

1956

## Rennold Pender v. Romney Lumber Co. et al : Brief in Answer to Petition for Rehearing

Utah Supreme Court

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Marr, Wilkins & Cannon; Richard H. Nebeker; Attorneys for Defendant and Respondent;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

**FILED**

JUL 3 2 1956

**RENNOLD PENDER,**

*Plaintiff and Appellant,*

—VS.—

**BOARD OF EDUCATION OF SALT  
LAKE CITY, a public corporation,  
et al.,**

*Defendants and Respondents.*

**BRIEF IN ANSWER TO PETITION  
FOR REHEARING**

**MARR, WILKINS & CANNON  
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and Respondent.*

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THE DECISION OF THE COURT CORRECTLY  
SETS FORTH THE APPLICABLE LAW

Throughout these proceedings, appellant has erroneously insisted that the pre-emptive settler upon the school lands here involved obtained a vested right to the property by the mere fact of his possession. The quotation at page 2 of this court's opinion plainly refutes appellant's contention.

“The U. S. Supreme Court has construed these statutes as not conferring any vested interest upon a mere settler, even though he might

improve the property, build a home thereon, and reside there. In the case of *Gonzales v. French*, 164 U.S. 338, 17 S. Ct. 85, 41 L. Ed. 458, the Court reiterated the language of *Shepley v. Cowan*, 91 U.S. 330, 23 L. Ed. 424:

“ ‘In those cases, *Frisbie v. Whitney* and the *Yosemite Valley Case*, the court decided that a party, by mere settlement upon the public lands, with an intention to obtain a title to the same under the pre-emption laws, did not thereby acquire such a vested interest in the premises as to deprive congress of the power to dispose of the property; that, notwithstanding the settlement, congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, lighthouses, custom-houses, and other public purposes for which real property is required by the government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as against the United States, or impair in any respect the power of congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition conferred upon congress by the constitution only ceased when all the preliminary acts prescribed by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested right in the premises of which he could not be subsequently deprived. He was then entitled to a certificate of entry from the local land officers, and ultimately to a

patent of the United States. Until such payment and entry, the acts of congress gave to the settler only a privilege of pre-emption in case the lands were offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others.'

"The case of *Buxton v. Traver*, 130 U.S. 232, 9 S. Ct. 509, characterizes the pre-emption statutes as an offer by the government, conditioned upon filing a declaratory statement and performing certain other acts. Unless these conditions are met, there is no acceptance of the offer and no rights arise in favor of the settler. See also *Railroad v. Stringham*, 38 Utah 113, 110 P. 868, *aff'd* on appeal on another issue, 229 U.S. 44, 36 S. Ct. 5, 60 L. Ed. 136."

Appellant claims that the Act of 1891 (28 Feb. 1891; 26 Stat. 796) rather than the Act of 1859 (26 Feb. 1859; 11 Stat. 385) is the applicable statute and that the change in phraseology "... in lieu of such as may be patented by pre-emptors ..." (1859) to "... in lieu of such land as may be thus taken by pre-emption ..." (1891) has significance. The reasoning of this court's opinion was simply that the very statute upon which appellant relies makes it clear that the pre-emptive title had to be perfected before the state's right to the particular school section was divested. The phrase "subject to the claims" (1891) or "subject to the pre-emption claim" (1859) expresses this reasoning in either instance and the change in phraseology "may be patented" to "may be thus taken by pre-emption" does not alter the Congressional intent to any material extent insofar as the issue here con-

cerned. But the fact of the matter is that D. Hendrix and John Prye et al. failed to file their declaratory statement in the district land office within three months from the time of the settlement (pursuant to Sec. 2265 Rev. Stat. 1878, 3 March 1843; 5 Stat. 620); or within three months from the date of the receipt at the district land office of the approved plat of the township (Sec. 2266 Rev. Stat. 1878, 30 May 1862; 12 Stat. 410) or in any event within thirty months after the date prescribed for filing their declaratory notice has expired (Sec. 2267 Rev. Stat. 1878, 14 July 1870; 16 Stat. 279). The pre-emptive right having been forfeited long before 1891, the decision of this court correctly cites and applies the act of 1859.

The single statute upon which appellant bases his entire case deals with the subject matter of lieu land selections by the state. It does not purport to obviate the necessity of timely compliance with the preliminary acts prescribed by law for the acquisition of title. The statutes can and must be construed harmoniously. The Act of 1891 was passed three days before the pre-emption laws were repealed (3 Mar. 1891; 26 Stat. 1097) so the change in phraseology made it clear that lieu land selections could continue to be made as long as all bona fide pre-emptive claims which had been previously initiated were perfected upon due compliance with law.

The possessory claim of the settler had to be duly perfected in order to prevent the statutory reservation to the territory for school purposes from becoming opera-

tive. Appellant has cited no case contrary to this proposition. The Supreme Court of the United States in *Gonzales v. French*, 164 U.S. 338, 17 S. Ct. 102, 41 L. Ed. 458 stated:

“As they (pre-emptioners) did not choose to assert their rights by filing a declaratory statement, or by making an entry as pre-emptioners, their mere possession did not prevent the rights of the territory from attaching to the school section when the survey was made.”

This survey was made in 1878 while the school section was reserved to the Arizona territory in 1850.

The federal statutory scheme of granting school sections to the various states commenced long before statehood. On September 9, 1850 Congress exercised its sovereign power and reserved for the purpose of being applied to schools, sections 16 and 36 in each township, in the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming, and in the States and Territories to be erected out of the same (9 Stat. 452). Thus Congress disposed of the tract now situated at 19th East Street and Kensington Avenue in Section 16, T. 1 S., R. 1 E., S. L.M. The fact that this school land was reserved prior to the settlement by D. Hendrix does not make it any less operative upon his failure to file the required declaratory statement in the district land office to perfect his possessory claim.

Appellant quotes half of a sentence only in his attempt to color with authority his petition for a rehearing. The matter inserted in brackets below is the remaining



language omitted from the sentence quoted by appellant from *Thompson v. Savidge*, 110 Wash. 486, 188 Pac. 397 at 402.

“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, (or because of want of government survey thereof, we think it plain that a relinquishment of the state’s claim thereto, and the exercise of its rights to select other lands in lieu thereof to which it will immediately acquire a completely vested title, will not be a disposition of the granted school lands of the state in violation of these constitutional provisions.)”

A careful study of the above case will demonstrate that it lends no support whatever to appellant’s contentions. The Washington Supreme Court is assuming that there was a valid title based on compliance with all the pre-emption requirements, in order to discuss a state constitutional question. The decision holds that the school land grant “did not vest title to sections 16 and 36 in the state prior to survey thereof.” In the instant case the survey was made in 1856, at which time the *reservation* to the territory attached. The Supreme Court decisions cited in the petition for rehearing squarely support the decision rendered herein. *Shepley v. Cowan*, 91 U.S. 330, 23 L. Ed. 424; *Heydenfeldt v. Daney Gold & S. Min. Co.*, 93 U.S. 634, 23 L. Ed. 995; *United States v. Morrison*, 242 U.S. 192, 36 S. Ct. 326, 60 L. Ed. 599.

*Shepley v. Cowan* is the case cited in the quotation from *Gonzales v. French* cited in this court's opinion. In *United States v. Morrison*, supra, the federal government withdrew school lands in the Cascade Forest Reserve, State of Oregon, after the date of statehood but before the survey was finally accepted by the Commissioner of the General Land Office. The holding of the Supreme Court of the United States that the State of Oregon did not take title to the land prior to the survey is entirely consistent with the adjudication in the case at bar.

The decisions of the federal Supreme Court quoted herein indicate that the territorial rights attached and became vested in this property at the time of survey, subject to the possibility of being divested by pre-emption. The burden was upon the individual, not the territory, to take the necessary steps to prevent title from passing according to the clear expression of the Organic Act of 1850 and the subsequent grant embodied in the Enabling Act of 1894. The decision of this court is clear, concise and correctly applies the appropriate case law and statutes.

However, there is no justification for the court's assumption that Rennold Pender was entitled to commence a suit to quiet title in the District Court of Salt Lake County before exhausting his administrative remedy. The application for federal patent which was rejected was made by Mr. Pender pursuant to the color of title act, section 1068, Title 43 U.S.C.A. The determination of whether or not Mr. Pender qualified as a suc-

cessor in interest of D. Hendrix and had a valid preemptive right was a question of federal law to be determined between Pender and the District Manager of the Bureau of Land Management. Upon consideration of that question and its conclusion against him, Mr. Pender's only recourse was to appeal to the Director of the Bureau of Land Management. See Section 221.5 of the Rules and Regulations of the Bureau of Land Management published at page 461 of 43 Code of Federal Regulations.

There is a statement in the last paragraph of Mr. House's letter of rejection to the effect that:

“Until the adverse conflicting claim of the State of Utah is eliminated, the application of Pender to purchase the land under the claim of color of title may not be considered favorably.”

But, there is no authority in the statutes, or regulations, for the Bureau of Land Management to divest itself of jurisdiction in this matter. This question of the commencement of proceedings in the district court should not be confused with the statutory authorization of such proceedings to determine adverse claims to application for mining patent under section 30 Title 30 U.S.C.A. There is no authority whatever for the failure of Pender to appeal to the Director of the Bureau of Land Management, but bring a quiet title suit instead.

The motion for summary judgment in this case can be sustained for the sole reason that Pender does not claim under any patent whatsoever, and the district courts of this state are not the proper forum for him to attempt to obtain one. Respondent submits that the opin-

ion of this court should not infer that the district courts of this state are available to applicants aggrieved by decisions of the Bureau of Land Management concerning color of title applications, until they have duly complied with the prescribed administrative procedure. Sections 57 to 60 inclusive, on Public Lands in 42 Am. Jur. review this matter thoroughly and at page 837 it is stated:

“In the absence of fraud, the decisions of the officers of the Land Department of the government as to matters within their jurisdiction are final and conclusive, except as they may be reversed on appeal in that department.”

The statement in the opinion of this court that after notification of rejection of his application “Pender then filed a quiet title suit . . .” is erroneous since the complaint was filed May 6, 1952 and the letter of rejection of application is dated July 9, 1952.

It is respectfully suggested that this sentence be corrected and the additional sentence inserted at the conclusion of the opinion:

“At any rate as Pender did not appeal from the decision of the District Manager of the Bureau of Land Management, he must be deemed to have acquiesced therein and concluded thereby. Gonzales v. French, Railroad v. Stringham, supra.”

See the additional cases to this effect at page 24 of respondent's brief.

Nothing has been presented by appellant's petition for rehearing which has not been considered and deter-

mined in the court's decision. The petition should be denied for as the court states:

“Under the U.S. Supreme Court cases cited supra the only possible conclusion to be drawn in the present case is that appellant has no rights whatever in the property.”

Respectfully submitted,

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