

1991

J. Lamar Richards v. Debra L. Youngman, Deborah
Diamanti, Ameristar Financial Corporation,
Associates Financial Services Company, Inc.,
Security Pacific National Bank, First Boston
Mortgage Securities Corp. : Brief of Appellant

Utah Supreme Court

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Ralph R. Tate, Jr.; Attorney for Plaintiff/Appellee.

Sherman C. Young; Jerry L. Reynolds; Ivie & Young; Attorneys for Defendant/Appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

J. LAMAR RICHARDS,
Plaintiff and Appellee,

vs.

DEBRA L. YOUNGMAN, DEBORAH
DIAMANTI, AMERISTAR FINANCIAL
CORPORATION, a corporation,
ASSOCIATES FINANCIAL SERVICES
COMPANY, INC., a corporation,
SECURITY PACIFIC NATIONAL BANK,
FIRST BOSTON MORTGAGE SECURITIES
CORP., and JOHN DOES 1 - 3,
Defendant and Appellant.

SUPREME COURT NO. ~~910547~~

ARGUMENT PRIORITY
CLASSIFICATION
NO. 16

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL
DISTRICT COURT IN AND FOR SALT LAKE COUNTY
HONORABLE PAT B. BRIAN, PRESIDING

BRIEF OF APPELLANT SECURITY PACIFIC NATIONAL BANK

SHERMAN C. YOUNG (3891)
JERRY L. REYNOLDS (2728)
IVIE & YOUNG *Defendant*
Attorneys for Plaintiff/Appellant
Security Pacific National Bank
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: (801) 375-3000

Plaintiff
Ralph R. Tate, Jr. (3192)
Attorney for Defendant/Appellee
4685 Highland Drive #202
Salt Lake City UT 84117
Telephone: (801) 278-4747

FILED

MAR 2 1992

CLERK SUPREME COURT
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

J. LAMAR RICHARDS,)	
)	
Plaintiff and Appellee,)	
)	
vs.)	
)	
DEBRA L. YOUNGMAN, DEBORAH	)	SUPREME COURT NO. 910547
DIAMANTI, AMERISTAR FINANCIAL)	
CORPORATION, a corporation,)	
ASSOCIATES FINANCIAL SERVICES)	
COMPANY, INC., a corporation,	)	ARGUMENT PRIORITY
<u>SECURITY PACIFIC NATIONAL BANK,</u>)	CLASSIFICATION
<u>FIRST BOSTON MORTGAGE SECURITIES</u>)	NO. 16
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Defendant and Appellant.)	

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SHERMAN C. YOUNG (3891)
JERRY L. REYNOLDS (2728)
IVIE & YOUNG
Attorneys for Plaintiff/Appellant
Security Pacific National Bank
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: (801) 375-3000

Ralph R. Tate, Jr. (3192)
Attorney for Defendant/Appellee
4685 Highland Drive #202
Salt Lake City UT 84117
Telephone: (801) 278-4747

LIST OF PARTIES TO PROCEEDINGS BELOW

Plaintiff

J. Lamar Richards

Defendants

Debra L. Youngman
Deborah Diamanti
Ameristar Financial
Corporation,
a corporation
Security Pacific National Bank
First Boston Mortgage Securities
Corp.

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JURISDICTION

This court has jurisdiction to hear this appeal by virtue of a timely notice of appeal filed by defendant Security Pacific National Bank (hereinafter "Security Pacific") pursuant to Rules 3 and 4, Utah Rules of Appellate Procedure, from a final judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, and pursuant to Utah Code Annotated Section 78-2-2(3)(j).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Statement of Issue. Whether the lower court erred in not subrogating defendant Security Pacific to the secured position of encumbrances satisfied from funds advanced by defendant Security Pacific's predecessor-in-interest at the request of the property owner which encumbrances were recorded years prior to the time plaintiff's mechanic's lien attached to the subject property.

Standard of Appellate Review. Because this matter was submitted to the court on undisputed facts, the appellate court reviews the trial court's conclusions of law for correctness, without any particular deference given to the trial court. Scharf v. BMG Corp., 700 P.2d 1068 (Utah 1985).

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS.

Utah Code Annotated Section 38-1-5: The liens herein provided for shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the

ground; also over any lien, mortgage or other encumbrance of which the lien holder had no notice and which was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground.

STATEMENT OF THE CASE

Nature of the Case

Plaintiff brought this action to foreclose a mechanic's lien for painting labor and supplies furnished to the home of defendant Debra L. Youngman. (Record at 2-8). Plaintiff commenced his work in June 1988 and completed his work August 30, 1988. (Record at 79). In July 1988 Ameristar Financial Corporation (hereinafter "Ameristar") loaned defendant Youngman the sum of \$320,000.00 to refinance existing encumbrances against defendant Youngman's home, which encumbrances predated plaintiff's first work. (Record at 98-101). Defendant Security Pacific is a successor-in-interest, through assignment, to Ameristar. (Record at 102-103). Defendant Security Pacific vigorously defended plaintiff's mechanic's lien action on grounds that defendant Security Pacific was subrogated to the position of the encumbrances satisfied by funds advanced by Ameristar at the request of defendant Youngman, and that defendant Security Pacific had priority over the mechanic's lien of plaintiff to the extent of the encumbrances so paid.

Proceedings and Disposition Below

Plaintiff initiated this action to foreclose his mechanic's lien by filing a complaint in the Third Judicial District Court of Salt Lake County, State of Utah, on August

15, 1989. Plaintiff named as defendants Debra L. Youngman, Deborah Diamanti, Ameristar Financial Corporation and Associates Financial Services Company, Inc. (Record at 2).

On or about February 1, 1990, plaintiff moved for summary judgment against defendant Debra L. Youngman and requested a default judgment against all other named defendants except defendant Diamanti. (Record at 31). That motion was unopposed. On May 8, 1990, the court signed a summary judgment and a decree of foreclosure in favor of plaintiff and against defendants Debra L. Youngman, Ameristar Financial Corporation and Associates Financial Services Company, Inc. (Record at 75).

Thereafter, on June 25, 1990, on motion of plaintiff, the court entered an order authorizing plaintiff to amend his complaint to name Security Pacific and First Boston Mortgage Securities Corporation (hereinafter "First Boston") as additional parties defendant. (Record at 65). Defendant Security Pacific filed an answer to plaintiff's amended complaint on July 16, 1990. (Record at 67). Plaintiff's complaint was not served on First Boston and said defendant did not make an appearance. The interest of First Boston had been assigned to Security Pacific on October 15, 1988. (Record at 103).

On March 11, 1991, plaintiff filed a motion for summary judgment against defendants First Boston and Security Pacific. On or about March 25, 1991 defendant Security Pacific filed a cross motion for summary judgment. The facts stated in both

motions were undisputed and on May 13, 1991 the court entered its minute entry granting plaintiff's motion for summary judgment and denying defendant Security Pacific's motion for summary judgment. (Record at 261). The court entered its order with respect to the motions for summary judgment on August 20, 1991 and an amended judgment and decree of foreclosure was also entered on August 20, 1991. (Record at 298-302).

The court entered its final order on December 2, 1991 by dismissing plaintiff's complaint without prejudice as against defendant Deborah Diamanti. (Record at 310). Defendant Security Pacific's notice of appeal was filed in the district court on December 9, 1991. (Record at 318).

Statement of Facts

(See Appendix, Exhibit 1)

1. Or or about May 15, 1985, defendant Debra Youngman entered into a uniform real estate contract for the purchase of real property located at 983 East 3rd Avenue, Salt Lake City, Salt Lake County, State of Utah and more particularly described as follows:

Commencing at the Southeast corner of Lot 1, Block 27, Plat "G", Salt Lake City Survey, and running thence West 135 ft; thence North 130 ft; thence East 135 ft; thence South 130 feet to the point of beginning.

A non-exclusive easement for ingress and egress over and across the following: Alley-way 16 feet wide adjoining said land on the North. Situated in Salt Lake County, State of Utah.

(Record at 97, 112).

2. Defendant Youngman purchased the property from

Lafayette Properties, Inc., a Utah Corporation, for the sum of \$420,000.00. (Record at 97, 112).

3. Defendant Youngman paid the sum of \$25,000.00 at the time of closing and contracted to make annual payments of \$25,000.00 plus accrued interest thereafter until May 15, 1989 at which time the entire unpaid principal balance and accrued interest was to be due and payable. (Record at 113).

4. At the time defendant Youngman purchased the aforesaid property, it was subject to the following encumbrances, each of which was reflected in the records of the Salt Lake County Recorder:

a. A deed of trust dated March 1, 1985 and recorded April 25, 1985 as Entry No. 4078404 in Book 5648, Page 2333, in the amount of \$95,000.00 in favor of Joseph Bunce as beneficiary. (Record at 98, 127).

b. A deed of trust dated April 15, 1985 and recorded April 25, 1985 as Entry No. 4078405 in Book 5648, Page 2334, in the amount of \$4,130.00 in favor of Jacob Tal as beneficiary. (Record at 98, 128).

c. A deed of trust dated April 22, 1985 and recorded April 25, 1985 as Entry No. 4078406 in Book 5648, Page 2336, in the amount of \$40,000.00 in favor of Zella Jeanne Jensen as beneficiary. (Record at 99, 131).

d. An all-inclusive deed of trust dated April 15, 1985 and recorded April 25, 1985 as Entry No. 4078408 in Book 5648, at Page 2340, in the amount of \$284,239.80, in favor of Gail

Zscheile as beneficiary. (Record at 99, 134).

5. On or about June 13, 1988, defendant Youngman applied for a loan from Ameristar Financial Corporation ("Ameristar"), to refinance her obligations under the aforesaid uniform real estate contract. (Record at 99-100, 151-152, 212-213).

6. Between June 13, 1988 and July 1, 1988, the following documents were completed and submitted to Ameristar as part of the underwriter's approval process:

a. A residential loan application (Fannie Mae form 1003, rev. 10/86) executed by defendant Youngman on June 13, 1988. (Record at 212-213). (Appendix Exhibit 6).

b. An affidavit and agreement (Fannie Mae form 1009, rev. 8/86) executed by defendant Youngman on July 1, 1988. (Record at 214-215). (Appendix Exhibit 6).

c. A transmittal summary (Fannie Mae form 1008, rev. 10/85) dated June 28, 1988 prepared by Ameristar underwriter Angela K. Garza. (Record at 208, 216). (Appendix Exhibit 6).

d. A loan status and conditions summary dated June 28, 1988 signed by Angela K. Garza, underwriter. (Record at 209, 221). (Appendix Exhibit 6).

e. Lender's closing instructions to U.S. Title of Utah dated July 1, 1988 prepared by Ginger Sickler, loan closer for Ameristar. (Record at 100, 147-152, 217-220).

7. The aforesaid uniform real estate contract was recorded on June 29, 1988 as Entry No. 4643837 in Book 6043 at page 347 in the official records of the Salt Lake County

Recorder. (Record at 101,112).

8. On July 7, 1988 the loan from Ameristar to defendant Youngman was closed. As part of that loan closing, Lafayette Properties conveyed fee title to defendant Youngman by warranty deed recorded July 7, 1988 as Entry No. 4647261 in Book 6045 at page 979 in the official records of the Salt Lake County Recorder. (Record at 101,172).

9. The total amount loaned by Ameristar to defendant Youngman was \$320,000.00. Of that amount, the sum of \$303,545.95 was disbursed to payoff all obligations reflected by recorded encumbrances against the subject property. The disbursements were made by U.S. Title Company on July 7, 1988, as follows:

- a. Joseph Bunce - \$86,414.00, check no. 2265
(Record at 177, 183).
- b. Jacob Tal - \$1,615.95, check no. 2266
(Record at 180, 186).
- c. Zella Jeanne Jensen - \$10,000.00, check no. 2267
(Record at 179, 185).
- d. Lafayette Properties - \$53,546.00, check no. 2268
(Record at 178, 184).
- e. Gail Zscheile - \$151,970.05, check no. 2269
(Record at 176, 182).

(Record at 101, 154-159).

10. None of the loan proceeds were distributed to defendant Youngman. The balance of the loan proceeds was applied toward closing costs. In fact, the aforesaid disbursements and closing costs exceeded \$320,000.00, the amount of the loan. (Record at 145, 218, 220).

11. As security for the loan to defendant Youngman, Ameristar received a trust deed in the amount of \$320,000.00 which was recorded on July 7, 1988 as Entry No. 4647262 in Book 6045 at page 980 in the official records of the Salt Lake County Recorder. (Record at 102, 187-193).

12. On July 22, 1988, deeds of reconveyance were recorded with respect to the aforescribed trust deeds in favor of Joseph Bunce, Jacob Tal, Zella Jeanne Jensen and Gail Zscheile. (Record at 102, 194-197).

13. In June 1988, plaintiff entered into a contract with defendant Youngman to provide painting labor and materials to defendant Youngman's home. Plaintiff commenced work upon the subject property sometime prior to June 29, 1988. (Record at 36, 99).

14. Defendant Youngman paid plaintiff the sum of \$4,000.00 for painting labor and materials supplied by plaintiff. (Record at 36).

15. Plaintiff completed his work on August 30, 1988 and filed a notice of lien on November 16, 1988, recorded as Entry No. 4702325 in Book 6081 at page 2039 in the official records of the Salt Lake County Recorder. (Record at 36, 39, 198-200).

16. At the time plaintiff commenced his work, the property was subject to encumbrances which totaled \$303,545.95. (Record at 98-99, 101, 127-131).

17. In applying for the loan from Ameristar, defendant Youngman stated that the purpose of the loan was to consolidate

existing obligations at a lower interest rate and agreed that the loan would be secured by a first deed of trust against the subject property. (Record at 100, 151-152, 212-213).

18. On July 1, 1988, defendant Youngman signed an affidavit and agreement that she had not given or permitted or contracted to give or permit any lien upon the property to secure a debt or loan, except in connection with financing subordinate to Ameristar. (Record at 100, 149-150, 214-215).

19. It was the expectation of Ameristar, based upon the representations of defendant Youngman, that Ameristar would have a first lien as security for the loan to defendant Youngman. It was the policy of Ameristar not to make loans which were not secured by first liens. (Record at 168-171, 205-209, 212, 213).

20. The loan status and conditions statement prepared by Angela K. Garza, underwriter for Ameristar, reflects that Ameristar anticipated that the security for the loan would be a first mortgage on the subject property and that there would be no cash given back to the borrower. Similarly, the transmittal summary prepared by Angela Garza reflects that the loan was to be secured by a first mortgage and that the loan was to refinance existing loans against the subject property. (Record at 170-171, 208-209).

21. On October 15, 1988 Ameristar assigned its deed of trust to First Boston. On October 15, 1988, First Boston assigned the deed of trust to defendant Security Pacific.

(Record at 102-103, 201, 202).

22. Defendant Youngman defaulted under the terms of her trust deed note with Ameristar, and defendant Security Pacific, successor-in-interest to Ameristar, proceeded with a nonjudicial foreclosure of the deed of trust by trustee's sale in July 1990. (Record at 247-248).

23. Defendant Security Pacific was the successful bidder at the trustee's sale, bidding an amount less than the outstanding encumbrances paid by the proceeds of the loan from Ameristar, which bid was approximately \$230,000.00. (Record at 248).

SUMMARY OF ARGUMENTS

Defendant Security Pacific seeks to have this court reverse the summary judgment entered by the trial court granting priority to plaintiff's mechanic's lien over the trust deed of defendant Security Pacific. While it is undisputed that the trust deed of defendant's predecessor-in-interest, Ameristar, was recorded subsequent to the time plaintiff commenced to furnish painting labor and materials to the subject property, under the principle of equitable subrogation, Ameristar is treated as an assignee of the encumbrances satisfied from the funds advanced by Ameristar. Martin v. Hickenlooper, 90 Utah 150, 59 P.2d 1139 (1936). Those encumbrances were recorded three years prior to the time plaintiff's mechanic's lien attached.

The doctrine of equitable subrogation is applied in

instances where a third party pays the debt of another under an agreement, express or implied, that the third party will be subrogated to or receive security equal to that of the original creditor. It was recognized by the Utah Supreme Court as early as 1897 in Johnson v. Tootle, 14 Utah 482, 47 P. 1033 (1897) and George v. Butler, 16 Utah 111, 50 P. 1032 (1897). Since that time this court has played a major role in the development of the doctrine of equitable subrogation. Martin v. Hickenlooper, supra, is a leading case which has been cited and relied upon by many other jurisdictions. It is the principal case in an ALR Annotation treating the subject of subrogation and has been repeatedly cited as authority in real property treatises. In Martin v. Hickenlooper, supra, and subsequent Utah cases, this court has taken a liberal approach to the application of equitable subrogation, recognizing it as "a wholesome and meritorious doctrine" which "is now highly favored in equity." 59 P.2d at 1140.

This court has applied equitable subrogation to give priority to later recorded trust deeds or mortgages over intervening (1) mortgages, (2) judgment liens, (3) equitable liens and (4) fee-title interests. The related principle of renewal mortgage has likewise been applied by this court to grant priority to later recorded trust deeds or mortgages over intervening judgment liens and this court has acknowledged its potential application vis-a-vis an intervening mechanic's lien.

To provide protection to those who enhance the value of

property by supplying labor or materials, the Utah mechanic's lien statutes are construed broadly. Accordingly, labor and material suppliers are allowed to base their lien priority on the commencement of an improvement to the property. Even so, mechanic's liens are still subject to whatever liens are of record at the time work is commenced on the property.

Equitable subrogation treats the satisfaction of a prior mortgage by a third party as an assignment of the prior mortgage to the third party. Intervening mechanic's lien claimants are left in the same position they would have occupied had the earlier encumbrance not been satisfied. This view is consistent with Utah Code Annotated Section 38-1-5. The later mortgage is treated as an assignment of the earlier mortgage, attaching as of the recordation of the earlier mortgage, and not as a mortgage attaching subsequent to the commencement of work upon the property.

The cases which have addressed the application of equitable subrogation vis-a-vis an intervening mechanic's lien, have not distinguished the equities of a mechanic's lien claimant from those of any other type of intervening lien claimant. Cases which have denied subrogation to a later lender as against an intervening mechanic's lien claimant, have done so not because of the nature of the mechanic's lien, but because the facts of the cases did not justify the application of equitable subrogation. Similarly, the cases which have applied equitable subrogation as against an intervening

mechnanic's lien claimant have not differentiated a mechanic's lien from any other lien.

The facts of this case compel the application of equitable subrogation in favor of defendant Security Pacific. Had defendant Youngman not refinanced the encumbrances against her home, plaintiff's lien would have been junior to outstanding encumbrances in excess of \$300,000.00. He did not provide painting labor and materials with the expectation of being entitled to a first lien on the property to secure the payment of his bill. On the other hand, Ameristar advanced funds upon assurances from defendant Youngman that Ameristar would have a first lien against the subject property to secure its loan of \$320,000.00.

The proceeds of the loan from Ameristar went directly to satisfy the outstanding encumbrances against the property in the amount of \$303,545.95. The balance of the loan was applied to closing costs. None of the loan proceeds were paid directly to defendant Youngman. The expectation of Ameristar was that it would have a first lien to secure its loan.

Because equitable subrogation is based upon an express or implied agreement and has as its objective complete and substantial justice among the parties, any negligence on the part of the lender invoking subrogation is not important unless that negligence rises to the level of culpable or gross negligence such as to shift the equities in favor of the intervening lien claimant. Ordinary negligence is not

sufficient to bar equitable subrogation. Assuming, arguendo, that Ameristar did not take notice of the painting labor and materials supplied to the subject property by plaintiff, that fact, under the authorities, does not preclude the application of equitable subrogation, particularly in light of the fact that plaintiff was charged with notice of the existing encumbrances against the property.

Accordingly, the trust deed of Ameristar, which was assigned to defendant Security Pacific, should be subrogated to the position of the encumbrances paid by the funds advanced by Ameristar to the extent of \$303,545.95 plus accrued interest. The mechanic's lien of plaintiff is junior to that amount, but is senior to the balance of the funds advanced by Ameristar. By reason of the fact that the successful bid at the Trustee's sale in July 1990 was less than the amount to which defendant Security Pacific was subrogated, the mechanic's lien of plaintiff became extinguished by that sale.

ARGUMENT

POINT I

FOR NEARLY A CENTURY THIS COURT HAS RECOGNIZED EQUITABLE SUBROGATION AS A WHOLESOME AND MERITORIOUS DOCTRINE AND HAS AFFORDED IT LIBERAL APPLICATION.

Subrogation originated in and was borrowed from Roman Law.¹ More recently, the doctrine appeared in eighteenth

¹ 4 American Law of Property, section 16.145 (A.J. Casner ed. 1952).

century France and its modern development draws on the civil law of that period.² It is closely related to the constructive trust, nonconsensual equitable lien,³ suretyship and restitution.⁴

Below follows a discussion of the Utah cases which have discussed the related doctrines⁵ of equitable subrogation and renewal mortgage.⁶ The cases and the theories present two dominant themes. First, under circumstances in which a lien or interest of a third party has unknowingly intervened, money is lent or paid upon an understanding that the money shall be used to satisfy or acquire an interest superior to that of the intervenor's, or is advanced as a continuation of a prior debt. Secondly, in those circumstances in which application of the doctrines is appropriate the person or entity advancing the funds is afforded a priority over the intervenor for the reason that application of the doctrine does not materially impact the

² Id.

³ Id.

⁴ G. Nelson and D. Whitman, Real Estate Finance Law, 2nd Edition 1985, p. 706.

⁵ American Savings Bank & Trust Co. v. Helgensen, 12 P. 26 at 27 (Wash 1917).

⁶ In addition to the two principal doctrines discussed, the doctrines of purchase money mortgage, Nelson v. Stoker, 669 P.2d 390 (Utah 1983) and that of a vendor's security interest, Butler v. Williamson, 740 P.2d 1244 (Utah 1987) may afford priority over intervening or pre-existing liens.

position of the intervenor.⁷

A. Early Utah Cases Recognize The Equitable Doctrines Of Subrogation And Renewal Mortgage In Establishing The Priorities Of Competing Interests In Real Property.

The origins of the doctrines in Utah appear to be found in Johnson v. Tootle, 14 Utah 482, 47 P. 1034 (1897) where this court applied subrogation under facts in which an owner of a property subject to a trust deed had a judgment entered against him. Subsequent to the entry of the judgment, the owners sold the property. Under the terms of the sale the purchaser agreed to pay off the preexisting trust deed based upon representations that it was the only encumbrance against the property. Without knowledge of the intervening judgment lien, the purchaser paid the obligation secured by the prior trust deed and it was reconveyed.

In affirming the trial court's subrogation of the purchaser to the position of the prior trust deed, this court noted that the deed of trust was a valid lien upon the property in question and that the intervening judgment was subject to that lien, that the respondent purchased the land in good faith relying upon the representation that the deed of trust was the only encumbrance upon the land and that the purchaser was "in utter ignorance" of the judgment. The court stated:

The general principle which runs through nearly all cases

⁷ Martin v. Hickenlooper, 59 P.2d 1139, 1151 (Utah 1936).

of this character is that "when the legal rights of the parties have been changed by mistake, equity restores them to their former condition, when it can be done without interfering with any new right acquired on the faith and strength of the altered condition of the legal rights, and without doing injustice to other persons." To apply this principle in this case is to prevent manifest injustice and hardship and its application will interfere with no superior intervening equities. (Citation omitted; quotation in original.)

47 P. at 1034.

George v. Butler, 16 Utah 111, 50 P. 1032 (Utah 1897), was a case in which the defendant Butler, a lessee under a 25 year lease describing Lot 6 Block 57, borrowed \$2,500.00 in 1890 from the Pacific Investment Company and secured that loan with an assignment of the lease. Subsequently, in 1891 Butler borrowed \$1,000.00 from plaintiff George and secured that obligation by giving a mortgage on the property described in the lease. The 1891 mortgage, however, misdescribed the security as Lot 5 in Block 57 instead of Lot 6. Approximately two years later, in 1893 Butler borrowed an additional \$1,000.00 from the investment company and the investment company took a deed of trust in the amount of \$3,500.00 on the same premises to secure the \$1,000.00 note as well as the \$2,500.00 note. At the time of this loan the officers and agents of the investment company did not have actual notice of plaintiff's mortgage. Two years subsequent to this loan in 1895, Butler borrowed \$3,500.00 from one Sutherland for the express purpose of paying his indebtedness to the investment company. Sutherland was granted a mortgage on Lot 6 to secure the loan to Butler and the proceeds from the Sutherland loan

actually paid the obligations owed the investment company. The notes were endorsed "paid" and all documents were delivered to Sutherland. At the time of this loan, Sutherland had no actual knowledge of the loan to George and the abstract of title upon which he relied did not make any reference to it.

George commenced an action to reform and foreclose his mortgage, naming Sutherland as a party defendant. The trial court, by its decree, subrogated Sutherland to Pacific Investment's first lien position on the mortgaged premises and directed that he should be paid first to the extent of the \$2,500.00 and interest thereon. In affirming the subrogation of Sutherland to the lien of Pacific Investment Company this court appears to have applied both equitable subrogation as well as the renewal mortgage doctrine. With regard to the \$1,000.00 loan from Pacific Investment in 1893, the court said:

The assignment and delivery of the lease by Butler, on November 1, 1890, to Pacific Investment Company, as a pledge to secure the \$2,500.00 borrowed of the company on that day, created a lien upon the property described in favor of the company, and ... including that note in the trust deed of February 1, 1893, without actual knowledge of the mortgage [to plaintiff] ..., did not abrogate the lien created by the pledge, for the reason that the company did not know of the mortgage to the plaintiff, and its agents understood they were acquiring the first lien by the deed of trust; and the plaintiff was not prejudiced by including the \$2,500.00 in the trust deed.

50 P. at 1034.

With respect to the transaction in which Sutherland loaned \$3,500.00 to pay off the liens upon the property, the court noted that Sutherland loaned his money to the owner of the leasehold estate for the purpose of paying off the lien held by

the Pacific Investment Company, believing and expecting that he would get the same security as that he had satisfied, but afterward learned of the \$1,000.00 mortgage held by the plaintiff. The court stated:

An application of the equitable doctrine of subrogation to the transaction gives to [Sutherland] the security he was lead to believe he was getting and the same that was held by the creditor whose debt he paid, and [George] is left with the same security he had before. Sutherland is substituted for the investment company as creditor and lienholder. No change is made in the rank or relative priority of the securities. The transaction consisted of mere immaterial changes as to its effect upon plaintiff's equities. Equity applies the doctrine of subrogation to a great variety of situations and emergencies arising in human affairs. Its end is substantial justice, and we think it is applicable to facts of this case.

50 P. at 1034.

Fullerton v. Bailey, 17 Utah 85, 53 P. 1020 (1898)

involved a mortgage upon land and owned by the estate of a deceased. The land covered by the mortgage, had, previous to the settlement of the estate, been conveyed to the appellant by the sole legatee under the decedent's will, with the representation that there were no estate debts except the mortgage in question and that the estate was solvent. After the appellant paid the mortgage, a claim was allowed in favor of a brother of the deceased which claim absorbed the entire estate and left the estate without assets to reimburse the appellant the money paid to satisfy the mortgage. The court noted:

Plaintiff was led to believe that no claim such as was presented by the brother of the deceased and allowed after the time for the presentation of claims had expired, existed, or that any claim would consume the entire estate. Had plaintiff not paid the [prior] mortgage it

would have been foreclosed and the land lost to the estate. The payment of the mortgage resulted in a benefit to the estate and in injury to no one. If subrogation is allowed, no one is injured by it, as the estate and the heirs are no worse off. If the appellant is allowed to be subrogated to the rights and positions occupied by [the prior mortgagee] no one is injured and justice is meted out to the parties. The facts to my mind present a clear case calling for the application of the doctrine of subrogation, which is not alone founded upon contract, either express or implied, but upon principles of equity and justice intended to offer protection to a meritorious creditor, which does not conflict with the legal or equitable rights of others....

53 P. at 1023.

In Badger Coal & Lumber Company v. Olsen, 50 Utah 307, 167 P. 680 (1917) the court addressed the renewal mortgage doctrine in a mechanic's lien setting. In that case an owner of a parcel of land sold the property to a developer and took six promissory notes as payment which were secured by a blanket mortgage on 39 lots. The mortgage provided for partial releases of the mortgage as to particular lots as payments were made. Badger Coal and Lumber supplied materials to a home being constructed on Lot 10 and subsequently the blanket mortgage was released as to Lot 10. Two mortgages in favor of the same mortgagee were recorded subsequently to Badger's delivery of materials. With language in which the similarities in the rationale and application of the doctrines of equitable subrogation and that of renewal mortgage can be seen, the court quoted approvingly from 2 Jones on Mortgages, Section 971:

When a new mortgage is substituted in ignorance of an intervening lien, the mortgage, released through mistake, may be restored in equity and given its original priority as a lien. ... [and] it was considered that although the court was not at liberty to infer facts not proved, yet that it was at liberty to draw all the inferences which

logically and naturally follow from the facts proved; [and] that it was not an act of reasonable prudence and caution such as men commonly use in the conduct of business affairs for one having a first mortgage upon property, without consideration or other apparent motive, to release it, and take a new mortgage subject to a prior lien of a considerable amount; and therefore it may be inferred that the mortgagee would not have made the release had he known of the intervening mortgage.

167 P. at 682.

In holding that the facts of that case did not fall within the renewal doctrine, the court noted that the two subsequent mortgages were taken for the specific purpose of obtaining additional security which was to be derived from the improvements constructed and that the notes which the mortgage secured were not a renewal of the prior obligation or part thereof. Id. at 682.

B. In Later Opinions This Court Recognized Two Classifications Of The Equitable Doctrine Of Subrogation; Legal Subrogation And Conventional Or Equitable Subrogation.

The distinction between the two branches of subrogation, legal subrogation and equitable or conventional subrogation, was first discussed in Bingham v. Walker Brothers Bankers, 75 Utah 147, 283 P. 1059 (1929). That case involved the competing rights of two decedents' estates in shares of common stock. In explaining the doctrine of subrogation, the court stated:

Subrogation is a remedy highly favored in equity. It seems to have first been applied in favor of sureties, but has been greatly extended.

* * *

Where the person who pays the debt of another stands in the situation of a surety or is compelled to pay to protect his own right or property, the right of the subrogation is a consequence which equity attaches to such a condition, and the right of subrogation under such circumstances is not the direct result of an agreement.

This in the law is termed "legal subrogation." In addition to the principle of legal subrogation, there exists another principle termed "conventional subrogation", which occurs where one who is under no obligation to make the payment and who has no right or interest to protect pays the debt of another under an agreement, express or implied, that he will be subrogated to the rights of the original creditor, made with either the debtor or the creditor. (Citations omitted.)

283 P. 1062, 1063. In Bingham v. Walker Brothers Bankers the court held that neither legal or conventional subrogation was applicable to the facts of the case. Because there was no compulsion upon the bank to pay the obligation in order to protect its interest, legal subrogation was not applicable. Similarly, since the court held the bank to be a volunteer, equitable subrogation was not applicable; there being no agreement, express or implied, that the bank was to be subrogated⁸ to the rights of the original creditor.

C. The Modern View Adopted By This Court Applies Equitable Subrogation Where There Is An Express Or Implied Agreement As A Matter Of Doing Justice Under The Circumstances.

In 1936 this court issued its landmark decision of Martin v. Hickenlooper, 90 Utah 150, 59 P.2d 1139, 107 ALR 762 (1936), (see Appendix, Exhibit 2). This decision is widely cited upon

⁸ "An agreement that a mortgage shall be kept alive in favor of one who advances money to pay it, and that he shall be subrogated to its lien, is not necessary to effect such subrogation as against the holder of an inferior judgment lien, the existence of which he is ignorant, if he makes the advance with the understanding that the mortgage shall be satisfied and that he shall have a first lien upon the property." Southern Cotton Oil Company v. Napoleon Hill Oil Company, 158 S.W. 1082 (Arkansas 1913).

the issue of equitable subrogation.⁹ In Hickenlooper, the court completed an extensive survey of the doctrine, its history and development in the United States as well as its application. In summarizing its review the court stated:

From our study we draw the following conclusions: (1) That where a lender, in no way related to the property nor in any way required to protect an interest, advanced the money to pay off a lien, it could not be a case for legal subrogation, but must, if anything, come within the principles of conventional subrogation. (2) That in conventional subrogation there must be an agreement, express or implied, that the lender whose money pays off a lien will have the same status as the lien his money releases to the extent of the debt secured by that lien. (3) That equity applies the doctrine of subrogation in such cases, not in exacting a performance of the contract, but as a matter of doing justice under the circumstances; the so called agreement only being of value showing such a situation where the doctrine should be applied in order to do justice and as evidence that the lender was not a volunteer. (4) That the facts or circumstances from which the agreement will be implied vary in the different courts, some requiring evidence from which an actual understanding between the parties may be inferred, while others hold that payment under such circumstances as show that the lender "supposed" or "intended" to get security of the same dignity as that released by his payment is sufficient; and some go as far as holding that such intention may be inferred from the mere fact that the money was advanced for the purpose of paying off another lien. (5) That according to the modern view, indiligence in searching the record will not prevent equity from applying the doctrine unless it is culpable or unjustifiable negligence, and that where there is an express agreement to subrogate or one from which such understanding can plainly be implied, the failure to look up the record will not stay the hand of equity for the reason that equity will treat the matter as if there was an assignment which was in effect what the parties intended; that in case of assignment the record would not need to be searched.

59 P.2d 1151,1152.

⁹ e.g. G. Nelson and D. Whitman, Real Estate Finance Law, 2nd Edition, 1985, p. 708, Notes 9,10 and 13; 4 American Law of Property, (A.J. Casner ed. 1952), page 344-345, Notes 8, 9, 13, 15, 18, 19.

In Hickenlooper this court upheld the trial court's decree of subrogation where a subsequent mortgagee had advanced funds for the purpose of paying off a prior loan. The property in question was originally owned by Mr. and Mrs. C. H. Stovens and on February 1, 1921, the Stovens' executed a mortgage for \$3,500.00 in favor of the State of Utah. On June 18, 1921, the Stovens conveyed the mortgaged property to Clara C. Hickenlooper subject to the mortgage. Two days later, on June 20, 1921, Clara C. and W. A. Hickenlooper, her husband, mortgaged the premises to Martin to secure two notes of even date in the aggregate amount of \$2,500.00. Thereafter, on February 24, 1922, Hickenloopers conveyed the property subject to the two above specified mortgages to the Fritsch Loan and Trust Company. On June 1, 1927, the Fritsch Loan and Trust Company delivered to Mrs. Zorn a mortgage to secure its note in the amount of \$3,500.00. This mortgage did not specify that it was subject to any other mortgages. The State's mortgage was released on the same day, June 1, 1927, by reason of the money advanced by Mrs. Zorn. On the same day, an abstract was furnished to Mrs. Zorn certified January 12, 1927, the \$1,000.00 note payable to Martin had been paid, but the \$1,500.00 note together with interest thereon remained unpaid.

Martin brought an action to foreclose, joining Mrs. Zorn among others. She cross-complained and answered. As to Martin, she claimed a priority on the ground that her money was used to pay off the State's note, that it was intended for that

purpose, and that the Fritsch Loan and Trust Company, by and through its general manager and secretary, agreed that Mrs. Zorn's mortgage was to be a first lien and that he made representations to Zorn that it was such. Mrs. Zorn had no knowledge that Martin had a mortgage on the property until he brought suit. She never examined, nor caused to be examined, either the abstract or the record. The evidence was that she trusted the general manager and that he said she did not need a lawyer and that he would have his lawyer look it over.

In affirming the trial court's decree of subrogation this court held:

Suffice it to say that where there is a promise on the part of the mortgagor or his transferee, given to one who pays money to pay off a lien, that such lender will be in equally as good position as regards security as the lienholder whose liens his money was intended to discharge and did discharge. [sic] He will be considered in equity as an assignee of the lien and especially where assurances are given him that his lien will be or is a first lien. The evidence in this case, we think, is amply sufficient to establish such a promise, if not expressed at least implied.

The court noted that the trial court correctly determined that Mrs. Zorn should be paid first from the proceeds of the Sheriff's sale. The amount she was entitled to be paid was established by the amount of debt Mrs. Zorn discharged, plus interest at the rate set forth in that mortgage. As to any amount owed Mrs. Zorn in excess of the debt discharged, plus interest, Martin had priority. Finally the court reversed a personal judgment in favor of Mrs. Zorn as against Stovens,

noting that "[t]he cases above speak of being subrogated to thelien" [of the prior creditor] and not to the debt. 59 P.2d at 1152-1153.

D. Recent Utah Cases Have Applied Principles Of Equitable Subrogation To Grant Priority To Later Recorded Mortgages Or Trust Deeds Over Intervening Judgment Liens, Equitable Liens And Fee title Interests.

Twenty years passed before the court again directly faced a subrogation question.¹⁰ In Tracy-Collins Trust Company v. Goeltz, 5 Utah 2d 350, 301 P.2d 1086 (1956) the defendants owned property as joint tenants from the date of acquisition to March 31, 1952, when the property was awarded to the wife Marion Goeltz in a divorce action. Previously, on October 27, 1936, the defendants had executed a mortgage covering the real property in question in favor of Tracy Loan and Trust Company, plaintiff's predecessor-in-interest. The mortgage secured a payment of a promissory note in the principal amount of \$6,000.00. On May 10, 1948, the husband, Francis Boydell Goeltz executed a promissory note for \$7,100.00. To secure the note, a mortgage covering the real property in question was executed. The \$7,100.00 note and mortgage purported to bear the signature of Mrs. Goeltz but the trial court found that "the purported signature of appellant was not affixed to said

¹⁰ Justice Wolfe however, explained the rationale of Martin v. Hickenlooper in Federal Land Bank of Berkley v. Salt Lake Valley Sand and Gravel, 96 Utah 359, 85 P.2d 791, 793 (1939).

note and mortgage by appellant."¹¹ At the time Mr. Goeltz discussed the loan with officers of the plaintiff, he was advised that if the loan were made, it would be upon the condition that the \$6,000.00 mortgage, given October 27, 1936, was to be paid off. The papers were prepared and Mr. Goeltz signed the papers at the plaintiff's place of business. Representing his wife to be ill, Mr. Goeltz requested that he be permitted to take the papers to her for her to sign. Mr. Goeltz returned the papers with what purported to be her signature affixed to the note, the mortgage, and additional papers. A check was issued by plaintiff in favor of the mortgagee under the 1936 mortgage and the balance of the loan was disbursed to Mr. Goeltz.

Plaintiff commenced foreclosure of the 1948 mortgage and the trial court subrogated plaintiff to the position of the 1936 mortgage. The court ordered that Mr. and Mrs. Goeltz were jointly and severally liable for \$3,224.41 and Mr. Goeltz was liable for and additional \$3,576.70. In affirming the trial court's decree of subrogation, this court stated:

In this case [the bank] imposed as a condition to granting the new loan that the 1936 mortgage be retired and the [bank] have a first mortgage on the premises. It would indeed be most inequitable to permit the payment by [the bank] of the balance due under the 1936 mortgage under the situation here disclosed and permit [Mrs. Goeltz] as well

¹¹ Reported cases have addressed similar facts. (e.g. Kaminskas v. Cepauskis, 218 N.E. 2d 218 (Ill. App. 1938) which involved subrogation of the first lien mortgagee and Daminskas v. Cepauski, 12 N.E. 2d 221 (Ill. App. 1938) which involved subrogation of the second lien mortgagee under the same facts.

as her former husband to receive a gratuity, unearned and not justified, of the \$3,224.41 paid to [the prior mortgagee].

Appellant is in no worse position than had the respondent taken assignment of the 1936 mortgage from [the prior mortgagee] and a second mortgage for an additional amount of approximately \$3,900.00.

301 P.2d 1090.

In Irving Heights Corporation v. Pace, 29 Utah 2d 80, 505 P.2d 297 (1973), the plaintiff commenced an action to recover damages from the county clerk of Summit County for the clerk's failure to properly docket a transcript of judgment in which one Reginald Saxton was the judgment debtor. The plaintiff had recovered a judgment in the Third Judicial District court against Saxton in the amount of \$1,030.00 together with \$400.00 attorney's fees and costs. Subsequently a transcript of the judgment was forwarded to the defendant Pace for entry on the judgment docket in Summit County. The judgment was docketed chronologically on June 13, 1968 but was not indexed alphabetically until December 1970. At the time the transcript of judgment was received by defendant, the judgment debtors were mortgagors on a mortgage in favor of First National Bank of Coalville. On March 28, 1969, the Saxtons executed a second mortgage in a larger amount which was thereafter recorded. The evidence showed that the second mortgage was a renewal of the first. The Saxtons defaulted on the second mortgage and the Federal Deposit Insurance Corporation, which was successor to the First National Bank of Coalville, commenced an action to foreclose the mortgage. The

plaintiff was made a party defendant in the foreclosure proceedings and it was decided that the plaintiff's judgment lien was inferior to the second mortgage.

The plaintiff claimed in Irving Heights, that but for the failure of the defendant to properly index the transcript of judgment, its judgment lien would have intervened between the first mortgage and the renewal mortgage and therefore would have had a priority over the mortgage subsequently recorded. This court held as follows:

The second mortgage being a renewal of the first, the bank's mortgage lien resulting from the first mortgage continued on at least in the amount of the first mortgage even though it was subsequently released when the second mortgage was recorded. (Citation omitted.) There being no interruption in the mortgage lien, we are unable to see how the plaintiff was damaged by the failure of the defendant to properly index the transcript of judgment.

505 P.2d at 298. This language resonates the dominate theme common to the doctrine of equitable subrogation and that of a renewal mortgage. That is, when applicable, the position of the intervening lien claimant is not materially changed by the application of the doctrines. The only practical difference between the two doctrines appears to be with respect to the identity of the subsequent mortgagee. If the subsequent mortgagee is the same as the original mortgagee, then the renewal mortgage doctrine may be applicable. If the subsequent mortgagee is a new lender, then equitable subrogation may be applicable.

Finally, and most recently, this court applied subrogation principles in Horton v. Horton, 695 P.2d 102 (Utah 1984). The

Hortons were divorced in 1977 and as part of the divorce decree Mrs. Horton was awarded the parties residence subject to Mr. Horton's equity interest in the amount of \$30,000.00. To secure his interest he remained an owner of record title. Thereafter Mr. Horton subordinated his equity interest to the security interests of two lenders. The first loan was in the amount of \$35,000.00 from First Security Bank. The second was in the amount of \$51,000.00 from Murray First Thrift.

Subsequently Mrs. Horton applied for a third "consolidation loan" from Majestic Mortgage in the amount of \$112,500.00 for the purpose of paying off the first two loans and obtaining additional sums for Mrs. Horton's investment purposes. Apparently, during the processing of this loan and execution of the loan documents, a quit claim deed was unintentionally executed by Mr. Horton which deed purported to convey his interest to Mrs. Horton. Mrs. Horton received the loan proceeds in her own name and paid the First Security Bank and Murray First Thrift obligations from those proceeds. Later she was unable to service Majestic's mortgage and Majestic commenced foreclosure.

The trial court found the elements of fraud necessary to set the quit claim deed aside. In affirming the trial court's finding this court stated:

The purpose of an equity action is to restore the parties to the status quo to the extent possible. (Citation omitted.)

It is generally accepted that he who seeks equity must do equity. (Citation omitted.) Thus, in order that the

fraudulently acquired quit claim deed be set aside and Mr. Horton's interest in the subject property be restored to him, Mr. Horton must, to the extent possible, return to Majestic the benefits received by him that he otherwise would not have received. If Majestic had not paid off the balances owing on the two loans from First Security and Murray First Thrift to which Mr. Horton had voluntarily subordinated his \$30,000.00 equity interest, Horton's interest would still be subordinate to that amount.

Thus, equity requires that Majestic, having paid \$86,700.00 to retire the mortgages to First Security and Murray First Thrift, should have a priority over Mr. Horton to the extent of that amount.

695 P.2d at 107. Taken as a whole, it would appear that Hickenlooper, and the cases before and after, hold with the modern view, which regards equitable subrogation as a highly favorable doctrine and affords it liberal application; the fundamental rationale of the doctrine being, that where appropriate, the application of the doctrine does not materially change the position of the intervening interest.¹² That position appears to be well supported by the decisions from other forums which evidence the continuing viability of the doctrine.¹³

¹² "... to substitute one creditor for another would apparently place the junior lienor in no worse position than he was." Martin v. Hickenlooper, 59 P.2d at 1151, citing Jackson Trust Company v. Gilkinson, 105 N.J.Eq. 116, 147 A. 113 (1929).

¹³ e.g.; Klotz v. Klotz, 440 N.W. 2d 406 (Iowa 1989); Smith v. State Savings and Loan Association, 175 Cal. App. 3d 1092, 223 Cal. Rptr. 298 (1986); Caito v. United California Bank, 576 P.2d 466 (Cal. 1978); Turney v. Roberts, 501 S.W. 2d 601 (Ark. 1973); and Capabianco v. Bork, 256 A. 2d 76 (N.J. 1969).

POINT II

NEITHER THE CASES WHICH HAVE ADDRESSED EQUITABLE SUBROGATION, NOR THE UTAH MECHANIC'S LIEN STATUTE AFFORD ANY BASIS FOR DIFFERENTIATING THE APPLICATION OF EQUITABLE SUBROGATION VIS-A-VIS AN INTERVENING MECHANIC'S LIEN FROM ANY OTHER INTERVENING REAL PROPERTY INTEREST

The above cases discussed have considered equitable subrogation and the related doctrine of renewal mortgage in various factual settings including intervening judgment liens, intervening mortgages, claims upon decedent's estates, equitable liens and fee title interests. No Utah case has yet addressed equitable subrogation as it affects the priority of an intervening mechanic's lien.

A. Cases Which Have Denied The Doctrine Of Equitable Subrogation Vis-a-Vis An Intervening Mechanic's Lien Have Done So Because The Facts Of Those Cases Did Not Justify Application Of The Doctrine.

There is however, no reason or rationale for denying the application of the doctrine simply by virtue of the fact that the form of the intervening interest is a mechanic's lien as opposed to that of some other interest. In Houston Investment Banking v. First City Bank of Highland Village, 640 S.W. 2d 660 (Tex. App. 1982) the court subrogated a lender to the lien rights of a prior vendor, affording it a priority over an intervening judgment lien. In relying upon Diversified Mortgage Investors v. Blaylock General Contractors, Inc., 576 S.W. 2d 794 (Tex. 1978) the Texas Court of Appeals stated:

Although it involves a mechanic's lien instead of a judgment lien, the fact pattern in regard to the Irving

project in Diversified Mortgage Investors parallels the facts of this case In both Diversified Mortgage Investors and the present case the intervening lien (ie. the mechanic's lien and the judgment lien, respectively) had its inception prior to the date of recording the deed of trust lien held by appellant.

660 S.W. 2d at 662-663.

Similarly, the various facts to which this court has applied the equitable subrogation and renewal mortgage doctrines, and the discussions in those cases, indicate no basis for denying the application of equitable subrogation solely by virtue of the fact that the intervening interest takes the form of a mechanic's lien, assuming all other criteria are satisfied. Indeed, appellant's research upon this issue has revealed no case in which equitable subrogation has been denied over an intervening mechanic's lien on that basis alone.

Appellant's research has however, revealed cases involving intervening mechanics liens in which subrogation has been denied due to the failure to satisfy the doctrine's requirements: Collateral Investment Company v. Pilgrim, 421 S.2d 1274 (Ala. Civ. App. 1982), (funds not advanced at instance of debtor to satisfy prior encumbrance); Southwest Title and Trust Co., Inc. v. Norman Lumber Company, 441 P.2d 430 (Okla. 1968), (no clear implication that subsequent mortgagee was to have mortgage of equal dignity of that discharged); Canton Morris Plan Bank v. Most, 184 N.E. 765 (Ohio 1932), (subrogation denied because mechanic's lien claimants would be prejudiced by subrogation since bank was not

ignorant of work done and materials supplied and knowingly allowed artisans to enhance value of premises); Metropolitan Life Insurance Company v. First Security Bank of Idaho, 491 P.2d 1261 (Idaho 1971), (subrogation denied because no evidence of an express or implied agreement of subrogation); Fleetwood v. Med Center Bank, 786 S.W. 2d 550 (Tex. App. 1990), (subrogation denied because its application would result in cognizable prejudice to junior lienholder); Peterson v. Zero Estates, 261 N.E. 2d 346 (Minn. 1977), (subrogation denied since subsequent loan was to finance continued construction and bank had knowledge of construction).

B. The Purposes Of The Utah Mechanic's Lien Statute Are Not Compromised By Application Of The Doctrine Of Equitable Subrogation.

Further, an examination of the Utah mechanic's lien statutes and the cases interpreting them afford no basis for denying subrogation solely upon the fact that the intervening lien is a mechanic's lien. This conclusion is true even though upon first blush, application of the doctrine of equitable subrogation would appear to be in conflict with the priority afforded a mechanic's lien pursuant to Utah Code Annotated Section 38-1-5 as fully set forth at pages 1-2 herein.

It is well established that the purpose of the mechanic's lien statutes is to protect those who have added directly to the value of property by performing labor or furnishing materials. AAA Fencing Co. v. Raintree Development & Energy Co., 714 P.2d 289 (1986); Stanton Transportation Company v.

Davis, 9 Utah 2d 184, 341 P.2d 207 (1959). The statute is designed to prevent a landowner from taking the benefit of improvements to the property without paying for the labor and materials incorporated into the improvements. Frehner v. Morton, 18 Utah 2d 422, 424 P.2d 446, 447 (1967), King Brothers v. Utah Dry Kiln Company, 13 Utah 2d 339, 374 P.2d 254 (1962). The statute is remedial in nature and intended to give the lien claimant the benefit of his bargain and will be broadly construed to effect that purpose. Bailey v. Call, 767 P.2d 138 (Utah App. 1989) citing Interiors Contracting v. Navalco, 648 P.2d 1382, 1386 (Utah 1982). There is no evidence however, in the statutes or in the cases interpreting the statutes that they are intended to grant a windfall to the lien claimants, which in the absence of equitable subrogation, would occur in this case. Indeed, those jurisdictions in which the issue has been presented have uniformly applied equitable subrogation without distinction or regard to the fact that the intervening interest is a mechanic's lien, when all other criteria were satisfied.

C. Cases Which Have Applied Equitable Subrogation
Vis-a-Vis An Intervening Mechanic's Lien Have Accomplished
Substantial Justice Without Prejudicing The Rights Of The
Mechanic's Lien Claimants.

This court has previously given a strong indication that it supports the view discussed in the preceding subsection. In both Martin v. Hickenlooper and Tracy-Collins Trust Company v. Goeltz, the court quoted with approval from Jackson v. Gilkinson, 105 N.J.Eq. 116, 147 A. 113 (1929), (See Appendix,

Exhibit 3), a case which addressed the subrogation of a subsequently recorded mortgage over an intervening mechanic's lien. That case is of particular significance both because it has been approved by this court and because its facts are so closely analogous to those of the instant case.

In Jackson Trust Company v. Gilkinson, defendant's borrowed \$8,500.00 from the plaintiff to pay off a first mortgage which was in default and about to be foreclosed. Of that amount, \$7,977.04 was paid to a first mortgagee and the balance was applied to taxes. Approximately six weeks prior to the execution and recordation of plaintiff's mortgage, defendant had contracted with a mechanic's lien claimant for the construction of a garage on the rear of the mortgaged premises. In noting that the defendants had delivered their affidavit to plaintiffs to the effect there were no liens or encumbrances against the property, the court stated:

The complainant, in my judgment, is entitled to be subrogated to the amount paid by it in satisfaction of the first mortgage ...

* * *

[W]here, as in the case sub judice, no one is injured by the mistake, and no one has changed his position by reason of the ... mistake, there is no good reason why the mistake should not be corrected although the highest degree of vigilance has not been exercised.

147 A. 114, 115.

In Peterman-Donnelly Engineers and Contractors v. First National Bank of Arizona, Phoenix, 2 Ariz. App. 321, 408 P.2d 841 (1965), a case similar to the present action, the court applied the doctrine of equitable subrogation in a case

involving an intervening mechanic's lien. In that case the subject property was encumbered by a first mortgage in favor of Eyre which was later paid from a larger construction loan made by First National Bank. Prior to the construction loan being recorded, work had begun on the project and a mechanic's lien had been filed by the plaintiff. The court held equitable subrogation to be applicable as follows:

The evidence supporting the [motion for summary judgment] revealed that at the time the property in question was conveyed to the Association from the Chamber [of Commerce], it was understood that a part of the loan forwarded by the appellee to the Association was to be used to satisfy the debt to Eyre. It is likewise evident from the depositions that appellee-bank regarded itself as stepping into the shoes of Eyre. However no formal assignment of the prior mortgage to appellee was executed, but it is implicit that the parties intended the appellee to have the security attached to the prior mortgage. Where such an understanding, express or implied, exists, the law generally allows a subsequent mortgagee to be subrogated to the rights of a prior mortgage where the subsequent mortgagee has advanced money to the debtor to satisfy the prior mortgage, and where the subsequent mortgagee is not a mere volunteer.

408 P.2d at 846. The Arizona court cited Martin v. Hickenlooper, supra, as the leading case on the issue of equitable subrogation and quoted the following language from Emmert v. Thompson, 49 Minn. 386, 52 N.W. 31 (1892), which was also quoted in Martin v. Hickenlooper:

The better opinion now is that one who loans his money upon real estate security for the express purpose of taking up or discharging liens and encumbrances on the same property has thus paid the debt at the instance, request and solicitation of the debtor, expecting and believing, in good faith, that his security will, of record, be substituted, in fact, in place of that which he discharges, is neither a volunteer, stranger, nor intermeddler... .

402 2d at 846. The Arizona court also followed Tracy-Collins

Trust Company v. Goeltz, supra in establishing the priority of the bank's security interest vis-a-vis the mechanic's lien.

Southern Colonial Mortgage Company Inc. v. Medeiros, 347 S. 2d 736 (Florida App. 1977) involved a contest as to the priorities between mortgages and mechanic's liens on a condominium development. In March and April of 1974 the mortgagees had extended two loans to two purchasers of condominium apartments. Portions of the loans were paid directly to the construction lender-mortgagee to secure a release of the construction mortgage which had been recorded approximately 18 months earlier on September 13, 1972. A notice of commencement of work was recorded on May 15, 1973 and the lienholders recorded their liens in August and November of 1974 and January of 1975. The purchasers of the condominium apartments defaulted and the mortgagee commenced foreclosure joining the lien claimants as defendants. The trial court held the lienholders' claims were superior to the mortgages on the basis that the mechanic's liens related back to and attached as of the date of the recording of the notice of commencement. In reversing, the court of appeals stated:

The mortgagees/appellants next claim they were entitled to priority by reason of being subrogated to the rights of the construction mortgage to the extent that the mortgage was paid by them. The construction mortgage predated the mechanic's liens and the payments by the appellant-mortgagees did pay off in full the construction mortgage insofar as it encumbered each condominium unit involved.

Continuing, the appeals court said:

This right of subrogation has been recognized in Florida:

"The rule is academic that one who makes a loan to

discharge a first mortgage, pursuant to an agreement with the mortgagor that he shall have a first mortgage on the same lands to secure it, the lender will be subrogated to the rights of the first mortgagee, notwithstanding there is at the same time a second outstanding mortgage of which he (the lender) is ignorant." (Citations omitted.)

The equitable result of such rule was further stated by the Supreme Court:

"The application of this rule works common justice to all; it prevents injury to the appellant, who furnished the money to pay off the first mortgage in ignorance of the second; it gives appellant the benefit of its payment; it carries out the intention of the parties and leaves ... the holder of the junior mortgage in his original position. One of the first tests determining the application of this rule is whether or not subrogation to the place of the prior or retired lien puts the holder of the second lien in any worse position than if the prior lien had not been discharged." (Citations omitted.)

* * *

We agree that an assignment would be the better practice to insure the successor mortgagee's subrogation rights. However, under the circumstances of this case and the equitable principles set out above we do not feel the failure to secure an assignment prevents subrogation. And by recognizing the mortgagee's subrogation rights, the lienholders are not placed in any worse position than if the construction mortgage had not been released.

347 So.2d at 738-739.

One of the most recent and perhaps most illuminating decisions addressing equitable subrogation and an intervening mechanic's lien is Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractors, Inc., 576 S.W. 2d 794 (Texas 1978) (See Appendix, Exhibit 4). That case discussed the relative priority of a mechanic's lien, a vendor's lien, a construction loan and a loan for the permanent financing (sometimes referred to as a "take-out loan"). The case addressed facts in which two motels were constructed on properties, one each in Fort Worth and Irving, Texas. The

doctrine of equitable subrogation was applicable only as to the Irving, Texas development.

The Irving property was purchased by Dollar Inns of America (Dollar Inns) for \$309,900.00 with funds borrowed from Palomar Mortgage Investors (Palomar) on April 5, 1973. This purchase was pursuant to a Tri-Party Agreement among Dollar Inns, Palomar and Diversified Mortgage Investors (DMI) which provided that Palomar would lend funds to Dollar Inns for the purchase of the property and construction of the motel. DMI would pay off Palomar with proceeds from the permanent financing. On April 5, 1973, the day Dollar Inns purchased the property, construction had already begun pursuant to a construction contract which the general contractor (Blaylock) had previously entered into with Dollar Inns. Also on April 5, 1973, the property was subject to a preexisting vendor's lien held by First Bank and Trust of Richardson. As part of the April 5th closing, \$109,900.00 of the \$309,900.00 borrowed from Palomar was used to pay off First Bank and Trust of Richardson and the bank released its vendor's lien one week later on April 12, 1973. Upon completion of construction Palomar assigned its interest in the deed of trust to DMI. Dollar Inns subsequently defaulted in payments on the note secured by the deed of trust and DMI conducted a foreclosure sale under its trust deed on December 3, 1974. In the meantime, Blaylock commenced an action in district court to foreclose its mechanic's lien naming DMI as a defendant. In determining the priorities of

the parties' liens, the Texas Supreme Court stated:

The date of inception of the mechanic's lien preceded both the execution and recordation of DMI's deed of trust lien on the Irving Property; therefore, if there was no other factor involved, such mechanic's lien would be senior and superior.

There is an additional factor, however, and that is the doctrine of equitable subrogation.

576 S.W. 2d 806-807. The court continued by stating:

We recognize the importance of this doctrine to lenders in this state. It serves to protect a lienholder from intervening liens, at least to the amount of the initial lien, when the lienholder has discharged a prior superior lien.

576 S.W. 2d 807. In explaining its ruling the court stated:

To put the matter more clearly, let us suppose that at the time of closing on the Irving property Dollar Inns had not purchased and Richardson bank had not sold and released its vendor's lien. This would result in the Richardson Bank holding a vendor's lien, Blaylock having a mechanic's and materialman's lien, and DMI having a deed of trust lien. Under those circumstances, it could not be doubted but that the Richardson Bank would hold the senior lien, superior to both Blaylock's and DMI's liens. That being the case, it also cannot be [disputed] that DMI stepped into the shoes of the Richardson Bank, at least to the extent of the Richardson Bank's lien, by virtue of the doctrine of equitable subrogation. By foreclosing its deed of trust lien, DMI foreclosed the preexisting vendor's lien secured thereby and it may now assert the priority of the bank's lien.

The result of this holding is that the liens stand in the following order of priority: (1) the Richardson bank's vendor's lien in the amount of \$109,900.00 to which DMI was subrogated; (2) Blaylock's mechanic's lien in the amount of \$136,767.00; and (3) the balance due on the note secured by the deed of trust held by DMI. The fundamental essence of this holding is that all proceeds received at the foreclosure sale of December 3, 1974 in excess of \$109,900.00 (the extent of DMI's subrogation) were excess proceeds. (Emphasis in original.)

576 S.W. 2d at 807.

Subsequent to establishing the priority of the lien, the

court addressed the further question of the appropriate remedy in view of the fact that the trust deed had been non-judicially foreclosed prior to the trial court's decree of foreclosure of Blaylock's mechanic's lien. The court elaborated:

Under these circumstances we are squarely faced with the precise question which this court reserved for judgment in Irving Lumber Company, supra: Whether Blaylock may pursue the excess proceeds of the foreclosure sale. We agree with the court of civil appeals holding that Blaylock may pursue the excess proceeds. (Citations omitted). This is the logical result inasmuch as DMI's right of subrogation extends only to the amount of the preexisting vendor's lien.

576 S.W. 2d at 808.

POINT III

THE EQUITIES OF THIS CASE FAVOR APPLICATION OF EQUITABLE
SUBROGATION TO DEFENDANT SECURITY PACIFIC, GRANTING
PRIORITY TO ITS TRUST DEED OVER THE MECHANIC'S LIEN
OF PLAINTIFF

A. Subrogation Effectuates The Expectations Of The Parties Hereto Without Prejudicing Or Granting A Windfall To Either Party And Without Affecting The Purpose Of The Mechanic's Lien Statues.

The instant case presents a very compelling factual setting for the application of the doctrine of equitable subrogation. The loan was requested by defendant Youngman for the purpose of paying off existing encumbrances against her property and she expressly agreed that Ameristar would have a first lien to secure the loan to her. (Record at 100, 151, 213, 214, 215). There was a further representation under oath by defendant Youngman that she had not caused or created any other encumbrances against the property. (Record at 100, 151, 214, 215). Ameristar clearly bargained for a first position lien against the property and paid \$303,545.95 to satisfy the

prior encumbrances. Defendant Security Pacific succeeded to the interest of Ameristar by assignment dated October 15, 1988. (Record at 102). Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractors, Inc., supra, at 806-807.

On the other hand, there is no evidence that plaintiff bargained for any security for the payment of labor and materials supplied by him other than that provided by law. His interest was clearly junior to the encumbrances which were against the property at the time he commenced supplying painting labor and materials thereto. He is charged with knowledge of those encumbrances. Utah Code Annotated Section 57-3-2; Capital Lumbering Co. v. Ryan, 34 Or. 73, 54 P. 1094, (1894). Plaintiff did not change his position in reliance on those liens being satisfied. (Record at 250). By subrogating defendant Security Pacific to the lien priority of the encumbrances paid from the loan proceeds, to the extent of those payments of \$303,545.95, plaintiff is in no worse position than had defendant Youngman not refinanced those existing obligations.

The facts of this case fall squarely within the holding of Martin v. Hickenlooper, supra. There was a clear, express agreement on the part of defendant Youngman that Ameristar would have security equal to that of the liens which were satisfied by its loan proceeds. Martin v. Hickenlooper held as follows:

Suffice it to say that where there is a promise on the part of the mortgagor or his transferee, given to one who

pays money to pay off a lien, that such lender will be in equally as good position as regards security as the lien holder whose lien his money was intended to discharge and did discharge. [sic] He will be considered in equity as an assignee of the lien and especially where assurances are given him that his lien will be or is a first lien.

59 P.2d at 1152.

Equity should apply subrogation in this case, not in derogation of the mechanic's lien statutes, but in light of them. Those who supply labor and materials to improve real property are granted by statute a lien against the property so improved to the extent they are not paid for their labor and materials. Utah Code Annotated Section 38-1-1 et seq. The unique feature of the mechanic's lien statutes is that the lien attaches as of the commencement of the improvement to the property and not when a notice of lien is recorded in the county recorder's office. Utah Code Annotated Section 38-1-5. Consequently, those who perform the finishing touches to the project are given the same priority as those who begin a project by excavation or otherwise. Utah Code Annotated 38-1-10. However, once the priority date is established, a mechanic's lien claimant is not accorded a favored status over any other type of lien claimant. He has no greater equity than a judgment lienholder, a mortgagee, a trust deed beneficiary or a vendor.

In this case, it is undisputed that plaintiff's mechanic's lien attached subsequent to the recordation of the existing obligations against defendant Youngman's property, and prior to the recordation of the trust deed in favor of Ameristar.

However, because equity, under Martin v. Hickenlooper, treats the payment by Ameristar of the existing obligations as an assignment of the liens so paid, the trust deed of Ameristar (which was later assigned to defendant Security Pacific) is deemed to have attached not at the time it was recorded, but as of the recording date of the liens it paid. Consequently, the provisions of Utah Code Annotated Section 38-1-5 are not defeated by the application of equitable subrogation.

B. The Undisputed Facts Herein Show A Clear Express Agreement Calling For Subrogation Coupled With An Absence Of Culpable Negligence On The Part Of Defendant Security Pacific And Its Predecessor-In-Interest . . . . .	45

There is no evidence in this case which would suggest that equity should stay its hand in subrogating defendant Security Pacific to the prior encumbrances. There is no hint of fraud or wrongdoing on the part of Ameristar or defendant Security Pacific and neither Ameristar nor defendant Security Pacific is guilty of culpable negligence. Plaintiff's mechanic's lien was not recorded until November 16, 1988, after both the recordation of the Ameristar trust deed on July 7, 1988 and its assignment to defendant Security Pacific on October 15, 1988. Furthermore, one of the conclusions drawn by the court in Martin v. Hickenlooper, supra, is that the clearer the agreement of subrogation or the assurances of a first lien, the less important the lender's negligence, if any, becomes. In American Law of Property, Section 16.151, page 353, the authors make the following observation:

In passing it may be worth remark that if the basis for subrogation really is contractual it would be puzzling to

understand why carelessness or notice should be thought to have any part whatsoever. "If subrogation depends upon an implied or express agreement to subrogate, what boots it whether or no [sic] the lender had notice of subsequent liens?" (Quoting Martin v. Hickenlooper, supra, at 1143).

In Capital Lumbering Co. v. Ryan, supra, the court observed that if a lender is ignorant of a recorded intervening lien, and yet is entitled to equitable relief, the right to such relief is even more meritorious if the intervening lien is a mechanic's lien which was unrecorded at the time the loan was given. In that regard the court stated:

...the [mechanic's] lien of plaintiff had not been filed, nor had Ryan [the owner] made default in his payments; and, this being so, it would be carrying the doctrine further than any adjudged case of which we have knowledge to hold that the defendant Noble [lender] is not entitled to have his lien restored to the position of the original mortgage as against the plaintiff's lien, simply because he knew the building was then in process of construction and uncompleted, and especially so when such restoration does not interfere with any superior equity.

45 P. at 1095.

In this case, there is no evidence of notice to Ameristar of the painting labor performed by plaintiff. There is no evidence in the record to the effect that a person inspecting the property at the time Ameristar's trust deed went of record would have been on notice that an improvement to the property was underway. But even if such would have been the case, that fact would not bar the application of equitable subrogation.

As noted by the court in Jackson Trust Company v. Gilkinson, supra, the fact that the lender could have inspected the property and ascertained that a garage was in the course of construction (possibly giving rise to a mechanic's lien claim),

but failed to do so, such failure did not constitute
inexcusable or culpable negligence such as to bar the
application of equitable subrogation. The court held as
follows in that case:

If the complainant had caused an inspection to be made of
the mortgaged premises, it would readily have ascertained
that the aforesaid garage was in course of erection, and
thus be put upon notice of inquiry respecting such right
as the building contractor may have claimed by way of
mechanic's lien, but complainant's neglect in the this
respect cannot operate as a bar to the equitable relief
sought herein, particularly for the reason that Bahr, the
mechanic's lien claimant, is not in anywise injured
thereby.

147 A. at 115.

The concurring opinion of Justice Wolfe in Federal Land
Bank of Berkeley v. Salt Lake Valley Sand & Gravel Company, 96
Utah 359, 85 P.2d 791, 793 (1939), is instructive on the degree
of negligence necessary to stay equitable relief:

In Martin v. Hickenlooper, 90 Utah 150, 50 P.2d 1139, we
considered the authorities which more and more show a
development toward not permitting a windfall to one person
because of the mere negligence of another where he has not
been injured by the negligence. It requires gross
negligence before another may fortuitously and vicariously
benefit by that negligence.

The evidence in this case clearly shows that neither
Ameristar nor Security Pacific was guilty of negligence or
other conduct which would preclude the application of equitable
subrogation.

POINT IV
SUBROGATION ACCOMPLISHES SUBSTANTIAL JUSTICE IN THIS CASE
BY ACCORDING PRIORITY TO THE DEED OF TRUST OF DEFENDANT
SECURITY PACIFIC ONLY TO THE EXTENT OF THE FUNDS
ADVANCED TO PAY EXISTING OBLIGATIONS.

The subrogation of defendant Security Pacific to the

position of the encumbrances paid by the loan proceeds from Ameristar gives defendant Security Pacific a first position lien against the subject property to the extent of \$303,545.95, plaintiff's mechanic's lien a second position and Security Pacific a third position in the amount of \$16,454.05 (\$320,000.00 - \$303,545.95). As noted in Tracy-Collins Trust Company v. Goeltz, supra, where the amount subrogated is less than the total funds advanced by the person paying off the earlier lien, the lender is subrogated to the amount of the prior encumbrances paid with the intervening lien claimant taking a second position to that amount. In that case, the funds advanced totaled \$7,100.00, but the first mortgage extinguished by those funds was \$3,224.41. The court stated the rationale for this result as follows:

Appellant is in no worse position than had respondent taken an assignment of the 1936 mortgage from Pacific Mutual Life Insurance Company and a second mortgage for the additional amount of approximately \$3,900.00.

Consequently, the court held that the lender had a first position lien to the extent of \$3,224.41 and subjected the fee title of Mrs. Goeltz to that amount. Only the interest of Mr. Goeltz was subject to the balance of the loan proceeds of \$7,100.00.

In Peterman-Donnelly Engineers and Contractors Corp. v. First National Bank of Arizona, Phoenix, supra, the court followed Tracy-Collins Trust Company v. Goeltz in holding that the lender was in a first position to the extent of the first mortgage paid of \$11,600.00, the mechanic's lien claimant then

held a second position and the balance of the \$35,000.00 loan (\$35,000 - \$11,600) was relegated to a third position behind the mechanic's lien claimant.

An additional factor in the present case is that the subject property was sold at a trustee's sale in July 1990 pursuant to the terms of the trust deed given to Ameristar. A similar fact situation was presented in Diversified Mortgage Investors v. Lloyd D. Blaylock General Contractor, Inc., supra, except that in that case the successful credit bid of the trust deed beneficiary at the sale was greater than the amount to which the lender was subrogated. The court allocated the proceeds of the trustee's sale as follows:

In summary, ... DMI's deed of trust lien is senior and superior to Blaylock's mechanic's lien only to the extent of the Richardson bank's preexisting vendor's lien in the sum of \$109,900.00. Beyond that amount, Blaylock has a valid and subsisting lien in the amount of \$136,767; however, the sale by the trustee under the deed of trust transferred the land itself free of all liens; therefore, Blaylock's security interest is transferred to the excess proceeds from the sale, which stand in the place of the property and may be reached by Blaylock. Whatever remains thereafter goes to DMI on the balance due on the note. Since DMI bid in the land at its own foreclosure sale, no cash actually changed hands. Instead, DMI took title to the land in cancellation of part of the loan. Consequently, we are of the opinion that the court of civil appeals correctly determined that Blaylock's proper remedy was in the form of a money judgment against DMI for the unpaid amount of its lien on the Irving property.

576 S.W. 2d at 808.

In the present case, the amount bid at the trustee's sale was less than the amount to which defendant Security Pacific was subrogated. (Record at 248). Accordingly, there are no excess proceeds from the trustee's sale to which the mechanic's

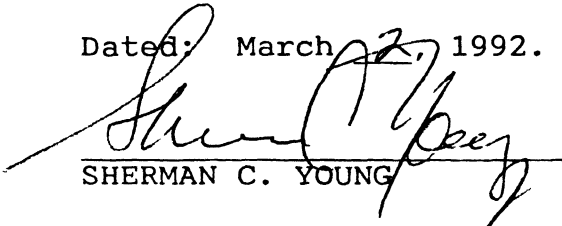
lien of plaintiff may attach. The trustee's sale extinguished the lien of plaintiff and an unencumbered fee title became vested in Security Pacific after the trustee's sale.

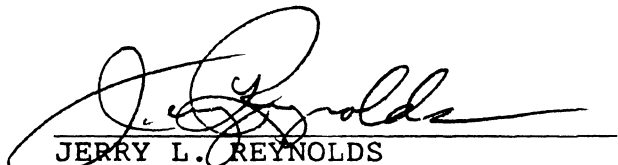
The summary judgment entered by the trial court should be reversed, the trust deed of defendant Security Pacific should be subrogated in the amount of \$303,545.95 to the position of the prior encumbrances, the mechanic's lien of plaintiff should be held junior to that amount, and the balance of the loan proceeds from Ameristar should be held to be in a third position. As a result of the trustee's sale, defendant Security Pacific became the fee title holder of the subject property and the mechanic's lien of plaintiff was extinguished.

CONCLUSION

Based upon the foregoing, defendant Security Pacific respectfully requests that the court reverse the summary judgment entered by the trial court, that judgment be entered in favor of defendant Security Pacific subrogating its trust deed to the amount of the prior liens paid from its loan proceeds, totaling \$303,545.95, that the mechanic's lien of plaintiff be held junior to that amount, and that the mechanic's lien of plaintiff be held extinguished as a result of the trustee's sale in July 1990.

Dated: March 27, 1992.

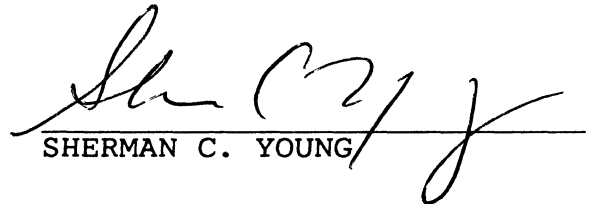

SHERMAN C. YOUNG


JERRY L. REYNOLDS

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing BRIEF OF APPELLANT SECURITY PACIFIC BANK to the following on March 2, 1992, postage prepaid, addressed as follows:

Ralph R. Tate
Attorney for Plaintiff
4685 Highland Drive, #202
Salt Lake City, UT 84117


SHERMAN C. YOUNG

youngman/c/1-50

APPENDIX

Exhibit 1

J. Lamar Richards v. Security Pacific National Bank
Supreme Court No. 910547

<u>Dates Executed (Recorded)</u>	<u>Chain of Title and Conveyances</u>	<u>Encumbrances, Security Interests, etc.</u>	<u>Beneficiary or Vendor</u>	
	JENTZCH	BUNCE	JENSEN	
	Q.C.D.	W.D.	W.D.	
	#4078401	#4078402	#4078403	
	3/20/85	4/18/85	4/22/85	
(4/25/85)	↓ >ZSCHEILE<			
3/01/85 (4/25/85)		Trust Deed #4078404	BUNCE	\$86,414.00
4/22/85 (4/25/85)		Trust Deed #4078405	TAL	\$1,615.95
4/22/85 (4/25/85)		Trust Deed #4078406	JENSEN	\$10,000.00
	ZSCHEILE			
4/22/85 (4/25/85)	W.D. #4078407			
4/15/85 (4/25/85)	LAFAYETTE PROPERTIES INC.	Trust Deed #4078408	ZSCHEILE	\$151,970.00
4/15/85	LAFAYETTE PROPERTIES INC.	Vendors Sec. Int. in —U.R.E.C.—	LAFAYETTE PROPERTIES INC.	\$53,546.00
	Vendee's Int. in U.R.E.C.			
	↓			
	YOUNGMAN			
6/28/88		Work Commences		
(6/29/88)		U.R.E. Contract Recorded		
7/01/88 (7/07/88)	YOUNGMAN	Trust Deed #4647262	AMERISTAR	\$303,545.95
		\$320,000.00		
(7/22/88)		Reconveyance of Bunce, Tal, Jensen and Zscheile Trust Deeds		

Exhibit 2

Martin v. Hickenlooper
90 Utah 150, 59 P.2d 1139 (1936)

<u>Dates</u>	<u>Chain of Title and Conveyances</u>	<u>Encumbrances, Security Interests, etc.</u>	<u>Mortgagee</u>
2/01/21	Stovens	Mortgage \$3,500.00	State of Utah
6/18/21	Deed		
6/20/21	Hickenlooper	Mortgage \$2,500.00	Martin
2/24/22	Deed		
6/01/27	Fritsch Loan	Mortgage \$3,500.00	Zorn

Exhibit 3

Jackson Trust Company v. Gilkinson
147 A. 113 (N.J. Eq. 1929)

<u>Dates</u>	<u>Chain of Title and Conveyances</u>	<u>Encumbrances, Security Interests, etc.</u>	<u>Mortgagee or Lien Claimant</u>
	Gilkinson	Mortgage _____>	Greenville Heights B. & L.A. <_____
3/34/27		Contract entered _____< Work Commenced	John Bahr
5/05/27	Gilkinson	Mortgage _____> \$8,500.00	Jackson Trust Company \$7,977.04 _____

Exhibit 4

Diversified Mortgage Investors v. Lloyd D.
Blaylock General Contractors Inc.
 576 S.W.2d 794 (Texas 1978)

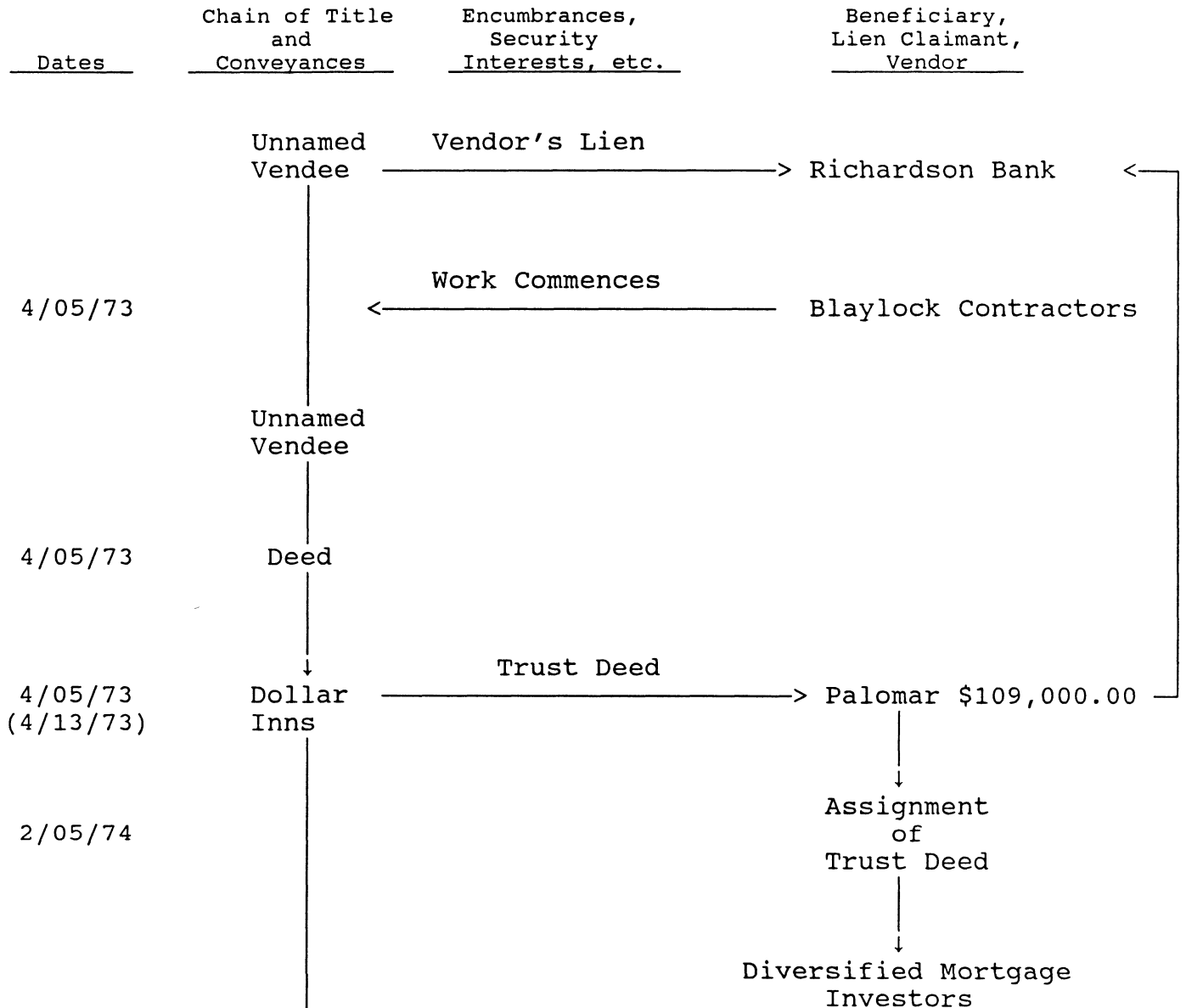


Exhibit 5

FILED DISTRICT COURT
Third Judicial District

DEC 02 1991

SHERMAN C. YOUNG (3891)
JERRY L. REYNOLDS (2728)
IVIE & YOUNG
Attorneys for Defendant, Security
Pacific National Bank
48 North University Avenue
P.O. Box 672
Provo, UT 84603
Telephone: (801) 375-3000

By *[Signature]* SALT LAKE COUNTY
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

J. LAMAR RICHARDS,)	
)	
Plaintiff,)	
	)	ORDER OF DISMISSAL
vs.	)	AS AGAINST DEFENDANT
	)	DIAMANTI
DEBRA L. YOUNGMAN & et al.,	)	Civil No 890904949CN
)	
Defendant.	)	Hon. Pat B. Brian

Based upon the Stipulation of the parties and for good
cause shown, IT IS HEREBY ORDERED THAT:

Plaintiff's complaint is dismissed as against defendant
Deborah Diamanti, without prejudice, each party to bear their
own costs.

Dated: October 2, 1991.

BY THE COURT

[Signature]
Hon. Pat B. Brian

[Signature]
Approved as to Form
Ralph R. Tate Jr.
Attorney for Plaintiff, Lamar Richards

youngman.ord.1

00310

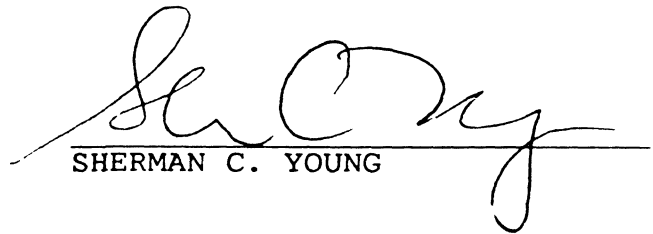
MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Order of Dismissal As Against Defendant Diamanti to the following on November 22, 1991, postage prepaid, addressed as follows:

Ralph R. Tate
Attorney for Plaintiff
4685 Highland Drive, #202
Salt Lake City, UT 84117

Larry G. Reed
Attorney at Law
455 South 300 East, #300
Salt Lake City, UT 84111

Deborah Diamanti
225 N. Main, #101
Salt Lake City, UT 84103


SHERMAN C. YOUNG

youngman/1

JUDGMENT

THIRD JUDICIAL DISTRICT COURT

AUG 20 1991

By Amy Basteen

RALPH R. TATE, JR. (#3192)
Attorney for Plaintiff
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117
Telephone: 278-4747

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

J. LAMAR RICHARDS,	)	2156624
Plaintiff,	:	SUMMARY JUDGMENT AND
vs.	:	AMENDMENT TO JUDGMENT
	)	AND DECREE OF FORE-
		CLOSURE DATED 5-8-90
DEBRA L. YOUNGMAN, et al.,	:	Civil No. 890904949CN
Defendant.	)	Hon. Pat B. Brian
		2167961
		8-27-91-8:16am.

This matter came before the court on motions for summary judgment filed by plaintiff and defendant Security Pacific National Bank, pursuant to Rule 4-501, Utah Code of Judicial Administration. The issue presented for decision was the relative priority of plaintiff's mechanic's lien and defendant Security Pacific's trust deed. After consideration of the parties' briefs, the court granted plaintiff's motion for summary judgment and denied defendant Security Pacific's motion for summary judgment as set forth by separate order. Pursuant to the court's rulings, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. The Judgment and Decree of Foreclosure dated May 8, 1990, is reinstated and amended to add the following provisions.

00798

All other aspects of the May 8, 1990, judgment are unchanged. The Amended Judgment and Decree of Foreclosure dated May 22, 1991, is hereby vacated and superceded by this Judgment.

2. Plaintiff's mechanic's lien recorded on November 16, 1988, as Entry No. 4702325 in Book 6081 at Page 2039 in the official records of the Salt Lake County Recorder is a valid and perfected lien upon the following described property:


Commencing at the Southeast corner of Lot 1, Block 27, Plat "G", Salt Lake City Survey, and running thence West 135 feet; thence North 130 feet; thence East 135 feet; thence South 130 feet to the point of beginning.

3. It is further ordered and decreed that the interests in the above property of defendant Security Pacific National Bank and First Boston Mortgage Securities Corp. as shown by assignments recorded May 10, 1989, arising from a trust deed in favor of Ameristar Financial Corp. recorded on July 7, 1988, as Entry No. 4647262 in Book 6045 at Page 980 in the official records of the Salt Lake County Recorder are inferior and subordinate to plaintiff's mechanic's lien recorded November 16, 1986.

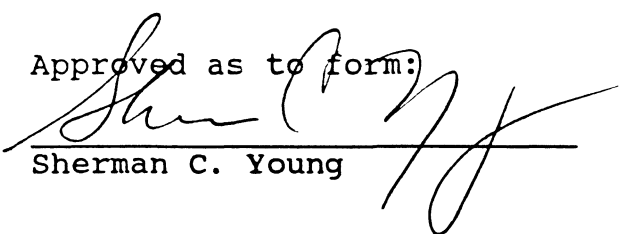
4. The judgment for attorney's fees heretofore entered on May 8, 1990, is augmented to add an additional award of attorney's fees incurred between the May 8, 1990, judgment and June 17, 1991, in the sum of \$2,420.00.

DATED this 20 day of August 1991.

BY THE COURT:


Judge

Approved as to form:


Sherman C. Young

00229

JUDGEMENT

AUG 20 1991

Alvin B. Bostwick

RALPH R. TATE, JR. (#3192)
Attorney for Plaintiff
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117
Telephone: 278-4747

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

J. LAMAR RICHARDS,)	
	:	ORDER PURSUANT TO: 2156624
Plaintiff,	:	
	:	1. PLAINTIFF'S MOTION FOR
vs.	)	SUMMARY JUDGMENT
	:	
DEBRA L. YOUNGMAN, DEBORAH	:	2. DEFENDANT SECURITY
DIAMANTI, AMERISTAR FINANCIAL	:	PACIFIC'S CROSS MOTION
CORPORATION, a corporation,	)	FOR SUMMARY JUDGMENT
ASSOCIATES FINANCIAL SERVICES	:	
COMPANY, INC., a corporation,	:	3. DEFENDANT SECURITY
SECURITY PACIFIC NATIONAL BANK,	:	PACIFIC'S MOTION TO
FIRST BOSTON MORTGAGE SECURITIES)	:	STRIKE
CORP., and JOHN DOES 1-3,	:	
	:	Civil No. 890904949CN
Defendants.	:	Hon. Pat B. Brian

This matter came before the court on motions for summary judgment filed by plaintiff and defendant Security Pacific National Bank. Defendant Security Pacific filed a motion to strike certain allegations of plaintiff. All motions were fully briefed and the matter was submitted to the court pursuant to Rule 4-501, Utah Code of Judicial Administration.

The court having been fully advised in the premises, there appearing to be no disputed issues of material fact, finds and concludes as follows:

1. Plaintiff commenced his work on the subject property

30330

prior to June 29, 1988, and completed his work on August 30, 1988.

2. Plaintiff's notice of mechanic's lien was recorded on November 16, 1988.

3. A Deed of Trust from defendant Youngman to Ameristar Financial Corporation was recorded July 7, 1988. It was subsequently assigned to First Boston Mortgage Securities Corp. on October 15, 1988. The assignment was recorded May 10, 1989. First Boston Mortgage Securities Corp. assigned its Deed of Trust to defendant Security Pacific. This Assignment was also recorded May 10, 1989. As of May 10, 1989, all interests of Ameristar Financial Corporation and First Boston Mortgage were vested in defendant Security Pacific National Bank.

4. Based upon the undisputed facts of record and equities between the parties, the court concludes that the doctrine of equitable subrogation as claimed by defendant Security Pacific is not applicable in this case.

5. Defendant Security Pacific's motion to strike references to title insurance and paragraphs 1 and 2 of plaintiff's Additional Significant Facts in plaintiff's Reply Memorandum is hereby granted.

6. Plaintiff's motion for summary judgment is granted.

7. Defendant Security Pacific's cross motion for summary judgment is denied.

8. An amendment to the judgment and decree of foreclosure shall be entered incorporating the elements of this order as they apply to the decree of foreclosure and awarding plaintiff such additional attorneys fees as shall be established in accordance with Rule 4-505 of the Code of Judicial Administration.

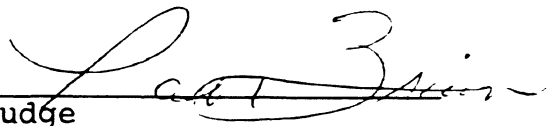
9. The order heretofore signed by this court May 22, 1991, entitled "Order on Summary Judgments and Motion to Strike" and the "Amended Judgment and Decree of Foreclosure" are hereby vacated and superceded by this order and the Amendment to Judgment filed herewith.

10. Except as qualified herein, the other undisputed statements of fact as set forth in the parties' Memoranda in support of their respective motions for summary judgment are incorporated by reference as findings of fact by this court.

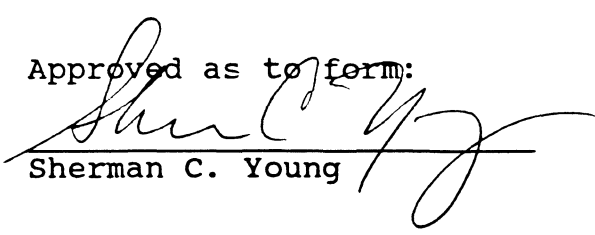
11. It is further ordered that defendant's Motion for Stay of Execution pending the issuance of this Amended Order is denied for the reason that said issue is now moot.

DATED this 20 day of August 1991.

BY THE COURT:


Judge

Approved as to form:


Sherman C. Young

RALPH R. TATE, JR., P.C. (#3192)
Attorney for Plaintiff
4685 Highland Drive, Suite 202
Salt Lake City, Utah 84117
Telephone: 278-4747

MAY 8 1990

SALT LAKE COUNTY
By E. Matheson
Clerk of Court

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH

J. LAMAR RICHARDS,

Plaintiff,

vs.

DEBRA L. YOUNGMAN, DEBORAH
DIAMANTI, AMERISTAR FINANCIAL
CORPORATION, a corporation, and
ASSOCIATES FINANCIAL SERVICES
COMPANY, INC., a corporation,
and JOHN DOES 1-5,

Defendants.

JUDGEMENT

JUDGMENT AND DECREE
OF FORECLOSURE

Civil No. 890904949CN
Hon. Pat B. Brian

2156624
5-10-90 2:15am

The above matter came before the court under the provisions of Rule 4-501 on plaintiff's Motion for Summary Judgment. The action was brought by plaintiff seeking in part a decree of foreclosure with respect to the property which is subject matter of this litigation arising out of a mechanic's lien for services rendered by plaintiff on the property. All parties have been properly served and the default of defendants Ameristar Financial Corporation and Associates Financial Services Company, Inc. have heretofore been entered. Defendant Diamanti has denied having any interest in the real property which is subject matter of the foreclosure proceeding. The issues of the financial responsibility of defendant Diamanti for any of the obligations have been reserved for further proceedings if necessary.

The matter came before the court on plaintiff's Motion

00072

for Summary Judgment, for entry of judgment as against defendant Debra L. Youngman, and for entry of a decree of foreclosure as against all parties, reserving certain issues pertaining to defendant Diamanti.

The court having considered the papers submitted by the parties, including the Motion for Summary Judgment and supporting Memorandum, and the Affidavits of plaintiff and plaintiff's counsel, being duly advised in the circumstances, good cause appearing therefore, hereby ORDERS, ADJUDGES, AND DECREES as follows:

1. Judgment is hereby entered in favor of plaintiff and against defendant Debra L. Youngman for \$5,499.50 representing the amount due for services rendered subject to plaintiff's mechanic's lien; \$893.67 representing unpaid interest through April 15, 1990; plaintiff's court costs to date in the sum of \$108.75; plaintiff's attorney's fees to date in the sum of \$780.00, for a total judgment of \$7,281.92 together with after-accruing interest at the rate of 12% per annum from the date of judgment until paid and plaintiff's court costs incurred hereafter. It is further ORDERED that this judgment shall be augmented by the amount of reasonable costs and attorney's fees expended in collection by foreclosure, execution, or otherwise as shall be established by affidavit.

2. The foregoing indebtedness arises from a mechanic's lien which constitutes a valid and perfected lien upon the following described real property:

Commencing at the Southeast corner of Lot 1, Block 27, Plat "G", Salt Lake City Survey, and running thence West 135 feet; thence North 130 feet; thence East 135 feet; thence South 130 feet to the point of beginning.

3. The court hereby decrees that the interest of Ameristar Financial Corporation and Associates Financial Services Company, Inc. in the above property, if any, is inferior to that of the plaintiff.


4. The court finds that from June through August 1988 plaintiff supplied labor and materials on the above property pursuant to a contract with Debra L. Youngman for which he was not paid. Pursuant to Title 38, Utah Code Annotated 1953 as amended, plaintiff filed a Notice of Lien in the office of the Salt Lake County Recorder on November 16, 1988, in Book 6081 at Page 2039 for the amount due of \$5,985.00 plus interest. Said Lien is a lien on the property described above. Plaintiff is entitled to have his lien foreclosed in the total amount of this judgment as it may hereafter be augmented. The court finds that the lien is superior to the interest, if any, of all of the other parties to this action.

5. It is further ORDERED, ADJUDGED, AND DECREED that the sheriff of Salt Lake County, Utah, shall advertise the property described herein for sale at sheriff's sale according to law. From the proceeds of said sale, the sheriff may pay to plaintiff the amount of this judgment with interest thereon or so much of said amount as is received by the sheriff from sale of the property. If the sheriff receives funds from the sale of property

above the amounts required to pay plaintiff in full, the sheriff may pay any surplus amount to the clerk of this court pending further order of this court. If the proceeds from the sheriff's sale are not sufficient to pay plaintiff the full amount due and owing as set forth herein, the sheriff shall specify the amount of deficiency in his return to be filed herein, and the Clerk of the Court shall enter a deficiency judgment against Debra L. Youngman for such deficiency. The plaintiff or any other party to this action may become a purchaser at said sale. If plaintiff is the purchaser, possession of the property shall be awarded to the plaintiff upon sale. The sheriff shall execute a Certificate of Sale to the purchaser. The sheriff shall execute a deed to the purchaser upon expiration of the redemption period provided by law. Upon the expiration of said redemption period, all parties to this action and all persons claiming under them are and shall be forever barred and foreclosed of all rights, claims, and equity of redemption in the property.

DATED this 8 day of April 1990.

BY THE COURT:


Judge

NOTICE OF MAILING

I certify that I mailed a copy of the foregoing Judgment and Decree of Foreclosure, postage prepaid, this 14 day of April 1990, addressed as follows:

Debra Youngman
c/o Club Karerra
3424 South State
Salt Lake City, Utah 84115

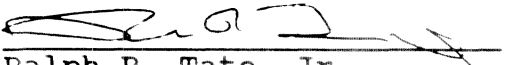
Debra Youngman
983 East 3rd Avenue
Salt Lake City, Utah 84103

Ameristar Financial Corp.
c/o C.T. Corporation
50 West 300 South, 8th Floor
Salt Lake City, Utah 84101

Deborah Diamanti
225 North Main #101
Salt Lake City, Utah 84103

Larry G. Reed, Esq.
CROWTHER, BEARD & SHAPHREN
455 South 300 East, Suite 300
Salt Lake City, Utah 84111

Associates Financial Services
c/o Prentice Hall
185 South State #600
Salt Lake City, Utah 84111



Ralph R. Tate, Jr.

Exhibit 6

No Prepayment Penalty- Regular FNMA/FHLMC

Subject Property	Property Street Address	City	County	State	Zip	Ac. Units
	983 e. Third Ave.	Salt Lake	Salt Lake	Ut.	84103	1
	Legal Description (Attach description if necessary)					
	commence at the Southeast corner Lot 1 Block 27 Plat G					
	Year: 1990					
Subject Property	Purpose of Loan	Lot Value Date	Original Cost	Present Value (a)	Cost of Imps (b)	Total (a + b)
	<input type="checkbox"/> Purchase <input type="checkbox"/> Construction-Permanent <input type="checkbox"/> Construction <input checked="" type="checkbox"/> Refinance <input type="checkbox"/> Other (Explain)					
	Complete this line if Construction-Permanent or Construction Loan	Year Acquired				
	Complete this line if a Refinance Loan	Purpose of Refinance	Describe Improvements [] made [] to be made			
	Year Acquired	Original Cost	Amt. Existing Liens	Mortgage consolidation		
1985		\$420,000	303,546	Lower interest rate		
Title Will Be Held In What Name(s)		Manner In Which Title Will Be Held		Cost \$		
Debra L. Youngman		A single Woman				
Source of Down Payment and Settlement Charges						
Loan proceeds						

This application is designed to be completed by the borrower(s) with the lender's assistance. The Co-Borrower Section and all other Co-Borrower questions must be completed and the appropriate box(es) checked if ☐ another person will be jointly obligated with the Borrower on the loan, or ☐ the Borrower is relying on income from alimony, child support or separate maintenance or on the income or assets of another person as a basis for repayment of the loan, or ☐ the Borrower is married and resides, or the property is located, in a community property state.

Borrower				Co-Borrower			
Name	Age	School		Name	Age	School	
Debra L. Youngman	33	Yrs 16					
Present Address	No Years	<input checked="" type="checkbox"/> Own <input type="checkbox"/> Rent		Present Address	No Years	<input type="checkbox"/> Own <input type="checkbox"/> Rent	
Street 983 E. Third Ave				Street			
City/State/Zip Salt Lake City, Ut 84103				City/State/Zip			
Former address if less than 2 years at present address				Former address if less than 2 years at present address			
Street				Street			
City/State/Zip				City/State/Zip			
Years at former address		<input type="checkbox"/> Own <input type="checkbox"/> Rent		Years at former address		<input type="checkbox"/> Own <input type="checkbox"/> Rent	
Marital <input type="checkbox"/> Married <input type="checkbox"/> Separated	DEPENDENTS OTHER THAN LISTED BY CO-BORROWER			Marital <input type="checkbox"/> Married <input type="checkbox"/> Separated	DEPENDENTS OTHER THAN LISTED BY CO-BORROWER		
Status <input checked="" type="checkbox"/> Unmarried (incl. single, divorced, widowed)	0	n/a		Status <input type="checkbox"/> Unmarried (incl. single, divorced, widowed)			
Name and Address of Employer	Years employed in this line of work or profession?			Name and Address of Employer	Years employed in this line of work or profession?		
Multi-Color Advertising	10 years						
P. O. Box 645	Years on this job	4					
Snyder, Texas	<input type="checkbox"/> Self Employed				<input type="checkbox"/> Self Employed		
Position/Title	Type of Business			Position/Title	Type of Business		
Director, Utah Division Advertising							
Social Security Number***	Home Phone	Business Phone		Social Security Number***	Home Phone	Business Phone	
524-82-5294	363-8503	915-573-0236					

Gross Monthly Income				Monthly Housing Expense**				Details of Purchase			
Item	Borrower	Co-Borrower	Total	Rent	PRESENT	PROPOSED		Do Not Complete if Refinance			
Base Empl. Income	\$11,500		\$11,500	First Mortgage (P&I)	2,083	\$2574.79		a. Purchase Price			
Overtime				Other Financing (P&I)				b. Total Closing Costs (Est.)			
Bonuses				Hazard Insurance	83	80.6		c. Prepaid Escrows (Est.)			
Commissions				Real Estate Taxes	271	450.0		d. Total (a + b + c)			
Dividends/Interest				Mortgage Insurance				e. Amount This Mortgage			
Net Rental Income				Homeowners Assn. Dues				f. Other Financing			
Other? (Before completing see notice under Describe Other Income below)				Other:				g. Other Equity			
				Total Monthly Pmt.	\$2,437	\$3104.79		h. Amount of Cash Deposit			
				Utilities	400	400		i. Closing Costs Paid by Seller			
Total	\$11,500		\$11,500	Total	\$2,837	\$3,074		j. Cash Req'd. For Closing (Est.)			

B-Borrower C-Co-Borrower	NOTICE: Alimony, child support, or separate maintenance income need not be revealed if the Borrower or Co-Borrower does not choose to have it considered as a basis for repaying this loan.	Monthly Amount
		\$
		\$
		\$

If Employed In Current Position For Less Than Two Years, Complete the Following						
B/C	Previous Employer/School	City/State	Type of Business	Position/Title	Dates From/To	Monthly Income
						\$
						\$
						\$

These Questions Apply To Both Borrower and Co-Borrower			
Is a "yes" answer is given to a question in this column, please explain on an attached sheet.	Borrower: Yes or No	Co-Borrower: Yes or No	
Are there any outstanding judgments against you?	no		
Have you been declared bankrupt within the past 7 years?	no		
Have you had property foreclosed upon or given title or deed in lieu thereof in the last 7 years?	no		
Are you a party to a law suit?	no		
Are you obligated to pay alimony, child support, or separate maintenance?	no		
Is any part of the down payment borrowed?	no		
Are you a co-maker or endorser on a note?	no		
Are you a U.S. citizen?			YES
If "no," are you a resident alien?			
If "no," are you a non-resident alien?			
Explain Other Financing or Other Equity (if any)			

☐ Completed Jointly ☒ Not Completed Jointly

Indicate by (*) those liabilities or pledged assets which will be satisfied upon sale of real estate owned or upon refinancing of such property.

Statement of Assets and Liabilities

Name of interviewee: Employer

Affidavit and Agreement
(by Borrower and Property Seller)

STATE

OF UTAH

(Name of State, District or Territory)

COUNTY

OF SALT LAKE

SS

(Name of County, if applicable)

Before me, KIMM PETERSEN

THE COUNTY OF SALT LAKE, STATE OF UTAH

DEBRA L. YOUNGMAN

a notary public in and for
personally appears:

(referred to herein, whether one or more persons, as "Borrower Affiant"), and

(referred to herein, whether one or more persons, as "Seller Affiant"), and each such person, being of lawful age and being duly qualified according to law, upon oath deposes and makes the applicable statements contained in Section III below, and Borrower Affiant and Seller Affiant also agree as provided in Section II below

I. REPRESENTATIONS:

Representation No. 1. That Borrower Affiant is the party named in a promissory note (referred to herein as the "Note"), mortgage, deed of trust, or deed to secure debt (referred to herein as the "Security Instrument"), both bearing date of JULY 01, 1988, evidencing and securing a loan (referred to herein as the "Loan") constituting a lien on the property located at 983 E 3RD AVE., SALT LAKE CITY, UT 84103

(Property Address) (referred to herein as the "Property"), the Loan having been made to Borrower Affiant by AMERISTAR FINANCIAL CORPORATION, A CORPORATION, ITS SUCCESSORS AND/OR ASSIGNS

(referred to herein as the "Lender")

Representation No. 2. That Seller Affiant is the seller of the Property to Borrower Affiant

Representation No. 3. That the purpose of the Loan is as shown by X in the appropriate space below

- ☐ to finance Borrower Affiant's purchase of the Property, at a purchase price of \$ _____
- ☒ to refinance outstanding debt against the Property
- ☐ for the following purpose _____

Representation No. 4. That the financial terms of the transaction constituting or related to the Loan are as follows

Amount of the First Mortgage on the Property \$ 320,000.00
Cash Equity (if the Loan is not a refinancing) \$.00
Purchase Price of the Property \$ _____
Initial Monthly Payment under the Note \$ 2,574.80

There is no subordinate financing relating to the Property except as specifically set forth immediately below

Terms of Subordinate Financing

Amount \$.00

Interest Rate .000 % Term _____ months

Monthly Payment \$.00

Name and address of the holder of such subordinate financing _____

Representation No. 5. That Borrower Affiant has not given, conveyed, permitted, or contracted for, or agreed to give conveyance or permit any lien upon the Property to secure a debt or loan, except for any lien connected with subordinate financing upon the Property, as fully disclosed in Representation No. 4 above, and the lien referred to in Representation No. 1 above

Representation No. 6. That if the Loan is for the purpose of financing Borrower Affiant's purchase of the Property, no expenses or charges relating to, or in connection with, Borrower Affiant's purchase of the Property, such as interest charges, real estate taxes, hazard insurance premiums, initial mortgage insurance premiums, or of funds to be used for renewal of mortgage insurance relating to the Loan, have been, or will be, paid, funded, or borne by Seller Affiant for or on behalf of Borrower Affiant, except as otherwise specifically stated immediately below

Representation No. 7. As indicated by X in the appropriate space adjacent to A or B below

- ☒ A That (if indicated by X in the appropriate space adjacent hereto) Borrower Affiant now occupies the Property as Borrower Affiant's principal residence, or in good faith will so occupy the Property, commencing such occupancy not later than thirty (30) days after this date or (b) thirty (30) days after the Property shall first have become ready for occupancy as a habitable dwelling, whichever is later
- ☐ B That (if indicated by X in the appropriate space adjacent hereto) Borrower Affiant does not occupy the Property as Borrower Affiant's principal residence and does not intend to do so.

Initials of Borrower Affiant

Initials of Seller Affiant:

06214

A. Borrower Covenant. Borrower Affiant agrees that (if an X is placed in the appropriate space adjacent to Representation No. 7A of Section I above) (1) it shall be an additional covenant of the Security Instrument that Borrower/Affiant occupy the property as provided in such Representation No. 7A, and (2) failure to so occupy the property shall constitute a breach of covenant under the Security Instrument that shall entitle the Lender, its successors and assigns, to exercise the remedies for a breach of covenant provided in the Security Instrument.

B. Inducement Agreement. Borrower Affiant and Seller Affiant agree and acknowledge that the foregoing Borrower Covenant (if applicable), the Representations made in Section I above, and the Statements under Oath made in Section III below are made for the purpose of inducing the Lender and its assigns to make or purchase the Loan.

III. STATEMENTS UNDER OATH

A. By Borrower Affiant. Borrower Affiant hereby deposes and says upon oath that those Representations referred to and set forth in Section I above as Representations Nos. 1, 3, 4, 5, 6, and (if applicable) Representation No. 7A are true and correct.

B. By Seller Affiant. Seller Affiant hereby deposes and says upon oath that those Representations referred to and set forth in Section I above as Representations Nos. 2 and 6 are true and correct, and that Representations Nos. 1, 3, 4, 5, and (if applicable) Representation No. 7A, as referred to and set forth in such Section, are true and correct to the best of Seller Affiant's knowledge, information, and belief.

(Signature)
(Seller Affiant)

Debra L. Youngman
DEBRA L. YOUNGMAN (Signature)
(Borrower Affiant)

(Signature)
(Seller Affiant)

(Signature)
(Borrower Affiant)

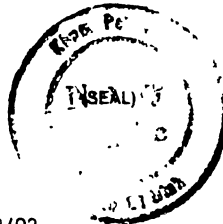
(Signature)
(Borrower Affiant)

(Signature)
(Borrower Affiant)

(Signature)
(Borrower Affiant)

(Signature)
(Borrower Affiant)

Sworn to and subscribed before me this 1st day of JULY, 1968



[Signature]
Notary public in and for
SUNSET, UT

My commission expires

3/8/92

(Date)

CERTIFICATE AND ACKNOWLEDGEMENT BY LENDER

The Lender hereby represents to and certifies for the reliance of, any party to which the Loan hereafter is sold or assigned that all of the applicable representations and statements contained in Sections I and III above are true and correct to the best of the Lender's knowledge, information, and belief. In addition, the Lender hereby acknowledges and accepts the Borrower covenant (if applicable) and the Inducement Agreement, set forth, respectively in Paragraphs A and B of Section II above.

AMCRISTAR FINANCIAL CORPORATION
(Name of Lender)
1-1-88
(Date)

By *[Signature]*
(Signature)
Loan Closing Supervisor
(Title)

This form should be executed by the borrower(s), property seller(s) and lender on the date the Loan is closed.

ADVISORY NOTICE

If any statement in the foregoing Affidavit and Agreement is made under oath by Borrower Affiant or Seller Affiant with knowledge that such statement is false, the person making such false statement may be subject to civil and criminal penalties under applicable law.

In addition, any breach of the covenant by Borrower Affiant relating to occupancy of the Property (as set forth in Paragraph A of Section I above) will entitle the holder of the Note to exercise its remedies for breach of covenant under the Security Instrument. Such remedies include, without limitation, requiring immediate payment in full of the remaining indebtedness under the Loan together with all other sums secured by the Security Instrument, and exercise of power of sale or other applicable foreclosure remedies, to the extent and in the manner authorized by the Security Instrument.



Transmittal Summary

Lender Name Ameristar Financial Corp.		Lender Address 4516 South 7th East #340, Murray, UT	
Borrower Name YOUNGMAN, Debra		Lender Number 111-6772112	Lender Loan Number 111-6772112
Property Address 983 E. 3rd Ave., Salt Lake, UT 84103		Contract Number	Fannie Mae Loan No.

Section 1—Loan Characteristics (Check all Applicable Categories)

Loan Type <input type="checkbox"/> FHA <input checked="" type="checkbox"/> 1st Mort. <input type="checkbox"/> Fixed Rate <input type="checkbox"/> Buydown <input type="checkbox"/> VA <input type="checkbox"/> 2nd Mort. <input checked="" type="checkbox"/> ARM Plan No. TR-1 <input checked="" type="checkbox"/> Conv		Loan Purpose <input type="checkbox"/> Purchase <input checked="" type="checkbox"/> Refinance If Refinance, Purpose _____	Occupancy <input checked="" type="checkbox"/> Primary Single-Family Owner-Occupied <input type="checkbox"/> Second Home <input type="checkbox"/> S. F. Investment <input type="checkbox"/> 2-4 Family Investment <input type="checkbox"/> 2-4 Family Owner-Occupied
Original Loan Amount \$320000	Initial Note Rate 9.00	Initial Monthly Installment 2574.79	Term (months) 360

Section 2—Underwriting Information

Sales Price \$ N/A	Appraised Value \$500,100.00	Loan to Value 63.99 %	Property Type <input type="checkbox"/> Condominium Project Type _____ <input type="checkbox"/> PUD Project Type _____ <input type="checkbox"/> Cooperative Project Type _____	<input type="checkbox"/> De Minimis PUD <input checked="" type="checkbox"/> Other SFD
Does Fannie Mae have an interest in the first mortgage? <input type="checkbox"/> Yes <input type="checkbox"/> No				
What is combined Loan-to-Value Ratio? _____ %				
Appraiser Name & Company Name William E. Loefflerth Wm. E. Lifferth and Assoc.		Underwriter Name Angela K. Garza		

Stable Monthly Income			Proposed Monthly Payments	
Borrower	Co-Borrower	Total	Borrower's Primary Residence	
Base Income	\$ 11,500.00	\$ 11,500.00	First Mortgage P&I	\$ 2574.79
Other Income	\$ _____	\$ _____	Second Mortgage P&I	\$ _____
Positive Cash Flow (Subject Property)	\$ _____	\$ _____	Hazard Insurance	\$ 80.00
Total Income	\$ 11,500.00	\$ 11,500.00	Taxes	\$ 450.00
Ratios			Mortgage Insurance	\$ _____
Primary Housing Expense/Income 27.0 %			Home Owner Association Fees	\$ _____
Total Obligation/Income 28.0 %			Other	\$ _____
Investment Property Only			Total Primary Housing Expense	\$ 3104.79
Debt Service Coverage Ratio _____ %			Other Obligations	
			Negative Cash Flow (Subject Property)	\$ _____
			All Other Monthly Payments	\$ 80.00
			Total All Monthly Payments	\$ 3184.79

Section 3—Lender's Underwriting Comments

Good ratios, very low LTV, good credit, good job stability, house is part of the Utah State Historical Society.

Section 4—Exhibits Submitted in Addition to Fannie Mae Standard Document Requirements

1. _____	4. _____
2. _____	5. _____
3. _____	6. _____

Section 5—Lender's Contact (Person to Whom Correspondence Should Be Directed)

Name Angela K. Garza	Title Underwriter	Telephone No. 619/492-1556
Signature <i>Angela K. Garza</i>		Date 6-28-88

LO 043 (8-86)

Fannie Mae Form 1008 Oct. 88



LOAN, FUS AND CONDITIONS

LOAN #: 111-6772112

BRANCH: Salt Lake City

NAME: YOUNGMAN

DATE SUBMITTED: RESUB. 6-28-88

The Above Referenced Loan Is:

☒ Approved ☒ Subject to the following conditions

Approval expires on: 7-31-88

☐ Suspended for the following

Suspended items must be rec'd by: _____

☐ Declined/Cancelled (see comments)

Loan Amt: \$320,000.00

Interest Rate: 9.00% ^{9.00}_{9.125} Term: 30 Yrs☒ XX ☐ D/O ☐ N/O/O ☐ 2nd home ☐ Purchase ☒ Refi ☐ Cash Out ☒ No Cash BackLTV 64.0 % (W/2nd) % ☒ 1st Mtge ☐ 2nd Mtge Loan Program: TR-1☐ Fixed Rate ☐ Buydown ☒ One Yr. ARM ☐ Other: no impounds

- A. ☐ Subject to Mortgage Insurance Approval _____ % Coverage PMI Co.: _____
B. ☐ *Evidence of Sale/CLSG of Property at: _____
Minimum net proceeds: \$ _____
C. ☐ *2nd Mtg. in the amount of \$ _____ @ \$ _____ /Mo. to be in compliance with program guidelines
D. ☐ Evidence that the following accounts have been paid in full prior to or at the time of closing:

1. _____ 2. _____ 3. _____ 4. *John*
E. ☒ Signed/Dated: _____ Original Application/1003 ☒ Final 1003
F. ☐ Project Approval: _____ FNMA _____ FHLMC
G. ☐ *Satisfactory explanation for credit history at: _____
H. ☐ *Satisfactory explanation for inquiries on credit report: _____
I. ☐ *Satisfactory credit history from: _____
J. ☐ *Satisfactory explanation of source of funds in account at _____
K. ☐ *VOE: _____
L. ☐ *VOD: _____
M. ☐ *Copy of current: _____ paystub _____ W-2 for: _____
N. ☐ Signed/Dated: _____ tax returns _____ P&L for: 19 ____, 19 ____, 19 ____
O. ☐ *Copy of lease/rental agreement for: _____
P. ☐ FHA/VA conditions as attached
Q. ☐ Evidence/Compliance with appraisal/CRV/Conditional Commitment requirements
R. ☐ *Clear Final Inspection with two sets of photos (3 with mortgage insurance)
S. ☐ *Satisfactory field review by an approved appraiser
T. ☒ Provide recording information on the contract of sale showing as item #15 on _____
U. ☐ the preliminary title report.
V. ☒ Have appraiser resign page two of letter dated June 24th regarding additional comparables. Also have him sign short cover letter be enclosed in file. *8/1*
W. ☐ _____
X. ☒ Escrow to certify sufficient funds to close.
Y. ☒ Appraiser to supply one additional set of comp pictures for comps #7 thru #12.
Z. ☒ NO CASH OUT
AA. ☒ Letter from borrower regarding reason for refinance.

The following items are also required prior to closing:

01. ☒ Acceptable title binder/prelim
02. ☐ Acceptable survey/plat
03. ☐ Flood Certification
04. ☐ Acceptable termite inspection/clearance
05. ☒ Acceptable hazard insurance policy
06. ☐ Acceptable evidence of flood insurance

Underwriting Comments: _____

JUL 1 1988

Corporate

By: *Angela K. Garza* 6-28-88

Underwriter

Angela K. Garza

Date

2nd Signature

Date

Clients Notified of conditions on: _____

by: _____

*Must be cleared by Underwriter prior to loan closing

111-6772112

Exhibit 7

Advisory Committee Note. — Rule 4(b) is added to the list of those rules that the appellate court may not suspend. The former list of rules that the appellate court could not suspend concerned procedures and time limits that confer jurisdiction upon the court. Under Rule 4(b), the post-judgment motions listed must be filed in a timely manner in the trial

court. If the motions are not filed in a timely manner, the appellant may not take advantage of Rule 4(b) that allows 30 days from the disposition of the motion to file the appeal. Both appellate courts treat the failure to file post-judgment motions in a timely manner as a jurisdictional defect. *Burgers v. Meredith*, 652 P.2d 1320 (Utah 1982).

NOTES TO DECISIONS

Timely filing.

When a motion for summary disposition was clearly meritorious, it would support a suspen-

sion of the time limitation contained in Rule 10, Utah R. App. P. *Bailey v. Adams*, 798 P.2d 1142 (Utah Ct. App. 1990).

TITLE II.

APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS.

Rule 3. Appeal as of right: how taken.

(a) **Filing appeal from final orders and judgments.** An appeal may be taken from a district, juvenile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the

party is not represented by counsel, then on the party at the party's last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

Advisory Committee Note. — The designation of parties is changed to conform to the designation of parties in the federal appellate courts

The rule is amended to make clear that the mere designation of an appeal as a "cross-appel" does not eliminate liability for payment of the filing and docketing fees. But for the

order of filing, the cross-appellant would have been the appellant and so should be required to pay the established fees

Cross-References. — Circuit courts, appeals from, § 78-4-11

Justice courts, appeals from, § 78-5-120

Juvenile courts, appeals from § 78-3a-51

NOTES TO DECISIONS

ANALYSIS

Absence of record
Attorney fees
Denial of intervention
Dismissal by trial court
Filing fees
Filing of notice
Final order or judgment
Judgment nunc pro tunc
Motion to strike
New trial
Partial judgment
Postjudgment orders
Purpose of notice
Review in equity cases
Summary judgment
Unsigned minute entry

Compiler's Notes. — All of the following annotations are taken from cases decided under former Rule 3, R. Utah S. Ct.

Absence of record.

There was nothing for the court to review where the alleged error was not made part of the record *Powers v. Gene's Bldg. Materials, Inc.*, 567 P.2d 174 (Utah 1977)

Attorney fees.

Where plaintiff was entitled to attorney fees

by law, he was entitled to attorney fees incurred on appeal in defending his judgment without the necessity of having to file a cross appeal *Coates v. American Economy Ins. Co.*, 627 P.2d 92 (Utah 1981), *Wallis v. Thomas*, 632 P.2d 39 (Utah 1981)

Denial of intervention.

Order denying with prejudice an application for intervention was appealable *Tracy v. University of Utah Hosp.*, 619 P.2d 340 (Utah 1980)

Dismissal by trial court.

Both an order to dismiss with prejudice, on the merits of the issues under Rule 41(b), U.R.C.P., and an order of dismissal without prejudice under Rule 41(a)(1), U.R.C.P., are final adjudications of the issues and the time for appeal under this rule begins to run with the entry of the order *Steiner v. State*, 27 Utah 2d 284, 495 P.2d 809 (1972)

Denial of defendant's motion to dismiss was not a final judgment subject to appeal *Little v. Mitchell*, 604 P.2d 918 (Utah 1979)

Dismissal without prejudice of plaintiff's action was appealable where the trial court's ruling went to the legal merits of any cause that plaintiff may have framed *Bowles v. State ex*

final judgment from which an appeal could be taken *J.B. & R.E. Walker, Inc. v. Thayne*, 17 Utah 2d 120, 405 P.2d 342 (1965).

Where court granted one defendant's motion to dismiss with prejudice and entered default judgment in favor of that defendant on his counterclaim, but action against other defendants and one defendant's counterclaim remained alive, court's order was not final and an appeal from it would be dismissed *Kennedy v. New Era Indus., Inc.*, 600 P.2d 534 (Utah 1979).

A judgment which disposes of fewer than all of the causes of action alleged in the plaintiff's complaint is not a final judgment from which an appeal may be taken *Salt Lake City Corp. v. Layton*, 600 P.2d 538 (Utah 1979).

A partial summary judgment is not generally a final judgment and hence it is not appealable under the limitations prescribed by this rule *South Shores Concession, Inc. v. State*, 600 P.2d 550 (Utah 1979).

District court order setting aside certain provisions in a default decree of divorce and providing for a further hearing on the matter was not a final ruling from which an appeal could be taken *Pearson v. Pearson*, 641 P.2d 103 (Utah 1982).

Postjudgment orders.

An order vacating a judgment is not a final order from which an appeal can be taken pursuant to this rule *Van Wagenen v. Walker*, 597 P.2d 1327 (Utah 1979).

The final judgment rule does not preclude review of postjudgment orders, such orders were independently subject to the test of finality, according to their own substance and effect *Cahoon v. Cahoon*, 641 P.2d 140 (Utah 1982).

Purpose of notice.

The object of a notice of appeal is to advise the opposite party that an appeal has been

taken from a specific judgment in a particular case *Nunley v. Stan Katz Real Estate, Inc.*, 15 Utah 2d 126, 388 P.2d 798 (1964).

Review in equity cases.

In the appeal of an equity case the Supreme Court may weigh the facts as well as review the law, but will reverse on the facts only when the evidence clearly preponderates against the findings of the trial court *Crimmins v. Simonds*, 636 P.2d 478 (Utah 1981).

In reviewing trial court's findings of fact in equity cases, the Supreme Court would give due deference to the trial court's decision and reverse only when the evidence clearly preponderated against the trial court's findings *Jensen v. Brown*, 639 P.2d 150 (Utah 1981).

Summary judgment

Order setting aside summary judgment was not final judgment from which aggrieved person might appeal as matter of right *Jensen v. Nielsen*, 22 Utah 2d 23, 447 P.2d 906 (1968).

Order denying a motion for summary judgment was not a final order and was not appealable *Denison v. Crown Toyota Motors, Inc.*, 571 P.2d 1359 (Utah 1977).

A summary judgment in favor of one defendant alone does not constitute a final order of judgment where the action against the remaining defendant remains alive *Neider v. State Dep't of Transp.*, 665 P.2d 1306 (Utah 1983).

Unsigned minute entry.

An unsigned minute entry did not constitute an entry of judgment, nor was it a final judgment for purposes of appeal *Wilson v. Manning*, 645 P.2d 655 (Utah 1982), *Utah State Tax Comm'n v. Erekson*, 714 P.2d 1151 (Utah 1986), *Sather v. Gross*, 727 P.2d 212 (Utah 1986), *Ahlstrom v. Anderson*, 728 P.2d 979 (Utah 1986).

An unsigned minute entry does not constitute a final order for purposes of appeal *State v. Crowley*, 737 P.2d 198 (Utah 1987).

COLLATERAL REFERENCES

A.L.R. — Appealability of order suspending imposition or execution of sentence, 51 A L R 4th 939

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3

shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

NOTES TO DECISIONS

ANALYSIS

Attorney fees.
Cross-appeal.
Extension of time to appeal.
Filing of notice.
Filing with county clerk.
Final order or judgment.
Post-judgment motions.
Premature notice.
Reconsideration of order.
Timeliness of notice.
—Date of notice.

Attorney fees.

No cross-appeal is necessary where plaintiffs merely sought attorney's fees incurred in de-

fending their judgment on appeal *Wallis v. Thomas*, 632 P.2d 39 (Utah 1981).

Cross-appeal.

Subdivision (d) requires that a notice of cross-appeal be timely filed. Absent a cross-appeal, a respondent may not attack the judgment of the court below. *Henretty v. Manti City Corp.*, 791 P.2d 506 (Utah 1990) (decided under former R. Utah S. Ct. 4).

Extension of time to appeal.

Neither Rule 6(b), U.R.C.P., granting the court power to extend a time limit where a failure to act in time is due to excusable neglect generally, nor Rule 60(b)(1), U.R.C.P., authorizing the court to relieve from final judgment

dence, internal confidential publications, office memoranda, university press publications, and publications of the state historical society. 1979

37-5-2. Commission to establish, operate and maintain.

The commission shall establish, operate and maintain a publication collection, a bibliographic control system and depositories as provided in this act. 1979

37-5-3. Deposit of copies of publications with commission.

(1) Each state agency shall deposit with the commission copies of each state publication issued by it in such number as shall be specified by the state librarian.

(2) Each political subdivision shall deposit with the commission two copies of each state publication issued by it.

(3) The commission shall forward two copies of each state publication deposited with it by a state agency to the Library of Congress, one copy to the state archivist, at least one copy to each depository library, and retain two copies.

(4) The commission shall forward one copy of each state publication deposited with it by a political subdivision to the state archivist and retain the other copy.

(5) Each state agency shall deposit with the commission two copies of audiovisual materials, and tape or disc recordings issued by it for bibliographic listing and retention in the state library collection. Materials not deemed by the commission to be of major public interest will be listed but no copies will be required for deposit. 1979

37-5-4. List of state agencies' state publications — Distribution.

The commission shall publish a list of each state agency's state publications, which shall provide access by agency, author, title, subject and such other means as the commission may provide. The list shall be published periodically and distributed to depository libraries, state agencies, state officers, members of the Legislature and other libraries selected by the commission, with at least an annual cumulation. Each state agency shall furnish the commission and the state archivist a complete list of its state publications for the previous year, annually. 1979

37-5-5. Designation as depository library.

Upon application, a library in this state may be designated as a complete or selective depository library by the commission. 1979

37-5-6. Contract to provide facilities and service — Complete depository libraries — Selective depository libraries.

To be designated as a depository library, a library must contract with the commission to provide adequate facilities for the storage and use of state publications, to render reasonable service without charge to patrons and reasonable access to state publications. A complete depository library shall receive at least one copy of all state publications issued by state agencies. A selective depository library shall receive those state publications issued by state agencies pertinent to its selection profile and those specifically requested by the library. 1979

37-5-7. Micrographics and other copying and transmission techniques.

The commission may use micrographics or other

copying or transmission techniques to meet the needs of the depository system. 1979

37-5-8. Rules and regulations — Standards.

The commission may adopt rules and regulations necessary to implement and administer the provisions of this act including standards which must be met by libraries to obtain and retain a designation as a depository library. 1979

TITLE 38

LIENS

Chapter

1. Mechanics' Liens.
2. Miscellaneous Liens.
3. Lessors' Liens.
4. Common Carriers' Liens.
5. Judgment Lien — United States Courts.
6. Federal Tax Liens.
7. Hospital Lien Law.
8. Self-service Storage Facilities.
9. Penalty for Wrongful Lien.
10. Oil, Gas and Mining Liens.

CHAPTER 1

MECHANICS' LIENS

Section

- 38-1-1. Public buildings not subject to act.
- 38-1-2. "Contractors" and "subcontractors" defined.
- 38-1-3. Those entitled to lien — What may be attached.
- 38-1-4. Amount of land affected — Lots and subdivisions — Franchises, fixtures, and appurtenances.
- 38-1-5. Priority — Over other encumbrances.
- 38-1-6. Priority over claims of creditors of original contractor or subcontractor.
- 38-1-7. Notice of claim — Contents — Recording — Service on owner of property.
- 38-1-8. Liens on several separate properties in one claim.
- 38-1-9. Notice imparted by record.
- 38-1-10. Laborers' and materialmen's lien on equal footing regardless of time of filing.
- 38-1-11. Enforcement — Time for — Lis pendens — Action for debt not affected.
- 38-1-12. Repealed.
- 38-1-13. Parties — Joinder — Intervention.
- 38-1-14. Decree — Order of satisfaction.
- 38-1-15. Sale — Redemption — Disposition of proceeds.
- 38-1-16. Deficiency judgment.
- 38-1-17. Costs — Apportionment — Costs and attorneys' fee to subcontractor.
- 38-1-18. Attorneys' fees.
- 38-1-19. Payment by owner to contractor — Subcontractor's lien not affected.
- 38-1-20. When contract price not payable in cash — Notice.
- 38-1-21. Advance payments — Effect on subcontractor's lien.
- 38-1-22. Advance payments under terms of contract — Effect on liens.
- 38-1-23. Creditors cannot reach materials furnished, except for purchase price.
- 38-1-24. Cancellation of record — Penalty.

Section

38-1-25. Abuse of lien right — Penalty.

38-1-26. Assignment of lien

38-1-1. Public buildings not subject to act.

The provisions of this chapter shall not apply to any public building, structure or improvement. 1953

38-1-2. "Contractors" and "subcontractors" defined.

Whoever shall do work or furnish materials by contract, express or implied, with the owner, as in this chapter provided, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors. 1953

38-1-3. Those entitled to lien — What may be attached.

Contractors, subcontractors, and all persons performing any services or furnishing or renting any materials or equipment used in the construction, alteration, or improvement of any building or structure or improvement to any premises in any manner and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superintendence, or who have rendered other like professional service, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor, or furnished or rented materials or equipment for the value of the service rendered, labor performed, or materials or equipment furnished or rented by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor, or otherwise. This lien shall attach only to such interest as the owner may have in the property. 1987

38-1-4. Amount of land affected — Lots and subdivisions — Franchises, fixtures, and appurtenances.

The liens granted by this chapter shall extend to and cover so much of the land whereon such building, structure, or improvement shall be made as may be necessary for convenient use and occupation of the land. In case any such building shall occupy two or more lots or other subdivisions of land, such lots or subdivisions shall be considered as one for the purposes of this chapter. The liens provided for in this chapter shall attach to all franchises, privileges, appurtenances, and to all machinery and fixtures, pertaining to or used in connection with any such lands, buildings, structures, or improvements. 1987

38-1-5. Priority — Over other encumbrances.

The liens herein provided for shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground; also over any lien, mortgage or other encumbrance of which the lien holder had no notice and which was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground. 1953

38-1-6. Priority over claims of creditors of original contractor or subcontractor.

No attachment, garnishment or levy under an execution upon any money due to an original contractor from the owner of any property subject to lien under

this chapter shall be valid as against any lien of a subcontractor or materialman, and no such attachment, garnishment or levy upon any money due to a subcontractor or materialman from the contractor shall be valid as against any lien of a laborer employed by the day or piece 1953

38-1-7. Notice of claim — Contents — Recording — Service on owner of property.

(1) Every original contractor within 100 days after the completion of his contract, and except as provided in this section, every person other than the original contractor who claims the benefit of this chapter within 80 days after furnishing the last material or performing the last labor for or on any land, building, improvement, or structure shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien.

(2) This notice shall contain a statement setting forth the following information:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;

(b) the name of the person by whom he was employed or to whom he furnished the material;

(c) the time when the first and last labor was performed, or the first and last material was furnished;

(d) a description of the property, sufficient for identification; and

(e) the signature of the lien claimant or his authorized agent, and the date signed.

(3) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail to either the reputed owner or record owner of the real property a copy of the notice of lien. If the record owner's current address is not readily available, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located. Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

(4) When a subcontractor or any person furnishes labor or material as stated in Subsections (1) through (3) at the request of an original contractor, then the final date for the filing of a notice of intention to hold and claim a lien for a subcontractor or a person furnishing labor or material at the request of an original contractor is 80 days after completion of the original contract of the original contractor. 1987

38-1-8. Liens on several separate properties in one claim.

Liens against two or more buildings or other improvements owned by the same person may be included in one claim; but in such case the person filing the claim must designate the amount claimed to be due to him on each of such buildings or other improvements. 1987

38-1-9. Notice imparted by record.

(1) The recorder must record the claim in an index maintained for that purpose.

(2) From the time the claim is filed for record, all persons are considered to have notice of the claim. 1987

38-1-10. Laborers' and materialmen's lien on equal footing regardless of time of filing.

The liens for work and labor done or material furnished as provided in this chapter shall be upon an equal footing, regardless of date of filing the notice and claim of lien and regardless of the time of performing such work and labor or furnishing such material. 1953

38-1-11. Enforcement — Time for — Lis pendens — Action for debt not affected.

Actions to enforce the liens herein provided for must be begun within twelve months after the completion of the original contract, or the suspension of work thereunder for a period of thirty days. Within the twelve months herein mentioned the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action, and the burden of proof shall be upon the lien claimant and those claiming under him to show such actual knowledge. Nothing herein contained shall be construed to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same. 1953

38-1-12. Repealed.

1981

38-1-13. Parties — Joinder — Intervention.

Lienors not contesting the claims of each other may join as plaintiffs, and when separate actions are commenced the court may consolidate them and make all persons having claims filed parties to the action. Those claiming liens who fail or refuse to become parties plaintiff may be made parties defendant, and any one not made a party may at any time before the final hearing intervene. 1953

38-1-14. Decree — Order of satisfaction.

In every case in which liens are claimed against the same property the decree shall provide for their satisfaction in the following order:

- (1) Subcontractors who are laborers or mechanics working by the day or piece, but without furnishing materials therefor,
- (2) All other subcontractors and all materialmen;
- (3) The original contractors. 1953

38-1-15. Sale — Redemption — Disposition of proceeds.

The court shall cause the property to be sold in satisfaction of the liens and costs as in the case of foreclosure of mortgages, subject to the same right of redemption. If the proceeds of sale after the payment of costs shall not be sufficient to satisfy the whole amount of liens included in the decree, then such proceeds shall be paid in the order above designated, and pro rata to the persons claiming in each class where the sum realized is insufficient to pay the persons of such class in full. Any excess shall be paid to the owner. 1953

38-1-16. Deficiency judgment.

Every person whose claim is not satisfied as herein provided may have judgment docketed for the balance unpaid, and execution therefor against the party personally liable. 1953

38-1-17. Costs — Apportionment — Costs and attorneys' fee to subcontractor.

As between the owner and the contractor the court shall apportion the costs according to the right of the case, but in all cases each subcontractor exhibiting a lien shall have his costs awarded to him, including the costs of preparing and recording the notice of claim of lien and such reasonable attorney's fee as may be incurred in preparing and recording said notice of claim of lien. 1961

38-1-18. Attorneys' fees.

In any action brought to enforce any lien under this chapter the successful party shall be entitled to recover a reasonable attorneys' fee, to be fixed by the court, which shall be taxed as costs in the action. 1961

38-1-19. Payment by owner to contractor — Subcontractor's lien not affected.

When any subcontractor shall have actually begun to furnish labor or materials for which he is entitled to a lien no payment to the original contractor shall impair or defeat such lien; and no alteration of any contract shall affect any lien acquired under the provisions of this chapter. 1953

38-1-20. When contract price not payable in cash — Notice.

As to all liens, except that of the contractor, the whole contract price shall be payable in money, except as herein provided, and shall not be diminished by any prior or subsequent indebtedness, offset or counterclaim in favor of the owner and against the contractor, except when the owner has contracted to pay otherwise than in cash, in which case the owner shall post in a conspicuous place on the premises a statement of the terms and conditions of the contract before materials are furnished or labor is performed, which notice must be kept posted, and when so posted shall give notice to all parties interested of the terms and conditions of the contract. Any person willfully tearing down or defacing such notice is guilty of a misdemeanor. 1953

38-1-21. Advance payments — Effect on subcontractor's lien.

No payment made prior to the time when the same is due under the terms and conditions of the contract shall be valid for the purpose of defeating, diminishing or discharging any lien in favor of any person except the contractor, but as to any such lien such payment shall be deemed as if not made, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract or be or become indebted to the owner for damages for nonperformance of his contract or otherwise. 1953

38-1-22. Advance payments under terms of contract — Effect on liens.

The subcontractors' liens provided for in this chapter shall extend to the full contract price, but if at the time of the commencement to do work or furnish materials the owner has paid upon the contract, in accordance with the terms thereof, any portion of the contract price, either in money or property, the lien of the contractor shall extend only to such unpaid balance, and the lien of any subcontractor who has notice of such payment shall be limited to the unpaid balance of the contract price. No part of the contract price shall by the terms of any contract be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, for the

purpose of evading or defeating the provisions of this chapter. 1953

38-1-23. Creditors cannot reach materials furnished, except for purchase price.

Whenever materials have been furnished for use in the construction, alteration or repair of any building, work or other improvement mentioned in Section 38-1-3 such materials shall not be subject to attachment, execution or other legal process to enforce any debt due by the purchaser of such materials, other than a debt due for the purchase money thereof, so long as in good faith the same are about to be applied to the construction, alteration or repair of such building or improvement. 1953

38-1-24. Cancellation of record — Penalty.

The claimant of any lien filed as provided herein, on the payment of the amount thereof together with the costs incurred and the fees for cancellation, shall at the request of any person interested in the property charged therewith cause said lien to be canceled of record within ten days from the request, and upon failure to so cancel his lien within the time aforesaid shall forfeit and pay to the person making the request the sum of \$20 per day until the same shall be canceled, to be recovered in the same manner as other debts. 1953

38-1-25. Abuse of lien right — Penalty.

Any person who knowingly causes to be filed for record a claim of lien against any property, which contains a greater demand than the sum due him, with the intent to cloud the title, or to exact from the owner or person liable by means of such excessive claim of lien more than is due him, or to procure any advantage or benefit whatever, is guilty of a misdemeanor. 1953

38-1-26. Assignment of lien.

All liens under this chapter shall be assignable as other choses in action, and the assignee may commence and prosecute actions thereon in his own name in the manner herein provided. 1953

CHAPTER 2

MISCELLANEOUS LIENS

- Section
- 38-2-1. Lien on livestock — For feed and care.
 - 38-2-2. Liens of hotels and boardinghouse keepers.
 - 38-2-3. Repairman's lien on personal property — Lien subject to rights of secured parties.
 - 38-2-3.1. Special lien on personal property for services rendered — General lien of dry cleaning establishments, laundries, and shoe repair shops.
 - 38-2-3.2. Sale of unclaimed personal property.
 - 38-2-4. Disposal of property by lienholder — Procedure.
 - 38-2-5. Action for deficiency.

38-2-1. Lien on livestock — For feed and care.

Every ranchman, farmer, agistor, herder of cattle, tavern keeper or livery stable keeper to whom any domestic animals shall be entrusted for the purpose of feeding, herding or pasturing shall have a lien upon such animals for the amount that may be due him for such feeding, herding or pasturing, and is authorized to retain possession of such animals until such amount is paid. 1953

38-2-2. Liens of hotels and boardinghouse keepers.

Every innkeeper, hotel keeper, boardinghouse or lodginghouse keeper shall have a lien on the baggage and other property in and about such inn belonging to or under control of his guests or boarders for the proper charges due him for their accommodation, board and lodging, for money paid for or advanced to them, and for such other extras as are furnished at their request. The innkeeper, hotel keeper, boardinghouse or lodginghouse keeper may detain such baggage and other property until the amount of such charge is paid, and the baggage and other property shall not be exempt from attachment or execution until the hotel or boardinghouse keeper's lien and the costs of enforcing it are satisfied. 1953

38-2-3. Repairman's lien on personal property — Lien subject to rights of secured parties.

Every person who shall make, alter or repair, or bestow labor upon, any article of personal property at the request of the owner or other person entitled to possession thereof shall have a lien upon such article for the reasonable value of the labor performed and materials furnished and used in making such article or in altering or repairing the same, and may retain possession thereof until the amount so due is paid; provided such lien and right to possession shall be subject and subordinate to the rights and interests of any secured parties in such personal property unless such secured party has requested such person to make, alter or repair or bestow labor upon such property. 1977

38-2-3.1. Special lien on personal property for services rendered — General lien of dry cleaning establishments, laundries, and shoe repair shops.

Every person who, while lawfully in possession of an article of personal property, renders any service to the owner or owners thereof, by labor or skill performed upon said personal property at the request or order of said owner, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner or owners for such service; and every laundry proprietor, person conducting a laundry business, dry cleaning establishment, proprietor and person conducting a dry cleaning establishment, shoe repair establishment proprietor and person conducting a shoe repair establishment has a general lien, dependent on possession, upon all personal property in his hands belonging to a customer, for the balance due him from such customer for laundry work, and for the balance due him for dry cleaning work, and for the balance due him for shoe repair work; but nothing in this section shall be construed to confer a lien in favor of a wholesale dry cleaner on materials received from a dry cleaning establishment proprietor or a person conducting a dry cleaning establishment. The terms "person" and "proprietor" as used in this section shall include an individual, firm, partnership, association, corporation and company. 1953

38-2-3.2. Sale of unclaimed personal property.

(A) Any garments, clothing, shoes, wearing apparel or household goods, remaining in the possession of a person, on which cleaning, pressing, glazing, laundry or washing or repair work has been done or upon which alterations or repairs have been made or on which materials or supplies have been used or furnished by said person holding possession thereof, for

Section

- 57-3-3. Effect of failure to record.
 57-3-4. Certified copies entitled to record in another county — Effect.
 57-3-5 to 57-3-9. Repealed.
 57-3-10. Legal description of real property and names and addresses required in instruments.
 57-3-11. Original documents required — Captions — Legibility.

57-3-1. Certificate of acknowledgment or of proof of execution a prerequisite.

A certificate of the acknowledgment of any document, or of the proof of the execution of any document that is signed and certified by the officer taking the acknowledgment as provided in this title, entitles the document and the certificate to be recorded in the office of the recorder of the county where the real property is located. 1988

57-3-2. Record imparts notice — Recordation not affected by change in interest rate — Validity of document not affected — Third person not charged with notice of unnamed interests — Conveyance free and clear of unrecorded interests.

(1) Each document executed, acknowledged, and certified, in the manner prescribed by this title; each original document or certified copy of a document complying with Section 57-4a-3, whether or not acknowledged; and each financing statement complying with Section 70A-9-402, whether or not acknowledged; shall, from the time of filing with the appropriate county recorder, impart notice to all persons of their contents.

(2) If a recorded document was given as security, a change in the interest rate in accordance with the terms of an agreement pertaining to the underlying secured obligation does not affect the notice or alter the priority of the document provided under Subsection (1).

(3) This section does not affect the validity of a document with respect to the parties to the document and all other persons who have notice of the document.

(4) The fact that a recorded document recites only a nominal consideration, names the grantee as trustee, or otherwise purports to be in trust without naming beneficiaries or stating the terms of the trust does not charge any third person with notice of any interest of the grantor or of the interest of any other person not named in the document.

(5) The grantee in a recorded document may convey the interest granted to him free and clear of all claims not disclosed in the document in which he appears as grantee or in any other document recorded in accordance with this title that sets forth the names of the beneficiaries, specifies the interest claimed, and describes the real property subject to the interest. 1988

57-3-3. Effect of failure to record.

Each document not recorded as provided in this title is void as against any subsequent purchaser of the same real property, or any portion of it, if:

- (1) the subsequent purchaser purchased the property in good faith and for a valuable consideration; and
- (2) the subsequent purchaser's conveyance is first duly recorded. 1988

57-3-4. Certified copies entitled to record in another county — Effect.

Whenever a document is of record in the office of the county recorder of any county, a copy of the record of the document certified by the county recorder may be recorded in the office of the county recorder of any other county. The recording of a certified copy in the office of the county recorder of another county has the same force and effect as if the original document had been recorded in the other county. 1988

57-3-5 to 57-3-9. Repealed.

1955, 1963, 1988

57-3-10. Legal description of real property and names and addresses required in documents.

(1) A document executed after July 1, 1983, is entitled to be recorded in the office of any county recorder only if the document contains a legal description of the real property affected.

(2) A document affecting title to real property presented for recording after July 1, 1981, is entitled to be recorded in the office of any county recorder only if the document contains the names and mailing addresses of the grantees in addition to the legal description required under Subsection (1).

(3) Each county recorder shall refuse to accept a document for recording if it does not conform to the requirements under this section. 1988

57-3-11. Original documents required — Captions — Legibility.

Unless otherwise provided, documents presented for recording in the office of the county recorder shall be originals and shall contain a brief caption stating the nature of the document. Documents presented for recording shall also be sufficiently legible for the recorder to make certified copies. 1988

CHAPTER 4

VALIDATING CERTAIN CONVEYANCES

(Repealed by Laws 1988, ch. 155, § 24.)

57-4-1 to 57-4-4. Repealed.

CHAPTER 4a

EFFECTS OF RECORDING

Section

- 57-4a-1. Document recordable despite defects.
 57-4a-2. Recorded document imparts notice of contents despite defects.
 57-4a-3. Public document recordable without acknowledgment.
 57-4a-4. Presumptions.

57-4a-1. Document recordable despite defects.

Each document executed and acknowledged on or before July 1, 1988, may be recorded in the office of the county recorder regardless of any defect or irregularity in its execution, attestation, or acknowledgment. 1988

57-4a-2. Recorded document imparts notice of contents despite defects.

A recorded document imparts notice of its contents regardless of any defect, irregularity, or omission in its execution, attestation, or acknowledgment. A certified copy of a recorded document is admissible as evidence to the same extent the original document would be admissible as evidence. 1988

78-2-2. Supreme Court jurisdiction.

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the Board of State Lands and Forestry;

(iv) the Board of Oil, Gas, and Mining; or

(v) the state engineer;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

(4) The Supreme Court may transfer to the Court of Appeals any of the matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) general water adjudication;

(f) taxation and revenue; and

(g) those matters described in Subsection (3)(a) through (f).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.