

1977

# Harold S. Sanders and Eleanor Sander v. Donn E. Cassity, Trustee, et al. : Brief of Appellant Donn E. Cassidy, Trustee

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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HAROLD S. SANDERS and ELEANOR SANDERS,	}	
	}	
Plaintiffs-Respondents,	}	
	}	
vs.	}	Case No. 15515
	}	
<u>DONN E. CASSITY, Trustee, et al.,</u>	}	
	}	
Defendants-Appellant.	}	

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BRIEF OF APPELLANT  
DONN E. CASSITY, TRUSTEE

---

APPEAL FROM JUDGMENT  
OF THE  
DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF SUMMIT COUNTY  
STATE OF UTAH

Honorable James S. Sawaya, Judge

---

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FILED

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### STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a judgment concerning the status of a judgment lien which existed prior to the date that defendant Leoda Dunham (who is the judgment debtor) declared her interest in the subject real estate to be her homestead, and prior to the date that said defendant Leoda Dunham conveyed her interest in the homestead property, reserving a life estate, to respondents.

### DISPOSITION IN LOWER COURT

On August 1, 1977, a hearing before the court below was held relative to respondents' Motion For Judgment On The Pleadings Or For Summary Judgment, and relative to appellant's cross-motion for Judgment On The Pleadings Or For Summary Judgment. In response thereto, the court below rendered its judgment adjudging that the conveyance of property subject to a homestead, with the reservation of a life estate in defendant Leoda Dunham (grantor), did not reserve the homestead in the said grantor, but that such homestead was conveyed to the grantees, respondents herein, and that the value of the conveyed interest at that time was less than that of the homestead interest. On that basis, the court granted respondents' Motion For Judgment On The Pleadings and denied appellant's motion. The judgment was entered on September 6, 1977, and appellant made his Motion To Reconsider And To Amend Findings Of Fact within ten days.

thereafter.

On October 3rd, 1977, the court heard appellant's Motion To Reconsider And To Amend Findings Of Fact. Thereafter, the court rendered its order denying appellant's motion, which order was entered on October 17th, 1977.

#### RELIEF SOUGHT ON APPEAL

Appellant seeks a ruling by this court to the effect that appellant's prior judgment lien was superior to defendant Leoda Dunham's subsequent homestead claim, and that, consequently, the interest acquired by respondents from defendant Leoda Dunham, even if it included defendant Leoda Dunham's homestead, was subject to appellant's prior judgment lien; or

In the alternative, appellant seeks a ruling by this court that defendant Leoda Dunham did not convey her homestead to respondents, and that, consequently, the interest acquired by respondents was subject to appellant's prior judgment lien; or

In the event this court affirms part of the judgment of the lower court by not reversing the lower court's judgment so as to conform with the legal propositions of the immediately preceeding two paragraphs, then appellant seeks a ruling requiring the lower court to determine at trial the value of the real estate interest conveyed to respondents by defendant Leoda Dunham; and

Appellant seeks an order from this court authorizing and requiring the court below to amend it's Findings of Fact to include all the allegations in the parties' pleadings which were admitted; and

Appellant seeks an order from this court authorizing and requiring the court below to amend it's Findings of Fact to incorporate the changes set forth in paragraphs four and five of appellant's Statement of Points Relied On.

#### STATEMENT OF THE CASE

(Reference to appellant's Counterclaim, which is a part of appellant's Answer To Amended Complaint, Counterclaim And Cross-complaint, is hereinafter referred to as "CC"; reference to respondents' Reply to appellant's counterclaim is hereinafter referred to as "R").

On or about the 17th day of May, 1971, appellant obtained a judgment against the defendant Leoda Dunham in the principal sum of \$11,549.43, together with costs of suit. (Respondents' Amended Complaint, First Cause of Action, para. 5; appellant's Answer To Amended Complaint, Counterclaim, And Cross-complaint, Second Defense, para 1.)

On or about the 1st day of August, 1972, appellant caused to be issued out of the office of the clerk of Summit County, an execution, whereby and wherein the sheriff of Summit County was directed to execute and levy upon the property of defendant



Leoda Dunham. Thereafter, the Sheriff of Summit County caused to be posted a Notice of Sale, whereby and wherein the property that is the subject matter of this action was noticed for sale at the county courthouse in Summit County, State of Utah, on the 13th day of September, 1972 at the hour of 1:00 p.m. (CC, para 5; R, para. 1.A.). The Sheriff's Sale did not occur.

On or about the 10th day of September, 1972, defendant Leoda Dunham <sup>signed</sup> ~~filed~~ a Declaration of Homestead asserting a homestead claim and exemption in the amount of \$4,600.00 for herself and her brother, and asserting that the value of the real estate subject to the homestead declaration, which is the subject property in this matter, was \$3,600.00. Said Declaration of Homestead was recorded on the 11th day of September, 1972, in the office of the Summit County Recorder. (CC para. 6; R, para. 1.A.; and Declaration of Homestead attached to respondents' Amended Complaint.)

On or about the 29th day of November, 1972, the defendant Leoda Dunham, as grantor, conveyed by quit-claim deed to respondents the subject property, reserving to herself a life estate representing her homestead claim to the property. (CC, para. 7; R, para. 1.A.)

Respondents, in consideration of the conveyance to them of defendant Leoda Dunham's remainder interest, agreed to pay off defendant Leoda Dunham's mortgage against the property

in the approximate amount of \$2,000.00, and to acquire the appellant's interest. Appellant's interest in the property was a judgment, plus interest thereon, in the total approximate amount of \$13,000.00. (See Agreement attached to either respondent's Affidavit which were submitted with respondents Motion For Judgment On The Pleadings Or For Summary Judgment.)

Respondents took the subject property knowing that appellant had an unsatisfied judgment against defendant Leoda Dunham. (CC, para. 8; R, para. 1.A.)

On or about the 11th day of November, 1976, appellant caused to be issued through the office of the clerk of Summit County, an execution, whereby and wherein the sheriff of Summit County was commanded to execute and levy upon the unexempt personal and real property of the defendant Leoda Dunham, in an amount sufficient to satisfy the judgment dated May 17th, 1971, together with accrued interest thereon. (CC, para. 9; R, para. 1.A.)

Instructions in the form of a Praecipe were issued to the sheriff of Summit County to sell an undivided one-half interest in the subject property. (CC, para. 10; R, para. 1.A.)

The Execution and Praecipe were served upon the respondents by the Salt Lake County Sheriff's Office. (CC, para. 11; R, para. 1.A.)

A sheriff's sale was held on December 7th, 1976, whereat the appellant bid in the entire amount of his judgment for the subject property believing that he was purchasing the interest of defendant Leoda Dunham and that of respondents. (CC, para. 13; R, para. 1.C.)

On or about the 21st day of April, 1977, respondents filed suit against appellant and others, seeking declaratory relief and a judgment quieting title in the subject property in them. It is out of this suit that this matter comes before this court. (Respondents' Complaint).

### ARGUMENT

#### I

APPELLANT'S JUDGMENT AGAINST DEFENDANT LEODA DUNHAM CREATED A LIEN ON THE LAND OF DEFENDANT LEODA DUNHAM WHICH WAS PRIOR TO AND SUPERIOR TO THE HOMESTEAD CLAIM OF DEFENDANT LEODA DUNHAM AND, CONSEQUENTLY, THE ACQUISITION OF THE HOMESTEAD INTEREST BY RESPONDENTS FROM DEFENDANT LEODA DUNHAM, IF SUCH OCCURRED, DID NOT RESULT IN THE ACQUISITION OF AN INTEREST IN THE PROPERTY FREE FROM THE JUDGMENT LIEN.

A judgment lien on real estate, obtained before a homestead is established thereon, is superior to, and not extinguished by, the homestead claim. Consequently, where a homestead declarant conveys real estate together with a homestead, where such homestead is subordinate to a judgment lien, the transferee receives the realty subject to the judgment lien, and that lien may be foreclosed against the property regardless of the fact that the homestead claimant may have transferred his homestead interest to the transferee.

U.C.A. 28-1-1 provides that a homestead "shall be exempt from judgment lien and from execution or forced sale" except upon certain conditions. None of the conditions apply to the instant case. Though this section has been amended to increase the exempt amounts and to add a condition, it's language is otherwise identical to the original provision as enacted in 1898. (See "History" and "Compilers Notes" regarding U.C.A.

28-1-1}.

U.C.A. 28-1-1 precludes execution and forced sale pursuant to a judgment lien only when a homestead exists at the time a judgment lien would otherwise attach to the property. McMurdie vs. Chugg, 107 P.2d 163 (Utah 1940); and U.C.A. 78-23-3. In McMurdie the court reaffirmed a position it had taken previously with the following language:

"Existing liens on property cannot be defeated by subsequently claiming said property as a Homestead." Page 166.

U.C.A. 78-23-3 provides:

"No article or species of property mentioned in this chapter or in the title Homestead is exempt from execution issued upon a judgment...on foreclosure of a mortgage or other valid lien..." (Emphasis added.)

A judgment creates a lien on the judgment debtor's realty under the provisions of U.C.A. 78-22-1. A judgment lien cannot attach to homestead property unless otherwise provided in U.C.A. 28-1-1. Thus, unless otherwise provided in U.C.A. 28-1-1, a judgment lien can be a "valid lien" on a judgment debtor's real estate only if the real estate is not homestead property at the time the judgment is entered. Therefore, a judgment docketed before a homestead is declared, creating a judgment lien which is a valid lien under the provisions of U.C.A. 78-23-3, is not affected by a subsequent homestead declaration. Thus, McMurdie and U.C.A. 78-23-3 demonstrate that

the past position of this court, and of the legislature, is that a judgment lien attaching to realty before a homestead exists thereon does not lose any of it's force and effect upon the subsequent establishment of a homestead. Also, it should be noted that Utah is not alone in this position. Schuler-Knox Co. vs. Smith, 144 P.2d 47 (Calif. 1944).

Application of the foregoing principles to the facts of the instant case mandates the conclusion that the respondents are in no position to successfully maintain that the homestead of defendant Leoda Dunham in any way affected the appellant's judgment lien, nor are they in a position to successfully claim that the sheriff's sale of the subject property did not transfer respondents' entire interest in the subject property to the purchaser, subject to rights of redemption. The pertinent facts are as follows:

Appellant obtained a judgment against defendant Leoda Dunham in May, 1971. Proceedings for a sheriff's sale of defendant Leoda Dunham's property, which is the property in question here, were begun on or about August 1, 1972, but the sale was not consummated. On September 10th, 1972, defendant Leoda Dunham <sup>signed</sup> ~~filed~~ a declaration claiming her interests in the subject property to be a homestead. Thereafter, on or about November 29th, 1972, defendant Leoda Dunham conveyed the subject property to respondents, reserving a life estate in herself.

On or about November 11th, 1976, appellant began sheriff sale proceedings which culminated December 7th, 1976, in a sheriff's sale of defendant Leoda Dunham's life estate and of respondents' remainder interest. Respondents thereafter in this action contested appellant's claim that their interest in the subject property had been sold at the sheriff's sale.

The appellant's judgment of May 17th, 1971, became a lien upon the realty of defendant Leoda Dunham which was not extinguished by her later homestead declaration. Defendant Leoda Dunham's conveyance of the remainder interest to respondents carried with it the judgment lien irrespective of whether defendant Leoda Dunham retained her homestead by reserving a life estate, or transferred it to the respondents with the remainder interest. Thus, the sheriff's sale was sufficient to foreclose the lien against respondents' interest in the property, and the sheriff sale purchaser, being the appellant herein, obtained title to the realty, subject to any rights of redemption. Consequently, respondents' claim that their interest in the subject realty was not sold, or was improperly sold at the sheriff's sale is unfounded.

## II

THE CONVEYANCE FROM DEFENDANT LEODA DUNHAM TO RESPONDENTS, WHEREIN DEFENDANT LEODA DUNHAM RETAINED A LIFE ESTATE, DID NOT CONVEY DEFENDANT LEODA DUNHAM'S HOMESTEAD IN THE SUBJECT PROPERTY TO RESPONDENTS.

In the event this court for any reason does not hold that appellant's prior judgment lien was superior to defendant Leoda Dunham's homestead claim, such that respondents took a remainder interest from defendant Leoda Dunham subject to it, then appellant submits the following argument.

Other than the pleadings filed by the parties in this matter, there was little evidence brought before the court below upon which it could base it's ruling in this matter. Appellant alleged in paragraph 7 of it's counterclaim that the act of defendant Leoda Dunham in reserving a life estate in the subject property was an act whereby she retained her homestead. Respondents admitted that this was the case in their Reply to Appellant's Counterclaim. See paragraph 1.A. of Respondents Reply. Though this admission was pointed out to the court below, the court ignored it. Further, respondents have never attempted to amend their Reply. This admission, by itself, should have precluded the court below from rendering a judgment on the pleadings, and in any case, it should prohibit the respondents herein from taking a position contrary to this admission.

Aside from respondents' admission, it is evident that defendant Leoda Dunham did not convey her homestead in the subject property.

In analyzing the facts from a position which most favors appellant, Frederick May & Company v. Dunn, 368 P.2d 266 (Utah 1962), one must assume that defendant Leoda Dunham acted rationally in conveying her interests in the subject property to respondents. This assumption leads directly to the conclusion that defendant Leoda Dunham did not convey her homestead to respondents with the conveyance of the remainder interest in the property. This conclusion becomes very apparent upon analyzing the facts of this case.

The pertinent facts are that defendant Leoda Dunham stated in her homestead declaration that the value of the property was \$3,600.00 (which amount appellant disputes), and that she was entitled to a \$4,600.00 exemption. Approximately three months later she sold her interest, reserving a life estate, for the respondents' promises that they would pay off a \$2,000.00 mortgage and "acquire" appellant's interest in defendant Leoda Dunham's property. (See Agreement attached to either respondents' Affidavit which was submitted with respondents' Motion For Judgment On The Pleadings Or For Summary Judgment,



and Defendant's Exhibit No. 1.) Assuming that the value of defendant Leoda Dunham's undivided one-half interest was \$3,600.00 as claimed, and that the full value was protected by a homestead claim in the amount of \$4,600.00, the following results could have been obtained:

<u>Situation</u>	<u>Result to defendant Leoda Dunham</u>
1. Defendant Leoda Dunham retained her entire interest instead of conveying a remainder interest therein to respondents.	Defendant Leoda Dunham would have an equity interest of \$1,600.00 free and clear over the \$2,000.00 mortgage.
2. Defendant Leoda Dunham conveyed a remainder interest in the subject property to respondents together with her homestead and reserved a life estate. Respondents were to pay the mortgage. (This is respondents' position herein.)	Defendant Leoda Dunham would be free of the \$2,000.00 mortgage, but she would have an unprotected life estate which could be taken from her upon foreclosure of the judgment lien.
3. Defendant Leoda Dunham conveyed a remainder interest in the subject property to respondents, reserving a life estate. The reserved life estate carried the homestead. Respondents agreed to pay off the \$2,000.00 mortgage. (This is appellant's position.)	Defendant Leoda Dunham would be free of the \$2,000.00 mortgage and she would have a protected life estate.

Clearly, defendant Leoda Dunham would have chosen situation No. 3 over situation No. 2.

In addition to the assumption that defendant Leoda Dunham acted rationally in conveying a remainder interest in her undivided one-half of the subject property, the fact that

defendant Leoda Dunham reserved to herself a life estate is conclusive evidence that she retained the homestead.

The assertion that a life estate may support a homestead has not been contested by respondents, nor should it be. See Arighi vs. Rule & Sons, 107 P.2d 970 (Cal. 1940). The obvious intent of defendant Leoda Dunham in retaining a life estate was to assure her a place to live for the rest of her life. Such assurance would certainly be lost had she conveyed her homestead because her life estate would then be subject to appellant's judgment.

In addition to the foregoing, which demonstrates from a factual standpoint that defendant Leoda Dunham did not convey her homestead, this court should hold as a matter of law that the reservation of any interest in homestead property which is capable of supporting a homestead, amounts to a reservation of the homestead unless the deed of conveyance specifically provides that the homestead is to be conveyed. Such a holding would follow the California rule as expressed in Arighi relative to the abandonment of a homestead. Further, it would meet the liberal construction requirement of In re Mower's estate, 73 P.2d 967 (Utah 1939), by preventing a homestead claimant from unwittingly subjecting a retained interest to creditors' claims. Also, it would aid judgment creditors in that they would not be forced to guess or begin lawsuits to determine what property is subject to their

claims. Thus, the public welfare could be served by establishing a precedent which requires a homestead claimant to specifically convey a homestead interest where such claimant retains an interest in the property sufficient to support a homestead.

### III

THE COURT SHOULD NOT HAVE HELD THAT THE VALUE OF THE INTEREST CONVEYED TO RESPONDENTS BY DEFENDANT LEODA DUNHAM WAS LESS THAN THE VALUE OF DEFENDANT LEODA DUNHAM'S HOMESTEAD WHEN SUCH VALUE WAS IN QUESTION AND CONSTITUTED A DISPUTED MATERIAL FACT.

In the event this court for any reason upholds the lower court's ruling that respondents received the homestead interest of defendant Leoda Dunham free and clear of appellant's judgment lien, then appellant submits the following argument.

Though the judgment appealed from is designated "Judgment On The Pleadings", it is more correctly a Summary Judgment in that the court did not exclude the respondents' affidavits which were submitted with respondents' Motion For Judgment On The Pleadings Or For Summary Judgment. Rule 12(c), U.R.C.P.

In In re Williams Estate, 348 P.2d 683 (Utah 1960), the court said the following regarding the propriety of summary judgment:

"Summary Judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law...." Page 685. (Emphasis added.)

Also, in Dunn, supra., the court gave additional guidance as follows:

" To sustain a summary judgment, the pleadings, evidence, admissions and inferences therefrom, viewed most favorably to the loser, must show that there is no genuine issue of material fact, and that the winner is entitled to a judgment as a matter of law. Such showing must preclude, as a matter of law, all reasonable possibility that the loser could win if given a trial". Page 268. (Emphasis added.)

Further, in Singleton vs. Alexander, 431 P.2d 126 (Utah 1967), the court said:

" It will be noted that a summary judgment can be granted only when it is shown that there is no genuine issue as to any material fact and that the moving party also is entitled to judgment as a matter of law under those facts. The court cannot consider the weight of testimony or the credibility of witnesses in considering a motion for summary judgment. He simply determines that there is no disputed issue of material fact and that as a matter of law a party should prevail. "Page 128. (Emphasis added.)

The court below held that the homestead of defendant Leoda Dunham had been conveyed to respondents, and that the value of the remainder interest so conveyed was less than the value of defendant Leoda Dunham's homestead. Consequently

the interest passed to respondents free of appellant's judgment lien pursuant to U.C.A. 28-1-2 and defendant Leoda Dunham was left with an unprotected life estate. If the court had held that the conveyed property interest had a value in excess of the homestead amount, the appellant's judgment would have attached to that excess. Thus, the value of the conveyed interest is a material question, which, as explained below, is in dispute.

At the hearing in the court below, respondents' counsel relied on defendant Leoda Dunham's self-serving declaration of the value of her interest in the subject property, which was stated in her homestead declaration to be \$3,600.00. Other than defendant Leoda Dunham's homestead declaration, no evidence was produced or referred to in the court below which would show that the value of defendant Leoda Dunham's remainder interest had a lesser value than her claimed homestead exemption of \$4,600.00.

The statement of the value of the subject property contained in the homestead declaration is incompetent evidence as to the true value of the property interest. Schuler-Knox Co., supra. Thus, the court below had no competent evidence before it which supports its judgment that the property interest conveyed by defendant Leoda Dunham to respondents had a lesser value than her homestead exemption.

At the hearing below, appellant's counsel claimed the interest was worth approximately \$15,000.00, and referred to the purchase agreement between respondents and defendant Leoda Dunham wherein respondents obtained the remainder interest by agreeing to pay approximately \$2,000.00 to obtain a release of mortgage against the property and to acquire appellant's interest in the property. See Agreement attached to either respondents' Affidavit which was filed with respondents' Motion For Judgment On The Pleadings Or For Summary Judgment. Appellant's interest in defendant Leoda Dunham's property was a judgment of \$11,574.43, together with interest of \$1,388.00 as of the time of the conveyance. Further, the conveyance to respondents took place less than three months after the homestead declaration of defendant Leoda Dunham was made. The fact that respondents offered to purchase defendant Leoda Dunham's interest, subject to her life estate, in return for a promise to acquire appellant's interest in the property and to pay off the \$2,000.00 mortgage, together with the fact that this consideration of approximately \$15,000.00 was offered only three months after defendant Leoda Dunham claimed the interest in the property was worth \$3,600.00, should have been sufficient by itself to cause the court below to question the validity of defendant Leoda Dunham's own claim

as to the value of her interest in the subject real estate. This is especially true in that defendant Leoda Dunham made her homestead declaration only three days before the subject property was to be sold at sheriff's sale.

In hearings before the District Court, respondents claimed that the Agreement provided only that respondents would be obligated to acquire the appellant's undivided one-half interest in the property. They argued that the agreement did not require them to satisfy appellant's judgment. If they had, they would have admitted that they were willing to pay off the \$2,000.00 mortgage and the appellant's judgment in the approximate amount of \$13,000.00 to obtain a remainder interest in defendant Leoda Dunham's undivided one-half. Thus they would have admitted that they paid consideration worth approximately \$15,000.00 for an interest which defendant Leoda Dunham had declared to be worth no more than \$3,600.00 only three months before.

The terms of the agreement clearly show what was intended. Paragraph 3 of the Agreement provides that the respondents herein were to "acquire" appellant's interest in the subject property so as to give defendant Leoda Dunham "the full use, control, income and possession" of the property for her life. See Agreement attached to either respondents' affidavit which was filed with respondents' Motion For Judgment On The Pleadings Or For Summary Judgment. The only way that defendant Leoda Dunham could obtain the full use and control of the subject property,

assuming respondents' claim that the homestead was conveyed to them is correct, was by satisfying appellant's judgment. If they failed to satisfy the judgment, defendant Leoda Dunham's life estate would be in continual jeopardy. Thus, part of the consideration paid defendant Leoda Dunham must have been the promise to satisfy appellant's judgment lien, and, consequently, respondents agreed to provide defendant Leoda Dunham with a consideration which was greatly in excess of the claimed value of \$3,600.00.

The court below, rather than recognize the dispute over the value of the subject real estate interest, chose to accept the value based on defendant Leoda Dunham's homestead declaration. The homestead declaration claimed defendant Leoda Dunham's interest to be worth \$3,600.00. The District Court apparently overlooked the self-serving and incompetent nature of the homestead declaration. The homestead declaration was clearly self-serving in that it was filed two days before the subject realty was to be sold at sheriff's sale. The obvious purpose of filing the declaration was to interfere with the sheriff's sale of the property. Within three months of the date the homestead declaration was filed, the property was conveyed to respondents upon the terms of the Agreement referred to above. Clearly, the value of property set forth in a homestead declaration, under these circumstances, should not be accepted as conclusive for purposes of summary proceedings.



Further, the value of defendant Leoda Dunham's homestead was not squarely before the court at the hearing, and was certainly not established sufficiently in the pleadings for the court to render a judgment on the pleadings. The motion of appellant for Judgment On The Pleadings Or For Summary Judgment shows that the appellant attempted to convince the court that the conveyance to respondents with the reservation of a life estate in defendant Leoda Dunham was an act of reserving the homestead as well. Respondents argued that the homestead had been conveyed to plaintiffs. Neither party was adequately prepared to present evidence on the true value of the interest conveyed to respondents.

Further, the court below was appraised in appellant's Memorandum In Support Of Motion To Reconsider of other evidence which reflects on the value of the realty in question, specifically the case of James L. Barker, Jr., Trustee vs. George R. Dunham and Leoda S. Dunham, Third Judicial District Court of Summit County, State of Utah, Civil No. 3085. In this case, judgment was rendered on September 4th, 1959, against defendant Leoda Dunham requiring her to account for sales of certain realty which was a part of the realty involved in this matter. Defendant Leoda Dunham was to account to the plaintiffs in that action for one-half the value of all lots sold after

November 8th, 1953, and those plaintiffs were to be granted judgment for that amount. The records of the County Recorder of Summit County show that approximately four and one-half acres of land were conveyed by defendant Leoda Dunham out of the parcel in question during the period of November 8th, 1953 to September 4th, 1959. On June 26th, 1962, the Third Judicial District Court of Summit County, State of Utah, rendered judgment against defendant Leoda Dunham in the amount of \$4,200.00, which amount represents one-half the proceeds of the sale of the approximately four and one-half acres referred to above.

The realty in question in this suit consists of an undivided one-half interest in approximately thirty five (35) acres of hillside land, certain unsold lots in Kamp Kill Kare subdivision, and approximately 6.5 acres of land which is similar to that for which the accounting was required of defendant Leoda Dunham. The value of the 6.5 acres alone should, consequently, be equal to or greater than the value of the approximately four and one-half acres for which defendant Leoda Dunham accounted. Since one-half of the value of four and one-half acres from 1953 to 1959 was \$4,200.00, the value of the 6.5 similar acres certainly must have been greater in 1972 when respondents purchased a one-half interest in the 6.5 acres as well as 35 hillside acres and unsold lots in Kamp

Kill Kare subdivision. Thus, evidence can be produced and should be produced relative to the value of the interest conveyed to respondents by defendant Leoda Dunham in 1972. This evidence will show that the true value of the realty interest in question is greatly in excess of \$3,600.00 as claimed by defendant Leoda Dunham in her homestead declaration.

The principles of law referred to above regarding summary judgment, as applied to this case, result in the conclusion that summary judgment on the value of the remainder interest conveyed to respondents was improper. The court below necessarily had to view the facts in the most favorable light to appellant. Dunn, supra. Also, it should not have judged the weight of the evidence, but rather determined whether conflicting evidence existed. Singleton, supra. The agreement, referred to above, by which respondents agreed to purchase defendant Leoda Dunham's remainder interest, when viewed in the most favorable light for appellants, demonstrates that respondents obligated themselves to pay approximately \$15,000.00 for the properties. Further, the court below should not have judged the credibility of the purchase agreement against that of the homestead declaration which showed defendant Leoda Dunham's entire interest to be worth

only \$3,600.00. Instead, the lower court should have recognized the incompetency of the stated value in the homestead declaration and ruled that the determination of the value of the subject property must await trial.

#### IV

THE FINDINGS OF FACT SHOULD HAVE BEEN AMENDED TO INCLUDE ALL OF THE ALLEGATIONS CONTAINED IN THE PARTIES' PLEADINGS WHICH WERE ADMITTED.

Many of the allegations in the parties' pleadings were admitted. Summary procedures were begun in the case because of these admissions. However, the Findings Of Fact as presented by the respondents and approved by the court did not reflect many of the admissions. These admissions are material and present a clear picture of the facts in this case. Appellant's motion to amend the Findings Of Fact to include these admissions should have been granted.

#### V

FINDING OF FACT NO. 5 SHOULD HAVE BEEN AMENDED TO AVOID THE REPRESENTATION THAT THE APPELLANT FILED NOTHING WHICH INDICATED THE VALUE OF THE LAND IN QUESTION, IN THAT SUCH FINDING OF FACT IS MISLEADING BECAUSE INSOFAR AS THE VALUE OF THE LAND WAS DISCUSSED, APPELLANT RELIED ON THOSE CERTAIN AFFIDAVITS FILED BY THE RESPONDENTS WHICH SET FORTH THE CONSIDERATION THE RESPONDENTS WERE WILLING TO PAY TO DEFENDANT LEODA DUNHAM TO OBTAIN HER INTEREST IN THE SUBJECT PROPERTY OF THIS LAWSUIT.

Finding of Fact No. 5 implies that appellant failed to make the court below aware of any evidence showing a value different than that claimed by defendant Leoda Dunham in her homestead declaration. As explained above, appellant relied on the Agreement submitted by respondents with their affidavit in support of their Motion For Judgment On The Pleadings Or For Summary Judgment to show what respondents were willing to pay for the property. Consequently, Finding of Fact No. 5 should have been amended to remove the false implication given therein.

## VI

FINDING OF FACT NO. 7 SHOULD BE AMENDED TO EXPLICITLY STATE THAT DUE TO THE CONVEYANCE BY DEFENDANT LEODA DUNHAM OF HER HOMESTEAD INTEREST TO THE RESPONDENTS, SHE RETAINED A BARE LIFE ESTATE WHICH WAS SOLD AT THE SHERIFF'S SALE OF DECEMBER 7th, 1976, WHICH STATEMENT WILL REMOVE THE AMBIGUITY CAUSED BY REFERENCE TO "EXISTING INTEREST" FOUND IN THE LAST SENTENCE OF FINDING NO. 7.

The court below held that defendant Leoda Dunham had conveyed her homestead to respondents, and that the value of the interest conveyed to respondents was less than the total homestead exemption defendant Leoda Dunham was entitled to. Thus, based upon this ruling, and U.C.A. 28-1-2, the respondents' interest in the property could not have been sold at the sheriff's sale of December 7th, 1976.

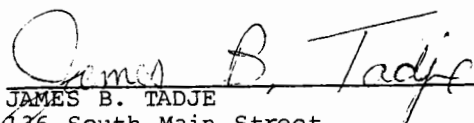
Finding of Fact No. 7 states that "the then existing interest was sold at the sheriff's sale. The finding does not indicate whose interest is referred to. However, in context, the reference can only be to the retained life estate of defendant Leoda Dunham, for, under the lower court's ruling, this is the only interest that could be sold at the sheriff's sale. Thus, the finding should have been amended so as to directly set forth the consequence of the court's ruling, i.e., that the unprotected life estate of defendant Leoda Dunham was sold at the sheriff's sale.

#### CONCLUSION

The issues herein considered which are of most importance concern the status of a homestead where a judgment has created a lien against the property prior to the time that the declaration of homestead is made and filed. It is appellant's position that a judgment lien existing prior to the date that a homestead declaration is made is superior to that homestead and, consequently, a declaration of homestead protects only against judgment liens obtained during the time that such homestead exists. It is also appellant's contention, which in this case may be seen to be in the alternative, that the act of a homestead claimant in reserving any interest capable of supporting a homestead, when the remaining interest of the homestead

claimant is conveyed away without specifically conveying the homestead, is, as a matter of law, a reservation of the homestead claim as well. In any event, the court below was not justified in holding in summary proceedings that the value of the property conveyed to respondents herein was in value less than the total homestead exemption of defendant Leoda Dunham. The question of value is material and is disputed herein, and, based upon such facts, the question of value should be properly determined at trial.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF MAILING

I hereby certify that on this 23<sup>rd</sup> day of December, 1977  
I mailed a true and correct copy of the foregoing Appellant's  
Brief to Bill Thomas Peters, of Tibbals and Staten, 400 Chancellor  
Building, 220 South 2nd East, Salt Lake City, Utah, 84111.

