

1956

# Rennold Pender v. Romney Lumber Co. et al : Brief of Appellant

Utah Supreme Court

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R. S. Johnson; Attorney-for-Plaintiff and Appellant;

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## Recommended Citation

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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RENNOLD PENDER,  
*Plaintiff and Appellant,*

— vs. —

ROMNEY LUMBER COMPANY, a  
corporation, and BOARD OF EDU-  
CATION OF SALT LAKE CITY, a  
public corporation, et al.,

*Defendant(s) and Added  
Defendant, Third Party  
Plaintiff(s) and Respondents,*

— vs. —

STATE OF UTAH,

*Third Party Defendant and  
Respondent.*

Case Number  
8469

FILED  
FEB 23 1956

BRIEF OF APPELLANT

Clerk, Supreme Court, Utah

Appeal from the District Court of Salt Lake County,  
State of Utah, HONORABLE MARTIN M. LARSON, *Judge*

R. S. JOHNSON

*Attorney-for-Plaintiff and  
Appellant.*

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BRIEF OF APPELLANT

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STATEMENT OF FACTS

(A) *Statement of Facts as to the Pleadings:*

This was an action to quiet title to certain real prop-  
erty situate in Salt Lake City and County, (Rec. 1-2)  
brought by plaintiff, Rennold Pender, under date of May  
7th, 1952, against, as originally filed, the Romney Lum-  
ber Company, a corporation, and Salt Lake County, a

municipal corporation, as defendants (Rec. 1-2). Later, the defendant, Romney Lumber Company filed a third party complaint against the State of Utah (Rec. 27-29), pursuant to motion therefore (Rec. 26) and order of the Court so permitting (Rec. 32). Answers to the complaint (Rec. 4-5, 11-12), and to the Third Party Complaint (Rec. 38-40), were filed on behalf of the various defendants and the State of Utah. Motion to substitute as a defendant, the Board of Education of Salt Lake City, a public corporation, in the stead of Romney Lumber Company, whose interest the former had acquired was thereafter made (Rec. 41), and the Court (Rec. 43), entered an order "adding" the Board of Education as a defendant. Salt Lake County, a municipal corporation, later disclaimed, (Rec. 80) any title to the above described premises. Upon motion for summary judgment (Rec. 48), made on behalf of defendant, Board of Education of Salt Lake City, the Court (Rec. 77-78), entered judgment in its favor that it was owner of the premises in dispute, quieted its title against plaintiff, and dismissed the plaintiff's complaint for similar relief as to quieting title in him. From such judgment and decree, plaintiff Pender appealed (Rec. 77-78) to this Court.

*(B) Statement of Facts As To Material Events:....*

The land involved in the dispute, in Salt Lake City and County, Utah, is more fully described in two different ways, i.e.:

Lots 16 and 17, Block 13, Five Acre Plat "C", Big Field Survey, in Section 16, Township 1 South, Range 1 East, Salt Lake Meridian,

and

Lot 4, Block 13, of Section 16, Township 1 South,  
Range 1 East, Salt Lake Meridian,

(See Rec. 1, 12, 23, 30, 65-69, 77, 80, Exhibit "1"), and this fact is mentioned in order that the Court in examining any matter pertaining thereto may avoid any misunderstanding as to the description(s) of the tracts involved.

Plaintiff's title is deraigned through a series of deeds, as shown in the abstract of title (Exhibit 1) dating back to the Surveyor-General's survey certificate dated February 28th, 1868 and recorded March 9th, 1868, showing possession then to have been in one John Prye, and title passes through intermediate conveyances passing title and possession down to the plaintiff herein, Rennold Pender. (Later mention of other earlier bases for title, obviates detailed mention at this point of same, but, reliance upon them is not waived because not here set out.) The realty in question was apparently never patented to the holders by the United States, although application filed by the plaintiff Pender in 1952, (Rec. 51-52), was rejected, as to further proceedings, until any adverse claim of the State of Utah thereto was eliminated. This suit followed for that purpose.

Title of the defendant, Board of Education of Salt Lake, is deraigned through a conveyance from Romney Lumber Company (Rec. 41, Exhibit 1, pages 83-4), which latter corporation, in turn claims under an alleged patent from the State of Utah to the ground in question, said patent being dated July 19, 1943, and recorded August

7th, 1943 (Exhibit 1, Page 25). The Board of Education was a taker with notice of the pendency of plaintiff's suit, when securing conveyance to itself of said property on May 5th, 1955 (Exhibit 1, Page 83-4) as pendency of suit was set out in said deed to it, and, since the lis pendens filed by the plaintiff, (Exhibit 1, page 82), had already been on record since May 6th, 1953.

No claim of adverse possession by the Board of Education of Salt Lake and/or its predecessor, Romney Lumber Company, by reason of any alleged ownership and possible possession and payment of taxes since date of the purported State patent arises, since, in answers to interrogatories made by the Romney Lumber Company (Rec. 34, Paragraphs V, VI, answering interrogatories of plaintiff numbered 7, 8, 9), it does not claim title by adverse possession or usage of the tract, or any part, since inception of its alleged title.

The controversy involved in the litigation arises over whether or not the ground in question as part of a Section 16 area, is, or ever became property of the State of Utah, by virtue of the enabling act, Section 15 of the Organic Act of 1850, creating the Utah Territory, or otherwise, so, that the State of Utah, could by conveyance or patent convey any title to Romney Lumber Company; or, as opposed to the State's claim on the basis of a school section, whether the undisturbed possession and usage of the ground of the plaintiff and his predecessors for something like 84 years, as shown by the abstract; and, as disclosed by an old plat of the area, filed with the Pioneer Plats in Salt Lake County Recorder's Office



(Rec. 66-67), there was a settlement of the area in question prior to the first official survey of the land involved herein, so as to antedate September 10th, 1856, the date of said survey (Rec. 50), which, settlement, would be sufficient, as hereinafter set forth in the argument, under the various applicable land laws of the United States, relating to school grants, to prevent any title of the Territory or State of Utah attaching thereto, as a school grant of that part of a Section 16. Other material facts concerning the issues will be set forth during the course of the argument.

## STATEMENT OF POINTS

### POINT I

SINCE FACTUAL MATTERS ARE INVOLVED, THE TRIAL COURT ERRED IN DECIDING THE MATTER ON DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT.

### POINT II

TRIAL COURT ERRED IN ENTERING JUDGMENT QUIETING TITLE IN FAVOR OF THE BOARD OF EDUCATION OF SALT LAKE, INSTEAD OF QUIETING TITLE IN FAVOR OF PLAINTIFF AND APPELLANT.

## ARGUMENT

### POINT I

SINCE FACTUAL MATTERS ARE INVOLVED, THE TRIAL COURT ERRED IN DECIDING THE MATTER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT.

Rule 56 (c), Utah Rules of Civil Procedure, provides, in pertinent part, that:

“The judgment sought shall be rendered forthwith, if the pleading, depositions, and admissions on file, together with the affidavits, if any, *show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.*” — Summary Judgment.

If any genuine issue of fact exists, the court should not determine the matter on motion. Or, as said in *Young, et al v. Felnoria, et al*, ..... Utah ....., 244 Pacific 2d, 862 (page 863):

“Under this rule, it is clear that if there is any genuine issue as to any material fact, the motion [for summary judgment] should be denied.”

In accord, see *R. J. Daum Const. Co. v. Child*, ..... Utah ....., 247 Pacific 2d, 817 (at page 818).

Here, there is involved the disputed question of whether or not the title of the plaintiff should be quieted as against the title of the defendant, and there is a denial by the defendant(s) of the allegations of plaintiff respecting his title.

Under such circumstances, it has been held in the Federal Courts, interpreting a similar rule, that:

“In making a motion for judgment . . . the moving party is deemed to have admitted the truth of his adversary’s allegations and the untruth of all of his own allegations which have been denied

by the adversary. However, such admission is only for the purposes of the motion, and is not final, binding, and conclusive, so as to amount to a waiver of any material issue. Consequently, the fact that the defendant has made such a motion did not eliminate all issues of fact so as to authorize summary judgment for the plaintiff." *M. Snow-er & Company v. U.S.*, 7 F.R. Serv. 12c.25, Case 1, 140 Fed. 2d, 488, as stated in 4 Fed. Rules Digest, 2d Ed., page 166.

"Where inconsistent hypotheses might be drawn from the facts and the facts reveal aspects as to which the minds of reasonable men might differ, and there is a substantial controversy as to how the parties view their respective rights and obligations, the court should not grant summary judgment, without making findings of fact and conclusions of law." *Winter Park Tel. Co. v. Southern Bell Tel. & Tel. Co.*, 14 F. R. Serv. 56.41, Case 2, 181 Fed. 2d, 341, as stated in 4 Fed. Rules Digest, 2d Ed., page 161.

"Summary judgment should be granted only if it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law. This is true even where there is no dispute as to the evidentiary facts, but only as to the conclusions to be drawn therefrom." *Stevens v. Howard D. Johnson Co.*, 14 F. R. Serv. 56c.41, Case 3, 181 Fed. 2d, 390, as stated 4 Fed. Rules Digest, 2d Ed., page 161.

In the instant case there is a sharp divergence of opinion as to both facts and conclusions to be drawn from the same. The date of September 10th, 1856, and the question of whether or not there is a showing of title prior to that time are the mooted questions, and, even

though the facts, as to the ones presented by either plaintiff's evidence or defendant's evidence, are admitted or undisputed, still, *there is a determination of fact to be made, whether or not, there was a settlement upon the ground in question, under the circumstances required by the federal law, prior to the first survey thereof, so as to preclude the land over which this litigation is had, from being or becoming a school section, and property, ultimately of the State of Utah.*

Plaintiff's position, of course, is that the plat of "Plot C", so-called (Rec. 66-67), and the notations thereon (all as more fully set out in argument under Point II, hereafter) establish a settlement upon the said lands with a *view to preemption or homesteading before the survey of the lands* in the field, on sections 16 or 36, so as to subject said sections to the claims of settlers, rather than to become school lands.

It is submitted, that there was a genuine issue of fact (or issues of fact), as to whether or not there was a settlement upon these lands herein involved with a view to preemption or homestead, prior to September 10th, 1856 (the date of the field survey acceptance, Rec. 50), so as to ~~present~~ the attachment of the reservation of the section in favor of the territorial or state schools. Such issue or issues, being real, were to be determined on hearing and trial of the cause, rather than on summary judgment procedure, and, consequently, the trial Court erred in so determining the same on motion rather than on trial, which constituted reversible error on its part, and to which exception is taken by appellant herein.

## POINT II

TRIAL COURT ERRED IN ENTERING JUDGMENT QUIETING TITLE IN FAVOR OF THE BOARD OF EDUCATION OF SALT LAKE, INSTEAD OF QUIETING TITLE IN FAVOR OF PLAINTIFF AND APPELLANT.

Chapter 20, Title 43, Section 851, United States Code Annotated, entitled, Deficiencies in Grants to State by Reason of Settlements, etc., on Designated Sections, Generally, reads:

“Where settlements with a view to preemption or homestead, have, been, prior to February 26, 1859, or shall thereafter be made, before the survey of the lands in the field, which are found to have been made on sections 16 or 36, those sections shall be subject to the claims of such settlers, and if such sections or either of them shall have been or shall be granted, reserved, or pledged, for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may thus be taken by preemption or homestead settlers.”

This is substantially the same language as contained in Sections 2275-76, Revised Statutes of the United States, 26 Statutes at Large page 796, 51 Congress, Session II, adopted February 28th, 1891, which statutes are expressly made applicable to the handling of school lands, by the Act of May 3, 1902, Public Law 102, Ch. 183, 32 Statutes at Large Page 188, 57 Congress, Chapter 683, as regards the State of Utah, *“anything in the act approved July 16th, 1894, providing for the admission of*

*said State of Utah to the union, TO THE CONTRARY NOT WITHSTANDING."*

Consequently, where there was a settlement *WITH A VIEW to preemption or homestead*, the lands if unsurveyed, and later found to be on school sections, never became "reserved" for school purposes, within the provisions of Section 15, Organic Act of September 9th, 1850, as set forth at Page 34, Compiled Laws of Utah, 1876, which provided:

"Section 15: Be it further enacted, That when the land in said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered 16 and 36 in each township in said territory shall be, and the same are hereby reserved, for the purpose of being applied to the schools in said territory, and in States and Territories, hereafter to be erected out of the same."

*It is to be particularly noted, that the statute does not require "PREEMPTION" or "HOMESTEAD", as such, to withdraw from the purview of the reservation of lands for the schools, said sections 16 or 36, BUT, ONLY THAT THERE BE A SETTLEMENT WITH A VIEW TO HOMESTEAD OR PREEMPTION.*

*AND, IF THAT CONDITION BE MET, then the lands in question never did become the property of either the territory, under section 15 of the Organic Act, or, of the State, when it acceded to the rights of the territorial government, and there would be no succession in the State of Utah, to the grant of those lands.*

It might be appropriate to point out here, also, that while preemption was an act toward perfecting the title to lands and obtaining the same from the federal government under the various land laws, and perhaps necessary as between possessors or settlers, both claiming the same ground, that even this Court, in construing Federal Court Decisions on the matter, commented, as in *Hamblin v. State Board of Land Commissioners*, 55 Utah 402, 187 Pac. 178, as respects Section 2266, Revised Statutes of United States, 1878, relating to the necessity for filing a preemption right within three months from date of receipt of the approved plat of the land that might be claimed, at the district land office, that:

*"In construing the section of the act of Congress above quoted, as far as we have been able to ascertain, the Courts have uniformly held it to be directory only." Quoting Landsdale v. Daniels, 100 U.S. 113, 25 L. Ed. 587; Johnson v. Towseley, 13 Wall. 72, 20 L. Ed. 485; Hollingshead v. Simms, 51 Cal. 188, etc., "Our investigation of this question fails to discover any case in conflict with these decisions, nor does there appear to be any logical reason against the doctrine therein announced."*

Coming now to the situation disclosed by the plaintiff's facts and theory-of-the case, we find:

(a) Land Certificate by Jesse W. Fox, Territorial Surveyor, issued to John Prye (name miscopied into later county records as "John Poy," and the description as Block 15, instead of Block 13, see Rec. 65, Certified copy of Abstract Record Page giving correct details as

to name and block, and Rec. 68-9, Certified Copy of Book B-8, page 137, showing name and lots involved), on February 25th, 1868, and recorded March 9th, 1868, (Exhibit 1, Page 1). No controversy exists as to the correctness of the name or description of the ground.

By virtue of an act of the Utah Territorial Legislature Approved January 9th, 1866, Mr. John Prye was established as the person holding "*title of possession*," of the said ground herein in controversy. The provisions of said act are, as found on page 95, Compiled Laws of Utah, 1876, as follows:

"(68) Section 1: Be it enacted by the Governor and Legislative Assembly of the Territory of Utah: That the surveyor general is hereby authorized and required to give, to the person for whom he makes a survey, a certificate thereof, describing the tract, block, or lot, and specifying its area, such certificate *SHALL BE TITLE OF POSSESSION TO THE PERSON HOLDING IT.*"

This possession, invested in Mr. John Prye, in 1868, has through intermediate conveyances, down to the present time, been carried over to the plaintiff and appellant herein, and no act of divesture has ever been shown to have taken place.

But, inherent in this very procedure which established Mr. John Prye as the title holder of possession of the ground in 1868, is the inference that he must have been in possession prior to the date when the survey certificate was made, in order to have had the survey



made, and the facts necessary for the surveyor general to know, ascertained. So, we may indulge in the presumption that Mr. Prye was in possession and on the ground prior to February 25th, 1868.

It is well known to title examiners, that the early recordings of deeds and transfers and the like relating to lands, were not made with the nicety that we observe today, and, that there are, as far as the county records are concerned, many gaps in titles prior to and during the period of 1860 to 1870 or thereabouts. So, that it is quite possible that Mr. Prye obtained his possession from some earlier or original settler on the ground. Which latter fact brings us to:

(b) The certified copy of the so-called "Plot 'C'" (Rec. 66-67), obtained from the Salt Lake County Recorder's Office, and containing on the one sheet, a showing of the linear outlines of the lots, blocks, and parts of Plot "C" [covering the property herein in dispute], and a further sheet showing what is an ownership plat, with each lot being marked with a name or names, as owners. In respect to Lots 16 and 17, Block 13, we find the name "D. Hendrix," appearing as the lot owner or holder. But, the most significant thing about the instrument in question, is that it bears the notation that it was:

*"COPIED FROM OLD PLOT BY LEO HAWKINS,  
G.S.L. CO. Recorder, — 1857."*

Obviously, if the Plot was copied from an "old" plot in 1857, the original must have been older, at least, than the date of December 31st, 1857, and the question arises

as to how "old was old." By dictionary definition, the term "old" has been said to mean:

- "1. Having existed for a long time; aged;"
- "3. Having been used or known for a long time."

Now, let us apply the term to the situation then existing. Utah was in a sense, a new country, having been settled in 1847, yet as a decade had elapsed since its settlement, much had been accomplished. So, in 1857, the copied "plot" being from an "old" plot, relatively, might go back as far as ten years. If the "plot" referred to as the original from which the copying had been done, had been made in 1857, it would hardly have been referred to as "old," nor, would there have been any need for an immediate recopying of the same, and, inserting the ownership names thereon would take some time, too, so, it would appear that the "old" plot would antedate the year 1857. From the "plot" itself, (Rec. 66-67), it would appear that the land was laid out in blocks, lots, and tracts, and, that same was based on some kind of a survey that had been made to lay out that land known or to be known as Plat or Plot "C." Since, a survey could not be made without expenditure of some time, and, as it would take time, after survey of the same to compile the ownership data, or indeed, to permit transfer to as many individuals as appear to be owners thereon, and, as, surveying would be unlikely during the wintertime, it would appear to have been made earlier, at least, than the fall of 1856, in order to be within the weather limits of 1856 season, and the time basis in making it up. And, yet, in considering how far we must push back to find

the extent of the world "old," it would appear that at most, we need set back the time to cover only the time to a day prior to September 10th, 1856, a matter of less than *four months*, to bring the time when settlement on the land with a view to *homesteading or preemption*, would give the settlers priority over any reservation for school usages, since the survey would not then have been completed. Surely, it would not be unreasonable to extend the meaning of the word "old" a few months to bring it ahead of the date of September 10th, 1856, when the plat now in the land office as the survey of that section 16, Township 1 South, Range 1 East, Salt Lake Meridian was approved.

Nor, can it be doubted, if the land was laid out into lots, blocks, and like, with spacing intervening for streets or approaches, that there was no intent not to homestead or preempt the land, in order to perfect title. But, as before noted, there was no requirement of an ACTUAL PREEMPTION, or IMMEDIATE HOMESTEADING, but, only WITH A VIEW TO THE SAME. Now, if the land had been surveyed "AFTER" settlement with a view to preemption or homestead, WOULD IT BE LIKELY that the same would be divided into lots, blocks, streets, and the like, when the contemporary people had the advantage of knowing the reservations in Section 15 of the Organic Act creating the Territory of Utah, making this school land? Indeed, it would be most unlikely for them to go on through all the motions that they did to plat the land, divide it up, sell, or trade the same, knowing all the time, (if their actions

were assumed to take place after September 10th, 1856) that it was school land, and could never be theirs? Futility was not the habit of the pioneers, and the very list of names on the ownership plat would militate against any such a useless proceeding. The very consideration of the situation shows its absurdity, and, makes obvious the only sensible conclusion, which is that the parties did know what they were doing, that it was not futile, and it did antedate September 10th, 1856. In the absence of contrary information, we must assume that what the settlers did was legal, and, that they did not take action for the purposes of usurping school lands that might inure to the benefit of the territory. There is every presumption as to legality and regularity of their acts.

And, of course, as shown by the record (Rec. 71, 72, 73, 74, 75) other areas of the same section 16, of Township 1 South, Range 1 East, Salt Lake Meridian, were patented under homestead entry, and the title of the settler or settlers perfected, which would certainly negative the idea that the title of the territory or of the state was so firmly attached to these lands that any other prospective settler was forever excluded therefrom, insofar as getting title was concerned. Certainly, the general land office in Washington would not have let slip by patent proceedings to land "reserved" for the territory, without a proper showing that the reservation was indeed ineffective in some manner as to the land in question. The record also shows that the state went further and selected lieu lands for those patented under the proceedings above mentioned.

The case of *Ferry vs. Street*, as reported in 11 Pacific Reporter, 571, 4 Utah, 521 (1888), is interesting in this respect, as showing that title to unsurveyed sections, if settlement thereon was made before date of survey, and same by the survey were determined to be school sections, was nevertheless retained in the settlers, and school title reservations did not attach; and that the same was true, even of sections which because of the survey of adjacent sections could almost be bounded by reason of the corners of the adjacent sections being fixed. Actual survey was required.

It is of no avail for defendant and respondent to argue that the present title may still be in the United States, and, that for any of a number of various reasons it is not, or should not be in the plaintiff and appellant. For, in a quiet title action, it is so well settled as not to need citation here and now, that the party recovering must recover upon the strength of his own title, not upon any weaknesses of his adversary's title. Yet, through just such inferences, the trial court was lured into its erroneous decision in favor of the defendant Board of Education of Salt Lake; whereas, the truth of the matter is, because of the matters relating to title as above set forth, that insofar as the Lots 16 and 17, of Block 13, of Five Acre Plat C, Township 1 South, Range 1 East, Salt Lake Meridian, Salt Lake County, Utah, are concerned, they never were school land, nor were they reserved for such purposes, hence did not pass to the State of Utah, and so its purported grant to Romney Lumber Company, a corporation, who conveyed

to the defendant Board of Education of Salt Lake City, is of no effect, and, the title of plaintiff and appellant should be quieted as against pretensions of any of the defendants and respondents, claiming under such invalid grant by the State of Utah. Failure so to decree constitutes reversible error.

Once the adverse interest of defendants and respondents is quieted in favor of appellant herein, he can, of course, proceed under Section 1068, United States Code Annotated, as amended, to secure title as an adverse holder of the land for more than 20 years, or for a period commencing not later than January 1st, 1901, (Section 10, USCA, Title 43, Page 64 Cumulative Annual Pocket Part), and, in such connection no preemption, homestead, or the like is required, and, there are no questions of transfer of possessory rights, or the like, or any inability or restriction to so do involved.

## CONCLUSION

It was therefore, it is respectfully submitted, and as set out in Points I and II of the argument, hereinabove, error on the part of the trial court to decide the case on motion for summary judgment, and to give judgment for the defendant-respondent, Board of Education of Salt Lake City, and to dismiss the plaintiff-appellant's complaint without granting him the relief sought by him quieting his title to said ground.

WHEREFORE, the plaintiff and appellant prays this Honorable Court to reverse the holding of the trial

court, and to remand the same for further proceedings in accordance with the principles set forth herein, or, for the Supreme Court to find for the appellant-plaintiff, and, enter a proper decree and judgment in his favor.

Respectfully submitted,

R. S. JOHNSON

*Attorney-for-Plaintiff and  
Appellant.*