

1960

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Aldrich, Bullock & Nelson; Pugsley, Hayes, Rampton & Watkiss; Attorneys for Respondent;

Recommended Citation

Reply Brief, *Utah Savings & Loan Ass'n v. Mecham*, No. 9159 (Utah Supreme Court, 1960).
https://digitalcommons.law.byu.edu/uofu_sc1/3523

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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

UTAH SAVINGS & LOAN ASSOCIATION,
Plaintiff, Respondent,
and Cross-appellant,

vs.

ROBERT B. MECHAM, et al.,
LUDLOW PLUMBING SUPPLY CO.,
Defendant and Appellant.

CASE
NO. 9159

JULY 6 - 1960

Clerk, Supreme Court, Utah

**Answering Brief of Respondent, Utah Savings
and Loan Association, to Brief of Appellant
Ludlow Plumbing Supply Company**

ALDRICH, BULLOCK & NELSON,
and
PUGSLEY, HAYES, RAMPTON &
WATKISS,
Attorneys for Respondent

NEW CONTACT PRINTING CO. PHOTO. 1960

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS.....	10
ARGUMENT:	
POINT I	
THE COURT DID NOT ERR IN FINDING AND DETERMINING THAT THE LIEN OF APPELLANT IS INVALID AND UNENFORCEABLE AS AGAINST THE PROPERTIES DESCRIBED IN RESPONDENT'S COMPLAINTS	13
POINT II	
THE COURT WAS CORRECT IN FINDING THAT THE BUILDING OF HOUSES IN EACH OF THE AREAS COVERED BY THE LIEN OF APPELLANT WAS NOT ONE ENTIRE PROJECT.....	20
POINT III	
THE COURT DID NOT ERR IN REFUSING TO FIND THAT MID-UTAH BROADCASTING COMPANY BECAME LIABLE TO APPELLANT FOR MATERIALS FURNISHED TO THAT PROPERTY AFFECTED BY CASE NO. 20,591, DESIGNATED AS SCHAUERHAMER AREA	25
POINT IV	
THE COURT DID NOT ERR IN REFUSING TO FIND THAT ROBERT B. MECHAM TOOK TITLE TO PROPERTIES DESIGNATED AS ROWLEY AND LA MESA FOR AND ON BEHALF OF RESPONDENT OR THAT ROBERT B. MECHAM WAS THE AGENT FOR RESPONDENT, AND WAS CORRECT IN REFUSING TO FIND AND DETERMINE THAT APPELLANT IS ENTITLED TO PERSONAL JUDGMENT AGAINST RESPONDENT IN CONNECTION	

TABLE OF CONTENTS (Continued)

	Page
WITH THE PROPERTY SITUATED IN ROWLEY AND LA MESA AREAS BY VIRTUE OF SECTION 14-2-2 UTAH CODE ANNOTATED 1953 (Bond Law)	27
POINT V	
THE COURT DID NOT ERR IN REFUSING TO EQUALLY APPORTION APPELLANT'S LIEN.....	29
POINT VI	
RESPONDENT'S RECORDED MORTGAGES GAVE CONSTRUCTIVE NOTICE OF CONTENTS, AS ACKNOWLEDGMENTS WERE FAIR ON THEIR FACES AND RECORD TITLE HOLDER, ROBERT B. MECHAM, PROPERLY EXECUTED AND ACK- NOWLEDGED THE SAME PRIOR TO RECORDING	31
POINT VII	
RESPONDENT IS NOT ESTOPPED TO CLAIM PRIORITY OF ITS MORTGAGES.....	36
POINT VIII	
APPELLANT HAS NO VALID AND ENFORCE- ABLE LIEN AGAINST THE PROPERTIES IN- VOLVED, BECAUSE ITS MATERIALS WERE SOLD UPON AN OPEN ACCOUNT IN THE ORDINARY COURSE OF TRADE.....	41
POINT IX	
IF A MECHANICS LIEN IN FAVOR OF AP- PELLANT IS DETERMINED TO BE VALID IN SOME ASCERTAINABLE AMOUNT AGAINST THE PROPERTIES INVOLVED, THE MORTGAGES OF RESPONDENT WOULD IN ANY SUCH EVENT BE PRIOR IN RIGHT TO SUCH LIEN.....	44
CONCLUSION	46

TABLE OF CONTENTS (Continued)

	Page
CASES CITED	
Badger Lumber Company vs. Holmes, 62 NW, 446....	16
Brannan Sand & Gravel Company vs. Santa Fe Land Co., 332 P. (2d) 892.....	16, 17, 29
Byrd vs. Cochran, 39 Nebraska 109, 58 NW 127....	16
Eccles Lumber Co. vs Martin, 31 Utah 241, 87P. 713..	14, 15
Eisenbeis vs. Workman, 28 P. 923.....	43
First Security Bank of Utah vs. Burgi, 122 Utah 445, 251 P. (2d) 297.....	46
W. P. Fuller Co. vs. Flisher, 218 P. 53.....	42
Johnson vs. Bennett, 40 P. 847, 848.....	18
Mitchel vs. Palmer, 240 P. (2d) 970, 121 Utah 245...	32
Myers vs. Ebey, 33 Idaho 266, 193 P. 77.....	35
Northcrest, Inc. vs. Walker Bank & Trust Co., 248 P. (2d) 692; 122 Utah 268.....	36
B. F. Salzer Lumber Co. vs. Lindenmeir, 131 P. 442...	42
Sarginson vs. Turner, 124 P. 379.....	16, 17
Security Stove Manufacturing Company vs. Sellards, 3 P. (2d) 481.....	24
Tabet vs. Davenport, 260 P. (2d) 722.....	44
Tarpey vs. Deseret Salt Co., 5 Utah 205, 14 P. 338...	35
U. S. Building & Loan vs. Midvale Home Finance Cor- poration, 86 Utah 506, 44 P. (2d) 1090.....	16, 19
Weaver vs. Harland Corp., 10 SE (2d) 547, 130 A.L.R. 417	16
Whittier vs. Puget Sound Loan Company, 30 P. 1094..	43

TABLE OF CONTENTS (Continued)

Page

OTHER AUTHORITIES CITED

10 A.L.R. 1026.....	14
10 A.L.R. 1033.....	14
755 A.L.R. 1328.....	14
130 A.L.R. 423.....	16
39 A.L.R. (2d) 397.....	44
59 A.L.R. (2d) 1316.....	36
1 Am. Jur. 228.....	36
36 Am. Jur. 62.....	43
36 Am. Jur. 116.....	14
1 C.J.S. 799.....	35
57 C.J.S. 756.....	24
Jones on Liens, Vol. II, 337.....	14
Jones on Liens, Vol. II, Sec. 1319.....	30

STATUTES

Section 14-2-2 UCA, 1953.....	25, 26, 27
Section 38-1-3, UCA, 1953.....	13
Section 38-1-5 UCA, 1953.....	32, 44, 45
Section 38-1-8 UCA, 1953.....	14

In the Supreme Court of the State of Utah

UTAH SAVINGS & LOAN ASSOCIATION,
Plaintiff, Respondent,
and Cross-appellant,

vs.

ROBERT B. MECHAM, et al.,
LUDLOW PLUMBING SUPPLY CO.,
Defendant and Appellant.

**CASE
NO. 9159**

Answering Brief of Respondent, Utah Savings and Loan Association, to Brief of Appellant Ludlow Plumbing Supply Company

STATEMENT OF FACTS

With some of the allegations in Appellant's Statement of Facts, Respondent agrees. As to others, we think they are immaterial to the issues, contrary to specific findings of the Trial Court not directly challenged in this appeal, and are conclusions, either without basis in the evidence or based upon isolated testimony of one witness without regard to contradictory testimony appearing elsewhere in the rec-

ord. Our primary objection to the Statement, however, is that we think it is incomplete to properly consider the legal issues involved.

In order to clarify the position of Respondent, we believe it necessary to restate the facts, as we see them, from the pleadings, Trial Court orders, Findings of Fact and Conclusions of Law, and the evidence, or lack of it, in the record. In such manner, it is believed that the facts which we consider essential to a proper consideration of the cases can be added more appropriately, and areas of agreement and disagreement with Appellant's Statement will be more apparent than if an attempt were made to take each individual "fact" as stated by the Appellant and either agree or disagree therewith or argue its materiality.

This appeal involves three separate mortgage foreclosure actions which were consolidated for trial and were tried together in the lower court. In each case, Respondent, by its Complaint, sought to foreclose construction mortgages which had been executed in its favor by Robert B. Mecham, as an owner builder, and his wife, Ruth W. Mecham, as to her statutory dower interest. (Plf. Exhibits 1-24, Civil 20,575, Exhibits 1-6, Civil No. 20,591, and Exhibits 1-4, Civil No. 20,592). The Complaint in Civil No. 20,575 contains twenty-four separate causes of action to foreclose twenty-four separate mortgages on twenty-four separate houses in various stages of completion in an area in Orem, Utah County, called "La Mesa". The Complaints in Civil Nos. 20,591 and 20,592 contain six and four causes of action, respectively, to foreclose six separate mortgages on six separate houses referred to as "Schauerhamer" in Case No. 20,591, and four separate mortgages on four separate houses referred to as "Rowley" in Case No. 20,592,

which areas are also in Orem. The relative locations of these areas are shown by Plaintiff's Exhibit 41 in Civil No. 20,575, and individual plats of the areas are shown by Plaintiff's Exhibit 40 in Civil No. 20,575, Exhibit 15 in Civil No. 20,591, and Exhibit 20, in Civil No. 20,592.

In each of the three cases, the mortgagors and all other persons known to claim some interest in the properties were named as defendants, there being 24 such defendants in Civil No. 20,575, 11 in Civil No. 20,591 and 19 in Civil No. 20,592. Most of the defendants were mechanics lien claimants under Notices of Lien filed by them, covering various portions of land from one lot in one area (Def. Exhibit 78, Civil No. 20,575) to 5 separate areas covering more than 100 lots, as in the case of Appellant, on which Mecham had commenced the construction of houses, and to which they claimed to have furnished materials. There were some others such as the United States which claimed tax liens as against Mecham, and the Industrial Commission which claimed a judgment lien as against Mecham. Most of the claims of the various defendants have been settled or purchased by Respondent, and some others have been disposed of by orders of the Trial Court, from which orders no appeals have been taken. Appellant was made a party defendant in each of the three cases because its Notice of Lien included the property sought to be foreclosed, but not all of the defendants in each of the cases are the same.

To the Complaints for foreclosure of Respondent's separate mortgages in each of the three cases, Appellant filed Answers and Cross-claims, which, for all practical purposes, were identical. (R. 38, Civil No. 20,575, R. 16, Civil No. 20,591, and R. 13, Civil No. 20,592). Appellant

set forth therein in all three cases its claim of mechanic's lien and in each prayed that the property **described in Plaintiff's Complaint** be sold and the sale proceeds applied to the payment of its claims in the amount of \$18,653.67 with interest.

Five months later, on June 9, 1958, Appellant filed an Amended Answer, Counterclaim, and Cross-claim in each of the three cases, and again prayed **that the lands described in Plaintiff's Complaint** be sold and that the proceeds of the sale be applied to the payment of its lien. (R. 79, Civil No. 20,575, R. 47, Civil No. 20,592, R. 58, Civil No. 20,592).

Just prior to the conclusion of the trial on December 17, 1958, Appellant filed a Second Amended Answer and Counterclaim and Cross-claim in each case, and again prayed in each that the **property described in Plaintiff's Complaint** be sold and the proceeds applied to the payment of the lien. (R. 161, Civil No. 20,575, R. 47, Civil No. 20,591, R. 85, Civil No. 20,592).

As will more fully appear herein, the significance of Appellant's pleadings is that (1) in neither the original nor in the two amended pleadings in each of the three cases did Appellant pray for the foreclosure of its **whole** lien by a sale of **all** the property covered by its lien, and to which it claimed to have furnished materials, and (2) the "bond law" wasn't mentioned.

Sometime after the filing of the original Answer and Counterclaim, some of the mechanics lien claimants (not Appellant) made motions to the court for orders adding D. Spencer Grow; D. Spencer Grow, dba Mid-Utah Construction Company and Radio Sales Corporation; Mortgage Insurance Corporation; Grow Investment Corporation; and

Mid-Utah Broadcasting Company, a corporation, as Cross-defendants in each of the three cases. Over objection of Respondent, the Trial Court granted the motion. However, neither Appellant nor any party to the appeals at bar designated for inclusion in the record now before the Court either the motions referred to or the orders granting them, and for all the record on this appeal shows, there are no Cross-defendants in any of the actions. While we will make some references to these "Cross-defendants" throughout this brief and will answer Appellant's arguments concerning them, we do not concede that any of them are properly or legally before this Honorable Court according to the record.

It should be noted at this point that the Notice of Lien filed by Appellant and upon which it relies in the three cases before the Court (Def. Exhibit 29, Civil No. 20,575) is a single or "blanket" lien claiming \$18,653.67 on a total of 101 buildings situated in Orem and Provo in five separate areas, **which properties were not owned by a common owner** either at the time Appellant's Lien was filed, or any other time. No designation is made as to the amount claimed against the properties described in the Notice of Lien either by lot, owner, or area.

The Trial Court found in each case that generally the properties described in Appellant's Notice of Lien are as follows: (R. 211, Civil No. 20,575, R. 69, Civil No. 20,591, and R. 99, Civil No. 20,592)

(a) "All of Keyridge Heights, a subdivision, owned by Cross-defendants at the times materials were furnished by said Ludlow, consisting of 25 lots on which have been constructed 23 homes by the said Robert B. Mecham under contracts with the said owners."

(b) "All of Keyridge Heights, Plat "B", owned by Cross-defendants at the time Defendant Ludlow furnished materials to Defendant Mecham, consisting of 35 lots on which have been constructed 35 homes by Defendant Mecham under contract with said owners, of which all have been substantially completed except 11 of said homes which are in various states of completion."

(c) "Twelve lots in the Schauerhamer area owned by Defendant Robert B. Mecham at the time of commencement of construction and on which 12 homes have been built by the Defendant Mecham, and all of which are substantially completed."

(d) "A parcel of land in Provo, Utah, at about 5th North between 15th and 16 West, consisting of about 7.79 acres, divided into lots and owned by Defendant, Robert B. Mecham, upon which he has constructed one house as owner builder, but which said house has not been completed."

(e) . "Forty-four lots in La Mesa Subdivision owned by Defendant Robert B. Mecham upon which he commenced construction of dwellings on 24 of said lots and said dwellings are in various stages of completion **from 45% to 90%**". (Emphasis supplied)

(f) "Four lots in Rowley area owned by Robert B. Mecham on which 4 homes were built by said Mecham, but not fully, completed."

It will be noted from the foregoing that the majority of the homes, some 58, on which Appellant claimed a lien are in Keyridge Heights and Keyridge Heights Plat "B" owned by three Cross-defendants. Neither these, the Provo property nor six of the twelve Schauerhamer properties are sought to be foreclosed by any of the parties to the actions before the Court.

The finding of the Trial Court with respect to the 58 Keyridge homes is as follows:

“That commencing August 5, 1955 and continuing to the summer of 1956, Defendant Robert B. Mecham, at various times during said period entered into a total of 58 separate contracts with Cross-defendant Mid-Utah Broadcasting Company, a corporation, and Cross-defendant D. Spencer Grow, whereby the said Mecham was to build for the owners of said property 58 separate dwellings for a consideration stated and agreed upon in each of said contracts; that the said Mecham did fully complete 47 of said dwellings, and the remaining 11 are substantially, but not fully, completed; that the said Mecham has been paid for said construction and all extras by the owners of said land.”

The contracts, each covering a particular lot and stating a separate consideration, were received in evidence as plaintiff's Exhibits 42 (1-58), Civil No. 20,575, '24 (1-58) Civil No. 20,591, and 22 (1-58) Civil No. 20,592.

Because it appeared obvious from the pleadings that Appellant was not seeking to foreclose its lien as against all the property described in the Notice of Lien, but was claiming the total amount of the lien as against the 34 properties described in the three cases before the Court, Respondent's counsel, at the pre-trial hearing, sought an explanation of Appellant's position. He was informed that Appellant claimed the full amount of the lien against each and every single property involved in the three cases before the Court. (Pre-trial hearing, Page 28-29)

The proof offered by Appellant at the trial in support of its lien as against the 34 properties described in Respondent's three Complaints was simply that commencing in June

1956, and continuing to June 1957, Appellant furnished plumbing materials first to Roger Allred who was working for Mecham, and later to Mecham, of the value of \$42,423. 60 upon an open account, and that there was due and owing by Mecham upon this account the sum of \$18,653.67. (Tr. 621-656). Appellant's witnesses were emphatic in their inability to state the value of the materials which went into each property, or even the amounts which were used or sold to be used in the separate areas liened. Although Appellant's testimony was also that it knew that Keyridge belonged to Mr. Grow, and La Mesa belonged to Mecham, (Tr. 626), Appellant either failed to keep any records as to dates, quantities, or points of delivery as between the areas, or if records were kept, for some reason refused to introduce them in evidence. Appellant was not the sole supplier of plumbing materials. (Tr. 375)

In this connection, the Trial Court made findings in each of the three cases as follows: (R. 215, Civil No. 20,575, R. 73, Civil No. 20,591, R. 101, Civil No. 20,592)

(1) "That during the period commencing June 1956 and continuing until June 1957, plumbing materials and supplies were sold to Defendant, Mecham, on an open account, Ludlow Plumbing Supply Company, and were not sold for use on any particular lot, property, or project, described in its Notice of Lien referred to in Paragraph 12 hereof, and were sold for use by the Defendant Mecham in such manner and for such use upon lots, properties or projects as Mecham should determine."

(2) "That during the period June 1956 to June 1957 Defendant Ludlow Plumbing Supply Co. delivered said plumbing materials and supplies from its place of business in Salt Lake City, Utah, to Orem,

Utah to the Defendant Mecham mostly by common carrier, and such materials were delivered to Keyridge subdivision and to the La Mesa Subdivision, and none were delivered by Ludlow to the Schauerhamer, Rowley, or Provo areas.”

Respondent does not challenge the above findings in its brief.

The Trial Court made a further finding to the effect that Appellant knew and understood that all of Keyridge Subdivision was owned by some of the Cross-defendants, and that all of La Mesa was owned by Defendant Mecham. (R. 215, Civil No. 20,575, R. 73, Civil No. 20,591, R. 101-102, Civil No. 20,592).

The Trial Court entered judgment in favor of Appellant and against Defendant Robert B. Mecham for the total amount of its open account, (R. 244, Civil No. 20,575, R. 80, Civil No. 20,591, R. 121, Civil No. 20,592), but held that its purported lien was invalid and that the evidence furnished no basis whereby the Court could apportion the materials and supplies sold by Appellant to Mecham among the numerous tracts of land covered by the lien. (R. 215, Civil No. 20,575, R. 73, Civil No. 20,591, R. 102, Civil No. 20,592). It is from the judgment denying Appellant a prior lien to Respondent’s mortgages upon the properties described in Respondent’s Complaints that Appellant makes this appeal.

There is no dispute as to the amounts found by the Trial Court to be due Respondent by Mecham on its mortgages or on the amount found to be due Appellant by Mecham on its open account. Neither Mecham nor his wife has taken any appeal.

It also does not appear that there is any dispute as to the facts found by the Trial Court that no work was actually commenced nor materials delivered on any property in each of the three areas involved in the cases at bar until after all the mortgages in each of the areas had first been recorded, (R. 210, Civil No. 20,575, R. 67, Civil No. 20,591, R. 98, Civil No. 20,592), except in the case of the property described in Respondent's Sixth Cause of Action in Civil No. 20,591. As to that latter property only, the mortgage sued upon, resulting from a refinancing transaction, was not recorded until June 26, 1957 (R. 67, Civil No. 20,591), and we concede that since work on that property was commenced prior to the recording of Respondent's mortgage, any valid mechanic's lien as against that property for the value of any materials furnished "to be used" upon that property would be prior in right to that mortgage.

Appellant has filed no supersedeas bond, and pursuant to Decrees in each of the three cases, all of the properties were sold by the Sheriff in separate parcels in accordance with the laws governing sales upon foreclosure. Respondent bid in each of the properties for a sum equal to or less than the amounts found to be due on the mortgages. There were no other bidders.

STATEMENT OF POINTS

POINT I

THE COURT DID NOT ERR IN FINDING AND DETERMINING THAT THE LIEN OF APPELLANT IS INVALID AND UNENFORCEABLE AS AGAINST THE

PROPERTIES DESCRIBED IN RESPONDENT'S COMPLAINTS.

POINT II

THE COURT WAS CORRECT IN FINDING THAT THE BUILDING OF HOUSES IN EACH OF THE AREAS COVERED BY THE LIEN OF APPELLANT WAS NOT ONE ENTIRE PROJECT.

POINT III

THE COURT DID NOT ERR IN REFUSING TO FIND THAT MID-UTAH BROADCASTING COMPANY BECAME LIABLE TO APPELLANT FOR MATERIALS FURNISHED TO THAT PROPERTY AFFECTED BY CASE NO. 20,591 DESIGNATED AS SCHAUERHAMER AREA.

POINT IV

THE COURT DID NOT ERR IN REFUSING TO FIND THAT ROBERT B. MECHAM TOOK TITLE TO PROPERTIES DESIGNATED AS ROWLEY AND LA MESA FOR AND ON BEHALF OF RESPONDENT OR THAT ROBERT B. MECHAM WAS THE AGENT FOR RESPONDENT, AND WAS CORRECT IN REFUSING TO FIND AND DETERMINE THAT APPELLANT IS ENTITLED TO PERSONAL JUDGMENT AGAINST RESPONDENT IN CONNECTION WITH THE PROPERTY SITUATED IN ROWLEY AND LA MESA AREAS BY VIRTUE OF SECTION 14-2-2 UTAH CODE ANNOTATED, 1953. (Bond Law)

POINT IV

THE COURT DID NOT ERR IN REFUSING TO EQUALLY APPORTION APPELLANT'S LIEN.

POINT VI

RESPONDENT'S RECORDED MORTGAGES GAVE CONSTRUCTIVE NOTICE OF CONTENTS, AS ACKNOWLEDGMENTS WERE FAIR ON THEIR FACES AND RECORD TITLE HOLDER, ROBERT B. MECHAM, PROPERLY EXECUTED AND ACKNOWLEDGED THE SAME PRIOR TO RECORDING.

POINT VII

RESPONDENT IS NOT ESTOPPED TO CLAIM PRIORITY OF ITS MORTGAGES.

POINT VIII

APPELLANT HAS NO VALID AND ENFORCEABLE LIEN AGAINST THE PROPERTIES INVOLVED, BECAUSE ITS MATERIALS WERE SOLD UPON AN OPEN ACCOUNT IN THE ORDINARY COURSE OF TRADE.

POINT IX

IF MECHANIC'S LIENS IN FAVOR OF APPELLANT ARE DETERMINED TO BE VALID IN SOME ASCERTAINABLE AMOUNTS AGAINST THE PROPERTIES INVOLVED, THE MORTGAGES OF RESPONDENT WOULD IN ANY SUCH EVENT BE PRIOR IN RIGHT TO SUCH LIENS.

ARGUMENT**POINT I**

THE COURT DID NOT ERR IN FINDING AND DETERMINING THAT THE LIEN OF APPELLANT IS INVALID AND UNENFORCEABLE AS AGAINST THE PROPERTIES DESCRIBED IN RESPONDENT'S COMPLAINTS.

Omitting immaterial wording, Section 38-1-3 **Utah Code Annotated** 1953, provides as follows:

“ . . . all persons . . . furnishing materials **to be used** in the construction . . . of any building, structure or improvement upon land . . . shall have a lien upon the property upon or concerning which they have . . . furnished materials . . . ” (Emphasis supplied.)

Section 38-1-8 **Utah Code Annotated**, 1953, reads 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.” (Emphasis supplied)

It is Respondent's position that Appellant's lien is fatally defective under the above statutes since its Notice of Lien includes several properties in five separate areas, all of which were not owned by the same person or persons, and there is no evidence in support of it upon which a determination can be made as to the value of the materials furnished “to be used” or actually used “in the construct-

tion" on any or all of the 34 separate lots foreclosed in the three actions before the Court.

In the absence of any statute such as Section 38-1-8, quoted above, authorizing blanket liens, **Jones on Liens**, Volume II at page 337 states the rule as follows:

"Where houses were built upon distinct lots of land, a separate lien must generally be filed against each house and lot for the work and materials used thereon. A single lien against the entire premises for the aggregate charge is invalid. It is immaterial that at the time of the contract all of the houses and lots belonged to the same owner, and that in a suit to foreclose the lien, he is the sole Defendant; and it is also immaterial that the lots are contiguous and in a compact body of land and are without division fences. Nor does it aid the lien in such case that the whole work is done under one contract for all the buildings."

Where there is a statute similar to Section 38-1-8, it then appears that a blanket lien may be filed on two or more properties which are owned by the same owner if the materials are furnished by a lien claimant under one single contract. See **36 Am. Jur. 116; 10 A.L.R. 1026; 75 A.L.R. 1328**. Even then the majority rule is that the lots must be contiguous. **10 A.L.R. 1033**.

In the case of **Eccles Lumber Co. vs. Martin**, 31 Utah 241, 87 P. 713, this Court held that a blanket lien on more than one lot owned by the same person was not invalid under Section 38-1-8 UCA because it failed to state in the notice the amount claimed on each lot. The rationale of that case was that since the property was under one ownership it would make no difference to the owner, and the lien was determined to be good as against a demurrer. How-

ever, the Court also said that the effect of not designating the amount claimed in the notice was to postpone the lien to the claims of all other lienholders who did designate, and we assume that this would include the Respondent in the cases at bar which did, by its separate mortgages, “designate” the amount claimed against each property.

In none of the many cases annotated in the **A.L.R** notes referred to above, and in no case cited by Appellant or which we have been able to discover, has a single blanket lien covering property owned in severalty, as in this case, been allowed.

If the **Eccles** case doctrine were to be expanded to allow a single blanket lien against several parcels of property owned by more than one owner, especially where there is no designation in the notice as to the amount claimed against each parcel or as against each owner and no proof as to the value of the materials furnished “to be used” upon or actually used in each parcel, then, in our opinion, both Sections 38-1-3 and 38-1-8, would be nullified and rendered meaningless, and would open a Pandora’s box of insolvable legal and practical problems and uncertainties in the field of construction financing.

Perhaps the most cogent reason why Appellant’s Lien is unenforceable against the 34 properties involved in this appeal is that in the actions before the Court Appellant seeks foreclosure of its lien against the 34 properties covered by Respondent’s mortgage only, and not as against the 101 properties covered by its lien. The weight of authority is to the effect that a single mechanics lien against more than one parcel of land may not be enforced against less than the whole of the property liened, unless it is first shown **what part** of the entire lien properly may be allo-

cated to the portion against which enforcement is sought. **Weaver vs. Harland Corp.**, 10 SE (2) 547, 130 A.L.R 417, and Annotation following.

The record in the three cases before the Court contains no evidence as to the proportion of Appellant's total lien which could be allocated to either the 24, 6 or 4 lots involved in the three cases.

In support of its contention as to the validity of its lien, Appellant cites the cases of **Badger Lumber Company vs. Holmes**, 62 NW 446; **Sarginson vs. Turner**, 124 P. 379; **U. S. Building and Loan vs. Midvale Home Finance Corporation**, 86 Utah 506, 44 P. (2) 1090; **Brannan Sand and Gravel Company vs. Santa Fe Land Company**, 332 P. (2) 892, and some others, none of which, in our opinion, actually stand for the proposition contended for, and are not contrary to any of the views expressed in this brief.

The **Badger Lumber Company** case does not help Appellant in any respect, and in fact is authority for Respondent's contention that a mechanic's lien cannot be enforced against less than the property liened unless it is first shown **what part** of the entire lien may properly be allocated to the portion against which enforcement is sought. The Court said in that case:

"If it is sought to charge a part only of the lots for material furnished under the contract, then the amount of the material furnished must be apportioned so that the part charged shall bear no greater amount of the expense than the value of the materials **actually used** on said parts in the construction of improvements made thereon." (Emphasis ours)

This decision was based upon a previous case, **Byrd**

vs. Cochran, 39 Nebraska 109, 58 NW 127, wherein it was held that:

“In order to recover upon a mechanics Lien filed against one of the houses and the lot upon which it stands, it must be shown that the amount charged one house and lot is of the value of the labor performed upon and materials furnished for such house, or an estimate made by some method or plan which will produce a **certain definite result, and mere approximation or guesswork will not suffice to establish a lien.**” (Emphasis ours)

In the case of **Sarginson vs. Turner**, supra, the Court held exactly contrary to Appellant’s contention and supports Respondent’s position with respect to this point. The decision, including the statement of facts, is three paragraphs in length, the third of which reads as follows:

“It appears from the record that appellant by one written instrument contracted with Gregg for the construction of five dwelling houses, one to be built on a lot belonging to a third party, in which the Respondent Turner Investment Company had no interest. It further appears that Appellant did not keep separate accounts with these several buildings for labor and material furnished in their construction; that, without separation or segregation, he now asserts one lien on all four houses built on the lots of the Turner Investment Company, for the sum remaining due on the entire contract. **This cannot be done, and, if no other reason existed, Appellant’s alleged lien would fail for the want of segregation of accounts against each property.**” (Emphasis ours)

In the **Brannan** case the lien claimant filed a notice of lien against one of three properties owned by three sepa-

rate owners, and sought foreclosure of the lien against the one property for the full amount of the claim attributable to all three proerties. The claim was made under a contract "to surface and pave a 1567 foot roadway." The paved area was on and traversed the three separate pieces of property. The Court held that the one property liened could not be charged with the full amount expended upon all three, but that since the cost of the roadway could be easily calculated on a square foot basis, (the case actually indicates that the amount was stipulated to), the amount attributable to the property liened could be easily ascertained, and it was proper to allow a lien for the part of the total attributable to that single property.

In construing a statute similar to ours, Section 38-1-3 hereinbefore set forth, that Court said on Page 894:

"In the express words of the statute, containing, as we believe, no ambiguity, there are two limitations on the lien involved. First, it is granted only upon the property upon which the labor, services and material are bestowed or rendered; second, only to the extent of the **value** of the labor, services and material **rendered upon the property**" (Emphasis, the Court's)

The Court quoted **Johnson vs. Bennett**, 40 P. 847, 848, in part as follows:

"By statute . . . the lien is restricted to the land of the contracting owner, or his interest in it, at the time of making the contract, and is **further restricted** to the work done '**upon such land**' . . . (Emphasis, the Court's)

And, then said:

". . . By statute, therefore, the inquiry of the

Trial Court was limited to determining what labor, service, and material were rendered by Plaintiff to the property upon which the lien was claimed . . .”

A close reading of this case does not appear to us to support Appellant’s contention in any respect.

The case of **U. S. Building and Loan vs. Midvale Home Finance Corporation**, *supra*, involved a single subdivision, and lien claimants who furnished materials for the entire subdivision. Foreclosure was sought on the single mortgage, and this Court held that the mechanics liens were prior to the mortgage because work on the subdivision had commenced prior to the recording of the mortgage, and that the mechanics liens were not invalid because the notice failed to state separately the amount and value of materials and labor furnished to each lot in the subdivision.

It appears to us that the **Midvale** case is correct on its facts, but is not authority for Appellant’s position that a blanket lien covering 101 properties in five distinct and non-contiguous areas, owned by more than one owner at all times both before and after work commenced on the first property, can be enforced as against 34 of those properties, without a scintilla of evidence as to the amount or value of materials either furnished “to be used” or actually used upon the 34 properties or any of them. Add the further facts in the case at bar that Respondent sought foreclosure of 34 separate mortgages covering 34 separate properties in three separate cases, that there were and are mechanics lien claimants and others who claim as against separate areas and separate properties in those areas, and who furnished identical or similar materials,

and it seems apparent that the **Midvale** case is really not in point.

POINT II

THE COURT WAS CORRECT IN FINDING THAT THE BUILDING OF HOUSES IN EACH OF THE AREAS COVERED BY THE LIEN OF APPELLANT WAS NOT ONE ENTIRE PROJECT.

If, in fact, the building of 101 houses in the five areas covered by Appellant's lien was a single project, and Appellant bona fidely so regarded it, then it would appear to us that Appellant would have sought foreclosure of its **whole** lien and not merely a portion thereof on the 34 properties covered by Respondent's 34 mortgages in the three cases before the Court. Had that been done, then the single project theory might logically have been advanced and issue thereon properly joined.

But appellant did not choose to raise this matter either by its pleadings or by its inclusion in the Pre-trial order, and is, therefore, precluded from raising it on this appeal.

Be that as it may, however, the Findings of Fact of the Trial Court based upon the undisputed testimony in the record and unchallenged by Appellant in its brief, are dead opposed to that theory insofar as the rights of Respondent are concerned. Bearing upon this matter, the Trial Court, in all three cases, found the facts substantially as follows: (R. 212-214, Civil No. 20,575 ,R. 70-72, Civil No. 20,591, R. 99 A-101, Civil No. 20,592)

“That the property known as Keyridge Heights and Keyridge Heights Plat “B” was acquired in three

separate parcels commencing in 1955 and continuing in 1956 by three Cross-defendants.”

“That 10 of the lots in the Schauerhamer area were acquired by Defendant Robert B. Mecham from D. Reuben Schauerhamer in the fall of 1955 after the said Mecham commenced construction of homes in Keyridge Heights under contracts with some of the Cross-defendants, and the consideration paid by Mecham for said lots was the rebuilding of a house for D. Reuben Schauerhamer, all of which was unknown to Plaintiff or any of its officers or agents or any of the Cross-defendants, prior to the summer of 1956, when Cross-defendant D. Spencer Grow, discovered Mecham to be building five homes thereon.

“That the other two of said lots in the Schauerhamer area were acquired by the Defendant Robert B. Mecham from William Henry Baldwin and Max R. Brown for substantial cash considerations, prior to the commencement of any construction thereon, which acquisitions were unknown to Plaintiff or any of its officers or agents or any of the Cross-defendants.”

“That Defendant Robert B. Mecham purchased the Provo property from Kenneth Allred in June, 1956, for about \$5,000.00 and sometime thereafter, as owner builder, commenced to build a home thereon, all without the knowledge of Plaintiff or any of its officers or agents or any of the Cross-defendants.”

“That the four Rowley lots were acquired by Robert B. Mecham from Maude G. Rowley, Don E. Rowley, Laura J. Rowley, by Warranty Deed dated January 15, 1957, for a cash consideration which Defendant Mecham paid.”

“That the La Mesa property was acquired by Robert B. Mecham from Maude G. Rowley, Don E. Rowley, Laura J. Rowley, Norman J. Rowley, and

Judith Kay Rowley, by Warranty Deed dated January 29, 1957, for approximately \$30,000.00 of which about \$20,000.00 has been paid by said Mecham."

"That commencing August 5, 1955 and continuing to the summer of 1956, Defendant Robert B. Mecham, at various times during said period entered into a total of 58 separate contracts with Cross-defendants Mid-Utah Broadcasting Company and Cross-defendant Grow Investment Company, a corporation, and Cross-defendant D. Spencer Grow, whereby the said Mecham was to build for the owners of said property 58 separate dwellings for a consideration stated and agreed upon in each of said contracts; that the said Mecham did fully complete 47 of said dwellings and the remaining 11 are substantially, but not fully, completed; that the said Mecham has been paid for said construction and all extras by the owners of said land."

"That in the summer of 1956, without the knowledge or consent of Plaintiff or any of its officers or agents and without the knowledge or consent of any of the Cross-defendants, Defendant Mecham commenced the construction of a dwelling on the Provo property as owner builder, which dwelling has been substantially completed."

"That on December 14, 1956 after the recording of seven separate mortgages thereon in favor of Plaintiff, the Defendant Mecham, as owner-builder, commenced construction on an additional seven dwellings on lots in the Schauerhamer area."

"That on or about February 1, 1957, after the recording of four separate mortgages thereon in favor of the Plaintiff, Defendant Mecham, as owner builder, commenced construction of 4 dwellings on the four Rowley lots."

“That on February 21, 1957, and after the recording of 24 separate mortgages thereon, Defendant Mecham as owner builder commenced the construction of 24 dwellings on 24 lots in the La Mesa subdivision.

“That during the period August 1955 to June 1957, Defendant Mecham was engaged in a general building and contracting business and did work and furnished materials and labor in connection with **other building**, including the construction of a home for Wes Parks, a house which was being sold by a Ward of the L.D.S. Church, and work and labor on a Bishop’s Storehouse, and constructed a masonry building on his own property; that the suppliers for these endeavors were generally the same as those involved in this action (20,575) and in Civil Numbers 20,591, and 20,592.”

As appears from the foregoing, the property covered by Appellant’s lien was acquired piecemeal by different owners over a period of more than one and a half years, the Keyridge contracts were entered into separately at different times over a period of nearly a year, the mortgages placed upon the property involved in this lawsuit were executed at different times, and at no time can it be said that the total construction which Mecham did and which was covered by Appellant’s lien was within the contemplation of any of the parties, including Appellant, Respondent, and Mecham. Add to this the further fact that the properties were widely scattered in five separate and distinct areas in two towns, and we think that under no circumstances can it be considered that the building which Mecham did on all the properties covered by Appellant’s lien was a single project.

The reason for Appellant raising this issue is not clear

from its brief, but apparently the theory is that if construction on all the properties covered by the lien were considered to be a single project, then it could claim the construction commencement date on the first house in Key-ridge as the construction commencement date of all of the homes involved in the three cases before the Court, and, therefore, its lien would be prior to the mortgages in these cases. The law will not support this theory. As the Kansas Court said in the case of **Security Stove Manufacturing Company vs. Sellards**, 3 P. (2) 481:

“This theory is inconsistent with the attitude of all parties to the case all the way through, including the lienholders. Their claims and their judgments were separate and distinct as to the two lots when they should have put them together as one claim and one judgment, if they expected to consider their lien as only one on both lots, to take advantage of the earlier commencement of work on the other lot. No authorities are cited to support this theory, and we are not inclined to accept it as applicable to the facts in this case.”

See also **57 C.J.S. 756**, which reads as follows:

“Where mechanics and materialmen maintain and enforce their lien separately on two lots belonging to the same person, on which buildings are being constructed at the same time, they cannot on one lot claim the advantage of the earlier commencement of the building on the other.”

It requires no imagination to perceive the inherent difficulties in home financing if the law were otherwise. For how could a lender or a purchaser ever be sure that lien rights had expired even though a particular home may

have been completed and occupied for months or even years?

POINT III

THE COURT DID NOT ERR IN REFUSING TO FIND THAT MID-UTAH BROADCASTING COMPANY BECAME LIABLE TO APPELLANT FOR MATERIALS FURNISHED TO THAT PROPERTY AFFECTED BY CASE NO. 20,591 DESIGNATED AS SCHAUERHAMER AREA.

We are unable to understand Appellant's point No. III. It is assumed, however, that it is referring in that point to some one or more of six Schauerhamer lots not involved in any of the three cases before the Court, and is asserting that one of the Cross-defendants, Mid-Utah Broadcasting Company, is liable to Appellant for materials furnished to Mecham and used upon some one or more of those six lots. This liability is predicated on the "bond law" and a claimed agency relationship between Cross-defendants and Defendant, Robert B. Mecham.

If our assumption is correct, then the "bond law" liability assertion, not having been pleaded and not having been reserved as an issue in the pre-trial order, is brand-new to this law suit and has no application to the foreclosure of the mortgages involved in the three actions before the Court.

The agency proposition was rejected by the Trial Court in both a specific finding of fact and conclusion of law in all three cases now before the Court, (R. 217, 222, Civil 20,575; R. 73, 75, Civil 20,591; R. 102, 105, Civil 20,592) and there is no evidence in the record which affirmatively establishes any agency relationship whatsoever. In this

connection the Trial Court found as a fact in Civil No. 20,591 and also in the other two cases, and Appellant makes no citation in its brief to any part of the record justifying a finding to the contrary:

“That Robert B. Mecham was never appointed or held out as an agent of D. Spencer Grow, the Plaintiff, or any of the corporate Cross-defendants.”

And as a Conclusion of Law, the Court found:

“That Defendant Robert B. Mecham was not the agent of Plaintiff or agent of Cross-defendants or any of them.”

In any event, the record in the cases now before the Court contains no evidence whatsoever which would establish or tend to establish a claim for any particular amount on account of any of Appellant's materials which might have been used in or upon properties in the Schauerhamer area. About all the evidence there is as to the use of materials in the Schauerhamer area appears on page 18 of Appellant's brief wherein he quotes the testimony of Robert B. Mecham as follows:

Question: Were materials delivered from La Mesa area—that is, plumbing materials to the Schauerhamer area?

Answer: In some rare occasions they were.

This testimony would not support a judgment under the “bond law” for any certain amount against Mid-Utah Broadcasting Company on account of materials furnished or claimed to be furnished in the Schauerhamer area.

POINT IV

THE COURT DID NOT ERR IN REFUSING TO FIND THAT ROBERT B. MECHAM TOOK TITLE TO PROPERTIES DESIGNATED AS ROWLEY AND LA MESA FOR AND ON BEHALF OF RESPONDENT OR THAT ROBERT B. MECHAM WAS THE AGENT FOR RESPONDENT, AND WAS CORRECT IN REFUSING TO FIND AND DETERMINE THAT APPELLANT IS ENTITLED TO PERSONAL JUDGMENT AGAINST RESPONDENT IN CONNECTION WITH THE PROPERTY SITUATED IN ROWLEY AND LA MESA AREAS BY VIRTUE OF SECTION 14-2-2 UTAH CODE ANNOTATED, 1953. (Bond Law)

In Appellant's brief on this point several statements are made both directly and inferentially to the effect that the evidence established that Mecham was "instructed by Grow as agent of Respondent to take title in his (Mecham's) name and that Respondent would furnish the money", and that Respondent was "the real party in interest", thereby inferring that Mecham was Respondent's agent. There is no reference in Appellant's brief as to where this evidence appears in the record, and such statements or inferences are bald conclusions without basis in fact and without consideration of Respondent's testimony. (Tr. 714-772).

In several days of testimony, neither Mecham nor any other witness claimed that Mecham purchased either of the two properties mentioned in Appellant's Point IV for Mr. Grow or for anyone but himself, and in over 30 depositions and 20 days of trial, not one witness claimed that Mecham was held out to anyone by Mr. Grow or by Mecham him-

self as an agent of Respondent or as an agent of Mr. Grow or any of the Cross-defendants.

Appellant's testimony with reference to the ownership of the La Mesa and Rowley properties was that it knew Keyridge belonged to Grow and La Mesa to Mecham. (Tr. 629). Mr. Grow categorically stated that he had nothing to do with the negotiations for and purchase of the four Rowley lots and did not instruct or otherwise counsel Mecham to purchase that ground. (Tr. 732). He testified precisely the same with regard to La Mesa, (Tr. 732), and said he did not know of the purchase of either of the properties until sometime after Mecham had made his own arrangements with the sellers. (Tr. 734).

Don Rowley, with whom Mecham had his negotiations for the purchase of the Rowley and La Mesa properties, and one of the Grantors in the deeds of those properties to Mecham, (Plf's. Exhibits 128 and 129 Civil No. 20,575) said that he was building in the general area of those properties when Mecham came by and asked him if he knew of any land available in that area. (Tr. 826). Rowley further said that Mecham told him that he (Mecham) had been building homes in the Schauerhamer area "on his own" and that is what he was going to do with the Rowley and La Mesa properties. (Tr. 828).

As heretofore pointed out, the Trial Court found both as a Finding of Fact and Conclusion of Law that Mecham was not the agent of Respondent or any of the Cross-defendants, and we submit that there is no evidence in the record which would support a contrary finding.

POINT V

THE COURT DID NOT ERR IN REFUSING TO EQUALLY APPORTION APPELLANT'S LIEN.

It is our position that in a proper case equal apportionment of a lien might be made, particularly where one supplier furnishes all of one type of material for a group of houses under one ownership, which materials are used indiscriminately therein, and where it might be presumed that approximately equal value was used in or upon each house in the group. We believe also that a lien might be apportioned, though not necessarily equally, in a situation such as occurred in the **Brannan** case, (*supra*), where the amount attributable to the parcel liened can be readily calculated or is stipulated to by the parties.

In the case at bar, however, Appellant contends under his Point V that an apportionment, which it refused to consider at any time during the pre-trial or trial and did not plead, should have been made on an equal basis among 52 of the properties on which Mecham built houses, although his lien covered 101 improved properties and these actions involved only 34. Just how the 52 figure is arrived at is not clear from Appellant's brief on this point, but if any apportionment were proper it would have to be on the total properties liened and not on the arbitrary figure of 52.

It is Respondent's position, however, that no legal, equitable, or logical basis for an equal apportionment of Appellant's total lien among the 101 properties, or among the 5 separate areas, or as between 58 Keyridge properties and the others, is shown by the evidence, and the Court was correct in so holding.

There is no evidence in the record as to the value of materials furnished by Appellant "to be used" in or upon or actually used in or upon any one or group of the 34 properties involved in the three actions before the Court. There is no evidence in the record that Appellant furnished any materials "to be used" in the Schauerhamer or Rowley areas, as it did not deliver to those properties and did not even know of the existence of those areas until construction ceased in June, 1957. (Tr. 651, 652). The only evidence that any materials were actually used in those areas is Mecham's testimony quoted on page 18 of Appellant's brief wherein Mecham said that "on some rare occasions" materials were delivered from La Mesa to Schauerhamer, and "some" were delivered from the La Mesa area to the Rowley area. Upon that evidence it would appear to us that any kind of a logical or reasonable apportionment of Appellant's lien would be impossible, especially, since other suppliers furnished to Mecham the same type of materials. (See Plf's Exhibit 125, Civil No. 20,575, wherein it appears that Peerless Utah sold plumbing supplies to Mecham in the amount of \$13,560.23 from November 10, 1955 through April 25, 1957. Utah Plumbing Supply also furnished plumbing materials and was made a party Defendant in the La Mesa action.)

As is said in **Jones on Liens**, Volume 2, Section 1319, cited by Appellant on page 24 of his brief:

"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 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.”
(Emphasis ours)

What “certain” amounts of materials could the Court be “satisfied” were furnished to be used upon any or all of the properties upon which foreclosure was sought by Appellant and Respondent in the cases at bar? What reasonable basis is there in Appellant’s evidence to justify an assumption that either 1/52 or 1/101th of the total amount of Appellant’s materials were furnished “to be used” upon the single properties separately foreclosed in the cases before the Court?

POINT VI

RESPONDENT’S RECORDED MORTGAGES GAVE CONSTRUCTIVE NOTICE OF CONTENTS, AS ACKNOWLEDGMENTS WERE FAIR ON THEIR FACES AND RECORD TITLE HOLDER, ROBERT B. MECHAM, PROPERLY EXECUTED AND ACKNOWLEDGED THE SAME PRIOR TO RECORDING.

Appellant makes a point in its brief of the fact that Ruth W. Mecham, wife of Robert B. Mecham, did not personally appear at the office of Respondent on all occasions when she signed the mortgages. It is asserted that because some of the mortgages were signed by her away from the presence of the Notary Public and her acknowledgements as to those were taken by telephone, that **all** the mortgages involved in the cases at bar gave no constructive notice to Appellant, and hence Appellant’s lien is prior in right.

For that argument to be of any benefit to Appellant in the cases at bar, the Court must first reverse the Trial

Court's holding that Appellant has no enforceable lien, and fix the amount thereof as against the properties sought to be foreclosed in these actions, and second, must conclude that the Appellant had no actual knowledge of the existence of the mortgages.

As we have heretofore pointed out and as the Trial Court held, no enforceable lien exists, and hence, whether or not the mortgages gave constructive notice to Appellant, would be immaterial. Appellant admits in its brief that the mortgages were valid as between the parties and neither of the Mortgagors ever claimed differently. The Utah case of **Mitchel vs. Palmer**, 240 P. (2) 970, 121 Utah 245, would seem to be decisive on that point. The Court held in that case that a deed need not be acknowledged in order to be valid as between the parties thereto.

On the matter of whether Appellant had actual knowledge of the existence of the mortgages, see the testimony of Appellant's witness, Jay D. Knudsen, commencing on Page 649 of the transcript wherein he insisted that he knew as a matter of common knowledge that there were mortgages on the property. Section 38-1-5, **Utah Code Annotated**, 1953, dealing with the priority of mechanic's liens over other encumbrances, makes such liens prior in right to a mortgage "of which the lienholder had no notice," and, therefore, if Appellant says that the existence of the mortgages was a matter of common knowledge, it knew of the existence of the mortgages and it would make no difference whether the recorded mortgages imparted constructive notice or not.

In any event, it is our position that the mortgages involved in these cases did impart constructive notice to Ap-

pellant and all others who dealt with or concerning the property, as will hereinafter appear.

The evidence shows clearly that all of the thirty-four mortgages involved in the three proceedings before the Court were executed and acknowledged by Robert B. Mecham at the office of Respondent and in the presence of the Notaries Public who took his acknowledgements. (Tr. 839, 847). The record further shows that at the time of execution of said mortgages, the record title to the property covered by the mortgages was in the name of Robert B. Mecham (Def. Exhibits 128 and 129, Civil No. 20,-575) and hence, the mortgages were in all respects proper and adequate so far as his execution and acknowledgements as record title holder are concerned.

At the time of signing the mortgages, Mrs. Mecham had only an inchoate statutory interest in the property, which might or might not ripen into ownership rights, dependent upon her survivorship of her husband, Robert B. Mecham. At no time in the proceedings did she, as a party defendant, deny the execution of said mortgages. She further, by telephone, acknowledged the execution thereof to a Notary Public who was employed at the office of Respondent. (Tr. 841). As a result of the foreclosure proceedings in the District Court, in which she was a party defendant, all of her inchoate right, title and interest in and to the properties was foreclosed. The sheriff's sale has been completed and a deed issued conveying to Respondent all interest which she might have acquired under her statutory right. She has taken no appeal.

A reading of the Utah statutes makes it clear that every prerequisite as to the acknowledgement prior to re-

cording, in so far as the same relates to Robert B. Mecham, has been met. If Mrs. Mecham had not signed the mortgages, nevertheless the same would have been adequate to give constructive notice of the existence thereof with merely the signature of Robert B. Mecham, which was duly acknowledged. The addition of her name thereon did not in any manner detract from the validity of the mortgages and their recording so as to give constructive notice of the execution by the record title holder.

Now let us analyze the question raised (which actually is immaterial in light of the validity of the acknowledgement as to the record title owner, Robert B. Mecham) and the cases which have been cited by Appellant regarding the telephonic acknowledgement by Mrs. Mecham. Not all of Mrs. Mecham's acknowledgements were by telephone, as it is admitted that she personally appeared at the office of Respondent and signed one group of mortgages. (Tr. 840, 848). As the mortgages on La Mesa were executed in groups of eight, we can safely assume that at least eight of the mortgages were signed by her and acknowledged in the presence of a Notary Public. None of the evidence identifies which mortgages were personally acknowledged by her as compared with those which were acknowledged by telephone. In view of the fact that the burden of proof is on the Appellant to upset the validity of the acknowledgements, we feel that it has failed in its burden of proof to identify the particular mortgages.

Now, assuming that the mortgages which were acknowledged by Mrs. Mecham in response to the telephone inquiry of the Notary Public could be identified, do those mortgages impart constructive notice to subsequent encumbrancers as to her? We notice that Appellant's brief

refers to certain cases in which that issue was considered. The primary case cited is **Myers vs. Ebey**, 33 Idaho, 266, 193 P. 77. In that matter the Idaho statute involved was different from our Utah statute in that it dealt specifically with a personal acknowledgement by a wife as to property claimed to be a **homestead** of the parties, and prescribed that in the absence of such, the document would be **void**. This is very dissimilar to our statute, which does not make a defectively acknowledged instrument **void**. No homestead properties are involved either, as these are all lots upon which houses were built by Mecham for resale. The Mechams resided on remote and different property and no declaration of homestead has been filed on any land involved in these three cases.

No criticism has been made as to the form of the acknowledgement, and if any defect appears, such is a result of extraneous evidence. The general law relating to the right of such a document to recordation and the effect of giving constructive notice thereby is stated in 1 CJS 799 under the heading of "Acknowledgements" to be:

"Where the acknowledgement is regular on its face so that it becomes the duty of the recording officer to admit the instrument to record, its record will afford constructive notice, although there are latent or hidden defects in the acknowledgement, as, for example, where it was taken before an interested party or an executor, or a stockholder, or was taken outside the proper county."

The Utah case of **Tarpey vs. Deseret Salt Co.**, 5 Utah 205, 14 P. 338 is clearly distinguishable. In that case the instrument had been properly acknowledged, but was not witnessed as was then required by statute, and the omission

sion was apparent on the face of the instrument. See annotation **59 A.L.R. (2d) 1316; 1 Am. Jur. 228.**

In Utah, the law has been established that one who asserts the invalidity of a deed or other document involving real proerty must prove such invalidity by clear and convincing evidence. The acknowledgement and recordation of the document gives rise to a presumption of its genuineness, due execution and delivery thereof, and is prima facie evidence. These presumptions arising from acknowledgement and recordation, should be given great weight and should not be overthrown by a mere preponderance of evidence, but only by clear and convincing proof. See **Northcrest, Inc. vs. Walker Bank & Trust Co.**, 248 P. (2d) 692; 122 Utah 268. This rule has also been declared in other Utah cases which are cited in the one noted above.

The lower court in the instant case has not found that the acknowledgement of Mrs. Mecham was defective, nor has the lower court found that the mortgages were not entitled to recordation, nor has the court found that constructive notice was not given by the presence of said documents on the official records in the office of the Utah County Recorder. We believe that Appellant not only has failed to support its legal theories by authority, but also has failed to show that there is in the record clear and convincing proof that some identifiable mortgages are invalid for any purpose.

POINT VII

RESPONDENT IS NOT ESTOPPED TO CLAIM PRIORITY OF ITS MORTGAGES.

The argument of Appellant in its brief on Point VII cites no authority and makes no reference to the transcript

or record wherein the "facts" allegedly creating an estoppel appear or are found, except in one instance. Furthermore, the argument is predicated upon the assumption that Appellant has a valid and enforceable lien in some ascertainable amount or amounts against the properties involved in the cases at bar, and which lien, though legally inferior to Respondent's mortgages, is nevertheless entitled to priority by reason of certain acts and conduct of Respondent's agent amounting to an estoppel.

We do not agree with Appellant's contentions for several reasons.

First, the lien of Appellant is unenforceable as against the properties because it is invalid under the law, and because there is no evidence as to the value of materials creating a lien which were furnished "to be used" or actually used upon the properties in the cases at bar. Therefore, even if Respondent was estopped to assert priority of its mortgages, which we strongly deny, there is still no enforceable "liens" on the properties in any ascertainable amounts in favor of Appellant. (See Respondent's argument under Point I and authorities cited therein). To illustrate this point, we respectfully call the Court's attention to Respondent's Sixth Cause of Action in Civil No. 20,591, involving the Schauerhamer property, wherein the mortgage therein sought to be foreclosed, resulting from a refinancing transaction, is dated June 14, 1957 and was recorded June 26, 1957. (R. 67). There is no question, and we have always conceded, that on that single lot work was commenced prior to the recording of the mortgage thereon and, therefore, any "liens" affecting that property are prior in right to that mortgage. The question, then, is: does Appellant have a lien upon this property, and if so

what is the amount? Is there any evidence in the record that any of Appellant's materials were furnished "to be used" in or actually used upon this property except the testimony of Mecham that upon "some rare occasions" materials were taken from La Mesa and used upon Schauerhamer? In our opinion, whether Appellant is estopped or not estopped to claim priority of its mortgages over Appellant's lien is beside the point, because Appellant failed in its burden to establish any lien at all.

Second, the facts upon which an "estoppel" is claimed are not facts found by the Trial Court and for the most part are assertions unsupported by the evidence. For example, on the question as to whether Mecham was losing money in Keyridge see Mecham's testimony commencing at page 168 of the Transcript and Defendant's Exhibit 443, Civil No. 20,575, wherein he admitted that he had no records kept except the Exhibit referred to, or any records of calculations, and apparently was basing his estimate of losses upon a general assumption that the type of house which he was building could not have been built for the contract price. In contrast to this testimony see the testimony of William R. Jex, a witness originally called by one of the lien claimants as an expert in the building of homes in and about Utah County. Mr. Jex stated exactly what in his opinion it would cost to build the homes which Mecham built in the Keyridge area, and in practically every instance the amount which Mr. Jex estimated as the cost of building each house was less than the contract price and included a ten per cent profit for the contractor. (Tr. 815-819; see also Plfs. Exhibits 42 (1-58) Civil No. 20,575 and Plfs. Exhibits 56 1-147) consisting of cancelled checks pay-

able to Mecham by Cross-defendants totalling in excess of the contract prices).

Even Mecham himself never claimed that he was the agent for Mr. Grow, as contended by Appellant, or that he purchased any property for and on behalf of Respondent or Mr. Grow or any of the Cross-defendants. Don Rowley, from whom Mecham bought the Rowley and LaMesa properties, in his testimony said that Mecham told him he had been building homes for Grow or Utah Savings and then had gone into the Schauerhamer area on his own, and that was what he was going to do with the Rowley and La Mesa properties. (Tr. 827,828).

Mr. D. Spencer Grow said in his testimony commencing on page 721 that he asked Mecham to get him a cost estimate and pursuant to that request a cost estimate was furnished to him on which the prices of the Keyridge properties were negotiated. He further said on page 731 that Mecham told him that some people by the name of Rowley owned some acreage located just east of Crystal Acres, that he (Mecham) could purchase and give back a mortgage, and out of the proceeds of the sale of homes, could pay off the mortgage. (Tr. 731). Mr. Grow denied that he had anything to do with the acquisition of land by Mecham from Ruben Schauerhamer and in fact testified that Mecham had owned it many months before Mr. Grow even knew about it. (Tr. 732). He further said that he had nothing to do with the negotiations and purchase of the four Rowley lots by Mecham or the La Mesa property and that he did not instruct or otherwise counsel Mr. Mecham to purchase this ground, or advise him or assist him in the negotiations for it. (Tr. 733). The Trial Court found the facts substantially as testified to by Mr. Grow.

Appellant is not in a position to claim an estoppel against anyone, except perhaps Mecham, because upon only one occasion was inquiry made by it or on its behalf to Respondent as to the monies available on the mortgages, and that was after construction had virtually ceased. (Tr. 649, 650). Appellant was then correctly informed that there were no balances on the mortgages. If it knew Respondent was financing Mecham's building and Mecham wasn't paying his bills, then some prior inquiries were in order. Appellant knew that the ownership of La Mesa and Keyridge were different, but even with that knowledge failed to keep or insist upon separate accounts as between those two projects. If it relied upon Mecham's statement that it made no difference, then if there is any estoppel, it would have to be against Mecham and not Respondent.

In twenty days of trial and in over 30 depositions, not a single lien claimant, including any witness for Appellant, could or did point to any representation made by Respondent, Cross-defendants, or any of them, whereby any lien claimant was misled into extending credit to Mecham, or respecting the ownership of any of the properties, either covered by Appellant's lien or involved in this law suit. If appellant failed to keep adequate records on which to predicate a lien, it has no one to blame but itself, and we perceive no duty on the part of Respondent to have instructed Appellant as to the requirements of the mechanics lien law.

The unfortunate part of this law suit is that regardless of the ultimate decision, the gross incompetence and mis-management of Mecham has been responsible for a great economic loss to all of the parties, including Respondent and Cross-defendants, and there is no way in which

he can make restitution. As indicated above, the testimony of Mr. W. R. Jex, who was first called as an expert by some of the lien claimants indicated that Mecham should have been able to pay all of his bills and make a considerable profit on the construction which he undertook. Where all of the hundreds of thousands of dollars went is still in doubt, although an unreasonable proportion of it was undoubtedly wasted in labor, pilfering, not needed equipment, sales forces which sold practically nothing, extensive advertising, and Mecham's indiscretion in expending monies for purposes unrelated to the construction for which they were disbursed. (Tr. 399-402, 408-431). Mecham had no records, even complete bank statements, which might have shed some light on the subject.

POINT VIII

APPELLANT HAS NO VALID AND ENFORCEABLE LIEN AGAINST THE PROPERTIES INVOLVED, BECAUSE ITS MATERIALS WERE SOLD UPON AN OPEN ACCOUNT IN THE ORDINARY COURSE OF TRADE.

It is clear from the evidence and testimony at the trial, the findings of the Trial Court, hereinbefore quoted commencing on page 8 of this brief, and the admissions of Appellant in its brief, that the materials sold to Mecham by the Appellant were sold upon an open account in the ordinary course of trade and, as a consequence, no lien may be asserted against part of the properties on which some of the materials thereafter may have been used. Until construction had virtually ceased, Appellant was not

particularly concerned where its materials were going. (Tr. 628, 625-627).

In the case of **B. F. Salzer Lumber Co. vs. Lindenmeier**, 131 P. 442, the Colorado Supreme Court held that in order to sustain a lien upon the property, it must appear that the materials were expressly furnished and delivered for use in constructing a specified building. In that case, the contractor was engaged in building two structures for different owners and lumber furnished to the contractor by the lien claimant was used in both structures. The lumber company filed a claim of lien upon both the buildings, but afterwards abandoned the claim on one of them. The secretary of the company said that he did not know in which of these buildings the material had been used until after the completion of the buildings. The Court held that no lien could attach under these circumstances.

In the case of **W. P. Fuller & Co. vs. Flisher**, 218 P. 53, the California Court, under a statute in all material respects similar to the one in the State of Utah, held that it is the furnishing of materials to be used or consumed in the construction, alteration, addition or repair of the particular building upon which the lien is claimed, that creates the lien. The statute does not contemplate that a lumber merchant should have the right to follow the material which he has sold to another, in general terms, and assert a lien upon any building to which the materials may have happened to have been applied. The Court further stated that in a suit to enforce a mechanic's lien, it not only must be alleged and proved by the Plaintiff that the materials were actually used or consumed in the construction, alteration, addition to or repair of the building, but it also must be averred and proved that the material

was furnished by the materialmen expressly for that particular building.

The Washington Supreme Court in **Whittier vs. Puget Sound Loan Company**, 30 P. 1094, held under a Washington statute providing that every person furnishing materials to be used in the construction of any buildings shall have a lien therefor, that a mechanic's lien cannot be maintained against the owner of a building for materials used in its construction which are furnished a contractor when the claimant has no knowledge of any contract relations existing between the contractor and owner, nor of the particular building to be constructed, but intends to hold whatever building the materials were used in as security.

The language used in the case of **Eisenbeis vs. Workman**, 28 P. 923, is stronger. There, the Court said that the plain import of the language of the statute giving a mechanic's lien is that the materials must be furnished to be used in a particular building upon which the lien is claimed. The intention must have existed to claim the lien when the merchandise was sold, and reliance had and credit extended partially, at least, by reason of the fact that the material was to be used in the construction of a building, and it must have been so furnished.

See **36 Am. Jur.**, page 62, wherein appears the following Statement:

"The lien is acquired, therefor, only when the materials are furnished with an understanding that they are to be used for a purpose named in the statute, and not when they are supplied under an ordinary sale on credit or on an open account although the buyer may actually use them in a building or improvement."

In a footnote to the annotation in **39 A.L.R. (2d)** on page 397, the writer says:

“It would seem to be the general rule that materials must have been sold or furnished for the purpose of being used in a particular building against which the lien is claimed, in order to sustain a lien, and, conversely, that no lien may be acquired for material furnished for general purposes, or sold in the ordinary course of trade.”

On facts more favorable to the lien claimant than the facts in this case, the Supreme Court of New Mexico held in the case of **Tabet vs. Davenport**, 260 P. (2d) 722, that a lien claimant must allocate materials sold to a particular building at the time of sale in order to foreclose a lien. It is not sufficient that allocation be made by a claimant after the sale of materials has taken place, as was done in this case. (Tr. 651).

POINT IX

IF MECHANIC'S LIENS IN FAVOR OF APPELLANT ARE DETERMINED TO BE VALID IN SOME ASCERTAINABLE AMOUNTS AGAINST THE PROPERTIES INVOLVED, THE MORTGAGES OF RESPONDENT WOULD IN ANY SUCH EVENT BE PRIOR IN RIGHT TO SUCH LIENS.

Section 38-1-5, Utah Code Annotated, 1953, reads 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 construction 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 materials furnished on the ground.” (Emphasis supplied)

The foregoing statute provides in effect that mechanic’s liens attach when the first work is done or the first materials are furnished on the ground for the structure or improvement, and has priority over a mortgage which subsequently attaches thereto. Conversely, a mortgage which has “attached” prior to the commencement of work or the furnishing of materials on the ground is prior in right to mechanic’s lien.

The Trial Court found specifically in all three cases that no work was commenced or materials furnished on the ground prior to the time the mortgages were recorded, except on the lot described in Respondent’s Sixth Cause of Action in Civil No. 20,591. The evidence is susceptible of no other conclusion. (Tr. 854-860, 866-869; R. 103, Civil No. 20,575; R. 23, Civil No. 20,591; R. 72, Civil No. 20,592; Plf. Exhibit 45, Civil No. 20,575).

As to the property described in the Sixth Cause of Action, Respondent admits and concedes that any mechanic’s lien for materials furnished “to be used” or actually used upon that property is prior to the mortgage thereupon. As to all other properties, it is clear that the mortgages “attached” within the meaning of Section 38-1-5, UCA, 1953, at the time of their recordation, and at such time, no work having been commenced and no materials

having been furnished, Appellant's "lien" if any, is expressly rendered inferior in right.

CONCLUSION

Appellant failed in any of the three cases on this appeal to establish by a preponderance of the evidence a claim or interest in any of the properties described in Respondent's complaints, or to establish any claims against Respondent or Cross-defendants or any of them, and the Trial Court committed no reversible error in so holding.

There being no manifest showing by Appellant that the Trial Court misapplied proven facts or made findings **clearly** against the weight of the evidence, such findings, and conclusions based thereon, should not be set aside. **First Security Bank of Utah vs. Burgi**, 122 Utah 445, 251 P. (2d) 297.

Even if the Court were wrong, however, in holding that Appellant has no valid and enforceable liens in ascertainable amounts against the properties in the cases at bar, such would not be prejudicial error for the reason that such liens could not be **prior** to the mortgages by virtue of Section 31-1-5, UCA, 1953. Since the properties involved herein were not sold upon foreclosure sale for any amounts in excess of the amounts found due on Respondent's mortgages, Appellant could have no right to any of the proceeds from such sales.

Respectfully submitted,

ALDRICH, BULLOCK & NELSON,

and

PUGSLEY, HAYES, RAMPTON &
WATKISS,

Attorneys for Respondent