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CHAPTER 39

PARTITION

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78-39-1. By cotenants of real property.

When several cotenants hold and are in possession of real property as joint tenants or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property or a part thereof, if it appears that a partition cannot be made without great prejudice to the owners.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-1.

Cross-References. — Action brought where property is situated, § 78-13-1.

Conservator's powers, § 75-5-424.

Creation of joint tenancy, § 57-1-5.

Decedent's estates, partition for purpose of distribution, § 75-3-911.

Homesteads, § 78-23-14.

Parties, Rule 20, U.R.C.P.

Recording of judgments affecting realty, notice imparted thereby, §§ 17-21-10, 17-21-11.

Trustee's powers, § 75-7-402.

Waste by joint tenant, damages, § 78-38-2.

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—Incomplete adjudication of property rights.

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Complaint.

—Necessary allegations.

Former § 104-58-1 was confined to action of partition brought by one cotenant against his joint tenant or tenant in common; accordingly, complaint was insufficient unless it alleged that plaintiff and defendant were either joint tenants or tenants in common. *Larsen v. Daynes*, 102 Utah 305, 122 P.2d 429 (1942), reversed, 102 Utah 312, 133 P.2d 785 (1943).

Divorce action.

—Incomplete adjudication of property rights.

Complaint in partition seeking relief because of an attempted but incomplete adjudication of property rights in a divorce action was held to state a cause of action. *Larsen v. Daynes*, 102 Utah 312, 133 P.2d 785 (1943).

Equality of division.

—Held proper.

Division by allocation of 44 feet from corner to one party, and 88 feet frontage in middle of block to another, held proper as a division equal in value. *Utah Oil Ref. Co. v. Leigh*, 98 Utah 149, 96 P.2d 1100 (1939).

Fairness.

The partition must in every case be equita-

ble and no one given an unnecessary advantage. *In re Ferguson's Estate*, 44 Utah 234, 139 P. 438 (1914).

Life tenant.

—Right to force sale.

Life tenant by himself, or by joining in a suit with a cotenant in the remainder fee interest, does not have the right to force a sale in lieu of partition pursuant to this section. *Funk v. Young*, 592 P.2d 619 (Utah 1979).

Mining claim.

—Partition by metes and bounds.

In action to partition mining claim as between owners respectively of five-sevenths and two-sevenths interests, wherein only evidence of value of mineral rights was proximity of other mines, and there was no evidence of known veins or bodies of ore in the particular claim or of any fixed or market value for it, partition according to metes and bounds, rather than sale of the property, was proper. *Ryan v. Egan*, 26 Utah 241, 72 P. 933 (1903).

Parol partitions.

—Actual possession.

A parol partition between joint owners of real property, when carried out and followed by actual possession in severalty of the several

parcels, is valid and will be enforced, notwithstanding the statute of frauds. *Whittemore v. Cope*, 11 Utah 344, 40 P. 256 (1895); *Allen v. Allen*, 50 Utah 104, 166 P. 1169 (1917).

Remainder interest.

—Right to force sale.

Cotenant of vested remainder fee interest by himself, or by joining in a suit with the life tenant, does not have the right to force a sale

in lieu of partition pursuant to this section. *Funk v. Young*, 592 P.2d 619 (Utah 1979).

Sales of property.

—Applicability of civil rules.

Sales of property in partition proceedings should be governed by the partition statute, and not by Rule 69(e), U.R.C.P. *Gillmor v. Gillmor*, 657 P.2d 736 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 1 et seq.

C.J.S. — 68 C.J.S. Partition § 20 et seq.

A.L.R. — Contractual provisions as affecting right to judicial partition, 37 A.L.R.3d 962.

Right to partition of overriding royalty interest in oil and gas leasehold, 58 A.L.R.3d 1052.

Key Numbers. — Partition ⇨ 10 et seq.

78-39-2. Complaint — To set forth interests of all parties.

The interests of all persons in the property, whether such persons are known or unknown, must be set forth in the complaint, specifically and particularly, as far as known to the plaintiff, and if one or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the plaintiff, or is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.

History: L. 1951, ch. 58, § 1; 1943, Supp., 104-39-2.

Cross-References. — Necessary joinder of parties, Rule 19, U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 82.

C.J.S. — 68 C.J.S. Partition § 88 et seq.

Key Numbers. — Partition ⇨ 55(2).

78-39-3. Parties — Only holders of recorded rights necessary.

No person having a conveyance of, or claiming a lien on, the property, or some part of it, need be made a party to the action, unless such conveyance or lien appears of record.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-3.

Cross-References. — Necessary joinder of parties, Rule 19, U.R.C.P.

Recordation of liens by county recorder, § 17-21-6.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 74.

C.J.S. — 68 C.J.S. Partition § 73.

Key Numbers. — Partition § 46(1).

78-39-4. Lis pendens required.

Immediately after filing the complaint in the district court the plaintiff must file with the recorder of the county or of the several counties in which the property is situated, either a copy of such complaint or a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action and a description of the property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-4.

Lis pendens in real property actions generally, § 78-40-2.

Cross-References. — County recorder, Chapter 22 of Title 17.

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Lis Pendens § 21.

tion prior to termination of underlying action, absent claim of delay, 49 A.L.R.4th 242.

C.J.S. — 54 C.J.S. Lis Pendens § 13.

Key Numbers. — Lis Pendens ⇨ 15.

A.L.R. — Lis pendens: grounds for cancella-

78-39-5. Summons — To whom directed.

The summons must be directed to all the joint tenants, tenants in common of all persons having any interest in, or liens of record by mortgage, judgment or otherwise upon, the property or any particular portion thereof, and generally to all persons unknown who have or claim any interest in the property.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-5.

Cross-References. — Contents of summons, Rule 4(c), U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 78.

C.J.S. — 68 C.J.S. Partitions § 80.

Key Numbers. — Partitions ⇨ 51.

78-39-6. Service by publication.

If a party having a share or interest is unknown, or any one of the known parties resides out of the state or cannot be found therein, the summons may be served on such absent or unknown party by publication as in other cases.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-6.

Cross-References. — Service by publication, Rule 4, U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 79.

C.J.S. — 68 C.J.S. Partition § 83.

Key Numbers. — Partition ⇨ 51.

78-39-7. Answer must set forth interests claimed.

The defendants who have been personally served with the summons, or who have appeared without such service, must set forth in their answers, fully and particularly, the origin, nature and extent of their respective interests in the property; and if such defendants claim a lien on the property by mortgage, judgment or otherwise, they must state the original amount and date of the same, and the sum remaining due thereon; also whether the same has been secured in any other way or not, and if secured, the extent and nature of such security, or they are deemed to have waived their rights to such lien.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-7.

Time for serving answer, Rule 12(a), U.R.C.P.

Cross-References. — General rules of pleadings, Rule 8, U.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Cross-complaint.

—Legal effect.

—Right to file.

Cross-complaint.**—Legal effect.**

Legal effect of setting cross-complaint for hearing was also to set for hearing original cause. *Chalmers v. Trent*, 11 Utah 88, 39 P. 488 (1895).

—Right to file.

Where plaintiff, in action for partition, failed to make parties all person interested in realty involved, and complaint stated that no persons, other than plaintiff and defendant and, because of her dower right, defendant's wife,

were interested in such realty, and defendant filed, with his answer, cross-complaint which asked affirmative relief and joined as defendants all interested persons omitted by plaintiff, and thereafter, by leave of trial court, plaintiff filed amended complaint which brought in all necessary parties, held that defendant had right to file his cross-complaint and that it was reversible error for court, on plaintiff's motion, to strike such pleading from files. *Chalmers v. Trent*, 11 Utah 88, 39 P. 488 (1895).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 81 et seq.

C.J.S. — 68 C.J.S. Partition § 94.

Key Numbers. — Partition ⇨ 56.

78-39-8. Right of all parties may be determined.

The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried and determined by such action; and when a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court before the judgment of sale can be made; and where service of the summons has been made by publication like proofs must be required of the rights of the absent or unknown parties before such judgment is rendered; except that where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not severally among themselves.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-8.

Cross-References. — Service by publication, manner of proof, Rule 4(g)(3), U.R.C.P.

NOTES TO DECISIONS

Jurisdiction in rem.

The rights of each party, plaintiff as well as defendant, may be determined, including the rights of unknown parties, when jurisdiction in

rem has been acquired by publication of summons. In re Green River Drainage Area, 147 F.Supp. 127 (D. Utah 1956).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 89 et seq.

C.J.S. — 68 C.J.S. Partition § 124.
Key Numbers. — Partition ⇨ 74.

78-39-9. Partial partition allowed — When.

Whenever from any cause it is, in the opinion of the court, impracticable or highly inconvenient to make complete partition in the first instance among all the parties in interest, the court may first ascertain and determine the shares or interests respectively held by the original cotenants, and thereupon adjudge and cause a partition to be made as if such original cotenants were the parties and sole parties in interest and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted as among those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-9.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 35.

C.J.S. — 68 C.J.S. Partition § 157.
Key Numbers. — Partition ⇨ 75.

78-39-10. When all holders of recorded rights are not made parties — Procedure — Reference.

If it appears to the court that there are outstanding liens or encumbrances of record upon such real property, or any part or portion thereof, which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action by an amendment or supplemental complaint, or appoint a referee to ascertain whether or not such liens or encumbrances have been paid, or, if not paid, what amount remains due thereon, and their order among the liens or encumbrances severally held by such persons and the parties to said action, and whether the amount remaining due thereon has been secured in any manner and, if secured, the nature and extent of the security.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-10.

Cross-References. — Effect of failure to join necessary parties, Rule 19(b), U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 74.

C.J.S. — 68 C.J.S. Partition § 73.

Key Numbers. — Partition ⇨ 46(1), 69.

78-39-11. Notice of appearance before referee — Referee's report.

The plaintiff must cause a notice to be served, a reasonable time previous to the day for appearance before the referee appointed as provided in the next preceding section [§ 78-39-10], on each person having an outstanding lien of record who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise of the amount due or to become due, contingently or absolutely, thereon. In case such person is absent, or his residence is unknown, service may be made by publication or by notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon must be made to the court, and must be confirmed, modified or set aside and a new reference ordered as the justice of the case may require.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-11.

Officers before whom affidavits may be taken, § 78-26-5.

Cross-References. — Masters, Rule 53, U.R.C.P.

Service by publication, Rule 4, U.R.C.P.

NOTES TO DECISIONS

Applicability of section.

—Defendant tenants in common.

This statute applies only to a person having an outstanding lien of record who is not a party

to the action; defendant tenants in common were not entitled to notice under this section. *Roper v. Bartholomew*, 30 Utah 2d 386, 518 P.2d 683 (1974).

COLLATERAL REFERENCES

C.J.S. — 68 C.J.S. Partition § 153.

Key Numbers. — Partition ⇨ 69.

78-39-12. If partition prejudicial, sale in lieu thereof — Partition by referees.

If it is alleged in the complaint and established by the evidence, or if it appears by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property or any part of it is so situated that the partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court, and appoint three referees therefor, and must designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained; provided, however, that when the action is for partition of a mining claim among the tenants in common, joint tenants,

copartners or parceners thereof the court, upon good cause shown by any party or parties in interest, may, instead of ordering partition to be made in the manner as hereinbefore provided, or a sale of the premises for cash, direct the referees to divide the claim in the manner hereinafter provided.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-12.

Cross-References. — Mining claims, Chapter 1 of Title 40.

Single referee by consent, § 78-39-46.

NOTES TO DECISIONS

ANALYSIS

Judicial review.

—Decree upheld.

Mining claims.

—Partition by metes and bounds.

—Sale by owner.

Right to relief.

Judicial review.

—Decree upheld.

Where none of the parties offered a constructive alternative, Supreme Court would not reverse a decree that resolved a longstanding dispute by awarding each of four cotenants approximately one-fourth of the residential land, one-fourth of the cultivated land, and one-fourth of the grazing land, even though one of the cotenants testified that the parcel of irrigated land awarded him was too small for economical farming. *Barrett v. Vickers*, 24 Utah 2d 334, 471 P.2d 157 (1970).

Mining claims.

—Partition by metes and bounds.

In action to partition mining claim as between owners respectively of five-sevenths and two-sevenths interests, wherein only evidence of value of mineral rights was proximity of

other mines, and there was no evidence of known veins or bodies of ore in the particular claim or of any fixed or market value for it, partition according to metes and bounds, rather than sale of the property, was proper. *Ryan v. Egan*, 26 Utah 241, 72 P. 933 (1903).

—Sale by owner.

After a mining claim has been properly located an owner may sell any part without prejudice of his right to hold the remainder, and this result would obtain in the event of partition. *Moody v. General Beryllum Corp.*, 224 F.Supp. 934 (D. Utah 1963).

Right to relief.

Where a cotenant has properly invoked the aid of this section, he is entitled to a partition or to a sale of the property as a matter of right, and the failure of a trial court to grant either remedy is error. *Barrett v. Vickers*, 12 Utah 2d 73, 362 P.2d 586 (1961).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 118 et seq.

C.J.S. — 68 C.J.S. Partition § 172.

Key Numbers. — Partition ⇌ 77, 91.

78-39-13. Duties and powers of referees — Procedure.

In making the partition the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them. In all cases the court shall direct the referees in making partition of land to allot the share of each of the parties owning an interest in the whole or any part of the premises sought to be partitioned, and

to locate the share of each cotenant, so as to embrace as far as practicable the improvements made by such cotenant upon the property; and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land; provided, however, that when the action is for partition of a mining claim among the tenants in common, joint tenants, copartners or parceners thereof, the court shall, by order, fix the time for the division of the claim by the referees, which shall be not less than twenty nor more than forty days from the day of the making of the order, except by consent of all the parties in interest who have appeared in the action. On the day designated in the order the referees shall go upon the claim to be divided and proceed to make division of the same as hereinafter provided, and shall continue from day to day until the same is completed. Two or more of the tenants in common, joint tenants, copartners or parceners may unite together for the purposes of such division, of which they shall give the referees written notice before they commence the division; and all who do not unite as aforesaid, or give notice of separate action, shall, for the purposes of division, be deemed and held to have united. The referees in their action shall recognize those named in the order of the court, or their agents and attorneys in fact duly appointed by instrument in writing, acknowledged as in cases of conveyances of real estate, a guardian of a minor, and a guardian entitled to the custody and the management of the estate of an insane person or other person adjudged incapable of conducting his own affairs, and as to the interest of each, shall be controlled entirely by the order of the court. At the time and place of division one of the referees, to be elected by them, shall in the manner of public auction offer to the party or parties who will take the least part or portion of such mining claim in proportion to the interest he or they may have therein, the privilege of first selecting the place at which his portion shall be located, and upon closing the bids the referees shall proceed to measure and mark off, by distinct metes and bounds, to the lowest bidder, his or their portion of such mining claim, at the place designated by him or them, according to the terms of his or their bid. When the referees have marked off and set apart the interest of the lowest bidder, as provided herein, they shall offer to the remaining parties the privilege of selection as herein mentioned and provided, and shall upon closing the bids proceed in the same manner to locate and mark off the portion of the lowest bidder, and shall thereafter continue in the same manner to receive bids and mark off the interest of the bidder or bidders until there shall remain but one party in interest, or parties united forming one interest. The party or parties remaining shall become the owner or owners, as the case may be, of the entire claim not marked off and set apart to other parties as hereinbefore provided, in proportion to their respective interests in the claim.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-13.

Cross-References. — Appointment of guardian, §§ 75-5-207, 75-5-303.

Mining claims, Chapter 1 of Title 40.

Public auctions, execution sales, Rule 69, U.R.C.P.

Surveyors, licensing, Chapter 22 of Title 58.

NOTES TO DECISIONS

ANALYSIS

Conditions of partition.

—Acceptance by parties.

Fairness of division.

—Held proper.

Survey.

—When required.

Surveyors.

—Failure to employ.

Conditions of partition.—**Acceptance of parties.**

Referees have no authority to condition partition upon its acceptance by the parties. *Arthur v. Chournos*, 574 P.2d 723 (Utah 1978).

Fairness of division.—**Held proper.**

Division by allocation of 44 feet from corner to one party, and 88 feet frontage in middle of block to another, held proper as a division equal in value. *Utah Oil Ref. Co. v. Leigh*, 98 Utah 149, 96 P.2d 1100 (1939).

Survey.—**When required.**

Failure to make a survey in a partition proceeding constituted reversible error where the

dividing line between the two portions of the partitioned property was not marked on the ground and there were no landmarks to which the referees made any reference in their division of the property. *Michaelson v. Larson*, 657 P.2d 754 (Utah 1982).

Surveyors.—**Failure to employ.**

Since determination to employ a surveyor to aid referees is committed to referees' discretion, judgment which incorporated proposed partition of referees was not in error on ground that it described the division by a corral fence and other landmarks, rather than by a survey designating the number of acres awarded to defendants. *Roper v. Bartholomew*, 30 Utah 2d 386, 518 P.2d 683 (1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 110 et seq.

C.J.S. — 68 C.J.S. Partition § 151.

Key Numbers. — Partition ⇨ 92.

78-39-14. Report of referees.

The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust, and describing the property divided, and the shares allotted to each party, with a particular description of each share.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-14.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 114.

C.J.S. — 68 C.J.S. Partition § 159.

Key Numbers. — Partition ⇨ 94(1).

78-39-15. Confirmation, modification or vacation by court — Effect of death of party before judgment.

The court may confirm, change, modify or set aside the report, and if necessary appoint new referees. Upon the report being confirmed judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive:

(1) on all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided or any part thereof, as owners in fee, or as tenants for life or for years, or as entitled to the reversion, remainder or the inheritance of such property or of any part thereof after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof as tenants for years or for life;

(2) on all persons interested in the property who may be unknown, to whom notice of the action for partition has been given by publications; and,

(3) on all other persons claiming from such parties or persons, or either of them.

And no judgment is invalid by reason of the death of any party before final judgment or decree; but such judgment or decree is as conclusive against the heirs, legal representatives or assigns of such decedent as if it had been entered before his death.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-15.

Cross-References. — Death of party after

verdict or decision and before judgment, Rule 58A(e), U.R.C.P.

Effect of failure to join necessary parties, Rule 19(b), U.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Acceptance of report.

Minimum bid.

—Discretion of court.

Acceptance of report.

The court is not bound to accept the report of the referees. *Arthur v. Chournos*, 574 P.2d 723 (Utah 1978).

Minimum bid.

—Discretion of court.

While the partition statute does not ex-

pressly authorize a trial court to designate a minimum price in its order of sale, such action is within the equitable discretion of the trial court, as implied by its express power under this section to confirm, modify, or set aside the report of the referees. *Gillmor v. Gillmor*, 657 P.2d 736 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition §§ 115, 116.

C.J.S. — 68 C.J.S. Partition § 161.

Key Numbers. — Partition ⇨ 94(3).

78-39-16. Tenant for years, less than ten, not affected by judgment.

The judgment does not affect tenants for years, less than ten, of the whole of the property which is the subject of the partition.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-16.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 189.

C.J.S. — 68 C.J.S. Partition § 253.
Key Numbers. — Partition ⇨ 95, 115.

78-39-17. Referees' expenses and fees — Apportionment.

The expenses of the referees, including those of the surveyor and his assistants when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court in its discretion to the referees, must be apportioned among the different parties to the action equitably.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-17.

Masters, appointment and compensation, Rule 53, U.R.C.P.

Cross-References. — Judgment and costs, Rule 54, U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 133.

C.J.S. — 68 C.J.S. Partition §§ 235 to 237.
Key Numbers. — Partition ⇨ 114.

78-39-18. Liens on undivided interests — Apportionment.

When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition is made, shall thenceforth be a charge only on the share assigned to such party, but such share must be first charged with its just proportion of the costs of the partition in preference to such lien.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-18.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 192.

C.J.S. — 68 C.J.S. Partition § 252.
Key Numbers. — Partition ⇨ 97.

78-39-19. Setoff of estate for life or for years.

When a part only of the property is ordered to be sold, if there is an estate for life or years in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-19.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 171.

C.J.S. — 68 C.J.S. Partition § 250.
Key Numbers. — Partition ⇨ 116(1).

78-39-20. Proceeds of sale of encumbered property — Disposition of.

The proceeds of the sale of the encumbered property must be applied under the direction of the court, as follows:

- (1) to pay its just proportion of the general costs of the action.
- (2) to pay the costs of the reference.
- (3) to satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment.
- (4) the residue among the owners of the property sold according to their respective shares therein.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-20.

Cross-References. — Satisfaction of judg-

ment as discharge of lien, Rule 58B(d), U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 131.

C.J.S. — 68 C.J.S. Partition § 217.
Key Numbers. — Partition ⇨ 111.

78-39-21. Lienholders required to exhaust other security first.

Whenever any party to the action, who holds a lien upon the property or any part thereof, has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just reduction to be made from the amount of the lien on the property on account thereof.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-21.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 192.

C.J.S. — 68 C.J.S. Partition § 218.
Key Numbers. — Partition ⇌ 97.

78-39-22. Distribution of proceeds or securities.

The proceeds of sale and the securities taken by the referees, or any part thereof, must be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction for distribution is given, all of such proceeds and securities must be paid into court, or deposited therein, as directed by the court.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-22.

Cross-References. — Deposit of money in
court, § 78-27-4.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 131.

C.J.S. — 68 C.J.S. Partition § 215.
Key Numbers. — Partition ⇌ 111(4).

78-39-23. Determination of adverse claims.

When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action, and who are known or unknown, are paid into court, the action may be continued as between such parties for the determination of their respective claims thereto, which must be ascertained and adjudged by the court. Further evidence may be taken in court or by a referee at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy by pleadings as in an original action.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-23.

Cross-References. — Interpleader, Rule
22, U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 131.

C.J.S. — 68 C.J.S. Partition § 216.
Key Numbers. — Partition ⇌ 111(4).

78-39-24. Sales at public auction — Notice.

All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge or lien, that fact must be stated in the notice.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-24.

Cross-References. — Sale of real property
on execution, Rule 69, U.R.C.P.

NOTES TO DECISIONS

ANALYSIS

Nonauction sale.

—Owelty.

Persons conducting sale.

Nonauction sale.**—Owelty.**

In action for partition, it was not error to order defendants to sell a share of their property to plaintiffs rather than at auction, where judgment acknowledged a difference in value of farmland and ordered plaintiffs to pay defendants \$200 per acre for four acres within division line determined by referees; order was

within purview of § 78-39-41. *Roper v. Bartholomew*, 30 Utah 2d 386, 518 P.2d 683 (1974).

Persons conducting sale.

The partition statute contemplates that sales in partition proceedings are to be conducted by referees, and not by the sheriff. *Gillmor v. Gillmor*, 657 P.2d 736 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 122 et seq.

C.J.S. — 68 C.J.S. Partition § 183.
Key Numbers. — Partition ⇨ 102.

78-39-25. Sales on credit — Order for.

The court must, in the order of sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, minors or parties out of the state.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-25.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 122.

C.J.S. — 68 C.J.S. Partition § 181.
Key Numbers. — Partition ⇨ 102.

78-39-26. Security for payment.

The referees may take separate mortgages and other securities, for the whole or convenient portions of the purchase money, on such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner, for the shares of a minor, in the name of the guardian of such minor, and for other shares, in the name of the clerk of the court and his successors in office.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-26.

Cross-References. — Appointment of guardian for minor, § 75-5-207.
Form and effect of mortgage, § 57-1-14.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 126.

C.J.S. — 68 C.J.S. Partition § 181.
Key Numbers. — Partition ⇨ 102.

78-39-27. Compensation for interest of tenant for life or years.

The person entitled to a tenancy for life or years, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, or which the person so entitled may consent to accept in lieu thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-27.

Cross-References. — Duties of clerk of
court, § 17-20-2.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 131.

C.J.S. — 68 C.J.S. Partition § 219.
Key Numbers. — Partition ⇨ 111(1).

78-39-28. Court determines reasonable compensation for tenant.

If such consent is not given, filed and entered as provided in the next preceding section [§ 78-39-27] before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate, and must order the same to be paid to such party, or deposited in the court for him, as the case may require.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-28.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 131.

C.J.S. — 68 C.J.S. Partition § 219.
Key Numbers. — Partition ⇨ 111(1).

78-39-29. If tenant unknown.

If persons entitled to such estate for life or years are unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-29.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 131.

C.J.S. — 68 C.J.S. Partition § 216.
Key Numbers. — Partition ⇨ 111(1).

78-39-30. Protection of vested, contingent or future rights.

In all cases of sales when it appears that any person has a vested or contingent or future right or estate in any of the property sold, the court must ascertain and settle the proportionate value of such contingent or vested right or estate, and must direct such proportion of the proceeds of the sale to be invested, secured or paid over in such manner as will protect the rights and interests of the parties.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-30.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 131.

C.J.S. — 68 C.J.S. Partition § 219.
Key Numbers. — Partition ⇨ 111(4).

78-39-31. Terms of sales — Separate sale of distinct parcels.

In all cases of sales of property the terms must be made known at the time, and if the premises consist of distinct farms or lots, they must be sold separately.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-31.

NOTES TO DECISIONS

Single farming unit.**—Value of land and structures.**

Trial court's finding that the properties constituted a single farming unit, and that they need not, therefore, be sold separately, was substantiated by the evidence where, although the property could conceivably be divided into

distinct parcels, the evidence established that the value of the parcels would diminish if sold separately and the ranch houses, corrals, barns and other physical structures would be rendered virtually useless unless the cropland were sold with it. *Gillmor v. Gillmor*, 657 P.2d 736 (Utah 1982).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 122.

C.J.S. — 68 C.J.S. Partition § 181.
Key Numbers. — Partition ⇨ 102.

78-39-32. Who may not be purchaser.

None of the referees nor any person for the benefit of either of them can be interested in any purchase; nor can a guardian of a minor party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the minor. All sales contrary to the provisions of this section are void.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-32.

Cross-References. — Powers and duties of guardian of minor, § 75-2-209.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 123.

C.J.S. — 68 C.J.S. Partition § 184.
Key Numbers. — Partition ⇌ 103.

78-39-33. Report of referees to the courts of sales.

After completing a sale of the property or any part thereof ordered to be sold, the referees must report the same to the court, with a description of the different parcels of land sold to each purchaser, the name of the purchaser, the price paid or secured, the terms and conditions of the sale, and the securities, if any, taken. The report must be filed in the office of the clerk of the court.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-33.

Cross-References. — Duties of clerk of court, § 17-20-2.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 122.

C.J.S. — 68 C.J.S. Partition § 192.
Key Numbers. — Partition ⇌ 105.

78-39-34. Referees' deed on confirmation — Disposition of proceeds.

If the sale is confirmed by the court, an order must be entered directing the referees to execute conveyances and take such securities pursuant to such sale as they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-34.

Cross-References. — Form and effect of warranty deed, § 57-1-12.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 131.

C.J.S. — 68 C.J.S. Partition § 193.
Key Numbers. — Partition ⇌ 106.

78-39-35. Allowance on purchase price — When interested party is purchaser.

When a party entitled to a share of the property, or an encumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for [so] much of the proceeds of the sale as belongs to him.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-35.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 126.

C.J.S. — 68 C.J.S. Partition § 188.
Key Numbers. — Partition ⇨ 104.

78-39-36. Conveyance to be recorded — Operates as a bar.

The conveyances must be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who have been named as parties in the action, and against all such parties or persons as were unknown, if the summons was served by publication, and against all persons claiming under them or either of them, and against all persons having unrecorded deeds or liens at the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-36.

Recording conveyances, Chapter 3 of Title 57.

Cross-References. — Effect of failure to join necessary parties, Rule 19(b), U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 126.

C.J.S. — 68 C.J.S. Partition § 213.
Key Numbers. — Partition ⇨ 110.

78-39-37. Investment of sale proceeds for non-residents or unknown parties.

When there are proceeds of a sale belonging to an unknown owner or to a person without the state who has no legal representative within it, the same must be invested in bonds of the United States, of this state or of some political subdivision thereof for the benefit of the persons entitled thereto.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-37.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 131.

C.J.S. — 68 C.J.S. Partition § 215.
Key Numbers. — Partition ⇨ 111(1).

78-39-38. Clerk of court to be custodian.

When the security of the proceeds of the sale is taken, or when an investment of any proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the district court and his successors in office, who must hold the same for the use and benefit of the parties interested, subject to the order of the court.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-38.

Cross-References. — Duties of clerk of court, § 17-20-2.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 131.

C.J.S. — 68 C.J.S. Partition § 215.

Key Numbers. — Partition ⇨ 111(1).

78-39-39. Distribution of securities to parties entitled.

When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their hands delivered to the referees, agree upon the shares and proportions to which they are respectively entitled, or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of, and payable to, the parties respectively entitled thereto, and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be filed with the clerk of the court.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-39.

Cross-References. — Duties of clerk of court, § 17-20-2.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 131.

C.J.S. — 68 C.J.S. Partition § 219.

Key Numbers. — Partition ⇨ 111(4).

78-39-40. Investment of securities by court clerk — Accounting.

The clerk of the court in whose name a security is taken or by whom an investment is made, and his successors in office, must receive the interest and principal as it becomes due, and apply and invest the same as the court may direct, and must deposit with the county treasurer all securities taken, and keep an account, in a book provided and kept for that purpose in the clerk's office, free to inspection by all persons, of investments and moneys received by him thereon and the disposition thereof.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-40.

Cross-References. — County treasurer, Chapter 24 of Title 17.
Duties of clerk of court, § 17-20-2.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 131.

C.J.S. — 68 C.J.S. Partition § 215.
Key Numbers. — Partition ⇨ 111(1).

78-39-41. Owelty.

When it appears that a partition cannot be made equally among the parties according to their respective rights without prejudice to the rights and interests of some of them, and a partition is ordered, the courts may adjudge compensation to be made by one party to another on account of the inequality; but such compensation shall not be required to be made to others by owners unknown, nor by a minor, unless it appears that such minor has personal property sufficient for that purpose and that his interest will be promoted thereby. And in all cases the court has power to make compensatory adjustment among the parties according to the principles of equity.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-41.

NOTES TO DECISIONS

Applicability of section.**—Forced sale among parties.**

Order in partition action requiring defendants to sell a share of their property to plaintiffs and ordering plaintiffs, because of differ-

ence in value of farmland, to pay defendants \$200 per acre for four acres within division line determined by referees is within purview of this section. *Roper v. Bartholomew*, 30 Utah 2d 386, 518 P.2d 683 (1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 61 et seq.

C.J.S. — 68 C.J.S. Partition § 142.
Key Numbers. — Partition ⇨ 84.

78-39-42. Interests of minor — Payment to guardian.

When the share of a minor is sold the proceeds of sale may be paid by the referee making the sale to his general guardian or to the special guardian appointed for him in the action, upon giving the security required by law or directed by order of the court.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-42.

Cross-References. — Guardians of minors, § 75-5-201 et seq.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 131.

C.J.S. — 68 C.J.S. Partition § 216.
Key Numbers. — Partition ⇨ 111(4).

78-39-43, 78-39-44. Repealed.

Repeals. — Sections 78-39-43 and 78-39-44 (L. 1951, ch. 58, § 1; C. 1943, Supp., §§ 104-39-43, 104-39-44; L. 1975, ch. 67, §§ 17, 18), relating to receipt of partition proceeds by an incompetent's guardian and to power of

guardian of minor or incompetent to consent to partition, were repealed by Laws 1977, ch. 194, § 74. For present provisions, see §§ 75-5-102, 75-5-209, 75-5-312, 75-5-409, 75-5-424.

78-39-45. Partition — Payment of costs — Enforcement of judgment.

The costs of partition, including reasonable attorneys' fees, expended by the plaintiff or either of the defendants for the common benefit, fees of referees and other disbursements must be paid by the parties entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expenses of such litigation to be paid by the parties thereto or any of them.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-45.

ceedings supplemental thereto, Rule 69, U.R.C.P.

Cross-References. — Execution and pro-

Judgment and costs, Rule 54, U.R.C.P.

NOTES TO DECISIONS

Attorney's fees.

Unless it can be shown that services rendered by counsel for defendants in partition proceedings assisted in some way to ensure buyer better title, or that by some act on part of such counsel more was obtained for premises than otherwise would have been obtained and to that extent such services were for common benefit, defendants are not necessarily entitled

to any counsel fees. *Murray v. Hays*, 51 Utah 211, 169 P. 264 (1917).

What sum would constitute reasonable attorneys' fee is question of fact, and where there is conflict in testimony as to such sum, the conclusion of trial court will not be disturbed. *Murray v. Hays*, 51 Utah 211, 169 P. 264 (1917).

COLLATERAL REFERENCES

Utah Law Review. — Attorney's Fees in Utah, 1984 Utah L. Rev. 553.

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 133 et seq.

C.J.S. — 68 C.J.S. Partition §§ 237, 244.

Key Numbers. — Partition ⇨ 114(7).

78-39-46. One referee instead of three allowed by consent.

The court, with the consent of the parties, may appoint a single referee instead of three referees in the proceedings under the provisions of this chapter, and the single referee when thus appointed has all the powers, and may perform all the duties, required of the three referees.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-46.

Cross-References. — Appointment of referees, § 78-39-12.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 110.

C.J.S. — 68 C.J.S. Partition § 151.
Key Numbers. — Partition ⇨ 91.

78-39-47. Lien for costs and expenses advanced by one for benefit of all.

If it appears that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common for the protection, confirmation or perfecting of the title, or setting the boundaries, or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action who have paid the expenses of such litigation or other proceedings all the expenses necessarily incurred therein, including attorneys' fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making such expenditures, and the same must be pleaded and allowed by the court and included in the final judgment, and shall be a lien upon the share of each tenant, in proportion to his interest, and shall be enforced in the same manner as taxable costs of partition are taxed and collected.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-47.

Cross-References. — Judgment and costs,
Rule 54, U.R.C.P.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition
§ 136.

C.J.S. — 68 C.J.S. Partition § 244.
Key Numbers. — Partition ⇨ 87.

78-39-48. Abstract of title, cost of, inspection.

If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned and such abstract has been procured by the plaintiff, or if the plaintiff has failed to have the same made before the commencement of the action and any one of the defendants shall have such abstract afterwards made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed. Whenever such abstract is procured by the plaintiff before the commencement of the action he must file with his complaint a notice that an abstract of the title has been made and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff has failed to procure such abstract before commencing the action, and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same and where it will be kept when finished. The court, or the judge thereof, may direct, from time to time during the progress of the action, who shall have custody of the abstract.

History: L. 1951, ch. 58, § 1; C. 1943,
Supp., 104-39-48.

Cross-References. — Abstracters, Chapter
1 of Title 1.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 136.

C.J.S. — 68 C.J.S. Partition § 136.
Key Numbers. — Partition ⇨ 87.

78-39-49. Interest on advances to be allowed.

Whenever during the progress of the action for partition any disbursement shall have been made, under the direction of the court or the judge thereof, by a party thereto, interest must be allowed thereon from the time of making the same.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-39-49.

Cross-References. — Interest on judgments, § 15-1-4.

COLLATERAL REFERENCES

Am. Jur. 2d. — 59 Am. Jur. 2d Partition § 131.

C.J.S. — 68 C.J.S. Partition § 136.
Key Numbers. — Partition ⇨ 87.

CHAPTER 40

QUIET TITLE

Section
78-40-1. Action to determine adverse claim to property — Authorized.
78-40-2. Lis pendens.
78-40-3. Disclaimer or default by defendant — Costs.
78-40-4. Termination of title pending action — Judgment — Damages.
78-40-5. Setoff or counterclaim for improvements made.
78-40-6. Right of entry pending action for purposes of action.
78-40-7. Order therefor — Liability for injuries.
78-40-8. Mortgage not deemed a conveyance — Foreclosure necessary.

Section
78-40-9. Alienation pending action not to prejudice recovery.
78-40-10. Actions respecting mining claims — Proof of customs and usage admissible.
78-40-11. Temporary injunction in actions involving title to mining claims.
78-40-12. Service of summons and conclusiveness of judgment.
78-40-13. Judgment on default — Court must require evidence — Conclusiveness of judgment.

78-40-1. Action to determine adverse claim to property — Authorized.

An action may be brought by any person against another who claims an estate or interest in real property or an interest or claim to personal property adverse to him, for the purpose of determining such adverse claim.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-1.

Cross-References. — Action brought in county where property situated, § 78-13-1.

Allowance for improvements made under color of title, §§ 57-6-1 et seq., 78-40-5.

Jurisdiction in district courts, Utah Const., Art. VIII, Sec. 5; § 78-3-4.

Limitations of actions, § 78-12-1 et seq.

Tax sales of real property, § 59-10-29 et seq.

NOTES TO DECISIONS

ANALYSIS

Adverse possession.

Heirs.

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Option to purchase.

Presumptions and burden of proof.

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What claims may be assailed.

What constitutes "claim" of "estate or interest."

Wrongful possession.

Adverse possession.

One claiming by adverse possession does not arrest the running of this section in his favor by commencing an action to quiet title. *Welner v. Stearns*, 40 Utah 185, 120 P. 490, 1914C Ann. Cas. 1175 (1911).

Heirs.

Heirs could bring action to quiet title though there had been no adjudication of heirship. *Chamberlain v. Larsen*, 83 Utah 420, 29 P.2d 355 (1934).

Judgment.

Court of equity, in an action to quiet title, may not only enter judgment quieting title, but may include in the judgment a general order restraining the defendant from asserting any claim adverse to, and in derogation of, the plaintiff's right, and may prohibit the defendant from doing any act that would tend to impair or destroy such right. *Richey v. Beus*, 31 Utah 262, 87 P. 903 (1906).

Decree in an action to quiet title can only bind the parties to the action. *Fisher v. Davis*, 77 Utah 81, 291 P. 493 (1930).

Effect of a decree quieting title is not to vest title, but to perfect an existing title as against other claimants. *State ex rel. Utah State Department of Social Servs. v. Santiago*, 590 P.2d 335 (Utah 1979).

Nature and scope of proceedings.

The language used in this section is very comprehensive. In terms, it authorizes an action by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. *Bullion, Beck & Champion Mining Co. v. Eureka Hill Mining Co.*, 5 Utah 3, 11 P. 515 (1886), appeal dismissed, 131 U.S. 431, 9 S. Ct. 796, 33 L. Ed. 224 (1888).

Action to quiet title is an action at law and thus either side, upon request, is entitled to a jury trial. *Holland v. Wilson*, 8 Utah 2d 11, 327 P.2d 250 (1958).

Statutory action to quiet title is an action in rem, or quasi in rem, requiring either a state or federal court to obtain jurisdiction over the property in dispute before proceeding to adjudication on the merits. *1st Nat'l Credit Corp. v. Von Hake*, 511 F. Supp. 634 (D. Utah 1981).

Option to purchase.

Validly exercised option to purchase cannot fail for the reason that funds are secured from a source not contemplated in the option; and, thus, a plaintiff who had placed the purchase money in escrow and had notified the owner of his intent to exercise the option should have his title quieted against claims of the assignee of the owner. *Bradshaw v. Kershaw*, 529 P.2d 803 (Utah 1974).

Presumptions and burden of proof.

In action to quiet title, a plea of the statute of limitations was an affirmative defense with regard to which the burden of proof was on the defendant. *Tate v. Rose*, 35 Utah 229, 99 P. 1003 (1909).

In an action to quiet title, where the plaintiff proved that he was entitled to possession and that legal title was in him, the law would presume that he was in constructive possession, and, in the absence of evidence to the contrary, he was entitled to actual possession. *Gibson v. McGurrian*, 37 Utah 158, 106 P. 669 (1910).

In an action to quiet title, the plaintiff must succeed by virtue of the strength of his own title rather than on the weakness of the defendant's title. *Babcock v. Dangerfield*, 98 Utah 10, 94 P.2d 862 (1939); *Mercur Coalition Mining Co. v. Cannon*, 112 Utah 13, 184 P.2d 341 (1947).

When the defendant admits the plaintiff's allegation of ownership, but denies his present ownership, the defendant has the burden of going forward with proof as to the present state of the title. *Gatrell v. Salt Lake County*, 106 Utah 409, 149 P.2d 827, 153 A.L.R. 1100 (1944).

In an action to quiet title wherein the plain-

tiff relies not on record title but upon possession, it is incumbent upon the plaintiff to show sufficient facts to justify the trial court in finding that the plaintiff was in possession. *Mercur Coalition Mining Co. v. Cannon*, 112 Utah 13, 184 P.2d 341 (1947).

Proof of claim.

In action to quiet title, it is sufficient if the plaintiff establishes that legal title is in him, and that the defendants had no right, title, or interest adverse to him in the premises in controversy; the plaintiff need not be in possession himself. *Gibson v. McGurrian*, 37 Utah 158, 106 P. 669 (1910).

Plaintiff could prevail on a claim of record title only by showing good title in itself, not by showing some defects in the title of the defendant. *Home Owners' Loan Corp. v. Dudley*, 105 Utah 208, 141 P.2d 160 (1943).

Stipulation that land was conveyed to the plaintiff by an insolvent bank through the state banking commissioner, and that title to the land had previously been quieted in that commissioner on behalf of the bank and its creditors, was sufficient proof of the fact that the plaintiff was legal titleholder and as such was presumed to have been in possession of the land, so as to be entitled to prevail in a suit to quiet title. *Day v. Steele*, 111 Utah 481, 184 P.2d 216 (1947).

Actual possession under a claim of ownership makes out a prima facie case against a stranger to the title and, unless controverted by one claiming an interest in the property, is sufficient to justify a decree quieting title in plaintiff. *Mercur Coalition Mining Co. v. Cannon*, 112 Utah 13, 184 P.2d 341 (1947).

Plaintiffs made out a prima facie case in a suit to quiet title by introduction in evidence of a tax title to the land in dispute. *Smith v. Nelson*, 114 Utah 51, 197 P.2d 132 (1948).

Tax titles or claims.

The owner who seeks to have a title quieted against a void tax deed must reimburse the tax title purchaser for all taxes lawfully levied and paid by the tax title purchaser. *Reeve v. Blatchley*, 106 Utah 259, 147 P.2d 861 (1944).

All that a court of equity should require as a condition to quieting title in the owner against

a tax title claimant is that he pay to such claimant the sum advanced by the latter to pay the taxes less any benefit which he derived from the property supposedly purchased. *Reeve v. Blatchley*, 106 Utah 259, 147 P.2d 861 (1944).

Where there was no showing that the county made any representations or that the plaintiff relied upon any representations of the county in purchasing a tax deed, the county and its successors in interest were not estopped from denying the validity of that deed in a suit to quiet title. *Duncan v. Hemmelwright*, 112 Utah 262, 186 P.2d 965 (1947).

Water rights.

An action to quiet title to water rights is in the nature of an action to quiet title to real estate. *Church v. Meadow Springs Ranch Corp.*, 659 P.2d 1045 (Utah 1983).

What claims may be assailed.

Plaintiff in a quiet title action may assail a judgment, deed, or any other instrument affecting his title, upon the ground of fraud or for any other reason rendering such judgment or instruments void. If a judgment is assailed in such an action, it is a direct, and not a collateral, attack. *Doyle v. West Temple Terrace Co.*, 43 Utah 277, 135 P. 103 (1913).

What constitutes "claim" of "estate or interest."

The words "claims an estate or interest" in this section are used in a broad sense, and are not technical in their meaning. They are evidently intended to embrace every species of adverse claim set up by a party out of possession. *Goldberg v. Taylor*, 2 Utah 486 (1880).

Wrongful possession.

In a possessory action the plaintiff must show that at the time of bringing suit the defendant was wrongfully in possession. *Federal Land Bank v. Sorenson*, 101 Utah 305, 121 P.2d 398 (1942).

The rule that the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's title, does not require the plaintiff to exhibit a perfect chain of title as against one wrongfully in possession. *Campbell v. Nelson*, 102 Utah 78, 125 P.2d 413 (1942).

COLLATERAL REFERENCES

Am. Jur. 2d. — 65 Am. Jur. 2d Quieting Title and Determination of Adverse Claims § 9 et seq.

C.J.S. — 28 C.J.S. Ejectment § 1 et seq.; 74 C.J.S. Quieting Title § 1 et seq.

A.L.R. — Common source of title doctrine, 5 A.L.R.3d 375.

Measure and amount of damages recoverable under supersedeas bond in action involving recovery or possession of real estate, 9 A.L.R.3d 330.

Key Numbers. — Ejectment ⇌ 1 et seq.; Quieting Title ⇌ 1 et seq.

78-40-2. Lis pendens.

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

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-2.

NOTES TO DECISIONS

ANALYSIS

Divorce action.
Effect pending appeal.
Federal lawsuit.
Proof of lack of notice.
Purpose.
Slander of title.

Divorce action.

A wife was entitled to file a notice of lis pendens with respect to property whose title would be affected by a pending divorce action, but the notice would not be effective where third-party rights had arisen subsequent to the execution of quitclaim deeds by the wife in compliance with a prior divorce decree if the third party has no actual notice. *Boyce v. Boyce*, 609 P.2d 928 (Utah 1980).

Effect pending appeal.

The recording of lis pendens is effective after judgment and pending appeal to give constructive notice of the pendency of proceedings which may affect the title or right of possession of the owner of the real property involved. *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244 (Utah 1979).

Failure to furnish a supersedeas bond pending appeal has no effect on the notice given by a recorded lis pendens during the time after judgment and pending appeal. *Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244 (Utah 1979).

Federal lawsuit.

The propriety of filing a notice of lis pendens from a federal lawsuit is a matter governed by

state law. *Hamilton v. Smith*, 808 F.2d 36 (10th Cir. 1986).

Proof of lack of notice.

The fact that a deed was dated two weeks before the recording of the notice of lis pendens did not constitute conclusive proof that the grantee took without notice of claims to property, since the deed was recorded a week after the lis pendens notice. *Harvey v. Sanders*, 534 P.2d 905 (Utah 1975).

Purpose.

The sole purpose of recording a lis pendens is to give constructive notice of the pendency of proceedings which might be derogatory to the owner's title or right of possession; its only foundation is the action filed, and it has no existence independent of that. *Hansen v. Kohler*, 550 P.2d 186 (Utah 1976).

Slander of title.

The recording of a lis pendens, which serves as constructive notice of the pendency of an action, is in effect a republication of the pleadings in the underlying action; as such it is an absolutely privileged publication, and cannot become the basis of an action for slander of title. *Hansen v. Kohler*, 550 P.2d 186 (Utah 1976).

COLLATERAL REFERENCES

Am. Jur. 2d. — 51 Am. Jur. 2d Lis Pendens § 22 et seq.

C.J.S. — 54 C.J.S. Lis Pendens § 22 et seq.

A.L.R. — Propriety of filing of lis pendens in action affecting leasehold interest, 67 A.L.R.3d 747.

Lis pendens: grounds for cancellation prior to termination of underlying action, absent claim of delay, 49 A.L.R.4th 242.

Key Numbers. — Lis Pendens ⇨ 18.

78-40-3. Disclaimer or default by defendant — Costs.

If the defendant in such action disclaims in his answer any interest or estate in the property, or suffers judgment to be taken against him without answer, the plaintiff cannot recover costs.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-3.

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Ejectment §§ 83, 152; 65 Am. Jur. 2d Quieting Title and Determination of Adverse Claims § 93.

C.J.S. — 28 C.J.S. Ejectment §§ 68, 127; 74 C.J.S. Quieting Title §§ 68, 110 et seq.

Key Numbers. — Ejectment ⇨ 71, 123; Quieting Title ⇨ 38, 54.

78-40-4. Termination of title pending action — Judgment — Damages.

If the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-4.

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Ejectment § 148 et seq.; 65 Am. Jur. 2d Quieting Title and Determination of Adverse Claims § 90.

C.J.S. — 28 C.J.S. Ejectment § 129; 74 C.J.S. Quieting Title § 99.

Key Numbers. — Ejectment ⇨ 125; Quieting Title ⇨ 49.

78-40-5. Setoff or counterclaim for improvements made.

When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value of such improvements, except improvements made upon mining property, must be allowed as a setoff or counterclaim against such damages.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-5.

Cross-References. — Counterclaim generally, Rules of Civil Procedure, Rule 13. Occupying claimants, § 57-6-1 et seq.

NOTES TO DECISIONS

Trial of issues as to improvements.

If making of improvements and their value were set up and determined in the main case to recover possession, the trial court will not per-

mit those issues to be tried again in a separate proceeding. Boland v. Nihlros, 79 Utah 331, 10 P.2d 930 (1932).

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Ejectment § 159; 65 Am. Jur. 2d Quietening Title and Determination of Adverse Claims § 60.

C.J.S. — 28 C.J.S. Ejectment § 158; 74 C.J.S. Quietening Title § 102.

Key Numbers. — Ejectment ⇨ 143; Quietening Title ⇨ 51.

78-40-6. Right of entry pending action for purposes of action.

The court in which an action is pending for the recovery of real property, or for damages for an injury thereto, or to quiet title or to determine adverse claims thereto, or a judge of such court, may, on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts or drifts thereon for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-6.

Cross-References. — Limitation on action

for waste or trespass upon mining claim begins to run on discovery, § 78-12-26.

Postponement of trial involving title to mining claim, injunction pendente lite, § 78-40-11.

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Ejectment § 106.

C.J.S. — 28 C.J.S. Ejectment § 59.

Key Numbers. — Ejectment ⇨ 58 to 60.

78-40-7. Order therefor — Liability for injuries.

The order must describe the property, and a copy thereof must be served on the owner or occupant, and thereupon such party may enter upon the property with necessary surveyors and assistants, and may make such survey and measurement; but if any unnecessary injury is done to the property, he is liable therefor.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-7.

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Ejectment § 106.

C.J.S. — 28 C.J.S. Ejectment § 59.
Key Numbers. — Ejectment ⇌ 59.

78-40-8. Mortgage not deemed a conveyance — Foreclosure necessary.

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.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-8.

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

Restraining waste during foreclosure, § 78-37-8.

NOTES TO DECISIONS

ANALYSIS

Conditional sale distinguished.

"Conveyance" construed.

Deeds intended as mortgages.

Foreclosure as only remedy upon mortgage.

Status of mortgage.

Conditional sale distinguished.

Where a grantor conveyed certain realty by warranty deed, and by contemporaneous agreement it was provided that, on specified payment by the grantor to the grantee, the grantee would reconvey the property, and time was expressly made of the essence, and it was further provided that upon default of payment on or before such time such agreement should be void, and where it further appeared that the grantor did not promise or bind himself to make the payments therein mentioned, such transaction constituted a conditional sale and not a mortgage. *Smyth v. Reed*, 28 Utah 262, 78 P. 478 (1904).

"Conveyance" construed.

Term "conveyance" was used in this section in its common-law meaning as a transfer of title or estate in land, so that the provision in § 57-1-14 that a mortgage in statutory form "shall have the effect of a conveyance of the land" was not inconsistent with that section, as that term was used in § 57-1-14 only as covering transactions involving an effective mortgage or encumbrance of land, in view of § 57-1-1. *Bybee v. Stuart*, 112 Utah 462, 189 P.2d 118 (1948).

It is settled in this state that a mortgage shall not be deemed a conveyance no matter what its terms. *Whiteley v. De Vries*, 116 Utah 165, 209 P.2d 206 (1949).

Deeds intended as mortgages.

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

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

In construing a deed absolute in form to be a mortgage, extrinsic evidence may be resorted to, not to vary the terms of the written instrument, but to show the object and purpose for which it was given. *Brown v. Skeen*, 89 Utah 568, 58 P.2d 24 (1936).

While a warranty deed absolute in form is presumed to convey fee simple title or at least whatever title the grantor has, where the written agreement between the parties contemporaneous with the deed shows that the deed was given for security purposes, the court will look to the real transaction and treat it as a mortgage. *Bybee v. Stuart*, 112 Utah 462, 189 P.2d 118 (1948).

In equity, a deed absolute upon its face may be shown by parol evidence to have been given for security purposes only and, upon such

showing, equity will give effect to the intention of the parties. *Bybee v. Stuart*, 112 Utah 462, 189 P.2d 118 (1948).

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

Evidence sustained a finding that an instrument, in the form of an absolute deed, given to secure a loan for the purpose of completing installation of plumbing in a tourist court, was intended as a mortgage, and not as an absolute conveyance. *Whiteley v. De Vries*, 116 Utah 165, 209 P.2d 206 (1949).

Parol evidence is admissible to show that a mortgage to secure an indebtedness was intended and not an absolute conveyance of title to the property. *Whiteley v. De Vries*, 116 Utah 165, 209 P.2d 206 (1949).

Foreclosure as only remedy upon mortgage.

If a transaction is shown to be a conditional sale and not a mortgage, then no foreclosure will be required, and to prove the character of the transaction, parol evidence to show the object or purpose for which the instrument was given may be introduced. *Thomas v. Ogden State Bank*, 80 Utah 138, 13 P.2d 636 (1932).

Status of mortgage.

Mortgage of real property does not vest title to such property in a mortgagee, and a mortgagor may convey such title, subject to the lien of the mortgage, to a third person. *Thompson v. Cheesman*, 15 Utah 43, 48 P. 477 (1897); *Azzalia v. St. Claire*, 23 Utah 401, 64 P. 1106 (1901).

Title to mortgaged property remains in the mortgagor. *First Nat'l Bank v. Haymond*, 89 Utah 151, 57 P.2d 1401 (1936).

In Utah a mortgage is only a lien and the mortgagee has no property or estate, but holds only a security for his debt. In *re Reynolds' Estate*, 90 Utah 415, 62 P.2d 270 (1936); *Bybee v. Stuart*, 112 Utah 462, 189 P.2d 118 (1948).

COLLATERAL REFERENCES

Am. Jur. 2d. — 55 Am. Jur. 2d Mortgages § 534; 65 Am. Jur. 2d Quieting Title and Determination of Adverse Claims § 46.

C.J.S. — 59 C.J.S. Mortgages § 484; 74 C.J.S. Quieting Title § 24.

78-40-9. Alienation pending action not to prejudice recovery.

An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-9.

Cross-References. — Action not to abate by death, disability or transfer, Rules of Civil Procedure, Rule 25(a) to (c).

Claims against assignees, Rules of Civil Procedure, Rule 13(j).

Cross demands not affected by assignment or death, Rules of Civil Procedure, Rule 13(i).

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Ejectment § 45.

C.J.S. — 28 C.J.S. Ejectment § 52.

78-40-10. Actions respecting mining claims — Proof of customs and usage admissible.

In actions respecting mining claims proof must be admitted of the customs, usages or regulations established and in force in the district, bar, diggings or camp embracing such claim; and such customs, usages or regulations, when not in conflict with the laws of this state or of the United States, must govern the decision of the action.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-10.

Cross-References. — Treble damages for unlawful taking of ore, § 40-1-12.

COLLATERAL REFERENCES

Am. Jur. 2d. — 54 Am. Jur. 2d Mines and Minerals § 242 et seq.

Key Numbers. — Mines and Minerals ⇐ 51(3).

C.J.S. — 58 C.J.S. Mines and Minerals § 123.

78-40-11. Temporary injunction in actions involving title to mining claims.

In actions involving the title to mining claims, if it is made to appear to the satisfaction of the court that, in order that justice may be done and the action fairly tried on its merits, it is necessary that further development should be made, and that the party applying has been guilty of no laches and is acting in good faith, the court shall grant the postponement of the trial of the action, giving the party a reasonable time in which to prepare for trial. And in granting such postponement the court may, in its discretion, annex as a condition thereto an order that the party obtaining such postponement shall not, pending the trial of the action, remove from the premises in controversy any valuable quartz, rock, earth or ores; and for any violation of an order so made, the court, or judge thereof, may punish for contempt as in the cases of violation of an injunction, and may also vacate the order of postponement.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-11.

Cross-References. — Order for survey of mining claim, §§ 78-40-6, 78-40-7.

COLLATERAL REFERENCES

Am. Jur. 2d. — 54 Am. Jur. 2d Mines and Minerals § 230.

Key Numbers. — Mines and Minerals ⇐ 52.

C.J.S. — 58 C.J.S. Mines and Minerals § 141.

78-40-12. Service of summons and conclusiveness of judgment.

Where service of process is made upon unknown defendants by publication, the action shall proceed against such unknown persons in the same manner as against the defendants who are named and upon whom service is made by publication, and any such unknown person who has or claims to have any right, title, estate, lien or interest in the said property, which is a cloud on the

title thereto, adverse to the plaintiff, at the time of the commencement of the action, who has been duly served as aforesaid, and anyone claiming under him, shall be concluded by the judgment in such action as effectually as if the action were brought against such person by his or her name, notwithstanding such unknown person may be under legal disability.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-12.

Cross-References. — Description of un-

known parties in pleadings, Rules of Civil Procedure, Rule 9(a)(3).

Service by publication, Rules of Civil Procedure, Rule 4(f)(1).

NOTES TO DECISIONS

ANALYSIS

Conclusiveness of judgment.

Service by publication upon one in possession.

Conclusiveness of judgment.

In proceedings to set aside a judgment quieting title to certain real property, where action to quiet title was brought not only against the record owner, but also against all unknown persons claiming an interest in the property, the fact that the record owner was dead at the time the action was commenced and the judgment was ineffective as against her would not warrant setting aside the judgment, where service by publication was effective as against un-

known defendants. *Parker v. Ross*, 117 Utah 417, 217 P.2d 373, 21 A.L.R.2d 919 (1950).

Service by publication upon one in possession.

Plaintiff may not sue as an unknown claimant one in actual possession of premises involved at the time the suit began and secure service of process by publication upon him under the provisions of this section. *Naisbitt v. Herrick*, 76 Utah 575, 290 P. 950 (1930).

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Ejectment § 75.

C.J.S. — 28 C.J.S. Ejectment § 55; 74 C.J.S. Quieting Title § 50.

Key Numbers. — Ejectment ⇨ 52, 53; Quieting Title ⇨ 31.

78-40-13. Judgment on default — Court must require evidence — Conclusiveness of judgment.

When the summons has been served and the time for answering has expired, the court shall proceed to hear the cause as in other cases, and shall have jurisdiction to examine into and determine the legality of the plaintiff's title and of the title and claims of all the defendants and of all unknown persons, and to that end must not enter any judgment by default against unknown defendants, but must in all cases require evidence of plaintiff's title and possession and hear such evidence as may be offered respecting the claims and title of any of the defendants, and must thereafter enter judgment in accordance with the evidence and the law. The judgment shall be conclusive against all the persons named in the summons and complaint who have been served and against all such unknown persons as stated in the complaint and summons who have been served by publication.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-40-13.

NOTES TO DECISIONS

Defendant showing no right or interest in premises.

In action to set aside a default judgment against the defendant in an action to quiet title in which the defendant did not show any right or interest in the premises, the defendant could

not be heard to complain that the court erred in rendering judgment for the plaintiff, since no matter how defective the plaintiff's title was, it was sufficient to withstand the assaults of the defendant. *Campbell v. Union Sav. & Inv. Co.*, 63 Utah 366, 226 P. 190 (1924).

COLLATERAL REFERENCES

Am. Jur. 2d. — 25 Am. Jur. 2d Ejectment § 126; 65 Am. Jur. 2d Quieting Title and Determination of Adverse Claims § 89.

C.J.S. — 28 C.J.S. Ejectment § 114; 74 C.J.S. Quieting Title § 86.

Key Numbers. — Ejectment ⇨ 114; Quieting Title ⇨ 52.

CHAPTER 41

TERMINATION OF LIFE ESTATE

Section

78-41-1. Petition — Notice — Recordation — Effect — Inheritance tax.

78-41-1. Petition — Notice — Recordation — Effect — Inheritance tax.

If any person has died or shall hereafter die whose death terminated or shall terminate a life estate, a fee tail or a determinable or conditional fee simple, or affected or shall affect a joint tenancy or a tenancy by the entirety, or affected or shall affect any other interest in property other than an estate of inheritance vested in such person at the time of his death, any person interested in the property in which the estate or the interest determined or affected by such death was held or any person interested in the title thereto, may file in the district court of the county in which the property or some part thereof is situated [a] verified petition, setting forth the facts with respect thereto and particularly describing the property and his interest therein and naming all persons who claim or might claim an interest therein so far as known to the petitioner.

Notice of the hearing on such petition shall be given for such time and in such manner by publication or otherwise as the court or a judge thereof shall direct; provided, that a written notice shall be mailed to the State Tax Commission at least ten days prior to the hearing. After such notice the court shall hear such petition and the evidence offered in support thereof and any issues raised thereon and shall make and enter judgment establishing the facts of such death and the effect thereof upon the title to and ownership of such property.

Any inheritance tax due the state of Utah with respect to such property by reason of such death must be paid before the decree is made and the decree

shall establish the fact of payment or that no such tax is due; provided, however, that waiver of the inheritance tax, or receipt of payment of the same, executed by an authorized agent of the State Tax Commission and recorded in the office of the county recorder of the county in which the property is located, shall operate as a complete release of the said property from said inheritance tax, and in such event, no further notice need be given the State Tax Commission of any proceeding provided for in this section.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-41-1.

Cross-References. — Estate for life or years set off in partition, § 78-39-19.

Inheritance tax, § 59-12-1 et seq.

Principal and income, § 22-3-1 et seq.

COLLATERAL REFERENCES

Am. Jur. 2d. — 20 Am. Jur. 2d Cotenancy and Joint Ownership § 3; 28 Am. Jur. 2d Estates § 98.

C.J.S. — 31 C.J.S. Estates § 65; 48A C.J.S. Joint Tenancy §§ 16 to 20, 28.

Key Numbers. — Husband and Wife ⇌ 14; Joint Tenancy ⇌ 5; Life Estates ⇌ 4.

CHAPTER 42

VOLUNTARY DISSOLUTION OF CORPORATIONS

(Repealed by Laws 1961, ch. 28, § 142)

78-42-1 to 78-42-7. Repealed.

Repeals. — Sections 78-42-1 to 78-42-7 (L. 1951, ch. 58, § 1; C. 1943, Supp., §§ 104-42-1 to 104-42-7), relating to voluntary dissolution of corporations, were repealed by Laws 1961,

ch. 28, § 142. For present comparable provisions, see Utah Business Corporation Act, § 16-10-77 et seq.

CHAPTER 43

VOLUNTARY WITHDRAWAL OF FOREIGN CORPORATIONS

Section
78-43-1 to 78-43-6. Repealed.
78-43-7. Saving clause.

Section
78-43-8. Repealing clause.

78-43-1 to 78-43-6. Repealed.

Repeals. — Sections 78-43-1 to 78-43-6 (L. 1951, ch. 58, § 1; C. 1943, Supp., §§ 104-43-1 to 104-43-6), relating to voluntary withdrawal of foreign corporations, were repealed by Laws

1961, ch. 28, § 142. For present provisions, see Utah Business Corporation Act, §§ 16-10-115, 16-10-116.

78-43-7. Saving clause.

The provisions of Title 78, "The Judicial Code," set out in Section 1 of this act, with respect to the organization of each of the several courts therein provided for, including all officers and employees thereof, shall be construed as continuations of existing law, and the tenure of the justices, judges, justices of the peace, officers, and employees of each of the same, in office on the effective date of this act, shall not be affected by the enactment, but each of them shall continue to serve in the same capacity under the appropriate provisions of Title 78, as set out in Section 1 of this act, pursuant to his prior election or appointment. No loss of rights, interruption of jurisdiction, or prejudice to matters pending in any of such courts on the effective date of this act shall result from its enactment.

History: L. 1951, ch. 58, § 2; C. 1943, Supp., 104-43-7.

"Effective date of this act". — The term "effective date of this act," referred to in this section, means May 8, 1951, the effective date of Laws 1951, Chapter 58.

Meaning of "this act". — The term "this act," referred to in this section, means Laws 1951, Chapter 58, which appears as various sections in Title 78, Chapters 1, 2, 3, 5 to 7, 11

to 13, 21, 22, 24 to 27, and 31 to 41 and §§ 78-43-7 and 78-43-8.

Compiler's Notes. — Although §§ 78-43-1 to 78-43-6 were repealed, this section is still effective; various sections in Title 78, Chapters 1, 2, 3, 5 to 7, 11 to 13, 21, 22, 24 to 27, and 31 to 41 that were also enacted by Laws 1951, ch. 58, § 1 remain in effect.

78-43-8. Repealing clause.

Title 20 and Title 104, Utah Code Annotated 1943, as amended and chapters 19, 33 and 34, Laws of Utah 1943; chapters 8 and 10, Laws of Utah 1947; and chapter 76, Laws of Utah 1949 are hereby repealed.

History: L. 1951, ch. 58, § 3; C. 1943, Supp., 104-43-8.

Compiler's Notes. — Although §§ 78-43-1 to 78-43-6 were repealed, this section is still

effective; various sections in Title 78, Chapters 1, 2, 3, 5 to 7, 11 to 13, 21, 22, 24 to 27, and 31 to 41 that were also enacted by Laws 1951, ch. 58, § 1 remain in effect.

CHAPTER 44

UNIFORM UNCLAIMED PROPERTY ACT

Section		Section	
78-44-1.	Short title.	78-44-8.	Life or endowment insurance policies — Annuity contracts — Duties of insurers.
78-44-2.	Definitions.	78-44-9.	Utility deposits.
78-44-3.	Presumption of abandonment of intangible property.	78-44-10.	Refunds ordered by court or agency.
78-44-4.	State custody of abandoned intangible property.	78-44-11.	Business association ownership interests.
78-44-5.	Money payable on travelers checks, money orders and similar instruments.	78-44-12.	Intangible property distributable on dissolution of business association.
78-44-6.	Money payable on checks, drafts and similar instruments.	78-44-13.	Intangible property held in fiduciary capacity.
78-44-7.	Deposit or payment toward purchase of an interest in a financial organization.	78-44-14.	Intangible property held by public authority for owner.