

1956

Rennold Pender v. Romney Lumber Co. et al : Petition and Brief on Rehearing

Utah Supreme Court

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R. S. Johnson; Attorney for Petitioner, Plaintiff and Appellant.

Recommended Citation

Petition for Rehearing, *Pender v. Romney Lumber Co.*, No. 8469 (Utah Supreme Court, 1956).
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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
JUN 8 - 1956

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.,

Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No. 8469

PETITION AND BRIEF ON REHEARING

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Plaintiff and Appellant.

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PETITION AND BRIEF ON REHEARING

PETITION FOR REHEARING

Comes now the plaintiff, appellant, and petitioner,
in the above entitled proceedings, and respectfully moves
and petitions this Honorable Court for a rehearing and
reconsideration of its former decision heretofore render-
ed in such cause under date of May 8th, 1956, upon the

grounds, and for the reasons that this Honorable Court erred in its determination and decision of said cause, that it misconstrued or misapplied the existing law applicable to said cause, or failed to give due consideration to important relevant facts and law, in the following particulars:

POINT I.

THAT THIS HONORABLE COURT ERRED IN AFFIRMING THE THIRD DISTRICT COURT'S ORDER ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND RESPONDENTS HEREIN, UPON THE FOLLOWING GROUNDS:

(A) THAT THE STATUTE APPLICABLE TO THE PRE-SURVEY SETTLEMENT OF POTENTIAL SCHOOL SECTION WAS THE ACT OF 1859 RATHER THAN THE ACT OF 1891.

(B) IN HOLDING THAT CONGRESSIONAL ACTS APPLICABLE, GRANTED AN "IN PRAESENTI" RIGHT TO THE TERRITORY TO PRE-SURVEY, POTENTIAL, SCHOOL SECTION, RATHER THAN AS A DIVESTMENT OF THE SAME.

(C) THAT PATENT WAS REQUIRED TO EXTINGUISH THE TERRITORY'S RIGHTS TO A PRE-SURVEY, SETTLED, POTENTIAL, SCHOOL SECTION.

(D) THAT NO DISTINCTION IS DRAWN BY THE COURT AS BETWEEN THE CATEGORIES OF ADVERSE CLAIMANTS:

- (1) *As to Conflicts between Settlers;*
- (2) *Paramount Authority of Congress To Grant to Others or Retain Rights in Land Where Settlement Rights are Not Vested.*

BRIEF IN SUPPORT OF PETITION
FOR REHEARING
ARGUMENT

POINT I.

THAT THIS HONORABLE COURT ERRED IN AFFIRMING THE THIRD DISTRICT COURT'S ORDER ENTERING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AND RESPONDENTS HEREIN, UPON THE FOLLOWING GROUNDS:

(A) THAT THE STATUTE APPLICABLE TO THE PRE-SURVEY SETTLEMENT OF POTENTIAL SCHOOL SECTION WAS THE ACT OF 1859 RATHER THAN THE ACT OF 1891.

This Honorable Court in its opinion of May 8th, 1956, quotes the statutory enactment of the United States Congress of 1859 (11 Statutes 385, 26 February, 1859, Section 2275 of Revised Statutes of the United States of 1875) as follows:

“Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption claim of such settler, and, if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory where the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors * * *”

and assumes that as it was the statute in effect nearest to the 1856 date of survey of the lands in controversy between the parties to this suit (See page 2, Appellant's

Original Brief, Section "B", Statement of Facts as to Material Events), that the terms of such statute are the applicable and controlling terms to be applied herein.

Yet, note, that while the Court applies the 1859 statute, *retrospectively*, it failed to consider and apply the 1891 Statute (Section 2275, Revised Statutes of the United States as amended by Act of February 28th, 1891, 26 Statutes at Large, page 796, 51 Congress, Session II, [See also Page 9 Appellant's Original Brief], which reads as follows:

"Where settlements with a view to pre-emption or homestead have been or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on Sections sixteen and thirty-six, those sections shall be subject to the claims of such settlers; and if such sections or either of them shall be granted, reserved, or platted 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 land as may be thus taken by pre-emption or homestead settlers."

As indicated at page 9 of Appellant's Original Brief, this act of 1891, was by Act of May 3rd, 1902, Public Law 102, Chap. 183, 32 Statutes at Large Page 188, 57th Congress, Ch. 683, made applicable to Utah, anything to the contrary in the enabling act, notwithstanding.

And, as will hereinafter be demonstrated, the applicable terms of the 1891 Act rather than the 1859 Act of Congress are the applicable statutory terms to govern, likewise applied, *retrospectively*, for, as shown in the

quoted extract of the *Shepley v. Cowan* case, 91 U.S. 330, 23 L. Ed. 424, as set out in the *Gonzales v. French* case, 164 U.S. 338, 17 Sup. Ct. 85, 41 L. Ed. 458, the federal supreme court, has held in effect that the national congress, may at any time before pre-emption or other rights vest, or patent is issued, legislate concerning or affecting the public domain, settled or otherwise. That is exactly what it did in the 1891 Act, and, since no "vested" rights intervened, as to either state, territory, or any individual, the congress was within its rights. Hence, the 1891 act rather than the 1859 act, is the governing statute, and failure to so hold, is and was erroneous, and as will hereafter be shown, adversely affected the rights of this petitioner.

(B) IN HOLDING THAT CONGRESSIONAL ACTS APPLICABLE, GRANTED AN "IN PRAESENTI" RIGHT TO THE TERRITORY TO PRE-SURVEY, POTENTIAL, SCHOOL SECTION, RATHER THAN AS A DIVESTMENT OF THE SAME.

As above pointed out in subpoint "A", a reading of the 1859 and 1891 acts present a considerably different situation, as delineated by the wording of each.

Note that the language of the 1859 statute provides for the lieu lands only as to such pre-settled land, as may be afterwards "patented by pre-emptors", whereas the later 1891 act provides for lieu lands as to lands "subject to the claims of such settlers," a vital, and distinctly different idea. Consequently, judged under the 1891 act, a different holding would necessarily follow as to the extinguishment of the territorial rights to section six-

teen lands, where settlement thereon was made prior to the survey thereof, since, neither *settlement by pre-emptors or patent* of the lands, as required by the earlier act, are any longer made requisites under the later act. See also in this connection argument commencing at top of page 10 of Appellant's Original Brief.

And, the correctness of the above reasoning, is, in an opinion of the Supreme Court of the State of Washington, at least hinted at, in the following language, respecting the question of whether the school land grants to that state were present grants by the terms of the statute, or future grants, when the same have yet to be surveyed:

“(4) * * * However, if title to the particular lands in question did not vest in the state upon its admission to the Union, and has not since then vested in the state, *because of pre-emption and homestead claims initiated by settlement prior to government survey*, because of the creation of national forest reservations, * * *” Page 402 Pacific, *Thompson v. Savidge*, 188 Pacific Reporter 397, 110 Washington 486.

It is therefore submitted, that in accordance with the above case, the cases therein cited of *Heydenfeldt v. Daney Gold, etc., Co.*, 93 U.S. 634, 23 L. Ed. 995, as explained in *United States v. Morrison*, 240 U.S. 192, 36 Sup. Ct. 326, 60 L. Ed. 599; that the Territory of Utah did not receive any interest in the instant section sixteen as asserted in the Court's original opinion herein, and, which, as under the 1859 Act, might have been regarded as a possibility.

(C) THAT PATENT WAS REQUIRED TO EXTINGUISH THE TERRITORY'S RIGHTS TO A PRE-SURVEY, SETTLED, POTENTIAL, SCHOOL SECTION.

It is submitted, that on the authorities, and reasoning as set out in Subpoint "B", above, that, the 1891 congressional act, being controlling, would not therefore require that the extinguishment of territorial rights be based solely in situations where a "pre-emptor" obtained a patent, as may have been the case under the 1859 act, and, therefore, to limit the appellant to the narrow situation where a final, later patent should actually be had, is erroneous.

And, in a further respect, it is believed that the Court's decision is in error, since, if under its holding, the patent is the sine qua non without which extinguishment of the territorial or state rights to the section cannot be had, the result of the holding is to bar the appellant and petitioner herein, from proceeding under the federal remedial act, as hereinafter mentioned, and as set out at page 18 of Appellant's Original Brief, to secure that very patent which is the essence of the purported extinguishment required.

(D) THAT NO DISTINCTION IS DRAWN BY THE COURT AS BETWEEN THE CATEGORIES OF ADVERSE CLAIMANTS:

- (1) *As to Conflicts between Settlers;*
- (2) *Paramount Authority of Congress to Grant to Others or Retain Rights in Land Where Settlement Rights are Not Vested.*

The Court quotes the language of *Shepley v. Cowan*,

91 U.S. 330, 23 L. Ed. 424, as quoted in *Gonzales v. French*, 164 U.S. 338, 17 Sup. Ct. 85, 41 L. Ed. 458, as indicative of the fact that no vested rights are acquired by a settler until compliance with the requirements of the statutes. That is true, in general, but, other aspects of matters have a bearing thereon. In the cases, like *Railroad v. Stringham*, 38 Utah 113, 110 Pacific 868, affirmed on appeal, the question as to adverse possession arose between a settler, who failed to make filings and the like, and, what was in effect a grantee of the United States, under a right of way selection. Now, as is shown by the Shepley case, the federal congress, at all times, until final vesting of title by perfection of pre-emption, homestead filing, patent, or the like, has a pre-eminent power over the public domain. Hence, a railroad right of way under a federal grant, would have priority of a mere settler on the public domain. Likewise, in the *Gonzales v. French* case, supra, the sole issue as to whether a settler, never having perfected his rights, is entitled to claim as against the townsite entry or patentee under a Congressional Act, relating to the same land. Obviously, the federal power to control and legislate concerning such lands as are still part of the public domain, is a part of the national sovereignty which cannot be divested, until the settler first OBTAINS a valid VESTED interest in some manner to such land. In other situations, where two settler claimants adverse as to the same tract of land, the courts will support the rights of the earliest one to make such compliance with federal law, such as pre-emption, as will give him a valid claim thereto. So

much is clear, and is well settled law. BUT NEITHER OF THOSE SITUATIONS, is the SITUATION THAT EXISTS HERE. Appellant does not deny that the federal government is the paramount owner of the property here, and, could by action of congress, or other lawful authority, in the sway of its power, grant the instant land away, take it for public use, or otherwise, as against appellant. What appellant is claiming is that same being federal land, since the original settlement, with a "view toward pre-emption or homestead" divested any potential claim of the territory or state, he, the appellant, as the successor in interest of a chain of title showing the requisite possession, may obtain title to this ground under the federal remedial statute(s), (Section 1068, U.S. Code Annotated, Title 43, Page 64 Cumulative Annual Pocket Part). No pre-emption, or the like is a requisite under this statute, nor, is the appellant relying on the so-called non-transferable settlers' rights to give him any rights, other than as to possessory rights, buttressed by the territorial statute mentioned at page 12 of Appellant's Original Brief.

As pointed out at page 11, in Appellant's Original Brief, even this Honorable Court, as indicated in *Hamblin v State Board of Land Commissioners*, 55 Utah 402, 187 Pacific 178, has held that the filing of the pre-emption rights was directory and not mandatory. Hence, in the absence of the special situations mentioned above, where there is a controversy between adversely occupying settlers, or between a non-complying settler, and a grantee of the government, the government has always acted with

leniency toward an occupant, and tended to protect his rights. True, the settler cannot as a matter of right assert his possessory right, unperfected as against his government, but, that is not the issue here. The appellant's predecessor's initial settlement on the ground herein in question, prior to the public survey thereof, barred any rights of the territory and later the state from attaching to this ground; and so, this court should permit the rehearing and reconsideration of this case, enter judgment in favor of this plaintiff, appellant, and petitioner, to the end that he can pursue his right to obtain title by patent, under the federal remedial statutes, freed of any adversary claim of the defendants and respondents, since they acquired nothing in the way of title from the purported transfer of the alleged rights of the territory or state to this potential school land, as such title never initially attached to the ground in question.

CONCLUSION

In view of the foregoing, and of the arguments contained in Appellant's Original Brief, appellant and petitioner prays that further consideration be given this cause, a rehearing and reconsideration be granted, and, that the present opinion be vacated or modified, and judgment in favor of the appellant and petitioner, plaintiff in the Court below, be entered, and a remand to the district court to that effect be made.

Respectfully submitted,

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Plaintiff and Appellant.*