

1986

# Jerome H. Mooney v. GR and Associates : Brief of Appellant

Utah Supreme Court

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BRIEF

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DOCKET NO. 860067

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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JEROME H. MOONEY,

:

Plaintiff/Respondent,

:

Case No. 860067-CA  
20227

vs.

:

GR AND ASSOCIATES, a Utah corporation,  
GRANT H. ROYLANCE, an individual,  
CONSOLIDATED MINING AND MILLING,  
a Utah corporation, C&H INVESTMENTS,  
a Utah partnership, COURTNEY WRATHALL,  
an individual, and CHARLES I. HAGAN,  
an individual,

:

:

:

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Defendants/Appellants.

:

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BRIEF OF APPELLANT

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Appeal from a final JUDGMENT of the Fourth Judicial District  
Court In And For Utah County, State of Utah, Honorable Cullen Y.  
Christensen, Judge Presiding.

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FILED  
DEC 17 1984

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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JEROME H. MOONEY,	:	
Plaintiff/Respondent,	:	
vs.	:	Case No. 20227
GR AND ASSOCIATES, a Utah corporation,	:	
GRANT H. ROYLANCE, an individual,	:	
CONSOLIDATED MINING AND MILLING,	:	
a Utah corporation, C&H INVESTMENTS,	:	
a Utah partnership, COURTNEY WRATHALL,	:	
an individual, and CHARLES I. HAGAN,	:	
an individual,	:	
Defendants/Appellants.	:	

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BRIEF OF APPELLANT

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

---

JEROME H. MOONEY,	:	
	:	
Plaintiff/Respondent,	:	Case No. 20227
vs.	:	
GR AND ASSOCIATES, a Utah	:	
corporation, GRANT H. ROYLANCE,	:	
and individual, CONSOLIDATED MINING	:	
AND MILLING, a Utah corporation,	:	
C & H INVESTMENTS, a Utah	:	
partnership, COURTNEY WRATHALL, an	:	
individual, and CHARLES I. HAGAN,	:	
an individual,	:	
	:	
Defendants/Appellants.	:	

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BRIEF OF APPELLANT

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NATURE OF THE CASE

This is an appeal from a "Judgment" entered in the District Court, Fourth Judicial District, Utah County, State of Utah, pursuant to which appellant Charles's I. Hagan's Motion for Summary Judgment was denied and respondent's Motion for Summary Judgment was granted so as to award respondent judgment against appellant for the sum of \$457,819.95 plus interest at the rate of 15% per annum from July 27, 1984, compounded annually, and costs in the sum of \$201.50 plus attorney's fees in the sum of \$11,400.00.

NATURE OF RELIEF SOUGHT BY APPELLANT

Appellant, by this appeal, seeks reversal of the trial Court's Judgment dated and entered on September 7, 1984.

STATEMENT OF FACTS

In the trial Court appellant and respondent entered into a "Stipulation to Facts" which was filed with the trial Court and which stated

each and every fact before the trial Court at the time appellant and respondent's Motions for Summary Judgment were considered by the trial Court.

The judgment appealed from denied appellant's Motion for Summary Judgment, granted respondent's Motion for Summary Judgment and was based entirely upon the facts contained in the parties' "Stipulation to Fact." Therefore, since all of the facts before the trial Court were stipulated to by the parties' to this Appeal, there is absolutely no controversy concerning the facts in the case.

The parties' Stipulation to Facts, including all exhibits attached thereto, is a part of the record filed with this Court. The parties' "Stipulation to Facts" (exhibits excluded) provides as follows:

"1. On October 15, 1976, Plaintiff, Jerome H. Mooney and his wife, Bonnie S. Mooney, Donald K. Bailey and his wife, Dorothy Bailey, Hal J. Drinkhaus and his wife, Elizabeth B. Drinkhaus, as sellers of real estate located in Salt Lake County, State of Utah, entered into a Uniform Real Estate Contract with C&H Investments, Inc. as buyers of which Defendant, Charles I. Hagan and Courtney Wrathall respectively, the president and vice president of the alleged corporation. A person guarantee upon the contract was executed by Defendant Charles I. Hagan.

2. During 1978, Plaintiff and Defendants, C&H Investments, Wrathall and Hagan, agreed to convey certain real property in Salt Lake County, State of Utah, to Defendant GR and Associates in return for cash and promissory notes which were to be executed by the remaining Defendant and which were to be secured by an interest in milling equipment owned by Defendant Consolidated Mining and Milling.

3. That at the time of the conveyance to GR and Associates, Plaintiff owned a sellers interest in the subject real property and Defendants C&H Investments, Courtney Wrathall, and Charles I. Hagan, owned a purchasers interest in said real property pursuant to a Uniform Real Estate Contract. A copy of said contract is attached hereto and incorporated herein by reference as Plaintiff's Exhibit A.

4. On August 17, 1978, Plaintiff received a promissory note in the principal sum of Two Hundred Ninety-Five Thousand, Seven Hundred Fifty-Six Dollars and Forty-Two Cents (\$295,756.42),

together with interest from the date at the rate of Fifteen Percent (15%) per annum on the unpaid balance, payable at the rate of Four Thousand Dollars (\$4,000.00) per month until August 17, 1979, when the remaining principal and interest would all be due and payable. The promissory note was executed by Defendant GR & Associates, Inc., by Grant H. Roylance, president, Defendant, Grant H. Roylance, as an individual, by Defendant Consolidated Mining and Milling, Inc., by Grant H. Roylance, president, by Defendant C&H Investments, a Utah partnership, by Defendants Courtney Wrathall and Charles I. Hagan. In exchange therefore, Plaintiff and Plaintiff's partners released all interest that they had in the subject real estate, by warranty deed. A copy of said promissory note is attached hereto and incorporated herein by reference as Plaintiff's Exhibit B.

5. Simultaneously with Plaintiff's sale, Defendants, C&H Investments, Wrathall and Hagan, conveyed their interest in the subject real property to Defendant GR and Associates, and received promissory notes therefore. A copy of the promissory note between Defendants C&H Investment and Grant H. Roylance, individually, Consolidated Mining and Milling, by Grant H. Roylance, president, and GR and Associate, Inc., by Grant H. Roylance, president, is attached hereto and incorporated herein by reference as Defendant's Exhibit 1.

6. Plaintiff's promissory note was secured by an interest in milling equipment then owned by Defendant Consolidated Mining and Milling, Inc. A copy of the UCC-1, as filed with the Lieutenant Governor's office, is attached hereto, and incorporated herein by reference as Plaintiff's Exhibit C.

7. Guardian Title Company acted as the escrow agent for the closing of the aforesaid transactions on August 17, 1978.

8. At the closing, although there were no written escrow instructions, it was understood by the parties to this litigation that Guardian was to file the UCC-1 security interest concurrently and simultaneously with recordation of title to the subject real estate, the recording of said document to occur immediately after execution, and plaintiff so instructed Guardian.

9. The parties to this litigation intended that the security interest evidenced by the UCC-1 was to be a first-place security interest on the full and fair market value of said security without lien or encumbrance and reasonably relied upon said understanding, in entering into the transaction described hereinabove.

10. Plaintiff instructed Guardian Title Company to exercise due diligence to establish that Plaintiff in fact would be receiving a first-place security interest in the subject milling equipment at the time of closing.

11. The parties to this litigation reasonably believed at the date of closing that said security had a fair market value



sufficient to completely satisfy the full amount of indebtedness evidenced by the promissory note at issue and the parties, reasonably relied upon said understanding, Plaintiff having obtained an appraisal of said property prior to said transaction showing a fair-market value in excess of five hundred thousand dollars (\$500,000.00).

12. Defendant Charles I. Hagan executed said promissory note in reasonable reliance upon the aforementioned stipulated facts and would not have done so without said facts.

13. After commencing this case of action, the Parties discovered that Sandy State Bank had a prior perfected security interest in the subject milling equipment, with additional yard and chemical equipment listed, filed with the State of Utah on July 10, 1978. A copy of Sandy State Bank's UCC-1, as filed with the State of Utah is attached hereto and incorporated herein by reference as Plaintiff's Exhibit D.

14. Plaintiff's security interest was not perfected by Plaintiff or Guardian Title until August 22, 1978, after a security interest in said property, and including additional yard and chemical laboratory equipment, was perfected by Penguin Investments, an entity which is not a party to these proceedings, on August 21, 1978. A copy of said security interest as recorded with the State of Utah is attached hereto and incorporated herein by reference as Plaintiff's Exhibit E.

15. Payment of Four Thousand Dollars (\$4,000.00) per month were made during the months of September and October. The payment due on November 17, 1978, was not submitted to Plaintiff until after this lawsuit was commenced. At that time, Plaintiff discovered that the security interest in the milling equipment had been subordinated to a prior security interest given to Penguin Investments, subsequent to the time that the documents were executed on August 17, 1978. Plaintiff's financing statement was filed with the Secretary of State of August 22, 1978 by Guardian Title. Deeming his security impaired, Plaintiff continued to proceed under the default provisions of the said promissory note to declare the entire principal sum due and payable. A copy of the payment ledger is attached hereto and incorporated herein by reference as Plaintiff's Exhibit F.

16. Plaintiff attached the assets of Consolidated Mining and Milling immediately, but took nothing thereby; the security being insufficient to satisfy the obligations of prior security holders. A List of Creditors and Priority of Such Claims as prepared by Dan Randall, Receiver for Consolidated Mining and Milling, is attached hereto and incorporated herein as Plaintiff's Exhibit B.

17. The property, subject to said security interest, was eventually sold by the prior lien-holder, Penguin Investments, for Three Hundred Thirty Thousand Dollars (\$330,000.00) on April 9, 1980.

18. A stipulation to enter judgment was entered between Plaintiff and Defendants, Grant H. Roylance, GR and Associates, and Consolidated Mining and Milling on March 30, 1979. On April 2, 1979, Defendants Courtney Wrathall and Charles I. Hagan stipulated and agreed to such entry of judgment regarding the other defendants.

19. Other than the initial Eight Thousand Dollars (\$8,000.00) paid upon the note, and since the tender of the Four Thousand Dollars (\$4,000.00) in November of 1978, Plaintiff has neither received nor been tendered any sums toward payment on said note.

20. Including interest, there is presently due and outstanding on said note, the sum of Four Hundred Fifty-Seven Thousand Eight Hundred Nineteen Dollars and Ninety-Five Cents (\$457,819.95) as of July 27, 1984.

21. That said promissory note provides for the payment of accrued interest and costs, including reasonable attorneys fees.

22. That Defendants, C&H Investments, Wrathall and Hagan did reasonably rely upon their being a perfected first-place security interest in executing said promissory note. Plaintiff, having the same understanding as Defendants, knew of said reliance, but insisted that said Defendants execute upon said note as additional collateral.

23. That Defendant, C&H Investments, Wrathall and Hagan, have never consented to the failure to properly perfect Plaintiff's security interest in the subject mining equipment.

24. That at the time the subject promissory note was executed, Plaintiff and Defendants, C&H Investments, Wrathall and Hagan, were all acting under a mistaken fact, to-wit: that said promissory note would be secured by the subject milling equipment and that said security interest would have a value equal to or greater than the amount due under said note.

25. That the present parties would not have accepted or executed the promissory note if they had known either that Plaintiff would not receive a first priority security interest in the subject mining equipment or that there would be a delay in perfecting Plaintiff's security interest."

Based upon the Stipulation to Facts recited hereinabove appellant and respondent filed cross Motions for Summary Judgment wherein respondent claimed to be entitled to judgment against appellant based upon the terms of the promissory note dated August 17, 1978. Appellant sought summary judgment dismissing plaintiff's Complaint.

POINTS AND AUTHORITIES

I. THE TRIAL COURT IMPROPERLY FAILED TO FIND THAT APPELLANT WAS AND ACCOMMODATION PARTY ON THE PROMISSORY NOTE OF AUGUST 17, 1978, AND IMPROPERLY FAILED TO HOLD THAT APPELLANT HAD BEEN DISCHARGED FROM ANY OBLIGATION ON SAID PROMISSORY NOTE DUE TO RESPONDENT'S UNJUSTIFIABLE IMPAIRMENT OF THE COLLATERAL FOR THE PROMISSORY NOTE.

Utah Code, Section 70A-3-606 provides in part as follows:

"(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

...

(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse."

As shown by the parties' Stipulation to Facts, it was intended by the parties that the promissory note respondent's suit is based upon would be secured by certain equipment which had a value in excess of the amount of the promissory note. (Stipulation to Facts, paragraphs 9 and 11)

The reason appellant signed the subject promissory note was to provide respondent with "additional collateral". (Stipulation to Facts, paragraph 22) Appellant was, therefore, an accommodation party. Utah Code Section 70A-3-415 (1).

In addition, the promissory note and security interest belonged to respondent and Guardian Title Company was instructed by respondent to immediately record said security interest so as to give respondent a first place security interest in the subject collateral. (Stipulation to Facts, paragraphs 8 and 10)

Appellant never consented to the failure of Guardian Title Company to properly perfect plaintiff's security interest in the subject collateral. (Stipulation to Facts, paragraph 23)

In Shaffer vs. Davidson, Wyoming, 445 P.2d 13, plaintiff brought suit against an accommodation maker on a promissory note which was to be secured by a chattel mortgage upon an automobile. The chattel mortgage

was delivered to the plaintiff but the plaintiff neither filed the chattel mortgage nor delivered the certificate of title to the proper officer to enable endorsement of the chattel mortgage thereon.

The third party sold the automobile and disappeared and neither he nor the car could later be found.

The Wyoming Court, at 445 P.2d 14, stated the issues in the case to be as follows:

"Under these facts, the questions presented to the trial Court were (1) Was Shaffer required to afford Mrs. Davidson the protection of whatever security the chattel mortgage provided her? and (2) Was Shaffer's failure to record the chattel mortgage and deliver the certificate of title of the mortgaged vehicle to the proper officer for notation of that mortgage upon the certificate of title such an impairment of collateral as discharged her liability as accommodation or co-maker of the \$200.00 note?"

In reaching its decision the Wyoming Court referred to UCC, Section 3-606 and comment 5 to that Section.

Comment 5 provides:

"5. Paragraph (b) of Subsection (1) is new. The suretyship defense stated has been generally recognized as available to endorsers or accommodation parties. As to when a holder's actions in dealing with collateral may be "unjustifiable", the section on rights and duties with respect to collateral in the possession of a secured party (Section 9-207) should be consulted".

As in Utah, the Wyoming Court found that Section 9-207 of the UCC provides that:

"(1) A secured party must use reasonable care in the custody and preservation of collateral in his possession. In the case of an instrument or chattel paper reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed."

Based upon the foregoing the Wyoming Court, at 445 P.2d 15, held as follows:

"In our view, §34-9-207 is of assistance to Mrs. Davidson. She was entitled to have Shaffer exercise reasonable care in his custody and possession of the chattel mortgage and certificate of title and to take the steps necessary to preserve her rights. This would include the proper filing of the chattel mortgage and the

delivery of the mortgaged property certificate of title to the proper official in order that notation of the mortgage encumbrance be endorsed thereon."

Further, the Court, at 445 P.2d 17, stated its decision as follows:

"The evidence shows Shaffer not only accepted the promissory note but also the chattel mortgage upon the motor vehicle given by Nank and Mrs. Davidson as security for the repayment of the \$200.00 borrowed by Nank and that Shaffer was given the certificate of title for the mortgaged vehicle. When Shaffer failed or neglected to do that which the code required him to do in order that the security placed in his hands became available for the protection of the accommodation maker of the promissory note, Shaffer discharged Mrs. Davidson from her obligation and erased her debt to him.

\*\*\*

"With respect to Mrs. Davidson's appeal from that portion of the court's judgment which awarded Shaffer \$55.92 interest, and attorney fees of \$60, we take note of the further fact that Shaffer claimed only \$199.70 to be the unpaid balance due upon the note as of the date he brought his action. As we have already found all liability of Mrs. Davidson upon the \$200.00 promissory note had been discharged by Shaffer's impairment of the security interest in the mortgage, only interest accruing upon any unpaid balance of the note remaining after applying the value of the impaired or lost mortgaged property would be allowable. Similarly, any allowance of attorney's fees would be contingent upon their being due and owing some amount to Shaffer from Mrs. Davidson at the commencement of this action."

Utah Code 70A-3-415 (1) provides as follows:

"An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it."

Based upon the foregoing, appellant submits that he was discharged from any liability to respondent upon the subject promissory note when respondent and its agent, Guardian Title Company, failed to promptly record the necessary documents to perfect the security interest; the collateral having had a fair market value in excess of the amount of the promissory note. (Stipulation to Facts, paragraphs 11 and 17) That being the case, appellant, as explained in Shaffer v. Davidson, supra, would also be discharged from any liability to respondent for interest and/or attorney's fees.

The Court below, in a document entitled "Rulings" stated that

in the Court's opinion Guardian Title Company was the agent of both appellant and respondent due to the fact that documents other than respondent's financing statement were deposited with Guardian and one of such documents was a deed from appellant and, therefore, respondent, by implication, was not responsible for Guardian Title Company's failure to file the financing statement which would have perfected the security interest as respondent had instructed Guardian Title Company to do. This "Ruling" of the trial Court is clearly erroneous since it assumes that simply because Guardian Title Company may have been acting as the agent of appellant for one purpose Guardian Title Company could not be acting solely as the agent of respondent for the purpose of properly filing the financing statement. The trial Court's said ruling further completely disregards the facts that the security interest was owned by respondent and not by appellant (Stipulation to Facts, paragraph 6) and that respondent specifically instructed Guardian Title Company to file the security interest concurrently and simultaneously with recordation of title to the subject real estate. (Stipulation to Facts, paragraph 8)

The Court below further erred when it ruled as follows:

"The Court is further of the opinion that in any event Hagan was more than an accommodation party. Hagan benefited from the transaction by being released from his personal guarantee on the real estate contract and his partnership was the recipient of a substantial promissory note from other participants in the transaction."

The foregoing ruling appears to completely disregard the definition of an accommodation party contained in Utah Code Section 70A-3-415(1) and the parties' stipulation that respondent insisted that appellant execute respondent's promissory note "as additional collateral". (Stipulation to Facts, paragraph 22) Said ruling also ignores the fact that the reason appellant's partnership received a substantial promissory note and appellant

was released from his personal guarantee of the Uniform Real Estate Contract was because appellant and his partnership owned a purchaser's interest in the subject real property (Stipulation to Facts, paragraph 3) and appellant, respondent and appellant's partnership conveyed their respective interests in the subject real property to defendant GR and Associates. (Stipulation to Facts, paragraph 5) Therefore, rather than receiving consideration for executing the promissory note appellant was released under the Uniform Real Estate Contract and his partnership received a substantial promissory note in return for the interest appellant and his partnership owned in the subject property that was conveyed.

II. THE TRIAL COURT ERRED IN REJECTING APPELLANT'S CONTENTION THAT APPELLANT WAS ENTITLED TO AVOID THE PROMISSORY NOTE DUE TO THE PARTIES' MUTUAL MISTAKE OF MATERIAL FACTS.

Paragraphs 24 and 25 of the parties' Stipulation to Facts provide as follows:

"24. That at the time the subject promissory note was executed plaintiff and defendant, C & H Investments, Wrathall and Hagan, were all acting under a mistaken fact, to-wit: that said promissory note would be secured by the subject milling equipment and that said security interest would have a value equal to or greater than the amount due under said note.

25. That the present parties would not have accepted or executed the promissory note if they had known either that Plaintiff would not receive a first priority security interest in the subject mining equipment or that there would be a delay in perfecting Plaintiff's security interest."

That a mutual mistake of a material fact will work so as to avoid an agreement has been recognized as the law in the State of Utah. See for example Board of Education v. Board of Education, 85 Utah 276, 39 P.2d 340 at 341 where the Court held ".... a mutual mistake as to material facts will avoid the agreement." and Reynolds v. Merrill, Utah, 460 P.2d 323 at 325 wherein the Court recognized that even a general release of a claim for personal injury could be avoided on the ground of mutual mistake

as to the nature or seriousness of an injury.

The foregoing proposition is stated by the American Law Institute's Restatement Of The Law, Contracts 2d, Section 152 as follows:

"(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the the mistake under the rule stated in § 154.

(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise."

Illustrations provided to Section 152 quoted above numbers 3, 4 and 5 are instructive with regard to this case. Those illustrations state as follows:

"3. A contracts to sell and B to buy a tract of land. B agrees to pay A \$100,000 in cash and to assume a mortgage that C holds on the tract. Both A and B believe that the amount of the mortgage is \$50,000, but in fact it is only \$10,000. The contract is voidable by A, unless the court supplies a term under which B is entitled to enforce the contract if he agrees to pay an appropriate additional sum, and B does so.

4. A contracts to sell and B to buy a debt owed by C to A, and secured by a mortgage. Both A and B believe that there is a building on the mortgaged land so that the value of the mortgaged property exceeds that of the debt, but in fact there is none so that its value is less than half that of the debt. The contract is voidable by B.

5. A contracts to assign to B for \$100 a \$10,000 debt owed to A by C, who is insolvent. Both A and B believe that the debt is unsecured and is therefore, virtually worthless, but in fact it is secured by stock worth approximately \$5,000. The contract is voidable by A."

Section 154 of the Second Restatement of Contracts which is referred to in Section 152 provides as follows:

"§ 154. When a Party Bears the Risk of a Mistake

A party bears the risk of a mistake when

(a) the risk is allocated to him by agreement of the parties, or

(b) he is aware, at the time the contract is made,



that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or

(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so."

As to the issue of what facts are "material" facts, please see Reynolds v. Merrill, Utah, 460 P.2d 323, 325, where it was held that a mutual mistake as to the nature or seriousness of an injury was a "material" mistake of fact. See also Super Valu Stores, Inc. v. Loveless, 5 Wash. App. 551, 489 P.2d 368 at 370 where the Court held "a fact is material if no contract would have been entered into had there been no mistake concerning the fact."

In Carpenter v. Hill, 131 Colorado 553, 283 P.2d 963, plaintiff and defendant entered into an agreement whereby the parties agreed that plaintiff would receive defendant's peach orchard in trade for plaintiff's gas station. Both of the parties believed the orchard was subject to a contract which required payment of the contract balance in "crop payments"; that is, that one-half of the value of the crop would go toward the contract balance and if there were no crop then no payment would be due. However, the contract actually provided that the entire balance was due several months after the exchange occurred.

The Colorado Supreme Court at 283 P.2d 965, held:

"We believe that no principal is better settled than the equitable doctrine that an agreement founded in a mutual mistake of facts that are the very basis of the contract will void the contract. The fact concerning which the mistake was here made was the very life and substance of the transaction; and the mistake, not only clearly proven, but admitted, is so important that rescission, if sought, must follow."

In the case at bar, respondent and appellant have stipulated that when the subject promissory note was executed and accepted both parties were mutually mistaken as to whether the promissory note would be secured by collateral which had a value in excess of the amount due on the promissory note and, further, that that fact was so material to both of the parties that neither would have

entered into the subject transaction without the erroneous belief.

(Stipulation to Facts, paragraphs 24 and 25)

In rejecting appellant's claim of a mutual mistake of fact the trial Court ruled that the failure of Guardian Title Company to perform as instructed by respondent was a mere failure of expectation and not a mistake of fact which existed at the time the transaction was closed. However, said ruling fails to recognize that at the time appellant signed the subject promissory note respondent's promissory note was secured by the subject interest in milling equipment (Stipulation to Facts, paragraph 6) there was to be no recording of title to the subject real estate except a simultaneous recording of said title with proper filing of the security interest (Stipulation to Facts, paragraph 8), the parties reasonably relied upon the security interest being a first-place security interest on the full and fair market value of the security (Stipulation to Facts, paragraph 9), appellant would not have executed the subject promissory note if he had not believed that said promissory note was fully secured and his said belief was reasonable (Stipulation to Facts, paragraph 12), the parties have stipulated that appellant and respondent, at the time the note was executed, were in fact acting under a mistaken fact (Stipulation to Facts, paragraph 24), and that none of the parties to this Appeal would have either accepted or executed the subject promissory note if they had not been acting under a mistake of fact. (Stipulation to Facts, paragraph 25)

As shown by the facts stipulated to by the parties, at the time appellant signed the subject promissory note and at the time respondent accepted the promissory note the parties were acting under a mutual mistake of fact in that they believed that the subject promissory note was fully secured, that the security interest was a first-place security interest

and that it would be perfected simultaneously with the recording of the documents which would divest appellant, appellant's partnership and respondent of their interest in the real property conveyed.

#### CONCLUSION

Based upon the foregoing points and authorities appellant submits that the judgment entered in the trial Court should be reversed for the reasons that:

A. The trial Court improperly ruled that appellant was not an accommodation party to the subject promissory note and;

B. The trial Court improperly ruled that respondent was not responsible for the failure of Guardian Title Company to properly perfect the subject security interest and;

C. The trial Court improperly determined that at the time appellant executed the subject promissory note and respondent accepted said promissory note appellant and respondent were not acting under a mutual mistake of fact when, in fact, said parties were acting under a mutual mistake of fact without which the subject promissory note would have been neither executed nor accepted.

Respectfully submitted this 17<sup>th</sup> day of December, 1984.



Brad L. Swaner  
Attorney for Defendant/Appellant

#### MAILING CERTIFICATE

I certify I mailed a true and correct copy of the foregoing Brief of Appellant to Stephen R. Smith, Jr., Attorney for Plaintiff/Respondent, at 356 South 300 East, Salt Lake City, Utah 84111; by depositing the same in the United States mail, postage prepaid, this 17<sup>th</sup> day of December, 1984.

