

1940

Robert B. Swaner v. Union Mortgage Company : Abstract of Record

Utah Supreme Court

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Dan B. Shields; Attorney for Appellant;

Recommended Citation

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In the Supreme Court Of the State of Utah

ROBERT B. SWANER,
Plaintiff and Respondent,
vs.
UNION MORTGAGE COMPANY,
a corporation,
Defendant and Appellant.

No. 6234

Appeal from Third Judicial District Court of Utah
In and for Salt Lake County
Herbert M. Schiller, Judge

ABSTRACT OF RECORD

DAN B. SHIELDS,
Attorney for Appellant.

FILED
MAR 13 1940

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DAN B. SHIELDS,
Attorney for Appellant.

INDEX

Advisory Verdict	58
Amended Complaint	1
Answer and Counter-Claim.....	6
Assignment of Errors.....	61
Bill of Exceptions.....	27
Certificate	60
Decision of Court.....	60
Decree	21
Modification	25
Findings of Fact.....	16
Modification	25
Instructions	48
Motion for New Trial.....	23
Notice of Appeal.....	60
Order Extending Time.....	60
Order Settling Bill of Exceptions.....	60
Reply	13
Ruling by Court.....	24
Stipulation Settling Bill of Exceptions.....	60
Waiver	25

WITNESSES

Plaintiff

Monty Carpenter

Direct Examination	34
Cross Examination	34
Redirect Examination	35

INDEX

A. J. Dean	
Direct Examination	35
Cross Examination	37
Redirect Examination	37
J. D. Hurd	
Direct Examination	37
George Swaner	
Direct Examination	33
Cross Examination	34
Robert B. Swaner	
Direct Examination	27
Cross Examination	30
Redirect Examination	32
<i>Defendant</i>	
Edward O. Anderson	
Direct Examination	40
Cross Examination	41
Redirect Examination	42, 43
Recross Examination	43
Carl W. Buehner	
Direct Examination	38
Cross Examination	39
William Park Conner	
Direct Examination	46
Cross Examination	48
Redirect Examination	48
O. C. Nielson	
Direct Examination	44
Cross Examination	45

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a corporation,		
Defendant and Appellant.		

Appeal from Third Judicial District Court of Utah
In and for Salt Lake County
Herbert M. Schiller, Judge

ABSTRACT OF RECORD

AMENDED COMPLAINT

Comes now the plaintiff and files herein his
amended complaint and alleges as follows:

I

19. That the defendant is a corporation organized
and existing under and by virtue of the laws of
the State of Utah, with its principal place of
business at Salt Lake City, Utah.

II

That on or about the 1st day of November,
1938, the plaintiff entered into an agreement
with the defendant whereby and by the terms

whereof the defendant agreed to loan the plaintiff \$3,000.00, to be expended for labor and building materials in the construction of a certain building to be erected on the property hereinafter described; that it was further agreed that the said \$3,000.00 should be advanced to the plaintiff as the construction of said building progressed, that is to say: 10 per cent when the first floor was completed; 15 per cent when the roof was completed; 25 per cent when the building was ready for lath and plaster; 20 per cent when the building was ready to be decorated; and 30 per cent upon the completion of said building.

III

That on or about the 14th day of November, 1938, the plaintiff executed and delivered to the defendant his certain promissory note for the said sum of \$3,000.00, so to be loaned as aforesaid, and a mortgage to secure the payment of said note covering the following described property, to wit:

20. Commencing at a point on the East line of 16th East Street, in Salt Lake City, Utah, said point being 100 feet South and 50 feet East of the Northwest Corner of the South Half or Lot 9, Block 12, F. M. Lyman Jr. Survey of Section 16, Township 1 South, Range 1 East, Salt Lake Meridian, and running thence South 50 feet; thence East 113 feet; thence North 50 feet; thence West 113 feet to the place of beginning, together with right of way,

which said mortgage is of record as No. 845777 in Book 225 of Mortgages, page 223, records of Salt Lake County, Utah.

IV

That on or about the 14th day of November, 1938, the plaintiff also executed and delivered to the defendant another mortgage for the sum of \$3,000.00, covering the property hereinbefore described, which said mortgage is of record as No. 845778 in Book 225 of Mortgages, page 223, records of Salt Lake County, Utah, to secure the payment of the above mentioned promissory note for \$3,000.00.

V

That the plaintiff proceeded with and constructed said building upon the above described property up to the completion of the roof thereof, and has complied with all of the terms and conditions of said agreement to be by him kept and performed, but that the defendant has refused to advance the said \$3,000.00, as agreed upon, or any part thereof, even though repeatedly requested so to do by the plaintiff; that upon such refusal of defendant to advance said money in accordance with said agreement plaintiff demanded of defendant that it surrender said above mentioned promissory note to plaintiff and release and discharge said mortgages of record, so that plaintiff might procure a loan on said property elsewhere to enable him to complete said building, but that the defendant has refused,

and still refuses, to surrender said note to the plaintiff, or to release and discharge said mortgages.

VI

21. That by reason of defendant's refusal to advance said sum, as agreed upon, or to release said mortgages, plaintiff has been unable to complete the construction of said building, and as a result thereof the lumber used in the construction thereof up to the completion of the roof and other parts of said building has become water soaked and otherwise damaged by the elements, and it will be necessary for plaintiff to repair said building, all to his damage in the sum of \$250.00.

VII

That in reliance upon defendant's promise to advance said money to the plaintiff, as hereinbefore set forth, plaintiff purchased a number of steel window sashes and when said sashes were delivered upon the above described premises plaintiff by reason of defendant's failure as aforesaid, was unable to pay for said window sashes, and became obligated to pay the further sum of \$10.00 demurrage thereon, to plaintiff's damage in said sum.

VIII

That on or about the 15th day of November, 1938, plaintiff purchased lumber from the Rio Grande Lumber Company for which he agreed to pay the sum of \$400.00; that the said lumber

company agreed to allow plaintiff a ten per cent discount if he paid for said lumber on or before the 1st day of December, 1938; that by reason of defendant's failure to advance said money, as aforesaid, plaintiff was unable to pay for said lumber on or before the 1st day of December, 1938, to his damage in the sum of \$40.00.

IX

That by reason of defendant's wilful failure and refusal to advance said money to plaintiff, as aforesaid, plaintiff has been unable to pay workmen and materialmen who performed work and labor and furnished materials in the construction of said building, and mechanic's liens for such labor and materials have been filed against said building and premises; that because of said liens and said unreleased mortgages plaintiff has been unable to procure any other loan upon said property, or to otherwise finance the completion of said building, so as to condition the same for sale, and plaintiff has been unable to sell said property; that because of defendant's said conduct plaintiff has been subjected to repeated demands for payment of money due laborers and materialmen, and has suffered great
22. embarrassment and humiliation and mental distress, due to his inability to meet said obligations, all to plaintiff's damage in the sum of \$2,000.00.

X

That by reason of defendant's refusal to advance said money as agreed, and its refusal to

cancel said note and release said mortgages, it has become necessary for plaintiff to employ counsel to prosecute this action in his behalf, for which service he has become obligated to pay the sum of \$200.00, as attorney's fee, and plaintiff alleges that the sum of \$200.00 is a reasonable attorney's fee for the prosecution of this action.

WHEREFORE plaintiff prays judgment against the defendant that it be required to cancel said note and release said mortgages of record; that plaintiff have judgment for the sum of \$2,500.00, including the said sum of \$200.00 attorney's fees, and that the court make such other and further order in the premises as may be just and proper. Plaintiff prays for his costs herein expended.

REX J. HANSON,
Attorney for plaintiff.

Duly verified.

(Title of Court and Cause.)

ANSWER AND COUNTER-CLAIM TO
AMENDED COMPLAINT
No. 62588

Comes now the defendant in the above entitled action, and answering plaintiff's amended complaint, admits, denies and alleges as follows:

1. Admits paragraph one.
2. Denies paragraph two.
3. Admits paragraphs three and four.
4. Answering paragraph five of said amend-

ed complaint, this defendant admits that it has refused to advance the plaintiff said \$3,000.00, admits that plaintiff has requested that the defendant release said mortgage, and having no information sufficient to form a belief as to the other matters alleged in said paragraph, denies the same.

Denies each and every other allegation in said amended complaint not herein specifically admitted, qualified or denied.

30. Further answering said amended complaint and as a defense and counterclaim thereto, this defendant alleges:

1. *That defendant is a corporation under the laws of Utah.*

2. *That on the 6th of July, 1938, the plaintiff applied to defendant to make him one certain loan of \$4,000.00 under the terms and conditions of the Federal Housing Administration plan and requested defendant to make the necessary application in his behalf and to provide for appraisals, credit reports, initial service charges, recording fees, abstracting and fire insurance in order that said application would in all respects meet the terms and conditions and comply with the rules and regulations of said Federal Housing Administration. Thereafter, on the 20th day of July, 1938, the said Federal Housing Administration did approve such loan and did issue its commitment therefor, subject to the qualification that one*

George B. Swaner, father of said plaintiff, should be a co-signer on the note and mortgage evidencing and insuring the payment of such loan, which were made, executed and delivered to defendant on or about the 22nd day of July, 1938.

3. *That in due time plaintiff began work and improvements upon the property described in the mortgage so dated July 22, 1938, and from time to time, for the accommodation of plaintiff and believing in and relying upon his representations that he would in all respects comply with the terms and conditions of said Federal Housing Administration, defendant advanced certain sums of money upon the order of plaintiff to material men and laborers as the improvements on such structure proceeded until such advances had approximated \$2,800.00.*

4. *That on September 15, 1938, plaintiff made application to defendant to obtain three additional insured Federal Housing Administration loans for \$3,000.00 each, each of said loans to be evidenced by the note of plaintiff and to be secured by a mortgage on property described by plaintiff in his application. That immediately defendant presented such applications to said Federal Housing Administration, and made certain advancements and expenditures in behalf of plaintiff, and on November 6, 1938, as a result of defendant's efforts, Federal Housing Administration approved one loan upon the property described in plaintiff's amended complaint, con-*

31.

ditioning said approval that George B. Swaner and Charlotte L. Swaner, father and mother of said plaintiff, should become co-signers thereon. On November 14, 1938, the note and mortgage referred to in plaintiff's amended complaint were made and executed, subject to the conditions above set forth and subject to the terms and conditions set forth and required by Federal Housing Administration and particularly that the structure upon which the Federal Housing Administration mortgage is placed shall be constructed according to its requirements and pass the required inspection and have approval by said Federal Housing Administration, all of which has not been done. That shortly after said note and mortgage were executed and before any work or improvements were made upon such property by plaintiff, this defendant was advised that plaintiff was failing to comply with the terms and conditions of the Federal Housing Administration rules and regulations in that he was not keeping the property described in the mortgage first above described free and clear of debt, except for the mortgage above referred to, and that he had not kept such property free of claims, and that he had not paid the accruing bills thereon; and that several material men and mechanics had already filed liens against such property. That in addition to the foregoing complaints, this defendant was advised that certain claims had been filed with the Industrial Commission of Utah because plaintiff had neglected to pay laborers employed by him

on such improvement. That thereupon, defendant called the plaintiff into its office and apprized him of the information which it had secured, and thereupon plaintiff assured defendant that immediately he would make arrangements for the liquidation of such claims, and that he would put such loan back in condition so that it might be finally approved by said Federal Housing Administration. Relying upon such further representations of plaintiff, defendant did make additional advancements, the last of which occurred on the 23rd day of December, 1938.

32. 5. *Notwithstanding the representations and agreements of plaintiff to liquidate unpaid obligations against said first above described property, he failed to pay the same and failed to liquidate such obligations and failed to clear such property of claims of material men and laborers, and upon his failure so to do, material men and laborers filed liens against such property, and defendant found itself confronted with the possibility of being obliged to defend suits to foreclose liens on the part of said laborers and material men which were clouding and encumbering the title to the property on which plaintiff's Federal Housing Administration insured mortgage existed as hereinbefore described.*

6. *That as the result of the failure of plaintiff to comply with his agreements and representations and his further failure to liquidate, pay and remove the claims of material men and laborers*

against the property first above described, defendant found itself in grave danger of losing much, if not all, of the principal advanced on such loan to plaintiff, and unless plaintiff complied with his agreement to keep such property clear from claims, defendant would be under the expense and obligation to defend actions to foreclose the liens above described, and defendant was further fearful that the Federal Housing Administration would withdraw its approval of the loan first above described, and owing to the fact that such loans are high percentage of value loans, defendant was confronted with possibility of large losses as above set forth, and notified plaintiff that it would not further advance on the first loan and that it was no longer interested in continuing the second loan above described.

7. Upon receipt of such notification by defendant, plaintiff demanded the release of the mortgage described in plaintiff's complaint. Upon such demand being made upon it, this defendant consented that such release of mortgage be made, and informed the plaintiff that upon payment by him to it of the expenses and outlay made by it on his behalf, in connection with such loan, that said loan would be immediately released.

8. *That defendant has expended in behalf of plaintiff in securing approval of such loan by the Federal Housing Administration and its commitment to insure the same, and did and per-*

formed certain services for him in that connection in the following amounts:

33.	<i>Federal Housing Administration</i>	
	<i>Appraisal Fee</i>	<i>\$10.00</i>
	<i>Mortgagee Appraisal Fee and</i>	
	<i>Credit Report</i>	<i>6.00</i>
	<i>Initial Service Charge.....</i>	<i>75.00</i>
	<i>Recording Fee</i>	<i>7.10</i>
	<i>Abstracting</i>	<i>5.00</i>
	<i>Fire Insurance</i>	<i>21.00</i>
		<hr/>
		<i>\$124.10</i>
	<i>Less payment received.....</i>	<i>10.00</i>
		<hr/>
	<i>Balance</i>	<i>\$114.10</i>

all of which were of the reasonable value herein set forth and all of which were necessary to secure such Federal Housing Administration commitment, and all of which are due and owing to this defendant; and when the same are paid, defendant agrees to release said mortgage immediately.

WHEREFORE, defendant prays that plaintiff take nothing by his amended complaint, and that the same be dismissed. That defendant have judgment against plaintiff in the sum of \$114.10, being the amount earned by defendant in securing said Federal Housing Administration loan for the plaintiff on the property described in his amended complaint and advancements made by it in behalf, with interest thereon at the legal rate from the 14th day of November, 1938, for costs of suit, and

that the court make such other and further order as shall be proper in the premises.

DAN B. SHIELDS,
Attorney for Defendant.

Duly verified.

The italicized matter was stricken from the amended answer by order of the court, see Transcript 177.

(Title of Court and Cause.)

PLAINTIFF'S ANSWER TO
DEFENDANT'S COUNTERCLAIM

Comes now the plaintiff and answers the defendant's counter-claim on file herein as follows:

I

Admits the allegations of paragraph 1.

II

24. Answering paragraph 2 plaintiff admits that on or about the 6th day of July, 1938, plaintiff applied to the defendant for a loan of four thousand dollars, under the terms and conditions of Federal Housing Administration plan, and that the application for said loan was approved by the Federal Housing Administration, and that said administration issued its commitment, subject to the qualification that the father of the plaintiff should be co-signer with the plaintiff on the note and mortgage evidencing said loan, and that the

said note and mortgage were executed and delivered to the defendant on or about the 22nd day of July, 1938.

III

Answering paragraph 3 plaintiff admits that he began work and improvement upon the property described in said mortgage, and that the defendant advanced certain sums of money upon the order of the plaintiff to materialmen and laborers as the improvements on said property were being constructed, until the advances approximated \$2,800.00.

IV

25. Answering paragraph 4 plaintiff admits that he made application to the defendant on or about the 15th day of September, 1938, for three loans of \$3,000.00 each, under the terms and conditions of the Federal Housing Administration plan, each of such loans to be evidenced by the note of the plaintiff to be secured by a mortgage on the property described in said application; admits that on or about the 6th day of November, 1938, the Federal Housing Administration approved one loan, conditioned upon the father and mother of the plaintiff becoming co-signers with the plaintiff; and admits that the note and mortgage referred to in plaintiff's complaint were made and executed on or about the 14th day of November, 1938, but denies each and every other allegation in said paragraph 4 contained. Plaintiff alleges the fact to be in respect to the non-payment

of claims for materials and labor that non-payment thereof by the plaintiff was due to the failure and refusal of the defendant to advance the money upon said loan.

V

Answering paragraph 5 plaintiff admits that materialmen and laborers filed liens against said property, but denies each and every other allegation in said paragraph, and alleges the fact to be that the failure of the plaintiff to liquidate obligations for material and labor was due to the defendant's failure to advance money on said property.

VI

Answering paragraph 6 plaintiff admits that the defendant refused to advance further money on the first loan, and also that it refused to advance any money on the second loan, but plaintiff denies each and every other allegation in said paragraph contained.

VII

26. Answering paragraph 7 plaintiff admits that he demanded the release of the mortgage described in plaintiff's complaint and that the defendant refused to release said mortgage, except upon condition that the plaintiff pay to the defendant certain alleged costs and expenses claimed by the defendant to have been incurred by it in connection with said loan, and in this connection plaintiff denies that the defendant was entitled to any such payment of costs and ex-

penses, as a condition for the release of said mortgage.

VIII

Plaintiff denies the allegations of paragraph 8.

IX

Plaintiff denies, generally and specifically, each and every allegation in defendant's counter-claim contained, not herein otherwise specifically admitted or denied.

WHEREFORE plaintiff prays that the defendant take nothing by reason of its said counter-claim and that the same be dismissed, and plaintiff have the relief prayed for in his complaint herein.

REX J. HANSON,
Attorney for plaintiff.

Duly verified.

(Title of Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

53. This cause came on regularly for trial on the 15th day of June, 1939, upon the amended complaint of the plaintiff, the answer and counter-claim of the defendant to said amended complaint, and the reply of the plaintiff to defendant's conter-claim; Rex J. Hanson and Jesse R. S. Budge appearing as attorneys for the plaintiff, and Dan B. Shields appearing as attorney for the defendant. At the request of the plaintiff a jury

was empaneled in an advisory capacity with respect to the question of damages, and there was submitted to the jury certain special interrogatories for their advisory verdict, and the jury found and returned a verdict in response to said interrogatories. The court having heard the evidence and having received the verdict of the jury, and final arguments of counsel having been expressly waived, the court, being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business in Salt Lake City, in said State.

2. That on or about the 1st day of November, 1938, the plaintiff and defendant entered into an agreement, whereby and by the terms whereof the defendant agreed to loan to the plaintiff the sum of \$3,000.00, to be expended for labor and materials in the construction of a certain building to be erected upon the following described property, situated in Salt Lake City, Salt Lake County, State of Utah, to wit:

54. Commencing at a point on the East line of 16th East Street, in Salt Lake City, Utah, said point being 100 feet South and 50 feet East of the Northwest Corner of the South Half of Lot 9, Block 12, F. M. Lyman Jr. Survey of Section 16. Township 1 South, Range 1 East, Salt Lake Meridian,

and running thence South 50 feet; thence East 113 feet; thence North 50 feet; thence West 113 feet to place of beginning, together with right of way.

54. That said loan so agreed to be made was to be in accordance with the requirements and subject to the approval of Federal Housing Administration, and to be insured for defendant's benefit by said Administration, and said sum so to be loaned was to be advanced to the plaintiff as construction of said building progressed, that is to say: 10 per cent when the first floor was completed and the work had passed the inspection of said Federal Housing Administration; 15 per cent when the roof was completed; 25 per cent when the building was ready for lath and plaster; 20 per cent when the building was ready to be decorated; and 30 per cent upon the completion of said building.

3. That on or about the 14th day of November, 1938, the plaintiff executed and delivered to the defendant his certain promissory note for the sum of \$3,000.00, so to be loaned as aforesaid, which said note was also signed by the father and mother of plaintiff, and to secure said note plaintiff executed and delivered to the defendant a mortgage covering the property above described, which said mortgage was duly acknowledged so as to entitle the same to be recorded, and the same was recorded as No. 845777, in Book 225 of Mortgages, page 223, records of Salt Lake County.

4. That evidencing the said loan plaintiff, on or about the 14th day of November, 1938, executed and delivered to the defendant another and additional mortgage covering said property for the sum of \$3,000.00, which said mortgage covering said property for the sum of \$3,000.00, which said mortgage was recorded as No. 845778 in Book 225, of mortgages, page 223, records of Salt Lake County.

55. 5. That in reliance upon the agreement of the defendant to advance the money as the work progressed, as set forth in paragraph 2 above, plaintiff proceeded with the construction of said building to the stage where the studding of the walls was covered with sheeting and the roof of said building was practically completed; that at the time when the concrete foundation and first floor of said building had been completed, said work was inspected and approved by Federal Housing Administration, and thereupon the plaintiff demanded of the defendant the payment to him of the first ten per cent of the money so to be advanced to him under said agreement.

6. That notwithstanding plaintiff's demands plaintiff refused to advance said ten per cent, or any money upon said loan as it had agreed to do, and has advanced no money, whatsoever, thereon; that plaintiff thereafter demanded of the defendant that it release the said mortgages of record and surrender to the plaintiff the said

promissory note, which the defendant likewise refused to do.

7. That by reason of the defendant's refusal to advance said money, as agreed, plaintiff was unable to complete the construction of said building, as a result whereof the lumber used in its construction became weather soaked and otherwise damaged by the elements, to plaintiff's damage in the sum of \$25.00.

8. That relying upon the defendant's promise to advance said money plaintiff purchased steel sashes for the windows of said building, and because of defendant's failure to advance said money was unable to pay for said window sashes, and became obligated to pay demurrage to the railroad company, to his damage in the sum of \$10.00.

9. That on or about the 15th day of November, 1938, plaintiff purchased lumber from the Rio Grande Lumber Company, at the agreed price of \$400.00, on which it was agreed by said lumber company that plaintiff should have a discount of ten per cent for cash, but by reason of defendant's failure to advance said money, as aforesaid, plaintiff lost said discount, to his damage in the sum of \$40.00.

56. 10. That by reason of defendant's refusal to advance said money, as agreed upon, and its refusal to cancel said note and release said mortgages of record, it became necessary for plaintiff

to employ counsel to prosecute this action in his behalf, for which service he became obligated to pay the sum of \$200.00 attorney's fees, to his damage in said sum.

From the foregoing Findings of Fact the court makes the following Conclusions of Law:

1. That plaintiff is entitled to judgment ordering the defendant to cancel and release of record the said mortgages referred to in the foregoing Findings of Fact, and to surrender and redeliver to the plaintiff the said promissory note therein referred to.

2. That plaintiff is entitled to judgment in the total sum of \$275.00, as damages, and his costs of suit herein.

Dated this 26th day of June, 1939.

HERBERT M. SCHILLER,
District Judge.

(Title of Court and Cause.)

JUDGMENT

This cause came on regularly for trial on the 15th day of June, 1939, upon the amended complaint of the plaintiff, the answer and counter-claim of the defendant to said amended complaint, and the answer of the plaintiff to defendant's counter-claim; Rex J. Hanson and Jesse R. S. Budge appearing as attorneys for the plaintiff,
57. and Dan B. Shields appearing as attorney for the

defendant. At the request of the plaintiff a jury was empaneled in an advisory capacity with respect to the question of damages, and there was submitted to the jury certain special interrogatories for their advisory verdict, and the jury found and returned a verdict in response to said interrogatories. The court having heard the evidence and having received the verdict of the jury, and final arguments of counsel having been expressly waived, the court, being fully advised in the premises, and having made Findings of Fact and Conclusions of Law,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant cancel and redeliver to the plaintiff that certain promissory note described in plaintiff's complaint, bearing date of November 14, 1938, in the sum of \$3,000.00, payable to the defendant, and that the defendant release of record those certain mortgages given to secure said promissory note, that is to say: Mortgages recorded in Book 225 of Mortgages, page 223, as No. 845777 and No. 845778.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff have and he is hereby awarded judgment against the defendant for the sum of \$275.00, as damages, and his costs
58. of suit herein, taxed at \$.....

Dated this 26th day of June, 1939.

HERBERT M. SCHILLER,
District Judge.

(Title of Court and Cause.)

MOTION FOR NEW TRIAL

Comes now the defendant above named and moves this Honorable Court to vacate and set aside the findings of fact and conclusions of law and judgment entered in such cause and grant the defendant a new trial upon the following grounds :

1. Irregularity in the proceedings of the Court and Jury and abuse of discretion by which the defendant was prevented from having a fair trial.

60. 2. Misconduct of the jury.

3. Accident or surprise which ordinary prudence of defendant or its attorney could not have guarded against.

4. Newly discovered evidence material to the defendant and its case which it could not with reasonable diligence have discovered and produced at the trial.

5. Excessive damages appearing to have been given under influence of passion or prejudice.

6. Insufficiency of the evidence to justify a verdict or decision, and that it is against law.

7. Errors in law occurring at the trial and by law deemed excepted thereto by the defendant.

This motion will be made upon the records and files of the court and upon affidavits hereafter to be supplied.

DAN B. SHIELDS,
Attorney for Defendant.

(Title of Court and Cause.)
RULING BY THE COURT

Case No. 62588

65. The defendant has filed a Motion for a New Trial based upon all the statutory grounds. One of the grounds stated in the motion in the Court's opinion has merit, this ground being that the evidence is insufficient to support the jury's verdict and the Court's finding in respect to two of the items of damage. The items are \$40.00 representing a discount on lumber purchased from the Rio Grande Lumber Company, and \$10.00 for demurrage charges which the plaintiff paid on certain building materials. The other grounds for the motion, in the Court's opinion, are without merit.

Because of the foregoing errors in the judgment, a new trial will be granted unless the plaintiff, on or before December 5, 1939, elects to waive the above mentioned items of damages and consents to a modification of the judgment pursuant to this ruling of the court. If the plaintiff so elects, the Motion for a New Trial will be denied.

Dated November 30, 1939.

HERBERT M. SCHILLER,
Judge.

(Title of Court and Cause.)

WAIVER

66. Comes now the plaintiff and hereby waives any claim to the items of \$40.00, representing discount on lumber purchased from Rio Grande Lumber Company, and \$10.00, representing demurrage charges paid by plaintiff on certain building material, and consents that the judgment herein may be modified to eliminate such items therefrom.

Dated this 2nd day of December, 1939.

ROBERT B. SWANER,
Plaintiff.

JESSE R. S. BUDGE,
REX J. HANSON,
Attorneys for plaintiff.

(Title of Court and Cause.)

MODIFICATION OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The defendant herein having filed its Motion for a New Trial and said motion having been argued by the respective parties and briefs submitted upon the questions involved; and the court having heretofore held and decided that the evidence is insufficient to support the findings and judgment heretofore entered in said cause in favor of the plaintiff, as to the item of \$40.00, representing a discount on lumber purchased from Rio Grande Lumber Company, and \$10.00 for

68. demurrage charges which the plaintiff paid on certain building materials; and the court having further held and decided that said motion for a new trial be granted, unless the plaintiff, on or before December 5th, 1939, elects to waive the above mentioned items of damage and consents to a modification of the judgment pursuant to said decision of the court, in which event the said motion for a new trial would be overruled and denied;

And it appearing from the records and files herein that the plaintiff filed herein its election to waive and its waiver of the aforesaid items of \$40.00 and \$10.00, respectively,

NOW THEREFORE, by reason of the premises, the court hereby denies said motion for a new trial and strikes from the Findings of Fact herein Findings 8 and 9, and amends Conclusion of Law 2, by changing the amount \$275.00 to \$225.00.

69. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the last paragraph in the judgment in said cause be amended by changing the amount of \$275.00 therein stated, to the sum of \$225.00.

Dated this 6th day of December, 1939.

HERBERT M. SCHILLER,
District Judge.

The case was called for trial on the 15th day of June, 1939, and all the evidence introduced is contained in the following

BILL OF EXCEPTIONS

- Robert B. Swaner, the plaintiff, testified as follows: My name is Robert B. Swaner, have lived in Salt Lake all of my life, am 22 years old, the plaintiff in this action, and for two years engaged in building homes, residences, remodeling and building new ones; formerly was a student at the University of Utah, have remodeled and built eight or nine houses all in Salt Lake City; in November, 1938, had some business with the Union Mortgage Company, attempted to borrow \$3,000.00 on F. H. A. loan to construct a house on 16th East Street.
82. I took in some blue prints and specifications for three houses up there which defendant agreed to send to F. H. A. to get commitments. One was passed and I gave them a mortgage and my note for \$3,000.00 at the time. My conversations were with Mr. Park Conner. Mr. Conner was one of the officials of the company and authorized to enter applications for mortgages, and during the course of the transaction I was in the office of the Union Mortgage Company around the 1st of November.
84. I was to be paid 10 per cent of the loan when the first floor joists were on and the house passed by F. H. A. approval, 15 per cent when the roof

was on, 20 per cent when the house for ready for plaster, 25 per cent when it was ready to be decorated, and the balance when it passed the final F. H. A. inspection.

85. Exhibit "A" was given to me by Mr. Park Conner when the mortgage was signed. Exhibit
89. "A" received in evidence.

90. It was stipulated that mortgage was executed, delivered and recorded.

I hired several men, the number varying from day to day. Sometimes four to five, some days only two, and completed the excavation of the house. The foundation was completed, the first floor was finished, and we got most of the roof on before I had to stop.

- Exhibit 'B' is a picture of the Southwest corner of the house, taken by me about three
91. weeks ago, and another photograph of the Southwest corner; Exhibit "C" is the Northwest corner of the same house taken at the same time by me, Exhibits are received in evidence.

92. The house had an F. H. A. inspection when the joist construction was finished and it was passed at that time. The roof was on and that's as far as we went because the Union Mortgage Company wouldn't make payments on the note and mortgage. They made no advancements on it at all, but they held my note and mortgage for \$3,000.00 I was unable to pay lumber bills, cement
94. bills, and I have not been able to pay them since.

95. The house lay open all winter, soaked up with
 95A. moisture. The sheeting on the outside of the house was soaked with water, the knots fell out through contraction and the sheeting became pulled and warped and in my judgment it would take around \$100.00 to make the repairs. I was
 95B. to pay for lumber and material the first of every month, and if I paid the first of the month I received a 10 per cent discount. I was unable to pay the 1st of December, and I lost \$40.00 as the result thereof. I purchased steel sash which I
 96. was not able to pay for, and the railroad charged
 97. demurrage to the extent of \$10.00. I was unable to pay my labor and the material men. There
 98. have been some liens filed against the property. I ceased work about the 1st of December and haven't been able to complete the structure because I couldn't borrow money on it with a mortgage on it, and I have made demands on the
 99. Union Mortgage Company to release the mortgage and surrender the note and they haven't done it.

Question: Have you employed attorneys to handle this action for you?

Answer: Yes.

Question: Were you to pay them for it?

Answer: Yes.

Question: How much have you agreed to pay for it?

Answer: \$200.00.

100. Mr. Shields: I object to it. It is immaterial, incompetent and irrelevant.

100 At the time I made demand for the release of these mortgages, the defendant told me that it would immediately release them if I would pay certain expenses it had incurred.

and began discussing it sometime prior to that. The note and mortgage was signed when a complete understanding of the plan had been had. I signed an application prior to that.

102. I am damaged by the house being soaked up by the elements. It is very dry now, and from

103. the standpoint of wet and dry it is in better condition today than the day it was built. Builders have difficulty with uncured lumber and the lumber there on the house is not uncured now. Sheeting is covered when we finish it. I think it better to have knots than holes in the sheeting.

104. I haven't counted the knot holes that are there damaging me on account of that warping. The sheeting should have been well nailed on, and the warping is noticeable around the windows and the doors. I think during the winter it soaked up an awful lot of water and at present it is very dry, but this is cured sheeting. The

105. application was made under the terms of the F. H. A. and when I first applied I applied for three houses. Two were refused and two were granted. The loan was granted on the basis that

- my father and mother should sign it. This work, as it progressed, had to be approved by the F. H. A. Mr. Conner had the only evidence of that approval. The F. H. A. makes inspections of the property. The F. H. A. leaves a sheet of paper at the job and they send Exhibit "A" to the Investment Company. F. H. A. has a standard form of inspection, but I have never seen it. Concrete was inspected and approved;
106. I don't remember just when. The mortgage was signed on the 14th of November and I made the demand for money on December 1st. I know Edward O. Anderson, who is one of the head men of the F. H. A. I have never seen Exhibit "1"
107. before. I quit work on the building some time after the 1st of December. It wasn't as far as Christmas time, and I don't remember with respect to Thanksgiving. I am not quite sure whether it was the 1st of December or within
108. a day or two of that time. I am fairly sure it was close to the 1st of December. I don't remember the exact day. It may have been the 10th. My agreement with respect to cash discounts was that I pay the 1st of every month. I could probably have gotten it to the 10th. I have no doubt
109. about it. The F. H. A. had to approve the work, as it was an F. H. A. insured loan and was one
110. of the high percentage loans so insured. The approved inspection was not for excavation only. I do remember signing the application and the signature on Exhibit "2" is my signature.
- 111.

REDIRECT EXAMINATION

113. The house had received its first F. H. A. inspection, which was after the joists were set, and I had a conversation after that with Park Conner,
114. on or about the 1st of December. Immediately after the F. H. A. inspection, I started to ask for 10 per cent and they told me that there was something wrong with the foundation. The matter was taken care of. As I remember it, the
115. F. H. A. were afraid the cement was frozen. They inspected it afterwards and passed it and left
116. the form which the F. H. A. inspector leaves on the job. The F. H. A. then passed the cement, etc. The inspection slip is a piece of paper about three and one-half inches wide by seven inches long. After that I talked with Mr. Conner but don't remember the date. It was a week or two after the 1st of December. I had a conversation with
117. them the day after the inspection slip was left with Mr. Conner in the defendant's office on 2nd East. He told me that the slip of paper wasn't enough to get my 10 per cent. They would have to have an official inspection from Mr. Anderson of F. H. A. before they would advance me my 10 per cent. I talked with Conner every day and every day received the same story. I then went to F. H. A. They said they'd mail it, and then I went back and talked with Chambers.
118. Then I talked to the F. H. A. and then went back to the Union Mortgage Company, and I talked to Mr. Chambers. Chambers works there,
119. and I saw him there. Chambers looked through

120. the files and found an F. H. A. report. I then talked to Mr. Conner after that, the same day, I believe. He said he would take the form to Mr. Billings and see what could be done about getting my 10 per cent. I called next day. He hadn't seen Mr. Billings. I called every day for a few days, and then I talked to Mr. Billings and he told me I couldn't get the money until we had arranged about this other house.

121. Exhibit copy of a letter received.

George Swaner, witness in behalf of plaintiff, testified as follows:

123. My name is George B. Swaner, am the father of the plaintiff, a builder by trade, so engaged for five years; was in the office of the Union Mortgage Company when plaintiff had a conversation with Mr. Conner.

124. Plaintiff asked for a schedule of advances. I said it was a good thing to have. Conner passed the paper to my son, Exhibit "A." Son resides at my house, and since they quit work on the house laborers have called at the house and have had conversation with both of us. The substance of their conversations were insults, and these conversations have occurred since early in December until two days ago. The conversations were irregular, sometimes four or five a day, sometimes only one or two. I can't try to remember all that was said.

127. CROSS EXAMINATION

I identified the paper. It has been at home. I don't know how often I saw it.

128. Monty Carpenter, a witness in behalf of plaintiff, sworn and testified:

I am Monty Carpenter, living at 1445 Herbert Avenue. I have lived in Salt Lake City ten years, am a Salesman for the Rio Grande Lumber Company for two years, and as a salesman to a customer I know the plaintiff. My duty is hunt-

129. ing up prospective customers, trying to convince them that our materials are as good or better than those of our competitors, trying to obtain the business, and I had business with Swaner fourteen or fifteen months ago with respect to a house he was constructing on 16th East Street.

130. I sold him some lumber which consisted of dimension lumber of various sizes and pine sheeting,

131. shingles and nails in the aggregate amount of \$400.00 with the understanding that he was to have 10 per cent on the list providing the bill was paid on the 1st of every month. This bill hasn't been paid at all. I have talked to Mr. Swaner

133. concerning the account. I don't know whether a lien was actually filed. I didn't do it myself.

CROSS EXAMINATION

I sell lumber to a great many people and I am anxious to secure business, and I was desirous of keeping Swaner's business under ordinary circumstances. This 10 per cent will not now be given to Swaner, if he pays his bills.

135. I can refuse a man credit, but I am not a stockholder there. If I stated a policy of the company, it would stand behind it. Robinson is a credit man and I cannot overrule him.

137. Our company isn't a departmentized company. We all work for the company and are involved in all activities of the company. I not only have the selling to a customer, but I check up on his credits, and if I feel that he doesn't have a good rating, I don't go any further.

REDIRECT EXAMINATION

138. We would not sell Mr. Swaner, under ordinary circumstances, again.

A. J. Dean, a witness on behalf of plaintiff, sworn and testified as follows:

139. I am A. J. Dean, residing at 171 East 21st South. I am a contractor and have lived in Salt Lake all my life and have been in the contracting business eighteen years in cement and carpenter work. I know Robert B. Swaner and have done cement and carpenter work for him, and I was employed on 16th East Street. I had a conversation with one of the officers of the defendant, before I started work, on the telephone, but I don't know the date. I talked with Don Irvine.

141. The operator answered when I first called the

142. Union Mortgage Company. I asked for Conner. He wasn't in. They connected me with Mr. Irvine. It was in the morning about ten o'clock.

143. I did some work for Mr. Swaner. We poured

- footings, then built forms and poured concrete in the forms after which we stripped the forms. I know that the structure was inspected by F. H. A. This was done before the floor was started.
144. I saw the house yesterday. It is in the same condition it was for six months, drying, shrinking, curling, knots falling out, nails rusting, permitting the boards to curl off of the sidings and the nails will continue to rust and to break off even if they are covered over. I saw the roof hadn't been painted. It isn't completely finished. It would require about two more bundles of shingles
145. to finish it. To put that house in first class condition, the boards should be taken off and new ones put on. It would take in the neighborhood of twelve hundred feet of siding and you would
146. have to add three hundred feet for cutting and waste to take off and put on, or a total of \$120.00. I have placed a lien for labor and material on the property, and I haven't been paid anything.

CROSS EXAMINATION

147. This sheeting is not the outside wall of the house. They will put paper on the sheeting and more board over that. Any lumber shrinks when it isn't dry. Any lumber cracks underneath after it has been covered up, and any lumber that is put on green dries and will leave cracks. The lumber used here was probably wet and there is no question but what it was green lumber when it was put on, and when it would dry, it would
148. crack. I think it would take 4 or 5 years for

lumber to dry on that hill, but it would preserve the knots.

REDIRECT EXAMINATION

149. There would be no curling if lumber had been covered; there would be cracks to a certain extent. We find if we take shingles off a house, the cause for them curling or becoming cracked or broken
150. is because the nails rusted away, first, and nails will rust sooner on a building that is not covered than on a covered one.

CROSS EXAMINATION

A nail won't rust if it is protected.

J. D. Hurd, a witness on behalf of plaintiff, sworn and testified as follows:

I am J. D. Hurd, a member of the bar of Utah.

151. Question: Mr. Hurd, in an action brought for the purpose of securing a decree for the cancellation of a mortgage wherein it appears from the evidence that a mortgage of \$3,000.00 was applied for by the plaintiff; that this mortgage was one which was to be executed in connection with a F. H. A. insurance of the mortgage, and it appears from the evidence that the mortgage and note for \$3,000.00 was executed by the plaintiff, and that the money was to be advanced as the work progressed; the mortgage was recorded; the plaintiff applied for the first advancement in accordance with the agreement and this ad-

vancement was refused; and that no money whatever had been advanced under the mortgage; and that the defendant refused to advance any money and also declined to release the mortgage and this action was brought to secure a decree cancelling this mortgage. What in your judgment would be a reasonable attorney's fee to be recovered for the prosecution of this action under the conditions which I have perhaps somewhat inadequately set out?

Mr. Shields: Object to the question on the ground it is immaterial, incompetent and irrelevant.

The Court: The objection is overruled.

Answer: Well, Mr. Budge, I would say that would depend somewhat on the time consumed in the trial of the action. I think that a \$250.00 fee for preparation of the case for trial would be reasonable and a per diem for trial in court at \$75.00 a day would be reasonable, for the preparation and trial of such an action.

At this point Mr. Carl W. Buehner, a witness in behalf of defendant, was called out of order and testified as follows:

I am Carl W. Buehner, live at 2299 South 7th East, Salt Lake, and have lived in Salt Lake for thirty-eight years. I am a building contractor, have been for twenty years or more, building residential constructions largely in Salt Lake City, and would estimate that I have constructed

156.

- at least one hundred houses. I am familiar with the house upon the Exhibits "B" and "C" and I have examined that house within the last few days. I went in and outside of the building and I found it to be an unfinished structure, frame, concrete foundation, the studding up, the outside roof all on except a few shingles on back side. House has diagonal sheeting, except where a place is left for the chimney, and on the side and gables some of the sheeting is off. There is no finished work on it. It is in the rough. I would
157. say the property is in good condition. It has stood there for a little while, but if anything, that is a good thing for the home for lumber to dry out rather than to rush the job too much. I see no injury to the building from its standing there. I would not tear that sheeting off. I didn't examine the nails, but if they are galvanized nails they shouldn't rust out for a great many years.

CROSS EXAMINATION

158. From a structural standpoint I wouldn't object to leaving a house uncompleted from November until June. I wouldn't say that it would improve it, but there shouldn't be any deterioration in that period of time. I don't know anything about the condition of the lumber when it was put into the building, as to whether it was green or dry. and I would say in the building's condition there is no damage. I don't think there was any damage to this house by being exposed to the elements for six months, even during the winter.

159. I don't think that is common practice; I wouldn't recommend it. I wouldn't advise leaving a building in that condition. I wouldn't say as to other ways either. When we build a building, we have to get it built quicker than six or eight months.

160. I was at the property about fifteen minutes. I had been past that building numerous times; I observed it frequently as I am working in the neighborhood. I examined the boards, but I didn't examine the nails. There was no more warping than on any job. Sheeting isn't ordinarily covered. It is usually left until the roof is on and it is plastered inside entirely. It is usually covered in a period of six or eight weeks. I say that this house hasn't warped more than in sixty days from naturally exposing that sheeting, and I want the jury to believe that from November when this house was constructed it would suffer just as much warping in thirty days as it would if it went through the entire winter in that condition.

161. Edward O. Anderson, a witness on behalf of the defendant, was called out of order, sworn and testified as follows:

162. I am Edward O. Anderson, an architect employed by F. H. A., living in Salt Lake City, and have been so employed four and one-half years as chief architectural supervisor. I examine plans that are presented by lending institutions for insurance on the mortgage to be placed on these houses when they are completed and to make

- inspection of the buildings under construction on which F. H. A. commitments have been made and check reports made by other men who are working under me. I am in control of the records and I am familiar with the construction on the corner of 17th South and 16th East, but I haven't seen the property. I have an inspection here—two inspections made under date of December 5th and December 21st, under our number 52-004372 at the corner of 16th East and 17th South. My
163. records show: "Construction approved to date, subject to correction of defective work." We issue a certificate whenever one of these reports is made under my signature. I have a report dated December 21, 1938 and the signature on Exhibit No. "1" is my signature and it is the original, showing the examination or inspection which was made by our board, and there has been
165. no other approval. I am familiar with the records, and the only record I have is of the first inspection, and whenever objection has been made and a correction overcomes it, the record does not show that.

CROSS EXAMINATION

- In subsequent inspections there might be a rechecking concerning objections which have been
166. made by the inspector, but my records show that no check has been made in this case. I didn't make the inspection myself, and I have no knowledge of
167. what was done by other inspectors, except what the records show. The inspectors inspect the

- job and what I know is what the record shows and what they told me. I don't know how many times they were there, except what the records show. Four inspectors inspect these jobs. In 1938 there were two and in November two. They
168. don't keep separate records. It is all written in the one record and they are supposed to turn that in. I know one inspector went to this building and I have a record of two inspections. All I know is from the record. Before this record
169. was made other men went out. Prior to these two inspections our men went out on the job also. They went out on the ground and inspected it.
170. Inspectors do leave documents on the job with the property owner relating to their inspection and they do that each time they inspect, but Exhibit "1" is not such a document. It is smaller than Exhibit "1." I have a copy of such a document.
171. I wasn't there to see them post the original.
172. Document Memorandum of Compliance Inspection, marked No. 3 is a copy of the document found in the file which in the course of business of this F. H. A. inspection is left upon the structure; and at the date the slip bears such an
173. inspection was made and Exhibit "3" is the only slip or document which in the course of construction is delivered to the property owner or left at the place; I mean type, but there are more than one.

174.

REDIRECT EXAMINATION

There are two types of inspection, the first required and alternate first. The first is at the

time the excavation has been completed and transit is prepared for the pouring of the footings and foundation. That is the first examination.

RECROSS EXAMINATION

But a slip is left, signifying the date.

REDIRECT EXAMINATION

The mortgagee is notified by the form as to
 175. the inspection. By the form 2051, the exhibit in
 178. your hand. Robert B. Swaner, plaintiff, recalled.
 179. When the inspection ticket, Exhibit "3," was left,
 the foundation was poured, the first floor was
 on and some of the studs were up.

RECROSS EXAMINATION

I have read Exhibit "3" and I know that it
 says that this is subject to correction and re-
 inspection as will be set forth in a compliance
 inspection report which will shortly be mailed to
 the applicant mortgagee.

180. REDIRECT EXAMINATION

I requested money from the defendant after
 the exhibit was left on the premises.

RECROSS EXAMINATION

That was the time that I made requests for
 the money. I had made requests before.

181. Exhibit "4" contains my signature.

182. O. C. Neilson, a witness on behalf of defendant, sworn and testified:

- I am O. C. Nielson, live in Salt Lake where I have lived all my life. I am property manager for Union Trust Company and Metropolitan Life Insurance Company. I was in the construction end of the business with Morrison-Merrill for thirteen years, and I have done building myself from 1920 up to the present time. I am familiar with the property depicted by Exhibits "B" and "C" and I saw that house this morning for the first time about 8:30 and again at 9:30, and I made an examination of it. I found some loose sheeting that had worked away from the studding due to improper nailing. One or two boards were broken due to someone having been in the property. These boards were around the fire place where they hadn't been cut off, and one of the boards was split. I made an examination of the nails. I found that they were 1 x 6 sheeting nailed with eight penny common galvanized nails. Galvanized nails hold a little better. I found the building was in fair condition. It hadn't suffered much from the weather. If you put siding on and paper on the outside of the sheeting, it would still have shrunken. It is natural, and I don't think it hurts the construction any. I don't believe it would make any difference whether the siding had been put on or not. It still would have shrunk. I certainly wouldn't take the sheeting off, but I believe a would nail it properly. As

I found 20 to 25 per cent of the nail heads still sticking up over the face of the boards, showing that they hadn't been properly sunk to get bearing and give it proper strength. I took out three nails and I found their heads slightly discolored from the elements, but the rest of each nail is in good condition. One of these nails I took from the East window on the North wall; another on the East opening for the fire place and one by the fire place out through the center of the house by the bedroom window. The discoloration on the nails is where they protruded.

Nails received in evidence.

186. Aside from this discoloration, I found no rusting out of the nails.

CROSS EXAMINATION

- I could see no damage done by the elements to this property. We have been forced to leave construction the way this is in making gables and things like that. I would say it isn't a good
- 186A. practice to leave houses unfinished, but in this particular case you have protection. It isn't the practice being followed. I know the grade of material that is used and I know what the requirements are. I don't know how much it was seasoned nor how dry it was nor how much sap it had, and I don't believe the contraction would increase
187. by continued subjection to the elements. It might in a period of years, and it might a little more during the hot weather. I don't think going

through winter has as much effect as hot weather. I don't think it has any effect.

William Park Conner, a witness on behalf of defendant, sworn and testified, as follows:

- I am Wiliam Park Conner, have lived in Salt Lake City since my birth and am employed by the Union Mortgage Company of Salt Lake City,
189. Utah, and was so employed in 1938. I know Robert Swaner and I had some business relations with him for the company in 1938. Swaner brought some blue prints and specifications and
190. three sets of applications for three loans on 16th East. These loans were approved. I told Mr. Swaner we had submitted the loans to the F. H. A. Later the loans were rejected. I told this to
191. Swaner and then I went back to the Mortgage Company at Mr. Swaner's request, and we obtained a commitment on one house with the provision that his father and mother sign the papers. I told this to Swaner and asked him for an abstract. Swaner wanted the commitment changed to a lot to the North and this was done and the F. H. A. approved it. We had title of this done, and after the papers were completed the mortgage was signed and recorded. In December I had
192. a conversation with Swaner. Swaner asked that his loan on 10th Avenue be closed and at the same time asked for a 10 per cent draw on the 16th East house. I told Swaner that the 10 per cent couldn't be advanced until inspection was

- made and approval given by F. H. A.; and I had numerous other conversations with him on other occasions. The document marked Exhibit "4" I have seen before. It was delivered to me at
193. our office on 2nd East by Mr. Swaner. I know his signature and that is it, and the document has been in our files ever since that. This was some time just before Christmas. The 21st should be about right. I don't know whether the 21st was Sunday or not. I had a conversation with Swaner before the document marked Exhibit "4"
195. was handed to me. Exhibit "4" is received for purposes indicated by the Court. I have seen Exhibit "1" before. It came in the mail from F. H. A., and I have received no other notification from it since then. This document has been
196. in the files ever since. I have never received the original of Exhibit "3" or any document which resembles it, and we have received no such document in the office. At the time I talked to Swaner nothing was said about the F. H. A. approval. The only time we talked about that was when he asked for the draw. I don't believe I understand the question. I am familiar with Exhibit
197. "2," and it was made in our office when the application was submitted asking for the loan. I saw Swaner sign the application and he furnished the information. It was filled out in my
198. office and the signature is his signature made in my presence.

CROSS EXAMINATION

Swaner came to the office with three sets of plans. I didn't prepare them and I didn't make up the application.

200. We didn't agree to pay him any money until it was approved by the F. H. A.

201. REDIRECT EXAMINATION

We received a commitment from the F. H. A. with respect to the house on 16th East. Commitment was in writing and Exhibit "6" is the document. Swaner saw it.

203. Exhibit received.

INSTRUCTIONS

204. Upon stipulation of respective parties, the Court instructed the jury orally as follows:

204. Gentlemen of the Jury, the plaintiff and the defendant have rested their respective cases; before this case is argued to you by counsel and before you commence your deliberations thereon it is the duty of the Court to instruct you upon
205. the law which you must apply in those deliberations and in arriving at your verdict.

Before the recess in open court counsel stipulated in the interest of saving time that the Court might orally instruct you, so there will be no copy of these instructions I am about to give to you which will accompany you to the jury room, consequently I request that you pay strict atten-

tion to the instructions which the Court is about to give.

1. You are instructed that in this action the plaintiff seeks a decree of this Court requiring the defendant to cancel a certain note and mortgage executed by the plaintiff in favor of the defendant and further seeks judgment against the defendant for damages which he, the plaintiff, claims he sustained by reason of the defendant's failure to advance to him the money which the defendant had agreed to loan under the note and mortgage.

Certain of the allegations of the plaintiff's amended complaint are admitted by the defendant in his answer to the amended complaint. The defendant admits that on or about November 14, 1938 the plaintiff executed and delivered to the defendant his note, his promissory note in the sum of \$3,000.00, and at or about the same time that the plaintiff executed and delivered to the defendant two mortgages to secure the payment of the note and covering a certain parcel of real property located on 16th East Street in Salt Lake City Utah.

The defendant further admits that the defendant refused to advance to the plaintiff the sum of \$3,000.00, and that the plaintiff has requested the defendant to release the mortgage.

206. The plaintiff in his amended complaint claims that on or about the first day of November

he entered into an agreement with the defendant whereby the defendant agreed to loan to the plaintiff \$3,000.00 to be expended for labor and building materials in the construction of a certain building to be erected on the property on 16th East Street in Salt Lake City, Utah, and that the defendant further agreed that the \$3,000.00 should be advanced to the plaintiff as the construction of the building progressed in certain designated percentages.

The plaintiff further claims that he proceeded with and constructed the building up to the completion of the roof and has complied with the terms and conditions of the agreement and that the defendant has refused to advance the \$3,000.00 as agreed, or any part thereof, even though repeatedly requested to do so by the plaintiff.

Plaintiff further claims that upon such refusal by the defendant to advance the money, the plaintiff demanded that the note be surrendered and that the defendant release the mortgage, the mortgage is on record, so the plaintiff could procure a loan on the property elsewhere in order to enable him to complete the building.

Plaintiff further claims that by reason of defendant's refusal to advance the sum agreed upon or release the mortgage the plaintiff has been unable to complete the building and as a result the lumber used in the construction of the building has become water soaked and otherwise

damaged by the elements to his damage in the sum of \$250.00.

207. Plaintiff further claims by reason of the refusal of defendant to advance the money agreed upon the plaintiff has been damaged in the further sum of \$10.00, demurrage charges for certain window sashes which he ordered in reliance upon the defendant's promise to advance the money under the mortgage.

The plaintiff further claims that he has also been damaged in the sum of \$40.00 by reason of his inability to take advantage of a discount on \$400.00 worth of lumber which he purchased in reliance upon the promise of the defendant to advance the money under the mortgage, the note and mortgage, the lumber company having agreed to allow a ten per cent discount if the bill were paid on the first of December, 1938.

The plaintiff further claims that by reason of the defendant's refusal to advance the money to the plaintiff, the plaintiff has been unable to pay workmen and material-men who have performed work and labor and furnished materials for the construction of the building, and that mechanic's liens and material men's liens have been filed against the building and premises.

Plaintiff further claims because of these liens and the unreleased mortgage the plaintiff has been unable to procure another loan on the building and otherwise finance the completion of the

building and furthermore he has been unable to sell the property.

Plaintiff claims that by reason of defendant's conduct plaintiff has been subjected to repeated demands for money due laborers, and material-men and suffered embarrassment and distress because of his inability to meet his obligations all to his damage in the sum of \$2,000.00.

208. Plaintiff further claims by reason of defendant's refusal to advance money as agreed and his refusal to cancel the note and mortgage it has become necessary for the plaintiff to employ counsel to prosecute this action and that he has obligated himself to pay the sum of \$200.00 as attorney's fees.

Plaintiff prays for judgment against the defendant, that the defendant be required to cancel the note and release the mortgage of record and further prays for judgment in the sum of \$2,500.00 damages, this sum including the items which the Court has heretofore particularized in analyzing the plaintiff's claims.

The defendant in answer to the plaintiff's amended complaint has denied all of the claims of the plaintiff except those claims which have been specifically admitted; those claims have heretofore been detailed to you, that is the claims which have been admitted and the defendant prays that the plaintiff take nothing by his amended complaint.

2. Now, Gentlemen of the Jury, you are instructed that the case at bar is what is known as an equity case and you are called upon to act in an advisory capacity only, to aid the Court in determining the facts of the case insofar as the same are submitted to you, and in this connection you are instructed that the only questions submitted to you and upon which the Court desires your answers are as follows:

Question No. 1. Was the plaintiff's building on 16th East Street damaged by reason of the defendant's failure to advance money to the plaintiff?

209. Question No. 2. If the answer to Question No. 1 is "yes," what, if any, is the amount of damage to said building?

Question No. 3. What, if any, damage did plaintiff sustain by reason of his inability to pay for lumber purchased from Rio Grande Lumber Company?

Question No. 4. What, if any, damage did plaintiff sustain by reason of his inability to pay the railroad company the freight on steel sashes?

Question No. 5. What, if any, damage did plaintiff sustain by reason of his inability to pay labor and material claims, and by reason of annoyance and embarrassment suffered by him because of the action and attitude of creditors?

Question No. 6. What, if any, damage did plaintiff suffer by reason of being obliged to

employ counsel to prosecute this suit to cancel the \$3,000.00 mortgage?

210. In this connection, Gentlemen of the Jury, you are further instructed that the burden of proving that he sustained damages by reason of the refusal of the defendant to advance the \$3,000.00 in question is on the plaintiff, and this he must do by a preponderance of the evidence; likewise the burden is upon the plaintiff to prove by a preponderance of the evidence the amount of his damages, if any. In other words, before you can find that the plaintiff was damaged, it must so appear to you from the preponderance of the evidence adduced in this case, and if it should so appear that the plaintiff has been damaged and proof has been adduced on this issue to your satisfaction by a preponderance of the evidence, then you must ascertain from a preponderance of the evidence what amount of damages, if any, the plaintiff is entitled in your opinion to recover.

In ascertaining the amount of damages which the plaintiff is entitled to recover, if he is entitled to recover any, you must consider all of the evidence in this case pertaining thereto.

In no event, however, may you find that the plaintiff is entitled to damages in excess of the amount prayed for in his amended complaint. That is to say, if you should determine that the plaintiff is entitled to recover damages by reason

of the refusal of the defendant to advance the \$3,000.00 under the note and mortgage, you can find that the plaintiff is entitled to recover not more than \$250.00 damages to the building itself, nor may you find that he would be entitled to more than the sum of \$10.00 damages suffered by reason of having to pay demurrage on the steel window sashes, nor more than the sum of \$40.00 as damages by reason of his inability to avail himself of the discount on the lumber bill to the Rio Grande Lumber Company, nor may you find that he is entitled to recover more than the sum of \$2,000.00 for the embarrassment, humiliation and distress because of his inability to meet his obligations, nor may you find he is entitled to recover more than \$200.00 damages by reason of it being necessary to employ counsel to prosecute this action.

211. 3. You are instructed that if you believe from the evidence in this case that the plaintiff has not sustained his burden of proof as to being damaged by reason of the failure of the defendant to advance the money under the mortgage or if he has failed to sustain his burden by proving by a preponderance of the evidence the amount of his damages, if any, then and in that event you are not to find in your special verdict which will be presented to you any amount due the plaintiff as to any specific item upon which the plaintiff has not borne his burden of proof. If the proof upon any item is equally balanced, or

if the evidence preponderates in favor of the defendant, the plaintiff would be entitled to no recovery as to that particular item or items, and as to such items, if such be the findings of the jury, you would under those circumstances find no amount of damages.

4. The Court has, in the giving of these instructions, referred to the phrase "preponderance of the evidence." By that phrase is meant the greater weight of the evidence, that which is more convincing as to its truth. It is not necessarily determined by the number of witnesses for or against a proposition although all things being equal it may be so determined.

If you find a conflict in the evidence, you must reconcile it as far as you can by any reasonable theory. If you can do so, you must determine what you do believe.

212. You are the exclusive judges of the facts submitted to you and the credibility of the witnesses. In judging of their credibility you have the right to take into consideration their deportment on the witness stand, their interest in the result of the suit, the reasonableness of their statements, their apparent frankness or candor or the want of it, their opportunities to know and understand, and their capacity to remember. You have the right to consider any fact in evidence, which in your judgment affects the credibility of any witness.

You should weigh the evidence carefully and consider it all together. You should not pick out any particular fact in evidence or any particular statement of any witness and give it undue weight. You should give only such weight to inferences from the facts proven as in fairness you think they are entitled to.

You should consider all the evidence fairly and impartially, and without prejudice of any kind, and from such consideration, in connection with the instructions given you by the court, you should reach such a verdict as will do justice between the parties.

You must not consider any testimony offered but not admitted, nor any evidence stricken out by the Court, but only such evidence as has been admitted in the case.

If you should believe that any witness on either side of this case has wilfully testified falsely on any material matter, then you have the right to disregard the entire testimony of such witness, unless his testimony is corroborated by other credible evidence.

When you retire to consider of your verdict you should elect one of your number as foreman. Your verdict must be in writing, signed by your foreman, and when found must be returned by you into Court. A concurrence of at least six members of the jury is necessary to your verdict, and six jurors thus concurring may find a verdict.

213. In this connection the Court further instructs you that upon your retirement to consider your verdict you will be handed a document which has been entitled "Advisory Verdict." When you have arrived at your verdict in this matter the answers to the questions should be given in the spaces which have been left for that purpose.

Each question has been numbered and the answer to each question has been given a number corresponding to that particular question.

I give you this explanation simply because some of you may have had prior jury experience will at this time be confronted with a new type of verdict, a type which perhaps has not come before you heretofore.

217. Certificate.

218. Stipulation and order settling.

Certificate of Court Reporter

(Title of Court and Cause.)

ADVISORY VERDICT

45. We, the jurors empaneled in the above cause find the following advisory verdict in said action:

Question No. 1. Was the plaintiff's building on 16th East Street damaged by reason of the defendant's failure to advance money to the plaintiff?

Answer No. 1. Yes.

Question No. 2. If the answer to Question

No. 1 is "Yes," What, if any, is the amount of damage to said building?

Answer No. 2. Twenty-five (\$25.00) dollars.

Question No. 3. What, if any, damage did plaintiff sustain by reason of his inability to pay for lumber purchased from Rio Grande Lumber Company?

Answer No. 3. Forty (\$40.00) dollars.

Question No. 4. What, if any, damage did plaintiff sustain by reason of his inability to pay the railroad company the freight on steel sashes?

Answer No. 4. Ten (\$10.00) dollars.

Question No. 5. What, if any, damage did plaintiff sustain by reason of his inability to pay labor and material claims, and by reason of annoyance and embarrassment suffered by him because of the action and attitude of creditors?

Answer No. 5. Nothing (00).

46. Question No. 6. What, if any, damage did plaintiff suffer by reason of being obliged to employ counsel to prosecute this suit to cancel the \$3,000.00 mortgage?

Answer No. 6. Two Hundred (\$200.00) dollars.

Dated June 16th, 1939.

(Signed) HARRY S. JOSEPH
Foreman.

51. ORDER

Order entered by the Court, judgment for plaintiff and against defendant in the sum of \$25.00 building, \$40.00 loss of discount on lumber, \$10.00 demurrage charges, \$200.00 attorney's fee; total of \$275.00 with costs.

52. DECISION OF THE COURT

Same effect as above entered order. Dated June 19, 1939.

72. ORDER

Sixty days additional time granted to file bill of exceptions.

218. STIPULATION

Stipulated that bill of exceptions may be settled. February 14, 1940.

218. ORDER

Bill of exceptions settled February 14, 1940.
Herbert M. Schiller, Judge.

Bill of exceptions filed February 15, 1940.

CERTIFICATE

Certificate transmitting files to Supreme Court, dated February 26, 1940.

(Title of Court and Cause.)

NOTICE OF APPEAL

To the Above Named Plaintiff and to Jesse R. S. Budge and Rex J. Hanson, His Attorneys:

You and each of you will please take notice that the defendant hereby appeals to the Supreme

73. Court of Utah from the judgment made and entered in favor of plaintiff and against the defendant and from the whole thereof.

DAN B. SHIELDS,
Attorney for Defendant.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

Comes now the defendant in the above entitled action and makes and separately assigns the following errors committed by the trial Court upon trial of said cause:

1. The Court committed error in entering its judgment and its modified judgment for plaintiff and against the defendant in said cause. (Tr. 57, 58, 68.)

2. The Court committed error in overruling defendant's motion for new trial. (Tr. 65.)

3. The Court committed error in making its finding of fact No. 5 for the reason that there is no evidence to support such finding. (Tr. 55.)

4. The Court committed error in making its finding of fact No. 7 for the reason that there is no evidence to support such finding. (Tr. 55.)

5. The Court erred in making its finding of fact No. 10 for the reason that there was no competent, material or relevant evidence introduced to justify such finding. (Tr. 56.)

6. The Court erred in making its conclusion of law No. 1, because there was no proper and legal finding to justify such conclusion. (Tr. 56.)

7. The Court erred in entering its conclusion of law No. 2 for the reason that there was no proper or legal finding to justify such conclusion of law. (Tr. 56.)

8. The Court committed error in allowing the plaintiff, Robert B. Swaner, over objection of the defendant, to answer the question "Now, have you employed attorneys to handle this action for you?" and the further question "Were you to pay them for it?" and the further question "How much have you agreed to pay them for it?" (Tr. 99, 100.)

9. The Court committed error in allowing the witness, J. D. Hurd, over objection of the defendant to answer the question:

"Mr. Hurd, in an action brought for the purpose of securing a decree for the cancellation of a mortgage wherein it appears from the evidence that a mortgage of \$3,000.00 was applied for by the plaintiff, that this mortgage was one which was to be executed in connection with a F. H. A. insurance of the mortgage, and it appears from the evidence that the mortgage and note for \$3,000.00 was executed by the plaintiff, and that the money was to be advanced as the work progressed; the mortgage was recorded; the plaintiff applied for the first advancement in ac-

cordance with the agreement and this advancement was refused; and that no money whatever had been advanced under the mortgage; and that the defendant refused to advance any money and also declined to release the mortgage and this action was brought to secure a decree cancelling this mortgage. What in your judgment would be a reasonable attorney's fee to be recovered for the prosecution of this action under the conditions which I have perhaps somewhat inadequately set out?" (Tr. 150.)

10. The Court committed error by striking from defendant's amended answer and counterclaim paragraphs 1, 2, 3, 4, 5, 6 and 8 thereof. (Tr. 177.)

11. The Court committed error in striking from defendant's amended answer and counterclaim the particular item for fire insurance supplied the plaintiff by defendant at his request and made a part of paragraph 8 of the amended answer and counterclaims. (Tr. 177.)

DAN B. SHIELDS,

Attorney for Appellant.

Received copy of the foregoing assignment of errors this 8th day of March, 1940.

REX J. HANSON,

JESSE R. S. BUDGE,

Attorneys for Respondent.

In the Supreme Court Of the State of Utah

ROBERT B. SWANER,
Plaintiff and Respondent,
vs.
UNION MORTGAGE COMPANY,
a corporation,
Defendant and Appellant.

No. 6234

APPELLANT'S BRIEF

DAN B. SHIELDS,
Attorney for Appellant.

FILED
MAR 28 1940

INDEX

	Page
Statement of Case	1
Assignment of Error—Supplemental.....	6
Appendix, Exhibits 1 and 3.....	31, 32
Argument	7

ALPHABETICAL INDEX OF AUTHORITIES

Texts :

American Jurisprudence, Vol. 15, Section 154, page 550	16
17 C. J. 807, Sec. 133	15
41 C. J. 819, Sec. 982.....	23
Jones on Mortgages, 7th Ed., Vol. 2, Sec. 991.....	23
Sedgwick on Damages, 9th Ed., Sec. 229, pages 463, 466, 470	16

Utah Cases :

Creer vs. Colorado Development Company, 96 Utah 1, 80 Pac. 2nd 914	27
Falkenberg vs. Neff, 72 Utah 258, 264 Pac. 1008.....	17
Openshaw vs. Haflin, 24 Utah 426, 68 Pac. 138.....	14
Rugg vs. Tolman, 39 Utah 295, 117 Pac. 54	17
St. Joseph Stock Yards Co. vs. Love, et al, 57 Utah 150, 195 Pac. 305	14
Section 78-3-8, Revised Statutes of Utah, 1933	13

Other Authorities :

American National Bank vs. Jordan, 123 Okla. 165, 254 Pac. 706	24
Avalon Construction Corporation vs. Kirch Hold- ing Company (N. Y.) 175 N. E. 651	18
Barber vs. George R. Jones Shoe Co., 80 N. Y. 507, 120 Atl. 80	19
Barnard vs. Poor, 21 Pick 378	20

INDEX

	Page
Boob vs. Hall (Cal.), 40 Pac. 117	18
Brown vs. Kidwell (Kan.), 244 Pac. 236	21
Burrows vs. Bangs, 34 Mich. 304.....	25
Cocking (Mont.) 213 Pac. 594.....	27
Continental Bank vs. Kowalsky (Mich.), 225 N. W. 496	26
Cornelius vs. U. S. Bldg. & Loan Ass'n, 50 Idaho 1, 292 Pac. 243.....	27
Dahlstrom Metallic Door Co. vs. Evatt Const. Co. (Mass.), 152 N. E. 715.....	20
First National Bank vs. Elam, 126 Okla. 93, 258 Pac. 892	24
Fitzgerald vs. Heady (Mass.), 113 N. E. 844.....	21
Flanders vs. Tweed, 82 U. S. 450, 21 Fed. 203.....	21
Guay, Executor vs. Brotherhood Bldg. Ass'n (N. H.), 177 Atl. 409	19
Guild vs. Guild, 2 Metc. 229	20
Harding, et ux, vs. Home Investment & Savings Co., 49 Idaho 64, 286 Pac. 920.....	25
Haubert vs. Haworth, 9 Phila. (Pa.) 123	24
Henry vs. Davis, 123 Mass. 345	20
Kelly vs. Narregang Investment Co., 41 So. Dak. 222, 170 N. W. 131.....	22
Knudson vs. Knudson, 275 Pac. 663.....	27
Kronebusch vs. Raumin, 6 Dak. 243, 42 N. W. 656....	23
Mathieu vs. Boston (So. Dak.) 216 N. W. 361.....	22
Meyer vs. Hart, 40 Mich. 517, 29 Am. Rep. 553.....	24
Miller vs. Kehoe, 107 Cal. 340, 40 Pac. 485.....	18
Morrill vs. Title Guaranty Co., 94 Wash. 258, 163 Pac. 733	17

INDEX

	Page
McQueen vs. First National Bank of Wetumpka (Ala.) 160 So. 723	26
Parkes vs. Parker, 57 Mich. 57, 23 N. W. 458	24
Parkhurst vs. National Bank, 53 Kan. 136, 35 Pac. 1116	26
Pittsburg M. & Inv. Co. vs. Cook, 1 Pac. 2nd 665.....	17
Sanger vs. Ryan, 122 Cal. 52, 54 Pac. 522.....	18
Schumacher vs. Falter, 113 Wis. 563, 89 N. W. 485..23, 25	
Scott vs. Field, 75 Ala. 419	25
Scurich vs. Ryan (Cal.), 113 Pac. 123.....	17
Sears vs. Nahant (Mass.), 122 N. E. 491.....	21
Shelton vs. Wilson, 264 N. W. 854.....	26
Smith vs. Colson, 31 Okla. 703, 123 Pac. 149.....	25
Spencer vs. Murphy (Colo.), 41 Pac. 841.....	21
Stapely vs. Rogers, 25 Ariz. 308, 216 Pac. 1072.....	17
Stumph vs. Wheat Belt Bldg. & Loan Ass'n of Pratt, 148 Kan., 25, 79 Pac. 2nd 896.....	26
Westfield vs. Mayo, 122 Mass. 100, 23 Am. Rep. 292..	20