

1964

# Henry Child v. Coy J. Halward and Aldin O. Hayward : Brief of Respondents

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Lorin N. Pace; Attorney for Appellant;

K. Roger Bean; John H. Allen; Attorneys for Respondents;

---

## Recommended Citation

Brief of Respondent, *Child v. Halward*, No. 10199 (Utah Supreme Court, 1964).

[https://digitalcommons.law.byu.edu/uofu\\_sc1/4683](https://digitalcommons.law.byu.edu/uofu_sc1/4683)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

HENRY CHILD,

*Plaintiff and Appellant,*

vs.

COY J. HAYWARD and  
ALDIN O. HAYWARD,

*Defendants and Respondents.*

FILED  
DEC 18 1964  
Utah Supreme Court, Utah  
Case

No.

~~9082~~

10199

---

RESPONDENTS' BRIEF

---

Appeal from the Judgement of the District  
Court for Davis County Hon. Charles G. Cowley, Judge

---

K. ROGER BEAN

Layton, Utah

and

JOHN H. ALLEN

Suite 201, 444 South State

Salt Lake City, Utah

*Attorneys for Respondents*

LORIN N. PACE

19 West South Temple

Salt Lake City, Utah

*Attorney for Appellant*

---

## TABLE OF CONTENTS

	<i>Page</i>
STATEMENT OF THE NATURE OF THE CASE.....	1
DEPOSITION IN THE LOWER COURT.....	1
RELIEF SOUGHT ON APPEAL .....	1
STATEMENT OF FACTS .....	2
POINT I. THE QUESTION OF A CONSTRUCTIVE TRUST AND UNDELIVERED GIFT ARE RAISED FOR THE FIRST TIME ON APPEAL AND CANNOT BE CONSIDERED ON APPEAL. ....	4
POINT II. PLAINTIFF FAILED TO PROVE THE ELE- MENTS OF ACTIONABLE FRAUD, AND THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT FOR THE DEFENDANTS. ....	5
CONCLUSION .....	10

### CASES CITED

<i>Auerbach vs. Samuels</i> , 10 Utah 2d 152, 349 P.2d 1112 (1960) ..	6
<i>Huber vs. Deep Creek Irrigation Company</i> , 6 Utah 2d 15, 305 P.2d 478 (1956) .....	5
<i>North Salt Lake vs. St. Joseph Water &amp; Irr. Co.</i> , 118 Utah 600, 223 P.2d 577 (1950).....	5
<i>Oberg vs. Sanders</i> , 111 Utah 507, 184 P.2d 229 (1947).....	6
<i>Pace vs. Parrish</i> , 122 Utah 141, 247 P.2d 273 (1952).....	6
<i>Pettingill vs. Perkins</i> , 2 Utah 2d 266, 272 P.2d 185 (1954)....	5
<i>Stuck vs. Delta Land &amp; Water Company</i> , 63 Utah 495, 227 Pac. 791 (1924) .....	5

### OTHER AUTHORITIES

17A C.J.S. Contracts, Sec. 418 (e).....	6
---	---

IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

HENRY CHILD,  
*Plaintiff and Appellant,*

vs.

COY J. HAYWARD and  
ALDIN O. HAYWARD,

*Defendants and Respondents.*

Case  
No.  
9082

---

RESPONDENT'S BRIEF

---

STATEMENT OF THE NATURE OF THE CASE

This is an action wherein plaintiff asks for rescission of a uniform real estate contract, or damages in the alternative, and for the definition of a boundary line between the property of the parties.

DISPOSITION IN THE LOWER COURT

The case was tried by the Court. At the conclusion of plaintiff's evidence defendants made a motion for judgment dismissing plaintiff's complaint and granting defendant's counterclaim for specific performance of the uniform real estate contract, and defining the boundary between the property of the parties. This motion was granted, and plaintiff has appealed.

RELIEF SOUGHT ON APPEAL

Defendants and respondents ask that the Court affirm the judgment of the trial court.

## STATEMENT OF FACTS

In the summer of 1957, defendant, Aldin Hayward, and his attorney, Wendell Hammond, visited property at the northeast corner of the intersection of Orchard Drive and 6300 South (also known as Virginia Lane) in the City of Bountiful, (T. 49) and discussed the possibility of acquiring the property and building a store thereon (T. 10). Later, Aldin Hayward began purchasing the various parcels in the area (T. 9). At the time, plaintiff Henry Child owned property contiguous to that which Aldin Hayward was acquiring, and plaintiff knew of Aldin Hayward's negotiations with other property owners in the area (T. 15, 23, 28, 32, 33, 41, 67). In March or April of 1958, Aldin Hayward contacted plaintiff and offered to buy some of his land (T. 11). Plaintiff was then living in the vicinity of the parcel in question (T. 12) and could see it from his residence (T. 106). The two men had three or four discussions about a possible sale (T. 12), and walked over the parcel together (T. 13, 15, 18). Finally, on an evening in April, 1958 — probably April 4, (T. 42, 43, 126, 142 defendant's exhibits 1, 5, and 10) — plaintiff agreed to sell to Aldin Hayward a parcel bound by a line starting at the rear of the Eugene Child lot, even with a concrete wall on the east side of said lot, and running north to the old Winegar fence, west to a tract which Aldin Hayward had recently acquired from plaintiff's ex-wife, south to the rear of the Wallace Child lot, and east to the point of beginning. (T. 19, 39, 40, 52, 55, 56, 58, 157). The original agreed purchase price was \$2,000.00 (T.

20, 40). The parties immediately went to the home of Attorney Wendell Hammond to have their agreement put in writing ('I. 20, 49). Plaintiff there reneged on the original purchase price and insisted on \$2,500.00. Aldin Hayward agreed to the increase (T. 20, 41). They described to the attorney the area of the parcel to be conveyed, and after an informal handwritten memorandum was prepared, they signed it. Aldin Hayward paid plaintiff \$100.00 that night (T. 16, 25, 50).

Mr. Hammond thereafter prepared a formal contract for the parties to sign (T. 51), with a description based on the section corner which had been recently relocated by the United States Government (T. 51, 160). The plaintiff had previously deeded property using that same relocated section corner as a base (T. 164). Nevertheless, he objected to the description on the contract first prepared by Mr. Hammond (T. 53), so Mr. Hammond prepared another formal contract using the old description (T. 56, 58). After the contract was prepared, plaintiff insisted that the concrete wall be referred to in the description and this reference was added to the contract (T. 58, 112, 115, 116, 157). Aldin Hayward and plaintiff signed the contract at Mr. Hammond's office and then they took it to the Hayward store where Coy Hayward, who had entered into the transaction as a buyer, also signed (T. 43, 59, 65, 66).

The contract (defendant's Exhibit 1) contained the following provision:

When buyers receive deed from seller, they agree to convey to Eugene Child the south 45

feet of said tract, by 122 feet east and west, without compensation therefor.

This provision was inserted at plaintiff's direction and with defendant's approval (T. 27, 61, 113, 120 to 122, 156). Eugene Child is plaintiff's son. Plaintiff never disclosed his reasons for wanting to pass the 45 by 122 foot tract to Eugene by this method, although a number of possible reasons appear from the evidence (T. 22, 61, 135).

On April 9, 1958, five days after the parties signed the first memorandum, Aldin Hayward entered into a written agreement with Eugene Child and his wife, for the purchase from them of the 45 x 122 foot tract above referred to, and the rear 21 feet of the Eugene Child lot (T. 29 to 31, 35, 44, 45; defendants' Exhibit 9).

In the latter part of March or early April, 1959, defendants tendered to plaintiff the first annual payment due under the contract, by a check dated March 26, 1959, in the amount of \$580.00. Plaintiff endorsed this check, and it was paid at the defendants' bank on April 1, 1959 (T. 142; defendants' Exhibit 5). Almost 3-1/2 years elapsed between the date the contract was made and the time plaintiff gave notice to rescind (T. 143; plaintiffs' Exhibit C).

## ARGUMENT

### POINT I.

THE QUESTION OF A CONSTRUCTIVE TRUST AND UNDELIVERED GIFT ARE RAISED FOR THE FIRST TIME APPEAL AND CANNOT BE CONSIDERED ON APPEAL.

This Court cannot pass on matters which were not raised in the trial court, but are raised for the first time on appeal. *Huber vs. Deep Creek Irrigation Company*, 6 Utah 2d 15, 305 P.2d 478 (1956); *Pettingill vs. Perkins*, 2 Utah 2d 266, 272 P.2d 185 (1954); *North Salt Lake vs. St. Joseph Water & Irr. co.*, 118 Utah 600, 223 P.2d 577 (1950).

Plaintiff's complaint sets forth 4 causes of action, to wit:

- A. Rescission of the Contract for fraud.
- B. Damages in the alternative to rescission.
- C. Defenition of a boundary line between the property of plaintiff and defendants.

These causes of action were further explained in the pre-trial order, which was prepared by the attorney for the plaintiff (T. 50 to 53). At the trial plaintiff abandoned his forth cause of action.

The questions of constructive trust and undelivered gift were raised at no time until the filing of plaintiff's brief in this Court. These questions, therefore, cannot be considered by this Court.

## POINT II.

**PLAINTIFF FAILED TO PROVE THE ELEMENTS OF ACTIONABLE FRAUD, AND THE TRIAL COURT DID NOT ERR IN GRANTING JUDGMENT FOR THE DEFENDANTS.**

The case of *Stuck vs. Delta Land & Water Company*, 63 Utah 495, 227 Pac. 791 (1924), sets forth the nine basic elements of actionable fraud. They are:

1. A representation.



2. Its falsity.
3. Its materiality
4. The speaker's knowledge of its falsity or ignorance of its truth.
5. His intent that it should be acted upon by the person and in the manner reasonably contemplated.
6. The hearer's ignorance of its falsity.
7. His reliance upon its truth.
8. His right to rely thereon.
9. His consequent and proximate injury.

For further discussion of these principles see *Pace vs. Parrish*, 122 Utah 141, 247 P.2d 273 (1952); *Oberg vs. Sanders*, 111 Utah 507, 184 P.2d 229 (1947); *Auerbach vs. Samuels*, 10 Utah 2d 152, 349 P.2d 1112 (1960).

The party asking for rescission of an executory contract on the basis of fraud must, therefore, show that he was induced to part with some legal right, or was induced to assume some legal liability, which he otherwise would not have done but for the fraudulent representations which induced the making of the contract. 17A C.J. S. *Contracts*, Sec. 418 (1).

Plaintiff has failed to prove a single element of actionable fraud, and did not prove that he parted with a legal right or assumed a legal right.

There was no misleading of plaintiff by defendants. It was plaintiff's own idea to convey the 45 x 122 foot tract to Eugene Child in the manner agreed on (T. 27, 61, 113, 120, 122, 156). Defendants neither said anything

nor did anything to induce plaintiff to part with his land in this fashion. Plaintiff's claim (Complaint R. 2) that defendants "did thereby deprive the plaintiff from an honest and full payment for the tract," and also "of the right to dispose of this tract according to his own desires" is baseless and false.

Plaintiff's disenchantment with the contract apparently arose from the fact that his son, Eugene, spurned his offering, and turned around and sold the tract to the Haywards. His own testimony is susceptible of no other interpretation. On examination by his attorney, he stated that he accepted the first annual payment on the contract and that he refused the second annual payment. When asked by his attorney to tell why he refused the second annual payment, he said it was because he had been deceived, that he had learned something from the development of the project and that it appeared that the 45 x 122 foot tract was going to go to the Haywards (T. 80 to 82). He acknowledged that the construction work which supposedly tipped him off was begun "first thing" after the contract was signed (T. 81), that same spring and summer (T. 141), and he claims that he went to Coy Hayward and told him he wanted to return the \$500.00 and cancel the contract. But he didn't tell Coy Hayward why (T. 82, 99, 100). Yet when the first annual payment was tendered to him some eight months later, he accepted it without protest. He did send Mr. Hammond back to get interest added to the check, but he expressed no other objection (T. 80, 81). His testimony, therefore, that he expressed immed-

iate dissatisfaction with the contract, is wholly unbelievable.

On the strength of plaintiff's agreement to convey the 45 x 122 foot tract to Eugene Child and the knowledge that they could deal with Eugene and Wallace Child, not only on that tract but on other property, defendants have made and carried out their plans and have changed their position. Additionally, they have given consideration to Eugene (T. 183, 184; defendants' Exhibit 4). Plaintiff, on the other hand, has suffered no damage or change of position whatsoever as a result of the transaction between defendants and Eugene Child. He contracted to convey the land to defendants who would then convey to Eugene. They stand ready and willing to do this. Defendants were not to receive any consideration from Eugene for so doing. Nor was plaintiff to receive any consideration from Eugene (T. 144). Further, plaintiff did not intend to retain any control over the property nor exercise any restraint as to what Eugene might do with it. For example from page 144 of the transcript:

Q. Now, Mr. Child, this 45 x 122 foot tract was to have been given to Eugene and not sold to him; is that correct?

A. Yes.

Q. You didn't intend to sell it to him or receive consideration from him for it; did you?

A. No.

Q. And it wasn't your intention to keep control of the property after you gave it to him was it?

A. Why no. I gave him property where his house is. But if conditions developed that it was to his advantage and profit, if he wanted to sell it, of course he could sell it. Yes.

Q. You didn't care what he did with it after he got it; did you?

A. Well, it wasn't my place to tell him what he was to do with it, no. I gave it to him to use it according to his best judgment, as he wanted to.

Q. He was free to do with it as he pleased, then; is that correct?

A. That is correct.

and again at page 149:

Q. Mr. Child, in accordance with your testimony that Eugene was free to do what he wanted with this property, I guess he could have leased it; couldn't he?

A. Yes, after it was his property.

Q. He could have lease it for five years if he wanted to, or three years?

A. Yes.

Q. Or 99 years?

A. Whatever he wanted to do with it.

and at page 150:

Q. I call your attention again, Mr. Child, to your deposition taken on August 9, 1962, page 28, your answer to a question concerning your reason for wanting to rescind this property. It was as follows. Reading from line 15: (reading) "No, that isn't the reason. My reason for wanting to, what do you call it,

rescind that contract is because of the deal they have with Eugene on the 45 feet by 122 feet, which was definitely contrary to my idea and purpose." Now, that was the problem wasn't it?

- A. Well, yes. That is what I have been saying all the time, that it was not according to my ideas concerning the property.

## CONCLUSION

Plaintiff entered into a written contract to sell a parcel of land to defendants for a price. The contract was tailor-made to suit plaintiff. The parcel included a smaller tract which plaintiff wanted defendants to convey, without charge, to his son. Defendants wanted the smaller tract and felt that they could deal with the son and acquire it. They did in fact deal with the son, after making their agreement with the plaintiff.

For reasons not entirely clear, plaintiff gave notice of rescission about 3-1/2 years after the contract was entered into, and then filed suit on the ground of fraud. At the trial plaintiff not only failed to bring forward evidence of all the elements of fraud but failed to prove any single element of fraud.

In looking at the entire transaction as a whole, we have a situation where plaintiff contracted to sell property to defendants, and defendants agreed to re-convey the property to plaintiff's son. Defendants stand ready and willing to do just that. Plaintiff cannot complain if his son thereafter re-conveys the property to defendants.

Respondents therefore respectfully submit that the judgment of the Trial Court should be affirmed and that they should have their costs on appeal.

Respectfully submitted

K. Roger Bean  
John H. Allen

*Attorneys for Respondents*