

1977

# Shirley Rodgers v. Annie N. Hansen And Albert J. Hansen : Appellant's Brief

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

SHIRLEY RODGERS,	)	
	)	
Plaintiff and Appellant,	)	
	)	Case No. 15334
v.	)	
	)	
ANNIE N. HANSEN and	)	
ALBERT J. HANSEN,	)	
	)	
Defendants and Respondents.	)	

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APPELLANT'S BRIEF

---

Appeal from the Judgment  
of the Third Judicial District Court in and for  
Salt Lake County  
The Honorable Peter F. Leary, Judge

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**FILED**

OCT 20 1977

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BRIEF OF APPELLANT

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STATEMENT OF THE KIND OF CASE

This is an action to quiet title, under the doctrine of equitable mortgage, to property located at 412 North 300 West in Salt Lake City, more particularly described as follows:

COMMENCING at a point 5 rods North of the Southwest corner of Lot 2, Block 121, Plat "A", Salt Lake City Survey, and running thence East 153 feet; thence North 2-1/2 rods; thence West 153 feet; thence South 2-1/2 rods to the place of beginning.

Together with and subject to a right of way over: Commencing at a point 153 feet East of the Southwest corner of said Lot 2, and running thence North 10 rods; thence West 10 feet; thence South 10 rods; thence East 10 feet to the place of beginning.

DISPOSITION IN LOWER COURT

The case was tried to the court on September 23, 1976, with judgment being entered in favor of defendants on March 25,

1977 (R. 123-124). The court dismissed plaintiff's complaint with prejudice and upon the merits and granted judgment for defendants on their counterclaim; title to a two-thirds interest in the subject property was quieted in defendants and a trust was impressed upon the one-third interest owned by plaintiff (Id.). On June 15, 1977, the court denied plaintiff's motion to set aside the judgment or, in the alternative, for a new trial (R. 131). Plaintiff now appeals.

#### RELIEF SOUGHT ON APPEAL

Plaintiff/appellant seeks reversal of the judgment and judgment in her favor as a matter of law or, that failing, a new trial. In any event, plaintiff/appellant seeks a determination that, if the judgment should stand in all other respects, she is entitled to a one-half interest in the subject property rather than to a one-third interest as found by the lower court.

#### STATEMENT OF FACTS

On April 25, 1942, William and Vivian Newsome entered into a Uniform Real Estate Contract (Ex. 1-P) with Harold and Myrtle Neil, the Neils agreeing to purchase from the Newsomes for \$3,250.00 the property which is the subject matter of this litigation. Although the receipts for the \$400.00 down payment (Ex. 12-D) and for a number of the payments in the amount of \$325.00 under the foregoing contract (Ex. 9-D) are made out to Harold E. Neil and/or Myrtle C. Neil, the defendants claimed and the court found (R. 110) that these payments were made by the defendants. Nevertheless, these payments were not in the nature of a business



deal but rather were made by the defendants, the Neils' daughter and son-in-law, out of a feeling of love and family responsibility (Tr. 78); repayment by Harold and Myrtle Neil was never discussed (Tr. 67, 78). The defendants have based no claim of an interest in this property upon these payments under the Uniform Real Estate Contract of 1942.

Subsequent to entering into the real estate contract, Mr. Neil died in 1942 (R. 19-20). Apparently, Mrs. Neil experienced difficulty in providing the payments for the property and sought help from the Hansens. It is undisputed that the Hansens provided the funds to pay off the full amount due to the Newsomes under the real estate contract, \$2,389.00 (See paragraph 2 of Stipulation of September 22, 1976--R. 96), and that on July 7, 1944, the Newsomes executed a warranty deed (Ex. 2-P) conveying the subject property "to Myrtle C. Neil and Annie N. Hansen and Albert J. Hansen, her husband, as joint tenants and not as tenants in common." The significance of these actions, however, is in dispute.

The Hansens maintain that they purchased outright a two-thirds interest in the property when making the \$2,389 payment and that the reason for the joint tenancy wording was so that if one of the three should die the other two would still own the property (Tr. 72, 73). They claim that they made no loan to Mrs. Neil (Tr. 87) and that they never agreed to reconvey their interest to her (Tr. 73, 88). Shirley Rodgers, the successor in interest to Mrs. Neil, however, contends that a loan and mortgage

arrangement was exactly what was anticipated by the parties; in other words, the deed absolute on its face was intended as a mortgage with Mrs. Neil taking title subject to the mortgage interest of the Newsomes.

After the execution of the warranty deed, Mrs. Neil maintained sole possession of the property until she died on August 24, 1975 (Tr. 20). She paid the real property taxes (See Tr. 24-25 and Ex. 10-P) and also paid the maintenance and upkeep (See Tr. 26 and Ex. 11-P). Furthermore, she believed that the property, her home, was hers and that the arrangement of the names of the grantees on the warranty deed was very misleading (Tr. 30).

Of even more importance, Mrs. Neil started making payments to the Hansens almost immediately. These payments are evidenced by a series of 43 receipts (Ex. 6-P) which bear the signature of and were executed by defendant Annie N. Hansen (See paragraph 3 of Stipulation of September 22, 1976--R. 96). These receipts all indicate that the payments they evidence were "house payments," often also indicating the address of the subject property. The first receipt in the series reflects a "Previous Balance" of \$2,389.00, the exact amount paid to the Newsomes, and each of the payments reflect the amount paid being deducted from that figure which is then reduced to reflect a new "Balance Due." Although most of these receipts evidence payments of \$25.00, many are for different amounts ranging from \$7.50 to \$70.00. Also, although most of these receipts are to Myrtle Neil, the last ten

beginning with an unnumbered receipt dated June 8, 1948, are to Myrtle Yeaman, reflecting the fact that she married one Nathan Thomas Yeaman in 1948 (Tr. 20). The final receipt in the series is dated August 5, 1949, and shows a balance then due to the Hansens from Mrs. Neil of \$1,055.00.

In 1958, apparently upset by a potential sale of the property arranged by the Hansens, Mrs. Neil contacted an attorney, Emmett L. Brown, who on September 29, 1958, wrote a letter to the Hansens (Ex. 13-P) in which he pointed out that Mrs. Neil had paid back a large amount of the money advanced by the Hansens. On September 30, 1958, Mrs. Hansen wrote a reply (Ex. 14-P) which, although generally incoherent, acknowledged receipt of payments by Mrs. Neil.

On February 12, 1964, in an effort to destroy any possible joint tenancy that might have been construed under the aforementioned warranty deed (Tr. 29-30), Mrs. Neil conveyed by quitclaim deed (Ex. 4-P) all of her right, title, estate and interest in the subject property to her daughter Shirley Rodgers, the plaintiff/appellant. Mrs. Rodgers, on that same date, reconveyed by quitclaim deed (Ex. 3-P) the same right, title, estate and interest to Mrs. Neil.

As noted above, Mrs. Neil considered the property hers and found the wording of the warranty deed misleading. This troubled her and was on her mind constantly, especially in the last seven to ten years of her life (Tr. 27, 47-48). In an effort to clear matters up she met with the Hansens at their home

in the summer of 1968 (Tr. 30 et seq.). An effort was made at that meeting to determine the amount due to the Hansens in order that Mrs. Neil might clear up any title problem (Tr. 32-33). Even though the last receipt in 1949 had shown a balance due on the property of \$1,055.00, Mrs. Neil stated that she believed she owed only about \$250, more or less, because she had not always received receipts when making payments (Tr. 33; see also Tr. 46). In answer, Mrs. Hansen stated that more than that was due (Tr. 33) and Mr. Hansen indicated interest was due even though the original agreement was for an interest-free loan (Tr. 34). Nothing, however, was resolved then (Tr. 34).

After the 1968 meeting, Mrs. Neil did not institute any legal proceedings because she was ill and did not wish to take her own daughter to court (Tr. 35). Instead, she executed a second quitclaim deed in favor of Mrs. Rodgers (Ex. 5-P) on May 21, 1971, so that she might eventually resolve the matter. The lower court ruled that Mrs. Rodgers did not take this interest as an individual but rather as a trustee with the property or its proceeds to be distributed by her in accordance with the will of Mrs. Neil (Ex. 8-D) which was executed on May 10, 1974. Plaintiff-appellant does not dispute that such was her mother's intent.

Mrs. Neil died on August 24, 1975. Within days after the death of Mrs. Neil, the mother of both Shirley Rodgers and Annie Hansen, Mrs. Rodgers attempted to settle the question of title to the subject property with defendants. Unable to do so, plaintiff commenced this quiet title action by filing the complaint.

(R. 2-4) on September 12, 1975, less than three weeks following the death of Mrs. Neil.

## ARGUMENT

### POINT I

THE DECISION OF THE COURT, AS TO  
TITLE TO THE SUBJECT PROPERTY,  
IS CONTRARY TO THE EVIDENCE.

This case is essentially to quiet title to the subject property in Shirley Rodgers based upon the fact that she holds title, as did her mother and predecessor in interest Myrtle C. Neil, subject only to an equitable mortgage in Annie and Albert Hansen. It is Mrs. Rodgers' contention that in 1944 the Hansens agreed to loan Mrs. Neil the money to pay off the Newsomes and acquire title to the subject property; that Mrs. Neil in turn agreed to secure repayment by listing the Hansens as joint tenants of the property until such time as she repaid the loan to them, and this in fact was done as reflected in the warranty deed of 1944 (Ex. 2-P). At all times, however, Mrs. Neil was to be considered the sole owner in fee simple of the property subject only to the lien held by the Hansens, with the relationship to be that of mortgagor and mortgagees, not joint tenants.

This contention by plaintiff is based in the concept of equitable mortgage. An equitable mortgage is not characterized by the standard legal niceties which one associates with a formal written legal mortgage filed at the County Recorder's office. In fact, an equitable mortgage need not even be evidenced by writing. Rather, an equitable mortgage is based upon the totality of the

transaction and is referable to the maxim that equity considers that as done which ought to be done. 55 Am.Jur.2d Mortgages § 1 at 200.

The basic concepts of equitable mortgage can be found in 59 C.J.S. Mortgages § 13 at 42-44, wherein it is stated:

[G]enerally, whenever a transaction resolves itself into a security, or an offer or attempt to pledge land as security for a debt or liability, equity will treat it as a mortgage, without regard to the form it may assume, or the name the parties may choose to give it. In applying the doctrine of equitable mortgages doubts are resolved in favor of the transaction being a mortgage. . . .

In order that an equitable mortgage may exist it is essential that the mortgagor have a mortgageable interest in the property sought to be charged as security, and that there be clear proof of the sum which it was to secure. It is absolutely essential to its existence that there be a definite debt, obligation, or liability to be secured, due from the mortgagor to the mortgagee. It is not necessary, however, that the debt secured should be evidenced by notes, bonds, or any other written obligation or promise to pay.

\* \* \*

. . . The doctrine of equitable mortgages has been held not to be limited to written instruments intended as mortgages, but to extend to a variety of parol transactions. Where equity and good conscience so require, such a mortgage may be found, even though no writing exists.

The concept of equitable mortgage has been recognized in Utah, most notably in Bybee v. Stuart, 112 Utah 462, 468-69, 189 P.2d 118, 122 (1948), wherein it is stated:

It is true, of course, that a warranty deed, absolute in form, is presumed to convey a fee simple title, or at least whatever title the grantor has. But where, as here, there is a written agreement between the parties, contemporaneous with the deed, which shows the deed to have been given for security purposes, the court will look to the real transaction and treat it as a mortgage. Brown v. Skeen, 89 Utah 568, 58 P.2d 24. . . .

. . . [I]n equity a deed absolute upon its face may be shown by a parol evidence to have been given for security purposes only, and when such a showing has been made, equity will give effect to the intention of the parties. Such security transactions, lacking the requisites of a formal mortgage, are termed equitable mortgages. 1 Jones on Mortgages, Chapter 5; Wasatch Min. Co. v. Jennins, 5 Utah 243, 251, 15 P. 65; Duerden v. Solomon, 33 Utah 468, 94 P. 978; Hess v. Anger, 53 Utah 186, 177 P. 232. See also 3 Jones, Commentaries on Evidence, 2d Edition, page 2793, Section 1531.

See also Taylor v. Turner, 27 Utah 2d 39, 43, 492 P.2d 1343, 1346 (1972); Kjar v. Brimley, 27 Utah 2d 411, 497 P.2d 23 (1972).

Admittedly, the cases in Utah which have involved an equitable mortgage dealt with a deed absolute on its face in which the grantor himself wished to create a mortgagor-mortgagee, rather than grantor-grantee, relationship and that is not the case here. However, as noted above, the concept extends to a variety of parol transactions, including advancing purchase money to one who is buying property and he, in turn, has the lender listed as grantee. This is set forth in 59 C.J.S. Mortgages § 14e. at 47 as follows:



If a person who has contracted for the purchase of land procures another to lend him all or part of the money necessary to make the payments, or to advance it for him, and has the deed made to the latter, with an agreement that he will convey the title to the former on repayment of the amount advanced, the transaction will amount to an equitable mortgage if it was the understanding and intention of the parties that the one should become debtor to the other for the money advanced, and that the land should be held merely as security for this debt.

Clearly, in light of the foregoing, it is the intent of the transaction, and not the use of "magic words" like "mortgage" or "lien," that is important in determining the existence of an equitable mortgage. This is especially true in a case such as this one where we are dealing with a transaction entered into by persons of limited education (Tr. 52-53).

Therefore, if the evidence indicated a transaction between Mrs. Neil and the Hansens, as described above, an equitable mortgage was created and Mrs. Neil took title in the property subject only to that equitable mortgage in the Hansens.

The basic factors which needed to be shown to establish that relationship, based on the principles cited above from C.J.S., were a mortgageable interest in the property and a definite debt secured by the property. The evidence clearly indicates that Mrs. Neil, at all relevant times, had an interest in the property, first under the 1942 real estate contract (Ex. 1-P) and then under the 1944 warranty deed (Ex. 2-P). As far as the debt is concerned, the series of 43 receipts (Ex. 6-P) amounted to clear and convincing evidence thereof and formed the



backbone of appellant's case below. Contrary to his findings and conclusions, Judge Leary himself even indicated that these receipts evidenced payments from Mrs. Neil to the Hansens commencing almost contemporaneously with the execution of the warranty deed (Tr. 64). However, this Court need not be bound by any findings below as to these receipts. In Lake v. Hermes Associates, 552 P.2d 126, 128 (Utah 1976), it is stated:

[W]here the resolution of the controversy depends upon meaning to be given documents, the trial court is in no more favored position and is no better able to determine the meaning of such documents than is this court.

Receipt number one, dated October 20, 1944, itself fairly well sets out the entire transaction. It indicates that the Hansens received a payment of \$25.00 from Mrs. Neil "For payment on house 415 N. 2nd West." It states the "Previous Balance" as \$2,389, the exact amount paid to the Newsomes. The \$25 payment is then deducted, leaving a "Balance Due" of \$2,364, the exact amount which appears as the "Previous Balance" on receipt number two, dated November 29, 1944. The back of the first receipt also reflects the transaction, both with the Newsomes and between Mrs. Neil and the Hansens. In fact, it even indicates that the loan to Mrs. Neil was to be interest-free. Written on the back of the receipt is the following:

Save 12.70 a month  
interest

interest	12.70
principle [sic]	12.30

In accordance with that, each payment reflected by the receipts is deducted in full from the amount listed as the previous balance. These receipts show that Mrs. Neil was making payments to the Hansens for the amount advanced to her by them and that they were acknowledging receipt of those payments and reducing the amount due from her. No other explanation can be made of these receipts, a fact recognized in the 1958 letter from Emmett Brown to the Hansens (Ex. 13-P) in which he stated:

As you are well aware, Mrs. Neil has paid you back out of this sum, approximately \$1,100.00, and if it were your intent to have the two-thirds interest in this home, it is hard to understand the basis upon which she would be paying you back that amount of money.

No explanation by the Hansens was given to Mr. Brown in 1958, other than Mrs. Hansen acknowledging:

My Mother paid us when ever however she wanted 600.00 Between 1944 And 1948 No questions asked & she paid no interest. [See Ex. 14-P.]

Similarly, when her deposition was taken on November 10, 1976, Mrs. Hansen not only denied receiving payments from her mother but also denied ever giving her any receipts (See generally Transcript of Deposition of Annie N. Hansen at 11-13). And she specifically denied knowing what the purpose of said receipts, if they existed, might be:

Q If . . . your mother had made payments that were deducted from the balance of \$2,389., do you know what purposes those payments would have been for?

A I don't know. [Transcript of Deposition of Annie N. Hansen at 13.]

However, by the time Mrs. Hansen testified at the trial of this matter, she had developed an explanation.

At trial, Mrs. Hansen testified that the receipts, the entire series, were part of an elaborate welfare fraud scheme (Tr. 85 et seq.). She claimed the receipts were given to "get money from the Welfare" (Tr. 86) and that they were for \$25 in order to get a housing allowance in that amount (Tr. 91). However, she could not explain why certain receipts were for other amounts, such as \$30, \$7, \$45 or \$70 (Tr. 91, 92-94). Also, she claimed the receipts stopped in 1949 because her mother "got married to Thomas Yeaman" and could no longer receive the welfare housing allowance (Tr. 86), yet the last ten of the receipts, issued between June 8, 1948, and August 5, 1949, were made out to "Myrtle Yeaman" (See Ex. 6-P).

Not only was Mrs. Hansen's story a complete surprise to Mrs. Rodgers and her counsel (Tr. 103) and ridiculously inconsistent, it was evidence which could form no basis whatsoever for the lower court's decision. In 37 Am.Jur.2d Fraud and Deceit § 301 at 397 it is stated as the general rule that:

No one will be permitted in a court of justice to take advantage of, or claim protection by reason of, his own fraud . . . .

Similarly, in Grover v. Garn, 23 Utah 2d 441, 447, 464 P.2d 598, 602 (1970), it is stated:

[U]nder the doctrine or principle of estoppel in pais one may by his acts or conduct away from the court prevent himself from denying in court the effect or result of those acts.

Clearly, the Hansens cannot hope to profit from what they assert was a fraud upon the state. They cannot admit to Emmett Brown that Mrs. Neil made payments to them on the house and even deny under oath the very existence of these receipts and then come into court and claim that no payments were made and that the receipts were only the device by which they helped perpetrate a welfare fraud. The Hansens must be bound by the inferences to be drawn from these receipts. Those inferences are that they made an interest-free loan to Mrs. Neil, in order that she might acquire title to the subject property, which loan was secured by the property itself, and that she made payments to them on the loan, at least 43 of which are evidenced by the receipts themselves. No other reasonable explanation can be derived from the evidence presented to the lower court which erred in ruling as it did.

## POINT II

THE COURT ERRED IN RULING THAT THE  
STATUTE OF FRAUDS WAS APPLICABLE  
TO THIS CASE.

The lower court erroneously concluded this action was a case in the nature of specific performance of an agreement to sell the Hansens' interest in the subject property to Mrs. Neil and that such an agreement violates the statute of frauds, Utah Code Annotated § 25-5-1 (1976) (R. 113) in that the receipts (Ex. 6-P) were insufficient to take the alleged agreement out of the statute of frauds, either as a written memorandum or under the doctrine of part performance (R. 114). This conclusion clearly

is erroneous because, as noted above, the doctrine of equitable mortgages is not limited to written instruments but rather extends to a variety of parol transactions even though no writing exists. 59 C.J.S. Mortgages § 13 at 43-44. In other words, the law says an equitable mortgage may be found even though no writing exists. Nevertheless, the court said no equitable mortgage could be found because there was no writing. Furthermore, under the doctrine of equitable mortgage, Mrs. Neil was the sole owner of the property and the Hansens had no interest, as either joint tenants or tenants in common, to sell to her. Therefore, Mrs. Neil could not have entered into a contract to buy the Hansens' "interest" from them and the transaction, from its inception, was outside the statute of frauds.

Assuming, arguendo, that the statute of frauds could be considered applicable to this transaction, the receipts (Ex. 6-P) taken together should be a sufficient writing. They indicate the amount to be paid, starting in 1944 at \$2,389.00 and being reduced each time a payment was made by the full amount paid. They clearly are denoted as "house payments" often also including the address to indicate exactly which house. Both the indication on the back of receipt number one and the fact that the full amount paid was deducted each time from the previous balance reflect the fact the loan was interest-free. Finally, they are all signed by Annie N. Hansen, the party to be bound.

Assuming further that this is still not sufficient to take this transaction out of the statute of frauds, the receipts

surely show part performance sufficient to take the transaction out of the statute. And part performance will, in a situation like this, avoid the statute of frauds. In re Madsen's Estate, 123 Utah 316, 340, 259 P.2d 595, 601 (1953). Clearly, the receipts indicate "house payments" being made over the course of almost five years under the terms outlined above.

### POINT III

THE COURT ERRED IN RULING THAT  
PLAINTIFF'S CLAIM WAS BARRED BY  
BOTH STATUTES OF LIMITATIONS  
AND THE DOCTRINE OF LACHES.

Plaintiff/appellant maintains that her quiet title/equitable mortgage action was not barred either by any statute of limitations, if it might be construed as a legal action, or by the doctrine of laches. Nevertheless, the lower court concluded that both were applicable (R. 114). To find either applicable to this case is baffling; to find both applicable is clearly contradictory.

To find statutes of limitations applicable in this particular case overlooks the fact that a quiet title action is basically equitable and, therefore, not barred by any statute of limitations. Furthermore, it overlooks the fact that the underlying theory here, that of equitable mortgage, is also obviously equitable and not subject to statutes of limitations. Finally, the specific statutes of limitations found by the lower court to apply, Utah Code Annotated §§ 78-12-25 and 78-12-26(3), seem to be curiously inappropriate. Admittedly, § 78-12-25(2) covers "[a]n action for relief not otherwise provided for by law" and

there is no limitation statute directly applicable to either a quiet title or equitable mortgage action. Nevertheless, those are real property actions and the entire of Article 1 to Chapter 12 of Title 78 (Utah Code Annotated §§ 78-12-2 to 78-12-21) relates to limitations in real property actions, but the court did not find any of these applicable. Likewise, actions based in fraud and mistake are the essence of § 78-12-26(3) and plaintiff/appellant has never claimed fraud or mistake to be applicable here.

If either of the bars to an action, limitations or laches, is appropriate here, it would have to be laches since this is clearly an equitable action. However, it has been held in Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008, 1012 (1957), that laches is not even available as a defense in a quiet title action. Assuming, arguendo, that laches could be available here:

The question whether the suit is barred by reason of laches is not to be determined by reference to any particular period as compared with the time during which the complainant delayed seeking to quiet his title. In this respect, a solution of the question as to laches vel non depends upon the circumstances of the case. [65 Am.Jur.2d Quieting Title § 57 at 188.]

Furthermore, it is stated at 27 Am.Jur.2d Equity § 163 at 703:

Lapse of time, although manifestly an important consideration in determining whether relief will be barred in equity because of laches, is not of itself decisive. That is to say, lapse of time is only one, and, moreover, not ordinarily the controlling

or most important one, of the elements to be considered in determining the exercise and application of laches as a defense in a suit of equity. . . . [M]ere delay in the assertion of a claim does not, of itself, amount to laches. This is obviously so where the complainant can show an excuse for his failure to seek relief more promptly. So, generally, the fact that the complainant has delayed to bring suit will not alone be held to have barred him of relief.

Among the facts and circumstances to be considered in determining whether laches is applicable is the relationship of the parties, 27 Am.Jur.2d Equity § 162 at 702, and especially intimate or confidential relations, Id. § 165 at 707.

It is noteworthy that the plaintiff and defendant Annie Hansen are sisters and that Mrs. Neil, plaintiff's predecessor in title, was their mother. It is pointed out in Major v. Shaver, 187 F.2d 211, 212 (D.C.Cir. 1951):

[I]n considering questions of laches, the utmost leniency is manifested by the courts where it appears that the delay is due to the intimate personal relations existing between the parties and the high degree of confidence reposed by one in another. In such case, and especially when a family relation exists, the same degree of diligence is seldom required.

Likewise, another excuse for delay is when the plaintiff is in possession of the subject property under claim of title. See 36 C.J.S. Equity § 116 at 62; 74 C.J.S. Quieting Title § 49 at 70; 27 Am.Jur.2d Equity § 165 at 708. The same is true of statutes of limitations. It is stated in Viersen v. Boettcher, 387 P.2d 133, 138 (Okla. 1963):



[A]n action to quiet title, where the plaintiff has been in continuous possession of property, claiming ownership therein, can be maintained at any time, and no statute of limitation bars his right to the relief sought.

Admittedly, Shirley Rodgers has not herself been in continuous possession of the property. However, her predecessor in title, her mother, was in continuous possession of the property until her death (Tr. 20), less than three weeks before the filing of the instant case. It is significant that Mrs. Neil, especially during her last years, was quite ill and did not wish to sue her own daughter (Tr. 35). Clearly, the family relationship of the Hansens, Mrs. Rodgers and Mrs. Neil, as well as Mrs. Neil's continuous possession of the property, provide an excuse for passage of time without instituting suit.

It also is stated in Mary Jane Stevens Co. v. First National Building Co., 89 Utah 456, 515, 57 P.2d 1099, 1125 (1936), that laches is not a matter of mere delay but rather involves standing by watching one change his position. Likewise, in Mawhinney v. Jensen, 120 Utah 142, 148-49, 232 P.2d 769 (1951), it is stated:

The equitable doctrine of laches is founded upon considerations of time and injury.

"Laches in legal significance is not mere delay, but delay that works a disadvantage to another." Pomeroy's Equity Jurisprudence, 4th Ed. § 1442; Chase v. Chase, 20 R.I. 202, 37 A. 804.

. . . The question of laches can only be determined under the circumstances of each case and there must be a finding that the delay has inequitably prejudiced the defendant before the remedy is barred.

Likewise, in Flora v. Gusman, 76 Idaho 188, 279 P.2d 1067 (1954) which discusses at length the factors which mitigate application of the doctrine of laches, it is stated:

[T]he defense of laches does not apply where unnecessary to protect adverse party from being placed in worse condition than he would have been had action been prosecuted with greater diligence; and . . . circumstances of each case must govern courts of equity in permitting defense of laches to be made. [279 P.2d at 1072.]

The lower court did conclude that the Hansens suffered prejudice to their case because of passage of time and "by virtue of their expenditure of money for the property in the belief that they had a clear unencumbered right thereto." (R. 114) However, this is totally at variance with the facts of this case. First of all, the loss of the "star witness," Mrs. Neil, clearly prejudiced Mrs. Rodgers' case more than the Hansens'. Secondly, the Hansens' unsubstantiated claims to having expended large sums of money, allegedly in improving the property, and that they performed maintenance and upkeep on the property should be considered completely insufficient to establish any monetary detriment.

The sum total of their claims is that they helped finance repair of the front porch and the building of a room on the back (R. 74) although no figures were given, that they gave

Mrs. Neil money, in an unspecified amount, to help pay taxes without ever knowing how it was spent (Tr. 74-75), and that some plumbing and electrical work was done (Tr. 75). This hardly amounts to hard proof any expenditures were even made or to some form of detrimental reliance. Even assuming that such payments were made and such repairs performed, it must be remembered that Mrs. Neil was the mother and mother-in-law of the defendants. It would seem odd indeed if one would refuse to assist his or her mother unless some claim to her property was involved. Very little significance should be attached to efforts at helping a widowed mother keep her home in repair and property taxes up to date, especially in the instant case in view of the fact that other family members often chipped in to help in similar ways financially (Tr. 25-26).

Also, it is undisputed that defendants claim that Mrs. Neil had a duty to pay taxes and a right to use the property for the duration of her life (R. 73). Therefore, they have not been placed in any worse condition than if the suit had been brought earlier. Assuming the validity of their claims, they would not have come into possession of the property until after the death of their mother and this suit was brought within three weeks after that occurrence.

Clearly, both the doctrine of laches and statutes of limitations were totally inappropriate in this case and did not constitute a bar to the action.

#### POINT IV

THE COURT ERRED IN RULING THAT  
PLAINTIFF WAS ENTITLED TO ONLY  
A ONE-THIRD INTEREST IN THE SUBJECT  
PROPERTY RATHER THAN A ONE-HALF  
INTEREST.

Assuming, arguendo, that plaintiff/appellant should not prevail on the main thrust of her appeal for a reversal of the judgment or a new trial, she still should be entitled to a one-half share of the subject property rather than the one-third interest found by the lower court. This is so because of sound common law principles of construction of deeds.

The warranty deed of 1944 (Ex. 2-P) covering the subject property was executed by William and Vivian Newsome "to Myrtle C. Neil and Annie N. Hansen and Albert J. Hansen, her husband, as joint tenants and not as tenants in common." Assuming this deed establishes the ownership of the subject property, Mrs. Rodgers, as successor in interest to Myrtle C. Neil, should take a one-half interest in the property and the Hansens take the other one-half interest. This is based first upon the general rule that a conveyance to three people, two of whom are husband and wife, results in the husband and wife taking one half of the estate and the third party taking the other half of the estate. This rule is based upon the common law presumption that a conveyance to a husband and wife results in the two persons taking as one, since the common law viewed a married couple as one person. That principle carries over into the situation, as in the instant case, when property is conveyed to a husband and wife and some third person:

Where property is conveyed or devised to husband and wife and a third person or persons, the husband and wife, being one person in law, will together take only an undivided moiety or half of the estate, leaving the other half to the third person. . . . As between themselves, husband and wife are tenants by entirety of their share, but as to third persons they are together a joint tenant or tenant in common with him. [41 C.J.S. Husband and Wife § 31(f) at 454.]

The essence of this first basis for contending appellant is entitled to one half rather than one third of the subject property is the common law concept of tenancy by the entirety and tenancy by the entirety exists in Utah. Admittedly, there are no cases from this Court recognizing its existence, but there likewise are no cases abolishing it. Therefore, it must exist because it is a common law concept and the common law is specifically adopted in Utah unless abrogated by statute, Utah Code Annotated § 68-3-1 (1968). Similarly, there is no statute specifically establishing tenancy by the entirety in Utah, but there is no statute abolishing or abrogating this common law concept. More importantly in the area of statutory law, three separate statutes implicitly recognize tenancy by the entirety by mentioning it: Utah Code Annotated § 78-41-1 (1977), on termination of life estates, recognizes the existence of "tenancy by the entirety." Utah Code Annotated § 75-2-1003 (Supp. 1977) [formerly § 74-5-3], a section of the Simultaneous Death Act, refers to "tenants by the entirety." This provision was reenacted by the Legislature only two years ago when the Probate Code was revamped. 1975 Utah Laws, ch. 150, § 3. Finally, Utah Code Annotated § 48-

1-4(2) (1970), a section of the Partnership Act, states that "tenancy by entireties . . . does not of itself establish a partnership."

Appellant's position is also based on the precise manner of stating the conveyance as, in essence, "to A and B and C, her husband," rather than "to A, B and C, her husband." Because of the use of the word "and" rather than a comma between the name of Mrs. Neil and the husband and wife unit of the Hansens, it is clear that Mrs. Neil was treated as one separate unit and the Hansens as a second. In that instance, each unit receives one half of the property conveyed.

The case of Heatter v. Lucas, 367 Pa. 296, 80 A.2d 749 (1951), illustrates each of these premises for plaintiff's contention. The Heatter case involves a deed to "Francis Lucas, a single man, and Joseph Lucas and Matilda Lucas, his wife." There is no indication in the clause as to what estate each party takes. Nevertheless, this case is important because it construes the significance of the phrase "his wife" and the importance of employing the conjunction "and," instead of using a comma, when delineating the grantees. The court first noted that a conveyance to three parties, two of whom are married but not designated as such, shall normally be deemed a conveyance of one third of the estate to each party. Then the court distinguished the case under consideration stating:

Here the conveyance is to "Francis Lucas, a single man, and Joseph Lucas and Matilda Lucas, his wife." The words "his

wife" cannot be treated as mere surplusage; they occur in context in the classic form for the creation of the tenancy by the entirety. The parties must be taken to have considered and given significance to the marital status of two of the grantees.

. . . . .

In the instant case the two grantees are in fact husband and wife, and the designation "his wife" sufficiently imports an intention that they shall take as such. Further, the conjunction "and," here used, is unnecessary if the parties were intended to take undivided one third parts; the use of the word "and" has separated the grantees into two units (1) Francis and (2) Joseph and Matilda. [80 A.2d at 752.]

Finally, the court noted that there was no restraint forbidding the creation of a joint tenancy or tenancy in common where one part of the tenancy was a combination of the husband and wife as tenants by the entirety.

The Heatter case goes right to the heart of the objections raised below by the defendants that, because Utah Code Annotated § 57-1-5 (1974) requires the interests of joint tenants to be equal and undivided, each of the Hansens is entitled to one third of the estate. Clearly, as noted above, this might well be the case when the married couple is not designated as such. However, here they are designated as a married couple and the words "her husband" cannot be treated as "mere surplusage." Furthermore, as in Heatter, there is no restraint, even in § 57-1-5, forbidding the creation of a joint tenancy or tenancy in common between a single person as one tenant and a husband-wife tenancy by the entirety as another tenant.

Likewise, the case of In re Buttnow, 49 Misc. 2d 445, 267 N.Y.S. 2d 740 (1966), involved a deed to "Anelia M. Bakowski, widow, and Josephine Katherine Buttnow, married to Alexander M. Buttnow, married to Josephine Katherine, jointly, all of Port Jefferson Station, Long Island, New York." The court found that husband and wife received a one-half interest in the estate, but as tenants in the entirety, and that the third party, Anelia Bakowski, received the other half of the estate, as tenant in common to the husband and wife. It was noted that the critical factor in determining the meaning of the phrase in question is the "intent of the parties as manifested by the language of the deed." The court felt that the designation of the Buttnows as husband and wife was indicative of the grantor's intention to convey to them a tenancy by the entirety. The court held that such a designation was probative of such an intent. The court also noted that the separation of the estates to Anelia Bakowski and the husband and wife by the word "and" indicated an intention by the grantor to apply the term "jointly" only to the husband and wife.

The case of Daniel v. Wright, 352 F.Supp. 1 (D.D.C. 1972), dealt with a deed "to Herbert L. Wright and Mattie G. Wright, his wife, and Pauline E. Liner . . . as Joint Tenants." The court noted that the term "Joint Tenants" appears to modify all of the three names involved. However, the court awarded a one-half interest to the Wrights and the other one-half interest to Ms. Liner. In the District of Columbia a conveyance to a



husband and wife as joint tenants creates a tenancy by the entirety and the court rested its decision on that principle, essentially that the Wrights, as a married couple, took only one half as one person.

Also, the opinion in Mosser v. Dolsay, 132 N.J. Eq. 121, 27 A.2d 155 (1942), interprets a granting clause similar in nature to the one in the instant case, which states:

[To] Ralph Mosser of the Burough of Wanaque, County of Passaic, and State of New Jersey, and Frank Dolsay and Emma Dolsay, his wife, as joint tenants and not as tenants in common, with rights of survivorship incident thereto.

The court, quoting Freeman on Co-tenancy and Partition § 70, stated:

The husband and wife not only take an entire estate as one person when it is granted to them, but they are also regarded as one person in any conveyance made to them and others, and therefore take but one moiety. Thus, if a deed be made to A and wife and B, here A and wife take together but one-half. This is true whether the conveyance be intended to create a joint-tenancy or a tenancy in common. [27 A.2d at 157.]

In summary, should Mrs. Rodgers, as successor to Myrtle Neil, take only the interest Mrs. Neil took in the warranty deed from the Newsomes, without regard to any other factors present in this case, she should take a one-half interest. The two basic reasons for this are: First, a conveyance to a husband and wife is a conveyance to one person and, therefore, a conveyance to a husband and wife and another person is a conveyance of a one-half interest to the husband and wife as one person and a one-half

interest to the other person. This position is strengthened where the grantor explicitly notes the marital status of the parties. Second, use of the conjunction "and," instead of a comma, between the name of a third person and the names of the married couple in a deed is presumptive evidence that the parties were not intended to take three equal interests in the estate but rather two.

### CONCLUSION

Appellant respectfully submits that the decision of the trial court was totally contrary to the clear and convincing evidence that Myrtle C. Neil took title to the subject property as sole fee owner in 1944 subject only to the equitable mortgage of the Hansens. Further, when Mrs. Neil quitclaimed her interest to appellant Shirley Rodgers in 1971, Mrs. Rodgers in turn became the sole fee owner. Therefore the judgment of the lower court must be reversed and judgment entered for appellant or a new trial must be granted.

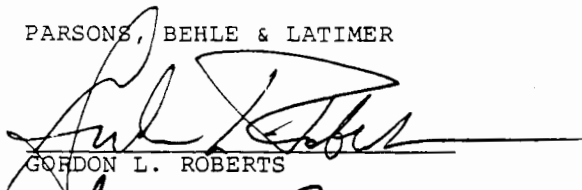
Appellant further submits that her claim is not barred by any of the technical defenses raised by the Hansens--statute of frauds, statute of limitations, or laches--and that the court erred in applying them.

Finally, appellant submits that, in the event this Court finds for respondents on each of the above issues, she


still is entitled to a one-half interest in the subject property rather than the one-third interest awarded by the trial court.

RESPECTFULLY SUBMITTED this 20th day of October, 1977.

PARSONS, BEHLE & LATIMER



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MAILING CERTIFICATE

A copy of the foregoing Appellant's Brief was mailed, postage prepaid and properly addressed, to Steven H. Gunn, of and for Ray, Quinney & Nebeker, attorneys for respondents, 400 Deseret Building, 79 South Main Street, Salt Lake City, Utah 84111, this 20th day of October, 1977.

