

1957

## Paul Sugar and Harry Ulmer dba Sugar & Ulmer v. Harry B. Miller : Brief of Respondent

Utah Supreme Court

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Ralph & Bushnell; Attorneys for Defendant and Respondent;

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Case No. 8639

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# In The Supreme Court

## of the State of Utah

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PAUL SUGAR and HARRY ULMER,  
d/b/a SUGAR & ULMER, a copart-  
nership,

Appellants,

— vs. —

HARRY B. MILLER,

Respondent.

**FILED**

JUN 12 1957

Clerk, Supreme Court, Utah

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### BRIEF OF RESPONDENT

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RALPH & BUSHNELL

Attorneys for Defendant and  
Respondent

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Case

No. 8639

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

Throughout this brief the parties will be referred to as they appear in the action below. Defendant (Respondent) disagrees with the statement of facts as appears in the Plaintiffs' (Appellants') brief.

The defendant is the owner and operator of the Lorraine Press, a printing establishment, and the plaintiffs are the general partners of an accounting firm. At the latter part of the Utah "uranium boom," around 1955, the plaintiffs organized a company called the Deseret Uranium Company (R. 10) and contacted the defendant to obtain his services to print the prospectus for the company. Having had bad experience with uranium companies, the defendant refused to

extend credit to the company and accepted the printing order only after the plaintiffs had personally assumed the payment. (R. 14, 15, 16, 18). The bill for the printing came to \$2,468.80 (Exhibit No. 3).

In January, 1956, after repeated demands for payment, the plaintiffs and the defendant obtained a loan from a bank for \$2,000, and the plaintiff signed with the defendant as co-makers. (R. 3) The money from the loan was given to the defendant as partial payment of the bill with the understanding that the plaintiffs would be reimbursed from the uranium company underwriting proceeds (R. 28).

The plaintiffs brought this action to recover the \$2,000 which they had paid back to the bank. They alleged that they had only guaranteed the note. Defendant counter-claimed and alleged as a set-off that the plaintiffs owed him the \$2,468.80 for the printing, and that therefore the defendant was entitled to a judgment of \$468.80 on the counter-claim.

At the trial the defendant stipulated as to the amount claimed on the note, and it was agreed that the only issue in the case concerned the set-off (R. 8, 9). It is upon the trial court's findings for the defendant that this appeal is taken.

## STATEMENT OF POINTS RELIED UPON

**POINT ONE: DEFENDANT STIPULATED THAT HE RECEIVED THE \$2,000 AS ALLEGED IN THE COMPLAINT. HE DID NOT STIPULATE AS TO INTEREST AND ATTORNEYS' FEES.**

**POINT TWO: THE COURT'S FINDINGS OF FACT ARE AMPLY SUPPORTED BY EVIDENCE, AND THE**

COURT'S CONCLUSIONS OF LAW NECESSARILY AND CORRECTLY CORRESPOND WITH THE FINDINGS OF FACT.

POINT THREE: THE COURT'S FINDINGS OF FACT THAT THE PLAINTIFFS AGREED TO PAY THE DEFENDANT IS NOT BARRED BY THE STATUTE OF FRAUDS.

## ARGUMENT

### POINT ONE

DEFENDANT STIPULATED THAT HE RECEIVED THE \$2,000 AS ALLEGED IN THE COMPLAINT. HE DID NOT STIPULATE AS TO INTEREST AND ATTORNEYS' FEES.

The only issue involved in this case is whether or not the defendant has a set-off against the plaintiffs. The amount of money involved in both the complaint and the counter-claim was not in question, and at the beginning of the trial, counsel for the defendant stipulated that \$2,000 was received by the defendant (R. 8, 9) and at the same time pointed out that the amount claimed to be owed by the plaintiffs was not in question (R. 8). Plaintiffs have never questioned the correctness of this amount as shown on Exhibit No. 3.

To expedite the trial, the defendant stipulated to the amount in controversy as claimed in the complaint (R. 9). That he did not intend to stipulate as to interest and attorneys' fees is apparent. In his answer the defendant denied that the plaintiffs were entitled to attorneys' fees (R. 4); in fact, the note in question was not such as to allow such fees, <sup>2144</sup>(1) it was not

between the defendant and the plaintiffs since they were co-makers, and (2) there was no contractual relationship between them awarding attorneys' fees (R. 3). In addition, the defendant had counter-claimed for \$468.80, whereas if he had stipulated to the entire amount claimed in the complaint, it would have exceeded the amount of the counterclaim, and there would have been nothing to litigate. *See 41 A.L.R. 2d 677* and cases cited therein where the majority rule is stated that where an offset exceeds the amount owed, no attorneys' fees will be awarded.

The court correctly found no cause of action on the complaint. Since the amount of the plaintiffs' claim was stipulated to be \$2,000.00 and the court found that the plaintiffs owed the defendant \$2,468.80 (R. 61), the court was correct in its ruling. This matter was specifically argued after the trial and before the signing of the findings of fact and conclusions by the court. After careful review of the plaintiffs' position, the court ruled in favor of the defendant.

## POINT TWO

THE COURT'S FINDINGS OF FACT ARE AMPLY SUPPORTED BY EVIDENCE, AND THE COURT'S CONCLUSIONS OF LAW NECESSARILY AND CORRECTLY CORRESPOND WITH THE FINDINGS OF FACT.

The plaintiffs criticize the form of the court's findings.

Whether or not the plaintiffs agreed to pay the defendant is a finding of fact which the court arrived at after hearing the evidence. Based upon this finding, the court concluded in



its Conclusions of Law that the defendant was entitled to a judgment. As long as the evidence supports the findings, which outside of the evidentiary objection the plaintiffs do not question, the court was correct in basing its conclusions upon such findings.

### POINT THREE

#### THE COURT'S FINDINGS OF FACT THAT THE PLAINTIFFS AGREED TO PAY THE DEFENDANT IS NOT BARRED BY THE STATUTE OF FRAUDS.

Plaintiffs allege that the statements made by the plaintiffs constituting an agreement are barred by the following section of the *Statute of Frauds. Title 25-5-4, Utah Code Annotated, 1953*, as amended:

“In the following cases every agreement shall be void unless such agreement or some note or memorandum thereof is in writing subscribed by the party to be charged therewith:

“(2) Every promise to answer for the debt, default or miscarriage of another.”

The problem of whether a promise by a stockholder, officer, or director to pay a debt of a corporation is subject to the statute of Frauds is well annotated in 35 A.L.R. 2d 906. From this annotation the following general rules are taken:

The problem usually resolves itself into a determination of whether the promise was original or collateral. The important question is how can a particular promise be determined to be either original or collateral. There are various tests which different courts use, although there is no universal

test used by all courts is all circumstances. (*Ibid.* P. 908). The following tests are then enumerated:

1. "If the main purpose and object in making the promise is not to answer for another, but to subserve the promisor's interest, and the consideration is beneficial to him, the promise is original and not within the statute." (*Ibid.* P. 909).

In this case the plaintiffs stated that they had a material interest in the uranium company (R. 11). They picked the officers (R. 11, 12). The plaintiffs stated that they were to receive a cash payment from the company if the public offering was a success (R. 11), and the printing of a prospectus is, of course, necessary for a public offering. Inasmuch as the plaintiffs were to receive substantial compensation in the form of cash, royalties, and stock for their services, they stood to benefit beyond the usual benefits that enure to a stockholder. Aside from this, "Where the promisor owns a majority of the stock, the courts seem more inclined to find that the benefits to him is sufficient to take the promise out of the statute" (*Ibid.* P. 910).

2. "The determination of whether such a promise is original or collateral depends upon whether such a promise is original to the promisor, or whether the indebtedness is also primarily that of the third person. In the latter case it is within the statute, while in the former it may not be." (*Ibid.* P. 909).

The defendant did not intend to extend any credit to the uranium company. He had had unfavorable experience in relying on such companies for payment, and in fact he would not take the order for the printing unless the plaintiffs assumed the obligation (R. 14-16). The defendant emphatically informed

the plaintiffs that he could not speculate on a uranium company (R. 19). The defendant had printed 85 to 90 per cent of the prospectuses for such companies (R. 20) and knew that he could not rely on their ability to sell stock. The company, in fact, was never able to sell its stock. In this case the credit was extended solely to the plaintiffs which the obligation primary theirs and thus outside the Statute of Frauds.

Appellants allege that the fact that goods are charged on the books of a merchant to the person for whose use they were furnished is prima facie evidence, at least that they were sold on his credit. A search of the cases reveals that the law is not that certain. Quoting from 35 A.L.R. 2d at P. 936 wherein this precise subject is annotated:

“Such charge (on the merchant’s books) is evidence, no doubt, of an intent on the part of the creditor to look to the corporation for payment, and the language used in some of the opinions would indicate that such a charge is regarded as conclusive against the creditor. It is fair to assume, however, that the court had in mind the facts of the particular case, and was merely referring to the effect of the charge to the corporation as an evidentiary fact in view of the circumstances, without any intention of asserting a rule of law.”

The trial court considered this evidence with all of the other evidence in the case and found in favor of the defendant.

There is substantial competent evidence to support the following facts:

1. The plaintiffs’ promise was original and not collateral.
2. The object of the plaintiffs’ promise was to subserve or promote a personal interest of their own.

3. The benefit the plaintiffs were to derive was more than the indirect benefit which would accrue to them as stockholders in the uranium company.
4. The credit was given to the plaintiffs and not to the corporation.
5. Plaintiffs' promise was made to induce the defendant to print the prospectuses after he had refused to perform on behalf of the corporation only.

Any one or all of these mentioned facts regarding this case are sufficient to take the plaintiffs' promise out of the Statute of Frauds.

The following additional citations are given to support the above propositions: 49 *Am. Jur.* pp. 417, 418; 37 *C.J.S.* pp. 523, 530, 531; *Moon v. Greenlee, et al.*, *Colorado*, 1920; 195 p. 1100 *Parish v. Greco, California*, 1953, 258 P. 2d 566; *Suwerkup et al. v. Suhl, California*, 1951, 238 P. 2d 674; *Eilertsen v. Weber, et al.*, *Oregon*, 1953, 255 P. 2d 150; *Gutowsky v. Halliburton Oil Well Co., Oklahoma*, 1955, 287 P. 2d 204; *Fairview Lumber Co. v. Makos, Washington*, 1954, 265 P. 2d 837.

## CONCLUSION

In the United States Supreme Court case of *Davis v. Patrick*, 141 U.S. 479, 35 L. Ed. 826, 12 S. Ct. 58, the purpose of this provisions of the Statute of Frauds was discussed. Its purposes, as there set forth, were to place the duty of paying a debt on the person receiving the benefit since there is a tendency of a promisee, when the real debtor is unable to pay, to enlarge the debt or the responsibility by torturing mere words of encouragement and confidence into an absolute promise. The court

said, “. . . it is so obviously just that a promisor receiving no benefits should be bound only by the exact terms of his promise, that this statute requiring a memorandum in writing was enacted.” The court went on to say, “But cases sometimes arise in which, though a third party is the original obligor, the primary debtor, the promisor has a personal, immediate and pecuniary interest in the transaction, and is therefore himself a party to be benefited by the performance of the promisee. In such cases the reason which underlies and which prompted this statutory provision fails, and the courts will give effect to the promise.” See also 35 A.L.R. 2d. 912, 913, wherein this case is cited.

The trial of this case involved one issue, namely, did the plaintiffs personally agree to pay the bill; or, stated differently, was the printing done for them individually. This raised primarily a factual issue and the court found that issue in favor of the defendant. Viewing the evidence in a light most favorable to the defendant, it is manifest there is sufficient competent evidence not only to sustain the finding of the trial court, but rather it compels such a determination. The agreement in question and the circumstances therewith fall squarely within the policy that is outside the purposes of the Statute of Frauds. Therefore, evidence as to the agreement was correctly admitted, and the decision of the trial court should be affirmed.

Respectfully submitted,

RALPH & BUSHNELL,

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Respondent