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Controlled Receivables, Inc. A Utah Corporation, and Claude D. Harman, An Individual v. Don Harman and Lila Harman, His Wife, and William Blake Harmon aka Blake Harman and Colleen Harmon, His Wife : Brief of Appellant

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IN THE SUPREME COURT of the STATE OF UTAH

CONTROLLED RECEIVABLES, INC., a Utah corporation, and CLAUDE D. HARMAN, an individual,
Plaintiffs,

vs.

DON HARMAN and LILA HARMAN, his wife, and WILLIAM BLAKE HARMON, a/k/a BLAKE HARMAN and COLLEEN HARMON, his wife,
Defendants.

BRIEF OF APPELLANT

Case No. 10403

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Appeal from the Judgment of the
Third District Court for Salt Lake County
Honorable Stewart M. Hansen, Judge

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TABLE OF CONTENTS

Page

STATEMENT OF THE KIND OF CASE 2

DISPOSITION IN LOWER COURT 2

RELIEF SOUGHT ON APPEAL 2

STATEMENT OF FACTS 3

ARGUMENT 6

SUMMARY 16

POINTS

I. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING PLAINTIFFS' COMPLAINT — NO CAUSE OF ACTION 6

(a) In ruling on defendants' motion for summary judgment the District Court was required to consider the pleadings and depositions most favorably to plaintiffs 7

(b) A determination of whether or not there has been a valid delivery requires the Court to ascertain the intent on the part of the grantor, and plaintiffs are entitled to a trial in regard to this matter, with opportunity to produce evidence showing the intent of the grantor 10

(c) Plaintiffs should have been permitted to have a trial on the issues and produce evidence to prove their contentions that the deeds in question were void by reason of the fact that they were an invalid attempt to make a testamentary disposition 15

AUTHORITIES

CASES

Page

Chamberlain v. Larsen, 83 Utah 420, 29 P.2d 355 ....12, 13, 15

Counter v. Counter, 232 P.2d 551 (Cal.) 15, 18

First Security Bank v. Burgi, 122 Utah 445,
251 P.2d 297, 299 ....10, 13, 15, 17

In Re Alexander's Estate, 104 Utah 288, 139 P.2d 432 17

Kelly v. Bank of America National Trust & Savings
Association, 242 P.2d 923 (Cal.) 14

Kidman, LaVere et ux. vs. Lavine H. White, et al,
14 Utah (2d) 142, 378 P.2d 898, 900 7

Mademann et al v. Sexauer et al, 256 P.2d 34 (Cal.) 15, 18

Mower v. Mower, 64 Utah 260 (1924), 228 P. 911 ....13, 15

Soloman v. Walton, 241 P.2d 49 (Cal.) 15

Stanley v. Stanley, 97 Utah 520, 94 P.2d 465 ....11, 13, 15

Steinke v. Sztanka, et al., 364 Ill. 344 (1936), 4 N.E. 2d 472.... 15

TEXTS

31 A.L.R. (2d) 542 16

31 A.L.R. (2d) 27 ....12, [illegible]

34 A.L.R. (2d) 588, 592, 593 ....7, 12, 13, 14

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APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This action is set out in two causes of action. The First Cause of Action is a suit to quiet title in the plaintiff Claude D. Harman and his successors in interest to the land in question located in Salt Lake County, Utah, being a part of the Southwest quarter of Section 29, Township 1 South, Range 1 West, Salt Lake Base and Meridian. (R. 14-15)

The Second Cause of Action asks the Court to set aside and declare null and void certain deeds under which the defendants claim an interest in subject property on the ground that there was no delivery, and on the additional ground that the deeds were intended to take effect only upon the death of plaintiff Claude D. Harman, and were an attempt to make a testamentary disposition of the property, and did not comply with the requirements for a testamentary disposition. (R. 15-17)

DISPOSITION IN LOWER COURT

The District Court granted defendants' motion for summary judgment, dismissing plaintiffs' complaint — no cause of action. (R. 33) Plaintiffs appeal from such judgment.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the District Court's summary judgment, dismissing plaintiffs' complaint, and re-

quest judgment in their favor voiding said deeds as a matter of law, or that failing, plaintiffs request an order remanding said action to the District Court for a trial of the issues.

STATEMENT OF FACTS

Plaintiff Claude D. Harman, since the year 1930, has been the owner and in possession of two parcels of property located in Salt Lake County, State of Utah, one of which has the general address of 3966 West 3500 South, Granger, Utah, consisting of 1¼ acres of ground, and fronts on 3500 South Street. (R. 40, p. 2 - Lines 18-25) There was a small, modest frame home constructed on this parcel in the early 1930's in which the plaintiff Claude D. Harman has lived since its construction to date, with his wife, until her death in approximately 1942 and in which the family was raised until they left home. The other parcel of property is approxmately 8⅓ acres of land and lies Northeast of the 1¼ acre parcel. (R. 43, p. 3 - Lines 18-22; p. 13 - Lines 21-25)

In 1947 the plaintiffs Claude D. Harman, then a widower with four children, all of whom were minors, (R. 40, p. 3 - Lines 1-3; p. 4 - Lines 12-13) was encouraged by his brother and sister-in-law to make arrangements so that in the event of his death his property would be divided equally among his children and avoid probate with all the expenses connected therewith. (R. 40, p. 3 - Lines 1-30)

His brother and sister-in-law, Franklin Harman and

his wife Marian, suggested that such could be accomplished in his and his children's names, as joint tenants. (R. 40, p. 3 - Lines 20-28). Plaintiff Claude D. Harman, following the instruction of Franklin Harman, and believing that thereby he would retain complete ownership and control of said property and provide for the passing of it to his children upon his death, executed a deed to Franklin Harman (R. 41 p. 13 - Lines 6-25; R. 40, p. 4, Lines 16-19; p. 10 - Lines 25-30; p. 15 - Lines 12-15; p. 5 - Lines 15-19) and Franklin Harman, as strawman, executed a deed as grantor to Claude D. Harman and his minor children: Barbara Louise Harman, Blake Harman, Don Harman and Larry Harman, grantees, as joint tenants and not as tenants in common. (R. 40, p. 3 - Lines 10-11) These deeds were never delivered by Claude D. Harman to his children or any other person (R. 40, p. 8 - Lines 3-5), but somehow were recorded without the knowledge or consent of the plaintiff Claude D. Harman. (R. 40, p. 16 - Lines 11-15) Plaintiff Claude D. Harman continued to live on the home property and possess both of said parcels, exercising all the rights of ownership, paid all of the taxes on said property, (R. 40, p. 4 - Lines 28-29) paid for all upkeep and maintenance expenses, (R. 40, p. 4 - Line 30, p. 5 - Line 1) and in every way treated the property as being exclusively his. On the other hand, the defendants Don Harman and Blake Harman and the other children of Claude D. Harman, contributed nothing to maintaining the property. They were even paid by their father for all chores and work performed by them in and on the property. (R. 42,

p. 9 - Lines 13-30 and p. 10 - Line 1; R. 43, p. 4, Lines 12-30). Further, the children at all times treated and referred to the property as being exclusively their father's. For example, in 1959 defendant Don Harman requested his father to provide him with security so that he could purchase a service station business from Lynn Packard. Plaintiff Claude D. Harman executed a mortgage to Mr. Packard covering both of said parcels. (R. 40, p. 6 - Lines 1-19) Although all of the children were aware of the transaction, none objected to the mortgage and none thought it necessary that they sign. Don Harman did in fact sign the mortgage in connection with the other papers of the transaction, but did not know that he had signed the mortgage on his father's property until the note was paid off and the mortgage released and he found the mortgage among the papers. (R. 42, p. 11 - Lines 28-30, p. 12 - Lines 1-7) Also, late in the year 1963 the plaintiff Claude D. Harman, without obtaining the consent of any of his children and without any objection on the part of his children, sold the one parcel of land comprising approximately 8⅓ acres to Pancake, Inc., a Utah corporation. (R. 40, p. 12 - Lines 2-16) In order to clear the record title to said property in connection with such sale, defendants Blake Harman and his wife Colleen, without requesting any consideration, executed a quit-claim deed to Claude D. Harman September 3, 1963, and defendants Don Harman and his wife and Larry Harman and his wife, and Barbara Louise Harman, without requesting any consideration, executed a quit-claim deed to Claude D. Harman October

4, 1963. (R. 40, p. 8 - Lines 16-22; p. 11 - Lines 21-30)

On May 23, 1964 Claude D. Harman was still treating the remaining property as being exclusively his, and without obtaining his children's consent executed an option to Pete Harman in which he agreed to sell to Pete Harman the said 1¼ acre parcel. (R. 40, p. 11 - Lines 1-20; p. 12 - Lines 5-16) Upon request and without any consideration or objection, Larry Harman and his wife and Barbara Louise Harman conveyed by quit-claim deed their record interest in the 1¼ acre parcel to their father, Claude D. Harman. (R. 40, p. 8 - Lines 23-28)

As was done in regard to the 8⅓ acre parcel, Don Harman and Blake Harman were requested to give quit-claim deeds in regard to the 1¼ acre parcel, but they both refused to do so (R. 40, p. 8 - Lines 23-28), and this action was brought in order to clear the record title to the 1¼ acre parcel of property.

ARGUMENT

POINT NO. I

A. THE DISTRICT COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSING PLAINTIFFS' COMPLAINT — NO CAUSE OF ACTION.

The District Court granted defendants' motion for summary judgment dismissing plaintiffs' complaint on the erroneous conclusion that plaintiffs are precluded as a matter of law from producing evidence to show that a deed under which the defendants are claiming an interest in subject property was not delivered and that said

deed was prepared and executed as an attempted testamentary distribution and is therefore void. The District Court's ruling is contrary to well established law in the State of Utah and if permitted to stand would open the gate to wholesale fraud in that any person could prepare a deed and claim title to property, and and person contesting the deed would be precluded from producing evidence to prove otherwise. (34 ALR 2d, 588, 593)

The District Court failed to follow well established law requiring it to consider the facts most favorable to the plaintiffs when considering defendants' motion for summary judgment. It further erred in not following Utah law which clearly permits testimony from the grantor and other evidence of acts and statements in determining whether or not the deeds were void for lack of delivery, and has failed to follow established law which permits plaintiffs to present testimony and other evidence at a trial to prove that the deeds were void because they were an attempted testamentary disposition which did not conform to testamentary requirements.

IN RULING ON THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT THE DISTRICT COURT WAS REQUIRED TO CONSIDER THE PLEADINGS AND DEPOSITIONS MOST FAVORABLE TO THE PLAINTIFFS.

The Utah Supreme Court in the case of *LaVere Kidman et ux. vs. Lavine H. White, et al.*, 14 Utah (2d) 142, 378 P.2d 898, 900, stated the law in regard to the granting of summary judgment as follows:

"In confronting the problem presented on this appeal we have been obliged to remain aware that a summary judgment, which turns a party out of court without an opportunity to present his evidence, is a harsh measure that should be granted only when, taking the view most favorable to a party's claim and any proof that might properly be adduced thereunder, he could in no event prevail."

"See statement in Samms v. Eccles, 11 Utah (2d) 289, 358 P.2d 344 (1963)."

Plaintiffs' amended complaint sets forth two causes of action. The First Couse of Action is a quiet title action and defendants should have been required to set forth their claims, if any, to an interest in the property and plaintiffs were entitled to a trial on the issues thus raised.

The Second Cause of Action seeks to have the deed under which defendants claim an interest in the property voided on the ground of lack of delivery, and on the further found that it was an attempted testamentary disposition. Plaintiffs should have been permitted to produce evidence at a trial and prove their contentions.

Plaintiffs have substantial evidence to present to the Court in regard to the two issues, — it being plaintiffs' contention that the deeds were never delivered to the children at any time, and that the recording of the same was without the knowledge and consent of grantor Claude D. Harman. It is also plaintiffs' contention that said Claude D. Harman, as grantor, never intended to pass any present interest to his minor children but was

merely following a form which he had been advised to use by his brother, with the belief and understanding that the deeds would take effect only upon his death.

At the time the District Court granted defendants' motion for summary judgment, the only things it had before it to consider were the pleadings and the depositions of plaintiff Claude D. Harmon and defendants Don Harman and Blake Harmon. In Plaintiffs' pleadings and in plaintiff Claude D. Harman's deposition, plaintiffs have consistently and strenuously maintained that there was never a delivery of the deeds under which defendants claim an interest in subject property, and that such deeds were prepared and executed as an attempted testamentary disposition and do not conform to the Statute of Wills, and are therefore void. There is no evidence in either the defendants' pleadings or depositions to refute the contentions of plaintiffs and the defendants have contended that they have an interest in the property on the flimsy argument that deeds exist and that such deeds were recorded and that these two facts preclude plaintiffs from showing any evidence which would invalidate such deeds. Such, of course, is not the law, and it was error for the District Court to accept defendants' argument as the law and a basis for the summary judgment.

The Court's attention is called to the fact that defendants in their motion for summary judgment contend that there is no dispute as to the facts in the case. Therefore, in considering the summary judgment, the District

Court is required to consider the case most favorable to the plaintiffs, and in view of defendants' admission that there is no controversy concerning facts, then the allegation of the plaintiffs that there was no delivery, and that the deeds in question were attempted testamentary disposition and therefore void, must stand as established fact, and, further, in view of the fact that defendants have shown no evidence and apparently by reason of their motion for summary judgment do not intend to show any evidence to refute plaintiffs' contention, plaintiffs are entitled to a summary judgment declaring that the deed from Claude D. Harman, dated the 20th day of February, 1947, to Franklin Harman, as a straw man, and the deed from Franklin Harman to Claude D. Harman and his children, as joint tenants, bearing the same date, are void and of no effect, and that thereby defendants have no interest in the subject property.

B. A DETERMINATION OF WHETHER OR NOT THERE HAS BEEN A VALID DELIVERY REQUIRES THE COURT TO ASCERTAIN THE INTENT ON THE PART OF THE GRANTOR, AND PLAINTIFFS ARE ENTITLED TO A TRIAL IN REGARD TO THIS MATTER, WITH OPPORTUNITY TO PRODUCE EVIDENCE SHOWING THE INTENT OF THE GRANTOR.

The Utah Supreme Court has clearly established in this jurisdiction that the intent on the part of the grantor is the controlling factor in determining the validity of a deed. In *First Security Bank v. Burgi*, 122 Utah 445, 251 Pac (2d) 297, 299, The Utah Supreme Court held:

> "Delivery is essentially a matter of intent. Such intent is to be arrived at from all the facts and surrounding circumstances both before and after the date of the deed, including declarations of the alleged grantor where it appears that the declarations are made fairly and in the ordinary course of life. *Stanley v. Stanley*, 97 Utah 520,
> course of life. Stanley v. Stanley, 97 Utah 520,
> 94 Pac. (2d) 465; Mower v. Mower, 64 Utah 260; 228 Pac. 814."

The issue in question in the case at bar is the intent of the grantor and the above cited *Burgi* case clearly states that the law in this jurisdiction is that the plaintiffs have a right to produce evidence concerning the surrounding circumstances, both before and after the date of the deed, "including declarations of the alleged grantor where it appears that declarations are made fairly and in the ordinary course of life." The District Court's summary judgment denied plaintiffs this very important right.

Other Utah Supreme Court cases which substantiate this position are *Stanley v. Stanley* 97 Utah 520, 94 Pac. (2d) 465, where this Court held as follows:

> "In the course of these various transactions he had repeatedly stated and represented that he was the owner of the property, such statements, however, being admissible only upon the question of intent to presently pass title, if in fact, there had been a manual delivery."

See also the case of *Chamberlain v. Larsen*, 83 Utah 420, 29 Pac. (2d) 355, where the Supreme Court held as follows:

> "The court committed no error in admitting evidence of the acts, conduct and declarations of Miss Bennett in reference ~~in~~ to the property, made after the date of the deed. Where as in this case the issue is whether the grantor named in the deed had ever parted with her title, evidence that the alleged grantor, after the signing of the deed, continued to pay taxes, carried the insurance in her own name, and offered to sell a portion of the property, was admissible on the issue of intention to deliver the deed."

Counsel for defendant cited to the District Court during the argument the line of cases in 31 ALR 27, contending that such cases were controlling in the instant matter. A reading of such cases will reveal that either the issue involved was something other than a determination of the intent of the grantor, which is the issue in this case, or the decision expressed a minority rule. The annotation cited in 34 ALR (2d) 588, 592, acknowledges that some jurisdictions have held the act and declaration of the grantor as inadmissible, but points out that the issue of intent was not present in such cases and concluded that where the question at issue is whether the grantor intended to make a legal delivery, i.e. unconditionally divest himself of title by instrument in the form of a deed of conveyance, declarations of such grantor are admissible as bearing on the vital question of intent for

the purpose of determining whether or not there was in contemplation of law an effective delivery. 34 ALR (2d) 588, 592:

> "2. Although it is well settled that acts and declarations of a grantor made after he was parted with the title to the property in disparagement of its effective delivery are inadmissible when made in the absence of the grantee, a point conceded by many of the cases below, nevertheless the following cases hold or recognize that where the very question at issue is whether the grantor intended to make a legal delivery, that is, to unconditionally divest himself of the title by an instrument in the form of a deed of conveyance, declarations of such grantor after physically delivering the deed to the grantee or to a third person to hold for the grantee until some future time are admissible as bearing on the vital question of intent for the purpose of determining whether or not there was in contemplation of law an effective delivery."

Cases cited includes the following Utah case *Mower vs. Mower* (1924) 64 Utah 260, 228P. 911; *Chamberlain vs. Larsen,* (1934) 83 Utah 420, 29 P. 2d 355; *Stanley vs. Stanley* (1939) 97 Utah 520, 94 P. 2d 465; *First Security Bank vs. Burgi* (1952) 122 Utah 445, 251 P. 2d 297.

In support of the statement, the ALR annotation cites Utah and California cases as the key cases. The annotation goes on by acknowledging that there is some conflict between the decisions of different jurisdictions in regard to the question and says:

"But the better reasoned cases' as designated in 25 Columbia Law Review, 373, which may also be fairly considered the weight of authority, support the rule stated at the beginning of this section. In this connection, the following remarks from the law review article above cited may be adverted to: '*To exclude all evidence prejudicial to the grant after the alleged delivery is to beg the very question in issue, i.e. whether delivery ever occurred. That view, moreover, would open the door to fraud. By merely claiming delivery at a certain date, such evidence of non-delivery would be excluded. A person having forged a deed could keep out evidence of great importance, viz: the statements and actions of the supposed grantor, by the mere assertion that the delivery was on the purported date of the instrument.*'"

In many cases where this issue is raised the grantor is deceased, but the instance case is one of the few cases where the Court has an opportunity to hear testimony from the grantor in regard to his intent. The California Supreme Court has made it clear that the argument that such would be self-serving is not valid, and the grantor's testimony should be admitted.

See *Kelly v. Bank of America National Trust & Savings Association,* 242 Pac. (2d) 923 (Cal.), in which the Court stated in part as follows:

"However, where as here, the issue is whether the grantor intended that the deed should be presently operative, such testimony is admissible. Huth v. Katz, 30 Cal. (2d) 605, 608, 184 Pac. (2d) 521. As was said in Whitlow v. Durst, 20 Cal. (2d)

523, 127 Pac. (2d) 530, 531. When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, *and it is immaterial that said declarations are in the interest of the party producing them.*'" (cases cited) (emphasis added)

In order to avoid unnecessary repetition the Court's attention is called to the following cited cases which support the foregoing statement of the law.

Steinke v. Sztanka, et al. (1936) 364 Ill. 344, 4 N.E. 2d 472; *Mower v. Mower,* (1924) 64 Utah 260, 228 P. 911; *Chamberlain v. Larsen,* (1934.. 83 Utah 420, 29 P. 2d 355; *Stanley v. Stanley,* (1939) 97 Utah 520, 94 P. 2d 265; and *First Security Bank v. Burgi,* (1952) 122 Utah 445, 251 P. 2d 297 Utah cases.

Counter v. Counter, 232 P. 2d 551 (Calif.) quoting with approval from *Azevedo v. Azevedo,* 1 Cal. App. 2d 504, 506, 36 P.2d 1078, 1079, that manual tradition is not enough but must be with intent of presently passing title. *Mademann et al. vs. Sexauer et al.,* 256 P.2d 34 (Calif); *Solomon v. Walton,* 241 P. 2d 49 (Calif.)

C. PLAINTIFFS SHOULD HAVE BEEN PERMITTED TO HAVE A TRIAL ON THE ISSUES AND PRODUCE EVIDENCE TO PROVE THEIR

CONTENTIONS THAT THE DEEDS IN QUESTION WERE VOID BY REASON OF THE FACT THAT THEY WERE AN INVALID ATTEMPT TO MAKE A TESTAMENTARY DISPOSITION.

Plaintiffs have contended in their complaint and plaintiff Claude D. Harman has testified in his deposition that the sole reason and purpose for the preparaton of the deeds under which defendants claim an interest in the property was to avoid the expense of probate, and it was the declared intent that no title should pass to defendants and other children of plaintiff Claude D. Harman until after his death. The law in this jurisdiction, as well as in most jursidiction, appears to be well settled that the intent of the grantor is the determining factor whenever the question is raised as to whether a present interest passed or the attempted conveyance was invalid by reason of the fact that it was an attempted testamentary disposition. The law in many jursidictions is summarized in 31 ALR (2d) 542, as follows:

> "The following cases expressly reaffirm the rule laid down in the original annotation that in construing an instrument in the form of a deed, containing provisions postponing or limiting the grantee's rights until the grantor's death, the intent of the grantor as to the interest which he intends to pass — whether a present irrevocable one or an ambulatory one to take effect after his death — is controlling."

Merely because a deed is prepared, such is not controlling. The real nature of a particular transaction, rather than the form in which it is cast, must always be

the decisive factor in cases of this kind.

In the *Burgi* case, supra, the Utah Supreme Court upheld the District Court's finding from the evidence that a purported deed was an attempted testamentary disposition and void.

In the case of *First Security Bank of Utah v. Burgi*, 251 P. 2d 297, the Court at page 299 said in part:

> "... The testimony reveals that the deceased clearly intended that the deed and bill of sale pass the property to the defendant. The facts and circumstances, however, support the trial court's finding that the decesaed had no intention to pass title immediately, but that such deed and bill of sale were to become operative upon the death of the decedent. Under such circumstances the deed and bill of sale were clearly testamentary in character and intent and were inoperative, since they did not conform to statutory requirements for testamentary disposition. In Re Alexander's Estate, 104 Utah 286, 139 P. (2d) 432."

The District Court's summary judgment in the instant case erroneously and unlawfully precluded the plaintiffs from showing the same thing as was shown in the *Burgi* case and which was upheld by the Supreme Court and resulted in the final determination of the case.

The following citations are in accordance with the law as stated above:

In re Alexander's Estate, 104 Utah 288, 139 P. 2d

432; *Counter v. Counter*, 232 P. 2d 551 (Calif.); *Moder-mann v. Sexauer*, 256 P. 2d 34 (Calif.).

SUMMARY

The District Court obviously erred in granting summary judgment dismissing plaintiffs' complaint. The law in this jurisdiction, and generally throughout the United States, requires that the Court should have considered the case most favorable to the plaintiffs in making a determination on a motion for summary judgment. The Court not only failed to consider the case most favorable to plaintiffs, but arbitrarily and without any justification in law or equity erroneously precluded the plaintiffs from producing evidence at a trial in regard to their contention that there was no delivery of the deeds under which the defendants claim an interest in subject property, and that the true character of the deeds was an attempted testamentary disposition which did not conform to the statutory requirements of testamentary disposition and therefore, void. The defendants by their motion for summary judgment admitted that there was no dispute as to fact. Therefore, the plaintiffs' statement of the facts must stand as true, and based upon plaintiffs' statement of facts, plaintiffs are entitled to a judgment voiding the deeds in question, with a resulting declaration that the defendants had no interest in the subject property. That failing, the Court should

reverse the District Court's summary judgment and remand the case for trial.

Respectfully submitted,

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