

1971

Zions First National Bank, A National Association,  
and Howard Nix and Hazel Nix v. Reginald L.  
Saxton and Louise A. Saxton, His Wife; Richard D.  
Saxton and Annie B. Saxton, His Wife; J. D. Mcneil;  
Ajax, Inc.; Glen v. Shields; John Worthen, dba  
Exotic Swim-Ming Pool Co.; Brazier, Montmor-  
Ency, Hayes & Talbot Architects, Inc.; Glen  
Hamilton, dba Western Excavating & Pipeline  
Company : Brief of Appellant

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Richard H. Nebeker; Attorney for Respondent

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#### Recommended Citation

Brief of Appellant, *Zions Bank v. Saxton*, No. 12472 (Utah Supreme Court, 1971).  
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# IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK, a Na-  
tional Association, and HOWARD NIX and  
HAZEL NIX,

*Plaintiffs and Respondents,*

vs.

REGINALD L. SAXTON and LOUISE A.  
SAXTON, his wife; RICHARD D. SAXTON  
and ANNIE B. SAXTON, his wife; J. D. Mc-  
NEIL; AJAX, INC.; GLEN V. SHIRLEY;  
JOHN WORTHEN, dba EXOTIC SWIM-  
MING POOL CO.; BRAZIER, MONTGOMERY  
AGENCY, HAYES & TALBOT ARCHITECTS  
INC.; GLEN HAMILTON, dba WESTERN  
EXCAVATING & PIPELINE COMPANY

*Defendant and Appellant*

Appeal from the judgment of the District  
Court, in and for Tooele County, Honorable  
J. H. HARRIS, Judge.

## APPELLANT'S BRIEF

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Aug 1961

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## TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF NATURE OF CASE .....	1
DISPOSITION IN THE LOWER COURT .....	2
RELIEF SOUGHT ON APPEAL .....	3
STATEMENT OF FACTS .....	4
ARGUMENT .....	8
POINT I. WHAT LEGAL EFFECT DID THE LIEN WAIVERS EXECUTED BY DEFENDANT AND LIEN CLAIMANT HAMILTON HAVE UPON HIS RIGHT TO CLAIM A LIEN UPON TRACT I. ....	8
POINT II. UNDER THE UTAH STATUTES AND THE CASE LAW PROMULGATED THERE- UNDER, A MECHANICS LIEN ATTACHES TO THE EQUITABLE INTEREST OF A CONTRACT PURCHASER. ....	11
POINT III. WHAT LEGAL EFFECT DOES A VOL- UNTARY FORFEITURE HAVE UPON A ME- CHANICS LIEN WHICH HAS ATTACHED TO THE INTEREST OF A CONTRACT PUR- CHASER. ....	12
POINT IV. DID THE COURT HEREIN HAVE JURISDICTION OVER THE CONTRACT PUR- CHASERS, I.E., REGINALD L. SAXTON AND RICHARD D. SAXTON AND THEIR RESPEC- TIVE WIVES. ....	14
POINT V. DID HAMILTON RECEIVE ADE- QUATE CONSIDERATION IN EXCHANGE FOR THE EXECUTED LIEN WAIVERS AND/OR	

## TABLE OF CONTENTS (Continued)

	<i>Page</i>
WERE THE WAIVERS' LEGAL EFFECT ABROGATED BY SAXTON'S MISREPRESENTATION. ....	14
POINT VI. DID NIXES AUTHORIZE THE IMPROVEMENTS OF TRACT I, AND/OR DID THEY RATIFY THE ACTIONS OF THE SAXTONS BY EXECUTING THE PURCHASE CONTRACT DATED FEBRUARY 18, 1970. ....	16
CONCLUSION .....	18

### AUTHORITIES CITED

#### STATUTES

Utah Code Annotated, Sec. 38-1-3 .....	11
Utah Code Annotated, Sec. 14-2-1 .....	11

#### CASES

Belnap v. Condon, 34 Utah 213, 97 P 111 .....	17
Brimwood Homes, Inc. v. Knudsen Builders Supply Company, 14 Utah 2d 419, 385 P 2d 982 .....	8, 9, 16
Buerger Investment Company v. D. F. Salzer Lumber Company, 77 Colo. 401, 237 P 162 .....	10
Burton Walker Lumber Company v. Howard, et al, 92 Utah 92, 66 P 2d 134 .....	13, 18
Cary-Lombard Lumber Company v. Sheets 10 Utah 332, 37 P 572 .....	11, 12
Gorman v. Birrell, 41 Utah 274, 125 P 685 .....	17
Holbrook v. Webster, Inc., 7 Utah 2d 149, 320 P 2d 661 ....	9

## TABLE OF CONTENTS (Continued)

	<i>Page</i>
King Brothers, Inc. v. Utah Dry Kiln, Inc. 21 Utah 2d 43, 440 P 2d 17 .....	11
Lazenby v. Wright, 250 Mich. 203, 229 N.W. 437 .....	13
Mid-West Engineering & Construction Company v. Campagna, (Mo.) 397 S.W. 2d 616 .....	16
Milwaukee Loan and Finance Company v. Grundt 207 Wis. 506, 242 N.W. 131 .....	13
Sanford v. Kunkle, et al, 30 Utah 379, 85 P 363, 1012 .....	12

### TEXT

57 CJS Mechanics Liens, Section 228 .....	9
15 ALR 3rd 119 .....	10
102 ALR 242 .....	13
53 Am Jur 2d Sec. 322 p. 850 .....	13
53 Am Jur 2d Sec. 297 p. 831 .....	16
53 Am Jur 2d Sec. 118 p. 639 .....	18
23 Am Jur 2d Sec .19 p. 770 .....	16
Article, Mechanics' Liens in Utah, 1 Utah Law Review 181 (1966) .....	17

# IN THE SUPREME COURT OF THE STATE OF UTAH

ZIONS FIRST NATIONAL BANK, a National Association, and HOWARD NIX and HAZEL NIX,

*Plaintiffs and Respondents,*

vs.

REGINALD L. SAXTON and LOUISE A. SAXTON, his wife; RICHARD D. SAXTON and ANNIE B. SAXTON, his wife; J. D. McNEIL; AJAX, INC.; GLEN V. SHIELDS; JOHN WORTHEN, dba EXOTIC SWIMMING POOL CO.; BRAZIER, MONTMORENCY, HAYES & TALBOT ARCHITECTS, INC.; GLEN HAMILTON, dba WESTERN EXCAVATING & PIPELINE COMPANY,

*Defendant and Appellant.*

Case No.  
12472

Appeal from the judgment of the Third Judicial District Court, in and for Tooele County, Honorable D. Frank Wilkins, Judge.

Brief of Appellant Glen Hamilton, dba Western Excavating & Pipeline Company

## STATEMENT OF NATURE OF CASE

This is an appeal by Glen Hamilton, dba Western Excavating and Pipeline Company, hereinafter sometimes referred to as "Hamilton", from a Judgment entered on January 18, 1971, by the Honorable D. Frank Wilkins, Judge, Third Judicial District Court, in and for Tooele County,

State of Utah. (P. 243-245) The Court below held that defendant and lien claimant, Glen Hamilton, had released his claim of lien to all tracts of land comprising the project known as Grandview Meadows, located in Tooele City, Tooele County, State of Utah.

## DISPOSITION IN THE LOWER COURT

The matter before the Court arises from a consolidated action wherein plaintiff Zions First National Bank commenced an action in Tooele County District Court, Case No. 7173, to foreclose a trust deed upon Tract II, a portion of a trailer development known as Grandview Meadows, and plaintiffs Howard Nix and Hazel Nix commenced an action, Case No. 7175, to quiet title to Tract I of the said development.<sup>1,2,3</sup> The actions were commenced after work had been abandoned upon the project by defendant Reginald L. Saxton, the developer. Subsequent to consolidation, one of the lien claimants, Brazier, Montmorency, Hayes and Talbot, architects, counterclaimed in the Nix case and asked for foreclosure of its lien. All of the lien claimants, including Hamilton, pursuant to order of the Court and the applicable Utah Statute, proved their liens at a hearing thereon on October 12, 1970. (Tr. 2,3,4, Tooele Proceeding)

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<sup>1</sup> For brevity and clarity, plaintiff Zions First National Bank will be referred to as "Zions". Plaintiffs Howard Nix and Hazel Nix as "Nixes". Defendants Reginald L. Saxton, Louise A. Saxton, Richard D. Saxton and Annie B. Saxton as "Saxtons".

<sup>2</sup> References to the pleadings contained in the record on appeal shall be preceded by "P" followed by the page number, i.e., "P. 75". References to the transcript of trial shall be preceded by "Tr." followed by the page number, i.e., "Tr. 40". References to the exhibits shall be preceded by "Ex." followed by the number thereof and "P" or "D", i.e., "Ex. 16 P."

<sup>3</sup> Addendum A. is a reproduction of Ex. 13 P., which displays Tract I and Tract II involved in the controversy herein.

Plaintiffs then moved for summary judgment, and after a hearing thereon, judgment was entered by the Honorable Stewart M. Hanson in favor of plaintiffs. By stipulation, all parties agreed that the judgment could be vacated, and it was so ordered. (P. 145-146) A pre-trial was held and the matter set for trial. (P. 168) Defendants Reginald L. Saxton, Richard D. Saxton<sup>4</sup> and Annie B. Saxton entered an appearance and purported to waive any interest they may have in Tract I. (Ex. 16 P.)

At the trial, the lien claimants, including Hamilton, claimed a lien upon the interest of the Saxtons in both tracts comprising the project. The Court below ruled that liens filed by all lien claimants were ineffective against the interest of the Saxtons in Tract I, and/or the interest of the fee title holders, plaintiffs Howard Nix and Hazel Nix, and that defendant Hamilton by executing written lien waivers,<sup>5</sup> had waived his right to claim a lien upon the interest of the Saxtons in Tract I, and further that the equitable interest of the Saxtons as contract purchasers of Tract I was not lienable by any claimant. With respect to Tract II, Zions was judged to have a first lien upon the tract, superior to all claimants, and a foreclosure sale pursuant to the trust deed was ordered and carried out. (P. 243-245)

### RELIEF SOUGHT ON APPEAL

Defendant and lien claimant contends that the Court below erred:

1. In concluding that lien claimant Hamilton had

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<sup>4</sup> Reginald L. Saxton and Richard D. Saxton are brothers and nephews of Hamilton. When Hamilton was a boy, he lived with the Saxton family for about three years. (Tr. 171-172)

<sup>5</sup> Addendum B is a reproduction of one of the waivers executed by Glen Hamilton (Ex. 23 P.)



waived his claim of lien upon Tract I and had been paid for the materials and labor performed thereon.

2. In denying defendant's Motion to Amend Findings of Fact and Conclusions of Law and for a New Trial.

3. In concluding that the legal and equitable interests in Tract I were not subject to defendant Hamilton's lien.

## STATEMENT OF FACTS

Defendant and lien claimant Hamilton is a licensed contractor residing in Tooele, Utah. That prior to June of 1969, Hamilton was contacted by Reginald L. Saxton, who made inquiry concerning a possible site for constructing a trailer park. (Tr. 173)

Hamilton introduced Saxton to Howard Nix and Hazel Nix, owners of property which was believed to be a good site for a trailer court project and on or about June 11, 1969, Saxton entered into an oral agreement to purchase a 20.3 acre tract from the Nixes and later contacted Hamilton and requested that he act as contractor.<sup>6</sup> (Tr. 27) (Ex. 13 P.)

Saxton requested that Hamilton prepare an estimate for a trailer park covering five acres, which was accomplished, and a cost estimate was delivered to Saxton involving a five acre development. (Tr. 197) (Ex. 22 P.)

After obtaining the estimate from Hamilton, and title to the five acre tract which he obtained from the Nixes by

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<sup>6</sup> The property originally purchased by the Saxtons consisted of approximately 20.3 acres. (Tr. 27) Reginald L. Saxton arranged a loan of \$10,000 to obtain a warranty deed for the five acre tract, Tract II. (Dep. Howard Nix, P. 12) He then obtained a loan from plaintiff Zions First National Bank for \$85,000. (Tr. 59) After obtaining the loan, Saxton, according to his subsequent account, attributed \$10,000 from the bank loan toward the purchase of the five acre tract, Tract II. (Ex. 26 D.)

oral contract,<sup>7</sup> Saxton obtained a loan from plaintiff Zions First National Bank for the sum of \$85,000. Zions recorded a trust deed upon Tract II as security for the loan. (Tr. 59)

Hamilton commenced work upon the project on or about June 14, 1969, and a few days after construction commenced, Saxton advised Hamilton that he had acquired additional acreage and was expanding the project to include Tract I, the additional 15.3 acres. (Tr. 177-178)

Prior to commencing work. Saxton stated to Hamilton that he, as owner, would hire all the contractors and pay all the materialmen.<sup>8</sup> The lender, plaintiff Zions First National Bank, disbursed the construction draws to Hamilton as contractor.<sup>9</sup> Hamilton deducted funds to cover his personal labor and materials and paid the balance to Saxton, who, in accordance with their agreement, was responsible to pay the materialmen and other contractors. (Tr. 183) As the funds were disbursed, Hamilton executed lien waivers and delivered them to Saxton, who delivered them to Zions.<sup>10</sup> (Ex. 23 P.)

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<sup>7</sup> The terms of the oral contract were that Saxton intended to purchase Tract I and Tract II. He paid the Nixes \$10,000 upon delivery of the deed to Tract II. The parties attributed \$7,500 to Tract II and \$2,500 as a down payment on the remaining acreage, Tract I. (Tr. 48)

<sup>8</sup> Saxton contracted with the cement contractor, J. D. McNeil, the architects, Brazier, Montmorency, Hayes & Talbot, and various other claimants who subsequently filed liens. Actually, Hamilton constructed only the water, sewer and gas lines. (Tr. 225)

<sup>9</sup> When Hamilton received the construction draws from the plaintiff Bank which were delivered to Saxton together with the lien waivers, \$18,000 was retained by Hamilton and the balance paid to Saxton. Saxton used \$62,519.79 upon the project, including the sum retained by Hamilton. The difference between \$62,519.79 and \$74,000 paid by Zions was used for promotional expenses. (Tr. 192) (Ex. 26 D.)

<sup>10</sup> The lien waivers executed by Hamilton refer to loan No. 51032 which is secured by Zions trust deed upon the five acre tract owned by the Saxtons. (Ex. 23 P.) (Tr. 77) The improvements, however,

Subsequent to commencing work upon the project, Hamilton contacted Richard Saxton, who was working for Zions First National Bank at their 5th South Branch, and indicated to him how the funds were to be disbursed. He was told that there was no objection to handling the disbursement in this manner. (Tr. 185)

Zions, prior to extending the loan commitment, inspected the project site and was aware that the loan was not sufficient to complete the planned project, that the project involved more than five acres, and that additional financing would be necessary. (Dep. Ellis, P. 6) Zions made regular inspections to the site and observed that the property involved consisted of more than a five acre tract. (Tr. 94)

In September, 1969, Hamilton received a check from Saxton which did not clear the bank, and upon checking with J. D. McNeil, the cement contractor, who had also received a similar check, determined that the project was in serious trouble and refused to sign further lien waivers. (Tr. 187)

Hamilton and McNeil contacted Saxton and were told that Saxton was negotiating for additional money with Valley Bank & Trust Company, and after checking the validity of this representation, Hamilton signed and returned the final lien waivers, relying upon Saxton's representation that Zions would be paid in full. (Tr. 189)

Hamilton immediately contacted Mr. Arlin Mecham of Zions<sup>11</sup> and advised him of the situation and was told that

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were made upon the entire project, a total of 20.3 acres. (Tr. 36, 177, 178) It was conceded by Hamilton at the trial that Zions was in first position with respect to Tract II by virtue of its trust deed.

<sup>11</sup> Arlin Mecham, a Second Vice-President employed by Zions, was the loan closing officer for the loan executed by the Saxtons and secured by the trust deed upon the five acre tract (Tract II).

something would be worked out. (Tr. 202) Zions relied totally upon Reginald L. Saxton in all dealings connected with their loan commitment. (Tr. 88)

In early October, 1969, a meeting was held with Mr. Mecham, Zions First National Bank, and an accounting was demanded of Saxton. (Tr. 190) Saxton ultimately furnished an accounting to Zions' attorney by mail showing disbursements by Saxton of the sum of \$62,519.79. (Tr. 192) (Ex. 26 P.)

After having met with the representatives of Zions and after having been assured of additional financing by Saxton, Hamilton continued to work on the project and expended an additional \$6,000 of his own funds. This expenditure occurred subsequent to receiving the last construction draw from Zions. (Tr. 206-207)

On November 14, 1969, Hamilton filed a notice of intention to claim a lien upon the interest of the Saxtons in the improved property, (Ex. 6 P.) (Tr. 223) and subsequent thereto Hamilton learned that the Saxtons held title to only Tract II and an amended lien was filed covering the interest of the Saxtons in Tract I.<sup>12</sup> (Ex. 7 P.)

Subsequent to the cessation of work upon the project, meetings were held between Zions and Reginald Saxton in an effort to refinance the project. (Tr. 81-82) On or about the 8th day of February, 1970, the Saxtons entered into a written contract for the purchase of the remaining 28 acres, which included Tract II and Tract I. (Ex. 14 P.) The description contained in the contract is incorrect, but the

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<sup>12</sup> Hamilton's lien in the sum of \$30,441.10 represented the balance due him after deducting the funds retained from construction draws. (Tr. 184) The sum also included labor and materials furnished to Hamilton by materialmen and subcontractors in the sum of \$10,-266.74, for which Hamilton remains liable. (Tr. 227)

parties intended it as a purchase of 28 acres, including Tract I. (Tr. 26) At the time the purchase agreement of February 18, 1970, was executed, the Nixes were aware that construction had ceased, that the entire acreage was improved and that Reginald Saxton needed a contract to enable him to borrow money to complete the project. (Tr. 50)

Subsequent to February, 1970, Zions attempted to help Saxton obtain a Small Business Administration loan, and after learning that Saxton was having difficulty with the Internal Revenue Service, this loan could not be consummated. (Tr. 83)

On or about July 1, 1970, Zions obtained an option from the Nixes to purchase Tract I, the remaining acreage which had been improved. The option price was the same amount as the previous contract price to the Saxtons and did not include the costs of the improvements thereon. (Dep. Howard Nix, P. 30)

## ARGUMENT

I. WHAT LEGAL EFFECT DID THE LIEN WAIVERS EXECUTED BY DEFENDANT AND LIEN CLAIMANT HAMILTON HAVE UPON HIS RIGHT TO CLAIM A LIEN UPON TRACT I.

It is the contention of Hamilton that the lien waivers executed by him upon the receipt of the funds from Zions must be construed strictly in accordance with the terms of the contracting parties. Zions and Hamilton were the contracting parties by the terms of the waiver agreement. Its effect is limited to the property described in the trust deed securing loan No. 51032 (the five acre tract). (See *Brimwood Homes, Inc., v. Knudsen Builders Supply Company*,

Infra) Where a waiver is executed and there is nothing in the context to show a contrary intention, the Court must enforce the contract as the parties have made it. (See Holbrook v. Webster, Inc., Infra) The clear import of the documents which were executed by defendant Hamilton indicate that he has released his lien with respect to loan No. 51032 and the property secured by the loan. It is also important to note that Zions First National Bank has no interest whatsoever in Tract I (15.3 acres). It is arguable that Zions has no standing to raise the waivers as a defense to any lien claim of Hamilton upon Tract I. The lien waivers, as has been previously stated, do not extend to the world at large and the lien claimed by Hamilton upon Tract I, and can only be attacked by the owner of the said tract or some person holding a legal or equitable interest therein. (See in this regard 57 CJS Mechanics Liens, Section 228.) The owners of Tract I are the Nixes and the Saxtons, legal and equitable. Waiver was not raised as an issue or evidence thereof offered by the Nixes at the trial, and the Saxtons presented no evidence whatsoever. (Ex. 18 P.)

There are no Utah decisions which are entirely factually similar to the case before the Court; however, there have been three Utah cases which are helpful in construing the lien release executed by Hamilton. In the case of Holbrook v. Webster, Inc., 7 Utah 2d 149, 320 P 2d 661, the Utah Court held that a lien release cannot be varied by parole evidence unless induced by fraud or misrepresentation and that a release of lien which was clear and unambiguous on its face was effective to release present liens and future liens upon the *property* described in the lien release. A later Utah case of Brimwood Homes, Inc., v. Knudsen Builders Supply Company, 14 Utah 2d 419, 385 P 2d 982, in construing a lien release, held that the release was effective only as to present

debts and did not release future lien rights for which no consideration had been paid, and that the lien release affected only the property described in the document. It has been held in many jurisdictions throughout the United States that a release of lien or lien claims as to some buildings or part of the premises is not effective on the remaining buildings in the group upon which labor or material was supplied pursuant to one contractor. (See 15 ALR 3rd 119.) An example of this situation is the Colorado case of Buerger Investment Company v. D. F. Salzer Lumber Company, 77 Colo. 401, 237 P 162, where a lime company sold lime to a property owner for the construction of four houses on four pairs of lots and the lime was used on all property indiscriminately. The lime company released its lien as to house No. 1 upon being paid out of a loan relating to that house, and thereafter furnished additional material for the construction project and later filed a blanket lien on all of the houses. It was held that the release of lien as to one of the houses did not operate to release or prevent the lime company from obtaining a lien as to the remaining three houses, but that an equitable portion of the lime company's lien as computed in relation to the released house should be deducted and lien or liens be allowed to the company against the remaining three houses, which lien was allowable even though various individuals had since purchased the houses in question. We submit that this principle applies to the matter before the Court and that the mere fact that Hamilton had released his lien as to the five acre tract in privity with Zions First National Bank, does not defeat his right to claim a lien upon the equitable interest of the contract purchaser of Tract I. Moreover, it would be inequitable to defeat the lien claim of Hamilton upon Tract I for the evidence adduced at trial substantiates that Hamilton furnished materials to the project which were applied to

Tract I subsequent to the time he received the last payment from the construction loan. (Tr. 206-207) The improved property, after the addition of the improvements affixed thereto, is worth substantially more than the value of the unimproved land. We submit that by executing the lien waivers referring to Tract II, Hamilton did not waive his right to claim a lien upon the equitable interest of the Saxtons as contract purchasers of Tract I.

## II. UNDER THE UTAH STATUTES AND THE CASE LAW PROMULGATED THEREUNDER, A MECHANICS LIEN ATTACHES TO THE EQUITABLE INTEREST OF A CONTRACT PURCHASER.

38-1-3, Utah Code Annotated, provides and specifies those entitled to a mechanics lien, what specifically may be attached and points out that such liens shall attach only to such interest as the owner may have in the property. The Utah case of Cary-Lombard Lumber Company v. Sheets, 10 Utah 332, 37 P 572, holds that one in possession of land under a contract to purchase is an "owner" within the meaning of the foregoing Section. A recent Utah case substantiating that an equitable interest is a lienable interest under Utah law is the case of King Brothers, Inc. v. Utah Dry Kiln, Inc., 21 Utah 2d 43, 440 P 2d 17, wherein the Court was attempting to define what was meant by the phrase "the owner of an interest in land" with respect to Section 14-2-1, Utah Code Annotated. The Court stated that the Bond Law Statute had developed along the lines of the Utah Mechanics Lien Statutes and that the word "land" as used in that particular statute has since time immemorial been regarded as a "generic term which includes not only the soil, but everything attached to it, whether attached by the cause of nature such as trees, herbage and water or by hand of man such as build-



ings, fixtures and fence.” The Court then states that this is particularly true with respect to lien statutes which should be liberally construed to effectuate their purpose and that mechanics liens have been allowed to attach to an interest less than fee simple, such as leasehold interest, an equitable interest, and to a building separate from the soil upon which it was erected. In support of those contentions, the Court cites the Cary-Lombard case, *supra*, and Sanford v. Kunkle, et al, 30 Utah 379, 85 P 363, 1012. It is submitted that the law in Utah with respect to the lienability of an equitable interest of a contract purchaser is well settled, and applying these principles to the matter before the Court, it is recognizable that the equitable interest of Reginald L. Saxton and Richard D. Saxton and their respective wives in Tract I became affixed with the lien claim of Hamilton filed herein.

### III. WHAT LEGAL EFFECT DOES A VOLUNTARY FORFEITURE HAVE UPON A MECHANICS LIEN WHICH HAS ATTACHED TO THE INTEREST OF A CONTRACT PURCHASER.

In the case before the Court, the evidence substantiates that Reginald L. Saxton and Richard D. Saxton, et al, were contract purchasers of Tract I, and that as contract purchasers they had an equitable interest therein. Indeed, there is no doubt that Tract I was improved and liens filed thereon prior to the time an “equitable conversion” had taken place under the terms of the purchase contract. The Nixes were the holders of legal title to Tract I and, of course, the Saxtons as contract purchasers were holders of the equitable title thereto and had the obligation to make the payments thereon. The important question then becomes whether or not the voluntary forfeiture, i.e., the failure to make pay-

ments as provided in the contract, affected the right of the lien claimants to claim a lien upon the interest of the equitable title holders. Again, there are few Utah decisions that have apparently been faced with the determination of this problem; however, there have been decisions in other jurisdictions throughout the United States. In the Wisconsin case of *Milwaukee Loan and Finance Company v. Grundt*, 207 Wis. 506, 242 N.W. 131, the vendee purchased land by contract. He then contracted for certain work on buildings upon the land and thereafter, upon default of payment under such contract, quit-claimed to the vendor in settlement thereof. There was a contest over whether or not the mechanics liens which had been filed in the meantime were effective as against the interest of the vendor or against the interest of the vendee only. It was held that in absence of a showing of intent on the part of the vendor to have the legal and equitable titles merged, the mechanics lien for work done on the houses without the knowledge of the vendor must be confined to the actual interest which the vendee had at the time of the rendering of the services. In other words, the forfeiture or surrender of any title of a contracting purchaser to such land shall not defeat the liens upon such buildings or structure of such persons furnishing services or materials. In this regard see also *Lazenby v. Wright*, 250 Mich. 203, 229 N.W. 437, 102 ALR 242, 53 Am Jur 2d Sec. 322 p. 850. See also *Burton Walker Lumber Company v. Howard, et al*, 66 P. 2d 134 (Utah).<sup>13</sup>

Applying the foregoing to the matter before the Court, it is clear that the voluntary forfeiture of the contract purchasers, i.e., the Saxtons, did not extinguish the right of the lien claimants to claim a lien upon the interest of the contract

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<sup>13</sup> Wherein it was held that default in payment does not necessarily mean the interest of the purchaser reverts to the vendor.

purchasers which would amount in the instant case to the value of the improvements upon Tract I (15.3 acres).

IV. DID THE COURT HEREIN HAVE JURISDICTION OVER THE CONTRACT PURCHASERS, I.E., REGINALD L. SAXTON AND RICHARD D. SAXTON AND THEIR RESPECTIVE WIVES.

Conclusion of Law No. 3 heretofore entered by the Court concludes that the Court at the time of trial had no jurisdiction over the Saxtons to enable the Court to determine their interest in the improved portion of the property described as Tract I. We submit the facts adduced at trial substantiate that in September, 1970, subsequent to the commencement of this action and at the time of a hearing for a Motion for Summary Judgment before the Honorable Stewart M. Hanson, Reginald L. Saxton, Richard D. Saxton and Annie B. Saxton, by and through the attorney for plaintiffs Howard Nix and Hazel Nix, filed an appearance in the action herein and purported to waive any interest in the property which was the subject matter of the action. Louise Saxton was served personally and defaulted. We submit that in making an appearance before the Court and waiving their interest in the described property and in effect forfeiting the said interest to the Nixes brought all the legal and equitable interest before the Court, and, therefore, the Court had jurisdiction to determine the interest of all parties in Tract I, i.e., the Nixes, the Saxtons, and the lien claimants who had filed and perfected their liens.

V. DID HAMILTON RECEIVE ADEQUATE CONSIDERATION IN EXCHANGE FOR THE EXECUTED LIEN WAIVERS AND/OR WERE THE WAIVERS

## LEGAL EFFECT ABROGATED BY SAXTON'S MISREPRESENTATION.

It is conceded under the facts adduced in the Court below that under the payment arrangement worked out between Hamilton, Reginald L. Saxton and Zions, Saxton delivered to Hamilton the sum of \$74,000 and Hamilton deducted \$18,000 therefrom and returned \$56,000 to Saxton. (Tr. 182) The Court, however, found that Hamilton had actually been paid the sum of \$74,000. (P. 236)

The record is replete with testimony which substantiates that Hamilton did in fact receive the sum of \$18,000 and, in addition thereto, expended the sum of \$6,000 subsequent to receiving the last construction draw. There is no contrary evidence in the record. Indeed, the accounting furnished by Reginald L. Saxton at the request of Zions substantiates that Hamilton received the sum of \$18,000 and that the bulk of the loan proceeds were spent for improvements upon the property. (Ex. 26 P.)

Moreover, we further submit the record is clear that Zions First National Bank had knowledge of the peculiar way in which the funds were disbursed, (Tr. 185) and knew in fact that the funds borrowed were inadequate to complete the project and assented to the arrangement of disbursement. (Dep. Ellis, P. 6)

It is clear that Zions relied upon Reginald L. Saxton completely in all matters pertaining to the loan and did not take affirmative action until all hope of refinancing Saxton had been exhausted. From the record it is only equitable to conclude that Hamilton did not receive adequate consideration for the lien waivers executed. There is no question that the final three waivers were executed upon the misrep-

resentation of Saxton that he had secured additional financing. (Tr. 189)

It is arguable, and we think forcefully so, that the entire project was promoted by the misrepresentation of Reginald L. Saxton, and such fraud should affect the validity of the waivers signed by Hamilton. It is submitted that fraud destroys the validity of everything into which it enters, 53 Am Jur 2d, Sec. 297 p. 831, *Mid-West Engineering & Construction Company v. Campagna*, (Mo.) 397 S.W. 2d 616, 626, 627, 629, especially where the rights of innocent third parties have not intervened. 23 Am Jur Sec. 19 p. 770.

We submit that under the principle enunciated in the Utah case of *Brimwood Homes, Inc. v. Knudsen Builders Supply Company*, *supra*, the waivers signed by Hamilton could not have waived his right to claim a lien for the sum of \$6,000. This sum was added to the project subsequent to the last construction draw which was received September 12, 1969. (Tr. 206-207)

## VI. DID NIXES AUTHORIZE THE IMPROVEMENTS OF TRACT I, AND/OR DID THEY RATIFY THE ACTIONS OF THE SAXTONS BY EXECUTING THE PURCHASE CONTRACT DATED FEBRUARY 18, 1970.

It is clear from the record that the Nixes resided in close proximity to the property sold to and developed by Saxton and were aware from the outset that the additional tract, Tract I, was being improved. (Tr. 36)

It is equally clear that on February 18, 1970, the date of execution of the written contract for the purchase of 28 acres which included Tract I, the Nixes realized that Tract

I had been improved and that Saxton was in need of a written agreement to enable him to borrow additional money. (Tr. 50) There is further evidence that the Nixes were cognizant that construction had ceased and that Reginald Saxton needed money to complete the project. (Dep. Hazel Nix, P. 8)

We concede that heretofore the Utah decisions have refused to impress the fee title of an executing contract seller of real property with the lien of a materialman or contractor who dealt exclusively with the purchaser, absent a showing of agency. *Belnap v. Condon*, 34 Utah 213, 97 P 111. *Gorman v. Birrell*, 41 Utah 274, 125 P 685. (See also *Mechanics' Liens in Utah*) 1 Utah Law Review 181 (1966). However, we contend that the case before the Court is distinguishable from the cases heretofore considered.

The sellers (Nixes) initially entered into an oral contract and accepted a down payment upon Tract I. (Tr. 27) The Nixes subsequently observed Tract I to be improved and construction to cease. (Tr. 36-37) With knowledge that the project was in trouble and that additional money was needed, the contract of February 18, 1970, was executed, conveying Tract I and additional acreage to the Saxtons. (Dep. Hazel Nix, P.8)

The important question here is whether or not Nixes ratified the action of the Saxtons by executing the contract of February 18, 1970.

The holding of the *Belnap* case, *supra*, is that an owner of property is not bound absent a showing of authority, express or implied, in the first instance, or by subsequent ratification, although the improvements might benefit the owner's land.

We contend that the execution of the contract of February 18, 1970, by the Nixes, with the knowledge that the instrument was needed to borrow money and that improvements had been made upon the property prior thereto by Reginald L. Saxton who represented himself as owner, was an act of ratification which subjected the fee interest of the Nixes in Tract I to Hamilton's lien. (See 53 Am Jur 2d 639) We argue, however, that in order to subject Tract I to lien claimant Hamilton's lien, it is unnecessary to find ratification. The Utah case of *Burton Walker Lumber Company v. Howard*, 92 Utah 92, 66 P 2d 134, *supra*, is factually similar to the case before the Court. The contract purchaser, Howard, subsequent to entering into a purchase contract for real property and making payments thereon, erected a home upon the property. Howard defaulted on the contract, and the plaintiff, who was unpaid, filed a mechanics lien upon the property. Thereafter, the fee owner, Campbell, conveyed the property to another, Caroline Bond, by warranty deed for \$250.00, which was the same price as the original contract of sale had specified Campbell was to receive. The deed made no mention of improvements. The Court held that the deed of conveyance was subject to the mechanics lien of the plaintiff. The Court noted that appellant had done nothing to terminate the contract prior to institution of suit and resolved the matter by ordering the property sold and awarding Caroline Bond, the new purchaser, the value of the real property prior to the improvements thereon and distributed the balance to the lien claimants.

We submit that the Court below had a similar situation with which to deal, and that the value of the improvements to Tract I could easily have been determined. Tract I could have been sold and the Nixes awarded the value of the unimproved land. The value of improvements could have been

awarded to the lien claimants, including Hamilton, proportionately according to the value of each lien claim.

### CONCLUSION

Finally, we submit that the action before the Court is an equitable proceeding, that the Court herein has, by virtue of the Utah decisions heretofore decided, ample authority in the law and based upon the facts adduced at trial to hold and determine that defendant Hamilton has not waived his right to claim a lien upon the equitable interest of the defendants Reginald L. Saxton and Richard D. Saxton and their respective wives as contract purchasers of Tract I, and that the value of the equitable interest is readily determinable inasmuch as it consists of improvements which, at the time of trial, could have been appraised separately from the value of the real property. We urge, therefore, that the judgment of the lower Court be reversed and that Hamilton be awarded a lien upon Tract I in proportion to the value of his claim to the value of improvements affixed to Tract I, after awarding Nixes the value of the unimproved real property.

Indeed, to allow the decision to stand as promulgated by the Court would be to allow the Nixes to be unjustly enriched by the amount of the value of those improvements placed by the lien claimants upon the premises, and as the evidence adduced at trial substantiated, the plaintiff Zions will ultimately become the recipient thereof as option purchaser of the Nixes' property.

Respectfully submitted,

ROY G. HASLAM

*Attorney for Glen Hamilton*

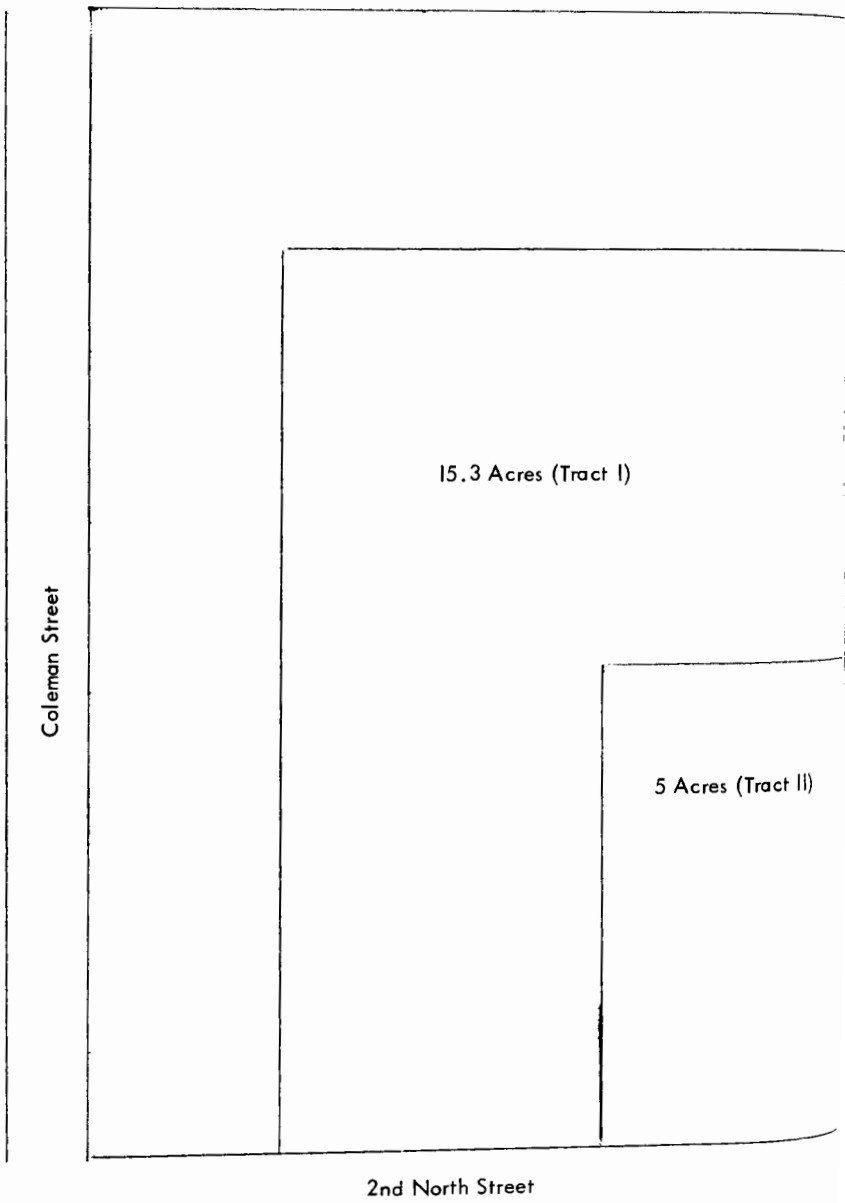
72 East 4th South, Suite 280

Salt Lake City, Utah 84111



ADDENDA

ADDENDUM A.



## ADDENDUM B.

## WAIVER &amp; RELEASE OF LIEN

No 8662

DATE September 12, 1969

I, the undersigned

Glen Hamilton Tooele Excavating Companyhereby acknowledges receipt from Zions First National Bank for and on behalf of \_\_\_\_\_, Contractor, \$ 5,000.00

FIVE THOUSAND and no/100 ----- DOLLARS  
 in payment of labor and/or materials furnished and delivered by the undersigned for construction of building and improvements on the following real property:  
Tooele, Utah - Grand View Meadows

Tooele Excavating Co. (Glen Hamilton) builder Loan 51032

The undersigned hereby waives, releases and discharges any lien the undersigned has or may have against said real property for work or labor performed  
 in materials furnished on or before \_\_\_\_\_, 196\_\_\_\_. The undersigned further agrees to furnish a good and sufficient waiver  
 of lien on said premises from every person or persons furnishing labor or materials for said premises who may be acting under contract with me. I also  
 certify that the labor or materials, or both, receipted for above was actually performed, or used, at the above described property. Execute and return to  
 ZIONS FIRST NATIONAL BANK, 70 East South Temple Street, Salt Lake City, Utah.

PLEASE SIGN LIEN WAIVER &  
 RETURN IN ENVELOPE PROMPTLY

*Tooele Excavating Co*  
*Glen Hamilton*