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Utah Supreme Court

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Duane A. Frandsen & MICHAEL A. HARRISON; Attorneys for AppellantJOHN PRESTON CREER, KENT B. SCOTT, RICHARD G. ALLEN; Attorneys for Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. M. BARNES COMPANY, a Corporation,

Plaintiff-Appellant,

vs

SOHIO NATURAL RESOURCES COMPANY, a Corporation, formerly SOHIO PETROLEUM COMPANY, a Corporation

Defendant-Respondent.

Case No. 16454

APPELLANT'S BRIEF

Appeal from the Judgment of the
Fourth District Court for Uintah County
Honorable George E. Ballif, Judge

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FILED

JUL 18 1979

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. M. BARNES COMPANY, a Corporation,

Plaintiff-Appellant,

vs

SOHIO NATURAL RESOURCES COMPANY, a Corporation, formerly SOHIO PETROLEUM COMPANY, a Corporation,

Defendant-Respondent. Case No. 1138

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vs	)	
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Defendant-Respondent.	)	Case No. 1138

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is a civil action to quiet title in real property situated in Uintah County, State of Utah, and for damages.

DISPOSITION OF THE LOWER COURT

This matter came before the Honorable George E. Ballif, Judge of the Fourth Judicial District Court in and for Uintah County, State of Utah, on Respondent's Motion for Summary Judgment. The Court granted Respondent's Motion for Summary Judgment against the Appellant ordering that the Complaint be dismissed. The court further ordered that Respondent's Motion for Summary Judgment against Appellant on Count 1 of Respondent's Counterclaim be granted and Summary Judgment was therefore ordered quieting title to the land in question in Respondent. In granting Respondent's Motion for Summary Judgment the Court held that the documents before the Court spelled out the transaction between the parties and established as a matter of law that said

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transaction was a sale of the property rather than a mortgage thereon and that there were no issues of material facts to be determined.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks to have the Lower Court's Order granting Respondent's Motion for Summary Judgment reversed and to have the case remanded to the District Court for a trial on the merits.

STATEMENT OF FACTS

Appellant, W. M. Barnes Company, is a corporation and is hereinafter referred to as Barnes. Respondent, Sohio Petroleum Company, is a corporation and is hereinafter referred to as Soh On September 1, 1969, Barnes was the owner of a 37 1/2 percent interest and Sohio was the owner of a 25 percent interest in wh is referred to as the Asphalt Ridge Properties, in Uintah Count State of Utah. As of said date they entered into an agreement along with others owning the remaining interest in said propert under the terms of which Sohio was to hold the full interest of said Asphalt Ridge Properties for the joint account of and in t for all owners of said property, consisting of approximately 5 acres. Also in this agreement, commonly referred to as an Operating Agreement, the parties thereto agreed that Sohio sho be the operator of said properties.

On October 7, 1971, Barnes borrowed from the National Cit Bank of Cleveland, located in Cleveland, Ohio, the sum of $500

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which amount with interest was due and payable on December 29, 1972. Barnes pledged and mortgaged its 37 1/2 percent interest in the Asphalt Ridge Properties to the National City Bank of Cleveland as security for said loan, and $500,000.00 was delivered to Barnes by the bank.

As security for said loan, Barnes, Sohio and the bank entered into an Escrow Agreement dated October 7, 1971, under the terms of which Sohio executed and delivered to Barnes on October 7, 1971, and placed in Escrow with the bank a letter which is termed a Letter of Commitment. Under the terms of said Letter of Commitment, Sohio agreed to pay to Barnes at least $500,000.00 for its interest in said Asphalt Properties, and to have a preference right to purchase said properties at a sum equal to any bona fide offer which Barnes may receive and be willing to accept at any time prior to December 31, 1972. Said letter also provided that Sohio should have 30 days after being notified by Barnes of any offer in which to decide whether or not to exercise this preferential right. In addition to said Letter of Commitment, the Escrow Agreement also contained a Conveyance and Assignment, dated October 7, 1971, by which Barnes conveyed, assigned and transferred to Sohio all of its right, title and interest in said Asphalt Ridge Properties. These documents were held in Escrow by the bank. The Letter of Commitment and the Conveyance and Assignment were required by the bank as security in making the loan.

On October 28, 1972, Barnes received an offer from Prudential Funds, Inc. to purchase Barnes' 37 1/2 percent interest in said

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Asphalt Ridge Properties for the sum of $500,000.00 in cash and a 5 year promissory note in the amount of $2,000,000.00 bearing interest at the rate of 6 percent per annum on the unpaid balance and a lease of said property to National Energy Corporation for a base period of 10 years subject to a royalty of 1/6 or $.60 per barrel, whichever was greater. On December 29, 1972 Barnes gave notice to Sohio by telephone, by telegram, and by letter advising Sohio of Prudential's offer, and giving Sohio an opportunity to exercise its right of first refusal in the purchase of the Asphalt Ridge Properties as agreed upon in the Letter of Commitment referred to above.

Barnes was not able to pay the National City Bank of Cleve for the $500,000.00 loan on December 29, 1972 and the bank, there fore, notified Sohio that the same had not been paid. On January 2, 1973 Sohio paid to the bank the principal amount of said loan together with accumulated interest in the amount of $444.44. The bank subsequently, on that same day, assigned its interest under the Escrow Agreement dated October 7, 1971 to Sohio.

Sohio is now and since January 2, 1973 has been the owner and holder of the banks interest under the October 7, 1971 Escrow Agreement. On the same day that Sohio paid for the assignment of the bank's interest on the Escrow Agreement, the b delivered the aforementioned Conveyance and Assignment, dated October 7, 1971 which was held in escrow, to Sohio. Sohio sin said date has held and continues to hold said Conveyance and Assignment in its possession.

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Sohio refused to recognize and honor the offer to purchase said properties by Prudential Funds, Inc. as communicated to Sohio by Barnes on December 29, 1972 and has declined to exercise its preferential right to purchase Barnes' interest in said Asphalt Ridge Properties by meeting the terms of Prudential's offer as required in the October 7, 1971 Letter of Commitment referred to above. Sohio now claims to be the owner in fee of the 37 1/2 percent interest of Barnes in the Asphalt Ridge Properties by reason of the bank's assignment of interest in said property to Sohio on January 2, 1973.

Never at any time did Barnes intend to sell the property to Sohio for $500,000.00. As evidenced by Prudential's October, 1972 offer to purchase the property, the property was worth many times more than $500,000.00. Barnes, at all times, intended to repay to Sohio the amount Sohio paid to the National City Bank of Cleveland in relieving Barnes of its obligation to the bank under the October 7, 1971 loan agreement plus interest. Never at any time has Sohio recorded any conveyance showing its purported ownership in said property.

The Respondent made a motion for Summary Judgment contending that based on the pleadings and documents in evidence there was no geniune issue as to any material fact and that therefore the Respondent was entitled to a Judgment as a matter of law. Pursuant to the request of Appellant's counsel, a hearing was held on the 12th day of January, 1979 and the court issued its final ruling granting Summary Judgment in favor of Respondent and against Appellant. Appellant now petitions the Court to reverse the order of the Lower Court granting Respondent's

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Motion for Summary Judgment.

ARGUMENT

WHETHER OR NOT A PARTICULAR TRANSACTION WAS INTENDED BY THE PARTIES THERETO AS A LOAN OR AS A SALE PRESENTS A GENUINE ISSUE AS TO A MATERIAL FACT, PRECLUDING THE ENTRY OF A SUMMARY JUDGMENT.

Summary Judgment under rule 56 of the Utah Rules of Civil Procedure is a harsh remedy in that it prevents litigants from fully presenting their case to the court, and is only proper if the Pleadings, Depositions, Affidavits and Admissions, having been viewed in the light most favorable to the loser, show that "there is no genuine issue as to any material fact and that the moving party is entitled to a Judgment as a matter of law"; such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a Judgment in his favor. Bullock v. Dessert Dodge Truck Center, Inc., 11 Utah 2d 1, 354 P. 2d 559 (1960). The very nature of Summary Judgment has caused the courts to be very reluctant to invoke this remedy. Brandt v. Springville Banking Co., 10 Utah 2d, 353 P.2d 460 (1960).

In discussing Summary Judgment proceedings under rule 56 the Utah Supreme Court in Reliable Furniture Company v. Fidelity and Guaranty Insurance Underwriters, 16 Utah 2d 211, 398 P.2d 685 stated that the sole purpose of Summary Judgment is to bar from the courts unnecessary and unjustified litigation, and only when it clearly appears that the party against whom the Judgment would be granted cannot possibly establish a right to recover should such Judgment be granted. Any doubts should be resolved in fa

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of such party when Summary Judgment against him is being considered.

In an even more recent case, Rich v. McGovern, 551 P.2d 1266 (1976), the Utah Supreme Court stated that a Motion for Summary Judgment provides a means for searching out the undisputed facts as shown by the Pleadings, Depositions, Admissions, Answers to Interrogatories and Documents before the court; its aim is to discover whether a controversy can be settled as a matter of law, thereby saving both court and litigants the time trouble and expense of a trial; but because the party against whom the Summary Judgment is entered is deprived of the privilege of a trial, the record must be carefully scrutinized to see if that party presents allegations which, if true, would entitle him to Judgment. If so, then Summary Judgment is improper.

In another recent Utah case, Holbrook Company v. Adams, 542 P.2d 191 (1975), the Court stated that it only takes one sworn statement to dispute averments on the other side of controversy and create an issue of fact, precluding Summary Judgment.

In no area of the law have the courts across the nation been more concerned about giving effect to the true intention of the parties and, therefore, being more liberal in allowing parol and extrinsic evidence to develop the facts and circumstances surrounding the parties' actions than they have in cases where it is contended by one of the parties that a deed absolute on its face is in fact a mortgage. Such are the facts of the present case. Certainly, in instances such as those presented by the facts of this case where the intention of the parties has been viewed by the courts as controlling, Summary Judgment

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precluding the development of issues and facts by the parties at trial is improper.

The following quotation is taken from 89 A.L.R. 2d 1041:

> The fact that an instrument is in form a deed absolute does not preclude the interpretation thereof as a mortgage. The interpretation of an instrument as a mortgage, or otherwise, presents a question to be decided from a consideration of the whole transaction, and not from any particular feature from it. The characterization of the transaction by the parties in the instrument is not conclusive. . . .
>
> The ultimate and essential point to be determined in every case in which it is thought to have an instrument of transfer construed as a mortgage is the intention of the parties or the object of the conveyance. To constitute a mortgage for the payment of a sum of money or the performance of some other act. . . .If intended to secure an obligation, it will be construed in equity as a mortgage and as possessing all the incidents thereof.

That the issue of whether or not a deed absolute on its face was intended as a mortgage presents "genuine issues of material facts" which need to be fully developed by the litigants at trial thereby making the Summary Judgment improper in such a case is clearly shown by an examination of the Utah Statute and cases dealing with the subject.

The position of the Utah Legislature on the issue of whether a deed absolute on its face was intended as a mortgage or a conveyance is reflected in the following statute:

> A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. (UCA 78-40-8, 1953 as amended).

Certainly this statute reflects the position of this legislature in preventing the inequitable forfeiture of property in cases dealing with fact situations similar to those of the present case

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In 1908 the Utah Supreme Court decided Duerden v. Solomon et. al., 33 Utah 468, 94 P. 978. This was an action brought by plaintiff to have an instrument purporting on its face to be a deed declared a mortgage, and the title to the real estate described therein quieted in plaintiff upon payment of the mortgage indebtedness. The court, after acknowledging that defendant testified that the transaction was not a mortgage but that it was an absolute purchase of the property, ruled against defendant and in favor of plaintiff and stated as follows:

> It is not contended that it was incompetent to show the real object of the deed by evidence aliunde the instrument. It is conceded that in cases such as this courts of equity will look beyond the terms of the instrument to the real transaction, and, when that is to be shown to be one of security and not of sale, they will give effect to the actual contract of the parties, and that the rule which excludes parol evidence to contradict or vary written instruments does not forbid an inquiry into the object of the parties in executing and receiving the instrument. . . . Whether the instrument should be treated as a deed or mortgage of course depends upon the facts and circumstances of the transaction, the object and purpose for which it was given and received and whether it was given as security or for a bargain and sale of the land.

In addition to the above-quoted factors the court noted the existence of other "material facts" that had been developed at trial in determining whether or not the transaction was intended by the parties to be a mortgage or an absolute sale and purchase, and stated:

> The receipts and book entries are strong corroborative evidence of the claim made by plaintiff that the transaction had between him and the defendant was that of a loan, and that there existed a continuing indebtedness. There was also evidence showing that the value of the land was greatly in excess of the amount paid by the defendant and that it increased in value more than 25 percent.

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In Hess v. Anger, 53 Utah 186, 177 P. 232 (1918), an acti brought to have a deed absolute in form declared a mortgage, and the same foreclosed the defendants, as security to the pla for all liabilities that might be incurred by the plaintiff i the transaction, conveyed by deed a 74 acre farm to the plain The court, in holding that the transaction was a mortgage, quoted the exact language of the plaintiff and defendants dev oped at trial with respect to the giving of the deed and sta

> In our state a deed absolute in form, executed and delivered as security under a parol agreement and with t understanding that it shall be so held, will be construe as a mortgage.

Corey v. Roberts, 82 Utah 445, 25 P.2d 940 (1933), was a action to impress the property involved with the trust in fav of the plaintiff subject to a mortgage lien, notwithstanding the absolute form of the conveyances, in which the court agai held for the plaintiff and against the defendant. In reachin its decision the court examined the testimony of the parties given at trial including the testimony of the plaintiff that she gave the deed to the defendant as collateral and that she did not intend to part with title and ownership of the propert In stressing the importance of fully developing the nature of the transaction involved through testimony and other evidence trial the court said:

> In an equity case, and particularly one in which th testimony is of such character that it is necessary for the trial court to base Findings of Fact upon implicatio relations and behavior of the parties, and to determine the intention accompanying certain acts, relations, and behavior, it is often difficult for a trial court to determine before the issues are well developed, as a tri proceeds, what testimony is material or relevant and what is not.

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The court then continued by saying that "the testimony must be considered and weighed for the purpose of determining what the nature and purposes of the instrument were." The court then indicated that:

> In examining the evidence for the purpose of determining whether the deed is what upon its face it purports to be, or whether it is a mortgage or an unconditional or a conditional sale or imposed a trust . . . or otherwise, parol evidence, extrinsic circumstances, and the relationship of the parties may be resorted to, not for the purpose of varying the terms of the written instrument, but for the purpose of showing the object and purpose for which the conveyance was made. (Emphasis added).

> It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible.

In determining whether the deed in this case, absolute in its terms, was intended as a mortgage, the court listed the essential elements, or "material facts, to be considered." Among these "material facts" are the following:

> Whether or not there was a continuing obligation on the part of the grantor to pay the debt or meet the obligation which it is claimed the deed was made to secure; the question of relative value; the contemporaneous and subsequent acts; the declarations and admissions of the parties; the form of the written evidences of the transactions; the nature and character of the testimony relied upon; the various business, social, or other relationship of the parties; and the apparent aims and purposes to be accomplished.

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The court in holding that the transaction in question was intended to secure a debt rather than as an absolute sale also looked to the testimony of the parties and other evidence introduced at trial regarding that the value of the property involved. The testimony as to the value of said property given on behalf of the plaintiffs and defendants ranged from a valuation of $54,500 to $104,000. The indebtedness to the defendant for which the deed was given was approximately $48,000. The court stated that there was a "substantial" difference between the total indebtedness owed by plaintiff to defendant and the value of the property at the time of the conveyance which pointed to the fact that the transaction was intended as security for a debt rather than as an outright sale.

Subsequent Utah cases have all followed the guidelines set forth in Corey v. Roberts (Supra) in determining whether a transaction was intended merely as security for the payment of a debt or as a sale. In all of these cases the court has looked beyond the terms of any written instruments in an effort to determine the real character of the transaction and the intention of the parties involved. In Brown v. Skeen, 58 P. 2d 24, 89 Utah 568 (1936), the court quoted from Story Eq. Jur. section 1018 language that "the particular form or words of the conveyance are unimportant" but rather that the intent of the parties to the transaction is controlling. The court then, in emphasising the importance of extrinsic evidence in determining the real character of the transaction involved, cited Utah Code Annotat

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section 78-40-8 which provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." The court then commented on this particular section of the code and stated that it has "been many times referred to in the cases and construed. A deed absolute in form may be shown to be a mortgage when it is shown to be an instrument of security rather than one of sale."

The court in Thornley Land and Livestock Company v. Gailey, 105 Utah 519, 143 P.2d 283 (1943), although holding that the transaction in question was a sale and not a mortgage, stated that the controlling question in such a case was "what was the situation of the parties and what was their intention" at the time the agreement was executed. The court continued by saying:

> . . .It is not clear from the terms of the agreement whether or not there was an obligation from plaintiff to defendant. . . existing after the execution of the agreement. There is no evidence as to relative values. A consideration of the acts of the parties must in this instance be coupled with and include their relationship and the apparent aims and purposes to be accomplished.

The courts' statement that the controlling question in determining whether a deed is a mortgage is the parties intention at the time of execution and delivery of the instrument was stated by the court earlier that same year (1943) in Gibbons v. Gibbons, 103 Utah 266, 135 P.2d 105 (1943). In holding that a warranty deed, absolute in form, was not an absolute conveyance of land to the grantee, but a mortgage in view of the parties' contemporaneous written agreement providing that the conveyance was made to enable the grantee to obtain a loan

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on premises for a sum to be used in paying the mortgage thereo and that, if the grantor desired to sell the land the grantee would convey title to the purchaser on payment to the grantee of such amount, the court stated that "the fact that by the terms of the contract, defendant had the right to sell the lan to a third person, clearly indicated the intention of the part that title should not pass to the defendant." The court then continued by terming transactions wherein a deed absolute upon its face has been shown by parol evidence to have been given fo security purposes only as "equitable mortgages."

In 1972 the Supreme Court decided a case with issues very similar to those involved in the case at hand. In this 1972 case, Kjar v. Brimley, 27 Utah 2d, 411, 497 P.2d 23, plaintiff were in default on a mortgage on their home and, when unable to refinance the obligation through the institutional mortgagee, were approached by defendants who proposed to refinance by means of a security agreement in the form of an absolute deed with an option to repurchase. Plaintiffs contended that the parties intended from its inception that the transaction was a loan, secured by a mortgage on plaintiffs' home. Defendants urged that the transaction was a conditional sale, i a sale with an option to repurchase at an advance price. Defendants filed their Motion for Summary Judgment which was granted by the trial court, and from which plaintiffs appealed. This case, therefore, came to the Supreme Court on an appeal

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from the lower court's granting of defendants Motion for Summary Judgment.

The court, in holding that under the circumstances of the case, there was a "material issue of fact as to whether the parties intended to create a debtor-creditor relationship and whether the alleged sale was intended to be no more than a security transaction", reversed the Judgment of the trial court and remanded the case for a trial on the merits. In so doing the court stated:

> In equity, a deed, absolute on its face, may be shown by parol evidence to have been given for security purposes only; and if such showing be made, equity will give effect to the intention of the parties.

The court continued by stating:

> Whether a transaction in the form of a sale with an option to repurchase is in fact a sale, or a loan. . . is an issue for the trier of fact. The controlling question is what was the intention of the parties as it existed at the time of the execution and delivery of the instrument?

In determining the "material facts", to be decided by the trier of fact the Utah Court stated:

> If by the terms of the contract the grantor has the right to sell to a third person, such a fact is a clear indication of the intention of the parties that title should not pass to the grantee.

The court continued:

> If there be a large margin between the debt or sum advanced and the value of the land conveyed, this represents an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor.

> In Rizo v. Macbeth, Alaska, 398 P.2d 209 (1965), the court decided circumstances relevant to the determination of whether an instrument was a deed or a security device:

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> '. . .the adequacy or inadequacy of consideration as compared to the value of the property, which is often stated to be the single most important factor. Retention or nonretention of possession. The conduct of the parties before and after the execution of the instrument. The financial condition of grantor at the time of execution of the instrument. The over-all relationship of the parties--financial business, debtor-creditor, etc. Whether the grantor or grantee paid the taxes. The construction of improvement after the execution of the deed. Whether or not revenue stamps were affixed to the instrument. There are others. Generally it can be said that no one of the circumstances is necessarily controlling, but that all present are to be considered.'

The conclusion of the court was that "the disputed issues as to material facts raised by the Pleadings, Interrogatories, and the Affidavit were sufficient so as to preclude the trial court from granting Summary Judgment under Rule 56, Utah Rules of Civil Procedure.

High Courts in states other than Utah have also ruled that in determining whether an instrument in form an absolute deed was intended as a mortgage, inadequacy of consideration, or the fact that the value of the property was greater than the consideration for the deed, is a circumstance tending to show that the deed was intended to operate as a mortgage. In Klingensmith v. Klingensmith, 193 Iowa 350, 185 N.W. 75 (1921) plaintiff had borrowed sums aggregating about $900 from banks by giving notes on which his father, since deceased, signed as surety. The father's estate consisted of $28,000 in real property, and personal property of the value of $2,500. Prior to his father's death, plaintiff had executed to defendants, four brothers and sisters, a Quit Claim Deed of his expected interest in the father's estate, when the banks pressed for

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payment of the notes and such defendants lent plaintiff money to pay off the notes. Plaintiff contended that the Quit Claim deed was executed as security for the aforesaid advances, and defendants contended that the instrument was an absolute conveyance. The court, in affirming a decree finding the equities in favor of plaintiff in his suit to have the purported deed cancelled and to have it construed as security for the advances, after considering all the evidence, including that detailed above, said:

> When we compare the consideration in fact given with the actual value of Ed's share in the decedent's property it is grossly inadequate, and sufficient to charge defendants with constructive fraud in their attempt to preclude the rights of Edward. . . .the mathematics of this case show that the plaintiff parted with about $6,000 in value for consideration of less than $1,000. Equity refuses to recognize such inequality.

The court said that it was clear that the Quit Claim Deed did not express the true agreement between the parties, even though it is conceded that Edward knew that he was signing a Quit Claim Deed in the first instance, Edward himself not intending it to be other than a mere security in the event he ever inherited anything from his father. The court said that defendants were entitled to take the monies, with interest, advanced by them on Edward's behalf, but to take more would be obnoxious to every sense of fairness, honesty, and right. In this connection the court quoted from Stone v. Moody, 41 Washington 680, 84 P. 617, 85 P. 346, (1906), where it was said:

> We do not believe that a court in equity should hesitate to interfere even though the victimized parties owe their predicament largely to their own stupidity and carelessness.

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Also, in Mattes v. Smith, 149 Oregon 93,39 P.2d 676 (1943), the court held an instrument to be a mortgage rather than a deed where, in addition to other circumstances detailed by the court, the property, reasonably worth $32,000 and encumbered by a mortgage of $1,000, was conveyed to defendants by plaintiffs by an instrument, in the form of a deed, for the sole considerat $400, and it appeared also, at the time of the execution of the instrument, the plaintiffs also executed a note in favor of defendants of $400, and defendants as part of the same transaction gave plaintiffs a 90 day option to purchase the land for the amounts specified in the note. The court stated that it was highly improbable that plaintiffs would sell the property in question for $400, and concurred in the opinion of the trial Judge that there was no intention on the part of plaintiffs to sell, or on the part of defendants to buy.

The foregoing examination of cases and authorities serves to show the "material facts" examined by the court in determinin whether a transaction was intended as an instrument of security or as an instrument of sale. Certainly, with the courts placing such great emphasis in these cases on the intentions of the parties involved and the real character of the transaction and in considering the courts policy against forfeiture, it would be a rare instance where Summary Judgment would be appropriate under facts similar to those in the cases above cited. Such is the case in Barnes v. Sohio.

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During the oral arguments which were held by the court on defendant's Motion for Summary Judgment in this case, Judge Ballif commented from the bench that because in this case the language appearing within the four corners of the documents involved was unambiguous, parol and extrinsic evidence could not be considered in determining the true nature of the transaction involved. This is certainly not the position other courts, including the Utah Supreme Court, have taken. The forfeiture of property is a serious matter and certainly presents issues which cannot be determined on Summary Judgment by an examination of the language contained within the four corners of the instruments involved.

On factual issue that needs to be resolved through the means of all discovery procedures legally available to the parties, including trial, and over which there is a dispute in this case as evidenced by the Pleadings and other documents on file herein, is the intentions of the parties to the transaction at the time the agreement was executed. Barnes in its complaint, states that it pledged and mortgaged its 37½ percent interest in the Asphault Ridge Properties to the National City Bank of Cleveland as security for said loan the bank required Sohio to execute and deliver to the bank the letter which has been termed a Letter of Commitment. Barnes states that at no time did it intend to sell the property to Sohio for $500,000. Sohio, on the other hand, claims that the transaction was an out right sale of the property.

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On page 65 of the Deposition of W. M. Barnes, President of the plaintiff corporation, taken on the 17th day of March, 1978, Mr. Barnes explains his understanding of the agreement:

Q. Now was it your understanding that you had signed a conveyance when you entered into the Escrow Agreement?

A. It was my understanding that I pledged my 37½ percent interest in the Asphault Ridge Properties to guarantee a note that I had issued for $500,000 for the company.

Mr. Barnes also testified that Mr. Harry Pforzaheimer representing Sohio suggested to him that the way to handle a transaction was for the parties to execute the Letter of Commitment to show that the property was worth at least that much money, namely, $500,000. Based on said letter, the bank would loan the money.

Certainly, this testimony of W. M. Barnes and the allegations contained in the Pleadings on file in this case raise an issue of "material fact" which cannot be determined by the court on Summary Judgment. Another issue of fact over which there is a dispute in this case and which makes Summary Judgment inappropriate is the actions of the parties subsequent to the transaction involved. In this case, the treatment by the bank of the note after it had been paid by Sohio is interesting. Item 5 of defendants memorandum in support of its Motion for Summary Judgment sets forth a copy of the note on page 1, and on the second page sets forth the endorsement by the bank on the note when it was paid and states:

Assigned to Sohio Petroleum Company without recourse. The National City Bank of Cleveland. By G. F. Carpenter, Vice President and Cashier. Executed January 2, 1973.

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As further evidence of what the bank did and its understanding of the agreement it wrote a letter to Barnes on January 4, 1973, which appears as defendants exhibit D8 in W. M. Barnes' Deposition and is item 8 in Sohio's Memorandum. In this letter to Mr. Barnes the bank states:

> In accordance with the Escrow Agreement between our bank, yourself and the Sohio Petroleum Company, we notified Sohio Petroleum Company on December 29, 1972, that the $500,000 note had not been paid, and we, therefore, assigned the note for $500,000 to the Sohio Petroleum Company without recourse to this bank on January 2, 1973.

The testimony of a disinterested third party as to its understanding of the transaction between Barnes and Sohio would certainly be helpful to the court in ascertaining the intentions of the parties at the time they entered into the transaction and certainly presents an issue of material fact precluding the entry of Summary Judgment.

Another issue of material fact to be decided in this case is a comparison of the value of the property described in the deed with the amount of the debt. In its Complaint Barnes alleges that Prudential Fund, Inc. had offered to purchase the 37½ percent interest of Barnes in the Asphault Ridge Properties for $500,000 cash and a five year promissory note in the amount of 2 million dollars bearing interest at 6 percent per annum on the unpaid balance. This allegation is supported by W. M. Barnes' Deposition pages 51-60 wherein he testified as to the terms of the deal between Barnes and Prudential and the written correspondence between the parties relating thereto. This offer

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by Prudential is some indication of the value of the property involved. In W. M. Barnes' Deposition he testified that never at any time had he agreed or intended to sell property worth approximately $2,500,000 to Sohio for $500,000. If this were a straight conveyance to Sohio, as Sohio contends, why would the parties have given Sohio the right to meet any other offer to purchase the property? Certainly, these allegations of Barnes contained in the Pleadings and in the Deposition present an issue of material fact which cannot be resolved on Summary Judgment.

The manner in which the parties treated the property in their business records and accounting books is also a material issue in determining the real nature of the transaction. In W. M. Barnes' Deposition, pages 74-77, Mr. Barnes testified that plaintiffs accounting books reflected a $500,000 debt owed to Sohio by reason of the banks assignment of its interest to Sohio under the terms of the agreement. There is no indication in the records of how Sohio treated the property on its books. This then, presents another issue to be determined by the court at trial and not on Summary Judgment. Also, the fact that Sohio has never recorded the deed is helpful in determining the intention of the parties.

CONCLUSION

Clearly, under facts such as those presented by this case wherein appellants allege that the transaction in question was a mortgage and the respondents allege that said transaction was

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a sale, it is essential in determining the true nature and character of the transaction that all material facts be fully developed and presented by the parties through all legal avenues available, including trial. An examination of the Pleadings and other documents on file in this case has revealed that there are many factual disputes in this case relating to factors on which the court, in prior cases, have placed great emphasis in determining the true nature and character of the transaction involved. In a case such as this one where appellant stands to forfeit all its interest in property valued at many times the amount of the debt secured, it is especially important that all issues and facts be fully developed and that the testimony of the parties and other witnesses by heard by the trier of fact.

The disputed issues as to material facts raised by the Pleadings, Affidavits, Depositions and other documents on file herein are sufficient so as to render the granting of Summary Judgment by the trial court under Rule 56, Utah Rules of Civil Procedure inappropriate. The facts and circumstances of this case require that a trial be had, and that full discovery and presentation of the evidence to the court be made.

DATED this 17 day of July, 1979.

Respectfully submitted,

BY Duane A. Frandsen

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CERTIFICATE OF MAILING

I hereby certify that on the 17th day of July, 1979, I mailed three (3) copies of the foregoing Appellant's Brief with postage prepaid addressed to Respondents Attorneys as follows:

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