6-1 et seq.

16. Appeal and Error ⇐1008.1(3)

Rules of appellate review generally preclude the Supreme Court from substituting its judgment for that of trial court on factual issues.

17. Trial ⇐388(1)

Trial court is bound to make factual determinations to support its legal conclusions and said findings must be supported by substantial evidence.

18. Improvements ⇐4(2)

Occupying claimant having made no showing that it acted in good faith in making improvements on subject property, it was not entitled to compensation for said improvements. U.C.A.1953, 57-6-1 et seq.

19. Improvements ⇐4(2)

One who relies upon rights afforded by statute as an occupying claimant is charged with burden of demonstrating his good faith in placing improvements in face of an adverse claim. U.C.A.1953, 57-6-1 et seq.

20. Improvements ⇐4(2)

Occupying claimant's reliance on accuracy of trial court's initial ruling dismissing action for specific performance of an option to purchasealty was not sufficient to justify a determination of good faith on part of occupying claimant in placing improvements in face of an adverse claim on subject property. U.C.A 1953, 57-6-1 et seq.

John G. Marshall, Salt Lake City, for Dee Mills, Evelyn I. Mills, and Evelyn Mills Trust.

Hanson & Garrett, Salt Lake City, for Intern. Environ. Sciences.

Leonard H. Russon and James L. Sadler, Salt Lake City, for Milton Christensen, Paradise Valley Estates, Lake Mills, Carole Christensen and Environmental Resources.

Cullen Y. Christensen, Provo, for plaintiff and respondent.

HALL, Justice:

This is an action in equity seeking specific performance of an option to purchase realty.

Defendants, Dee Mills and Evelyn I. Mills (hereinafter "Mills"), granted the option in question in favor of plaintiff's predecessor in interest. Subsequently, Mills granted a similar option to defendant, Milton C. Christensen (hereinafter "Christensen"). Mills

refused to honor plaintiff's option which resulted in the filing of the initial complaint and the recording of a Lis Pendens in the office of the county recorder. Thereafter, Mills conveyed various interests in the land in question to defendants, Paradise Valley Estates, Inc., (hereinafter "Paradise") Lake Hills Company, a limited partnership, (hereinafter "Lake") Carole Lee Davis, Environmental Resources, Inc., and International Environmental Sciences, a limited partnership (hereinafter "International"). Those conveyances were apparently with the consent of Christensen as he was president of Paradise, the principal of Lake and became the husband of Carole Lee Davis (a partner in International).

The initial trial of the specific performance action resulted in a judgment of dismissal declaring the option void and an appeal was filed to this Court. Supersedeas bond was fixed in the sum of \$50,000, however, none was ever furnished. This Court reversed and directed the granting of specific performance of the option.¹ On remand, the trial court on August 28, 1973 ordered Mills to transfer the property to plaintiff for the sum of \$86,200. In the interim between the entry of the initial judgment and the order of August 28, 1973, Lake and Paradise conveyed the land in question to defendant, International, which proceeded to make certain improvements on the land and also made certain conveyances of various portions thereof. When plaintiff was unable to enforce the judgment against Mills due to the interim conveyances, it filed a supplemental complaint and joined as additional parties defendant those persons who had acquired any interest in the subject land subsequent to the entry of the initial judgment of the trial court.

After a trial on the issues raised by the supplemental complaint, the trial court specifically found that all defendants had actual knowledge of the appeal pending in this Court prior to their acquisition of any purported interest in the land and, since the Lis

Pendens remained unreleased, they had constructive notice of plaintiff's interest as well. The trial court further found that International had made improvements upon the land consisting of land leveling and clearing, installation of culverts, grading of roads, installation of ditches and remodeling and addition to a house situated thereon, all of which had a value of \$35,000. The trial court also found that International had undertaken certain planning, platting and rezoning activities with respect to the use of the land, but declined to place any value thereon as an improvement. Accordingly, judgment of specific performance was entered in favor of plaintiff, subject to International's entitlement to compensation in the amount of \$35,000 for improvement made as an occupying claimant.²

Mills, Christensen and International filed separate appeals which have been previously consolidated.³ The basic issue raised by each appeal bears upon the propriety of the trial court's determination that the recordation of a Lis Pendens precludes the conveyance of a marketable title to lands that are the subject of a pending appeal. Both International and Mills raise additional issues which bear upon their respective positions as occupying claimants, the former contending it is entitled to a further award for expenditures attributable to its efforts to rezone the land, and the latter contending that the trial court erred in refusing to receive proffered evidence of improvements they made to the land.

Plaintiff cross-appeals, challenging the award to International as an occupying claimant on the ground that the improvements were not made in good faith.

[1] First addressing the Lis Pendens issue, we note that appellants simply urge that Lis Pendens has no effect or duration after judgment and pending appeal. A review of the basic doctrine of Lis Pendens,

our statutory enactment pertaining thereto, and the prior pronouncements of this Court, fail to sustain their contentions.

[2, 3] Literally, the term "lis pendens" signifies pending litigation and the so-called "doctrine of lis pendens" confirms the power of the courts over property during the pendency of legal proceedings. It charges the public with notice of outstanding claims and causes one who deals with property involved in pending litigation to do so at his peril.⁴

U.C.A., 1953, 78-40-2 provides as follows:

78-40-2. Lis pendens.—In any action effecting the title to, or the right of possession of, real property the plaintiff at the time of filing the complaint or thereafter, and the defendant at the time of filing his answer when affirmative relief is claimed in such answer, or at any time afterward, may file for record with the recorder of the county in which the property or some part thereof is situated a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names. [Emphasis added.]

The fact that the foregoing statutory provision allows the recordation of a Lis Pendens at any time clearly preserves its integrity after judgment and pending appeal.

Consistent with said statutory provision, this Court long ago recognized the on-going potency and effectiveness of a recorded lis pendens after judgment. In *Larsen v. Gas-*

merly Carole Lee Davis), and Environmental Resources will hereafter be referred to that of "Christensen" for the purposes of convenience since the issues raised are identical.

4. See 51 Am Jur 2d Lis Pendens, Sec. 1

1. *Hidden Meadows Development Company v. Mills, et al.*, 29 Utah 2d 469, 511 P 2d 737 (1973)

2. Pursuant to U.C.A., 1953, 57-6-1, et seq.

3. Various other named defendants' interests were previously compromised and settled so as to obviate their appeal. Also, the appeal of Paradise, Lake, Carole Lee Christensen (for-

berg⁶ it was held that where real property was levied upon under an execution as the property of the judgment debtor, the filing of a lis pendens notice of a suit by the grantor of the judgment debtor one day before the execution sale imparted notice to the purchaser at such execution sale of all plaintiff's right, title and interest. Consequently the deed executed under such circumstances was held to be null and void and was cancelled for want of a bona fide or innocent purchaser.

• [4, 5] The sole purpose of recording a lis pendens is to give constructive notice of the pendency of proceedings which may be derogatory to an owner's title or right to possession.⁴ One who takes with full knowledge that the property taken is the subject of on going litigation acquires only the grantor's interest therein subject to whatever disposition the court might make of it.⁷

[6] The rule is well settled that, where a judgment is reversed and remanded with specific instruction or directions, the case stands in the lower court precisely as it did before a trial was had in the first instance.⁸ Hence, that very situation existed in the instant case as a result of our reversal and remand with directions to grant specific performance.⁹ Also by so reversing the Court has already recognized the full effectiveness of lis pendens pending appeal.

[7-10] Appellants further contend that since plaintiff failed to furnish a supersedeas bond it was not entitled to a stay of proceedings and that such failure in some way rendered the notice given by the recorded lis pendens ineffectual. For two very obvious reasons, that contention is without merit. First and foremost the

"failure" to accomplish any number of imaginable things in no way alters the inescapable fact that a duly recorded lis pendens serves as notice to all persons. It is an elementary principle of real estate law that those who deal in property interests are bound by those matters that appear of record and one may not be penalized or deprived of the effectiveness of such notice as is imparted by the record simply because of some unrelated action or inaction of his or others. Secondly, plaintiff was not bound to furnish supersedeas. Such was merely available to him.¹⁰ The fact that none was furnished is of no consequence in this case. This is found to be so when it is observed that the purpose and effect of supersedeas is to restrain the successful party and the lower court from taking affirmative action to enforce a judgment or decree.¹¹ The judgment involved here was one of dismissal and, as such, was self-executing. Hence, it was not the subject of any enforcement and the failure to perfect supersedeas could in no way affect it.¹²

[11] In light of the foregoing analysis, it cannot be said that a lis pendens does not endure after judgment and pending appeal, and we so hold. Consequently, the trial court correctly determined that all appellants were thereby charged with constructive notice of plaintiff's claims prior to their acquisition of any interests in the land in question.

[12] The propriety of the trial court's conclusion that appellants had actual notice of plaintiff's appeal is also borne out by the record which reflects the fact that at all times material to these proceedings, Christensen was intertwined with all of the appellants and was the apparent alter ego of certain of them. He was president of Para

dise and Environmental Resources, Inc which was the general partner of Environmental, a limited partnership, and he married Carole Lee Davis on February 16, 1973. Those facts are sufficient to support the trial court's conclusion that the appellants had actual knowledge of plaintiff's appeal and hence were charged with knowledge of the fact that the first judgment was subject to being reversed.¹³

[13] Turning now to the issue presented by the appeal of Mills which bears upon their entitlement to the value of improvements made as occupying claimants after the date of plaintiff's option to purchase, it appears that their contentions are without substance. This is so by reason of the fact that these matters were before the trial court in the proceeding conducted following our earlier remand. In that proceeding, plaintiff and Mills were both parties, the same property was involved, and the amount to be paid by plaintiff to Mills to acquire the property was determined. No appeal was taken from the order of Specific Performance of August 28, 1973. Such prior determination is res judicata as to the amount payable by the plaintiff under the option to Mills, who cannot now attempt to alter that former decision.¹⁴

The final issue requiring our attention involves the appeal of International which seeks to enhance its award for improvements as occupying claimant and the cross appeal of plaintiff which asserts the trial court erred in making any award at all for improvements.

The Legislature has seen fit to temper the rigid rules of the common law by enacting an "Occupying Claimants' statute" which provides in pertinent part as follows:

57-6-1 Where an occupant of real estate has color of title thereto and in

good faith has made valuable improvements thereon, and is afterwards in a proper action found not to be the owner, no execution shall issue to put the plaintiff in possession of the same after the filing of a complaint as hereinafter provided, until the provisions of this chapter have been complied with. [Emphasis added.]

57-6-2 Such complaint must set forth the grounds on which the defendant seeks relief, stating as accurately as practicable the value of the real estate, exclusive of the improvements thereon made by the claimant or his grantors, and the value of such improvements. The issues joined thereon must be tried as in law actions, and the value of the real estate and of such improvements must be separately ascertained on the trial.

[14] The foregoing sections ameliorate the strict common law rule that the owner is entitled to the improvements placed by another upon his property, and is based upon the equitable doctrine of unjust enrichment.¹⁵

[15] An occupying claimant is required by our statute to establish two elements before he can recover for improvements placed on real property by him: (1) that he has color of title, and (2) that he placed the improvements in good faith. If he fails to establish either one, he cannot recover.¹⁷

A number of jurisdictions including Utah, have announced the broad proposition that no recovery can be had for improvements made with the knowledge of the existence of an adverse claim which subsequently proves to be superior to that of the occupant.¹⁸ The cases of *Reimann v*

5 43 Utah 203 134 P 885 (1913)

6 *Hansen v Kohler* Utah 550 P 2d 186 (1976)

7 *Glynn v Dubin* 13 Utah 2d 163 369 P 2d 930 (1962)

8 *Larsen v Gasberg* supra footnote 5

9 *Hidden Meadows Development Company v Mills* supra footnote 1

10 Rule 73(d) Utah Rules of Civil Procedure

11 4 Am Jur 2d Appeal and Error Section 371

12 *Gumberts v East Oak Street Hotel Co* 404 Ill 386 88 N E 2d 883 (1949) *Western United Dairy Co v Miller* 40 Ill App 2d 403 189 N E 2d 786 (1963)

13 *McClung v Hohl* 10 Kan App 93 61 P 507 (1900) *Patterson v Old Dominion Trust Co* 149 Va 597 140 S E 810 (1927) *Glynn v Dubin* supra footnote 7

14 *Matthews v Matthews* 102 Utah 428 132 P 2d 111 (1942)

15 UCA 1953 57-6-1 et seq

590 P.2d-37

16 *Reimann v Baum* 115 Utah 147 203 P 2d 387 (1949)

17 *Doyle v West Temple Terrace Co* 47 Utah 238 152 P 1180 (1915) *Day v Jones* 112 Utah 286 187 P 2d 181 (1947)

18 See 41 Am Jur 2d Improvements Section 17 for citations

*Baum*¹⁹ and *Erickson v. Stokes*²⁰ both stand for the proposition that one who places improvements after notice of an adverse claim is precluded from recovering the value thereof.

The facts in *Erickson v. Stokes* are strikingly similar to those in the case before us. There, Erickson, a purchaser at tax sale, sued to quiet title and obtained a judgment. Thereafter Stokes sought to intervene and moved to set aside the decree and re-open the case, setting forth by affidavit that she had a substantial interest in the property and a good defense to the action. Her application for intervention was denied and she then sued Erickson to quiet title, recording a lis pendens. She was ultimately successful in her suit, having shown the tax sale was defective. After the filing of her quiet title action and during its pendency, Erickson proceeded to construct improvements. The court in denying Erickson's claim for the value of the improvements observed that he had notice of the adverse claim prior to the placement of the improvements and in the absence of a showing of good faith, (which burden was upon him) he could not recover.

[16, 17] The rules of appellate review generally preclude this Court from substituting its judgment for that of the trial court on factual issues. However, the trial court is bound to make factual determinations to support its legal conclusions and said findings must be supported by substantial evidence.

[18] A review of the record in this matter reveals that International made no showing that it acted in good faith in making the improvements and the court's findings of fact are entirely silent in that regard, leaving nothing to support its conclusion of law that International was entitled to an award of \$35,000.

It is also to be noted that the conclusion of the trial court that International had actual and constructive notice of plaintiff's

claims is wholly inconsistent with the concept of good faith on the part of International.

[19] As was noted supra, the doctrine of lis pendens imposes upon one who deals in property, which is the subject of pending litigation, the burden of doing so at his peril. Consequently, one who relies upon the rights afforded by statute as an occupying claimant is charged with the burden of demonstrating his good faith in placing improvements in the face of an adverse claim.

[20] International's sole explanation of good faith was that it relied on the accuracy of the ruling in the first trial under the facts of this case. Such is not sufficient to justify a determination of good faith.

The judgment is affirmed except that portion thereof which awards \$35,000 to International as an occupying claimant is vacated. Plaintiff is entitled to costs.

ELLETT, C. J., and MAUGHAN and WILKINS, JJ., concur.

CROCKETT, Justice: (Concurring, but dissenting in part)

I agree with all that is said in the main opinion, except that I dissent from those portions dealing with the reversal of the award of \$35,000 to the defendant as an occupying claimant. That reversal appears to be based upon the statement that "no recovery can be had for improvements made with the knowledge of the existence of an adverse claim which subsequently proves to be superior to that of the occupant." That statement is too broad. If literally applied, it would in many instances defeat the purpose of the occupying claimant statute. It is submitted that an examination of the cases cited in support thereof will reveal that the rule as stated is all right as applicable to the particular facts therein, but is not necessarily inconsistent with what is said in this dissent.

It requires little reflection to realize that if a claimant must have title which ultimately

1. See footnote 18 main opinion

Cite as 590 P.2d 1251

mately proves to be superior, he would have no need to recover for improvements placed on the land. It is only when he has a bona fide claim, constituting color of title, and in good faith places improvements on the land, and his claim of title later proves to be inferior to some other claim, that he needs that protection.

Consistent with the foregoing is the language of the statutes themselves. Secs. 57-6-1 and 2 indicate that the occupant can recover if "in good faith" he makes valuable improvements on the property and is afterwards "found not to be the owner." It is obvious that this contemplates a situation where there is an outstanding "adverse claim which subsequently proves to be superior to that of the occupant."

The main opinion correctly states that the doctrine is based on unjust enrichment of the person who proves to be the true owner. This enrichment entails something which is a benefit to the land and thus to the true owner.

Whether recovery may be had may well depend upon several circumstances, including the nature of the improvement placed on the property. Conceivably it could be a dam, or a bridge or some other improvement essential to preserve the land itself, as contrasted with something which would improve it only for the purpose and use of the occupying claimant. In this case the view of the trial court was that the leveling and clearing of the land, installation of ditches and culverts, grading of roads and remodeling of the house were such improvements of the land itself as to constitute an unjust enrichment to the plaintiff.

The critical questions for determination in this case: whether the defendant as an occupying claimant placed the improvements thereon in good faith, and whether they unjustly enriched the plaintiff by improving his land, are necessarily questions of fact the determination of which should be left to the trial court. This is affirmed by Sec. 57-6-2 which states that "the issues joined thereon must be tried as in law actions"

Inasmuch as those critical issues have been tried and determined by the trial court, and there is a reasonable basis in the evidence to support his finding and judgment, it is my opinion that under the standard rule of review they should not be overturned.

I would affirm the judgment in its entirety.



T. Val CHRISTIANSEN, Plaintiff and Appellant,

v.

UTAH-IDAHO SUGAR COMPANY, a corporation, and Union Pacific Railroad, a corporation, Defendants and Respondents.

No. 15751.

Supreme Court of Utah.

Jan. 24, 1979.

Grantee brought suit for damages for alleged breach of covenants under special warranty deed. The Fourth District Court, Utah County, J. Robert Bullock, J., entered summary judgment in favor of grantor, and grantee appealed. The Supreme Court, Hall, J., held that summary judgment in favor of grantor was precluded by existence of factual issues concerning when grantee received notice of existence of encumbrance and whether grantee was ever evicted from property.

Reversed and remanded.

I. Covenants ¶110

Cause of action for a breach of certain implied covenants in warranty deed remains viable for six years. U.C.A.1963, 78-12-23(2).

19. Supra, footnote 16

20. 120 Utah 653, 237 P.2d 1012 (1951)

KENNETH F. CLARKE
ATTORNEY AT LAW
Attorney for Plaintiff
42 North University Ave, Suite 11
P.O. Box H
Provo, Utah 84603
Telephone 801-375-2911

IN THE SUPREME COURT OF THE STATE OF UTAH

VERNON S. CHEEVER, MARTHA
T. CHEEVER, UTAH COUNTY
PACKING COMPANY, INC., and
COLES BROTHERS, INC.,

STIPULATION

Plaintiffs-Appellants,

vs.

Civil No. 20,362

JOSEPH A. SEETHALER, MYRA
K. SEETHALER, and SECURITY
TITLE AND ABSTRACT COMPANY,

Defendants-Respondents.

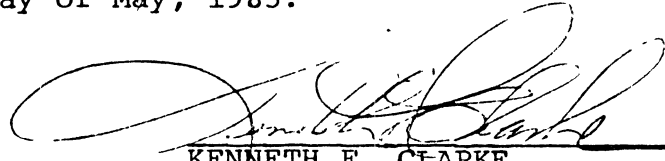
WHEREAS, the Appellant filed a MOTION TO SUBSTITUTE PAGE IN BRIEF AND FILE EXHIBIT 7, dated the 12th day of April, 1985 and the same has not yet been scheduled for hearing;

AND WHEREAS, Appellant having filed a MEMORANDUM OF POINTS AND AUTHORITIES, dated the 12th day of April, 1985 in support of SUBSTITUTING PAGE 26 OF BRIEF, a copy of which is attached hereto;

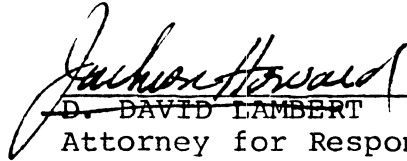
NOW THEREFORE IT IS AGREED, that hearing on the same need not be had at this time and that the Appellant may incorporate the matters heretofore set forth into its REPLY BRIEF OF APPELLANTS and that the Respondents, may have the option of replying to the same if they file a Response to REPLY BRIEF OF APPELLANTS. That oral argument on the same may be had at the time of Oral Argument in the

above entitled case.

DATED this 8 day of May, 1985.



KENNETH F. CLARKE
Attorney for Appellant



~~D. DAVID LAMBERT~~
Attorney for Respondent

VERNON CHEEVER, Exhibit 9, PR 760, Paragraph 2; Affidavit of MARTHA T. CHEEVER, Exhibit 18; Affidavit of BRUCE COLES, Exhibit 19.

Appellants Third Cause of Action, is also viable; the trier of the facts may determine that there is no contract.

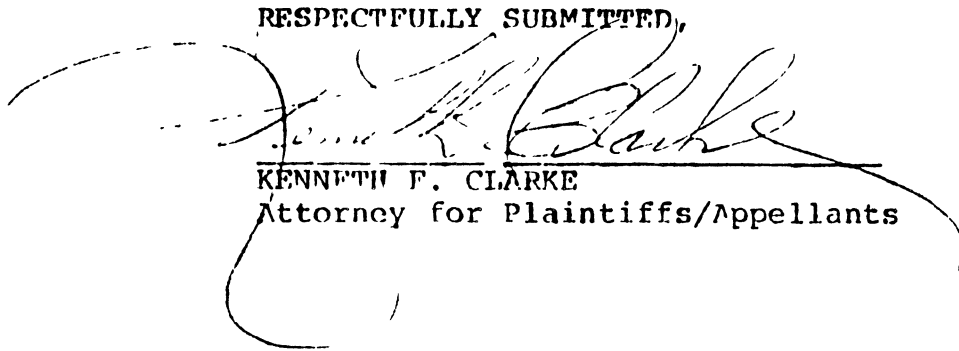
Appellants Fourth Cause of Action, is equitable in nature and should be sustained. So also as to Appellants FIFTH CAUSE OF ACTION.

CONCLUSION AND PRECISE RELIEF SOUGHT

The Court should rule that SUMMARY JUDGMENT, was improperly granted, and the judgment of Lower Court reversed with all causes of action in place and that the Lower Court should seriously look to determining if the prevailing party should be awarded Attorney Fees pursuant to Section 78-27-56 of the Utah Code.

That in the event the Appellants are successful on Appeal, That Plaintiffs be allowed to file a Cause of Action for damages for the loss of the use of their property and for quieting Title to the Property in Plaintiffs by allowing amendments to Plaintiffs pleadings.

RESPECTFULLY SUBMITTED,



KENNETH F. CLARKE

Attorney for Plaintiffs/Appellants

note in question was given, was known to both plaintiffs and to C. & R., or that the circumstances were such as to give notice to them of the existence of such a promise. It is also to be noted, when they signed as sureties, did not know that Scott was interested as a partner of each firm on the contract concerning which they were acting. It is also to be noted, that the plaintiffs were not aware of the fact that the defendants had been in the manipulation of the business of the second firm. *Wid.* that the intentional concealment of the fact that the defendants had been known to the sureties at the time they signed, might have caused them to act differently, constituted such a fraud upon the sureties as to constitute a material fraud on the sureties, and directly affecting the sureties' liability, and which might influence the sureties in signing the contract, in purposefully concealing from the sureties the fact that the defendants, or such concealment, though no inquiry is made by the sureties, amounts to a fraud upon the sureties, and would discharge them from liability.

2. The plaintiffs were residents of Salt Lake county; defendants of Utah county. The case had already been tried in the First district court of Utah county, and the judgment was affirmed by the Utah State Court, 1888, as amended by Salt Lake Utah 1890, passed before this case was tried the last time. It was not error in the court to try the case in that county, and to deny a change of venue to Salt Lake county.

3. Section 5 of article 8 of the constitution is only prospective in its operation, and does not apply to actions pending when the constitution was adopted.

4. Section 2 of article 21 of the constitution continues in force such territorial laws as were not repugnant to the constitution, and makes them valid laws.

(Syllabus by the Court.)

Appeal from Fourth district court; A. C. Hatch, Judge.

Action by Franz Jungk and another against L. Holbrook and others. From a judgment for certain defendants, plaintiff's appeal. Affirmed.

This action was brought against Cropper and Reed, as makers of three promissory notes for \$1000 and unpaid respondents Holbrook and Tugghes, as indorsers. The notes were payable in Salt Lake City, where the plaintiffs resided. Respondents resided in Provo, in the First district, where the action was brought. Cropper and Reed resided in Millard county, Idaho, and Tugghes answered separately, and set up failure of consideration, and fraud in obtaining their signatures to the notes, by the defendants Cropper and Reed, and fraud and concealment of material facts from them by the plaintiffs in obtaining their signatures as indorsers. It appears that in November, 1889, Jungk and Fabian, the plaintiffs, were partners, and had been engaged in buying sheep. At this time they entered into a partnership agreement with one S. W. Scott, by which Scott was to be an equal partner, but the business was to be carried on in the name of Jungk and Fabian. Money was to be furnished by them, and Scott was to buy the sheep, and pay in checks signed, "Jungk and Fabian, per S. W. Scott." Checks were afterwards issued to Cropper and Reed signed in this way. Cropper and Reed were partners, doing a stock business. Scott solicited Cropper

JUNGK et al. v. HOLBROOK et al.
(Supreme Court of Utah, June 10, 1897.)
FRANZ JUNGK — PLAINTIFFS —
VERSUS —
L. HOLBROOK — TUGGLES — CROPPER — REED —
DEFENDANTS —
CIVIL ACTION — CONTRACT — LAW.

1. Defendants were sureties on a promissory note given by C. & R. to plaintiffs. At the time the note was given, it appeared that Scott was a partner of C. & R. in the manipulation of the business of the second firm. It was also known to the plaintiffs that he was also, so with the signature of C. & R. in the sale of the sheep to the plaintiffs; that the relationship, at the time the

401—20

per and Reed to enter into a contract with Jungk and Fabian for a large number of sheep, for future delivery, but concealed from them, as they claim, that he was himself interested in the purchase, or that he was a partner with Jungk and Fabian. Scott represented to Cropper and Reed that he could contract with Jungk and Fabian at a price much larger than they could be purchased for. He finally proposed a partnership with Cropper and Reed to furnish the sheep to Jungk and Fabian. The contract was to be in their name, and he was to be a silent partner, and interested in the profits. He was to purchase the sheep at a rate that would make a profit, and advised them where he could get the sheep. Under these inducements Cropper and Reed entered into an agreement with Jungk and Fabian December 24, 1890, by which they were to deliver in July, 1891, to Jungk and Fabian 500 sheep at a certain price, in certain places in Southern Utah. In February, 1890, another similar contract was made under similar circumstances. Scott was interested as a partner on both sides. Cropper and Reed claim that they did not know that he was interested with Jungk and Fabian. On the making of the contracts, \$5,000 was advanced by Jungk and Fabian on each contract, and Cropper and Reed were required to give sureties for due performance on their part. Holbrook and Duggins were offered as such sureties, and, being accepted, Jungk and Fabian directed Scott to go with Cropper and Reed to Provo, as their representative, and get Holbrook and Duggins to sign the guaranties. All these parties went to Provo, solicited and obtained Holbrook and Duggins as sureties for Cropper and Reed, Scott taking an active part in the conversation and in bringing about the result, but his interest in both sides of the contract was not divulged to the sureties. Holbrook and Duggins were old acquaintances of Cropper and Reed. Scott was a stranger. The partnership contract between Scott and Cropper and Reed, of November, 1890, was not placed in writing until March 7, 1891. It reads as follows: "This agreement made and entered into by and between Cropper, Reed, and Scott, as partners dealing in cattle, sheep, and real estate; they each one agree with each other to buy and sell on commission, and share equally in profits and loss on all real estate and cattle and expenses of handling the same; to share in two contracts of sheep made by Cropper and Reed to Jungk and Fabian. The said Scott is to divide all profits made in selling, and the said Cropper and Reed is to divide all profits made in buying, should there be any, and to work to one another's interest in the entire business as partners. Cropper and Reed in the meantime made a contract to sell sheep, relying on their contract with Scott, but the market price had risen above the contract price. Scott failed in performing his agreement with Cropper and Reed, and they with Jungk and Fabian as agreed. After which Cropper and Reed and Jungk and Fabian met at Deseret

in July, 1890, in the absence of Holbrook and Duggins and Scott; and it was agreed that Cropper and Reed should pay back the \$10,000 advanced, and \$5,000 as damages for breach of contract. This sum was paid back except about \$8,000. Jungk and Fabian then went to Provo, and presented their claim to Holbrook and Duggins, but no disclosure was at any time made to them of Scott's participation on both sides of the contract. This fact was concealed from the sureties. It was agreed that Cropper and Reed should make the three notes for \$7,000, and that Holbrook and Duggins should indorse them as they had indorsed the contract, in continuation, and in pursuance of their liability as sureties. The notes were made and indorsed, and are the notes in suit. Cropper testified that he knew or suspected, before the notes were given, that Scott was interested with Jungk and Fabian. Testimony was offered tending to show that Fabian had notice of Scott's duplicity with his firm, and alleged secret dealings with Jungk, his partner, in July. Testimony was also offered tending to show that Jungk and Fabian, or one of them, knew that Cropper, Reed, and Scott owned sheep that were at Oasis in 1890 or 1891, when Fabian was there, before the notes were given; that Cropper and Reed also knew that Scott was buying sheep for Jungk and Fabian; and that Scott acted as agent for Jungk and Fabian in procuring the signatures of Holbrook and Duggins, as their sureties on the sheep contract. Scott's name does not appear on either of the notes or contract, except that Scott indorsed a note of Cropper and Reed for \$1,500, given in settlement, also a \$900 note, given in settlement, which plaintiffs regarded as equal to Scott's profit in the sheep dealing in the early part of the contract. Three notes formed part of the consideration paid plaintiffs at the time of the settlement, outside of the notes in suit. When the three notes were due, defendants Holbrook and Duggins learned for the first time that Scott was a partner with both Cropper and Reed and Jungk and Fabian, and that he was interested in the contract, to their detriment, and refused payment. A trial was had, and judgment rendered against Cropper and Reed on a former hearing. Plaintiffs appeal.

The court refused to instruct the jury to render a verdict in favor of plaintiffs, but instructed the jury in effect that if the defendants knew that Jungk, Fabian, and Scott were partners and that Cropper, Reed, and Scott were partners when they signed the note, they would be bound, and that the burden to show that they did not know it was upon defendants, that if the jury found that, at the time the contract was guaranteed by defendants, Scott was interested on both sides of the contract, and was a partner of Jungk and Fabian for the purpose of buying sheep, and of Cropper and Reed for the purpose of delivering sheep to Jungk and Fabian, and that defendants were ignorant of such relations when they signed the contract and notes, and that Jungk and Fabian, or either

(Utah)

(Utah)

ther of them, knew at the time of such signing by defendants as sureties for Cropper and Reed that Scott was a partner, and interested with Cropper and Reed in the two sheep contracts and that they concealed such fact from the defendants, the jury should find for defendants; that Scott's knowledge that he was a partner in both parties for the purposes named would not be knowledge of or notice to Jungk and Fabian; that the knowledge of Scott could not be imputed to Jungk and Fabian, that if Jungk and Fabian, or either of them, knew or had notice before defendants signed the contract of Scott's interest with Cropper and Reed in the sheep contracts it was their duty to inform the defendants of the same, and their neglect to do so would be a fraud on defendants, and in that case defendants would not be liable unless they knew of Scott's interest from some other source; that notice does not mean actual and direct information. If a party is put upon inquiry as to a particular fact then he is charged in law with whatever inquiry will disclose. The court gave other instructions with reference to the notes being in continuation of the contract of guaranty; that if, before the contracts were fulfilled, one partner of Jungk and Fabian entered into a partnership with Reed and Cropper, and this fact was purposely concealed from the sureties and they did not know about it, this would release them upon the guaranty; and, if the notes were simply a continuation of their supposed liability on the original contract, then the defendants are not liable, unless they knew at the signing of the notes of the double relation of Scott to the parties to the sheep contract.

Bennett, Harkness, Howat & Bradley and Williams, Van Cott & Sutherland, for appellants. Brown & Henderson, for respondents.

MINER, J. (after stating the facts). This case was taken before the territorial court prior to this appeal. The cases are reported in 9 Utah, 40, 34 Pac. 230, and 12 Utah, 260, 42 Pac. 292. Upon each occasion the record discloses a somewhat dissimilar state of facts. The case now presents a somewhat different state of facts from those presented on the last appeal, so far as appears from the opinion rendered. The first question arises upon the charge of the court as given and the refusal of the court to charge as requested. In some respects the testimony bearing upon the question involved is somewhat indefinite and unsatisfactory. The jury were the judges of its weight and conclusiveness, and found against the plaintiffs. There are sufficient facts and circumstances disclosed in the record from which the jury could infer and find that Jungk, Fabian and Scott were partners for the purpose of purchasing sheep, and that Jungk and Fabian knew at the time or were chargeable with notice that Scott was a partner with Cropper and Reed or at least in trusted with them in the contracts for the purchase and sale of sheep to them, that Cropper

per, Reed and Scott were partners in the purchase and sale of sheep to Jungk and Fabian, that Cropper and Reed knew, or were chargeable with notice, that Scott was a partner or interested in the contract for the purchase of sheep with Jungk and Fabian, that defendants Holbrook and Duggins were wholly ignorant of the double relation existing between Scott and the two firms at the time they signed the guaranty contract and the notes given in pursuance of it, and would not have executed the contract or indorsed the notes had the true state of facts been made known to them by either firm, that the concealment of these facts and circumstances immediately affected the liability of the sureties; that Cropper and Reed and Jungk and Fabian fraudulently withheld from the sureties the true state of facts existing between them and Scott when the indorsements were made; that each of these firms knew that Scott was their partner in the transactions with the other firm and that the sureties were making the indorsement in ignorance of the relation, that Jungk and Fabian sent Scott, as their agent and representative to obtain the signatures of Holbrook and Duggins to the contract, that Scott was their partner at the time, that Jungk and Fabian knew, or were chargeable with notice, that Cropper, Reed, and Scott owned sheep together at Oasis, and had them there when Fabian was present, that Reed and Cropper and Jungk and Fabian knowing the facts, induced the sureties to sign the notes, and fraudulently withheld from them the double relation of Scott, as affecting their interest and liability.

If, in obtaining the signatures of these defendants to the contract of suretyship or as indorsers of the notes made in continuation of their supposed liability, there was any fraudulent concealment on the part of Cropper and Reed and Jungk and Fabian or either of said firms, of any fact or circumstance within their knowledge or concerning which they were reasonably chargeable with notice which materially affected and increased the liability and responsibility of Holbrook and Duggins as sureties or indorsers in those transactions in which they were sureties and operated to their prejudice then the sureties should be discharged. "It has been held that the mere noncommunication by the creditor to the surety of material facts within the knowledge of the creditor which the surety should know although not willful or intentional on the part of the creditor, or with a view to advantage to himself will discharge the surety." The fraud upon the sureties consists in the situation in which they were placed by the conduct of the other parties and not on what was passing in their minds not expressed but concealed. Upon this subject, Brandt on Suretyship section 1290 says: "It has been held that one who becomes surety for another must ordinarily be presumed to be satisfied with the facts that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the or

ordinary risks attending it; and the party to whom he becomes a surety must be presumed to know that such will be his undertaking, and that he will not upon it unless he is informed that there are extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances by which his risks will be materially increased, well knowing that there are such circumstances, and having an opportunity to make them known, and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract." It is also held that, in order to discharge the surety, the undisclosed information should relate to business which is the subject of suretyship. Story says: "The contract of surety imports entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract. Upon the same ground, the creditor is in all subsequent transactions with the debtor bound to equal good faith to the surety." Story, 124 Jur. § 324; Bank v. Cooper, 30 Me. 179; Brandt, Bur. § 419 § 21; Comstock v. Gage, 61 Ill. 328; Bank v. Stevens, 30 Me. 532; Jungk v. Reed, 9 Utah, 40, 33 Pac. 236; Peck v. Durrett, 9 Dana, 496; Pileock v. Bishop, 1 Law Lib. 87; Doughty v. Savage, 28 Conn. 116; Ralston v. Matthews, 10 Ark. & P. 911; Warren v. Branch, 16 W. Va. 21. It is said that that "test as to whether the disclosure should be voluntarily made is whether there is a contract between the debtor and creditor to the effect that his position shall be a different one from that which the surety might expect." Hamilton v. Watson, 12 Ark. & P. 309.

These sureties did not know that Scott was a partner of each firm on the contract concerning which they were sureties, and did not inform with the knowledge that they were becoming liable for the acts of Scott in the manipulation of the business of the several firms. They signed as sureties for Cropper and Reed, relying upon their integrity, and not as sureties for Cropper, Reed and Scott. When they signed they were not informed that a member of both firms had laid plans with each, by which the sureties should be robbed, and Cropper and Reed turned for the benefit of one member of the several firms. Nor did the sureties know that Cropper and Reed and Jungk and Falden were either passive or active agents in such resulting dishonesty. Neither did the sureties know that Jungk and Falden knew that Scott was interested with Cropper and Reed in the sale of sheep, nor that Cropper and Reed knew that Scott was interested with Jungk and Falden in the purchase of sheep. If a material fact connected with the contract of suretyship, and directly affecting the sureties'

liability, which might influence the sureties in entering into the contract, is concealed from the sureties, or, if knowing the fact, such information is purposely concealed from the sureties, in the interest of the creditor, such concealment, though no inquiry is made by the sureties, amounts to a fraud upon the sureties, and would discharge them from liability. Under all the facts and circumstances shown for the consideration of the jury, they have found the facts against the appellants. We find no reversible error in the instructions of the court, nor is there any error in refusing to give the instructions asked by the plaintiffs.

Prior to the trial plaintiffs moved the district court of Utah county for an order transferring said cause for trial to Salt Lake county. The motion was based upon an affidavit showing that plaintiffs owned the notes, and had resided in Salt Lake county since they were given, and that they were payable at Salt Lake. The motion was overruled, and an exception taken. The motion is based on section 7 of article 21, and section 5 of article 8, of the constitution. Plaintiffs resided in Salt Lake City when they commenced this action in the first district court in Utah county, January 10, 1891. This case had been tried in that county three times prior to the last trial, which occurred October 9, 1890. The defendants resided in Provo, Utah county.

Section 5 of article 8 of the constitution provides, among other things, that all civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken. In such cases as may be provided by law. Section 7 of article 21 of the constitution provides, among other things, that all actions and cases pending in the district and supreme courts of the territory at the time the state is admitted into the Union shall, except as otherwise provided, be transferred to the supreme court and district courts of the state. Section 2 of article 21 of the constitution provides that all laws of the territory now in force, and not repugnant to the constitution, shall remain in force until they expire of their own limitation, or are altered or repealed by the legislature. Section 5 of article 8 of the constitution is only prospective in its operations, and therefore does not apply to actions which were commenced and pending in the territorial district courts when the constitution went into effect. A constitutional provision should not be construed with a retrospective operation, unless that is the unmistakable intention of the words used. Black, Const. Law, p. 70; Land Interp. 81 § 506; Watt v. Wright, 66 Cal. 202, 5 Pac. 91; Guinee v. Superior Court, 58 Cal. 88; People v. County Comrs of Grand Co., 6 Colo. 294; Lehigh Iron Co. v. Lower Merion Tp., 81 Pa. 81, 484. Section 2 of article 21 of the constitution continues in force, under the state, such territorial laws as were not repugnant to it, and thereby makes them state laws. This court so held in Whitely v. Hen-

(Utah.)

senon, 45 Pac. 271, 13 Utah, 484; Pleasant Val. Coal Co. v. Board of Comrs, 48 Pac. 1022, 15 Utah, 97. Among the laws of the territory then in force with reference to the territory of trial were sections 3193 to 3201, Comp. Laws Utah 1888, which were amended (Sess. Laws 1890, p. 90) by making these sections conform to the new condition of things under the constitution. The territorial act was substantially re-enacted after striking out the words "judicial district," and substituting the word "county." The act was approved and took effect February 17, 1890, before this motion was made. This act provides where cases shall be commenced and tried, and when and where they may be removed for trial. Section 3193 provides that "in all other cases the action must be tried in the county in which the defendants, or some of them, reside at the commencement of the action." When this action was commenced, the plaintiffs resided in Salt Lake, and the defendants in Utah county. The first district formerly comprised Utah and several other counties. Under the new constitution, Utah county is made distinct by itself. The action was brought in pursuance of law in the proper county under the statute as it then existed. This statute was continued in force until changed by the act of 1890. We are of the opinion that the district court of Utah county properly assumed jurisdiction in this case. We find no reversible error in the proceedings. The judgment of the district court is affirmed, with costs.

ZANE, C. J., concurs. HART, District Judge, concurs in the result.

(Utah, 121)

WRIGHT v. SOUTHERN PAC. CO.
(Supreme Court of Utah, June 24, 1897.)

REVIEW OF DECISION OF THE DISTRICT COURT OF UTAH, IN A CASE WHEREIN THE PLAINTIFFS, JAMES ALFRED WRIGHT AND OTHERS, SUED THE SOUTHERN PACIFIC COMPANY.

1 Whether a witness is shown to be qualified to testify as to matters of opinion is a preliminary question for the trial judge to pass upon at the trial, and his decision is conclusive unless manifestly erroneous as a matter of law, and the running and management of locomotives is so far a part outside of the experience and knowledge of ordinary jurors as to render expert testimony proper and admissible.

2 It is not necessary or usual for the supreme court to pass upon each and every question raised on appeal when the case is reversed. It is sufficient to pass upon and determine such questions raised on the appeal as are necessary to the final determination of the case.

3 The population of the place where the injury happened, the proportion of the population that were railroad employees, and the danger of those not engaged in or immediately connected with the making up of trains, were questions not relevant to the case as presented.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. B. Rohpp, Judge.

Action by James Alfred Wright against the Southern Pacific Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Marshall & Boyle, for appellant. Richards & Macmillan and A. E. Pratt, for respondent.

MINER, J. This action was brought to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant in failing to furnish a fireman in addition to the engineer to operate the engine, and in the engineer negligently failing to obey the signals given, while acting in the double capacity of engineer and fireman. The record shows that the plaintiff was a switchman in the employ of the defendant at the time of the accident. On the morning of the 11th day of August, 1892, about 1 15 o'clock, he was performing his duties as switchman, and, for the purpose of uncoupling them, went in between two cars of a freight train, which was standing upon a slight grade, so that the links were drawn tight. Being unable to uncouple them on account of the grade, he came out from between the cars and with his lantern signalled the engineer, who performed the duties of fireman as well as engineer, to back up slowly, and then stepped in again between the cars to pull the pin the moment the slack came, and stood with his back towards the engine and one hand upon the rung of the ladder on the car in front of him. The engineer saw and obeyed the signal, but the train came back with a jerk, and plaintiff's right heel was caught and held by the brake beam. He immediately grasped the rung of the ladder with his other hand, and signalled the engineer with his lantern to stop, throwing his lantern out to one side. This signal was not seen by the engineer, who at this particular moment was necessarily engaged in shovelling coal into the fire—a duty which should have been performed by a fireman—and the plaintiff was dragged for some distance until his hands were jerked from their hold upon the ladder, and he was thrown under the wheels of the car, which passed over his leg, necessitating its amputation at a point about seven inches above the knee.

On the trial of the case Mr. Doughty was called as a witness for the plaintiff, and gave testimony tending to show that he was the engineer operating the engine at the time of the accident, and had been so employed for about one year, that he had been in the employ of the defendant company since 1885, that he was car inspector for the defendant the first year at Carlin, had worked as helper in the machine shops for several months; worked as fireman on the road for three years; again as helper for several years at different points on the road; that it was his duty as helper to take care of the engines and fix them up, and prepare them to go out, since July, 1891, had charge of the switch engine, and run it at night; that his duty was to run the engine as engineer, and do the firing when needed. No fireman was furnished on the engine at the time of the accident. Thereupon the plaintiff asked the witness the following question: "Now, Mr. Doughty, I want to ask you, in your