

2001

# Sweeney Land Company v. Gilbert Kimball and Maud Kimball, et al. v. Melvin Fletcher and Peggy Fletcher, et al. : Petition for Rehearing

Utah Court of Appeals

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STATE COURT OF APPEALS  
BRIEF

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DOCKET NO.

IN THE UTAH COURT OF APPEALS

880080-CA  
SWEENEY LAND COMPANY,

Plaintiff and Appellant,

v.

GILBERT KIMBALL and MAUD  
KIMBALL,

Defendants and Respondents,

Case No. 880080-CA

GILBERT KIMBALL and MAUD  
KIMBALL, et al.,

Crossclaim Plaintiffs  
and Respondents,

v.

MELVIN FLETCHER and PEGGY  
FLETCHER, et al.,

Counterclaim-cross  
claimants and Respondents

PETITION FOR REHEARING

DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT, SUMMIT COUNTY, STATE OF UTAH  
HONORABLE J. DENNIS FREDERICK, JUDGE

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FILED  
OCT 18 1988

IN THE UTAH COURT OF APPEALS

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SWEENEY LAND COMPANY, )  
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Plaintiff and Appellant, )  
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v. )  
 )  
GILBERT KIMBALL and MAUD )  
KIMBALL, )  
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Defendants and Respondents, ) Case No. 880080-CA  
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PETITION FOR REHEARING

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PETITION FOR RE-HEARING

Pursuant to the provisions of Rule 35 of the Rules of the Utah Court of Appeals, Respondents Melvin Fletcher and Peggy Fletcher petition the Court for rehearing of the decision entered on October 3, 1988 by the Court.

Counsel for the petitioners, Gerald H. Kinghorn, hereby certifies that the petition is presented in good faith and not for delay.

The points of law and fact which the Court has overlooked or misapprehended are as follows.

POINT I

**THE OPINION OF THE COURT IS BASED ON THE ASSUMPTION OF FACTS NOT IN EVIDENCE, FACTS WHICH WERE INTERNALLY CONTRADICTIONARY AND FACTS WHICH WERE OVERWHELMINGLY REBUTTED BY CREDIBLE EVIDENCE**

The opinion of the Court on the issues of laches and estoppel, is grounded on statements attributed to Robert Kimball. Because the reports of the statements allegedly made by Robert are so internally contradictory and were completely rebutted by the evidence there is inadequate factual support for the proposition that the statements were actually made.

**A. LACHES**

The Court finds that the petitioner's claim is barred by laches in a discussion beginning on page 4 of the opinion. The finding of laches is predicated on two self-admitted assumptions as described in the opinion; the opinion assumes first: that Gilbert redeemed the property in his name in 1947, second: gave notice of the redemption to Robert in 1953 and third: that Robert

failed to act. It is undisputed that Gilbert did not redeem the property in his name in 1947. The last deed of record prior to Gilbert's deed to himself and Maud in 1976 is the 1940 deed to Gilbert and Robert from Summit County. Gilbert and Maud admitted the existence of Robert's interest and contradicted their testimony in the legal description portion of two 1976 deeds to themselves. (See Exhibits 9 and 11 - Deposition of Gilbert Kimball) The Court admits the facts upon which it bases the laches decision are assumptions in discussing Robert's failure to act: "If Robert believed . . ." clearly identifies this Court's opinion of Robert's failure as based on an assumption of notice and a failure to act.

At the trial Maud Kimball and Gary Kimball fabricated the statements allegedly made by Robert; plainly, they committed perjury.

Maud testified that she was personally present during the 1947 discussion and the opinion of the Court cites her statement as truthful. But in Maud's deposition she testified she was not personally present and did not hear the alleged statement. (Maud Kimball deposition p. 21, line 23). Maud committed perjury by testifying that she was present and heard the Robert's statement. She claimed knowledge of a tax sale that never occurred and Robert's alleged presence in the State was clearly rebutted when Elizabeth Kimball testified Robert did not travel to Utah during that period of time or in 1947.

Gary Kimball testified he heard and remembered a discussion in 1953 between his father and Robert. Gilbert Kimball testified the last discussion between he and Robert was the 1947 discussion and Elizabeth Kimball testified that Robert could not have been present in Park City in 1953 because he was not in the State of Utah that year. Gary Kimball fabricated the entire conversation in an attempt to further his own interests.

Elizabeth Kimball testified that her husband was not even in the State of Utah (or Park City) during the years 1947 and 1953. Robert Kimball was not present in the State of Utah and could not have heard any statement by Gilbert, have made a statement to Gilbert or have been placed on notice by any verbal statement by Gilbert during either 1947 or 1953. There was no evidence of a tax redemption in Gilbert's name in 1947 and Robert could not be placed on notice by an event that never occurred, Gilbert and Maud admitted to Robert's interest in the 1976 deeds to themselves and Elizabeth Kimball clearly testified that Robert was not even in the State in 1947 or 1953. The finding of laches against the Robert Kimball interest in completely and totally unsupported by any factual basis on the record.

**B. ESTOPPEL**

The Court also finds that Robert Kimball's successors in interest are estopped to assert the property interest of Robert Kimball. The factual basis for the claim of estoppel apparently the disputed evidence of Robert's renouncement of interest and Gilbert's continued payment of property tax. There is no

evidence of any expenditure of time or money on the property with the exception of the payment of taxes, there is no evidence of any improvement to the property, there is no evidence of any act by Gilbert Kimball or his successors in interest which Gilbert Kimball would not otherwise have done. Gilbert Kimball and Maud Kimball testified that they purchased the property in Gilbert's name in 1947 and that the property no longer carried Robert's name after that time; there was no reason for Gilbert and Maud to rely on Robert's renouncement of interest. The opinion of the Court states that the Kimball's relied on Robert's renouncement of interest. Why? Clearly, if Gilbert and Maud Kimball are telling the truth, there was no reason for them to rely on Robert's renouncement of interest in the property. They simply could rely upon the deed to themselves from the County after the purported tax sale.

It has been the position of Elizabeth Kimball and Melvin Fletcher and Peggy Fletcher that Robert Kimball never renounced his interest or verbally surrendered his interest in the property to Gilbert Kimball. (The Statute of Frauds U.C.A. 25-5-1 (1953 as amended) prevents unwritten surrenders of interests in real property.) The statements by Gilbert and Maud Kimball and Gary Kimball are pure fabrications. The repudiation of interest did not occur and by the Kimball's own testimony the repudiation of interest could not be detrimental to them because they believed, if we believe their testimony, that they purchased the property in Gilbert's name in 1947.



Gilbert and Maud Kimball testified that they received legal advice on how to proceed in the absence of a deed from Robert. Apparently Gilbert and Maud Kimball did not do what they were advised to do by their legal advisor because the property remained in the name of Gilbert and Robert up to the present time. The testimony by Gilbert and Maud Kimball creates the fact that there could be no estoppel in this situation because they did not rely on Robert's statements or renouncement of interest and they did nothing based on Robert's purported statements which they would not have done in the absence of the purported statements.

At the time of his deposition, Gilbert Kimball knew where Robert Kimball's widow lived in Salt Lake City. He testified in his deposition that he knew Robert had a son living in Salt Lake City. During Gilbert's deposition counsel for the Respondents pointed out to Gilbert that there was no deed or document placing title to the property in his name alone. Following that deposition, the Kimball's counsel executed an affidavit in support of a motion for publication for service of summons as he initiated the quiet title portion of the Kimball's claim. The Kimballs did not make an effort to find Elizabeth Kimball in Salt Lake City even though it was clear from the record that Robert Kimball's interest has survived over time. The Kimballs clearly tried to not serve the successors in interest to Robert Kimball personally with process to put them on notice of the quiet title matter. The Kimballs committed perjury in an attempt to support laches and estoppel defenses to the successors in interest of Robert

Kimball. The opinion of the Court rewards this reprehensible conduct by awarding the entire property to Maud and Gary Kimball.

C. PRESCRIPTIVE EASEMENT

Prior to the purchase of Elizabeth Kimball's interest by Melvin and Peggy Fletcher, the pleadings in the case filed by former counsel pled a prescriptive easement arising in the Fletchers by virtue of the continued use and possession of the property adverse to Gilbert and Robert Kimball for a period of more than thirty years.

It is essential for the Court to understand that the property purchased by Melvin and Peggy Fletcher from their predecessors in interest is separate but adjacent to the property previously owned by Roy Fletcher, Melvin's father. The Kimball property adjoins the Roy Fletcher property at the rear and the separate Melvin Fletcher property at the rear.

The opinion of the Court apparently defeats the prescriptive easement of Melvin Fletcher to use the Kimball property at the rear of his property for access to his home by relying on certain statements by Melvin's brother and sister which apply only to the Roy Fletcher property and not to the Melvin Fletcher property. Both Juanita Fletcher Love and Marion Fletcher prepared written statements defining the extent of the permission their father Roy enjoyed to cross the Kimball property. Neither Marion Fletcher nor Juanita Fletcher Love ever claimed that Melvin Fletcher had or has permission to cross the Kimball property from the property

which he and Peggy Fletcher separately own as distinguished from the Roy Fletcher property.

The Court's opinion misapprehends the facts with respect to the Fletcher's predecessors. Apparently the Court believes the Marion Fletcher and Juanita Fletcher Love statements are material. Mary Workman, not Roy Fletcher, is the predecessor of Melvin and Peggy Fletcher and therefore Roy's consent has no bearing on the adverse use by Melvin and Peggy.

Until the conclusion of the trial below and the opinion of this Court, no party knew who owned the property to the rear of the Mel Fletcher home; the smaller 98 x 77 foot description was alleged to be controlling by the owners of the Sweeney Land Company and a large gap (30 feet) existed between the 98 x 77 foot parcel and the parcel to the North purchased by Sweeney Land Company from the Silver King Mining Company. It was across this gap which Gilbert and Maud Kimball claimed in 1976 that Mel Fletcher continued to enjoy access to his home for over thirty years. The opinion of the Court now apparently assumes that Mel Fletcher had the permission of an unknown owner for a thirty year period of time and is foreclosed from asserting a prescriptive easement to the land on which his garage, outbuildings and driveway now rest.

It is clear that the prescriptive easement enjoyed by Melvin Fletcher and Peggy Fletcher is a separate property interest having to do with a separate and distinct property from the property described by Marion Fletcher and Juanita Fletcher Love

in their statements to Gilbert Kimball. The statements regarding Roy Fletcher's consensual use of the Kimball property have no bearing on the nature of Mel and Peggy Fletcher's use of the property to the rear of their home which is not the home of Roy Fletcher. It is also clear that until a judicial finding was entered of the accuracy of the 1976 Kimball deed, all of the parties to this dispute understood that no clear record interest was vested in Gilbert or Maud Kimball with respect to the property between the 98 x 77 foot parcel and the parcel purchased by Sweeney Land Company from the Silver King Mines; approximately a 30 foot gap existed between those two parcels and it is this property which Melvin Fletcher and Peggy Fletcher have used for access to their property and for their garage and other outbuildings for more than thirty years.

## POINT II

### THE OPINION FAILS TO FOLLOW THE STANDARD FOR THE REVIEW OF DECISIONS OF THE TRIAL COURTS AS MANDATED BY THE UTAH SUPREME COURT

The Trial Court entered Findings of Fact and Conclusions of Law and a Decree of Quiet Title and Partition as required by the Utah Rules of Civil Procedure. The Findings of Fact were based on the Trial Court's observations of the witnesses and a review of the documentary and testimonial evidence available to it.

The opinion of the Court correctly states the Rule that Findings of Fact should not be set aside unless they are clearly

erroneous. The clearly erroneous standard requires that there be no evidence to support the Findings of Fact.

In Acton vs. Deliran, 737 P.2d 996, (Utah 1987) the Supreme Court of Utah provided the most comprehensive guidance concerning the requirements of the trial courts to enter Findings of Fact and Conclusions of Law. Differences of interpretation in the facts should be resolved in favor of the judgment of the trial court who had the opportunity to view the witnesses and their candor while on the witness stand. Here the main opinion exercises a substitution of a judgment of the Appellate Court for the judgment of the trial court. Throughout the main opinion the Court assumes that the statements attributed to Robert W. Kimball were in fact made by Robert Kimball and were true. The Court overlooks the internal inconsistency of the testimony and the contradiction of the testimony by documentary evidence and testimony of Elizabeth Kimball. Where the evidence must be weighed by a finder of fact, deference should be given to the trial judge and the trial judge should be sustained.

The main opinion fails to sustain the findings of the trial court where the evidence was contradictory, rebutted and internally inconsistent.

POINT III

THE OPINION MISSTATES THE LAW OF PROMISSORY ESTOPPEL  
AS AN EXCEPTION TO THE STATUTE OF FRAUDS

The Statute of Frauds 25-5-1 (U.C.A. 1953, as amended) requires that no interest in land may be surrendered unless in writing. This rule is intended to prevent frauds being perpetrated on the public and the courts in the trial of matters involving real property. It is uncontroverted that there is no writing surrendering or transferring the interests of Robert W. Kimball to Gilbert or Maud Kimball.

The only exception to the Statute of Frauds requirement that such matters be in writing is the principle of promissory estoppel as described in Monarco vs. LoGreco, 220 P.2d 737 (1950). In Monarco v LoGreco the Supreme Court of California enforced an orally created interest in land. In that case the Plaintiff had worked an entire lifetime on a farm as a result of a promise that the farm would be left to him by his stepparents. The enormous degree of harm to the Plaintiff was weighed against the interest of the State in requiring that all interests conveying land be in writing. This landmark case sets the standard for the creation of promissory estoppel and the principal ingredient is the detrimental reliance and conduct in furtherance in the reliance on an oral promise.

In the present case there is no conduct in reliance of the nature demonstrated in Monarco v LoGreco. The conduct of Gilbert

and Maud Kimball demonstrates no change in the course of dealing of the parties. First of all, the oral representation must be uncontroverted. It must have been made and the parties must agree that it was made. Second, there must be reliance on the oral statement and, third, that reliance must result to the detriment of the party who has relied on the statement. In the present case it simply is not clear that an oral renouncement of the property interest of Robert W. Kimball ever occurred. In fact, the overwhelming weight of the evidence is that it did not occur. Maud and Gilbert Kimball did nothing to demonstrate reliance and the elements of promissory estoppel to establish an exception to the Statute of Frauds are not present.

#### CONCLUSION

This case clearly should be remanded to the Trial Court for entry of Findings of Fact sufficient to clarify the reasoning of the Court with respect to the application of the doctrines of laches and estoppel. The Trial Court should also be instructed to reconcile the oral finding of the Court with the written Findings of Fact and Conclusions of Law by making additional findings which further delineate the verdict of the Court. However, the Trial Court should not be directed to a predetermined result by this Court.