

1952

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

Utah Supreme Court

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Colton & Hammond; Dean W. Sheffield; Attorneys for Respondent;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

HAROLD WARREN,

*Respondent,*

vs.

DIXON RANCH COMPANY,

*Appellant.*

**Case No.  
7848**

**FILED**  
DEC 27 1982

Clerk, Supreme Court, Utah

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## Respondent's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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vs.

DIXON RANCH COMPANY,<sup>32</sup>

*Appellant.*

**Case No.  
7848**

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## Respondent's Brief

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### PRELIMINARY STATEMENT

Respondent desires, for purposes of clarity and convenience, to restate the facts upon which this case arises and to expand them somewhat to give a clearer picture of the problems involved.

### STATEMENT OF FACTS

The property in question was sold to Duchesne County for taxes assessed against the Dixon Ranch Company (Abstract, Ex. A), and the respondent.

plaintiff below, and his predecessors purchased the same from Duchesne County, and have paid the taxes thereon for the past 15 years (R. 50, Ex. A).

This action by the respondent to quiet title was commenced in April of 1951, by the filing of a complaint (R. 2, 3). Summons was served upon the Valley Investment Company and an answer filed by that company on June 19, 1951. Thereafter, on July 11, 1951, the Valley Investment Company filed a disclaimer (R. 9). 1

A summons and complaint were served upon Dixon Ranch Company and upon Arnold Dixon (R. 7). Arnold Dixon was the sole surviving director of the Dixon Ranch Company, which was a defunct corporation (R. 7, 59). Service upon the Dixon Ranch Company and upon Arnold Dixon was complete on May 26, 1951 (R. 7), and the default of these parties was entered July 11, 1951.

Service by publication was had as to J. G. Brown who was not a resident of Utah and whose whereabouts was unknown (R. 12, 16, 24). Publication of Summons was complete August 23, 1951. Time for answer by Brown under the published Summons expired September 12, 1951, and default of J. G. Brown was entered September 13, 1951.

An answer, purporting to be that of the Dixon Ranch Company, was filed September 13, 1951, 90

days after answer was due, and 64 days after the default of that Company had been entered. Upon motion of respondent this purported answer and counterclaim were stricken as having been untimely filed and having not been properly served upon plaintiff or his counsel (R. 29,32). Thereupon the court entered judgment for the respondent on October 16th, 1951.

Thereafter, on November 13, 1951 there was filed by counsel for Dixon Ranch Company and Arnold Dixon, a motion to Vacate Judgment (R. 39). An affidavit accompanying said motion recites that Arnold Dixon, upon whom service was made, was and had for a long time been seriously ill and did not notify interested parties (R. 40). A counter-affidavit was filed by the plaintiff reciting among other things that the default of the Dixon Ranch Company was entered July 11, 1951 and that Dixon Ranch Company had no answer properly filed in the case (R. 50).

On January 7, 1952, the Motion of Dixon Ranch Company and Arnold Dixon to Vacate Judgment, was heard and counsel for defendants failed to appear. The court after consideration of the evidence denied the motion, (R. 53) and entered an order to that effect (R. 54).

Counsel for Dixon Ranch Company then filed

a motion for Reconsideration, reciting that the de-

fendant Dixon Ranch Company had not received notice of the hearing (R. 56). Upon a hearing on February 18, 1952, the court granted the motion for reconsideration and heard counsel on the motion to Vacate. After arguments the court took the matter under advisement and gave counsel an opportunity to file a brief in support of the motion and give plaintiff an opportunity to file a brief in opposition (R. 62).

On March 20, 1952, the court filed a Memorandum Decision denying defendants' motion (R. 63, 64), and expanding at some length his reasons for denying the motion.

\* \* \*

The Notice of Appeal filed herein recites that the appellants are Dixon Ranch Company, a corporation, Arnold Dixon and Paul Dixon, on behalf of the stockholders of the Dixon Ranch Company (R. 70). The undertaking on appeal recites the defendants Arnold Dixon and Dixon Ranch Company have appealed (R. 73). The statement of Points on Appeal recites that the defendants "Arnold Dixon, Dixon Ranch Company and Paul Dixon, stockholder of the Dixon Ranch Company" set out their statement of points on appeal (R. 79). All of which leaves some doubt as to exactly who is pursuing the appeal.

In their Statement of Points Relied Upon, the appellants, whoever they may be, recite the follow-

ing as points relied upon (R. 79):

\* \* \*

2. That the record shows persuasive evidence of due diligence on the part of the defendants so as to bring them within the meaning of 60 (b) U.R.C.P.

\* \* \*

4. That the court has no discretion in deciding the question of whether the stockholders should be allowed to defend the action but is compelled to allow them to defend.

5. That title to the assets of a dissolved corporation is vested in the stockholders.

6. That service of process upon Arnold Dixon, sole surviving director of the Dixon Ranch Company, was not due process so as to preclude the stockholders from defending the action.

7. Since title to property of a corporation is vested in the stockholders, they are entitled to personal service of process before they can be deprived of their property.

However, in their brief the appellants indicate that they waive all of the points set out above. (Appellants Brief page 2.)

It appears, therefore, that this appeal must necessarily be treated as an appeal by the Dixon Ranch

Company, rather than as stated by Appellants Brief, to include stockholders appealing on behalf of themselves and the rest of the stockholders (Appellants Brief p. 1), and the appellant may not merely “concede” that there was service upon Arnold Dixon individually and as the sole surviving director of the Dixon Ranch Company (Appellants Brief p. 7), but rather, has admitted this to be proper service upon the corporation.

### **STATEMENT OF POINTS**

1. The Court in the exercise of sound discretion properly denied defendants motion to Vacate the default entered.

A. The defendants failed to establish excusable neglect to require setting aside the default.

B. The defendants failed to establish a meritorious defense which would require the Court to vacate the default.

2. The Court correctly ruled that it would not be proper to grant the motion to vacate merely for the purpose of permitting a cross action between certain of the defendants.

## ARGUMENT

### POINT I

**The Court in the exercise of sound discretion properly denied defendants motion to Vacate the default.**

In order for the Appellant to prevail, it is necessary that it establish first that there was excusable neglect on its part which would be sufficient to justify the court in setting aside its default, and second it must establish that it had a meritorious defense to the suit itself. Failing in either of these matters constitutes a failure to establish error on the part of the trial court in its ruling. Since the matter admittedly is one of discretion with the trial court, the appellant has the laboring oar to establish that the trial court acted in an arbitrary and capricious manner.

The respondent does not disagree with the principle espoused in *Cutler v. Haycock*, 32 Utah 254, 90 P. 897, that the decision as to whether or not the judgment should be vacated is one to be passed upon by the court in its sound discretion, nor the rule announced in *Hurd v. Ford*, 74 Utah 46, 276 P. 908, that “the discretion lodged in the court by this statute to set aside a default 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.”

**However, it is equally true that in a case where**

the court has carefully considered the evidence and has given due weight to all the factors involved, and in the exercise of sound judicial discretion has denied a motion to set aside the default, his ruling should be upheld. As stated in 3 Bancroft, Code Practice, 2479, Sec. 1876:

“Nevertheless, notwithstanding the remedial character of the statutes and their purpose to afford a speedy and efficient means of relief, they are not to be invoked so as to impair the attribute of certainty and finality which should attend all judgments, and a judgment should never be annulled except upon due consideration based upon a clear showing.”

This principle is clearly announced in the case of Carmichael v. Carmichael, 101 Or. 172, 199 P. 385, wherein the court said:

“While section 103, Or. L., is remedial in its character, and is intended to furnish a simple, speedy, and efficient means of relief in cases where persons are, in the true sense of the statute, victims of mistake, inadvertence, surprise, or excusable neglect, yet its wholesome provisions are not to be invoked, so as to render judgments but temporary structures, ‘to be torn down, remodeled, or rebuilt whenever the builders feel competent to improve the original workmanship or design.’ A judgment is sometimes termed a ‘finality’ because it finally terminate the disputes and adjusts the adverse interests of litigants, and it should

never be annulled, except upon due consideration, based upon a clear showing.”

That the trial court carefully considered and weighed the merits of defendants motion to Vacate is revealed throughout his Memorandum Decision (R. 64). As the court puts it:

“The law is clear to the effect that the trial court has a wide discretion in an application to set aside defaults. However, it is not permitted to rule arbitrarily or captiously. There must be a legal foundation for its action whichever way its decision may lie. . . .”

**A. The defendants failed to establish excusable neglect to require setting aside the default.**

The trial court in his Memorandum Decision examines the evidence before him upon which defendants predicated their claim of excusable neglect, and sets it forth therein. An examination of that evidence will at once reveal its insubstantial character.

The primary thing upon which defendants had to rely, and upon which appellant now has to rely, is the statement in the affidavit of Paul Dixon to the effect that “Arnold Dixon is and for a long time has been ill.” As the court so aptly points out, there is no indication whatsoever, of the nature of that illness, and that no inference can be made that he was, or is, mentally afflicted; and that a telephone call or a letter would have brought counsel to his side.

A similar affidavit was made in the case of Scott v. Wright, 50 Neb. 840, 70 N.W. 396, which did not allege the nature of the defendant's sickness—whether it was of such a character as to affect his mind and deprive him of power to give directions concerning a pending lawsuit. On appeal, an order vacating the default, was reversed. In Reither v. Webb, 73 Iowa 559, 35 N.W. 631 it was held that a lame back was not sufficient to constitute excusable negligence.

In Quist v. Gwinup, 46 N.Y.S. 2d 105, the plaintiff purchased property at tax sale and began proceedings thereafter based thereon and recovered a judgment by default. Thereafter the judgment was vacated upon motion of the defendant and the plaintiff appealed.

As a part of the petitioners papers was an affidavit by herself stating that she was not in very good health and didn't understand the papers served upon her. There was also an affidavit of a physician to the effect that:

“... he had known Eliza Gwinup and that she had been suffering from a goiter and had been undergoing a change of life for several years. She has suffered severe mental shock due to tragedies in her life and all these things had impaired her physically and had caused a mental shock at least temporarily, and for some years past had impaired her mental

processes so that in his judgment this mental condition would not allow her to comprehend and appreciate the nature of legal papers that might be served upon her."

An opposing affidavit was filed to the effect that she had been notified by letter two years earlier that plaintiff had bid on the property and that something must be done.

The court concluded from this evidence, which is much stronger than that in the instant case, that there was an insufficient showing to open the default.

In *Cooper v. Deon*, 58 Col. App. 2d 789, 137 P. 2d 733, it was held that the trial court did not abuse its discretion in refusing to vacate a default judgment where the defendant's affidavit was to the effect that she was ill and at times had to stay in bed. For other cases to like effect see: *Rome v. Warskafsy*, 299 Ill. App. 609, 19 N.E. 2d 759; *Thomas v. Arnold*, 192 Ark. 1127, 96 S.W. 2d 1108; *Ewes v. Davison-Paxon Co.*, 44 Ga. App. 322, 161 S.E. 275.

As positive evidence in the record that Mr. Arnold Dixon was in full possession of his mental faculties and was able to contact an attorney and conduct business affairs just shortly before he was served with process in the present action is the fact that he executed a deed to Valley Investment Company, which contained a comprehensive recital of factual matters with relation to the Dixon Ranch Company and

which was executed apparently in Provo, Utah, and acknowledged before Maurice Harding, Notary Public, residing at Provo, Utah. (See file on Motion to Reconsider and Motion to Set Aside Default.)

Further evidence of his capacity and ability both physically and mentally is to be found in the comprehensive affidavit which he filed in support of the Motion to Vacate and Motion to Reconsider (R. 59). Surely, if his affidavit was entitled to be filed as representing a basis for vacating the judgment, it also stands as an admission of the existence of mental facility and physical ability to contact counsel had he been so inclined. The plain fact is that he did nothing, but quite obviously could have done something had he thought either he or the Dixon Ranch Company had any interest in the property.

Certainly no excusable neglect can be made out from the bare statement that Mr. Arnold Dixon is and has been for a long time seriously ill, in view of the fact that he was able to appear a few months previously for the purpose of executing a deed, and a few months afterward to make a comprehensive affidavit. As a matter of fact, the affidavit of Paul Dixon which recites the facts of the long illness does not purport to say that *because* of the long illness Arnold Dixon *could not* or *did not* notify interested parties, but only that Arnold Dixon "is and for a long time has been seriously ill and he did not notify interested parties."

The more logically inferable reason why he did not notify interested parties is that he considered that neither he nor the Ranch Company had any interest in the property.

The only other basis shown by the affidavits to even remotely hint at excusable neglect is the affidavit of Phil Hansen, one-time attorney for Dixon Ranch Company. It should be noted initially, that the Dixon Ranch Company had been in default for 87 days before the September 9, 1951 date which affiant sets as the time when counsel agreed to allow him time in which to plead.

The court carefully considered and weighed this affidavit as he, of course, was entitled to do in determining whether excusable neglect had been made out, and concluded that it was not persuasive to him that excusable neglect had been made out. In this he was fully justified. Excusable neglect to justify voiding a default cannot be predicated upon something which is alleged to have occurred 86 days after the default has occurred and 60 days after that default has been entered. It can have no force or effect in establishing excusable neglect. Nor has appellant claimed more for it than evidence to sustain its theory that it had been guilty only of excusable neglect from which it should be relieved.

In Salt Lake Hardware Co. v. Neilson Land & Water Company, 43 Utah 406, 134 P. 911, and again

in *McWhirter v. Donaldson*, 36 Utah 293, 104 P. 731, it has been held such a promise as alleged in the affidavit of Phil Hansen, even if accepted as true, would not be sufficient to justify a claim of excusable neglect.

In *Elms v. Elms*, 72 Cal. App. 2d 508, 164 P. 2d 936, the principles governing cases such as this are fully expounded. In that case it is said:

“It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief . . . will be denied. Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. All must be governed by the rules in force universally applied according to the showing made . . . The law frowns upon setting aside default judgments resulting from inexcusable neglect of the complainant. The only occasion for the application . . . is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded. Neither inadvertence nor neglect will warrant judicial relief unless it may reasonably be classified as of the excusable variety upon a sufficient showing.”

In *Peterson v. Crosier* 29 Utah 235, 81 P. 860, it was held that the fact the defendant would have lost his job had he attended the trial was not a sufficient showing of excusable neglect to constitute a ground for vacating judgment.

**B. The defendants failed to establish a meritorious defense which would require the court to vacate the default.**

The case of *Queagly v. Willardson*, 35 Utah 414, 100 P. 930, cited by the appellant, holds that the court in passing upon whether a meritorious defense is asserted, may not determine the truth or falsity of the averments but only the question of whether the defense asserted is meritorious. As the court so aptly points out in the present case in his Memorandum Decision, the defendant admits by the answer which was stricken, that the taxes had been paid, since it offers to pay or settle them. This leaves only a bare assertion by the affiant Paul Dixon, that the plaintiff and his predecessors have not been in possession openly, notoriously and adversely for the requisite period of time. The record reveals that the appellant corporation passed whatever title it had to the Valley Investment Company in 1950. Thus, it appears that none of the parties asserting rights as appellants would be in a position to claim that theirs was a meritorious defense to the existing action. Where the defense is as tenuous as that upon which the appellant has to rely, surely the court could justifi-

fiably conclude that the defense which had to be based on so many contingencies was not sufficiently meritorious as to warrant setting aside the default.

The court was thus not determining the truth or falsity of any of the evidence, but only considering the assertions in the answer and the affidavits in relation to the uncontradicted facts, to determine whether a meritorious defense was asserted.

\* \* \*

Thus, it appears conclusively, that appellant is unable to sustain either of the two requirements it must sustain in order to secure a reversal. First, no showing of excusable neglect has been made out. To the contrary, the neglect appears completely inexcusable as a legal proposition. Second, appellant failed to assert a meritorious defense which would justify the court in reversing the trial court.

The trial court in the exercise of its sound discretion and with a clear understanding of the principles upon which that discretion must be based, and after carefully studying and weighing the evidence of excusable neglect, and after careful study of the claimed meritorious defense, upon correct principles concluded that no showing of excusable neglect had been made out and no meritorious defense shown.

Appellant to prevail must make out a case that the trial judge, who clearly had the appropriate prin-

ciples in mind to guide him, acted arbitrarily and capriciously and abused his discretion—not on one, but on both of these propositions. This it has failed to do. The court, to the contrary has done exactly what the case of *Cutler v. Haycock*, 32 Utah 254, 90 P. 897, has indicated that he might do, that is, to apply his discretion to the facts as they appear in each individual case. It is respectfully submitted, that this court on appeal should affirm the ruling of the trial court, there being no manifest abuse of discretion shown.

\* \* \*

An examination of the cases relied upon by the appellant's brief reveals at once the clear distinction between those cases and the instant case. An analysis of the *Cutler v. Haycock* case reveals ample cause for setting aside the default where the defendant's attorney had actually filed a demurrer which was en route, and where transportation difficulties beset the parties and where the demurrer was filed within a matter of one or two days, and the entire condition was attributable to the lack of facilities for communication between the defendant and his counsel.

Again, in *Hurd v. Ford*, 74 Utah 46, 276 P. 908, cited by appellant, the court had actually opened the default within his discretion, but then imposed a condition which was not met, and whereupon the court

enforced the default. The court held that imposition of such a condition was beyond the jurisdiction of the court. Thus, factually, the case bears no relationship to the instant case. In that case the defendant had filed a motion to make more definite and to furnish a bill of particulars and thus was actively engaged in the progress of the case when the default was entered for failure to file an answer. This case clearly is no parallel to the instant case.

## POINT II

**The Court correctly ruled that it would not be proper to grant the motion to vacate merely for the purpose of permitting a cross action between certain of the defendants.**

The only information we have in the record with regard to the filing of a cross action by the appellant is that the Memorandum Decision recites that in oral argument counsel for defendant stated that he proposed to attack the deed from Arnold Dixon to Valley Investment Company. Accordingly, with nothing more than this to sustain the burden of appellant's argument on the second point in his brief, it is extremely doubtful that any point is raised by the brief for review.

However, the court did not base his denial of the motion to vacate upon the proposition that the

re-opening of the case would be only for the purpose of a cross-action between the appellants and the Valley Investment Company (Appellant's Brief p. 12).

To the contrary, the court very clearly stated in his Memorandum Decision, that he concluded that it would be improper to grant the motion merely for the purpose of permitting a collateral cross action between defendants (R. 68). In other words, the fact that one defendant desired to file a cross action against another defendant was not alone a sufficient ground for setting aside the default.

Whether the rules of Civil Procedure would or would not allow such an action within the framework of this suit is not material. The plain fact is that no such ground, as here considered, exists under Rule 60 (b) which would justify setting aside the default for such a purpose. Therefore, the court was entirely correct in his observation that such a ground is not a proper ground upon which to grant a motion to set aside the default.

\* \* \*

It is respectfully submitted that this is a judgment which should be accorded the finality which it deserves and freedom from upset by a belated attempt to oust the plaintiff from property upon which he and his predecessors have paid taxes for 15 years;

that the trial court was well within his discretionary authority in ruling as he did, and that the judgment should, therefore, be affirmed.

Respectfully submitted

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