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Rennold Pender v. Mose Alix et al : Brief of Intervening Plaintiff and Respondent Leon Brown

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

RENNOLD PENDER,
Plaintiff and Appellant,

VS.

MOSE ALIX, et al.,
Defendants and Respondents.

VS.

LEON BROWN,
*Intervening Plaintiff and
Respondent.*

FILED

MAR 28 1960

Clerk, Supreme Court, Utah

Case No. 9167

BRIEF OF INTERVENING PLAINTIFF AND
RESPONDENT, LEON BROWN

BOYDEN, TIBBALS, STATEN
& CROFT

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BRIEF OF INTERVENING PLAINTIFF AND
RESPONDENT, LEON BROWN

INTRODUCTION

Appellant's Statement of facts includes as "facts" too many statements, to quote the expression of the appellant's attorney, "dehors the record", to be acceptable to the respondent. For example it is stated at page 2 of the appellant's brief:—"Plaintiff Pender's title is deraigned from Arnold E. Wall, the heir or beneficiary of Nellie Wall, who was the owner of said property (Rec. 35)". Rec. 35 is a

photostatic copy of a quit claim deed from one Arnold E. Wall to the appellant. This document does not in any way substantiate the statement that Nellie Wall was the owner of the property — nor can any substantiation of this rather crucial point be found anywhere else in the entire record. In view of this and other innaccuracies in the Statement of Facts of the Appellant, Respondent chooses to make his own statement of facts.

STATEMENT OF FACTS

Respondent herein, Leon Brown, for a consideration of \$200.00, acquired by Deed of Salt Lake County the title of said County to the following described real estate located within said County:—

Commencing 612½ feet South and 66 feet West from the Northwest Corner of Block 4, Plat “C”, Salt Lake County Survey, running thence North 300 feet, thence West 296 feet, thence South 328 feet to river, Easterly along river to beginning. (R. 28).

The County deed was dated September 16th, 1942, and was duly recorded in the office of the Recorder of Salt Lake County on September 18, 1942 in Book 261 at Page 637. (R. 10, 28) Respondent entered into possession of the ground described in the deed and made use of said ground in the conduct of the floral business owned and operated by him. (R. 10) The use consisted of plowing the land, clearing weeds from it, planting crops on it, and use

as a growing yard and storage yard. (R. 10) Respondent paid all taxes lawfully levied and assessed against the said land from the date of acquisition by him from the County to the date of the filing of the complaint in intervention in the case now before this court. (R. 10, 12-27 inc.)

On May 19, 1948, a Notice of Lis Pendens was filed by appellant through his attorney, Milton V. Backman, with the Recorder of Salt Lake County, which notice was entered in Book 610 at Page 205 of the records of that office. (R. 80) This notice contained a statement that Rennold Pender had filed a complaint in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, praying for judgment in favor of the plaintiff and against the defendants quieting title to the property described in the notice, which along with numerous other tracts of land contained a description of the tract in question in the instant action. (R. 80) Leon Brown, though his interest in the land in question was of record, as above set forth, was never joined as a party to the action commenced by Pender. (R. 1 Par. 3., R. 3 Par. 4., R. 6 & 7 second defense & appellant's brief P. 2 & 6.) To rid his title of the cloud of the recorded Lis Pendens and of any claim by the appellant or other parties to the action, Respondent, on the 9th day of July 1959 moved the court for permission under the Rules of

Civil Procedure to intervene in the action commenced by appellant. (R. 1, 2) The intervention was granted by the court and an order entered July 17th, 1959 authorizing Respondent to file a complaint in intervention and directing appellant to answer the same within 20 days from service of the order and the complaint. (R. 5) The order was served the day it was entered, on counsel for the appellant. (R. 5) Appellant filed an answer to the complaint in intervention on July 31, 1959 denying respondents allegations of title but not affirmatively pleading any title in the appellant. (R. 6) A motion for judgment on the pleadings and for summary judgment was filed by Respondent supported by affidavit and exhibits consisting of photostatic copies of the deed from Salt Lake County to the Respondent and of the receipted tax notices from 1943 through 1958. (R. 8-28 inc.) The matter was called up for hearing on respondent's motion, and at the hearing thereon appellant appeared by his counsel Milton V. Backman and requested leave to file an amended answer. This request was resisted by respondent, but the Court overruled respondent's objection, denied the motion for summary judgment and permitted the amended answer to be filed. (R. 7) Thereupon, Respondent filed a second motion for judgment on the pleadings and for summary judgment. (R. 29, 30) Appellant filed a doc-

ument entitled "Plaintiff's Supporting Documents Filed in Connection With Second Motion of Intervening Plaintiff for Summary Judgment". (R. 31) This document listed several attachments which were filed with the document including a photostatic copy of an unrecorded quit claim deed from one Arnold. E. Wall to appellant and describing the property of interest herein, as well as other property. The deed from Wall bore the date of August 29th, 1951, which is substantially after the date of the filing of the Lis Pendens by the Appellant. (R. 35, 80) No evidence was ever produced nor is there any portion of the record which in any way connects this isolated deed with the chain of legal or fee title to the property. The motion for summary judgment and judgment on the pleadings was duly and regularly called up for hearing before the court by the respondent. At the hearing no testimony was taken nor other evidence introduced. On this state of the record, after having heard the arguments of counsel the court took the matter under advisement and subsequently caused a minute entry to be made of its order granting the summary judgment as prayed. (R. 65) A written Judgment and Decree were duly presented to the Court and signed October 9th, 1959 by the Honorable Joseph G. Jeppson, Judge. (R. 66-68). A copy of the Judgment and Decree was duly served upon Counsel for Appel-

lant, but no objections were ever filed to any of the Findings contained therein nor to the Judgment and Decree itself. Within the time allowed by law, Rennold Pender, appellant, filed a Notice of Appeal to this Court. (R. 69) While there are numerous other parties named defendants to the original action commenced by appellant in which respondent was permitted to intervene, no party other than appellant Pender and respondent Brown in any manner appeared or participated in the proceedings in the court below from which this appeal is prosecuted.

POINTS RELIED UPON

POINT I

RESPONDENT'S RIGHT IN THE LAND IN QUESTION BASED UPON POSSESSION UNDER TAX DEED FROM SALT LAKE COUNTY AND PAYMENT OF ALL TAXES LAWFULLY ASSESSED THEREON FOR A PERIOD OF MORE THAN FIFTEEN YEARS PRIOR TO FILING OF THE COMPLAINT IN INTERVENTION BY RESPONDENT IS A SUFFICIENT TITLE TO SUPPORT THE JUDGMENT OF THE LOWER COURT QUIETING TITLE IN RESPONDENT.

POINT II

APPELLANT HAS SHOWN NO RIGHT TITLE OR INTEREST IN OR TO THE LAND IN QUESTION AND CANNOT BE HEARD TO COMPLAIN OF THE JUDGMENT OF THE LOWER COURT QUIETING TITLE IN THE RESPONDENT.

POINT III

ANY CLAIM OF APPELLANT IS BARRED BY STATUTE OF LIMITATIONS.

ARGUMENT

No attempt is here made by Respondent to answer the argument of Appellant under the same points as those set forth in appellants brief because the points there enumerated are, in the opinion of respondent, entirely incidental to the main issue before the court, and will be disposed of by the argument here presented on the basic issues which respondent believes the court must decide.

POINT I

RESPONDENT'S RIGHT IN THE LAND IN QUESTION BASED UPON POSSESSION UNDER TAX DEED FROM SALT LAKE COUNTY AND PAYMENT OF ALL TAXES LAWFULLY ASSESSED THEREON FOR A PERIOD OF MORE THAN FIFTEEN YEARS PRIOR TO FILING OF THE COMPLAINT IN INTERVENTION BY RESPONDENT IS A SUFFICIENT TITLE TO SUPPORT THE JUDGMENT OF THE LOWER COURT QUIETING TITLE IN RESPONDENT.

Respondent, Leon Brown, pleaded in his complaint in intervention that he was the owner of the tract of land therein described having acquired title to it from Salt Lake County by deed of said County duly recorded, and that he had owned, occupied and possessed said property under claim of right and paid all taxes lawfully assessed thereon. (R. 3, 4) Appellant by his Answer and likewise by his amended answer to the complaint in intervention denied this allegation of the respondent, but did not affirmatively plead either that the title thus

claimed by respondent was defective nor did appellant plead any title in himself (R. 6, 7) In the amended answer which appellant was permitted to file, appellant pleaded that the complaint in intervention was barred by the provisions of Sections 104-2-5 and 104-2-5, 11 UCA 1943. (R. 7) No reliance on this defense was had at the hearing before the court, and the matter is not presented nor argued by appellant before this court and consequently it is assumed that the defense thus pleaded was abandoned.

Respondent filed a motion for judgment on the pleadings and summary judgment under the applicable rules of civil procedure and supported the motion with the affidavit of respondent and a photostatic copy of the deed from Salt Lake County bearing the recording data, and copies of each of the annual general property tax notices bearing the payment received stamp and validation number of the County Treasurer for the years from 1943 to and including 1958, the last year for which taxes had become payable prior to the filing of the complaint in intervention. (R. 8-30) The affidavit of the respondent alleged the acquisition by respondent of the title and interest of Salt Lake County by deed and the continuous possession of the property by respondent and use thereof in the floral business owned by respondent consisting of plowing of said

land, clearing the weeds therefrom, planting of crops therein, use of lands for growing yards and storage yards continuously and successively from the acquisition of said lands to the commencement of the action in intervention, and the payment of all taxes levied and assessed upon the premises. (R. 10) No counter affidavit was ever filed by appellant. Appellant filed a document entitled, "Plaintiff's Supporting Documents Filed In Connection With Second Motion of Intervening Plaintiff For Summary Judgment." (R. 31) To this were appended copies of the following documents which were listed therein, Affidavit of Mrs. Robert Ford dated October 5th, 1959; Affidavit of Walter E. Porschatis, dated October 3rd, 1959; quit claim deed of Arnold E. Wall to Rennold Pender, dated August 29, 1951; Protest of L. H. Gray dated May 20, 1936, recorded Book 167, Page 80 Salt Lake County Recorder's Records, and a Notice of Lis Pendens filed by Rennold Pender at the time of commencement of the action in which this intervention was ultimately filed. (R. 31, 35, 78-80) Appellant offered no testimony or other evidence at any time. It is apparent from the argument that appellant considered that in some manner an issue of fact was presented by the filing of the documents referred to, which could not be resolved except by Trial and which was pertinent to the issues before

the court. Appellant argues therefore that the summary judgment should not have been granted. It is submitted that an examination of all of the material submitted by the appellant does not raise any issue or dispute of fact which is even material to the matter which was before the court, to wit, the validity of the tax title claimed by the respondent, and the status which he claimed to enjoy thereunder as the possessor paying taxes for more than fifteen years. It is noted that there is not one allegation of possession in the appellant, nor contravention of any of the facts upon which the respondent based his title.

It is noted that at page 5 of appellants brief the attempt is made to assail the validity of the County deed. The argument there presented is so fallacious as to hardly merit the dignity of a reply. There is not one scintilla of law that says that the purchaser of a tax title is subject to the maxim — “let the Buyer beware”, and no such law is cited by the appellant. Appellant attempts to rely upon the affidavit of L. H. Gray as giving notice to all the world and respondent in particular of a defect in the tax title. The quotation therefrom in appellant’s brief is entirely misleading. A reading of the document reflects that far from setting forth any irregularity in connection with the imposition or collection of the taxes protested therein, Mr. Gray

bases his protest entirely on the fact that the owner, whom he purports to represent, did not have the money to pay the taxes, and due to the depression was unable to borrow any money with which to pay the taxes, and that therefore any attempt to collect the taxes was an unconstitutional delegation of powers and illegal. (R. 78, 79) Far from being notice of any imperfection in the tax title or the procedures in levying the taxes the document speaks in clear terms of the fact that the taxes were due and payable and the owner could not pay them. By a statement, which appellants brief at Page 5 admits is entirely "dehors the record", appellant seeks to bring before this court a technical defect in the procedure which appellant claims occurred, in that the auditors affidavit was not attached for the years involved in the sale. Counsel attempts to lay claim that the affidavit of Gray is bottomed on this defect. A reading of the affidavit conclusively disproves this allegation. Appellant offered no proof of any such defect or of any other defect in the title passed by the deed of Salt Lake County. It was the burden of the appellant to plead and to prove such defects if any were claimed and there was no attempt made by appellant to do so. That it is the burden of the party asserting a defect in the title of one claiming under a Tax Deed from the County, to plead and prove the defect is well estab-

lished. Title 80-10-68 UCA 1943 was enacted into law as chapter 101 Laws of Utah 1939. This section states,

“* * * (5) The county auditor is authorized in the name of the county to execute deeds conveying in fee simple all property sold at said public sale to the purchaser and to attest the same with his seal. Deeds issued by the county auditor in pursuance of this section or of section 80-10-66 shall recite the total amount of all the delinquent taxes, penalties, interest and costs which were paid in for the execution and delivery of the deed, the year for which the property was assessed and sold to the county at preliminary sale, a full description of the property and the name of the grantee, and when executed and delivered by the auditor shall be prima facie evidence of all proceedings subsequent to the preliminary sale and of conveyance of the property to the grantee in fee simple. * * * (8) All property for which there is no purchaser at the sale heretofore provided for in this section may be disposed of at either public or private sale for such price and upon such terms as the said board may determine; * * * The county clerk is authorized to execute deeds for all property sold pursuant to this subsection in the name of the county and attest the same by his seal, vesting in the purchaser all of the title of all taxing unit or districts in the real estate sold.”

Examination of the deed given in this instance to respondent discloses that it complies with the statute as to form and recitals and is executed as required by law. (R. 28)

This Court has recognized the effect of the 1939 amendment to the code and its effect in making the tax deed prima facie evidence of the regularity of the proceedings subsequent to the preliminary sale in the case of *Anson v. Ellison*, 104 Utah 576, 140 P2d 653 at page 655 where it is said:

“* * * the 1939 amendment to 80-10-68 (L '39, Ch 101) which amendment authorized the issuance of a new form of tax deed and made this new tax deed prima facie evidence of the regularity of all proceedings subsequent to the preliminary sale. * * *”

Even prior to this amendment to the law, when there was no statutory authority for the effect of the deed and the claimant under the deed was required to prove the regularity of the proceedings leading up to the deed in order to give it effect, this court recognized that the deed by itself was sufficient title to withstand the onslaught of a mere intruder who did not in any manner connect himself with the chain of title or show himself in any way to be the fee owner or claiming through him. In the case of *Peterson v. Johnson*, 84 Utah 89, 34 P2d 697 this court said:

“It is earnestly urged on behalf of defendant that plaintiff failed to establish any title to the property in question. Such contention is founded upon the fact as shown by the evidence that Plaintiff's grantor acquired his title by a tax deed from Sevier county. It is apparently defendant's position that he may

not be deprived of his possession of the disputed strip of land and of his claim of title except by one who establishes a superior title thereto, and that plaintiff failed to establish any title. Our attention is directed to the following cases (citing cases). The cases cited are authority for the doctrine that one whose title is founded upon a tax deed must prove a strict compliance with the various provisions of the Statute regulating the levy of taxes and the sale of the property upon which the tax has become delinquent when such tax title is asserted against the original owner or one claiming under him. A different rule is applied when a tax deed is asserted against a mere intruder. In such case it has been held that a purchaser at a tax sale has all that is required against one who enters without right. Black on Tax Titles Sec. 445, P. 564, 61 C. J. 1396, and cases cited in the footnotes. It is not necessary, however, to determine whether the defendant's claim to the land in question was such as to entitle him to attack such deed issued to plaintiff's grantor, because defendant did not attempt to attack such deed. While in his answer, defendant denied generally plaintiff's ownership of the land described in the complaint, it is apparent from the pleadings and the evidence that the sole issue tried out was whether or not defendant had acquired title to the strip of land within his inclosure by reason of his claim of a long established boundary line. The only evidence offered concerning the tax deed was the mere fact that such a deed had been given to plaintiff's grantor. Defendant, through his counsel, stipulated that such a deed had been given. The record is silent as to the owner of the

land before it was sold for taxes. * * * In the absence of some evidence tending to show the invalidity of the tax deed issued by Sevier County to plaintiff's grantor, it may not be said that plaintiff failed to make out a prima facie title to the land claimed by him."

The parallel between the cited case and the case before the court is interesting because likewise in this case there is no issue raised about the Tax deed and there is no evidence in the record whatever as to the owner prior to the sale for taxes. We submit that either according to the benefit of the statutory effect given to the Tax deed at the time of its issuance, or under the state of the law as recognized by the court in the above citation prior to the amendment of the statute in 1939, the action of the court below in recognizing respondents tax deed as sufficient was correct.

Appellant further argues at some length in his brief that the affidavits of Porschatis and of Ford show a lack of possession in respondent and raise an issue on this point. It was admitted by both parties that the land is a vacant lot, that no structure has been raised thereon. Respondent claimed to have used the ground in his floral business, cleared the weeds and to have plowed the same and grown crops thereon. (R. 10) Far from disproving the allegations of the respondent the affidavits of both Porschatis and of Ford substantiate the claim of

the respondent. Porschatis says, "The only time I have seen any occupancy on this property was approximately from two to three and a half years ago when a portion of this property was for one season used for growing gladiolus." (R. 34) Mrs. Ford says, "In one year soon after 1946 someone attempted to raise some vegetables on a portion of the property and the vegetables turned out to be a failure, full of worms. About 1956 someone tried to raise some flowers for one season on a portion of the property and it was a failure." (R. 32) Certainly these statements are consistent with the statements of the respondent, and it must be noted that there is no evidence of any intervening use inconsistent with the use of the respondent which in any way dispossessed him. The allegation that is made in Mrs. Ford's affidavit that the city dredged the river and put the leavings on the bank of the river along the land in question does not indicate any dispossession of the respondent in the absence of a showing that it was done without his permission and without right by the city. No showing of this nature is made. Under this state of the record respondent asserts that no substantial issue of fact on possession was before the court, and the record substantiates the action of the Court in granting the summary judgment quieting title in the respondent to the land in question.

POINT II

APPELLANT HAS SHOWN NO RIGHT TITLE OR INTEREST IN OR TO THE LAND IN QUESTION AND CANNOT BE HEARD TO COMPLAIN OF THE JUDGMENT OF THE LOWER COURT QUIETING TITLE IN THE RESPONDENT.

Appellant did not plead title to the land in question was in himself, nor did he offer any credible proof that title to the land in question was in him, (R. 6. 7) nor did he submit any proof that he was ever at any time in possession of the land in question or had paid any taxes thereon. Appellant's sole effort at showing any interest in the land in question to be in himself consisted of the filing as a part of the document filed in the lower court in response to respondent's motion for judgment on the pleadings and summary judgment, two documents, the first a Lis Pendens in which it is stated that,

“* * * Rennold Pender has filed his complaint in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, praying for judgment in favor of plaintiff and against defendants, quieting title in plaintiff in and to the following described properties situated in Salt Lake County, State of Utah, * * *”

The Lis Pendens then described many tracts of property one of which was the tract involved herein. (R. 80). This Notice of Lis Pendens was filed with the recorder of Salt Lake County May 19th, 1948 and duly entered in the records of that office. (R. 80) The Tax Deed to Leon Brown was recorded September 18, 1942. (R. 28) It is admitted that

Leon Brown was not made a party defendant to the action commenced by appellant. (Appellant's brief P. 2 & 6 & R. 1 Par. 3, 3 Par. 4) The only other evidence in any way attempting to show title in appellant consisted of a photostatic copy of a quit claim deed from one Arnold E. Wall to the appellant. (R. 35). This deed bears date of August 29th, 1951, and had not been recorded. It is observed that the deed is dated substantially after the filing of the Lis Pendens referred to above. These two documents stand entirely isolated. No effort was made by appellant to introduce any evidence of the connection of the deed of Arnold E. Wall with the chain of title. The appellant in his brief states that Nellie Wall was the owner of the property. Not one scintilla of evidence of this fact was ever offered, nor can any such be found in the record. The deed of Arnold E. Wall, who claims to be a beneficiary under the Last Will and Testament of Nellie M. Wall deceased, in the absence of a showing of some title in the grantor, is meaningless. The deed is not a warranty deed. A quit claim deed under the existing law conveys only the interest of the grantor at the time that the deed was given. Appellant totally failed to show any interest of the grantor in the land in question. Likewise the appellant never at any time pleaded nor proved that he had at any time been in possession of the pro-

perty or paid any taxes. The presumption indulged in under the laws of this state of possession of the legal owner is of no avail to appellant in the absence of a showing or a pleading that he was the legal owner.

Interestingly enough this court in a previous decision rendered in regard to other property involved in this same suit commenced by Pender has told this same appellant that the mere presentation of an isolated deed to property the validity of which was not proved gave the appellant no standing to assail the title of the tax title holder. We refer to the case of *Pender v. Bird*, 119 Utah 91, 224 P2d 1057. In that case Pender presented a deed from one Hansen who did appear in the chain of title which in that case (contrary to the procedure in the instant case) was introduced in evidence. But it appeared that Hansen told Pender when he gave the deed that the appearance of his name in the chain of title was solely by reason of his receiving title as security for a debt, that the debt had been paid and that he made no claim to the property. Pender nevertheless took a quit claim deed from Hansen. This court said,

“Respondents (R. L. and Mae Bird in that case) as herein above noted had possession of the property at the time of commencement of the action. Even assuming that the tax title from the County was defective it gave

the defendants, R. L. Bird and Mae Bird, color of title which was clearly superior to the claims of record title asserted by plaintiff which was shown to be invalid. Thus, there was before the court a plaintiff with no vestige of title and defendants with color of title who were in possession . . . Certainly defendants' title, however, defective it may be, is nevertheless ample to withstand the assault of the plaintiff so long as the plaintiff shows no right, title or interest whatever in the property . . .”

In order to have the standing to attack the action of the court in quieting title in the respondent appellant must show title in himself. He cannot prevail in an action of this kind by pointing out a weakness, real or supposed in the title of the respondent.

This rule has been so generally recognized as to be almost platitudinous.

“As frequently stated, the complainants right to relief depends upon the strength of his own title, not upon the weakness of the title of his opponent. Having failed to establish title in himself, he cannot complain of insufficiency of the evidence upon which the court adjudged title to be in the defendant.” 44 Am. Jur. *Quieting Title* P. 69, Sec. 83.

The Supreme Court of the United States has said:

“The rule in ejectment is that the plaintiff must recover on the strength of his own title and not on the weakness of the title of

his adversary. A like rule obtains in an equitable action to remove a cloud from a title, and title in the complainant is of the essence of the right to relief." — *Dick v. Roraker*, 155 US 404, 39 L. Ed. 201.

This Court said in *Campbell v. Union Savings and Investment Co.*, 63 Utah 366; 226 Pacific 190:

"If, therefore, the defendant has shown no right to or interest in the premises, which it has not, how can it be heard to complain that the court erred in adjudging plaintiff to be the owner as against the defendant? Certainly plaintiff's title however defective it may be, is nevertheless ample to withstand the assaults of the defendant so long as the defendant has shown no right, title or interest whatever in the property."

This view has been re-iterated by the Court in the case of *Pender vs. Bird*, supra and in the case of *Pleasant Grove City vs. Crease*, et al. 1 Utah 2d 352, 266 P2d 1019.

POINT III

ANY CLAIM OF APPELLANT IS BARRED BY STATUTE OF LIMITATIONS.

Under the circumstances and the proof presented in this case it appears unnecessary to argue at length the position of the respondent with respect to the protection afforded his tax title by the Statute of Limitations, 78-12-5.1-.2-.3 and 78-12-7.1 UCA 1953 as amended.¹ By failing to prove his connection with the chain of fee or legal title to the property the appellant places himself in the

1. See Appendix for text of sections referred to.

position of being unable to claim the benefit of any presumption of possession in favor of the legal owner granted by law. But, in this case, even assuming the presumption to be indulged, the affidavit of Leon Brown which, as previously argued is not controverted, is sufficient to rebut any presumption of possession in the appellant. Furthermore the respondent is entitled to the benefit of the statute of limitations. The appellant seeks to avoid the statute by claiming that the mere commencement of the action by appellant in 1948, though the respondent was never joined as a party thereto tolled the Statute as to appellant. Such is not the law. In the case of *Wood v. Dill*, 3 Kan. App. 484, 43 P. 822, an action was commenced to foreclose a mortgage. There appeared as of record a mortgage to another party at the time that the action of foreclosure was commenced against the mortgagor and owner. The second mortgagee was not joined as a party to the action and the contention was made that despite the fact that the second mortgage was never joined as a party to the action, that the commencement of the action prevented the running of the Statute of Limitations in his favor. The court said at page 823 of the opinion:

“It is true that at said date (commencement of the action) said mortgage had been assigned to Frank Wood, trustee, and the Farmers’ Loan and Trust Company of Kan-

sas had no interest therein. It is also true that the assignment to Frank Wood, trustee, was not recorded, but it plainly appeared of record that there was an incumbrance upon the premises; and it cannot be doubted that if Farmers' Loan & Trust Co. had been a party to such action, and properly served, not only their rights could have been adjudicated but a judgment in such action would have been binding upon their assignee, whose assignment was not of record. It cannot be successfully contended that, by bringing the owner of the property affected into court, the statute of limitation would cease to run as to the mortgagee. Their interests were neither common nor identical. * * * As to each defendant in an action, the action is commenced and is pending only from the time of service of the summons on him or of his appearance without service; and where each may object that the action was not commenced within the time limited by the statute, its commencement as to his objection is to be determined by the time of service on him, and not by the time of service on some other defendant. This is a rule applicable to every action, and applies as well to actions to enforce mechanics liens as to any others. * * *

Likewise in a Montana case, *Marek v. Smith*, 314 P2d 864, it was held:

“Where new parties are brought into a case, and it appears between commencement of the suit and time when they are brought in the period of limitations had expired, the new parties may plead the statute of limitations as far as they themselves are concerned but

the plea is not available to the original parties.”

In a case under the Federal Rules decided in Pennsylvania, *Carlisle v. Monongahela Railway Co.*, 16 F. R. D., 426 it was said,

“Neither operation of federal civil procedure rule as to joinder of parties nor amendment of complaint to assert direct cause of action against third party defendant brought in by original defendant instilled life into plaintiff's action against such third party defendant after expiration of limitation period, as such an amendment was in effect an original complaint, filed too late against third party defendant.”

It seems likewise to be recognized as a general rule that an intervention starts a new cause of action and the limitations run anew as to the parties thus brought in and as between such parties and the parties already in the action.

“However, it has been held that the statute of limitations ceases to run against the claim of an intervener only from the date of the intervention and not from the commencement of the suit, where there is no community of interest and no privity of estate between the intervener and the other parties * * * Also, where a defendant makes no affirmative assertion of title to the property in the suit until he has himself made a party plaintiff, the statute of limitations continues to run against him until he is made plaintiff. * * *”

54 C. J. S. Limitation of Actions P. 311, Sec. 276.

Also in the case of *Kam Koon Wan v. E. E. Black, Ltd.*, decided in the district court of Hawaii, 75 F. Supp. 553, it is said at page 564,

“Under ordinary rules, since the filing of a petition to intervene marks the introduction of a new party and a new cause of action, the situation is measured for the purposes of the statute of limitations as of the date it was filed.”

Respondent claims therefor the protection of the Statutes of Limitation cited as against the claims of the appellant, and since appellant has failed to show himself either possessed of the property or to have paid taxes thereon within the period of the limitations provided by the sections cited, the bar of the statute provides further grounds, if needed, upon which to sustain the action of the lower court in quieting the title to the tract in question in the respondent.

CONCLUSION

The Court below correctly decided the issues presented and granted the respondent the Summary Judgment quieting title in the respondent to the tract of land in question. The judgment of the lower

court should be affirmed and the respondent awarded his costs.

Respectfully submitted,

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APPENDIX

78-12-5.1 UCA 1953 Seizure or possession within seven years — Proviso — Tax title — No action for the recovery of real property or for the possession thereof shall be maintained, unless the plaintiff or his predecessor was seized or possessed of such property within seven years from the commencement of such action; provided, however, that with respect to actions or defenses brought or interposed for the recovery or possession of or to quiet title or determine the ownership of real property against the holder of a tax title to such property, no such action or defense shall be commenced or interposed more than four years after the date of the tax deed, conveyance, or transfer creating such tax title unless the person commencing or interposing such action or defense or his predecessor has actually occupied or been in possession of such property within four years prior to the commencement or interposition of such action or defense or within one year from the effective date of this amendment.

78-12-5.2 Holder of tax title — Limitations of action or defense — Proviso — No action or defense for the recovery or possession of real property or to quiet title or determine the ownership thereof shall be commenced or interposed against the holder of a tax title after the expiration of four years from the date of the sale, conveyance or transfer of such tax title to any county, or directly to any other purchase thereof at any public or private tax sale and after the expiration of one year from the date of this act. Provided, however, that this section shall not bar any action or defense by the owner of the legal title to such property where he or his predecessor has actually occupied or been in actual possession of such property within four years from

the commencement or interposition of such action or defense. And provided, further, that this section shall not bar any defense by a city or town, to an action by the holder of a tax title, to the effect that such city or town holds a lien against such property which is equal or superior to the claim of the holder of such tax title.

78-12-5.3 Definition of "tax title" (and "action" — Separability) — The term "tax title" as used in section 78-12-5.2 and section 59-10-65, and the related amended sections 78-12-5, 78-12-7, and 78-12-12, means any title to real property, whether valid or not, which has been derived through or is dependent upon any sale, conveyance or transfer of such property in the course of a statutory proceeding for the liquidation of any tax levied against such property whereby the property is relieved from a tax lien.

Definition of "Action".

The word "action" as used in these sections includes counterclaims and cross-complaints and all civil actions wherein affirmative relief is sought.

Invalidity in Part.

If any section or part of section of this act shall be held invalid, it shall not invalidate the remaining portions of this act.

78-12-7.1. Adverse possession — Presumption — Proviso — Tax title — In every action for the recovery or possession of real property or to quiet title to or determine the owner thereof the person establishing a legal title to such property shall be presumed to have been possessed thereof within the time required by law; and the occupation of such property by any other person shall be deemed to have been under and in subordination to the legal

title, unless it appears that such property has been held and possessed adversely to such legal title for seven years before the commencement of such action. Provided, however, that if in any action any party shall establish prima facie evidence that he is the owner of any real property under a tax title held by him and his predecessors for four years prior to the commencement of such action and one year after the effective date of this amendment he shall be presumed to be the owner of such property by adverse possession unless it appears that the owner of the legal title or his predecessor has actually occupied or been in possession of such property under such title or that such tax title owner and his predecessors have failed to pay all the taxes levied or assessed upon such property within such four year period.

78-12-12.1. Possession and payment of taxes — Proviso — tax title — In no case shall adverse possession be established under the provisions of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all the taxes which have been levied and assessed upon such land according to law. Provided, however, that payment by the holder of a tax title to real property or his predecessors, of all the taxes levied and assessed upon such real property after the delinquent tax sale or transfer under which he claims for a period of not less than four years and for not less than one year after the effective date of this amendment, shall be sufficient to satisfy the requirements of this section in regard to the payment of taxes necessary to establish adverse possession.