

1977

Marion W. Beckstrom v. Vere Beckstrom and Norman Laub : Appellant's Reply Brief

Utah Supreme Court

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J. MacArthur Wright; Attorney for Appellant;

Borris & Bishop; Attorneys for Appellant; Allen, Thompson, Hughes & Behle; Attorneys for Respondent;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MARION W. BECKSTROM,
Plaintiff and Respondent,

vs.

VERE BECKSTROM and NORMAND LAUB,
Defendants and Appellant,

NORMAND D. LAUB and BARBARA R. LAUB,

Cross Plaintiffs and
Appellants,

vs.

VERE BECKSTROM and ELIZABETH S.
BECKSTROM,

Cross Defendants and
Respondents.

No. 15273

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Fifth
District Court for Washington County
Hon. Don V. Tibbs, Judge

J. MacArthur Wright
P. O. Box 339
75 North 100 East
St. George, Utah 84770
Attorney for Appellant, Beckstrom

Morris & Bishop
P. O. Box 279
Cedar City, Utah 84720
Attorneys for Appellant, Laub

FILED

Allen, Thompson, Hughes & Behle
148 East Tabernacle

St. George, Utah 84770
Attorneys for Respondent

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This Brief is a reply to the Brief submitted by Cross-Respondant, MARION W. BECKSTROM, and is restricted to the issues raised in the appeal before the Honorable Court between MARION BECKSTROM and VERE BECKSTROM, and not the appeal between Cross-Plaintiffs and Appellants, NORMAND D. LAUB and BARBARA LAUB, and Cross-Defendants and Respondants VERE BECKSTROM and ELIZABETH S. BECKSTROM.

Plaintiff and Cross-Respondant, MARION BECKSTROM, hereinafter sometimes referred to as "MARION", states on page 5 of his Brief that the Cross-Appellant, VERE BECKSTROM, hereinafter sometimes referred to as "VERE", used oxymoronic logic in stating in his initial Brief: "It was not until MARION had abandoned both the Lewis property and the Hunt property that he made any payment whatever on the mortgage or on taxes."

The Court will recognize that the significance of that observation was that MARION did not worry about paying any of the mortgage payments while his brother, VERE, was doing so. However, since the mortgage was actually on the Pine Valley property, which had been used as the security to borrow the money to purchase the Hunt property, and was not on the Hunt property when he, MARION, abandoned the Hunt property, he was only concerned with making the final mortgage payment for the purpose of preserving the Pine Valley property, not the Hunt property.

That was simply one additional circumstance

evidencing MARION's abandonment of the Hunt property. Even though he denied that was his only motivation in the trial, circumstances are more persuasive that he was then only concerned with preserving the Pine Valley property for himself. He was giving up any interest he may have claimed in the Hunt property, and he was obviously concerned that VERE, under those circumstances, might not continue to pay the payments on the Pine Valley mortgage, so he paid the final payment on it.

MARION's Brief, page 5, states that that payment was made directly to RODNEY SNOW, the mortgagee of the Hunt property. Though SNOW had loaned the money to buy the Hunt property, his mortgage, as security for the loan, was on the Pine Valley property, not the Hunt property. (Tr. P54, LL21-26)

Cross-Appellant is greatly concerned about a practice engaged in by Cross-Respondant in his Brief before this Court. MARION, in his Brief before this Court often cites from depositions of either MARION BECKSTROM or VERE BECKSTROM to support statements of alleged fact. However, even though the deposition may have been "published" during the trial, the only portions thereof that were evidence before the Trial Court, or for that matter, this Court, were those specific items, if any, which were read into the record at the trial from the deposition, either over the objections of opposing parties, or without objection of the

opposing parties.

If an entire desposition were simply and arbitrarily admitted in its entirety, as evidence in a trial, because of the liberal discovery rules applicable to depositions, and the customary waiver of all objections, except as to the form of the question until the trial, havoc would be wreaked upon the rules of evidence insofar as admissibility is concerned.

Cross-Appellant respectfully and strenuously submits that the liberal and repeated use of citations to depositions by the Cross-Respondant in his Brief, is improper and any fact sought to be established by such a citation in Cross-Respondant's Brief should be disregarded in its entirety by the Court, unless the specific question and answer was read into and admitted into the record by the Trial Court. Cross-Appellant submits that few, if any, questions and answers were read into the trial record, and even then, if it were done, the proper citation by Cross-Respondant should be to the trial record, not the deposition.

Cross-Appellant submits that Cross-Respondant's use of great numbers of "facts" not substantiated by references to the transcript, but by citation to said depositions, tends to taint the entire Brief of Cross-Respondant.

Point II of Cross-Respondant's Brief is entitled

"THE TRIAL COURT'S FINDINGS ARE AMPLY SUPPORTED BY THE RECORD", yet the "record" used by Cross-Respondant is not the record admitted in the trial and lends a sandy foundation to the Cross-Respondant's conclusions in the entire Brief, and especially sections labelled Point II, Point III and Point IV.

Cross-Appellant is also concerned about the accuracy of many of Cross-Respondant's citations. For example, on page 10 of Cross-Respondant's brief, he states that MARION and his wife continued to approach VERE with offers (to buy the Hunt property) from third parties, but the only credible citation to support that statement is found in the transcript on page 38, lines 5-10, that is simply a statement by MARION's wife, wherein she said she had talked with a "Mr. Gardner" whom she reported, wanted to buy the property. That is hardly the kind of "offer" one might place great dependence upon.

Cross-Respondant also cites transcript, page 52, lines 24-26 as authority for the statement that MARION presented offers to purchase the Hunt property to VERE. However, in reading the transcript, it is evident that that was not the fact at all. Counsel for Cross-Respondant asked VERE BECKSTROM if MARION had not told him a JOE ROMERO wanted to purchase the Hunt property? VERE's answer was clearly that ROMERO was represented to him by MARION as wanting

the "Lewis" property and not the "Hunt" property (See transcript, page 52, lines 27-30 and page 53, lines 1-15). Counsel for MARION BECKSTROM continuously but unsuccessfully attempted to badger VERE BECKSTROM into saying the alleged offer was for the Hunt property, but he unwaiveringly insisted it was for the Lewis property. Counsel may have wanted him to say it was for the Hunt property, but he did not do so.

Cross-Respondant's Brief also cited the transcript, page 77, lines 1-4 as support for his assertion that MARION had transmitted offers to sell the Hunt property to his brother, VERE. As a matter of record, that very citation from the transcript refers only to a statement purportedly made by MARION that "---he would like to sell the property---" not that he had an offer by anyone to buy it. Cross-Appellant cites these instances as examples to the Court of the unreliability of some of the citations in Cross-Respondant's Brief. They, together with the use of improper citations of "evidence", which, in fact, was not admitted in the trial, raises grave questions concerning the credibility of the Cross-Respondant's Brief.

The statement previously cited from Cross-Respondant's Brief, that "---MARION and his wife continued to approach VERE with offers from third parties (Cross-Respondant's Brief, page 10) turns out to be a single casual telephone

all from MARION's wife. That statement is both not substantiated by the record and is misleading.

Another example of misinterpretation of the record, and evidence found therein in Cross-Respondant's Brief, is found in the first paragraph of page 12 of his Brief. Cross-Respondant there states: "Another contradiction in his (VERE's) testimony as to the conversation is evidenced by the statement in his Affidavit (Affidavit in Opposition to Motion for Partial Summary Judgment, paragraph 11, Record 92). [Again, the Cross-Respondant cites a document that was not part of the trial transcript or evidence therein] that the conversation wherein MARION disclaimed his interest, took place in Pine Valley. At trial, of course, he maintained the conversation took place at Pickett's, a store in St. George." This observation was intended, of course, to discredit VERE BECKSTROM, the witness, who, as the record shows, had suffered a stroke (Tr. P63, LL1-8) and was hard of hearing (Tr. P42, LL14-19).

The true facts, as revealed by the record, however, are that during the trial VERE BECKSTROM did indeed testify that one conversation referred to took place in front of Pickett's in St. George, as the Cross-Respondant points out. Though the Affidavit referred to by Cross-Respondant is not a part of the trial record, Cross-Respondant has referred to it in an attempt to discredit VERE.

Equity and justice demand that the issue be clarified, and though VERE did state in the Affidavit as Cross-Respondant contends, that MARION made a visit to him at Pine Valley. It also states in Paragraph 13 thereof as follows:

"13. That thereafter in 1959, Affiant (VERE BECKSTROM), while on his way to the Courthouse (in St. George) to pay taxes on the Washington County property, happened to meet MARION in St. George, Utah and asked him to help pay the taxes on the Hunt Property in Iron County and MARION refused to do so; that Affiant said that if the taxes were not paid on the property, it would be taken 'by the State' and that MARION said, 'Let the State sell it, I am not putting anything more into it.'"

That is not a contradiction as the Cross-Respondant represented it was, and would lead the Court to believe, but, in fact, just the opposite!

Cross-Respondant's Point III, commencing on page 13 of his Brief, goes to great lengths to establish that one co-tenant cannot normally claim property from his co-tenant by adverse possession. He somehow tries to equate that principal, even if it is the law, with the estoppel theory here urged by Cross-Appellant. He states the acts relied on to create an estoppel were insufficient because "they (the acts of VERE) were not adverse to MARION's claim or interest in the property." (Cross-Respondant's Brief, P. 14, LL7-8) That observation is little more than a "Red Herring".

Cross-Respondant misconstrues the meaning of an

estoppel. An estoppel does not arise out of the acts or words of one claiming the benefit of it. Black's Law Dictionary, in defining Equitable Estoppel quotes from Crane Co. of Minnesota v. Advance Plumbing & Heating Co., 177 Minn. 132, 224 N.W., 847, 848 and says:

"Elements of equitable estoppel are representations intentionally made under such circumstances as show that [the] party making them intended, or might reasonably have anticipated, that [the] party to whom they are made, or to whom they are communicated, will rely and act on them as true."

Thus, the acts in the instant case which are of significance, are those acts or statements of MARION's, and not statements or acts of VERE's, which were "adverse to MARION's claim or interest in the property."

Adverse possession is not urged by Cross-Appellant and is not the theory upon which it urges this Court to reverse the Trial Court's decision!

In support of his attempt to divert the attention of the Court from the true issue involved, Cross-Respondant cites certain cases:

Sperry v. Tolley , 114 Utah 303, 199 P 2d 542, cited by Cross-Respondant, merely says that the conduct of the parties over the years did not evidence an intent to partition the premises. This, of course, has no relationship to an Estoppel in Pais or Equitable Estoppel as urged upon the Court by Cross-Appellant.

Cross-Respondant also cites Chatworthy v. Clyde, 1 Utah 2d 251, 265 P.2d 420, but again, that case deals with the principal of adverse possession by co-tenants, not Equitable Estoppel. The Court, in that case, in fact, held contrary to Cross-Respondant's assertion that given proper acts showing open notorious and adverse possession by one co-tenant against another co-tenant, adverse possession may apply even to co-tenants. However, again, Cross-Appellant is not claiming adverse possession by VERE against MARION.

Adverse possession has nothing to do with the real issue in this case!

Heiselt v. Heiselt, 10 Utah 2d., 126, 349 P.2d 175 again cited by Cross-Respondant, merely said that there was not the necessary elements to establish adverse Possession between co-tenants.

Again, on page 16 of Cross-Respondant's Brief, he misconstrues the nature of Equitable Estoppel when he says: "Clearly, VERE's continued payment of the taxes is not adverse to MARION, and does not constitute a basis of estopping Mation (sic) from asserting his claim as a co-tenant."

It is not the act of VERE in paying taxes that estops MARION; it is MARION's various statements to VERE that he wanted nothing more to do with the property, and would as soon see the property go to the State (County) on a tax sale as pay any tax on it, and, as supported by his letting VERE

pay all the taxes and proceed thereafter as if he, VERE, were the sole owner, without any objection or act directed to disabuse VERE of that supposition or belief, which caused VERE, in reliance thereupon to act to his detriment, and which are the acts of estoppel invoked by Cross-Appellant in this case.

The true nature of an Equitable Estoppel is that MARION, after he has made statements and done acts calculated, and which he knew VERE would rely upon, may not, after that reliance, deny them or attempt to retract them.

Equitable Estoppel has nothing to do with Adverse Possession nor or any of Cross-Defendant's other cases cited in his section on Point III, Manzy v. Wilson, 131 S.E.2d 389, Atlantic Refining Company v. Golson, 127 S02d 341, Bevan v. Shelton, 469 P.2d 245 and Fleisher v. Terber, 259 N.Y. 60, 181 N. E. 14, any more in point than the previous cases.

Manzy Supra deals with a decedent who had attempted to convey to one daughter the entire interest in a parcel of land in which he only owned a half interest. The Court held the other co-tenant was not "Estopped" from claiming her interest in the property simply because a probate of the decedent's estate had occurred and she had not objected to the probate for a period of seventeen years. Implicit in that ruling is the recognition of the fact that she herself had done nothing affirmatively to cause the decedent, or the

daughter to whom he had attempted to convey the entire parcel, to rely upon her, the co-tenant's, acts.

The Bevin case Supra deals with a co-tenant, who was in possession of the property and failed to pay taxes upon it, as was his responsibility, both legally and morally according to the Court, thereby allowing the property to be put up for sale at a tax sale by the County, then buying it himself, in an obvious scheme to deprive his co-tenant of his interest in the property.

The Court said he could not do that, but again, this was not a case remotely connected with the principal of "Equitable Estoppel."

The Court in the Bevin case did make one sage observation very applicable to the instant case. Quoting from Burnet v. Cole, 193 Okla. 25, 140 P.2d 1015, the Court said:

"Defendant contends that he owed Plaintiff no duty to pay the taxes on the mineral estate. The the right to acquire a tax title against another does not always rest on the question of whether a duty is owed to such other person. Defendant at least had a duty to pay his own taxes and a question is whether he may profit by neglecting his own duty."

In the present case, it would not appear that MARIC should refuse to pay his taxes, or even a share of them, then later profit from that refusal, after VERE had paid them.

The Atlantic Refining case Supra, again simply reiterates that one co-tenant cannot divest other co-tenants

by letting property go to a tax sale and then buy it himself. Again, certainly not even close to being in point with the current case.

The Fleischer case, Supra is much related to the Bevan and Atlantic cases, except that the scheme used therein was to fail to pay the mortgage payments, then buy at the foreclosure sale. Certainly that is no more in point with the instant case, than the previous cases cited.

Cross-Respondant's Point IV in his Brief, page 17, finally deals with the principal and substantive issue involved in this case, but unfortunately upon a somewhat misconstrued or misleading basis. For example, Cross-Respondant, on page 17 of his Brief, attempts to draw two distinctions therein:

"1. Estoppel to assert title to realty is more difficult to establish than estoppel to assert rights under a contract not dealing with real estate.

"2. Estoppel to assert title to realty is different than estoppel to divest title to realty,"

and then proceeds to state that Cross-Defendant has "entirely ignored" these distinctions.

To support this thesis, Cross-Respondant generalizes as to distinction No. 1 above, but cites no authority, then cites, to support his distinction No. 2, 31 C.J.S. Estoppel 150 and 28 Am Jur 2d, "Estoppel and Waiver §81 and proceeds to comment further:

"The distinction is between the rights of one who has not yet established a legally recognized interest in realty who seeks to assert title, and one who already has legally recognized rights in realty from which rights are to be effectually divested."

The Cross-Respondant, to support that premise, quoted from 31 C.J.S., Estoppel §150, but he skipped over the extremely important and significant statement: "...a person may, by his acts or conduct, preclude himself, on clear and satisfactory grounds of justice and equity, from asserting his title to or interest in land...." (clearly a case of divesting oneself of his title). Cross-Respondant quotes a portion of that same section that follows:

"There is considerable diversity of state-ment as to whether title to land can be divested by an estoppel in pais, some decisions declaring broadly that it can be so divested or transferred.... On the other hand, other decisions hold that title to realty cannot be divested or conveyed by estoppel." 31 C.J.S. , Estoppel §150 (1964).

That much of the quotation, as provided by Cross-Respondant, indeed supports as much as it denigrates the principal that title might be divested by an Estoppel in Pais, merely noting that Courts have disagreed. However, the true impact of that quotation is found in the portion immediately following the last word quoted by Cross-Respondant which he did not include in his Brief. The omitted portion continues on to say:

"However, it has been said that whether, in strictness of speech, a title may be 'created' by estoppel is a refinement of no value in the light of modern equity jurisprudence, for although the title does not pass, a conveyance will be decreed by a court of equity in accordance with the maxim discussed in equity section 106 that equity considers that done which should have been done." (Emphasis added)

In other words, the distinction No. 2, drawn by Cross-Respondant, is a "refinement of no value" in the minds of the editors of C.J.S. and "in light of modern equity jurisprudence."

In fact, C.J.S. quotes from Nissen v. McCafferty, a New York case, 195 N.Y.S. 549 202 App. Div 528 as follows:

"Estoppel in Pais does not create a technical title in land. Its effect is to preclude the party from denying the effect of his statements or admission designed to influence, or which have influenced the conduct of another, and when so applied, it is as actual as a deed from the party estopped." (Emphasis added)

Cross-Defendant submits that this is the situation that exists in the present case.

Cross-Respondant also cited 28 Am Jur 2d, Estoppel and Waiver §81, but does not quote from it. The reason is obvious, of course, upon reading that section. It says:

"Although the courts are inclined to be somewhat more reluctant to give effect to estoppels when they effect the title to real estate than in other instances, the rule is generally well settled in the modern law that the title to land or real property may pass by an

equitable estoppel, which is effectual to take the title to land from one person and vest it in another where justice requires that such action be done."
(Emphasis and double emphasis is added).

This is, of course, just opposite to what the Cross-Respondant cited the Section to support!

That Section in Am Jur goes on to lay down some ground rules and parameters, then adds:

"Occasionally, the question is raised as to whether the title to real property can be passed by means of an Estoppel in Pias, since there is no writing made by the person sought to be estopped in such cases, and the statute of frauds requires some memorandum in writing in connection with the transfer of title of real property. The prevailing rule is to the effect that to permit the transfer of title by operation of equitable estoppel does not contravene the statute, and that the legal title may be so transferred. In other states in which it is held that a legal title may be precluded by equity from setting up the defense of the statute of frauds, and that title may pass by operation of an equitable estoppel in spite of the statute. In only a few jurisdictions has it ever been held that the statute of frauds prevents the passage of title by means of the doctrine of equitable estoppel."

Section 82 of the same Am Jur Treatise says:

"An owner may be stopped to assert his title to realty whereby his renunciation or disclaimer of title he has induced another to believe and act thereon to his detriment."

It cites Thom v. Thom, 208 Minn. 461, 294 N.W. 461

in support of that enunciation. Thom is also cited by Cross-Appellant in his initial Brief before this Court.

The Cross-Respondant cites Blackburn v. Florida West Coast Land Development Co., 109 So.2d 413 as an example of a court which does not allow title to be divested by Estoppel in Pais. The court did, of course, make the statements quoted by Cross-Respondant, but the case was, in reality, a case involving a boundary line dispute and did not involve a case where one party made affirmative representations, disclaiming any further claim to the property, upon which the other relied as is present in the instant case, and therefore, is not truly applicable to this case.

Cross-Respondant makes much of his distinction between "asserting" title and "divesting" title. Cross-Appellant points out that the two theories are merely opposite sides of the same coin. The fact is that if "A" asserts a title against "B", who claims title and the court awards it to "A", who has asserted a title, the court has divested the title from "B". In the present case, if one looks at the situation from VERE's standpoint, it may be a case of "assertion of title", while from MARION's standpoint, it is "divestiture" of title. In either case, the same thing is happening. Because he previously represented he was through with the property, and wanted nothing more to do with it, including paying taxes, etc., and because VERE relied upon

that representation, VERE is "asserting title" and MARION would be divested of title. And, by the same token, it may be said, that now that VERE, relying upon his brother's representation, has assumed he owned the property, and has attempted to sell it, MARION is now "asserting" his title. In reality, the whole argument is an exercise in semantics and as C.J.S. Supra noted, the distinction "is a refinement of no value..."

It should be noted, that if Cross-Respondant insists upon belaboring the "Assertion-Divestiture" distinction it is in reality, he who is asserting a title. He filed suit in the first instance to "assert" his title against his brother, VERE!

Cross-Respondant, in his Brief, takes issue with the Cross-Appellant's citation to Holsteen v. Thompson case, 169 N.W. 2d 554, and adds an additional portion of the Section from 28 Am Jur 2d , "Estoppel and Waiver" §81, quoted in the Holsteen case.

The portion added by Cross-Respondant commences with this statement:

"Thus, by intentional misrepresentation, misleading conduct, or wrongful concealment, a person may preclude himself from asserting his legal title to land or from enforcing an encumbrance on, or maintaining an interest in, real estate."

This addition to the quote from Am Jur 2d only strengthens VERE's position. MARION certainly "intentional

misrepresented" to VERE that he no longer claimed an interest, supported by his refusal to pay the taxes, or even his share of the taxes, to keep from losing the property, when in fact, he now does claim an interest in the property. His former statements and acts must have been misrepresentation.

The additional portion of Am Jur 2d quoted by Cross-Respondant on pages 22 and 23 of his Brief, states in general that there must be "fraudulent representation, concealment or such conduct or negligence as will amount to fraud in law...." and that the other party was actually misled to his injury. Certainly, these elements are found in the instant case. VERE was told by MARION that he had no further interest in the property, and "let the State take it." VERE, then, relying on that, continued to put his own time, effort and money into it, and ultimately sold it when he grew too old to handle it, and is now faced with a damage judgment of potentially several thousand dollars by the buyer!

It is true, one must believe VERE's version of the key conversation, i.e., the one in St. George, when VERE asked MARION to pay or help pay the taxes. But that belief is easily supportable.

MARION himself admitted that he told VERE the property was worthless and he couldn't make it, and wasn't going to farm it anymore, and didn't want anything to do

with it during the conversation at Pine Valley. (Tr. P29 LL11-15)

Further, on cross examination by counsel for Cross-Plaintiff, NORMAND LAUB, when asked if he had been asked by VERE to make a payment on taxes in front of Pickett in St. George, MARION admitted he had, but then when further asked if he had said "let the State take it", he, MARION, merely said he could not remember. He did not deny it, merely said he couldn't remember. (Tr. P29, LL19-30)

MARION also admitted he knew the effect of failure to pay property taxes, i.e., that the property may be taken and sold for taxes. (Tr. P30 LL-1-13)

MARION did not directly deny the statement attributed to him when first asked it, only at best that he didn't remember it, which of course, is to be expected if he is now to get the property back. On the other hand, VERE is very specific that, upon asking MARION to pay the taxes due in 1959, MARION said "let the State take it and pay it off." VERE was then cut off from adding something additional in regard thereto by counsel for Cross-Respondant. (Tr. P45 LL4-9) (The Court must remember that in 1959 the property did not appear to have any value, and may not have had much value. It is only in recent years, when land and water have so inordinately appreciated, that its value is realized.)

Again, on cross examination by his own counsel

(Cross-Respondant had originally called him as his witness),
VERE retold the same conversation unequivocally and without
doubt. (TR P64 LL2-5)

The Trial Court, did not, in fact, make any determination as to which version of the conversation in front of Pickett's in St. George was correct. (See Findings of Fact and Conclusions of Law). The Court circumvented the necessity of making that determination by refusing to even consider the estoppel theory, (TR P102 LL10-20) leaving counsel for Cross-Appellant no ground upon which, nor any basis, to even argue to the Trial Court the issue of Estoppel in Pais or Equitable Estoppel. This, Cross-Respondant, argues was reversible error on the part of the Trial Court.

Cross-Respondant in his Brief, cites cases from only three states: Florida, Louisiana and Colorado, which he says, do not permit the doctrine of Equitable Estoppel to divest record title; and three states: Michigan, Kansas, and California, where the doctrine is circumscribed by the requirement that false representation or fraud must first be shown.

The use of the term "False representation of fraud" is significant. What does it mean?

Thom v. Thom, 208 Minn. 461, 294 N.W. 461, cited and relied upon heavily in Cross-Appellant's initial Brief, contributes an excellent answer to that question:

"The vital principal is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acts. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always to be applied as to promote the ends of justice." (Emphasis added)

The Thom case, as the Court will note in Cross-Appellant's opening Brief, involved one party refusing to pay a "mortgage payment", just as MARION has refused to pay a "tax payment".

The Court in the Thom case sagely and succinctly noted:

"If Plaintiff had done nothing at all with respect to the mortgage, which his words and conduct showed was his intention, he would have lost the land anyway. Instead of letting the land go to foreclosure, he consented to the taking over by Clifford, who, relying on his words and conduct which continued throughout the period from 1932 to the commencement of this action, acted thereon and changed his position to his prejudice."

The Thom case sets up almost identical circumstances to the instant case.

The Cross-Respondant admits there may be some jurisdictions which refuse to recognize Equitable Estoppel to effect title to real property. Cross-Respondant cites *et al.* three, but regardless of the situation in other jurisdictions this appears to be a case of first impression in Utah and the Court has the opportunity to adopt the position, as enunciated

in the case Supra that "...This remedy (Equitable Estoppel) is always to be applied as to promote the ends of justice."

Cross-Appellant respectfully submits that there is sufficient evidence in the record, in spite of the Trail Court's attempt to excise from the trial, the issue of Equitable Estoppel, to show that MARION did represent to VERE (a false and fraudulent representation, if you will) that he was divesting himself of interest in the property by the conversations he had in Pine Valley in 1959 (Tr P29, LL-6-15) and in front of Picketts in St. George (Tr P29 LL 19-30; Tr P48, LL 409; and Tr P64 LL 2-5).

Furthermore, Cross-Appellant's version of the conversations is corroborated by the vast amounts of mostly uncontradicted evidence which shows that MARION acted as though that was what he had said, until he discovered that VERE had been able to sell the property profitably, and he filed this suit to recover half of the property. In addition, VERE had been the only productive contributor to acquiring and maintaining the property over the 21 or 22 years involved.

Cross-Appellant submits that this case involves the age-old situation of two partners in a business venture which at one point appears to be hopeless, and unproductive, so one partner abandons it, and leaves the other partner high and dry to either lose everything, or pull it out on his own. When he does, by industry, hard work and introduction

of additional time and money in the venture, makes it, at least not a totally losing venture, the first partner suddenly wants back in to share the fruits of the second partner's industry, faith and hard work. Unfortunately, for the second partner, this business venture involves real property which now serves as a trap to snap off the head of the industrious partner, if Cross-Respondant is successful in this appeal.

Cross-Appellant respectfully submits that the Trial Court's decision should be reversed and it should be ordered to enter its Order quieting the entire title in VERE BECKSTROM, or such other order as will effect that result.

DATED this _____ day of _____, 1977

J. MacArthur Wright
Attorney for Cross-Appellant