

1980

Wayne B. Baker v. Charles W. Taggart, A Single)
Man; H. B. Wade and Edna) Wade, His Wife;
Valley Bank) & Trust Company; and)
Commercial Security Bank : Brief of Defendants-
Appellee

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

WAYNE B. BAKER,)	
Plaintiff-Appellant,)	
vs.)	Case No. 16857
H.B. WADE, et ux.)	
Defendants-Appellee.)	

On Appeal from the District Court
for the Third Judicial District
in and for Salt Lake County, Utah

Honorable David K. Winder, District Judge

BRIEF OF DEFENDANTS-APPELLEE

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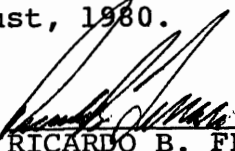
IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.)	Case No. 16857
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Defendants-Appellee.)	

The following corrections should be noted in the Brief of H.B. Wade, et ux., defendants-appellee herein:

p.2, line 1	" <u>R. 107</u> " should be " <u>R. 199</u> ".
p.3, line 9	"mortgagee" should be "mortgagor".
p.3, line 1	"optionee" should be "optionor".
p.10, note 2, line 1	"weight" should be "weight".
p.21, line 21	"emphasis <u>is</u> original" should be "emphasis <u>in</u> original".
p.23, line 6	"SUPPORT FOR ITS" should be "SUPPORT FOR HIS".
p.33, line 14	"the testimony <u>to</u> one of" should be "the testimony <u>of</u> one of"
p. 35, line 14	" <u>R. 107</u> " should be " <u>R. 199</u> ".

DATED this 28th day of August, 1980.


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FILED

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BRIEF OF DEFENDANTS-APPELLEE

STATEMENT OF THE CASE

This is an appeal by Wayne B. Baker ("Baker"), a judgment creditor of Charles W. Taggart ("Taggart"), from a determination entered in favor of defendants-appellee, Mr. and Mrs. H.B. Wade, after trial in the District Court of Salt Lake County. Baker sought to have a March, 1975 transfer of certain real property from Taggart to the Wades set aside and the Wades' interest in the property declared an equitable mortgage in the

principal amount of \$20,000 (R. 107), so that plaintiff could execute upon the property.

Baker obtained a \$45,813.51 judgment against Taggart on May 22, 1975. He states, and appellees have no reason to question, that no payment has been made on that judgment. R. 2. Therefore, Taggart's present indebtedness, including interest, to Baker is approximately \$60,000. Appellant's Brief, p.2. This action originally was brought against the Wades, Taggart, Valley Bank & Trust Company and Commercial Security Bank. Plaintiff sought a declaration that his rights in the property were superior to those of Taggart and the banks (R. 4-5) and he obtained judgment by default or by summary judgment as to each of them. R. 22-23, 64-65. The matter went to trial on November 14, 1977 as an action exclusively between Baker and the Wades.

Plaintiff's claim against the Wades was this: On March 19, 1975, Taggart had deeded his home to the Wades. R. 3. Plaintiff claimed, alternatively, that the transfer was for purposes of security only, was without fair consideration or was made to hinder, delay and defraud Taggart's creditors. R. 3-4. He prayed that the conveyance be declared null and void or that the Court declare the Wades to have only an equitable mortgage on the property. R. 5. By the time of trial, plaintiff had abandoned his other claims and alleged only that the transfer was in the nature of a mortgage and sought only that the Wades' interes

be adjudged to be an equitable lien. The Wades responded that the transaction was a purchase with an option allowing Taggart to buy back the property (which expired unexercised). Although an option or a mortgage each allows the optionor or mortgagor to clear title to his property by paying a certain sum, a mortgage guarantees payment of principal and interest to the mortgagee, while an option, if unexercised, leaves the optionee with no recourse against the optionor if the property turns out to be worth less than he paid for it. Further, a mortgagee remains owner of the demised property, while an optionee does not. The Wades claimed that the evidence indicated that the transaction bore the characteristics of a sale with option. R. 183-185; Appellant's Brief, p. 15. The property having appreciated from \$45-\$50,000 to as much as \$120,000 during Wade's ownership (R. 127, 133), reversion of title to Taggart would have enabled Baker, through execution, to discharge all prior encumbrances upon the property (including what he claims is the Wades' equitable mortgage) and collect "in excess of \$50,000" (Appellant's Brief, p. 12) -- all or nearly all his judgment -- from the balance. A claim such as plaintiff's must be proved by clear and convincing evidence. The District Court rejected Baker's claim.

1. The Sale of the House

In the spring of 1975, Charles Taggart was in serious -- indeed, desperate -- financial straits. His business had failed and he "was just out of money." R. 98. He had had no income since 1974 and had been borrowing money to meet his living expenses. R. 117-118. His only remaining substantial asset was equity of between \$15,000 and \$25,000 in his home. R. 133. (The home had a value of \$45-\$50,000 and was encumbered by two mortgages with a combined balance of \$25-\$30,000. Ibid.) He had tried to borrow without success and finally approached H.B. Wade ("Wade") for funds. R. 98. The upshot of their discussion was

...[H]e wouldn't grant me [a] loan. But he would buy the house and..we...worked out the terms of the sale of that house... .

....

...[T]he original purchase price that we agreed upon... was \$20,000. ...I said I wouldn't sell the house although the value was approximately there, unless I had an option to buy it back.

Ibid. (At that time, Taggart had some frail hope of recouping his losses and of being able to regain his house. R. 101, 121.)

The sale was concluded on March 19, 1975. Taggart quit-claimed his house to Wade by a deed which was absolute on its face; Wade paid Taggart \$10,000 and agreed to pay a second

\$10,000 after June 18, 1975 if Taggart had not bought the property back by that time (R. 97-99, 109; Exh. P-2), pursuant to an option, also executed on March 19, by which Wade agreed to sell the house back to Taggart for \$10,900 by June 18, 1975. R. 100; Exh. P-4.

Taggart was unable to exercise the option. By November 28, 1975, Wade had paid Taggart an additional \$7,000, for a total payment of \$17,000. R. 103-110. Taggart waived the remaining \$3,000 payment in return for an option to purchase the home for \$20,900, plus 18% of the \$20,000, by November, 1976, or \$24,500. R. 111. That option expired unexercised in 1976. R. 124. In recognition that the Wade performance was concluded, Wade's last payment, a check dated November 28, 1975, was endorsed by Taggart as: "BALANCE IN FULL FOR EQUITY IN HOME LOCATED at 234-7th AVENUE, SALT LAKE CITY, UTAH." R. 106, Exh. P-8.

Wade purchased the Taggart home as long-term investment. He planned to give or sell it to one of his sons, should either be interested in the house. R. 181. In the meantime, Wade has allowed Taggart to occupy the house as a tenant at will, in consideration of his servicing the two mortgages on the property, including loan payments, taxes and insurance (at a total monthly payment of about \$450) and maintaining the property. R. 114, 130-131.

There never has been any question between Taggart and Wade as to who owned the house. Wade has behaved like a landlord, and a harsh one, at that. He has given Taggart orders

concerning the house's operation and threatened him with eviction if he did not comply. R. 129. He required Taggart to get rid of his dog, to replace a back door and paint the house, all under threat of eviction. Ibid. When Taggart fell behind in mortgage payments, Wade ordered him to come current or be evicted. Ibid. Taggart has even been compelled to re-paint his living room to conform to Wade's taste. That incident, as described by Mr. Taggart, typifies the kind of landlord Mr. Wade has been:

He went in once and said I had to paint the inside of the living room [which] had some -- I thought at least, some lovely scroll work in between the beams. I asked him what color he wanted it painted and he said white. It looks somewhat like a monk's cell in there now, but I painted the inside.

R. 114. On the other hand, Wade has never attempted to recover the payments he made to Taggart, as a lender would, or commenced foreclosure proceedings. R. 122-123.

Taggart has behaved like a man who considered himself a tenant. He acceded to all Wade's orders (R. 114, 129), told friends that he was renting (R. 131, 144-146) and, when approached by realtors who were interested in a possible sale of the house, told them that he was not the owner. R. 131-132. In 1978, Taggart believed he could raise \$20,000 or more and asked Mr. Wade if he would sell him the house back; Wade refused. R. 124-125.

Taggart's and Wade's relationship can only be described as that of a seller and buyer. Taggart gave Wade a deed to the home. Wade agreed to pay him \$20,000, which later was reduced by \$3,000 in consideration of a second option to purchase the house. The agreed-upon price of \$17,000 was paid. Taggart received a fair price for his equity of \$15,000 to \$25,000. Wade's last check was endorsed by Taggart as "Balance in full for equity in home located at 234 - 7th Avenue." Taggart never made a payment to Wade and Wade never sought repayment, attempted foreclosure, or otherwise undertook a creditor's remedies. Wade consistently refused to allow Taggart to buy back the house after the second option's expiration; a mortgagee, of course, would have had no choice but to accept payment of the loan and to release the mortgage.^{1/} Finally, Wade consistently behaved like a landlord toward Taggart -- and not a kind or indulgent one at that: he ordered him to get rid of his dog, repaint his living room to suit Wade's taste, etc.

^{1/}Taggart still needed cash in 1977, 1978 and 1979. As the house's value appreciated from \$45,000 or \$50,000, subject to \$25,000 or \$30,000 in mortgages, to perhaps \$120,000 in 1979, with no additional encumbrances, other than the alleged equitable mortgage (R. 127, 133), it would have been greatly to his advantage to sell the house, pay off the mortgages -- if Wade was a mortgagee -- and pocket the profit.

2. The Testimony and Documentation.

Plaintiff does not challenge the accuracy of the above testimony or dispute that all above-described documents and events were wholly consistent with a buyer-seller relationship and wholly inconsistent with a lender-borrower relationship. Plaintiff's attempt to rebut rests principally on two legs. The first is Taggart's prior testimony; the second are three "promissor notes" which Taggart executed. Appellant's Brief, pp.8-10.

Taggart's prior testimony is a bit garbled. In a deposition which plaintiff offered in evidence, he testified;

A "oh, I thought at that time-- Listen, I thought at that time, I would turn the thing around quickly."
Q "Question: Pay the money and get your property back?"
A "Sure."
Q "You felt it was basically a loan and he was secured by the deed. Is that correct?"
A "No, we treated it as I said in my first testimony, as a loan. But he had the option and I hoped to be able to pay it back. If I couldn't pay it back--"
Q "He had the property?"
A "He had the property, of course."
Q But your testimony there does say it was treated as a loan?
A Well, I--maybe I said that, but in my mind, I may have treated it as that, but in actuality, he owned the property.
Q All right. Let's look at page 18, Mr. Taggart, and let's do the same thing.
"Question: What were these monies for?"
A "Well, when I sold the house to Mr. Wade, I sold it for 20,000, not \$10,000. I felt that I was borrowing the first \$10,000 with the option to buy it back."

Cited at R. 101-102. That testimony establishes nothing other than how confused a witness can become under cross-examination. Taggart denied that the transaction was "basically a loan", then said "we treated it as a loan" (whatever that meant), then said

"in my mind, I may have treated it like that, but in actuality, he owned the property." His final answer, perhaps, is the most revealing: "[W]hen I sold the house...I felt that I was borrowing the first \$10,000 with the option to buy it back."

(emphasis added). With his life collapsing around him, Taggart, although he knew that he had sold his last worldly possession, tried to pretend it wasn't so.

In March, 1975, Taggart was clinging to the hope that he could salvage his business like a drowning man grasping a life preserver. He has recounted his state of mind at the time:

...I had no idea what was happening to me. I had no idea that things were collapsing around me and I thought that I could turn this around very quickly and buy the house back.

R. 107. (Of course, the situation's hopelessness would have been obvious to any objective observer. Taggart's business had failed and he had earned no income since 1974. R. 117-118.) He acknowledged very poignantly:

I have always known I sold the house, but I always had hope -- hope springs eternal and I always thought I could buy it back.

R. 142.

Plaintiff also offered in evidence an excerpt from a supplemental proceeding which was conducted on July 7, 1975:

Q "Question: Now, you borrowed some money or allegedly some money some time ago and gave a deed to your home to someone, did you not?"

A "I did."

Q "Question: Who was that person?"

A "Answer: H.B. Wade."

Q "Question: Does Mr. Wade live here in Salt Lake City?"

A "Yes, he does."

Q "Did you borrow on--"

A "Well, yes."

Q "When did you borrow that money?"

A "Ninety days ago or so."

Q "Question: Did you sign a note?"

A "No, I--well, I signed a Quit Claim Deed, I know that."

Q "Question: You gave a deed to your home as security, is that right?"

A "That is right."

R. 117. Mr. Taggart did not sign that transcript and had no recollection of giving the testimony. R. 132-133. Defendant's counsel objected to the transcript's admission. In overruling the objection, the Court noted the transcript's relative weakness as evidence:

I think [the objection] goes to the weight. It is certainly true. I don't think Mr. Taggart ever read it like he would a deposition, but I don't think it affects its admissibility, just its weight. So it is received.

R. 134.^{2/}

^{2/}The Court obviously accorded little weight to the transcript, and properly so. In the supplemental proceeding, Taggart was being pressed hard by an extremely skilled attorney, who was trying to establish that Taggart, not Wade, owned the house. Taggart simply was not his interrogator's equal. ("Q Did you borrow on-- A Well, yes." "Q Did you sign a note? A No, I--well, I signed a Quit Claim Deed, I know that.") One can only speculate on what Taggart's answers would have been if he had had a chance to reflect upon the interrogation (as he would have if the transcript had been submitted to him for signing). It is clear that in July, 1975, he still hoped to get his house back through the exercise of a second option; it is not surprising that a combination of wishful thinking and tough examination could have extracted the answers which he gave.

The second -- and most relied upon -- basis of plaintiff's claim that this was a mortgage rather than a sale is Wade's strange practice of having Taggart sign "promissory notes" to him. R. 98-99, 103-104, 110; Exhs. P-3,7,9. At trial, plaintiff offered three such notes in evidence. Those notes simply make no sense. First, they are in the total principal amount of \$27,000 although Taggart received only \$17,000 from Wade. Second, they are completely inconsistent with the transaction's other documentation. The documentation consists of:

a. A quit-claim deed by Taggart to Wade dated March 19, 1980, representing a transfer of the house to Wade which is absolute on its face. R. 97-99, Exh. P-2.

b. A promissory note dated March 18, 1975 by Taggart to Wade Finance (a name under which Wade does business) in the sum of \$20,000 at interest of 18% per annum, payable on December 22, 1975. R. 98-99, 171; Exh. P-3;

c. An option agreement dated March 19, 1979, entitling Taggart to buy back the house for \$10,900 by June 18, 1975. R. 100, Exh. P-4.

d. A check dated March 19, 1975 by H.B. Wade, on his personal account, to Charles W. Taggart in the amount of \$10,000. R. 99, Exh. P-5;

e. A check dated October 15, 1975 by H.B. Wade to Charles W. Taggart in the amount of \$3,750.00. R. 103; Exh. P-6;

f. A promissory note dated October 15, 1975 by Taggart to Wade (as H.B. Wade, rather than Wade Finance) in the sum of \$3,850, at interest of 18% per annum, payable on November 22, 1975. R. 103-104, Exh. P-7.

g. A check dated November 28, 1975 by H.B. Wade to Charles W. Taggart in the amount of \$2,400 endorsed "BALANCE IN FULL FOR EQUITY IN HOME LOCATED AT 234 7th AVE. SALT LAKE CITY, UTAH. Charles W. Taggart." R. 106; Exh. P-8;

h. A promissory note dated November 28, 1975 by Taggart to H.B. Wade in the sum of \$3,150, at interest of 18% per annum, payable on December 22, 1975. R. 110, Exh. P-9. ^{3/}.

If the trust deed, option, checks, and Taggart's and Wade's testimony are considered alone, the transaction is easily comprehensible: Wade agreed to buy the home for \$20,000 and paid \$10,000 down; Taggart deeded him the property. Wade gave Taggart an option to buy the property back for \$10,900 within three months. Taggart was unable to exercise the option, but requested a second, one-year, option, which Wade gave him in return for a \$3,000 reduction of the purchase price. Wade then paid Taggart the balance due and owing, with the last payment made on November 28, 1975 (by a check which Mr. Taggart endorsed, "BALANCE IN FULL FOR EQUITY IN HOME..."). Since March, 1975, Taggart has occupied the house as a tenant at will, paying rent in the form of \$450 monthly payments and maintenance. All the above conduct and documents, of course, are consistent with a sale of the house; they would be wholly inconsistent with a mortgage.

^{3/}Wade gave Taggart \$850 in addition to the above checks. R. 103, 110, 158.

The promissory notes, if they really are promissory notes, are hopelessly inconsistent with the other documents and the parties' conduct; indeed, they make no sense whatever. The "notes" total \$27,000, but only \$17,000 changed hands between Wade and Taggart. When Wade gave Taggart \$10,000, Taggart gave him a note for \$20,000, payable by December 22. On October 15, Taggart signed a note for \$3,850, payable on November 22. On November 28, Taggart signed a note for \$3,150 payable on December 22, but simultaneously endorsed the check he received from Wade as payment in full for his house. Those "notes" bear no relation to reality.

a. Taggart, who had received \$10,000 on March 19, never would have agreed to pay back \$20,000 plus 18% annual interest -- \$22,700 -- by December 22 or sign additional notes obliging him to pay a total of \$27,000 plus interest on November 22 and December 22, when he had received only \$17,000.

b. If Taggart had borrowed \$10,000 at 18% annual interest on March 19, he could have liquidated that indebtedness and disencumbered his house by paying \$10,450 on June 18 (or a lesser sum if he paid sooner). He would not have executed an option agreement which required him to pay \$10,900. (Indeed, it would have been commercially preferable to pay off the note in December, rather than pay the equivalent of 36% annual interest in June.) On the other hand, if Taggart owed Wade \$20,000, Wade would have been foolish to release his collateral for \$10,900. Plaintiff's loan theory and the option agreement simply are incompatible.

c. Wade never attempted to collect on his notes (which entitled him to principal, interest and attorney's fees) or foreclose on the house, as any prudent lender would, particularly with a borrower as impecunious as Taggart.

d. Finally, there obviously was no reason for Wade to make a loan to Taggart. Taggart's prospects were dismal. A mortgage upon his property almost certainly would have been foreclosed, a troublesome and expensive process. It was far more to Wade's advantage to buy the property at once, thus avoiding the inevitable foreclosure, obtaining control of the property at once, etc.

e. If Taggart were a borrower, Wade would not have had him endorse, and he would not have endorsed, his last check as "balance in full" for his home. That is language appropriate to a sale, not a loan.

The "notes" do not make sense, whether they are considered separately or in the context of the entire transaction. (Plaintiff counsel acknowledged in his closing argument: "It doesn't make sense to me, either." R. 199.) Mr. Taggart recognized the incongruity of those notes:

Well, Mr. Wade does things a little differently than anyone I have been around. Each time he gave me money, he made me sign a note. Actually, the reverse should be true. I said, "Mr. Wade, you owe me the money." But he said this is his form of recordkeeping.

You know, he is -- I think he is a very shrewd man but not brilliant. And he comes from, you know, a country man from -- This is the way he does business.

R. 99.

As I said, each time I ever received any money from Mr. Wade, he made me execute a note to him. And I said to him---and we have had extended conversations over this-- "Why is it that I sign a note to you when, in reality, you owe me the money?" And he, I believe--and you will have to ask him, but he uses this for his records. As he explained it to me, this is what he used to--so there would be no misunderstanding of what took place. He wanted to make sure that I knew that I had sold that house.

R. 106.

Mr. Wade has testified:

[W]hen I advanced him the \$10,000 with option to re-purchase it with the understanding if he couldn't...pay the option, then I would pay him the balance of this money.

...

Q Why did you draw up a Promissory Note, though?

A Well, that's the way I do business. I've done it all the time. I've never had any repercussions from it. Because--one thing I didn't want to have in this deal with Mr. Taggart was a misunderstanding. ...It was to apply against this \$20,000. He couldn't say it went in something else.

R. 179.

Considered in context with the transaction's other documentation, the "notes" are contradicted by all the other documents. Taggart and Wade both testified that the notes simply were Wade's idiosyncratic way of keeping track of his business transactions.

Mr. Wade is an elderly, uneducated and somewhat eccentric person. He is a former Greyhound bus driver who turned to buying real estate and lending money. R. 148, 175. Some of his lack of sophistication is conveyed by the printed page, but his continual mispronunciations, halting vocabulary and difficulty

comprehending ordinary business concepts are far more evident to one who can observe him in person, as Judge Winder did.

The remaining grounds upon which plaintiff challenges the District Court's findings are the claim that Taggart "continues... to occupy the property making monthly mortgage payments of approximately \$450 as his sole 'rent'" (Appellant's Brief, p.3) and that Taggart has deducted the interest payments which were included in the mortgage payments on his income tax, while Wade, during 1977 and 1978, did not report any rental income from, or deduct any interest payments on, the property. Id., p.4. The District Court apparently did not assign these claims much weight. The claim of inadequate rent is easily answered. Taggart's monthly rent is more than \$450 per month; it consists of \$450 per month plus maintenance. Plaintiff failed to demonstrate, or even allege, that even \$450 a month is an unreasonably low rent. (Indeed, most persons would consider \$450 a month to be a rather stiff rent.)

Mr. Taggart's deducting the interest payments from his income tax may be a practice of questionable propriety, but it is hardly compelling evidence of a mortgage. Mr. Wade's failure to properly report matters on his income tax seems more indicative of general sloppiness than anything else. Mr. Wade turns over his records to an accountant, who in turn prepares his tax returns. He testified, quite candidly, "Don't ask me, because I never filled out one of these forms in my life. My CPA man filled those."

R. 168. On further examination, Mr. Wade stated that he did not recall what records he had sent to his "CPA man" for preparation

of his 1977 and 1978 returns. Ibid. It certainly is likely that he had no documents from which the accountant would have gleaned knowledge of those payments.

ARGUMENT

I

PLAINTIFF DID NOT
PROVE BY A CLEAR AND
CONVINCING PREPONDERANCE
OF THE EVIDENCE THAT THE
TRANSFER OF TAGGART'S HOME
ACTUALLY WAS A MORTGAGE.

The transfer of Taggart's home to Wade was, on its face, an absolute transfer of ownership. To have such a transfer found to be as equitable mortgage and set aside, plaintiff must demonstrate by a clear and convincing preponderance of evidence that both parties intended the transaction to be a mortgage rather than a sale. Ideal Elec. Co. v. Willey, 20 Utah 2d 182, 435 P.2d 921, 923 (1968). If plaintiff failed to discharge that burden as to the transferor or the transferee, defendant must prevail. Jacobsen v. Jacobsen, 557 P.2d 156, 158 (Utah 1976).

Judge Winder correctly observed, "I think it just boils down to what the intention of the parties was at the time this occurred." R. 187. Plaintiff concedes that he was obliged to prove his case by a clear and convincing preponderance of evidence and that the District Court properly identified the question before it.

The burden of proof by clear and convincing preponderance of the evidence requires the proponent to establish that "the truth of the facts asserted is highly probable." Cook v. Michael, 214 Or. 513, 330 P.2d 1026, 1032 (1958). Accord, Johnson v. Wilson, 276 Or. 69, 554 P.2d 157, 161 (1976). This Court held in Greener v. Greener, 116 Utah 571, 212 P.2d 194, 204-205 (1949) (Wolfe, J), that clear and convincing proof is that which

...carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind. ...

But for a matter to be clear and convincing to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. ...

Accord, Jardine v. Archibald, 3 Utah 2d 88, 279 P.2d 454, 457 (1955).

The United States Court of Appeals, in Aetna Ins. Co. v. Paddo 301 F.2d 807, 811 (5th Cir. 1962), held proof by clear and convincing evidence to require that the evidence be

"...clear, distinct and weighty so as to enable [the trier] to come to a clear conviction without hesitancy of the truth of the precise facts in issue."

Accord, Philippine Sugar Estates Dev. Co. v. Government of Philippine Islands, 247 U.S. 385 (1918). The burden of proof by clear and convincing preponderance is substantially greater than the burden of proof by a mere preponderance of evidence. E.g. In re Levias, 83 Wash. 2d 253, 517 P.2d 588, 590 (1973); Vernette v. Andersen, 16 Wash. App. 466, 558 P.2d 258, 261 (1976).

The District Court found

on conflicting evidence that the intention of Messrs. Wade and Taggart at the time of the March 19, 1975 conveyance, was that Taggart was selling his real property to Wade, subject to an option to repurchase in Taggart, and that the intention was not simply that there be a loan of money from Wade to Taggart and with the latter using the real property as security therefor.

R. 80. Of course, Judge Winder found more than was necessary for a judgment against plaintiff. If he had found even that the weight of the evidence favored plaintiff, but not clearly and convincingly so, he still would have had to enter judgment in defendant's favor. The trial court's finding could have been far less favorable to defendant than it was without the case's outcome being different.

Even if the matter were before this Court for trial de novo, plaintiff would have to fail. It cannot conceivably be said that it is "highly probable" that both Taggart and Wade intended their transaction to be a loan or that the evidence is so "clear, distinct and weighty" as to leave one with "a clear conviction" of that proposition when:

a. Both participants have sworn to the contrary;

b. The option agreement, which is essential to plaintiff's case,^{4/} recites a purchase price and option fee which are greatly at variance with the principal and interest set forth in the purported promissory notes;

c. Taggart endorsed his final check from Wade as payment in full for the house;

^{4/}Without a right to redeem the property, the deed cannot be intended as a mortgage. Such a right is not conclusive that a mortgage was intended; but without the right there can be no mortgage.

d. Wade and Taggart have behaved like landlord and tenant throughout their relationship;

e. Taggart consistently has held himself out to others as being a mere tenant;

f. Taggart offered to buy the house back after the mortgage's expiration, but Wade refused;

g. Taggart, who had he been a mortgagee, could have sold the house as it appreciated in value, discharged the "mortgage" and kept the profit; he did not do so; and

h. Wade never attempted to collect his "loans" or foreclose his "mortgage".

Plaintiff's rebuttal to the foregoing consists principally of Mr. Wade's extraordinary "notes", which bear so little relation to reality that they do not even represent the amount of money which actually changed hands. It perhaps is conceivable that some trier of fact would believe, by a preponderance of evidence, that Taggart and Wade both were lying under oath, that all their manifestations of a sale were for naught and that the "promissory notes" really did represent a mortgage; but to claim that any trier could come to "a clear conviction without hesitancy" of those propositions strains the imagination, and to claim -- as plaintiff must -- that Judge Winder was "plainly unreasonable"^{5/} in having at least a "substantial doubt" about plaintiff's allegations is preposterous.

^{5/A} finding of fact may be reversed only when it is "so plainly unreasonable that no trier of fact could fairly make such a finding". Ranch Homes, Inc. v. Greater Park City Corp., 592 P.2d 620, 626 (Utah 1979).

II

THE TRIAL COURT'S
FINDINGS WERE
NOT CLEARLY ERRON-
EOUS AND THEREFORE
SHOULD BE AFFIRMED.

In order to reverse the District Court's factual findings, this Court must find that it was plainly unreasonable for the trial judge not to be firmly convinced of plaintiff's claims. Inasmuch as plaintiff does not dispute the propriety of Judge Winder's interpretation of the law, he is asking this Court to reverse purely factual findings, without the benefit of live testimony, observation of the witnesses' demeanor or the other natural advantages of a trial judge. This Court defined the standards for review of a case of this type in Jacobsen v. Jacobsen, supra at 158:

...[A] deed regular in form is presumed to convey the entire fee title, or at least whatever title the grantor has. ...[I]n order to overcome that presumption, one who attacks a deed has the burden of proving otherwise by clear and convincing evidence.

Even though...the attempt to reform a deed is a proceeding in equity in which the [appellate] court may review the facts, it is nevertheless well established that because of the advantaged position of the trial court, we give considerable deference to his findings and judgment. ... [emphasis is original].

Of course, the rule enunciated in Jacobsen has been applied in many other contexts. E.g., Ream v. Fitzen, 581 P.2d 145, 147 (Utah 1978) ("[T]he trial judge is in a far better position to judge the credibility of the witnesses, to observe

their demeanor and to weigh the respective merits of the case."); Ranch Homes, Inc. v. Greater Park City Corp., supra at 626; Nunley v. Walker, 13 Utah 2d 605, 369 P.2d 117, 121 (1962) ("Although the question...is a matter of equity, we will reverse the trial court's findings of fact only if we conclude that they are clearly erroneous."); Raulie v. United States, 400 F.2d 487, 509-510 (10th Cir. 1968).

Deference to a trial judge's factual determinations is particularly appropriate in cases involving a burden of clear and convincing proof:

What constitutes clear, cogent and convincing proof necessarily depends upon the character and extent of the evidence considered, viewed in connection with the surrounding facts and circumstances. Whether the evidence in a given case meets the standard of persuasion, designated as clear, cogent, and convincing, necessarily requires a process of weighing, comparing, testing, and evaluating-- a function best performed by the trier of the fact, who usually has the advantage of actually hearing and seeing the parties and the witnesses, and whose right and duty it is to observe their attitude and demeanor.

Bland v. Mentor, 63 Wash. 2d 150, 385 P.2d 727, 730 (1963).

Accord, Smith v. King, 100 Ida. 331, 597 P.2d 217, 220 (1979).

In the instant case, Judge Winder had to evaluate the testimony of two witnesses, one of whom was an elderly, unlettered man, the other of whom was under the duress of a \$60,000 obligation to plaintiff Baker. He was confronted by a welter of conflicting documentation. His findings were carefully reached and are at least as supportable by the evidence as are plaintiff's

contentions. It would have been virtually impossible for the trial court to have found that plaintiff has discharged the very heavy burden which the law imposes in cases such as this.

III

PLAINTIFF HAS
FAILED TO CITE
SUBSTANTIAL
SUPPORT FOR ITS
CLAIMS HEREIN

Plaintiff offers seven criteria by which he submits his claim should be evaluated. Application of those criteria simply does not support plaintiff's claim that the "facts and exhibits established at trial...meet that level of proof requiring this Court to reverse the judgment of the District Court." Appellant's Brief, p.5.

a. Continuing Obligation of Grantor to Pay Debt (p.6).

Plaintiff claims that there was such a continuing obligation. However, as has been pointed out at page 13, above, Wade never attempted to collect on the "promissory notes" or to foreclose on the house. The parties' conduct simply does not indicate a continuing obligation by Taggart to pay an obligation to Wade. If one thing is clear in this case, it is that Wade and Taggart did not behave as creditor and debtor after March 19, 1975; they behaved as landlord and tenant. Applying the test of at least one jurisdiction, Wade's and Taggart's conduct alone would be dispositive of the case in defendant's favor:

While all the factors are to be considered, the controlling test is whether the grantor sustains the relation of debtor to grantee after the execution of the instrument. [citations omitted] A mortgage is an incident of a debt, and without a debt there can be no mortgage. [citations omitted].

Credit Bureau of Preston v. Sleight, 92 Ida. 210, 440 P.2d 143, 149 (1968).

B. Relative Values (p.6). It is undisputed that Taggart's equity in the house in March, 1975 was \$15-\$25,000. Wade agreed to pay Taggart \$20,000 for that equity. The price later was reduced by \$3,000 in return for a second, one-year, option which undoubtedly was of some substantial value to Taggart. In sum, the purchase price was a plausible and proper one.

C. Contemporaneous and Subsequent Acts of the Parties (pp. 6-8). Plaintiff claims that the "promissory notes", option agreement and tax returns of Taggart and Wade are probative of an equitable mortgage. The "promissory notes", and their lack of any sense (much less significance), are discussed at pages 10-14 above. They are probative of little, if anything.

The option's incompatibility with a loan arrangement is discussed at pages 12-13 and 18, above. Quite simply, a mortgagor who was obliged to pay 18% annual interest would not sign an option requiring him to pay the equivalent of 36% annual interest to clear the same title; similarly, a lender who held a \$20,000 obligation would not surrender his security for \$10,900. The option fee obviously was an option fee, not disguised interest. The option does not support plaintiff's position. Indeed, the buy-back option itself cuts very strongly against a claim of mortgage. The essence of a mortgage arrangement is that the lender is guaranteed repayment through foreclosure, if possible, and through a deficiency judgment

if necessary. By contrast, an option, if unexercised, leaves the grantee with the property and no means of recovering his purchase price from the grantor.

[I]f [grantor] does not exercise the option, it need never repurchase the property at all. Thus, ultimately [grantee] might never receive...repayment of the amount advanced by it, which indicates a mortgage transaction was not contemplated.

In re San Francisco Indus. Park, Inc., 307 F. Supp. 271, 275 (N.D. Cal. 1969).

Taggart's rental arrangements are discussed at page 15, above, and the matter of the taxes is discussed at pages 15-16, above. Neither of these matters are persuasive of plaintiff's claim.

D. The Parties' Declarations and Admissions (pp. 8-10). Plaintiff offers two pages of excerpts (from 108-page trial transcript) to demonstrate that the evidence "clearly and convincingly" established that the transfer was really a loan. The trial court's decision was based upon Judge Winder's evaluation of all the testimony (not just excerpts), aided by the opportunity to observe the witnesses and their demeanor.

Even the excerpts plaintiff relies upon reveal a confused situation. Plaintiff cites Taggart's deposition testimony, which is of questionable value, as has been noted at pages 7-8, above. Plaintiff also cites a couple of occasions, once in a deposition and once at trial when Taggart spoke in terms of a loan. However, these are more a testament to a capable lawyer's ability to exact information than evidence of what Taggart meant. Indeed, the excerpts cited are far from conclusive. At page 8 of his Brief, plaintiff reproduces the following exchange:

Q You felt it was basically a loan and he was secured by the deed. Is that correct?

A No, we treated it...as a loan. But he had the option and I hoped to be able to pay it back... .

Q But your testimony there does say it was treated as a loan?

A Well, I -- maybe I said that, but in my mind, I may have treated it as that, but in actuality he owned the property.

That testimony -- even taken alone -- certainly does not conclusively establish a loan. Indeed, Taggart denied that he "felt it was basically a loan" and stated that Wade "owned" the house. The most that can be said of Taggart's purported "admission" is that he took some comfort in thinking that the sale of his home with an option to re-purchase was somewhat like a loan; it obviously was his way of telling himself that he hadn't lost everything. As he said, a few lines below the cited excerpt, "When I sold the house...I felt I was borrowing the first \$10,000 with the option to buy it back." R. 102. (emphasis added).

Taggart's reference to having "borrowed" the money in the next excerpt on page 8 of the Brief is entirely inconsistent with the following sentence of that answer, which plaintiff does not quote: "I had no idea that things were collapsing around me and I thought I could turn this around very quickly and buy the house back." R. 107 (emphasis added).

Finally, plaintiff quotes Taggart, at page 9 of his Brief, as saying that, in the event of exercise of the second option, he "had to pay Mr. Wade the amount lent to me" plus the option fee and interest. However, in the very next question -- again not quoted in the Brief -- plaintiff's counsel asked:

Q So you had to pay \$20,000 plus \$900 plus the interest.

A Yes, I would assume so. As I recall, that was it.

R. 112. It is well established that Wade paid Taggart \$17,000, not \$20,000. Thus, the \$20,000 option price could not represent the amount of a loan. Therefore, the prior answer is contradicted. It represents only the confusion of a badly beaten man under tough cross-examination; it is not a meaningful statement of fact.

The balance of Taggart's testimony is very different than plaintiff's selected excerpts. For example:

[W]ade wouldn't grant me a loan. But he would buy the house and...we...worked out the terms of the sale of that house... .

R. 98.

...Each time he gave me money, he made me sign a note. Actually, the reverse should be true. I said, "Mr. Wade, you owe me the money."

R. 99.

Q [by Mr. Poole] But your testimony [in the deposition] does say it was treated as a loan?

A Well, I -- maybe I said that, but in my mind, I may have treated it like that, but in actuality, he owned the property.

....

20
"Well, when I sold the house to Mr. Wade, I sold it for \$20,000, not \$10,000. I felt that I was borrowing the first \$10,000 with the option to buy it back."

R. 102.

The purchase price was \$20,000. He was obligated to give it to me.

R. 109 (emphasis added).

Q You believe you don't owe him any money.

A I don't owe him any money.

Q Would you tell us the basis of that belief?

A Well, he bought that house and I don't owe him any money.

R. 123.

Q Has there been any time since the end of 1976 that you have had the -- that you believed you could have raised \$20,000 or more?

A Sure.

Q There have been? Did you ever offer to pay that -- to pay any sum to Mr. Wade for the house?

A Yes, but he wouldn't sell it to me.

....

...I asked him, "Would you sell that house back to me?" and he said, "No."

R. 125.

The most that can be said of Mr. Taggart's testimony is that, during the option's pendency, when he still hoped to be able to buy the house back, he liked to think of the transaction as being something of a loan.^{6/} However, he knew at all times

^{6/}The secret intention of one of the parties is insufficient to transmute the character of the transaction. To do so requires the intention of both parties that a deed absolute was meant to be a mortgage.

In re San Francisco Indus. Park, Inc., supra at 274 (N.D. Cal. 1969 (emphasis in original)). Of course, Taggart's occasional wishful thinking hardly amounts to a "secret intention" anyway.

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that he had sold the house, that it was Mr. Wade's and unless he could buy it back -- not repay a loan, but buy it back -- it always would be Wade's.

Mr. Wade's testimony was emphatically to the effect that he, not Taggart, owned the house from March 19, 1975 forward. For example:

Well, we talked at length about his house [before March 19, 1975] and he didn't want to sell the house and I didn't want to lend any money on it.

....

...I told him I would buy it and he said he wouldn't sell it unless I gave him an option to repurchase it.

R. 151.

So, when I gave him the thirty-one fifty [i.e., the November 28 check for \$3150], I signed on the back in payment in full without any question of a doubt that that was my house.

R. 179.

Plaintiff attempts to rebut all of the above testimony with a single excerpt from pages 178-179, in which Mr. Wade repeatedly spoke of Mr. Taggart's option to "buy back" or "repurchase" the property -- which, of course, connotes a purchase, not a loan. Plaintiff hangs his entire claim as to Mr. Wade on the final answer, which is typical of Mr. Wade's occasional lapses into incoherence:

And he knew and I knew that if he didn't exercise that option, he was to get \$20,000. And if he paid it back, he was to pay the \$20,000 with stipulations on it.

R. 179.

That answer is so internally contradictory as to suggest no more than an old man's fatigue and confusion (which the

trial judge could observe and evaluate). What Mr. Wade appears to be saying, albeit poorly, is that if the March 19 option was not exercised, the \$20,000 was Taggart's -- which certainly does not sound like a loan. The answer's second sentence refers to the second option which was not the subject of the question. Plaintiff's burden was to prove clearly and compellingly that both Wade and Taggart intended a loan. The converse has occurred; neither person's testimony proves such an event.

E. Written evidence (pp. 10-11). Plaintiff, at page 10 of his Brief, urges that a statement on one of the three notes (Exh. P-3) that it was secured by the Taggart home is dispositive of his claim. However, that statement -- which does not appear on another of the notes, Exhibit P-9 -- is inconsistent with Taggart's endorsement of the last check, Exhibit P-10, as final payment for the house. The notes' lack of probative value already has been discussed at length.

Plaintiff, at page 11 of his Brief, characterizes the option fee included in the March 19 option agreement as "interest", as he must in order to claim that this was a loan. However, as has been pointed out, at page 12 above, the option fee, if it were interest, would have been double the interest on the \$10,000 which Taggart had agreed to pay. The fee does not appear to be an interest payment.

F. Nature and Character of Testimony Relied Upon (p. 11). Notwithstanding his claim, just two pages earlier, that Messrs. Taggart's and Wade's testimonies supported his position, plaintiff acknowledges that Taggart's and Wade's "oral testimony says that a sale occurred". However, plaintiff claims that this was the testimony of the "biased" witnesses. Certainly, Mr. Wade

had an interest in the outcome of the case and thus had a "bias"; what litigant does not? However, the trial court, after observing Mr. Wade for a day, decided that his testimony deserved enough weight to defeat plaintiff's claim.

Mr. Taggart, on the other hand, had more compelling reasons to testify in plaintiff's favor than in Mr. Wade's. Plaintiff has a judgment of \$45,813.51, plus interest, against Mr. Taggart. R. 2. That judgment plus accumulated interest amounts to approximately \$60,000 today. Plaintiff's Brief, p.2. According to plaintiff's computations, the present equity in the former Taggart home, over and above its mortgages and what plaintiff claims is Wade's "equitable mortgage", is "in excess of \$50,000" -- or enough to nearly satisfy Baker's judgment. Id., p. 12. Taggart's estimate of the property's value was even higher. R. 127.

Although there may be little love lost between Taggart and Baker, Baker's success in this litigation would liquidate nearly all of Taggart's liability to him. With a little luck, the property's sale could liquidate the entire liability. (Of course, Taggart would have to find a new home, but at a \$450 monthly rental that should not be difficult.) On the other hand, if Baker is unsuccessful, he will find other means of pursuing Taggart. Taggart stands to lose both money and peace if Wade prevails and stands to lose only a little convenience if Baker does.

Plaintiff has failed to show that Taggart is biased against his cause.

Plaintiff's claim that it is entitled to reversal of the district court's judgment is without support in the cases he has cited. In Bybee v. Stuart, 112 Utah 462, 189 P.2d 118 (1948), this Court affirmed a trial court's finding of a mortgage. In that case, the underlying agreement stated that its purpose was to procure a loan and recognized that grantor retained the right to sell the property. Id., 189 P.2d at 120-122. Neither of those events occurred in this case. Further, and significantly, the Court in Bybee affirmed the trial court's factual findings, showing the deference to the trial judge's superior vantage point which defendant urges herein.

In Gibbons v. Gibbons, supra, this Court affirmed a judgment u holding the character of a transfer of property as a sale. In that case, grantor transferred certain real property, reserving a life estate in herself. Grantee was required by the agreement to sell the property upon grantor's death and retain only his purchase price plus interest (Id., 135 P.2d at 106-107), an arrangement bearing far more resemblance to a loan than the instant transaction. Nevertheless, the trial Court found, and the Supreme Court affirmed, that the fact that the grantor apparently had no right to sell the property suggested that the transfer was not a mortgage. The Court concluded:

The controlling question is what was the intention of the parties at the time of the execution and delivery of the instrument? The matters indicated above are merely the elements of the instruments executed. ...

Supra at 107. In Corey v. Roberts, 82 Utah 445, 25 P.2d 940 (1933), a purported sale was found to be a transfer in

trust or a mortgage (the Court did not decide which) on the basis of grantor's testimony to that effect (Id., 25 P.2d at 943-944), a great discrepancy between the property's value and the consideration given by grantee (Id., supra at 948-949) and the fact that the grantor and grantee "recognized this trust or mortgage relationship...from [their] conduct immediately and for a long time thereafter" (supra at 950), even to the point that the grantee "rendered detailed statements monthly to [grantor]... showing...the balance due." (Supra at 947.) That case is not analogous to the matter at bar.

Finally, in Orlando v. Berns, 154 Cal. App. 2d 753, 316 P.2d 705 (1957), the only remaining case cited by plaintiff, the District Court of Appeals affirmed a trial court's finding of a mortgage, based in large measure on the testimony to one of the parties to the transaction that the parties intended the grantee to "receive a mortgage on the property" and that he in turn would use the property as collateral for a loan from an insurance company. Id., 316 P.2d at 707. The trial court based its finding upon the grantor's testimony, the fact that the purported purchase price of \$178,000 was \$114,000 less than the value of the property transferred and that grantee admittedly computed the resale price on the basis of "purchase price" plus interest. Ibid. (However, such a method of computation would not support a finding of a mortgage in Utah, in view of Gibbons v. Gibbons, supra, 135 P.2d at 106-107). In the instant case, by contrast, the transaction was not entered into for the purpose

of obtaining funds from a lending institution; both parties to the transaction have stoutly contended that the transaction was a sale; the purchase price was a fair approximation of the property's value; and repurchase prices under both options -- \$10,000 and \$24,500 -- were not computed on the basis of purchase price plus interest. Finally, and perhaps most important, Orlando was an affirmance of a trial court's finding, not an appellate court's substituting its judgment of the facts, witnesses, etc., for that of the trial judge.

CONCLUSION

Plaintiff seeks to set aside a transfer of real property which was absolute on its face. The record herein reflects a transaction by which the Wades acquired Charles Taggart's former home in March, 1975 for the fair value of his equity and, in the intervening five years, never made any effort to recover their purchase price from him. Taggart twice was given options to re-purchase the home at prices wholly inconsistent with what Baker alleges to have been the loan arrangement, but once those options lapsed, Mr. Wade refused to let him buy the property back. From the date of purchase to date, Mr. Wade has behaved like the owner of the property and Mr. Taggart has behaved like a tenant. In sum, Taggart had no continuing obligation to pay Wade and had no continuing right to redeem the property; he was not a mortgagee.

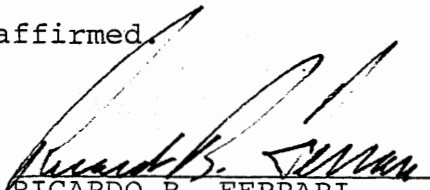
Wade's and Taggart's conduct consistently reflected a purchase. The documentation also reflected a purchase, with the exception of the "promissory notes" which are inconsistent with either party's theory, with the other documents and with the parties' conduct. Finally, the transaction's participants have testified that they intended a sale, not a mortgage. Plaintiff, who was required to prove his case by clear and convincing evidence, has not overcome the strong indications of a sale which appear throughout the record.

In addition to failing to rebut the above evidence, plaintiff has failed even to present a coherent theory of his case. He bases a claim of a mortgage principally on the supposed promissory notes, which his counsel admitted, "I can't frankly can't explain... . It doesn't make sense to me, either." R. 107. Nevertheless, plaintiff asked the District Court to find an equitable mortgage in the principal sum of \$20,000 (Ibid.) based upon promissory notes for \$27,000 and a transaction in which \$17,000 changed hands! Plaintiff's failure to deal with the evidence and describe the transaction satisfactorily is compounded by his failure to suggest any reason for the parties' conduct. Why would Wade make a loan to anyone who was as bad a risk as Taggart? Would it not have made far more sense to buy in March than foreclose in December? What would Taggart have gained by incurring still another debt; did it not make far more sense for him to sell with an option and

thus be able to walk away if he did not have funds when the option expired? If Taggart was a debtor under an unforeclosed mortgage, how could Wade have refused to let him pay off the encumbrance in 1978, when he finally was able to do so?

The District Court, after careful consideration of the transaction, documentation, events and the testimony and demeanor of the witnesses -- which was essential to an understanding of the unorthodox Wade or the easily distraught Taggart -- was unconvinced of plaintiff's claim. In view of the heavy burden plaintiff bore and the many gaps in his case, it could not have been otherwise. It cannot be said that the result was unreasonable.

The judgment below should be affirmed.


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