

# Tulsa Law Review

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Volume 3 | Issue 1

---

1966

## Mortgages: Priority of Construction Liens

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### Recommended Citation

O. B. Johnston, *Mortgages: Priority of Construction Liens*, 3 Tulsa L. J. 72 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol3/iss1/11>

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concerned only with who was the owner and one in possession at the time of the search.<sup>21</sup>

Thus it would appear from the *Kinderman* case that the only way a child, regardless of age, may have a right of privacy in his personal effects and still live with his parents is to keep the effects locked in a cabinet, as in the *Holzhey* case. In the alternative, he should, as in the *Reeves* case, make sure that his parents are aware that his bedroom is exclusively for his own use. But even then, he may not be safe in Minnesota, since the court said, "[T]he protection afforded to the child must be viewed in light of the father's right to waive it."<sup>22</sup>

*Daniel T. Monte*

#### MORTGAGES: PRIORITY OF CONSTRUCTION LIENS

The Oklahoma Supreme Court recently served notice that it will no longer give priority to materialmen's and mechanics' liens over a mortgage lien when the material furnished and labor rendered are commenced after the mortgage is recorded. In the past, Oklahoma courts have allowed the mechanics' and materialmen's liens to have priority over a mortgage holder even if the work was started or material was furnished after the mortgage was recorded as long as construction was begun prior to the recording of the mortgage.

There are three important cases concerning this problem in Oklahoma: *Fleharty v. National Loan & Investment Co.*,<sup>1</sup> *Industrial Tile Co. v. Home Federal Savings & Loan Assoc. of Tulsa*,<sup>2</sup> and the recent case of *American First Title & Trust Co. v. Ewing*.<sup>3</sup> The basis of the conflict concerning priority of construction liens is the interpretation of Section 141 of Title 42 of the Oklahoma Statutes (1961),<sup>4</sup> which the Supreme Court by its construction in the *American First* case has overruled its holdings in *Fleharty* and *Industrial Tile*.

The issue in this trilogy of cases involves the redundant priority of liens where a mortgage lien attaches after commencement of construction, and thereafter mechanics and materialmen begin to furnish labor and material under separate contracts with the owner-builder on separate segments of the construction, as distinguished from a single or general con-

<sup>21</sup> See text accompanying notes 6 and 7 *supra*.

<sup>22</sup> *State v. Kinderman*, *supra* note 1, at 580.

<sup>1</sup> 89 Okla. 292, 215 P. 744 (1923).

<sup>2</sup> 331 P.2d 918 (Okla. 1958).

<sup>3</sup> 403 P.2d 488 (Okla. 1965).

<sup>4</sup> ". . . and such lien shall follow said property and each and every part thereof, and be enforceable against the said property wherever the same may be found, and compliance with the provisions of the Article shall constitute constructive notice of the claimant's lien to all purchasers and encumbrances of said property or any part thereof, subsequent to the date of the furnishing of the first item of material of the date of the performance of the first labor."

tract for such construction where the mortgage lien attaches after commencement of construction. The Oklahoma Supreme Court has in the past relied upon Section 141 of Title 42 of the Oklahoma Statutes (1961)<sup>5</sup> dealing with priority of liens, the court stating that a mechanics' or materialmen's lien on a single building project attaches, not when the actual labor or materials are furnished, but on the date when construction actually starts. The mere hauling of materials to the property and staking of the corners has been held to be sufficient as the start of construction.<sup>6</sup>

The court has been divided in its decisions mostly on the interpretation of the part of Section 141 which reads the mortgage lien is "subsequent to the date of the furnishing of the first item of material or the date of the performance of the first labor."<sup>7</sup> The problem is whether the word "first" should be applied to the first item furnished towards construction by any of the contractors upon which the others could claim priority, or whether the "first" applies to each contractor alone. The former has been the favored interpretation by the Oklahoma Supreme Court as in the *Industrial Tile* case, but usually by a narrow margin. The *American First* case shows that the court has changed its way of thinking to establish a rule that in the future each lien claimant will have to establish his own priority over the mortgage note.

The court in the *American First* case felt that to construe Section 141 to mean that any and all liens relate back to the commencement of the building would be in derogation of, and not in harmony with Section 17 of Title 16 of the Oklahoma Statutes (1961). The defendants in the *American First* case, prior to the time the mortgage lien attached, had no privity of contract with the owner and had full notice and knowledge of the mortgage lien when they first furnished labor and materials. It should be noted, as did Justice Halley in his dissent,<sup>8</sup> that Section 141 of Title 42 of the Oklahoma Statutes (1961) clearly favors those who perform labor or furnish material, but the majority felt that the mortgage holder also should be protected. The decisions before the *American First* case show that the Oklahoma courts have followed the decision of the Kansas Supreme Court<sup>9</sup> in dealing with mechanics' liens. In *Dickason Goodman Lumber Co. v. Foresman*,<sup>10</sup> the Oklahoma Supreme Court said that since our mechanics' lien statutes were adopted from Kansas, they would follow the interpretation of such statutes by the Kansas courts. The Oklahoma court in the *American First* case reasoned that the amendment to Section 141 in 1919 released the Oklahoma courts from the idea that they should adhere to the Kansas rules on lien superiority.

There seems to be no dispute about superiority of liens where there is absolutely no construction started before the mortgage lien has attached, in which case the mortgage lien has superiority over all mechanics' and

<sup>5</sup> *Industrial Tile Co. v. Home Federal Savings & Loan Ass'n. of Tulsa*, 331 P.2d 918 (Okla. 1958).

<sup>6</sup> *Hughey v. Cadehead*, 389 P.2d 973 (Okla. 1964).

<sup>7</sup> 42 OKLA. STAT. § 141 (1961).

<sup>8</sup> *American First Title & Trust Co. v. Ewing*, *supra* note 3, at 496.

<sup>9</sup> *Kansas Mortgage Co. v. Weyerhaeuser*, 48 Kan. 335, 29 P. 153 (1892).

<sup>10</sup> 120 Okla. 168, 251 P. 70 (1926).

materialmen's liens.<sup>11</sup> There seems to be in the court a split of opinion also on whom the burden should fall to show when work actually commenced on the building. The majority in the *Industrial Tile* case felt the burden should fall upon the mortgage holder to show that the mortgage was filed before any work had commenced. The dissent in the *Industrial Tile* case said that it should fall upon the materialmen and laborers, if need be, to fix with certainty the commencement of their work. In the future it should be interesting to see whether the burden will be on the mortgage holder to show that no work had begun before the mortgage was filed, or whether the materialmen and laborers must show that they had started their part of construction before the mortgage was filed.

It seems that the entire fault arising over the interpretation of Section 141 of Title 42 of the Oklahoma Statutes (1961) can be laid at the feet of the legislature for not properly expressing their intentions when adopting the statute. Perhaps a revision of the Kansas lien laws should have been made when they were adopted by Oklahoma. A better explanation of what "first," as used in Section 141 of Title 42 of the Oklahoma Statutes, was intended to mean would have avoided numerous suits and the varied opinions in the Oklahoma courts. The Oklahoma Supreme Court said in the *American First* case that in the future it will not interpret the word "first" to mean the commencement of the construction; but rather the "first" material or labor furnished by the individual contractor. Thus, if the material or labor is not furnished before the mortgage lien attaches, the materialmen's or mechanics' lien of that contractor are inferior to that of the mortgage lien claimant.

The *American First* case should serve to clarify the law for mortgage lien holders, materialmen, and laborers. By examining the records and the property itself, the potential mortgage lien holder will know that only those materialmen's and mechanics' liens that are prior to his will have superiority over his lien in case of foreclosure. Nor will he need fear subsequent liens taking priority over his lien by riding the "coat tails" of the prior materialmen's and mechanics' liens that were prior in time to the mortgage lien. The supplier and laborer should take note of the case as they are now restricted to the old maxim of "first in time is first in right,"<sup>12</sup> and if there is a mortgage on record before they commence their segment of construction, their lien will be inferior to that of the mortgage.

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<sup>11</sup> Local Federal Savings & Loan Ass'n v. Davidson & Case Lumber Co., 208 Okla. 155, 255 P. 2d 248 (1953); Morley v. McCaskey, 134 Okla. 50, 270 P. 1107 (1928); Home Savings & Loan Ass'n. v. Sullivan, 140 Okla. 300, 284 P. 30 (1930).

<sup>12</sup> Miller's Appeal, 122 Pa. 95, 15 Atl. 672 (1888).