

1951

# Rennold Pender v. Ellis L. Anderson and Eva Anderson et al : Brief of Respondents

Utah Supreme Court

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William S. Livingston; Attorney for Respondents;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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RENNOLD PENDER,

*Plaintiff and Appellant,*

— vs. —

ELLIS I. ANDERSON and EVA  
ANDERSON, his wife, BERT  
CENTER and JANE DOE CEN-  
TER, whose true name is unknown,  
his wife, ALLIANCE REALTY &  
BUILDING COMPANY, a corpora-  
tion, also all other persons un-  
known, claiming any right, title,  
estate or interest in or lien upon  
the real property described in the  
complaint adverse to plaintiff's  
ownership or clouding plaintiff's  
title thereto,

*Defendants and Respondents.*

Case No.  
7638

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## Brief of Respondents

# FILED

JUL 3 1951

WILLIAM S. LIVINGSTON,

*Attorney for Respondents*  
Clerk, Supreme Court, Utah

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## Brief of Respondents

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### STATEMENT OF FACTS

The respondents feel compelled to briefly restate the material facts.

The complaint is a quiet title complaint in its simplest form. (R. 1). The answering defendants were Alli-

ance Realty & Building Company, claiming a tax title (Exs. 1, 2, 3, and 4) and Bert Center, who claimed a deed from one G. Murray Edwards (Ex. 5) who admittedly had held fee simple title. Appellant claims under subsequent deed from Edwards. (R. 32).

Appellant in his attempt to show title in himself relied upon the deposition of Edwards to the effect that the deponent believed that the instrument executed was a power of attorney (R. 86-89) given to a sales agent.

The instrument, however, is in the form of an absolute deed. (Ex. 5).

The deposition of the defendant, Bert Center, was relied on by the respondents, and his testimony was that a conveyance of the lots was made in consideration of past services and that the same was duly delivered and recorded. (R. 94-107).

Upon conclusion of the appellant's case, the answering defendants moved for a judgment of dismissal, and said motion was taken under advisement. (R. 91). At the conclusion of all of the evidence and both sides having rested, the Court found the issues in favor of the respondents (R. 108-9) and Findings of Fact and Conclusions of Law were made and filed accordingly (R. 110-113).

## STATEMENT OF POINTS

Point 1. The evidence and the findings amply support the decree.

Point 2. Under the evidence presented, title should have been found in respondent Alliance Realty & Building Company.

## ARGUMENT

### Point 1.

The appellant's sole ground of appeal seems to be an impression that the Court did not fully consider the merits of the case. This, however, is not the case (R. 108-9).

The Court, in explaining the decision, did make the following statement which is among the appellant's grounds of complaint:

“The Court is of the opinion that legally that is not sufficient (speaking of Plaintiff's evidence) and so, that there is *NO* clear and convincing evidence that this deed should be set aside and declared to be an instrument of agency.”

The word “no” inserted above does not appear in the reporter's transcript, but that such is what the Court said, or at least meant to say, is abundantly clear from the following further statement made at the same time: (R. 109).

“My position in this case is this: That one man testifies one way and the other man contradicts him. There is not enough evidence for the court to rely upon one or the other. For that reason, the Plaintiff fails because of his failure to carry the burden.”

It is respectfully submitted that the court did not fail to decide the issues herein upon the merits, but on the contrary did so and made due and proper findings and decree. No error prejudicial to the appellant can be predicated upon the court's failure to rule upon the motion for dismissal. It is noted that the trial court did not make or file an opinion in writing, but even if the statements made orally and quoted above and in the appellant's brief are given the status of an opinion, the same may not be looked to to take the place of or modify or contradict the findings, but only to explain and interpret them. *Christensen vs. Nielsen*, 73 Utah 603 at page 613, 276 Pac. 645.

Respondents contend that there is nothing improper or erroneous in the observations made by the Court, except the obvious omission in the transcript referred to. But even if such statements are to be criticized, that does destroy the effect of the findings and the decree entered thereon. *Christensen vs. Nielsen*, *supra*.

The findings of fact and conclusions of law of the trial court are not attacked by the appellant as unsupported by the evidence, except that it is alleged that the court did not find the facts, nor is it contended that this court in its review of the facts in a case in equity should reverse the findings of the trial court. Respondents, therefore, do not deem it necessary to further review the facts or to argue the inferences therefrom favorable to the respondents.

## Point 2.

Under the evidence presented, title should have been found in the respondent Alliance Realty & Building Company.

Both parties claim title through a common source of title, one G. Murray Edwards. Exhibit 1 is a duly certified copy of the record of a tax sale of the property assessed in his name which together with the auditor's conveyance so certified (Ex. 2), is prima facie evidence of a conveyance to the county in fee simple of the property and of the regularity of all proceedings preliminary thereto. Sec. 80-10-68 (7) U.C.A. 1943. Proper proof was made of conveyance from the County through a mesne party to said respondent. (Exs. 3 and 4). Appellant assumes that the tax proceeding was invalid, but the only possible evidence to that effect was the following remark made during an objection to the introduction of evidence: (R. 93)

“In order to save the time of the Court and also Counsel, we might be willing to stipulate, Mr. Livingston might be willing to stipulate in these proceedings, each of them that I have been in there has been a stipulation to the effect that if someone from the auditor's office or the County Treasurer's office were called to testify as a witness, that he would testify to the fact that the auditor's affidavits were not attached to the assessment roll, as required by law. That is the point that I want to protect my record on in permitting these instruments to go into evidence at this time. That is, I don't want to waive that objection.”



No such stipulation was obtained, or in fact even asked for or referred to thereafter. Under the quoted statute providing that the documentary evidence before the court was prima facie proof of title, the Court could not indulge the assumption as does the appellant in his brief that such title did not pass. Therefore, the decree properly refused to quiet title in the plaintiff irregardless of the other questions in the case.

### CONCLUSION

The decree of the trial court was proper under the evidence and findings and should be affirmed.

Respectfully submitted,

WILLIAM S. LIVINGSTON  
*Attorney for Respondents*

Receipt of copies of the foregoing brief is acknowledged this 3rd day of July, 1951.

*Backman, Backman & Clark*  
*Attorney for the Appellant.*  
*by Robert L. Backman*