

**PRATT V. PARKER, 1953-NMSC-020, 57 N.M. 108, 255 P.2d 311 (S. Ct. 1953)**

**Pratt et al.  
vs.  
Parker et al.**

No. 5428

SUPREME COURT OF NEW MEXICO

1953-NMSC-020, 57 N.M. 108, 255 P.2d 311

March 26, 1953

Original Opinion of January 23, 1953, Reported at 57 N.M. 103.

**JUDGES**

Lujan, Justice. Sadler, C.J., and Compton and Coors, JJ., concur. McGhee, J., concurs in the result.

**AUTHOR: LUJAN**

**OPINION**

{\*108} On Motion for Rehearing

{1} Defendants (appellees) have moved for a rehearing and therein complain that we {\*109} did not discuss certain points argued in their briefs and orally in our opinion. It must not be thought that because we do not reply to all arguments of counsel that such arguments have not been duly considered. In the present instance we thought the matter so well settled that no comment was necessary. However, the zeal and insistence of counsel for defendants have caused us to go over the matter again, and we conclude that it may be of service to the bar if we discuss the points briefly.

{2} In so far as defendants' claim under the plea of ten years adverse possession is concerned, 1941 Comp. 27-121, even if the sale to the state by the county treasurer had been valid, the fact is that, at the time they acquired the property in question it was purchased from the state and the statute did not run against it.

{3} In order to perfect a title by adverse possession, such possession must be continuous for the entire period prescribed by the statute of limitations. In the case at bar the defendants had actual possession of the lot in question for only eight years at the time suit was instituted by the plaintiffs.

{4} In the case of *Armstrong v. Morrill*, 14 Wall. 120, 81 U.S. 120, 20 L. Ed. 765, it was held that: "Forfeiture to the state within the period necessary to give effect to the statute, has the effect to break the continuity of adverse possession, and prevents the operation of the statute bar."

{5} In that case the defendant claimed to have acquired certain property in the State of Virginia by adverse possession. The court found that "Beyond all doubt the land described in the deed of Robert Morris and others to the grantors of the plaintiff, became forfeited to the state by reason of the failure to enter the same on the books of the Commissioners of the Revenue." One of the errors complained of was: "That the court erred in the instruction to the jury that the statute of limitations (meaning the statute relating to the acquisition of property by adverse possession) ceased to run when the land became forfeited to the state."

{6} The Supreme Court held that the instruction to the jury was correct, and in the course of its opinion said: "Argument to show that the statute of limitations ceased to run when the forfeiture attached and the title became vested in the State can hardly be necessary, as the rule that time does not run against the State has been held for centuries, and is supported by all courts in all civilized countries."

{7} The court further said:

"Continuity of possession is also one of the essential requisites to constitute such an adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession {*\*110*} the seizin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseizin, and it is equally well settled that if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute, **a new adverse possession** for the time limited must be taken for that purpose. (*Brinsfield v. Carter*, 2 Kelly [Ga.] 143; *Ringgold v. Malott*, 1 Har. & J. [Md.] 316; *Hall v. Gittings*, 2 Har. & J. [Md.] 112.)

"Beyond all question the case (last cited) presented the same question as that involved in the case before the court, and the decision was that the forfeiture to the State within the period necessary to give effect to the statute did have the effect to break the continuity of adverse possession, and prevented the operation of the statute bar. *Taylor v. Burnside*, 1 Grat. [Va.] 190."

{8} In 2 C.J., *Adverse Possession*, 162, the general rule is stated as follows:

"Where, during the running of the statute of limitations in favor of the adverse occupant of land, the land is forfeited to the state for taxes, the general rule is that continuity of possession is interrupted for the reason that the statute of limitations does not run against the state in the absence of some special provision to that effect." See also, 2 C.J.S., *Adverse Possession*, 152e.

**{9}** The rule announced in the case of *Armstrong v. Morrill*, supra, seems to be the general rule. 2 C.J.S., *Adverse Possession*, 152e, p. 721; *Reusens v. Lawson*, 91 Va. 226, 21 S.E. 347; *Monroe v. Morris*, 7 Ohio 262; *Daveis v. Collins*, C.C., 43 F. 31; *Lawless v. Wright*, 39 Tex. Civ. App. 26, 86 S.W. 1039; *Wall v. Rabito*, 138 La. 609, 70 So. 531. See, also, *Burgett v. Calentine*, 56 N.M. 194, 242 P.2d 276; *Field v. Turner*, 56 N.M. 31, 239 P.2d 723; *Wilson v. Kavanaugh*, 55 N.M. 252, 230 P.2d 979.

**{10}** The plea of adverse possession of ten years is attempted to be sustained by showing that defendants and their predecessor in title (State) had been in possession of the property for more than ten years prior to the filing of this suit on March 7, 1950. But the State of New Mexico owned the land from the year 1938 until it sold the same to C. J. Parker in 1942. Adverse possession did not start to run during the time the state was the owner of the property; and ten years had not elapsed since the state parted with title in favor of defendants.

**{11}** Under the decision of *Shackelford v. McGlashan*, 27 N.M. 454, 202 P. 690, 23 A.L.R. 75, **{\*111}** the sale of the property in question by the treasurer of Otero County to the State of New Mexico was void and the subsequent sale of said property by the State Tax Commission to C. J. Parker, and his conveyance of the same to the other defendants, was likewise a nullity. It follows that the said pretended sale by the county treasurer cannot be the basis for ten years' adverse possession acquirendi causa by the defendants.

**{12}** Defendants further contend that the plaintiffs have been guilty of laches and for that reason should be denied relief. The defense of laches is not favored. It is only in those cases where the party has been guilty of inexcusable negligence in enforcing a right that the rule has been applied.

"Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what should have been done. More specifically, it is inexcusable delay in asserting a right; and implied waiver arising from knowledge of existing conditions and an acquiescence in them, \* \* \*." 21 C.J., p.210, 211; 2 C.J.S., *Adverse Possession*, 112.

Then on page 245 of the same volume, the author says:

"\* \* \* Another frequent application of the rule occurs in suits on the ground of mistake, where the court in determining whether relief should be denied as for laches, considers only such time as elapsed after the discovery of the mistake."

**{13}** Plaintiffs were nonresidents. They had paid their taxes believing that they were paying them correctly and felt secure in their belief that it was all that was required of them as the holders of the legal title. The taxes had been accepted by the treasurer even though he knew that they were paying taxes under the mistaken description, and must have known what land they intended for them to apply. No actual knowledge of any tax sale or claim by any other person became known to them until July of 1949. Suit

was instituted on March 7, 1950, and there does not appear to have been any alteration of conduct by defendants between the date of notice and date of suit. Under these circumstances we feel that if there were any laches on the part of plaintiffs they were excusable laches.

{14} The next question is whether or not plaintiffs are estopped by their actions and conduct from asserting title to the property in dispute, or, in other words, whether their acts have raised them an equitable estoppel. In treating of this question it must be borne in mind that the sale of the property for taxes to the state was absolutely void and that therefore it {112} had absolutely no title to convey to C. J. Parker. *Dye v. Crary*, 13 N.M. 439, 85 P. 1038, 9 L.R.A.,N.S., 1136. As the tax sale was null, the defendants cannot now give life and effect to an invalid deed urging against the owners of the lot a plea of estoppel. If C. J. Parker acquired no title to the property from the state, neither he nor his vendees could acquire any by urging the plea of estoppel. There is nothing to show that defendants have been misled by anything done by the plaintiffs. *First National Bank of Clayton v. Harlan*, 30 N.M. 356, 234 P. 305; *Doran v. First National Bank of Clovis*, 22 N.M. 236, 160 P. 770. Plaintiffs were not aware of the error in the description of their land, and so far as the records show, they knew nothing of the sale of their property for taxes. They had paid all their taxes for the year for which their property was sold and had no reason to believe that it would be sold for taxes.

{15} It is next claimed that the plaintiffs failed to do or offer equity and hence are not entitled to be heard in a court of equity. This proposition was disposed of in our opinion and needs no further discussion.

{16} Lastly, it is urged that the two year curative statute of limitations attacking the regularity of assessments and sale of real estate for delinquent taxes, 1941 Comp. 76-727, is a bar to plaintiffs recovery. Since the *Shackelford v. McGlashan* case, *supra*, is authority for our holding that the taxes in the instant case had in fact been paid on the disputed land, notwithstanding the erroneous description, the two year curative statute of limitation could not apply.

{17} The motion for rehearing should be denied and,

{18} It is so ordered.