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# King Bros, Inc. v. Utah Dry Kiln Company : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

KING BROS., INC., a corporation

*Plaintiff and Appellant,*

vs.

UTAH DRY KILN COMPANY, INC.  
a corporation,

*Defendant and Respondent.*

FILED

APR 1 1962

Clerk, Supreme Court, Utah

Case No. 9626

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## BRIEF OF APPELLANT

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APPEAL FROM THE JUDGEMENT OF THE  
DISTRICT COURT OF GARFIELD COUNTY, UTAH  
HON. FERDINAND ERICKSON, JUDGE

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*Plaintiff and Appellant,*

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UTAH DRY KILN COMPANY, INC.  
a corporation,

*Defendant and Respondent.*

Case No. 9626

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## BRIEF OF APPELLANT

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### STATEMENT OF THE KIND OF CASE

This is an action brought under Sections 14-2-1 and 14-2-2, Utah Code, Ann. 1953, which is the private contracts or bond statute of our Code.

### DISPOSITION IN LOWER COURT

In the Lower Court a complaint was filed and a motion to Dismiss on the ground that the complaint failed to state a claim upon which relief could be granted was filed by the defendant. Oral Arguments on this motion were heard by the lower court and the parties submitted briefs. On January 15, 1962 the lower court sustained the defendant's motion to dismiss.

### RELIEF SOUGHT ON APPEAL

The plaintiff-appellant seeks a reversal of the Order of the Lower Court dismissing the complaint, and to permit the case to be heard on its merits.

## STATEMENT OF FACTS

The case was never tried below and of course the only facts with which we are concerned are the allegations of the complaint which, for the purpose of this appeal, must be taken as true. As stated above this is an action under our private contractor's statute or bond statute, being Sections 14-2-1 and 14-2-2, Utah Code. The plaintiff-appellant is the supplier of materials and the defendant-respondent is the owner of the property involved.

The complaint alleges that between October 15, 1959 and 23, 1959 the appellant supplied to the Oregon Dryer Company lumber dry kiln equipment for installation in a dry kiln of the defendant's at Panguitch, Utah, and at the request of the Oregon Dryer Company, this equipment was shipped direct to the job site at Panguitch, Utah by the plaintiff. The Oregon Dryer Company was the contractor to build the dry kiln for the defendant. The total selling price of this equipment was \$2,692.00 for which the plaintiff was never paid. The complaint further alleges that this equipment was in fact installed on the property of the defendant at Panguitch, Utah and is in use by said defendant.

The second cause of action alleges that on or about October 27, 1959, the assignor of the plaintiff sold and supplied to Oregon Dryer Company as contractor additional dry kiln equipment of a value of \$1463.19 which was likewise shipped by the supplier direct to the job site at Panguitch, Utah and was installed in the dry kiln and is being used by the defendant. The claim for this equipment was subsequently assigned to the plaintiff.

The complaint further alleges that the plaintiff was not paid for this equipment supplied and that the value of the equipment was more than \$500.00 and that the defendant, as the owner of the property had not secured a

bond and therefore, the defendant is liable under Section 14-2-2, Utah Code.

It should be stated at the outset that the plaintiff feels that the complaint possibly should be amended. At the oral argument on the Motion to Dismiss and also in the Brief filed by plaintiff in the lower court, the plaintiff requested permission to amend the complaint if it was felt that the complaint did not sufficiently allege that the equipment sued for was an improvement to defendant's land. The lower court, however, conceding that any such deficiencies could be supplied by amendment, ruled summarily on the merits by holding that the equipment in question was not "an improvement on the land" within the meaning of the statute relied upon.

## ARGUMENT

IT WAS ERROR FOR THE COURT TO RULE, AS A MATTER OF LAW, THAT THE EQUIPMENT SUED FOR WAS NOT USED IN THE CONSTRUCTION, ADDITION TO ALTERATION, OR REPAIR OF ANY BUILDING, STRUCTURE OR IMPROVEMENT UPON LAND.

For the purpose of this argument and because there is no evidence before the court, it may be necessary to explain in a simple way what the dry kilning equipment consisted of and how it works. In order to cure and dry lumber, it is necessary that great quantities of heat be supplied. The equipment herein sued for consisted of a large iron or steel furnace, the duct work leading from the furnace to large blowers run by fans and electric motors. These fans suck the heat from the furnace and blow it over and through the green or uncured lumber. In other words, the principle of operation is almost exactly the same as a hot blast furnace in a home or building, operated by natural gas, oil or other fuel. Although evidentiary, this furnace, duct work, blower fans and

motors are securely fastened to the building and are part of it the same way as is a home furnace.

It is the contention of the Plaintiff-appellant that if the improvement was lienable under our lien laws, then it was also such an improvement as would come within the provisions of the private contracts statute herein relied upon. In fact these two statutes use almost identical language. Section 14-2-1 provides as follows:

“The owner of any interest in land entering into a contract, involving \$500 or more, for the **construction, addition to, or alteration or repair of any building, structure or improvement upon land shall**, before any such work is commenced, obtain from the contractor a bond in a sum equal to the contract price, with good and sufficient sureties, conditioned for the faithful performance of the contract and prompt payment for material furnished and labor performed under the contract. Such bond shall run to the owner and to all other persons as their interest may appear; and any person who has furnished materials or performed labor for or upon any such building, structure or improvement, payment for which has not been made, shall have a direct right of action against the sureties upon such bond for the reasonable value of the materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon.”

Section 14-2-2 provides as follows:

“Any person subject to the provisions of this chapter who shall fail to obtain such good and sufficient bond . . . . . shall be personally liable to all persons who have furnished materials or performed labor under the contract for the reasonable value of such materials furnished or labor performed, not exceeding, however, in any case the prices agreed upon.”

Our Mechanics Lien law, being Section 38-1-3 pro-

vides as follows:

"Contractors, sub-contractors 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 . . . . . shall have a lien upon the property . . . . ."

It will be noted that the clause in each of said statutes which is in bold type are in practically identical language. In fact one leading Utah case, *Rio Grande Lumber Company vs. Darke*, 167 Pac. 241 stated that the bond statute was an auxiliary to the Mechanics Lien Law and is just as much a part of it as if it had been incorporated into the Mechanics Lien Law, as it has in the State of California. In fact the latest case out of the Supreme Court having to do with the private contractors statute, *Crane Co., vs. Utah Motor Park*, 335 Pac. 2d, 837 definitely shows that this statute is an auxiliary to our Mechanics Lien Law. Therefore, anything which is lienable under the Mechanics Lien law would be an improvement to land within the terms of the contractors or bond statute. Although furnaces and heating systems are not expressly mentioned under the lien law, unless they are included under the terms "foundry men and boiler makers," no one seriously doubts the right of a supplier of a furnace in a building or home, or a plumber installing plumbing fixtures, to claim a lien. The reason they are given the right to file a lien is because their materials have become incorporated into the home or building as a fixture and become part of the realty and have lost their identity as personal property and unless the supplier is able to claim a lien on the real property, he would have a difficult, if not an impossible job of following his material in order to require payment. When the materials have been built into the structure and are an integral part of it as a fixture within the accepted rules laid down by the law



of fixtures, then they are an improvement upon land for which the supplier can file a Mechanics lien or sue under the contractors statute. It is the contention of the Appellant that the equipment supplied here became an integral part of the building and was incorporated into it so as to become a fixture as a part of the realty and that a trial of the case would so show.

It is elementary that our lien law does not apply to chattels or personal property installed in a building which do not become attached to it or become fixtures and therefore, we must turn to the law of fixtures to see what is classed as such and what retains its status as personal property. On the subject of fixtures, 22 Am. Jur. page 713 provides as follows:

"Fixtures are a species of property which lies along the dividing line between real and personal property, and to decide on which side of the line certain items of property belong is often a difficult question. While there are differences of opinion as to the precise meaning of the term "fixture," it is generally used in reference to some originally personal chattel which has been actually or constructively affixed either to the soil itself or to some structure legally a part of such soil. It implies having possible existence apart from the realty but which may by annexation be assimilated into realty."

This same authority then goes on to state the various rules for determining what are fixtures, one of which is annexation to the realty and two, adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated, and three, intention to make the article a permanent accession to the freehold. 22 Am. Jr. pages 763 to 794 gives specific application of these rules to various items of property which are and are not fixtures and although the intention of the parties is given much weight, generally heat-

ing systems, hot water heaters, refrigeration systems, filling station equipment and plumbing appliances are classed as fixtures as are attached boilers and engines and machinery.

The books are literally full of cases stating what become fixtures and a part of the realty. The following are cited:

Metropolitan Life Ins. Co. vs. Kimball, 94 Pac. 2d, 1101 (Ore.) held that where entire dehydration plant, including building, scales, motors, trays, trucks, furnace, etc. and buried oil tank and other machinery was bolted on, including motors and fans, they became fixtures.

Westinghouse Electric Supply Co. vs. Hawthorne, 150 Pac. 2d, 55 (Wash.) held that electrical wiring and accessories and appliances used in connection, whether unprotected or in conduit which were attached to building, were part of the building, and subject to lien.

Dawson vs. Scruggs-Vandervoort Barney Realty Co. 268 Pac. 584 held that a refrigeration plant connected with the freehold by brine pipes and brackets held part of the freehold so as to entitle one furnishing new brine pipes to file a lien.

Lanier vs. Lovett, 213 Pac. 391 held that material used in a plumbing job is understood in general way to mean such articles as gas, sewer and water pipes, sinks, bathtubs, etc., as articles for which mechanics lien could be filed.

Michael vs. Reeves, 60 Pac. 577 held that a furnace in home was lienable if affixed to the buildings, otherwise not.

Independent Meat Co. vs. Jerome and Crane Co. 184 Pac. 992 held that to come within the statute so as to permit the claiming of a lien for machinery furnished it must appear that the same became part of the con-

struction, erection or completion of the improvements and became fixtures to the realty or machinery necessary in accomplishing the construction of the improvement.

The Utah case of *Moe vs. Millard County School Dist.* 179 Pac. 980 which held that plumbing, heating and ventilating equipment installed in a school became fixtures.

Probably the last pronouncement from the Utah Supreme Court on this subject was the case of *Crane Co. vs. Utah Motor Park*, *supra*. There a new boiler was installed, no bond was supplied by the owner and the supplier of the boiler sued under the private contractor's statute. Although not specifically raised, it appears to have been conceded that this was a fixture and therefore lienable and therefore within the terms also of the private contractors statute. True, one of the latest cases from the Utah Supreme Court was the case of *Backus vs. Hooten*, 294 Pac. 2d 703, wherein it was held that the leveling of land was not such an improvement upon land within the terms of the statute. But another recent case out of our Supreme Court is that of *Stanton Transportation Co. vs Davis*, 341 Pac. 2d, 209 where it was held under our Mechanics Lien Law, transportation charges of an oil rig could not be claimed but work in erecting the rig on the property could be.

In order to determine whether the equipment herein involved became fixtures it would be necessary to try the case, the finding of which on this particular point, the appellant has nothing to fear but for the lower court to summarily decide this question, as a matter of law, decides the case on its merits without regard as to whether or not they have become fixtures and thus an improvement "upon land." It is for this reason it was error for the lower court to so summarily decide this case. The lower court has ruled that installation of this lumber dry-

ing and curing equipment in a lumber kiln was not an improvement upon the land. In fact the wording of the lower court's order is sufficiently broad that not even an installer of a heating, refrigeration or plumbing system in a home could claim a lien therefor. It is generally conceded, however, that such are lienable improvements.

In summary on this point, it is the Appellant's contention that whatever is lienable comes within the terms of the private contractor's statute and that the furnishing of items which become fixtures are improvements to the land; that the Mechanics Lien Law and the private contractors statute are auxiliary to each other and that this point has been decided at least twice by our Supreme Court in the cases of the Rio Grande Lumber Co. vs. Darke, *supra*, and Crane Co. vs. Utah Motor Park, *supra*. Furthermore, the Utah case of Liberty Coal and Lumber Co. vs. Snow, 178 Pac. 341 holds that the private contractors or bond statute is very broad and sweeping in its terms.

The purpose of the Mechanics Lien statute and also the bond statute is to prevent the owners of land from having their lands improved with materials and labor furnished and performed by third person and thus enhance the value of such land without becoming personally responsible for the reasonable value of the materials and labor which enhance the value of those lands. Such will be the exact case here.

## POINT 2. THE PRIVATE CONTRACTORS STATUTE HAS BEEN HELD TO BE CONSTITUTIONAL

The Respondent's memorandum filed in the lower court and also the Order of the Lower Court dismissing the complaint touched upon the constitutionality of the statute involved. In fact the Lower Court appears to rely upon the unconstitutionality of this statute and its hardship provisions to support its ruling. It should be suffi-

cient to state here that Rio Grande Lumber vs. Darke case, supra, after a very full and complete exploration of the constitutionality question, ruled the statute as being constitutional and this ruling was affirmed in the Crane Co. vs. Utah Motor Park case above referred to.

Perhaps something should be said regarding the claimed penal or hardship application of these statutes. Every owner of property having improvements made thereon can protect himself by one of two different methods as fully explained by the Darke case. He may require a bond of the contractor to protect against suppliers of labor or materials, or he may hold back sufficient of the contract price to assure that they are paid. If he does neither but blithely pays the contractor he has contributed to his own hardship. He has had it in his power to prevent such a situation and fails to do so. It is not for him now to come in and cry hardship. In fact the Court in the Darke case used the apt language of stating that "under the bond statute he must take care to exact the bond and under the lien statute he must take care to hold the fund."

#### CONCLUSION

Therefore, in conclusion, the Appellant contends that it is entitled to have this case heard on its merits; that if upon a trial it is found that the equipment supplied is now incorporated into the defendant's real property as fixtures, they are improvements upon the land within the meaning of the bond statute and that such statutes have been upheld by our Court and work no undue hardship upon the owner of property.

Respectfully submitted,  
ORVILLE ISOM  
Attorney for Appellant