

1949

Geneve Graehl Burt, Lorele Burt Neff, Karleen Burt, Bonnie A. Burt, Shanna G. Burt, John G. Burt v. Luella H. Burt, Emerson H. Burt, Mrs. Helen B. Reed, Mrs. Dorothy B. Flowers, Lester C. Burt, Milton F. Burt : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Gaylen S. Young; Attorney for Defendants and Appellants;

Recommended Citation

Brief of Appellant, *Burt v. Burt*, No. 7313 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1087

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE
SUPREME COURT
 OF THE
STATE OF UTAH

GENEVE GRAEHL BURT, LOR-
 ELE BURT NEFF, KARLEEN
 BURT, BONNIE A. BURT,
 SHANNA G. BURT, JOHN G.
 BURT.

Plaintiffs and Respondents.

VS.

LUELLA H. BURT, Administra-
 trix of the estate of John A.
 Burt, deceased; LUELLA H.
 BURT, an individual; EMER-
 SON H. BURT, MRS. HELEN
 B. REED, MRS. DOROTHY B.
 FLOWERS, LESTER C. BURT,
 MILTON F. BURT,

Defendants and Appellants.

No. 7313

BRIEF OF APPELLANTS

FILED

APR 7 - 1946

GAYLEN S. YOUNG,

*Attorney for Defendants
 and Appellants*

CLERK, SUPREME COURT, UTAH

I N D E X

CASES CITED

	Page
Anderson v. Cercone 54 Utah 345, 180 P. 586.....	39
Bancroft Code Pleading Vol. 1 P. 635.....	38
Black's Law Dictionary, 3rd Edition P. 1778.....	28
C. J. Vol. 18 P. 162 Sec. 42.....	41
Cyc. Vol. 39 pp. 118 and 119.....	39
Estey et al v. Haughian (Mont.) 113 P. 2d 325.....	40
Raleigh v. Wells 29 Utah 217, 81 P. 908.....	42
Thomas v. Farrell 82 Utah 537, 26 P. 2d 328.....	36
Utah Code Annotated Sections 101-4-2, 101-4-5, 101-4-10.....	30
104-26-2	33
104-2-24, 104-2-30.....	36
Weelwright v. Roman 50 Utah 10, 165 P. 513.....	40

STATEMENT	3
Answer	9 to 13
Complaint	4 to 9
Conclusions of Law.....	21 to 22
Findings of Fact.....	18 to 21
Judgment and Decree.....	22 to 23
Pre-trial Statement.....	13 to 16
STATEMENT OF ERRORS.....	23 to 26

A R G U M E N T

THE COURT ERRED IN OVERRULING DEFEND- ANTS' DEMURRER TO THE FIRST CAUSE OF ACTION	26
THE COURT ERRED IN OVERRULING DEFEND- ANTS' DEMURRER TO THE SECOND CAUSE OF ACTION	29

I N D E X—(Continued)

	Page
THERE IS A VARIANCE BETWEEN THE PLEADINGS AND THE PROOF IN THE FIRST CAUSE OF ACTION	31
THERE IS A VARIANCE BETWEEN THE PLEADINGS AND THE PROOF IN THE SECOND CAUSE OF ACTION	31 & 32
THE CONCLUSION (b) ALLOWING PLAINTIFF THE PROPERTY IN THE FIRST CAUSE OF ACTION IS NOT SUPPORTED BY THE FINDINGS OR PLEADINGS	32
THE COURT ERRED IN TRYING TO MAINTAIN JURISDICTION OF SECOND CAUSE OF ACTION.....	32
THE COURT ERRED IN MAKING VALID DELIVERY OF DEED ONE OF THE ISSUES AS WELL AS INTENT TO VEST TITLE	33
THE COURT ERRED IN ADMITTING TESTIMONY VARYING THE TERMS OF A WRITTEN INSTRUMENT	34
THE COURT ERRED IN FAILING TO FOLLOW ITS OWN RULING	35
THE COURT ERRED IN FAILING TO MAKE FINDINGS ON ALL OF THE MATERIAL ISSUES	35
THE CONCLUSIONS OF LAW AND JUDGMENT OF FIRST CAUSE OF ACTION ARE CONTRARY TO LAW	37
THE CONCLUSIONS OF LAW AND JUDGMENT OF SECOND CAUSE OF ACTION ARE CONTRARY TO LAW	42

In the Supreme Court of the State of Utah

GENEVE GRAEHL BURT, LOR-
ELE BURT NEFF, KARLEEN
BURT, BONNIE A. BURT,
SHANNA G. BURT, JOHN G.
BURT.

Plaintiffs and Respondents.

vs.

LUELLA H. BURT, Administra-
trix of the estate of John A.
Burt, deceased; LUELLA H.
BURT, an individual; EMER-
SON H. BURT, MRS. HELEN
B. REED, MRS. DOROTHY B.
FLOWERS, LESTER C. BURT,
MILTON F. BURT,

Defendants and Appellants.

No. 7313

BRIEF OF APPELLANTS

STATEMENT

This action was filed by Geneve Graehl Burt, a plural wife of John A. Burt, deceased, and her five children as plaintiffs. The defendants are Luella H. Burt, Administratrix of the estate of said John A. Burt, deceased, Luella H. Burt as individual and her five children. Luella H. Burt is the widow and the legal and lawful wife of said deceased. The action is to set aside a

deed and for a part of the estate of John A. Burt, deceased.

The original COMPLAINT consists of two causes of action. About the time of the trial a third cause of action was filed but before the trial was over this was abandoned. This left the first and second causes of action (Tr. 1 to 5) which as stated in the original complaint except for the verification are as follows:

“FIRST CAUSE OF ACTION

1. That the plaintiff, Geneve Graehl Burt, is the owner in fee of a valuable piece of ground in Salt Lake County, State of Utah, consisting of approximately 2.55 acres and described as follows:

Commencing 1223.7 feet East from Northwest Corner of Section 34, Township 1 South R 1 East, Salt Lake Meridian, thence East 315 feet more or less to Salt Lake City Tract; thence South 99 feet; thence South $14^{\circ} 26' 30''$ East 154.38 feet, thence West 44.3 feet South 128.8 feet to creek; Westerly along the creek to a point due South of beginning North 332 feet to beginning. 2.55 Acres.

2. That said plaintiff came into ownership and possession of said tract of land on about the 15th day of August, 1939, and since that time has with her own hands and labor improved the said land by planting fruit trees and gardens thereon, and by removing stumps, dilapidated buildings and by landscaping said ground and improving other buildings thereon and by building new structures and permitting the building of other structures thereon which has greatly enhanced and improved the value of said property.

3. That on the 30th day of September, 1920, plaintiff, Geneve Graehl Burt, entered into what she thought was a valid and legal marriage with one John A. Burt, and since that time through their relationship entered into as aforesaid, has given birth to and reared five children, the five plaintiffs last named above.

4. That since the beginning of said relationship, said plaintiff and the said John A. Burt lived together as man and wife; that the said John A. Burt was a man of strong character with definite opinions and ideas who treated plaintiff and the five children aforesaid with strictness and firmness demanding obedience in all things; that said John A. Burt was a man of unusual business ability, and obtained the respect and confidence of these plaintiffs in all matters pertaining to business and business transactions.

5. That said plaintiff through most of her life has been afflicted with a nervous ailment, which at intervals has prostrated said plaintiff and which since the time of her said marriage to the said John A. Burt, has at times caused her to be dependent upon the said John A. Burt for help and assistance in maintaining herself and her home, and until the said children became old enough to be of assistance to her, at the time of the onset of said nervous spells as aforesaid, she was entirely dependent upon said John A. Burt; that during some of the more severe spells of sickness aforesaid, plaintiff has been unconscious and otherwise unable to give consideration to business affairs or matters concerning herself or her property or to act rationally in the conduct of her affairs.

6. That on or about the 12th day of March, 1941, said John A. Burt caused said plaintiff to sign a deed, in which she was the grantor and he

was the grantee of the property described in paragraph No. 1 hereof; that said plaintiff had therefore refused to sign such a deed but did so upon this occasion at the instance and request and under the direction of the said John A. Burt, who stated to said plaintiff that because of the serious illness from which she was then suffering and because of the possibility that she would not recover from it would be better that she sign a deed *conveying the property* to him; that in reliance thereon and under the direction and under the influence and domination of the said John A. Burt, said plaintiff did sign the deed aforesaid, but did not appear before a notary public for the purpose of having her signature thereon acknowledged and did surrender the said deed to said John A. Burt.

7. At the time of signing said deed *and delivering it to the said John A. Burt*, said plaintiff did not receive any compensation or other consideration for said deed, but *delivered it to* (signed the deed for) the said John A. Burt because of her reliance upon him and because of the great influence and domination which he exercised over her; that thereafter said plaintiff saw nothing more of said deed and heard nothing more of it until during the month of May, 1948, when the said deed was found in the deposit box of the said John A. Burt following his sudden death, by defendant, Luella H. Burt, the administratrix of his estate.

8. That the said Leulla H. Burt has taken possession of said deed and has refused to deliver it up to said plaintiff and has caused said deed to be recorded in the office of the County Recorder of Salt Lake County, Utah; and has informed said plaintiff that she intends to list said property as part of the assets of the estate of

said John A. Burt and to deprive said plaintiff of it as her home and to divide it up among the heirs at law, including herself, of the said John A. Burt, deceased.

9. That the five plaintiffs last named above are the children of plaintiff Geneve Graehl Burt and John A. Burt, deceased, and are willing and agreeable that the deed to said property be returned to plaintiff, their mother; that the other defendants refuse to surrender the said deed; that plaintiff is without a remedy except as prayed herein.

SECOND CAUSE OF ACTION

10. Plaintiff, Geneve Graehl Burt, alleges as a second cause of action, that on the 30th day of August, 1920, she and John A. Burt, deceased, entered into what in good faith she thought was a valid and legal marriage, and since that time through their relationship entered into as aforesaid, she has given birth to and reared five children, the five plaintiffs last named above.

11. That since that time and during the intervening twenty-eight years until the death of the said John A. Burt on May 12, 1948, said plaintiff and the said John A. Burt, worked and planned together for the acquisition and development of an estate; that the said John A. Burt lived at the home of said plaintiff during a portion of the intervening time; that said plaintiff cooked his meals, mended his clothes, and otherwise provided for his wants and needs, and discussed with him values of certain properties and the advisability of acquiring or selling of said properties; that said plaintiff on occasion went with said John A. Burt to view properties; that said plaintiff lent encouragement to said John A. Burt on his plans and undertakings and assisted

him in various ways in the accumulation of substantial properties.

12. That said John A. Burt died suddenly in Salt Lake City, Utah, on May 12, 1948, without leaving any will and without making any provision for distribution of the property and estate accumulated as aforesaid by the said John A. Burt.

13. That defendant, Luella H. Burt, has been appointed as administratrix for the estate of John A. Burt, deceased, and has proceeded with the administration of said estate indicating that she will complete the administration of said estate and divide it among the heirs at law (including herself) of the said John A. Burt, and will make no provision for said plaintiff.

14. Said plaintiff estimates the value of the estate of said John A. Burt to be about \$60,000.00, and alleges that because of her contribution to said estate and the assistance she has rendered to the John A. Burt in the development and accumulation of said estate, and that because of her participation in the development of said estate, she has an interest in said estate amounting to \$20,000.00.

15. That she has no remedy or means of securing for herself said interest except as prayed for herein.

WHEREFORE, plaintiffs demand judgment under the first cause of action:

1. That the deed delivered by said plaintiff to said John A. Burt be determined by the court to be void.

2. That the defendants produce said deed and deliver it up to be cancelled.

3. That defendants cause that the record of

said deed and conveyance be removed from the records at the County Recorder's office of Salt Lake County, aforesaid.

Under the second cause of action :

1. That the estate of said John A. Burt, deceased, be divided so as to provide for said plaintiff a share amounting to the sum of \$20,000.00 or for such other share as in equity and good conscience this said plaintiff may be entitled to receive.

And for any and all other relief meet in the premises and for the costs of this action."

Defendants filed general demurrers (Tr. 7) to each of said causes of action; and their ANSWER to the complaint (Tr. 8 to 12), except for the verification, is as follows:

"1. Deny Paragraph 1 thereof.

2. In answer to Paragraph 2 thereof, admit that the said plaintiff, Geneve Graehl Burt, came into possession of the property described in Paragraph 1 of said Complaint in and about August, 1939, through the permission of John A. Burt, the deceased. Admit that some improvements have been made upon the said property, but allege the fact to be that the said deceased, John A. Burt, himself made said improvements, either through the expenditure of his own funds or through the work and labor of his children. The defendants allege further that the plaintiff, Geneve Graehl Burt, has paid no rental for the use of said property.

3. In answer to Paragraph 3 thereof, these defendants deny that said Geneve Graehl Burt thought or had any grounds of believing that she was entering into a legal and valid marriage with

the said John A. Burt. On the contrary, the said plaintiff, Geneve Graehl Burt, knew at the time of the purported marriage, that the said John A. Burt, deceased, already had a legal and lawful wife living and a family by her. Admit that the said plaintiff, Geneve Graehl Burt, has given birth to five (5) children by said John A. Burt, deceased.

4. Deny, both generally and specifically, each and every allegation contained in Paragraph 4, and allege the fact to be that when said Geneve Graehl Burt and said John A. Burt, deceased, lived together that the said plaintiff, Geneve Graehl Burt, and the said John A. Burt, deceased, well knew that such relationship was contrary to the laws of the State of Utah and was, and is now, punishable by imprisonment in the State Penitentiary.

5. In answer to Paragraph 5 thereof, admit the deceased, John A. Burt, has given the said Geneve Graehl Burt great assistance, financially and otherwise, but on information and belief, deny, both generally and specifically, each and every other allegation contained in Paragraph 5.

6. In answer to Paragraphs 6, 7, 8 and 9 thereof, the defendants deny each and every allegation contained therein, except that may be admitted or qualified herein.

7. Defendants deny, both generally and specifically, each and every other allegation contained in first said cause of action.

By way of an affirmative defense to the first cause of action, the answering defendants allege that in 1939 the deceased, John A. Burt, purchased with his own money the real property specifically described in Paragraph 1 of Plaintiffs' Complaint, and caused the same to be placed of

record in the name of Geneve Graehl, who is named as one of the plaintiffs herein as Geneve Braehl Burt. In 1941, realizing that upon the death of said Geneve Graehl Burt said property would go to her five children, named as plaintiffs herein, and that his other five children by his legal and lawful wife, Luella H. Burt, named as defendants herein, would get no part of said property, he requested said Geneve Graehl to deed said property to him, the said property being equitably owned by him in any instance. In order that all of the heirs of the deceased, John A. Burt, might inherit said property, the said Geneve Graehl did of her own free will and choice on March 12, 1941, duly execute and deliver to said John A. Burt, deceased, said deed of conveyance. That ever since said time, said deed together with the Abstract of Title to said property have been in the possession of said John A. Burt, and which were in his possession at the time of his demise. The Utah State Tax Commission insists that said property be made part and parcel of his estate for taxation purposes.

That in order to protect the interests of all of the heirs-at-law of said John A. Burt, deceased, it became the duty of Luella H. Burt, the administratrix, to, and she did, file in the County Recorder's Office of Salt Lake County, State of Utah, said deed.

These defendants allege further that after the said Geneve Graehl executed and delivered to said John A. Burt, deceased, the said deed, the said John A. Burt made, at his own expense and with the work and labor of his own children, considerable improvements and built a building on said lot.

That the plaintiffs are barred from proceed-

ing with this action on the grounds that they are guilty of laches. That if said John A. Burt, deceased, used any undue influence or domination of Geneve Graehl Burt to have her execute and deliver to him the said deed, the Geneve Graehl Burt should have commenced proceedings immediately following the same, rather than to wait more than seven years following such execution and delivery, and until after the death of the said Grantee.

The said plaintiffs are barred from any action in this matter by reason of Section 104-2-24 of the Utah Code Annotated, 1943.

That the said plaintiffs are barred from any legal action in this matter by reason of Section 104-2-30 of the Utah Code Annotated, 1943.

IN ANSWER TO PLAINTIFFS' SECOND CAUSE OF ACTION, the defendants admit, deny and allege as follows:

1. Deny Paragraph 10 thereof, except that said defendants admit that the said Geneve Graehl Burt has given birth to five (5) children by said John A. Burt, deceased.

2. Deny each and every allegation contained in Paragraph 11 thereof.

3. In answer to Paragraph 12 thereof, the defendants admit that the said John A. Burt died on or about May 12, 1948, without leaving a will, and deny each and every other allegation contained in Paragraph 12, but allege the fact to be that the said five (5) children of the plaintiff, Geneve Graehl Burt, under the laws of the State of Utah will inherit one-third of the entire estate of said John A. Burt in their own right. Said estate, after paying all debts, will amount to approximately \$60,000.00.

4. In answer to Paragraph 13 thereof, admit the same and allege the further fact to be that under the law, the plaintiffs, excepting the plaintiff, Geneve Graehl Burt, will receive one-third of the entire estate of the said John A. Burt, deceased, as aforesaid.

5. In answer to Paragraph 14 thereof, the defendants admit that the value of said estate is about \$60,000.00, but deny each and every other allegation contained in Paragraph 14.

6. Deny, both generally and specifically, each and every other allegation contained in Second Cause of Action.

7. That the plaintiffs are barred from proceeding with this action on the grounds that they are guilty of laches That the plaintiffs are barred from any action in this matter by reason of the Statute of Limitations under Sections 104-2-23 and 104-2-30 of the Utah Code Annotated, 1943.

WHEREFORE, the answering defendants pray that the plaintiffs' Complaint be dismissed with costs assessed against the plaintiffs, and for such other relief that the Court may deem proper in the premises."

The Court held a pre-trial on December 3, 1948, and after the case was called for trial on December 8, 1948, the Court handed to counsel a written paper called PRE-TRIAL STATEMENT the whole of which is as follows:

"The above-entitled matter came on for pre-trial hearing, pursuant to the order of the Court, at 3:00 o'clock P. M. on the 3rd day of December, 1948, before Honorable J. Allan Crockett, one of the judges of the above-named court. Merrill C. Faux, Esq., appeared on behalf of the plain-

tiffs, and Gaylen S. Young, Esq., appeared on behalf of the defendants.

John A. Burt, herein called the deceased, and Geneve Graehl Burt, herein called plaintiff, went through a purported marriage ceremony about September 30, 1920, and thereafter cohabited together and lived more or less continuously together, at least until about 1934. Born to them were the five children who have joined their mother as co-plaintiffs in her interest in this action.

During the time above mentioned, said John A. Burt had a legal wife and another family, consisting of the above-named defendants with whom he also lived more or less continuously during the same period of time, and up until his death on May 12, 1948.

During the time aforementioned, and until his death, said deceased exerted efforts to provide for plaintiffs, and maintained his interest in them as his family. About August 15, 1939, there was selected the property described in Paragraph 1 of the complaint as a home for plaintiff and her children; they moved thereon, where they have since resided. The deed to such property showed Geneve Graehl as grantee and was duly recorded. Plaintiff did not individually invest any of her separate money in said property.

March 12, 1941, the deed, Exhibit A, naming deceased as grantee, was signed by plaintiff (and surrendered to deceased). There was no actual payment of money, or transfer of other physical thing of value in connection with the signing of said deed. The deed was left in a safety deposit box, which deceased had exclusively in his name, where it was found at the time of his death. The abstract to said property was in the possession of said deceased.

Said deed was recorded at the request of Gaylen S. Young, attorney for the defendant administratrix, on July 29, 1948.

Plaintiff, during all times material to this cause, has been suffering from a nervous ailment which, at times, has caused her to be confined to her bed.

The estate of said deceased is being probated in this court and appraised by the County Appraisers in the sum of approximately \$89,000, which includes an item of \$15,000 for the property in controversy hereinbefore referred to, and described in Paragraph 1 of the complaint.

If plaintiff is entitled to recover on her third cause of action, it is agreed that \$200 per year for each child is a reasonable charge for care and attention given by plaintiff to her children, the other plaintiffs.

Disputed issues:

1. Defendant contends that, although there was no formal separation between plaintiff and deceased, they ceased cohabitation more than ten years ago.

2. Did plaintiff contact and continue the marriage relationship in good faith, believing it to be a valid marriage?

3. Was there a valid delivery of the deed, Exhibit A?

4. Was there a valid consideration for the deed, Exhibit A?

5. Was the delivery of Exhibit A for a special purpose only and without the necessary intent to vest title in the grantee?

There is some dispute about the acknowledgement of Exhibit A, but the parties agree that the

failure, if there was such failure, to have it properly acknowledged would not in and of itself invalidate the deed.

J. ALLAN CROCKETT
Judge''

At some time the words in parenthesis "and surrendered to deceased" were crossed out of the file copy (Tr. 27 and 28).

At the trial one Edwin E. Johnson testified that about 1941 he tried to buy a strip of the land in question from the deceased, John A. Burt, but that he would not sell it because "he proposed to have a home there for his wife and children." (Tr. 57 and 58).

The deceased, John A. Burt, frequented the place two or three times a week (Tr. 60). He had his legal and lawful wife and family living in another part of the city. John A. Burt hired men to work on the place (Tr. 69). He paid them. (Tr. 73). Geneve Graehl did not stand any of the expense. John A. Burt took charge of the place. (Tr. 73). The deceased's brother did a lot of work on the house. (Tr. 75). John A. Burt "worked on the place, irrigated." (Tr. 90). Geneve Graehl Burt got permission of the deceased to build a garage-like house on the property (Tr. 113). John A. Burt bought the place with his own money and had the title taken in the name of Geneve Graehl. Said plaintiff used that name as well as Davis and Geneve Graehl Burt. (Tr. 120 and 123).

When the supposed marriage took place the plaintiff, Geneve Graehl Burt, says she knew they had to have a license and a marriage certificate which they did

not get. When questioned as to whether or not about 1930 when the civil authorities were after the polygamists she and the deceased agreed from then on not to live together as man and wife she said "no." When asked a further question whether or not the deceased and she would thereafter comply with the civil law she answered "no, we did not; it never bothered us;" and that they were "firm in their convictions," and conscience is what guided them. She knew at the time of the supposed marriage that the deceased John A. Burt had a legal wife and family living and that his said legal wife, Luella H. Burt survived him.

There was no understanding that plaintiff Geneve Graehl Burt should not part with title at the time of execution of the deed. No understanding that way at all. (Tr. 107). She has lived there since Mr. Burt purchased it and has not paid any rent. (Tr. 123).

Mr. Burt brought up the question of her executing the deed several times. She refused at first but later she consented to sign it. She then signed the deed conveying the property to him. She surrendered and delivered the deed to John A. Burt, the deceased. (Tr. 3).

After both parties had rested and over the objection of defendants the court on motion of the plaintiffs' attorney permitted plaintiffs to amend the complaint by striking out the words shown in italics in paragraphs 6 and 7 and by adding the four words shown in parenthesis in paragraph 7. Also during the trial an amendment was made adding the water right clause following

the description of the real estate as found in finding No. 3.

Leaving out the titles and the preliminary statements the findings of fact and conclusions of law and decree are (Tr. 29 to 34) as follows:

“FINDINGS OF FACT

FIRST CAUSE OF ACTION:

1. Geneve Graehl Burt, hereinafter called plaintiff, and John A. Burt, hereinafter called the deceased, on or about September 30, 1920, went through a purported marriage ceremony and thereafter cohabited together and lived more or less continuously together up until the death of the deceased on May 12, 1948. Born to them during that time were the five children who have joined their mother as co-plaintiffs, in her interest in this action and during that time said deceased exerted efforts to provide for plaintiffs and maintained his interest in them as his family.

2. Also during the time above mentioned, said John A. Burt had a legal wife and another family consisting of the above named defendants with whom he also has lived more or less continuously during the same period of time and up until his death. That plaintiff, at the time of her purported marriage to deceased, knew of his other wife and family, but because of religious convictions believed her association with deceased to be proper.

3. On about August 15, 1939, plaintiff and deceased selected as a home for plaintiff and her children the property known as No. 2150 Evergreen Street in Salt Lake County, Utah, more particularly described as follows:

Commencing 1223.7 feet East from Northwest Corner of Section 34, Township 1 South R 1 East, Salt Lake Meridian, thence East 315 feet more or less to Salt Lake City Tract; thence South 99 feet; thence South $14^{\circ} 26' 30''$ East 154.38 feet, thence West 44.3 feet South 128.8 feet to creek; Westerly along the creek to a point due South of beginning North 332 feet to beginning. 2.55 Acres.

Together with all water and water rights appertaining to said lands, including 1500 gallons per day from the Mill Creek; also $3\frac{4}{5}$ hours of water every 7 days out of the Keller ditch.

That plaintiffs soon thereafter moved upon said property where they have since resided. The deed to such property showed Geneve Graehl as grantee and was duly recorded. Plaintiff did not individually invest any of her separate money in said property.

4. During the time plaintiff has lived on said property, she with her own hands and labor and by directing others, has improved said land by planting fruit trees and gardens thereon, by removing stumps, dilapidated buildings and by landscaping said ground and improving other buildings and by building new structures and permitting the building of other structures thereon and has greatly enhanced and increased the value of said property.

5. That during all times material to this case, plaintiff has suffered from a nervous ailment, which at times has rendered her unable to attend the affairs of her home and caused her to be confined to her bed.

6. That on or about the 12th day of March,

1941, the deed admitted in evidence as "Exhibit A" in said case naming deceased as grantee and containing the description of property as set out in paragraph 3 hereof was signed by plaintiff. There was no actual payment of money or transfer of other physical thing of value in connection with the signing of said deed. The deed was left in a safety deposit box, which deceased had exclusively in his name, where it was found at the time of his death. The abstract of said property was in possession of said deceased. Said deed was recorded in the office of the County Recorder of Salt Lake County, State of Utah, at the request of Attorney Gaylen S. Young, attorney for defendant, administratrix, on July 29, 1948, in book No. 625, page 115.

7. That plaintiff did not intend to part with title to said property when she signed the deed aforesaid, but intended it to operate only in the event of and at the time of her death, and that she did not deliver said deed to deceased. That the estate of said deceased is being probated in this court, and has been appraised by the County appraisers in the sum of approximately \$89,000.00 which includes an item of \$15,000.00 for the property described in paragraph 3 hereof.

SECOND CAUSE OF ACTION:

8. As to the second cause of action, the court finds in accordance with and incorporates herein the findings set forth in paragraphs 1, 2, 3, and 4 hereof.

9. That during the period between the time that plaintiff and deceased went through the purported marriage ceremony on September 20, 1920, and the death of the deceased on May 12, 1948, said plaintiff and deceased worked and planned together for the acquisition and develop-

ment of an estate; that said John A. Burt lived at the home of said plaintiff during a portion of said period. That plaintiff discussed with deceased, values of certain real estate properties and the adviseability of acquiring or selling said properties; that said plaintiff on occasions went with said deceased to view real estate properties, and that said plaintiff lent encouragement to said deceased on his plans and undertakings, and in doing all of the foregoing assisted him in the accumulation of the substantial properties inventoried in the proceedings to probate his estate now pending in this court.

10. That when deceased died as aforesaid, he left no will and made no provision for distribution of the property in the estate accumulated by him of the value of \$89,000.00 as appraised by the County appraisers aforesaid.

11. As to the third cause of action, plaintiffs abandoned it during the course of said trial and the court accordingly with respect to said cause of action, makes no findings of fact.

From the foregoing Findings of Fact, the court now makes and enters its

CONCLUSIONS OF LAW

That the plaintiff is entitled to a judgment and decree as follows:

As to the FIRST CAUSE OF ACTION:

(a) That the deed referred to in paragraph 3 of the Findings of Fact herein should be determined to be void, and the same should be cancelled.

(b) That the plaintiff should be allowed the property described in said paragraph 3 of the foregoing Findings of Fact.

As to the SECOND CAUSE OF ACTION:

(c) That in the event, through appeal or review of the judgment herein, the conclusions of the court as to the first cause of action should be held to be error, and that on that account the judgment based thereon be reversed, then and in that event plaintiff should be entitled to an equitable distribution of the property of said deceased, acquired during the time this plaintiff and deceased were cohabiting as man and wife and inventoried in the proceedings to probate his estate now pending in this court.

Dated this 3rd day of January, 1949.

J. ALLAN CROCKETT
Judge''

“JUDGMENT AND DECREE

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That the deed referred to and described in paragraph 6 of the Findings of Fact herein, and recorded on July 28, 1948, in the office of the County Recorder of Salt Lake County in Book No. 625, page 115, be and is hereby held to be void and is hereby cancelled.

2. That plaintiff Geneve Graehl Burt, is hereby allowed the property home and grounds known as No. 2150 Evergreen Street in Salt Lake County, Utah, and more particularly described as follows:

(Same description as in finding No. 3).

It is the further judgment of this court that should plaintiff by appeal or review of this judgment be deprived of the ownership of the property described in the foregoing paragraph hereof,

then and in that event, said plaintiff should be granted and allowed an equitable interest in the estate of deceased, John A. Burt, the amount of such interest to be determined by further proceedings in this court.

Dated this 3rd day of January, 1949.

J. ALLAN CROCKETT
Judge''

STATEMENT OF ERRORS

1. The Court erred in overruling defendants' general demurrer to plaintiffs' first cause of action.

2. The Court erred in overruling defendants' general demurrer to plaintiffs' second cause of action.

3. The Court erred in rendering judgment for plaintiffs on the first cause as amended when the same does not state facts sufficient to constitute a cause of action .

4. There is a variance between the pleadings and the proof in first cause of action.

5. There is a variance between the pleadings and the proof in second cause of action.

6. That the conclusion (b) of first cause of action is not supported by the findings or the pleadings.

7. That the Court erred in trying to maintain jurisdiction of second cause of action, after rendering a decision thereon, until after first cause of action should be determined in the Supreme Court.

8. The Court erred in making one of the issues in

dispute at the beginning of the trial the valid delivery of the deed. (Tr. 28).

9. The Court erred in making one of the issues in dispute at the beginning of the trial the delivery of the deed for a special purpose only and without the necessary intent to vest title in grantee. (Tr. 28).

10. The Court erred in permitting Geneve Graehl Burt over the objection of defendants to testify what was in her own mind as is shown in the following testimony found on pp. 106 and 107 of transcript.

“By Mr. Faux:

Q. Mrs. Burt. I hand you what has been marked here as Exhibit B, (the deed) and ask you if that is your signature?

A. Yes, think it is mine.

Q. State whether or not when you signed that, you had the intention of parting with title to that property during your life time?

Mr. Young: Just a minute, I object to this on the ground it is attempting to vary the terms of a written instrument.

Mr. Faux: I resist that; it goes to the very crux of this law suit.

The Court: Just missed a word right in the beginning; “In connection with the signing of that deed, did you intend”—was the general question, did you ever intend—

Mr. Faux: No, I have forgotten.

The Court: Way I understand it you asked it generally, and to that question, I would sustain an objection. Let's get back—she said that is her signature; with reference to that signature, you asked her what?

Q. (By Mr. Faux) Whether or not you intended to part with the title of the property covered by that deed?

A. There was no understanding—

Mr. Young: Just a minute.

The Court: She may answer.

Mr. Young: May we have an objection?

The Court: Yes.

Mr. Young: We want to object in case—

The Court: That is all right; you may have your objection; she may answer.

Q. State whether or not you intended, during your lifetime, to part with the title to that property.

A. Absolutely no; there wasn't any understanding that way at all."

11. The Court erred when it failed to follow its ruling in the following instance:

Mr. Faux asked the said Mrs. Geneve Graehl Burt (Tr. 81): Did you finally consent to sign a deed to take care of things in case of your death?

A. ----- "so he told me that it would be wise for me to sign the deed, in case I should die" etc.

Mr. Young objected and further on at the bottom of p. 125 moved that statements he made to her be

stricken on the grounds it was all hearsay and contrary to the dead man's statute.

The Court after some discussion said it "will disregard the evidence that is incompetent insofar as I am able to; is that satisfactory, Mr. Young."

Mr. Young: That's all right.

Finding No. 7 indicates the Court disregarded its promise in this respect.

12. The Court erred in failing to make findings, conclusions and judgment as to whether or not the plaintiffs are guilty of laches and barred by the statute of limitations as presented in the issues by the last three unnumbered paragraphs of defendants' affirmative defense to the first cause of action.

13. That the Court erred in failing to make findings, conclusions and judgment as to whether or not the plaintiffs are guilty of laches and barred by the statute of limitations as presented in the issues in paragraph 7 of defendants' answer to plaintiffs' second cause of action.

14. That the conclusions of law and judgment concerning the first cause of action are contrary to law,

15. That the conclusions of law and judgment concerning the second cause of action are contrary to law.

ARGUMENT

1. THE COURT ERRED IN OVERRULING DEFENDANTS' DEMURRER TO THE FIRST CAUSE OF ACTION:

This cause alleged at the time of demurrer:

(a) The ownership by Geneve Graehl Burt of the property in question.

(b) In 1920 she entered into what she thought was a valid and legal marriage with deceased, John A. Burt.

(c) That said Burt was a man of strong character and demanded obedience in all things.

(d) That he had unusual business ability and obtained plaintiffs' respect and confidence in business matters.

(e) That plaintiff was afflicted with a nervous ailment.

(f) That said plaintiff had refused to sign the deed as requested by John A. Burt before but on March 12, 1941, at his instance and request and under his direction she signed the deed and surrendered it to him. At the time he stated to her "that because of the serious illness from which she was suffering and because of the possibility that she would not recover it would be better that she sign a deed conveying the property him."

(g) That in reliance thereon under his influence and domination she did sign and surrender the deed to said John A. Burt.

The complaint sounds in fraud but it does not contain the necessary allegation to support a fraud action. It is enough to say that in no place does it contain any allegation that Mr. Burt made any representations to

the grantor that were false, nor that she believed such representations.

The complaint would also seem to indicate that a cause of action might have been intended in the nature of undue influence. In that instance there would certainly have to be pleaded facts to show incapacity or weakness of mind of the grantor. A person might be ever so weak physically but a giant mentally. "Influence obtained by persuasion and argument, or gained by kindness and affection, is not prohibited, where no imposition of fraud is practiced, and where the person's will is not overcome "Undue influence is a species of fraud" p. 1778 Black's Law Dictionary Third Edition under "Undue influence."

The fact that John A. Burt was a strong character is not sufficient. The grantor could be a woman with much stronger will than the grantee. It appears from the complaint that she deeded that property back to him because she wanted him to have it. She wanted to be fair about it. The property she knew belonged to Mr. Burt. He paid for it. She did not feel that the property in case of her death should all go to her children when Mr. Burt also had five children of Luella H. Burt, his legal and lawful wife. It was not agreed that Mr. Burt should have control of the property only in case of the grantor's death. He thought it was better and wise that the property be in his name. She thought with him that it would be better also. She continued in that thinking for seven years. It was not until after she found out that he died that she changed her mind. She is not willing now that the children of the legal wife share in the

property. She in effect tells this court that she made a mistake and that it was not better; that she did not act wisely when she deeded and conveyed the property to him. That does not make a legal or equitable cause of action.

The defendants do not believe the first cause states facts sufficient to constitute a cause of action. The Court should have sustained the general demurrer.

2. THE COURT ERRED IN OVERRULING DEFENDANTS' DEMURRER TO THE SECOND CAUSE OF ACTION.

We obtain from this cause:

(a) That said John A. Burt, the deceased, left no provision for Geneve Graehl Burt by will and that she will not get any part of his estate when she thought she was legally married to him.

(b) That she lived with him years and bore five children by him; that she cooked his meals, mended his clothes, etc.; that she discussed with him his business affairs and lent him encouragement and assisted him in various ways in accumulation of substantial properties.

Where is the cause of action in this case? Suppose she did cook some of his meals. She does not say that she was or was not well paid for those meals. She alleges no investment of time or money in his properties. Nor does she state that he ever took her in as a partner. Many people assist others in various ways to accumulate properties. A bank gives advice and encour-

agement to its customers which may assist those customers very materially in accumulating properties. That does not make the bank a joint owner or give them any interest in the properties. If she had no interest at the time of his death she has no interest now.

At the time of his death the title of all his real and personal property vested in his heirs subject to administration of the estate—U. C. A. 101-4-2. Section 101-4-5 U. C. A. provides that the property *must* be distributed in the following manner: - - - - if the deceased leaves a surviving wife, and more than one child - - - - one third to the surviving - - - - wife and the remainder in equal shares to his children. Section 104-4-10 provides that illegitimate children inherit - - - - the same as if born in lawful wedlock.

The prayer for the second cause asks that the estate of John A. Burt provide a share of \$20,000.00 for her—about one third of the estate. The complaint does not set out any interest she had in the property at the time of his death. The Court has no jurisdiction to take away property belonging to and vested in the legal heirs and give it to one who is not a legal heir—and this too merely because plaintiffs think that deceased should have made a will.

We believe that the second cause does not state facts sufficient to constitute a cause of action and that the court should have sustained the general demurrer.

As an argument in support of error number 3 defendants adopt the argument in support of error number 1. It can be noted that after the amendments to

the first cause of action were made none of the facts as alleged were changed or modified. The amendments were clearly made to try to avoid the admission of delivery of the deed to the deceased, John A. Burt, but upon even a casual perusal one can see there is still a definite admission that the deed was surrendered to said deceased in the last ten words of paragraph 6. (Tr. 3).

Error Number 4: ,

THERE IS A VARIANCE BETWEEN THE PLEADINGS AND THE PROOF IN FIRST CAUSE OF ACTION.

A variance is apparent between the pleadings and the proof. The complaint and answer raises the issues as to whether or not the deceased, John A. Burt, by gaining the confidence of the said plaintiff, Geneve Graehl Burt, using his so called "strong character" forced her to sign and surrender to him the deed and whether or not she executed it only because of his great influence and domination over her. Not a scintilla of evidence was introduced to show that he used force or his strong character and domination over her to get her to sign the deed. On the other hand said plaintiff stated, as is reflected in finding number 7, that she signed the deed and intended "it to operate only in the event of and at the time of her death." No finding was made and no proof was given that the deed was not executed of her own free will and choice.

Error Number 5:

THERE IS A VARIANCE BETWEEN THE

PLEADING AND PROOF IN THE SECOND CAUSE OF ACTION.

The center point, or the foundation, upon which the whole second cause of action was built was the claim, as set out in paragraph 10 of the complaint, that said Geneve Graehl Burt "entered into what in good faith she thought was a valid and *legal marriage*." The proof shows quite to the contrary that she knew the marriage was invalid and illegal. (Tr. 121 and 122).

Error Number 6:

THAT CONCLUSION (b) ALLOWING PLAINTIFF THE PROPERTY IN FIRST CAUSE OF ACTION IS NOT SUPPORTED BY THE FINDINGS OR PLEADINGS.

There is no finding and no pleading in the first cause to the effect plaintiffs, or any of them, should be allowed the property in question. The action was one to void and cancel a deed.

Error Number 7:

THE COURT ERRED IN TRYING TO MAINTAIN JURISDICTION OF SECOND CAUSE OF ACTION.

By the last paragraph of the decree it looks like the trial court believed it was maintaining jurisdiction of the second cause of action. On the other hand it would appear that the trial court would desire to have the last say in this law suit; for the decree provided that if the plaintiff Geneve Graehl Burt should be deprived of the property in question then and in that

event the said trial court would grant her an interest in the estate of John A. Burt, deceased. Neither the findings, conclusion nor the facts justify such a decree. It was a strong indirect persuasion put before defendants that they should not appeal this case. This action of the court is a novel experience to counsel in the realm of appeals. The trial of this case was finished and complete when plaintiffs and defendants rested. All the facts were in. Section 104-26-2 of the Utah Code Ann. 1943 provides that upon the trial the "decision" of the Court "must be given in writing, and filed with the clerk within thirty days after the cause is submitted for decision." The decision in this sense means a final determination so far as the trial court is concerned. The defendants take the position that the trial court has no further jurisdiction in this matter once it is appealed. It has no power to call for further proceedings unless the Supreme Court directs.

Errors Number 8 and 9:

THE COURT ERRED IN MAKING VALID DELIVERY OF DEED ONE OF ISSUES AS WELL AS INTENT TO VEST TITLE.

The pre-trial was held five days before the case was tried. Counsel for defendants at no time admitted or conceded that one of the issues in the case was the valid delivery of the deed. The pre-trial statement in at least one place and the complaint before the end of the trial in at least three places admitted that after the deed was signed it was surrendered or delivered to John A. Burt, the deceased, and in another place that

Geneve Graehl Burt signed the deed *conveying the property to said Burt*. Even at the end of the trial after the amendments to the complaint were made he plaintiffs admit in the last sentence of paragraph 6 of the complaint that she did sign the deed and surrendered it to him. So we think the court erred in making one of the issue the valid delivery of the deed.

Counsel had no time to study the pre-trial statement. At the pre-trial we did generally agree as to a very brief statement of facts taken from the pleadings. We saw nothing in writing until the time the case was called for trial. The so called "disputed" issues were arbitrarily made by the court. Neither counsel had a chance to check it. The statements of facts is a very brief statement of what is contained in the pleadings. The disputed issue Number 5 "was the delivery of Exhibit A for a special purpose only and without the necessary intent to vest title in grantee was a new phase injected into the case. The complaint states the grantee signed and surrendered the deed because of grantee's persuasion and undue influence. Nothing is found in the pleadings that grantor did not intend to give him the title.

Error Number 10:

THE COURT ERRED IN ADMITTING TESTIMONY VARYING THE TERMS OF A WRITTEN INSTRUMENT.

The questions and answers as copied in statement of errors tells the story. The court refused to recognize defendants' objection to plaintiffs' question on

direct examination of Mrs. Geneve Graehl Burt. Counsel asked her if it was her intention to part with title. The objection was made on the ground that it was attempting to vary the terms of a written instrument. The deed showed on its face what it was. It was a deed conveying to grantee all of her interest. Now she wants to tell the court she did not intend to part with all the title but wanted it to operate only in case of her death. In other words she wanted to reserve in herself a life interest. The court permitting her to answer that question over the objection of defendants was in violation of the well established rule that oral evidence will not be permitted to vary the terms of a written instrument. This we think is reversible error.

Error Number 11:

THE COURT ERRED IN FAILING TO FOLLOW ITS OWN RULING:

Objection was made to statements that were supposed to have been made by deceased, John A. Burt, to plaintiff, Geneve Graehl Burt. After the statement was in counsel for defendants moved it be stricken. The court agreed to pay no attention to it. The findings indicate that he did pay some attention to that testimony.

Errors Number 12 and 13:

THE COURT ERRED IN FAILING TO MAKE FINDINGS ON ALL THE MATERIAL ISSUES.

I shall discuss errors 12 and 13 together. Both of them are on the ground that the court did not make any

findings, conclusions and judgment on the question of laches and statute of limitations as presented in the pleadings. This court has long held that no judgment can properly be rendered until there is a finding on all material issues. *Thomas v. Farrell* (Utah 1933) 26 P. 2d 328, 82 Utah 537. The question of limitation and laches is very material in this case. The plaintiff Geneve Graehl Burt executed and delivered the deed to the deceased way back in 1941—more than seven years before the grantee died. If he coerced her, or used his influence and domination on her to get her to sign the instrument she knew it then. She did not have to wait over seven years to find that out. If she had any rights arising from that transaction she certainly slept on them. If plaintiffs claim on the ground of fraud the action was barred under Section 104-2-24 in three years. If they claim in equity then they are barred within a reasonable time—and seven years is far beyond a reasonable time in such a case. If they claim under any other ground they are barred under Section 104-2-30 in four years. Counsel may say, that may apply to the first cause of action but what about the second cause of action? The grantor knew at all times that the deceased had a legal wife and family living and that his legal wife had her dower interest in whatever real estate he acquired. Now if grantor any time thought by her efforts she was entitled to 1/3, or any other amount, of his property why did she wait until after he was dead when his mouth is closed to make that claim? We do not say that the second cause of action gives her any legal right of action—but if

she had any legal right by any supposed claim of partnership or joint ownership she cannot now after grantee's death assert it without proof of some kind of agreement between them. If there ever were any such agreement in justice and equity she should have asserted it while he was alive.

Error Number 14:

THE CONCLUSIONS OF LAW AND JUDGMENT OF FIRST CAUSE OF ACTION ARE CONTRARY TO LAW.

They endeavor to void the deed and at the same time allow plaintiff the property. I fail to see how they can do both. The plaintiff does not ask in the first cause for any allowance of property. Such a conclusion and decree are surplusage. It is also noted that conclusion (a) is based upon the finding that said plaintiff "did not intend to part with title" and did not deliver said deed to deceased." This is absolutely contrary to the admitted facts in the complaint, in the amended complaint and all of the surrounding circumstances of the case.

We have already called the court's attention to the many places in the original complaint where four distinct admissions of delivery of the deed were made. Even in the complaint as amended we have the following words of admission of delivery, taken from the end of paragraph 6:

---- "John A. Burt stated to said plaintiff that because of the serious illness from which she was then suffering and because of the pos-

sibility that she would not recover it would be better that she sign a deed; that in reliance thereon and under the direction and under the influence and domination of said John A. Burt, *said plaintiff did sign the deed aforesaid - - - and did surrender the said deed to said John A. Burt.*”

That statement is susceptible of only one meaning is it not? That is the deed was executed by her and delivered to him. If there were any question then it must be construed most strongly against the pleader—vol. 1 p. 635 Bancroft Code Pleading. In view of this admission and in view of the fact Mr. Burt had possession of the deed and abstract at the time of his death the defendants surely were under no burden to add further testimony of delivery.

At no place in the complaint did plaintiffs allege that said Geneve Graehl Burt did not intend to part with title. There might be a weak inference, if the complaint were construed most strongly in plaintiffs' favor, that she had confidence and faith in him that he would let her live there as long as she lived. Is not this the strongest inference in her favor you can draw from that pleading? If the deceased had made her any promises to let her live there during her lifetime then her action should be one to reform the deed and not to void an otherwise good deed. The action is not founded upon her lack of intention to part with title. In any event we have her statement alone—and this was in answer to a leading question whether or not she intended to part with title. The pleadings and the surrounding circumstances belie her claim in this respect.

We think that in the beginning the property was held in trust by plaintiff Geneve Graehl Burt. She was merely getting the beneficial use out of it with the consent of the deceased. It is not disputed that the deceased purchased the property with his own money. It is not disputed that he, the deceased, furnished her a place to live and for the most part supported her all these years from about 1920. We must bear in mind she was not his wife. So far as the law was concerned she was a stranger to him. When he bought the property and caused it to be put in her name she held it in trust for him and was entitled to request her to deed it back to him at any time he wanted to.

In the case of *Anderson v. Cercone* (Ut. 1919) 180 P. 586, 54 Utah 345, the plaintiff and defendant had been married and later divorced. Plaintiff during their married life bought some real property and (as he said "I considered she had some interest in it because she was looking after the house and the children and helping me what she could do") he caused it to be put in her name (the defendant's). She later got a divorce. Plaintiff sued to quiet the title. The court held there was a resulting trust and that she held the property in trust for him since he paid for it.

The court quoted 39 Cyc. pp. 118, 119 as follows:

"It is a well settled rule of equity, in the absence of statutory provisions otherwise, that where property is paid for with money or assets of one person, and the title thereto is taken in the name of another person, in the absence of circumstances showing a different intention or understanding a resulting trust in the property

arises in favor of the person whose money or assets are so used, or persons claiming under him, the controlling question being the ownership of the purchase money, and this is true, although there is no actual intention on the part of the party purchasing and taking the conveyance to hold the equitable title for the party whose funds are used in the purchase."

This rule is practically universal the court said except where changed by statute. Also see *Wheelwright vs. Roman* (Utah 1917) 165 P. 2d 513, 50 Utah 10, and *Estey et al v. Haughian* (Mont. 1941) 113 P. 325.

John A Burt exercised control and ownership over the property. He frequented the place and worked on it. He hired people to work on it. He paid them. He took charge of the place, hired his brother to do a lot of the work. He irrigated it. When some person wanted to buy a piece of the land he refused to sell. He did not refer him to said plaintiff. He never did anything which would lead one to believe that he did not claim ownership. Mrs. Geneve Graehl Burt said she stood none of the expense. From this it could be reasonably inferred that she did not pay the taxes but that the deceased did.

In view of the circumstances of this case I am sure the court would not say there was an inadequate consideration. Since no conclusion of law was made as to whether or not there was adequate consideration this is probably not before the court. Suffice to say, however, in the case of *Estey et al v. Haughian* (Mont.) 113 P. 2d 325 above quoted the court held there was

sufficient consideration where the grantee had furnished part of the money for the purchase of the property the title to which was put in the name of the grantor. In that case the defendant and plaintiff had been living together for years as if they were married, but in fact were not married. Plaintiff Harriet Estey died and her heirs brought suit against defendant to set aside the deed given him by deceased. They declare the deed was void for reason deceased was insane at time of execution and on the further ground of undue influence on part of defendant, that it was *without consideration* and that deed was never delivered to defendant during her lifetime.

The deed was not recorded until after the death of grantor, seven years after it was executed. The deed was left in place where Mrs. Estey, the deceased, had access to it and where Haughian said she could have it anytime she wanted it.

There was not sufficient evidence to prove grantor was insane nor that there was undue influence.

As to consideration—defendant furnished \$600.00 of the \$1200.00 down payment for the property. Then he turned over his checks to grantor over a period of years and from them monthly payments were made on the property in question. - - - “*To say that the deed was executed without consideration finds no support in the record*” the court said.

The court held also there was sufficient delivery.

In 18 C. J. p. 162, Sec. 42 we find that the grantor cannot deny the consideration stated. Further that in

the absence of fraud as between the parties or their heirs a deed is good without consideration. The defendants submit that the deed on its face is an absolute conveyance of the fee and that there is not sufficient evidence supported by any proper conclusions of law to justify the judgment of the court in the first cause of action.

As to Error Number 15:

THE CONCLUSIONS OF LAW AND JUDGMENT OF THE SECOND CAUSE OF ACTION ARE CONTRARY TO LAW.

We have already said something about this in other parts of this brief. We shall merely add this: In the second cause the said plaintiff, Geneve Graehl Burt, is trying to get part of the inheritance which rightfully, under the law, belongs to all the children of the deceased and his legal wife, Luella H. Burt, one of the defendants. It has long been the rule of law in this state, as we understand, that "a plural wife is without the pale of the law of inheritance as to any property which her husband had acquired (before marriage) or might thereafter acquire:" *Raleigh v. Wells* (Utah 1905) 81 P. 908, 29 Utah 217.

We respectfully submit that the judgment of the trial court on both causes of action should be reversed; that both causes of action should be dismissed; that defendants are entitled to their costs herein and for

such other relief as to the court may seem proper in the premises.

Respectfully submitted,

GAYLEN S. YOUNG,
*Attorney for Defendants
and Appellants*