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COMMENTS

BOUNDARIES—PUBLIC LANDS—INJUNCTIONS—BALANCING OF EQUITIES.∗ —
Determining the boundary between contiguous parcels of land has been and
continues to be a major problem area in the law of real property. This comment
undertakes to discuss some of the questions raised where one parcel is leased from
the state while the other is held in fee by a private person.

Most courts hold that adverse possession may not be claimed against the state.1
This is the rule followed in New Mexico.2 As a matter of public policy, the
people are not held to suffer for the negligence of public officials in failing to
assert the interests of the state.3 However, an incongruous result may be reached
in New Mexico if a lessee of state land delays in bringing an action to enjoin
a trespass on his leased property.

In Sproles v. McDonald,4 plaintiff, a 76 year-old widow who had home-
steaded part of the property in question, sought to enjoin defendant from mov-
ing two fences which had been in place for some 45 years and which plaintiff
claimed represented the correct boundary line. Defendant, who held a state
grazing lease on the section west of plaintiff, had claimed that the north-south
fence separating their property was 420 feet west of the correct, surveyed line.
Defendant also held part of the section north of plaintiff in fee and part under
a lease from the state. He had claimed that the east-west fence separating their
property was from 30 to 60 feet north of the correct, surveyed line. Defendant
counter-claimed, asking that plaintiff be enjoined from trespassing and com-
pelled to move the fences. The trial court held that the true boundary conformed
with the surveyed lines; that plaintiff had acquired title by adverse possession to

1. 6 Powell on Real Property, § 1020 (1958); Miller, Real Property—Nullum Tem-
par Occurrit Aegi, 24 U. Kan. City L. Rev. 187 (1956); 2 C.J.S. Adverse
Possession § 11 (1936); Tyler, Ejectment and Adverse Enjoyment 146 (1870). See also Pratt v. Parker,
57 N.M. 103, 109, 255 P.2d 311, 315 (1953): "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."
2. Pratt v. Parker, supra note 1; Burgett v. Calentine, 56 N.M. 194, 197, 242 P.2d
276, 277 (1951): "An easement cannot be acquired against the State... by adverse
3. Miller, supra note 1, at 195:
The reason for the continued vitality of this doctrine where the royal privi-
lege no longer exists is that the public should not suffer by the negligence of its
servants especially in a representative government, where the people do not
and cannot act in a body, where their power is delegated to others, and must of
necessity be exercised by them if exercised at all.
See also, Buswell, Limitations and Adverse Possessions § 97 at 148 (1889): "The sound
reason for it, however, rests in the public policy of preserving public rights, revenues,
and property from injury and loss by the negligence of public officers."
such portions of defendant's fee lands as were south of the east-west fence; and that the fences which were on state land must be moved. On appeal to the Supreme Court of New Mexico, held, Reversed and Remanded with instructions to "consider the equities" in granting the injunction against plaintiff.

The question of "balancing the equities," which was not presented to the trial court, is one of first impression in New Mexico. The primary authority cited by the Supreme Court was de Funiac, Handbook of Modern Equity, § 25, p. 42 (2d ed. 1956):

The doctrine or rule is sometimes stated to be that the court will weigh the loss, injury, or hardship resulting to the respective parties from granting or withholding equitable relief; that if the loss result-

5. Although defendant did not appeal this decision, a finding of adverse possession is difficult to justify. See Ward v. Rodriguez, 69 N.M. 191, 88 P.2d 277 (1939) (requisite intent lacking where fence is placed under a mistake of fact as to the true boundary line).

6. Record, p. 14, Sproles v. McDonald, 372 P.2d 122 (1962): "the plaintiff has encroached on the property of the state . . . during all of this time and as adverse possession, acquiescence and laches, under the majority rule, will not run against the Federal Government, the State or an agency thereof, she therefore has no defense."


8. The court also held that the Commissioner of Public Lands was neither an indispensable party nor the real party in interest. And, after holding that the trial court's findings of fact were not open to attack since they were supported by substantial evidence, the court went on to discuss the doctrine of acquiescence in a boundary line. Since the court had held that the finding was supported by substantial evidence the discussion seems superfluous. Sproles v. McDonald, supra note 7.


Although Appellant [plaintiff] did not request the trial court to consider the equities in the case, she has here argued the point, and appellees have met the issue directly and have not objected to it as being raised in this court for the first time. Accordingly, under the rule announced by us in Ferran v. Jacquez, 68 N.M. 367, 362 P.2d 519, it is proper for us to pass upon whether or not the trial court should have considered the same.

In Ferran v. Jacquez, 68 N.M. 367, 371, 362 P.2d 519, 521 (1961), the court held, without citation of authority, as follows:

where appellee does not question the right of appellant to change his theory and position, and where it appears that a wrong principle of law has been applied below, we are constrained to consider the appeal on its merits rather than refuse to do so because of a technicality in pleading or practice.

The "technicality" is Supreme Court Rule 20, N.M. Stat. Ann. § 21-2-1(20) (1953): "None but jurisdictional questions shall be first raised in the Supreme Court." Since the parties are now able to avoid the Rule by merely not objecting to new questions being raised, the Rule is of little value and it would appear to behoove appellant to raise any theory which the court might possibly accept. If appellee for one reason or another does not object to the question being raised for the first time, the new theory might be the point relied upon by the Supreme Court for reversal. Certainly this "exception" to Rule 20 does not make for orderly administration of appeals and does not force the parties to present their arguments to the trial court in an effort to avoid appeals and give all possible finality to judgments.
ing to the plaintiff from denying the equitable relief will be slight as compared to the loss or hardship caused to the defendant if the injunction is granted, the equitable relief will be denied. The plaintiff is left to pursuit of damages as his remedy.10

That such a doctrine exists does not seem open to serious question; that it should be applied in this case is.

Disregarding the facts of this case for the moment and considering only the question whether, under any circumstances, plaintiff should be allowed to resist defendant's demand for an injunction, one is immediately faced with the rule that "time does not run against the State."11 The only distinguishing feature in Sproles is that the person who has failed to act is a lessee of state property and not a public official or agency. This distinction, however, becomes very thin when it is considered that the lessee of state land has a statutory duty to protect "the land leased by him from waste or trespass by unauthorized persons."12 Since he is charged with the duty of acting for the state his latches should not be imputed to the state and he should not be prevented from obtaining an injunction against a continuing trespass. Certainly the policy of protecting the public lands will be thwarted if a contrary result is reached.

At the conclusion of its opinion, the court said:

By nothing which we have said herein do we in any way suggest that the rules announced for fixing boundaries as between private litigants, or for granting or denying injunctive relief, would be applicable in a case involving the interests of the state.13

But, isn't an interest of the state involved in this case? Defendant sought to protect the state land against plaintiff's trespass; because he would benefit from that protection does not mean that the state does not also benefit. If the trial

10. Two additional secondary authorities were cited for the general proposition: 4 Pomeroy's Equity Jurisprudence §1359a (5th ed. 1941) (concerning preliminary injunctions), and Restatement, Torts §941 (1939). The example in Comment c of the Restatement, supra, indicates the type of case in which the doctrine might be applied. Defendant's building encroached on plaintiff's land in that from the tenth story up defendant's building is a few inches over the property line. It would cost defendant $500,000 to remove the encroachment. The injunction should be denied. These facts seem unlike those presented in Sproles.

For discussions of the general principle, see McClintock, Discretion to Deny Injunction Against Trespass and Nuisance, 12 Minn. L. Rev. 565 (1928); Note, 59 Dick L. Rev. 243 (1955); Note, 19 Notre Dame Law. 360 (1944); Note, 8 Ohio St. L. J. 341 (1942); Note, 15 Temp. L. Q. 548 (1941); Note, Balancing the Equities, 18 Texas L. Rev. 412 (1940). See also, Annot. 60 A.L.R. 2d 310 (1958).

11. Pratt v Parker, 57 N.M. 103, 109, 255 P.2d 311, 315 (1953). See also footnotes 1 and 2, supra.


court is allowed to deny defendant's request for an injunction, plaintiff will presumably be entitled to use the property as she wishes, regardless of possible wasting of the public lands. The court also states that "no question of title or of the true boundary between appellant's [plaintiff's] property and the state is involved." If this is so, why did the court review the trial court's findings concerning the true boundaries and hold that they were supported by substantial evidence? Perhaps the court means that no question of title or of the true boundary as against the state is involved since it is not a party to the action and has not consented to be sued. Certainly it would seem that a determination of the true boundary, at least as between the parties to this suit, is indispensable in determining the rights of the parties before the court.

The court set forth the facts upon which it based its ruling that the trial court should have "balanced the equities" as follows:

Although there is no proof of the value of the land in dispute, and very little evidence concerning the improvements, it appears that the land in question is contained in a grazing lease covering a total of approximately 8155 acres, and the annual rental on this property is computed at rates varying from three cents to six cents per acre. The total acreage involved is in the neighborhood of fifty acres. As regards the improvements, we know nothing except that there is a house where plaintiff has not lived for a number of years, but where she still has furniture and has stayed overnight on occasion in recent years. It also appears that there are some corrals and an old well on the property. A new well was completed within the last few years, which is a short distance east of the correct line as found by the court, and on appellant's property.

From the foregoing, together with the fact that the possession of the property in dispute has been in appellant for many years without any question being raised by the appellees or their predecessors, we are convinced that this is a proper case for the balancing of equities.

14. Ibid.
15. Id. at 125-26.
18. Sproles v. McDonald, 372 P.2d 122, 126-27 (1962). Concerning improvements within the disputed area, the trial court found only that "plaintiff and her husband erected a dwelling and corrals approximately 200 feet from the west boundary of the property enclosed and occupied by them and within the area claimed by the defendants to constitute the encroachment." Finding of Fact No. 9, Record, p. 26, Sproles v. McDonald, supra. No mention is made in the Findings of Fact of the existence of an old well, although plaintiff in her brief indicates such a well exists (Brief of Appellant, p. 19 Sproles v. McDonald, supra), which statement was vigorously protested by defendant (Brief of Appellee, p. 14 Sproles v. McDonald, supra). Plaintiff did testify to the existence of an old well. Record, p. 26, Sproles v. McDonald, supra. Nor was there a finding
The only case cited to support the conclusion that these facts present a proper case for "balancing of equities" was *Golden Press v. Rylands*, a 1951 decision by the Supreme Court of Colorado wherein neither party claimed through the state. The trial court had granted a mandatory injunction requiring that defendant remove a part of the footing of his building. The footing encroached on plaintiff's land from two to three and a half inches at a distance of from seven to nine feet below the surface of the ground. As the court said, "the encroachment here complained of is very slight. . . . They constitute no interference whatever with plaintiff's present use of the property. . . ." In holding that the mandatory injunction should have been denied and plaintiff allowed to proceed in damages if he desired, the court said:

[W]here the encroachment was in good faith, we think the court should weigh the circumstances so that it shall not act oppressively. . . . Where defendant's encroachment is unintentional and slight, plaintiff's use not affected and his damage small and fairly compensable, while the cost of removal is so great as to cause grave hardship or otherwise make its removal unconscionable, mandatory injunction may properly be denied and plaintiff relegated to compensation in damages.

This narrow holding cannot buttress the decision in *Sproles*, unless plaintiff's trespass on 50 acres of land is "slight" and defendant's use thereof "not affected." In short, the cases are difficult to analogize. Although "no specific and universally accepted rule as to encroachments" can be formulated, the narrow holding in *Golden Press* does not support the conclusion in *Sproles*.

of the annual rental on the property, although defendant's exhibit "3" does not note rent per acre. Record, p. 182, *Sproles v. McDonald*, supra. The Court's assumption of facts not found in Finding of Fact No. 9 is questionable since the finding was not attacked. Jontz v. Alderett, 64 N.M. 163, 167, 526 P.2d 95, 98 (1958): "This Court will not originally determine the questions of fact in a case. Such function lies entirely within the province of the trial court." See also Hickman v. Mylander, 68 N.M. 340, 362 P.2d 500 (1961); White v. Wheeler, 67 N.M. 346, 355 P.2d 282 (1960).
20. Id. at 128-29, 235 P.2d at 596.
21. Id. at 129, 592 P.2d at 596:
   The expense and hardship of such removal would be so great in comparison with any advantage of plaintiffs to be gained thereby that we think it would be unconscionable to require it, and that under all the circumstances disclosed mandatory injunction should have been denied by the trial court, with permission for plaintiffs to proceed, if desired, in damages.
23. Id. at 126, 235 P.2d at 595.
24. The New Mexico Supreme Court also cites an annotation in 28 A.L.R. 2d 679, 699 (1953), which, although instructive, is little aid in resolving the problem presented in *Sproles*. 
According to the court's statement, the availability of an action for damages in lieu of the injunction is a factor in applying the doctrine of "balancing the equities." Since the case was remanded on the sole issue of granting or denying the injunction, defendant apparently would not be allowed to raise the issue of damages in this action if the injunction were denied. And there is some question whether the doctrine of collateral estoppel would prevent his bringing a separate action for damages suffered by reason of plaintiff's past trespass: the trial court found no damage and defendant did not appeal. This circumstance was not discussed by the court.

Accepting the decision as it now stands and assuming that on remand the trial court might deny the injunction, where would this leave the parties? Defendant might lose his lease for failing to protect the state land from "waste or trespass by unauthorized persons." And he might be subject to suit by the Attorney General for any damages caused by the trespass. On the other hand, plaintiff may also be in a difficult position. Under New Mexico Statutes, it is a crime for any person to fence "to the injury of any person or persons, any land which they do not own or have no legal title thereto, by lease or otherwise." Would plaintiff have "legal title"? Also, it is a crime to enter upon state land "without having leased or purchased the same, or obtained a legal right to the use or occupation of the same." Would plaintiff have a "legal right" to the use of the premises? And who would pay the rent on the 50 acres of state land under fence by plaintiff?

If possible criminal prosecution is insufficient to prompt plaintiff's removal from the state land, what other remedy might the state pursue? It might bring a suit to quiet title, although the action seems strange since title may not be acquired against the state by adverse possession and thus plaintiff really has no adverse interest. Nevertheless, our statute seems broad enough to allow suit by the state. Or perhaps the more appropriate action would be ejectment. The action may be brought by a plaintiff who is "legally entitled to the possession of the premises" against "the tenant in possession, or against the person under

25. Sproles v. McDonald, 372 U.2d 122, 16 (N.M. 1951): "The plaintiff is left to pursue of damages as his remedy."
26. Id. at 127.
27. See, Restatement, Judgment § 69 (1942); Chick Springs Water Co. v. State Highway Department, 178 S.C. 415, 183 S.E. 27 (1935); 50 C.J.S. Judgments § 672 (1947).
29. Ibid.
31. N.M. Stat. Ann. §§ 7-7-3 (1953). See also N.M. Stat. Ann. § 7-3-11 (1953), making it unlawful to enclose public lands unless "in conformity with the provisions of the United States laws relative to government lands or the laws of this state."
whom such tenant holds or claims possession." This broad language should include an action by the state. Absence of specific authorization for an action by the state was held not to be a bar in Brown v. The State, an early Colorado case wherein the state sought to recover the possession of certain real property claimed to have been deeded to the state. Apparently there would be no "balancing of equities" in such an action.

The uncertainty created by Sproles v. McDonald could have been avoided had the court held that plaintiff will not be allowed to do indirectly what she cannot do directly; that is, she will not be allowed to remain in possession of state land because the trial court "balances the equities" when she could not acquire that right by adverse possession.

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35. 5 Colo. 496, 497 (1881):
   It is accepted law, that a State, as a political corporation, may maintain, in its corporate name and in its own courts, actions for the enforcement of its rights or the redress of its wrongs, independently of any statutory provisions therefor.
   The right springs from the general principle that every person, whether natural or artificial, capable of making a contract or suffering wrong, may have an action to enforce the one and to redress the other.
See also, Sedgquick & Wait, Trial of Title to Land § 192 (2d ed. 1886).