

1949

Leon Stucki v. James Ellis, W. H. Stewart, June S. Spackman, Clare Spackman, Thomas A. Tarbet and Magnus Olsen : Petition for Rehearing

Utah Supreme Court

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# In the Supreme Court of the State of Utah

LEON STUCKI

*Plaintiff and Respondent*

vs

JAMES ELLIS et al

THOMAS A. TARBET

*Defendant and Appellant*

## PETITION FOR REHEARING

Plaintiff and respondent prays for a Rehearing in the above cause upon the following grounds:

1. That the decision will cause confusion and uncertainty as to the effect and validity of our mechanic's lien statutes.

2. That the decision is too broad regarding the homestead statutes, and is unnecessarily restrictive and partially nullifies the mechanic's lien statute.

3. The decision sets up and creates a new exemption not heretofore known or recognized in this State, for it holds that a homestead right may be assigned to, and set up by a third party in defense of foreclosure of mechanic's lien,—That the assignee or grantee of homestead premises becomes subrogated to the homestead

exemption rights of grantor.

4. The decision holds, unnecessarily for the protection of the homestead, that a mechanic's lien does not attach against a homestead, that "In as much as the homestead exemption could have been asserted, which would preclude foreclosure of lien, that the homestead is exempt from attachment of mechanic's lien, and that said exemption runs with the transfer of the property".

LEON FONNESBECK

*Attorney for Plaintiff and Respondent*

WHEREFORE, Petitioner prays that the Court grant a rehearing and reconsider its decision herein relative to homestead exemption and mechanic's lien, as rendered herein.

LEON FONNESBECK

### ARGUMENT

It must be kept in mind that appellant Tarbet was unmarried and not the head of a family. The trial court expressly so found, and that finding is not reversed; in fact there is no appeal from that finding.

It is submitted that the decision herein will cause much confusion in the future, as to the validity and effect of our mechanic lien statutes, so far as the same relates to premises which may be claimed as a homestead.

It is further submitted the decision is too broad, in favor of the homestead statutes, and is unduly restrictive of the mechanic's lien statutes, as the decision holds that mechanic's lien does not attach to homestead premises, thereby substantially limiting the absolute and unqualified provisions of Section 52-1-3.

which provides that every contractor or person, "shall have a lien upon the property upon or concerning which they have rendered services, performed labor or furnished materials".

The decision seems to hold plaintiff's mechanic's lien void because "Defendant Ellis was entitled to assert a homestead exemption against plaintiff's mechanic's lien, and if he conveyed the premises to defendant Tarbet, within the meaning of this section, then the plaintiff's lien herein cannot be foreclosed against the premises".

It is submitted that the court should recouncil and protect the rights created by both the homestead statutes and the mechanic's lien statutes. In the case of *Evans vs Jensen*, 168 P. 762, 4, this Court said both rights were created by law "and, in our judgment it is the duty of the court to protect both rights".

I further submit that the *Volker-Lumber Co. vs Vance* case 88 P. 896, dose not go to the extent of holding that a mechanic's lien is void as against homestead premises. That case merely holds that the homestead claimant, by ordering the materials and the work done, is not prevented from asserting his homestead exemption against one who attempts to foreclose a mechanic's lien.

This Court, in the *Jensen* case, *supra*, expressly so held in the following language: "All that is held in the *Vance* case is that the head of a family, who enters into a contract when the status defined by the Constitution exists, is not prevented from claiming his home-

stead exemption against one who claims a mechanic's lien thereon''.

In the Jensen case, *supra*, this Court also points out and holds that a mechanic's lien is of a higher order than judgment liens and that the statute does not provide that homestead shall not be subject to mechanic's lien, as it provides against judgment liens.

It is submitted that it is not necessary, for the protection of the homestead, to hold that a mechanic's lien does not attach to the homestead premises. If the court holds that the head of a family may, even though he has ordered the work done and the materials furnished, nevertheless set up his homestead exemption, in case the mechanic's lien is being foreclosed, and thus defeat foreclosure of such lien; that is all the protection which the homestead claimant needs or is entitled to under the Constitution.

If however, the court now holds that a mechanic's lien is void, a mere nullity, because such a lien could have been defeated if the head of the family were still the owner and had seen fit to come in and set up his homestead exemption, that I submit, is unduly favoring the homestead exemption, and unnecessarily restricting and limiting the rights of the mechanic's lien claimant who has improved and greatly benefitted the homestead premises.

The whole and sole purpose of the homestead law is to protect the family claiming the homestead. Mr. Ellis only had \$800.00 equity in the premises. He got his money in cash and left for parts unknown, after

signing that he agree to the sale to Tarbet "Subject to approval of the owner".

Ellis was not here when we started our suit to foreclose our mechanic's lien. Long before that, Ellis had sold or assigned his interest in that property. If we could have found him and served summons on him, he could not have come in and set up any homestead exemption, for at that time he had not only vacated the property, but he had sold his interest in the property.

The record is conclusive that Ellis had abandoned his homestead rights in said premises. He listed said premises for sale February 18, 1946 (Ex. H. Tr. 53, 149), and he received all of his equity, \$800.00, and signed his consent that the property be sold to Tarbet, February 25, 1946. After that no one ever saw him.

"The right to claim a statutory exemption may be relenquished, waived, or abandoned, not only in its aspect as an exemption from seizure, but also in its aspect as an interest in property. . . ."—26 Am. Jur. 118.

So how can the court deny the plaintiff his legal right to foreclose his mechanic's lien, on a mere supposition of what Ellis might or could have done if he had acted differently—done something that might have happened, but didn't happen.

Sec. 38-0-2 must be construed in connection with and as a part of Sec. 38-0-1, and should not be enlarged by the Court beyond its express provisions, as stated by the Legislature. Sec. 38-0-1 says the homestead "shall be exempt from judgment lien" (not from mechanic's lien). That is therefore the only exemption

referred to in Sec. 38-0-2, when it provides that a conveyance of the homestead premises “shall not subject the premises to any lien or incumbrance *to which it would not be subject in the hands of the owner*”. That section should not be construed to include mechanic’s lien, for that would not only be pure legislation by the Court, but it would also partially nullify the express and absolute provisions of the Mechanic Lien Statute, *supra*.

From the mere fact that the homestead claimant may set up and plead his homestead exemption (if he is still in possession and occupies the premises as a homestead), and thus defeat attempted foreclosure of the mechanic’s lien against the homestead premises, it does not follow that a mechanic’s lien may not exist against the homestead premises, or may not be foreclosed against the premises, after the homestead claimant had vacated or abandoned the premises and had sold or assigned all interest and equity which he claimed therein.

If the court recognizes that plaintiff had a valid mechanic’s lien on the Ellis premises, subject only to be defeated by Ellis setting up his homestead exemption; then the plaintiff at least has some protection. In such case the court will grant a foreclosure of the lien if: (a) The head of the family defaults, after being duly served with summons, and fails to come in and set up his homestead exemption; (b) if the family abandons and vacates the homestead premises; (c) if the family moves out of the State and become non-residents, and also (d), if the head of the family sells or assigns all interest which he formerly had in the homestead premises.



In all such cases we are not infringing on the homestead rights, for the head of the family has himself destroyed and waived any homestead claim of exemption. But if the Court holds that the plaintiff has no valid mechanic's lien on the premises, then plaintiff is precluded from bringing a foreclosure proceeding, even though the head of the family defaults, has abandoned the premises, moved out of the State, or has sold or assigned his interest, and no longer claims any interest in the premises. Furthermore the court has created a new exemption in Tarbet. Can Tarbet sell those premises as exempt? If not, why not, if they are exempt? When would they cease to be exempt?

We are in a sea of confusion because the decision goes beyond the express provisions of the homestead statutes (Section 38-0-1 and 38-0-2) and in effect nullifies the express and absolute provisions of the Mechanic's Lien Statute.

To summerize: From the mere fact that the Court has held that a foreclosure of mechanic's lien may be defeated by setting up and pleading homestead exemption, if the status perscribed by the Constitution exists—possession of home premises, residence in State, head of a family,—it does not follow that a valid mechanic's lien does not, or may not exist against the premises. Hence that lien is there and may be foreclosed when the homestead status ceases to exist, e. g. if the homestead claimant becomes a nonresident, if he abandons the homestead, vacates, sells or assigns his interest in the homestead, and claims no interest therein.

Hence Section 38-0-2 does not apply to mechanic's



lien and should not be invoked as a shield in the hands of a new grantee, Tarbet, for the premises were subject to to plaintiff's mechanic's lien in the hands of Ellis, (subject only to be defeated by Ellis while he held his Constitutional status), prior to conveyance to Tarbet.

We also respectfully submit that the consent signed by Ellis "SUBJECT TO APPROVAL OF THE OWNER", amounted to ~~to~~ conveyance of the premises by Ellis to Tarbet.

*Respectfully submntted,*

Leon Fonnesbeck