

1960

# Rennold Pender v. Mose Alix et al : Appellant's Petition for and Brief on Rehearing

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

RENNOLD PENDER,  
*Plaintiff and Appellant,*

vs.

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

vs.

LEON BROWN,  
*Intervening Plaintiff and Respondent*

FILED

SEP 28 1960

Clerk, Supreme Court, Utah

Case No.  
9,167

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APPELLANT'S  
PETITION FOR, and BRIEF ON REHEARING

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## TABLE OF CONTENTS

	Page
Table of Contents.....	i
Index of Cases and Authorities Cited.....	ii
Motion for Rehearing.....	1, 2
ARGUMENT: Points .....	2
POINT — 1. Appellant's Action Not Barred by Statute of Limitations.....	3
POINT — II. Failure of Proof of Respondent Brown's Tax Title.....	4
POINT — III. INSUFFICIENCY OF PROOF OF RESPONDENT BROWN'S ADVERSE POS- SESSION .....	6
POINT — IV. SUMMARY JUDGMENT NOT TO SUPPLANT TRIAL OF FACTUAL ISSUES....	8
Proper .....	3
Conclusion .....	9
Proof of service.....	9

## INDEX TO CASES AND AUTHORITIES CITED:

	Page
<b>UTAH STATUTES CITED:</b>	
Section 78-12-5.2 Utah Code Annotated 1953.....	4
Sections 5, 7, of Section 59-10-64, Utah Code Annotated 1953 .....	5

### CASES CITED:

Pages vs. Fed. Sec. Ins. Co., 8 Utah 2nd 226, 332 Pac 2nd 666.....	7
Pender vs Mose Alix et al, vs. Brown,..... Utah....., .....Pac 2nd.....	3, 4, 5, 7, 8
Young vs. Texas Company, 8 Utah 2nd 206, 331 Pac. 2nd 1099.....	8
Cases cited in Appellant's Original Brief Under Point II, Page 6.....	4
Cases cited in Appellant's Reply Brief, Point III, Page 7 .....	4
Cases cited in Conclusion to Appellant's Reply Brief, Page 11 .....	4
Cases cited in Appellant's Original Brief, Point IIII, Page 9 .....	7
Cases cited in Appellant's Original Brief, Point IV, Page 11 .....	8

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---

Comes now the petitioner (the appellant and plaintiff in the former proceedings herein), and moves this HONORABLE COURT, for a rehearing and reconsideration of its opinion and decree heretofore entered and filed in the above entitled cause, and for grounds and as bases for such motion, relies upon the following:

(1) That this Honorable Court erred in its decision and opinion in holding that the four year, or any, statute

of limitations was applicable to the right of plaintiff-appellant to proceed against intervening plaintiff and respondent.

(2) That this honorable Court by inadvertence and oversight, erred in its decision, respecting the quantum of proof of title to be required to be presented by intervening plaintiff and respondent Brown, to establish his tax title.

(3) That this Honorable Court by inadvertence overlooked the proper quantum of proof as to the validity of intervening plaintiff and respondent Brown's purported adverse holding and possession of land under the seven year statute, and erred with respect thereto.

(4) That this Honorable Court, by inadvertence erred in its decision by failing to hold that there were issues of fact requiring trial involved.

### ARGUMENT: POINTS.

The following points will be argued in support of the motion for reconsideration and rehearing, based upon the foregoing statement of erroneous conclusions in the majority opinion of the court heretofore rendered in this cause:

I. — APPELLANT'S ACTION NOT BARRED BY STATUTES OF LIMITATION.

II. — FAILURE OF PROOF OF RESPONDENT BROWN'S TAX TITLE.

III. — INSUFFICIENCY OF PROOF OF RESPONDENT BROWN'S ADVERSE POSSESSION..

IV. — SUMMARY JUDGMENT NOT TO SUPPLANT TRIAL OF FACTUAL ISSUES.

## ARGUMENT PROPER

POINT I. — APPELLANT'S ACTION NOT BARRED  
BY STATUTES OF LIMITATION.

The majority opinion of this Honorable Court assumes that the alleged deed submitted by respondent Brown, as the basis of his title from Salt Lake County, Utah (Rec. 28), is and was a *tax deed*, as used in connection with the application of the wording of the various Utah statutes relating to (a) The presumptions to be given as to the validity of tax procedures, (b) As affecting the application of the statutes of limitation relating to tax titles.

As very ably shown by the dissenting opinion of Chief Justice Crockett in *Pender vs. Mose Alix, et al. vs Leon Brown*,..... Utah....., .....Pac. 2nd....., from which the following is quoted:

“It cannot be assumed that the plaintiff Brown has a tax title merely because of the fact that he received a quit-claim deed from Salt Lake County, which has no credit except its own recitals. Absent such an assumption, *there appears not one scintilla of evidence in the record competent to prove that Salt Lake County ever acquired an interest in this property, from any source, for taxes, or otherwise.*”

it is apparent that the assumption in the majority opinion is erroneous in that it assumes a fact not in evidence, or proved by any competent evidence. And such assumption, being erroneous, as to the existence of a tax title in respondent Brown, it follows then that the further determination of the majority of the court, as set forth in the prevailing opinion heretofore rendered in this cause:

“Under such uncontroverted circumstances, and applying the provisions of Title 78-12-5.2 thereto, it becomes obvious that Pender [appellant herein] was vulnerable to the four year limitations statute mentioned.”

that such would be erroneous, because, absent any competent proof in the record that Salt Lake County had obtained tax title to the property in question, there could be no proper application of the four year statute above mentioned in the quoted excerpt, since, no situation existed where a tax title to which said statute could apply is shown to be extant.

Also, as heretofore set out in detail in Point II (Page 6) of Appellant's Original Brief, and in Point III (Page 7) of Appellant's Reply Brief, and in the Conclusion of the Appellant's Reply Brief (Page 11), the filing of the original action herein in this situation tolled the statute of limitations. For brevity in presentation, further discussion will be omitted as to this latter material and authorities cited therein, but, same is hereby called to the attention of this Honorable Court.

## POINT II — FAILURE OF PROOF OF RESPONDENT BROWN'S TAX TITLE.

The majority opinion of this Honorable Court, rendered herein, fails to give consideration to the fact, that even assuming that the respondent were endeavoring to quiet his title is an uncontested or default matter, that the quantum of proof as to his alleged tax title adduced in this cause, would not be sufficient to entitle him to a decree quieting his title, and the trial court would be justified in refusing to grant him a

decree by way of relief, since no introduction of a tax sale record, or auditor's deed, in order to prove that there was a tax sale, a transfer to the county or a third person, and to prove (at least *prima facie*) the validity of the steps taken of the proceedings up to the point of sale. Certainly, in cases such as the present, where there is an actual and protesting adverse party, certainly a less stringent rule of proof of the elements required or necessary to prove the existence of a tax title, and the proceedings relating thereto, should not be sanctioned as compared with a default case!!!

Chief Justice Crockett's comments in his dissent, succinctly illustrate the injustice of assuming to be so, what the statute requires to be proven, and, in the interests of clarity and brevity, his pertinent comments are quoted; from the opinion in the instant cause:

“But nothing could be plainer than that these statutes [Sections 5, 7 of Section 59-10-64 U.C.A. 1953] were not designed to permit the use of the magic words ‘tax title’, and eliminate all necessity of proving that the claimant had something that at least resembled one. Even the most casual reading of their language indicates that they presuppose that before one could have their benefit, there must be some modicum of proof that there has been a tax delinquency and a tax sale. In other words, there must be at least some semblance of a tax title even though it may be irregular and invalid. But they cannot be applicable where there is a total absence of proof any tax title as is the case here.”

Under these circumstances, can it be that the majority opinion was meant to sanction in quiet title actions a lesser quantum of proof than is required by the statutory minimal?

If so, are the statutes then overturned? Is it no longer necessary to bottom the proof of a tax title upon something showing both the existence and validity of the tax proceedings, at least when certain instruments are by statute made prima facie evidence of the existence and validity of divestiture proceedings? It is believed, that viewed in this light, the apparent sanction of the majority opinion as to the quantum of proof required, being reduced below the statutory standards heretofore existing, is without precedent, and constitutes oversight resulting in error which should be corrected.

### POINT III — INSUFFICIENCY OF PROOF OF RESPONDENT BROWN'S ADVERSE POSSESSION.

The respondent Brown's further contention that his alleged deed from Salt Lake County considered as color of title, plus adverse possession and payment of taxes, creates in him a new title, seems to have been allowed without further discussion on the part of the majority of the court, and, by this action, it would appear that summary judgment has likewise been applied to give respondent Brown the benefit of his contentions.

Here again, however, a careful examination of the facts and law, would indicate an oversight, or omission, on the part of the majority of the Court, resulting in compounding error, for, if, as heretofore demonstrated, no competent proof of tax title is presented by the respondent Brown, and no application of the short four year statute of limitations is warranted, then respondent Brown's reliance upon the seven year statute requiring adverse possession and usage in addition to the payment of taxes, is likewise insufficient for two reasons:

(1) No adequate showing aside from the respondent Brown's own-self-serving declarations, as to the sufficiency of the nature of adverse possession is made, and,

(2) Such adverse use purportedly made, is, in fact denied, as evidenced by the introduction of affidavits of neighbors controverting such adverse use for the period requisite to show adverse possession. (See Appellant's Original Brief, Point III, Page 9).

And, quite understandably, the Honorable Chief Justice in his dissenting opinion rendered herein, could not likewise countenance the lack of substantiating evidence to support a claim of adverse possession and usage for seven years, as he indicated in his dissenting opinion heretofore filed in this case:

"Inasmuch as the case is being disposed of upon summary judgment, the issue of possession is not reached. Yet I deem it not amiss to make this observation: On that issue the defendant relies solely upon his own affidavit, which the fact trier may or may not believe because of his obvious self interest [Citing Pages vs Fed. Sec. Ins. Co., 8 Utah 2nd 226, 332 P. 2nd 666]. He never has been subject to cross examination on the self serving statements therein. In dispute thereof are affidavits of two disinterested witnesses who were present in the neighborhood during the years in question, concerning lack of possession and occupancy of the property . . . . Yet *their statements are sufficient to cast grave doubt* upon the claim of the plaintiff [respondent] Brown."

Certainly, in view of the foregoing it would seem improbable that the issue of adverse possession in a contro-

verted matter should be thus settled by summary judgment, and, yet, the net effect of the majority opinion is to do this!!!

#### POINT IV — SUMMARY JUDGMENT NOT TO SUPPLANT TRIAL OF FACTUAL ISSUES.

Lastly, the holding of this Honorable Court, in upholding the summary judgment of the trial as rendered herein, is in effect denying the appellant the right to have this controverted issue of adverse possession determined as a factual matter. And, as set out in Point IV of Appellant's Original Brief (Page 11) such factual matters when in dispute, negate the disposition of the matter by summary judgment. The Honorable Chief Justice, in his dissenting opinion, in this case, recognized this shortcoming in the majority opinion, when it was pointed out:

“It should be kept in mind that this is a review of a summary judgment, that it is a drastic remedy which deprives the party of the opportunity to present his evidence, and which the courts should be extremely reluctant to grant. When it does so, the record must be reviewed in the light most favorable to the defeated party, and wherever the claims of the parties are in dispute, it must be assumed that his claim will be believed. This is so, because he should be turned out of court without trial only when, in viewing the record as above stated, and all doubts are resolved in his favor, he nevertheless would not be entitled to prevail (citing *Young vs. Texas Company*, 8 Utah 2nd 206, 331 Pac 2nd 1099).

## CONCLUSION.

Upon these facts, and under these circumstances, it is urged that this Honorable Court reconsider its former majority opinion herein rendered, in the light of the foregoing, and of the consequences and inferences which may flow from the decision as it now stands, and, that in connection with such reconsideration, that the original majority opinion herein be recalled or modified in accordance with the foregoing arguments, and, that as sought in appellant's original brief, that a reversal of the summary judgment heretofore rendered by the trial court in this cause be granted, and the cause remanded to the district court, if for no other reason than that the respondent Brown has utterly failed to sustain the burden of his proof as to the existence of any tax title, or, as to his adverse possession acts, so as to warrant quieting his title.

Respectfully Submitted,

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appellant, Rennold Pender.*

Receipt of three (3) copies of the foregoing "Appellant's Petition for, and Brief on Rehearing", is acknowledged this 27th day of September, 1960.

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*Attorneys for Respondent, Leon Brown.*