Law of the New Mexico Land Grant

W. A. Keleher
A paper on the land grant law of New Mexico suggests a venture into a field that might be termed "legal archaeology." The impress of the laws and customs of three distinct peoples is upon New Mexico land grants: Spain, Mexico and the United States.

Spain having acquired from the Indians dominion over the lands now contained within the boundaries of Arizona, New Mexico, Colorado, California, Nevada, Utah and Wyoming, enactment of laws and promulgation of royal decrees soon followed.

Under the Spanish rule Indians were acknowledged to be the owners of the lands they actually possessed and cultivated. Mexico recognized the same right. However, on February 23, 1781, a Spanish decree was issued prohibiting Indians from selling their lands, which remained in force until February 24, 1821, when Mexico achieved independence and Indians became Mexican citizens. The laws of Spain attempted to do justice to Indians in land matters; and as late as September 1, 1867, Benito Juarez, president of Mexico, issued a decree designed to protect the Indians in their rights of ownership in land.

Spain's rule tottered, and the Mexican Empire for a brief year or two ruled in 1821 and 1822 over the lands in which we are interested. Then came the first Mexican Republic in 1823, and the Mexican government carried the burden of land grants forward until the Mexican Occupation in 1846, followed by the treaty of Guadalupe Hidalgo on February 2, 1848, which marks the beginning of the

1. Paper read at a joint meeting of the Texas Bar Association and the New Mexico Bar Association, at Amarillo, Texas, on July 5, 1929.
American dominion over the lands ceded by Mexico to the United States. On December 30, 1853, by a treaty called the Gasden purchase, by which the United States acquired certain lands south of the Gila River, disputes over land growing out of the treaty of Guadalupe Hidalgo were finally adjusted.

Properly, a paper on this subject could and would include a discussion of a number of interesting collateral propositions. We shall be obliged, however, to limit ourselves to a consideration of the law of the land grant insofar as it pertains to New Mexico, and to refer only briefly to a few of the outstanding features of the subject. The Indians, the original owners, who held title by possession, may be entirely eliminated from the discussion. Apparently they were not interested in the business of land grants; and, judging by the experience of the Spanish and Mexican grantees, the Indians exhibited wisdom in not seeking grants, assuming that the ruling governments had been willing to grant land to them. The Indians had, and still have, lands which they were permitted to retain by Spain, Mexico and the United States. The rights of the Indians to the lands they actually occupy, and their rights to additional lands, have been the subject of endless litigation, and investigation by Congress. The New Mexico Indian land question is one that must be mentioned only and then dismissed, as it occupies a field all its own.

Land grant litigation in New Mexico has concerned itself with treaties; with documents purporting to support titles to grants; with conditions annexed to grants; with questions of inheritance; with the law of evidence as to boundaries; with the rule as to proof of foreign laws, usages and customs; with ejectment, partition, statutes of limitation; with the powers of the congress of the United States; and the powers of courts of private land claims and other related legal questions.

In order to understand fully the law of the New Mexico
land grant to-day, it is necessary to go back to Spanish rule, to the decrees, proclamations and instructions of Ferdinand V of June 18 and August 9, 1513; Emperor Charles V, June 26, 1523, and May 19, 1525; and Philip II; May 25, 1596. In those decrees, proclamations and instructions, set forth in a compilation known as "Laws of the Indies," is contained the authority to confer land grants. In the fourth book, the twelfth title, is recited in great detail the manner of distribution of pueblo lands. Power is granted in these words: "In order that our vassals may be encouraged to make discoveries and settlements in the Indies . . . it is our will that lands be partitioned and distributed to all those who shall go to settle new lands in towns and places which shall be assigned to them by the governor of the new settlement . . . and these grants may be extended and improved in a measure corresponding to the services that each grantee shall render, so as to stimulate them in the tilling of the land and rearing of cattle."

The viceroys of Spain were authorized to give lands and house lots to those who went to settle; and it was provided that the apportionment of lands should be made with the advice of the city or town council; and that the councilmen should be preferred; that the apportionment of the lands should be made with the assistance of the attorney of the place; and without damage or prejudice to the Indians.

Apparently the rulers of Spain were under a misapprehension as to the possibilities for colonizing the new world, but nevertheless the laws, decrees and instructions were in existence, to be followed by the viceroy, and they were followed, with the result that after four centuries the land titles of the Southwest are still tinged with the impress of king and emperor. Whether the viceroy had absolute power to grant lands without confirmation by the crown has long been debated. The wording of his powers seemed to indicate that he did have final and absolute power
to vest title in the name of the sovereign. The question of confiscation is interesting, but cannot be discussed here other than to say that in all probability the Spanish King reserved the power to revoke or confiscate a grant, and to that extent a grant could never become absolute. The power that granted, could likewise destroy.

The turbulent history and final fate of the Spanish crown cannot be traced here; neither may mention be made of the many and varied decrees, proclamations and amendments made to Spanish law. The same thing may be said of the history of the Mexican empire and republic and of the various laws and regulations pertaining to the granting of land. There an inviting field awaits further study and investigation, made all the easier by the painstaking labors of Gustavus Schmidt, author of "The Civil Law of Spain and Mexico," published in New Orleans in 1851; of Frederic Hall, of San Francisco, publisher of "The Laws of Mexico," in 1885; of J. Alexander Forbes, author of "Mexican Titles in the States and Territories," published in San Francisco in 1891; and of Matthew G. Reynolds, author of "Spanish and Mexican Land Laws," published in St. Louis in 1895.

After the treaty of Guadalupe Hidalgo, the United States government was confronted with a land grant problem, or, it would be more accurate to say, a series of problems. At the outset our government learned that there had been three distinct types of land grant; those made to settlements, those of small size claimed by individuals, and those of large size granted to individuals for the purpose of encouraging habitation of a fixed area of territory.

To refer to Blackstone in a discussion on land grants as understood by the Spanish and Mexican governments is irrelevant, but it may be said that in the bestowal of grants in Spanish and Mexican possessions there was similarity to the English livery of seisin, known to the common law.

The English method was for the sovereign or his rep-
resentative actually to go upon the land and exert dominion over it, by breaking a twig from a tree, or throwing earth into the air, thus vesting title in the grantee. The Spaniards, and later the Mexicans, had a similar idea, possession being delivered personally, by a representative of the ruling power, with ceremony, accompanied at the same time or later by delivery of a written document explaining in detail the method of delivery of the grant, its boundaries, and the reasons prompting the generosity of the ruling power. The thought behind the so-called English livery of seisin and the delivery of possession of land customary to Spanish and Mexican rulers was that there could be no valid vesting of title to real estate unless there was a personal, manual delivery and investiture. The ancient Romans were much further advanced in this direction than the English or other nationals, having plainly in their jurisprudence the idea of actual, legal delivery of a thing, or a conveyance of title, whether it be land or personal property, by an instrument in writing at a distance from the land, or without manual delivery of the article, title and possession of which it was intended to transfer. There is no doubt but that under the laws of Mexico transfers of real estate could be made by verbal contract. This proposition in fact has never been controverted by the Supreme Court of New Mexico. Grant V. Jaramillo, 6 N. M. 315. The statute of frauds was unknown to the civil laws which were in force at the time of the acquisition of the territory now known as New Mexico. Real estate could be sold in the same manner as personal property.

Documents supporting land grants made by Spanish sovereigns or those under their authority are replete with flowery words and embellishing adjectives. There is, to mention one of many, the decree of royal possession for the Alameda Grant, partly in what is now Bernalillo county, New Mexico, reciting that on the 27th day of the month of January in the year 1710, Captain Martin Hurtado, chief
alcalde and war captain of the town of San Felipe de Albuquerque and the jurisdiction thereof, pursuant to authority granted him did "in the name of his Majesty (may God preserve him) observing the customary ceremonies, and designating boundaries, placing landmarks, and the boundaries are, on the north a ruin of an old pueblo, which of two there are, is the more distant one from said Alameda Tract, and on the south a small hill, which is the boundary of Luis Garcia; on the east the Rio del Norte, and on the west prairies and hills for entrances and exits."

The decree of royal possession for Alameda Grant, dated January 27, 1710, was followed by actual delivery of the grant, identified as Exhibit "B" to the decree, reciting that on May 16, 1748, some thirty-eight years later, giving to the inhabitants of the grant a patron saint, Saint Anthony of Sandia. The document continues, "the people cried aloud, threw stones, pulled up weeds, and in a loud voice exclaimed 'Long Live the King Our Sovereign' », continuing after a most minute description of the ceremonies, "and they heard the royal possession given in the name of His Majesty; which is a sufficient title to them now and forever to prevent interference at any time and against any person or persons who may trespass within the boundaries set forth and of which they are in possession."

The influence of the Spanish custom of bestowing a grant is plainly seen in the Mexican custom of delivery of land. For instance there is the Dominguez Fernandez Grant, referred to in Catron v. Laughlin, 11 N. M. 621, wherein it appears that the actual delivery of the grant was made by the Mexican officials in much the same manner that grants had been made before that time by representatives of the Spanish government. The date was August 21, 1827, and the alcalde "pulled up grass, scattered handfuls of earth, broke off branches from trees, and the people from great joy and satisfaction, uttered expressions saying, 'Long live our actual president, Don Guada-
lupe Victoria, long live the Mexican Nation." The point of law decided in Catron v. Laughlin was that the action of congress in confirming a claim for land under a grant made by Mexico was to be treated as an adjudication, the courts being powerless to revise what had been done by congress. This is still good law.

From the foregoing it appears that it was customary to obtain a so-called degree of royal possession, followed by actual possession. Reading of the documents discloses almost invariably that surveying was not recognized as one of the fine arts. Land measurements were as wide as the prairies and as far away as a river or mountain. Inadequate descriptions proved to be one of the principal contentions involved in land grant litigation after the American occupation. At the end of the Mexican war and under the treaty of Guadalupe Hidalgo, claimants to various grants had been assured of protection of titles by the United States. Land grant problems would have been comparatively simple had there existed proper supporting documents and correct surveys. Boundary lines were indefinite and uncertain. Documents were unsatisfactory. Forgery and the fabrication of documents proved a fine art in connection with claims made before the Court of Private Land Claims in New Mexico, established by Act of Congress on March 3, 1891.

Before the establishment of the Court of Private Land Claims in New Mexico, the United States Surveyor-General for New Mexico, an office created in 1854, recommended to Congress confirmation of a number of land grant claims. The Congress of the United States confirmed some thirty-six New Mexico grants during the years 1858 to 1860, including the famous Carlos Beaubien and Guadalupe Miranda Grant, later known as the Maxwell land grant, consisting of 1,470,000 acres, the grant having been made by Governor Armijo of New Mexico on January 11, 1841.
Confirmation of land grants by the legislative branch of the government proved unsatisfactory, largely for reasons which cannot enter into this discussion; and the creation of the Court of Private Land Claims for New Mexico, Colorado and Arizona, followed. The court consisted of five judges empowered to pass upon the merits of petitions asking confirmation of lands with titles fully and regularly derived from Spain and Mexico, appeals being allowed to the Supreme Court of the United States. The Court of Private Land Claims heard 301 petitions, involving 34,653,340 acres of land, finishing its work June 30, 1904, at Santa Fe, New Mexico. Two-thirds of the petitions presented were entirely rejected. Seventy-five claims were finally allowed in effect quit-claiming to petitioners any right the United States had in 1,934,986 acres of land.

Intricate questions of fact, and complicated questions of law, involved in the litigation concerning the Spanish and Mexican land grants have challenged the best efforts of New Mexico's ablest lawyers and judges for more than sixty years.

The Supreme Court of New Mexico has decided a number of fundamentals in connection with land grants. There are few, if any, new questions that might be the subject of litigation, insofar as the grants themselves may be concerned. However, there are numerous questions involving the rights of individuals which must be settled eventually in the courts of last resort. Lawyers will be necessary assistants in connection with the determination of such questions. Consequently it will not be inappropriate for the members of the New Mexico and West Texas Bar Associations to be somewhat familiar with the general principles of land grant law. While the things that are discussed here are of peculiar interest to New Mexico lawyers at the present time, they will be of future interest to lawyers of Texas and Oklahoma. Prospecting for oil will sooner or later begin on land grants in an important way.
Members of the Texas and Oklahoma bars will be engaged to pass on the validity or invalidity of land grant titles.

There is no claim that the land grant as such is peculiar to New Mexico. There are Spanish and Mexican land grant lands in a number of the western states, and there are Spanish grants in Florida and Louisiana. The City of San Francisco, within a Pueblo land grant, was the subject of considerable litigation before titles were finally perfected. In New Mexico it is of the utmost importance to have definitely settled by court decrees whether a land grant is a so-called pueblo, or town grant, or a private or individual grant. Much important litigation has resulted from disputes in this direction.

A prospective purchaser of a mining lease some months ago, being advised that there was doubt as to whether a grant was a town grant or a grant to individuals, proved his resourcefulness by employing two old time land grant lawyers, neither being aware that the other had been employed. The same documents and title papers were submitted to each of them, and opinions were obtained, with the result that one reached the conclusion that the grant was a pueblo grant, and the other, on the same state of facts, and with the same law available, rendered an opinion that the grant was a grant to individuals. The prospective purchaser closed the deal by obtaining a lease from the board of trustees of the grant, and at the same time required the signatures of all known, available individuals who might have an interest in the grant in the event it was proved eventually to be an individual grant, with the inevitable co-tenancy to be considered.

Land grant litigation is not now as prolific or as profitable as it was twenty-five and thirty years ago. The lawyer of the old school in New Mexico ordinarily had one or more complicated land grant cases in his office upon which he worked in his spare time. Claimants of interests in a grant were ordinarily without money. Frequently the
lawyer was obliged to accept his fee either after the sale, in the event of a partition, or in acreage, at the conclusion of the litigation. Some of the cases dragged along for years, in apparently interminable litigation, with a great many defendants, many pleadings, reports of referees and special masters without end. It is quite certain that in nearly every case the lawyers earned their money, and were nearly always obliged to have professional assistance from surveyors, archive-searchers, genealogical experts,—eventually establishing some of the facts by ancient witnesses, in the manner indicated by Greenleaf on Evidence, or otherwise, as their consciences dictated.

The participation of the lawyer in land grant affairs, both before and after the legal work had been completed in connection with confirmation by the Congress of the United States, and by the Court of Private Land Claims, was inevitable, because of the open question as to whether or not valid title had been derived from Spain or Mexico; because of the uncertainty of boundaries, and finally because of the manner in which many of the confirmations were made.

Lawyers called upon to assert the claims of clients found that in some instances there were hundreds of heirs of the original grantee, if the grant had been to an individual, and determination of heirship in most instances would be of no value unless there could be a partition. Ordinarily, partition of the land in kind would be of no avail and not satisfactory to those finally determined to be lawful heirs of a given grantee. A sale of the grant after partition was the practical remedy. There followed a period in New Mexico legal annals, roughly speaking from 1891 to 1910, in which the lawyers of the then territory engaged extensively in land grant litigation. There were many suits in the district courts, and a number of them were appealed to the supreme court. Some of the suits, because of the small value of the land, inability of heirs to finance
litigation, vexatious legal questions, and discouraged and disheartened counsel, were abandoned. As a result, there are to-day in New Mexico some parcels of land, unclaimed, to all practical purposes, and known as “lost land grants.”

“The lost land grant” in New Mexico has a counterpart in ghost land grants, of which the so-called Royuela and Beales Grant is an interesting example. The title to all the farming lands in Quay County, New Mexico, is overshadowed by this ghostly grant, which has haunted abstracters, lawyers and loan companies in that particular county since November 17, 1916. On that date there were filed a number of instruments purporting to convey title to practically all of the public domain in Quay county, among them being a purported certified copy of a petition signed by Jose Manuel Royuela, asking the establishment of a land grant; and warranty deeds in a chain of title purporting to convey approximately one million acres of land. Apparently there never was a grant. At most there was a designation of land in 1832 which might have become a grant had there been a confirmation by the proper Mexican authorities. This so-called grant was litigated in the case of Interstate Land Company v. Maxwell Land Grant Co., 41 Fed. 275, and on appeal to the supreme court of the United States as reported in 139 U. S. 569. The opinions in the United States Courts, and one in the lower court by Mr. Justice Brewer, and the one in the supreme court by Mr. Justice Lamar, are of interest, demonstrating that certain factors are essential in the fundamentals of a Spanish or Mexican land grant and that without them there is no grant. The lands claimed to have been granted to Royuela and Beales became public domain of the United States and thousands of acres have been homesteaded. The ghost of the grant throws a cloud over the title, but there is absolutely no question but that the grant is and was void; and that the real owners of the land have a fee simple title that is marketable; and that they
LAND GRANT LAW

will never be subjected to serious interference. However, the ghost of this particular grant still haunts the land, because as late as a few months ago an unsuccessful effort was made to have the New York Title and Mortgage Co. issue a policy of title insurance on the so-called Beales property for one million dollars.

Along with the lost land grant and the ghost land grant, there is what might well be called "nobody's land grant." Consider, for example, the Cebolleta de La Joya land grant, situate partly in Socorro and partly in adjoining counties of New Mexico, a tract in excess of 29,000 acres, the subject of much litigation, and for the last several years in process of being sold for non-payment of taxes. The board of county commissioners of Socorro county entered into a contract on June 18, 1929, with Reuben M. Ellerd, of Tulsa, Okla., to sell this grant for $42,367.00, the amount of a tax judgment. This grant, originally to individuals, is now owned by hundreds of descendants of the original grantees. In the famous case historized in the one immortal novel of the law, "Ten Thousand a Year," the lawyers and litigants remembered nothing of the facts in the case excepting the amount of the court costs. In connection with the La Joya land grant, it appears that almost everyone has forgotten about everything connected with the grant excepting the taxes.

The war with Mexico was declared by resolution of the Congress of the United States, May 13, 1846. The treaty between the United States and Mexico was signed at Guadalupe Hidalgo, Mexico, on February 2, 1848, under which and subsequent protocols, 234,000,000 acres of land were ceded to our country. Prior to May 13, 1846, the Mexican government had granted certain lands to Mexican nationals who were qualified to receive the lands granted, and in the treaty, the United States agreed to protect all Mexican nations in their rights inviolate.

Under our law, that is the law of the United States,
and the law of Mexico, the record is the grant, and the grant is the title. Briefly, if there is no record, there is no grant; and if there is no grant, there is no title. Title fails, and under the decisions of the United States Supreme Court, such lands become public domain and are held by the federal government in trust for the people of the United States. In numerous decisions the Supreme Court of the United States has held that title under a Mexican Grant cannot be held valid without evidence of the compliance with requirements of the Mexican law in effect at the time the grant was made. Written evidence of the forms required by the Mexican law must be found in the archives and records where they were required to be deposited and recorded. Inability to produce such proof by actual introduction of the documents themselves or by certified and authenticated copies, developed the rule that title may be supported by secondary evidence, one requirement being that positive proof must be produced that the title papers were deposited or recorded as required by law in the proper office in Mexico.

The first reported case in New Mexico involving a land grant is that of Pino v. Hatch, 1 N. M. 125, decided at the January term, 1855, the majority opinion being written by Judge Benedict. This was a suit in ejectment, involving the right to possession of a large tract of land in San Miguel County, New Mexico, and was in the nature of test litigation. The court held in that case that the political chief of the province of New Mexico, under the government of Mexico, after the separation from Spain, had no power, without express authority from the Mexican government to grant away any part of the public domain, but held further that papers purporting to show the existence of such a grant, although not sufficient to pass absolute title, should be admitted in evidence as against one having no better right, to show the time and mode of gaining possession, from which title by adverse possession might be established.
There is a dissenting opinion in that case by Judge Broc­chus, in which he took the position that the court should recognize the grant of a political chief of New Mexico, apparently on the theory that it might be presumed that he was acting with the authority and by consent of the re­public of Mexico. The particular grant involved was made by one Bartolomé Baca, as political chief pro tem. of the province of New Mexico, on December 23, 1823. It will be recalled that the United States acknowledged the in­dependence of Mexico, achieved from Spain in 1821, up to which time the royal order of the king, by virtue of his prerogative, was absolute in all things; and in the Pino case it was pointed out by our court that title to all lands pre­viously held by Spain, was lodged after 1821 in the re­public of México. Judge Benedict contended in his opinion, and a majority of the court agreed, that neither a political chief nor a provincial governor, could divest the sovereignty of the soil unless expressly authorized by the new power to do so, or his acts should be subsequently sanctioned by the political authority. There have been numerous other cases on land grant questions, but to cite them here or discuss them would be burdensome to those not particularly inter­ested in local decisions.

As the result of disagreements over management of the land grants in New Mexico, considerable statute law has been enacted, management of community grants being left to boards of trustees, with varying powers, there being re­flected in each statute providing for the control of a parti­cular grant, the wishes and desires of the people occupying the grant, or their chosen political and business leaders. In 1907 some order was developed out of the chaos as to manage­ment by the enactment of what amounts to a land grant code. Briefly, this code provides that all grants of land in New Mexico made by the government of Spain or by the government of Mexico, to any community, town or pueblo, shall be managed by a board of trustees elected by ballot,
at which all persons residing within the limits of the grant who have lived thereon for a period of five years prior to the election; and are otherwise qualified to vote at state elections, shall be eligible to cast a ballot. Those grants which were not made or confirmed by Congress or the court of private land claims to community, town, colony or pueblo, are by exclusion eliminated from such government. Private land grants, therefore, are not subject to the so-called grant code, but are subject to the same laws, with one or two exceptions, as any other real estate holdings. The question of importance therefore is to identify the kind of a grant and to have an effectual and final declaration that a grant is either a community or a private grant.

The sale or encumbrance of community land grants is made difficult by a statute enacted in 1913, which provides that no sale, mortgage or other alienation of the common lands within a grant shall take effect unless authorized by a resolution duly adopted by the grant board of trustees, and ratified, and until after approval of such resolution by the district judge of the district within which the grant or a portion thereof is situate. Has the court the power to veto a sale, or is the power of the court merely ministerial, a formal ratification? Can the courts lawfully be vested with such power, in the case of an individual grant, without having all owners of the grant properly served and before the court? These are questions that must some day be answered.

For a number of grants there is special legislation. The case of the Las Vegas Grant is of considerable interest because of the great value of the land belonging to the grant and the large sums of money available for investment. This particular grant was confirmed by an act of Congress June 21, 1860, to the town of Las Vegas, and differs from other grant governments in that the district court of San Miguel County is vested with jurisdiction to manage, control
and administer the grant, with authority to appoint not less than three nor more than five persons from among residents upon the land, actually to administer the affairs of the grant, but with full control in the court "over the acts and doings of the board of trustees, that courts of equity exercise over receivers appointed by them and over the acts and doings of their receivers," considerable power being thus vested in the court.

After a land grant had been confirmed by act of Congress or by the court of private land claims, the United States ordinarily issued a patent as evidence of title; and the very wording of the patent provoked discussion and resulted in litigation: If confirmation was to a town, pueblo or community, complications frequently arose over boundaries; and if the patent issued to the individual grantee or grantees, or his or their heirs, because in nearly every instance the original owners were dead, the difficulties that confronted attorneys were many and varied.

Apparently there was nothing in the civil law of Spain or Mexico equivalent to joint tenancy with the right of survivorship as shown to the English common law. The original grantees under a grant took an estate quite similar to a tenancy in common. That early day attorneys recognized the situation is indicated by the adoption in 1852; by the first New Mexico territorial legislature, of an act which is now Section 4762 of the 1915 Code, which reads:

"All interest in any real estate, either granted or bequeathed to two or more persons, other than executors or trustees, shall be held in common unless it be clearly expressed in said grant or bequest that it shall be held by both parties."

Time does not permit a discussion as to the power of the legislature to enact such a statute as the foregoing, but it may be said that it is the settled law generally that the legislature may destroy the survivorship in joint ten-
ancies, as it is a mere contingency destructible by either joint tenant. 12 C. J. Constitutional Law, sec. 497; Note 10 (a). The weight of authority appears to be that "statutes changing existing joint tenancies into tenancies in common are valid; as operating merely to render the estates more beneficial, and in like manner, a statute making joint heirs tenants in common may embrace estates existing at its passage." Consequently there is small doubt as to the validity of our section 4762.

These statements are preliminary to a reference to the doctrine that each tenant in common is equally entitled to the use, benefit and possession of the common property, and may exercise acts of ownership in regard thereto. Right to possession extends to every part of the property; and a tenant in common is entitled to possession of the common property as against all the world save his co-tenant and entitled to his share of the rents, issues and profits. A brief consideration of some phases of the rights of co-tenants is set forth in Bradford v. Armijo, 28 N. M. 288, in which litigation there was involved the title to the Agua Salada Land Grant, granted on July 20, 1769, confirmed by the Court of Private Land Claims on August 23, 1893, patent from the United States November 15, 1909, which grant was confirmed unto "the heirs, legal representatives and assigns of Luis Jaramillo," and opened the gate to litigation still pending in the courts.

The question of the kind of a right of ownership, undefined under Spanish or Mexican law, that a claimant may be entitled to under the law known to the Anglo-Saxon system of jurisprudence, when such claimant is an owner of a fractional interest in a land grant not only prompted the passage of the ownership in common statute of 1852 referred to in the foregoing, but also prompted the passage of the statutes previously referred to vesting power in boards of trustees to manage grants, and under conditions specified, with the final approval of the court, to alienate
the land. Time does not permit an extended discussion of the various acts, of the powers conferred upon the trustees of the grant boards, and of the rights of the claimants of the interests in the grant, but it may be said in a general way that, as to some of the laws enacted by the legislature of New Mexico, vesting in a board of trustees power to govern a land grant originally made to individuals, now owned by many individuals, there does not seem to be a single right of a tenant in common, as ordinarily understood in the general law, which is not violated by the provisions of such acts.

It seems plain that the power of the board to sell, mortgage, encumber, partition and otherwise alienate, offends against the prohibition against depriving persons of their property without due process of law, as contained in the 5th and 14th amendments of the federal constitution, and Section 18, Article 2 of the statute constitution.

Taxes have been a staggering burden for all of the land grants in New Mexico with the exception of possibly five or six. Taxation of land as we understand it in our law was a vague thing in Spanish and Mexican law. The community or individual obtaining a grant was ordinarily exempt from taxation on the real estate for a number of years, and perhaps forever. This explains in part why efforts were made by the early settlers and settlements to obtain large grants of land. After the American occupation and introduction of taxation of real estate for production of revenue, the land grant, instead of an asset, became in many instances a liability. The grants were burdened with taxes. Lacking confirmation by act of Congress or by a court of private land claims, the rights of owners or apparent owners were doubtful; the issuance of patents by our government for individual grants resulted in litigation because the rights were vested in a hundred, perhaps a thousand or more heirs of the original grantee. The individual grantee, owning perhaps a thousandth part of the whole, or less, declined,
or was unable, to pay his proportionate share of the taxes levied against the grant as an entirety. As a result of the grants being unproductive and unwieldy for partition purposes, the owners have been unable, in many instances, to pay the taxes, even to this date; and the grants continue to fail to bear their burden in this direction. Prospective buyers of land grants, confused by the complications in which a grant found itself, dubious as to whether or not the grant could be extricated with safety so as to make possible a good and merchantable title as understood in most states, declined to make investments. It is the belief of writer that it would have been more fortunate for the now State of New Mexico, if when the treaty of Guadalupe Hidalgo had been signed, the United States had taken possession of all the grants, declared them public domain, and duly compensated the owners at the then fair value. Spanish and Mexican land grants, it appears to me, have been a curse to New Mexico, reaping little profit and reward to those intended to be rewarded, and retarding in great measure the orderly development of the resources of the state. This is said with full appreciation of the bravery and fortitude of the first colonizers and their noble attempts to found settlements and develop the land.

Sufficient time is not available to discuss here the New Mexico method of partition and sale of grants, but it is sufficient to say that the methods followed are not essentially different from those in other states, there being no necessity for the application in a partition suit of Spanish or Mexican law as to the method, but only as to the rights of the parties to the cause.

A curious situation exists on a number of land grants in New Mexico which will eventually give rise to litigation of importance, and that is with reference to the mineral rights. Spain and Mexico, in bestowing a grant, in many instances bestowed the land without reference to the minerals or other valuables under the soil. In the treaty of
Guadalupe Hidalgo, the United States promised protection to nationals in such rights as they had at a specified time. The nationals of Mexico in a certain type of grant not having acquired a right in the minerals under their grants, such rights became vested in the United States. The United States owning those rights, apparently, have no right to issue a permit for mineral exploration to a stranger to the title, because the federal government has no right on the land itself. The patent from the United States to a land grant owner ordinarily reserves in the government of the United States "the rights to prospect for gold, copper, cinnabar and lead." The question is, has the government retained the rights to the oil, if any, that may be found, and eventually will be found, in some of the grants?

There is a peculiar statute of limitations in connection with land grants in New Mexico, the constitutionality of which has been passed upon by the Supreme Court of the United States, in the case of Montoya v. Gonzales, 232 U. S. 375. On February 1, 1858, the territorial legislature of New Mexico passed an act now known as Section 3364 of the 1915 Codification, which provided briefly, that in all cases where "any person or persons; their children, heirs or assigns, shall have had possession for ten 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 government to make grants of land, holding or claiming the same under or by virtue of a deed or deeds of conveyance, devise, grant or other assurance purporting to convey an estate in fee simple, and no suit in law or equity effectually prosecuted shall have been set up or made to the same within ten years, then such person, their children, heirs or assigns so holding such possession" are, by the terms of the statute, given a good, indefeasible title in fee simple to the lands claimed. It will be noted that there is no necessity for the payment of taxes, ordinarily an absolute essential. The
The statute was before the Supreme Court of New Mexico in Farish v. New Mexico Mining Company, 5 N. M. 279, and again in Gildersleeve v. Milling Company, 6 N. M. 27, in the early days of the court, and was the settled law of the state, apparently free from attack until its constitutionality was vigorously attacked in the Montoya case, 16 N. M. 349.

The Supreme Court of New Mexico in that case recited the history of the statute, discussing whether or not it was a statute of limitation or repose merely; or went further and was intended to grant affirmative relief by conferring absolute title on a claimant contending to come within its provisions. Our court decided that the statute was intended to create, and did create, a right and indefeasible title in fee simple to real property acquired in a land grant, under the prescribed conditions. Appealed to the Supreme Court of the United States, in an opinion handed down on February 24, 1914, by Mr. Justice Holmes, 232 U. S. 375, the court stated that the title of the claimants successful in the lower court did not depend upon the ordinary statute of limitations, but rested upon a peculiar statute that had been in force in New Mexico unchanged in any important way, since 1858. "By this act, possession for ten years," the opinion reads, "under a deed purporting to convey a fee simple of any lands which have been granted by Spain, Mexico, or the United States, gives a title in fee to the quantity of land specified in the deed, if, during the ten years, no claim by suit in law or in equity, effectually prosecuted, shall have been set up."

The attack on the constitutionality of the statute, was not seriously considered, the court declaring that: "We can see no taking of property without due process of law in this. The disseisee has notice of the law and the fact that he is dispossessed, and that a deed to the disseisor may purport to convey more than is fenced in. . . . The statute does not deny the equal protection of the laws, even if it should be confined to Spanish and Mexican grants,
For there very well may have been grounds for the discrimination in the history of those grants and the greater probability of an attempt to revive stale claims, as is explained by the Supreme Court of New Mexico. The territorial Supreme Court had, as is indicated in the opinion by Mr. Justice Holmes, explained the reasons for the enactment of the law. Having thus been passed upon by our Supreme Court and the United States Supreme Court, the statute of limitations discussed here may be said to be one of the fundamentals of New Mexico law of land grants. It only remains to say that the statute as Mr. Justice Holmes said, is a peculiar statute, and that lawyers having to advise their clients on land grant titles may well require a personal investigation to determine whether or not there are any claimants in possession of any part of the grant with an instrument purporting to convey title, because apparently under the decisions and the law as it now stands, such settlers are immune to the provisions of recording acts.

To further explore the ramifications of the law of the land grant would be an imposition on the bar of Texas. It has not been my intention to leave the impression that good title can not be obtained to New Mexico land grants; that would not be true. Confirmed by act of Congress or by the Court of Private Land Claims, with boundaries surveyed by competent surveyors, and titles quieted and settled by able lawyers, there is every reason to say that many owners are vested with a title that is marketable and beyond any attack. Each grant must be considered on its own merits, not only as to validity of title, but to all other factors prompting a purchase.

Certain general principles of law pertaining to land grants are firmly a part of New Mexico jurisprudence; and as new questions are presented to lawyers and to courts we may confidently expect that they will be dealt with in the future intelligently and capably by bench and bar, as they have in the past.