

1960

# Rennold Pender v. Mose Alix et al : Reply Brief of Appellant

Utah Supreme Court

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R. S. Johnson; Attorneys for Plaintiff and Appellant;

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

**FILED**

RENNOLD PENDER,  
*Plaintiff and Appellant,*

APR 8 - 1960

vs.

Clerk, Supreme Court, Utah

MOSE ALIX, et al.,  
*Defendants and Respondents,*

Case  
9,167

vs.

LEON BROWN,  
*Intervening Plaintiff and Respondent.*

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**REPLY BRIEF OF APPELLANT**

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**R. S. JOHNSON,**  
*Attorney-for-Plaintiff*  
*and Appellant, Rennold Pender*  
207 Atlas Building,  
Salt Lake City 1, Utah

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Appellant's  
Reply Brief.

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REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

ARGUMENT

Respondent in this cause made, and makes no effort in his brief to answer the appellant's points squarely and under the same headings as set out, but, instead, in an

attempt to dispose of them by making his own arguments under unrelated points that fail to meet the issues raised, and by beclouding those issues with "platitudinous" half-truths and semi-quotations from cases, insinuates facts and law, that, thus contrived, appear plausible, and which closer analysis will show are not sustainable.

## POINT I.

### REFUTATION of RESPONDENT'S POINT I— (REGARDING RESPONDENT'S CLAIM OF TAX TITLE AS SUFFICIENT TO SUPPORT LOWER COURT'S JUDGMENT)

Respondent would have it appear that acquisition of a county tax deed and payment of taxes over a period, would, without question, clothe him with a title so valid and formidable as to exclude all thought of any question thereto or thereof.

Much is made of the fact that appellant "offered no testimony or other evidence at any time" (Respondent's Brief, Page 9). Yet, at the same time, it will appear that respondent did not introduce in evidence, or have marked any exhibits, offer any abstract of title in evidence, or in anywise, except for the self-serving affidavit of intervening plaintiff, Brown, the respondent herein, relating to his purported use of the property; and, consequently respondent's evidentiary pretensions rise to no higher dignity than any exhibits or affidavits filed and offered by appellant. All were before the trial court, and considered during the hearing.

Respondent's counsel further overlooks the point that, as well stated in *Price vs. Hanson*, 206 Pacific 272, 60 Utah, 29, by this Honorable Court, that:

"We remark, however, that a party seeking to intervene in a particular action should make it appear that he would have been at least a proper party to the action *when it was commenced*, and, in which he seeks to intervene, and *that he would have been entitled to the relief he seeks* in a separate action in the same court against the parties against whom he seeks relief."

Certainly, at the time of the commencement of this action in 1947, the respondent might have qualified as a proper party, but "*would he have been*" THEN, entitled to the relief which he seeks here. The obvious answer is an "ABSOLUTE NEGATIVE", since in 1947, when appellant's action was instituted, respondent, whatever the worth of his purported tax deed, could not have then had a title by adverse possession based on seven years occupation, usage, payment of taxes, particularly since, in view of the subsequent holding of *Toronto vs. Sheffield*, 222 Pac. 2nd 594, 118 Utah 460, the legislatures then abortive attempt at a short statute of limitations had been declared unconstitutional, and particularly, inasmuch as respondent claimed no interest prior to September 16th, 1942.

Further, (Respondent's Brief, page 11), there is an attempt to alleviate the effect of the cited portion of L. H. Gray's affidavit (Appellant's Brief, page 3) relative to the claimed invalidity of Salt Lake County's then impending tax sale. No matter how much or how many

other reasons, especially those that might seem pertinent to a layman, may be set forth in the protest as to the tax sale, obviously those inapplicable may be regarded merely as surplusage, and, do not contradict or detract from the statement contained therein that the real property herein involved, "is not assessed according to law".

Respondent (Respondent's Brief, page 15) arrogates to himself as beneficial the statements in the Porschatis and Ford affidavits (Rec. 32-34; Appellant's Brief, pages 9-10) filed by appellant, whereas in truth and effect they illustrate, at most, intermittent and less than the full, complete, adverse, occupation and usage of the property, with notice to all the world thereof, that is required under the circumstances.

There are extensive quotes (Respondent's Brief, pages 13-15) from the case of Peterson vs. Johnson, 84 Utah 89, 34 Pac. 2nd 697, to prove that there is a parallel situation in that and the instant case. No such conclusion may be drawn, nor is it justifiable, for in the Peterson case, it was apparent that the plaintiff's tax title was sufficient as against defendant's claim of boundary establishment by fence, in absence of (a) Any showing that defendant's deed to his own land included the tract in dispute, (b) That there was any boundary line agreement made pursuant to a dispute in connection with the establishment of the fence, (c) That there had been any long period of acquiescence in the line established by the fence.

Whereas, in this case, as shown by the deed to appellant herein (Rec. 35), his claim was not as to land to which he had no claim or color of title; and the realty



here in question was described and included within his deed description. The situation in the Peterson case is nowise comparable with the instant case on the facts or the law, and the omission from the respondent's quoted excerpt of the fact (page 698, 34 Pac. 2nd), "It is further made to appear that the strip of land in dispute is within the description contained in the plaintiff's deed, and the defendant has all of the land covered by the description in his deed, INDEPENDENT OF THE STRIP OF LAND IN CONTROVERSY" destroys the contextual meaning of the original quote.

## POINT II.

### REFUTATION OF RESPONDENT'S POINT II:

(Relating to respondent's claim that appellant made no showing of title.)

Respondent's arguments under this heading are so self-contradictory and illogical as to destroy any effectiveness therein.

For example, respondent (Respondent's Brief, page 17, asserts appellant did NOT plead title to the land in himself, and yet at that same point (Respondent's Brief, page 17) quotes from the *lis pendens*, and cites that appellant had filed his complaint praying for "*quieting of title in appellant.*" Certainly, any complaint to quiet title in due form would contain the essential allegations of ownership, possession, or entitlement thereto.

Again, respondent assails appellant's "Quit-Claim Deed" as though some sort of stigma was attached to the

taking of a quitclaim deed, and although grudgingly conceding a quitclaim is effective to convey the interest of the grantor, attempts to cast aspersions on the taking of that type of deed. Certainly, a warranty deed (in the absence of after acquired title, which is not involved here) could convey no greater title than could a quitclaim deed used.

Respondent's futile attempts at parallelism are further illustrated by his attempt to misconstrue the meaning of the language and wording quoted from *Pender vs. Bird*, 119 Utah 91, 224 Pac 2nd 1057, into some kind of meaning, albeit grossly distorted, presumably favoring his cause. The language in that case is inapplicable to the case at bar, because there has been no showing, and no such item was here involved, as a deed absolute given as a mortgage, which, when the debt was paid and the obligation cancelled, operated to extinguish the force and effect of the deed, so that a conveyance by the deed holder would be ineffectual to carry any title to the grantee. Here, the deed of Arnold Wall (Rec. 35) is as much *prima facie* valid to convey title as was respondent's tax deed.

The quotation by respondent from *Campbell vs. Union Savings & Investment Company*, 63 Utah 366, 226 Pac. 190, fails to include the pertinent information stated by the Court, that such rule as cited, was based on the fact that (page 192), "No claim is made in the answer and counterclaim (to the there plaintiff's quiet title action) that Langlois, who executed and delivered the mortgage (assigned to defendant) had or claimed any right or title in the property in question, nor that the plaintiff claimed

under or through said Langlois. Indeed, in defendant's answer and counterclaim, Langlois is not connected with the title to the property in question." Lifted out of context, and without reference to the facts, the respondent's quote appears definitely not in point, nor suggestive of a rule of property law consonant with any facts in this case.

### POINT III.

#### REFUTATION OF RESPONDENT'S POINT III —(Anent the Statute of Limitations).

Assumption that the pretended occupation of the premises by respondent herein [which as shown by affidavits filed on behalf of appellant herein (Rec. 32-34) to have been at most intermittent and disjointed, and non-exclusive] was so exclusive as to deprive appellant of the benefit of having any possession or occupation, should be viewed in the light of the language of the Court in Ephraim Willow Creek Irrigation Company vs. Olson, 70 Utah 95, 258 Pac. 216, in the following excerpt:

Page 222 Pacific "[6] The presumption is against the question of title by adverse possession.", and again at

Page 227 Pacific: "In adverse possession the possession must be actual, for otherwise there is no disseisin, and the real owner remains in possession actually and constructively. It must be continuous, *for upon suspension or interruption, possession in contemplation of law is again in the holder of the legal title*; and it must be hostile to the real owner, and with the intention to claim the land adversely to him. This claim must be manifest from the nature of the circumstances of the pos-

session, so that the owner may be informed of it, and that he shall not be misled into quiescence in what he might reasonably suppose to be a mere trespass when he would not acquiesce in the assertion of a right adverse to his own title."

Respondent's excerpt from *Wood vs. Dill*, 3 Kan App 484, 43 Pac 822, is not applicable to the circumstances here, as the court there very properly held that a mechanic's lien foreclosure that omitted as a party, a mortgagee appearing of record, did not toll the statute of limitations respecting the time to foreclose the lien against the mortgage holder, since "Their owner's and mortgagee's interests were neither common nor identical."

Certainly, here, the purported interests of Salt Lake County passed on to the respondent Brown in the tax deed, were common and identical, encompassing the same, if any, rights to the land in question.

The quoted portion from the *Marek vs. Smith* case, 314 Pac 2nd 864, relating to applicability of the statute of limitations to a new party, is an inapplicable rule as to this situation both factually and otherwise. The case shows that the county pleading the statute, had disclaimed any interest in the premises, and claimed that its interest having been conveyed long since, it was not and could not become a party to the action against the bar of the statute of limitations. Further, there was no showing in such cause that the county pleading the statute of limitations was either an absolutely "necessary" party, or an "indispensable" party.

In the *Carlisle vs. Monongahela Railway Co.* case, 16 F. R.D. 426, the portion cited is based on the federal pro-

cedure that a plaintiff that cannot join for jurisdictional reasons certain other parties, cannot in effect circumvent the rule by having an interpleader of a second party, who, may in turn seek to join another party, identically the same as which plaintiff could not join in the first instance.

The dicta quoted from the *Kam Koon Won vs. E. E. Black, Ltd.* case, 75 Fed Sup. 553, is shown up by the actual holding in the case, to the effect that "Under these circumstances the claims of intervening plaintiffs related back (page 564) to the date when the action was filed by the original plaintiff for himself and in their behalf."

All of these situations, quoted piecemeal, seem to sustain plaintiff in intervention and respondent's position until analyzed and the factual situation shown up so as to differentiate them from the situation in the instant case.

Indeed, the situation here is akin to that commented on by our Court in the *Case of Upper Marion Ditch Company*, 94 Utah, 134, 76 Pac 2nd 234, where the court said at:

Page 240 Pac. 2nd "[16-18]: Whenever a party has been omitted, whose presence is so indispensable to a decision of the case upon its merits that a final decree cannot be made materially affecting his interests, the Court should not proceed to a decision of the case upon the merits. The objection may be made by any party at a hearing or on appeal or error, and the court will upon its own motion take notice of the omission and require the omitted party to be made a party—to the litigation, even though no objection is made by any party litigant."

And, as stated by the Court in *Reader vs. District Court of the Fourth Judicial District*, 94 Pac 2nd 855, 98 Utah 1, at page 861 Pac. 2nd:

“/9/ The failure of the court to obtain jurisdiction over one of the indispensable parties rendered the judgment as to all of them void.”

So here, to permit the case to proceed, the respondent would have had to have been joined in the original *Mose Alix* suit, to continue proceedings, or in absence thereof, judgment could not be rendered, and to permit the joinder, either as a defendant, or in that effect by intervening, there is a necessity for tolling the statute of limitations until the necessary party is joined.

In this connection, see *Bank of California National Association vs. Superior Court*, 106 Pac. 2nd 879, 16 Cal 516, at page 883, as to a further discussion of what may constitute indispensable parties, and how to classify parties to an action.

## CONCLUSION

The situation in this case is akin to that set out by the Court in *Turner vs. White*, 12 So. 601, 97 Alabama 545, where the Court said at page 603:

“3. It is a principle often repeated, that, if, during the pendency of a suit, any new matter or claim not before asserted is set up and related back by complaint, the defendant has the right to insist upon the benefit of the statute until the time that the new claim is presented, because until that trial, there was no *lis pendens* as to that matter between

the parties . . . . But this was no amendment by the plaintiff and Mrs. Turner came into the suit on her own petition, filed in accordance with the statute, to make herself a defendant as landlord, and against the objection of the plaintiff, she was admitted to defend her title against the claim of title by the plaintiffs, and the very purpose of her application and of her being admitted was to test the strength and validity of competing titles. Her claim was within the *lis pendens*. If the statute of limitations gave her a title against plaintiffs' assertion on which she was willing to rely, why should she come into this suit? When admitted in the manner in which she was, *her position in the case was the same as if notice had been served on her to make her a party, at the same time it was served on the other defendants.*"

It follows that the application of intervenor herein to enter this case, places him in the same position, as an indispensable party joined as a party defendant, and the statute of limitations is tolled as to him, and the pendency of the action brought by plaintiff, tolls the statute of limitations until such time as the indispensable party (respondent here) is so joined, either voluntarily, or involuntarily. It having been so demonstrated that respondent has interposed no real, substantial, or legal aspects contrary to the position advocated by appellant in his original brief, then it is the prayer of the appellant, that this Honorable Court, find that the statute of limitations tolled as to the respondent, that there are justiciable issues of fact involved in this cause, and, questions as to the sufficiency of the adverse possession purportedly relied upon by defendant, and reverse the action of the

district court in entering a summary judgment and judgment on the pleadings in favor of the respondent in this cause, and remand the same for further proceedings to the district court.

Respectfully submitted,

R. S. JOHNSON,

*Attorney for Plaintiff and  
Appellant*

Receipt of three copies and due service hereof, acknowledged this \_\_\_\_\_ day of April, 1960.

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*Attorneys-for-Intervening Plaintiff and  
Respondent, Leon Brown.*