PACE V. WIGHT, 1918-NMSC-081, 25 N.M. 276, 181 P. 430 (S. Ct. 1918)

PACE
vs.
WIGHT

No. 2200

SUPREME COURT OF NEW MEXICO

1918-NMSC-081, 25 N.M. 276, 181 P. 430

May 28, 1918

Appeal from District Court, Union County; Leib, Judge.

On Rehearing May 8, 1919. Second Motion for Rehearing Denied June 7, 1919. 25 N.M. 276 at 285.

Suit to quiet title by Susie S. Pace against Mark D. Wight. Judgment for defendant, and plaintiff appeals. *{*278}*

SYLLABUS

SYLLABUS BY THE COURT

1. The curative provision of section 25, c. 22, Laws 1899, relative to tax sales, does not apply to jurisdictional defects. P. 279

2. The fact that property was in fact sold for delinquent taxes is jurisdictional; for, if no sale in fact occurred, the bases for the subsequent proceedings would not exist. P. 279

3. The proceedings on which tax sales depend are to be proved by the records or by the originals from which the records should be made up. The fact that real estate was sold for delinquent taxes must necessarily be established by the record, and cannot be proved by the parol evidence of the county treasurer who made the sale. P. 280

4. Section 23, c. 22, Laws 1899, requires the collector to keep a book of sales containing the date of sale, description of the property sold, name of the purchaser, and amount for which sold. Section 22 of the same act provides that, where property is struck off to the county, the collector shall make an entry, "Sold to the county," on the tax roll opposite the tax. It is the duty of the county treasurer making the sale to record the facts in the official record, and such entry cannot be made by the successor in office of the county treasurer who made the sale, such successor having no personal

knowledge of the fact recorded, and there being no memorandum from which to make the same. P. 280

5. It is essential to the official character of official registers that the entries in them be made promptly, or at least without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them and in the mode required by law, if any has been prescribed. P. 280

On Rehearing

6. The Legislature may pass a retroactive law operating on property belonging to the state, and such law will not be unconstitutional so long as private rights are not infringed. P. 287

7. Where a tax sale certificate is held by a private individual, the purchaser has a vested right to a deed at the time specified in the law under which the purchase was made, and the Legislature cannot subsequently extend the period of redemption, as such extension would be an impairment of the obligation of the contract. But this rule is held not to apply where the state itself is the purchaser at the tax sale, as the extension of the time in that case is not a violation of contract rights, but an act of grace. P. 287

8. Chapter 22, Laws 1899, which provide that the owner of land might redeem from a tax sale at any time within three years from the date of sale, was specifically repealed by chapter 84, Laws 1913. Under the later act it was provided that the owner might redeem at any time within three years from the date of recording the certificate of sale. **Held,** that the later act applied to certificates of sale held by the county acquired under the former law, and that the owner was entitled to redeem at any time within three years from the recording of such certificate of sale. P. 288

COUNSEL

O. P. Easterwood, of Clayton, for appellant.

L. H. Larwill, of Denver, Colorado, for appellee.

JUDGES

Roberts, J. Hanna, C. J., concurs. Parker, J., dissenting. On Rehearing: Roberts, J. Parker, C. J., and Raynolds, J., concur.

AUTHOR: ROBERTS

OPINION

OPINION OF THE COURT.

{1} This suit was instituted in the court below by appellant to quiet her title in and to certain real estate situated in Union county. Appellee answered, setting up the fact that he was the owner of the land by deed from one Lenora Sullivan; that appellant claimed title under a tax deed which was alleged to be invalid on various grounds, the principal one being that the tax certificate upon which the deed was based was not made by the collector in office at the time said sale was held, or by any of his deputies. In other words, the validity of the deed was attacked on the ground that it was based upon a void certificate of sale. Another defense set up was, that under chapter 84, Laws 1913, the owner had the right to redeem the land at any time within three years from the date the certificate of sale was recorded, and that proper tender had been made within such time.

{2} To the answer appellant demurred, and, her demurrer being overruled, she filed a reply. The facts may be briefly stated as follows:

The land in question was listed for assessment in the year 1909. Taxes were levied thereon, and remained unpaid, and the land was advertised for sale. This much is shown by the record evidence introduced by the plaintiff at the trial.

*{*279}* Appellant then introduced R. Q. Palmer as her witness, who testified that he was county treasurer of Union county from 1909 to January, 1912. He also testified that the land was advertised for sale for delinquent taxes together with other real estate; that it was all offered for sale on the 15th day of January, 1911; that there were no bidders for the land in question; and that he thought he thereafter struck it off to Union county. He made no record whatever of the transaction. In January, 1912, Nestor C. De Baca became county treasurer, and on March 4, 1913, De Baca or one of his deputies marked on the roll opposite this land the words, "Sold to the County," and at the same time a record was made in the treasurer's record of delinquent tax sales showing a sale of the land to the county on January 15, 1911. At the same time he made a certificate of sale in which he recited that he, Nestor C. De Baca, did, on January 15, 1911, sell the land in question to the county of Union. The certificate was signed by him, and was indorsed "March 4, 1913, as for January 15, 1911." This certificate was not recorded until September 17, 1915. The court refused to find that a sale of the land for taxes to the county was made, and entered judgment for the appellee.

But two questions will be considered here, one being decisive of the case, and the other being determined because fairly presented and of great public interest. The first question is as to whether or not the evidence established the fact that a sale of the land in question for delinquent taxes actually occurred. If no sale was in fact made, title did not pass to the county, and the attempted issuance of the certificate of sale and its subsequent assignment to Gow, through whom appellant obtained title, would be a nullity. The taxes were levied and the sale was made, if there was a sale under the provisions of chapter 22, Laws 1899. Under section 25 of that chapter it is provided:

> "And no bill of review or other action attacking the title to any property sold at tax sale in accordance with this act shall be entertained by any court, nor shall such

sale or title be invalidated *{*280}* by any proceedings except upon the ground that the taxes, penalties, interest, and costs had been paid before the sale, or that the property was not subject to taxation."

{3} The effect of this curative provision has been before this court in several cases. It was first considered in the case of Straus v. Foxworth, 16 N.M. 442, 117 Pac. 831. It was there held that the sale vests a title in the purchaser which can be invalidated only on the ground that the taxes, penalties, interest, and costs have been paid before the sale, or that the property was not subject to taxation, and that it could not be invalidated for irregularities in the proceedings leading up to the sale unless they were fraudulent or amounted to jurisdictional defects. The rule in this case was followed in the later cases of Maxwell v. Page, 23 N.M. 356, 168 Pac. 492; Hiltscher v. Jones, 23 N.M. 674, 170 Pac. 884; Knight v. Fairless, 23 N.M. 479, 169 Pac. 312. In all of these cases it is conceded that jurisdictional defects are not cured by the curative provisions of the statute. In other words, it is essential that the property should have been listed for taxation, and that the tax should have been laid.

{4} The fact that the property was in fact sold for delinquent taxes is likewise jurisdictional; for, if no sale in fact occurred, the basis for subsequent proceedings would not exist. In Black on Tax Titles, § 452, the author sets out the indispensable requirements essential to constitute a valid exercise of the taxing power, without which no tax sale could be validly made, which is as follows:

"First, that a tax has been levied; second, that the property sold is subject to taxation; third, that the property has been assessed; fourth, that the taxes had not been paid; fifth, a statutory warrant for the sale; sixth, a sale made under such warrant."

"The proceedings on which tax sales depend are to be proved by the records or by the originals from which the records should be made up." Black on Tax Titles, § 446.

{5} The fact that real estate was sold for delinquent taxes must necessarily be established by the record, *{*281}* and cannot be proved by the parol evidence of the county treasurer who made the sale. Section 23, c. 22, Laws 1899, provides:

"The collector shall keep a book of sale containing the date of sale, description of the property sold, name of purchaser and amount for which sold."

{6} Section 22 of the same chapter provides that, when there are no bidders for real estate offered for sale, it shall be struck off to the county, and that the collector shall make an entry, "Sold to the County," on the tax roll opposite the tax. The book of sales required by section 23 is intended to provide an official record of the sale and to give information to the public and to the party whose property has been sold of such fact. It is the register wherein the collector records the fact known to him and done by him, or under his direction, that he has sold the real estate therein described to the county or to

the individual purchaser who may have bought at the sale; it is designed to afford evidence of the official act, and in order to be competent evidence and establish the fact recorded therein, it is essential that the entry should have been made by the person whose duty it was to do so. In other words, the entry should be made by the party who performed the act recorded. In Greenleaf on Evidence (16th Ed.) vol. 1, § 485, the author says:

> "It is deemed essential to the official character of these books that the entries in them be made promptly, or at least without such long delay as to impair their credibility, and that they may be made by the person whose duty it was to make them and in the mode required by law, if any has been prescribed."

{7} In Jones on Evidence, vol. 3, § 509, the same rule is announced.

{8} In the case of Warren v. Bray, 8 B. & C. 813, 108 Eng. Reprint, 1245, the question arose as to the admissibility of a register in evidence for the purpose of establishing the date of birth; the entry not having been made by the minister of the parish at the time the act occurred, but by his successor in office. The court said:

> *{*282}* "The register ought not to have been received in evidence. Registers should be made up promptly, and by the person whose duty it is to make them up. The register of baptism in this case purports to bear date the 6th of February, 1776, but it was not made up till June, 1777, and then it was made up not by the person who was minister of the parish at the time of the baptism, or by a person who appeared at that time to have any connection with the parish, but by one who afterwards became the minister of the parish. It must be taken, therefore, that he made this entry after the death of the minister of the parish who was present at this baptism. He was recording a fact, therefore, not within his own knowledge, but one of which he received information from the clerk."

{9} The same facts substantially exist in the present case. Palmer was the treasurer who is supposed to have made the sale, and, if made by him, it was his duty to have recorded the fact. He failed to do so, and left no written memorandum or evidence of any kind of the fact that he had made the sale. His successor in office, without any personal knowledge of the matter whatever, made the record show that a sale had in fact taken place some two years and three months prior to the entry of the record, a fact wholly without his knowledge, and which, if it had occurred, it was the duty of his predecessor to have recorded. De Baca had no authority to make the entry, and the record thus afforded no evidence of the fact that a sale took place, thereby justifying the issuance of the certificate of sale, and the subsequent proceedings wholly failed to show that a sale of the land in question to the county actually was made.

{10} It would lead to manifest injustice and afford ample opportunities for fraud to announce a rule that would justify such a proceeding. The owner of real estate might examine the records in the treasurer's office from time to time and fail to find any record showing that his property had been sold for taxes. After the time had expired for

redemption, in case a sale had actually been made, the county treasurer or his successor in office might make up a record, issue a certificate of sale to the county, assign the certificate to a private individual, issue a deed, and take from the landowner his real estate, and he would be without *{*283}* remedy. In Minnesota (Smith v. Lambert, 68 Minn. 313, 71 N. W. 381) it is held that a certificate of sale required to be issued by the county auditor to a purchaser at a sale of forfeited lands to the state is not valid unless executed at the time of sale or within a reasonable time thereafter. Many Minnesota cases will be found collected and discussed in this opinion, all to the same effect.

{11} It is not necessary for us to follow or approve the rule adhered to by the Minnesota courts. If the record of the sale had been made by the county treasurer who made the sale, it is probable that his successor could have legally issued the certificate of sale; but here the succeeding treasurer not only issued the certificate of sale some two and a quarter years after the sale is supposed to have occurred, which would have been invalid under the rule announced by the Minnesota courts, but he made up the record upon which the certificate was issued. We think the court below properly refused to find that a sale in fact had taken place, and for this reason the judgment will be affirmed.

{12} There is another question which should be considered because of the public interest, and that is as to whether the owner of land sold under the law of 1899 has a right to redeem within three years from the date of the sale as provided by that law or whether the right of redemption is governed by chapter 84, Laws 1913. The former act authorizes redemption within three years from the date of sale. The latter act authorizes redemption within three years from the date the certificate of sale is recorded. As the certificate in question was owned by Union county, it is undoubtedly true, as contended by appellee, that the state could pass a retroactive law dealing with such property and the right of redemption. 8 Cyc. 902; 6 Am. & Eng. Ency. of Law, 940; Commissioners v. Lucas, 93 U.S. 108, 23 L. Ed. 822.

{13} The question remains, however, as to whether the Legislature intended that the latter act should apply to certificates of sale theretofore issued to and held by the *{*284}* various counties. Section 38 of the latter act provides that the county shall give to the purchaser a certificate of sale, and that such certificate must be recorded, and that redemption may be made at any time within three years from the date of recording such certificate, or duplicate certificate, provided for in section 36 of said act. The provisions of said section as to what the certificate shall contain, where it shall be recorded, and how it can be redeemed apply solely to certificates thereafter issued.

{14} It is our opinion that certificates issued under the 1899 law are controlled by that law. It is only certificates issued by the collector "under section 36" of said act that must be recorded and from which the former owner may redeem within three years from the date of the recording of such certificate. Sections 4100 and 4101 of the Compiled Laws of New Mexico 1897 were in force at the time of the said tax sale and at the time the right of redemption therefrom expired, and these sections were not repealed by the

1913 law. Section 4100 provided for the issuance of a tax deed three years after the date of sale. Section 38, c. 84, Laws 1913, provides:

> "Such former owner may at any time, within three years from the date of recording such certificate, or duplicate certificate, provided for in section 36 thereof, redeem the property."

{15} To construe said section 38 as applying to certificates issued under the 1899 law would be to make it conflict with and nullify said section 4100. It is the duty of the court to give force and effect to both sections.

{16} In the case of Crane v. Cox, 18 N.M. 377, 137 Pac. 589, it was held that the act of 1913 should be limited to prospective operation. It is a general rule of law that statutes are to be construed as prospective, and not retrospective, unless constrained to the contrary course by the rigor of the phraseology. 1 Cooley on Taxation, 495. In the case of Smith v. Auditor General, 20 Mich. 398, in an opinion written by Justice Cooley, it was said:

> "We do not understand it to be questioned that it was competent for the Legislature to make the general provisions of *{*285}* the act of 1869 apply to the taxes previously assessed and returned, so far as the subsequent proceedings to be taken by the state were concerned, if they had seen fit to do so. The question is whether they have expressed an intention to that effect. Unless the intention distinctly appears, the familiar rule of construction which presumes that legislation is designed to have prospective operation only will require the court to hold that the legislative purpose was that this act should apply only to the taxes subsequently assessed."

{17} In the case of Blakemore v. Cooper, 15 N. D. 5, 106 N. W. 566, 4 L. R. A. (N. S.) 1074, 125 Am. St. Rep. 574, the court cites a great many cases in support of the rule that the repeal or revision of a statute is to have prospective operation only, unless the intent of the Legislature to the contrary clearly appears. There is nothing in the act under consideration which makes it clearly apparent that it was the intention of the Legislature that the redemption feature should apply to sales made under the former statute.

{18} We conclude that said section 38 of the Act of 1913 does not act retrospectively and does not in any way affect or refer to tax certificates issued under the 1899 law, and does not extend or revive the right of redemption on certificates issued under said law.

{19} For the reasons stated, the judgment of the district court will be affirmed; and it is so ordered.

DISSENT

{20} Parker, J. I dissent. The act of 1913 was intended to have a retroactive effect and to govern all cases in regard to the right of redemption.

REHEARING

On Rehearing

ROBERTS, J.

{21} In the original opinion the judgment of the lower court was affirmed on the ground that the evidence failed to establish the fact that a sale of the land in question for delinquent taxes actually occurred. Appellant has filed a motion for rehearing, in which she points out that this was not an issuable fact in the case, *{*286}* because appellee in his answer expressly alleged that the property had been sold for taxes, under which sale and the deed issued thereon appellant was claiming title to the land. The court overlooked this admission in the answer, and the oversight was occasioned by the fact that in this court the case was argued orally on behalf of appellee and was submitted by appellant on briefs. In the oral argument appellee stressed the fact that the evidence failed to show a sale, and upon examining the transcript of evidence we found this contention was correct. It is only fair to appellee, however, to say that there was no intention upon the part of his counsel to mislead the court. His statement was a prelude to a discussion of the effect of the tax sale certificate issued more than two years after the sale, and the failure of the county treasurer to make the required entries on the tax roll and in the tax sale record. The court, in the former opinion, without making an investigation of the pleadings, took it for granted that the answer denied that the property had been sold for taxes, and, as the evidence failed to show a sale, concluded that the judgment of the court, although based on other grounds, could be sustained because of the failure on the part of appellant to show a tax sale. In this we were in error, because, as the answer admitted a sale of the land in question at the time stated in the tax sale certificate and deed, appellant was not required to prove this fact.

> "A party who formally and explicitly admits, by his pleading, that which establishes plaintiff's right, will not be suffered to deny its existence or to prove any state of facts inconsistent with that admission." 31 Cyc. 211.

{22} A tax sale upon which the deed in question was based having been admitted in the answer, the failure of the collector to note on the tax roll the fact of the sale or to enter the same in the tax sale record or to issue the tax sale certificate is of no moment. These records and the issuance of the tax sale certificate were only record evidence by which the sale could be proved. In the case of Hiltscher v. Jones, 23 N.M. 674, 170 Pac. 884, this court said:

> *{*287}* "The tax sale certificate, which, of course, is thereafter issued, is only written evidence or an acknowledgment that the sale has taken place. When the property has been struck off, the rights of the purchaser become fixed."

{23} In that case the court quoted with approval from the case of Bruno v. Madison, 38 Utah, 485, 113 Pac. 1030, Ann. Cas. 1913B, 584, and if the reasoning in that case is applied to the present case, it will be clearly seen that the failure on the part of the treasurer to make the entry and do the acts referred to does not affect the rights of the appellant, under his tax deed; appellee having admitted the fact that the sale took place.

{24} On rehearing the court has reconsidered the question as to whether the owner of lands sold under the law of 1899 (chapter 22, Laws 1899) to the county, the certificate of sale being held by the county at the time of the enactment of chapter 84, Laws 1913, has the right to redeem from such sale under the later statute, or whether the right of redemption is governed by the statute in force at the time of the sale. Under the law of 1899 the owner was authorized to redeem at any time within three years from the date of sale. Under the act of 1913, the owner was permitted to redeem at any time within three years from the date of recording the certificate of sale. The certificate in question in this case was not recorded until 1915, and appellee offered to redeem within three years from the date of the recording of such certificate. The act of 1913 specifically repealed chapter 22, Laws 1899, and contained no saving clause.

{25} Appellant argued that the latter statute could have no application to past sales under which the rights of the parties had become fixed; that tax statutes are given a prospective operation, and in the former opinion the majority of the court agreed with the appellant and held that the later enactment had no application to the certificate in question. Upon a reconsideration of the question, however, we have concluded that we were in error in such construction. The general rule is that, when an act of the Legislature is repealed without *{*288}* a saving clause, it is considered, except as to transactions past and closed, as though it had never existed. Sutherland on Stat. Const. § 282. As between private individuals, when a right has arisen on a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it, or an action for its enforcement. Sutherland on Stat. Const. § 284. Undoubtedly the repeal of a statute under which a tax sale certificate is acquired by a private individual would not affect the rights of the holder of such certificate. His rights would be governed by the law in force at the time of the purchase, and it would not be competent for the Legislature to enact a statute which would impair such rights; but the Legislature may pass a retroactive law operating on property belonging to the state, and such law will not be unconstitutional so long as private rights are not infringed. 8 Cyc. 902. In 6 A. & E. Ency. of Law, p. 940, it is said:

> "The state may constitutionally pass retrospective laws impairing her own rights."

{26} See, also, People v. Frisbie, 26 Cal. 135; State v. Dexter, 10 R. I. 341.

{27} Municipal corporations are mere instrumentalities of the state, for the convenient administration of government, and their powers may be qualified, enlarged, or withdrawn at the pleasure of the Legislature. Property rights which they hold are subject

to legislative control, as they are merely agents of the state in the administration of government. Commissioners v. Lucas, 93 U.S. 108, 23 L. Ed. 822.

{28} Where a tax sale certificate is held by a private individual, the purchaser has a vested right to a deed at the time specified in the law under which the purchase was made, and the Legislature cannot subsequently extend the period of redemption, as such extension would be an impairment of the obligation of the contract. 37 Cyc. 1390. *{*289}* But this rule is held not to apply where the state itself is the purchaser at the tax sale, as the extension of the time in that case is not a violation of the contract rights, but an act of grace. Adkin v. Pillen, 136 Mich. 682, 100 N. W. 176; State v. Smith, 36 Minn. 456, 32 N. W. 174. This right has been at times exercised by the Legislature of this state. By the repeal of the act of 1899 by the act of 1913 we thus have this condition as to tax sale certificates purchased under the law of 1899: Those purchased by private individuals by reason of constitutional provisions against the impairment of the obligations of a contract under the 1899 statute would not be affected by its repeal. That the later statute undoubtedly attempted to do so may be admitted, because, as stated, the later act contained no saving clause and completely wiped out all the provisions of the former act. But, by reason of the constitutional provision, such later act could have no effect upon the rights of such private purchaser. Such repeal, however, was not rendered ineffectual by any constitutional inhibition as to tax sale certificates held by the county by purchase under the former act. Consequently it would and did apply to such certificates. This being true, we must look to the later act to ascertain the rights of the landowner to redeem from such sale, and we find that he is given three years from the date of recording the certificate of sale. If such certificate had been recorded by the county treasurer at the time it was, or should have been, issued, as required by the act of 1899, of course the owner would have had the right of redemption within three years from such recordation. While the act of 1913 requires the recordation of the assignment of such certificate, the redemption right does not date from the recording of the assignment, but from the recording of the original tax certificate. State ex rel. Ols v. Romero, Treasurer, 25 N.M. 290, 181 Pac. 435. That the purchaser from the state takes the certificate as it exists at the time of its assignment cannot be questioned.

> "Where land is forfeited to the state for nonpayment of taxes, or bid in by the state at a tax sale, its subsequent conveyance to a purchaser from the state will ordinarily invest *{*290}* him with any and all titles which the state holds to the particular property, although he may take subject to conditions subsequent, such as a requirement of notice to the former owner, the nonobservance of which may divest his title, or subject to the right of the original owner, his grantees, or mortgagees to obtain a reconveyance." 37 Cyc. 1473.
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> "The appellant took his deed for the land [a tax deed] in the same condition in which the state held it, and subject to the same equities and defenses." Martin v. Barbour, 140 U.S. 634, 11 Sup. Ct. 944, 35 L. Ed. 546.

{29} To the same effect are Wilcox v. Leach, 123 N. C. 74, 31 S. E. 374; Felch v. Travis (C. C.) 92 Fed. 210; Shelley v. Towle, 16 Neb. 194, 20 N. W. 25.

{30} Appellant has cited many cases in her brief, but all these are to the effect that the state is powerless to affect the rights of private purchasers under tax sale certificates, and have no application to the question here presented. We hold that the act of 1913 applies to tax sale certificates held by the counties at the time the act became effective, and that such act had the effect to extend the time of redemption to three years from the date of recording the certificate of purchase as to all tax sale certificates held by the various counties at the time such law became effective. In this case the trial court found that the landowner had offered to redeem within three years from the date of recording the certificate of sale, and further held that the act of 1913 applied.

{31} We agree with the trial court, and for this reason the former opinion will be adhered to; and it is so ordered.