

1960

W. E. Williams v. H. R. Espey and J. H. Morgan, Sr. :  
Brief of Respondent and Cross-Appellant J. H.  
Morgan Sr.

Utah Supreme Court

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Mulliner, Prince and Mangum; Attorneys for Respondent and Cross-Appellant;

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#### Recommended Citation

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IN THE SUPREME COURT

of the

STATE OF UTAH FILE

SEP 15 1911

W. E. WILLIAMS,  
*Plaintiff and Appellant,*

vs.

H. R. ESPEY,

*Defendant,*

and

J. H. MORGAN, SR.

*Defendant and  
Cross-Appellant.*

Clerk, Supreme Court, Utah

Case No. 9251

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BRIEF OF RESPONDENT AND  
CROSS-APPELLANT, J. H. MORGAN, SR.

---

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and MANGUM

*Attorneys for Respondent and  
Cross-Appellant, J. H. Morgan, Sr.*

Continental Bank Bldg.  
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IN THE SUPREME COURT  
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W. E. WILLIAMS,  
*Plaintiff and Appellant,*

vs.

H. R. ESPEY,

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and

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Cross-Appellant.*

Case No. 9251

---

BRIEF OF RESPONDENT AND  
CROSS-APPELLANT, J. H. MORGAN, SR.

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PRELIMINARY STATEMENT

To aid the Court the respondent and cross-appellant Morgan will likewise refer to the transcript by the letter "R" and to the parties as in the court below.

This brief will encompass both an answer to appellant's brief and the cross appeal of the defendant Morgan. As to each subject a statement of points will be separately set forth.

## STATEMENT OF FACTS

In most respects the plaintiff's statement of facts is acceptable to the defendant Morgan. There are some material statements made, however, that are not supported by the testimony and exhibits, and in fact are contrary to the evidence adduced at the trial. Also, additional facts are necessary to properly present the picture to this court.

The defendant Morgan especially objects to the factual statement at page 3 of plaintiff's brief wherein it is stated:

“However, when plaintiff pointed out the options contained in the agreement and attempted to exercise the option to purchase the additional 2500 shares of White Canyon Mining Company stock at 80 cents per share, the defendant Morgan refused to make any payment and indicated to plaintiff that the agreement in his opinion was usurious and plaintiff left Morgan's office without any satisfaction either by way of cash or stock. (R. 47-49)”

The above referred to pages do not support such a factual statement. The record is clear that defendant Morgan offered to pay the note (R. 48. R. 69-70. R. 79. R. 83. R. 120-121.) Morgan paid into court \$2,681.55 on November 4, 1955. (R. 14.)

The quoted statement from plaintiff's brief is also misleading, unfounded, and contrary to the facts which are that at the time the plaintiff came

to see the defendant Morgan, purportedly to exercise the option for 2500 shares of White Canyon Mining Company stock, the plaintiff was actually asking for 10,000 shares of White Canyon Mining Company stock and not just the 2500 shares as set forth in plaintiff's statement of facts. The facts are that plaintiff was demanding the 7500 shares in addition to the 2500 shares. (R. 66-67. R. 78. R. 84. R. 95. R. 120-121.) As testified to by plaintiff (R. 51.), plaintiff's counsel was authorized to write and did send to defendant's Ex. P-5, from which we quote:

“Demand is hereby made upon you for delivery of 7500 shares of White Canyon Mining Company stock in lieu of payment of the above mentioned note and further demand is hereby made for an additional 2500 shares of White Canyon Mining Company stock at the purchase price of 80¢ per share, totaling \$2000, which amount I am authorized to pay you upon receipt of 10,000 shares of said stock.”

Morgan's testimony is completely consonant with the contents of Ex. P-5 which, as above noted, was written and sent by plaintiff's counsel. Morgan testified:

“The conversation took place as Mr. Williams stated after I told him that I would pay the \$2500.00 note and interest and then he said, ‘What about the stock?’ We had the contract out at that time and he said he wanted the 7500 shares and the 2500 shares. The



2500 shares he was willing to pay the eighty cents a share if I would deliver him the 10,000 shares. He put it just about the same way as Mr. Boyle put it in his letter; that they wanted delivery of the 10,000 shares. I told him that I was holding that stock as trustee for Mr. Espey; that if I should deliver him the 7500 shares, Mr. Espey could sue me because I was holding it in trust for him; that the only thing I could do was to let him exercise his option if he wanted to on the 2500 shares at eighty cents. He didn't want to exercise his option on the 2500 shares unless I would deliver him the full 10,000 shares. (R. 95.)

Moreover, plaintiff was willing to loan defendant Espey money upon proper safeguards, for he testified:

“If you could get someone whom I know or know of and know that they are good for it, I would possibly make the loan.” (R. 43.)

Additionally, it is a fact that the defendant Morgan had never met the plaintiff until some four to ten days after the note had become due. (R. 47. R. 55. R. 58.) The defendant Morgan was an accommodation endorser and did not receive any portion of the \$2,500.00 loaned by the plaintiff to the defendant Espey. (R. 67. R. 118).

## STATEMENT OF POINTS

### POINT I.

THERE IS NO ERROR IN THE FINDING OF THE TRIAL COURT THAT THE 7500 SHARES OF WHITE CANYON STOCK WERE HELD BY THE DEFENDANT MORGAN AS SECURITY ONLY.

## POINT II.

EVEN IF THE 7500 SHARES OF STOCK WERE NOT HELD AS SECURITY, PLAINTIFF MUST NEVERTHELESS FAIL UNDER HIS THEORY, SINCE MORGAN ELECTED TO PAY THE NOTE RATHER THAN DELIVER THE SHARES.

## ARGUMENT

### POINT I.

THERE IS NO ERROR IN THE FINDING OF THE TRIAL COURT THAT THE 7500 SHARES OF WHITE CANYON STOCK WERE HELD BY THE DEFENDANT MORGAN AS SECURITY ONLY.

Plaintiff contends by his appeal that he can parlay a loan of \$2,500.00 for five months into \$16,780.00, and this amount to be charged to a defendant (Morgan) who did not receive five cents of the \$2,500.00 loaned by plaintiff. Assuming the facts and law would support such a harvest, it is shocking. Fortunately, neither the facts nor the law will permit it.

Plaintiff in his brief assumes that the 7500 shares was a pledge and then proceeds to say it was not a pledge because possession was never delivered to plaintiff. The defendant Morgan is not overly concerned as to what type of security the 7500 shares constituted. Possibly the shares did constitute a pledge. If so, did not the plaintiff and all parties select and agree that Morgan would be the pledge holder? How more clearly could they have done this than by their execution of the agreement,

Ex. P-1. The law is cognizant of such a delivery to a depository or pledge holder. See 41 *Am. Jur.* 599, wherein it is stated:

“In order to perfect the contract of pledge, the delivery need not be made to the creditor himself; it will be sufficient if the thing pledged is placed in the hands of a third person who has been chosen by debtor and creditor to hold for the creditor, provided such third person knows of the trust and accepts the obligation which it imposes.”

See also *C.J.S.* at page 23 wherein it is stated:

“Such third person may be agent, clerk or servant of the pledgor.”

The fundamental and basic question is whether or not the 7500 shares were held as security. They may have taken the form of a chattel mortgage, a bailment, trust, trust receipt, or it may have been that they were the subject of an equitable lien. In this regard, see generally 33 *Am. Jur.* 427, wherein it is stated:

“An equitable lien is a right, not recognized at law, to have a fund or specific property, or its proceeds, applied in whole or in part to the payment of a particular debt or class of debts. It is not an estate of property in the thing itself, nor is it a right to recover the thing, that is, it is not a right which may be the basis of a possessory action, but it is merely a charge upon it. Such a lien may be created by an express contract which shows an intention to charge some particular property with a debt or obligation, or it may

arise by implication from the relations and dealings of the parties whose interests are involved. Likewise, a lien may be created by an equitable assignment of a contract, debt, or fund. In fact, if a transaction resolves itself into a security, whatever may be its form and whatever name the parties may choose to give it, it is in equity a lien. Possession by the lienor of the thing sought to be charged is not essential to the existence of an equitable lien, which differs in this respect from a common-law lien.”

*C.J.S.* defines equitable liens as follows, page 836:

“The essential elements of an Equitable Lien include a debt, duty or obligation owing by one person to another, and a res to which that obligation fastens. An Equitable Lien may arise from an express contract whereby a party promises to transfer, or indicates an intent to charge a particular property as security for an obligation. No special form of contract is essential, provided the intent of the parties to create a lien is clearly expressed.”

Utah recognizes the equitable lien doctrine. See *Olsen vs. Kidman*, 120 Utah 443, 235 P. 2d 510.

To determine the status of the 7500 shares, the contract and note, Ex. P-1 and P-2, respectively, must be examined. The contract has in the recital paragraph that first parties (the defendants) are to receive 50,000 shares of White Canyon Mining Company stock; and second party (the plaintiff)

shall make a \$2500.00 loan to defendant Espey.

By paragraph 1, defendant Espey agrees to execute a note for \$2500.00 plus interest for a period of five months. In this same paragraph the agreement provides:

“To secure said note, Espey authorizes Morgan to hold for him in trust 7500 shares . . . to be delivered to second party upon failure to pay the note when due.”

Then the agreement at paragraph 2 commences:

“For making said loan, second party may choose one of three following options.”

The options are lettered “A”, “B”, and “C”, and the first two refer to Coyote claims and “C” grants an option to White Canyon stock. In addition to the above three options, the agreement states:

“An additional consideration for said loan . . . .”

And this relates to the particular 2500 shares of White Canyon Mining Company stock, which are partially the subject of this litigation and often-times referred to as the option stock.

It is to be readily noted that the agreement very clearly separates the note and 7500 shares of stock contained in paragraph 1 from the option stock which is contained in paragraph 2. Observe that paragraph 2 commences: “For making said loan . . . .” and there is given under this paragraph the options lettered “A”, “B”, and “C”. These options, in other words, were the consideration for

the making of the loan. Observe also that the agreement states, "An additional consideration for said loan . . ." and there it is just as the parties intended, the plaintiff was granted the further option to acquire 2500 shares upon paying 80 cents per share.

The 7500 shares of White Canyon stock are tied in solely and exclusively with the note and, in fact, the agreement states that they are "to secure said note." And so the agreement, under any reasonable interpretation, shows an intent to separate the option stock from the security stock which was tied to the note.

As an aid to the construction and interpretation we need not entirely be confined to the four corners of the agreement. Certainly the note, Ex. P-2, should be considered. The note is in the normal form and the last sentence provides:

"If this note or interest is not paid as agreed, the undersigned jointly and severally agree to pay all costs incurred and such reasonable attorney's fees as may be allowed by court upon the actual foreclosure of the security or upon entry of judgment."

Thus, the note clearly spells out what was to be done with the security if default occurred.

The agreement and note are plainly susceptible to only one reasonable interpretation. They clearly show that the parties understood the difference



between a security transaction and option for a sale. There are no provisions for forfeiture or liquidated damages.

Since there are no words of sale pertaining to the 7500 shares of stock qualifying the manifest provisions that said shares are held as security, plaintiff's claim that he is entitled to all of it in absolute appropriation to satisfaction of the debt must be found in some rule of law. Plaintiff has quoted no such law, and our search has revealed no such rule. The cases are numerable holding that a creditor is entitled to satisfaction of the debt and he can look to the security for satisfaction, but that he would be required to account to the debtor for any surplus above the obligation and proper expenses, and upon payment or tender before sale of the security, the lien upon the security is discharged. *Lilenquist v. Utah State Savings Bank*, 99 Utah 163, 100 P. 2d 185; *Hyams v. Bamberger*, 10 Utah 336 P. 2d 202. The *Lilenquist* case, *supra*, quotes with approval the text of R.C.L. found in 41 *Am. Jur., Pledges and Collateral Security*, Sec. 74:

“The rule is settled in most jurisdictions that upon the tender of the amount of the debt for which the property is pledged, either upon the day of the maturity, or thereafter before the property has been lawfully sold by the pledgee, the lien of the pledgee is destroyed, and an action will lie in favor of the pledgor, against the pledgee if the latter refuses to

deliver up the pledge, and it is usually held that it is not necessary that the pledgeor should keep the tender good in order to maintain the action.”

The plaintiff, in his efforts to avoid the obviously correct finding of the trial court that the 7500 shares were held as security for the note, has been forced to contend that in reality the option lay with the defendants as to whether they would pay the note at maturity or deliver the stock. See page 12, plaintiff’s brief. To support this strained contention, the plaintiff argues at page 13 of his brief; that it was his understanding that if the stock had gone down in value, the defendants could have satisfied their obligation insofar as the \$2500.00 loan was concerned by delivering 7500 shares of stock; that even though the stock might be worth less than \$2500.00 at the time the note was due, still, plaintiff was willing to take the gamble of such a transaction because of the hope that the stock would subsequently achieve a substantial increase in value.

In making this argument, reliance is placed upon the testimony of the plaintiff as to what was his understanding of the agreement. The purported understanding was never communicated or divulged to defendant Morgan and, although repeated and strenuous objection was made to the admission of this testimony during the course of the trial, never-



theless the evidence was admitted. In view of the court's finding, there is no need to comment further on this, except to point out that even this argument by plaintiff seems exactly contrary to the following testimony by plaintiff elicited during cross examination: (R. 70.)

“Q. If the stock had only been worth ten cents a share and Mr. Morgan had put on a good act, that would have been all right with you?

A. It probably would have because if Mr. Morgan actually had insisted that I take this White Canyon stock, I would have no doubt have taken the money, would have insisted on having the money.

Q. You testified that he wanted to give you a check for the \$2500.00 and you said —

A. He wanted to give me a check for \$2500.00, that is correct.

Q. So you were going to just wait for Mr. Morgan and were going to go the other way, is that right?

A. In effect, that way, yes.

Returning to the plaintiff's contention that the defendants had the option of paying the note when due, or, in lieu thereof, delivering the stock, we are compelled to wonder where in the agreement there is any consideration granting defendants this right, or if defendants were accorded such an option, would not the parties have so stated in the agreement?

The fact that there were options in the agreement involving Coyote claims and White Canyon stock also completely discredits any such contention by plaintiff. Under option "C" the plaintiff, and only the plaintiff, can elect to take 2500 shares of White Canyon stock and forgive \$1250.00 of the debt. Under option "B" the plaintiff, and only the plaintiff, could elect to cancel \$1250.00 and accept instead 2% interest in the Coyote District claims. The only logical result of plaintiff's argument is that options "B" and "C" would have been eliminated if defendants had elected to discharge the \$2500.00 obligation by delivering the 7500 shares of White Canyon stock which conceivably could have only been worth, at the time of delivery, ten cents a share. This would seem to follow, since there would no longer have been any \$2500.00 obligation against which the plaintiff could have chosen to cancel \$1250.00 in exchange for Coyote claims (option "B") or White Canyon Mining Company stock (option "C").

This, to the defendant's mind, points out rather vividly the compelled conclusion that the agreement is susceptible of only one reasonable interpretation. The agreement covers two subjects, one, a note which is secured by 7500 shares of stock, and the other subject refers to various stock options. It is a well accepted rule of law that in the interpre-

tation of written instruments the intent so expressed is to be found, if possible, within the four corners of the instrument itself in accordance with the ordinary accepted meaning of the words used. (*Ephraim Theatre Co. vs. Hawk*, 7 Utah 2d 163, 321 P. 2d 221.)

The intent of a contract is to be ascertained from the four corners of the instrument itself, and if ambiguity can be reconciled from a reasonable interpretation of the instrument, extrinsic evidence should not be allowed. (*Continental Bank and Trust Co. v. Bybee*, 6 Utah 2d 98, 306 P. 2d 773).

Here, as we have pointed out, to interpret this agreement as in reality granting the right to defendants to pay the note at maturity or deliver the 7500 shares, could result in rendering the language of options "B" and "C" useless and meaningless.

As we have heretofore stated, the defendant is not particularly concerned as to the nature of the security. At 41 *Am. Jur.* p. 584, it is stated:

"The solution of the question whether a transaction shall be treated as having the characteristics of one form of security rather than the other often must depend on the showing as to the intention and conduct of the parties. This intention or conduct is ascertained from the whole instrument evidencing the transaction, and not from particular words therein. Thus, the fact that the word "pledge" is employed in an instrument evidencing a transaction does not conclusively

determine its character, but the rule is that even where this word is used, if it appears that it is the clear intent of the parties that the possession of the subject matter is to remain in the debtor and the possession does so remain, the transaction may be held to be a mortgage.”

And later, at p. 585, it is stated:

“Unless there is some evidence tending to show an intention on the part of the debtor to give, and also on the part of the creditor to receive, the property in satisfaction of the debt, either in whole or in part, the law presumes that it is given only as a collateral security. Especially does this presumption arise if the property given was itself a chose in action or a security of a different nature from the debt, whose value was neither intrinsic nor apparent, and was not agreed upon by the parties.”

This authority also cites with approval *Casey v. Cavaroc*, 96 US 467, 24 L. ed. 779 and Am. Law Inst. Restatement, Security, Sec. 10, as authority for the proposition that:

“A contract which is intended as a pledge of property is enforceable between the parties, although there has been no delivery of possession, provided there is a proper subject matter, a debt or engagement, and a meeting of the minds of the parties that the subject matter shall be handed over to secure the payment or fulfillment of the debt or engagement.”

By any test of conduct of these parties as to

the 7500 shares of stock, it is clear that a security transaction was intended and created. The plaintiff said he would be willing to make a loan if a responsible party would sign. He accepted Morgan as such a party and obtained his signature. The note and agreement, Ex. P-1 and P-2, as pointed out, created a security transaction, and not as plaintiff contends, a right to demand appropriation of 7500 shares of stock to satisfy the debt. The state of the oral testimony by the parties leads to the same conclusion.

## POINT II.

EVEN IF THE 7500 SHARES OF STOCK WERE NOT HELD AS SECURITY, PLAINTIFF MUST NEVERTHELESS FAIL UNDER HIS THEORY, SINCE MORGAN ELECTED TO PAY THE NOTE RATHER THAN DELIVER THE SHARES.

Although the defendant Morgan does not concede the ill-founded theory of plaintiff to the effect that by the agreement defendants were given the option of either paying the note at maturity or delivering the stock, nevertheless, even under such a theory it would appear that plaintiff must fail; and this for the plain and obvious reason that if such an election resided in the defendant Morgan, he made the election to pay the note and not deliver the 7500 shares. We have previously referred to numerous instances in the record where Morgan tendered payment of the note and will not again detail these.

The trial court found that Morgan tendered payment of the note. There is ample evidence for such a finding, and indeed, no other finding could have been made in the light of the evidence. And, of course, it is elemental that the trial court's judgment will not be disturbed on appeal unless there is insufficient evidence to support it, or unless there is a prejudicial error of law.

In summation, the defendant submits that clearly the 7500 shares were held as security; that if they were not so held, then even though plaintiff's theory is adopted, which would give defendants the option of paying the note or delivering the stock; nevertheless, the tender of payment by Morgan constituted an election on his part not to deliver the stock. And in neither event can there be any basis for an action of conversion. And if there was no conversion, the damages claimed by plaintiff are, of course, immaterial.

## CROSS APPEAL STATEMENT OF POINTS

### POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT, AND CONTRARY TO, THE FINDING OF THE COURT THAT PLAINTIFF EXERCISED THE OPTION TO ACQUIRE 2500 SHARES OF WHITE CANYON MINING COMPANY STOCK.

POINT II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT, AND CONTRARY TO, THE FINDING OF THE COURT THAT DEFENDANT J. H. MORGAN, SR. WRONGFULLY REFUSED TO SELL 2500 SHARES OF WHITE CANYON MINING COMPANY STOCK TO PLAINTIFF AT THE AGREED PRICE OF 80 CENTS A SHARE.

POINT III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT, AND CONTRARY TO, THE FINDING OF THE COURT THAT PLAINTIFF IS REASONABLY ENTITLED TO ATTORNEY'S FEES IN THIS MATTER, AND THAT FIVE HUNDRED DOLLARS IS A REASONABLE FEE THEREFOR.

POINT IV.

THE FINDINGS AND CONCLUSIONS ARE INSUFFICIENT TO SUPPORT THE JUDGMENT OF DAMAGE TO PLAINTIFF AS THE SAME RELATES TO THE 2500 SHARES OF WHITE CANYON MINING COMPANY STOCK.

POINT V.

THE FINDINGS AND CONCLUSIONS ARE INSUFFICIENT TO SUPPORT THE AWARD OF FIVE HUNDRED DOLLARS ATTORNEY'S FEES TO PLAINTIFF.

POINT VI.

ASSUMING, ALTHOUGH DENIED BY THIS DEFENDANT, THAT PLAINTIFF EXERCISED THE OPTION TO ACQUIRE THE 2500 SHARES OF WHITE CANYON MINING COMPANY STOCK; EVEN SO, THE JUDGMENT IS AGAINST LAW, IN THAT PLAINTIFF, BY HIS INITIAL COMPLAINT, MADE AN ELECTION OF REMEDIES AND SHOULD NOT BE PERMITTED TO DEPART FROM HIS ELECTION BY AMENDING THE COMPLAINT AND TRYING THE CASE ON A SUBSEQUENT THEORY OF CONVERSION.



## POINT I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT, AND CONTRARY TO, THE FINDING OF THE COURT THAT PLAINTIFF EXERCISED THE OPTION TO ACQUIRE 2500 SHARES OF WHITE CANYON MINING COMPANY STOCK.

An option is merely an offer which cannot be withdrawn for a specified period of time. See *Williston on Contracts*, Section 61, and to be binding the offer must be accepted according to the terms of the offer without imposing new conditions. *Williston on Contracts*, Sec. 73, *Restatement of Contracts*, Sec. 59 and 60.

The above is so fundamental that no additional authority need be cited. And thus we are left with the sole question as to whether, bearing in mind that the burden was upon the plaintiff, has the plaintiff as a matter of fact proved, that he exercised the option according to its terms, and that the defendant Morgan refused to honor the terms of the option. For plaintiff to prevail there must have been an unqualified and unconditional exercise of the option granted. And this would require the tender of \$2000.00 by the plaintiff for 2500 shares of White Canyon Mining Company stock. This tender to be effective, can in no way be qualified or coupled with any other demand or condition, as for instance, demand for the 7500 shares.

The trial court found in paragraphs 4 and 5 of its findings of fact that plaintiff indicated his de-



sire to exercise his option to the 2500 shares of stock in the White Canyon Mining Company by offering to defendant \$2000.00 and that the defendant Morgan refused to sell the 2500 shares to the plaintiff at the agreed price. Conclusions of law were accordingly made by the trial court.

The only and ultimate question now presented is whether or not the findings of fact are contrary to the evidence. We submit the correct and true facts are; that the defendant Morgan did not sell the 2500 shares to the plaintiff; that the defendant Morgan never refused to sell to the plaintiff 2500 shares of stock according to the terms of the option; that any attempted exercise of the option by plaintiff was always coupled, qualified and conditioned upon defendant delivering, not only the 2500 shares, but also the 7500 shares of White Canyon Mining Company stock.

There are three main sources in the record from which it can be determined whether the option was exercised and properly or improperly refused. We will quote at length from the record as to these three sources.

First, the plaintiff could not have attempted to exercise the option so far as the defendant Morgan is concerned, until he first met Morgan which was some four to ten days after the due date of the note. (R. 46-47.) Plaintiff testified as to this first

and only meeting with the defendant Morgan as follows:

“A. For this meeting we were on, yes, and I discussed this thing with Mr. Morgan that Espey had never paid the note and that he was very shocked; that seemingly appeared shocked that he hadn’t paid it. He said, ‘I can’t understand why he hasn’t paid it. He has paid the rest of them. I don’t know why he missed yours.’ As I recall this, Mr. Morgan got on the telephone and tried to find him at a tourist court or some such a thing. I don’t even recall if he did find him. I don’t believe he did but as I recall he did some of that. He said, ‘Well, Mr. Williams, I’ll have to pay this note to you,’ and he called his secretary in and said, ‘Give Mr. Williams \$2500.00 plus this 6% interest that he has coming to him.’ I told Mr. Morgan that there was other things in the contract and that — that there was optional stock — various stock options in it and too that the note had not been paid on time and that I would expect to get out of this contract those things that I felt that I was entitled to.

Q. Did you discuss particularly the Coyote interests that are mentioned on the first page of Exhibit I?

A. Yes, Mr. Morgan pointed at that and told me that I could have that. As I recall, too, he said, ‘It isn’t any good but you can have it.’ He said, ‘I don’t think it would be any good but you can have it.’

So, I further explained that there was a couple of other options here that had to do

with White Canyon stock and he said, 'No,' he said, 'you're not about to get that.'

THE COURT: I did not hear that.

A. He said, 'No,' or words to the effect that, 'you are not about' — I think the word he used, actually used was, 'I'll see you in hell first on that one. You will not get it,' and I told him that I felt I was entitled to it and I would have to see an attorney. He told me, he said, 'It is usury.' I said 'I don't know about that.' Actually I didn't because I didn't know what usury was but I would have to see an attorney and decide.

THE COURT: Now, that was as to what stock?

THE WITNESS: That has reference, Your Honor, to the White Canyon stock, yes sir.

Q. (By Mr. Boyle) Did he make any reference as to what a Court might do if you went to Court?

A. Well, the only reference he had to it, Mark, was that a Court would call it usury. I saw an attorney and —

Q. Excuse me, did you receive any money?

A. No sir.

Q. And did that terminate the conversation?

A. That terminated the conversation. Additional testimony by the plaintiff concerning the White Canyon Mining Company stock is to

be found at R. 66-67. This is the conversation plaintiff purportedly had with defendant Espey, the substance of which was never communicated or divulged to the defendant Morgan.

On cross examination, R. 69-70, almost all of the testimony pertains to the 7500 shares of stock. At R. 83, the plaintiff testified:

“Well, Mr. Morgan was very courteous, and very nice. He, as I before mentioned, offered to pay this \$2500.00 plus the interest, Then, when I talked about the other things in the contract that I felt that I was entitled to and got into it, of course, he was — he didn’t mind about Coyote. He told me himself. I knew nothing about Coyote but as I recall he told me that Coyote was worth nothing anyway but might be and you can have that but when we got to the White Canyon deal, that is when Mr. Morgan — he wanted to know — he wanted no part of that.”

Reading the above testimony, it is certainly clear that plaintiff on none of those occasions tendered \$2000.00 for 2500 shares of White Canyon Mining Company stock. It is true that he testified:

“I told Mr. Morgan that there was other things in this contract and that — that there was optioned stock — various stock options in it and too that the note had not been paid on time and that I would expect to get out of this contract those things that I felt that I was entitled to.” (R. 48)

And later:

“So I further explained that there was a couple of other options here that had to do with White Canyon stock.” (R. 48)

And further at R. 83:

“I knew nothing about Coyote but as I recall he told me that Coyote was worth nothing anyway but might be and you can have that but when we got to the White Canyon deal that is when Mr. Morgan — he wanted to know — he wanted no part of that.”

And so as to all of these quoted statements, there is completely lacking any definite or positive assertion by plaintiff that he tendered \$2,000.00 for the 2500 shares of White Canyon stock.

One thing certainly appears to be true and that is that when the plaintiff went to the defendant Morgan’s office he didn’t have the preconceived plan of exercising the option to acquire the 2500 shares of White Canyon stock by paying 80 cents per share. This conclusion is arrived at when we consider the testimony of plaintiff on redirect, R. 83:

“Q. On cross examination you said it was Mr. Morgan’s actions that made you think the White Canyon stock was valuable for the first time. Will you tell the court just exactly what his actions were that led you to this belief?”

The testimony of plaintiff on cross examination at R. 69-70, wherein he stated that:

“. . . if Mr. Morgan actually had of insisted that I take this White Canyon stock,

I would have no doubt have taken the money, would have insisted on having the money,” also requires the conclusion that certainly during plaintiff’s talk with Morgan he had no preconceived idea to exercise the option for the 2500 shares of White Canyon stock.

Another illuminating factor of this transaction is that by option “C” plaintiff could have acquired 2500 shares of White Canyon stock for 50 cents a share. It is utterly unreasonable and incomprehensible that plaintiff would tender 80 cents a share for stock that he could have acquired for 50 cents a share. The plain fact of the matter is that, regarding the testimony we have so far examined, plaintiff did not tender the 80 cents per share for the 2500 shares of White Canyon stock, and thus from the first source, plaintiff’s testimony, there is no evidence clearly indicating that the option was exercised.

The second source to which we can look involves an examination of Ex. P-5, which was the letter plaintiff’s attorney wrote to the defendant on February 18, 1955, and from which we quote in part:

“Demand is hereby made upon you for delivery of 7500 shares of White Canyon Mining Company stock in lieu of payment of the above mentioned note and further demand is hereby made for an additional 2500 shares of White Canyon Mining Company stock at

the purchase price of 80¢ per share, totaling \$2000, which amount I am authorized to pay you upon receipt of 10,000 shares of said stock.”

Now here the key phrase is, “which amount (and this can only mean the \$2000.00) I am authorized to pay you upon receipt of 10,000 shares of said stock.” The letter containing the demand is clear and unequivocal, a tender of \$2000.00 was made providing 10,000 shares were received. This was not an unqualified exercise of the option. It was conditional, the condition being delivery of 10,000 shares and not just the 2500 shares which were the subject of the option.

The third source can be found in the testimony of the defendant Morgan at R. 95:

“The conversation took place as Mr. Williams stated after I told him that I would pay the \$2500.00 note and interest and then he said, ‘What about the stock?’. We had the contract out at that time and he said he wanted the 7500 shares and the 2500 shares. The 2500 shares he was willing to pay the eighty cents a share if I would deliver him the 10,000. He put it just about the same way as Mr. Boyle put it in his letter; that they wanted delivery of the 10,000 shares. I told him that I was holding the stock as trustee for Mr. Espey; that if I should deliver him the 7500 shares, Mr. Espey could sue me because I was holding it in trust for him; that the only thing I could do was to let him exercise his option if he wanted to on the 2500



shares at eighty cents. He didn't want to exercise his option on the 2500 shares unless I would deliver him the full 10,000 shares."

It is submitted that a reading of the testimony of the plaintiff and defendant and examination of Ex. P-5 fails to show the plaintiff exercised the option for 2500 shares, and in fact compels the conclusion that the option was not exercised. If the option was not exercised, there can of course be no finding that Morgan wrongfully refused to sell the 2500 shares, and it follows that there is no basis to support the judgment of damage to the plaintiff as the same relates to the said shares.

Points II and IV are primarily covered by the argument previously made and no further argument will be submitted as to these.

### POINT III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT, AND CONTRARY TO, THE FINDING OF THE COURT THAT PLAINTIFF IS REASONABLY ENTITLED TO ATTORNEY'S FEES IN THIS MATTER, AND THAT FIVE HUNDRED DOLLARS IS A REASONABLE FEE THEREFOR.

Defendant Morgan endorsed the promissory note for the accommodation of Espey, and, as he stated, he did not receive one cent from the loan. He is an accommodation party under definition of the Law of Negotiable Instruments, 44-1-30, U.C.A., 1953, and was entitled to notice before he could be in default. 44-1-91, U.C.A., 1953. All of the evidence is;



that upon notice to defendant Morgan that the maker Espey had not paid the note on its maturity date, defendant promptly tendered principal and interest to the holder plaintiff. There is no evidence to the contrary.

Having made a valid tender, and not being in default, defendant is not liable to pay attorney's fees for enforcement of the note nor for interest accruing after the tender. See *11 C.J.S. sec. 726 Page 274*, holding:

“There is no liability for attorney's fees when the amount due on the instrument has been tendered.” (citing cases).

47 C.J.S., *INTEREST*, sec 52, p. 63,

“The valid tender of the amount of the principal debt prevents the running of interest.” (citing cases)

Curiously, the trial court found that the defendant Morgan had tendered payment of the note, but then inconsistently, it was also found that plaintiff was entitled to \$500.00 attorney's fees. The award of attorney's fees can only be predicated upon the note, and if tender of payment was made upon demand, the award of attorney's fees cannot be supported. Point V relates to the same subject matter and is submitted without further argument.

Both upon principle and authority the Lower Court's judgment awarding interest and attorney's fees on the note should be reversed, and the Lower

Court should be directed to modify the judgment to allow principal and interest to the date of tender only.

#### POINT VI.

ASSUMING, ALTHOUGH DENIED BY THIS DEFENDANT, THAT PLAINTIFF EXERCISED THE OPTION TO ACQUIRE THE 2500 SHARES OF WHITE CANYON MINING COMPANY STOCK; EVEN SO, THE JUDGMENT IS AGAINST LAW, IN THAT PLAINTIFF, BY HIS INITIAL COMPLAINT, MADE AN ELECTION OF REMEDIES AND SHOULD NOT BE PERMITTED TO DEPART FROM HIS ELECTION BY AMENDING THE COMPLAINT AND TRYING THE CASE ON A SUBSEQUENT THEORY OF CONVERSION.

Plaintiff by his original complaint, filed on or about March 18, 1955, demanded that defendants deliver title to 7500 shares and 2500 shares of White Canyon Mining Company stock. It is submitted that this action as initially filed, clearly amounts to an action in the nature of replevin. The plaintiff by his pleading made demand upon defendants for delivery of the stock and alleged refusal to deliver on the part of the defendants. The prayer of the complaint demanded transfer of title and delivery of the 7500 and 2500 shares to plaintiff. Subsequently, the defendants answered the complaint, and the matters were at issue.

Thereafter, on January 11, 1957, almost two years later, the plaintiff filed an amended complaint. By this amended complaint, the theory of recovery

was drastically changed. The amended complaint, and the pleading upon which issues have been drawn now pertains to recovery on a theory of conversion. The answer of the defendant Morgan plead as a defense the doctrine of election of remedies.

That the plaintiff is now proceeding upon a theory of conversion is plainly evident from the amended complaint. Paragraph 8 states:

“Defendants have converted said shares of stock to their own use and benefit.”

And again at paragraph 11 it is plainly evident that the theory is now conversion. It is of course not even remotely possible that the plaintiff would dispute the nature of the amended complaint in view of the brief filed on his behalf.

And so it is submitted that this is exactly the type of situation to which the doctrine of election of remedies applies. As is generally stated in 18 *Am. Jur.* at page 129:

“DEFINITION AND NATURE. — Election is simply what the term imports — a choice shown by an overt act between two or more inconsistent rights, either of which may be asserted at the will of the chooser alone. An election of remedies may be defined as the choosing between two or more different and coexisting modes of procedure and relief allowed by law on the same state of facts. The doctrine is applicable where an aggrieved party has two remedies by which he may enforce inconsistent rights growing out of the

same transaction and, being cognizant of his legal rights and of such facts as will enable him to make an intelligent choice, brings his action by one of the methods. Under such circumstances, the law says he shall not thereafter adopt the alternate remedy, for a suitor cannot pursue a remedy which predicates his case upon one theory of right and thereafter seek a remedy inconsistent with such prior proceeding. If he has voluntarily chosen and carried into effect an appropriate remedy with knowledge of the facts and his rights, he will not, in general, be allowed to resort afterward to an inconsistent remedy, which would involve a contradiction of the grounds upon which he before proceeded.”

As stated in 89 C.J.S., page 553:

“Trover is the technical name of the action to recover damages for a wrongful conversion of the personal property of another.”

We now have a situation in this litigation where plaintiff instituted an action of replevin, indeed plaintiff termed the initial complaint, as being one for specific performance (R. 6) and then subsequently, over objection of defendant Morgan, amended to plead and thereafter try the case upon a theory of trover, or, as is more commonly known, conversion.

The doctrine of election of remedies is applicable where remedies of replevin and trover are concerned. In the case of *Equitable Trust Company vs.*

*Connecticut Brass and Manufacturing Corporation*, C.C.A. 2, 290 F. 712, it is stated at page 725:

“All actions which proceed upon the theory that title to the property is in the claimant are substantially inconsistent with those which proceed upon the theory that title is in the defendant. Thus the remedies of replevin and trover are inconsistent. In one of them the plaintiff affirms his ownership of and title to the property seized; in the other he disaffirms his ownership and title and sues for the conversion. If a plaintiff elects to resort to one of these remedies, he thereby deprives himself of any right to resort to the other.”

The above case was cited with approval in *Todd vs. Duncklee*, 94 N.H. 226, 52 Atl. 2d 285. The Tennessee case, *Johnston vs. Cincinnati, N.O. and TPR Company*, 146 Tenn. 135, 240 S.W. 428, states at page 438:

“It is therefore manifest that, if the facts would have sustained a claim of conversion, which is not necessary to decide, complainant in his bill elected to waive that claim by alleging his own ownership of the property, and asking for its return and for rental or hire for its use . . .”

In *Saner vs. Whiteman Lumber Company vs. Texas and N.O.R. Co.*, Texas, 288 S.W. 127, the court at page 128 stated:

“The court of appeals has correctly held that the lessor of these rails had a choice of remedies. It could recover the rails, or pro-

perty itself as per the terms of the contract, or it could recover their value because of the conversion. But the two remedies are clearly inconsistent. Both cannot be pursued. One cannot recover the rails and also their value. It was necessary to make an election, and lessor made it. Having made this election, it must abide by it.”

There can no longer be any question in Utah as to when the election is conclusive. *Howard vs. Paulson Co.*, 41 Ut. 490, 127 Pac. 284 held that where there was a duty of election as to a particular remedy, the bringing of an action based upon one remedy constitutes an irrevocable election in the absence of mistake of fact or other legal excuse.

The fairness involved in the election of remedies doctrine is brought into sharp focus in this case. For a period of some 22 months the plaintiff pleaded and relied upon replevin, that is to say he was seeking the return of the stock. In effect, during this period the plaintiff played the market, and when the value of White Canyon stock substantially decreased, see Ex. P-4, he determined to amend his pleading and proceed on another and inconsistent theory, namely, trover and conversion.

The defendant J. H. Morgan, Sr. submits without ~~agreement~~<sup>argument</sup> the previously designated defense of usury.

## CONCLUSION

In summation, defendant J. H. Morgan, Sr. submits the following:

The 7500 shares of White Canyon Mining Company stock were held as security, and the decision of the trial court must be affirmed. If not so held, then even under plaintiff's theory the defendant elected to pay the note rather than deliver the stock.

The trial court's decision as to the 2500 shares must be reversed for the reason that plaintiff never exercised the option to purchase such shares, or if the option was exercised, plaintiff by his initial complaint made an irrevocable election to sue in replevin and thus was precluded from thereafter amending and proceeding in trover and conversion.

The trial court's award of \$500.00 attorney's fees is clearly in error and must be reversed, since defendant tendered payment of the note.

The lower court should be directed to modify the judgment so as to award interest to the date of tender only.

Respectfully submitted,

MULLINER, PRINCE  
and MANGUM