

1977

Shirley Rodgers v. Annie N. Hansen And Albert J. Hansen : Respondents' Brief

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT

OF THE STATE OF UTAH

SHIRLEY RODGERS,

Plaintiff and Appellant,

v.

ERWIN N. HANSEN and
ALBERT J. HANSEN,

Defendants and Respondents.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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

RESPONDENTS' 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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IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff to quiet title to the subject property in herself. Defendants counterclaimed seeking to quiet title to a two-thirds interest in the subject property in themselves and a one-third interest in plaintiff as trustee for the heirs of Myrtle Neil (among whom are numbered plaintiff and the defendant, Annie N. Hansen).

DISPOSITION IN LOWER COURT

The case was tried before the Honorable Peter F. Leary, District Judge, sitting without jury on September 23, 1976. Judgment was entered in favor of defendants on March 25, 1977. (R.123-124.) The judgment dismissed plaintiff's complaint with prejudice and granted judgment in favor of defendants on their Counterclaim. (Id.)

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment with regard to the dismissal of her Complaint and with regard to the granting of defendant's Counterclaim insofar as it relates to their two-thirds interest in the subject property. Plaintiff does not seek reversal of the court's determination that she was holding the interest which she received from Myrtle C. Neil in trust for Mrs. Neil's heirs.

STATEMENT OF THE FACTS

By a Uniform Real Estate Contract dated April 25, 1942, William and Vivian Newsome agreed to sell the subject property to Harold and Myrtle Neil. (Ex. 1-P.) The purchase price under the contract was \$3,250.00. (Id.) Because the Neils were experiencing financial difficulties, their daughter and son-in-law, defendants here, assisted them in making the down-payment and in paying a number of the monthly installments due under the contract. (Tr. 68-72.) In all, defendants paid \$725.00 prior to the final balloon payment of \$2,389.00. (Id.) During the time that the defendants were aiding the Neils to meet their obligations under the contract, Mr. Neil died. (R. 19-20.) Thereafter, defendants sold an unrelated piece of real estate and used the proceeds from the sale thereof to pay the balance due under the contract, \$2,389.00. (R. 96, paragraph 2; Tr. 72.) On July 7, 1944, the Newsomes executed a warranty deed 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". (Ex. 2-P.)

After execution of the warranty deed, defendants allowed Mrs. Neil to remain in possession of the subject property and to retain rents paid by boarders. (Tr. 73-75.) Although there appears to have been no specific agreement in this regard, there was apparently an understanding between the parties that Mrs. Neil would pay the taxes and maintain the property. Defendants offered occasional financial assistance in paying the taxes and assisted Mrs. Neil in providing maintenance and repairs. (Id.)

Beginning with a receipt dated October 20, 1944, Annie Hansen executed a series of 43 receipts purporting to show receipt of a total of \$1,334.00 from Mrs. Neil. (Ex. 6-P.) The first of these receipts shows a "previous balance" of \$2,389.00, and payment of \$25.00 for "payment on house 412 North 2nd West". The last such receipt, dated August 5, 1949, shows a balance due of \$1,055.00. Although this particular receipt does not show the purpose for which the payment was made, the receipts typically state that the payment (usually \$25.00) was for "payment on house" or "payment on home".

When asked about the purpose of these receipts at trial, defendants responded that the receipts were given to Mrs. Neil to aid her in obtaining additional welfare benefits. Defendants acknowledged, however, receipt of money from Mrs. Neil on a sporadic basis. (Tr. 78-79, 85-86.) In most cases

Mrs. Neil did not specify the purpose for which the money was given (Tr. 87); however, some payments were given to the Hansens to be delivered to a creditor. (Tr. 84-85.)

In 1958, apparently upset by a proposed sale of the property by the Hansens, Mrs. Neil contacted an attorney, Emmett L. Brown, who, by a letter dated September 29, 1958, wrote to the Hansens. In his letter Mr. Brown objected to the proposal that the Hansens take two-thirds of the appreciated value of the property. He also explained Mrs. Neil's concern that because of the joint tenancy she would not be able to leave her interest to all of her heirs. He acknowledged that Mrs. Neil was aware that the Hansens claimed the property as joint tenants. (Id.) Mrs. Hansen responded by a letter dated September 30, 1958, in which she reaffirmed the right of her and her husband to two-thirds of the proceeds of the sale of the house. (Ex. 14-P.)

On February 12, 1964, in an effort to sever the joint tenancy between herself and defendants, Mrs. Neil conveyed her interest in the property by quit claim deed to the plaintiff. On the same date, plaintiff reconveyed the property to Mrs. Neil, thus destroying the joint tenancy as between Mrs. Neil and the defendants. (Ex. 3-P, Ex. 4-P.) At trial plaintiff admitted that at the time of the above transactions Mrs. Neil was aware that defendants asserted a two-thirds fee interest in the subject property. (Tr. 39.)

In the summer of 1968, several members of the family, including Mrs. Neil, defendants, and plaintiff met at defendant's home in Ogden, Utah, at plaintiff's request to discuss Mrs. Neil's will. (Tr. 76, 88.) During the conversation plaintiff took the lead in stating that the Hansens had loaned money to Mrs. Neil and that she had repaid all but \$250.00 of the debt. (Tr. 32-33.) Although the evidence is disputed, Mrs. Neil apparently said nothing during the conversation. (Tr. 77, 89, 102.) In the course of the meeting, defendants reaffirmed their belief that they were owners of a share of the subject property (Tr. 37, 101-102), at the same time denying existence of a loan. (Tr. 76, 100-101.)

Mrs. Neil died on August 24, 1975, without ever having attempted to seek a legal determination of her rights in the property. Shortly before her death, Mrs. Neil executed a second quit claim deed in favor of plaintiff. (Ex. 5-P.) Prior to her death she executed a will which directed her executrix, Mrs. Rogers, to distribute her estate equally among her six children. (Ex. 8-D.)

Plaintiff commenced the present action on September 12, 1975. In her Complaint, plaintiff alleged that the parties to the 1944 Deed intended that Mrs. Neil would receive fee title to the subject property subject only to a mortgage interest in favor of defendants. (Record p.2-4.)

ARGUMENT

POINT I

THE EVIDENCE SUPPORTS THE TRIAL COURT'S
FINDING THAT DEFENDANTS OWN A FEE INTEREST
RATHER THAN A MORTGAGE IN THE PROPERTY.

Plaintiff claims that the 1944 Warranty Deed which on its face purports to convey the subject property to Mrs. Neil and to defendants was in fact intended to create the relationship of mortgagor/mortgagee between Mrs. Neil and the defendants. Thus, the critical question of fact which the court below was called upon to determine was what the intent of the parties to the deed was.

Contrary to plaintiff's allegations, the trial court found that the parties intended that the 1944 Deed conveyed the subject property to Mrs. Neil and the defendants as joint tenants and that no mortgage was intended. The relevant findings of fact by the trial court state:

. . .

6. Prior to the time of execution of the Warranty Deed, Mrs. Neil agreed that defendants would be named as joint tenants thereon. Upon its execution, she received a copy of the deed which she took to the county recorder's office for recordation.
7. The grantors under the Warranty Deed intended to convey the property in joint tenancy to defendants and Mrs. Neil. Mrs. Neil never asked the grantors to change the deed nor did she ever express dissatisfaction as to its provisions.
8. Defendants neither agreed with Mrs. Neil that they would sell their interest in the subject property to her nor that they would treat the Warranty Deed as conveying the property to Mrs. Neil only, while creating a mortgage interest in themselves. (R. 111.)

This court has long adopted the view that the evidence

should be reviewed in the light most favorable to sustain the findings of the tryer of fact. Cutler v. Bowen, 543 P.2d 1349 (Utah 1975).

Even in equity actions where this court has the prerogative of reviewing the evidence, the presumption has been adopted that the tryer of fact is better able to weigh the evidence and veracity of testimony than an appeals court, and therefore that the evidence is reviewed in the light most favorable to sustain the trial court's findings. As to the review of the findings of the court in an equity of action, this court has stated:

Notwithstanding the fact that in an equity case such as this it is our prerogative to review the evidence, we ordinarily repose some confidence in the verity of the actions of the trial court; and assume that he believed those aspects of the evidence which are in accord with his findings and judgment. Foster v. Blake Heights Corporation, 530 P.2d 815, 816 (Utah 1974).

Thus, in Taylor v. Turner, 27 Utah 2d 34, 492 P.2d 1343 (1972), this court was called upon to determine whether the trial court was correct in finding that certain payments had been made against one of two loans. The court refused to overturn the trial court's findings saying:

[T]he trial court did not adopt defendant's interpretation of the transaction; this was a factual determination which cannot be disturbed on appeal. Id., at 1346 (emphasis added).

Similarly, in Kesler v. Rogers, 542 P.2d 354 (Utah 1975), the appellant alleged that the findings of an advisory jury in an equity action and the findings and decision of the court were not supported by the evidence. In affirming the trial court's decision this court stated:

It seems necessary and appropriate to reiterate the oft stated rule of review: that we are obliged to survey the record, not as the defendant views the facts from his defensive position, but in the light favorable to the findings made by the advisory jury and to the findings and decision made thereon by the trial court. Id., at 356.

The trial transcript and the documentary evidence in the instant case indicate that there was ample support for the court findings that the parties to the 1944 Deed did not intend that Mr. Neil would receive the entire fee estate. That evidence includes the following:

(a) Albert Hansen, one of the parties to the 1944 Deed, gave the following testimony:

Q. Did you discuss the fact with Mrs. Hansen that you planned on having three of the names on the deed?

A. Yes.

Q. Do you know who it was who suggested to Mr. Newsome that three names be placed on the deed?

A. I suggested it.

Q. Did you discuss that with Mrs. Neil before you did it?

A. Yes.

Q. Did she ever raise any objection to that procedure?

A. No.

Q. Did you enter into any sort of agreement with Mrs. Neil concerning income from the property if any was generated?

A. No.

Q. What about the payment of taxes?

A. Well, we--she and I figured that if she paid the taxes that would be fair enough as long as she was living in the place.

Q. Then did you agree that she would remain in possession of the house?

A. Yes, as long as she lived.

Q. And upon her death?

A. Well, at that time we just figured that if it was either any of us it would go to the other two.

Q. Did you ever agree with Mrs. Neil that you would convey your interest in the property to her?

A. No.

Q. Was there ever any agreement that the deed from Mr. Newsome would convey only a mortgage interest to you?

A. No.

Q. Did you ever agree that Mrs. Neil would pay you back for the moneys you spent on the house?

A. No, she never had any obligations.
(Tr. 72 (lines 29-30), 73 (all), 74 (lines 1-3).)

Mr. Hansen's uncontradicted testimony clearly supports the court's finding that the 1944 Deed was intended to create the very type of relationship between the grantees described thereon, namely, that of joint tenants--not that of mortgagor and mortgagees.

(b) Similarly, in her testimony at trial and in her deposition, Mrs. Hansen, another party to the 1944 Deed, described the relationship between the grantees as that which is recognized at law as a joint tenancy:

Q. Now, was there any kind of an understanding, or an agreement, that you had with your mother between 1942 and 1944 when you were making these payments?

A. She said, when we went to pay off the big payment, that if we would pay it off, why, then and put her name on the deed, why then it would be all equal, and when she was through with it, why then the property would belong to us, vice versa, with us.

We figured that if we died before she did, why then, it would be the other two. (Deposition of Annie Hansen P. 9, lines 9-18)

Concerning the existence of the alleged loan and mortgage, Mrs. Hansen gave the following testimony:

Q. Mrs. Hansen, it has been alleged that there is an agreement between your mother and you and your husband that you would - that you would loan her the money. Was there ever such a loan?

A. There was never a loan. We paid off the house. She had a name on the deeds. She was living in the house, so why would we need a loan?

Q. Did you ever agree to convey your interest in the property to her?

A. Never did.
(Tr. 87 (lines 29-30), 88 (lines 1-3) (emphasis added).)

(c) Gayla Hansen, daughter of the defendants, and granddaughter of Mrs. Neil testified that in a conversation she had with

Mrs. Neil in 1968, her grandmother spoke of her one-third interest in the subject property:

Q. . . .What did she say?

A. She said, "Well, I just -" toward the end of the whole discussion she just said to me that, well, she thought she could do with her third what she wanted to.

Q. Did she use the word "one-third"?

A. Yes sir.

(Tr. 101 (lines 21-26).)

It is perhaps stating the obvious to remark that Mrs. Neil's acknowledgment that she considered herself to be a one-third interest holder in the subject property is inconsistent with the plaintiff's theory that Mrs. Neil owned the entire fee estate subject only to a mortgage in favor of defendants.

(d) As early as 1958, Mrs. Hansen in response to a letter, had written to her mother's attorney that she and her husband claimed a two-thirds interest in the property and that the money which they paid for the house was not intended as a loan. Mrs. Hansen wrote:

We have no intentions of selling the house she [i.e., Mrs. Neil] is living in now or ever. We bought the house for her to live in, enjoy [sic] do what she wants to in so she would always have a roof over her head. We have never asked her for one penny of anything So we offered her our little new rambler to live in and sell her house and finish the one we have started for ourselves and give her 1/3 of the money we got from the house to live on or whatever she wanted to do. We asked nothing except 2/3rds. . . . (Letter to Emmett L. Brown dated September 30, 1958, Exhibit 14P)

The above passages clearly express the belief of the defendants that Mrs. Neil was not obligated to repay them for having purchased the property. The letter also shows that it is the view of the Hansens that if the property were sold, they would

be entitled to two-thirds of the proceeds of the sale. Such a belief is consistent with the Hansen's contention that the deed was intended to convey a two-thirds interest as joint tenants to them, but inconsistent with the allegation that they intended to take only a mortgage in the subject property.

(e) The 1944 Warranty Deed states unequivocally that Myrtle C. Neil, Annie Hansen and Albert Hansen were to receive the property as joint tenants. (Exhibit 2P) Mrs. Neil obviously knew of the Deed's provisions, since she was the person who recorded it. (Id.)

The foregoing evidence presented at trial at the very least demonstrates that the trial judge was on firm evidenciary ground when he found that the parties to the 1944 Warranty Deed intended that the grantees would receive the property as joint tenants and not as mortgagor (Mrs. Neil) and mortgagees (Defendants).

Plaintiff attempts to avoid the fatal effect of the trial court's findings on her appeal by directing this court's attention to certain receipts bearing Mrs. Hansen's signature and by citing the rule that this court is not bound by the interpretation of documents applied by the trial court. See Lake v. Hermes Associates, 552 P.2d 126, 128 (Utah 1976). The weakness of this argument is that as shown by the discussion above, there was ample evidence to support the court's findings without resort to an interpretation of the receipts. Indeed, the court's finding concerning the receipts does not appear to indicate that the court attached any special significance to them. The relevant Finding states:

9. Beginning on October 20, 1944, and extending up until August 5, 1949, defendant, Annie Hansen executed a series of 43 receipts purporting to show payments by Mrs. Neil to Mrs. Hansen in the total sum of \$1,159.00. These receipts stated that the payments evidence thereby were "for payment on house" or "for payment on home". The last receipt dated August 5, 1949 indicated there was a balance due of \$1,055.00. Mrs. Neil made no payments to defendants after that date. (Tr. 111-112)

Similarly, the court's Conclusions of Law based upon above Finding contain no indication that it relied on the receipts indetermining the intention of the parties. The only reference to the receipts is found in Conclusion 8 which states:

The receipts executed by Mrs. Hansen were insufficient to take the alleged agreement out of the Statute of Frauds under the Doctrine of Part Performance or Written Memorandum. (Tr. 114)

Since the Findings and Conclusions show that the trial court did not rely upon any particular interpretation of the receipts, and since there was ample other evidence of a nondocument character to support its findings, the rule in Lake v. Hermes Association, supra, has no relevance.

A more serious flaw in appellant's argument is that she has failed to meet her burden of proof in overcoming the clear language of the 1944 Deed.

It is a well-accepted rule in this jurisdiction that the presumption of truthfulness and accuracy accorded written instruments can only be overcome "by clear and convincing evidence." Pagan Walker, 539 P.2d 452, 454 (Utah 1975). This rule has been applied in cases where the court has been asked to declare a deed absolute to be in fact a mortgage. In Hess v. Anger, 53 Utah 186, 177 P.2d 121 (1919), which involved the issue of equitable mortgage, the court

stated:

We are not unmindful that in this class of cases the oral testimony of witnesses should be scrutinized by the court with great care and that the proof should be plain and convincing before the court is authorized to declare upon the intention of the parties. Id., at 234 (emphasis added).

Similarly, in Thornley Land & Livestock Co. v. Gailey, 105 Utah 519, 143 P.2d 283 (1943), the court refused to reverse the lower court's dismissal of the plaintiff's action to have a quit claim deed declared a mortgage on the grounds, inter alia, that the proffered evidence was not such "clear, definite, unequivocal, and conclusive evidence as is required to declare a deed a mortgage . . ." Id., at 287.

Thus, a successful attack on a deed absolute must be based upon more than a mere preponderance of the evidence. An examination of the evidence adduced by the plaintiff at the trial demonstrates that the trial court was correct in ruling that the plaintiff had not met her burden of proof.

Plaintiff's evidence consisted primarily of plaintiff's own testimony and of the receipts referred to above. Mrs. Rogers was not a party to the transactions and to conversations leading up to the execution of the 1944 Deed. However, she attempted to show that her mother understood that the deed actually created a mortgage by relating conversations she had had with her mother. The first of these conversations took place in 1964 in the office of her mother's attorney. Concerning this conversation Mrs. Rogers' testimony is as follows:

Q. Tell us what your mother told Mr. King relative to her understanding as to the ownership of this home

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A. Well, she felt like the home was hers and that the deed was - very misleading about the names on it. And she felt like - well she told him that she had paid the house, the money back for the Hansens and she had paid all the taxes and all of the upkeep. And the house was hers as far as she was concerned, as she wanted that severed. And the only way to do it, he said, was - without them doing something with her - would be to do the quit claim deed.
(Tr. 30 (lines 10-20).)

The second conversation testified to by Mrs. Rogers took place in 1968 in the defendant's home. According to Mrs. Rogers in the course of that conversation, which involved several members of the family, Mrs. Neil stated that she thought she still owed Hansens about \$250.00 and that the Hansens had agreed to charge no interest. (Tr. 33 (lines 21-24), 34 (lines 7-8).)

Concerning these alleged conversations the following observations are relevant. First, the conversations took place 18 years and 8 years, respectively, prior to the time of trial. The trial court in weighing the credibility of the evidence could reasonably have concluded that Mrs. Rogers' testimony was so clouded by the passage of time as to have lost its probative value. Indeed, the remarks which Mrs. Rogers attributed to her mother were expressed only once as a direct quote. (Tr. 34 (lines 7-8).) On other occasions Mrs. Rogers' paraphrasing of her mother's comments was prefaced by the words "she felt like. . ." (Tr. 30 (line 12), Tr. 33 (line 11).)

In addition, Mrs. Rogers' testimony as to the remarks made by her mother in the 1968 meeting are directly contradicted by the testimony of both defendants and of their daughter (Tr. 77 (line 11), 89 (line 14), 102 (lines 11-19).) Under the circumstances it would not be surprising if the trial judge felt that

Mrs. Rogers' testimony fell short of the standard of "clear, definite, unequivocal and conclusive" evidence required by Thornley Land & Livestock Co. v. Gailey, and Hess v. Anger, supra. As to the testimony concerning the intent of a decedent, this court has observed:

It is generally recognized that testimony concerning intent of one who is deceased should be looked upon with caution; and this is particularly true when such testimony is suffused with self-interest. Pagano v. Walker, supra, at 454.

Second, even if Mrs. Rogers' testimony were accepted as being completely accurate, and if the Hansen's testimony were disregarded, it does not follow that evidence of the existence of a mortgage was so "clear, definite, unequivocal and conclusive" as to lead the court ineluctably to the conclusion that the relationship between Mrs. Neil and the defendants was that of mortgagor/mortgagee. Mrs. Rogers' testimony can be summarized as follows:

(a) Mrs. Neil believed the house was hers; and (b) Mrs. Neil believed that she was indebted to the Hansens and that she had repaid most of that debt. Such facts, if true, would be consistent with a variety of relationships between Mrs. Neil and the defendants. It is reasonable to assume, for example, that Mrs. Neil believed the house was hers because she was a joint tenant and that she had a moral obligation to repay the Hansens for their largess in buying the house and placing her name on the deed as a joint tenant. In the alternative, Mrs. Neil may have believed that she was purchasing the Hansen's two-thirds interest in the property under an oral contract. She may even have believed that she was under a legal obligation to repay the Hansens and that until she did so

she could not sever the joint tenancy. Thus, Mrs. Neil's statements could not be said to comprise the type of clear and convincing evidence which this court has required for setting aside an absolute deed.

Finally, plaintiff places great reliance upon a series of 43 receipts executed by Mrs. Hansen purporting to acknowledge receipt of various sums of money from Mrs. Neil (Exhibit 6P.) Upon examination, however, these receipts prove to be as inconclusive as Mrs. Rogers' testimony.

With some exceptions, the receipts in question contain the following information: Date (from October 20, 1944 to August 5, 1949), person paying the money (Mrs. Neil), person receiving the money (Mrs. Hansen), amount of payment (usually \$25.00), previous balance (\$2,389.00 on receipt #1), the balance due (\$1,055.00 as of the date of the last receipt) and the purpose of the payment (usually "payment on house" or "payment on home").

These receipts suffer from the same paucity of detail as the remarks attributed to Mrs. Neil in Mrs. Rogers' testimony. If, for example, Mrs. Neil had been buying the property from the Hansens under an installment contract for sale, the receipts would be exactly the same as those found in Exhibit 6P. Similarly, the receipts in question could demonstrate that Mrs. Neil repaid the Hansens because they purchased the home for her and allowed her to live in it during her life. Thus, the receipts lack the clarity and conclusiveness necessary to overcome the absolute doubt.

In light of the above analysis, the trial court was clearly correct in ruling as one of its Conclusions of Law:

There is no clear and convincing evidence of the intent of the parties to the 1944 Deed to have created a relationship other than a joint tenancy as between the grantees.

Since there is sufficient evidence to support the court's Findings and Conclusions, the judgment should be affirmed.

POINT II

THE COURT BELOW WAS CORRECT IN RULING THAT PLAINTIFF'S CLAIM IS BARRED BY THE STATUTE OF FRAUDS

Because of ambiguities in plaintiff's Complaint and in plaintiff's response to subsequent attempts by defendants' counsel to clarify plaintiff's theory for quieting title, the trial court and defendants' counsel assumed that one of plaintiff's theories was that Mrs. Neil had entered into a contract with defendants for purchase of their two-thirds interest in the property. Since there was no evidence that such an agreement existed in written form, the court correctly ruled that such an agreement would have been barred by the statute of frauds. (See the trial court's Conclusion No. 7 (Tr. 113).) As plaintiff has now unequivocally stated that hers is an action to quiet title based upon the doctrine of equitable mortgage, (see plaintiff's Statement of the Kind of Case) plaintiff argues that the statute of frauds is inapplicable to this action. In this regard, defendants respectfully submit that under the peculiar facts of this case the statute of frauds is applicable and does bar plaintiff's action.

A. THIS ACTION FALLS WITHIN THE STATUTE OF FRAUDS.

Utah's Statute of Frauds, Section 25-5-1, Utah Code Ann.

(1953) provides:

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created,

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granted, assigned, surrendered or declared otherwise by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

An exception to the above rule is found in Section 25-5-2 which states:

The next preceeding section shall not be construed . . . to prevent any trust from arising or being extinguished by implication or operation of law.

In general, this latter provision (Section 25-5-2) has been construed by the courts to take equitable mortgages out of the statute of frauds on the theory that the transferee of a deed intended as a mortgage holds the deed in constructive trust for the transferor. The Restatement describes the above rule as follows:

(1) Where the owner of an interest in land transfers it inter vivos to another in trust for the transferor, but no memorandum properly evidencing the intention to create a trust is signed, as required by the statute of frauds, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the transferor, if

. . .

(c) The transfer was made as security for an indebtedness of the transferor
Restatement (Second) of Trusts, §44 (1954).

The above rule has been adopted by Utah courts in such cases as Wasatch Mineral Co. v. Jennings, 5 Utah 243, 15 P.65, (1887), and Taylor v. Turner, 27 Utah 2d 39, 492 P.2d 1343, 134 (1972). It is significant to note, however, that in both of the above cases the mortgagor had executed a deed absolute in favor of the mortgagee. Indeed, plaintiff freely admits that she has been unable to find any Utah cases in which an equitable mortgage was created by means of a conveyance from a third-party grantor to

grantees who bore the relationship of mortgagor/mortgagee to one another. (See Appellant's Brief, P. 9.)

The above quoted passage from the Restatement clearly relates only to situations in which A conveys to B by absolute deed, but intends only to create a mortgage interest in B. Under such circumstances, the transaction is clearly within the trust exception to the statute of frauds since the law imposes a constructive trust on the property. This is not the case where A conveys to B and C, intending to convey the property in fee to B subject to a mortgage in favor of C. Under such circumstances, Section 45 of the Restatement sets forth a different rule:

(1) Where the owner of an interest in land transfers it inter vivos to another in trust for a third person but no memorandum properly evidencing the intention to create a trust is signed, as required by the statute of frauds, and the transferee refuses to perform the trust, the transferee holds the interest upon a constructive trust for the third person, if, but only if,

(a) The transferee by fraud, duress or undue influence prevented the transferor from creating an enforceable interest in the third person, or

(b) The transferee at the time of the transfer was in a confidential relation to the transferor, or

(c) The transfer was made by the transferor in anticipation of death.

Restatement (Second) Trusts, §45.

As adopted in Utah, this doctrine is even broader than the rule proposed by the Restatement. Thus, in Chadwick v. Arnold, 34 Utah 48, 95 P. 527, 530 (1908) the court stated:

[I]f A, having no interest in the real estate, orally agrees with B that the latter should purchase it with his own funds and take the title in his own name, and that he should thereafter convey it to A upon an agreed price, no resulting or constructive trust arises, and . . . such a contract is also within the statute of frauds.

Thus, while in general the statute of frauds requires that a conveyance of an interest in land be in writing, a well-recognized exception to this rule is that the statute is inapplicable to the creation of a trust. As a consequence, in most equitable mortgage cases, the statute is inapplicable because the courts which have recognized the existence of an equitable mortgage have also recognized the existence of a constructive trust. It follows that in cases where no trust is present the enforcement of an equitable mortgage may be barred by the statute of frauds. This is the significance of Section 45 of the Restatement and the rule set forth in Chadwick v. Arnold, supra.

In the instant action, Mrs. Neil, having only a small equitable interest in the property allegedly orally agreed with defendants that they should purchase the property with their own funds and take title to a two-thirds interest in their own name, and that they should convey it to Mrs. Neil upon an agreed price. Thus, even if plaintiff's allegations are true, under the rule Chadwick v. Arnold, supra, the agreement is unenforceable under the statute of frauds.

But even if the more liberal Restatement rule were adopted, the necessary prerequisites to the creation of a constructive trust are not present. These are: (a) transfer under duress, fraud or undue influence, or (b) transfer to one who holds a confidential relationship to the transferor, or (c) transfer in anticipation of death. It should be noted that these elements are not present here. The court specifically found that the deed was not executed under the influence of fraud or duress.

(Conclusion of Law No. 4, Tr. 113.) Indeed, plaintiff has not alleged the existence of fraud, duress or undue influence. Similarly, it is not contended--and the evidence would not support such an allegation--that the transferees, Mrs. Neil and the Hansens, stood in a confidential relationship to the grantor, Mr. Newsome. Finally, there is no evidence to suggest that the transfer was made in anticipation of the transferor's death, nor does plaintiff allege this to be the case.

Thus, the facts in the instant case do not give rise to a finding that a constructive trust was created. Because the alleged arrangement between Mrs. Neil and the defendants was not in writing, the transaction falls with the statute of frauds.

B. THE DOCTRINES OF PART PERFORMANCE AND WRITTEN
MEMORANDUM ARE INAPPLICABLE

Plaintiff further contends that even if the statute of frauds were otherwise applicable, the transaction in question is taken out of the statute by reason of the doctrines of part performance and written memorandum. These doctrines are set forth in the Utah Code as follows:

Section 25-5-3. Leases and Contracts for Interest in Lands - Every contract . . . for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

Section 25-5-8. Right to Specific Performance Not Affected - Nothing in this chapter contained shall be construed to abridge the power of courts to compel the specific performance of agreements in case of part performance thereof.

Conceptually, both the doctrines of part performance and specific performance are based upon the same basic premise, namely,

that an agreement otherwise unenforceable under the statute of frauds will be enforced if the actions of the parties have so clearly defined the terms of the contract as to permit its enforcement. Thus, as to part performance, it has been stated:

[T]hree general criteria emerge in removing an oral contract from the statute of frauds by part performance. First, the oral contract and its terms must be clear and definite; second, the acts done in performance of the contract must be equally clear and definite; and third, the acts must be in reliance on the contract. Randall v. Tracy Collins Trust Co., 6 Utah 2d 18, 305 P.2d 480, 484 (1956). See also 73 Am. Jur. 2d Statute of Frauds, §407.

Similarly, as to the doctrine of written memorandum, it has been stated:

A memorandum sufficient to satisfy the requirement of the statute of frauds must be complete in itself as to the parties to, and the essential terms of, the contract. The memorandum cannot rest partly in writing and partly in parol; that is to say, a deficiency in the memorandum cannot be supplied by parol evidence. 72 Am. Jur. 2d Statute of Frauds, §296.

This court has also adopted the above rule. In Birdze v. Utah Oil Refining Co., 121 Utah 412, 242 P.2d 578, 580 (1952) this court stated:

It is fundamental that the memorandum which is relied upon to satisfy the statute of frauds must contain all the essential terms and provisions of the contract.

In view of the foregoing, it is clear that the mere existence of a set of receipts purporting to acknowledge receipt of a certain sum of money from Mrs. Neil by Mrs. Hansen for "paid on house" does not necessarily take this case out of the statute of frauds. The critical question as raised by the above cited authorities is whether the terms of the alleged contract are clearly enough shown by part performance and by the receipts to

permit enforcement thereof. An examination of the alleged acts of part performance and of the receipts shows that the provisions for which plaintiff seeks specific performance cannot be deduced from the acts of Mrs. Neil and the Hansens.

As described above, the receipts typically show acknowledgment of a sum of money (usually \$25.00) from Mrs. Neil by Mrs. Hansen. The document shows the date of the receipt, the balance due and the fact that the payment was for "payment on home" or "payment on house". Even assuming that Mrs. Neil did in fact receive the payments receipted--and she denies this fact-- the last receipt shows a balance due of \$1,055.00 (the first receipt shows a beginning balance due of \$2,389.00). The key question, then, is: Do the above described receipts evidence the intention of Mrs. Neil and the defendants to create a mortgage? Defendants respectfully submit that this question must be answered in the negative.

It is important to note that the receipts in question show any of a number of possible relationships between Mrs. Neil and the defendants. The following is a partial list of such possible relationships:

1. Mortgagor-Mortgagee

Admittedly, receipts like the ones in question could show payment by Mrs. Neil as mortgagor to the Hansens as mortgagees. However, in view of the fact that the receipts cease in August, 1949, showing a remaining balance of in excess of 40 percent of the starting balance, and in view of the fact that none of the receipts refer to a loan or to a mortgage, this explanation seems unlikely.

Furthermore, if the defendants understood that they held a mortgage in the subject property, it is difficult to understand why they would have not foreclosed on their mortgage or to have exacted interest on the underlying obligation.

2. Contract of Sale

The receipts might also be interpreted to show that the Hansens were selling their two-thirds interest in the subject property to Mrs. Neil by an oral installment contract.

3. Repayment of Unsecured Loan

Since plaintiff has failed to adduce any evidence of a mortgage, it is also fair to assume that Mrs. Neil considered herself to be indebted to the Hansens by virtue of their having purchased the property with their own money and having placed Mrs. Neil's name on the deed as a one-third interest holder. The receipts could therefore show an attempt by Mrs. Neil to repay the Hansens for their having purchased her one-third interest, or for their allowing her to remain in possession of the home and to keep the rent money.

4. Welfare Payments

One other explanation for the existence of the receipts has been offered. Mrs. Hansen testified that she gave her mother the receipts without actually having received money to allow Mrs. Neil to qualify for extra welfare benefits. The practice of giving receipts was terminated in 1949 when Mrs. Neil remarried and thus became ineligible for the benefits which had been obtained by use of the receipts.

The above discussion is not intended to convince this court of the correctness of any one of the proposed explanations.

for the existence of the receipts. Rather, it simply illustrates the fact that the receipts are ambiguous in describing the relationship between Mrs. Neil and the defendants. Thus, if the receipts are, indeed, memoranda as the plaintiff suggests, then they are memoranda which do not set forth the terms of the alleged contract with sufficient clarity to permit specific performance. Recognizing this fact, the trial court concluded:

. . .

8. The receipts executed by Mrs. Hansen were insufficient to take the alleged agreement out of the statute of frauds under the doctrine of part performance or written memorandum. (Tr. 114.)

Finally, it is clear that the doctrine of part performance has no application to this case, because that doctrine is applicable only where plaintiff seeks specific performance. See Section 25-5-8, supra. In the instant action, plaintiff has specifically stated that her action for quiet title is based upon the theory of equitable mortgage. (Brief of Appellant, page 1.) Furthermore, even if plaintiff changes her theory to specific performance, her use of that remedy is barred by the statute of limitations and by the fact that Mrs. Neil's performance was incomplete. Thus, it has been stated:

And although the promisee under a unilateral contract is not entitled to specific performance while the contract remains executory on his part, he may be awarded specific performance after he has performed his part of the contract.

The practical effect of this distinction is that while contracts which lack mutuality may not be specifically enforced as long as they are executory on both sides, when the plaintiff has fully executed his obligations he may be entitled to specific performance. 71 Am. Jur. 2d Specific Performance, §26, at 44.

Consistent with this doctrine, the trial court concluded:

. . .

9. Even if the alleged agreement existed, plaintiff would not be entitled to specific performance, since Mrs. Neil did not complete her performance. (Tr. 114)

From the foregoing, it is clear that the court correctly ruled that plaintiff's action is barred by the statute of frauds.

POINT III

THE COURT BELOW WAS CORRECT IN RULING THAT THE
APPLICABLE STATUTE OF LIMITATIONS AND THAT THE
DOCTRINE OF LACHES BAR PLAINTIFF'S CLAIM

Plaintiff alleges that the court below was in error when it ruled that her claim was barred by Utah's statutes of limitations and by the doctrine of laches. However, a review of the proceedings below, as well as an examination of the applicable law, reveals that the court was correct in its ruling. Defendants will discuss these doctrines separately in the balance of this Point.

A. THE STATUTE OF LIMITATIONS IS APPLICABLE TO AN EQUITABLE ACTION WHERE, LIKE HERE, THE PLAINTIFF SEEKS AFFIRMATIVE RELIEF

Plaintiff's attack on the court's finding that the statute of limitations is applicable to the instant action is based upon the premise that "a quiet title action is basically equitable and therefore, not barred by any statute of limitations". (Appellate Brief, p. 16.) Plaintiff cites no authority in support of this proposition. Indeed, an examination of the law reveals that the authorities do not support the rule proposed by the plaintiff.

Utah's Statute of Limitations makes no distinction between actions at law and at equity. Section 78-12-1 states, for example,

Civil actions can be commenced only within the periods prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute. (Emphasis added)

Most jurisdictions have taken the position that an equitable action comes within the purview of "dragnet" or "catchall" provisions such as Section 78-12-25, Utah Code Ann. (1953). Thus, it has been stated:

A provision that an action for relief not therein-before provided for must be commenced within a prescribed period after the cause of action shall have accrued has been held to apply to all suits in equity not strictly of concurrent cognisance in law and equity. 51 Am. Jur. 2d, Limitation of Actions, §83.

The Utah Supreme Court adopted a similar position in the case of Branting v. Salt Lake City, 47 Utah 296, 153 P. 995 (1915). There the plaintiff brought a quiet title action against a municipal corporation in an attempt to remove a tax lien which had been imposed as the result of a special sewer tax. Among other defenses the defendant stated that the action was barred by Section 2883, Comp. Laws of 1907 which provided:

An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued.

The trial court concluded that the statute was not applicable, but the Supreme Court reversed saying:

We are very clearly of the opinion that, while actions by which nothing is sought except to remove a cloud from or to quiet the title to real property as against apparent or stale claims are not barred by the statute of limitations, yet we are also clear that all actions in which the principle purpose is to obtain some affirmative relief, as was the case here, clearly can come within the provisions of Section 2883, supra. Id., at 1001.

A similar result was reached in Davidson v. Salt Lake City, 95 Utah 347, 81 P.2d 374 (1938). There plaintiff brought suit in equity seeking to have a deed set aside and to have title to the subject property quieted in himself. Plaintiff's complaint asserted that the deed in question was obtained by fraud. The defendant raised as one of its defenses the applicable statute of limitations relating to an action for relief on the ground of fraud or mistake. The trial court agreed with the defendant's contentions and entered judgment for defendant. On appeal, the Supreme Court affirmed. In doing so, the court reiterated the rule of Branting.

This court has also held that, although actions by which nothing is sought except to remove a cloud from or to quiet the title to real property as against apparent or stale claims are not barred by the statute of limitations, yet the statute does apply to actions in which the principal purpose is to obtain some affirmative relief. Id., at 376.

The court then noted that in the case before it the plaintiff had sought affirmative relief in that he had sought cancellation of the deed. Id.

Finally, in McConkie v. Hartman, 529 P.2d 801 (Utah 1975) the Supreme Court affirmed the decision of the trial court finding that an action seeking in the alternative reformation of a warranty deed, quiet title, and specific performance, was barred by Sections 78-12-23, -25, and -26 of Utah's Statute of Limitations.

Thus, it is clear that plaintiff is mistaken in asserting that an action to quiet title does not come within the statute of limitations. On the contrary, the rule is that if plaintiff as part of her quiet title action seeks affirmative relief, the statute of limitations will bar recovery. Branting v. Salt Lake

City, Davidsen v. Salt Lake City, supra. Therefore, the critical question is whether plaintiff has, in fact, sought affirmative relief.

In the instant action, plaintiff has stated that her relief is based upon the theory that as between her as successor to Mrs. Neil and the defendants there exists the relationship of mortgagor/mortgagee. Since title to the property currently reposes in plaintiff and defendants as joint tenants by virtue of the deed of 1944 and of the conveyance of Mrs. Neil's subsequent conveyance of her interest in the property to the plaintiff, it is clear that what plaintiff actually seeks is either (1) reformation of the 1944 Deed to show Mrs. Neil as the sole owner, or (2) specific performance of the alleged agreement between Mrs. Neil and the defendants for conveyance of the defendant's two-thirds interest in the property to Mrs. Neil upon payment of a certain sum. In either case, plaintiff seeks affirmative relief from this court. As a result, the transaction in question is subject to the applicable statute of limitations. (As more fully discussed in Point II, plaintiff's reliance on the doctrine of part performance indicates that specific performance is sought since §25-5-8 refers only to that remedy).

Plaintiff argues that Sections 78-12-25 and 78-12-26 cannot be applicable in the instant action because all actions relating to real property are contained within Sections 78-12-2 to 78-12-21. Because of the very long lapse of time involved in this case, defendants hesitate to quibble over whether this court should apply the limitations period of seven years adopted in cases

relating to real property or to the shorter periods applicable to other types of actions. Indeed, even application of the lengthiest limitation period (eight years) would still result in a bar to plaintiff's action.

In reality, it appears the trial court was correct in concluding that plaintiff's action is barred by Sections 78-12-23(3) and 78-12-25 which contain limitation periods of respectively three and four years. While plaintiff's complaint does not speak specifically in terms of fraud or mistake, a review of the trial transcript and of the documents filed by plaintiff indicates that plaintiff's prayer for quiet title is based upon the allegation that fraud or mistake was present. Thus, under the holdings in Davidson v. Salt Lake City, and McConkie v. Hartman, supra, the three-year limitations period of Section 78-12-26 appears applicable. Otherwise, the trial court would have been justified in applying the "catchall" provision of Section 78-12-25(2). See Branting v. Salt Lake City, supra.

Assuming one or the other of the above provision to be applicable, it remains only to determine at what point the statute began to run. Plaintiff appears to contend that the statutory period would begin to run only upon the death of Mrs. Neil, less than a year prior to the commencement of this action. The obvious answer to such an argument is, of course, that the statutes of limitation are designed to bar recovery on a particular cause of action, not the bringing of suit by a particular individual. That the statute of limitations begins to run immediately upon the accrual of the cause of action. 51 Am. Jur. 2d Limitation of Actions §107. The time for bringing of an action is not renewed by the

death of the aggrieved party or by the conveyance of the property.
Id., §408.

Section 78-12-26(3) states that a cause of action based on the allegation of fraud or mistake accrues upon "the discovery by the aggrieved party of the facts constituting the fraud or mistake". Similarly, in Branting v. Salt Lake City, supra, the court held that the four-year statute of limitations began to run when the tax which resulted in the lien was levied, and therefore became a matter of public record. Thus, in the instant case the limitations period would run from the date when Mrs. Neil became aware that the Hansens asserted ownership of a fee, rather than a mortgage, interest in the subject property. The evidence suggests several possible dates at the time of which Mrs. Neil had such knowledge. For example, by a letter dated September 30, 1958, (Exhibit 14-P.) Mrs. Hansen in response to a letter written to her and her husband by Mrs. Neil's attorney stated that in the event of a sale of the house, Mrs. Neil would receive one-third of the proceeds and they, the Hansens, would receive two-thirds. She wrote:

So we offered her our little, new rambler to live in and sell her house and finish the one we have started for ourselves and give her 1/3 of the money we got from the house to live on or whatever she wanted to do. We asked nothing except 2/3rds. (Emphasis supplied.)

Since it is plaintiff's contention that Mrs. Neil and the defendants bore the relationship of mortgagor-mortgagee, it is clear that the above quotation would put a reasonable person on notice that the alleged "mortgagees" claimed a two-thirds interest in the subject property, and that their claim was one of fee

ownership.

Plaintiff herself admits that Mrs. Neil knew as early as 1964 that defendants claimed a two-thirds interest in the property as joint tenants with Mrs. Neil. In that year, Mrs. Neil approached a second attorney with the request that he draft two quit claim deeds relating to the subject property. The first of these deeds showed Mrs. Neil as grantor and plaintiff as grantee. The second reversed their positions by showing plaintiff as grantor and Mrs. Neil as grantee. According to plaintiff, the express purpose of these deeds was to sever the joint tenancy between Mrs. Neil and the defendants. As to the circumstances leading up to the execution of these deeds, the plaintiff offered the following testimony at trial:

Q. Now, Mrs. Rogers, I'd like to refer to the conversation which took place in the office of Mr. Dwight King, and I refer to plaintiff's Exhibit Nos. 3-P and 4-P. Are these deeds which were executed in Mr. King's office?

A. Yes they were.

Q. And were you present when they were executed?

A. Yes.

Q. I don't understand why these deeds were given.

A. To break the joint tenancy with Hansens and mother.

. . .

Q. Then I gather your mother knew [at] the time of the making of these deeds the Hansens claimed a joint tenancy interest in the property; is that correct?

A. Yes.

(Tr. 38-39.)

Finally, several of the witnesses at trial testified to a meeting which took place in 1968 between Mrs. Neil, the plaintiff, the defendants and other members of the family. While there is some disagreement as to the details of that meeting, the witnesses were all in agreement that the discussion related to

interest which the Hansens claimed in the subject property. Thus, plaintiff testified that in the meeting the defendants openly laid claim to a fee interest in the property:

Q. Isn't it true that they [the Hansens] denied that--or, isn't it true that they stated that the house was theirs?

A. Yes, they claimed that it was theirs; that it was their "retirement fund," they said.
(Tr. 30.)

Similarly, Mrs. Neil's daughter, Gladys Tidwell, testified that in the course of the conversation, Mrs. Hansen stated that if the house were sold she would take "her share". (Tr. 51.)

Mrs. Hansen testified that at the meeting she stated in her mother's presence that there was no mortgage. (Tr. 90.)

The above described testimony, as well as other testimony relating to the 1968 meeting demonstrate that as a result of that meeting Mrs. Neil and the plaintiff were aware that the Hansens claimed a fee rather than a mortgage interest in the property. Since the present action was filed in September, 1975, and since the meeting took place in the summer of 1968, it is clear that even application of the seven-year statute of limitations will not save plaintiff's action from the bar of the statute of limitations.

B. PLAINTIFF'S ACTION IS BARRED BY THE DOCTRINE OF LACHES

But even if it is concluded that the relief prayed for by plaintiff requires no affirmative action by the court and that the statutes of limitations are therefore not applicable, it is clear that laches bars this action. This court has stated:

A court of equity has always refused to aid stale demands, where the party has slept upon his rights and acquiesced for a great length of time . . . laches and neglect are always discontenanced. Ruthrauff v. Silver King Western Mining & Mill Co., 95 Utah 279, 80 P.2d 338, 347 (1938).

While the doctrine of laches does not require any particular length of delay, it has been generally acknowledged that a court of equity should look to the analogous statute of limitations in determining whether a delay will be deemed unreasonable:

[U]nder ordinary circumstances, a suit in equity will not be stayed for laches before and will be stayed after the time fixed by the analogous statute of limitations of law . . . 1 Pomeroy's Equitable Remedies, §20 (3rd Edition, 1905).

In the instant case, it should be noted that plaintiff's theory of equitable mortgage is closely analogous to an action for relief on the ground of fraud or mistake, or an action upon a contract obligation or liability not founded upon an instrument in writing. The statutes of limitations for such actions are, respectively, three and four years. Section 78-12-26(3) and 78-12-25, Utah Code Ann. (1953). As noted in the above discussion relating to the running of the statute of limitations, the evidence indicates that Mrs. Neil knew as early as 1958, and in no case later than 1968, that the Hansens claimed a fee interest in the property. Thus, using the applicable statute of limitations as an equitable "rule of thumb" it is apparent that a sufficient length of time has elapsed to invoke the defense of laches.

The Utah Supreme Court has recognized that the bar of laches requires not only the lapse of time, but the prejudice of the other party because of an unexcused delay. Jacobson v.

Jacobson, 557 P.2d 156 (Utah 1976); see also Am. Jur. 2d Equity, §169. In Jacobson v. Jacobson, supra, the court pointed to two sets of facts showing the type of prejudice through delay which would permit invocation of laches. Those factors were: (1) death of one of the parties and, (2) increase in value of the property. Id., at 159.

The instant action offers strikingly similar facts. At least two material witnesses have died since Mrs. Neil became aware of the defendant's claim to the property. The first and most important of these witnesses is Mrs. Neil herself who died on August 24, 1975. The other potential witness was Mrs. Neil's attorney, Emmett L. Brown, who died on October 17, 1972. (Tr. 96.) Similarly, defendants request that this court take notice of the fact that since the time of the execution of the 1944 Deed, real property, including the subject property, has increased greatly in value.

Defendants were further prejudiced by the fact that many of the witnesses were unable to recall details of events which had transpired many years before. William A. Newsome, the grantor under the 1944 Deed, could not even recall having entered into the real estate contract with Mrs. Neil and her husband which had resulted in the execution of the deed. Neither could he remember receiving a downpayment of installments under the contract, execution of the deed, or the reason why the buyers under the contract were different from the grantees under the deed. (Tr. 13-18.) Similarly, at the time of her deposition, Mrs. Jacobson could neither recall the execution of the receipts, nor the

purpose for which they were executed. (Deposition of Annie N. Hansen, page 12.) Under such circumstances, defendants have suffered obvious prejudice to the preparation of their defense. This prejudice should raise the defense of laches to bar plaintiff's recovery, for, as the U.S. Supreme Court has stated:

[W]here the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. Hammond v. Hopkins, 143 U.S. 224, 274, 36 L. Ed. 134, 153 (1892).

A final example of the prejudice which defendants have suffered by virtue of the delay of plaintiff's predecessor in interest in bringing this action can be found in the fact that the defendants made expenditures for the improvement of the property in reliance upon the fact that they were fee title owners. These expenditures included financial participation in the remodeling of the house, performance of plumbing and electrical work, and occasional payment of property taxes. (Tr. 74-75.)

Thus, defendants have met the burden of showing that the delay in bringing this action has caused them prejudice. On such facts, the court below concluded:

. . .

12. Because of plaintiff's and plaintiff's predecessor's delay in bringing an action to quiet title to this property, defendants suffered prejudice to the preparation of their defense because of the deaths of several potentially key witnesses and the loss of memory of pertinent events on the part of other witnesses. In addition, defendants have suffered financial injury by virtue of their expenditure of money for the property in the belief that they had a clear unencumbered right thereto. Plaintiff's claim is therefore barred by the doctrine of laches. (Tr. 114.)

Plaintiff attempts to avoid this conclusion by directing this court's attention to a number of exceptions to the doctrine of laches. Defendants will attempt to deal briefly with these exceptions as they relate to this case.

1. Intimate Personal Relationship

Plaintiff argues that because of the intimate personal relationship between Mrs. Neil and the defendants, Mrs. Neil was excused from bringing an action for quiet title. A reading of the authorities cited by plaintiff for this proposition shows that the rationale adopted by those authorities is that the accrual of a cause of action may be delayed where, because of the close personal relationship of the potential litigants, the party who may seek enforcement of his rights is not given sufficient notice of the adverse claim of the other. That the existence of an intimate personal relationship does not prevent the raising of laches as a defense is clearly shown by Jacobson v. Jacobson, supra. There the plaintiff and his wife sought to quiet title in themselves as against the plaintiff's father and mother. The court nonetheless granted judgment in favor of the defendants based upon the laches..

In the instant action, there can be no doubt that notwithstanding the close relationship between defendants and Mrs. Neil she nonetheless had notice on several occasions of their adverse interest in the subject property. Her delay in bringing this action is therefore inexcusable for the purpose of holding laches in abeyance.

2. Possession of the Property

Plaintiff next asserts that because her predecessor, Mrs. Neil, was in continual possession of the property from 1944 until her death, the doctrine of laches has no application. While it cannot be doubted that possession of the property is a factor to which the courts will look in deciding whether delay in bringing an action is excusable, it does not follow that this factor alone prevents application of the doctrine of laches. Indeed, the significance of the plaintiff's possession in a suit in which laches is raised as a defense lies in the fact that such possession may give rise to the valid belief in the plaintiff that his right to the property is undisputed. Thus, it has been held that where one of several joint tenants or tenants in common is in exclusive possession of land, the other tenants are not chargeable with laches unless they actually know he is holding adversely to them. Reed v. Bachman, 61 W.Va. 452, 57 S.E. 769, 772 (1907). As with such factors as the relationship of the parties, the true issue is whether the party against whom laches is asserted had notice of the adverse claim and of the claimant's intention to assert it.

This conclusion is consistent with Viersen v. Boettcher, 387 P.2d 133 (Okla. 1963), which is cited in plaintiff's Brief. Although that case related to the applicability of a statute of limitations rather than the doctrine of laches, it is nonetheless useful in reaching an understanding of the importance, or lack thereof, of possession by a party against whom laches is asserted. There plaintiffs claiming fee title ownership in the subject property based upon a sheriff's deed sought to quiet title as

against the defendants. Defendants counterclaimed to quiet title to a one-half mineral interest in themselves. Plaintiffs, as defense to defendants counterclaim, claimed that the counterclaim was barred by the 15-year limitations period applicable to such actions. (Defendants' claim to the property was based upon a deed executed more than 15 years prior to the commencement of the law suit). The trial court agreed with plaintiff's assertion and held that the counterclaim was barred by the statute. On appeal, however, the Supreme Court reversed, saying that defendants had inadequate notice of plaintiff's claim to the property. The court stated:

The execution and recording of oil and gas leases by a mineral co-tenant, standing alone, will not support a claim of adverse possession to severed mineral [sic] which are owned by and in the constructive possession of another. [citations omitted] Possession of the surface by the surface owner constitutes no noticeable claim of adverse possession to the owner of the mineral estate. Id., at 138.

Thus, the critical question in a case where the party against whom laches is asserted has been in possession is whether delay in bringing a quiet title action is "excusable", i.e., whether the party in possession had notice of the adverse claim of the party raising the defense of laches.

In this context, it is important to note that the court below found that Mrs. Neil had the requisite notice to raise the defense of laches. It stated:

. . . .

10. Plaintiff's predecessor, Mrs. Neil, had notice of defendants' claim of a two-thirds interest in the subject property as early as 1958. Notice of defendant's claim was also communicated to Mrs. Neil in 1968. (R. 114.)

3. Mrs. Neil's Illness

In a further attempt to avoid application of laches, plaintiff asserts that Mrs. Neil's delay in bringing a quiet title action was excusable because she "was quite ill and did not wish to sue her own daughter." (Appellant's Brief 19.)

Whether Mrs. Neil's illness provides a sufficient basis for a finding of excusable neglect depends, of course, on the nature and length of that illness. If, for example, Mrs. Neil had been insane from the time she discovered defendants' adverse claim until the time of her death, defendants would readily concede that her neglect in bringing a quiet title action would be "excusable". Here, however, plaintiff's own testimony makes it abundantly clear that Mrs. Neil's illness was not of a type which would have prevented her from seeking to quiet title. At trial the following colloquy took place between defendants' counsel and plaintiff:

Q. You testified that your mother was sick during the last few years of her life. When did her serious illnesses begin? You said she had heart trouble, for example. Do you know when her heart trouble started up?

A. I don't know when it started, no. But she started to become ill about, oh, maybe nine, ten years before she died.

Q. Was she able to get around at all?

A. Yes, she would. She would get around; very determined lady.

Q. For example, you said back in 1964 you had to go to Mr. King's office back then. Would you say that she was --.

A. She could get around on the bus; yes.

Q. Was her mind clear during her later years?

A. Yes.

Q. Was she able to behave rationally?

A. Yes.

Q. Did she require someone in attendance with her at all times?

A. Not until the last month, month and a half.

Q. And up until that time she was able to take care of herself?

A. Pretty much; yes.
(Tr. 46-47.)

The above testimony shows that Mrs. Neil suffered a lingering illness which lasted nine or ten years. During that time her mind was clear, she was active, and she was able to "get around" without help from others. Indeed, other evidence referred to above indicates that in 1958 and in 1964 she went to the offices of two different attorneys for advice as to the ownership of the property.

Under the circumstances, it cannot be doubted that had Mrs. Neil so desired, she would have been perfectly capable of obtaining the help of family members and of her attorneys for the purpose of bringing a quiet title action. Thus, there is no substance to the allegation that her illness provided an excuse for delaying the institution of this action.

In conclusion, plaintiff's contention that the statutes of limitations and the doctrine of laches are inapplicable in this action is clearly incorrect. The statute of limitations is applied in equitable actions where, as here, plaintiff has sought affirmative relief from the courts. But even if the statute were inapplicable, the equitable doctrine of laches would bar plaintiff's action because plaintiff's predecessor in interest delayed in excess of eight years in seeking to quiet title and because such delay prejudiced defendants.

POINT IV

THE COURT CORRECTLY RULED THAT THE 1944 DEED CREATED
A ONE-THIRD INTEREST IN EACH OF THE THREE GRANTEEES

In Point IV of her brief, plaintiff advances that novel theory that the 1944 Deed by which the Newsomes conveyed their interest in the subject property to Mrs. Neil and to defendants created a one-half interest in defendants and a one-half interest in Mrs. Neil. According to plaintiff, this theory "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." (Appellant's Brief 22.)

While plaintiff is certainly to be commended for the originality of her theory, an examination of the authorities proves her contention to be without merit.

As a starting point in examining plaintiff's contention, two principals must be kept in mind. First, the doctrine proposed by plaintiff has only been recognized in states which have adopted the concept of tenancy by the entirety. All of the cases cited by plaintiff in her brief in support of the above doctrine contain acknowledgment by the courts that the decisions are based upon the existence of such a tenancy. Indeed, plaintiff acknowledges this fact when she states:

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.
(Appellant's Brief 23.)

Second, the proposed rule is at best a rule of construction relating to the intention of the parties.

In the remainder of this Point, defendants will consider the affect of these principals in relation to the theory proposed by plaintiff.

A. THE RULE OF CONSTRUCTION PROPOSED BY PLAINTIFF HAS NO APPLICATION TO THE INSTANT CASE BECAUSE UTAH HAS NOT ADOPTED THE DOCTRINE OF TENANCY BY THE ENTIRETIES

The doctrine of tenancy by the entireties is based upon the legal fiction that a husband and wife are a single legal entity. Thus, a conveyance to a husband and wife and to a third party is said to be a conveyance to two, rather than three, entities. Mosser v. Dolsay, 132 N.J. Eq. 121, 27 A.2d 155, 157 (1942); 4 A. R. Powell, The Law of Real Property, 686 (1977). This doctrine was purely a creation of the common law. Id. at 685.

Plaintiff fails to direct the court's attention to a single Utah case or statute adopting the doctrine of tenancy by the entireties. Defendants have been similarly unsuccessful in finding such authority. Undaunted by this fact, however, plaintiff points out that the doctrine is one of common law and that unless expressly abrogated by statute, the common law, including tenancy by the entireties, is adopted in Utah. As support for this proposition, plaintiff points to Section 68-3-1, Utah Code Ann. (1953), which states:

The common law of England so far as it is not repugnant to, or in conflict with . . . the constitution or laws of this state, and so far only as it is consistent with and adopted to the natural and physical conditions of this state and the necessities of the people hereof, is hereby adopted, and shall be the rule of decision in all courts of this state.

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The language of the above statute makes it clear that plaintiff is not correct in alleging that "the common law is specifically adopted in Utah unless abrogated by statute" (Appellant's Brief 23.) Rather, the correct rule is that the common law is abrogated to the extent it is inconsistent with the laws of the State. It therefore remains to be determined whether any Utah statute is inconsistent with the common law doctrine that a conveyance to a husband and wife creates a tenancy by the entirety or that a husband and wife are treated as a single legal entity.

Section 57-1-5, Utah Code Ann. (1953) states:

Every interest in real estate granted to two or more persons in their own rights shall be a tenancy in common, unless expressly declared in the grant to be otherwise. Use of the words "joint tenancy" or "with rights of survivorship" or "and to the survivor of them" or words of similar import shall declare a joint tenancy. A sole owner of real property shall create a joint tenancy in himself and another or others by making a transfer to himself and such other or others as joint tenants by use of such words as herein provided or by conveying to another person or persons an interest in land in which an interest is retained by the grantor and by declaring the creation of a joint tenancy by use of such words as herein provided. In all cases the interest of joint tenants must be equal and undivided.

The above section is clearly inconsistent with the concept of tenancy by the entirety. The statute does not differentiate between grantees who are married to one another and other types of grantees. Thus, under the statute, a conveyance to a married couple creates either a tenancy in common or a joint tenancy. By contrast, if tenancy by the entirety were recognized in this state, a conveyance to two grantees who are husband

and wife would create a tenancy by the entirety.

Furthermore, under the above statute a conveyance to several grantees in joint tenancy creates an interest in each of the joint tenants which "must be equal and undivided." Id., (Emphasis added.) But in states which have adopted the doctrine of tenancy of the entirety, a grant to three grantees in joint tenancy, two of whom are husband and wife, results in the spouses each receiving a one-quarter, and the third grantee a one-half, interest. In short, the interests of the joint tenants are not "equal".

From the foregoing, it is clear that the concept of tenancy by the entirety is "inconsistent" with Section 57-1-5, supra. This common law doctrine is therefore not within the body of common law grafted into Utah law under Section 68-3-1, supra.

While the Utah Supreme Court has not expressly denied the existence of tenancies by the entirety in this state, the court has written decisions whose results are inconsistent with the existence of such a tenancy. Thus, in Clearfield State Bank v. Contos, 562 P.2d 622 (Utah 1977), the court held that a creditor foreclosing upon the interest of one of two joint tenants becomes a tenant in common with the remaining spouse. Id., at 624-625. It is well-settled that there is no right of survivorship as between tenants in common; i.e., the heirs of the deceased tenant in common, rather than other co-tenants, inherit the interest of the decedent. Thus, when the court in Contos, supra, held that the right of either spouse was alienable and that the purchaser of one spouse's interest becomes a tenant in common with the

other spouse, it was, in effect, saying that no right of survivorship existed between the remaining spouse and the purchaser.

The rule in Contos is inconsistent with the theory that a conveyance to a married couple creates a tenancy by the entireties. The reason for this is that such a tenancy creates the right of survivorship between the spouses, even if one has conveyed his interest to a third party. Powell, supra, at 712. Thus, in Sieb's Hatcheries v. Lindley, 111 F. Supp. 705, 716 (W.D. Ark. 1953), the court stated:

But, neither a conveyance by one tenant by the entirety, nor an execution against such tenant, can in any manner affect the interest of the other tenant. [Citations omitted] Thus, a purchaser of the interest of one tenant by the entirety cannot oust the other tenant from possession, and can only claim one-half of the rents and profits. [Citations omitted] The remaining tenant is not only entitled to possession plus one-half of the rents and profits, but the right of survivorship is not destroyed or in any wise affected. (Emphasis added.)

Similarly, in McLean v. United States, 224 F. Supp. 726, 729 (E.D. Mich. 1963) the court said:

One incident of an estate by the entirety is that the survivor, whether husband or wife, is entitled to the whole, and such right cannot be defeated by a conveyance by one spouse to a stranger.

It follows that in states recognizing tenancies by the entireties, the purchaser of the interest of one tenant by the entireties may be cut off if the tenant from whom he purchased predeceases the other tenant. Such a result is inconsistent with Section 57-1-6, supra, permitting creation of a tenancy in common between "two or more persons" (including spouses), and the above quoted language from Clearfield State Bank v. Contos, supra.

In an attempt to persuade the court of the continued existence of tenancies by the entirety in Utah, plaintiff cites several statutes referring to such tenancies. See §§ 78-41-1, 75-2-1003 and 48-1-4(2), Utah Code Ann. (1953). While it is true that these statutes do make reference to tenancies by the entirety, it does not follow that these references show a desire on the part of the Utah legislature to acknowledge the creation of such tenancies in this state as the product of Utah law. A more logical explanation for such references is that the legislature recognized that a tenancy by the entirety could be established in personal property located in another state, and that that property could be brought into this State. Thus, when §78-41-1 states that upon the death of one whose death "shall affect any other interest in property", any person interested in the property may petition the court for a determination of his interest, it is unlikely that the statute is intended as recognition of the doctrine of community property, even though an interest in community property may be "any other interest in property" within the meaning of the statute. Similarly, where §48-1-4 states that a tenancy by the entirety does not of itself establish a partnership, that fact in itself does not show legislative recognition of the creation of such tenancies under Utah law any more than reference in the statute to community property would show that community property interests could be created in Utah. At best, these statutes simply show an awareness on the part of the legislature of the existence of tenancies by the entirety and of the fact that property in which such tenancies are be created in other

jurisdictions may be brought into this state.

B. THE PARTIES TO THE 1944 DEED INTENDED TO CREATE
A JOINT TENANCY

Even assuming, arguendo, that a tenancy by the entireties may be created under Utah law, it does not follow that the 1944 Deed created such a tenancy. At best, the rule proposed by plaintiff is a rule of construction. Thus, it has been stated:

At common law a conveyance to husband and wife and another party presumptively granted a one-half interest to the third party and a one-half interest to the husband and wife as an entirety. 2 H. Tiffany, Real Property, Section 431 at 222-23 (1939). But this axiom is only a rule of construction and the intent of the parties must be effected if it can be ascertained. Daniel v. Wright, 352 F. Supp. 1, 3 (D.C.D.C. 1972) (emphasis added).

From the foregoing it can be seen that the rule proposed by plaintiff is a rule of construction which creates a presumption in favor of the creation of a tenancy by the entireties. In cases involving a conveyance to multiple parties, Utah has adopted a contrary presumption:

Where a conveyance is made in the names of a number of parties to an instrument, and the conveyance does not show respective interests, the presumption is that they own in equal shares, but such presumption is rebuttable by parol evidence. Garrett v. Ellison, 93 Utah 184 72 P.2d 449, 452 (1937).

Similarly, Section 57-1-5, supra, states, "in all cases the intent of joint tenants must be equal and undivided." Thus, the rule of construction adopted in Utah appears to be the following: (a) a conveyance to two or more individuals is conclusively presumed to create a tenancy in common in the absence of the use of the words "joint tenancy" or words of like import. Section 57-1-5, supra. (b) In the event of the creation of a tenancy in common

and absent language in the granting clause to the contrary, a rebuttable presumption arises that the parties intended that each of the co-tenants will take his interest in equal shares. Garrett v. Ellison, supra. (c) Where a conveyance is made to two or more individuals who are designated as "joint tenants" such tenants are conclusively presumed to have taken their interest in equal shares. Section 57-1-5, supra. If, as plaintiff insists, a tenancy by the entireties may be created in this state, the only manner in which that could occur consistent with Section 57-1-5 and with the decision in Garrett v. Ellison, is if the document of conveyance specifically recites the fact that the grantees take as tenants by the entireties.

The 1944 Deed at issue in this case does not conform to the above requirements, if a tenancy by the entireties between defendants had been intended. The Deed states:

To Myrtle C. Neil and Annie N. Hansen and Albert J. Hansen, her husband as joint tenants and not as tenants in common and to the survivors or survivor of them.

Clearly under Section 57-1-5 the above formulation creates the relationship of joint tenancy between the three grantees with each taking a one-third interest in the subject property. While the deed is clear enough on its face as to not require parol evidence in determining the intent of the parties thereto, it is relevant to note that the trial court found that the grantors under the deed intended to convey the property in joint tenancy to defendants and Mrs. Neil. (R. 111, Finding No. 7.)

Thus, even if this court holds that a tenancy by the entireties may be created under Utah law, the findings of the

trial court, as well as Section 57-1-5, Utah Code Ann. (1953), support the court's conclusion of law and its judgment that defendants each took a one-third interest as joint tenants under the 1944 Deed.

CONCLUSION

The linchpin of plaintiff's attack on the decision of the trial court is the proposition that the evidence did not support the court's finding that the 1944 Deed was intended to convey fee title in the subject property to Mrs. Neil and defendants as joint tenants. Unless this court finds that there was insufficient evidence to support the trial court's findings, plaintiff's argument as to the inapplicability of the statute of frauds, the statute of limitations, and the doctrine of laches is irrelevant.

Defendants have demonstrated by reference to the trial transcript that there was ample evidence to support the trial court's judgment. While defendants are of the opinion that plaintiff's evidence was woefully inadequate for the purpose of overturning a deed absolute, that fact, too, is irrelevant in light of the finding of the trier of fact that the parties to the 1944 Deed intended to create precisely those interests which are described in the granting clause; namely, a joint tenancy between Mrs. Neil and the defendants.

Similarly, plaintiff's theory that the conveyance to Mrs. Neil and defendants as joint tenants created a one-half interest in the property to Mrs. Neil and a one-half interest in the defendants is basically a question of intent. In reviewing the evidence the trial court

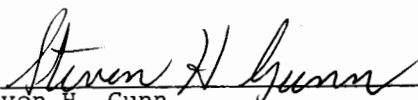
concluded that the intent of the parties was to create a one-third interest in each of the grantees.

This court has always recognized the principal that the tryer of fact is better able to analyze and weigh the evidence than is an appellate court. This court has therefore adopted the view that it should survey the record in light favorable to the findings of the tryer of fact. Kesler v. Rogers, supra. Since the record of the proceedings below shows that there was ample evidence to support the court's findings, plaintiff's appeal must be denied.

Furthermore, the failure of the alleged parol agreement between Mrs. Neil and defendants to qualify as a constructive trust means that the mortgage would be unenforceable under the statute of frauds. Similarly, because of the lapse of time in enforcing the agreement, plaintiff's claim is barred by laches and the applicable statute of limitations.

Respectfully submitted this 6th day of December, 1977.

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MAILING CERTIFICATE

A copy of the foregoing Respondent's Brief was mailed, postage prepaid and properly addressed, to Gordon L. Roberts and Stephen K. Schroeder of PARSONS, BEHLE & LATIMER, Attorneys for Appellant, 79 South State Street, Salt Lake City, Utah 84111 this 5th day of December, 1977.

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