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Property

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This article reviews the more significant decisions in the area of property law rendered by the New Mexico appellate courts during the Survey year and comments briefly on legislative changes made by the New Mexico Legislature during the 1981 session. The cases and legislation contained in this portion of the Survey are included for the purpose of alerting the reader to developments in these areas. Developments in the areas of property taxation, community property, and mining are not covered in this portion of the Survey.

I. CASE LAW

A. *Bailments*

The New Mexico Court of Appeals in *Hertz Corporation v. Paloni*[1] considered the question of what constitutes an involuntary bailee or constructive bailment of personal property. This appears to be a question of first impression in New Mexico. Paloni, the owner of an Albuquerque truck stop, came into possession of a vehicle owned by Hertz Corporation when it was abandoned at Paloni's truck stop after it was stolen from Hertz in Denver. When Paloni discovered the vehicle on his property, he notified the Albuquerque Police Department. Paloni received no reply from the police, and he stored the automobile. Paloni notified the Bernalillo County Sheriff's Office nine months later. The Sheriff's Office found it had the car on its stolen car list and notified Hertz of the whereabouts of the car. Hertz filed a complaint, replevied the car from Paloni and dismissed its suit, all prior to Paloni's filing an answer to the complaint. The trial court allowed Paloni to reopen the case. Hertz then amended its complaint and prayed for damages from Paloni for unlawfully detaining the vehicle and depriving Hertz of its use. Paloni counterclaimed for storage charges. The trial court awarded summary judgment to Paloni for the storage charges and dismissed Hertz' complaint with prejudice.

The court of appeals reversed. The court held that Paloni was an

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1. 95 N.M. 212, 619 P.2d 1256 (Ct. App. 1981).

involuntary bailee and was not entitled to storage fees under either New Mexico statutes[2] or under common law. The court adopted the general doctrine of involuntary bailment and defined an involuntary bailee of property as one who comes into the possession of another's property by mistake, accident, or force of circumstances under which the law imposes upon him the duties of a bailee. He will act as a bailee gratuitously, if there is no reasonable basis for implying an intent of mutual benefit and no mutual contract of bailment.[3]

The case was remanded to the trial court for a determination of whether section 66-3-203 was applicable to Paloni and to the facts of this case. Paloni contended that the statute was not applicable to him because he was not in the business of storing vehicles for the public. If applicable, this statute would require Paloni to give written notice to the New Mexico State Police and the Bernalillo County Sheriff of the unclaimed vehicle in order to claim storage fees. If the trial court determined that the statute applied, then Paloni's failure to notify the proper authorities within the statutory time period would make Paloni liable to Hertz Corporation for any damages sustained as a result of the loss of use of its vehicle.[4]

B. *Boundaries*

Three cases of interest dealing with boundaries were decided during the Survey period. In *Tresemer v. Albuquerque Public School District,*[5] Tresemer brought suit to quiet title to a piece of property. Tresemer's property adjoined that of the property of the Canon de Carnou Land Grant [Grant], a named defendant. The properties were separated by an arroyo, the center of which was claimed by Tresemer to be the boundary between his property and that of the

2. N.M. Stat. Ann. §66-3-203 (1978). Paloni asserted no statutory claim for storage fees under §66-3-203. His claim was based on an alleged common law right.

3. Mack v. Davidson, 55 App. Div. 2d 1027, 391 N.Y.S.2d 497 (1977); United States Fire Ins. Co. v. Paramount Fur. Serv. Inc., 168 Ohio St. 431, 156 N.E.2d 121 (1959). *See generally,* 9 S. Williston, Contracts, §1032 (3d ed. 1967).

4. Paloni made no claim under N.M. Stat. Ann. §66-3-203 (1978). Hertz's claim for storage fees was based on the statute. Guidance as to whether the vehicle was unlawfully detained as Hertz claimed can be ascertained from the statute, which provides:

> An operator of a place of business for garaging, repairing, parking or storing vehicles for the public, in which a vehicle remains unclaimed for a period of thirty days, shall, within five days after the expiration of that period, report in writing to the New Mexico state police at Santa Fe and sheriff of the county in which the unit is stored, setting forth the make of car, model-year, [and] engine, serial and vehicle numbers of the vehicle unclaimed. A person who fails to report a vehicle as unclaimed in accord with this subsection forfeits all claims and liens for its parking or storing and is guilty of a misdemeanor punishable by a fine of not more than twenty-five dollars ($25.00).

5. 95 N.M. 143, 619 P.2d 819 (1980).

Grant. The Grant contended that the boundary was not the center of the arroyo, but an old fence line on Tresemer's side of the arroyo which was shown as the boundary on the survey offered by the Grant. Tresemer's deed description only mentioned that the property was bounded by an arroyo, as did the deeds of Tresemer's predecessors in interest. The Grant argued that the fence was the boundary by virtue of the doctrine of acquiescence.

The trial court found for the Grant, but the supreme court reversed, holding that the Grant failed to meet its burden of proving the elements which have been previously recognized by New Mexico Courts as being necessary to establish a boundary by "acquiescence."[6] The court stressed that it is necessary to prove the element of "knowledge" on the part of the adjoining land owners that a mutually agreed line is going to be the boundary dividing the properties. While there was testimony that the old fence had "existed for years," no proof was offered in support of defendant's contentions that there was knowledge of the fence or that the plaintiff or his predecessors in any way consented to treat the fence line as the boundary. The court found that the burden of proof was clearly upon the Grant, and that the burden was not met.

The court determined the boundary to be the arroyo in accordance with the description on Tresemer's deed. Tresemer's surveyor had used an established principle applicable to arroyos, which are nonnavigable waterways, that natural landmarks or objects are resorted to rather than artificial monuments. The court found that the arroyo was a natural object and had precedence over an artificial monument. Its centerline therefore constituted the boundary.

In another case, *Kilcrease v. Campbell,*[7] the plaintiffs, Kilcrease

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6. *Id.* at 144, 619 P.2d at 820. The court repeated that the requirements for establishing boundaries pursuant to the doctrine of acquiescence are that:

(1) adjoining landowners
(2) who occupy their respective tracts up to a clear and certain line (such as a fence)
(3) which they mutually recognize and accept as the dividing line between their properties
(4) for a long period of time,

cannot thereafter claim that the boundary thus recognized is not the true boundary. Sacks v. Bd. of Trustees, 89 N.M. 712, 557 P.2d 209 (1976).

The court further cited Platt v. Martinez, 90 N.M. 323, 563 P.2d 586 (1977):

> [Acquiescence] involves more than a mere establishment of a line by one party and the taking of possession by him. There must be *knowledge* on the part of the other party of the establishment of the line and the taking of possession by the adjoining owner, and there must be *assent* thereto, and this may be shown by the conduct of the second party, by his words, or even by his silence.

95 N.M. at 144, 619 P.2d at 820 (emphasis added).

7. 94 N.M. 764, 617 P.2d 153 (1980).

and his wife, sought to quiet title to a lot which was part of a subdivision. The property had been subdivided by defendant, Campbell, some thirty years before. Campbell sold lot 32 of the subdivision to the Kilcreases' predecessor in interest. When they bought the land, the Kilcreases had it surveyed per the subdivision plat and discovered that Campbell had built a mobile home park on part of the lot. The Kilcreases then filed suit for restitution of the land to them, which the trial court did.

The principal issue on appeal was whether the plaintiffs and their predecessors in title had "acquiesced" in the location of the boundary that Campbell now claimed. The court found no evidence in the record that either the original purchasers of the lot or the Kilcreases were aware of Campbell's occupancy. The court affirmed the judgment of the trial court and found as a matter of law that no acquiescence existed. As in *Tresemer,* the court stated that the party claiming a boundary change under the doctrine of acquiescence must prove by substantive evidence that the other party had "knowledge" or was aware of the adjoining land owner's claim. The court rejected Campbell's argument that the plaintiffs' failure to join other lot owners whose lots may have been affected by Campbell's error rendered the Kilcreases' trial court judgment void.[8]

In *Perea v. Martinez,*[9] an admittedly inadequate description was contained in a deed. Plaintiff Perea sought to quiet title and remedy the inadequate description by resort to extrinsic evidence. The supreme court rejected the use of extrinsic evidence to establish the description of the property, citing *Komadina v. Edmondson,*[10] which states the general rule in New Mexico when deed descriptions are not adequate to describe a particular parcel of property:

> The grantor's intent must be ascertained from the description contained in the deed which must itself be certain or capable of being reduced to certainty by something extrinsic to which the deed refers. (Citation omitted.) Consequently, if extrinsic evidence is to be relied upon to identify the land intended to be conveyed, the deed itself must point to the source from which such evidence is to be sought.[11]

In *Perea,* plaintiff's deed read "Sandoval County, New Mexico, Map 15, Tract 14A *and mesa land.*"[12] The description contained in

8. The other lot owners were not indispensable parties. *Id.* at 766, 617 P.2d at 155.
9. 95 N.M. 84, 619 P.2d 188 (1980).
10. 81 N.M. 467, 468 P.2d 632 (1970).
11. *Id.* at 469, 468 P.2d at 634.
12. 95 N.M. at 85, 619 P.2d at 189 (emphasis supplied).

the deed referring to "mesa land" is not capable of appropriate legal identification. Plaintiff offered several kinds of extrinsic evidence. The grantor had pointed out the boundaries of the mesa land at the time of the conveyance; also, plaintiff had the mesa land surveyed and monumented and had paid taxes. None of this was legally sufficient to identify the land.

The trial court had attempted to settle the matter by dividing the disputed property between the plaintiff and the defendant. The supreme court reversed, holding that plaintiff must recover on the strength of his own title, not the weakness of that of his adversary. The court commented that the law in this regard is elementary. The plaintiff acquired no "mesa land" by the deed because the description in the deed was simply too indefinite to have constituted a valid conveyance.

C. *Brokers*

One case handed down during the Survey year concerned the value of services performed by an unlicensed real estate salesperson. The New Mexico Statutes provide that one cannot engage in the business of selling real estate without an appropriate license issued by the New Mexico Real Estate Commission.[13] There are some statutory exceptions to the general rule relating to owners of property "or to the regular salaried employees thereof."[14] In *Bank of New Mexico v. Freedom Homes, Inc.*,[15] the plaintiff brought suit to foreclose the mortgage and interests of lienholders. A defendant, Anguiano, counterclaimed for commissions earned as a "contract" salesman employed by Freedom Homes, Inc., a defunct real estate development company. Anguiano's claim was dismissed for failure to state a claim after he stipulated that he was unlicensed as a real estate salesperson. The New Mexico Court of Appeals agreed with the dismissal.[16] The court noted that Anguiano did not seek a judgment against his former employer on his employment contract, but instead contended that his unrewarded selling efforts benefited the bank and that he should be entitled to recover in *quantum meruit* a reasonable value of his services.

Whether a *quantum meruit* claim by an unlicensed salesperson could be made against the bank was a case of first impression in New

13. N.M. Stat. Ann. §61-29-1 (1978).
14. N.M. Stat. Ann. §61-29-2(D) (Supp. 1981).
15. 94 N.M. 532, 612 P.2d 1343 (Ct. App. 1980).
16. Judge Sutin dissented, believing that Anguiano's complaint did state one or more claims. *Id.* at 537, 612 P.2d at 1348.

Mexico. The court turned to the New Mexico case of *Kaiser v. Thompson*[17] for guidance.[18] In *Kaiser,* the plaintiff was an unlicensed contractor rather than a real estate salesperson, seeking *quantum meruit* for work he had performed for the defendant. The court in *Kaiser* said: "To give effect to [the *quantum meruit*] claim [of the unlicensed contractor] would . . . nullify plain statutory provision to the contrary."[19] The court in *Bank of New Mexico v. Freedom Homes* applied the same logic and held that Anguiano, as an unlicensed real estate salesperson, could not recover for the reasonable value of his services.

D. *Deeds and Conveyances*

New Mexico courts decided three important cases during the Survey year in the area of deeds and conveyances. In all three cases, the documents involved were used as the limits of the title claim. The court reiterated in two cases the New Mexico rule that a document need not be flawless to provide "color of title" for an adverse possession claim.

The supreme court in *Sisneros v. Garcia*[20] held that a 1959 deed executed by a minor was merely voidable rather than void as a matter of law. That is, the contract was valid until actively disaffirmed, despite the failure of the deed to be executed with approval of the court as required by New Mexico law at that time.[21]

The deed which purported to convey the land in 1959 had a signature that could have been that of Sisneros, who would have been a minor at that time. Sisneros, however, testified that he knew nothing about the conveyance until 1972 when the deed was recorded by Garcia, the grantee. Sisneros testified further that he never intended to sell the land to Garcia for $950.00 as Garcia claimed. When he found out about the Garcia claim, Sisneros immediately disaffirmed any sale. Although thirteen years had passed since the date of the deed and eleven had passed since Sisneros attained the age of majority, the court found that the disaffirmance was made within reasonable time after becoming aware of the deed. The court reasoned that there would have been no reason for Sisneros to disaffirm a conveyance he never knew he had made and of which he had no legal notice until Garcia recorded the deed in 1972.

17. 55 N.M. 270, 232 P.2d 142 (1951).
18. 94 N.M. at 534, 612 P.2d at 1345.
19. 55 N.M. at 274, 232 P.2d at 145 (1951), decided under the Contractors Licensing Act, N.M. Stat. Ann. §15-1901-1914 (1941) (repealed 1967).
20. 94 N.M. 552, 613 P.2d 422 (1980).
21. N.M. Stat. Ann. §32-1-29 (1953) (repealed 1975).

Garcia argued in the alternative that if the deed were voidable and disaffirmed, that Garcia should be awarded the property by reason of adverse possession. The court disagreed. The record indicated that Garcia only occupied the property occasionally, not continuously, openly or hostilely for the required ten-year period.[22] Garcia did not, therefore, meet the requirements necessary to gain title by adverse possession.

The validity of a tax deed was the subject of a claim made by plaintiffs in *Gallegos v. Quinlan*.[23] The plaintiffs sought to be declared fee simple owners of certain property allegedly obtained in 1959 by defendant Quinlan from the State of New Mexico by defendant Quinlan's fraud. The trial court found for defendant Quinlan and the supreme court affirmed. The plaintiffs were holders of deeds from heirs of the original patentees who never assessed the property or recorded the patent. Quinlan, an adjoining land owner, wished to purchase the property and searched the county clerk's records to determine who was the owner. He did not find a record owner. He was able, however, to determine the names of the original patentees from the United States Government.

After an unsuccessful attempt to locate the patentees, Quinlan went to the Taos County Assessor's Office to have the property entered for assessment of unpaid taxes in order to precipitate an eventual tax sale. Quinlan checked with the County Assessor's Office and was told that he was listed on the assessor's tax schedule as the owner. Quinlan paid no taxes. In 1959 the land was deeded to the state for unpaid taxes. Later in 1959 Quinlan purchased the property from the state and was issued a tax deed which erroneously listed him as the original owner. It is important to note that at the time Quinlan purchased the property from the state, a New Mexico statute provided that only the previous owner could repurchase the property from the state.[24] The incorrect listing of Quinlan's name made it possible, under this statute, for him to repurchase the property. The summary judgment in Quinlan's favor was appealed by Gallegos.

The appellate court rejected all arguments presented by either of the parties. The court determined that the plaintiffs had no standing even to bring suit against Quinlan because the deed from the county to the state was not defective in any way, despite the fact the property was assessed in the wrong name. The court stated that "[t]he

22. N.M. Stat. Ann. §37-1-22 (1978).
23. 94 N.M. 405, 611 P.2d 1099 (1980).
24. N.M. Stat. Ann. §72-8031 to -32 (1953) (repealed 1973).

state obtained a good title to the land and the original patentees lost it."[25] Thus, the plaintiff had no standing to attack Quinlan's title.

Brylinsky v. Cooper[26] was remanded to the trial court for a trial on the merits to determine whether plaintiff, Brylinski, could quiet title to an 80-acre portion of her 490-acre tract. The tract was purchased by Brylinski's mother from the state after being lost for taxes in 1937 by defendant Jones' predecessors in interest. The assessment descriptions and descriptions in the tax deed contained an erroneous call to a quarter section, where "N.E." was substituted for "N.W." This error resulted in a legal description which conveyed the northeast one-fourth of the section twice in the same description but did not convey the northwest quarter. This resulted in her having 80 acres less than the "490 acres" also stated in the tax deed.

Plaintiff claimed that the deed was ambiguous on its face and redundant. She argued that the ambiguity should be resolved in her favor by the court's allowing extrinsic evidence such as the description of the property as it appeared in the assessment rolls before and after 1937. The court rejected plaintiff's contentions, and followed prior case law.[27] The court reiterated the rule that a tax deed is based on the validity of the assessment. If the assessment is void, so is the deed.[28] "[T]he [legal] description must be sufficient, *aided by data furnished by it*. . . ."[29]

Brylinski further argued she should have title to the 80 acres under an adverse possession claim. She claimed that the tax deed, though erroneous, was sufficient to satisfy the "color of title" required by New Mexico law.[30] The defendants argued that this claim failed because the tax deed issued to plaintiff's mother was void because it contained the erroneous description. The court rejected the defendant's argument and found that the test for color of title under a claim of adverse possession differs from that test used to determine the validity of the tax deed in that the test for the former is more liberal. Thus the New Mexico rule is that extrinsic evidence may be used to determine whether the description in a tax deed is sufficient to identify the property in dispute for the purpose of supplying color of title.

Jones also argued that the fact that Brylinski's mother offered to

25. 94 N.M. at 406, 611 P.2d at 1100.
26. 95 N.M. 580, 624 P.2d 522 (1981).
27. *Id.* at 582, 624 P.2d at 524, citing Baltzley v. Lujan, 53 N.M. 502, 212 P.2d 417 (1949).
28. 53 N.M. at 506, 212 P.2d at 419.
29. 95 N.M. at 583, 624 P.2d at 525, *quoting* Richard v. Renehan, 57 N.M. 75, 253 P.2d 1046 (1953).
30. N.M. Stat. Ann. § 37-1-22 (1978).

purchase the land from Jones' predecessor years before constituted evidence that Brylinski's predecessors acknowledged the superior title of Jones. The court disagreed and held that an offer to purchase the 80 acres made by Brylinski's mother to Jones' predecessor in interest did not constitute an acknowledgment by Brylinski of the superior title of Jones. New Mexico case law follows the general rule that the purchase or offer to purchase an outstanding title, interest, or claim to land by an adverse holder, will not in and of itself interrupt the continuity of adverse possession.[31]

E. *Easements*

Two cases were reported concerning easements during the Survey period. A question of first impression was decided in *Otero v. Pacheco,*[32] a case in which the court held that there could be an easement by implied reservation. Easement by implied reservation exists where the easement is sufficiently necessary that explicit notice of it will not be required for it to be valid. Easements by implied grant have been recognized in New Mexico.[33]

Plaintiff Otero and his wife brought suit for damages claiming that the sewer line which serviced both his and Pacheco's homes occasionally backed up, causing damage to plaintiffs' home. Defendants counterclaimed alleging that they had an easement by implied reservation across plaintiffs' property. The property in question was two lots purchased by the defendants in 1944. The defendants then built their home which they situated partially on each lot. In 1950 the City of Santa Fe notified defendants that they could no longer use their septic tank and that they must connect to the new city sanitary sewer system, which they did. In 1950, they built another house on the remaining portion of one of the lots, and also connected it to the city sanitary sewer system line because no alternative was available. The second house was sold to plaintiffs' predecessor in interest in 1953. The deed contained no reservation of an easement for defendants' sewer line. The plaintiffs purchased the property in 1965 after there had been numerous successive owners. There was conflicting testimony as to whether anyone told plaintiffs' predecessors of the defendants' sewer line. Plaintiffs testified they first heard of the sewer line in 1974. The trial court found an easement by implied reservation for defendants on their counterclaim. The court specifi-

31. Chambers v. Bessent, 17 N.M. 487, 134 P. 237 (1913).

32. 94 N.M. 524, 612 P.2d 1335 (Ct. App. 1980), *cert. denied,* 94 N.M. 674, 615 P.2d 991 (1980).

33. Venegas v. Luby, 49 N.M. 381, 164 P.2d 584 (1945).

cally found that the sewer line was reasonably necessary to the use of the defendants' property at the time plaintiffs' property was first sold. The trial court further found that the necessity continued.

On appeal, the court of appeals noted that there is a split of authority as to the degree of necessity required to find an easement by implied reservation. The minority view is the application of a "strict" necessity test.[34] This test would require a showing of absolutely no other place to put the sewer line. The majority rule, in which no distinction as to the degree of necessity is established, holds the test satisfied if the use is necessary to the reasonable enjoyment of the property.[35] An easement by implied reservation will be found under this analysis as the result of a reasonable necessity. The court adopted the majority view. The court also held that the plaintiffs, when purchasing the property, had constructive notice of the sewer line. This holding was made despite the fact the pipe was underground. The court characterized pipes so concealed as an "apparent" condition.[36] The court reasoned that a homeowner must know that sewage must be taken care of in some way, and is under a duty to inquire how. The plaintiffs in *Otero v. Pacheco* did not inquire and thus acquiesced in the easement.[37]

The second case concerning easements involved an appeal by a land owner from an order of the trial court which permanently enjoined the land owner from obstructing the use of an access road across his property. In *Trigg v. Allemand,*[38] Allemand was found by the trial court to have had a private easement. The court of appeals disagreed, and determined instead that a public easement or right of way had been established rather than a private right. The court of appeals restated the principle that a public highway can be established by use alone. The court applied that principle in *Allemand* and held that Allemand and others had used the road in an adverse manner under claim of right with the knowledge of Trigg for more than ten years. The court applied the reasoning in an earlier New Mexico case, *Martinez v. Mundy.*[39] In *Martinez,* the claim of the users was so common to the general public interest that the appellants in that case could not acquire a private easement for themselves but only a

34. Winthrop v. Wadsworth, 42 So. 2d 541 (Fla. 1949).

35. Jack v. Hunt, 200 Or. 263, 264 P.2d 461 (1953).

36. 94 N.M. at 527, 612 P.2d at 1338.

37. Andrews, J., dissented on this point. Judge Andrews indicated that she disagreed with the majority opinion which held the plaintiff had constructive notice of the easement. She felt that the underground sewer was not an apparent condition. 94 N.M. at 527, 612 P.2d at 1338.

38. 95 N.M. 128, 619 P.2d 573 (Ct. App. 1980).

39. 61 N.M. 87, 295 P.2d 209 (1956).

public easement or right of way. The same interest in public use prevailed in *Trigg,* and gave rise, therefore, to a public easement.

Trigg also argued that because he was a lessee in possession of land owned by the state, no prescriptive rights could be acquired by others on his lease estate. Such a right would indirectly be obtained by adverse possession against the state. He relied upon the general rule in New Mexico that a prescriptive easement cannot be created against the state by adverse possession because adverse possession applies to the acquisition of title, not to easements.[40] The court did not apply that rule in this case. The court found the rule to apply only where the land in question is property of the state which is for public use. Trigg's was not public use land. The court further noted that Trigg was subject to the public easement of a right of way and that the prescriptive easement was not a private right created against the state. Quite to the contrary, it was created in favor of the public for public users. In both *Pacheco* and *Trigg,* the New Mexico courts allowed easements. In each case, the court considered actual and constructive notice to the parties. In the case of *Trigg,* the court looked to the necessity for public use of the land.

F. *Leases*

Two lease cases were decided during the Survey period. In *Acquisto v. Joe R. Hahn Enterprises,*[41] a trial court verdict for the landlord (Acquisto) for damages allegedly caused by his tenant's negligence was reversed and remanded for retrial. The landlord, plaintiff Acquisto, sued the tenant for negligently damaging the leased premises by fire. Defendant raised as defenses specific lease provisions which appeared to exculpate the tenant and to indicate that the risk of loss by fire was to be borne by the landlord.

The issue of whether express exculpatory language may be used in a lease in New Mexico to exempt the lessee from liability for a fire caused by the negligence of the lessee had never been decided in New Mexico. Some jurisdictions require that the lease must explicitly state that the lessee is released from liability resulting from his own negligence.[42] Other jurisdictions hold that the lease must be interpreted as a whole.[43]

40. Burgett v. Calentine, 56 N.M. 194, 242 P.2d 276 (1951).

41. 95 N.M. 193, 619 P.2d 1237 (Ct. App. 1980).

42. Sears, Roebuck & Co. v. Poling, 248 Iowa 582, 81 N.W.2d 462 (1957); Wichita City Lines v. Puckett, 156 Tex. 456, 295 S.W.2d 894 (1956); Winkler v. Appalachian Amusement Co., 238 N.C. 589, 79 S.E.2d 185 (1953); Carstens v. Western Pipe & Steel Co., 142 Wash. 259, 252 P. 939 (1927); Galante v. Hathaway Bakeries, Inc., 6 A.D.2d 142, 176 N.Y.S.2d 87 (Sup. Ct. 1958).

43. General Mills, Inc. v. Goldman, 184 F.2d 359 (8th Cir. 1950), *cert. denied,* 340 U.S. 947 (1951).

The court adopted the rule of *General Mills, Inc. v. Goldman,*[44] that the lease must be interpreted as a whole. Applying that rule, the court found the lease in *Acquisto* to be ambiguous on the question of liability, due to the failure of the parties to fill in certain blank spaces in the lease which would have provided which party was to obtain fire insurance and in what amount. The court held that the trial court had erred in finding the lease to be unambiguous and in prohibiting testimony on who was to provide the insurance. The court of appeals, therefore, remanded the case for retrial, to determine the parties' intent as to who would provide fire insurance.

In *Padilla v. Roller,*[45] the court reiterated the long-standing New Mexico rule that leases of mineral interests such as coal are real property.[46] If such leases are owned by husand and wife as community property, both husband and wife must join to make a valid conveyance of the lease.

G. *Mechanics' and Materialmen's Liens*

A claim of lien must be acknowledged[47] in accordance with New Mexico recording statutes[48] in order for mechanics' and materialmen's liens to be effective. The purpose of these requirements is to provide sufficient notice to third parties. The rule of *New Mexico Properties, Inc. v. Lennox Industries, Inc.*[49] demonstrates this proposition. In this case the creditor filed liens containing what amounted to a verification,[50] but which were not sufficient to constitute a corporate acknowledgment of a lien. The verification alone, without an acknowledgment substantially conforming to that required by the recording statute, was not considered recorded. An unrecorded verification has "no effect" or at least its effect would be junior to the record claims or interests.[51]

The requirements of a corporate acknowledgment are:

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44. *Id.*

45. 94 N.M. 234, 608 P.2d 1116 (1980). *See* Kelsey & Montoya, *Domestic Relations,* 12 N.M. L. Rev. 325 (1982); Recent Development, *Coal Leases Held Real Property,* 21 Nat. Resources J. 415 (1981).

46. *See also,* Sachs v. Board of Trustees, 89 N.M. 712, 557 P.2d 209 (1976); Bolack v. Hedges, 56 N.M. 92, 240 P.2d 844 (1952); Vanzantt v. Heilman, 54 N.M. 97, 214 P.2d 864 (1950); Duval v. Stone, 54 N.M. 27, 213 P.2d 212 (1949); Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434 (1973); Staplin v. Vesely, 41 N.M. 543, 72 P.2d 7 (1937); Terry v. Humphreys, 27 N.M. 564, 203 P. 539 (1922).

47. N.M. Stat. Ann. §14-8-4 (1978).

48. N.M. Stat. Ann. §48-2-8 (1978).

49. 95 N.M. 64, 618 P.2d 1228 (1980).

50. A verification is also required by New Mexico law. N.M. Stat. Ann. §48-2-6 (Supp. 1981).

51. 95 N.M. at 65, 618 P.2d at 1229.

1. That the acknowledging officer or agent personally appeared before the officer taking the acknowledgment.
2. That the seal affixed is a corporate seal or a statement that the corporation has no seal.
3. That the instrument was signed by authority of the board of directors of the corporation and acknowledged by the officer or agent so signing to be the free act and deed of the corporation for the use and purpose set forth therein.[52]

The court pointed out, however, that the improper acknowledgment in this case did not affect the lien or render it void as between the parties. The creditor still had all his remedies, including foreclosure of liens except as against persons whose rights "rest upon the absence of a record in the office of the county clerk establishing a prior claim against the lands that are the subject of such liens."[53] This case has been legislatively overruled by the 1981 session of the legislature which cured liens suffering from this deficiency.[54]

In *Houston Lumber Co. v. Skaggs,*[55] a lumber supplier sought foreclosure of a mechanics' and materialmen's lien. Skaggs borrowed $37,000.00 from a local bank and secured the loan with a construction loan from the bank. Skaggs hired contractors who purchased supplies from plaintiff some five months later. The bank released its construction mortgage and filed a new permanent mortgage. During the period of the filing of the construction mortgage and the later filing of the permanent mortgage, liens had been filed by plaintiff and others. The trial court found that the filing of the release of the construction mortgage by the bank resulted in a loss of its priority over the mechanics' and materialmen's liens.

The supreme court reversed, applying the rule followed in a substantial number of other jurisdictions.[56] The rule stated that the cancellation of a mortgage is not conclusive as to its discharge where the holder of a senior mortgage discharges it of record and contemporaneously takes a new mortgage. The mortgagee will not under those circumstances, in the absence of countervailing equitable considerations,[57] be held to have subordinated his security to an intervening lien, unless circumstances show this to have been his intention.

The supreme court did not find that the equities in *Houston*

52. N.M. Stat. Ann. § 14-13-21 (1978).
53. 95 N.M. at 65, 618 P.2d at 1229.
54. N.M. Stat. Ann. § 48-2-8 (Supp. 1981). *See* text accompanying note 69, *infra.*
55. 94 N.M. 546, 613 P.2d 416 (1980).
56. Hadley v. Schow, 146 Neb. 163, 18 N.W.2d 923 (1945), *quoting* 33 A.L.R. 149 (1924).
57. Kellogg Bros. Lumber v. Mularkey, 214 Wisc. 537, 242 N.W. 596 (1934).

Lumber could allow the loss of the bank's priority over the mechanics' and materialmen's lien. All work had started after the filing of the construction mortgage. Plaintiff Houston Lumber, who was pressing this equitable claim, had worked with the contractor hired by Skaggs prior to the Skaggs project. Houston readily advanced credit to Skaggs without a credit check. Credit was advanced by Houston despite the failure of Houston to receive Skaggs' payment of monthly statements. Houston was unaware of the bank's release and substitution of the permanent mortgage, and there was no showing of any reliance on the release by Houston in any way. The court found that under these circumstances the bank's position with respect to priority was not changed. The mortgage remained superior to the liens of the plaintiff. The fact that the trial court held the bank negligent in managing its loan, because it lent money to Skaggs who contracted with a builder on the verge of bankruptcy, did not help Houston. Houston had the responsibility for its own credit practices. The bank's negligence could not relieve Houston from its own careless credit practices. The equities did not, in this instance, favor the lienholder.

H. *Restrictive Covenants*

The supreme court in *Hines Corp. v. City of Albuquerque*[58] affirmed the trial court's grant of injunctive relief in favor of some home owners againt the builder of six quadraplexes. The holding mandated that the builder, Hines, bring the quadraplexes into compliance with certain restrictive covenants. These covenants provided that only single-family residential dwellings could be built on lots in the subdivision.

Hines Corporation mistakenly believed that its land, a tract in the subdivision, was zoned R-2.[59] Accordingly, the corporation submitted plans to the city for approval of the construction of the six quadraplexes. The city issued the building permits. During construction Hines Corporation discovered that the zoning for the property was actually R-T,[60] which permitted fewer dwelling units on the property than R-2 zoning.

Hines Corporation filed a declaratory action against the city, seeking the have the city estopped from enforcing the R-T zoning restriction because the city had issued the building permits under R-2. The parties settled the suit. The settlement provided that the

58. 95 N.M. 311, 621 P.2d 1116 (1980).
59. *See* City of Albuquerque Zoning Ordinance § 12 p. 21 (1978).
60. *Id.* § 11, p. 20.

corporation would be granted a variance by the city which would permit the quadraplexes to remain. A home owner in the subdivision brought suit to set aside the settlement and to have the restrictive covenants allowing only single family dwellings in the subdivision strictly enforced. The trial court set aside the settlement.

The covenants sought to be enforced were more restrictive than the zoning laws. The supreme court followed the general rule of *Ridge Park Home Owners v. Pena*[61] and found that the requirements of the restrictive covenants would prevail. The court held that the other home owners in the subdivision must be able to rely on the restrictions when purchasing their homes and that the benefits to the community were of paramount importance.

The court balanced the equities and the hardships, and concluded that Hines' claimed hardship of having to spend $316,000.00 to bring the building into compliance with the trial court's mandate was uncertain. It was uncertain because the trial testimony that Hines' loss would depend upon the future saleability of the units after remodeling could not be infallibly ascertained. The court found that the uncertain cost to Hines did not outweigh the other home owners' right to rely on the restrictive covenant.

I. *Subdivisions*

The court of appeals in *State v. Select Western Lands, Inc.*[62] reversed the conviction of the defendant land owner for violating the county subdivision laws. The court held that the subdivision laws[63] were in derogation of the common law, and are strictly construed against the governmental body attempting to enforce them. The court found that the mere dividing of land was not a "subdivision" within the County Subdivision Act. The court noted that the subdivision laws are concerned with dividing one parcel of land into several lots. The record did not show that more than one parcel was divided at any one time. There was always only one parcel remaining after each sale. No direct evidence of an interest to subdivide on the part of the land owner was proven. The court concluded that the land owner was not in the business of selling subdivided lots within the meaning of the Act, despite the evidence that the land owner had sold between twenty-four and forty parcels from his 3400-acre tract.[64]

61. 88 N.M. 563, 544 P.2d 278 (1975).

62. 94 N.M. 555, 613 P.2d 425 (Ct. App. 1980).

63. N.M. Stat. Ann. §47-6-1 to -29 (Supp. 1981).

64. Hernandez, J., dissented. Judge Hernandez felt that the interpretation of the majority rendered the Subdivision Act meaningless, and defeated the plain meaning of the statute and the intentions of the legislature. 94 N.M. at 562, 613 P.2d at 432.

J. *Vendor-Vendee*

Campbell v. Kerr[65] concerned the interpretation of a real estate contract. Vendor Samuels sold property to Kerr on a real estate contract and then sold his interest in the Kerr property to a third party, Stepnowski. Kerr sold his interest to Campbell and Campbell sold part interest to Katz. Campbell and Katz were now vendees to the Samuels-Kerr real estate contract, with Stepnowski as vendor. Katz defaulted on her payments. Stepnowski sent a demand letter to Kerr at the address provided in the real estate contract. When the default was not cured within the time required by the contract, Stepnowski picked up the special warranty deed from the escrow agent as provided for in the contract. Campbell then filed a suit to enjoin Stepnowski from recording the special warranty deed and Stepnowski counterclaimed to quiet title against Kerr, Campbell, and Katz.

The trial court allowed forfeiture, and the supreme court affirmed. The court held that the original vendor or successor in interest has no affirmative duty under New Mexico law to send a notice of default to any successors in interest (sub-purchasers) of the original purchaser even if he knows of the sub-purchasers' interest and their whereabouts. The court found that Stepnowski had no obligation to attempt to locate Kerr after Kerr left the address provided in the default provision of the real estate contract. The court indicated instead that if a purchaser wants to receive notice at an address other than that provided in the contract, it is the purchaser's affirmative duty to notify the vendor or the escrow agent of his change of address.

The supreme court further held that the demand letter was not defective, although Stepnowski improperly requested attorney's fees. The court noted that this request would not render the demand so defective as to invalidate the forfeiture where the demand letter in all other respects complied with the requirements provided in the real estate contract. The court also found that there was reasonable notice to Kerr of Stepnowski's intent to terminate the contract if the payments were not cured within the time required.

Finally, the court held that the secondary purchaser, Campbell, could not be relieved of his obligation to cure default on the ground that Kerr, in default himself, could not convey good title as required by the Kerr-Campbell contract. The court restated the rule in New Mexico that a vendor is not obligated to convey merchantable title until his purchaser fulfills the obligations of his contract by com-

65. 95 N.M. 73, 618 P.2d 1237 (1980).

pleting payments to vendor.[66] The question of Kerr's good title would not arise, therefore, until Campbell had completed his part of the bargain. The *Campbell* case indicates three things in the area of real estate contracts. First, a vendor has no affirmative duty to send notice of default to successors in interest to the contract. Second, a demand letter is sufficient if it provides notice, even if extraneous matter is contained. Third, a vendor need not prove his ability to convey good title before the vendee has completely performed his part of the contract.

II. LEGISLATION

While property law was not drastically changed by 1981 legislative action, some significant changes were made to existing law, and several new statutes are noteworthy. There were changes in mechanics' and materialmen's lien laws, a recompilation of the eminent domain statutes, changes in mortgage laws, laws concerning state lands, unclaimed property and land development subdivisions.

A. *Mechanics' and Materialmen's Liens*

The legislature in House Bill 644, amended section 48-2-8[67] in an attempt to cure the problems of possibly invalid liens due to a failure to have liens appropriately acknowledged for recording.[68] This bill eliminated the necessity of an acknowledgment to a mechanics' and materialmen's lien and stated:

> . . . Any claim the form of which complies with the requirements of this article, shall be entitled to be filed of record and need not comply with the requirements of Section 14-8-4 N.M.S.A. 1978 [the recording statutes].[69]

Further substantial changes in the mechanics' and materialmen's liens law were passed. In House Bills 645 and 646, section 48-2-10.1 was added to provide that all mechanics' and materialmen's liens shall be discharged by operation of law on residential dwellings of not more than four units upon payment of all sums due, unless prior to such payment the person entitled to a lien filed his of record.[70]

This legislation places the burden of perfecting liens on the con-

66. *Id.* at 78, 618 P.2d at 1237, *citing* Mountain View Corp. v. Horne, 74 N.M. 540, 395 P.2d 676 (1964).

67. N.M. Stat. Ann. §48-2-8 (Supp. 1981).

68. *See* text accompanying notes 38-42, *supra.*

69. N.M. Stat. Ann. §48-2-8 (Supp. 1981).

70. N.M. Stat. Ann. §§48-2-10.1(A) & (B) (Supp. 1981).

tractor. Under the new law the original contractor, when entitled to payment of his final bill, must notify in writing the owner or his successor or prospective purchaser, that liens may be filed within the next twenty working days. On the same day, the contractor must notify in writing all persons with whom he has contracted and not paid that the twenty-day period for filing liens has commenced. This notice must include the date of the last day for filing of liens. The original contractor must also furnish the owner or his successor with an affidavit of mailing or delivery which indicates to whom he gave notice. Subcontractors, upon receipt of the notice from the original contractor, have five days from their receipt of the original contractor's notice in which to certify to the original contractor in writing that the subcontractor's material and labor suppliers have been notified. If these notice requirements are complied with, the fact that payment in full has been made to the contractor within the twenty day period will not discharge any such liens as may be filed against the property.[71]

Subsection D of the new statute also provides for a criminal penalty in certain instances. If a contractor or subcontractor fails to give notice as indicated above, and, as a result, a material or labor supplier does not file a lien timely, the contractor shall be guilty of a misdemeanor. The contractor may avoid the criminal penalty by making payment to the harmed material or labor supplier or by making other arrangements sufficient to discharge the lien.[72] Subsection E provides that no supplier of labor or materials to an unlicensed original contractor shall be entitled to file a lien if that contractor was required to be licensed as a general contractor.[73]

Subsection F calls for additional criminal penalties. Any contractor or subcontractor who is indebted to a supplier of labor or materials and has been given funds by the owner to discharge that debt, and who intentionally diverts the funds for a purpose other than to pay such supplier shall be guilty of a felony. The degree of the felony shall be determined by the amount involved, unless the contractor or subcontractor has since made payment, in which case he may escape criminal sanction. He may also be absolved from criminal penalties if he has made other arrangements to discharge the lien or his debts have been discharged in bankruptcy.[74]

House Bills 645 and 646 also repeal sections 48-2-18 and 48-2-19

71. N.M. Stat. Ann. §48-2-10.1(B) (Supp. 1981).
72. N.M. Stat. Ann. §48-2-10.1(D) (Supp. 1981).
73. N.M. Stat. Ann. §48-2-10.1(E) (Supp. 1981).
74. N.M. Stat. Ann. §48-2-10.1(F) (Supp. 1981).

relating to the notice required to be given to an owner of residential property and the failure to discharge a valid lien. The effective date of the new law was June 19, 1981.[75]

B. *Eminent Domain*

Senate Bill 130[76] adopted a new Eminent Domain Code which repealed and recompiled the former statutes.[77] The statute also adopts the Rules of Civil Procedure for the handling of claims pursuant to the new statute.[78] The new statute became effective July 1, 1981.

C. *Mortgages*

Senate Bill 142[79] had the effect of amending section 48-7-12 and provided in substance that a due on sale clause is unenforceable. A due on sale clause provides that on the transfer of the mortgagor's interest, the mortgagee is entitled to accelerate or increase the indebtedness on the amount due on the contract. The indebtedness, or interest rate, must stay the same under the new law, unless the security interest is substantially impaired or unless the mortgage funds were provided through the issuance by a governmental entity or instrumentality of tax-exempt status and the sale is in violation of the regulations governing the bonds. The rate of interest on the indebtedness cannot be increased in the event of the transfer of all or any part of the mortgagor's interest to another party by *any* means, unless the security interest is substantially impaired. The statute, however, does not include certain mortgages entered into between a *bona fide* employer as mortgagee and an employee and the employee's spouse if he is married. Whether a due on sale clause can be enforced in these circumstances is still open to question.

D. *State Lands*

House Bill 325,[80] amended section 19-7-9 and expanded the powers of the commissioner of public lands. The commissioner now has the power, in addition to selling public lands for cash or on a deferred payment basis over thirty years, to lease state lands for

75. No effective date was included by the legislature when House Bills 645 and 646 were passed. Pursuant to N.M. Const. art. 4 §23, this legislation would be effective ninety days after the adjournment of the legislature. The 1981 session of the legislature adjourned March 21, 1981. *See Annot.*, N.M. Stat. Ann. §48-2-10.1 (Supp. 1981).

76. N.M. Stat. Ann. §§42A-1-1 to -34 (Supp. 1981).

77. *See* N.M. Stat. Ann. §§42-1-1 *to* -40 (1978).

78. N.M. Stat. Ann. §42A-4-15 (Supp. 1981).

79. N.M. Stat. Ann. §48-6-12 (Supp. 1981).

80. N.M. Stat. Ann. §19-7-9 (Supp. 1981).

more than five years, if the state lands have a value for commercial development or for public use. The commissioner must comply with all of the requirements of the disposition of lands as set forth in the Constitution of New Mexico[81] and the New Mexico Enabling Act,[82] including but not limited to those requirements pertaining to appraisal at true value, advertising, and public auction. The term and nature of the estate to be so conveyed shall be set forth in a public notice of auction pertaining to the particular conveyance.

E. *Unclaimed Property*

House Bill 636 modified the existing Uniform Disposition of Unclaimed Property Act[83] and provided for the disposition of undistributed dividends, profits, distributions, royalty interest, royalties, interest payment, payments on principal or any other sums held owing by a business association for the person entitled thereto who has not claimed any such property within ten years after the date prescribed for the payment or delivery of the property. All such property under the Act is presumed abandoned. The Act further provides that any intangible interests of the person entitled thereto shall also be presumed abandoned. An amended section 7-8-20 refines the procedure for disposing of any sums unclaimed and presumed abandoned as defined in section 7-20-6 and new section 7-20-6.1. A further modification of the Act provides a procedure for the cancellation of abandoned certificates of stock. The director of the Revenue Division of the Department of Taxation (Director) may authorize the holder of stock certificates presumed abandoned to cancel the certificates after the Director receives a request to do so from the holder. The Director may determine that it would be in the best interest of the state that the value of such certificates be forwarded to the Director as a condition precedent to cancellation. The Director is required to notify the holder of his election immediately by registered mail.

Alternatively, the Director is empowered to make one further election not previously provided for in the statutes. The Director may direct the holder to issue stock certificates in the same number of shares as were presumed abandoned. He may direct these stocks to be issued in the name of the State of New Mexico and further direct that the shares be remitted to himself after which he shall notify the holder that the shares in the name of the person who abandoned the property will be cancelled.

81. N.M. Const. art. 13 §§1-3.
82. Act of June 20, 1910, 36 Stat. 557, c. 310.
83. N.M. Stat. Ann. §§7-8-1 to -34 (Supp. 1981).

F. *Land Development and Land Use—Subdivisons*

House Bill 441[84] provided for certain changes in the New Mexico Subdivision Act. These changes included certain minor definitions, in particular "subdivider" and "subdivision."[85] A definition similar to that used in the federal statutes relating to interstate land sales defining a "common promotional plan" was also included.

The bill provided for an expansion of the dedication provision contained in section 47-6-5. New subdivision plats submitted to the Board of County Commissioners for approval must clearly state that the subdivider agrees to build the roads within the subdivision to county specifications. The dedication on the plat must indicate that upon completion of the roads to county standards, the roads may be accepted by the county for maintenance. Section 47-6-9 now gives the county the power to adopt regulations concerning "phase developments" in addition to those already provided in the previous statute.[86] The bill has the effect of modifying section 47-6-13 in some minor respects. The chief modification is a new subsection C which provides that a subdivider must be able to "reasonably demonstrate" that the roads in his subdivision which are to be constructed will receive use, and also that they "are required to provide access to parcels or improvements within twenty-four months from the date of the construction of the roads."[87] Changes were made to the criminal penalties for failure to comply with the New Mexico Subdivision Act, specifically section 47-6-27, which now states "that a conviction based on any violation of the New Mexico Subdivision Act now requires proof of and a finding of a general criminal intent."[88]

By far the most important aspect of House Bill 441 is the addition of Section 47-6-27.1 which allows private remedies. This section permits the purchaser or lessee of lots in an unapproved subdivision to void any transactions at his option. The change also allows the purchaser or lessee to seek restitution from the seller or lessor within one year after the purchaser or lessee's discovery that the property was purchased or leased in an unapproved subdivision. No action can be maintained, however, after the expiration of three years from the signing of the purchase or lease agreement.[89]

Other subsections of section 47-6-27.1 provide that any losses sustained by a purchaser or lessee as a result of a "material violation"

84. N.M. Stat. Ann. §§47-6-2 to -27.1 (Supp. 1981).
85. N.M. Stat. Ann. §§47-6-2(H) & (I) (Supp. 1981).
86. N.M. Stat. Ann. §47-6-9 (Supp. 1981).
87. N.M. Stat. Ann. §47-6-19(C) (Supp. 1981).
88. N.M. Stat. Ann. §47-6-27(D) (Supp. 1981).
89. N.M. Stat. Ann. §47-6-27.1(A) (Supp. 1981).

of the New Mexico Subdivision Act may be recovered from the seller or lessee.[90] Further, the aggrieved purchaser may sue for specific performance by the subdivider of any proposed improvements provided by the subdivider. These improvements may have been set forth in the subdivider's disclosure statement, in the document obligating the purchaser to purchase or lease the land or in any advertising or promotional material relating to the subdivided land. Any action must be brought within three years from the signing of the purchase or lease agreement. In all of the above actions court costs should be allowed to the prevailing parties. At the discretion of the court, reasonable attorney's fees may also be awarded.[91] The private remedies provided in section 47-6-27.1 are only applicable to purchases and leases of land entered into after April 6, 1981, the effective date of this bill.

House Bill 441 changes the owner's exemption from the license requirements of real estate brokers and sales persons. Section 61-29-2(D),[92] as amended, limits the former exception permitting unlicensed owners, lessors or their agents to offer property for sale or lease when selling property in subdivisions of ninety-nine lots or less. From now on all sellers or lessors of their own properties in subdivisions of one-hundred lots or more will either have to be licensed real estate brokers in order to market their properties or will have to engage a licensed broker to do the marketing for them.

90. N.M. Stat. Ann. §47-6-27.1(B) (Supp. 1981).
91. N.M. Stat. Ann. §47-6-27.1(D) (Supp. 1981).
92. N.M. Stat. Ann. §61-29-2(D) (Supp. 1981).