

1965

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

Utah Supreme Court

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Supreme Court, Utah

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**IN THE SUPREME COURT  
OF THE  
STATE OF UTAH**

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HENRY CHILD,  
*Plaintiff and Appellant*

vs.

COY J. HALWARD and  
ALDIN O. HAYWARD,  
*Defendants and Respondents*

Case No. 9082-

10199

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**BRIEF OF APPELLANT**

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Appeal from the Decree of the  
Second Judicial District Court for Davis County,  
State of Utah  
Before the Honorable Charles G. Cowley, Judge

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**APR 29 1965**

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**STATEMENT OF NATURE OF CASE**

This is an action for rescission, or in the alternative, for the reasonable value of a tract of real property, and determination of a property boundary line based on a uniform real estate contract between the parties.

## DISPOSITION IN LOWER COURT

The case was tried to the Court. From a decree based on a motion for summary judgement on behalf of the Defendants, denying Plaintiff's petition for a rescision and granting to the Defendants a decree in the nature of specific performance, ordering the conveyance of real property which is the subject matter of this action, and determining boundary of real property, the Plaintiff appeals.

## RELIEF SOUGHT ON APPEAL

The Plaintiff seeks a reversal as a Matter of Law of the decision of the trial Court, that the matter be referred to the trial Court for a continued hearing of evidence of the Defendants and that judgement be entered at the time giving due consideration to the points of Law hereinafter set forth.

## STATEMENT OF FACTS

At an undertermined date, but prior to the execution of the uniform real estate contract herein, the Defendants contemplated obtaining land located at the corner of Orchard Drive and Virginia Lane in Davis County, Utah, for the purpose of construction of a market. (T-9, T-10 and T-49) The Defendants have another market in Bountiful, and they contemplated expansion. (T-13) At some time between the conception of their plan and the expansion, they decided to lease to Mayfair Markets. (T-63, T-64) It was in an effort to put together a land block large enough to support a super market that the Defendants entered into the negotiations which resulted in the uniform real estate contract before the Court. (Ex. D-1, T-9, T-10) Sometime in February or March, 1958,

at an undetermined time (T-12), the Defendant Aldin Hayward began to negotiate with the Plaintiff Henry Child for the purpose of purchasing a strip of land located to the east of other land which had been obtained for the purpose above mentioned. (T-11, T-71) Plaintiff Child, during the course of these negotiations, had refused to sell, and had indicated that he had no desire to sell. (T-72, T-156) Then on a certain evening, the date of which is unknown, but probably in March of 1958 (T-78), Aldin Hayward approached the Plaintiff Henry Child, and told him that he had a house to move off the corner near Orchard Drive and that he needed a place to which he might move the house. (T-72, T-73) The Defendant Aldin Hayward asked Plaintiff Child to sell him a piece of ground to which this house might be moved. (T-37, T-38) On this occasion the Plaintiff agreed to a transaction involving a tract of land measuring 122 feet by 209 feet, being rectangularly shaped and being 122 feet east and west and 209 feet north and south. At this time the Plaintiff specifically told the Defendant Aldin Hayward that he would not sell the South 122 feet of this tract, either to the Defendant Aldin Hayward under any circumstances. (T-73, T-73, T-75, T-156) Having come to a tentative agreement, the Plaintiff and the Defendant Aldin Hayward got into the Defendant's automobile and drove to Bountiful where they consulted with Defendant's attorney, Wendell Hammond. (T-26, T-48) Wendell Hammond drafted a memorandum agreement which embodied the general terms as agreed upon by the parties. T-26, T-40, T-41, T-50, T-75) Plaintiff and the Defendant had not gone over the tract on this specific evening when the memorandum was signed. (T-43) At the time the memo-

randum was signed, \$100.00 (Ex. D-2 was paid by Aldin Hayward by check to Henry Child T-15, T-16, T-17, T-25) The date of this meeting has not been established. A copy of the memorandum agreement was never given to the Plaintiff Henry Child, and the Defendant's copy has been reported as lost or destroyed. (T-17, T-43) Defendant Aldin Hayward reports that he never saves his personal checks. (T-43) It was therefore impossible to establish the exact date of the memorandum agreement.

Either simultaneously with the negotiations for the purchase of the Plaintiff's property or shortly thereafter, the Defendants negotiated with Eugene Child, estranged son of the Plaintiff, and obtained an agreement (Ex. D-9) which would eventually give the Defendants the property the Plaintiff had reserved for his son. (T-29, T-30, T-43, T-44, T-60, T-61, T-63 T-66, T-130, T-131)

The date of the document (Ex. D-9) by which Defendants obtained an interest from Eugene Child was placed at April 9, 1958, by the Defendant Hayward. It must be noted, however, that the date is fixed only by a notation at the top of Exhibit D-9 which was made at another time from the time of its execution, and with a different pen. (T-30)

Some weeks after signing the memorandum agreement, a uniform real estate contract was prepared and Plaintiff met with Defendant's attorney, Wendell Hammond, for the purpose of executing that agreement. At that time the Plaintiff was not satisfied with the uniform real estate contract which had been drawn up by Wendell Hammond, counsel for Defendants, and he insisted that a better description be used. (T-27, T-51) The new de-



scription was prepared by Defendant's counsel, Wendell Hammond. (T-59) After which description, the Plaintiff insisted that the words:

"All of this said tract lies west of a line continuing north from the cement wall on the east part of the adjacent Eugene Child tract."

be added to the contract in order to make sure that another survey description would not be used which would place the boundary line far east of the point which would encompass 122 feet actually described. There was also added to the contract, at the request of the Plaintiff Henry Child, the following words:

"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." (T-27, T-60)

The revised contract (Ex. D-1) was then signed by Henry Child and by Aldin Hayward on June 2, 1958. At the same time, a check in the amount of \$400.00 for the balance of the down payment was made payable to Henry Child, Plaintiff. (T-45, T-80) The description finally used on the real estate contract was selected by Wendell Hammond, counsel for Defendants. (T-79) Plaintiff never did refer to boundaries on the ground and Wendell Hammond, Defendant's attorney, provided the terms that the "entire tract being conveyed would lie west of the cement wall marking the eastern boundary of Eugene Child's property." (T-79, T-115, T-116) The Plaintiff alleged at all times that he was selling 122 feet measured from the west boundary of his property to the east.

The Plaintiff Henry Child discussed the reservation of the 45 feet by 122 feet for the use and benefit of his son

Eugene Child with the Defendant Aldin Hayward and with Defendant's counsel, Wendell Hammond, at the time of the Memorandum. It was also discussed two or three times during the preparation of the uniform real estate contract. The reservation was also discussed once when the uniform real estate contract was prepared and not signed and also again at the time of final execution. (T-62, T-64, T-65, T-56, T-170, T-78) During all of these encounters between the Defendants and/or Defendant's counsel and the Plaintiff, all of which were before signature of the final uniform real estate contract entered into, the Defendants never took the trouble to advise Plaintiff of the agreement to purchase the 45 foot by 122 foot tract from Eugene Child. (T-62, T-64, T-65, T-78, T-156, T-66, T-67, T-170) Aldin Hayward testified

Quoting from Page 32 of the Transcript:

Q You knew the contents of the uniform real estate contract?

A It was discussed that evening.

Q You knew about this paragraph which refers to this 45 feet by 122 feet which was to be conveyed to Eugene Child?

A That's right.

Q And you didn't at that time advise Mr. Child that you had arranged to purchase this land from Eugene?

A Mr. Child knew that I was negotiating with this. Mr. Child knows that I tried to get the Child boys and later him to buy the Williams home and move in this area on lots east of Eugene's.

Q Mr. Hayward, you are not being entirely responsive to my question. I have asked you if you in any way made Mr. Harry—Henry Child aware of the existence of this agreement at the time you signed this contract? I think that can be answered yes or no.

A I can say that Mr. Child knew that I was negotiating with these people for all this land before the agreement was signed. I think this was very well understood by him. Well, what I want to ask is how I could move a home up onto there if there wasn't some type of negotiating on it.

Q Mr. Hayward, I am sure you will have an opportunity to explain everything that your attorneys will want to bring out in this case. At the present time, I would like to ask you to restrict your answers to that which is in response to the question. I would like to ask you again whether or not at the time this uniform real estate contract was signed, you in any way made Mr. Henry Child aware that you had negotiated an agreement with Eugene Child to take that land?

A Yes, I think Mr. Child knew that we were negotiating on this land.

(Recess)

Q Mr. Hayward, at the time you signed the uniform real estate contract, had you advised Mr. Henry Child, the Plaintiff, that you had entered into an agreement to purchase this 45 by 122 foot tract from Eugene Child?

THE COURT: You can answer it yes or no.

A Let me say that I think that his son—he was living with his son Brandt, and Brandt was go-

ing back and forth with Eugene and Wallie. And I rather think that if there was any discussions in advance or so, that he knew everything that went on.

MR. PACE: You Honor, I will ask to have the witness instructed to answer the question yes or no.

THE COURT: Yes. You can answer the question yes or no.

A I don't know.

Further, Mr. Hammond, Defendant's attorney, testified concerning the paragraph with respect to the 45 by 122 foot tract of land as is found on Page 60 of the Record as follows:

Q Now I presume that this paragraph was put in this contract under direction in your office?

A I did it myself.

Q Could you tell me, Mr. Hammond, who it was that instructed you that this paragraph or a similar paragraph should be included in the contract?

A Well, my recollection is this. That we discussed it. We discussed it more than once in regard to a variety of things in that regard. And it's my recollection that that was just agreed upon between the parties. That is, Aldin Hayward and Harry Child. That that was what was understood. So I put it in according to their instructions. It was something—I don't think Harry directed it at all. It was just agreed between them that that would be done, so I inserted it like that.

Wendell Hammond, counsel for Defendants again testified as found on page 66 and 67 of the record:

Q And so am I correct then that all three parties were present when it was signed—Coy Hayward, Aldin Hayward and Henry Child?

A Yes. But not all signing at the same time. But when it was finalized, they were all present.

Q Had Harry signed previous to this?

A Yes. That's my recollection.

Q And then it was taken down and Coy Hayward and Aldin Hayward together in your presence and in Mr. Child's presence then signed the contract; is that correct?

A Yes, when Mr. Child was given the payment there.

Q Do you recall as they signed this contract or any time in your negotiations in getting it signed, do you recall whether or not either one of the Haywards advised Mr. Child that they had a contract to purchase this land from Eugene Child?

A It wasn't a point that came up.

Q They didn't volunteer this information?

A It wasn't a point that came up whatsoever, as I recall.

Q Was it ever mentioned to your knowledge in any of the negotiations in which you were present with the Haywards and Mr. Child?

A Well, I knew of it and talked to Harry about it.

Q Yes?

A I don't recall when first I did, though.

Q Is it your testimony that you talked to Mr. Child about the agreement that the Haywards had with Eugene Child; is that correct?

A Well, just what do you mean by that?

Q Well, I am referring to this. You just mentioned, Mr. Hammond, and I am just trying to get this clear. You just mentioned that you knew about the existence of this contract?

A Yes.

Q And you mentioned that you had discussed it with Harry Child?

A Yes.

Q I was wondering, did you—was this discussed with Harry Child before or after signing these contract?

A Well, I really don't recall. You see there is quite a bit of time elapsed when we signed that memorandum and when the other was finally signed—several weeks elapsed.

Q Wouldn't it be true that the first time you discussed it with Harry Child was when he came into your office and brought the matter up, when he had somehow obtained the information about this contract?

A It might have been because I thought then that all that Harry wanted was for Gene to have this so he could make up for what had happened between them before, and I just somehow took that for granted that he just wanted

to make up in some way for things that had happened before in their troubles.

Plaintiff Henry Child testified referring to the time of the final execution of the contract, as found on Page 170 of the record:

Q All right, Mr. Child, at any time, did either Coy Hayward or Aldin Hayward tell you they were negotiating to purchase that 45 by 122 foot strip of land?

A No.

On March 26, 1959, an additional payment of \$580.00 was made to Plaintiff Henry Child by Coy Hayward as the first anniversary payment on the contract. (T-80, T-81, T-142, T-143) Plaintiff Henry Child stated that at that time he accepted the first anniversary payment but had some misgivings about whether or not the contract was being honored by the Defendants. (T-80, T-81, T-168) because he had noticed that the Defendant had not moved a house onto the property which he indicated was his purpose for the purchase. (T-82, T-140, T-141) Not long after the first anniversary payment was made, the Plaintiff noticed that excavation work was being done on that portion of real property which he had reserved in the uniform real estate contract for delivery to his son. (T-82, T-141) He noticed that there was some excavation work being done and that a water pipe was being moved from that property. (T-82) At this time he approached Mr. Coy Hayward at his store and told him that what was being



done with his property was not according to the agreement at all and that he wanted to return the money paid and take the property back. (T-99) He was told that if he had any complaints he should go to the attorney of the Defendants. Plaintiff did go to Defendant's attorney, Wendell Hammond. (T-100) On that occasion and on subsequent occasions on which attorney Wendell Hammond and Plaintiff Henry Child talked, they discussed the agreements of the Haywards to convey the 122 by 45 foot tract to Eugene Child. Wendell Hammond indicated that this might have been the first time the matter of the purchase from Eugene Child was discussed with the Plaintiff. This time being when the Plaintiff came into his office after having evidenced his dissatisfaction at the handling of the property. (T-67) As is pointed out above, at no time prior to the final execution of the uniform real estate contract did attorney Wendell Hammond indicate that he had mentioned to the Plaintiff that the Defendants Hayward had in fact obtained a contract between themselves and Plaintiff's son, Eugene Child, to buy the tract measuring 45 by 122 feet from Eugene Child. Although Aldin Hayward claims that Henry Child, the Plaintiff, knew that the Haywards were negotiating with all property holders in the area. Henry Child was never directly told by the Defendants of their attorney that they intended to purchase this property from Plaintiff's son, Eugene Child. (T-62, T-64, T-65, T-66, T-67, T-32, T-170) And that they in fact had entered into negotiations with Eugene Child and had obtained prior to the signing of the uniform real estate contract the document known as Defendant's Exhibit 9. (T-104)



Grant Nielsen testified as an appraiser that the value of the 122 by 209 foot tract was in the amount of \$13,000.00 in 1958. (T-86) He also stated that this figure was arrived at based on a value of 50c per square foot. (T-98)

The Plaintiff appeals from the judgement of the Court requiring specific performance of the uniform real estate contract and determining the eastern boundary of the property to be an extension of the cement wall forming the east boundary of the Eugene Child tract.

## ARGUMENT

### Point 1.

THE COURT ERRED IN DENYING THE PLAINTIFF A DECREE OF RESCISION OR COMPENSATION FOR THE 45 BY 122 FOOT TRACT OF LAND.

A. FACTS PRESENTLY BEFORE THE COURT SHOW A CONSTRUCTIVE MISREPRESENTATION UPON WHICH A RESCISION MAY BE BASED.

B. FACTS BEFORE THE COURT SHOW THE CREATION OF A CONSTRUCTIVE TRUST IMPLIED BY LAW FOR THE BENEFIT OF THE PLAINTIFF.

C. FACTS BEFORE THE COURT SHOW AN INCOMPLETE AND UNDELIVERED GIFT FROM THE PLAINTIFF TO THE PLAINTIFF'S SON, WHICH GIFT IS STILL UNDER THE CONTROL OF THE PLAINTIFF AND SUBJECT TO PLAINTIFF'S WITHDRAWAL.

A. FACTS PRESENTLY BEFORE THE COURT SHOW A CONSTRUCTIVE MISREPRESENTATION UPON WHICH A RESCISION MAY BE BASED.

In this case the Defendants rely upon the existence of a memorandum and check showing an original agreement existing between the Defendants and the Plaintiff, presumably dated on the 4th day of April, 1958, the date of April 4th being determined by the anniversary date of the contract. This date is important to the Defendants because it shows an execution of a memorandum agreement prior to the date of April 9, 1958, which is the date of the Defendant's agreement with Eugene Child. Although the memorandum should have been in the possession of the Defendants and the check by which payments was made to the Plaintiff on the same date should have been in the possession of the Defendants, and although the same was requested by the Plaintiff to be presented in Court for examination of counsel and the Court, the same was not presented, it being alleged that said documents were lost. Even so, it is obvious that the complex being put together on Orchard Drive and Virginia Lane was a complex of property which to be functional would have to be composed as a unit. Any portion of the unit which was not obtained would substantially lessen the value of the entire property. There is no question but that the 45 foot by 122 foot tract was important to the Defendants. It can therefore be assumed that when Aldin Hayward approached the Plaintiff Henry Child at his residence to negotiate the purchase of the tract of land measuring 122 feet by 209 feet, he did so with the intent of purchasing the entire tract. Plaintiff Henry Child maintained continually that he would not sell the south 45 by 122 feet to the Defendants. With this knowledge in mind, the Defendants nevertheless negotiated a preliminary memorandum on April 4th, a uniform real estate

contract which was changed at the request of the Plaintiff, and finally a uniform real estate contract which specifically set out the obligation of the Defendants to deliver a certain tract of real property to Eugene Child, the son of the Plaintiff. It is significant that there is in evidence an agreement ostensibly dated the 9th of April, 1958, between Eugene Child and his wife, Armilla P. Child, and the Defendants, by which Eugene Child and his wife agree to convey the 122 feet by 45 feet south tract of land to the Defendants. It is also significant that the Plaintiff had various discussions with counsel for the Defendants and with the Defendants down to and including the time of the final contract which was executed, only one of these conversations was held prior to the execution of the agreement of sale with Eugene Child. *Nevertheless, there is no evidence any place in the record where it is alleged that either of the Defendants or counsel for the Defendants took the time or the trouble to tell the Plaintiff Henry Child about the agreement with Eugene Child before the final execution of the contract.*

On page 66 of the record the occasion when the contract between Henry Child and the Defendants was finally executed was related, and Wendell Hammond indicates that Coy Hayward had several questions in regard to the contract "because Coy was very particular. He wanted to be sure that it was just as intended and asked questions, and then he signed, yes."

Nevertheless, even though Coy Hayward was very particular about many provisions of the contract, there is no evidence in the record to indicate that the subject of an agreement with Eugene Child was ever mentioned

to the Plaintiff Henry Child before the contract was signed.

This Court has previously discussed the elements of fraud. In the case of Pace, etal, vs. Parrish, etal, (1952 122 Utah 141) (247 Pacific 2nd 273) the Court specifically states:

“This action being in deceit, based on fraudulent misrepresentations, the burden was upon the Plaintiff to prove all of the essential elements thereof. These are: (1) that a representation was made, (2) concerning a presently existing material fact (3) which was false, (4) which the representor either (a) knew to be false or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation (5) for the purpose of inducing the other party to act upon it; (6) that the other party acting reasonably and in ignorance of its falsity (7) did in fact rely upon it and (8) was thereby induced to act (9) to his injury and damage.”

In argument before the Lower Court, Defendants made much of the necessity of an overt act of misrepresentation. A misrepresentation can be by act, by omission, or by withholding information where it should in good conscience be given.

In American Jurisprudence, Vol. 23 Fraud and Deceit, Sec. 24, the general rule is stated:

“Representation may be made orally, by writing, or by acts and conduct and arts and artifices calculated to deceive... in short each party to a transaction must take care not to say or do anything tending to impose upon the other and the mode

of falsely representing a matter of fact is immaterial."

The rule has been specifically applied in *Regan vs. First National Bank*, an Arizona case of 1940 (101 Pacific 2nd 214) (55 Arizona 320), in which it was stated:

"When one under duty to disclose facts to another fails to do so, and the other is injured thereby, an action in Court lies against a party whose failure to perform his duty caused the injury."

Also in *Stuart vs. Phoenix National Bank* (62 Pacific 2nd 101) (39 ALR 334 1937) it was stated:

"Where relation of trust or confidence exists between two parties so that one places peculiar reliance in trustworthiness of another, the latter is under a duty to make full and complete disclosure of all material facts and is liable for misrepresentation or concealment."

In the instant case, the Defendant Aldin Hayward was told many times by the Plaintiff that he would not convey the south 122 by 45 feet of land. The Defendant knew that it was not the intention of the Plaintiff to part with that land to the Defendants. The Defendants were made an agent of the Plaintiff for the purpose of the delivery of that land to his son. At the time the uniform real estate contract was entered into, which contract is dated some time in May, 1958, the agreement evidenced by Defendant's Exhibit 9 between the Defendants and Eugene Child, son of Henry Child, was already in existence. For the Defendants to execute the uniform real estate contract with the requirement of conveyance clause in it was a tacit admission and agreement to perform a task which at that time was impossible of perform-



ance because of the agreement in existence between the Defendants and Eugene Child. This misrepresentation was material because without the misrepresentation, Henry Child would not have entered into the sale agreement. The Defendant intended that the Plaintiff should act upon their representation. It is obvious that the Defendants were striving to put together a complex of real property in an area where a large super market might be constructed. All of the representations made by the Defendants were made for the purpose of obtaining the contract which they have in their possession. Plaintiff relied on the representation made in the contract by the Defendants; he had the right to rely upon it; he had no reason but to believe it; and he was injured in that he was deprived of the right to dispose of his property according to his own desires. Under the circumstances, to allow the Defendants to have the benefit of their own wrongdoing would be inequitable and not in accordance with the Law.

#### B. FACTS BEFORE THE COURT SHOW THE CREATION OF A CONSTRUCTIVE TRUST IMPLIED BY LAW FOR THE BENEFIT OF THE PLAINTIFF.

“Where a special relationship exists between the parties, a constructive trust will be created. A constructive trust is a trust created by the operation of Law which arises contrary to intention against one who by fraud, actual or constructive, by duress or abuse of confidence or commission of wrong or any form of unconscienable conduct, artifice, concealment or questionable means, or who in any way against equity and good conscience has obtained or holds right to property which he ought not, in equity and good conscience hold and enjoy. This question is raised by equity to

satisfy the demands of justice. A breach of confidence, rendering an acquisition of property by one person unconscienable against another, raises a constructive trust."

(American Jurisprudence Vol. 54 Trusts Sec. 218)

In *Renshaw vs. Tracy Loan and Trust Co.* (1935) (87 Utah 364) (49 Pacific 2nd 403) the Court states that: "It is the confidential relationship plus the abuse of the confidence thus imposed that authorizes equity to construct a trust for the benefit of the party whose confidence has been abused."

The Court further states:

"It is true that upon any establishment of certain fiduciary relationships and transactions between the parties to that relationship equity will presume fraud, the abuse of confidence and place the burden of proving good faith and fairness upon the dominant party in the relationship."

*Oklahoma case, Rees vs. Bruscoe* (1957 (315 Pacific 2nd 758) states:

"A fiduciary relationship exists in all cases where there has been a special confidence reposed in one who in equity is bound to act in good faith and with due regard to interest of one reposing the confidence. It arises wherever the trust is specially reposed in skill or integrity of another, extends to every possible case in which there is a confidence reposed in one side and resulting domination or influence on the other, and origin of confidence and source of influence is immaterial."

American Jurisprudence Vol. 54 Sec. 225 seems to state the general rule:

“An abuse of confidence rendering the acquisition or retention of property by one person unconscionable against another suffices generally to ground equitable relief in the form of a declaration and enforcement of a constructive trust and the Courts are careful not to limit the rule or the scope of its application by a narrow definition, of fiduciary or confidential relationships protected by it.”

The Defendants, by virtue of their being selected and requested to hold and make conveyance at a future date to the party selected by the Plaintiff would normally be prohibited from personal traffic in the trust estate, and a trustee is under a duty to refrain from the private application or appropriation of trust property or funds. A trustee is at all times disabled from obtaining any personal benefit, advantage, gain or profit out of his administration of a trust, his dealing with the trust property or his relationship with the trust estate. Nothing in the Law of fiduciary trusts is better settled than that a trustee shall not be allowed to effect an advantage in dealing with the trust estate. Lack of any fraud on the part of the trustee will not validate a transaction having the effect of making for himself a profit out of the trust estate. (American Jurisprudence Vol. 54 Sec. 313)

Even in the event of the failure of the Courts to find that there was actionable fraud as set forth in Argument No. 1, there is such a confidential relationship and reliance on the part of the Plaintiff on the Defendants as to cause the formation of a constructive trust. The De-



fendants, then, as trustees of the property which they took to convey to the Plaintiff's son were then prohibited from dealing in the property which they held as trustees. In the event the son of the Plaintiff, Eugene Child, did not take the property, or for some reason had become unable to take the property, the trust would fail, and by Law would then revert to the Plaintiff or the Donor, certainly the Defendants who had an interest in acquiring the property and were actively pursuing that interest and had entered into an agreement with Eugene Child before executing the final uniform real estate contract. On a number of occasions Defendants of their counsel could have advised the Plaintiff of their completed negotiations with his son. In view of their knowledge of his stated purpose, the property constituting a gift to his son, the failure to disclose on the part of the Defendants can only be viewed as a deliberate statagem to obtain title to land that could not otherwise be obtained.

**C. FACTS BEFORE THE COURT SHOW AN INCOMPLETE AND UNDELIVERED GIFT FROM THE PLAINTIFF TO THE PLAINTIFF'S SON, WHICH GIFT IS STILL UNDER THE CONTROL OF THE PLAINTIFF AND SUBJECT TO PLAINTIFF'S WITHDRAWAL.**

The Court erred in granting a Decree of specific performance covering the tract of land not being purchased by the Defendants. By admission of all the parties in the present action ,the Defendants were purchasing for their own use and benefit, and had paid consideration for, only the property measuring 122 feet by 164 feet. The tract measuring 45 feet by 122 feet was included in the description with instructions from the Plaintiff that the same

should be delivered to his son at the time a deed was made. It is the contention of the Plaintiff that such a transaction constitutes the Defendant an agent for and in behalf of the Plaintiff for the purpose of carrying out Plaintiff's instructions. Instructions were set out on the uniform real estate contract as follows:

“When Buyers receive Deed from the Seller, they agree to convey to Eugene Child the south 45 feet of the said tract by 122 feet east and west without compensation therefor.”

Until and unless the agent has performed the function of delivering the gift to Eugene Child, the agency, by definition, may be revoked and canceled. The agent has not been able to effect the gift because the agent has not received a conveyance of the property from the Plaintiff.

In *re Galinger's Estate* 1948 (199 Pacific 2nd 575) 31 The Court further stated:

“A gift will not be presumed, but Donor's intention to make gift must be proved by clear, convincing strong and satisfactory evidence, and delivery of property must be as perfect as the nature of property and surroundings of parties will reasonably permit.”

The Court further stated:

“Gifts *intervivos* and *causa mortis* must be fully executed and there must be intention to transfer title to property, delivery by Donor and acceptance by Donor.”

In *Thatcher vs. Merriam*, 1952 a Utah case, (240 Pacific 2nd 266) 121 Utah 191) the Court stated:

“The Courts have quite generally held that where there is an assignment or conveyance in writing that is delivered to the Donor, that the gift is not defeated because the gift remains in possession of the Donor. It must be remembered that as between Donee and Donor it is not necessary to the validity of a gift, if made by a written instrument transferring title to the Donee, that possession of the property also be delivered to the Donee.”

It will be noted, however, that the Court makes the distinction in this landmark Utah case between those cases wherein the Donor deals directly with the Donee. In the instant case at hand, we have a contract between the Defendants and the Plaintiff, and by virtue of this contract, the Defendants are required to do certain things, at some future date, and there is no delivery to the Donee, nor is there delivery by the Donor to the Donee of any written instrument allowing or giving claim to the Donee of the property hereunder discussion.

In the case of *Thatcher vs. Merriam* and similar cases annotated in 63 ALR 537 it is stated as follows:

“It is almost universally held that a gift by instrument in writing is good without a delivery of the property where the instrument is a deed or an absolute conveyance.”

The annotation goes on to state that in connection with instruments of gift that are not deeds, the question of whether delivery of the property is necessary is not easy of solution, and further, it is generally held where the paper is neither a deed, a sealed instrument nor a formal instrument purporting to pass title, but is only an in-

formal instrument, that it is insufficient to constitute a gift without the delivery of the property. It is also significant to note that the annotation concerns itself with the transactions directly between the Donor and Donee. In the instant case, the Donor and Donee have made no contact one with another, and one reason that the Donor allowed the instant contract to be drawn up was in order to have the property eventually given to his son in a circuitous route because of bad feelings between the father (Plaintiff) and son. In the instant case, the Defendant can only be considered as agent and agents of the Plaintiff. The Plaintiff may terminate the agency at will. Neither the Defendants nor the Donee have the right at Law to force the conveyance of the 45 by 122 foot strip of property, and until said portion of property is actually conveyed and the gift delivered and completed, the Plaintiff has the right to withdraw his gift and appropriate it to some other purpose. The decision of the Court granting specific performance deprives the Plaintiff of this right.

Respectfully submitted,

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