

1990

Zion's First National Bank and 4447 Associates, a Utah General Partnership, by and through its General Partner, Robert D. Kent v. Overthrust Oil and Gas Corporation, a Utah Corporation, Bertagnole Investment Company Limited Partnership, a Utah Limited Partnership, Faust Land, Inc., a Utah Corporation, Joseph L. Pentz, Capitol Thrift and Loan, Richard A. Christenson;

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Overthrust Oil and Gas Corporation, a Utah Corporation, and Faust Land, Inc., a Utah Corporation v. Capitol Thrift and Loan, a Utah Corporation, and Richard A. Christenson, an

Individual; Unknown

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

90391  
ZIONS FIRST NATIONAL BANK and :  
4447 ASSOCIATES, a Utah General :  
Partnership, by and through its :  
General Partner, ROBERT D. KENT, :

Plaintiffs and Respondents :  
vs. :

OVERTHRUST OIL & GAS CORPORATION, :  
a Utah Corporation; BERTAGNOLE :  
INVESTMENT COMPANY LIMITED PART- :  
NERSHIP, a Utah Limited Partner- :  
nership; FAUST LAND, INC., a Utah :  
Corporation; JOSEPH L. PENTZ; :  
CAPITOL THRIFT & LOAN; RICHARD A. :  
CHRISTENSON, :

Defendants :

BRIEF ON APPEAL OF  
OVERTHRUST OIL & GAS CORPOR-  
ATION AND FAUST LAND, INC.  
DEFENDANTS AND APPELLANTS  
(Subject to Assignment to  
the Court of Appeals)

Appeal No. 90 391

OVERTHRUST OIL & GAS CORPORATION, :  
a Utah Corporation, and FAUST :  
LAND, INC. a Utah Corporation, :

Cross Claim Plaintiffs :  
and Appellants, :  
vs. :

CAPITOL THRIFT & LOAN, a Utah :  
Corporation, and RICHARD A. :  
CHRISTENSON, an individual, :

Cross Claim Defendants :  
and Respondents :

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Defendants and Cross-Claim Defendants

**FILED**

NOV 13 1990

Clerk, Supreme Court, Utah

ZIONS FIRST NATIONAL BANK and  
4447 ASSOCIATES, a Utah General  
Partnership, by and through its  
General Partner, ROBERT D. KENT,

OVERTHRUST OIL & GAS CORPORATION,  
a Utah Corporation; BERTAGNOLE  
INVESTMENT COMPANY LIMITED PART-  
NERSHIP, a Utah Limited Partner-  
nership; FAUST LAND, INC., a Utah  
Corporation; JOSEPH L. PENTZ;  
CAPITOL THRIFT & LOAN; RICHARD A.  
CHRISTENSON,

BRIEF ON APPEAL OF  
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ATION AND FAUST LAND, INC.  
DEFENDANTS AND APPELLANTS  
(Subject to Assignment to  
the Court of Appeals)

OVERTHRUST OIL & GAS CORPORATION,  
a Utah Corporation, and FAUST  
LAND, INC. a Utah Corporation,

CAPITOL THRIFT & LOAN, a Utah Corporation, and RICHARD A. CHRISTENSON, an individual,

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### STATEMENT OF JURISDICTION

The Supreme Court of the State of Utah has jurisdiction and this Appeal which is brought as a matter of right pursuant to 78-2-2(F), and also brought pursuant to Article VIII(3) Utah State Constitution.

This case is subject to assignment to Court of Appeals.

### STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether a party can foreclose a Trust Deed when the exclusive remedy by contract is one of contract rescission.

Legal standard is one of contract interpretation.  
Blumfield Agency v. Little Belt, Inc. 663 P.2d 1164 (Montana)

Whether the One Action rule applies to the sale of Trust Deed property by means of a mortgage foreclosure.

The standard is provided by the statute 78-37-1 and Stewart Livestock v. Ostler, 105 V. 529, 144 P. 2276.

There are remaining issues of fact.

The standard is that if there was evidence in support of a Finding, the Finding will not be disturbed.

If there is no evidence to support the fact, the Finding is subject to review.

### STATEMENT OF NATURE OF CASE

Defendant-Appellant, OVERTHRUST OIL & GAS CORPORATION, signed a Trust Deed describing certain real property located in Tooele County, Utah to secure payment of a Renewal Promissory Note with a face amount of \$1,000,000.00. Said Note was signed by CAPITOL THRIFT AND LOAN, as maker and RICHARD A. CHRISTENSON, as a personal guarantor. The Note was payable to Plaintiff-Respondent, ZIONS FIRST NATIONAL BANK. The Note was not paid by CAPITOL or CHRISTENSON who had received the funds, and an action

was brought against OVERTHRUST to foreclose the Trust Deed as a mortgage. Overthrust signed the Trust Deed as a security accommodation and received no benefit therefrom. Overthrust did not sign the Note, either as a guarantor or as maker.

Capitol and Christenson, as well as others (excluding Overthrust), had executed two other Notes of large denominations which were also in default and had entered into a written agreement with all Defendants (excluding Overthrust) to settle all issues.

The Plaintiffs had accepted payments and assets to be credited on the Notes; had entered into subsequent agreements with Defendants (excluding Overthrust); had dismissed primary obligors (CAPITOL) and guarantor (CHRISTENSON); had applied assets and security erroneously to other Notes; all of which the Defendants-Appellants allege as defenses to the foreclosure of their property under the Trust Deed.

Overthrust filed a Cross-Complaint against Capitol as maker of the Note and against Christenson as guarantor.

#### **DISPOSITION IN LOWER COURT**

The matter was tried before the District Court, Findings of Fact, Conclusions of Law and a Judgment and Decree of Foreclosure in favor of Plaintiffs and against Defendants were entered by the Lower Court. Judgment was granted in favor of Overthrust against Capitol on Overthrust's Cross Complaint. A Judgment of Dismissal was entered in favor of Christenson and against Overthrust, dismissing Overthrust's Cross Complaint against Christenson.



### **RELIEF REQUESTED ON APPEAL**

Defendants Appellants seek to have the Facts, Conclusions and Decree modified to be consistent with evidence and the Law.

Defendants-Appellants also seek:

(a) To have the Judgment and Decree of Foreclosure set aside and the title of the land quieted in OVERTHRUST-FAUST, and the foreclosure action dismissed for the reasons that:

(i) that by Contract-Agreement of September 30, 1987, the dismissal of Maker (Capitol) and Guarantor (Christenson) by operation of law dismisses the Trust Deed upon which this action is brought;

(ii) that the Agreement provides an exclusive remedy of rescission and that remedy has not been sought;

(iii) that Plaintiffs are precluded from going around the four corners of the Agreement to foreclose on the Trust Deed.

(b) To receive compensation for mineral rights conveyed to ZIONS-4447 ASSOCIATES;

(c) For an Order requiring that Zions-4447 return the Tooele Property (Value 410,000) and North Park mineral rights (Value \$450,000), or in the alternative for Judgment in the amount of \$860,000, plus interest.

(d) For subrogation judgment against Capitol and against Christenson for losses sustained in payment of the Note which was for the benefit of Capitol and Christenson.

(e) As an alternative, to set aside the Decree of Foreclosure until the resolution of the ZIONS-4447 ASSOCIATES vs. First Security Financial lawsuit.

(f) For a finding that Zions-4447 accepted and converted specific security pledged to secure the Note in lieu of payment by which Overthrust is entitled to a dismissal of the Complaint.

(g) For a finding that the Note was paid in full by the properties and equities accepted by Zions-4447 as set forth in the September 30, 1987 Agreement (D-4).

(h) For a finding that Overthrust's involvement in the Note was a pure accommodation and that Overthrust is entitled not only to Judgment against Capitol as maker, but against Christenson for any losses suffered by Overthrust.

#### **STATEMENT OF FACTS**

##### **1. Parties**

(a) Plaintiffs are ZIONS FIRST NATIONAL BANK and 4447 ASSOCIATES, a Utah General Partnership, by General Partner, ROBERT D. KENT. These parties shall be referred to herein as Plaintiffs-Respondents or Zions-4447 (R-33).

(b) Defendant is OVERTHRUST OIL & GAS CORPORATION, a Utah Public Corporation, doing business in the State of Utah. FAUST LAND, INC. is a wholly owned subsidiary of OVERTHRUST. For purposes of this appeal, these Defendants shall be referred to as Overthrust or Overthrust-Faust (R-33 and Transcript Page 189 Transcript Page 5). Where the name Overthrust is used it also is

meant to include Faust Land, Inc., where appropriate. Defendant Faust's only involvement in the lawsuit is that Faust held (holds) title to the 3500 acres sought to be foreclosed.

(c) Bertagnole Investment Company Limited Partnership is (was) a Utah Partnership which filed a petition in bankruptcy (Transcript Page 5). Because of the bankruptcy, Bertagnole Investment Company is not a party to this action. However, some of its acts affect other parties (Exhibit D-4). This Defendant is known in this appeal as Bertagnole.

(d) Joseph L. Pent was a Lessee of the property sought to be foreclosed. The lease expired prior to the trial of the case. The interest of Pent was terminated when the lease expired. All parties have stipulated that Pent has no interest in the property (Transcript R-481, Page 5).

(e) Defendant CAPTIOL THRIFT AND LOAN is a Utah Industrial Loan Corporation. Capitol Thrift and Loan was the maker and signator of the Note secured by the Trust Deed of Overthrust. Capitol Thrift and Loan was and is controlled by Defendant Richard A. Christenson. Captiol Thrift and Loan is sometimes known as Capitol in this appeal (D-3, Page 1).

(f) Richard A. Christenson is an individual residing in Salt Lake County, State of Utah. He is a former officer and director of Capitol. Christenson was a guarantor on the Note secured by the Overthrust Trust Deed. Defendant Richard A. Christenson is sometimes referred to as Christenson in this appeal.

2. In early 1981, Zions First National Bank advanced the first of a series of large loans, principally arranged through Christenson (Testimony of Richard A. Christenson; Testimony of Al Potts, Defendant, for the benefit of Richard A. Christenson, Capitol Thrift and Loan and for affiliates of Bertagnole Properties, a Utah Partnership (R-481, Page 223; also Exhibit D-3).

3. The first loan advanced by Plaintiff Zions First National Bank was made on September 30, 1981 as a \$2,00,000 revolving line of credit to Capitol Thrift and Loan then owned by Richard A. Christenson (D-3, R-481, Page 223). Richard A. Christenson had drawn and used \$870,000 of this loan as of September 28, 1984 (R-481, Page 225, lines 1-6). Defendant Overthrust received none of the proceeds of the loan (R-481, Page 36). (Also see Page 12 of Pre-Loan Agreement [D-3] signed by Richard Christenson.)

4. The second loan advanced by Plaintiff Zions First National Bank was made on March 13, 1983, in the amount of \$3,015,000 to Defendant Bertagnole Investment Company Limited Partnership, Defendant Richard A. Christenson, an entity owned by Richard A. Christenson known as Franklin Financial, and a Utah Limited Partnership known as Bertagnole Properties (Plaintiff's Complaint) (Exhibit D-4, Page 1.) \$2,000,000 of this second loan was for the benefit of and used by Richard A. Christenson's entity Franklin Financial. (R-481, Page 7, Testimony of Richard A. Christenson.) Defendants Overthrust and Faust Land received none of the proceeds of this second loan (D-4, Page 2).

5. The third loan advanced by Plaintiff Zions First National Bank was made on June 8, 1984, in the amount of \$1,389,418.76, to Defendant Bertagnole Investment Company Limited Partnership, and a Utah Limited Partnership known as Bertagnole Properties. (Plaintiff's Complaint.) Defendants Overthrust and Faust Land received none of the proceeds of this loan. (Exhibit D-4, Page 2.)

6. The first line of credit loan was replaced by a fourth loan, which is the subject of this action. The fourth loan was made by Plaintiff Zions First National Bank on September 28, 1984 to Defendant Capitol Thrift & Loan in the amount of \$1,000,000.00 (Plaintiff's Exhibit 1). Such loan was a renewal or rollover of the prior first loan to Defendant Capitol Thrift and Loan (Finding No. 4, R-481, Page 43) which was owed by Richard A. Christenson at the time the first loan was made and of which Capitol, under the direction of its president, Richard A. Christenson, had used \$870,000.00 at the time the 4th loan was signed. (Defendants Exhibit 12; Defendants Exhibit 13; Defendants Exhibit 3; Defendants Exhibit 13.) Such loan was guaranteed by Defendant Richard A. Christenson (Recitals Page 1, paragraph C and Exhibit D of Defendants Exhibit 3).

7. Defendants Overthrust and Faust Land received none of the proceeds of this fourth loan or any of the loans. (Testimony Richard Christenson, R-481, Page 225 and Exhibit D-13.)

8. The \$1,000,000 loan (the fourth loan) was subsequently exclusively secured by the following:

a) A Promissory Note receivable, issued and signed by First Security Financial December 10, 1982, in the unpaid amount of \$1,007,777.42, including interest, payable to Richard A. Christenson and Bruce Moser. (Parts A and B of Defendants Exhibit 5; Defendants Exhibits 6.) This receivable was assigned to Zions as security on December 28, 1984 (Exhibit D of Defendants Exhibit 5).

b) Later added as security on May 20, 1986 were 538 acres in Section 35 of Summit County in the name of Bertagnole Investment Co. (No. 6 of Defendants Exhibit 3). This 538 acres was co-mingled with other land and sold as North Park property for \$5,000,000 on February 7, 1988 (Parts A and B of Plaintiffs Exhibit 10.)

c) On May 20, 1986 a Trust Deed on the Tooele Property, 3,500 acres describing undeveloped land in the name of Overthrust was given as security (No. 7 of Defendants Exhibit 3; Plaintiffs Exhibit 2). This is the Trust Deed which Plaintiffs seek to foreclose in this lawsuit. No additional consideration was given to obtain this Trust Deed from Overthrust (D-3).

9. At the time the Tooele Property was pledged by Trust Deed to secure the \$1,000,000 Note on May 20, 1986, the Bertagnoles held no interest in Capitol Thrift and Loan. (Exhibit D-5; Exhibit D-3.) Richard A. Christenson signed as President of Capitol (D-3).

10. Richard A. Christenson controlled Capitol Thrift & Loan and allowed the \$1,000,000 Note to go into default (Defendants Exhibit 5; and Plaintiffs Third Amended Complaint (R-198.)

11. 4447 Associates, a Utah Partnership, acquired a participation interest in and to Plaintiff Zions First National Bank's interest to the second, third, and fourth Promissory Notes. (Defendants Exhibit 4, Page 4, paragraph 1; also Amended Complaint R-197.)

12. Subsequent to the execution of the above-described Trust Deed, Defendant Overthrust conveyed title to the Tooele Property to Defendant Faust Land, Inc. (Plaintiffs Complaint). Defendant Faust is a wholly-owned subsidiary of Defendant Overthrust (Defendants Answer to Third Amended Complaint, R-208.)

13. Subsequent to the default on the Notes, Plaintiffs Zions and 4447 Associates engaged in negotiations with the obligors on such Notes (Exhibit D-4).

14. Defendants Overthrust Oil and Gas Corporation and Faust Land, Inc., were not obligors on such Notes. Overthrust and Faust did not sign the Notes and had no obligation of payment thereon. (Exhibit P-1.)

15. On September 30, 1987, following the settlement negotiations, the Plaintiffs and the obligors under all of the Promissory Notes executed a Settlement Agreement (Exhibit D-4). Such Agreement was executed between the Plaintiffs, Bertagnole Investment Company Limited Partnership, Bertagnole Properties,

several individuals from the Bertagnole family, Emanuel A. Floor, and Richard A. Christenson. (Exhibit D-4, Page 1, paragraph 1 and Page 17, paragraph 18.) (Also see entire Exhibit D-4.)

16. The Settlement Agreement contemplated the foreclosure, or conveyance in lieu thereof, of various parcels of property securing the three Notes, as well as the payment of certain "boot" by the obligors under such Notes, all in exchange for a contemplated release from liability of the obligors on such Notes. (Exhibit D-4, Page 15, paragraph 8c through Page 16, paragraph 9.)

17. Defendants, Overthrust Oil & Gas and Faust Land were not a party to said Settlement Agreement. (Exhibit D-4, Page 10, paragraph 4, sentence 2; Page 4, paragraph 1a(1).)

18. Said Agreement provides:

(a) "That the fee ownership of such property [the Tooele Property] is presently vested in the name of Overthrust Oil & Gas Co." (Exhibit D-4, Page 4, paragraph 1.a(a).)

(b) The Agreement states that Overthrust is not a party to the Agreement: "It is acknowledged that some or all of the . . . rights to be transferred to Lenders are owned by Overthrust or other third parties which are not parties to this Agreement." (Exhibit D-4, Page 10, paragraph 4, sentence 2.) (Also Page 14, paragraph 8(b).)

(c) The First Security Note receivables securing the Note was "unconditionally assigned to Zions." (A completed and



irreversible transaction.) (Exhibit D-4, Page 12, paragraph 6, sentence 1.)

On September 30, 1987, the Promissory Note ceased to be security and title was transferred to Zions Bank, without any consideration to Defendants Overthrust or Faust Land, Inc. (Defendants Exhibit 4, Page 12, paragraph 6 . . . have been "unconditionally assigned to Zions.")

Pursuant to this assignment Plaintiffs Zions and 4447 Associates initiated legal action to collect said First Security Financial Note in Third District Court, Case No. C-1978, Zions vs. First Security. That case had not been concluded at the time of the trial of this case (D-5).

(d) The Agreement provides that "in the event any requirement of this Agreement cannot be achieved, and is not waived by both of the Lenders, the entire Agreement shall be null and void. . ." (Exhibit D-4, Page 14, paragraph 8(c), last sentence at bottom of page), and the Court ruled that Plaintiffs were estopped from setting aside the September 30, 1987 Agreement because almost two years have passed and Plaintiffs have elected to treat the agreement as valid (Conclusions of Law No. 3).

(e) The Agreement provides that the maker and guarantor of the \$1,000,000 Note, Capitol Thrift and Loan and Richard A. Christenson, "shall be mutually released . . ." (Exhibit D-4, Page 10, paragraph 9).

(f) The Agreement provides that the sole remedy for non-performance shall be to declare the Agreement void. (Exhibit D-4, Page 15, top of page.)

(g) The Agreement of September 30, 1987 provides for a mutual release of all parties "to release each other from further liability." (Exhibit 4, Page 4.)

(h) By the Agreement the Kimball property was to be conveyed to Zions. The Kimball property belonged to Kimball Associates who was not a party to the Agreement (Exhibit D-4, pages 4 and 5).

(i) By the Agreement the North Park Property was 5368 acres. However, 5000 acres had been pledged on Note No. 2 and 368 acres as security on the Note upon which this foreclosure is based. The Agreement merges and dissolves the distinction between the properties and disposes of these properties jointly (Exhibit D-4).

(j) The Agreement also included Deer Hollow property which was not pledged as security on any Note (Exhibit D-4).

(k) The Agreement further provided for receipt by Zions of lease assignments (Exhibit 4, Page 7 and 9) and mineral rights (Exhibit 4, Page 10).

(l) The Agreement provided that 10,000,000 shares of Overthrust stock be conveyed to Zions.

(m) The Agreement describes real property not pledged on any Note (D-4, 1a, Page 4, Exhibit D-4). The real property was described as follows:

(1) Tooele County Property (subject of this lawsuit). (Security for Note 4.)

(2) Kimball Property (did not secure any note).

(3) North Park Property - 5368 acres - 5000 acres  
Note 2 and 340 acres secured Note 4.

(4) Redwood Road Property (did not secure any Note).

(5) Deer Hollow Property (did not secure any Note).

(n) The Agreement refers to "miscellaneous" which include:

(1) Mineral rights to North Park and Tooele Properties.

(2) Water rights.

(3) Oil and gas leases.

(o) The Agreement required the assignment of the First Security Financial note, principal and interest in the amount of \$1,007,777.00 to Zions-4447 with an agreed upon no credit to borrowers "unconditionally assigned without credit to any Note (D-4, page 12).

(p) The Agreement called for the Defendants, Bertagnole Investment Company and Bertagnole Properties, to transfer to the Plaintiffs and/or allow the foreclosure of certain real and personal properties which were the security for the settled loans. Said Defendants did transfer to Plaintiffs and did allow the foreclosure of the assets as called for in the Agreement in

the following paragraphs of the Agreement. (Exhibit D-4, page 4, Definitions (a), (2), (3), (4)(a), (4)(b), (5)(b), (1), (2), (3).

19. The properties accepted by Zions-4447 either by foreclosure sale or by conveyance secured the loans indicated and had these values as follows as found by the Court:

(a) North Park Property - The North Park Property was pledged on the No. 2 loan. However, in the Agreement (Exhibit 4), Section 35 was included in the North Park description and both properties were sold for \$5,000,000 at the sale--even though Section 35 was specifically pledged to Note 4. The sale was made at \$5,000,000, allocated to Notes 2 and 3.

(b) Redwood Road Property - The Redwood Road Property was sold at a price of \$155,000, allocated to Notes 2 and 3.

Other properties, i.e., Deer Hollow Property and Kimball Property, were conveyed without sale as "boot." Zions-4447 allocated all credit from these properties to Notes 2 and 3.

20. Leases and lease payments were assigned under the contract. All credit was assigned to Notes 1 and 2.

21. Mineral rights having a value of \$451,000 were transferred by Overthrust to Zions-4447. This credit, also, was given to Notes 1 and 2.

22. Ten million shares of stock of Overthrust were transferred to Zions-4447. Credit for this transfer was given to Notes 1 and 2.

23. The First Security Financial litigation was assigned to Zions and no credit given to any note and the parties agreed that

even if Zions should collect said Note in full, that no credit would be given to any Note (D-4, Page 12).

The First Security Financial receivable, however, secured Note 3 and its benefits were all contracted away by all parties with no benefit to the Note on which Overthrust's land was pledged (see D-3, Pre-Loan Agreement). Zions-4447 converted the receivable and initiated a legal action on the same (Exhibit 5).

24. George Woodhead did not agree and could not agree to allow foreclosure or to make a conveyance because as President of Overthrust he had no authority to bind Overthrust and liability to himself would be created if he exceeded his authority and minority shareholder rights would not be protected. (Testimony George S. Woodhead.) (R-481, Page 175; also see Findings of Fact No. 19, Conclusion No. 5.)

25. The Court found the amount owing on the \$1,000,000.00 loan referenced in paragraph 5 above, as of August 31, 1989, but without the allocation of any previously received amounts or allocation of the corresponding reduction of interest, was the sum of \$1,461,226.70 (Testimony Allen J. Potts, Zions). The amount due on all loans was \$7,380,000 (R-481, Pages 14 and 44).

26. This amount was owed by Capitol Thrift and Loan and Richard A. Christenson. (Exhibit D-3, Extension Agreement; Exhibit P-1; Exhibit D-13, Christenson Letter; Exhibit D-12, Stock Purchase Agreement; Exhibit D-11, 1st Promissory Note on which Christenson borrowed monies.)

27. The proportionate pro rata share to be applied to the loans was determined by the Court to be as follows:

\$1,000,000.00 loan plus interest to Trial Date September 30, 1989 . . . . .	\$1,461,000.00
Total Loans . . . . .	\$7,380,000.00
$\frac{1,461,000.00}{7,380,000.00} =$	19.79%

(Conclusions of Law No. 13; also Testimony of Al Potts, Zions, R-481, Pages 14 and 44.)

Thus the Court found that the proportionate amount to be credited against the loan for boot and sale of co-mingled North Park Property is 19.79% of each credit. (Memorandum Decision; P.4, line 25 to P.5, line 4.)

	<u>A</u> Total Value	<u>B</u> 19.9% of A
Summit County Water and Oil Rights	\$450,000	
Deer Hollow Property	\$200,000	
Redwood Road Property	\$150,000	
Overthrust Stock	<u>\$250,000</u>	
	\$1,055,000	\$208,784.50
Value of Shirley Thorpe Trust Deed		\$ 21,200.00
Section 35		<u>\$ 79,200.00</u>
Balance Owing on Note 3		\$1,152,115.50
(Typographical error of \$300.00)		<u>- 300.00</u>
		\$1,151,815.50

This amount is \$300.00 less than Judgment (because of mathematical error).

## **SUMMARY OF ARGUMENTS**

### **ARGUMENT I.**

Overthrust believes that the Agreement of September 30, 1987 was dispositive of this case and that the case should have been dismissed as settled by the terms of that Agreement.

### **ARGUMENT II.**

Overthrust was entitled to a determination of debt; however, Capitol and Christenson had paid extra consideration for a release and that consideration should have been credited to the Overthrust Note and it was not. Overthrust was entitled to receive credit against the Note and to have other pledged security sold and the credits therefrom applied to the debt prior to the foreclosure of its real property.

### **ARGUMENT III**

The release by the Agreement of the September 30, 1987 of Christenson and Capitol operated as a release of Overthrust.

### **ARGUMENT IV**

Under the Agreement of September 30, 1987, certain transfers were made to Zions-4447. When credits based on the Courts Findings were totaled, they were found to be in excess of the total debt.

### **ARGUMENT V**

The Agreement of September 30, 198 provided for a transfer of 10,000,0000 shares of Overthrust to Zions-4447. A right of redemption was given for 10 cents a share which fixed the value of \$1,000,000. Zions-4447 should be estopped from claiming a lesser value.

#### ARGUMENT VI

There was absolutely no testimony that Bertagnole Family held substantial interest in Capitol Thrift and Loan.

#### ARGUMENT VII

An act of Overthrust could not be a failure of consideration because Overthrust was not a party to the Agreement.

#### ARGUMENT VIII

There was ample evidence to sustain the fact that Overthrust was an accommodation guarantor (with its Trust Deed). There was no evidence to the contrary.

#### ARGUMENT IX

The Agreement of September 30, 1987 was a Novation. It substituted agreements for the Notes, security and obligations. These agreements affected Overthrust's properties by which Overthrust should be released.

#### ARGUMENT

##### POINT I

THE COURT ERRED IN FAILING TO ENFORCE THE TERMS OF THE AGREEMENT OF SEPTEMBER 30, 1987, WHICH HAD DISPOSED OF ALL ISSUES IN THIS CASE.

The parties in late summer and early fall of 1987 negotiated an Agreement (D-4). The Agreement preliminarily took the form of a petition to the Bankruptcy Court where a Bankruptcy Court Order was entered consistent with section 363 sale as provided by the Bankruptcy Act (see page 8 of Exhibit D-4 and various other references contained therein).



The Agreement names the parties thereto (Page 1, D-4) significantly, the name of Overthrust does not appear. The testimony was that Overthrust joined in negotiations but did not become a party (R-431, Findings 17 and 19). Overthrust is also specifically referred to as not being a party on Page 10 paragraph 4 of D-4 which states:

It is acknowledged that some or all of the mineral rights and the water rights to be transferred to the Lenders are owned by Overthrust . . .

The property subject to this action is described on page 4, paragraph 1(a) of the Agreement, which states:

Fee ownership of such property is presently vested in the name of Overthrust Oil and Gas Corporation.

Where the Agreement refers to Deer Hollow Property, it also states that said property is "not vested" in the name of Richard Christenson; it also adds "but can be obtained by Christenson to fulfill the terms of this Agreement." A like statement is Not made with respect to Overthrust in paragraph 4 of D-4. By the Agreement it is obvious that all parties knew that Overthrust was not a party to the Agreement (D-4).

Under paragraph 2, the Agreement provides for a sale of North Park Property. This occurred including the 538 acres specifically pledged on the \$1,000,000 Note to which Overthrust land was pledged as security. In this paragraph the signators completely ignored the rights of Overthrust to have that property separately sold and funds applied to the \$1,000,000 debt prior to the sale of the Overthrust land.

Under paragraph 6 the borrowers unconditionally assign to Zions-4447 the First Security Financial Note principal and interest of \$1,007,777. In making this assignment, the borrowers were being very generous with the receivable which should have protected Overthrust's property. By this Agreement, Zions Bank took title outright to the receivable and openly arrogantly stated on page 13 of D-4 that No Credit will be given to borrowers and none to Overthrust for any collection.

The treatment of the 538 acres of the North Park property and the absolute conveyance of the First Security Financial obligation to Zions-4447 and the sale of the 538 acres merged with the North Park properties as well as process of initiating an action on the First Security Financial Note constitutes a conversion of security and Zions-4447 are estopped from alleging that the debt is not paid in full.

The contractual obligations of the borrowers (this does not include Overthrust) are set forth in paragraphs 2, 3 and 4 of the September 30, 1987 Agreement.

Borrowers have complied with all these obligations pursuant to said contract of September 30, 1987.

Paragraph 9 of the Settlement Agreement of September 30, 1987 provides a general (not just deficiency) release to Guarantor Christenson and Capitol Thrift and Loan (maker of the \$1,000,000 Note) from any obligation, and interestingly enough a series of entities controlled by Christenson (Cape Trust, Franklin Financial).

Paragraph 8(b) provides that the Agreement is subject to "cooperation and performance." In 8(c) the Agreement states that if any term cannot be achieved and is not waived, then "the entire Agreement shall be thereafter null and void at option of Zions or 4447.

The Agreement was dated September 30, 1987, and no notice of rescission has been given in over 23 months at time of trial from date of the Agreement. It follows that there has been a waiver of the condition of conveyance in lieu of foreclosure. Otherwise, all parties would now have received a notice of rescission and restoration of other considerations granted in the Agreement. It is now legally too late to void the contract. Failure to act on an existing right constitutes a waiver of that right.

Paragraph 8(c) states that all documents accomplishing the intent of this Agreement shall be held in escrow. This has not happened. Titles to the properties have been rendered. Specifically, Section 35 Deed and North Park Deed have been recorded in the name of Zions First National Bank, and a legal action has been initiated to collect the \$1,007,777 Note from First Security Bank. The Agreement is in full force and effect.

While Overthrust has not become a party to the Agreement, the Agreement has irremediably disposed of properties which Overthrust was entitled to have disposed of under the one action rule prior to the foreclosure sale of its property. Section 35 was disposed of by a global sale, together with the North Park Property. Also, the First Security Financial Note was "given"

to Zions-4447 who have initiated a legal action on the same. Overthrust was entitled also to have this item sold in the open market sale prior to foreclosure of its properties.

Zions-4447 did not ask for rescission of the September 30, 1987 Agreement (D-4) nor did they ask for reformation (see Third Amended Complaint).

This action in effect constitutes an effort by Zions-4447 to retain everything obtained by the Agreement (including summary disposition of security which should have protected Overthrust's position and the granting of releases to the maker (Capitol) and guarantor (Christenson), but to obtain the Overthrust property when it is precisely these Plaintiffs who have disposed of the security which should first have been sold and credited to Overthrust. Only after the sale of the previous security could the Overthrust property be sold in foreclosure.

In addition, the Agreement released Capitol as maker and Christenson as guarantor. A release of primary obligors constitutes a release of security.

The Plaintiffs have taken advantage of the Agreement to the detriment of Overthrust and they have not followed procedures for setting the Agreement aside. Said procedures are a condition precedent to bringing an action to foreclose.

Zions-4447 received approximately \$8,000,000 worth of property, partly in sales and partly just by conveyance as "boot." Zions-4447 ought not to obtain benefits from the Agreement and not honor the Agreement.

A party cannot avail itself of benefits under a contract on the one hand but avoid burdens of that same contract on the other hand. Blumfield Agency v. Little Belt, Inc., 663 P.2d 1164 Montana (1983). Specifically, the Court stated: "A party cannot avail himself of benefits of contract but avoid burdens of that contract on the other hand. In Triste v. Industrial Commission, 544 P.2d 706, 25 Ariz. App. 489 (1976) the Court said, "There is no suggestion that the petitioner or anyone else with an interest in this matter wishes to undo the settlement which was made and upon which payments have already been paid . . . Under ordinary principles of estoppel, a party to a settlement is not entitled to keep the benefits of it while renouncing the burdens.

The burden in this Agreement is that of rescission in the event of non-performance by any party expected to perform, even though not a party to the Agreement. This was contemplated by the parties. (D-4, Page 8).

Although the Trial Court tried to unravel the Gordian Knot, it did not, and indeed, cannot do so. The Agreement and all provisions should stand.

## POINT II

THE TRIAL COURT ERRED IN FAILING TO DISMISS THE CASE FOR FAILURE TO COMPLY WITH THE ONE ACTION RULE. U.C.A. 78-37-1 AND PLAINTIFFS SHOULD BE ESTOPPED FROM PROCEEDING WITH THE FORECLOSURE ACTION AFTER HAVING DISPOSED OF OVERTHRUST'S PRIOR SECURITY.

The Agreement of September 30, 1987 provided for only one remedy. That remedy was rescission. That has not been requested and indeed the Court held that the Agreement is binding.

(Memorandum Opinion.)

In that Agreement, Zions-4447 converted and disposed of the First Security Financial Note (\$1,007.777) and 538 acres sold along with the North Park property. The 538 acres and the First Security Financial Note were specifically pledged on this Note and none other.

The Court erred in trying to unravel these premature actions. The Court even did this in inconsistent fashion by placing a value on the 538 acres of Section 35 and refused to give any value to the First Security Financial receivable. (See Memorandum Decision.)

Overthrust believes both rulings to be in error. The properties and the Note should have been sold at the foreclosure sale, together with or prior to the Trust Deed property:

There can be one action for the recovery of any debt or the enforcement of any right secured solely by mortgage upon real estate, which action must be in accordance with the provisions of this chapter. Judgment shall be given adjudging the amount due, with costs and disbursements, and the sale of mortgage property, or some part thereof, to satisfy said amount and accruing costs, and directing the sheriff to proceed and sell the same according to the provisions of law relating to sales on execution, and a special execution order of the sale shall be issued for that purpose.  
U.C.A. 78-37-1.

The Utah Supreme Court has stated:

Foreclosure is statutory; foreclosure proceedings on a mortgage securing a note in default must be conducted in accordance with the statutes. Stewart Livestock Co. v. Ostler, 105 U. 529, 144 P. 2d 276, applying R.S. 1933, ss 104-55-1, et seq.

This rule requires that a foreclosure of security must be joined with the determination of debt. Debt is not a disembodied spirit. It must be owed by someone.

The Agreement (D-4, Page 9) states:

Upon the transfer and recordation of the documents required herein, it is agreed that the Lenders on the one hand and the Borrowers, Christenson, Franklin Financial, Capitol Thrift & Loan and the trustees of CAPE TRUST, a qualified pension and profit sharing plan, on the other hand, shall be mutually released from any and all obligation and liability to each other in connection with, or in any way related to, Loans No. 1, No. 2, No. 3 and No. 4, except for any duties, responsibilities and rights set forth in this Agreement and documents and instruments executed in connection herewith. In such event, Lenders specifically acknowledge that Borrowers' and Christenson's personal obligations under such Loans will be terminated and Lenders' sole remedy shall be against the real properties which are subject of this Agreement.

The Note was signed by Capitol Thrift and Loan (D-3). The failure of Plaintiffs to have joined Capitol in Plaintiff's original Complaint is further evidence that Plaintiffs believe that they have effectively released Capitol and that Capitol could not therefore be joined as a party defendant. If there is no debt for the Overthrust Mortgage to secure, the action must be dismissed. In the answers to Cross Complaint, Cross Claim Defendant Capitol, as well as Richard A. Christenson, allege that the Note upon which this action is based was paid and discharged by an Accord and Satisfaction. (R-213, Christenson and Capitol Responses to Third Amended Complaint.)

There was additional security pledged to satisfy this obligation (D-3). Overthrust was entitled to have the "other"

security (Section 35) and First Security Financial receivable applied the debt prior to or concurrent with the foreclosure of Overthrust real estate.

When a Creditor sues for recovery of a single debt secured by more than one parcel of real property, the debtor may compel the creditor to include all of the security in a single judicial foreclosure. Walker v. Community Bank, 518 P.2 329, 111 Cal. Rptr 897, 10 C.3rd 729.

This the Plaintiff cannot do having previously disposed of Section 35 and the First Security Financial obligation.

#### POINT III

THE COURT ERRED IN FAILING TO FIND THAT THE DEBT WAS PAID BY AN ACCORD AND SATISFACTION WITH THE CONTRACTUAL RELEASE OF CAPITOL AND CHRISTENSON.

#### POINT IV

THE COURT ERRED IN FAILING TO FIND THAT ALL NOTES WERE PAID IN FULL BY TRANSFERS MADE UNDER THE SETTLEMENT AGREEMENT OF SEPTEMBER 30, 1987.

#### POINT V

THE COURT ERRED IN FINDING THAT THE VALUE OF STOCK GIVEN TO ZIONS-4447 WAS \$250,000 INSTEAD OF \$1,000,000.

The above three arguments are treated jointly.

The Agreement of September 30, 1987 contains two paragraphs on releases. Paragraph 9 states ". . .Lenders on one hand and Borrowers, Christenson, Franklin Financial, Capitol Thrift and Loan and the trustees of Cape Trust. . . shall be mutually released, shall be released from any and all obligations and liability to each other. . ." Also, the introduction on page 4



of that Agreement states ". . . and to release each other from further liability in connection with said loans."

The Court found that the Agreement was a binding contract and by its terms any remedy for nonperformance is rescission. The Court also ruled that the contract could not now be rescinded. (See Memorandum Opinion.)

Assuming arguendo that the contract Agreement (D-4) did not dispose of the debt as above argued, the debt is nevertheless paid (Point IV) by the transfer of assets as found by the Court.

The Court made Findings as to values as set forth in the Findings of Fact. These values made by the Court are as follows:

<u>Description of Asset Received by Zions</u>	<u>Credit to Overthrust</u>	<u>Total Credit to Zions-4447</u>
North Park and Section 35 (R-427)	\$79,500.00	\$5,000,000.00
Shirley Thorpe Release of Trust Deed Note on Sec. 35	21,200.00	21,200.00
Redwood Road Property Front 10 acres (R-426)	30,675.00	155,000.00
Redwood Road Rear Utility Access	-0-	620,000.00
Kimball Associates Note	-0-	350,000.00
Deer Hollow Property (R-426)	39,580.00	200,000.00
Mineral Rights (R-426)	89,055.00	450,000.00
Overthrust Stock (R-426)	49,470.00	250,000.00
Reverse of Interest Charges from Sept. 30, 1970 to Date of Trial (R-481, Page 34)	-0-	<u>1,422,291.00</u>
TOTAL PAYMENTS RECEIVED BY ZIONS-4447 PURSUANT TO THEIR AGREEMENT (D-4)		\$8,468,491.00

TOTAL DUE ON ALL NOTES ON DATE OF TRIAL                    7,380,000.00

THIS CONSTITUTES ON OVERPAYMENT ON ALL  
NOTES BY THE AMOUNT OF -                    \$1,088,491.00

In actuality, the true amount for which credit should be given on overcharged interest is approximately \$200,000.00 more than above stated because the figure used to back off interest to September 30, 1987 was ten percent (10%) when the interest rate on the Notes is one (1) point above B-2 (R-481, Page 34). (Also see Exhibit D-3.)

In addition, the Court found the stock value to be \$250,000, when Exhibit D-4 placed a value of \$1,000,000 on the stock. Parole evidence should not be allowed to defeat the Agreement.

POINT V is perhaps moot because the amount paid by transfers to Zions-4447 under Exhibit D-4 is in excess of the debt. However, if the agreed upon value of the stock is accepted (D-4, Pages 10-11, paragraph 4), the value of transfers on the Notes would be \$750,000 greater than that indicated or \$9,218,491.

The Agreement (D-4) was drafted by Zions-4447 counsel. That Agreement has globally lumped and averaged the assets and the liabilities. This was evidently exactly that which Zions-4447 wanted to do. If there is any ambiguity in the document, it must be interpreted in favor of an Overthrust interpretation. Zions-4447 should be estopped from asking for any relief not consistent with that Agreement.

In analyzing these assets we have taken the value as found by the court. The portion not allocated on the \$1,000,000 Note must be credited to the indebtedness as a whole. We cannot pick

up one end of the stick without picking up the other. It is mathematically clear that all debts on all Notes were paid in full by the Agreement of September 30, 1987. This was largely established by testimony of Zions-4447 own witness (Al Potts, R-41).

#### POINT VI

THE COURT ERRED IN FINDING THAT BERTAGNOLE PARTNERSHIP AND MEMBERS OF THE BERTAGNOLE FAMILY HELD SUBSTANTIAL INTEREST IN CAPITOL THRIFT AND LOAN (Finding No. 7).

The only testimony dealing with this point is that given by George Woodhead when he testified that Bertagnoles did not control Capitol (R-481, Page 158).

The alleged Finding No. 7 is in error to the extent it influenced the Finding by the Court that the pledge by Overthrust was not an accommodation. To that extent it was prejudicial to Overthrust (Finding No. 13, R-432). The Court found that even though Bertagnole had an interest in Capitol and Overthrust, they were two separate entities. (Memorandum Decision.) There was no testimony supporting Finding No. 7.

#### POINT VII

THE COURT ERRED IN CONCLUSION OF LAW NO. 2 WHICH STATED "FAILURE OF THE PLAINTIFFS TO BE ALLOWED TO FORECLOSE AGAINST THE TOOELE PROPERTY...WOULD HAVE CONSTITUTED A FAILURE OF CONSIDERATION." (Conclusion of Law No.2,R-427)

The above Conclusion of Law is in conflict with the Findings of the Court that Overthrust is not a party to the Agreement (Finding No. 13, R-432). Further, the parties entered into the Agreement with full knowledge that Overthrust was not a participant (see Exhibit D-4, Pages 1, 4 and 10).

The Court also found that the Plaintiffs Zions-4447 are estopped from setting the Settlement Agreement aside. It is a valid agreement. Zions-4447 entered into the Agreement with full knowledge that Overthrust was not a participant (see Exhibit D-4, Pages 1, 4 and 10).

#### POINT VIII

THE COURT ERRED IN FINDING THAT OVERTHRUST WAS NOT AN ACCOMMODATION GUARANTOR WITH RESPECT TO THE PLEDGE OF REAL PROPERTY. THE COURT FURTHER ERRED IN NOT FINDING THE ACCOMMODATION SECURITY DISCHARGED BY THE DISCHARGE OF THE PRINCIPALS.

Overthrust believes it to be entitled to the benefits of Utah Code Annotated, Section 70A-3-606 (1986). This statute provides in pertinent part as follows:

(1) The holder discharges any part 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.

The Utah Supreme Court, in interpreting this section, stated that:

[a] division of authority exists concerning the scope of the reference to "any party" in subsection 3-606(1) (footnote omitted). We believe that the defense of discharge found in that provision is properly characterized as suretyship defense" (footnote omitted). Thus, it would appear that subsection 3-606(1), while including accommodation parties and other parties to an instrument in the position of sureties, does not apply to makers binding themselves only as principals. Utah Farm Prod. Credit Ass'n v. Watts, 737 P.2d 154, 160 (Utah 1987) (emphasis added).

Thus, while accommodation parties have defenses available under section 70A-3-606, principal makers do not.

The Court goes on to state that whether or not a signor does so as an accommodation is a question of intent. The Court sets out three criterion:

- (1) Whether signer receives a benefit directly or indirectly;
- (2) Whether the signature was necessary to receive the consideration;
- (3) Whether the party claiming accommodation . . . ???  
Mooney v. GR and Associates, 746 P.2d 1174 (Utah Ct. of Appeals). See also Utah Farm Production Credit Association v. Watts, 737 P.2d 154, (Supreme Court).

In this case the facts are clear in the documents:

Page 3 of the Agreement between borrowing parties.  
(Paragraph I of Loan Agreement, D-3.)

Wherein, Zions affirms it willingness to grant an extension . . . certain real property in Tooele County . . .  
(D-3, Page 3, Document 1

Further, Christenson testified that he and his affiliates had drawn down the line of credit by \$870,000. (Exhibit D-13, Christenson Letter, Exhibit D-11, First Promissory Note on which Christenson borrowed money.)

This pledge by Overthrust was not to secure its own debt in any particular. Indeed, the debt guaranteed by

Overthrust was contracted in 1981. Overthrust's generally was 1986.

Overthrust was clearly accommodation guarantor with its security.

It therefore follows that Overthrust is entitled to the benefit of 70A-3-606. Zions-4447 ought to be estopped from proceeding on this foreclosure action.

The issues between the maker (Capitol) and guarantor (Christenson) of the \$1,000,000 Promissory Note on the one hand and Plaintiffs on the other hand were settled by an Accord and Satisfaction.

Paragraph 9 of the Settlement Agreement of September 30, 1987 reads as follows:

"9. General Release. Upon the transfer and recordation of the documents required herein, it is agreed that Lenders on the one hand, and Borrowers Christenson, Franklin Financial, Capitol Thrift and Loan and the trustees of CAPE TRUST, a qualified pension and profit sharing plan, on the other hand, shall be mutually released from any and all obligation and liability to each other in connection with, or in any way related to Loans #1, #2, #3, and #4, except in this Agreement and documents and instruments executed in connection herewith. In such an event, Lenders specifically acknowledge the Borrowers' and Christenson's personal obligations under such loans will be terminated and Lender's sole remedy shall be against the real properties which are subject to this Agreement."

Where there is no debt, there is no claim on the security.

McAllister v. Farmers Development Co., 143 P.2d 537, 47 N.M. 395.

Foreclosure of a trust deed (mortgage) cannot be ordered until the amount of the indebtedness sued upon and so secured by the mortgage is determined.

55 Am. Jur. 2d P. 437, Section 394 states: (see action Section 34 ALR 980):

The general rule is that payment of the secured debt ipso facto eo instanti extinguishes the lien of the mortgage or deed of trust for the benefit of whoever is the owner at the time of payment. Indeed, on the ground that the incident cannot survive the principal, it is said that anything that operates to extinguish the debt necessarily operates to discharge the mortgage. See also Am. Jur., 2d Section 132.

The dominant feature of a real estate mortgage is generally regarded as that of security for the debt, to which it is collateral, appurtenant or an accessory, and on which it is dependent. In other words, the debt secured by a mortgage is regarded as the primary obligation between the parties, and the mortgage as incidental to the indebtedness or obligation thereby.

In Grieve v. Huber, Supreme Court of Wyoming, 283 P. 1105, 285 Wy 788, the Court said;

Of course in order that a judgment directing the sale of the property be valid, a debt or account on which it is directed to be made must exist, and none should be ordered unless that fact is certain.

The existence of the September 30, 1987 Settlement Agreement provides that there is no debt. The action should therefore be dismissed.

#### POINT IX

THE MODIFICATIONS SET FORTH IN PART III ABOVE CONSTITUTES A NOVATION OR A SUBSTITUTE CONTRACT. THAT NOVATION COM-PROMISES THE RIGHTS OF OVERTHRUST.

The Agreement of September 30, 1987 draws a new accord between the Borrowers and Lenders. The parties did not make Overthrust a party to that Agreement. This was not an oversight. Overthrust refused to be a party. The contract makes

reference to the Overthrust position, but Overthrust is not a party to the Agreement. Existing security was disposed of in the Agreement and additional consideration was accepted.

"For a substitute contract to be effective it must be supported by consideration. Sufficient consideration exists where there is reciprocity." Horman v. Gordon et al, Utah 1987 Court of Appeals, 740 P.2d 1346; also U.C.A. 15-4-4 and 15-4-5 provide that a release of a co-obligor is a release of the obligor and the surety.

In this process the Plaintiffs have destroyed the subrogation rights of Overthrust by which Overthrust is entitled to be relieved from the claims of the Plaintiff.

In M.C.I.C. Financial Corp. vs. H.A. Briggs, Wash. Appeals, 600 P.2 573 Court of Appeals, the Court stated:

Courts must protect subrogation rights of junior interest holders against prejudicial acts by senior interest holders.

Subrogation is equity extending to parties who, although not personally bound to pay debt, are compelled to do so in order to protect their property interest, and subrogation entitles party paying debt to all rights, priorities, liens and securities which senior mortgage had against mortgagor. Where mortgagor sold mortgaged property by warranty deed, such subsequent purchasers had right to pay off deed of trust note and be subrogated to whatever right senior lienor had against mortgagor, including right to seek personal judgment against mortgagor, and where senior lienor with notice of interest of subsequent purchasers released mortgagor and guarantor from personal liability, to which release the purchasers did not consent, there was sufficient prejudice to equitable rights or purchasers to discharge lien against their property.



Where mortgagor sold mortgaged property and senior lienor with notice of interest in purchaser released mortgagor and guarantor from personal liability, fact that purchasers would have been subrogated to nothing more than dubious right to seek personal judgment against bankrupt. Mortgagor did not preclude equity from requiring that purchasers be released from burden of having to forfeit their land to satisfy debt for which principal judgment against bankrupt.

The Courts have held release of principal without release of surety generally releases surety. Also see U.C.A. 70 A-3-606 (Uniform Commercial Code).

#### CONCLUSION

The granting of a Decree of Foreclosure was in error; was contrary to law; provided for unjust enrichment; and causes Overthrust to pay a debt which (1) does not exist and (2) has been more than paid.

The case should be reversed with instructions to the Trial Court to find the extent of damages suffered by Overthrust for loss of mineral rights and its Tooele property and for entry of a Judgment in that amount against Ziokns-4447, as well as against Capitol and Christenson. In the alternative, if Overthrust's Tooele Property has not been disposed of, it should be ordered returned to Overthrust.

Respectfully submitted,

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LORIN N. PACE  
Attorney for Appellants  
OVERTHRUST-FAUST

**Certificate of Mailing**

I HEREBY CERTIFY that I mailed two true and correct copies of the foregoing Corrected Brief on Appeal of Overthrust Oil & Gas Corporation and Faust Land, Inc. and Addenda, postage prepaid, this \_\_\_\_ day of November, 1990, to the following:

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