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ADVERSE POSSESSION IN NEW MEXICO—Part One*

VERLE R. SEED†

This article summarizes New Mexico's law of adverse possession, as authorized by our statutes and as construed by the opinions of our supreme court. Our volume of litigation in this area has been so great that scarcely any problem can be raised for which there is not at least one decision by our court. Even so, not every decision has been mentioned here. It is thought that the use of the very language of the supreme court will be more instructive than a mere paraphrasing thereof.

PART I

ORIGIN AND OPERATION OF STATUTES OF LIMITATION

I

ORIGIN AND HISTORY

"The sole historical basis of title by adverse possession is the development of statutes of limitation on actions for the recovery of land in England, *viz.* the ancient writ of right, the possessory assizes and writs of entry and the modern action of ejectment which displaced the earlier actions."¹ The earlier of these statutes limited the time of a prior seisin to a fixed date in the past. The consequence was that the period of limitation continued to increase from year to year. A statute in the reign of Henry VIII was the first to establish a fixed period of time.² In 1623, the Statute of Limitations³ reduced the period to twenty years; by barring an entry after the period, this statute effectively barred the action of ejectment which depended thereupon.

In the United States the older statutes naturally followed the general form of the earlier English statutes. . . . Irrespective of the form [however] which the American statutes take, they are uniformly construed as limiting the period in which an action to recover land [held in the wrongful possession of another] must be brought.⁴

* Part Two of this article will appear in Volume 5, No. 1, to be published in May, 1965.

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1. 3 American Law of Property § 15.1 (Casner ed. 1952).

2. 32 Hen. 8, c. 2 (1540) (sixty years).

3. 21 Jac. 1, c. 16 (1623).

4. 3 American Law of Property § 15.1 (Casner ed. 1952).

New Mexico has two statutes, each establishing a ten-year period.

II

HOW THE STATUTES OF LIMITATIONS OPERATE UPON TITLE

All statutes of limitations are statutes of repose. Their primary purpose is the barring of stale claims. These statutes foreclose any right by the former owner—the disseisee—to bring an action to recover his possession or to assert his title, no matter how valid his claim, after the period fixed by the statute has run. Since the law does not recognize a title which it will not protect, the effect of the bar of the statute is to extinguish the former owner's title.

The necessary further result is to quiet the title of the adverse possessor. This title he already had as against all but the real owner. With the extinction of the title of the former owner the claim of title originating in the wrongful possessor becomes absolute. It must be emphasized that this is an original, and not a derivative title. There has been no transfer to him of the title of the former owner by operation of law or otherwise.⁵

III

ESTATE AND TITLE ACQUIRED BY ADVERSE POSSESSION

The effect of the statutes of limitation is not only to bar the remedy of ejectment but also any other right or remedy of the former owner, *e.g.*, self-help.⁶ The new and independent title of the adverse possessor is complete subject only to interests which may have been reserved by the government in the original grant, such as the minerals. Although his new title was not derived from nor in privity with that of the former owner, his title is the same as that of the former owner, freed, however, of all liens which were dependent upon the former title.

As a vested title it cannot be divested by parol abandonment, by reentry by the former owner (unless continued in possession for the statutory period), or by a failure to continue in possession.

It is not recordable, for there is no document to record; and a failure to record therefore cannot affect the title. The only way to make it recordable is by an action to quiet title, with recordation of the decree.

5. *Cf.* 3 American Law of Property § 15.2 (Casner ed. 1952).

6. This is true by statute in a number of states, not including New Mexico; and by decision or dicta in almost any other state.

Adverse possession of the surface will not give title to the mineral estate, if the latter was severed from the surface by conveyance before the adverse possession was commenced.⁷

PART II

THE NEW MEXICO STATUTES OF LIMITATION

I

NEW MEXICO STATUTES ANNOTATED SECTIONS

23-1-21 AND 23-1-22

I shall attempt to summarize the provisions of the New Mexico statutes of limitation at this point. The full text of each is printed in a footnote.⁸

7. Cf. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 8 *infra*.

8. 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

Under the first of these two statutes, a person who has had possession for ten years of any lands contained in a Spanish or Mexican land grant, claiming the same under some instrument purporting to convey an estate in fee simple without any action at law or in equity having been effectually prosecuted against him shall have good and indefeasible title to those lands. The time for bringing such action shall, however, be tolled by certain named disabilities.⁹ The possession presumably must be actual, although this is not expressly stated. This statute was first adopted in 1858, and has not since been amended, except in minor respects in 1899.¹⁰

of title for ten (10) years of any 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 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 persons or persons whatsoever; 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.

9. The time is tolled by the following disabilities: imprisonment, unsound mind, or minority. N.M. Stat. Ann. § 23-1-21 (1953), set out in note 8 *supra*.

10. The words "at the time the cause of action therefor first accrued" were substituted for "at the time of said right or title first descended, or accrued." N.M. Laws 1899, ch. 63, § 1.

The second statute provides that where a person shall have had adverse possession continuously and in good faith under color of title of any lands for a period of ten years, and shall have continuously paid all taxes assessed against them, he shall be entitled to keep possession of the lands so described in the writing purporting to give color of title. Any person or persons having any title to or interest in such lands who for a period of ten years, shall have neglected to bring an action in law or equity against such adverse possessor shall be forever barred, and the adverse possessor shall have a good and indefeasible title. The same disabilities as in the case of section 23-1-21, however, toll the running of the statute. The statute defines "adverse possession."

The requirement of the payment of taxes was added in 1899,¹¹ and the definition of "adverse possession" in 1905.¹² Because of the added requirements of the second statute over those of the first, it has been suggested, quite properly I think, that the first is merely a statute of limitations, but the second is one of adverse possession as well.¹³

In *Jackson v. Gallegos*,¹⁴ where the defendant pleaded title by adverse possession under the wrong statute (section 23-1-22), the court discussed differences between the two statutes:

As we view the matter from the record before us, in order to prevail upon their claim of adverse possession, the defendants must establish title under . . . [section 23-1-21¹⁵], as contradistinguished from title under . . . [section 23-1-22¹⁶].

The former recognizes title by adverse possession where any one shall have had possession for ten years of lands granted by the governments of Spain, Mexico, or the United States, holding or claiming the same by virtue of a deed or deeds purporting to convey an estate in fee simple. Payment of taxes for the period covered is not required under this statute. Under . . . [section 23-1-22], payment of taxes is required. While the abstract here in evidence shows payment of all taxes of defendants or their predecessors in interest on the Polvadera grant, including the overlap, for the years 1904 to 1926, both inclusive . . . this would fall short by two years of

11. N.M. Laws 1899, ch. 53, § 2.

12. N.M. Laws 1905, ch. 76, § 1.

13. See *United States v. Wooten*, 40 F.2d 882 (10th Cir. 1930). See also *Ward v. Rodriguez*, 43 N.M. 191, 194, 88 P.2d 277, 279, *cert. denied*, 307 U.S. 627 (1939); *Bradford v. Armijo*, 28 N.M. 288, 304, 210 Pac. 1070, 1076 (1922).

14. 38 N.M. 211, 30 P.2d 719 (1934).

15. N.M. Stat. Ann. § 23-1-21 (1953), set out in note 8 *supra*.

16. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 8 *supra*.

showing tax payments for ten years after defendants began to hold under their special master's deed, admittedly good as furnishing color of title under section . . . [23-1-22]. Hence, although defendants pleaded title under both statutes, the failure to show tax payments for the full period of time required eliminates a consideration under the record before us of title under the last-mentioned statute.¹⁷

II

WHY WE HAVE TWO STATUTES OF LIMITATIONS

The most serious effort to answer this question was made in *Montoya v. Heirs* in 1911.¹⁸ The Alameda Grant was a private grant made by the King of Spain in 1710 to one Vigil for military services. It contained almost 90,000 acres and lay in what subsequently became Bernalillo and Sandoval Counties. In 1712 Vigil sold and conveyed the grant to a Captain Gonzales. Later the grant was confirmed by the Court of Private Land Claims to the heirs, assigns, and legal representatives of the original Vigil and the original Gonzales.

In 1906, one Vicenta Montoya filed an action for partition of the entire grant, naming as defendants "the unknown heirs of . . . Vigil, deceased; the unknown heirs of Juan Gonzales, deceased; and all unknown owners of the real estate" After describing the grant, and setting forth the alleged history of the title as above, the complainant denied that the unknown heirs of Vigil had any valid claim because of the sale in 1712 to Gonzales. It was further alleged that various persons were in possession of certain tracts in the irrigated and cultivated portions of the grant in the Rio Grande Valley, claiming in severalty by reason of original allotments or by adverse possession, names and amounts claimed unknown.

The prayer was that the defendants be required to set up or prove their respective interests or be forever barred; that partition be granted according to the respective rights of the parties, etc.

Service was by publication. Subsequently, the attorney for the plaintiff filed an answer on behalf of a considerable number of defendants, presumably heirs of Gonzales, each claiming an interest in the real estate and joining in the prayer for partition.

A little later, other attorneys appeared on behalf of a large number of claimants in severalty asking to intervene. Leave was

17. *Jackson v. Gallegos*, 38 N.M. 211, 219, 30 P.2d 719, 724 (1934).

18. 16 N.M. 349, 120 Pac. 676 (1911), *aff'd*, 232 U.S. 375 (1914).

granted. A voluminous answer was filed for them. In essence these intervenors alleged that neither the plaintiff nor the defendants previously appearing had ever previously held and occupied the lands held by them, that they, or their predecessors had gone into possession of their lands under deed of conveyance, demises, grants, or other assurances purporting to convey a fee simple estate, and thus had acquired and claimed and had occupied their respective lands in severalty and not as tenants in common, and that they or their predecessors had so possessed their lands for more than fifty years, and no claim by suit in law or equity had been brought against them within such fifty-year period.

The intervenors asked that title be established in each of them in fee simple and duly and forever quieted.

On January 4, 1910, the trial court entered judgment in essence as prayed for by the intervenors.

On appeal, this judgment was affirmed under the Spanish grant statute of limitations¹⁹ except as to two individuals, as to whom there was no showing that either of them had ever lived upon or improved any portion of the lands described in the conveyances under which they claimed ownership.

The vital question presented by this appeal, then, is, did the court err in rendering the latter decree? The answer . . . must be found . . . in the intent and purpose of the legislature of the territory in the enactment of . . . [section 23-1-21²⁰]. It may be said that . . . this section is still substantially as it was originally enacted in 1858. It becomes a pertinent inquiry, at this point, as to what were the conditions existing at the time necessitating or making desirable the enactment of such a statute. . . . The Republic of Mexico, following the achievement of its independence from the parent country, had continued the policy of granting land to individuals. These grants were dormant and useless until population made settlement thereon. In the possession of the titled grantee (and we refer to a military title) they were a source of weakness rather than of strength to the province. Prior to the enactment an increasing number of people from year to year were seeking settlement upon these grants and were making use thereof by a civilized cultivation. Transfers of lands embraced within land grants had been made with considerable frequency. . . . Some of the grantees of the grant, when the contest between the Republic of Mexico and the United States in the War of 1846-47 came on and was ended by the Treaty

19. N.M. Stat. Ann. § 23-1-21 (1953), set out in note 8 *supra*.

20. *Ibid.*

of Guadalupe Hidalgo, doubtless abjured the province of New Mexico and remained citizens of the Republic of Mexico. The people of this territory were thoroughly familiar with the existing conditions and with the prior traditions and practice. It was within the decade following the acquisition of New Mexico by the United States. American and European settlers were coming this way. The native population was also increasing and it was obvious to the people and the law-making power, that efforts would be made, as such efforts are now being made, to disturb grantees, occupiers, heirs, and devisees in their respective possessions held by written evidence of title. Possession that these claimants had lawfully acquired and for which they had paid a consideration. These settlers and occupiers had defended the soil and the people occupying it from the incursions of the Indians. This had been done at a very great sacrifice. The law-making power, confronted with these conditions and appreciating the necessity for legal protection not only from fictitious claimants, but from claimants who had long slept upon their rights as well, enacted this statute and thus assured protection to persons possessing land described in their deeds, assurances and devises, in their bona fide claim of ownership. The legislature, therefore, enacted the statute in question, and intended to create, and did create, a right and title as to real property acquired in a land grant and provided another and different rule of limitation as to real property which might be adversely acquired under . . . [section 23-1-22²¹].

* * * *

The Alameda Grant, being an individual grant, in private ownership, there can be no doubt of the application of this section to the lands embraced in the Alameda Grant, which had been in existence for one hundred and forty-eight years at the time this statute was enacted. Even at the time this law was passed these grants were largely owned by heirs and assigns of original grantees, and these heirs would naturally, be widely separated from each other and few, if any, of them in actual occupation of the lands. The lands, being unoccupied and uncultivated, induced settlers to enter upon them and for many years before and after the American occupation these settlers have been occupying, cultivating and grazing these lands and purchasing, selling and devising and assigning them by deeds, wills and other documents and in good faith, claiming the ownership of the lands, notwithstanding these title documents may not be traceable to the real heirs or owners of the grant. Now this act provides that all of those persons, their children, heirs or assigns who were in possession of portions of these lands for ten years, claiming them

21. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 8 *supra*.

under the provisions of the act at the time of the enactment or at any time thereafter 'shall have a good and indefeasible title in fee simple to such lands, tenements and hereditaments.' This fee simple title is conferred upon all those who have complied with the conditions prescribed by the act.²²

This decision makes clear that if one is in actual occupation claiming by some deed, devise, or other instrument which purports to convey title to the area occupied, which itself is an otherwise unoccupied part of a tract which was originally the subject matter of a Spanish, Mexican, or United States grant, he has only to satisfy the requirements of section 23-1-21, and not the more stringent requirements of section 23-1-22, such as payment of taxes. A United States grant certainly does not mean a "patent"; it probably refers to confirmation of a Spanish or Mexican grant.

III

IS THE ENGLISH TWENTY-YEAR STATUTE OF LIMITATIONS²³ IN FORCE IN NEW MEXICO?

This question was raised for the first (and last) time by counsel in *Christmas v. Cowden*.²⁴ This was a quiet title action brought by Christmas against Cowden and others concerning certain tracts of what was formerly only grazing land but had lately become valuable for its oil and gas development prospects. Cowden defended on the basis of alleged title by adverse possession. Finding it to be difficult, if not impossible, to show conformance with the New Mexico statutes, he attempted to invoke the common law twenty-year statute of limitations. Excerpts from the opinion will be quoted on this point only.

The common law statute of limitation, of 20 years, appellant says, must be in force in New Mexico. Appellee, on the other hand, argues that this statute was never in force here and points out that when the legislature on Jan. 7, 1876, adopted the common law of England 'as recognized in the United States of America' to be the rule of practice and decision . . . it did not adopt the common law statute of limitations (21 Jac. 1) for the reason that in the territory of New Mexico there was already upon the books and had been since 1858,

22. *Montoya v. Heirs*, 16 N.M. 349, 377-81, 120 Pac. 676, 686-87 (1911), *aff'd*, 232 U.S. 375 (1914). (Emphasis the court's.)

23. 21 Jac. 1, c. 16 (1623).

24. 44 N.M. 517, 105 P.2d 484 (1940), noted in 13 Rocky Mt. L. Rev. 167 (1940).

a statute similar to the common law rule, except, that instead of 20 years of occupancy being required, only 10 years were necessary; and, that this condition would have presented a patent inconsistency fatal to the operation of the common law rule.²⁵

* * * *

The striking similarity of the language of the two statutes, particularly as between paragraph II of the English Act and the portion of our own statute following the first proviso therein, is significant. It surely cannot be said that by the Act of 1858 we were not enacting a statute of limitations governing title by adverse possession and that we did not there adopt substantially the English statute. Of necessity, there had to be a substitution of Old World names and terms to make the statute applicable here. Likewise a lapse of 150 years justifies some change in language. It may, or may not, represent an improvement. It does reflect the inevitable—growth.

* * * *

The question is: Would there be a 'conflict' with the laws of the territory—with the Act of 1858 hereinbefore set out—if we were to hold that under the general terms of the 1876 Act, this common law statute of limitations as it applies to title to land by adverse possession, was adopted? We think there would be, clearly and unequivocally.²⁶

* * * *

There was doubtless some reason for our early territorial legislature of 1858—only twelve years after our conquest of this territory—to fix the required period of occupancy at ten rather than twenty years. . . . The common law period of twenty years may have been deemed too long to suit the 'conditions' of our people and our country.

* * * *

While this exact question has not been heretofore directly presented to this court, and we have not therefore passed directly upon it, in our treatment of kindred issues in several other cases where the question of title to land by adverse possession was involved, we have assumed, or rather clearly indicated, that New Mexico recognizes no such common law statute of limitations.²⁷

25. *Id.* at 524-25, 105 P.2d at 488. The court, in discussing the New Mexico legislature's adoption of the common law of England, cited what is now N.M. Stat. Ann. § 21-3-3 (1953), which provides: "In all the courts in this state the common law as recognized in the United States of America, shall be the rule of practice and decision."

26. *Id.* at 526-27, 105 P.2d at 489-90.

27. *Id.* at 528-29, 105 P.2d at 490-91.

The reasoning of the foregoing decision is that the original legislative equivalent of our existing section 23-1-22 was intended as a complete substitute in this state for the common law twenty-year statute of limitations. Therefore, the legislative adoption on January 7, 1876, of the common law of England did not and could not include the twenty-year adverse possession statute.

PART III

THE NECESSARY ELEMENTS FOR ADVERSE POSSESSION IN NEW MEXICO

I

THE NEW MEXICO STATUTES

Section 23-1-21 of the New Mexico statutes²⁸ speaks only in terms of "possession" by the occupant claiming the benefit of the statute of limitations for a period of ten years, without action having been brought in law or equity by the dispossessed owner, as giving the occupant a good and indefeasible title.

This "possession" must, however, be actual, not constructive. Our supreme court has said:²⁹

Plaintiff's counsel argues strenuously that even if plaintiff has failed to establish title by adverse possession under . . . [section 23-1-22³⁰] which he denies, that . . . [section 23-1-21³¹] is not an adverse possession statute and point to the language of the territorial court in *Montoya v. Unknown Heirs of Vigil*³² . . . differentiating between the two statutes. The trouble with the differentiation is that it does not go far enough to aid the plaintiff. Under either statute *possession* is an essential element of proof which one claiming under it must sustain. In *Montoya v. Unknown Heirs of Vigil*, the case relied upon, this is made clear. The court said: 'But even under . . . [section 23-1-22³³] deeds alone are not sufficient, unaccompanied by actual occupation of at least part of the tract, to mature a fee-simple title in 10 years. *The possession is as essential to that end as the deed, but both are necessary.* As to those tracts, there has never been actual visible possession of any part of the

28. N.M. Stat. Ann. § 23-1-21 (1953), set out in note 8 *supra*.

29. *Tietzel v. Southwestern Constr. Co.*, 48 N.M. 567, 154 P.2d 238 (1944).

30. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 8 *supra*.

31. N.M. Stat. Ann. § 23-1-21 (1953), set out in note 8 *supra*.

32. 16 N.M. 349, 120 Pac. 676 (1911), *aff'd*, 232 U.S. 375 (1914).

33. N.M. Stat. Ann. § 23-1-21 (1953), set out in note 8 *supra*.

lands, therefore, conceding that the conveyances were valid, fee simple title could not mature under the circumstances of this case.³⁴

On other occasions, the New Mexico Supreme Court has spoken of the actual possession which the occupying claimant must have even under section 23-1-21 as being adverse. This, however, seems to mean only that the possession be intended to result ultimately in fee simple title in the occupant.³⁵

Further, it is obvious that the words "holding or claiming the same by virtue of a deed or deeds of conveyance, demise, grant, or other assurance purporting to convey title" in section 23-1-21, require only color of title. If the title purported to be conveyed is a valid record title emanating from the grant, then it would not be necessary to rely upon the statute for title.

Section 23-1-22 of the New Mexico statutes,³⁶ however, provides that the disseisor, in order to acquire good and indefeasible title, "shall have had adverse possession continuously and in good faith under color of title for ten (10) years." It further defines "adverse possession" to be "an actual and visible appropriation of land, commenced and continued under color of title and claim of right inconsistent with and hostile to the claim of another;" and it states that "adverse possession" shall not be considered as established unless the party claiming it, his predecessors or grantors have continuously paid all state, county, and municipal taxes assessed against the property for the ten-year period.

The requirements that the adverse possession be continuous and in good faith under color of title, and that the taxes be paid, were added by amendment in 1899.³⁷ The definition of "adverse possession" was added by amendment in 1905.³⁸

The requirements of payment of taxes and of color of title in good faith and under claim of right are not usual, and would not exist but for the statutory enactment. However, the requirements that the possession be actual, visible, hostile, and continuous, together with the requirement that it be exclusive, had already been established by judicial decision, and formed a part of the common law.

34. *Tietzel v. Southwestern Constr. Co.*, 48 N.M. 567, 579, 154 P.2d 238, 246 (1944). (Emphasis the court's.)

35. See, *e.g.*, *Manby v. Voorhees*, 27 N.M. 511, 520-21, 203 Pac. 543, 546-47 (1921); *Hoskins v. Talley*, 29 N.M. 173, 177, 220 Pac. 1007, 1009 (1923).

36. N.M. Stat. Ann. § 23-1-22 (1953), set out in note 8 *supra*.

37. N.M. Laws 1899, ch. 53, § 2.

38. N.M. Laws 1905, ch. 76, § 1.

The several elements of adverse possession were set forth in *Johnston v. City of Albuquerque*.³⁹ The court gathered the following facts upon which the plaintiff relied in his claim of title by adverse possession as against the defendant city. They nearly all involved the plaintiff's predecessor in possession—one Martin. The latter went upon the land in 1887, believing it at first to be property of the United States. He claimed some seventy or eighty acres, but his only actual possession was of a small area containing a barn and the house which he occupied. He started a fence which never surrounded the entire tract, and soon let the part built fall into decay. For the greater part of the time he remained there, the area was used as a common pasturage for all who desired to graze their livestock thereon. After Martin left, about 1892, the plaintiff and his tenants occupied the house for less than a year. Then it was boarded up, and finally moved away. At all times, those who desired went upon the land and took dirt and other substances away. The supreme court affirmed the trial court for the defendant city, saying that it did not think any of the five elements necessary to make the statute run were proved by the appellant on trial.

In all jurisdictions where the determination of what constituted adverse possession has arisen, the decisions and the textbooks are unanimous in declaring that the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under a statute of limitations which time is ten years in the case at bar⁴⁰

That an adverse claim to land may ripen into a perfect title by virtue of the statutes of limitations, it is primarily essential that the possession relied upon be actual.

Actual possession consists in exercising acts of dominion over it, and in making the ordinary use of it to which it is adapted, and in taking the profits of which it is susceptible. . . . The law sets out no particular rules where the statutes of limitations does not prescribe them, which are necessary to constitute acts of dominion. Actual possession is a question compounded of law and fact. . . . Its determination must largely depend upon the situation of the parties, the size and extent of the land, and the purpose for which it is adapted. The only rule which is generally applicable is that the acts relied upon to establish possession must always be as distinct as the character of the land reasonably admits of, and must be so exercised as to acquaint the owner, should he visit it, that a claim

39. 12 N.M. 20, 72 Pac. 9 (1903).

40. *Id.* at 28, 72 Pac. at 11.

of ownership adverse to his title is being asserted. . . . Where adverse possession is sought to be shown by having the land fenced for the period prescribed by the statute of limitations, such fence must be a real and substantial one . . . and the land must be completely enclosed, either by natural objects or an artificial enclosure. . . . The building of a fence around the land, and then allowing it in a short time to go to decay so that it will not keep out livestock or trespassers, is not such a possession as will give title by reason of the statute of limitations.

By visible possession is meant, that the true owner must have actual knowledge of the hostile claim, or the possession must be so open, visible and notorious, as to give notice to the world that the right of the true owner is invaded intentionally, and with the purpose to assert a claim adversely to his.

The possession must be exclusive, that is, that the person who claims the property by reason of the workings of the statute of limitations, or those under whom he claims, must have had exclusive possession of it. When the occupation is in common with the public generally, it is not such exclusive possession as will constitute the basis of title by adverse possession.

The possession at its inception must be hostile or adverse to that of the true owner, or although not hostile at its commencement, such acts must be done, as to make it hostile, which must continue during the period of the running of the time of the statute of limitations.

In order to perfect a title by adverse possession, such possession must continue for the entire period prescribed by the statute of limitations. . . . Any break or interruption of the continuity of the possession will be fatal to the claim of the party setting up title by adverse possession. . . . But temporary vacancies in the occupation, caused by the substitution of one tenant for another, which vacancies are not longer than is reasonable in view of the character of the land, do not constitute interruptions of possession, such as would destroy the running of the statute.⁴¹

In *Jenkins v. Maxwell Land Grant Co.*,⁴² the court lay down the rule "that to constitute adverse possession the occupancy of the one so claiming must be (1) actual; (2) visible; (3) exclusive; (4) hostile; and (5) continuous. If any one of these elements is lacking, no title by adverse possession can ripen."⁴³

41. *Id.* at 28-30, 72 Pac. at 11.

42. 15 N.M. 281, 107 Pac. 739 (1910).

43. *Id.* at 291, 107 Pac. at 741.

The case of *Montoya v. Catron*⁴⁴ approved the foregoing statement, and added:

'It is very generally held that to prove title by adverse possession, or any single element thereof, the evidence should be clear and convincing. It is also a rule of general application that such possession or element cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture. Title by adverse possession cannot be established by inference or implication.'⁴⁵

II

THE PHYSICAL ELEMENTS: THE POSSESSION MUST BE ACTUAL, VISIBLE, OPEN, NOTORIOUS, EXCLUSIVE, AND CONTINUOUS AND UNINTERRUPTED FOR THE STATUTORY PERIOD

I have seen fit to group separately those cited New Mexico decisions in which the emphasis in the opinion is upon the alleged lack of or defect in one or more of the physical characteristics necessary for adverse possession from those in which the central issue was whether the possession was with the necessary intent, *i.e.*, adverse, hostile, in good faith, or under claim of right.

It is rarely that one finds a decision in which the opinion dwells only on a single characteristic. However, I have divided the cases involving physical elements into three groups, depending upon whether they emphasize the requirement (a) that the possession must be actual, visible, open and notorious; or (b) that it must be exclusive; or (c) that it must be continuous and uninterrupted for the statutory period.

A. The Possession Must Be Actual, Visible, Open and Notorious

In *Baker v. De Armijo*,⁴⁶ the supreme court defined this requirement as follows:

It has been settled that to constitute an adverse possession there need not be a fence, building or other improvement made; it sufficing, for this purpose, that visible and notorious acts of ownership be exercised, for the statutory period, after an entry under claim and color of title. . . . The uses to which the property can be applied, or to which the owner, or claimant may choose to apply it, the nature of the property and its situation are largely controlling factors

44. 22 N.M. 570, 166 Pac. 909 (1917).

45. *Id.* at 574, 166 Pac. at 910, quoting from 2 C.J. *Adverse Possession* § 621 (1915).

46. 17 N.M. 383, 128 Pac. 73 (1912).

in determining what acts of ownership might be considered requisite to the assertion of an adverse claim.

In the case at bar, the property is an unimproved city lot, which claimants, in possession, fenced on several occasions, but which apparently it was found difficult to keep fenced. The lot was frequently rented for circuses, carnivals, bill boards, temporary photographers' stands, storage of pipe and other temporary uses.

The trial court having found that this evidence was such as to indicate acts of ownership constituting adverse possession we are not disposed to disturb the finding.

It has been said . . . that 'what is adverse possession is one thing in a populous country, another thing in a sparsely settled one, and still a different thing in a town or village.' It has also been held that less notoriety, and even less frequency of such acts of ownership will be required with possession under color of title than without it. . . . 'All the law requires . . . is that the possession, or rather the acts of dominion by which it is sought to be proved, shall be of such a character as may be reasonably expected to inform the true owner of the fact of possession and an adverse claim of title.'⁴⁷

*Merrifield v. Buckner*⁴⁸ was an action to quiet title to 126 acres of land within the boundaries of the Chilili Land Grant, a community grant. The grant was one made by Mexico, confirmed by Congress in 1858, and patented in 1909. As a community grant, it had certain tracts set apart to residents, and common lands managed by a board of trustees. In 1909, the trustees sold 126 acres of the common land to the Eblens for two dollars per acre in cash, and issued a trustee's deed which was promptly recorded. The Eblens paid the taxes on the tract until 1916, when they deeded it to George Merrifield for four dollars per acre. He recorded the deed and assessed the land to his name. His widow, the plaintiff, through inheritance from him and by deeds from his children of a former marriage, claimed the property and paid the taxes to 1933. Mrs. Merrifield in good faith made a contract to sell the land to another. As a consequence, this action was commenced. The land was uncultivated. Mr. Merrifield started a fence on one side in 1916, cut firewood and posts on it from time to time, and on one occasion when residents cut mine props on it, had the props confiscated as his own. The trustees made no move to question his title, paid no taxes on the tract for twenty-five years, and retained the purchase price paid in 1909. The district court cancelled the two deeds, and

47. *Id.* at 391-92, 128 Pac. at 75-76.

48. 41 N.M. 442, 70 P.2d 896 (1937).

denied the plaintiffs prayer for relief. The supreme court agreed that the deeds were void, and then discussed whether the plaintiff might have acquired title under them by possession under section 23-1-21.

The court made no finding as to what uses the land was adapted or susceptible, and we are not advised in that regard. But the payment of taxes and occasional cutting of timber is not adverse possession. . . .

True, appellant's predecessors had paid taxes on the land for over twenty years, which indicated that they claimed title to it, as the failure to pay taxes on it by the Town of Chilili indicated that it did not claim the title; and would have an important bearing on the question of adverse possession if the facts had been in dispute. . . . But we do not understand that these cases hold the payment of taxes alone is proof of adverse possession, but that it is evidence that may be considered on the question. This court and the Territorial Supreme Court have consistently held that continuous possession for ten years is necessary to perfect a limitation title; though the character of the possession depends upon the uses to which the land can be applied. . . .

Aside from paying the taxes, there is no evidence of a limitation title. The fact that appellant's predecessors cut firewood and posts 'from time to time' is not sufficient. From what time to what time? There must be some proof of entry and possession. Even though we should hold that this was proof of entry, there is no proof of any particular ten years of continuous cutting of firewood and posts established. Now and then, or 'from time to time,' is too indefinite. . . . The court also found as facts that during the twenty-five years immediately prior to filing of the suit that residents of the Chilili Grant had likewise cut firewood and posts from the land in suit; from which it would appear that the land was used as much by the Grant residents as by appellant and her predecessors, and that even this exercise of ownership was not exclusive.⁴⁹

*GOS Cattle Co. v. Bragaw's Heirs*⁵⁰ was a suit to quiet title to certain property in Grant County, known as the Hefley place. Hefley acquired the land by patent from the United States, and conveyed it to John Bragaw on August 1, 1899. The defendants claimed title as the heirs of Bragaw, who died in 1910. The plaintiff cattle company claimed by adverse possession under color of title, plus continuous payment of all taxes, from February 1, 1911, to

49. *Id.* at 448-49, 70 P.2d at 900.

50. 38 N.M. 105, 28 P.2d 529 (1933).

date of suit in 1930 or 1931. The plaintiff always used the land for grazing land in connection with the business of cattle raising. Other facts appear in the excerpts following from the opinion. The main issue was whether the plaintiff's possession satisfied the requirements for adverse possession.

It is next contended by appellant that the possession of appellee was neither open, visible, nor hostile, because the particular tract of land in question had never been fenced, no one was living on it, no hay was cut, no inclosure, no improvements, and could not be distinguished from the other adjacent land except that it was on the Mimbres River. That the land was used for grazing, watering and salt land, the appellant does not question. That it was used for such purpose as found by the trial court is supported by substantial evidence.⁵¹

* * * *

The record here shows that . . . [plaintiff's predecessor] and his associates, and their successors to this day, have had complete, adverse, and undisputed possession of the premises in question, and neither the appellants nor any one else ever disputed such possession, and no other person or persons pastured or had the same right to pasture their cattle upon these lands. . . .

The land in dispute here has been used at all times as a watering place for cattle and as a salt ground and range. The cattle belonging to the appellee were the only cattle using the place, and the appellee was the only one ever claiming the property, and such claim was open and notorious

If the land were of such nature that fencing or construction of buildings would be proper to denote ownership and possession, the argument of appellant might prevail; but where a rancher and owner of a large range, in good faith, has possession of an L-shaped tract of land in the middle of his range, which he uses for watering his cattle, and as a salt ground and range, it is not necessary that the same be fenced or other improvements made thereon; it being sufficient that visible and notorious acts of ownership be exercised after an entry under claim of right and color of title.⁵²

In *Stull v. Board of Trustees*,⁵³ the trial court decided that the appellees had established their contested title by adverse possession. The question on appeal was whether the finding was amply supported by substantial evidence. The premises were unusual in that

51. *Id.* at 110, 28 P.2d at 532.

52. *Id.* at 110-11, 28 P.2d at 532-33.

53. 61 N.M. 134, 296 P.2d 474 (1956).

they are covered with brush, greasewood, and sand dunes. The court disposed of the appellant's contentions as follows:

Generally the controlling factor in determining whether the acts of dominion exercised, constitute open, hostile and exclusive possession, is the character and use to which the premises are adapted. In this respect, the premises were covered with brush, greasewood and sand dunes. Appellees immediately, after acquiring the premises, established corners by placing concrete markers or monuments. They cut (brushed) a path 2 or 3 feet wide around the exterior boundaries where any one going on the premises would very likely notice it. This path has been kept opened at all times. Later, iron pipes were placed at the corners. Various witnesses testified as to having gone upon the premises and observing the boundaries and corners. Some testified that the boundaries were as noticeable as a fence. There is evidence that appellees posted "no dump," "dumpers will be prosecuted," and "please don't dump" signs, on the premises in 1942, which were maintained to date of trial. Also, appellees blocked some old roads across the premises. Further, they paid all taxes when due. We think these acts of dominion were sufficient to give notice to appellants that the property was claimed adversely to them.⁵⁴

B. The Possession Must Be Exclusive

A number of New Mexico decisions have subscribed to the universally recognized requirement that the possession must be exclusive in order to be adverse, and to confer title. The exercise of acts of possession by the claimant is insufficient if he allows other persons to do the same. If the owner also is in possession, the possession of another is under license from him, or is a trespass.

However, the assertion that the possession must be exclusive does not mean that two or more persons cannot be in possession jointly and thus acquire a joint interest by adverse possession. Under such circumstances, the possession is exclusive though joint.

Perhaps the opinion in the case of *Jenkins v. Maxwell Land Grant Co.*⁵⁵ serves as well as any to develop the element of exclusiveness. The *Jenkins* case was an action in ejectment, by which the plaintiff claimed title to some 6,000 acres of land within the exterior boundaries of the Maxwell Land Grant, the record title to which was conceded to be in the defendant. The plaintiff occupied a house and was in possession of a few acres of land immediately

54. *Id.* at 136-37, 296 P.2d at 475.

55. 15 N.M. 281, 107 Pac. 739 (1910), *aff'd*, 235 U.S. 691 (1914).

adjacent thereto. There was never at any time any enclosure of any kind around the claimed tract, or anything to put the defendant upon notice as to the extent of the plaintiff's claim. The plaintiff laid great stress upon the contention that during the entire period of his occupancy his cattle ranged over the tract. The court found that during the same period cattle belonging to the defendant company and to an organization known as the Sugarite Cattle Outfit as well as to other persons also grazed on the same range. It further appeared that in the period during which the plaintiff contended that his title was being acquired the defendant company leased portions of the land in controversy to various individuals and organizations including the plaintiff himself. It will be seen that other elements of adverse possession as well as exclusiveness were in doubt. Excerpts from the opinion follow:

We therefore hold in accordance with these and other authorities, too numerous to cite, that to constitute adverse possession, the occupancy of the one so claiming must be (1) actual, (2) visible, (3) exclusive, (4) hostile, and (5) continuous. If any one of these elements is lacking no title by adverse possession can ripen. At least three were lacking in the case at bar.

The possession of all but a relatively insignificant part of this large area was constructive and not actual and such constructive possession was ineffectual against the true owner. . . .⁵⁶

* * * *

'It is true that when a person enters upon unoccupied land, under a deed or title, and holds adversely, his possession is construed to be co-extensive with his deed or title, and the true owner will be deemed to be disseized to the extent of the boundaries described in that title. Still, his possession beyond the limits of his actual occupancy is only constructive. If the true owner be at the same time in actual possession of part of the land, claiming title to the whole, he has the constructive possession of all the land not in the actual possession of the intruder "The reason is plain. Both parties cannot be seized at the same time of the same land under different titles. The law, therefore, adjudges the seisin of all that is not in the actual occupancy of the adverse party to him who has the better title."'⁵⁷

* * * *

56. *Id.* at 291, 107 Pac. at 741.

57. *Id.* at 291, 107 Pac. at 742. The language quoted by the New Mexico court is from *Hunnicut v. Peyton*, 102 U.S. 333, 368 (1880), quoting from *Clarke's Lessee v. Courtney*, 5 Pet. (30 U.S.) 319 (1831).

The possession was not exclusive. It appears that various other persons were in possession of portions of the land in controversy while the plaintiff's title was alleged to have been ripening.

The possession was not hostile. The defendant company, through its officers and agents frequently exercised acts of ownership over the property. It is at least doubtful whether any one of the five necessary elements was present. Certainly the three we have mentioned were not.⁵⁸

In *Nickson v. Garry*,⁵⁹ the court held that where the general public at all times had access to an alley and used it, title thereto could not be acquired under the statutes of limitations by an adjoining landowner who used the alley, for lack of exclusive possession.

C. The Possession Must Be Continuous: It Must Not Be Interrupted: Herein Also of Tacking

New Mexico cases discussing the requirement of continuous and uninterrupted possession are not numerous. It seems desirable to supplement them with a few well-recognized principles.

Adverse possession which will ripen into title must be continuous and uninterrupted for the entire statutory period of ten years. This does not mean, however, that the *acts* of possession must be continuous or that the adverse possessor constantly occupy the premises. Rather, the requirement is for such use as the actual owner could and would be likely to make of them. Thus title to a summer cabin can be acquired simply by actual and adverse occupancy of it for the purposes for which it is designed for a reasonable portion of each season for ten successive seasons. Analogous situations will suggest themselves to the reader.

An interruption which will effectually break the continuity of the possession must consist of an act or event which would constitute a legal wrong to the possessor if he had the legal title. Such an act can consist of the owner of the legal title reentering and taking actual physical possession of all or a portion of the property held adversely under color of title even though the wrongful possessor is not wholly ousted.

However, the simplest and most effective form of interruption by the legal owner is to file an action to recover the possession of the premises. The mere commencement of the action constitutes an in-

58. *Id.* at 292, 107 Pac. at 742.

59. 51 N.M. 100, 179 P.2d 524 (1947).

terraption if the suit is carried on with reasonable diligence to a successful conclusion. It is not necessary that the legal owner secure a favorable judgment within the ten-year period if his suit was filed in time.

The requirement of continuous adverse possession for the full statutory period need not be met by the possession of one person only. The doctrine of tacking permits more than one person to combine adverse possessions to make up the statutory period, provided there is privity between the successive possessors. Such "privity" exists between the original adverse possessor and his heir, devisee, or grantee. Even an oral transfer of possession meets the requirement.

Tacking cannot be availed of, however, where the original adverse possessor is ousted by a third party. The latter wrongful entrant merely starts a *new* period of adverse possession.⁶⁰

In New Mexico, the payment of taxes for the ten-year period must be continuous, as well as the possession. Some of the subsequent citations are concerned with this problem.

In *Jackson v. Gallegos*,⁶¹ the trial court ruled that the defendants had been in possession of the premises involved for at least ten years prior to the institution of the suit. On appeal, the plaintiff contended: (1) that the defendants' possession was not continuous, in that permittees of the defendants had occupied the premises for two of the ten years without rental; and (2) that because of such occupancy, the defendants' possession had not been "visible" for the full statutory period. The court disposed of these contentions as follows:

The possession of the defendants through these permittees being otherwise sufficient we are unable to declare as a matter of law that the mere circumstance that they paid no rental destroys the efficacy of such possession. It is not as though the owners had thrown the land into a commons and later sought to take advantage of the possession of whomsoever by chance may have used it. The very fact that the permit was confined to grazing of cattle and horses and that during the greater portion of the permittees' occupancy without rental the owners were receiving rental from others for grazing of sheep precludes such a view.⁶²

60. For a more complete discussion of the foregoing principles, see 3 American Law of Property §§ 15.9-.10 (Casner ed. 1952).

61. 38 N.M. 211, 30 P.2d 719 (1934).

62. *Id.* at 223, 30 P.2d at 727.

Upon principle we see no reason for denying to an adverse claimant the benefit of possession through a permittee or licensee unless some other reason than the mere fact that it is without rental be advanced to destroy its effectiveness. For the comparatively short period when the efficacy of defendants' possession depends solely upon the occupancy of such permittees, other considerations than money rental may have been sufficient unto them to warrant their remission of a money rental. The evidence tends to show that for such period defendants' possession through the permittees was exclusive and continuous. The only other ground of attack raised by the demurrer is that it was not visible. It is here argued that it lacked visibility. But the payment of rental would not have rendered it more visible. Nor does it seem the slightest inquiry by the Lobato owners of the occupants would have failed to disclose by what right they claimed to occupy, the claimed right being concededly adverse.

That possession by permission or license from an owner is in law deemed possession by the latter seems well settled. The licensee or permittee cannot claim adversely to such owner, the reason being that possession of the occupant under such circumstances is deemed possession of him upon whose pleasure it depends . . . We have recognized that less notoriety, and even less frequency of acts of ownership, are required with possession under color of title than without it.⁶³

In *Chambers v. Bessent*,⁶⁴ the plaintiff brought action to quiet title, relying on title by adverse possession, against the holder of the record title. The defendant acquired his title by deed, January 4, 1899, at which time the taxes for 1898 were unpaid. On November 6, 1899, the property was sold at a tax sale to the plaintiff's predecessor, who received a tax certificate and went into possession. The defendant was at all times a resident of Oklahoma. As a part of his reply to the complaint, the defendant alleged that in October, 1908, the plaintiff's agent approached him and endeavored to persuade him to execute a quitclaim deed to the premises. The defendant contended that this constituted a break in the continuity of the plaintiff's adverse possession. The court held that the plaintiff, asserting a claim to the premises in question, had a right to seek a quitclaim deed from the defendant for purposes of quieting his own (plaintiff's) asserted title:

63. *Id.* at 223-24, 30 P.2d at 727, citing *Baker v. Armijo*, 17 N.M. 383, 128 Pac. 73 (1912).

64. 17 N.M. 487, 134 Pac. 237 (1913).

'It may be safely assumed as a general proposition that, if a defendant in possession of disputed territory concede that the true title is in another, and offer to purchase from him, then the continuity of adverse possession is broken. But there is a broad difference between the cases where the real title is acknowledged to be in another, and an offer or contract is made to buy the title from him as the true owner, and the cases where there is a new offer to buy in an outstanding claim for the purpose of quieting a title already held, in order to prevent litigation.

The defendant in possession has the right to buy in an outstanding hostile claim in order to quiet his own title and possession under a different title, and he may make such purchase or offer to purchase of the real owner without prejudice to his own adverse holding, providing he buys in such hostile title in order to quiet his own, and not merely as a recognition of the superiority of the adverse title, and his desire to hold under it.'⁶⁵

In *Pratt v. Parker*,⁶⁶ an action to quiet title was brought by the plaintiff, the record title owner. Some of the defendants had to rely on title by adverse possession. In order to make out the ten-year period under section 23-1-22, it was necessary to attempt to include a period during which the State of New Mexico had held the land following a tax sale. The state had purchased the land at a tax sale two years before the action was brought. The defendants had bought from the state four years later. The plaintiff record title owner was allowed to avoid the tax sale and the deed issued to the state thereunder. The defendants claimed that the state, the defendants' predecessor, and the defendants had been in continuous adverse possession for twelve years. The court held that the period of four years during which the land was held by the state could not be "tacked" to the eight years during which the defendants had possession. The court reasoned that the statute of limitations did not run against the state, and that, therefore, the defendants' possession began a *new* adverse possession, which had lasted only eight years prior to the suit:

The plea of adverse possession of ten years is attempted to be sustained by showing that defendants and their predecessors in title (State) had been in possession of the property for more than ten

65. *Id.* at 495-96, 134 Pac. at 240, quoting from *Headrick v. Fritts*, 93 Tenn. 270, 272, 24 S.W. 11, 12 (1893).

66. 57 N.M. 103, 255 P.2d 311 (1953).

years prior to the filing of this suit on March 7, 1950. But the State of New Mexico owned the land from the year 1938 until it sold the same to C. J. Parker in 1942. Adverse possession did not start to run during the time the State was the owner of the property; and ten years had not elapsed since the State parted with title in favor of defendants.⁶⁷

67. *Id.* at 110, 255 P.2d at 315-16. The *Pratt* case was cited and relied upon in *Greene v. Esquibel*, 58 N.M. 429, 434, 272 P.2d 330, 333 (1954).