

1985

Worthington and Kimball Construction Company,  
a Utah general partnership, Gary Worthington and  
Edwin N. Kimball, general partners v. C and A  
Development Company, an Arizona corporation,  
C and A Enterprises, an Arizona partnership, First  
Interstate Bank of Arizona, N.A., Stewart Title  
Company of Salt Lake City : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

20674/  
WORTHINGTON & KIMBALL CONSTRUCTION :  
COMPANY, a Utah general partnership, :  
GARY WORTHINGTON and EDWIN N. KIMBALL, :  
general partners, :

Plaintiffs/Appellants, :

vs. :

C & A DEVELOPMENT COMPANY, an :  
Arizona corporation, C & A ENTERPRISES, :  
an Arizona partnership, FIRST INTERSTATE :  
BANK OF ARIZONA, N.A., STEWART TITLE :  
COMPANY OF SALT LAKE CITY, :

Defendants/Respondents. :

NO. 20674

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APPELLANT'S BRIEF

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Appeal from the Judgment of the Second  
District Court for Weber County  
The Honorable Ronald O. Hyde

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Security Title Company

**FILED**  
NOV 8 1985

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APPELLANT'S BRIEF

---

STATEMENT OF CASE

This action arises out of the construction of a two million dollar building in Ogden, Utah to house a manufacturing process. The Arizona developer, C & A Development and C & A Enterprises (hereinafter "C & A"), failed to pay the Utah general contractor, Worthington & Kimball, the balance due on the construction contract of approximately \$400,000.00. Pursuant to an arbitration agreement in the construction contract, the parties arbitrated the claims of Worthington & Kimball and the developer's counterclaim of over one million dollars. The panel of arbitrators awarded Worthington & Kimball \$377,132.00 plus interest. Worthington & Kimball sought confirmation of the arbitration award and enforcement of its mechanic's lien on the subject property.

### DISPOSITION IN THE LOWER COURT

The trial court confirmed the arbitration award in favor of Worthington & Kimball with the sole modification of a reduction in the interest rate provided in the arbitration award. The trial court denied the foreclosure of Worthington & Kimball's mechanic's lien on the basis that the lien was not properly perfected due to a defective verification.

### RELIEF SOUGHT ON APPEAL

Worthington & Kimball seeks relief in three particulars. First, Worthington & Kimball seeks a determination by this court that its mechanic's lien substantially complies with the verification requirement. Second, in the alternative, that the 1985 amendment to the mechanic's lien statute repealing the verification requirement be applied to the instant case. Third, that the interest rate awarded by the arbitration panel be reinstated.

### STATEMENT OF FACTS

In July of 1980 C & A Development Company and Worthington & Kimball entered into a contract for the construction of a building to house the manufacturing process for Permaloy Corporation. (R. 1, R. 119, Ex. P-2) C & A Development Company, an Arizona corporation, subsequently assigned the contract to C & A Enterprises, an Arizona partnership. (R. 1120) Affiliates of C & A had recently acquired controlling interest in Permaloy Corporation. Payments were made by C & A to Worthington & Kimball with little difficulty until the conclusion of the project. Worthington & Kimball submitted its last pay request in November of 1981 for the sum of \$445,833.00. (Ex. R. 1127, P-214) C & A failed to pay the balance due on the contract and asserted various and sundry reasons why it did not have to make the final payment. Near the completion of the project First Interstate Bank of Arizona loaned C & A \$2,300,000.00

secured by a Trust Deed on the subject property dated November 1, 1981 recorded November 30, 1981. (R. 1120)

Worthington & Kimball had never before filed a mechanic's lien on this or any other project. A mechanic's lien, however, had been filed on this project by a subcontractor of Worthington & Kimball. Said mechanic's lien was prepared by the law firm of Ray, Quinney and Nebeker. (Ex. P-217) Worthington & Kimball using said mechanic's lien as a guide, prepared a mechanic's lien of their own. (Ex. P-219) Edwin Kimball, one of two general partners of Worthington & Kimball, took said mechanic's lien together with documents from which he could establish the first and last date of performance of work and appeared before a notary public employed at Otto Buener & Co. (R. Partial Transcripts of Testimony of Edwin Kimball, pages 2 - 5 and 2 - 9) Mr. Kimball's testimony was uncontroverted that: (1) he appeared before the notary public with the documents that he had brought; (2) the notary wanted to see Mr. Kimball's driver's license to compare signatures; (3) the notary informed Mr. Kimball that the notary seal was for the purpose of identifying Mr. Kimball and his oath; (4) that Mr. Kimball had taken the oath and properly signed the lien; (5) that Mr. Kimball was informed by the notary that affixing his seal to the lien stipulated that Mr. Kimball had appeared before him, and under oath, had signed the lien and indicated that it was true and correct and that Mr. Kimball had personal knowledge of its contents; and (6) that Mr. Kimball told the notary that the contents of the lien were true. (R. Partial Transcripts of Testimony of Edwin Kimball, pages 2 - 5 and 2 - 9) Mr. Kimball then proceeded to file the mechanic's lien in the Weber County Recorder's office.

Worthington & Kimball continued to try to obtain payment of the balance due on the contract, but its efforts were in vain. Worthington & Kimball then initiated a demand for arbitration on May 25, 1982, before the American Arbitration Association, pursuant to the contractual provision. Worthington & Kimball subsequently obtained counsel who filed a complaint for breach of contract and for foreclosure of the previously

filed mechanic's lien. (R. 1) Simultaneously, counsel filed a motion to stay said proceedings pending the determination of the contractual issues in the arbitration proceedings. (R. 8)

The arbitration panel was chaired by the senior partner of the Salt Lake City law firm of Fabian & Clendenin, Peter W. Billings. George E. Lyman, Esq., and B. Lue Bettilyon, an experienced contractor, also served on the panel. (R. 44) C & A asserted a counterclaim in excess of a million dollars. The arbitration consisted of 17 days of hearing during which in excess of 20 witnesses were called, including several expert witnesses. The transcript of the proceedings exceeded three thousand pages. The panel also made a visit to the construction site. Both parties to the arbitration filed extensive post hearing and reply briefs. On November 7, 1983 the arbitration panel awarded Worthington & Kimball the sum of \$377,131.00 together with interest at the rate of fifteen percent (15%) per annum from December 1, 1981 until paid by C & A (R. 44).

C & A refused to pay the sum awarded. Worthington & Kimball filed a motion in the pending action to confirm the arbitration award. (R. 41) Said arbitration was confirmed by order of the trial court on January 23, 1984. (R. 166) Worthington & Kimball then sought to foreclose its mechanic's lien. The issues were tried to the court during a four day trial. The court found (1) that Worthington & Kimball in the performance of its contract with C & A performed the first work on July 15, 1980 and did the last work on November 12, 1981 (R. 1122); (2) that all of the work performed during said time period was necessary to complete the contract between Worthington & Kimball and C & A together with appropriate change orders (R. 1122); (3) that the work performed during the months of August, September, October and November of 1981 was required under the terms and provisions of the contract between the parties and was made in pursuance of the natural and reasonable fulfillment of Worthington & Kimball's obligation under its contract and was not made for the purpose of extending

the time of filing a lien (R. 1126-27); (4) that the work was not done a long time after the principal work had been completed but was performed within the time frame for the reasonable completion of the contract between the parties and was not delayed for the purpose of extending time to file a notice of lien (R. 1127) and; (5) that the items of work were not trivial or minor but were made in good faith to complete the contract between the parties (R. 1127).

The court also found that the amount due and owing to Worthington & Kimball by C & A was the sum of \$377,132.00 of which \$2,355.00 was personal property for which a mechanic's lien would not apply leaving a balance due and owing subject to the Utah mechanic's lien statute of \$374,776.00. (R. 1130)

The court found that the mechanic's lien of Worthington & Kimball was not properly verified and was therefore null and void. (R. 1130, 1132) The court also held that it appeared that the 15% interest awarded by the panel of arbitrators was a penalty and therefore reduced the prejudgment interest rate to ten percent (10%) per annum. (R. 1130) During the pendency of the proceedings, Pemaloy Corporation vacated the premises. First Interstate Bank of Arizona subsequently foreclosed on the property by foreclosing its Trust Deed.

#### SUMMARY OF ARGUMENT

The jurat of the mechanic's lien filed by Worthington & Kimball, the unpaid general contractor, substantially complies with the requirements of Utah Code Section 38-1-7 (1953). The fact that the jurat does not specifically mention the word "oath" is not fatal since the jurat states that Edwin Kimball, a partner in Worthington & Kimball, read the contents of the lien and that the contents were true of his own knowledge. This is especially true since Edwin Kimball discussed the oath with the notary public and his swearing to the truth of the contents of the lien so as to comply with the requirements for an oath set forth in Coleman v. Schwendiman, 680 P.2d 29 (Utah 1983).



In the alternative only, assuming that under the pre-1985 amendments to Utah Code Section 38-1-7 this Court is of the opinion that a defect exists which voids the \$374,000 lien of the general contractor, the 1985 amendments deleting the verification requirement should be applied to this case. It is appropriate to apply said amendments since the revision to the mechanic's lien law is remedial in nature.

Finally, the lower court's modification of the interest rate provided by the arbitration award exceeded the lower court's authority and was without justifiable basis. The arbitrators had evidence upon which they could base the interest rate award and had authority to make such an award. The modification should be reversed.

### **ARGUMENT**

#### **POINT I**

#### **THE UTAH MECHANIC'S LIEN LAW WAS ENACTED TO PROTECT THOSE WHO PERFORM LABOR AND FURNISH MATERIALS ON CONSTRUCTION PROJECTS.**

The purpose of the Utah mechanic's lien statute is to protect those who have added directly to the value of real property by performing labor or furnishing material for the improvement of the property. From early in the history of this State this Court has held:

The aim and purpose of our mechanic's lien law manifestly has been to protect, at all hazards, those who perform the labor and furnish the materials which enter into the construction of a building or other improvement.

Rio Grande Lumber Co. v. Darke, 50 Utah 114, 167 P.241, 244 (1917). More recently this Court stated in Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207, 209 (1959) that the purpose of the lien statutes is to protect those who have added directly to the value of property by performing labor or furnishing materials upon it.

This Court went on to state that the statute was to be liberally construed to give effect to its purpose and to promote justice. Id. at 210.

## POINT II

### THE UTAH MECHANIC'S LIEN LAW IS TO BE CONSTRUED BROADLY.

Not only is the statute designed to protect those who improve property, but the statute is to be construed broadly. These two principles were discussed by this Court in the recent case of Interiors Contracting, Inc. v. Navalco, 648 P.2d 1382, 1383 (Utah 1982):

The purpose of the Utah mechanics' lien law is to provide protection to those who enhance the value of a property by supplying labor or materials. First of Denver Mortgage Co. v. Zundel, Utah, 600 P.2d 521 (1979). We construe the lien statutes broadly to effectuate that purpose. See Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 341 P.2d 207 (1959).

## POINT III

### THE UTAH MECHANIC'S LIEN LAW REQUIRES ONLY SUBSTANTIAL COMPLIANCE.

To further the goal of broad construction and to protect those who supply labor and materials, many of which are not overly sophisticated in legal technicalities, this Court has held that the standard is one of substantial compliance. In the case of Chase v. Dawson, 117 Utah 295, 215 P.2d 390 (1950) this Court reviewed the notice of lien which apparently had a number of defects. This Court held "The notice of lien is no model. However, substantial compliance with the statute is all that is required." Id. at 390. A year later this court again reaffirmed its position that the doctrine of substantial compliance has validity and applicability to the mechanic's lien statute. Graff v. Boise Cascade Corp., 660 P.2d 721 (Utah 1983).

POINT IV

THE MECHANIC'S LIEN RECORDED BY  
WORTHINGTON & KIMBALL ON JANUARY 14, 1982  
IS IN SUBSTANTIAL COMPLIANCE WITH THE  
VERIFICATION REQUIREMENTS OF UTAH CODE  
SECTION 38-1-7 (1953).

Assuming that the mechanic's lien filed by Worthington & Kimball is required to be verified, no particular form for verification is required by the statute. Further, this Court recently reaffirmed, in the case of Graff v. Boise Cascade Corp., 660 P.2d 721 (Utah 1983), that "substantial compliance" is the standard by which to judge the jurat. The jurat on the Notice of Lien filed January 14, 1982 by Worthington & Kimball constitutes a sufficient verification.

Comparing the jurat in the subject Notice of Lien with the statutory acknowledgement form clearly shows that the subject jurat was much more than an acknowledgement.

The statutory form (Utah Code Ann. Section 57-2-7) of acknowledgement is as follows:

State of Utah, County of \_\_\_\_\_

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

The jurat used to verify the lien in question is in the following form:

STATE OF UTAH )  
COUNTY OF SALT LAKE )

On this 13th day of January, 1982, personally  
appeared before me Edwin N. Kimball, who duly  
acknowledged to me that he has executed this notice  
and that he has read the contents thereof, and the  
same is true of his own knowledge.

/s/ Arnold Allrea

Notary Public  
Residing at: 6586 W. 3500 S.

My Commission Expires:

18 Sept. 1985

Therefore, the subject jurat is clearly not simply an acknowledgement as contended before the trial court by Defendants First Interstate Bank of America and Security Title. The subject jurat significantly contains the statements that Edwin Kimball has read the contents of the lien and states that the contents are true of his own knowledge.

The two cases decided recently by this Court invalidating liens due to the lack of verification are clearly distinguishable from the instant case. In First Security Mortgage Co. v. Hansen, 631 P.2d 919 (Utah 1981), this Court held a mechanic's lien invalid because of a total lack of compliance with the verification requirement. In that case the notice of lien contained only a simple statutory corporate acknowledgement. This Court stated:

The acknowledgement in this case did not contain even a general verification of the subject matter of the notice of claim. The only fact that was sworn to was the identity and authority of the person signing the claim. There is no suggestion that he personally vouched for the accuracy of the facts underlying the claim. (Emphasis added).

Id. at 921.

Since there was no statement that the party had read the contents of the lien and knew of his own knowledge that the contents were true the lien was fatally defective. The jurat in the subject lien is clearly distinguishable since it provides that Edwin Kimball "has executed this notice and that he has read the contents thereof, and the same is true of his own knowledge." Mr. Kimball definitely vouched for the accuracy of the facts underlying the claim.

In Graff v. Boise Cascade Corp., 660 P.2d 721 (Utah 1983), the lien was signed but the jurat did not specify the name of the person who had read the contents of the lien nor was there a signature to identify the person. This Court stated:

In order to adopt defendant's contention, it must be assumed that the name and the signature of Berk Butters were intended to be affixed on the blank line provided for verification of the notice of claim. We are not free to make those assumptions. (Emphasis added).

Id. at 722.

This Court concluded that the notice of claim of lien lacked substantial compliance with the verification requirement and was therefore defective.

In the instant case, the lien was properly signed by Edwin Kimball. Further, the jurat clearly identifies Edwin Kimball as the individual who read the contents of the lien and stated that the contents were true of his own knowledge. Therefore, this Court does not need to make either of the two assumptions that the Graff Court could not make.

A case with similar facts is Fircrest Supply, Inc. v. Plummer, 30 Wash. App. 384, 634 P.2d 891 (1981). The registered agent signed the claim directly above the jurat. His name was typed in the jurat identifying him as the claimant who heard the foregoing claim and read and knew the contents thereof to be true. There was no further signature of the registered agent below the jurat. The court held that the statutory verification requirements for a lien claim were substantially satisfied.

Another similar case is Stephenson v. Ketchikan Spruce Mills, Inc., 412 P.2d 496 (Alaska 1966). As in that case, the claimant signed the claim form but not again below the jurat. The claimant's name, however, was typed in the jurat as having read the contents and stating that the contents were true of his own knowledge. The notary properly signed. The court held that there was "substantial compliance" with the statute.

An almost identical factual and more recent case is Anchorage Sand and Gravel Co. v. Woolridge, 619 P.2d 1014 (Alaska 1980) where the Alaska Supreme Court reversed a lower court's invalidation of a lien. The claim of lien was signed by a Buff V. Jacobsen and followed by a notary's jurat stating:

THIS CERTIFIES that on this 11th day of October, 1978, before me, the undersigned, a Notary Public in and for Alaska, duly commissioned and sworn as such, personally appeared Buff V. Jacobsen known to me to be the corporate Secretary of the above entitled corporation and (s)he acknowledged that (s)he signed and sealed the foregoing instrument freely and voluntarily on behalf of said corporation, being duly authorized to act on behalf of said corporation by its board of Directors, and (s)he acknowledged that the facts recited in the above Claim of Lien are known to him/her and (s)he hereby verifies that said facts are true and correct.

WITNESS MY HAND AND SEAL the day and year in this certificate first above written.

/s/  
NOTARY PUBLIC in and for Alaska

Id. at 1015

In that case the property owners contended that the quoted jurat was simply a variant of a corporate acknowledgement. The court stated:

The jurat in the case at bar clearly goes further: it contains a corporate acknowledgement plus the following statement by a notary:

"(s)he acknowledged that the facts recited in the above Claim of Lien are known to him/her and (s)he hereby verifies that said facts are true and correct."

Id.

The court also rejected the contention that the jurat must explicitly state that the lien claimant made on oath. The court held:

We conclude that when a lien claimant, in the presence of a notary, affixes his signature to a written statement incorporating the necessary elements of a claim of lien, and the notary certifies this act, claimant has substantially complied with the requirement of an "oath."

Id. at 1016.

The jurat in the Worthington & Kimball Notice of Lien substantially complies with the requirements of the Utah Code. It specifically identifies that Edwin Kimball,

the one who signed the lien, appeared before the notary and stated that he had read the contents of the lien and that the same is true of his knowledge.

While the jurat does not specifically mention that Mr. Kimball took an oath, such fact is not fatal. As mentioned above, the case of Anchorage Sand and Gravel, supra, held that when a lien claimant, in the presence of a notary, affixes his signature to a written statement incorporating the necessary elements of a claim of lien, and the notary certifies this act, the claimant has substantially complied with the requirements of an "oath." It should be noted that the case of H.A.M.S. Co. v. Electrical Contractors of Alaska, Inc., 563 P.2d 258 (Alaska 1977) was cited as authority. The H.A.M.S. case is cited by this Court in both the First Security Mortgage and Graff cases in support of the importance of the verification.

The case of Coleman v. Schwendiman, 680 P.2d 29 (Utah 1984), discusses what constitutes the taking of an oath. The majority opinion does not answer the question of the dissenting opinion as to the applicability of the holding to mechanic's lien actions. If the holding is applicable to mechanic's lien actions, the uncontroverted testimony of Edwin Kimball indicates that the Coleman requirements have been met.

Citing McKnight v. State Land Board, 14 Utah 2d 238, 381 P.2d 726 (1963) the Coleman Court set forth these essentials of an oath:

1. A solemn declaration.
2. Manifestation of an intent to be bound by the statement.
3. Signature of declarer.
4. Acknowledgment by an authorized person that oath was taken.

Coleman at 31.

The Coleman Court rejected the validity of a police officer's report stating:

The foregoing precedents set by this Court require a formal verbal affirmation in order for a statement to be validly sworn to. We thus conclude that since the patrolman failed to verbally affirm or swear to the validity of the contents of the report, the report was not validly sworn to.

Coleman at 31.

Edwin Kimball verbally affirmed the contents of the mechanics lien. He did not simply sign the mechanic's lien in the presence of the notary. The discussion was undertaken, in large part, because this was the first mechanic's lien that Mr. Kimball had filed and he was uncertain as to what would be required of him. He appeared before the notary with the documents to evidence the dated of the first and last work. The notary informed Mr. Kimball that his seal had the purpose of identifying him and his oath and that he had signed the document under oath. Mr. Kimball told the notary that the contents of the lien were true. (R. Partial Transcript of testimony of Edwin Kimball, pages 2 - 5)

Recalling the facts of McKnight, which case produced the test in Coleman, establishes that the dialogue and subsequent notarization between Mr. Kimball and the notary met the requirements of an oath. In McKnight, the affiant signed applications in blank and as stated by the Court:

he conferred at various times by phone from Denver with [the notary public] about various lease applications, including those hereinbefore referred to. There is no question as to the authenticity of [the applicant's] signature. There was an understanding between [the applicant] and [the notary public] that [the notary public] would fill in accurate descriptions of the property to be leased on the applications. From these facts the Land Board held the oath valid."

McKnight at 733. The Court went on to state "The administration [of the oath] need not follow any set pattern. The ritual is of secondary importance and does not affect the validity of the oath." Id. at 734.

Mr. Kimball and the applicant in McKnight both discussed the events with the notary while the police officer in Coleman apparently had no discussion whatsoever.



Mr. Kimball went even further than the applicant in McKnight since Mr. Kimball actually discussed the oath with the notary and told him the contents of the lien were true. There was no such evidence of any discussion of an oath between the applicant and the notary in McKnight.

Based on the foregoing discussion, the mechanic's lien of Worthington & Kimball substantially complies with the verification requirements of the statute, including the requirement of an oath.

#### POINT V

UTAH CODE ANNOTATED SECTION 38-1-7, AS AMENDED EFFECTIVE APRIL 29, 1985, APPLIES TO THE CASE AT BAR

A. SINCE THE MECHANIC'S LIEN LAW IS PROCEDURAL IN NATURE, UTAH CODE ANNOTATED SECTION 38-1-7, AS AMENDED, IS APPLICABLE TO THE LIEN FILED BY WORTHINGTON & KIMBALL.

Utah Code Ann. Section 38-1-7 was amended effective April 29, 1985 to, among other things, delete the requirement of a verification when filing notice of a mechanic's lien. Appellant's Notice of Lien complies with the revised statute in every respect.

The amended statute is applicable to Appellant's lien notice even though the notice was filed and the trial judgment was entered eleven days before the revised statute became effective. This Court has applied amended statutes to causes of action that accrued before the revised statute became effective when the revision was purely remedial or procedural in nature. See Petty v. Clark, 113 Utah 205, 192 P.2d 589 (1948), and Boucofski v. Jacobsen, 36 Utah 165, 104 P. 117 (1909).

This Court, in Petty, distinguished remedial, or procedural, law from substantive law as follows:

Substantive law is defined as the positive law which creates, defines and regulates the rights and duties of the parties and which may give rise to a cause of action, as distinguished from adjective (or procedural) law which pertains to and prescribes the practice and procedure . . . by which the substantive law is determined or made effective.

Petty at 593-94.

The court reiterated this rule in Pilcher v. State, 663 P.2d 450 (Utah 1983). [P]rocedural statutes enacted subsequent to the initiation of the suit which do not enlarge, eliminate or destroy vested or contractual rights apply not only to future actions, but also to accrued and pending actions as well. Id. at 455 (Citing State v. Higgs, 565 P.2d 998, 1000 (Utah 1982)).

It has been observed by this Court in Calder Brothers Company v. Anderson, 652 P.2d 922, 924 (Utah 1982) 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." The rights which the mechanic's lien statute is designed to protect are created not when the lien is filed or perfected, but when work commences on the project. In Morrison v. Carey-Lombard Company, 33 P. 238 (Utah 1893), the Court, interpreting an earlier enactment of the Utah mechanic's lien law, stated that:

[I]t is evident that the filing of the statement does not create the lien, for the language of the statute is "any party claiming a lien shall file," etc. but simply holds it in force for the time of one year . . . so as to give the claimant an opportunity to enforce the same by process of law.

Id. at 239 (Emphasis added).

Later in the Morrison opinion this Court concluded that the the legislature intended that subcontractor liens attach on the date of their commencing to work and that the lien may be later lost if the statement as required by law is not filed. Id. at 241. Although Morrison interpreted prior Utah mechanic's lien law, the law discussed in that case is substantially similar to the present Utah Code Annotated Section 38-1-

7. This judicial interpretation of the nature of the mechanic's lien law must be considered persuasive in the absence of later decisions.

Previous Utah mechanic's lien law has also been reviewed by the United States Supreme Court. In Bear Lake Irrigation Co. v. Garland, 164 U.S. 1 (1896), the Court stated that "the right [in the mechanic's lien statute] consisted of the right of sale of the property in order, if necessary, to obtain payment of the money due the contractor. The remedy consisted of the taking of certain proceedings by which this sale was to be accomplished." 164 U.S. at 13. Garland reinforces the idea that the rights of a contractor accrue as work is accomplished on the project; the later filing of a mechanic's lien statement is simply a procedural step, "the taking of certain proceedings," to perfect the lien. Any statute must be regarded as merely procedural which does no more than direct the form the notice of lien must be in in order to properly attach and which in no way affects the substantive rights of the contractor which came into being at the time the work was done.

The Utah Legislature intended the amendments to Section 38-1-7 to be procedural only. At the third reading of House Bill 56 (which became the revised Section 38-1-7) before the Utah Legislature, Representative Holt, sponsor of the bill, stated that the purpose of the Bill was "basically to simplify the procedures so that anyone can file a mechanic's lien and not need to have to obtain services of an attorney or something like it. It is just to make it a little simpler or a little easier for people that may be affected and want to file a lien." Transcript of third reading discussion of H.B. 56, January 17, 1985 8:00 a.m. (Emphasis added). (See Addendum) During legislative discussions of the proposed amendment, Rep. Holt stated that "the purposes of this [bill] is just to simplify and get away from technicalities I don't think have any part with our procedures and our idea of what mechanic's liens are for, and that's all this bill [addresses]." Business, Labor Committee Minutes, January 17, 1985, 8:00 a.m., at 2 (Emphasis added). Rep. Holt further stated that "[t]his [completing the lien

notice] is something that a materialman ought to be able to do on his own to protect his lien. . . ." Id. (Emphasis added). The Legislature's intention to modify only procedural aspects, as well as the Legislature's belief that the lien right exists prior to filing notice, is apparent.

The situation under which a mechanic's lien usually arises is further argument that any change in the filing requirements for a lien are procedural only. The owner of a construction project is ordinarily on notice from the time a contractor or subcontractor begins work that work is being done on his property and that improvements are being made which will enrich his interest in the property. This enrichment accrues to the owner as the improvements are completed and the owner incurs at that time, either as the result of an express written or oral contract or under the doctrine of quantum meruit, an obligation to compensate the contractor for the work and materials incorporated into the project. The purpose of the mechanic's lien is merely to provide the contractor with a means of recovering these monies that he has already earned by furnishing his labor and materials. See Bear Lake Irrigation Company v. Garland, *supra*, Morrison v. Kerry-Lombard Company, *supra*, Calder Brothers Company v. Anderson, *supra*.

Other jurisdictions have also held that mechanic's liens are remedial in nature and that changes in mechanic's lien filing procedures may be applied retroactively. In Hansen-Snyder v. General Motors Corp., 124 N.W. 2d 286 (Mich. 1963), the Michigan Supreme Court retroactively applied a statutory amendment extending the time period for filing a preliminary notice of mechanic's lien from sixty to ninety days of first furnishing labor or materials. The court stated that such a change "pertained solely to procedure for effectuating the statutory right already existing" and therefore could be retroactively applied. Id. at 288. See also, Utah Savings and Loan Association v. Mechem, 12 Utah 2d 335, 366 P.2d 598 (1961).

In S & R Builders & Suppliers, Inc. v. Marler, 610 S.W. 2d 690 (Mo. App. 1980) the Missouri Court of Appeals held that a change in their mechanic's lien law allowing a lien to be filed on three acres of land rather than one acre could be retroactively applied. The court reasoned the change was remedial in nature and that the legislature expressed no contrary intention that the amendment should be prospective in effect only. In Kopp's Rug Company, Inc. v. Talbot, 5 Kan. App. 2d 565, 620 P.2d 1167 (1980), the Kansas Court of Appeals retroactively applied an amendment allowing proof of receipt of a copy of a mechanic's lien as adequate notice of the lien to others. In Denver Wood Products Company v. Frye, 202 Neb. 286, 275 N.W. 2d 67 (1979), the Nebraska Court held that a change in the mechanic's lien law extending the filing time from three months to four months applied to all proceedings even if the right accrued before the amendment became effective. In each of these cases, the court retroactively applied revised statutes even though the lien may have been invalid under the old statute. The courts apparently reasoned that rights under the mechanic's lien statute accrued at the time the work was done, and that changes in the filing or noticing procedures did not affect those existing rights.

The Utah Supreme Court has also applied statutes retroactively in areas other than mechanic's liens. In Silver King Coalition Mines Company v. Industrial Commission, 2 Utah 2d 1, 168 P. 2d 689 (1954), the Court retroactively applied a statutory amendment extending time for employer liability in workmen's compensation cases. The Court said that "a law is retrospective in its legal sense, which takes away or impairs vested rights acquired under existing laws or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already passed (citations omitted)." The Court held that the statute in question was procedural, reasoning the rights of the employee to claim compensation had accrued previously as part of the employer-employee relationship, and that the employer had already incurred an obligation to pay if the employee contracted a work-

related illness. Therefore, no new duty was imposed on the employer and there was no unacceptable retroactive application of the statute.

The situation in Silver King is analogous to that in the case of a mechanic's lien. The owner of a project has already incurred an obligation to pay the contractor as the contractor completes his work. The owner of the project has been enriched to the value of the contractor's work and should not be allowed to retain this enrichment without compensating the contractor. The obligation to pay the contractor arises at the time the work is done, not when the lien notice is filed.

**B. THE MECHANIC'S LIEN STATUTE IS AN EXTRAORDINARY REMEDY. ANY AMENDMENT TO THE STATUTE IS THEREFORE REMEDIAL AND MAY BE APPLIED TO THE CASE AT BAR.**

The Maryland Court in Aviles v. Eshelman Electric Corp., 281 Md. 529, 379 A.2d 1227 (1977) followed a different line of reasoning in deciding that changes to their mechanic's lien law should be retroactively applied. The Court held that the mechanic's lien is not a vested right but an extraordinary remedy only. Under this theory of mechanic's lien law, any change to a mechanic's lien statute would be remedial in nature and therefore could be retroactively applied. Previous Utah cases have stated that the purpose of the Utah mechanics' lien law is to "provide protection to those who enhance the value of a property by supplying labor or materials." Interiors Contracting Incorporated v. Navalco, 648 P.2D 1382, 1385 (Utah 1982). See also Calder v. Davis, 652P.2d 992 (Utah 1982); Davis v. Barrett, 24 Utah 2d 162, 567 P.2d 6031 (1970); Stanton Transportation Co. v. Davis, 9 Utah 2d 184, 341 P2d 207 (1959); Rio Grande Lumber Co.v. Darke, 50 Utah 114, 167 P.241 (1917). This line of cases indicates that the Utah Supreme Court has consistently considered the mechanic's lien law to provide a remedy against nonpaying owners. If this court adopts the theory of Aviles, the question of whether the verification of the lien notice was substantive or procedural would become moot; the amendment to section 38-1-7 would automatically apply. Utah

has consistently held that the lien statute provides a remedy; it would be both logical and just to adopt the Aviles position and apply the amended section 38-1-7 to the case at bar. To do otherwise, would deny a remedy to the very party the statute was intended to protect.

C. UTAH CODE ANNOTATED SECTION 68-3-3 DOES  
NOT BAR APPLICATION OF THE AMENDED SECTION  
38-1-7.

The statutory bar to retroactive application of statutes, Utah Code Annotated Section 68-3-3, is not applicable if the revised statutory amendment is intended only to clarify or amplify how the law is to be understood. Okland Construction Company v. Industrial Commission, 520 P.2d 208 (Utah 1974)(retroactively applying an amended statute extending the maximum disability period in workmen's compensation cases). The 1985 amendments to Utah Code Annotated Section 38-1-7 were similarly intended merely to clarify and amplify how the mechanic's lien law should be applied.

Rep. Holt's comments, supra, indicate the purpose of the revision to Section 38-1-7 was strictly to simplify and clarify the intent of the legislature by making a mechanic's lien available to the public without requiring the services of an attorney. Under Okland Construction, therefore, the revised Section 38-1-7 should be applied retroactively to the case at bar.

D. CONCLUSION

The amendment to Section 38-1-7 in no way affects or changes any of the rights or obligations of either party under the contract. C & A could not have relied on the provisions of the previous statute in making its contract with Worthington & Kimball. The amended statute will not deprive any party of any rights that it had prior to the amendment; nor will it impose a new obligation on any party that did not previously exist in the contract with Appellant. The only obligation C & A has is its

pre-existing obligation to pay Worthington & Kimball for the work done on its project. The amendment to Section 38-1-7 neither increases nor decreases that obligation, but merely changes the procedure by which Worthington & Kimball's right to foreclose is perfected. The amended version of Section 38-1-7 therefore must be applied to the case at bar. Appellant's notice of lien is therefore in compliance with the applicable statutes and should be declared a valid lien against the property.

#### POINT VI

##### THE INTEREST AWARDED BY THE PANEL OF ARBITRATORS SHOULD BE REINSTATED.

The contract between C & A and Worthington & Kimball provides in article 11.1.4 that payments due but unpaid shall bear interest at the rate the Owner is paying on his construction loan or at the legal rate, whichever is higher. (R. 60) In support of its claim for interest, Worthington & Kimball submitted a summary of its interest calculations as an exhibit in the arbitration. (A copy of said exhibit is included as Exhibit "A" in the addendum hereto). The panel of arbitrators, in the arbitration award, provided that interest would commence in December of 1981. (R. 48) Averaging the applicable rates of interest on the aforementioned exhibit commencing in December of 1981 (which period included times of high interest rates, which were costly to Worthington & Kimball from December of 1981 through May of 1983, the month the arbitration hearings were begun) produced an average interest rate of 15.8%. (See Addendum)

The Construction Industry Arbitration Rules of the American Arbitration Association, the rules by which the dispute was arbitrated, referred to in Article 16.1 of the contract (R. 65) between the parties, provide, in Rule 43, entitled Scope of Award:



The arbitrator may grant any remedy or relief which is just and equitable and within the terms of the agreement of the parties. (R. 82)

The arbitration award granted, among other things, the following:

7. The contractor is entitled to interest at the rate of 15% per annum on the sum of \$377,131.00 from December 1, 1981 until paid by owner. We select that rate in part as a measure of damages to Worthington & Kimball for the unreasonable withholding of the balance of the contract price.

(R. 48)

Pursuant to the arbitration rules, the arbitrators are entitled to grant any remedy or relief which is just and equitable. The panel of arbitrators, after hearing extensive evidence in the matter, including a counterclaim for over one million dollars, rejected the claims of C & A and awarded almost the entire contract balance to Worthington & Kimball. The arbitration panel chose the interest rate of 15%, which is not unreasonable and is supported by the average of the applicable interest rates set forth in the request of Worthington & Kimball.

There is precedential authority for arbitrators to award interest beyond the statutory rate. In the recent case of Morrison-Knudsen and Co. v. Makahuena Corp., 675 P.2d 760 (Hawaii 1983), the Supreme Court of Hawaii upheld the arbitrators award of interest at prime plus 2% even though it was at odds with the Hawaii statute governing post judgment interest. The court concluded that what was labeled as interest was actually intended by the arbitrator as compensation for damages.

The interest award of the arbitrators to Worthington & Kimball was likewise compensating for damages and not a penalty, as construed by the lower court.

### CONCLUSION

The mechanic's lien filed by Worthington & Kimball substantially complies with the requirements of the Utah Code Section 38-1-7 prior to the amendments of 1985 and fully complies with the requirements in said section after the 1985 amendments. The very purpose of the mechanic's lien statute is to provide a means of securing payment to parties similarly situated to Worthington & Kimball. It would be extremely inequitable to deny recovery to Worthington & Kimball who, filing its first lien ever, copied a lien prepared by one of the premier law firms in Salt Lake, which would be deemed to have a super-technical defect in not mentioning the word "oath" in the jurat. If the jurat is deemed to be required, the jurat substantially complies with the mechanic's lien statute. The jurat identifies Edwin Kimball and clearly states that he personally vouched for the facts underlying the claim. Mr. Kimball undisputedly discussed the oath with the notary. That is a verification. The judgment of the lower court declaring Worthington & Kimball's mechanic's lien null and void by reason of a defective verification should be reversed.

Further, the lower court's modification of the arbitration award reducing the rate of interest awarded by the arbitrators should be reversed. The award was supported by evidence presented to the arbitrators. Such award is within their powers in granting "any remedy or relief which is just and equitable."

Respectfully submitted this 28<sup>th</sup> day of October, 1985.

WALSTAD & BABCOCK

By: Robert F. Babcock

Robert F. Babcock  
Attorneys for Appellant  
Worthington & Kimball  
Construction Company

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Brief, postage prepaid, this 28<sup>th</sup> day of October, 1985 to:

Robert F. Bentley  
BENTLEY & ARMSTRONG  
7525 East Camelback Road  
Scottsdale, Arizona 85251

Thomas A. Duffin  
311 South State, Suite 380  
Salt Lake City, Utah 84111

Lavar E. Stark  
2045 Grant Avenue, Suite 200  
Ogden, Utah 84401

Robert F. Babcock

## **ADDENDUM**

1. Mechanic's Lien filed by Worthington & Kimball
2. Mechanic's Lien filed by Ray, Quinney & Nebeker
3. Arbitration Award
4. Findings of Fact and Conclusions of Law
5. Order, Judgment and Decree of Foreclosure
6. Partial transcript of testimony of Edwin Kimball (Direct)
7. Partial transcript of testimony of Edwin Kimball (Cross)
8. Legislative history for 1985 Amendment to Mechanic Lien Law
9. Exhibit in arbitration proceeding supporting interest claim

PLATTED ☐ VERIFIED ☒  
 FILED ☒ FILED ☐
NOTICE OF LIEN

## TO WHOM IT MAY CONCERN:

Notice is hereby given that the undersigned Gary J. Worthington and Edwin N. Kimball d/b/a Worthington & Kimball Construction Company, of Lindon, Utah, hereby claims and intends to hold and claim a lien upon that certain real property owned and reputed to be owned by C and A Enterprises an Arizona Corporation, which property is located in Weber County State of Utah, and is more particularly described as:

Lot 9 Plat "A" of the Weber County Industrial Park.

The aforesaid lien is to secure payment of the sum of Four Hundred Thirty Thousand Five Hundred Eighty Six Dollars and fifteen cents (\$430,586.15) plus interest accruing and other direct and related expenses owing and or accruing to Worthington and Kimball Construction Co. for labor and materials and sub-contractors hired by them or paid through them as a General Contractor for buildings and improvements in, on and about the said property.

The foresaid indebtedness accrued and the foresaid labor and materials were furnished to C & A Enterprises Inc, the owner of the above described premises under a contract of construction (with accrued change orders, extra work and additions) made and entered into between Worthington & Kimball Construction Co. as General Contractor and C & A Development Co. on the 2nd day of July, 1980 by the terms of which Worthington & Kimball Construction Co. did agree to construct certain improvements on and about the said property and C & A Development did agree to pay therefore.

Construction Co. on the 15th day of July 1980, and the last work was performed on the 12th day of November 1981. The reasonable value of the work performed by Worthington & Kimball Construction Co. during said period is the sum of Two Million Six Hundred Eighty Five Thousand, Five Hundred and Fifty One Dollars (\$2,685,551.00) against which the sum of Two Million, Two Hundred Fifty Four Thousand, Nine Hundred and Sixty Four Dollars and Eighty Five cents (\$2,254,964.85) has been paid by C & A Companies. The said payments leave a net balance due and owing to Worthington and Kimball Construction Co. of Four Hundred Thirty Thousand, Five Hundred Eighty Six Dollars and Fifteen Cents (\$430,586.15), after deducting all just credits and offsets plus, an additional amount is owing for interest and other accruing expenses. For the said amounts and accruing amounts Worthington and Kimball Construction Co. holds and claims a lien by virtue of the provisions of Utah Code Annotated Section 38-1-1 et seq (1953 as amended).

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Dated this \_\_\_\_\_ day of Jan. 1982.

Worthington and Kimball Const. Co.

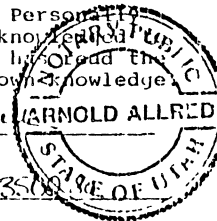
by \_\_\_\_\_

STATE OF UTAH)  
County of San Juan

On this 13<sup>th</sup> day of January 1982, Person Edwin N. Kimball appeared before me Edwin N. Kimball, who duly acknowledged to me that he has executed this notice and that he has read the contents thereof, that the same is true of his own knowledge.

Edwin N. Kimball

Notary Public  
residing at: 686 W. 3500



My Commission expires

18 Sept 85

Suite 400 Deseret Building  
79 South Main  
Salt Lake City, Utah 84111  
(801) 532-1500

PLATTED ☐ VERIFIED ☒  
ENTERED ☒ MICROFILMED ☐

NOTICE OF LIEN

TO WHOM IT MAY CONCERN:

Notice is hereby given that Hans R. Kuhni d/b/a Kuhni Concrete Company (hereinafter "Kuhni Concrete"), of Provo, Utah, hereby claims and intends to hold and claim a lien upon that certain real property owned, and reputed to be owned by C and A Development Inc., which property is located in Weber County, State of Utah, and is more particularly described as:

Lot 9 Plat "A" of the Weber County Industrial Park

The aforesaid lien is to secure payment of the sum of Ten Thousand Eight Hundred and Ninety-Six (\$10,896.00) owing to Kuhni Concrete for labor furnished by Kuhni Concrete as a sub-contractor in, on and about the said land.

The aforesaid indebtedness accrued and the aforesaid labor was furnished to C and A Development Inc., the owner and reputed owner of the above-described premises, under a contract of construction (with accrued change orders, extra work and additions), made and entered into between Worthington & Kimball Construction, as original contractor, and Kuhni Concrete on the 2nd day of July, 1980, by the terms of which Kuhni Concrete agreed to construct certain improvements on the said premises and Worthington and Kimball Construction did agree to pay therefor.

The first work under said contract upon the described premises was performed by Kuhni Concrete on the 15th day of July, 1980, and the last work prior to Worthington and Kimball Construction's breach and repudiation of the contract was performed on the 21st day of February, 1981. The reasonable value of the work performed by Kuhni Concrete during said period is the sum

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Hundred and Seventy-Six Dollars (\$71,876.00) has been paid by Worthington and Kimball Construction. The said payments leave a net balance due and owing to Kuhni Concrete of Ten Thousand Eight Hundred Ninety-Six Dollars (\$10,896.00) after deducting all just credits and offsets. For said amount Kuhni Concrete holds and claims a lien by virtue of the provisions of Utah Code Annotated Section 38-1-1 et seq. (1953 as amended).

DATED this 31<sup>st</sup> day of March, 1981.

HANS R. KUHNI d/b/a/KUHNI  
CONCRETE CO.

By: H. Kuhni

STATE OF UTAH            )  
                                  ) ss.  
COUNTY OF SALT LAKE)

On this 31<sup>st</sup> day of March, 1981, personally appeared before me Hans R. Kuhni, who duly acknowledged to me that he has executed this notice and that he has read the contents hereof, that the same is true of his own knowledge.

Gwendolyn A. Mulka  
Notary Public  
Residing at: Salt Lake County, Utah

My commission expires:

March 4, 1983



BEFORE THE AMERICAN ARBITRATION ASSOCIATION

WORTHINGTON & KIMBALL	)	
CONSTRUCTION COMPANY, a	)	
Utah general partnership,	)	
	)	
Claimant,	)	AWARD
	)	
v.	)	
	)	
C & A DEVELOPMENT COMPANY,	)	No. 77-110-0130-82
an Arizona corporation,	)	
C & A ENTERPRISES, an	)	
Arizona partnership, and	)	
C & A COMPANIES, INC., an	)	
Arizona corporation,	)	
	)	
Respondents.	)	
	)	

---

This matter came before Peter W. Billings, George E. Lyman and B. Lue Bettilyon, sitting as a board of arbitrators, to resolve disputes between the parties arising out of the performance and interpretation of a contract originally between C & A Development Company, as owner, and Worthington & Kimball Construction Company, a Utah general partnership and L. M. Hendriksen, dba Western States Construction, a sole proprietorship, as contractor, for the design and construction of a factory building to be occupied by Permaloy Corporation.

Seventeen days of hearings were held on April 25 to 29, May 16 to 20, June 20 to 24 and July 14 and 15, 1983 and the construction site was visited by the panel and representatives of the parties on July 14, 1983. In addition, the arbitrators met on July 5, 1983 to review the evidence and to prepare suggestions to the parties as to the matters they believed should be covered by the post-hearing briefs. During the hearings both parties were

given full opportunity to call all witnesses they desired and 84 exhibits were introduced by Worthington & Kimball and 59 by the respondents. Both parties were given opportunity to file and did file post-hearing and reply briefs.

Under date of August 30, 1983 Worthington & Kimball moved to reopen the hearing to determine the respective rights and liabilities of C & A Development Company, C & A Enterprises and C & A Companies, Inc. under any award made in these proceedings in light of an assignment of the original contract by C & A Development to C & A Enterprises in March, 1981. Under date of September 29, 1983 the American Arbitration Association notified the parties that the arbitrators had agreed to reopen the hearings. Under date of October 18, 1983 the parties were advised the reopened hearing would be held on October 24, 1983, limited to evidence and argument as to whether any award can or should be made for or against any party other than the parties to the original contract, i.e., C & A Development Company as owner and Worthington & Kimball Construction Company as contractor, and as to the allocation of costs and fees.

Because of the inability of counsel for respondents to appear, the hearing scheduled for October 24, 1983 was not held. By means of a conference telephone call, the parties stipulated that in March, 1981 the contract between Worthington & Kimball and C & A Development Company was assigned by C & A Development to C & A Enterprises, an Arizona partnership of which C & A Companies is a general partner. The parties further agreed that respondents should have until and including October 28, 1983 to respond in writing to the merits of the contentions of Worthington & Kimball set forth in their motion to reopen the hearing.

The arbitrators, therefore, vacated the hearing set for October 24, 1983 and granted Worthington & Kimball until November 4, 1983 to respond to any arguments presented by respondents as to the effect of the assignment on the rights and liabilities of C & A Development Company, C & A Enterprises and C & A Companies in the matter before the arbitrators. The arbitrators further directed that the memoranda to be filed by each party should also state the position of such party as to the assessment of costs and fees in this proceeding.

After receipt of said briefs the arbitrators met on November 7, 1983 and, based on the evidence heard, the exhibits introduced, the briefs of counsel and the visit to and inspection of the construction site, make the following Findings:

1. On or about July 2, 1980 Worthington & Kimball and C & A Development Company entered into a contract on AGC Form No. 6a "Design - Build Agreement between Owner and Contractor." The only significant amendment to that form made by the parties was in paragraph 2.5.2, to which was added the following language:

Any and all test borings, soil sampling and pre-determined construction surveys and investigations (other than site survey) shall be done by contractor, if contractor fails or neglects to obtain such borings, testings, etc., contractor shall assume all liability for any failures in the building as a result of any deficiency that may result therefrom.

2. We construe that language to mean that the parties intended that if (a) the contractor employed a competent person to conduct such borings, testings, etc., (b) fully informed that person of the general nature of the planned construction, (c) the borings, testings, etc., were performed and the report thereof was made in accordance with standards of the industry, (d) the

plans and specifications provided by the contractor under paragraph 2.1 complied with the findings and recommendations of the person employed to make such borings, testings, etc., and (e) the contractor followed such plans and specifications in the construction of the building, the contractor is relieved of any liability for any failures or defects in the building resulting from soil conditions, differential settlement and the like.

3. In March, 1981, with the consent of Worthington & Kimball, the original contract between Worthington & Kimball and C & A Development was assigned by C & A Development to C & A Enterprises, an Arizona partnership of which C & A Companies, Inc. is a general partner. In addition, the property on which the building was constructed was deeded by C & A Development to C & A Enterprises. By reason thereof, references in this award to "owner" shall be deemed to include both C & A Enterprises and C & A Development, jointly and severally. We believe any allocation of payment of the award is to be determined by agreement between them, without necessity of any ruling by the arbitrators. The obligation of C & A Companies, Inc. under the award is only as a general partner of C & A Enterprises and is determined by the provisions of Section 48-1-12, Utah Code Annotated.

4. The unpaid balance of the contract price, as adjusted by change orders as provided in Article 9 of the Contract, to which Worthington & Kimball is entitled to be paid as provided in Article 11 of the contract, is \$430,053.00, subject to such deductions therefrom as the arbitrators find to be warranted under the terms of the contract and the evidence received with respect to the claims of the owner.

5. The owner is entitled to a reduction of the said unpaid balance in the sum of \$52,922.00, allocated as follows:

- a. Repairs to asphalt in parking lots and drives, \$25,125.00;
- b. Punch list items - this includes correction of cantilever area of roof over dock, \$10,000.00;
- c. Repair of external walls due to separation and spalling, \$2,500.00; and
- d. Credit for payments by C & A to Worthington & Kimball subcontractors, \$15,297.00.

6. All other claims of the owner have been carefully and fully considered, but are denied on one or more of the following grounds:

- a. Not the responsibility of the contractor;
- b. Not supported by the evidence;
- c. Not authorized by or barred by the terms of the contract between the parties, including the plans and specifications;
- d. Not quantified by reliable evidence;
- e. Not included within the scope of the work to be performed by the contractor;
- f. Barred by acts or failure to act of the owner; and
- g. Abandonment of the claim during hearings or in briefs.

7. The contractor is entitled to interest at the rate of 15% per annum on the sum of \$377,131.00 from December 1, 1981 until paid by owner. We select that rate in part as a measure of damages

to Worthington & Kimball for the unreasonable withholding of the balance of the contract price.

8. All other claims of the contractor have been fully and carefully considered, but are denied on one or more of the following grounds:

- a. Not the responsibility of the owner;
- b. Not supported by the evidence;
- c. Not authorized by the contract or barred by the terms of the contract, including the plans and specifications;
- d. Already covered in change orders executed by owner and contractor;
- e. Not quantified by reliable evidence;
- f. Are otherwise contained in the award herein made;
- g. Barred by acts or failure to act of the contractor; and
- h. Abandonment of claim during hearings or in briefs.

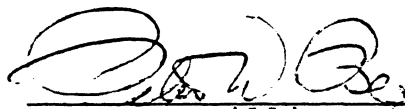
9. Owner shall pay to contractor the sum of \$377,131.00 plus interest as provided in paragraph 7 above upon the contractor filing with the office of the American Arbitration Association in Denver, Colorado lien waivers from the contractor and all its subcontractors. This requirement does not include Robert E. Lee doing business as Ogden Industrial Plastic, who we find is not a subcontractor of Worthington & Kimball.

10. Administrative fees and arbitrators' fees and expenses as determined by the American Arbitration Association office in Denver, Colorado shall be borne 75.0% by owner and 25.0% by

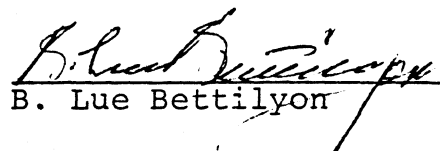
Worthington & Kimball. All other expenses shall be allocated as follows:

- a. The expenses of witnesses for either side shall be paid by the party producing such witness including witnesses produced in response to the arbitrators' letter to counsel dated May 27, 1983;
- b. Cost of the stenographic record, equally between owner and Worthington & Kimball, unless they shall have otherwise agreed prior to the receipt of this award;
- c. All other expenses of the arbitration, as described generally in paragraph 50 of the Construction Industry Arbitration rules, shall be born equally by the parties; and
- d. The nature and amount of such expenses shall be determined by the Denver office of the American Arbitration Association.

DATED this 7th day of November, 1983.

  
Peter W. Billings, Chairman

  
George E. Lyman

  
B. Lue Bettilyon

THOMAS A. DUFFIN of  
SPAFFORD, DIBB, DUFFIN & JENSEN  
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, IN AND FOR  
WEBER COUNTY, STATE OF UTAH

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WORTHINGTON & KIMBALL	)	
CONSTRUCTION COMPANY, a	)	
Utah general partnership	)	
GARY WORTHINGTON and	)	FINDINGS OF FACT AND
EDWIN N. KIMBALL, general	)	CONCLUSIONS OF LAW
partners,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
C & A DEVELOPMENT COMPANY,	)	
an Arizona corporation,	)	
C & A ENTERPRISES, an Arizona	)	
partnership, FIRST INTERSTATE	)	
BANK OF ARIZONA, N.A.,	)	
STEWART TITLE COMPANY OF	)	
SALT LAKE CITY, C & A	)	
DEVELOPMENT COMPANY, INC., an	)	
Arizona corporation,	)	
PERMALOY CORPORATION, a Utah	)	
corporation, OTTO BUEHNER &	)	
COMPANY, HOLBROOK COMPANY,	)	
INC., DONALD K. LYBBERT, dba	)	
LYBBERT MASONRY COMPANY,	)	
JOSEPH SMITH PLUMBING,	)	Civil No. 83387
REDD ROOFING COMPANY and	)	
JOHN DOES 1 through 24,	)	
	)	
Defendants.	)	

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The above entitled matter came on regularly for trial before the Honorable Ronald O. Hyde, one of the judges of the above entitled court, on December 3, 4, 5 and 6, 1984. Robert F. Babcock appearing for and on behalf of plaintiffs, Worthington and Kimball Construction Company, a Utah general partnership, Gary Worthington and Edwin N. Kimball, general partners; Robert F. Bentley and Vaughn Armstrong appearing for and on behalf of C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona general partnership, comprised of Frank S. Campbell, F. Richard Campbell, Gary Dee Jones, Robert A. Campbell and Robert F. Bentley, and C & A Companies, Inc., an Arizona corporation; LaVar E. Stark appearing for and on behalf of First Interstate Bank of Arizona, N.A., and Stewart Title Company of Salt Lake City; Thomas A. Duffin appearing for and on behalf of Otto Buehner & Company and Joseph Smith Plumbing. Whereupon the court heard the respective testimony of plaintiff and defendants in support of their Complaint and Counterclaims and Cross-claims for a period of four days and then having taken the matter under advisement, and now being fully advised in the premises, enters the following Findings of Fact:

#### FINDINGS OF FACT

1. This is an action by the plaintiff as the general contractor on an industrial project in Weber County, State of

Salt Lake County, State of Utah, hereinafter designated as "Buehner Concrete".

6. That Joseph Smith Plumbing is an individual proprietorship with its principal offices in Salt Lake County, State of Utah, hereinafter designated as "Smith Plumbing".

7. Stewart Title Company of Salt Lake City is a title company with its principal office at 261 East 300 South, Salt Lake City, Utah, hereinafter designated as "Stewart Title".

8. That First Interstate Bank of Arizona, N.A., is an Arizona corporation, with its principal office at the Interstate Bank Plaza, P. O. Box 20551, Phoenix, Arizona, hereinafter designated as "First Interstate".

9. Permaloy Corporation, is a Utah corporation now in bankruptcy and was at all times herein a tenant or lessee of C & A Enterprises, an Arizona partnership, hereinafter designated as "Permaloy".

10. All of the other parties have not answered or have filed dismissals or are not material to this action.

11. That on or about July 2, 1980, C & A Development entered into a construction contract with Worthington & Kimball for a manufacturing plant to be built on Lot 9 in the Weber Industrial Park in Weber County, Utah, hereinafter designated as the "subject property" for \$1,977,813.00, attached hereto as Exhibit 2 of the trial exhibits.

12. That after entry into the contract between the above entitled parties, C & A Development, as owner, assigned the construction contract to C & A Enterprises.

13. That on the 5th day of August, 1980, Worthington & Kimball entered into a subcontract with Buehner Concrete for the furnishing of concrete members (floor double tees inverted tee beams, column and rectangular beams) for the sum of \$469,657.00.

14. That Buehner Concrete furnished the first materials on the subject building and property on the 24th day of September, 1980, and furnished the last materials on the project, pursuant to its contract on the 19th day of February, 1981.

15. That a Deed of Trust to secure an indebtedness on the subject building and property was given by First Interstate according to the following terms, conditions, amounts and time:

Dated:	November 1, 1981
Trustor:	C & A Enterprises
Amount:	\$2,300,000.00
Trustee:	Stewart Title Company of Salt Lake City
Beneficiary:	First Interstate Bank of Arizona, N.A.
Recorded:	November 30, 1981, as Entry No. 848026 in Book 1393, at page 1305 of official records

16. A mechanic's lien was filed in Weber County by Gary J. Worthington and Edwin N. Kimball, dba Worthington and Kimball in the amount of \$430,586.15, plus interest for labor and materials recorded January 14, 1982, as Entry No. 850356 in Book 1396 at page 258 of official records, first work day being

7/15/80 and last work day being 11/12/81, hereinafter designated as Worthington & Kimball's first mechanic's lien.

17. A mechanic's lien was filed by Buehner Concrete in Weber County in the amount of \$46,966.00, plus interest for labor and material, recorded January 15, 1982, as Entry No. 850122 in Book 1396 at page 387 of official records, hereinafter designated as the Buehner mechanic's lien.

18. A mechanic's lien was filed in Weber County by Joseph Smith Plumbing in the amount of \$6,172.50, plus interest for labor and materials, recorded January 29, 1982, as Entry No. 851211 in Book 1397 at page 24 of records, and re-recorded February 19, 1982, as Entry No. 852228 in Book 1397 at page 1753 of official records, hereinafter designated as the Smith mechanic's lien. No Counterclaim or action was filed by Smith Plumbing to foreclose their lien and the parties stipulated that the lien is null and void as an encumbrance against the property as herein set forth.

19. A notice of lien was filed by Gary J. Worthington and Edwin N. Kimball, dba Worthington and Kimball Construction Co. in the amount of \$430,586.15, plus interest for labor and materials, recorded February 8, 1982, as Entry No. 851656 in Book 1397 at page 768 of official records, first work day being 7/15/80 and last work day being 10/23/81, hereinafter designated as the Worthington & Kimball second mechanic's lien.

20. That the contract between Worthington & Kimball, C & A Development and C & A Enterprises, provided for arbitration and that an arbitration hearing was held between the parties and an award was made together with Findings of Fact on the 7th day of November, 1983, with Peter Billings, Chairman and George E. Lyman and B. Lue Bettilyon as arbitrators, which arbitration award was affirmed by the above entitled court on the 17th day of January, 1984, and is now part of the record in the above entitled matter, hereinafter designated as the Arbitration Award.

21. That Worthington & Kimball in the performance of its contract with defendants, C & A Development Company, and C & A Enterprises performed the first work on the subject property and subject building on the 15th day of July, 1980, and did the last work on November 12, 1981, and that all of the work between July 15, 1980, and November 12, 1981, was necessary to complete the original, or general contract that Worthington & Kimball had with the C & A Enterprises, together with appropriate change orders.

22. That on August 14, 1981, Worthington & Kimball gave to C & A Enterprises a Certificate of Substantial Completion, which is defined as follows:

"The Date of Substantial Completion of the Work or designated portion thereof is the Date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents, so the Owner can occupy or utilize the Work or designated portion thereof for the use for

which it is intended, as expressed in the Contract Documents."

The court finds that the Certificate of Substantial Completion and the definition as given therein, and its purpose was not given by the parties as their intention that Worthington & Kimball's general contract and change orders had been completed, but that the project had reached the stage of completion that the Owner could start to commence to occupy the building, to install various machinery, tanks and other equipment which the Owner needed in order to carry on its manufacturing process. The document was never accepted by C & A Enterprises, among other things.

The court finds that after August 14, 1981, that Worthington & Kimball performed the following work to complete its contract with C & A Enterprises as follows:

<u>DATE</u>	<u>DESCRIPTION OF WORK PERFORMED</u>
8/15/81	Completed the general painting contract.
8/17/81	Obtained materials for the boiler piping and installed them in the heating system for the manufacturing purposes of the C & A Enterprises.
8/18/81	Worked on the boiler piping on the building.
8/19/81	Obtained strap and other materials for hanging the boiler piping and worked on the project on this date.
8/20/81	Picked up boiler piping, worked on the suspended ceiling to complete this work and drilled holes for the installation of the boiler piping.

8/21/81            Worked on the boiler piping.

8/24/81            Worked again on the boiler piping and  
did weather stripping on the building.

                    Picked up and installed three locks  
pursuant to the hardware schedule.

8/25/81            Work on keying the doors and hinges and  
installed the bumpers on various doors  
and did additional work on the boiler  
piping.

8/26/81            The landscape architect completed most  
of his work. Work was done on  
installing fittings in the boiler  
piping.

8/27/81            Bases for the boiler pump were installed  
Louvers were installed for the furnaces.

8/28/81            Sump at the ramp was poured and work was  
done on the electrical system. Work on  
the dampers was done.

SEPTEMBER 1981

9/1/81            Work was done on weather stripping for  
the building together with work to get  
the heat to the camera room.

9/2/81            Electrical wiring was performed for the  
make-up air units.

9/3/81            Continued wiring for the make-up units.  
Castors were installed for the large  
swing doors on the project.  
Work was done on the emergency lighting.

9/4/81            Materials were obtained for painting the  
floors.

9/8/81            Materials were picked up for the alarm  
system.

9/9/81            Materials were picked up for the epoxy  
paint for the floor finish.

9/10/81           The subcontractor picked up alarm equipment for the subcontractor's work on the project.

9/11/81           Work on the boiler piping.

9/21/81           Picked up sealers for the floors at Pratt & Lambert.

9/22/81           Picked up acid to clean the panels in the front entry way and work was commenced on this particular project.

9/23/81           ABC Fire Protection Equipment completed their contract on the fire sprinkling system for the building.

9/30/81           Checked out the electrical wiring on Permatex. Color coded the three-phase electrical system on the project.

                  Also greased and lubed the motors on the electrical equipment in the building.

OCTOBER 1981

10/1/81           Picked up the vents and piping.

10/2/81           Washed the front entry way with acid. Prepared it for paint.

10/5/81           Additional entry way cleaned. Patched the stairs with a first coat of materials. Worked on completing and keying the hardware.

10/6/81 thru  
10/8/81           Checked out the electrical system, finished the walls in the building.

10/27/81          On this date the general contractor's subcontractor for testing, Servco, check tested and started 4 Applied Air Heaters. Made adjustments, set controls, set input gas air. Set dampers and checked modulation and settings and calculated. Instructed personnel on operation. Remounted air



switch lines on two large units. Repaired Partlow modulation on small unit. The cost for this, which the parties testify was absolutely essential for the operation of the air units, was \$326.50.

10/26/81            Sealed the stairs with a second coat of sealer.

10/27/81 thru    Did the final electrical testing,  
10/30/81           checked out the miscellaneous punch  
                 items. Installed pans around the door  
                 locks so that when doors were open, the  
                 hardware would not push holes in the  
                 wall as they were opened.

NOVEMBER 1981

11/1/81           Instructed the owner in the operation of  
                 the mechanical design equipment for  
                 make-up air units over the tank lines.

11/10/81          Installed scuppers and down spouts on  
                 the roof.

11/12/81          Built and completed the drainage ditch  
                 around the building and sprayed the  
                 trees with wax sealer.

23. The court finds that all of the items, many of which are mentioned and some which are not, were done to complete the building in the months of August, September, October and November, 1981, were required under the terms and provisions of Worthington & Kimball's contract with C & A Enterprises, and were made in the pursuance of the natural and reasonable fulfillment of Worthington & Kimball's obligation under its contract and were not made for the purpose of extending the time of filing of a lien and none of them were done a long time after the principal

work had been done on the contract, and all of the reasons that were given pursuant to the evidence were satisfactory and reasonable to the above entitled court within the time frame for the reasonable completion of the contract between the parties and the court finds that they were not delayed for the purpose of extending time to file the notice of lien. The court further finds that the items were not trivial or minor, but were made in good faith to remedy defects or made in good faith to complete the contract between the general contractor and the owner.

24. The court further finds that C & A Enterprises' Answer, Counterclaim in Arbitration also alleged that the contract between the two parties was not completed on November 12, 1981, the last date that work was performed by the general contractor, and further allege that a punch list which they had furnished previous to this time had not been completed.

25. The court finds that the application for final payment was not made until November 15, 1981, further indicating that the parties did not regard that final completion had occurred.

26. The court finds that before final completion of all of the items under the contract between the general contractor and the owner, that the general contractor, Worthington & Kimball was ordered off the project because of a financial inspection that was going to take place on or about

November 10, 1981, which would indicate to a loaning institution that there were still items to be completed on the contract; and work was thereafter suspended at the request of and pursuant to the instruction of the C & A Enterprises.

27. The court, therefore, finds that Otto Buehner & Company, as a subcontractor of the general contractor, filed its Lien on January 15, 1982, within 64 days after C & A Enterprises requested and directed Worthington & Kimball to leave and cease work on the project and the mechanic's lien was timely filed.

28. A copy of the lien was mailed to the owner, C & A Enterprises, on January 18, 1982, and was acknowledged by the C & A Enterprises in open court as having been received and the court finds that although Utah Code Annotated, 1953, §38-1-7 requires that the lien shall be delivered by certified mail, that the purpose of the statute was to assure notice and that where the C & A Enterprises duly admitted that they had received notice, that the certified mail requirement was of no significance and that regular mail satisfied the requirements.

29. The court finds that the Otto Buehner & Company lien was properly verified and is a good and valid and enforceable lien pursuant to the provisions of Utah Code Annotated, 1953, §38-1-7, as of the time the first work was commenced on the premises as of July 15, 1980, and is prior in

time to the mortgage of First Interstate Bank of Arizona and is a first and prior encumbrance as to the interests of all of the defendants in this action.

30. That the reasonable amount of labor and materials properly incorporated into the subject property, subject to the Utah Mechanic's Lien Statute by Otto Buehner & Company was the sum of \$41,466.00 together with interest since December 1, 1981, in the sum of \$13,820.00, or a total of \$55,286.00, together with reasonable attorney's fees in the sum of \$12,000.00 for enforcement of its lien. The court holds that the legal rate for the enforcement of Otto Buehner & Company's lien is 10%. That all of the parties herein stipulated that the sum of \$12,000.00 for services rendered herein by Otto Buehner & Company's attorney was reasonable. That the amounts provided in this paragraph of \$55,286.00, together with \$12,000.00 attorney fes, are included in the amounts due and owing by C & A Development and C & A Enterprises to Worthington & Kimball Construction and are further included in the arbitration award as herein set forth.

31. That Otto Buehner & Company and Worthington & Kimball stipulated in open court that 15% interest would be due and owing on the Otto Buehner & Company contract. The court, therefore, finds that Otto Buehner & Company is entitled to a separate judgment against Worthington & Kimball, not included within the foreclosure decree for the sum of \$3,749.94 as the

difference between the interest rate agreed between the parties and the legal rate awarded by the court.

32. That Joseph Smith Plumbing furnished labor and materials of the reasonable value as hereinafter set forth to the project at the special instance and request of Worthington & Kimball, although it filed a mechanic's lien, it did not foreclose the lien and it is entitled to a judgment against Worthington & Kimball for the sum of \$6,172.50, together with interest at the rate of 10% from December 1, 1981, in the sum of \$1,974.52 or a total of \$8,147.02.

33. That the amount due and owing to Worthington & Kimball by C & A Enterprises, is the sum of \$377,131.00, together with interest at the rate of 10% per annum. The court further finds that of this amount, \$2,355.00 was personal property and was not properly lienable, leaving a balance due and owing, subject to the Utah Mechanic's Lien Statute of \$374,776.00, together with interest at the rate of 10% per annum. It appears to the court that the 15% interest awarded in the Arbitration Award is a penalty and, therefore, the court is only awarding Worthington & Kimball 10% interest on the amounts as provided herein.

34. The court finds that the first mechanic's lien of Worthington & Kimball was not properly verified and that the second mechanic's lien was superfluous in that the parties

thought that the first mechanic's lien description was flawed, but it was sufficient to give notice. The court finds that all of plaintiffs' mechanic's liens were not properly verified.

35. That the reasonable value of the attorney fees by Robert F. Bentley, attorney for the C & A Companies, as the prevailing party on the lien foreclosure is \$6,000.00 and the reasonable value of the attorney fees by LaVar E. Stark, as attorney for First Interstate Bank and Stewart Title of Salt Lake is the sum of \$6,000.00.

36. The court finds that Frank S. Campbell, F. Richard Campbell, Gary Dee Jones, Robert A. Campbell and Robert F. Bentley and C & A Companies, Inc. were partners of C & A Enterprises, but were not served with process in this action. Plaintiff, Worthington & Kimball Construction Company, a general partnership, should have the right to commence an appropriate action against the individual partners of C & A Enterprises, an Arizona partnership for a determination as to their liability under this Judgment, without any prejudice for failure to join the individual partners at the commencement of this action.

From the foregoing Findings of Fact, the court now concludes as a matter of law:

CONCLUSIONS OF LAW

1. That there is now due and owing from the defendants, C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, to Worthington & Kimball Construction Company, a Utah general partnership, Gary Worthington and Edwin N. Kimball, general partners, the sum of \$377,131.00, together with interest at the rate of 10%; the court further finds that of this amount, \$2,355.00 was personal property and was not properly lienable, leaving a balance due and owing, subject to the Utah Mechanic's Lien Statute of \$374,776.00, which includes the amounts due and owing to Otto Buehner & Company, dba Buehner Concrete as provided for in these Findings of Fact and Conclusions of Law, exclusive of attorney fees. The mechanic's lien filed in Weber County by Gary J. Worthington and Edwin N. Kimball, dba Worthington and Kimball to secure the above amounts recorded on January 14, 1982, as Entry No. 850356 in Book 1396 at page 258 of the official records, is null and void and was not properly perfected because of the defective verification of the lien pursuant to Utah Code Annotated, 1953, §38-1-7 as amended.

2. That there is now due and owing to the Otto Buehner & Company by plaintiff, Worthington & Kimball Construction Company the sum of \$41,466.00 together with interest since December 1, 1981, in the sum of \$13,820.00, or a total of

\$55,286.00, together with reasonable attorney's fees in the sum of \$12,000.00 for enforcement of its lien, which is secured by a good and sufficient Mechanic's Lien as provided for in Utah Code Annotated, 1953, §38-1-7, on the following described property:

Lot 9, Plat "A" of the Weber County Industrial  
Park

That the mechanic's lien of Otto Buehner & Company is prior in time and prior in priority to the interest of any of the other defendants, C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, First Interstate Bank of Arizona, N.A., Stewart Title Company of Salt Lake City, Permaloy Corporation, Holbrook Company, Inc., Donald K. Lybbert dba Lybbert Masonry Company, Joseph Smith Plumbing, Redd Roofing Company, Worthington & Kimball Construction Company, Gary Worthington and Edwin N. Kimball, and that the above described property be foreclosed and sold by the Sheriff of Weber County, as in such cases made and provided and that the proceeds from the sale thereof after payment of the costs be applied first to the satisfaction of the amounts due and owing to Otto Buehner & Company as herein, and the balance, if any, to C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, and C & A Companies, an Arizona corporation, First Interstate Bank of Arizona, N.A., as their interest may appear or as the above entitled court may determine. In the event that the proceeds of the sale are insufficient to satisfy the amounts due



and owing to defendant, Otto Buehner & Company herein, Otto Buehner & Company shall have a deficiency judgment against Worthington & Kimball Construction Company. The amounts due and owing to Otto Buehner & Company, exclusive of attorney fees are also included in the amounts due and owing in paragraph 1 of the Conclusions of Law, owing by C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, and C & A Companies, an Arizona corporation, to Worthington & Kimball Construction Company.

4. That C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, are entitled to a reduction from the amounts due and owing to Worthington & Kimball Construction Company for \$6,000.00 as the reasonable attorney's fees for prevailing in the mechanic's lien foreclosure action and the failure of Worthington & Kimball Construction Company to establish their mechanic's lien.

5. That First Interstate Bank of Arizona, N.A. is entitled to a judgment against Worthington & Kimball Construction Company for \$6,000.00 as the reasonable attorney's fee for prevailing in the mechanic's lien foreclosure action and the failure of Worthington & Kimball Construction Company to establish their mechanic's lien.

6. That there is now due and owing to the Otto Buehner & Company by Worthington & Kimball Construction Company,

the sum of \$3,749.94 as the difference between the interest rate agreed between the parties and the legal rate awarded by the court.

7. That Joseph Smith dba Joseph Smith Plumbing is entitled to a judgment against Worthington & Kimball Construction Company, a Utah general partnership, Gary Worthington and Edwin N. Kimball, general partners, for the sum of \$8,145.04, together with interest as provided for by law.

8. Any person acquiring any interest since filing the lien as herein specified shall be foreclosed of any right, title or interest as subscribed herein.

9. That the rights and claims of the defendants, C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, First Interstate Bank of Arizona, N.A., Stewart Title Company of Salt Lake City, Permaloy Corporation, Holbrook Company, Inc.. Donald K. Lybbert dba Lybbert Masonry Company, Joseph Smith Plumbing, Redd Roofing Company, and Worthington & Kimball Construction Company and any other person or persons claiming by or through or under them be declared to be subject and subordinate to the mechanic's lien of the defendant, Otto Buehner & Company and such rights or claims of such defendants and such other persons be forever barred, subject only to redemption in the manner provided by law.

10. That the plaintiff, Worthington & Kimball Construction Company, a general partnership, shall have the right to commence an appropriate action against the individual partners of C & A Enterprises, an Arizona partnership for a determination as to their liability under this Judgment, without any prejudice for failure to join the individual partners at the commencement of this action.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1985.

BY THE COURT:

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JUDGE

MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing Findings of Fact and Conclusions of Law to the following parties by placing a true copy thereof in an envelope addressed to:

Robert F. Bentley  
Attorney for C & A Development Co. and  
C & A Enterprises, Inc.  
7525 East Camelback Road  
Scottsdale, Arizona 85251

LaVar E. Stark  
Attorney for First Interstate Bank of  
Arizona, N.A. and  
Security Title Company of Salt Lake  
2651 Washington Boulevard  
Suite 10  
Ogden, Utah 84401

-22-

Robert F. Babcock  
Attorney for Plaintiff  
185 South State, Suite 1000  
Salt Lake City, Utah 84111

postage prepaid, this 11 day of April, 1985.

Thomas A. Balf

THOMAS A. DUFFIN of  
SPAFFORD, DIBB, DUFFIN & JENSEN  
Attorneys for Defendant,  
Otto Buehner & Company  
311 South State, Suite 380  
Salt Lake City, Utah 84111  
Telephone: 531-8020

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, IN AND FOR  
WEBER COUNTY, STATE OF UTAH

---

WORTHINGTON & KIMBALL	)	
CONSTRUCTION COMPANY, a	)	
Utah general partnership	)	ORDER, JUDGMENT AND
GARY WORTHINGTON and	)	DECREE OF FORECLOSURE
EDWIN N. KIMBALL, general	)	
partners,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
C & A DEVELOPMENT COMPANY,	)	
an Arizona corporation,	)	
C & A ENTERPRISES, an Arizona	)	
partnership, FIRST INTERSTATE	)	
BANK OF ARIZONA, N.A.,	)	
STEWART TITLE COMPANY OF	)	
SALT LAKE CITY, C & A	)	
DEVELOPMENT COMPANY, INC., an	)	
Arizona corporation,	)	
PERMALOY CORPORATION, a Utah	)	
corporation, OTTO BUEHNER &	)	
COMPANY, HOLBROOK COMPANY,	)	
INC., DONALD K. LYBBERT, dba	)	
LYBBERT MASONRY COMPANY,	)	
JOSEPH SMITH PLUMBING,	)	Civil No. 83387
REDD ROOFING COMPANY and	)	
JOHN DOES 1 through 24,	)	
	)	
Defendants.	)	

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The above entitled matter came on regularly for trial before the Honorable Ronald O. Hyde, one of the judges of the above entitled court, on December 3, 4, 5 and 6, 1984. Robert F. Babcock appearing for and on behalf of plaintiffs, Worthington and Kimball Construction Company, a Utah general partnership, Gary Worthington and Edwin N. Kimball, general partners; Robert F. Bentley and Vaughn Armstrong appearing for and on behalf of C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona general partnership, comprised of Frank S. Campbell, F. Richard Campbell, Robert A. Campbell, Gary Dee Jones, Robert F. Bentley, and C & A Companies, Inc., an Arizona corporation; LaVar E. Stark appearing for and on behalf of First Interstate Bank of Arizona, N.A., and Stewart Title Company of Salt Lake City; Thomas A. Duffin appearing for and on behalf of Otto Buehner & Company and Joseph Smith Plumbing. Whereupon the court heard the respective testimony of plaintiff and defendants in support of their Complaint and Counterclaims and Cross-claims for a period of four days and then having taken the matter under advisement, and being fully advised in the premises, and having entered its Findings of Fact and Conclusions of Law;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Worthington & Kimball Construction Company, a Utah general partnership, have and recover from C & A Development

Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, the sum of \$377,131.00 together with interest at the rate of 10% and the court further finds that of this amount, \$2,355.00 was personal property and was not properly lienable, leaving a balance due and owing, subject to the Utah Mechanic's Lien Statute of \$374,776.00. That the amounts as provided herein also include the amounts due and owing to Otto Buehner & Company as hereinafter set forth, exclusive of attorney fees as provided in paragraph 3 of this Decree.

2. The mechanic's lien filed in Weber County by Gary J. Worthington and Edwin N. Kimball, dba Worthington and Kimball Construction Company, to secure the above amounts recorded on January 14, 1982, as Entry No. 850356 in Book 1396 at page 258 of the official records, as more particularly described in Weber County, State of Utah, as:

Lot 9, Plat "A" of the Weber County Industrial  
Park

is null and void and was not properly perfected because of the defective verification of the lien pursuant to Utah Code Annotated, 1953, §38-1-7 as amended.

3. A notice of lien was filed in Weber County by Gary J. Worthington and Edwin N. Kimball, dba Worthington and Kimball Construction Co. secured by the above amounts, recorded February 8, 1982, as Entry No. 851656 in Book 1397 at page 768 of official records, as more particularly described in Weber County, State of

Utah, as:

Lot 9, Plat "A" of the Weber County Industrial  
Park

is null and void and was not properly perfected because the defective verification of the mechanic's lien pursuant to Utah Code Annotated, 1953, §38-1-7 as amended.

3. That the amount due and owing to Otto Buehner & Company by Worthington & Kimball Construction Company, is the sum of \$41,466.00 together with interest since December 1, 1981, in the sum of \$13,820.00, or a total of \$55,286.00, together with reasonable attorney's fees in the sum of \$12,000.00 or a total of \$67,286.00 for enforcement of its lien, which is secured by a good and sufficient Mechanic's Lien as provided for in Utah Code Annotated, 1953, §38-1-7, on the following described property:

Lot 9, Plat "A" of the Weber County Industrial  
Park

That the mechanic's lien of Otto Buehner & Company is prior in time and prior in priority to the interest of any of the other defendants, C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, First Interstate Bank of Arizona, N.A., Stewart Title Company of Salt Lake City, Permaloy Corporation, Holbrook Company, Inc., Donald K. Lybbert dba Lybbert Masonry Company, Joseph Smith Plumbing, Redd Roofing Company, Worthington & Kimball Construction Company, Gary Worthington and Edwin N. Kimball, and that the above described



property be foreclosed and sold by the Sheriff of Weber County, as in such cases made and provided and that the proceeds from the sale thereof after payment of the costs be applied first to the satisfaction of the amounts due and owing to Otto Buehner & Company as herein, and the balance, if any, to C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, and as to any other parties as their interest may appear or as the above entitled court may determine. In the event that the proceeds of the sale are insufficient to satisfy the amounts due and owing to defendant, Otto Buehner & Company herein, Otto Buehner & Company shall have a deficiency judgment against Worthington & Kimball Construction Company, Gary Worthington and Edwin N. Kimball, general partners.

4. That C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, are entitled to a reduction against the amounts owing to Worthington & Kimball Construction Company for \$6,000.00 as the reasonable attorney's fees for prevailing in the mechanic's lien foreclosure action and the failure of Worthington & Kimball Construction Company to establish their mechanic's lien. The same is offset against the amounts due and owing as set forth in paragraph 1 of the general judgment entered by Worthington & Kimball Construction Company against C & A Development, an Arizona corporation, C & A Enterprises, an Arizona partnership.

5. That First Interstate Bank of Arizona, N.A. have and recover against Worthington & Kimball Construction Company a judgment for \$6,000.00 as the reasonable attorney's fee for prevailing in the mechanic's lien foreclosure action and the failure of Worthington & Kimball Construction Company to establish their mechanic's lien.

6. That Otto Buehner & Company have and recover a judgment against Worthington & Kimball Construction Company for the sum of \$3,749.94 together with interest at the rate of 15% per annum from date hereof, as an additional sum not set forth in the foreclosure of its Mechanic's Lien.

7. That Joseph Smith dba Joseph Smith Plumbing have and recover judgment against Worthington & Kimball Construction Company, a Utah general partnership, Gary Worthington and Edwin N. Kimball, general partners, for the sum of \$8,145.04, together with interest at the rate of 12% per annum from date hereof.

8. Any person acquiring any interest since filing the lien as herein specified shall be foreclosed of any right, title or interest as subscribed herein.

9. That the rights and claims of the defendants, C & A Development Company, an Arizona corporation, C & A Enterprises, an Arizona partnership, First Interstate Bank of Arizona, N.A., Stewart Title Company of Salt Lake City, Permaloy Corporation, Holbrook Company, Inc., Donald K. Lybbert dba

Lybbert Masonry Company, Joseph Smith Plumbing, Redd Roofing Company, and Worthington & Kimball Construction Company and any other person or persons claiming by or through or under them be declared to be subject to and subordinate to the mechanic's lien of the defendant, Otto Buehner & Company and such rights or claims of such defendants and such other persons be forever barred, subject only to redemption in the manner provided by law.

10. That the plaintiff, Worthington & Kimball Construction Company, a general partnership, have the right to commence an appropriate action against the individual partners of C & A Enterprises, an Arizona partnership for a determination as to their liability under this Judgment, without any prejudice for failure to join the individual partners at the commencement of this action.

Dated this 15 day of April, 1985.

BY THE COURT:

/s/  
\_\_\_\_\_  
JUDGE

MAILING CERTIFICATE

I certify that I mailed a copy of the foregoing  
Judgment to the following parties by placing a true copy thereof  
in an envelope addressed to:

Robert F. Bentley  
Attorney for C & A Development Co. and  
C & A Enterprises, Inc.  
7525 East Camelback Road  
Scottsdale, Arizona 85251

LaVar E. Stark  
Attorney for First Interstate Bank of  
Arizona, N.A. and  
Security Title Company of Salt Lake  
2651 Washington Boulevard  
Suite 10  
Ogden, Utah 84401

Robert F. Babcock  
Attorney for Plaintiff  
185 South State, Suite 1000  
Salt Lake City, Utah 84111

postage prepaid, this 11 day of April, 1985.

Thomas A. Huff

1 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF UTAH  
2 IN AND FOR WEBER COUNTY

3 -----  
4 WORTHINGTON & KIMBALL CONSTRUCTION :  
5 COMPANY, a Utah general partnership, :  
6 GARY WORTHINGTON and EDWIN N. KIMBALL, :  
7 general partners, :  
8 :  
9 Plaintiffs, :  
10 :  
11 vs. : Case No. 83387  
12 :  
13 C & A DEVELOPMENT COMPANY, an : TRANSCRIPT OF  
14 Arizona corporation, C & A ENTERPRISES, : PROCEEDINGS  
15 etal, :  
16 :  
17 Defendants. :  
18 -----

12 BE IT REMEMBERED, that this cause came on for  
13 trial on December 3, 4, 5 and 6, 1984, before the HON.  
14 RONALD O. HYDE, Judge presiding, at the Municipal Building  
15 in Ogden, Utah.

16 APPEARANCES:  
17 ROBERT F. BABCOCK, ESQ., appeared for plaintiffs.  
18 ROBERT F. BENTLEY, ESQ., appeared for C & A  
19 Development and C & A Enterprises, defendants.  
20 LAVAR E. STARK, ESQ., appeared for First  
21 Interstate Bank of Arizona, defendant.  
22 THOMAS A. DUFFIN, ESQ., appeared for Otto  
23 Buehner & Company, defendant.  
24  
25

1 ON DIRECT EXAMINATION BY MR. BABCOCK OF MR. KIMBALL:

2 .....

3 Q Did you have occasion to file a lien on this  
4 project, a Mechanic's Lien?

5 A Yes, I did.

6 Q Let me direct your attention to Exhibit-- Well,  
7 first of all, 217. Do you recognize that document?

8 A Yes. This is a lien of a concrete contractor who  
9 felt that he wasn't getting paid what was entitled him for his  
10 work. We later, when he was calmed down, were able to sit  
11 down and show him that he had been paid every nickel owed him,  
12 and he removed this lien. In the meantime I had to insure  
13 around this one by putting \$10,896.00 on deposit with the  
14 title company that was insuring the title for C & A.

15 Q All right. And this lien, this notice of lien, was  
16 in your file?

17 A Yes, I had copies of this lien.

18 Q All right. Let me direct your attention to  
19 Exhibit 218. Do you recognize that exhibit?

20 A Okay. I have that in front of me.

21 Q All right. Do you know what that document is?

22 A This is a rough draft that was put together by  
23 Gary Worthington with some inputs from me. It was determined  
24 that we would utilize as a pattern this lien of Mr. Kuni's,  
25 since we weren't lien experts and that was filed by a lawyer,

1 and that utilizing that pattern we would put together a lien  
2 for the building. And Mr. Worthington had it typed up and  
3 turned it over to me to file.

4 Q Okay. I note at the top of the second page it  
5 looks like your handwriting's there and it changed the dates.  
6 Can you tell us about that?

7 A Well, I had in my possession at the time a copy of  
8 the document that I picked up from renting the back hoe, and  
9 utilizing that document I could establish that I was on the  
10 job on the 12th of September--I'm sorry--the 12th of November.

11 Q So after Mr. Williams gave it to you, you modified  
12 it then?

13 A I modified it and retyped it, yes.

14 Q What did you do with it after you had it typed?

15 I guess I direct your attention to Exhibit 219.

16 Is that the document that was finalized?

17 A Exhibit 219 is a copy of the document that was  
18 finalized, yes.

19 Q After you typed it, what did you do with it?

20 A After I typed the lien, I went over--well, I needed  
21 it notarized, and I thought that probably they'd have a  
22 notary up here since they run so much work through the  
23 recorder. And I went over and notified Nick over at Bushner  
24 Concrete that we had a problem and were getting nowhere, and  
25 that I was filing a lien. And I showed him this lien that I

1 was filing, and informed Mr.--Gee, I have forgotten his last  
2 name. But I informed Nick that he ought to be filing one also,  
3 as well as I notified all of my subs that we still hadn't  
4 been paid monies for. And when I mentioned to him that I  
5 was headed next to get it notarized and filed, Nick told me,  
6 he said, "We've got a notary right here." And I had forgotten  
7 where I had filed the thing--or where I had had it notarized,  
8 and so on, until I got to looking into it again. And Mr.  
9 Allred is a notary in the office of Bushner Concrete.

10 Now I went out to the car and brought my briefcase back  
11 in while Nick was getting ahold of Mr. Allred, and I brought  
12 out this document showing him when I had rented the back hoe  
13 and done that last work, and that since this was the first  
14 lien I'd ever filed, and not knowing what notaries did with  
15 liens, I was appalled when I heard him say, "Well, I've got  
16 no interest in that document." He said, "My only purpose is  
17 to swear you in and have you subscribe to the fact that you  
18 know the contents of this lien, and that you know that those  
19 contents are true, and that you can testify to that." And  
20 with that explanation I put my papers back in my briefcase.

21 Q Did you sign the lien?

22 A Yes, I did.

23 Q Did you tell him that the things were true?

24 A Yes, I did.

25 Q Did he notarize it?



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A. Yes, he did.

Q. What did you do after that?

A. Well, I bewilderdly drove up here and filed it.

.....

REPORTER'S CERTIFICATE

This is to certify that I, Evelyn S. Funk, was one of the official court reporters of the Second Judicial District Court of Utah; that I was present in court during the trial in the above matter, and thereat reported in stenograph the proceedings had.

The foregoing pages of transcript, 2 to 5, inclusive, constitute a true and correct transcription of my said stenographic notes of those portions requested by counsel.

Dated and signed this 26<sup>th</sup> day of October, 1985.

Evelyn S. Funk  
Official Court Reporter



1 (ON CROSS EXAMINATION, DECEMBER 5, 1984, BY MR. STARK OF  
2 EDWIN KIMBALL)

3 BY MR. STARK:

4 Q Your deposition was taken, at least the 14th and  
5 20th day of August of '84, and possibly a day earlier, or a  
6 few days earlier than that; is that your recollection?

7 A Sometime back through that period. I would have  
8 to check my calendar.

9 Q Referring to Page 29-- Is his deposition handy so  
10 he can look at it?

11 A Bob, I believe it's in my briefcase back there.  
12 (handed to witness)

13 Q Page 29. Let me ask you if indeed I asked you the  
14 questions as indicated and the responses as indicated?

15 Were your responses referring to the Mechanic's Lien that  
16 you prepared, going to Line 13:

17 "Q Let me show you what appears to be a copy of  
18 notice of lien dated January 13, 1982, apparently signed by  
19 you, and ask you if you recognize it, please? Does that  
20 appear to be your signature?

21 "A Yes, it does.

22 "Q Did you cause the document to be prepared?

23 "A Excuse me?

24 "Q Did you cause that document to be prepared?

25 "A Oh, I think a lack of payment caused it to be

1 prepared.

2 "Q Did you require someone to type that notice of lien  
3 up?

4 "A I typed up. I don't do too well with one finger  
5 missing, but I typed it.

6 "Q And you typed it up on or about the 13th of  
7 January of '82, the date it shows that it was signed?

8 "A No, we had several rough drafts prior to that, and  
9 it may have been typed a day or so before.

10 "Q When you say we may have had several drafts, to  
11 whom do you refer?

12 "A Oh, I reviewed the problem with Mr. Worthington and  
13 determined that the time was of the essence and we had to  
14 act.

15 "Q So the two of you together talked about making--?

16 "A It seems like two weeks before or three weeks before  
17 we made a rough draft of it.

18 "Q The two of you together did?

19 "A Oh, I don't recall if it was just me alone or the  
20 two of us together.

21 "Q You talked with Mr. Worthington?

22 "A We talked it over, yes.

23 "Q And where were you when you signed this document?

24 "A I was in the presence of a notary public.

25 "Q Who?

1 "A. Since I don't use anyone in particular, I may have  
2 gone to a used car agency or gone to one of the other people  
3 I knew that had a notary stamp. It looks like Mr. Arnold  
4 Allen. I do not have a personal working acquaintance with  
5 him, so I either dropped by the bank or a car dealer, or  
6 someone that I knew could notarize the document for me.

7 "Q. Do you recall where you were when you signed the  
8 document?

9 "A. That one may have been done in the bank. I'd have  
10 to check on that.

11 "Q. Is it your testimony then that you signed this in  
12 the presence of Arnold Allen?

13 "A. That's correct.

14 "Q. On the 13th of January, 1982?

15 "A. I believe that's when it's dated, yes.

16 "Q. And that was as you recall in a bank?

17 "A. Well, like I say, I don't know. It may have been in  
18 the bank. It was more than-- At that time I was more  
19 inclined to go to one or two of the branches that were in  
20 my area out there.

21 "Q. What bank do you refer to?

22 "A. The one that I do most of my notarizing was First  
23 Security Bank. However, this could have been Tracy Bank &  
24 Trust or Draper Bank.

25 "Q. Do you know Arnold Allen?

1 "A. I have no working acquaintance with him. The only  
2 thing I remember about the signing of it is that he wanted  
3 to see my driver's license, and see the picture on it, and  
4 compare it with me to make sure I was the one signing the  
5 document.

6 "Q Okay. Look at that again if you would, please.  
7 There's some writing beneath your signature. Who typed that  
8 in?

9 "A. Beneath my signature?

10 "Q Yes.

11 "A. I typed that in.

12 "Q Now where were you when you typed up the notice of  
13 lien?

14 "A. In my residence.

15 "Q Utah County?

16 "A. Sandy, Utah.

17 "Q You don't recall what bank you went to, huh?

18 "A. No, I don't. All I know, it would probably be one  
19 in the Sandy area.

20 "Q Near where your office is?

21 "A. Near where my home is.

22 "Q Did the notary ask you whether or not the matters  
23 stated in the notice of the lien were true?

24 "A. The notary informed me that his seal was for the  
25 sole purpose of identifying me and my oath, and that I had

1 taken it and signed properly, properly signed the  
2 document. He said that he himself by putting his seal on  
3 there only stipulated that and nothing more.

4 "Q Stipulated what?

5 "A That I appeared before him, and under oath I had  
6 signed the document, and that it was true and correct, and  
7 that I had personal knowledge of its contents."

8 Q Were those the questions and answers at that time?

9 A Yes, they were.

10 MR. STARK: All right.

11 . . . . .

12 (ON REDIRECT EXAMINATION, DECEMBER 5, 1984, BY MR.  
13 BABCOCK OF EDWIN KIMBALL)

14 Q Can you explain how your recollection was  
15 refreshed about the events following the notarization of  
16 the Mechanic's Lien that was filed by you in this case?

17 A Yes. Mr. Stark questioned me extensively on where  
18 I had found a notary. I told him what my common practices  
19 were. And wanting to know for myself where I had signed  
20 it, so that I would know for sure what the answers should  
21 have been, I gave-- That's why the answers were so vague is  
22 I did not have total recollection. I went and looked up  
23 this gentleman's name in the phone book.

24 Q The lien had an address under his signature?

25 I direct your attention to the exhibit.

1       A.       I don't recall that. I do know it was looked up  
2 in the phone book. A call was made to his home. His wife  
3 answered.

4       I asked: "Is this where the notary public lives, and  
5 where does he work?"

6       The response was: "Buehner Concrete."

7       And then it came to light that I had been down there and  
8 seen Nick who had been pressuring me for payment, and said:  
9 "Nick, I'm having to file a lien. If you want to join in  
10 this, I suggest you get your lien in."

11               MR. BABCOCK: All right. Thank you.

12               (ON RECROSS EXAMINATION, DECEMBER 5, 1984, BY MR. STARK  
13 OF EDWIN KIMBALL)

14       Q.       Now I believe you have testified that in the  
15 conduct of your construction business you have not found it  
16 necessary to file any notice of liens; is that correct?

17       A.       That is correct. This is the first one I've ever  
18 filed.

19       Q.       The first one you have ever filed.

20       A.       Yes.

21       Q.       And it was filed by you in January of 1982; is that  
22 right?

23       A.       I'd have to look at the lien. I assume you're  
24 right.

25       Q.       And you were claiming some \$500,000, \$400,000,



1 something like that, whatever it says, a large amount of  
2 money?

3 A Okay.

4 Q Right?

5 A (nods head up and down)

6 Q So this was indeed as far as you're concerned an  
7 isolated event in connection with your construction business?  
8 That is to say, it is the first lien you've ever filed?

9 A That I have, yes.

10 Q Yes. And when your deposition was taken in August  
11 of this year, didn't you remember the circumstances of  
12 signing that lien and the filing of it?

13 A I didn't remember the location where I had signed  
14 the lien. I remembered the circumstances because it was  
15 the first one that I had ever signed. I do remember that  
16 I took paper work with me to show the notary that I could  
17 prove the last date, and so on. And he told me that wasn't  
18 of his concern.

19 Q Well, were the circumstances as you testified in  
20 the deposition that I read, that was taken in August, or as  
21 you have now testified in court?

22 A I don't find any contradiction in either, because  
23 normally I go just down to the bank, or local corner bank or  
24 something, and grab the nearest used car salesman or  
25 whoever has got a notary seal.

1 Q To file a Mechanic's Lien for \$500,000?

2 A A notary is a notary; isn't it?

3 .....  
4  
5  
6

7 REPORTER'S CERTIFICATE

8 This is to certify that I, Evelyn S. Funk, was the  
9 official court reporter of the Second Judicial District  
10 Court for the Honorable Ronald O. Hyde; that I was present  
11 in court during the trial in the above matter, and thereat  
12 reported in stenograph the testimony and proceedings had  
13 at said trial.

14 The foregoing pages of transcript, 2 to 9,  
15 inclusive, constitute a full, true and correct transcription  
16 of those portions of the testimony at trial "regarding the  
17 preparation of the Mechanic's Lien, the appearance before  
18 the notary public, and the filing of the lien", as requested  
19 by counsel.

20 Dated and signed this 18<sup>th</sup> day of October, 1985.

21  
22  
23 Evelyn S. Funk  
24 Official Court Reporter  
25

HOUSE OF REPRESENTATIVES  
STATE OF UTAH



CAROLE E. PETERSON  
ACTING CHIEF CLERK

318 CAPITOL, SALT LAKE CITY 84114  
(801) 533-5801

May 8, 1985

TO WHOM IT MAY CONCERN:

I, Carole E. Peterson, Chief Clerk of the Utah State House of Representatives do hereby certify the attached text entitled "Business, Labor Committee Minutes, January 17, 1985, 8:00 a.m." is a verbatim text of said committee meeting held on January 17, 1985.

I also certify the attached third reading discussion of H.B. No. 56, is a verbatim text of said debate.

Sincerely,

CAROLE E. PETERSON  
Chief Clerk

Enclosures

Business, Labor  
Committee Minutes  
January 17, 1985  
8:00 a.m.

Mr. Chairman (Rep. Sykes): The next item on the agenda is Simplified Mechanics Lien Notice, House Bill 56, Representative Holt. I just saw him walk in.

Rep. Scott W. Holt: Good morning.

Chairman: Good morning.

Rep. Scott W. Holt: Basically, all this Bill is is a House clearing Bill. The purpose of the Mechanics Lien is to give a party notice, a claimant or a materialman or someone who is has been shorted someway with regards to supplies, labor, services performed. I'm an attorney and... run into a practice an awful lot that people of the trade just have difficulty filling out Mechanics Liens properly and this is just to assist them. The Supreme Court is also addressing the problem. The Supreme Court has made several rulings with regards to Mechanics Lien, Notary type statements in the 1982 and 1983 and they've made it rather technical so that anybody that screws up a little bit with regards to the statement although the notice is there for everyone to read, just because its a Mechanics Lien will lose his claim. The

old law basically is to set forth a person had to sign one of these things under a subscribed and sworn to but different practitioners within the state and out of state, there is a lot of different notary statements that float around and usually are attached to Mechanics Lien and the Supreme Court has come down and has construed this language in the existing statute most narrowly and that's the purpose of this is just to simplify and get away from technicalities I don't think have any part with our procedures and our idea of what mechanics liens are for, and that's all this bill addressing.

Mr. Chairman: What, what difference, would you give us an example of before and after, concisely how that would ah...be different.

Rep. Scott W. Holt: ...Um, as the law requires right now, a person would have to sign a mechanics lien with the statement subscribed and sworn to by a notary. The notary would have to use the oath. Although that's how the law is now; this basically would mean that a person would just have to sign it and date it, and would not have to obtain a notary or go through a notarization type process. There wouldn't have to be a notary statement put on. And that's what an awful lot of Court cases have swung on is the technicality: is has that notary done his or her job correctly? Quite a few mechanics have basically lost their lien because of a small technicality. The Supreme Court has

taken the tack that its exact and very precise like I said all the requiring the i's and t's be crossed in these notary type statements in the mechanics lien and a lot of people just don't understand. I mean the mechanics liens sounds simple if you read through the law, but when you actually put together the form, it's fairly hard for a lot of people and I'm hired and retained a lot of times to have to draw these things up for people. This isn't something that you should have to go hire a lawyer for to get the exact form. This is something that a materialman ought to be able to do on his own to protect his lien and this is why -- this is the problem we're trying to address in this bill is (cough, cough) to make it simple for everybody for have and keep lien rights.

Mr. Chairman: Now we wouldn't want your business to suffer because of this, Representative.

Rep. Scott W. Holt: No, but I see an abuse and a need and that's all I'm trying to grasp.

Rep. H. Craig Moody: Representative Scott W. Holt, my only question is, right now with the notary being required, is this going to change the recording of the lien in order to make it valid?

Rep. Scott W. Holt: No.

Rep. H. Craig Moody: So it still will need to be recorded. Is the date of the 80 days going back from the date that it is filed or is it the date that it's recorded?

Rep. Scott W. Holt: The 80 days, the way the current law is, and this hasn't modified the existing law with regard to the time periods. For a General Contractor, he has to file his lien 100 days after his last work, labor or services were rendered or performed.

Rep. H. Craig Moody: When you say filed, does that mean recorded or just have -- .

Rep. Scott W. Holt: Recorded.

Rep. H. Craig Moody: Alright.

Rep. Scott W. Holt: Recorded in the appropriate recorder's office. I'm not modifying any of the other language, that language existed before. This does not change it.

Mr. Chairman: Alright so this wouldn't create a situation where somebody could go in and say, "Well, gee, you know I backdated it to the 15th

Rep. Scott W. Holt: No.

Rep. H. Craig Moody: But I did file it on the 30th.

Rep. Scott W. Holt: Yeah -- when -- they go by the date of recordation, of the date and time.

Rep. H. Craig Moody: So the days still apply to the recording?

Mr. Chairman: Uh, just, just one quick question. You mean that you wouldn't have to have an acknowledgement to record it either?

Rep. Scott W. Holt: No.

Rep. Scott W. Holt: See where a lot of people got in trouble with was they -- .

Mr. Chairman: So, so you could -- .

Rep. Scott W. Holt: Put down an acknowledgement instead of a subscribed and sworn to or they'll come in -- uh you'll get a corporation and you'll have them basically say, like someone is working for Boise Cascade, an agency type of situation from the main materialman and he'll put down a different form. A lot of states require different types of verifications, different types of notary type statements. -- And Utah, just says subscribed and sworn to and where the materialman or the lien claimants have gotten trouble in the past is the best technique for setting aside these liens by someone who's trying to beat him out of his money is he'll come in and argue the technicality that he hasn't followed the proper lien form. And the Supreme Court, on several appellate cases uh, I think it was First Security Title v. Watmans, I remember, a 1982 case. Basically, they come through and instead of saying well the person is substantially complied, which is the way it should be, they're saying, "Well, he didn't have the right notary -- or -- on this thing" and they've thrown out his lien. So, they've they've construed this most, most narrowly, most technically. And what I'm trying to do is re -- uh -- address that problem and say, "Wait a minute Supreme Court,



this is not an area that we need to be hyper-technical on." This is an area that people; everybody should be able to come in and file a claim that they feel that they've been shorted with money. Let's get away from being lawyers, let's get away from doing -- the purpose is just to give a notice, that's the purpose of the act. And we shouldn't have too complicated for people to do this and that's all I'm trying to do is simplify it.

Mr. Chairman: I notice in -- uh -- on Page 1, Line 33, you also took out the section that said he had to deduct his credits. So if he gives an approximate amount, the lien would still be valid.

Rep. Scott W. Holt: That's right. Because its all an issue when you enforce these liens, the trial courts are always going hear what are credits and what are not credits. Also there was -- uh -- I guess there's a -- the guy that drew this up for us has also done some housekeeping that I didn't request but uh -- it also been taken out uh -- alleging what the terms of the agreement was in a mechanics lien. Again, I think that's a question for fact that will always come up at any trial. I don't -- the purpose is to give a notice and the more you put in there, that the person has to give for notice, the more chance he's going to make an error in it, the more chance that this thing is too technical for him and you're going to have to, you know, employ an attorney to

do something more complicated. There is a greater chance that he'll lose everything that we require.

Mr. Chairman: Okay Representative Dixon M. Pitcher and Representative Hunter.

Rep. Dixon M. Pitcher: Representative, let me see if I understand this correctly. Actually we haven't really changed the due process of serving, is that correct?

Rep. Scott W. Holt: Right.

Rep. Dixon M. Pitcher: And so really we're giving it the same force -- of -- it was before as opposed to Court, but actually we've simplified the whole procedure. As far as the way you've set it where -- .

Rep. Scott W. Holt: That's true. That's the intent here.

Rep. Dixon M. Pitcher: It seems to me this would be a great advantage, like you indicated for someone who didn't want to come in and retain an attorney and move away from the concept of how much justice [inaudible] this legislation.

Mr. Chairman: Thank you, Representative ?

Rep. Hunter: Being an individual who believes in simplicity, I'd like to move this bill out favorably.

Rep. Dixon M. Pitcher: I second it.

Mr. Chairman: Before we take a vote on that, as we indicated last time we will talk to the public. Is there anyone

here that would like to make a statement on this bill? State your name and position.

Holland, Neal: Mr. Holland Neal, of the Electrical Contractors Assn: And we very much appreciate your representative that came here and we urge you to support this bill.

Mr. Chairman: Okay. Any other discussion to the motion? Seeing none, I'll place the vote to the committee. All in favor of passing this bill out favorably, say Aye. Any opposed? It's unanimous.

HOUSE OF REPRESENTATIVES  
STATE OF UTAH



CAROLE E. PETERSON  
ACTING CHIEF CLERK

518 CAPITOL, SALT LAKE CITY 84114  
(801) 533-8801

May 8, 1985

TO WHOM IT MAY CONCERN:

I, Carole E. Peterson, Chief Clerk of the Utah State House of Representatives do hereby certify the attached text entitled "Business, Labor Committee Minutes, January 17, 1985, 8:00 a.m." is a verbatim text of said committee meeting held on January 17, 1985.

I also certify the attached third reading discussion of H.B. No. 56, is a verbatim text of said debate.

Sincerely,

A handwritten signature in cursive script, appearing to read "Carole E. Peterson".

CAROLE E. PETERSON  
Chief Clerk

Enclosures

### THIRD READING DISCUSSION OF H. B. No. 56

House bill No. 56 - Simplified Mechanic's Lien & Notice Scott W. Holt; Being inacted by the Legislature by the State of Utah.

Representative Holt: Thank you Mr. Speaker. Before I address this Bill, I would like to ask the Chair for a personal privilege. We have in the gallery, students from the Joseph Kirk Elementary School. The teachers are Lucille Garrit, Audrey Frances and Janene Manning, fourth and third grade, and I would like to ask the House to recognize them at this time, have them stand perhaps.

Mr. Speaker: Please stand and be recognized.

Representative Holt: Thank you Mr. Speaker. With regard to the House Bill No. 56, the intent of this Bill is basically to simplify our existing Mechanic's Liens law. The Supreme Court came down in two decisions; one in 1981 and another again in 1983, which chose to construe our language most narrowly. The proposed legislation would make it much simpler for the people to file Mechanic's Lien and not have to worry about the hypertechnicalities that the Supreme Court has placed upon the lien law. Most of the act has not been changed, all we're trying to do is do away with the requirement of a verification and that they put down exact terms and details with regard to the contract date a materialman may have entered and it has no fiscal impact, it basically is just to simplify the procedures so that anyone can file a Mechanic's Lien and not need to have to obtain the services of an attorney or something like that. It's just to

make it a little simpler and a little easier for people who may be affected and want to file a lien.

Mr. Speaker: Others to the bill. Seeing none, I'll turn it back to Representative Holt for summation.

Representative Holt: I'd waive it Mr. Chairman.

Mr. Speaker: The voting is now open on House Bill 56. Seeing that all have voted. Voting is closed, voting is closed on House Bill 56, having received 57 affirmative votes and no negative votes, passes this House and will be transmitted to the Senate for its action.

CONTRACT BALANCE PLUS INTEREST

LAST DRAW INCLUDING RETAINAGE	445,883.00
INTEREST ON EXCESSIVE RETAINAGE WITHHELD	15,373.00
INTEREST ON LATE PAYMENTS	<u>9,734.00</u>
TOTAL	470,990.00

ACCRUING INTEREST

<u>DATE</u>	<u>INTEREST RATE</u>		<u>INTEREST DUE</u>		<u>BALANCE DUE</u>
8-30-81	(22.50)	+	17 41.98	=	472,7 31.98
9-30-81	(22.08)	+	8698.26	=	481,430.24
10-30-81	(20.45)	+	8204.37	=	489,634.61
11-30-81	(18.84)	+	7687.26	=	497,321.87
12-30-81	(17.75)	+	7356.21	=	504,678.08
1-30-82	(17.75)	+	7465.02	=	512,143.10
2-29-82	(18.56)	+	7921.14	=	520,064.24
3-30-82	(18.50)	+	8017.65	=	528,081.89
4-30-82	(18.50)	+	8141.26	=	536,223.15
5-30-82	(18.50)	+	8266.77	=	544,489.92
6-30-82	(18.50)	+	8394.21	=	552,884.13
7-30-82	(18.26)	+	8413.05	=	561,297.18
8-30-82	(16.39)	+	7666.38	=	568,963.56
9-30-82	(15.50)	+	7349.11	=	576,312.67
10-30-82	(14.52)	+	6973.38	=	583,286.05
11-30-82	(13.85)	+	6732.09	=	590,018.14
12-30-82	(13.50)	+	6637.70	=	596,655.84
1-30-83	(13.16)	+	6543.32	=	603,199.16
2-30-83	(12.98)	+	6524.60	=	609,723.76
3-30-83	(12.98)	+	6595.18	=	616,318.93
4-30-83	(12.98)	+	6666.52	=	622,985.44
5-30-83	(12.98)	+	6738.62	=	629,724.06

*Average Interest 12-30-81 through 5-30-83 - 15.84%*