

1960

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

Utah Supreme Court

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

**UTAH SAVINGS & LOAN  
ASSOCIATION,**

*Plaintiff and Respondent,*

**vs.**

**ROBERT B. MECHAM, et al.  
LUDLOW PLUMBING SUPPLY CO.**

*Defendant and Appellant,*

**FILED**

**MAR 23 1960**

*Clerk, Supreme Court, Utah*

**Case No. 9159**

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**BRIEF OF APPELLANT  
LUDLOW PLUMBING SUPPLY CO.**

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*Attorneys for Appellant.***

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## VI



IN THE SUPREME COURT  
of the  
STATE OF UTAH

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UTAH SAVINGS & LOAN  
ASSOCIATION,

*Plaintiff and Respondent,*

vs.

ROBERT B. MECHAM, et al.  
LUDLOW PLUMBING SUPPLY CO.

*Defendant and Appellant,*

Case No. 5159

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BRIEF OF APPELLANT  
LUDLOW PLUMBING SUPPLY CO.

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STATEMENT OF FACTS

This appeal is from a judgment of foreclosure entered by the trial court in three cases which were, by stipulation of all parties to the actions, consolidated for trial. The

actions were filed by respondent, Utah Savings & Loan Association against Robert B. Mecham and others, one case No. 20591 is for the foreclosure of six separate mortgages executed by Robert B. Mecham and Ruth W. Mecham, his wife, on six separate properties in Utah County, in an area referred to and designated as the Schauerhamer area. The Schauerhamer area is not a plotted subdivision property (R.137). There has been building of residences by Robert B. Mecham on twelve separate tracts in this area each designated by metes and bounds descriptions. However foreclosure of mortgages is sought by respondent on but six of the twelve lots, which lots are the only ones affected by the savings and loan company's mortgages. The complaint for foreclosure of the six mortgages states six separate causes of action. The mortgages being foreclosed in the first five causes of action were recorded December 13th, 1956. (R. 141) The mortgage described in the sixth cause of action was recorded June 26th, 1957. \$3,000 of the mortgage money was advanced on each mortgage by respondent, Utah Savings & Loan Association before any work had been done on the properties in the Schauerhamer area. (R. 141)

Another case so consolidated is Civil No. 20,592 in which respondent seeks to foreclose four mortgages purportedly executed by Robert B. Mecham and his wife. The complaint states four separate causes of action. This area is referred to and designated as the Rowley area, it also is not a plotted subdivision but each mortgage describes a tract by metes and bounds. Mecham constructed a house on each one of these four tracts. Each of the mortgages affected by this action were recorded on January 31st, 1957.

The third case so consolidated is Civil No. 20,575 in which respondent, seeks to foreclose twenty-four mortgages on twenty-four separate tracts. Each of these mortgages are purportedly executed by Robert B. Mecham and his wife. The complaint in this case states twenty-four separate causes of action. This area is referred to and designated as the LaMesa area. This area was not a plotted subdivision at the time of the recording of the mortgages (R. 138) and therefore each tract described in each mortgage is by a metes and bounds description. The description contained in these mortgages was the first time such description was used in any document (R. 139). The subdivision plat of this area was filed after considerable construction had taken place and after appellant's lien had been filed. The mortgages affecting the properties in this area were recorded in three groups, eight of which were recorded February 5th, 1957, eight of which were recorded February 13th, 1957 and eight of which were recorded February 18th, 1957.

D. Spencer Grow who is named as one of the cross defendants in appellant's Counter-claim and cross claim for the foreclosure of appellant's lien is and was at all times pertinent to the three cases, a man of vast experience in the real estate mortgage and loan business (R. 454). He is president of respondent corporation, Utah Savings & Loan Association (R. 456) owning ninety per cent (90%) of its stock. Grow was president of Mid-Utah Construction Company named as another cross defendant by appellant, in which company Grow and his wife owned 90% of the stock, Mrs. Grow was Vice President and Secretary of this corporation (R. 455-456); Grow was Vice President of Radio Sales Corporation in which company he and his wife owned 80%

to 85% of the stock, this company was also named a cross defendant by appellant; D. Spencer Grow was also President of Mortgage Insurance Corporation (R. 504), Grow Investment and Mortgage Company (R. 512) and Mid-Utah Broadcasting Company in each of which corporations he and his wife were controlling stockholders. Each of said companies were named cross defendants by appellant in its counterclaim and cross claim.

In addition to being a man of vast experience in the real estate and mortgage loan business, Grow had had considerable experience in the building of homes prior to the entering into contracts with Robert B. Mecham for construction of homes in the named areas both as owner and as representative of loan institutions. (R. 454)

One out of every four mortgages made by respondent, was made to a corporation of which Grow was president (R. 490), and 95% of construction loans made by respondent were made to Grow's controlled corporations (R. 538).

In August, 1955, Robert B. Mecham started construction of houses for Grow in an area designated as the Keyridge Heights area (R. 147). Construction was continued from Keyridge Heights area into Keyridge Heights Plat "B" area adjoining Keyridge Heights until about October, 1956 (R. 512-513). Work was commenced in these areas before the mortgages on the properties were recorded (R. 515). There were 58 houses to be built in Keyridge (R. 163). Properties in Keyridge and Keyridge Heights Plat "B" were owned by several of Grow controlled corporations and building was financed by respondent, Utah Savings & Loan Association (R. 528). Mecham thought he was dealing with

Mr. Grow and did not know to begin with that he was dealing with Grow corporations (R. 153). Some of the homes being built by Mecham for Grow in the Keyridge area are not yet finished (R. 518). Mecham found he was losing money on Keyridge from the first house (R. 168). He was losing about \$1500.00 a house (R. 172) and he so informed Grow (R. 174). It became necessary for one of Grow's companies, Grow Investment and Mortgage Company to spend money on the homes in the Keyridge area in order to bring some of these houses to a point of completion (R. 518). In addition to monies paid by Grow's companies to bring some of the houses to a point of completion it would take some \$25,000 to \$35,000 more to complete those houses being built by Mecham for Grow's companies under contract in the two Keyridge areas (R. 522). Grow was aware of the fact that the houses contracted to be built by Mecham in the Keyridge areas were not completed (R. 524-525). Grow did not know at any time during the year 1956 what portion of the contract price agreed to be paid by his companies to Mecham had been advanced (R. 525).

While houses in Keyridge Heights also referred to as Keyridge, and Keyridge Heights Plat "B" which Mecham was building under contract for Grow's companies were being built were not being completed, and Grow having knowledge of the fact that Mecham was losing money on his building for Grow in the two Keyridge areas, still respondent, through Grow made loans to Mecham of \$89,000 on seven Schauerhamer area properties (R. 140, 528, 756). Grow made no investigation as to Mecham's financial ability to perform his agreements, neither did he inquire as to Mecham's financial condition (R. 246, 516, 528, 531). Respondent

had no cut and dried procedure in making construction loans, as to financial requirements of a borrower, until recently (R. 536, 541).

The work in the Keyridge areas had not been completed at the time of the trial of the cases. Most of the workmen were moved by Mecham into the Schauerhamer area at the time that property was acquired (R. 756).

Grow told Mecham upon learning that Mecham was losing money on his buildings that he would let Mecham build 43 homes north of the Keyridge area using the same plans at a base price of \$2000 to \$3000 more than the price fixed on the Keyridge houses (R. 175).

When loans were made on the LaMesa area by respondent to Mecham, a service fee of \$1350 was charged on each loan by respondent (R. 544). Upon an examination of respondent company by the State Banking Department it was determined that such charge was not legal, therefore each of these 24 loans were credited with \$1350. Respondent's foreclosure proceeding is based on each of the 24 LaMesa mortgages being reduced in principal by the sum of \$1350, which sum is 10% of the face of the mortgages (R. 546-7). This credit made a total of \$32,400.00 (R. 549) which the borrower, Mecham, never did receive. On the day of the opening of the trial the credit to these LaMesa mortgages was entered by respondent (R. 547). Six percent of the ten percent service fee held out by respondent on each mortgage in the LaMesa area was paid to Allied Properties, a Grow owned corporation for house plans (R. 549). The plans were those used in the Keyridge areas (R. 551).

There was \$30,000 advanced by respondent out of the LaMesa mortgage money before any work was done in that area (R. 250).

Appellant, Ludlow Plumbing Supply Company was a supplier of plumbing materials and fixtures which were used in the construction of houses built by Robert B. Mecham in each area including Keyridge sometimes referred to as Keyridge Heights and Keyridge Heights Plat "B" (R. 575) and in addition to having supplied plumbing materials and fixtures to each of the houses built in the areas affected by each of the actions herein above referred to and the two Keyridge areas, appellant furnished plumbing supplies and fixtures which were delivered to a stockpile on the Keyridge areas (R. 574) which went into construction of houses on six other properties in the Schauerhamer area not affected by the mortgages being foreclosed on in case Civil No. 20,591 (R. 578) and also a tract on which one house was constructed in the city of Provo, Utah. (R. 585). Other than the one property situated in the city of Provo, each of the other tracts are located in the Orem, Utah, area and in the same general area, the Keyridge and Schauerhamer area being two blocks apart are not contiguous to the Rowley, LaMesa area. The Keyridge, Schauerhamer area is located to the west of U. S. Highway No. 91 and the Rowley, LaMesa area is located to the east of that highway, about 2 miles from the Keyridge, Schauerhamer area Pltff. Ex. 41, Case 20575 (R. 594). Appellant having made delivery as instructed by Robert B. Mecham, the contractor, delivered its materials to but two areas as designated by the contractor where the materials were stockpiled by Mecham one of which was on the Keyridge area (R. 578) not affected by



either one of the three actions before the Court and the other point of delivery was on the LaMesa area which property is affected by Case No. 20,575 (R. 557) (R. 580) (R. 626) from which points plumbing materials were taken by the employees of the contractor and used in each area as houses were made ready to receive such materials (R. 579, 580). No designation as to where plumbing materials were being used and no segregation of accounts was made by Mecham (R. 579) and Mecham advised appellant that it was not necessary to designate the place where plumbing materials were being used and that it was not necessary to segregate accounts as it made no difference (R. 622).

Grow was on and about the properties from time to time and made no objection to the practice of materials being taken from Keyridge and LaMesa stockpiles and being used in the several areas (R. 612, 613). Having no record as to the amount and kind of materials and fixtures which went into each house and having supplied the same under one open account (R. 581), appellant filed its lien on all of the properties on which its materials were used. There was no new contract or account as delivery location was added or changed by Mecham (R. 580, 581).

Appellant having been named as a party defendant to respondent, Utah Savings & Loan Association's mortgage foreclosure actions, answered in each case and filed its counterclaim and cross complaint praying for the foreclosure of its lien as to those properties affected by the mortgage foreclosure actions, seeking equitable relief under the equally apportionable rule, it not being possible to tell definitely what plumbing material went into each house (R. 613-616), and also seeking a judgment against respondent, Utah Savings



and Loan Association, and Mid-Utah Broadcasting Company, which companies appellant claims are the true owners of the properties affected by appellant's lien, the owners having failed to furnish a performance bond as required by Section 14-2-2 UCA 1953.

Appellant has another action pending, not now before this court in which it seeks foreclosure of its lien as to those properties covered by its lien which are situated in the Keyridge area and not affected by these cases, that property not being described in any of respondent's mortgages being foreclosed.

Robert B. Mecham named as a defendant in each of the actions now before this court who was the contractor and who constructed houses in each area affected, admitted the delivery by appellant and receipt by him of plumbing materials and fixtures in the amount claimed (R. 581), he further admitted the correctness of the account (R. 583), and that the account was one open account (R. 579) (R. 597). Mecham admitted that delivery was made by appellant in accordance with instructions given by Mecham to appellant to two points of delivery one upon the Keyridge area, the other upon the LaMesa area and that upon delivery having been made by appellant to those points of delivery appellant had no control over the materials. He further admitted the taking of plumbing materials furnished by appellant from the points of delivery designated by him where they were stockpiled and admitted using same in each area as houses were made ready to receive those materials (R. 580). Materials were stockpiled before work was commenced on the LaMesa area. The evidence shows the building in the several areas was treated at all times as one project

in the ordering and use of materials received from appellant. (R. 578-579). Houses were not completed in one area before Mecham fanned out and moved into one of the other areas, but work was being carried on in all areas at one and the same time (R. 203) (R. 207). Appellant delivered materials to the Keyridge area as early as June 6, 1956 (R. 633).

When Mecham started the last seven houses in the Schauerhamer area he found he was getting himself out on a limb, ready to be sawed off. It was necessary to get new building, new work, and new money as fast as possible in order to pay bills on Grow's Keyridge properties (R. 303) and also on houses Mecham was building for Grow in the Schauerhamer area. (R. 214) (R. 236). It was a matter of paying old bills. Not all of the houses being built by Mecham in the Schauerhamer area have been completed.

Robert B. Mecham, the contractor was broke and in order for him to continue building and to get financing for building it was necessary for him to fan out and get more properties which could be and which were mortgaged to respondent. (R. 301). Mecham had no monies with which to purchase the Rowley and LaMesa properties and admitted that while he took title in his name he was following instructions given him by D. Spencer Grow in so doing (R. 247). The monies used for the purchase of the Rowley and LaMesa properties were furnished by respondent through mortgages placed on the LaMesa properties (R. 233-R. 248).

Grow did not request that Mecham make any segregation nor did he inquire of Mecham if he was making any segregation of materials going into the various areas (R. 612).

The mortgages were not entitled to be recorded as to the LaMesa properties, the same not having been executed as required by the laws of Utah. Mecham and his wife did not appear before the notary public and acknowledge signing the same (R. 318).

The trial court entered judgment for appellant as against Robert B. Mecham in the amount claimed by appellant's lien and ruled that the lien of appellant was invalid, holding as its reason, appellant did not designate the amount of the lien claimed against each property. The trial court failed to enter judgment against the owners of properties who undisputedly engaged the services of Robert B. Mecham to build on their properties on their behalf even though it was admitted that no performance bond had been filed, as required by the laws of Utah.

Respondent caused lien waivers to be prepared (R. 587) in which numerous properties were described, the lien waivers were furnished to appellant with a request to have same executed by appellant which appellant refused to do (R. 327) (R. 586). The properties described in appellant's lien are those properties described in the lien waivers. Appellant refused to sign the lien waivers because they included properties in the Keyridge area in addition to the other areas (Defts. Ex. 50 & Ex. 51) (R. 587).

At the pre-trial and when appellant introduced its lien into evidence objection was made as to its validity by respondent, because appellant had not specified the amount claimed as against each property. Appellant through its counsel stated that it would not designate the amount as claimed against each property at the trial because it could

not do so. Therefore as counsel stated, appellant claimed a lien in the full amount against each property, appellant having delivered its materials as directed to but two areas.

Appellant pleaded and urged the doctrine of estoppel to the claim of respondent as being prior in time and superior to the lien of appellant.

There is very little conflicting and contradictory evidence in the record insofar as the evidence is applicable to appellant's case.

The trial court applied the apportionment rule in its decision in favor of lien claimants Masonry Specialties and Supply Co., Central Utah Block Co. and Geneva Rock Products Co. each as to their claimed lien against LaMesa area and as to Geneva Rock Products Co. as to both LaMesa and Rowley areas but refused to apply the same rule to the lien of this appellant.

The trial court ruled that the mortgages affecting the LaMesa area were not mortgages for future advances.

## STATEMENT OF POINTS

### POINT I

THE COURT ERRED IN FINDING AND DETERMINING THAT THE LIEN OF DEFENDANT AND APPELLANT, LUDLOW PLUMBING SUPPLY COMPANY, IS INVALID AND THAT THE SAME IS INFERIOR TO THE LIEN OF THE MORTGAGES OF PLAINTIFF AND RESPONDENT, AND IN FAILING TO ENTER A DECREE FORECLOSING THE LIEN OF APPELLANT.

## POINT II

THE COURT ERRED IN NOT FINDING THAT THE BUILDING OF HOUSES IN EACH OF THE AREAS COVERED BY THE LIEN OF DEFENDANT AND APPELLANT WAS TREATED IN ALL RESPECTS AS ONE ENTIRE PROJECT, AND THAT IT WAS ONE PROJECT INsofar AS THE RIGHTS OF APPELLANT IS AFFECTED.

## POINT III

THE COURT ERRED IN FAILING AND REFUSING TO FIND AND DETERMINE THAT ROBERT B. MECHAM WAS AGENT FOR MID-UTAH BROADCASTING COMPANY, GROW INVESTMENT AND MORTGAGE COMPANY, AND RADIO SALES CORPORATION WHICH COMPANIES THROUGH ITS AGENT, D. SPENCER GROW CONSTRUCTED HOUSES IN KEYRIDGE HEIGHTS SUBDIVISION AND SCHAUERHAMER SUBDIVISION AND THAT SAID MID-UTAH BROADCASTING COMPANY FAILED TO REQUIRE ROBERT B. MECHAM, THEIR AGENT, TO FURNISH A PERFORMANCE BOND IN CONFORMITY WITH TITLE 14-2-2 UCA, 1953, AND THEREFORE, SAID MID-UTAH BROADCASTING COMPANY BECAME LIABLE TO DEFENDANT AND APPELLANT, LUDLOW PLUMBING SUPPLY COMPANY FOR MATERIALS FURNISHED TO THAT PROPERTY AFFECTED BY CASE NO. 20,591 DESIGNATED AS SCHAUERHAMER AREA.

## POINT IV

THE COURT ERRED IN FAILING AND REFUSING TO FIND THAT ROBERT B. MECHAM TOOK TITLE TO

PROPERTIES DESIGNATED AS ROWLEY AND LaMESA FOR AND ON BEHALF OF PLAINTIFF AND RESPONDENT AND THAT RESPONDENT WAS THE REAL PARTY IN INTEREST AND THAT ROBER B. MECHAM WAS THE AGENT FOR PLAINTIFF AND RESPONDENT AND THAT PLAINTIFF AND RESPONDENT FAILED TO REQUIRE ROBERT B. MECHAM, THEIR AGENT, TO FURNISH A PERFORMANCE BOND IN CONFORMITY WITH TITLE 14-2-2 UCA, 1953, AND THAT DEFENDANT AND APPELLANT IS THEREFORE ENTITLED TO PERSONAL JUDGMENT AGAINST PLAINTIFF AND RESPONDENT AS THE SAME AFFECTS THE PROPERTIES SITUATED IN THE ROWLEY AND LaMESA AREAS.

#### POINT V

THE COURT ERRED IN FAILING AND REFUSING TO APPLY THE EQUITABLE EQUAL APPORTIONABLE RULE.

#### POINT VI

THE COURT ERRED IN FAILING AND REFUSING TO DECREE THAT THE MORTGAGES INVOLVED IN EACH OF SAID ACTIONS WERE INVALID AS TO APPELLANT, LUDLOW PLUMBING SUPPLY COMPANY, THE SAME NOT HAVING BEEN EXECUTED IN CONFORMITY WITH THE LAWS OF THE STATE OF UTAH.

#### POINT VII

THE COURT ERRED IN FAILING AND REFUSING TO FIND THAT BECAUSE OF THE CONDUCT OF THE PLAINTIFF AND RESPONDENT IN EACH OF SAID ACTIONS PLAINTIFF AND RESPONDENT IS ESTOPPED FROM CLAIMING ANY RIGHTS AS BEING PRIOR AND SUPERIOR TO THE RIGHTS OF DEFENDANT AND APPELLANT.

## ARGUMENT

## POINT I.

THE COURT ERRED IN FINDING AND DETERMINING THAT THE LIEN OF DEFENDANT AND APPELLANT, LUDLOW PLUMBING SUPPLY COMPANY, IS INVALID AND THAT THE SAME IS INFERIOR TO THE LIEN OF THE MORTGAGES OF PLAINTIFF AND RESPONDENT, AND IN FAILING TO ENTER A DECREE FORECLOSING THE LIEN OF APPELLANT.

Appellant's lien on which action was brought to foreclose the same in the three cases consolidated for trial was introduced and received in evidence at the pre-trial hearing of the cases as consolidated for trial. Upon appellant offering the lien in evidence, objection was made by respondent to the validity of the lien which objection was based on (1) the lien fails to conform to the laws of Utah in that the properties are not separately stated, and (2) the lien fails to designate the amount claimed against any particular lot or property or any house referred to in the lien.

The lien was received in evidence notwithstanding the fact that appellant's counsel stated that appellant would not and could not show the value and amount of the material which went into each house, this because appellant had no record neither did appellant have any control over the materials after they were delivered as directed by Mecham the Contractor, to two points of delivery where the materials were stockpiled and from which materials were taken by Mecham as houses were made ready in each area to receive the materials.



Approximately twenty days of trial did not bring out other or different evidence.

The evidence shows and it was admitted by Mecham, the contractor, that he ordered the plumbing materials for appellant, that he used the same, some in each of the houses in each area, that he ordered the materials on one open account, that materials of the value charged for by appellant were received by him and used in the houses in each area, and that the amount claimed as due and owing by appellant was correct. Mecham further admitted that appellant had no control over the materials after the same were delivered by appellant to stockpile as designated by him, that delivery was made by appellant under Mecham's orders and under his directions to the two points of delivery, one on the Keyridge area and one on the LaMesa area. He admitted that materials were taken from the stockpile in each area as houses were made ready to receive plumbing materials, that plumbing materials were taken from the stockpile in Keyridge area and used in the two Keyridge areas, in the Schauerhamer area as that area was being built on, then in the Rowley and LaMesa areas as these two areas were being improved. Mecham also admitted that materials which were stockpiled in the rock building on the LaMesa area were not only used on the LaMesa area but also taken from that stockpile and used on the Rowley, Schauerhamer and Keyridge areas, and in a building in Provo, Utah, that building was going on in each area at the same time. Mecham further admitted that materials were delivered by appellant to the two points of delivery between those dates specified in the lien, there is no contradiction as to these facts. Excerpts from the testimony by Mecham as to same is as follows: (Page 579)



Q. Now, were these materials—plumbing materials received and ordered from Ludlow Plumbing Supply Company on an open account?

A. Yes, they were.

Q. Did you, as plumbing materials were being used from one area to another, instruct Mr. Allred or anyone else to make any designation or segregation of the accounts?

A. No, we did not.

Q. Did you, on your records, make any segregation or designation of the accounts as to where plumbing materials were being used in the several areas and the various houses on those several areas?

A. No. We didn't make any designation.

Q. Did you give any orders to Mr. Allred or to anyone in your employment as materials were being taken from this stock pile to make any records as to where those materials were going?

A. No, I didn't.

Q. Now, was there any discontinuance of stock piling in the Keyridge area?

A. Yes, We changed our point of unloading to LaMesa after we had—after the construction was fairly well along in LaMesa.

Q. Did you then direct where materials were to be delivered when you changed over to LaMesa?

A. I instructed the plumbers to have a central place to unload the materials. I didn't direct the distribution to the various houses.

Q. No. But you did direct them to have a location, did you, on LaMesa?

A. Yes, that's right.

Q. Were materials distributed, do you know, from those points of delivery to these other projects, or these other areas?

A. They were on occasion.

Q. Were materials delivered from the LaMesa area to Keyridge?

A. Yes, they were in some cases.

Q. Were materials delivered from LaMesa area—that is, plumbing materials to the Schauerhamer area?

A. In some rare occasions they were.

Q. Were materials delivered from the LaMesa area to the Rowley area?

A. Yes, some.

Q. Now, when you made the change to—instruction to have deliveries made to the LaMesa area, did you have any new contract or agreement with Ludlows as to setting up a new account for that—for the delivery of those materials?

A. No. We went on the same original arrangement.

Q. You carried on the same open account, did you?

A. Yes, that is right.

Q. That continued throughout the whole operation. Isn't that correct?

A. Yes.

Q. Was the same practice used in the distribution of material from the LaMesa area to these other areas, insofar as the manner of not keeping records were concerned, as to where the materials were being used?

A. That's correct.

Q. Did you instruct your men as they were taking materials—plumbing materials from the La-Mesa area to make any record as they were taking them, as to where those materials were being used?

A. No, I didn't.

Q. When materials were delivered by Ludlows, according to your instructions to your men, Mr. Mecham, did Ludlows have any control from thereon as to where they were to be used?

A. No. They had no control.

Respondent consistently argued at the trial of the case, and apparently convinced the trial court, that because appellant could not specify the materials which went into each house and the cost of same and further because appellant seeks to foreclose its lien as the same covers only that property affected by the three pending cases here before the court that appellant's lien is invalid. It is apparent that respondent confuses the foreclosure of a lien and the filing of a lien. Appellant was obliged to seek the application of the equitable equal apportionable rule and thus seek recovery of that portion of its lien in these actions which affected that property liened and which is affected by the mortgages being foreclosed on by respondent, appellant having been named as a defendant to respondent's foreclosure action and having been required to foreclose its lien as to

those properties affected by respondent's mortgage in the same action. Appellant must look to recovery of the balance of its claim on other properties liened through actions separate and apart from the three cases here before the court, one of which is pending in the district court, as same covers those properties liened by appellant and not affected by these actions and not affected by respondent's mortgages here being foreclosed on. That is to say, appellant having furnished plumbing materials to not only buildings on those lots covered by respondent's mortgages but also other lots in the same areas, which lots appellant liened, appellant can but look to that part of the property affected by the pending actions here before the court to satisfy that proportionate part of its lien which the property mortgaged and included in the pending actions bears to the total number of lots covered by appellant's lien. By appellant so doing appellant is not burdening a portion of the property affected by its lien with the whole amount of the lien. Respondent contends that the filing of a lien on each lot in the full amount of the lien is burdening each lot with the full amount of the lien, therefore the lien is invalid. True appellant's lien is in the total amount claimed against the whole of the properties. It could not be otherwise unless appellant could positively specify the amount represented by materials which went into each house. This it is evident is not possible. A portion of the testimony of Mecham regarding this fact is as follows: (P. 613)

Q. Now, Mr. Mecham, you stated in the question propounded to you by Mr. Aldrich that you possibly could make an estimate of the plumbing materials that went into the houses on these several

projects. I will ask you, could you tell, or would you know which way the sewer ran from the house to the sewer line.

A. Not definitely. In some cases, possibly. Many cases, have very little idea.

Q. Then you would not know the length of the sewer line, would you?

A. No. Not without digging it up.

Q. Would you know the number of joints in the sewer line or in the water line?

A. No. That would be impossible.

Q. Would you know whether cast iron or transit pipe was used under ground?

A. No. No way to tell.

Q. As a matter of fact, there is a considerable difference in the cost of cast iron over transit pipe, isn't there?

A. Yes. Cast is about twice as expensive as transit.

Q. Do you know how much waste pipe had been broken or disappearing on the job?

A. No. There is no way I could have known that.

Q. Therefore, when you state that one might have an idea as to what went into a house, it would be guess work, would it not?

A. There would be a considerable amount of guess work in it.

Q. There is no way of determining the exact amount after the materials have been placed in the houses, is there?

A. None that I know of.

Q. Do you know, Mr. Mecham, whether cast iron and transit pipe were used on those projects?

A. Yes. They were both used.

Q. Do you know which houses cast iron was used in and which houses transit pipe was used in?

A. No. I am sorry I don't.

Appellant's position is supported by the very recent case of Brannan Sand & Gravel Co. vs Santa Fe Land Co. handed down by the Supreme Court of Colorado on Dec. 8, 1958 found in 332 P2d at page 892, which case is very much in point.

Brannan was a subcontractor engaged by Harris Constructors, Inc., the general contractor to surface and pave a 1567 foot roadway. The paved area was on and traversed three separate pieces of property one of which was owned by the Land Company and was constructed to extend the east lane of Quivas Street northward so as to connect with a newly constructed warehouse of Sears-Roebuck & Co., thus providing for ingress and egress from the latter's warehouse to Quivas Street. After completion of the work the Land Company paid Harris Constructors, Inc., the general contractor in full. The Harris Company was declared a bankrupt and none of the moneys paid to it were ever paid to Brannan. Brannan filed a lien upon the property of the Land Company for the full amount of the lien. But because the cost of the roadway could be apportioned on

a square foot basis among the three properties the court allowed Brannan a lien on that portion of the property which belonged to the Land Company to the extent that the cost of the portion of the Land Company property bore to the whole job. In its opinion the court said:

“First question to be determined: Does the Mechanics’ Lien Statute *supra*, subject defendant in error’s land to a lien for the entire contract price involving improvements constructed on other lands? This question is answered in the negative.

“Omitting the verbiage in 83-3-1 not pertinent to the question the statute provides:

‘ . . . subcontractors . . . shall have a lien upon the property upon which they have rendered service or bestowed labor or for which they have furnished materials . . . for the value of such services rendered or labor done or materials furnished’

“Brannan’s counsel, did not attempt to claim the lien upon the whole roadway but filed only on the segment located upon the Land Company’s property. By statute, therefore, the inquiry of the trial court was limited to determining what labor, services and material were rendered by plaintiff to the property upon which the lien was claimed.”

It will be noted that section 83-3-1 of the Colorado Statute quoted from above is almost identical with section 38-1-3 UCA 1953, which by omitting the verbiage as was done by the Colorado Court we find by comparison would read as follows:

“ . . . subcontractors . . . shall have a lien upon the property upon or concerning which they have ren-



dered service, performed labor or furnished materials, for the value of the service rendered, labor performed or materials furnished . . . ”.

As has heretofore been pointed out, appellant is not asking this Court to satisfy the whole amount of its claim out of the properties affected by the three pending actions. It asks the court to satisfy that portion of the lien which the number of properties involved in the pending action bears to the total properties covered by its lien. This is a simple matter to be determined and the court in equity has the power to allocate an equal amount to each property when appellant does not have the right to do so because it had no record as to the materials furnished to each house. In support of this argument we refer to Jones on Liens, Volume II, section 1319, reading as follows:

“A lien claim may be apportioned when practicable without the aid of any special statute for the purpose. In an action to enforce a lien for labor performed on two houses, the fact that the petitioner is not able to state the precise share of the labor performed on each house does not necessarily defeat altogether his recovery. The jury may sustain his lien against each house for such certain amounts of labor as they are satisfied he performed thereon, although they may not be satisfied that he did not perform more.”

This being an equity case a court of equity may apportion the claim on an equal basis where the claimant itself cannot do so when the lien claimant is unable to specify with certainty that material which went into each building.

This argument finds further support in Thompson on Real Property, Per. Ed. Vol. 10, Sec. 5432. p. 432 reading as follows:



“A materialman delivering lumber to two buildings may claim a lien on both, even though he may not be able to determine definitely what percentage of the lumber furnished by him was used in one building and what was used in the other.”

In the case of *Sargison v Turner*, 124 Pac. 379 we find syllabus 1 reading as follows:

“A builder who contracted for the construction of five dwelling houses, one to be built on a lot in which defendant had no interest, and who kept no separate accounts with the several buildings for labor and materials furnished in their construction could not assert a single lien against all the defendant’s four houses.”

That is to say the lien claimant was obliged to assert his lien against the five houses for which labor and materials were furnished.

A most interesting annotation is found on this subject in 130 ALR at page 424 in which the case of *Badger Lumber Co. v Holmes*, 44 Neb. 244, 62 NW 446, 48 Am. St. Rep. 726 is quoted from as follows:

“The failure of a mechanics’ lienor to show the proportion of the materials furnished to each parcel under an agreement by which the lienor was to furnish materials for the erection of buildings on each of six lots, which materials, when furnished, were used indiscriminately by the owner, was held ground for reversal of judgment decreeing a lien for the entire balance due against less than all the parcels for the improvement of which materials were furnished.

*The whole debt might be charged to all six lots but all the debt for all the material cannot be charged to a part of the lots.” (Italics added)*

This same law is found in Jones on Liens Vol. II, Sec. 1315.

Regarding this question appellant relies on the case of U. S. Bldg. & Loan vs Midvale Home Finance Corp. 86 U. 506, 44 P2d 1090. It appears to be the controlling case in this state to date.

A brief summary of the pertinent facts of the Midvale case is as follows:

Early in 1930 a finance company undertook to promote the construction and sale of a large number of homes in Midvale, Utah, on a tract of land known as Lincoln Subdivision. The land was platted into lots or units. In March of the same year construction work was begun. The lots or units were sold to various parties on contracts most of which contracts were either entered into prior to commencement of construction or shortly thereafter. The contractor failed to carry out its contract and suit for the foreclosure of a mortgage by the mortgage holder was instituted against the contractor and lien claimants, also against the unit purchasers all of whom answered and cross complained. The court found for the lien claimants over the mortgage because the work and materials had been furnished prior to the filing of the mortgage. However the point which we contend is controlling in the instant cases is this. The unit holders urged that the liens filed by the lien claimants were fatally defective in that they failed to state the amount and value of materials and labor furnished to each unit, relying

on section 3737 Compiled Laws of Utah 1917, now 38-1-8 UCA 1953 which provides:

“Liens on several separate properties in one claim—  
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 to him on each of such buildings, mining claims or other improvements.”

In the Midvale case the court said:

“It is next urged by the unit holders that the liens filed by the lien claimants are fatally defective in that they fail to state the amount and value of materials and labor furnished to each unit. Our attention is directed to Comp. Laws Utah 1917, Sec. 3737, now R. S. Utah 1933, 52-1-8. It is there provided: ‘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 to him on each of such buildings, mining claims or other improvements.’

“A similar question was involved in the case of *Eccles Lumber Co. v. Martin*, 31 Utah, 241, 87 P. 713, 714. The law with respect to the acquisition and enforcement of mechanics’ liens was substantially the same at the time herein involved as it was at the time the rights of the parties attached and the decision was rendered in the *Eccles Lumber Company Case*. The unit holders attempt to distinguish that case from the case in hand upon the ground that in the former case the two houses had not been sold to two different persons, while in the instant case the unit holders

have contracted in severalty for the purchase of the lands in question.”

It is the contention of appellant that the same rule of law applies in the present cases as applied in the Midvale case.

In the instant case appellant delivered materials to Mecham under one contract and on one open account.

It is the delivery of materials under a single contract which determines the question whether several lots are subject to a lien and not the location of the lots or the matter of ownership, and the lots need not be contiguous as was the holding by the Kansas Court in *Golden Belt Lumber Co. v McLean*, reported in 26 P2d at page 274 in which we find paragraph one of the syllabus reading as follows:

“Where materials or labor are supplied under single contract for construction of improvements on non-contiguous town lots, single lien statement timely filed created lien on all lots.”

The evidence in the instant cases shows that materials were used indiscriminately by the contractor, Mecham, and Grow the agent of respondent was aware of the manner in which materials were being so used. Grow made no objection to the method adopted by Mecham at any time during the construction of houses in each area. There was no segregation of plumbing materials as to any particular lots in any of the areas.

Our own state law, Sec. 38-1-4 UCA 1953 is to the same effect, it provides:

**“AMOUNT OF LAND AFFECTED—LOTS AND SUBDIVISIONS — MINES — FRANCHISES, FIXTURES AND APPURTENANCES.**

“The liens granted by this chapter shall extend to and cover so much of the land whereon such building, structure or improvement shall be made as may be necessary for the convenient use and occupation thereof, *and in case any such building shall occupy two or more lots or other subdivisions shall be deemed one for the purpose of this chapter; . . .*” (Italics supplied)

It appears the above section has not been construed by our Court except as to mining claims.

In *Warrenton Lumber Co. v Smith*, 117 Or. 530, 245 Pac. 313 it is said by the Court:

“A materialman who furnishes material for several disconnected houses built under one entire contract has a lien in gross against all of the houses, and need file but one notice including all.”

In *Sprague Inv. Co. v Mouat Lumber Co.*, 14 Colo. App. 197, 60 Pac. 179, cited in 10 ALR at page 1027 we find the following:

“It appeared that under a single contract three houses were built over four lots of land, owned by the same person. Holding that a single lien was valid, the court said:

‘Where, however, there is practically no segregation of the lots, and no description of the land on which the houses are built in the convey-

ances, so that the lienors may be advised respecting it, and where, also, the proof is, as here, the lumber went into the houses indiscriminately, it cannot be true the lienor must at his peril subdivide his claim and assign to each house as built, the proportion of the debt which it ought in equity to bear. The evidence shows, and the court found, the material was delivered from time to time from November, 1892, until June 27, 1893,—delivered sometimes at the houses, sometimes at Freeman's shop on vacant lots to the north of the property. Some of the material went into one house, some into another, and it was impossible by any means known to dealers in material to ascertain which house the lumber or the materials went into. Since this is true, the case is brought clearly within the decisions of this court'."

While we recognize in the Sprague case there was one owner still we think the law as therein handed down is applicable.

It is trusted the Court will adopt and apply the law as has been contended for herein, however, should the Court not be inclined to do so then we rely on those cases cited in 57 CJS Mechanics' Liens, Sec. 43 at page 535 wherein the case of East End Lumber Co. v. Bennett, 187 NE 786, 46 Ohio App. 104 is found from which the following statement is quoted:

"One who delivers material to an owner's contractor on the premises may be entitled to a lien therefore although the material is delivered to another project by the contractor."

See also *Houston Fire & Casualty Inc. Co. vs. Hales (Texas)* 279 SW2d 389 in which the court said:

“Where a materialman furnishes materials to a building for a specific construction job, it is not required in order to establish a lien that the materials should actually enter into the construction, and the lien cannot be defeated by proof that a part of the material was used for other jobs.

This rule of law was followed by our own court in *Sierra Nevada Lumber Co. vs. Whitmore* 24U130, 66 P. 779.

In the *Houston* case the facts are quite similar to the instant case. There the supplier furnished materials to be used on either one project or another, he was not certain which job the materials were used in as the contractor was doing two jobs at the same time.

And in *Drake Lubr. Co. v Paget Mortgage Co., Oregon*, 274 P2d 804, 811 a case where it was evident that it was difficult for the materialman to make a strictly accurate statement because materials furnished for one job were used in another and in which the court said:

“The difficulty which it (materialman) encountered in arriving at a strictly accurate statement was not of its own making, but arose from the use by the contractor in one house of materials furnished for use in another. This Drake could hardly have prevented for it cannot be expected that a materialman would be obliged to watch the progress of a structure, to see that every stick of timber or other material so supplied by him was used therein.”



The doctrine adopted by the courts as is reflected by the above cases shows the widely accepted rule and the one adopted by the Utah courts. An interesting discussion of this doctrine may be found in 39 ALR 2d at page 398.

It is admitted in the instant case however that the materials were used in the properties liened.

### LOOSE DESCRIPTION

The lien filed by appellant affects more property than it appeared from the evidence houses were built upon. This discrepancy was not brought about by appellant but by respondent who furnished the descriptions of that property which respondent requested a lien waiver on. A comparison of the description of the property contained in the lien will show it to be that same property as is described in the form of lien waiver which respondent sought to have executed by appellant. Certainly respondent at the time considered appellant to have lien rights as against that property described in the lien waiver, if not why the lien waiver?

The evidence shows respondent to have caused the lien waiver to be prepared and that Mr. Grow discussed the same with representatives of appellant company when Grow endeavored to persuade appellant's representative to execute the waiver which appellant refused to do because the waiver covered property on which appellant claimed a lien other than the LaMesa properties.

We find in footnote to Sec. 38-1-3 UCA 1953, the Annotators cite the Iowa case of *Fruden Lumber Co. v Kinnan*, 117 Iowa, 93, 90 NW 515 as follows:



“It is the furnishing of material for a building which entitles a party to a lien, and its actual use in the construction thereof need not be shown.”

It developed during the trial that the description contained in appellant's lien covered properties not improved, also properties on which no materials were furnished by appellant and also some properties which had been released from claim of lien on the part of the appellant. It is further evident that these mistakes were innocent mistakes, not caused through any fault of appellant but as has been heretofore said, appellant relied on those descriptions of the properties used by respondent and contained in the lien waiver.

The court said in the Golden Belt case, *supra* as to such defect:

“Inclusion of town lot on which no materials or services were used in lien statement does not invalidate lien so far as it relates to other lots on which materials or services were used, but such lot should be excluded from lien on rendition of judgment.”

Reference is also made to the case of Caird Engineering Works v. Seven Up Gold Mining Co., (Montana) 111 P2d 267 in which case the court said lien statutes should receive a liberal construction in order to effectuate their purpose.

It is stated in 40 C.J. p. 219 and subsequent pages as follows:

“The Courts are liberal in upholding imperfect descriptions, and are reluctant to set aside a mechanics’

lien claim, merely because of a loose description of the property. The test generally applied in determining the sufficiency of the description is whether it will enable one familiar with the locality to identify the property upon which the lien is intended to be claimed with reasonable certainty. Facts taken into consideration in determining the sufficiency of the description are that the person sought to be charged could not have been misled.”

Most certainly neither Mecham nor respondent could have been misled in this case. We find in 57 CJS Mechanics’ Liens, Sec. 185, p. 736, the following:

“It does not attach to land on which no lienable improvement has been made, nor does it ordinarily extend to land which is outside of, and distinct from the part or parcel on which the building or improvements stands; but the inclusion in the lien statement of land on which no improvement has been made does not invalidate the lien as to the improved land.”

And in this same text, Sec. 161, p. 685 we find the following:

“As a general rule the fact that the claim or statement describes more land than is subject to the lien does not defeat the lien as to the land properly subject thereto if there is no fraudulent intent and no one is injured thereby.”

There is no showing of any injury to anyone in the instant cases because appellant liened property not improved. Neither does it appear that there was any fraudulent intent on the part of appellant in its having liened all the property, appellant having used the descriptions contained

in the form of lien waiver furnished to appellant by respondent.

## NAMED OWNERS OF PROPERTY

Appellant described many owners as the reputed owners of the properties affected by the lien. It is evident that because of the manner in which title to the various properties was taken that it was impossible for appellant to identify a particular tract as being owned by a certain owner, this was especially true because Mecham and respondent both treated the construction at all times as one in the matter of improving the properties. A lien is not invalid if parties other than the owners are named as purported owners so long as the owner is named. Sec. 38-1-7 UCA 1953 requires name of owner to be given only if known.

In 57 CJS, Sec. 45, at page 538 the law is stated as follows:

“When labor or materials are furnished to a contractor engaged in the construction of several buildings for different owners, each building with the lot on which it stands may be subject to a lien for materials used, in, or labor expended on it, even though according to but not all authorities, the labor and materials were furnished indiscriminately for use in the construction of the several buildings.”

Neither the Schauerhamer, Rowley or LaMesa areas were subdivided therefore it would have taken an engineer to determine the location of a house with any particular description.

## POINT II.

THE COURT ERRED IN NOT FINDING THAT THE BUILDING OF HOUSES IN EACH OF THE AREAS COVERED BY THE LIEN OF APPELLANT WAS TREATED IN ALL RESPECTS AS ONE ENTIRE PROJECT, AND THAT IT WAS ONE PROJECT INsofar AS THE RIGHTS OF APPELLANT IS AFFECTED.

It is apparent from the evidence that it would have been impossible for any of the lien claimants to designate the amount of their lien as against any particular property, this is especially true as to the LaMesa area in which the evidence shows that the metes and bounds descriptions used in the mortgages by respondent do not fit the lots as platted in the plat which was not filed until some time after construction had been commenced in this area. Neither was a plat of the property filed in the Schauerhamer area when mortgages were filed and work was going on in that area, nor was a plat filed on the Rowley area. Therefore had appellant attempted to designate a particular amount against a particular lot in the LaMesa area or followed the descriptions used by respondent in its mortgages there would have been discrepancies between the description and the plot plan. This discrepancy exists in the LaMesa mortgages.

The method of building adopted and carried out by the contractor, Mecham was a mass production and assembly line method. Mecham was keeping his crews busy. As the excavators prepared some properties for the building of houses they would move to another area and another and another, then they would come back to areas from which they had previously moved, the same method was used as to each

mechanic. Plumbers roughed in houses in one area then moved to another area, then as houses were constructed to a point where finishing plumbing and fixtures were needed, those materials were taken from the stockpile and used in that house which was made ready, some in each area were being finished at the same time. It is evident that plumbing materials were being delivered at one and the same time to the two points of delivery and from each stockpile plumbing materials were taken and used in each area. Some of the sewer pipe furnished by appellant was cast iron and some was transit pipe, cast iron is almost twice the cost of transit pipe. Appellant had no knowledge as to that material used in any particular house. Mecham's men would drive Mecham's truck to the stockpile and take the material to be used from the point where it had been delivered. There were times when a part of a delivery made by appellant some by freight line and some by appellant's own trucks was left at each of the stockpiles. Appellant's agent being concerned about the manner in which plumbing materials were being taken from each stockpile and used in each area inquired of Mecham, the contractor, if appellant should not make some designation as to where plumbing materials were being used or to be used and a segregation of accounts as to same and he was advised by Mecham that it was not necessary, that it made no difference. Mecham did not keep a record as to where plumbing materials were being used as same were taken from each stockpile, nor did he require his workmen to make a record as to same. No one could tell with any degree of accuracy the amount or value of plumbing materials which went into each house. Had appellant delivered only bathtubs, showers, basins and water closets there would be no problem but in addition

to same appellant also delivered roughing in materials, sewer pipe, valves etc.

Even if the trial court were not in error in having refused to find that respondent was the owner of this property, this does not make appellant's lien invalid, because it is admitted Mecham was the contractor doing the building on each area. Mecham admitted there was but one contract between him and appellant covering materials furnished by appellant on each of the areas. He admitted that there was but one account.

It is evident under the facts of these cases and the admissions of Mr. Mecham, the contractor, that appellant had no alternative but to lien all the properties in which its materials were used and admitted by Mecham to have been used. The fact that the properties were noncontiguous does not invalidate the lien of appellant as was the holding of the Oklahoma Court in *Parker v Walker*, 48 Okla. 705, 150 P. 690, 10 ALR 1022 in which the court said:

“The syllabus of the court was that ‘where a single entire contract is made with the materialman to furnish material for building houses on noncontiguous lots, and no request is made to keep separate accounts of the material which is used in the several houses, one lien claim may be filed against all of the lots and buildings for which the lien claimant has furnished material which has actually gone into the buildings.’”

From the above case it is evident that the real test is, did Mecham consider and treat the contract which he made with appellant as one entire contract in his dealings with appellant. This Mecham did do. It further appears from

the Parker case, *supra* that the manner in which the party deals with the materialman is the controlling factor.

Because of the manner in which appellant's materials were ordered and used by Mecham, appellant's lien must necessarily be against each of the properties. Respondent and Mecham both considered that appellant had lien rights against all of the properties, this is clearly evident because of the request for the lien waiver which was prepared by respondent and which described all of the properties liened by appellant.

Appellant's contention is supported by Sec. 38-1-4 UCA 1953, *supra*.

In these cases the court is not called upon to determine from conflicting evidence whether or not the operation was treated as one this because Mecham testified to the fact that it was one account and one contract as between him and appellant. Mecham's method of operation was assembly line method and this was admitted by Mr. Grow. The admissions by Mecham of the fact that it was one account and one contract with appellant is binding upon respondent.

As to the method used in stockpiling plumbing materials by Mecham and the use made of same we quote a few excerpts from Mecham's testimony, page 250:

Q. You have testified Bob, that you had a shop where cabinets were fabricated in the Keyridge area.

A. Yes.

Q. How long did the shop—strike that, please. How many men were working in the shop at the time it was located on the Keyridge property?



A. About four men. We had three or four full time men, . . .

Q. Now, for what porperties did you do fabricating work in the shop while the shop was located in Keyridge?

A. We did it for Keyridge. Of course, Schauerhamer, some for the Rowley houses, and I even think we did some for LaMesa. I would have to check that.

Q. Now how many houses had planters?

A. Practically all of the houses did.

Q. When you say "all the houses", you mean all the houses in Keyridge, the Schauerhamer houses, and the Rowley houses?

A. Yes, most of the houses we built had planters.

Q. Did that include some of the LaMesa houses?

A. Yes, it would.

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Q. Do you know the date on which you first ordered materials to be delivered on the Rowley homes?

A. I don't have the exact date. I do know that we started around the first of February, and the materials were ordered from then on for those houses.

Q. Give us your best judgment of the first day that materials would have been ordered and delivered for the Rowley houses.

A. Some materials had been delivered to the shop for the Rowley houses prior to construction in any amount on the Rowley houses. They had been delivered to the shop so it could be locked up.

Q. When did those deliveries commence?

A. I would say right around the 1st of February.

Q. Would you say that they had been made by the 1st of February?

A. Yes I would say so.

Q. Will you describe the shop please? The one that was located on the LaMesa property?

A. This is a block building with a cement floor which had been used for a fruit packing shed, which I bought along with the ground in LaMesa from the Rowley people, and which, eventually, we set up for our shop.

Q. And materials were delivered to that building on the LaMesa property by February 1st, 1956?

A. That is my belief. The reason for it is materials could be locked up in that particular building.

Q. Now, do you know if any of the materials that were delivered to that building ultimately found their way into the houses on the LaMesa property?

A. I could state that some did.

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Q. What arrangements did you have regarding plumbing supplies?

A. For some time in Keyridge we had a double garage set up for the storage of plumbing supplies.

We used this as a central depot, so to speak, for our supplies the houses in Keyridge; also Schauerhammer, and some of this went over on the first Rowley houses.

Q. Did you have any point of delivery for plumbing supplies, at any time, other than the point of delivery in Keyridge?

A. Yes, eventually, we delivered plumbing supplies into LaMesa.

Q. Where in LaMesa were the plumbing supplies delivered?

A. Originally they were delivered to the shop, because it could be locked. Eventually, when a double garage was prepared so it could be locked, they were delivered to that garage.

Q. What happened to the materials after they were delivered to the garage?

A. The plumbers used one of the trucks we had there a good part of the time. They could come with their truck to the central location, pick up what they needed for a given house, and take it to that house and install it.

### POINT III.

THE COURT ERRED IN FAILING AND REFUSING TO FIND AND DETERMINE THAT ROBERT B. MECHAM WAS AGENT FOR MID-UTAH BROADCASTING COMPANY, GROW INVESTMENT AND MORTGAGE COMPANY, AND RADIO SALES CORPORATION WHICH COMPANIES THROUGH THEIR AGENT, D. SPENCER GROW CONSTRUCTED HOUSES IN KEYRIDGE HEIGHTS SUBDIVISION AND SCHAUER-

HAMER SUBDIVISION AND THAT SAID MID-UTAH BROADCASTING COMPANY FAILED TO REQUIRE ROBERT B. MECHAM, THEIR AGENT, TO FURNISH A PERFORMANCE BOND IN CONFORMITY WITH TITLE 14-2-2 UCA, 1953, AND THEREFORE, SAID MID-UTAH BROADCASTING COMPANY BECAME LIABLE TO APPELLANT FOR MATERIALS FURNISHED TO THAT PROPERTY AFFECTED BY CASE NO. 20,591 DESIGNATED AS SCHAUERHAMER AREA.

There is no contradiction of the fact that lots in the Keyridge area were owned by companies owned or controlled by D. Spencer Grow, certain ones of his companies holding title to certain designated lots and that Robert B. Mecham was constructing houses in the Keyridge area for each owner at one and the same time without regard as to which company held title to any particular lot. There is no contradiction of the fact that appellant furnished plumbing materials to Mecham for these construction jobs as early as June 6, 1956 and that while Mecham was building in the Keyridge area he fanned out into the Schauerhamer area where he commenced some construction work on his own, he did, however convey some of these properties to Mid-Utah Broadcasting Company and also built homes for this same company in that area. Therefore under Title 14-2-2 UCA 1953, appellant was entitled to judgment against Mid-Utah Broadcasting Company even if the lien of appellant as to this property was invalid.

It is further evident that respondent company did the financing of the building of these properties and that respondent loaned Grow's companies enough money on each of the Keyridge houses to not only pay for the construction of the house but to pay for the lot.

Respondent admits that a portion of the Schauerhamer property was acquired by some of Grow's companies and built upon at the same time building was going on in the Keyridge area. It is evident that some of Ludlow's materials went into this property which evidence is undisputed. It is also evident that Grow's company Mid-Utah Broadcasting Co. took title at a subsequent date, to those properties in Schauerhamer in which title had been taken in the name of Mecham and this was before the buildings thereon had been completed.

The evidence in these cases shows without a doubt that respondent is the real party in interest and the owner of the properties affected and designated as Rowley and LaMesa areas. Should the court not agree, however, with this statement we refer to those authorities treating the cases heretofore cited in which a contractor does work on several buildings for different owners which is not unusual at the present time.

#### POINT IV.

THE COURT ERRED IN FAILING AND REFUSING TO FIND THAT ROBERT B. MECHAM TOOK TITLE TO PROPERTIES DESIGNATED AS ROWLEY AND LaMESA FOR AND ON BEHALF OF RESPONDENT AND THAT RESPONDENT WAS THE REAL PARTY IN INTEREST AND THAT ROBERT B. MECHAM WAS THE AGENT FOR RESPONDENT AND RESPONDENT FAILED TO REQUIRE ROBERT B. MECHAM, THEIR AGENT, TO FURNISH A PERFORMANCE BOND IN CONFORMITY WITH TITLE 14-2-2 UCA, 1953, AND THAT APPELLANT IS THEREFORE ENTITLED TO PERSONAL JUDGMENT

## AGAINST RESPONDENT AS THE SAME AFFECTS THE PROPERTIES SITUATED IN THE ROWLEY AND La-MESA AREAS.

It is appellant's contention which is amply supported by the evidence that while title to the various properties in these areas did appear vested of record in other names, the real party in interest at all times was respondent, respondent was the party who furnished all monies not only for the construction of houses on the properties but also for the purchase of the properties. The evidence conclusively shows that respondent furnished more than the total cost of the real estate and the contract price for the building thereon on the Keyridge property. Respondent financed the building on the Schauerhamer properties and respondent furnished all monies with which the Rowley and LaMesa properties were acquired.

The evidence shows that when Mecham went into the Rowley and LaMesa areas he was so heavily in debt that he was unable to complete the construction of the houses contracted to be built in either the Keyridge area or in the Schauerhamer area, he had to get more land on which to raise money in order to use that money toward completion of houses for Grow in the Keyridge and Schauerhamer areas. Mecham testified to the fact that he had no money when he negotiated with Rowleys for the acquisition of the LaMesa property, that he made the payment called for by the contract out of monies furnished to him by respondent. He testified to the fact that he was instructed by Grow as agent of respondent to do the negotiating for the property and to take title or enter into a contract for the purchase of the property in his (Mecham's) name and that respondent would furnish the

money. This was done. Respondent was the real party in interest and being such is liable to appellant should the judgment of the trial court as to the question of the validity of appellant's lien be affirmed. The same is true as to the four Rowley lots.

It is evident that the plan was to build in the LaMesa area and move into that area during construction in the Keyridge and Schauerhamer areas. The plot plan was delayed in filing and building permits could not be had for the LaMesa area. Mecham wanted to keep his crew busy and while waiting for approval of the plot plan for LaMesa he negotiated with Rowleys for the four lots across the street from LaMesa. Respondent furnished the money for this purchase. Grow was doing the very thing which Mecham testified he had agreed to do when Mecham found he was losing money in the Keyridge area, that was to get more property for Mecham to build on at a higher contract price.

The evidence shows that Grow was at all times the president of respondent company and the controlling stockholder therein, that he was president and controlling stockholder in each of the companies which held title to various properties, that he sat on the loan committee and approved loans to each of his companies by respondent company, that three out of every four loans made by respondent were made to Grow companies and that 95% of the construction loans made by respondent were made to Grow's companies.

The evidence further shows that respondent advanced \$30,000 out of LaMesa mortgages before any work was started in that area. The money from LaMesa loans instead



of going into construction of houses in that area was used to bring Grow's Keyridge and Schauerhamer houses nearer to a point of completion.

It is evident that Grow observed materials being stockpiled on the Keyridge and LaMesa areas, that he observed same being taken from those stockpiles and being used at each area, that Grow made no objection to such method of construction by Mecham. And why should Grow object to such method, his company, respondent herein was the party to be benefited and to be affected by such method of operation.

## POINT V.

### THE COURT ERRED IN FAILING AND REFUSING TO APPLY THE EQUITABLE EQUAL APPORTIONABLE RULE.

Section 38-1-3 UCA 1953, which is applicable is hereinabove set out omitting the verbiage.

It is evident without contradiction that appellant furnished plumbing materials which went into that improved property liened and upon which appellant seeks a foreclosure and it is further evident without contradiction that the plumbing materials were furnished either to the owner or to the agent for the owner acting by authority of the owner.

The difficulty with which appellant was confronted in not being able to designate or specify that material which went into each house was not of appellant's own making. Appellant followed instructions and orders in making delivery of its materials to the stockpile of materials at two

convenient points, it had no control over the plumbing materials after delivery was so made. No one could determine with any degree of certainty whether the waste lines are of galvanized steel or transit pipe without uncovering same, nor can it be determined what the length of same is, neither can it be determined as to the number of L's or joints which are buried. Without appellant being able to specify with some degree of certainty the value of the materials which went into each house it is required under the statute to place a blanket lien on all of the property on which its materials were used.

Then too even if appellant could have specified the amount of materials which went into each house it would have been most difficult to designate who the owner was because so many different owners appear of record, especially is this true as to the Keyridge area, and the metes and bounds descriptions in the LaMesa area do not fit the plot plan which was not filed until a time after appellant had filed its lien.

In support of appellant's argument regarding this point reference is made to the Brannan case cited under point I, Jones on Liens Vol. II, Sec. 1319 and Thompson on Real Property, Per. Ed. Vol. 10, Sec. 5432, p. 432 both of which authorities are quoted from under point I herein, also Sec. 38-1-3 UCA 1953, *supra*.

It is evident from these authorities that a court may apply the rule and apportion the amount equally as to each property where the lien claimant cannot do so, especially where the contractor admits that appellant's materials went into the properties. At the trial of the cases appellant

requested the trial court to adopt and apply the rule in the following manner. There are 52 improved properties in all affected by appellant's lien, 24 of which are located in the LaMesa area, 6 of which are located in the Shauerhamer area, 4 of which are located in the Rowley area, all covered by mortgages held by respondent which are being foreclosed on in the three cases here before the court. The original lien designated the amount owing and claimed to be due in the sum of \$18,653.67. It appeared at the trial that an error of \$62.74 was made in the amount and that the same included interest in the sum of \$291.64, which Mecham agreed to pay, but appellant reduced its claim in these amounts leaving an amount as claimed of \$18,299.29, with attorney's fees of \$25.00 makes a total of \$18,324.29, divided by 52 being the total number of lots makes the sum of \$352.12 per lot, there being a total of 34 lots affected by the three cases here before the court the court should have found appellant's lien superior to respondent's mortgages and the court should have granted appellant judgment of foreclosure of its lien in the sum of \$352.12 as against each lot affected by respondent's mortgages or a total in the three cases of \$11,972.08. The priority of appellant's lien over the mortgages dating back to the time of delivery of materials to the Keyridge area from which the whole operation fanned out.

This position is supported by Sec. 38-1-5, UCA 1953 which provides as follows:

“The liens herein provided for 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 or 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 first 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.”

There are 11 lots affected by appellant’s lien pending in another action which lots are located in the Keyridge area, six lots in the Schauerhamer area and one lot in the City of Provo which appellant must look to for the balance of its claim.

It is evident that appellant is not seeking to burden any particular lot or any particular area with the whole amount of its lien or in an amount in excess of that portion of the lien allocated to each lot. It would be much to the advantage of appellant were the rule otherwise so that appellant could have filed its lien on one area in the full amount of its lien.

It is apparent the above rule was applied by the court as to those other lien claimants in this action in whose favor the court ruled as the same affected the LaMesa area and Geneva Products lien which was apportioned between LaMesa and Rowley areas. Those claimants were not required to specify the amount of their lien claimed against each one of the 24 lots located in the LaMesa area, and even though the amount of Geneva’s claim as to the Rowley area was stipulated to, the equal apportionment rule was applied by the

court, still the court refused to apply the same rule in favor of the appellant.

From the above authorities and statute it is apparent that appellant must rely on the equitable doctrine provided for such cases and ask the court to make the apportionment to appellant's claim.

As to the overstatement of the amount of appellant's lien it was as a result of an innocent mistake with no intent to defraud. No one was misled or prejudiced thereby. And as stated in 57 CJS Sec. 153, subsection B. page 676 under such facts the lien may be enforced.

In the application of this rule it poses no problem in the foreclosure proceeding as Sec. 38-1-15 UCA 1953 provides for the sale of the property in satisfaction of the lien and costs as in the case of foreclosure of mortgages.

## POINT VI.

THE COURT ERRED IN FAILING AND REFUSING TO DECREE THAT THE MORTGAGES INVOLVED IN EACH OF SAID ACTIONS WERE INVALID AS TO APPELLANT, THE SAME NOT HAVING BEEN EXECUTED IN CONFORMITY WITH THE LAWS OF THE STATE OF UTAH.

## ACKNOWLEDGMENTS

The evidence shows that Mrs. Robert Mecham appeared personally upon only one occasion to sign mortgages at the offices of the Utah Savings and Loan Association and

that on all other occasions, by the admission of the plaintiff, the mortgages were signed by her outside of the presence of the notary and that the proof of signature was telephoned to Mrs. Gardner an employee of respondent and, in turn, relayed to Mrs. Peterson, also an employee of respondent. The mortgages therefore did not impart notice to the lien claimants at the time of their recording the acknowledgments were not conforming with the statutory requirements.

The statutory provisions regarding this point are as follows:

**57-2-7, Utah Code Annotated, 1953, FORM OF CERTIFICATE OF ACKNOWLEDGMENT.**

“A certificate of acknowledgment to any instrument in writing affecting the title to any real property in this state may be substantially in the following form:

Sate of Utah, County of .....

On the ..... day of ....., 19....., personally appeared before me....., the signer of the above instrument, who duly acknowledged to me that he executed the same.”

**57-3-1, Utah Code Annotated, 1953. CERTIFICATE OF ACKNOWLEDGMENT OR OF PROOF OF EXECUTION A PREREQUISITE.**

“A certificate of the acknowledgment of any conveyance, or of the proof of the execution thereof *as provided in this title*, signed and certified by the officer taking the same as provided in this title, shall

entitle such conveyance with the certificate or certificates aforesaid, to be recorded in the office of the recorder of the county in which the real estate is situated.” (Italics supplied)

57-3-2, Utah Code Annotated, 1953. RECORD IMPARTS NOTICE.

“Every conveyance, or instrument in writing affecting real estate, executed, *acknowledged* or proved, and certified, *in the manner prescribed by this title*, and every patent to lands . . . shall, from the time of filing the same with the recorder of record, impart notice to all persons of the contents thereof, and subsequent purchasers, mortgagees and lienholders shall be deemed to purchase and take with notice.” (Italics supplied)

57-2-1, Utah Code Annotated, 1953, MANNER OF ACKNOWLEDGING OR PROVING CONVEYANCES.

“Every conveyance in writing whereby any real estate is conveyed or may be affected shall be acknowledged or proved and certified in the manner hereinafter provided.”

57-1-6, Utah Code Annotated, 1953, RECORDING NECESSARY TO IMPART NOTICE-OPERATION AND EFFECT INTEREST OF PERSON NOT NAMED IN INSTRUMENT.

“Every conveyance of real estate and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be effected, *to operate as notice to third persons* shall be



proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proofs, acknowledgment, certification or record, and as to all other persons who have had actual notice.” (Italics supplied) 1 Am. Jur. Sec. 69 states:

“While there is some authority to the effect that in the absence of fraud, accident or mistake, an acknowledgment may be taken over a telephone, a majority of the few cases discussing the question hold that where the personal presence of a party before an officer is required by the statute, an acknowledgment cannot be taken over a telephone.”

The following cases are in point.

Myers v. Eby, 33 Idaho 266, 193 P 77;

Roach v. Francisco, 138 Tenn. 357, 197 S.W. 1099,  
1 A.L.R. 1074;

Annot. 12 A.L.R. 538; 58 A.L.R. 604;

Humble Oil and Ref. Co. v. Downey, 143 Tex. 577,  
183 S.W. 2d 426;

Charlton v. Richard Gill Co. (Tex. Civ. App.), 285  
S.W. 2d 801.

Reference is also made to 59 A.L.R. 2d 1293, with Annotations beginning on page 1301, (1315) where numerous cases are cited holding that latent defects in an acknowledgment prevents constructive notice. The principal case cited in this annotation, Citizens National Bank in Zanesville, Appt. v. Bertha G. Denison, et al, 133 N.E. 2d 329, deals with priorities between mortgage holders the author says:

“That the recording of a defectively acknowledged mortgage did not constitute constructive notice to the subsequent mortgagees and give it priority over the subsequently recorded mortgages; and that the defective execution could be proved by evidence of defects not apparent on the face of the instrument.”

See also 25 A.L.R. 2d 1124, for additional annotated cases and specifically Section 49 thereof, page 1166, which, among other cases, refers to *Little v. Bergdahl Oil Company*, 60 Idaho 662, 95 P 2d 833, which held that:

“In the absence of the identical person who signed the instrument an officer cannot accept the affidavit of a witness to the signature and then, upon such affidavit alone, take the acknowledgment.”

In the case of *Myers v. Eby supra*, the facts were almost identical with the case in point in that the signature of one of the mortgagors was affixed to the mortgage outside of the presence of the justice of the peace who notarized the document and the justice called the mortgagor and confirmed the signature by telephone. The court in that case said:

“Where the personal presence of a party before an officer is a requirement of the statute, an acknowledgment of a person not in the presence of the officer, taken by means of the telephone, is not a mere irregularity. It is beyond the power of the officer to take an acknowledgment in this manner. The recitals in the certificate become a mere fabrication.”

See: *LeMesnager, et al v. Hamilton*, 101 Cal, 532, 35 Pac. 1054.

See *Tarpey v. Deseret Salt Co*, 5 Utah 205, 14 Pac. 338. which states:

“One object of the acknowledgment is to entitle the deed to be recorded but the record is only the prima facie evidence of the facts therein stated. The certificate of acknowledgment is itself only prima facie evidence of the facts therein stated. It is not conclusive and may be rebutted.”

## POINT VII.

THE COURT ERRED IN FAILING AND REFUSING TO FIND THAT BECAUSE OF THE CONDUCT OF RESPONDENT IN EACH OF SAID ACTIONS RESPONDENT IS ESTOPPED FROM CLAIMING ANY RIGHTS AS BEING PRIOR AND SUPERIOR TO THE RIGHTS OF APPELLANT.

The argument contained in next to last paragraph under appellant's Point VI may also be applied and argued under this point.

Appellant pleaded and relies upon the doctrine of equitable estoppel in the instant cases. From the acts and conduct of respondent, regardless of which conclusion the court might come to under the various contentions of respondent, respondent should be estopped from either challenging the validity of appellant's lien or of claiming priority over same. The instant cases are equity cases. Respondent has not come into court with clean hands. If there was ever a case in which this doctrine should be applied it appears that this is such a case.

It appears that respondent has taken a most inconsistent position in these cases. Respondent contends for one theory as against this appellant, and the opposite theory as against the other lien claimants.

Respondent was responsible for the manner in which construction was carried on. Grow the agent of respondent knew during the construction of homes in the Keyridge area that Mecham was losing money so what did Grow do, he told Mecham to get additional properties on which to build and that he would contract with Grow on those houses at a higher figure than had been contracted for on the Keyridge area. Mecham did this. Grow persuaded Mecham to mortgage the Schauerhamer lots to respondent company and told Mecham that respondent would finance the purchase of additional properties which could be mortgaged. The mortgage monies from these additional properties were used at least in part to bring houses in Grow's controlled companies areas to a more near completion. Mecham was in debt \$119,000 and the scheme was to get more property on which more mortgages could be placed, the proceeds from which the old bills would be paid first.

Grow as agent for respondent stood by and observed materialmen stockpiling materials some on Keyridge property in the name of his controlled company and some on LaMesa in the name of Mecham. He further observed the taking of plumbing materials from each stockpile and its being used in buildings in each area. As to this fact a portion of the testimony given by Mecham is herein set out as follows:

(page 612)

Q. Mr. Mecham, did you see Mr. Grow on and about the areas in which you were building during the course of construction of these buildings?

A. Yes, I did.

Q. Did you see Mr. Grow on and about the properties during the period of time that workmen were working around the areas?

A. Yes.

Q. Did you see Mr. Grow on or about the properties during the period of time when plumbing materials were being taken from stock piles on Keyridge and used on other projects?

A. Yes, I am sure.

Q. Did you see Mr. Grow in and about the La-Mesa area when plumbing materials were being taken from the stock pile on LaMesa and used in other areas?

A. Yes, I saw Mr. Grow on the property at that time.

Q. Did Mr. Grow ever request you or inquire of you whether you were making any segregation of materials that were going into these various areas?

A. No, he didn't.

Q. Did Mr. Grow ever ask you to make a segregation of materials that were going into these several areas.

A. No.

It is evident that respondent was not obligated to advance mortgage monies as the trial court rightly held. Neither did respondent advance to Mecham, the contractor, or if he was in fact the owner, 100% of the amount of the mortgage, nor were the mortgages credited with the 10% withheld by respondent from each of the LaMesa mortgages until the day of the opening of trial. The amount withheld by respondent and credited on the first day of trial was \$32,400.00. Had respondent been obligated to advance said sum and had such sum been made available to Mecham during the course of construction of houses in the four areas we have a right to presume appellant would not have been confronted with the mess which causes us to bring this case before the Supreme Court.

While the mortgages foreclosed by respondent might in law be enforceable as against Mecham, they are not such as entitles the mortgages to priority over the lien of appellant.

Respondent controlled the release of the monies represented by the mortgages and directed the manner in which payment was to be made and to whom the monies were to be paid. Respondent, and respondent only determined which account monies drawn by Mecham against the mortgages were to be charged. If the properties were some Mecham's and some respondent's or Grow's companies as respondent contends then it was the duty of respondent to have requested that appellant segregate its accounts and to require a record and charging out of materials which were going into those properties owned by respondent and those properties owned by Mecham. There is no contradiction of the fact that no records were kept by Mecham or by any of his men as

plumbing materials were taken from each stockpile and used in each area. Nor was Mecham ever instructed by Grow as agent for respondent to keep such a record or to segregate the accounts.

The descriptions used by appellant in its lien were those furnished by respondent to appellant in the lien waiver which respondent requested appellant's agents to sign and which they refused to do. No one but an engineer could take the descriptions furnished by respondent and find a particular lot and point out with any degree of accuracy the particular lot as fitting a particular description. The plat on the LaMesa area was not filed until a time after appellant filed its lien. The Rowley property was never platted? Nor was the Schauerhamer property platted as a subdivision.

The evidence conclusively shows that Mecham was but a tool in the hands of Grow who was acting at all times on behalf of and for respondent. It is clearly evident that the placing of title in the name of various companies by Grow and the method of operation and of having Mecham take title to LaMesa and Rowley areas in his name, was all a scheme by and through which the rights of materialmen and creditors would be and were defeated.

## CONCLUSION

The evidence in this case so strongly shows that because of the acts and conduct of agents of respondent, respondent should be estopped from questioning the validity of appellant's lien or claiming its rights as being superior to that of appellant that the court need not concern itself, in the opinion of appellant, with the other points upon which appellant re-



lies any one of which if the court should rule in favor of appellant will establish appellant's right to a foreclosure of its lien and which should establish the lien as superior to that of respondent's mortgage.

If the court however, does not apply estoppel in favor of appellant and should the court not find and determine that Mecham in fact held title to Rowley and LaMesa areas for respondent but that Mecham was the true owner, such determination still will not defeat the lien of appellant inasmuch as appellant was dealing at all times with Mecham, the owner builder. Then too, such defense could not be relied on by respondent as to the Schauerhamer area owned by Mid-Utah Construction Co. on which area Mecham had contracted to build for Mid-Utah.

In the Schauerhamer area appellant could not have kept track of the way title to these properties were being juggled around. It is evident that Mecham took title to a part of the property in his name first, then Mid-Utah Construction Company took title to that part of the property which had been held in Mecham's name and which had not been sold. Appellant was at all times dealing with Mecham the contractor.

Respondent cannot defeat the lien of appellant no matter how bad it might be without first establishing the validity of its mortgages, this because unless respondent can bring itself into a class of lien claimants it has no right to question the lien of appellant. Appellant's action to foreclose its lien is against Mecham. It is Mecham against whom appellant seeks a deficiency judgment unless appellant estab-

lishes the fact that respondent and not Mecham is the true owner of the properties.

Section 38-1-8 UCA 1953 gives appellant the right to lien any and all property which has received its materials under a single contract with Mecham, this is true whether delivered to the owner or the agent of the owner, and under section 38-1-4 UCA 1953 the properties whether two or more lots or subdivisions is one for the purpose of establishing appellant's lien. The contractor, materialman relationship is the determining factor, one ownership is not necessary.

There was no showing that anyone has been misled by the description as contained in appellant's lien nor has it been shown that anyone has been prejudiced as a result of appellant's claiming all properties which received its materials under one lien. Mecham has not objected to such procedure.

The judgment of the district court should be reversed and the lien of appellant should be found and determined to be valid and superior to the rights of respondent and a foreclosure of the lien should be ordered and a sale of the properties out of which the proceeds of the sale should be applied equally to the lots affected by the three actions here before the court as to that proportionate amount of the lien affected by these actions.

Respectfully submitted,

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