

1986

General Glass Corp. v. Mast Construction Comp. : Petition for Rehearing

Utah Court of Appeals

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Ronald C. Barker; Mitchell R. Barker.

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JUN 2 ' 1998

BEFORE THE COURT OF APPEALS
OF THE STATE OF UTAH

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

Plaintiff and Respondent,

vs.

MAST CONSTRUCTION COMPANY,
a Utah Corporation, et al.,

Defendants and Appellants,

Docket No. 860355-CA

PETITION FOR REHEARING

* * * *

APPEAL FROM THE RULING OF THE THIRD JUDICIAL DISTRICT COURT,
SALT LAKE COUNTY, STATE OF UTAH,
THE HONORABLE TIMOTHY R. HANSEN PRESIDING

* * * *

PETITION FOR REHEARING

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TABLE OF CONTENTS

I. JURISDICTION.....	ii
II. TABLE OF AUTHORITIES.....	ii
III. NATURE OF THE PETITION.....	iii
IV. OVERLOOKED FACTS.....	1
V. MISAPPREHENDED LAW.....	2
VI. LEGAL ARGUMENT.....	2
A. Appellants as assignees cannot have their rights affected by a finding Ron Mast had notice.....	2
B. This Court should not make a factual finding.....	6
C. The Court has misread the mechanic's lien priority statute (38-1-5, UCA).....	7
D. The opinion sets a precedent dangerous to the economy.....	10
E. All else being equal, the Mechanics' Lien Statute prevails over trust deed law.....	11
CONCLUSION.....	12
RELIEF REQUESTED.....	13
ADDENDUM A: Article from Enterprise	
ADDENDUM B: Pertinent Statutes and Provisions	
ADDENDUM C: Opinion of Court of Appeals	

I. JURISDICTION

This Petition for Rehearing is filed pursuant to Rule 35, R. Utah Ct. App. Mast Construction Company and Ron Mast petition the Court to review and reverse its ruling that American Savings & Loan's trust deed has priority over Mast's mechanics' liens.

II. TABLE OF AUTHORITIES

Constitutional Provision, Statutes and Rules

(Set forth in full in Addendum B):

Former Art. VIII, § 9, Utah Constitution.....	7
38-1-1 to 26, Utah Code Annotated (1974).....	3
38-1-5, Utah Code Annotated (1953).....	5, 6, 8, 9, 10, 12
38-1-10, Utah Code Annotated (1953).....	6
38-1-26, Utah Code Annotated (1953).....	2, 4
57-1-6, Utah Code Annotated (1986).....	12
Rule 35, Rules of the Utah Court of Appeals.....	i, iii

Cases:

<u>Build, Inc. v. Italasano</u> , 398 P.2d 544 (Utah, 1965).....	6
<u>Calder Bros. Co. v. Anderson</u> , 652 P.2d 922 (Utah 1982).....	8

<u>First of Denver Mortg. Investors v. C. N. Zundel,</u> 600 P.2d 521 (Utah 1979).....	5, 6, 10
<u>Johnson v. Bell,</u> 666 P.2d 308 (Utah 1983).....	6
<u>Rasmussen v. Olsen,</u> 583 P.2d 50 (Utah 1978).....	6
<u>Mitchell v. Shoreridge Oil Co.,</u> 75 P.2d 110 (Cal.App. 1938)....	3
<u>Union Supply Co. v. Morris,</u> 30 P.2d 394 (Cal. 1934).....	3
<u>Smith v. Gunniss,</u> 144 P.2d 186 (Mont. 1944).....	3
<u>Brice Mortg. Co. v. Wodtke,</u> 332 P.2d 1044 (Or. 1958).....	3

III. NATURE OF THE PETITION

This is a Petition for Rehearing pursuant to Rule 35, R. Utah Ct. App. Both parties argued issues other than the one upon which the Court based its decision. Mast Construction and Ron Mast are the Appellants and Petitioners. American Savings is the Respondent. Mast's believe the Court made its decision in error, and was perhaps not well enough educated by the briefs of respective counsel.

IV. OVERLOOKED FACTS

The Court appears to overlook the significance of the status of appellants as both direct parties and as assignees of the rights of other lien holders.

The Court notes in its decision that this action is a consolidation^{1.} of actions brought by various lien holders. Opinion p. 5. And in a footnote (Opinion p. 5, n. 1) the Court observes that other lien claimants have assigned their claims and lien priorities to Ron Mast. The assignors to Mr. Mast were Intermountain Glass and Paint, Inc. and Marathon Steel Company. Additionally, Debenham Electric Supply Company assigned its lien priority to Mast Construction Company. R-II-118; R-III-1182.^{2.}

The Court found^{3.} that Ron Mast had actual notice of the deed of trust prior to the date work commenced, and then concluded the trust deed is therefore valid and binding as to Ron Mast and Mast Construction. Opinion p. 7. That finding could not properly apply to the rights and priorities of other lien claimants, or to the priority of the liens assigned to Mr.

1. The actions consolidated are as follows: Debenham Electric Supply Co. v. Electro Technical Corp., et al., Civil Number C-85-1607; General Glass Corp. v. Mast Construction Co., et al., Civil Number C-85-3067; and American Savings and Loan Association v. Oakhills Partnership, et al., Civil Number C-85-4855. See respondent's brief, p. 3.

2. This was pointed out in Appellant's Brief, p. 2.

3. As discussed below, the Court ought not to have made a finding of fact not made by the trial judge.

Mast and Mast Construction long after the occurrence of all operative facts in this case.

V. MISAPPREHENDED LAW

On the way to establishing the supposed priority of American Savings' deed of trust the Court simply finds Ron Mast had notice there would be such a deed. Having so found, the Court assumes mistakenly that it becomes unnecessary to analyze whether work commenced before proper recording of the trust deed, or to otherwise apply the mechanic's lien statutes.

The holding effectively emasculates Utah mechanics' lien law, and the adverse effect on the construction industry and economy in general could be dramatic. See Article, Appendix Exhibit 1.

VI. LEGAL ARGUMENT

Petitioners incorporate all the arguments contained in Appellant's Brief and Reply Brief, and offer the following additional analysis in support of this Petition for Rehearing.

A. Appellants as assignees cannot have their rights affected by a finding Ron Mast had notice. Mechanic's liens are freely assignable. Section 38-1-26, UCA (1953), states:

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 provided herein.

It is apparent the legislature intended all the rights a mechanic or materialman has to be assignable with the substantial rights afforded by law securely attached. See, Brice Mortg. Co. v. Wodtke, 332 P.2d 1044 (Or. 1958); Smith v. Gunniss, 144 P.2d 186 (Mont. 1944). The assignee may enforce it precisely as if he were the original lienor. See, Union Supply Co. v. Morris, 30 P.2d 394 (Cal. 1934); Mitchell v. Shoreridge Oil Co., 75 P.2d 110 (Cal.App. 1938).

As stated above, Mast Construction is assignee of another mechanic's lien holder, and Ron Mast is assignee of two other mechanic's lien holders. So some of Mast Construction's rights and all of Ron Mast's rights arise by assignment.

American Savings did **not** suggest to the Court in its brief that the law was as the Court found it: that actual notice to Ron Mast would give American Savings' deed priority. Surely this is because counsel had in mind the fact that Masts were protected by their assignee status, not just their status as general contractor.

After finding Ron Mast was put on notice, the Court appears to overlook his (and Mast Construction's) true position as assignee and states:

Because of the above, it is unnecessary to analyze whether. . . 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.

Opinion, p. 7 (emphasis supplied). The bold faced portions of the holding appear to contradict each other, or at least the second appears to be a non sequitur as to the first.

If the Court leaves intact its holding, the effect is unusual and undesirable. Mast surely cannot purchase the rights of others and still not better its position. The liens of Debenham Electric Supply, Intermountain Glass and Paint and Marathon Steel cannot have become less potent by being placed in the hands of the general contractor. And American Savings cannot receive the windfall that would result if the fortuitous transfer of the rights of certain mechanics lien holders to others robs them of their priority.

All the above flies in the face of the obvious legislative intent in adopting 38-1-26, UCA (1953) (set forth in full on page three). What the statute gives in making liens assignable, the Court's decision seems to take away.

The same public policy that creates a mechanics' lien dictates it should be freely and effectively assignable. In this manner the unpaid lien holder who is unable, for financial or other reasons, to sue on his claim, can still receive some amount of consideration for its labor or material. The value of the lien will be greatly reduced if it cannot enhance the position of the fellow lien holder to whom it is sold.

Statutorily allowing the assignment and leaving the lien priority unaffected does not change the position or expectations of the trust deed holder.

Here it is undisputed that the assignments took place after occurrence of all the operative facts (commencement of work, recordings and corrective cancellations/recordings of trust deed, recording of mechanics' liens, etc.). When the rights of the assignor lien creditors were vesting and obtaining their priority, their holders had no material relation to any of the Masts. Nothing Ron Mast heard or saw long before the assignment can diminish the rights and priority of other lien holders who later assign them to Masts. Phrased another way, a defect (here notice) found in one lien cannot affect others. And the assignee takes no more or no less than the assignor had to give.

This situation is analogous to that in First of Denver Mortg. Investors v. C. N. Zundel, 600 P.2d 521, 526, 527 (Utah 1979).⁴ There the mechanic's lien holder who was found to have done the initial work on the property released its lien and priority to the construction loan mortgagee. The release stated that the release was final and would apply to all other

4. The First of Denver case is also noteworthy in light of the controversy, not determined by the Court's initial Opinion, over whether the placement of a power box and cable constituted "commencement to do work or furnish materials on the ground for the structure or improvement." 38-1-5, UCA (1953). The Utah Supreme Court held in that case that installation of sewer and water lines in other parts of the same subdivision satisfied the statute, even though it appears they would have been less visible than the power box and cable here. 600 P.2d at 526.

mechanics' lien holders. 600 P.2d at 526. The Court held that since the release occurred after the work performed by the other lien holders in the case, it came after their lien rights had already attached. 600 P.2d at 527. It could not affect their status as lien holders. They were entitled to the priority date earned for them by the first performer of work on the project, even though that lien holder had released that priority as to himself and tried to do so as to the other mechanic's lienors. *Id.*, citing 38-1-10, UCA (1953).

Like the lender in First of Denver, American Savings cannot overcome priority of all lien claimants merely because of a loss of one's lien holder priority.

B. This Court should not make a factual finding. The Court stated that in view of the fact Ron Mast is said to have signed a subordination agreement "we find that Ron Mast had actual notice of the deed of trust" before work commenced. Opinion p. 7. Judge Jackson points out that the Court has thereby made a factual finding that was not made by the trial court. Jackson, J., concurring, opinion p. 8. Actual notice is a question of fact. Johnson v. Bell, 666 P.2d 308 (Utah 1983); Opinion p. 6.

In cases of equity, some limited fact-finding ability rests in the appeals court. Rasmussen v. Olsen, 583 P.2d 50 (Utah 1978). But this is not so in law cases (like this one). Build, Inc. v. Italasano, 398 P.2d 544 (Utah, 1965). See also,

former Art. VIII, § 9, Utah Constitution.

C. The Court has misread the mechanics' lien priority statute (38-1-5, UCA). Utah's mechanics' lien scheme establishes a lien upon property to which the lienor has added value. Then it provides:

The liens herein provided shall relate back to, and take effect as of, the 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;
. . . .

38-1-5, UCA (1953) (emphasis supplied). There is no proviso automatically making a trust deed prior to mechanics' liens if the lienor has actual notice of the deed. Therefor, Mastis believe the decision of the Court misreads the statute.

It is true the section has a second half, which allows actual notice to diminish a lien holder's rights. The remainder provides:

The liens herein provided shall relate back to, and take effect as of, the 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 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.

By way of summary, the statute provides that the mechanic's lien holder has priority over the following:

1. encumbrances attaching after the date the first work was performed or first material was furnished, and

2. encumbrances attaching prior to the commencement of work, but recorded after, except where the lien holder had notice.

If American Savings' trust deed is validly recorded despite the omissions and irregularities, the above statute allows the Court to rule in its favor only if the recordation date (April 8, 20 or 26, depending on which is valid) precedes the placement of the power panel and cable (or commencement of other work), or if that placement is held not to constitute "commencement to do work or furnish materials on the ground." If there was not a proper trust deed, if it was not properly notarized or if it was not duly recorded before work commenced, the statute allows the Court to rule in American Savings' favor only as to lien holders who had notice of the trust deed.

Unfortunately the Court went straight to number two above, applying the notice escape clause to benefit American Savings without first ruling on whether work was performed or material furnished prior to attachment of American Savings' lien. This despite the fact that "commencement to do work" is construed in favor of lien claimants as a general rule. Calder Bros. Co. v. Anderson, 652 P.2d 922 (Utah 1982).

The opinion is free of any analysis of the two issues pointed out by the Court (Opinion p. 6):

(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 signators were not placed under oath; and (2) did the placement of the electrical equipment at the building site on April 6, 1983, constitute commencement to do work for purposes of Utah Code Ann. § 38-1-5 (1974).

Opinion p. 6.

In light of all the authorities cited in the Masts' briefs and the facts of the case, these issues deserve treatment. It is far from clear that a deed so vague as to omit the name of the trustee, the amount of the secured debt, the corporate seal and the full address of the notary is nevertheless valid so as to impart constructive notice. The cases cited by Mast (brief 17-22) which require oath or affirmation must be followed or distinguished. And the Court should rule on whether re-recording a deed (and simultaneously crossing out the former priority date), with corrections made but without a new signature or jurat, is valid. As the concurring opinion noted,

[w]ithout 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.

Jackson, J. concurring, p. 8.

D. The opinion sets a precedent dangerous to the economy. Clearly the mechanics' lien priority section (38-1-5, UCA) exists to provide special protection to those adding to the value of property. First of Denver Mortg. v. C. N. Zundel & Assocs., 600 P.2d 521, 524-525. The decision of the Court seems to put that public policy at grave risk.

The Court found Masts had notice simply because on March 28 Ron Mast signed a subordination agreement (which nobody argues subordinates Masts' liens to American Savings. However, the only knowledge that would actually be imparted to Masts by that agreement would be the fact there would be a loan by American. As Judge Jackson noted:

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.

Jackson, J. concurring p. 8. The potential lien holder on a project of any substantial size will know a loan is likely quite as well as Ron Mast knew it. Where will the line be drawn, if not precisely where the statute dictates?

The subordination agreement that was thought by the majority to have imparted notice was executed long before the trust deed was even executed. The statute provides for notice to strip the lien holder of priority only if he had notice of the "lien, mortgage or other encumbrance." 38-1-5, UCA (1953). For purposes of the statute, can one have notice of a document

that has not even come into existence?

More perplexing still: Is knowledge or reason to know that a loan will be needed tantamount to notice of the resulting trust deed lien? Mr. Mast's knowledge that a loan was contemplated should not strip him of his lien. Do we desire a precedent that gives potential laborers/suppliers every disincentive to get acquainted with the project and its participants?

The lien priority statute is set up to create predictability in this area of the law. The decision of the Court does the opposite. Judge Jackson noted:

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. . . .

Jackson, J. concurring p. 8.

E. All else being equal, the Mechanics' Lien Statute prevails over trust deed law. In effect, the Court has determined that the entity adding value to the realty by its labor or materials must strictly comply with the statute (as to commencement of work, filing the lien, etc.), but the lender need only approximate what the law requires. A material defect

(such as omitting the name of the trustee and the amount of the lien, or failure to swear the persons executing the deed) cannot be winked at in the trust deed, and result in a finding that it somehow supplies constructive notice as against the building and supplier.

The Court does not quote the mechanics' lien priority statute, but only the statute on validity of a trust deed. 57-1-6 UCA (1986). This is insufficient, since the mechanics' lien priority statute clearly governs, and by its terms supersedes an otherwise proper trust deed, except under certain circumstances. 38-1-5 UCA (1953). It is true that the trust deed section provides that a trust deed is valid as to third persons with notice even if it is not properly acknowledged. 57-1-6 UCA (1986). As discussed above, Mast and Mast Construction had no notice. And even if they did this would not apply to them in their capacity as assignees of lien holders without notice.

The only defect actual notice overcomes in the trust deed statute is a failure to properly prove, acknowledge or record the document. The other defects here present are not excepted.

VII. CONCLUSION


The Court based its decision on a theory which was not argued, either for or against, by either party, and did not treat the issues presented in any of the briefs. Undue emphasis

was placed on notice, and the Court misread the statutes, made a factual finding not made in the lower court, and failed to consider the effect of the assignment of various liens to Masts. The net result emasculates the mechanics' lien's statutory protection.

VIII. RELIEF REQUESTED

Mast Construction and Ron Mast jointly request that the Court rehear this appeal, considering each of the arguments made in the respective briefs on file, and reverse the holding of the trial court. The Court should find the Masts have priority over American Savings, or grant a new trial.

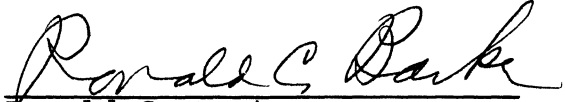
Respectfully so requested this twenty-fourth day of June, 1988.


Ronald C. Barker & Mitchell R.
Barker, attorneys for Ron Mast
and Mast Construction Company

IX. CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be hand delivered (four copies) on this twenty-fourth day of June, 1988, to:

FABIAN & CLENDENIN
Warren Patten
W. Cullen Battle
Attorneys for Respondent
215 South State Street
Floor 12
Salt Lake City, Utah 84111



Ronald C. Barker
Mitchell R. Barker

ADDENDUM A: Article from Enterprise

Judge blasts appeals court ruling as opening Pandora box against lienholders

by Barbara Rattle
Managing Editor

Utah's Court of Appeals issued a decision last week that one judge, critical of the majority's reasoning, said renders it impossible for any person who supplies material or labor on a construction job "bigger than a child's sandbox" to ever be able to achieve lien priority over an entity that loans money on the development.

"Every materialman on any job big enough to look like it requires financing will be charged [under the majority's reasoning] 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," wrote Judge Norman H. Jackson. "The majority's decision requires the materialman to become a fortune teller, thereby opening Pandora's box in cases where predictability is needed."

The case involved an appeal
see COURT page two

\$3.4 bil credit c

by Teresa Browning-Hess
Staff Writer

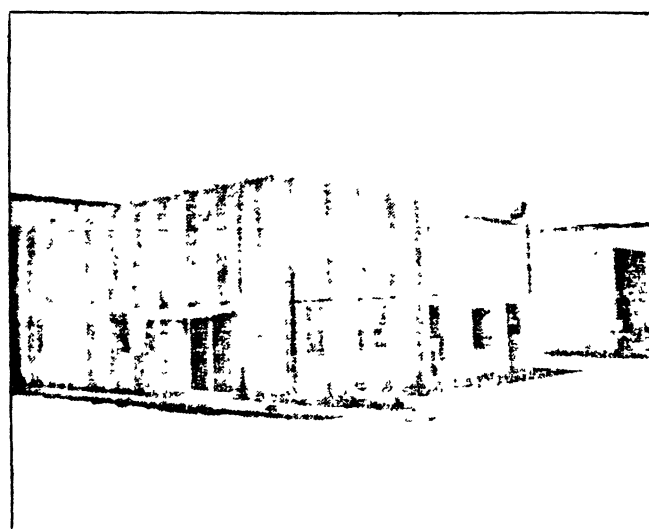
San Jacinto Savir billion-asset financial based in Houston, with a large scale credit operation in Salt Lake that could ultimately employ upwards of 150 people. San Jacinto president

Nat'l trucking firm scouting SL for substantial terminal site

by Teresa Browning-Hess
Staff Writer

The Pride Lease Co. division of Crete Carrier Corp., a Lincoln, Nebraska-based common and contract carrier trucking company active throughout the country, is scouting the Salt Lake area for a site suitable to house a major terminal operation it plans to establish here this summer.

According to Tonn Ostergard, executive vice president and chief operating officer of the privately-held concern, Crete Carrier's Salt Lake facility will help to implement the company's plan to expand



Great Western, fleet now exceeds 700 pieces of equipment

91 new pieces of equipment ordered

Great Western Leasing makes \$1.5 mil. purchase

by Barbara Rattle
Managing Editor

Salt Lake City's Great Western Leasing, a national lessor of semi tractors and trailers, is investing more than \$1.5 million in the acquisition of 91 new pieces of equipment, including the concern's first purchase of "bobtail" or straight trucks, prompting a corresponding expansion of the firm's

noting Great Western has purchased five White semitractors, 12 Freightliner semitractors, 61 Great Western flatbed and dropdeck trailers, 10 utility flatbed trailers, and three 18-foot Hino vans. The latter are a new acquisition. The type of equipment Great Western has available is noted.

Both the Salt Lake

looking at "a variety of other enterprises in Salt Lake." He added the Houston group is in the "beginning stages of negotiations" to acquire the credit card portfolio of a firm already established in the area, but declined to reveal the party's identity.

"From a banking standpoint, Utah has reasonable credit card provisions and a fine labor base — those two factors combined make it a great place for us to do business. We're a well capitalized organization and we believe our move into Salt Lake will be good for the community as well as good for us," Larson observed.

San Jacinto Savings was founded in 1955 in Houston and was acquired by its parent company, the mammoth

Candy

(continued from page one)

several factors, including local distribution accounts, the labor force and need for more space in which to launch the new line.

"Because several of our distributors are located here, we thought it would be advantageous to be closer to them," he said.

Plans call for the addition of more than 100 employees to Sweet Thanks' current workforce of 14 by the end of the summer to manufacture the new candy product, which for reasons of competition Taylor declined to discuss at present.

"He added, "the labor force is more plentiful here."

Around 90 percent of the group's product is distributed out-of-state, said Taylor, who anticipates the new line will be ready for national sale in 40 days.

A 100 percent gross sales increase is projected because of the new candy line, he said.

institution maintains 21 branches scattered throughout Texas and boasts assets of approximately \$3.4 billion.

Larson attributed San Jacinto's ability to weather Texas' poor economy while still posting substantial profits to a well diversified asset base that is spread nationwide. "We haven't concentrated on one specific geographic area and are thus not dependent on the economic ups and downs of one particular region," he explained.

Court

(continued from page one)

by Ron Mast and Ron Mast Construction Co., on their own behalf and as assignees of the rights of other holders of liens against the local Oakwood Hills condominium project, from the lower court's finding that a deed of trust filed by American Savings & Loan to secure a loan made to the project's developers was valid and has priority over all other liens against the development.

The original deed was filed April 8, 1983, but contained a number of omissions. Mast claimed an April 28 lien placed by him against the project had priority over the deed because of its failure to conform with legal standards.

However, the majority found that Mast had "actual notice" of the deed as required by law prior to its being filed, regardless of any omissions. The majority relied on Mast's

Stanley, who was instrumental in establishing Western Savings of Arizona's credit card operation in Salt Lake last year, to organize its local efforts as well. According to Stanley, who currently serves as bank card director for the Texas concern, "Salt Lake was such a positive move for Western that we thought we'd try to duplicate that success ourselves."

Stanley indicated he found Salt Lake's work ethic and lifestyle to be "very conducive" to a business environment.

having signed a subordination agreement on March 28, 1983 that informed him that American was loaning money for the project on which he and other lien claimants eventually worked.

Judge Jackson, while agreeing the alleged defects in the April 8 deed didn't deprive it of its legal validity or recordability, did express concern with the majority's reliance on the subordination agreement as having provided Mast with actual notice. The agreement, he said, 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," he said, "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."

(Case No. 860355-CA).

ESI Auto Leasing secures new site on State Street

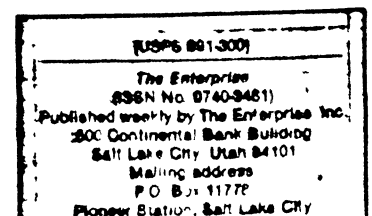
E.S.I. Auto Leasing has secured an 8,200 square foot location at 6885 So. State St. in a transaction conducted

through Tai Biesinger and Ken Keller of Pentad Properties and Bill Zimmerman of Coldwell Banker Commercial.

FLEET DISCOUNTS

on muffler, exhaust
and tail pipe work.

Quality Workmanship
And Fair Prices



ADDENDUM B

Constitutional Provision, Statutes and Rules

Former Art. VIII, § 9, Utah Constitution

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)

Rule 35, Rules of the Utah Court of Appeals

ART. VIII, § 9

CONSTITUTION OF UTAH

Cross-Reference.

Statutory provisions, § 78-5-1 et seq.

Appeals to district court.

Where a justice of peace court was without jurisdiction to hear and adjudicate the subject matter of an action commenced therein, a district court to which an appeal was taken did not acquire jurisdiction of the action, even though district court would have had original jurisdiction of the subject matter of the action. *Burt & Carlquist Co. v. Marks*, 53 U. 77, 177 P. 224.

Consolidating of city and justices' courts.

Uniting or consolidating of city and justices' courts in different cities of state held valid. *Leatham v. Reger*, 54 U. 491, 182 P. 187.

Legislative control in general.

When last sentence in this section was inserted in Constitution, it had reference to law then in force, and construction of existing statutes by Supreme Court was part thereof. *Briscoe v. Rich*, 20 U. 349, 58 P. 837.

Former statute, analogous to § 78-5-1 et seq., held not enlargement of jurisdiction of justice of peace as it stood at time Constitution was adopted, and not invalid under last sentence in this section. *Briscoe v. Rich*, 20 U. 349, 58 P. 837.

This section confers on legislature power to restrict jurisdiction of justices of peace by general law, but not to prescribe jurisdiction for justices in particular localities of state different from that possessed by justices in state at large. *Love v. Liddle*, 26 U. 62, 72 P. 185, 62 L. R. A. 482.

Under this provision, legislature may determine of what matters, and when and how justices' courts shall acquire and exercise jurisdiction. *State ex rel. Gallagher v. Third Judicial District Court for Salt Lake County*, 36 U. 68, 104 P. 750.

Part of state's judicial system.

Justices of peace courts constitute part of judicial system of Utah. *In re Wiseman*, 1 U. 39.

Collateral References.

Justices of the Peace, § 2, 31 et seq.
51 C.J.S. Justices of the Peace §§ 4, 26 et seq.

47 Am. Jur. 2d 920, 937, Justices of the Peace §§ 2, 30 et seq.

Arrest, power of justice of the peace to take affidavit as basis for warrant of, 16 A. L. R. 923.

Compensation per diem, 1 A. L. R. 296.

Fault or omission of justice of peace regarding bond, undertaking, or recognition as affecting party seeking appeal, 117 A. L. R. 1386.

Judgment, prior action in justice's court in which claim might have been asserted by counterclaim, set-off, or cross petition as bar to subsequent independent action on such claim, 8 A. L. R. 735.

License, liability for refusing to grant, 85 A. L. R. 299.

Pardon as restoring justice to office forfeited by conviction, 47 A. L. R. 543, 143 A. L. R. 172.

Search warrant, civil liability for improper issuance of, 45 A. L. R. 609.

Set-off as between judgments, jurisdiction of justice of peace to order, 121 A. L. R. 480.

Summons or notice of commencement of action emanating from justice's court, effect of defects or informalities as to appearance or return day in, 6 A. L. R. 851, 97 A. L. R. 752.

When title to real property deemed involved within contemplation of statute providing that justice of the peace (or similar court) shall not have jurisdiction of matters relating to title of land, 115 A. L. R. 504.

Sec. 9. [Appeals from district court—From justices' courts.]

From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the court below and under such regulations as may be provided by law. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the Court in the administration of decedent estates, and in cases of guardianship, as shall be provided by law. Appeals shall also lie from the final judgment of justices of the peace in civil and criminal cases to the District Courts on both questions of law and fact, with such limitations and restrictions as shall be provided by law; and the decision of the District Courts on

such appeals shall be final, except in cases involving the validity or constitutionality of a statute.

Cross-Reference.

Appeals generally, Rules of Civil Procedure, Rules 72-76.

Appeal and review generally.

Since the Constitution guarantees appeals to the Supreme Court, the proceedings relating thereto, in case the jurisdictional steps have been taken, must be liberally construed so as to effectuate the exercise of the right rather than to obstruct it by strict construction. *Roberson v. Draney*, 54 U. 525, 182 P. 212.

In absence of any specific legislative provision regulating procedure in appeals from judgment or order of director of department of registration in revoking or refusing to revoke physician's license Supreme Court has authority and duty to direct the procedure that shall be followed. *Baker v. Department of Registration*, 78 U. 424, 3 P. 2d 1082.

When opinion of trial court is settled in bill of exceptions and made part of record on appeal, the opinion may be examined to ascertain the reason for the decision although it amounts to no judicial finding of fact and has no judicial effect whatsoever, since there is no decision until findings of fact, conclusions of law, and decree or judgment are signed by the judge and filed with the clerk. *Wasatch Oil Ref. Co. v. Wade*, Judge, 92 U. 50, 63 P. 2d 1070.

Right to appeal is valuable and constitutional right and should not be denied except where it is clear that right has been lost or abandoned. *Adamson v. Brockbank*, 112 U. 52, 185 P. 2d 264.

When an appeal from an interlocutory order permitting discovery involves issues of fact, and there are no findings of fact, the Supreme Court does not review the facts but assumes that the trier of the facts found them in accord with its decision; the Supreme Court affirms the decision if from the evidence it would be reasonable to find facts to support it. *Mower v. McCarthy*, 122 U. 1, 245 P. 2d 224.

Premature filing of notice of appeal from denial of motion for writ of habeas corpus did not deprive the Supreme Court of jurisdiction where the judgment as filed was in accord with the ruling appealed from. *Wood v. Turner*, 18 U. (2d) 229, 419 P. 2d 634.

Appeal to district court from justice's court.

Neither this section nor statutes authorized city to appeal to district court from

justice's court judgment in favor of accused in prosecution for ordinance violation. *Castle Dale City v. Wooley*, 61 U. 291, 212 P. 1111, followed in 71 U. 328, 265 P. 1117.

Appeal to Supreme Court from juvenile court.

Hearings in the juvenile court as to the custody of children are equitable, and the Supreme Court is charged with responsibility for reviewing the evidence. *State in Interest of K—B—*, 7 U. (2d) 398, 326 P. 2d 395.

Appeal to Supreme Court where case originated in justice or city court.

Laws of territory controlled right of appeal to Supreme Court from judgment of territorial district court on appeal from judgment of justice of peace, even though appeal to Supreme Court was not perfected until after statehood. *Hodson v. Union Pac. Ry. Co.*, 14 U. 381, 46 P. 270.

Appeal lies to Supreme Court in every case which originates in justice's (or city) court and in which validity or constitutionality of statute or city ordinance is drawn into question in, and is decided by, or ought to be decided by, district court on appeal to it; Supreme Court has no jurisdiction to consider any question not affecting validity or constitutionality of statute or ordinance. *Eureka City v. Wilson*, 15 U. 53, 48 P. 41, *affd.* 173 U. S. 32, 43 L. Ed. 603, 19 S. Ct. 317; *Post v. Foote*, 18 U. 233, 54 P. 975; *State v. Briggs*, 46 U. 288, 146 P. 261; *Park City v. Daniels*, 46 U. 554, 149 P. 1094, *Ann. Cas.* 1918E, 107, *Salt Lake City v. Lee*, 49 U. 197, 161 P. 926; *State v. Roberts*, 56 U. 136, 190 P. 351; *State v. Holtgreve*, 58 U. 563, 200 P. 894, 26 A. L. R. 696; *Logan City v. Blotter*, 75 U. 272, 284 P. 333; *State v. Lyte*, 75 U. 283, 284 P. 1006; *Bountiful City v. Granato*, 77 U. 133, 292 P. 205; *American Fork City v. Robinson*, 77 U. 168, 292 P. 249; *Salt Lake City v. Perkins*, 122 U. 43, 245 P. 2d 1176; *Salt Lake City v. Grameri*, 16 U. (2d) 245, 398 P. 2d 888, appeal dismissed 382 U. S. 23, 15 L. Ed. 2d 17, 8 S. Ct. 227; *Salt Lake City v. Peters*, 22 U. (2d) 127, 449 P. 2d 652; *State v. Robinson*, 23 U. (2d) 78, 457 P. 2d 969.

Where question as to validity of constitutionality of statute has been raised before district court, on appeal from justice's court, Supreme Court, on review, must affirm judgment if question was correctly adjudged; Supreme Court must further inquire whether, notwithstanding

error in deciding statutory question, there was decided any other matter or issue, not affected by statutory question, which in itself is sufficient to sustain judgment, and, if such is case, judgment must be affirmed, without determining whether adjudication on such other matter or issue is correct; if statutory question is of such force as to render correct decision thereof necessary to final adjudication, or if there has been no decision of any other matter or issue, not affected by statutory question, sufficient to sustain judgment of district court, Supreme Court will reverse judgment and direct proper judgment to be entered, or remand cause, as may be required by circumstances of each particular case. *Eureka City v. Wilson*, 15 U. 53, 48 P. 41, *affd.* 173 U. S. 32, 43 L. Ed. 603, 19 S. Ct. 317.

Exception, in last clause of this section, applies when validity or constitutionality of city ordinance, as well as when validity or constitutionality of statute, is involved in case originating in justice's court. *Eureka City v. Wilson*, 15 U. 53, 48 P. 41, *affd.* 173 U. S. 32, 43 L. Ed. 603, 19 S. Ct. 317.

Under this section, appeal may be taken to Supreme Court in all cases originating in justices' courts in which validity or constitutionality of statute or ordinance is drawn in question, made issue, and decided by district court on appeal; in all other cases transferred to district court from justices' courts, final judgment of district court is conclusive. *Ogden City v. Crossman*, 17 U. 66, 53 P. 985, following *Eureka City v. Wilson*, 15 U. 53, 48 P. 41, *affd.* 173 U. S. 32, 43 L. Ed. 603, 19 S. Ct. 317. In *Ogden City* case, district court held unconstitutional city ordinance which, in justice's court, defendants had been found guilty of violating. However, in *Town of Ophir v. Jorgensen*, 63 U. 288, 225 P. 342, in which, seemingly, there was raised no question of constitutionality of town ordinance involved and only question at issue was as to town's right to appeal from district court's judgment in action, originating in justice's court, for violation of ordinance, court said at p. 290 of 63 Utah: "This court, in the case of *Ogden City v. Crossman*, 17 U. 66, 53 P. 985, did entertain an appeal from the district court in a criminal case brought under a city ordinance * * *. But * * * that case is not reasoned upon this question; the statutes and constitutional provisions and general legal propositions involved are not discussed. The case ought to be deemed overruled, by implication, by the doctrine of *Castle Dale City v. Woolley* [61 U. 291, 212 P. 1111] and the holding in *Salina City v. Freece*," 61 U. 574, 216 P. 1078.

Supreme Court has no power, on appeal in case originating in justice's court, to determine whether district court's construction of particular statute was erroneous. *State v. Olsen*, 18 U. 484, 56 P. 22.

Where case, originating in justice's court, did not involve validity or constitutionality of statute, and unsuccessful plaintiffs had right of appeal to district court but, instead of appealing, petitioned district court for writ of prohibition and by petition raised same questions that had been raised in justice's court, appeal to Supreme Court could no more be taken from judgment of district court dismissing petition for writ than it could have been taken from adverse judgment of district court on appeal to it. *Overland Gold Min. Co. v. McMaster*, 19 U. 177, 56 P. 977.

The word "statute" in last clause of this section includes municipal ordinances. *Park City v. Daniels*, 46 U. 554, 149 P. 1094, *Ann. Cas.* 1918E, 107.

A city cannot appeal from the judgment of the district court in criminal action for violation of ordinance where the action originates in the court of a city justice. *Salina City v. Freece*, 61 U. 574, 216 P. 1078.

This section does not authorize a city to appeal from judgment on appeal from city court to district court, dismissing defendant from custody, even though constitutionality of ordinance under which defendant was prosecuted was involved. *Town of Scipio v. Olsen*, 71 U. 328, 265 P. 1117, following *Castle Dale City v. Woolley*, 61 U. 291, 212 P. 1111.

This section applies to and limits appeals to Supreme Court from the district court in criminal cases, where case originated in city court, and was first appealed to district court. *State v. Brown*, 75 U. 37, 282 P. 785.

Certiorari from Supreme Court to review judgment in case originating in justice or city court.

Supreme Court may, by certiorari, review decision or judgment of district court in case appealed from justice of peace, even though validity or constitutionality of statute is not involved, where district court exceeded its jurisdiction or failed to acquire jurisdiction. *Hansen v. Anderson*, 21 U. 286, 61 P. 219 distinguishing *Crooks v. Fourth Judicial District Court*, 21 U. 98, 59 P. 529, and overruled in *Smith v. District Court of Second Judicial Dist.*, 24 U. 164, 66 P. 1065 (Baskin, J., dissenting). (In *Oregon Short Line R. Co. v. District Court of Third Judicial Dist.*, 30 U. 371, 85 P. 360, court "adhered" to *Crooks* and *Smith* cases, and did not mention *Hansen* case, but did, in effect, return to doctrine of latter case.)

Action of district court in dismissing, for want of prosecution, case appealed from justice court but not involving validity or constitutionality of statute, held final and not subject to review by Supreme Court on certiorari; certiorari may not be used to have mere errors or mistakes of district court reviewed. *Smith v. District Court of Second Judicial District*, 24 U. 164, 66 P. 1065, construed and adhered to in *Oregon Short Line R. Co. v. District Court of Third Judicial District*, 30 U. 371, 85 P. 360.

Where judgment was rendered in district court in favor of plaintiff in action before justice of peace and taken to district court by appeal, and it was shown that district court had exceeded its jurisdiction, Supreme Court had power by certiorari to review such jurisdictional question, such judgment not being reviewable by further appeal. *Oregon Short Line R. Co. v. District Court of Third Judicial Dist.*, 30 U. 371, 85 P. 360.

The mere fact that court misconceives the law and acts contrary thereto in matter where it has jurisdiction of subject matter does not carry such act beyond jurisdiction of court, and its action is not reversible on certiorari; dismissal of appeal from justice's court by district court on theory that undertaking, as required by law, had not been filed in justice's court, held not to exceed jurisdiction of district court, and such dismissal was not reviewable on certiorari. *Hoffman v. Lewis*, 31 U. 179, 87 P. 167.

Equity as distinguished from law case.

The Supreme Court, in cases at law tried before court without a jury, will examine the evidence only so far as may be necessary to determine questions of law, and it will not pass upon the sufficiency of the evidence to justify finding or judgment, unless there is no legitimate proof to support it and in no case, whether tried with or without a jury, will the appellate court determine questions of fact. *Lyman v. Town of Price*, 63 U. 90, 222 P. 599.

Since this section provides that in cases of law the appeal shall be on questions of law alone, where evidence was conflicting in law action and there was substantial evidence to support findings below, Supreme Court would not weigh evidence but would affirm judgment. *Osborn v. Peters*, 69 U. 391, 255 P. 435.

Trial court cannot merely take the evidence in equity case and certify record to Supreme Court for disposition of evidentiary issues. *In re Thompson's Estate*, 72 U. 17, 269 P. 103.

A will contest is an action at law, not an equity case, and Supreme Court on ap-

peal cannot weigh and pass on conflicting evidence. *In re Alexander's Estate*, 104 U. 286, 139 P. 2d 432.

As suit in equity to have a deed, absolute in form, declared to be a mortgage, is a suit in equity, it is duty of Supreme Court, under this section of the Constitution, to review the facts. "In examining the transcript to determine what our conclusions from the evidence will be we are to make an independent analysis of it. If at the end of that investigation we are in doubt or even if there be a slight preponderance in our minds against the trial court's conclusions we will affirm." *Crockett v. Nish*, 106 U. 241, 147 P. 2d 853, following earlier Utah case.

In a case at law, the appeal is upon questions of law alone. That being true, the function of the Supreme Court is not to pass upon the weight of the evidence, nor to determine conflicts therein, but to examine it solely for the purpose of determining whether the judgment finds substantial support in the evidence. *Sine v. Salt Lake Transp. Co.*, 106 U. 289, 147 P. 2d 875.

Action to quiet title to land would be considered as action at law rather than suit in equity with respect to extent of review on appeal, where no equitable issues were involved. *Dahnken v. Geo. Romney & Sons Co.*, 111 U. 471, 184 P. 2d 211.

This section precludes Supreme Court on appeal in law case from reviewing facts found by jury, and Supreme Court must sustain verdict where there is substantial evidence to support it. *Horsley v. Robinson*, 112 U. 227, 186 P. 2d 592.

On appeal in equitable proceeding, Supreme Court is permitted to review both questions of law and fact, but that court will give consideration to findings of trial court and it will not disturb findings of fact unless it appears that trial judge made findings against weight of evidence. *Peterson v. Peterson*, 112 U. 554, 190 P. 2d 135.

Where action was brought to enforce terms of a lease and involved no equitable issues, only errors of law could be reviewed by Supreme Court. *Jespersen v. Deseret News Publishing Co.*, 119 U. 235, 225 P. 2d 1050.

In an action at law, the appellate court is powerless to substitute another evaluation of the evidence for that of the trial court, where such evidence was conflicting. *Pixton v. Dunn*, 120 U. 658, 238 P. 2d 408.

In a case in equity the Supreme Court has responsibility to review the evidence. *Nokes v. Continental Min. & Mill. Co.*, 6 U. (2d) 177, 308 P. 2d 954.

In equity cases the Supreme Court reviews the evidence, keeping in mind that the trial court heard and saw the witnesses, and reverses if the court concludes that the evidence clearly preponderates against the decision. *Barker v. Dunham*, 9 U. (2d) 244, 342 P. 2d 867.

Although the question of a boundary line by acquiescence is a matter of equity, the Supreme Court will reverse the trial court's findings of fact only if it concludes that they are clearly erroneous. *Nunley v. Walker*, 13 U. (2d) 105, 369 P. 2d 117.

In an equity case in which the Supreme Court reviews the findings of fact of the trial court, it overturns them only where it is manifest that the trial court has misapplied proven facts or made findings clearly against the weight of the evidence. *Metropolitan Investment Co. v. Sine*, 14 U. (2d) 36, 376 P. 2d 940.

Even though Constitution states that in equity cases court may review facts, court will nevertheless take into account advantaged position of trial judge. *Stone v. Stone*, 19 U. (2d) 378, 431 P. 2d 802.

In proceeding to settle partnership accounts, findings that proceeds from ranch sale were partnership assets were reviewable under this section but were not disturbed because preponderance of evidence was not against the findings, discretion was not abused, and injustice did not result. *Corbet v. Corbet*, 24 U. (2d) 378, 472 P. 2d 430.

Final judgment.

It is a termination of a particular action which marks the finality of the judgment, and a decision which terminates the suit, or puts the case out of court without an adjudication on the merits is nevertheless a final judgment; test of finality is not whether whole matter involved in action is completed but whether the action is terminated by the judgment. *Benson v. Rozzelle*, 85 U. 582, 39 P. 2d 1113.

Judgment dismissing action without prejudice was a final and appealable judgment where the judgment of dismissal was entered after a new trial had been granted, over defendant's objection, on ground of error in instruction. *Klinge v. Southern Pac. Co.*, 89 U. 284, 57 P. 2d 367, 105 A. L. R. 204.

Judgment denying rescission but construing contract to mean that defendant was liable under certain conditions was a conclusion of law in so far as appeal was concerned and was a final decree. *Minersville Reservoir & Irr. Co. v. Rocky Ford Irr. Co.*, 90 U. 283, 61 P. 2d 605.

The question of whether an order of dismissal is a final and appealable judgment

which involves the jurisdiction of the Supreme Court is a matter the court will itself notice, though not called to its attention by either party. *Shurtz v. Thorley*, 90 U. 381, 61 P. 2d 1262.

A final judgment is an adjudication that disposes of the case as to all the parties and which finally disposes of the subject matter of the litigation on the merits of the case. *Shurtz v. Thorley*, 90 U. 381, 61 P. 2d 1262.

The decisions of a district court in cases brought before it from either justice of the peace courts or a city court are final decisions within meaning of this section. *State v. Johnson*, 100 U. 316, 11 P. 2d 1034, distinguished in 115 U. 394 205 P. 2d 247, 250.

In action to determine and quiet right in waters from a lake and its tributaries and to enjoin winter-flooding of lands order denying petition of defendants to have court call in state engineer and to proceed to hear the action as a statutory adjudication was a final judgment from which an appeal could be taken. *Salt Lake City v. Anderson*, 106 U. 350, 148 P. 2d 346.

Where an order granting defendant's motion for a new trial merely set aside the jury verdict and placed the parties in the same position as they had been prior to trial, such order was not a final judgment from which an appeal could be taken, and complaining plaintiff's proper recourse was either a petition for interlocutory appeal under Rule 72 (b), Rules of Civil Procedure, or preservation of the claimed error for review upon final judgment. *Haslan v. Paulsen*, 15 U. (2d) 185, 38 P. 2d 736.

Mandamus to compel district court to act in case appealed from justice or city court.

Where district court dismissed appeal from justice's court wrongfully or without cause, remedy was by writ of mandamus to require district court to vacate order of dismissal, reinstate appeal, and proceed to hear cause on its merits. *Hoffman v. Lewis*, 31 U. 179, 87 P. 167.

While if district court passes upon merits of case appealed to it from justice court, its errors, however gross, cannot be reviewed by Supreme Court, because district court is the court of last resort on such appeals, still if district court without sufficient or any legal reason, refuses to dispose of the appeal upon the merits, Supreme Court must require the court to hear and determine the same upon its merits, and make findings and conclusions of law in accordance with the evidence as it finds it to be, and enter

judgment accordingly. *Salt Lake Coffee & Spice Co. v. District Court of Salt Lake County*, 44 U. 411, 140 P. 666.

Mandamus to reinstate appeal was proper remedy where appeal was dismissed on ground that district court was without jurisdiction as matter of law when court in fact had jurisdiction of appeal. *Hanson v. Iverson*, District Court Judge, 61 U. 172, 211 P. 682.

Motion for new trial.

A judgment becomes final, for purpose of appeal, when the motion for a new trial is overruled, and effect of a motion for a new trial, when seasonably made, is to suspend the judgment or decree for purposes of appeal until the motion has been disposed of. *Petersen v. Ohio Copper Co.*, 71 U. 444, 266 P. 1050.

Where no motion was made for directed verdict or new trial, the Supreme Court was precluded from reviewing sufficiency of evidence in action at law, since under this section appeal may be made only on questions of law. *Brigham v. Moon Lake Electric Assn.*, 24 U. (2d) 292, 470 P. 2d 393.

Water Conservancy Act.

This constitutional provision applies only to appeals from final judgments of

district courts, not from district boards such as created by the Water Conservancy Act. But that act, in so far as it attempted to abrogate right of appeal from final judgments of court allowing or dismissing petition for organization of district, violated this section. (73-9-1 et seq.) *Patterick v. Carbon Water Conservancy Dist.*, 106 U. 55, 145 P. 2d 503.

Collateral References.

Appeal and Error—4; Courts—190.
4 C.J.S. Appeal and Error §§ 18-22.
4 Am. Jur. 2d 532, 535, Appeal and Error §§ 1, 4.

Moot questions: when criminal case becomes moot so as to preclude review of or attack on conviction or sentence, 9 A. L. R. 3d 462.

Plea of guilty in justice of peace court as precluding appeal, 42 A. L. R. 2d 995.

Reviewability, on appeal from final judgment of justice of the peace resulting in trial de novo, of interlocutory order, as affected by fact that order was separately appealable, 79 A. L. R. 2d 1367.

Law Review.

Proposals for Truce In The Holy War: Utah Adoption, Richard I. Aaron, 1970 Utah L. Rev. 325.

DECISIONS UNDER FORMER LAW

Review of facts in equity cases.

Since action to recover money claimed to be owing on contract, wherein foreclosure of mortgage or other lien to secure payment thereof was also sought, was case in equity and jury's decision therein was

only advisory to trial court, by virtue of Code 1943, 104-23-5, as amended by Laws 1945, ch. 25, this constitutional provision required that facts in such case be reviewed by Supreme Court on appeal. *Petty v. Clark*, 113 U. 205, 192 P. 2d 589.

Sec. 10. [County attorneys—Election, terms, appointment pro tempore.]

A county attorney shall be elected by the qualified voters of each county who shall hold his office for a term of four years. The powers and duties of county attorneys, and such other attorneys for the state as the legislature may provide, shall be prescribed by law. In all cases where the attorney for any county, or for the state, fails or refuses to attend and prosecute according to law, the court shall have power to appoint an attorney pro tempore. (As amended November 5, 1946, effective January 1, 1947.)

Compiler's Notes.

The 1945 amendment was proposed by House Joint Resolution No. 4, Laws 1945, p. 321, and was adopted at the general election on November 5, 1946, and became effective January 1, 1947. The amendment increased the term of county attorneys from two to four years.

Cross-Reference.

Statutory provisions, 17-18-1 et seq.

Construction, operation and effect.

The 1947 amendment to 17-16-6, providing that county attorneys be elected at general election held in November, 1950 and every four years thereafter, and that

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, the 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

commencement of work and furnishing of materials, 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 materials 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 relation 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 estopped by his or its acts and conduct from enjoying 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 building, 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 noticeable 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 constructed cannot take precedence over a mechanic's lien for work done and materials furnished in building the canal, although trust deed antedates the doing of the work or furnishing 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 account, for purpose of developing and operating mine, held prior to trust deed executed by mining 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 foreclosure 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 purchaser 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. *Burton Walker Lumber Co. v. Howard*, 92 Utah 92, 66 P.2d 134 (1937).

In determining priorities between construction mortgagee and mechanic's lienors, mortgage for definite amount recorded prior to attachment 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 intended 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 purchase money mortgage given at time of purchase 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 security 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 mechanics' lien where the mechanics' lien did not attach until after the mortgage was recorded. *Calder Bros. Co. v. Anderson*, 652 P.2d 922 (Utah 1982).

Questions of law and fact.

In action involving priority between mortgages 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 281 (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 598, 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 mechanic's 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.

NOTES TO DECISIONS

Relation back.

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)

38-1-11. Enforcement — Time for — *Lis pendens* — Action for debt not affected.

Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days. Within the twelve months herein mentioned the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action, and the burden of proof shall be upon the lien claimant and those claiming under him to show such actual knowledge. Nothing herein contained shall be construed to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.

History: R.S. 1898 & C.L. 1907, §§ 1390, 1395; C.L. 1917, §§ 3740, 3745; L. 1931, ch. 5, § 1; R.S. 1933 & C. 1943, 52-1-11.

Cross-References. — Justices' courts, jurisdiction to foreclose lien, § 78-5-2
Lis pendens generally, § 78-40-2

NOTES TO DECISIONS

ANALYSIS

Another action pending
Burden of proof
Effect of untimely action
Execution
Extension of time for filing notice
Findings and conclusions of law
Lis pendens
Nature of proceeding
Parties
Pleadings and proceedings
Waiver and estoppel
What law governs
Cited

Another action pending.

Action in equity to foreclose mechanic's lien is not barred by prior suit at law to recover for materials sold and delivered *State ex rel Dorsett v Morse*, 36 Utah 362, 103 P 969 (1909).

Burden of proof.

Burden of proof is on claimant to show that he is entitled to the lien and has complied with

the statute *Hathaway v United Tintic Mines Co*, 42 Utah 520, 132 P 388 (1913), *Greenhalgh v United Tintic Mines Co*, 42 Utah 524, 132 P 390 (1913)

Effect of untimely action.

An untimely action under this section is jurisdictional and forecloses the rights of the parties. It is not subject to waiver and estoppel as are procedural statutes of limitations AAA

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. 178, 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 181, 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

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.

NOTES TO DECISIONS

ANALYSIS

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. Corey*, 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. Corey*, 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 plaintiffs' 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 self-proving both as to execution and delivery, and recording of deed is likewise evidence of delivery. *Chamberlain v. Larsen*, 83 Utah 420, 2 P.2d 355 (1934).

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

Where duly acknowledged and recorded deed was found among papers of deceased grantor, inference of delivery and execution at above date stated in deed arose, and burden was upon those claiming nondelivery to show such fact. *Knighton v. Manning*, 84 Utah 1, 33 P.2d 4 (1934).

In action by administrator of grantor against executor of grantee, finding of nondelivery 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 4 (1934).

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

Effect of failure to record.

Where, after mortgage was executed on certain tract of land, owner executed deed to grantee on property not included in mortgage which deed was not recorded, decree in action to foreclose mortgage on tract of land, including part conveyed to grantee, was not binding on grantee who was not party to such action. *Federal Land Bank v. Pace*, 87 Utah 150 P.2d 480, 102 A.L.R. 819 (1935).

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

Equitable rights.

This section itself gives no equities; it applies this section in determining equities. *Federal Land Bank v. Pace*, 87 Utah 150 P.2d 480, 102 A.L.R. 819 (1935).

Livery of seizin.

In Utah, livery of seizin is unknown. Nevada has expressly abolished it, but by us it is dispensed with. *Wells, Fargo & Co. v. S. 2 Utah 39* (1877), *aff'd*, 104 U.S. 428, 26 802 (1881).

Mortgages.

This section applies to mortgages. Priorities between successive mortgages, however, are governed by general principles of mortgage law. *State v. Johnson*, 71 Utah 572, 268 P. 561 (1928).

Patents.

Record showing that patent was duly executed and verified as provided by law is admissible. *Tate v. Rose*, 35 Utah 229, 99 P. 1003 (1909).

Priorities.

Where contract vendor, notwithstanding that there was still balance due on purchase price, executed warranty deed in trust, for protection of purchaser and to secure loan, and made assignment of his interest with knowledge and consent of trustee and vendee, and subsequently creditor of vendor recovered judgment against him, and after sheriff's sale sold his interest to bank which recorded deed prior to assignment, bank was entitled to priority as against assignee. *Huffaker v. First Nat'l Bank*, 12 Utah 317, 173 P. 903 (1918).

Recital of consideration.

This section does not provide that a nominal consideration is not such a circumstance as to place a third person on notice of any outstanding interests but rather that the recital of a nominal consideration in a deed or other re-

corded instrument shall not have that effect. It is a well-known fact that often a conveyance recites a nominal consideration whereas the true consideration is not nominal. It is therefore never certain that the recited consideration is the true consideration. This is not the case in an execution sale. In such a sale there can be no doubt in the mind of the purchaser as to what was the actual consideration. *Pender v. Dowse*, 1 Utah 2d 283, 265 P.2d 644, 42 A.L.R.2d 1078 (1954).

Recordation as notice.**—In general.**

One who deals with real property is charged with notice of what is shown by the records of the county recorder of the county in which the property is situated. *Crompton v. Jensen*, 78 Utah 55, 1 P.2d 242 (1931).

—Forged deed.

The recording of a forged deed gives no notice as to its contents and a bona fide purchaser from the person who forged the deed takes nothing. *Rasmussen v. Olsen*, 583 P.2d 50 (Utah 1978).

"Recorded" construed.

There is nothing in this section which specifically defines what is meant by the word "recorded." *Boyer v. Pahvant Mercantile & Inv. Co.*, 76 Utah 1, 287 P. 188 (1930).

COLLATERAL REFERENCES

Am. Jur. 2d. — 66 Am. Jur. 2d Records and Recording Laws § 47 et seq.

C.J.S. — 26 C.J.S. Deeds § 74; 92 C.J.S. Vendor and Purchaser § 325.

A.L.R. — Failure of vendor to comply with statute or ordinance requiring approval or recording of plat prior to conveyance of property rendering sale void or voidable, 77 A.L.R.3d 058.

Recorded real property instrument as charging third party with constructive notice of provisions of extrinsic instrument referred to therein, 89 A.L.R.3d 901.

Key Numbers. — Deeds ⇨ 82; Vendor and Purchaser ⇨ 227.

57-1-7. Applicability of chapter.

This act shall apply to all instruments, whether recorded prior to or subsequent to the effective date hereof, but as to instruments which have been recorded prior thereto, it shall not apply until one year from its effective date.

History: L. 1945, ch. 106, § 2; 1947, ch. 97, § 2; C. 1943, Supp., 78-1-6.10.

Meaning of "this act". — The phrase "This act" appearing at the beginning of this section appeared in this section both as enacted by L. 1945, ch. 106, § 2 and as amended (without change) by L. 1947, ch. 97, § 2 and appears to be referring to those acts. The former act (L. 1945, ch. 106) amended § 57-1-6 and enacted

this section, while the latter act (L. 1947, ch. 92) amended both § 57-1-6 and this section.

Meaning of "effective date hereof." — The phrase "effective date hereof" appearing in this section appeared in this section both as enacted by L. 1945, ch. 106, § 2 and as amended by L. 1947, ch. 97, § 2. The effective dates of L. 1945, ch. 106 and L. 1947, ch. 97 are May 8, 1945 and May 13, 1947, respectively.

party. If the adverse party timely objects to the cost bill, the clerk, upon reasonable notice and hearing, shall determine and settle the costs and tax the same, and a judgment shall be entered thereon against the adverse party. The determination by the clerk shall be reviewable by the Court of Appeals upon the request of either party made within five days of the entry of judgment; unless otherwise ordered, oral argument shall not be permitted. A judgment under this section may be filed with the clerk of any district court in the state, who shall docket a certified copy of the same in the manner and with the same force and effect as judgments of the district court.

Rule 35. Petition for rehearing.

(a) **Time for filing; contents; answer; oral argument not permitted.** A rehearing will not be granted in the absence of a petition for rehearing. A matter may not be reheard by the court en banc. A petition for rehearing may be filed with the clerk within 14 days after the entry of the decision of the Court of Appeals, unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner so desires. Counsel for the petitioner must certify that the petition is presented in good faith and not for delay. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court.

(b) **Form of petition; length.** The petition shall be in a form prescribed by Rule 27(a), and copies shall be served and filed as prescribed by Rule 26(b). Except by permission and order of the court, a petition for rehearing and any response requested by the court shall not exceed 15 pages.

(c) **Action by court if granted.** If a petition for rehearing is granted, the court may make a final disposition of the cause without reargument, may restore it to the calendar for reargument or resubmission, or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(d) **Untimely or consecutive petitions.** Petitions for rehearing that are not timely presented under this rule and consecutive petitions for rehearing will not be received by the clerk.

Rule 36. Issuance of remittitur.

(a) **Date of issuance.** The remittitur of the court shall issue 15 days after the entry of the judgment, unless the time is shortened or enlarged by order. A certified copy of the opinion of the court, any direction as to costs, and the record of the proceedings shall constitute the remittitur.

(b) **Stay of remittitur pending rehearing petition.** The timely filing of a petition for rehearing will stay the remittitur until disposition of the petition, unless otherwise ordered by the court. If the petition is denied, the remittitur shall issue immediately after entry of the order denying the petition, unless the court otherwise orders.

(c) **Stay, supersedeas, or injunction pending application for review to Supreme Court of Utah and Supreme Court of United States.** A stay or supersedeas of the remittitur or an injunction pending application for review

ADDENDUM C: Opinion of Court of Appeals

IN THE UTAH COURT OF APPEALS

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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 corporation,
United Pacific Reliance Insurance
Company, a Washington corporation,
and Oakhills 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,

Crossclaim 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,

Crossclaim 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.

OPINION
(For Publication)

Case No. 860355-CA

FILED

JUN 10 1998

Timothy M. Shea
Clerk of the Court
Utah Court of Appeals

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 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 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 and 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; Capital 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.

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 Western 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 recorded 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 (Western 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.

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).

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

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 signators 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

Utah R. Civ. P. 52(a) requires that findings of fact "shall not be set aside unless 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.



Richard C. Davidson, Judge

I CONCUR:



Russell W. Bench, Judge

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.

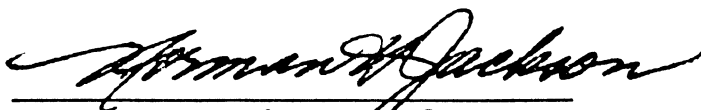
I am concerned that, under the majority's reasoning, no person who supplies material or labor on a construction job bigger than a child's sandbox will ever be able to achieve lien priority over an entity that loans money on the project. Every materialman on any job big enough to look like it requires 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.


Norman H. Jackson, Judge

**BEFORE THE COURT OF APPEALS
OF THE STATE OF UTAH**

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

Plaintiff and Respondent,

vs.

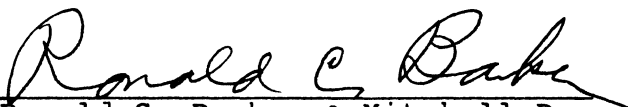
MAST CONSTRUCTION COMPANY,
a Utah Corporation, et al.,

Defendants and Appellants,

Docket No. 860355-CA

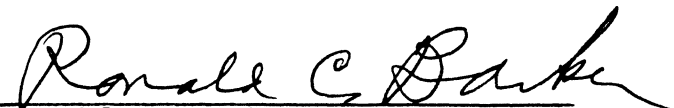
**CERTIFICATE OF GOOD FAITH
AND NOT FOR DELAY**

The undersigned attorney hereby certifies that he believes that the foregoing petition for rehearing is submitted in good faith and not for purposes of delay.


Ronald C. Barker & Mitchell R.
Barker, attorneys for Ron Mast
and Mast Construction Company

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be mailed, postage prepaid, the 19th day of July, 1988, to Warren Patten, Esq. and W. Cullen Battle, Esq., 215 South State, 12th Floor, Salt Lake City, Utah 84111.


Ronald C. Barker