
NATURAL RESOURCES JOURNAL

Volume 5
Issue 1 *Winter 1965*

Winter 1965

Adverse Possession in New Mexico - Part Two

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ADVERSE POSSESSION IN NEW MEXICO—Part Two*

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OTHER ELEMENTS: THE POSSESSION MUST BE ADVERSE AND UNDER COLOR OF TITLE

Our statute of limitations statute[68] provides merely that the land

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* Part One of this article appeared in 4 Natural Resources J. 559-83 (1964-1965).

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68. N.M. Stat. Ann. § 23-1-21 (1953):

> In all cases where any person or persons, their children, heirs or assigns, shall have had possession for ten [10] years of any lands, tenements or hereditaments which have been granted by the governments of Spain, Mexico or the United States, or by whatsoever authority empowered by said governments to make grants to lands, holding or claiming the same by virtue of a deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple, and no claim by suit in law or equity effectually prosecuted shall have been set up or made to the said lands, tenements or hereditaments, within the aforesaid time of ten [10] years, then and in that case, the person or persons, their children, heirs or assigns, so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in his, her or their deed of conveyance, devise, grant or other assurance as aforesaid, in preference to all, and against all, and all manner of person or persons whatsoever; and any person or persons, their children or their heirs or assigns, who shall neglect or who have neglected for the said term of ten [10] years, to avail themselves of the benefit of any title, legal or equitable, which he, she or they may have to any lands, tenements or hereditaments, within this state, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever barred, and the person or persons, their children, heirs or assigns so holding or keeping possession for the term of ten [10] years, shall have a good and indefeasible title in fee simple to such lands, tenements or hereditaments: Provided, that if any person entitled to commence or prosecute such suit or action is or shall be, at the time the cause of action therefor first accrued, imprisoned, of unsound mind, or under the age of twenty-one [21] years, then the time for commencing such action shall in favor of such persons be extended so that they shall have one [1] year after the termination of such disability to commence such action; but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued and to no other.

N.M. Stat. Ann. § 23-1-22 (1953):

> In all cases where any person or persons, their children, heirs or assigns, shall have had adverse possession continuously and in good faith under color of title for ten (10) years of any lands, tenements or hereditaments, within

shall have been actually possessed for ten years, holding or claiming the same by virtue of a deed or deeds of conveyance, demise, grant, or other assurance purporting to convey an estate in fee simple. Our courts have said consistently that such possession must be adverse.[69]

Our adverse possession statute[70] provides for "adverse possession continuously and in good faith under color of title." It also defines adverse possession as "an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another." The use in the statute of the clauses "in good faith" and "claim of right" pose some questions of construction which would not otherwise exist.

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the aforesaid time of ten (10) years, then and in that case, the person or persons, their children, heirs or assigns, so holding adverse possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in some writing purporting to give color of title to such adverse occupant, in preference to all, and against all, and all manner of person or persons whatsoever; and any person or persons, their children or their heirs or assigns who shall neglect or who have neglected for the said term of ten (10) years, to avail themselves of the benefit of any title, legal or equitable, which he, she or they may have to any lands, tenements or hereditaments, within this state, by suit of law or equity effectually prosecuted against the person or persons so as aforesaid in adverse possession, shall be forever barred, and the person or persons, their children, heirs or assigns so holding or keeping possession as aforesaid for the term of ten (10) years, shall have a good and indefeasible title in fee simple to such lands, tenements or hereditaments: Provided, that if any person entitled to commence or prosecute such suit or action is or shall be, at the time the cause of action therefor first accrued, imprisoned, of unsound mind, or under the age of twenty-one (21) years, then the time for commencing such action shall in favor of such persons be extended so that they shall have one (1) year after the termination of such disability to commence such action; but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued and to no other. "Adverse possession" is defined to be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another: Provided, however, that in the case of severed mineral interests the possession by the party in possession of the surface shall be considered as the constructive possession of such mineral claimant until actual possession shall have been taken by such mineral claimant; and Provided further in no case must "adverse possession" be considered established within the meaning of the law, unless the party claiming adverse possession, his predecessors or grantors, have for the period mentioned in this section continuously paid all the taxes, state, county and municipal, which during that period have been assessed against the property.

69. See Montoya v. Catron, 22 N.M. 570, 166 Pac. 909 (1917); Merrifield v. Buckner, 41 N.M. 442, 70 P.2d 896 (1937).

70. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 68 *supra*.

A. Adverseness as a Hostile and Inconsistent Claim

Standing alone, "adverse possession" means a possession which is hostile to and inconsistent with the right of the true owner. Hostility of possession ordinarily is indicated by actions rather than express declarations. It is lacking in the case of a possession which is permissive or is otherwise consistent with the title of the record owner who permits it to continue. Thus possessions held by an agent or servant of the owner, by his tenant, or by a cotenant are not adverse. They may be made so, however, by a repudiation by either party of the special relationship, brought to the other's notice.[71]

Most of the New Mexico cases in which hostility of possession has been discussed as an element have been cases in which the contesting parties have had simultaneous legal interests in the land, and one of them has sought to acquire the entire and complete legal title by adverse possession. The most common situation has been that of cotenants. Only a few of the cases are presented.

1. Vendor and Purchaser

In *De Bergere v. Chaves*,[72] the facts were as follows: In 1878, Manuel A. Otero, owner of the Galisteo Ranch, entered into a written contract in Spanish for the sale of the ranch to Jesus M. Sena y Baca, by which the latter was entitled to take immediate possession of the ranch, situated in Santa Fe County. Otero agreed to deliver a deed as soon as he should have obtained an adjudication and approval of the Grant of Bartolome Baca, a tract situated in Valencia County. Sena y Baca, his heirs and other successors in interest, remained continuously in possession of the ranch, farming and leasing it, and exercising all the control over it which an owner would, until 1901, when the Court of Private Land Claims finally rejected the Bartolome Baca Grant. The court, however, had approved the Galisteo Ranch. The plaintiffs, heirs of Manuel A. Otero, brought this action to recover possession of the Galisteo Ranch from its present occupants. The plaintiffs were successful in the trial court. On appeal, the supreme court affirmed, holding as follows:

'Where one enters into and holds possession of lands under an execu-

71. See 3 American Law of Property § 15.4(a) (Casner ed. 1952).
72. 14 N.M. 352, 93 Pac. 762 (1908).

> tory contract of purchase or bond for title, the entry and possession are in subordination to the title of the vendor until payment or performance of all the conditions by the vendee or until the vendee has distinctly and unequivocally repudiated the title of his vendor, which repudiation is brought expressly or by legal implication to the vendor's knowledge.'
>
> The evidence in this case nowhere discloses that Sena y Baca, or his assigns, ever distinctly and unequivocably repudiated the title of Manuel Antonio Otero.[73]

2. Landlord and Tenant

In *Andrews v. Rio Grande Live Stock Co.*,[74] the plaintiff, Edgar Andrews, brought action to quiet title in 1908, relying on title by adverse possession. For many years prior to 1897, the land had been in the possession of Bonanzas Mining Co., which claimed ownership. In 1889, Bonanzas leased the tract to John Andrews, uncle of the plaintiff, who went into possession. A short time later, Edgar joined him in possession, and they continued to occupy the land under the lease. For some years they paid rent to the company. Then, for some years prior to 1896, they paid no rent, but continued to recognize the tenancy until 1897. In October 1897, the sheriff, on execution against one of the paper holders of the title sold the tract at public auction to one Bennett, for the use of the Andrews. The fact that the sale was for the use of the Andrews was announced publicly at the sale, at which a representative of Bonanzas was present. After the sale, the sheriff again announced to the Bonanzas representative that the sale was to Bennett. The sheriff, at the request of the Andrews, issued his deed to Fritz Muller, the Andrews paying the consideration. Muller was another uncle of Edgar Andrews. Muller held the title until 1903, when, at the request of John Andrews, he deeded it to Edgar. In the interim, the Andrews put up the money for taxes; after the deed to Edgar, the land was assessed to him, and he paid the taxes. It was admitted that the sheriff's deed to Muller was void, because of certain irregularities, but the defendant conceded that it would nevertheless constitute color of title. The defendant contended that from 1897 to 1903, Edgar and his uncle did not hold the land adversely, but held it in subserviency to and under the claimed title of

73. *Id.* at 367, 93 Pac. at 765.
74. 16 N.M. 529, 120 Pac. 311 (1911).

Bonanzas. The lower court upheld this contention, but this judgment was reversed on appeal. The supreme court declared that:

> The solution . . . depends upon whether the facts occurring at the sale of the property by the sheriff, in 1897, and the continued occupancy and cultivation of the land by Andrews, was a sufficient renunciation and disclaimer of the title of the landlord, under which Andrews had theretofore held the land, to set the statute in motion. In the case of *Willison v. Watkins*[75]. . . . the Supreme Court of the United States considered and declared the law to be settled, that a purchase by a tenant of an adverse title, claiming under or attorning to it, or any other disclaimer of tenure with knowledge of the landlord, was a forfeiture of his term; that his possession became so adverse, that the act of limitation would run in his favor, from the time of such forfeiture; and the landlord could sustain ejectment against him without notice to quit. This case has been repeatedly cited with approval by that and other courts. The appellee, the defendant, is not claiming under or in privity with the title of the Bonanzas Mining Company, the landlord, and the Bonanzas Mining Company is not asserting the tenancy, but appellee is relying upon the relationship of landlord and tenant between appellant and a third party to prevent the statue from running against it. We think the facts sufficient to set the statute running against the landlord and all other claimants or owners. The agent of the Bonanzas Company was present at the sheriff's sale . . . . The sheriff announced that he had sold the property to Ed Bennett for Andrews; the agent of the landlord heard the statement made, and, as Andrews was present, heard the statement made, apparently understood it, by his silence acquiesced in it. Had the statement been untrue the circumstances certainly called for a denial on his part, which was not made. Later, the sheriff again told the agency of the Bonanzas Company that Ed Bennett purchased the property for Andrews. Thereafter, no rent was paid or tendered by Andrews to the landlord; no act was done by him which could in any way be construed as an admission of the title of the landlord. He used the premises as his own, repaired buildings and fences and cultivated the fields. Had Andrews taken the deed in his own name; had he himself been the bidder and the purchaser at the sale, certainly there would be no dispute as to his renunciation of the title of his landlord, and we cannot see how the fact that the bid was made by a third party for Andrews, all of which was known to the landlord, and the title was taken in some other name, for his use, can alter the case. We think the facts sufficiently establish the renunciation of the landlord's title and were sufficient to set the statute in motion.[76]

75. 3 Pet. (28 U.S.) 43 (1830).
76. Andrews v. Thomas, 16 N.M. 529, 534-35, 120 Pac. 311, 312-13 (1911).

3. Husband and Wife

In *Torrez v. Brady*,[77] certain heirs of the defendant's wife brought suit to partition land occupied by the defendant. The defendant had occupied the premises with his wife for sixteen years until her death, which occurred ten years before the suit was begun. The property had been the wife's separate property at the time for her marriage to the defendant. The defendant claimed that because of such possession, the plaintiffs were bound by the statute of limitations. The trial court ruled against the defendant, and this ruling was upheld on appeal. As to the defendant's contention that his possession of the land while his wife was alive constituted possession adverse to the wife's estate, the supreme court stated:

> The land was admittedly the separate property of appellant's wife at the time of his marriage to her, and the court, we think, properly found that the possession of appellant of said lands during the period of coverture, was a joint possession with his wife, and was by virtue of his marital relationship to her.
>
> Such a possession of real estate by the husband could not be said to be adverse to the wife's estate.[78]

4. Tenants in Common

In *Torrez v. Brady*,[79] the same case as that discussed immediately above, the defendant also claimed that his possession of the land for a period of ten years subsequent to his wife's death and prior to the partition suit barred the plaintiff's action. Upon his wife's death, the defendant husband became a cotenant with the plaintiff heirs. The trial court again ruled adversely to the defendant, and this ruling was also upheld on appeal. The supreme court held that the defendant's possession was the possession of all the heirs at law of his wife's estate:

> In *Bradford v. Armijo*[80]. . . this court, in speaking upon the same subject, said: 'There is a strong presumption against every claim of a cotenant that he holds possession in opposition to the rights of his cotenants, and, in the absence of evidence to that effect, he will be pre-

77. 37 N.M. 105, 19 P.2d 183 (1932).

78. *Id.* at 109-10, 19 P.2d at 186.

79. 37 N.M. 105, 19 P.2d 183 (1932). See notes 77 and 78 *supra* and accompanying text.

80. 28 N.M. 288, 297, 210 Pac. 1070, 1074 (1922).

> sumed to hold for all of the cotenants. Every element of adverse possession must be shown. There must be express denial of the title and right to possession of the fellow cotenant, brought home in the latter openly and unequivocally.
>
> * * * *
>
> We are satisfied with the rule thus announced, and it is also generally held that the continued possession of the wife's land by her husband after the wife's death would not be considered adverse to her heirs at law until actual knowledge of the adverse claim was brought home to the heirs.[81]

In *Thurmond v. Espalin*,[82] the plaintiff brought suit to quiet title, claiming title by adverse possession. The controversy in this case arose as follows: Two brothers, Jose and Damacio Espalin, each held undivided one-half interests in the land in question. Damacio died, leaving as his heirs two sons, Damacio and Ramon, the defendants. Jose deeded his one-half interest to his wife, Matilda Espalin. On April 5, 1929, Matilda executed and delivered a styled quit-claim deed to the lands involved to Thurmond, the plaintiff, which deed was recorded April 6, 1929. This deed did not purport to convey merely Matilda's undivided one-half interest, but the entire premises. Thurmond immediately went into possession of the lands, fenced the lands theretofore unfenced, used the land for stock grazing, and in later years used a small portion for raising crops. He paid the taxes at all times. The trial court entered judgment for the plaintiff and this judgment was affirmed. Numerous issues, including "color of title," "claim of right," "good faith," etc. were raised in this case, and excerpts from it will appear later under these subjects. At present we are concerned only with what the court had to say with regard to adverse possession as among tenants in common. On appeal, the defendants asserted that the plaintiff's possession was for them as well as for himself and therefore was not hostile to them. In support of this argument, the defendants claimed that since Matilda Espalin had only a one-half undivided interest in the land, her deed to the plaintiff conveyed only that interest (although it purported to convey the fee), and the plaintiff, therefore, took the land as a cotenant with the defendants. The New Mexico Supreme Court rejected this contention as follows:[83]

81. Torrez v. Brady, 37 N.M. 105, 110-11, 19 P.2d 183, 186 (1932).
82. 50 N.M. 109, 171 P.2d 325 (1946).
83. *Id.* at 119, 171 P.2d at 331.

The act of the grantor . . . in assuming to convey to a stranger the entire title as if she owned it was a repudiation of the existing cotenancy. It has been held that the effect of such a conveyance is to terminate the cotenancy. *Jones v. Siler*[84]. . . .

Matilda W. Espalin did not convey an undivided one-half interest in the property, but, on the contrary, conveyed the entire premises. The acceptance of the deed by the grantee, his entry under it and his continued acts thereafter of ownership of, and dominion over, all of the land were likewise hostile to the rights of appellants. The conveyance by Matilda W. Espalin of the entire estate in the entirety was decisive of her purpose to appropriate the entire estate to her own use, and entry by Thurmond under the deed was equally evincive of his intention to claim the whole to the exclusion of the other cotenants of his grantor, if any, and upon the recording of the deed, this disseisin became complete.

According to the opinion in *Jones v. Siler*,[85]. . . Thurmond's possession and the recording of the deed delivered to him, gave appellants constructive notice of the hostile character of his claim. . . . 'The recording of the deed, without possession by the grantee, would not have given notice. This because of the general rule that one is not charged with notice by the registration of an instrument which is not in his chain of title. [Citation omitted.] But possession is equivalent of registration, in that it gives constructive notice of the possessor's rights. [Citation omitted.] Siler's possession pointed to the records for the information contained in his deed as to the source, nature, and extent of his claim. The function of the recorded deed here, to aid and explain the notice given by possession, is the same as that of the recorded deed in the ordinary case where title is claimed under the five-year statute of limitations. [Citations ommitted.]'[86]

In making use of the foregoing quotation, we do not mean to express an opinion as to whether under our registration laws, the recording of a deed has the limited effect stated in the Texas case. We say that our registration laws are at least as potent as claimed for the Texas statute as construed . . . .

And see also *Pickens v. Stout*[87]. . . where the proposition was discussed and the court had this to say on the question of notice: 'Every owner is deemed to be cognizant of what is done upon his land and of who is in possession of it. The law exacts this measure of diligence from him. He must know whether strangers are entering upon it, and, knowing that, must inquire by what right they do so. In every instance, such inquiry will presumptively lead to discovery of the

84. 129 Tex. 18, 100 S.W.2d 352 (1937).
85. *Ibid.*
86. Jones v. Siler, 129 Tex. 18, 100 S.W.2d 352, 355 (1937).
87. 67 W. Va. 422, 68 S.E. 354 (1910).

hostile claim. Hence the owner is bound to know, and is estopped from denying, all information to which such inquiry, prosecuted with reasonable diligence, would have led'[88]. . . .

B. Color of Title

Color of title is a well-recognized and reasonably well understood concept in connection with title by adverse possession but seldom is made a mandatory requirement. Even less frequently do statutes couple the color of title requirement with qualifications of "good faith" or "claim of right." In New Mexico, however, section 23-1-22[89] requires that adverse possession be "in good faith under color of title," and defines adverse possession as being an actual and visible appropriation of land commenced and continued "under a color of title and claim of right." The New Mexico Supreme Court holds that color of title is essential also to acquisition of legal title by adverse possession under section 23-1-21.[90] This section does require that actual possession be "under a conveyance . . . or other assurance *purporting* to convey an estate in fee simple."[91] Such conveyance "or other assurance" can only, perforce, pass color of title. If it were legal title, recourse to the statute of limitations would be unnecessary.[92] What will and will not serve as color of title in New Mexico appears from the following decisions.

In *Armijo v. Trujillo*,[93] the plaintiff brought action to recover certain land. The defendants, claiming that the plaintiff was barred by the statute of limitations, were successful in the trial court. The

88. Pickens v. Stout, 67 W. Va. 422, 432-33, 68 S.E. 354, 359 (1910).

89. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 68 *supra.*

90. N.M. Stat. Ann. § 23-1-21 (1953), set out in note 68 *supra.*

91. *Ibid.* (Emphasis added.)

92. See Ward v. Rodriquez, 43 N.M. 191, 194, 88 P.2d 277, 279, *cert. denied*, 307 U.S. 627 (1939). See also Burby, Real Property § 223 (2d ed. 1954):

> Color of title consists of a writing which, although inoperative as a conveyance, is believed by the occupant to constitute a valid conveyance. . . . [C]olor of title is essential even where not required by statute if the adverse claimant seeks to take advantage of the doctrine of constructive adverse possession.

See also 3 American Law of Property § 15.4 (Casner ed. 1952):

> As used in treating of adverse possession, 'color of title' is an instrument or a record which appears to convey title but which in fact does not have that effect. Regardless of the invalidity of title which is inherent in the term itself, it affords good evidence of the hostility of the possession of the grantee and may lessen the notoriety and frequency of his acts of ownership from what would otherwise be required to show title in him by adverse possession. In the few states whose statutes impose a requirement of color of title, a possession will not ripen into title without it.

93. 4 N.M. (Gild.) 57, 13 Pac. 92 (1887).

defendants claimed that they held the land under color of title, but they did not show any writing or conveyance which purported to grant the land to them. The supreme court reversed, saying:

> Color is not every pretense or claim of title, but consists in a writing or conveyance of some kind purporting to convey the land under which the claim of title is asserted. What constitutes color of title is a question of law for the court, and not of fact for the jury, except under proper instructions from the court. Color of title, strictly speaking, cannot rest in parol. There must be a document of some sort.[94]

In *Sandoval v. Perez*,[95] the plaintiff successfully recovered possession of land from the defendant. On appeal, the defendant, who set up the statute of limitations in bar to the plaintiff's claim, contended that a writing is not essential to show color of title. The supreme court, in affirming, rejected this contention, saying:[96]

> It is appellant's contention that a writing is not essential to color of title, and that actual adverse possession by virtue of which the occupant claims ownership is under color of title. The statute . . . requires the adverse possession to be under 'color of title'. . . . [T]he prevailing rule in the United States [is] as follows: 'By the weight of authority, some writing which purports to give title to the premises is essential to give title to an adverse occupant; and oral transactions, however effective they may be as between the parties, do not constitute color of title.'[97]

In *Garcia v. Pineda*,[98] the plaintiff sued in ejectment to recover certain land. The defendants set up title by adverse possession, and prevailed in the trial court. On appeal, the plaintiff contended that the defendants had not shown color of title, in that the defendants' color of title rested upon an 1871 conveyance,[99] in the Spanish lan-

94. *Id.* at 63, 13 Pac. at 94.

95. 26 N.M. 280, 191 Pac. 467 (1920).

96. *Id.* at 282, 191 Pac. at 467.

97. The "prevailing rule" was quoted by the New Mexico court from Annot., 2 A.L.R. 1453, 1457 (1919).

98. 33 N.M. 651, 275 Pac. 370 (1929).

99. The conveyance contained the following description, as translated:

> 'A small sod house composed of two small rooms and a small hallway, which have been erected upon the locality which corresponds with property of Antonio Silva, and which house I have sold together with the little courtyard [chorreras] as specified in this present document. First, on the south side a courtyard of ten varas; on the east seven and a half varas; on the north three varas; and west to the line which is the old public wagon road.'

Id. at 652, 275 Pac. at 370.

guage, which the plaintiff contended was too indefinite and uncertain to constitute color of title. The defendants' color of title was also supported by testimony tending to identify the land described in the conveyance. The supreme court, in affirming, held that the description was sufficient:

> It is contended that the . . . description is so indefinite and uncertain that the deed was not receivable as color of title, and that extrinsic evidence was not competent to identify the land. Counsel contends that an instrument to constitute color of title must contain a description sufficient to pass title . . . . We may admit, without deciding, the correctness of this rule. Still we must hold that the . . . description was sufficient to permit of identification of the land and the passing of title.[100]

In *Green v. Trumbull*,[101] the plaintiff brought suit to quiet title to certain land. Plaintiff sought to establish title by way of adverse possession, relying upon the unprobated will of his mother as constituting color of title. The will had been filed in the probate court and notice had been given of the time of hearing, but no order admitting the will to probate appeared in the record. The plaintiff was mentioned only in the residuary clause of the will,[102] which purported to devise the residue of the testatrix's estate, "wheresoever it may be found, and of whatsoever it may consist," to her children. The trial court refused to admit the will in evidence, and the supreme court upheld this ruling, saying:

> It is often held that parol evidence is permissible to apply but not to supply description. . . . The residuary clause contains no description of any particular tract. Taking the will alone, claim might be made to 30,000 acres of the Las Vegas land grant as well as to the 370 acres. There is nothing whatever in this clause of the will to identify the land as being that claimed by defendant. It is necessary to call for information not referred to in the will in order to identify the

100. *Id.* at 652, 275 Pac. at 370. See also Gutierrez v. Ortiz, 58 N.M. 187, 268 P.2d 979 (1954), which holds that a tax deed, even though void, may constitute "color of title" sufficient to support a claim of title by adverse possession.

101. 37 N.M. 604, 26 P.2d 1079 (1933).

102. The residuary clause of the will read as follows:

> All the residue of my estate, real, personal and mixed, wheresoever it may be found, and of whatsoever it may consist, I give and devise unto my children . . . [naming them] share and share alike, to hold to them and their heirs forever.'

Id. at 604, 26 P.2d at 1079.

> land it suit. There must be at least a descriptive word in the written instrument relied upon as color of title which furnishes the key to the identity.[103]

Turner v. Sanchez[104] was an action of ejectment in which the plaintiff's right to possession of the lands in dispute was that of a purchaser at a tax sale. At all material times, defendant was in actual, visible, and hostile possession of the lands involved, farming it under a warranty deed to him as grantee, dated August 20, 1942, executed by the Corporation of Mesilla. The plaintiff conceded the sufficiency of description in the deed, but contended that it did not furnish color of title, since it was not shown that the land granted by the deed was land held in common (*i.e.*, not allotted) by the Corporation of Mesilla. The plaintiff supported this contention by reference to an earlier New Mexico case[105] which held that the Corporation of Mesilla had no power of disposition over lands not held in common, and that a party claiming under a deed from the Corporation must show that the lands purported to be conveyed were part of the lands held in common. The trial court sustained the plaintiff's objection to the deed and refused to receive it in evidence. The supreme court reversed, saying that

> such a deed, notwithstanding its infirmities, may afford color of title sufficient to support a claim of adverse possession. It has been asserted that deeds which are defective because of want of title or of authority to convey in the grantor, may be 'color' of title. . . . Even void or voidable conveyances, or even fraudulent conveyances, will give 'color' of title.[106]

C. Color of Title in Constructive Adverse Possession

In addition to being a mandatory requirement for acquisition of title by adverse possession, color of title serves the same purposes in New Mexico that it does under the common law. It permits adverse title to be acquired to the entire described tract although only a portion thereof is actually occupied. This is the doctrine of constructive adverse possession. Of course, in New Mexico, the taxes must also be paid upon the entire tract. The doctrine of constructive adverse

103. *Id.* at 605-06, 26 P.2d at 1080.
104. 50 N.M. 15, 168 P.2d 96 (1946).
105. Williams v. Lusk, 28 N.M. 146, 207 Pac. 576 (1922).
106. Turner v. Sanchez, 50 N.M. 15, 19, 168 P.2d 96, 98 (1946).

possession will not apply, however, if the legal owner is in actual occupancy of another portion of the tract during the period of adverse possession.[107]

Quintana v. *Montoya*[108] was an action in ejectment for possession of a tract of land, the defendant-appellant relying upon title by adverse possession. A decision of the trial court for the plaintiff was reversed on appeal, the court saying:

> There is nothing in the record to show fraud or bad faith in obtaining the quiet title decree made in favor of appellant's husband in 1927, and the district court refused to find that there was bad faith in obtaining of this decree.
>
> The evidence shows that the appellant and her husband had possession of the property under the quiet title decree and paid taxes thereon for more than the ten-year statutory period to entitle the appellant to have title by adverse possession.
>
> We believe and hold that the quiet title decree of 1927 by which appellant's husband was decreed to be the owner of the property constitutes color of title.
>
> The appellee claims that the appellant was in actual possession of only a portion of the land and not all of the land in question. We believe that even if this be true the authorities generally hold that one who is in possession of land under color of title, holding under adverse possession, such person is constructively in possession of all of the land which is described in the instrument giving color of title.[109]

D. The Possession Must Be Adverse in Intent

Our "adverse possession" statute[110] provides that the claimant "shall have had adverse possession . . . *in good faith under color of title* for ten years . . .";[111] and, later, "adverse possession is defined to be an actual and visible appropriation of land, *commenced*

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107. Montoya v. Catron, 22 N.M. 570, 166 Pac. 909 (1917). See also Tiffany, Real Property § 752 (Tollman abr. ed. 1940):

> In the case of overlapping invalid conveyances the grantee who first takes actual possession of part of the land obtains constructive possession of the land covered by both conveyances, to the exclusion of any subsequent acquisition of merely constructive (as distinguished from actual) possession by the other.

108. 64 N.M. 464, 330 P.2d 549 (1958); see Annot., 71 A.L.R.2d 397 (1958).

109. *Id.* at 469, 330 P.2d at 552.

110. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 68 *supra*.

111. *Ibid.* (Emphasis added.)

and continued under a color of title and claim of right inconsistent with and hostile to the claim of another . . . ."[112]

Our "statute of limitation" statute[113] contains neither of the above-quoted requirements nor their equivalent.

> The essence of the adverseness which will give the necessary cause of action [to the legal owner] is a possession which is inconsistent with and hostile to the right of the true owner. Not only should the possession be open and notorious in order that by observation or report the owner has an opportunity to know of it, but the fact that the possession is hostile should also be open and notorious for the same reason. However, actions rather than express declarations of hostility are ordinarily sufficient to produce this result.[114]

1. "Claim of Right" as an Element of Hostility and Adverseness of Possession

The legislature which in 1858[115] used the qualifying words or phrases relative to hostility of claim and to intent in the use of color of title, seems to have been aping a point of view at that time popular with a good many courts.[116] These courts had inserted such seeming requirements of subjective intent of the adverse possessor by judicial edict even without the legislative use of such phrases.

What these courts did was to create confusion and controversy which has continued until this day. These courts seem to say that *A*, a landowner, cannot maintain an action to evict or eject a man who is in actual wrongful possession of *A*'s land without *A*'s consent unless such wrongful possessor proclaims that he is claiming the title to *A*'s land to be his own, and therefore claims the right to be upon *A*'s land. Where the owner has no cause of action, of course, the statute of limitations cannot begin to run.

It logically followed, as one old and otherwise forgotten case had it, that the unlawful possessor must continue to keep his banner flying—*i.e.*, to continue to proclaim his claim of title.[117]

Calmer and more logical courts began to say that these terms meant only that the *actions* of the occupant must show an intent to

112. *Ibid.* (Emphasis added.)

113. N.M. Stat. Ann. § 23-1-21 (1953), set out in note 68 *supra.*

114. 3 American Law of Property § 15.4(a) (Casner ed. 1952).

115. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 68 *supra.*

116. Rickard v. Williams, 20 U.S. (7 Wheat.) 59 (1822); Jackson, *ex dem.* Dunbar v. Todd, 2 Cai. R. 183 (N.Y. Sup. Ct. 1804); Ives v. Hulet, 12 Vt. 314 (1840); M'Call v. Neely, 3 Watts 69 (Pa. 1841).

117. Jasperson v. Scharnikow, 150 Fed. 571 (9th Cir. 1907).

appropriate and use the land as his own, or the same as if it were his own, to the exclusion of all others; and that such a use gave the owner a cause of action for the wrongdoer's eviction.[118]

And so today, the following statement should be true whether the terms "claim of title" or "claim of right" are judically proclaimed or set forth in a statute:

> The great majority of the cases establish convincingly that the alleged requirements of claim of title and of hostility of possession mean only that the possessor must use and enjoy the property continuously for the required period as the average owner would use it, without the consent of the true owner and therefore in actual hostility to him irrespective of the possessor's actual state of mind or intent.[119]

2. What "Good Faith" Means in Connection With Color of Title

The New Mexico Supreme Court seems to feel that good faith is a requirement distinct from "claim of right." Both phrases are touched upon in the case of *Thurmond v. Espalin*[120] which is set out in part below.

In *Thurmond*, the plaintiff sued to quiet title to a tract of land, claiming title by adverse possession. The defendants claimed a three-tenths interest in the land. The trial court found that the plaintiff, in 1929, obtained a quitclaim deed to the land, the grantor in which owned only an undivided one-half interest therein. However, the deed purported to convey the entire property, rather than merely the title or interest of the grantor. The trial court also found that the plaintiff had satisfied all the other requirements for adverse possession, citing them; and issued a decree quieting title in the plaintiff and declaring that the defendants had no right, title or interest in the land. The defendants appealed, contending that there was an absence of a showing of good faith by the plaintiff in the acquisition of his color of title, and also that the plaintiff did not assert a claim of right to the entire title to the land in good faith. The defendants conceded that a quitclaim deed which purports to convey the property itself, as distinguished from merely the interest or title of the grantor in it, is color of title so far as form is concerned. But the

118. Iowa R.R. Land Co. v. Blumer, 206 U.S. 482 (1907); Skipworth v. Martin, 50 Ark. 141, 6 S.W. 514 (1887); Roach v. Knappenberger, 172 Ark. 417, 288 S.W. 912 (1926). See also 3 American Law of Property § 15.4(b) n.42 (Casner ed. 1952).

119. 3 American Law of Property § 15.4(b) (Casner ed. 1952); *cf.* Walsh, *Title by Adverse Possession*, 16 N.Y.U.L. Rev. 532, 547 (1939). In the analogous field of prescription, see Restatement, Property § 458, comments c & d (1944).

120. 50 N.M. 109, 171 P.2d 325 (1946).

defendants argued that the color of title requirement was not satisfied because the plaintiff's grantor actually owned only an undivided interest, and that she did not *intend* by her deed to convey, nor did the plaintiff *intend* to acquire, the whole of the property. It was clear that if the plaintiff did not at first know of the existence of the undivided interests of the other co-owners, he learned of them soon after he received his deed. The supreme court affirmed the decree of the trial court, relying heavily upon various and sundry quotations from *Corpus Juris Secundum*. While probably a reading of the entire opinion is necessary for complete comprehension of the position of the court, an attempt is made hereafter to set forth the more conclusive statements.

> [I]f the color of title may serve to limit the boundaries of the plaintiff's claim, we see no reason why it may not also serve to limit or define the extent and nature of the claim with respect to the estate claimed.
>
> * * * *
>
> If the deed in question had expressly conveyed only an undivided one-half interest, we think it could not be doubted that it were not color of title to the interest not conveyed.[121]
>
> * * * *
>
> We do not hesitate to say that if the plaintiff's 'claim of right' was to only an undivided one-half interest in the land here involved and he acknowledged the claim of others to an undivided one-half interest therein, such a claim was not 'inconsistent with and hostile to the claim of the defendants,' and therefore such a claim would not support adverse possession of the entire estate in the lands unless the claim of others so recognized was repudiated and adverse possession was distinctly commenced and continued effectively against such erstwhile recognized claim.[122]
>
> * * * *
>
> We are now concerned with what constitutes good faith by one who invokes . . . [Section 23-1-22[123]] which requires broadly that adverse possession must be in good faith.
>
> * * * *
>
> 'Good faith in the creation or acquisition of color of title is freedom from a design to defraud the person having the better title, and the knowledge of an adverse claim to or lien upon the property does not,

121. *Id.* at 114, 171 P.2d at 328.
122. *Id.* at 115, 171 P.2d at 328.
123. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 68 *supra*.

> of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien.'[124]
>
> * * * *
>
> A further rule to guide our consideration is that: 'It is presumed that the color of title of one claiming by adverse possession was acquired in good faith, and that the parties so entered into and held possession. Bad faith is never presumed.'[125]
>
> Plaintiff had color of title fair on its face to the land described. . . . According to a finding of the court, the plaintiff immediately entered into possession of the land. We think these facts make out a prima facie case for plaintiff. . . . 'But knowledge of a defect in title is not of itself inconsistent with a bona fide claim of right. Where a claimant puts a deed upon record and enters into possession, his possession is presumptively referable to his deed. In such case, in so far as good faith is essential to his claim of right, it is presumed in his favor.'[126]
>
> * * * *
>
> We may not, as have some courts, ignore the element of good faith in adverse possession cases, because of the great difficulty of judicial investigation into the hidden motives of the entry or possession and all questions of good faith respecting the same. But these difficulties suggest the propriety of the requirement that where one relying upon adverse possession has satisfied all other elements of it, one who challenges the good faith of the occupant must clearly discharge the burden of overcoming the presumption of good faith which flows from the occupant's open, exclusive, continuous, uninterrupted, hostile possession with the payment of taxes for the statutory period.[127]

The position of our supreme court in *Thurmond v. Espalin* seems to be that while it cannot ignore completely the statutory requirements of "good faith" and "claim of right," it can take away most of their significance by looking first to see if all of the other elements for adverse possession have been satisfied. If so, then this creates a presumption of conformity to the requirements of good faith and claim of right. Such prima facie case will prevail unless the former

124. Thurmond v. Espalin, 50 N.M. 109, 115, 171 P.2d 325, 329 (1946). The language quoted by the court is from Third Nat. Exch. Bank v. Smith, 20 N.M. 264, 276, 148 Pac. 512, 516 (1915), *aff'd*, 244 U.S. 184 (1916).

125. Id. at 116-17, 171 P.2d at 330. The language quoted by the court is from 2 C.J.S. *Adverse Possession* § 219 (1936).

126. *Id.* at 117, 171 P.2d at 330. The Language quoted by the court is from 2 C.J.S. *Adverse Possession* § 170 n.72 (1936).

127. *Id.* at 119, 171 P.2d at 331.

owner clearly discharges the burden of overcoming such presumption.

In *Witherspoon v. Brummett*,[128] it was held that the adverse possessor had acquired in good faith color of title, consisting of an administrator's deed which was void on its face. Preceding the issuance of this deed, certain provisions of the statute for the sale of property by administrators were not followed. In *Apodaca v. Hernandez*,[129] it was held that the method employed by the adverse possessors to acquire their color of title—a quitclaim deed from the grantee under a tax deed to whom the adverse possessors had advanced the money to purchase the tax title as a straw man—was not in good faith, and so did not lay the foundation for the application of the statute of limitation. The two foregoing cases, taken together, indicate that "bad faith," if any, is to be found not in the relative appearance of validity of the instrument chosen for color of title, but in the methods used in the acquisition of such instrument.

E. Adverse Possession in Boundary Disputes

Boundary disputes between adjoining landowners are sometimes decided by application of the doctrine of acquiescence, sometimes under the "ancient fence" doctrine, and sometimes on principles of adverse possession.

> The notion that an actual claim of right must exist rather than a claim of wrong demonstrated by the possessor's open and notorious acts of ownership has disappeared for the most part in the great majority of states where boundary disputes are not involved . . . but the notion lives on in a considerable number of states in cases of boundary disputes in which one of the parties has been in open and notorious possession of the strip of land in dispute up to a fence, hedge, or other physical boundary, believing it to be the true line of division, but he admits, on cross-examination usually, that he intended to claim title only to the true line. . . . The weight of authority strongly supports the position that the mental attitude of the possessor is immaterial, and an actual open and notorious possession which is wrongful since it is without the consent of the owner is necessarily adverse and ripens into title in the usual way when the period of the statute has run.[130]

128. 50 N.M. 303, 176 P.2d 187 (1946).
129. 61 N.M. 449, 302 P.2d 177 (1956).
130. 3 American Law of Property § 15.5 (Casner ed. 1952).

The position of our supreme court with reference to the effect of mistake in boundary disputes seems, unfortunately, to be at odds with that taken with reference to the meaning of good faith in connection with color of title. In the *former* type of controversy, mental attitude of the alleged adverse possessor does seem to be taken into account, in accordance with what the American Law of Property states above to be the minority view.

In *Ward v. Rodriguez*,[131] the plaintiff, Ward, relying for title upon a tax deed, filed an action for ejectment against the defendants seeking determination of title to a disputed strip of land of some eleven acres lying between their two properties. This strip either belonged to and was a part of the property and eighty-acre tract claimed by the defendants or to the adjoining tract claimed by the plaintiff. The plaintiff claimed the land because it was included within the exterior boundaries, according to government survey and description, of the land granted by his tax deed. The defendants asserted title upon the ground that the original survey of the properties and especially the proper establishment of the north and south medial line of the two properties placed the disputed strip within the boundaries of their land; and, if not, that the strip had become theirs by virtue of their having acquired title thereto by adverse possession.

The trial court held for the plaintiff upon the following grounds: (1) by the original survey, as confirmed by resurveys, the strip was actually within the plaintiff's boundaries; and (2) the defendants had failed to show acquisition of the strip by adverse possession. On appeal, the supreme court upheld the trial court's finding that the strip actually lay within the original boundaries of the plaintiff's property. It also held that the defendant's patent formed color of title to its claim of title by adverse possession. Any issue as to payment of taxes was bypassed. This left only the question: whether one who locates a boundary fence, believing it to be on the true boundary line and intending to claim to such line, is in adverse possession to the fence when it turns out to be located beyond the true boundary line. The supreme court answered this question negatively:

> 'A few decisions hold, without qualification that one who, through misapprehension as to boundaries of his land, occupies and possesses

131. 43 N.M. 191, 88 P.2d 277 (1939).

land of another for the statutory period thereby acquires title by adverse possession. Nevertheless, according to the great weight of authority, when occupancy of the land is by a mere mistake and with no intention on the part of the occupant to claim as his own land which does not belong to him, but with the intention to claim only to the true line wherever it may be, the holding is not adverse.'[132]

It is apparent from the testimony of defendant . . . that he never fenced the land intending to claim beyond the true boundary. He said the lines were pointed out to him and he undertook to build the fence in question in line with the fences of his neighbors both to the north and the south. He was clearly trying to build on the true line and not to make an appropriation of the land of his neighbor. The fact that he now insists upon his old fence line being the true line under the original survey shows clearly that fixing the line as he did was under a mistake of fact as to the true lines, and did not grow out of any agreement, or acquiescence by or dispute with the adjoining owners. Defendants tried to place their fence on the true line and still maintain they have done so. The trial court properly found they had not done so.

So, the principle of acquiring title by adverse possession, or upon a theory of agreement, estoppel or acquiescence in such fixing of the boundary line, are all out.

Defendants thought their fence was upon the proper and true line. The record throws no light upon the attitude of any of plaintiff's predecessors in title, the adjoining owners, during any of the time, but we must assume, in the absence of proof, that they never understood that defendants were intending to claim beyond the true line. Title is not acquired in this way.[133]

F. *Payment of Taxes.*

The payment of taxes is not required as a prerequisite to acquisition of title under our "statute of limitations" section;[134] but is a requirement under the "adverse possession" statute.[135]

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132. *Id.* at 196-97, 88 P.2d at 281, quoting from 2 C.J. Adverse Possession §§ 242-43 (1915).

133. *Id.* at 197, 88 P.2d at 281.

134. N.M. Stat. Ann. § 23-1-21 (1953), set out in note 68 *supra.*

135. N.M. Stat. Ann. § 23-1-22 (1953). The language in which the requirement is stated is:

[A]nd Provided further in no case must 'adverse possession' be considered established with the meaning of the law, unless the party claiming adverse possession, his predecessors or grantors, have for the period mentioned in this

> Generally, payment of taxes is not a prerequisite to the acquisition of title by adverse possession. However, in some states, statutes provide that title cannot be acquired by adverse possession unless the claimant pays all taxes assessed against the land during the statutory period. These statutes have apparently been enacted for the benefit of the owner; by an examination of the tax record he can ascertain the fact that an adverse claim to his land is being asserted. But the adverse claimant can perfect his title if he pays taxes, even though the true owner also pays the taxes assessed against the land. To meet the requirement, the claimant must pay the taxes as they accrue. Eventual payment of taxes that have accrued in the past years is not a proper compliance.
>
> The payment of taxes, under some statutes, will invoke a shorter period of limitations. In any jurisdiction, the payment of taxes by an adverse claimant is evidence of a claim of title, and tends to fix the scope or extent of the claim. It is clear, however, that the payment of taxes alone will not be sufficient basis upon which to sustain the claim of title by adverse possession. Actual or constructive possession of the land for the statutory period is essential.[136]

In *Turner v. Sanchez*,[137] the plaintiff, a purchaser of land at a tax sale, brought an action to eject the defendant. The defendant had been in actual, visible, and hostile possession of the land, but not for the full prescriptive period. After the tax sale, the defendant had made offers to redeem the land, which would have been sufficient to defeat the plaintiff's title under the tax sale redemption statute[138] if the defendant had a "legal or equitable right"[139] in the property at the time he offered to redeem. The trial court found for the plaintiff, but the supreme court reversed, saying:

> It has been asserted, and we do not doubt, that one who has acquired title to land by adverse possession has a legal and/or equitable right in land sold for taxes sufficient upon which to predicate the right to redeem from a tax sale and we think the right also extends to one who may not yet have completed the prescriptive procedure, if he is in good faith on his way. Our law gives one the right to ac-

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section continuously paid all the taxes, state, county and municipal, which during that period have been assessed against the property.

This tax-paying requirement was first inserted in the statute by N.M. Laws 1899, ch. 53, § 2.

136. Burby, Real Property § 220 (2d ed. 1954).

137. 50 N.M. 15, 168 P.2d 96 (1946).

138. N.M. Stat. Ann. § 72-8-9 (Repl. 1961).

139. *Ibid.*

> quire title by adverse possession and this right is capable of protection by means of redemption from tax sale.[140]
>
> * * * *
>
> Now under our tax laws, a person has a right to acquire title to land by adverse possession. He must found his right, among other factors, upon color of title and possession and the payment of taxes. It would seem that since payment of taxes is a factor, it is no far cry to say that he has such an interest as will permit him to redeem from a tax sale, since paying the redemption money is in itself a species of payment of taxes. . . . And furthermore, the failure of one in possession of land under color of title to redeem would entitle the tax title holder to take possession of the land . . . which would interrupt and deprive the erstwhile possessor of an essential element in his quest to acquire title by adverse possession. The analogy is apparent. The holder of a tax sale certificate has an inchoate right only, so has the adverse claimant in possession of land a right inchoate, which if pursued and protected, may ripen into title.[141]

In *McGrail v. Fields*,[142] the plaintiff, McGrail, brought an action to quiet title. The defendant, Helen Fields, denied that the plaintiff had title to the property, and specially pleaded the ten-year statute of limitation. She claimed title through mesne conveyances from W. F. Roark. In 1929, C. L. Moore, a married man—his wife not joining in the conveyance—conveyed the property by warranty deed to Roark. It was the community property of Moore and his wife. Roark went into possession; on March 30, 1935, he and his wife conveyed to P. L. Hubby; and on October 23, 1945, Hubby and wife conveyed to the defendant. Mrs. Moore died, survived by her husband. He died, survived by W. L. Moore, son and sole heir-at-law, who quitclaimed the property on November 28, 1945, to the plaintiff.

Roark and then Hubby paid all taxes on the property when due, except on two occasions. The property was sold for taxes for the year 1936, but redemption was made therefrom by Roark. The property was also sold for taxes for the year 1942, but Hubby redeemed through an agent.

The trial court found, *inter alia*, that the adverse possessors had continuously paid all taxes on the land which were levied during the statutory period, and gave judgment for the defendant on her coun-

140. Turner v. Sanchez, 50 N.M. 15, 21, 168 P.2d 96, 99-100 (1946).
141. *Id.* at 22, 168 P.2d at 100.
142. 53 N.M. 158, 203 P.2d 1000 (1949).

terclaim to quiet title. The supreme court reversed and remanded with instructions to quiet title in the plaintiff:

> The plaintiff asserts that defendant did not 'continuously' pay all the taxes which during the period of claimed limitation had been levied upon the land in suit as required by the limitation statute. This contention is based upon the facts that the property was sold for the taxes of 1947 and again for the taxes of 1942, but was redeemed in each case by the defendant's predecessor in title or agent. The taxes were otherwise 'continuously' paid.
>
> The question is whether the redemption of property from a tax sale is payment of taxes.
>
> The weight of authority supports plaintiff's contention. . . . [Citations omitted.]
>
> The California courts in construing a statute [Cal. Code Civ. Proc. § 325] in language almost identical with ours, concluded that redemption from tax sales is 'payment of taxes' as the phrase is used in the California limitation statute. . . . [Citations omitted.]
>
> We come now to consider the New Mexico cases. [In several earlier opinions, the court had said that redemption from tax sale amounted to or was nothing more than "payment of taxes," but none of these decisions specifically, or even indirectly, involved a construction of the limitation statute.]
>
> * * * *
>
> Our holding in the New Mexico cases mentioned, is not a rule of property, because the specific question here discussed was not involved. We are constrained to follow the general rule. We therefore hold that a redemption of property from a tax sale is not 'payment of taxes' in the sense that phrase is used in our limitation statute here construed.[143]

G. *Disabilities.*

The two New Mexico statutes of limitation for the institution of an action by the legal owner contain identical disabilities clauses.[144]

143. *Id.* at 165-68, 203 P.2d at 1004-06.

144. N.M. Stat. Ann. §§ 23-1-21, -22 (1953). These disability provisions read: Provided, that if any person entitled to commence or prosecute such suit or action is or shall be, at the time the cause of action therefor first accrued, imprisoned, of unsound mind, or under the age of twenty-one . . . years, then the time for commencing such action shall in favor of such persons be extended so that they shall have one . . . year after the termination of such disability to commence such action; but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued and to no other.

Neher v. Armijo[145] appears to be the first decision in New Mexico in which the disability of a true owner of the land at the time of the inception of the adverse possession was raised to defeat the acquisition of title by adverse possession. The disability consisted of the infancy of two of the owners of interests in the property at that time. It was held that such infants had, respectively, three years from the time of reaching their majority within which to bring an action to recover possession of the property. The three year period later was reduced by statutory amendment to one year.[146]

In *Field v. Turner*,[147] the plaintiff brought an action to recover an undivided one-half interest in a half-section of land. Elvis Bullock and his wife, while the former was insane, conveyed the one-half interest to H. Field for its full value, on June 3, 1936, without the exercise of coercion or undue influence. Elvis continued insane until his death, which occurred on April 27, 1942. Field filed his deed for record and went into possession, and he and his heirs thereafter continued in adverse possession, timely paying all taxes. On May 2, 1950, the Field heirs filed suit to quiet title as against the Bullock heirs, and also as against one Turner who held an oil and gas lease on the property executed by the Bullock heirs. The Bullock heirs and a guardian *ad litem* for Deward Bullock, who had been insane at least since before the death of his father, Elvis, disaffirmed the deed from their father and mother to H. Field, tendered back the consideration, less rents and profits, and asked that they be allowed to recover the interest in the land which would have gone to them on the death of their father.

The trial court held that the claims of the defendant heirs were barred ten years after the delivery of the deed and the grantee's entry into possession of the property. The supreme court affirmed:

> The parties agree that the deed of an insane person is voidable and not void, but they disagree as to the applicable statute and when it started running, the appellants contending the ten-year statute [Section 23-1-22[148]] . . . governs and that it, except as to the insane appellant, started running on the death of the grantor. The

145. 9 N.M. 325, 54 Pac. 236 (1898).

146. N.M. Laws 1899, ch. 63, § 1 (amending § 23-1-21); N.M. Laws 1899, ch. 53, § 2 (amending § 23-1-22).

147. 56 N.M. 31, 239 P.2d 723 (1952).

148. N.M. Stat. Ann. § 23-1-22 (1953). The disability provisions of this statute are quoted in note 144 *supra*.

> guardian *ad litem* says as his ward was insane at the time of the death of his father, limitations never started running against him. The appellees contend the four-year statute [Section 23-1-4[149]] . . . controls, but if it be determined that the ten-year statute applies the claim was barred at the time of the filing of the cross-complaint for the reason limitation began to run at the time of the filing of the deed to Field for record and his entry into possession of the property, and that the insanity of Deward Bullock cannot be tacked to that of his father so as to suspend the operation of the ten-year statute.[150]

The supreme court, after an extended analysis of cases from Iowa and other jurisdictions, reached the following conclusions: *First*: The statute of limitations started running at the time of the delivery of the deed of June 3, 1936, and the entry into possession thereunder of the grantee, H. Field, regardless of the fact that Elvis Bullock was then insane. *Second*: If Elvis Bullock had recovered his sanity at any time during the period of ten years, then he would have had the right to bring an action within the ten-year period or within one year after recovering his sanity, whichever period would have given him the longer time. *Third*: If Elvis Bullock had continued alive and insane for a period longer than the ten-year period, and then had recovered his sanity, he would have had a period of one year in which to bring an action. *Fourth*: If Elvis Bullock had continued alive and insane for a period longer than the ten-year period, and then had died insane, his heirs would have had a period of one year after his death in which to bring an action. *Fifth*: Where, as here, Elvis Bullock died while insane within the ten-year period, and more than one year of that period remained to run, his heirs must bring their action within the ten-year period from the time of the entry of Field into possession. Here, when Elvis died, four years still remained of the ten-year period; consequently, there is no occasion to extend the running of the statute for the one-year period. *Sixth*: As the statute specifically says, the disability of Elvis must have been one which existed, as it did, at the time the adverse possession began. *Seventh*: As the statute also specifically provides, successive disabilities may not be tacked; therefore, the insanity of the heir, Deward, could not be tacked to that of his father, Elvis.

149. N.M. Stat. Ann. § 23-1-4 (1953).

150. Field v. Turner, 56 N.M. 31, 32, 239 P.2d 723, 724 (1952).

CONCLUSION

Since this article is expository rather than expostulatory, the usual form of conclusion is inappropriate. It is to be hoped, however, that if some future controversy permits, the Supreme Court of New Mexico will make perfectly clear its position on the problem of subjective versus objective intent. It is believed that a certain inconsistency exists as between the boundary dispute cases and the decisions as to claim of right or of title and good faith in the color of title cases.

The article does not purport to be complete either as to New Mexico citations or as to certain questions of minor import. An example is the matter of exemption of certain governmental agencies from disseisin because of the nonapplicability of statutes of limitations to their remedies.

It was at first suggested that most of the quotations from the courts' opinions should be relegated to the footnotes, in the customary fashion. But footnotes are seldom given as much attention as is afforded the text. It was desired that these quotations have a better chance to be read,[151] and so they have been placed in the text.

151. The writer had used the same method in a production on adverse possession for his property students, which served as the inspiration for this article.