

1959

James L. Barker, Jr. v. George R. Dunham and Leoda Dunham : Brief of Appellant

Utah Supreme Court

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Donn E. Cassity; Jack L. Crellin; Attorneys for Appellant;

Recommended Citation

Brief of Appellant, *Barker v. Dunham*, No. 9012 (Utah Supreme Court, 1959).
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In the
Supreme Court of the State of Utah
UNIVERSITY UTAH

AUG 6 1959

JAMES L. BARKER, JR., TRUSTEE
IN THE MATTER OF GEORGE
RAY DUNHAM, VOLUNTARY
BANKRUPT,
Plaintiff and Appellant.

vs.

GEORGE R. DUNHAM AND LEODA
S. DUNHAM, HIS WIFE,
Defendants and Respondents.

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Case No.
9012

FILED

MAY 1 - 1959

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

DONN E. CASSITY,
JACK L. CRELLIN,

Attorneys for Appellant.

ARROW PRESS, SALT LAKE

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vs.

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S. DUNHAM, HIS WIFE,

Defendants and Respondents.

Case No.
9012

BRIEF OF APPELLANT

STATEMENT OF THE CASE

The plaintiff, as trustee in the voluntary bankruptcy of the defendant, George Ray Dunham, brought this action in behalf of the only two creditors named in the bankrupt's petition to have a certain conveyance of real property from the voluntary bankrupt to his defendant wife, set aside as a fraudulent conveyance made with intent to hinder, delay and defraud said creditors.

From an adverse judgment of the Court below, sitting without a jury, plaintiff brings his case to this Honorable Court on appeal.

STATEMENT OF FACTS

As a result of an automobile accident which occurred on November 8, 1953, judgments were entered against the defendant, George R. Dunham in favor of Fred B. Garrett and Bruce R. Sizemore in the sum of \$51,840.00, plus costs, in the District Court of Summit County, State of Utah, on September 10, 1954 (R. 9, 10, 28, 65). La Mar Duncan served as counsel for the defendant, George R. Dunham, during the entire course of this litigation (Tr. 33, 34). Nineteen days following this automobile accident, in which the defendant, George R. Dunham, was seriously injured and hospitalized, there was recorded in the office of the County Recorder of Summit County, a warranty deed dated upon its face, November 1, 1952, and purporting to have been acknowledged before La Mar Duncan on that same date, conveying all of defendant George R. Dunham's interest in and to certain real property located in Summit County, Utah, to his wife, the defendant Leoda S. Dunham (R. 10, 28, 118, 119, Tr. 26, 51). This property had been conveyed to GEORGE R. DUNHAM AND LEODA S. DUNHAM, HIS WIFE, AS JOINT TENANTS WITH FULL RIGHTS OF SURVIVORSHIP, AND NOT AS TENANTS IN COMMON, by warranty deed dated January 6, 1951, from Carrie N. Kirkpatrick, which was recorded January 12, 1951 (R. 94). The deed from George R. Dunham to his wife did not

include improvements and waters rights as are contained in the deed from Carrie N. Kirkpatrick to the defendants as joint tenants (See Plaintiff's exhibits No. 1 and No. 13, R. 94, 118, 119). The defendants' own testimony indicates that the property was originally sold in 1944 by Carrie N. Kirkpatrick upon contract to George R. Dunham alone (Tr. 16-17, 21, 60, 64-67, 77).

Subsequent to November 1, 1952, claimed by defendants to be the date of execution and delivery of the deed from the defendant husband to his wife, and prior to November 8, 1953, the date of the automobile accident which resulted in the judgments against Mr. Dunham, the defendants conveyed eight separate parcels of the land acquired from Carrie N. Kirkpatrick and each such deed showed the grantors to be GEORGE R. DUNHAM AND LEODA S. DUNHAM, HIS WIFE. (See plaintiff's exhibits Numbers 2-9, inclusive, R. 96-111). On October 22, 1953, just seventeen days before the automobile accident referred to above, there was recorded at the request of George R. Dunham, a subdivision plat of Kamp Killkare, being a portion of the land conveyed to the defendants by Carrie N. Kirkpatrick. (See plaintiff's exhibit No. 12, R. 116-117, as further explained by the County Recorder in Tr. 128-130). And on October 26, 1953, just thirteen days before the accident, a mortgage was negotiated on the subject property with GEORGE R. DUNHAM AND LEODA S. DUNHAM, HIS WIFE, named as mortgagors. (See plaintiff's exhibit No. 15, R. 123-125). Following the automobile accident on November 8, 1953, and the recording of the deed from Mr. Dunham to his wife on November 27, 1953, the manner of conveying and en-

cumbering the land was radically changed by defendants. Thus a mortgage to Kamas State Bank, executed on April 12, 1954, designating the mortgagors as LEODA S. DUNHAM AND GEORGE R. DUNHAM, HER HUSBAND, was signed by Mrs. Dunham only. (See plaintiff's exhibit No. 14, R. 120-122). In addition warranty deeds of small parcels of land sold to Roy M. Thornton and Anna Ruth Thornton, his wife, in February 1, 1954, and to Harold Sanders and Edith Sanders, his wife, in June 21, 1954, were executed solely by Mrs. Dunham. (See Plaintiff's exhibits No. 10 and 11, R. 112-115).

It is undisputed that no consideration or payment was given to defendant George R. Dunham by his wife for the transfer of title into her name only and that said George R. Dunham owned no property after the delivery of the Deed conveying his interest to his wife. (Pre-trial Order, Sections 2 (c) and (d), R. 52). Defendant Leoda S. Dunham testified that her husband had not been employed, other than helping her, since 1951 (Tr. 78). She also testified that she did not pay him a salary or give him an allowance for his services (Tr. 79). However, at the purported time of executing the deed conveying his interest to his wife Mr. Dunham was obligated on a note secured by a mortgage to the Coalville Bank (Tr. 74-75, 141). He thereafter obligated himself on another note secured by a mortgage to the Kamas State Bank on October 26, 1953. (See plaintiff's exhibit No. 15, R. 123-125).

Mrs. Dunham further testified that she gave her husband full authority to handle the management of the sale of lots upon the property because of her lack of knowledge in

real estate matters (Tr. 66, 139). She further testified that her husband lived upon the property and that she allowed him to tell other people that he owned the property (Tr. 78-79). The testimony of Herbert Frank Heinhold, who was one of the purchasers of the lot from the defendants on August 3, 1953, shortly before the automobile accident, further emphasizes the fact that Mr. Dunham exercised all the power of an owner over this property by showing it to prospective purchasers and accepting payment upon consummated sales without limitation by his wife (Tr. 112-115).

On August 17, 1956, the defendant George R. Dunham filed his voluntary petition in bankruptcy, No. B-279-56, with the United States District Court for the Central District of Utah, naming as his only creditors Fred B. Garrett and Bruce R. Sizemore, and on August 22, 1956, he was duly adjudged a bankrupt in said proceedings and on September 12, 1956, the plaintiff was appointed trustee of the bankrupt's estate for the benefit of creditors. (See paragraphs 1, 2 and 3 of plaintiff's amended complaint admitted in paragraphs 1, 2 and 3 of the fourth defense in defendant's answer, R. 9, 28).

The evidence in support of the defendants' contention that the deed in question did not constitute a fraudulent conveyance is conflicting and manifestly inconsistent. Mr. Dunham testified that the property was originally purchased with his wife's own money, because he drank up all he made but he could not explain why the purchase contract was originally put in his own name alone (Tr. 23). He also testified that he "partially" negotiated the sale with Mrs.

Kirkpatrick (Tr. 22). As to the date and place of execution of the deed in question, Mr. Dunham testified as follows, at page 26-27 of the transcript:

"Q. Is that your signature at the bottom, Mr. Dunham?

"A. It looks like it. You bet. It must be.

"Q. That is your signature?

"A. Yes.

"Q. Where did you write that signature?

"A. *I don't remember.*

"Q. Were you in the hospital at the time, Mr. Dunham?

"A. *I wouldn't—I can't remember when that was signed.*

"Q. Did Mr. Duncan prepare this deed and bring it to you, Mr. Dunham, at the hospital?

"A. *I don't remember if anybody brought it to me, but that is my signature. I don't know where it was executed. I don't know where it was signed because I don't remember.*

"Q. Now, Mr. Dunham, isn't it true that Mr. Duncan brought this to you in November of 1953 when you were in the Veterans Hospital after the accident that you had when you injured yourself and Mr. Sizemore and Mr. Garrett?

"Mr. Pratt: If the court please, I will object to that question. I think it is an attempt to vary this document which he's introduced as an exhibit and which is dated November 1, 1952, and acknowledged.

"THE COURT: The objection is overruled.

"Q. Isn't that the place and the time that you signed this document when you were in fear of your life because of that accident?

"A. *It could be very well.*

"MR. PRATT: Now, if the court please, which time are we talking about? Are we talking about the time on the deed or some other time?

"MR. CASSITY: I am talking about the time that I stated. It is very clear.

"THE COURT: You don't need to argue with counsel or explain to him.

"Q. Do you remember whether anyone aside from yourself and Mr. Duncan was present at the time you signed this deed?

"A. I don't even remember when I signed it."
(Emphasis added.)

Mrs. Dunham testified that she and her husband were working as cooks for the Union Pacific Railroad when the property was purchased from Mrs. Kirkpatrick (Tr. 52-53) and that Mr. Dunham did not work for anyone else during the periods of time they operated the beer tavern after purchasing it (Tr. 54). She testified that she earned a little under two hundred dollars per month and her husband earned about two hundred twenty-five dollars per month while working for the railroad (Tr. 91) and that she had received seven hundred dollars back pay and her husband had received eight hundred dollars back pay from the railroad just prior to purchasing the property from Mrs. Kirkpatrick (Tr. 63, 131-132). She also testified that her husband was drinking away all his income at this time and was inebriated very often *but that he never missed his work on*

the railroad (Tr. 55-57). Furthermore, she did not deny that the original purchase contract was made in the name of her husband alone (Tr. 64-67). With respect to the execution of the deed from her husband to herself, thus ending their joint tenancy, Mrs. Dunham testified that Mr. Dunham's illness prompted this action (Tr. 68) and that she and her husband consulted La Mar Duncan, an attorney, to prepare the deed (Tr. 68-69). However, in dealing with prospective purchasers of lots at arm's length, both before and after the purported date of execution of the questioned deed, Mrs. Dunham testified that the defendants never consulted an attorney to prepare the necessary deeds which, by their nature, required new legal descriptions (Tr. 69-71). And, although the defendants were allegedly anxious enough about effecting a change of ownership that they sought out an attorney in Salt Lake City, Utah, to prepare the deed for them, they were not concerned with having it recorded (Tr. 72). Instead, the deed was purportedly placed in a steel box in Mrs. Dunham's bedroom and removed for recordation only after Mr. Dunham's automobile accident (Tr. 72-73). Furthermore, Mrs. Dunham testified that the deed was dated and acknowledged as shown upon its face, but admitted that she never represented herself to be the sole owner to prospective purchasers following that date (Tr. 76-77). Among the many Freudian "slips" evidencing common and accepted concepts of ownership and contributions and long, established matters of fact in the minds of the defendants concerning the property in question, plaintiff cites the following as illustrative:

1. When asked at what time the defendants left the railroad and moved into the property in question, Mr. Dunham answered as follows at page 18 of the transcript:

“A. Well, I think we—I don’t remember, but we made the first—she made the first letter and the first—sent the first money to Mrs. Kirkpatrick I think and had the property. I don’t know. It has been too long ago for me to remember.”

2. In response to a question concerning her husband’s drinking habits on page 55 of the transcript, Mrs. Dunham answered as follows:

“A. Did you mean in the earlier part of our marriage, or did you mean *after we negotiated for the property?*” (Emphasis added.)

3. In answer to a question as to when the property was originally purchased, Mrs. Dunham answered thusly at page 60 of the transcript:

“A. Well, we—I think I sent a retainer—. I’m not exactly sure—I think I sent a retainer fee to sort of hold it, don’t you see, until we got there, and I think I finished paying for it the day I moved in, if I am not mistaken. I don’t recall exactly, but it seems to me that that was the way it was.”

And again on the same page when asked how much time elapsed from sending the retainer to Mrs. Kirkpatrick before the defendants moved into the property, Mrs. Dunham stated:

“A. Well, I wouldn’t know exactly because it was springtime—it was early spring when we—when I negotiated with Mrs. Kirkpatrick, and it was May when I moved in.”

4. Again, at page 63 of the transcript, in answer to a question concerning when the balance of the down payment was made to Mrs. Kirkpatrick, Mrs. Dunham testified:

“A. The balance of that payment should have been made by May 1, when we took—when I took occupancy.”

Insofar as La Mar Duncan's testimony is concerned, he stated positively that the instrument was executed and acknowledged upon the dates shown on its face (Tr. 30-33). Thus Mr. Duncan could recall vividly the date that he acknowledged a deed in a routine matter, but he thereafter could not remember, and in fact, denied, signing stipulated judgments against his client, Mr. Dunham, in excess of fifty thousand dollars as a result of the actions that arose from the automobile accident (Tr. 34-35). However, upon being shown the stipulated judgments in the trial records of the cases involved, he then remembered signing them (Tr. 37-38). The court then sustained an objection by defendant's counsel to the evidence concerning the stipulations upon the ground that plaintiff's counsel had delayed Mr. Duncan's testimony 30 minutes because of stipulations claimed by plaintiff to be on the way to the court when in fact they were available to plaintiff all the time and for the further reason that this constituted impeachment of plaintiff's own witness (Tr. 38-39). The court thereafter refused plaintiff's counsel an opportunity to explain that affidavits actually on the way from Salt Lake City were the basis of counsel's request for delay in Mr. Duncan's testimony and not the stipulations produced. (Tr. 7, 28, 38, 41, and see

affidavit of Donn E. Cassity filed with the motion for new trial, R. 72-75).

Mr. Lefler of the Kamas State Bank testified on direct examination directly opposite to Mrs. Dunham in that he claimed she was the spokesman and handled all transactions concerning this property (Tr. 93) which is at variance with the statements of Mrs. Dunham (Tr. 66, 139). He claimed he was aware of the deed from Mr. Dunham to Mrs. Dunham when the first mortgage with his bank was obtained in late 1953, but that the bank required the signatures of both parties to the mortgage to conform to the county records (Tr. 93-95). On cross examination he stated that, although he had heard of the deed in question, he never saw it until it was recorded (Tr. 98-99).

The testimony of defendants' witness, Leland L. Layton, is most revealing. Upon direct examination, when asked of his knowledge concerning the execution of a deed from Mr. Dunham to Mrs. Dunham, he answered as follows, at page 144 of the transcript:

"A. I am referring to the deed of where George put the property fully into Leoda's name. That is the deed that I was going to give an answer to. In 1953, the early part of 1953, George and I was out fishing at one time, and it was after his sickness at Coalville. He told me that *he was going to put* all of the property into Leoda's name." (Emphasis added).

Upon cross examination he stated that this statement was made to him by Mr. Dunham in September or October after he purchased his first lot, which was August 5, 1953 (Tr. 146-147). Again upon redirect examination concern-

ing his knowledge of the deed in question, the witness responded as follows, at page 148 of the transcript:

“Q. Had you had conversations with Mr. Dunham prior to that time? You mentioned that you had knowledge of a deed or something. Now, is the deed —

“THE COURT: I don’t know—I’m not sure he’s said that he had any knowledge. He just told me that Mr. Dunham said he was going to put that property—going to put all his property in his wife’s name.

“A. The first—if I may, *the first knowledge that I ever had of any deed was the day that George Dunham told me he was having a deed drawn up throwing all the property to Leoda.*

“THE COURT: And that is the day you have told me about here?

“A. That was the day that—that’s the day that I told you about there.

“THE COURT: Some days when a man wishes he had stayed home in bed, aren’t there, Mr. Pratt?”

With respect to the testimony of Mr. Layton, as above set forth, the court opined as follows in granting the defendants judgment for no cause of action, at page 155 of the transcript:

“THE COURT: I have to ignore what Mr. Layton said there. Either he didn’t understand, or else it was a man that doesn’t have anything and still trying to impress somebody to make him think he’s got it, or else he is in error on the date, or else he wanted to help and didn’t know how. That was my impression, that Mr. Layton was trying to help his friends and didn’t know how. The defendants may have judgment for no cause of action.”

STATEMENT OF POINTS

POINT I

THE JUDGMENT OF THE LOWER COURT IS CONTRARY TO THE LAW AND THE EVIDENCE.

POINT II

THE LOWER COURT ERRED IN MAKING AND ENTERING ITS FINDINGS OF FACT NUMBERED 4, 5 AND 7 FOR THE REASON THAT SUCH FINDINGS OF FACT ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.

POINT III

THE LOWER COURT ERRED IN MAKING AND ENTERING ITS CONCLUSIONS OF LAW FOR THE REASONS THAT THERE WAS NOT SUFFICIENT COMPETENT EVIDENCE TO SUPPORT OR WARRANT SUCH CONCLUSIONS OF LAW AND SUCH CONCLUSIONS OF LAW ARE CONTRARY TO THE LAW PERTAINING TO FRAUDULENT CONVEYANCES AND DELIVERY OF DEEDS.

POINT IV

THE LOWER COURT ERRED IN GRANTING DEFENDANTS' MOTION TO STRIKE THE

TESTIMONY OF LA MAR DUNCAN PERTAIN-
ING TO STIPULATED JUDGMENTS EN-
TERED IN THE CIVIL CASES BROUGHT BY
BRUCE R. SIZEMORE AND FRED B. GAR-
RETT AGAINST THE DEFENDANT GEORGE
R. DUNHAM WHILE MR. DUNCAN WAS AT-
TORNEY FOR SAID DEFENDANT.

ARGUMENT

POINT I

THE JUDGMENT OF THE LOWER COURT IS
CONTRARY TO THE LAW AND THE EVI-
DENCE.

By its very nature fraud, and the proof thereof, lies most conveniently nestled in the bosoms of those who are participants therein. The process of dislodging the truth from those nefarious hearts involves such ingenious deviation as to make the odds of success most prohibitive. Such has been the task of the plaintiff in this case. In this regard it will be noted that the plaintiff's entire case necessarily rested upon the evidence to be adduced from the defendants and those in close confidential relationship with the defendants, except for matters of public record. However, the seeds of fraud bear the tell-tale fruit of original sin as the facts of this case most eloquently display.

There can be no argument that if the deed in question was actually executed after the date of the accident which gave rise to the creditors' claims against Mr. Dunham, it

would be fraudulent and void as to such creditors. An actual intent to hinder, delay or defraud, as would be shown by the falsification of the dates of execution and acknowledgment of the deed involved in this case, would stamp this conveyance as fraudulent against the grantor's creditors even if the conveyance had been supported by a valuable consideration. Pomeroy's Equity Jurisprudence, Fifth Edition, § 971; Sections 25-1-7 and 25-1-8, U. C. A. 1953.

Let us now view the evidence with respect to the actual date of execution and acknowledgment of the deed in question. Upon its face it is dated November 1, 1952, and acknowledged the same date by the attorney who subsequently defended Mr. Dunham in the actions arising from the automobile accident on November 8, 1953. The date of recordation of this deed is most significant—November 27, 1953, nineteen days following the accident. Between November 1, 1952, the purported date of the deed, and November 8, 1953, the date of the accident, no less than eight conveyances of land were made by the defendants showing *George R. Dunham and Leoda S. Dunham, his wife*, as grantors. During this same period of time, a subdivision plat of the land was recorded at the request of *George R. Dunham* and a new mortgage was negotiated upon the property naming *George R. Dunham and Leoda S. Dunham, his wife*, as mortgagors. Not one single instrument was executed during this time designating Leoda S. Dunham as the sole owner nor did any single instrument even infer that such might be the case. Not so following the date of the accident and recordation of the deed in question. The county records from this time forward clearly indicate that ownership was

then being asserted by one person alone, namely Leoda S. Dunham. It is clear and undisputed that George R. Dunham exercised dominion and control over the sale of lots and represented himself as an owner of the property during the period of time between the purported date of the deed in question and the automobile accident referred to above. Mr. Dunham himself testified that he couldn't remember where or when he signed the deed *but that it could very well be that it was brought to the Veteran's Hospital by Mr. Duncan following the automobile accident for his signature.* This admission by the grantor himself fits perfectly the mosaic of fraud that all the remaining circumstances would indicate, but, unlike an inference to be drawn from circumstantial evidence, it is direct evidence of a fraudulent act committed with a fraudulent intent. Add to this the precise testimony of defendant's own witness, Mr. Layton, with reference to the statements made to him by Mr. Dunham concerning the transfer of title to Mrs. Dunham. He positively established the time that said statements were made—subsequent to August 5, 1953, the date he purchased his first lot from the Dunhams. Upon direct examination and redirect examination by defendant's counsel he reiterated that Mr. Dunham had told him that he, Mr. Dunham, *"was going to put all the property in Leoda's name."* Thus, long after the purported date of the deed in question, the grantor therein made known his intention to convey to his wife as a future possibility not as a matter of past actuality. It should also be borne in mind that if this witness had any interest to serve in the case it would be that of the defendants and not the plaintiff. This evidence again establishes the actual intent of the defendants to defraud their credi-

tors. In addition to the above let us consider the following circumstances surrounding this conveyance. The conveyance was voluntary and consisted of his entire estate. It left the grantor with no property yet obliged upon a mortgage note and subject to the claims of the two men injured in the accident, thus leaving him insolvent. The property description contained in the questioned deed is incomplete as compared to that conveyed to the defendants by their predecessor in title. At the time the deed was recorded, the accident had occurred and the notary public upon the acknowledgment was one and the same person as the attorney who defended Mr. Dunham in the civil suits which arose from the automobile accident. It also seems singularly unusual that these defendants would deem it advisable to consult an attorney for the purpose of preparing a deed as between themselves for their entire property and yet feel that such a practice was unnecessary before, and after, the accident insofar as preparing deeds requiring special descriptions to purchasers in business transactions. The reason given by defendants for the conveyance from joint tenancy to sole ownership in Mrs. Dunham, namely the claimed illness of Mr. Dunham, seems rather feeble in view of the recognized reason for holding property in joint tenancy. Likewise the failure to record the deed promptly does not confirm the claimed urgency which purportedly prompted its execution. The subsequent petition in bankruptcy by Mr. Dunham to be relieved of his obligations to the two judgment creditors who were injured in the accident on November 8, 1953, was the last step required to complete defendants' fraudulent scheme.

The only opposing evidence to that above set forth is the testimony of Mrs. Dunham and La Mar Duncan that the deed was executed and acknowledged upon the dates shown on its face. First of all it should be made absolutely clear that both of these witnesses had such interests in this deed as to prohibit their telling the truth if, as the above evidence clearly shows, the deed was in fact predated and fraudulently acknowledged. That they could have testified one way or the other without impunity is not true. An admission of fraud would have caused Mrs. Dunham the loss of her property. An admission of fraud would have caused Mr. Duncan the loss of his professional standing in all likelihood. Thus this testimony is not the testimony of disinterested witnesses. Quite to the contrary it is elicited from those most vitally concerned with the determination of whether fraud existed as a matter of fact in this case.

Based upon the evidence in this case it is the plaintiff's contention that the overwhelming weight of the evidence sustains the belief that this conveyance was made subsequent to the automobile accident giving rise to the creditors claims and that such conveyance was made with an actual intent on the part of the grantor and grantee to hinder, delay and defraud the creditors in the satisfaction of their claims and that the judgment of the lower court is contrary to the great weight of the evidence in the case. Plaintiff feels that the lower court in this case did not view the evidence with the "rigid scrutiny" required in conveyances between near relatives where creditors rights against one of such relatives is involved. See *Paxton v. Paxton*, 80

U. 540, 553, 15 P. 2d 1051; *Peterson v. Peterson*, 112 U. 554, 190 P. 2d 140.

Let us now assume, without admitting, that the trial court was justified in finding that the deed in question was actually executed and acknowledged upon the dates shown on its face. In view of the evidence, this conveyance must still fail as a matter of law. Section 25-1-7, U. C. A. 1953, provides as follows:

“25-1-7. CONVEYANCE TO HINDER, DELAY, DEFRAUD CREDITORS.—Every conveyance made, and every obligation incurred, with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors.”

Thus a showing of an actual fraudulent intent will render a conveyance fraudulent as to future creditors. The facts in this case clearly support a finding of actual intent to defraud to the exclusion of any other conclusion. The failure to record, coupled with continued possession and acts of ownership by Mr. Dunham, as evidenced by the deeds and mortgage subsequently executed by both defendants as grantors, is strong evidence of such an intent. Indeed, where the failure to record is coupled with other indicia of fraud, it may be concluded that the transaction was fraudulent. See 24 Am. Jur., *Fraudulent Conveyances*, § 19, and cases therein cited. Likewise, it has been held that placing a deed in the hands of a grantee does not constitute delivery, where it is shown that the intention of the parties was that it was not to become operative immediately, and where such

intention was evidenced by continued acts of ownership and operation. *Redmond v. Gillis*, 346 Ill. 223, 178 N. E. 504; *Spero v. Bove*, 116 Vt. 76, 70 A. 2d 652. As stated in 4 *Tiffany Real Property*, Third Edition, section 1045, page 222:

“* * * that the grantor acts as if the title had or had not passed to the named grantee would certainly appear to be strong evidence of his intention that the instrument should or should not operate to pass the title.”

See also *Jeppesen v. Jeppesen*, (Iowa), 88 N. W. 2d 633; *Cardon v. Harper*, 106 U. 560, 151 P. 2d 99, 154 A. L. R. 960; *Losee v. Jones*, 120 U. 385, 235 P. 2d 132; *Mower v. Mower*, 64 U. 260, 228 P. 911. The assertion of title solely by Mrs. Dunham following the accident and recordation of the deed is further evidence that the defendants intended such conveyance to vest title in the grantee only in the event that unfavorable circumstances would warrant such a course of action. The testimony of defendants' witness, Mr. Layton, establishes that as late as September or October of 1953, Mr. Dunham was considering a future conveyance to his wife of his interest in the land. This is certainly incompatible with the theory that he had absolutely conveyed his estate in the land to his wife almost a year previously or that he intended such a conveyance, if actually made, to alienate his interest at the time the deed was purportedly executed. But it is compatible and entirely consistent with plaintiffs' contention that the deed, if executed and acknowledged as stated on its face, was intended to pass title only at such time as would be beneficial to the defendants and detrimental to creditors. In addition we have the un-

disputed facts that the conveyance was voluntary and left the grantor insolvent. Section 25-1-4, U. C. A. 1953, sets forth the law of this state as follows:

"25-1-4. CONVEYANCES BY INSOLVENT.

—Every conveyance made, and every obligation incurred, by a person who is, or will be thereby rendered, insolvent is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or the obligation is incurred without a fair consideration."

In anticipation of defendants' contention that this conveyance was supported by consideration in that Mrs. Dunham allegedly paid the original down payment of \$1,000.00 out of her own money, plaintiff submits that such a finding is absolutely contrary to the evidence and, under the evidence introduced in this case, is contrary to law. First of all, with reference to the question of fact, such an allegation is supported only by the testimony of Mr. and Mrs. Dunham. In order to add credence to their story it is the testimony of both defendants that, at the time of the purchase, and for some time prior thereto Mr. Dunham was "drinking" away his entire income which exceeded that of his wife. Although they stated he was drunk a good deal of the time, which admittedly would be true if he were consuming his entire monthly salary of \$225.00 for alcohol in the years immediately preceding their original contract purchase of the property in 1944, *yet it is admitted that he never missed his work with the Union Pacific Railroad as a result of intoxication.* The most conclusive evidence against the defendants in

this regard is that the original purchase contract was made in the name of George R. Dunham alone. The evasive and qualified answers given by the defendant Leoda S. Dunham in this regard, without denying the fact, are ample to support this fact. It would seem most unlikely that Mrs. Dunham would use her own money to purchase real property and then have it placed in her husband's name alone at a time when he is alleged to have been a confirmed drunk. These facts just do not adhere to logic and common sense. It also seems most unlikely that Mrs. Dunham would allow her husband to continue as an apparent owner, without his making any real contribution to the business property, for the 9½ years following the purchase, which apparent title, in all probability would have continued to this day had not the automobile accident intervened. It is also stated by both defendants in their testimony that Mr. Dunham participated in the negotiations with Mrs. Kirkpatrick for the purchase of the property. Contrary to the above we have the statements of the defendants that it was Mrs. Dunham's money which purchased the property. The facts do not bear out that contention.

Secondly, as a matter of law, the statements of the defendants are not sufficient to sustain a finding that the alleged fraudulent conveyance was based upon a pre-existing consideration or obligation. In the case of *Paxton v. Paxton*, supra, a mortgage allegedly based upon a past due indebtedness to the defendant's brother was sustained as valid in the lower court against the plaintiff's contention that it constituted a fraudulent conveyance. This court, upon a

complete analysis of the facts by virtue of its equity powers, reversed the lower court and held as follows:

"In reaching a conclusion as to facts, the findings made by the trial court should not be disturbed unless we are convinced that they are wrong, but, when so convinced, it becomes our duty to set them aside. *It is quite generally held that a transfer or mortgage of property between near relatives which is calculated to prevent a creditor from realizing on his claim against one of such relatives is subject to rigid scrutiny.* 27 C. J. 495, and cases there cited. Under the rule, a transfer or mortgage of property made to a near relative in consideration of past-due indebtedness will be sustained if attacked in a creditor's suit when, and only when, it is shown the debt is genuine, that the purpose of the grantee or mortgagee is honest, and that he acted in good faith in obtaining his title or lien. *The burden, in such case, is cast upon the grantee or mortgagee to show the good faith of the transaction by clear and satisfactory evidence.* * * * Applying the rule to the mortgage made by Anthony and his wife to Frank, it cannot be said that Frank has discharged that burden. * * * *There is not a scintilla of evidence, other than the testimony of Frank and Anthony, which shows, or tends to show, that Anthony was indebted to Frank at the time the note and mortgage were executed.* * * * there is no documentary evidence other than the note and mortgage here involved which supports, or tends to support, the claim that Anthony was indebted to Frank. *Such claim rests solely upon the testimony of Anthony and Frank. Upon this record the appellants are entitled to a finding that the mortgage given by Anthony and his wife to Frank was without consideration and that it was executed for the purpose of hindering, delaying and preventing the Walkers from collecting the*

money owing to them by Anthony and his wife Ida."
(Emphasis added.)

As in the case quoted, there is not a scintilla of evidence, other than the testimony of Mr. and Mrs. Dunham which shows, or tends to show, that the original consideration for the purchase of the property in question was paid by Mrs. Dunham. Under the ruling of the *Paxton* case, which reversed the lower court on the facts and law, the defendants have not met the burden of showing the good faith of the transaction by clear and satisfactory evidence. The holding in the *Paxton* case was affirmed and approved in *Boccalero v. Bee*, 102 U. 12, 126 P. 2d 1063, which was distinguished on the facts in that there was ample evidence, such as cancelled checks and records of payment, of the debt owed by the insolvent grantor to his sister as consideration for the assignment. It is thus crystal clear that something more than the testimony of Mr. and Mrs. Dunham will be required to establish the bona fides of their claim—that additional something is lacking in the record of this case.

Without burdening the court with a long list of authorities sustaining certain factual circumstances which constitute "badges of fraud", the plaintiff herewith sets forth the many "badges" or "indicia" of fraud which exist in the present case and from which the existence of fraud may be properly inferred:

1. Inadequacy of consideration, 37 C. J. S., Fraudulent Conveyances, § 81.
2. Conveyance which leaves the grantor without any estate or renders him insolvent. 37 C. J. S., Fraudulent Conveyances, §§ 88, 89.

3. Withholding instrument from recordation. 37 C. J. S., Fraudulent Conveyances, § 85.

4. Retention by the grantor of the possession of the property and thereafter exercising acts of ownership with the knowledge of the grantee. 37 C. J. S., Fraudulent Conveyances, § 92.

5. Close relationship between grantor and grantee, as husband and wife. 37 C. J. S., Fraudulent Conveyances, § 96.

6. Misdescription or insufficient description of the property transferred. 37 C. J. S., Fraudulent Conveyances, § 97.

The concurrence of several badges of fraud will always make out a strong case. 37 C. J. S., Fraudulent Conveyances, § 79. As we have shown heretofore, where the failure to record, is coupled with other indicia of fraud, it may be concluded that the transaction was fraudulent. Likewise, as previously pointed out, the continued acts of ownership and statements of the grantor following the purported execution of the deed, is conclusive evidence that no present intention to convey the land was shown as of the date it was allegedly executed and acknowledged even though the deed was manually transferred to the grantee. See *Redmond v. Gillis*, supra. In view of the failure of defendants to sustain the burden of proving the actual purchase of the property by Mrs. Dunham with her own money, both as a matter of fact and as a matter of law, and the concurrence of the above mentioned badges of fraud, it necessarily follows that the conveyance from George R. Dunham to his wife was a fraudulent conveyance in fact and in law against the

creditors of defendant George R. Dunham. If the facts and circumstances surrounding the case and directly proved are such as to lead a reasonable individual to the conclusion that fraud in fact exists, this is all the proof which the law requires. 24 Am. Jur., Fraudulent Conveyances, § 225; *Cardon v. Harper*, supra.

Finally it may be laid down as a doctrine generally accepted, that if a person, being at the time indebted, makes a voluntary conveyance of his property to such an extent that he is left actually insolvent, or wholly unable to pay his existing debts, or that it is reasonable to suppose he contemplated his consequent inability to pay, or even that it is reasonably doubtful whether he is able to meet his obligations, then the conveyance will be fraudulent and void as against his subsequent, as well as his existing creditors. Pomeroy's Equity Jurisprudence, Fifth Edition, § 973, pp. 880-881.

A careful analysis of the facts of this case, together with the law governing delivery of deeds and fraudulent conveyances, compels a reversal of the judgment of the district court. This court has the power to review both facts and law in equity cases by virtue of express statutory provision and the rules of procedure established by this court. See Section 78-2-2, U. C. A. 1953 and Rule 72 (a) of the Utah Rules of Civil Procedure. In the exercise of this power to the ends of justice this court should find, as a matter of fact and law, that the conveyance from defendant George R. Dunham to his wife, defendant Leoda S. Dunham, was fraudulent as to his creditors who are represented by the plaintiff in this action, and should therefore set aside this

conveyance and require an accounting of all proceeds received by the defendants from the sale of portions of their land.

POINT II

THE LOWER COURT ERRED IN MAKING AND ENTERING ITS FINDINGS OF FACT NUMBERED 4, 5 AND 7 FOR THE REASON THAT SUCH FINDINGS OF FACT ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW.

Fact No. 4 found by the lower court holds that Leoda S. Dunham paid the down payment upon the property from her own money and the balance from the earnings of the property (R. 64). Plaintiff incorporates herein his argument under Point I with respect to the weight of the evidence. Plaintiff also incorporates herein the argument contained in Point I with regard to the law governing the finding of a pre-existing consideration based solely upon the statements of the grantor and grantee. The rule in the *Paxton* case, *supra*, which was affirmed in *Baccalero v. Bee*, *supra*, is clearly controlling in this case. In the absence of other extrinsic evidence, the bare statements of the grantor and grantee as to a pre-existing debt or obligation constituting the consideration for a voluntary conveyance between near relatives will be insufficient, as a matter of law, to sustain the finding of such consideration as a matter of fact where the conveyance is attacked by the grantor's creditors. Such is the case here. Not one whit of evidence was introduced to support the testimony of Mr. and Mrs.

Dunham in this regard and, as pointed out under Point I, all other evidence indicates the absolute opposite fact to that found by the lower court.

Finding of Fact No. 5 is to the effect that the deed in question was executed, acknowledged and thereafter delivered to Leoda S. Dunham on November 1, 1952, and Finding of Fact No. 7 holds that the deed was executed and delivered without intent to defraud (R. 66). Plaintiff incorporates the argument contained in Point I to sustain its contention that such findings are contrary to the overwhelming weight of evidence and also contrary to the law governing fraudulent conveyances and the delivery of deeds. Plaintiff again reiterates that, even if the lower court had sufficient evidence upon which to find that the deed was actually executed and acknowledged on November 1, 1952, the subsequent acts of ownership by Mr. Dunham without objection by Mrs. Dunham absolutely negatives the finding of a present intent to deliver even though there had been a manual delivery of the deed. In addition the surrounding circumstances amplify beyond question the fact that no present intent to convey was ever made manifest by the parties to this deed and that the deed was not to become operative immediately. See *Redmond v. Gillis*, *supra*; *Spero v. Bove*, *supra*; *Cardon v. Harper*, *supra*; *Losee v. Jones*, *supra*; 4 *Tiffany Real Property*, *supra*.

POINT III

THE LOWER COURT ERRED IN MAKING
AND ENTERING ITS CONCLUSIONS OF LAW
FOR THE REASONS THAT THERE WAS NOT

SUFFICIENT COMPETENT EVIDENCE TO SUPPORT OR WARRANT SUCH CONCLUSIONS OF LAW AND SUCH CONCLUSIONS OF LAW ARE CONTRARY TO THE LAW PERTAINING TO FRAUDULENT CONVEYANCES AND DELIVERY OF DEEDS.

As pointed out under points I and II, it was clearly error for the lower court to enter its Conclusions of Law to the effect that the conveyance herein involved was not made with an intent to defraud, hinder or delay existing or subsequent creditors, that the deed was executed, acknowledged and delivered on November 1, 1952, and that the grantor, George R. Dunham, had no interest in the said property subsequent to that date, as set forth at pages 66-67 of the Record on appeal, and plaintiff incorporates herein the arguments set forth under points I and II.

POINT IV

THE LOWER COURT ERRED IN GRANTING DEFENDANTS' MOTION TO STRIKE THE TESTIMONY OF LA MAR DUNCAN PERTAINING TO STIPULATED JUDGMENTS ENTERED IN THE CIVIL CASES BROUGHT BY BRUCE R. SIZEMORE AND FRED B. GARRETT AGAINST THE DEFENDANT GEORGE R. DUNHAM WHILE MR. DUNCAN WAS ATTORNEY FOR SAID DEFENDANT.

As has been stated heretofore the plaintiff's case in this action, being one of fraud, lay primarily in the evidence to

be elicited from the defendants and those in close confidential relationship with the defendants, outside of matters of public record. Intent, which is an important element in cases of fraud, is most often a matter of difficult proof because of its concealment in the minds of the perpetrators. In this case the actual date of the deed and the acknowledgment thereon were drawn in issue. If fraud had actually been committed in this case by the pre-dating of the deed and acknowledgment, and the great weight of evidence so indicates as shown in the argument under Point I, Mr. Duncan became as much a participant in the fraud as did the defendants. Let us now view the circumstances giving rise to this particular point of argument.

Mr. Duncan was called as a witness at the trial by the plaintiff. During questioning by plaintiff's counsel, Mr. Duncan testified that he clearly remembered the date he acknowledged this deed which was prepared as a routine matter in his law office and that it was dated and acknowledged on the dates shown thereon (Tr. 30-33). Subsequent to this testimony he denied having ever signed stipulated judgments on behalf of his client, George R. Dunham, in excess of fifty thousand dollars in 1954 as a result of civil actions arising from the automobile accident (Tr. 34-35). Upon being shown the stipulations in the county clerk's case files, Mr. Duncan admitted signing the stipulated judgments (Tr. 37-38). Thereupon the defendant renewed his objections and the court responded by striking the entire line of questioning (Tr. 38-39). There can be no question that plaintiff was attempting to impeach this witness. The court

even recognized this when it denied defendants' earlier objection by stating as follows:

"MR. PRATT: If the court please, I object to that as hearsay as to these defendants. This is their witness.

"THE COURT: I'm not taking it as a fact. *I suppose he is laying a foundation for some impeaching question he is going to ask counsel or trying to show an interest that counsel has.* The objection is overruled and you may answer that question." (Emphasis added).

A close examination of the transcript will reveal that the true cause of the trial court's sudden change of ruling arose out of a mistaken concept in the mind of the trial judge that plaintiff's counsel had attempted to delay Mr. Duncan's appearance on the ground that certain written documents were allegedly on their way from Salt Lake City when in fact they were in the possession of plaintiff's counsel all the time. In this regard it will be noted that counsel for plaintiff asked for the delay of Mr. Duncan's appearance as a witness because of certain conflicting affidavits to which he was a party which were then on their way to Coalville from Salt Lake City. (Tr. 7, 28. See also the affidavit and supporting documents filed with the court by Donn E. Cassity, R. 72-75). Upon the introduction of the stipulated judgments entered in prior civil cases against Mr. Dunham and signed by his then attorney, Mr. Duncan, the court was clearly under the impression that these documents were the ones claimed by plaintiff's counsel to be on their way from Salt Lake City. The judge's impression thus left him with the feeling that plaintiff's counsel had resorted to a

concealment of facts before the court. In fact, the court's unjustified wrath was such that he absolutely refused to listen to plaintiff's repeated attempts to explain the true circumstances (Tr. 38-39).

It is plaintiff's contention that the rule against impeaching one's own witness should have no application as to Mr. Duncan who was the acknowledging officer before whom the deed in question was executed. With respect to the prohibitory rule against impeachment of one's own witness, it is stated in McCormick on Evidence, § 38, at pages 70-71:

"Among the reasons, or rationalizations, found for the rule are, first, that the party by calling the witness to testify vouches for his trustworthiness, and second, that the power to impeach is the power to coerce the witness to testify as desired, under the implied threat of blasting his character if he does not. The answer to the first is that, except in a few instances such as character witnesses or expert witnesses, the party has little or no choice. He calls only those who happen to have observed the particular facts in controversy. The answer to the second are (a) that it applies only to two kinds of impeachment, the attack on character and the showing of corruption, and (b) that to forbid the attack by the party calling leaves the party at the mercy of the witness and his adversary. *If the truth lies on the side of the calling party, but the witnesses character is bad, if he tells the truth he may be attacked by the adversary: if he tells a lie the adversary will not attack him, and the calling party, under the rule, cannot.* Certainly it seems that if the witness has been bribed to change his story, the calling party should be allowed to disclose this to the court."

It has been stated in many cases that the rule against impeachment of one's own witness is subject to exception in the interests of justice. *Schlatter v. McCarthy*, 113 U. 543, 196 P. 2d 968, rehearing denied 113 U. 560, 198 P. 2d 473; *Delfino v. Warners Motor Exp.*, 142 Conn. 301, 114 A. 2d 205; *White v. Southern Oil Stores*, 198 S. C. 173, 17 S. E. 2d 150. Thus it has been stated that the purely formalistic concept, that the party producing a witness vouches for him and is bound by his testimony, should not preclude impeachment where fairness requires it, and the trial court should be liberal in permitting such impeachment, resolving all doubts in favor of allowing testimony. *People v. Spinosa*, 115 C. A. 2d 659, 252 P. 2d 409.

This court has had occasion to construe the testimony of an acknowledging officer upon a deed. In the case of *Northerest, Inc. v. Walker Bank & Trust Co.*, 112 U. 268, 248 P. 2d 692, this court quoted with approval from 1 Am. Jur. 380, Acknowledgment, Sec. 154, which states:

“* * * The trend or authority however, is in favor of admitting any evidence that may have a tendency to prove the truth, and a more liberal rule permits the officer to be called as a witness and compelled under oath to state the true facts of the transaction so far as he can remember them, whether he acted under mistake, misapprehension, or in collusion with the party to be benefited by taking the acknowledgment * * *.”

The court then held:

“We are in accord with the foregoing rule as better serving the purpose of getting at the truth and doing justice between the parties.”

Furthermore our own Rules of Civil Procedure have broadened the scope of cross examination and impeachment to include many persons other than strictly adverse parties. Thus, although not himself a party to an action, an officer of a corporation, partnership or association which is an adverse party, may be called and cross-examined and impeached in all respects as if he had been called by the adverse party. See Rule 43 (b) of the Utah Rules of Civil Procedure. Certainly Mr. Duncan in the instant case reposed in a position much more adverse to the plaintiff than that presented in most cases which might involve an officer of a corporation as a witness. It would seem that if such persons as are enumerated in Rule 43 (b) may be called as one's own witness and impeached, it is only logical that the acknowledging officer to the execution of deed claimed to be fraudulent as to its date of execution and acknowledgment should likewise be subjected to the test of cross examination and impeachment as to his memory, veracity, truthfulness, etc.

Plaintiff would make one more comparison. There can be no doubt that a party may impeach the testimony of a witness whom he is compelled to call, as a subscribing witness to a will, etc. See 98 C. J. S. Witnesses, § 477 (c); *Re Warren*, 138 Ore. 283, 4 P. 2d 635, 79 A. L. R. 389; *Schlatter v. McCarthy*, supra. Thus it would appear no less logical to allow a party attacking the validity of a deed and acknowledgment on the grounds of fraud to call, as his own witness, all parties to the claimed fraudulent instrument and to cross examine and impeach them, if possible, in an effort

to disclose the element of intent so guardedly concealed within them.

For the foregoing reasons, plaintiff contends that the lower court erred in striking from the record the damaging evidence brought out by the cross examination of Mr. Duncan. No attorney could ever hope to be believed in asserting, on one hand, that he could recall definitely the date of execution and acknowledgment of a deed prepared as a routine matter in 1952, and then, on the other hand, suffer a lack of memory to the point of denying that he had executed stipulated judgments in excess of fifty thousand dollars as counsel for the same parties in late 1954. Such evasiveness and lack of sincerity are circumstances which the plaintiff should have been permitted to show in proving the fraud alleged in this action.

CONCLUSION

A close examination of the facts and the law applicable in this case reveals the following:

1. The trial court's finding that Mrs. Dunham bought the subject property with her own money is contrary to the great weight of the evidence *and being based upon the testimony of defendants alone, cannot be sustained as a matter of law.*
2. The trial court's finding that the deed in question was executed and acknowledged on November 1, 1952, is contrary to the overwhelming weight of the evidence.

3. That, even though the lower court may have found that the deed was dated and acknowledged on November 1, 1952, its further finding that the deed was delivered on that date is contrary to the great preponderance of evidence *and, in view of the continued acts of ownership and assertion of title by Mr. Dunham thereafter with the grantee's knowledge and consent cannot be sustained as a matter of law.*

4. The facts and circumstances surrounding the conveyance in question, even if dated and acknowledged upon November 1, 1952, would necessarily lead reasonable individuals to the conclusion that fraud was intended by these defendants as to present and subsequent creditors *and, in view of the many concurring badges of fraud, including failure to record coupled with continued acts of ownership by Mr. Dunham, it may be concluded that the conveyance was fraudulent as a matter of law.*

The plaintiff, therefore, is of the opinion that this appeal is justified both as to the facts and the law and requests that this honorable court set at rest, once and for all, the fraudulent scheme of the defendants that has caused this plaintiff, and the creditors whom he represents, to pursue a trail of litigation covering a period of five years with only such solace as was contemplated by Shakespeare in Henry VI:

“Thrice is he arm'd that hath his quarrel just,
And he but naked, though lock'd up in steel,
Whose conscience with injustice is corrupted.”

Plaintiff asks this honorable court to (1) set aside the conveyance from defendant George R. Dunham to his wife,

defendant Leoda S. Dunham, as a fraudulent conveyance calculated to defraud, hinder and delay the creditors of George R. Dunham; (2) order the defendants to account for the proceeds of all sales or alienations of all or any part of said property subsequent to said fraudulent conveyance; (3) order the defendants to account for all income derived from said property or the use thereof subsequent to said fraudulent conveyance; (4) order the said property to be disposed of in satisfaction of the claim of plaintiff in order that said plaintiff can properly marshall the assets of the estate of the bankrupt defendant, George R. Dunham; (5) restrain the defendant, Leoda S. Dunham, from disposing of said real property in any manner, or from alienating the same; (6) grant the plaintiff his costs incurred in the court below and upon this appeal, and (7) order such other and further relief as to the court shall appear proper.

Respectfully submitted,

DONN E. CASSITY,
JACK L. CRELLIN,

Attorneys for Appellant.