

1958

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

Utah Supreme Court

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In the Supreme Court of the State of Utah

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AUG 12 1958

HARRY CHILD, also known as
HENRY CHILD,

Respondent,

— vs —

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

Clerk, Supreme Court, Utah

Case No. 8869

RESPONDENT'S BRIEF

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In the Supreme Court of the State of Utah

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Respondent calls attention to the fact that markings have been made in many places throughout the transcript of the trial, and asks that no unusual weight be ascribed by the Court to the passages so marked. They are not respondent's markings.

Because appellants have set forth many conflicts in the evidence in their statement of facts, respondent considers it desirable to set forth the facts found to be true by the trial court.

Respondent commenced this action July 18, 1956, to compel reconveyance to him of certain real property near Bountiful, Utah, referred to in the findings as "property A," consisting of 19.26 acres. Trial was had in the District Court of the Honorable Charles G. Cowley, J., sitting without jury, on June 14, 1957. The trial court found the issues for the respondent on his second cause of action and entered judgment thereupon on March 4, 1958.

Appellant Eugene A. Child is a son of the respondent and Hazel Marie Child, who was the wife of respondent until divorced in December, 1955. Until the divorce, respondent owned and resided upon approximately nine acres of farm land near Bountiful, Utah, known in the Findings as "property B." Property "A" is near property "B," is higher in elevation, and is accurately described in the Findings.

Respondent became interested in buying property "A" for his use in storing water and grazing livestock, and in approximately 1941 he searched out the owner and after investigating the value of the tract negotiated for its purchase through R. O. Warnock of Salt Lake City (Tr. 6, 7, 8, 9). His offer of \$15.00 per acre was rejected by Mrs. Griffiths, the owner at the time.

Early in 1945 respondent learned of the death of Mrs. Griffiths and again contacted Mr. Warnock in an effort to purchase property "A" (Tr. 9), at which time Mr.

Warnock, acting for Ione Griffiths Rankin, the succeeding owner, offered to sell property "A" to respondent for \$300.00 because of his prior interest therein (Tr. 11). Respondent immediately, on this occasion, accepted the offer and made a down-payment of \$25.00 to Mr. Warnock, the balance of the purchase price in the amount of \$275.00 to be paid to Mr. Warnock upon delivery of the deed from Ione Rankin in California conveying title to respondent (Tr. 11).

Immediately thereafter respondent applied to the Bountiful State Bank for a loan of \$275.00 to pay the balance due on the property. The bank approved the loan on condition that respondent deposit his water stock as security therefor (Tr. 12).

Respondent's water stock was at the time in the bank safety deposit box of his wife, Hazel Child, who, with full knowledge of respondent's intended use of the water stock and the proceeds of the anticipated loan from the bank, refused to surrender the water stock to respondent upon his request therefor (Tr. 12, 13) in order to force him to sell cows to get the money (Tr. 70). The evidence indicates that Hazel Child objected to respondent's efforts to build up a dairy herd (Tr. 24, 47-48, 69, 70, 75, 77, 79). There was also evidence that she tried a number of times to sell respondent's cows (Tr. 74). Hazel's response to respondent's request for the water stock was, "Sell some of your cows" (Tr. 13, 24, 40).

Hazel testified that the sale of two cows would have brought enough to pay the balance of \$275.00 due on property "A" (Tr. 40), but she also admitted that at about that same time (while Eugene was away in the

service) she had sold one of respondent's cows for \$25.00 (Tr. 59, 80). Respondent testified that he had only 5 or 6 cows and none that he wanted to sell (Tr. 13, 24), and that two cows would not have brought enough money (Tr. 24).

Being thus obstructed by Hazel Child from obtaining a loan from the bank, respondent requested of Hazel a loan of \$275.00 from a joint bank savings account held in the names Hazel Child and Eugene Child (Tr. 13). Hazel wrote to Eugene, who was then eighteen years of age (Tr. 20, 89) and stationed away from Utah in the Navy, for his permission to grant respondent the loan. In time, Hazel received a reply from Eugene and informed respondent that Eugene would grant the loan on condition that title to property "A" be placed in his name to secure the loan (Tr. 23, 24).

Respondent did not receive, see, or read Eugene's reply to Hazel (Tr. 14, 23), but relied solely upon the representations of Hazel as to its contents.

On or about April 16, 1945, Hazel withdrew money from the joint bank savings account of Hazel and Eugene Child in Bountiful and drove with respondent to Salt Lake City, where she delivered \$275.00 (Tr. 14) to respondent only after he got out of the car and after first exacting an express promise from him that he would put title to property "A" in the name of Eugene Child to secure Eugene the repayment of the loan (Tr. 15).

This \$275.00 was intended and received by respondent (Tr. 25, 108), and delivered by Hazel for Eugene, as a loan (Finding No. 15). This \$275.00 was the only money

paid to respondent by Hazel or Eugene in connection with this loan (Tr. 107), and respondent did not receive from Hazel or Eugene any reimbursement of his \$25.00 down payment (Tr. 55).

After receiving the \$275.00 from Hazel, respondent went alone to the office of Mr. Warnock in the Kearns Building in Salt Lake City and gave him the \$275.00 in return for a deed conveying title to property "A" from Ione Griffiths Rankin to respondent (Tr. 16). This deed is in evidence, and is dated April 10, 1945, reciting \$300.00 as consideration.

Property "A" was purchased by respondent for his sole benefit (Tr. 108, Finding No. 19).

During this time, Eugene had no knowledge of the availability of property "A" nor of its location or value (Tr. 97). Eugene did not purchase nor negotiate for the purchase of this property (Tr. 81).

After he purchased the property, respondent went with Hazel Child to the office of Toronto Real Estate Co. in Salt Lake City on April 16, 1945, and there executed a deed placing title to property "A" in Eugene's name in fulfillment of his promise (Tr. 17). Respondent executed this deed for the sole purpose of securing Eugene's loan to him and for no other consideration, and no money was paid to respondent for this deed (Tr. 18, Finding No. 21). Respondent conveyed title to Eugene as security for the loan, and intended that Eugene hold title for respondent in trust, to be reconveyed upon payment of the loan (Finding No. 22).

Respondent retained both deeds, and recorded them

in the office of the Davis County Recorder on June 6, 1945.

Ever since he purchased property "A," and through the date this action was filed, respondent has enjoyed uninterrupted possession and use of property "A" (Tr. 21, 100, 101).

From the time he purchased it and ever since, respondent has at all times unequivocally claimed ownership of property "A" (Tr. 22, 31, 42, 82, 99), has at no time agreed or intended that Eugene have the beneficial ownership thereto (Tr. 31, 108), and has at all times denied appellants' claim of ownership (Tr. 31, 42, 82).

After he bought property "A," respondent procured and paid for a land survey thereof (Tr. 18) and an abstract of title thereon (Tr. 20, 21, 96). At his sole expense (Tr. 20, 93, 94) in an amount exceeding \$200.00 (Tr. 116) and virtually his sole effort (Tr. 20, 93), respondent constructed for his sole benefit a substantial fence enclosing property "A" (Tr. 18, 19). From the date of his purchase until the filing of this action respondent continuously and uninterruptedly pastured livestock on the property (Tr. 21).

Respondent paid taxes on the property for 1945 and 1946 (Tr. 20, 26), and Eugene paid the taxes thereon from 1947 to 1956 in the total amount of \$172.41.

Appellants have at no time objected to the respondent's use, occupation, and enjoyment of property "A" though this use, occupation, and enjoyment have been open and known to appellants (Tr. 84).

After the return of Eugene from the service in 1946, respondent requested reconveyance to him of title to the property (Tr. 21, 82, 99) upon repayment of the loan (Tr. 25, 113), but Eugene refused to reconvey or to discuss the matter (Tr. 22, 25, 27, 30, 35), and has persisted in his refusal to discuss the matter with respondent (Tr. 22). Respondent has tendered repayment of the loan with interest and demanded reconveyance from Eugene, but the tender was refused and Eugene refused to reconvey the property.

Without respondent's permission and over his express objections, Eugene removed soil from both property "A" and property "B" (Tr. 33, 101, 113). His profit from the soil from property "A" was \$600.00. Prior to the filing of this action and without the knowledge or consent of respondent, appellants encumbered property "A" with two mortgages.

In order to avoid conflict and division within his family and to encourage unity therein, respondent in the hope and with the expectation of persuading appellants to reconvey property "A" to him delayed bringing an action at law to compel reconveyance (Tr. 35).

Respondent initiated this action to protect his rights and compel reconveyance following the divorce action by Hazel Child and in order to prevent the sale or disposal of property "A" and because of the interference by Eugene Child with respondent's possession and enjoyment of said property by destruction of respondent's fence. Shortly before this suit, the property became subject to condemnation proceedings (Tr. 96).

STATEMENT OF POINTS

POINT I

- A. FINDING NUMBER 12 IS FULLY SUPPORTED BY THE EVIDENCE.
- B. THE LOWER COURT MADE NO SUCH FINDINGS OR CONCLUSIONS AS THOSE STATED IN POINTS ONE AND TWO OF APPELLANTS' BRIEF.

POINT II

THE EVIDENCE IS FULLY SUFFICIENT TO SUPPORT THE FINDINGS AND JUDGMENT OF THE COURT BELOW.

POINT III

FINDINGS AND CONCLUSIONS THAT THE AMOUNT OF THE LOAN WAS \$275.00 FIND AMPLE SUPPORT IN THE EVIDENCE.

POINT IV

CONCLUSIONS OF LAW THAT THERE WAS A BREACH OF A CONFIDENTIAL RELATIONSHIP BETWEEN RESPONDENT AND HAZEL AND EUGENE CHILD ARE WITHIN THE ISSUES AND ARE ADEQUATELY SUPPORTED BY THE EVIDENCE.

POINT V

CONCLUSIONS OF LAW NO. 6 AND NO. 7 ARE WITHIN THE ISSUES OF THE CASE AND ARE SUPPORTED BY THE EVIDENCE.

POINT VI

RESPONDENT'S RECOVERY IS NOT BARRED BY THE STATUTE OF LIMITATIONS NOR BY LACHES.

ARGUMENT

POINT I

- A. FINDING NUMBER 12 IS FULLY SUPPORTED BY THE EVIDENCE.
- B. THE LOWER COURT MADE NO SUCH FINDINGS OR CONCLUSIONS AS THOSE STATED IN POINTS ONE AND TWO OF APPELLANTS' BRIEF.

A.

Finding No. 12 that respondent was informed by Hazel Child that Eugene Child agreed to grant plaintiff a loan on condition that title to the property in question be placed in the name of Eugene Child to secure the loan finds ample support in the evidence during the cross-examination of respondent by appellants' attorney, Tr. 23:

"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."

Also, Tr. 24 (bottom of page) :

"... She told me she would let me have that money if I would put it in Eugene's name to secure the loan so Eugene would be sure to get his money back."

This testimony is plainly a sufficient basis for Finding No. 12.

B.

In their points one and two, and the argument in support thereof, appellants complain of a finding that Eugene Child agreed to grant a loan, findings that the deed was an equitable mortgage, and a conclusion of law entered upon these findings. The respondent respectfully points out that the record does not contain the findings and conclusion mentioned by appellants in their points one and two.

Appellants do not refer by number to the findings and conclusion to which they object, except for a reference on page 33 of their brief to Finding No. 12. The record, p. 27, reveals that Finding No. 12 states that, "... Hazel Marie Child ... *informed* the plaintiff that ... Eugene A. Child expressed a willingness to grant plaintiff the loan upon the condition that the title to the property ... be placed in the name of Eugene A. Child to secure

the loan.” (Emphasis added.) This is, of course, a different finding from that mentioned by appellants in their point one.

It would appear that appellants, in points one and two, have set themselves up “straw men” and then proceeded to demolish them in their argument.

The burden of a considerable part of the argument of appellants under their points 1 and 2 is that the trial court found and concluded that the deed to property “A” executed by plaintiff to defendant Eugene A. Child is an equitable mortgage; that a deed can be given construction as an equitable mortgage only on the basis of a finding of fact that *both* parties to the deed so intended it; and that there was insufficient or no competent evidence adduced at the trial showing that defendant Eugene Child intended the deed to be a mortgage. The plaintiff takes issue with these arguments; but we here point out that this entire line of argument is fruitless and pointless in connection with the present appellate proceedings, inasmuch as there is no finding anywhere in the record, nor any conclusion of law, that the deed conveying title to property “A” constitutes an equitable mortgage. The Court will notice that plaintiff’s theory of equitable mortgage was pleaded under the first cause of action of his complaint, but that the trial court, by minute entry (R. 12), expressly found the issues in favor of the plaintiff under his second cause of action and issued judgment thereupon.

We therefore suggest that appellants’ argument under their points 1 and 2 pertaining to equitable mortgages is

irrelevant and immaterial to the case before the Court, and should be disregarded.

POINT II

THE EVIDENCE IS FULLY SUFFICIENT TO SUPPORT THE FINDINGS AND JUDGMENT OF THE COURT BELOW.

In their brief, appellants have much to say about the sufficiency of the evidence, and the respondent considers it desirable at this point to consider in a general way the evidence adduced at the trial, together with authorities, in answer to appellants.

Appellants quote in their brief from *Northcrest, Inc., v. Walker Bank & Trust Co., et al.* (1952), 122 U. 268, 248 P.2d 692, 698, and we feel the quotation would be more helpful to the Court if more fully given:

“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. *The evidence so satisfied the mind of the trial court. His finding should not be disturbed unless we must say that no one could reasonably find the evidence to be clear and convincing. . . .*”

(Emphasis added.)

A leading Utah case relative to the sufficiency of the evidence in cases such as the present one is *Stanley v. Stanley* (1939), 97 U. 520, 94 P.2d 465, 466, which states that,

“The scope of the review on appeal in equity cases is clearly settled in this jurisdiction. ‘This court is authorized by the state Constitution to review the findings of the trial courts in equity cases, but the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence.’ *Olivero v. Eleganti*, 61 Utah 475, 214 P. 313, 315.”

The *Stanley* case has been cited and followed in many cases, including *Perry v. McConkie* (1953), 1 U.2d 189, 264 P.2d 852, and *Haws v. Jensen* (1949), 116 U. 212, 209 P.2d 229, both of which are of interest relative to the present case.

This Court recently said in a similar case, *Toombs v. Toombs* (1958), 7 U.2d 256, 322 P.2d 405, that,

“The trial court having found in favor of respondents and their being sufficient evidence to sustain such a finding and the evidence and circumstances not being such as to require a different finding, this court will not reverse.”

In their comments regarding the evidence, the appellants fail to recognize that the trial judge resolved conflicting issues of fact in favor of the respondent and against appellants.

In IX Wigmore on Evidence, 3rd ed., sec. 2498, p. 327, this eminent authority quotes the following:

“‘There is no measure of the weight of evidence (unless the witnesses on the evidential facts are counted) other than the *feeling of probability* which it engenders.’” (Emphasis the author’s.)

And on pp. 334, 335 of the same volume and section we find,

“The application of the phrase ‘preponderance of evidence’ is apt to lead the judicial discussion close to the danger line of the fallacious quantitative or numerical theory of testimony. . . . Although that theory has been generally repudiated in our law, yet there is often a lurking recurrence to it in the statement that an uncontradicted witness must be believed, i.e. his testimony constitutes ‘per se’ a preponderance. The unsoundness of this conception has already been noticed. . . .”

In vol. VII of the same work, sec. 2033, p. 255, the author states,

“. . . The probative value of a witness’ assertion is utterly incapable of being measure (sic) by arithmetic. All the considerations which operate to discredit testimony affect it in such varying ways for different witnesses that the net trustworthiness of each one’s testimony is not to be estimated, either in itself or in reference to others’ testimony, by any uniform numerical standard. Probative effects are too elusive and intangible for that. The personal element behind the assertion is the vital one, and is too multifarious to be measured by rule. ‘Testimony,’ as Boyle well said, ‘is like the shot of a long-bow, which owes its efficacy to the force of the shooter; argument (i.e. circumstantial inference) is like the shot of a cross-bow, equally forcible whether discharged by a giant or a dwarf.’ The cross-bow notion of testimony—the notion that one man’s shot is as forceful as any other man’s—can find no defenders to-day.”

And in vol. VII, sec. 2034, pp. 259 ff., Professor Wigmore writes,

“The common law, then, in repudiating the numerical system, lays down four general principles:

(1) Credibility does not depend on numbers of witnesses. Therefore:

(2) In general, the testimony of a single witness, no matter what the issue or who the person, may legally suffice as evidence upon which the jury may found a verdict.

(3) Conversely, the mere assertion of any witness does not of itself need to be believed, even though he is unimpeached in any manner; because to require such belief would be to give a quantitative and impersonal measure to testimony. . . .”

These authorities find particular application to the present case, wherein the trial judge was especially justified in discounting the testimony of Hazel Child, the embittered former wife of respondent.

In its consideration of this case, we invite the particular attention of the Court to the following facts:

1. Respondent, not Eugene Child, initiated efforts to purchase the property in about 1941 and personally conducted negotiations and made his offer.

2. Respondent alone, and not Eugene, conducted all negotiations for the property, both in 1941 and 1945.

3. Hazel Child's testimony that the transaction was consummated through Mr. Toronto in his office and that she paid the \$275.00 to Mr. Toronto on this occasion was completely impeached by the independent testimony of Mr. Warnock.

4. Respondent took title to the property in his own name, and the deed conveying title to Eugene was only constructively delivered when respondent recorded it on June 6, 1945.

5. Respondent immediately accepted the offer of the property by Mr. Warnock, for respondent himself, paying \$25.00 down at the time and the balance on receipt of the deed.

6. Respondent received the \$275.00 from the hands of Hazel Child only after he got out of the car to go to Warnock's office, and then only after she had again exacted his express promise to deed the property to Eugene to secure the loan.

7. The loan was made before respondent executed the deed to Eugene Child, and no consideration passed at the time respondent executed the deed as security nor thereafter.

8. It is more than a little absurd to think that the respondent should try for a period of several years to purchase the property in question and, as soon as he was successful, immediately turn around and sell it for \$25.00 less than he paid for it; or to think that he so diligently tried to purchase the property for another.

9. It is not controverted that through all the years since he acquired the property, the attitude of the respondent toward it has remained constant and unswerving. He wanted the property and he

finally bought it. He has unfailingly and frequently claimed the property as his own, only to be rebuffed or met with silence on the part of his son. At the time of the transaction, Eugene Child's agent, Hazel Child, knew full well that the respondent considered the property his and gave the deed only to secure the loan.

10. Eugene Child admitted in court that he had never investigated the value of real property anywhere at the time of the transaction, and had never purchased any real property. He was 18 years old, away from home at the time, and did not even know the location of the property. Respondent hardly need mention the strong improbability that appellant intended to "invest" therein, or to purchase it sight-unseen.

11. Respondent at the time did not have sufficient money to purchase the property, a goal of long-standing interest. He acceded to the duress imposed upon him by his wife to execute a deed required as security for a loan which would allow him to reach his goal, and he did so in good faith and confidence in the members of his family. The duress on respondent was real, and was admitted by Hazel when she testified that she deliberately refused to surrender to respondent his water stock.

12. The evidence shows plainly that a sale of the property would have deprived respondent of his goal and was the last thing in his mind. The situation shows a loan, with an absolute deed exacted under the duress of his financial situation by persons he trusted. Let the Court judge the good faith of Hazel Child in this connection.

13. As to appellant Eugene Child, the entire matter commenced in respondent's application for

a loan, and nothing else. Respondent made no offer at any time to sell the property, and appellants do not even claim he did. Respondent categorically insists that only a loan was consummated; anything else would have defeated respondent's entire purpose.

14. Respondent has been in beneficial, open, and notorious possession of the property ever since he purchased it. He paid no rent of any kind. Appellants did not object to respondent's use of the land. Respondent, with his own labor and at his sole expense, made the only improvement upon the land. The only treatment of the property by appellant was to commit waste thereupon and also upon property "B" over the express objections of respondent.

15. Respondent undeniably did not intend to convey the beneficial interest in the property to his son.

16. Appellant Eugene Child did not negotiate for the land, did not know the owner's identity, and was never considered by the sellers as the purchaser of the land.

17. It is highly significant that appellant Eugene Child's only contact with the entire matter was his response to respondent's application for a loan.

Contrary to contentions of appellants, it was made abundantly clear at the trial that respondent was never called upon at the time of the divorce action initiated by Hazel Child to list his property. Respondent asks appellants to explain to this Court why respondent should volunteer additional property at the time of the divorce in

order to share it with Hazel Child, through whose mala fides respondent had parted with record title to said property.

Hazel Child testified that Eugene told her before going into the Navy not to loan respondent any money for anything (Tr. 38). But independent testimony introduced after the trial by stipulation (R. 21) shows that at the time Eugene is purported to have left this instruction relative to his bank account, he had a balance in said account of \$8.45. Eugene left for the service in June, 1944. It is doubtful that Eugene was this fearful about his \$8.45 bank balance. This indicates again the general unreliability of Hazel Child's testimony in connection with matters involving her former husband.

Appellants mention the testimony of Brandt Child relative to a letter. Brandt admitted during the trial that he had not read the letter he mentioned and had no knowledge of its contents. He only guessed or "assumed" that the date was April 16, 1945, and he admitted that he was 17 years of age at the time. There is nothing in his testimony connecting any letter he allegedly saw in the hand of the respondent with a letter from Eugene to Hazel Child concerning the property in question. Brandt's recollection that Hazel Child suggested that respondent sell his cows and buy the property with the proceeds does not have the significance suggested by the appellants. Rather, it only indicates again how obstinate was the fixation of his mother relative to those cows. Brandt admitted in his testimony (Tr. 72) that cows was a "... very, or spoken, or mentioned thing," that his father and mother had frequent arguments about the cows, and that his

mother had tried on several occasions to sell the cows. In fact, the letter arrived authorizing the loan; but it was still up to Hazel to go to the bank and withdraw the money, and Hazel just seemingly could not rid her mind of respondent's cows. She satisfied her insistence upon dominance over her husband by requiring him to promise a deed absolute as security for the loan, or suggesting to Eugene that he require said deed as security.

Appellants misrepresent the evidence beginning at the bottom of page 31 of their brief, referring to the cross-examination of respondent. The respondent very clearly and plainly testified that he was unable to relate the mention of selling cows by Hazel Child to the day on which he paid the balance on the property (Tr. 23, 24). Further, respondent testified that two cows would not have brought enough money to purchase the property at that time. After all, a major reason respondent wanted the property was for pasture in his effort to build up a dairy herd, and the appellants find it difficult to understand why respondent did not want to sell the very cows with which he was trying to build a dairy herd and for which he was buying the property.

POINT III

FINDINGS AND CONCLUSIONS THAT THE AMOUNT OF THE LOAN WAS \$275.00 FIND AMPLE SUPPORT IN THE EVIDENCE.

A.

Appellants object, in their point 3, to the findings and conclusions that the amount of the loan to respondent

was \$275.00 rather than \$300.00. Appellants suggest that respondent adheres to the figure \$275.00 because of remarks during the course of the trial by the trial judge. Unfortunately for this argument of appellants, it clearly appears from the transcript that respondent testified that he paid \$25.00 down at the time he accepted Mr. Warnock's offer of the property, that the purchase price of the property was \$300.00, and that the balance due was \$275.00 (Tr. 11). The remarks of the trial judge mentioned by appellants occurred during the cross-examination of Hazel Child (Tr. 55) an hour or more later, and after a recess (Tr. 32).

Appellants admit in their brief, p. 35, that if respondent received \$275.00 of Eugene's money, this is some evidence that Eugene was lending him enough to enable him to pay the balance of the purchase price.

Respondent testified that the balance he owed on the purchase price was \$275.00 (Tr. 11); that he went to Bountiful State Bank to borrow the \$275.00 (Tr. 12); that he asked his wife for his water stock so he could borrow \$275.00 (Tr. 12); that he asked his wife for \$275.00 from the joint bank account (Tr. 13); that he eventually got the \$275.00 from his wife (Tr. 14); and that he gave this \$275.00 to Mr. Warnock for the deed to the property (Tr. 16). Respondent further, answering the trial judge, testified that he did not receive back his down payment of \$25.00 (Tr. 55). Respondent submits that this is ample evidence to support the findings and conclusions that the amount of the loan was \$275.00.

It is interesting to note that Hazel Child's testimony

that she paid this money to Mr. Toronto in Mr. Toronto's office, complete with an account of what was said at the time (Tr. 41, 42), was entirely and completely impeached by the independent testimony of Mr. Warnock. Appellants remark that Hazel Child's testimony in this particular was "hazy." A careful perusal of Hazel Child's testimony shows that it was "hazy" much of the time except when she thought something would be detrimental to respondent, at which times she made sure that her recollections were not "hazy"—even though imaginative.

B.

Appellants captiously object to the findings and conclusions that the amount of the loan was \$275.00, rather than \$300.00 as mentioned in the complaint. Counsel for appellants sufficiently brought out the reason for this himself upon his examination of respondent during the trial (Tr. 105), when the respondent freely admitted that at the time depositions were taken in October, 1956, approximately eight months prior to the trial, he did not remember whether he received \$300.00 or \$275.00 from Hazel Child. It is obvious that respondent was reminded of the \$25.00 down payment he made when asked specifically (Tr. 11) whether or not anything was done to bind the deal when he accepted Mr. Warnock's offer to sell the property to respondent. It is clear, also, that this accords with the view of the trial judge.

Appellants significantly make no claim nor attempt any showing that this variance between the complaint and the evidence has surprised or misled them in any way. As to this variance, in addition to the above, respondent

relies upon the familiar rule that an immaterial variance, with no showing of prejudice to the appellants' case, is not reversible error. This rule is so ancient and well-known that it needs no citation of authority.

Further, respondent relies upon the equally familiar rule that an appellate court will not reverse where an appellant raises a question for the first time on appeal that should have been presented to the trial court, particularly in the absence of any showing of prejudice to the appellant's case. Appellants should have objected below to the introduction of evidence showing the amount of the loan as \$275.00 rather than \$300.00, in order that respondent could move to amend the complaint to conform to the evidence. In fact, counsel for appellants elicited some of the evidence himself to which he now objects ('Tr. 108'). In addition, it is submitted that appellants should have submitted this matter to the trial court under *Rule 52 (b)*, U.R.C.P. Appellants failed to take these steps below, and their present objections come too late.

POINT IV

CONCLUSIONS OF LAW THAT THERE WAS A BREACH OF A CONFIDENTIAL RELATIONSHIP BETWEEN RESPONDENT AND HAZEL AND EUGENE CHILD ARE WITHIN THE ISSUES AND ARE ADEQUATELY SUPPORTED BY THE EVIDENCE.

Appellants first complain that there is no allegation in the complaint of a confidential relationship. Appellants, however, fail to allege or make any showing at all that they were surprised, misled, or prejudiced in any way

because confidential relationship of the parties was not specifically pleaded. On the contrary, all the evidence shows that appellants were fully apprised concerning the case and its ramifications at the trial. This complaint is therefore without merit.

The burden of appellants' argument that the facts do not show the existence of a confidential relation is to the effect that neither Hazel nor Eugene had confidence in respondent. Respondent wishes to point out that this argument is immaterial, for it was the confidence respondent had in Hazel and Eugene Child that was breached. It is sufficient that the confidence goes from the one who trusts to the ones who breach; it is not required that those who breach have confidence also in the one who trusts.

Respondent states in his testimony that he had confidence in Hazel (Tr. 15), for he said that he did not think she would deliver to him any different sum from that he requested. He accepted and relied fully upon her representations that Eugene would grant the loan on condition that Eugene have record title as security. On her representations, respondent was induced to part with record title; and this alone is sufficient to show respondent's trust and confidence in his wife and son. That Hazel in turn had confidence in him is shown by the fact that she delivered over the money upon his oral promise to deed to Eugene as security.

That respondent had confidence in Eugene is shown by evidence that he loaned Eugene and Brandt \$1200.00 without security and after the transaction here in question (Tr. 28, 31, 103, 104), as well as by the fact that he

willingly conveyed title to Eugene for security as he promised to do. As noted above, Hazel's testimony that Eugene told her before leaving for the Navy not to loan any of his money to his father (Tr. 38) is shown to be most highly improbable by the stipulated evidence (R. 21) showing that at the time Eugene had only about \$8.45 in the joint account with his mother. Also, Eugene himself testified that he and his father were on good terms in 1945 (Tr. 98), and that he and his father trust one another (Tr. 104).

This Court, in *Perry v. McConkie* (1953), 1 U.2d 189, 264 P.2d 852, 854, states that where a fiduciary relationship exists, because of the kinship of the parties, the fiduciary has the burden of proving that his dealings with the beneficiary are fair and in good faith. In that case, there appears to be far less evidence of confidence placed by the sister in her brothers than there is evidence of misplaced confidence in the present case. This Court also found confidential family relationships in *Anderson v. Cercone* (1919), 54 U. 345, 180 P. 586; *Haws v. Jensen* (1949), 116 U. 212, 209 P.2d 229; and *Hawkins v. Perry* (1953), 123 U. 16, 253 P.2d 372.

POINT V

CONCLUSIONS OF LAW NO. 6 AND NO. 7 ARE WITHIN THE ISSUES OF THE CASE AND ARE SUPPORTED BY THE EVIDENCE.

Appellants complain that Conclusions of Law No. 6 and No. 7 are not within the issues of the case and are contrary to the evidence. Their argument states that the

subject-matter of these conclusions (unjust enrichment and constructive fraud) is not expressly mentioned in the complaint, and their sole comment about the evidence relative to these matters is confined to unjust enrichment.

The allegations of the complaint are in essence that respondent borrowed money from Eugene Child through his mother, Hazel Child, to purchase certain property; that he purchased this property and thereafter placed title thereto in the name of Eugene as security; that respondent received the money only as a loan; that respondent did not intend to part with beneficial ownership of the land; that all parties to the transaction intended the deed to be a mortgage; in the alternative that Eugene Child, knowing the mind and intentions of respondent, did not intend to hold the property for the benefit of respondent and return title to him; and that appellants wrongfully refused to reconvey to respondent upon demand and offer of repayment. These allegations adequately present the factual situation which was the basis of the action and sufficiently raise as issues the relationship of the various persons named and their actions with respect to the transaction, as well as the question whether or not Eugene lawfully held the property in question. The actions of the parties being in issue, their constructively fraudulent actions must necessarily be also. The issue whether or not Eugene lawfully held the property certainly included reasons at law why he did not lawfully so hold, including unjust enrichment.

There is no complaint or showing by appellants that they were misled in any way by the complaint. On the contrary, a reading of the transcript shows that both

sides were fully apprised of the situation giving rise to the action; and it affirmatively appears in the transcript that appellants took the deposition of respondent prior to the trial, at which time they of course had full opportunity to explore and develop respondent's facts. The record is devoid of a motion for a more definite statement; therefore it is plain that appellants did not need one, being fully apprised.

Rebutting appellants' comments on the evidence relative to unjust enrichment, the *Restatement of Restitution*, Sec. 160, comment d, points out that restitution is made in such cases to ". . . restore to the plaintiff property of which he has been unjustly deprived and to take from the defendant property the retention of which by him would result in a corresponding unjust enrichment of the defendant; in other words the effect is to prevent a loss to the plaintiff and a corresponding gain to the defendant, and to put each of them in the position in which he was before the defendant acquired the property." Appellant's do not deny that it was respondent who wanted to buy the property, sought out the owner, investigated its value, negotiated for its purchase over a period of four years, and finally purchased it; who built with his own labor and paid for a substantial fence around the property; who has continuously and without objection used and occupied the property ever since he bought it; and who has continuously and without exception claimed the property as his own ever since.

Respondent testified, and the trial court found, that he delayed his application to the courts for redress in an unsuccessful attempt to preserve his family unity and

harmony. But he immediately applied to the courts when his family was disrupted by divorce at the instance of his wife, Hazel, and when he learned of acts by Eugene Child derogatory to respondent's beneficial ownership of the property (Tr. 116, 117). He patiently tried for all the intervening years to talk to Eugene, hoping to persuade him to reconvey the property amicably, but Eugene refused to talk with him about it. Throughout, respondent's interest has been to develop a dairy herd for the benefit of the family.

In contrast, what of Eugene? Eugene Child had no interest in nor knowledge of the property or its value. He did not search out the owner and try to buy it. He did not negotiate for its purchase. His sole contact therewith was his response to his father's application to him for a loan. He knew no reason at the trial why his father should give him any preference to the property over the other children in the family. He did not develop the property, nor use it except to commit waste by removal of soil. He simply returned home from the service and found himself, because of the wrong either of Hazel alone or of Hazel and Eugene jointly, the record owner of a large tract of land. It is safe to conclude that Eugene's determination not to reconvey was in direct proportion to the rising value of the property. The lower court properly concluded that Eugene would be unjustly enriched were he allowed to retain the property.

POINT VI

RESPONDENT'S RECOVERY IS NOT BARRED
BY THE STATUTE OF LIMITATIONS NOR BY
LACHES.

Appellants invoke the doctrine of laches, and in answer thereto respondent invites the attention of the court to the fact that respondent has been in possession of the property in question, enjoying the full beneficial use thereof, ever since he purchased it. It was established at the trial that record title to realty in the Child family frequently reposed in another than the true owner. Specifically, title to property "B" was in respondent's sister Martha for many years as security for a loan, and then (through Hazel's alteration of a deed) went to Hazel, respondent's wife, even though respondent purchased and actually owned said property. As long as respondent had the possession and beneficial use of property "A," and while he still had hopes of maintaining family unity and harmony, he cannot be said to have been under an equitable obligation to throw the fat into the fire by instigating litigation against his son. It most surely cannot be said to be the policy of the law in such a situation to avoid patient attempts at peaceful persuasion and to stir up intra-family strife by requiring a precipitate lawsuit. Surely equity will look with sympathy upon respondent's earnest and patient efforts to accomplish justice within his family in peace and harmony and without recourse except as a last alternative to the shame and disruption of a public trial at law. The transcript and findings show that respondent delayed pursuing his remedy at law because: he was in peaceful and beneficial possession of the property; he had hopes that eventually Eugene would discuss the question with him and be persuaded to reconvey to the true owner; respondent and Eugene were in the confidential relationship of father and son, with respondent loaning Eugene and his brother money (Tr. 28) without

security and conveying land from property "B" to Eugene for his residence without charge (Tr. 29, 30, 43); and he did not want to destroy his family by the open conflict of a lawsuit (Tr. 34, 35). This is sufficient justification for the delay in bringing this suit.

Unreasonable delay alone, moreover, is not sufficient reason for finding laches. *Restatement of Restitution*, Sec. 148 and comments. There must also be such a material and innocent change of position by the other party that restitution would work injustice or an inequitable hardship upon him. In the present case, appellants knew ever since Eugene returned from the service in 1946 that respondent claimed ownership of the property; thus any change of position by appellants was not innocent. Further, appellants have made no showing of any kind of any detrimental reliance upon respondent's delay. Appellants show no damage, no hardship, no assumption of risk or responsibility with respect to the property. They fail to show in any regard wherein the present judgment against them is a greater disadvantage or hardship than the same judgment would have been five or ten years ago. Absent such a showing, a court cannot properly apply the doctrine of laches.

Appellants' comments relative to risk, responsibility, and fruition of faith, against the background of the present situation, go beyond the point of argument and assume proportions of the ludicrous. Appellants cannot point to a single element of risk, responsibility, or faith on the part of Eugene relative to this property, save, perhaps, for the payment of less than \$20.00 per year in taxes. (That payment of taxes are not controlling, see

Christensen v. Williams (1908), 34 U. 127, 97 P. 219.) The only faith and responsibility exercised as to this property have been respondent's—and undeniably his has been all the risk, with record title in another. Relative to appellants' argument as to change in value of the property, it is interesting to note that the tax records in evidence show that the valuation for tax purposes, and presumably market value, did not rise until 1955 or 1956.

As to laches, as said by the court in *Berniker v. Berniker* (1947), 30 Cal.2d 439, 182 P.2d 557, 563,

“Nor is the defense of laches available here, for it is plain that no legal prejudice was caused to appellant by reason of the delay in making a demand nor by reason of the nonenforcement of the trust. . . . Moreover, the facts and circumstances of this case suggest other grounds for the rejection of the doctrine of laches: It is not applied strictly between near relatives . . . it is of little significance in the case of a resulting trust . . . and ‘(it) is not designed to punish a plaintiff’ but is ‘invoked where a refusal would be to permit an unwarranted injustice.’ . . . ‘it is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong.’ ”

As to appellants' contentions relative to the statute of limitations, it does not appear that the *Davidson* case, cited by appellants on p. 41 of their brief, is in point, for the respondent here is in possession of the property. Respondent points to the evidence and findings that respondent enjoyed full possession and use of the property from the time he purchased it until the time of the suit. In the *Berniker* case, cited above, the court said on this point, p. 563, Pacific:

“ . . . The statute of limitations never runs in favor of a trustee as against the beneficiary while the latter is in possession of the property. (citing cases) ”

Also in this regard see *Anderson v. Cercone* (1919), 54 U. 345, 180 P. 586, where this Court expressly states that joint possession by the beneficiary of such a trust tolls the statute of limitations by the express terms thereof.

CONCLUSION

The evidence is wholly sufficient to sustain the judgment of the trial court. The evidence alone that the property in question was purchased in the first instance by respondent is sufficient to sustain the judgment under *Christensen v. Williams* (1908), 34 U. 127, 97 P. 219, cited above.

To deprive respondent in his old age of the benefits of his initiative and judgment in purchasing the property after prolonged interest therein would be a most grave miscarriage of justice.

The judgment of the trial court should be affirmed.

Respectfully submitted,

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