

2001

Jerry V. Strand v. Prince-Covey and Co., INC., and Almon Covey : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

JERRY V. STRAND,
Plaintiff-Respondent,

vs.

PRINCE-COVEY & CO., INC., and
ALMON COVEY,
Defendant-Appellant.

Case No.
13804

BRIEF OF APPELLANT

PRINCE-COVEY & CO., INC.

APPEAL FROM JUDGMENT
of the
DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT IN AND FOR SALT LAKE
COUNTY, STATE OF UTAH
Honorable Gordon R. Hall, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

JERRY V. STRAND,
Plaintiff-Respondent,

vs.

PRINCE-COVEY & CO., INC., and
ALMON COVEY,
Defendant-Appellant.

Case No. 13804

BRIEF OF APPELLANT

PRINCE-COVEY & CO., INC.

NATURE OF THE CASE

Plaintiff-Respondent Jerry V. Strand (referred to hereinafter as plaintiff) brought this action alleging that defendant-appellant Prince-Covey & Co., Inc. (hereinafter defendant¹), converted negotiable securities allegedly owned by plaintiff.

DISPOSITION IN LOWER COURT

The District Court for the Third Judicial District in and for Salt Lake County, the Honorable Gordon R. Hall presiding, granted plaintiff's motion for summary judg-

¹ The trial court did not enter judgment against the individual defendant, Almon Covey, and plaintiff's claims against Mr. Covey are not before this Court.

ment and awarded damages of \$26,000. Defendant's subsequent motion to set aside judgment and for rehearing was denied.

RELIEF SOUGHT ON APPEAL

Defendant seeks an order of this court vacating the summary judgment rendered by the trial court and remanding the case for further proceedings. In the alternative, if the judgment is affirmed, defendant seeks an order of this court directing satisfaction of the judgment by set-off against a prior final judgment obtained by defendant against plaintiff in the amount of \$34,696.16, together with interest, no part of which has been satisfied to date.

STATEMENT OF FACTS

During 1972 defendant Prince-Covey & Co. incurred substantial losses from transactions in which its employee, Mr. Ted England, acted as trader and from the failure of Mr. England's customers to pay for purchases on accounts for which he acted as account executive. As is customary in the brokerage business, Mr. England had agreed to repay his employer for the losses. (R. 19-20).

Almon Covey, the president and a director of defendant Prince-Covey & Co., inquired as to when defendant might expect payment and was advised by Mr. England that the latter had a personal loan at Murray First Thrift & Loan of Salt Lake City secured by the pledge of 4,000 shares of Hoffman Resources stock. These shares had a current market value greater than the total of Mr. England's loan. Mr. England agreed that if defendant

would pay Mr. England's debt to Murray First Thrift, thereby obtaining release of the stock, Mr. England would sell the stock, repay defendant for the Murray First Thrift payment and use the balance of the proceeds to pay or reduce his debt to defendant. (R. 20).

Mr. Covey accompanied Mr. England to Murray First Thrift where Mr. Covey delivered defendant's check to pay the loan and Murray First Thrift released and delivered to Mr. England certificates representing at least 4,000 shares of Hoffman Resources stock. The certificates were in bearer form; neither plaintiff's nor Mr. England's name appeared on them. Mr. Covey and Mr. England returned to the Prince-Covey & Co. offices where 4,000 shares of the stock were deposited in England's personal account and sold. The proceeds were given to defendant Prince-Covey & Co. to repay it for the money advanced to Murray First Thrift and to pay or reduce England's debt to defendant. (R. 20). The balance of the stock was retained by England. (R. 37).

In his complaint, plaintiff alleges that he owned the 4,000 shares of Hoffman Resources stock and had "pledged" them in January of 1972 to Mr. England, who in turn had pledged them to Murray First Thrift. There is no explanation as to what plaintiff means when he says he "pledged" the stock. Defendant, in its answer, denied plaintiff's allegations of ownership, and, in any event, Mr. Almon Covey's affidavit denied knowledge or belief of such a fact. (R. 23-24). Plaintiff Jerry Strand filed no affidavit to support his purported ownership of the stock or to support any other allegation in his complaint. Mr.

England's affidavit stated that he "borrowed" the stock from plaintiff and that he "knew" plaintiff owned it. (R. 19-21). Mr. England's affidavit contains strained and self-serving statements to the effect that Mr. Covey might have inferred that plaintiff owned the stock. (R. 20-21).

At the hearing on plaintiff's motion for summary judgment, in addition to the complaint and answer, the court considered the affidavit of Mr. Ted England filed by plaintiff (R. 19-21) and the affidavit of Mr. Almon Covey filed by defendant. (R. 23-24). Mr. Covey's affidavit was presented to the court at the commencement of the hearing, although it appears in the record after the minute entry noting the granting of summary judgment,

Defendant filed additional affidavits in support of its Motion to Set Aside Judgment and for Rehearing from Michael F. Heyrend (R. 44-45), Almon Covey (R. 34-43), and David Nelson (R. 46-51). For the convenience of the court, the complaint, answer, and affidavits are included as appendixes to this brief, except for the record of Ted England's personal trading account which was attached to Mr. Covey's second affidavit.

The trial court ruled that defendant's lack of knowledge of plaintiff's ownership or claim of ownership was not a defense to a claim for conversion of negotiable securities. Alternatively, the trial court ruled that, even if knowledge was a necessary element in the conversion of negotiable securities, Mr. England's knowledge of plaintiff's alleged ownership must be imputed to defendant because of the employer-employee relationship between

them. The trial court so ruled despite the statements in Mr. England's affidavit that he and defendant were adverse parties with respect to this transaction. Moreover, Mr. England's affidavit indicates clearly that his dealings with plaintiff were not of a nature that would further his employer's interests, since Mr. England was acting on his own behalf and for his own benefit. (R. 20).

There is nothing in the record to indicate when plaintiff received notice of the alleged conversion. An affidavit of Mr. Mark E. McBride, not controverted by defendant, establishes that on one day in September 1972 Hoffman Resources Corporation was quoted at \$6.25 bid and \$6.75 asked. (R. 12).

The affidavit of Michael F. Heyrend (R. 44-45) filed in connection with defendant's motion for a new hearing establishes that on or about May 11, 1972, in the earlier case of *Prince-Covey & Co., Inc. v. Jerry V. Strand*, defendant Prince-Covey & Co. was awarded judgment against plaintiff in the amount of \$34,696.16 for plaintiff's failure to pay for stock he ordered.² In the course of defendant's attempts to collect this judgment, plaintiff gave testimony pursuant to an order in supplemental proceedings on July 20, 1972 and testified under oath that as of that date he owned no stock of any company other than 7,000 to 8,000 shares of Dusenberg Corporation, that he owned options on 20,000 shares of Hoffman Resources stock at \$3.00 per share, but did not then own any Hoff-

² The judgment set out in Mr. Heyrend's affidavit was affirmed by this Court; *Prince-Covey & Co., Inc. v. Strand*, 29 Utah 2d 224, 507 P.2d 708 (1973).

man Resources stock, and that the only note or chose in action he owned was a \$5,000 debt owed by a Mr. Al Johnson. At no point in the course of the examination, during which plaintiff was asked specifically what shares of stock he owned, was the Hoffman Resources stock in question in this lawsuit mentioned. (R. 44-45). This testimony of July 20, 1972 directly contradicts plaintiff's allegation of ownership in his complaint because in the instant action plaintiff alleges that he "pledged" the Hoffman stock to England in January 1972 (R. 1), that the stock was then pledged by England to Murray First Thrift in January 1972 (R. 19) and that plaintiff owned the stock on August 2, 1972, the date of the alleged conversion. (R. 1).

In his affidavit filed in support of the motion for rehearing, Mr. Almon Covey established that the Murray First Thrift loan was repaid and the shares obtained on August 2, 1972. (R. 36). Mr. England's affidavit, which was used by the court below to fix damages, stated that the shares were obtained and sold on approximately September 13, 1972. (R. 20). Mr. England's personal account which was attached to Mr. Covey's affidavit supports Mr. Covey's position and contradicts the position of Mr. England. (R. 43).

In the same affidavit, Mr. Covey discloses the details of Mr. England's position with Prince-Covey & Co. Mr. England was allowed to maintain a private brokerage account at Prince-Covey & Co., the use and maintenance of which was entirely personal and was not related to his duties as a registered representative of defendant. (R. 35-36). Mr. England's debt to Prince-Covey & Co. arose from

losses on his unauthorized actions or administrative errors as a trader and a registered representative and this debt was entirely personal to Mr. England and established between him and defendant Prince-Covey & Co. the relationship of debtor-creditor. (R. 36) It was within the context of this debtor-creditor relationship that Mr. Covey agreed to advance money for the repayment of the loan to Murray First Thrift and Mr. England agreed that, upon obtaining the shares of Hoffman Resources, he would sell the same and repay the amount of the Murray First Thrift loan plus all or a portion of his debt to defendant. (R. 36). The sale of the shares was effected through Mr. England's personal account. (R. 37).

The record of Mr. England's personal account attached to Mr. Covey's affidavit shows conclusively that there was a substantial number of trades in the Hoffman Resources stock during the year 1972, contrary to the statements contained in Mr. England's affidavit. (R. 39-43).

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THERE WERE UNRESOLVED ISSUES OF MATERIAL FACTS AND PLAINTIFF WAS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Substantial issues of material facts remained unresolved when the trial court entered its judgment. No evidence was before the court from which it could properly fix a date for determining the value of the stock allegedly converted. There were no facts other than the allegations

of the complaint establishing plaintiff's ownership of the stock. The pleadings and affidavits placed squarely in issue the question of whether defendant was a bona fide purchaser of the negotiable securities. Defendant introduced evidence establishing that it acted as a bona fide purchaser and therefore took the securities free and clear of any adverse claims. Mr. Almon Covey's affidavit established defendant as a bona fide purchaser of the negotiable securities since the defendant had no knowledge of plaintiff's purported ownership interest in the stock. On this issue the only way the trial court could find such knowledge in light of Mr. Covey's affidavit was to impute Ted England's knowledge to defendant. This was error since England's interests were established in the record as adverse to defendant's with respect to the transactions in question.

A. KNOWLEDGE OF AN ADVERSE CLAIM IS A NECESSARY PREREQUISITE TO LIABILITY FOR CONVERSION OF A NEGOTIABLE SECURITY AND THE TRIAL COURT ERRED IN HOLDING KNOWLEDGE TO BE UNNECESSARY OR IN IMPUTING SUCH KNOWLEDGE TO DEFENDANT.

Although in most instances a purchaser of goods may be liable for their conversion even though he is without knowledge of any adverse claims,³ the rule is opposite with

³ "Although conversion results only from intentional conduct it does not however require a conscious wrongdoing, but only an intent to exercise dominion or control over the goods inconsistent with the owner's right . . . thus a bona fide purchaser of goods for value from one who has no right to sell them becomes a converter when he takes possession of such goods." *Allred v. Hinkley*, 8 Utah 2d 73, 328 P.2d 726, 728 (1958). See also Restatement 2d, Torts, §229.

respect to a bona fide purchaser of negotiable securities. The Utah Uniform Commercial Code (§70A-8-301(2), Utah Code Annotated) provides:

A bona fide purchaser in addition to acquiring the rights of a purchaser *also acquires the security free of any adverse claim.*⁴ (Emphasis added.)

If Prince-Covey & Co. was a bona fide purchaser, it took the securities free of *any* adverse claim, including plaintiff's, and plaintiff has a cause of action only against Mr. England for his admitted conversion of the stock. This section of the Utah Uniform Commercial Code embodies prior Utah law as expressed in, *e.g.*, *Nokes v. Continental Mining & Milling Co.*, 6 Utah 2d 177, 308 P.2d 954 (1954), and the law of other jurisdictions, *e.g.*, *East Coalinga Oil Fields Corp. v. Robinson*, 86 Cal. 2d 153, 194 P.2d 554 (1948); *McCullen v. Hereford State Bank*, 214 F.2d 185 (5th Cir., 1954), all of which state the rule that a bona fide purchaser takes securities free of any adverse claim.

The Utah Uniform Commercial Code defines the attributes of a bona fide purchaser:

⁴ Section 70A-8-301(1), Utah Code Annotated (1953), defines "adverse claim" to include plaintiff's claim in this action:

"Upon delivery of a security the purchaser acquires the rights in the security which his transferor had or had actual authority to convey except that a purchaser who has himself been a party to any fraud or illegality affecting the security or who as a prior holder had notice of an adverse claim cannot improve his position by taking from a later bona fide purchaser. '*Adverse claim*' includes a claim that a transfer was or would be wrongful or that a particular adverse person is the owner of or has an interest in the security." (emphasis added)

A "bona fide purchaser" is a purchaser for value in good faith and without notice of any adverse claim who takes delivery of a security in bearer form or of one in registered form issued to him or endorsed to him in blank. §70A-2-302, U.C.A.

There is no dispute that the stock received from Murray First Thrift was in bearer form. There should be no question that defendant gave "value" since it extinguished Mr. England's debt to it.⁵ There can also be no question but that the "adverse claim" of ownership alleged by plaintiff is among those that cannot be asserted against a bona fide purchaser for value.⁶ Good faith is defined by the Code as "honesty *in fact* in the conduct or *transaction concerned*."⁷ Certainly there is nothing in the record to impugn Mr. Covey's honesty.

The trial court's determinative conclusion must, then, have been that defendant, through Almon Covey, had notice of plaintiff's adverse claim, and that this notice was established by the pleadings and affidavits in conformance with the stringent standards required for summary judgment.⁸ This conclusion is not supported in the record.

⁵ Section 70A-1-201(44), Utah Code Annotated, (1953).

⁶ Section 70A-8-301(1), Utah Code Annotated, defining "adverse claim", set out in footnote 4, *supra*.

⁷ Section 70A-1-201(19), Utah Code Annotated (1953) (emphasis added).

⁸ The pertinent provisions of Rule 56(c), Utah Rules of Civil Procedure, provide that summary judgment shall be rendered *only* if there is on a showing "that there is no genuine issue as to any material fact and *that the moving party is entitled to judgment as a matter of law*." (emphasis added).

Summary judgment should be granted with great caution, *Watkins v. Simonds*, 11 Utah 2d 46, 354 P.2d 852; only upon a showing that precludes all reasonable possibility that the loser might prevail at trial, *Green v. Garn*, 11 Utah 2d 375, 359 P.2d 1050; with all doubts resolved in favor of permitting trial, *Henry v. Washiki Club, Inc.*, 11 Utah 2d 138, 355 P.2d 973.

Mr. Covey's affidavit filed at the time of the hearing on plaintiff's motion for summary judgment states that he did not have knowledge of any adverse claim of plaintiff Strand. This lack of actual knowledge is not controverted in the record by plaintiff and even Mr. England's affidavit indicates only that Mr. Covey should have been on notice that England held the securities for a third person, *possibly* Mr. Strand. Notice of an adverse claim under §70A-8-302, U.C.A. is defined in §70A-8-304(2), U.C.A.:

The fact that the purchaser (including a broker for the seller or buyer) has notice that the security is held for a third person . . . does not create a duty to inquire into the rightfulness of the transfer or constitute notice of adverse claims. If, however, the purchaser . . . has *knowledge* that the proceeds are being used or that the transaction is for the individual benefit of the fiduciary or otherwise in breach of duty, the purchaser is charged with notice of adverse claims. (Emphasis added)

Even if England's statement to the effect that Mr. Covey should have been on notice that England held the securities for a third person had been uncontroverted, the above section makes clear that no duty was thereby created on defendant's part to inquire into the rightfulness of the transfer, let alone that such "notice" constituted "notice of adverse claims" under §70A-8-302. The actual knowledge required by the last sentence of §304(2) was unequivocally denied in Mr. Covey's affidavit presented to the court at the time of the motion for summary judgment hearing. (R. 23-24).

The plaintiff failed to show defendant's actual knowledge of plaintiff's alleged ownership. Nevertheless the

court below imputed England's knowledge of plaintiff's ownership of the stock to the defendant. This was error. England's knowledge could be imputed to Prince-Covey only if England was acting as an agent of Prince-Covey in the transaction. While an agent's knowledge is imputed to his principal if the knowledge is gained or used in the course and scope of the agent's employment, there can be no imputation when the agent is acting adversely to the principal. As stated in Restatement 2d, Agency §279:

The principal is not affected by the knowledge of an agent as to matters involved in a transaction in which the agent deals with the principal or another agent of the principal as, or on the account of, an adverse party.

Illustration 2 to that section is on all fours with the instant case:

Having obtained goods from T by fraud, A conveys them to P in consideration of the extinguishment of a debt due P from A. P is not bound by A's knowledge in a jurisdiction in which the extinguishment of an antecedent debt is value.

It was uncontroverted in the trial court that England was acting entirely for his own personal benefit, outside the scope of his employment, when he obtained the Hoffman stock from plaintiff for use as security for a personal loan. These transactions did not involve his employer in any sense. More importantly, however, Mr. England's actions in obtaining the shares from Murray First Thrift, selling them and applying the proceeds to his debt to defendant were not within the scope of his employment. As was well established in the record before the trial court, England

dealt with defendant in these transactions as an adverse party. For England to accomplish his purpose he had to conceal his knowledge (or belief) as to plaintiff's ownership in the stock. Failure to conceal this knowledge would have led Prince-Covey to execute on the stock in order to satisfy its pre-existing \$34,600 judgment against plaintiff, and England would have continued to owe his personal debt to defendant.⁹ Under these circumstances the agent, England, had to avoid disclosure to his principal, Prince-Covey & Co., Inc. These circumstances fall squarely within the universally accepted rule expressed in Restatement 2d, Agency §279, which has been applied in Utah as well as most other jurisdictions.

In *Powerine Co. v. Russell's, Inc.*, 103 Utah 441, 135 P.2d 906 (1943) the court stated that where "the agent was acting adversely to the principal . . . his knowledge and actions cannot be imputed to his principal," and that this "is the exception to the general rule that the knowledge and acts of the agent will be imputed to the principal." (135 P.2d at 912). In *Western Securities Co. v. Silver King Consol. Mining Co.*, 57 Utah 88, 192 P. 664 (1920) the court declined to impute the knowledge of a director and agent of a corporation to the corporation when the agent was acting in his own interests in effectuating a sale of stock to a third party. The court said:

⁹ At best, even assuming that England did not know of defendant's judgment against plaintiff, England's purpose in securing the monies to reduce his debt to defendant would have been defeated if Mr. Covey had been told of Strand's ownership and had refused to participate in the conversion. It is significant that England nowhere alleges that he told Covey of Strand's ownership.

The law is well settled that, in case [an] . . . agent of a corporation transacts business in which he is adversely interested, his knowledge respecting the particular transaction . . . is not imputable to the corporation, and hence it is not liable for his acts. 192 P. at 669.

The court also quoted with approval the following language from *E. S. Woodworth & Co. v. Carroll*, 104 Minn. 65, 112 N.W. 1054:

"The doctrine that a principal is chargeable with notice of facts known to his agent is based on the ground that it is the duty of the agent to communicate his knowledge to the principal, and that it is to be presumed that he has performed this duty. Ordinarily this presumption is conclusive. The reason of the rule ceases, however, where the agent is dealing with the principal for his own purposes, or where for other reasons his interest is adverse to that of the principal, *so that it is to his own advantage not to impart his knowledge to the principal*. It is accordingly well settled in the law that a corporation is not chargeable with notice of facts because of the knowledge on the part of the . . . agent, where the . . . agent is dealing with the corporation in his own interest, and where for other reasons his interest is adverse to that of his corporation, so that communication of knowledge by him cannot be presumed." quoted at 192 p. 669-670 (Emphasis added.)

In the instant case Mr. England was acting in his own interests in extinguishing his debt to defendant. In addition, England must have known, in light of the statement contained in his affidavit as to the antagonism between the parties, of defendant's \$34,000 judgment against plaintiff Strand, and this knowledge made it mandatory,

if his plan to liquidate his debt to defendant was to succeed, to keep knowledge of plaintiff's ownership of the stock from defendant.

There is no authority applying a different rule to cases involving negotiable instruments. The Arizona Supreme Court in *Bank of America v. Barnett*, 87 Ariz. 96, 348 P.2d 296 (1960) ruled that the knowledge of a lending institution which had endorsed certain notes to the plaintiff bank could not be imputed to the bank even if the lending institution had knowledge of the worthlessness of the consideration given for the notes and acted as the bank's agent in certain matters:

United acted only as the bank's *collection* agent, and — because United was a prior holder of the notes and liable thereon in case of default and had in fact made warranties to the bank at the time it endorsed the notes in blank, which warranties are in conflict with the knowledge which it is presumed to have had — . . . the position of United was, in all other respects, adverse to that of the bank. 348 P.2d at 298. (Emphasis in original)

Parallels can be drawn between the instant case and the *Bank of America* case. In both, the scope of the agency relationship did not include the transactions in issue, and in both the position of the agent was adverse to the position of the principal — in the *Bank of America* case the agent was a warrantor to the principal, in this case a debtor.

Similarly in *McLean v. Paddock*, 78 N.M. 234, 430 P.2d 392 (1967), the New Mexico court ruled that the knowledge of an original payee on a promissory note

could not be imputed to the parties to whom he had endorsed it, even though the original payee acted as the holder's agent by collecting and transferring the maker's payments. After quoting §279 of the Restatement 2d, Agency, the court said:

This rule has been applied to situations involving knowledge by an agent of equities or infirmities in promissory notes sold by the agent to the principal [citations]. And under this rule the principal has been granted the status of bona fide purchaser despite the agent's knowledge of wrong doing. 430 P.2d at 396.

In *Hays v. Bank of Arizona*, 57 Ariz. 8, 110 P.2d 235 (1941), the court held that the knowledge of a manager of a lumber company that the bank loaned him money to pay off certain accounts he personally owed the company was not imputed when the manager was acting to deceive the company.

The rule has also been applied in cases involving negotiable securities in the determination of the status of bona fide purchaser. In all of the following cases the courts ruled that a principal was not bound by the knowledge of its agent of adverse claims in securities when the principal and agent were in adverse positions: *Western Securities Co. v. Silver King Consol. Mining Co.*, 57 Utah 88, 192 P. 664 (1920); *George H. Sasser & Co. v. Chuck Wagon System*, 50 N.M. 136, 172 P.2d 818 (1946); *Steunen-berg v. National Progressive Life Insurance Co.*, 138 Neb. 240, 292 N.W. 737 (1940); *Tallbatchie Home Bank v. Aldridge*, 169 Miss. 597, 153 S. 818 (1934); *Bloomberg v. Taggart*, 213 Minn. 39, 5 N.W.2d 388 (1942); *Union Old*

Lowell National Bank v. Paine, 318 Mass. 313, 61 N.E.2d 666 (1945); *Jefferson Trust & Savings Bank, Peoria v. W. Heller & Son*, 305 Ill. App. 644, 27 N.E.2d 844 (1940); *Montgomery v. Commercial Trust & Savings Bank*, 286 Ill. App. 241, 3 N.E.2d 139 (1936).

All of these cases stand for the principle that on a showing of deceit by the agent against the principal, or if the principal and the agent are in adverse positions with respect to the transaction in question, the principal will not be bound by the agent's knowledge.

To summarize the rule of law stated in §279 of the Restatement, the reporter's notes are helpful:

It is only where the agent *acts* as an agent that the principal is affected by his knowledge. . . . If an agent does not act and does not purport to act as an agent, but acts and purports to act on his own account . . . the principal is not responsible for his conduct or for his knowledge. Thus in accordance with the rule stated in this section, if the agent deals with the principal . . . *upon matters in which he is an adversary party, . . . acting on his own account* . . ., the fact that he commits a breach of duty to his principal in acting or in failing to reveal facts in the transaction does not make the principal responsible for the failure. Thus one who is an agent has a duty to reveal all pertinent facts to the principal upon entering into a transaction with him, but the failure to do so is a failure by him as an individual and not a failure by him as the principal's agent. Restatement 2d, Agency, Appendix at 478-79 (1958). (Emphasis added).

In the instant case, it is clear that Mr. England was acting on his own personal behalf, both in his dealings with the plaintiff and with the defendant. Under the rules stated in §279 of the Restatement of Agency and in numerous cases from Utah and virtually every other jurisdiction, the fact that Mr. England was defendant's agent for other purposes has no bearing on this case. Here his failure to reveal the true facts to his employer resulted from his personal interest in extinguishing his debt to that employer.

Since imputation of knowledge in this case was clear error of law, the fact issue of defendant Prince-Covey & Co's. knowledge of England's breach of duty to plaintiff was directly in issue before the trial court on the face of the contradictory pleadings and affidavits that were before it. The summary judgment violated Rule 56 and should be reversed and remanded.

B. THE TRIAL COURT ERRONEOUSLY DETERMINED THAT NO ISSUES OF FACT EXISTED CONCERNING PLAINTIFF'S OWNERSHIP OF THE STOCK.

Even if the bona fide purchaser question had not been placed squarely in issue by the pleadings and affidavits before the trial court, it was error for the court to determine that no issues of fact existed concerning plaintiff's ownership of the Hoffman Resources stock. Plaintiff's allegation in his complaint that he "owned" the stock was specifically denied by defendant's answer. Mr. England's affidavit, in which his knowledge of plaintiff's interest in the stock was asserted, was obviously self-serving and could not be contradicted by counter-affidavit

from defendant's own knowledge. As is shown by the affidavit of Mr. Heyrend, plaintiff himself testified under oath pursuant to an order in supplemental proceedings that he did not own the Hoffman Resources stock on July 20, 1972. Accordingly, defendant's denial is based not only on lack of knowledge but on the inference that if plaintiff did not own the stock on July 20, 1972 he could not have owned it on August 2, 1972, the date of the alleged conversion, since on that date and at all times from January 1972 to August 2, 1972 the stock was pledged to and in the possession of Murray First Thrift securing payment of a personal loan to Ted England.

England's statement of his belief of plaintiff's ownership could not have been contradicted by defendant because such statements are inherently uncontradictable without the examination of the person making them. Faced with this type of evidence in *Cross v. United States*, 336 F.2d 431 (1964), where a taxpayer had obtained summary judgment on his claim that certain travel expenses should be allowed as proper deductions from his income tax, the United States Court of Appeals for the Second Circuit noted that:

Many of the facts [concerning the taxpayer's travel as set forth in his affidavits] remain largely within his own knowledge and the government should have the opportunity to test his credibility on cross-examination 336 F.2d at 433

It went on to say that:

While we have recently emphasized that ordinarily the bare allegations of the pleadings, unsupported by specific evidentiary data, will not alone defeat a motion for summary judgment [citation], this

principle does not justify summary relief where, as here, the disputed questions of fact turn exclusively on the credibility of movant's witnesses. *Id.*

The circuit ruled that the question could not be decided by the affidavit alone, and reversed the trial court.¹⁰ While in the instant case defendant's right to a trial does not "turn *exclusively* on the credibility of movant's witnesses", at least the question of plaintiff's ownership of the stock, on the present state of the record, must have been decided by the trial court exclusively on England's affidavit. Thus, as to this fact the *Cross* rule must apply and must necessarily compel reversal of the summary judgment.

When England's affidavit is read in its entirety its self-serving nature is apparent; his breach of duty to plaintiff is admitted on its face, but only for the purpose of establishing defendant's liability. In such circumstances the credibility of the affiant himself properly becomes a matter at issue, and credibility is not an issue that can be disposed of at a hearing on a motion for summary judgment with only pleadings and affidavits before the court. On the issue of ownership the demeanor and tone of England must be subjected to the test of trial, and for these reasons defendant respectfully submits that the trial court erred in accepting the pleadings and affidavit of Mr. England as establishing plaintiff's ownership interest in the stock.

¹⁰ See also *Arnstein v. Porter*, 154 F.2d 464 (2nd Cir., 1940), for a similar discussion concerning the propriety of summary judgment based on self-serving affidavits.

Summary judgment in the instant case necessarily ignored the often repeated instructions of this court that a showing supporting summary judgment must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor, see, e.g. *Green v. Garn*, 11 Utah 2d 375, 359 P.2d 1050 (1961); *Frederick May & Co. v. Dunn*, 13 Utah 2d 40, 368 P.2d 266 (1962).

Defendant respectfully submits that the allegations and sworn statements upon which the trial court must have based its findings of ownership do not meet this test. As stated above plaintiff's only "proof" of his ownership of the stock comes from the allegation of his complaint and is denied by defendant's answer. Mr. England's allegation of plaintiff's ownership is simply unsupported hearsay evidence of his belief which would have been inadmissible to prove plaintiff's ownership in any trial of this matter.

Plaintiff's right to summary judgment is improper for other reasons as well. An essential element of an action for conversion is the defendant's intentional interference with plaintiff's right to *immediate* possession of the property, Restatement 2d, Torts §222A. Thus, to prevail in an action for conversion the plaintiff must show a right to immediate possession of the property at the time it was converted, *Larsen v. Knight*, 120 Utah 261, 233 P.2d 365 (1951); *Johnson v. Flowers*, 119 Utah 425, 228 P.2d 406 (1951).

Even under plaintiff's own allegations he did not have a right to immediate possession of the stock because

it was twice pledged, once to England and once to Murray First Thrift, by England, with plaintiff's permission. Although the stock was released from the pledge to Murray First Thrift when England's loan was repaid, there is no allegation that plaintiff ever performed whatever obligation was necessary to release the stock from the pledge to England. Such consideration is obviously necessary if, as plaintiff pleads, the stock was in fact pledged by him to England, since the essence of a pledge is the passing of possession by the owner to the pledgee who is entitled to hold it until the debt is paid or the obligation is performed (see *Campbell v. Peters*, 108 Utah 565, 162 P.2d 754). If plaintiff did, in fact, "pledge" the stock to England, then he had no right to possession of it at the time of the alleged conversion and would not have had such right until he had performed or tendered the performance of the obligation secured by the pledge. If, of course, it was not pledged, then a multitude of issues arise concerning plaintiff's interests in the stock that could not be resolved by the pleadings and affidavits before the court. In either event summary judgment was improper.

C. A QUESTION OF FACT EXISTED AS TO THE PROPER DATE FOR FIXING DAMAGES.

The plaintiff accurately sets out the rule for fixing damages for conversion of securities in paragraph 11 of his complaint:

... the highest market value obtained for the shares of Hoffman Resources, Inc. within a reasonable time after plaintiff had notice of the conversion.

In paragraph 12 plaintiff alleges that the "highest market value reached by Hoffman Resources, Inc. common stock within a reasonable time after plaintiff had notice of the conversion was \$6.50 per share." Defendant denied this allegation upon information and belief.¹¹ Plaintiff does not set out the time at which he received notice in his complaint, nor does the affidavit of Mr. England state when he might have informed plaintiff of his breach of duty. Mr. Covey's affidavit makes it very clear that the stock was not sold on September 13 as asserted by Mr. Strand and Mr. England, but on August 2, approximately six weeks earlier.

From this, two points are evident. First, the burden was on plaintiff to establish notice of the conversion after his allegation regarding notice was denied in the pleadings. This plaintiff failed to do. Had this matter been tried and had plaintiff brought on his expert to testify as to the price of the stock on September 22, 1972, the defendant would have objected that no foundation had been laid for that date as a proper one on which to fix damages because nothing was in evidence as to the date of plaintiff's notice or knowledge of the conversion. Plaintiff's expert would have been in no position to establish the date of notice. Plaintiff would not have been heard to argue that his allegation of time of notice established that fact and that he need adduce no evidence for it. In fact, the testimony of Mr. Strand or Mr. England would have been required

¹¹ "If [a defendant] is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial." Rule 8(b), Uah Rules of Civil Procedure.

as to when Strand learned or was told of England's breach of duty.

At the hearing for summary judgment, however, plaintiff was allowed to establish his damages without any proof of the date of his notice of the alleged conversion. The fixing of such a date is a vital element in proof of damages for conversion of stock, since the general rule and the rule that has been announced in Utah is that the offended party is entitled to the highest price within a reasonable time after he has *learned* of the conversion, *Western Secur. Co. v. Silver King Consol. Mining Co.*, 57 Utah 88, 192 P. 664; Anno., "Conversion of Stock — Damages," 31 ALR3d 1286. It would be incongruous to allow plaintiff to obtain summary judgment on a lesser showing than he would be compelled to make at trial. Such a result would contradict both the express language of Rule 56 and this court's statement that, for purposes of summary judgment, if any material fact asserted by plaintiff is contradicted by defendant, the facts as stated by defendant must be taken as true, *Disabled American Veterans v. Hendrixson*, 9 Utah 2d 152, 340 P.2d 416 (1959).

Secondly, since the actual date of the sale of the stock, as established by Mr. Covey's second affidavit, was August 2, 1972, and Mr. Strand apparently recalls that he received notice very soon after the sale, a substantial question is raised as to whether September 22 was within a reasonable time after the notice. Plaintiff himself says that less than nine days is a reasonable time since he relies on the price on September 22 and alleges that the sale took place on September 13 and he learned of it soon afterwards.

A "reasonable time" depends on many factors including among others, the state of the market for the stock and the reasonableness of the offended party's behavior after notice, see §5[e], Annotation, 31 ALR3d at 1332-34. On the state of the record in this case, it would be fruitless to argue what a reasonable time might be, but numerous cases collected in the ALR Annotation just cited have declared periods shorter than the 51 days between August 2 and September 22 to be unreasonable. More facts would have to be before the court before this determination could be made. This void in the record makes summary judgment improper.

POINT II

THE TRIAL COURT ERRED IN DENY- ING DEFENDANT'S MOTION TO SET ASIDE JUDGMENT AND FOR REHEARING.

Upon its motion to set aside judgment and for rehearing, defendant amplified the evidence concerning its relationship to Mr. England and showed that two important facts had not been brought to the attention of the trial court upon plaintiff's motion for summary judgment:

First, the affidavit of Michael F. Heyrend showed that defendant's denial of plaintiff's ownership of the stock in question was based upon inference, derived from the examination of plaintiff under oath.

Secondly, the affidavit of Almon Covey established that the sale of the stock occurred on August 2 rather than September 13, as alleged by plaintiff.

Mr. Heyrend's affidavit establishes that plaintiff had testified under oath approximately thirteen days before the sale of the stock that he did not own any Hoffman Resources stock. Obviously he could not have obtained the stock in the meantime since it was pledged at Murray First Thrift. In addition, after his testimony as to his impecuniosity given on July 20, it is hard to see how he could have paid for over \$13,500 worth of stock on August 2. Although these facts merely corroborate, substantiate, and make vivid and clear, defendant's contention that genuine issues of material fact existed as to plaintiff's ownership of the stock and as to the damages when the summary judgment was entered, the trial court should have applied Rule 60(b), Utah Rules of Civil Procedure, and granted defendant relief from the summary judgment:

(b) On motion and upon such terms as are just, the court may in the furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (7) any other reason justifying relief from the operation of the judgment.

Defendant concedes that none of the first six reasons enumerated in Rule 60(b) is applicable to this situation. However, relief under (7) of this rule was appropriate in this case. Certainly no prejudice would accrue to plaintiff by granting the relief requested, since he knew of his prior sworn testimony concerning the ownership of the stock, and the motion for relief was made expeditiously. Plaintiff, therefore, respectfully submits that the trial court should have granted the motion.

POINT III

IF JUDGMENT FOR DEFENDANT IS AFFIRMED, THIS COURT SHOULD ORDER A SET-OFF BETWEEN THIS JUDGMENT AND A PRIOR FINAL JUDGMENT OBTAINED BY DEFENDANT AGAINST PLAINTIFF.

On May 11, 1972, defendant Prince-Covey & Co., Inc. obtained a judgment against plaintiff Jerry Strand in the amount of \$34,696.16, together with interest and costs, which was affirmed by this court in *Prince-Covey & Co., Inc. v. Strand*, 29 Utah 2d 224, 507 P.2d 708. Despite diligent efforts by defendant, including the order in supplemental proceedings of July 20, 1972, in which plaintiff Strand testified under oath that he did not own any Hoffman Resources stock or have any other assets upon which execution could be levied, defendant to date has been unable to satisfy any part of this judgment. If judgment for plaintiff is affirmed in this case, this court should order satisfaction of it by set-off against the previous judgment in defendant's favor. The principal amount of defendant's judgment exceeds the amount of summary judgment granted in this case by \$8,696.16, which would leave defendant with an unsatisfied judgment against plaintiff in that amount plus accrued interest.

As a general rule, a judgment creditor may be forced to accept in payment a judgment to which he is subject, see generally 47 Am.Jur.2d, Judgments, §§999-1013, Anno. 121 ALR 478 (1939); and *Snow v. West*, 37 Utah 528, 110 P. 52, 54 (1910) where the Utah Supreme Court affirmed the granting of set-off of judgments, saying:

Whether mutual judgments should be set off and satisfied in that way, rather than by the ordinary method of enforcing them, rests largely within the discretion of *the court to which the application is made*. . . . Ordinarily . . . the application should be made in equity and the matter should be controlled by equitable principles. 110 P.2d at 54 (Emphasis added).

Clearly the equities in this case demand a set-off of the opposing judgments. Appellant has been diligent in seeking to execute upon its judgment, yet has been unable to locate nonexempt assets of plaintiff Strand on which to levy. If judgment in the present action is affirmed and no set-off granted, defendants will run the risk of being forced to pay the judgment to plaintiff and then losing any right to a return of such a payment to satisfy its earlier judgment against plaintiff. If defendant were forced to pay his judgment, there is no guarantee that it could immediately levy execution on the funds so paid since pre-existing liens might prevent effective execution. Thus, the unjust result might occur that plaintiff would be able to collect his judgment against defendant, but defendant would not be able to collect its pre-existing judgment against plaintiff because of intervening interests.

The fact that defendant did not plead set-off of the prior judgment as a counterclaim should not preclude this court from granting such a set-off. The prior judgment is not a compulsory counterclaim because it did not "arise out of the transaction or occurrence that is the subject matter of the opposing party's claim." Rule 13(a), U.R.C.P. Hence, there is no requirement that it be affirmatively pleaded.

Even though offset of the judgment might be asserted as a permissive counterclaim, the fact that it was not so asserted does not preclude this court from ordering said set-off since an appellate court has the power to grant set-off between judgments; see, *e.g. Welscher v. Libby*, 107 Wis. 47, 82 N.W. 693 (1900); Annot. 121 ALR at 491. Defendant submits that if the judgment below is not reversed, this would be an appropriate occasion for the exercise of this power.

CONCLUSION

Numerous genuine issues of material fact remained unresolved when the trial court entered its summary judgment. It was a clear error of law to impute Mr. England's knowledge to defendant. For these reasons, the judgment below should be reserved.

Respectfully submitted,

PRINCE, YEATES, WARD,
MILLER & GELDZAHLER

F. S. Prince, Jr.
Michael F. Heyrend
J. Rand Hirschi

APPENDIX A

{R. 1}

IN THE DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

JERRY STRAND,

Plaintiff,

vs.

PRINCE-COVEY AND COMPANY,
INC. and ALMON COVEY,

Defendants.

Complaint
Civil No.
217662

Plaintiff Alleges:

1. Prince Covey and Company, Inc. is a Utah corporation engaging in the over-the-counter brokerage business and doing business in Salt Lake County, State of Utah and the defendant Almon Covey is an individual residing in Salt Lake County, State of Utah.

2. Plaintiff was the owner of 6,000 shares of the common stock of Hoffman Resources, Inc.

3. On or about the 13th day of January, 1972, the plaintiff pledged with an individual, Ted England, his 6,000 shares of Hoffman Resources, Inc. for the specific purpose of having Mr. England pledge those securities as security for a loan.

4. That said individual Ted England was indebted to the defendants.

5. At all times pertinent herein Ted England acted as the agent and the employee of the defendant and the defendant is liable for the actions of Ted England.

6. That the defendant learned of the pledge of common stock of Hoffman Resources, Inc. at the lending institution which had loaned Mr. England the forementioned moneys.

7. That at all times pertinent herein, the defendants, and each of them, knew that the Hoffman Resources, Inc. common stock which had been pledged as security for a loan by Mr. England was in fact the property of the plaintiff.

{R. 2}

8. On September 13, 1972, the defendant Almon Covey for himself and as agent of Prince Covey tendered to the lending institution the sums borrowed by Mr. England and in return therefore received the common stock owned by the plaintiff. Thereafter, contrary to the rights of plaintiff, the defendants exercised ownership rights over the common stock of Hoffman Resources, Inc. and, upon information and belief, sold the same.

9. Upon information and belief, the proceeds from the sale by defendant of plaintiff's stock were used to liquidate indebtedness of Mr. England to the defendants.

10. The actions and conduct of the defendant in exercising ownership rights and selling the common stock owned by plaintiff, constitute an intentional conversion.

11. That as a result of the conversion of the plaintiff's common stock, the defendants are liable to plaintiff for the highest market value obtained for the shares of Hoffman Resources, Inc. within a reasonable time after plaintiff had notice of the conversion.

12. The highest market value reached by Hoffman Resources, Inc. common stock within a reasonable time after plaintiff had notice of the conversion was \$6.50 per share.

13. The plaintiff is entitled to damages from the defendant in the sum of \$39,000.00.

14. Inasmuch as the action of the defendants was intentional and full knowledge of plaintiff's rights to the stock, the plaintiff is entitled to punitive damages in the sum of \$10,000.00.

WHEREFORE plaintiff prays judgment against the defendant for the sum of \$39,000.00 general damage together with \$10,000.00 punitive damages, interest, costs, and other relief the court deems just and proper.

DATED this 13 day of February, 1974.

RICHARD J. LEEDY

APPENDIX B

[R. 6]

ANSWER OF PRINCE COVEY & CO.

[heading deleted in printing]

Defendants, Prince-Covey and Company, Inc. and Almon Covey, by and through their attorneys, Prince, Yeates, Ward, Miller & Geldzahler, answer plaintiff's Complaint as follows:

FIRST DEFENSE

1. The Complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE

2. Defendants admit the allegations contained in paragraph 1 of the Complaint.

3. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the Complaint and therefore deny same.

4. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the Complaint and therefore deny same.

5. Defendants admit that Ted England was indebted to defendant Prince-Covey and Company, Inc. Defendants deny that Ted England was indebted to Almon Covey.

6. Defendants deny the allegations contained in
[R. 7]
paragraph 5 of the Complaint.

7. Defendants admit that they learned of Ted England's pledge of Hoffman Resources stock, but deny that they learned of plaintiff's "pledge" of the stock to Ted England then or at any material time subsequent.

8. Defendants deny the allegations contained in paragraph 7 of the Complaint.

9. Defendants deny each and every allegation contained in paragraph 8 of the Complaint.

10. Defendants admit that the proceeds from the sale of a portion of 6,000 shares of Hoffman Resources, Inc. were used to liquidate England's indebtedness to Prince-Covey and Company, Inc. and deny every other allegation contained in paragraph 9 of the Complaint.

11. Defendants deny the allegations contained in paragraph 10 of the Complaint.

12. Defendants deny the allegations contained in paragraph 11 of the Complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 12 of the Complaint and therefore deny same.

14. Defendants deny the allegations contained in paragraph 13 of the Complaint.

15. Defendants deny the allegations contained in paragraph 14 of the Complaint.

THIRD DEFENSE

16. Plaintiff's Complaint fails to join an indispensable party, Ted England.

WHEREFORE, defendants pray that plaintiff take nothing by way of his Complaint and that defendants be awarded costs and such other relief as the Court shall deem just and proper.

Dated this 14th day of April, 1974.

PRINCE, YEATES, WARD,
MILLER & GELDZAHLER

F. S. Prince, Jr.
Michael F. Heyrend

Attorneys for Defendants

APPENDIX C

{R. 12}

AFFIDAVIT OF MACK McBRIDE

[heading deleted in printing]

STATE OF UTAH)

: ss.

County of Salt Lake)

Mack McBride being first put on his oath deposes and says:

1. That he is the office manager of Brown Securities, an over-the-counter broker-dealer firm, located in Salt Lake City, Utah.

2. That Brown Securities was a market maker in the stock of Hoffman Resources Corporation during January through December of 1972.

3. That affiant has reviewed the trading transaction in Hoffman Resources Corporation for the period of time of September 1972.

4. That affiant has ascertained from trading transactions that Hoffman Resources Corporation was quoted on September 22, 1972, at \$6.25 bid at \$6.75 ask with transactions being made at prices between the bid and ask on that date.

DATED this the 28th day of June, 1974.

MACK McBRIDE

Subscribed and sworn to before me on this the 28th day of June, 1974.

Rita Watts,
Notary Public, Residing in
Salt Lake County, State of Utah

APPENDIX D

[R. 19]

AFFIDAVIT OF TED ENGLAND

[heading deleted in printing]

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Ted England being first put on his oath deposes and says:

1. That he previously was employed as an account executive and trader with Prince Covey and Company of Salt Lake City, Utah.

2. Prince Covey and Company is an over the counter brokerage firm and Almon Covey is the principal, substantial stockholder, officer, and director of Prince Covey and Company.

3. On or before the 13th day of January, 1972, your affiant borrowed 6,000 shares of Hoffman Resources common stock from plaintiff Jerry V. Strand.

4. Your affiant borrowed said shares to use as collateral for a loan he was to secure with Murray First Thrift of Salt Lake City, Utah.

5. That he was borrowing said money for the purpose of using the proceeds to pay to Prince Covey and Company on losses that had been sustained by Prince Covey and Company due to trading transactions in which your affiant acted as the trader and also from customers

failing to pay for stock purchases on accounts at Prince Covey and Company which your affiant acted as account executive.

6. A portion of the proceeds of the above loan were paid for the purposes mentioned above.

{R. 20}

7. Prince Covey and Company had substantial losses due to trading transactions in which I acted as trader and for customers failing to pay for purchases in accounts in which I acted as account executive.

8. As a result of those losses, your affiant, subsequent to the procurement of the loan, agreed with Almon Covey to have Prince Covey and Company pay off the above mentioned loans, obtain the pledged Hoffman Resources stock, and sell the same to mitigate those losses.

9. That on the 13th day of September, 1972, your affiant in the company of Almon Covey, paid off affiant's loan with Murray First Thrift.

10. Payment on that loan was made with a Prince Covey and Company check.

11. At the time of the payoff of the loan, your affiant and Almon Covey obtained possession of 4,000 shares of Hoffman Resources stock that had been pledged to secure the loan; 2,000 shares having previously been picked up by affiant and sold with the proceeds being paid to Prince Covey; all 6,000 shares were owned by Jerry V. Strand.

12. Then Prince Covey and Company sold the Hoffman Resources stock.

13. The proceeds from the sale were divided to cover the losses mentioned above and a portion was given to me.

14. Jerry V. Strand got none of the proceeds from the sale of his stock by Prince Covey and Company.

15. Your affiant knew that Jerry V. Strand and Almon Covey were antagonists.

16. Almon Covey had prohibited your affiant from making a market in Hoffman Resources stock at Prince Covey and Company for the reason that he knew the stock was being sponsored by Jerry V. Strand.

17. Almon Covey knew that your affiant was insolvent and did not have sufficient assets to pay off the losses of Prince Covey and Company due to your affiant's trading transactions and customers failure to pay.

18. It is common knowledge and my belief that Almon Covey knew that very few persons would have blocks of Hoffman Resources common stock as large as 6,000 shares and that Jerry V. Strand would be one of those few persons that would have such a sizeable block and that Almon Covey knew that your affiant would not have ownership of such a large block of Hoffman Resources common stock.

{R. 21}

19. Almon Covey knew or should have known that the stock which he took receipt of from Murray First

Thrift and affiant belonged to Jerry V. Strand or, at least, did not belong to affiant.

20. At any rate, your affiant, an employee and agent of Prince Covey and Company, knew the Hoffman Resources stock belonged to Jerry V. Strand; that it was not to be sold; that Mr. Strand did not authorize the sale thereof; but the stock was only to be used as collateral for loan; and that Jerry V. Strand never received any of the proceeds from the sale or loan.

FURTHER SAITH AFFIANT NOT.

DATED this 19th day of June, 1974.

TED ENGLAND

SUBSCRIBED AND SWORN TO before me this
19th day of June, 1974.

J. V. Strand,
Notary Public.

APPENDIX E

[R. 23]

AFFIDAVIT OF ALMON COVEY

[heading deleted in printing]

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

ALMON COVEY, being first duly sworn, on oath,
deposes and says:

1. Affiant is a defendant in the above-entitled action and is also President and director of co-defendant Prince-Covey and Company, Inc.

2. Affiant at all material times was unaware that plaintiff Jerry Strand claimed ownership or was in fact owner of the 6,000 shares of Hoffman Resources stock which is the subject matter of this lawsuit, and affiant had no reason to believe that plaintiff claimed ownership.

3. Plaintiff's name did not appear on the certificates which were subsequently sold to liquidate Ted England's debt to Prince-Covey and Company, Inc.

4. Only a portion of the 6,000 shares were sold to liquidate the indebtedness of Ted England, and Ted England retained the balance of the shares, the disposition of which by England is unknown to defendants Almon Covey and Prince-Covey and Company, Inc.

5. Defendants Almon Covey and Prince-Covey and Company, Inc. were not aware of the solvency or insol-

vency of Ted England, but were informed that Ted England had pledged Hoffman Resources stock to secure a loan. Defendants Almon Covey and Prince-Covey and Company, Inc. were not aware nor could they draw the inference from the fact that since Ted England had a large block of Hoffman Resources stock that it would follow that Jerry Strand, the plaintiff in the above-entitled action, was in fact the owner of said shares.

6. If Ted England knew that plaintiff claimed an interest in the Hoffman Resources stock, he misrepresented the ownership of the stock to defendants. All actions and representations made or engaged in by Ted England covering the stock which is the subject matter of the action were not within the scope of employment of England, but were personal in nature.

Further affiant saith naught.

ALMON COVEY

Subscribed and sworn to before me this 22nd day of July, 1974.

Connie C. Wilson,
Notary Public

APPENDIX F

{R. 35}

AFFIDAVIT OF ALMON COVEY

[heading deleted in printing]

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

ALMON COVEY, being first duly sworn on oath,
deposes and says:

1. Affiant is an officer and director of defendant corporation Prince-Covey and Company, Inc.

2. Prince-Covey and Company, Inc. is a brokerage firm engaging principally as a broker-dealer in over-the-counter securities transactions.

3. During 1972 Ted England was employed as a registered representative of Prince-Covey and Company, Inc. His duties consisted of acting as broker and agent for customers of Prince-Covey and Company, Inc. in connection with the purchase and sale of securities.

4. In this capacity, Ted England's duties consisted of soliciting and taking orders for purchases and sales of securities on behalf of customers and the furnishing of investment information and advice.

5. Ted England was allowed to maintain, and did maintain a private brokerage account at Prince-Covey and Company, Inc., the use and maintenance of which were

entirely personal to Ted England and were not related to his duties as a registered representative for Prince-Covey and Company, Inc.

6. Pursuant to an agreement between Prince-Covey and Company, Inc. and Ted England, Ted England was personally responsible to the company for any losses accruing to it by reason of unauthorized actions of administrative errors taken by him as a registered representative.

7. During the course of England's employment, England accrued a substantial debt to defendant corporation by virtue of such unauthorized actions and errors.

8. During the course of his employment, affiant had numerous conversations with England concerning the liquidation of that debt, which varied month to month as a result of monthly accruals and payments made by England.

9. On or about the last of July or the first day of August, affiant was informed by England that England had secured a loan from Murray First Thrift some months prior and that as security he had pledged over 4,000 shares of Hoffman Resources stock, which stock was then worth more than the balance of the debt to Murray First Thrift.

10. England proposed to affiant that Prince-Covey and Company, Inc. advance England the loan balance, that England would pay the loan, and that he would sell the stock and pay the proceeds to Prince-Covey and Company, Inc. to reduce his indebtedness.

11. On or about August 2, 1972, affiant directed the issuance of a check, a copy of which is attached hereto as Exhibit 1 and incorporated herein by reference. The check was made payable to Ted England and was in the amount of \$4,300.00.

12. On the same day affiant accompanied Ted England to Murray First Thrift, where the check was delivered to Murray First Thrift and said shares of Hoffman Resources stock were delivered to England. Said stock was not registered in England's nor in plaintiff's name, but was in bearer form.

13. Affiant and England then returned to the

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offices of Prince-Covey and Company, Inc.

14. England then sold the 4,000 shares of Hoffman Resources stock obtained at Murray First Thrift and the proceeds thereof were credited to his account. Attached hereto and incorporated herein by reference as Exhibit 2 are records of England's personal account through which the sales were effected at a total sales price of \$13,500.00. Of this amount, \$4,300.00 was retained by Prince-Covey and Company, Inc. to repay its advance which was paid to Murray First Thrift, and the balance of \$9,200.00 was applied to the reduction of England's debt to Prince-Covey and Company, Inc. The balance of the shares received from Murray First Thrift were retained by England and affiant has no knowledge as to the disposition thereof.

15. England at all material times acted as principal for himself under circumstances where defendant Prince-

Covey and Company, Inc. and England were in opposition and were antagonists.

16. The repayment of the loan, the securing of the stock, its sale and the subsequent application of the proceeds to England's indebtedness were acts of England which bore no relation to England's duties at Prince-Covey and Company, Inc. other than the fact that the debt owed to England to defendant corporation was incurred during his employment.

17. England at no time during the transactions acted as agent for affiant or Prince-Covey and Company, Inc.

18. England at no time prior to this transaction indicated or implied to affiant that the Hoffman Resources stock was plaintiff Strand's or that Strand claimed an interest therein.

19. The records of England's personal account attached hereto as Exhibit 2, which records are maintained in the usual and regular business of Prince-Covey and Company, Inc. reveal that England during 1972 traded large quantities of Hoffman Resources stock.

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Further affiant saith naught.

ALMON COVEY

Subscribed and sworn to before me this 30th day of July, 1974.

Donald Jay Gamble
Notary Public residing at:
Salt Lake City, Utah

APPENDIX G

[R. 44]

AFFIDAVIT OF MICHAEL F. HEYREND

[heading deleted in printing]

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

MICHAEL F. HEYREND, being first duly sworn,
deposes and says:

1. Affiant is legal counsel to Prince, Covey and Company and was counsel for Prince Covey and Company in July of 1972.

2. Defendant Prince Covey and Company, on or about May 11, 1972, was awarded judgment against Jerry Strand after trial in the amount of \$34,696.16 for Jerry Strand's failure to pay for stocks after placing orders through Prince Covey and Company.

3. Pursuant to an attempt to collect the judgment which was entered against Jerry Strand in favor of Prince Covey and Company, affiant caused the issuance of an Order in Supplemental Proceedings compelling Jerry V. Strand to appear in the Third Judicial District Court of Salt Lake County, State of Utah, to be examined concerning his assets and liabilities.

4. On or about July 20, 1972, plaintiff, in compliance with said order, appeared in the Third Judicial Dis-

strict Court for Salt Lake County before the Court, where he was duly sworn, placed upon the witness stand, and examined by affiant.

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5. During the course of the examination of plaintiff, affiant asked plaintiff if he owned any stocks, and if so, the names of each stock and the location.

6. Plaintiff stated to affiant that the only stock he owned was 7,000 to 8,000 shares of Dusenburg Corporation stock which stock was pledged as security for a loan procured by plaintiff at Murray First Thrift.

7. Plaintiff went on to state to affiant that he owned options on 20,000 shares of Hoffman Resources stock at \$3.00 per share and that the options were through Shamrock Fund in Los Angeles, California, but that he did not own any Hoffman Resources stock.

8. Plaintiff at no time on July 20, 1972, mentioned any interest in stock allegedly loaned to Ted England, which loan plaintiff claims took place in January of 1972, prior to the hearing.

9. Affiant next asked plaintiff if he held any stock through nominees. Plaintiff responded that he had used nominees in the past, but that no stock was held in the name of nominees as of July 20, 1972.

10. Finally, affiant inquired as to any notes or other choses in action held by plaintiff and was told that the only amount owing to plaintiff was \$5,000.00 owed to plaintiff by Mr. Al Johnson.

11. Affiant attempted to procure a transcript of the above hearing, but was informed and believes that the tapes made by the Certified Court Reporter were destroyed due to age.

FURTHER, affiant sayeth naught.

MICHAEL F. HEYREND

**SUBSCRIBED AND SWORN TO before me this
30th day of July, 1974.**

**Jacquelin Humphrey,
Notary Public
Residing at: Salt Lake City, Utah**

APPENDIX H

[R. 46]

AFFIDAVIT OF DAVID NELSON

[heading deleted in printing]

STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

DAVID NELSON, being first duly sworn on oath,
deposes and says:

1. Affiant is an officer of defendant corporation Prince-Covey and Company and is employed by the company, among other things, to maintain the records which are kept in the usual course of business at Prince-Covey and Company.

2. Attached hereto as Exhibit 1 is a true and correct copy of the appropriate records maintained by Prince-Covey and Company reflecting the personal account of Ted England. Said records evidence that on August 2, 1972, 4,000 shares of Hoffman Resources were sold through England's account, that prior thereto England purchased and sold blocks of Hoffman Resources stock of comparable size, and that no sale of this size took place on or about September 22, 1974.

Further affiant sayeth naught.

DAVID NELSON

Subscribed and sworn to before me this 30th day of
July, 1974.

Nancy S. Druce,
Notary Public residing at:
Salt Lake City, Utah