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Marion W. Beckstrom v. Vere Beckstrom and Norman Laub : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MARION W. BECKSTROM,
Plaintiff and Respondant,
vs.
VERE BECKSTROM and NORMAN LAUB,
Defendants and Appellant,

NORMAND D. LAUB and BARBARA R.
LAUB,
Cross Plaintiff and
Appellants,
vs.
VERE BECKSTROM and ELIZABETH S.
BECKSTROM,
Cross Defendants and
Respondants.

Case No. 15273

Appellant's
APPELLANT'S BRIEF

Appeal from the Judgment of the 5th
District Court for Washington County,
Hon. Don V. Tibbs, Judge

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STATEMENT OF POINTS

1. The Plaintiff-Respondant should be estopped from asserting title to certain property referred to herein as the "Hunt Property".

2. The Plaintiff-Respondant should be estopped from asserting an objection to the sale by Defendant-Appellant of the property referred to herein as the "Hunt Property" to the Cross Plaintiff-Appellant.

3. The Court erred in sustaining objections to evidence tending to show that Plaintiff-Respondant abandoned the subject property and his claim of any interest in it and that he should be estopped from asserting such a claim.

STATEMENT OF THE KIND OF CASE

This is an action to partition real property in which the title is held in joint tenancy and for damages by a third party who purchased the property from one of the joint tenants.

DISPOSITION IN LOWER COURT

This case was tried to the Court. From a judgment for the Plaintiff, Cross Complainant and Defendant both appeal.

RELIEF SOUGHT ON APPEAL

Defendant, VERE BECKSTROM, seeks reversal of the judgment and judgment in his favor as a matter of law, or that failing, a new trial.

STATEMENT OF FACTS

Plaintiff, MARION BECKSTROM, and Defendant, VERE BECKSTROM, are brothers. (Tr. P40, LL22-23)

In 1949, VERE and MARION, who had just come home from the service, purchased 80 acres in the area near Beryl, Utah (Tr. P40, LL21-23) often referred to by the parties as the "Hunt Property" or as the property "on the desert", which is the subject of this lawsuit.

VERE and his wife, ELIZABETH, paid the down payment of \$2,000.00 out of their savings. (The transcript, P65, LL6, 7 & 13 says \$1,200.00 but counsel represents that that

is an error in the transcript and the figure should be \$12,000.00. See, for example, Deposition of Plaintiff, MARION BECKSTROM, P3, L16) was borrowed from ELIZABETH BECKSTROM's brother, RODNEY SNOW, (Tr. P65, LL11-15) giving a mortgage, to secure the loan, on 25 acres of property owned by MARION together with some property adjacent to it owned by VERE in Pine Valley, Utah. (Tr. P65, LL19-20)

MARION moved onto the 80 acres on the desert and attempted to farm it, while VERE operated the 25 acres of property in Pine Valley owned by MARION, together with property he owned himself in Pine Valley as well as some property he leased from his sister, also in Pine Valley.

Thereafter, MARION and VERE and VERE's wife, ELIZABETH purchased an additional 80 acres "on the desert" referred to as the "Lewis Property" which MARION also occupied and attempted to operate together with the Hunt Property. (Tr. P31, LL27-29)

After attempting to operate the Hunt Property for approximately 10 years, and the Lewis Property for a portion of that time, MARION abandoned both properties (Tr. P31, L30; P32, LL1-2, 27-29)

MARION paid none of the taxes on the Hunt Property while he occupied it and attempted to farm it (Tr. P20, LL8-9; P29, LL16-18). They were all paid by VERE BECKSTROM. Neither did MARION make any payments on the note to RODNEY

SNOW during those ten years. (Tr. P26, LL23-30; P27, L1)

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. After he had abandoned the property, he made the final payment of approximately \$1,500.00 to RODNEY SNOW which was needed to release the mortgage that was on his as well as VERE BECKSTROM's property in Pine Valley. (Tr. P27, LL2-15)

In approximately November, 1959, after MARION had abandoned the Beryl property, VERE met MARION on the street in St. George and asked him if he would pay the taxes on the Hunt Property. (Tr. P22, LL16-18; P29 LL 19-23) MARION refused to do so and, in fact, did not pay any taxes on the property thereafter just as he had not prior thereto. (Tr. P45, LL23-25; P64, LL1-8)

MARION acknowledged that he knew and understood that if taxes were not paid, the property could be sold for back taxes by the county and that it would be lost by him. (Tr. P30, LL1-13)

After MARION abandoned the Hunt and Lewis Property, the Lewis Property, according to MARION, was lost by foreclosure (Tr. P32, LL28-29) and according to VERE, was sold to avoid foreclosure (Tr. P61, LL9-10).

VERE, after MARION abandoned the Hunt Property and after he refused to pay any taxes on it, moved onto the

Hunt Property and farmed it for approximately 2 years until he suffered a severe stroke and was unable to operate the property himself any longer. (Tr. P62, LL22-30; P63, LL1-6)

While operating the property, VERE drilled a well to replace one that had caved in while MARION operated the property. That well cost approximately \$2,300.00 which was paid entirely by VERE. (Tr. P68, LL1-8)

After VERE suffered a stroke and was physically unable to operate the Hunt Property any longer, he caused it to be leased for approximately six years. (Tr. P41, LL4-5)

In 1972, VERE BECKSTROM entered into a sale agreement with Cross Plaintiff-Appellant, NORMAND LAUB, to sell the Hunt Property for \$20,000.00. (Tr. P42, LL8-10 and Plaintiff's Exhibit 14).

In 1974, Plaintiff, MARION BECKSTROM, filed the instant case naming VERE BECKSTROM and NORMAND D. LAUB as Defendants and NORMAND D. LAUB filed a Cross-Complaint against VERE BECKSTROM and his wife, ELIZABETH.

ARGUMENT

I. The Plaintiff-Respondant should be estopped from asserting title to certain property referred to herein as the "Hunt Property".

MARION and VERE BECKSTROM were brothers. When MARION returned from the service in 1949, VERE, who was married to ELIZABETH, made the down payment of \$2,000.00 on an 80 acre tract of ground on the desert near Beryl, Utah. They raised the balance of \$12,000.00 to purchase the property

by borrowing it from ELIZABETH's brother, Dr. RODNEY SNOW. This was done, at least partially, if not primarily, to provide a home (Tr. P72, LL12-24) and an occupation for MARION, but also to earn a profit, according to the testimony of VERE and ELIZABETH. To secure the loan from SNOW, a mortgage was placed upon 25 acres of property owned by MARION, inherited from his parents, together with land adjacent to it, owned by VERE.

While ELIZABETH taught school, VERE operated the Pine Valley property belonging both to himself and to MARION and MARION moved onto the 80 acres of desert land referred to as the "Hunt Property".

Thereafter, an additional 80 acres, referred to as the "Lewis Property" was purchased for MARION to operate together with the Hunt Property making a total of 160 acres on the desert.

MARION, however, spent much of his time, according to his testimony, working for the railroad, sorting potatoes and attending "G.I. School" (Tr. P20, LL18-22) which had nothing to do with making productive the 160 acres he was supposed to be farming.

After ten years on the property, during which time he did not contribute anything to the payments on the mortgage and did not contribute anything to the payments on property taxes, MARION abandoned both the Hunt and the Lewis Property

During that time, VERE, who was operating the small acreage at Pine Valley, part of which was owned by him and part by MARION, while ELIZABETH, his wife, taught school, paid all of the payments on the mortgage except the final one of approximately \$1,500.00 and paid all of the taxes on the Hunt and Lewis Property. MARION freely acknowledged that VERE and ELIZABETH made those payments.

In 1959, when MARION left the property near Beryl, he did so proclaiming in no uncertain terms that he wanted nothing more to do with farming the property and that it was no good and that he wasn't interested in preserving it by even paying the taxes on it. (Tr. P22, LL27-29; P22, LL26-28; P26, L19; P29, LL11-15; P48, LL7-9; P62, LL12-13; P67, LL22-25)

While MARION was operating the property, the well caved in and was not repaired or replaced by MARION, so that after he abandoned the property, VERE, who then began to operate the Hunt Property himself, was forced to drill a well on the property at a cost of \$2,300.00 which he also paid entirely himself. (P68, LL1-6)

However, of great significance at the time of MARION's abandoning the Hunt Property is his concurrent abandonment of the Lewis Property and what happened to it. He had been operating both 80 acre parcels jointly when he gave up and moved off. Though the Court sustained some

objections to questions concerning the Lewis Property and thereby prevented a complete disclosure of the evidence which would, in the Defendant-Appellant's opinion, have supported the position that there was an estoppel in pais, i.e. that MARION is estopped from asserting title to the property in question, some limited evidence concerning it was admitted and it is significant.

MARION testified that when he abandoned the two properties, both Lewis and Hunt, he had a buyer for them by the name of JOE ROMERO, "before the Lewis place went back". (Tr. P23, LL3-6) He stated that VERE refused to sell the properties and he added that one MR. LEWIS did foreclose on the parcel which he had sold to MARION and VERE. (Tr. P32, LL28-29)

VERE, however, testified that the Lewis Property was indeed sold to avoid foreclosure to JOE ROMERO at that time (Tr. P52, LL24-30; P53, LL1-8) MARION had washed his hands of the whole affair, except to suggest that JOE ROMERO was interested in purchasing the property. VERE insisted JOE ROMERO only had an interest in purchasing the Lewis Property, not the Hunt Property. (Tr. P53, LL3-8)

It would appear logical, since the Lewis Property was sold to ROMERO according to VERE, that it was done to avoid the threat of foreclosure by LEWIS and to avoid the

sometimes devastating effects on VERE and his wife as well as MARION, of a foreclosure proceeding.

However, the Hunt Property posed an entirely different situation to VERE and ELIZABETH.

To that time in 1959, they had paid all the payments on the mortgage and on taxes themselves. There remained only \$1,500.00 left in order to own it free and clear. There was not the pressing need to sell it to save it from foreclosure that there was with the Lewis Property and they did not want to sell it - still believing, in spite of MARION's poor track record over the past 10 years, that the property had some value.

Had MARION had the interest, at that time, in the property and particularly in selling it, that he displayed 14 years later when this suit was filed, he could have filed a partition action then to force "an accounting" or to force sale.

Obviously, however, he did not because he considered the land worthless and even more important had contributed nothing to acquiring it or preserving it to that point. He does now argue ex post facto that the proceeds from the Pine Valley property, part of which belonged to him, went to the payment of the mortgage and taxes on the Hunt Property. However, it is just as arguable that the funds used to pay the taxes and mortgage are as much or more the result of the

hard work and efforts of VERE as they were the fruits of that bare land.

MARION did not produce anything to contribute to the taxes and mortgage payments off of a total of about 4 times more land than that which VERE was operating.

MARION abandoned the property, let the Lewis Property be either sold or foreclosed upon with no argument or interest in its disposition.

MARION did pay the final payment of approximately \$1,500.00 on the mortgage, but in spite of his present protestations to the contrary, it is apparent that he did so primarily to remove the encumbrance against his Pine Valley Property rather than to preserve the Hunt Property.

Furthermore, shortly after abandoning the property, VERE confronted MARION and, after ten years of paying the taxes on the Hunt Property himself as well as the taxes on the Pine Valley property, part of which was owned by MARION, asked MARION if he was going to pay the taxes which were due on the Hunt Property. MARION said he was not and as a matter of fact, did not! MARION further testified that he knew and understood that if taxes were not paid, the property could and would be taken by the taxing authority in lieu of taxes. Nevertheless, he either did not care, which is the contention of the Defendant-Appellant, or he could not pay the taxes. In either event, had it not been for VERE's coming to the

rescue again and paying those taxes for the next 14 years, the county would, no doubt, have taken the property and MARION would have had nothing to be claiming now!

VERE, on the other hand, assumed the burden of paying taxes from 1959 to 1974, in addition to having paid them the previous ten years, assumed the expense and obligation of drilling a well at a cost of \$2,300.00 to himself, maintained water rights, leased the property when he was himself incapacitated physically and did all of that which was necessary to retain and maintain the property under the honest impression that MARION had abandoned any interest or claim in the property.

Again, it is extremely important to note, that had VERE not done these things, there would have been no property to sell to the Cross-Complainant, NORMAND LAUB and there would have been no property for MARION to now claim is half his!

Furthermore, VERE, after operating the property for a couple of years and then becoming incapacitated physically by a severe stroke, leased it for several years thereafter, finally sold the property for the sum of \$20,000.00, a figure which Cross Complainant-Appellant's expert witness testified was a fair and reasonable value for the property when it was sold in 1972. (Tr. P96, LL23-26)

The Defendant-Appellant, from the time a Motion to Amend his Answer to allege an affirmative defense, to-wit,

that the Plaintiff be estopped from claiming an interest in the subject property, has maintained and attempted to show that an estoppel in pais existed in spite of the Court's refusal to even consider that principal of law, as will be more fully reviewed in paragraph III infra.

In 1880, the United States Supreme Court announced perhaps the leading case pertaining to Equitable Estoppel or Estoppel in Pais as it applies to a situation similar to the situation that exists in the instant case. The facts in that case, Dickerson vs. Colgrove, 100 U.S. 578, 25 L. Ed. 618, were that one MORTON purchased land by Warranty Deed from JOHN KLINE and his wife, SARAH, daughter of MICAHAH CHANCEY, who had owned it until his death. MORTON, after occupying the land for several years, learned of the existence of a brother of SARAH KLINE and a son of MICAHAH CHANCEY, one EDMUND CHANCEY, and wrote to him asking if he made any claim to the land. EDMUND CHANCEY wrote back to his sister, SARAH, saying he did not make a claim and disavowing any intention of ever making a claim to the land.

Thereafter, however, EDMUND CHANCEY did make a claim and conveyed by Quit-Claim Deed the property to one DICKERSON who then filed a suit for ejectment against the Defendants, COLGROVE, successor to MORTON.

The Supreme Court of the United States decided against the Plaintiff, finding that he was estopped by his

deeds and actions from later asserting a title or claim to the property he had once disavowed.

The Court reflected upon the effect upon MORTON of CHANCEY's letter disclaiming an interest:

"He was lulled into security. He took no measures to perfect title, nor to procure any redress from the Klines."

The Court then proceeded to elaborate upon the principal involved:

"The estoppel here relied upon is known as an equitable estoppel or estoppel in pais....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 acted."

The Court adds:

"This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and it is not permitted to go beyond this limit. It is akin to the principal involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked." (Emphasis Added)

This quote, referring to the ends of justice as it does, is most appropo to the instant case wherein MARION, having contributed little or nothing to the purchase and maintenance of the property through the ten years he occupied it, and then having refused to pay any taxes thereafter to

preserve, all because he did not consider the property to be of any value at that time, should not, at this late date, be able to come in 14 years later, when historical circumstances have created value that did not appear to be there previously, i.e. the increased scarcity of water and consequent increase in value of water, and exploit and take advantage of VERE's foresight and VERE's efforts and expenses in preserving and maintaining the property.

Of course, one might argue that in the Dickerson case there was a letter from CHANCEY disavowing any claim to the property which constitutes a writing and that such a writing is not present in the instant case. The Court, in the Dickerson case, however, cited a case Faxton vs. Faxton, 38 Mich 159 wherein the Court said:

"The Complainant may have estopped himself without any positive agreement if he intentionally led Defendants to do or abstain from doing anything involving labor or expenditure to any considerable amount by giving them to understand that they should be relieved from the burden of the mortgages."

In other words, the Court is saying that one, by his action, may cause a second to rely upon that action and as a result, that second person should not be penalized at a later date for having relied upon the acts of the first party.

In the instant case, VERE BECKSTROM relied upon what appeared to be a distinct disavowal of any interest in the

Hunt Property by his brother, MARION. MARION had left the property, stated he wanted nothing to do with it, had similarly abandoned companion property and allowed it to either be sold to prevent foreclosure or it had been foreclosed and had refused to pay taxes. VERE then went to much labor and expense and assumed the responsibilities of paying taxes and the other concurrent responsibilities of ownership of land in order to preserve that property believing MARION would never express an interest in it thereafter.

The Dickerson case Supra, also cited Harkness vs. Toulmin, 25 Mich 80 and Truesdail vs. Ward, 24 Mich 117 and made this further comment:

"There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect."

In the present case, VERE BECKSTROM relied upon the acts and statements of his brother, MARION, and supposed that he made no claim and had no interest in the Hunt Property. Relying upon that, VERE operated the property himself for 2 years, including assuming all the costs and expenses of maintaining and improving it, leased it for several years after he was physically incapacitated from operating it himself and ultimately sold the property for \$20,000.00.

Now, however, MARION makes a claim to that property, and as a result of the finding of the Court below that MARION is entitled to a one-half interest in that property, VERE is faced with a potential claim of up to \$35,000.00 by the Cross Complainant-Appellant for damages, based upon the current value of the property of \$75,000.00, since, under the ruling of the lower court, VERE only had a one-half interest in the property to convey. This hardly seems a just reward for his faith, diligence and sacrifice in attempting to preserve the property by paying taxes upon it and maintaining and improving the property over the many years that he did so, all at a time when MARION had no faith in it and had disavowed any willingness to assist in the payment of the taxes or any other of the expenses and costs of maintaining and improving the property!

In the Dickerson case Supra the Court makes the comment that Justice Cooley, in deciding one of the Michigan cases, either Harkness or Tenesdail, -- "was inclined to doubt the sufficiency of the proof but said finally:

"His (the Mortgagee's) assurances undoubtedly had been relied upon and acted upon by the Defendants, and, considering the great lapse of time without any claim under the mortgages on the part of the Complainant, I am not disposed to dissent from the conclusion of my brethren."

This, again, is exactly the situation that has existed in the instant case. The Defendant, VERE, has, in

fact, relied upon the representation of MARION and has certainly taken steps that he would not have taken had he believed that his brother, MARION, claimed an interest in the property. It would, no doubt, have been very easy for VERE to have obtained the signature of MARION on the Contract of Sale for \$20,000.00 in 1972, which was then the admitted value of the property, if, in fact, MARION had, as he now insists, asked VERE to sell the property on a previous occasion once, only 2 years earlier. VERE did not seek MARION's signature because he did not believe that MARION claimed any interest in the property, or that having failed to contribute to its maintenance, was not entitled to any interest, even if he did claim it.

The Dickerson case Supra further commented in reference to another case, Evans vs. Snyder, 64 Mo. 516:

"But the Supreme Court of the state held that where they stand silently by for years while the occupant was making valuable and lasting improvements on the property and redeeming it from the lien of the ancestor's debts, his heirs would be estopped from afterwards asserting their claim."

In Holsteen vs. Thompson, 169 N.W. 2d 554, the Court enunciates the rule involved herein as follows:

"One who, by his renunciation or disclaimer of title to property has induced another to believe and act thereon to his prejudice is estopped to assert such title. Lucas vs. Hart, 5 Iowa 415, 419; McDowell vs. McDowell, 141 Iowa 286, 290, 119 N.W. 702, 703, 31 L.RANS, 176 (Title Quieted in Plaintiff based

on estoppel against Defendant); Koep vs. Koep, 146 Iowa 179, 182, 123 N.W. 174, 175; Thom vs. Thom, 208 Minn. 461, 294 N.W. 461, 464 (facts similar to case et bar)"

The Holsteen case Supra quotes from 28 Am Jur 2d, Estoppel and Waiver, Section 81, Page 723 as follows:

"Although the courts are inclined to be somewhat more reluctant to give effect to estoppels when they effect the title to real estate and 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 invest it in another where justice requires that such action be done." (Emphasis Added)

Defendant-Appellant has been unable to find where the Supreme Court of Utah has dealt with this precise issue previously, however, Thom vs. Thom, 208 Minn. 461, 294 N.W. 461, cited in the Holsteen case Supra pertained to a factual situation, that in all essentials, is similar to the instant case.

WILLIAM C. THOM conveyed property to his brother, ARTHUR THOM, the Plaintiff, and FRANK THOM subject to a mortgage in the amount of \$7,000.00 to his, WILLIAM C. THOM's mother. The deed of conveyance was placed in a safety deposit box to which ARTHUR THOM, the Plaintiff, did not have access. In fact, ARTHUR THOM, did not know it was there until later. FRANK V. THOM later purported to convey the property by Warranty Deed to CLIFFORD THOM, his son, the Defendant then

The Deed to Arthur and to FRANK was recorded at the same time as the Deed from FRANK to CLIFFORD, but the name, "ARTHUR" had been, it was later determined, erased from it by that time, by an unknown party, so that on the record, ARTHUR, the Plaintiff, appeared to have no claim to the land.

ARTHUR and FRANK had earlier delivered a mortgage to their mother on the property for \$7,000.00 to replace the original one from WILLIAM. CLIFFORD leased the farm from ARTHUR and FRANK and commenced to operate it for 4 years until he received a Deed to the property from his father, FRANK.

A title company noted, at that time, however, that ARTHUR was listed as a mortgager and wanted a Quit-Claim Deed from him, which he then refused to give. It was also at that time that it was discovered that the Deed had been recorded with his name erased, but still detectable on it.

When the mortgage for \$7,000.00 from ARTHUR and FRANK had earlier become due, Plaintiff, ARTHUR THOM, told the mortgagee's son..."he could not do a thing about the mortgage and he had all he could handle at home."

That language was very similar in context to the language MARTON admitted to making on direct examination by his attorney, when he said, "well, he (VERE BECKSTROM) just asked if I paid any taxes and I says, 'no, I didn't. I

haven't got any money to pay taxes with now on that group (sic) on the desert'". (Tr. P22, LL16-18)

Again, MARION agreed under cross examination by Defendant-Appellant's counsel when he was asked...."at that time you told him (VERE BECKSTROM) that the property was worthless and you couldn't make it and you weren't going to farm it anymore and you didn't want anything to do with it, didn't you?" (Tr. P29, LL11-15). MARION agreed that was true. (Tr. P29, L15)

VERE BECKSTROM recalls MARION's words as, after he had asked MARION if he wanted to pay taxes on the property "to hell with it---let the state take it and pay it off". (Tr. P48, LL7-9 and P64, LL2-3)

It is clear that the thrust of MARION's statement and his intent in 1959 when asked to pay taxes on the Hunt Property was essentially the same as ARTHUR THOM's statement in the Thom vs. Thom case, Supra, when asked to pay off the mortgage.

ARTHUR THOM made other similar representations to various parties. The Thom Court then reported that the Defendant, CLIFFORD THOM, relying upon that statement by ARTHUR THOM took certain steps to take over the farm and extend the mortgage and become responsible for it.

The Court noted:

"Plaintiff, on the other hand, by his conduct as well as by his words, approved

and acquiesced in Clifford's assertions of ownership. He claimed no title after 1932, nor any right to rent or the crops. He did not concern himself about taxes, interest or payment, on the mortgage, upkeep and improvements of the premises or any of the things in which an owner of the property would be interested."

In the instant case, MARION BECKSTROM, after 1959, did not interest himself in the payment of the taxes, payment for the drilling of the well, or any of the other matters that are associated with ownership of property. There is some testimony by him and his wife that he contacted VERE BECKSTROM at least on one occasion and suggested that there was a buyer available for the property by the name of GARDNER, but that is disputed by the Defendant and even, at best, according to MARION BECKSTROM's own testimony, amounted only to a statement that GARDNER was available or interested in purchasing the property. That could be interpreted as a brotherly effort to assist his brother, VERE, if he was looking for a purchaser as easily as it could be interpreted as a renewed claim to ownership in the property. He certainly did nothing more and even by his own testimony did not object when VERE apparently rejected the idea of selling the property to the said GARDNER.

The Thom case, Supra, in discussing the legal principal involved, stated on page 464:

"The claim of estoppel rests upon Plaintiff's disclaimer of all title and interest in the farm and his consent that Clifford might

take over the farm under any arrangement which he could make by which Clifford and his wife were influenced to deal with the property in the belief that they were the owners thereof so far as Plaintiff was concerned, to continue in actual possession of the farm, to acquire Frank V. Thom's title, and to expend large sums of money for the payment of taxes, principal, and interest on the mortgage, repairs, improvements, and upkeep of the premises so that under the circumstances it would be unjust now to permit Plaintiff to assert title."

Certainly, again, that statement pertains and refers precisely to the instant case. The Defendant, VERE BECKSTROM and his wife, ELIZABETH, relied upon the representations made by MARION, treated the property as their own for several years to which they received no objection from MARION, and then ultimately when VERE had grown old and was unable to operate or lease the property himself, contracted to sell the property. Unfortunately for them, thereafter, the value of the water, not the farm itself, but the water, became considerably more valuable and made it attractive for MARION to now claim an interest in the property.

If successful, under the ruling of the Court before the Defendant, VERE BECKSTROM, will be rewarded for his having struggled to retain the property over the several years when it was not a profitable venture and for having paid taxes, invested his money in a well and all the other expenses and heartaches associated with his attempt to preserve the property with a liability conceivably as high as \$35,000.00 if the

Cross Complainant is successful in his appeal.

The Thom case, again on page 464 meets that very situation with these words:

"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 acted. 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)

Another very important point made by the Thom case and which is an almost identical situation to the present case, is found in these words:

"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 by 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."

In the present case, had the Defendant-Appellant not agreed to, and in fact, had not paid the taxes on the property, MARLON would have lost his interest by virtue of the county taking the property for that failure to pay the taxes. Again, this is an identical situation to that in the Thom case.

The Court there found that under those circumstances,

the Plaintiff, ARTHUR THOM, was estopped to assert title.

If justice be done, the Court here can do no less than reach the same conclusion.

II. That the Plaintiff-Respondant should be estopped from asserting an objection to the sale by Defendant-Appellant of the property referred to herein as the "Hunt Property" to the Cross Plaintiff-Appellant.

Without belaboring the facts or the situation as described in the brief heretofore, and if the Court were not to accept the position that MARION BECKSTROM is estopped from claiming any title to the property, the interest of justice would certainly dictate that he is, at the very least, estopped from objecting to the sale of the property which was made by VERE BECKSTROM to the Cross Complainant-Appellant, NORMAND D. LAUB.

MARION BECKSTROM, in his testimony and in the testimony of his wife FAYE BECKSTROM, represented that on at least two occasions he proposed to VERE BECKSTROM that the property be sold. The first was in 1959 right after he had abandoned the property. There is dispute that he proposed selling the Hunt Property but that, in fact, he only proposed selling the Leavitt Property, but be that as it may, even if MARION BECKSTROM's version of the circumstances were to be accepted, he was, in fact suggesting, requesting and agreeing to the sale of the Hunt Property at that time.

Again, in 1970, according to the testimony of MARION BECKSTROM's wife, FAYE BECKSTROM, she conveyed a suggestion

to the Defendant-Appellant, VERE BECKSTROM, that the property be sold to a "MR. GARDNER".

In view of the two representations referred to above, if they were, in fact, made, that the property be sold, certainly VERE BECKSTROM was entitled to believe that his brother, MARION, if he did, in fact, have a viable claim to the property, wanted to sell the property. In fact, under MARION's version of the circumstances, it was only VERE that did not wish to sell it. Therefore, if VERE later changed his mind and found a buyer, he is certainly justified in assuming that he was acting with the approval and the consent of his brother, MARION.

There is not question that in 1972, when the property was sold to LAUB, that it was sold at a reasonable value. The only testimony in the record is that of an independant appraiser and expert witness who testified that the value of the property was \$20,000.00, the amount for which it was sold by VERE BECKSTROM to NORMAND D. LAUB.

Consequently, the Defendant-Appellant, would respectfully submit that if the Court is not persuaded that the Plaintiff-Respondant, MARION BECKSTROM is estopped from claiming any interest whatever in the property, he is at least estopped from now asserting an objection to the sale of the property and should be entitled only to one-half of the proceeds of that sale less perhaps, an adjustment for the relative investments

made in the property by the Plaintiff-Respondant and the Defendant-Appellant.

III. That the Court below erred in sustaining objection to evidence tending to show that Plaintiff-Respondant abandoned the subject property and his claim of an interest in it and that he should be estopped from asserting such a claim.

The Defendant-Appellant, VERE BECKSTROM, upon substituting counsel in the case, filed a Motion to Amend his Answer to allege, pursuant to the statutes of the State of Utah, the affirmative defense of estoppel.

The Plaintiff had filed a Motion for Partial Summary Judgment and Defendant-Appellant filed a Memorandum in Opposition to that Motion for Partial Summary Judgment, discussing, in detail, the principal of equitable estoppel or estoppel in part as it pertains to the instant case.

Though the Motion to Amend Answer by the Defendant-Appellant was filed on the 2nd day of March, 1977, it was not heard by the Court until the day set for trial, to-wit March 15, 1977. The Plaintiff-Respondant objected to the Amendment and the Court listened to brief oral arguments by the respective counsel and then in provisionally allowing the amendment in the pleadings to allow an allegation of estoppel as an affirmative defense, the Court said, "I am going to allow the amendment in the pleadings allowing estoppel, for what it is worth". (Emphasis Added) (Tr. P5, 1114-15) The Court demonstrated at that point its bias against the defense of estoppel with

even having heard any evidence whatever on the issue. Furthermore, during the trial, it later became apparent that the Court had neither read nor considered the Defendant-Appellant's Memorandum pertaining to the principal of equitable estoppel or estoppel in pais when the Court said, upon a reference being made to the Memorandum by counsel, "Well, I don't see any Memorandum. There is nothing before me on that. I am at the trial right now." (Tr. P74, LL1-3) After a short colloquy between the Court and counsel for Defendant-Appellant, the Court stated again, obviously without having read or considered the Defendant-Appellant's brief on the matter, "Well, I don't agree, Counsel, but go ahead and ask your question. It might be quicker to do that than to argue it." (Tr. P74, LL28-30) Immediately thereafter, when the Defendant-Appellant attempted to pursue the issue, the Court sustained an objection to any reference to the Lewis Property summarily cutting off any further evidence which counsel for the Defendant-Appellant represented would demonstrate MARION's attitudes towards the Hunt Property and tend to show whether or not an estoppel in pais had, in fact, occurred regarding the Hunt Property.

Thereafter, upon the conclusion of the evidence, and upon time for argument, though it is not recorded, the Court refused to permit counsel for Defendant-Appellant, VERE BECKSTROM, to even argue or discuss the theory of equitable estoppel.

The Court then, upon motion of Plaintiff-Respondant's counsel to strike the defense of equitable estoppel, immediately granted it without any argument whatever being permitted. (Tr. P102, LL12-16)

It is respectfully submitted that the Court below was disinclined from the very commencement of the trial to even consider the merits of a defense based upon the theory of an equitable estoppel. Yet, in failing to consider the said defense in failing to admit evidence to support said defense and in striking said defense and thereafter finding that the Plaintiff-Respondant, MARION BECKSTROM, did in fact have a one-half interest in the subject property, and finding that the Defendant-Appellant, is liable to the Cross Complainant-Appellant, for damages, the Court is subjecting the Defendant-Appellant to an inequitable, and unjust penalty for his having had the foresight and the willingness to expend funds, time and effort of his own to the preservation of the subject property from an ultimate tax sale.

Should the Cross Complainant-Appellant be successful in his appeal, that penalty upon the Defendant-Appellant could not be merely a loss of the balance of the payments supposed due Defendant-Appellant under the contract with Cross Complainant-Appellant as the Court below ruled, but even as much as an affirmative award of up to \$25,000.00 or \$35,000.00 depending upon this Court's ultimate disposition of Cross Complainant-

Appellant's appeal. Certainly, the only person who put any money into the property in the first instance, i.e. the Defendant-Appellant, should not be required to enrich another, when all he did was rely upon statements and representations made by MARION, the Plaintiff-Respondant herein,

CONCLUSION

It is respectfully submitted that the Court below erred in striking the defense of equitable estoppel, which the Defendant-Appellant attempted to interpose, and further erred in not applying the principal of equitable estoppel in the instant case and in not finding that the acts and conduct of the Plaintiff-Respondant, MARION BECKSTROM, did in fact constitute a basis upon which the Defendant-Appellant was entitled to rely and that the Plaintiff-Respondant should be therefore estopped from asserting his claim to the property.

On the other hand, should the Court not find that the evidence was sufficient to maintain that principal, though Defendant-Appellant strongly urges that it is, the evidence is clearly sufficient to estop the Plaintiff-Respondant from interposing an objection to the sale by the Defendant-Appellant and the only remedy which ought to be awarded to the Plaintiff should be one-half of the proceeds of the sale to the Cross Defendant-Appellant, subject further to an accounting of the contribution the Plaintiff-Respondant made to the purchase price and costs of the said property.

The Defendant-Appellant respectfully submits that the Court should reverse the decision of the Court below and hold that the Plaintiff has no interest in the subject property; or in the alternative that the Plaintiff-Respondant be estopped from objecting to the sale of the property and be awarded only one-half of the purchase price subject to an accounting of offsets as appropriate and equitable, or, in the alternative, that the matter be remitted to the Court below for a new trial. *pl*

DATED this 8th day of August, 1977.

A handwritten signature in cursive script, reading "J. MacArthur Wright", written over a horizontal line.

J. MacArthur Wright,
Attorney for Defendant-Appellant