1966

Western Mortgage Loan Corporation v. Cottonwood Construction Company, a Corporation, et al. : Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

WESTERN MORTGAGE LOAN CORPORATION, a corporation,
Plaintiff-Respondent,
vs.
COTTONWOOD CONSTRUCTION COMPANY, a corporation, et al.,
Defendants,
* * * * *
OSCAR E. CHYTRAUS COMPANY, INC., a corporation, GIBBONS & REED CONCRETE PRODUCTS COMPANY, a corporation, RICHARD P. GARRICK, BOISE CASCADE CORPORATION, a corporation,
Defendants-Appellants.

Case No. 10516

APPELLANTS' BRIEF

Intermediate Appeal from Interlocutory Pretrial Rulings of the 3rd District Court for Salt Lake County, Honorable Aldon J. Anderson, Judge

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STATEMENT OF THE KIND OF CASE

This intermediate appeal involves the relative priorities of mechanic's lienors upon, and of a future advance construction mortgagee to, Lot 10, Lazy Bar Subdivision, an improved residential subdivision lot in Salt Lake County.

DISPOSITION IN THE LOWER COURT

Ten cases, including the "bellwether" (Civil No. 147326 below) in which this appeal is taken, involving twelve improved residential lots in Lazy Bar Subdivision in Salt Lake County were consolidated because of similarity of issues of fact and law. By its fifth supplemental pretrial order, the trial court made certain rulings, of which the following two are the subject of this intermediate appeal:

1. A ruling that the operative documents evidencing the mortgage transaction between Western Mortgage Loan Corporation and Cottonwood Construction Company provided for "obligatory" (or more properly, "non-volitional")[1] advances and that such advances, and the mortgagee's attorneys' fees and costs take priority as of the time of recordation of the mortgage. (R. 133, 134)

2. A denial of the mechanic's lienors' motion for partial summary judgment to the effect that certain work constituted the "commencement to do work or furnish materials on the ground for the structure or improvement" within the meaning of Utah Code Annotated 38-1-5 (1953). (R. 133, 134)

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1. The traditional phrasing of the point of law here involved is that, if advances made under a prior mortgage are contractually "obligatory", their priority none-the-less attaches as of the recordation of such mortgage, but that — if future advances are "optional" with the lender — the priority of each such advance attaches as of the date of the advance itself, *Anno.,* 80 A.L.R. 2d 179, 191. Appellants consider, however, that certain case authority is more readily understood if the formula is couched in somewhat different terminology, as follows: if advances made under a prior mortgage are contractually "non-volitional" with the lender, their priority attaches as of the recordation of the mortgage, but — if future advances are entirely "volitional" with the lender — the priority of each such advance attaches as of the date of the advance itself. The point is that the question is whether or not the lender's *sole discretion* is involved to any such advance. For this reason, the "volitional" — "non-volitional" terminology is utilized more often than not herein.

RELIEF SOUGHT ON APPEAL

Appellants seek the following relief on intermediate appeal:

1. A determination that the construction financing transaction did not provide for obligatory (or, more properly, "non-volitional") advances but that, on the contrary, it provided for optional (or, more properly, "volitional") advances which take priority only as of the time of each such advance, or

2. Determination that, in any event, volitional expenditures made at the option of the mortgagee subsequent to the default of the borrower take priority only as of he time of each such expenditure.

3. Remand with instructions to grant the mechanic's lienors' motion for partial summary judgment to the effect that the work evidenced by affidavits in support of said motion constituted "commencement to do work or furnish materials on the ground for the structure or improvement" within the meaning of Utah Code Annotated 38-1-5 (1953), thus establishing the priority date for all mechanic's lien holders.

STATEMENT OF THE FACTS

This is an intermediate appeal from interlocutory rulings noted. Documents have been admitted in evidence. Depositions have been published. Admissions have been made by pleadings or otherwise. Certain facts have been developed by affidavits. No testimony yet has been presented personally to the trier of fact.

Some time prior to the beginning of 1960, probably the latter part of 1959, the owners of an unimproved tract of Salt Lake County realty decided to develop a residential subdivision thereon. They entered into a contract with Harrison & Moore, a partnership, which contract provided, in part, for sale of the land to the partnership for $84,000 and further that the purchasers would develop a subdivision or subdivisions on the land, including platting of the land, installation of water mains, grading and surfacing of roads, installation of curb and gutter, and other improvements necessary under applicable ordinances. The agreement further provided for payment for individual lots and the building of homes thereon. The individual lots could be paid for by mortgages and notes subordinated to construction mortgages. It was contemplated that they would be paid out when the homes were sold. (R. 163-168)

Harrison & Moore, in turn, contracted with James A. Finnegan, Jr., and wife, in essentially the same terms but at slightly higher prices. In addition, part of the price to be paid by Finnegan was to go directly to the surveyor for work done. Finnegans, in turn, assigned their interest to Cottonwood Construction Company, a corporation, of which Finnegan was one of the principals. (R. 169-177)

Early in 1960 a subdivision plat was submitted to the county officials. It contained 55 lots, and was known as Lazy Bar subdivision. County approval was obtained in the latter part of 1960.

Commencing in the latter part of 1959 and going into approximately October of 1960, Charles V. King,

licensed engineer and surveyor, surveyed the land, platted it, placed visible stakes upon the ground marking the lots, including Lot 10, thus defining the intended subdivision development. (R. 69)

Following the surveying and platting, Lloyd Jackson and Rex L. Jackson, contractors, installed the roads, curb and gutter, sidewalks, water mains, sewer mains and sewer laterals throughout most of the subdivision, including Lot 10. The lateral sewer line installed on Lot 10 terminated inside the lot itself by some three feet, and in installing the sewer lateral the trench required for it extended into the lot inside the platted lot line approximately eleven feet. Installation of the sewer mains and laterals was completed about January 1, 1961. Water main installation was completed about August, 1962. Roads, curb and gutter were commenced in 1961 and completed in 1962. (R. 72-75)

Mountain States Telephone & Telegraph Company erected utility poles in the subdivision, including one on Lot 10. The installation included ground anchors and the stringing of telephone cables to serve Lot 10. (R. 80)

Following the foregoing work, short term future advance construction financing on several of the lots in the subdivision was obtained from plaintiff, Western Mortgage Loan Corporation (hereinafter designated Western), or United Savings and Loan Association, construction mortgagee in some of the companion cases. (R. 152, pages 5, 6, 11)

Application for future advance construction financing on Lot 10 was made to Western. Upon approval by

Western's loan committee, documents evidencing the transaction were prepared, dated all the same date, and executed by the parties. (R. 152, page 8) The five documents, dated October 29, 1962, used for the future advance construction financing of Lot 10 were:

1. Note.
2. Mortgage.
3. Building and Loan Agreement and Assignment of Account. (hereinafter designated Loan Agreement)
4. Release, Indemnity and Schedule A. (hereinafter designated Schedule A)
5. Pre-construction Affidavit. (All these documents are in R. 151, Exhibits W-2)

The note is in the face amount of $15,750.00. It is secured by the mortgage which was recorded October 29, 1962, the date it bears.

The Loan Agreement specifically incorporates Schedule A.

Although the Loan Agreement provides that the net proceeds of the loan shall be deposited in a special non-interest bearing account, no such deposit was ever made. In fact there was no segregation of funds from the general funds of the lender and no funds were in fact committed thereto in advance by the lender. (R. 82-3)

Schedule A provides, as here pertinent, for the disbursement of funds to be in the discretion of the lender, contains provisions exculpating the lender from almost

all liability otherwise usually incident to such a transaction, lists a schedule of fund advances but provides also that changes in this schedule of advancements "as to amounts and time of disbursement may be made at any time by the [lender] as it may, in its sole discretion, determine."

In the Pre-construction Affidavit, Finnegan and an associate stated that no work has been started and no materials furnished for Lot 10.

Of the five documents evidencing the transaction between the lender and the borrower, only the mortgage, which recites, contrary to the fact, that the full $15,750.00 had been received by the borrower, was placed on record. The remaining four documents were not.

Western assigned its mortgage to First Security Bank of Utah, N.A. as security. First Security Bank of Utah, N.A. was brought into the case as an involuntary defendant.

As shown by its ledger, Western attributed advances to Lot 10 at frequent intervals from October 31, 1962, to January 24, 1963. (R. 151, Exhibit W-84) At about this time, Western, learning of purported misuse of funds by the borrowers principals, refused further advances to Cottonwood, thereby stopping work on Lot 10 and other lots. (R. 152, page 18; R. 2)

Paragraph 10 of the unrecorded Loan Agreement provided that upon default of the borrower, including work stoppage by the lender under the terms of the agreement, the lender could, at its option, (1) declare all sums advanced immediately due and payable and be

released from all further obligations to the borrower, or (2) take possession of the premises, finish improvements and charge the costs thereof to the borrower to be secured by the note and mortgage. (R. 151, Exhibits W-2) These rights of the lender were cumulative and not to the prejudice of any other rights under its mortgage.

Although the lender was at this stage relieved of any obligation to advance further funds, it voluntarily and without benefit of a receiver, took possession of the premises and completed the improvements thereon, charging all expenditures, costs and various miscellaneous fees to the borrower. Then several months later it brought this suit to foreclose, claiming all advances, both before and after default to be secured by the mortgage and to take priority as of the recording of the mortgage. (R. 152, page 18; R. 151, Exhibits W-84)

Western had advanced $9,462.04, according to its ledger sheet, at the time it caused stoppage of the work and exercised its option to enter the premises and take over the job. (R. 151, Exhibits W-84)

Liens for unpaid materials were filed by Oscar E. Chytraus Co. in the amount of $665.38 (R. 40); by Gibbons & Reed Concrete Products Company in the amount of $479.83 (R. 35); by Richard P. Garrick in the amount of $283.46 (R. 45); and Boise Cascade Corporation in the amount of $508.33 (R. 36); all for sums due for materials furnished prior to Western's exercise of its option.

Western's complaint prayed for $14,312.64 and attorneys' fees and costs, (R. 1) up to the time of the

complaint. It also prayed for such additional sums as might have been expended by it subsequent to the complaint. Exhibit W-84 shows a total of $16,435.47 attributed to Lot 10 as of January 8, 1965. Thus $6,973.43 of the amount prayed for by Western, not including attorney's fees and costs attributable by it to this same expenditure, represents expenditures or charges made by Western subsequent to its exercise of its option to enter the premises and take over the project.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN RULING THAT CONSTRUCTION FINANCING ARRANGEMENT BETWEEN WESTERN MORTGAGE LOAN CORPORATION AND COTTONWOOD CONSTRUCTION COMPANY PROVIDED FOR NONVOLITIONAL ADVANCES AND THAT ALL SUCH ADVANCES THEREFORE TOOK PRIORITY AS OF THE TIME OF RECORDATION OF THE MORTGAGE.

(A) INSTEAD, THE CONSTRUCTION FINANCING ARRANGEMENT PROVIDED FOR VOLITIONAL ADVANCES AND THUS EACH ADVANCE MADE THEREUNDER TAKES PRIORITY ONLY AS OF ITS DATE.

This point concerns a future advance construction financing arrangement, the express written terms of which are before the Court. We are not concerned with construction financing in general nor with the various

other types of arrangements which might be used for construction financing.[2] It may be appropriately here pointed out that no evidence was presented to the trial court, nor is any before this Court, to the effect that the written documents and their terms as here used are typical or atypical of the documents and terms used in the construction financing business. Moreover, no reported construction financing cases have been found dealing with the *specific language* under scrutiny in this Point.

The issue at hand is what the parties agreed to. What may have been desirable or ordinary in such an agreement is not germane except to the extent that the documents used might fairly accomplish such purpose by their own terms — not by Sunday morning quarterbacking.

Nor should it be assumed that the mere fact that construction was the purpose for which money was borrowed dictates by some innate legerdemain the legal consequences of the transaction, thus avoiding all recourse to the terms of the agreement between the parties.[3]

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2. See Appendix A.

3. The mortgagee evidenced below understandable enthusiasm for the obiter dictum in *Micele v. Falduti,* 101 N. J. Eq. 103, 137 Atl. 92 (1927) to the effect that "(a)ny building and loan mortgage advances are not optional" in that "the building and loan is bound to make the advances." Although the opinion does not enlighten as to the terms of the loan agreement therein, if the New Jersey Court meant to suggest that advances agreed by the parties to be discretionary would be held non-discretionary if inserted in a *construction loan* agreement, it was far wide of the mark. See *Gray v. McClellan,* 214 Mass. 92, 100 N. E. 1093 (1913) and *Elmendorf-Anthony Co. v. Dunn,* 10 Wash. 2d 29, 116 P. 2d 253 (1941) for case decisions negativing this proposition. Also see Spradling, "Legal Hazards of Construction Lending," 19 *Business Lawyer* 221 (1963) and "The Open-End Mortgage — Future Advances. A Survey," 5 *DePaul Law Review* 76, 78 (1955) for scholarly articles which recognize that construction mortgage advances are not immune from the "volitional - non-volitional" rule. When read in context, in accord is Kratavil's chapter on "Mortgage Law" in the business school text, Pease and Kerwood, *Mortgage Banking,* (1965).

The primary rules of law in the area here concerned are well established. If a mortgagee is legally bound to make advances, the fact that such advances might occur subsequent in time to the recording of the mortgage does not alter the priority of such advances — absent other factors not here pertinent, such advances relate back to the time of the recording of the mortgage. The reason for this rule is sound. Where the lender is bound to make the advances, he is unable to exercise discretion and being so bound is a legal detriment to him just as though he had already parted with the money. In legal contemplation, he is simply making deferred payments.

Typical of the cases expressing this line of authority are: *E. K. Wood Lumber Co.* v. *Mulholland,* 118 Cal. App. 475, 5 P.2d 669 (1931), where the lender could not of its own volition refuse advances, the advances being tied to the progress of the work and an appraisal thereof; *Lampson Lumber Co.* v. *Chiarelli,* 100 Conn. 301, 123 Atl. 909, 912 (1924), where there was a positive obligation to sell supplies to a party for use in the construction of a certain building at current prices; and *Boise Payette Lumber Co.* v. *Winward,* 47 Idaho 485, 276 Pac. 971, 972 (1929), where the mortgagee was bound by his original agreement to make the advances specified.

The rule is otherwise where the lender may in its own discretion refuse any or all such advances. Thus, where the full amount of the purported loan is not paid over to the borrower, but under the terms of the agreement the lender may, at its own volitition, refuse to make future advances, any such advances take priority as to intervening liens only as of the time of each such dis-

bursement and do not relate back to the recordation of the mortgage.

Disregarding occasional, varied statutory modification, not obtaining in Utah, the above rule is universally applied to construction mortgages — as well as any other type of mortgage. *Superior Lumber Co.* v. *National Bank of Commerce,* 176 Ark. 300, 2 S.W.2d 1093 (1928); *Community Lumber Co.* v. *California Publ. Co.,* 215 Cal. 274, 10 P.2d 60 (1932); *Yost-Linn Lumber Co.* v. *Williams,* 121 Cal. App. 571, 9 P.2d 324 (1932); *W. P. Fuller & Co.* v. *McClure,* 48 Cal. App. 2d 185, 191 Pac. 1027 (1920); *Balch* v. *Chaffee,* 73 Conn. 318, 47 Atl. 327 (1900); *Boise Payette Lumber Co.* v. *Winward,* 47 Idaho 485, 276 Pac. 971 (1929) (dictum); *Gray* v. *McClellan,* supra; *Finlayson v. Crooks,* 47 Minn. 74, 49 N.W. 398 (1891); *Garey* v. *Rufus Lillard Co.,* 196 Okla. 421, 165 P.2d 344 (1945) (where the mortgage contained no provision requiring mortgagee to make advances, advances were held to be separate transactions inferior to intervening mechanics liens); *Home Saving & Loan Association* v. *Sullivan,* 140 Okla. 300, 284 Pac. 30 (1929). *Heller* v. *Gate City Building and Loan Assn.,* 75 N.M. 596, 408 P.2d 753 (1965); *Elmendorf-Anthony Co.* v. *Dunn,* supra.[4]

In *W. P. Fuller & Co., supra,* all advances over a certain amount were at the discretion of the lender. His lien was held inferior to the liens of intervening mechanics' lien claimants as to the advances he was not obligated to make.

Although no Utah case squarely in point has been found, *Utah Savings & Loan Association* v. *Mecham,*

12 Utah 2d 335, 366 P.2d 598 (1961) is persuasive precedent for the proposition that this Court recognizes the foregoing rules and specifically that discretionary advances take priority only as of the time of each such advance. In *Mecham* there was no agreement concerning future advances, merely a mortgage regular on is face for a sum certain. Under this set of facts, it was held that the law implied an obligation consonant with the terms of the mortgage and that, if the mony had not been paid out, the lender was under an obligation to pay it out according to the instructions of the borrower.

This Court said:

> " . . . A mortgagee, who is loaning money to a mortgagor-borrower, is obligated to pay out the money in accordance with the directions of the borrower. This is especially so where, as in the instant case, a sum certain is stated in the mortgage and *no provisions are made for future advances.*" (Emphasis added)

The basis for the rule regarding the priority only as of its own date of any discretionary advance rests on sound legal principal. A mortgage is security for a debt. Where there is a binding obligation to make an advance it may be equated in law with an advance already made, but where there is no such binding obliga-

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4. The "volitional - non-volitional" rule is equally as applicable to (1) loan agreements secured by a mortgage for a stated sum which, in fact, secures future volitional advances up to that amount, as to (2) a loan transaction secured by an "open end" mortgage for a stated sum, in fact received by the mortgagor, plus open-end future advances. *Gray v. McClellan,* supra, involved the first type of arrangement. Far from restricting the "volitional - non-volitional" rule to "open end" mortgages, a leading article on the subjct, Blackburn, "Mortgages to Secure Future Advances," 21 *Missouri Law Review* 209, 213-215 (1956), lists the "open end" mortgage as merely one of four types of secured transactions in which that rule may come into play — another of which is the type of transaction involved in our case.

tion the analogy fails and without a debt there is no mortgage.

As a matter of fundamental fairness, no other conclusion is tenable. The law gives to a materialman or laborer improving property at the owner's instance the statutory right to look to the property for compensation therefor if need be, subject only to prior valid rights in the property. To make this right subject to subsequent, discretional advances of a lender would completely emasculate and nullify the legislatively established protection for the mechanic's lienor, for the lender could with impunity advance or refuse to advance as it chose, swallowing up, at its own volition, and for its own benefit, the protection intended the mechanic's lienors.

The documents evidencing the transaction between Western and Cottonwood demonstrate on their face that Western here was not under a binding legal obligation to make advances, but that such advances were completely within the sole discretion of Western and further that, since Western was not liable for failure to make advances, no legal requirement to make advances existed.

In determining the nature of the instant transaction recourse to all the documents involved is required. *Gary* v. *McClellan,* 214 Mass. 92, 100 N.E. 1093, 1094 (1913) and *Doran* v. *Britto,* 52 R.I. 425, 161 Atl. 141 (1932) hold that written agreements outside the mortgage may properly show the transaction to be discretionary. In fact, parol evidence would be admissible for this purpose. *Frank E. Ewing Co.* v. *Krafft Co.,* 222 Md. 21, 158 A.2d 654, 659 (1960); *W. P. Fuller & Co.* v. *McClure,* 48 Cal. App. 185, 191 Pac. 1027, 1030 (1920).

Western's contemporaneously executed documents, all of which were integral parts of the transaction may be — in fact, must be — considered together in determining the legal effects of the transaction.

In addition to simultaneous execution, the operative documents specifically refer to each other and specifically incorporate each other into one integrated agreement.

That the mortgagee was not bound to make future advances, but that making such future advances was entirely discretionary with it is patent upon an examination of the agreements prepared by it and used by it.

The second unnumbered paragraph of the Loan Agreement provides that the net proceeds of the loan should not be given the borrower, but, on the contrary, would be deposited in an account with the lender (which was not done (R. 82-3)) and that such account was assigned by the borrower to the lender as security for itself.[5] That paragraph further provides:

> "Each of the undersigned acknowledges that he has no right to the moneys in the Account, other than to have the same used by the Lender in accordance with this Agreement, which the Lender agrees to do, upon its acceptance of this Agreement."

Paragraph 5 of the Loan Agreement provides:

> "Subject to the provisions of this Agreement, the Account shall be disbursed by the Lender from time to time as the construction of the improvements progress in accordance with Schedule "A" attached hereto, . . . Such disbursements may be made to any of the undersigned, or, at the option of the Lender, may be made to contractors, mate-

> rialmen and laborers, or any of them, for work done or labor furnished in connection with such improvements."

Schedule A, which also refers back to the Loan Agreement, provides, in part:

> "It is agreed that *such disbursements are to be made wholly within the discretion of the* [*lender*] and we hereby release said [lender] from any liability for any error of judgment or for any act done or steps taken or omitted by it in good faith, or based on any mistake of fact or law, or for anything it may do or refrain from doing in connection with such disbursements, excepting willful misconduct of its employees, it being particularly understood that said [lender] may take any action in connection with such disbursements in reliance upon any notice, request, waiver, consent, receipt or other paper or document believed by it to be genuine and signed by the parties purporting to have executed it. It is understood that such disbursements will be made by you in accordance with "Schedule A" as follows:" (Then follows a schedule related to stages of construction.) (Emphasis supplied)

In addition to the discretionary power and the exculpatory immunity from liability provided by the above paragraph, Schedule A effectively removes any doubt as to the optional nature of the lender's advances by specifically providing, immediately following the schedule listing, that:

> *"Changes in the above "Schedule A" as to*

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5. In fact, no such separate account was established in the sense that moneys were segregated out of the funds otherwise available to mortgagee. The bookkeeping "credit" to such account was, therefore, a mere fiction.

amounts and time of disbursements may be made at any time by the [lender] as it may, in its sole discretion, determined." (Emphasis added)

Although the note and mortgage recite receipt of the funds supposedly provided thereby, in fact, not one cent had been disbursed, and under these broad provisions of Schedule A, not one cent need be disbursed by the lender should it, in its "sole discretion" determine not to so disburse. Since the disbursements are relegated to the "sole discretion" of the lender, no legal right inhered in the borrower to compel disbursement and no legal penalty could be imposed upon the lender if in its "whole" or "sole" discretion it determined not to disburse.

For the following five reasons — each sufficient unto itself — disbursements, from the very inception of the financing arrangement, remained within the control of the lender and were legally optional upon its part, and in no sense obligatory:

1. Disbursements were wholly within the discretion of the lender.

2. The borrower released the lender from contractual liability for anything it might do or fail to do in this regard.

3. Disbursements were not made when the documents were executed and were not to be even expected until certain stages of construction had been completed.

4. *And even then,* in its "sole discretion" the lender could at any time alter the time when it would make advances, and

5. *In addition thereto,* in its "sole discretion" the lender could alter at any time the amount of advances.

With the power to do all these things, and be relieved from contract liability for so doing, the lender could not be forced to disburse — *ergo,* disbursements, if and when made, were in contemplation of law volitional or optional, and while binding as between the parties, would take priority as to intervening liens only as of the time of each such disbursement.

A party to a contract is bound by the words used. This Court said in *Valcarce* v. *Bitter,* 12 Utah 2d 61, 362 P.2d 427, 428 (1961):

> "(T)he court cannot fabricate the kind of contract the parties ought to have made and enforce it."

Regardless of any protestation by one of the parties to the instant contract that it was intended to provide for nondiscretionary payments, the fact remains that it did not.

The intentional use of the words "discretion" and "sole discretion" obviate any possibility that the users meant something else; particularly is this evident from the setting in which the words are used. The entire purpose of the Schedule A is to increase the rights of the lender, eliminate his liability and diminish the rights of the borrower.

It is thus clear from the context in which used that the phrases "wholly within the discretion" and "sole discretion" in no manner signify "judicial discretion" but, are intended to convey the meaning generally attributed

to these words and phrases as here used, i.e., a sole or entire power of decision.

Since "discretion" many have various meanings analysis of its use and the words used to modify it are significant.

The adjective "sole" is variously defined by Webster's Third New International Dictionary as (1) having no spouse. . . (2) having no companion. . . (3) (a) having no sharer. . . (b) of unmatched quality of kind. . . (4) functioning (as in acting, working, moving) independently and without assistance or interference. . . (5) (a) . . . that is such and no other (6) belonging, granted, or atributed to the one person or group specified; independently accomplished, held or developed, exclusively exercised, unshared. . . .

Thus modified, by "sole", which always denotes exclusivity and as used in relation to the remainder of the exculpatory and indemnifying provisions of Schedule A, discretion is meant to convey its common meaning, defined by Webster's Third New International Dictionary as "power of decision; individual judgment." The example there given is "it is a matter that I cannot leave to anyone's discretion — Upton Sinclair."

Similarly, "wholly" is defined by Webster as: (1) In entriety; fully; as a whole without loss; as, to see a situation *wholly*. (2) To the whole extent; totally; entirely; completely; thoroughly; as to be *wholly* at a loss; *wholly* finished. (3) To the exclusion of other things; solely.

In meaning, the phrase "wholly within the discre-

tion" and the phrase "sole discretion" as used in the instant documents are significantly similar to the expression "sole judge" used in *Heller* v. *Gate City Building and Loan Association,* 75 N.M. 596, 408 P.2d 753 (1965) a case decided by the New Mexico Supreme Court within the last few months. There the mortgagee had the right to make needed repairs, and he was to be the "sole judge" of the necessity for the repairs. Against the assertions of the mortgagee that its advances so made should be deemed non-volitional and prior to intervening liens, the New Mexico Court said:

> "The language of the above provision grants appellant an option to make repairs. Appellant is made the sole judge as to the necessity of the repairs. . . . "

The manner in which the term "discretion" is used by those dealing in the mortgage area is also important, thus in Blackburn, "Mortgages to Secure Future Advances," supra, at 214, we find:

> "In the third type, the mortgage will also provide expressly for the making of future advances, but the making of these advancements is strictly within the *discretion* of the mortgagee. Such a device is termed a mortgage to secure 'optional future advances'." (Emphasis added)

and at page 223, the author says:

> "*Optional Advances.* The final type of mortgage to secure future advances is one wherein the mortgagee may make the advance solely at his option or discretion."

In another factual setting, *Davis* v. *General Foods Corporation,* 21 F. Supp. 445 (S.D. N.Y. 1937) held that

discretion to make payments meant a volitionary right to disburse, or not, depending on the decision reached by the holder of the power of discretion.

Statutes bestowing "discretion" have been interpreted as imparting free choice to its recipient. *State v. Pemiscot Land & Cooperage Co.,* 317 Mo. 41, 295 S.W. 78, 80 (1927). And in *Rollins* v. *Helvering,* 92 F.2d 390, 392 (8 Cir., 1937), *cert. den.* 302 U.S. 763 (1938) discretion in section 167 of the 1928 Internal Revenue Act was interpreted as meaning a "power of choice."

Accordingly, given the power to determine if and when and how much might be advanced, the lender had, by definition, the power not to advance. Under the terms of the agreement, Cottonwood would not have been able to force Western to make advances were Western to decide unilaterally, as it did when it heard rumors of purported default, that it would not make advances — but under the terms of the agreement Western could have determined not to advance without fear of being held liable therefor, without having heard rumors of default.

SUMMARY

Western was the sole judge of whether to advance or not. In its "whole" or "sole discretion," it could refuse to advance funds, therefore any advances it did make must in contemplation of law be volitional or optional and take priority only as of the time of each such advance.

POINT I.

(B) AND IN ANY EVENT, PURSUANT TO THE EXPRESS TERMS OF PARAGRAPH 10 OF

ITS LOAN AGREEMENT THE LENDER WAS RELEASED FROM ANY AND ALL CONTRACTUAL OBLIGATIONS, IF ANY IT HAD, UPON DEFAULT OF THE BORROWER AND THUS THE VOLUNTARY EXPENDITURES MADE BY THE LENDER SUBSEQUENT TO SUCH DEFAULT TAKE PRIORITY ONLY AS OF THE TIME OF EACH SUCH ADVANCE OR EXPENDITURE.

The issue here under discussion is factually, completely independent of the previous discussion concerning the volitional or non-volitional nature of the entire mortgage transaction. It rests not on the wording of Schedule A, but upon paragraph 10 of the Loan Agreement, which provides:

> "Should [the borrower] default in the performance of any agreement hereunder; or should work cease on the improvements, specifically including stoppage by the Lender under the terms of this Agreement, or for any reason whatsoever, for (15) calendar days; or if the improvements shall be damaged or destroyed by fire or other casualty; or in the case of death of any of the undersigned; or if a petition in bankruptcy or under any debtor's relief law shall be filed by or against any of the undersigned; . . . ; [or lien filed against the premises, etc,] then in any such events, at its option, the Lender may, without notice:
>
> > (a) declare all indebtedness secured by the mortgage immediately due and payable and withdraw all sums in the Account and credit the same in such a manner as it elects

upon the indebtedness due the Lender, and thereupon the Lender shall be released from all obligations to the undersigned under this Agreement, or

(b) take possession of the premises and let contracts for or proceed with the finishing of the improvements and pay the cost thereof out of the funds in the Account; should such cost amount to more than the balance of the Account, then such additional costs may be expended at its option by the Lender and they shall be secured by the mortgage as hereinafter specified.

The rights and remedies of the Lender are cumulative and the exercise of any such rights shall not operate to waive or cure any default existing under the mortgage or note, nor to invalidate any Notice of Default or any act done pursuant to such notice and shall not prejudice any rights of the Lender under the Mortgage."

The plain, simple effect of paragraph 10 of the Loan Agreement, upon its coming into play, is to end any legal obligation, if any existed, of the Lender to the borrower. That this is so is elemental. The proposition that when one has discretion to do or not do something he is not legally bound to do it is axiomatic, requiring no citation of authority. However, the authorities cited in Point I (A) dealing with future volitional advances are here pertinent.

It follows then that, subsequent in time to the instance when the lender is relieved of any obligation to make advances, if any existed, and such advances or expenditures are therefore at his discretion, any such

advances or expenditures take priority, as against intervening liens, only as of the time of each such advance.

Elmendorf-Anthony Co. v. *Dunn,* supra, involved, in the part here pertinent, an almost identical fact situation and therefore may shed light upon rules and reasons for them. The question was there phrased by the Washington Supreme Court as:

> " . . . When a mortgage, given to secure advances for the construction of a dwelling house, provides that in case of abandonment by the mortgagor before completion, for a period of fifteen days, the mortgagee may, *at its option,* enter upon the premises and complete the construction and add the sums so expended to the principal amount provided for in the note and secured by the mortgage, and thereafter the mortgagor executes and delivers to another a second mortgage on the same property for a pre-existing debt, and then abandons construction before the house is completed, and the first mortgagee, with actual knowledge of the second mortgage, enters upon the premises and makes certain expenditures deemed by it necessary to complete construction, is the first mortgagee entitled to priority over the lien of the second mortgagee for the total sum advanced, including the sum expended on the property after abandonment and notice of the second mortgage?" (Emphasis in original)

In *Elmendorf-Anthony,* the first mortgagee had entered and completed construction under a provision in its agreement with the borrower identical in effect with the agreement in paragraph 10 of the instant Loan Agreement: " . . . and in the event of abandonment of work upon the construction of the said building or build-

ings for a period of fifteen days as aforesaid, the mortgagee may, at its option, also enter into and upon the mortgaged premises and complete the construction of the said building . . . and monies so expended . . . shall be added to the principal amount of said note and secured by these presents . . . . "

It was held that money expended to put the house in saleable condition upon the abandonment by the borrower was volitional in nature and that the intervening mortgage had priority over such advances. This rule was applied without distinction to sums within the stated limit of the first note and mortgage and to sums in excess thereof.

Relative to the weight of authority in this regard, the Court said, at 256:

> " . . . . If there were any substantial diversity of opinion in the decisions of our sister states, we would be inclined to view the rights of the first mortgagee relative to advances made pursuant to an optional clause in a construction contract, even after notice of a junior encumbrance, as superior to such junior encumbrance. *But as we read the cases cited by appellant, not one has reached that result, and our own efforts to locate such authority has proved unavailing,* with the possible exception of First National Bank v. Zook, 50 N.D. 423, 196 N.W. 507." (Emphasis added)

In the instant controversy, there has been no showing that the property would not have been ample security for the amount of the then existing indebtedness to the lender at the time of default and stoppage of work, not that, as indicated in *Elmendorf-Anthony Co.,* such in-

formation is likely to be material. Nor is there any showing that the large sums voluntarily expended by the lender to complete the home and put it into rentable or saleable condition were necessary or even desirable to preserve the status of its lien pending foreclosure.

The lender, under its right as against the borrower in the Loan Agreement, preempted the venture on Lot 10 when it was about half finished. R. 151, Exhibit W-84, the ledger sheet of Western for Lot 10 shows that as of January 24, 1963, approximately $9,462.04 had been attributed to this lot by the lender. Subsequent entries are after the lender learned of alleged default, refused further funds to the builders, took possession itself, and completed the home under the optional provision of paragraph 10 of the Loan Agreement.

Such assumption of Cottonwood's venture was not even needed — for at this intermediate stage, the lender was protected by the buffer afforded by the land value. Its mortgage was contractually prior to the purchase money mortgage involved. By waiting and taking over the venture, expending more money for building and other miscellaneous purposes, and charging interest on all money expended, the lender undertook to enhance its own position at the expense of already disadvantaged lienors. This the law should not, and does not, allow. Legislative mandate attaches the lienors priority at this point in time. This cannot be whittled away or brushed under the carpet by self-serving assertions that the property is enhanced by the lender's activities, for any such enhancement then would merely innure to the benefit of the lender, with interest, service charges, etc.

A similar situation was encountered in *Heller* v. *Gate City Building and Loan Association,* supra. There the mortgagee under a right to do so given by the mortgage made advances for needed repairs, as to which he was to be the sole judge as to necessity. The Court held that such advances were within the universal rule as to volitional future advances and thus inferior to intervening rights.

SUMMARY

The happening of the event chosen by it to have such effect, relieved Western of any contractual liability or obligation whatsoever to Cottonwood — assuming it had any in the first place. Expenditures thereafter cannot rob the lienors of their rightful priority. Expenditures thereafter take priority, if any, only as of the date of making of each such expenditure.

POINT II.

THE TRIAL COURT ERRED IN DETERMINING IN PARAGRAPH 4 OF ITS AMENDED FIFTH SUPPLEMENTAL PRETRIAL ORDER THAT THE FACTS SUBMITTED BY THE AFFIDAVITS IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT DID NOT CONSTITUTE "COMMENCEMENT TO DO WORK OR FURNISH MATERIALS ON THE GROUND FOR THE STRUCTURE OR IMPROVEMENT" WITHIN THE MEANING OF UTAH CODE ANNOTATED 38-1-5 (1953).

The basic issue before the Court relating to this point is simply whether or not the priority of the

mechanic's lienors relates back to the time of performance of the work and improvements described in the Affidavits of Lloyd Jackson, Charles V. King and Durwed Cook, relating to Lot 10, Lazy Bar Subdivision. Briefly summarized, the facts material to this point are as follows:

The first labor performed upon Lot 10, Lazy Bar Subdivision, was the surveying and staking work done by the engineering firm of Coon, King & Knowlton (hereinafter "Coon, et al."), commenced in late 1959 and completed about October 1, 1960. Between January 1, 1961, and the end of 1962, sewer and water mains were installed in the street adjacent to Lot 10, and a lateral sewer line was installed upon Lot 10; the adjacent street was graded and completed; and the curb, gutter and sidewalk upon Lot 10 were completed. All of this work was done by Lloyd and Rex L. Jackson (hereinafter "Jacksons"). During the installation of the sewer and water mains, the sewer lateral and the sidewalk, curb and gutter, and the completion of the road, Mountain States Telephone & Telegraph Company (hereinafter "Telephone Company") erected poles and ground anchors and strung telephone cables to serve Lot 10.

Respondent's mortgage covering Lot 10 was executed, delivered and recorded on October 29, 1962, after all of the above described labor was performed upon and all of the above described materials were furnished to, or for the benefit of, Lot 10.

Lienor Oscar E. Chytraus Company, Inc. performed labor upon and furnished materials to, and for the benefit of, Lot 10, commencing on or about January 17, 1963,

and ending on or about January 18, 1963; lienor Gibbons and Reed Concrete Products Company furnished materials to Lot 10, on or about November 17, 1962; lienor Richard P. Garrick performed labor upon and furnished materials to Lot 10 commencing on or about October 1, 1962,[6] and ending on or about January 9, 1963; and the lienor, Boise Cascade Corporation furnished materials to Lot 10 commencing on or about November 12, 1962, and ending on or about January 16, 1963. Said defendants are hereinafter designated "lienors".

Defendants submit that under these facts, their liens are entitled to the same priority as the liens possessed by Coon, et al., Jacksons and the Telephone Company.

RELEVANT STATUTES

The following provisions of the Utah Code are relevant to a determination of the above stated issue:

> Section 38-1-3. "Contractors, subcontractors and all persons performing labor upon, or furnishing materials to be used in, the construction or alteration of, or addition to, or repair of, any building, structure or improvement upon land; all foundry men and boiler makers; all persons performing labor or furnishing materials for the construction, repairing or carrying on of any mill, manufactory or hoisting works; all persons who shall do work or furnish materials for the prospecting, development, preservation or working of any mining claim, mine, quarry, oil or gas well, or deposit; and licensed architects and engineers and artisans who have furnished designs, plats, plans, maps, specifications, drawings, estimates of cost, surveys or superinten-

6. This commencement date has been controverted by the mortgagee and cannot be assumed for purposes of this appeal.

dence, or who have rendered other like professional services, or bestowed labor, shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished materials, for the value of services rendered, labor performed or materials furnished by each respectively, whether at the instance of the owner or of any other person acting by his authority as agent, contractor or otherwise. Such liens shall attach only to such interest as the owner may have in the property, but the interest of a lessee of a mining claim, mine or deposit, whether working under bond or otherwise, shall for the purposes of this chapter include products mined and excavated while the same remain upon the premises included within the lease."

Section 38-1-4. "The liens granted by this chapter shall extend to and cover so much of the land whereof such building, structure or improvement shall be made as may be necessary for the convenient use and occupation thereof . . . "

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 th 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."

Section 38-1-10. "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."

DISCUSSION

Section 38-1-3, quoted above, establishes beyond question that Coon, et al., the engineers who prepared the subdivision plat and surveyed the lots, streets, curbs, gutters and sidewalks, that the Telephone Company, the concern which erected the utility poles and strung the telephone cables, and that the Jacksons, who installed the sewer mains and laterals, the water mains, the streets, the curbs and gutters, and the sidewalks, each acquired liens upon Lot 10. See *Backus* v. *Hooten,* 4 Utah 2d 364, 294 P.2d 703 (1956); *King Bros., Inc.* v. *Utah Dry Kiln Co.,* 13 Utah 2d 339, 374 P.2d 254 (1962); *Headlund* v. *Daniels,* 50 Utah 381, 167 Pac. 1170 (1917); see also *Nolte* v. *Smith,* 11 Cal. Rptr. 261, 87 A.L.R. 2d 996 (1961); Annotation, 87 A.L.R. 2d 1004, entitled "Mechanic's lien for services in connection with subdividing lands"; *Park City Meat Co.* v. *Comstock Silver Mining Co.,* 36 Utah 145, 103 Pac. 254 (1909); *Badger Lumber Co.* v. *Marion Water Supply Co.,* 48 Kan. 182, 29 Pac. 476 (1892); *Beatty* v. *Parker,* 141 Mass. 523, 6 N.E. 754 (1886); and *O'Harra* v. *Frazier,* 54 So. 2d 688 (Fla. 1951). Indeed, Section 38-1-3, by its terms, establishes clearly that even the engineers who furnished the plats and surveyed the property acquired a lien upon Lot 10. Section 38-1-3, is equally clear in establishing that the Jacksons and the Telephone Company acquired liens.

The record establishes with equal clarity that the mechanic lienors had and have liens for the labor and materials furnished by them to Lot 10. The provisions of the Utah Code further establish unequivocally the time as of which said liens have priority and said provisions do not make their priority dependent on whether or not the labor and materials relating to the liens were furnished prior to the execution, delivery and/or recording of the mortgages of the plaintiff. Section 38-1-10 provides that all liens created by the stature are on an equal footing regardless of the date of filing of the notice of lien and regardless of the time of performing the work or furnishing materials giving rise to the lien. Section 38-1-5 provides that all liens created by the statute 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."

In short, it is clear from the statute that Coon, et al., the Telephone Company, the Jacksons and the mechanic's lienors, each had a lien upon Lot 10. It is equally clear from the statute that each of these liens under the statute is on an equal footing. Finally, the statute also makes clear that each of these liens became effective as of the time of the commencement to do work or furnish materials by any potential lienor on the particular lot to which such liens relate. Squarely in point is *United States Bldg. & Loan Ass'n.* v. *Midvale Home Finance Corp.,* 86 Utah 506, 44 P.2d 1090, 1093-94 (1935). See also *Teahen* v. *Nelson,* 6 Utah 363, 23 Pac. 764 (1890); *Morrison* v. *Carey-Lombard Co.,* 9 Utah 70, 33 Pac. 238 (1893); *Sanford* v. *Kunkel,* 30 Utah 379, 85 Pac. 363 (1906); also *Culmer* v. *Caine,* 22 Utah 216, 61 Pac. 1008 (1909);

Fields v. *Daisy Gold Mine Co.*, 25 Utah 76, 69 Pac. 528 (1902); *Eccles Lumber Co.* v. *Martin*, 31 Utah 241, 87 Pac. 713 (1906).

Paragraph 4 of the Fifth Supplemental Pretrial Order, wherein the trial court denied the Motion for Summary Judgment of Chytraus does not reveal the theory upon which the trial court reached its conclusion. It does not appear that the trial court directly considered the impact of the Utah statutes relied upon herein as quoted and discussed hereinabove.

It may be that the trial court concluded that the labor and materials furnished by Coon, et al., the Jacksons and the Telephone Company were not furnished for the same improvement as were the materials furnished by the mechanic's lienors. If this is the basis for the ruling of the trial court, it is erroneous on two grounds. First, as a matter of fact, the labor and materials furnished by Coon, et al., the Jacksons and the Telephone Company were furnished for the same improvement as were the materials furnished by the mechanic's lienors. It is plain, and undisputed, that the defendant Cottonwood Construction Company, and its predecessors in interest, conceived, planned and carried out the development of the Lazy Bar Subdivision as a unified and integrated project. That is, Cottonwood Construction Company and its predecessors in interest subdivided the land and undertook to construct dwellings upon the lots in the subdivision for sale to the public. Thus, the surveying of the lots, the installation of sewer and water mains in the streets, the grading and completion of the streets, the installation of the curb, gutter and sidewalk

upon Lot 10, and the installation of the sewer lateral upon Lot 10, together with the erection of utility poles and stringing of cables, were all a part of the improvement of a residential dwelling lot for sale to the public. The labor and materials subsequently furnished by the mechanic's lienors and used in connection with Lot 10 for the further improvement of that lot for sale to the public were furnished for the same improvement as were the labor and materials furnished by Coon, et al., the Jacksons and the Telephone Company. See *Park City Meat Co.* v. *Comstock Silver Mining Co.,* supra; *King Bros., Inc.* v. *Utah Dry Kiln Co.,* supra; *Badger Lumber Co.* v. *Marion Water Supply Co.,* supra; and *Beatty* v. *Parker,* supra.

The apparent conclusion of the trial court is also erroneous as a matter of law. There is absolutely no provision of the Utah statutes relating to mechanic's liens that provides for a different priority of mechanic's liens depending upon the particular aspects of the improvement to which the several mechanic's lienholders furnished material or labor. Indeed, any such differentation would be intolerable, for the result would be that the priorities of persons who furnish labor or materials would be different if, for example, they furnished labor and materials for the sidewalk as opposed to the driveway, for a separate garage as opposed to the house itself, for a retaining wall as opposed to a fence, for a sewer line as opposed to a water line, and for a telephone line as opposed to a power line. Such distinctions would make a mockery of the plain legislative intent that all persons furnishing labor or materials for the improvement of land are entitled to liens which have equal priority,

taking effect as of the date of commencement of the labor or furnishing of materials. This legislative intent is made clear beyond doubt by Section 38-1-10, which provides that:

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

This provision is not limited to liens for work and labor done for, or material furnished to, the same aspect of the contemplated improvement as the trial court apparently concluded. The provision relates to all liens, "provided in this chapter." The priority of all such liens is provided in Section 38-1-5 to be the time of the commencement to do work or furnish materials upon the ground for the structure upon or the improvement of the land. See *Teahen* v. *Nelson,* supra, *Morrison* v. *Carey-Lombard Co.,* supra, and *Sanford* v. *Kunkel,* supra. In *Sanford* this Court phrased the rule as follows:

> "Under the statute, the lien had its inception from the time of the commencement of the work and the furnishing of material, and by relation, takes effect after that date, and is given priority over any lien or encumbrance subsequently intervening . . . "

SUMMARY

The issue presented for decision under this point is easily resolved. It is clear that the performance of labor upon and the furnishing of materials to Lot 10 commenced long before the execution, delivery and recording

of the mortgages of respondent. The statutes do not require that such labor or materials be furnished to the same particular building or structure. Even if the statute did require that, for the mechanic lienors to share the priority of Coon, et al., the Jacksons and the Telephone Company, the labor performed and materials furnished be related to the same particular aspect of the improvement, this would be satisfied in this case. The sidewalks, curb and gutter installed upon the surface of Lot 10 had utility only in connection with a dwelling. The sewer lateral installed below the surface of Lot 10, for a distance inside the line, could only be for connection to the dwelling house constructed upon Lot 10. The utility poles erected and cables strung by the Telephone Company had utility only when connected to the dwelling house constructed. Obviously, the labor and materials furnished by the lienors had utility only in connection with such dwelling house.

Section 38-1-3 accords to each of the parties who performed such work and furnished such materials a mechanic's lien upon Lot 10. Sections 38-1-4 and 38-1-10 dictate that all mechanic's liens upon Lot 10 shall be upon an equal footing, and Section 38-1-5 expressly provides that the priority of all such liens relates back to and takes effect as of the performance of the first labor or the furnishing of the first materials giving rise to the lien senior among the group of liens.

Thus, the liens of the mechanic's lienors upon Lot 10 are of equal priority and stand with the liens of Coon, et al., the Jacksons and the Telephone Company. The liens of Coon, et al., the Jacksons and the Telephone

Company are admittedly prior to the liens of the mortgage of respondent. Inasmuch as the liens of the mechanic's lienors are by the express provisions of the statute, upon an equal footing and of an equal priority with the liens of Coon, et al., the Jacksons and the Telephone Company, their priority over the liens of the mortgage of respondent is equally clear.

It is respectfully submitted that the record and the applicable law establish the priority of the mechanic's liens of the appellants over the liens of the mortgage of respondent, and thereby establish that the trial court erred in denying the Motion for Summary Judgment and in holding, in connection with such denial, that the liens of the mechanic's lienors are not prior and superior to the liens of the mortgage of respondent.

CONCLUSION

For the reasons stated herein ,appellants respectfully pray that this Court reverse the trial court's interlocutory order appealed from in the following particulars:

1. By determining that the construction financing transaction did not provide for obligatory (or more properly, "non-volitional") advances but that, on the contrary, it provided for optional (or more properly, "volitional") advances which take priority only as of the time of each such advance, or

2. By determining that, in any event, volitional expenditures made at the option of the mortgagee subsequent to the default of the borrower take priority only as of the time of each such expenditure.

3. And, in any event, remand with instructions to

grant the mechanic's lienors' motion for partial summary judgment to the effect that the work evidenced by affidavits in support of said motion constituted "commencement to do work or furnish materials on the ground for the structure or improvement" within the meaning of section 38-1-5, Utah Code Annotated, (1953).

Respectfully submitted,

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APPENDIX A

Will a decision favorable to the mechanic's lienors on this appeal preclude construction financing in Utah?

Always implicit, and often explicit, in litigation of this type is the question of whether a decision contrary to the construction lender — no matter how justified upon legal principles — will lead to the withdrawal of construction financing from Utah.

The table below affords the answer to the inquiry. Each of our sister states listed afforded construction lenders in 1964 much less favorable priority treatment than that advocated by the appellants herein. Yet each issued more new unit permits per capita than did Utah.

What the table demonstrates is that the prosperity of a given state's construction industry depends upon economic, more than legal, factors. Adjustments to legal requirements have always been, and can always be, made by lenders of any type, including construction lenders. If a Colorado construction lender could, in 1964, adjust to absolute mechanic's lien priority through careful disbursal of funds, a Utah construction lender can, as easily, either provide such a disbursal or utilize non-volititional paper. Equally, the lender can assure that labor has not been done or material has not arrived on the site prior to recordation of the mortgage.

There *are* other states, e.g. Alabama, with both stricter laws *and* a lower ratio of new permits per capita than Utah. They do not derogate from the point just made, however, but rather reinforce it, for they again

illustrate the complete non-relationship between new construction and reasonable legal safeguards against construction lender abuse.

PRIORITIES AND NEW UNIT PERMITS, 1964

State	Legal Situation	New Unit[1] Permits	Population[2]	Permits Per Capita
Colorado	Absolute lienholder priority, *Darien v. Hudson,* 134 Colo. 213, 302 P. 2d 519 (1956)	16,985	1,966,000	1:116
Missouri	Absolute lienholder priority as to building, etc., which purchaser on execution has right to remove within reasonable time. Missouri Rev. St. §429.050 (1959)	35,711	4,409,000	1:123
Oregon	Absolute lienholder priority as to improvement, which purchaser on execution has right to remove within reasonable time. Oregon Rev. St. §§87.010, 87.025 (1963 Rep. part)	15,655	1,871,000	1:120
Virginia	Lienholder prior as to improvement; prior lien entitled only to value of land on foreclosure. Virginia Code §43-21 (1950)	37,680	4,378,000	1:116
Utah	————	6,160	992,000	1:161

1. New Unit Permits figures were obtained by cumulating statistics in U. S. Bureau of Census, *Construction Reports — Building Permtis, Housing Authorized in Individual Permit-Issuing Places*: 1964. Table 1.
2. U. S. Bureau of the Census, *Statistical Abstract of the United States,* 1965, page 11.