

1986

Vincent Rotta JR. v. Hal Hawk : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
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COURT OF APPEALS

STATE OF UTAH

* * * * *

VINCENT ROTTA, JR., WESTERN
GENERAL CONSTRUCTION CO.,
et al.,

Plaintiffs, Appellant
and Cross-Respondent

vs

HAL HAWK, HOME SAVINGS AND
LOAN ASSOCIATION, et al.,

Defendants, Respondent
and Cross-Appellant

Case No. 860356 CA

* * * * *

BRIEF OF RESPONDENT AND CROSS
APPELLANT, HOME SAVINGS AND LOAN

Appeal by Western General and Home Savings
from Orders of the Third District Court,
Honorable Timothy Hansen, Granting Summary
Judgment on Mechanic's Liens Claims

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)	Case No. 860356 CA
Plaintiffs, Appellant and Cross-Respondent)	
vs)	
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Defendants, Respondent and Cross-Appellant)	

* * * * *

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LIST OF PARTIES AT THE TRIAL COURT

This appeal is from four cases which were consolidated in the trial court as Vincent Rotta, Jr. v. Hal Hawk, C84-6174. The only parties to the appeal are Western General Construction and Home Savings and Loan. The parties in the consolidated cases were:

* * * * *

VINCENT ROTTA, JR.,)	
Plaintiff,)	Civil No. C84-6174
vs)	
HAL HAWK, individually and)	
DBA KALCO PARTNERSHIP and)	
KENT DENNIS, individually and)	
DBA KALCO PARTNERSHIP, PIHL)	
and CLARK ENTERPRISES, INC.)	
a Utah Corporation, EMPIRE)	
ENTERPRISES, INC., a Utah)	
Corporation, HOME SAVINGS)	
AND LOAN, a Utah Corporation,)	
CONTROL MANAGEMENT, a)	
Utah Corporation, EQUITY)	
RELIANCE CORPORATION, a Utah)	
Corporation, JACK NIXON, an)	
individual, COORDINATED)	
INVESTMENTS, a Utah General)	
Partnership, EDNA RAE MADSEN,)	
an individual and John Does)	
1 through 10,)	
Defendants.)	

* * * * *

* * * * *

WESTERN GENERAL CONSTRUCTION)
CO., INC.,)
) Civil No. C85-5268
Plaintiff,)
)
vs)
)
PIHL AND CLARK ENTERPRISES,)
INC., HOME SAVINGS AND LOAN)
ASSOCIATION, EQUITY RELIANCE)
CORP., IPC LTD., and)
CONTROLLED MANAGEMENT,)
)
Defendants.)
)
* * * * *

* * * * *

KIRBY BUILDING SYSTEMS, INC.,)
)
Plaintiff,)
)
vs) Civil No. C85-5384
)
WESTERN GENERAL CONSTRUCTION)
COMPANY, PIHL-CLARK)
ENTERPRISES, INC., PIHL-)
CLARK ENTERPRISE, INC.)
dba IPC LTD., DENNIS P.)
NIELSEN, EQUITY RELIANCE)
CORPORATION, HORIZON WEST)
ENTERPRISES, DIVERSIFIED)
PLANNING CORPORATION,)
WESTERN SAVINGS AND LOAN)
COMPANY, VINCENT ROTTA, JR.,)
LOGAN SAVINGS AND LOAN)
ASSOCIATION, HOME SAVINGS)
AND LOAN ASSOCIATION,)
INTERMOUNTAIN FASTENING)
SYSTEMS, K & M SPECIALTIES)
COMPANY, PIONEER DOOR SALES,)
SMITH'S & WHITE MASONRY,)
KNOWLTON H. BROWN CONSTRUCTION,)
JOHNSON ELECTRIC MOTORS, INC.,)
GENEVA ROCK PRODUCTS, INC.,)
ACME FENCE COMPANY, INC.,)
RCI, INC., RAY GILLIES dba)

GILLIES' BACK HOE SERVICE,
INTERSTATE BRICK COMPANY,)
KALCO PARTNERSHIP, a Utah
corporation, EQUITIES, INC.,)
KENNECOTT COPPER CORPORATION,
HARPER EXCAVATING, INC.,)

Defendants.)

* * * * *

* * * * *

R.C.I., INC.,)

Plaintiff,)

Civil No. C86-1310

vs)

HOME SAVINGS & LOAN,)
PIHL AND CLARK ENTERPRISES,
INC., WESTERN GENERAL)
CONSTRUCTION,)

Defendants.)

* * * * *

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF JURISDICTION AND PROCEEDINGS BELOW.....	1
ISSUES FOR REVIEW.....	1
STATUTES AND CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	7
I. The trust deed of Home Savings has priority over the mechanic's liens, including the lien of Western General.....	7
II. Home Savings is entitled to recover attorney's fees as the successful party.....	18
CONCLUSION.....	26
APPENDIX.....	
Exhibit A - Map of Project site.....	i
Exhibit B - Trustee's Deed.....	ii
Exhibit C - Project 2 Contract.....	vii
Statutes	
UCA §38-1-5 (1953).....	viii
UCA §38-1-18 (1953).....	
UCA §38-1-17 (1953).....	
Rev. Laws §1400 (1898).....	ix
Comp. St. §1400 (1907).....	x
Constitutional Provisions.....	
Article VI, Section 26, Utah Constitution.....	xi
Cases.....	
<u>Brubaker v. Bennett</u> , 19 Utah 401, 57 Pac. 170 (Utah 1899).....	xii
<u>Rupp v. Earl H. Cline & Sons</u> , 188 A.2d 146, 1 A.L.R. 3d 815 (Md. 1963).....	xiv
<u>Western Mortgage Loan Co. v. Cottonwood Constr. Co.</u> , 18 Utah 2d 409, 424 P.2d 437 (1967).....	xix

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Aladdin Heating Corp. v. Trustees of Central States,</u> 564 P.2d 82 (Nevada 1977).....	14,18
<u>Backus v. Hooten,</u> 4 Utah 2d 364, 294 P.2d 703 (1956).....	10
<u>Brand v. First Federal Savings & Loan of Fairbanks,</u> 478 P.2d 829 (Alaska 1970).....	21
<u>Brubaker v. Bennett,</u> 19 Utah 401, 57 Pac. 170 (1899)...	23,24,25
<u>Calder Bros. Co. v. Anderson,</u> 652 P.2d 922 (Utah 1982).	13,14,16
<u>Clark v. General Electric Co.,</u> 243 Ark. 399, 420 S.W. 2d 830 (1967).....	15
<u>Diversified Mortgage Investors v. Gepada, Inc.,</u> 401 F.Supp. 682 (D.C. Ia. 1975).....	15
<u>First of Denver Mortg. Investors v. Zundel,</u> 600 P.2d 521 (Utah 1979).....	12
<u>First National Bank of Ardmore v. Worthly,</u> 714 P.2d 1044 (Okla. 1985).....	21
<u>Irwin Concrete, Inc. v. Sun Coast Properties,</u> 653 P.2d 1331 (Wash. 1982).....	20
<u>Maule Industries v. Gaines Construction,</u> 157 So.2d 835 (Fla. 1963).....	16
<u>Mysawka v. Mullen,</u> 73 Montgomery County Law Rptr. 497 (Montg. Co. Pa. 1957).....	16,17
<u>Palombi v. D & C Builders,</u> 22 Utah 2d 297, 452 P.2d 325 (1969).....	19
<u>Perkins Const. Co. v. Ten-Fifteen Corp.,</u> 545 S.W. 2d 494 (Tex. 1979).....	16
<u>Rupp v. Earl H. Cline & Sons, Inc.,</u> 188 A.2d 146, 1 A.L.R. 3d 815 (Md. 1963).....	10,11,16
<u>Shupe v. Menlove,</u> 18 Utah 2d 130, 417 P.2d 246 (Utah 1966).....	20
<u>Stanton Transportation Co. v. Davis,</u> 9 Utah 2d 184, 341 P.2d 207 (1957).....	17
<u>Utah Farm Bureau Ins. Co. v. Utah Ins. Guar. Assn.,</u> 564 P.2d 751 (Utah 1977).....	25
<u>Western Mortgage Loan Co. v. Cottonwood Constr. Co.,</u> 18 Utah 2d 409, 424 P.2d 437 (1967).....	8,9,11,14,18

Other Authorities

Anno., "What Constitutes Commencement of Building or Improvement for Purposes of Determining Accrual of Mechanics Liens," 1 A.L.R. 3d 822.....	16
16 Am. Jur. 2d, <u>Const. Law</u> §137.....	24
57 Corpus Juris Secundum, <u>Mechanic's Liens</u> §179.....	9, 15
Jones on Liens, Section 1469, 1474.....	9

Constitutional Provisions

Article VIII, Section 3 of the Utah Constitution.....	1
Article VI, Section 26 of the Utah Constitution.....	2, 6, 24
Fourteenth Amendment, U.S. Constitution.....	25

Statutes

U.C.A. §38-1-5.....	1, 2, 7, 19
U.C.A. §38-1-17.....	20, 23
U.C.A. §38-1-18.....	1, 2, 6, 18
U.C.A. §78-2-2(3)(i).....	1
Rev. St. §1400 (1898).....	23, 24
Rev. St. §1394 (1898).....	23
Compiled Laws §1400 (1907).....	24

This brief is the reply of Home Savings and Loan to that of Western General Construction regarding the issue of priority of mechanic's lien claims. The brief is also filed in support of the cross-appeal of Home Savings on the issue of attorney's fees.

STATEMENT OF JURISDICTION

AND PROCEEDINGS BELOW

This case was poured over into the Court of Appeals by the Utah Supreme Court. Jurisdiction in the Supreme Court was vested pursuant to Article VIII, Section 3 of the Utah Constitution and U.C.A. § 78-2-2(3)(i).

The issues on appeal were decided by the Third District Court pursuant to summary judgment and subsequent certification pursuant to Rule 54(b), U.R.C.P.

ISSUES FOR REVIEW

The following issues are presented for review:

1. Does the trust deed interest of Home Savings and Loan have priority, as that term is used in U.C.A. § 38-1-5, over the mechanic's lien claim of Western General Construction?
2. Is Home Savings and Loan entitled to recover attorney's fees pursuant to U.C.A. §38-1-18 as a successful party in the mechanic's lien foreclosure action?

STATUTES AND CONSTITUTIONAL PROVISIONS

Interpretation of the following statutes is at issue:

U.C.A. § 38-1-5

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."

U.C.A. § 38-1-18

38-1-18. Attorney's fees.

"In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action."

In addition, consideration of the effect of the following constitutional provision on U.C.A. §38-1-18 is presented:

Utah Constitution, Article VI, Section 26:

No private or special law shall be enacted where a general law can be applicable.

STATEMENT OF THE CASE

The Third Judicial District court, (Honorable Timothy Hansen) ruled in a memorandum decision (R.307) that:

"Based upon the facts and circumstances before the court as undisputed facts regarding the question of "commencement to work" as that term is used in § 38-1-5 of Utah Code Annotated 1953 as amended, it does not appear

to the Court, under the appropriate case law that governs the issue, that there has been a commencement to do work as to place the lien claimant ahead of the mortgage." (R.308).

Pursuant to a Partial Summary Judgment (R. 380), the Court ruled that the interest of Home Savings and Loan was prior to and superior to the mechanic's liens, including the lien of Western General Construction.

Subsequently, the trial Court denied Home Savings' Motion for Attorney's Fees (R.625, 626) and certified that its orders regarding priority and attorney's fees were final orders pursuant to Rule 54(b), U.R.C.P. (R.628). Both decisions are on appeal.

STATEMENT OF FACTS

This action involves two projects for the construction of self-storage units in Sandy, Utah. The projects were designed to and proceeded under separate contracts. (R. 225). Home Savings was the construction lender on each project, Western General was the general contractor. There were separate loans and separate construction contracts entered into with respect to each project. (R. 225, 226)

The first project (referred to in the documents of the parties as Phases I and II) was built upon three parcels designated as Parcels 1, 2 and 3 on the map filed with the trial Court, R. 218. (A copy of the map is attached to this brief as Exhibit "A".) It was conceded in the trial court (R. 665) that there was no issue regarding Home Savings' priority for Project 1 on Parcels 1, 2 and 3.

The second project was built upon parcels designated as parcels A and B, located immediately south of the first project. (R. 225) Parcels A and B were the subject of a separate loan (trust deed of Home Savings recorded June 7, 1984, R.219) and a separate construction contract (Exhibit C in Appendix, dated June 20, 1984, R. 241, R. 225) between the owner and Western General Construction.

Western General's appeal is directed only to the issue of priority on Project 2. It was agreed at the oral argument in the trial court that there were no fact issues, the only issue being one of law. (R. 687, 688)

The following undisputed facts support the trial court's determination regarding the priority of Home Savings as to Project 2, i.e. Parcels A and B:

1. The trust deed of Home Savings and Loan (the construction lender) as to Project 2 (Parcels A and B) was recorded on June 7, 1984. (R. 231).

2. The contract of Western General Construction (the general contractor) to construct Project 2 (Phase III) was submitted to the owner on June 20, 1984, some two weeks after Home Savings' trust deed was recorded (R. 241).

3. Prior to June 20, 1984 no work had commenced toward to the construction of improvements for Project 2 which was visible on Parcels A and B, except for some general clearing of plant material and the movement of top soil related to Project 1. (R. 226).

4. This movement of top soil and clearing of plant material was apparently done in April and May, 1984. Any top soil that was moved from the Project 2 parcels (Parcels A and B) was moved to the Project 1 parcels (Parcels 1, 2 and 3). (R. 259, 286). There was no evidence that the movement of the topsoil from Parcels A and B to Parcels 1, 2 and 3 was in any way related to the improvements which were ultimately constructed on Parcels A and B for Project 2. (R. 683, L. 15-20) (R. 286, para. 5).

5. As of June 7, 1984, the date Home Savings' trust deed was recorded, parcels A and B still had residences on them that were being rented out. The residences remained rented until the end of June, 1984, when the residences were demolished. (R. 286).

6. After the rental units on A and B were demolished, Western General brought in fill to parcels A and B and graded them to achieve proper elevations for the improvements on Project 2 (Parcels A and B). (R. 286, 287).

7. There was no evidence that there was any equipment located on or working on Parcels A and B in June, 1984, or more particularly, on June 7, 1984, when Home Savings trust deed was recorded. The only evidence of record was that the clearing and movement of soil which was done was done in April and May, 1984. (R. 259)

8. There is no evidence in the record which suggests that any work had commenced on the structures to be built on Parcels A and B prior to June 7, 1984, nor any evidence to suggest that any movement of earth on Parcels A and B in April or May in any way

benefited or facilitated the structures which were later built on A and B as part of Project 2.

9. Preliminary field surveys were not commenced for Project 2 (Parcels A and B) until June 25, 1984. (R. 223)

Subsequent to the entry of the judgment determining the priority of Home Savings' trust deed over the mechanic's lien, Home Savings moved for a judgment of attorney's fees pursuant to U.C.A. §38-1-18. The trial court denied this motion. The following facts are relevant to the cross-appeal regarding attorney's fees:

1. Six lien claimants sought to foreclose their mechanic's liens as against Home Savings & Loan, including Western General Construction. (R. 435).

2. At one time, there were three separate actions by claimants which required an active defense by Home Savings. (R. 436).

3. Counsel for Home Savings reviewed and analyzed thousands of pages of invoices and receipts, conducted numerous interviews, engaged in research and prepared numerous pleadings. The total cost of successfully defending Home Savings against the lien foreclosure actions was \$11,902.50. (R. 435).

SUMMARY OF ARGUMENT

1. The trial court properly determined that "the time of the commencement to do work . . . on the ground (Parcels A and B) for the structure or improvement" occurred after Home Savings' trust deed was recorded, and the trust deed of Home Savings was prior to and superior to the mechanic's liens.

2. The trial court's denial of Home Savings' motion for attorney's fees incurred in its successful defense against the lien claims is contrary to U.C.A. § 38-1-18 and Article VI, Section 26 of the Utah Constitution.

ARGUMENT

THE TRUST DEED OF HOME SAVINGS HAS PRIORITY OVER THE MECHANIC'S LIENS, INCLUDING THE LIEN OF WESTERN GENERAL.

The ruling of the trial court establishing the priority of Home Savings' trust deed disposed of many mechanic's liens claims. Only Western General Construction, the general contractor who filed a "blanket" lien, has appealed.

The issue presented by Western General's appeal is whether the clearing of trees and movement of topsoil on Parcels A and B prior to June 7, 1984, the date Home Savings' trust deed was recorded, creates "priority" for its mechanic's lien as that term is used in U.C.A. § 38-1-5. As set forth herein, priority was not established by Western General or any lien claimants.

Initially, it must be observed that each of the parties agreed at argument of the motion for summary judgment that there were no issues of fact. (R. 687, 688).

None of the mechanic's liens against Parcels A and B were recorded prior to June 7, 1984, when Home Savings trust deed was recorded. Therefore, the lien claimants must rely on U.C.A. § 38-1-5 to establish priority.

When summarized the undisputed facts are that some trees were cleared and some top soil was moved from Parcels A and B

(Project 2) to the adjacent Parcels 1, 2, and 3 (Project 1) prior to June 7, 1984. This movement of top soil was for the benefit of Parcels 1, 2 and 3 and was not done in furtherance of the contract for Project 2 which was entered into between the owner and the contractor on June 20, 1984. (R. 259, 286). In fact, additional fill was brought back into Parcels A and B to bring them up to grade during construction on Parcels A and B (Project 2). (R. 287). Field surveys of Parcels A and B were not commenced until June 25, 1984 (R. 223). Rental homes remained on Parcels A and B until the end of June. There was no evidence that there was any machinery on or work actually proceeding on Parcels A and B on June 7, 1984 or any day prior thereto in June, 1984.

As set forth hereinafter, these facts do not support a finding of priority for the lien claimants.

The foregoing facts reflect that none of the work that was done on Parcels A and B (Project 2) prior to June 7 was related to the subsequent improvements constructed on Parcels A and B. The work was clearly not excavation for the Project 2 units. Even if the work had been related to the improvements ultimately constructed on Project 2, the work was insufficient to create priority.

There are two requirements set forth in U.C.A. §38-1-5 and in the cases decided under it that Western General must prove to establish priority for Project 2: first, that work alleged to constitute commencement of work on the structure or improvement has been performed; and second, that the work be clearly

recognizable as the beginning of the improvement. Western Mortgage Loan Co. v. Cottonwood Constr. Co., 18 Utah 2d 409, 424 P.2d 437 (1967).

The Utah Supreme Court has consistently observed that the "problem is one of notice. The presence of materials on the building site or evidence on the ground that work was commenced on a structure or preparatory thereto is notice to all the world that liens may have attached." Western Mortgage, supra, p. 439.

The issue of the type of work necessary to create notice under the lien statute has been the subject of frequent consideration. The general rule as to what constitutes commencement of work on a building is contained in 57 Corpus Juris Secundum, Mechanic's Liens, §179:

"The commencement of the building or improvement within the meaning of mechanic's liens statutes is the visible commencement of actual operations on the ground for the erection of the building, the doing of some work or labor on the ground, such as beginning to excavate for the foundation or the basement or cellar, walling the cellar, or work of a like description, which every one can readily see and recognize as the commencement of a building, and which is done with the intention and purpose then formed to continue the work until the completion of the building.

On the other hand, work which, although it may improve the property, is merely preparatory to building operations at some future time, and does not of itself tend to contribute directly to the erection, such as clearing, leveling, filling up, or fencing the property . . . does not constitute a commencement for the purpose of fixing a time to which the lien relates, especially when done without any present intention of building. Also staking out the plan of the building or the line of foundation, or staking the boundary line of the tract, . . . does not constitute a commencement of the building within the meaning of the lien statutes." (Emphasis added.)

See also: Jones on Liens, Section 1469, 1474.

In Backus v. Hooten, 4 Utah 2d 364, 294 P.2d 703 (1956), an action involving a bond claim, the Utah court analyzed mechanic's liens cases interpreting language similar to that of U.C.A. § 38-1-5 and stated:

"let it be conceded that leveling land enhances its value and improves its utility. It does not follow that such leveling constitutes an improvement upon land. It would seem to be an unreasonable construction to hold that a contract for plowing, seeding or manuring of land is a contract for the construction of an improvement upon land." Id., at 705.

The case of Rupp v. Earl H. Cline & Sons, Inc., 188 A.2d 146, 1 A.L.R. 3d 815 (Md. 1963) (case included in appendix) is very analogous to the case at issue. In Rupp, the developer purchased a 50 acre tract of property for the development of cottages and apartments. The cottages were to be constructed first, with the apartments to follow on another part of the 50 acres. During the construction of the cottages, the contractor needed additional fill and borrowed it from another portion of the 50 acre site where the apartments were to be built later. The contractor removed some 2,000 cubic yards of soil, from the apartment parcel, excavating to a depth of four to six feet in some places, thereby leveling the site to the approximate grade needed for the apartments. Some six months after work began on the cottages, a second contract was issued for the construction of apartments and a deed of trust on the apartment property was recorded securing the second construction loan. When the slabs for the apartments were laid, little additional excavation work

was necessary because of the prior excavation. The court addressed the priority issue and after considerable discussion concluded that:

"While the removal of soil had the effect of leveling the apartment site, that fact did not constitute commencement for the purposes of fixing the time to which a lien could relate. [citation omitted] Nor did the grading or leveling, since there was no work on the ground which everyone could readily see and recognize as the commencement of a building, [citation omitted] - have the effect of putting the party making the construction loan on notice that the building had been commenced, and we so hold."

The Rupp court went on to state:

"But even if it is assumed (for the purpose of this case) that there was no substantial change of plan and that the owner and builder had a continuing intention - if and when they could get financing and permission - to erect apartments of some type, we think it is apparent that the removal of soil from one part of a development to another even for the dual purpose of grading one site to a specified level and filling in the other to the required height was at most a preparatory operation that was not the "commencement of a building."

The Utah Supreme Court cited favorably the Rupp case in reaching its decision in Western Mortgage, supra, 424 P.2d 437, that not all work creates notice under § 38-1-5. In Western Mortgage, the lender made a loan for the construction of a residence on a lot in a subdivision. The evidence was that "the work of laying out and developing the subdivision, including engineering, installing water mains, sewer mains and laterals, curb and gutter, surfacing streets and other off-site construction" was done before the mortgage was recorded. The lien claimants argued that this work was sufficient to establish priority as to the lot. The Utah Supreme Court disagreed:

"We are not inclined to give the statute such a broad meaning as contended for by the appellants. We are inclined to the view that the legislature intended the language "commencement to do work or furnish materials on the ground" to be limited to relate to the home or other structure which was being built upon the land."

In spite of Western General's apparent contention at page 5 of its Memorandum that clearly visible excavation and site preparation had commenced, there are no facts in the case before this Court to suggest that the removal of soil from Parcels A and B had any relation to the improvements ultimately constructed on Parcels A and B. In fact, the evidence is to the contrary - fill had to be hauled back onto Parcels A and B to achieve proper elevations before the slabs could be laid for Project 2. (R. 287, para. 6) With the possible exception of tree removal, the work done on Parcels A and B prior to June 7, 1984, actually led to more work on those parcels before the improvements could begin.

Two subsequent Utah Supreme Court decisions have addressed the issue of priority. In First of Denver Mortg. Investors v. Zundel, 600 P.2d 521 (Utah 1979), the issue of priority involved a construction loan "for the financing of improvements on the 44-acre property, which was to comprise 54 single-family building sites and 69 condominium units." (p. 523) The improvements which had commenced prior to the recording of the lender's trust deed apparently included the installation of sewer and water on the entire site. The Court found that this type of work enhanced the value of the developer's land and was necessary to make the residences habitable. (p. 525) The Court then distinguished the

Western Mortgage case based upon the purpose of the loans, the loan in Zundel having been specifically made for "off-site improvements." The Court clearly left intact the requirement that the work provide notice of the commencement of the actual improvements to be constructed.

In this case, the work of clearing trees and moving top soil on the Project 2 parcels prior to June 7 did not benefit the Project 2 property. It also gave no notice that a building was going to be constructed on the Project 2 parcels.

The second decision to address priority was Calder Bros. Co. v. Anderson, 652 P.2d 922 (Utah 1982). In Calder Bros., the new owner of the Star Palace hired some work done on the building before the mortgage was recorded. "The work performed prior to the recording of Calder Bros.' mortgage included painting the building exterior, cutting down two trees, clearing weeds and placing grout in the building. At no point up to and including the time Calder Bros.' mortgage was recorded, was it evident from the inspection of the premises that an improvement had been commenced." (p. 924). The Supreme Court observed that:

The purpose of the mechanic's lien act is remedial in nature and seeks to provide protection to laborers and materialmen who have added directly to the value of the property of another by their materials or labor." (p. 924)

As is the situation in the present case, there was no question in Calder Bros. that some work had been performed on the property prior to the recording of the mortgage. Applying the standard just quoted above, the Supreme Court concluded that priority had not been established. This conclusion was reached on two

basis: first, that there was no evidence on the site that an improvement had been commenced; (p. 924) and second, the improvements ultimately made negated the value of the prior work. (p. 925). The touchstone for both of these factors is whether value was directly added to the property by the materials or labor.

By applying the Calder Bros. criteria to the present case, it becomes more apparent that priority was not established by the clearing of trees or the borrowing of top soil. Neither of these tasks "added directly to the value of the property." In fact, soil had to be hauled back onto Project 2 for construction.

The vast majority of cases from other states support the conclusion of the Calder Bros. case. In Aladdin Heating Corp. v. Trustees of Central States, 563 P.2d 82 (Nevada 1977) the Court was petitioned to determine whether architectural soil testing and survey work constituted commencement of work. The pertinent statutory provision allowed any lien to attach "subsequent to the time when the building, improvement or structure was commenced, or materials were commenced to be furnished." N.R.S. 108.225. The Nevada Supreme Court relied on the visibility requirement in Western Mortgage, supra, and found that the facts relied on for priority were insufficient to constitute commencement of work. The Court stated:

"Were we to hold otherwise, and permit mechanic's liens to accrue based on this work done prior to the commencement of construction, mechanic's liens could relate back to a time long before there were any visible signs of construction to inform prospective lenders inspecting the premises that liens had attached. Under such

circumstances, no prudent business man would be willing to lend money." Id at 84.

The issue of whether clearing the land of brush, debris and trees constitutes commencement of work in order to establish priority of a mechanic's lien was also resolved by the Arkansas Supreme Court in Clark v. General Electric Co., 243 Ark. 399, 420 S.W. 2d 830 (1967). The court interpreted commencement to mean "some visible or manifest action on the premises to be improved, making it apparent that the building is going up, or other improvement is to be made", id., at 833. The Court followed the visibility requirement established by a majority of states, which hold that "mere preparation of the land for the construction is not sufficient." On this rationale, the Court held that priority was not established.

Resolution of the same issue under a similar factual situation was considered in Diversified Mortgage Investors v. Gepada, Inc., 401 F.Supp. 682 (D.C. Ia 1975), where a mechanic's lien claimant sought priority over a recorded mortgage by attempting to establish commencement of work based on the following acts: (1) having a farmer mow the weeds off the soil of the lot, (2) spending four hours determining the existing ground elevations, and (3) removing six inches of top soil, weeds and vegetation. The Court in Diversified stated that Iowa follows those states adhering to the rule quoted in 57 C.J.S., Mechanic's Lien, § 179(b) supra, which states that commencement means the "visible commencement of actual operations." In Diversified, as in the instant case, the acts purported to constitute commencement of work were performed prior to a signing of the contract to construct the building on the lot.

Numerous other cases reach a similar conclusion, i.e., that preliminary site preparation is not commencement of work sufficient to create notice to a lender that liens have attached. Maule Industries v. Gaines Construction, 157 S.2d 835 (Fla. 1963) (removing grass and scarifying a portion of the land); Perkins Const. Co. v. Ten-Fifteen Corp., 545 S.W. 2d 494 (Tex. 1979) (clearing).

The author of the annotation entitled "What Constitutes Commencement of Building or Improvement for Purposes of Determining Accrual of Mechanic's Lien", 1 A.L.R. 3d 822 states at page 824 that:

It has been generally recognized that in order for the work done on the premises to constitute the commencement of a building under mechanic's lien statutes which state in effect that a mechanic's lien accrues to the lien claimants at the time the building is commenced, it is necessary that it become obvious from the work done on the premises that a building is going up, and the owner must have intended to construct a building at the time the initial work on the premises was begun. 4

[4. This very broad proposition is supported, at least impliedly, by the great majority of cases found throughout the annotation.]

The author goes on in § 5 and discusses numerous cases, including Rupp v. Cline, supra, where clearing, grading or filling had been commenced, each of which support the proposition that clearing, grading and filling are not sufficient to constitute commencement of work for priority to attach. The final case in the section, which is set forth as an exception to the majority rule, is the case of Mysawka v. Mullen, 73 Montgomery County Law Rptr. 497 (Montg. Co. Pa 1957), relied upon by Western General.

The Mysawka case is a county court decision whose only citation is in the ALR annotation. The fact that the Mysawka opinion has been in the annotation since 1965 when the volume was published and never been subsequently cited itself reflects upon the value of the case as precedent. The Utah Supreme Court has expressly rejected in Calder Bros., supra, the conclusion in Mysawka that the felling of trees creates priority. Any Pennsylvania mechanic's lien statute upon which the case may have been decided has been repealed (Pa. Code 49 § 1501, et. seq.) and there is no reason to believe that the case reflects current Pennsylvania law. Perhaps more significant about the Mysawka case is that it does not deal at all with the issue of priority as that term relates to mechanic's liens. In Mysawka, the issue was whether an agreement, allowed by statute, between the owner and general contractor precluding liens was binding on the claimant subcontractor so as to avoid his lien against the owner. No lender was involved in Mysawka. As against an owner of property, priority is not an issue. Priority is an issue only against claimants other than the owner.

Western General argues that the lien statute should be broadly construed in favor of lien claimants. Mechanic's liens are purely creatures of statute and are in derogation of general rules requiring interests in property to be recorded to constitute notice to third parties. It is also true that statutes should not be construed so as to defeat their intent. Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207 (1957). The intent of the Utah mechanic's lien statute as

expressed in Western Mortgage, supra, is to protect lien claimants where the work is such that there is notice on the property itself that work has commenced on the structure or improvement. There are also considerable rights of lenders at stake. In Aladdin Heating v. Trustees of Cent. States, 564 P.2d at 84 (Nev. 1977), the Nevada court specifically recognized that if mechanic's liens could relate back to a time before there were visible signs of construction, "no prudent businessman would be willing to lend construction money."

The trust deed of Home Savings and Loan is prior to the interest of the mechanic's lien claimants.

II

HOME SAVINGS AND LOAN IS ENTITLED TO
RECOVER ATTORNEY'S FEES AS THE
"SUCCESSFUL PARTY."

U.C.A. § 38-1-18 provides in full that:

In any action brought to enforce any lien under this Chapter, the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the Court which shall be taxed as costs in the action.

Home Savings was joined as a party defendant in each of the mechanic's liens actions and was ultimately a party defendant to six claims or crossclaims. Each of the six claimants sought to foreclose their mechanic's lien and thereby foreclose as against the trust deeds of Home Savings. Home Savings was required to retain counsel to defend its interests in the property or be foreclosed on a loan in excess of one million dollars. Home Savings was successful on each of the claims in the trial court.

After the trial court's ruling on the mechanic's lien claims, Home Savings moved for an award of attorney's fees only against the parties who had sought to foreclose Home Savings' interest. The issue was argued to Judge Hansen on November 3, 1986, (R. 700-729), and in an oral ruling (R. 721-725) the trial court declined to award attorney's fees. (The Judge commented during the hearing that he felt he might get reversed on appeal on the issue of attorney's fees. R. 728, l. 2-5).

It is clear from § 38-1-5 that the issue of priority is an integral part of any successful mechanic's lien foreclosure action. U.C.A. §38-1-5 specifically refers to priority as affecting not only lienholders but mortgages. Thus, the mechanic's lien claimant has two choices when he initiates his action: 1) he can join the owner and other lien claimants, or 2) seek foreclosure against everyone, including construction and mortgage lenders. If he elects the first course and is successful, he takes the property subject to the mortgage. In this case, the six claimants each attempted to establish priority over Home Savings' trust deed interest. As against Home Savings, they were clearly not successful.

It is clear in Utah that as between the owner and lien claimant, the successful party is to be awarded its attorney's fees. Palombi v. D & C Builders, 22 Utah 2d 297, 452 P.2d 325 (1969). The only new issue before this court is whether a mortgage lender can be included within the meaning of "successful party" as that term is used in § 38-1-18.

The argument will be made by Western General that § 38-1-18, when read in conjunction with § 38-1-17 (which provides in part that "as between the owner and the contractor, the Court shall apportion costs according to the right of the case . . .") and Shupe v. Menlove, 417 P.2d 246 (which states generally that 38-1-17 and 38-1-18 are to be read together " . . . and that when attorney's fees are awardable thereunder, they are to be treated as costs . . ."), precludes an award of attorney's fees to a lender. The argument ignores the broad language of §38-1-18.

There are no Utah cases which deny attorney's fees to a successful lender under § 38-1-18. Counsel is not aware of any case from any other jurisdiction with a statute similar to Utah's which denies attorney's fees to a lender who is successful in establishing priority in defense of a mechanic's liens foreclosure action.

The State of Washington has a mechanic's lien statute which includes in RCW 60.04.130 the following language:

" . . . The Court may allow to the prevailing party in the action, whether plaintiff or defendant, as part of the cost of the action, the monies paid for filing or recording the claim, and a reasonable attorney's fee in the Superior Court, Court of Appeals, and Supreme Court."

In the Washington case of Irwin Concrete, Inc. v. Sun Coast Properties, 653 P.2d 1331 (1982), the mechanic's lien claimants sought relief against the lenders and the owner on their mechanic's liens. The trial court determined, apparently pursuant to summary judgment, that the trust deed of the lender had priority with respect to the mechanic's liens which had been

filed. The Washington Court specifically ruled, at page 1338, that the lenders were entitled to recover their attorney's fees as the prevailing party in the lien foreclosure action based upon the statute. In addition, the lenders were awarded their attorney's fees on appeal.

At least two other states have implicitly determined under their mechanic's lien statutes that a successful lender is entitled to recover attorney's fees upon establishing priority. In the Oklahoma case of First National Bank of Ardmore v. Worthly, 714 P.2d 1044 (1985), a bank sued to foreclose its trust deed and was confronted with a counterclaim for a mechanic's lien determination, including the issue of priority. The trial court found co-equal priority and refused to allocate attorney's fees. Implicit in this decision is the notion that the fees would have been awarded if the priority issue had been determined in favor of the lender. The Oklahoma statute, OSA 42 §176 states: "In an action brought to enforce any lien, the party for whom judgment is rendered shall be entitled to recover a reasonable attorney's fee, to be fixed by the Court, which shall be taxed as costs in the action." In the Alaska case of Brand v. First Federal Savings & Loan of Fairbanks, 478 P.2d 829 (1970), a mechanic's lien claimant sued the lender to foreclose its mechanic's lien. Although the Court did not specifically address the issue of attorney's fees, it was implicit in the Court's decision that the lender was entitled to recover its fees.

There is no rational basis why, in a case wherein a mechanic's lien claimant seeks affirmative relief against a

lender, that the lender should not be entitled to recover its attorney's fees pursuant to U.C.A. §38-1-8 if it is successful in the defense of its trust deed. The lender's participation is not voluntary, it is a matter of survival as against a claim initiated by the mechanic's lien claimant. If the mechanic's lien claimant seeks relief only as against the owner, and the lender thrusts himself upon the scene, a rational basis may exist to deny the lender attorney's fees. Home Savings was not a voluntary party to these actions. In the case now before the Court, the mechanic's lien claimants failed to prove a crucial element of their action, their priority, and as between the lender and the lien claimant, the lender was clearly the "successful party," entitled to attorney fees.

There is nothing in U.C.A. §38-1-18 to indicate that it is intended to be limited in its scope. The reference to "successful party" is as broad as it can be. The unintended dilemma the trial court's decision creates for the mortgage lender is further evidenced by the fact that if a lien claimant prevails as against the lender, the lender has to pay the claimant's fees to save the trust deed.

Therein lies a second, and perhaps more significant, basis for reversing the trial court's order denying Home Savings its attorney's fees. The decision renders U.C.A. §38-1-18 unconstitutional.

Mechanic's lien statutes were created to give a remedy where none existed, i.e., to create an interest in real property where no recorded transfer has occurred. As enacted in Utah, the

statute affects not only the rights of property owners and lien claimants, but of mortgage lenders. (U.C.A. §38-1-5).

When the Utah mechanic's lien statute was first enacted, it included the following provision:

"In any action brought to enforce any lien under this chapter, where judgment is rendered for a lienholder, such lienholder shall be entitled to recover a reasonable attorney's fee, not to exceed twenty-five dollars, to be fixed by the court, which shall be taxed as costs in the action."

(emphasis added). Rev. St. §1400 (1898). Rev. St. §1394 (1898), similar to U.C.A. §38-1-17 (1953), provided for apportionment of costs between owners and contractors.

In 1899, the Utah Supreme Court was confronted with the claim that Rev. St. §1400 (1898), by limiting attorney's fees to a successful lienholder, was unconstitutional. Brubaker v. Bennett, 19 Utah 401, 57 Pac. 170 (1899). (Case included in Appendix.) In Brubaker, the plaintiff subcontractor was successful upon his claim and asked for attorney's fees pursuant to Rev. St. §1400 (1898). The defendant owner objected on the basis that §1400 was unconstitutional. The trial court and Supreme Court agreed:

"It is a fundamental principle of our government that all persons are entitled to equal rights and equal protection under the law, and that no law shall be enacted which discriminates against one party for the benefit of another. All laws, so far as the nature of the case will permit, should be uniform in their operation. This principle is expressed in the state constitution in this language: "In all cases where a general law can be applicable, no special law shall be enacted." Const. art. 6, §26, subd. 18. In the matter of attorney's fees, or costs in suits, a general law can be made applicable to

all parties to the litigation; but section 1400 of the Revised Statutes is not general, but confers the privilege upon a certain class of litigants of recovering as costs from the opposing party attorney's fees -- a privilege which none but the favored class of litigants can enjoy under the present laws of the state. Such a discrimination in favor of this class of litigants is violative of fundamental principles and the provisions of the state constitution.

The legislature subsequently revised §1400 to refer to "the successful party." Compiled Laws §1400 (1907). The legislative reaction was an obvious effort to remedy the constitutional defect.

The decision of the trial court denying Home Savings its attorney's fees places the constitutional defect back into the statute. Article VI, Section 26 of the Utah Constitution provides that:

No private or special law shall be enacted where a general law can be applicable.

To paraphrase Brubaker, a general law can be made applicable to all parties to the litigation. Home Savings was clearly made a party to the mechanic's lien litigation in an effort by the lien claimants, including Western General, to establish priority pursuant to U.C.A. §38-1-5. If Home Savings is precluded by §38-1-18 from recovering its attorney's fees, then §38-1-18 confers a privilege upon a certain class of litigants, lien claimants, of recovering attorney's fees as costs from the opposing party -- a privilege which a lender would not enjoy.

There is a strong presumption when interpreting statutes to give them a construction which renders them constitutionally sound. 16 Am. Jur. 2d, Const. Law §137, et seq., Utah Farm

Bureau Ins. Co. v. Utah Ins. Guar. Assn., 564 P.2d 751 (Utah 1977). U.C.A. §38-1-18 can be construed to be constitutionally sound simply by including in the term "successful party" any party, including a mortgage lender, which finds itself in the class of parties affected by mechanic's liens claims. (See Utah Farm Bureau Insur., supra at headnote 4, page 754.)

The unconstitutionality of any construction which precludes lenders from being awarded fees is further demonstrated in every case where a lien claimant is determined to have priority and is awarded attorney's fees, which the lender then has to pay to preserve its mortgage. This situation is clearly violative of the Fourteenth Amendment to the United States Constitution regarding equal protection of laws. (See Brubaker, supra p. 171) (Both constitutional defects were presented to the trial court in oral argument, R. 708 and 709.)

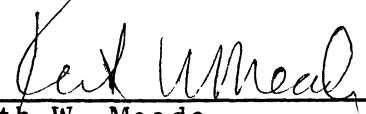
In this particular case, a third reason exists to support an award of attorney's fees. At the time the trial court made its ruling with respect to priority, Home Savings was actually the owner of Parcels A and B, the same having been previously foreclosed and purchased by Home Savings. (Trustee's deed is attached as Exhibit B in Appendix.) (R. 713, 714). As such, they were an "owner" of Parcels A and B, entitled to an award of attorney's fees under any interpretation of U.C.A. §38-1-18.

For each of the foregoing reasons, Home Savings is entitled to an award of attorney's fees, including fees incurred in this appeal to be shown in the district court.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's determination that Home Savings' trust deed has priority over the lien claim of Western General. This Court should reverse the trial court's denial of attorney's fees and remand for entry of fees incurred in the trial court, on the prior appeal, and on this appeal.

DATED this 11 day of June, 1987.



Keith W. Meade
COHNE, RAPPAPORT & SEGAL
Attorneys for Respondent
and Cross Appellant
Home Savings and Loan

MAILING CERTIFICATE

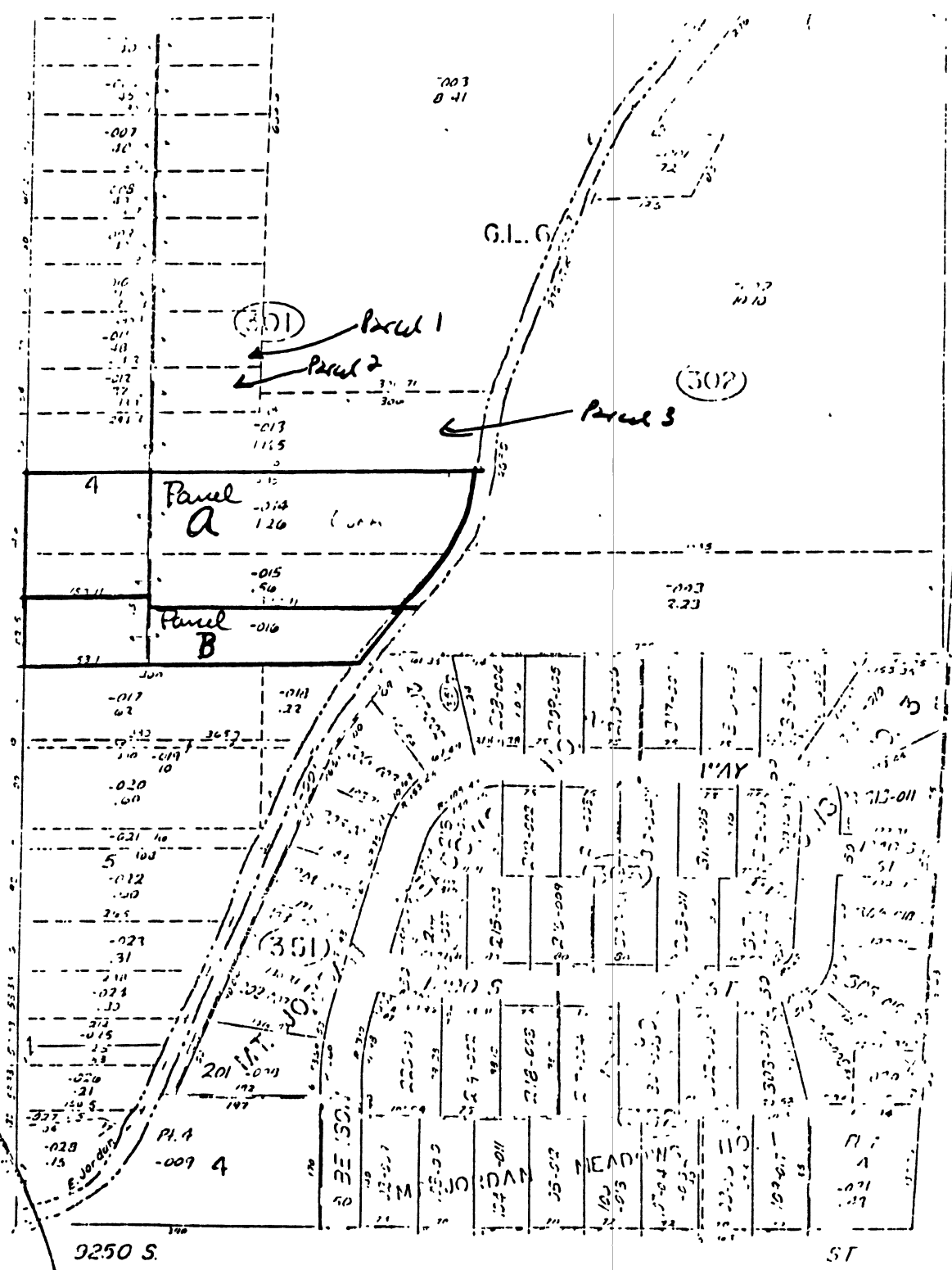
The undersigned hereby certifies that four true and correct copies of the foregoing BRIEF OF RESPONDENT AND CROSS APPELLANT, HOME SAVINGS AND LOAN were mailed, postage fully prepaid, on the 11 day of June, 1987 to the following:

Noall T. Wootton, Esq.
Attorney for Appellant and Cross Respondent
Western General Construction
8 North Center Street
P.O. Box 310
American Fork, Utah 84003

vic/Home

7-1-2
See Detail on pg 7-1-62

UT 89



23-5-32

4205914

950

Edward M. Hika

5600 ARTHUR BLVD
SEP

FEB 25 10 06 AM '85

RECORDED
SALT LAKE COUNTY,
UTAH

When recorded return to:

Home Savings and Loan
130 East 3300 South
Salt Lake City, UT 84115

Address of Grantee
Home Savings and Loan
130 East 3300 South
Salt Lake City, UT 84115

TRUSTEE'S DEED

This Deed, made by and executed by Home Savings and Loan, a Utah corporation, and in such capacity as Trustee (hereinafter called "Trustee"), under the hereinafter mentioned Deed of Trust, and Home Savings and Loan (herein called "Grantee");

W I T N E S S E T H:

WHEREAS, Pihl and Clark Enterprises, Inc., a Utah Corporation, by Trust Deed dated May 31, 1984, and recorded June 7, 1984, as Entry No. 3951698 in Book 5562, at Page 1970 and re-recorded on June 27, 1984, as Entry No. 3960410, in Book, 5568, at Page 1397 of Official Records, in the Office of the County Recorder of Salt Lake County, State of Utah, did grant and convey to said Trustee for the uses and purposes set out in said Deed of Trust, the property hereinafter described to secure, among other obligations, payment of a certain promissory note and interest, according to the terms thereof, made and executed by the said Pihl and Clark Enterprises, Inc., other sums advanced, and interest thereon, and,

WHEREAS, a breach and default occurred of an obligation for which the trust property was conveyed as security under the terms of said Deed of Trust in the particulars set forth in the Notice of Default hereinafter referred to, and

NO. 5738 PM 2662

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

WHEREAS, Trustee in consequence of said declaration of default, election and demand for sale, and in compliance with the terms of said Deed of Trust, did on September 26, 1985, file for record in the office of the County Recorder of Salt Lake, Utah, a Notice of Default, identifying the Trust Deed by stating the name of the Trustor named therein and giving the book and page where the same is recorded and a description of the trust property and containing a statement that a breach of an obligation for which the trust property was conveyed as security had occurred, and setting forth the nature of such breach and of the election to sell of cause to be sold such property to satisfy the obligation, and said Trustee on October 4, 1985, did mail by certified mail with postage prepaid, a copy of such Notice of Default with the recording date shown thereon, addressed to the Trustor and each person, a party thereto at the address of such person as set forth in the request for a copy of said Notice of Default in the Trust Deed and to each person whose name and address are set forth in a request therefor, if any, which had been recorded prior to the filing for record of the Notice of Default, directed to the address designated in said request; and

WHEREAS, a period of not less than three (3) months did elapse after the filing and giving of said Notice of Default as herein set forth, and said default not being cured and said Trust Deed not being reinstated, and

13-5738 REC 2683

WHEREAS, Trustee in consequence thereof and in compliance with the terms of said Deed of Trust, did execute its Notice of Trustee's Sale, stating that it, by virtue of the authority in it vested, would sell at public auction to the highest bidder for cash, in lawful money of the United States, the property particularly therein and hereafter described, said property being in Salt Lake County, State of Utah, and fixing the time and place of said sale as February 19, 1986 at 10:00 o'clock a.m. of said day, on the North front steps of the Courts Building, 240 East 400 South, Salt Lake City, Utah and said Trustee did cause a copy of said Notice of Trustee's Sale to be published once a week for three consecutive weeks on the following days, to wit: January 24, 1986, January 31, 1986, and February 7, 1986, in the SALT LAKE TIMES, a newspaper having general circulation, printed and published in Salt Lake County, Utah, in which County the property to be sold is situated; the last publication thereof being at least ten (10) days but not more than thirty (30) days prior to the day of sale as fixed in said Notice of Sale; and said Trustee did post copies of said Notice of Sale on January 21, 1986 being not less than twenty (20) days before the date of sale therein fixed, in a conspicuous place on the property to be sold and also in at least three (3) public places in the city or county in which the property to be sold is situated; and said Trustee did on January 24, 1986, mail by certified mail with postage prepaid, a copy of such Notice of Trustee's Sale to the Trustor and to each person, a party thereto, at the address of such person as set forth in the request for a copy of said Notice of Sale in the Deed of Trust and to each person whose name and address is set

BOOK 5738 PAGE 284

forth in a request therefor, if any, which had been recorded prior to the filing for record of the Notice of Default, referred to herein, directed to the address designated in said request, and

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

WHEREAS, Trustee did at the time and place of sale fixed as aforesaid, then and there sell, at public auction, to Grantee, Home Savings and Loan, a corporation, being the highest bidder therefor, the property hereinafter described for the sum of One Million Thirty Five Thousand Dollars and No Cents (\$1,035,000.00) paid in cash, lawful money of the United State of America by satisfaction of part of the indebtedness then secured by said Deed of Trust.

NOW THEREFORE, Home Savings and Loan, a Utah corporation, as Trustee, in consideration of the premises recited and of the sum above mentioned, bid and paid by Grantee, the receipt whereof is hereby acknowledged, and by virtue of the authority vested in it as Trustee by said Deed of Trust, does, by these presents, grant and convey unto Home Savings and Loan, a corporation, Grantee, but without any covenant or warranty, express or implied, all of that certain property situated in Salt Lake County, State of Utah, described as follows:

PARCEL A: Commencing at a point on the East side of State Street 139.8 feet East and 764 feet South of the Northwest corner of the Southwest quarter of Section 6, Township 3 South, Range 1 East, Salt Lake Base and Meridian; and running thence South 146 feet; thence East 153.1 feet; thence South 13.58 feet; thence East 335.11 feet more or less, to the West line of the right of way of the East Jordan Canal; thence Northeasterly along the West line of

BOOK 5738 PAGE 2865

said canal right of way to point due East of the point of commencement; thence West 530 feet, more or less, to the place of Commencement.

PARCEL B: Commencing at the Southwest Corner of Lot 9, Block 4, Sandy 5 Acre Plat, thence 82.5 feet North; thence 153.1 feet East, thence South 13.58 feet; thence East 335.11 feet, more or less, to a canal; thence along said canal to a point due East of the point of commencement; thence West to the point of commencement.

IN WITNESS WHEREOF, said Home Savings and Loan, a Utah corporation,, and in such capacity as Trustee, has caused its corporate name and seal to be hereto affixed this day of February, 1986.

HOME SAVINGS AND LOAN,
Trustee

By Thomas C. Corlew

Thomas C. Corlew,
Assistant Vice President

By Fred A. Smolka

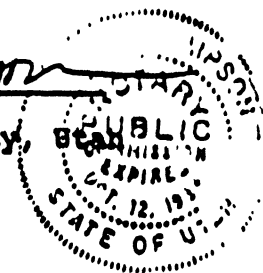
Fred A. Smolka
President

STATE OF UTAH)
) ss.
County of Salt Lake)

On the 21st day of February, 1986, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Thomas C. Corlew, and Fred A. Smolka who being by me duly sworn, each for himself and not for the other, did say that they are the Assistant Vice-President and President, respectively of Home Savings and Loan, a Utah corporation, and that the foregoing Trustee's Deed was signed in behalf of said corporation, by authority of its by-laws and that said corporation, as Trustee executed the same.

[Signature]
Notary Public
Residing in Salt Lake City, Utah

My Commission Expires:
10-12-88



5738 REC 2866



June 20, 1984

Pihl & Clark Enterprises
1347 Miller Ave.
Salt Lake City, Utah 84115

Reference: Self Storage Unit, Sandy, Utah
Phase 3

Gentlemen:

The following is our cost breakdown for the proposed properties development and facilities for Phase 3, and the specifications submitted.

	55,000 Sq.Ft. Facility cost	51,400 Sq.Ft. Facility Cost
Engineering	7,000	7,000
Permits	11,200	11,200
Hydrants	19,665	19,665
Sitework	41,000	41,000
Landscaping	7,200	7,200
Fencing	8,200	8,200
Kirby Building Systems	200,750	187,600
Partitions	41,250	38,550
Sprinkling System	6,000	6,000
Doors	96,950	88,250
Brick	11,250	11,250
Paint	15,500	15,000
Concrete Work	90,750	84,810
Curb & Gutter	11,100	11,100
Lighting	12,000	11,500
Insurance	900	900
Apartment stubbed up	2,500	2,500
Sub total	583,215	551,725

Payments to be on a percentage of completion basis every 30 days, less 10% retention. Payment to be made 10 days after receipt of approved invoice. Final payment of retention to be made 10 days after a final inspection and approval is made by the owner.

Pihl & Clark Enterprises

-2-

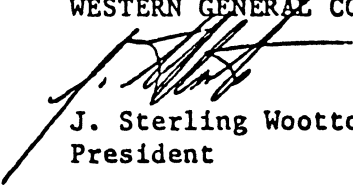
June 20, 1984

It is the intent of this proposal that the owner will be furnished with a turnkey project performed as expeditiously as possible.

If there are any questions, please contact this office.

Yours truly,

WESTERN GENERAL CONSTRUCTION, INC.



J. Sterling Wootton
President

JSW/km

UTAH CODE ANNOTATED 1953

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.

38-1-17. Costs—Apportionment—Costs and attorneys' fee to subcontractor.—As between the owner and the contractor the court shall apportion the costs according to the right of the case, but in all cases each subcontractor exhibiting a lien shall have his costs awarded to him, including the costs of preparing and recording the notice of claim of lien and such reasonable attorney's fee as may be incurred in preparing and recording said notice of claim of lien.

38-1-18. Attorneys' fees.—In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action.

THE
REVISED STATUTES
OF THE
STATE OF UTAH,
IN FORCE
JAN. 1, 1898.

1400. **Attorney's fee.** In any action brought to enforce any lien under this chapter, where judgment is rendered for a lienholder, such lienholder shall be entitled to recover a reasonable attorney's fee, not to exceed twenty-five dollars. to be fixed by the court, which shall be taxed as costs in the action. ['96, pp. 334-5.

THE
COMPILED LAWS
OF THE
STATE OF UTAH
1907

1400. **Attorney's fee.** In any action brought to enforce any lien under this chapter, the successful party shall be entitled to recover a reasonable attorney's fee, to be fixed by the court not to exceed \$25, which shall be taxed as costs in the action. Am'd '99, p. 81.

Art. VI

CONSTITUTION OF UTAH

Sec. 26. [Private laws forbidden.]

No private or special law shall be enacted where a general law can be applicable.

subject is the same when a case is submitted to the court below, without a jury, as when a jury is impaneled to try the cause. *Bank v. Earl*, 2 Okl. 617, 39 Pac. 391. Such testimony was produced upon the examination of Eldoreau Powell herself, who testified that she "had not signed the mortgage" in question; that she "had not authorized any one to sign it"; that she "did not know that a mortgage was given on that home for a couple of weeks afterwards"; that she was sick in bed, unconscious a part of the time, and had been sick for three weeks; that she remembered the parties coming in, but did not know what they came for; had no conversation with them, did not sign the mortgage and that nothing was said to her about signing her name to it; that she made no acknowledgment upon it, nor had ever consented to the signing of it; that it was her home and homestead, and the home and homestead of the family, and the only one they had and that neither she nor they had ever abandoned it, but that they had left it temporarily, having agreed to rent it for one year from about the 1st of March, 1897, and had gone to her father and mother, where her husband, Oren A. Powell, was, to find work. This evidence was supported by other facts and circumstances. The testimony abundantly "tended to support the findings" of the trial court and the finding will not be disturbed here. It cannot be disputed here that Eldoreau Powell did not join in the execution, and did not acknowledge the mortgage which purported to convey the land for the purposes of securing the payment of the debt then incurred by Oren Powell, and the mortgage was therefore void for all purposes from its inception—was so from the beginning,—because there is no question that the land was the homestead of the defendants at the time the mortgage purported to have been executed, and because the wife, as the trial court found, had never joined in its execution. It is argued, however, that when the family, after the execution of the mortgage by Oren A. Powell left the land, no intention having been proven that Oren Powell intended to return to it, since he was the head of the family, such leaving of the homestead for the period of a year, without the proven intention of returning, was an abandonment. If it should be sustained that such a leaving of the homestead was abandonment, it could not avail the plaintiff in error here, since there is no question that at the time of the execution of the mortgage by Oren A. Powell the land was the homestead of the family; and since the special findings of the court below, supported by evidence, show that the wife did not join in the mortgage, it was void from the beginning; and the subsequent abandonment, if, indeed, it was Oren Powell's intention never to return to the place, could have no effect to validate the mortgage or entitle the mortgagee to any remedy under it against the land included therein. *Ott v. Sprague*, 27 Kan. 620; *Bruner v. Bateman*, 68

Iowa, 483, 24 N. W. 9; *Shoemaker v. Collins*, 49 Mich. 597, 14 N. W. 559. And, the mortgage having been void from the beginning, and no fraud having been shown on the part of the wife, Powell had a perfect right to convey the land to his wife, although signed by himself alone. *Furrow v. Athey*, 21 Neb. 671, 33 N. W. 208; *Harsh v. Grimes*, (Iowa) 34 N. W. 441. The latter case declares that: "A deed by a husband to his wife of their homestead is void, unless the wife joins therein, thus executing a deed to herself of her own interest in the property." Code, § 1990, is relied upon to support this position. It provides that a deed of a homestead is not valid unless the husband and wife join therein. The case of a deed to the wife is not within the spirit of this section which surely cannot intend that the wife should do the vain and absurd thing of executing, as grantor, a deed to herself as grantee." The judgment of the court below will be affirmed. All the justices concur.

(19 Utah, 461)

BRUBAKER v. BENNETT et al.

(Supreme Court of Utah. April 29, 1899.)

MECHANIC'S LIEN—CLAIM BY SUBCONTRACTOR—NOTICE—ATTORNEY'S FEE—RECOVERED BY LIENHOLDER—SPECIAL ACT—CONSTITUTIONAL LAW.

1. Under section 1386, Rev. St., a subcontractor is not required to state in his notice of intention to claim a mechanic's lien any of the terms or conditions of the contract between the owner and the original contractor.

2. Section 1400, Rev. St., providing for the recovery by the lienholder, if successful, of an attorney's fee is a special law, in violation of subdivision 18, § 20, art. 6, Const., and therefore void.

Minor, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county. Ogden Hiles, Judge.

Action by G. T. Brubaker against J. H. Bennett and Clinie Bennett. Judgment for plaintiff, and defendants appeal. Plaintiff files cross appeal. Affirmed on both appeals.

W. R. Hutchinson, for plaintiff. Pierce Critchlow & Barrette, for defendants.

BASKIN, J. This is a suit to foreclose a subcontractor's mechanic's lien. A demurrer was interposed to the complaint on the ground that no cause of action was stated. The demurrer was overruled, and on the trial the admission of the notice of lien was objected to by the defendants on the ground that it was not in conformity with the provisions of section 1386, Rev. St. The objection being overruled, the defendants excepted. The ground of the demurrer urged by appellants' counsel is the same as the ground of said objection. The only defect of the notice claimed by the appellants is that it fails to state the price, terms, or conditions of the contract between the owner and the original contractor. The section of the statute referred to is as follows:

original contractor, within sixty days after the completion of his contract, and every person claiming a lien under the provisions of this chapter, must, within forty days after furnishing the last material or performing the last labor for any building, improvement, or structure, or for any alteration, addition to, or repair thereof, or performance of any labor in or furnishing any materials for any mining claim, file for record with the county recorder of the county in which the property or some part thereof is situated, a claim in writing containing a notice of intention to hold and claim a lien, and a statement of his demand, after deducting all just credits and offsets, with the name of the owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the material, with a statement of the terms, time given, and conditions of his contract, specifying the time when the first and last labor was performed, or the first and last materials furnished, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person." Rev. St. § 1386. Any notice which conforms to the provisions of this section is sufficient, and nothing more than a compliance with these provisions can be required of a lienholder in order to secure his rights to a lien. There is nothing in said section to justify the claim of the appellants that any lienholder, save the original contractor, is required to state in the notice the price, terms, or conditions of the contract between the owner and the original contractor. The only thing in this record which is required of the subcontractor is a "statement [in the notice] of his demand, after deducting all just credits and offsets, with the name of the owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, with a statement of the terms, time given, and the conditions of his contract." The subcontractor does not contract with the owner, but with the original contractor, and it is the latter contract which is required to be stated in the notice, with terms, time given, conditions, etc., when the subcontractor claims a lien. The notice in question does this, and in all other respects conforms to the statute.

We are therefore of the opinion that the demurrer and objection to the admission of said notice in evidence were properly overruled. At the trial of the case the plaintiff asked the court to allow an attorney's fee to be taxed as costs, in pursuance of section 1400, Rev. St., which is as follows: "In any action brought to enforce any lien under this chapter, where judgment is rendered for a lienholder, such lienholder shall be entitled to recover a reasonable attorney's fee, not to exceed twenty-five dollars, to be fixed by the court, which shall be taxed as costs in the action." It was admitted that \$25 was a reasonable attorney's fee, but the defendants objected to its allowance on the ground that said section violates

the provisions of the fourteenth amendment to the constitution of the United States, which prohibits a state from denying any person within its jurisdiction the equal protection of the laws. The court refused the request of plaintiff, and from such refusal the plaintiff appeals.

It is a fundamental principle of our government that all persons are entitled to equal rights and equal protection under the law, and that no law shall be enacted which discriminates against one party for the benefit of another. All laws, so far as the nature of the case will permit, should be uniform in their operation. This principle is expressed in the state constitution in this language: "In all cases where a general law can be applicable, no special law shall be enacted." Const. art. 6, § 26, subd. 18. In the matter of attorney's fees, or costs in suits, a general law can be made applicable to all parties to the litigation; but section 1400 of the Revised Statutes is not general, but confers the privilege upon a certain class of litigants of recovering as costs from the opposing party attorney's fees,—a privilege which none but the favored class of litigants can enjoy under the present laws of the state. Such a discrimination in favor of this class of litigants is violative of fundamental principles and the provisions of the state constitution. The decree of the court below in sustaining and foreclosing plaintiff's lien is affirmed, with costs, and the action of the court from which plaintiff took his cross appeal is also affirmed; and it is ordered that plaintiff pay the costs of the cross appeal.

BARTCH, C. J., concurs in the conclusion.

MINER, J. I am of the opinion that the demurrer should have been sustained, within the holding of *Morrison, Merrill & Co. v. Willard* (Utah) 53 Pac. 832. I dissent from that part of the opinion, but concur in other respects.

(19 Utah, 212)

CROFOOT v. THATCHER et al.

(Supreme Court of Utah. April 3, 1899.)

CONTRACTS—CONFLICT OF LAWS—CORPORATIONS—
LIABILITY OF STOCKHOLDERS—DEMAND
NOTES—LIMITATIONS.

1. *Lex fori* controls in respect to the time within which a cause of action must be enforced, but *lex loci contractus* controls the validity, interpretation, and effect of the contract sued upon.

2. When a demand note was given under the authority of section 3, c. 43, Comp. St. Neb., for the unpaid portion of the subscription price of stock in an insurance company organized under the laws of Nebraska, under section 4 of article 11, entitled "Miscellaneous Corporations," of the constitution of that state, no cause of action arose on the note until the insolvency of the corporation and until actual demand made for the amount of the note.

3. Under the statute and constitution of Nebraska, the parties must have intended the words "on demand," expressed in the note, to

230 Md. 656

Joseph Lewis GLADNEY

v.

WARDEN OF the MARYLAND
PENITENTIARY.

Post Conviction No. 63.

Court of Appeals of Maryland.

Feb. 15, 1963.

Before BRUNE, C. J., and HENDER-
SON, HAMMOND, PRESCOTT, HOR-
NEY, MARBURY and SYBERT, JJ.

PER CURIAM.

For the reasons given by Judge Manley
for denying relief below, this application for
leave to appeal is hereby denied.

230 Md. 573

Christopher A. RUPP et al., Trustees,
etc., et al.

v.

EARL H. CLINE & SONS, INC., et al.

No. 155.

Court of Appeals of Maryland.

Feb. 7, 1963.

Proceeding for distribution of proceeds
of a foreclosure sale under a deed of trust.
The Circuit Court, Frederick County, W.
Earle Cobey, J., granted mechanics' lien
claims priority over deed of trust and an
appeal was taken. The Court of Appeals,
Horney, J., held that removal of soil from
one part of a development to another for
dual purpose of grading one site to a
specified level and filling in the other to
required grade was at most a preparatory
operation and was not the "commencement
of a building," for purposes of giving grad-

ing contractor's mechanics' lien preference
over a subsequently recorded mortgage.

Order reversed and case remanded with
directions.

1. Mortgages ⇨151(3)

Before there can be the "commence-
ment of a building," which would give
mechanics' lien claimant a preference over
a recorded mortgage there must be a mani-
fest commencement of some work or lab-
or on the ground which everyone can readily
see and recognize as the commencement of
a building, and the work done must have
been commenced with intention and purpo-
se then formed to continue the work until
completion of the building and if either of
the elements is missing then there has been
no commencement of the building within
the lien statute. Code 1957, art. 63, § 15.

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

2. Mortgages ⇨151(3)

Removal of soil from one part of a
development to another for dual purpose of
grading one site to a specified level and fill-
ing in the other to required grade was at
most a preparatory operation and was not
the "commencement of a building," for pur-
poses of giving grading contractor's me-
chanics' lien preference over a subsequently
recorded mortgage. Code 1957, art. 63, §
15.

Walter C. Mylander, Jr., and Charles C.
W. Atwater, Baltimore (Carlyle Barton,
Jr., Baltimore, and Herbert L. Rollins,
Frederick, on the brief), for appellants.

Robert E. Clapp, Jr., and Benjamin B.
Rosenstock, Frederick (H. Reese Shoe-
maker, Jr., Frederick, on the brief), for
appellees.

Before HENDERSON, HAMMOND,
PRESCOTT, HORNEY and SYBERT, JJ.

HORNEY, Judge.

This appeal is from an order allowing the mechanics' lien claims of the claimants-appellees (Earl H. Cline and Sons, Inc., et al.) priority in the distribution of proceeds of a foreclosure sale under a deed of trust held by the trustees-appellants (Christopher A. Rupp and Sidney H. Tinley, Jr., trustees under deed of trust from James T. Galloway Company, a body corporate). Subsequent to the filing of the foreclosure proceedings by the trustees, the claimants filed a petition alleging that work done on the foreclosed premises had begun prior to the recording of the deed of trust and prayed that the lien of the trustees be subordinated to those of the claimants.

James T. Galloway and Alfred F. Flynn were the sole stockholders in equal shares of two corporations: The K. & G. Construction Company (K & G) and the James T. Galloway Company (Galloway).

In December of 1958, K & G purchased a fifty-acre tract of land in Frederick (from Frederick Homes, Inc.) to be developed for cottages and apartments. Preliminary subdivision plans for the whole development were prepared in March of 1959 and filed with the planning commission in April of that year. But, although the owners contemplated erecting apartment units for one hundred and twenty families on a part of the tract, they did not furnish detailed plans for the apartments at that time and the commission reserved its decision as to the apartments for further consideration.

Construction of the cottages was begun as soon as the deed for the tract from the seller to K & G was recorded in June of 1959. At or about the same time, the then owner applied to a mortgage broker for a loan to construct the apartments, but the formal application for financing the project was not submitted by the broker to the lender on behalf of Galloway (not K & G) as late as September 10, 1959.

During the summer of 1959, when K & G needed fill for the area around the cottages

then under construction, some was moved in June and July (by whom it is not clear) from an area that was not a part of the apartment site. But on September 5, 7, 8 and 9, K & G directed a contractor (Earl H. Cline and Sons, Inc.) to "borrow" additional fill from the site on which apartments were subsequently built for the cottage site. Before proceeding, Cline advised the owners that soil ought not to be moved from one area to another if houses were to be built on the former, and was informed that since apartments were to be constructed thereon, it would not be necessary to replace it. At this time Cline, who was operating under a contract with K & G relating to the cottage project, was not given any grading instructions but was told not to cut below the curb line of the nearby shopping center. Cline was paid for removing the soil as a part of the cottage project: the contract under which Cline later worked on the apartment project was not submitted until December 31, 1959. Pursuant to instructions, Cline, in removing some 2000 cubic yards of soil to a depth of from four to six feet in some places, leveled the apartment site to the approximate grade needed. And when the excavation work for the slab ground floor of the apartment project was begun five months later, little grading was required with respect to two of the apartment buildings, although some soil had to be returned to the apartment site from another part of the tract.

The proposed planning that had been filed in April, and was still pending before the planning commission, was abandoned in mid-September of 1959, and a new plan was filed seeking approval of the contemplated 120-unit apartment project on the same site. When the project and plan were approved by the commission, K & G sought rezoning of the 4½ acre apartment site from Residential C to Residential B. This was necessary in order to construct 120-unit apartments. Due notice having been given of the application for rezoning, the Mayor and Aldermen of Frederick held a

public hearing as advertised, but reserved their decision on the matter.

When rezoning had not been granted after the expiration of more than forty days—and the lender in the meantime had given its commitment for the financing of a 48-unit apartment project—the request for rezoning was withdrawn, the withdrawal was approved by the city, and, in November of 1959, Galloway, as owner, and K & G, as builder, applied for permission to proceed with building a 48-unit apartment project which did not require rezoning. The permit was finally issued on December 21, 1959, and about two weeks later a utility contract with the city was also approved, but a formal contract was never executed.

A deed from K & G conveying the apartment site to Galloway was executed on December 29, 1959, and was recorded on the 31st. On the same day Cline submitted its proposal (never formally accepted by either K & G or Galloway) for grading and excavating work at the apartment site,¹ but it was not until after traverse lines had been run and two apartment buildings were staked out early in February of 1960 that Cline began excavating for the foundations.

The construction loan was finally approved on January 12, 1960, the deed of trust and note were executed on January 25, and the deed of trust was recorded on January 27. In the afternoon of the same day an agent of the title insurance company and a salesman for K & G went to the premises and took photographs, which clearly showed that soil had been removed from the site sometime before, but did not show any stakes, trenches, excavations for foundations or other evidence of the commencement of a building.

The discovery on August 15, 1960, of the absence of utilities for the project, brought about foreclosure of the deed of trust and a sale of the apartment premises.

1. Specifically, Cline proposed to "strip and stockpile topsoil"; to "excavate and rough grade site"; to "excavate founda-

The chancellor, being of the opinion that limiting the commencement of a building to the digging of the foundation was to ignore modern building practices, found a continuing intention on the part of K & G and Galloway to erect apartments as soon as they acquired the necessary financing and authority to proceed and that the excavation work done in February of 1960 was a continuation of the grading work done in September of 1959, and decided that the claimants were entitled to priority over the trustees in the distribution of the net proceeds from the foreclosure sale.

While numerous primary and secondary questions are presented by the appeal, it is not necessary to consider all of them. The principal question is what constitutes the commencement of a building within the meaning of the mechanics' lien law.

It is clear that if any lienable work was done for or about the apartment site before the recording of the deed of trust which could be said to be the "commencement of [the] building," then the liens of the claimants would "be preferred." Code (1957), Art. 63, § 15. But, as we see it, that was not the case here.

At the outset we point out that § 1 of Art. 63, which defines to what and for what a mechanics' lien attaches, has been amended from time to time, to include many things, besides work done on and materials furnished for a building, such as services for "grading, filling and landscaping." But the provisions of § 15 (of Art. 63), relating to preference over other liens, which were enacted by Ch. 205 of the Laws of 1838, have never been changed, except for an amendment as to form made by Ch. 287 of the Laws of 1845.

The effect and meaning of the provisions of § 15 of Art. 63 were considered and construed by this Court in three early cases. In the first of these, *Brooks v. Lester*, 36

tions (no footers)"; and to "replace topsoil and fine grade as per plans."

Md. 65 (1872), where the question was whether the driving of pegs into the ground in laying out a house was sufficient to constitute the beginning of construction, it was said, among other things, that the commencement of a building is the first work done on the ground which is made the foundation of the building and forms a part of the work suitable and necessary for its construction.

In the second case, *Jean v. Wilson*, 38 Md. 288 (1873), where the question was whether the construction of foundation walls at the time building lots were being filled and graded (with the intention of erecting houses thereon in the future) in order to avoid the expense of subsequent excavation for cellars constituted the commencement of a building, it was held that the mortgagees were entitled to priority.

Finally, in *Kelly v. Rosenstock*, 45 Md. 389 (1876), where the driving of stakes and the digging away of soil to level the ground prior to beginning construction were held not to be the commencement of the building, the principles of law laid down in the two preceding cases were restated thus (at p. 392):

"We have said in *Brooks v. Lester*, * * * that what the law means by the 'commencement of the building' is 'some work or labor on the ground, such as beginning to dig the foundation, or work of like description, which every one can readily see and recognize as the commencement of a building,' and in *Jean v. Wilson*, * * * we held that such work must be done with the intention and purpose *then formed* to continue it to the completion of the building, and that the work done on the ground without any design or purpose of constructing a building *at that time*, and which was interrupted, is not sufficient."

[1] These cases make it clear that before there can be the commencement of a building which would give a mechanics' lien

claimant a preference over a recorded mortgage there must be (i) a manifest commencement of some work or labor on the ground which every one can readily see and recognize as the commencement of a building and (ii) the work done must have been begun with the intention and purpose then formed to continue the work until the completion of the building. If either of these elements is missing then there has been no "commencement of the building" within the meaning of § 15 of Art. 63.

The cases in other jurisdictions are generally in accord. See, for example, *Fryman v. McGhee*, 108 Ohio App. 501, 163 N.E.2d 63 (1958); *Connecticut Gen. Life Ins. Co. v. Birzer Bldg. Co.*, 101 N.E.2d 408 (Ohio Com.Pl.1950); *Ustruck v. Home Association*, 166 Minn. 183, 207 N.W. 324 (1926); *North Shaker Blvd. Co. v. Harriman Nat. Bank*, 22 Ohio App. 487, 153 N.E. 909 (1924); *Kiene v. Hodge*, 90 Iowa 212, 57 N.W. 717 (1894); *Pennock v. Hoover*, 5 Rawle 291 (Pa.1835). See particularly *National Lumber Co. v. Farmer & Son, Inc.*, 251 Minn. 100, 87 N.W.2d 32 (1957), where the Court, in finding that the erection of a fence around a tree on the premises (that had been paid for prior to the execution of the construction mortgage) was not the actual and visible beginning of the building but was several and separate from the work done on the house, had this to say (at p. 36 of 87 N.W.2d) with regard to the transactions:

"[T]he line of distinction is whether or not the improvement bears directly on the construction of the building rather than whether it is a part of the overall project involved. * * * And where excavation is involved, it appears that the excavation itself or something directly connected therewith, rather than any prior activity, constitutes the beginning of the visible improvement."

[2] It may be that the abandonment of the 120-unit apartment project, and the undertaking to build the 48-unit apartment

project instead, was such a change of plan as would, in any event, prevent the mechanics' liens from relating back to the time when the apartment site was graded or leveled in the early part of September of 1959, but even if it is assumed (for the purposes of this case) that there was no substantial change of plan and that the owner and builder had a continuing intention—if and when they could get financing and permission—to erect apartments of some type, we think it is apparent that the removal of soil from one part of the development to another even for the dual purpose of grading one site to a specified level and filling in the other to the required height was at most a preparatory operation that was not the "commencement of the building." While the removal of soil had the effect of leveling the apartment site, that fact did not constitute *commencement* for the purpose of fixing the time to which a lien could relate. *Kelly v. Rosenstock*, supra. Nor did the grading or leveling—since there was no work on the ground which everyone could readily see and recognize as the commencement of a building, *Brooks v. Lester*, supra—have the effect of putting the party making the construction loan on notice that the building had been commenced, and we so hold.

To hold otherwise would be contrary to the previous decisions of this Court. If any change in the meaning and effect of § 15 (of Art. 63) is either desirable or required that is a matter for the legislature, not the courts, to consider.

With this holding we do not reach the remaining questions presented by the trustees-appellants concerning the requirement of notice to an owner of intention to claim a lien and the entitlement of a claimant to a lien for grading a public thoroughfare into and through the apartment site. Nor is it necessary—since it appears that taxes for the then current year had been paid in advance—for us to consider the contention of the claimants-appellees that the lender made further advances to the borrower after it had defaulted. Similar contentions were

made and decided in *Rupp et al., Trustees v. M. S. Johnston Co.*, 226 Md. 181, 172 A.2d 875 (1961).

Order reversed and case remanded for the entry of an order in conformity with this opinion; the appellees to pay the costs.



230 Md. 596

James Omar TULL

v.

STATE of Maryland.

No. 185.

Court of Appeals of Maryland.

Feb. 12, 1963.

The defendant was convicted in the Circuit Court for Dorchester County, W. Laird Henry, C. J., and E. McMaster Duer, A. J., of first-degree murder, and he appealed. The Court of Appeals, Marbury, J., held that defendant was not entitled to separate trial on issue of insanity, and that error, if any, in refusing challenge to array after selected and prospective jurors heard a prospective juror state that he thought defendant was guilty was remedied by indications of selected juror and prospective jurors that that statement would not affect their opinion.

Affirmed.

1. Criminal Law \S 1166½(8)

Error, if any, in refusing challenge to array after selected and prospective jurors heard a prospective juror state that he thought defendant was guilty was remedied by indications of selected juror and prospective jurors that that statement would not affect their opinion.

and his advantaged position, that in such matters he is allowed a comparatively wide latitude of discretion which will not be disturbed in the absence of a clear abuse, a circumstance which we have not found here. *Anderson v. Anderson*, 18 Utah 2d 286, 422 P.2d 192 (1967); *Frank v. Frank*, 18 Utah 2d 228, 419 P.2d 199 (1966); *Wilson v. Wilson*, 5 Utah 2d 79, 296 P.2d 977 (1956). This is also true of attorney fees which it is likewise the trial court's prerogative to fix. *Christensen v. Christensen*, 18 Utah 2d 315, 422 P.2d 534.

Affirmed. Costs to defendant (respondent).



424 P.2d 437

WESTERN MORTGAGE LOAN CORPORATION, a corporation, Plaintiff
and Respondent,

v.

COTTONWOOD CONSTRUCTION COMPANY, a corporation et al., Defendants,
Oscar E. Chytraus Company, Inc., a corporation,
Gibbons & Reed Concrete Products Company, a corporation,
Richard P. Garrick, **Boise Cascade Corporation**, a corporation,
Defendants and Appellants.

No. 10516.

Supreme Court of Utah.

Feb. 27, 1967.

Action involving priorities of construction mortgage and mechanics' liens. The

Third District Court for Salt Lake County, Aldon J. Anderson, J., made findings as to relative priorities of mechanics' lienors and mortgagee, and the lienors took an interlocutory appeal. The Supreme Court, Tuckett, J., held that construction money mortgage providing that mortgage will also secure additional loans made by the then holder of the note secured to the then owner of the real estate described, provided that no such additional loan would be made if the making thereof would cause the total indebtedness secured to exceed the amount of the original indebtedness, created obligation on part of lender to pay over funds in accordance with borrower's directions and mortgagee had priority for monies actually advanced under mortgages over liens for materials furnished subsequent to recording of mortgages.

Affirmed.

Henriod, J., dissented in part.

I. Mortgages 151(3)

Construction money mortgage providing that mortgage would secure additional loans made by the then holder of the note secured to the then owner of the real estate described but providing that no such additional loan would be made if the making thereof would cause the total indebtedness secured to exceed the amount of the original indebtedness, created obligation on part of lender to pay over funds in accordance with borrower's directions, and mortgagee

thus had priority for monies actually advanced under mortgage over liens for materials furnished subsequent to recording of mortgage. U.C.A.1953, 38-1-5.

2. Mechanics' Liens ⇨173

Statute providing for mechanics' lien upon "commencement to do work or furnish materials on the ground" is limited to the home or other structure which is being or about to be built upon the land, and liens for labor or materials furnished in off-site improvements in connection with laying out and construction of facilities used in connection with subdivision as a whole would not relate back and take effect as of time first work was done in respect to laying out the subdivision and the installation of water lines, sewers, curbs and gutters and street paving. U.C.A.1953, 38-1-5.

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

3. Mechanics' Liens ⇨183

Presence of materials on building site or evidence on the ground that work has commenced on structure or preparatory thereto is notice to all the world that liens may have attached, however, off-site construction in developing subdivision for building sites would not necessarily bring to attention of lender that someone might be claiming lien to particular lot, especially where lender advances construction money to build home long after subdivision has been developed. U.C.A.1953, 38-1-5.

VanCott, Bagley, Cornwall & McCarthy, Fabian & Clendenin, Cannon, Duffin & Pace, Mark & Schoenhals, Neslen & Mock, Salt Lake City, for appellants.

Halliday & Halliday, Backman, Backman & Clark, Ray Quinney & Nebeker, Salt Lake City, for respondent.

TUCKETT, Justice.

This case is now before the court on an interlocutory appeal. It involves the relative priorities of mechanics lienors' and a construction mortgage which the plaintiff and respondent seeks to foreclose on lot 10, Lazy Bar Subdivision of Salt Lake County.

The district court made certain rulings of which the following two are the subject of this appeal:

1. That the documents evidencing the mortgage transaction between the plaintiff-respondent, Western Mortgage Loan Corporation and the defendant, Cottonwood Construction Company, provided for obligatory or nonvolitional advances, and that such advances together with attorneys fees and costs take priority as of the time of the recording of the mortgage.

2. A denial of the mechanics lienors' motion for a partial summary judgment to the effect that certain work constituted the "commencement to do work or furnish materials on the ground for the structure or improvement" within the meaning of Section 38-1-5. U.C.A.1953.

The work of laying out and developing the subdivision, including engineering, installing water mains, sewer mains and laterals, curb and gutter, surfacing streets and other off-site construction was accomplished by Cottonwood Construction Company (the mortgagor) and its predecessors. The lateral sewer line installed on Lot 10 terminated inside the lot. The sewer and lateral were completed about January 1, 1961. Water mains were completed about August, 1962, streets, curb and gutter were commenced in 1961 and completed in 1962.

The Mountain States Telephone and Telegraph Company erected utility poles in the subdivision, including one on Lot 10.

Application for a construction loan was made to Western Mortgage Loan Corporation and approved. A note and mortgage in the amount of \$15,750.00 were executed October 29, 1962, and the mortgage was recorded that day.

A separate loan agreement was entered into between Western and Cottonwood Construction Company, which provided in part that in event of default on the part of the mortgagor, Western was released from all further obligations to the borrower, or in the alternative, it could take possession of the premises, finish the improvements and charge the costs to the borrower to be secured on the note and mortgage.

When it later became apparent that Cottonwood had misapplied funds advanced by Western, the latter elected to complete the home. At the time Western took over the construction it had advanced approximately \$9,500. An additional sum of about \$5,000 was used to complete the home on Lot 10.

[1] A provision of the note and mortgage is as follows: "This mortgage shall also secure additional loans hereafter made by the then holder of the note secured hereby to the then owner of the real estate described herein, provided that no such additional loan shall be made if the making thereof would cause the total indebtedness secured hereby to exceed the amount of the original indebtedness stated herein."

It is the appellants' contention that the language of the note and mortgage quoted above provided for nonvolitional or nonobligatory advances and that each advance made thereunder takes priority only as of its date.

Under the construction loan agreement Western was obligated to pay out the funds as the building progressed. We are of the opinion that the agreement to disburse the funds created an obligation on the part of lender to pay over the funds in accordance with the borrower's directions.¹ We see no distinction between the mortgage in *Utah Savings & Loan Association v. Mc-*

1. *Utah Savings & Loan Association v. Mecham*, 12 Utah 2d 335, 366 P.2d 598.

cham² and the mortgage before us in this case. Under the terms of the loan agreement Western was obligated to deposit the net proceeds of the loan in a separate account to be expended in accordance with the agreement. The mortgage provides for additional loans to be secured by the mortgage, nevertheless, the instrument is for a single fixed amount, and no additional loans were in fact made.

The appellants' second assignment of error relates to the court's denial of the motion for summary judgment based upon a finding that the facts set forth in the supporting affidavits did not constitute "commencement to do work or furnish materials on the ground for the structure or improvement" within the meaning of Section 38-1-5 U.C.A.1953. The appellants claim they are entitled to have their liens relate back and take effect as of the time the first work was done in respect to laying out the subdivision and the installation of water lines, sewers, curb and gutters and street paving.

[2,3] We are not inclined to give the statute such a broad meaning as contended for by the appellants. We are inclined to the view that the legislature intended the language "commencement to do work or

furnish materials on the ground" to be limited to relate to the home or other structure which was being or about to be built upon the land. To tack the liens for labor or materials that went into the construction of the house to the liens that may have arisen for labor and materials furnished in off-site improvements in connection with the laying out and construction of facilities used in connection with the subdivision as a whole would be going beyond the intent of the statute. The problem is one of notice. The presence of materials on the building site or evidence on the ground that work has commenced on a structure or preparatory thereto is notice to all the world that liens may have attached. However, the off-site construction in developing the subdivision for building sites would not necessarily bring to the attention of a lender that someone is claiming a lien on a particular lot in the subdivision. This is especially true as in this case, where the lender advanced money to build a home long after the subdivision had been laid out and developed. It is apparent that the persons who supplied labor or materials for the construction of roads, sewers, etc., could have filed liens for unpaid balances due them, if any. The erection of the home was separate and sev-

2. Ibid; Valley Lumber Co. v. Wright, 2 Cal.App. 288, 84 P. 58; Home Savings & Loan Association v. Burton, 20 Wash.

688, 56 P. 940; see also anno. 76 A.L.R. 1402; 80 A.L.R 2d 191; 57 C.J.S. Mechanics Liens § 205, p. 774.

erable from the earlier work in developing the subdivision.³

The orders and rulings of the district court are affirmed. Costs to respondent.

CALLISTER and ELLET, JJ., concur.

CROCKETT, Chief Justice (concurring specially):

I agree that under the facts as disclosed in this case a mortgage for a definite amount, which is recorded prior to the attachment of any lien rights, should under normal circumstances take preference up to the amount that is paid out under the terms of the recorded mortgage agreement. But I desire to note that there may be situations in which the lending institution is holding money not yet advanced on a building, when it acquires actual knowledge that the builder is diverting money to some other purpose, and knows that the laborers or materialmen are not being paid and will not be paid. Under such circumstances the financier certainly should not be permitted to go on paying the money to a builder and thus in effect assist in cheating the laborers and materialmen out of their pay and preclude them from the right to lien protection. See dissenting opinion of Jones, District Judge, in *Utah Savings & Loan Association v. Mecham*, 12 Utah 2d 335, 366 P.2d 598.

3. *National Lumber Co. v. Farmer & Son, Inc. et al.*, 251 Minn. 100, 87 N.W.2d 32; *Rupp v. Earl H. Cline & Sons, Inc. et*

HENRIOD, Justice (concurring and dissenting):

I concur in that portion of the main opinion with respect to commencement of work, etc., but dissent from that portion having to do with priority of liens of materialmen.

The main opinion says, "We see no distinction between the mortgage in *Utah Savings & Loan Association v. Mecham*." This statement is disarming. True, there is no difference in the *recorded* mortgage, upon which Utah Savings relied, and the one here. The fallacy of the main opinion's conclusion lies in its assumption that the *cause of action* in the Utah Savings case was identical to this present Western Mortgage case. The former was based on the *recorded* mortgage, while in this case it was based on an *unrecorded collateral* agreement smuggled to the bosoms of the mortgagor and mortgagee, without any opportunity for the materialmen to take a look-see.

The cases are not the same. In Utah Savings, materialmen could rely on the record. In our present case the main opinion charges materialmen with notice of an unrecorded, independent agreement. The *recorded* mortgage in Utah Savings *said* advancement of moneys by the mortgagee was *obligatory*. The *unrecorded collateral* agreement in the present case clearly was

al., 230 Md. 573, 188 A.2d 146, 1 A.L.R. 3d 815.

not obligatory, but volitional. A materialman may not deliver a two-by-four piece of plywood if he knew he could not rely on the recorded promise of the mortgagee to pay the mortgagor as represented, but would be bound by a secret, unrecorded agreement that would permit the mortgagee to cancel the recorded promise five minutes after it was recorded, an incident beyond the ken of a materialman. To conclude otherwise does not dignify the recording act.



424 P.2d 440

William C. JENSEN, Plaintiff,

v.

UNITED STATES FUEL COMPANY and the
Industrial Commission of Utah,
Defendants.

No. 10600.

Supreme Court of Utah.

March 1, 1967.

Original proceeding seeking reversal of order of Industrial Commission denying application for workmen's compensation benefits. The Supreme Court, Crockett, C. J., held that determination of Commission that act of claimant in bumping his back while working in defendant's mine was not significant factor in causing his back condition

was supported by substantial evidence and that Commission's denial of award of benefits was not arbitrary or capricious.

Affirmed.

1. Workmen's Compensation ⇐1358, 1362

Workmen's compensation claimant must show, as predicate to his recovery, that he suffered claimed accident arising out of or in course of his employment and that it proximately caused his injury.

2. Workmen's Compensation ⇐1935

On review of order of Industrial Commission denying application for workmen's compensation benefits, Supreme Court would assume that Commission believed evidence and reasonable inferences therefrom favorable to employer's position.

3. Workmen's Compensation ⇐1305

It is not prerogative of panel appointed to conduct medical examination of workmen's compensation claimant to encroach upon authority vested in Industrial Commission to make findings of fact and render decision on application, but rather, its proper purpose is limited to medical examination and diagnosis, evidence of which is to be considered by Commission in arriving at its decision. U.C.A.1953, 35-1-77, 35-1-85.

4. Workmen's Compensation ⇐1492

Determination of Industrial Commission that act of claimant in bumping his back after crawling under machine while working as mechanic in defendant's mine