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Property

Diane Fisher

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DIANE FISHER*

This section of the *Survey* briefly and summarily reviews developments in certain limited areas of New Mexico property law between April, 1979 and March, 1980. Cases and statutes dealing with community property and property tax issues are beyond the scope of this article and are omitted.

I. LEGISLATION

Legislation having a substantive impact on the law of property was not a hallmark of the 1980 legislative session. Of interest to practitioners, however, are House Bill 89,[1] which establishes certain rights, obligations, and limitations relating to eminent domain proceedings, and House Bill 57,[2] which creates a fund for the satisfaction of judgments obtained against state-licensed real estate brokers or salespersons. These two bills:

(1) Imposed a three-year statute of limitations on the filing of inverse condemnation suits against state agencies or political subdivisions;[3]

(2) established procedures designed to ensure good faith efforts to purchase on the part of condemnors by prohibiting the prosecution

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*Associate, Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico.

1. Ch. 20, 1980 N.M. Laws 53. Sections 1 and 2 of House Bill 89 amended N.M. Stat. Ann. § § 42-1-24, -40 (1978), respectively. Sections 3 through 16 of the bill are new enactments, codified as N.M. Stat. Ann. § § 42A-1-1 to -14 (1980); Section 17 amends N.M. Stat. Ann. § 62-1-4 (1978). Section 18 enacts a new statute, N.M. Stat. Ann. § 62-9-3.2 (Supp. 1980), while section 19 of the bill replaces N.M. Stat. Ann. § 62-9-4 (1978). Sections 20 and 21 of the bill amend N.M. Stat. Ann. § § 70-3-4, -5, respectively. Sections 22 and 23 contain provisions relating to severability and the effective date.

2. Real Estate Recovery Fund Act, N.M. Stat. Ann. § § 61-29-20 to -29 (Supp. 1980).

3. N.M. Stat. Ann. § § 42-1-24, -40(B) (Supp. 1980). This 3-year period of limitation applies to any suit brought under N.M. Stat. Ann. § 42-1-23 (1978). Prior to July 1, 1980, the effective date of House Bill 89, the only limitation defense available to most defendants in an inverse condemnation action was the defense of adverse possession, and "no other statute of limitation [was to] be applicable or pleaded as a defense." N.M. Stat. Ann. § 42-1-24 (1978). (The defense of adverse possession bars suit after 10 years if several requirements are met. N.M. Stat. Ann. § 37-1-22 (1978).) Municipalities, however, could avail themselves of the 3-year limitation period specified in N.M. Stat. Ann. § 37-1-24 (1978). Buresh v. City of Las Cruces, 81 N.M. 89, 463 P.2d 513 (1969). The legislature, by enacting the new limitations period, presumably intended to equalize treatment of all defendants. It is interesting that the shorter period was chosen.

of a condemnation action over a timely objection that such efforts had not been made;[4]

(3) enacted a new Chapter 42A of the New Mexico statutes which requires a condemnor and condemnee to exchange appraisals unless disclosure is prohibited by federal law,[5] and provides for the appointment of a three-member panel to conduct an independent appraisal at the request of the condemnee;[6]

(4) provided means by which a condemnor can obtain entry onto land located outside the boundaries of a municipality for the purpose of obtaining suitability studies relating to condemnation;[7]

(5) allowed for the condemnation of electric transmission line rights-of-way requiring widths in excess of 100 feet, subject to approval by the Public Service Commission;[8] and

4. N.M. Stat. Ann. §§ 42A-1-1 to -5 (1980). These sections apply to all condemnation actions brought pursuant to the laws of the State of New Mexico. *Id.* § 42A-1-14.

5. N.M. Stat. Ann. § 42A-1-2 (1980).

6. *Id.* § 42A-1-3. The three-member panel is comprised of one appraiser who is appointed by the condemnee, one who is appointed by the condemnor, and a third who is jointly selected by the party-appointed appraisers. A panel must be convened upon the request of a condemnee made within 25 days after written notice by the condemnor of its intent to file a condemnation action. *Id.* § 42A-1-3(A). While the appraisal tendered by the panel is not binding or conclusive, the condemnor may offer to acquire the property for an amount not less than that shown by the final common appraisal, or, if the panel has not agreed upon a common appraisal, for an amount not less than the value adopted by the appraiser appointed by the condemnor. *Id.* § 42A-1-3(E). An offer made pursuant to this section must be accepted or rejected within 15 days, *id.*, and presumably would be prima facie evidence of the good faith effort to purchase required by section 42A-1-4. Although section 42A-1-4 provides that substantial compliance with section 42A-1-1 (authorizing settlement) or section 42A-1-2 (requiring the exchange of appraisals) constitutes prima facie evidence of good faith, and fails to mention efforts made pursuant to section 42A-1-3, it seems clear that the drafters of the statute intended to include these efforts within the scope of section 42A-1-4.

While the evidentiary impact in a subsequent court action of an appraisal performed pursuant to section 42A-1-3 is not addressed in the statute, it would seem that as a practical matter, the value set by such an appraisal would be extremely difficult to overcome.

7. N.M. Stat. Ann. §§ 42A-1-6 to -14 (1980). Entry may be made pursuant either to written consent or court order. *Id.* § 42A-1-6. If a court order is sought, it will be granted unless good cause is shown by the respondent. *Id.* § 42A-1-7(B). Notice to the owner as well as to any person known to be in physical possession of the property is required. *Id.*

Entry may be conditioned on the deposit of an amount (or bond) sufficient to compensate the owner of the property for physical damage to the property or for substantial interference with its use and possession. *Id.* §§ 42A-1-8, -9. An action to recover such damages is authorized by section 42A-1-10. If the court finds in an action filed pursuant to that section that the condemnor entered the property unlawfully or failed without just cause to comply substantially with the terms of an order authorizing entry, the claimant is entitled to recover reasonable attorneys' fees incurred in the litigation. *Id.* § 42A-1-10(B).

8. N.M. Stat. Ann. §§ 62-1-4, -9-3.2 (Supp. 1980). This statute apparently was passed in response to El Paso Elec. Co. v. Real Estate Mart, Inc., 92 N.M. 581, 592 P.2d 181 (1979), which held that the prior 100-foot width limitation imposed by N.M. Stat. Ann. § 62-1-4 (1978) constituted a legislative determination that no easement of greater width could ever be "necessary." The court in that case further held that the statutory limitation could not

(6) established a state-administered "Real Estate Recovery Fund" for the payment of actual damages included in judgments obtained against real estate brokers or salespersons on the grounds of fraud, misrepresentation or deceit.[9]

The 1980 Legislature also passed the so-called Sagebrush Rebellion Act,[10] which purports to place under State control all public lands within New Mexico that are currently administered by the federal government.[11] The New Mexico Act is similar to acts passed by several other western states, and appears to be politically motivated.[12]

The status of the enforceability of due-on-sale clauses contained in real estate mortgages is still unresolved. An act passed in 1979 declared such clauses to be unenforceable if contained in a mortgage instrument or deed of trust securing an interest in residential property of no more than four units unless the security interest was substan-

be by-passed by the condemnation of two parallel and adjacent easements, each having a width of 100 feet.

9. N.M. Stat. Ann. § § 61-29-20 to -29 (Supp. 1980). The fund cannot be used to satisfy any judgment or portion thereof based on a cause of action arising prior to July 1, 1980. *Id.* § 61-29-23(A). The maximum amount of actual damages payable out of the fund for each transaction (regardless of the number of persons aggrieved) increases over the next three years, from $3,300 for the year following the effective date of the Act, July 1, 1980, to a maximum level of $10,000, achieved in the third year after the effective date. A court in its discretion may award up to an additional $1,000 per transaction as compensation for attorneys' fees and court costs. *Id.*

The fund itself is administered by the Real Estate Commission, N.M. Stat. Ann. § 61-29-21 (Supp. 1980), and recovery proceedings are initiated by the filing of a verified petition in the court where the judgment was entered. *Id.* § 61-29-23(A). The court is required to hold a hearing on the matter within 30 days after service of the petition on the Commission. *Id.* § 61-29-23(L). In order to obtain recovery from the fund, the petitioner must show *inter alia,* that he has made reasonable efforts to secure payment of the judgment from assets of the judgment debtor and that such efforts have proved successful. *Id.* § 61-29-23 (L)(1)-(5).

10. N.M. Stat. Ann. § § 19-15-1 to -10 (Supp. 1980).

11. N.M. Stat. Ann. § 19-15-1(B) (Supp. 1980) defines public lands as

> [A]ll lands within the exterior boundaries of this state except lands:
> (1) to which title is held by any natural person, corporation, company, partnership, firm, association, society or any other private entity;
> (2) which are owned or held in trust by this state or any political subdivision of this state, including leased school or university land;
> (3) which are located within and meet the standards and purposes of congressionally authorized national parks, monuments, national forests and wildlife refuges and such other lands acquired by purchase, gift or eminent domain consented to by the legislature;
> (4) which are controlled by the United States department of defense, department of energy or bureau of reclamation and which were acquired by consent of the legislature and which meet the standards and purposes for which control was authorized; or
> (5) which are held in trust for Indian purposes or which are Indian reservations.

12. The Attorney General for the State of New Mexico has declined to join other states in an action to declare the various "Sagebrush Rebellion" acts valid.

tially impaired.[13] A Santa Fe District Court has recently upheld the validity of the Act[14] while a second action has been remanded by the United States District Court for the District of New Mexico to state court for lack of jurisdiction.[15]

II. CASE LAW

A. Condemnation.

The condemnation cases decided during the *Survey* year presented a variety of issues, including the power of a condemnor to condemn a state-held real estate contract and the right of a foreign utility to exercise the power of eminent domain. In *Hobbs Municipal School District No. 16 v. Knowles Development Co.*,[16] the New Mexico Supreme Court affirmed a Lea County District Court judgment in holding that a school district has power to condemn a portion of a tract of land held under a contract of purchase from the state. The court thus resolved questions left unanswered by its decision in *City of Carlsbad v. Ballard*,[17] in which the court had declined to address the issue of whether a portion of land held under contract with the state could be condemned.

In *Hobbs*, as in *Ballard*, the condemnor argued that because the interest sought to be condemned was an interest in a real estate contract, the condemnor should be entitled to condemn the entire interest in the contract even though it could show a present need for only a portion of the land covered by the contract. The court in *Hobbs* reaffirmed *Ballard* in rejecting this argument, noting that the nature of the interest sought to be condemned could not reasonably affect or enlarge the scope of the condemnor's authority.

Hobbs raised a more interesting question, however. Assuming that a condemnor could condemn no more land than necessary, could any land be condemned if the land shown to be reasonably necessary for public use was only a portion of a larger tract held under contract

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13. N.M. Stat. Ann. § § 48-7-11 to -14 (Supp. 1980). The act applies to any provision which permits

> (1) an acceleration of the payment of an indebtedness due in the event of a transfer of all or any part of the mortgagor's interest to another party by any means . . . ; or (2) an increase in the rate of interest on the indebtedness in the event of a transfer of all or any part of the mortgagor's interest to another party by any means. . . .

N.M. Stat. ann. § 48-7-12 (Supp. 1980).

14. Bingaman v. Southwest Sav. & Loan Ass'n, No. 80-659 (Santa Fe Dist. Ct., N.M., filed _____, 1980).

15. Bingaman v. Southwest Sav. & Loan Ass'n, No. 80-0294 (D.N.M., filed _____, 1980). The order of the court remanding this case is currently on appeal to the Tenth Circuit.

16. 94 N.M. 3, 606 P.2d 541 (1980).

17. 71 N.M. 397, 378 P.2d 814 (1963).

from the state. The problem arose from the decision in *Zinn v. Hampson,*[18] in which the court held that the state had no authority to issue a patent for less than the entire amount of land represented by a real estate contract held by the state.[19]

In *Hobbs,* the purchasers noted that the condemnor could forefeit its rights to the condemned land if the purchasers defaulted on their remaining interest. They argued, under the rationale employed in *Zinn,* that the contract from the state was not severable, and that acquiring land which would be subject to forfeiture by acts of third parties would not be in the public interest.[20] The court, however, rejected this argument, holding that a purchaser's interest in a real estate contract is an interest which is subject to condemnation regardless of the status of the seller. The court declined to address problems which might arise upon the purchasers' subsequent default of any remaining interest in the contract.

The court in *Hobbs* also declined to address the School District's argument that condemnation was authorized not only on a showing of present need but also on proof that a public need for the land would occur in the reasonably foreseeable future. The court found substantial evidence to support a finding that the School District had failed to prove such future need.

In another condemnation action,[21] the court held that a foreign utility could exercise the power of eminent domain in New Mexico, being entitled to the same rights and privileges as a domestic utility. The court in *El Paso Electric Co. v. Real Estate Mart, Inc.* further held that the utility could not by-pass an express statutory 100-foot width limitation imposed on the condemnation of rights-of-way[22] by condemning two parallel and adjacent easements, each one having a width of 100 feet. The effect of this ruling, however, has been ameliorated by a 1980 legislative amendment allowing for the condemnation of easements wider than 100 feet on a showing of public convenience and necessity.[23]

B. Contracts and Financing.

During the *Survey* year, the courts decided several cases involving property contracts and financing which are of practical importance

18. 61 N.M. 407, 301 P.2d 518 (1956).

19. The reasoning of the court was that until the entire contract was paid off, the state was obligated to protect its interest by retaining title to the entire tract as security. 61 N.M. at 410, 301 P.2d at 520-21.

20. 94 N.M. at ____, 606 P.2d at 542.

21. El Paso Elec. Co. v. Real Estate Mart Inc., 92 N.M. 581, 592 P.2d 181 (1979).

22. N.M. Stat. Ann. § 62-1-4 (1978).

23. N.M. Stat. Ann. § § 62-1-4, -9-3.2 (Supp. 1980).

to the bar. In addition to holding that a judgment lien cannot attach to a vendor's interest in a real estate contract,[24] the courts generally reemphasized their reluctance to enforce forfeitures in transactions involving real property.[25]

In *Marks v. City of Tucumcari,*[26] the supreme court held that the interest of a vendor in an executory contract for the sale of realty was not subject to a judgment lien. Reaffirming the status of the doctrine of equitable conversion in New Mexico,[27] the court held that, because a vendor's interest in a real estate contract is personalty rather than realty, no lien could attach to such an interest under a statute providing that a properly filed judgment "shall be a lien on the real estate of a judgment debtor."[28] In so holding, the court disavowed language to the contrary appearing in *Mutual Building and Loan Ass'n of Las Cruces v. Collins.*[29]

With respect to forfeitures, in *Comer v. Hargrave,*[30] the New Mexico Supreme Court held that a provision in a note allowing for a 30-day grace period was applicable to a mortgage securing the note, despite the fact that the morgage itself contained no such provision.[31] The court further held that an escrow agent's refusal to accept a tender prior to notice of acceleration constituted a waiver of the vendor's right to exercise an optional acceleration clause.[32] The court

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24. Marks v. City of Tucumcari, 93 N.M. 4, 595 P.2d 1199 (1979).

25. Comer v. Hargrave, 93 N.M. 170, 598 P.2d 213 (1979); Hale v. Whitlock, 92 N.M. 657, 593 P.2d 754 (1979).

26. 93 N.M. 4, 595 P.2d 1199 (1979).

27. The doctrine of equitable conversion provides that on execution of a real estate contract, equitable title to the property sold passes to the vendee, the vendor retaining bare legal title. The vendee's interest in the contract is then classified as realty and the vendor's interest as personalty.

28. N.M. Stat. Ann. § 39-1-6 (1978).

29. 85 N.M. 706, 516 P.2d 677 (1973). Although *Collins* had dealt with the question of whether a judgment lien could attach to a vendee's interest in a contract, the court in that case had declared that "both legal and equitable interests in real estate are subject to judgment liens." 85 N.M. at 707, 516 P.2d at 678. *Collins* was overruled by *Marks* insofar as the language used in *Collins* purported to subject the interest of a vendor to a judgment lien.

The holding in *Marks* does not affect the advisability of filing a judgment for record. If, for instance, the judgment debtor has a vendor's interest in a real estate contract, should the vendee default, the vendor's interest would revert to realty and be subject to the judgment lien.

30. 93 N.M. 170, 598 P.2d 213 (1979).

31. This case applies the general holding of Samples v. Robinson, 58 N.M. 701, 275 P.2d 185 (1954), that a note and mortgage executed simultaneously in the same transaction should be construed together, but that the note would control if there were any conflict between the two.

32. In so holding, the court relied on Carmichael v. Rice, 49 N.M. 114, 158 P.2d 290, 159 A.L.R. 1072 (1945). Although *Carmichael* expressly refused to require actual notice of acceleration before the filing of a foreclosure suit, some language in *Comer* may indicate that such notice is now a condition precedent to the filing of suit.

also approved, in *Hale v. Whitlock,*[33] a trial court's discretionary grant of what was, in effect, an equitable period of redemption to vendees found to be in default under a real estate contract.[34]

Of particular note to representatives of purchasers at foreclosure sales, and mortgagees and mortgagors alike, is the case of *United States v. Hargrove,*[35] decided by the United States District Court for the District of New Mexico.[36] In that case, the court held that the statutory right to redeem after a foreclosure sale could not be waived by a mortgagor without some affirmative knowledge.[37] Holding that proof of a voluntary and knowing waiver on the part of a mortgagor would be required, the court indicated that the signing of a standard form mortgage containing an inconspicuous waiver clause may not constitute a valid waiver of redemption rights,[38] and so held under the facts in *Hargrove.*[39]

C. Deeds and Conveyances.

The appellate cases dealing with deeds and conveyances were un-

33. 92 N.M. 657, 595 P.2d 754 (1979).

34. Unlike Eiferle v. Toppino, 90 N.M. 469, 565 P.2d 340 (1977), in which the court declined to find a default in order to avoid enforcing a forfeiture clause, the court in *Hale* found the vendees in that case to be in default under the contract and ordered the escrow documents delivered to the vendor's assignee. The lower court further found that:

> As a matter of law, this contract has been breached by the Plaintiffs . . . and the option rests with the Defendants to either declare the entire amount due under this contract due and owing at this present time or at his option terminate the contract and retain all sums heretofore received by him as rental to this date as provided in clausing [sic] of the contract.

Transcript of Record at 31-32, Hale v. Whitlock, 92 N.M. 657, 593 P.2d 754 (1979). The court, however, allowed the plaintiffs an additional 15 days after judgment within which to pay off the entire contract balance. Because the supreme court's decision in *Hale* merely approved the lower court's use of equitable powers based on the facts of that case, its value lies not in the establishment of any rule of law but rather in its use as an example to other lower courts which might be persuaded to allow vendees additional time within which to perform their obligations under a contract.

35. 19 N.M. St. B. Bull. 832 (Oct. 19, 1979).

36. 494 F. Supp. 22 (D.N.M. 1979).

37. 19 N.M. St. B. Bull. at 833.

38. In light of the court's decisions in *Hargrave,* it would be wise for attorneys, at a minimum, to point out explicitly and to explain any waiver clause contained in a mortgage and require the mortgagor to initial the same. Providing a "conspicuous" waiver clause would also afford the parties some protection.

39. The court stated that

> [The waiver] clause was hidden among the many in the mortgage instrument and was not specifically pointed out to the defendant at the time he signed the document. The defendant was not represented by counsel, nor did he have any bargaining position or leverage at the time the transaction was consumated. For equitable reasons, if not others, the court will not find a knowing and voluntary waiver of the defendant's redemption rights. While such rights might not rise to the constitutional level, they are significant enough that they cannot be waived without some affirmative knowledge on the defendant's part.

494 F. Supp. at 24.

remarkable for the most part. In two cases dealing with deed descriptions,[40] the supreme court reaffirmed its approval of the rule that if a description in a deed describes a monument as a border, the description is presumed to include the land to the center line of the monument. The court indicated that it would look skeptically at a summary judgment on the issue, noting that whether the presumption prevails "depends upon the intention of the parties to the deed, to be ascertained from its language, viewed in light of the surrounding circumstances."[41]

In another case involving deeds,[42] the New Mexico Court of Appeals, citing *Martinez v. Archuleta,*[43] reiterated the principle that legal delivery of a deed requires a present intent on the part of the grantor to divest himself of title.[44] The presence or absence of this intention may be "established from words and actions at time of delivery, or it may be inferred from the circumstances preceding, attending, and subsequent to the execution of the deed."[45]

With respect to conveyances, New Mexico finally joined a majority of other states[46] in abolishing the rule of destructability by merger of contingent remainders.[47] For a detailed analysis of *Abo Petroleum Corp. v. Amstutz,*[48] the reader is referred to a recent note published in the New Mexico Law Review.[49]

D. Recording Statutes.

In the only case[50] involving recording statutes decided during the *Survey* year, the supreme court held that the recording act[51] protects an innocent purchaser from the effect of a community property

40. State Highway Dep't v. Hidalgo Area Dev. Corp., 94 N.M. 63, 607 P.2d 601 (1980); Parr v. Worley, 93 N.M. 229, 599 P.2d 382 (1979).

41. State Highway Dep't v. Hidalgo Area Dev. Corp., 94 N.M. at ____, 607 P.2d at 602; Parr v. Worley, 93 N.M. at 230, 599 P.2d at 383.

42. Den-Gar Enterprises v. Romero, 94 N.M. 425, 611 P.2d 1119 (Ct. App.), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1980). This case is also referenced in the text accompanying note 75 *infra.*

43. 64 N.M. 196, 326 P.2d 1082 (1958).

44. Mere physical delivery of a deed without such intent does not constitute legal delivery and is not effective to pass title. *Id.*

45. Den-Gar Enterprises v. Romero, 94 N.M. at ____, 611 P.2d at 1123 (emphasis deleted) (quoting Waters v. Blocksom, 57 N.M. 368, 370, 258 P.2d 1135, 1136 (1953)).

46. States which apparently preserve the rule are Florida, Oregon, Pennsylvania, and Tennessee. L. Simes & A. Smith, The Law of Future Interests § 209 (2d ed. 1956); 10 N.M. L. Rev. 471, 474 nn. 22-25 (1980).

47. Abo Petroleum Corp. v. Amstutz, 93 N.M. 332, 600 P.2d 278 (1979).

48. *Id.*

49. 10 N.M.L. Rev. 471 (1980).

50. Jeffers v. Martinez, 93 N.M. 508, 601 P.2d 1204 (1979).

51. N.M. Stat. Ann. § § 14-9-1 to -9 (1978).

statute holding void any contract to convey community property which is signed by only one spouse.[52] *Jeffers v. Martinez*[53] concerned a real estate contract executed in 1978 between Betty Martinez as seller and Rodney and Victoria Jeffers as purchasers. Martinez' husband was not a party to the contract, although Martinez was married at the time the contract was executed. The property, however, had been owned by Martinez prior to her marriage, and the Jefferes testified that they had been assured that the property had remained her sole and separate estate.[54]

When Martinez failed to fulfill her obligations under the contract, the purchasers sued for specific performance. The district court, apparently relying on a 1977 unrecorded deed which transferred title to the real estate from Martinez to Mr. and Ms. Martinez, as husband and wife, entered summary judgment in favor of Martinez on the ground that a conveyance of community real estate by one spouse alone is void under section 40-3-13 of the New Mexico statutes. The supreme court reversed, noting that, since the deed was unrecorded, "[a]ny conflict between Sections 40-3-13 [the community property statute] and 14-9-3 [the recording act] should be resolved in favor of the latter statute which protects the rights of innocent purchasers for value without notice of unrecorded instruments."[55]

Although the result in *Jeffers* seems equitable, the court's reasoning is awkward. The court consistently has held that section 40-3-13 renders a contract or conveyance executed in violation of that statute "unenforceable, void and of no effect."[56] The court in *Jeffers*, in fact, reaffirms this position. In order to avoid the effect of the statute the court, having assumed that the 1977 deed was valid, held that the question of whether the real estate was community property so as to come within the purview of section 40-3-13 depended on whether the purchasers had notice of the deed.

If the Jeffers are found to be innocent purchasers for value without

52. N.M. Stat. Ann. § 40-3-13(A) (1978). This statute provides that "spouses must join in all transfers, conveyances or mortgages or contracts to transfer, convey or mortgage any interest in community real property." The supreme court in Hannah v. Tennant, 92 N.M. 444, 589 P.2d 1035 (1979), interpreted this language to require the actual signatures of both husband and wife. Intent to join the conveyance or contract was held to be insufficient.

53. 93 N.M. 508, 601 P.2d 1204 (1979).

54. *Id.*

55. *Id.* at 510, 601 P.2d at 1206.

56. Hannah v. Tennant, 92 N.M. 444, 446, 589 P.2d 1035, 1037 (1979). *See* Marquez v. Marquez, 85 N.M. 470, 513 P.2d 713 (1973); Pickett v. Miller, 76 N.M. 105, 412 P.2d 400 (1966); Mounsey v. Stahl, 62 N.M. 135, 306 P.2d 259 (1957). *Marquez, Pickett,* and *Mounsey* all were decided under a former law which affected any "transfer or conveyance" of community property but which did not specifically refer to contracts. N.M. Stat. Ann. § 57-4-3 (1953) (repealed 1973).

> notice *then the real estate was not at any material time community property as to the innocent purchaser for value.* . . . Before the law relating to sale and conveyance of community property may be made applicable to Jeffers in the real estate transaction before us, the trial court must first resolve as a question of fact that the Jeffers were not innocent purchasers for value or that they had prior knowledge or notice of the unrecorded deed from Ms. Martinez to Mr. and Ms. Martinez as husband and wife.[57]

The question thus posed by the supreme court is "when is community property not community property"? Since the purpose of section 40-3-13 is to protect the interest of a non-signing spouse, it seems illogical to condition the application of that section on the knowledge of third parties.[58]

E. Easements.

The supreme court, in *Martinez v. Martinez*,[59] held that a grant including the "right of ingress and egress" was sufficient to create an express easement in favor of a grantee over adjoining lands. The court found the words "ingress and egress" to denote not only access to land but also passage over another's land to obtain this access. The parties in *Martinez* had acquired the lands in question through a bequest from their father, who devised his estate to his 12 children as tenants in common. The heirs exchanged deeds severing the tenancy and creating individual ownership in 12 tracts. Each deed provided for "rights of ingress and egress." Although the deed to appellant did not identify a servient estate, the court held that, since appellee's land was the only land adjoining that of appellant, the easement necessarily crossed appellee's property.

In addition, in *Dutton v. Slayton*,[60] the court expressly held for the first time that an easement in favor of the public could be created by prescription over private land.[61] The court in *Dutton* reversed a

57. 93 N.M. at 510, 601 P.2d at 1206 (emphasis added).

58. In fact, it appears that the Court in *Jeffers* could have arrived at the desired result without addressing the rights of innocent purchasers *vis-a-vis* section 40-3-13. The court clearly could have expressed its holding in terms of estoppel, as that theory appears to be the basis of its decision. Additionally, sufficient facts appear in the record to raise an issue regarding the validity of the 1977 deed, and the lower court's summary judgment could have been reversed on that ground. Even if specific performance were denied, the purchasers in this case presumably still would be entitled to maintain an action for fraud based on the Martinez' representations respecting the status of the property.

59. 93 N.M. 673, 604 P.2d 366 (1979).

60. 92 N.M. 668, 593 P.2d 1071 (1979).

61. Although the court used the case of Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864 (1946), as authority for the proposition that prescriptive easements in favor of the public could be established, the court in *Lovelace* specifically had declined to consider the question of whether a public road over private land could be created by prescriptive use.

summary judgment based on a statutory definition of "public road"[62] which the court found to be nonexclusive. The decision in *Dutton* is consistent with the general rule.[63]

F. Covenants.

Both the court of appeals and the supreme court reiterated the principle that restrictive covenants are to be construed in favor of the free use of property. Beyond this, the precedential value of the decided cases is limited by their facts to interesting reading. For instance, in *Heath v. Parker,*[64] the supreme court held that, under the particular circumstances of that case, appellants' mobile home was sufficiently permanent to escape a restriction in their deed prohibiting the use of a trailer. Similarly, the court of appeals in *Hyder v. Brenton,*[65] found that a provision in a deed restricting the size and use of any building on the property operated as a limitation on the construction of any dwelling, but did not impose an affirmative obligation on the grantee to build a home. The court held that the grantee's use of the land for formal gardens did not violate the restriction.

G. Actions.

During the year the supreme court resolved the question of whether counterclaims could be raised in actions to quiet title. Although under the New Mexico Rules of Civil Procedure the answer to this question would seem to be obvious,[66] the court previously had held in *Clark v. Primus*[67] and *Jackson v. Harley*[68] that "counterclaims are not within the purview of the quiet title statute."[69] Since the court had also ruled that a counterclaim to quiet title could be raised in an action, such as ejectment, not brought under the quiet title statute,[70] these decisions created an untenable situation. As one

62. N.M. Stat. Ann. § 67-2-1 (1978).

63. *See generally* 2 G. Thompson, Real Property § 342 (Repl. 1980).

64. 93 N.M. 680, 604 P.2d 818 (1979).

65. 93 N.M. 378, 600 P.2d 830 (Ct. App. 1979).

66. The very purpose of Rule 13, which governs the assertion of counterclaims, is to promote the "consolidation and the expeditious resolution (where that is fair) of all the claims between the parties in one proceeding." Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 140, 597 P.2d 745, 750 (1979) (quoting Scott v. United States, 354 F.2d 292, 300 (Ct. Cl. 1965) with respect to identical portions of Rule 13 of the Federal Rules of Civil Procedure).

67. 62 N.M. 259, 308 P.2d 584.

68. 90 N.M. 428, 564 P.2d 992 (1977).

69. Clark v. Primus, 62 N.M. at 263, 308 P.2d at 586.

70. Bailey v. Barranca, 83 N.M. 90, 488 P.2d 725 (1971); Martinez v. Mundy, 61 N.M. 87, 295 P.2d 209 (1956).

commentator noted, "[w]hether or not two actions, one of which involves a suit to quiet title, can be determined in a single proceeding in New Mexico may depend upon the wholly coincidental factor of which party first commences litigation."[71]

When faced with a similar question in *Ortega, Snead, Dixon & Hanna v. Gennitti,*[72] therefore, the supreme court took the opportunity to overrule *Clark* and its progeny. Noting that no "justification [was] set forth for the principle announced" in those decisions,[73] the court held that counterclaims and cross-claims properly could be asserted in an action to quiet title, subject only to the limitations of Rules 1, 13, 20(b) and 32 of the Rules of Civil Procedure.[74]

In other proceedings, the appellate courts held that attorneys' fees and other costs of a quiet title suit are appropriate items of damages in an action for slander of title.[75] Because fees and costs are special damages, however, they must be pleaded specifically as well as proved.[76] In addition, the court of appeals set forth the elements of a claim for slander of title as follows: (1) The willful and malicious recording or publication (2) without privilege (3) of a matter which is untrue and disparaging to another's property rights in land, (4) as would lead a reasonable man to foresee that the conduct of a third purchaser might be determined thereby, and (5) special damages.[77]

Finally, the court of appeals, in *McClure v. Town of Mesilla,*[78] held

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71. Walden, *The 'New Rules' in New Mexico,* 25 F.R.D. 107, 121 (1960).

72. 93 N.M. 135, 597 P.2d 745 (1979).

73. *Id.* at 139, 597 P.2d at 749.

74. Since *Ortega* raised the question of whether counterclaims and cross-claims to quiet title could be asserted in a mortgage for foreclosure action, the case could have been decided under Martinez v. Mundy, 61 N.M. 87, 295 P.2d 209 (1956), without the necessity of overruling *Clark.* As Justice Payne observed, however, under the facts of *Ortega,* any decision other than the one made would have produced a particularly incongruous result:

> [N.M. Stat. Ann. § 42-6-1 (1978)] provides that a claim to quiet title may be brought by a mortgage holder in an action to foreclose a mortgage. The statute contemplates the trial of both a foreclosure action and a quiet title claim in a single proceeding. It would be logically inconsistent to hold that it is permissible to try both claims in one proceeding if both are asserted by the plaintiff, but it is not permissible to join them in one case if one is asserted by the plaintiff and the other arises in a defendant's counter-claim or cross-claim.

93 N.M. at 140, 597 P.2d at 750.

75. Den-Gar Enterprises v. Romero, 94 N.M. 425, 611 P.2d 1119 (Ct. App.), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1980).

76. Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App.), *cert. denied,* 94 N.M. 628, 614 P.2d 545 (1980); Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d 788 (1966).

77. Den-Gar Enterprises v. Romero, 94 N.M. at ____, 611 P.2d at 1124. Although malice and special damages previously had been recognized in New Mexico as essential elements of a claim for slander of title, Garver v. Public Serv. Co., 77 N.M. 262, 421 P.2d (1966); City of Hobbs v. Chesport, Ltd., 76 N.M. 609, 417 P.2d 210 (1966), prior to *Den-Gar,* no New Mexico case had set forth the remaining substantive elements of the tort.

78. 93 N.M. 447, 601 P.2d 80 (Ct. App. 1979).

that an inverse condemnation action for damages would lie against a municipality under a claim alleging the negligent installation of drainpipe. The plaintiff in *McClure* had alleged a common law tort against the municipality. Although the court found that immunity for such a tort had not been waived by the Tort Claims Act,[79] the court rejected the town's argument that the Act constituted plaintiff's exclusive remedy. The Act, it was held, grants immunity based on traditional tort concepts of duty and standard of care. Since an action for inverse condemnation is a statutory remedy,[80] the court found that the Tort Claims Act was inapplicable to such an action.

79. N.M. Stat. Ann. § § 41-4-1 to -25 (1978).
80. N.M. Stat. Ann. § 42-1-13 (1978).