

1979

W. M. Barnes Company, A Corporation v. Sohio Natural Resources Company, A Corporation, Formerly Sohio Petroleum Company, A Corporation : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

W. M. BARNES COMPANY, a)
Corporation,)

Plaintiff-Appellant,)

vs)

Case No. 16454

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

Defendant-Respondent.)

RESPONDENT'S BRIEF

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

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STATEMENT OF THE NATURE OF THE CASE

This is a civil action in which plaintiff-appellant and defendant-respondent each seek to quiet title in themselves to certain real property located in Uintah County, State of Utah.

DISPOSITION IN THE LOWER COURT

On October 31, 1979, the Honorable George E. Ballif entered a preliminary ruling granting defendant-respondent's motion for summary judgment and dismissing the complaint. In its ruling, the court held that there were no "issues of material facts" presented by the pleadings, exhibits, affidavits, depositions, and other documents submitted. (R. 144). The ruling was based upon the court's conclusion that the transaction between the parties was a sale and not a mortgage. (R.144)

The court stayed entry of an order pending an oral hearing and invited plaintiff-appellant to submit "additional affidavits or objections to any of the evidence the court has considered." (R. 145) In the two and one-half month interim between the court's preliminary ruling and oral argument plaintiff-appellant failed to produce any additional exhibits, affidavits, documents, or depositions, and offered no objections to the facts in the record.

On February 16, 1979, the court issued a further ruling concluding that summary judgment should be granted in favor of defendant-respondent. On April 2, 1979, the court entered its final order granting defendant-respondent's motion for summary judgment, dismissing the complaint and quieting title in defendant-respondent. (R.154-55).

RELIEF SOUGHT ON APPEAL

Defendant-respondent seeks a decision of this court affirming the order of the district court granting summary judgment in its favor.

STATEMENT OF FACTS

On December 28, 1977, plaintiff-appellant, W. M. Barnes Company (hereinafter "Barnes"), filed a complaint against respondent, Sohio Natural Resources Company (hereinafter "Sohio"), seeking to quiet title in certain real property located in Uintah County, Utah. The property comprises approximately 5,000 acres of mining leases, patented and unpatented mining claims and water rights in what is known as the Asphalt Ridge (hereinafter "Asphalt Ridge"). Sohio thereafter counterclaimed to quiet its title in the same property.

As of October 6, 1971, the property was owned by Barnes (37 1/2 percent), City Investing, Inc. (18 3/4 percent), Tarinc, S.A., a Panama corporation (18 3/4 percent), and Sohio (25 percent). (R.70-78).

On that day, all four owners entered into an operating agreement in Cleveland, Ohio, designating Sohio as operator of Asphalt Ridge. (R.70-78) Contrary to the statement in Barnes' brief, this agreement specifically provided that it did not create a trust relationship between the parties. (R.75).

While in Cleveland, Mr. W. M. Barnes (hereinafter "Mr. Barnes"), President of Barnes, also sought to borrow \$500,000 from Sohio for use in a venture unrelated to Asphalt Ridge. Mr. Harry Pforzheimer, Vice-President of Sohio, informed Mr. Barnes that Sohio was not in the lending business. (R. 42: 29; R. 100). However, Mr. Pforzheimer stated that Sohio was interested in purchasing Barnes' interest in Asphalt Ridge and that an agreement to do so might assist Mr. Barnes in obtaining a loan of the money he needed from a bank. (R. 42:28-29; R. 100).

On the strength of Sohio's agreement to buy Barnes' interest for \$500,000, the National City Bank of Cleveland (hereinafter "Bank") agreed to loan Barnes \$500,000. If Barnes defaulted on its promissory note with the Bank, Sohio was obligated to purchase Barnes' interest and remit the purchase price to the Bank. (R. 43:D-3; 90). The transaction

became embodied in two agreements, each dated October 7, 1971 involving Barnes, Sohio and the Bank, as escrow agent. The first agreement was a letter agreement between Sohio and Barnes which contained an irrevocable promise by Sohio to purchase Barnes' interest in Asphalt Ridge for \$500,000. (R. 43:D-2; 79-80).

The letter agreement provided (1) that Barnes could elect to sell its interest to Sohio for \$500,000 at any time between October 7, 1971 and March 7, 1973; and (2) that Sohio would have a first right of refusal if Barnes received another offer on the property. In that event, Barnes would

notify Sohio in writing of the complete consideration offered and the identity of the offeror, whereupon Sohio shall have a period of thirty (30) days in which to advise Barnes in writing whether it wishes to purchase Barnes' interest upon the terms and conditions of said offer. (R. 43:D-2; 79-80).

Mr. Pforzheimer, Mr. Barnes and an officer of the Bank executed an Escrow Agreement in conjunction with the letter agreement. (R. 43:D-3; 89-92). The Escrow Agreement provided for the execution of a deed, entitled a "Conveyance and Assignment", by Barnes conveying Barnes' 37-1/2 percent undivided interest in Asphalt Ridge to Sohio. (R. 43: D-13; 85-88) This deed was executed by Barnes on October 7, 1971, and was deposited in escrow with the Bank.

Paragraph 2 of the Escrow Agreement outlined the terms of a sale of Barnes' Interest to occur upon Barne's failure to pay the note to the Bank:

In the event Borrower [Barnes]
fails to pay, on or before

December 29, 1972, its indebted-

ness to Escrow Agent [Bank] in the amount of Five Hundred Thousand Dollars (\$500,000) together with all interest accrued thereupon, it shall be deemed that Borrower has elected to sell to Offeror [Sohio] the properties described in the said Letter of Commitment [letter agreement] and Borrower hereby authorizes and directs Escrow Agent to notify Offeror not later than January 5, 1973 that Borrower has elected to sell to Offeror, whereupon Offeror shall be obligated as of delivery of said notice by Escrow Agent to purchase the properties and pay Escrow Agent interest on said indebtedness from December 29, 1972 at the rate of eight percent (8%) per annum calculated on a 360 day basis. (R. 43:D-3; 90).

The Bank then loaned Barnes \$500,000 on a promissory note due and payable on December 29, 1972. Mr. Barnes, who was experienced in borrowing amounts of this magnitude, has since admitted that he understood these documents and was not acting under any duress:

Q. So basically, your answer is that you knew what you were signing and under no duress when you signed it and made the agreement?

A. Right.

(R. 42:33).

Q. Mr. Barnes, this kind of thing though was not new to you, borrowing from banks?

A. Being in business, no, we had borrowed this kind of money many times.

(R. 42:36).

In November, 1972, the Bank sent Barnes a maturity notice stating that the entire balance on the note plus interest was due December 29, 1972. (R. 43:D-14; 95). On the latter date, Mr. Barnes telephoned the Bank to ask for a thirty-day extension of time for payment. Because of the terms of paragraph 2 of the Escrow Agreement, the Bank was unable to grant the requested extension. Barnes' failure to repay the loan on December 29, 1972 triggered the sale of Asphalt Ridge to Sohio.

In letters dated January 2 and 4, 1973, the Bank advised Sohio and Barnes, respectively, that Barnes' failure to retire the note on December 29, 1972 constituted an election by Barnes sell the property to Sohio and that the Bank would deliver the deed to Sohio upon payment of the purchase price. (R. 43:D-8; 96-97).

On January 2, 1973, pursuant to the Escrow Agreement, Sohio paid the Bank \$500,000 plus the accrued interest on Barnes' note and received the deed. Sohio later sold sixty percent (60%) of Barnes' former interest in Asphalt Ridge to other investors for sixty percent (60%) of the purchase price, or \$300,000. (R. 102, 106).

In his telephone conversations with representatives of Sohio and the Bank on December 29, 1972, and in the letter to Sohio bearing the same date, Mr. Barnes, for the first time, spoke of an offer to purchase Barnes' interest in Asphalt Ridge which he claimed to have received from a company called Prudential Fund. (R. 42:52-54; 43:D-9; 111). Barnes tried to

persuade the Bank to grant a thirty-day extension on the promissory note in order to allow Sohio the thirty days required by the letter agreement in which to exercise its first right of refusal. By Mr. Barnes' own admission, however, until late in the day on December 29, 1972, at no time had he made any attempt to tell Sohio or the Bank about another offer to purchase. (R.2; 42:53-54 43:D-9; 111; 114). Such notice did not come in time to allow Sohio the requisite thirty days to consider the offer prior to the due date of the note. The note went into default; Sohio purchased Barnes' interest and the late notice was without legal effect.

In other correspondence between Barnes and Sohio during January, 1973, Mr. Barnes expressed his unhappiness that the Bank had not extended the term of the note and that Sohio had not allowed Barnes a "grace period" before purchasing the property. (R. 43:D-11; 114) Barnes made no mention of any "mortgage" or "pledge". Sohio repeated its position that at all times its intention had been to abide strictly by the terms of the letter agreement, Escrow Agreement, and deed. (R. 43:D-12; 116-17).

Although Barnes now claims that it "mortgaged", rather than sold, Asphalt Ridge, it was not until December, 1977, when this suit was filed, that Barnes took any further interest in the property. (R.103). Barnes made no attempt to complete the sale to the purported offeror, Prudential, after Sohio acquired the deed. (R. 42: 62-63, 71-72). Although Barnes knew that

work was being performed on the property during the five ensuing years at substantial expense to Sohio and others, Barnes did not object or participate in those activities or offer to pay for any share thereof. Although Barnes had previously paid its share of development expenditures, assessment costs, and taxes on the property, it paid for nothing after December 29, 1972. (R. 103, 110, 122).

Not until late 1977, when Sohio sought Mr. Barnes' acknowledgement of the deed, did Barnes exhibit any interest in the property. (R. 103). This suit was filed by Barnes shortly thereafter. ¹

ARGUMENT

I

THE LOWER COURT'S DECISION WAS FULLY
CONSIDERED AND COMPORTS WITH ALL REQUIREMENTS
OF SUMMARY JUDGMENT.

The basic and controlling consideration in a summary judgment proceeding is to look beyond, search out, and pierce the pleadings to determine whether a genuine issue of material fact exists between the parties. Rich v. McGovern, 551 P.2d 1266, 1267-68 (Utah 1976); Larsen v. Christensen, 443 P.2d

¹ Mr. Barnes has since acknowledged the deed in sworn testimony. (R.42:67). Contrary to what Mr. Barnes says, there is no evidence in the record that Sohio has not recorded its deed. The deed was, in fact, recorded prior to the filing of this action.

402, 403 (Utah 1968); Dupler v. Yates, 351 P.2d 624, 636 (Utah 1960).

The submissions, i.e., affidavits, documents, depositions, and pleadings are to be carefully considered by the court in the light most favorable to the losing party. Rich v. McGovern, supra at 1268; Larsen v. Christensen, supra at 403. When all the evidence, considered as a whole, fails to establish a genuine issue as to any material fact, or any right of recovery, it is incumbent upon the court to grant the motion for summary judgment. Larsen v. Christensen, supra at 403.

Summary judgment

. . . does have a useful and salutary purpose. When the evidence as contended by the plaintiff, and every reasonable inference that fairly could be drawn therefrom, are considered in the light most favorable to him, and it nevertheless appears that he could establish no right to recovery, the motion should be granted to save the time, trouble and expense involved in a trial.

Henry v. Washiki Club, Inc., 355 P.2d 973, at 973 (Utah 1960).

See also Harvey v. Sanders, 534 P.2d 905, 907 (Utah 1975);

Frederick May & Co. v. Dunn, 368 P.2d 266, 268 (Utah 1962).

The lower court's decision to grant Sohio's motion for summary judgment was carefully and deliberately considered. On October 31, 1978, the court indicated a preliminary intention to grant summary judgment, but stayed entry of an order until Barnes could provide additional submissions and objections, if

any, and be heard. Barnes offered no further affidavits, interrogatories, depositions, documents, or objections and on January 12, 1979, two and one-half months later, the court heard oral argument on Sohio's motion. On February 16, 1979, the court issued a further ruling restating that Sohio's motion should be granted. The court concluded that the instrument of sale in this case

. . . would not as a matter of law permit an interpretation of the transaction as a security transaction contemplating foreclosure, rather than one of purchase as is expressly provided in the instrument. (R. 152).

The actual order granting summary judgment and dismissing the case was signed by Judge Ballif on April 2, 1979.

In its brief, Barnes asserts that summary judgment is a harsh remedy and should be granted with caution. Caution was the byword of the lower court in this case. It is clear that the court concluded, as did this court in Allen's Products Co. v. Glover, 414 P.2d 93, 94 (Utah 1966), that

[t]he trial judge not only can but should grant motion for summary judgment if he feels certain that he would rule that way no matter what proof a party could produce in support of his contentions.

After oral argument and a second look at the undisputed facts of this case, the court below held that no material facts were genuinely in dispute and that Barnes was not entitled to the relief sought in the complaint. This court should affirm the summary judgment quieting title in Sohio.

II.

THE CONVEYANCE AND ASSIGNMENT FROM BARNES TO
SOHIO WAS AN ABSOLUTE DEED AND THE
TRANSACTION WAS A SALE.

A. It is clear from the deed itself that the transaction between Barnes and Sohio was a sale. The deed executed by Barnes on October 7, 1971, was entitled "Conveyance and Assignment," and contained the following language:

For valuable consideration . . .
W. M. Barnes Company . . .
does hereby convey, assign,
transfer, set over, release,
and quitclaim unto Sohio Petroleum
Company . . . all of its right,
title and interest in and to all
mining leases, patented and un-
patented mining claims and water
rights located in the Asphalt
Ridge project. . . . (R. 85).

Attached to the deed was a complete description of the
Property conveyed.

The deed by Barnes conforms with the requirements for a deed found at Utah Code Ann. § 57-1-13. See also Powell on Real Property 1010-11 (Single Vol. Ed. 1968). Even in the absence of acknowledgment or proof, it is clear that the deed is valid and binding between Barnes and Sohio. Utah Code Ann. § 57-1-6.

The deed was deposited in escrow to be delivered to Sohio upon the occurrence of any of the conditions set forth in the letter agreement or Escrow Agreement. Such a conditional delivery is entirely appropriate. See Powell, supra at 1029-30. The date the condition occurs is the date of delivery and the deed becomes effective and binding on that date (in this case January 2, 1973). See Powell, supra at 1029-30.

Barnes does not contend that the deed is deficient in any respect and the deed should be given the effect it was intended to have by its own clear and unequivocal terms.

B. Construing the deed together with the letter agreement and the Escrow Agreement clearly and unambiguously evidences the transaction between Barnes and Sohio to be a sale. It is clear that different instruments executed at the same time are to be read together in order to ascertain the intent of the parties at the time the deed was executed. See Smyth v. Reed, 78 P.478, 479 (Utah 1904). See also Utah Code Ann. § 70A-3-119. The instruments executed along with the deed in the instant case include the letter agreement and the Escrow Agreement. Construed together, it is clear that these instruments effected a sale of Barnes' interest in Asphalt

Ridge to take place upon the occurrence of the following events: (1) Barnes' failure to pay its indebtedness to the Bank on or before December 29, 1972; followed by (2) Sohio's payment of \$500,000, plus interest, to the Bank. It is by the occurrence of these events that the sale between Barnes and Sohio actually took place, as required by the deed, the letter agreement and paragraph 2 of the Escrow Agreement. (R. 43:D-3; 79-80; 85, 90). Barnes' failure to pay the Bank constituted an election by Barnes to sell and Sohio proceeded to acquire Barnes' interest in the properties. Sohio paid the purchase price to the Bank, as escrow agent, and the Bank delivered the deed to Sohio.

None of the terms in the deed, Escrow Agreement, or letter agreement reveal or imply any intention by either party to enter into a mortgage. Considered together, the terms of these instruments are not ambiguous and extrinsic evidence may not be resorted to in order to vary them. See Brown v. Skeen, 58 P.2d 24, 32 (Utah 1936); Corey v. Roberts, 25 P.2d 940, 946 (Utah 1933); Thomas v. Ogden State Bank, 13 P.2d 636, 639 (Utah 1932).

C. The presumption that the transaction was a sale can only be overcome by clear, unequivocal, and convincing evidence which proves that both parties intended a mortgage.

The language of the deed speaks as an absolute conveyance. There arises, therefore, a strong presumption that the written terms express the intention of the parties. In the case of Ewing v. Keith, 52 P.4, 5 (Utah 1898) the

Utah Supreme Court made it clear that in an action to declare a deed to be a mortgage

. . . the burden rests on the moving party to overcome the strong presumption arising from the terms of the written instrument, by clear, unequivocal, and convincing testimony; and if there is a failure to overcome this presumption by testimony clear, plain and convincing, beyond any reasonable controversy, the written instrument will be held to express the intention of the parties.

See also Jacobsen v. Jacobsen, 557 P.2d 156, 158 (Utah 1976); Thornley Land & Livestock Co. v. Gailey, 143 P.283, 287 (Utah 1943); Smyth v. Reed, supra; Chambers v. Emery, 45 P. 192, 195 (Utah 1896) 3 Powell on Real Property p.447 (1977). Furthermore, a deed may not be considered a mortgage unless and until it can be shown that both parties regarded it as a mortgage. In Northcrest, Inc. v. Walker Bank & Trust Co., 248 P.2d 692, 696 (Utah 1952), this court stated:

Plaintiff maintains further that whether an instrument is a deed or mortgage is a matter of the intention of the parties, and that it must appear not only that one but both parties regarded it as a mortgage before it is such legally. There is no doubt that this is so. . . . (Emphasis added).

See also Ideal Electric Co. v. Willey, 435 P.2d 921, 923 (Utah 1968); Rizo v. MacBeth, 398 P.2d 209, 212 (Alas. 1965) cited with approval in Kjar v. Brimley, 497 P.2d 23 (Utah 1972).

In the instant case, there is nothing on the face of the documents which lends itself to a mortgage construction. Moreover, it is abundantly clear that Sohio has never considered the transaction to be a mortgage. From the very beginning Mr. Pforzheimer, Vice President of Sohio, indicated to Barnes that Sohio wanted to purchase the Asphalt Ridge property. Sohio has always acted consistent with that intention. Barnes has never suggested, let alone offered any proof of, the contrary. Therefore, even assuming Barnes' secret intention was as Mr. Barnes now states it to be, as a matter of law, the necessary union of intention to regard the transaction as a mortgage cannot be proved.

Based upon the pleadings, affidavits and exhibits on file herein, it is apparent that even if a sale were not clear from the terms of the documents, the transaction was a sale based upon Barnes failure to allege facts sufficient to establish a mortgage.

D. The acts of the parties confirm that the transaction was a sale rather than a mortgage. Such evidence, albeit not itself determinative, has nevertheless assisted courts in deciding whether a deed should be declared a mortgage. See, e.g., Thornley Land & Livestock Co. v. Gailey, supra at 287.

In this case, it is clear that Mr. Barnes' eyes were open when he executed the various documents in question. He admits to having read and understood the documents and acted free from any duress. (R.42:33) He also admits

to having previously negotiated and entered into many other business transactions on a level comparable with this one. (R.42:36).

Although Barnes claimed to have a bona fide offer to purchase from Prudential Fund, Barnes made no attempt to sell the property to Prudential when Sohio failed to match the offer within the thirty-day period. If the transaction were a mortgage and the note had been assigned to Sohio upon Barnes' default, as Barnes contends, Barnes could be expected to complete the sale to Prudential and pay off the note or redeem the property, as the case may be. More importantly, Barnes ignored the property for five years following the sale, while Sohio and the other working interest owners managed, operated, developed and paid the taxes on the property. (R.103) Although well aware of the purchase and subsequent actions of Sohio consistent therewith, Barnes made no objection or contrary claim for five years prior to this lawsuit. (R. 42: 81-84; 103). Now Barnes belatedly decides to reveal previously unknown intentions which are self-serving and contrary to the language of the writings, saying that he "did not catch the significance" of that language and that he "missed it" at the time he signed the agreements. (R.42: 38-39).

Sohio's actions have always been fully consistent with ownership. Sohio has never had any reason to treat the transaction as anything but a sale and has never done so. Since the purchase of Barnes' interest the property has

been managed by Sohio with some participation by the other owners, but with no participation by Barnes. (R. 103). Without protest from Barnes, Sohio has conveyed sixty percent of the interest acquired from Barnes to its remaining partners, Tarinc, Inc., S.A. and City Investing Co., for sixty percent of the price Sohio paid for Barnes' interest. (R. 102; 106-107). Sohio has also entered into new arrangements for the development of the property (R. 102) and has paid taxes and assessed expenses to other partners, but not to Barnes.

The circumstances of this case may be likened to those in Thornley Land & Livestock Co. v. Gailey, supra, where this court stated as follows,

Defendant went into possession, received the rents from the property and paid the taxes and expenses incident to its operation. He made a sale of some of the property, apparently without protest from the plaintiff. This situation continued for approximately 6 1/2 years from the time of the execution of the agreement, or approximately 5 1/2 years after the one year period to 'redeem' had expired, before plaintiff made any move at all with respect to the property or any obligation with regard thereto. No interest was paid during this period and the parties did nothing which would be inconsistent with the full ownership of the property in Gailey. Then for the first time Plaintiff makes claim that the deed absolute was in fact a mortgage. . . . Viewing the situation of the parties at the time and their conduct since that time, the

conclusion is inescapable that the agreement was intended to be a sale agreement with option to repurchase within one year. Furthermore, conduct of the parties from the time of execution of the deed until the time of filing of this action indicates that they considered the agreement an option to repurchase and not a mortgage.

The undisputed fact of Barnes' subsequent inaction, together with the actions of Sohio and the terms of the documents themselves, indicate that the transaction was a sale and not a mortgage.

III

SINCE THERE WAS NO INDEBTEDNESS ON THE PART OF BARNES TO SOHIO, THE TRANSACTION CANNOT BE DEEMED TO BE A MORTGAGE.

The most important factor in determining whether a deed absolute on its face is in reality a mortgage is the existence of an indebtedness on the part of the grantor to the grantee, the payment of which is secured by the property. According to the authorities, the absence of such indebtedness demonstrates that the transaction was a sale.

In determining whether an absolute conveyance is a mortgage, by far the most important fact is whether there is an indebtedness on the part of the grantor to the grantee, left unaffected by the conveyance. The debt may either have existed prior to the conveyance or have arisen from a loan made at the time of the

conveyance. The existence of such an indebtedness is considered as almost conclusive that the transaction was a mortgage. Even if it is legally possible to have a mortgage without a personal debt, its absence raises such a strong, natural inference in this sort of case that the transaction was a sale that it practically establishes the point. (Emphasis added).

IV American Law of Property 92 (1952 Ed.).

In Thomas v. Ogden State Bank, supra, this court recognized that without a debtor-creditor relationship there could be no mortgage. There, the court, at 638, quoted with approval the following paragraph from Jones on Mortgages, (8th Ed.)

The existence of the debt is the test. . . . There must be a debt or there can be no security for its payment. Hence, it is said if there is no debt there can be no mortgage.

See also Thornley Land & Livestock Co. v. Gailey, supra at 287 (Utah 1943); Smyth v. Reed, supra at 479.

Appellant claims that the deed was a mortgage to the Bank to secure the payment of the \$500,000 promissory note executed by Barnes in favor of the Bank. Such a claim ignores the fact that the grantee under the deed was Sohio, not the Bank. The Bank could never have foreclosed on the property upon the failure of either Barnes or Sohio to pay the note. Therefore, the deed was not security for the Bank. As explicitly stated in the Escrow Agreement, the security relied upon by the Bank to make the loan was

the commitment of Sohio to buy out Barnes, the proceeds to go to the Bank. Barnes and Sohio owed one another nothing. Indeed, Barnes has never even claimed any indebtedness between it and Sohio. The essential element of an indebtedness on the part of Barnes to Sohio is lacking and without it there can be no mortgage.

IV.

SINCE THERE WAS NO PROVISION FOR REDEMPTION, THE TRANSACTION BETWEEN BARNES AND SOHIO IS A SALE.

In Gibbons v. Gibbons, supra at 107, this Court stated:

The right of defeasance of the title conveyed that is the right to redeem the property, is essential element of a mortgage. Without the right to redeem the property, the deed cannot be intended as a mortgage. Such right is not conclusive that a mortgage was intended; but without the right there can be no mortgage.

See also Hallstrom v. Buhler, 378 P.2d 355, 357 (Utah 1963) where the court held that the transaction was a sale, and not a loan "because no right was given to the sellers to regain the property sold. . . ."

No language in the letter agreement or the Escrow Agreement would permit redemption of Sohio's title. Once Barnes defaulted on the note and Sohio paid \$500,000, the sale was completed and the deed belonged to Sohio. Barnes has not claimed that the transaction contemplated a right of redemption. The absence of any right of redemption by Barnes is evidences as a matter of law that the transaction between the parties was not a mortgage.

V.

EVEN IF THE DEED COULD BE CONSTRUED
TO BE A MORTGAGE, THE PRESENT ACTION
IS BARRED BY THE DOCTRINE OF LACHES.

It is clear that the doctrine of laches is applicable to a suit to have a deed absolute on its face declared a mortgage. Since the appellant is alleging an equitable doctrine to declare a deed absolute on its face to be a mortgage, the equitable defense of laches is available to Sohio. In 55 Am. Jur.2d, Mortgages, § 37, pp. 218-19, the following is stated:

Since it is only by the intervention of equity that a deed absolute on its face may be declared a mortgage, the rule obtains generally that equitable principles as to laches and stale demands are applicable to a suit to secure such relief.

There is, however, no fixed rule by which to determine when there is laches sufficient to constitute a defense. Each case is determined according to its own peculiar circumstances. Although a mere delay short of the period established by the statute of limitations does not of itself raise the presumption of laches, it has been held that relief may be refused in the case of a stale demand independent of the period fixed by the statute of limitations, and this is particularly true where the relations of the parties have been altered in the meantime.

The Utah Supreme Court relied upon the doctrine of laches to refuse to construe a deed as a mortgage in the case of Jacobson v. Jacobson, supra. In Jacobson, the plaintiffs filed suit to quiet title to property alleging that a deed

executed in favor of the defendants was an equitable mortgage. The deed had been given to the defendants when they provided funds needed by the plaintiffs to pay off a debt on the property. Following the deeding of the property to the defendants in 1966, the defendants paid taxes, maintained the premises, harvested crops, and sold some of the property. It also appeared that until the action was filed, the plaintiffs did not believe that they owned the property in question. As consequence, the Utah Supreme Court held as follows, at 158-59:

Supplementing what has been said above, there is also to be considered the doctrine of laches. That is, that a court of equity is reluctant to reward a party who has been dilatory in seeking his remedy. As is sometimes said, equity aids the vigilant. The requirement that laches must involve a delay; and also that because of the delay there has resulted some disadvantage to the other party, is met here. In addition to the delay of eight years in bringing this suit, circumstances have intervened so that the delay has indeed placed the defendants at a substantial disadvantage. The father . . . has now passed away, so his testimony as to his version of the transaction is no longer available. It is also shown that the property greatly increased in value; and that a portion of it has been conveyed to a third party.

In the instant case, there has been a delay of five (5) years. The property has increased in value, portions of it have been sold and at least one person present at the time the documents in question were executed is deceased. (R. 101). Furthermore

the nature of some of the properties, being unpatented mining claims, requires constant vigilance on the part of an owner. Where Barnes, a self-professed experienced and knowledgeable oil lease operator, did nothing for five years which would be inconsistent with Sohio's full ownership of the property and where Sohio has so significantly altered its position in the meantime, appellant's complaint should be dismissed as barred by the doctrine of laches.

VI.

THE CASES CITED BY BARNES DO NOT SUPPORT THE PRESENCE OF TRIABLE FACTS OR THE EXISTENCE OF A MORTGAGE IN THIS CASE.

Barnes has cited certain cases in which courts received parole evidence in determining whether a deed absolute on its face should be interpreted, instead, as a mortgage. However, these cases do not require such a factual inquiry where, as in the present case, the deed is accompanied by contemporaneous writings exhibiting the intentions of the parties. Parole evidence may be allowed on occasion in examining the intentions of the parties to a bare deed, but not to vary the terms of a written contract which accompanies a deed. Barnes is attempting to do the latter here. See e.g., Brown v. Skeen, 58 P.2d 24, 32 (Utah 1956). Furthermore, such evidence is immaterial where the necessary elements of a mortgage are lacking anyway.

Barnes' description of the opinion in Duerden v. Solomon, 94 P. 978 (Utah 1908), is misleading. It is true that

the court held that courts of equity will look beyond the terms of a bare deed to determine whether there is clear and convincing proof that a mortgage was the object of the parties in executing and receiving the deed. However, there was no dispute in that case that an indebtedness existed between the parties and that the deed had been given to secure payment of the indebtedness. 94 P. at 979. This essential element is lacking in the present case. Barnes does not even contend that there was, or is, any indebtedness between Barnes and Sohio. Barnes was indebted to the Bank and the security for that indebtedness was Barnes' note together with Sohio's promise to buy the property and pay off the note in case of Barnes' default.

Furthermore, there was no other writing to look to in Duerden to ascertain the intentions of the parties. In the present case there are two contemporaneous written agreements. It was the content of these writings upon which Judge Ballif relied in his ruling below. No court is as free to examine parole evidence where a written agreement accompanies a deed, as where there is no such additional writing.

Finally, the receipts and book entries mentioned in Duerden were not only parole evidence, but were also the defendant- mortgagee's own records showing the plaintiff's payments as loan interest, rather than rental payments. They were thus, in effect, admissions by the defendant that the deed was a mortgage to secure repayment of a loan. In the present

case Sohio has received no payments from Barnes at all and to the extent Sohio's records reflect the nature of the transaction at all, they show it to be a purchase. (R. 100-102)

Hess v. Anger 177 P. 232 (Utah 1918), also cited by Barnes, is entirely inapposite. In Hess there was "no contention . . . but that the deed . . . was intended as a mortgage" by both parties pursuant to an oral agreement. Id. at 233. The sole dispute was as to the "nature and extent of the indebtedness the deed was given to secure." Id. In the present case there is no allegation of a parole contract, nor any indebtedness and Hess has no relevancy.

In Corey v. Roberts, supra, relied upon heavily by Barnes, the court at the outset distinguished that case from the present situation by holding that in a case such as this it is essential to determine

[w]hether 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 . . .

Here there was no debt, hence there was no continuing obligation.

In Corey the court held that a transaction involving a deed was actually a mortgage relationship because: (1) There was a pre-existing debt which was not extinguished by the deed; (2) The grantee paid nothing for the deed; (3) The grantor remained in possession after the conveyance vested and retained all the indicia of ownership; (4) The grantor had a right to

redeem or "repurchase" the property; (5) Neither party actually maintained that the deed was absolute, although it purported to be such on its face; and (6) Income received on the property was applied by the grantee to the grantor's loan account.

It is undisputed that none of these factors is present in the instant suit. Furthermore, there are contemporaneous writings in this case, whereas there were none in Corey. Therefore, Corey is good law on what constitutes a mortgage, but is factually opposite to this case.

Brown v. Skeen, supra, is another case which is factually self-distinguishing. In Brown the court held that a deed and written declaration of trust, construed together, constituted a trust deed allowing a right of redemption and having the same effect as a mortgage.

In the present case it is undisputed that the contemporaneous agreements contain language denoting a sale, rather than a declaration of trust or mortgage.

It is also important to note that Brown stands for the view that where contemporaneous written instruments accompany a deed, the original intent of the parties with respect to the deed may be ascertained through reference to such instruments, and extrinsic evidence will not be allowed to vary the terms of the instruments. Thus Barnes is attempting to do precisely that which is prohibited. Nevertheless, Sohio contends that even assuming the truth of Barnes' extrinsic factual

assertions, there still is no genuine issue of material fact and the case was properly decided as a matter of law. See Point II C, supra.

According to Barnes the decision in Thornley Land and Livestock Co. v. Gailey, supra, turned on a finding that it was 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." Id. at 287, Barnes brief on appeal, p. 13. It is undisputed in this case that there was no such obligation either before or after the agreement, hence there has never been a mortgage. It should also be noted that in Thornley the court held that the transaction was a sale.

Barnes erroneously states that in Gibbons v. Gibbons, supra, the court held the transaction to be a mortgage. The contrary is true, Id. at 108. More importantly, the first thing that Gibbons teaches is that where a written contract accompanies a deed, the question whether the deed was intended by the parties to be part of a sale or a mortgage is one to be decided as a matter of law by reference to the contract. Id. at 106. Since the recitals in the Gibbons contract demonstrated (1) the absence of an indebtedness secured by the deed (the deed was given to discharge an indebtedness, rather than to secure one); (2) that the conveyance was to be absolute; (3) a reservation of a life estate by the grantor; and (4) a right of sale in the grantee, the transaction was held to be a sale.

Each of these elements is also present in this case. With particular reference to factor (3), although no life estate was reserved by Barnes, Barnes did reserve his interest during the term of the note. Once the note expired without payment, the sale of Barnes' interest took effect. From that time forward Sohio enjoyed full ownership, including the right to sell, and in fact did sell portions of Barnes' former interest to other parties.

In its discussion of Gibbons it is clear that Barnes has confused the parties, and perhaps the cases as well. Barnes seems to argue that the court held the transaction to be a mortgage because the contract gave the grantor a right to sell the property to a third party. Actually, the court found that the agreement "did not recognize a right of sale in the grantor." On the contrary, the contract gave the grantee a right of sale and the court held the transaction was a conveyance.

Kjar v. Brimley, 497 P.2d 23 (Utah 1972) is a case in which the subject property was heavily mortgaged and the mortgagor (plaintiff) had defaulted on his obligation and was about to lose his land. In urgent need of money, the plaintiff was referred to defendants and an agreement was prepared contemporaneous to the deed, whereby (1) the grantees agreed to advance the money; (2) the grantees agreed to reconvey to the grantor upon repayment of the indebtedness; and (3) the grantor retained the right to sell the property to a third party. Inasmuch as these factors pointed clearly to a

mortgage, the court remanded to the trial court for a determination of whether the transaction was one actually intended to disguise a usurious loan. If so, the borrower would have been entitled to the penalty provided under Utah Code Ann. §15-1-7. ²

There is no dispute that the mortgage elements mentioned in Kjar are lacking in the present case. Rather than making out a mortgage, the contemporaneous written agreements in this case make out a sale.

Finally, Hallstrom v. Buhler, 378 P.2d 355 (Utah 1963), cited by the court in Kjar, is of interest because it held a transaction to be a sale, rather than a loan, in the face of a claim that the value of the property far exceeded the alleged indebtedness (or, as the court stated, the purchase price). This court affirmed a summary judgment in favor of the buyers because

[t]he only reasonable interpretation of the transaction as evidenced by the written documents, pleadings and pre-trial order based on the discussion between the court and counsel was that it was a sale and not a loan. This is so because no right was given to the sellers to regain the property sold upon payment of any given amount

Id. at 357.

² The procedural posture of the case on appeal is not entirely clear, which leaves uncertain the exact purpose of the remand. All parties apparently agreed that material questions of fact existed which rendered the trial court's summary judgment inappropriate. The nature of these factual issues is not clear from the opinion. On appeal the defendants-respondents merely asserted that the court nonetheless did not abuse its discretion in granting summary judgment. Kjar v. Brimley, 497 P.2d 23 (Utah 1972), at 24.

Since there was no provision in this case for redemption by Barnes once the sale occurred, the transaction between Barnes and Sohio likewise cannot be considered a loan, regardless of the considerations raised by Barnes on this appeal.

Although the law in the cases cited by Barnes does apply in the present case insofar as there is an identity of facts, that law supports Sohio's legal position, rather than Barnes'. The cases cited by Barnes which (1) interpret a transaction as a mortgage; or (2) permit an inquiry into extrinsic facts, are distinguishable on their facts. In the former cases there was an indebtedness, a right of redemption and, in some of the cases, a contemporaneous writing (or oral agreement) which constituted a mortgage. In the latter cases there was an absence of any written or oral agreement between the parties other than the deed. Here there are written agreements evincing a sale and the absence of any elements of a mortgage transaction and the lower court so held.

CONCLUSION


There never was any indebtedness between the parties in this case and Barnes had no right of redemption after the sale took effect. The absence of these elements is conclusive proof that there was no mortgage. The agreements between the

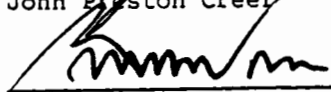
parties, together with the deed, demonstrate an intent by both parties to enter into a sale. What Mr. Barnes now says his intentions were may not be allowed to vary the writings. The questions raised by Barnes in this case are immaterial in the absence of the fundamental elements of a mortgage.

This court should affirm the summary judgment granted by the district court. There is no genuine issue of material fact in this case and the district court properly granted summary judgment in favor of Sohio.

Respectfully submitted,

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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Respondent's Brief was mailed, postage prepaid, to Duane A. Frandsen and Michael A. Harrison, Frandsen, Keller & Jensen, Attorneys for Plaintiff-Appellant, Professional Building, 90 West 1st North, Price, Utah, 84501, on this 28th day of September, 1979.

Carol B. Larson