

1961

# Ludean H. Cox v. Edward C. Carlisle : Appellant's Reply Brief

Utah Supreme Court

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Don V. Tibbs; Attorney for Plaintiff;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

LUDEAN H. COX,

Plaintiff and Appellant.

— vs. —

EDWARD C. CARLISLE, Mayor of  
Manti City, MANTI CITY, A Municipal  
Corporation, Henry Henningson, John  
McIntosh and Ed Nielson,  
Defendants and Respondents.

FILED

FEB 14 1967

Clerk, Supreme Court, Utah

Case No. 9242

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APPELLANT'S REPLY BRIEF

Appealed from the District Court of  
Sanpete County, Utah

Honorable L. Leland Larson, Judge

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DON V. **UNIVERSITY OF UTAH**  
TIBBS

Attorney for Plaintiff

and Appellant JUL 10 1967

Manti, Utah

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## APPELLANT'S REPLY BRIEF

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### STATEMENT OF FACTS

In reply to Defendants-Respondents Brief the present case is not concerned with the question "of whether a person can acquire public property merely by claiming ownership," but rather is there one rule of morals for a municipality and another for an individual. Should the doctrine of Equitable Estoppel be subjected to fixed and narrow confines of a technical formula or should each case be considered in the light of its own particular facts and circumstances?

Do the facts in this case call upon the Court to use the Doctrine of Estoppel to prevent injustice?

Only by examination of the evidence can the Court answer these questions.

The Defendants-Respondents would have the Court look at the naked legal title and ignore the facts of usage, the emotion that always comes with injustice and the great damage which will be caused by opening the strip of land between Parcel 99 and 113. The defendants ask this Court to rule against the Plaintiff, who with her predecessors have been using this strip of land as part of a farming operation for the past 70 years and as long as the memory of man.

Plaintiff-Appellant also agrees generally with the Defendants' statement of facts in so far as it repeats the occurrences at the trial, however, Plaintiff does not agree with some conclusions drawn and therefore earnestly solicits the Court to examine the testimony and the evidence submitted. The Petition signed by over 40 farmers in this area in 1910, the commissioners' report, and the Court Order in Civil Case No. 786, in the District Court in and for Sanpete County, Utah, Fred Jensen et al vs. Manti City, should be treated as evidence as to whether there was a road on these premises at any time.

Plaintiff contends that in view of the statement of the signers of the Petition and the oral evidence submitted to the Court the evidence is overwhelming to the effect that there has never been a road or street on the strip of land separating parcels 99 and 113.

The living witness most familiar with the land is Dr.

H. R. Clark who owned property immediately to the north and definitely stated he had been familiar with the land for over the past 70 years. He stated there had never been a road of any type on said strip of land. (See P. 77.)

All the Defendants' witnesses stated there were bars in the fences and in every case on cross examination had the bars further to the north on the Clark premises.

Defendants would have the court believe there will be no damage by building a road over the land. The husband of the Plaintiff testified on page 85 as follows concerning the improvements:

"Question: (By Mr. Tibbs) What have been the nature of the improvements?

Answer: Well, the first place we changed our irrigation system by running the water different ways. It used to go several ways over the land. We re-leveled it so we could handle our water most efficiently by changing our ditches around.

Question: Concerning water rights, have you had occasion to drill wells and anything in the vicinity.

Answer: Yes. We drilled a well there, a twelve-inch well. We didn't drill it. The well was there. But we equipped it with a pump and everything.

Question: Have you had the occasion to improve the land further by constructing ponds?

Answer: Oh, we have.

Question: Lining ditches?

Answer: We have constructed a pond there. We have put in concrete pipes to take care of the water, our

Question: Mr. Cox, do you have any idea on how much you have improved the land since 1948?

Answer: Well, we have spent in the neighborhood of \$15,000 on this land.

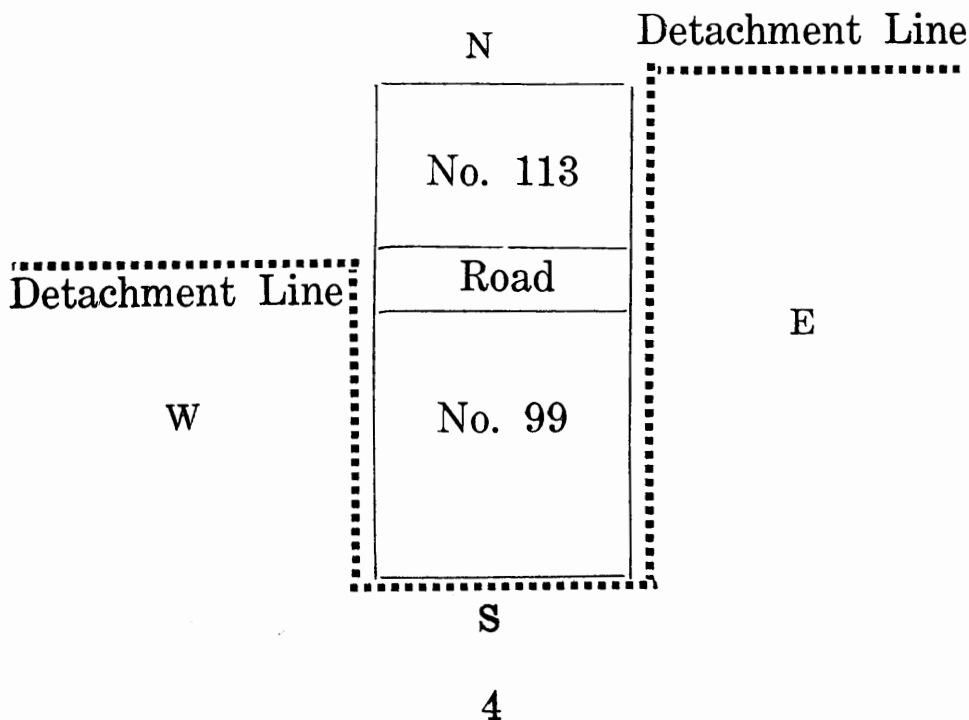
Question: And approximately how many acres would that cover?

Answer: Eighty acres.

Question: That would cover the land known as Parcel 99 and Parcel 113, and the land between those parcels?

Answer: That is right."

As was set forth in Defendants' brief the boundary line in the Detachment proceedings is very interesting. The Defendants drew it in their brief to show that there was a definite jog made in the petition, commissioners' findings and Court decree to take in these particular Parcels 113 and 99.



Why did the boundary make such a jog? The only answer is that there were no roads or city improvements in the detached area and there never had been.

It should also be kept in mind that this area we are talking about has no homes or other buildings near it now or in the history of Manti City.

To now allow construction of a road will separate into two pieces the Plaintiff's 80-acre farm which (page 95) would vitally effect and damage the irrigation system for the entire farm operation. The Plaintiff's husband Grant Cox on page 95 testified as follows:

Question: (By Mr. Tibbs) As I understand, then, this farm is based upon an operating unit, based on your irrigation system, your ponds, your wells and your leveling, is that right?

Answer: The whole thing was based on, when it was designed by the Soil Conservation, one piece fits in with the other piece to take care of the waste water from one piece to the headgate of another piece. It is all designed to use the water most efficiently. **So if you take one piece away then you are spoiling the whole irrigation system.**

Question: So that, as I understand, if a tract of land was cut right through the middle, where the Defendants claim their roadway is, it would vitally affect the irrigation system for the balance of the farm. Is that correct?



Answer: That is correct.”

Further on page 95 Mr. Cox testifies:

“Question: (By Mr. Tibbs) Would you tell the Court whether or not the cutting of a, the taking of a parcel of property between Parcel 99 and Parcel 113, if there is such a piece of property, would effect the irrigation system on the balance of your farm?

Answer: Yes. It would make quite a difference if they went, if they went north on that piece I would have to relevel that piece of land below in order to take my water out of the ditch again, because the top piece of land the water runs west and we’ve got it leveled so that the bottom piece of land there is a headgate or a headditch and it runs east there so that we can take care of the top water, tail water, from there and run it east to irrigate the bottom part, so that we would have to relevel the whole piece if they started cutting through it.

Question: What would happen as to the parcel above, or when I mean above, I mean south of such an alleged—

Answer: Well, if it done that why I would just, I would want to sell the land, because it would just make it valueless to me as a unit. I couldn’t, it would make it too long of a strip to irrigate decent. It just wouldn’t be an efficient setup then.”

Defendants would have the Court believe the improvements testified as follows:

ments were all made after the city indicated it wanted to build a road on the strip of land. In answer to Defendants' question on page 96, Mr. Cox the husband of the Plaintiff

“Question: (By Mr. Roe) When did you put in this irrigation system, Mr. Cox? That is, I will make, was this before or after the City told you that they claimed a right in that road?

Answer: You mean pertaining to what we have done to the irrigation system?

Question: Yes. You were telling us about how this road would effect the system, and I want to know how much of that comes from things you did after you received notice of the City's claim.

Answer: Well, the well was drilled before the city ever said anything. The land was leveled one time before the City said anything about it, and in 1955 I releveled it again because there were a few, a little waves in there so that it wouldn't work too efficient. So we leveled it again. We had, all of the, our headgates was poured before that, before the City told me about they wanted a road through there. Since then I have built a pond and we have put in pipe, cement pipe and cement ditches.”

SPECIFICATION OF POINTS RELIED UPON  
FOR A REVERSAL OF JUDGMENT

POINT I

BECAUSE OF THE EXCEPTIONAL CIRCUMSTANCES INVOLVED THE TRIAL COURT ERRED IN FAILING TO USE THE DOCTRINE OF ESTOPPEL TO PREVENT THE DEFENDANT-RESPONDENT MANTI CITY FROM OPENING THE 66 FOOT WIDE STRIP OF LAND USED AS PART OF PLAINTIFF-APPELLANT'S FARM AS A PUBLIC STREET.

POINT II

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 8, WHERE IT FOUND THAT THE 66 FOOT WIDE STRIP OF LAND BETWEEN PARCELS 99 AND 113, PLAT "A" MANTI CITY SURVEY, HAD BEEN USED AS A PUBLIC STREET.

POINT III

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 9, WHERE IT FOUND THAT THE PLAINTIFF OR HER PREDECESSORS IN INTEREST WERE NOT IN OCCUPANCY OF THE SAID 66 FOOT WIDE STRIP OF LAND AT THE TIME OF THE ENTRY UPON THE LAND BY THE CORPORATE AUTHORITIES OF MANTI CITY.

## POINT IV

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 10, WHEN IT HELD THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE 66 FOOT WIDE STRIP WAS OCCUPIED BY ANY PRIVATE PERSON AT ANY TIME PRIOR TO THE DATE OF THE PATENT TO LUTHER T. TUTTLE, MAYOR OF MANTI, AND THAT IF THE 66 FOOT WIDE STRIP WAS NOT BEING USED AS A PUBLIC STREET AT THE TIME OF THE ENTRY, IT WAS VACANT AND UNOCCUPIED, AND ON JANUARY 25, 1892, WAS DEDICATED AS A PUBLIC STREET.

## POINT V

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT NUMBER 12, WHEN IT FOUND THERE WAS NO EVIDENCE OF LEGAL ABANDONMENT OR ANY ABANDONMENT OF THE PUBLIC STREET BY MANTI CITY OR BY OFFICIAL CITY OR COUNTY ACTION.

## REPLY ARGUMENT ON ALL POINTS

The Defendants-Respondents case is basically a reliance on the fact that the record title of the strip of land between Parcels 99 and 113 is in the name of Manti City.

The Plaintiff-Appellant acknowledged the title but argues there are circumstances where a Court must look beyond the letter of the law and decide what is equitable as to the parties based upon the circumstances involved.

Plaintiff contends there has never been an actual road over this strip of land, that it is a paper road only. The witnesses relied on by the Defendants never had their alleged travels on the strip of land herein involved but upon the land of H.R. Clark north of Parcel No. 113. Dr. H. R. Clark, a life long resident of Manti, has been familiar with this property for over 70 years and states that there has never been a road of any type on the strip of land between Parcel 99 and 113.

Plaintiff introduced as evidence to show there had never been a road over the premises the Detachment proceedings, Civil Case No. 786, in the District Court in and for Sanpete County, Utah, which included a Petition signed by over  $\frac{3}{4}$ ths of the farmers owning land immediately north of Manti City (in excess of 40 farmers) including the Plaintiff's predecessors in interest. This Petition is signed by the land owners in 1910, and in essence said there was no road or street on the strip of land in question and there had never been.

The Court appointed three Commissioners to adjust the terms of the property to be severed. These Commissioners also reported no property belonging to the City, no streets or road on the detached area which includes the premises in question.

The Court on May 20, 1910, Judge A. J. Christensen issued an order in pursuance to the Commissioner's Report and prayer.

Compare this Petition, Commissioners' report and Court Order made in 1910, together with Dr. H. R. Clark's

testimony that there had never been a road to the evidence there was a road submitted by Defendants' witnesses.

This Court as in *Wall vs. Salt Lake City*, (50 Utah 573, 168 Pacific 766), held there were an exceptional class of cases when it was the duty of the Court to decide as "right and justice require" and the Court then estopped Salt Lake City from clearing the premises therein as a Public Street.

In *Wall vs. Salt Lake City* there was affirmative misleading conduct. Defendant would have the Court believe that because Manti City never did anything for over 70 years the Doctrine of Estoppel couldn't apply.

In 19 American Jurisprudence, Section 33, it states:

"Since, however, the principle which underlies equitable estoppel in its proper sense runs throughout all the transactions and contracts of civilized life, such estoppel cannot be subjected to fixed and settled rules of universal application, like legal estoppels, or hampered by the narrow confines of a technical formula. In other words, each case of estoppel must in the nature of things stand on its own bottom."

Our Court has on several occasions held that inaction or silence may under some circumstances amount to a misrepresentation and concealment of the true facts so as to raise an equitable estoppel. In *Hilton vs. Sloan, et al*, (108 Pac. 44, 37 Ut 359) the Court held:

"The Doctrine of "estoppel in pais" is an equitable doctrine originally applied to prevent an advantage to be taken of strict legal rights, and the

equities of the particular facts must control in applying it.”

Our Court in *Utah State Building Comn. vs. Great American I. Co.* (140 P. 2d 763, 105 Utah 11), while holding the facts in that case were not sufficient to justify an estoppel still stated that:

“It is true as stated by our Court in the case of *Hilton vs. Sloan et al.*, 37 Utah 357, at Page 373, 108 P. 689, at page 694, “It is almost unnecessary to add that mere inaction or silence may, under peculiar circumstances, amount to both misrepresentation and concealment, which may amount to an estoppel. This doctrine is referred to and approved in the later case of *Tanner vs. Provo Reservoir Company et al.* 76 Utah 335, 289 P. 151.

Our Court in *Tanner vs. Provo Reservoir Company* (76 Utah 335, 289 P. 151) committed itself to the Doctrine of Estoppel as follows:

“Doctrine of estoppel applies where person undertakes to deny as true what he has by conduct over a long period avowed as true.”

“Intent to deceive need not always be shown in order to estop person.”

An annotation concerning “Estoppel of Municipality to Open or Use Street” appears in 171 ALR 94. On page 98 Under II (a) General Consideration it sets forth the general rule:



As stated in American Jurisprudence: "It is generally recognized that with respect to matters within the scope of its power and authority to act, a municipal corporation is subject to the rules of estoppel in those cases wherein equity and justice require their application, and where such application will not interfere with the proper exercise of governmental functions; ----- some authorities apply the doctrine of equitable estoppel to municipal corporations even where they are acting in a governmental capacity, where justice, right, and the equities of the situation demand it. In any event, the doctrine of estoppel is applied in the case of municipal corporations with caution and only under circumstances clearly demanding its application to prevent manifest injustice."

It further states on page 110 as follows:

"Doctrine of estoppel.

According to one substantial line of authority, an estoppel to open or use a street may arise where there is long-continued nonuser thereof by the municipality, together with possession of the street areas by private parties acting in good faith and in the belief that its use or once intended use as a street has been abandoned, and their erection of valuable improvements thereon without objection from the municipality, which has knowledge thereof, and the situation is such that to permit the municipality to reclaim the land would result in great damage to those in possession."



Plaintiff contends there are extraordinary factors present in this case which should give rise to the Doctrine of Estoppel.

(First) There is no evidence of a road having ever been established on the ground, there are no fences separating the strip from other land, no grading, and no travel on the premises for over 70 years and as long as the memory of man.

(Second) Plaintiff has put improvements on the premises and has established an engineered irrigation system to get the maximum beneficial use of an 80-acre farm. This system required the leveling of land in order for the waste water to be reused from one area to another. It also included the cementing of ditches and headgates, and the piping of water, all to an expense in excess of \$15,000.00 for only 80 acres of land.

(Third) That the alleged city road is outside the city's limit and no purpose for the construction has been shown.

(Fourth) To allow the city to now construct a farm road over the premises would greatly damage the Plaintiff's farm operation by destroying the irrigation system for the entire 80 acres.

## CONCLUSION

This is a proper case for the Court to apply the Doctrine of Estoppel and establish that there is not one rule of morals for a municipality and another for an individual.

The Plaintiff-Appellant respectfully requests that this case and cause be remanded to the Court below with instructions that the Court prevent the City from entering the premises and the Court fix the damages caused to the Plaintiff based upon the evidence submitted.

Respectfully submitted,

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