

1988

Gilbert Kimball and Maud Kimball, et al. v. Sweeny Land Company; Melvin Fletcher and Peggy Fletcher: Brief of Appellant

Utah Court of Appeals

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Gerald H. Kinghorn; Robert Felton; Attorney for Respondents.

Paul D. Veasy; Attorneys for Appellant.

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BRIEF

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DOCKET NO.

IN THE SUPREME COURT OF THE STATE OF UTAH

~~88-0080-CA~~

* * * * *

SWEENEY LAND COMPANY,

Plaintiff/Appellant

vs.

THE ESTATE OF GILBERT KIMBALL
and MAUD KIMBALL,

Defendants/Appellants,

MEL FLETCHER and
PEGGY FLETCHER,

Defendants/Respondents.

THE ESTATE OF GILBERT KIMBALL
and MAUD KIMBALL,

Crossclaim Plaintiffs/
Appellants,

vs.

MELVIN FLETCHER and
PEGGY FLETCHER,

COUNTERCROSS CLAIMANTS
and RESPONDENTS.

* * * * *

88-0080-CA

Case No. 860084

13-B

APPELLANT KIMBALLS' BRIEF

An Appeal From A Judgment Of The Third Judicial
District Court of Summit County, State of Utah Quieting
Title To Real Property And Partitioning Real Property

THE HONORABLE J. DENNIS FREDERICK, DISTRICT COURT JUDGE, PRESIDING

Gerald Kinghorn
9 Exchange Place, Ste 1000
Salt Lake City, Utah 84111
Attorney for Defendant/Respondent
Fletchers

Robert Felton
5 Triad Center, Suite 585
Salt Lake City, Utah 84180
Attorney for Appellants,
Kimballs

OCT 21 1986

Paul Veasy
50 West Broadway, Suite 1000
Salt Lake City, Utah 84111
Attorney for Appellants
Sweeney Land Company

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IN THE SUPREME COURT OF THE STATE OF UTAH

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SWEENEY LAND COMPANY,
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PEGGY FLETCHER,
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and MAUD KIMBALL,
Crossclaim Plaintiffs/
Appellants,
vs.
MELVIN FLETCHER and
PEGGY FLETCHER,
COUNTERCROSS CLAIMANTS
and RESPONDENTS.

* * * * *

APPELLANTS' BRIEF

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Did the District Court abrogate its judicial responsibility by allowing respondents to alter the findings of the Court and partition the real estate contrary to the Court's ruling?

2. Are the claims of Sweeney and Fletchers barred by the Doctrine of Laches for their failure to assert any claim in the Kimball parcel for 40 years or by the Statute of Limitations, § 78-12-2 et seq., U.C.A. (1953) for failure to commence an action within seven years?

3. Are the claims of Sweeneys and Fletchers otherwise barred by the Doctrine of Adverse Possession pursuant to §78-12-10 U.C.A. (1953, amended)?

4. Is the claim of Fletchers to any Kimball property barred by estoppel arising from the predecessor's disclaimer of any interest in the property in the probate proceeding or for lack of any consideration paid by Fletchers for any interest in the Kimball property?

5. Does a party have an absolute privilege to disparage another's title if the parties are involved in litigation and the recorded document is not authorized nor permitted by law?

6. Is it error to award property claimed by one party to another litigant when that litigant has expressly waived any interest in the property and stated to the Court that no interest was claimed?

7. Are the findings and conclusions of the Court so ambiguous and confused as to require that this matter be remanded?

STATEMENT OF THE CASE

This is an appeal from a final judgment quieting title to several parcels of contiguous property located in Park City and partitioning that property among the litigants (R. pp 382-387).

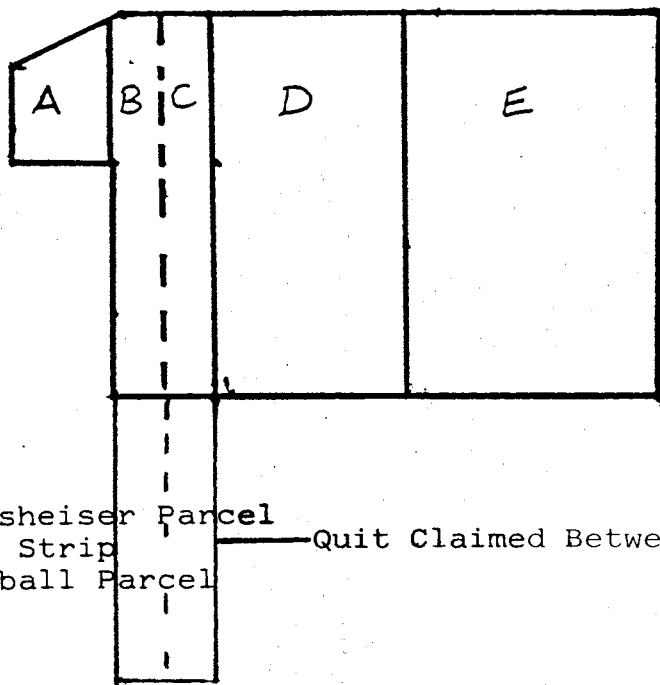
In its ruling, the District Court awarded the property as set forth on Page 4 herein (R. p 439, Addendum). In the written Judgment prepared by the Respondent, the ruling was changed and the ownership of the property redistributed without leave or

request of Court (R. pp 395-397, Addendum). The discrepancy between the Court's ruling and the Judgment is demonstrated on the diagram on the following page.

The Plaintiffs, Sweeney Land Company, originally brought this action against Fletchers to quiet title to a 30 foot strip of property lying between the site of the old Coalition Bulding in Park City (now the site of the Town Lift) (R. pp 1-3). Subsequently the Kimballs were joined as party defendants to resolve asserted claims to their property which lie south and east of the original parcel and include what is designated as the Kimball parcel and the small piece know as the Hershiser parcel. The locations of these properties are set forth on the diagram attached on Page 5 of this Brief.

The Fletchers asserted a prescriptive use along the 30 foot right-of-way as well as a prescriptive right to a driveway crossing the Kimball property to the back of the Fletcher property (R. p 12).

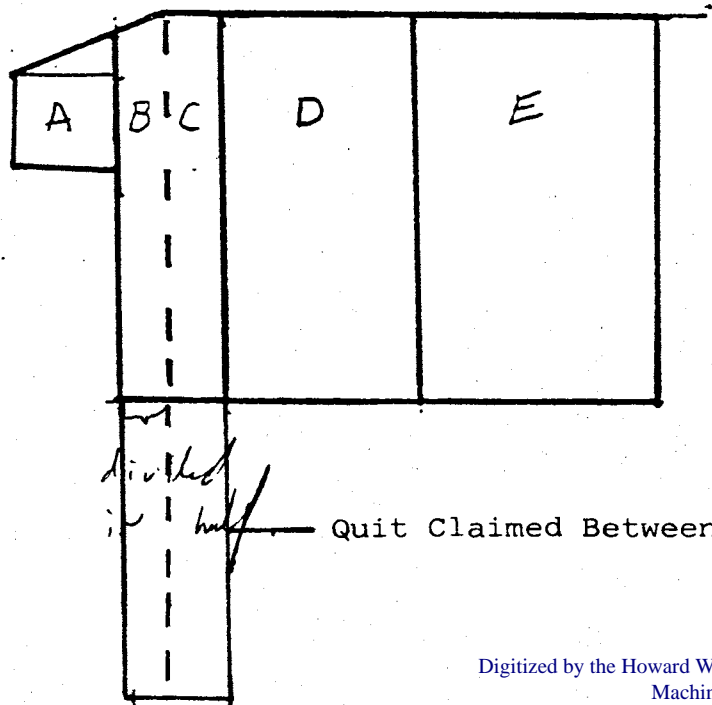
Prior to the trial, the claims of Fletchers and Sweeneys to a portion of the 30 foot right-of-way strip was resolved by an exchange of Quit-Claim Deeds between those parties. The Court divided the rest of the disputed property into essentially five parcels, though it ignored the claim of the Kimballs to the 30 foot strip which was divided between Fletchers and Sweeneys by means of the deed. Otherwise, the Court awarded two of the parcels to Sweeneys and Kimballs as 50% co-tenant owners; two of the parcels to Fletchers as 100% owners; and one parcel to Kimballs (R. pp 395-397, see diagram on Page 5).



RULING FROM THE BENCH

A - Sweeney 100%
 B - Fletcher 100%
 C - Fletcher 100%
 D - Fletcher 100%
 E - Kimball 100%

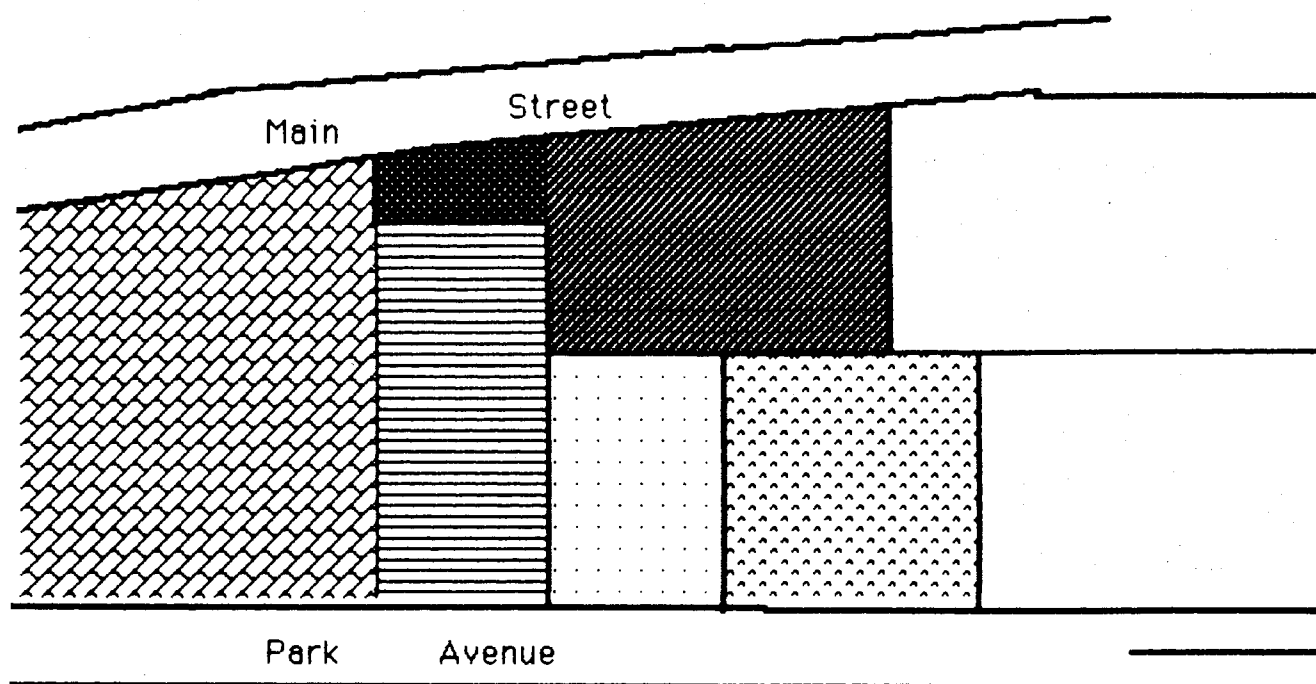
A - Hersheiser Parcel
 & C - 30' Strip — Quit Claimed Between Sweeney and Fletcher
 & E - Kimball Parcel



WRITTEN JUDGMENT

A - Sweeney 50%; Kimball 50%
 B - Sweeney 50%; Kimball 50%
 C - Fletcher 100%
 D - Fletcher 100%
 E - Kimball 100%

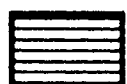
divided in half — Quit Claimed Between Sweeney and Fletcher



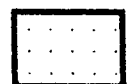
Gilbert Kimball Property



Hershiser claimed by Gilbert Kimball only



30 foot right-of way



Mel Fletcher et ux property



Blanche Fletcher Estate



Sweeney property

The Court also ruled that Kimballs and Fletchers were cotenants but that Fletcher had maintained a prescriptive easement over the partnership property for the maintenance of certain buildings and a driveway to the rear of his home (R. p 389; F.F. 10).

STATEMENT OF FACTS

This case was originally brought by Sweeney Land Company to quiet title to a 30 foot strip of property to which the Plaintiffs received title by a Quit Claim Deed from United Park City Mines in 1980 (R. pp 1-3). Fletchers then filed an Answer and Counterclaim seeking to quiet title to the property by adverse possession or enforce other prescriptive rights because of a long-term historical use of this right-of-way running east from Park Avenue. (R. p 12). Maud and Gilbert Kimball filed an Answer and Counterclaim alleging prescriptive use in the 30 foot strip and requesting the Court to quiet title in Kimballs to certain other adjoining property which, for the purposes of this appeal is designated as the Kimball parcel and the Hershisier parcel (R. p 18).

In 1940, Gilbert Kimball purchased the "Kimball parcel" for back taxes, and he and his wife have continually paid the taxes on that piece of property since that time. (Transcript (hereinafter "T.") pp 119-121). The taxes were assessed to Gilbert Kimball from 1942 to 1976 (T. p 119, F.F. No. 15) at which time Gilbert Kimball signed a Quit Claim Deed to himself and his wife for the Kimball parcel and the Hershisier parcel (at

the suggestion of the Summit County Recorder; Wanda Spriggs) (R. p 443 at pp 21-22).

The plat in the Summit County Recorder's office indicates that Gilbert Kimball has paid the real property taxes on those two parcels of property (Exs K-12, K-13 and K-14). Gilbert and Maud Kimball have occupied the premises continually since approximately 1942 and no other person has made any claim to the property other than that asserted by Fletcers in this action.

Robert Kimball died March 20, 1975 and his estate was duly probated in the Third District Court of Salt Lake County, State of Utah and closed January, 1976. That estate made no mention of the existence of any ownership interest in the subject property (R. P 129). At no time within the last 40 years has Robert Kimball or his successors or heirs made any contribution or payment towards either the purchase of this property or the taxes, or assert any claim arising from the 1940 deed until Mel Fletcher obtained a Quit-Claim Deed from Robert Kimball's widow in May of 1983 and asserted a co-tenant interest (R. 440 at p 46). in property knowing that even the widow "wasn't aware that she owned . . ." (R. 400 at p 46).

The reason the Deed was solicited was because after it was discovered that Robert Kimball's name appeared on the original deed issued in the 1940s even though the property was purchased by Gilbert Kimball, alone (Ex. K-10), Melvin Fletcher went to the widow of Robert Kimball and obtained the Deed from her. He also added the description of additional property known as the Hershisier parcel. No consideration passed to Mrs. Kimball in May, 1983, for that Quit-Claim Deed (T. p 180).

Gilbert Kimball died that same month, May, 1983. Immediately thereafter, counsel for Melvin and Peggy Fletcher, Gerald Kinghorn, recorded a document in the Summit County Recorder's Office known as "Notice of Probate Distribution" (R. p 128). The description in that document includes both the Kimball parcel and the Hershiser parcel. At the time he received the deed from Robert Kimball's widow, Melvin Fletcher did not pay any sum, whatsoever, for the deed, though he later testified that approximately one year later he gave her \$10.00 for property he offered to buy from Gilbert Kimball for \$60,000 (T. p 175). Gilbert Kimball's son testified that Melvin Fletcher had offered to buy this property for \$90,000 - \$96,000 from his father and mother. (T. p 157).

On or about July 7, 1983, Kimballs requested leave of the Court to amend their pleadings to assert a slander of title action against Fletchers as a result of the filing of the "Notice of Probate Distribution" (R. p 114) and the altered description contained in it. That same date the death of Gilbert Kimball was duly suggested upon the record in compliance with Rule 25 of the Utah Rules of Civil Procedure. (R. p 117).

On June 21, 1983 Fletchers had requested leave to amend their Answer against Kimballs asserting a co-tenancy as a result of the Quit Claim Deed obtained in May of 1983 from Robert Kimball's widow.

November 17, 1983 the Estate of Gilbert Kimball again filed a Notice of Death and Appointment of Personal Representative in this action (R. p 169).

December 7, 1983, the District Court denied Kimball's request to amend their pleading stating that Fletchers and their attorney had an absolute privilege to disparage the title to Kimball's property in private litigation (R. pp 171-175).

March 5, 1984, Kimball's moved the District Court to dismiss all claims of ownership to any property by Gilbert Kimball or the Estate of Gilbert Kimball since his death had been suggested upon the record and no motion to join the Estate had been made as provided for by Rule 25 of the Utah Rules of Civil Procedure. Kimball's also moved the Court to dismiss on the grounds that the statute of limitations barred all claims by Fletchers (R. p 226).

On May 29, 1984, the Motion to Dismiss was granted only as to the Decedent Gilbert Kimball but denied as to his Estate (R. p 190).

On March 12, 1984, Elizabeth Kimball, the widow of Robert Kimball, filed a Disclaimer with this Court disclaiming any interest in the real property which was the subject matter of the litigation (R. p 241). The Disclaimer filed by Elizabeth Kimball was filed as a result of the request of Gilbert and Maud Kimball to reopen the Estate of Robert Kimball and determine whether or not he had any interest which passed in the subject property to his widow and subsequently to Fletchers. In that proceeding in the District Court of Salt Lake County, State of Utah, Mel and Peggy Fletcher were represented by counsel, Gerald Kinghorn and Elizabeth Kimball was represented by Robert Ruggeri. That hearing was held on January 18, 1984 and the District Court of Salt Lake County denied the Motion to Reopen the Estate (Ex K-15).

The transcript of the probate hearing was admitted as evidence at the trial (Exhibit K-15). In that transcript, counsel for Elizabeth Kimball stated:

"I would like to simply offer one more time that I enter an appearance on behalf of Elizabeth Kimball in the District Court in Summit County and enter disclaimer of any interest coming to her since she is the only person, the only litigee, the only devisee is entitled to do the entire estate * * *" (emphasis added)

(Ex K-15 p 21).

In addition to claiming an interest as partners with Kimballs, Mel Fletcher and Peggy Fletcher alleged prescriptive rights for a driveway which crossed the property of the Kimballs and where two small sheds were placed. Kimballs contend said use was permissive and was not therefore hostile to their ownership. Mr. Mel Fletcher (T. p 179); Mr. Gilbert Kimball (R. p 443 at p 28); Maud Kimball (T. p 130); Mr. Fletcher's brother (Ex. 22-K); Mr. Fletcher's sister (Ex. 23-K); Mr. Fletcher's father (T. 177) and the Estate of Blanche Fletcher, his mother, which owns the contiguous property, (T. p 174) all stated their opinion that all use by the Fletchers was with Gilbert Kimball's consent.

The trial was held September 5, 1985 before the Honorable J. Dennis Frederick. At the commencement of the trial, counsel for Fletchers stated that the parcel designated as the Hershiser piece had been quit-claimed to Sweeneys (T. p 9). Further, counsel for Sweeneys stipulated on the record that Sweeneys made no claim to the Hershiser parcel (T. p 7). Even though Sweeney stipulated in opening argument, that they made no claim to the Hershiser parcel (T. p 7) and that the Defendants, Fletchers, had

earlier quit-claimed any right in said property to Sweeneys (T. p 9), the ruling of the Court, from the bench, awarded the Hershiser parcel to Sweeney, in spite of their disclaimer of any interest and, later, upon the preparation of the Judgment, the Hershiser parcel was divided 50% to the Sweeneys and 50% to Kimballs (R. pp 395-397).

GILBERT KIMBALL The deposition of Gilbert Kimball was taken February 28, 1983 (R. p 443). Mr. Kimball died in May of 1983, the same month that Elizabeth Kimball delivered the Quit-Claim Deed to Melvin Fletcher for the Kimball parcel and the Hershiser parcel. Because of his death, and no further testimony about his brother being on the 1940 deed was available from Gilbert Kimball.

Gilbert Kimball testified that in 1956 the County Recorder showed him a plat of his property and it included both the Kimball parcel and the Hershiser parcel (G. Kimball Dep. p 28; R. p 443).

Kimballs and the Fletchers have been long-time family friends and neither Mel Fletcher nor anyone else had ever claimed to have any ownership of the property (G. Kimball Dep. p 28) and Fletcher's father, Roy Fletcher, had asked permission to use the property (T. pp 28, 35) which was freely granted because the parties were close, family friends.

Prior to the institution of the lawsuit, Mel Fletcher and his wife had offered to buy the property without any claim for ownership or easement (G. Kimball Dep p 28; R. p 443; T. p 179).

Marion Fletcher, Mel Fletcher's brother, had delivered a written statement to Mr. Kimball that the use of the Kimball

property by the Fletchers was permissive (Ex. 22-K, Addendum). This statement was witnessed by Mr. Fletcher's wife, Nola (G. Kimball Depo. p 33; R. 443) and Mel Flecher and his wife always had permission to use the property (G. Kimball Dep. pp 56, 57; R. p 443).

Gilbert Kimball also testified that his brother, Robert Kimball, told him that he had nothing to do with this property in Park City (G. Kimball Dep. p 52; R. p 443).

MELVIN FLETCHER The Kimball property was utilized by Mr. Fletcher and his mother for access to the rear of both Mel Fletcher's property and the estate property. Mr. Fletcher claimed an easement across the Kimball property yet no claim was ever asserted by his mother or any other part of the family (T. pp 174-176). This was because the Kimballs and Fletchers have been lifetime friends and neighbors (T. p 175).

Mel Fletcher's father freely admitted that the "Kimball property" belonged to Maud and Gilbert Kimball (T. p 177) and also, Mel Fletcher's brother and sister both acknowledged that the property belonged to Maud and Gilbert Kimball (T. p 178, Ex. 22-K and 23-K).

Melvin Fletcher always had permission to use the Kimball/Hershiser property (T. p 179) and he offered to buy the property from Gilbert Kimball for \$60,000.00 (R. p 180) to \$90,000.00 (R. pp 156, 157). When he was unsuccessful in purchasing the property, Melvin Fletcher approached the widow of Robert Kimball and obtained a Quit-Claim Deed to the property for which he paid nothing (R. p 180). He then asserted a co-tenant

interest after May, 1983. That interest was eventually enforced by the Court.

MAUD KIMBALL Maud Kimball has lived within sight of the subject property which is designated as the Kimball-Hershiser piece for 60 years (T. p 112). She was personally familiar with the fact that there was a fence existed along the northern part of her property, separating the right-of-way which has been called the 30 foot strip (T. pp 116, 117) and the Sweeney property.

Kimball's had assumed that they were fee title owners of the property. They also thought their payment of taxes for the last 45 years had acted to extinguish Robert Kimball's name from the title because this was done at the insistence of Robert Kimball himself when he said he did not want to pay the taxes or want anything to do with this property (T. p 126). In fact, Robert Kimball told Gilbert Kimball he did not want to pay the taxes and wanted nothing to do with the property (T. pp 127, 128).

No one disputed ownership of the Kimball and Hershiser property between 1940 and 1983 (T. p 130) and Robert Kimball had instructed Gilbert Kimball to pay the taxes and it would take his name off the title (T. p 149).

Gary Kimball. Gary Kimball testified that Robert Kimball told his father, Gilbert Kimball, that he had no interest in the Kimball/Hershiser property in 1953 in Park City, Utah (T. pp 154-156). Also, Gary Kimball was present in the early 1980s or late 1970s when Mel Fletcher offered to buy the Kimball property for \$90,000.00. (T. p 157).

RULING OF THE COURT: The trial was concluded on September 6, 1985 the Court entered its ruling awarding the property as follows (R. p 439, Addendum):

1. The Hershiser parcel was awarded 100% to Sweeneys.
2. Fletchers were awarded the 30 foot strip and one-half of the Kimball property.
3. Kimballs were awarded the southern half of the Kimball parcel. (Trascript of Court's Ruling, R. p 439).
4. The rest of the 30 foot right-of-way was not addressed.

Counsel for Fletchers then prepared the Findings of Fact and Judgment in this action and without requesting an amendment of judgment or any other appropriate ruling by the Court changed the ruling to award property as follows (R. pp 395-397, Addendum):

1. Hershiser parcel - 50% to Sweeney and 50% to Kimball.
2. Northly half of the 30 foot right-of-way - 50% to Sweeney and 50% to Kimball.
3. Southerly half of the 30 foot right-of-way way to Fletcher.
4. Northern half of Kimball property to Fletcher.
5. Southerly half of Kimball property to Kimball.

Thereafter Sweeneys' and Kimballis' Motion to Amend the Judgment and Findings or for New Trial was denied, without comment, by Order executed January 13, 1986 (R. p 415).

The Court also found that the 30 foot strip began at the easterly side of Park Avenue and extended in a northerly direction for an indefinite distance and description (R. p 387). The northeasterly boundary of this strip cannot be identified (F.F. No. 7, R. p 387).

In 1940, Robert Kimball and Gilbert Kimball purchased the Hershiser parcel, but the legal description contained in the Deed was incomplete and the property description should have included the Hershiser parcel (F.F. No. 8, R. p 388).

The Plaintiff was on notice of the claim of Gilbert and Maud Kimball at the time they received the Quit Claim Deed in 1980 and the Plaintiff occupied only 15 feet of the 30 foot strip (F.F. No. 9, R. p 389).

Fletchers have openly, notoriously and adversely used approximately the northern half of the Kimball parcel and the 30 foot strip (F.F. No. 10, R. p 389).

Gilbert and Maud Kimball were co-tenants with Robert W. Kimball (no ruling as to the Estate of Gilbert Kimball is made) (F.F. No. 14, R. p 391).

Gilbert and Maud Kimball have paid all property taxes assessed on both the Hershiser and Kimball parcels since 1942 (F.F. No. 15, R. p 391) and Fletchers owe Kimballs \$4,641.66 being one-half of the property taxes for the last 42 years (F.F. No. 15, R. p 391).

SUMMARY OF ARGUMENT

1. The District Court Judge failed to make proper findings in accordance with Rule 52 of the Utah Rules of Civil Procedure and otherwise abrogated his responsibility to rule in this case by allowing Respondents' counsel to change the ownership of the property distributed by the Court.

2. The claims of Sweeney and Fletcher as to the property claimed by Kimball are barred by the Statute of Limitations because more than seven years elapsed after the probate proceeding and prior to the institution of any claim or assertion of ownership. This claim is barred by §§ 78-12-6, 78-12-8 and 78-12-12 U.C.A. (1953).

3. Any claim of ownership to the property claimed by Kimballs is barred by the Doctrines of Estoppel and Laches because Kimballs have been in good faith possession for over 40 years and no one has challenged their title or occupancy. Further, the claimants' predecessors specifically disclaimed any interest in the property, took no action to assert any rights in it for 43 years and conceded that even they believed the property belong to Gilbert and Maud Kimball.

4. Kimballs acquired title to the property through adverse possession in that they had openly possessed the property for 40 years, paid all taxes assessed against it and the fact that their possession was hostile was of the most obvious and clear character to everyone, including the parties to this action.

5. The District Court was mistaken in deciding that a party to private litigation has an absolute privilege to file any document he wants and thereby slander or disparage the title to the other litigant's property when the recorded document is not a lis pendens or otherwise sanctioned or privileged by law.

6. The claims of Fletchers and Sweeneys against the title held by Kimballs is barred by Rule 25 for failure to join the Estate as a party within 90 days after the death of Gilbert

Kimball was suggested upon the record. The trial court found that the Quit-Claim Deed from Gilbert Kimball to he and his wife as joint tenants was ineffective to convey the property and, therefore, the property claimed by Kimballs in their Counterclaim must be quieted to the Estate of Gilbert Kimball.

7. In the event the trial court's ruling that Fletchers and Kimballs are co-tenants is upheld, then Kimballs are entitled to one-half of all of the property awarded to Fletchers, including the 30 foot strip and a redistribution of the property so that they receive their fair share. The trial court allowed counsel for the Respondent to divide the property in a manner most convenient to his client, resulting in Kimballs being awarded interests which are divided and have minimum value. Such unequal distribution as to percentages and location constitutes an abuse of discretion.

I.

DISTRICT COURT JUDGE ABROGATED HIS RESPONSIBILITY
BY ALLOWING COUNSEL FOR THE RESPONDENT TO SUBSTITUTE
COUNSEL'S RULING FOR THE JUDGMENT OF THIS COURT
CONTRARY TO RULE 52 OF THE UTAH RULES OF CIVIL PROCEDURE.
THE FINDINGS ARE AMBIGUOUS AND CONTRADICTORY

Upon conclusion of the evidence, the Court ruled that the property in question should be divided upon between the parties as set forth at the top of Page 4 of this Brief (R. p 439, Addendum).

Upon completion of the proposed Findings of Fact and Conclusions of Law and Judgment, counsel for the Respondent, changed the ruling of the Court and awarded ownership of the property in question as shown on the bottom diagram on Page 4 of this Brief.

Upon a hearing of the Appellant's Motion to Amend the Findings to comply with the ruling of this Court, the Judge allowed the Findings and Judgment and thereby permitted the Respondents to substitute their judgment for that of the Court without one change or comment (R. pp 414-415, Addendum).

In **Phillips v. Phillips**, 171 Colo 127, 464 P.2d (1970) the Colorado Supreme Court at page 878 stated:

"There may be exceptional cases in which such a procedure is justified (having both parties submit proposed findings for consideration), but they are rare. They are certainly not represented by the instant case. After taking whatever time was necessary to digest the evidence in this case, the trial judge had the judicial responsibility to give utterance - solely from his own lips, of his views . . ."

Perhaps the most often cited case in regards to a Judge's responsibility to make findings is found in **United States v. Forness**, 125 F.2d 928 (1942), cert. denied 316 U.S. 694, 62 S.Ct. 1293 (1942) which was cited with approval in **U.S. v. El Paso Natural Gas**. The Court stated at page 942

"It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose - that of evoking care on the part of the trial judge in ascertaining the facts for, as every judge knows, to sit down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of his duty."

Not only are the Findings of Fact and Conclusions of Law in this case ambiguous and uncertain, they are totally contradictory to the actual ruling of the Court (see diagram on Page 4).

Rule 52(a), Utah Rules of Civil Procedure states:

"In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A."

By allowing Respondent to unilaterally make their own determination of how the property should be partitioned, the trial judge has passed the aegis of his position to the parties.

Counsel for Appellants admits that this is a complicated case involving several pieces of property and their ownership.

Article I, § 11 of the Constitution of Utah provides:

"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal of this State, by himself or counsel, any civil cause to which he is a party."

Article VIII, § 1:

"The judicial power of the state shall be vested in the senate sitting as a court of impeachment, in a Supreme Court, in district courts, in justices of the peace, and such other courts, inferior to the Supreme Court, as may be established by law."

The trial judge in this action has ceded his office to the Respondents by allowing them to divide up the property as they choose. Such action renders Appellants redress to the court as meaningless and contrary to the rights guaranteed them by the Utah Constitution. As Judge Frank said in *U.S. v. Forness*, *supra*, at Page 943:

"To ascertain the facts is not a mechanical act, it is a difficult art, not a science. It involves skill and judgment. As fact findings is a human undertaking, it can, of course, never be perfect. For that very reason, every effort should be made to render it as adequate as it humanly can be."

It is an art which must be practiced by the judge, not the litigants.

The confusion and contradiction which are found in the Judgment also require reversal. In addition to the discrepancy above, the Judgment awarded an interest in the Hershiser parcel to Sweeney who had disclaimed any interest in it. Counsel for Sweeney stated at Page 7 of the Transcript, "The Plaintiff makes no claim to that property (Hershiser)." The Judgment also determines that Fletchers and Kimballs are co-tenants (Conclusions of Law No. 3, R. p 393, Addendum) yet goes on to find that Fletchers' use of the property is prescriptive as against Kimballs (F.F. No 10, R. p 387, Addendum). The Court completely ignores the case of **Olwell v. Clark**, 658 P.2d 585 (Utah, 1982) requiring unequivocal notice to a co-tenant of adverse claims. (This case is addressed later, so omitted here). In **Sillman v. Powell**, Utah, 642 P.2d 388, 391 (1982), this Court stated:

"We are unable to determine whether any of the foregoing assignments of error have any validity because the findings of fact are couched in ambiguous, indefinite and conclusory terms that do not allow us to determine whether the trial judge correctly applied the law to the facts."

The ambiguity and contradictions in this case also require reversal.

II.

SWEENEY AND FLETCHER'S CLAIMS TO THE KIMBALL/HERSHISER
PARCEL ARE BARRED BY THE STATUTE OF LIMITATIONS,
§§78-12-6, 78-12-8 AND 78-12-12 U.C.A. (1953)

The claim of Mel Fletcher for title as a co-tenant to the property arising from the Deed from Elizabeth Kimball in May of 1983 is barred because it was not commenced within seven years of

the Decree of Distribution of the Estate of Robert Kimball. The Decree of Distribution (R. pp 147, 148, Addendum) was filed January, 1976, more than seven years prior to the execution of the Quit-Claim Deed from Elizabeth Kimball to Fletcher in May of 1983. In **Parr v. Zions First National Bank**, 13 Utah 2d 404, 375 P.2d 461 (1962) the heirs of a deceased sought to quiet title more than seven years after the Decree of Distribution. Excluding the issue addressed in **Parr** as to whether or not the Statute of Limitations was tolled during minority, that case is strikingly similar to the one now before this Court. A complaint in that action alleged that respondents had acquired title to property by adverse possession for over 15 years and appellant's counterclaim alleged their interest arose as heirs of the deceased.

The Court upheld Summary Judgment that the claim by the heirs was barred by the Statute of Limitations §§78-12-6, 78-12-8 and 78-12-12, U.C.A. (1953) (reproduced in Addendum) because more than seven years had run since the Decree of Distribution. The Court stated at Page 406:

"* * * the facts in this case are that a guardian was appointed for appellants when distribution was made to it of appellant's interest in all the property which descended to them in their father's estate. This guardian had possession or the right to possession in the property for more than the required seven years. In **Dignon v. Nelson**, this Court held that where the statute of limitations has run against the guardian, the minor heirs are likewise barred, just as we have held that when the administrator is barred, the minor heirs of decedent were barred and for the same reasons."

Because neither the estate, the heir, Elizabeth Kimball, Mel Fletcher nor Sweeneys commenced any proceeding for more than

seven years subsequent to the Decree of Distribution, the claim is barred by the Statute of Limitations as against Kimballs.

III.

THE CLAIMS OF THE SWEENEYS AND FLETCHERS
ARE BARRED BY THE DOCTRINE OF LACHES AND ESTOPPEL
BECAUSE FOR OVER 40 YEARS NO CLAIM WAS ASSERTED

It is respectfully submitted to this Court that there is no doubt in the record that Maud and Gilbert Kimball believed in good faith that they were sole owners of the property designated as the Hershisser/Kimball parcel. Up to the time the name of Robert Kimball was discovered on the old Deed in 1983, not one person ever challenged their right to possession or ownership of this property upon which they faithfully paid the taxes.

Gilbert Kimball, Maud Kimball and Gary Kimball all testified that they heard Robert Kimball tell them years ago that he wanted nothing to do with the property and it was theirs, and they should do whatever they wanted to take his name off it. One must consider this statement in light of the fact that in the 1940s, 50s and 60s Park City was a deserted town. Even the County records demonstrated the property belonged to Kimballs (Addendum) when Gilbert went to the County in 1956 (G. Kimball Depo pp 21, 25; Exs K-12, K-13 and K-14).

The record amply indicates that the Fletchers believed the Kimballs owned the property since they attempted to purchase it from them (Fletcher, T. p 180) and only when that was unsuccessful did they assert various easements and ownership interests.

Mr. Fletcher's father, Roy, as well as his father and sister knew that any use of the property was permissive. This was because all of these parties were residents of Park City and good friends until Mr. and Mrs. Fletcher saw a way to take advantage of that relationship, for profit.

In addition to Fletchers lack of diligence, neither his deceased brothers nor heirs ever asserted any claim or rights in over 40 years. In 1976 Robert Kimball died and no mention of this property was made in his estate or Will. Counsel for Kimballs asked to reopen Robert Kimball's estate to determine what, if any, ownership interest Robert Kimball had in this property and the attorney for Elizabeth Kimball, Robert Ruggeri, stated in court that they would disclaim any interest coming to her (emphasis added) in open court. Fletchers were represented by Mr. Kinghorn at that hearing (Addendum) and Judge Daniels did not reopen the Estate in reliance on that disclaimer.

In **Papnikolas Brothers v. Sugarhouse Shopping Center, Utah**, 535 P.2d 1256 (1975) this Court addressed the elements of laches in deciding a one year delay was not significant to invoke the equitable powers of the Court.

This Court stated at Page 1259:

"The benefits of balancing the doctrine of equities or relative hardship, is reserved for the innocent defendant, who proceed without knowledge or warning that he is encroaching upon another's property rights

At Page 1260 it was stated that the Doctrine of Laches requires:

- "1. The lack of deligence on the part of the plaintiffs.
2. An injury to defendant owing to such lack of deligence.

Although lapse of time is an essential part of laches, the length of time must depend on the circumstances of each case, where the propriety of refusing a claim is equally predicated upon the gravity of the prejudice suffered by defendant and the length of plaintiff's delay."

Mrs. Kimball is having her assets of a lifetime stripped from her on technicalities which, if not unlawful, are immoral and require imposition of this equitable doctrine.

IV.

KIMBALLS HAVE ACQUIRED TITLE TO THE KIMBALL/HERSHISER PARCEL BY ADVERSE POSSESSION

It is undisputed that Gilbert and Maud Kimball paid the real property taxes assessed on the property from at least 1942 (Ex K-10; F.F. No. 15, R. p 391). The tax sale record demonstrates sale to Gilbert J. Kimball alone (attached to Ex K-10, Addendum). The Summit County Assessor's plat showed the property SA348 assessed to Gilbert Kimball in the early 1950s (Ex K-12) as well as currently (Ex K-14, Addendum).

Robert Kimball told Gilbert Kimball that "he had nothing to do with this property. He refused to pay any part of the taxes on it, so we let the property go to taxes. And we bought it back in my name." (Dep. G. Kimball, R. 443 p 53). In fact, it was Robert Kimball who instructed Gilbert Kimball on the manner in which to get Robert Kimball's name off the property (R. pp 126-128).

Possession and use of the property has been maintained by Gilbert and Maud Kimball as owners continuously since 1947 and such possession has been open, notorious and hostile to the

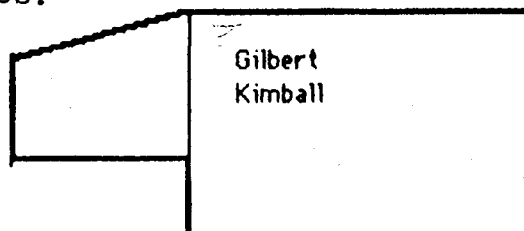
entire world (Dep. G. Kimball pp 7-26, Addendum). There is no dispute that all real estate taxes assessed against the property were paid by Gilbert and Maud Kimball alone and that no other party contributed in any way to the payment of those taxes prior to the commencement of this action.

In the recent decision of **Olwell v. Clark**, 658 P.2d 585 (Utah, 1982) this Court established the very strict standard when a party is claiming adverse possession against a co-tenant and stated at Page 589, "stated another way, the claimant's conduct must give notice of his claim to his co-tenant in some clear, unequivocal manner". It is submitted to this Court that the standards set forth in **Olwell** are satisfied in all respects to extinguish any claim to ownership by Robert Kimball and Fletchers as a result of the Quit-Claim Deed from Elizabeth Kimball in May of 1983. They simply desereted the property 44 years ago.

V.

THE DISTRICT COURT ERRED IN RULING THAT
"A PARTY TO LITIGATION HAS AN ABSOLUTE PRIVILEGE
TO DISPARAGE ANOTHER'S PROPERTY"

The Appellant's attorney recorded a document in the Summit County Recorder's office known as "Notice of Probate Distribution" which described the original Kimball parcel, the 30 foot strip adjacent to it, and the parcel they have designated at the Hershiser piece. Visually the piece included all property within these boundaries:



That document was recorded for the purpose of affecting or clouding the title to the property involved in this litigation. The District Court refused to allow Appellants to assert a claim of slander of title and would not allow the pleadings to be amended on the basis of absolute privilege (R. p 190).

In her deposition, Elizabeth Kimball, the widow who deeded the property to Mr. Fletcher in May of 1983, stated (R. 442 p 13):

"Question: (By Mr. Felton) Alright, now, did Mr. Fletcher pay you anything for signing the Deed?

Answer: No, he did not."

At pages 14 and 15:

"Question: Okay, had you ever heard prior to Mr. Fletcher calling you that this property had Robert's name on it?

Answer: No.

Question: You didn't in fact know anything about this property, did you, until Mr. Fletcher called you otherwise regarding ownership?

Answer: No. Other than, as I say, when I was married a little building was there and we stored stuff in it, and Bob was suppose to have half of it.

* * *

Question: This is the Decree of Distribution from your late husband's estate?

Answer: Yes.

Question: And the property that is reflected on the Quit-Claim Deed, Exhibit 1, does not appear in this?

Answer: I understand that.

Question: Was that because you didn't claim any interest at that time?

Answer: That's right.

Question: Have you ever claimed interest in this property?

Answer: No."

It is submitted that there was sufficient basis to assert a cause of action for slander or disparagement of title for and on the basis that the document which was recorded by Flechers is not sanctioned or authorized by Statute or otherwise and the Estate never claimed to own it.

It must be emphasized that no Lis Pendens was filed by Fletchers and the "Notice of Probate Distribution" (Addendum) is not such an instrument as is contemplated by §78-40-2 U.C.A. 1953. The District Court ruled that there is an absolute privilege, in private litigation, to slander or disparage another's property and that **Hansen v. Kohler**, 55, P.2d 186 (Utah, 1976) did not just apply to filing a Lis Pendens.

This ruling is absolutely contrary to the law as explained by this Court in **Olsen v. Kidman**, 120 Ut. 453, 235 P.2d 510 (1951). The offending document is one invented by Respondents and filed to "affect" the title of property in litigation. Even an innocent filing without privilege or right is slanderous, **Olsen, supra**.

The ruling must be reversed and the case remanded for a new trial to allow Appellants an opportunity to present their claims.

VI.

THE CLAIMS OF FLETCHERS AND SWEENEY ARE
BARRED BY RULE 25, UTAH RULES OF CIVIL PROCEDURE

The trial judge ruled that Maud and Gilbert Kimball could

not rely on title according to the deeds between themselves in 1976 and 1977 and the description was in error (Transcript Court Ruling p 5, Addendum). Title to Kimballs, therefore, must vest in Gilbert Kimball since the Quit-Claim Deeds between he and his wife were nullities. Since the Quit-Claim Deed could not pass "after-acquired title", **Duncan v. Hemmelwright**, 112 U. 262, 186 P.2d 965 (1947) there could be no joint tenancy and all property belongs to the Estate of Gilbert Kimball.

As stated, Gilbert Kimball died in May, 1983. His death was duly suggested upon the record on two occasions (R. pp 117, 118; R. pp 229, 230) in compliance with Rule 25(a)(1) of the Utah Rules of Civil Procedure (Addendum) which states that unless the motion for substitution is made not later than 90 days, the action shall be dismissed. Since the joint tenancy was not created, the claims against Gilbert Kimball should have been dismissed. Appellants' Motion to Dismiss on this basis was denied (R. pp 226-228).

Rule 25 requires this matter be remanded with instructions to quiet title to the property described in Kimballs' Counterclaim to the estate of Gilbert Kimball.

VII.

IF FLETCHERS AND KIMBALLS ARE CO-TENANTS,
THEN, THE COURT ABUSED ITS DISCRETION
PARTITIONING THE PROPERTY

As stated earlier in this brief, the trial judge allowed the Respondents to alter the judgment of the Court in the distribution of the ownership of the property.

This abrogation of duty resulted in the Respondents preparing the Judgment so that they received title to the property as they wanted and left the property retained by Kimball divided and unuseable (See diagram on p 4).

The importance of this distribution is that if the Fletchers and Kimballs are co-tenants, as asserted by Respondents (which Appellant disputes), then Kimballs are entitled to their co-tenant interest in the 30 foot strip, all the way to Park Avenue. This entitlement is not addressed by the Court, apparently for the reason that Fletchers and Sweeney quit-claimed one-half of their portion of that right-of-way among themselves prior to trial.

Further, since as part of that pre-trial agreement, Fletchers quit-claimed Parcel A (Hershiser) on the diagram on Page 4 of this Brief to Sweeneys and Sweeneys disclaimed any interest to that property in their opening statement, that Parcel A must be awarded to Kimballs free and clear of the interest of the other litigants.

If the Court upholds the existence of a co-tenancy between Kimballs and Fletchers, then this case must be remanded for the trial court to establish what property was held as co-tenants at the time of trial and to equitably partition that property among the co-tenants in accordance with their interest.

CONCLUSION

1. The Appellants request this Court that this case be remanded for a new trial or that title to the following property

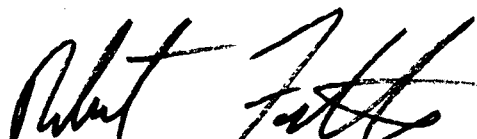
be quieted in the Estate of Gilbert Kimball for the reasons stated herein.

2. The following property description constitutes the property shown on Page 5 of the Brier as the "Gilbert Kimball property" and the "Hershiser property claimed by Gilbert Kimball only" and more particular described as:

Beginning at a point North 23° 38' West 85.97 feet and North 33° 25' West 36.70 feet from the Southeast corner of Block 7, Amended Plat of Park City and Section 16, Township 2 South, Range 4 East, Salt Lake Base and Meridian and running thence South 61° 10' West 73.16 feet; thence North 28° 50' West 128.59 feet; thence North 61° 10' East 33.90 feet; Thence North 28° 50' West 30 feet; thence North 64° 11' East 17 feet; thence South 43° 13' East 56.50 feet; thence South 33° 25' East 103.30 feet to the point of beginning.

3. Appellant Kimball moves this case be remanded for the trial court to reconsider the distribution of the property so that separate parcels which are contiguous to each other and which brings the greatest economic benefit to each of the parties be addressed rather than allowing Respondents to pick choose the parcel which they think would be of the greatest benefit to them and which would result in an economic loss to Appellants.

RESPECTFULLY submitted this 29th day of September, 1986.



Robert Felton