

2001

# J. P. Koch, Inc. v. JC Penney Company : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_sc2](https://digitalcommons.law.byu.edu/byu_sc2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Richard H Moffat; Attorneys for Plaintiff-Respondent.

Wallace D Hurd; Attorney for Defendant-Appellant.

---

## Recommended Citation

Brief of Appellant, *Koch v. JC Penney*, No. 13850.00 (Utah Supreme Court, 2001).

[https://digitalcommons.law.byu.edu/byu\\_sc2/1022](https://digitalcommons.law.byu.edu/byu_sc2/1022)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

[http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

DISCOUNT

KFD

45.9

\$9

DOCKET NO.

BRIEF

**13850 A**

RECEIVED  
LAW LIBRARY

DEC 6 1975

OF THE STATE OF

BRIGHAM YOUNG UNIVERSITY  
J. Reuben Clark Law School

J. P. KOCH, INC.,

*Plaintiff-Respondent,*

*vs.*

J. C. PENNEY COMPANY,

*Defendant-Appellant.*

Case No.  
13850

BRIEF OF APPELLANT

Appeal from a Judgment of the Third District Court  
in and for Salt Lake County, State of Utah  
The Honorable Ernest F. Baldwin, Judge

WALLACE D. HURD  
1011 Walker Bank Building  
Salt Lake City, Utah 84111  
*Attorney for Defendant-Appellant*

RICHARD H. MOFFAT  
9th Floor, Tribune Building  
Salt Lake City, Utah 84111  
*Attorney for Plaintiff-Respondent*

**FILED**

JAN - 20 1976

## TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE .....	2
DISPOSITION IN LOWER COURT .....	2
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	3
POINT I.	
LIABILITY UNDER SECTION 14-2-2 U.C.A., 1953 IS NOT ABSOLUTE .....	6
POINT II	
APPELLANT WAS JUSTIFIED IN RELYING ON THE LIEN WAIVERS .....	14
POINT III	
THE FIRST CONDITION CONTAINED IN THE ORDER STAYING ENFORCEMENT OF JUDG- MENT IS VOID .....	18
CONCLUSION .....	22

## STATUTES CITED

Utah Code Annotated, 14-2-1 (1953) .....	12
Utah Code Annotated, 14-2-2 (1953) .....	6
Utah Code Annotated, 15-1-4 (1953) .....	19
Utah Code Annotated, 38-1-3 (1953) .....	7

## CASES CITED

<i>Apex Lumber Company v. Commanche Construction</i>	
Company, 18 U.2d 119, 417 P.2d 131 .....	12
<i>Carter v. McHaney</i> (Tex. Civ. App.) 373 SE.2d 82. ....	20
<i>Chicago Bridge and Iron Company v. Reliance Insurance</i>	
Company, 46 Ill.2d 522, 264 N.E.2d 134 .....	13
<i>Cote, etc., Brick Co. v. Sadring</i> , 68 Mo. App. 15 .....	11
<i>Crane Company v. Parker Construction Company</i> (Mass)	
247 N.E.2d 591 .....	13
<i>Crane Company v. Utah Motor Park, Inc.</i> , 8 U.2d 413,	
335 P.2d 837 .....	8

	Page
<i>Dairy Distributors, Inc. v. Local Union No. 976,</i> <i>Joint Council 67, Western Conference of</i> <i>Teamsters</i> , 16 U.2d 85, 386 P.2d 47 .....	19
<i>Dezen v. Slatcoff</i> , (Fla.) 65 S.2d 484 .....	21
<i>Geier v. Tjaden</i> (N.D.) 84 NW.2d 582 .....	20
<i>Holbrook v. Webster's, Inc.</i> , 7 U.2d 148, 360 P.2d 661 .....	9
<i>Johnson v. Hazen</i> , 333 Mass. 636, 132 NE.2d 391 .....	21
<i>Kaufman v. Kaufman</i> , 292 Ky. 351, 166 SW.2d 860 .....	20, 21
<i>King Brothers, Inc. v. Utah Dry Kilne Company</i> , 13 U.2d 339, 374 P.2d 254 .....	8
<i>North Drive-Inn Theater Corporation v. Park Drive-Inn</i> <i>Theater, Inc., et al.</i> , (10th CR, 1957) 248 F.2d 232.....	21
<i>Rio Grande Lumber Company vs. Darke</i> , 50 U. 114, 167 P.241. ....	8
<i>West v. Pinktson</i> , 44 U. 123, 138 P. 1152 .....	10
<i>Zions First National Bank v. Reginald L. Saxton, et al.</i> , 27 U.2d 76, 493 P.2d 602 .....	8

## AUTHORITIES CITED

45 Am. Jur. 2d, p. 67 .....	19
45 Am. Jur. 2d, p. 71 .....	21
54 ALR 2d 810 .....	21
144 ALR 866 .....	20

IN THE SUPREME COURT  
OF THE STATE OF UTAH

J. P. KOCH, INC.,	}	Case No. 13850
<i>Plaintiff-Respondent,</i>		
<i>vs.</i>		
J. C. PENNEY COMPANY,		
<i>Defendant-Appellant.</i>		

BRIEF OF APPELLANT  
STATEMENT OF THE KIND OF CASE

This is a suit to recover money allegedly owing for labor and material furnished pursuant to a construction contract. Suit was filed under the provisions of Section 14-2-2 U.C.A., 1953.

DISPOSITION IN LOWER COURT

The court granted a Motion for Summary Judgment in favor of the plaintiff and against the defendant-appellant J. C. Penney Company in the amount of \$56,-147.97 with interest from February 22, 1972 at the rate of six percent per annum until date of judgment, and thereafter at the rate of eight percent per annum. The lower court also entered an Order Conditionally Staying Enforcement of the Judgment. From such judgment and order defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks a reversal of the judgment and a judgment in defendant's favor as a matter of law or in the alternative a mandate that the case should be tried. Defendant also seeks an order declaring the condition

contained in the Order Staying Enforcement of the Judgment to be void.

### STATEMENT OF FACTS

On about June 6, 1970, the defendant J. C. Penney Company entered into a contract with the defendant Skyline Construction Company for the erection of a store building in Bountiful, Utah. Skyline Construction Company was the general contractor for the project. On or about August 31, 1970, Skyline Construction Company entered into a subcontract with the plaintiff J. P. Koch, Inc., by the terms of which the plaintiff was to furnish materials and to perform labor incident to the general mechanical portion of the construction of the defendant Penney Company's building. The general contract, as originally signed, required that Skyline Construction Company furnish a bond to guarantee payment of bills for labor and material furnished in the construction of the building. On or about September 18, 1970, the bond required was deleted from the general contract.

In performance of the subcontract, plaintiff furnished material and labor for the construction of the building of the defendant J. C. Penney Company of a reasonable value of \$583,086.00. Upon completion of the contract, according to the books of the defendant Skyline Construction Company, there were backcharges or other lawful offsets against such amounts of material and labor in the sum of \$2,160.64, leaving a net amount of \$580,925.36.

In accordance with the provisions of the general contract between the defendant J. C. Penney Company and defendant Skyline Construction Company, progress payments were made by Penney Company to the general contractor from time to time as work progressed. In accordance with the contract and the general conditions thereof, payment requests were accompanied and supported by lien waivers from various subcontractors and materialmen, which waivers in most instances, showed the total amount of money received by each of the individuals (R.95-104). Under date of October 31, 1971, plaintiff furnished a lien waiver acknowledging receipt from the general contractor, on account of work performed and material furnished of \$569,608.34 (R.104). In reliance on the lien waivers so furnished, the defendant J. C. Penney Company paid to the general contractor, Skyline Construction Company on account of the mechanical work performed the total sum of \$569,608.34. The defendant J. C. Penney Company admitted in its answer on file herein that there remained due and owing the sum of \$11,317.02 and paid such amount to the Clerk of the Court as a tender of all amounts owing.

By its answer, the defendant Skyline Construction Company admitted that it owed to the plaintiff the sum of \$56,147.97. Skyline Construction Company is now insolvent.

The plaintiff filed a Motion for Partial Summary Judgment. At the hearing thereon, the depositions taken in the case were ordered opened and published. On November 29, 1973 the Court granted plaintiff's Motion

and entered a Partial Summary Judgment (R.30-32). Subsequent thereto and under the date of January 9, 1974, and Court entered an Amended Partial Summary (R.26-28), in favor of the plaintiff and against the defendant J. C. Penney Company in the amount of \$56,147.97 plus interest thereon from February 29, 1972 at the rate of 6% per annum until entry of judgment and thereafter at the rate of 8% per annum (R.26).

The Amended Partial Summary Judgment expressly finds that in reliance on the total figures in the lien waiver, defendant J. C. Penney Company "paid to defendant Skyline Construction Company the sum of \$569,608.34 shown on the last lien waiver upon which disbursement was made, which leaves due and owing from J. C. Penney Company to the plaintiff the sum of \$11,317.02, exclusive of interest" (R.27, par.7).

The court further finds that the defendant J. C. Penney Company "could not justifiably rely on the lien waivers or the figures contained therein and said reliance is not a defense" (R. 28), and reserved for future determination the validity of the claimed backcharge.

Under date of April 22, 1974, the defendant J. C. Penney Company filed a Motion to Stay the Enforcement of the Judgment and upon hearing, the Court entered an order conditionally staying the enforcement thereof (R.11-12). The conditions were that interest on the judgment should run from June 6, 1974 on the principal and then accrued interest:

"at the current prime rate calculated by averaging the daily rate for each month and that rate



will be applied for each month from June 6, 1974 until the date of payment of any judgment awarded to the plaintiff" (R.11) and that the defendant Penney Company pay to the plaintiff the sum of \$11,317.02 together with interest at 6% per annum, being the sum the defendant Penney Company had admitted was still owing and unpaid on the total subcontract. Subsequent to the entry of the said order, the defendant J. C. Penney Company did pay the sum of \$11,317.02 together with interest as shown by the Partial Satisfaction of Judgment signed by the plaintiff's attorney (R.10).

Subsequent thereto and under date of September 11, 1974 the defendant J. C. Penney Company and the plaintiff settled and compromised the issue as to the claim of offset and all of the parties stipulated and agreed that the Amended Partial Summary Judgment should be declared to be and become a final judgment on the date an order was signed by the Court (R.7-8). Under date of September 11, 1974 the Court signed an order providing that as of the date thereof the Amended Partial Summary Judgment should be and become the final judgment in the case. The defendant J. C. Penney Company thereupon filed Notice of Appeal.

## POINT I

### LIABILITY UNDER SECTION 14-2-2 U.C.A., 1953 IS NOT ABSOLUTE

The basis of plaintiff's suit is the liability imposed by Section 14-2-2 U.C.A., 1953 which provides as follows:

“Any person subject to the provisions of this chapter, who shall fail to obtain such good and sufficient bond, or to exhibit the same, as herein required, 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. Actions to recover on such liability shall be commenced within one year from the last date the last materials were furnished or the labor performed.’

It is clear in the plaintiff’s Memorandum of Authorities submitted to the lower court in support of the Motion for Summary Judgment that plaintiff’s contention is that liability under this statute is absolute. The lower court appears to follow this argument since in paragraph 8 of the Amended Partial Summary Judgment (R.28) it is stated:

“J. C. Penney could not justifiably rely on the lien waivers or the figures contained therein, and *said reliance is not a defense* to the claim of the plaintiff.” (Emphasis added)

The statute itself as quoted verbatim above does not appear to impose absolute liability and plaintiff has cited no cases from Utah or other jurisdictions so holding.

This court has stated that decisions interpreting Section 14-2-2 U.C.A., 1953, known as the bonding statute, and Section 38-1-3 U.C.A., 1953, known as the lien statute, deal with the same or similar rights and, therefore, cases decided under one statute are applicable in determining the application of the other. The first such de-

cision was *Rio Grande Lumber Company vs. Darke*, 50 U. 114, 167 P.241. This was an attack on the constitutionality of the statute imposing liability on the owner for failure to require a completion bond. (Now Section 14-2-2 U.C.A., 1953.) The court held that the statute was constitutional and stated at page 124 Utah reports:

“The statute of Utah now under review is auxiliary to our mechanics’ lien law and just as much in aid of it as if it had been made a part of it and incorporated in the same chapter . . . under the bond statute, he (the owner) must take care to exact the bond and under the lien statute, he must take care to hold the fund.” (Parenthetical phrase added.)

In *King Brothers, Inc. vs. Utah Dry Kiln Company*, 13 U.2d 339, 374 P.2d 254 it was stated:

“Because of the common purposes of these lien and contractors’ bond statutes and their practically identical language, adjudications as to what is lienable under the former are helpful in determining the proper application of the latter.”

To the same effect, see also *Crane Company v. Utah Motor Park, Inc.*, 8 U.2d 413, 335 P.2d 837.

Keeping in mind then the applicability of cases decided under the materialmen’s and mechanics’ lien statute to the bonding statutes, there are a number of decisions of this court. Factual situations similar to the present case have been considered on several occasions.

In *Zions First National Bank v. Reginald L. Saxton, et al.*, 27 U.2d 76, 493 P.2d 602, the owner, defendant Saxton, obtained a loan from plaintiff to do certain con-

struction on a five acre tract of land. Shortly thereafter the owner advised the contractor that construction was to be expanded to include a twenty acre tract. As work progressed, the owner and the contractor, as an inducement to plaintiff to advance funds, executed a certificate that the labor and materials were used in the construction. Upon receiving checks, they endorsed the same below language stating that they waived and released all lien rights. The contractor claims a lien on the original five acre tract and also on the additional fifteen acres.

In deciding the matter, the Court cited *Holbrook v. Webster's Inc.*, as controlling and said:

"In signing a lien waiver Hamilton waived all liens for the work done, and it matters not that unknown to the plaintiff bank some of the work for which money was received was performed on the 15-acre tract."

In *Holbrook v. Webster's, Inc.*, 7 U.2d 148, 360 P.2d 661, the contractor had signed a request for funds directed to a lender and on the same document was a receipt and lien release which recited that it was delivered to the lender to induce it to make payment of the stated sum and that the materialmen waived, released and discharged any lien or right to lien that he then had or may thereafter acquire against the real property described in the document. This Court stated:

"We are of the opinion that no genuine issue of fact is presented by the lien release. The only issue is one of law. It does not lie in the mouth of appellant to say that he was mistaken in the legal effect of the release or that he did not in-

tend that it should be given the only legal effect of which it is susceptible."

The supplier had filed an affidavit stating that the release was only intended to release the property so far as the receipted amount is concerned. Going on the court said,

"The release is susceptible of only one meaning and absent fraud cannot be varied except by agreement of the parties."

A summary judgment entered below denying the materialmen a lien right was affirmed.

In *West v. Pinkston*, 44 U. 123, 138 P. 1152, plaintiff entered into a subcontract to do brick work on a dwelling house and after completion of the work the general contractor delivered his personal check to the plaintiff for the agreed price. Plaintiff delivered a receipt for payment so that the contractor could obtain the money due the owner on the contract price. Thereafter, the contractor delivered the receipt to the owner and relying on the receipt and the contractor's representation that he had paid the plaintiff, the owner paid the contractor. The contractor failed to deposit the check from the owner and refused to pay the same or any part thereof to the plaintiff. Suit was brought to foreclose a lien against the property. In deciding that plaintiff was entitled to no relief, the court said at page 129 Ut. Rep:

"Appellant (plaintiff) therefore clearly authorized as well as induced the respondent to pay the contractor the \$850.00 which, but for the receipt of appellant, she undoubtedly would have paid to

him. After having induced respondent to pay the money, we cannot see how appellant can complain. In legal effect, she paid the money as directed by him, and he must look to the contractor and not to her for the same. Respondent thereafter had a right to deal with all others who had any claim upon her as though appellant was out of the case."

Going on the Court said:

"We remark that this conclusion is based upon the undisputed facts that the appellant issued the receipt to the contractor with the understanding and for the purpose that he should use the same to obtain the money due to appellant as subcontractor from the respondent; that it was fully understood between the appellant and the contractor that the latter had no money in the bank to pay the check, but that such money had to be obtained from the respondent; and that the receipt was to be used as a means to obtain the money. Upon these facts, we think the appellant is clearly estopped from making any further claims against the respondent under the statute."

The Court quoted an early Missouri case, *Cote, etc.*,

*Brick Co. v. Sadring*, 68 Mo. App. 15:

"A material man, who executes a receipt of payment in full to the contractor for material furnished for a building, for which he sues the owner, who honestly and without any negligence on their part paid the contractor upon the faith of such receipt, is estopped from saying that the acknowledgment of payment is untrue."

Although *West v. Pinkston* is an old case, it appears from Shepherd's Citator not to have been overruled or

modified and is still the law in the State of Utah.

It has, in fact, been specifically held by this Court that liability under Section 14-2-2 is not absolute. In *Apex Lumber Company v. Commanche Construction Company*, 18 U.2d 119, 417 P.2d 131, in affirming a judgment of no cause of action in favor of the property owners, the Court said:

“Apex urges that (1) the evidence shows Apex supplied material for which it was not wholly paid. Apex is right, but this is not controlling, since such an argument would insure it against any nonpayment which it itself help to produce, as was the case here. Further it says (2) that under the statute it has a cause of action for the unpaid value of the material. Equally this is true, unless it was particeps in creating a defense for its opponents, as was the case here.”

In plaintiff's memorandum in support of the summary judgment, the statement is made that the bond was deleted, “without the knowledge of J. P. Koch, Inc.” This statement seems to imply that Penney Company should have notified Koch of the deletion. It is respectfully submitted that under the factual situation herein set forth, plaintiff is in no position to complain of the absence of the bond. The court's attention is respectfully directed to the final paragraph of Section 14-2-1 U.C.A., 1953:

“The bond herein provided shall be exhibited to any person interested, upon request.”

It is respectfully submitted that the plaintiff had an obligation on its part to ascertain that in fact a bond had

been secured as required by the contract, and that it was sufficient in form and amount.

The defense raised by Penney Company is based on the fact that the conduct of the plaintiff itself resulted in plaintiff's loss. Such defense would be equally valid and available to a bond surety. See *Chicago Bridge and Iron Company v. Reliance Insurance Company*, 46 Ill. 2d 522, 264 N.E.2d 134, wherein it was held that a subcontractor who executed waivers of liens without receiving payment from the general contractor would not be allowed to recover on a bond against a non-consenting surety. To the same effect is *Crane Company v. Parker Construction Company* (Mass) 247 N.E.2d 591, where the Court held that a supplier's agent who gave a heating subcontractor a certificate to the effect that he had been paid for boilers furnished was estopped from asserting a claim against the general contractor and the surety that he had not been paid since the general contractor relied upon the certificate to its detriment, and the general contractor obtained payment for the amount of the boilers. This was the holding notwithstanding the fact that the subcontractor's check representing payment for the boilers was subsequently dishonored. The Court went on to say that the contractor had no duty to make certain that checks had been honored before relying on the certificate of the supplier.

It is respectfully submitted that the law in the State of Utah is clear that where a subcontractor or supplier executes and delivers to the general contractor a lien



waiver knowing that the owner will rely thereon in making payments to the general contractor, the signer of the lien waivers is estopped thereafter to claim a lien or to contend that he has not been paid the amounts shown in such lien waiver. This estoppel operates to barr a cause of action under Section 14-2-2 U.C.A., 1953.

## POINT II

### APPELLANT WAS JUSTIFIED IN RELYING ON THE LIEN WAIVERS

The record shows that the general contract contained a detailed plan for making progress payments, and that this plan was followed (Peterson deposition, ps 5-8). Under this plan, payment requests were submitted periodically by the general contractor. These requests show the percentage of completion for the various trade categories, the amount previously paid on each account, and the amount claimed as presently being due. Payment requests were supported by lien waivers from each of the subcontractors in the various trade categories. The amount on each lien waiver was to at least equal the amount paid on the previous payment request.

Plaintiff was aware of this requirement. In his deposition, Gordon Neiderhauser, co-owner of the plaintiff corporation, said he knew that the lien waivers were required, to support the payment requests, and also that defendant Penney Company would rely on the waivers in making disbursements to the general contractor. (Neiderhauser deposition, p.14, line 25 through p.15, line 13.)

Mr. Neiderhauser identified the lien waivers submitted (R. 95-104) as having been signed by him. He further testified that some of the figures written on the lien waivers were in his handwriting and some were not. He could not recall in all instances whether or not the figures had been filled in at the time he signed the lien waivers. He freely admitted that in some instances signed waivers were left with Skyline Construction without dollar figures filled in, stating that "I assumed that Penney's or Skyline would put in the amount based on their estimate or my estimate to them". (Neiderhauser deposition p.15, line 11). Although he had a copy of the estimate of the value of work completed, he did not take it with him or consult it in filling in any of the amounts on the lien waivers, but simply relied on Skyline to fill in the correct amounts (Deposition, p.16).

Charles D. Peterson, the architect on the project, was asked about the lien waivers submitted. At page 41 of his deposition is a series of questions regarding the accuracy of lien waivers. The witness stated that:

"Every single time I receive a lien waiver and it states on there that an amount of money has been paid, I have always believed that that was a true representation of the monies that had actually been paid by the general contractor to the sub."

Further on the same page the witness stated that he was not aware that any of the lien waivers were a misrepresentation of the facts. He was not aware that Skyline had required subcontractors to submit lien waivers in

advance of payment. On the following page the witness stated that he was not aware that this was a common practice in the construction industry, and that he could not believe that it was.

It is clear from Peterson's deposition that he had no way of knowing what amounts had actually been paid by the contractor from each construction advance to the various subcontractors. Of necessity he relied on the amounts shown as having been received in the lien waivers submitted by each subcontractor. This is not an unreasonable assumption or reliance. The subcontractors were in the best position to know what funds they had received from the general contractor on the job at any given time.

In oral argument and in the Memorandum in Support of the Motion for Summary Judgment, plaintiff relies heavily on the fact that there was a discrepancy in the figures contained in two of the lien waivers, Exhibits 7 and 8 (R.101-102). Peterson testified that upon receipt of the lien waiver, Exhibit 8, with a lower figure than for the previous month, he mentioned this fact to Penneys (Deposition p.30, lines 19-25; p.40 lines 1-14).

On the foregoing state of the record, the court erred in three respects in holding that the defendant Penney Company was not justified in relying on the lien waivers.

1. Plaintiff admits, at least for the purpose of the Motion for Summary Judgment, that Penney Company paid to the general contractor \$569,608.34 on account of

the mechanical subcontract. This is the precise amount of the last lien waiver (R.104). Reliance on the figures contained therein is obvious. The court, in fact, found in its Memorandum Decision that, in fact, Penney had relied on the lien waivers.

Plaintiff represented by the lien waivers that a specific sum of money had been paid on account of work done. At the time the waivers were furnished, plaintiff knew that the defendant Penney Company would rely on the amounts shown therein as paid in making progress payments to the general contractor.

Notwithstanding these facts, the plaintiff not only made no effort to see that the amounts shown were correct and accurate, but left these amounts blank to be filled in by the general contractor. Having this constituted, the general contractor, its agent to complete the figures, the plaintiff should be estopped to deny the correctness of such figures.

2. The discrepancy in the figures shown on Exhibits 7 and 8, as mentioned above, occurred in August, 1971. The last lien waiver was submitted in October of that year. During September a waiver was submitted and payment received, and following that the October waiver payment requests were submitted, and payment was made.

The lower court apparently held, as a matter of law that because two of the lien waivers submitted, in a series of ten, over a period of eight months contained incon-

sistent figures, none of the lien waivers could be relied upon. It is respectfully submitted that such finding, particularly when it is on a Motion for Summary Judgment, is not proper or supported by the evidence.

3. The judgment of the lower court on this matter was based on the record as presented, the pleadings, Answers to Interrogatories and depositions. On the question of the reasonableness of defendant Penney Company's reliance on the lien waivers, the defendant had no opportunity to present evidence. This is a factual question: Was the reliance reasonable? The trial court determined such question in the negative, without affording Penney Company an opportunity to present evidence to the contrary.

It is respectfully submitted that such determination on a Motion for Summary Judgment under the circumstances set forth above, was erroneous, and at the very least, the matter should be remanded for a trial.

### POINT III

#### THE FIRST CONDITION CONTAINED IN THE ORDER STAYING ENFORCEMENT OF JUDGMENT IS VOID

On July 22, 1972, the Court entered an Order Conditionally Staying Enforcement of the Judgment upon two conditions (R.11). The first condition was:

"That in the event judgment is finally awarded to the plaintiff, interest thereon shall run on the un-

paid balance at 6% from May 26, 1972 until January 9, 1974, and from said date at 8% per annum until June 6, 1974 and thereafter on the principal and then accrued interest at the current prime rate calculated by averaging the daily rate for each month, and that rate will be applied for each month from June 6, 1974 until the date of payment of any judgment awarded to the plaintiff."

The second condition was that the defendant pay to the plaintiff the sum of \$11,317.02 with interest. This condition has been met as shown in the Statement of Facts herein. Since the defendant J. C. Penney Company always admitted that this amount was owing, such condition is not objectionable.

Section 15-1-4 U.C.A., 1953 provides as follows:

"Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum."

Under the provisions of this statute, the court was without power or authority to direct that a judgment should bear interest at any other than the statutory 8% per annum. Speaking of interest on judgments, this Court said in *Dairy Distributors, Inc. v. Local Union No. 976, Joint Council 67, Western Conference of Teamsters*, 16 U.2d 85, 386 P.2d 47, "this interest follows the judgment as a matter of law and would be collectable even though the judgment did not so provide".

In 45 Am. Jur. 2d at p. 67 it is stated:

"The rate of interest on judgments generally is

prescribed by statute. Such a provision is controlling and the rate prescribed cannot be reduced by reason of equitable considerations". *Geier v. Tjaden* (N.D.) 84 NW.2d 582 and *Carter v. McHaney* (Tex. Civ. App.) 373 SE. 2d 82.

Also cited in support of the statement that interest may not be reduced by reason of equitable considerations, is *Kaufman v. Kaufman*, 292 Ky. 351, 166 SW. 2d 860, 144 ALR 866. In that case a statute provided that a judgment shall bear legal interest from its date. The legal rate at that time by statute was 6% per annum. The lower court took judicial notice that interest rates in the commercial world had greatly decreased and even 2% was regarded as a good yield. It then construed the statute as expressing a legislative intent to limit interest on judgments to a maximum 6% and make a less rate legal interest. In a memorandum decision the lower court held it inequitable that Court obligations should carry a rate of interest altogether out of proportion to the earning of money generally. On appeal the court held:

"The statute is too plain and definite we think to afford the interpretation that it but declares a maximum rate of interest . . . Although the judgment in this particular seems fair and just under existing conditions, economically speaking, we are constrained to hold the Chancellor was without authority to provide other than that the judgment should bear 6% interest."

Not only did the lower court provide for a floating rate of interest, but provided for compound interest by

stating that after June 6, 1974 interest shall run "on the principal and then accrued interest".

As stated in 45 Am.Jur.2d, p.71:

"Although compound interest generally is not allowable on a judgment, it is established that a judgment bears interest on the whole amount from its date, even though the amount is in part made up of interest. . . "

In *Dezen v. Slatcrott*, (Fla.) 65 S.2d 484 the court said:

"The principal sum, that is, the amount of the initial judgment . . . is not disputed, but interest is. The court evidentially allowed interest compounded yearly. This was error. The plaintiff was entitled to simple interest only."

Also, in *North Drive-Inn Theater Corporation v. Park Drive-Inn Theater, Inc., et al.*, (10th CR, 1957) 248 F.2d 232 it is stated:

"It is the general rule that a judgment bears interest on the whole amount thereof, although such amount is made up partly of interest on the original obligation and even though the interest is separately stated in the judgment."

As stated in *Johnson v. Hazen*, 333 Mass. 636, 132 NE.2d 391, 54 ALR2d 810:

"A judgment bears interest from its date, although the amount of the judgment in part is made up of interest."

If the rule is as stated in *Kaufman v. Kaufman*, *supra*, that interest may not be reduced below that speci-



fied by statute, the converse should likewise be true that interest may not be increased. It is respectfully submitted that the trial court was without authority or jurisdiction to increase the interest above the statutory rate.

Even were this not the case, it is submitted that the provision for interest "at the current prime rate calculated by averaging the daily rate for each month" is impossible of computation. The judgment is silent as to what is meant by current prime rate, and it is a matter of common knowledge and, therefore, within judicial notice that the prime rate charged by banks in the eastern United States is frequently, if not always, different than the prime rate charged by local banks, and the judgment offers no guideline or formula by which this interest may be arrived at for the purpose of calculation.

It is respectfully submitted that the first condition in the order staying enforcement of the judgment is void.

## CONCLUSION

The judgment of the District Court should be reversed and judgment entered in favor of defendant-appellant J. C. Penney Company. Liability under Section 14-2-2 U.C.A., 1953 is not absolute, and the cases clearly hold that one claiming under such statute is barred from recovery if his own conduct is relied upon and causes the loss in question.

The finding of the lower court that defendant-appellant J. C. Penney Company could not justifiably rely

on the lien waivers submitted, should be vacated as being unsupported by the evidence and as having been made without the opportunity for the defendant-appellant to present evidence.

The condition attached to the Order Staying Execution of the Judgment, which provides for interest at more than the rate set forth in the statute, Section 15-1-4 U.C.A., 1953, should be declared to be void as being in excess of the jurisdiction and power of the District Court.

In the alternative, this matter should be remanded to the District Court with directions that the same should be tried.

*Respectfully submitted,*

WALLACE D. HURD

*Attorney for Defendant-Appellant*  
1011 Walker Bank Building  
Salt Lake City, Utah 84111