

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 Respondents

Utah Supreme Court

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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.

FILED

CLERK, SUPREME COURT, UTAH

No. 7313

BRIEF OF RESPONDENTS

MERRILL C. FAUX,
*Attorney for Plaintiffs
and Respondents*

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ARGUMENT

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 of 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

In the Supreme Court of the State of Utah

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Defendants and Appellants.

No. 7313

BRIEF OF RESPONDENTS

FACTS

The brief heretofore filed by appellants contains a short statement of facts, the text of the complaint and answer, set out in full as originally filed, together with the pre-trial statement. The facts of the case are therein substantially set forth so that more in that regard is thought unnecessary except as comment upon the facts is required during the argument that follows.

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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-----
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-----
11. The Court erred when it failed to follow its ruling-----
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 plaintiff 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-----

In the Supreme Court of the State of Utah

GENEVE GRAEHL BURT, LOR-
ELE BURT NEFF, KARLEEN
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Plaintiffs and Respondents.

Appellants here were defendants and respondents were plaintiffs in the trial court. Both titles have been used in referring to the parties with the thought that doing so makes the reading of this brief easier.

Geneve Graehl Burt is the real party plaintiff because the other plaintiffs are her children and join to show that they agree with the position taken by their mother in this action, but seek no relief on their own behalf.

ARGUMENT

Appellants set out fifteen separate assignments of error to justify their appeal in this case.

The first is that the trial court erred in overruling the demurrer to plaintiff's complaint. Respondents' answer to that contention is that there was no error and that even though the ruling had been erroneous still it was not prejudicial and so not reversible. Unless there is a basis upon which injury or prejudice may be presumed the error, if any, must be overlooked and is not reversible. *Ryan v. Beaver County* 21 Pac. (2nd) 858, 82 Utah 27; *Olsen v. H. D. Kress Co. Inc.* 48 P. 2nd 430, 87 Utah 51. Counsel for defendants submitted his demurrer without argument and informed counsel for plaintiffs that as he was filing an answer at the same time, he would not resist overruling of his demurrer. He accordingly asserted no particular objection to the complaint and expressed no view or interpretation of it which caused him surprise or resulted in prejudice, during the course of said trial.

“The court must in every stage of an action disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.” Section 104-14-7 U.C.A. 1943.

With respect to this rule, this court has said:

“The burden, of course, is on the appellant to show, not only error, but prejudicial effect as well.” *Jensen v. Utah Railway Co.* 270 Pac. 349 p. 362, 72 Utah 366 p. 400.

Furthermore, as shown by the pre-trial statement set out on pages 13-16 of Appellants' Brief, the court held a pre-trial conference in said cause on December 3, 1948 at which time the issues were fully discussed, and the scope of the trial determined. Counsel for plaintiffs at the outset of said pre-trial conference informed the court and counsel that if counsel for defendants intended to assert that the complaint alleged a legal delivery of the deed by Geneve Graehl Burt to John A. Burt, deceased, and that such a pleading was in effect an admission of delivery in the legal sense with intent to vest title in the said John A. Burt then counsel for said plaintiffs would ask leave to amend and so remove grounds for such a view of the complaint. Because of that statement and others which followed, the court indicated that whether there was a delivery in the legal sense would be made one of the issues of the trial.

The trial proceeded accordingly and plaintiff was permitted to make the amendments to the complaint which had been mentioned and discussed at the pre-trial

conference. It seems clear that the general rule respecting the effect of amendments after a ruling on a demurrer applies:

“Any error in the ruling on a demurrer to a complaint becomes immaterial if the complaint is amended and the issues made on the amended pleading are tried and judgment rendered thereon.” Bancroft Code Practice Vol. 9, p. 9743 sec. 7410.

At the commencement of the trial appellants were already advised and aware of respondents' theory of the case. They proceeded to trial without objection as to the issues; they did not contest the scope of the trial as outlined by the pre-trial statement and cannot now be permitted to say that they were prejudiced by an alleged error in overruling the demurrer to the first cause of action in the complaint.

The second assignment of error is that the trial court erred in overruling the demurrer to the second cause of action in the complaint. The foregoing argument may also be set up here in refutation of appellants' contention and in support of respondents' position that there was no error and though there was, it was not prejudicial. The position of respondent Geneve Graehl Burt was akin to the position of the supposed wife in the case of *Jenkins v. Jenkins*, 153 P. (2d) 262, 107 Utah 239. There the parties had assumed the relation of man and wife knowing that one of the essentials of a valid marriage was not complied with—that the interlocutory decree of divorce of the wife had not become final. Recognizing that an inequitable situation

would result, that one party to this arrangement would be denied a share in the fruits of the joint labors, and that the other party would be unjustly enriched, this court held that the trial court "in the exercise of its equitable power had jurisdiction to require an equitable distribution of the property acquired during the time the litigants were cohabiting as man and wife." Cases cited in support of that principle were: *Sanguinetti v. Sanguinetti*, 9 Cal. 2d 95, 69 P. 2d 845, 111 A.L.R. 342, *Figoni v. Figoni*, 211 Cal., 295 P. 339; *Fuller v. Fuller*, 33 Kan. 582, 7 P. 241; *Werner v. Werner* 59 Kan. 399, 53 P. 127, 41 L.R.A. 349, 68 Am. St. Rep. 372; *Krauter v. Krauter*, 79 Ok, 30, 190 P. 1088; *Deed v. Strode*, 6 Idaho 317, 55 P. 656, 43 L.R.A. 207, 96 Am. St. Rep. 263; *Buckley v. Buckley*, 50 Wash. 213, 96 P. 1079, 126 Am. St. Rep. 900; *Powers v. Powers*, 117 Wash. 248, 200 P. 1080.

Under similar facts there being a cause of action stated in the Jenkins case, it follows that there was a cause of action stated in favor of Geneve Graehl Burt, consequently there was no error in overruling the demurrer to the second cause of action.

Respondents do not dispute the statement of appellants in their brief, page 30, that as a general rule title to the property of a decedent vests in his heirs. It is urgently contended however, that in a case like that at bar such title is subject to the equitable claim of one who frugally and industriously toiled to raise and provide for decedent's children and to preserve, improve and enhance decedent's estate.

As to assignment of error No. 3, that judgment should not have been rendered where a cause of action was not stated, respondents contend that their first cause of action alleges and the evidence proves facts which justify judgment for Geneve Graehl Burt; that having real property in her own name, and without receiving any money or other thing of value therefor (stipulated and included in the pre-trial statement), not exercising a will or intention of her own to pass title in her lifetime, she signed the deed and surrendered it to said John A. Burt. When asked whether or not she intended, during her lifetime, to part with title to that property, her answer was "Absolutely no." (tr. 107). To that answer there was no contradiction except the mute inference arising from the finding of the deed in decedent's safety deposit box.

In assignment of error No. 4 appellants rely upon an alleged variance between pleading and proof in plaintiff's first cause of action. Whether there is a variance depends not upon what the complaint contained alone but upon what was transacted at the pre-trial conference, the contents of the pretrial statement and the amendments to the complaint permitted by the trial court. Appellants seem to ignore all of these and point to the fact with seeming significance that no evidence was introduced to prove their interpretation of plaintiffs' complaint. Ordinarily in a case where, as here, plaintiffs are handicapped by the prohibitions of the "dead man's statute," and this case was no exception, all the available evidence is not introduced. That the record is not more replete with details of transactions

between Geneve Graehl Burt and John A. Burt is chargeable to appellants and to their insistence that her lips be sealed and the facts suppressed surrounding the signing and surrender of the deed to her home.

Assignment of error No. 5 charges a material variance between the pleadings and the proof in plaintiffs' second cause of action. Appellants take the view that Geneve Graehl Burt, regardless of other facts, could never properly lay claim to any interest in the estate of John A. Burt because the marriage ceremony by which they justified their relation did not meet the requirements of and conform to the Utah statutes relating to marriage. Numerous adjudicated cases as cited above in the argument relating to the second assignment of error refute that view. Some have permitted a recovery by one of the contracting parties seemingly to prevent alone an unjust enrichment and to save the party the product of his labor in building up and accumulating said estate.

In the *Jenkins v. Jenkins* case, *supra*, it can hardly be said that the parties were innocently unaware of the requirement which operated to prevent their marriage from being valid and binding in the eyes of the law. They knew that the wife's decree of divorce had not become final. Yet that fact did not shackle equity and prevent it from coming to the aid of that plaintiff and decree to her a proper distribution of the property accumulated by their joint efforts.

As to her marriage to John A. Burt, plaintiff, Geneve Graehl Burt, testified as follows:

O. You stated in your sworn complaint, you thought you had, had been legally married; you remember that you stated that, don't you?

A. I said, as far as our religious convictions go, of course, I am his wife; always will be his wife unless I prove myself unworthy. (tr. 120).

A. --- we were firm in our convictions and conscience is what guided us. (tr. 122).

She had participated in a ceremony of marriage, performed by Israel Barlow (tr. 100). They lived together as husband and wife, in perfect confidence and with compatibility until the death of Mr. Burt. (tr. 109). To her mind the marriage was valid and legal, made her the wife of John A. Burt and that she would always be his wife unless she proved herself unworthy. The allegation complained of in paragraph 10 of the complaint is that plaintiff entered into what in good faith "she thought" was a valid and legal marriage. It clearly referred to the *state of mind of plaintiff* Geneve Grahel Burt with respect to said marriage and the proof clearly revealed her belief and confidence in it so that appellants were not deceived nor misled to their prejudice. It is submitted, therefore, that there was no variance or if any at all it was so slight and immaterial as to be no cause for reversal whatever.

"It is a general rule under the codes that no variance between the allegation in a pleading and the proof is deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." Bancroft Code Pleading Vol. 1, sec. 702; Dobbs v. Rees, 49 Utah 270, 163, Pac. 255.

There was no objection by defendants at the trial that they had been prejudiced by a variance. And as has been said by the Idaho Supreme Court that if during the trial of a cause the defendant is misled to his prejudice because of a variance between the allegations of the complaint and the proofs he should then and there notify the court of that fact and ask for proper relief; if he does not, he will not be permitted to raise the question on motion for new trial or an appeal. *Aulbach v. Dahler* 4 Idaho 654. 43 Pac. 322.

In assignment of error No. 6 appellants complain of the conclusion of the court as to the first cause of action that plaintiff should be allowed the property in question. The court did find that the property had been selected as a home for plaintiff and her children, that the deed to said property showed Geneve Graehl as grantee and that the deed to said property had not, in law, been delivered by plaintiff to John A Burt and that when she signed it she did not intend to part with title to said property. The court thereupon concluded that the deed from said plaintiff to John A. Burt should be determined to be void and should be cancelled, and that plaintiff should be allowed the said property. It is submitted that the second is in effect a restatement of the first, that to cancel the deed recorded by defendants is to allow to plaintiff the property which had originally stood in her name.

In assignment of error No. 7 appellants complain of the last paragraph of the decree which provided that:

“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.”

This was an equitable proceeding and it is inherently the power of a court of equity to so frame its decree that in finally disposing of all matters justice might be had between the parties.

In *Mason v. Ellison*, 160 P. 2nd 326, the Supreme Court of Arizona in making a conditional decree said, quoting from 19 Am. Jur. 23, sec. 123:

“In an equity case the court—adapts its relief and molds its decrees to satisfy the requirements of the case and to conserve the equities of the parties litigant. The court has such power since its purpose is the accomplishment of justice amid all the vicissitudes and intricacies of life.”

In *Baumer v. Welsh*, (Kan.) 226 P. 98, the following appears relative to the power of a court of equity:

“In a suit in equity to establish an interest in specific real property and for appropriate relief, the court, having acquired jurisdiction of the parties and of the subject matter and having found that plaintiff has a specific interest in the property, has power to so frame its decrees as to meet the exigencies of the situation and to reach the ends of justice.”

And in a California case the court, going beyond the injunction sought, said:

“It is a cardinal rule of equity that the court has power to make its decrees effective and that when it has jurisdiction of the parties and of the subject matter its decree will be complete in order to terminate the litigation if possible.” *Santa Monica Ice Cold Storage Co. v. Rossier et al.* 109 P. 2nd 382.

Complaint is made by appellants by assignments of error 8 and 9 that the court improperly made valid delivery of the deed to John A. Burt and intent to vest title in said John A. Burt issues for the trial of said case. They were informed at the beginning of the pre-trial conference that plaintiffs intended to amend the complaint for that purpose. There was no objection made to that proposal and before leaving said conference the court indicated that said issues would be regarded as in dispute and so to be disposed of at the trial of said case.

In the adoption of the rule providing for the pre-trial procedure effective May 1, 1948, this court made simplification of the issues one of the purposes of the pre-trial process and further provided that:

“The court shall make an order—which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action unless modified at the trial to prevent manifest injustices.”

Pursuant to that rule the court called a pre-trial conference on December 3, 1948, at which counsel for the parties were present. Counsel for plaintiffs asked to be allowed to make amendments so that valid de-

livery of the deed in question would clearly be in issue at the trial as well as the purpose of the deed. The trial judge made an outline of the matters admitted and the matters in dispute and by reading his outline indicated what his pre-trial order would be. At the beginning of the trial the court said, "We all agree that is a disputed issue, and we are going to hear evidence about it." (tr. 49).

Testimony on the purpose of the deed to John A. Burt was introduced and objected to by counsel for defendants only "on the ground it is attempting to vary the terms of a written instrument." (tr. 106).

In assignment of error No. 10 this same objection that oral testimony was being introduced to vary the terms of a written instrument is urged. By examination of plaintiff it was sought to demonstrate her intent when she signed the deed in dispute. There was no attempt made to change its terms. The object was to establish its effect. Counsel contends that the court erred in permitting plaintiff to testify respecting her intention not to transfer title to deceased. His objection was that to permit her to testify would, by parol, vary the terms of a written instrument. It is submitted that the purpose of the testimony was not to change the terms of the deed but to clarify and illuminate the circumstances under which the deed was executed and the purpose of its execution. It may be contended with propriety that a deed properly executed in the possession of the grantee carries with it a presumption of delivery. Said presumption, however, by proper evidence is rebuttable, the

intention of grantor being of outstanding importance in that respect. "The intention of the parties, particularly the grantor, is an essential and controlling element of delivery of a deed." 16 Am. Jur. 501 sec. 115.

"The presumption of delivery arising from manual tradition, however, is not conclusive and may be rebutted by the evidence, the burden of proving a valid delivery ordinarily resting upon the party relying upon the instrument." Tighe v. Davis (Mich.) 278 N.W. 60. See also Hood v. Nichol (Ky.) 34 S.W. (2nd) 429; Blades v. Wilmington Trust Co. (N.C.) 178 S.E. 565, John Hancock Mutual Life Ins. Co. v. Chinn (Kan.) 28 Pac. 2nd 761; Cavett v. Pettigrew (Ark.) 32 S.W. 2nd 308; Rouland v. Burton (Ill.) 15 N.E. (2nd) 920; Buchwald v. Buchwald (Md.) 199 A. 800, 141 A.L.R. 308.

This court has recently had a similar question before it and had this to say with respect to the importance and materiality of the donor's intention in case of a bill of sale.

"Before such instrument (bill of sale) can have the effect of transferring any interest in the property there must be a delivery with the necessary intention. What the donor's intention was may be shown by parol evidence without violating the rule against varying the terms of a written instrument by such evidence, because the object is not to change the terms of the instrument but to show whether the instrument ever went into effect as a transfer of the property or an interest therein." Jackson v. Jackson (Utah) 192 P. (2nd) 397.

Respondents submit in light of the foregoing au-

thority there was no error in overruling defendants' objection to the evidence.

Appellants' assignment of error No. 11 is almost too general to merit any attention and is uncertain to the point that it is difficult, almost impossible in fact to ascertain to which statement of the court reference is made. It is assumed that it is the statemen (tr. 125-126) where the court says:

“I think this evidence is objectionable, but I am not going to put the burden on myself to go back here and find out what is objectionable and what isn't. It has come in—certain statements, without any objection, and a general motion of that nature, I wouldn't know which you want stricken and which you wanted to have the motion apply to, and I think, however, that the court will disregard the evidence that is incompetent, insofar as I am able to; is that's satisfactory, Mr. Young.”

It is not evident wherein the court ignored an agreement as to the evidence in making its findings. We think counsel does not seriously contend that prejudicial error can be found in this assignment.

Assignment of error No. 12 and 13 assail the court for failure to make findings and conclusion and judgment on the question of laches and limitations. Respondents say in answer that such defenses, if ever intended to be, were not made and did not become issues at the trial. Counsel made no mention of them in discussing the proposed issues at the pre-trial conference; he made no objection to their omission from the prepared Pre-Trial Statement; he introduced no evidence concerning

either alleged defense during the course of the trial and made no argument concerning them at the close of the trial. Respondents contend that these alleged defenses, with numerous other matters such as the allegation in the middle of page 3 of defendants' answer that "The Utah State Tax Commission insists that said property be made part and parcel of his estate for taxation purposes," were "washed out" in the pre-trial process and cannot now be made the basis for a reversal of the judgment of the trial court. If that view of the effect of the pre-trial process is not correct, then instead of assisting in "coping with the present over crowding of court calendars—" as intended by the Committee on Rules of Civil Procedure which recommended its adoption to this court, it would have just the opposite effect and be merely another cumbersome process that would entail greater delay rather than saving of time and would increase uncertainty and confusion at the trial rather than prevent it.

Assignment of error No. 14 complains of the conclusions of law and judgment of the First Cause of Action. Appellants' objection seems to be that canceling of the deed to John A. Burt and allowing of the property described therein to respondent, Geneve Graehl Burt are inconsistent and at war with each other, as it is said in Appellants' Brief, p. 37,

"They endeavor to void the deed and at the same time allow plaintiff the property. I fail to see how they can do both."

Actually the two provisions are consistent and parallel each other. The earlier deed to such property

showed Geneve Graehl as grantee and was duly recorded. (Pre-Trial Statement—tr. 27, 28). Canceling the later one signed by her in which John A. Burt was named as grantee re-established Geneve Graehl as the title holder of record and “allowed Geneve Graehl Burt the property - - - .”

Appellants deny that Geneve Graehl Burt owned the property but insist on the contrary that she received it merely as a trustee for John A. Burt, she being, as appellants assert, “So far as the law was concerned—a stranger to him.” They cite *Anderson v. Cercone*, 180 P. 586, 54 Utah 345, to support that position. That case cited with approval 39 Cyc. pp. 118, 119.

“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, - - - ”

By its own terms this rule appears not to be one of universal application:

“It is a well settled rule of equity — in the absence of circumstances showing a different intention or understanding - - - .”

The transcript is full of evidence showing a different intention or understanding on the part of John A. Burt. Mr. Edwin E. Johnson, who stated that he lived on the property which adjoins, on the west, the property occupied by plaintiff, Mrs. Geneve Graehl Burt, and that

he was, at the time he testified, the Bishop of the Evergreen Ward, testified that he talked to John A. Burt during his lifetime. He said, "Well, on several occasions I have talked to him along the line of what he was going to do with the property; in fact at one time, I tried to buy a strip off the lower end next to me from him, and he intimated that he didn't care to sell any of it, that he proposed to have a home there for his wife and children." (tr. 57).

Edward Capson a man 74 years of age who had lived in the locality of the Geneve Burt home on Evergreen Street all his life, testified that he worked on the Burt property improving it. Respecting his conversations with Mr. John A. Burt, he said on direct examination:

"Q. Did he ever state to you in your conversations, whether that place belonged to Geneve?

A. Yes, he said that was for, for her and the family."

On cross examination he testified as follows:

"Q. Did he ever tell you that that was for her during her lifetime?

A. Well, he told me on one occasion that he gave her the place.

Q. He had told you on one occasion he had given her the place?

A. Yes.

Q. And he didn't say whether he gave her a life interest or the whole fee or what?

A. Yes; I understood him to say he give

her the deeds to it, as near as I can remember.”
(tr. 72).

C. H. Carlquist, a former business associate of John A. Burt, testified respecting a conversation he had with appellant, Luella Burt.

“Q. Did you have a conversation with Luella Burt regarding John A. Burt?

A. Yes, sir.

O. Will you state about when that was Mr. Carlquist?

A. It was in the afternoon of the day he passed away.

Q. And will you relate the substance of that conversation so far as it concerns this plaintiff, Geneve Burt? (tr. 86).

A. Luella Burt had been very fair to Mrs. Geneve Graehl Burt because he had given her that property out in Millcreek, and it was a very valuable piece of property - - -” (tr. 88).

On cross examination Mr. Carlquist testified:

“Q. Didn’t she also say that that home up there was to be for, not only Geneve but for the children and that was all they were to get?

A. No, apparently at that time she thought that the home was in Mrs. Geneve Graehl Burt’s name, and I praised her broadminded attitude when I talked to Mr. Parkinson, so that is how it came up.

Q. That was before the funeral?

A. That was before the funeral.

Q. And the safety box had been opened?

A. Yes, sir.” (tr. 88).

Ralph E. Pitts, a neighbor, testified:

“Q. Did you have conversations with Mr. Burt?

A. A number of times.

Q. How did he refer to Geneve Graehl Burt in your conversations?

A. Well, just as wife and family.

Q. Did he at any time make any statement to you with respect to the property there as it related to these plaintiffs?

A. Yes, he talked to me on one or two occasions, and his chief concern seemed to be that the home and property there should be as the family wanted it. He made the statement several times that that was their home, and they were the ones to say how it should be. Now, I make that statement because it was a small home and they were—they wanted to enlarge and make changes from time to time, and he said that it was their home, and, if that was their will, that was the way he wanted it.” (tr. 90).

Plaintiff testified on cross examination respecting the building of a house on the property in question:

“Q. But Mr. Burt knew about it before it was built didn't he?

A. Oh, yes, he knew they were building it.

Q. He knew it so that he gave his permission?

A. Not until I gave mine though. He considered it was my place, considered it was my place to do with as I pleased. He never considered that was his place at all.” (tr. 113).

Again while under cross examination:

“Q. He got that as a home for you?

A. Yes, he bought it for me when I was so sick.

Q. The property that you are living in, he purchased with his own money—speaking of “he,” Mr. Burt?

A. Yes, he purchased it in my name for me.

Q. And you paid nothing?

A. No, I didn’t pay anything.” (tr. 123).

Clearly in light of all these circumstances showing a different intention on the part of John A. Burt it cannot be said that the rule relied upon by appellants to create a resulting trust applies in this case.

As to error No. 15 respondents disagree with statement of appellants respecting the second cause of action that “Geneve Graehl Burt, is trying to get a part of the inheritance which rightfully, under the law, belongs to all the children, of the deceased and his legal wife, Luella H. Burt ---.” (Brief p. 42). Plaintiff sought the aid of a court of equity to have set apart to her a fair share of the estate of the approximate value of \$90,000.00 she had helped to accumulate during 28 years of toil and hardship and to nullify the action which would pauperize her and put her upon the charity of her children in her declining years. The law does not make her an heir, but equity will not permit her to be robbed. As was said by this court in the case of *Jenkins v. Jenkins*, *supra*,

“In view of the fact that the plaintiff had

only an interlocutory decree of divorce from her prior marriage and said decree had not yet become final, she was still married at the time of her purported marriage to defendant ---."

"--- where, as here, both parties knew of the interlocutory decree of divorce, which had not yet become final, the court in the exercise of its equitable power had jurisdiction to require an equitable distribution of the property acquired during the time the litigants were cohabiting as man and wife."

Other courts have in similar cases done equity between the parties even though in the eyes of the law there had been no valid marriage to make them husband and wife—no relationship that would vest in one an enforceable right to claim part of the property owned by the other.

In *Fuller v. Fuller* (Kan.) 7 P. 241; the court denied alimony after an annulment of a supposed marriage, but said:

"It is our opinion, however, that in all judicial separations of persons who have lived together as husband and wife, a fair and equitable division of their property should be had; ---."

In *Werner v. Werner*, (Kan) 53 P. 127, the court dissolved an invalid marriage and decreed a distribution of the property accumulated by the two during the time they cohabited. In upholding the decree the Supreme Court of that State said:

"But, independently of the statute of divorce, we think the court had authority to decree not only an annulment of the marriage, but also the division of the property which had been

jointly accumulated by the parties. --- the testimony tends to show that the property they have now is largely the result of their joint labor and earnings. She was active, industrious and faithful—she performed labor of the hardest and most menial character—she was diligent, tireless and economical in building up a business and in gathering up the property which they held at the time of the trial. A portion of the time the title to the property was in her name ---.The court has the same power to make equitable division of the property so accumulated as it would have in case of the dissolution of a business partnership. --- There is considerable testimony tending to show—that her misconception of the law was largely due to the advice and influence of the plaintiff in error. --- the share which was awarded her was no more than she was justly entitled to.”

There are many situations here parallel to those recited in the decision in the Werner case quoted from above:

John A. Burt proposed marriage to plaintiff --- “continued his attentions for quite a little while.” (tr. 100).

“Well we had an awful struggle; conditions was bad. Mr. Burt was broke when I married him; he had absolutely nothing; he was in debt. Of course, I went into it understanding all this, but this was a matter of religious conviction with me and him both, so we put our shoulders to the wheel and pushed along. I worked; I did some cleaning, I did sewing, not only for my children out of cast-offs.

The court:

May I say when you say “I worked, did some

cleaning" you worked outside the home for income?

A. Yes, I did sewing for friends and relatives, and I did some cleaning out of the home for others, and I did laundry work, did washing and ironing and I did a little hairdressing. This was while the children were young and my health was a little better, and, then in addition to that, I clothed my children practically on cast-offs. I am a good sewer, and I made them beautiful clothing out of cast-offs from my sisters and my relatives - - -." (tr. 101, 102).

Respecting John A. Burt,

"He always discussed his business affairs with me, his business enterprise—failures and successes. He confided in me perfectly."

Q. Did he ask your counsel and suggestions?

A. Yes, he asked for my counsel and we considered things—he showed me different pieces of property, and we were generally agreeable; I had tried to please him." (tr. 110).

Edwin E. Johnson, bishop of the L. D. S. Ward where plaintiff lives, said:

"And Mrs. Burt has worked very consistently; in fact, for a woman of her age, I wondered at times how she could do the type of work she really did. (tr. 62).

Mrs. Dorothy B. Sandberg, a former neighbor, testified that she had known plaintiff before she moved onto Evergreen Street and stated respecting plaintiff:

"--- that she was a very diligent worker, that she made most of the childrens clothing;

that she painted and repaired furniture. (tr. 79).
 --- that she was more industrious than the average mother, and that she had a lot of difficulties to overcome." (tr. 81).

Ralph E. Pitts, a neighbor said:

"Well, she certainly took a more than a motherly interest let's say; the lights were burning many times after midnight so that (the children) could have the right dress for school and graduation dresses—she did a lot of sewing—she worked almost constantly; then they would be done and gone for days at a time, and of course we would go over and she would be sick at that time. She would make the statement she just had to go out and work because the weeds were getting the best of her, so she worked quite constantly." (tr. 48).

Mrs. Pitts testified that Mrs. Burt:

"--- has been a very hard worker and has done a whole lot of canning foods and making clothes for the children; worked around the place. They have papered rooms—she and the girls done painting and remodeling. She works outside, too, except when she is sick." (tr. 95).

Edward Capson, her neighbor, said that the home of plaintiff on Evergreen Street was in very poor shape when they moved onto it.

"--- it had been sage brush—it was waste ground—there was nothing grewed there, it just was rocky. --- we carried rocks off of there; I wheeled them off, and his children and wife picked them off in buckets — when he wasn't there, she was the one to tell me what to do. (tr. 70). --- she was always working outside. (tr. 73.) --- his wife was always working. --- she done

all her own housework I guess. --- she added to the house. (tr. 74). I suppose Mrs. Burt put in more hours than anyone—she was always there—she done pretty near everything, watering—with the weeds ---.” (tr. 75).

Respondents believe that in light of the record equity could do no less than void the deed to John A. Burt and allow to Geneve Graehl Burt her home and, on condition that those provisions should fail, set apart to her a portion of the estate she helped create. They, accordingly, submit their case and pray that this honorable court will affirm the decision of the trial court.

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 and Respondents*