

1952

# Harold Warren v. Dixon Ranch Company : Brief of Appellant

Utah Supreme Court

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Clyde & Mecham; Attorneys for Appellants;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD WARREN,

*Respondents,*

— vs. —

DIXON RANCH COMPANY, et al.,

*Appellants.*

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## Appellant's Brief

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**FILED**

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OCT 29 1952

By ROBERT C. GIBSON

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Clerk, Supreme Court, Utah

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## Appellant's Brief

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### NATURE OF THE CASE

The appellants are the Dixon Ranch Company and certain of the Stockholders who are appealing on behalf of themselves and the rest of the stockholders.

In the District Court the appellants unsuccessfully moved to set aside a default judgment entered against the corporation. After a contested hearing the District Court denied the motion and the appellants appealed.

## SPECIFICATION OF ERROR

The appellants contend that the District Court erred as follows:

1. That the District Court abused its discretion in not allowing the appellants' motion to vacate the default judgment.

2. In holding that reopening the case would be only for the purpose of a cross-action between certain of the defendants.

The appellants waive the rest of the points raised in the designation of points.

## THE FACTS

The facts as shown on the record of the case are not in dispute for the most part. The case was a quiet title action initiated in the District Court of Duchesne County to quiet title to approximately 1120 acres of valuable oil property which constitute the entire assets of the defunct Dixon Ranch Company, a corporation originally organized and authorized to do business within the State of Utah, (R. 2, 52). The Dixon Ranch Company forfeited its charter for nonpayment of taxes and has not actively engaged in business since the year 1934 (R. 52). The stock in the company had been owned by six stockholders, all of whom were deceased at the time of the filing of the action except for Arnold Dixon, (R. 59, 60). Arnold Dixon at one time had been a director of the company,

and as such he was the sole surviving director, (R. 59). There are now about 20 stockholders as heirs of the original stockholders (one of whom is Paul Dixon, an appellant), all but two of whom reside in the vicinity of Salt Lake and Provo, (R. 59). On or about the 15th day of September, 1950 Arnold Dixon purported by quit-claim deed to convey all right, title and interest in and to said property on behalf of the Dixon Ranch Company to the Valley Investment Company, (R. 60). This was done without notice to and without consulting the other stockholders. This conveyance is alleged by the appellants to have been obtained fraudulently, and it is also contended that Arnold Dixon had no authority to make such a conveyance which purported to convey away and dissipate the entire assets of the corporation, R. 68). The Valley Investment Company was a party to the action in the District Court (R. 2).

At the beginning of the quiet title action concerning the subject property, Arnold Dixon, the sole surviving director of the corporation, was served with process individually and as a director and trustee of the Dixon Ranch Company (R. 6, 7). At no time were any of the stockholders notified by Arnold Dixon of the pending suit, (R. 40). As alleged in the affidavit of Paul Dixon, the elderly Arnold Dixon had for a long time been a seriously ill man, (R. 40). The only notice the stockholders had of the pending suit was that by chance they discovered publication of summons in a newspaper on the 23rd day of August, 1951, the last day of publication, (R. 27, 40). Immediately they wrote to the County

Clerk for a copy of the complaint and contacted attorney Phil Hansen to represent their interests and the interests of the corporation, (R. 40, 41). An answer and counterclaim were filed by mail in the District Court on the 13th day of September, 1951, 21 days after the last date of publication of summons (R. 22). According to the affidavit of attorney Hansen, Mr. Colton, attorney for the respondent had orally granted him time in which to answer, (R. 57). The record further shows that the appellants' answer and counterclaim were stricken upon motion of the respondent's attorney on the 13th day of September, 1951, the very day upon which the answer was filed, (R. 29, 32). The appellants had no notice of the striking on September 13, or that a default had been entered against them on the 11th day of July, (R. 40, 57). They had no notice of any of the proceedings until the findings of fact and conclusions of law and judgment and decree were mailed to them on the 24th day of October, 1951, (R. 33, 37).

Immediately upon receipt of judgment and decree, proceedings were instituted on behalf of the stockholders and the Dixon Ranch Company to have the default and judgment set aside and vacated in order that they might again file an answer to the plaintiff's complaint, (R. 39, 56, 62). After a contested hearing on the motion to set aside the default judgment the District Court denied the appellants' motion, (R. 71).

The defense which the appellants assert against the claim of title of the respondents is that the tax titles

upon which the respondents rely are void because no auditor's affidavit was ever issued and no proper tax sale proceeding was had, and that the respondent has not been in possession of the land for the statutory period, and therefore, could not acquire title by adverse use, (R. 41).

## ARGUMENT

### I. THE COURT ABUSED ITS DISCRETION IN NOT ALLOWING THE APPELLANTS' MOTION TO VACATE THE DEFAULT JUDGMENT.

Rule 60 (b) U.R.C.P. provides that on terms which are just and in furtherance of justice, the Court may relieve a party from a final judgment or proceeding on the grounds of "excusable neglect".

While the granting or withholding of relief rests largely in the sound discretion of the trial court, this court will reverse the lower court if that discretion is abused. Each case must be determined on its own facts.

Rule 60 (b) was patterned after Sec. 104-14-4, U. C. A. 1943. This statute has been considered on numerous occasions.

*Cutler vs. Haycock*, 32 Ut. 254; 90 Pac. 897, the appellants' attorney untimely filed a demurrer to the respondent's complaint and, as here, a default was entered. Appellant attempted to set aside the default. The District Court refused to vacate the default. The Supreme Court reversed and in setting aside the default said:



“That the question whether a default and judgment should or should not be vacated is one to be passed on by the trial court, and that it rests within its sound discretion, has so often been declared to be the rule of practice that it has become elementary and needs no citation of authorities. It is equally elementary that this discretion is to be applied to the facts as they appear in each case, and in the exercise of this discretion, the aim and object should be the promotion and furtherance of justice and the protection of rights of all concerned. As has been well said, in all doubtful cases the general rule of courts is to incline toward granting relief from the default and to bring about a judgment on the merits. (Citing Cases) This rule as appears from the authorities, is of almost universal application and is defeated only in cases where the default is the result of inexcusable neglect of the party in default, or where it would be inequitable to set it aside . . . Good faith and reasonable effort to make defense are always elements to be considered in each case.”

“ . . . Law and courts alike abhor a result that condemns a party unheard and unless the law unavoidably requires and justice demands it where a party has not by his own inexcusable neglect deprived himself of the rights, the courts should and will, where equity permits, afford relief, to the end that a party may be given a hearing.”

In *Hurd vs. Ford*, 74 Ut. 46; 276 Pac. 908, the trial court granted the appellants' motion to set aside a default judgment on condition that the appellant turn over certain property in her possession to the sheriff. This she refused to do. She appealed from the order of the

court which denied her motion to vacate the default judgment. This court reversed saying:

“... The discretion lodged in the court by this statute to set aside a default or to relieve one from is to be exercised in the furtherance of justice. In doubtful cases the courts will incline toward granting relief from defaults to the end that a party may have a hearing.”

It is submitted that under the rule of these cases excusable neglect was shown in this case and that the trial court abused its discretion in refusing to grant appellants' motion. It is shown by the record that the stockholders of the Dixon Ranch Company had no actual knowledge that a quiet title action was pending concerning the entire assets of the company. It is conceded that Arnold Dixon, the sole surviving director was served with summons individually and on behalf of the Dixon Ranch Company. Conceding without admitting that it was proper service upon the corporation, the affidavit of Paul Dixon alleges that the elderly Arnold Dixon had been very seriously ill for a long time, and that he failed to notify any of the other interested members of the corporation—the stockholders. The affidavit further shows that the stockholders first had knowledge of the action by reading publication of summons in a newspaper dated the 23rd of August, 1951. The very purpose of publication of summons is to give notice of the action to interested parties who cannot or have not been served with process. The affidavit of attorney Hansen states that during a phone conversation with attorney for the respondents that respondent's attorney agreed to allow

additional time within which the appellants could answer the complaint. This oral extension was granted without reference to the fact that the default of the Dixon Ranch Company had already been entered.

The answer was filed within one day of the time required by the published summons and well within the time allowed by the oral extension. The striking of the answer and entry of default were both done without notice. Appellants had procured counsel and had assumed that their rights were being protected. As soon as they learned to the contrary they procured new counsel who promptly sought relief from the default.

A more clear case of excusable neglect is presented here than in the case cited above where this court granted relief because Arnold Dixon was seriously ill he did not inform the stockholders of the pending action. In the furtherance of justice and the protection of the rights of all parties concerned, the stockholders should be allowed to defend the action. It is the stockholders of the Dixon Ranch Company who suffer if the default judgment is allowed to stand. They had no knowledge of the action because of misfortune and circumstances over which they had no control. As soon as they learned of the action they took measures to protect themselves.

Time is of some importance on the question of due diligence. Rule 60 (b) U.R.C.P. states that a motion for relief under 60 (b) for excusable neglect "shall be made within a reasonable time . . . , not more than three

months after the judgment, order or proceeding was entered or taken.”

One of the standards set forth in the *Cutler vs. Haycock* case cited above is “good faith and reasonable efforts to make a defense.”

After appellants received notice of the Decree on October 24th they procured the services of other attorneys for the purpose of having the judgment vacated so that they could defend the action. On the 10th day of November, 1951, the motion to set aside the judgment was filed. The date of filing of this motion was well within the time limitation of three months as expressed in Rule 60 (b) U.R.C.P., and under the circumstances is unquestionably within a reasonable time as expressed in the same rule. The appellants not only used due diligence in the filing of the motion to vacate the judgment, but previous to the entry of judgment they had used due diligence to defend the action.

In the conversation between the attorneys for appellants and respondent more time had been given in which to file an answer if appellants’ attorney desired. No where does it appear that the attorney for the respondent told the attorney for the appellant that a default had already been entered. On the contrary the affidavits of Paul Dixon and attorney Hansen state that they had no such knowledge. Without knowledge it would be impossible for them to take further steps to protect themselves. As soon as they became aware of their position

they did take steps. The respondent's attorney claims that the answer and counterclaim filed by appellants was not properly served upon him, but the record shows that said answer and counterclaim were stricken upon motion of the plaintiff's attorney on the very same day that they were filed with the District Court. Proper service of the answer if given the day the answer was filed would have added nothing to plaintiffs knowledge.

In its memorandum decision in denying the appellants' motion, the District Court states in substance that it is not persuaded that the appellants could successfully defend against the claims of title of the respondents. This was improper. Such a conclusion was not within the province of the trial court upon a hearing of the motion to set aside the default judgment.

Such was this court's holding in the case of *Quealy vs. Willardson*, 35 Ut. 414; 100 Pac. 930. That case was a foreclosure suit in which judgment was taken by default. The appellant attempted to have the default set aside on the grounds of excusable neglect. The District Court entertained the view that if it was made to appear from the evidence generally that the judgment was right, then the judgment should not be vacated regardless of whether there was excusable neglect. The case had been dormant for six years without an answer being filed. The supreme court set aside the default. It said:

“All that the court could pass on at the hearing on the motion was whether the appellants had presented a meritorious defense in their answer, and whether they had shown sufficient excuse for

not presenting the defense at the proper time. With respect to the merits of the defense, the appellants had the right to have the court make specific findings of fact and conclusions of law and enter judgment accordingly, and from such judgment they had the right to appeal upon questions of both law and fact. When the court however, adjudged the defense of the appellants made profert as untrue upon the hearing of the motion, the right of appeal upon those questions was necessarily cut off. It is also true that the courts have frequently held that a court will not set aside a default judgment when the answer which is tendered upon its face shows that the defense is unconscionable, dishonest, or purely technical. (Citing Cases) A defense may however, seem technical, or even unconscionable, upon its face, and when all the evidence is heard with respect to it may, nevertheless, present a good defense to plaintiff's claim. A Court therefore should be very slow in adjudicating in advance of trial what defenses are or are not meritorious, or whether the judgment entered by default is the only proper one in view of all the facts that may be made to appear in case a trial upon the merits is had."

"... While the courts have the right to require all litigants to come into court and to present their claims and defenses in accordance with the law and rules of procedure, and in case of inexcusable neglect to refuse them a hearing, still these rules should be enforced so as to reflect justice between the parties to the action and for the purpose of vindicating the law and maintaining the dignity of the court."

In the lower court the respondents claimed title to the property under a tax deed from the County and further claimed title upon adverse possession together

with the payment of taxes. The appellants proposed answer and counterclaim to the respondent's claim of title under the tax deeds is that the tax deeds are absolutely void because no auditor's affidavit was ever issued and therefore the statutory requirements have not been met. The appellants' proposed answer and counterclaim to the respondent's claim of title by adverse possession is that the respondents have actually never been in possession for the statutory period, and therefore, could not have acquired title by adverse possession. It is clear that if the appellants could sustain their burden upon the trial on these issues they could prevail at the trial. It is the trial where such issues should be determined, not by affidavit supporting a motion to vacate the judgment. Furthermore, if the respondents successfully prove title in themselves the respondents will not be injured by a trial of the issues. It further does not appear that the respondent would be injured in any way if the default is set aside. In such a case it is an unmistakable abuse of discretion on the part of the District Court to deny the appellants' motion to set aside the judgment and decree.

II. REOPENING THE CASE WOULD NOT BE ONLY FOR THE PURPOSE OF A CROSS-ACTION BETWEEN CERTAIN OF THE DEFENDANTS. THE CROSS-ACTION AS PERMITTED UNDER RULE 13 (f) U.R.C.P. WOULD BE MERELY INCIDENTAL TO THE ISSUES BETWEEN THE PARTIES TO THE MAIN ACTION BUT NECESSARY TO PREVENT INJUSTICE.

This District Court partially based its denial of the motion to vacate on the grounds that to allow a reopen-

ing of the case would be only for the purpose of a cross-action between the appellants and the Valley Investment Company, one of the defendants in the District Court.

It is absolutely essential that the appellants' claims against the Valley Investment Company be determined in this same action. If not, title would be quieted both against the appellants and the Valley Investment Company in this action. A subsequent case between the appellants and the Valley Investment Company would be moot if both are adjudicated therein to have no interest.

The main purpose the appellants have in defending the suit is to preclude the respondents from quieting title to the property. For the District Court to determine that the only purpose of the suit would be for a cross-action against another defendant is for the court to erroneously and capriciously assume that the appellants could not successfully defend the action against the respondents upon a trial of the issues. For the District Court to make such an assumption amounts to its passing judgment before trial—contrary to *Quealy vs. Willardson* cited above.

However, in order to prevail at the trial of the case against the respondents, it may be that the appellants would first have to have a quit-claim deed from Arnold Dixon, sole surviving director of the Dixon Ranch Company to the Valley Investment Company set aside. In this regard, the appellants claim that said deed was



obtained by fraud, and further that Arnold Dixon had no authority to execute such an instrument, and further that he did not have the legal capacity to execute such an instrument.

Rule 1 (a) U.R.C.P. says in part referring to the scope of the rules:

“They shall be liberally construed to secure the just, speedy and inexpensive determination of every action.”

To force the appellants to bring a separate action against the Valley Investment Company would cause unnecessary circuity of action which would certainly not be “just, speedy, and inexpensive”, if then the appellants had to bring another action against the plaintiff who is now before the court, and as stated above, it would be a useless proceeding.

Rule 13 (f) U.R.C.P. would permit such a cross-action. It provides:

“A pleading may state as a cross-claim any claim by one party against a co-party arising out of the original action or of a counter-claim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.”

## SUMMARY

In conclusion, the record shows facts constituting excusable neglect within the meaning of Rule 60 (b) U.R.P.C. The facts further show that the appellants have prosecuted their rights with due diligence. The facts are so strong and unmistakably clear that the District Court's denial of the appellant's motion to vacate the default judgment was an abuse of its discretion. The motion should be granted, and the appellants should be allowed to enter its answer and counterclaim and be permitted to defend the action.

Respectfully submitted,

CLYDE & MECHAM

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By Robert C. Gibson