

1958

Harry Child aka Henry Child v. Eugene A. Child and Arvilla Child : Brief of Appellants

Utah Supreme Court

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J. Grant iverson;

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In the Supreme Court of the State of Utah

HARRY CHILD, also known as
HENRY CHILD,
Plaintiff and Respondent,

vs.

EUGENE A. CHILD and ARVILLA
CHILD, his wife,
Defendants and Appellants.

Case
No. 8869

BRIEF OF APPELLANTS

J. GRANT IVERSON

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In the Supreme Court of the State of Utah

HARRY CHILD, also known as
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EUGENE A. CHILD and ARVILLA
CHILD, his wife,
Defendants and Appellants.

Case
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BRIEF OF APPELLANTS

This suit was brought by Harry Child, Respondent, to have a deed executed and delivered April 16, 1945, from the Respondent and his wife to his son, Eugene A. Child, one of the the Appellants, declared a mortgage and the Appellants ordered to reconvey the land described in said deed to the Respondent. The Court entered judgment for the Respondent, ordering Appellants to reconvey said lands to Respondent and to pay him \$1,164.62 for the top soil removed from said lands and for one-half acre thereof which Appellant had sold and

conveyed, and further ordering Appellants to remove certain mortgages which Appellants had placed on the property. From this judgment Appellants appeal.

Respondent pleaded his cause in two counts: first, that Respondent and Appellant, Eugene A. Child, both intended the deed to be a mortgage only, to secure the repayment of \$300.00 and second, that the Respondent at all times mentioned in the Complaint intended that the ownership of the property be in himself, which fact Appellant, Eugene A. Child, had at all times known, and that the \$300.00 received by respondent from Eugene A. Child was intended by Respondent to be a loan, which fact was known to Eugene A. Child.

Appellants challenge the sufficiency of the evidence to sustain the Findings and Judgment of the Court. A review of the evidence is therefore necessary.

STATEMENT OF FACTS

The Respondent, Harry Child, hereinafter sometimes referred to as Mr. Child, testified as follows:

That he resides at 6300 South 325 East, which is south of Bountiful. The land in controversy, 19.25 acres, hereinafter sometimes referred to as 20 acres, lies south and east of his residence and at a higher elevation. (Tr. 5-6). He first became interested in the 20 acres in 1941 or 1942. He was asked what he wanted the land for. He answered that he wanted to put a reservoir there,

for one thing, and store water that was going to waste. Also, he could use the land to pasture his cows. (Tr. 7).

Respondent wrote to the owner of the land, Mrs. Griffiths, who resided in California, to inquire if she desired to sell the property. She told him to see Mr. R. O. Warnock in the Kearns Building (Tr. 8). Respondent offered Mrs. Griffiths \$300.00, or \$15.00 an acre, through Mr. Warnock. Mrs. Griffiths refused the offer. Respondent learned in 1945 that Mrs. Griffiths had died. (Tr. 9). He again contacted Mr. Warnock, who told him he could buy the land for \$300.00. He gave Mr. Warnock \$25.00 as a deposit and agreed to pay the balance of \$275.00 upon receipt of the deed from California (Tr. 11).

Respondent went to Bountiful State Bank to borrow \$275.00. He was told a loan would be made if he would pledge certain water stock for security (Tr. 12). His wife, Hazel Child, had shares of water stock belonging to Respondent, but refused to deliver the water stock to him (Tr. 12-13). She told him to sell some of his cows to raise the purchase money.

The following question and the following answer were asked and given:

“Q. Did you agree to sell some cows to raise the money?

A. No, I did not, because the cows were part of my program.

Respondent knew that Appellant, Eugene A. Child, who was away in the Navy, had money in a joint bank account in his name and his mother's name. Respondent

requested Hazel Child to lend him some of Eugene's money. She stated she could not lend Eugene's money. (Tr. 13). She wrote to Eugene to ask if he would lend money to Respondent. Respondent stated that she apparently got word back that it was OK, but he never saw the letter. He got \$275.00 from his wife. He was asked where she got the \$275.00 and he stated that he understood she got the money from Eugene's account, but he was uncertain (Tr. 14).

After getting the money, Respondent and his wife drove to Salt Lake City. He left the car on First South and Main Street after she gave him the money and went to Warnock's office in the Kearns Building. He stated that she would not give him the money until he promised to put the property in Eugene's name to secure the loan. He gave Warnock \$275.00 and received a deed to the 19.25 acres. The deed was marked Exhibit 1 and introduced in evidence.

When he returned to the car, his wife asked for the deed (Tr. 16). He told her the deed was made out in his name and he would have to have a deed made to Eugene, because he had promised her he would do so to secure the loan. They drove around to Second South to Mr. Toronto's office. Toronto made out a deed from Respondent and his wife to Eugene (Tr. 17). This deed was marked Exhibit 2 and introduced in evidence (Tr. 18).

Respondent had the 19.25 acres surveyed and built a fence around it (Tr. 18). It took probably three years

to build the fence (Tr. 19). Eugene went out once with him to get railroad ties to put into the fence (Tr. 20). Respondent stated that he paid taxes on the land for 1946, but wasn't certain about the 1945 taxes. Thereafter, he paid no more taxes. The tax notices were issued in Eugene's name (Tr. 20).

Respondent had an abstract of title to the land made. He staked cows and a horse on the land until the fence was completed (Tr. 21). After Eugene returned from the Service, Respondent asked him when he was going to deed the property back. Eugene wouldn't discuss with him the matter of his paying the loan back. This refusal to discuss the matter persisted up until the suit was filed (Tr. 22).

On cross-examination, Respondent testified as follows: The following questions and the following answers were asked and given:

“Q. Mr. Child, isn't it true that when Mrs. Child wrote the letter to Gene and asked him whether or not he would lend some of his money to you that you received the answer—went and got it from the Postman, didn't you?

A. No. (Tr. 22)

Q. You didn't ever see the letter?

A. I never saw the letter.

Q. Did Mrs. Child ever tell you what was in the letter?

A. I don't recall her telling me what was in the

letter, other than that Eugene would loan me the money on the condition that I put the property in his name to secure the loan. That was my understanding of what was in the letter.

Q. When did that letter arrive?

A. Well, it must have arrived sometime about that time — in the Spring of 1945. I don't remember the date.

Q. In fact, you got it from the Postman the morning you took your wife to Salt Lake City?

A. No, I never got the letter from the Postman.

Q. Calling your attention to the morning of April 16, 1945, the day the deed was purchased, you went into the kitchen of the home where your wife and your son, Brant, were present and you had in your hand the envelope, didn't you?

A. No, never. I don't ever remember seeing the letter.

Q. You have no recollection of that?

A. No recollection of that.

Q. You have no recollection of Mrs. Child reading the letter at that time and saying to you, 'Why, Gene says he will not lend you any money.' You have no recollection of that?

A. No, absolutely none.

Q. And also telling you at the same time that you still had time to go and sell a couple of cows if you wanted to buy the property that day? (Tr. 23)

A. Yes. She told me to go and sell cows, yes.

Q. That day?

A. I wouldn't say that day. It might have been that day, but she said to sell some cows.

Q. Do you have a recollection of the very day that you bought that property, Mrs. Child told you to go and sell a couple of cows and get the money if you wanted to buy that property?

A. She told me to go and sell cows to get the property, but a couple of cows wouldn't have brought enough money to buy the property or pay the balance, and not only that, I didn't have any cows that I wanted to sell. That was part of my plan.

Nothing was said about paying Eugene back or the rate of interest (Tr. 24). Since that time, April 16, 1945, he has never offered to pay Eugene back, because there was nothing said about it. He has tried to talk to Eugene about it, but Eugene would not discuss it (Tr. 25).

Respondent admitted that when his deposition was taken in October of 1956 he testified that he had never paid any taxes on the property, but stated that later he found a receipt for taxes he paid in 1946. He never said anything to Eugene about the taxes, but supposed Eugene was paying them. He always checked the delinquent tax list in the Davis County Clipper. Never at any time from 1947 to 1956 had he offered to pay the taxes (Tr. 26). He naturally supposed Eugene was paying the taxes (Tr. 27).

Eugene has told him repeatedly that he wasn't ever going to deed the property back. He couldn't remember exactly how long it was after Eugene got home before he told him that he would never deed the property back. It could be a month or more, but he has known since 1946 that Eugene had no intention of ever deeding the property back to him.

In 1952 he made a loan to Eugene and his brother, Brant. At the time the loan was made, nothing was said about paying off on the 19.25 acres (Tr. 31-32).

He had been advised to have a lawsuit over the 19.25 acres, but didn't want to drag the thing into Court, because it would mean trouble in the family (Tr. 35).

Plaintiff rested.

Hazel Marie Child was called and testified as follows: She is the divorced wife of the Respondent and the mother of Eugene A. Child. Prior to April, 1945, Respondent had told her he had taken an option which expired April 16, 1945, on approximately 20 acres of land lying east and south of her home for a purchase price of \$300.00. He asked her for water stock belonging to him and which she held. She refused to give him the water stock. She had obtained it when she paid off an obligation owing by Respondent and herself to Respondent's sister, Martha, with money she had earned and saved to pay the debt off, because Respondent refused to pay the debt and always stated that his sister didn't need the money when she requested repayment. (Tr. 37-38).

When Respondent asked her to lend him some of

Eugene's money, she told him she could not do so until she got Eugene's permission, because Gene had told her not to lend him any money for anything when he went into the Navy.

At Respondent's request, she wrote an airmail letter to Eugene and asked him to answer back airmail. She was asked to state the contents of the letter and gave the following answer:

"I wrote and asked Gene if he wanted to loan his Dad the \$300.00 for the land, and I said, 'If you don't want to loan it and your Dad don't want to buy it, do you want to buy it for yourself, because I think it is a good proposition.'

Concerning the receipt of his answer, witness testified as follows:

"A. Well, Mr. Child was very anxious to get that letter. It was the last day, the 16th of April when his option was up, so he went down to the Post Office to be there when the Post Office opened, and the mail carrier had already gone on his route, so he followed the mail carrier, which was out to Woods Cross, and got the letter from him and he came back. Well, it may have been between 10:00 and 11:00, and he had the letter out of the envelope in his hand, and he came in the kitchen door and he handed it to me — he didn't hand it — he held it out and he said, 'Go and get the money.' I said, 'Is it all right? Will Gene lend you the money?' He said, 'It's all right; go and get the money.' I said, 'Let me see the letter.' It was out of the envelope. I took the letter and read it. I read it back to him and Gene said, 'I don't want

to loan Dad the money, but if he don't buy the land, I would like to buy the land, if you think it's a good proposition, Mother, but I don't want Dad's name on the deed, because if I buy it I want the land for my own.'

- A. Did you have any conversation that morning about him obtaining the money elsewhere to buy the land?
- A. For a week, I think, I tried to get him to sell some of his cows to buy it. I told him to sell himself a few cows and buy the land and not to bring Gene in on it.
- Q. Did you have any conversation of that nature on the morning that you received the letter?
- A. I certainly did. I said, "You see, if Gene buys the land, it will be Gene's. If you want the land, you had better buy the land yourself." Sell two cows, that's all it would have taken, two cows (Tr. 39). Cows were worth \$200.00 apiece in 1945. At that time Mr. Child had roughly 20. Three or four were in the stable milking and the rest were in the pasture. (Tr. 40)

After the above conversation, respondent said, "Well, come on, we've to get to the bank and get that money, if we're going to buy the land." She answered, "Well, it will be Gene's land, remember, if he buys it." Respondent took her to the bank and she went in and got \$300.00 and they went to Salt Lake. As nearly as she could recollect, they went directly to Toronto's office. Her recollection was that she gave Toronto \$275.00 and

handed Respondent \$25.00. The deed was made and signed there.

About two days after Eugene returned from the Service, he asked his father for his deed to the land. Mr. Child asked, "What deed?" and Eugene said, "To my land that I bought." They then engaged in an argument. Gene always said it was his land when he and his father discussed the matter. Eugene would ask his father, "Why didn't you buy it, if you wanted it?" Respondent would always say that it was his land. (Tr. 42)

Mrs. Child on several occasions told her husband, "You should have bought the land yourself, but it is Gene's."

On cross-examination, Mrs. Child testified as follows: Eugene went into the Service on June 8, 1944. On April 16, 1945, the bank account contained at least \$300.00. From the time Gene was ten years old, he had known what it was to have most of his father's income spent on cows and he had known what it was to go without. He had known what it was for her to go without to keep a bunch of cows. That was one of the reasons Gene did not want to lend his father any money. (Tr. 47)

Mr. Child told her that he had paid \$25.00 down on the land and he would lose it if he didn't buy it by April 16, 1945.

When Respondent and Mrs. Child purchased nine acres for their home in Bountiful in 1930, they borrowed

\$2,250.00 from Mr. Child's sister, Martha. When they sold their home in Salt Lake they paid Martha \$1,200.00 in a lump sum. (Tr. 49) The property was deeded to Martha as security for the loan. (Tr. 50) During five or six years nothing was paid to her. She started asking for her money, stating that she needed it. There was \$650.00 then owing her. Mrs. Child obtained the balance of \$650.00 by picking fruit and selling it and working at the air port and with the money paid off the loan. (Tr. 52)

Mrs. Child was asked whether or not in the letter to Eugene she stated the purchase of the land was a good proposition. She stated, "Yes, I thought it was. That's the reason I tried to get Mr. Child to buy it." (Tr. 56)

Mr. Child brought Eugene's letter home on April 16, 1945. He said he had gotten it from the Postman (Tr. 57). He indicated he had already read the letter. (Tr. 58).

Mr. and Mrs. Child were divorced in 1955.

In the letter sent to Eugene she first stated that she asked Eugene if he wanted to loan the money and then went on and asked him if he wanted to buy the property, if his father did not. She did not ask Mr. Child if he was willing that Eugene buy the land before writing the letter (Tr. 62).

She was asked if the property was placed in Martha's name for security when they borrowed from her, exactly the same as when Mr. Child borrowed the money from

Eugene and the property was required to be put in Eugene's name. She answered, "Mr. Child didn't borrow the money, Eugene bought the property." (Tr. 62-63). At the time she withdrew \$300.00 from the Bountiful Bank they went directly to Salt Lake. It is her recollection that she gave the money to Mr. Child in Mr. Toronto's office (Tr. 64). She did not go to any other office that day, but she did not recollect whether Mr. Child went to another office. She stated that she remembered giving him \$275.00 and that in Toronto's office she remembered turning to him and saying, "Here's your \$25.00." She didn't know whether Mr. Toronto was paid for making the deed (Tr. 65).

She withdrew an even \$300.00 from the bank to take it to Salt Lake. She had no other money. Toronto was a friend of Mr. Child's. She just knew him (Tr. 66). On redirect examination she testified as follows:

In answer to a question propounded by counsel for Respondent, she had stated she was not going to be a go-between — if Gene's money was going to be used, the property would have to be put in Eugene's name. She was asked for what purpose it would have to be put in Gene's name. She answered, "Because Gene was buying it."

The following question and answer were asked and given:

"Q. While you were in Mr. Toronto's office, did Mr. Child say anything about what he would do after Gene came home if the property was put in Gene's name?

- A. "He said, 'He's just a kid. He doesn't know what he's talking about and I'll settle with him when he comes home.'"

She withdrew \$300.00 from the bank and she did not keep any part of it (Tr. 69). She wanted Mr. Child to get rid of all but four milker cows.

Brant Adams Child was called and testified as follows:

He is the son of Respondent and brother of Appellant. He was at home the morning his mother and father had a discussion concerning a letter which had been received from Eugene. He was in the kitchen when his father came in with an open letter in one hand and the contents in another. The following answers and questions were given:

- "A. Well, I remember that Gene did say he had the money there. I don't remember the circumstances. I can't remember exactly what was agreed upon, I just remember that it was all that Dad had been waiting to arrive. It was there and they were discussing it. I remember something about Gene had the \$300.00 available and that the time was running short and Dad said. 'Come on, let's go.'
- Q. Was any mention made of selling cows at that time?
- A. Yes, that was a very, or spoken, or mentioned thing.
- Q. That particular morning was there a conversation?
- A. Yes, I remember Mother saying, 'Why don't you sell some cows and buy it for yourself?'"

On cross-examination he testified: At that time he was 17 years old. His father left early in the morning and returned before noon (Tr. 72). He was interested in the proceedings from the time his father told him the 20 acres was available for purchase. He knew his father was planning to buy it (Tr. 73). He remembered his mother didn't want the water stock mortgaged (Tr. 74). His father and mother had a lot of arguments over the cows. He didn't know what Eugene had stated in the letter concerning whether he would lend the money or whether the money would be used to purchase the property.

Hazel Child was recalled and testified as follows: In April 1945 Mr. Child may have had 20 cows. It was not her desire that he sell all of his cows, merely a part of them (Tr. 76). In answer to a question concerning her attitude toward his keeping his cows, she said, "If it meant taking the money a family needed to live on—we were in constant confusion with the neighbors, with the Sheriff of Bountiful, and the Sheriff of Davis County, confusion all summer long, the neighbors calling and calling about the cows, they were in the garden. They ate up our garden, we expected that, but it was just a continual confusion and fuss and haggle over cows." Mr. Child did not always have enough money to feed his cows (Tr. 77).

Defendant Eugene A. Child was then called and testified as follows: He received a letter from his mother airmail, stating that a parcel of land was up for sale

and that his father wanted to borrow some money to buy it. She stated that she thought it was a good investment, so when he wrote back he told them he wasn't interested in loaning the money, but if his father didn't buy it, he would be glad to buy the land for himself so long as the land was put in his name and was meant for him. He was discharged on June 11, 1946, in San Diego and came directly home. Between the time of the letter mentioned and the time he returned home he did not have any negotiations or dealings in connection with this piece of property (Tr. 81). Within a week after he returned from the Service he started looking for his deed. He walked up to the land and looked it over to see what he had bought. He asked his father where the deed was. His father asked, "What deed?" to which he replied, "The deed to my land up there." His father stated, "Well, that ain't your land, that's my land," to which he replied, "Oh, no, I paid the money. How do you get it that it's your land? When I usually buy something, I figure that it's mine, especially with intent that it's mine." On numerous occasions his father has come to him and wanted to know when he was going to deed the land back to him. He has always told him that it isn't his land. He, the appellant, had paid the full purchase price of it and he intended to buy it for himself. That's the way it was written up in the letter and that's the way he figured it should be. (Tr. 82).

Since his return he has paid all of the taxes. The tax receipts presented by him were marked Exhibit A

and offered and received (Tr. 83). His father has never offered to pay any taxes and he has never asked his father for repayment of the \$300.00. His father never offered to pay \$300.00 for his interest in the property until the time this proceeding started. The offer was made through a letter received from Respondent's lawyer's, stating they would repay the original purchase price plus interest.

The property was not used until 1951 or 1950 and at that time it was fenced by his father and he has pastured cows in it since then. He was asked if he had had any discussion with his father about the use of the property, as far as the cows go. He made the following answer: "Well, no. I have never objected to it. I just as soon see the cows up there fenced in as on somebody else's place tearing it up and having the Sheriff down our neck, and the neighbors, numerous times, the neighbors have been down our neck numerous times about cows being on people's places."

A man removed the top soil from the property under a contract with the Appellant. He received between \$500.00 and \$600.00 for the top soil in 1951 or 1952. It was after the fence was put up. He did not secure his father's consent to the removal of the top soil. His father did not say anything to him about the removal of the top soil that he could remember. He has used the property twice as security for loans. The first was in March of 1953 when he borrowed \$3,500.00 from the Bountiful State Bank. In 1955 he borrowed another

\$4,000.00 from Earl Burnham on a second mortgage. He has never discussed the fact of the mortgages with his father. He was asked whether his father knew or had done anything he considered as indicating that he had known of the fact that he had borrowed money on the property (Tr. 85). He stated his father knew he had gotten the abstracts and he thinks he knew it was to borrow money. His father did not make any objections to him borrowing the money on the property. The father has never attempted to borrow money on the property, as far as Eugene knows. Eugene sold half an acre to the Government for use in connection with the pumping plant for the new Davis County Aqueduct. The property was sold in 1956. The Government paid him \$1,250.00. The present value of the property is \$2,500.00 an acre. He deeded off land for a road on one side of the property. The road consists of half an acre, or possibly one-fourth of an acre. (Tr. 86). The total value of the land is between \$40,000.00 and \$50,000.00. Mr. Child had nothing to do with either the sale of the property to the Government or the donation of this strip of land to Harold Calder. He was sure the father was aware of the sale of the land to the Government (Tr. 87). He had never mentioned the fact that he had deeded a piece of land to Harold Calder to his father. He didn't see any reason for it. The father made no complaint about the sale of the land to the Government and he claimed no part of the sale price. The attention of the witness was called to the fact that the father in his testimony had stated something about the use of the 20 acres in

part for a reservoir. He was asked if his father had ever mentioned a reservoir being put on the property. He gave the following answer: "Oh, yes, he was wanting to put a reservoir there, but I just absolutely said no; that's not feasible." He just did not like the father putting a reservoir on the property. He answered "No" to the following question:

"Q. Mr. Child, had you ever considered at any time that the \$300.00 that you gave in 1945 was a loan secured by a mortgage on that property?"

He stated that the deed which his father delivered to him was not in his mind a mortgage. It was an absolute conveyance of title. He never has discussed the matter of the land with his father without stating that it was his (Eugene's) land.

On cross-examination the defendant testified as follows: He had never loaned his father any money before 1945. When he went into the Service his father had between 15 and 18 cows. It was possible that his father paid the taxes in 1945 and 1946 (Tr. 91). He is sure he paid the taxes from 1947 on and is not sure who paid them before 1947. It was just as possible that he paid the taxes as that the father paid them prior to his returning home.

The land was fenced by his father in 1951 and no fencing was done before he got home from the Service. (Tr. 92). He did not help his father build the fence. He did not money-wise reimburse his father for building

the fence (Tr. 93). He was asked if he told his father he was going to borrow money on the land, to which he answered, "Well, it's my land, why should I?" He doesn't remember whether he told his father or did not tell his father that he was going to borrow on the land. He did not recollect that he told his father about deeding a piece of land for a road to Harold Calder. Concerning the putting of a reservoir on the land, he said, "I just don't want a reservoir on the ground. I just said frankly 'no'." The following questions and answers were given:

"Q. Did you ever have any reason to think if you loaned your Dad money you would never get it back?

A. From the past dealings, it wasn't so much that he wouldn't pay it back. I wouldn't doubt for a minute that he wouldn't pay it back if he had it, but he just put everything in the cows and never had it to pay back to anybody.

Q. But you knew if you asked the jury you could get it back, didn't you?

A. Not necessarily. I had just as soon not even borrow it. I bought the land."

He was asked if his father objected to taking top soil off the land, to which he answered that the father objected more to the truck going up through the gate and leaving the gate open than he did to taking the top soil off. He did not remember that his father objected to the top soil being taken off at all. He did not ask permission of his father to remove the top soil. (Tr. 101). He had not heard as early as 1948 that the

Weber Basin Project was being planned through that area. On redirect examination defendant testified as follows:

“Q. Counsel asked you if you ever reimbursed your father for the fence he put on your property. Do you want to make an explanation to the answer you made?”

A. Well, he asked me if I ever reimbursed him in cash for it. I figure his reimbursement came in the fact that he was putting cows on my piece of land up there and he had been paying in years past hundreds of dollars for pasture land.”

Respondent was then recalled and testified as follows:

On the first day of October, 1956, when his deposition was taken, he didn't remember whether he received \$275.00 or \$300.00 from Mrs. Child.

He and Hazel Child were divorced in December, 1955. (Tr. 105). In the divorce action there was a division of property rights. The 20 acres wasn't taken into consideration. Neither he nor Mrs. Child asserted that the 20 acres belonged to him.

On April 16, 1945, when Hazel gave him the money, he did not understand that Eugene intended the land to be Eugene's. If he had thought so, he would have never borrowed the money from Eugene. He would have gone elsewhere and gotten the money. He paid a total of \$300.00 for the property to Mr. Warnock. He paid \$25.00 prior to the day the transaction was closed and

\$275.00 on the date it was closed (Tr. 108).

Robert Oliver Warnock was called and testified as follows:

He is an insurance agent. His place of business is in the Kearns Building in Salt Lake City. He had had that place of business at least five years prior to 1945. He handled property for Mrs. Griffiths in Salt Lake City. He was familiar with some real property which she had in Davis County. It was one parcel of property of approximately 20 acres. He recalls Respondent coming to his office concerning the property. The first time, no transaction was affected. Shortly after the death of Mrs. Griffiths, her daughter, Ione Rankin, decided to dispose of the property. (Tr. 110). He received a deed from Mrs. Rankin and turned it over to Mr. Child when the money was paid for the property (Tr. 111). The property was not listed with any other real estate company, to his knowledge. He did not ever deal through Toronto Real Estate Company. He handled the entire transaction (Tr. 112).

Respondent was again called to testify, which he did as follows: He had never gone with cash in hand with an offer to repay \$300.00 to Eugene. He had asked him several times if he wanted to make a settlement and wanted to have the property deeded back to Mr. Child. He was asked if he objected to Eugene removing the top soil from the 20 acres, to which he answered, "Yes, I objected to it, told him I planted grass up there and the trucks were going up there and it was more or less

just absolutely wrecking the ground.” (Tr. 113). He stated that he didn’t know anything about the mortgages which Eugene had placed on the property. He did not give an abstract to Eugene. (Tr. 114). The total cost of the fence, including the cost of rental of the truck, was over \$200.00. He did not have any knowledge of the transaction between Eugene and the United States Government. He did not know that Eugene had received and money for the transaction. He stated that the thing which first caused him to take steps to protect his rights was because Gene was going ahead and selling the property and making deals with the Government and not considering him.

Prior to the time he and Mrs. Child were divorced he had considered taking the matter to Court, but hated to do so. He was asked what made him determine to take legal action and he gave the following answer: “Well, just the fact that, like I said before, Eugene was going ahead and not considering me at all in the deal and there was things he did. He went up there about this time and the fence I had along the west side, unbeknown to me, he went up there with a bulldozer and knocked the fence all down and made the road and things like that.” (Tr. 117).

On cross-examination he testified that at the time of the divorce the property belonging to him and Mrs. Child was divided up, where each took part. They divided up the real estate, the water stock, cattle and household furniture. She got one share of water and he got two

shares of water; she got one cow; and he got part of the land and she got part of the land. They made a complete division of their property. Only the 20 acres was not taken into consideration. It was not mentioned. (Tr. 121). They divided all the property that was in his name and his wife's name. He was asked if the property was not all that he and his wife owned, to which he answered "No, I wouldn't say that. That was all that was in my name." (Tr. 122). At the time they were dividing the property Mrs. Child did not make any claim that Mr. Child owned the 20 acres and that it should be divided with her. (Tr. 123).

After the case was closed and submitted, upon stipulation and motion, the Court entered orders that the case be reopened and the record show that if called to testify, the defendant Eugene A. Child would testify that prior to the time he entered the Navy he worked at Hill Field for approximately one and one-half years, that he made his own contract of employment for said work; he collected and spent his wages as he chose and his father never made claim of any kind to his wages.

The Court further ordered that the record show that B. T. Wride would testify that he is the Assistant Cashier of Bountiful State Bank; that he had checked the records of the bank as they refer to the account of Eugene A. Child; that on April 27, 1944, he had \$8.45 in the account; no deposits, credits or withdrawals were made to or from the account until August 1944; on April 16, 1945, said account, which was then joint

with Hazel Child, had a balance of \$370.37. On that date there was withdrawn \$300.00, leaving a balance of \$70.37. (R. 22-23).

STATEMENT OF POINTS

Appellants argue this appeal on the following points:

POINT ONE

THE FINDING THAT EUGENE A. CHILD AGREED TO GRANT A LOAN TO PLAINTIFF ON CONDITION THAT THE PROPERTY BE PLACED IN THE NAME OF EUGENE A. CHILD TO SECURE A LOAN IS NOT SUPPORTED BY THE REQUISITE WEIGHT OF THE EVIDENCE OR BY ANY COMPETENT EVIDENCE AND IS CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

POINT TWO

THE FINDINGS THAT THE DEED WAS AN EQUITABLE MORTGAGE AND THE CONCLUSION OF LAW ENTERED THEREON ARE NOT SUPPORTED BY THE REQUISITE WEIGHT OF THE EVIDENCE AND ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

POINT THREE

THE FINDINGS THAT \$275.00 OF EUGENE'S MONEY WAS GIVEN TO THE RESPONDENT INSTEAD OF \$300.00 AND THE CONCLUSIONS OF LAW THEREON ARE NOT SUPPORTED BY THE REQUISITE WEIGHT OF THE EVIDENCE AND ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

POINT FOUR

CONCLUSIONS OF LAW THAT THERE WAS A BREACH OF CONFIDENTIAL RELATIONSHIP EXISTING BETWEEN THE RESPONDENT AND HAZEL CHILD AND EUGENE CHILD ARE NOT WITHIN THE ISSUES OF THE CASE AND ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

POINT FIVE

CONCLUSIONS OF LAW THAT EUGENE A. CHILD WOULD BE UNJUSTLY ENRICHED AT THE EXPENSE OF THE RESPONDENT IF ALLOWED TO RETAIN THE PROPERTY AND THAT THE ACTS OF EUGENE CHILD AND HAZEL CHILD CONSTITUTE CONSTRUCTIVE FRAUD ARE NOT WITHIN THE ISSUES AND ARE CONTRARY TO THE EVIDENCE.

POINT SIX

RESPONDENT'S ACTION IS BARRED BY THE STATUTE OF LIMITATIONS AND LACHES.

ARGUMENT

Points One and Two

POINT ONE

THE FINDING THAT EUGENE A. CHILD AGREED TO GRANT A LOAN TO PLAINTIFF ON CONDITION THAT THE PROPERTY BE PLACED IN THE NAME OF EUGENE A. CHILD TO SECURE A LOAN IS NOT SUPPORTED BY THE REQUISITE WEIGHT OF THE EVIDENCE OR BY ANY COMPETENT EVIDENCE AND IS CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

POINT TWO

THE FINDINGS THAT THE DEED WAS AN EQUITABLE MORTGAGE AND THE CONCLUSION OF LAW EN-

TERED THEREON ARE NOT SUPPORTED BY THE REQUISITE WEIGHT OF THE EVIDENCE AND ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

Appellants will discuss Points One and Two together, because the evidence in support thereof is the same.

Appellants have set forth the evidence in great detail on both sides, for the reason that a careful analysis of the evidence is of utmost importance in this case.

The most important question in this case is: Was it the intention of both Eugene A. Child and Harry Child that the deed which was executed by Harry Child and his wife to Eugene A. Child on April 16, 1945, should be an absolute conveyance of the property described therein, or was it given to secure a loan and therefore constituted an equitable mortgage? If either Respondent or Appellant did not intend said deed to be security for a loan, Appellants are entitled to a reversal of the judgment of the Trial Court. Respondent must sustain the burden of proof in support of his contention that the deed was given as and for a mortgage and not an absolute conveyance of title. Decisions of this Court have been consistent that a deed cannot be declared a mortgage unless the evidence is clear and convincing that both grantor and grantee intended that the deed be security for a loan and not an absolute conveyance.

In the case of *Northcrest, Inc. v. Walker Bank &*

Trust Co., et al, 122 Utah 268, 248 P. 2d 692, the following statements are found:

“Undisputed is the plaintiff’s contention that one who asserts the invalidity of a deed must so prove by clear and convincing evidence. *Thornley Livestock Company vs. Gailey*, 105 Utah 519, 143 P. 2d 283; *Corey vs. Roberts*, 82 Utah 445, 25 P. 2d 940 * * *

“Plaintiff maintains further that whether an instrument is a deed or mortgage is a matter of intention of the parties and it must appear not only that one, but both parties, regarded it as a mortgage before it is so legally. There is no doubt that this is so. 36 Am. Jur., Mortgages, sec. 132 * * *

“For evidence to be clear and convincing, it must be such that there is no serious or substantial doubt as to the correctness of the conclusion. *Greener v. Greener* (Utah), 212 P. 2d 194.”

In the case of *Gibbons v. Gibbons*, 103 Utah 266, 135 P. 2d 105, the Court stated:

“The controlling question is what was the intention of the parties as it existed at the time of the execution and delivery of the instrument.”

In *Corey v. Roberts*, 82 Utah 445, 25 P. 2d 940, the Court said:

“It is likewise the law that, where conveyances clear, unambiguous and unequivocal in their terms are attacked by parol evidence seeking to establish a trust or give to the documents a mortgage construction, the party so seeking

must by clear, unequivocal and satisfactory proof establish the alleged trust or mortgage relationship * * *

“Plaintiff also accepts the position that the proof must show that both grantor and grantee understood that the conveyance was made as security for a debt and not as an absolute conveyance. If plaintiff fails to meet these conditions and burdens of proof, her action must fail.”

There have been numerous interpretations by the Court of the meaning of clear and convincing evidence. One of the most recent, if not the most recent, statement on this matter by this Court is found in the case of *Naisbitt v. Hodges*, 6 Utah 2d 116, 307 P. 2d 620. In this case the Court stated:

“The case of *Sine v. Harper*, 118 Utah 415, 222 P. 2d 571, 580, presents the analysis in an equity review of what is ‘clear and convincing evidence’ necessary to reform a deed. All that is required is that evidence exist whereby this Court can say that the Trial Judge acted as a reasonable man in finding that the proof of the fact asserted is greater than a mere preponderance.”

A review of the evidence in this case establishes clearly that the evidence in support of the Respondent’s position that the deed was intended by both him and Eugene to be a mortgage is not only not greater than a mere preponderance, but is contrary to the great weight of the evidence.

The most important single fact in this case is what was contained in the answer of Eugene Child to the

letter written by Hazel Child at the request of Harry Child, wherein she asked Eugene Child if he would make a loan of \$300.00 to his father, Harry Child. Let us review the record on this matter.

Harry Child testified that he doesn't know when the letter was received, that he never saw the letter, but was told by his wife, Hazel Child, that Eugene had consented to lend him the money, provided the property was deeded to Eugene to secure the loan. It is most unlikely that he did not see the letter which was so all-important to him. He could not admit that he read the letter, because its contents destroy his case. However, as against his statement that he did not see the letter is the testimony of his son, Brant, that he was in the kitchen of the family home when his father brought the letter, which he had already taken out of the envelope, into the kitchen and that his father and his mother discussed the contents of the letter. Brant Child did not remember the contents of the letter, but a most significant bit of evidence is his statement, "Yes, I remember Mother saying, "Why don't you sell some cows and buy it for yourself?" If the letter had stated that Eugene would lend the money to his father to make the purchase, what sense would there be in discussing the matter of the Respondent selling some cows and buying the property for himself? (Tr. 72).

Hazel Child, whose testimony on this matter has been given in detail in the statement of Facts, (pages 9-10 of this brief) testified that at the request of her

husband she wrote to Eugene and asked if he would lend some money to his father. On the morning of April 16, 1945, Mr. Child went to the Post Office for the letter and later followed the Postman until he obtained the letter from him and brought the letter, opened, into the kitchen of the family home, where she and Brant were present. He told her to go and get the money and when she asked if it was all right with Eugene to lend him the money, he stated that it was all right; to go and get the money. She asked him for the letter and when she read it, she quoted to him therefrom the statement. "I don't want to loan Dad the money, but if he don't buy the land, I would like to buy the land, if you think it's a good proposition. Mother, but I don't want Dad's name on the deed, because if I buy it, I want the land for my own."

Eugene testified to the same effect that in the letter which he sent back he stated that he wasn't interested in loaning the money, but if his father didn't buy it, he would be glad to buy the land for himself, as long as the land was put into his name and was meant for him.

This evidence of three witnesses outweighs the evidence of the Respondent that he did not receive the letter and did not know anything concerning its contents, except what was told him by his wife. But his own testimony on this point is seriously impeached by his admissions on cross-examination. When asked concerning the conversation in the kitchen of the home above mentioned on April 16, 1945, which he first flatly denied

ever occurred, but to which, when asked the following question:

“Q. Do you have a recollection of the very day that you bought that property, Mrs. Child told you to go and sell a couple of cows and get the money, if you wanted to buy that property?”

he gave the following answer:

“A. She told me to go and sell cows to get the property, but a couple of cows wouldn't have brought enough money to buy the property or pay the balance, and not only that, I didn't have any cows that I wanted to sell. That was part of my plan.”

What reason would there be for Mrs. Child to tell him to sell two cows if he wanted the land, if Eugene had written that he would lend the money? At the time of the transaction, it is apparent that Mr. Child desired to purchase the property, but that he was not willing to sell two cows to obtain the money therefor. His cows were more important to him than the land. When he was asked, “Did you agree to sell some cows to raise the money?” when Hazel Child refused to deliver to him the water stock which she held and when she told him to sell some of his cows to raise the money, he answered, “No, I did not, because the cows were part of my program.”

He knew that Eugene had refused to lend him the money. He would not sell the cows to raise it. He took a chance he could talk Eugene into deeding the property

back to him when he returned. The evidence is uncontradicted that while he and Mrs. Child were in Toronto's office when the property was placed in Eugene's name, Mr. Child said, "He's just a kid; he doesn't know what he's talking about and I'll settle with him when he comes home." But when Eugene came home, he insisted upon his rights as a purchaser, paid the taxes upon the land, and dealt with the property as his own and others dealt with him on that basis.

The evidence is overwhelming that Harry Child did not consider the deed a mortgage. There is not a word of competent evidence to establish that Eugene considered the deed a mortgage. Finding No. 12, that Eugene agreed to make a loan to his father if the property was deeded to him to secure the loan, is not supported by any competent evidence. The only evidence that Eugene authorized Hazel Child, as his agent, to lend his money to his father is that of the father to the effect that although he did not see the letter from Eugene to his mother, he was told by Hazel Child that Eugene in his letter had authorized her to make the loan, provided the property was placed in Eugene's name. It will be observed that this is a statement of a third person that the agent, Hazel Child, had defined her authority to make a loan from the principal. Hazel Child flatly contradicts this testimony. If she had made such a statement on the witness stand, it would have been competent, but for a third person to state that the agent,

outside of court, had stated what her authority was, is not competent evidence as to the fact of the authority. On his point the law is stated in 3 C.J.S., Agency, sec. 324, page 285, as follows:

“Notwithstanding broad statements in a few cases that the declarations of an agent are admissible against the principal to show the extent of the authority of the agent, it is elementary that the acts, declarations, admissions, statements or representations of an agent are not admissible against the principal to prove the power or authority of the agent or the scope or extent thereof unless such acts or declarations were done or made in the presence of the principal or within his knowledge, or were authorized or ratified by him, or there is other evidence of authority. The rule refers to declarations made by the agent out of court, off the witness stand, or otherwise than in his sworn testimony, and it means that such declarations cannot be testified to by a third person for the purpose of proving the scope or extent of the authority of the agent.”

Another interesting fact is that Respondent pleaded in his First Cause that both he and Appellant intended the deed to be a mortgage. When the Court entered his Order that judgment be given to Plaintiff, he specified that it was on the Second Count (R. 12). Apparently the Court didn't think that both Respondent and Appellant intended the deed to be a mortgage.

Neither Respondent or Hazel Child considered the land to be Respondent's subject to a mortgage, when a division of properties was made at the time of their divorce in 1955.

POINT THREE

THE FINDINGS THAT \$275.00 OF EUGENE'S MONEY WAS GIVEN TO THE RESPONDENT INSTEAD OF \$300.00 AND THE CONCLUSIONS OF LAW THEREON ARE NOT SUPPORTED BY THE REQUISITE WEIGHT OF THE EVIDENCE AND ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

It is interesting to observe that in Findings Nos. 10, 14, 15, 16, 21, 32 and 33, Respondent stated the figure \$275.00. The reason for this is that during the course of the trial, the Court observed, "I think there is one significant fact in this case pertaining to the 20 acres, and as Mr. Child disagrees with the testimony of Mrs. Child, I think that is your lawsuit. I am going to ask Mr. Child that one question, and that is, did he receive his \$25.00 back when they were in Toronto's office?" (Tr. 55). It appears that the Court considered the matter of whether Mr. Child received from Eugene the amount necessary to pay the balance of the purchase price, or whether he received the full purchase price from Eugene, of great importance. Certainly if Mr .Child received the full \$300.00, it is evidence that Eugene was buying the property. If he received only \$275.00, it is some evidence that Eugene was lending him enough to enable him to pay the balance of the purchase price.

We shall therefore discuss the evidence as to the amount which Mrs. Child gave to Mr. Child on April 16, 1945. The Respondent, throughout his testimony, referred to the amount of \$275.00. However, when he gave his deposition on the first day of October, 1956, he

didn't remember whether he received \$275.00 or \$300.00 from Mrs. Child (Tr. 105). Mrs. Child testified throughout that she withdrew \$300.00 from Eugene's account in the bank and gave it all to Mr. Child on April 16, 1945. It is difficult to understand why she would withdraw more than the amount which was required. It is her recollection that she gave the money to him in the office of Mr. Toronto, but she indicated that her recollection was hazy on this one point as to the place where the money was paid.

Thus, the testimony of Mr. Child and Mrs. Child comes into direct conflict. We have already mentioned the fact that at the time of the taking of his deposition prior to trial, Mr. Child did not remember whether it was \$275.00 or \$300.00 which he received.

As in all of the evidence which is in conflict in this case, on this point Mr. Child's testimony is uncorroborated and is contradicted by the testimony of other witnesses and by other circumstances. The evidence on this point is typical. The Court entered its Order on page 23 of the Record that if the Assistant Cashier of Bountiful State Bank, Mr. B. T. Wride, were called to testify, he would testify that on April 16, 1945, there was withdrawn from the account of Eugene Child \$300.00.

Although in seven separate Findings, the Respondent refers to the sum of \$275.00 instead of \$300.00, it is most significant that the Complaint, which was filed before the Respondent realized that it would not serve

his purpose to state that he received \$300.00, in five separate paragraphs states that the Respondent received \$300.00 from Eugene Child. Nowhere in plaintiff's Complaint is the sum of \$275.00 mentioned. The Appellants, in answering plaintiff's Complaint, admit that the amount involved is \$300.00. A party cannot disprove or make a contention based on a statement of fact contrary to an admission in his own pleadings. As stated in *Back v. Hook*, 236 P. 2d 910: (a California case)

“In *Lifton vs. Harshman*, 80 Cal. App. 2d 422, 431; 182 P. 2d 222, 228, it was said, ‘when allegations in a complaint are admitted by the answer (a) no evidence need be offered in their support; (b) evidence is not admissible to prove their untruth; (c) no finding thereon is necessary; (d) a finding contrary thereto is error.’”

POINT FOUR

CONCLUSIONS OF LAW THAT THERE WAS A BREACH OF CONFIDENTIAL RELATIONSHIP EXISTING BETWEEN THE RESPONDENT AND HAZEL CHILD AND EUGENE CHILD ARE NOT WITHIN THE ISSUES OF THE CASE AND ARE CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE.

There is no allegation in the Complaint that any confidential relationship existed between the parties to this action or between them and Hazel Child or that there was any breach of any confidential relationship. The mere fact that the relationship of husband and wife, and son and father, existed does not establish a confidential relationship.

It is apparent from all of the evidence in this matter that there had never existed a confidential relationship between other members of the family and the Respondent. As Mrs. Child testified, when Eugene went into the Service, he stated that he did not want that any of his money should be loaned to his father in his absence. Mrs. Child refused to deliver water stock standing in the name of Respondent to him, because, as she and her son Brant both testified, she did not want him to mortgage the water stock. She had obtained the water stock by working herself and saving her money to pay an obligation which her husband either could not or would not pay. As Eugene, when asked concerning lending money to his father, stated in answer to the following questions:

“A. Did you ever have any reason to think if you loaned your Dad money you would never get it back?

A. From the past dealings, it wasn't so much that he wouldn't pay it back. I wouldn't doubt for a minute that he wouldn't pay it back, if he had it, but he just put everything into the cows and never had it to pay back to anybody.

Q. But you knew if you asked a jury you could get it back, didn't you?

A. Not necessarily. I had just as soon not even borrow it. I bought the land.”

As the Court stated in *McMurray v. Sivertsen*, (California), 83 P. 2d 48:

“The mere existence of the relationship of parent and child did not alone give rise to a fiduciary relationship. *Smith v. Mason*, 122 Cal. 426, 55 P. 143 *Best v. Paul*, 101 Cal. App. 497, 281 P. 1089; *Broaddus v. James*, 13 Cal. App. 464, 472, 110 P. 158. The relationship of mother and son is merely one of several circumstances which, taken together, may or may not warrant a finding that a fiduciary relationship existed, *Lynch v. Lynch*, 207 Cal. 582, 279 P. 653. * * * Negating cross-complainant’s claim that she reposed trust and confidence in her son, the record shows that she mistrusted him. * * * It is apparent from what we have said that this Court finds support in the record for the findings of the lower court that there was no fiduciary relationship between the parties to the transaction under consideration * * *.”

POINT FIVE

CONCLUSIONS OF LAW THAT EUGENE A. CHILD WOULD BE UNJUSTLY ENRICHED AT THE EXPENSE OF THE RESPONDENT IF ALLOWED TO RETAIN THE PROPERTY AND THAT THE ACTS OF EUGENE CHILD AND HAZEL CHILD CONSTITUTE CONSTRUCTIVE FRAUD ARE NOT WITHIN THE ISSUES AND ARE CONTRARY TO THE EVIDENCE.

There is not a word in the pleadings concerning either of the above mentioned matters. The value of the property at the time Eugene Child paid \$300.00 therefore could not have been greatly in excess of \$300.00. There is no evidence that it was. The sale price of \$300.00 raises the presumption that that was the fair market value, which has not been rebutted. Immediately after

Eugene Child returned from the Service, he asked his father for the deed to the property and a discussion ensued. The father admits that he has known since Eugene returned from the Service in 1946 that Eugene had no intention of ever deeding the property to him and accepting the \$300.00 which he had spent for the property. The Respondent is the one who would be unjustly enriched if he were granted title to this property. As hereinafter mentioned, one ground for invoking the rule of laches is that one sits for a long period of time, such as ten years in this matter, without attempting to assert legally his claim to the property, and then when the property rises in value, seeks to assert his claim.

There is not one word of pleading in this case of fraud, either actual or constructive. When the Respondent attempted to introduce evidence which hinted at fraud, the Court, on motion, stopped counsel for respondent and made the observation that there had been no issue of fraud raised in this matter. (Tr. 55).

POINT SIX

RESPONDENT'S ACTION IS BARRED BY THE STATUTE OF LIMITATIONS AND LACHES.

In this matter, as next above stated, the Respondent admitted that he has known since 1946 that Eugene Child had no intention of ever deeding the property to him. Yet despite this fact, he did nothing to legally assert his claim to the property. In the meantime, the property has risen in value from \$300.00 to probably \$50,000.00.

This has always been a ground for the invoking of the rule of laches. As the Court said in *Duncan v. Colorado Investment and Realty Co.*, 178 P. 2d 428, the defense of laches is particularly applicable in cases of notable increase or probable increase in value where the former owner has evaded all risk and responsibility until time has brought to fruition the faith of his adversary. The Respondent has made reference to fraud in this matter. Any action based upon fraud is barred by the statute of limitations within three years from the time of the discovery of the fraud. There is no evidence in this matter that the Respondent discovered any particular fraud at any time, or for that matter, that there was ever any fraud. He knew in 1946 that Eugene Child claimed the property for himself and that he would not deed the same back to the Respondent. Particularly in this case, in which the Court has ordered monies paid to the Respondent for top soil removed from the property and has ordered that mortgages placed upon the property by Eugene Child be removed, the case of *Davidson v. Salt Lake City*, 81 P. 2d 374, is in point. In that case, the Court stated:

“Plaintiff in this case apparently concedes the statute of limitations applies, but contends that the section of the statute which is applicable is the seven-year statute relating to actions for recovery of real property. With this we cannot agree. Plaintiff here asks for affirmative relief other than removal of a cloud on his title. He is not in possession of the land. He asks that a deed which he executed to the defendant be can-

celled for fraud. The legislature in this State, as in nearly all other States, has seen fit to fix a shorter period of limitations upon actions for relief upon the ground of fraud or mistake than for recovery of possession of real property * * * but if his relief in each case depends, as here, upon the cancellation of a deed for fraud or mistake, he must bring his action within the period provided by law for an action based upon that ground. It would be extremely mischievous if a person claiming to be a victim of fraud or mistake were permitted to delay bringing his action until nearly seven years after discovery of the fraud or mistake upon which he relies."

CONCLUSION

The evidence is wholly insufficient to support the judgment. The great weight of the evidence establishes that Eugene Child refused to lend money to his father and authorized use of his money only for the purchase of the property. The Respondent knew that. His desire to buy the property was not strong enough that he would sell two cows to purchase it for himself. He took a chance that he could talk Eugene into deeding the property to him after Eugene returned from the Service. In this he was unsuccessful. For ten years thereafter he took no steps to assert his ownership. In 1955, when Respondent and his wife were divorced and a complete property settlement was made, neither Respondent or his wife gave any consideration to the property, the subject of this suit, as belonging to Respondent, although

its worth greatly exceeded all other assets of the Respondent and his wife.

To deprive the Appellants of the fruits of the investment Eugene made as a boy, while in the Service, would be a grave miscarriage of justice.

The judgment of the Trial Court should be reversed.

Respectfully submitted,

J. GRANT IVERSON

Attorney for Appellants