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Clerk, Supreme Court of Appeals

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Record No. 7360

In the
Supreme Court of Appeals of Virginia
at Richmond

JOHN R. BOWERS

v.

CAPITAL EQUIPMENT COMPANY, INC.

FROM THE CIRCUIT COURT OF HENRICO COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7360

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 26th day of November, 1969.

JOHN R. BOWERS, Plaintiff in error,

against

CAPITAL EQUIPMENT COMPANY, INC., Defendant in error.

From the Circuit Court of Henrico County
John Wingo Knowles, Judge

Upon the petition of John R. Bowers a writ of error is awarded him to a judgment rendered by the Circuit Court of Henrico County on the 18th day of April, 1969, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Capital Equipment Company, Inc., was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

RECORD

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April 18, 1969

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Gentlemen:

The Court has carefully reviewed its minutes of the hearing on March 14, 1969, and has examined memoranda submitted by counsel. The appreciation of the Court for the research and cooperation of counsel is now expressed.

The Court is of the opinion that judgment in this case should be entered for the defendant corporation. The plaintiff has failed to prove by a preponderance of the evidence that the party accommodated by him in his execution of the lease agreement, *certicate* of delivery and transfer agreement pertaining to the D-7 Caterpillar Crawler Tractor in question was the defendant corporation.

As the Court views the evidence, there is little question but that the plaintiff was apprised by Mr. Mottley of the fact that Mottley could not obtain funds from General Electric Credit Corporation when the security agreement utilized consisted of a lease from the defendant corporation to Mottley, its president, as an individual. As the plaintiff clearly stated, this was a "straw man" operation, but the Court finds that the use of the "straw man" was intended to be for the benefit of Mottley, the individual, rather than for the benefit of Capital Equipment Company, Inc.

The Court will enter an order awarding judgment to the defendant, noting therein the exception of the plaintiff, by counsel, to this action of the Court.

page 20 } Again, thank you for your cooperation throughout.

Very truly yours,

John Wingo Knowles
Judge

page 21 }

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FINAL JUDGMENT ORDER

On March 14, 1969, came the parties, in person and by counsel, and the defendant having filed its grounds of defense to the motion for judgment exhibited against it, issue is joined.

Thereupon, both the plaintiff and the defendant waived trial by jury of the issue joined herein and requested that all matters of law and fact be submitted to the Court for hearing and determination without the intervention of a jury.

The Court having heard the evidence on behalf of the plaintiff, defendant, by counsel, moved to strike the evidence of the plaintiff upon grounds stated in the record, which motion having been argued, was overruled by the Court and exception duly noted by the defendant.

Thereupon, the Court heard the evidence on behalf of the defendant and the evidence offered in rebuttal by the plaintiff. And, argument of counsel having been heard, the attorney for the plaintiff representing to the Court that he desired to submit a memorandum of law relevant to the issues presented, the Court did take under advisement its decision in the premises and request that plaintiff's memorandum be submitted on or before March 21, 1969; the defendant's reply memorandum be forwarded on or before March 28, 1969, and the plaintiff's rebuttal thereto, if any, be submitted on or before April 4, 1969.

This action having been continued as set out above, and memoranda of counsel having been received and page 22 } carefully examined by the Court, the Court finds for the defendant upon the issue joined, and it is ADJUDGED and ORDERED that the plaintiff take nothing and that judgment is entered in favor of the defendant, together with its costs in this behalf expended. To which action of the Court the plaintiff, by counsel, objects and excepts.

ENTER: 4/18/69

John Wingo Knowles
Judge

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ASSIGNMENTS OF ERROR

1. The trial court erred in not finding as a matter of law that defendant was the accommodated party to the lease agreement, which plaintiff signed as accommodation maker.
2. The trial court erred in not awarding judgment to plaintiff for the amount sued for against the accommodated party.

* * * * *

W. R. Gambill, Counsel for Plaintiff

Received & filed in office June 10, 1969.

Margaret B. Baker, Deputy Clerk.

* * * * *

Trial Proceedings

March 14, 1969

Before: The Honorable John Wingo Knowles, Judge

Appearances:

W. R. Gambill, Esq., attorney,
of counsel for plaintiff

McGuire, Woods & Battle
By: Robert A. Drash, Esq., attorney,
of counsel for defendant

Reported by:

Dwayne M. Savik

* * * * *

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KENNETH MEYERS, was sworn, and testified in behalf of the plaintiff, as follows:

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CROSS EXAMINATION

By Mr. Drash:

Q. Mr. Meyers, in your capacity with General Electric Credit Corporation, you mentioned you had some phone conversations with Mr. Bowers; did you ever go out and personally talk to him at his office?

A. Yes.

Q. Do you recall when that was?

A. I can't pin it to the exact date, it was shortly my letter notifying—shortly after that point forward we would be looking to him for payment.

Q. Did he make any mention at that time that Motley owed the money?

page 40 } A. Yes.

Q. Did he make any mention that Capital owed it?

A. I don't recall the exact conversation, as far as—I don't recall the exact conversation, but to the best I can remember, there was nothing as far as Capital owing the money, no.

* * * * *

By Mr. Drash:

Q. That's all right. Now prior to that time, I believe on or about September 18, 1967, G.E.C.C. had transferred this obligation of Bowers to C. C. Motely individually, and I now ask you to take, if you would, Plaintiff's Ex-

page 41 } hibit Number 3. Do you have it, sir?

The Court: Somebody has got them.

Kenneth Meyers

A. I have the transfer.

The Court: The witness has them.

Q. Do you have that in front of you, sir?
A. Yes, I have.
Q. Now if you would please, tell the Court who signed that, sir?
A. Mr. Motely signed as the transferee and Mr. Bowers signed as the transferor, and I executed as far as General Electric Credit Corporation, I accepted it.

The Court: You signed on behalf of them?
The Witness: Right.
The Court: Okay, I couldn't quite hear you.

By Mr. Drash:
Q. Mr. Motely signed this as an individual?
A. Yes, there is no indication of any title here.
Q. So far as you knew, he was undertaking this obligation personally then?
A. Yes.
Q. Did he so tell you?
A. Yes.
Q. Did he tell you at the time that he would make payments?
page 42 } A. Yes.
Q. And did he make payments?
A. He made some payments, yes.
Q. Now Mr. Meyers, did there ever come a time in the early fall of 1967 when you had occasion to discuss this lease transaction with Claiborne Terry, who was also a member of that corporation?
A. Yes.
Q. And do you know from your conversation whether the information that you imparted to Mr. Terry at that time was the first knowledge that he ever had of this being a corporate transaction?
A. Yes. He indicated to me at the time I showed him this lease agreement and assignment that he had not seen it previously, he had no knowledge of the transaction.

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Claiborne W. Terry

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CLAIBORNE W. TERRY, Defendant, was called as an adverse witness, and testified in behalf of the plaintiff, as follows:

DIRECT EXAMINATION

By Mr. Gambill:

Q. Mr. Terry, tell the Court your name, address and occupation?

A. Claiborne W. Terry, I live at 8000 Cameron Road, and I'm with Capital Equipment Company, heavy equipment distributors.

Q. In what capacity?

A. I'm President of Capital Equipment Com-
page 44 } pany.

Q. On July 13, 1967, in what capacity were you with Capital Equipment Company?

A. I was Secretary-Treasurer.

Q. And who was the president at that time?

A. C. C. Motley.

Q. Now Mr. Terry, you have heard the testimony of Mr. Coleman and Mr. Meyers that a $14,000.00 draft was mailed to Capital Equipment Company, Inc. on or about the 14th of July; do you recall whether that draft was ever received at the office of Capital Equipment Company, Inc.?

A. I don't believe it was mailed to Capital Equipment Company.

Q. You think it was delivered?

A. I think it was delivered in person to—

Q. To Mr. Motley?

A. To Mr. Motley, right.

The Court: What is the last thing you said?

Mr. Gambill: It was delivered to Mr. Motley.

The Court: Oh, to Mr. Motley.

By Mr. Gambill:

Q. In other words, your recollection is different?

A. Yes. G. E. probably mailed us three-quarters or eighty percent of the checks, but occasionally I think they deliver them or hand them to somebody.

Claiborne W. Terry

page 45 } The Court: What you are saying is Capital did business with General Electric Credit all along, and in the course of that business, on occasions they would deliver certain checks in person, or by somebody?

The Witness: To a particular individual, yes.

By Mr. Gambill:

Q. Generally they did it by mail?

A. I would say a majority of the time they do it by mail.

Q. In this case you think the check in the amount of $14,000.00 there is so much hastle about, was in fact delivered by hand rather than by mail?

A. To Mr. Motley.

Q. Was that check ever endorsed by Capital Equipment Company, Inc.?

A. Yes, it was endorsed by . . .

Q. Do you know who signed the endorsement?

A. I signed the endorsement to Mr. Motley.

Q. Do you know whether he also signed the endorsement?

A. I don't know.

The Court: Wait a minute, you said you signed the endorsement. In other words, how was it endorsed in the back?

page 46 } The Witness: It was endorsed to Motley Equipment Company.

The Court: What I'm getting at, who in effect executed it, the check was payable to Capital Equipment Company?

The Witness: Right, Capital Equipment Company endorsed it to Motley Equipment Company, and Mr. Motley took the check, and I don't know what he did with it.

By Mr. Gambill:

Q. All right, that "Capital Equipment Company" was by whom? Was there any "by" on there?

A. I endorsed it.

Q. By Claiborne W. Terry?

A. Yes, sir.

Q. Secretary-treasurer, right?

A. Yes, sir.

Q. And then you say just Motley Equipment Company, that's all it was?

A. Yes, sir.

Q. No incorporated or anything else?

A. I don't—it may have been incorporated, I'm not sure.

Q. Very well and then the next question was whether in

Claiborne W. Terry

turn that check was again endorsed and deposited,
page 47 } or did Mr. Motley also endorse it?

The Court: Did Mr. Motley also endorse it on behalf of Capital Equipment?

Mr. Drash: He said he endorsed it as to Capital. I think the question was if—

By Mr. Gambill:

Q. Let me ask the question again, because I think I didn't make it clear. Mr. Terry, do you know whether in fact Mr. Motley also signed this check, also endorsed this check on behalf of Capital Equipment Company, Incorporated, along with your signature?

Mr. Drash: Well, Your Honor, that may call for something he has learned later.

The Court: He can tell whether he saw it.

Mr. Gambill: He can tell if it was endorsed in his presence at that time.

Mr. Drash: Right, but that's not the question.

The Court: I will limit him to whether when it came in and was endorsed by and on behalf of Capital Equipment Company, Inc., anyone else who was duly authorized to endorse, endorsed on behalf of Capital.

A. At the time I endorsed it, I was the one to endorse it to Motley Development Company.

Q. So the last thing that would appear on the
page 48 } back of it was "Secretary-Treasurer," underneath your name?

A. I don't even think that is underneath my name, I think it's just signed, my John Henry.

Q. You didn't see it anymore after that, or did you?

A. No, I didn't see it anymore after that.

Q. But you were authorized to endorse checks in your capacity as an officer of the corporation at that time, and it wasn't necessary for anyone else to endorse it, other than yourself?

A. Yes, I was authorized to endorse checks, sign them as Secretary-Treasurer of the corporation.

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Claiborne W. Terry

page 49 }

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Q. Now when did you become part owner of Capital Equipment Company?

A. I became part owner of Capital Equipment Company in the middle of June, approximately the first week in June, I would say or second week in June.

Q. Of what year, sir?

A. Of 1967.

Q. Now did you go to work for them at that point?

A. No, I did not go to work for them until July, I was still employed with Owens and Minor, and they asked me to work with them until the end of June, which I did before I could go to work for Capital Equipment Company.

Q. So is it fair to say on or about the 1st of June of 1967, you went to work for Capital?

A. No, 1st of July.

Q. July, excuse me. All right, sir, and what was to be your duty with Capital?

page 50 } A. I was working, handling the inside work at Capital, the office part of it.

Q. Who was your other partner in this corporation?

A. C. C. Motley.

The Court: Now you crossed me up; can you have a partner in a corporation? Weren't there stockholders?

Mr. Drash: No.

The Court: It wasn't a partnership then?

Mr. Drash: No, I will rephrase the question.

The Court: I know what you meant, the layman would understand, but that's what got me.

By Mr. Drash:

Q. I will rephrase it. Mr. Terry, who was the other stockholder in this corporation?

A. C. C. Motley.

Q. You and Mr. Motley were running the corporation together?

A. Yes.

* * * * *

Claiborne W. Terry

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* * * * *

Q. All right, sir, now directing your attention to approximately the middle of July, 1967, did there come a time when Motley brought you a check?

A. Yes.

Q. In the amount of roughly $14,000.00?

A. Yes, he did.

Q. And did he have it in his hand at that time?

A. Yes, he did.

Q. And what did he tell you about this check?

A. That this check was payable—this check was his, but it was made out to Capital Equipment Company, on some equipment that he had leased.

Q. All right, sir, now have you had occasion in your corporation—

A. I didn't even know it was leased at that time, you know, to John Bowers. It was money he got from G. E.

page 52 } for his own equipment.

Q. Did there come a time when you ultimately found out that this was not true?

A. Yes, it did. In the process of when Mr. Motley and myself were, you know, decided we couldn't be in business together, at that time in that process I found out.

Q. And when was that?

A. I would say this was in September of '67.

Q. Did Mr. Meyers tell you?

A. Yes, he did, and at that time I had an agreement—

Q. Mr. Terry, in your corporate capacity as secretary-treasurer in the summer of 1967, and now president, have you searched your records to determine whether or not this particular piece of equipment ever belonged to Capital Equipment Company?

A. It has never belonged to Capital Equipment Company in any way, shape or form.

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By Mr. Drash:

Q. Now Mr. Terry, in your corporate capacity as secretary-treasurer, have you also had occasion to check the corporations books to see if any monies were ever paid on this lease through Capital Equipment Company?

A. No, a check was never processed through Capital at all.

Q. Have any payments ever been made by Capital on this lease?

A. No.

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JOHN R. BOWERS, Plaintiff, was called, and testified in his own behalf, as follows:

DIRECT EXAMINATION

By Mr. Gambill:

Q. Mr. Bowers, will you tell the Court your name, address and occupation?

A. John R. Bowers, R.F.D. 2, Goochland, and I'm in the real estate and construction business.

Q. You have heard the testimony given here this morning relative to the lease transaction; would you tell the Court briefly in your own words how this came about?

A. Well, one day I got a call from Chuck Motley, and he came over to the office. He was then President of Capital Equipment Company, and said that he had a piece of equipment that he could not lease himself, as President of the company. It just wasn't allowed by G.E.C.C., and asked if I would lease the equipment from Capital, and then re-lease it back to him.

Not knowing the equipment, not having seen the equipment, I didn't know anything about it, anl I was hesitant to get involved in it. He then explained to me that the

page 55 } equipment was in Winchester, it would be brought

to Richmond. It would be sold or leased, and that I would have no further responsibility for the equipment.

At that point he had just, I think in June of that year, or May, had just bought Capital Equipment Company, and he signed the lease for the company, leasing the equipment to me. I then transferred the equipment back to him, and my feeling was this was an equipment company and that I could —if they were going to sell it, it didn't make any difference anyway, that it wouldn't be on the paper very long.

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Q.

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You say, Mr. Bowers, that all these four or five documents which have been introduced in evidence were all signed the same time, at one visit in your office?

A. Right.

Q. Did you in fact ever receive this Caterpillar tractor that is described in the lease?

A. No.

* * * * *

page 61 } Q. Have you ever seen the tractor?

A. No.

Q. Was there any agreement in existence you signed, this document or all these documents, whereby you would receive any benefit from this contract, either the use of the equipment or any cash or any consideration?

A. No, sir.

Q. Mr. Bowers, did General Electric Credit Corporation make demand on you to pay this, to make payments on this lease?

A. Yes.

Q. Did you receive any communication from them prior to the time they asked for the money?

A. No, you mean by—when the money wasn't paid, they

would send me a notice that it was due, which I would forward on.

Q. I hand you here, Mr. Bowers, a copy of a letter perporting to be from you to Mr. Motley, dated August 1, 1967; would you tell the Court what that letter refers to?

A. This is a letter to Charles C. Motley, Capital Equipment Company, 2050 Westmoreland Avenue, Richmond, Virginia,

"Dear Chuck: Please find the G.E.C.C. payment schedule requesting insurance verification on the loader.
page 62 } "I didn't know whether it was a bulldozer or loader either. "Any further correspondence concerning this piece of machinery, I wish you would have directed to yourself."

Q. And then I hand you a letter dated January 30, 1968, to Mr. Motley. Would you please identify the circumstances around that, what was that all about?

A. This is another letter to Charles C. Motley, Capital International, 2050 Westmoreland Avenue."

The Court: Is Capital International the same thing?

The Witness: No, sir. "Please find two payment reminders from G.E.C.C. regarding account 600756, which is still in my name, which I would like to have changed right away."

Q. Well now Mr. Meyers, you were just informing Mr. Motley then they were after you for the money, and you were passing that information on to him then, is that correct?

A. That is correct.

Q. Now then subsequently did you pay off the obligations under this lease to G.E.C.C.?

A. Yes, sir.

Q. And were those payments the figures which
page 63 } were testified to by Mr. Coleman this morning, and shown in this letter from Mr. Meyers to me, dated August 30, 1968, are those the sums which you paid?

A. Yes, sir.

The Court: Let the record show that that is Plaintiff's Exhibit Number 6.

Q. Mr. Bowers, did you ever receive anything, any consideration from Capital Equipment Company, Inc., or from

C. C. Motley in return for signing those documents in the first place, or for paying the obligation last summer?

A. No, sir.

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CROSS EXAMINATION

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By Mr. Drash:

Q. Mr. Bowers, you have known Mr. Motley some time?

A. Yes, sir.

Q. You all went to college together?

page 64 } A. Yes, sir.

Q. Were friendly on a social basis?

A. Yes.

Q. As a matter of fact, you sold him a farm?

A. Sold him a house too.

Q. For which you were paid commission?

A. Yes, sir.

Q. And from all you could determine, Mr. Motley had plenty of money?

A. I would say from all I could determine, yes.

Q. Had you done any business for any of his friends?

A. Well, if his friends are friends like myself, like we were friends, we had a lot of mutual friends, I would say yes, I have done business with his friends.

Q. Doing favors for Chuck Motley could, though, result in some business for you?

A. I don't know how to connect that, doing favors for anybody results in business for me.

Q. I see, now Mr. Bowers, it never was anticipated that you were going to actually use this bulldozer, was it?

A. No, sir, not by me.

Q. It was just a financial arrangement with Chuck Motley?

A. Well, when he came to see me, he was, had just

page 65 } bought an equipment company. It wasn't an arrangement with Chuck for Chuck Motley, he told me he was going to put—bring the equipment to Richmond from Winchester, and put it on his yard over there, and sell it or lease it.

Motley was involved?

Q. You knew it was a financial transaction in which Chuck

John R. Bowers

A. He told me he could not lease the equipment as President of Capital Equipment Corporation, would I do it for him.

The Court: May I ask a question? He said as President of Capital Equipment he could not lease this piece of equipment?

The Witness: He couldn't lease the piece.

The Court: In other words, he couldn't, did you understand him to say he couldn't have a lease drawn between Capital Equipment and—

The Witness: Chuck Motley, that's right, because he was President of the Corporation.

The Court: Which would enable—what he is saying, in his position of President, this was a barrier to his dealing with his own company?

The Witness: That's right, he wanted me to deal with his company, because he couldn't.

The Court: I see.

page 66 } By Mr. Drash:

Q. Did Motley ever tell you that the Company owned this piece of equipment?

A. I don't recall what he told me about the piece of equipment. He told me the piece of equipment was in Winchester, and that was about all that I really knew about the equipment.

Q. Well Mr. Bowers, I want you to look at these two letters that your counsel has asked you about, August 1, 1967 and January 30, 1968; now let's take the one first of August 1, 1967, that's addressed to Mr. Charles C. Motley, Capital Equipment Company, Inc., 2050 Westmoreland Avenue, Richmond, Virginia, is it not?

A. Yes, sir.

Q. It's not addressed to Charles C. Motley, President of Capital Equipment Company, is it?

A. No, I would assume that they would know where he was when it got there.

Q. And down in the body you refer to this as the loader "we have leased back?"

A. Well, I leased it from Capital, and he leased it from me.

Q. But you are writing to Mr. Motley individually there is no designation here you are writing to him as

page 67 } President of Capital Equipment Company, is there?

A. No, none at all.

John R. Bowers

Q. Now on your January 30, 1968 letter, you knew at this time Mr. Motley was no longer with Capital Equipment Company?

A. No, sir.

Q. So at that time you write him Mr. Charles C. Motley, Capital International, Inc.?

A. My understanding when the Capital International Incorporated was formed, it was a 50-50 stock split, he took 50 percent of Capital and traded it to Clay for 50 percent of Capital at the time, that's what I heard at the time, but he was now President of Capital International, and I never really knew who was who over there.

Q. You are not writing to Capital Equipment Company, you are writing to Charles C. Motley, wherever he is and in whatever capacity?

A. I am writing to Charles C. Motley, yes.

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REDIRECT EXAMINATION

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The Court: Mr. Bowers, let me ask you one question; did I understand you to say that when this thing started, and Mr. Motley said to you, and I will have to try to paraphrase it—what I'm trying to get is what the gist of the conversation was, that there was a piece of heavy equipment which was owned by Capital Equipment?

The Witness: He said there was a piece of equipment, I don't recall whether he said it was owned by—

page 69 } The Court: And he said this piece of equipment was in Winchester?

The Witness: Yes.

The Court: And he wanted to get it to Richmond to sell or lease it?

The Witness: Yes, sir.

The Court: And how did the question of getting money or financing this thing, in other words, ever come up? That's how you all left me out in left field. Where did the financing question come into it.

John R. Bowers

The Witness: He came to me and said he wanted to finance the piece of equipment, and said he could not finance it himself, for his company, because he was President of the company. I think that's generally how it was.

The Court: What I'm getting at is this; when he came to you and said here, we have a piece of equipment and want to finance it, and I can't do it myself, because I'm President of the company, did you have the impression that Capital Equipment could not have financed it on its own, in other words, that Capital Equipment could not have

page 70 } gone to some commercial or industrial lending agency and said, "I've got a D-7 here, I want to borrow money on it. How much will you lend on it?" Is that the impression you got?

The Witness: The impression he gave me is he was the President of Capital Equipment Company.

The Court: The one impression you gave me, you said he was Capital Equipment Company, what did you think when he said, "Lease it back to me, in other words, transfer the stuff over to me, or lease back," as you call it. In other words, the two aren't consistent, as I see it. On the one hand, the way you tell it, you felt the transaction was okay, because of the inability of Capital Equipment to borrow on a piece of equipment and therefore it had to be leased to you as security, at least the paper had to be discounted, and the equipment was secured, and you turned around in the same breath you are saying at the same time you did execute a receipt or certificate of receipt, and at the same time you executed a transfer or assignment of all your rights under lease, and all your duties and obligations to Mr. Motley as an individual.

The Witness: Well, when it was explained to me,

page 71 } it was explained to me as sort of a straw man situation, which we use in real estate in a similar situation. This piece of equipment on Capital's yard paid for is one thing; this piece of equipment on Capital's yard with a mortgage on it is something else.

The Court: What I'm trying to get at is how did you reconcile in your own mind the difference between this piece of equipment with Capital's name, whether there is a mortgage or a lease on it, and you being the lessee, and this piece of equipment in Capital's name, you being the lessee who has in turn transferred your rights under the lease to hold the equipment and to pay the $600.00 whatever odd dollars it is a month to an individual who is at the same time President of that corporation?

John R. Bowers

The Witness: Well, this gives my interpretation of it was strictly as we would do in the real estate business, and that would be we would be freeing up money for working capital.

The Court: Wouldn't you free up that money through the company itself, and not through an individual officer? Do you in the real estate business free up money, when you are dealing with a company, by in turn have a transfer to an individual officer of that corporation?

page 72 } The Witness: We have done that, yes.

The Court: Do you all put this in writing to the lending agencies? I mean do they find out about it?

The Witness: No. It depends on how, in the real estate business, it depends on who is really doing the financing. We don't have any organizations like G.E.C.C. that will mortgage just, I guess, anything.

The Court: I understand the fact the interest rates were originally paid and all that, I understand that but what I can't get is what went on in your mind with what is apparently the usual, let's call it real estate straw man situation, and then you find that not the corporation as such, but the officer as an individual is the one who is going to get the benefit of this whole transaction, you aren't obviously—

The Witness: He didn't tell me now—

The Court: But the question in my mind is whether, in your mind, you could possibly have reasonably figured you were doing this favor for the corporation, and not to Mr. Motley as an individual?

The Witness: To me at that point, they were one

page 73 } in the same, he had just gotten the corporation.

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page 74 }

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The Witness: At that point, when I reassigned the lease to Mr. Motley, then my position at that point I thought was that if Motley didn't pay for it, Capital Equipment would pay for it. If they didn't have to pay for it, I would have to pay for it. I felt pretty safe being third man. As it turned out, I am in the second seat.

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CHARLES C. MOTLEY, was sworn, and testified in behalf of the defendant, as follows:

DIRECT EXAMINATION

By Mr. Drash:

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Q. Mr. Motley, I direct your attention to the summer of 1967, during that summer were you part owner of a corporation known as Capital Equipment Company?
A. That is right.
Q. How much did you own of the stock?
A. Fifty percent.
Q. Who owned the other fifty percent?
A. Claiborne Terry.

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Q. Now Mr. Motley, did there come a time in the summer of 1967 when you attempted to raise money on a 1958 Caterpillar D-7 tractor?
A. Yes, sir.
Q. And did you yourself own that piece of equipment?
A. Yes, sir.
Q. Capital Equipment Corporation did not?
A. No, sir.
Q. Okay, now in order to raise money on this,
page 93 } did you contact General Electric Credit Corporation?
A. That's right.
Q. And did you work out an arrangement with them whereby you could raise the money?
A. Yeah. Let me, if it's all right, let me explain exactly how it came about. This piece of equipment which I owned and had title to, which was in Bob Butcher's office, I went to

G. E. Credit to get, I forget who I talked to, either Dave or Ken Meyers—I believe it was Ken, and asked him if there wasn't anything owed on it, would they refinance it, and they said yes at first, and then they came back and said it was company policy not to loan money to principals involved in credit situations where they were giving paper, this was a company policy. So I asked them at that time, I said, if I get somebody else to do it; sell the piece of equipment to Capital, and then let Capital sell it to somebody else, would they go along with it, so they said yeah. So I talked to John Bowers and asked them if John Bowers would be suitable. They checked his credit, they said he would.

When I went to see John Bowers, he said, "You know I don't need this piece of equipment, I am on this thing, I want to be sure I don't have to pay for it some day." So at that time we got a transfer and assumption agreement page 94 } from G. E. Credit. In other words, G. E. Credit knew what we were doing, and knew there was a way of getting out of their policy of not loaning to me direct, so in effect, I sold it to Capital Equipment, who in turn sold it to John Bowers who subleased it to me, or what we call this transfer and assumption.

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By Mr. Drash:

Q. Mr. Motley, let's get back to this case, was this a private arrangement between you and Mr. Bowers?

A. What do you mean by private?

Q. Did he know that you were going to be ul- page 97 } timately responsible?

A. Oh, yeah. That's what this transfer and assumption agreement was, he knew I needed the money; he knew that I had a note due that I had to pay, and this is the only way I could pay it. We had an operation in South America that was not going according to schedule, and we were in a real cash bind.

Q. By "we," you are not referring to Capital Equipment?

A. Oh, no, I meant me—

Q. And other parties?

A. And other partners, yes.

Charles C. Motley

Q. So really, Mr. Bowers was doing you a personal favor?
A. Yes, sir, he was in my opinion.
Q. Do you think he understood that? Did you explain it to him?
A. Yes, sir.
Q. Now when you did this on July 12, 1967, did Terry know you were using the corporation for this purpose?
A. Of course, you have asked me this before. I am not sure, I can't honestly say if he knew it at that time, as I remember. Of course you are talking about a year and a half ago. As I remember, I'm just not sure, to answer
page 98 } that question, but as I remember the check was made out from G. E. Credit to Capital Equipment Company. Now I did not handle the money. The only time I ever ran a check is a payroll check if Claiborne wasn't around. I wasn't involved in it.
Q. You told Claiborne at that time it wasn't corporate money, it was your money?

Mr. Gambill: If the Court please, I don't want to be difficult; I think it would be more proper for counsel to refrain from leading the witness.
Mr. Drash: Sir?
The Court: He's right.

Q. Let me rephrase the question then; did there come a time, Mr. Motley, when you advised Mr. Terry—
A. He knew it was, to answer your question, he knew it was for personal reasons. We had done this once before, so he was familiar. We did it with refinancing and all. Now whether the check came to Capital and Capital paid me the approximately $13,000.00 or whether he endorsed the record over, this I don't know. I'm sure it's in somebody's record somewhere. I would like to know too, I do not know whether it's proper, because I don't remember.
Q. So was it clear to Mr. Bowers he was never to actually receive delivery of this piece of equipment?
A. Yes, sir, he said he didn't have any use for
page 99 } it, that's right.
Q. He understood it was strictly then a financing arrangement?
A. Right.
Q. And he went along with it?
A. Yes, sir.

Charles C. Motley

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CROSS EXAMINATION

By Mr. Gambill:

Q. Mr. Motley, did you tell John on July 12, 1967, when you went in to get these papers signed, that what you were going to do was take these papers over to General Electric Credit Corporation, pick up $14,000.00 made payable to Capital Equipment Company, Inc., and put that $14,000.00 in your pocket and use it for your own personal benefit? Did you explain that to Mr. Bowers, you were going to steal this money from Capital Equipment Company?

A. I resent very much the term stealing the money.

Q. I'm just asking if you told him that?

page 100 } A. I believe I have already answered that question, Walter. I answered it and said yes, John knew exactly what the money was going for. I had a note; he even knew who it was with. I had to pay off Laquita at that time which he was familiar with, L-a-q-u-i-t-a, a company in Texas.

Q. Did Mr. Bowers own any stock in Laquita?

A. No.

Q. What made you think he knew about the activity of that corporation?

A. He knew about my activity in South America.

Q. How did he know in what capacity you went to South America?

A. I told him.

Q. Did you say, "John, I'm going to South America, not in my capacity as President of Capital Equipment Company, but I'm going for this company in Texas?"

A. I owed money to Laquita, they made me a loan when I went in to South America. I wasn't an officer, I wasn't in Laquita at all. John knew of my activity. I had done a lot of business with John. This was nothing but a personal favor he was doing for me, and something I greatly appreciated, and if he comes out short any money, he is going to get paid back, he knows this.

page 101 } Q. Well, did you tell John that Capital Equipment Company, Inc. was not going to receive any of this money?

A. Sure, he knew Capital Equipment—

Q. Did you tell him that?

A. Sure, he knew it was going to my personal use.

Charles C. Motley

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A. (Continuing) Everybody knew it, John knew the story, or he wouldn't have done it on a bet. What would he do with a dozer? He did it to help me. G. E. knew it, here it is, they knew it.

Q. Did they know that Capital Equipment Company never owned this equipment?

A. They knew I was going to sell.

Q. Just try to answer the question, did they know Capital Equipment Company did not, on July 12th, and never at any time, own this piece of equipment, did General Electric Credit know that, or did they not?

A. How did you think that General Electric was going to make this deal go if Capital Credit didn't know, and I sold it to Capital.

Q. General Electric Credit Corporation thought Capital Equipment Company owned this equipment?

A. They did. Capital Equipment Company did own it.

Q. If in fact Capital Equipment Company, Incorporated owned this piece of equipment, why did you put

page 103 } the money in your pocket?

A. Because Capital Equipment Company owed me for my selling it to them. Look, Walter, I took the piece of equipment, I have already explained why we went around the horn to do it, because of G. E.'s policy. I took the piece of equipment and in effect sold it to Capital Equipment; they owed me money, but couldn't get it until they got it from G. E. Credit. They sold it to John. All right, John got the money from G. E. Credit. The money went to Capital Equipment.

Q. Who got the money?

A. The loan was actually made to John, and the money was paid to Capital Equipment Company, and the Capital Equipment Company paid me the money for me selling them the piece of equipment which I owned, and had title to.

Q. Are you suggesting to the Court here that Mr. Bowers ever saw any of that money?

A. No, I'm not saying that, that isn't the way it works, Walter. When you finance the piece of equipment, it doesn't go through the person; the finance people take the money

and send it to the person who is supposed to get it. That's the way it's handled, it's the procedure in the business.

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page 106 }

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Q. On July 12, 1967 were you not engaged full time as President of Capital Equipment Company, Inc.?

A. Full time job for me. I had some related things that were involved in buying equipment from Capital, so I could say very easily anything I did, if I wasn't in the office, I was making money for the company.

Q. And you are telling the Court here today, as I understand it, that you went to see John Bowers, and explained to John, "John, I need some money personally, and the only way I know how I can personally get this money is for you to sign a lease with Capital Equipment Corporation, and that Capital Equipment Corporation will sell that lease to General Electric Credit Corporation; General Electric Credit Corporation will pay the money to Capital Equipment Company, but before it gets to the treasury of Capital Equipment Company, Inc., I'm going to put it in my pocket," did you explain that to John?

A. That isn't the way it happened. Why would I explain something the way it didn't happen?

Q. Did one penny of this $14,000.00 ever get to the treasury of Capital?

page 107 } A. I don't know how it was handled, either one of two ways. Either Claiborne endorsed the check to me, or it went in and he signed it over to me, I could not have handled that check without his knowledge. It amounted to the same if he endorsed it over, it meant he was paying me for the machine.

This is about the third time I said that. Did John understand it, yes, he knew my problem, he knew G. E.'s problem. He says, "Why don't you go do it yourself?" I explained to him why I couldn't do it.

Q. In other words, General Electric Credit Corporation would not have bought that lease from Capital Equipment Company, if you as President of Capital Equipment Corporation had been the lessee, is that what you are saying?

A. Right, right. They would not do business with people

who were *involed,* who were giving them business. They were worried about a conflict of interest. They checked with the home office, and the home office said no they would not do something like this where the third party is involved.

The Court: What they are saying is they would rather have two than one.

The Witness: Apparently that is the case, but I think in this case, they had a policy about dealing direct.

page 108 } The Court: That's the reason for the policy.

The Witness: That is right.

The Court: You get three persons hung on paper, it's a lot better than having two which may turn out to be one.

The Witness: That's right, exactly.

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page 109 }

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Q. You don't have any evidence, any documentation of any kind that the title to this Caterpillar ever came out of your name into Capital's?

A. You just don't do that.

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page 110 }

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The Court: Well, needless to say, as I understand what you are saying now, Capital Equipment Company, Incorporated, did not own this piece of equipment

page 11 } at the time this document was signed, and never did own it, except for—

The Witness: They owned it.

The Court: Just going in and out like a check mark.

The Witness: Just going in and out makes it a transfer; and being President of the Company, I was dealing with myself, but it was my authority to approve a deal or to handle sales, and I approved it, right or wrong, or how poor a business it was, or the way it was handled, that's for somebody else to decide, but there was a transfer as far as I was concerned as President of the Company.

Charles C. Motley

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A. Walter, let me make one thing clear, because this question has been asked me before, and I said, and I do not remember at the point of time that Claiborne was notified or I told him about what I was doing or asking. He did know it, he had to know it because the check was made out to Capital Equipment Company, and it seems to me something about his name was on the check too or something. I don't remember exactly how it happened, but Claiborne did not—yes, now at that point he knew, Walter, but this I don't know.

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page 114 }

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Q. Now we get to Plaintiff's Exhibit Number 3, Mr. Motley, and here is a document, Plaintiff's Exhibit 3, which you signed in your individual capacity?

A. Right. *Thiw* was on the 18th day of September. I think I went back at a later date and did this—oh, excuse me, it says payment was due—no, this was made the 18th of September, I'm pretty sure, I went back at a later date to get John off the hook on this, so to speak. I said I

page 115 } would make the payments, and he said, "You know, I would like to get off of this, get my name off, as far as credit," and so at a later date we went and did this.

Q. A later date you delivered this document to G.E.C.C. but you wouldn't deny you and John signed this paper at the same time?

A. No, no, we didn't do it at the same time.

Q. You didn't do it at the same time?

A. I went back at a later date, when John was concerned about his credit, it had shown up and so on, it was obvious it showed up, it was the 18th of September. Ken Meyers signed it too.

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page 118 }

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CLAIBORNE TERRY, Defendant, was called as a witness, and testified in his own behalf, as follows:

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CROSS EXAMINATION

By Mr. Gambill:

Q. Mr. Terry, you knew that you were endor-
page 119 } sing a check over to Mr. Motley?

A. Yes, I did.

Q. And you knew that no entry was being made in the books of Capital Equipment Company, Incorporated, with respect to the transfer of that check?

A. The check—Mr. Motley had the check and came in and said this was his money, and the money was paid to Capital Equipment Company, but it was his money and his equipment, and I endorsed it over to him.

Mr. Gambill: No further questions.

The Court: Do I understand from what you are saying that the inference which you received, or which you arrived at was that by accident, by mistake or otherwise, the check had been made out to Capital Equipment, when the point in fact he should have been the payee, or his company should have been the payee?

The Witness: The impression I was left with was that the check was made out to Capital Equipment Company, but it was his money and belonged to him, would I endorse it over to him, to his company which had sold—I think he used the word "sold" at that time, even though it's a leased equipment agreement.

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page 120 }

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JOHN R. BOWERS, Plaintiff, was recalled, and testified in behalf of the plaintiff, on rebuttal, as follows:

John R. Bowers

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The Court: Well who did you sign them to accommodate?

The Witness: I signed them to accommodate Capital Equipment Company, when he brought them to me. He put it to me as an equipment situation, and that's exactly the way I interpreted it, having never touched the equipment at all. I knew it was a financing thing, but I had no idea whether the money was going to the equipment company or into equipment. I put them together, the equipment or the equipment company, that's what I'm signing for.

The Court: You don't make any sense now, you say the money was going into equipment?

The Witness: He told me to sign this with Capital Equipment Company.

The Court: All right.

page 122 } The Witness: That he was going to take this and pay Capital Equipment Company, or let's see how he put it—anyway he said this is equipment I'm going to have—I'm going to finance this piece of equipment, and I can't do it because I'm President of the Company. They wouldn't accept me, as President of the company, making arrangements with Capital, but they will approve you on a third party arrangement with Capital Equipment Company.

The Court: He asked you this on behalf of Capital Equipment, and not on behalf of Motley?

The Witness: Well, he couldn't make the deal unless I did it.

The Court: I understand that, but if a piece of equipment was his, and he was selling it to Capital Equipment, and in turn Capital Equipment was leasing it and they couldn't release it directly to him, but they had to re-lease it to him or sublease it to him, let's call it that, then the reason you did this was an accommodation to the company and not to him. In other words, did you feel that the company stood to profit by this transaction, or were you doing it because you felt Mr. Motley might profit by the transaction, he was the one you wanted to help?

page 123 } The Witness: Well, I really don't know how to define that, I think I was doing it—I don't know what my feeling is about that. I think I was doing it to accommodate the company, and I think I was probably doing it

John R. Bowers

to accommodate him. I really don't know how to separate them.

The Court: Isn't it you felt he was the company, in effect?

The Witness: No, I knew Claiborne had—

The Court: Had you ever had any dealing with Capital before that?

The Witness: No, sir.

The Court: You did know Motley?

The Witness: I had just closed a farm sale with him.

The Court: You knew him, and you had dealt with him?

The Witness: Right.

The Court: As far as Capital Equipment Company is concerned, this is the first time you had in any way negotiated with them, or been a part of any transaction in which they were a party?

The Witness: Yes, sir, I had no dealing with Capital Equipment or any equipment company prior to

page 124 } that.

The Court: I understand that, if there had been a course of business between you and Capital Equipment, you had one situation, but there is no prior transaction, you say, "I was accommodating the company partly and accommodating Motley partly," you had no reason to accommodate the company is what I'm trying to get at. What was your reason for accommodating a company you never had dealt with?

The Witness: I had seen right many figures from the books on the company, I knew the company had inventory on the lot, I have got to think they have got some worth, and when I accommodated the company as well as Motley, or one in the same, or however you want to put it together, I had to think that I wouldn't have to pay for it, that the company was responsible for it, that I wouldn't be called on as a third party to pay for it.

The Court: I see—

The Witness: I had no intention of buying a dozer or loader or whatever it is at any time.

The Court: You are getting part of what I said. I don't think you really know the answer in your own mind, because what I am saying is to accommodate somebody

page 125 } you in effect are doing them a favor, right?

The Witness: Right.

The Court: All right, to do a favor for a perfect stranger is unusual. To do a favor for someone who is a friend or acquaintance or business associate is not unusual, and that is

why I'm trying to get it straight in my mind, what you had in mind when you came along, you said you knew the company had inventory on the lot?

The Witness: I thought they had some worth.

The Court: What lot?

The Witness: I had been by there when he bought the company, I went over there and looked at it.

The Court: All right, when this transaction took place you didn't look it over?

The Witness: The way he put it to me is why I thought I was accommodating the company more than him. He said, "the company cannot make this lease to me, individually, because I am the President, but the company can make you the lessee and then we can get the money."

If he says it to me like that, I have got to feel like I'm accommodating the company by signing my name, and he was going to take the equipment individually page 126 } after that.

The Court: The thing that bothers me is you are a reasonable man, and you are sitting there, and he gives you this story, as you recited, and you say to yourself what in the world is the sense in the company leasing the property to Motley anyhow, why lease it to a third party and then Motley, and the answer you come up with, they need the money.

The Witness: That's right, someone needs money.

The Court: Why didn't they do it any other way than with a lease?

The Witness: This is what I asked him, he said, "I can't do it any other way."

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A Copy—Teste:

Howard G. Turner, Clerk.

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