

1962

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

Utah Supreme Court

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George W. Latimer; Backman, Backman & Clark; Attorneys for Appellant;

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

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

UTAH SAVINGS AND LOAN  
ASSOCIATION,

*Plaintiff-Respondent,*

vs.

ROBERT B. MECHAM, et al. LUD-  
LOW PLUMBING SUPPLY CO.,

*Defendant-Appellant,*

**E D**

1962

Clerk, Supreme Case No.

9159

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**PETITION OF APPELLANT, LUDLOW PLUMBING  
SUPPLY CO. FOR RE-HEARING AND BRIEF**

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Appeal from the Judgment of the Fourth District  
Court for Utah County  
Hon. R. L. Tuckett, Judge

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George W. Latimer,  
Kearns Bldg.,  
Salt Lake City, Utah, and  
Backman, Backman & Clark,  
1111 Deseret Bldg.,  
Salt Lake City 11, Utah,  
*Attorneys for Appellant,*

Aldrich, Bullock & Nelson  
35 North University Ave.,  
Provo, Utah, and  
Pugsley, Hayes, Rampton &  
Watkiss,  
Continental Bank Bldg.  
Salt Lake City, Utah  
*Attorneys for Plaintiff-  
Respondent,*

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

UTAH SAVINGS AND LOAN  
ASSOCIATION,

*Plaintiff-Respondent,*

vs.

ROBERT B. MECHAM, et al. LUD-  
LOW PLUMBING SUPPLY CO.,

*Defendant-Appellant,*

Case No.  
5159

PETITION OF APPELLANT, LUDLOW PLUMBING  
SUPPLY CO. FOR RE-HEARING

The defendant and appellant Ludlow Plumbing  
Supply Co. respectfully requests a rehearing in the above  
entitled case upon the following grounds:

STATEMENT OF POINTS

1. The Supreme Court erred in overruling its prior  
decision in the same case reported in 11 Utah 2d 159,  
356 P. 2d 281.

2. The Supreme Court erred in holding that the  
lien and claim of Ludlow Plumbing Supply Co. was  
invalid and defective because the materials for which

claim was made were not furnished to improve property owned by the same person or persons.

3. The Supreme Court erred in holding that the lien and claim of Ludlow Plumbing Supply Co. was invalid and defective because the materials for which claims were made were not apportioned to the properties upon which they were used.

4. The Supreme Court erred in holding that Ludlow Plumbing Supply Co.'s contention that D. Spencer Grow was the real party in interest and that Robert B. Mecham and his wife took title to the property in their names as agent for Grow is not substantiated by the record.

5. The Supreme Court erred in holding that the appellant Ludlow Plumbing Supply Co. was not induced by the conduct of plaintiff to act differently than it would otherwise have acted in furnishing materials and supplies.

6. The Supreme Court erred in affirming the judgment of the trial court against the appellant Ludlow Plumbing Supply Company.

7. The Supreme Court erred in refusing to return the action to the District Court of the Fourth Judicial District in and for the State of Utah to hear and decide the issue of estoppel.

## STATEMENT OF FACTS

Counsel for appellant would supererogate to state fully the facts found in the record, as they have been set out in previous briefs, argued to the court, and mentioned in two prior opinions. However, those which are necessary to support the present claims of error or the inferences counsel draw therefrom will be related under the particular point being argued. For purposes of simplicity and clarity Utah Savings & Loan Association will be referred to as respondent and Ludlow Plumbing Supply Company as appellant.

## POINT I.

THE SUPREME COURT ERRED IN OVERRULING ITS PRIOR DECISION IN THE SAME CASE REPORTED IN 11 UTAH 2d 159, 356 P. 2d 281.

## ARGUMENT

This case has twice been argued before this Honorable Court and two diametrically opposite opinions have been published. When that situation arises, some of the points asserted and arguments made must necessarily be repetitious, but it is believed by the writers of this brief that the last decision of the Supreme Court is so contrary to the purposes of statutory liens, equitable principles and justice, that a partial repeating of argument should be acceptable as a means to cause the issue to be reconsidered and a further hearing granted.

In presenting our reasons for the contention advanced under this point, we first mention the merits of the first decision, for they are in keeping with the principle that lien statutes should be construed reasonably and in such a way as not to defeat their obvious purposes. In that opinion it was recognized that the methods of operation of Robert B. Mecham, the owner and contractor, and the mortgagee, Utah Savings & Loan Association, were such that it was impossible for the lien claimants, including this appellant, to fix the value of materials which went into the various properties and that to do justice the application of the "equitable apportionment" rule should be invoked. That was a salutary holding and the Court should not have been driven from the position. Unfortunately, however, the Court in the present opinion by tenuous reasoning does an about face and exculpates Mecham and the respondent by the simple expedient of holding that appellant was at fault because its notice of lien covered too much property and named too many owners. In addition, in the first instance a unanimous court concluded that the trial judge failed to make necessary findings on the issue of estoppel, particularly, the knowledge or lack of knowledge by the respondent that the money was being borrowed for the purpose of creating improvements on the property and that materials were being furnished under circumstances that respondent reasonably should know that materialmen were relying upon being paid from such funds. Now that issue is summarily dismissed and counsel for the appellant fails to understand why a question as im-

portant as that is now glossed over by the Court to the benefit of a mortgagee who aided and abetted in comingling and misapplying materials and moneys to the detriment of innocent materialmen and to the enrichment of itself. Certainly a decision which brings about that inequitable result spawns the thought that sharp practices pay large dividends. It is the hope of counsel for appellant in this brief to convince the Court to retreat to its original position of equity and justice and change the result to the end that those who deal unfairly will not carry away the prize.

We believe it essential to a proper consideration of this first point to consider the cast of characters and the efforts of the leading men to exploit and saddle losses on other members of the troupe. When this is done the respective merits of the two opinions in this case may be weighed. The lead character by any criteria was D. Spencer Grow; he held ninety per cent of the stock of the plaintiff corporation and was the puppet master who pulled the financial strings for the disbursement, allocation and payment of all moneys on all properties without regard to ownership. It mattered not to him who owned the land where the improvements were made or which piece of property should be charged with the advance as he allocated the money wherever he thought would best serve his interests. Any similarity between his method of operation and that of an ordinary loan official dealing with independent borrowers is not found in this record. Moreover, he well knew that funds earmarked



for a particular loan were being misapplied and he above all could have prevented that sort of misapplication and the losses suffered by mechanics and materialmen. Furthermore, he knew that materials furnished by this appellant and other materialmen were being used indiscriminately on all properties. The second most important character in this drama is Robert B. Mecham. While he may have initiated the program in good faith, he learned early in the venture that he was being used by Grow as a device for constructing homes at less than their cost and that a continuation of the construction would result in losses to the suppliers and benefits to Grow and his companies. In addition to being a tool for Grow, he was primarily responsible for the garbled use of materials. In this particular appeal the appellant was first considered by the Court as the innocent character who had figuratively lost its shirt to the above-mentioned villains — and then in a short space of time appellant became the culprit and the rascals were whitewashed. If the characterizations set out above are supported by the record, and counsel for appellant insists they are, then the tragedy of this litigation is apparent and the scales are out of balance because the Court was induced to leave a position of strength and justice for one of weakness and injustice. Accordingly, appellant respectfully insists the Court erred in overruling its prior decision.

## POINT II.

THE SUPREME COURT ERRED IN HOLDING THAT  
THE LIEN AND CLAIM OF LUDLOW PLUMBING SUPPLY

CO. WAS INVALID AND DEFECTIVE BECAUSE THE MATERIALS FOR WHICH CLAIM WAS MADE WERE NOT FURNISHED TO IMPROVE PROPERTY OWNED BY THE SAME PERSON OR PERSONS.

## ARGUMENT

In arguing this point counsel believe it significant to point out that the Court did not find that the appellant's materials were not used to improve all of the properties here involved. Neither did the Court find that all owners and plaintiff were not benefited by the materials furnished. Accordingly, the only basis to support the Court's conclusion is the vague notion that the notice should be held to be fatally defective because more than one person held title to the lands covered by the notice of intent to hold lien and the materials used on each particular piece of property were not identified. At this point and touching only on the ownership facet of the argument, it might be helpful to state what the record shows with regard to ownership and control of properties where the appellant's materials were used. There are seven individuals and corporations who appear as record holders of the lands, and they are all mentioned in the notice of lien. They are: Robert B. Mecham and wife; Mid-Utah Construction Company; Radio Sales Corporation; Grow Investment & Mortgage Company; Mortgage Insurance Corporation; and Mid-Utah Broadcasting Company. The record shows that including the Mechams every purported owner involved in all the construction projects was controlled and manipulated by

Grow to suit his personal purposes, and that plaintiff Utah Savings & Loan Association belonged in that category and was used in this construction program to aid and benefit Grow. Accordingly, we have a situation where all dealings by purported owners of all properties were funneled into a channel which was managed, operated and maneuvered by the same person who controlled the purse strings. When faced with that situation, some of the technical principles of law on liens are inapplicable, and they are replaced by equitable hypotheses.

Be the foregoing as it may, for the purposes of this point alone we will assume that the corporations owning the properties were separate and distinct entities, but even with that assumption we are unable to ascertain how they, along with Grow and Mecham, have been prejudiced by the inclusion of their names and properties in one document, and why it is invalid against them. Primarily the filing of notice of lien is to give notice to the owner, other lien claimants and all persons dealing with, or claiming an interest in, the property that the lienor is seeking to hold the property for the amount due him for the merchandise he supplied to benefit and improve the premises. Certainly, not one can contend seriously that the lien filed in this case by appellant failed to serve that purpose. If in truth and in fact properties are owned by two different individuals, then the premises of owner "A" should not be saddled with the cost of the improvements placed on the premises of owner "B"; that, however, is not the situation here and

has nothing to do with the question of notice. If both individuals are named in the notice of lien, then each has notice that the lienor is asserting some claim against his property; and if later there should be any question arise in connection with the reasonable value of materials used on the property of each owner, a Court could determine the proper charge against the property under the doctrine of equitable apportionment. The whole concept underlying the purposes of the lien statute is to prevent an owner of land from obtaining the labor and capital of another person and retain the benefits thereof without paying therefor. Surely that wholesome principle should not be discarded because of a claim, technical at best, that the names of more than one separate owners were included in the same document.

Going one step further, the Court's present opinion seems to hold that the lien is invalid per se because of the sweeping coverage and that even if this was a suit involving only the appellant and Meham, that the latter would succeed. Apparently the Court overlooked the facts that in certain instance he was both owner and contractor and that the reasons for requiring strict compliance with the statutes are not present. It may well be that the lienor's rights must be cut off when third parties are involved, but even then an inequitable situation would be brought about by a holding that merely because different persons are named in a lien the security is lost and the owner gets enriched. The rationalization used by the Court in reaching that result in the case at bar is entirely contrary to the philosophy supporting

statutory liens, and particularly is that true when there is not a shred of evidence that Mecham was misled because he was joined with an owner of another parcel of land. Regardless of the broad coverage of the lien filed by the appellant, it was docketed in good faith, it gave more than ample notice to all interested parties, and it covered property improved and benefited by appellant's property; and yet the full effect of the Court's latest ruling is that the owners or their privy are permitted to retain the property without being required to pay therefor.

To make this point perfectly clear, we are not arguing the priority of appellant's lien and respondent's mortgage, as we will treat with that later. What we are seeking to impress upon the Court is that under the present decision the lien is held to be invalid even as against Mecham, the purported owner and prime contractor, merely because it names others than himself. He is not protesting the validity of the lien, and it would appear to us that respondent is in no position to raise the issue unless its mortgage is subsequent in point of time and inferior to appellant's lien. Certainly it has no standing or reason to complain of the infirmities in the lien if it does not impinge on the rights fixed by the mortgage.

For the foregoing reasons it appears to appellant's counsel that if the decision of the Court holding respondent's mortgage to be superior to appellant's lien is proper, the additional holding that the lien is invalid is

not only a mere gratuity but a gift which conceivably could prejudice this appellant.

The generalizations set out above are supported by the Utah law and prior pronouncements by this Court. However, before discussing the specifics, we believe it advisable to mention the rule generally followed by the more forward thinking Judges in construing lien statutes. It is stated in 57 C.J.S. p. 500, Mechanics' Liens, paragraph 4 b. (2) as follows:

## (2) Liberal Construction

*In most states the mechanics' lien statutes are regarded as remedial in their nature, and therefore must be liberally construed, subject to the limitation that the construction must be reasonable.*

In most states mechanics' lien statutes are regarded as remedial in their nature, and therefore generally should be liberally construed so as to effectuate their objects and purposes and protect laborers, materialmen, or other claimants within the scope of the statutes, as well as to promote substantial justice and equity as to all parties concerned. This rule has been said to be the better doctrine and to represent the trend of more recent decisions.

With the foregoing rule in mind, we look to the Utah statutes; Title 38, Chapter 1, § 7, insofar as relevant, it reads:

\* \* \* must file for record with the county recorder of the country in which the property, or some part thereof, is situated a claim in writing, containing a notice of intention to hold and claim a lien, and a statement of his demand after deducting all just credit and offsets, *with the name of the owner, if known*, \* \* \*

The Court in the last opinion quotes this section but apparently elects to construe it as standing alone and not in pari materia with other sections, for the quotation set out above is followed in the decision by this statement:

“This section would appear to apply only to a claim for work or material furnished on a single building, structure or improvement.”

We submit that if this quoted section is construed with other pertinent sections on Mechanics' Liens that logically it must follow that if there were many buildings in which supplies and materials were used and the name of the owner was unknown, a lien including a statement to that effect would be valid. If validity can be breathed into a lien with the owner undesignated, then surely a lien which mentions more than one owner ought to be more effective, for at least the named owners are placed on notice that their property is being held for a claim asserted by the lienor.

Now as to the specific. In *United States Building & Loan Ass'n vs. Midvale Home Finance Corporation*, 86 U. 506, 44 P. 2d 1090, it appears that there was more



than one owner of the property and so far as the record appears only one owner was named in the notice of the lien. Moreover, there was no attempt to designate the amount claimed to be due the lienors on each piece of property. Thus there was a deviation from the exact statutory prescription, but in that case the court did not hold the variations invalidated the lien. A somewhat similar question was involved in the earlier case of *Eccles Lumber Co. vs. Martin*, 31 Ut 241, 87 P.713, and the Supreme Court came up with the same answer. Both of those holdings indicate the Court was not concerned with deficiencies which did not mislead other parties to their detriment. Counsel for respondent differentiates these cases by merely stating that they are not authority contrary to the position they assert. We disagree and assert that through misapprehension of the consequences of the first decision the Court has wandered far afield from equity and justice. We believe it should return ere it is too late.

In furtherance of this point, we submit the following: The Court recognized that the notice of lien named only Mecham's and Grow-controlled corporations. In every instance herein involved the contract to construct the homes was negotiated between Grow and Mecham. The corporations were owned, controlled and managed by Grow and used by him as a shield to protect his construction manipulations. Moreover, the record shows persuasively that all plaintiff's advances for construction loans were for purposes of eventually building up the



worth of Grow. It was impossible for any ordinary materialman to know who was the real party in interest, and from the method of operation and control, it was improbable that anyone could ascertain whether Meham was the owner or merely an alter ego for Grow and his corporate shields. If more owners were named than was necessary and if materials were not allocated to buildings where used by lot and block, it was because of overlapping and surreptitious activities by Meham, Grow and respondent. The lien statutes are intended to make it possible for ordinary citizens to prepare notices sufficient to protect themselves and basic ingredients only must be set out; but if notices of liens are to be declared invalid because of technical niceties in descriptions, identifications, and misjoinder of parties, then not only will laymen be unable to meet prescribed standards, but lawyers will be required to draw lines so carefully that the slightest deviation will render the notice of no force and effect. It is hoped by counsel for appellant that that result not be forced upon the public and they are convinced that a reversal of the present holding is necessary to restore simplicity to the preparation of the documents.

### POINT III.

THE SUPREME COURT ERRED IN HOLDING THAT THE LIEN AND CLAIM OF LUDLOW PLUMBING COMPANY WAS INVALID AND DEFECTIVE BECAUSE MATERIALS FOR WHICH CLAIMS WERE MADE WERE NOT APPORTIONED TO THE PROPERTIES UPON WHICH THEY WERE USED.

## ARGUMENT

Counsel for appellant present this point out of an abundance of caution as they have a feeling that the members of the Court who changed their minds between the two decisions did so because of belief that they might wreak havoc on the title standards now being followed in the State of Utah. Counsel believe that these fears are unfounded, for facts control principles of law and equity and when, as here, the Court is faced with a peculiar factual base which shows comingling of funds, shifting of materials and uncertainties in connection with the place of use, a liberal construction of the statute in favor of an innocent party could not affect the standards adversely. Moreover, consideration should be given to the possibility that greater harm may result to the standards if the rules laid down in *Eccles Lumber Co. vs. Martin*, 31 Utah 241, 87 P. 713, and *United States Building & Loan Association vs. Midvale Home Finance Corporation*, 86 Utah 506, 44 P. 2d 1090, are clouded. Obviously the members of the Court joining in the majority opinion must believe that those cases can be distinguished from the one at Bar. Counsel appreciate that distinctions of varying degrees can be pointed out when the holdings in different cases are being compared, but in the case at Bar, the majority opinion appears to rely on a very weak reed for this is the distinguishing feature:

“As previously pointed out, Ludlow’s notice of a lien included properties owned by the Grow-controlled corporations in addition to the proper-

ties owned by the Mecham's. Therefore its claim is defective and invalid because the materials for which claim was made were not furnished upon buildings owned by the same person or persons."

While it is recognized that this quotation goes around the periphery of this issue, it seems that by implication the Court is touching on the failure of appellant to fix the amount of materials used to improve each piece of property. As previously mentioned, if the factual situation was different the rule announced in the quotation might be appropos, but here when you push aside the window dressing you see the familiar face of Grow in every building and the rule concerning failure to designate the materials used on each piece of property is governed by the above cited cases and therefore requires reversal of the present holding.

#### POINT IV

THE SUPREME COURT ERRED IN HOLDING THAT LUDLOW PLUMBING SUPPLY COMPANY'S CONTENTION THAT D. SPENCER GROW WAS THE REAL PARTY IN INTEREST AND THAT ROBERT B. MECHAM AND HIS WIFE TOOK TITLE TO THE PROPERTY IN THEIR NAMES AS AGENT FOR GROW IS NOT SUBSTANTIATED BY THE RECORD.

#### ARGUMENT

Because the Court merely notes that the issue is not substantiated by the record, counsel for appellant is unable to ascertain the particular deficiency. However,

we do assert that the Record shows the following and that it is more than ample to sustain the assigned error.

The record titles to the various properties in these areas were vested in either Mecham, or Grow's companies; that the real party in interest, that is, the company which was seeking to break into the construction loan business was at all times the respondent who acted through its principal stockholder, Grow; that at his direction, it furnished all monies, not only for the construction of the houses on the property, but also for the purchase price of the property; that Mecham had little, if any, equity in any of the properties; that respondent furnished more money on the Keyridge property than the total cost of the real estate and the contract price for the buildings; that it financed the construction on the Schauerhamer property and it furnished all monies to acquire the Rowley and LaMesa properties; that when Mecham and Grow concluded that the Rowley and LaMesa areas should be improved Mecham was so heavily in debt that he was unable to complete the construction of the houses which he had agreed to build in the Keyridge area and the Schauerhamer area; that it was necessary to obtain more land to raise moneys through respondent's mortgages in order to complete the houses for Grow or his companies in the Keyridge and Schauerhamer areas; that Mecham had no money when he negotiated with Rowleys for the acquisition of the LaMesa property and that he made the payment called for by the contract out of monies advanced by the respondent on the

other properties which misapplication was concurred in by Grow; that he was instructed by Grow to do the negotiating for the property and to take title or to enter into a contract for the purchase of the property in his, Mecham's, name and that respondent would furnish the money to make payment; that Grow was at all times the President of respondent Company and the controlling stockholder; that he was President or an officer and controlling stockholder in all of the companies which held title to the various properties; that he controlled, directed, supervised and managed the building and financial activities of Mecham, and if the latter had any voice in the ultimate decision it was so weak it could not be heard; that Grow sat on the loan committee and approved loans to each of these companies and in legal effect he was dealing with himself; that 95% of the construction loans made by respondent were to Grow companies; that as between Mecham, Grow and the companies there were no arms length dealings; that respondent advanced \$30,000.00 out of mortgages placed on the LaMesa property before any work was started in that area; that at the direction of Grow and through the operations of respondent company, money was paid to complete houses and property owned by Grow; and that so far as this record shows Mecham was merely a tool which Grow used for his benefit and through whom he successfully enriched himself at Appellant's expense. If, in law, that set of facts does not show a principal who controlled the thinking, acting and ordering and an agent who merely followed directions and orders, then

counsel fails to understand how a status can be created which is that of principal and agent.

#### POINT V.

THE SUPREME COURT ERRED IN HOLDING THAT THE APPELANT LUDLOW PLUMBING SUPPLY COMPANY WAS NOT INDUCED BY THE CONDUCT OF PLAINTIFF TO ACT DIFFERENTLY THAN IT WOULD OTHERWISE HAVE ACTED IN FURNISHING MATERIALS AND SUPPLIES.

#### ARGUMENT

This point is without a doubt the most important to the success or failure of appellant and the Court in its latest decision committed its most egregious error when it gave short shrift to its disposition and then disposed of it wrongly. The Trial Judge did worse, for he failed to give any consideration to the issue and made no finding of fact thereon even though importuned to do so by counsel for appellant. For the latter reason alone it would appear to follow that the present decision must be reversed, for under the law, as we interpret it, when findings are insufficient the Supreme Court remands the case to the Trial Judge to make appropriate findings of fact on all material and relevant issues. See *Utah Association of Credit Men vs. Home Fire Insurance Co.*, 36 Utah 20, 102 P. 631.

In the latest opinion in this instance the Supreme Court cites 57 C.J.S. p. 768 and recognizes the rule therein laid down. It states good law and we quote the pertinent parts:



“A mortgagee may be precluded by estoppel or the like from claiming priority over the holder of mechanics’ or materialmen’s liens and, where a mortgagee has failed to take the necessary steps prescribed by statute to obtain priority for himself over mechanics’ liens, equity will not disregard the terms of the statutes to avoid the consequences of the mortgagee’s own carelessness. A mortgagee may by reason of his having induced the furnishing of labor or materials be precluded from asserting the priority of a mortgage over a mechanic’s lien.”

and:

“Of course the facts in particular cases may not be such as to estop or preclude the mortgagee from asserting priority. In order to establish an estoppel against the mortgagee a lienholder must show some concealment, misrepresentation, act or declaration on which the lienholder properly relied and by which he was induced to act differently than he would otherwise have acted.”

The limited reason mentioned by the majority members of the Court to dispose of this issue of estoppel is that a reading of the record and the Findings of Fact revealed to them that the defending lien claimants were not induced by the plaintiff to act differently than they would otherwise have acted. Counsel for appellant, like the dissenting members of the Court, take sharp issue with that conclusion for it ignores human conduct and behavior. Obviously, we can speak only for this lienor; but as to him there are many reasons why the majority of the Court overlooked the obvious and we herein-after mention a few.

First, the record indicates clearly that Mecham was insolvent and in debt to the extent of some \$150,000.00. Common sense would suggest that a materialman would not furnish materials to a debtor that he knew was unable to pay. Respondent knew Mecham's financial condition but for reasons best known to it, no disclosure was made to appellant. This concealment induced appellant to continue extending credit.

Second, ordinary banking practice by a reputable institution leads materialmen to believe that money would cease to be advanced if a builder was bankrupt. Significantly, respondent continued to furnish funds to Mecham during a substantial period of time, knowing he was unable to pay his bills. Had respondent not played along with Mecham, appellant would have stopped the flow of supplies.

Third, this appellant would not have furnished materials to new properties had it known that money to be realized from mortgages placed on that land was to be diverted to and used for the payment of improvements on other properties belonging to the principal stockholder of the lender. Again, had respondent, who was participating in this practice, notified appellant of the true situation, the later supplies would not have been shipped.

Fourth, respondent knew Mecham was losing money on his construction and it not only remained silent about that condition, but it went further and led third parties to believe he was prospering. It is axiomatic that



materialmen do not ordinarily furnish supplies to losing ventures without requiring some security.

Fifth, this appellant would not have continued to furnish materials had it been informed that padded notes secured by the ostensible owner, were obtained by the mortgagee who just happens to be the respondent and winner of the last round.

Sixth, no sane merchant would extend credit to a debtor whose principal source of income was funds realized from mortgages when those funds were being misapplied and paid to a selective few, particularly, individuals or companies allied in the venture and the principal stockholder of the mortgagee.

We could advance other reasons to further undermine the conclusion reached by a majority of the Court, **but we believe the foregoing** are sufficient to show that respondent's concealment and action were intended to and did mislead this appellant to do something he otherwise would not have done, namely to furnish materials to the subsequent projects. Accordingly, we believe the conclusion reached by a majority of the Court is based on the quicksand of a mistaken belief that there was no inducement.

Apparently other matters of some importance were overlooked by the majority of the Court. This record does not show a single and isolated transaction between Mecham and appellant. On the contrary, it discloses dealings continuous in nature taking place over a sub-

stantial period of time. Appellant furnished materials and supplies on an open account basis and they were delivered from the 6th day of June 1956 to the 19th day of June 1957. Obviously at any time during that period had the appellant been informed of the method of operation and irregular payments by respondent at the direction and for the benefit of its principal stockholder the stream of supplies could have been stopped and appellant's losses prevented. However, due to respondent's activities, together with those of its controlling stockholder, Grow, appellant was led to believe that all was in financial order and that moneys available to be paid out for the construction would be channeled in proper sources. Now it is met with the mere assertion by the Court that respondent's conduct did not induce it to act differently than it would otherwise have acted. That declaration is plainly contrary to ordinary business practices and procedures.

Having argued that appellant was induced to its detriment because of respondent's conduct, we now consider the method by which we saddle respondent with misleading the appellant. Estoppel is an equitable remedy and it is applied to a situation where, because of something which he has done or omitted to do, a party is denied the right to plead or prove an otherwise important fact. The doctrine must be rooted in the facts and circumstances of a particular case. And so we look to this record to ascertain whether the respondent, because it acted by, through and at the direction of

Grow, should be denied the right to plead and prove that appellant's lien is invalid. Grow was the principal stockholder and the agent of respondent in all of these transactions, and his knowledge is imputable to the respondent. He knew that during the construction of the first homes in the Key Ridge area that Mecham was losing money; he was well aware of the fact that materialmen were furnishing materials to improve the property, and he took no action to notify them of Mecham's bankrupt financial condition; but on the contrary, he worked with Mecham to obtain additional properties on which to construct homes in the hope that the amounts due on the Key Ridge property could be paid, thereby giving the impression that Mecham was solvent. He had the respondent advance the money for the purchase of the property and had it divert funds which should have been used on the subsequent developments to those properties which were encumbered earlier. The whole thrust of the plan was to benefit and protect properties owned either by Grow or his controlled corporations, and the diversions resulted in a shortage of payments on the properties subsequently developed. Without going further into detail, if knowledge of the facts mentioned only in this paragraph is chargeable to the respondent, most certainly it should be estopped. However, the complete knowledge by Grow, as pointed out in other sections of the brief, is imputable to respondent and the whole bundle of facts, when considered in the proper perspective, compel a holding that respondent should not be heard to complain of the deficiencies in the notice of the lien, if there are deficiencies.

One other question touching on this point needs clarification: it is to be noted that appellant is claiming that respondent is estopped from asserting the invalidity of the lien and also from asserting that its mortgage is superior to appellant's lien. We have set forth the reasons for estoppel on the first ground, and so we move on to discuss why respondent should be estopped from making the later assertion. In that connection we believe that without question the evidence shows a unitary plan or scheme to promote a building venture which included construction in several noncontiguous areas. The scheme and device of Mecham, aided and abetted by Grow and respondent, was that materials should be furnished to a given location; from here they were distributed to the several projects and no attempt was made to keep a record of the particular area where used, and appellant was informed it made no difference. The appellant had one contract, and the original materials were furnished on the 6th day of June 1956; that is the time the appellant's lien took effect, and any mortgages recorded thereafter are subsequent to that lien. But assuming the worst situation against appellant, and that is, that each building project was a separate and distinct transaction, then as previously pointed out the acts and conduct of respondent and Grow misled this appellant into believing that it was dealing with one contractor, financed by one lending company, and building under one construction plan. Accordingly, if respondent is not estopped from contending each home was a separate and independent transaction and can escape

liability on the basis that its mortgage is prior to appellant's lien, then it is granted a largess because of its own misconduct. We do not believe principles of law when correctly applied bring about this result, and we accordingly contend this point should be sustained in appellant's favor.

### POINTS VI - VII.

Counsel for appellant believe the arguments set out previously adequately present their views on these points. However, in connection with Point VII, we call the Court's attention to its prior decisions in which it has held that the trial court's failure to find on all material issues is error and that the trial judge must find the facts upon every issue, either affirmatively or negatively. See *Piper vs. Eakle*, 78 Utah 342, 2 P.2d 909; and *Thomas vs. Clayton Piano Co.*, 47 Utah 91, 151 P. 143. In this case the trial judge failed to follow those authorities and because of his preferred position to determine the credibility of witnesses and the issue of estoppel, this Court should return the case to him for further proceedings.

Respectfully submitted,

George W. Latimer, and  
Backman, Backman & Clark,  
Attorneys for appellant  
Ludlow Plumbing Supply Co.