

1960

## Utah Savings & Loan Association v. Robert B. Mecham et al : Cross-Brief of Appellant

Utah Supreme Court

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Aldrich, Bullock & Nelson; Pugsley, Hayes, Rampton & Watkiss; Attorneys for Cross-Appellant;

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**In the Supreme Court of the  
State of Utah**

**FILED**

**UTAH SAVINGS & LOAN ASSOCIATION**  
a corporation,

**MAR 17 1960**

Plaintiff,  
Cross-appellant,  
and Respondent,

Clerk, Supreme Court, Utah

vs.

**CASE  
NO. 9159**

**ROBERT B. MECHAM, et al,**  
Defendants,

**LUDLOW PLUMBING SUPPLY CO.,**  
Defendant and  
Appellant,

**GENEVA ROCK PRODUCTS COMPANY,**  
a corporation; **MASONRY SPECIALTIES  
AND SUPPLY,** a partnership; and **CEN-  
TRAL UTAH BLOCK COMPANY,** a corpo-  
ration,

**Lower  
Court  
Civil  
No. 20,575**

Defendants and  
Cross-respondents

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**CROSS-APPELLANT'S BRIEF**

---

**ALDRICH, BULLOCK & NELSON,**  
and  
**PUGSLEY, HAYES, RAMPTON &  
WATKISS,**  
Attorneys for Cross-Appellant

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# In the Supreme Court of the State of Utah

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UTAH SAVINGS & LOAN ASSOCIATION  
a corporation,

Plaintiff,  
Cross-appellant,  
and Respondent,

vs.

ROBERT B. MECHAM, et al,  
Defendants,

LUDLOW PLUMBING SUPPLY CO.,  
Defendant and  
Appellant,

GENEVA ROCK PRODUCTS COMPANY,  
a corporation; MASONRY SPECIALTIES  
AND SUPPLY, a partnership; and CEN-  
TRAL UTAH BLOCK COMPANY, a corpo-  
ration,

Defendants and  
Cross-respondents

**CASE  
NO. 9159**

**Lower  
Court  
Civil  
No. 20,575**

---

## CROSS-APPELLANT'S BRIEF

---

### PROCEDURAL NOTES

Three separate cases were tried together by the Court below and numbered in the Lower Court as Civil No. 20,575, Civil No. 20,591 and Civil No. 20,592. Not all the parties

defendants in the three cases were involved in each case.

As to all three cases, the trial Court found the issues against defendant, Ludlow Plumbing Supply Company, a corporation, and in favor of plaintiff, Utah Savings & Loan Association, and defendant, Ludlow Plumbing Supply Company, has duly filed its Notice of Appeal as against plaintiff, Utah Savings & Loan Association, in all three cases. Plaintiff, Utah Savings & Loan Association, will respond to that appeal in another brief upon receipt of appellant's brief and will designate itself as respondent therein.

In Civil No. 20,575, the Court found the issues in favor of defendants, Geneva Rock Products Company, a corporation, Masonry Specialties & Supply, a co-partnership, and Central Utah Block Company, a corporation, and against the plaintiff. In Civil No. 20,592, the Court found the issues in favor of defendant, Geneva Rock Products Company, a corporation, and against the plaintiff. Defendants, Masonry Sepcialties & Supply, and Central Utah Block Company, were not parties in Civil No. 20,592.

This cross-appeal of plaintiff, Utah Savings & Loan Association, herein designated as cross-appellant, is prosecuted as to Civil No. 20,575, wherein the Court found the issues against the cross-appellant and in favor of defendants, Geneva Rock Products Company, a corporation, Masonry Specialties & Supply, a co-partnership, and Central Utah Block Company, a corporation ,who are herein designated as cross-respondents.

In the interest of clarity, the cross-appellant herein is submitting another brief as to Civil No. 20,592, contemporaneously herewith, inasmuch as in that matter the facts are similar, but different as to dates, amounts, and prop-



erties involved, and there will be only one cross-respondent, Geneva Rock Products Company.

No cross-appeal has been taken in Civil No. 20,591.

### STATEMENT OF FACTS

On January 31, 1957, Robert B. Mecham, as an owner-builder, and and Ruth W. Mecham, his wife, executed and delivered to cross-appellant, Utah Savings & Loan Association, eight separate promissory notes and eight separate mortgages securing said notes, covering eight separate vacant lots in an area in Utah County, referred to by the litigants throughout the trial as "La Mesa". (Plaintiff's Exhibits 1-8; see plaintiff's Exhibit 40; R. - 198). The notes and mortgages were executed for the purpose of procuring money to build dwellings and improvements on the lots covered by the mortgages, which monies were to be disbursed from time to time as construction progressed. (Tr. 82) These mortgages were each duly recorded on February 13, 1957. (Plaintiff's Exhibits 1-8; R. 193-198)

On February 5, 1957, Mecham also executed and delivered to the cross-appellant eight additional notes and eight additional mortgages covering eight additional vacant lots in the same area on which homes were to be built. (Plaintiff's Exhibits 9-16; R. 199-204) These mortgages were duly recorded February 5, 1957, the same day they were executed. (Plaintiff's Exhibits 9-16; R. 199-204) Again on February 15, 1957, eight more notes and mortgages were executed and delivered by Mecham to cross-appellant covering eight additional vacant lots in the subdivision, (Plaintiff's Exhibits 17-24; R. 204-209 — making in all a total of 24 notes and mortgages on 24 vacant lots,

on which Mecham was to construct 24 dwellings. These latter eight mortgages were duly recorded on February 18, 1957. (R. 204-209) The 24 notes and mortgages were in the face amount of \$13,500.00 each. (R. 193-209)

Individual loan accounts were then set up for Mecham on the books of cross-appellant, (Tr. 83 and 87, and 106), and Mecham commenced construction on the first of the 24 lots on February 21, 1957. (R. 210) The Court specifically found that no materials were furnished for any of the properties involved in this action or work commenced on any of the lots prior to that date. (R. 210)

Approximately nine per cent of the total of the face amounts of the mortgages was disbursed by cross-appellant, mortgagee, to Mecham, mortgagor, prior to the commencement of construction on the first lot on February 21, 1957, and the balance, to the extent of a total of \$12,150.00 on each mortgage, was disbursed by the mortgagee to the mortgagor from time to time during construction. (R. 193-209, and 290)

After the mortgages had all been recorded and construction had been commenced, cross-respondent, Geneva Rock Products Company, sold and delivered materials to Mecham, consisting of ready-mix concrete of the value of \$5,159.74, no part of which has been paid, which concrete was used upon some of the properties in La Mesa. (R. 215-216) Likewise cross-respondent, Masonry Specialties and Supply, sold sundry masonry supplies to Mecham, all of which were of the value of \$8,905.32, and no part of which has been paid. (R. 216) In the same position is cross-respondent, Central Utah Block Company, which furnished brick and blocks and sundry masonry materials to Mecham

of the value of \$11,800.00, no part of which has been paid, which materials were used upon some, but not all, of the 24 homes. (R. 216)

The three cross-respondents recorded their Notices of Mechanics Lien timely, but none of them segregated the amounts claimed against the particular lots upon which the materials were used and upon which the individual mortgages were placed. (R. 216) The Notices of Lien filed by cross-respondents, Masonry Specialties and Supply and Central Utah Block Company, described the property on which their liens were claimed by metes and bounds, and included the 24 La Mesa lots involved in this action and 21 vacant lots on which no construction was performed. (Defendant's Exhibits 105 and 112, plaintiff's Exhibit 40) The Notice of Lien of cross-respondent, Geneva Rock Products Company, described the same property, and in addition, the four lots involved in Civil No. 20,592, which are located some two blocks from the La Mesa area. (Defendants' Exhibit 99, and plaintiff's Exhibits 41 and 20, Civil No. 20,592)

The homes being in various stages of completion from only 45 per cent to a maximum of 90 per cent on four of them, excluding special improvements, (Tr. 369-371; Plaintiff's Exhibit 40), the mortgage money substantially gone, (Tr. 68 and 121-122), Mecham in default, (R. 122) and the parties involved being unable to work out any practical way in which additional financing could be obtained, (Tr. 750, 752), cross-appellant, on November 22, 1957, filed its Complaint in Civil No. 20,575, setting forth therein 24 accuses of action to foreclose its 24 mortgages. Cross-respondents and some 19 other defendants then filed counter-

claims and cross-claims setting forth their Notices of Lien, judgments against Mecham, etc., and claiming priority over the mortgages. The claims of all such defendants, except those of appellant, Ludlow Plumbing Supply Company, the cross-appellant, Utah Savings & Loan Association, and the three cross-respondents, were disposed of by various orders during the course of the trial below and are not involved in this appeal.

After a trial of considerable length, the lower Court entered its Findings of Fact on June 1, 1959, (R. 191-222) and on June 30, 1959, entered its Decree of Foreclosure. (R. 234-245) Thereafter, several motions to amend the Findings and Decree were made by various parties, but the Court denied all motions except to amend Finding No. 7. (R. 290)

In substance, the lower Court held that the mechanics liens of the three cross-respondents were valid and were prior to and took precedence over cross-appellant's mortgages except as to the amounts disbursed to the mortgagor on the mortgages by the cross-appellant prior to the commencement of construction on February 21, 1957. (R. 219) The fundamental basis for this holding was the conclusion of the Court that the mortgagee was not legally bound in any event to disburse the loan proceeds, and, therefore, the disbursements actually made by the mortgagee to the mortgagor were optional and not obligatory. (R. 179)

An appeal from the Court's holding being contemplated, and in order to free the property from litigation so that the uncompleted homes could be completed and put on market, a Stipulation was entered into by cross-appellant and cross-respondents on July 1, 1959. (R. 246-247) This Stipula-

tion provided in substance and effect that the properties might be sold as ordered by the Court, and that cross-appellant would pay to cross-respondents such amounts, if any, as should ultimately, upon appeal, be determined to be prior in right to the amounts due to cross-appellant under the mortgages.

Pursuant to the Court's Decree and the Stipulation referred to, the properties were sold by the Sheriff in separate parcels on July 28, 1959, in accordance with the laws governing sales upon foreclosure, and cross-appellants bid in each of the properties for a sum less than the amount found to be due, and considerably less than the amount necessary to satisfy the claims of all the parties. (R. 265) There were no other bidders.

There is no dispute as to the amount found by the lower Court to be due the cross-appellant, mortgagee, and the cross-respondents', Mechanics lien claimants, by the defendant, Mecham. The matters raised upon this cross-appeal are as set forth in cross-appellant's statement of points, (R. 300-303), and relate solely to the priority accorded to and the validity of cross-respondents' mechanics liens, which were apportioned by the trial Court equally among the 24 properties involved. Cross-respondents have raised no other or additional matters for consideration by the Appellate Court as provided in Rule 75 (b), Utah Rules of Civil Procedure.

## **STATEMENT OF POINTS**

### **POINT I**

**THE COURT ERRED IN NOT HOLDING AS A MATTER OF LAW THAT THE DISBURSEMENT OF THE LOAN PROCEEDS BY CROSS-APPELLANT, MORT-**

GAGEE, TO MECHAM, MORTGAGOR, UNDER THE NOTES AND MORTGAGES INVOLVED WERE OBLIGATORY UPON, AND NOT OPTIONAL WITH THE MORTGAGEE.

#### POINT II

THE COURT ERRED IN HOLDING THAT THERE WAS NO AGREEMENT BETWEEN MECHAM, MORTGAGOR, AND CROSS-APPELLANT, MORTGAGEE, PROVIDING FOR DISBURSEMENT OF THE LOAN PROCEEDS.

#### POINT III

THE COURT ERRED IN HOLDING THAT THE LIENS OF CROSS-RESPONDENTS, GENEVA ROCK PRODUCTS COMPANY, MASONRY SPECIALTIES AND SUPPLY AND CENTRAL UTAH BLOCK COMPANY, AS TO EACH LOT INVOLVED IN THIS ACTION, IS PRIOR TO THE LIEN OF CROSS-APPELLANT'S MORTGAGES EXCEPT AS TO THE AMOUNTS ADVANCED THEREON BY THE MORTGAGEE PRIOR TO THE COMMENCEMENT OF CONSTRUCTION.

#### POINT IV

THE COURT ERRED IN HOLDING THAT THE ALLEGED MECHANICS LIENS OF CROSS-RESPONDENT, GENEVA ROCK PRODUCTS COMPANY, A CORPORATION, WAS GOOD AND VALID IN ANY AMOUNT AS AGAINST THE PROPERTIES INVOLVED HEREIN.

#### POINT V

THE COURT ERRED IN HOLDING THAT THE ALLEGED MECHANICS LIEN OF MASONRY SPECIAL-



TIES & SUPPLY, A CO-PARTNERSHIP, WAS GOOD AND VALID IN ANY AMOUNT AS AGAINST THE PROPERTY INVOLVED HEREIN.

#### POINT VI

THE COURT ERRED IN HOLDING THAT THE ALLEGED MECHANICS LIEN OF CENTRAL UTAH BLOCK COMPANY, A CORPORATION, WAS GOOD AND VALID IN ANY AMOUNT AS AGAINST THE PROPERTIES INVOLVED HEREIN.

#### POINT VII

THE COURT ERRED IN FAILING AND REFUSING TO FIND THAT CENTRAL UTAH BLOCK COMPANY, A CORPORATION, EITHER INTENTIONALLY OR AS A RESULT OF GROSS CARELESSNESS, OVERSTATED THE VALUE OF MATERIAL FURNISHED TO DEFENDANT, ROBERT B, MECHAM, IN ITS NOTICE OF LIEN BY APPROXIMATELY 22 PER CENT.

### THE ARGUMENT

#### POINT I

THE COURT ERRED IN NOT HOLDING AS A MATTER OF LAW THAT THE DISBURSEMENT OF THE LOAN PROCEEDS BY CROSS-APPELLANT, MORTGAGEE, TO MECHAM, MORTGAGOR, UNDER THE NOTES AND MORTGAGES INVOLVED WERE OBLIGATORY UPON, AND NOT OPTIONAL WITH THE MORTGAGEE.

As heretofore stated, it is apparent from the lower Court's Memorandum Decision and Conclusion of Law No.

7 based thereon, (R. 249), that the authority on which the mechanics liens were accorded priority over the mortgages is the often stated proposition that if the making of future advances is not obligatory on the mortgagee, his lien therefor is subordinate to intervening encumbrances of which he had actual notice at the time of making the advances. **W. P. Fuller Co. vs. McClure**, 191 P. 1027 (Calif.); **Elmendorf-Anthony vs. Dunn**, 116 P. 253. Although this proposition has been criticized both on principle and on the decisions actually rendered, we will, nevertheless, assume for the purposes of this brief, without admitting, that such proposition is a correct rule of law. See 138 ALR 572: **Potwin State Bank vs. Houston**, 327 P.2d 1091; **Lumber & Builders Supply Co. vs. Ritz**, 25 P.2d 1002 (Calif.). The question, then, is whether or not the disbursements made by the cross-appellant on the notes and mortgages executed and delivered to it by the mortgagor were "optional" or "obligatory".

The 24 promissory notes and the 24 mortgages securing the same, are all identical except for dates and property covered. On their faces, it appears that they were executed in consideration of monies then paid over to the mortgagee. No reference is made in any of them to the fact that dwellings were to be constructed and monies were to be advanced as construction progressed nor is any other condition imposed. The promissory notes contain the usual installment provisions, and at the bottom thereof recite:

"This note is given for an actual loan of the above amount, and is secured by a mortgage on real property of even date herewith, made by the undersigned to Utah Savings & Loan Association."



The mortgages contain standard provisions and recite in part as follows:

“This mortgage is given to secure the following indebtedness, to-wit: a certain promissory note, a copy of which is in words and figures as follows, to-wit: . . .”

It is the position of cross-appellant that when the notes and mortgages were executed by Mecham in favor of cross-appellant and delivered to cross-appellant, there immediately arose, in law, a correlative obligation on the part of cross-appellant to disburse the money to Mecham as construction progressed on the houses to be built by him, and in no sense was this an “optional” situation as that term is used in some of the cases pertaining to mortgages for future advances.

Upon almost identical facts as those in the case at bar, insofar as they involve this issue, the Court of Appeals, Third District of California, in the case of **Valley Lumber Co. vs. Wright**, 84 P. 58, stated as follows:

“We entertain no doubt but that the correlative obligation to pay this money to Wright arose when he executed and delivered his note and agreed to pay it, and secured payment by conveying the legal title to his land to the trust company. He had performed every condition of the agreement for the loan on his part to be performed, and there was, to our view of the matter, a clear legal obligation on the part of the loan association to perform its part by furnishing the money which it did soon thereafter. This obligation was not optional with the association, but was obligatory, and we have so regarded it in this opinion.”

This case has been cited at least 16 times by various Courts, and we are unable to find that it has ever been criticized, modified or overruled.

Other cases directly and forcefully supporting cross-appellant's position are the following: **Home Savings & Loan Association vs. Burton**, 56 P. 940 (Wash.); **Security Stove and Mfg. Co. v. Sellards**, 3 P2d 481 (Kansas); **Hayward Lumber & Inv. Co. v. Nashlund**, 13 P2d 775 (Calif.); **Mutual Reserve Association v. Zeran**, 277 P. 984 (Wash.); **Boise-Payette Lumber Company v. Winward, et al**, 276 P. 971 (Idaho); **Lumber & Builders Supply Co. v. Ritz**, 25 P2d 1002 (Calif.); **Hammond Lumber Co. v. Roubian**, 30 P2d 440 (Calif.); **First National Bank v. Horsley**, 49 P2d 495 (Okla.); **Platt v. Griffith**, 27 NJ Eq. 207 (for excellent reasoning); See also 36 Am. Jur. 123-125.

In no case which we have been able to discover has it been held that disbursements made to a mortgagor under a note and mortgage for a definite sum were "optional" with the mortgagee, unless there existed either an express collateral agreement between the mortgagor and mortgagee to that effect or unless optional provisions were incorporated in the note or mortgage.

The case at bar is not the "optional" situation considered in **W. P. Fuller Company vs. McClure**, *Supra.*, where the Court found that there was a specific understanding between the mortgagor and the mortgagee that any sums which might be advanced over \$1,600.00 should be "entirely optional" with the mortgagee and that the only amount that the mortgagee "should be obligated to loan or advance on account of the note and mortgage or otherwise, was to be said sum of \$1,600.00 and no more". There, the Court determined that the mortgage was prior to the mechanics liens to the extent of \$1,600.00 only.

Likewise, this is not the **voluntary** situation construed

to be “optional” in **Elmandorf-Anthony v. Dunn**, Supra., and in no way conflicted with or modified that Court’s holding in **Home Savings & Loan v. Burton**, Supra., which we cite in support of our position.

## POINT II

THE COURT ERRED IN HOLDING THAT THERE WAS NO AGREEMENT BETWEEN MECHAM, MORTGAGOR, AND CROSS-APPELLANT, MORTGAGEE, PROVIDING FOR DISBURSEMENT OF THE LOAN PROCEEDS.

In addition to the agreement to disburse the loan proceeds implied by law as discussed in Point I, the undisputed testimony of D. Spencer Grow, President of cross-appellant corporation, was to the effect that there was a general agreement or understanding between the mortgagor and mortgagee that funds would be advanced as nearly as possible with the rate of construction and as the mortgagor needed them (R. 142) He further indicated that his institution had an obligation to advance the money, and that the mortgagor had an obligation to complete the houses. (R. 143)

We think the fact that when the instruments were executed loan accounts were set up on the books of the mortgagee, the fact that the mortgagor commenced construction of the houses after he executed the mortgages, the fact that substantially all of the funds were actually advanced to the mortgagor, and the fact that at no time was any question raised by the mortgagee as to its obligation to disburse the funds, are conclusive as to the understanding which the parties had regarding their respective obligations created by the execution of the notes and mortgages. It seems only logi-

cal and reasonable to assume that if disbursement of the funds were to be "optional" with the mortgagee, some collateral understanding or agreement to this effect would have been had as in the case of **W. P. Fuller Co. v. McClure**, *supra*, or such optional provisions would have been incorporated in the instruments.

So far as we have been able to ascertain, there is no requirement, in determining whether disbursement of funds under a mortgage is "obligatory" or "optional" within the doctrine of future advances, that a specific oral or written agreement be entered into setting forth all of the details of the method or mechanics of disbursement, or providing that in any event, including whether the houses were built at all, the loan proceeds would be disbursed.

In oral arguments and in written briefs to the lower Court, cross-respondents have contended, and will undoubtedly contend before this Honorable Court that the fact that cross-appellant claims only 90 per cent of the face amounts of the mortgages in its foreclosure action shows conclusively that all advancements made by the mortgagee under the mortgages to the mortgagor were "optional" and not obligatory, and therefore, their mechanics liens take precedence.

We submit that such is not the law and we have been unable to locate any authority for such proposition. On the contrary, as the Kansas Court said in the case of **Security Stove and Mfg. Co. v. Sellards**, (*Supra.*):

"We are not persuaded by the rulings in any or all of these decisions that the priority of a mortgage lien over mechanics lien where the mortgage was executed and recorded before the commencement of the building is limited to the amount of the advancements before the commencement of the work, especially where the mort-

gage, as in this case, does not provide for advancements. Neither do we think the rule of priority is affected in the example of counsel where the mortgagee undertakes to foreclose his mortgage when he has failed to advance or pay over a considerable part of the money promised. Of course, he could not recover a judgment for more than the amount he had in fact advanced and interest thereon, and perhaps only a prior lien to that extent, because that is the whole amount which he had a right to recover under the mortgage because of his own failure to advance the balance secured by the mortgage."

In this connection, we also invite the Court's attention to the Utah case of **Culmer Paint & Glass Co. v. Gleason**, 42 U. 344, 130 P. 66, wherein this Court held that the full face amount of the mortgage not being advanced, it was superior to a mechanics lien to the extent of the actual advancements only. If the rule of law were as cross-respondents contend, and as the lower Court, in effect, held, then this Honorable Court erred in the **Culmer** case in holding that **any** amount of the mortgage in that case was superior to the mechanics lien. Such a rule does not conform to the requirements of commerce or appeal to reason.

As a matter of fact and possible interest, cross-appellant in its Complaint sought foreclosure on the properties for the full face amount of the mortgages, but at the trial reduced the amount to 90 per cent for the reason that in view of the **Culmer** case it appeared questionable if a discount of 10 per cent which the mortgagor had been charged and agreed to pay could be recovered from the property as against mechanics lien claimants. The fact that cross-appellant ultimately claimed only actual advancements, con-



stituting 90 per cent of the face amounts of the mortgages, plus interest on actual advances, appears to us to be of no legal consequence and proves nothing except the good faith of the cross-appellant. See **Home Savings & Loan v. Burton**, *supra* (where \$3,500.00 was not advanced because the borrower abandoned the construction).

### POINT III

THE COURT ERRED IN HOLDING THAT THE LIENS OF CROSS-RESPONDENTS, GENEVA ROCK PRODUCTS COMPANY, MASONRY SPECIALTIES AND SUPPLY AND CENTRAL UTAH BLOCK COMPANY, AS TO EACH LOT INVOLVED IN THIS ACTION, IS PRIOR TO THE LIEN OF CROSS-APPELLANT'S MORTGAGES EXCEPT AS TO THE AMOUNTS ADVANCED THEREON BY THE MORTGAGEE PRIOR TO THE COMMENCEMENT OF CONSTRUCTION.

Section 38-1-5, Utah Code Annotated, 1953, provides as follows:

"The liens herein provided shall relate back to and take effect as of the time of the commencement to do work or furnish materials on the ground for the structure of improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or material furnished on the ground; also, over any lien, mortgage, or other encumbrance of which the lien holder had no notice and which was unrecorded at the time the building, structure or improvement was commenced, work begun or first material furnished on the ground."

The cases cited under Point I involve statutes substantially similar to that quoted above, and hold, in effect, that

a mortgage "attaches" when recorded, and not as each subsequent disbursement is made thereunder. In the case at bar, since the mortgages were all recorded prior to the time any work was begun or materials furnished on the ground, the mechanics liense of cross-respondents, if any, do not have priority over the mortgages by virtue of the foregoing statute, but are expressly rendered inferior in right.

#### POINT IV

THE COURT ERRED IN HOLDING THAT THE ALLEGED MECHANICS LIENS OF CROSS-RESPONDENT, GENEVA ROCK PRODUCTS COMPANY, A CORPORATION, WAS GOOD AND VALID IN ANY AMOUNT AS AGAINST THE PROPERTIES INVOLVED HEREIN.

Section 38-1-8, Utah Code Annotated, 1953, provides as follows:

"Liens against two or more buildings, mining claims, or other improvements owned by the same person or persons may be included in one claim; but in such case the person filing the claim must designate therein the amount claimed to be due him on each of such buildings, mining claims, or other improvements."

We believe the single lien of Geneva Rock Products Company, (Defendant's Exhibit 99), is fatally defective since it embraces non-contiguous property in two separate areas, (Plaintiff's Exhibit 41), and the weight of authority is to the effect that a single lien covering non-contiguous properties is unenforceable. (Annotations: 10 ALR 1026; 75 ALR 1328).

This lien is also unenforceable because the lien claimant at the time of filing its Notices of Lien on June 12, 1957, was

able to separate the amount of concrete which had gone into the "Rowley" and "La Mesa" houses, (R. 673), and where this is possible it must be done, especially where there are other claimants who have also filed liens and segregated amounts. **Hendrickson vs. Bertelson**, 35 P2d 318 (Calif.); **Garner vs. Van Patten**, 58 P. 684 (Utah). It is further unenforceable because other suppliers of the same type of material were furnishing their materials at the same time, and there is nothing in the Notice of Lien or in the Record from which it can be determined upon which houses this claimant furnished his materials. As the New Jersey Court said in **Morris County Bank v. Rockaway Mfg. Co.**, 16 N.J. Eq. 150, in which a single lien was filed upon a number of lots, but there was no apportionment of the claim:

"I do not see upon what principle the claim can be sustained, if any regard be had to the letter, spirit, or policy of the act, to the rights of the landowner, or to the just claims of other encumbrancers."

See also **Withrow Lumber Co. vs. Glasgow Inv. Co.**, 101 F. 863-866; **Rathburn vs. Landess, et al**, 129 So. 739.

If suppliers are going to look to the property as security for the payment for their materials, then there is an obligation upon them to identify the particular properties to which materials are furnished, at least when proving their liens, especially when materials are not furnished for all of the property covered by the lien. **Weaver vs. Harland Corp.**, 10 SE 2d 547, 130 ALR 417 and annotation following.

## POINT V

THE COURT ERRED IN HOLDING THAT THE ALLEGED MECHANICS LIEN OF MASONRY SPECIAL-



**TIES & SUPPLY, A CO-PARTNERSHIP, WAS GOOD AND VALID IN ANY AMOUNT AS AGAINST THE PROPERTY INVOLVED HEREIN.**

The arguments set forth in Point IV above are applicable to the lien of this defendant. The lien claimant furnished relatively high cost and readily identifiable brick, (R. 694-697) and intercommunication systems, for only part of the houses on which they claim a lien, but did not, in their proof, identify any of the particular lots upon which these materials were furnished. (R. 684) An equal apportionment is, therefore, not equitable as against other encumbrancers of which there were many, including cross-appellant. We do not think the cases of **Eccles Lumber Co. vs. Martin**, 87 P. 713, or **U. S. Building and Loan vs. Midvale Home Finance Corp**, 44 P2d 1090, 46 P2d 672 are authority to the contrary.

## **POINT VI**

**THE COURT ERRED IN HOLDING THAT THE ALLEGED MECHANICS LIEN OF CENTRAL UTAH BLOCK COMPANY, A CORPORATION, WAS GOOD AND VALID IN ANY AMOUNT AS AGAINST THE PROPERTIES INVOLVED HEREIN.**

This lien is fatally defective because it also does not segregate the amounts claimed against each particular lot in La Mesa as required by Section 38-1-8, Utah Code Annotated, 1953, there is no proof as to the value of materials furnished for any lot, and this claimant's evidence was to the effect that it was not only possible, but practicable to have segregated the claims at the time the Notice of Lien was filed, and to have shown by its proof the amounts which

were used upon each of the lots. (R. 705-713) For this reason, under the authorities cited in Point IV, we think the lien is unenforceable as against cross-appellant.

## POINT VII

THE COURT ERRED IN FAILING AND REFUSING TO FIND THAT CENTRAL UTAH BLOCK COMPANY, A CORPORATION, EITHER INTENTIONALLY OR AS A RESULT OF GROSS CARELESSNESS, OVERSTATED THE VALUE OF MATERIAL FURNISHED TO DEFENDANT, ROBERT B. MECHAM, IN ITS NOTICE OF LIEN BY APPROXIMATELY 22 PER CENT.

The Court will note from Defendants' Exhibit No. 112 that this cross-respondent claimed the sum of \$15,078.72 as a lien on the properties involved in this action, whereas Defendant's Exhibit 110 introduced by this cross-respondent at the trial shows that only \$11,793.64 value of materials were delivered to and used upon these properties.

Where the amount claimed is grossly and intentionally exaggerated or where it is much greater than the claimant honestly believed to be due, the entire lien fails. **Berry vs. Van Soelen**, 295 P. 310; **Equitable Savings and Loan Association vs. Hewitt**, 106 P. 447; 36 Am. Jur. 108. We think the testimony of defendant's witness (Tr. 705-713) and Defendant's Exhibits 110 and 112 warrant a finding by the Court that the amount claimed by the cross-respondent was grossly and intentionally overstated, hence the entire lien should fail.

**CONCLUSION**

The Trial Court erred in according any priority to the mechanics liens claimed by cross-respondents over the liens of cross-appellant's mortgages.

Respectfully submitted,

ALDRICH, BULLOCK & NELSON,  
and

PUGSLEY, HAYES, RAMPTON &  
WATKISS,

Attorneys for Cross-Appellant