

1959

Harry Child aka Henry Child v. Eugene A. Child and Arvilla Child : Petition for a Rehearing and Brief in Support Thereof

Utah Supreme Court

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J. Grant iverson; Attorney for Appellants;

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FILED

JAN 1 0 1959

Clerk, Supreme Court, Utah

**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

**PETITION FOR A REHEARING AND BRIEF IN
SUPPORT THEREOF**

J. GRANT IVERSON
Attorney for Appellants

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PETITION FOR A REHEARING AND BRIEF IN SUPPORT THEREOF

COME now the defendants and appellants in the above entitled action and jointly and severally respectfully petition the Court to grant a rehearing in the above entitled cause for the reason and upon the ground that in its Opinion heretofore written the Court erred in the following particulars:

POINT I

THE COURT ERRED IN ITS STATEMENT OF THE EVIDENCE IN SEVERAL MATERIAL PARTICULARS.

POINT II

THE COURT ERRED IN THE BASIS OF ITS APPRAISAL OF THE EVIDENCE IN THIS CASE.

POINT III

THE COURT ERRED IN SUSTAINING THE JUDGMENT OF THE TRIAL COURT BY FINDING THAT THE EVIDENCE IN FAVOR OF THE RESPONDENT'S CASE IS CLEAR AND CONVINCING AND IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT.

I, the undersigned attorney for the appellants and defendants herein, certify that in my opinion there is merit to the foregoing claim and that the Court committed errors in the particulars above specified.

J. GRANT IVERSON
Attorney for Defendants
and Appellants

ARGUMENT

POINT I

THE COURT ERRED IN ITS STATEMENT OF THE EVIDENCE IN SEVERAL MATERIAL PARTICULARS.

The evidence in support of the Trial Court's findings and judgment, as the evidence is stated to be in this Court's Decision, is not clear and convincing. This is more apparent if several errors in the statements of the evidence are corrected.

In reviewing the crucial evidence, this Court stated:

"Eugene's letter in reply is of critical importance *** Harry Child said that Hazel received Eugene's answer to her letter and *read it to him*
* * * The undisputed fact is that Hazel withdrew

the money from Eugene's account and gave it to Harry, who took it to Mr. Warnock and *had the deed made out to himself. Later, on his own initiative, he had a deed made from himself to Eugene and had it recorded.*" (Italics throughout this brief are defendants)

The statement that Harry Child said that Hazel read the letter to him is not correct.

The evidence of Harry Child on cross-examination on this matter is as follows:

"Q. You didn't ever see the letter?

A. I never saw the letter." (Tr. 23)

The evidence of Harry Child on direct examination on this subject is as follows:

"A. Oh, yes, she must have written to Eugene. She apparently got word back that it was O.K. I don't know. I never saw it." (Tr. 14)

There is no evidence to the effect that when Harry took the money to Mr. Warnock he "had the deed made out to himself and later, on his own initiative, had the deed made to Eugene". The evidence is undisputed that on April 16, 1945, Hazel drove with Harry to Salt Lake. Harry testified:

"Yes, the only thing that riveted it in my mind, of her giving the money, we drove in town and I parked right there on First South,* * *I remember I got out of the car before she would give me that money* * *she would not give me the money until she said, 'Will you put that property in Eugene's name to secure the loan?'"* * * I said, 'Absolutely, I will put the property in Eugene's name to secure the loan.'" (Tr. 15)

Harry then took the money to Mr. Warnock, who gave him the deed made out to Henry Child, as grantee, executed by Kathryn Ione Griffith Rankin, as grantor, dated April 10, 1945 (six days before) and acknowledged in California. (Exhibit No. 1) He immediately rejoined Hazel. She asked for the deed. He told her it was made out in his name and he would have to have the deed made out from himself to Eugene, because he had promised that he would do so. (Tr. 16-17)

They immediately went to the office of a friend of Harry's, Albert Toronto, and there made out a deed (Exhibit No. 2), bearing the date of April 16, 1945, executed by Henry Child and Hazel Marie Child, as grantors, to Eugene A. Child, as grantee.

These, with other errors in statement of the evidence cannot but raise a question as to whether the evidence as appraised by the Court was taken from the Briefs of counsel or from the record. There were so many misstatements and false assumptions and inferences in respondent's Brief that appellant in his Reply Brief, Point IV, called attention to eleven such matters of significant importance.

In a case such as this, the original transcript of the evidence is of indispensable importance. It is for that reason that the appellant throughout his Briefs has quoted verbatim the critical evidence. The transcript of evidence in this matter alone reflects the true state of the evidence.

Another important statement made by the Court in its Decision is:

“Notwithstanding Eugene’s claim that his father, Harry, purchased the property solely for him, neither Eugene nor his mother, Hazel, who was on his side supporting him in the controversy, claim that he ever expressly stated that he would do so. *Such result would have to be made out of the letter*, which she failed to produce and which they claim stated that Eugene would not loan money to his father but the purchase would have to be made for himself.” (page 2, Decision of the Court)

Is it unusual that Harry and Eugene failed to produce a letter written in April 1945 at the trial held June 14, 1957? The 11 years delay in bringing this case to trial after the date of the deed points up the laches of Harry Child in failing to bring this action until 1956, when such important evidence could not be expected to be produced.

Coming back to the statement, “such result would have to be made out of the letter”. There was much evidence from which, it appears that Harry knew that Eugene and Hazel would not and did not let Harry use \$300.00 of Eugene’s money for any other purpose than to buy the land for Eugene. The following are some items of evidence to this point:

Brandt Child testified that the day the letter was received he was in the kitchen when Harry entered with the letter from Eugene in one hand and the envelope in the other hand, and he heard his father and mother dis-

cuss the contents of the letter. He stated, "Yes, I remember mother saying, 'Why don't you sell some cows and buy it yourself?'" (Tr. 72).

Hazel Chld testified: "I took the letter and read it and 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 is a good proposition'." (Tr. 40).

Also she testified, "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." (Tr. 40).

He refused to sell two cows. As he testified, "She told me to 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.*" (Tr. 24)

In other words, the cows were more important to him than the land.

Also, Hazel testified: "I told him, I said, 'you should have bought that land yourself. It was a good proposition. You should have bought that land yourself, but it is Gene's'. Everytime we had any conversation, I said, 'It's Gene's, you let him buy it'." (Tr. 43)

The truth of the above statement is confirmed by the actions of Hazel and Harry when they were divorced in 1955, before this action was started. They made a minute division of property. The land in question was then worth

\$40,000 to \$50,000—more than all other assets of the parties. She made no claim to any part of the property in question which she certainly would have done if he owned it subject to a \$300.00 mortgage to Eugene. He made no representation that the property in question was his. Since the basic problem is the intention of the parties at the time the deed was made, this evidence is of the utmost importance.

Also, on cross-examination, Hazel testified: “Mr. Child didn’t borrow the money. Eugene bought the property.” (Tr. 63)

POINT II

THE COURT ERRED IN THE BASIS OF ITS APPRAISAL OF THE EVIDENCE IN THIS CASE.

The Court stated at page 4 of the Decision, “The fundamental consideration is that there is nothing incredible or unnatural about Harry Child’s contention that inasmuch as he conceived the idea of acquiring this property and nourished it for several years, finally overcoming the obstacles encountered in getting it, he did not agree to forego all interest in it himself and purchase it for Eugene.”

For Harry to prevail in this matter, the evidence must be clear and convincing that Eugene intended that his money be used as and for a loan and that the deed should be a mortgage to secure such loan. It is not enough that Harry did so intend.

The appellant will discuss the evidence on this

matter hereafter.

The law is plain that in such a situation as this, for one to prevail who attempts to establish that a written conveyance was something other than it purported to be, he must prove that *both parties* to the instrument intended that it should be something other than it on its face showed it to be.

The law in this matter was laid down in *Corey vs. Roberts*, 82 Utah 445, 25 P. 2d 940. We quote from said case as follows:

“It is likewise the law, 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 concedes that, to establish any other relationship, she must show by proof meeting the standard required by the courts that the defendant was not a purchaser, but a mortgagee or trustee, or both, and that the deed was security for the debt owing by the plaintiff to the defendant. Plaintiff also accepts the position that the proof must show that both grantor and grantee understood that the conveyance was made as security for the debt and not an absolute conveyance. If plaintiff fails to meet these conditions and burdens of proof her action must fail.”

This statement of the law was reaffirmed in *Northcrest, Inc. vs. Walker Bank and Trust Co., et al*, 122 Utah 268,

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This statement of the law was reaffirmed in *Northcrest, Inc. vs. Walker Bank and Trust Co., et al.* 122 Utah 268,

248 P. 2d 692. The statement of the Court is as follows:

“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 Co. 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, Section 132**.”

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

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

As the Court said in *Beeler vs. American Trust Company*, 147 P. 2d 583, 24 Cal. 2d 1,

“The burden was on the plaintiff to prove that it was highly probable that the deed was not what it purported to be. He did not sustain this burden by evidence that at best is simply consistent with the deed’s being something else, but which is just as consistent with being what it purports to be.”

This statement is applicable to the evidence in this case.

The evidence will be considered under the next point.

POINT III

THE COURT ERRED IN SUSTAINING THE JUDGMENT OF THE TRIAL COURT BY FINDING THAT THE EVI-

DENCE IN FAVOR OF THE RESPONDENT'S CASE IS CLEAR AND CONVINCING AND IN AFFIRMING THE JUDGMENT OF THE TRIAL COURT.

Considering the evidence upon the question of whether Eugene considered the deed a mortgage, the following is pertinent:

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

A. No.

Q. And the deed which was delivered to you by your father and mother was not, I take it then, in your mind a mortgage?

A. Absolutely not.

Q. It was an absolute conveyance of title to you?

A. That has always been my mind.

Q. And in the discussion with your father, have you ever indicated any other understanding? Have you ever indicated anything else other than that when you have discussed the matter with your father?

A. Just discussing the land is the only thing that has ever been discussed is that it's my land.”

(Tr. 88, 89)

It would be repitious to again discuss the contents of the letters testified to by Eugene and Hazel and the testimony of Brandt Child that despite the fact that Harry

Child stated that he had never seen the letter he was present when Harry Child and Hazel Child discussed the letter and at the conclusion of the discussion Hazel said to Harry: "Why don't you sell some cows and buy it yourself?" (Tr.72)

Eugene has always treated the property as his own, as evidenced by the following:

1. He has paid the taxes for the last ten years at least. (Tr. 84)

2. He has never asked his father for the repayment of \$300.00 or any sum. (Tr. 84)

3. His father has never offered to pay the \$300 to Eugene. (Tr. 84)

4. He removed top soil from the land, but did not secure his father's consent to its removal. (Tr. 84)

5. He mortgaged the property to Bountiful State Bank in March of 1953 for \$3,500. (Tr. 85)

6. He mortgaged the property to Earl Burnham in 1955 for \$4,000 (Tr. 85)

7. He sold one-half acre to the Government. (Tr. 85)

8. He deeded a piece of the land to Harold Calder. (Tr. 87)

9. He made a contract with Harold Calder, who was opening up a subdivision on the south of the land in question, for a road for the center of the road to go up the property so he, Eugene, could take advantage to open up

some land there and Mr. Calder could open up some land on the other side. (Tr. 87)

10. His father had nothing to do with either the sale of the land to the Government or the deal with Mr. Calder. (Tr. 87)

11. He was sure that his father knew about the Government transaction, but Eugene didn't know whether Harry knew about the deal with Mr. Calder. He didn't mention it to him. He didn't see any reason to. (Tr. 88)

12. He refused to let his father put a reservoir on the land, although he wanted to do so. (Tr. 88, 97)

13. Mr. Ashdown, a neighbor, at the time he removed top soil from his, Mr. Ashdown's land, asked permission of Eugene to go across the land in question. (Tr. 94)

Is it credible to conclude in the light of this evidence that the evidence is clear, unequivocal and convincing that Eugene thought the deed was a security for a loan? The principles and rules of law are laid down to help effect justice. One of these rules is that property which has been deeded to a grantee shall not be taken away from him except upon clear, unequivocal and convincing evidence. For 12 years Eugene has thought the property was his. He has treated it as his. Others have loaned him money on the security of the land. Others have purchased parts of the land and have sought his permission to haul soil across the land. During this long period of time, could all third parties dealing with Harry and Eugene be mistaken as to who owned the land? If Harry had thought that the land was his, could he have kept

it a secret from so many people for so long a time? Is Eugene now deprived of the land on the oral, hearsay, incompetent statement of Harry Child that Hazel Child told him that in a letter Eugene had said she could lend Harry the money, and this despite the testimony of Eugene and Hazel concerning the contents of the letter that was received in reply? And despite the testimony of Hazel and Brandt that Harry received the letter and took it to the home where it was discussed at length, although Harry denied ever seeing the letter, and despite the testimony of Brandt that after they had discussed the letter Hazel said to Harry, "Why don't you sell some cows and buy it yourself?" (Tr. 72)

It appears to the defendants that the evidence outlined above is quantitatively and qualitatively greater than the evidence adduced by the plaintiff.

Let us briefly discuss some of the inferences made by the Court on the evidence. At page 1 of the Decision, the Court observed that Hazel did not share Harry's enthusiasm for buying the property. This inference is not supported by the evidence, as Hazel testified:

"Q. Did you say in that letter that purchase of that land was a good proposition?

A. Yes. I thought it was. That's the reason I tried to get Mr. Child to buy it."

(Tr. 55-56)

It is true that she told him to sell some of his cows to raise the money. The transcript is filled with evidence by Hazel, Brandt and Eugene as to the difficulties the

family had encountered because of Harry's failure to properly confine his cows. She had good reason not to turn over the water stock which she had received from Harry's sister when she paid off a note to him. She, by her own labor had earned and saved \$600.00 to pay off the note when Harry refused to repay his sister a loan which was long, past due. (Tr. 37-38) She apparently did not care to go to work again and save money to pay off another loan for Harry or probably lose the water stock, if she did not.

This Court stated: "It was he (Harry) who conceived the original idea of purchasing this property and nourished it to fruition* * * They do not point out what Harry Child was to gain by turning over his favorable option to Eugene. In carrying out the details of the transaction and doing all the work on the property he did all for the benefit of a son whom they now claim at the age 17 did not trust his own father and declared he would not loan him money. If Eugene is to prevail, it must be on the basis that he was that kind of a son, but his father benignly overlooked the rebuff and in spite of it put in several years time and effort to see that Eugene got the sole benefit of the property."

The inference from this statement is that Harry had an intense desire to purchase the land which persisted for years and that he expended great effort in acquiring and many years in improving the property. The evidence is that in 1941 and 1942 he wanted the land because it had a hollow running up through it in which

he might impound water. He did not in any of his testimony state that he wanted to purchase the property as an investment. "I wanted to put a reservoir up there for one thing and store a lot of water that was going to waste* * * Also I could use the land to pasture my cows". (Tr. 7.) He checked the records at Farmington and learned that Mrs. Griffith owned the land. He wrote to her in California. He heard from Mr. Warnock, her agent in Salt Lake City. He offered Mr. Warnock \$300.00. (Tr. 8) Mr. Warnock told Harry he didn't think she would accept it. In 1945 he learned that Mrs. Griffith had died. He again offered \$300.00 to Mr. Warnock. His offer was accepted. (Tr. 11) He paid \$25.00 and went about raising the \$275.00 balance. He got \$300.00 from Hazel and took it to Mr. Warnock and received the deed. He staked some cows and horses on the land. In 1950 and 1951 he spent \$200.00 plus approximately \$100.00 for rental of trucks in putting a fence around it. (Tr. 116) This is the total amount spent in "improving" the land in eleven years. In fact, in that area a fence was no real improvement.

Harry gained much more than he spent on the property by buying it for Eugene. On this subject, Eugene 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 figured his reimbursement

come 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."

There is no evidence that "all the work he did on the property," which was only putting on a fence at a cost of \$200 to \$300, was "for the benefit of a son whom they now claim at 17 did not trust his father." Let us examine this statement. The fence was no benefit to Eugene, except as it benefited the whole family by keeping Harry's cows away from neighbors' gardens and lawns and thus embarrassing the family. It does not enhance the value of the property.

The defendants do not claim that Eugene did not trust his father. The evidence on this point is as follows:

"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."

(Tr. 98)

The plaintiff does not attempt to contradict the testimony of Hazel that Harry wouldn't or couldn't pay

the \$600.00 he had owed his sister for years. Hazel testified that after the sister had repeatedly asked for the money, Harry would say that she didn't need it. Hazel finally worked and saved enough to pay it herself. (Tr. 37, 38) These things were no doubt well known to Eugene. Money loaned and not repaid is a source of friction. As Shakespeare said through his character, Polonius: "Neither a borrower nor a lender be, for a loan oft loses both itself and friend and borrowing dulls the edge of husbandry". Was Eugene wrong in following this advice?

That Harry's credit was not good at the time is obvious. He very apparently couldn't borrow \$275.00 unsecured. The only collateral, except some 20 cows, he had, was the water stock Hazel was holding, which we have discussed above. The only available source of money was his cows. This fact and his attitude towards selling the cows, from his own testimony, is a key to the whole situation. The defendants urge the Court to give consideration to the testimony, not only of Hazel and Eugene and Brandt, but of Harry himself on this point. At the expense of being repetitious, the defendants submit the following testimony of Harry:

"Q. Do you have a recollection of the very day 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.

(Tr. 24)

On direct examination, Harry testified as follows:

“Q. And did you agree then to sell some cows to raise the money?

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

This testimony points up the fact that Harry had no intense desire to purchase this property, particularly if it necessitated selling a couple of cows.

Another important statement in the Opinion is the following: “Consistent with Harry Child’s claims and the findings of the trial court are the undisputed facts that he went into possession of the property* * *and has at all times remained in possession and exercised general dominion over it”.

As to this point, the defendants in their Reply Brief (at pages 19-23) discussed the matter of what constitutes possession and quoted the law, citing *National Cypress Pole & Piling Co. v. Hemphill Lumber Co.*, 325 Mo. 807, 31 S.W. 2d 1059, 1063, as follows:

“Possession of land has been defined as the actual control by physical occupation and the holding and exercising dominion over it; that position or relation which gives one its use and control and excludes all others from like use or control.”

Under this definition, Harry Child did not have possession of the property. He had only permissive use thereof.

Without going into detail, defendants call attention to the facts delineated in their Brief, which were simply these:

1. Harry wanted to purchase the property for the purpose of putting a reservoir thereon. Eugene refused to let him build a reservoir thereon.
2. Eugene removed top soil, for which he received \$500.00 or \$600.00, no part of which Harry ever claimed until the Complaint in this case was filed.
3. When Mr. Ashdown desired to remove top soil from his property, it was Eugene and not Harry to whom he made application for the right to cross the property. If Harry had been in possession and exercising general dominion over the property, this would not have happened.
4. Harold Calder obtained a part of the property.
5. Bountiful State Bank and Earl Burnham loaned Eugene money on the property.
6. The Weber River Project purchased part of the property from Eugene.
7. Eugene paid all the taxes for 10 years. Harry never offered to pay the taxes.
8. Harry never offered to pay \$300.00 to Eugene.

Merely pasturing his cows on the property, while Eugene dealt with all third parties, many of them neighbors living in the immediate vicinity, indicates that no one considered that Harry was in possession and exercising general dominion over the land.

Defendants appreciate the fact that there is some difficulty in determining what is clear and convincing evidence under the rules laid down for so determining. However, defendants desire to cite what apparently has become the rule in Utah and contrast it with the evidence in this matter. In *Chambers vs. Emery*, 45 P. 192, 13 Utah 374, the Court said:

“So, in *Howland v. Blake*, 97 U.S. 624, the Supreme Court, speaking through Mr. Justice Hunt, said: ‘In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption, entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties.’ Citing 1 Story Eq. Jur., Sec. 157; Pom. Eq. Jur., Sec. 1040, and several U. S. and State Court decisions.”

In *Jensen vs. Howell*, 282 P. 1034, 75 Utah 64, Mr. Justice Straup laid down the rule as follows:

“In such cases (equity cases) on appeal and a review on questions of both law and fact and on the challenge of findings, the review in effect is a trial de novo on the record. On such a review, if, after making due allowance as to the better opportunity of the trial court to observe the demeanor of the witnesses, or determining their credibility and the weight of their evidence, we on the record nevertheless are persuaded that a challenged finding is against the fair preponderance or greater weight of the evidence or not supported by it, we disapprove it and make or direct a find-

ing, or remand the case for further proceedings; otherwise we affirm it.”

In *Sine v. Harper*, 222 P. 2d 571, 118 Utah 415, Mr. Justice Latimer stated:

“The Court below determined that the evidence was sufficiently clear and convincing to satisfy his mind beyond a reasonable doubt that a mutual mistake of fact existed. We are, therefore, compelled to analyze the evidence and determine whether it is sufficient from the standpoint of quality and quantity to sustain the findings of the Trial Judge. While the terms ‘clear and convincing’ are relative and are not capable of measurement, they carry an element of certainty. Mr. Justice Wolfe, in the case of *Greener v. Greener* (Utah) 212 P.2d 194, 204, defines ‘clear and convincing’ in a very appropriate way. In that opinion he distinguishes between the phrases ‘preponderance of the evidence’ and ‘clear and convincing evidence’ in the following language:

“* * * that proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable * * * but for a matter to be clear and convincing to a particular mind it must have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. A mind which was of the opinion that it was convinced and yet which entertained not a slight but a reasonable doubt as to the correctness of its conclusion, would seem to be in a state of confusion.’

In the same case, in a concurring opinion, Mr. Justice Wolf stated:

“The thought I am anxious to emphasize is that while we take into consideration the advantaged position of the fact finder in that he views the live scene as against our reading the dead record, there must also be a factor allowed for differences we may except in reasonable minds. We cannot set up our conclusions as being the only ones which reasonable minds could arrive at, even had we the advantage of the imponderables.

“In other words, the degree of proof which requires clear, unequivocal and convincing evidence in order to conclude for or against a certain issue is of importance and should be observed. It is used where one is charged with fraud because a party should not be stigmatized with fraud by a simple preponderance of evidence; in cases where it is necessary to set aside a release or a contract because of claimed fraud or mutual mistake of fact; in cases where reform of a contract is asked to comport with what is claimed to express the alleged real intent of the parties at the time the contract was made; in those cases where the courts are asked to do something which will change the situation from that which on the surface appears to be, where the parties have placed themselves or where the situation should remain as it exists, unless the court is morally convinced that justice requires that it be altered, and in other cases where public policy requires that status be not disturbed until the proof goes beyond a mere or fair preponderance.

“But there are degrees of proof between evidence which merely or barely preponderates and

ing, or remand the case for further proceedings; otherwise we affirm it."

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where it preponderates to a convincing degree just as there may be degrees between that evidence which convinces and that which proves a fact to a certainty. Evidence may be such as to create a definite probability that a conclusion is correct, but not reaching convincingness, it may have passed the point of equipoise and also the point of bare or mere preponderance and reached a point of definite probability, but may not have reached the point of conviction. I have taken occasion to deal at some length on these degrees of proof, because there is an increasing tendency to ignore them and put all proof on a flat plane of mere preponderance and this sort of result may be accomplished by the legerdemain of telling ourselves as reviewers that if it is convincing to a trial judge, regardless of how it appears to us, we should accept it as convincing to us. I do not go that far. I think such reasoning is definitely on the side of retrogression.”

Invoking the standards set forth in the above cases, the defendants submit that the evidence as set forth in the transcript cannot reach a degree that is clear, unequivocal and convincing that Eugene considered the deed a mortgage. We have delineated the evidence as to Eugene’s intent above. The evidence counter thereto is, primarily, the statements of Harry Child. Uncorroborated, his evidence is weak and inconclusive. On the critical matter of the contents of the letter, he is contradicted by Hazel, Eugene and Brandt. True, the matter of weight is not a matter of “counting noses,” but there comes a point when the number opposed to one witness certainly must carry some weight. If the three witnesses mentioned

gave any evidence of dishonesty in their evidence, the Court would be justified in disregarding their testimony. But as set forth at length in appellants' Reply Brief, their testimony is more straightforward, consistent and should be more convincing than Harry's testimony. He stands alone and uncorroborated. The fact that he is an interested witness who stands to gain \$50,000 for something for which he has paid nothing seriously impairs the validity of his testimony. His testimony is contradictory in several respects, as set forth in said Reply Brief. When he was divorced from his wife neither she nor he claimed the property belonged to Harry. He certainly knew, over the period of 12 years, that Eugene was dealing with the property, as the evidence now shows. It is inconceivable that living near Eugene and near to the property every day during that period he was so unaware of what was transpiring as he would have us believe. He made no claim to the money for the top soil and he made no claim to any part of the money received from the sale of the land to the Government. He never offered to pay the \$300.00 to Eugene and he paid no taxes.

There is one fact which is the key to Harry's actions, a statement, which is not denied by Harry Child, in Mr. Toronto's office when the deed was made from Harry and Hazel to Eugene. The following is the testimony:

"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 in Gene's name?

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

It is apparent that Harry Child would not sell cows to buy the property and he knew that it was the intention of Hazel and Eugene that the deed should be an absolute conveyance. He took his chance, that when Eugene came back he could talk him into deeding the property back. This was not an unreasonable anticipation, because the property was not worth any considerable amount in excess of the price Eugene paid for it, \$300.00. However, Eugene did not care to sell the property. He had bought it on the premise that it was a good investment. As he stated in his letter to his mother, he would buy the property if she thought it was a good investment. Harry never testified that he purchased the property as an investment. He wanted the land to build a reservoir thereon and to stake some cows thereon. Circumstances have given the property a great value as Eugene had hoped when he purchased it. Harry has had the benefit of the use of the land to stake his cows on, if not to build a reservoir thereon for 13 years.

Whether the transaction is considered an equitable mortgage or a trust relationship if it involves the lending of money and the giving of a deed as security the burden is on the one asserting that the deed is not an absolute conveyance to establish "that both grantor and grantee understood that the conveyance was made as security for the debt and not as an absolute conveyance. If plaintiff fails to meet these conditions and burdens of proof her action must fail." *Corey v. Roberts*, 82 Utah 445, 25 P. 2d 940.

The Court in its decision states that "It is not to be gainsaid that there is evidence which can be viewed as pointing both ways on this critical issue in dispute: "whether the deed from Harry Child conveyed full fee ownership to his son Eugene or only placed title in him to secure payment of the money he advanced his father to purchase the property." In other words, was this a security transaction? Thus the question can only be, was this an equitable mortgage transaction? Plaintiff in his brief concedes that the trial court did not find an equitable mortgage established by the evidence. As plaintiff said at pages 1 and 2 of his brief attacking points I and II of appellant's brief, which were a discussion of the evidence upon the basis of an equitable mortgage relationship: "fruitless and pointless in connection with the present appellant 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 plaintiffs' 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 plaintiff under the Second Cause of Action and issued judgment thereon."

"We, therefore, suggest that appellants' argument under their Points I and II pertaining to equitable mortgage is irrelevant and immaterial to the case before the Court and should be disregarded."

Thus it appears that the plaintiff concedes that his

proof does not establish an equitable mortgage and agrees with the statement made in appellants' brief that the trial court did not believe that the evidence established an equitable mortgage or that both respondent and appellants intended the deed to be a mortgage.

Thus, the basis of this Court's decision is not in accord with the theory of the respondent or the respondent's interpretation of the Trial Court's decision.

CONCLUSION

Measured by the rules set forth above for determining clear, unequivocal and convincing evidence, the defendants submit that the record is wholly wanting in evidence sufficient to support the judgment in favor of the plaintiff and respectfully requests the Court to grant a rehearing of this matter.

Respectfully submitted,

J. GRANT IVERSON

*Attorney for Defendants
and Appellants*