

for the purpose of publicizing their organization and organizing an industry is also a valuable one without which union effectiveness would be seriously limited. Attempts to solve this conflict by making the distinction on the basis of the object of the picketing are, as already suggested, impractical. One solution would be legislation allowing peaceful picketing for a reasonable time (measured by the size of the unit picketed), followed by an election after which, if the union were defeated, no further picketing would be presently allowed.¹⁴ Such legislation would certainly require a board to administer it, determining the proper unit and voting qualifications and, in general, supervising elections.

JAMES A. KING, JR.

Mechanics' Lien—Statutory Construction—Encumbrances by Optionee As Statutory Owner.—*Sontag v. Abbott*.¹—Prior to an option holder's exercise of his option to purchase land he entered into a contract with the plaintiff-materialman for the supply of building materials for the construction of a house on the property. Some of the materials were delivered to the lot on the day of the contract. Subsequently the option to purchase was exercised and a mortgage deed of trust executed in favor of the defendant-mortgagee. The mortgage was recorded the next day. The purchaser abandoned the property without paying in full for the improvements then made by the plaintiff. On foreclosure of the mortgage the defendant secured a deed to the property. The plaintiff now seeks to enforce a materialman's lien on the property.² The defendant resists on the basis that the controlling lien statute requires the owner or his agent to contract for the improvements;³ whereas the contract for the improvements was here entered into with an option holder. Judgment for the plaintiff affirmed on appeal. HELD: An option holder is an owner of the property under option within the meaning of the lien statute.⁴

¹⁴ In this relation see, Cox, *Role of Law in Labor Disputes*, 39 Cornell L.Q. 592 (1954).

¹ 344 P.2d 961 (Colo. 1959).

² Colo. Rev. Stat. Ann. § 86-3-6 (1953): "... All liens, established by virtue of this article shall relate back to the time of the commencement of work under the contract between the owner and the first contractor ... Nothing herein contained, however, shall be construed as impairing any valid encumbrance upon any such land, duly made and recorded prior to the signing of such contract, or the commencement of work upon such improvement or structure."

³ Colo. Rev. Stat. Ann. § 86-3-1 (1953): "Mechanics, materialmen, ... shall have a lien upon the property ... for which they have furnished materials for the value of such services rendered ... whether at the instance of the owner, of any other person acting by his authority or under him, as his agent, contractor or otherwise, for the work done or materials furnished. ..."

⁴ Colo. Rev. Stat. Ann. § 86-3-3 (1959): "... Any lien provided for by this article shall extend to and embrace any additional or greater interest in any of such property acquired by such owner at any time subsequent to the making of the contract or the commencement of the work upon such structure and before the establishment of such lien by process of law, and shall extend to any assignable, transferable or conveyable interest of such owner or reputed owner in the land upon which such structure ... shall be placed."

CASE NOTES

The court had held⁵ that to establish a lien within the statute the contract by which the materials were furnished must have been made with the owner. A mere possessor did not have such an interest as would support a lien, the title being in a third party at the time the contract for the materials was made.⁶

It had also been held⁷ that to attach a lien to property the possessor with whom the contract was made must have an interest in the land which the law will recognize and enforce. This is so despite the fact that the possessor subsequent to the contract for the improvements, secures the title to the realty.⁸ For the recognition of a lien under such circumstances there must be some basis for determining that a new contract had in fact been entered into between the new owner and the contractor.⁹ The corollary proposition of such rules is that the contractor must at his peril determine that the other party to the contract is the owner of the property before he commences work.¹⁰

In view of these cases it becomes essential to determine whether the option holder had an interest in the land which would qualify him as an owner within the meaning of the statute.¹¹ The Colorado Court had decided in *Home Public Market v. Fallis*¹² that an optionee had such an interest. This decision is based on two cases which are clearly distinguishable.¹³ The first case¹⁴ involved the construction of an irrigation canal, pursuant to a statutory privilege, across the public domain. The legal title to the right-of-way did not vest under the statute until the canal was completed and the water put to beneficial use. However, it was held that an equitable interest arose in favor of the contractor contemporaneously with, and as a result of, the labor and materials of the mechanics and that such an interest would support a lien in favor of his mechanics. In the second case¹⁵ a conditional sales contract was made, expressly obligating the vendee to make improvements on the land. It was held that the materialman's lien arising out of the installation of the improvements attached to the vendor's interest and followed the legal title into the hands of the vendee. Both cases represent the majority view,¹⁶ in that in the first case the contractor had an equitable interest in the property to be charged and in the second case the legal interest of the owner was encumbered and a subsequent transferee of the legal in-

⁵ 15 Colo. App. 487, 63 Pac. 809 (1900).

⁶ Ibid.

⁷ 10 Colo. 337, 15 Pac. 680 (1887).

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Colo. Rev. Stat. Ann. § 86-3-3 (1953).

¹² 72 Colo. 48, 209 Pac. 641 (1922).

¹³ *Jarvis v. State Bank*, 22 Colo. 307, 55 Am. St. Rep. 129 (1896); *Colorado Gold Dredging Co. v. Sterns-Rogers Mfg. Co.*, 60 Colo. 412, 153 Pac. 765 (1916).

¹⁴ *Jarvis v. State Bank*, supra note 13.

¹⁵ *Colorado Gold Dredging Co. v. Sterns-Rogers Mfg. Co.*, supra note 13.

¹⁶ Annot., 95 A.L.R. 1095 (1934).

terest took subject to the lien. The *Home Public Market* case should not have been decided upon the principle of either case.

An option holder clearly has no legal interest in the realty. Furthermore, there is substantial authority holding that an option does not give the optionee any equitable interest in the land.¹⁷ Pomeroy states that until a contract is changed from a conditional to an absolute form there can be no interest in the property in the optionee.¹⁸ This position is consistent with the doctrine of equitable conversion wherein the right of a vendee to specific performance of a contract for the sale of land gives rise to an equitable interest in the vendee in the subject realty.¹⁹ Since an option is a continuing offer, which until seasonably accepted creates no contractual right in the optionee to the transfer of the property,²⁰ the doctrine of equitable conversion is inapplicable. With neither a legal nor an equitable interest in the land an optionee can not subject the land to a mechanics' lien under the statute.²¹

Because of the lack of ownership required by the lien statute, it is suggested that *Home Public Market v. Fallis* is in error and should have been overruled. The legislature carefully defined the conditions under which a lien would attach. Such a statute, being in derogation of the common law, should not be construed liberally in respect to these conditions.²² While the interest of the mechanic is favored by the law because of the inferior position he holds after the accession of the materials to the land, the judiciary can not extend the unambiguous language of the statute to include situations which do not fall within its provisions.²³

EDGAR J. BELLEFONTAINE

Robinson-Patman Act—Brokerage—Reduction of Brokerage by Seller's Agent Followed by Price Reduction to Buyer as Violation of § 2(c) by Broker.—*Federal Trade Commission v. Henry Broch & Co.*¹—Respondent, an independent seller's-broker, agreed with one of his principals to reduce his commission from the contract rate of 5% to 3% to enable the seller to make a sale at a reduced price proposed by a buyer. The 2% reduction represented 50% of the saving passed on to the buyer, the other 50% coming directly from the seller. The buyer was unaware that a reduction in brokerage was partially responsible for the lower selling price.

¹⁷ *Durepo v. May*, 73 R.I. 71, 54 A.2d 15 (1947); *Mendenhall v. Klinch*, 51 N.Y. 246 (1872); *Kern v. Robertson*, 92 Mont. 283, 12 P.2d 565 (1932); See, Annot., 52 A.L.R. 693 (1927); *American Law of Property* § 11.17 (1952).

¹⁸ Pomeroy, *Specific Performance of Contracts* § 319 (3rd ed. 1926).

¹⁹ Pomeroy, *Equity Jurisprudence* § 161 (5th ed. 1941); *Walsh, Equity* 415 (1930).

²⁰ *Helvering v. Bartlett*, 71 F.2d 598 (4th Cir. 1934); *Rampton v. Dolson*, 156 Iowa 315, 136 N.W. 682 (1912).

²¹ Colo. Rev. Stat. Ann. § 86-3-3 (1953).

²² *Friedman v. Stein*, 4 N.J. 34, 71 A.2d 346 (1950).

²³ *Turner v. Furliegh*, 124 Wash. 45, 213 Pac. 454 (1923).

¹ 363 U.S. 166 (1960).