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General Glass Corporation, a Colorado Corporation v. Mast Construction Company, a Utah Corporation, et al.; Debenham Electric Supply Company v. Electro Technical Corporation, a Utah corporation, et al.; American Savings and Loan Association, a California Coporation, a Utah corporation, et al.; American Savings and Loan Association, a California coporation v. Oakhills Partnership, a Utah limited partnership, et al. :
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Petition for Writ of Certiorari

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**UTAH SUPREME COURT
BRIEF**

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DOCKET NO.

IN THE SUPREME COURT FOR THE STATE OF UTAH

860355

GENERAL GLASS CORPORATION,
a Colorado Corporation,
Plaintiff,

v.

MAST CONSTRUCTION COMPANY,
a Utah Corporation, et al.,
Defendants
Appellants,
and Petitioners,

Supreme Court Docket
No. _____

**DEBENHAM ELECTRIC SUPPLY
COMPANY,**
Plaintiff,

v.

ELECTRO TECHNICAL CORPORATION,
a Utah corporation, et al.,
Defendants.

Court of Appeals Docket
No. 860355-CA

**AMERICAN SAVINGS AND LOAN
ASSOCIATION,** a California
corporation,
Plaintiff and Respondent,

v.

OAKHILLS PARTNERSHIP, a Utah
limited partnership, et al.,
Defendants.

PETITION FOR WRIT OF CERTIORARI

Appellants' Petition for Writ of Certiorari
To the Court of Appeals for the State of Utah

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Clerk, Supreme Court

IN THE SUPREME COURT FOR THE STATE OF UTAH

GENERAL GLASS CORPORATION, a Colorado Corporation, Plaintiff, v. MAST CONSTRUCTION COMPANY, a Utah Corporation, et al., Defendants Appellants, and Petitioners;	Supreme Court Docket No. _____
DEBENHAM ELECTRIC SUPPLY COMPANY, Plaintiff, v. ELECTRO TECHNICAL CORPORATION, a Utah corporation, et al., Defendants.	Court of Appeals Docket No. 860355-CA
AMERICAN SAVINGS AND LOAN ASSOCIATION, a California corporation, Plaintiff and Respondent, v. OAKHILLS PARTNERSHIP, a Utah limited partnership, et al., Defendants.	

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LIST OF ALL PARTIES TO ACTION

Petitioners/Appellants. Mast Construction Company was the Defendant below in C-85-1607, C-85-3067, C-85-4885. Mast Construction was substituted for Debenham Electric Supply Co. on December 16, 1986. R-III-1179 to 1185.

Ron Mast: Ron Mast was substituted for Intermountain Glass and Paint Co. and Marathon Steel Co. on December 16, 1986. Id. Masts appear as mechanic lienholders at their own right and also 'as assignees of various other mechanics' lienholders. Mast Construction Company and Ron Mast will usually be known hereinafter as "Masts".

Respondent. American Savings & Loan Association ("American Savings"), was the Plaintiff below in C-85-4885.

Other parties. Electro Technical Corporation ("Electro Tech") was the Defendant below in C-85-1607 and C-85-4885. Electro Tech did not appeal.

Edwards & Daniels Associates, Inc. ("Edwards & Daniels"): Defendant below in C-85-4885. Edwards & Daniels filed a Notice of Appeal on December 16, 1986. That appeal, No. 860669, was dismissed by the Supreme Court of Utah on June 8, 1987 due to Edwards & Daniels' failure to prosecute the appeal.

Masts are unaware of any other party having petitioned this Court for a writ of certiorari.

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QUESTIONS PRESENTED FOR REVIEW

I. Is a "Trust Deed" omitting the amount of the loan, name of the trustee and terms of the secured loan enforceable as a legal mortgage as against third party mechanics' lien holders?

II. Is the court's finding that the Trust Deed was signed in the presence of the notary against the great weight of the evidence?

III. Is a deed signed outside the presence of a notary but later "notarized" an acknowledged document, capable of being recorded?

REPORTS OF OPINIONS

Original affirmance of trial court. General Glass Corp. v. Mast Constr. Co., 758 P.2d 438 (Utah Ct. App. 1988).

Opinion withdrawn on rehearing. General Glass Corp. v. Mast Constr. Co., 91 Utah Adv. Rep. 15, ___ P.2d ___ (Utah Ct. App. 1988).

New opinion, on rehearing, from which this petition is taken. General Glass Corp. v. Mast Constr. Co., 98 Utah Adv. Rep. 53, ___ P.2d ___ (Utah Ct. App. December 15, 1988).

STATEMENT OF JURISDICTION

This Petition seeks review of the December 15, 1989 decision on rehearing of the Utah Court of Appeals. The original

decision was entered June 10, 1988, withdrawn September 13, 1988, and a new opinion decision affirming on different grounds was entered December 15, 1988.

On January 17, 1989 Justice Richard C. Howe granted an Order Extending Time to Petition for Certiorari through and including February 2, 1989.

This Court has jurisdiction pursuant to Rules 45 and 46, R. Utah S. Ct., and 78-2-2(5), Utah Code Annotated (1988).

CONTROLLING STATUTORY PROVISIONS

The full text of the following code sections is included in the Appendix.

38-1-1 to 26, Utah Code Annotated (1974)

38-1-5, Utah Code Annotated (1953)

38-1-10, Utah Code Annotated (1953)

38-1-26, Utah Code Annotated (1953) 57-1-6, Utah Code Annotated (1986)

STATEMENT OF THE CASE

Respondent American Savings and Loan Association ("American Savings") brought this action seeking to recover sums due on construction loans by foreclosing an alleged trust deed covering real property located in Salt Lake County, claiming priority over the mechanics' liens of Petitioners (Masts). Actions by various mechanics' lien holders were consolidated with American

Savings' lawsuit. This is an appeal from a judgment entered in favor of American Savings and against Masts in that consolidated action, upholding the acknowledgment and form of American Savings' trust deed and the priority of its trust deed over Masts' mechanics' liens.

This is a Petition for Writ of Certiorari to the Utah Court of Appeals, which affirmed the decisions on summary judgment and after trial of the Third District Court, Salt Lake County, Honorable Timothy R. Hanson presiding.

A. Parties.

Mast Construction Company was substituted for Debenham Electric Supply Company and Ron Mast was substituted for Intermountain Glass and Paint, Inc., and Marathon Steel Company. (R-II-118)(R-III-1182). For all practical purposes in this petition, American Savings is the Respondent in this matter, and Ron Mast and Mast Construction Company are the Petitioners.

B. References.

This matter consists of three (3) volumes of Record and six (6) volumes of Transcript and Judge's Ruling. Reference to the record will be made by (R). Reference to the Transcript and Judge's Ruling will be made by (T) with a hyphen then a Roman Numeral (I, II, III, IV, V or VI) and then a page number to indicate the appropriate page and volume of the record, or

transcript and judge's ruling. For clarity, the date of the transcript will sometimes be used.

C. Procedural History.

In a pre-trial summary judgment hearing Judge Hanson held that American Savings' trust deed is effective even though it was incomplete when recorded, and subsequently twice amended and re-recorded. (T-I-3), (T-I-4) & (T-I-9). The Order reflecting this ruling was signed on June 19, 1986. See (R-II-764 to 765), where Judge Hanson concisely states the issues of fact and law which remained for trial.

At the conclusion of a two day court trial, Judge Hanson held that American Savings' trust deed was regular on its face and conforms to the format prescribed by statute (T-VI-21); that said trust deed was "executed completed, delivered and recorded in conformance with the intent of the parties." (R-III-1014 ¶4); that at the time the trust deed was signed the persons signing the trust deed were not placed under oath (R-III-1-14 ¶3) and did not otherwise acknowledge their signatures to the notary; and that the deed was signed in the presence of the notary. Id.

Judge Hanson held therefor that the notarization of the trust deed was a valid acknowledgment, the trust deed was entitled to be recorded, and adequately imparted notice from April 8, 1983, the date of its first recordation (T-VI-21),

(T-VI-28), (T-VI-29) & (R-III-1014 to 1015). The court also found that work did not begin on the site prior to April 8, 1983. (T-VI-25 to 26) & (R-III-1014 to 1015 ¶3), (T-IV-1648).

Masts and various other mechanics' lien holders filed motions objecting to the Proposed Findings of Fact and Conclusions of Law, moved for a new trial, and to amend the judgment (R-II-831), (R-II-845), (R-II-870), (R-III-985), (R-III-988), (R-III-1006). The court denied the motions, entering its Findings of Fact and Conclusions of Law on August 27, 1986 (R-III-1012). Masts filed a Motion for Rule 54(b) Certification Re Judgment on Priority Issues, heard October 6, 1986. In an Order for Entry of Final Judgment dated November 18, 1986 (R-III-1175) the district court held that the Findings of Fact and Conclusions of Law were a final determination of the lien priority issues; that said issues would be appealable but for other issues remaining to be decided in the case; that there was no just reason for delaying the appeal of the lien priority claims; and that pursuant to Rule 54(b) URCP there existed no just reason for delaying the entry of final judgment on the claims of lien priority.

The Court of Appeals in its first decision found that Ron Mast, one of the petitioners, had actual notice of the lien and that such notice automatically caused all the liens of petitioners to be subordinate to the deed of trust. General Glass Corp. v. Mast Constr. Co., 758 P.2d 438 (Utah Ct. App.

1988)(copy in appendix).

Masts petitioned for rehearing on the basis that the Court of Appeals had misapprehended law and facts. Masts pointed out that they were holders of various mechanics' liens, directly and as assignees, and that if actual notice had been fatal it would have affected the rights of other lien holders and the liens assigned to Masts after the occurrence of all operative facts in this case. Masts also argued that the effect of the Court of Appeals ruling was to emasculate the mechanics' lien statutes and would have serious effects on the economy. The decision had mistakenly found that if a party had actual notice there would eventually be a construction loan the court would not need to determine whether work commenced before a proper recording of the lender's deed of trust.

The Court of Appeals granted Masts' petition for rehearing and withdrew its decision by order dated September 13, 1988. General Glass Corp. v. Mast Constr. Co., 91 Utah Adv. Rep. 15 (Utah Ct. App. 1988).

On December 15, 1988 the Court of Appeals entered its opinion on rehearing, affirming the trial Court decision on different grounds. 98 Utah Adv. Rep. 53 (Utah Ct. App. 1988) (copy in appendix). The court found the document was not a valid trust deed but was a valid mortgage.

On January 17, 1989 the Court granted Masts' ex parte motion for an extension of time to petition the Court for a Writ of Certiorari, allowing through and including to February 2,

1989 to file the petition (copy in appendix).

D. Relevant Facts

On March 28, 1983 American Savings loaned \$10.4 million to Oakhills, a Utah limited partnership, to finance condominium construction. Exhibit P-1 (included in Appendix). A note for that amount was signed by Oakhills, and American Savings and Oakhills executed a document titled "Multifamily Deed of Trust, Assignment of Rents and Security Agreement." Exhibits P-1 and P-4. The circumstances and questionable validity of the execution and subsequent recording of that document give rise to the appeal, which in turn gives rise to this Petition. The "Deed of Trust" will be referred to herein as Trust Deed, although its validity as such is not admitted.

The Trust Deed was executed by Charles Akerlow and Richard Anderson, officers of the general partner of Oakhills. Exhibit P-1. When they signed the document, the amount of the loan, the date and description of the loan and the identity of the Trustee were left blank. Exhibit P-1; Brief of Respondent, p. 5. Some blanks were filled in sometime after recordation. The deed was prepared by a title company, agent for American Savings.

The acknowledgment was filled in by Jeffrey Jensen, a notary public and officer of the title company. T-IV-3 to 6. Neither Anderson nor Akerlow took an oath. Finding of Fact # 3. R. 001014. The notary stated in the acknowledgment, however, that

the two were "sworn by me. . . ." Exhibit P-1 at p. 8. The court below also found they signed in the presence of the notary. Id. # 1; R. 001013. Masts believe this finding was against the great weight of the evidence.

In addition to the acknowledgement's statement that Akerlow and Anderson "appeared before me", the only other evidence petitioner has been able to marshal on point is as follows:

--Akerlow, called as a witness for American Savings, testified he and Anderson signed the trust deed in his own office, that no one else was present, and that the notary had never even been to his office. He denied having even attended the closing. T-II-1380 (Pages 74 through 81 and 95 through 96 of the June 1986 proceedings are attached in the Appendix for the Court's convenience). Judge Hanson disbelieved Akerlow. T-8-11-86 p. 8.

--Akerlow signed an affidavit to the same effect, but at a deposition stated he could not at that time recall whether he appeared before the notary. T-II-1383. Akerlow's explanation for his clearer memory at trial than at the earlier deposition was the realization the notary, whom he knew well, had never been to his office. He stated he was sure both men signed in his office, and therefor had recalled clearly that the notary could not have witnessed the signatures. T-11-1386.

--Stephen Emrick, who attended the closing on behalf of American Savings, testified that Anderson and Akerlow were

present, and that the notary was "there for time periods", and was "in and out" of the room. T-II-1340 to 1342. He could not recall any details of the execution of the note and trust deed. Id. He testified Mr. Stermer of American Savings attended the closing with him. Stermer was not called as a witness by any party. Emrick has attended about 50 closings involving over a million dollars each. He did say the closing lasted about two hours. T-6-25-86 p. 61. He also testified Ron Mast was present part of the time. T-12-1340 to 1342.

--Ron Mast testified he has never been to Western Title, the site of the closing, and had never met Mr. Emrick before trial. T-6-25-86 p. 126.

--Anderson, the other signatory, testified that he, Jensen, Akerlow and Emrick were present at the closing, which he said lasted most of the day. Anderson Depo. at 15-16. He did not mention Ron Mast being present. He could not recall whether Jensen was in the room when the trust deed was signed. Anderson Depo. at 12, 15-17, 20.

--Jensen, the notary public, could not recall Akerlow's and Anderson's execution of the trust deed, T-VI-7, 8, 14, although he was well acquainted with both signatories. In fact, asked if he recalled "any of the circumstances of that closing" he said, "I have vague recollection of Mr. Emerick's name, and his involvement being in town, discussing some documents with him, but not a direct recollection of the closing ceremony, if there

one was itself (sic)." Partial Transcript of 6-25-86, p. 4. He continued, "I don't have a direct recollection of seeing loan documents signed, no." Id. He did not recall at trial whether he was present or not. Id. at 6. When American Savings' counsel asked Jensen whether he had a custom or practice, he said:

Yes. In by far the majority of cases -- in all cases where it is possible, I am present when the people are signing documents. There are occasions when I may be out of the room getting a copy. I may be discussing something with someone out of the room. . . .

Id. at 8. He also stated, "If I know that person, and I witness him signing documents, I don't check to see that he has signed every one while I'm present in the room." Id.

On the date of the closing Jensen's Daytimer contained an entry "Akerlow, Thomas, Dyer." He explained, "that's what I know Akerlow's group by." Id. at 10.

Jensen stated that since he was acquainted with Akerlow and knew his signature, he would have less hesitation to notarize his signature. Id. at 11.

It is undisputed that work was commenced at the property sometime in April or May, although Judge Hanson found it did not commence before the April 8, 1983 recording date. Finding of Fact # 6 T-001014. The Court of Appeals upheld that finding. General Glass Corp. v. Mast Constr. Co., 98 Utah Adv. Rep. 53, ___ P.2d ___ (Utah Ct. App. 1988).

ARGUMENT

INTRODUCTION

The desirability of granting this Petition is underlined by the recent decision of this Court in Mickelsen v. Craigco, Inc., 99 Utah Adv. Rep. 21; ____ P.2d ____ (Utah January 11, 1989). In that case the Court appears to have resolved, at least under the facts of that case, the question of whether an acknowledgment may suffice without an oral oath. However, it points out the area of law is still unclear, and seems to affirm the requirement that the affiant appear **personally** before the notary.

I. Is a "Trust Deed" omitting the amount of the loan, name of the trustee and terms of the secured loan enforceable as a legal mortgage as against third party mechanics' lien holders?

The trust deed at issue recited it was between the "Trustor/Grantor" Oakhills, _____ "(herein trustee)", and the "Beneficiary", State Savings (now American Savings) referred to as "Lender". Exhibit P-1.

The next paragraph states that Borrower, in consideration of the "indebtedness herein recited and the trust herein created" grants, conveys and assigns to Trustee, with power of sale, "[the leasehold estate pursuant to a lease (herein 'ground lease') dated _____ between _____

_____ and _____
_____ recorded in _____
in and to]" (sic) the property contained in the legal
description which was attached as an exhibit, together with
personal property listed,

To Secure to Lender (a) the repayment of the
indebtedness evidenced by Borrower's note dated _____
_____ (herein note) in the principal sum of
_____ Dollars, with interest
thereon, with the balance of the indebtedness, if
not sooner paid, due and payable on _____
_____ and . . . the performance of the covenants
and agreements of Borrower contained in a
Construction Loan Agreement between Lender and
Borrower dated _____, 19____. . . .

In each example above the blanks left are as they appeared in
the original as recorded. Exhibit P-1. Nowhere is the amount
of the debt or the identity of the trustee contained in the
instrument. And the terms of the loan are also absent from
this, the only document recorded.

The Court of Appeals began its analysis by correctly
pointing out the distinction between a mortgage and a trust deed
in a "lien theory" state like Utah. General Glass Corp. v. Mast
Constr. Co., 98 Utah Adv. Rep. 53, 55. The court found the
document could not serve as a valid trust deed since it does not
identify the trustee to whom it purports to convey title. Id.

However, the court went on to agree with the trial
court's alternative conclusion that the instrument recorded is
operative as a mortgage despite the omissions. Id. This Mast's
belief was in error.

As the Court of appeals itself states, a mortgage is not a title-conveying instrument. Id.; Bybee v. Stewart, 112 Utah 462, 189 P.2d 118 (1948). The instrument at issue clearly intends to convey title in trust to a trustee. American Savings is merely and expressly the beneficiary. If title is conveyed to an unidentified person, surely no interest is conveyed. The Court of Appeals has taken the mistake of American Savings, and tried to remedy it by calling it something else. This would require the Court to ignore the language which is contained in the deed.

As indicated by the above, as written and with the omissions much of the deed is nonsensically vague.

While the provisions of § 57-1-14 (1986) are merely a suggestion of what a land mortgage might contain, Utah's legislature must have included it to indicate some formality and some inclusion of basic terms is necessary. Surely a gross deviation containing almost none of the suggested elements cannot pass for a legal mortgage, except perhaps between the parties. Here the Court of Appeals' interpretation closes out innocent mechanics' lien holders in favor of the draftsman of the defective instrument.

"[T]he mechanic's lien law was enacted for the benefit of those who perform the labor and supply the materials and . . . the lien claimant's remedy should not be limited without a clear mandate from the legislature requiring such an effect."

Mickelsen v. Craigco, Inc., 99 Utah Adv. Rep. 21; ___ P.2d ___ (Utah Jan. 11 1989). In Mickelsen this Court found no clear legislative intent to support its cutting off of these lien holders. To protect mechanics' lien holders, the courts should construe the statute creating mechanics' liens broadly. Bailey v. Call, 100 Utah Adv. Rep. 11, 12 (Utah Ct. App. Jan. 12, 1989). The Court of Appeals did not have the benefit of either Mickelsen or Bailey in rendering its decision.

The Court of Appeals looks to the intention of the parties, but to the wrong end. 98 Utah Adv. Rep. at 55. Indeed, the intent of the parties controls in deciding whether a document is a mortgage. Hallstrom v. Buhler, 14 U.2d 111, 114; 378 P.2d 355, 357 (1963). Here the intent was not just to create a security agreement. The obvious intent was to deed the property in trust. The lender having failed to accomplish this, no effective transaction was consummated. No particular form may be required for the mortgage, but the intent of the parties must be shown. Bybee v. Stewart, 112 Utah 462, 189 P.2d 118 (1948). Here it is not.

The Summary of Utah Real Property Law, BYU (1978) Vol. I § 9.55 recommends a mortgage might contain consideration (which this does not), description of property, habendum clause, the covenants, due on encumbrance clause, charges, insurance and taxes, and the mortgagee's right to possession.

Purported mortgages are construed strictly against the party responsible for the drafting (here American Savings). Crompton v. Jenson, 78 Utah 55, 1 P.2d 242 (1931). Here lack of a trustee is similar to lack of a payee, which would render a mortgage invalid. Summary of Utah Real Property Law, BYU (1978) Vol. I § 9.69, 9.72. Courts will not torture the meaning of a document to make construe it as a mortgage. Pearce v. Shurtz, 2 U.2d 124, 270 P.2d 442, 444 (Utah 1954).

II. Is the court's finding that the Trust Deed was signed in the presence of the notary against the great weight of the evidence?

The Court of Appeals rejected Masts' argument that the deed was invalid because it was signed outside the presence of the notary, saying Mast failed to marshal the evidence and show the court's finding to the contrary was erroneous. The finding may be overturned if it is against the great weight of the evidence. Bailey v. Call, 100 Utah Adv. Rep. 11 (Utah Ct. App. Jan. 13, 1989 (dealing with mechanics' liens), quoting Utah R. Civ. P. 52(a). Mast believes it did marshal the evidence in its briefs before the Court of Appeals (see, e.g., App. Brief pp. 6, 7, 13, 14, 15, 26), but, sensitive to the criticism, this is done in the foregoing summary of facts.

In sum, of five possible witnesses, one did not testify, one said no notary was present, and two, including the notary, did not recall.

The burden of proof is always upon the party who seeks to establish a fact. The burden of proving the validity of the notarization is, and always has been upon upon American Savings. Utah Rule of Evidence 301 deals with presumptions and is substantially identical Federal Rule of Evidence 301. FRE 301 states that a presumption does not shift the burden of proof or the burden of persuasion on an issue. The burden always remains upon the party on whom it was originally cast. 12 Fed. Proc. L. Ed., §§33:67, 33: 69.

Respondents are aided in this burden by the presumption that notaries have properly carried out the duties of their office, including the acknowledgment of documents. Farm Bureau Finance Co. Inc., v. Carney, 605 P.2d 509 (Idaho 1980). However, a presumption is not evidence, and it disappears entirely upon the introduction of any contradicting evidence. When such evidence is introduced the truthfulness of the presumed fact is determined exactly as if no presumption had existed. Bank of Washington v. Hilltop Shakemill, Inc., 614 P.2d 1319 (Wash. App. 1980); Sheehan v. Pima County, 680 P.2d 486 (Ariz. App. 1982).

Here the presumption that the notarial acts were validly accomplished was defeated by evidence and testimony to the contrary, shifting the burden to Respondents. This is especially true in light of the fact the acknowledgment perjures itself, stating falsely that the signatories were sworn under

oath. This falsity is undisputed. In the Farm Bureau case, since there was sufficient evidence to find that acknowledgment was false and not merely incomplete, the presumption of regularity in performance of notarial acts was overcome. Farm Bureau Finance Co. Inc., v. Carney, 605 P.2d 509 (Idaho 1980). See also 12 Fed. Proc. L. Ed., §33:68.

The presumed regularity of notarizations is overcome by evidence that the notary failed to require that the trust deed be signed in his presence and failed to require an oath or affirmation. See Farm Bureau Finance Co. Inc., v. Carney, 605 P.2d 509 (Idaho 1980).

Respondents have failed to prove the trust deed was properly acknowledged, despite their burden to do so. 12 Fed. Proc. L. Ed., §33:69.

III. Is a deed signed outside the presence of a notary but later "notarized" an acknowledged document, capable of being recorded?

The Mickelsen case, *supra*, found that no oral oath was necessary, so long as an oath was provided in the language to which the signatories signed their names. 99 Utah Adv. Rep. at 22. In this case there was not such a "correct written oath or affirmation." Exhibit P-1 pp. 7-8. So even under Mickelsen the failure to require an oath--oral or written--may invalidate the deed as against a third party mechanic's lien holder.

And Mickelsen pointed out that "it must be signed in the presence of a notary or other person authorized to take oaths", which it was not. Id. (emphasis added).

That case expressly did not upset Helsten v. Schwendiman, 668 P.2d 509 (Utah 1986), requiring the affiant to appear personally in front of the notary. Id. at 22.

CONCLUSION


The deed as written is so incomplete as to be vague, and does not impart notice to third parties or rise to the level of a valid mortgage. Nor, as the Court of Appeals concluded, can it be a trust deed.

Finding the deed was signed in the presence of the notary is against the great weight of the evidence. Because the notary did not actually see the signing, and because there was no actual oath, written or spoken, the deed could not be validly recorded and may not prevail over the liens of these mechanics and materialmen.

RELIEF REQUESTED

Petitioner requests a Writ of Certiorari to the Utah Court of Appeals, and reversal of that court's decision.

Respectfully so petitioned the second day of February, 1989.



Mitchell R. Barker

CERTIFICATE OF SERVICE

I hereby certify that I mailed or hand delivered four copies of the foregoing to the following persons on the sixth day of February, 1989, and that I lodged a copy with the Clerk of the Court on the second day of February, 1989.

VANCOTT, BAGLEY, CORNWALL & MCCARTHY

David Black

B. Stephen Marshall

Edwards & Daniels

50 S. Main #1600

Salt Lake City, Utah 84144

FABIAN & CLENDENIN

Warren Patten

W. Cullen Battle

Attorneys for Respondent

American Savings & Loan Assoc.

215 S. State, #1200

Salt Lake City, Utah 84111



Mitchell R. Barker

APPENDIX I

TRUST DEED AS ORIGINALLY RECORDED

EXHIBIT P-1

State Savings and Loan Association
343 East Main Street
Stockton, Calif. 95202

SPACE ABOVE THIS LINE FOR RECORDER'S USE

THIS DEED OF TRUST (herein "Instrument") is made this 28th day of March 1983, among the Trustor/Grantor, OAKHILLS PARTNERSHIP, a Utah Limited Partnership whose address is C/O Pacific Western Industries, Inc., 68 South Main Street, Salt Lake City, (herein "Borrower"), Utah 84101 (herein "Trustee"), and the Beneficiary, STATE SAVINGS AND LOAN ASSOCIATION, a corporation organized and existing under the laws of the State of California whose address is 343 East Main Street, Stockton, California 95201 (herein "Lender").

Borrower, in consideration of the indebtedness herein recited and the trust herein created, irrevocably grants, conveys and assigns to Trustee, in trust, with power of sale, (the leasehold estate pursuant to a lease (herein "ground lease") dated between and recorded in _____ in and to*] the following described property located in the County of Salt Lake _____ State of Utah:

* Either handwritten numeral or not completed.

See Exhibit "A", attached hereto and incorporated herein by reference.

APR 8 12 51 PM '93
RECEIVED
SALT LAKE COUNTY
UTAH

MAILED 12
APR 10 1993
RECORDS
SALT LAKE COUNTY
UTAH

6008-650 MAY 1993

600

Letter to State Dept
of
Housing & Urban
Development

TOGETHER with all buildings, improvements and tenements now or hereafter erected on the property, and all heretofore or hereafter vacated alleys and streets abutting the property, and all easements, rights, appurtenances, rents (subject however to the assignment of rents to Lender herein), royalties, mineral, oil and gas rights and profits, water, water rights, and water such appurtenant to the property, and all fixtures, machinery, equipment, engines, boilers, incinerators, building materials, appliances and goods of every nature whatsoever now or hereafter located in, or on, or used, or intended to be used in connection with the property, including, but not limited to, those for the purposes of supplying or distributing heating, cooling, electricity, gas, water, air and light; and all elevators, and related machinery and equipment, fire prevention and extinguishing apparatus, security and access control apparatus, plumbing, bath tubs, water heaters, water closets, sinks, ranges, stoves, refrigerators, dishwashers, disposals, washers, dryers, awnings, storm windows, storm doors, screens, blinds, shades, curtains and curtain rods, mirrors, cabinets, panelling, rugs, attached floor coverings, furniture, pictures, antennas, trees and plants, and

.....; all of which, including replacements and additions therein, shall be deemed to be and remain a part of the real property covered by this Instrument; and all of the foregoing, together with said property (or the leasehold estate in the event this Instrument is on a leasehold) are herein referred to as the "Property".

TO SECURE TO LENDER (a) the repayment of the indebtedness evidenced by Borrower's note dated (herein "Note") in the principal sum of Dollars, with interest therein, with the balance of the indebtedness, if not sooner paid, due and payable on and all renewals, extensions and modifications thereof; (b) the repayment of any future advances, with interest thereon, made by Lender to Borrower pursuant to paragraph 31 hereof (herein "Future Advances"); (c) the performance of the covenants and agreements of Borrower contained in a Construction Loan Agreement between Lender and Borrower dated 19....., if any, as provided in paragraph 25 hereof; (d) the payment of all other sums, with interest therein, advanced in accordance herewith to protect the security of this Instrument; and (e) the performance of the covenants and agreements of Borrower herein contained

Borrower covenants that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant, convey and assign the Property (and, if this Instrument is on a leasehold, that the ground lease is in full force and effect without modification except as noted above and without default on the part of either lessor or lessee thereunder), that the Property is unencumbered, and that Borrower will warrant and defend generally the title to the Property against all claims and demands, subject to any easements and restrictions listed in a schedule of exceptions to coverage in any title insurance policy insuring Lender's interest in the Property.

Uniform Covenants. Borrower and Lender covenant and agree as follows:

1. PAYMENT OF PRINCIPAL AND INTEREST. Borrower shall promptly pay when due the principal of and interest on the indebtedness evidenced by the Note, any prepayment and late charges provided in the Note and all other sums secured by this instrument.

2. FUNDS FOR TAXES, INSURANCE AND OTHER CHARGES. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly installments of principal or interest are payable under the Note (or on another day designated in writing by Lender), until the Note is paid in full, a sum (herein "Funds") equal to one-twelfth of (a) the yearly water and sewer rates and taxes and assessments which may be levied on the Property, (b) the yearly ground rent, if any, (c) the yearly premium installments for fire and other hazard insurance, rent loss insurance and such other insurance covering the Property as Lender may require pursuant to paragraph 5 hereof, (d) the yearly premium installments for mortgage insurance, if any, and (e) if the instrument is on a leasehold, the yearly fixed rent, if any, after the ground lease, all as reasonably estimated annually and from time to time by Lender on the basis of statements and bills and reasonable assumptions thereof. Any waiver by Lender of a requirement that Borrower pay such Funds may be revoked by Lender, in Lender's sole discretion, at any time upon notice in writing to Borrower. Lender may require Borrower to pay to Lender, in advance, such other Funds for other taxes, charges, premiums, assessments and impositions in connection with Borrower or the Property which Lender shall reasonably deem necessary to protect Lender's interests (herein "Other Impositions"). Unless otherwise provided by applicable law, Lender may require Funds for Other Impositions to be paid by Borrower in a lump sum or in periodic installments, at Lender's option.

The Funds shall be held in an account(s) the deposit or amounts of which are insured or guaranteed by a Federal or state agency (including Lender if Lender is such an institution). Lender shall apply the Funds to pay said rates, rents, taxes, assessments, insurance premiums and Other Impositions so long as Borrower is not in breach of any covenant or agreement of Borrower in this instrument. Lender shall make no charge for or holding and applying the Funds, analyzing said account or for verifying and compiling said statements and bills, unless Lender pays Borrower interest, earnings or profits on the Funds and applicable law permits Lender to make such a charge. Borrower and Lender may agree in writing at the time of execution of this instrument that interest on the Funds shall be paid to Borrower, and unless such agreement is made or applicable law requires interest, earnings or profits to be paid, Lender shall not be required to pay Borrower any interest, earnings or profits on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds in Lender's normal format showing credits and debits to the Funds and the purpose for which each debit in the Funds was made. The Funds are pledged as additional security for the sums secured by this instrument.

If the amount of the Funds held by Lender at the time of the annual accounting thereof shall exceed the amount deemed necessary by Lender to provide for the payment of water and sewer rates, taxes, assessments, insurance premiums, rents and Other Impositions, as they fall due, such excess shall be credited to Borrower on the next monthly installment or installments of Funds due. If at any time the amount of the Funds held by Lender shall be less than the amount deemed necessary by Lender to pay water and sewer rates, taxes, assessments, insurance premiums, rents and Other Impositions, as they fall due, Borrower shall pay to Lender any amount necessary to make up the deficiency within thirty days after notice from Lender to Borrower requesting payment thereof.

Upon Borrower's breach of any covenant or agreement of Borrower in this instrument, Lender may apply, in any amount and in any order as Lender shall determine in Lender's sole discretion, any Funds held by Lender at the time of application (i) to pay rates, rents, taxes, assessments, insurance premiums and Other Impositions which are now or will hereafter become due, or (ii) as a credit against sums secured by this instrument. Upon payment in full of all sums secured by this instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

3. APPLICATION OF PAYMENTS. (Unless applicable law provides otherwise, all payments received by Lender from Borrower under the Note or this instrument shall be applied by Lender in the following order of priority: (i) amounts payable to Lender by Borrower under paragraph 2 hereof, (ii) interest payable on the Note, (iii) principal of the Note, (iv) interest payable on advances made pursuant to paragraph 8 hereof, (v) principal of advances made pursuant to paragraph 8 hereof, (vi) interest payable on any Future Advance, provided that if more than one Future Advance is outstanding, Lender may apply payments received among the amounts of interest payable on the Future Advances in such order as Lender, in Lender's sole discretion, may determine, (vii) principal of any Future Advance, provided that if more than one Future Advance is outstanding, Lender may apply payments received among the principal balances of the Future Advances, in such order as Lender, in Lender's sole discretion, may determine, and (viii) any other sums secured by this instrument in such order as Lender, at Lender's option, may determine; provided, however, that Lender may, at Lender's option, apply any sums payable pursuant to paragraph 8 hereof prior to interest on and principal of the Note, but such application shall not otherwise affect the order of priority of application specified in this paragraph.)

4. CHARGES; LIFES. Borrower shall pay all water and sewer rates, rents, taxes, assessments, premiums, and Other Impositions attributable to the Property at Lender's option in the manner provided under paragraph 2 hereof or, if not paid in such manner, by Borrower making payment, when due, directly to the payee thereof or in such other manner as Lender may designate in writing. Borrower shall promptly furnish to Lender all notices of amounts due under this paragraph 4, and in the event Borrower shall make payment directly, Borrower shall promptly furnish to Lender receipts evidencing such payments. Borrower shall promptly discharge any lien which has, or may have, priority over or equality with the lien of this instrument, and Borrower shall pay, when due, the claims of all persons supplying labor or materials to or in connection with the Property. Without Lender's prior written permission, Borrower shall not allow any lien inferior to this instrument to be perfected against the Property.

5. HAZARD INSURANCE. Borrower shall keep the improvement now existing or hereafter erected on the Property insured by carriers at all times satisfactory to Lender against loss by fire, hazards included within the term "extended coverage", rent loss and such other hazards, casualties, liabilities and contingencies as Lender (and, if this instrument is on a leasehold, the ground lease) shall require and in such amounts and for such periods as Lender shall require. All premiums on insurance policies shall be paid, at Lender's option, in the manner provided under paragraph 2 hereof, or by Borrower making payment, when due, directly to the carrier, or in such other manner as Lender may designate in writing.

All insurance policies and renewals thereof shall be in a form acceptable to Lender and shall include a standard mortgage clause in favor of and in form acceptable to Lender. Lender shall have the right to hold the policies, and Borrower shall promptly furnish to Lender all renewal notices and all receipts of paid premiums. At least thirty days prior to the expiration date of a policy, Borrower shall deliver to Lender a renewal policy in form satisfactory to Lender. If this instrument is on a leasehold, Borrower shall furnish Lender a duplicate of all policies, renewal notices, renewal policies and receipts of paid premiums if, by virtue of the ground lease, the originals thereof may not be supplied by Borrower to Lender.

In the event of loss, Borrower shall give immediate written notice to the insurance carrier and to Lender. Borrower hereby authorizes and empowers Lender as attorney-in-fact for Borrower to make proof of loss, to adjust and compromise any claim under insurance policies, to appear in and prosecute any action arising from such insurance policies, to collect and receive insurance proceeds, and to deduct therefrom Lender's expenses incurred in the collection of such proceeds, provided, however, that nothing contained in this paragraph 5 shall require Lender to incur any expense or take any action hereunder. Borrower further authorizes Lender, at Lender's option, (a) to hold the balance of such proceeds to be used to reimburse Borrower for the cost of reconstruction or repair of the Property or (b) to apply the balance of such proceeds to the payment of the sums secured by this instrument, whether or not then due, in the order of application set forth in paragraph 3 hereof (subject, however, to the rights of the lessor under the ground lease if this instrument is on a leasehold).

If the insurance proceeds are held by Lender to reimburse Borrower for the cost of reconstruction and repair of the Property, the Property shall be restored to the equivalent of its original condition or such other condition as Lender may approve in writing. Lender may, at Lender's option, condition disbursement of said proceeds on Lender's approval of such plans and specifications of an architect satisfactory to Lender, contractor's cost estimates, architect's certificates, surveys of lots, sworn statements of mechanics and materialmen and such other evidence of costs, percentage completion of construction, application of payments, and satisfaction of liens as Lender may reasonably require. If the insurance proceeds are applied to the payment of the sums secured by this instrument, any such application of proceeds to principal shall not extend or postpone the due dates of the monthly installments referred to in paragraphs 1 and 2 hereof or change the amounts of such installments. If the Property is sold pursuant to paragraph 27 hereof or if Lender acquires title to the Property, Lender shall have all of the right, title and interest of Borrower in and to any insurance policies and unearned premiums thereon and in and to the proceeds resulting from any damage to the Property prior to such sale or acquisition.

6. PRESERVATION AND MAINTENANCE OF PROPERTY; LEASEHOLDS. Borrower (a) shall not commit waste or permit impairment or deterioration of the Property, (b) shall not abandon the Property, (c) shall repair or replace promptly and in a good and workmanlike manner all

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(d) shall keep the Property, including improvements, fixtures, equipment, machinery and appliances therein in good repair and under repair, fixtures, equipment, machinery and appliances on the Property when necessary to keep such items in good repair. (e) shall comply with all laws, ordinances, regulations and requirements of any governmental body applicable to the Property. (f) shall provide for professional management of the Property by a residential real property manager satisfactory to Lender pursuant to a contract approved by Lender in writing, unless such requirement shall be waived by Lender in writing. (g) shall generally operate and maintain the Property in a manner to ensure maximum rental and (h) shall give notice in writing to Lender of and, unless otherwise directed in writing by Lender, appear in and defend any action or proceeding purporting to affect the Property, the security of this instrument or the rights or powers of Lender. Neither Borrower nor any tenant or other person shall remove, demolish or alter any improvements now existing or hereafter created on the Property or any fixture, equipment, machinery or appliance in or on the Property except when consistent with the replacement of fixtures, equipment, machinery and appliances with items of like kind.

If this instrument is on a leasehold, Borrower (i) shall comply with the provisions of the ground lease. (ii) shall give immediate written notice to Lender of any default by lessor under the ground lease or of any notice received by Borrower from such lessor of any default under the ground lease by Borrower. (iii) shall cause any action to renew or extend the ground lease and give written confirmation thereof to Lender within thirty days after such action becomes enforceable. (iv) shall give immediate written notice to Lender of the commencement of any remedial proceedings under the ground lease by any party thereto and, if required by Lender, shall permit Lender as Borrower's attorney-in-fact to control and act for Borrower in any such remedial proceedings and (v) shall within thirty days after request by Lender obtain from the lessor under the ground lease and deliver to Lender the lessor's estoppel certificate required thereunder. If any Borrower hereby, expressly transfers and assigns to Lender the benefit of all covenants contained in the ground lease, whether or not such covenants run with the land, but Lender shall have no liability with respect to such covenants nor any other covenants contained in the ground lease.

Borrower shall not surrender the leasehold estate and interests herein conveyed nor terminate or cancel the ground lease covering said estate and interests, and Borrower shall not, without the express written consent of Lender, alter or amend said ground lease. Borrower covenants and agrees that there shall not be a merger of the ground lease, or of the leasehold estate created thereby, with the fee estate covered by the ground lease by reason of said leasehold estate or said fee estate, or any part of either, coming into common ownership unless Lender shall consent in writing to such merger; if Borrower shall acquire such fee estate, then this instrument shall automatically and without further action be spread so as to become a lien on such fee estate.

7. USE OF PROPERTY. Unless required by applicable law or unless Lender has otherwise agreed in writing, Borrower shall not allow changes in the use for which all or any part of the Property was intended at the time this instrument was executed. Borrower shall not encumber or acquiesce in a change in the zoning classification of the Property without Lender's prior written consent.

8. PROTECTION OF LENDER'S SECURITY. If Borrower fails to perform the covenants and agreements contained in this instrument, or if any action or proceeding is commenced which affects the Property or title thereto or the interest of Lender therein including, but not limited to, eminent domain, insolvency, code enforcement, or arrangements or proceedings involving a bankruptcy or decedent, then Lender at Lender's option may make such appearances, disburse such sums and take such action as Lender deems necessary, in its sole discretion, to protect Lender's interest, including, but not limited to, (i) disbursement of attorney's fees, (ii) entry upon the Property to make repairs, (iii) procurement of satisfactory insurance as provided in paragraph 5 hereof and (iv) if this instrument is on a leasehold, exercise of any option to renew or extend the ground lease on behalf of Borrower and the curing of any default of Borrower in the terms and conditions of the ground lease.

Any amounts disbursed by Lender pursuant to this paragraph 8, with interest thereon, shall become additional indebtedness of Borrower secured by this instrument. Unless Borrower and Lender agree to other terms of payment, such amounts shall be immediately due and payable and shall bear interest from the date of disbursement at the rate stated in the Note unless collection from Borrower of interest at such rate would be contrary to applicable law, in which event such amounts shall bear interest at the highest rate which may be collected from Borrower under applicable law. Borrower hereby covenants and agrees that Lender shall be subrogated to the lien of any mortgage or other lien discharged in whole or in part, by the indebtedness secured hereby. Nothing contained in this paragraph 8 shall require Lender to incur any expense or take any action hereunder.

9. INSPECTION. Lender may make or cause to be made reasonable entries upon and inspections of the Property.

10. BOOKS AND RECORDS. Borrower shall keep and maintain at all times at Borrower's address stated below, or such other place as Lender may approve in writing, complete and accurate books of accounts and records adequate to reflect correctly the results of the operation of the Property and copies of all written contracts, leases and other instruments which affect the Property. Such books, records, contracts, leases and other instruments shall be subject to examination and inspection at any reasonable time by Lender. Upon Lender's request, Borrower shall furnish to Lender, within one hundred and twenty days after the end of each fiscal year of Borrower, a balance sheet, a statement of income and expenses of the Property and a statement of changes in financial position, each in reasonable detail and certified by Borrower and, if Lender shall require, by an independent certified public accountant. Borrower shall furnish, together with the foregoing financial statements and at any other time upon Lender's request, a rent schedule for the Property, certified by Borrower, showing the name of each tenant, and for each tenant, the space occupied, the lease expiration date, the rent payable and the rent paid.

11. CONDEMNATION. Borrower shall promptly notify Lender of any action or proceeding relating to any condemnation or other taking, whether direct or indirect, of the Property, or part thereof, and Borrower shall appear in and prosecute any such action or proceeding unless otherwise directed by Lender in writing. Borrower authorizes Lender, at Lender's option, as attorney-in-fact for Borrower, to commence, defend in and prosecute, in Lender's or Borrower's name, any action or proceeding relating to any condemnation or other taking of the Property, whether direct or indirect, and to settle or compromise any claim in connection with such condemnation or other taking. The proceeds of any award, payment or claim for damages, direct or consequential, in connection with any condemnation or other taking, whether direct or indirect, of the Property, or part thereof, or for conveyances in lieu of condemnation, are hereby assigned to and shall be paid to Lender subject, if this instrument is on a leasehold, to the rights of lessor under the ground lease.

Borrower authorizes Lender to apply such awards, payments, proceeds or damages, after the deduction of Lender's expenses incurred in the collection of such amounts, at Lender's option to restoration or repair of the Property or to payment of the sums secured by this instrument, whether or not then due, in the order of application set forth in paragraph 3 hereof with the balance, if any, to Borrower. Unless Borrower and Lender otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly installments referred to in paragraphs 1 and 2 hereof or change the amount of such installments. Borrower agrees to execute such further evidence of assignment of any awards, proceeds, damages or claims arising in connection with such condemnation or taking as Lender may request.

12. BORROWER AND LIEN NOT RELEASED. From time to time, Lender may, at Lender's option, without giving notice to or obtaining the consent of Borrower, Borrower's successors or assigns or of any junior lienholder or guarantor, without liability on Lender's part and notwithstanding Borrower's breach of any covenant or agreement of Borrower in this instrument, extend the time for payment of said indebtedness or any part thereof, reduce the payments thereon, release anyone liable on any of said indebtedness, accept a renewal note or notes therefor, modify the terms and time of payment of said indebtedness, release from the lien of this instrument any part of the Property, title or release either or additional ac. ry, recover any part of the Property, consent to any map or plan of the Property, consent to the granting of any easement, join in any extension or subordination agreement, and agree in writing with Borrower to modify the rate of interest or period of amortization of the Note or change the amount of the monthly installments payable thereunder. Any actions taken by Lender pursuant to the terms of this paragraph 12 shall not affect the obligation of Borrower or Borrower's successors or assigns to pay the sums secured by this instrument and to observe the covenants of Borrower contained herein, shall not affect the guaranty of any person, corporation, partnership or other entity for payment of the indebtedness secured hereby, and shall not affect the lien or priority of lien hereof on the Property. Borrower shall pay Lender a reasonable service charge together with such title insurance premiums and attorney's fees as may be incurred at Lender's option, for any such action if taken at Borrower's request.

13. INSURANCE BY LENDER NOT A WAIVER. Any forbearance by Lender in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any right or remedy. The acceptance by Lender of payment of any sum insured by this instrument after the due date of such payment shall not be a waiver of Lender's right to either require prompt payment when due of all other sums so insured or to declare a default for failure to make prompt payment. The procurement of insurance or the payment of sums or other sums or charges by Lender shall not be a waiver of Lender's right to subordinate the maturity of the indebtedness secured by this instrument, nor shall Lender's receipt of any awards, proceeds or damages under paragraphs 3 and 11 hereof operate to cure or waive Borrower's default in payment of sums insured by this instrument.

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acknowledged, setting forth the sums secured by this instrument and any right of set-off, counterclaim or other defense which exists against such sums and the obligations of this instrument.

15. UNIFORM COMMERCIAL CODE SECURITY AGREEMENT. This instrument is intended to be a security agreement pursuant to the Uniform Commercial Code for any of the sums specified above as part of the Property which under applicable law may be subject to a security interest pursuant to the Uniform Commercial Code, and Borrower hereby grants Lender a security interest in said sums. Borrower agrees that Lender may file this instrument, or a reproduction thereof, in the real estate records or other appropriate index, as a financing statement for any of the sums specified above as part of the Property. Any reproduction of this instrument or of any other security agreement or financing statement shall be sufficient as a financing statement. In addition, Borrower agrees to execute and deliver to Lender, upon Lender's request, any financing statements, as well as extensions, renewals and amendments thereof, and reproductions of this instrument in such form as Lender may require to perfect a security interest with respect to said sums. Borrower shall pay all costs of filing such financing statements and any extensions, renewals, amendments and releases thereof, and shall pay all reasonable sums and expenses of any record searcher for financing statements Lender may reasonably require. Without the prior written consent of Lender, Borrower shall not create or suffer to be created pursuant to the Uniform Commercial Code any other security interest in said sums, including replacements and additions thereto. Upon Borrower's breach of any covenant or agreement of Borrower contained in this instrument, including the covenants to pay when due all sums secured by this instrument, Lender shall have the remedies of a secured party under the Uniform Commercial Code; and, at Lender's option, may also invoke the remedies provided in paragraph 27 of this instrument as to such sums. In exercising any of said remedies, Lender may proceed against the sums of real property and any sums of personal property specified above as part of the Property separately or together and in any order whatsoever, without in any way affecting the availability of Lender's remedies under the Uniform Commercial Code or of the remedies provided in paragraph 27 of this instrument.

16. LEASES OF THE PROPERTY. As used in this paragraph 16, the word "lease" shall mean "sublease" if this instrument is on a leasehold. Borrower shall comply with and observe Borrower's obligations as landlord under all leases of the Property or any part thereof. Borrower will not lease any portion of the Property for non-residential use except with the prior written approval of Lender. Borrower, at Lender's request, shall furnish Lender with executed copies of all leases now existing or hereafter made of all or any part of the Property, and all leases now or hereafter entered into will be in form and substance subject to the approval of Lender. All leases of the Property shall specifically provide that such leases are subordinate to this instrument, that the tenant agrees to Lender, such agreement to be effective upon Lender's acquisition of title to the Property, that the tenant agrees to execute such further evidences of agreement as Lender may from time to time request, that the enforcement of the tenant shall not be terminated by foreclosure, and that Lender may, at Lender's option, accept or reject such agreements. Borrower shall not, without Lender's written consent, execute, modify, surrender or terminate, either orally or in writing, any lease now existing or hereafter made of all or any part of the Property providing for a term of three years or more, permit an assignment or sublease of such a lease without Lender's written consent, or request or consent to the subordination of any lease of all or any part of the Property to any lien subordinate to this instrument. If Borrower becomes aware that any tenant proposes to do or is doing, any act or thing which may give rise to any right of set-off against rent, Borrower shall (i) take such steps as shall be reasonably calculated to prevent the accrual of any right in a set-off against rent, (ii) notify Lender thereof and of the amount of said set-off, and (iii) within ten days after such accrual, reimburse the tenant who shall have acquired such right to set-off or take such other steps as shall effectively discharge such set-off and as shall assure that rents thereafter due shall continue to be payable without set-off or deduction.

Upon Lender's request, Borrower shall assign to Lender by written instrument satisfactory to Lender all leases now existing or hereafter made of all or any part of the Property and all security deposits made by tenants in connection with such leases of the Property. Upon assignment by Borrower to Lender of any leases of the Property, Lender shall have all of the rights and powers provided in this instrument prior to such assignment and Lender shall have the right to modify, extend or terminate such existing leases and to execute new leases in Lender's sole discretion.

17. REMEDIES CUMULATIVE. Each remedy provided in this instrument is distinct and cumulative to all other rights or remedies under this instrument or afforded by law or equity, and may be exercised concurrently, independently, or successively in any order whatsoever.

18. ACCELERATION IN CASE OF BORROWER'S INSOLVENCY. If Borrower shall voluntarily file a petition under the Federal Bankruptcy Act, as such Act may from time to time be amended or under any similar or successor Federal statute relating to bankruptcy, insolvency, arrangements or reorganizations, or under any state bankruptcy or insolvency act, or file an answer in an involuntary proceeding brought for the reorganization, dissolution or liquidation of Borrower, or if Borrower shall be adjudged a bankrupt, or if a trustee or receiver shall be appointed for Borrower or the Property, or if the Property shall become subject to the jurisdiction of a Federal bankruptcy court or similar state court, or if Borrower shall make an assignment for the benefit of Borrower's creditors, or if there is an attachment, execution or other judicial seizure of any portion of Borrower's assets and such seizure is not discharged within ten days, then Lender may, at Lender's option, declare all of the sums secured by this instrument to be immediately due and payable without prior notice to Borrower, and Lender may invoke any remedies permitted by paragraph 27 of this instrument. Any attorney's fees and other expenses incurred by Lender in connection with Borrower's bankruptcy or any of the other aforesaid events shall be additional indebtedness of Borrower secured by this instrument pursuant to paragraph 6 hereof.

19. TRANSFERS OF THE PROPERTY OR BENEFICIAL INTERESTS IN BORROWER; / SNI OPTION. On sale or transfer of (i) all or any part of the Property, or any interest therein, or (ii) beneficial interests in Borrower (if Borrower is not a natural person or persons but is a corporation, partnership, trust or other legal entity), Lender may, at Lender's option, declare all of the sums secured by this instrument to be immediately due and payable, and Lender may invoke any remedies permitted by paragraph 27 of this instrument. This option shall not apply in case of:

- (a) transfers by devise or descent or by operation of law upon the death of a joint tenant or a partner;
- (b) sales or transfers when the transferee's creditworthiness and management ability are satisfactory to Lender and the transferee has executed prior to the sale or transfer, a written assumption agreement containing such terms as Lender may require, including, if required by Lender, an increase in the rate of interest payable under the Note;
- (c) the grant of a leasehold interest in a part of the Property of three years or less (or such longer lease term as Lender may permit by prior written approval) not constituting an option to purchase (except any interest in the ground lease, if this instrument is on a leasehold);
- (d) sales or transfers of beneficial interests in Borrower provided that such sales or transfers, together with any prior sales or transfers of beneficial interests in Borrower but excluding sales or transfers under subparagraphs (a) and (b) above, do not result in more than 49% of the beneficial interests in Borrower having been sold or transferred since commencement of amortization of the Note; and
- (e) sales or transfers of fixtures or any personal property pursuant to the first paragraph of paragraph 6 hereof.

20. NOTICE. Except for any notice required under applicable law to be given in another manner, (a) any notice to Borrower provided for in this instrument or in the Note shall be given by mailing such notice by certified mail addressed to Borrower at Borrower's address stated below or at such other address as Borrower may designate by notice to Lender as provided herein, and (b) any notice to Lender shall be given by certified mail, return receipt requested, to Lender's address stated herein or to such other address as Lender may designate by notice to Borrower as provided herein. Any notice provided for in this instrument or in the Note shall be deemed to have been given to Borrower or Lender when given in the manner designated herein.

21. SUCCESSORS AND ASSIGNS BOUND, JOINT AND SEVERAL LIABILITY; AGENTS; CAPTIONS. The covenants and agreements herein assumed shall bind, and the rights hereunder shall inure to, the respective successors and assigns of Lender and Borrower subject to the provisions of paragraph 19 hereof. All covenants and agreements of Borrower shall be joint and several. In exercising any rights hereunder or taking any action provided for herein, Lender may act through its employees, agents or independent contractors as authorized by Lender. The captions and headings of the paragraphs of this instrument are for convenience only and are not to be used to interpret or define the provisions hereof.

22. UNIFORM MULTIFAMILY INSTRUMENT; GOVERNING LAW; SEVERABILITY. This form of multifamily instrument combines uniform provisions for national use and non-uniform provisions with limited variations by jurisdiction to constitute a uniform security instrument covering real property and related fixtures and personal property. This instrument shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision of this instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this instrument or the Note which can be given effect without the conflicting provision, and to this end the provisions of this

Interest and the Note are declared to be unseverable. In the event that any applicable law limiting the amount of interest on other charges permitted to be collected from Borrower is interpreted to that any charge provided for in this Instrument or in the Note, whether considered separately or together with other charges levied in connection with this Instrument and the Note, violates such law and Borrower is entitled to the benefit of such law, such charge is hereby reduced to the extent necessary to eliminate such violation. The amount of any previously paid to Lender in excess of the amounts payable to Lender pursuant to such charges as reduced shall be applied by Lender to reduce the principal of the indebtedness evidenced by the Note. For the purpose of determining whether any applicable law limiting the amount of interest on other charges permitted to be collected from Borrower has been violated, all indebtedness which is secured by this Instrument or evidenced by the Note and which constitutes interest as well as all other charges levied in connection with such indebtedness which constitute interest shall be deemed to be allocated and spread over the stated term of the Note. Unless otherwise required by applicable law, such allocation and spreading shall be effected so such a manner that the rate of interest computed thereby is uniform throughout the stated term of the Note.

23. WAIVER OF STATUTE OF LIMITATIONS. Borrower hereby waives the right to assert any statute of limitations as a bar to the enforcement of the lien of this Instrument or to any action brought to enforce the Note or any other obligation secured by this Instrument.

24. WAIVER OF MARSHALLING. Notwithstanding the existence of any other security interests in the Property held by Lender or by any other party, Lender shall have the right to determine the order in which any or all of the Property shall be subjected to the remedies hereunder. Lender shall have the right to determine the order in which any or all portions of the indebtedness secured hereby are satisfied from the proceeds realized upon the exercise of the remedies provided herein. Borrower and any party who consents to this Instrument and any party who acquires or hereafter acquires security interests in the Property and who has actual or constructive notice hereof hereby waives any and all right to require the marshalling of assets in connection with the exercise of any of the remedies permitted by applicable law or provided herein.

25. CONSTRUCTION LOAN PROVISIONS. Borrower agrees to comply with the covenants and conditions of the Construction Loan Agreement if any which is hereby incorporated by reference in and made a part of this Instrument. All advances made by Lender pursuant to the Construction Loan Agreement shall be indebtedness of Borrower secured by this Instrument and such advances may be obligated as provided in the Construction Loan Agreement. All sums disbursed by Lender prior to completion of the improvements to protect the security of this Instrument shall be the principal amount of the Note shall be treated as disbursements pursuant to the Construction Loan Agreement. All such sums shall bear interest from the date of disbursement at the rate stated in the Note unless collection from Borrower of interest at such rate would be contrary to applicable law in which event such amounts shall bear interest at the highest rate which may be collected from Borrower under applicable law and shall be payable upon notice from Lender to Borrower requesting payment therefor.

From time to time as Lender deems necessary to protect Lender's interests, Borrower shall upon request of Lender execute and deliver to Lender in such form as Lender shall direct assignments of any and all rights or claims which relate to the construction of the Property and which Borrower may have against any party supplying or who has supplied labor, materials or services in connection with construction of the Property. In the event of breach by Borrower of the covenants and conditions of the Construction Loan Agreement, Lender at Lender's option with or without notice upon the Property (i) may invoke any of the rights or remedies provided in the Construction Loan Agreement (ii) may accelerate the sums secured by this Instrument and invoke those remedies provided in paragraph 27 hereof or (iii) may do both. If after the commencement of amortization of the Note, the Note and this Instrument are sold by Lender from and after such sale the Construction Loan Agreement shall cease to be a part of this Instrument and Borrower shall not assert any right of set-off, counterclaim or other claim or defense arising out of or in connection with the Construction Loan Agreement against the obligations of the Note and this Instrument.

26. ASSIGNMENT OF RENTS, APPOINTMENT OF RECEIVER, LENDER IN POSSESSION. As part of the consideration for the indebtedness evidenced by the Note, Borrower hereby absolutely and unconditionally assigns and transfers to Lender all the rents and revenues of the Property including those now due, past due or hereinafter due by virtue of any lease or other agreement for the occupancy or use of all or any part of the Property regardless of in whom the rents and revenues of the Property are payable. Borrower hereby authorizes Lender or Lender's agents to collect the aforesaid rents and revenues and hereby directs each tenant of the Property to pay such rents to Lender or Lender's agents, provided however that prior to written notice given by Lender to Borrower of the breach by Borrower of any covenant or agreement of Borrower in this Instrument, Borrower shall collect and receive all rents and revenues of the Property as trustee for the benefit of Lender and Borrower to apply the rents and revenues so collected to the sums secured by this Instrument in the order provided in paragraph 3 hereof with the balance going as to such balance as occurred to the account of Borrower. It being understood by Borrower and Lender that this assignment of rents constitutes an absolute assignment and not an assignment for additional security only. Upon delivery of written notice by Lender to Borrower of the breach by Borrower of any covenant or agreement of Borrower in this Instrument and without the necessity of Lender entering upon and taking and maintaining full control of the Property in person or by a court appointed receiver, Lender shall immediately be entitled to possession of all real and personal property of the Property as specified in this paragraph 26 as the same become due and payable including but not limited to rents then due and unpaid and all such rents shall immediately upon delivery of such notice be held by Borrower as trustee for the benefit of Lender only, provided however that the written notice by Lender to Borrower of the breach by Borrower shall contain a statement that Lender exercises its rights to such rent. Borrower agrees that commencing upon delivery of such written notice of Borrower's breach by Lender to Borrower, each tenant of the Property shall make such rents payable to and pay such rents to Lender or Lender's agent or Lender's written demand to each tenant therefor delivered to each tenant personally by mail or by delivering such demand to each rental unit without any liability on the part of said tenant to inquire further as to the existence of a default by Borrower.

Borrower hereby covenants that Borrower has not executed any prior assignment of said rents that Borrower has not performed and will not perform any act or has not executed and will not execute any instrument which would prevent Lender from exercising its right under this paragraph 26 and that at the time of execution of this Instrument there has been no anticipation or prepayment of any of the rents of the Property for more than two months prior to the due dates of such rents. Borrower covenants that Borrower will not hereafter collect or accept payment of any rents of the Property more than two months prior to the due dates of such rents. Borrower further covenants that Borrower will execute and deliver to Lender such further assignments of rents and revenues of the Property as Lender may from time to time request.

Upon Borrower's breach of any covenant or agreement of Borrower in this Instrument, Lender may in person or by agent or by a court-appointed receiver regardless of the adequacy of Lender's security, enter upon and take and maintain full control of the Property in order to perform all acts necessary and appropriate for the operation and maintenance thereof including but not limited to the prevention, cancellation or modification of leases, the collection of all rents and revenues of the Property, the making of repairs to the Property, the execution or termination of contracts providing for the management or maintenance of the Property, all on such terms as are deemed best to protect the security of this Instrument. In the event Lender elects to seek the appointment of a receiver for the Property upon Borrower's breach of any covenant or agreement of Borrower in this Instrument, Borrower hereby expressly consents to the appointment of such receiver. Lender or the receiver shall be entitled to receive a reasonable fee for so managing the Property.

All rents and revenues collected subsequent to delivery of written notice by Lender to Borrower of the breach by Borrower of any covenant or agreement of Borrower in this Instrument shall be applied first to the costs of any of taking control of and managing the Property and collecting the rents, including but not limited to attorney's fees, receiver's fees, premiums on receiver's bonds, costs of repairs to the Property, premiums on insurance policies, taxes, assessments and other charges on the Property and the costs of discharging any obligation or liability of Borrower as lessor or landlord of the Property and then to the sums secured by this Instrument. Lender or the receiver shall have access to the books and records used in the operation and maintenance of the Property and shall be liable to account only for those rents actually received. Lender shall not be liable to Borrower anyone claiming under or through Borrower or anyone having an interest in the Property by reason of anything done or left undone by Lender under this paragraph 26.

If the rents of the Property are not sufficient to meet the costs of any of taking control of and managing the Property and collecting the rents, any funds expended by Lender for such purposes shall become indebtedness of Borrower to Lender secured by this Instrument pursuant to paragraph 8 hereof. Unless Lender and Borrower agree in writing, no other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment therefor and shall bear interest from the date of disbursement at the rate stated in the Note unless payment of interest at such rate would be contrary to applicable law in which event such amounts shall bear interest at the highest rate which may be collected from Borrower under applicable law.

Any surviving upon and taking and maintaining of control of the Property or Lender or the receiver and any application of sums as provided herein shall not cure or waive any default hereunder or invalidate any other right or remedy of Lender under applicable law or provided herein. This assignment of rents of the Property shall terminate at such time as this Instrument ceases to be an indebtedness held by Lender.

Non-Uniform Covenants. Borrower and Lender further covenant and agree as follows:

27. ACCELERATION, IF NECESSARY. Upon Borrower's breach of any covenant or agreement of Borrower in this instrument, including, but not limited to, the covenant to pay when due any sums secured by this instrument, Lender or Lender's option may declare all of the sums secured by this instrument to be immediately due and payable without further demand and may revoke the power of sale and any other remedies permitted by applicable law or provided herein. Borrower acknowledges that the power of sale herein granted may be exercised by Lender without prior judicial hearing. Borrower has the right to bring an action to assert the non-existence of a breach or any other defense of Borrower to acceleration and sale. Lender shall be entitled to collect all sums and expenses incurred in pursuing such remedies, including, but not limited to, attorney's fees and costs of documentary evidence, abstracts and title reports.

If the power of sale is exercised, Trustee shall execute a written notice of the occurrence of an event of default and of the election to exercise the Property to be sold and shall record such notice in each county in which the Property or some part thereof is located. Lender or Trustee shall make cause of default in the manner provided by the laws of Utah to Borrower and to such other persons as the laws of Utah prescribe. Trustee shall give public notice of sale and shall sell the Property according to the law, of Utah. Trustee may sell the Property at the time, place and under the terms designated in the notice of sale in one or more parcels and in such order as Trustee may determine. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or Lender's designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property to said purchaser without any covenant or warranty expressed or implied. The records in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all costs and expenses of the sale, including, but not limited to, Trustee's and attorney's fees and costs of title, abstract, (b) to all sums secured by this instrument in such order as Lender or Lender's sole discretion, directs, and (c) the excess, if any, to the person or persons legally entitled thereto or to the county clerk of the county in which the sale took place.

28. RECONVEYANCE. Upon payment of all sums secured by this instrument, Lender shall request Trustee to reconvey the Property and shall surrender this instrument and all notes evidencing indebtedness secured by this instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled thereto. Such person or persons shall pay Trustee's reasonable costs incurred in so reconveying the Property.

29. SUBSTITUTE TRUSTEE. Lender or Lender's option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property the successor trustee shall succeed to all the title, power and duties conferred upon the Trustee herein and by applicable law.

30. REQUEST FOR NOTICES. Borrower requests that copies of the notice of default and notice of sale be sent to him at Borrower's address stated below:

31. FUTURE ADVANCES. Upon request of Borrower, Lender or Lender's option so long as this instrument secures indebtedness held by Lender, may make Future Advances to Borrower. Such Future Advances, with interest thereon, shall be secured by this instrument when evidenced by promissory notes stating that said notes are secured hereby. At no time shall the principal amount of the indebtedness secured by this instrument, not including sums advanced in accordance herewith to protect the security of this instrument, exceed the original amount of the Note (US \$ _____) plus the additional sum of US \$ _____.

IN WITNESS WHEREOF, Borrower has executed this instrument or has caused the same to be executed by its representatives thereunto duly authorized

OAKHILLS PARTNERSHIP,
a Utah Limited Partnership

By: Pacific Western Industries, Inc.,
a Utah Corporation
General Partner

[Signature] *[Signature]*

Chairman President

Borrower's Address:

c/o Pacific Western Industries, Inc.,
c/o South Main Street, Suite
Salt Lake City, Utah 84101

0075450 101 156

CORPORATE ACKNOWLEDGMENT

STATE OF UTAH, County ss.

On this day of, 19, personally appeared before me the signer of the foregoing instrument, who, being by me duly sworn, did say, that he is the of a corporation, and that the foregoing instrument was signed in behalf of said corporation by authority of its Board of Directors, and acknowledged to me that said corporation executed the same. My commission expires

Notary Public Residing at:

INDIVIDUAL ACKNOWLEDGMENT

STATE OF UTAH, County ss.

On this day of, 19, personally appeared before me the signer(s) of the foregoing instrument who, being duly sworn, acknowledged to me that ..he.. executed the same. My commission expires

Notary Public Residing at:

INDIVIDUAL LIMITED PARTNERSHIP ACKNOWLEDGMENT

STATE OF UTAH, County ss.

On this day of, 19, personally appeared before me the signer(s) of the foregoing instrument who, being by me duly sworn, did say that he general partner(s) of a limited partnership, and that said instrument was signed in behalf of said limited partnership, and acknowledged to me that said limited partnership executed the same. My commission expires

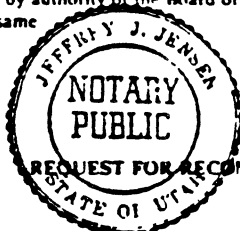
Notary Public Residing at:

CORPORATE LIMITED PARTNERSHIP ACKNOWLEDGMENT

STATE OF UTAH, SALT LAKE County ss.

On this 23rd day of MARCH, 19 83, personally appeared before me CHARLES N. JENSEN the signer of the foregoing instrument who being by me duly sworn, did say, that he is the CLARENCE J. JENSEN of PACIFIC MOUNTAIN INDUSTRIES INC. a corporation general partner of ONE HILLS PARTNERSHIP, a limited partnership, and that said instrument was signed in behalf of said limited partnership by authority of the Board of Directors of said general partner, and acknowledged to me that said limited partnership executed the same.

My commission expires 9-9-83



Notary Public Residing at: SALT LAKE

TO TRUSTEE

The undersigned is the holder of the note or notes secured by this instrument. Said note or notes, together with all other indebtedness secured by this instrument, have been paid in full. You are hereby directed to cancel said note or notes and this instrument which are delivered hereby and to reconvey, without warranty, all the estate now held by you under this instrument to the person or persons legally entitled thereto.

Date

BOOK 5450 PAGE 197

Exhibit A

Beginning at the most Southerly corner of a 12.00 foot right of way (Edwards and Daniels), said corner being North $0^{\circ}14'34''$ East along the quarter section line 369.48 feet and East 494.97 feet from the center of Section 11, Township 1 South, Range 1 East, Salt Lake Base and Meridian, and running thence North $26^{\circ}09'$ East along the Southeasterly line of said right of way 12.00 feet; thence North $63^{\circ}51'$ West 10.04 feet to a point on a 74.5 foot radius curve to the left the center of which bears North $6^{\circ}17'21''$ West; thence Northeasterly along the arc of said curve 69.56 feet to a point of tangency; thence North $30^{\circ}13'$ East 184.22 feet to a point of a 29.28 foot radius curve to the right; thence Northeasterly along the arc of said curve 23.00 feet to a point of a 39.0 foot radius reverse curve to the left, the center of which bears North $14^{\circ}47'$ West; thence Northeasterly along the arc of said curve 49.66 feet; thence North $48^{\circ}00'$ East 44.63 feet; thence South $89^{\circ}54'$ East 127.08 feet; thence South $0^{\circ}06'$ West 114.45 feet; thence South $52^{\circ}45'$ West 0.75 feet to a point on the Northwesterly line of Kennedy Drive, said point also being on a curve to the left, the center of which bears South $12^{\circ}39'$ West 50.00 feet; thence Southwesterly along said Northwesterly line and along the arc of said curve 104.41 feet to a point of a reverse curve to the right, the center of which bears South 73° West 35.36 feet; thence Southerly along the arc of said curve 27.77 feet to a point of tangency; thence South 28° West 27.27 feet to a point of a 1675.00 foot radius curve to the left; thence Southwesterly along the arc of said curve 160.79 feet to a point of tangency; thence South $22^{\circ}30'$ West 16.43 feet; thence North $63^{\circ}51'$ West 225.65 feet to the point of beginning.

APPENDIX II

June 10, 1988 Court of Appeals Decision

**GENERAL GLASS CORPORATION, a
Colorado corporation, Plaintiff,**

v.

**MAST CONSTRUCTION COMPANY, a
Utah corporation, Ron Mast as assignee
of the rights of Intermountain Glass
and Paint Company, a Utah corpora-
tion, United Pacific Reliance Insurance
Company, a Washington corporation,
and Oakhills Condominium Limited
Partnership, a Utah limited partner-
ship, Defendants and Appellants.**

**Ron MAST as assignee of the rights of
Intermountain Glass and Paint Compa-
ny, a Utah corporation, Crossclaim
Plaintiff and Appellant,**

v.

**MAST CONSTRUCTION COMPANY, a
Utah corporation, United Pacific Re-
liance Insurance Company, a Washing-
ton corporation, and Oakhills Condo-
minium Limited Partnership, a Utah
limited partnership, Crossclaim De-
fendants and Appellant.**

**Ron MAST as assignee of the rights of
Intermountain Glass and Paint Compa-
ny, a Utah corporation, Third-party
Plaintiff and Appellant,**

v.

**STATE SAVINGS & LOAN ASSO-
CIATION; Utah State Tax Commission;
Robert P. Hansen; Capitol Glass &
Aluminum; Ron Mast as assignee of
the rights of Debenham Electrical Sup-
ply Co.; Electro Tech Corporation;
Ron Mast as assignee of the rights of
Marathon Steel Company; Edwards &
Daniels Associates; and John Brown &
Associates; and John and Jane Does 1
thru 100, Third-party Defendants and
Appellants.**

**Ron MAST as assignee of the rights of
Marathon Steel Company, an Arizona
corporation, Plaintiff and Appellant,**

v.

**MAST CONSTRUCTION COMPANY, a
Utah corporation; Oakhills Condo-**

**minium Limited Partnership, a Utah limit-
ed partnership; and United Pacific Re-
liance Insurance Company, a Washing-
ton corporation, Defendants and Appel-
lant.**

**MAST CONSTRUCTION COMPANY, a
Utah corporation, Third-party
Plaintiff and Appellant,**

v.

**PACIFIC WESTERN INDUSTRIES, INC.,
a Utah corporation, Oakhills Condo-
minium Limited Partnership, a Utah
limited partnership, and Edwards &
Daniels Associates, Inc., Third-party
Defendants.**

**AMERICAN SAVINGS & LOAN ASSO-
CIATION, a California corporation,
formerly State Savings and Loan Asso-
ciation, Plaintiff and Respondent,**

v.

**OAKHILLS PARTNERSHIP, a Utah lim-
ited partnership; Pacific Western of
Utah, Inc., a Utah corporation, former-
ly Pacific Western Industries, Inc., a
Utah corporation; Charles W. Akerlow;
Richard J. Anderson; State Tax Com-
mission of Utah, Robert P. Hansen;
Capital Glass and Aluminum Corpora-
tion, a Utah corporation; Ron Mast as
assignee of the rights of Debenham
Electric Supply Company, Inc., an
Alaska corporation; Electro Technical
Corp., a Utah corporation; Ron Mast as
assignee of the rights of Intermountain
Glass & Paint Co., a Utah corporation;
General Glass Corp., a Colorado corpo-
ration; Ron Mast as assignee of the
rights of Marathon Steel Co., an Arizo-
na corporation; Edwards & Daniels As-
sociates, Inc., a Utah corporation; Og-
den's Carpet Outlet, a Utah corpora-
tion; Mast Construction Co., a Utah
corporation; Mildred S. Freymuller;
and John Does 1 thru 30, Defendants
and Appellants.**

Cite as 758 P.2d 438 (Utah App 1985)

Ron MAST as assignee of the rights of
Debenham Electric Supply Company,
Plaintiff and Appellant,

v.

ELECTRO TECHNICAL CORPORA-
TION, Mast Construction Company, the
Oakhills Partnership, and United Pacific
Insurance Company, Defendants and
Appellants.

No. 860355-CA.

Court of Appeals of Utah.

June 10, 1988.

nership, a Utah limited
nd United Pacific Re-
Company, a Washing-
Defendants and Appel-

TION COMPANY, a
on, Third-party
d Appellant,

v.

INDUSTRIES, INC.,
on, Oakhills Condo-
Partnership, a Utah
ip, and Edwards &
s, Inc., Third-party

GS & LOAN ASSO-
lifornia corporation,
vings and Loan Asso-
and Respondent,

v.

ERSHIP, a Utah lim-
Pacific Western of
corporation, former-
n Industries, Inc., a
Charles W. Akerlow;
ion: State Tax Com-
Robert P. Hansen;
Aluminum Corpora-
ration; Ron Mast as
rights of Debenham
Company, Inc., an
n; Electro Technical
oration; Ron Mast as
hts of Intermountain
a Utah corporation;
p., a Colorado corpo-
as assignee of the
Steel Co., an Arizo-
wards & Daniels As-
ah corporation; Og-
et, a Utah corpora-
uction Co., a Utah
red S. Freymuller;
thru 30. Defendants

Lawsuits were brought to establish
priority of liens in connection with condo-
minium construction project. The Third
District Court, Salt Lake County, Timothy
Hansen, J., entered judgment declaring
lender's deed of trust to be valid lien and to
have priority over all other liens, and gen-
eral contractor and contractor's president
appealed. The Court of Appeals, Davidson,
J., held that as a consequence of actual
notice of deed of trust to general contrac-
tor's president, deed of trust was valid and
binding lien as to contractor and president.

Affirmed.

Jackson, J., concurred in result only
and filed opinion.

Condominium ¶5

Deed of trust securing loan funding
construction of condominium project was
valid and binding lien as to general contrac-
tor and general contractor's president as
consequence of president's actual notice of
deed of trust; subordination agreement exe-
cuted on general contractor's behalf in
favor of lender was dated day of closing,
signed by general contractor's president
and contained legal description the same as
that depicted on deed of trust, and lender's
representative testified that subordination
agreement had been executed by time of
closing. U.C.A.1953, 57-1-6 (Repealed).

Ronald C. Barker (argued), Salt Lake
City, for appellants, Mast & Mast Const.

Warren Patten, W. Cullen Battle (ar-
gued), Douglas B. Cannon, Salt Lake City,
for respondents, American Sav. & Loan
Assoc.

Jeffery B. Brown, Salt Lake City, for
Electrical Technical Corp. & Capital Glass
& Aluminum

R. Stephen Marshall, Salt Lake City, for
Edwards & Daniels

Paul R. Howell, Salt Lake City, for Unit-
ed Pacific Ins.

John C. Green, III Salt Lake City, for
Electro Technical

Leland S. McCullough, Jr., Salt Lake
City, for Mildred Freymuller.

James E. Boevers, Salt Lake City, for
Western State Title

David Black, Stephen Marshall, Salt
Lake City, Van Cott, Bagley, Cornwall &
McCarthy for Edwards & Daniels

Before Judges DAVIDSON, BENCH
and JACKSON

OPINION

DAVIDSON, Judge

American Savings and Loan Association
(American) loaned funds to the Oakhills
Partnership (Oakhills) for the construction
of Oakhills Condominiums. Oakhills, a
Utah limited partnership, had Pacific West-
ern Industries, Inc. (Pacific Western), a
Utah corporation, as the general partner.
Charles W. Akerlow (Akerlow) and Richard
J. Anderson (Anderson) were respectively,
chairman of the board and president of
Pacific Western.

The March 28, 1983, loan from American
to Oakhills was secured by a promissory
note and a deed of trust. Akerlow and
Anderson signed the deed of trust but the
loan amount, date of the note, identity of
the trustee, and the seal of Pacific Western
were omitted. The deed of trust was re-
corded with the Salt Lake County Recorder
on April 8, 1983. It was rerecorded on
April 20, 1983. The date and the amount
of the note were added at that time. An
"X" was placed over the initial recording
with a line-out placed on the book and page
numbers of that recording. On April 26,
1983, Western States Title Company (West-
ern States) was added to the deed of trust
as trustee and the April 20th recording was
crossed out in the same manner. At trial,
Akerlow testified the deed of trust, "as

completely filled in," conformed to "the terms of [the] deal" with American.

Jeffrey J. Jensen (Jensen), vice president of Western States, acknowledged the deed of trust in his capacity as a notary public. He testified that he could not "remember specifically" whether Akerlow and Anderson were present when he acknowledged their signatures. Neither could Jensen state whether the two officers of Pacific Western were placed under oath "as to their corporate authority." Jensen did testify that it was his "customary practice" to have the parties sign documents "at the time of closing" and he would acknowledge them. It was not his practice to place them under oath. Additionally, Jensen testified to his personal knowledge of Akerlow and Anderson.

A representative of American testified that Jensen, Akerlow, and Anderson were present at the closing. He also testified Ronald E. Mast, president of Mast Construction Company, the general contractor, was present for a portion of the closing. The representative could not remember exactly how the closing was conducted. Ron Mast denied he was present at the closing, that he had ever seen American's representative prior to the trial, and that he had ever been "to the business" of Western States.

Ron Mast claimed work began on Oakhills Condominiums prior to April 8, 1983, the date of the initial recording of the deed of trust by American. However, the notice of lien recorded by Mast Construction Company indicated April 28, 1983, as the date the "first labor, material and equipment was performed." In an answer to an interrogatory, Ron Mast listed April 18, 1983, as the date on which "work was commenced, or materials were furnished on the ground for the structure, or improvement constructed on the property." Roger J. Mast, vice president of Mast Construction Company, was questioned at trial about his deposition. There, he answered that he "started the job" on April 18, 1983.

1. Other lien claimants have assigned their claims to Ron Mast resulting in his being an appellant personally as well as president of

W. David Hammons (Hammons), president of Electro Technical Corporation (Electro Tech) and a subcontractor on Oakhills Condominiums, filed a notice of lien which indicated May 6, 1983, as the date Electro Tech commenced work. However, Hammons testified at trial a temporary power panel and pole, a coil of wire, and some conduit were placed at the building site on April 6, 1983. Mast Construction Company relies on Electro Tech's placement of electrical equipment at the site to establish the priority of its lien over American's deed of trust.

Another lienholder filed a complaint on March 14, 1985, to foreclose its lien on Oakhills Condominiums. Other similar actions were consolidated with the result that Mast Construction Company and Ron Mast are appellants and American the respondent.¹ On June 19, 1986, the trial court granted American partial summary judgment which stated the deed of trust at issue, as recorded on April 8, 1983, was operative as either a deed of trust or mortgage. The court reserved the propriety of the signatures' acknowledgment and the date work commenced on Oakhills Condominiums for the bench trial which was held on July 25 and 26, 1986. An order for entry of final judgment was filed on November 18, 1986, which declared American's deed of trust was a valid lien against Oakhills Condominiums and had priority over all other liens against that project. The trial court directed the entry of judgment as final pursuant to Utah R.Civ.P. 54(b).

Appellants present two issues for review; (1) was the recording of the deed of trust as it appeared on April 8, 1983, effective in view of the omissions thereon and that the signatories were not placed under oath; and (2) did the placement of the electrical equipment at the building site of Oakhills Condominiums on April 6, 1983, constitute commencement to do work for purposes of Utah Code Ann. § 38-1-5 (1974)?

STANDARDS OF REVIEW

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Hammons), president of Hammons Corporation (Electrician) on Oakhills. Notice of lien which was filed on the date Electro was filed. However, Hammons' temporary power of attorney, and some of the building site on Oakhills. Mast Construction Company's placement of electrical equipment to establish the American's deed of

and a complaint on the deed of trust to enclose its lien on

Other similar actions with the result that any and Ron Mast American the respondent, the trial court summary judgment of deed of trust at April 8, 1983, was void of trust or mortgaged the property of judgment and the on Oakhills Condominium which was held 36. An order for was filed on November 1, 1983, declared American a valid lien against and had priority against that project. the entry of judgment to Utah R.Civ.P.

on issues for review; of the deed of trust 8, 1983, effective in hereon and that the deed under oath; and the electrical equipment of Oakhills Condominium 1983, constitute common for purposes of 1-5 (1974)?

OF REVIEW

requires that findings be set aside unless company, the other appel-

clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." However, we accord the trial court's conclusions of law no particular deference, but review them for correctness. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

THE DEED OF TRUST

Utah Code Ann. § 57-1-6 (1986) states:

Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, *and as to all other persons who have had actual notice* (emphasis added).

The "actual notice" exception to the requirement that a conveyance or instrument be validly recorded to impart notice to third persons is discussed in *Johnson v. Bell*, 666 P.2d 308 (Utah 1983). There the Utah Supreme Court stated actual notice was a question of fact. The Court wrote:

This statute was under examination by this Court in *Toland v. Corey*, 6 Utah 392, 24 P. 190 (1890), where we held that the "actual notice" required by § 57-1-6 was satisfied if a party dealing with the land had information of facts which would put a prudent man upon inquiry and which, if pursued, would lead to actual knowledge as to the state of the title. See a similar expression in *McGarry v. Thompson*, 114 Utah 442, 201 P.2d 288 (1948).

Id. at 310. *Accord Stumph v. Church*, 740 P.2d 820 (Utah App. 1987).

In the instant case it is not necessary to address the "duty to inquire" prong of actual notice. The record on appeal contains numerous exhibits. American's exhibit 32, received by the trial court, is a

letter written on March 24, 1983. In it, American's representative at the closing sent Jensen a list of conditions to be fulfilled prior to closing. Condition number 6 requires, "You must have in your possession the Subordination Agreement signed by Mast Construction Co. Inc." American's exhibit 33, also received, is that agreement in which Mast Construction Company subordinated to American a specific sum until the occurrence of certain events set forth in the document. The agreement was dated March 28, 1983, the day of closing, and was signed by American's representative and by Ron Mast in his capacity as president of Mast Construction Company. The legal description of the property on the exhibit attached to the subordination agreement is the same as that depicted on the exhibit to the deed of trust. At trial, American's representative testified the subordination agreement had been executed by the time of closing because of a notation on exhibit 32 followed by his initials.

In view of the above, we find that Ron Mast had actual notice of the deed of trust at issue prior to April 6, 1983, the date on which he relies to establish the priority of his lien. As a consequence of his actual notice, the deed of trust is valid and binding as to Ron Mast and Mast Construction Company.

Because of the above, it is unnecessary to analyze whether Hammons' placement of electrical equipment at the building site constituted commencement to do work for the purpose of satisfying the mechanics' lien statutes, Utah Code Ann. §§ 38-1-1 to -26 (1974). The validity of the April 6, 1983 lien date is immaterial once the priority of American's deed of trust is established as to appellants.

The judgment of the court below that American's deed of trust was valid and had priority over all other liens is affirmed.

Costs against appellants.

BENCH, J., concurs.

JACKSON, Judge (concurring in result only):

Without addressing whether the April 8 trust deed from Oakhills' general partner to American was legally effective to create a lien, the majority has determined that it was "valid and binding" on Ron Mast and his company. The majority examines the record evidence and makes a factual finding that was not made by the trial court, namely, that Mast had actual notice of the April 8 trust deed. This actual notice arises solely from the fact that, on March 28, Mast signed a subordination agreement that clearly informed him that American was loaning money to Oakhills for the condominium construction project on which Mast Construction Company and other lien claimants eventually worked. That agreement, however, does not mention anything about an existing or planned trust deed on the project site from Oakhills to American as security for the construction loan. I fail to see how it proves that Mast had actual notice of a deed of trust that was not even executed until after the subordination agreement was signed.

I am concerned that, under the majority's reasoning, no person who supplies material or labor on a construction job bigger than a child's sandbox will ever be able to achieve lien priority over an entity that loans money on the project. Every materialman on any job big enough to look like it requires financing will be charged with knowing or having reason to know that, at some unknown future time, the lender will require the borrower to execute a deed of trust to secure a loan. This result undermines the purpose of the mechanics' lien statute, which is "to protect those who have added directly to the value of property by performing labor or furnishing materials upon it." *Stanton Transp. Co. v. Davis*, 9 Utah 2d 184, 187, 341 P.2d 207, 209 (1959) (quoted with approval in *First of Denver Mortg. Inv. v. C.N. Zundel & Assocs.*, 600 P.2d 521, 524-25 (1979)). The majority's decision requires the materialman to become a fortune teller, thereby opening Pandora's box in cases where predictability is needed.

Furthermore, I do not believe that a third party's "actual notice" can turn an invalid legal instrument into one that creates a valid lien superior to the mechanic's lien of the third party. In other words, if an instrument of conveyance is defective in some material way, such that it is ineffective to create an encumbrance on the subject property notwithstanding its recording, how can it be legally effective as a superior lien as against a supplier of materials or labor, even one who knows (or could guess) that it is in existence? Significantly, the statute relied upon by the majority, Utah Code Ann. § 57-1-6 (1986), makes an instrument valid and binding against a third party with actual notice even though it is "without such acknowledgment, certification or record[ing]" as the statutes require. The statute does not make an instrument with *other* material defects, such as those alleged in this case, valid and binding against either a party to the legally defective instrument or a third party with actual notice of it.

Like the trial court, I believe the relevant issues are: (1) was the trust deed, as recorded on April 8, legally effective to create a lien, with the result that its recording on April 8 gave constructive notice to the world of American's lien from that date? and (2) if so, did work commence on the site, pursuant to Utah Code Ann. § 38-1-5 (1988), prior to April 8?

I agree with the trial court that the alleged defects and omissions in the April 8 trust deed did not deprive it of legal validity or recordability and that one lien claimant's placement of a temporary power panel and coil of wire at the project construction site on April 6, on the ground next to a pile of trash, would not impart sufficient notice that the materialman's work had commenced. See *Western Mortg. Loan Corp. v. Cottonwood Constr. Co.*, 18 Utah 2d 409, 424 P.2d 437, 439 (1967); *Tripp v. Vaughn*, 747 P.2d 1051, 1055 (Utah App. 1987). I therefore join in the affirmance of the judgment of the trial court.



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APPENDIX III

December 15, 1988 Court of Appeals Decision

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Cite as
98 Utah Adv. Rep. 53

IN THE UTAH COURT OF APPEALS

**GENERAL GLASS CORPORATION, a
Colorado corporation,
Plaintiff and Respondent,**

v.

**MAST CONSTRUCTION COMPANY, a
Utah corporation; Ron Mast, as assignee of
the rights of Intermountain Glass and Paint
Company, a Utah corporation; United Pacific
Reliance Insurance Company, a Washington
corporation; and Oak-hills Condominium
Limited Partnership, a Utah limited
partnership,**

Defendants and Appellants.

**Ron Mast, as assignee of the rights of
Intermountain Glass and Paint Company, a
Utah corporation,**

Cross-claim Plaintiff and Appellant,

v.

**Mast Construction Company, a Utah
corporation; United Pacific Reliance Insurance
Company, a Washington corporation; and
Oakhills Condominium Limited Partnership, a
Utah limited partnership,**

Cross-claim Defendants and Appellant.

**Ron Mast, as assignee of the rights of
Intermountain Glass and Paint Company, a
Utah corporation,**

Third-party Plaintiff and Appellant,

v.

**State Savings & Loan Association; Utah State
Tax Commission; Robert P. Hansen; Capitol
Glass & Aluminum; Ron Mast, as assignee of
the rights of Debenham Electrical Supply Co.;
Electro Technical Corp.; Ron Mast, as
assignee of the rights of Marathon Steel
Company; Edwards & Daniels Associates,
Inc.; John Brown & Associates; and John and
Jane Does 1 thru 100,**

Third-party Defendants and Appellants.

**Ron Mast, as assignee of the rights of
Marathon Steel Company, an Arizona
corporation,**

Plaintiff and Appellant,

v.

**Mast Construction Company, a Utah
corporation; Oakhills Condominium Limited
Partnership, a Utah limited partnership; and
United Pacific Reliance Insurance Company, a
Washington corporation,**

Defendants and Appellant.

**Mast Construction Company, a Utah
corporation,**

Third-party Plaintiff and Appellant.

v.

**Pacific Western Industries, Inc., a Utah
corporation; Oakhills Condominium Limited
Partnership, a Utah limited partnership; and
Edwards & Daniels Associates, Inc.,**

Third-party Defendants.

**American Savings & Loan Association, a
California corporation, formerly State Savings
& Loan Association,**

Plaintiff and Respondent,

v.

**Oakhills Partnership, a Utah limited
partnership; Pacific Western of Utah, Inc., a
Utah corporation, formerly Pacific Western
Industries, Inc., a Utah corporation; Charles
W. Akerlow; Richard J. Anderson; State Tax
Commission of Utah; Robert P. Hansen;
Capitol Glass and Aluminum Corporation, a
Utah corporation; Ron Mast, as assignee of
the rights of Debenham Electric Supply
Company, Inc., an Alaska corporation;
Electro Technical Corp., a Utah corporation;
Ron Mast, as assignee of the rights of
Intermountain Glass & Paint Co., a Utah
corporation; General Glass Corp., a Colorado
corporation; Ron Mast, as assignee of the
rights of Marathon Steel Co., an Arizona
corporation; Edwards & Daniels Associates,
Inc., a Utah corporation; Ogden's Carpet
Outlet, a Utah corporation; Mast Construction
Co., a Utah corporation; Mildred S.
Freymuller; and John Does 1 thru 30,**

Defendants and Appellants.

**Ron Mast, as assignee of the rights of
Debenham Electric Supply Company,
Plaintiff and Appellant,**

v.

**Electro Technical Corporation; Mast
Construction Company; the Oakhills
Partnership; and United Pacific Insurance
Company,**

Defendants and Appellants.

Before Judges Davidson, Bench, and Jackson.

**No. 860355-CA
FILED: December 15, 1988**

**THIRD DISTRICT
Honorable Timothy Hansen**

ATTORNEYS:

Ronald C. Barker for Mast & Mast Const.

**David W. Slaughter for United Pacific
Reliance.**

**Warren Patten, W. Cullen Battle, Douglas B.
Cannon for American Savings.**

**Jeffery B. Brown for Electrical Technical
Corp. & Capital Glass.**

R. Stephen Marshall for Edwards & Daniels.
 Paul R. Howell for United Pacific Insurance.
 John C. Green, III for Electro Technical.
 Leland S. McCullough, Jr. for Freymuller.
 Pacific Western of Utah & Oakhills
 Partnership c/o Charles Ackerlow.
 Richard Anderson.
 James E. Boevers for Western State Title.
 David Black, Stephen Marshall for Edwards &
 Daniels.
 Robert F. Babcock.
 Barbara W. Richman.

OPINION ON REHEARING

JACKSON, Judge:

These consolidated actions were brought to establish priority of the parties' interests in real property that was the site of the Oakhills Condominium project. Due to various assignments and substitutions, Ron Mast and Mast Construction Company (referred to collectively as "Mast" are the appellants and American Savings & Loan Association ("American") is the respondent. Mast appeals from the judgment below that American's deed of trust constitutes a valid lien against the Oakhills Condominiums property, with priority over Mast's mechanics' liens. We affirm.¹

On March 28, 1983, Oakhills Partnership ("Oakhills") executed a promissory note to State Savings & Loan Association (the former name of respondent American) for \$10,400,000, the sum loaned for construction of the Oakhills Condominium project, with interest payable monthly from April 1, 1983, and the principal due on May 1, 1985. On April 8, 1983, a document entitled "Multifamily Deed of Trust, Assignment of Rents and Security Agreement (Security for Construction Loan Agreement)" and dated March 28, 1983, was filed for recording in Salt Lake County. The document showed Oakhills, a Utah limited partnership, as "Trustor/Grantor" and "Borrower" and State Savings & Loan Association as "Beneficiary" and "Lender." The recitals state that Borrower, in consideration of the indebtedness recited and the trust created, grants, conveys and assigns to Trustee, in trust and with power of sale, the described Oakhills Condominium project property. The document recites that it is executed for the purposes of, among other things, repayment of the indebtedness evidenced by Borrower's note and performance of the covenants and agreements of Borrower contained in a Construction Loan Agreement, incorporated by reference. However, blanks in the deed of trust form for the trustee's name and for the date, amount, and due date of the note were not filled in; the space for the date of the Construction Loan Agreement was also

left blank. The trust deed was executed by the Oakhills Partnership and signed by Charles Ackerlow and Richard Anderson on behalf of its general partner.

These competing actions were commenced after default on the note. On motions for summary judgment, the trial court ruled that the trust deed, as recorded on April 8, 1983, was operative as either a trust deed or mortgage, even though it contained the aforementioned blanks. The court reserved the following issues for trial: (1) whether the execution of the instrument was acknowledged before a notary public and, if not, what effect failure to acknowledge would have; (2) whether work commenced prior to April 8, 1983; and (3) whether the claimed activities of the subcontractor, Electro Technical Corporation, could constitute commencement of work under the mechanics' lien statute, Utah Code Ann. §38-1-5 (1988).

At trial, Mast Construction Company, the general contractor, claimed work on the project began under the mechanics' lien statutes prior to April 8, 1983. Relying on the trial testimony of David Hammons, president of Electro Technical Corporation, that he placed certain electrical materials at the project site on April 6, 1983, appellants asserted their mechanics' liens should relate back to Hammons's date and take priority over American's deed of trust.

The trial court found: the trust deed was signed by duly authorized officers of the general partner in the presence of a notary public, who completed the certificate of acknowledgment but did not place the signatories under oath as stated in the certificate; and the notary public was personally acquainted with the signers and familiar with their respective authorizations from and business relationships with Oakhills and its general partner. In addition, the trial court specifically found no work commenced and no materials were furnished at the Oakhills Condominiums site prior to April 8, 1983.

Based on these findings, the court concluded: (1) the trust deed acknowledgment was regular on its face and conformed to the statutory format; (2) the trust deed was entitled to be recorded and imparted constructive notice to all parties of American's lien; and (3) American's lien had priority over all other subsequent liens against the Oakhills Condominiums property.

On appeal, we must determine whether alleged defects and omissions in American's deed of trust, as recorded on April 8, 1983, were fatal to the creation of a lien or encumbrance on the property or to the recordability of the instrument. If not, we must then decide whether the court clearly erred in finding that, for purposes of applying Utah Code Ann. §38-1-5 (1988), no materials were furnished and no work commenced on the project

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trust.

First, we examine the purpose and hybrid
nature of a trust deed under Utah statutes.
"Trust deed" means a deed executed in con-
formity with this act and conveying real prop-
erty to a trustee in trust to secure the perfor-
mance of an obligation of the grantor or
other person named in the deed to a benefi-
ciary." Utah Code Ann. §57-1-19(3) (1986).
Although a trust deed, like a mortgage, is
given as security for the performance of some
obligation, it is nevertheless a conveyance by
which title to the trust property passes to the
trustee. See Utah Code Ann. §57-1-19(4)
(1986) ("trustee" is person to whom title to
real property is conveyed by trust deed); see
also Utah Code Ann. §57-1-28 (1986).

As a general rule, an instrument purporting
to be a deed and in which a blank has been
left for the name of the grantee is no deed and
is inoperative as a conveyance of legal title as
long as the blank remains. *Burnham v.*
Eschler, 116 Utah 61, 208 P.2d 96 (1949).
Thus, the document recorded by American on
April 8, 1983, is ineffective as a title-
conveying instrument because it does not iden-
tify or name the trustee, who is the grantee
under the deed.² We nonetheless agree with
the trial court's alternative conclusion that the
instrument recorded is operative as a mortgage
despite this omission.

Unlike a trust deed, a mortgage in Utah is
not a title-conveying instrument. The mort-
gagor retains legal title, and the mortgagee's
interest is a lien on the property to secure
payment of a debt. *State Bank of Lehi v.*
Woolsey, 565 P.2d 413 (Utah 1977). See Utah
Code Ann. §78-40-8 (1987); *Bybee v.*
Stuart, 112 Utah 462, 189 P.2d 118 (1948). In
order to establish a valid mortgage (or trust
deed), there must be in existence a legal debt
or obligation with a specific amount owing.
Bangerter v. Poulton, 663 P.2d 100 (Utah
1983), but there is nothing in our statutes
which requires an instrument to specify the
amount of indebtedness in order to be valid as
a legal mortgage. Although Utah Code Ann.
§57-1-14 (1986) sets forth a land mortgage
form that may be used which includes spaces
for insertion of the amount and terms of the
debt, no particular form is necessary as long
as the writing shows the intention of the
parties to create a valid legal mortgage. See
Bybee, 189 P.2d at 122. The instrument need
not show the amount of indebtedness as long
as it sufficiently discloses the sources from
which the specific amount may be ascertained.
Hampshire Nat'l Bank v. Calkins, 3 Mass.
App. Ct. 697, 339 N.E.2d 244 (1975); *Sease v.*
John Smith Grain Co., 17 Ohio App. 3d 223,
479 N.E.2d 284, 290 (1984). See *Commercial*
Factors of Denver v. Clarke & Waggener, 684
P.2d 261 (Colo. Ct. App. 1984).

Here, the clear intention of the parties that

American be given an interest in the described
project property to secure repayment of its
loan to Oakhills appears repeatedly on the
face of the document. The parties are identi-
fied and repeatedly referred to as "borrower"
and "lender." Notwithstanding the omission of
the amount and terms of the underlying note,
the instrument recites numerous times that it is
being executed precisely to secure repayment
of Oakhills's indebtedness to American for a
specific construction loan, evidenced by a
promissory note. The instrument is thus a
valid legal mortgage giving American a lien
against the project property as security for
repayment of the construction loan.

Mast next contends American's instrument
was not entitled to be recorded under Utah
Code Ann. §57-3-1 (1986)³ because
"acknowledgment" of the instrument, required
by Utah Code Ann. §57-1-6 (1986),⁴ nec-
essitates a statement by the signers under oath.
As an unrecordable instrument, Mast main-
tains, it could not impart the notice to third
parties provided for in section 57-1-6 and
Utah Code Ann. §57-3-2 (1986)⁵ even
though it was, in fact, recorded. See *Norton v.*
Fuller, 68 Utah 524, 251 P. 29 (1926) (actual
recording of purported mortgage of no legal
effect where acknowledgment of execution
improperly taken by mortgagee as notary).
Appellants' principal arguments are: (1)
Ackerlow and Anderson did not sign the in-
strument in front of the notary public; and (2)
the acknowledgment by the signers is defective
because, as the trial court found, they were
not placed under oath by the notary.

Mast overlooks the specific finding of the
trial court that the instrument was signed in
the notary's presence, choosing instead to
reargue the contradictory testimony on this
point in the light most favorable to appell-
ants' position. We must begin our analysis,
however, with the trial court's findings, not
with appellants' view of what facts should
have been found. *Ashton v. Ashton*, 733 P.2d
147, 150 (Utah 1987). As we have said on
numerous occasions, in order to challenge a
finding of fact, it is an appellant's burden to
marshall all the evidence that supports the
court's finding and then demonstrate why,
even viewing it in the light most favorable to
the court below, it is insufficient to support
the finding made. *E.g.*, *Fitzgerald v. Critch-*
field, 744 P.2d 301, 304 (Utah Ct. App. 1987);
Harker v. Condominiums Forest Glen, Inc.,
740 P.2d 1361, 1362 (Utah Ct. App. 1987)
(following *Scharf v. BMG Corp.*, 700 P.2d
1068, 1070 (Utah 1985)). Only then can we
consider whether those findings are "clearly
erroneous" under Rule 52(a) of the Utah Rules
of Civil Procedure. *Ashton*, 733 P.2d at 150.
In light of Mast's failure to carry this burden
on appeal, we will not disturb the trial court's
finding. See *id.*; *Newmeyer v. Newmeyer*, 745
P.2d 1276, 1278 (Utah 1987).

Mast also claims the instrument was not properly acknowledged because the notary public did not require the signers "to take an oath, affirm or swear in connection with the signing" of it. Mast incorrectly cites *R. S. McKnight v. State Land Board* and asserts that case "sets forth the four requirements need [sic] for a valid notarization: (1) an oath or solemn declaration; (2) a manifestation of an intent to be bound by a statement or act, but something more than just signing the document; (3) the signature; and (4) an acknowledgment by an authorized person that the oath was taken." (Emphasis added.) Mast then argues that the acknowledgment on American's instrument is invalid because requirements (1) and (2) were not satisfied. Mast has, however, grossly mischaracterized the facts and holding in *McKnight* in order to make it appear controlling in this case.

McKnight involved the filing of applications for oil and gas leases under statutes that required applicants to be citizens or corporations of the United States and stated lease applications must be accompanied by a "statement under oath over applicant's signature of his qualifications" *McKnight v. State Land Board*, 14 Utah 2d 238, 381 P.2d 726, 730 (1963). Plaintiff argued another's application must lose priority because it omitted an oath of citizenship when filed. After discussing several types of oaths and their purposes,⁶ the court stated, "The essentials of an oath are: 1. A solemn declaration. 2. Manifestation of an intent to be bound by the statement. 3. Signature of declarer. 4. Acknowledgment by an authorized person that oath was taken." *McKnight*, 381 P.2d at 734.

In contrast to the statute in *McKnight*, the acknowledgement statutes governing conveyances of interests in land in the spring of 1983 did not require any statement under oath by the representatives of Oakhills Partnership about their execution of the instrument we have determined is a legal mortgage.⁷ Conveyances in writing were to be "acknowledged or proved" and certified in the manner provided by the statutes. Utah Code Ann. §57-2-1 (1986). See also Utah Code Ann. §57-1-6 (1986) (in order to operate as notice to third parties, instrument "shall be proved or acknowledged and certified").

A person acknowledging the execution of an instrument appears before an authorized officer and in some manner admits the fact of execution, with a view to giving the instrument authenticity. See 1 Am. Jur. 2d *Acknowledgments* §29 (1962). Under our statutes, the acknowledgment or proof could be taken by one of several officers, including a notary public, Utah Code Ann. §57-2-2 (1986), who was then required to make a certificate thereof and endorse it on or annex it to the instrument of conveyance. Utah Code Ann. §57-2-5 (1986). Where the person making

the acknowledgment was personally known to the officer to be the person whose name was subscribed to the conveyance, no sworn oath or affirmation of a third party regarding the identity of the acknowledging person was necessary. See Utah Code Ann. §57-2-6, -8 (1986). In such a case, the officer's certificate of acknowledgment was permitted to be in substantially the following form:

State of Utah, County of _____

On the day of __, 19__, personally appeared before me ____, the signer of the above instrument, who duly acknowledged to me that he executed the same.

Utah Code Ann. §57-2-7 (1986).⁸ The statutory form does not require the certificate to state affirmatively that the person making the acknowledgment is personally known to the officer. *Cf. In re New Concept Realty & Dev., Inc.*, 107 Idaho 711, 692 P.2d 355 (1984).

The trial court found that the signers and their relationships to Oakhills and its general partner were personally known to the notary public, who had taken their acknowledgments many times. The notary's certificate of acknowledgment recites that the two named signers appeared before him and stated their positions in Oakhills Partnership's general partner, their authority to sign the document on behalf of the limited partnership and for the general partner, and the fact that they acknowledged the execution of the instrument by the limited partnership.

The certificate thus complies with the statutory requirements and was sufficient to require acceptance of the instrument for recording under Utah Code Ann. §57-3- (1986). As a properly acknowledged and recorded mortgage, the instrument imparted notice of its contents to third parties as of the recording date, April 8, 1983.⁹ See Utah Code Ann. §57-1-6 (1986); Utah Code Ann. §57-3-2 (1986).

We now examine the issue of priority between Mast's mechanics' liens and American's mortgage lien. Utah Code Ann. §38-1-3 (1988) specifies the circumstances in which those persons rendering services, performing labor, or furnishing materials in certain construction projects are given mechanics' liens on the construction property. In determining the priority among competing liens against the same property, another section of the statute makes clear that the date of recording a notice of a mechanics' lien prescribed by Utah Code Ann. §38-1 (1988), is not conclusive. Instead, the mechanics' liens

shall relate back to, and take effect as of, the time of the commencement to do work or furnish mater-

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7-2-7 (1986).⁸ The
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711, 692 P.2d 355

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Code Ann. §57-3-1
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1983.⁹ See Utah Code
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Code Ann. §38-1-7
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and take effect
the commence-
or furnish mater-

ials on the ground for the structure
or improvement, and shall have
priority over any lien, mortgage or
other encumbrance which may have
attached subsequently to the time
when the building, improvement or
structure was commenced, work
begun, or first material furnished
on the ground; also over any lien,
mortgage or other encumbrance of
which the lien holder had no notice
and which was unrecorded at the
time the building, structure or
improvement was commenced, work
begun, or first material furnished
on the ground.

Utah Code Ann. §38-1-5 (1988). Under
this provision, a properly recorded mortgage
has priority over a mechanics' lien arising
from the furnishing of labor or materials that
commenced after the mortgage recordation. See
Utah Savings & Loan Ass'n v. Mecham,
12 Utah 2d 335, 366 P.2d 598, 602 (1961).

Mast asserted at trial that work commenced
on the Oakhills Condominium project on
April 6, 1983, two days before the recording
of American's instrument. Hammons, presi-
dent of Electro Technical Corporation, testi-
fied he placed a temporary power panel and
pole, a coil of electrical wire, and some
conduit at the building site on April 6. Ron
Mast and Roger Mast claimed to have seen
these materials when visiting the project site
on or about April 8, 1983. The trial court,
however, obviously disbelieved the witnesses'
testimony, entering a specific finding that
"[n]o work commenced and no materials were
furnished at the Oakhills site prior to April 8,
1983."

Once again, appellants are attempting to
challenge this finding by rearguing the evi-
dence. See *Ashton*, 733 P.2d at 150. Under the
"clearly erroneous" standard of review, we
must give due regard to the trial court's
opportunity to judge the credibility of the
witnesses. Utah R. Civ. P. 52(a). We cannot
set aside a trial court's finding of fact unless
it is against the clear weight of the evidence or
we otherwise reach a definite and firm convic-
tion that a mistake has been made. *Western*
Kane County Special Serv. Dist. No. 1 v.
Jackson Cattle Co., 744 P.2d 1376, 1377
(Utah 1987). Mast has not demonstrated either
to us.

Hammons testified he placed the temporary
power panel at the top of the project site
behind a pile of debris. Roger Mast, however,
testified the panel was in a clear spot—not
near any debris—considerably to the left of
where Hammons said he placed it. Hammons
filed a notice of lien stating Electro Technical
Corporation's work on the project began May
6, 1983, which is the same date its written
subcontract with Mast Construction Company

was signed. Electro Technical Corporation's
first application for payment identified May 9,
1983, as the first day of the project work
period. Mast Construction Company filed a
notice of lien signed by its president, Ron
Mast, giving April 28, 1983, as the date work
commenced on the project. In its April 1986
response to interrogatories, Mast Construction
Company identified April 18, 1983, as the date
work commenced, and described that work as
clearing the site, with no mention of any
temporary power equipment being left there
earlier. Finally, photographs of the work site
taken during the second half of April 1983
revealed no panel. Commenting on the inco-
sistent evidence, the trial court observed:

I also note with some interest that
this power pole seems to evade
having its picture taken, and it
always seems to be just outside the
range of the photographs. There is
some substantial confusion on the
part of the lien claimants as to
where this power pole was placed.

If it was placed as Mr. Hammons
said, it's to the left side of the pile
of [refuse]. And Mr. Mast as I
recall testified it was on the right-
hand side. And that's all shown in
the grading plan that was marked as
an exhibit and received. I'm surp-
rised it didn't get photographed one
way or another.

The lower court thus questioned the credi-
bility of the mechanics' lien claimants' self-
serving testimony and weighed it against their
prior inconsistent actions and written statem-
ents. It is not our function to second-guess
the trial court as factfinder where there is a
dispute in the evidence. The finding that no
work was begun on or materials furnished to
the project before the recording of American's
mortgage on April 8, 1983, is not clearly er-
roneous.¹⁰ The trial court correctly concluded
that American's lien took priority over all
other liens subsequent to that date.

We have considered the other issues raised
by appellants and find them equally meritless.
The judgment of the trial court is affirmed.

Norman H. Jackson, Judge

WE CONCUR:

Richard C. Davidson, Judge

Russell W. Bench, Judge

1. We previously issued an opinion in this case aff-
irming the judgment of the trial court on a different
basis. *General Glass Corp. v. Mast Constr. Co.*, 758
P.2d 438 (Utah Ct. App. 1988). Mast's subsequent
petition for rehearing was granted and the case was
resubmitted for decision. The prior opinion was
withdrawn by order of this court dated September
13, 1988. *General Glass Corp. v. Mast Constr. Co.*,
91 Utah Adv. Rep. 15 (Ct. App. 1988).

2. In addition, Utah Code Ann. §57-3-10(2) (1986) rendered the document unentitled to recording as a trust deed because it omits the name and address of the trustee/grantee.

3.

A certificate of the acknowledgment of any conveyance, or of the proof of the execution thereof as provided in this title, signed and certified by the officer taking the same as provided in this title, shall entitle such conveyance, with the certificate or certificates aforesaid, to be recorded in the office of the recorder of the county in which the real estate is situated.

Utah Code Ann. §57-3-1 (1986). The term "conveyance" as used in Title 57 embraced "every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered or assigned, except wills, and leases for a term not exceeding one year." Utah Code Ann. §57-1-1 (1986).

4.

Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated

Utah Code Ann. §57-1-6 (1986) (repealed by Utah Laws 1988, ch. 155, §24; now see Utah Code Ann. §57-3-2 (1988)).

5.

(1) Every conveyance, or instrument in writing affecting real estate, executed, acknowledged, or proved, and certified, in the manner prescribed by this title ... shall, from the time of filing the same with the recorder for record, impart notice to all persons of their content. Subsequent purchasers, mortgagees, and lien holders are deemed to purchase and take with notice.

Utah Code Ann. §57-3-2(1) (1986) (1985 amendments were stylistic only).

6.

The purpose of an oath is to avoid a violation of a pledge or promise. It is to become secure against profanation or corruption, or breach. In its broadest form the term "oath" is used to include all forms of attestation by which one signifies that he is bound in good faith to perform what is demanded by the oath faithfully and truly. It does not include those forms of the attestation which are not accompanied by an imprecation.

McKnight, 381 P.2d at 733-34.

7. The instrument in this case was executed by a partnership. The certificate of acknowledgment of an instrument executed by a corporation, however, was required to be substantially in the statutory form found in the second part of Utah Code Ann.

§57-2-7 (1986), which specifically refers to the person executing the document as swearing or affirming to his or her corporate officer or agent status and to the source of authorization to sign the instrument on the corporation's behalf. The acknowledgment statutes, Utah Code Ann. §§57-2-1 through-9 (1986) were recently repealed by Utah Laws 1988, ch. 155, §24 (effective July 1, 1988). The current comparable provisions can be found at Utah Code Ann. §§57-2a-1 through-7 (1988).

8. The substance of what it means to acknowledge execution of a document before a notary or other authorized officer in particular circumstances, such as on behalf of a partnership or corporation, is now set forth in Utah Code Ann. §57-2a-2(1) (1988).

9. We reject appellants' assertion, supported only by superficial legal analysis, that omission of the amount and date of the note rendered the instrument recorded "void" because it could not impart constructive notice of American's mortgage lien under Utah Code Ann. §57-1-6 (1986) and Utah Code Ann. §57-3-2 (1986). The clear reference in the mortgage to the separate note and construction loan agreement, along with the names and addresses of Oakhills and American, were adequate to put prudent subsequent lienors on inquiry notice which, if pursued, would lead to actual notice of the amount and terms of the indebtedness. See *Johnsco v. Bell*, 666 P.2d 308 (Utah 1983). See also *Commercial Factors of Denver v. Clarke & Waggener*, 68 P.2d 261, 263 (Colo. Ct. App. 1984); *Air Flo Heating & Air Conditioning, Inc. v. Baker*, 37 So.2d 449, 451 (Fla. Ct. App. 1976), cert. denied 341 So.2d 289 (Fla. 1976).

10. In light of this determination, we do not reach the issues of whether placement of this temporary power equipment at the project site would be liable work under section 38-1-3 and, if so, whether it would have provided sufficient notice constitute the "commencement of work" under section 38-1-5.

Cite as

98 Utah Adv. Rep. 58

IN THE UTAH COURT OF APPEALS

Gail Kathleen THROCKMORTON,
Plaintiff and Respondent,

v.

Cecil Dee THROCKMORTON,
Defendant and Appellant.

Before Judges Garff, Billings, and Jackson.

No. 870400-CA
FILED: December 19, 1988

THIRD DISTRICT
Homer L. Wilkinson

ATTORNEYS:

Robert M. McRae for Appellant
Nolan J. Olsen for Respondent.

APPENDIX IV

Extension of Time dated January 17, 1989

Ronald C. Barker, #0208
Mitchell R. Barker, #4530
David C. Cundick, #4817
Attorneys for Masts
2870 South State Street
Salt Lake City, Utah 84115-3692
Telephone (801)486-9636

BEFORE THE SUPREME COURT OF THE
STATE OF UTAH

GENERAL GLASS CORPORATION, a
Colorado corporation, et al.,

Plaintiffs and Respondents,

vs.

MAST CONSTRUCTION COMPANY,
INC., a Utah corporation,
et al.,

Defendants and Appellants,
and Petitioners for
Writ of Certiorari.

ORDER EXTENDING
TIME TO PETITION
FOR CERTIORARI

DOCKET NUMBER _____

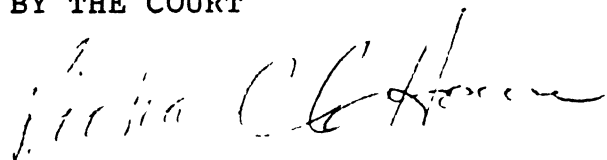
Court of Appeals Docket No.
860355-CA

The Court having considered the foregoing ex parte
motion, and good cause appearing therefore, it is hereby

ORDERED, that Ron Mast and Mast Construction Company
shall have through February 2, 1989 within which to petition
this Court for a Writ of Certiorari to the Utah Court of Appeals
in this matter.

So ordered this seventeenth day of January, 1989.

BY THE COURT



APPENDIX V

Trial Proceedings of June 1986, pages 74-81 and 95-96

1 adverse party. We have sued him.

2 MR. STRONG: They've also called him as their
3 witness.

4 THE COURT: That doesn't solve the problem. He's
5 an adverse party. He may lead. Objection overruled.

6 MR. BARKER: I object that it asks for a
7 conclusion of the witness. If he wants to ask about a
8 specific affidavit, or a specific transaction, or event, he
9 should do so.

10 MR. PATTEN: I asked about the closing.

11 THE COURT: Objection overruled.

12 THE WITNESS: No. I don't think that's fair. I
13 have some very specific recollections of what took place on
14 March 28th when we were asked to sign documents by American
15 Savings.

16 Q (By Mr. Patten) And your memory is what, sir?

17 A My memory is that the--

18 MR. STRONG: Excuse me, Your Honor. I'm going to
19 object to the form of that question. I don't think he
20 specifically asked about his memory.

21 MR. PATTEN: I'll rephrase it, sir.

22 MR. BARKER: I suggest we have a foundation.

23 THE COURT: That's what he's going to do.

24 Q (By Mr. Patten) Where do you recall signing
25 Exhibit P-1, sir?

1 A In my office.

2 Q In whose presence?

3 A In the presence of Mr. Anderson.

4 Q Do you recall whether or not Mr. Anderson signed
5 the document at the same time in your office?

6 A It's my recollection that he did.

7 Q Do you recall attending a closing at the office of
8 Western States SAVings--Western States Title?

9 A Not on this transaction, no.

10 Q Is it that you have no memory either way, or that
11 you have a memory that in fact you did not?

12 A My memory is that on this closing, we did not go
13 to Western Title. We went to one a few months later.

14 Q Do you recall, sir, whether you ever appeared
15 before Mr. Jensen to acknowledge to him, or tell him that
16 you in fact had signed Exhibit P-1?

17 A No. I did not do that.

18 MR. PATTEN: Your Honor, if it hasn't been done
19 before, I move that the deposition of Mr. Akerlow taken on
20 May 1, 1986 be published at this time.

21 MR. BARKER: No objection.

22 THE COURT: Any objection to publishing the
23 deposition of Mr. Akerlow?

24 MR. STRONG: No, Your Honor.

25 MR. GREEN: No objection.

1 THE WITNESS: This would be my second deposition.

2 MR. PATTEN: I believe that's correct.

3 MR. STRONG: The third, I think, actually.

4 THE COURT: This is the deposition taken on
5 May 1st, '86. Is this the one you'd like to have
6 published?

7 MR. PATTEN: Yes, Your Honor.

8 THE COURT: There being no objection, the Court
9 will publish the deposition of Mr. Akerlow of that date.

0 MR. PATTEN: Your Honor, I would like to read,
1 beginning on page 10, line 25.

2 THE COURT: Let me hand this to Mr. Akerlow so he
3 can follow along. The record will show that Mr. Akerlow
4 has signed that.

5 THE WITNESS: Thank you, Your Honor.

6 Q (By Mr. Patten) "Question: Did you ever appear
7 before Jeff Jensen and swear that this was, in fact, your
8 signature on page 8 of this Trust Deed?

9 "Answer: I don't recall whether I did or not.

0 "Question: You have no specific recollection?

1 "Answer: No."

2 That was indeed your testimony at that time, was
3 it not?

4 A Yes.

5 MR. PATTEN: I have nothing further at this time,

1 Your Honor.

2 THE COURT: Let's break for the noon recess,
3 gentlemen. We'll continue with Mr. Akerlow. We'll be in
4 recess until 2:00 p.m., and hopefully at that point in time
5 I'll have sufficient accommodation for all of you. We'll
6 be in recess until two.

7 (The noon recess was taken.)

8 THE COURT: The record will show we continue in
9 Debenham versus Electro Technical and others. It appears
10 that all parties are present. All counsel are present.
11 Mr. Strong?

12 MR. STRONG: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MR. STRONG:

15 Q Mr. Akerlow, do you remember who gave you the
16 Trust Deed that's been marked P-1 for you to sign?

17 A Not specifically, no. Someone from American
18 Savings.

19 Q Do you remember in relationship to the day you
20 signed the deed what day that would have been?

21 A It was Monday the 28th of March.

22 Q When you received Exhibit P-1, were all of the
23 spaces completed in that document?

24 A No, they were not.

25 Q So there were blanks, then?

1 A Yes.

2 Q Who was it that asked you to sign the Exhibit P-1,
3 even though there were blanks in it?

4 A I think it was the representative from American
5 Savings who came over to my office. We were trying to get
6 this loan closed by the end of the month, and not all the
7 documentation was done. And in fact, I hadn't even
8 received a copy of the commitments from American Savings on
9 this particular loan.

10 They brought those with them on the 28th. It was
11 the first time I'd even seen any loan commitments. So we
12 had to have a discussion on that.

13 The fellow I'd been dealing with was Jack Stermer.
14 I recall it was him. I wouldn't swear to it, but I think
15 it was he and I that visited about that on the 28th.

16 Q That would have been in your office?

17 A Yes.

18 Q You were present in the courtroom this morning; is
19 that correct?

20 A Yes.

21 Q And you saw a man who identified himself as
22 Stephen Emrick testify; is that correct?

23 A Yes.

24 Q Have you ever seen Stephen Emrick before today?

25 A No. I don't believe so.

1 Q Now, again, when you actually signed Exhibit P-1,
2 who else was present in your office?

3 A As I recall, Richard Anderson was there.

4 Q Was there a notary present?

5 A No.

6 Q Did anyone place you under oath before signing
7 that document?

8 A No.

9 Q At any other time, did you ever appear in front of
10 a notary public to acknowledge that you had signed that?

11 A No. I don't believe so.

12 Q Now, before we took a break for lunch, Mr. Patten
13 asked you that question, and then called to your attention
14 the deposition that you had given some time ago--I guess
15 maybe on May 1st--where your answer seemed to be a little
16 different. Are you able to explain the difference in the
17 testimony today as opposed to the deposition testimony?

18 A Well, subsequent to the deposition, the thought
19 occurred to me that in all the years I've been in the
20 development business, I do not recall a time that Jeff
21 Jensen has ever been in my office. The nature of the
22 business is I would always go to his office if I needed to
23 go anywhere, and I remember we once met at lunch. But he'd
24 never been in my office. And so I guess that's why I
25 answered maybe a little more strongly today than I did in

1 the deposition, because I know I signed that document in my
2 office. And I really don't believe Jeff has ever been in
3 my office. So I don't think I could have signed it in
4 front of him.

5 Q Now, Mr. Anderson has testified in his deposition,
6 which has now been introduced into court, that he signed
7 the Exhibit P-1 at Western States Title. Mr. Emrick
8 testified this morning that he also appeared at Western
9 States Title, and that Ron Mast was briefly at the closing.
10 Can you recall any other closing that you'd been involved
11 in with similar circumstances?

12 A We had a closing within a few months after this on
13 another building, an office building downtown, that we did
14 close at Western States Title. And Richard and I were the
15 signatories on that loan as well. And at that particular
16 closing, Ron Mast did have to come to the closing, as I
17 recall, because there was some documents for him to sign.

18 MR. PATTEN: Well, Your Honor, I move to strike
19 the question and answer. It hasn't been related at all to
20 American Savings & Loan. Apparently some other totally
21 unrelated deal had nothing to do with American Savings.

22 MR. STRONG: I believe my question asked whether
23 there was another closing where Mr. Mast was there,
24 Mr. Anderson was there, and I believe American Savings. I
25 believe I added they were there at another closing, and I

1 think the question has been answered.

2 THE COURT: I don't think you included American
3 Savings in your question. Do you want to reask it?

4 MR. STRONG: All right.

5 Q (By Mr. Strong) Well, I'll really just ask a
6 subsequent question. You've already told us that you
7 remember a time when Mr. Anderson, yourself, Mr. Jensen,
8 and briefly Mr. Mast were all present. Do you remember a
9 closing where in addition to those four entities, or
10 parties, that American Savings was also present?

11 A No. No. They were not at that closing.

12 Q Thank you. Now, on March 28th, Mr. Anderson
13 actually executed Exhibit P-1?

14 A Well, I thought I did.

15 Q And what's your best recollection as to that?

16 A My best recollection is that in the morning we met
17 with, I believe it was Jack Stermer, to go over the deal,
18 which until that time we hadn't seen. Until that time we
19 had not seen the commitment letter on either the
20 construction loan, or the permanent financing.

21 We generally knew the terms, but the fine print,
22 we hadn't seen. And there was a lot of fine print in there
23 that had not been discussed in all of the communications
24 between us.

25 We knew our loan had been approved, but we didn't

1 signed?

2 A We gave it all back to American Savings, or State
3 Savings, and understood that they would take it from there
4 to get recorded and funded.

5 Q Did you ever resign that document?

6 A No.

7 Q Did you ever take an oath in connection with
8 signing Exhibit 1?

9 A I don't know what you mean by take an oath.

10 Q Did someone swear you to tell the truth?

11 A No.

12 Q Did someone ask you if you acknowledged that the
13 contents were true?

14 A No.

15 Q Did someone verify that the contents were true?

16 A No.

17 Q Calling your attention to Exhibit 36, when did you
18 first see that document?

19 MR. BARKER: That's the opinion letter, Your
20 Honor.

21 THE WITNESS: I don't remember when I first saw
22 it.

23 Q (By Mr. Barker) Do you recall having seen it in
24 the proximity of April, 1983, or was it your--a year or two
25 later?

1 A Oh, no. No. No. I saw it at that time--at the
2 time of the closing, because it was our responsibility to
3 get an opinion letter over there. I just don't remember
4 the exact date I saw it.

5 Q I see. Now, you indicated that you were on the
6 site with the Masts, and you were concerned about non-
7 receipt of footing drawings. You mentioned that in
8 response to a prior question.

9 A Yes.

10 Q When was that?

11 A It would have been 15--16 April, somewhere in
12 there, '83.

13 Q Were you on the site earlier than that in April?

14 A I don't recall.

15 MR. BARKER: May I have a moment with my client?

16 THE COURT: Certainly.

17 MR. BARKER: No further questions.

18 THE COURT: Mr. Green?

19 MR. GREEN: I have no questions.

20 MR. MARSHALL: I have no questions.

21 THE COURT: Now that I've got you folks a spot, I
22 hope you feel like you're part of it.

23 MR. MARSHALL: Appreciate it.

24 THE COURT: Mr. Patten?

25

APPENDIX VI

Bybee v. Stuart, 189 P.2d 118 (Utah 1948)

ever, appellants contend, as I understand their position, that in a case such as this, the jury should have pointed out to them, by instruction from the court, the various elements to be considered in determining the depreciation. Appellants went so far in this case as to submit a request for instruction embodying their theory, and asking separate damages for claimed injuries to each separate part of the land. Not only did the court not err in refusing this request, but it would have committed error if it had granted it. The request was a complete departure from the well settled rule that damages are given for depreciation in the fair market value of the land as a whole.

The state put on two real estate experts, who testified that the depreciation in market value of the remaining land was \$1500 or \$1800. Both of these experts were subjected to searching cross-examinations, and the exact bases of their opinions were clearly shown to the jury, both as to factors considered by them in making their estimates, and as to factors unknown to or ignored by them.

As pointed out in the prevailing opinion, restoration costs may, in some cases, be an accurate measure of damages, i. e. of the depreciation in market value. In other cases restoration costs may bear no relation to the depreciation in market value. Market value is the price at which a willing vendor would sell, and at which a willing buyer would purchase in a free and open market. Fair market value is ordinarily proved by the testimony of experts, who may be fully examined and cross-examined as to the factors considered by them, and the bases upon which they determined their appraisals.

As heretofore stated, the state put on two real estate experts. Appellants called none. Appellants put on evidence of the value of the basement home, replacement cost, cost of destroying the old home, value of trees, shrubs, fruit plants, etc. All of these factors were prominently before the jury. That the jury was fully aware of all these factors and that they took them into account in reaching their verdict is evidenced

by the fact that they fixed the damages to the remaining property at \$3,000, or about twice the amount fixed by the experts as the depreciation value. The appellants have shown no prejudicial error. For these reasons, I concur.



BYBEE et al. v. STUART.

No. 6981.

Supreme Court of Utah.

Jan. 29, 1948.

1. Appeal and error ⇐987(3)

On appeal from judgment for plaintiff in equity action to compel conveyance of lands to him and quiet his title thereto, Supreme Court may review facts as well as law.

2. Mortgages ⇐33(3)

A warranty deed, absolute in form, was not absolute conveyance of land to grantee, but a "mortgage," in view of parties' contemporaneous written agreement, providing that conveyance was made to enable grantee to obtain loan on premises for sum to be used in paying mortgage thereon and that, if grantor desired to sell land, grantee would convey title to purchaser on payment to grantee of such amount.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

3. Mortgages ⇐33(1), 36

A warranty deed, absolute in form, is presumed to convey fee-simple title or at least whatever title grantor has to land described, but, where contemporaneous written agreement between parties shows that deed was given for security purposes, court will look to real transaction and treat it as mortgage.¹

4. Mortgages ⇐42

An instrument need not follow statutory form to be a real estate mortgage, and

no particular parties' intent 1913, 78—1—1

5. Mortgages ⇐

A real estate contained in a contract of warranty contract.¹

6. Mortgages ⇐

In equity, may be shown been given for on such show to parties' inte

7. Mortgages ⇐

Deeds give lacking requis termed "equita

See Words Edition, for "Equitable M

8. Mortgages ⇐

A warrant poraneous writ veyance of land loan thereon in paying mortg understanding the premises to gra tee of amount o merely "equitab in parol and co formal "mortga law, and grant land, but was n

9. Frauds, statu

Grantor's of any interest veyed as securit borrowed by thereon was unte of frauds. 33—5—3.

¹ Brown v. 2d 24.

² Wasatch M 243, 251, 15 P 33 Utah 468, 1 53 Utah 186, 1

³ Thompson 48 P. 477; Dc

A particular form is necessary so long as parties' intention is shown. Utah Code 43, 78—1—13.

1. Mortgages  33(1)

A real estate mortgage need not be retained in one writing, but may consist of warranty deed and separate written contract.¹

1. Mortgages  37(2)

In equity, a deed absolute on its face may be shown by parol evidence to have been given for security purposes only, and, on such showing, equity will give effect to parties' intention.

1. Mortgages  27

Deeds given for security purposes only, lacking requisites of formal mortgages, are termed "equitable mortgages".²

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Mortgage".

1. Mortgages  33(3)

A warranty deed and parties' contemporaneous written contract, reciting conveyance of land to enable grantee to obtain loan thereon for specified sum to be used in paying mortgage against land, with understanding that grantee would reconvey premises to grantor on repayment to grantor of amount of mortgage, constituted, not merely "equitable mortgage" resting partly in parol and cognizable only in equity, but formal "mortgage" cognizable in court of law, and grantee did not acquire title to land, but was merely mortgagee.

1. Frauds, statute of  63(5)

Grantor's oral surrender to grantee of any interest of grantor in land conveyed as security for repayment of amount borrowed by grantee to pay mortgage thereon was unenforceable as written statute of frauds. Utah Code 1943, 33—5—1, 3—5—3.

¹ Brown v. Skeen, 89 Utah 568, 58 P. 2d 24.

² Wasatch Min. Co. v. Jennings, 5 Utah 243, 251, 15 P. 65; Duerden v. Solomon, 33 Utah 468, 94 P. 978; Hess v. Anger, 33 Utah 186, 177 P. 232.

³ Thompson v. Cheesman, 15 Utah 43, 48 P. 477; Donaldson v. Grant, 15 Utah

10. Mortgages  137

In "title theory" or "common law" states, mortgage deed conveys legal title to mortgagee, subject to mortgagor's equity of redemption, but in "equitable" or "lien theory" states, including Utah, legal title remains in mortgagor subject to lien in mortgagee's favor. Utah Code 1943, 104—57—7.³

11. Mortgages  137

The code section providing that mortgage of land shall have effect of conveyance thereof to mortgagee as security for payment of indebtedness set forth therein is not necessarily inconsistent with section providing that real property mortgage shall not be deemed a conveyance, whatever its terms, in view of section defining "conveyance" as embracing every written instrument by which any real estate or interest therein is created, aliened, mortgaged, encumbered, or assigned. Utah Code 1943, 78—1—1, 78—1—13, 104—57—7.

12. Deeds  3

At common law, term "conveyance" meant transfer of title to or estate in land or the instrument by which such transfer was accomplished, but definition thereof was broadened by statute to include also mortgages, encumbrances, etc., and as used in statute respecting land mortgages, covers transactions not involving transfers of title to or estates in land, but merely effective mortgages or encumbrances thereof. Utah Code 1943, 78—1—1, 78—1—13.

See Words and Phrases, Permanent Edition, for all other definitions of "Conveyance".

13. Mortgages  134, 137

A mortgagor retains title to mortgaged lands, and mortgage creates in mortgagee's favor only a lien or right to resort to land to satisfy mortgage debt.⁴

231, 49 P. 779; Azzalia v. St. Claire, 23 Utah 401, 64 P. 1106; Carlquist v. Coltharp, 67 Utah 514, 248 P. 481, 47 A. L.R. 765; In re Reynolds' Estate, 90 Utah 415, 62 P.2d 270.

⁴ In re Reynolds' Estate, 90 Utah 415, 62 P.2d 270.

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One conveying land by warranty deed as security for repayment of sum loaned to grantee for payment of mortgage on land held title thereto in fee, subject to mortgage lien in grantee's favor, and hence had such estate or interest in land as could be conveyed only by written instrument. Code Utah 1943, 33-5-1.

In judgment ordering grantee of land to reconvey it to grantor as mortgagor and quieting grantor's title thereto, court properly ordered payment to grantee of so much of amount paid into court by grantor in repayment of sums advanced by grantee to preserve mortgaged property as was advanced by grantee for water stock assessments and general taxes thereon, mortgage payments, etc., and remission of balance to grantor.

Action by Byron L. Bybee, Sr., and another against Claude E. Stuart to compel conveyance of certain lands to plaintiffs by defendant, who filed a counterclaim against plaintiffs and a cross-claim against Oni Douglas Stuart and another, interpleaded as plaintiffs and cross-defendants, to quiet title to the lands in defendant. From a judgment ordering defendant to convey the lands to plaintiffs and quieting plaintiffs' title thereto, defendant appeals.

David J. Wilson, of Ogden, for defendant and appellant.

Thatcher & Young, of Ogden, for plaintiffs and respondents.

Thatcher & Young, of Ogden, for interpleaded plaintiffs, cross-defendants and respondents

Appeal by the defendant from a judgment and decree of the second district court, ordering defendant to execute a conveyance of certain lands to plaintiffs, and quieting plaintiffs' title thereto.

In 1936 the wife of cross-defendant Oni Douglas Stuart died, and defendant (Claude Stuart) took Oni's son, David, to live with him and his family. Oni and Claude were brothers. It is fairly inferable from the record that defendant took the boy, David, as an acknowledged family obligation, and without expectation of recompense. There was no contract between the brothers that defendant should receive any pay or other consideration for performance of this duty. Oni, at all times, paid for his son's clothing, schooling, and other expenses. The boy, David, assisted with the household chores around defendant's place, and apparently was treated very much the same as defendant's own sons.

The trial court found the facts substantially as follows:

On May 11, 1942, and for a long time prior thereto, Oni Stuart owned a tract of land in Weber County. The land was heavily mortgaged, and the mortgages were then in the process of foreclosure. Oni was in straitened financial circumstances and was about to lose his land. Oni being unable to get credit from outside sources, his brother, the defendant, agreed to advance the money necessary to pay off the mortgages in order that he would not lose his land. As security for the money advanced, Oni executed to defendant a warranty deed, absolute in form, to his land. Contemporaneous with the deed, and as part of the same transaction, the parties also had drawn the following agreement:

"This Memorandum of Agreement witnesseseth:

"That Oni Douglas Stuart has this day conveyed by warranty deed to the undersigned, Claude E. Stuart, the following described real property * * * [description omitted]

"The conveyance of said property was made to enable the undersigned, Claude E. Stuart, to obtain a loan on said premises for eleven hundred (\$1100.00) Dollars, to be used in paying an existing mortgage against said property, together with de-

"It is understood of the said Clause to reconvey said land to Stuart upon the amount of mortgage against said premises interest and other that said Claude incurred or may mortgage execute and any other the same, said period ———— years from

"It is further said Claude E. Douglas Stuart & that he, the said convey to such property upon the amount hereinbe-

"This agreement shall be binding upon the assigns of the parties."

"This, the 11th
"(Sig)

During June, in the hospital, to leave the hos- ant's home to stay. Defendant testi- er Oni left the had a conversati-

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linquent taxes and certain expenses incurred in connection with adjusting foreclosure proceedings instituted against said property amounting to the sum of approximately eleven hundred (\$1100.00) Dollars.

"It is understood and agreed on the part of the said Claude E. Stuart that he will reconvey said premises to Oni Douglas Stuart upon the repayment to him of the amount of mortgage which he has executed against said premises, together with all interest and other expenses, including taxes, that said Claude E. Stuart may have incurred or may incur in paying off the mortgage executed against said premises, and any other expenses connected with the same, said payment to be made within —years from this date.

"It is further agreed on the part of the said Claude E. Stuart that should Oni Douglas Stuart desire to sell this property, that he, the said Claude E. Stuart, will convey to such purchaser the title to said property upon the payment to him of the amount hereinbefore provided.

"This agreement or understanding is to be binding upon the heirs, successors, and assigns of the parties hereto.

"This, the 11th day of May, A. D., 1942.

"(Signed) Claude E. Stuart"
(Italics added)

During June, 1942, Oni Stuart was ill in the hospital. When he was well enough to leave the hospital, he went to defendant's home to stay during his convalescence. Defendant testified that about a week after Oni left the hospital, the two brothers had a conversation as follows:

"A. We were sitting in the living room and Oni turned to me and he said: 'You have been mighty nice to me. Have me come and live here. I want to stay here until I get over my illness I got.' I said: 'That is perfectly alright.' He said: 'You have been good to me and good to the boy, and have given the boy a good home. We will just let the title stay in your name, and leave the title just as it is, and you can have the use of the land, and the title will be yours, and the land is yours. We will let the title stay just as it is at the present time.'

180 P.2d—8½

"Q. Was anything said about the care of the boy? A. Yes.

"Q. What? A. He said: 'If you continue to take care of the boy and give him a good home until he gets of age, why, you have the land.'

"Q. Alright, what did you say? A. I told him: I said, 'That is perfectly alright with me. When the time came when the boy was of age, if he wants the land then I will give him title to the land in reimbursement of what I got in the land myself, without interest.'

"Q. Was anything further said by your brother Oni? A. Oni said: 'That is alright. We will let the matter stand as it is. "

Defendant's wife, who was present at the time the conversation was supposed to have taken place, was called to corroborate defendant's testimony but was unable to do so. Oni categorically denied that any such conversation ever took place.

On July 13, 1942, about two weeks after the purported conversation above quoted, Oni listed the land for sale with cross-defendant Cook, a real estate broker. In September, 1944, plaintiffs contracted to purchase the land from Oni, and he executed a deed to them in October, 1944.

When defendant learned of the deal between plaintiffs and Oni, he called upon Cook, and claimed to be owner of the premises.

Plaintiffs commenced this action against defendant to compel him to execute and deliver to them a conveyance to the premises, upon receiving the amount expended by defendant in preserving the property. Defendant answered, and by way of counterclaim against plaintiffs and cross-claim against Cook and Oni Stuart who were interpleaded as "cross-defendants," asserted title in himself and prayed that title be quieted in him.

The trial court concluded from the facts as outlined above that plaintiffs were the owners of the premises and entitled to immediate possession of the premises, and rendered judgment accordingly. From that judgment defendant prosecutes this appeal.

[1] Defendant has assigned numerous errors, all of which go to the correctness of the court's construction of the original transaction between Oni and defendant, and the effect, if any, upon this transaction, of the subsequent oral conversation between the two brothers. This being an equity case, we may review the facts as well as the law.

[2,3] The first question presented for our determination is as to the nature of the original transaction between the brothers Stuart. Although it is not clear in the briefs, it appears to be defendant's contention that the original transaction was an absolute conveyance of the land in question to defendant. This position is without support in fact or law. It is true, of course, that a warranty deed, absolute in form, is presumed to convey a fee simple title, or at least whatever title the grantor has. But where, as here, there is a written agreement between the parties, contemporaneous with the deed, which shows the deed to have been given for security purposes, the court will look to the real transaction, and treat it as a mortgage. *Brown v. Skeen*, 89 Utah 568, 58 P.2d 24. The fact that by the terms of the contract, Oni Stuart had the right to sell the land to a third person, clearly indicates the intention of the parties that title should not pass to the defendant.

[4-7] Our statute (Sec. 78-1-13 U. C. A. 1943) furnishes a form for real estate mortgages. However, it is not necessary that an instrument follow the statutory form to be a mortgage. No particular form is necessary so long as the intention of the parties is shown. Nor is it necessary that the mortgage be contained in one writing—it may consist of a warranty deed and a separate contract in writing. *Brown v. Skeen*, supra. See also 1 Jones on Mortgages, 8th Edition, Chapter 2. And in equity a deed absolute upon its face may be shown by parol evidence to have been given for security purposes only, and when such a showing has been made, equity will give effect to the intention of the parties. Such security transactions, lacking the requisites of a formal mortgage, are termed equitable mortgages. 1 Jones on Mortgages, Chapter 5; *Wasatch Min. Co. v. Jen-*

nings, 5 Utah 243, 251, 15 P. 65; *Duerden v. Solomon*, 33 Utah 468, 94 P. 978; *Hess v. Anger*, 53 Utah 186, 177 P. 232. See also 3 Jones, Commentaries on Evidence, 2d Edition, page 2793, Section 1531.

[8] The deed and contract here show all the requisites of a formal mortgage—a conveyance of particular land as security for a debt with the necessary defeasance clause. This was not merely an equitable mortgage—a security transaction resting partially in parol and cognizable only in equity. The two instruments, taken together, constitute a formal mortgage, cognizable in a court of law. Defendant did not acquire the title to the lands under the warranty deed. He was merely a mortgagee.

[9] This brings us to the second question:

As we have heretofore noted, defendant testified to a conversation between himself and his brother Oni, by which it is claimed Oni orally surrendered to defendant any interest he had in the property. The court found that such a conversation did take place, and his finding is cross-assigned as error by the appellees. However, the court found that this purported surrender was ineffectual under the Statute of Frauds—Secs. 33-5-1 and 33-5-3, U.C.A.1943. Defendant contends that Oni Stuart's oral surrender of his interest in the premises was valid.

We deem it unnecessary to pass upon appellees' cross-assignment of error, since we are of the opinion that even if such conversation took place as was testified to by defendant, it was within the Statute of Frauds and therefore unenforceable.

[10] There are two rather well defined views of mortgages in the United States. In the so-called "title-theory" or "common law" states, it is held that a mortgage deed conveys to the mortgagee the legal title, subject to the mortgagor's equity of redemption. In the "equitable" or "lien-theory" states, it is held that the legal title remains in the mortgagor subject to a lien in favor of the mortgagee. 1 Jones on Mortgages, Sections 12, 15-16, 18 and 67.

Utah, along with most of the other western states, has long been recognized as a

"lien theory" state. Sections 60, 61 repeatedly said that the mortgage does not vest title, but merely creates a lien. *Oni v. Cheesman*, 33 Utah 468, 94 P. 979; *Azzalia v. Oni*, 53 Utah 186, 177 P. 1106; *Carlson v. Oni*, 514, 248 P. 481, 100 S. 2d 1014. These cases are in accord with the statutory provision in the Code as Sec. 10.

"A mortgage shall be deemed a lien, so as to entitle the mortgagee to recover the property without

[11] We note that in our statute, A.1943, after the form for a mortgage is set out, it follows:

"Such mortgage shall be required by law to be a conveyance of the land together with all appurtenances to the mortgagee, his legal representatives, as against the indebtedness of the mortgagor, covenants from the mortgagor, and assessments levied on the land described, the mortgage, shall be a lien upon the land, day appointed for the payment of taxes; and may be enforced by law upon any condition of the condition of the mortgage, either principal or interest." (Italics)

At first blush it seems to be in direct conflict with the 7. Apparently the mortgage "shall be a lien, whatever the mortgage provides that a lien shall have in the mortgage of the land." 1 Jones on Mortgages, 8th Edition, Chapter 2, Section 13, when construed with Sec. 78-1-1, is in

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Sections 60, 67, 68. This court has re-
peatedly said that a mortgage in this state
does not vest title in the mortgagee, but
merely creates a lien in his favor. Thomp-
son v. Cheesman, 15 Utah 43, 48 P. 477;
Donaldson v. Grant, 15 Utah 231, 49 P.
779; Azzalia v. St. Claire, 23 Utah 401, 64
P. 1106; Carlquist v. Coltharp, 67 Utah
34, 248 P. 481, 47 A.L.R. 765; In re Rey-
nolds' Estate, 90 Utah 415, 62 P.2d 270.
These cases are based largely on a statu-
tory provision which appears in our 1943
Code as Sec. 104—57—7 and is as follows:

"A mortgage of real property shall not
be deemed a conveyance, whatever its
terms, so as to enable the owner of the
mortgage to recover possession of the real
property without a foreclosure and sale."

[11] We note here a seeming contradic-
tion in our statutes. Sec. 78—1—13, U.C.
A.1943, after setting forth the statutory
form for a mortgage of land, provides as
follows:

"Such mortgage when executed as re-
quired by law *shall have the effect of a con-
veyance* of the land therein described, to-
gether with all the rights, privileges and
appurtenances thereunto belonging, to the
mortgagee, his heirs, assigns and legal rep-
resentatives, *as security for the payment of
the indebtedness* thereon set forth, with
covenants from the mortgagor of general
warranty of title, and that all taxes and
assessments levied and assessed upon the
land described, during the continuance of
the mortgage, will be paid previous to the
day appointed for the sale of such lands for
taxes; and may be foreclosed as provided
by law upon any default being made in any
of the conditions thereof as to payment of
either principal, interest, taxes or assess-
ments." (Italics supplied.)

At first blush this section would appear
to be in direct conflict with Sec. 104—57—
7. Apparently one section provides that a
mortgage "shall not be deemed a convey-
ance, whatever its terms," while the other
provides that a mortgage in the statutory
form "shall have the effect of a convey-
ance of the land." However, Sec. 78—1—
13, when construed in the light of Sec.
104—57—7, is not necessarily inconsistent

with Sec. 104—57—7. Sec. 78—1—1 is as
follows:

"The term 'conveyance' as used in this
title shall be construed to embrace every
instrument in writing by which any real
estate, or interest in real estate, is creat-
ed, aliened, *mortgaged, encumbered* or as-
signed, except wills, and leases for a term
not exceeding one year." (Italics sup-
plied.)

[12] At common law the term "convey-
ance" meant a transfer of title or of an es-
tate in land, or the instrument by which
such transfer was accomplished. By the
terms of Sec. 78—1—1, the definition is
broadened to include not only the transfers
of estates or interests in land, but also
mortgages, incumbrances, etc. As used in
Sec. 78—1—13, the term "conveyance" cov-
ers transactions not involving a transfer of
title or of an estate in land, but merely
an effective mortgage or incumbrance of
the land. However, as used in 104—57—7,
"conveyance" is used in its common law
sense—a transfer of title or an estate in the
land.

[13] We adhere to the now well estab-
lished doctrine that the mortgagor retains
title to the mortgaged lands, and all that is
created in favor of the mortgagee is a lien
—a right to resort to the land to satisfy
the mortgage debt. In re Reynolds' Es-
tate, 90 Utah 415, 62 P.2d 270.

[14] Oni Stuart therefore, as mort-
gagor, held the title to the premises in fee,
subject to a mortgage lien in favor of de-
fendant, and therefore he had such an es-
tate or interest in the land as could be
conveyed only by a written instrument un-
der Sec. 33—5—1, U.C.A.1943, which pro-
vides as follows:

"No estate or interest in real property,
other than leases for a term not exceeding
one year * * *, shall be created,
granted, assigned, *surrendered* or declared
otherwise than by act or operation of law,
or by deed or conveyance in writing sub-
scribed by the party creating, granting, as-
signing, surrendering or declaring the
same, or by his lawful agent thereunder au-
thorized by writing." (Italics supplied.)

See annotation commencing at page 777
of 65 A.L.R.

[15] Prior to the trial of this case, \$882 was paid into court for the benefit of defendant, as repayment of the sums advanced by him to preserve the property. This tender was refused. The court found that the total money advanced by defendant was \$875.20 for water stock assessments, general taxes, mortgage payments, etc., and ordered that \$875.20 of the money paid into court be paid to defendant, and the balance remitted to Oni Stuart. There was no error in this.

The judgment of the trial court is affirmed. Respondents to have their costs.

MCDONOUGH, C. J., and PRATT, WADE, and LATIMER, JJ., concur.



EDWARDS v. INDUSTRIAL COMMISSION
et al.

No. 7089.

Supreme Court of Utah.
Feb 4, 1948.

1. Workmen's compensation ⇨1794

When an aggrieved party has been granted a rehearing, receives an adverse decision thereon by Industrial Commission, and files subsequent application for further rehearing timely, commission has jurisdiction to entertain second application and may grant or deny second application. Utah Code 1943, 42-1-76, 42-1-77.¹

2. Workmen's compensation ⇨1864

Aggrieved party who has been granted a rehearing by Industrial Commission need not file a second application for rehearing as condition precedent to petitioning Supreme Court for writ of certiorari, when decision on rehearing in substance is the same as the order made on original hearing. Utah Code 1943, 42-1-76, 42-1-77.

3. Workmen's compensation ⇨1541

Evidence justified denial of death benefits to widow of employee who died as result of injury arising out of and in the course of employment, causing recurrence of old hernia which was repaired by operation, on ground that death caused by injury did not occur within three years of injury as required by compensation act. Utah Code 1943, 42-1-64.

4. Workmen's compensation ⇨602

Workmen's Compensation Act, authorizing recovery for death of workman only if death occurs within three years of injury causing it, is unambiguous and hence not subject to interpretation. Utah Code 1943, 42-1-64.²

Original certiorari proceeding under Workmen's Compensation Act by Mary F. Edwards, widow of Samuel Edwards, deceased, opposed by the Industrial Commission of Utah, Tintic Standard Mining Company, employer, and Continental Casualty Company, insurance carrier, to review a decision of the Industrial Commission denying claimant's application for compensation for death of her husband and for benefits allegedly owing to him prior to death.

Decision of the Industrial Commission affirmed.

Willard Y. Morris, of Salt Lake City, for plaintiff.

Shirley P. Jones, of Salt Lake City, and Grover A. Giles, Atty. Gen., for defendants.

PER CURIAM

On writ of certiorari, plaintiff, widow of Samuel Edwards, seeks to have this court determine the lawfulness of the decision of the Industrial Commission denying her application for compensation for the death of her husband and for benefits allegedly owing to him prior to death.

Defendants moved to quash the writ and to dismiss the petition for writ of certiorari on the ground that plaintiff failed to

petition for rehearing. 42-1-76, U.C.A. This court for the session of the Commission. After it an application for rehearing the Commission hearing, the Commission decision, and court for certiorari application for rehearing. Heretofore motion to quash the petition, and now reaching such conclusion.

[1, 2] In support of the petition, the defendants cited Cases 520, 537, 76 Utah 520, 537, case holds that a party who has been granted an adverse decision subsequent application for rehearing timely, the Commission to entertain and that the Commission to grant or to deny. The case does not have been granted second application for rehearing in substance order made on the a party against whom a party against whom, files an application timely, the requirement has been met. When the privilege of applying for rehearing, he is not in order to exhaust himself as a condition precedent to a writ of certiorari. Sec. 42-1-77, 1 of which is here repeated.

"Within thirty days after notice of decision on the rehearing, the commission or may apply to the court of certiorari for the lawfulness of the award on rehearing terminated."

¹ Carter v. Industrial Commission, 76 Utah 520, 200 P. 776.

² Salt Lake City v. Industrial Comm.,

93 Utah 510, 74 P.2d 657, Hallstrom v. Industrial Comm. 96 Utah 85, 6 P.2d 730 distinguished.

APPENDIX VII

Pertinent Statutes

[all references are to Utah Code]

17-21-6 (duties of county recorder)

38-1-5 (priority of mechanics' liens)

38-1-9 (notice imparted by record)

38-1-26 (assignment of lien)

57-1-6 (recording necessary to impart notice)

57-1-19 (trust deed definition)

57-1-20 (transfers in trust of realty)

57-2-1 (manner of acknowledging conveyances)

57-2-5 (notary shall make certificate of acknowledgment)

57-2-7 (form of certificate of acknowledgement)

57-3-1 (certificate of acknowledgement to be recorded)

57-3-2 (record imparts notice)

17-21-4. Certified copies.

The county recorder is authorized to make and furnish to interested persons certified photographic copies of any of the records in his office upon payment of fees and charges provided therefor. Certified copies of such records may be supplied to officers of the county for their official use without the payment of any fee.

History: C.L. 1907, § 618x, added by L. 1915, ch. 87, § 1; C.L. 1917, § 1577; R.S. 1933 & C. 1943, 19-18-4.

17-21-5. Receipts for documents received for record.

On the filing of any instrument in writing for record in the recorder's office the recorder shall when requested give to the person leaving the same to be recorded a receipt therefor.

History: R.S. 1898 & C.L. 1907, § 619; C.L. 1917, § 1578; R.S. 1933 & C. 1943, 19-18-5.

17-21-6. General duties — Records and indexes.

Every recorder must keep:

(1) An entry record, in which the recorder shall immediately upon receipt of any instrument to be recorded, enter in the order of its reception or entry, as the case may be, the names of the parties thereto, its date, the hour, the day of the month and the year of filing any such statement and a brief description of the premises, endorsing upon each instrument a number corresponding with the number of such entry.

(2) A grantors' index, in which shall be indexed all deeds and final judgments or decrees partitioning or affecting the title to or possession of real property, which shall show the number of the instrument, the name of each grantor in alphabetical order, the name of the grantee, date of instrument, time of filing, kind of instrument, consideration, the book and page and entry number in which it is recorded, and a brief description of the premises.

(3) A grantees' index, in which shall be indexed all deeds and final judgments or decrees partitioning or affecting the title to or possession of real property, which shall show the number of the instrument, the name of each grantee in alphabetical order, the name of the grantor, date of the instrument, time of filing, kind of instrument, consideration, the book and page and entry number in which it is recorded, and a brief description of the premises.

(4) A mortgagors' index, in which shall be entered all mortgages, deeds of trust, liens, and all other instruments in the nature of an encumbrance upon real estate, which shall show the number of the instrument, name of each mortgagor, debtor or person charged with the encumbrance in alphabetical order, the name of the mortgagee, lien holder, creditor or claimant, date of instrument, time of filing, nature of instrument, consideration, the book and page and entry number in which it is recorded, and a brief description of the property charged.

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(5) A mortgagees' index, in which shall be entered all mortgages, deeds of trust, liens, and all other instruments in the nature of an encumbrance upon real estate, which shall show the number of the instrument, name of each mortgagee, lien holder, creditor or claimant, in alphabetical order, the name of the mortgagor or person charged with the encumbrance, date of instrument, time of filing, nature of instrument, consideration, the book and page and entry number in which it is recorded, and a brief description of the property charged.

(6) An abstract record, which shall show by tracts or parcels every conveyance or encumbrance, or other instrument recorded, the date and character of the instrument, time of filing the same, and the book and page and entry number where the same is recorded, which record shall be so kept as to show a true chain of title to each tract or parcel and the encumbrances thereon as shown by the records of the office.

(7) An index to recorded maps, plats, and subdivisions.

(8) An index of powers of attorney, labeled "powers of attorney," each page divided into seven columns, namely: "date of filing," "book," "page," and "entry number," "from," "to," "revoked."

(9) A miscellaneous index, in which shall be entered all instruments of a miscellaneous character not otherwise provided for in this section, each page divided into eight columns, namely: "date of filing," "book," "page," and "entry number," "instrument," "from," "to," "remarks."

(10) An index of transcripts of judgments, labeled "transcripts of judgments," each page divided into seven columns headed, respectively, "judgment debtors," "judgment creditors," "amount of judgment," "where recovered," "when recovered," "when transcript filed," "when judgment satisfied."

(11) A general filing index in which shall be indexed all executions and writs of attachment, and any other instruments not required by law to be spread upon the records, and in separate columns he must enter the names of the plaintiffs in the execution, the defendants in the execution, the purchaser at the sale and the date of the sale, and the filing number of the documents.

The indexes provided for in subdivisions (8) to (11) shall be alphabetically arranged, and in each case a reverse index shall be kept.

(12) Nothing in this section shall preclude the use of a single name index by the recorder if such index includes and references all of the above indexes.

History: R.S. 1898 & C.L. 1907, § 620; L. 1915, ch. 45, § 1; C.L. 1917, § 1579; R.S. 1933 & C. 1943, 19-18-6; L. 1955, ch. 29, § 1; 1973, ch. 24, § 1; 1980, ch. 20, § 2; 1983, ch. 69, § 5.

Amendment Notes. — The 1983 amendment inserted the references to parcels in Subsection (6); deleted a former Subsection (7) which read: "An index of chattel mortgages, labeled 'chattel mortgages,' each page divided into seven columns, namely 'date of filing,' 'book,' 'page,' 'canceled,' 'from,' 'to,' and 'remarks'"; redesignated the following subsections; substituted "8 to 11" in Subsection (11)

for "7 and 9 to 12", and deleted "The indexes provided for in subdivisions 7 and 9 to 12 shall be alphabetically arranged, and in each case a reverse index shall be kept" at the end of the section

Cross-References. — Condominium projects, duty to keep index, § 57-8-12

Federal tax liens, § 38-6-1.

Marketable record title, notice of claim of interest, § 57-9-5

Recording as imparting notice, § 57-3-2 et seq.

erected without knowledge and consent of owner thereof, or mechanic's lien holders, does not relieve building in its new location from liability of a deficiency existing on the sale of the land on which the building was erected to satisfy such liens. *Sanford v. Kunkel*, 30 Utah 379, 85 P. 363, 85 P. 1012 (1906).

Scope and extent of lien generally.

Necessary appurtenances, including easements which extend outside of boundaries of land upon which building is erected, is covered

by provisions of this section. *Park City Meat Co. v. Comstock Silver Mining Co.*, 36 Utah 145, 103 P. 254 (1909).

Waiver, loss or forfeiture of lien.

Where there is substantial compliance with statute creating lien, and lien has in fact been established, lien so established cannot be defeated by technicalities nor by nice distinctions. *Park City Meat Co. v. Comstock Silver Mining Co.*, 36 Utah 145, 103 P. 254 (1909).

COLLATERAL REFERENCES

Am. Jur. 2d. — 53 Am. Jur. 2d Mechanics' Liens § 39.

C.J.S. — 57 C.J.S. Mechanics' Liens § 20.

A.L.R. — Mechanic's lien for work on or ma-

terial for separate buildings of one owner, 15 A.L.R.3d 73.

Key Numbers. — Mechanics' Liens — 22.

38-1-5. Priority — Over other encumbrances.

The liens herein provided for shall relate back to, and take effect as of time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground; also over any lien, mortgage or other encumbrance of which the lien holder had no notice and which was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground.

History: R.S. 1898 & C.L. 1907, §§ 1384, 1835; C.L. 1917, §§ 3734, 3735; R.S. 1933 & C. 1943, 52-1-5.

Cross-References. — Priority of lessor's lien, § 38-3-2.

NOTES TO DECISIONS

ANALYSIS

Commencement and duration of lien.
"Commencement to do work."

Estoppel.

Extent of lien.

Notice to lien holders.

Priority over other liens and claims.

Purchase money mortgage.

Questions of law and fact.

Real estate mortgage.

Recordation and notice.

Relation back.

Subdivision development.

Cited.

Commencement and duration of lien.

This section expressly provides that liens shall attach at the time the performance of the contract commences; accordingly, claimant's lien attaches on the date he commences the

work or furnishes the material, and is not postponed to the date of filing the notice for record. *Morrison v. Carey-Lombard Co.*, 9 Utah 70, 33 P. 238 (1893).

Mechanic's lien takes effect as of the date of

Park City Meat
Co., 36 Utah

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as of the date of

commencement of work and furnishing of ma-
terials, and is prior to intervening equities.
Sanford v. Kunkel, 30 Utah 379, 85 P. 363, 85
P. 1012 (1906).

When labor and materials are furnished to
one not an owner, lien attaches to title instant
title vests in owner so contracting for labor and
materials furnished before he became the
owner. United States Bldg. & Loan Ass'n v.
Midvale Home Fin. Corp., 86 Utah 506, 44
P.2d 1090, rehearing denied, 86 Utah 522, 46
P.2d 672 (1935).

Whether the subsequent furnishings of ma-
terials is part of one continuous transaction, in
which case the priority date of the lien would
relate back to the first delivery date, or
whether such furnishings constitute separate
contracts, in which case there would be no rela-
tion back, is a question of fact. Boise Cascade
Corp. v. Stephens, 572 P.2d 1380 (Utah 1977).

"Commencement to do work."

The phrase "commencement to do work," as
used in this section, is construed in favor of
lien claimants. Calder Bros. Co. v. Anderson,
652 P.2d 922 (Utah 1982).

Estoppel.

A person furnishing materials may be es-
topped by his or its acts and conduct from en-
joying the priority accorded by this section.
Spargo v. Nelson, 10 Utah 274, 37 P. 495
(1894).

Extent of lien.

While mortgagee who advances money to
mortgagor to construct a building has lien
prior to that of a subcontractor performing
labor and furnishing materials for such build-
ing, such lien extends only to amount actually
advanced on mortgage. Culmer Paint & Glass
Co. v. Gleason, 42 Utah 344, 130 P. 66 (1913).

Notice to lien holders.

This section requires other lien holders, by
mortgage or otherwise, to take notice of the
commencement of work on the building.
Teahen v. Nelson, 6 Utah 363, 23 P. 764
(1890).

Survey of property did not meet the notice
standard contemplated by this section where
the survey stakes were not sufficiently notice-
able or related to actual construction to impart
notice to a prudent lender. Tripp v. Vaughn,
747 P.2d 1051 (Utah Ct. App. 1987).

Priority over other liens and claims.

A deed of trust upon a canal to be con-
structed cannot take precedence over a me-
chanic's lien for work done and materials fur-
nished in building the canal, although trust
deed antedates the doing of the work or fur-
nishing the materials. Canal is not in existence
until constructed. Garland v. Bear Lake &
River Waterworks & Irrigation Co., 9 Utah

350, 34 P. 368 (1893), *aff'd*, 164 U.S. 1, 17 S. Ct.
7, 41 L. Ed. 327 (1896).

Lien for all of materials furnished by single
lien claimant on continuous, open, running ac-
count, for purpose of developing and operating
mine, held prior to trust deed executed by min-
ing company and recorded between times when
materials are first and last furnished. Fields v.
Daisy Gold Mining Co., 25 Utah 76, 69 P. 528
(1902), Salt Lake Hdwe. Co. v. Fields, 69 P.
1134 (1902) (not officially reported).

Where vendees of land contracts on property
involved jointly assigned errors in mortgage
foreclosure action on cross-appeal, their liens
are postponed to date of last vendee's contract,
and claims of lien claimants attach as of date
when first materials are furnished and first
labor performed; and claim of lien claimants is
held superior to claim of such vendees in fore-
closure action. United States Bldg. & Loan
Ass'n v. Midvale Home Fin. Corp., 86 Utah
506, 44 P.2d 1090, rehearing denied, 86 Utah
522, 46 P.2d 672 (1935).

Lien for labor and materials supplied pur-
chaser of lot for building constructed thereon is
inferior to interest of vendor of the lot and his
successor, where it is not shown that vendor or
his successor consent to, ratify, or authorize
the furnishing of the materials and labor. Bur-
ton Walker Lumber Co. v. Howard, 92 Utah
92, 66 P.2d 134 (1937).

In determining priorities between construc-
tion mortgagee and mechanic's lienors, mort-
gage for definite amount recorded prior to at-
tachment of any lien takes priority up to the
amount actually paid over any mechanic's
liens attaching subsequent to recording of
mortgage, although loan which mortgage is in-
tended to secure is paid over to borrower as
needed and never advanced in full. Western
Mtg. Loan Corp. v. Cottonwood Constr. Co., 18
Utah 2d 409, 424 P.2d 437 (1967).

Purchase money mortgage.

A mechanic's lien is superior even to a pur-
chase money mortgage given at time of pur-
chase of property in question where mortgagee,
after materials are furnished, releases original
mortgage and takes new mortgage, which
transaction, however, is not in renewal of old
mortgage, but is done to obtain increased secu-
rity on old debt. But after satisfaction of lien,
mortgagee is entitled to surplus. Badger Coal
& Lumber Co. v. Olsen, 50 Utah 307, 167 P.
680 (1917).

Purchase money mortgage had priority over
a mechanic's lien where the mechanic's lien did
not attach until after the mortgage was re-
corded. Calder Bros. Co. v. Anderson, 652 P.2d
922 (Utah 1982).

Questions of law and fact.

In action involving priority between mort-
gages and mechanic's lien, whether all mate-

rials furnished during certain period are furnished under one contract or under different contracts is question of fact. *Gwilliam Lumber & Coal Co. v. El Monte Springs Corp.*, 87 Utah 134, 48 P.2d 463 (1935)

Real estate mortgage.

A mortgagee who loans money to a mortgagor-borrower generally is not only entitled but obliged to pay out the money in accordance with the directions of the borrower, however if the mortgagee knows that the money is being borrowed for the purpose of creating improvements and that materials are being furnished under such circumstances that the mortgagee should know that materialmen are relying on being paid from such funds, and if the mortgagee knows that the money is being diverted into other purposes, then under such circumstances the mortgagee is not accorded priority as to those funds advanced after a materialman starts delivering building supplies. *Utah Sav. & Loan Ass'n v. Mecham*, 11 Utah 2d 159, 356 P.2d 261 (1960)

A mortgagee may be estopped from claiming a priority over a mechanic's lien, however, in order to establish an estoppel, the lien claimant must show some concealment, misrepresentation, act, or declaration by the mortgagee upon which the lien holder properly relies and by which he is induced to act differently than he would otherwise act. *Utah Sav. & Loan Ass'n v. Mecham*, 12 Utah 2d 335, 366 P.2d 596, 15 A.L.R.3d 63 (1961)

Recordation and notice.

From the time the contractor begins to furnish materials, it is notice to anyone thereafter contracting with the owner that the property is burdened with a lien, and no previous notice is required and by the terms of this section, the lien relates back to the time of furnishing the materials. *Cary-Lombard Lumber Co. v. Sheets*, 10 Utah 322, 37 P. 572 (1894)

Materialmen furnishing an occupying claimant of real estate, material for improvements thereon with record notice of a prior mortgage on the premises have no lien against the true owner thereof particularly where occupying claimant's claims to property are based upon fraud and lack of good faith. *Doyle v. West Temple Terrace Co.*, 47 Utah 238, 152 P. 1180 (1915)

Relation back.

Mechanics' liens arising from the furnishing of materials and labor, both on the overall 44-acre site and on individual condominium units within the development, related back to the initial work done on the project. *First of Denver Mtg. Investors v. C.N. Zundel & Assocs.*, 600 P.2d 521 (Utah 1979)

The priority of all mechanic's liens arising from a project is determined by the date of commencement of work on the project site or furnishing materials on the site and the release of his claims and liens by the lien holder who so commenced work or initially furnished materials does not affect the priority of other liens. *First of Denver Mtg. Investors v. C.N. Zundel & Assocs.*, 600 P.2d 521 (Utah 1979)

For one contractor's lien to relate back to the commencement of work or supplying of materials by another contractor, both contractors' projects must have been performed in connection with what is essentially a single project performed under a common plan prosecuted with reasonable promptness and without material abandonment however, ordinary maintenance and cleanup work does not constitute a sufficient basis to permit "tacking" in order to fix an earlier lien date under this section for labor and materials supplied. *Calder Bros. Co. v. Anderson*, 652 P.2d 922 (Utah 1982)

The right to have a mechanic's lien relate back to the commencement of work is not defeated merely because the owners did not employ a general contractor but instead contracted individually with various subcontractors. *Duckett v. Olsen*, 699 P.2d 734 (Utah 1985)

Subdivision development

Work of laying out and developing subdivision including engineering installing water mains sewer mains and laterals curbs and gutters surfacing streets and other off-site construction does not give rise to mechanics lien attaching to particular home being constructed within subdivision. *Western Mtg. Loan Corp. v. Cottonwood Constr. Co.*, 18 Utah 2d 409, 424 P.2d 437 (1967)

Cited in *Knight v. Post*, 748 P.2d 1097 (Ct. App. 1988)

COLLATERAL REFERENCES

Am. Jur. 2d. — 53 Am. Jur. 2d Mechanics' Liens § 263

C.J.S. — 57 C.J.S. Mechanics' Liens § 197

A.L.R. — Mechanic's lien based on contract

with vendor pending executory contract for sale of property as affecting purchaser's interest, 50 A.L.R.3d 944

Key Numbers. — Mechanics' Liens — 198

erty, is properly admitted in evidence. *Garner v. Van Patten*, 20 Utah 342, 58 P. 684 (1899).

Where labor is performed or materials furnished upon several buildings owned by the same person or persons, a claimant may include in one claim all amounts due and the claim will not be defective if the amount due on each separate building is not designated. *Utah Sav. & Loan Ass'n v. Mecham*, 12 Utah 2d 335, 366 P.2d 598, 15 A.L.R.3d 63 (1961).

If a claimant files a lien against more than

one piece of property belonging to the same owner without designating the amount due on each building or improvement, he may enforce the lien against the owner; however, if there are other lien claimants of the same class, his claim is subordinate to theirs if the claims of the latter are against only one of the buildings or if they complied with this section. *Utah Sav. & Loan Ass'n v. Mecham*, 12 Utah 2d 335, 366 P.2d 598, 15 A.L.R.3d 63 (1961).

COLLATERAL REFERENCES

Am. Jur. 2d. — 53 Am. Jur. 2d Mechanics' Liens § 185.

C.J.S. — 57 C.J.S. Mechanics' Liens § 134.

A.L.R. — Mechanic's lien for work on or ma-

terial for separate buildings of one owner, 15 A.L.R.3d 73.

Key Numbers. — Mechanics' Liens — 130(1).

38-1-9. Notice imparted by record.

(1) The recorder must record the claim in an index maintained for that purpose.

(2) From the time the claim is filed for record, all persons are considered to have notice of the claim.

History: R.S. 1898 & C.L. 1907, § 1389; C.L. 1917, § 3739; R.S. 1933 & C. 1943, 52-1-9; L. 1987, ch. 50, § 5.

Amendment Notes. — The 1987 amendment divided this section into subsections; substituted "an index maintained for that purpose" for "a book kept by him for that purpose, and" at the end of Subsection (1); and substi-

tuted "the claim is filed" for "of the filing thereof" and "are considered to have notice of the claim" for "shall be deemed to have notice thereof" and made a capitalization and punctuation change in Subsection (2).

Cross-References. — Record as imparting notice, § 57-3-2.

COLLATERAL REFERENCES

Am. Jur. 2d. — 53 Am. Jur. 2d Mechanics' Liens § 186.

C.J.S. — 57 C.J.S. Mechanics' Liens § 131.
Key Numbers. — Mechanics' Liens — 159.

38-1-10. Laborers' and materialmen's lien on equal footing regardless of time of filing.

The liens for work and labor done or material furnished as provided in this chapter shall be upon an equal footing, regardless of date of filing the notice and claim of lien and regardless of the time of performing such work and labor or furnishing such material.

History: Code Report; R.S. 1933 & C. 1943, 52-1-10.

waives, releases, and discharges any lien or right to lien that materialman might have or thereafter acquire against real property; such provision does not apply to any future lien right which materialman might acquire. Such release relates only to the particular debt paid and receipted for in the particular transaction. Claims of materialman for mechanics' liens for remainder due are valid entitling it to assert and foreclose such liens. *Brimwood Homes, Inc.*

v. Knudsen Bldrs. Supply Co., 14 Utah 2d 419, 385 P.2d 982 (1963)

Where claims of materialman for mechanics' liens are valid, he is entitled to a reasonable attorney's fee under § 38-1-18 where penalty provided by this section for alleged failure of materialman to release liens is sought by builder who contends that the liens are invalid. *Brimwood Homes, Inc. v. Knudsen Bldrs. Supply Co.*, 14 Utah 2d 419, 385 P.2d 982 (1963)

COLLATERAL REFERENCES

C.J.S. — 57 C.J.S. Mechanics' Liens § 246
Key Numbers. — Mechanics' Liens ◀ 242

38-1-25. Abuse of lien right — Penalty.

Any person who knowingly causes to be filed for record a claim of lien against any property, which contains a greater demand than the sum due him, with the intent to cloud the title, or to exact from the owner or person liable by means of such excessive claim of lien more than is due him, or to procure any advantage or benefit whatever, is guilty of a misdemeanor.

History: R.S. 1898 & C.L. 1907, § 1399;
C.L. 1917, § 3749; R.S. 1933 & C. 1943,
52-1-25.

38-1-26. Assignment of lien.

All liens under this chapter shall be assignable as other choses in action, and the assignee may commence and prosecute actions thereon in his own name in the manner herein provided.

History: R.S. 1898 & C.L. 1907, § 1396;
C.L. 1917, § 3746; R.S. 1933 & C. 1943,
52-1-26.

NOTES TO DECISIONS

Right to perfect lien.

Under this section, right to perfect a lien is

assignable. *Smoot v. Checketts*, 41 Utah 211, 125 P. 412, 1915C Ann. Cas. 1113 (1912)

COLLATERAL REFERENCES

Am. Jur. 2d. — 53 Am. Jur. 2d Mechanics' Liens § 284.

C.J.S. — 57 C.J.S. Mechanics' Liens § 216 et seq.

Key Numbers. — Mechanics' Liens ◀ 202

ing to another person or persons an interest in land in which an interest is retained by the grantor and by declaring the creation of a joint tenancy by use of such words as herein provided. In all cases the interest of joint tenants must be equal and undivided.

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

Cross-References. — Inheritance tax on jointly held property, § 59-12-5
Interparty agreements, § 15-3-1 et seq

NOTES TO DECISIONS

ANALYSIS

Joint tenancies

- Alienation and execution.
- Judicial sales
- Severance by conveyance or sale.
- Preference for tenancy in common.

Joint tenancies.

—Alienation and execution.

The Supreme Court of the United States has said that it would assume that "Utah accepts the general common-law rules relating to joint tenancies, including the rules permitting alienation of the interest of a joint tenant and making its property subject to execution and separate sale." *Mangus v. Miller*, 317 U.S. 176, 63 S. Ct. 182, 87 L. Ed. 169, rehearing denied 317 U.S. 712, 63 S. Ct. 432, 87 L. Ed. 567 (1943).

—Judicial sales.

Where a joint tenant defaulted on her obligation to a mortgagee, her subsequent purchase

of the property at a judicial sale was deemed to be for the benefit of all cotenants. *Jolley v. Corry*, 671 P.2d 139 (Utah 1983).

—Severance by conveyance or sale.

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

Preference for tenancy in common.

This section expresses the trend away from the English joint tenancy and in favor of tenancy in common. *Neill v. Royce*, 101 Utah 161, 120 P.2d 327 (1941).

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Cotenancy and Joint Ownership § 27

C.J.S. — 86 C.J.S. Tenancy in Common § 7

A.L.R. — Severance or termination of joint

tenancy by conveyance of divided interest directly to self 7 A.L.R. 4th 1268

Key Numbers. — Tenancy in Common — 3

57-1-6. Recording necessary to impart notice — Operation and effect — Interest of person not named in instrument.

Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, and as to all other persons who have had actual notice. Neither the fact that an instrument, recorded as herein

interest in
by use
nts must

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et seq

provided, recites only a nominal consideration, nor the fact that the grantee in such instrument is designated as trustee, or that the conveyance otherwise purports to be in trust without naming the beneficiaries or stating the terms of the trust, shall operate to charge any third person with notice of the interest of any person or persons not named in such instrument or of the grantor or grantors, but the grantee may convey the fee or such lesser interest as was conveyed to him by such instrument free and clear of all claims not disclosed by the instrument or by an instrument recorded as herein provided setting forth the names of the beneficiaries, specifying the interest claimed and describing the property charged with such interest.

History: R.S. 1898 & C.L. 1907, § 1975; C.L. 1917, § 4875; R.S. 1933 & C. 1943, 78-1-6; L. 1945, ch. 106, § 1; 1947, ch. 97, § 1.

Cross-References. — Acknowledgments generally, § 57-2-1 et seq

Certified copies of record of conveyance, admission in evidence, § 78-25-13

County recorder, § 17-21-1 et seq

Fees of recorder, § 21-2-3

Judgments, record of as imparting notice, § 17-21-11

Recording generally, § 57-3-1 et seq

Transmitting documents by telegraph or telephone, § 69-1-2

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NOTES TO DECISIONS

ANALYSIS

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Acknowledgments

Actual notice

—Assignments

—Duty to inquire.

—Execution sales

—Occupancy and possession

—Trusts

Delivery of deed

Effect of failure to record

Equitable rights

Livery of seizin

Mortgages

Patents

Priorities

Recital of consideration

Recordation as notice.

—In general

—Forged deed

"Recorded" construed

Acknowledgments.

A deed as between the parties and those having notice thereof is good without any acknowledgment, and actual possession constitutes notice *Jordan v Utah R R*, 47 Utah 519, 156 P 939 (1916).

A deed need not be acknowledged to be valid between the parties thereto *Mitchell v Palmer*, 121 Utah 245, 240 P 2d 970 (1952).

Acknowledgment taken by mortgagee himself as notary public is void, thus, a mortgage, acknowledged by the mortgagee, though recorded, is ineffective for purpose of notice, since it is not legally recordable *Norton v Fuller*, 68 Utah 524 251 P 29 (1926). See § 57-2-1 et seq

Actual notice.

—Assignments.

Attaching creditors who had actual notice of assignment for benefit of creditors were not in position to object that statutory notice of assignment was not given *Snyder v Murdock*, 20 Utah 407, 59 P 88 (1899).

—Duty to inquire.

The demands of this section are answered if a party dealing with the land has information of a fact or facts that would put a prudent man upon inquiry and would, if pursued, lead to actual knowledge of the state of the title, this is

actual notice *Toland v. Corev*, 6 Utah 392, 24 P 190 (1890), aff'd 154 U.S. 499, 14 S. Ct. 1144, 38 L. Ed. 1062 (1894), distinguished *Shafer v. Killpack*, 53 Utah 468, 173 P 948 (1918).

The "actual notice" required by this section is satisfied if a party dealing with the land had information of facts which would put a prudent man upon inquiry and which, if pursued, would lead to actual knowledge as to the state of the title, actual notice is a question of fact *Johnson v. Bell*, 666 P.2d 308 (Utah 1983).

—Execution sales.

Where vendee purchased realty from one who had bought it at an execution sale and the record shows the consideration given at the sale was grossly inadequate, the levy excessive and no return made by the sheriff of any attempt to levy on personal property, the vendee would not be justified in failing to make a reasonable inquiry into the validity of the sale and if he did not make such inquiry, he would not be a bona fide purchaser for value *Pender v. Dowse*, 1 Utah 2d 283, 265 P.2d 644, 42 A.L.R.2d 1078 (1954).

—Occupancy and possession.

Even though auditor's tax deed and county tax deed were not acknowledged title technically need not pass to protect a tax title claimant, and also the deed is binding as to defendant who had actual notice because of the claimant's occupancy of the property *Peterson v. Callister*, 6 Utah 2d 359, 313 P.2d 814 (1957), aff'd 8 Utah 2d 348, 334 P.2d 759 (1959).

Actual occupancy is enough to put parties dealing with the premises upon inquiry *Toland v. Corev*, 6 Utah 392, 24 P 190 (1890), aff'd 154 U.S. 499, 14 S. Ct. 1144, 38 L. Ed. 1062 (1894), distinguished *Shafer v. Killpack*, 53 Utah 468, 173 P 948 (1918).

Under this section actual possession and occupancy amounts to "actual notice" to all the world of grantee's rights even if his deed is not recorded *Neponset Land & Live Stock Co. v. Dixon*, 10 Utah 334, 37 P 573 (1894).

—Trusts.

Trustee under a deed of trust did not have actual notice of plaintiff's predecessors' interest in the grazing land subject to the deed of trust where at the time the deed of trust was executed and recorded there were no cattle grazing on the land, no one living on the land and no other evidence of any activity on the property which would have reasonably alerted the trustee to the claims of plaintiff's predecessors and which would have required further investigation *Johnson v. Bell*, 666 P.2d 308 (Utah 1983).

Delivery of deed

Deed duly executed and acknowledged and

shown to be in possession of grantee is not proving both as to execution and delivery, a recording of deed is likewise evidence of delivery *Chamberlain v. Larsen*, 83 Utah 420, P.2d 355 (1934).

Inference of delivery arising from possession of deed by grantee and from recording thereof is entitled to great and controlling weight and can only be overcome by clear and convincing evidence *Chamberlain v. Larsen*, 83 Utah 420, P.2d 355 (1934).

Where duly acknowledged and recorded deed was found among papers of deceased grantor inference of delivery and execution at all date stated in deed arose and burden was on those claiming nondelivery to show such *Knighton v. Manning*, 84 Utah 1, 33 P.2d 1934.

In action by administrator of grantor against executor of grantee, finding of nondelivery of deed found among effects of grantee duly acknowledged and recorded three days after death of grantor was sustained by evidence *Knighton v. Manning*, 84 Utah 1, 33 P.2d 1934.

Assuming valid delivery of warranty deed to grandson of grantor, such deed would not avail over right to property existing in person who had previously acquired deed from grantor, but who had not recorded same after deed to grandson, where it appeared land was in possession of occupant as purchaser from and after default as tenant, third person *Meagher v. Dean*, 97 Utah 91, P.2d 454 (1939).

Effect of failure to record.

Where after mortgage was executed certain tract of land owner executed deed to grantee on property not included in mortgage which deed was not recorded decree in to foreclose mortgage on tract of land including part conveyed to grantee, was not binding on grantee who was not party to such *Federal Land Bank v. Pace*, 87 Utah 1, P.2d 480, 102 A.L.R. 819 (1935).

Recordation is not a prerequisite to validity of a deed although unrecorded deed is binding on the parties thereto *Grege Jensen*, 669 P.2d 396 (Utah 1983).

Equitable rights

This section itself gives no equities applies this section in determining equities *Federal Land Bank v. Pace*, 87 Utah 1, P.2d 480, 102 A.L.R. 819 (1935).

Livery of seizin.

In Utah livery of seizin is unknown and has expressly abolished it, but by statute is dispensed with *Wells, Fargo & Co. v. ...*, 2 Utah 39 (1877), aff'd 104 U.S. 428, 2 L. Ed. 802 (1881).

grantor of property has no implied obligation to protect the grantee's rights by recording his interest in the property or by giving notice to third parties of the existence of the interest. If the grantee fails to record, he assumes the risk of a subsequent grantee of the property acquiring superior rights to his by recording first. *Horman v. Clark*, 744 P.2d 1014 (Wyo. App. 1987).

Repeals and Reenactments. — Laws 1988, ch. 155, § 3 repeals former § 57-1-16, Utah

Code Annotated 1953, relating to affidavits of lack of notice or knowledge of power of revocation, and enacts the present section, effective July 1, 1988.

57-1-17, 57-1-18. Repealed.

Repeals. — Laws 1988, ch. 155, § 24 repeals §§ 57-1-17 and 57-1-18, Utah Code Annotated

1953, relating to powers of attorney, effective July 1, 1988.

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

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

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

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

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

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

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

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

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

Amendment Notes. — The 1988 amendment, effective July 1, 1988, substituted "Sections 57-1-20 through 57-1-36" for "this act" in

the introductory paragraph and in Subsection (3); substituted "trustor" for "grantor" in Subsection (3); and substituted the present provision in Subsection (5) for the former definition, which had listed various interests in land.

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

NOTES TO DECISIONS

Error in notice.

—Validity of sale.

Validity of a sale was not affected by a typographical error in a notice dated October 1, 1983, which indicated that the sale would take

place on October 28, 1982, where the notice did not confuse bidders or result in an undervaluation of the property. *Concepts, Inc. v. First Sec. Realty Servs., Inc.*, 743 P.2d 1158 (Utah 1987).

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

(5) "Real property" means any estate or interest in land, including all buildings, fixtures and improvements thereon and all water rights, rights of way, easements, rents, issues, profits, income, tenements, hereditaments, privileges and appurtenances thereunto belonging, used or enjoyed with said land, or any part thereof.

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

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History: L. 1961, ch. 181, § 1. and subdivision (3) apparently refers to L. 1961, ch. 181 which enacted this section and
Meaning of "this act". — The phrase "this act" appearing in the introductory language §§ 57-1-20 to 57-1-36.

COLLATERAL REFERENCES

Am. Jur. 2d. — 55 Am. Jur. 2d Mortgages § 15 et seq. C.J.S. — 59 C.J.S. Mortgages § 5.
Key Numbers. — Mortgages ⇌ 1.

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

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

History: L. 1961, ch. 181, § 2.

COLLATERAL REFERENCES

C.J.S. — 59 C.J.S. Mortgages § 6.
Key Numbers. — Mortgages ⇌ 1.

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

- (1) The trustee of a trust deed shall be:
 - (a) any member of the Utah State Bar;
 - (b) any bank, building and loan association, savings and loan association, or insurance company authorized to do business in Utah under the laws of Utah or the United States;
 - (c) any corporation authorized to conduct a trust business in Utah under the laws of Utah or the United States;
 - (d) any title insurance or abstract company authorized to do business in Utah under the laws of Utah;
 - (e) any agency of the United States government; or
 - (f) any association or corporation which is licensed, chartered, or regulated by the Farm Credit Administration or its successor.

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CHAPTER 2

ACKNOWLEDGMENTS

Section		Section	
57-2-1.	Manner of acknowledging or proving conveyances	57-2-10.	Proof of execution—How made.
57-2-2.	Who authorized to take acknowledgments.	57-2-11.	Witness must be known or identified.
57-2-3.	Acknowledgment by deputy.	57-2-12.	Certificate of proof by subscribing witness.
57-2-4.	Taking acknowledgments of persons with United States armed forces.	57-2-13.	Form of certificate of proof.
57-2-5.	Certificate of acknowledgment.	57-2-14.	When subscribing witness dead—Proof of handwriting.
57-2-6.	Party must be known or identified.	57-2-15.	What evidence required for certificate of proof.
57-2-7.	Form of certificate of acknowledgment.	57-2-16.	Subpoena to subscribing witness.
57-2-8.	When grantor unknown to officer.	57-2-17.	Disobedience of subpoenaed witness—Contempt—Proof aliunde.
57-2-9.	When executed by attorney in fact.		

57-2-1. Manner of acknowledging or proving conveyances.

Every conveyance in writing whereby any real estate is conveyed or may be affected shall be acknowledged or proved and certified in the manner hereinafter provided.

History: R.S. 1898 & C.L. 1907, § 1984; C.L. 1917, § 4884; R.S. 1933 & C. 1943, 78-2-1.

NOTES TO DECISIONS

Deed

Either the acknowledgment or the proving must accompany every deed to make it valid. Both are not necessary to make it prima facie

good, either being sufficient if the deed is otherwise sufficient. *Tarpey v. Desert Salt Co.*, 5 Utah 205, 14 P. 338 (1887), aff'd, 142 U.S. 241, 12 S.Ct. 158, 35 L. Ed. 999 (1891).

COLLATERAL REFERENCES

Am. Jur. 2d. —1 Am. Jur. 2d Acknowledgments § 5.

C.J.S. — 1 C.J.S. Acknowledgments §§ 6, 7.
Key Numbers. — Acknowledgment ☞ 3, 4.

57-2-2. Who authorized to take acknowledgments.

The proof or acknowledgment of every conveyance whereby any real estate is conveyed or may be affected shall be taken by some one of the following officers:

- (1) If acknowledged or proved within this state, by a judge or clerk of a court having a seal, or a notary public, county clerk or county recorder.
- (2) If acknowledged or proved without this state and within any state or territory of the United States, by a judge or clerk of any court of the United States, or of any state or territory, having a seal, or by a notary

(2) When made by any other officer, under the hand and official seal of such officer.

History: R.S. 1898 & C.L. 1907, § 1987;
1917, § 4887; R.S. 1933 & C. 1943,
-4.

NOTES TO DECISIONS

priorities	always determinative of priorities between
date of certificate.	mortgages State v. Johnson, 71 Utah 572, 268
date of certificate of acknowledgment is not	P. 561 (1928)

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am Jur 2d Acknowledgments § 32 et seq.	C.J.S. — 1A C.J.S. Acknowledgments § 67. Key Numbers. — Acknowledgment ¶ 33.
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7-2-6. Party must be known or identified.

No acknowledgment of any conveyance whereby any real estate is conveyed or may be affected shall be taken unless the person offering to make such acknowledgment shall be personally known to the officer taking the same to be the person whose name is subscribed to such conveyance as a party thereto, or shall be proved to be such by the oath or affirmation of a credible witness personally known to the officer taking the acknowledgment.

History: R.S. 1898 & C.L. 1907, § 1988;
C.L. 1917, § 4888; R.S. 1933 & C. 1943,
78-2-5.

COLLATERAL REFERENCES

C.J.S. — 1A C.J.S. Acknowledgments § 52
Key Numbers. — Acknowledgment ¶ 22.

57-2-7. Form of certificate of acknowledgment.

A certificate of acknowledgment to any instrument in writing affecting the title to any real property in this state may be substantially in the following form:

State of Utah, County of _____

On the _____ day of _____, 19____, personally appeared before me _____, the signer of the above instrument, who duly acknowledged to me that he executed the same.

The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:

State of Utah, County of _____

On the _____ day of _____, 19____, personally appeared before me _____, who being by me duly sworn (or affirmed), did say that he _____ president (or other officer or agent, as the case may be) of (naming _____) signed in behalf of said

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Acknowledgments § 14.

C.J.S. — 1A Acknowledgments § 36.
Key Numbers. — Acknowledgment ⇨ 16.

57-2-4. Taking acknowledgments of persons with United States armed forces.

In addition to the acknowledgment of instruments in the manner and form and as otherwise authorized by this chapter, any person serving in or with the armed forces of the United States may acknowledge the same wherever located before any commissioned officer in the active service of the armed forces of the United States with the rank of second lieutenant or higher in the Army or Marine Corps, or ensign or higher in the Navy or United States Coast Guard. The instrument shall not be rendered invalid by the failure to state therein the place of execution or acknowledgment. No authentication of the officer's certificate of acknowledgment shall be required, but the officer taking the acknowledgment shall endorse thereon or attach thereto a certificate substantially in the following form:

On this _____ day of _____, 19_____, before me _____, the undersigned officer, personally appeared _____, known to me (or satisfactorily proven) to be serving in or with the armed forces of the United States and to be the person whose name is subscribed to the within instrument and acknowledged that _____ executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

 Signature of Officer

 Rank of Officer and Command to Which Attached

History: C. 1943, 78-2-3.10, enacted by L. 1943, ch. 83, § 1.

COLLATERAL REFERENCES

C.J.S. — 1A C.J.S. Acknowledgments § 33.
Key Numbers. — Acknowledgment ⇨ 16.

57-2-5. Certificate of acknowledgment.

Every officer who shall take the proof or acknowledgment of any conveyance affecting any real estate shall make a certificate thereof, and cause such certificate to be endorsed on or annexed to such conveyance. Such certificate shall be:

- (1) When made by any judge or clerk, under the hand of such judge or clerk, and the seal of the court.

corporation by authority of its bylaws (or of a resolution of its board of directors, as the case may be), and said _____ acknowledged to me that said corporation executed the same.

History: R.S. 1898 & C.L. 1907, § 1989;
C.L. 1917, § 4889; R.S. 1933 & C. 1943,
78-2-6.

NOTES TO DECISIONS

ANALYSIS

Effect of certificate.

—Evidence of facts therein.

Verification of mechanic's lien notice.

Effect of certificate.

—Evidence of facts therein.

The certificate of acknowledgment is itself only prima facie evidence of the facts therein stated. It is not conclusive, and may be rebutted. *Tarpey v. Desert Salt Co.*, 5 Utah 205, 14 P. 338 (1887), *aff'd*, 142 U.S. 241, 12 S. Ct. 158, 35 L. Ed. 999 (1891).

Verification of mechanic's lien notice.

The use of a corporate acknowledgment instead of a sworn statement that the contents of the mechanic's lien notice were true did not satisfy the requirement of § 38-1-7 that such notice must be verified. *First Sec. Mtg. Co. v. Hansen*, 631 P.2d 919 (Utah 1981).

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Acknowledgments § 34.

C.J.S. — 1A C.J.S. Acknowledgments § 61.
Key Numbers. — Acknowledgment ⇨ 29.

57-2-8. When grantor unknown to officer.

When the grantor is unknown to the officer taking the acknowledgment, the certificate shall be substantially in the following form, to wit:

State of Utah, County _____

On this _____ day of _____, 19____, personally appeared before me _____, satisfactorily proved to me to be the signer of the above instrument by the oath of _____, a competent and credible witness for that purpose, by my duly sworn, and he, the said _____ acknowledged that he executed the same.

Such certificate when properly executed by an officer authorized to take acknowledgments to instruments in writing affecting the title to real property in this state, and attached to a conveyance in writing, shall be a sufficient acknowledgment and certificate that such conveyance was executed as required by law.

History: R.S. 1898 & C.L. 1907, § 1990;
C.L. 1917, § 4890; R.S. 1933 & C. 1943,
78-2-7.

C.J.S. — 26A C.J.S. Deeds § 203.
Key Numbers. — Deeds ⇌ 207.

CHAPTER 3

RECORDING CONVEYANCES

Section		Section	
57-3-1.	Certificate of acknowledgment or of proof of execution a prerequisite.	57-3-6, 57-3-7.	Repealed.
57-3-2.	Record imparts notice — Recordation not affected by change in interest rate.	57-3-8.	Failure to discharge mortgage after satisfaction—Liability.
57-3-3.	Effect of failure to record.	57-3-9.	Conveyances prior to January 1, 1898—Recording—Effect.
57-3-4.	Certified copies entitled to record in another county—Effect.	57-3-10.	Legal description of real property and names and addresses required in instruments.
57-3-5.	Mortgages—Assignment of—Effect of recordation.	57-3-11.	Original documents required — Captions — Legibility.

57-3-1. Certificate of acknowledgment or of proof of execution a prerequisite.

A certificate of the acknowledgment of any conveyance, or of the proof of the execution thereof as provided in this title, signed and certified by the officer taking the same as provided in this title, shall entitle such conveyance, with the certificate or certificates aforesaid, to be recorded in the office of the recorder of the county in which the real estate is situated.

History: R.S. 1898 & C.L. 1907, § 1999; telegraph or telephone may be recorded, C.L. 1917, § 4899; R.S. 1933 & C. 1943, § 69-1-2.
78-3-1.

Cross-References. — Documents sent by Model Marketable Titles § 57-9-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Acknowledgment by mortgagee.
Disqualification of office taking acknowledgment.

Acknowledgment by mortgagee.
An acknowledgment taken by mortgagee himself as a notary public is void, and renders mortgage unrecordable. Norton v. Fuller, 68 Utah 524, 251 P. 29 (1926).

Disqualification of office taking acknowledgment.
If acknowledgment is taken before officer disqualified to act, certificate is ineffectual. Crompton v. Jensen, 78 Utah 55, 1 P.2d 242 (1931).

Recorded — Assignment of a Beneficial Interest.

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

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

Amendment Notes. — The 1988 amendment, effective July 1, 1988, deleted "and shall, from the time of filing the same with the re-

corder for record, impart notice of the contents thereof to all persons, including subsequent purchasers and encumbrancers for value, except that the" at the end of the first sentence and made minor stylistic changes.

CHAPTER 2

ACKNOWLEDGMENTS

Section

57-2-1 to 57-2-9. Repealed.

57-2-1 to 57-2-9. Repealed.

Repeals. — Laws 1988, ch. 155, § 24 repeals § 57-2-1, Utah Code Annotated 1953, § 57-2-2, as amended by Laws 1987, ch. 53, § 1, and §§ 57-2-3 to 57-2-9, Utah Code Annotated

1953, relating to acknowledgments, effective July 1, 1988. For present comparable provisions, see §§ 57-2a-1 to 57-2a-7.

CHAPTER 2a

RECOGNITION OF ACKNOWLEDGMENTS

Section

57-2a-1. Title.

57-2a-2. Definitions.

57-2a-3. Persons authorized to perform notarial acts under laws of other jurisdictions.

Section

57-2a-4. Proof of authority — Prima facie evidence.

57-2a-5. Certificate.

57-2a-6. Form of certificate.

57-2a-7. Form of acknowledgment.

This chapter is known as the Recognition of Acknowledgments Act."

History: C. 1953, 57-2a-1, enacted by L.
1988, ch. 155, § 6.

Effective Dates. — Laws 1988, ch. 155,
§ 25 makes the act effective on July 1, 1988

57-2a-2. Definitions.

As used in this chapter:

(1) "Acknowledged before me" means:

(a) that the person acknowledging appeared before the person taking the acknowledgment;

(b) that he acknowledged he executed the document;

(c) that, in the case of:

(i) a natural person, he executed the document for the purposes stated in it;

(ii) a corporation, the officer or agent acknowledged he held the position or title set forth in the document or certificate, he signed the document on behalf of the corporation by proper authority, and the document was the act of the corporation for the purpose stated in it;

(iii) a partnership, the partner or agent acknowledged he signed the document on behalf of the partnership by proper authority, and he executed the document as the act of the partnership for the purposes stated in it;

(iv) a person acknowledging as principal by an attorney in fact, he executed the document by proper authority as the act of the principal for the purposes stated in it; or

(v) a person acknowledging as a public officer, trustee, administrator, guardian, or other representative, he signed the document by proper authority, and he executed the document in the capacity and for the purposes stated in it; and

(d) that the person taking the acknowledgment:

(i) either knew or had satisfactory evidence that the person acknowledging was the person named in the document or certificate; and

(ii) in the case of a person executing a document in a representative capacity, either had satisfactory evidence or received the sworn statement or affirmation of the person acknowledging that the person had the proper authority to execute the document.

(2) "Notarial act" means any act a notary public is authorized by state law to perform, including administering oaths and affirmations, taking acknowledgments of documents, and attesting documents.

History: C. 1953, 57-2a-2, enacted by L.
1988, ch. 155, § 7.

Effective Dates. — Laws 1988, ch. 155,
§ 25 makes the act effective on July 1, 1988

57-2a-3. Persons authorized to perform notarial acts under laws of other jurisdictions.

The following persons authorized under the laws and regulations of other governments may perform notarial acts outside this state for use in this state with the same effect as if performed by a notary public of this state:

- (1) a notary public authorized to perform notarial acts in the place where the act is performed;
- (2) a judge, clerk, or deputy clerk of any court of record in the place where the notarial act is performed;
- (3) an officer of the foreign service of the United States, a consular agent, or any other person authorized by regulation of the United States Department of State to perform notarial acts in the place where the act is performed;
- (4) a commissioned officer in active service with the Armed Forces of the United States and any other person authorized by regulation of the Armed Forces to perform notarial acts if the notarial act is performed for any of his dependents, a merchant seaman of the United States, a member of the Armed Forces of the United States, or any other person serving with or accompanying the Armed Forces of the United States; or
- (5) any other person authorized to perform notarial acts in the place where the act is performed.

History: C. 1953, 57-2a-3, enacted by L. 1988, ch. 155, § 8.

Effective Dates. — Laws 1988, ch. 155, § 25 makes the act effective on July 1, 1988.

57-2a-4. Proof of authority — Prima facie evidence.

(1) Except as provided in Subsections (2) and (3), the signature, title or rank, branch of service, and serial number, if any, of any person described in Subsections 57-2a-3(1) through (5) are sufficient proof of his authority to perform a notarial act. Further proof of his authority is not required.

(2) Proof of the authority of a person to perform a notarial act under the laws or regulations of a foreign country is sufficient if:

- (a) a foreign service officer of the United States resident in the country in which the act is performed or a diplomatic or consular officer of the foreign country resident in the United States certifies that a person holding that office is authorized to perform the act;
- (b) the official seal of the person performing the notarial act is affixed to the document; or
- (c) the title and indication of authority to perform notarial acts of the person appears either in a digest of foreign law or in a list customarily used as a source of such information.

(3) The signature and title or rank of the person performing the notarial act are prima facie evidence that he is a person with the designated title and that his signature is genuine.

History: C. 1953, 57-2a-4, enacted by L. 1988, ch. 155, § 9.

Effective Dates. — Laws 1988, ch. 155, § 25 makes the act effective on July 1, 1988.

A person taking an acknowledgment shall cause a certificate in a form acceptable under Section 57-2a-6 or 57-2a-7 to be endorsed on or attached to the document or other written instrument.

History: C. 1953, 57-2a-5, enacted by L. 1988, ch. 155, § 10.

Effective Dates. — Laws 1988, ch. 155, § 25 makes the act effective on July 1, 1988.

57-2a-6. Form of certificate.

The form of a certificate of acknowledgment used by a person whose authority is recognized under Section 57-2a-3 shall be accepted if:

- (1) the certificate is in a form prescribed by the laws or rules of this state;
- (2) the certificate is in a form prescribed by the laws or regulations applicable in the place where the acknowledgment is taken; or
- (3) the certificate contains the words "acknowledged before me," or their substantial equivalent.

History: C. 1953, 57-2a-6, enacted by L. 1988, ch. 155, § 11.

Effective Dates. — Laws 1988, ch. 155, § 25 makes the act effective on July 1, 1988.

57-2a-7. Form of acknowledgment.

The form of acknowledgment set forth in this section, if properly completed, is sufficient under any law of this state. It is known as "Statutory Short Form of Acknowledgment." This section does not preclude the use of other forms. State of _____)

) ss.

County of _____)

The foregoing instrument was acknowledged before me this (date) by (person acknowledging, title or rank, and representative capacity, if any).

(Seal)	(Signature of Person Taking Acknowledgment)
	(Title or Rank, Branch of Service, and
	Serial Number, if applicable)
My commission expires: _____	Residing at: _____

History: C. 1953, 57-2a-7, enacted by L. 1988, ch. 155, § 12.

Effective Dates. — Laws 1988, ch. 155, § 25 makes the act effective on July 1, 1988.

CHAPTER 3

RECORDING OF DOCUMENTS

Section		Section	
57-3-1.	Certificate of acknowledgment or of proof of execution a prerequisite.	57-3-3.	Effect of failure to record.
57-3-2.	Record imparts notice — Recordation not affected by change in interest rate — Validity of document not affected — Third person not charged with notice of unnamed interests — Conveyance free and clear of unrecorded interests.	57-3-4.	Certified copies entitled to record in another county — Effect.
		57-3-10.	Legal description of real property and names and addresses required in documents.
		57-3-11.	Original documents required — Captions — Legibility.

57-3-1. Certificate of acknowledgment or of proof of execution a prerequisite.

A certificate of the acknowledgment of any document, or of the proof of the execution of any document that is signed and certified by the officer taking the acknowledgment as provided in this title, entitles the document and the certificate to be recorded in the office of the recorder of the county where the real property is located.

History: R.S. 1898 & C.L. 1907, § 1999; C.L. 1917, § 4899; R.S. 1933 & C. 1943, 78-3-1; 1988, ch. 155, § 13.

Amendment Notes. — The 1988 amend-

ment, effective July 1, 1988, substituted "document" for "conveyance" throughout the section and made stylistic changes.

COLLATERAL REFERENCES

Law Reviews. — Recent Developments in Utah Law, 1986 Utah L. Rev. 95, 123.

57-3-2. Record imparts notice — Recordation not affected by change in interest rate — Validity of document not affected — Third person not charged with notice of unnamed interests — Conveyance free and clear of unrecorded interests.

(1) Each document executed, acknowledged, and certified, in the manner prescribed by this title; each original document or certified copy of a document complying with Section 57-4a-3, whether or not acknowledged; and each financing statement complying with Section 70A-9-402, whether or not acknowledged; shall, from the time of filing with the appropriate county recorder, impart notice to all persons of their contents.

(2) If a recorded document was given as security, a change in the interest rate in accordance with the terms of an agreement pertaining to the underlying secured obligation does not affect the notice or alter the priority of the document provided under Subsection (1).

(3) This section does not affect the validity of a document with respect to the parties to the document and all other persons who have notice of the document

naming beneficiaries or stating the terms of the trust. . . .
third person with notice of any interest of the grantor or of the interest of any
other person not named in the document.

(5) The grantee in a recorded document may convey the interest granted to
him free and clear of all claims not disclosed in the document in which he
appears as grantee or in any other document recorded in accordance with this
title that sets forth the names of the beneficiaries, specifies the interest
claimed, and describes the real property subject to the interest.

History: R.S. 1898 & C.L. 1907, § 2000;
C.L. 1917, § 4900; R.S. 1933 & C. 1943,
78-3-2; L. 1977, ch. 272, § 54; 1985, ch. 159,
§ 7; 1988, ch. 155, § 14.

Amendment Notes. — The 1988 amend-

ment, effective July 1, 1988, added Subsections
(3) to (5) and rewrote Subsections (1) and (2), as
last amended by Laws 1985, ch. 159, § 7, to
such an extent that a detailed comparison is
impracticable.

NOTES TO DECISIONS

ANALYSIS

Effect of failure to record.

Mortgages.

Recordation as notice.

—Time from which notice imparted.

Effect of failure to record.

Where a prior deed was not recorded until
three years after the purchasers' assignments
of their equitable interests in the property
were executed and recorded, the assignee had
no constructive notice of the deed, and the as-
signee's lien was therefore superior to a bank's
subsequent trust deed received from the pur-
chasers. *Utah Farm Prod. Credit Assoc. v.*
Wasatch Bank, 734 P.2d 904 (Utah 1987).

Mortgages.

Mortgages are subject to the provisions of

this section. *Utah Farm Prod. Credit Assoc. v.*
Wasatch Bank, 734 P.2d 904 (Utah 1987).

Recordation as notice.

—Time from which notice imparted.

The date of recording, not the date of execu-
tion, governs the time from which an instru-
ment imparts notice to all persons. *Utah Farm*
Prod. Credit Ass'n v. Wasatch Bank, 734 P.2d
904 (Utah 1986).

57-3-3. Effect of failure to record.

Each document not recorded as provided in this title is void as against any
subsequent purchaser of the same real property, or any portion of it, if:

(1) the subsequent purchaser purchased the property in good faith and
for a valuable consideration; and

(2) the subsequent purchaser's conveyance is first duly recorded.

History: R.S. 1898 & C.L. 1907, § 2001;
C.L. 1917, § 4901; R.S. 1933 & C. 1943,
78-3-3; 1988, ch. 155, § 15.

Amendment Notes. — The 1988 amend-
ment, effective July 1, 1988, substituted "docu-

ment" for "conveyance of real estate" in the
introductory paragraph; added Subsections (1)
and (2), deleting comparable provisions from
the introductory paragraph; and made minor
stylistic changes.

IN THE SUPREME COURT FOR THE STATE OF UTAH

GENERAL GLASS CORPORATION, a Colorado Corporation, Plaintiff, v. MAST CONSTRUCTION COMPANY, a Utah Corporation, et al., Defendants Appellants, and Petitioners,	Supreme Court Docket No. _____
DEBENHAM ELECTRIC SUPPLY COMPANY, Plaintiff, v. ELECTRO TECHNICAL CORPORATION, a Utah corporation, et al., Defendants.	Court of Appeals Docket No. 860355-CA
AMERICAN SAVINGS AND LOAN ASSOCIATION, a California corporation, Plaintiff and Respondent, v. OAKHILLS PARTNERSHIP, a Utah limited partnership, et al., Defendants.	

PETITION FOR WRIT OF CERTIORARI

Appellants' Petition for Writ of Certiorari
To the Court of Appeals for the State of Utah

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