

1978

Harold S. Sanders and Eleanor Sander v. Donn E. Cassity, Trustee, et al. : Appellant's Brief In Support of Petition For Rehearing

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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

APPELLANT'S BRIEF IN SUPPORT
OF PETITION FOR REHEARING

POINTS WHEREIN IT IS ALLEGED THE SUPREME COURT ERRED:

POINT I

THE SUPREME COURT ERRED BY ASSUMING THAT LEODA DUNHAM WAS A QUALIFIED HEAD OF HOUSEHOLD, AND THEREFORE ENTITLED TO A HOMESTEAD EXEMPTION AT THE TIME THAT APPELLANT'S JUDGMENT WAS DOCKETED. THIS ASSUMED FACT HAS NO FOUNDATION IN THE RECORD ON APPEAL NOR IN ANY EVIDENTIARY MATERIAL SUBMITTED IN THESE PROCEEDINGS.

On appeal appellant argued that his judgment of May 14, 1971, created a judgment lien on the property of Leoda Dunham which was not affected by Leoda Dunham's subsequent homestead declaration. In support of his position, appellant cited the court to Evans v. Jensen, 168 P 762 (Utah 1917), a

case which held that a subsequent change of status (becoming the head of the household} after the lien attached to the property could not be used to defeat the existing mechanic's lien.

In its decision filed October 13, 1978, this court apparently in support of this position embraces the rule, as held previously in Evans, that a pre-existing lien cannot be defeated by a subsequent change in status which qualifies the land owner to take advantage of a homestead exemption. This court also referred to 40 AM. Jur. 2nd Homestead Sec. 94. Having adopted this standard, the court then stated:

"....Dunham was qualified as head of the household and was entitled to the exemption before the judgment lien was recorded....." p. 3.

In making this statement the court assumed a fact which is not before it and which is not in the record on appeal.

The evidence of Leoda Dunham's status as a head of household is as follows:

1. Pleadings - Leoda Dunham made her declaration of homestead on September 10, 1972, and recorded it on September 11, 1972. Nothing in the pleadings indicates that Leoda Dunham was qualified as a head of household prior to the date the declaration was made.
2. Declaration Of Homestead (Part of Record on Appeal by Stipulation of the parties) - The

declaration states that Leoda Dunham's blind brother lives with her, without stating when he came to live with her, and further states that her husband is dead. Nothing therein indicates when she acquired the status of a head of household.

This evidence does not support the contention that Leoda Dunham was a head of household on or about May 14, 1971, when appellant's judgment was docketed.

Respondents have the duty to prove that the judgment lien of appellant did not attach to the remainder interest they acquired from Leoda Dunham. " 'He who sets up an exemption must prove it.' " Giesy - Walker Co. v. Briggs, 162 P 876, 878 (Utah 1916). Therefore, because no evidence has been placed before the court to show that Leoda Dunham was a head of household at the time appellant's judgment was docketed, respondents have failed to carry their burden of proof.

For the reason that there is no evidence before the court upon which the court could base its determination that Leoda Dunham was a head of household on May 14, 1971, this court must hold that Leoda Dunham did in fact not hold such status, that appellant's judgment created a lien on her property which was not affected by Leoda Dunham's subsequent homestead declaration, that respondents acquired Leoda Dunham's remainder interest subject to appellant's judgment lien, and that the sheriff's sale to foreclose that lien was proper.

POINT II

THE SUPREME COURT ERRED BY IMPROPERLY PLACING A DUTY UPON APPELLANT TO CONTEST THE DECLARED VALUE OF THE HOMESTEAD PROPERTY OF LEODA DUNHAM, AS SET FORTH IN HER HOMESTEAD DECLARATION, AT THE TIME THE DECLARATION WAS RECORDED. THE IMPROPER IMPOSITION OF THIS DUTY WAS THE BASIS FOR THE COURT'S FINDING THAT APPELLANT WAIVED HIS RIGHT TO CONTEST THE DECLARED VALUE OF THE PROPERTY IN THESE PROCEEDINGS.

Appellant argued that the lower court's determination as to the value of the homestead property of Leoda Dunham at the time she conveyed it was in error. He argued to this court that a trial should be held to determine whether it in fact had a value in excess of the homestead amount at the time Leoda Dunham conveyed a remainder interest to respondents. Appellant's judgment lien would have attached to any excess value over the homestead amount. Giesy - Walker Co. v. Briggs.

This court held that appellant is estopped to question the value of the property interests. The court said:

"...any objection to the value stated should have been raised at the time Dunham recorded her declaration of homestead interest..." p. 4

In reaching this decision, the court referred to the fact that appellant's failure to question the value "in the earlier proceeding constitutes a waiver". The court, however, does not indicate to what "earlier proceeding" it refers.

There was no earlier proceeding! The record on appeal contains no reference to any earlier proceeding. It can only

be assumed that this court is referring to the sheriff's sale which was to take place on September 13, 1972, two days after Leoda Dunham recorded her homestead declaration.

The first opportunity that might have arisen to question the value of the homestead property would have been the sheriff's sale of September 13, 1972. If the homestead declarant and the officer conducting the sale had disagreed as to the value of the property, then appraisers would have been appointed to determine the true value. U.C.A., 1953, 28-1-16.

This opportunity to question the value of the homestead property never materialized. The sheriff's sale was never held. The record on appeal discloses no reasons why the sale was not held. Respondent's counsel has speculated upon oral argument before this court and the court below that the sale did not occur because of Leoda Dunham's homestead declaration. Appellants' counsel, on the other hand, represented upon oral argument to the court below and to this court his belief and understanding that the sale was cancelled due to a faulty notice. Nevertheless, this court should look only to the record before it, and that record discloses no reason. Therefore, this court should not speculate that appellant was aware of the homestead declaration or that he had an opportunity to contest the value as set forth therein by Leoda Dunham. Further,

appellant had no duty to contest the value as it is the duty of the officer conducting the sale and the homestead declarant to determine this issue. U.C.A., 1953, 28-1-16.

Not only does this court err in supposing that appellant waived his right to contest the value of the homestead property, but its holding places an impossible burden on judgment creditor; it fails to consider the probability that the value of the homestead property will increase, and it invites abuse of the homestead act.

The effect of this court's holding is that judgment creditors must contest the declared value of homestead property at the time a declaration of homestead is recorded or thereafter; lose this right. In order to fulfill this duty a judgment creditor will have to continuously review the records of the County Recorder for the County wherein the judgment debtor owns realty, for if he should fail to discover that a homestead declaration had been filed at any time before a forced sale, he would be bound by the value of the property as set forth therein. This result would occur, under this court's decision, even where the homestead declaration had been filed years before a sheriff's sale is noticed and takes place. Thus an impractical and prohibitively expensive burden is placed on a judgment creditor by the court's holding.

The court's holding also fails to take into account that the value of the homestead property may increase above the amount of the homestead exemption. In the context of this case, appellant is contesting the value of the property at the time it was conveyed by Leoda Dunham, not when the declaration of homestead was made. This court's holding prohibits appellant from questioning the value of the property at the time it was conveyed to respondents because he failed to contest the value when the homestead declaration was recorded. It does not take into account the possibility that the value of her property increased above the homestead exemption in the interim between the date the declaration of homestead was recorded and the date the property was conveyed. The possibility exists that such an increase would occur, but under the court's holding, a judgment creditor would be unable to take advantage of the increase if he failed to discover and contest the value of the property as set forth in the homestead declaration which may have been filed months or years before.

Further, the court's holding encourages land owners to file homestead declarations disclosing that the value of the described property is less than the exempt amount when in fact it is not. Should a judgment creditor months, or years, thereafter seek to have his judgment satisfied at a sheriff's sale by executing upon the value in excess of the exemption, the homestead claimant could claim that the creditor waived his right to claim that any excess value existed because he failed to contest the value as set forth in the declaration.

The foregoing demonstrate the effect of the court's holding herein that appellant is estopped to question the value of the homestead property. It should be noted that appellant's first opportunity to contest the value of the property arose in the proceedings below whereat appellant showed the lower court that respondent's evidence of value was incompetent and self serving, and that a genuine issue existed as to the value of the property at the time Leoda Dunham conveyed the remainder interest to respondents. Appellant has not waived his right, nor should he be estopped. This court should remand this matter to the lower court for a determination of the value of the property at the time it was conveyed to respondents.

POINT III

THE SUPREME COURT ERRED BY FAILING TO ADDRESS A MATERIAL ISSUE ON THIS APPEAL, I.E. WHETHER LEODA DUNHAM RETAINED HER HOMESTEAD EXEMPTION OR CONVEYED IT TO RESPONDENTS.

This court held in substance that the property interest conveyed to respondents by Leoda Dunham was free and clear of appellant's judgment lien by operation of law because the value of Leoda Dunham's interest immediately prior to the conveyance was less than the homestead exemption amount. The court held that appellant waived his right to contest the value of the property, which holding appellant assigns as

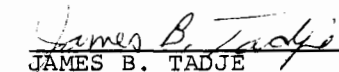
error in Point II of this brief. If this court decides, upon rehearing, that appellant is not precluded from seeking a determination of the value of the property, then it should also modify its opinion with respect to the question of whether the homestead exemption was conveyed. In the event the property is determined to have a value in excess of the exempt amount, then the question of whether the homestead exemption was conveyed or retained by Leoda Dunham is material and must be answered.

SUMMARY

The Supreme Court should reconsider its opinion herein. It should recognize that it erred in holding that Leoda Dunham was a head of household at the time appellant's judgment was docketed, and that this error led to an erroneous conclusion, namely, that appellant's judgment lien was defeated by her subsequent homestead declaration. It should also recognize that it erred in holding that appellant waived his right to contest the value of the homestead property by failing to raise the issue at the time Leoda Dunham recorded her homestead declaration, when in fact he had no opportunity to raise such question, and even if he had, it would have been raised prematurely since the

critical point in time was the date Leoda Dunham conveyed a remainder interest to respondents. This court should also recognize that it erred in holding that there was no need to determine whether Leoda Dunham retained or conveyed her homestead exemption, which holding was based upon the conclusion that the value of Leoda Dunham's interest immediately before the conveyance was less than the exemption amount, when the value of Leoda Dunham's property interest has not been determined. Therefore, appellant requests that the court reconsider its opinion herein, and thereafter issue an opinion in accordance with the facts of this case and the law applicable thereto.

Respectively submitted this 30 day of October, 1978.


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CERTIFICATE OF MAILING

I hereby certify that on this 30 day of October, 1978, I mailed 3 true and correct copies of the foregoing Appellant's Petition For Rehearing and Brief In Support of Petition For Rehearing to Bill Thomas Peters, attorney for Respondent, at his office at Tibbals and Staten, 400 Chancellor Building, 220 South 2nd East, Salt Lake City, Utah, 84111.

