

1986

William D. Blodgett and Florence G. Blodgett, his
wife v. Zions First National Bank, Stanley L. Pace
and Allan D. McComb, individually and d/b/a
Alco Investment and Does 1-10 : Brief of
Respondent

Utah Supreme Court

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BRIEF

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DOCKET NO. 860178-CA FOR THE STATE OF UTAH

IN THE SUPREME COURT

WILLIAM D. BLODGETT and)
FLORENCE G. BLODGETT, his wife,)
)
Plaintiffs-Respondents,)
)
vs.)
)
ZIONS FIRST NATIONAL BANK,)
)
Defendant,)
)
STANLEY L. PACE and ALLAN D.)
McCOMB, individually and)
d/b/a ALCO INVESTMENT,)
)
Defendants-Appellants,)
)
and DOES 1-10,)
)
Defendants.)

860178-CA
Case No. 86-0115

BRIEF OF RESPONDENTS WILLIAM D. BLODGETT and FLORENCE G. BLODGETT

APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE JAMES S. SAWAYA, DISTRICT JUDGE

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TABLE OF CONTENTS

	<u>Page</u>
ISSUES PRESENTED ON APPEAL.....	1
STATUTES AND RULES.....	2
REQUEST TO TAKE JUDICIAL NOTICE.....	3
STATEMENT OF THE CASE.....	4
1. The Parties.....	4
2. The Underlying Facts.....	5
SUMMARY OF ARGUMENT.....	17
ARGUMENT.....	19
I. THE COURT SHOULD DISMISS ALCO'S APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION.....	19
II. THE RIGHTS OF ZIONS (AND CONSEQUENTLY ANY RIGHTS OF ITS ASSIGNEE ALCO) TO THE STORE TRACT WERE EXTINGUISHED BY THE JUDGMENTS AND ORDERS RENDERED IN <u>BLODGETT I</u> AND <u>BLODGETT</u> <u>II</u> ; ACCORDINGLY, THE TRIAL COURT IN <u>BLODGETT</u> <u>III</u> PROPERLY ENTERED SUMMARY JUDGMENT QUIET- ING TITLE TO THE STORE TRACT IN THE BLODGETTS.....	21
A. By Virtue Of The Doctrine Of Lis Pendens Zions And Alco Are Bound By The Trial Court's Disposition Of The Store Tract Pursuant To The Terms Of The Settlement Order In <u>Blodgett I</u> And <u>Blodgett II</u>	22
1. After A Lis Pendens Is Filed In A Quiet Title Action, Judgment Credi- tors Of The Defendants Therein Cannot Reach The Interest Of Which Their Judgment Debtors Are Deprived By A Judgment In The Quiet Title Action.....	24
2. Betty Purcell Was Deprived Of Her Interest In The Store Tract In <u>Blodgett I</u> And <u>Blodgett II</u>	30

B.	The Trial Court's Disposition Of The Store Tract Pursuant To The Terms Of The Order And Judgment Of Quiet Title In <u>Blodgett I</u> And <u>Blodgett II</u> Extinguished Any Interest Or Claim Of Zions And Alco In Or To The Store Tract.....	32
1.	The Trial Court In <u>Blodgett I</u> And <u>Blodgett II</u> Properly Entered The Order And Judgment Of Quiet Title Pursuant To Rule 60(a) Of The Utah Rules Of Civil Procedure.....	33
2.	Alco's Erroneous Citation Of Authority Deprives It Of Any Support For Its Argument That It Is Not Bound By Orders And Judgments Entered In <u>Blodgett I</u> And <u>Blodgett II</u>	35
III.	BECAUSE LORIN PACE DISCHARGED THE JUDGMENTS OBTAINED BY ZIONS AGAINST BETTY PURCELL IN <u>ZIONS I</u> AND <u>ZIONS II</u> , ZIONS AND ALCO HAVE NO JUDGMENT LIEN OR CLAIM TO ENFORCE AGAINST THE STORE TRACT.....	37
	CONCLUSION.....	41

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>Bagnall v. Suburbia Land Co.,</u> 579 P.2d 914 (Utah 1978).....	18,25,26,30,31,40
<u>Betenson v. Call Auto and Equip. Sales,</u> 645 P.2d 684 (Utah 1982).....	6
<u>Blodgett v. Martsch,</u> 590 P.2d 298 (Utah 1978).....	10,19
<u>Blodgett v. Betty Purcell aka Betty Purcell Martsch</u> <u>& Water Park Corp., Civ. No. C78-8017.....</u>	passim
<u>Edmond v. Fairfield Sunrise Village, Inc.,</u> 132 Ariz. 142, 644 P.2d 296 (Ariz. App. 1982).....	39
<u>Hoyt v. American Traders, Inc.,</u> 76 Or.App, 253, 709 P.2d 1090 (Or.App. 1985), <u>appeal pending, 713 P.2d 1058</u> (Or. 1986).....	18,27,28,29,30,31
<u>Lindsay v. Atkin,</u> 680 P.2d 401 (Utah 1984).....	34,35
<u>Litwin v. Barrier,</u> 6 Kan.App.2d 182, 626 P.2d 1232 (Kan. App. 1981).....	39
<u>Meagher v. Equity Oil Co.,</u> 5 Utah 2d 196, 299 P.2d 827 (1956).....	34,35
<u>Milton E. Giles & Co. v. Bank of America</u> <u>Nat. Trust & Savings Ass'n.,</u> 47 Cal. App.2d 315, 117 P.2d 943 (1941).....	29
<u>Richards v. Siddoway,</u> 24 Utah 2d 314, 471 P.2d 143 (1970).....	33,34,35
<u>Stanger v. Sentinel Sec. Life Ins. Co.,</u> 669 P.2d 1201 (Utah 1983).....	33,34,35
<u>Stearns v. Los Angeles City School Dist.,</u> 244 Cal.App.2d 696, 53 Cal.Rptr.482, 21 A.L.R.3d 164 (1966).....	18,27,28,29,30,31
<u>Tuft v. Federal Leasing,</u> 657 P.2d 1300 (Utah 1982).....	18,26,30,31
<u>Utah Dept. of Bus. Reg. Etc. v. Public Serv.,</u> 602 P.2d 696 (Utah 1979).....	18,20

<u>Zions Bank v. Purcell</u> , Civil No. C79-1685.....	passim
<u>Zions Bank v. Purcell and Pace</u> , Civil No. 232782.....	passim
<u>Zions Bank v. Lorin N. Pace</u> , Civil No. C84-0299.....	14

Statutes

Utah Code Ann. §15-4-3.....	2,38,39,40
Utah Code Ann. §42-2-10.....	2,20
Utah Code Ann. §42-2-5.....	2,18,20
Utah Code Ann. §78-40-2.....	2,18,24
Utah Rules of Appellate Procedure Rule 24(f)	2
Utah Rules of Appellate Procedure Rule 4	21
Utah Rules of Civil Procedure Rule 58B	38
Utah Rules of Civil Procedure Rule 60(a).....	2,33,34,35
Utah Rules of Evidence 201(a),(b),(d),(f).....	2,3

Other Authorities

54 C.J.S., Lis Pendens, §39(b).....	35,36
-------------------------------------	-------

CONTENTS OF THE ADDENDUM

	Addendum Page
Utah Code Annotated: Statutory Provisions and Rule.....	1
Utah Code Ann. § 15-4-3.....	1
Utah Code Ann. § 42-2-5.....	1
Utah Code Ann. § 42-2-10.....	1
Utah Code Ann. § 78-40-2.....	2
Utah Rules of Evidence Rule 201(a),(b),(d),(f).....	2
Utah Rules of Civil Procedure Rule 60(a).....	3
Certificate, Department of Business Regulation, August 25, 1986 (DBA Alco Investment expired).....	4
Chronological List of Events.....	6
Quitclaim Deed, November 8, 1973 (Martsch to Water Park).....	10
Letter from Zions' Counsel, August 18, 1986.....	11
Promissory Note, July 7, 1971 (Lorin Pace and Betty Purcell to Zions).....	12
Motion for Leave to Withdraw as Counsel, March 16, 1976 (Lorin Pace in Blodgett I).....	13
Complaint, March 13, 1979 (Zions II).....	14
Order to Consolidate, April 11, 1979 (Blodgett I and Blodgett II).....	16
Deafault Judgment, May 1, 1979 (Water Park in Blodgett I and Blodgett II).....	18
Minute Order, December 7, 1979 (Blodgett I and Blodgett II).....	22
Order and Judgment of Quiet Title, August 13, 1986 (Blodgett I and Blodgett II).....	23
<u>Hoyt v. American Traders Inc.</u> , 76 Or.App. 253, 709 P.2d 1090 (Orr. App. 1985) [appeal pending in this case].....	26
Judgment by Default, March 3, 1976 (Lorin N. Pace in Zions I).....	31

IN THE SUPREME COURT
FOR THE STATE OF UTAH

WILLIAM D. BLODGETT and)	
FLORENCE G. BLODGETT, his wife,)	
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Plaintiffs-Respondents,)	
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vs.)	Case No. 86-0115
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ZIONS FIRST NATIONAL BANK,)	
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Defendant,)	
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STANLEY L. PACE and ALLAN D.)	
McCOMB, individually and)	
d/b/a ALCO INVESTMENT,)	
)	
Defendants-Appellants,)	
)	
and DOES 1-10,)	
)	
Defendants.)	

ISSUES PRESENTED ON THE APPEAL

I. Whether this appeal should be dismissed for lack of subject matter jurisdiction because Appellants are doing business under an assumed name not registered to them?

II. Whether Appellants, as judgment creditors, can reach the interest in real property of which their judgment debtor has been deprived in a prior quiet title action in which a lis pendens had been recorded against the property?

III. Whether Appellants, as purported assignees of a judgment creditor whose judgments against one co-maker of a promissory note whose judgment has been discharged by the other co-maker can execute on their assignment?

STATUTES AND RULES

Pursuant to Rule 24(f) of the Utah Rules of Appellate Procedure, the following statutes and rules have been set forth in the Addendum ("Ad.") to this brief:

	Addendum Page
Utah Code Annotated §15-4-3	1
Utah Code Annotated §42-2-5	1
Utah Code Annotated §42-2-10	1
Utah Code Annotated §78-40-2	2
Utah Rules of Evidence 201(a),(b),(d),(f)	2
Utah Rules of Civil Procedure 60(a)	3

REQUEST TO TAKE JUDICIAL NOTICE

The Plaintiffs-Respondents request that this Court take judicial notice of pleadings, orders, decisions, exhibits and opinions in other related actions not already part of the record in this case, deeds and an explanatory letter from counsel to a party below pursuant to Rule 201 of the Utah Rules of Evidence.* Copies of the relevant materials are annexed in the Addendum to this Brief and made a part hereof by this reference. The materials are indexed at the first page of the Addendum for the convenience of the Court.**

* Rule 201 provides in part:

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

* * *

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

* * *

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

** The original copy of the brief contains a number of certified copies, some of which are on legal-sized paper, thus making the original somewhat cumbersome. The other copies of the brief, including those served on opposing counsel, contain copies of the documents reduced to standard size.

STATEMENT OF THE CASE

1. The Parties.

William D. Blodgett and his wife Florence G. Blodgett (the "Blodgetts") were owners of property in Salt Lake County which they seek to protect from foreclosure by Alco Investment ("Alco"), whose partners are Stanley L. Pace ("Stanley Pace") and Allan D. McComb ("McComb").

Although Stanley Pace and McComb purport to be partners under the name Alco Investment (R.60 ¶ 3, R. 71 ¶ 3), the records of the Department of Business Regulation, Division of Corporations and Commercial Code do not list them as current registrants of the name "Alco Investment". The Division of Corporations and Commercial Code reports that Allan D. McComb and Colleen C. McComb filed an application to do business under an assumed name, DBA Alco Investment, on September 22, 1976. Their DBA expired September 22, 1984, as shown by a Certificate from the Director, Division of Corporations and Commercial Code. (Ad. 4-5.)

Alco's foreclosure efforts began in 1985 and were made pursuant to an assignment of a judgment lien from Zions First National Bank ("Zions") to Alco after Zions had received payment of a default judgment on a promissory note made by Lorin N. Pace ("Lorin Pace"), father of Stanley Pace, and Betty Purcell (aka "Betty Purcell Alexander" or "Betty Purcell Martsch" and sometimes spelled "Pursell"). Zions did not receive payment from co-

maker Betty Purcell. Zions is not a party to this appeal and stated in its answer to the complaint that:

18. Zions affirmatively alleges that it claims no interest in the subject property.
(R. 68 ¶ 18.)

2. The Underlying Facts.

This case is the culmination of some fifteen years of transactions and six court proceedings, including an appeal to this Court, in which various persons and entities have claimed an interest in the Blodgetts' land.

The Blodgetts' problems began in 1971 when Raco Car Wash Systems ("Raco"), whose president was Betty Purcell, falsely represented to a bank that two tracts of Blodgett land could be used as security for a loan to Raco. The Blodgetts had agreed with Raco that only one tract could be used as security but were deceived into signing papers covering two. They have been trying to recover their property ever since.

The Blodgetts brought two earlier actions arising from the unauthorized actions encumbering their land. Zions brought three court proceedings because Betty Purcell and her former attorney Lorin Pace defaulted on their promissory note to Zions. After Lorin Pace paid \$27,262.59 under his default judgment on August 31, 1984, Zions purportedly assigned its judgments against Betty Purcell to Alco. Alco then attempted to foreclose on the Blodgetts' property because of Betty Purcell's prior but extinguished interest in the property. The Blodgetts thus brought this

action, seeking to resolve their property problems once and for all.

The undisputed facts leading to this action are set forth in numbered paragraphs. The facts are documented in court files, judgments, title documents and deeds and other such sources. Because of the length and complexity of the facts, a chronological list of the pertinent events, matters of public record, is set forth in the Addendum. (Ad. 6-9.) This Court may draw all legal conclusions justified by such facts. See e.g., Betenson v. Call Auto and Equip. Sales, 645 P.2d 684, 686 (Utah 1982) ("It is well established that where the issue is solely one of law, . . . this Court is as capable of determining the question as the trial court. . . ").

1. In 1969, the Blodgetts owned two adjacent tracts of land located at approximately 6100 South Highland Drive in Salt Lake County, Utah. The Blodgetts operated a grocery store on the larger tract (the "Store Tract"). They leased the smaller tract (the "Car Wash Tract") to Raco for the installation of a car wash in early 1969. The lease agreement with Raco provided that the Blodgetts would pledge the Car Wash Tract as security for a loan to Raco to finance the car wash installation. Raco, acting through its president Betty Purcell, made arrangements for the loan with Valley Bank and Trust Company ("Valley Bank"). (Record ["R."] 78, 79, 93.)

2. Without the Blodgetts' knowledge and prior to closing the loan, Valley Bank advised Raco that it required additional security in order to make the loan for the installation of the car wash. Raco falsely advised Valley Bank that the Blodgetts had agreed that both their Store Tract and the Car Wash Tract could be used as security for Raco's loan. (R. 79, 93.)

3. Valley Bank prepared a trust deed granting it a security interest in both the Car Wash Tract and the Store Tract. In addition, without first discussing the matter with either Raco or the Blodgetts, Valley Bank prepared a promissory note in its favor for signature by the Blodgetts as co-makers. (Id.)

4. On November 5, 1971, the Blodgetts attended the Raco loan closing at Valley Bank's offices. They intended to execute documents necessary for the hypothecation of the Car Wash Tract alone. The only commitment the Blodgetts had made to anyone concerning the use of any of their real property as security until the moment of closing was the one contained in the Raco lease; Valley Bank had a copy of the lease. (Id.)

5. Although Valley Bank usually explained the terms of loan documents to borrowers unless they demonstrated some degree of sophistication, it offered the Blodgetts no explanation of the contents of the trust deed and, in particular, failed to call attention to the trust deed's departure from a material provision of the Raco lease: that only the Car Wash Tract would be used as security for Raco's loan. (Id.)

6. Valley Bank personnel spent half an hour explaining the documents to Betty Purcell, although neither she nor her corporation was making any contribution to the real property collateral for the loan. Valley Bank personnel made no similar effort to explain the loan documents to the Blodgetts even though the Blodgetts announced that they did not understand them. (R. 80, 93-94.)

7. When the Blodgetts asked about the promissory note, Valley Bank falsely advised them that by executing the loan documents the Blodgetts assumed only a secondary or "stand-by" obligation. The Blodgetts requested copies of all loan documents for review; however, Valley Bank sent them a copy of the promissory note only. (R. 80, 94.)

8. The Raco loan went into default; but Valley Bank did not notify the Blodgetts or suggest to them that the Store Tract was in jeopardy. (Id.)

9. Valley Bank foreclosed on the Store Tract in 1973. To effectuate the foreclosure, Valley Bank utilized Wayne Ashworth ("Ashworth") as trustee. (Id.)

10. Ashworth failed to comply with the procedures prescribed for non-judicial foreclosure of trust deeds in Utah. Ashworth held a public trustee's sale which the Blodgetts attended. By reason of their misconception that only the Car Wash Tract was subject to sale, the Blodgetts failed to take the most elementary steps to protect their interests. For example,

they did not require Ashworth to sell the property in separate tracts or in a particular sequence. Moreover, the Blodgetts did not enter a bid even though the high bid was a small fraction of the property's value. The high bidder at the sale was Joe Martsch, a director of Raco and Betty Purcell's husband at the time. (R. 80, 81, 94.)

11. Neither Ashworth nor Valley Bank consulted with, advised, or sought instruction from the Blodgetts before or during the sale. Both acted purely in Valley Bank's interest and took the course of action most likely to assure that Valley Bank would either be paid in full or acquire the tracts at a bargain price. (Id.)

12. On November 11, 1973, Joe Martsch conveyed a one-half undivided interest in the Store Tract to Water Park Corporation ("Water Park"), a corporation wholly owned by Betty Purcell. (Id.) Lorin Pace witnessed and notarized the conveyance. (Ad. 10.)

13. The Blodgetts first became aware that the Store Tract had been included in the sale when Joe Martsch asserted his rights of ownership after the sale. In 1974 the Blodgetts brought suit to obtain the return of the Store Tract in the Third Judicial District Court, Salt Lake County, Civil No. 223407, against Joe Martsch, Betty Purcell aka Betty Purcell Martsch, Doyle Nease, Raco Car Wash Systems, Inc., a Utah corporation, Wayne A. Ashworth, trustee, Carl W. Tenny, Valley Bank & Trust

Company, and First Security Bank of Idaho, N.A. ("Blodgett I"). The Blodgetts also recorded a lis pendens on November 4, 1974 with the Salt Lake County Recorder in Book 3714, at Page 334, giving notice that they had filed Blodgett I to terminate the interests of all of those defendants in and to the Store Tract. (R. 81, 82, 98, 99.) Lorin Pace represented Raco and Betty Purcell. See Blodgett v. Martsch, 590 P.2d 298, 300 (Utah 1978).

14. The Blodgett I defendants moved for summary judgment. The trial court (per Baldwin, J.) granted the motion, and the Blodgetts appealed. This Court reversed and remanded Blodgett I for trial on December 26, 1978. Blodgett v. Martsch, supra, 590 P.2d at 304.

15. On or about January 16, 1976, while Blodgett I was still pending, Zions filed an action in the Third Judicial District Court, Salt Lake County, against Betty Purcell, a defendant in Blodgett I, and Lorin Pace, seeking judgment for \$27,262.59 on their unpaid promissory note. Zions First National Bank v. Betty Pursell [sic] Alexander and Lorin N. Pace, Civil No. 232782, ("Zions I"). (R. 82.) A copy of the promissory note from Lorin Pace and Betty Pursell to Zions is annexed. (Ad. 12.) Zions alleged, inter alia:

2. On or about the 7th day of July, 1971, at Salt Lake City, Utah, the defendants [Purcell and Lorin Pace], and each of them, made, executed and delivered their promissory note to the plaintiff [Zions], in the amount of \$27,262.59, payable on demand at Salt Lake City, Utah. . . . (R. 9 ¶ 2.)

16. On March 3, 1976, Zions obtained a default judgment in Zions I against Lorin Pace in the amount of \$31,064.52. (Ad. 31.) Fifteen days later, on March 18, 1976, Lorin Pace filed a Motion For Leave To Withdraw As Counsel for Betty Purcell (but not for Raco) in Blodgett I. (Ad. 13.)

17. On August 13, 1976, Zions obtained a default judgment in Zions I against Betty Purcell in the amount of \$31,064.52. (R. 82.)

18. Water Park, to which Joe Martsch had conveyed a one-half undivided interest in the Store Tract in 1973, was administratively dissolved September 30, 1977. An order of the trial court in Zions I (per Durham, J.) concluded that Water Park's assets had become the undivided property of Betty Purcell upon the dissolution of Water Park on September 30, 1977. Thus, according to that order, Betty Purcell was the owner of record of a one-half undivided interest in the Store Tract (conveyed from Joe Martsch to Water Park) as of September 30, 1977. (R. 15; see ¶ 24 below.)

19. In 1978, the Blodgetts brought a second action in the Third Judicial District Court, Salt Lake County, against Betty Purcell and Water Park, seeking to terminate Betty Purcell's and Water Park's interest in the Store Tract. Blodgett v. Betty Purcell aka Betty Purcell Martsch and Water Park Corporation, Civil No. C78-8017, ("Blodgett II"). (R. 15.)

20. On March 13, 1979, Zions brought a second action in the Third Judicial District Court, Salt Lake County, against Betty Purcell for the purpose of enforcing the judgment obtained against her in Zions I. Zions Bank v. Purcell, Civil No. C79-1685, ("Zions II"). (Ad. 14-15.)

21. On April 11, 1979, the trial court (per Durham, J.) consolidated Blodgett I and Blodgett II for trial. (Ad. 16-17.)

22. On May 1, 1979, the trial court in Blodgett I and Blodgett II (per Durham, J.) entered an order on default against Water Park, conveying all right, title and interest of Water Park in and to the Store Tract to the Blodgetts. (R. 83, 100, 101, Ad. 18-21.)

23. On May 2, 1979, the trial court in Zions I (per Durham, J.) set aside Zions' August 13, 1976 default judgment in the amount of \$31,064.52 against Betty Purcell. (R. 83.)

24. On May 16, 1979, Zions obtained an order in Zions II (per Durham, J.) determining that Water Park owned the Store Tract, that Betty Purcell was the sole shareholder of Water Park, that Water Park had been dissolved on September 30, 1977, and that Betty Purcell became the owner of the subject real property on September 30, 1977 by virtue of the dissolution. The order stated further that:

"Any judgment lien [Zions] may have against defendant [Purcell] which is properly docketed in the office of the Salt Lake County Clerk constitutes a lien upon the above-

described property [the Store Tract] as of the date of such docketing if subsequent to September 30, 1977. If any such judgment is docketed prior to September 30, 1977, such judgment shall constitute a lien commencing September 30, 1977. (R. 84.)

Zions had no judgment against Betty Purcell on the date Judge Durham entered this order. The Blodgetts were not parties or participants in Zions I or Zions II. (R. 83, 84.)

25. On or about May 29, 1979, Joe Martsch quitclaimed all interest he had in the Car Wash Tract and in the Store Tract to the Blodgetts, thus conveying to them his one-half undivided interest in the Store Tract and his interest in the Car Wash Tract. (R. 84, 102, see also Ad. 10.)

26. On June 1, 1979, Zions obtained a second default judgment against Betty Purcell in Zions I. The amount of the judgment was \$27,262.59 -- \$3,801.93 less than the amount of the original default judgment Zions had obtained against her. (R. 84.)

27. On December 7, 1979, the trial court in Blodgett I and Blodgett II (per Baldwin, J.) held a pretrial hearing during which the parties settled both cases. The terms of the settlement were read into the record. (R. 84, 85, 103-07.)

28. On December 7, 1979, Judge Baldwin entered an order in Blodgett I and Blodgett II (the "Settlement Order") approving the settlement reached at the pre-trial hearing. A certified copy of the December 7, 1979 Minute Order in Civil No. 223407 is annexed. (Ad. 22.)

29. The terms of settlement approved in the Settlement Order provided for: (1) execution of quitclaim deeds by the defendants in Blodgett I and Blodgett II conveying the Store Tract to the Blodgetts; (2) payment of damages to the Blodgetts; (3) dismissal with prejudice of the Blodgetts' actions; (4) a court order quieting title to the Store Tract in the Blodgetts. (R. 103-07.)

30. On January 15, 1980, Betty Purcell executed a quitclaim deed and delivered it to the Blodgetts pursuant to the terms approved in the Settlement Order. (R. 109-12.)

31. On May 5, 1980, the trial court (per Baldwin, J.) entered an order (the "Dismissal Order") dismissing Betty Purcell as a defendant in Blodgett I and Blodgett II. The Dismissal Order did not include all of the terms of the settlement read into the record at the pre-trial hearing before Judge Baldwin. (R. 85.)

32. In 1984 Zions commenced an action in the Third Judicial District Court, Salt Lake County, to renew its Zions I judgments ("Zions III"). Zions First National Bank v. Lorin N. Pace, No. C84-0299. (See Ad. 11.) After Zions III was filed, Lorin Pace, father of Appellant Stanley Pace, paid Zions \$27,262.59, on August 31, 1984, for amounts due under the judgment against him. (R. 85, 86.) Counsel for Zions confirmed the payment by Lorin Pace in a letter dated August 18, 1986, a copy of which is annexed. (Ad. 11.) The letter substantiates and

explains Zions' averment in its answer in this case that it makes no claim to the subject property. (R. 68.)

33. On or about August 31, 1984, Zions purportedly assigned its judgment of May 16, 1979 in Zions I and its judgment of June 2, 1979 in Zions II to Alco. (See R. 85, 86.) Alco's DBA expired approximately three weeks later on September 22, 1984. (Ad. 4-5.)

34. On April 19, 1985, the Blodgetts received an informal notice to enforce lien from Alco. The notice stated that Alco intended to execute on any judgment lien received by it from Zions. (R. 86.)

35. On May 24, 1985, the Blodgetts brought the instant action ("Blodgett III") against Zions, Stanley Pace, McComb and Alco to quiet title to the Store Tract in the Blodgetts. The Blodgetts also recorded a lis pendens. (Id.)

36. On January 16, 1986 the trial court (per Sawaya, J.) entered an order in Blodgett III granting the Blodgetts' motion for summary judgment. (R. 134-37.) The judgment states:

Therefore, the court hereby orders, adjudges and decrees that:

1. The Motion for Summary Judgment of defendants, Stanley L. Pace and Allen D. McComb dba Alco Investment, is denied.

2. The Motion of plaintiffs as against all defendants, Zions First National Bank, Stanley L. Pace and Allen D. McComb dba Alco Investment, is granted as follows:

a. The judgment liens that arise on behalf of the defendant, Zions First National

Bank, within the civil actions known as Zions Bank vs. Purcell and Pace, Civil No. 232782 [Zions I] and Zions Bank vs. Purcell, Civil No. C79-1685, [Zions II], filed in the Third Judicial District Court of Salt Lake County, State of Utah, which judgment liens and their underlying judgments have been assigned to defendants, Stanley L. Pace and Allen D. McComb, dba Alco Investment, are void and of no effect as against the real property that is the subject of this action, [the Store Tract] identified as [description omitted].

b. Title to the above-identified real property is quieted in the plaintiffs [the Blodgetts] as against any and all right, title, or interest claimed by the defendants, Zions First National Bank and Stanley L. Pace and Allen D. McComb dba Alco Investment.

(R. 135-37.)

37. On August 13, 1986, the trial court in Blodgett I and Blodgett II (per Dee, J.) entered an order (the "Order and Judgment of Quiet Title") granting the Blodgetts' unopposed Motion to Set Aside Order of Dismissal and Enter Judgment of Quiet Title. The Blodgetts filed the motion on March 17, 1986 to correct a clerical error in the Dismissal Order to accord with the settlement that had been read into the record and approved by the trial court (per Baldwin, J.). Even though not required to do so, the Blodgetts personally served Betty Purcell with a copy of the motion. (Ad. 23.) The Order and Judgment of Quiet Title provide:

The court being fully advised in the premises and having considered the Motion of plaintiff hereby orders, adjudges and decrees:

1. The Order of Dismissal against defendant Betty Purcell, aka Betty Purcell Martsch, signed and entered May 5, 1980 by the Honorable Ernest F. Baldwin, Jr., is hereby set aside.

2. Judgment is hereby entered against Betty Purcell, aka Betty Purcell Martsch, quieting Title of all right, title and interest of said defendant within the following identified real property in and to the plaintiffs', William D. Blodgett and Florence G. Blodgett. The real property to which this quiet title judgment applies is located within Salt Lake County, State of Utah, and is more particularly identified as: [description omitted].

This Order shall relate back to and be effective as of May 5, 1980.

The Complaint of plaintiffs against defendants Betty Purcell Martsch, Raco Car Wash Systems, Inc., and Water Park Corporation is hereby dismissed with prejudice and any and all counter-claims of said defendants are hereby dismissed with prejudice with the parties to bear their own costs.

The sum of \$2,400 on deposit with the court in this case be paid over to plaintiffs by the clerk of the court.

A copy of the Order and Judgment of Quiet Title is annexed. (Ad. 23-25.)

SUMMARY OF ARGUMENT

1. The facts underlying this action are undisputed and support the trial court's decision for the Blodgetts.

2. Since Alco is not registered with a DBA, it could not file a Notice of Appeal; consequently, this Court lacks jurisdiction over the appeal and should affirm without proceeding

to the merits. Utah Code Ann. §42-2-5; Utah Dept. of Bus. Reg. Etc. v. Public Serv., 602 P.2d 696 (Utah 1979).

3. By an order of the trial court (per Durham, J.), Betty Purcell was determined to be the owner of Water Park's interest in the Store Tract as of September 30, 1977. The Blodgetts had filed a lis pendens on the Store Tract in their suit against her in 1974; thus anyone seeking a lien against Betty Purcell's property after September 30, 1977 was precluded by the doctrine of lis pendens, which protects the right, title and interest of the Blodgetts. Betty Purcell's judgment creditors could obtain no interest in the property from her because of the Blodgetts' lis pendens. Utah Code Ann. §78-40-2; Tuft v. Federal Leasing, 657 P.2d 1300 (Utah 1982); Bagnall v. Suburbia Land Co., 579 P.2d 914 (Utah 1978); Stearns v. Los Angeles City School District, 244 Cal.App.2d 696, 53 Cal.Rptr. 482, 21 A.L.R.3d 164 (1966); Hoyt v. American Traders, Inc., 76 Or.App. 253, 709 P.2d 1090 (Or.App. 1985), appeal pending, 713 P.2d 1058 (Or. 1986).

4. Since a co-maker of a promissory note discharged a judgment against him and his co-maker, his remedy is against the co-maker, who was, like him, a judgment debtor. Thus, the Zions assignment to Alco (taken after one judgment debtor paid the judgment) does not permit foreclosure on land in which the non-paying co-maker once had an interest.

ARGUMENT

I. THE COURT SHOULD DISMISS ALCO'S APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION.

After Lorin Pace, judgment debtor to Zions on his promissory note, paid Zions, Alco took an assignment and then gave notice of foreclosure on the Store Tract. Alco's notice prompted this suit, which the Blodgetts won on summary judgment.*

* Alco argues at some length that summary judgment should not have been granted to the Blodgetts because it was supported by an affidavit based on information and belief concerning business and attorney-client relationships between Lorin Pace and Betty Purcell. This Court may take judicial notice of the documents upon which the affidavit was based. First, Lorin Pace is a maker of a promissory note with Betty Purcell to Zions dated July 7, 1971 for the amount of \$27,262.59 payable on demand. (Ad. 12.) Zions subsequently took a default judgment against Lorin Pace for non-payment of the note on March 3, 1976. (Ad. 31.) He paid Zions \$27,262.59 pursuant to that judgment on August 31, 1984. (Ad. 11.) The Court may properly infer that, when a person signs a promissory note with another person, there is some relationship between them. Since the relationship evidenced by a promissory note involves money and debt, that relationship may be presumed to involve business.

As to an attorney-client relationship between Lorin Pace and Betty Purcell: Lorin Pace appears as attorney of record for Betty Purcell in Blodgett I from 1974 to 1976, when there was a motion for leave to withdraw as of counsel. (Ad. 13.) He was an attorney for the defendants and respondents, including Betty Purcell, in the Blodgett's appeal to this Court in Blodgett I. Blodgett v. Martsch, 590 P.2d 298, 300 (Utah 1978). Also, on November 8, 1973, Joe Martsch, Betty Purcell's husband at the time Valley Bank foreclosed on the property, conveyed a one-half undivided interest in the Store Tract to Water Park, which was solely owned by Betty Purcell. Lorin Pace witnessed and notarized the Martsch deed. (Ad. 10.) These documents evidence an attorney-client relationship between Lorin Pace and Betty Purcell and demonstrate that Lorin Pace was or had reason to be familiar with Betty Purcell's corporate holdings and business. As her attorney in Blodgett I he knew that the Blodgetts had filed a lis pendens on the Store Tract.

Utah Code Ann. §42-2-5 requires persons who carry on, conduct or transact business under an assumed name to register that name with the Division of Corporations and Commercial Code, to maintain a registered office and to appoint a registered agent to receive process. Stanley Pace and Allan D. McComb have no registration of Alco Investment as an assumed name under which they conduct or transact their business, and they have not otherwise complied with the provisions of Chapter 2 of Title 42, Utah Code Annotated 1953, as amended. Alco's registration expired September 22, 1984, before Alco attempted to foreclose on the Blodgetts' land.

Utah Code Ann. §42-2-10 establishes penalties for failure to register assumed names and provides:

Any person or persons who shall carry on, conduct or transact any such business under an assumed name without having complied with the provisions of this act shall not sue, prosecute or maintain any action, suit, counterclaim, cross complaint or proceeding in any of the courts of this state until the provisions of this chapter have been complied with. (Emphasis added).

Thus, persons who fail to register their assumed names and have otherwise failed to comply with Chapter 2 of Title 42 are legally incompetent to participate as parties litigant in any of the courts of this state, including this Court.

In Utah Dept. of Bus. Reg. Etc. v. Public Serv., 602 P.2d 696, 699 (Utah 1979), this Court stated:

Generally, a court's lack of jurisdiction over the subject matter of a dispute may not

be waived by the parties, and may be raised by the court sua sponte. Likewise, a court may not, when moved by an inclination to reach the merits of a particular case, ignore the fact that the case falls outside its legally proscribed domain.

This Court should dismiss any action pending before it when it lacks jurisdiction over the subject matter of a dispute.

The jurisdiction of this Court in appeals taken from the district courts, such as the instant proceeding, depends upon the timely filing of a notice of appeal with the Clerk of the District Court under Rule 4, Utah Rules of Appellate Procedure. To file such a notice, a party must be legally competent to sue, prosecute or maintain actions in Utah courts.

Alco and its partners are not legally competent to prosecute their appeal before this Court. It follows, therefore, that being incompetent to prosecute or maintain their appeal, the notice of appeal they filed was void; and, the time for appeal in this matter having expired long ago, this Court is now without subject matter jurisdiction to proceed further and determine the merits of this case. Accordingly, the Court should dismiss the appeal for lack of jurisdiction.

II. THE RIGHTS OF ZIONS (AND CONSEQUENTLY ANY RIGHTS OF ITS ASSIGNEE ALCO) TO THE STORE TRACT WERE EXTINGUISHED BY THE JUDGMENTS AND ORDERS RENDERED IN BLODGETT I AND BLODGETT II; ACCORDINGLY, THE TRIAL COURT IN BLODGETT III PROPERLY ENTERED SUMMARY JUDGMENT QUIETING TITLE TO THE STORE TRACT IN THE BLODGETTS.

Although the Blodgetts respectfully submit that this Court lacks subject matter jurisdiction to examine the merits of

this appeal, they believe that the facts are such that the trial court's judgment in their favor must be affirmed. Although the underlying facts are extensive and the law somewhat complex, careful analysis demonstrates that the Blodgetts are proper owners of the Store Tract because of the doctrine of lis pendens recognized in Utah and elsewhere.

A. By Virtue Of The Doctrine Of Lis Pendens, Zions And Alco Are Bound By The Trial Court's Disposition Of The Store Tract Pursuant To The Terms Of The Settlement Order In Blodgett I And Blodgett II.

In their brief, the Appellants state:

In any case, when Judge Durham decided on May 16, 1979 that Betty Purcell had owned the property since September 30, 1977, it was conclusively established that Water Park had no interest in the property on May 1, 1979 when the Blodgetts obtained their default judgment against Water Park.

(App. Br. p. 8).

If, as Judge Durham recognized and held in Zions II, ownership in Betty Purcell (through Water Park, which had a one-half undivided interest from Joe Martsch) was conclusively established as of September 30, 1977, then Zions took its judgment against Betty Purcell and sought to file a judgment lien against the Store Tract after the Blodgetts' lis pendens had been filed in a suit in which Betty Purcell was named as a defendant. That lis pendens covered any interest in the property which Betty Purcell had. Consequently, any claim of Zions against Betty Purcell's interest in the property is subject to the lis pendens and was extinguished as against that property

when the Blodgetts prevailed in their suits against Betty Purcell. Accordingly, summary judgment was properly granted to the Blodgetts in Blodgett II.

The Blodgetts recorded a lis pendens on the Store Tract on November 4, 1974. The order in Zions II vested a one-half undivided interest in the Store Tract in Betty Purcell, which was immediately subject to the Blodgetts' original claim and lis pendens. Since the August 13, 1976 default judgment against Betty Purcell in Zions I had been vacated, Zions had no judgment against Betty Purcell on the date that Judge Durham recognized Betty Purcell's one-half undivided ownership of the Store Tract. Zions acquired no colorable claim against Betty Purcell's interest in the Store Tract until June 1, 1979, when it obtained a default judgment against her. (Even if that default judgment were to relate back to September 30, 1977, it is still subsequent to the Blodgetts' 1974 lis pendens.) Thus, by virtue of the doctrine of lis pendens, Zions (and consequently Alco as its 1985 assignee) is bound by the trial court's disposition of Betty Purcell's interest in the Store Tract to the Blodgetts pursuant to the terms of the Settlement Order entered in Blodgett I and Blodgett II. Since Zions never sued Joe Martsch, it had no claim against him, and the one-half interest in the Store Tract which he conveyed to the Blodgetts has been theirs without rightful claim by Betty Purcell, Zions or now its assignee Alco since the Martsch conveyance.

1. After A Lis Pendens Is Filed In A Quiet Title Action, Judgment Creditors Of The Defendants Therein Cannot Reach The Interest Of Which Their Judgment Debtors Are Deprived By A Judgment In The Quiet Title Action.

Alco's attempt at foreclosure is exactly what the doctrine of lis pendens prevents: when Betty Purcell was ordered to quitclaim her interest to the Blodgetts, in whom title was to be quieted, that court-ordered conveyance to the Blodgetts left Betty Purcell with no interest in the Store Tract to which a judgment lien could attach.

Lis pendens means, simply, that even though Alco may have a right against Betty Purcell, Alco cannot claim any right to property in which Betty Purcell no longer has any right, title or interest. Alco can only stand in Betty Purcell's shoes; it cannot exceed her interests in any property. Since she has no interest in the Store Tract, lis pendens mandates that Alco has no interests in it. If Alco has a bona fide claim against Betty Purcell, it must sue her personally or seek assets she owns against which to satisfy its claim.

Utah Code Annotated §78-40-2 governs the filing of lis pendens in actions affecting the title to or the right of possession of real property in Utah. This provision states:

In any action affecting 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 re-

corder of the county in which the property of 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 or 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.

In Bagnall v. Suburbia Land Co., 579 P.2d 914, 916

(Utah 1978), this Court explained the doctrine of lis pendens:

The doctrine of lis pendens preserves the status quo by keeping the subject of the lawsuit within the power and control of the court until judgment or decree shall be entered. The recording of a lis pendens serves as a warning to all persons that any rights or interests they may acquire in the interim are subject to the judgment or decree. One who acquires an interest in land that is the subject of pending litigation stands in no better position than the person he acquires it from, he is charged with notice of the claimed contrary rights of others, and he is bound by the judgment rendered in the litigation. (Emphasis added).

In Bagnall, United Paint & Colors Company ("United Paint") acquired a certain tract of property from Utah Valley Land & Development Company ("Utah Valley"). Prior to the execution and delivery of the deed to United Paint by Utah Valley, the Bagnalls had recorded a lis pendens on the tract. Nonetheless Utah Valley executed and delivered a deed to United Paint. The Bagnalls named Utah Valley and United Paint as parties in a suit

to quiet title to the property. The trial court ruled that the Bagnalls were entitled to a decree quieting title against Utah Valley and, consequently, United Paint. The Court held:

The final undisputed fact is that the default judgment entered against Utah Valley (thereby quieting title in Bagnalls as against it) was previously affirmed on appeal to this Court. This event, coupled with the fact that a lis pendens was recorded, serves to conclusively defeat any interest United Paint may have acquired through Utah Valley. This is the case by reason of the doctrine of lis pendens which requires United Paint to stand in the same position of its grantor, Utah Valley. Consequently, when the interests of Utah Valley in the 140.15 acres were defeated, so were those of United Paint.

Bagnall, supra, at 916, 917 (emphasis added).

In Tuft v. Federal Leasing, 657 P.2d 1300, 1302-03 (Utah 1982), this Court reaffirmed the principles announced in Bagnall and held:

In the present case, the lis pendens document gave constructive notice to both Bayshore Inn and Federal Leasing of the pendency of the foreclosure suit. Both parties, in acquiring the property, were therefore charged with the knowledge that their rights with respect to the property would be determined by that suit.

Because Bayshore Inn and Federal Leasing had both actual and constructive notice of the pendency of the foreclosure suit at the time they acquired their successive interests in the property, they are bound by the results of that suit. The trial court properly quieted title in plaintiff on that basis. (Emphasis added).

Thus, after a lis pendens has been recorded in a quiet title action, a lis pendens grantee cannot reach the interest of which its grantor is deprived by a judgment in the quiet title action. Zions was trying to obtain Betty Purcell's interest in the land, but the Blodgetts' lis pendens, filed in connection with a suit against Betty Purcell, was constructive notice to Zions that any claim to the land it could make because of or through Betty Purcell was subject to an existing dispute between the Blodgetts and Betty Purcell. Zions' assignee Alco thus has no right against the Blodgetts or their property, and the summary judgment for the Blodgetts in this action should be affirmed.

Judgment creditors are bound by the application of the doctrine of lis pendens. Zions, as a judgment creditor of Betty Purcell, could not take something Betty Purcell could not take from the Blodgetts; as assignee of Zions, Alco is a judgment creditor pursuing a defendant who has lost its assets in a suit. The losing defendant Betty Purcell has nothing, and that is what her judgment creditor can get: nothing. See Stearns v. Los Angeles City School District, 244 Cal.App.2d 696, 53 Cal.Rptr. 482, 21 A.L.R.3d 164 (1966); Hoyt v. American Traders, Inc., 76 Or.App. 253, 709 P.2d 1090 (Or.App. 1985), appeal pending, 713 P.2d 1058 (Or. 1986). A copy of the Hoyt case is annexed. (Ad. 26-30.)

In Stearns, Rose Landier had been awarded certain real property pursuant to a judgment against her former husband, Felicien P. Landier, in a divorce action in which she had filed a lis pendens. She had filed her lis pendens before the husband's judgment creditors recorded their judgment against the property. She brought an action to quiet title to the real property against Mr. Landier's judgment creditors. Discussing the effect of the lis pendens filed in Rose Landier's suit against her ex-husband, the California Court held:

The only mention of [the judgment creditors of Felicien P. Landier] in the property is a finding which notes that since the commencement of the action an abstract of judgment had been recorded against the property for a sum in excess of \$300,000.

A lis pendens having been recorded prior to the abstract, the latter [the judgment creditors] could not directly reach the interest of which [Felicien P.] Landier and the Company were deprived by the judgment in Rose's suit.

53 Cal.Rptr. at 503 (emphasis added, citations omitted).

In Hoyt v. American Traders, Inc., supra, Ms. Hoyt filed an action for a declaratory judgment that a parcel of real property which was awarded solely to her in a divorce proceeding was free and clear of a judgment lien filed against her former husband. In connection with her divorce action, Ms. Hoyt had filed a lis pendens before American Traders, Inc., the husband's judgment creditor, obtained its judgment against him and before

it recorded the lien against her real property. The lower court entered judgment in favor of American Traders, Inc. On appeal, the Oregon Court of Appeals reversed and held:

We hold that the doctrine of lis pendens was applicable to plaintiff's [Hoyt's] dissolution proceeding, as a result of which defendant's [American Traders, Inc.'s] judgment lien was subject to the outcome of that proceeding. When plaintiff was awarded the property free of her husband's interest, defendant lost its lien.

Hoyt, supra, 709 P.2d at 1093 (emphasis added).

Thus, after a lis pendens has been recorded in a quiet title suit, the defendants' judgment creditors cannot, by there-after recording their judgment, reach the interest which their judgment debtors lost in the quiet title action. Whether the final orders and judgments are rendered after a trial on the merits or pursuant to compromise and settlement is immaterial and does not affect the binding nature of those judgments and orders. See e.g. Milton E. Giles & Co. v. Bank of America Nat. Trust & Savings Ass'n., 47 Cal.App.2d 315, 117 P.2d 943 (1941).

The Blodgetts are like Ms. Landier and Ms. Hoyt. The Store Tract belongs to the Blodgetts, awarded in settlement of their suits against Betty Purcell. Like the judgment creditors in Stearns and Hoyt, Zions (and hence its assignee Alco) lost its lien (if it ever truly had one) against the Store Tract, and therefore can take nothing from the Blodgetts.

2. Betty Purcell Was Deprived Of Her Interest In
The Store Tract In Blodgett I And Blodgett II.

Under the principles stated in Bagnall, Tuft, Stearns and Hoyt, the Blodgetts' lis pendens, filed in 1974, served as a warning to Zions (and thus its assignee Alco) that any rights or interest it might acquire in, to or against the Store Tract (through Betty Purcell) during the pendency of the Blodgetts' actions would be subject to any and all judgments or orders rendered in the Blodgetts' proceedings.

On December 7, 1979, Judge Baldwin entered the Settlement Order in Blodgett I and Blodgett II which provided: "Based on stipulation of respective counsel, court orders: the within case settled as set out in the record." (Ad. 22.) The Settlement Order memorializes and clarifies the intent of the trial court. The terms of settlement approved by the Settlement Order were:

MR. BUSHNELL [attorney for the Blodgetts]:
We'll get the quit-claims we want signed, you
get the releases and satisfactions you want
signed. Why don't you prepare the release
you want for the bank and get the check and
we'll go from there. Will that be all right?

THE COURT [Judge Baldwin]: A dismissal with
prejudice of the action.

MR. BUSHNELL: We'll prepare the dismissal.

MR. BARKER [attorney for Betty Purcell]: If
you want quit-claim deeds, we are going to
mail them to Idaho and get them back. This
is a few days mail time.

MR. BUSHNELL: Lets get all of it done plus
that-- well --

MR. BARKER: If you can do it by the Court Order and quiet title to the matter --

MR. BUSHNELL: Let's get the deed too.

THE COURT: All right.

MR. BARKER: Very good.

(R. 103-07, emphasis added.)

Thus, the terms of settlement in Blodgett I and Blodgett II, which the trial court approved in the Settlement Order, included: (1) execution of a quitclaim deed by Betty Purcell conveying her interest in the Store Tract to the Blodgetts, (2) payment of damages to the Blodgetts, (3) dismissal with prejudice of the Blodgetts' actions, (4) a court order quieting title to the Store Tract in the Blodgetts.

Under the terms of settlement approved by the Settlement Order in Blodgett I and Blodgett II, Betty Purcell, a defendant in Zions I and Zions II and through whom Zions and Alco claim an interest in the Store Tract, relinquished and was judicially deprived of any interest she had in the Store Tract. The Settlement Order disposed of the Store Tract by approving Betty Purcell's transfer of the Store Tract to the Blodgetts pursuant to quitclaim deeds. In accordance with the law as set forth in Bagnall, Tuft, Stearns and Hoyt, Zions and Alco are bound by the trial court's disposition of the Store Tract in Blodgett I and Blodgett II.

This result follows from the fact that both Zions and its assignee Alco had constructive notice of the Blodgetts' litigation through the Blodgetts' lis pendens filed in November, 1974 -- two years prior to Zions I and the judgments obtained therein and four years prior to Zions II.

When Betty Purcell lost her interest in the Store Tract under the Settlement Order in Blodgett I and Blodgett II, Zions and Alco lost any interest and claim to the Store Tract because their only claims were to Betty Purcell's interest in the Store Tract, not in the Store Tract itself. That distinction is crucial but ignored by Alco. The trial court, following the doctrine of lis pendens explained by this Court, recognized these principles. Consequently, the trial court in Blodgett III properly entered summary judgment quieting title to the Store Tract in the Blodgetts.

B. The Trial Court's Disposition Of The Store Tract Pursuant To The Terms Of The Order And Judgment Of Quiet Title In Blodgett I And Blodgett II Extinguished Any Interest Or Claim Of Zions And Alco In Or To The Store Tract.

Since Zions and its assignee Alco were subject to the trial court's disposition of the Store Tract in Blodgett I and Blodgett II, and since the final Order and Judgment of Quiet Title in those cases quieted title to the Store Tract in the Blodgetts, Zions and Alco have absolutely no claim against, title to, or interest in the Store Tract. Accordingly, the trial court

in Blodgett III properly entered summary judgment quieting title to the Store Tract in the Blodgetts.

1. The Trial Court In Blodgett I And Blodgett II Properly Entered The Order And Judgment Of Quiet Title Pursuant To Rule 60(a) Of The Utah Rules Of Civil Procedure.

The Dismissal Order did not accurately reflect the trial court's judgment, set forth on the record in Blodgett I and II and in its minute order to quiet title in the Blodgetts. To correct the error in the Dismissal Order, the Blodgetts served Betty Purcell and filed on March 17, 1986 a Motion to Set Aside Order of Dismissal and Enter Judgment of Quiet Title pursuant to Rule 60(a) of the Utah Rules of Civil Procedure, which provides:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

In Stanger v. Sentinel Sec. Life Ins. Co., 669 P.2d 1201, 1206 (Utah 1983), this Court construed Rule 60(a), defining a clerical mistake as one which is mechanical in nature, is apparent on the record and does not involve a legal decision or judgment by an attorney. The distinction between a judicial error and a clerical error does not depend upon who made it; rather, the distinction depends on whether it was made in rendering the judgment (judicial error) or in recording the judgment as rendered (clerical error). See Richards v. Siddoway, 24 Utah 2d

314, 471 P.2d 143, 145 (1970). Corrections contemplated by Rule 60(a) must be undertaken for the purpose of reflecting the actual intention of the court and the parties. See Lindsay v. Atkin, 680 P.2d 401, 402 (Utah 1984).

Under the criteria set forth in Stanger, Richards and Lindsay, the omission of the quiet title provisions in the Dismissal Order constituted a "clerical error". The error was mechanical in nature, and it occurred in the course of recording a judgment, since the court ordered "quiet title" but the subsequent written judgment neglected to recite those exact words. Making the correction did not involve a legal decision or judgment by an attorney; the correction arose naturally from the plain words of the record when the settlement was approved by Judge Baldwin. That settlement reflected what the Blodgetts had sought all along. The trial court corrected the error on August 13, 1986 to reflect the actual intention of the trial court and the parties as set forth in the record and the Settlement Order, quieting title to the Store Tract in the Blodgetts as of the date of the settlement.

In Meagher v. Equity Oil Co., 5 Utah 2d 196, 299 P.2d 827 (1956), this Court reviewed a case in which the trial judge signed an order on the erroneous assumption that the order, as prepared by counsel, correctly reflected his judgment in the matter. This Court held that the execution of the order was a mistake of a perfunctory or a clerical nature since the order did

not accurately reflect the result of the trial court's judgment and that the trial court could and properly did correct the error upon its own motion.

In Blodgett I and Blodgett II, Judge Baldwin, like the trial judge in Meagher, executed the Dismissal Order on the erroneous assumption that it correctly reflected his judgment, thus making an error perfunctory and clerical in nature and properly correctable by the Blodgetts' Rule 60(a) motion and under the principles announced in Stanger, Richards, Lindsay and Meagher.

2. Alco's Erroneous Citation Of Authority Deprives It Of Any Support For Its Argument That It Is Not Bound By Orders And Judgments Entered In Blodgett I And Blodgett II.

Although Alco recognizes the binding effect of the Blodgetts' 1974 lis pendens (see App. Brief, p. 9.), it argues that because the Dismissal Order in Blodgett I and Blodgett II did not contain provisions quieting title in the Blodgetts it is not precluded from reaching and executing on the Store Tract. To support its position, Alco cites 54 C.J.S., Lis Pendens, §39(b), quoting only the following language:

. . . a lis pendens purchaser is not bound where there is an agreed judgment not based on the relief relied on in the suit, . . . (Emphasis added).

(See App. Brief at 9.)

The actual language from 54 C.J.S., Lis Pendens, §39(b) at 612 gives Alco absolutely no authority or support for its position. The sentence from 54 C.J.S. at 612, actually and correctly reads:

Also, a lis pendens purchaser is not bound where there is an agreed judgment not based on the grounds for relief relied on in the suit, or where the parties by agreement include in the judgment lands not referred to in the pleadings. (Emphasis added).

Thus, according to C.J.S., it is only when a judgment is entered pursuant to a compromise and settlement that is not based on the grounds relied upon in the suit that a lis pendens purchaser is not bound by the judgment. It is therefore inconsequential whether the return of the property to the plaintiff is effected by a judgment quieting title or a judgment authorizing the return of the property pursuant to quitclaim deeds, and 54 C.J.S. would not argue to the contrary so long as the grounds for the result are the same as those pleaded.

In Blodgett I and Blodgett II, the Blodgetts sought to terminate the named defendants' interest in the Store Tract on the grounds that the defendants in those actions held title to the Store Tract improperly and unlawfully. At no time have the Blodgetts ever changed the grounds for the relief they sought. The settlement approved on the record reflected their position and thus is not defeated by Alco's unsupported argument.

III. BECAUSE LORIN PACE DISCHARGED THE JUDGMENTS OBTAINED BY ZIONS AGAINST BETTY PURCELL IN ZIONS I AND ZIONS II, ZIONS AND ALCO HAVE NO JUDGMENT LIEN OR CLAIM TO ENFORCE AGAINST THE STORE TRACT.

In Zions I, Zions obtained a judgment against Lorin Pace in the amount of \$31,064.52, which included \$27,262.59 (the amount of the promissory note, see Ad. 12) plus interest and attorney fees. Thereafter, on August 13, 1976, Zions obtained a default judgment in Zions I against Betty Purcell for the same amount.

On May 2, 1979, the trial court set aside Zions' judgment against Betty Purcell in Zions I. On June 1, 1979, Zions obtained a second judgment against Betty Purcell for \$27,262.59, which does not include interest or attorney fees. Notwithstanding the existence of two judgments, (one against Lorin Pace and the second against Betty Purcell, the two makers of the note), Zions had only one debt for \$27,262.59 due and owing to it, and that is all Zions ever claimed (except interest and attorney fees). Zions purportedly assigned two judgments to Alco: the May 16, 1979 judgment against Betty Purcell and the June 1, 1979 judgment for \$27,262.59 against Betty Purcell.

Lorin Pace's liability to Zions arose from his status as a co-maker on a promissory note, as alleged by Zions in its complaint. Lorin Pace never answered that complaint but permitted a default to be entered against him. The allegations in Zions I, having never been disputed, must be taken as true.

Since he was a co-maker of the note, Lorin Pace's payment to

Zions satisfied the judgment against Betty Purcell. He also satisfied all but \$3,801.93 of the judgment against him in Zions I. Although Zions has not filed a satisfaction of judgment pursuant to Rule 58B of the Utah Rules of Civil Procedure, Lorin Pace's payment to Zions nevertheless discharged Betty Purcell's obligations. These facts are undisputed.

The Utah law of Obligations, Utah Code Ann. §15-4-3, provides:

The amount of value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint or of joint and several obligors, in whole or in partial satisfaction of their obligations shall be credited to the extent of the amount received on the obligation of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

Since Lorin Pace satisfied the judgments obtained by Zions against Betty Purcell, Zions had absolutely nothing to assign to Alco. Consequently, Alco took nothing by virtue of the Assignment of Judgments.

Having satisfied Betty Purcell's liability under the promissory note for which she was jointly and severally liable, Lorin Pace's only remedy, which he seems to have given to his son's partnership, is to seek contribution from Betty Purcell, not to take property from the Blodgetts. Lorin Pace could recover payment from the Blodgetts only if he were an accommodation party and surety and only if Betty Purcell had an interest in the Store Tract.

Nothing in the records of any of the cases related to this proceeding demonstrates that Lorin Pace acted as an accommodation party or surety in executing the promissory note on which Zions based its default judgments against Betty Purcell and him as co-makers.

The use of the Assignment of Judgment between Zions and Alco is nothing more than a thinly veiled attempt to place Lorin Pace in the position of an accommodation party or surety at the Blodgetts' expense. Lorin Pace's remedy is against Betty Purcell or property she now owns. This Court should not permit Lorin Pace either directly or indirectly to reach the Store Tract. For whatever reason, Lorin Pace and Betty Purcell entered their loan agreement with Zions, but Lorin Pace cannot now, some 15 years after he signed the note, remedy a grievance against Betty Purcell by letting his son try to take land from the Blodgetts. See Utah Code Ann. §15-4-3; Edmond v. Fairfield Sunrise Village, Inc., 132 Ariz. 142, 644 P.2d 296 (Ariz. App. 1982); Litwin v. Barrier, 6 Kan.App.2d 182, 626 P.2d 1232 (Kan. App. 1981) and cases and authorities cited therein.

Betty Purcell's corporation, Raco, set the Blodgetts up for a loss in 1971 by representing to Valley Bank without the Blodgetts' knowledge or acquiescence that Valley Bank could take a security interest in the Store Tract; Valley Bank sent the Blodgetts only a promissory note and not the full documentation on the loan, and Valley Bank's appointed trustee did nothing to

protect the Blodgetts at the sale when Betty Purcell's former husband was the high bidder on the property.

Lorin Pace and Betty Purcell made their promissory note to Zions July 7, 1971. (See R. 9 ¶ 2; Ad. 12) Lorin Pace was thus already associated with Betty Purcell at the time Raco authorized Valley Bank to use all of the Blodgetts' property as security for Raco's loan. The Blodgetts attended the closing on the Raco loan which they unwittingly secured on November 5, 1971. Lorin Pace notarized the document by which Joe Martch, Betty Purcell's former husband, quitclaimed a one-half undivided interest in the Store Tract to Betty Purcell's wholly owned company Water Park. Lorin Pace, as attorney defending Betty Purcell in the Blodgett I quiet title proceeding, had actual notice of the Blodgetts' 1974 lis pendens. As a co-defendant in the Zions I suit on his promissory note, he must have known that Zions took a default judgment against Betty Purcell. He must have expected such a development when he withdrew as her counsel in Blodgett I, and it is likely that he knew when he paid the judgment in 1984 and his son's unregistered partnership took an assignment of his co-maker's judgment on the same date. Consequently, Lorin Pace and Alco, like Zions through which they attempt to trace a right to the property, are subject to the Blodgetts' lis pendens, just as Betty Purcell was. See Bagnall, supra, 579 P.2d at 916; Utah Code Ann. §15-4-3.

Alco's foreclosure attempts should never have been made. The Blodgetts have gone through enough trouble already to

protect their rights to the Store Tract; the merits of this case require that the judgment in their favor be affirmed.

CONCLUSION

For the foregoing reasons, the Blodgetts respectfully request that this appeal be dismissed, that the judgment rendered by the trial court in their favor be affirmed, that the Court take judicial notice of the record and documents in the prior actions, that they be awarded their costs, disbursements and counsel fees on this action, that they be awarded such other and further relief as may be just and proper and that, after more than a decade of costs and harrassment, title in the Store Tract be quieted in them.

DATED: September 2, 1986

Respectfully submitted,

KIRTON, McCONKIE & BUSHNELL

By: Lester A. Perry
Lester A. Perry

By: James J. Cassity
James J. Cassity

By: M. Karlynn Hinman
M. Karlynn Hinman

Attorneys for WILLIAM D.
BLODGETT and FLORENCE
G. BLODGETT, Plaintiffs-
Respondents

CONTENTS OF THE ADDENDUM

	Addendum Page
Utah Code Annotated: Statutory Provisions and Rule.....	1
Utah Code Ann. § 15-4-3.....	1
Utah Code Ann. § 42-2-5.....	1
Utah Code Ann. § 42-2-10.....	1
Utah Code Ann. § 78-40-2.....	2
Utah Rules of Evidence Rule 201(a),(b),(d),(f).....	2
Utah Rules of Civil Procedure Rule 60(a).....	3
Certificate, Department of Business Regulation, August 25, 1986 (DBA Alco Investment expired).....	4
Chronological List of Events.....	6
Quitclaim Deed, November 8, 1973 (Martsch to Water Park).....	10
Letter from Zions' Counsel, August 18, 1986.....	11
Promissory Note, July 7, 1971 (Lorin Pace and Betty Purcell to Zions).....	12
Motion for Leave to Withdraw as Counsel, March 16, 1976 (Lorin Pace in Blodgett I).....	13
Complaint, March 13, 1979 (Zions II).....	14
Order to Consolidate, April 11, 1979 (Blodgett I and Blodgett II).....	16
Deafault Judgment, May 1, 1979 (Water Park in Blodgett I and Blodgett II).....	18
Minute Order, December 7, 1979 (Blodgett I and Blodgett II).....	22
Order and Judgment of Quiet Title, August 13, 1986 (Blodgett I and Blodgett II).....	23
<u>Hoyt v. American Traders Inc.</u> , 76 Or.App. 253, 709 P.2d 1090 (Orr. App. 1985) [appeal pending in this case].....	26
Judgment by Default, March 3, 1976 (Lorin N. Pace in Zions I).....	31

UTAH CODE ANNOTATED: STATUTORY PROVISIONS AND RULES

15-4-3. Payments by co-obligor.

The amount or value of any consideration received by the obligee from one or more of several obligors, or from one or more of joint or of joint and several obligors, in whole or in partial satisfaction of their obligations shall be credited to the extent of the amount received on the obligation of all co-obligors to whom the obligor or obligors giving the consideration did not stand in the relation of a surety.

42-2-5. Certificate of assumed and of true name - Contents - Execution - Filing.

Every person or persons who shall carry on, conduct, or transact business in this state under an assumed name, whether such business be carried on, conducted, or transacted as an individual, association, partnership, corporation, or otherwise, shall file with the Division of Corporations and Commercial Code a certificate setting forth the name under which such business is, or is to be carried on, conducted, or transacted, and the full true name, or names of the person or persons owning, and the person or persons carrying on, conducting, or transacting such business, the location of the principal place of business, and the post-office address, or addresses of such person or persons. Such certificate shall be executed by the person or persons owning, and the person or persons carrying on, conducting, or transacting such business, and shall be filed not later than 30 days after the time of commencing to carry on, conduct, or transact said business.

42-2-10. Penalties.

Any person or persons who shall carry on, conduct or transact any such business under an assumed name without having complied with the provisions of this act shall not sue, prosecute or maintain any action, suit, counterclaim, cross complaint or proceeding in any of the courts of this state until the provisions of this chapter have been complied with.

78-40-2. Lis pendens.

In any action affecting 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 or 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.

UTAH RULES OF EVIDENCE

Rule 201. Judicial Notice of Adjudicative Facts.

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

* * *

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

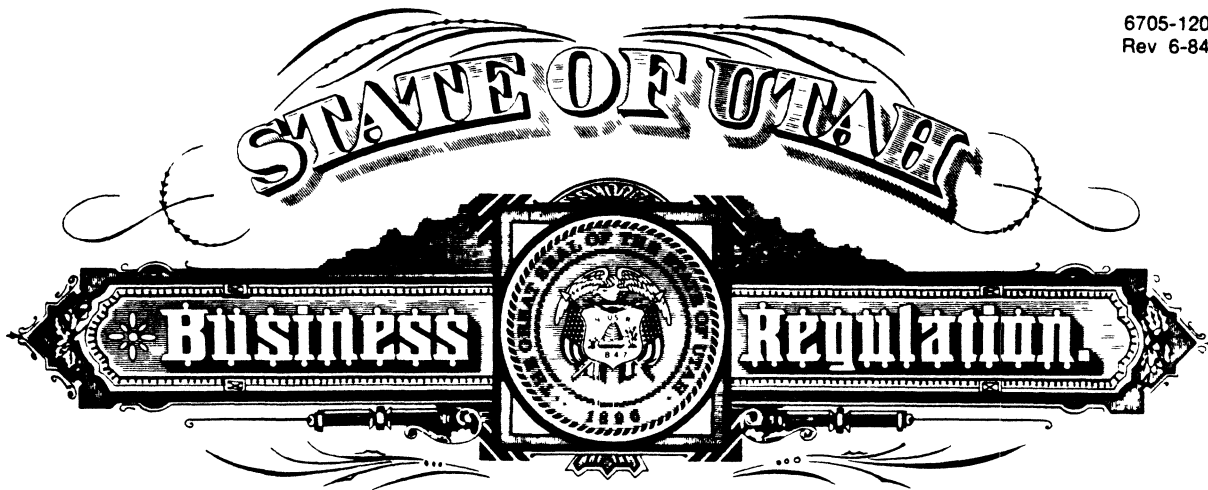
* * *

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

UTAH RULES OF CIVIL PROCEDURE

Rule 60. Relief from Judgment or Order

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.



THE DEPARTMENT OF BUSINESS REGULATION, DIVISION OF CORPORATIONS AND COMMERCIAL CODE CERTIFIES THAT attached is a full, true and correct copy of the Application To Transact Business Under An Assumed Name, DBA for **ALCO INVESTMENT**, filed with this office on September 22, 1976, by **ALLAN D. MCCOMB** and **COLLEEN C. MCCOMB**. Said DBA expired on September 22, 1984.

File #20794
AS APPEARS OF RECORD IN THE DIVISION OFFICE.



Dated this 25th day of
August A.D. 19 86


Director, Division of Corporations and
Commercial Code

CHRONOLOGICAL LIST OF EVENTS

1969	Blodgetts lease Car Wash Tract to Raco and agree to pledge that tract only for loan to finance installation	
07/07/71		Lorin Pace and Purcell make demand note to Zions (\$27,262.59)
11/05/71	Blodgetts close loan with Valley Bank, unknowingly pledge Car Wash Tract <u>and</u> Store Tract, sign note	
	Raco defaults on loan	
1973	Valley Bank via Ashworth, Trustee, forecloses both tracts; Purcell's ex-husband Martsch bids high for both tracts	
10/12/78	Trustee deed issued to Martsch	
	Martsch claims ownership to Blodgetts	
11/08/73	Martsch coveys 1/2 intrest in Store Tract to Purcell's Water Park; Lorin Pace notarizes quit claim deed	
11/04/74	Blodgetts sue Purcell, Martsch and others, file lis pendens (<u>Blodgett I</u>)	
	Summary judgment against Blodgetts who appeal	
01/16/76		Zions sues Purcell and Lorin Pace for demand note (<u>Zions I</u>)

<u>Date</u>	<u>Blodgett Transactions and Suits</u>	<u>Zions/Pace/Purcell/Alco Transactions and Suits</u>
03/03/76		Zions takes default against Lorin Pace (\$31,064.52)
08/13/76		Zions takes default against Purcell (\$31,064.52)
09/30/77	Water Park is dissolved; Purcell takes its assets, becomes owner of Store Tract	
1978	Utah Supreme Court orders trial in <u>Blodgett I</u> Blodgetts sue Water Park and Purcell to terminate their interests in Store Tract (<u>Blodgett II</u>)	
03/13/79		Zions sues Purcell to enforce judgment in <u>Zions I</u> (<u>Zions II</u>)
04/11/79	<u>Blodgett I</u> and <u>Blodgett II</u> consolidated for trial	
05/01/79	Default order conveys rights of Water Park in Store Tract to Blodgetts	
05/02/79		Default in <u>Zions I</u> against Purcell vacated
05/16/79		Zions obtains order that Water Park was dissolved; Purcell, as sole owner, took its assets to become sole owner of Store Tract on Water Park's dissolution Sept. 30, 1977; Zions may docket lien against Store Tract effective September 30, 1977

<u>Date</u>	<u>Blodgett Transactions and Suits</u>	<u>Zions/Pace/Purcell/Alco Transactions and Suits</u>
05/29/79	Martsch quitclaims 1/2 interest in Store Tract to Blodgetts	
06/01/79		Zions takes second default against Purcell in <u>Zions I</u> (\$27,262.59)
12/07/79	<u>Blodgett I</u> and <u>II</u> settled on record: a) quit claims on Store Tract to Blodgetts; b) damages to Blodgetts; c) quiet title to Blodgetts; d) suits dismissed with prejudice	
01/15/80	Purcell, Raco, Water Park quitclaim interest in Store Tract to Blodgetts	
05/05/80	Dismissal order in <u>Blodgett I</u> and <u>II</u> (corrected 8/13/86 to match terms in record of December 7, 1979) - title quieted to Blodgetts	
1984		Zions renews judgment against Lorin Pace and Purcell (<u>Zions III</u>)
08/31/84		Lorin Pace pays Zions \$27,262.59 (face amount of note)
08/31/84		Zions assigns judgment to Alco
09/22/84		Alco dba expires and not renewed
04/19/85	Alco notifies Blodgetts of intent to execute judgment against Store Tract	
05/24/85	Blodgetts sue Zions, S. Pace, McComb and Alco (<u>Blodgett III</u>); Blodgetts file lis pendens Zions denies interest in Store Tract	

<u>Date</u>	<u>Blodgett Transactions and Suits</u>	<u>Zions/Pace/Purcell/Alco Transactions and Suits</u>
01/16/86	Blodgetts obtain summary judgment against Alco et al.; appeal taken	
08/13/86	Trial court corrects clerical error in judgment, effective May 5, 1980 to quiet title in Blodgetts	

Recorded at Request of *Grant 3144 Park St 54166* NOV 8 1973
at *17* M Fee Paid \$ *2.50* JERALAN MAN IN SALT LAKE COUNTY RECORDER
by *John Stahl* Dep Book _____ Page _____ Ref _____
Mail tax notice to _____ Address _____

2581007 QUIT-CLAIM DEED

JOSEPH MARTSCH
of Heyburn, County of Minidoca, State of ~~North Dakota~~ hereby
QUIT CLAIM S to WATER PARK CORPORATION, a Utah Idaho
Corporation,

of Salt Lake City, Utah, grantee
TEN DOLLARS AND OTHER CONSIDERATION----- DOLLARS,
A one-half undivided interest in
the following described tract of land in Salt Lake County,
State of Utah

BEGINNING at a point in the center of Highland Drive on the
projected North line of Vine Street (6100 South), said
point being, North 668.9 feet, more or less, and West 215.3
feet, more or less, from the Southeast corner of Section 16,
Township 2 South, Range 1 East, Salt Lake Base and Meridian,
and running thence North 0° 20' 50" East along center line
of Highland Drive 154.0 feet; thence South 89° 15' 45" West
197.17 feet; thence South 0° 17' 45" West 154.0 feet to North
line of Vine Street (6100 South); thence North 89° 15' 45"
East along said North line 197.03 feet to the point of begin-
ning.

EXCLUDING FROM said above described property that certain
property taken by Salt Lake County as a part of the Cotton-
wood Expressway, Project S-0160-1, and particularly des-
cribed as follows: Beginning at the intersection of grantors
West property line and centerline of survey at Engineer's
Station 176+92.29, which point is North 668.90 feet and West
484.09 feet from the Southeast corner of Said Section 16;
and tangency to the curve of said Engineer's Station 176+92.29
bearing South 38° 54' 40" East; thence North 116.0 feet to

WITNESS the hand of said grantor, this
November _____, A D one thousand nine hundred and seventy-three

Signed in the presence of } *Joseph Martsch*
Louis Stahl }

STATE OF UTAH, }
County of _____ }
On the _____ day of November A D one
thousand nine hundred and seventy-three personally appeared before me JOSEPH



the grantor of the foregoing instrument, who duly acknowledge to me that he executed the
Notary Public.

My commission expires _____ Address: _____
* point of a 2167.0 foot radius curve to the right; thence Southeasterly along
the arc of said curve a distance of 150.20 feet, more or less, to the North
line of 6100 South St.; thence West along the North line of 6100 South Street
95.41 feet, more or less to grantors west boundary line, the place of begin-
ning, Less Tract deeded to Salt Lake County and Street.

B003454 m: 444

CALLISTER, DUNCAN
& NEBEKER

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
SUITE 800 KENNECOTT BUILDING
SALT LAKE CITY, UTAH 84133
TELEPHONE 801-530-7300
TELECOPIER 801-364-9127

August 18, 1986

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W. CLARK BURT
L. S. MCCULLOUGH, JR.
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W. WALDAN LLOYD
H. RUSSELL HETTINGER
ROBERT S. PRINCE
JEFFREY L. SHIELDS
STEVEN E. TYLER
R. DUFF THOMPSON

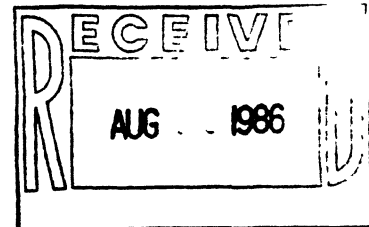
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ANDREW C. HESS⁴
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E. DOUGLAS CLARK
PAUL R. INCE⁵
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LYNDA COOK
JOHN H. REES
MARK H. EGAN
P. BRYAN FISHBURN
SHERYL L. SIMPSON
MICHELLE J. SCOTT

¹ALSO MEMBER ARIZONA BAR
²ALSO MEMBER CALIFORNIA BAR
³ALSO MEMBER FLORIDA BAR
⁴ALSO MEMBER MISSOURI BAR
⁵MEMBER MISSOURI BAR ONLY
*REGISTERED PATENT ATTORNEY

OF COUNSEL
WALLACE R. BENNETT
PAUL B. CANNON
FRED L. FINLINSON
EARL P. STATEN
PHILIP L. WARD
JOHN W. WELCH

LOUIS H. CALLISTER, SR.
(1904-1983)

TO CALL WRITER DIRECT
801-530-7332



Lester A. Perry
KIRTON, McCONKIE & BUSHNELL
330 South Third East
Salt Lake City, Utah 84111

Re: Zions First National Bank v. Betty Pursell,
Alexander and Lorin N. Pace, Civil Action No.
232782 and William Blodgett, et ux. v. Zions
First National Bank et al., Civil Action No.
C85-3348

Dear Mr. Perry:

Enclosed please find a copy of the Promissory Note dated July 7, 1971 in the principal sum of \$27,262.59 executed by Betty Pursell Alexander and Lorin N. Pace. As you may know, a Default Judgment was entered against Mr. Pace on March 3, 1976 for the principal amount of \$31,064.52 plus interest at the rate of eight per cent, attorney's fees in the amount of \$2500 and costs in the amount of \$24.60. This Judgment was subsequently renewed on March 14, 1984 in a case entitled "Zions First National Bank v. Lorin N. Pace", Civil Action No. C84-0299. The Judgment was subsequently satisfied by Mr. Pace on August 31, 1984.

Please let me know if you need any additional information.

Very truly yours,

CALLISTER, DUNCAN & NEBEKER

Steven R. Ellinwood
Steven R. Ellinwood

SRE/dt
Enclosure

27,262.59

PROMISSORY NOTE
COLLATERAL — INDIVIDUALS AND PARTNERSHIP

LOUIS N. PACE & BETTY PURSELL
ALEXANDER

Salt Lake City, UTAH

July 7, 1971

Upon Demand

AFTER DATE, FOR VALUE RECEIVED

THE UNDERSIGNED, JOINTLY AND SEVERALLY, PROMISE TO PAY TO THE ORDER OF ZIONS FIRST NATIONAL BANK, A NATIONAL ASSO-
CIATION, AT ITS Head Office IN Salt Lake City, UTAH, THE SUM OF
Twenty Seven Thousand Two Hundred Sixty Two & -----59/100 DOLLARS

IN LAWFUL MONEY OF THE UNITED STATES WITH INTEREST THEREON IN LIKE MONEY AT THE RATE OF 10 PER CENT PER ANNUM,
BEFORE AND AFTER JUDGMENT, PAYABLE on demand FROM DATE UNTIL PAID

If the holder deems itself insecure, or if default be made in payment of the principal or if the interest be not paid when due, time being the essence hereof,
then the entire unpaid balance, with interest as aforesaid, shall at the election of the holder hereof and without notice of said election, at once become due and
payable.

If this note becomes in default as aforesaid, the undersigned, jointly and severally, agree to pay to the holder hereof collection costs, including reasonable
attorneys' fees and legal expenses, in addition to all other sums due hereunder.

The undersigned and all endorsers, sureties and guarantors hereof hereby jointly and severally waive presentment for payment demand, protest, notice of pro-
test and of non-payment and of dishonor, and consent to extensions of time, renewals, waivers or modifications without notice and further consent to the release of
any security, or any part thereof, with or without substitution.

This note is secured by a Security Agreement on file with Zions First National Bank

NO. 101389 DUE 12/31/71 RENEWED 12/31/71
P. O. 431 South 3rd East PHONE 461-9623
Salt Lake City, Utah

Betty Purcell Alexander
Louis N. Pace

CL-3 REV 9-70 BM

Exhibit "A"

LORIN N. PACE
Attorney for Defendants Betty Purcell and
Raco Car Wash Systems, Inc.
431 South Third East
Salt Lake City, Utah 84111
Telephone: 328-9623

FILMED

P. Ashton

IN THE DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

WILLIAM D. BLODGETT and
FLORENCE G. BLODGETT, his wife,

Plaintiffs,

vs.

JOE MARTSCH, BETTY PURCELL, aka
BETTY PURCELL MARTSCH, DOYLE NEASE,
RACO CAR WASH SYSTEMS, INC., a Utah
corporation, WAYNE A. ASHWORTH, Trustee,
KARL W. TENNEY, VALLEY BANK and TRUST
COMPANY, a Utah banking corporation,
FIRST SECURITY BANK OF IDAHO, N.A.,
STATE OF UTAH, and JOHN DOES 1 through
10,

Defendants.

MOTION FOR LEAVE TO
WITHDRAW AS COUNSEL

Civil No. 223407

A conflict of interest having developed, LORIN N. PACE,
moves the above entitled Court for leave to withdraw as Counsel
in representation of Betty Purcell, aka Betty Purcell Martsch.

Lorin N. Pace

LORIN N. PACE
Attorney at Law
431 South Third East
Salt Lake City, Utah 84111

CERTIFICATE OF MAILING: I hereby certify that a true and correct
copy of the foregoing MOTION and the attached NOTICE OF MOTION was
mailed, postage prepaid, this 16 day of March, 1976, to Donald
Sawaya, Attorney for Defendant Ashworth, 2805 South State Street,
Salt Lake City, Utah 84115; Harry D. Pugsley, Attorney for
Defendant Martsch, Suite 400 315 East Second South, Salt Lake City,
Utah, 84111; Mr. Irving H. Biele, Attorney for Valley Bank & Trust
Company and Tenney, 80 West Broadway, Suite 300, Salt Lake City,
Utah 84010; Raymond W. Gee, Attorney for Plaintiffs, 336 South
Third East, Salt Lake City, Utah 84111.

Lorin N. Pace

5
11947
FILMED

MAY 13 1979

W. STEPHEN
Gandy
DEPUTY CLERK

John H. Allen
CALLISTER, GREENE & NEBEKER
Attorney for Plaintiff
800 Kennecott Building
Salt Lake City, Utah 84133
Telephone: 531-7676

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

ZIONS FIRST NATIONAL BANK, :
 :
Plaintiff, : COMPLAINT
 :
vs. :
 :
BETTY PURSELL ALEXANDER : Civil No. C-79-
aka BETTY PURSELL MARTSCH, :
 :
Defendant. :

C79- 1685

Plaintiff complains of defendant and for cause of action alleges:

1. On August 13, 1976, plaintiff obtained a judgment against defendant Betty Pursell Alexander in the District Court of Salt Lake County, State of Utah, in the matter of Zions First National Bank vs. Betty Pursell Alexander, et al., Civil No. 232782. By virtue of that judgment, plaintiff has a lien upon all real property of defendant in Salt Lake County, Utah.

2. Water Park Corporation, a Utah corporation, was dissolved on September 30, 1977. On that date it was the owner of the following described real property located in Salt Lake County, State of Utah, to-wit:

Beginning at a point in the center of Highland Drive on the projected North line of Vine Street (6100 South), said point being North 668.9 feet, more or less, and West 215.3 feet, more or less, from the Southeast corner of Section 16, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 0°20'50" East along center line of Highland Drive 154.0 feet; thence South 89°15'45" West 197.17 feet; thence South 0°17'45" West 154.0 feet to North line of Vine Street (6100 South); thence North 89°15'45" East along said North line 197.03 feet to the point of beginning.

Excluding from said above-described property that certain property taken by Salt Lake County as a part of the Cottonwood Expressway, Project S-0160-1, and particularly described as follows: Beginning at the intersection of grantors West property line and center-line of survey at Engineer's Station 176+92.29, which point is North 668.90 feet and West 484.09 feet from the Southeast corner of said Section 16; and tangency to the curve of said Engineer's Station 176+92.29 bearing South 38°54'40" East; thence North 116.0 feet to a point on a 2367.0 foot radius curve to the right; thence Southeasterly along the arc of said curve a distance of 150.20 feet, more or less, to the North line of 6100 South Street; thence West along the North line of 6100 South Street 95.41 feet, more or less, to grantors West boundary line, the place of beginning, less Tract deeded to Salt Lake County and Street.

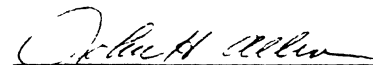
3. Defendant was and is the sole shareholder of Water Park Corporation, and therefore is or will be the owner of the above-described real property.

4. By virtue of the ownership of the above-described real property the same is subject to the judgment lien of plaintiff, and said lien should be foreclosed in accordance with the laws of the State of Utah.

WHEREFORE, plaintiff prays that the court issue its Decree foreclosing plaintiff's judgment lien in accordance with the laws of the State of Utah, and for such other and further relief as the court deems proper.

DATED this 13 day of March, 1979.

CALLISTER, GREENE & NEBEKER



John H. Allen
Attorney for Plaintiff
800 Kennecott Building
Salt Lake City, Utah 84133

Plaintiff's address:

One South Main Street
Salt Lake City, Utah 84111

STATE OF UTAH)
COUNTY OF SALT LAKE) ss
I, THE UNDERSIGNED CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK. WITNESS MY HAND AND SEAL OF SAID COURT THIS 21st DAY OF AUGUST 19 80
H. DIXON HINDLEY, CLERK
BY Mark Fausch DEPUTY

FILMED

FILED IN CLERK'S OFFICE
Salt Lake City, Utah

APR 11 1979

William T. Blodgett
W. Blodgett & Co.
E. City Clerk

JOSEPH C. RUST
KIRTON & McCONKIE
Attorneys for Plaintiffs
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH
* * * * *

WILLIAM T. BLODGETT and
FLORENCE G. BLODGETT, his wife,)

Plaintiffs,)

vs.

JOE MARTSCH, et al.,)

Defendants.)

ORDER TO CONSOLIDATE

AND)

WILLIAM T. BLODGETT and
FLORENCE G. BLODGETT, his wife,)

Plaintiffs,)

Civil No. 223407 and
No. C-78-8017

vs.

BETTY PURCELL a/k/a)
BETTY PURCELL MARTSCH,
and WATER PARK CORPORA-)
TION, a Utah corporation,)

Defendants.)

* * * * *

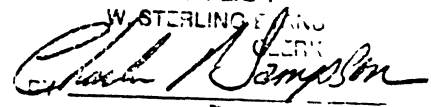
Plaintiffs' Motion to consolidate Case #C-78-8017 with Case #223407 having come on for hearing before the Honorable Judge Christine M. Durham on the 6th day of April, 1979 at the hour of 2:00 p.m. and the plaintiffs being represented by their counsel, Joseph C. Rust, and defendants Valley Bank & Trust and Tenney being represented by their counsel, Irving H. Biele, and none of the other defendants being present or represented and the court having heard the arguments of counsel,

IT IS HEREBY ORDERED that pursuant to Rule 42 of the Utah Rules of Civil Procedure, Case #C-78-8017 be and the same is hereby consolidated with Case #223407 to retain the presently

scheduled trial date of May 21, 1979. Counsel for plaintiffs is hereby directed that a copy of the Amended Complaint filed in Case #C-78-8017 be served on counsel for defendants in case #223407.

Dated this 11th day of April, 1979.


Christine M. Durham, Judge

ATTEST
W. STERLING E. AND
CLERK

Dated: 1979

JUDGMENT

FILMED

MAY 1 11 45 AM '79

W. STEPHEN EVANS, CLERK
COURT
BY *W. Evans*
DEPUTY CLERK

JOSEPH C. RUST
KIRTON & McCONKIE
Attorneys for Plaintiffs
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

WILLIAM D. BLODGETT and
FLORENCE G. BLODGETT,

Plaintiffs,

vs.

BETTY PURCELL aka
BETTY PURCELL MARTSCH,
and WATER PARK CORPORATION,
a Utah Corporation,

Defendants.

)

)

)

)

)

21-152 NO. 2682
5-7-79 - 9:01 A.M.

JUDGMENT BY DEFAULT

Civil No. 223407
and C-78-8017

In this action the defendant Water Park Corporation, having been regularly served with process, and having failed to appear and answer the plaintiffs' complaint filed herein, the legal time for answering having expired, and the default of the said defendant in the premises having been duly entered according to law, now upon application of said plaintiffsto the Third Judicial District Court of Salt Lake County, judgment is hereby entered against said defendant, in pursuance of the prayer of said complaint.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that all of the right, title and interest of defendant Water Park Corporation in and to that certain property in Salt Lake County, State of Utah described in the complaint as parcel 1 and parcel 2 and more specifically described on the attached Exhibits A and B, attached hereto and made a part hereof, be and the same is hereby conveyed and deeded over to plaintiffs William D. and Florence G. Blodgett, his wife. It is further ordered that all rental monies received by defendant Water Park Corporation from

the said parcel 2 be paid over to plaintiffs together with interest thereon at the rate of 8% per annum together with said plaintiffs' costs and disbursements in the amount of \$14.00.

Judgment rendered May 1, 1979

Christine M. Durham
J U D G E

ATTEST my hand, and seal of said Court, this 1 day of

May, 1979.

W. STERLING EVANS

By: W. Sterling Evans

Filed _____

EXHIBIT A

COMMENCING on the North line of Vine Street, 215.3 feet West and 668.9 feet North and South 89° 15' 45" West 197.03 feet from the Southeast corner of Section 16, Township 2 South, Range 1 East, Salt Lake Meridian, South 89° 15' 45" West 71.67 feet; North 0° 20' 50" East 154 feet; North 89° 15' 45" East 71.53 feet; South 0° 17' 45" West 154 feet to BEGINNING, less tract deeded to Salt Lake County.

To include rights of egress and ingress to Highland Drive on both sides of the existing building and exclude area occupied by sign to the west of existing building.

EXHIBIT B

BEGINNING at a point in the center of Highland Drive on the projected North line of Vine Street (6100 South), said point being North 668.9 feet, more or less, and West 215.3 feet, more or less, from the Southeast corner of Section 16, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence North $0^{\circ} 20' 50''$ East along center line of Highland Drive 154.0 feet; thence South $89^{\circ} 15' 45''$ West 197.17 feet; thence South $0^{\circ} 17' 45''$ West 154.0 feet to North line of Vine Street (6100 South); thence North $89^{\circ} 15' 45''$ East along said North line 197.03 feet to the point of Beginning.

EXCLUDING from said above described property that certain property taken by Salt Lake County as a part of the Cottonwood Expressway, Project S-0160-1, and particularly described as follows: Beginning at the intersection of grantors West property line and centerline of survey at Engineer's Station 176+92.29, which point is North 668.90 feet and West 484.09 feet from the Southeast corner of said section 16; and tangency to the curve of said Engineer's Station 176+92.29 bearing South $38^{\circ} 54' 40''$ East; thence North 116.0 feet to a point of a 2367.0 foot radius curve to the right; thence Southeasterly along the arc of said curve a distance of 150.20 feet, more or less, to the North line of 6100 South Street; thence West along the North line of 6100 South Street 95.41 feet, more or less, to grantors west boundary line, the place of beginning. Less tract deeded to Salt Lake County and Street.

FILMED

THIRD JUDICIAL DISTRICT
COUNTY OF SALT LAKE - STATE OF UTAH

William D. Blodgett
Plaintiff

vs

Joe Mantzsch
Defendant

MINUTE ORDER:

Case:

Time:

Date:

223407

28-8017

Dec-7, 1979

P. Atty J. Rust - D. Bushnell

Hon. Baldwin

Judge

D. Atty R. Barker - W. Ellett

Shewell

Clerk

H. Biele - R. Haslam

Levens

Reporter

Bell

Bailiff

ACTION TAKEN:

☐ Default Judgment _____ Summons

Default of debt entered.

Pltfs Counsel Sw & Ex _____

Doc. proof offered, admitted & withdrawn

Pltf is granted a Judgment as prayed.

☒ Based upon ~~written~~ stipulation of respective counsel, court orders: The within case settled as set out in the Record.

☐ Based upon motion of pltfs or defts counsel, court orders _____

☐ Based on the failure of debt to appear in response to an order of the court and on motion of pltfs counsel, court orders _____ / _____ shall issue for debt. Returnable _____ Bail _____

☐ Based on written stipulation of respective counsel/motion of plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice.

☐ Based on written motion of Pltfs counsel, court orders
Deft to ans conc prop on _____ at _____

☐ Based on _____ motion of pltfs counsel, court orders
Deft to show cause on _____ at _____

☐ Based on motion of pltfs counsel, pltfs _____
is amended and made returnable on _____ at _____

☐ It appearing to the court that a writ of garnishment was issued in the proper form and an answer filed stating that the garnishee is indebted to the defendant. It is ordered that the defendant have and recover of the garnishee _____

for the use and benefit of the plaintiff in the sum of \$ _____
STATE OF UTAH) ss
COUNTY OF SALT LAKE)

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 21st DAY OF AUGUST 19 86

H. DIXON HINDLEY, CLERK

BY Mark Fairclough DEPUTY

Recorded **AUG 15 1986** at **2:11 P**^m FILED IN CLERK'S OFFICE
Request of _____ SALT LAKE COUNTY, UTAH

KATIE L. DIXON, Recorder
Salt Lake County, Utah

AUG 13 11 34 AM '86

\$ _____ By _____ Deputy H. DIXON HINDLEY CLERK
REF. **4246418** 3rd DIST. COURT
BY *Charles Johnson*
DEPUTY CLERK

Lester A. Perry - A2571
Robert M. Dyer - A0495
KIRTON, McCONKIE & BUSHNELL
330 South Third East
Salt Lake City, Utah 84111
Telephone: (801) 521-3680

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

WILLIAM D. BLODGETT and
FLORENCE G. BLODGETT, his wife,

Plaintiffs,

vs.

JOE MARTSCH, BETTY PURCELL,
aka BETTY PURCELL MARTSCH,

Defendants.

ORDER AND JUDGMENT
OF QUIET TITLE

Civil No. 223407 and
C-78-8017 (Consolidated)

Be it remembered that Plaintiffs' Motion To Set Aside Order of Dismissal and Enter Judgment of Quiet Title came for hearing before the Honorable David B. Dee, of the above entitled court on May 2, 1986, at the hour of ten o'clock a.m.

Plaintiff was present by and through it's counsel of record, Mr. Lester A. Perry, of Kirton, McConkie & Bushnell. Defendant, Betty Purcell, aka Betty Purcell Martsch, was not present, either in person or through counsel; said defendant having been previously served with Plaintiffs' Motion and the associated pleadings by personal service on April 1, 1986.

The court being fully advised in the premises and having considered the Motion of plaintiff hereby orders, adjudges and decrees:

1. The Order of Dismissal against defendant Betty Purcell, aka Betty Purcell Martsch, signed and entered May 5, 1980 by the Honorable Earnest F. Baldwin Jr., is hereby set aside.

2. Judgment is hereby entered against Betty Purcell, aka Betty Purcell Martsch, quieting Title of all right, title and interest of said defendant within the following identified real property in and to the plaintiffs', William D. Blodgett and Florence G. Blodgett. The real property to which this quiet title judgement applies is located within Salt Lake County, State of Utah, and is more particularly identified as:

Beginning at a point in the center of Highland Drive on the projected North line of Vine Street (6100 South), said point being North 668.9 feet, more or less, and West 215.3 feet, more or less, from the Southeast corner of Section 16, Township 2 South, Range 1 East, Salt Lake Base and Meridian, and running thence North 0°20'50" East along center line of Highland Drive 154.0 feet; thence south 89°15'45" West 197.17 feet; thence South 0°17'45" West 154.0 feet to North line of Vine Street (6100 South); thence North 89°15'45" East along said North line 197.03 feet to the point of beginnning.

Excluding from said above-described property that certain property taken by Salt Lake County as a part of the Cottonwood Expressway, Project S-0160-1, and more particularly described as follows: Beginning at the intersections of grantors West property line and centerline of survey at Engineer's Station 176+92.29, which point is North 668.90 feet and West 484.09 feet from the Southeast corner of said Section 16; and tangency to the curve of said Engineer's Station 176+92.29 bearing South 38°54'40" East; thence North 116.0 feet to a point on a 2367.0 foot radius

curve to the right; thence Southeasterly along the arc of said curve a distance of 150.20 feet, more or less, to the North line of 6100 South Street; thence West along the North line of 6100 South Street 95.41 feet, more or less, to grantors West boundary line, the place of beginning, less Tract deeded to Salt Lake County and Street.

3. This Order shall relate back to and be effective as of May 5, 1980.

4. The Complaint of plaintiffs against defendants Betty Purcell Martsch, Raco Car Wash Systems, Inc., and Water Park Corporation is hereby dismissed with prejudice and any and all counter-claims of said defendants are hereby dismissed with prejudice with the parties to bear their own costs.

5. The sum of \$2,450 on deposit with the court in this case be paid over to plaintiffs by the clerk of the court.

Dated this 13 day of August, 1986.

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

BY THE COURT:

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK.

WITNESS MY HAND AND SEAL OF SAID COURT THIS 13 DAY OF August 19 86

H. DIXON HINDLEY, CLERK

BY Charles J. Dixon DEPUTY

David B. Dee
David B. Dee, District Judge

ATTEST
H. DIXON HINDLEY
Clerk

By Charles J. Dixon
Deputy Clerk

PER CURIAM.

Reversed and remanded for reconsideration. *1000 Friends v. LCDC* (A32117), 76 Or.App. 33, 708 P.2d 370 (decided this date).



76 Or.App. 253

Martha W. HOYT, Appellant,

. v.

AMERICAN TRADERS, INC., a
Washington corporation,
Respondent.

84-1701-NJ-2; CA A33635.

Court of Appeals of Oregon,
In Banc.

Argued and Submitted May 13, 1985.

Resubmitted In Banc Sept. 11, 1985.

Decided Nov. 14, 1985.

Reconsideration Denied Jan. 10, 1986.

Review Allowed Jan. 28, 1986.

Wife brought action for declaratory judgment that her parcel of real property, which was awarded solely to her in marriage dissolution decree, was free of judgment lien filed against husband, who was former tenant by the entirety of parcel, during pendency of divorce proceedings. The Jackson County Circuit Court, L.L. Sawyer, J., entered summary judgment for judgment creditor, and wife appealed. The Court of Appeals, Buttler, J., held that doctrine of lis pendens applied in divorce action such that wife's claim on parcel, as reflected in divorce pleadings filed prior to judgment lien, was ahead of judgment creditor's lien.

Reversed and remanded.

1. Although this case was disposed of on the two motions for summary judgment, which seems questionable in a declaratory judgment action, there is no issue of material fact, the parties

Richardson, J., dissented and filed opinion, in which Warden and Van Hoomissen, JJ., joined.

1. Lis Pendens ¶15

Doctrine of lis pendens applies in dissolution cases if property is described with particularity in a pleading.

2. Lis Pendens ¶25(1)

Under doctrine of lis pendens, wife, who filed petition for marriage dissolution seeking sole title to real property held by wife and husband as tenants by the entirety and who was ultimately awarded title to property in dissolution decree, took property free of lien by husband's judgment creditor, which filed judgment lien against husband after wife filed dissolution petition. ORS 18.350, 93.740, 107.025, 107.036, 107.095(1)(e).

A.E. Piazza, Medford, argued the cause and filed the brief for appellant.

Richard A. Stark, Medford, argued the cause for respondent. With him on the brief was Stark and Hammack, Medford.

BUTTLER, Judge.

In this declaratory judgment action, plaintiff contends that her interest in a parcel of real property that was awarded to her in the decree dissolving her marriage should be free of the lien of a foreign judgment that defendant obtained against plaintiff's former husband and registered in the county where the property is located while the dissolution proceeding was pending. The trial court granted defendant's and denied plaintiff's motion for summary judgment¹ and entered judgment accordingly. Plaintiff appeals; we reverse.

The only facts before the trial court were those to which the parties stipulated, which we summarize: Prior to March 20, 1980, plaintiff Martha W. Hoyt and Edwin R.

having stipulated to the relevant facts. The only question presented was a legal one, and we treat the case as having been tried on stipulated facts.

Hoyt were husband and wife and the owners of certain real property as tenants by the entirety, described as follows, to-wit:

"Lot 1 in Block 3 of ROGUE VALLEY ESTATES SUBDIVISION in Jackson County, Oregon, according to the Official Plat thereof, now of record."

On March 20, 1980, plaintiff filed a petition for dissolution of her marriage and requested, among other things, that the real property, which was specifically described, be awarded to her as her sole and separate property.

On April 26, 1980, plaintiff's husband was served personally with a summons and the petition, and on July 16, 1980, defendant, American Traders, Inc., obtained a judgment against the husband in the Superior Court of Snohomish County, Washington, in the amount of \$601,951.52. On August 20, 1980, defendant caused that judgment to be registered in Jackson County, Oregon, in accordance with the provisions of ORS chapter 24. On April 27, 1981, a decree of dissolution of the Hoyt marriage was entered, which, among other things, awarded plaintiff, as her sole and separate property, all right, title and interest in the described real property and specifically provided that the decree operated as a deed of conveyance of that property.

There are no issues of fact presented; the only issue is one of law—whether the doctrine of *lis pendens* applies in dissolution cases. Defendant's judgment did not become a lien on plaintiff's husband's interest in real property in Jackson County until it was registered there, ORS 18.350, after the dissolution action was commenced. If *lis pendens* does apply, the judgment lien would be subject to the outcome of the dissolution proceeding; because the decree awarded the property to plaintiff, her interest would be ahead of defendant's lien. If *lis pendens* does not apply, defendant prevails, because its judgment lien against plaintiff's husband's interest was of record before the property was awarded to plaintiff.

In *Slauson v. Usher*, 39 Or.App. 303, 592 P.2d 247, rev. den. 287 Or. 129 (1979), we

discussed, but did not decide, the question presented here; we noted:

"As an alternative to his principal argument, plaintiff contends that the doctrine of *lis pendens* should be extended to dissolution proceedings which, under ORS 107.105(1)(e) make all property of the parties subject to distribution by the court. Twice, prior to the enactment of ORS 107.105(1)(e), the Supreme Court declined to decide whether *lis pendens* applies in dissolution cases. *Houston v. Timmerman*, 17 Or 499, 21 P 1037, 11 AS 848, 4 LRA 716 (1889); and *Burnett et al. v. Hatch*, 200 Or 291, 266 P2d 414 (1954). The enactment of ORS 107.105(1)(e) created logical reasons both for applying *lis pendens* to dissolution cases and for rejecting the doctrine's application. The trial court has jurisdiction over *all* property of the parties under that statute, and the argument for applying *lis pendens* to dissolution proceedings is, for that reason, more compelling than was the case when *Houston* and *Burnett* were decided. The property is now automatically a 'subject' of a dissolution suit. However, the court's plenary authority to distribute the parties' property also has the effect of eliminating the need for the petitioner to specify in his pleadings what property of his spouse he claims. The absence of such specification is inconsistent with the application of *lis pendens* under prior interpretations of the doctrine. See *Walker v. Goldsmith*, 14 Or 125, 12 P 537 (1886); *Burnett et al. v. Hatch*, *supra*; and Annotation, 166 ALR 406. Because we decide this appeal in favor of plaintiff on other grounds, we too decline to reach the question of whether *lis pendens* applies to dissolution cases and, if so, what pleading requirements would be necessary to invoke the doctrine." 39 Or.App. at 308 n. 3, 592 P.2d 247. (Emphasis in original.)

[1] We must now decide the question we left open in *Slauson* and we hold that the doctrine of *lis pendens* does apply in dissolution cases if the property is described with particularity in a pleading. In

Houston v. Timmerman, 17 Or. 499, 21 P. 1037, 11 AS 848, 4 LRA 716 (1889), the court set forth two requirements for the applicability of the doctrine:

" * * * Two things, however, seem indispensable to give [*lis pendens*] effect: 1. That the litigation must be about some specific thing, which must necessarily be affected by the termination of the suit; and 2. That the particular property involved in the suit 'must be so pointed out by the proceeding as to warn the whole world that they intermeddle at their peril.' * * *" 17 Or at 504, 21 P. 1037. (Citation omitted.)

The dissolution action involved here met both requirements. The first requirement is that the litigation must be about some specific thing, which must necessarily be affected by the termination of the action. We do not understand that requirement to be that the litigation be only about one specific thing; it is enough that the ownership of that specific thing (the particularly described real property) necessarily be involved in the litigation. Here, plaintiff, as the wife in the dissolution proceeding, described the real property and prayed that it be awarded to her. Accordingly, the disposition of that real property had to be affected by the termination of that proceeding; it had to be awarded to one or both of the parties. The second requirement is that the particular property "must be so pointed out by the proceedings as to warn the whole world that they intermeddle at their peril." That was done here.

The dissent argues that the first requirement can never be met in a dissolution proceeding, because the litigation is not about particular property. Although there was a time when it was the *status* of the parties that was the subject of divorce proceedings and, once it was determined that one of the parties was entitled to a divorce, certain property consequences followed as a matter of law, see *Houston v. Timmerman*, *supra*, that is no longer true. Either party is entitled to dissolve the marriage without regard to fault, ORS 107.025, 107.036, and the only issues, other than the

custody of children, are economic—support and property division. Accordingly, in dissolution cases in which there is property to be divided, the litigation is about property and, if the real property is particularly described, it is about particular real property.

The dissent also argues that there is no certainty that any particular property of a party or the parties necessarily will be affected. It is true that one cannot determine in advance *who* will be awarded particular property; however, all of the property will be affected in the sense that it will be awarded to one or both of the parties. Furthermore, when, as here, one of the parties describes particular property and prays that it be awarded to him or her, the court must necessarily dispose of that claim. Accordingly, the *Houston* requirements were satisfied.

The broader policy question is whether *lis pendens* ought to apply to dissolution proceedings. As the dissent points out, it is not necessary to describe specific real property in the pleadings in dissolution cases, because the court necessarily divides the property between the parties "as may be just and proper in all the circumstances." ORS 107.105(1)(f). Therefore, the dissent argues, if we were to apply *lis pendens* when a petition contains "superfluous property descriptions," "the practical effect would be a tail-wagging-the-dog phenomenon in which descriptions would be included in petitions, not because of any relevance they have to the dissolution process, but for the sole purpose of making *lis pendens* applicable." That objection seems to us to be the precise reason for applying *lis pendens*. We perceive no reason why either of the spouses should not be entitled to put everyone in the world on notice that people may deal with the property only at their peril.

That protection is particularly important with respect to judgments against one of them that become liens after the dissolution proceedings are commenced. ORS 93.-

740² permits any party to an action in which the title or any interest in real property is involved to file with the recorder of deeds of any county in which any part of the property lies, other than the one in which the action is brought, a notice of *lis pendens*. From the time of filing, "purchasers and incumbrancers" are on notice of the rights and equities in the property of the party filing the notice. There is nothing in the statute that even suggests that it does not apply to dissolution proceedings. By its terms, it does apply and we perceive no reason why it should not be applied.³

The application of *lis pendens* would make it more difficult for parties to a dissolution proceeding to alienate real property in an attempt to remove it from the dissolution court's jurisdiction. Although it is true that the dissolution court has authority to enjoin either party from encumbering or disposing of any property, ORS 107-095(1)(e), an order issued pursuant to that authority does not, and cannot, cure the problem presented in this case: husband's judgment creditor obtaining a lien against the property before the dissolution court has awarded it to one party or the other. Because protection against such judgments is one of the functions of *lis pendens*, there is every reason to apply it here.

[2] We hold that the doctrine of *lis pendens* was applicable to plaintiff's dissolution proceeding, as a result of which defendant's judgment lien was subject to the outcome of that proceeding. When plain-

tiff was awarded the property free of her husband's interest, defendant lost its lien.

Reversed and remanded for entry of a judgment not inconsistent with this opinion.

RICHARDSON, J., dissents

RICHARDSON, Judge, dissenting.

I would hold that the common law doctrine of *lis pendens* is inapplicable to dissolution cases, and I therefore respectfully dissent from the majority's holding that the doctrine applies to the dissolution proceeding on which plaintiff bases this action.

The court said in *Houston v. Timmerman*, 17 Or. 499, 21 P. 1037 (1889):

" * * * Two things, however, seem indispensable to give [*lis pendens*] effect: 1. That the litigation must be about some specific thing, which must necessarily be affected by the termination of the suit; and 2. That the particular property involved in the suit 'must be so pointed out by the proceeding as to warn the whole world that they intermeddle at their peril.' * * *" 17 Or. at 504-05, 21 P. 1037. (Citation omitted.)

The majority reasons that dissolution cases as a class meet the first of those tests, because all of the parties' property is subject to division. The majority then concludes that the particular dissolution proceeding involved here satisfies the second *Houston* test, because plaintiff described the property in her dissolution petition and asked that it be awarded to her. I disagree with the majority on both points.

of the suit is notice, to purchasers and incumbrancers, of the rights and equities in the premises of the party filing the notice. The notice shall be recorded in the same book and in the same manner in which mortgages are recorded, and may be discharged in like manner as mortgages are discharged, either by such party or the attorney signing the notice."

3. The dissent's objection that our decision will require attorneys to describe "every item of property" in the pleadings in order to avoid concern for malpractice claims is overstated. Only real property is subject to *lis pendens*, and all of the real property must be particularly described at some point in the proceedings. Why not in the pleadings?

² ORS 93 740 provides:

"In all suits in which the title to or any interest in or lien upon real property is involved, affected or brought in question, any party thereto at the commencement of the suit, or at any time during the pendency thereof, may file of record with the county clerk or other recorder of deeds of every county in which any part of the premises lies, except in the county in which the suit is brought, a notice of the pendency of the action containing the names of the parties, the object of the suit, and the description of the real property in the county involved, affected, or brought in question, signed by the party or his attorney. From the time of filing the notice, and from that time only, the pendency

It is correct, as a generality, that *all* property of the parting spouses is *subject* to judicial allocation and distribution when a marriage is dissolved. However, the first *Houston* test requires that, for *lis pendens* to be invoked, there must be litigation *about particular* property and that the property will *necessarily* be affected by the result of the litigation. The requisite particularity and certainty of impact are absent in dissolution cases. The majority has extended the *lis pendens* doctrine to property if there is a *chance* that interests in it will be affected by a pending proceeding. The majority's application of *lis pendens* here is little more supportable, if at all, than it would be to apply the doctrine to the real property of a tort defendant on the chance that the result of the action might be that the property will be levied on to exonerate a judgment debt. I do not agree that the underlying dissolution proceeding here or any other dissolution proceeding can come within the first *Houston* test.

I have even greater problems with the majority's conclusion that the dissolution proceeding involved in this case satisfies the second *Houston* test by virtue of plaintiff describing the property in her petition and requesting that the domestic relations court award it to her. Under the relevant statutory scheme, dissolution petitions do not have to contain such specific descriptions and specific requests, *see* ORS 107.085, and, when they do, the specification is legally meaningless in the context of the dissolution procedure. Courts in dissolution cases must make a comprehensive allocation of the property of the parties and the contents of petitions have no bearing on that judicial responsibility. *See* ORS 107.105(1)(e), (f). The majority's holding that *lis pendens* applies in dissolution cases if the petitions contain superfluous property descriptions creates a tail-wag-

ging-the-dog phenomenon in which descriptions will be included in petitions not because of any relevance they have to the dissolution process but for the sole purpose of making *lis pendens* applicable.

The majority's conclusion not only *can* distort and complicate the dissolution process in the way I have described; it *necessarily will* do so. In the wake of the majority's holding, no competent lawyer who has any concern about malpractice will be able to refrain from including a specific description in every dissolution petition filed of every item of property in which either or both of the parties may have an interest. The legislative objective of simplifying dissolution pleadings and procedures will be completely subverted by today's holding.¹

The systematic cost that the holding will cause is offset by only one gain, and the gain is academic. *Lis pendens* does have the effect of impeding or remedying attempts to alienate property before a court's disposition of the property takes effect. That result is desirable, but *lis pendens* is not necessary as an addition to the procedures that are already available to accomplish it in dissolution cases. *See, e.g.,* ORS 107.095(1)(e); *Slauson v. Usher*, 39 Or. App. 303, 592 P.2d 247, *rev. den.* 287 Or. 129 (1979).

WARDEN and VAN HOOMISSEN, JJ., join in this dissent.



1. I note, too, that the holding can have the effect of making *lis pendens* applicable to some dissolution cases, but not to others in which specific property is not described in the pleading. That effect is hardly salutary, given the already sensitive relationship between the need of the judicial system to preserve the subject matter of litigation and the desirability of giving persons

acquiring interests in property the greatest possible certainty as to where they must look to determine whether the property is encumbered. Compare *Land Associates v. Becker*, 294 Or. 308, 313-14, 656 P.2d 927 (1982), with *Fremont Indemnity Co. v. Corbett*, 66 Or.App. 668, 674, 675 P.2d 1097, *rev. den.* 297 Or. 340, 683 P.2d 1370 (1984) (Richardson, J., concurring).



MAR 8 1976

Russell J. Lamm
District Clerk

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Attorney for Plaintiff
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Salt Lake City, Utah 84133
Phone 531-7676

BL 137 NO. 1607
3-5-76 - 8:09 A.M.

In the District Court of SALT LAKE County
State of Utah

ZIONS FIRST NATIONAL BANK,
a National Association,

Plaintiff....

vs.

BETTY PURSELL ALEXANDER and
LORIN N. PACE

Defendant....

JUDGMENT BY
DEFAULT

Civil No. 232782

IN THIS ACTION, the defendant LORIN N. PACE

having been regularly served with process, and having failed to appear and answer the plaintiff's complaint filed herein, the legal time for answering having expired, and the default of the said defendant in the premises having been duly entered according to law, now upon application of said plaintiff to the above entitled court, judgment is hereby entered against said defendant, in pursuance of the prayer of said complaint.

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed that said plaintiff do have and recover from the said defendant the sum of Thirty-One Thousand Sixty-Four Dollars and 52/100 (\$31,064.52) Dollars, with interest thereon at the rate of 8 per cent per annum from the date hereof, till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$ Twenty-Four and 60/100 (\$24.60) and attorneys fees in the Amount of Two Thousand Five Hundred and no/100 (\$2,500.00) Dollars
Judgment rendered March, A.D., 1976.

WITNESS, the Clerk of said Court, with the seal thereof, attached, this 3rd day of March, A.D., 1976.

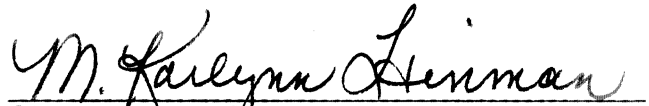
BY THE COURT
James S. Lamm
DISTRICT JUDGE
FORM 313 - JUDGMENT BY DEFAULT - KELLY CO., 88 W NINTH SO., S.L.C.

W. STERLING EVANS, Clerk
Russell J. Lamm
By Deputy Clerk

CERTIFICATE OF SERVICE

Pursuant to the Utah Rules of Appellate Practice, I hereby certify that four copies of the foregoing Brief of Respondents William D. Blodgett and Florence G. Blodgett with Addendum were delivered this 2nd day of September, 1986 to:

Walter P. Faber, Jr.
Watkins & Faber
Attorneys for Defendants-Appellants
2102 East 3300 South
Salt Lake City, Utah 84109



Attorney at Law