

1959

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

Utah Supreme Court

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Clyde & Mecham; Elliott Lee Pratt; Attorneys for Defendants and Respondents;

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Case No. 9012

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IN THE SUPREME COURT

UNIVERSITY UTAH

of the

AUG 6 1959

STATE OF UTAH

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

*Plaintiff and Appellant,*

—vs.—

GEORGE R. DUNHAM AND LEODA  
DUNHAM, HIS WIFE,

*Defendants and Respondents.*

FILED

AY 20 1959

Supreme Court, Utah

RESPONDENT'S BRIEF

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CLYDE & MECHAM  
ELLIOTT LEE PRATT

*Attorneys for Respondent*

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RESPONDENT'S BRIEF

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STATEMENT OF FACTS

There is very little, if any, dispute in the facts of this case. The dispute arises in the interpretation thereof. Appellant's statement of facts is substantially correct if the argumentative matter is disregarded. However, the following brief supplemental statement of facts might be helpful.

George and Leoda Dunham are in their late fifties and had worked at various jobs, including the mines and the railroad prior to the aquisition of the subject property up along the Upper Provo River in Summit County in 1944 (R. 8, 9, 17, 19).

The property was purchased from Mrs. Kirkpatrick with \$1000 down payment, paid out of Leoda Dunham's money, with \$40.00 a month payable from the income from the property (R. 133). None of George's money went into the transaction (R. 20, 56, 133).

Thereafter Leoda Dunham managed the property, with the help of George who acted as handy man around the tavern. Various lots were sold from the property, the deeds for which were prepared for the signature of both Leoda and George by officers of the Coalville or Kamas State Bank, and the proceeds from which went directly to either of the banks to pay an existing mortgage on the property (R. 133). The banks handled all of the details on these transactions, except the original contact and showing of the property by either George or Leoda (R. 139).

George ever since his days with the railroad had been a heavy drinker spending any money he earned on liquor. Leoda therefore managed and ran the property considering it as her own (R. 133-139). In October 1952, George had serious heart attacks sending him to the hospital (R. 68). Because of this illness and on November 1, 1952, Leoda and George went to Lamar Duncan attorney to have him prepare a deed from George to Leoda and the deed was prepared, executed and acknowledged on said date in Mr. Duncan's office (R. 68-70). The deed was delivered to Leoda who placed it in a strong box in her home at the subject premises (R. 137).

Thereafter George and Leoda continued to live on the premises, Leoda managing and George helping in the

same manner up to the present time (R. 133-138). However, in November 1953 George was involved in an automobile accident as a result of which the creditors, Sizemore and Garrett and George suffered serious injuries (R. 138). Leoda Dunham, because of the extent of the injuries, recorded the aforesaid deed, which up to that time she had not recorded not believing it necessary (R. 72).

After the accident, George was left with serious permanent disabilities affecting his memory and speech (R. 138). Leoda and George from that time on to the present have lived on the property, Leoda has managed, George has helped, and additional lots have been sold, some in the name of both parties and some in the name of Leoda alone (R. 137, 138). Leoda continued, as in the past, to negotiate with the bank in the sale of the various lots applying the proceeds therefrom, as well as the proceeds from her business to the satisfaction of the mortgage (R. 104) (Ex. 15). Except for the mortgage, George had no debts when the executed the deed (R. 136, 137).

Mr. Tom Lefler at the Kamas State Bank handled all of the transactions, and had the mortgages and deed signed by both George and Leoda, although he knew of the execution of the deed prior to the accident (R. 98-105). This was to conform the documents with the record title according to the bank's attorney's instructions (R. 105).

### ARGUMENT

It is apparent that Appellant is contending that the trial court has made Findings and Conclusions contrary

to the evidence. However, Appellant does not point out any specific deficiencies in the evidence, but merely disagrees with the inferences and conclusions arrived at by the trial court based upon the evidence of the case. From the evidence Appellant draws his own inferences, contrary to those of the trial court, and seeks to have this Court affirm him in his beliefs. The brief is not so much one seeking redress of error in law, but one seeking retrial of the fact issues. Appellant's theory and argument in support thereof herein presented is patently contrary to the many rulings of this Court, some of which are hereinafter cited.

The following quotation from *Parrish v. Tahtaras*, 7 Utah 2d 87 is representative of the applicable rule of law:

"Since the court made findings and entered judgment based thereon, it is our duty to review the evidence in a light most favorable to the findings. In reciting the facts, therefore, we state them as found by the trial court so long as the record shows some competent evidence from which said findings could derive."

Again, as has been stated in *Rummell v. Bailey*, 7 Utah 2d 137:

"The rule of review of issues of fact is that all of the evidence and every inference and intent fairly arising therefrom should be taken in light most favorable to the finding made by the trial court. And if when so viewed there is substantial support in the evidence for the finding made, it will not be disturbed."



Other cases upholding this same principle are *McCollum v. Clothier* (Utah) 241 Pac. 2d 465; *Lawrence v. Bamberger Railroad Company*, 3 Utah 2d 247; *Fleming v. Fleming-Felt Company*, 7 Utah 2d 293; and, *Buehner Block Company v. Glezos*, 6 Utah 2d 226.

Appellant raises no questions of law in his brief, but rather attempts to construe the facts and the inferences arising therefrom according to his own theory of fraud. It must be recognized that from any fact situation, there might possibly be more than one inference. However, to have this Court now set aside the trial court's Findings, would be to hold that no reasonable minds would arrive at the same conclusions as did the trial court. Such a holding would appear unlikely under the evidence adduced at the trial.

#### POINT NO. I

#### THE FINDINGS OF THE TRIAL COURT ARE SUPPORTED BY THE EVIDENCE.

Appellant's Point No. I is general in nature and does not pin point any particular reversible error committed by the trial court, but merely makes an all inclusive charge as to the insufficiency of the evidence. However, as one reads through the entire brief, it becomes apparent, that appellant's entire appeal is based upon his disagreement with the trial court's inferences and conclusions derived from the evidence adduced at the trial. It is not a question of the insufficiency of the evidence as a matter of law. This is graphically demonstrated on pages 14 through 18, wherein appellant attempts to disprove the execution of the deed by parading before this court cer-

tain "badges of fraud." These badges are fraudulent, only because appellant makes such an inference from the facts. His own inferences then, are used by appellant to disprove uncontradicted evidence of the execution of the deed.

A. THE DEED WAS EXECUTED NOVEMBER 1, 1952.

Under the Pre-Trial Order and at the trial, the appellant first had to prove that the deed was not executed on November 1, 1952. Appellant's own witness, LaMar Duncan, as well as Mrs. Leoda Dunham and Thomas Lefler, all testified unequivocally that the deed was so executed, acknowledged and delivered on November 1, 1952. The evidence further showed without contradiction that the deed was given to Leoda because of George's serious heart attacks, and that the description was taken from a Tax Notice (R. 30-34, 94, 95, 102-105, 108, 134-137, 139).

Now, in this appeal, appellant wants this court to overrule the trial court's finding that said deed was so executed, by holding that there was no reasonable evidence to support such a finding, and because the inferences appellant draws from the badges of fraud completely overwhelm said uncontradicted evidence. An examination hereinafter of the so-called badges of fraud very clearly shows the reasonable basis of the trial court's findings. This examination also shows that the only basis for appellant's position is his attempt to impute dishonesty to attorney LaMar Duncan and to Mrs. Dunham, which accusations are as unfounded as are the appellant's general claims of "fraudulent intent" found throughout the brief.

## 1. GEORGE'S ASSERTION OF TITLE.

Mrs. Dunham negotiated and dealt with the Kamas State Bank regarding the various deeds, releases of mortgage, sales and application of the sales proceeds, all in connection with the various transactions involving sales of portions of the Property (R. 89, 92-102). There is no doubt but what George talked with proposed buyers and showed them around the property (R. 66). However, contrary to appellant's statement and after the deed was recorded, George Dunham did sign a deed (Ex. 11) and the mortgage (Ex. 11) was prepared by the bank for his signature (Ex. 14). One deed was executed by Leoda Dunham alone (Ex. 10). Mr. Lefler stated that the reason for the change in the form of the deed was that the bank's attorneys required the documents to be executed in accordance with the record title, and, of course, the record title would only have changed when the deed was recorded November 17, 1953 (R. 94-96, 139).

Other than the difference in the deed forms, prepared by the bank, the evidence shows no great change in the conduct of the parties after the deed was recorded as compared to prior thereto (R. 78-80). Leoda from first to last, paid for the property, managed the property, dealt with the bank and generally directed George in whatever he did either as handy man or as contacting people for the sale of lots. They lived together as husband and wife on the property all of the time. Can it be said that these facts show George's claim to ownership contrary to the lower Court's findings. I think not.

## 2. RECORDING PLAT.

Appellant makes a great deal out of the recordation of the subdivision plat. Plaintiff's witness, the County Recorder, however, testified that the mere fact that the stamp on the plat indicated that the document was recorded at the request of a person did not by any means indicate ownership (R. 130, 131). This is well understood by anyone who has recorded any documents in the County Recorder's Office.

## 3. PREPARATION OF DEED.

Is it really unusual, as argued by appellant, to have Mr. Duncan prepare the deed and to have the bank handle all of the other deeds wherein portions of the property were sold? Should not the bank prepare the deeds, handle the payments thereon, apply the payments to the bank's mortgage and make partial releases, all in connection with the bank's interest in the property under its mortgage (R. 89, 96, Ex. 15) and under an assignment of the lot sale proceeds?

## 4. CONTINUED POSSESSION OF PROPERTY.

Appellant claims that George Dunham retained possession after the execution of the deed. The record is clear that George lived at the tavern and worked on the property as a handy man from the time Camp Kilkare was purchased up to the present (R. ....). It would be unusual indeed, to require George to move away or to stop his work in order to negative fraud.

## 5. DEFENDANT'S CLAIMED ILLNESS.

Was the stroke suffered by George in October, 1952, merely a *claimed illness*, as is argued by appellant (R. 68, 135)? One only has to observe and talk with Mr. Dunham to understand his physical and mental capabilities, and the trial court had this opportunity of observation and appraisal. Should the respondents Dunham be expected to know the ramifications and legal consequences of joint tenancy, as is argued by appellant? Again, an observation of Mr. and Mrs. Dunham, their appearance, demeanor, personality, character and testimony would clearly answer this question (R. 68). Notwithstanding the trial court's appraisal of the parties, appellant now maintains that the lower court's opinion as to the parties' testimony is clearly erroneous, and, in effect, argues that the trial court should not have believed George and Leoda Dunham in their respective testimonies, and as a matter of fact, should not have believed any of the other witnesses, excepting as to testimony in favor of appellant.

## 6. THE ADEQUACY OF THE PROPERTY DESCRIPTION.

The description on the November 1, 1952 deed was given to Mr. Duncan by Mrs. Dunham from a Tax Notice (R. 71). Appellant surely realizes that the property description on a Tax Notice gives the absolute minimum by way of descriptive terms, and admittedly does not include water rights or other similar types of appurtenances. Appellant nevertheless argues that the use of the abbreviated description when compared with the original

description on the Kirkpatrick deed, which included water rights, graphically points up fraud on the part of the defendants.

#### 7. MR. LAYTON'S STATEMENT.

Again the trial court's interpretation of and reliance upon the testimony of a witness is challenged by appellant. Admittedly, Mr. Layton was not clear in pin pointing the date upon which Mr. Dunham informed him of the deed to Mrs. Dunham. At one point, Mr. Layton indicated his conversation was immediately following his acquisition of his first lot at Camp Kilkare, sometime in the Fall of 1953 (R. 147, 148). At another time, Mr. Layton indicated that this conversation was at least a year before the accident (R. 150). The latter testimony would be consistent with the date of the execution of the deed and the former testimony would be inconsistent. The trial court chose to disregard the inconsistency in the testimony (R. 155). Again appellant attempts to argue that the trial court had no right to either believe or disbelieve the testimony or portions of the testimony of the witness.

#### 8. GEORGE DUNHAM'S UNCERTAINTY.

Mr. Dunham was himself frank to admit that he could not recall the exact circumstances under which the deed was executed. Such uncertainty is entirely consistent with Mr. Dunham's generally clouded memory and physical defects arising not only from his stroke but from the serious injuries resulting from the accident (R. 19, 28). Again the trial court had the opportunity to hear the testimony and to evaluate the weight and accuracy thereof. Certainly

such frankness is not indicative of an intent by Mr. Dunham to falsify the execution date of the deed. It is for the trial court to draw the inferences from the testimony and it is not for appellant nor for the writer here to attempt to negative the inferences so drawn.

Is it fair and reasonable to now state that the above separately stated matters from 1 to 8, are "badges of fraud"? Is not each circumstance susceptible of a reasonable inference of rationality, reliability and bona fides? Was not the trial court justified in inferring from these facts that the deed had been executed on November 1, 1952?

None of the inferences drawn by appellant from the foregoing facts even remotely negative the unquestionable execution of the deed. There is reasonable justification for all these matters, completely untainted with fraud.

#### B. STATUTORY PROVISIONS RELATING TO FRAUD.

At Page 19 of appellant's brief, appellant assumes as a matter of argument that the deed was executed on November 1, 1952, and then contends that notwithstanding said execution, there is actual fraudulent intent which brings the conveyance under Section 25-1-7, *Utah Code Annotated*, 1953. It is clear that said section requires "actual intent . . . to defraud either present or future creditors . . ." This section prohibits the finding of intent based upon a presumption. Appellant, however, although he calls this actual intent, is suggesting by innuendo and inference a fraudulent scheme on the part of the re-

spondents. Certainly there can be no suggestion from the evidence, or any reason for such a suggestion, that fraud was intended against any present creditors on November 1, 1952. There simply were no present creditors at that time, other than a few minor current bills owed by Leoda Dunham (R. 136, 137). The note and mortgage in favor of the bank was admittedly in existence, but ample security existed to cover the obligation and such a creditor under the circumstances could hardly be classed as a present creditor of George Dunham (R. 141). The various conveyances from time to time and the payment to the bank of the proceeds therefrom certainly indicate nothing by way of insolvency or fraudulent intent against present creditors. Mr. Dunham's ill health was and is the reason for the execution of the deed November 1, 1952.

Furthermore, there is no evidence whatsoever indicating the possibility or probability of future creditors on November 1, 1952. The accident very obviously was not anticipated. Mrs. Dunham had been operating Camp Kilcare for several years, had applied the proceeds from the business to pay off the mortgage and to pay the current expenses. There is absolutely no factual basis for argument that there was actual intent to defraud any future creditors. It would seem quite elementary in showing actual intent to defraud that the defrauding party have at least some suspicion or anticipation of the existence of some future creditors who would be subjected to the fraud; or some scheme to defraud future



creditors generally. Such a showing is manifestly lacking in this case.

This general rule is stated in 24 *Am. Jur.* 285:

“Whereas the familiar indicia or badges of fraud may in many instances be relied on by an existing creditor as establishing a case for the granting of relief, it is not sufficient for the subsequent creditor to make out a case of merely constructive fraud, founded on such facts as lack of consideration or insolvency on the part of the transferer; he must establish fraud in fact or actual fraud, and he must assume the burden of proof in this respect.”

Appellant further cites as evidence of the actual intent to defraud, the various “badges of fraud” hereinbefore discussed and from these facts attempts to infer actual intent. This inference the trial court did not find and such inferences could not support a finding of actual intent, in any event.

Appellant cites Section 25-1-4 and charges that a conveyance under this section rendering the person insolvent is a fraudulent conveyance. There is no evidence in this case to indicate the insolvency of Mr. Dunham in November of 1952. Mrs. Dunham testified that George had no debts. The record does show, however, a mortgage. It would be strange indeed were we to say that a mortgagor renders himself insolvent when he conveys property encumbered by a mortgage by reason of fact that the mortgage note still remains in his name. Such a conception of the law of insolvency completely ignores the purpose of a mortgage and the place that the security

takes in the foreclosure of the mortgage indebtedness. The property was more than adequate security for the mortgage as is evident by comparing the original purchase price with the amounts of the mortgages. There is no evidence to indicate a possible deficiency against the defendant, George Dunham. As a matter of fact, all conveyances of the property in the various parcels resulted in payments on the mortgage and Leoda Dunham herself made mortgage payments out of the income from the property. Under these facts, wherein lies insolvency?

The matter of consideration is raised in appellant's brief in discussing Section 25-1-4. It is clear that the down payment was made by Leoda Dunham from her own money. It is further clear that the payments on the mortgage, the proceeds of which were used to pay the Kirkpatrick contract, all came from the income from Camp KilKare and from the sales of portions of the land.

In the case of *Schreyer v. Scott*, 134 U. S. 955, a case on all four's with the present one, the United States Supreme Court held that where the original consideration is paid by one spouse and the balance of the contract payments are from the proceeds realized from the property, the full consideration is determined to be that of the spouse contributing the down payment and the other person has no interest in the property. The court further held that under these facts, a conveyance from the husband to the wife of his legal interest, whatever it may be, is supported by consideration. See also *Horbach v. Hill*, 112 U.S. 144; *McDonald v. Dewey*, 202 U.S. 529; *Lumpkin v. McPhee*, 286 P.2d 299 (N. Mex.).

There was no evidence in this case indicating that these payments were not made as testified to and it is difficult to infer from this evidence that there was no consideration. The trial court did not make such a finding and if this court now so holds, it would be to disregard the well accepted principle of law that all inferences arising from the evidence must be construed in favor of the trial court's Findings of Fact.

Therefore, under Section 25-1-4, appellant can neither show insolvency nor inadequate consideration. Even if these elements were present, appellant would only have shown constructive fraud, rather than actual fraud, and under the above authorities, as well as the Utah Statutes above cited, constructive fraud is not sufficient to enable a subsequent creditor to prevail.

## POINT II

FINDINGS OF FACT NOS. 4, 5 AND 7 ARE SUPPORTED BY THE EVIDENCE AND THE LAW.

The only new matter raised under Point II involves a question of the adequacy of the consideration passing from Leoda Dunham to George Dunham in connection with the November 1, 1952 deed. Appellant states that there is no evidence to support Findings of Fact Nos. 4, 5 and 7, and that, therefore, there is no pre-existing consideration passing from the grantee to the grantor.

It is readily apparent in the Findings of Fact that Paragraph No. 4 relates to the consideration paid by Leoda Dunham to Carrie Kirkpatrick, and to the application to the purchase price of the proceeds from the lot

sales. As has been previously indicated, Leoda Dunham was the owner of the property, took care of the property, thereafter sold the property, and George Dunham had no interest therein, other than a legal interest as shown on the record title. The evidence as to the payments by Leoda Dunham sufficiently support Finding of Fact No. 4, independent of the consideration question, and also support a finding of consideration, were such a finding necessary. See *Schreyer vs. Scott*, supra. However, consideration is not here necessary to sustain defendants' position. The mere fact that the deed is not supported by consideration does not make a fraudulent transaction. There must be other indications of fraud, including insolvency, sufficient to show actual intent to defraud future creditors. These matters have been presented heretofore in respondent's brief.

Our court has stated in *Smith v. Edwards*, 81 Utah 244, that:

“A conveyance without consideration is voluntary, but not for that reason alone fraudulent.”

The court indicates there must also be insolvency, the burden of proof of which must be borne by the creditor seeking to set aside the conveyance. The Court therein adopts the definition of insolvency set forth in Title 25-1-1, Utah Code Annotated, to-wit:

“A person is insolvent when the present fair saleable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.”

George Dunham, as found by the trial court, had no interest in the property, other than a legal interest, prior to the execution of the deed. There is no evidence whatsoever from which one could infer that the execution of the deed rendered George Dunham insolvent. Any obligation he had was secured by the mortgage against the property and under the definition above set forth, there would be no amount required to pay his liability as the debt became absolute and matured. There is no evidence whatsoever to indicate that the property was not completely adequate to secure the debt and the burden was on the plaintiff to show that to be a fact, if such be the case. The facts to the contrary show that the mortgage was periodically reduced by the payments from the business and from the sale of the lots.

Appellant relies at great length upon the case of *Paxton v. Paxton*, 80 Utah 540, in support of the proposition that mere oral testimony between relatives will not sustain a finding that there was past consideration for the execution of this deed. Appellant quotes at Page 23 from this decision, but very conveniently omits a portion of the quotation indicating that the court had other facts before it upon which the decision was based. The omitted portion of the quotation is as follows :

“On the contrary, there are a number of facts disclosed by the evidence which tend to show that the mortgage was executed for the purpose of preventing the Walkers from collecting the amount owing to them by Anthony and Ida Paxton.”

The court, in the Paxton case, was not concerned merely with the lack of consideration, but also found other facts,

indicating the actual fraudulent intent of the grantor insofar as existing creditors were affected. Thus the Paxton case is clearly distinguishable in many respects.

#### POINT III

APPELLANT RAISES NO NEW MATTER UNDER THIS POINT THAT HAS NOT BEEN ADEQUATELY DISCUSSED ABOVE.

#### POINT IV

THERE WAS NO ERROR IN THE TRIAL COURT'S RULNG AS TO THE TESTIMONY OF MR. DUNCAN.

This Point relates to a portion of the testimony of Lamar Duncan a witness of Appellant. During the course of Appellant's counsel's examination of Mr. Duncan, said counsel undertook a long series of questions, apparently intending to test the memory of Mr. Duncan relating to certain stipulations in a prior case, involving Respondents. (R 35-38). Objection was made for the reason that said questioning concerned the contents of the stipulations, without giving Mr. Duncan the opportunity of examining them when said stipulations were in Court in the possession of Appellant's counsel. Said objection was sustained and the Court directed counsel for appellants to continue his examination (R. 38). There was no motion to strike any testimony, but merely an objection as to the type of questions being asked. The stipulations were present and should have been used by Appellants counsel, as the best evidence of their contents.

An examination of the pleadings and of the record on the Motion To Strike certain other affidavits filed

in the case, (R. 158-175), shows that said affidavits and stipulations in question would have added nothing to the case and certainly indicate nothing to show the untruthfulness of any testimony of Mr. Duncan relative to the issues of the case.

It is apparent that counsel for Appellant has at pages 30-32 of his brief misinterpreted the rulings of the trial court in this matter. The trial court did not strike the testimony of Mr. Duncan at all, but sustained an objection because the questioning was improper in asking Mr. Duncan to recall from memory the contents of a document which Appellant's counsel had in his possession.

There is manifestly no error in this regard, much less do we have reversible error committed by the trial court.

### SUMMARY

The execution of the deed from George to Leoda Dunham can not be challenged by showing inferences of fraudulent intent. The execution of the deed on November 1, 1952 is an uncontradicted fact and such a fact is not buried by an avalanche of innuendoes. The deed was executed and delivered and under the pre-trial order the Appellant failed to clear the first and most important hurdle in his case by showing that said deed was not so executed.

Since the facts show without question the execution of the deed, the other matters concerning failure of consideration, insolvency and similar 'badges of fraud' need

not be considered. It is clear that for a subsequent creditor to overthrow a prior conveyance upon the grounds of fraud, he must prove clearly and convincingly an actual fraud on the part of the grantor. Badges of fraud, inferences of fraud or constructive fraud are not enough. Our statute and our case law clearly uphold this rule.

Here, however, there are not even "badges of fraud." There was consideration, there was no insolvency, and the other "badges" such as insufficient descriptions, failure to record and the like was merely misinterpretations of the evidence by appellant.

The trial court had ample and reasonable evidence to support its Findings of Fact and Conclusions of Law, and the Supreme Court should give all reasonable inferences in favor of such findings.

The trial court should be affirmed in its Findings of Fact, Conclusions of Law and Judgment.

Respectfully submitted,  
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