

1960

James L. Barker, Jr. v. George R. Dunham and Leoda Dunham : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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UNIVERSITY UTAH

IN THE SUPREME COURT OCT 14 1959

of the

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STATE OF UTAH

FILED

OCT 14 1959

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.

Clerk, Supreme Court, Utah

Case No.

9012

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

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STATE OF UTAH

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9012

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF
PETITION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF THE
STATE OF UTAH:

GEORGE R. DUNHAM and LEODA DUNHAM,
defendants and respondents, respectfully request a re-
hearing in the above-entitled cause upon the following
grounds:

POINT I.

THE COURT HAS MISINTERPRETED THE RECORD.

POINT II.

THE COURT HAS FAILED TO FOLLOW PRINCIPLES GOVERNING EQUITY APPEALS.

POINT III.

THE COURT HAS FAILED TO SUSTAIN ITS FINDINGS BY CLEAR AND CONVINCING EVIDENCE.

Respondents respectfully submit that on each of the above grounds, the error of this court was decisive in its decision reversing the trial court.

CLYDE & MECHAM
ELLIOTT LEE PRATT
Attorneys for Respondents

BRIEF IN SUPPORT OF PETITION

POINT I.

THE COURT HAS MISINTERPRETED THE RECORD.

Under equity rules, this Court is entitled to examine the evidence and to determine both factual and legal matters on appeal. This Court in so doing has made completely new findings of fact, contrary to those of the trial court. In this re-examination, however, this Court has misinterpreted the testimony of Leoda Dunham. The only procedure which Respondent now has for pointing out this error is by a Petition for Rehearing, wherein the Court will have the opportunity to re-evaluate the evidence.

This Court has found that the defendants' witnesses, attorney LaMar Duncan, Thomas Lefler, Cashier of the

Kamas State Bank, and also Leoda Dunham, defendant, have testified falsely with reference to the execution of the deed. In order to reach this conclusion, the Court strongly relies upon the alleged testimony that Leoda Dunham placed the property in joint tenancy because of her serious illness, that she, therefore, knew of the legal effects of joint tenancy and would have no reason for placing the property in her own name. SUCH IS NOT A REASONABLE INTERPRETATION OF THE RECORD.

The relevant paragraph of the Court's opinion is quoted below with the incorrect fact statements italicized:

"A very strong reason for believing that the deed was made after the accident and not at the time it is dated *is the fact that there is no reason whatever shown for making such a deed at the time it was dated.* This is equally true whether or not her claim is correct that she paid for the property out of her own separate funds. *For until the accident in which the creditors were injured occurred there was no reason for making the transfer and none has been suggested. She testified that although she paid for the property out of her own separate funds, she had it conveyed to her and her husband jointly because (1) she had ulcers of the stomach and if anything happened to her she wanted him to get the property; (2) it is customary for husband and wife to hold their property as joint tenants; and (3) she had no head for real estate so she turned it over to him,* and the fact that he was drinking heavily at that time gave her no concern. *The fact that she said she placed the property in joint tenancy so he would get it if anything happened to her indicates that she knew that the survivor of joint tenants would get the property on the death of*

the other. If his heavy drinking was no concern to her, and she felt it safe to put her property in joint tenancy with him, then there was no reason to have him deed the property back to her merely because he had a heart attack. *Because if he died, she knew that as a joint tenant she would become the sole owner of the property upon his death.* The only excuse she gives for making this deed was her fear that he would have a heart attack and die. She does not claim that she had any fear that his drinking might cause an accident and make him liable to creditors, or that he might wrongfully encumber the property. *So under her own understanding of joint tenancy there was no occasion whatever for making the deed to her at that time."*

To the contrary, the only evidence is Leoda Dunham's testimony to the effect that she had the property placed in George Dunham's name *alone* because of her illness. I quote below the applicable portions of the record: (R. 64, 65)

"DIRECT EXAMINATION, cont'd.

"By Mr. Cassity:

"Q. Mrs. Dunham, isn't it true that before the referee in bankruptcy that you testified that the uniform real estate contract under which you first took the property from Mrs. Kirkpatrick was placed in your husband's name, Mr. Dunham, alone, no other name being on it?

"A. I don't remember that issue coming up about the real estate contract.

"Q. Do you remember, Mrs. Dunham, stating that—upon being questioned that the reason you had it put in your husband's name at

that time and his name alone was that you were ill?

“A. I remember telling you down there that I was ill.

“Q. And did you state that — further that your illness consisted of bad ulcers?

“A. That’s right.

“Q. Now, do you remember that you did put it in your husband’s name alone originally?

“A. If I did, it was because of my illness at that time. I was very ill with ulcers at that time.

“Q. So that when it was originally purchased, your husband’s name alone was on the contract of sale. Is that not true?

“A. Well, I don’t know for sure whether it was or not, it has been so long, but I know that I was sick, and if his name was on there alone, that would be the reason for it.

“Q. Do you remember this question being asked: ‘What was the reason the title was put in your husband’s name?’ And your answer said, ‘I had ulcers of the stomach, and I was very ill?’

“A. I remember that, yes.

“Q. Do you remember the question, ‘Did your physician expect those ulcers to be fatal?’ And you said, ‘I don’t know. I didn’t know at any time what would happen. I was really sick?’

“A. That’s right.

“Q. And then you were asked, ‘How long were you ill?’ And you answered, ‘I still have them ever since 1929 continuously since that period?’

"A. That's right.

"Q. Do you have any other explanation for putting the property in his name after it was purchased alone the first time?

"A. No Sir."

(R. 67, 68)

". . . Q. Now, going to that experience wherein that took place, I refer you back to this question that was asked which you said was your answer that you had very bad ulcers back in 1929, and that was the reason you put the property in Mr. Dunham's name in the first place and that you have had very bad ulcers ever since.

"A. Yes, they had been bad but not nearly as bad as they were before because I have watched my diet considerable.

"Q. I see, Now, did anybody ever explain to you what joint tenancy means?

"A. Well, not fully, no.

"Q. Do you have any reason why the property was taken from your husband's name and put in your name and his name? Did you have some reason for that that you can recollect?

"A. Well, no, not other than that I was ill. That's the only reason that I remember, and that he was more capable of doing it probably than I was at that time.

"Q. I am speaking of the time when the property was put in both your names, taken from his to both your names.

"A. Will you repeat the question?

"Q. Pardon?

"A. Will you repeat the question then, please. I misunderstood.

"Q. Do you remember what your reason was for doing that?

"A. What my reason was for having it in joint tenancy?

"Q. Yes.

"A. The only reason I can say is I think it is customary for husband and wife to have those things done in their two names isn't it? I have always understood. I know my mother and father used to anything like that they have.

"Q. Now, what was the reason that you put the property from both names into just your name?

"A. Mr. Dunham's illness.

"Q. And what did that have to do with it?

"A. Well, he was—he has a very bad heart, and be blacked out several times. In fact, one Sunday he blacked out several times, and he was under surveillance of the doctors, under Doctor Nuttall, and he had frequent heart attacks, blacked completely out.

"Q. Did this worry you with respect to the property?

"A. Yes, it did."

Therefore, it is very clear and uncontradicted that Leoda Dunham had the property placed in her husband's name originally in 1944 because of her serious illness. It was later placed in joint tenancy in 1951 because she thought it customary to have property in the name of the husband and wife, since that was how her mother

and father held their property. She then had it transferred to herself alone and out of the joint tenancy when she believed that George's death was near. In other words, one reaches an exactly opposite conclusion from that of the Court. There *was* a reason to have the property placed in her name in 1952, i.e., George's possible death, which reason was consistent with her reason for putting the property in George's name alone in 1944.

The statements I have italicised in the Court's opinion are not supported by the evidence and the Court should not reasonably infer that Leoda Dunham knew she would become the sole owner of the property under a joint tenancy upon the death of George. She had no such understanding of joint tenancy and, the Court erred in so holding. Should we not, therefore, rely upon the evidence set forth in the record as heard and observed by the trial judge? If this Court's "strong reason" for disbelieving the defendants' witnesses is now abandoned, there is no basis for the Court's opinion. There certainly is clear and convincing evidence that the deed was executed. It is not equitable to deprive Leoda Dunham of her property upon such a misinterpretation of the evidence.

Again on Page 3 of its opinion, the Court relies upon a missappraisal of the record, by stating in the third paragraph:

"Shortly after the deed from Mr. Dunham to Mrs. Dunham was recorded on November 27, 1953, another mortgage was made by the Dunhams to the bank, dated April 12, 1954. In this mortgage her name is first, and only Mrs. Dunham signed this mortgage. No reason whatever is given why

the cashier of the bank took a mortgage from Mr. Dunham with his name appearing first on the mortgage at a time when he knew that he had deeded away all of his interest in the property."

Contrary to this statement, the record, at Page 97, 98, shows the following:

"Q. Now, just a moment. Didn't you say that Mr. and Mrs. Dunham signed this mortgage?

"A. Yes.

"Q. Now you are saying that you loaned it to Mrs. Dunham?

"A. The property at that time was in both names.

"Q. Did you see the—yes. Now, who did you loan the money to?

"A. Well, I loaned it to Mrs. Dunham. She generally does all the speaking.

"Q. Is she the only wife of all the husbands and wives that deal with you that deal for the husband?

"A. Many of the wives do.

"Q. Then how is it that you think you loaned the money to Mrs. Dunham when you made both of them sign the mortgage?

"A. Because I have to have both of them sign the mortgage at that time when it was in both names.

"Q. But you think you loaned the money to Mrs. Dunham?

"A. Yes sir. She was the spokesman. I don't know what they did before they came, but she does all the talking when she comes into the bank.

"Q. Now, Mr. Lefler, you say that you understand — you understood that though you loaned the money after both of them signed the mortgage, you understood that they had a deed which put the property in Mrs. Dunham's name?

"A. I knew of it, yes. She had told me of it.

"Q. Did you see it?

"A. No. . ."

(R. 100, 101)

". . . Q. In other words, simply because she claimed she owned the property didn't disturb you?

"A. I follow the records of the county.

"Q. So you didn't rely on her statements?

"A. Not necessarily. If our attorney gives us his opinion that the title is clear and corresponds with our note, that is all we ask for.

"Q. Now, let me ask another question. You prepared a mortgage a month or so before the accident which both Mr. and Mrs. Dunham executed, the property being found by your abstractor to be in the names of both. Is that true?

"A. That's right.

"Q. Then just a matter of a few months after that when the property was recorded in the name of one of the parties, you executed a new mortgage which again you had both parties sign. What was the reason for that?

"A. As I stated before, we had them sign because we don't want to take any chance of any prior lien that may be in the case of the husband, although the wife does have the

right to own property. Many cases we have the husband sign.

"Q. Yes, but you have already pointed out that he had already signed. What was the purpose in him signing twice?

"A. What I say, we recorded this new one to bring it in line with the records of the county.

"Q. And you wanted a new mortgage after the new deed had been recorded. Is that it?

"A. Yes.

"Q. But you still wanted Mr. Dunham to sign it?

"A. We had him sign it, yes, for our protection. ."

The record, at Page 105, shows the following:

". . . Q. Well, now, Mr. Lefler, isn't it contrary to your practice as a bank official to have somebody come to you and ask for a mortgage and tell you that the property is recorded in two names but actually belongs to another person, one of those two persons individually, is that your practice to loan money under those circumstances?

"A. It's—can I answer that in my own way?

"Q. Yes, please.

"A. In approaching individuals for loans, we take the application, we submit it to the attorney and abstractor, they determine whose name the property has and is recorded. Then it comes back to us with that information. We proceed, and we get the mortgage with those signatures, those people giving the mortgage.

"Q. In other words, it doesn't matter whether the applicant for the loan told you — you answer this 'yes' or 'No' — it doesn't matter

to you what they tell you; the only thing you go by is by the record. Is that true?

“A. Both.

“Q. Weren’t you concerned at all about her telling you that it was her property alone when you loaned her this money?

“A. I think we are protected by the records of the county.

“Q. So you weren’t concerned then. Is that it?

“MR. PRATT: I object to that, Your Honor.

“A. I don’t remember.

“MR. PRATT: That is not what he testified to.

“MR. CASSITY: I am asking him to say ‘Yes’ or ‘No’. He didn’t answer my question.

“THE COURT: I think he can answer it ‘Yes’ or ‘No’.

“Q. Were you or weren’t you?

“A. We are always, yes, we are concerned, sure.

“Q. Why did you loan the money if you were concerned?

“A. I don’t recall the details of it, but I do know that I checked with the abstracter. If it was her’s or whose it was or both of them signed at that time, it would be all right. . .”

Mr. Lefler testified above to the effect that he relied upon the record title, which procedure was and is well accepted as a matter of proper legal and practical dealing with real property. Also, he testified in the answer to the last question above, to the effect that whether it was

her's or George's property by reason of the unrecorded deed, both had signed the mortgage and it was, therefore proper. In view of this testimony, it is not reasonable for this court to say that "no reason whatever" is given for Mr. Lefler's action in handling the mortgage transaction in this manner.

The foregoing misinterpretations of the evidence, i.e., the joint tenancy problem and the mortgage problem, are major joints of reliance by this Court in rendering its opinion. This incorrect factual basis should not and cannot exist as an equitable foundation for an opinion, which deprives Leoda Dunham of her property. For this reason and because there are additional errors in the record citation, this Court should reconsider this case and the evidence. This rehearing is the only procedure available to Petitioners whereby review can be had of this Court's alleged errors in its equitable fact finding.

POINT II.

THE COURT HAS FAILED TO FOLLOW PRINCIPLES GOVERNING EQUITY APPEALS.

This Court, in its opinion, has completely disregarded its duty, as enunciated in its prior decisions, to give credence and dignity to the trial court's findings. This Court has repeatedly held that on appeal, it must strongly consider the trial court's opportunity to see, hear and appraise the witnesses as they testify. Particularly is this rule applicable where the evidence consists primarily of the oral testimony of the witnesses.

The more recent cases and some of the statements of this Court setting forth this rule are cited below:

Walton v. Koffman, 110 Utah 1. The Court states:

“As above stated, this is an equity case, (cases cited). It is, therefore, our duty to carefully examine the record and make an independent determination of what the facts are. In so doing, we should keep in mind that the trial judge saw and heard the witnesses and observed their demeanor and was acquainted with the circumstances surrounding the giving of their testimony, and, therefore, was in a better position than we are to weigh and evaluate their evidence. (cites concurring opinion of Mr. Justice Wolfe in *Stanley v. Stanley*, 97 Utah 527, 94 P. 2d 465).”

I quote from said concurring opinion:

“In short, as held in *Wilcox v. Cloward*, 88 Utah 503, 56 P. 2d 1, if after we review the record we can not say that the court came to a wrong conclusion, we should affirm. We do not reverse if we find the court’s findings supported by a fair preponderance of the evidence, or if supported only by a slight preponderance or if the evidence is evenly balanced, or even if there is in the record a slight preponderance the other way, for the reasons above set out.”

The reasons above set out are in part as follows:

“Our duty is to make an independent examination of the record. If after that, we find (1) the preponderance of the evidence supports the trial court’s findings of fact; or, (2) if there is doubt in our minds as to where the preponderance lies, or (3) we think the evidence as revealed by the record may slightly preponderate against its conclusions but such preponderance may well be offset in favor of his conclusions by having seen the witnesses and been able to judge by their demeanor as to their credibility, then we will not reverse. . . .”

In *Nokes v. Continental Mining and Milling Company*, 6 Utah 2d 177, 178, this court, through Justice Crockett, states the following:

“[1, 2] This being a case in equity, it is our responsibility to review the evidence. In doing so it is well to have in mind the general pattern as to the scope of such review as set out in prior adjudications in this court. Where there is a conflict in the evidence, the finding of the trial court will not be disturbed if the evidence preponderates in favor of the finding; nor, if the evidence therein is evenly balanced or it is doubtful where the preponderance lies; nor, even if its weight is slightly against the finding of the trial court, but it will be overturned and another finding made only if the evidence clearly preponderates against his finding.

“[3] The rule just stated is based upon the sound reasoning that some credit should be indulged in favor of the findings of the trial court because of the advantages peculiar to his position in immediate contact with the trial. It is indeed often true that, ‘the manner hath more eloquence than naked words portend.’ There are intangibles of expression and attitude which give color and meaning not apparent from words alone. The trial judge feels the impact of the personalities of the parties and the witnesses: He is able to observe their appearance and behavior; their forthrightness or hesitancy in answering; their frankness and candor, or lack of it. Similarly revealing to him are indications of surprise, anger, resentment or vindictiveness, pleasure or other emotions which may be discerned from expressions of the countenance or voice. He also has some advantage in appraising their abilities to understand and their capacities to remember. Furthermore, he is in a position to question the witness himself to

clarify doubtful points or verify his impressions on the matters just mentioned. All of this combines to afford him better insight as to the truthfulness of the testimony offered than does a perusal of the cold record. It is a sound and well recognized policy of the law to repose some confidence in the verity of the actions of the trial court, and not to interfere with them unless it clearly appears that he is in error."

Again, in a more recent case, *Child v. Child*, 8 Utah 2d 261, 332 P. 2d 981, this court again, through Justice Crockett, says:

"[2] Passing upon the credibility of witnesses involves to some extent the judgment of what goes on in the minds of others and is therefore fraught with uncertainty. Whether one believes a witness is telling the truth often depends as much or more upon the impression the witness is making as upon the words he says. His appearance and demeanor, his manner of expression and tone of voice, his apparent frankness, or candor, or the want of it; his forthrightness in answering, or his tendency to hesitate or evade, and in fact his whole personality go into the composite effect of the testimony. This is so even though the hearer may not be paying particular attention to nor separately evaluating such factors. In addition to the personality aspects involved in the interpretation and evaluation of testimony, there are also difficulties to be encountered because of the uncertainties found in fact situations themselves which must be correlated to the testimony of the witnesses. We have heretofore pointed out the trial court's advantages in judging the credibility of witnesses and determining the facts. It is due to these considerations that it is firmly established that passing on such matters is exclusively within his province. . . ."

“ . . . [6-8] It is not required that the trial judge's view of the evidence be that which the justices, or any particular justice, of this court would have taken of it. There is the practical necessity of making allowance for his advantaged position and indulging some latitude for his personal reactions and reasoning with respect thereto, even though they may not fit the exact pattern of our own. In reviewing the appraisal he makes we can only apply the standard of reasonableness, as it appears to us: this entails application of a rule that is admittedly, but necessarily, not as precise as might be desired: if the evidence in favor of his finding appears to be such that reasonable minds acting fairly, reasonably and in good conscience could regard it as being clear and convincing, as the ordinary meaning of those words imply, the finding should not be disturbed. Inasmuch as the burden rests upon the defendants to demonstrate that the trial court was in error, the findings and judgment should not be disturbed unless we can say affirmatively, and with some degree of assurance, that there is no reasonable basis in the evidence upon which he could fairly and rationally have thought that the requisite degree of proof, i.e., by clear and convincing evidence, was met. . . ”

Our case is a most graphic example of the necessity for strict adherence to this rule. Here all of the material evidence concerning fraud, the execution of the questioned deed, etc., is by oral testimony. Mr. Duncan, the attorney, Mr. Lefler, the banker, Leoda Dunham, one of the defendants, and George Dunham, the other defendant, all testified. The trial court heard and observed these witnesses as they testified and chose to believe the first three witnesses, giving little weight or emphasis to the testimony of George Dunham. The trial court ob-

served the demeanor of the defendant, George Dunham, and the many statements wherein he was vague or could not remember details (R. 15-17). The following portions of the record are fairly representative of the situation presented to the trial court as Mr. Dunham testified:

Record, Page 19:

“ . . . A. I am sixty-two, Your Honor. I’m not trying to foul up the court, Your Honor. Since that accident I don’t remember some of these things, Your Honor. I’m not trying to foul up anything.

“THE COURT: You were hurt yourself?

“A. I was hurt, and I have a blood clot, and in the summertime it knocks — looks at my hands, broken, every time I fall. I can’t help it. I just don’t remember those things. . .”

Record, Page 28:

“THE COURT: Now, let me interrupt enough to say this, that I don’t believe this witness’s memory according to him is sufficient to hold Mr. Duncan longer. If you wish to put Mr. Duncan on the stand, you may withdraw this witness to put him on. . .”

Record, Page 138:

“ . . . Q. In the management of the property up there, just what specifically has George done throughout the years?

“A. George helps out with a little repair work. He sells a few bottles of beer. He isn’t able to do much. He was so badly crippled that he’s not been able to do much, and he was sick before that with a heart condition.

“Q. When you say ‘crippled,’ in what way is he crippled?

“A. Well, his hip is completely gone, and his left arm is completely demolished, and he had all of his jaws broken, jaws broken on both sides of his face, and nearly every bone in the body, I suppose the greater majority was broken.

“Q. And when did this happen?

“A. That was on November 8, 1953. . .”

Record, Page 51:

“... THE COURT: I have a question, sir. Were you in the hospital after you were in an accident?

“A. Yes Sir.

“THE COURT: How long were you in the hospital?

“A. Oh, off and on for three and a half years. . .”

The foregoing excerpts from the record do not show a witness upon which this Court should rely — whose testimony could be considered “clear and convincing” evidence that the deed was not executed. Nor can he be deemed reliable, when, within two months after trial, he shot Leoda Dunham, her mother and brother at Camp Killkare and is now committed to the State Mental Hospital. The trial court did not think the testimony was reliable and counsel for defendants did not think so and did not call Mr. Dunham as a witness nor cross-examine him. Mr. Dunham’s disabilities are apparent to all who observe him in his actions and speech.

This Court apparently ignores these matters and

places great emphasis on the statement of George Dunham, "it could very well be." At Page 3 in the first full paragraph, the opinion states in part:

"... Then in answer to the question: '... Isn't it true that Mr. Duncan brought this (the deed) 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? ... Isn't that the place and the time that you signed this document .. ?' He said: 'It could very well be.'

The Court relies upon this statement even though in the testimony immediately preceding and immediately after said statement, Mr. Dunham states that he does not know where or when he signed the deed.

A more patent disregard of the trial court's appraisal of the witnesses would be difficult to find. Since there is no review of this court's findings, other than by this Petition for Rehearing, it is equitable and in harmony with this Court's prior rulings to follow the trial court's appraisal of the individual characteristics of the witnesses and the manner in which they testified.

This Court makes inference after inference of fraud based upon portions of the testimony which it finds inconsistent or which it believes is questionable because of the veracity of the witnesses. All of these inferences are contrary to the trial court's findings and nowhere is any consideration given to the trial court's more favorable opportunity to observe the witnesses. Some of the more obvious of these instances are hereinafter mentioned:

(a) In paragraph 1, page 2 of the Opinion, the

Court relies upon the testimony of Mr. and Mrs. Dunham, indicating the income each was making. At the same time, testimony of these witnesses indicating that Leoda purchased the property while George drank up his wages, was completely rejected. This later is the only testimony to show how the property was purchased and this Court gives it no weight. (R. 24, 60)

(b) In paragraph 2, page 2 of the Opinion, the Court recites that various deeds and mortgages were executed by both George and Leoda Dunham, that the sales of the properties were largely negotiated by him and that he never suggested to any of the purchasers that Leoda was the owner of the property. The Court then concludes that these actions indicated George was at least an equal owner with Leoda in the property. The Court makes this conclusion notwithstanding the extensive testimony of both Leoda Dunham and Tom Lefler indicating that Leoda was the person who handled the property, that George was given the right to negotiate in some instances, that the record title required the execution of the deeds and mortgages by both George and Leoda. (R. 66, 72, 75) All of this testimony by Leoda Dunham and by Mr. Lefler is completely rejected apparently upon the basis that the witnesses' credibility is challenged by this Court. There is no other evidence controverting this testimony.

(c) In paragraph 2, page 3 of the Opinion, the Court sets forth as a "doubtful circumstance" the inference that since all of the deeds and mortgages, other than the deed in question, were drawn by the bank's officers, the deed in question was not executed prior to

the accident. Again, this Court has completely rejected the testimony appearing at Pages 89, 94, 95 and 139 of the record, wherein Leoda Dunham and Mr. Lefler, in great detail, explain that all of the money went to pay the mortgage at the bank because of assignments it held and that the bank prepared all of the various documents, having a substantial interest in the closing of each transaction. It certainly is more reasonable to accept such testimony than to ignore it or to infer from it the commission of acts of fraud.

(d) In paragraph 2, page 3 of the Opinion, this Court points to the statement of Mr. Layton as having little weight as evidence that the deed was made prior to the accident.

The Court, however, fails to mention Mr. Layton's statement that these conversations occurred about a year before the accident (R. 150) and appears to ignore the inconsistencies existing in his testimony which led the trial court to eliminate this evidence from its consideration. (R. 155)

(e) In the last paragraph on page 3 of the Opinion, the Court concludes that half of the property is George's. There is no evidence that George owned half of the property or any specific portion of the property and such conclusion is manifestly unsupported by the evidence.

POINT III.

**THE COURT HAS FAILED TO SUSTAIN ITS FINDINGS
BY CLEAR AND CONVINCING EVIDENCE.**

If we now look at the recital of facts and inferences

therefrom made by this Court, there is no clear and convincing evidence that the deed was not executed on the date it bears, that Leoda Dunham and her husband George fraudulently placed the property in Leoda's name and that George now owns one-half of the property.

The evidence which this Court has found as a basis for determining that the deed was not executed November 1, 1952, is shown hereafter:

(a) The most important point relied upon by the Court and concerning Leoda Dunham's understanding of joint tenancy (4th para. pg. 2 of Opinion) is disposed of under Point I above.

(b) The next point being Mr. Dunham's statement, "it could very well be" (para. 1, pg. 3 of Opinion), in view of the uncertainty of his testimony and of the nature of his personality can hardly be termed as "clear and convincing evidence."

(c) The fact that Dunhams went to Mr. Duncan and not to the bank (para. 2, pg. 3 of Opinion) shows no fraud nor anything to indicate the deed was not executed that day. The Kirkpatrick to Dunham deed was prepared by Harlan Clark in January of 1951. The George to Leoda deed on November 1, 1952, was the first transaction thereafter relating to the property. It was natural for the Dunhams to again go to an attorney, since this deed had nothing to do with the bank, with any assignment of monies from the sale of the property, nor with any releases of mortgage.

(d) It certainly is consistent for the Dunhams to both say that they did not discuss joint tenancy with Mr.

Duncan (para. 2, pg. 3 of Opinion) and for Mr. Duncan to say that joint tenancy was not discussed, but that it wouldn't make any difference anyway since he did not believe in joint tenancy. These statements show nothing with reference to the execution of the deed.

(e) Mr. Duncan said he *probably* (R. 40) told the Dunhams to record the deed (para. 2, pg. 3 of Opinion), but Mrs. Dunham did not do so for over a year. Clear and convincing evidence should not be predicated upon such indefiniteness as the phrase "probably told," as testified to by Mr. Duncan. One has only to see and hear Mrs. Dunham to realize her homespun and unassuming personality, and to believe that she was sincere in saying that she did not record the document because she was busy and did not realize it had to be recorded. (R. 72)

The Court recognizes (para. 2, pg. 3 of Opinion) that none of these incidents singly were strong proof that the deed was not executed. Certainly putting these three fact incidents together, do not make any more clear and convincing, the claim of fraud.

"Two other claims in favor of the Dunhams" (para. 3, pg. 3 of Opinion) are apparently not relied upon as proof of the fraud, but merely to show weakness in the defendants' proof. Neither of these two points add much to plaintiff's case. The actions of Mr. Lefler are certainly reasonably explained at great length (R. 97, 98, 100, 101, 105) and the statements of Mr. Layton admittedly add nothing to the case. However, the very inclusion of these two points in this opinion indicate the Court's reliance to some extent in making inferences from the facts therein set forth.

Therefore, paragraphs (b), (c), (d) and (e) above include all of the evidence stated by this Court to show a case of fraud, supposedly by clear and convincing evidence. In the case of *Child v. Child*, supra, recently decided by this Court, is a clear and extensive definition of the "clear and convincing evidence" rule. To reverse and to make findings in this equity case, as it has now done, this Court must be convinced that there is no reasonable basis in the record to support the lower court's findings that the deed was executed and that there was no fraud. Such a burden does not appear to have been sustained in this Court's opinion.

Finally with reference to the finding that George Dunham owns one-half of the property, there appears to be no evidence upon which such a finding can be made. If Leoda and George are sustained in their testimony concerning payment for the property, then Leoda without a doubt owns the property in her own name. If the Court does not believe these witnesses with reference to the payments made for the property, then there is no evidence whatsoever to indicate how the property has been paid for and to further indicate the proportionate amount of payment borne by each. If a rehearing is not permitted, the case should nevertheless be remanded for the lower court to now determine the respective interests of these defendants.

SUMMARY

Leoda Dunham is the owner and manager of the property. She is an honest, straight forward, hard working and sincere wife. George Dunham on the other hand, as is shown by the testimony and by his commit-

ment to the State Mental Hospital, was physically and mentally uncertain. One can only form such a contrasting opinion of these two defendants by seeing them and talking with them. One has only to see and talk with Thomas Lefler, the cashier of the bank, to know his sincerity and trustworthiness. This Court, however, is not able to pass upon these traits of the witnesses, since it has had no opportunity to observe these witnesses. Notwithstanding this lack of intimate contact so necessary to a trial court in determining the veracity of witnesses, this Court has decided that these witnesses testified falsely. Such a determination, so far removed from the scene of trial, should be subject to re-examination by this Court in view of the lack of supporting evidence. Leoda Dunham, by this opinion, will have one-half of her property and in effect, a substantial, if not entire means of support taken from her without the opportunity of a review of these factual determinations by this Court.

It is submitted that in all fairness and under reasonable and equitable principles, this Court should re-examine the evidence and thereupon affirm the trial court in its findings.

Respectfully submitted,

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