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Leon Frehner, and Minnie C. Frehner, dba
Mountain Gardens, and Leon C. Frehner v.
Margaret Morton, D. A. Skeen, Bertha K. Skeen and
Prudential Federal Savings & Loan Association, A
Corporation : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEON FREHNER, and MINNIE
C. FREHNER, d/b/a MOUN-
TAIN GARDENS, and LEON C.
FREHNER,

Plaintiffs and Respondents,

vs.

MARGARET MORTON, D. A.
SKEEN, BERTHA K. SKEEN
and PRUDENTIAL FEDERAL
SAVINGS & LOAN ASSOCIA-
TION, A Corporation,

Defendants and Appellants.

No.
10525

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third Judicial District Court for Summit County
Honorable Joseph G. Jeppson, Judge

BENJAMIN SPENCE
Attorney for Defendants & Appellants

ALLEN M. SWAN
American Oil Building
Salt Lake City, Utah
Attorney for Plaintiffs & Respondents

FILED

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Clk. Supreme Court, Utah

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SAVINGS & LOAN ASSOCIA-
TION, A Corporation,

Defendants and Appellants.

No.
10525

APPELLANT'S BRIEF

STATEMENT OF NATURE OF THE CASE

The Appellants, D. A. Skeen, Bertha K. Skeen, and Prudential Federal Savings and Loan Association, a Corporation, appeal from a jury verdict and judgment on the verdict entered therein, on the foreclosure of a mechanic's lien on real property pursuant to the pro-

visions of Section 38-1-3, and Section 38-1-18 as amended, U.C.A. 1953, which verdict and judgment on the verdict was in favor of the Plaintiffs and against the Defendants.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From a verdict and judgment on the verdict in favor of the Respondents and the denial of the Appellants' motion to have verdict and judgment set aside and to have judgment entered in accordance with Defendants' motion for directed verdict and motion for a new trial, Defendants appeal.

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the verdict and judgment of the verdict, or new trial.

STATEMENT OF FACTS

Prior to November 25, 1964, the Defendants and Appellants, D. A. Skeen and Bertha K. Skeen, purchased a piece of real property in Summit Park, Summit County, Utah, described as Lot 48, Summit Park, Plat "C" and executed and delivered to the Defendant and Appellant, Prudential Federal Savings & Loan Association, a Corporation, a deed of trust on said property which was recorded in Summit County, Utah, on or about the 30th day of November, 1964.

That upon the purchase of said property, the Defendants and Appellants, D. A. Skeen and Bertha K. Skeen, built a house on said property and permitted their daughter, Margaret Morton, to live in said property, provided she paid the monthly payments as provided by the trust deed with the Defendants and Appellants, Prudential Federal Savings & Loan Association.

While said daughter was living in said property she apparently, but unknown to Defendants and Appellants, D. A. Skeen and Bertha K. Skeen, employed Plaintiffs and Respondents to do some landscape gardening on said premises, consisting of sodding a very small lawn not to exceed twenty-five feet long and tapering to eight feet wide (Tr. 58), with a small basin at one end containing water which was to be pumped some six feet high (Tr. 60) on the side of the mountain and returned by a small water fall to this basin, which was approximately four to six feet long and three feet wide, and in addition to this to clear some of the land of bushes and trees and vines. This work was apparently performed by Plaintiffs and Respondents between August and December, 1964. At no time did Plaintiffs and Respondents consult with or approach Defendants and Appellants with relation to this work and if an agreement was ever entered into for these services it was done with Margaret Morton (Tr. 6, 7, 9-10). The only time Appellants were ever notified by Respondents that this work had been done, was when Respondent, Leon Frehner, approached Appellant, Skeen, on or about February 8, 1965, and advised Skeen that the bill for

his services had not been paid (Tr. 42-43). It was then that Respondent, Leon Frehner, learned that Mr. Skeen was the owner of the property in question (Tr. 44-45). Appellant, Skeen, then refused to pay Respondents (Tr. 46). Pursuant thereto, Appellants then proceeded to and did file a mechanic's lien on the property in question (Tr. 47) and then filed this action to foreclose this lien. After the commencement of this action, the Defendant, Margaret Morton, was killed in an accident, and the Appellants, at a pre-trial conference, had a discussion with relation to a substitution by way of an Administrator to be appointed for the estate of Margaret Morton, and Appellants not deciding on such, the court dismissed the action against Margaret Morton (R. 18).

ARGUMENT

POINT I.

THE COURT ERRED IN ITS PRE-TRIAL ORDER, OVER THE OBJECTIONS OF APPELLANTS THAT THE PROPERTY IN QUESTION WAS SUBJECT TO LIEN RIGHTS FOR MATERIAL FURNISHED AND WORK AND SERVICES PERFORMED BY RESPONDENTS UPON SAID PROPERTY.

Section 38-1-3, U.C.A. 1953, provides as follows:

“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 - - - shall have a lien upon the property upon or concerning which they have rendered service, performed labor or furnished material, for the value of the services rendered, labor performed or material 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."

Appellants in their answer denied that the Respondents had any lien rights on the property in question, due to the type of work and services performed. The court in its pre-trial order (R. 21) over the objections of the Appellants and on motion to dismiss the complaint of the Plaintiffs on the question of having lien rights on said property, overruled said objections and denied the motion of Defendants and Appellants, which the Appellants and Defendants contend is error and the court should have granted the motion and sustained the objections of the Appellants and Defendants to dismiss the complaint of the Respondents and Plaintiffs, with relation to their purported action on the foreclosure of a lien, and in support of this contention, Appellants submit the following:

Does the work performed by Respondents come within the Mechanic's Lien Statute of the State of Utah?

The work performed by Plaintiffs consisted of the construction of a small cement pool, and waterfall, some top soil, sodding a small lawn, cleaning yard, hauling

trash, cutting logs for firewood, etc. (Tr. 58-59-60) (Exhibit 8).

The law in the State of Utah is not clear as we have been able to find, but we are of the opinion, that if the work performed by Respondents comes within the statute at all, it must come within the "improvement" clause of the Statute.

Timber Structures Inc. v. C. W. S. Grinding & Machine Works, 229 P.2d 623, at 629 Oregon.

"We agree with Defendant that the right to a lien is purely statutory, and a claimant to such a lien, must in the first instance bring himself clearly within the terms of the Statute. The Statute is strictly construed as to persons entitled to its benefits and as to the procedure necessary to perfect the line, but when the claimant's right has been clearly established, the law will be liberally interpreted toward accomplishing the purposes of its enactment.

Drake Lumber Co. v. Linquist, 170 P.2d 712; Phillips v. Graves, 9 P.2d 490, 83 A.L.R. 1."

36 Am. State Reports, 85 (Tennessee).

"The claimant must make it clearly to appear that he has a lien. This lien is purely statutory and unknown to common law. Only those enumerated and embraced in the statute are entitled to it. A liberal construction of the mechanic's lien law does not mean that they shall be liberally construed in enlarging or including others than those enumerated in the Statute. No one is entitled to a lien unless the statute includes him or them. They are not to be included by strained

construction. Unless the Statute gives the lien the party has none."

Howe v. Myers, 162 Pac. 1000, Washington.

"It is well settled that liens of this character are in derogation of the common law. They depend for their existence solely on the Statutes, and the courts refuse to extend their operation for the benefit of those who do not come clearly within the terms of the Statute."

76 A. State Reports, 650.

"A statute giving a lien upon land upon which a home has been constructed, built or repaired or fixtures or machinery furnished or erected or improvements made by special contract refers to things constructed upon the land, such as buildings, machines, fixtures and structures *and not to the enriching of the soil and beautifying the grounds* by planting flowers, shrubs, and trees and by grading and graveling the grounds and walks."

36 Am. Jur., Page 55, Paragraph 66.

"It has been held that a lien on building lots for grading is authorized by a statute giving a lien to any person who shall perform labor or services in altering or repairing any building or building lot. But where the labor and material for which a lien is claimed are not shown to have born any relation to the construction, alteration, or repair of any structure upon the land, the rule would seem to be otherwise. *Such statutes are not to be construed as authorizing a lien* for improvements or operations upon the soil merely, which do not enter into or contribute to the erection, alteration or repair of any building or structure

upon the land and which are wholly unconnected with the creation of or work upon such artificial structures. *Coene v. Staub*, 36 N.W. 877; *Pratt v. Duncan*, 32 N.W. 709, Iowa; *Howe v. Meyers*, 162 P. 1000, Washington. Similarly it has been held that merely enriching the soil and beautifying the ground, and grading and graveling the grounds and walks, are not within the words, 'improvements made,' where the same section of the statute uses the expression, 'building contemplated in this section'; nor is such work deemed to be within the term, 'Appurtenance'."

POINT II.

THE COURT ERRED IN ITS INSTRUCTIONS TO THE JURY, ESPECIALLY IN INSTRUCTIONS NO. 9-A, 9-B, AND 9-C. THE COURT ERRED IN REFUSING TO GIVE TO THE JURY APPELLANTS' REQUESTED INSTRUCTIONS NOS. 1 AND 6, AND APPELLANTS' REQUEST FOR SUBMISSION OF INTERROGATORY.

It is the contention of the Appellants, in their defense of this case, that there existed no agency between Margaret Morton and Appellants authorizing her to employ Respondents to do the work on the subject property owned by these Appellants. That the work performed by Respondents was not known to the Appellants until sometime after the work was performed. That no contract was ever entered into or authorized by Appellants and Respondents for the performance of these

services. That the Respondents did not know, or investigate who owned the property until sometime after the services were performed and the material furnished (Tr. 70). That at no time did the Appellants ever ratify or consent to the performance of these services and furnishing of material, and because of these facts the property in question never became subject to lien rights of the Respondents, if any they had. That at no time did Margaret Morton own any interest in this property, that she contemplated buying it from her father, Mr. Skeen, but had not entered into any contract to that end.

There was some testimony that was introduced on the part of the Contractor who constructed the house on the property, that he informed Mr. Skeen that Mr. Frehner was on the property (Tr. 137-138), but it is the contention of Appellant that this would not bind Appellants, or estop Appellants from disclaiming any liability for the performance of these services or furnishing material, and in connection with this we submit the following:

Morrow v. Merritt, 16 Utah 412, 52 Pac. 667 (1898).

The owner of certain real estate leased the same to another who promised to make permanent improvements thereof. Plaintiff builder sue to impose a Mechanic's Lien against the lessor's interest for materials and labor furnished in making the improvements. The trial court imposed a lien; the Supreme Court reversed, holding

that a mechanic's lien could not attach to the Lessor's interest in the absence of a principal-agent relationship. The knowledge and acquiescence of the owner did not estop him from showing that he had made no contract with the claimant, neither did it constitute a ratification of the Lessee's contract.

The statute then in effect is found in Laws of Utah (1894), Ch. XLI, p. 44. It is almost verbatim with our present statute; I find no substantial difference. Zane, J., pointed out that some states have statutes which would allow a lien to attach to the reversioner's interest by mere consent; he distinguished our statute:

“Under this law the lien exists upon the interest of the reversioner when the materials are furnished at his request, or upon the request of his agent or contractor. The request of the tenant is not sufficient, though he has bound himself to make improvements.” (At 668.)

This language favors Appellants in the instant case, for they made no request, for work or materials from Respondents, nor did their agent or contractor.

Morrison v. Clark, 20 Utah 432, 59 Pac. 235 (1899).

In this case the defendant wife owned real estate in her own name. Her husband hired plaintiff to perform work and furnish material for the construction of a dwelling upon the property. The wife knew that her husband had signed a written contract with plaintiff, she lived on the land and knew that the plaintiff was working

thereon, she did not prevent the erection of the building, but she never consented that her land should be liable under the contract. The trial court found for the plaintiff and imposed a lien; the Supreme Court reversed, holding that the husband had no power to bind the land of his wife:

“While she knew of the contract, lived on the land, and did not prevent the erection of the building, she never consented to it, but on the contrary, objected to it, protested against it (to her husband), and never in any way gave her consent to it. She concealed nothing, and consented to nothing that was done, but objected to everything that was done (to her husband). — Under such circumstances, no power resides in the husband, as such, to bind the land of his wife.”

Her knowledge and occupation of the land did not change the rule.

Belnap v. Condon, 34 Utah 213, 97 Pac. 111 (1903).

The court reaffirmed its position. Here defendant, vendor of certain realty, sold the land under a contract. The vendee was supposed to make payments and construct a house on the land. He did not make any payments, although he did pay interest; he constructed a building on the property and became indebted to plaintiff for materials. Plaintiff brought this action to foreclose a lien against the real estate. The trial court denied the lien and the Supreme Court affirmed. Justice Frick quoted with approval the following language from *Morrow v. Merritt* (supra):

“Doubtless statutes of other states may be found giving a lien upon the interest of the lessor of land without a contract with him or his agent, when materials or labor is furnished to the tenant, and employed with his consent in erecting buildings or making improvements on the land. But, as we have seen, the Utah Statute . . . requires the materials to be furnished or the services to be rendered upon the request of the owner of the land, or his agent, before the lien can arise upon his interest.”

Justice Frick then added:

“Nor do we think that mere permission by the vendor to the vendee to make improvements would be sufficient, and certainly mere knowledge or acquiescence on the part of the owner, is not sufficient under the statute.” (114.)

Burton Walker Lumber Co. v. Howard, 92 Utah 92, 66 P.2d 134 (1937).

This case involved a complicated fact situation in which the vendee of realty had plaintiff build upon the property. The court reaffirmed that the vendor's interest could not in any case be subjected to the lien.

In the recent case of Buehner Block Co. v. Glezos, 6 Utah 2d 226, 310 P.2d 517 (1957), plaintiff brought suit against both Lessor and Lessee for the value of materials used in improving a building. Judge Van Cott entered a judgment foreclosing a mechanic's lien against the leasehold interest only. The Lessee appealed. The Supreme Court, per Crockett, J., affirmed, holding that a lessee is an “owner” within the meaning of the me-

chanic's lien statute and that *his interest* is subject to a lien for the value of improvements contracted for by him. This would strongly indicate, in Appellant's opinion, that Respondents should have dismissed this action against Appellants D. A. Skeen and Bertha K. Skeen, leaving the Respondents to look to the person with whom they contracted or her interest in the realty for security.

The foregoing cases show that, though the Supreme Court pays lip service to the "rule" that ratification or estoppel could apply, it is not prone to allow these doctrines in actual cases. In most of these cases, even though the owner of realty benefited as a result of the claimant's labor and improvements and had knowledge that the work was being done, the lien statute was held inapplicable against him. It would appear that in actual practice, the Supreme Court treats our statute as of the "contract" type whereunder a prior contract with the landowner is a prerequisite to doing work protected by the Statute.

The statute itself does not read like a "consent" statute. It insists upon a contract, express or implied, with the owner; further, it is clear that the labor or materials must be furnished at the instance of the owner, his agent or contractor. This infers that the owner's request must *precede* the furnishing.

Appellants' contend that the correct view would be to insist upon a contract in the first place, followed by the performing of labor or furnishing of material which

would effect the lien. See Thompson Real Property (4th ed., 1957) § 5189, at 285 (citing cases from Arkansas, Colorado, Georgia, Illinois, Indiana, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Wisconsin and West Virginia).

The foregoing is the position taken by the Colorado Supreme Court. *Mellor v. Valentine*, 3 Colorado 225 (1877). The court in this case reversed the lower court's imposition of a lien in the following language:

“This in no wise dispenses with the necessity of showing a previous hiring, or contract with the owner or his agent under which the work was continuously done or material continuously furnished. That the contract should be with the owner or agent is essential. The law imposes upon mechanics, like other persons, the necessity to ascertain for themselves the nature of the interest in the land to be improved, of the persons with whom they contract, and all negligence in this regard is charged to their account.”

The compiler of the Utah Code lists the following under the footnotes on original history of the act:

“The mechanic's lien law of this state was taken from Colorado, together with the construction placed thereon by the Colorado courts.”

This *Mellor* case was decided under the Colorado Statute before Utah adopted it; its rule that there be a contract with the owner preceding the beginning of work

should therefore be good law in the State of Utah at present.

The statute provides for liens by "Contractors" and "Sub-Contractors." Since plaintiffs have no contract, express or implied, with the owner, they cannot be contractors. Since they were not hired by the contractor (evidence shows that contractor disliked and distrusted him (Tr. 246), he was not a subcontractor. Section 38-1-3 provides for a lien by "all other persons" but this is substantially qualified by "shall have a lien" . . . for the value of the services . . . whether at the instance of the owner or any other person acting by his authority as agent, contractor or otherwise." Plaintiffs did not act at the instance of the owner, his agent, or his contractor; he acted at the instance of a tenant, a licensee, or at most a vendee. A contract with a non-owner does not suffice to bind the owner. E.g., *Lierz v. Cook*, 435 Colo. 221, 315 P.2d 535 (1957) (contract with licensee; lessor protected even though he had not filed notice of non-liability as required by Colorado Statute). *Bunt v. Roberts*, 76 Idaho 158, 299 P2d 629 (1955) (contract with licensee); *Boise-Payette Lumber Co. v. Bickel*, 80 Idaho 312, 245 Pac. 92 (1926) (contract with optionee); *Morrison v. Clark*, *supra* (Utah) (contract with spouse of owner); and *Belnap v. Condon*, *supra*, (Utah) (contract with vendor).

The rule of refusing to bind the owner's interest by a contract with a non-owner is sound; otherwise there could be no security in property ownership for ambi-

tious builders would forever be building under contracts with non-owners and then forcing a sale of the land for their price.

If the court holds that the Utah lien statute is of the "contract" type, there could be no lien imposed by estoppel or ratification, for to have a lien the contract would have to precede the beginning of the work. Even if a lien could be imposed by ratification or estoppel, it is the contention of Appellants that the evidence does not show the existence of either in this case.

Ratification is defined as "confirmation after the act with full knowledge." *Homes v. Hrobon*, Ohio . . . , 103 N.E. 2d 845, 869 (1951).

The evidence shows that defendants, the Skeens, did not possess full knowledge; they were unable to visit the premises (Tr. 112, 113, 115, 241, 241A), did not know the costs, etc. Therefore, they could not ratify. As noted above, the Utah Supreme Court has not yet found a contract ratified sufficiently to support a mechanic's lien; in *Behnap v. Condor*, 34 Utah 213, 97 Pac. 111, the owner knew that the work was being done, was desirous of having it done, acquiesced without objection, and accepted the benefits therefrom, yet this was not a ratification. This seems to be the majority rule; mere inactive consent is insufficient in the absence of fraud. E.g., *Boise-Payette Lumber Co. v. Bickel*, supra; *Snelling v. Wortman*, 107 Ind. App. 422, 24 N.E. 2d 791 (1940).

As stated by the Idaho Supreme Court, the reputed owner of property has no right to do anything which would give a lien on the premises. Further, the true owner's permission or knowledge of the improving is insufficient to authorize a lien thereon. *Parker v. Northwestern Investment Co.*, Idaho, 225 Pac. 307 (1927).

If theories of estoppel or ratification would support a lien, Respondents would have to show that Appellants had ratified or had so acted to be estopped. As noted above, it is necessary that one have full knowledge of all operative facts in order to ratify; not knowing Respondents' price or what they were doing would seem to bar a ratification.

The Utah Supreme Court defines estoppel thusly:

“ ‘Equitable estoppel’ or ‘estoppel in pais’ is the principle by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying or asserting the contrary of any material fact, which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely on such words and conduct, to believe and act on them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were followed.” *Migliaccio v. Davis*, 120 Utah 1, 232 P.2d 198 (1951).

The facts of the instance case do not fit into this

definition. The Appellants did not induce the Respondents through their acts or conduct to rely on them or on the land itself for payment of the debt. Respondents had actual notice of Appellants' lack of confidence in his abilities (Tr. 248) through prior dealings for which Respondent Frehner was not paid.

Further Respondents were not excusably ignorant of the fact that the fee title was in Appellants. The deed showing this was filed in the proper place putting Respondents on constructive notice of the true ownership. See, e.g., *Boise-Payette Lumber Co. v. Bicknel*, supra; *Royal Lumber Co. v. Haelzner*, Iowa, 201 N.W. 53 (1924).

POINT III.

THE COURT ERRED IN NOT GRANTING APPELLANTS' MOTION FOR A DIRECTED VERDICT AT THE CONCLUSION OF RESPONDENTS' CASE.

In view of the foregoing authorities, it is the contention of the Appellants that the court erred in not submitting the facts of this case to the jury, and directing the jury to return a verdict in favor of Respondents and against the Appellants as contained in Instructions Nos. 9-A and 9-B (R. 65).

The court of its own volition and ignoring the petition of Appellants, decided that the land in question was subject to a lien; that there was an

agency existing between Margaret Morton and Appellants and that the Appellants knew of the work going on and are estopped from denying these facts. These are facts which should have been submitted to the jury instead of the court deciding same.

At the conclusion of the Respondents' case, the only evidence introduced by the Respondents that could apply to an estoppel was the testimony of the witness Brewer (Tr. 138-139) as follows:

"Q. Did you talk to Mr. Skeen about Mr. Frehner being up there and making these improvements?

A. Yes, I must have told him. He was up there, yes.

Q. About when you would have known he was up there, and told Mr. Skeen about it?

A. Well, I presume the time, approximately, he started the job."

In view of the decisions in *Morrow v. Merritt*, 16 Utah 412, 52 Pac. 557, *supra*, even if Mr. Skeen had some information about Frehner being on the place would not amount to an estoppel. To the same effect is the case of *Morrison v. Clark*, 20 Utah 432, 59 Pac. 235, *supra*, *Belnap v. Condon*, 34 Utah 213, 87 Pac. 111, *supra*, and other cases cited above. These cases hold that mere knowledge of the owner that some work is being done on his property would not amount to incurring a liability on the part of the owner nor subject the property to a foreclosure of any lien rights.

There is evidence that Mr. Skeen consented that his daughter, Margaret Morton, could go ahead with the landscaping (Tr. 247-248), but advised her not to employ Frehner. Mr. Skeen testified as follows (Tr. 245, 246, 248) :

“Q. When, if any time, did you learn anything about this landscape gardening — the subject of this law suit — the gardening on these premises?

A. Well, when they was getting out the plans, she said, ‘I have been told that Frehner does good work, do you know him?’

I said ‘Yes, I had a very unfortunate experience with him one time, and I would advise you to seek another architect if you need one. . . .’ ”

Again (Tr. 248) :

“Q. Who made the arrangement for the employment of Mr. Frehner?

A. Margaret, Margaret as I have told you. I said, ‘I don’t — I have had an unpleasantness with him, and I would prefer you not do it.’ ”

Again (Tr. 252) :

“Q. Now at any time in your conversation with Margaret about this matter, did you ever say anything or give her any permission to go ahead with this work?

A. Absolutely not.”

Again (Tr. 259), Cross Examination:

“Q. So you were advised, in that conversation at least, it was Frehner, and that he was going

to perhaps charge you more than would be reasonable in Mr. Brewer's eyes?

A. Charge it to Margaret. I had nothing to do with employing him. No contract. I had no knowledge what he was doing."

CONCLUSION

The evidence discloses that D. A. Skeen and Bertha Skeen, Appellants, are the owners of the property in question at all times mentioned.

They placed their daughter Margaret Morton in possession of the premises for the purposes of living there, provided she paid the monthly payments on the property with some understanding that if she later wanted to buy the property some arrangements could be made to that end. She was, at most, a renter or a tenant at will.

The only person the Frehners contacted with relation to their work on this property was Margaret Morton, a renter or tenant at will. At no time did the Frehners contact the owners. In fact they did not know who was the owner of the property until along in February 1965, when they learned that the Skeens owned the property. They looked to Margaret Morton at all times with relation to payment. As an afterthought, when they could not get their money out of Margaret Morton they contacted Mr. Skeen and demanded payment from him, who refused to pay.

The deed to the property was on record in the Recorder's Office of Summit County at all times after the property was acquired and before the Frehners commenced work on this property. The law imposes the obligation on the lien claimant to ascertain the owner of the property he is working on as decided in *Mellor v. Valentine*, supra. No such inquiry was made by Respondents.

While there is evidence that Mr. Skeen consented to his daughter doing some landscaping on this property, there was no authorization. A mere consent or permission is not sufficient to bind the owner as decided in *Morrow v. Merritt*, supra.

The evidence discloses that the Skeens never went on the property during the time the Frehners were performing services thereon. There was no estoppel according to the definition of an estoppel as cited herein.

There was no contract with the owner, either actual or implied.

It is very questionable as to the services performed and the material supplied that they were of the kind that would subject this property to lien rights.

The court was in error in directing the jury to find in favor of Respondents for the above reasons.

We respectfully request of the court to analyze the decisions and the reasons of the cases and the law with relation to lien rights as the Appellants have respectfully submitted hereinabove.

In view of the foregoing we contend that the verdict and judgment on the verdict in this case be reversed and set aside, or grant a new trial to Appellants.

Respectfully submitted,

BENJAMIN SPENCE

Attorney for Appellants

1301 Walker Bank Bldg.
Salt Lake City, Utah