

1957

Joseph G. Toombs v. Jack Donald Toombs et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH G. TOOMBS,
Plaintiff and Appellant,

— vs. —

JACK DONALD TOOMBS, RO-
LAND J. TOOMBS, individually
and as Guardian ad litem of the
said Jack Donald Toombs, a
minor; ALMA TOOMBS,
EDRIS GLASMANN, and
J. M. TOOMBS,
*Defendants and
Respondents,*

FILED

OCT 23 1957

Clerk, Supreme Court, Utah

Case
No. 8665

Appellant's Brief

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*Defendants and
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Appellant's Brief

STATEMENT OF FACTS

This is an appeal by the plaintiff Joseph G. Toombs from a Decree entered by the Honorable John L. Sevy, Jr., sitting as Judge of the District Court of Box Elder County, which Decree was entered on the 27th day of February, 1957 (R. 520). The action was originally commenced on February 24, 1950, by the filing of a Complaint by the plaintiff for the purpose of imposing a

constructive trust, with respect to the defendants, Jack Donald Toombs, Roland J. Toombs, and Alma Toombs, on certain real property situated in Box Elder County, near Promontory, Utah, and known as the Cedar Springs property (R. 490-492). The Plaintiff is the nephew of the defendant Alma Toombs, and a cousin of Roland J. Toombs, who is the son of the said Alma Toombs. Jack Donald Toombs is the son of Roland Toombs, and the grandson of Alma Toombs. It is therefore evident that the defendants are in close relationship one with the other, not only by family but also by reason of their activities conjointly in operating land adjacent to the Cedar Springs land in Box Elder County. Since the action was commenced, the defendant Jack Donald Toombs has died, so that Roland J. Toombs and Emma Toombs, his wife, distributees of the estate of Jack Donald Toombs, deceased, have been substituted as parties defendant in place and instead of the said Jack Donald Toombs (R. 515). Likewise defendant Edris Glasmann and J. M. Toombs were dismissed as parties defendant so the action now remains against Roland J. Toombs individually and Roland J. Toombs and Emma Toombs, his wife, as distributees of the estate of Jack Donald Toombs, deceased, and Alma J. Toombs.

The land involved was originally acquired in two separate contiguous tracts consisting of 186½ acres and 60 acres. Plaintiff's claim, as set forth in his Complaint, is twofold: With respect to the 186½-acre tract, plaintiff claims that he is the owner of an undivided 1/3 interest therein by reason of having joined with his father, Jo-

seph M. Toombs, back in approximately 1906, in purchasing this land from the defendant Alma Toombs. Plaintiff further claims that he paid through labor a sum equivalent to 1/3 of the purchase price and has at all times since the time of purchase been the owner of a 1/3 undivided interest, although the title to the property was taken in the name of Joseph M. Toombs.

The other theory of plaintiff's claim for a constructive trust relates to the entire tract of property consisting of 246½ acres (independently of the 1/3 undivided interest claimed by the plaintiff as to a 1/3 interest in the 186½ acres). With respect to the entire tract of land the plaintiff claims that at the time the title to the property was acquired by them, said defendants were under obligation to the plaintiff by oral agreement to acquire said land for him and in his name, and that because of such agreement and by reason of their relationship one with the other and to the plaintiff, the court should impose a constructive trust on the property for the benefit of the plaintiff. (R. 490-492)

In their Answer first filed herein, defendants admitted:

“That on or about the 21st day of March, A. D. 1913, plaintiff and his father, J. M. Toombs, purchased from the defendant Alma Toombs land in Box Elder County, State of Utah, described as follows: The SW¼ of Section 34, Township 11 North, Range 7 West, S.L.M.; also, beg. at the SE corner of the SW¼ of said section 34, thence running East 53 rods, thence North 80 rods, thence

West 53 rods, thence South 80 rods to beg., containing 186 $\frac{1}{2}$ acres, more or less.” (R. 493)

Defendants further admitted:

“that the defendant Alma Toombs, on or about the 20th day of October, A. D. 1948, entered into an oral agreement with and between the plaintiff to purchase certain described land in the county of Box Elder, State of Utah, in consideration whereof the plaintiff was to reconvey certain land located in Box Elder County, State of Utah, to the defendant, Alma Toombs. That the defendant Alma Toombs purchased and paid for said land and had the same placed in the name of his grandson, Jack Donald Toombs, a minor.” (R. 494)

As a “Second Defense” to plaintiff’s Complaint, and by further answer to paragraph V of plaintiff’s Complaint, defendants alleged that the oral agreement with and between plaintiff and defendant Alma Toombs:

“was simply one for the purchase and sale of real estate. Under said agreement the parties above named were dealing with each other as co-principals and not as principal and agent. Therefore, the oral agreement fails within the provisions of Title 33, Chap. 5, Section 3 of the Utah Code Annotated 1943, providing that every contract for the sale of land or an interest therein shall be void unless the contract or some note or memorandum thereof is in writing. Further, that the agreement entered into between the parties above named was one for the joint benefit of both parties. Said agreement cannot be enforced under the provisions of Utah Code Annotated above cited, unless the same, or some memorandum, is in writing.” (R. 494)

This Answer was filed in the Court on March 17, 1950. Thereafter, on March 25, 1950, defendants filed an Amended Answer in which the admissions made as set out above were eliminated and the allegations of the Complaint with respect to such matters were denied (R. 497, 498).

Plaintiff filed an Amended Complaint September 7, 1950 (R. 500-505), which was answered by the defendants on September 22, 1950 (R. 506-510). The case was tried by the Court without a jury beginning December 4, 1950 (R 1), and was taken under advisement on January 13, 1951, at the conclusion of the trial.

Counsel for the respective parties filed written briefs with the Court. Thereafter, on March 17, 1952, the Court rendered a Memorandum Decision stating generally that the Court found "in favor of the defendants and against the plaintiff, no cause of action." The Court further directed defense counsel to prepare Findings of Fact and Conclusions of Law and Decree "in accordance herewith." Notwithstanding this direction, no action was taken by defendants or their counsel until after plaintiff, in February, 1956, filed a Motion requesting the Court "to withdraw its Memorandum Decision filed herein, and to reopen the case for the purpose of allowing counsel to reargue and resubmit the matter either with or without additional testimony" (R. 512). During the interim of approximately four years numerous attempts had been made by counsel for plaintiff to have the Court enter Findings of Fact, Conclusions of Law, and Decree, and

the Court in turn had made numerous requests upon defense counsel to prepare Findings, Conclusions, and Decree. As stated by plaintiff's counsel in the Motion to Reopen, counsel for defendant had "neglected, failed, and refused to submit any Findings to the Court, so that the Court has not been in a position fully and completely to pass upon the merits of the case, and to make an intelligent and complete analysis of the issues for the purpose of preparing and making its Findings and Conclusions herein" (R. 512, 513).

This Motion was argued before the Court on April 11, 1956, up to which time counsel for defendants had still failed to draft any proposed Findings, Conclusions, or Decree. Following the argument on Motion the Court refused to reopen the case and again directed defendants to prepare Findings and Conclusions to be submitted for approval and signature. Such Findings, Conclusions, and Decree were submitted and signed by the Court on February 27, 1957.

STATEMENT OF POINTS

In connection with this appeal, Plaintiff contends:

1. The trial court erred in refusing to reopen the case after a lapse of more than five years after the case had been tried and more than four years after counsel for defendants had failed to prepare Findings and Conclusions for the Court's approval.

2. The Findings as ultimately entered by the Court on February 27, 1957, are not supported by the evidence

but are contrary thereto insofar as the Findings are in favor of the defendants and against plaintiff.

3. The Judgment and Decree are not supported by the evidence.

4. The evidence in the case requires a finding that Plaintiff is the owner of a $\frac{1}{3}$ undivided interest in and to approximately $186\frac{1}{2}$ acres by reason of having purchased the same with his father, J. M. Toombs.

5. The evidence requires a finding by the Court that defendants hold the real property in question in trust for the use and benefit of the plaintiff upon the payment by the plaintiff of the amount paid by defendants for said property, and that defendants should account to plaintiff for all the rents, issues, and profits received by them from said property during the time the same has been in their possession.

For convenience of the Court and to consolidate the foregoing points for argument, plaintiff proposes to argue the same under the following categories :

I. Error of the trial court in failing to find that plaintiff is the owner of a $\frac{1}{3}$ undivided interest in approximately $186\frac{1}{2}$ acres of land purchased by him with his father, J. M. Toombs.

II. Error of the trial court in failing to impose a constructive trust in respect to all of the real property consisting of approximately $246\frac{1}{2}$ acres and requiring defendants to account to plaintiff for the rents, issues and profits received therefrom.

III. Error of the trial court in refusing to reopen the case.

ARGUMENT

I

ERROR OF THE TRIAL COURT IN FAILING TO FIND THAT PLAINTIFF IS THE OWNER OF A $1/3$ UNDIVIDED INTEREST IN APPROXIMATELY $186\frac{1}{2}$ ACRES OF LAND PURCHASED BY HIM WITH HIS FATHER, J. M. TOOMBS.

In order for the Court to make an accurate appraisal of the evidence of this case as it relates to Appellant's Points I and II, a synopsis of the testimony of each of the witnesses is herein reported.

The plaintiff Joseph G. Toombs testified that he and his father bought the quarter section of land in 1907 (R. 8) and that the deed was issued in about 1913 (R. 15). In 1948 plaintiff learned that his sister Edris Glasmann had obtained a deed from their father to the property; (R. 23) that thereafter plaintiff had made several attempts to purchase the property and on one occasion had accepted an offer made to him by Mrs. Glasmann, through her husband, to purchase the property for Forty-five Hundred Dollars (\$4,500.00). However, this offer and acceptance had been withdrawn by Mrs. Glasmann so that he did not get the property for that amount (R. 24-30).

Plaintiff talked on several occasions to the defendant Alma Toombs (his uncle and brother of Joseph

Toombs, the father) about buying the property. On one occasion (the day before the property was acquired) the defendant Alma Toombs came to his home and in the presence of other witnesses drew on a notebook a diagram of the property showing that a house and other improvements (which Alma Toombs believed was on his property adjoining) was in fact on the property in question. This diagram was identified as Exhibit No. 2 and admitted in evidence (R. 30-32). At that time Alma agreed with the plaintiff that if the plaintiff would sell Alma approximately two acres on which said improvements were located, said defendant Alma Toombs would go down to Ogden and purchase the property in question for the plaintiff. Plaintiff agreed to allow Alma to do this and thereupon did not go to Ogden the following morning when the property was sold. (R. 30-32) In fact, plaintiff testified that when he was contacted by telephone he told them to sell the property to Al. (R. 89) Upon returning from Ogden Alma told the plaintiff that he had bought the property and agreed to get together in a day or two and fix the matter up (R. 33). Thereafter plaintiff saw the defendant Roland Toombs and at that time Roland stated that the title to the land had been put in the hands of Roland's son. (R. 33)

On cross-examination the plaintiff testified that his sister Edris Glasmann and the others would not have given him a chance to buy the property if it were not for the fact that plaintiff's father had insisted and that if plaintiff's father "were here today he would testify to it." (R. 89) He identified Exhibit 3 which is an Affidavit

executed by the father Joseph Toombs with respect to the property. Exhibit 3 was admitted in evidence; (R. 109-110) and reads in part as follows:

“A number of years ago my son, Joseph and I, entered into an agreement with my brother, Alma Toombs, whereby we agreed to purchase 186.50 acres of ground in Sec. 34, Twp. 11 N.R. 7 W., SLM, known as Cedar Springs property in Box Elder County, Utah. This is sage brush land with some cedars on it. My son Joseph fenced part of same about four years ago, and I told him to go ahead and use the land, or my share of same, for pasture, to reimburse him for the work and material for fencing. Before that time it was a part of the open range.

* * * * *

“Sometime ago I made a deed in favor of my daughter Edris Glasmann as I was owing doctor's bill and hospital fee, covering the 186.50 acres known as the Cedar Springs property. . . . I advised my son-in-law, A. L. Glasmann that my son Joseph was to have the first chance to buy the land at Cedar Springs for a less price than other people would pay for same, and I wanted the money obtained from the sale to pay my hospital and doctor bills.”

The plaintiff further testified that he and his Uncle “Al” had various business dealings in the past; that they had worked quite closely together; and that plaintiff placed considerable trust and confidence in his uncle, particularly in agreeing to let him go down to Ogden and buy the property for the plaintiff. (R. 100)

Arnold Christensen testified that he had agreed to make a bid of Five Thousand Dollars (\$5,000.00) for the

Cedar Springs property on behalf of Joseph G. Toombs, the plaintiff. On cross-examination he described the transaction as follows :

“A. Well, they mentioned that. The question was put to me, or I put it up to them. I came to buy the place and asked them what they had. Asked them if it would be fair if they gave me the bid. They mentioned the highest bid. I said, ‘If I beat the bid I want to buy it.’ And they agreed to do that. They agreed to sell me the land. If I beat the bid what they were bid, and I bid them \$5,000 cash. Then they wanted to give their Uncle Al a chance. This one lady said, ‘We better give Uncle Al a chance.’ ”

* * * * *

“A. Well, when I came back again about a week after, I honked him out and he came out to my car and he said, ‘You won’t need to go any more to make a bid on it. My Uncle Al is bidding it in for me.’ ”

Alexander Dickey testified that in the year 1942 while on a water survey at Cedar Springs he had a conversation with Alma Toombs, who was constructing a granary on a water survey at Cedar Springs he had a conversation. The conversation also included Mr. Joseph G. Toombs, the plaintiff. At that time Alma Toombs pointed out to Mr. Dickey the dividing line between Alma Toombs’ property and the property belonging to Joseph G. Toombs and stated to Mr. Dickey that Joseph G. Toombs owned a 1/3 interest in the field lying adjacent to his (Alma Toombs) land and immediately south of his house. (R. 124, 125) He further testified that J. M. Toombs, father of the plaintiff, told the witness that plaintiff owned

62½ acres of the Cedar Springs property and that he had fed cattle for it. (R. 124)

Mr. Dickey testified that on the evening of October 18, 1948, when he was about to go into the home of plaintiff and had gotten out of his car, another car pulled up ahead of him and because of that the witness did not go into the home but decided to come back the next day. The following morning Joseph Toombs told him that his Uncle "Al" had gone down to Ogden to buy the Cedar Springs property for plaintiff. (R. 132)

On cross-examination Mr. Dickey testified that the reason he had gone to J. M. Toombs was that he was interested in finding out who discovered Cedar Springs (R. 128). He again repeated that J. M. Toombs told him that Joe owned about 62½ acres which he had paid for by feeding cattle for Alma Toombs. (R. 128-129)

Edward L. Thorsted testified that he is the son-in-law of the plaintiff; that he was in plaintiff's home in the forepart of October, 1948, when a conversation took place involving Alma Toombs and his wife, Joseph Toombs and his wife, and the witness and his wife. That on such occasion he was introduced to Alma Toombs who seemed excited about a land survey which had just been made which had found that his home and granary and water troughs were over on Joe's property. On that occasion Alma Toombs told plaintiff:

"A. . . 'I'll purchase all that land for you, Joe, if you will sell me that small portion that my house and granary and the water trough is on.'

And father-in-law says, 'You know that I own that portion of land,' and he says, 'Yes, I remember you worked for that and paid for it.' Well, my father-in-law says, 'Well, if you purchase that land,' he says, 'I'll give you that small portion of land your property is on.' And Mr. Alma Toombs says, 'That would be swell.' He says he didn't want there's fellow named Christensen that he mentioned that he said he didn't want him to get hold of the land, because he was sure he wouldn't be able to purchase the land from him, and he would lose his home and all.'" (R 135)

Wayne Toombs, plaintiff's son, testified that he and his father ran cattle and horses on the Cedar Springs property for as long as he could remember. He detailed the manner and method of operating the Cedar Springs property from 1939 until 1948. (R. 141) He further stated that for several years during this period of time he and his father had exchanged with the defendant Alma Toombs use of the Cedar Springs property and the property which Alma Toombs owned adjacent thereto. (R. 144, 145) He further testified to a conversation which his father and Alma Toombs had just prior to "Peach Day" in the latter part of August or the first part of September, 1948, as follows :

"A. Well, I drove up in front of the place and dad and Al was sitting on the fence there talking about the Cedar Springs property at that time. And dad was telling him, 'I don't believe they'd sell it to me, because . . . they were mad at me.' And Al said he would go down and buy it for my father.

"Q. What did your father say to that?

“A. Well, dad said that he’d be glad to have him do, because he wanted it.” (R. 146, 147)

The witness testified that later in October he overheard a conversation between defendant Alma Toombs and his father as follows:

“Al was pretty excited about the property at Cedar Springs. He said they had it surveyed and he found out that his house and his barn and his corals, water trough, was over on the Cedar Springs property there. And he said he had been down to try to buy that piece of ground off from them, but they would not sell it to him. He said he could buy it all, but he didn’t want it all because he had enough ground as it was and he wanted dad to buy it, and Al said he would go buy it for him.” (R. 148)

After a deed had been obtained to the land in the name of the defendant Jack Toombs, several conversations occurred between the plaintiff Joseph Toombs and the defendant Roland Toombs or Alma Toombs or both. The witness testified that on one occasion in the presence of a Mr. David Richards the following conversation took place:

“A. We discussed the boundaries. We drew the place out on a piece of board and we were discussing how things were there. Roland said he would like to keep four rods east of the house and running north over to the end of that forty. And I said, ‘Well, gosh! you don’t need that much.’ ‘Well,’ he said, ‘I’d like to keep on a straight fence.’ We asked him why he wanted it, and he said he didn’t have no dooryard left there if he didn’t get some ground there. And we told him we wouldn’t let him have the four rods clear

through, but we agreed to let him have two rods in front of his house and leave the fence south of his house where it was. As Roland went to go he says, 'Well,' he says, 'My father has gone to California. I would like to wait until he gets back before I turn the deeds.' We said, 'How long will that be?' And he says, 'About three weeks.' Well, we agreed that probably that was all right.' (R. 154)

Nellie Toombs, wife of the plaintiff, testified as to her knowledge of the use and occupation of the land in question by the plaintiff during the years preceding 1948. With respect to the conversation which occurred in their home in the early part of October, 1948, the witness testified:

"A. Well, he told Joe that it was a big section and he just had it surveyed, and, of course, I told that once. The improvements were all over on Joe's land. He says, 'I don't know what I'm going to do. I've been down to Ogden to buy this land, and they won't sell it to me.' And he seemed very angry at the Glasmanns. He says, 'They're trying to sell the water to Brownings, and Christensen and Mr. Hendricks are trying to buy the land also, and I don't want them in there. Now, Joe, he says, 'I've got all the land I want. I don't want any more, and if you want me to buy this land for you.' He says, 'You can't buy it if you go down there. They're mad at you, they won't sell it to you.' He says, 'I'll go down and buy it. I think I can buy it.' Then he asked Joe if he'd give him this two acres, deed him this two acres, and Joe says, 'I'll give you the two acres if you get the land for me, Uncle Al.' " (R. 181, 182)

The witness further testified that she was present

the night before Alma Toombs went to Ogden to purchase the land at which time the following conversation ensued:

“A. He says, ‘Joe, they’re selling the place in the morning.’ And Joe says, ‘Yes, I’ve heard they are.’ And he says, ‘They’re going to call you up, but,’ he says, ‘You turn that down, because they will not sell it to you.’ He says, ‘Your dad wants you to have it, but Glasmann does not want you to have it, but I can buy it.’ And he says, ‘If you’ll secure my property around there, those two acres, I’ll go down and buy it and turn it over to you.’ ” (R. 184, 185)

OWEN L. BROUGH testified that he was the County Treasurer of Box Elder County between 1935 and 1947. He identified plaintiff’s Exhibit 6 as comprising tax notices for several years; that he had a personal recollection of having received taxes from Joe Toombs and that Joe Toombs had paid taxes on the Cedar Springs property in the years 1939 and 1942 of his own recollection. (R. 200, 204)

DAVID RICHARDS, an elderly gentlemen of 70 years of age, testified that he was acquainted with the Cedar Springs land and that he had arranged with Joe Toombs on many occasions to run cattle on the property. He was present at a conversation which occurred between Joe Toombs and the defendant Roland Toombs in the month of November, 1948, at the plaintiff’s home. At this conversation Wayne Wayne Toombs was also present. The witness testified as follows:

“Q. And will you tell us what took place at that time?

“A. Why, this gentleman back here, Roland Toombs, he came around the south of the house here and stepped up to Joe and Wayne and he says, ‘Joe,’ he says, ‘I’ve come to see what you intend to do about that Cedar Springs property.’ Joe says, ‘Just as I agreed to do.’ He says, ‘What was that agreement?’ He says he agreed to turn that part of the barn and house is over to his father if he would buy the other part for him.

“Q. Then what was said?

“A. Then he says, ‘We had them put it in Jack’s name to keep him out of the draft,’ and he says, ‘If you let us keep it in Jack’s name until spring, we’ll turn it over to you.’

“Q. What if anything did Joseph Toombs say?

“A. Well, he got kind of huffy and says, ‘What did you do that for? I don’t know what you put it in his name for. You had no right to.’”
(R. 212, 213)

ABINADI TOLMAN testified that he was well acquainted with the parties to the matter as well as with the property in question; that he had discovered from examination of the records that the title to the land appeared to be in the name of J. M. Toombs and had therefore contacted Mr. J. M. Toombs for the purpose of leasing the property on an Oil and Gas Lease (215-217). At that time Mr. J. M. Toombs told the witness that his son Joseph G. (plaintiff) owned the north third or 62½ acres of the property (R 2173. Mr. Tolman likewise gave an accurate account of the conversation which took place in the home of the plaintiff on the evening preceding the sale

of the land in question. He fixed the date as October 18th, and testified concerning Alma's promise:

"A. Well, he said, 'If you go down'—he said, 'Your father wants you to get the place.' And he said, 'If you should go down there, Joe, you'd only get in a squabble with your sisters, and I've made arrangements that I can buy the place, but I don't need it and don't want it. If you will deed me the land that my house and granary is on.' Later in the conversation he repeated it several times. He said, 'My house and the trough, water trough.' And then Joe says, 'Well, how is that?' 'Well,' he said, 'I've had Mr. Griffiths out and survey it, and he finds that's a large section, and so he said in equalizing the land there my house comes under your 62½ acres.' And so he took his finger and he drew how it was, and then he said to Mrs. Toombs, 'Have you got a piece of paper here?' And Mrs. Toombs got up and she turned the light on as she did. The light didn't shine directly at me, but I could see Mr. Alma Toombs because he sat directly from me, but I was in the shadows of the lamp. And she got the paper and he drew how it was. And he had, running from the quarter section, running east, he drew it so you could see it was crooked running off a good many degrees north of east, but he took his pencil after he got through and said, 'This is all I want is this piece right here. It's about two or two and a half acres.' " (R. 221, 222)

He identified the writing as Plaintiff's Exhibit 3 and further testified:

"A. 'Well,' he said, 'your father wants you to have it, Joe,' and he said, 'They'll call you in the morning. They'll call you in the morning, and all you have to do is say that I'm going to buy it.'

And I don't know. Of course, in the conversation that came up several times during the time he was there." (R. 221, 223)

LOIS THORSTED, daughter of plaintiff, testified that she worked in the Box Elder County Treasurer's Office from 1938 to 1945 and was acquainted with the procedure for mailing tax notices; that she was likewise acquainted with the Cedar Springs property. (R. 228, 230) During the time she worked in the Treasurer's Office her father paid the taxes on the Cedar Springs property each year except for two occasions, on when she paid them and one when her grandfather J. M. Toombs paid them. (R. 321)

On cross-examination she testified that her father paid the taxes on the Cedar Springs property in cash while he paid taxes on other property in his own name by check, stating to her that he did not want to get the matter mixed up for income tax purposes. R. 239)

In addition to the foregoing witnesses who testified for plaintiffs, plaintiff introduced portion of depositions of defendants taken by plaintiff, in which defendants testified as follows:

ALMA TOOMBS testified plaintiff asked him if he would go down and get a deed for the plaintiff and Alma told plaintiff he would do so. (R. 344) After the property had been purchased the defendant testified that "Roland agreed to turn it over to him." Roland "came in and told me he was going to let Joe have it back." (R. 347)

ROLAND TOOMBS testified that he knew plaintiff claimed an interest in the property before he went to Ogden about buying it; (R. 349) that his father Alma said he had promised to buy it for plaintiff and "I heard him say he would buy this before I went to Ogden." This could have been as much as two weeks or more before land was acquired. (R. 351)

Subsequent to obtaining the deed there was a conference at the home of Alma Toombs, at which defendants Alma, Roland and Donald as well as plaintiff and Wayne Toombs, son of the plaintiff, were present. This meeting was arranged for the purpose of discussing turning over the deed on the property to plaintiff. Roland testified that at that time he was going to turn the property over to the plaintiff if they could agree about protecting Roland on the house and yard in the corner of the property. (R. 354, 355) He was concerned about being protected because the survey which had been made showed that the house and yard were on the adjoining land. (R. 355, 356) He further testified that plaintiff told him he could keep what he wanted around the house and that the defendant Roland stated that he wanted to keep ten rods. Defendant Roland then testified, "I was going to town and we could fix it up there, and come to find it had to be surveyed over again, and I told him we couldn't do it until spring. We had to take an engineer out and get it straightened up." (R. 356, 357)

JACK DONALD TOOMBS testified that he had heard plaintiff claim a one-third interest in the Cedar

Springs property as early as about 1940. (R. 359, 360) He also testified that he didn't go to Ogden the day that the property was going to be sold, that he had been down there before but he didn't go down there on that day; (R. 360) that "We had talked about it and decided we had to do it because it was close to our house, and we didn't know exactly where the line was." (R. 361) He likewise remembered the conference at the home of Alma Toombs shortly after the property was purchased. The various parties met there by appointment and "We told them that we'd sell it to them if we could agree on the terms around the house and that, and we didn't come to any agreement then. They were going to leave it until next spring." (R. 363) He also knew that this grandfather Alma, had agreed to go talk to the sisters about purchasing the property for the plaintiff. (R. 363, 364)

Much of the evidence introduced by defendants corroborates plaintiff's position in this matter, although contradicting plaintiff in respect to some of the claimed conversations which took place before the property was purchased. The evidence introduced by defendant is summarized briefly as follows:

A. L. GLASMANN testified that plaintiff had stated that he wanted to buy the property and that the witness had told plaintiff there was no reason why he couldn't. (R. 247) The witness later talked to Arnold Christensen about selling the land to him. (R. 248) The Plaintiff's father had "expressed desire that Joe be given privilege of buying this land at the best figure offered by anybody

else. So I had Mr. Gale, who was my other brother-in-law and is also my auditor, call Joe Toombs up.” (R. 249) This call apparently took place the morning that defendant Alma Toombs and Roland came to Ogden to buy the property. The witness testified he heard Mr. Gale talk to the plaintiff and that he also talked to the plaintiff at which time plaintiff stated he was not interested in purchasing the property. (It is interesting to note that Mr. Gale testified that he was the only one who talked to plaintiff on the telephone.)

The witness further testified he had sent plaintiff a letter dated October 14, 1948 (Defendant’s Exhibit “A”), in which he had stated that “Your younger sisters are all pretty sore at the way you have tried to shirk your duties in regard to your father, etc. They have asked me to institute suit against you if I can find any basis for a suit for the past use of the lands owned by your father and used by you for the last 40 years without adequate payment.” The letter also stated that Mrs. Glasmann had agreed to sell the land to someone else on October 19th for the sum of Five Thousand Dollars (\$5,000.00) unless she received a higher bid. (R. 260) Previous to this time defendant Alma Toombs had talked to the witness about wanting just a piece of the property; (R. 261, 262) that the only persons to whom witness talked about buying the property were Roland Toombs and Alma Toombs. (R. 256)

HAROLD F. GALE testified that he was employed by the Ogden Standard-Examiner and was a brother-in-law

of the witness A. L. Glasmann. (R. 265) In the middle of 1948 plaintiff stated that he owned a one-third of the Cedar Springs property. (R. 266) He testified that he called the plaintiff on October 20, 1948, and said:

“Joe, Al and Roland is here to buy the property.’ And I says, ‘Do you want it? I’ve just left your father and Mrs. Glasmann, and they wanted me to give you the first chance to buy the property.’ And he says, ‘Harold I don’t want it. It isn’t worth that money to me.’ And so I said, ‘Joe, the family is going to sell it so is all right with you?’ And he says, ‘It’s all right with me.’ So from then we sold it to Jack. I made out the deed that day and Jack bought the property.” (R. 267)

The property was paid for by Roland Toombs and Alma Toombs each giving a check for one half. (R. 268) The checks were introduced as Defendants’ Exhibit “F.”

On cross-examination Mr. Gale testified that defendant Alma Toombs had previously mentioned that his house was on a small portion of the Cedar Springs property and he wanted to be protected. (R. 272) That he alone talked to plaintiff on the telephone (R. 272) at which time he told plaintiff that Alma and Roland were there to buy the property and the plaintiff told witness to sell it to him. (R. 282) Previously, plaintiff’s father had told the witness to be sure to give plaintiff a first chance to buy the property. (R. 272) He knew the plaintiff had been using the land for 40 years. (R. 275) By way of conclusion he further testified that he was interested in seeing that the conveyance made by Mrs. Glasmann to the defendants “remain as is.” (R. 282)

MYRTLE E. TOOMBS (who was present in the court room during previous testimony after the court had made an order of exclusion but was nevertheless permitted to testify over objection of the plaintiff) testified that she is a sister-in-law of the plaintiff. That she had never heard plaintiff claim to own a third interest in the Cedar Springs property although she had not seen him a great deal over the past years. (R. 284-286)

DEO LOUISE GALE testified that she is the wife of Harold Gale and a sister of the plaintiff. (R. 290) In the spring of 1948 when her father went to the hospital, plaintiff told her he thought he ought to have "Cedar," (R. 293) but she did not hear him claim to own a third interest in the property. (R. 293) She had attempted to contact plaintiff on several occasions but was not successful. Whenever a bid was received on the property it would be communicated to their father who repeatedly said, "Give Joe another chance," so the girls would hold the property. (R. 302)

GUSSIE RAY SMITH testified that she is a sister to plaintiff and lives in Palo Alto, California. (R. 305) She never knew plaintiff claimed an interest in the Cedar Springs property until the trouble started. (R. 307) When she talked to the plaintiff at the time her father was in the hospital in 1948, plaintiff would say, "Don't you think I should have Cedar" and "Don't you think it belongs to me." (R. 308)

W. H. GRIFFITHS was called first as a witness for defendant and later as a witness for the plaintiff. He

testified that he was the County Surveyor. (R. 312) According to a notation made in his day book (Defendants' Exhibit "H"), he was out at the Alma Toombs property west of Promontory on October 17, 1948, for the purpose of making a survey for a water filing for Alma Toombs. At that time he was concerned with establishing the northeast corner of the southwest quarter of the section, where the water location would be filed. (R. 321) At that time he determined that the section was a large section. (R. 324) He testified that he also determined that part of Alma's house and the area to the south within the fence enclosure was south of the quarter section line which would place it on the property here involved; and that he told Alma and Roland of this discovery. (R. 418, 419)

ALMA TOOMBS, one of the defendants and uncle to the plaintiff, testified he bought the land in question from the State and sold it to plaintiff's father. (R. 327) He went down to Ogden in the latter part of October at the request of plaintiff to see the Glasmanns and the girls about plaintiff buying the property at Cedar Springs. (R. 328, 329) He testified that when he came back from Ogden he told plaintiff he wouldn't buy the property for him because plaintiff could buy it for himself. (R. 330)

On cross-examination he testified that he knew plaintiff had run cattle over the property in question for many years. (R. 339) He admitted that in his deposition he knew of plaintiff's claim to one-thrd of the Cedar Springs property before he had gone down to Ogden to do anything about buying the property; (R. 337) that he had

talked to plaintiff two or three times about going down to buy the property for him. (R. 338) He further remembered a meeting which took place at his home shortly after the property had been purchased at which he, his son Roland, his grandson, Jack, the plaintiff, and plaintiff's son Wayne were present. At that time Roland agreed to turn the land over to the plaintiff (R. 340)

LILLIAN TOOMBS testified that she is the wife of the defendant Alma Toombs and knew he had gone to Ogden in the fall of 1948 to purchase the property for the plaintiff. (R. 367) However, she testified that later she heard Alma tell plaintiff that he could go himself that he didn't want to have anything more to do with it. (R. 368, 369)

JOE BROWN testified that he lived in Promontory, Utah, and was employed by the defendant Roland Toombs; that he had certain conversations with Wayne and that he had been present in the spring of 1949 when conversations had taken place between the parties to this matter. (R. 375)

EDRIS GLASMANN testified that she is the wife of A. L. Glasmann and a sister of the plaintiff; (R. 391) that she and her father had paid the taxes each year on the property in question and identified Defendants' Exhibit "I" as being a group of the tax notices which had been paid. However, on voir dire she could not remember any dates on which taxes had been paid. (R. 392) She testified that plaintiff had talked about getting their father to sign Cedar over to him when the father was in the hos-

pital of March 1948, (R. 397) but she never knew that plaintiff claimed a third interest in the property. (R. 398)

She further testified that several weeks before the property was sold the defendant Alma talked to her about buying it, stating he wanted it for his grandson but never mentioned that he was there to buy it for the plaintiff. (R. 399-401) She believed he offered Four Thousand Dollars (\$4,000) for the property at that time. (R. 407) Although she called on defendant Alma Toombs in Brigham City to discuss the matter of purchasing the property, she never called on the plaintiff. (R. 402)

On cross-examination she testified that the land had been given to her by their father to sell to pay his expenses and that her father wanted plaintiff to have the first chance to buy the property. (R. 403) She was in the process of checking on the value of the property and finding a buyer for it from the time she got the deed on July 15, 1948 until the property was sold in October of that year. (R. 403, 404) To show her attitude and animosity toward the plaintiff we quote her testimony as follows:

“Q. As a matter of fact you have never been to his home to talk to him about this property, have you?

“A. Neither has he to mine.

“Q. Well, have you been to his home?

“A. No, sir.

“Q. All right. You knew that he has a home in Brigham City?

“A. I’ve been told.

“Q. And you’ve also been told that you’re his sister?

“A. I’ve been told that.

“Q. Do you resent the fact that you are his sister?

“A. I’m not answering that.

“Q. Do you bear any animosity towards your brother Joe?

“A. I’m not answering that.” (R. 404)

WILL M. JACOBSEN testified that he is a son-in-law of the defendant Alma Toombs and lives at Mantua, Utah. (R. 419) He had never heard plaintiff claim a one-third interest in the Cedar Springs property, nor had he ever asked plaintiff if he owned any property. (R. 422)

ROLAND J. TOOMBS, one of the defendants, testified that he talked to the plaintiff about October 18, 1948, on Forrest Street in Brigham City, Utah, after he had received a letter, Defendants’ Exhibit “J.” (R. 424-427) At that time plaintiff said he did not want the property. (R. 425) He likewise testified that he was the one who went to Ogden to put in a bid and bought the property for his son. (R. 428) (Note, this testimony is contradictory to the finding of the court to the effect that the transaction of the sale and purchase of the property “was negotiated by Alma Toombs, grandfather, of Jack Donald Toombs as agent and for the use and benefit of Jack Donald Toombs.” (R. 517) He paid one-half of the purchase price, his father paid the other half, and the deed was taken in the name of the defendant Jack Donald Toombs. (R. 429) Since that time Jack has paid a portion of the

purchase price back. (R. 431) In January of 1949 they had a meeting at his father's home at which his father and Joseph Toombs got into an argument about whether the father had agreed to buy the property for Joe but at the conclusion of the meeting Roland asked his son Jack, "What do you think? Think we ought to let them have it?" And he said, 'I guess so.' " (R. 440) Later on in March of 1949 he told the plaintiff that he wanted \$25.00 an acre (which was \$5.00 an acre more than was paid for the property) and plaintiff said he would not pay. (R. 440-442)

On cross-examination the defendant Roland Toombs admitted that his testimony before the court differed in several respects with the testimony given in his deposition because "I found out different since then." He admitted that he had been told by the surveyor Griffiths about the conflict on the location of the home and other improvements before acquiring the property; (R. 448) that he first talked about putting the property in Jack's name when he was in Ogden to bid on the property. (R. 449)

With respect to the meeting at his father Al's he testified:

"Q. The purpose of your going down to Al's place on about the fourth of January, 1949, was to discuss the arrangement for turning over the deeds to Joe, wasn't it?

"A. Discuss the property, yes. Took it over.

"Q. And at that time you agreed to turn the property over to him, didn't you?

“A. Yes, sir.

“Q. And your son Jack was there?

“A. Yes, sir.” (R. 454)

Before this meeting defendant Roland Toombs had offered to pay plaintiff what he had in the property if he would figure it out, but plaintiff later came back and stated, “he was going to keep it.” (R. 456)

JACK DONALD TOOMBS, one of the defendants and the son of the defendant Roland Toombs, (R. 459) testified that he went to Ogden on the day that the bid was put in for the property but not the next day when the deed was delivered. (R. 461, 462) He testified that before the property was purchased he had heard plaintiff tell Roland Toombs that plaintiff did not want the property, (R. 464) but he further testified that he agreed with his father after the property was purchased to sell it to the plaintiff. (R. 467)

On cross-examination he testified that he ratified and approved all that his father and grandfather had done on his behalf in acquiring the property. (R. 471) He knew that the plaintiff claimed an interest in the property for many years before it was purchased and that plaintiff had run cattle on the place most of the time. (R. 475) His father Roland and he had discussed the facts of the case with their counsel Mr. Mason before the original answer was prepared in which it was admitted that there was an agreement between plaintiff and defendant Alma Toombs whereby the latter would purchase the land for plaintiff. (R. 478-481)

EMMA M. TOOBS testified that she is the wife of the defendant Roland Toombs and the mother of Jack Donald Toombs; that she was with her husband at the home of the plaintiff during the fall of 1948 and heard the plaintiff state that the defendant Alma Toombs had talked to him about the dispute over the boundary lines and that she had repeated he couldn't have done so because at that time the Glasmanns "didn't know there was any dispute about where the boundry line was." (R 484)

The foregoing summary of testimony conclusively establishes that plaintiff purchased with his father the quarter-section of land consisting of 186½ acres and is the rightful owner of an undivided one-third interest therein. The only evidence to the contrary is the statement of Alma Toombs that he sold the property to plaintiff's father. However, plaintiff's father in his affidavit (Exhibit 3) states "A number of years ago my son, Joseph and I, entered into an agreement with my brother, Alma Toombs, whereby we agreed to purchase 186.50 acres of ground in Sec. 34, Twp. 11 N.R. 7 W., SLM, known as Cedar Springs property in Box Elder County, Utah." Surely the elderly Mr. J. M. Toombs (who is the predecessor in interest of defendants Roland and Jack D. Toombs) should know more about the matter than any one else. All of the defendants admitted they knew of plaintiff's possession of the property for approximately forty years and knew of his claim before they obtained title. We do not understand how the trial court could have failed to find in favor of the plaintiff on this proposition.

II.

ERROR OF THE TRIAL COURT IN FAILING TO IMPOSE A CONSTRUCTIVE TRUST IN ALL OF THE REAL PROPERTY CONSISTING OF APPROXIMATELY 246½ ACRES AND REQUIRING DEFENDANTS TO ACCOUNT TO PLAINTIFF FOR THE RENTS, ISSUES AND PROFITS RECEIVED THEREFROM.

What has been said above with respect to the weight and effect of the evidence relating to plaintiff's one-third interest in the Cedar Springs property applies likewise to the testimony with respect to plaintiff's claim that Alma Toombs had agreed with plaintiff to purchase the land for him. The original Answer admitted this (R. 494) but claimed the agreement was within the Statute of Frauds. The court found that Alma Toombs "was not at any time employed as an agent and trustee by Joseph G. Toombs, the plaintiff herein, to purchase the last above described real property for Joseph G. Toombs from Edris Glasmann" (R. 517). This finding is an absolute contradiction of the testimony of the defendant Alma Toombs, who admitted that he had agreed to endeavor to buy the property for plaintiff. He attempts to exonerate himself by saying that this agreement was rescinded. However, the evidence is clear that plaintiff at all times wanted the property. He told his sisters he wanted it and should be entitled to it. He was unable to deal on the matter himself because of the animosity his sister Edris Glasmann had for him, and therefore endeavored to have Arnold Christenson acquire the property on his behalf. When this failed, he made arrangements with Alma

Toombs to buy the property for him and told Mr. Christenson to forget the matter. Likewise, his testimony is clear that the only interest the defendants had in the property was to protect themselves in the acquisition of the corner on which their buildings may have been located. Each of the defendants testified that even subsequent to the acquisition of the property by them they agreed to turn it over to the plaintiff and plaintiff has at all times stood ready, willing and able to pay them the amount of the purchase price upon their delivering a deed to him less the two acres in the upper northeast corner of the quarter section.

The issue raised by defendants initially and which was argued at length to the trial court was to the effect that a constructive trust could not be imposed under the facts of this case. We respectfully submit that the law is well settled that a constructive trust should be imposed under such a situation.

A good discussion on the subject of constructive trusts is contained in American Jurisprudence, Volume 54, under the title of Trusts. Section 241 of Trusts (volume 54) Am. Jur. 184, contains the following quotation:

“All authorities agree upon the principle that a constructive trust will arise where, in addition to the breach of agreement to purchase for the owner or one having an interest at such a sale, there are circumstances of fraud or abuse of confidence, conduct, or facts that would tend to raise an equitable estoppel to assert the defense of the statute of frauds. A constructive trust will be declared where it appears that the promises or principal

furnished the purchase money or a part thereof; refrained from bidding by reason of the agreement, promise, or agency; relaxed his efforts to save the property from being sold, or to prevent a sale at a sacrifice; or where it appears that the promisor or agent bought in the property at a price greatly below its value, or that the agreement was known to other possible bidders and as a consequence chilled their bidding.

Likewise, the Restatement on the Law of Restitution sets out the principle of law applicable to this case, as follows:

“(1) A fiduciary who purchases from a third person for himself individually property which it is his duty to purchase for the beneficiary holds it upon a constructive trust for the beneficiary.

“(2) A person who agrees with another to purchase property on behalf of the other and purchases the property for himself individually holds it upon a constructive trust for the other, even though he is not under a duty to purchase the property for the other.” (Restatement of Restitution, Section 194, Pages 795, 796)

Scott of Trusts, Volume 3, Section 499, has the following to say with reference to a purchase by a fiduciary of property which he should purchase for another:

“A person in a fiduciary relation to another who purchases property for himself individually may be chargeable as constructive trustee of the property, even though he purchases it from a third person and not from himself as fiduciary. He is chargeable as a constructive trustee where he purchases for himself individually property which he should purchase for the beneficiary.”

This authoritative work in the field of trusts then goes on to state that the question involved is one of determining whether the fiduciary relationship exists, and discusses the various situations in which the relationship would automatically arise, among them being the relationship of family, guardian and ward, principal and agent, employer and employee, and so forth. After discussing various relationships of this nature the author states the following:

“Even though there was no pre-existing fiduciary relation, and even though the defendant was not employed professionally by the complainant, and even though no continuing fiduciary relation was contemplated, yet if the defendant undertakes with the complainant to purchase property for him, and purchases the property for himself, he can be charged as constructive trustee of the property. Although the oral undertaking is not enforceable as a contract, because of lack of consideration or because the property is an interest in land, yet a fiduciary relation was created and the fiduciary will not be permitted to profit through a breach of his duty as fiduciary. By undertaking to purchase the property for the complainant, the relation of principal and agent was created. Such a relation arises where one person undertakes to act for and in behalf of another, even though the undertaking is gratuitous and oral. Accordingly, it is held that a person who undertakes to purchase land for another and who purchases it for himself is chargeable as constructive trustee of the property, even though the undertaking is gratuitous and oral. In *Harrop v. Cole* [85 N.J. Eq. 32, 95 Atl. 378; Aff’d 86 N.J. Eq. 250, 98 Atl. 1085] the complainants orally employed the defendant to purchase certain land for them, but the defendant

purchased the land with his own money and took a conveyance to himself. The court gave a decree establishing a constructive trust for the complainants and directing the defendant to convey the land to the complainants upon payment of the price. The court said that where one man assumes to act as agent for another and the other reposes confidence in him, a fiduciary relation arises, although there is no written contract or no contract at all. If the agent violates his duty as fiduciary, a constructive trust arises. The court said that it was immaterial that there was no antecedent fiduciary relation, and that it arose contemporaneously with the particular transaction.”

This court has previously considered the matter of imposing a constructive trust. In the case of *Haws v. Jensen*, 116 Utah 212, 209 P. 2d 229, this court had before it the question of imposing a constructive trust where the decedent had executed a warranty deed to her daughter with the understanding that her daughter would hold the property for the use and benefit of the other children. The facts, therefore, are not in point, but the principles of law laid down by the court are of particular importance in the following respects :

1. As to whether it would be necessary to have any statement in writing in order to impose a constructive trust, the court held :

“Admittedly there is no writing evidencing Mrs. Haws’ intention that the property conveyed by her be held in trust by Amer. However, under certain circumstances existing at the time a conveyance in trust is made, no writing evidencing an intent to create a trust is required. In those in-

stances, equity will impress a constructive trust upon the property in favor of the person or persons designated by the grantor as the beneficiary or beneficiaries of the oral trust. A constructive trust, being an equitable remedy to prevent unjust enrichment, arises by operation of law and is not within the statute of frauds.”

2. With respect to the facts necessary to show a confidential or fiduciary relationship, the Supreme Court stated: (quoting from Scott on Trusts, volume 1, Section 42.2)

“A constructive trust is imposed even if there is no fiduciary relationship such as that between attorney and client, principal and agent, trustee and beneficiary; it is sufficient that there is a family relationship or other personal relationship of such a character that the transferor is justified in believing that the transferee will act in his interest.” Restatement of the Law of Trust, Sec. 44, comment (c), accord. A constructive trust will be imposed even though at the time of the transfer the transferee intended to perform the agreement, and even though he was not guilty of undue influence in procuring the conveyance. The abuse of the confidential relation consists merely in the failure of the transferee to perform his promise. Scott on Trusts, Vol. 1, Sec. 44.2. A court of equity in decreeing a constructive trust, is bound by no unyielding formula, but is free to effect justice according to the equities peculiar to each transaction wherever a failure to perform a duty to convey property would result in unjust enrichment. 3 Bogert on Trusts and Trustees, Part 1, 1946 Ed. § 471.”

In the case of *Barrett v. Vickers*, 100 Utah 534, 116 P. 2d 772, where the plaintiff sought to evict certain de-

fendants from the property, a counter-claim was filed by defendants and intervenors for the purpose of imposing a constructive trust on property which had therefore belonged to S. D. Vickers. The facts in the Vickers Case are quite similar to those contained in the instant litigation. There the evidence revealed that at the time of the death of S. D. Vickers, he owned a ranch near Nephi, Utah, which was mortgaged to the State of Utah. Because of the inability of his estate to continue the payments the State foreclosed on the mortgage and the property was about to be taken over by it. Prior to the expiration of the period of redemption the family met together and discussed the possibility of repurchasing the land from the State. Thereafter, on or about July 21, 1938, the plaintiff Arliean Vickers Barrett entered into a contract with the State to repurchase the ranch, to which contract her husband, George C. Barrett, became a party in December 1938. The other parties to the action claimed that the plaintiffs George Barrett and his wife Arliean Vickers Barrett, had agreed to acquire the property for the benefit of all of the children and that they were therefore entitled to their pro rata interest in the property. The evidence discloses that because some of the children were financially embarrassed the agreement was made that George C. Barrett would advance part of their payment, whereas, one of the other children would advance the balance. It further appeared that the State of Utah refused to deal with any of the children except George Barrett and his wife. The lower court found from the evidence that the plaintiff, George Barrett and wife, were constructive trustees for the use and benefit of the

other children of the decedent to the extent of the agreement which was entered into and not merely to the extent of the amount of money paid by each, so that the plaintiffs and other children would each have an undivided one-fourth in the property when it was paid for.

One of the defenses raised in that case was that the agreement, if any, was oral and therefore within the statute of frauds. In disposing of this point the court held: (quoting from the syllabus)

“Parol evidence is admissible to show a trust relationship by operation of law.”

“Evidence which was sufficiently clear, unequivocal and explicit to show that ranch which had been bought by plaintiffs from state under agreement with defendants and intervenors that each family was to have an undivided one-fourth interest and that plaintiffs and intervenors advanced down-payment but later defendants tendered their shares, established a “trust” in plaintiffs for each family of an undivided one-fourth interest in the ranch.”

In the case of *Hawkins v. Perry* (Utah 1953) 253 P. 2d, 372, the court imposed a constructive trust where the plaintiff had given money to his uncle, a minister of the gospel, to be used in purchasing a home, with the understanding that title would be taken in the uncle's name until the plaintiff became of age. The facts disclosed that the uncle had taken the home in the name of himself and wife and that the uncle's interest was subsequently acquired by his wife in divorce proceedings. The court held that under the circumstances the evidence not only

showed a confidential relationship between the plaintiff and the uncle, but also that the wife was not a bona fide purchaser in due course and had no beneficial interest in the realty as against the plaintiff.

Cases from other jurisdictions also support the plaintiff's position in this matter. In *Maddox v. Maddox*, 151 Neb. 626, 38 N.W. 2d 547 (1949) the plaintiffs brought an action to have the trial court declare and enforce a constructive trust with relation to a one-fifth interest in the estate of Wesley H. Maddox, deceased. The action was brought against one of the heirs and his wife, by certain other heirs. The testimony disclosed that William M. Maddox, husband of defendant, proposed to the other children of decedent that they buy the one-fifth interest of the widow (a second wife) of the decedent to which the other children agreed. However, notwithstanding that he was designated and authorized to act as agent for the others to acquire the interest, he made negotiations with the widow but did not complete the purchase in conformity with the agreement. Rather, thereafter, on October 9, 1947, defendant's wife, with full notice and knowledge of the agreement aforesaid and in violation thereof, bought the one-fifth interest of the widow, paying by check drawn upon their joint bank account. Even though the property was purchased by the wife of the defendant (the latter being the one who plaintiffs claimed was obligated to make purchase for plaintiffs) the court held:

“This court has also adhered to the rule that where one person undertakes as agent to purchase property for another, the other to pay part or all

of the purchase price and become owner of all or a part of the property proportionate to his contribution, *the purchase price thereof by such person in his own name or otherwise for himself*, gives rise to a constructive trust for the benefit of the other in the agreed proportion, conditioned upon reimbursement for the agreed part of the purchase price. Johnson v. Hayward, 74 Neb. 157, 103 N.W. 1058, 107 N.W. 384, 5 L.R.A.N.S., 112, 12 Am. Cas. 800; Lamb v. Sandall, 135 Neb. 300, 281 N.W. 37; Watkins v. Waits, 148 Neb. 543, 28 N.W. (2d) 206; Restatement, Restitution, s. 194 P. 795.

“This court has repeatedly held that the statute of frauds, sections 36-103 and 36-104, R.S. 1943, does not apply to a constructive trust growing out of an undertaking by one person as agent to purchase property for another, where, in violation of his agreement, he has taken the title in his own name or otherwise for himself and refuses to convey after tender of the agreed part of the purchase price.” (*Italics added*)

By way of summary the court concluded:

“Finally, it will be remembered that defendant William M. Maddox, while acting in a confidential and fiduciary capacity, could not acquire the title to the interests involved without the approval or ratification of all plaintiffs, and his wife, also in a confidential relation, would be equally barred from doing so, because said defendant could not do indirectly that which he could not do directly. *The rule generally is that where a party acting as agent or trustee is barred from purchasing property because of a confidential or fiduciary relationship, the husband or wife of such party is equally barred, and no advantage can be gained by purchasing the property and taking the title*

thereto in the name of such husband or wife. In re Estate of Jurgensmeier, 142 Neb. 188, 5 N.W. (2d) 233; In re Estate of Statz, 144 Neb. 154, 12 N.W. (2d) 829; Johnson v. Hayward, Supra; 26 Am. Jur., Husband and Wife, s. 127, p. 752; 54 Am. Jur., Trusts, s. 466, p. 370; 65 C. J. Trusts s. 646, p. 775.” (Italics added)

Other cases where the Courts have imposed a constructive trust are: *Sime v. Malouf*, 95 Cal. App. 2d 82, 212 P. (2d) 946, where the court held that one who assumes a position of trust and confidence is a fiduciary and as long as trust and confidence is deposited in him he remains such fiduciary.

Raper v. Thorn (Oklahoma 1949) 211 P. (2d) 1007. Here plaintiff and defendant were neighbors occupying farms in the same area, and were warm friends. There was approximately 120 acres of land lying between the two farms which was advertised for public sale in pursuance of a decree of partition. The parties agreed or between themselves that the defendant was to attend the sale and purchase the entire tract for the benefit of himself and the plaintiff, the plaintiff to acquire 40 acres and the defendant to own 80 acres. They were advised by a banker that it was not necessary to have such agreement in writing. The plaintiff also offered to pay the defendant the amount of the money which might be necessary to purchase the land but the defendant refused to take it, stating that he would not need the check until the purchase was made. Although plaintiff claimed that he relied upon the defendant's promise to bid in the land for benefit of both and did not attend the sale, he never-

theless had his attorney there. The defendant acquired the property at the sale but thereafter requested the plaintiff to wait until the sale was confirmed before turning over to the plaintiff the amount which plaintiff was to receive. On learning of the confirmation of sale Mr. Presson, attorney for the plaintiff, went to the home of the defendant to close the matter and was then advised that it would be necessary to take the matter up with the defendant's son and the son's wife, to whom defendant had sold the property. Thereafter, at a meeting with the children, they refused to make the conveyance, whereupon suit was instituted. It appeared that the son, Clarence Raper, was fully conversant with the oral agreement which had theretofore existed between his father and plaintiff. As was claimed in this case, the defendant testified that before the sale he advised Presson, plaintiff's attorney that the agreement was rescinded; that he was not going to recognize any agreement as binding; and would independently thereof. Inasmuch as Presson attended the sale, the defendant contended that the plaintiff would not be entitled to rely upon the agreement. The court, however, imposed a constructive trust.

Evanoff v. Hall, 310 Mich. 487, 17 N.W. (2d) 724, where suit was commenced by the plaintiff to establish and enforce a constructive trust with respect to land which had been purchased by the defendant. The facts of the case reveal that plaintiff and defendant were both residents of the City of Flint and had been friends for some time. Plaintiff was an attorney and had represented defendant on occasions in the past. On the day

in question, the defendant called upon plaintiff and during their visit plaintiff advised him that there was to be a scavenger sale of certain real property known as Lot 509, which was located adjacent to plaintiff's home property. Plaintiff told defendant that he intended to buy it whereupon the the defendant said that he intended to be at the scavenager sale on that day to buy some lots for himself and would buy the lot for the plaintiff. On the day of the sale plaintiff was detained in his office and was unable to attend, but the defendant attended and bid the lot in his own name for \$95.00. Thereafter, plaintiff called the defendant and defendant stated that he would turn the property over to him — there was nothing to worry about. The defendant admitted that there had been an agreement to buy the property for the plaintiff but stated that the plaintiff told him that he would be there at the sale and buy the property and therefore, when he failed to show up, defendant purchased the property for himself. See also *Trippensee v. Rice*, 312 Mich. 233, 20 N.W. (2d) 172.

Again, in the case of *Bigby v. Thorson*, 319 Mich. 524, 30 N.W. (2d) 266, the court held that actual fraud is not necessary to give rise to a constructive trust, but if the circumstances are such as to render it inequitable for the holder of the legal title to retain it, the court may charge it with a trust in favor of the equitable owner.

In *Stein v. Soref*, 255 Wis. 42, 38 N.W. (2d) 3, an action was brought by the plaintiffs against the defendant for an adjudication that the plaintiffs are the owners of an interest in an undivided one-fourth interest in

certain real property, title to which appeared to be in the name of the defendant. In that case there had been negotiations between the plaintiffs and defendant to the effect that the defendant would acquire the property for the benefit of the plaintiffs as well as the defendant. The evidence showed that the property was acquired and that the defendant had failed to account to the plaintiffs for the undivided interest which they were to receive. Under such circumstances, the court held, "equity converts the defendant into a trustee and thus there is present in these transactions a constructive trust created by operation of law," citing *Beatty v. Guggenheim Exploration Company*, 225 N. Y. 380, 122 N.E. 378; *Krzysko v. Gudyniski*, 207 Wis. 608, 242 N.W. 186; *Schofield v. Rideout*, 233 Wis. 550, 290 N.W. 155, 133 A.L.R. 834.

See, also, *Black v. Gray*, 403 Ill. 503, 87 N.E. (2d) 635; *Rankin v. Satir*, 75 Cal. App. 2d 691, 171 P. 2d 78; *Johnson v. Clark*, 7 Cal. (2d) 529, 61 P. (2d) 767; *Getken v. Shell*, 168 Kan. 244, 212 P. (2d) 329; *Mackay v. Baker*, 327 Mich. 57, 41 N.W. (2d) 331. (In the latter case the court held the evidence was sufficient to establish a constructive trust although based on the plaintiff's testimony alone, uncorroborated by the testimony of independent witnesses.

In the *Satir Case*, supra, the court discusses the difference between resulting and constructive trusts and holds as to constructive trusts as follows:

"Constructive trusts of this form are not based primarily on the intention of the parties but are forced on the conscience of the trustee by equitable

construction and the operation of law. *Millard v. Hathaway*, 27 Cal. 119. In such trusts, based upon fraud or wrongdoing, an oral promise is sufficient and the existence or absence of a confidential relationship between the parties, in the strict sense, is not controlling. *Brison v. Brison*, 7' Cal. 525, 17 P. 689, 7 Am. St. Rep. 189. "Such trusts are creatures of equity, and take form whenever title is obtained by means of chicanery, deceit, or other variety of fraud, actual or constructive." *Sanguinetti v. Rossen*, 12 Cal. App. 623, 107 P. 560, 562. In order to create a constructive or involuntary trust, as defined in section 2224 of the Civil Code, no conditions other than those stated in that section are necessary. *Lauricella v. Lauricella*, 161 Cal. 61, 118 P. 430. By section 2223 of that code the rule of constructive trust is extended to the case where one person wrongfully detains a thing from another. The rule extends to almost any case where there is a wrongful acquisition or detention of property to which another is entitled, since it is based upon the equitable principle that no one may take advantage of his own wrong. Civ. Code, sec. 3517. As was said in *Brazil v. Silva*, 181 Cal. 490, 185 P. 174, 176. 'The instances of its application are as various nearly as the ways in which property can be wrongfully acquired.' "

In *Plant v. Schrock*, 102 Okl. 97, 227 P. 439, appears the following statement in the syllabus:

"A sale by a guardian of real estate belonging to his ward to his sister-in-law through the interposition of a third person, with the secret understanding that the purchaser not pay for the same and for the purpose of securing a loan thereon, constitutes a fraud on the estate of the minor and may be set aside against the parties to the fraud

and any person not a bona fide purchaser for value, but such sale is not void.”

A good annotation on the subject is contained in 27 A.L.R. (2d) 1285, supplementing earlier annotations found in 42 A.L.R. 10 and 135 A.L.R. 232.

This is an equity case and the court should invoke the equitable principles set forth above to prevent the defendants from obtaining an unjust enrichment at the expense of the plaintiff. If defendants should claim that plaintiff has no remedy because title to the property was taken in the name of Jack Donald Toombs instead of Alma or Roland, the case of *Hawkins v. Peery*, supra, and *Maddox v. Maddox*, fully answer this argument.

Too, the Findings of the court (which were prepared by counsel for defendants) state “that the said transaction of the sale and purchase . . . was concluded by Alma Toombs, grandfather of Jack Donald Toombs, as agent and for the use and benefit of Jack Donald Toombs” (Finding No. 13, R. 517). With this Finding we agree. However, we cannot, because of such Finding, agree with the subsequent Finding No. 19 to the effect that Jack Donald Toombs “did not at any time have any knowledge of any conversation, if there was such conversation, whereby Joseph G. Toombs had asked Alma Toombs to purchase the last above described real property for him from Edris Glasmann.” It is elementary law that the principal is bound by the knowledge of his agent in connection with the agent’s employment.

The evidence in this case, when considered in the light of the principles of the law applicable thereto, required the trial court to impose a constructive trust in favor of the plaintiff.

III.

ERROR OF THE TRIAL COURT IN REFUSING TO REOPEN THE CASE.

After counsel for defendants failed to submit any proposed Findings or Conclusions for four years from the time the court announced its determination of the issues, plaintiff felt compelled to file a Motion to reopen the case for the purpose of rearaguing the matter with or without additional testimony (R. 512). This Motion in effect constituted a Motion for a new trial under the provisions of Rule 59 (a) and 59 (e) U.R.C P. While counsel has not been able to find any decisions in respect to his present argument that failure to grant such Motion was error, lack of any authority on the matter would seem to indicate that no court had in the past taken such a protracted length of time to conclude a case or to enter Findings of Fact, Conclusions of Law, and Decree after having decided the issues. Rule (41 (b) provides for dismissal of an action for failure of plaintiff to pursue his action with reasonable diligence but no apparent relief is afforded to a party where the court — whether trial or appellate — takes an unreasonable and unconscionable length of time to decide the issues between the parties and render its judgment or decision thereon. As has recently happened in another case in which counsel was

interested, serious material damage has resulted from the failure of the court to perform its function with reasonable promptitude. It appears to counsel that under such circumstances the proper and equitable course of action to pursue would be to allow the parties to be heard on the merits — if necessary, before a different judge — in order that justice be accomplished. A complete review of the evidence in this case, as has been made herein, should have been made. We feel confident that such a review would have required a determination of the issues in favor of plaintiff.

S U M M A R Y

In conclusion, we would like to summarize for the benefit of the court.

I. Plaintiff is the owner of an undivided one-third interest in the 186½ acres of land described in the complaint:

A. He purchased the land in about 1906 with his father from the defendant Alma Toombs:

1. Not only testified by the witnesses but admitted by defendants in their original answer.
2. Affidavit of Joseph M. Toombs to that effect appears as Exhibit 3, together with testimony that Joseph M. Toombs on more than one occasion stated his son owned one-third of the land.

B. Plaintiff paid the taxes on the land.

C. Defendants had knowledge that plaintiff had

been in possession of the property for over 40 years, and claimed a one-third interest therein.

D. During the time plaintiff has been in possession of the land he has assisted in fencing it so that it is entirely enclosed and has occupied it exclusively since 1940.

II. The Court should impose a constructive trust on the balance of the land, making the defendants constructive trustees as to the entire tract for the benefit of the plaintiff. Upon paying the amount of the purchase price by plaintiff the defendants should be required to convey to said plaintiff and account for the rents, issues and profits received by them.

A. Property was deeded by Joseph M. Toombs to his daughter Edris Glasmann, without consideration, for the sole purpose of having her sell it to pay his medical and hospital expenses and with the expressed desire that his son Joseph G. Toombs be given the first opportunity to purchase.

B. Although plaintiff made two bids on the property it did not appear that he would be able to acquire it; nor did his sister ever contact plaintiff personally in an attempt to sell it to him.

C. Defendant Alma Toombs, with the knowledge of defendants Roland Toombs and Jack Donald Toombs, agreed with plaintiff that he, Alma Toombs, would acquire the land for the plaintiff if plaintiff would convey approximately two acres to defendant to protect the latter in connection

with certain improvements located on adjoining land.

1. The fact that such agreement existed was testified to by plaintiff and certain of his witnesses and admitted by each of the defendants.

2. The agreement between plaintiff and defendant Alma Toombs was admitted by the original Answer filed by defendants and later admitted by them in their depositions, but defendants later contended that the defendant Alma Toombs had rescinded it. (Note: The court made no finding on this.)

3. All parties, including defendant, testified that at the meeting in Alma Toombs' home in January 1949, the defendants agreed to turn the property over to the plaintiff, but requested time to have it surveyed again so as to ascertain exactly the portion needed to protect defendants' outbuildings.

D. In violation of the agreement with plaintiff, Defendant Alma Toombs, with his son Roland who had knowledge of the agreement, purchased the property and put in the name of Jack Donald Toombs.

III. If the trial court had granted plaintiff's Motion to reopen the case for the purpose of reargument, or to take additional testimony, the overwhelming force of the evidence, as reported hereinabove, would have re-

quired the trial court to reverse its decision and enter judgment in favor of the plaintiff.

A. The trial court manifestly abused its discretion in refusing to reopen the matter after more than five years had elapsed from the submission of the case to it.

We respectfully submit that the decision of the trial court should be reversed and the cause remanded with instructions to enter judgment in favor of the plaintiff and against the defendants and requiring defendants to account to plaintiff for the rents, issues and profits derived by them from the use and occupation of the property in question since 1949.

Respectfully submitted,

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