CHAPTER 37
LIMITATION OF ACTIONS; ABATEMENT AND REVIVOR

ARTICLE 1
LIMITATIONS OF ACTIONS

37-1-1. [Generally.]

The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided.

History: Laws 1880, ch. 5, § 1; C.L. 1884, § 1860; C.L. 1897, § 2913; Code 1915, § 3346; C.S. 1929, § 83-101; 1941 Comp., § 27-101; 1953 Comp., § 23-1-1.

ANNOTATIONS

Cross references. - For provision barring sale under mortgage or deed of trust where action on underlying indebtedness barred, see 37-1-20 NMSA 1978.

For limitations applicable to tax assessments, and collection of same, see 7-1-18, 7-1-19 NMSA 1978.

For limitation on action to enforce tax lien, see 7-1-39 NMSA 1978.

For limitations to challenge sale of real property for delinquent taxes, see 7-38-70 NMSA 1978.

As to limitation on actions for collection of property taxes, see 7-38-81 NMSA 1978.

For limitations applicable to criminal prosecutions, see 30-1-9, 30-1-10 NMSA 1978.

As to limitations for bringing of paternity actions, see 40-11-23 NMSA 1978.

As to limitation of action to enforce mechanic's lien, see 48-2-10 NMSA 1978.

Law favors right of action rather than right of limitation, since limitation is procedural, not substantive in nature, and merely bars the remedy by which one party seeks to enforce his substantive rights; fault of defendant and injustice to plaintiff are other reasons to favor action and should be the guidelines of public policy. Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976).

But public policy against stale litigation. - The statutes of limitation announce a public policy that it is better for the public that some rights be lost than that stale litigation be permitted, and when the limitation of the liability fixed by the statute is doubtful or debatable, it should be so construed as not to contravene that policy. Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976).

Stale litigation involves plaintiff who is himself at fault; it does not arise when a defendant is at fault. Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976).

Accrual from injury, not wrongful act. - A cause of action accrues, for the purpose of the statutes of limitations, from the injury rather than the wrongful act. Zamora v. Prematic Serv. Corp. 936 F.2d 1121 (10th Cir. 1991).

Question for court. - Where the facts are not disputed, the question of whether a case is within the bar of the statute of limitations is one of law for the court. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

Applicability of limitations to suit brought by state. - If an action, although brought in the name of a body corporate or politic, is in reality for the state which is the real party in interest and the nominal plaintiff has no real interest in the litigation, then the statute of limitations could not be pleaded against the sovereign; if the suit is brought in the name of the state, but it is only the nominal party of record and its name is used to enforce a right which enures solely to the benefit of the body corporate or politic, then the statute of limitations can be pleaded as a bar to the action. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

Statutes of limitation ordinarily do not run against the state. New Mexico Dep't of Labor v. Valdez, 136 Bankr. 874 (Bankr. D.N.M. 1992).

Bodies corporate and politic. - The general statutes of limitations (as originally set out in Laws 1880, ch. 5, and now appearing as 37-1-1 to 37-1-19 NMSA 1978), with few amendments are applicable in all actions brought by or against bodies corporate or politic except when otherwise expressly declared. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969); Romero v. New Mexico Health & Env't Dep't, 107 N.M. 516, 760 P.2d 1282 (1988).

This section applies to proceedings in probate court. Bent v. Thompson, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891); Browning v. Estate of Browning, 3 N.M. (Gild.) 659, 9 P. 677 (1886).

Limitations against trust beneficiary. - A statute of limitations does not run between a trustee and his beneficiary until there has been a repudiation of the constructive trust. Miller v. Miller, 83 N.M. 230, 490 P.2d 672 (1971).

Generally the obligation of a trustee to account is not affected by limitations until a denial or repudiation of the trust. McCallister v. Farmers Dev. Co. 40 N.M. 101, 55 P.2d 657 (1936).

Action for accounting. - An action for an accounting based on a letter from defendants allegedly creating an express trust in certain motel property in plaintiff's favor has been held to be subject to the limitations in this statute. Fidel v. Fidel, 87 N.M. 283, 532 P.2d 579 (1975).

Accrual of negligence action. - While the statute of limitations began to run when the cause of action accrued, there was no cause of action for negligence until there had been a resulting injury; hence, cause of action arising out of allegedly negligent failure to furnish liability coverage could only accrue when legal liability materialized, that is, when suit was filed. Spurlin v. Paul Brown Agency, Inc. 80 N.M. 306, 454 P.2d 963 (1969).

Accrual of action for breach of indemnity contract. - Where a contract of indemnity contains a promise to make specified payments, an immediate right of action accrues upon the failure of the indemnitor to perform, regardless of whether actual damages have been sustained. Zamora v. Prematic Serv. Corp. 936 F.2d 1121 (10th Cir. 1991).

Certificate of deposit. - The statute of limitations does not begin to run against a certificate of deposit until presentation and demand of payment. Allison v. First Nat'l Bank, 85 N.M. 283, 511 P.2d 769 (Ct. App.), rev'd on other grounds, 85 N.M. 511, 514 P.2d 30 (1973).

Mortgage sale. - Execution of power of sale in mortgage is not barred by limitation barring suit or action on the debt or security. Baca v. Chavez, 32 N.M. 210, 252 P. 987 (1927). But see 37-1-20 NMSA 1978.

Overpayment on public lands. - The statute on limitation of actions has no application to proceedings under Laws 1931, ch. 99 (19-7-59 to 19-7-63 NMSA 1978), and the commissioner of public lands should consider claims filed for refund of payments erroneously made on account of lease or sale of state lands regardless of time. 1931-32 Op. Att'y Gen. 174.

Statute not tolled. - There is no tolling of the six-year statute of limitations during the 20 days in which the decedent's widow has preferential right to apply for appointment as administratrix. In re Matson's Estate, 50 N.M. 155, 173 P.2d 484 (1946).

Extinguishment of lien. - Lien created by statute authorizing recordation of a transcript of the docket thereof is a right as distinguished from a remedy, and if the remedy of foreclosure of the judgment lien prayed for in a counterclaim is barred, the lien has been extinguished. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Nonclaim statute not a substitute. - The nonclaim statute does not replace the statute of limitations upon a person's death, and the holder of a note barred by the general statute cannot rely on the nonclaim statute which has not yet run. In re Matson's Estate, 50 N.M. 155, 173 P.2d 484 (1946).

Law reviews. - For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M.L. Rev. 271 (1976).

Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968), commented on in 9 Nat. Resources J. 101 (1969).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitation of Actions § 1 et seq.

Reasonableness of period allowed for existing causes of action by statute reducing period of limitation, 49 A.L.R. 1263, 120 A.L.R. 758.

Inclusion and exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Validity and applicability to existing causes of action not already barred of statute enlarging period of limitation, 79 A.L.R.2d 1080.

Settlement negotiations as estopping reliance on statute of limitations, 39 A.L.R.3d 127.

Fraud, misrepresentation or deception as estopping reliance on statute of limitations, 43 A.L.R.3d 429.

Which statute of limitations applies to efforts to compel arbitration of a dispute, 77 A.L.R.4th 1071.

What statute of limitations applies to state law action by public sector employee for breach of union's duty of fair representation, 12 A.L.R.5th 950.

Extensions of time under § 108(a) of the Bankruptcy Code (11 USCS § 108(a)), 80 A.L.R. Fed. 374.

Monetary remedies under § 23 of Consumer Product Safety Act (15 USCS § 2072), 87 A.L.R. Fed. 587.

What statute of limitations applies to action to compel arbitration pursuant to § 301 of Labor Management Relations Act (29 USCS § 185), 96 A.L.R. Fed. 378.

Statute of limitations in civil actions for damages under the Racketeer Influence and Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961-1968, 156 A.L.R. Fed. 361.

54 C.J.S. Limitations of Actions §§ 1 to 31 et seq.

37-1-2. Judgments.

Actions founded upon any judgment of any court of the state may be brought within fourteen years from the date of the judgment, and not afterward. Actions founded upon any judgment of any court of record of any other state or territory of the United States, or of the federal courts, may be brought within the applicable period of limitation within that jurisdiction, not to exceed fourteen years from the date of the judgment, and not afterward.

History: Laws 1891, ch. 53, § 2; C.L. 1897, § 2914; Code 1915, § 3347; C.S. 1929, § 83-102; 1941 Comp., § 27-102; 1953 Comp., § 23-1-2; Laws 1965, ch. 282, § 3; 1983, ch. 259, § 1.

ANNOTATIONS

Saving clauses. - Laws 1983, ch. 259, § 3, provides that nothing in the act shall be construed to revive a judgment for which the statute of limitation has expired under prior law.

Limitation not vested right. - A right, fully matured under existing law, to defeat a debt by plea of the statute of limitations is neither a vested right nor a property right, and may be taken away at will by the legislature. Orman v. Van Arsdell, 12 N.M. 344, 78 P. 48 (1904).

Application to pre-1983 judgment. - This section allows a judgment creditor to bring an action to revive a judgment for a period of 14 years after its entry. Pursuant to 39-1-20 NMSA 1978, execution may issue at any time within seven years after the rendition or revival of the judgment. This includes judgments entered prior to the 1983 amendment of this section, which lengthened the original seven-year revival period. Fischoff v. Tometich, 113 N.M. 271, 824 P.2d 1073 (Ct. App. 1991).

Statutes of limitation are procedural and not substantive in nature and are governed by the law of the forum. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

Construed in pari materia. - This section and Rule 1-058, N.M.R. Civ. P., shall be read in pari materia. Navajo Dev. Corp. v. Ruidoso Land Sales Co. 91 N.M. 142, 571 P.2d 409 (1977).

Judgment deemed rendered when entered of record. - Within the contemplation of this section, a judgment is not completely and effectively rendered until it has been

entered of record. Navajo Dev. Corp. v. Ruidoso Land Sales Co. 91 N.M. 142, 571 P.2d 409 (1977).

Domesticated judgment. - When a judgment by a federal bankruptcy court is domesticated in a district court in New Mexico, that court has jurisdiction to address and resolve issues concerning the judgment, including revival thereof; however, the district court lacks jurisdiction if the judgment has not been properly domesticated pursuant to the Foreign Judgment Act. Walter E. Heller W., Inc. v. Ditto, 1998-NMCA-068, 125 N.M. 224, 959 P.2d 560, cert. denied, 125 N.M. 147, 958 P.2d 105 (1998).

Actions to domesticate a foreign judgment are governed by this section, and as such these actions must be brought within the applicable period of limitation for foreign judgments, 14 years. Accordingly, a 1989 judgment on the domestication issue converted the foreign judgment into a New Mexico judgment from which date the applicable state statutes of limitations commenced running. Plaintiff's 1992 action for a charging order based on the 1989 judgment satisfied the three alternative state statutes of limitations (37-1-4, 39-1-20, 37-1-2 NMSA 1978) and does not force a decision on the "correct" statute. Galef v. Buena Vista Dairy, 117 N.M. 701, 875 P.2d 1132 (Ct. App. 1994).

Limitations of forum on foreign judgment. - The New Mexico statutes of limitation are applicable to an action on a Kansas judgment for child support. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

Foreclosure of mortgage. - A decree of foreclosure of a mortgage is not such a judgment as becomes inoperative after seven years from its rendition. Crowell v. Kopp, 26 N.M. 146, 189 P. 652 (1919).

Enforcing deficiency judgment. - In foreclosure proceedings there is both a decree of foreclosure and a common-law judgment for the money, and where the right to enforce the latter is postponed until after sale, and then only for the deficiency, limitations run only from the date of the ascertainment of the deficiency, and execution therefor. Kerr v. Hardwick, 28 N.M. 602, 216 P. 503 (1923).

Child support judgment. - A Kansas judgment for periodic child support payments is a judgment in installments, each of which becomes vested when due and unpaid, and the statute of limitations begins to run on each installment at the moment it vests. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

This section applies to an action to collect accrued and unpaid periodic child support installments mandated in a New Mexico divorce decree. Britton v. Britton, 100 N.M. 424, 671 P.2d 1135 (1983).

Support claim barred. - Where last of minor children for whom support money had been decreed reach the age of 21 years more than seven years before claim for further

support money was filed against the father's estate, the claim was barred by limitations prior to the father's death. In re Coe's Estate, 56 N.M. 578, 247 P.2d 162 (1952).

Claim against estate. - A judgment of allowance of a claim against an estate is not a complete and effective judgment until the order on the administrator to pay is obtained, and a procedure to obtain such an order is not an action on such a judgment under this statute. Gutierrez v. Scholle, 12 N.M. 328, 78 P. 50 (1904).

Accrued interest on judgment. - A suit for interest accrued on a judgment is a suit on the judgment itself and governed by the general statute of limitations concerning judgments unless removed therefrom by some specific statute. Keeter v. Board of County Comm'rs, 67 N.M. 201, 354 P.2d 135 (1960).

Award of discovery sanctions. - Because the award of sanctions is not an action on the judgment, the court is not limited by the statutory bar of fourteen years and a party may be held accountable for an abuse of the discovery process under the court's inherent powers to impose sanctions at any time, subject to constitutional limitations or equitable defenses. Gonzales v. Surgidev Corp. 120 N.M. 151, 899 P.2d 594 (1995).

Scire facias to revive a judgment is included in word "action" in this section. Browne v. Chavez, 181 U.S. 68, 21 S. Ct. 514, 45 L. Ed. 752 (1901).

And not maintainable after running of statute. - After a judgment is barred under the statute, a scire facias giving a new right of action and avoiding the statute cannot be maintained. Browne v. Chavez, 181 U.S. 68, 21 S. Ct. 514, 45 L. Ed. 752 (1901).

Judgment lien expires with judgment. - The period of limitation applicable to judgment liens is the seven years provided by this section, with the important qualification that the enforceability of the judgment lien expires with the judgment upon which it is founded. Western States Collection Co. v. Shain, 83 N.M. 203, 490 P.2d 461 (1971).

The lien created by the statute authorizing recordation of a transcript of the docket thereof is a right as distinguished from a remedy, and if the remedy of foreclosure of the judgment lien prayed for in a counterclaim is barred, the lien has been extinguished. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

The lien of a money judgment does not continue after the judgment on which it is founded has become barred, though the statute which provides for creation of the lien is silent as to any limitation upon such lien. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

When a judgment can no longer be enforced by reason of this section, the judgment lien, subject perhaps to displacement as to priority of intervening liens or encumbrances, becomes unenforceable with it. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

But judgment lien barred by limitations remains cloud upon title and a party is entitled to seek a decree to discharge such cloud. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Appeal does not toll period for execution upon judgment. - Since an appeal does not postpone or suspend the operation of the statute of limitations from the date of entry of a final judgment, unless a supersedeas bond is posted or a stay of enforcement is ordered by the court, an appeal from a final judgment does not toll the period during which a judgment holder may execute upon the judgment. Farms v. Carlsbad Riverside Terrace Apts., Inc. 102 N.M. 50, 690 P.2d 1044 (Ct. App. 1984).

Remarriage of parties tolls statute on divorce judgment. - The running of the statute on a former wife's action to enforce the judgment entered after her first divorce was tolled during the remarriage of the parties, the remarriage having been followed by a second divorce. Dolezal v. Blevins, 105 N.M. 562, 734 P.2d 802 (Ct. App. 1987).

Payment of extinguished lien not condition of quieting title. - Where a judgment lien has been forfeited through running of the statute of limitations, payment of the judgment for which the lien on real estate is claimed will not be necessary as a condition of removing a cloud on the title caused by the record of the lien. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Cancellation of deed. - Where plaintiff sues to quiet title to land whose title was held void 15 years earlier, and defendant counterclaims that the deed is void, citing the previous court proceedings, this section does not apply because defendant's cause of action is not an action on a judgment, but to cancel a void deed. Gabaldon v. Westland Dev. Co. 485 F.2d 263 (10th Cir. 1973).

Presence of codebtor bars tolling of statute. - Where one of two cojudgment debtors remains within the jurisdiction at all times, statute of limitations is not tolled though the other codebtor is absent from the jurisdiction of the court for a portion of the seven-year period. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Nonresidence as defense to action on foreign judgment. - In an action on a foreign judgment, where the answer pleads limitations, and the reply sets up nonresidence as a defense, a judgment entered upon the theory that defendants had agreed to file an affidavit as to residence, and had failed to do so, was irregular, in that there is no statute or order of court requiring it. Northcutt v. King, 23 N.M. 515, 169 P. 473 (1917).

Priority of liens. - Where execution on a judgment was issued four times within a five-year period although order of revivor was subsequently obtained, the judgment lien did not become dormant; hence a purchaser at an execution sale less than seven years after judgment was entitled to priority over purchaser at special master's sale under judgment docketed subsequently. Otero v. Dietz, 39 N.M. 1, 37 P.2d 1110 (1934).

Law reviews. - For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Judgments § 969 et seq.

Death of judgment debtor as affecting running of statute of limitations against judgment, 2 A.L.R. 1706.

Suspension, or removal of bar, of statute of limitations as against judgment, 21 A.L.R. 1038, 166 A.L.R. 768.

Inclusion and exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tort-feasor, 91 A.L.R.3d 844.

50 C.J.S. Judgments §§ 854, 871.

37-1-3. Notes; written instruments; judgments of courts not of record; period of limitation; computation of period.

A. Those founded upon any bond, promissory note, bill of exchange or other contract in writing, or upon any judgment of any court not of record, within six years.

If the payee of any bond, promissory note, bill of exchange or other contract in writing or upon any judgment of any court not of record, enters into any contract or agreement in writing to defer the payment thereof, or contracts or agrees not to assert any claim against the payor or against the assets of the payor until the happening of some contingency, the time during the period from the execution of such contract or agreement and the happening of such contingency shall not be included in computing the six-year period of limitation above provided.

B. Those against any banking or financial organization subject to the provisions of the Uniform Disposition of Unclaimed Property Act founded upon a bill of exchange, within ten years.

C. Those founded upon a traveler's check, within fifteen years.

History: Laws 1880, ch. 5, § 3; C.L. 1884, § 1862; C.L. 1897, § 2915; Code 1915, § 3348; C.S. 1929, § 83-103; Laws 1939, ch. 89, § 1; 1941 Comp., § 27-103; 1953 Comp., § 23-1-3; Laws 1975, ch. 70, § 1.

ANNOTATIONS

I. General Consideration.
II. Applicability.
III. Accrual of Cause of Action.

I. GENERAL CONSIDERATION.

Cross references. - For Public Securities Limitation of Action Act, see 6-14-4 NMSA 1978.

For statute of limitations in contracts for sale, see 55-2-725 NMSA 1978.

Compiler's notes. - The Uniform Disposition of Unclaimed Property Act, referred to in Subsection B, was compiled as Chapter 7, Article 8 NMSA 1978 before being repealed in 1997. Comparable sections are compiled as Chapter 7, Article 8A NMSA 1978.

Statutes of limitations are procedural and law of forum governs matters of procedure. Sierra Life Ins. Co. v. First Nat'l Life Ins. Co. 85 N.M. 409, 512 P.2d 1245 (1973).

Effect of dismissal without prejudice. - A dismissal without prejudice operates to leave the parties as if no action had been brought at all. Following such dismissal, the statute of limitations is deemed not to have been suspended during the period in which the suit was pending. King v. Lujan, 98 N.M. 179, 646 P.2d 1243 (1982).

Filing of complaint tolls statute. - Filing of the complaint is commencement of the action which generally tolls the applicable statute of limitations. King v. Lujan, 98 N.M. 179, 646 P.2d 1243 (1982).

Contract provisions control. - Provision of fire insurance policy that no suit should be sustainable thereunder unless commenced within 12 months next after loss prevailed over this section as to time when suit on policy must be commenced. Electric Gin Co. v. Firemen's Fund Ins. Co. 39 N.M. 73, 39 P.2d 1024 (1935).

Extension by guarantor. - Where contract of guaranty appearing on note involved in foreclosure suit provided that, in consideration of extension of time of payment of note, payment of note on demand at any time six years from stated date was guaranteed by the guarantor, such contract of guaranty extended time of payment six years, and suit by payee a few months after execution of contract of guaranty was not barred by limitation. Cullender v. Levers, 38 N.M. 436, 34 P.2d 1089 (1934).

Effect of verbal promise. - Verbal promise to pay an old debt in monthly installments in consideration for extension of time for paying balance due was not a new contract superseding original loan contracts and did not toll running of the statute of limitations. Petranovich v. Frkovich, 49 N.M. 365, 164 P.2d 386 (1945).

Written deferral of payments. - Where an agreement is written into promissory notes that payment is to be deferred for 60 days after demand, the period between their dates and demand is not to be counted in computing the six-year period of limitation. Schoonover v. Caudill, 65 N.M. 335, 337 P.2d 402 (1959).

Effect of nonclaim statute. - The nonclaim statute is not a substitute for the general statute of limitations as to claims against a decedent's estate and the holder of a promissory note cannot rely on nonclaim statute where general statute had run but not the statute of nonclaim. In re Matson's Estate, 50 N.M. 155, 173 P.2d 484 (1946).

Statute not tolled by performance. - A contract vendee's claim of title, where the vendee has fully performed and whether or not he or she is in possession, is not cut off by the running of a statute of limitations. Garcia v. Garcia, 111 N.M. 581, 808 P.2d 31 (1991).

Statute not tolled by possession. - Possession of mortgaged land by mortgagee with consent of mortgagor does not toll the statute of limitations; the court will not create an exception not provided by law. Buss v. Kemp Lumber Co. 23 N.M. 567, 170 P. 54 (1918).

Equitable estoppel as tolling statute. - The party asserting estoppel must sustain the burden of showing not only that he failed to discover the cause of action prior to the running of the statute of limitations, but also that he exercised due diligence and that some affirmative act of fraudulent concealment frustrated discovery notwithstanding such diligence. The district court in this case abused its discretion in applying the doctrine of equitable estoppel to toll the six-year statute of limitations on the breach of contract claim. The grounds upon which the plaintiffs based their claims were apparent to them many years prior to filing the 1982 complaint, and they could have commenced the action within the statutory period. Continental Potash, Inc. v. Freeport-McMoran, Inc. 115 N.M. 690, 858 P.2d 66 (1993), cert. denied, 510 U.S. 1116, 114 S. Ct. 1064, 127 L. Ed. 2d 383 (1994).

In an action for breach of contract, proof that the defendant intended to deceive or delay the plaintiff or to dissuade him from pursuing legal action was not required for the plaintiff to claim equitable estoppel. Tiberi v. CIGNA Corp. 89 F.3d 1423 (10th Cir. 1996).

In an action for breach of contract, the defendant's claim that it made no representations to the plaintiff upon which he could reasonably rely could not be used to prevent the application of equitable estoppel. Tiberi v. CIGNA Corp. 89 F.3d 1423 (10th Cir. 1996).

Nor pending administrator's appointment. - There is no tolling of the six-year statute of limitations during the 20 days in which the decedent's widow has preferential right to apply for appointment as administrator. In re Matson's Estate, 50 N.M. 155, 173 P.2d 484 (1946).

Defendants with foreign residence. - This section and 37-1-9 NMSA 1978 apply to defendants residing in another country at time of and since executing note sued on. Bunton v. Abernathy, 41 N.M. 684, 73 P.2d 810 (1937).

Extinguishment of lien. - Lien created by the statute authorizing the recordation of a transcript of the docket thereof is a right as distinguished from a remedy, and if the remedy of foreclosure of the judgment lien prayed for in a counterclaim is barred, the lien has been extinguished. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

For comment, "Commercial Law - Uniform Commercial Code - Sale of Goods," 8 Nat. Resources J. 176 (1968).

For comment, "Negotiable Instruments - A Cause of Action on a Cashier's Check Accrues from the Date of Issuance," see 4 N.M.L. Rev. 253 (1974).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For annual survey of commercial law in New Mexico, see 18 N.M.L. Rev. 313 (1988).

For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bills and Notes §§ 1035 to 1056; 51 Am. Jur. 2d Limitations of Actions §§ 92 to 99, 126 to 134.

When statute of limitations begins to run in favor of drawer of check, 4 A.L.R. 881.

Statute of limitations as applied to certificate of deposit, 23 A.L.R. 7, 128 A.L.R. 157.

Availability of statute, and time when it begins to run, where one assumes and agrees to pay another's debt, 31 A.L.R. 1056.

Acceleration provision in note or mortgage as affecting the running of the statute of limitations, 34 A.L.R. 897, 161 A.L.R. 1211.

Action by or in behalf of creditors of a corporation on unpaid stock or subscription, 35 A.L.R. 832.

When statute of limitations begins to run against action to recover interest, 36 A.L.R. 1085.

Purchase subject to mortgage as removing or interrupting defense of statute of limitations as against mortgage, 48 A.L.R. 1320.

Grantee's assumption of mortgage indebtedness by deed as simple contract or specialty within statute of limitations, 51 A.L.R. 981.

When statute of limitations begins to run against warrant of municipal or quasi-municipal corporation, 56 A.L.R. 830.

Posting of notice or other steps preliminary to nonjudicial foreclosure of mortgage as tolling statute of limitations as against grantee of mortgaged premises, 122 A.L.R. 938.

Statute of limitations as affecting suit to enforce mortgage or lien securing debt payable in installments, 153 A.L.R. 785.

When statute of limitations begins to run against action on written contract which comtemplates on actual demand, 159 A.L.R. 1021.

Acceleration provision as affecting running of limitations, 161 A.L.R. 1211.

Contract in writing within statute of limitations, what constitutes, 3 A.L.R.2d 809.

What period of limitations governs in an action against a public officer and a surety on his official bond, 18 A.L.R.2d 1176.

Action by passenger against carrier for personal injuries as based on contract or on tort, with respect to application of statutes of limitations, 20 A.L.R.2d 331.

Entry or indorsement by creditor on note, bond or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

When statute of limitations begins to run against note payable on demand, 71 A.L.R.2d 284.

Validity of contractual time period, shorter than statute of limitations, for bringing action, 6 A.L.R.3d 1197.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tort-feasor, 91 A.L.R.3d 844.

Statute of limitations as bar to arbitration under agreement, 94 A.L.R.3d 533.

Limitation of action against insurer for breach of contract to defend, 96 A.L.R.3d 1193.

Debtor's restrictive language accompanying part payment as preventing interruption of statute of limitations, 10 A.L.R.4th 932.

Statutes of limitation: actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability, 12 A.L.R.4th 866.

When statute of limitations commerces to run on automobile no-fault insurance personal injury claim, 36 A.L.R.4th 357.

When statute of limitations commences to run on right of partnership accounting, 44 A.L.R.4th 678.

When statute of limitations commences to run as to cause of action for wrongful discharge, 19 A.L.R.5th 439.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts, 33 A.L.R.5th 1.

Limitations of actions applicable to action by trustees of employee benefit plan to enforce delinquent employer contributions under ERISA (29 USCS § 1132(a)), 90 A.L.R. Fed. 374.

17A C.J.S. Contracts § 531; 54 C.J.S. Limitations of Actions §§ 56, 59, 63, 149 to 152.

II. APPLICABILITY.

"Mortgage" is a contract in writing and it falls within the six-year statute. Griffith v. Humble, 46 N.M. 113, 122 P.2d 134 (1942).

Land purchase agreement. - Claim arising out of written agreement by defendant purchasers to pay an additional amount beyond the agreed purchase price for sale of land within one and one-half years was barred where the action was brought 13 years after execution of the contract. Romero v. Sanchez, 86 N.M. 55, 519 P.2d 291 (1974).

Interest coupons. - An action to recover on interest coupons is an action on written instruments, and the six year, not the four year, limitation applies. Coler v. Board of County Comm'rs, 6 N.M. 88, 27 P. 619 (1891).

City warrants. - It is not error for the court to enter judgment against plaintiff, after plea of limitations, on petition to fund city warrants, where 10-year delay is not explained. Miller v. City of Socorro, 9 N.M. 416, 54 P. 756 (1898); Cross v. Board of County Comm'rs, 9 N.M. 410, 54 P. 880 (1898).

Freight charges. - The limitations for transportation charges on freight moving intrastate in New Mexico is that provided for written contracts, to wit, six years. 1955-56 Op. Att'y Gen. No. 6417.

Section does not apply to action to recover on deficiency on motor vehicle installment contract. - Article 2 of the Uniform Commercial Code governs an action to recover a deficiency after a default on a motor vehicle installment contract; thus, the statute of limitations is four years. First Nat'l Bank v. Chase, 118 N.M. 783, 887 P.2d 1250 (1994).

Failure to service debt. - Action for breach of contract, brought more than six years after defendant failed to bring certain foreclosure action, was barred where plaintiffs had had previous notice of defendant's breach. First W. Sav. & Loan Ass'n v. Home Sav. & Loan Ass'n, 84 N.M. 72, 499 P.2d 694 (Ct. App. 1972).

Written account. - If a written contract is an account, the four-year limitation of 37-1-4 NMSA 1978 applies; hence, despite written agreements by hospital patients to be responsible for payment of their accounts, these accounts would still be subject to a four-year limitation. 1969-70 Op. Att'y Gen. No. 70-25.

Failure to pay wages. - In an action to exact a penalty from an employer for failure to pay wages, the time limitations of 50-4-4 NMSA 1978 control over this section. Spikes v. Mittry Constr. Co. 295 F.2d 207 (10th Cir. 1961).

Published offer of reward. - An offer by publication of reward for the discovery of the parties concerned in a murder, while it becomes a contract by performance of the thing for which the reward was offered, was not a "written contract" within this section. Cunningham v. Fiske, 13 N.M. 331, 83 P. 789 (1906).

County bonds. - The six-year statute of limitations did not apply to county bonds maturing in 1881, where taxes were levied for their payment, and the board of county commissioners recognized the interest due as a continuing liability before the six years could attach by authorizing a loan to meet it at maturity. Coler v. Board of County Comm'rs, 6 N.M. 88, 27 P. 619 (1891).

Six-year limitation period governs action on insurance policy. - In an action brought on an insurance policy, the six-year limitation period of this section, pertaining to actions brought on a written contract, governs the action. Sandoval v. Valdez, 91 N.M. 705, 580 P.2d 131 (Ct. App. 1978)(specially concurring opinion).

Even where uninsured motorist clause in policy. - An insurer under an uninsured motorist clause in a policy is governed by the contract statute of limitations in this section. To allow an insurer to lessen the period of time to bring an action on an insurance policy from six years to one year by means of a contract provision would thwart the purpose of the insured motorist statute. Sandoval v. Valdez, 91 N.M. 705,

580 P.2d 131 (Ct. App. 1978) (specially concurring opinion) Ellis v. Cigna Property & Cas. Cos. 1999-NMSC-034, 128 N.M. 54, 989 P.2d 429;.

Subrogated insurer action against uninsured motorist. - Since an insured has a six year limitation period for suit against the insurance carrier under an uninsured motorist claim, the subrogated insurance carrier is bound by the same limitation period as the insured would be if the insured were bringing suit against the uninsured motorist. Liberty Mut. Ins. Co. v. Warren, 119 N.M. 429, 891 P.2d 570 (Ct. App. 1995).

III. ACCRUAL OF CAUSE OF ACTION.

Accrual at time of breach. - A cause of action for a breach of contract accrues at the time of the breach. Jeffers v. Butler, 762 F. Supp. 308 (D.N.M. 1990), aff'd, 931 F.2d 62 (10th Cir. 1991).

Accrual from injury, not wrongful act. - A cause of action accrues, for the purpose of the statutes of limitations, from the injury rather than the wrongful act. Zamora v. Prematic Serv. Corp. 936 F.2d 1121 (10th Cir. 1991).

Cashier's check. - Statute of limitations on cashier's check begins running on date issued not on the date checks were presented for payment. First Nat'l Bank v. Allison, 85 N.M. 511, 514 P.2d 30 (1973).

Note payable on demand starts statute running from its date. Schoonover v. Caudill, 65 N.M. 335, 337 P.2d 402 (1959).

Promissory note. - The statute of limitations commences to run against a cause of action on a note upon default in payment of interest, where the note provides that upon default in interest the principal sum becomes due and collectible. Heisel v. York, 46 N.M. 210, 125 P.2d 717 (1942); Buss v. Kemp Lumber Co. 23 N.M. 567, 170 P. 54 (1918).

Under contract obligations payable by installments, the statute begins to run only with respect to each installment when due. The statute begins to run with respect to the whole indebtedness only from the date of an exercise of the option to declare the whole indebtedness due. Welty v. Western Bank, 106 N.M. 126, 740 P.2d 120 (1987).

Contract of indemnity. - Where a contract of indemnity contains a promise to make specified payments, an immediate right of action accrues upon the failure of the indemnitor to perform, regardless of whether actual damages have been sustained. Zamora v. Prematic Serv. Corp. 936 F.2d 1121 (10th Cir. 1991).

Certificates of deposit. - The statute of limitations does not begin to run against a certificate of deposit, until it has been presented to the bank with a demand of payment and a refusal. Bank of Commerce v. Harrison, 11 N.M. 50, 66 P. 460 (1901).

The statute of limitations begins to run against the depositor of certificate of deposit at the time when demand for payment is made. Luna v. Montoya, 25 N.M. 430, 184 P. 533 (1919).

Guaranty contract. - Statute of limitations does not run against a guarantor until default of his principal. Cullender v. Levers, 38 N.M. 436, 34 P.2d 1089 (1934).

County warrants. - Where a county has issued a warrant for feeding prisoners, drawn upon the treasurer, and one year later the holder presented it to the commissioners to exchange for bonds, and it was endorsed "presented but not refunded," and signed by the clerk, this is not a presentment for and refusal of payment; the holder of the warrant may not then claim that the right of action has not accrued until suit is begun nine years after the drawing of the warrant. Cross v. Board of County Comm'rs, 9 N.M. 410, 54 P. 880 (1898).

Accounting under trust. - Any cause of action under a letter allegedly creating an express trust in certain motel property in favor of plaintiff arose at the time of the sale or sales of the property, and at that time, if not before, any right plaintiff might have had to an accounting came into existence; since there was no evidence of fraudulent concealment by defendants, the six-year statute of limitations barred plaintiff's action. Fidel v. Fidel, 87 N.M. 283, 532 P.2d 579 (1975).

Where two brothers operated a farm as partners, but property purchased in 1950 and 1957 was recorded in only one brother's name, the limitations period to reform the deeds did not begin to run until the brother in whose name the property was held repudiated the partnership agreement. Bassett v. Bassett, 110 N.M. 559, 798 P.2d 160 (1990).

Broker's commission. - Where contract for payment of real estate broker's commission was entered into more than six years before filing of suit, but commission, if any, would not become due until title to the acreage was obtained by defendant, time elapsing between the making of the contract and the happening of the condition when performance became due was not to be counted. Harp v. Gourley, 68 N.M. 162, 359 P.2d 942 (1961).

Suspension during period where no action possible. - A real estate contract provided that, should the purchaser continue in default for 30 days after written demand for payment, the seller could terminate the contract. Since no action on the contract was possible until 30 days after a notice of default, the statute of limitations was suspended for 30 days following the notice. Welty v. Western Bank, 106 N.M. 126, 740 P.2d 120 (1987).

Demand guaranty. - The statute of limitations on a demand guaranty begins to run when demand is made upon the guarantor. Western Bank v. Franklin Dev. Corp. 111 N.M. 259, 804 P.2d 1078 (1991).

Uninsured motorist coverage. - The limitations period on the claim of an insured against his uninsured motorist carrier for injuries sustained while occupying an automobile not owned by him does not begin to run until his claim against the automobile's insurer is finally adjudicated. Ellis v. Cigna Property & Cas. Cos. 1999-NMSC-034, 128 N.M. 54, 989 P.2d 429.

37-1-4. [Accounts and unwritten contracts; injuries to property; conversion; fraud; unspecified actions.]

Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within four years.

History: Laws 1880, ch. 5, § 4; C.L. 1884, § 1863; C.L. 1897, § 2916; Code 1915, § 3349; C.S. 1929, § 83-104; 1941 Comp., § 27-104; 1953 Comp., § 23-1-4.

ANNOTATIONS

I. General Consideration.
II. Applicability.
A. In General.
B. Actions by State or Public Body.
C. Actions Barred.
D. Actions Not Barred.
III. Accrual of Cause of Action.

I. GENERAL CONSIDERATION.

Cross references. - For limitation on action for damages for injuries to person or reputation, see 37-1-8 NMSA 1978.

As to limitations on wrongful death actions, see 41-2-2 NMSA 1978.

For limitations on actions to recover gambling losses, see 44-5-3 NMSA 1978.

For limitations on enforcement of mechanics' liens, see 48-2-10 NMSA 1978.

For limitations on actions to enforce liens on oil and gas wells and pipelines, see 70-4-7 NMSA 1978.

Determination of fraudulent intent. - Where, in suit to cancel deed and settlement agreement entered into prior to divorce for lack of consideration, the only possible defense is the statute of limitations, or laches, to establish which the burden rested upon the defendant husband, trial court should determine, first, whether husband at time of execution of the deed and the agreement held a fraudulent intent not to perform

on his part, and, second, when the wife first discovered this fraud. Primus v. Clark, 48 N.M. 240, 149 P.2d 535 (1944).

Filing as conditional tolling of statute. - The filing of the complaint one week before the asserted cause of action would be barred by this section did not toll that statute where service of process was not procured for over 13 months, for although the act of filing a complaint usually conditionally suspends the statute of limitations, New Mexico has recognized the need for good faith in the filing of actions and of due diligence in the issuance of process in order to toll the statute of limitations; defendant's failure to issue process for over 13 months indicates a continued lack of reasonable diligence, an essential to the effective suspension of the statute of limitations. Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957).

Abandonment of suit not shown. - While conduct of a plaintiff subsequent to a timely filing of complaint may constitute an abandonment of the action, failure to procure service of summons for slightly more than 60 days after the expiration of the period of limitation does not in itself constitute lack of due diligence or show abandonment of the cause of action. Isaacks v. Jeffers, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Service timely. - Where complaint was filed before period of limitations had expired, though process was not actually served until slightly more than 60 days after expiration of four years from the accrual of the action, the action was timely brought and running of the statute was interrupted. Isaacks v. Jeffers, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Computing timeliness. - When appellant filed suit herein exactly four years from the date of decedent's death, his claim was timely filed within the four years required by this section as under former 12-2-2 NMSA 1978 (see now 12-2A-7 NMSA 1978) in computing time, the first day is excluded and the last included unless the last falls on Sunday, in which case, the time prescribed is extended to include the whole of the following Monday. Skarda v. Skarda, 87 N.M. 497, 536 P.2d 257 (1975).

Laches. - The four elements necessary to establish laches are: (1) conduct of the defendant giving rise to a situation for which the plaintiff seeks a remedy; (2) delay by the plaintiff in asserting his rights, though he has notice or knowledge of the defendant's conduct and has had the opportunity to institute suit; (3) lack of knowledge or notice on the defendant's part that the plaintiff would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant should the plaintiff be accorded relief or the suit is not held to be barred. McCabe v. Hawk, 97 N.M. 622, 642 P.2d 608 (Ct. App. 1982).

Relation back of amendments to complaint. - Where original complaint, filed before running of the statute, and amendments thereof filed after the period had run, all centered around the same transaction, the handling of certain branded cattle, the only difference being that in the earlier pleadings plaintiff also sought an accounting from

others than the defendant, the last amended complaint dated back to the filing of the original complaint so that the statute constituted no bar. Isaacks v. Jeffers, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Effect of verbal promise. - Verbal promise to pay an old debt in monthly installments in consideration for extension of time for paying balance due was not a new contract superseding original loan contract and did not toll running of the statute of limitations. Petranovich v. Frkovich, 49 N.M. 365, 164 P.2d 386 (1945).

Verbal promise to use monthly rentals from garage and filling station until their sale to pay on loan contracts, and payment of balance from sale proceeds, was without consideration and invalid since it amounted to an extension of time for repayment of loan as to which there was an existing obligation to pay. Petranovich v. Frkovich, 49 N.M. 365, 164 P.2d 386 (1945).

Extinguishment of lien. - Lien created by the statute authorizing the recordation of a transcript of the docket thereof is a right as distinguished from a remedy, and if the remedy of foreclosure of the judgment lien prayed for in a counterclaim is barred, the lien has been extinguished. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Foreign judgments later domesticated. - Actions to domesticate a foreign judgment are governed by 37-1-2 NMSA 1978, and as such these actions must be brought within the applicable period of limitation for foreign judgments. Accordingly, a 1989 judgment on the domestication issue converted the foreign judgment into a New Mexico judgment from which date the applicable state statutes of limitations commenced running. Plaintiff's 1992 action for a charging order based on the 1989 judgment satisfied the three alternative state statutes of limitations (37-1-4, 39-1-20, 37-1-2 NMSA 1978) and does not force a decision on the "correct" statute. Galef v. Buena Vista Dairy, 117 N.M. 701, 875 P.2d 1132 (Ct. App. 1994).

Law reviews. - For comment on Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968), see 9 Nat. Resources J. 101 (1969).

For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For article, "Survey of New Mexico Law, 1979-80: Torts," see 11 N.M.L. Rev. 217 (1981).

For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico," see 11 N.M.L. Rev. 359 (1981).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For annual survey of New Mexico law relating to torts, see 13 N.M.L. Rev. 473 (1983).

For note, "Federal Civil Rights Act - The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983: DeVargas v. State ex rel. New Mexico Department of Corrections," see 13 N.M.L. Rev. 555 (1983).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Accounts and Accounting § 21 et seq.; 18 Am. Jur. 2d Conversion § 94; 37 Am. Jur. 2d Fraud and Deceit §§ 400 to 415; 51 Am. Jur. 2d Limitation of Actions §§ 84 to 85, 91, 100 to 101, 124 to 125.

Running of limitations against an action to recover on account of removal of timber by a trespasser, 27 A.L.R. 1005.

Limitation applicable to action for consequential damage as result of taking or damaging of property for public use, 30 A.L.R. 1190, 139 A.L.R. 1288.

When limitation begins to run against an action to recover on account of removal of mineral from land, 37 A.L.R. 1182.

Limitation of action against tenant for years or for life for waste or breach of obligation as to use and care of property, 53 A.L.R. 46.

Action to enforce stockholder's superadded liability, when limitation begins to run, 55 A.L.R. 1068, 137 A.L.R. 788.

Attorney as trustee for purpose of running of limitations against claim for money or property received or collected by him, 151 A.L.R. 1388.

National Service Life Insurance, accident policy of, 156 A.L.R. 1445, 157 A.L.R. 1445, 158 A.L.R. 1445.

Contract in writing within statute of limitations, what constitutes, 3 A.L.R.2d 809.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 A.L.R.2d 500.

Commencement of running of statute of limitations respecting actions by owners of right of re-entry or actions against third persons by reversioners, 19 A.L.R.2d 729.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default or miscarriage of another, 20 A.L.R.2d 246.

Action by passenger against carrier for personal injuries as based on contract or on tort, with respect to application of statutes of limitations, 20 A.L.R.2d 331.

Entry or indorsement by creditor on note, bond or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

Statute of limitations governing damage action against warehouseman for loss of or damage to stored goods, 23 A.L.R.2d 1466.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

Statute of limitations governing action to recover unearned premium retained by insurer upon cancellation of policy, 29 A.L.R.2d 938.

Account stated, limitation of actions as applied to, 51 A.L.R.2d 331.

When limitation commences to run against action to recover, or damages for detention of, property deposited without definite date for its return, 57 A.L.R.2d 1044.

When statute of limitations or laches begins to run against action to set aside fraudulent conveyance or transfer in fraud of creditors, 100 A.L.R.2d 1094.

Action to recover money or property lost and paid to gambling as affected by statute of limitations, 36 A.L.R.3d 900.

Running of statute of limitations against claim for contribution or indemnity based on tort, 57 A.L.R.3d 867.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tort-feasor, 91 A.L.R.3d 844.

Delay in prosecution of disciplinary proceeding as defense or mitigating circumstance, 93 A.L.R.3d 1057.

Statute of limitations as bar to arbitration under agreement, 94 A.L.R.3d 533.

Limitation of action against insurer for breach of contract to defend, 96 A.L.R.3d 1193.

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R.4th 284.

Statutes of limitation: actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability, 12 A.L.R.4th 866.

When statute of limitations begins to run against action based on unwritten promise to pay money where there is no condition or definite time for repayment, 14 A.L.R.4th 1385.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts, 18 A.L.R.4th 1340.

Oil and gas royalty as real or personal property, 56 A.L.R.4th 539.

Application of statute of limitations in private tort actions based on injury to persons or property caused by undergound flow of contaminants, 11 A.L.R.5th 438.

Physician's use of patient's tissues, cells or bodily substances for medical research or economic purposes, 16 A.L.R.5th 143.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts, 33 A.L.R.5th 1.

Attorney malpractice - tolling or other exceptions to running of statute of limitations, 87 A.L.R.5th 473.

When does state statute of limitations begin to run in civil action for securities fraud under § 10(b) of Securities Exchange Act of 1934 (15 USCS § 78j(b)), 71 A.L.R. Fed. 257.

Limitations of actions applicable to action by trustees of employee benefit plan to enforce delinquent employer contributions under ERISA (29 USCS § 1132(a)), 90 A.L.R. Fed. 374.

54 C.J.S. Limitations of Actions §§ 36, 64, 67, 68, 71.

II. APPLICABILITY.

A. IN GENERAL.

Statutes of limitations apply to both complaints and counterclaims, whether they be compulsory or permissive. Hartford v. Gibbons & Reed Co. 617 F.2d 567 (10th Cir. 1980).

Nature of right dispositive. - The nature of the right sued upon, and not the form of action or relief demanded, determines the applicability of the statute of limitations. Taylor v. Lovelace Clinic, 78 N.M. 460, 432 P.2d 816 (1967).

Subrogated insurer's action against third-party tortfeasor. - When a workers' compensation insurer settles with an injured worker, receives an assignment of his negligence cause of action to the extent of the payment, and seeks reimbursement from

a third party, the relevant statute of limitations is not this section (four-year period), which governs unspecified actions, but § 37-1-8 (three-year period), which governs actions for personal injury, which begins to run on a subrogated insurer's action against a third-party tortfeasor at the same time that the statute of limitations would begin to run on an action by the insured, or his personal representative in the event of the death of the insured. American Gen. Fire & Cas. Co. v. J.T. Constr. Co. 106 N.M. 195, 740 P.2d 1179 (Ct. App. 1987).

Tort of misappropriation of likeness, which occurs when someone appropriates to his own use or benefit the name or likeness of another, is a property claim governed by this section. Benally v. Hundred Arrows Press, Inc. 614 F. Supp. 969 (D.N.M. 1985), rev'd on other grounds sub nom. Benally v. Amon Carter Museum of W. Art, 858 F.2d 618 (10th Cir. 1988).

"Account" defined. - A mutual, open, current account of which the law takes cognizance in determining the rights and liabilities of debtor and creditor litigants in apparent qualification of the statute of limitations may be defined as an account usually and properly kept in writing, wherein are set down by express or implied agreement of the parties concerned a connected series of debit and credit entries of reciprocal charges and allowances. Gentry v. Gentry, 59 N.M. 395, 285 P.2d 503 (1955).

Open account shown. - Where there is a record of a connected series of debit and credit entries and a continuation of a related series, along with evidence that the amount claimed to be due by plaintiff and defendant's payments thereon were intended by the parties as the beginning of a connected or related series, there was a mutual open account, and the four-year limitation period commenced with the last entry thereon. Hunt Process Co. v. Anderson, 455 F.2d 700 (10th Cir. 1972).

Loans not transformed to account. - The fact that defendant makes payments to plaintiff on loans works no change in the nature of plaintiff's rights or defendant's liability; it does not create an open current account between the parties. Gentry v. Gentry, 59 N.M. 395, 285 P.2d 503 (1955).

"Other actions". - It was intended that actions on constructive trusts should be included within the all-inclusive words, "and all other actions not herein otherwise provided for and specified within four years," of this section. Reagan v. Brown, 59 N.M. 423, 285 P.2d 789 (1955).

Prior to the 1988 enactment of 52-2-14 NMSA 1978, there was no specific period of limitations for actions against the Subsequent Injury Fund contained in the Subsequent Injury Act (52-2-1 to 52-2-13 NMSA 1978), and an employer's claim for reimbursement from the fund was not sufficiently analogous to a claim for personal injuries so as to justify invocation of the statute of limitations (37-1-8 NMSA 1978) on this theory. Therefore, the four-year limitations period in 37-1-4 NMSA 1978 for "all other actions not . . . otherwise provided for and specified" was the applicable statute. Hernandez v. Levi Strauss, Inc. 107 N.M. 644, 763 P.2d 78 (Ct. App. 1988).

Section has application to ordinary action based upon fraud, such as suits to rescind contracts brought about by false representations of the defendant; it has no application to suits in which the fraud charged is a collateral matter. Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968).

No application to collateral fraud. - This section does not apply to suits wherein the fraud charged is collateral in nature, but applies only to the ordinary action based on fraud, such as suits to rescind contracts which are the result of false representations by the defendant. Lotspeich v. Dean, 53 N.M. 488, 211 P.2d 979 (1949).

Applicability to duress. - In an action to cancel a contract because of alleged duress, the same statute of limitations applies as controls in actions based on alleged fraud. Taylor v. Lovelace Clinic, 78 N.M. 460, 432 P.2d 816 (1967).

Declaratory actions are governed by same limitations applicable to other forms of relief. Taylor v. Lovelace Clinic, 78 N.M. 460, 432 P.2d 816 (1967).

Action for establishing paternity. - Trial court's sua sponte application of this section in an action to establish paternity was not error, despite the fact that the father never pled, presented evidence or argument, or requested a finding of fact dealing with this section, although the father did specifically present a statute of limitations defense by way of argument for the application of the prior Bastardy Statute, which was previously declared to be unconstitutional. Padilla v. Montano, 116 N.M. 398, 862 P.2d 1257 (Ct. App. 1993).

Applicability in federal court. - The law of New Mexico governs as to the time within which an action must be commenced when brought in federal court of that state, but the manner in which actions are commenced, when actions are deemed to have begun, the manner and method of serving process, all relate to procedure and are governed by the law of the forum. Isaacks v. Jeffers, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Statute of limitations applicable to 42 U.S.C. § 1983 actions. - An action under 42 U.S.C. § 1983 for excessive use of force during an arrest is not governed by the limitations on actions contained in the Tort Claims Act but by the general statutory limitations on actions for personal injury, 37-1-8 NMSA 1978, or for miscellaneous claims, this section. Gunther v. Miller, 498 F. Supp. 882 (D.N.M. 1980).

Section 41-4-15 NMSA 1978 applicable to claims under 42 U.S.C. § 1983. - The two-year period under 41-4-15 NMSA 1978 is the applicable limitation period to claims under the Federal Civil Rights Act, 42 U.S.C. § 1983. DeVargas v. State ex rel. New Mexico Dep't of Cors. 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981).

Application to claim against subsequent injury fund. - An employer's claim against the subsequent injury fund which accrued prior to the effective date of former 52-2-14 NMSA 1978, was governed by the four-year limitations period provided for in this

section and not the two-year limitations period provided for in former 52-2-14 NMSA 1978. Kennecott Copper Corp. v. Chavez, 113 N.M. 504, 828 P.2d 416 (Ct. App. 1992).

Suits to divide personalty. - The four-year statute of limitations of this section applies to suits to divide personal property brought under 40-4-20 NMSA 1978. Plaatje v. Plaatje, 95 N.M. 789, 626 P.2d 1286 (1981).

Receipt of payments for military retirement. - The statute of limitations applicable to the receipt of payments for military retirement is a four-year statute, this section, and it runs from the date of each installment of military retirement. Berry v. Meadows, 103 N.M. 761, 713 P.2d 1017 (Ct. App. 1986).

Deceit by attorney. - This section applied to a claim against an attorney for deceit. Duncan v. Campbell, 1997-NMCA-028, 123 N.M. 181, 936 P.2d 863.

Actual injury to limited partner. - Where plaintiff invested in a limited partnership based on accountant's advice, her cause of action for accountant malpractice based on the investment accrued when she received notice of Final Partnership Administrative Adjustment (FPAA) from the Internal Revenue Service; the FPAA is the functional equivalent of an individual IRS tax deficiency notice and constitutes actual injury to a partner in a limited partnership. Wiste v. Neff & Co. 1998-NMCA-165, 126 N.M. 232, 967 P.2d 1172, cert. denied, 126 N.M. 534, 972 P.2d 353 (1998).

B. ACTIONS BY STATE OR PUBLIC BODY.

Statute of limitations does not run against the state. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

The state was not barred by the statute of limitations from intervening in a suit to compel compliance with 47-6-1 NMSA 1978 et seq. Even if the county, the original plaintiff, was barred by the limitations period, the state's status as a "real party in interest" precluded dismissal of the suit. State ex rel. Stratton v. Alto Land & Cattle Co. 113 N.M. 276, 824 P.2d 1078 (Ct. App. 1991).

But may run against localities. - Statutes of limitations do not run against the state unless the statute expressly includes the state or does so by clear implications, but will run against county and other political subdivisions, including school districts, unless such may be deemed to be an arm of the state because of the particular governmental functions or purposes involved. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

Actions by municipal corporations. - The plea of the statute of limitations is no defense to actions by counties or municipal corporations involving public rights, such as taxation, unless the statute expressly so provides, and our statute contains no such provision. Hagerman v. Territory, 11 N.M. 156, 66 P. 526 (1901).

Special assessments. - The four-year statute of limitations applies and runs against special assessments for street paving obligations, since such assessments are not levied for governmental purposes and are not "taxes," and actions to foreclose such improvement assessment liens are barred where for nearly six years there has been default in payment of annual installments. Altman v. Kilburn, 45 N.M. 453, 116 P.2d 812 (1941).

School board as real party in interest. - If a school district or board of education has the power or duty to contract, lease, issue bonds, sue and be sued and hold both real and personal property then it is a body corporate and politic, and where the obligation sued upon is one owed solely to the school district as administered by the board of education, it is the real party in interest and the statute of limitations may run against it. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

Statute does not run against directors of state insane asylum. Directors of Insane Asylum v. Boyd, 37 N.M. 36, 17 P.2d 358 (1932).

C. ACTIONS BARRED.

Written accounts. - If a written contract is an account, the four-year limitation of 37-1-4 NMSA 1978 applies; hence, despite written agreements by hospital patients to be responsible for payment of their accounts, these accounts would still be subject to a four-year limitation. 1969-70 Op. Att'y Gen. No. 70-25.

Trusts founded on verbal agreements. - This limitation applies to equitable actions on trusts founded on verbal agreements or unwritten contracts when the defendant has not fraudulently concealed his cause of action, or the existence thereof. Patterson v. Hewitt, 11 N.M. 1, 66 P. 552 (1901), aff'd, 195 U.S. 309, 25 S. Ct. 35, 49 L. Ed. 214 (1904).

Abstractor's bond. - Action on an abstractor's bond would probably be founded on an unwritten contract, and would be prescribed in four years. 1921-22 Op. Att'y Gen. 65.

Breach of warranty or products liability claim was barred by the four-year statute of limitation. Standhardt v. Flintkote Co. 84 N.M. 796, 508 P.2d 1283 (1973).

Setting aside probated will. - Under the laws of the territory of New Mexico, a judgment of a probate court in that territory admitting a will to probate could not be annulled by the same court in a proceeding instituted by an heir more than 20 years after the original judgment was rendered and more than four years after the heir became of age. Bent v. Thompson, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891).

Association membership. - Where plaintiff acquired whatever right he had to membership in cooperative association no later than 1956 by his own testimony, at which time he was rejected, the four-year limitation period provided in this section for the bringing of his suit to compel his acceptance to membership had expired long before

the filing of his complaint in intervention. Moya v. Chilili Coop. Ass'n, 87 N.M. 99, 529 P.2d 1220 (1974), cert. denied, 421 U.S. 965, 95 S. Ct. 1954, 44 L. Ed. 2d 452 (1975).

Legal malpractice suit barred where discoverable more than four years prior to filing of complaint. - Where the harm or damage from an alleged legal malpractice in drafting and supervising the execution of a will arose at the time the testatrix died, although the cause of action did not accrue until the harm or damage was ascertainable or discoverable, the executrix was in a position to ascertain or discover the harm or damage to her as a result of the alleged defect in the execution of the decedent's will each time she changed attorneys and also at the time the court set aside the order admitting the will to probate. So, if the executrix had a cause of action against her attorney, it was ascertainable or discoverable more than four years before she filed her complaint, the four-year statute of limitations had elapsed and the executrix's complaint was properly dismissed. Jaramillo v. Hood, 93 N.M. 433, 601 P.2d 66 (1979).

Where plaintiff knew all the facts underlying his claim for legal malpractice more than four years before filing suit, the claim was time barred under both this section and 37-1-8 NMSA 1978. Delta Automatic Sys. v. Bingham, 1999-NMCA-029, 126 N.M. 717, 974 P.2d 1174, cert. denied, 126 N.M. 532, 972 P.2d 351 (1999).

D. ACTIONS NOT BARRED.

Section does not apply to actions founded on written instruments. Coler v. Board of County Comm'rs, 6 N.M. 88, 27 P. 619 (1891).

Section inapplicable to personal injuries. - Where the action in its effect is one for the recovery of damages for personal injury, the statute of limitations for injuries to the person applies, even though the cause of action stated is ex contractu in its nature. Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962).

Quiet title actions. - Plaintiffs' action, as heirs, to have title in property left by decedent quieted in them as against defendant creditors to whom, pursuant to compromise settlement, the administrator had executed deeds to the property, but who did not have possession thereof, was not barred by four-year statute of limitations, as bar of laches does not run in favor of one claiming real property, by or through a void deed, who is not in possession. Emblem v. Emblem, 57 N.M. 495, 260 P.2d 693 (1953).

Cause of action to establish interest in real estate and to quiet title in plaintiff was not barred by this section. Apodaca v. Hernandez, 61 N.M. 449, 302 P.2d 177 (1956).

Defendant's claims to the realty were not barred by the four-year statute of limitations where the trial court could properly determine that he possessed a superior claim to that asserted by plaintiff. Tres Ladrones, Inc. v. Fitch, 1999-NMCA-076, 127 N.M. 437, 982 P.2d 488, cert. denied, 127 N.M. 391, 981 P.2d 1209 (1999).

Action by remaindermen. - Where remaindermen brought quiet title action against one to whom the life tenant had conveyed a "fee" and delivered quitclaim deed bearing the alleged forged signatures of the remaindermen, the four-year statute of limitations applicable to actions seeking relief against fraud is not applicable. Lotspeich v. Dean, 53 N.M. 488, 211 P.2d 979 (1949).

Suit for balance of purchase price. - Where evidence lent support to the clear implication that initial agreement as to the times and amounts of payments on the purchase price had been changed, filing of suit after discovery of defendants' recording of quitclaim deed prior to full payment, in violation of this agreement, was timely. Romero v. Sanchez, 86 N.M. 55, 519 P.2d 291 (1974).

Section does not bar suit to enforce restrictive covenant or negative easement brought within 10-year period applicable under 37-1-22 NMSA 1978. Jinkins v. City of Jal, 73 N.M. 173, 386 P.2d 599 (1963).

Condemnation compensation. - This section was not applicable to action to recover compensation for condemned land. State Hwy. Comm'n v. Ruidoso Tel. Co. 73 N.M. 487, 389 P.2d 606 (1963).

Promise to devise. - Where plaintiff in a cross-action claims title to land because of repeated promises of its owner to adopt plaintiff and leave her property to plaintiff at her death, such action is not barred by limitation of four years after ancestor's death, since the claim is not founded upon contract, and did not accrue at ancestor's death. Wooley v. Shell Petroleum Corp. 39 N.M. 256, 45 P.2d 927 (1935).

Creditor's suit timely. - Where trial court found that transferee had accepted conveyance of title with fraudulent intent in order to assist debtor to defraud creditors, a creditor's suit which was brought within the statutory period of limitations was not barred by laches, where no change in property value or relationship of the parties had taken place. Consolidated Placers, Inc. v. Grant, 48 N.M. 340, 151 P.2d 48 (1944).

In absence of a change in relationship of the parties or value of the property a creditor's suit against the debtor's transferee seeking to set aside a conveyance as fraudulent commenced two years and eight months after the conveyance and two months after debtor's death was not barred by laches. Consolidated Placers, Inc. v. Grant, 48 N.M. 340, 151 P.2d 48 (1944).

Obstruction and appropriation of creek. - This section did not apply to a suit for damages for obstruction of flow and appropriation of waters of a creek. New Mexico Prods. Co. v. New Mexico Power Co. 42 N.M. 311, 77 P.2d 634 (1937).

Collateral fraud. - Section did not apply to suit by former wife to set aside conveyance fraudulently procured by former husband on grounds that she did not have competent and independent legal counsel. Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968).

III. ACCRUAL OF CAUSE OF ACTION.

Action for accounts and unwritten contracts may be brought within four years after the cause of action accrues and where there is no specified time for the payment of loans, the action accrues upon the date of such loan. Akre v. Washburn, 92 N.M. 487, 590 P.2d 635 (1979).

Former spouse's share of military retirement benefits. - Military retirement benefits are a form of employee compensation and are community property if the period of employment upon which those benefits are based occurred during coverture. Although the right to receive benefits matured prior to divorce, the right to receive each monthly installment accrues when the installment becomes due. Thus the statutory time limitation upon a former spouse's right to sue for a portion of each installment commences to run from the time each installment comes due. Plaatje v. Plaatje, 95 N.M. 789, 626 P.2d 1286 (1981).

Statute of limitations began to run with discovery of fraud in 1961 and did not bar suit in 1963 for fraud from 1957 to 1961 against finance company for payments made by house trailer dealers to finance company for insurance which was not obtained. Southwestern Inv. Co. v. Cactus Motor Co. 355 F.2d 674 (10th Cir. 1966).

As to the common-law fraud, the limitations period commences to run upon discovery of the fraud or upon discovery of such facts as would, on reasonable diligent investigation, lead to a knowledge of fraud. Jones v. Ford Motor Co. 599 F.2d 394 (10th Cir. 1979).

Learning of fraud. - A demurrer based on 37-1-7 NMSA 1978 was not well taken where the complaint alleged that "it was not until about the month of July, 1902" that plaintiff learned of defendant's fraudulent claim to be the absolute owner of the real estate in question, in violation of an agreement made in 1898, which complaint was filed November 24, 1903. Alexander v. Cleland, 13 N.M. 524, 86 P. 425 (1906).

When negligence cause arises. - The period of limitation begins to run when the cause of action accrues; and there is no cause of action for negligence until there has been a resulting injury to the plaintiff. Chisholm v. Scott, 86 N.M. 707, 526 P.2d 1300 (Ct. App. 1974); Spurlin v. Paul Brown Agency, Inc. 80 N.M. 306, 454 P.2d 963 (1969).

Successive injuries from structure or nuisance. - Where a structure or nuisance is such that its construction and continuance are not necessarily injurious, damages may be awarded for successive injuries, and a new statute of limitations begins to run from the date of each injury. Valdez v. Mountain Bell Tel. Co. 107 N.M. 236, 755 P.2d 80 (Ct. App. 1988).

Failure to furnish insurance. - The cause of action arising out of negligent failure to furnish liability coverage could only accrue when legal liability materialized, that is, when negligence suit was filed, and since a policy of insurance such as defendant allegedly failed to furnish would have provided for the insurance company to furnish a defense;

otherwise the loss would have accrued only after judgment had been entered, or possibly when settlement had been made or a judgment paid. Spurlin v. Paul Brown Agency, Inc. 80 N.M. 306, 454 P.2d 963 (1969).

Action against insurer for failure to settle claim accrues upon judgment against insured. - An action against an insurer for wrongful failure to settle a claim does not accrue until judgment against the insured is final. It is only then that any liability in excess of the policy limits is established. Torrez v. State Farm Mut. Auto. Ins. Co. 705 F.2d 1192 (10th Cir. 1982).

Tax deficiency. - Liability imposed by deficiency notice from the IRS was the injury which formed plaintiffs' cause of action against defendant accountants, as the deficiency was not owed until the IRS rendered its assessment in written notice to the taxpayer plaintiff; hence, the statute may not be deemed to have run until four years after this notice had been given. Chisholm v. Scott, 86 N.M. 707, 526 P.2d 1300 (Ct. App. 1974).

Discovery of breach of fiduciary duty. - In lessor's action against realtor for breach of fiduciary duty in connection with negotiation of lease on lessor's behalf, trial court properly submitted issues of whether lessor relied on realtor acting in fiduciary capacity and when lessor discovered or should have suspected fraud or negligence of realtor. Ramsey v. Culpepper, 738 F.2d 1092 (10th Cir. 1984).

Repudiation of constructive trust. - A statute of limitations does not run between a trustee and his beneficiary until there has been a repudiation of the constructive trust. Miller v. Miller, 83 N.M. 230, 490 P.2d 672 (1971); Garcia v. Marquez, 101 N.M. 427, 684 P.2d 513 (1984).

Equitable trust. - When suit is brought for imposition of an equitable trust, the statute of limitations does not run between a trustee and a beneficiary until there has been a repudiation of the trust, whether it be a constructive trust, or a resulting trust. To prove repudiation of the trust, the complaining party must show that there has been an open denial of the trust by the trustee who held the property for the benefit of the plaintiff. Granado v. Granado, 107 N.M. 456, 760 P.2d 148 (1988).

Plaintiff pretermitted heir could properly anticipate that executrix would administer the estate according to law; until executrix asserted unlawful dominion over plaintiff's property interest, which she must have done, if at all, after the entry of the decree approving the final account and ordering distribution to her as sole devisee and legatee, there was no dispute between them and nothing over which they had reason to contest; hence, suit filed well within the four-year period after entry of the decree was timely. Hagerman v. Gustafson, 85 N.M. 420, 512 P.2d 1256 (1973).

Continuous representation does not toll statute of limitation. - New Mexico does not recognize the "continuous representation" doctrine as a principle that tolls the statute of limitations for legal malpractice. Sharts v. Natelson, 118 N.M. 721, 885 P.2d 642 (1994).

Action against Subsequent Injury Fund. - Where an employer seeks to file a suit against the Subsequent Injury Fund for reimbursement, and where the 1988 statute of limitations (52-2-14 NMSA 1978) is not applicable, the period of limitations on such claim begins to run from the time the employer knew or should have known it had a claim against the fund. Hernandez v. Levi Strauss, Inc. 107 N.M. 644, 763 P.2d 78 (Ct. App. 1988).

The four-year statute of limitations with respect to claims by an employer against the Subsequent Injury Fund, as announced in Hernandez v. Levi Strauss, Inc., 107 N.M. 644, 763 P.2d 78 (Ct. App. 1988), should be applied retrospectively. Kennecott Copper Corp. v. Chavez, 109 N.M. 439, 786 P.2d 53 (Ct. App. 1990).

Accrual of legal malpractice claim. - The statute of limitations in a cause of action for legal malpractice commences when both elements of a two-part test have been satisfied, namely: (1) when the harm or damage is ascertainable or discoverable by the injured party; and (2) when actual loss or damage has occurred to the client. In this case, the plaintiffs' cause of action for legal malpractice accrued when the judgment was entered against them in the employment contract dispute. At that point the plaintiffs were aware that the law firm's legal advice had been determined to be erroneous and they had been damaged. While there was still a possibility both those decisions would be reversed on appeal, an unreversed judgment is final between the parties as to all matters to which the judgment relates. Brunacini v. Kavanagh, 117 N.M. 122, 869 P.2d 821 (Ct. App. 1993).

An invasion of a legally protected interest (an injury), without actual loss (harm), is insufficient to accrue a cause of action in legal malpractice. Sharts v. Natelson, 118 N.M. 330, 881 P.2d 690 (Ct. App. 1993), rev'd on other grounds, 118 N.M. 721, 885 P.2d 642 (1994).

A cause of action for legal malpractice is established when the client can allege the following facts: (1) the employment of the attorney; (2) the attorney's neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the client. Sharts v. Natelson, 118 N.M. 721, 885 P.2d 642 (1994).

The limitations period for legal malpractice commences when the client sustains actual injury and the client discovers, or through reasonable diligence should discover, the facts essential to the cause of action. Sharts v. Natelson, 118 N.M. 721, 885 P.2d 642 (1994).

Discovery of injury by client. - The statute of limitations does not begin to run until the client discovers, or should discover, that he or she has suffered a loss and that the loss may have been caused by the attorney's wrongful act or omission. Sharts v. Natelson, 118 N.M. 721, 885 P.2d 642 (1994).

The question of when a client is deemed to have discovered an attorney's malpractice and the resulting injury is generally a question of fact, but if the undisputed facts show

that the client knew, or should have been aware of the negligent conduct on or before a specific date, the issue may be decided as a matter of law. Sharts v. Natelson, 118 N.M. 721, 885 P.2d 642 (1994).

Continuing wrong doctrine. - In an action for fraud, misrepresentation and unfair trade practices, the fact that the plaintiff knew of his injuries, which he attributed to the risk of loss inherent in every contract, did not prevent application of the continuing wrong doctrine since the defendant held the plaintiff to the agreement while at the same time taking measures to dissolve it. Tiberi v. CIGNA Corp. 89 F.3d 1423 (10th Cir. 1996).

Tolling of legal malpractice claim. - A cause of action for legal malpractice is not tolled during the pendency of an appeal of the underlying action. Brunacini v. Kavanagh, 117 N.M. 122, 869 P.2d 821 (Ct. App. 1993).

Attorney's fees. - Where plaintiff in suit for attorney's fees was employed to perform services involved in the foreclosure of a mortgage, his right to compensation began when the sale of the mortgaged premises was confirmed by the court, not when the decree of foreclosure was signed, and suit begun within four years from the date of the order confirming the sale was not barred. Prichard v. Fulmer, 25 N.M. 452, 184 P. 529 (1919).

Cancellation of liens by municipality. - Where municipality not merely failed to enforce collection of assessments but affirmatively accepted bonds higher in number than those held by plaintiff in satisfaction of the lien against the property of the persons surrendering the bonds and canceled the lien against the property, plaintiff was required to take notice of the records of the municipality pertinent to the time and manner of payments, defaults, etc., and in the absence of evidence that cancellation of the liens was surrounded by secrecy, cause of action accrued at time this wrong occurred and a suit initiated more than four years thereafter was barred by limitations. Freeman v. Town of Gallup, 152 F.2d 273 (10th Cir. 1945).

Action against void private land grant corporation. - A void private land grant corporation has no right to the proceeds from a land sale and no authority to pay such proceeds to its "shareholders." Conversion is present where the "shareholders" claim and erroneously receive proceeds of the sale. The party aggrieved cannot be deemed to have discovered she has a cause of action for conversion until the date of the judicial opinion which declares the company in question to be a void corporation. Apodaca v. Unknown Heirs of Tome Land Grant, 98 N.M. 620, 651 P.2d 1264 (1982).

Pleading accrual of cause. - A general allegation in a complaint in an action for injury to property fixing the accrual of the cause of action within four years is controlled and limited by a specific averment showing the discovery of the injury at an earlier date. Mayer v. Lane, 33 N.M. 18, 262 P. 178 (1927).

37-1-5. [Recovery of unpaid overtime compensation or damages.]

All suits and actions for the recovery of unpaid overtime compensation or damages in connection therewith, whether arising under contract or a state or a federal law or administrative ruling, shall be brought within one (1) year after the accrual of such a cause of action, or three (3) months after this act takes effect, whichever is the later, and not thereafter. Nothing in this act [this section] shall be construed as reviving or extending any cause of action which may now or hereafter be barred by any other statute.

History: 1941 Comp., § 27-125, enacted by Laws 1947, ch. 44, § 1; 1953 Comp., § 23-1-5.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 48A Am. Jur. 2d Labor and Labor Relations § 3250 et seq.

37-1-6. [Accrual of cause of action on open accounts.]

When there is an open current account the cause of action shall be deemed to have accrued upon the date of the last item therein, as proved on the trial.

History: Laws 1880, ch. 5, § 7; C.L. 1884, § 1866; C.L. 1897, § 2919; Code 1915, § 3351; C.S. 1929, § 83-106; 1941 Comp., § 27-105; 1953 Comp., § 23-1-6.

ANNOTATIONS

With open account there is one single and indivisible liability arising from a connected series of related and reciprocal debits and credits. Panhandle Irrigation, Inc. v. Bates, 78 N.M. 706, 437 P.2d 705 (1968).

Mutual open account. - A mutual, open, current account of which the law takes cognizance in determining the rights and liabilities of debtor and creditor litigants in apparent qualification of the statute of limitations may be defined as an account usually and properly kept in writing, wherein are set down by express or implied agreement of the parties concerned a connected series of debit and credit entries of reciprocal charges and allowances. Gentry v. Gentry, 59 N.M. 395, 285 P.2d 503 (1955).

Lease not an open account. - Lease agreement between oil company and city, which by agreement was to last for five years or so long as oil continued to be produced on the land, could not be unilaterally closed and settled, and therefore was not an "open account" within the meaning of this section. City of Carlsbad v. Grace, 1998-NMCA-144, 126 N.M. 95, 966 P.2d 1178.

Loans not transformed to account by payments. - The fact that defendant makes payments to plaintiff on loans works no change in the nature of plaintiff's rights or

defendant's liability; it does not create an open current account between the parties. Gentry v. Gentry, 59 N.M. 395, 285 P.2d 503 (1955).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Accounts and Accounting § 4 et seq.

What constitutes an open current account within the statute of limitations, 1 A.L.R. 1060, 39 A.L.R. 369, 57 A.L.R. 201.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Entry or indorsement by creditor on note, bond or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

54 C.J.S. Limitations of Actions § 161.

37-1-7. [Accrual of cause of actions for fraud or mistake, injuries or conversion of property.]

In actions for relief, on the ground of fraud or mistake, and in actions for injuries to, or conversion of property, the cause of action shall not be deemed to have accrued until the fraud, mistake, injury or conversion complained of, shall have been discovered by the party aggrieved.

History: Laws 1880, ch. 5, § 6; C.L. 1884, § 1865; C.L. 1897, § 2918; Code 1915, § 3366; C.S. 1929, § 83-123; 1941 Comp., § 27-106; 1953 Comp., § 23-1-7.

ANNOTATIONS

Compiler's notes. - This section was amended by Laws 1893, ch. 47, § 1, by adding thereto the provisions contained in 37-1-26 NMSA 1978.

Constructive fraud is breach of legal or equitable duty which the law declares fraudulent because of its tendency to deceive others; such fraud may be present on the part of the fraud feasor without any showing of dishonesty of purpose or intent to deceive. Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976).

Accrual where no duty to disclose. - Purchasers' action, eight years after the real estate closing, against a title insurer for "negligence or oversight" in not informing them of a balloon payment on an assumed mortgage was barred by 37-1-4 NMSA 1978; this section does not extend the limitation period where the insurer had no duty to make such a disclosure and the purchasers failed to make a reasonable inquiry or to examine

the original mortgage. Roscoe v. U.S.Life Title Ins. Co. 105 N.M. 589, 734 P.2d 1272 (1987), overruled on other grounds, Ruiz v. Garcia, 115 N.M. 269, 850 P.2d 972 (1993).

Running of statute of limitations in fraudulent concealment actions. - In an action for fraudulent concealment, the statute of limitations begins to run when plaintiff learns of facts that should arouse his suspicion about defendant's statements or nondisclosure. Ramsey v. Culpepper, 738 F.2d 1092 (10th Cir. 1984).

Normally some positive act of concealment must be shown such as a false representation in order to establish fraudulent concealment. Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976).

Limitation period not tolled where party did not actively or passively conceal transactions. - Trial court properly granted summary judgment on the basis of limitations in regard to a claim regarding the purchase of disputed property, where there was nothing in the record to indicate that the moving party did anything, either actively or passively, to conceal his transactions from the opposing party, so as to justify the equitable tolling of the statute of limitations. Dow v. Chilili Coop. Ass'n, 105 N.M. 52, 728 P.2d 462 (1986).

Mistake of one party. - Oil company's claim that it overpaid oil and gas royalties to city for sixteen years was barred by the statute of limitations; the period of limitations was not tolled by the oil company's mistake because it could have been discovered any time during the sixteen-year period, had the oil company examined its accounting records. City of Carlsbad v. Grace, 1998-NMCA-144, 126 N.M. 95, 966 P.2d 1178.

Effect of fraudulent concealment. - Where a party against whom a cause of action accrues prevents the one entitled to bring the cause from obtaining knowledge thereof by fraudulent concealment, or where the cause in known to the injuring party, but is of such character as to conceal itself from the injured party, the statutory limitation on the time for bringing the action will not begin to run until the right of action is discovered, or, by the exercise of ordinary diligence, could have been discovered. Hardin v. Farris, 87 N.M. 143, 530 P.2d 407 (Ct. App. 1974).

Fraudulent concealment is not restricted to actions in which fraud is the gist of the action, and neither does it create a new or separate cause of action; it merely tolls the running of a statute of limitations. Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976).

Concealment not shown. - Where municipality not merely failed to enforce collection of assessments but affirmatively accepted bonds higher in number than those held by plaintiff in satisfaction of the lien against the property of the persons surrendering the bonds and canceled the lien against the property, plaintiff was required to take notice of the records of municipality pertinent to the time and manner of payments, defaults, etc., and in the absence of evidence that cancellation of the liens was surrounded by secrecy, cause of action accrued at time this wrong occurred and a suit initiated more

than four years thereafter was barred by limitations. Freeman v. Town of Gallup, 152 F.2d 273 (10th Cir. 1945).

Continuing wrong doctrine. - In an action for fraud, misrepresentation and unfair trade practices, the fact that the plaintiff knew of his injuries, which he attributed to the risk of loss inherent in every contract, did not prevent application of the continuing wrong doctrine since the defendant held the plaintiff to the agreement while at the same time taking measures to dissolve it. Tiberi v. CIGNA Corp. 89 F.3d 1423 (10th Cir. 1996).

Action for breach of fiduciary duty. - In lessor's action against realtor for breach of fiduciary duty in connection with negotiation of lease on lessor's behalf, trial court properly submitted issues of whether lessor relied on realtor acting in fiduciary capacity and when lessor discovered or should have suspected fraud or negligence of realtor. Ramsey v. Culpepper, 738 F.2d 1092 (10th Cir. 1984).

Discovery of false representation. - A false representation constitutes fraudulent concealment and constructive fraud, each of which tolls the statute of limitations; the date of discovery of the false representation is the time from which plaintiffs' cause of action accrues. Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976).

Where two brothers operated a farm as partners, but property purchased in 1950 and 1957 was recorded in only one brother's name, the limitations period to reform the deeds did not begin to run until the brother in whose name the property was held repudiated the partnership agreement. Bassett v. Bassett, 110 N.M. 559, 798 P.2d 160 (1990).

Discovery not shown. - Where articles of a corporation stated that 10% of subscriptions to its stock had been paid to its treasurer who made affidavit to that effect, the fact that he informed a creditor when an indebtedness was incurred that such subscriptions had not been paid did not constitute a discovery so as to make the statute of limitations begin to run. Albright v. Texas, S.F. & N.R.R. 8 N.M. 110, 42 P. 73 (1895), rev'd, 8 N.M. 422, 46 P. 448 (1896).

Scope of constructive notice. - The recording of an instrument is constructive notice to subsequent purchasers and encumbrancers only, and does not affect prior parties. Romero v. Sanchez, 83 N.M. 358, 492 P.2d 140 (1971).

When grantor affected. - The recording of a deed must be accompanied by other circumstances sufficient to put a reasonable person upon inquiry in order for the recording to act as constructive notice to grantor of fraud. Romero v. Sanchez, 83 N.M. 358, 492 P.2d 140 (1971).

Action against void private land grant corporation. - A void private land grant corporation has no right to the proceeds from a land sale and no authority to pay such proceeds to its "shareholders." Conversion is present where the "shareholders" claim and erroneously receive proceeds of the sale. The party aggrieved cannot be deemed

to have discovered she has a cause of action for conversion until the date of the judicial opinion which declares the company in question to be a void corporation. Apodaca v. Unknown Heirs of Tome Land Grant, 98 N.M. 620, 651 P.2d 1264 (1982).

Failure to obtain insurance. - Four-year statute of limitations began to run with discovery of fraud in 1961 and did not bar suit in 1963 for fraud from 1957 to 1961 against finance company for payments made by house trailer dealers to finance company for insurance which was not obtained. Southwestern Inv. Co. v. Cactus Motor Co. 355 F.2d 674 (10th Cir. 1966).

Misrepresentation by broker. - Plaintiffs, as a matter of law, had a right to rely on the misrepresentation of square footage made by the real estate agent through whom they purchased their residence; their cause of action for the false representation accrued not on the date of their purchase but on the date of discovery. Gaston v. Hartzell, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976).

In a suit against certain brokers, for intentionally and negligently misrepresenting the amount of square footage contained in certain apartments, given the purchasers' backgrounds involving real estate investments, the purchase of other apartment complexes, the fact that an enlarged version of the survey was made available to one of the purchasers before closing, the fact that one of the purchasers was a commissioned broker in the sale of the apartments, and that one of purchasers, according to testimony, was concerned at the time of sale with the number of square footage rentable area in the apartments, the court properly determined as a matter of law that the purchasers knew or should have known of the misrepresentation at the time of the sale. Ambassador E. Apts. v. Ambassador E. Invs. 106 N.M. 534, 746 P.2d 163 (Ct. App. 1987).

Complaint not barred. - Complaint filed in November, 1903, alleging that fraud was discovered "about the month of July, 1902," was not barred. Alexander v. Cleland, 13 N.M. 524, 86 P. 425 (1906).

Specific allegations in pleading showing date of discovery govern a general statement in determining whether the statute of limitations has run. Mayer v. Lane, 33 N.M. 18, 262 P. 178 (1927).

Determinations by trial court. - Where, in suit to cancel deed and settlement agreement entered into prior to divorce, for lack of consideration, the only possible defense is the statute of limitations, or laches, to establish which the burden rested upon the defendant husband, trial court should determine, first, whether husband at time of execution of the deed and the agreement held a fraudulent intent not to perform on his part, and, second, when the wife first discovered this fraud. Primus v. Clark, 48 N.M. 240, 149 P.2d 535 (1944), subsequent appeal, 62 N.M. 259, 308 P.2d 584 (1957).

Timely service of process. - Where complaint was filed before period of limitations had expired, though process was not actually served until slightly more than 60 days

after expiration of four years from the accrual of the action, the action was timely brought and running of the statute was interrupted. Isaacks v. Jeffers, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Point not preserved for review. - Appellants may not urge in the supreme court that the statute of limitations could not run against them, to give right to adverse possession, because of ignorance of the mistake or fraud until suit was commenced, when such plea was not made in the court below. GOS Cattle Co. v. Bragaw's Heirs, 38 N.M. 105, 28 P.2d 529 (1933).

What law governs. - The law of New Mexico governs as to the time within which an action must be commenced when brought in federal court of this state, but the manner in which actions are commenced, when actions are deemed to have begun, the manner and method of serving process, all relate to procedure and are governed by the law of the forum. Isaacks v. Jeffers, 144 F.2d 26 (10th Cir.), cert. denied, 323 U.S. 781, 65 S. Ct. 270, 89 L. Ed. 624 (1944).

Law reviews. - For article, "The Law of Medical Malpractice in New Mexico," see 3 N.M.L. Rev. 294 (1973).

For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M.L. Rev. 271 (1976).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 18 Am. Jur. 2d Conversion § 98; 51 Am. Jur. 2d Limitation of Actions § 146.

Action on implied contract arising out of fraud as within statute of limitations applicable to fraud, 3 A.L.R. 1603.

When action considered to be one on contract rather than one for fraud as regards statute of limitations, 114 A.L.R. 525.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

Running of statute of limitations against claim for contribution or indemnity based on tort, 57 A.L.R.3d 867.

When statute of limitations begins to run on negligent design claim against architect, 90 A.L.R.3d 496.

When does statute of limitations begin to run upon an action by subrogated insurer against third-party tort-feasor, 91 A.L.R.3d 844.

Statutes of limitation: actions by purchasers or contractees against vendors or contractors involving defects in houses or other buildings caused by soil instability, 12 A.L.R.4th 866.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts, 18 A.L.R.4th 1340.

When statute of limitations commences to run on right of partnership accounting, 44 A.L.R.4th 678.

Modern status of the application of "discovery rule" to postpone running of limitations against actions relating to breach of building and construction contracts, 33 A.L.R.5th 1.

When statute of limitations begins to run upon action against attorney for legal malpractice - deliberate wrongful acts or omissions, 67 A.L.R.5th 587.

Attorney malpractice - tolling or other exceptions to running of statute of limitations, 87 A.L.R.5th 473.

54 C.J.S. Limitations of Actions §§ 34, 87, 192, 197.

37-1-8. Actions against sureties on fiduciary bonds; injuries to person or reputation.

Actions must be brought against sureties on official bonds and on bonds of guardians, conservators, personal representatives and persons acting in a fiduciary capacity, within two years after the liability of the principal or the person from whom they are sureties is finally established or determined by a judgment or decree of the court, and for an injury to the person or reputation of any person, within three years.

History: Laws 1880, ch. 5, § 5; C.L. 1884, § 1864; C.L. 1897, § 2917; Laws 1909, ch. 60, § 1; Code 1915, § 3350; C.S. 1929, § 83-105; 1941 Comp., § 27-107; 1953 Comp., § 23-1-8; Laws 1975, ch. 257, § 8-115; 1976, ch. 58, § 25.

ANNOTATIONS

Cross references. - For limitation applicable to wrongful death actions, see 41-2-2 NMSA 1978.

Severability clauses. - Laws 1976, ch. 58, § 28, provides for the severability of the act if any part or application thereof is held invalid.

Compiler's notes. - Laws 1978, ch. 28, § 2, and Laws 1978, ch. 166, § 17, repeal Laws 1976, ch. 58, § 31, which provided that Laws 1976, ch. 58, § 25, which amended this section, would terminate on July 1, 1978.

Statutes of limitations apply to both complaints and counterclaims, whether they be compulsory or permissive. Hartford v. Gibbons & Reed Co. 617 F.2d 567 (10th Cir. 1980).

Meaning of "official bond". - An "official bond" is one made payable to the state for its indemnification in case of wrongdoing on the part of the bonded person, and not one made payable to a private individual. Keeter v. Board of County Comm'rs, 67 N.M. 201, 354 P.2d 135 (1960).

Actions by state. - An action by the state against a county collector of taxes, and his surety, to recover back a commission erroneously paid to the collector, is not barred by the statute of limitations unless expressly included in the statute. State v. Roy, 41 N.M. 308, 68 P.2d 162 (1937).

This statute does not preclude the state or any of its subdivisions or agencies from maintaining actions against the principal and sureties on official bonds. 1925-26 Op. Att'y Gen. 67.

Statute of limitations does not run against the state in action to recover on official bond. 1947-48 Op. Att'y Gen. No. 5019.

Form of action not controlling. - Where action in its effect is one for recovery of damages for personal injury, statute of limitations for injuries to the person applies, even though the cause of action is ex contractu in its nature. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972); Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962). See also Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

Actions in strict liability in tort. - An action seeking recovery for personal injury under strict liability is governed by the three-year statute of limitations. Fernandez v. Char-Li-Jon, Inc. 119 N.M. 25, 888 P.2d 471 (Ct. App. 1994).

Asbestos exposure under strict liability theory. - An action in strict liability is a tort action and if it concerns personal injuries, it would be controlled by the three-year statute, which begins to run at the time of the wrongdoing and not at the time of the discovery; accordingly, any exposure to asbestos which occurred more than three years before the filing of plaintiff's action would be barred by the statute of limitations. Bassham v. Owens-Corning Fiber Glass Corp. 327 F. Supp. 1007 (D.N.M. 1971).

Breach of warranty of habitability. - Suit against vendor of house for breach of express or implied warranty that the house was fit for habitation, after a dangerous accumulation of carbon monoxide caused plaintiff's wife to become violently sick, was

basically a cause of action for injuries to her person, to which this section applied. Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962).

Personal injury limitation not applicable for UCC breach of warranty. - Since the warranty of merchantable goods provisions in 55-2-314 NMSA 1978 specifically apply to the sale of beverages to be consumed on the premises, 55-2-714 NMSA 1978 governs claims arising from such sales; the limitation period for those sales is four years, and this section does not apply. Fernandez v. Char-Li-Jon, Inc. 119 N.M. 25, 888 P.2d 471 (Ct. App. 1994).

Loss of consortium. - This section is the applicable statute for an action brought by husband for medical expenses of deceased wife and loss of consortium. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

Accrual from time of injury. - This statute begins to run from the accrual of the cause of action, which in personal injury cases is the time of the injury not the time of the negligent act. New Mexico Elec. Serv. Co. v. Montanez, 89 N.M. 278, 551 P.2d 634 (1976).

Product liability cases. - Where an individual has been injured by an unsafe or defective product and the resulting injury does not immediately manifest itself, the three-year statute of limitations prescribed in this section commences when a plaintiff knows, or reasonably should know through diligent inquiry, that he or she has been injured. Martinez v. Showa Denko, K.K. 1998-NMCA-111, 125 N.M. 605, 964 P.2d 176.

Application of discovery rule. - Where plaintiff took dietary supplement in 1989 and 1990, began suffering symptoms and received medical opinions and other pharmacological information on the supplement as early as 1990, but did not file her products liability action until 1996, the filing exceeded the three-year period of limitations prescribed by this section, and her cause of action was barred, even though the supplement had not been definitively linked by researchers to a specific disease until 1996. Martinez v. Showa Denko, K.K. 1998-NMCA-111, 125 N.M. 605, 964 P.2d 176.

Section applicable to malpractice. - An action by a patient or the spouse of a patient against a physician and surgeon for injuries sustained by reason of the unskillful or negligent treatment by the physician or surgeon is an action sounding in tort for injuries to the person, and is barred within three years of the date of accrual of the cause of action for the personal injury. Roybal v. White, 72 N.M. 285, 383 P.2d 250 (1963), overruled on other grounds, Roberts v. Southwest Community Health Servs. 114 N.M. 248, 837 P.2d 442 (1992).

Where plaintiff knew all the facts underlying his claim for legal malpractice more than four years before filing suit, the claim was time barred under both this section and 37-1-4 NMSA 1978. Delta Automatic Sys. v. Bingham, 1999-NMCA-029, 126 N.M. 717, 974 P.2d 1174, cert. denied, 126 N.M. 532, 972 P.2d 351 (1999).

When § 41-5-22 does not toll this section. - Section 41-5-22 NMSA 1978 of the Medical Malpractice Act (telling of limitation period upon submission of claim to medical panel) does not apply to toll the running of the general limitation period for a personal injury claim (this section), where the act of malpractice has occurred prior to the effective date of the Medical Malpractice Act, February 27, 1976. Loesch v. Henderson, 103 N.M. 554, 710 P.2d 748 (Ct. App. 1985).

Statute not tolled during treatment. - Cause of action for medical malpractice accrued at the time of the wrongful act causing the injury, and the statute of limitations was not tolled during the period of medical treatment. Mantz v. Follingstad, 84 N.M. 473, 505 P.2d 68 (Ct. App. 1972).

But tolled by doctor's failure to speak. - Defendant-doctor's failure to inform plaintiff that her tubal ligation was incomplete after having had knowledge of that fact tolled the three-year statute of limitations and plaintiff's malpractice suit brought 10 months after the birth of a child was not barred thereby. Hardin v. Farris, 87 N.M. 143, 530 P.2d 407 (Ct. App. 1974).

Silence constituting fraudulent concealment. - In a confidential relationship where there exists a duty to speak, such as in a doctor-patient relationship, mere silence constitutes fraudulent concealment. Hardin v. Farris, 87 N.M. 143, 530 P.2d 407 (Ct. App. 1974).

Tolling for minors and incapacitated persons. - Section 37-1-10 NMSA 1978, regarding minors and incapacitated persons, effectively tolls the provisions of this section. Romero v. New Mexico Health & Env't Dep't, 107 N.M. 516, 760 P.2d 1282 (1988).

Section applicable to civil rights action. - An action under 42 U.S.C. § 1983 for excessive use of force during an arrest is not governed by the limitations on actions contained in the Tort Claims Act but by the general statutory limitations on actions for personal injury, this section, or for miscellaneous claims, 37-1-4 NMSA 1978. Gunther v. Miller, 498 F. Supp. 882 (D.N.M. 1980).

A civil rights action under 42 U.S.C. § 1983 against a social service agency and an agency of the state for failure to investigate or prevent abuse of mentally incompetent children was subject to the personal injury limitation of this section. Desert State Life Mgt. Servs. v. Association of Retarded Citizens, 939 F. Supp. 835 (D.N.M. 1996).

Section provides appropriate limitations period for § 1983 actions. Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), aff'd, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985); Walker v. Maruffi, 105 N.M. 763, 737 P.2d 544 (Ct. App. 1987); Jackson v. City of Bloomfield, 731 F.2d 652 (10th Cir. 1984).

Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984), which applies the statutory period in this section to actions arising under 42 U.S.C. § 1983, is to be applied prospectively only. Jackson v. City of Bloomfield, 731 F.2d 652 (10th Cir. 1984).

Section 41-4-15 is applicable to civil rights action. - The two-year period under 41-4-15 NMSA 1978 is the applicable limitation period to claims under the Federal Civil Rights Act, 42 U.S.C. § 1983. DeVargas v. State ex rel. New Mexico Dep't of Cors. 97 N.M. 450, 640 P.2d 1327 (Ct. App. 1981).

Federal civil rights case based on conspiracy for malicious prosecution was not time-barred when it was commenced within the three-year limitation period, and the trial judge properly disregarded defendants' characterization of the case as discrete claims and acts and accepted plaintiff's characterization that it was one conspiracy, or a single continuing violation of plaintiff's constitutional rights. Robinson v. Maruffi, 895 F.2d 649 (10th Cir. 1990).

Statutes of repose serve two well-defined purposes: first, by requiring litigation to be commenced within a prescribed period of time the reliability and availability of evidence is assured; second, both defendants and the courts, are protected from the burdens necessarily entailed in protracted controversies of unknown potential liability. Hartford v. Gibbons & Reed Co. 617 F.2d 567 (10th Cir. 1980).

Statute runs from manifestation of injury. - In personal injury action involving medical malpractice, the limitation period stated in this section began to run against plaintiff, not from the time of the malpractice, but from the time the injury manifested itself in a physically objective manner and was ascertainable; therefore, where operating physician failed to remove a cottonoid during surgery, statutory limitation period did not begin until the cottonoid was discovered by later surgery. Peralta v. Martinez, 90 N.M. 391, 564 P.2d 194 (Ct. App.), cert. denied, 90 N.M. 636, 567 P.2d 485 (1977).

The limitation period begins to run from the time the injury manifests itself in a physically objective manner and is ascertainable. Crumpton v. Humana, Inc. 99 N.M. 562, 661 P.2d 54 (1983).

Since the plaintiff began experiencing pain apparently related to the prosthesis in 1984, had the prosthesis replaced in December of that year, consulted with a clinic in June 1987 for continuing pain, and finally had the prosthesis removed in September 1987, she had reason to know the specific cause of her injuries before September 1987, and thus a products liability action filed in September 1990 was barred by the three-year statute of limitations. Sawtell v. E.I. Du Pont De Nemours & Co. 22 F.3d 248 (10th Cir. 1994), cert. denied, 513 U.S. 917, 115 S. Ct. 295, 130 L. Ed. 2d 209 (1994).

Physical and psychological injury. - Acquisition of a veneral disease and pregnancy leading to an abortion are sufficiently substantial physical injuries that once the plaintiff knew her former parish priest had caused the injuries, the limitations period would begin, regardless of whether the plaintiff knew or should have known of the severe

psychological damage caused by the priest's misconduct. Martinez-Sandoval v. Kirsch, 118 N.M. 616, 884 P.2d 507 (Ct. App.), cert. denied, 118 N.M. 731, 885 P.2d 1325 (1994), cert. denied, 515 U.S. 1124, 115 S. Ct. 2282, 132 L. Ed. 2d 285 (1995).

When running of limitation period delayed until injury discovered or discoverable. - Where a party against whom a cause of action accrues prevents the one entitled to bring the cause from obtaining knowledge thereof by fraudulent concealment or where the cause is known to the injuring party but is of such character as to conceal itself from the injured party, the statutory limitation on the time for bringing the action will not begin to run until the right of action is discovered or, by the exercise of ordinary diligence, could have been discovered. Garcia v. Presbyterian Hosp. Center, 92 N.M. 652, 593 P.2d 487 (Ct. App. 1979).

Exclusionary provision in liability policy which limits insured's time for bringing action. - As 66-5-301 NMSA 1978 contains no time limit in which the insured can exercise his rights, an exclusionary provision in the liability policy which limits the insured's time for bringing an action to one year violates the three-year statute of limitation of this section for bringing a personal injury suit, deprives the insureds of their uninsured motorist coverage and is void as against public policy. Sandoval v. Valdez, 91 N.M. 705, 580 P.2d 131 (Ct. App. 1978).

Subrogated insurer's action against third-party tortfeasor. - When a workers' compensation insurer settles with an injured worker, receives an assignment of his negligence cause of action to the extent of the payment, and seeks reimbursement from a third party, the relevant statute of limitations is not 37-1-4 NMSA 1978 (four-year period), which governs unspecified actions, but this section (three-year period), which governs actions for personal injury, which begins to run on a subrogated insurer's action against a third-party tortfeasor at the same time that the statute of limitations would begin to run on an action by the insured, or his personal representative in the event of the death of the insured. American Gen. Fire & Cas. Co. v. J.T. Constr. Co. 106 N.M. 195, 740 P.2d 1179 (Ct. App. 1987).

Since an insured has a six year limitation period for suit against the insurance carrier under an uninsured motorist claim, the subrogated insurance carrier is bound by the same limitation period as the insured would be if the insured were bringing suit against the uninsured motorist. Liberty Mut. Ins. Co. v. Warren, 119 N.M. 429, 891 P.2d 570 (Ct. App. 1995).

Dismissal of plaintiff's suit for failure to prosecute with due diligence. - The statute of limitations is tolled by the timely filing of the complaint but the trial court, in the exercise of its inherent power and in its discretion, independent of statute, may dismiss a case for failure to prosecute when it is satisfied that plaintiff has not applied due diligence in the prosecution of his suit. Prieto v. Home Educ. Livelihood Program, 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980).

Respondeat superior claim barred where parties not notified within three years. - Respondeat superior claim asserted under an amended complaint which represents the addition of a party and of a claim against that party was barred by the three-year statute of limitations because, by adding a previously unnotified party beyond the applicable limitation period, the amended complaint did not relate back to the timely filing of the original complaint. Romero v. Ole Tires, Inc. 101 N.M. 759, 688 P.2d 1263 (Ct. App. 1984).

Actions against a deceased personal representative on his surety bond are exempted from the time limitations imposed by 45-3-803 NMSA 1978. Such a claim is governed by this section. Bowman v. Butler, 98 N.M. 357, 648 P.2d 815 (Ct. App. 1982).

Accrual of tort of unlawful public disclosure of private fact. - In the tort of unlawful public disclosure of a private fact, the gravamen of the claimed injury is the publication of the information; thus, the statute of limitations runs from the date that the information is published. Benally v. Hundred Arrows Press, Inc. 614 F. Supp. 969 (D.N.M. 1985), rev'd on other grounds sub nom. Benally v. Amon Carter Museum of W. Art, 858 F.2d 618 (10th Cir. 1988).

When running of limitation period delayed until injury discovered or discoverable. See Roney v. Siri Singh Sahib Harbhajan Singh Yogi, 103 N.M. 89, 703 P.2d 186 (Ct. App. 1985).

Law reviews. - For article, "Medical Malpractice Legislation in New Mexico," see 7 N.M.L. Rev. 5 (1976-77).

For survey, "The Statute of Limitations in Medical Malpractice Actions," see 6 N.M.L. Rev. 271 (1976).

For comment, "A Survey of the Law of Strict Tort Products Liability in New Mexico," see 11 N.M.L. Rev. 359 (1981).

For article, "Constitutional Torts and the New Mexico Torts Claims Act," see 13 N.M.L. Rev. 1 (1983).

For annual survey of New Mexico law relating to torts, see 13 N.M.L. Rev. 473 (1983).

For note, "Federal Civil Rights Act - The New Mexico Appellate Courts' Choice of the Proper Limitations Period for Civil Rights Actions Filed Under 42 U.S.C. § 1983: DeVargas v. State ex rel. New Mexico Department of Corrections," see 13 N.M.L. Rev. 555 (1983).

For article, "Defamation in New Mexico," see 14 N.M.L. Rev. 321 (1984).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

For survey of medical malpractice law in New Mexico, see 18 N.M.L. Rev. 469 (1988).

For annual survey of New Mexico law of civil procedure, 19 N.M.L. Rev. 627 (1990).

For annual survey of New Mexico law of products liability, 19 N.M.L. Rev. 743 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bonds § 37; 51 Am. Jur. 2d Limitations of Actions §§ 102, 135.

Action "for injury to person" in statutes relating to notice or limitation as including actions ex contractu, 1 A.L.R. 1313, 157 A.L.R. 763.

When statute of limitations commences to run against civil action for seduction, 3 A.L.R. 155.

Applicability of general statute of limitations to action or proceeding under Workmen's Compensation Act, 16 A.L.R. 462, 40 A.L.R. 495.

Waiver or tolling of statute of limitations by executor or administrator, 8 A.L.R.2d 660.

What period of limitation governs in an action against public officer and a surety on his official bond, 18 A.L.R.2d 1176.

Action by passenger against carrier for personal injuries as based on contract or on tort, with respect to application of statutes of limitations, 20 A.L.R.2d 331.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

What constitutes "publication" of libel in order to start running of period of limitations, 42 A.L.R.3d 807.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 A.L.R.4th 456.

Limitation of actions: invasion of right of privacy, 33 A.L.R.4th 479.

Limitation of actions: time of discovery of defamation as determining accrual of action, 35 A.L.R.4th 1002.

When statute of limitations commences to run on automobile no-fault insurance personal injury claim, 36 A.L.R.4th 357.

Validity, construction, and application, in nonstatutory personal injury actions, of state statute providing for borrowing of statute of limitations of another state, 41 A.L.R.4th 1025.

Statute of limitations applicable to third person's action against psychiatrist, psychologist, or other mental health practitioner, based on failure to warn persons against whom patient expressed threats, 41 A.L.R.4th 1078.

Parent's right to recover for loss of consortium in connection with injury to child, 54 A.L.R.4th 112.

Medical malpractice: when limitations period begins to run on claim for optometrist's malpractice, 70 A.L.R.4th 600.

Application of "discovery rule" to postpone running of limitations against action for damages from assault, 88 A.L.R.4th 1063.

Computation of net "loss" for which fidelity insurer is liable, 5 A.L.R.5th 132.

Application of statute of limitations in private tort actions based on injury to persons or property caused by undergound flow of contaminants, 11 A.L.R.5th 438.

Pre-emption, by Railway Labor Act (45 USCS §§ 151 et seq.), of employee's state-law action for infliction of emotional distress, 104 A.L.R. Fed. 548.

54 C.J.S. Limitations of Actions §§ 69, 152, 164, 165, 168, 176, 183.

37-1-9. [Effect of absence from state or concealment of debtor.]

If, at any time after the incurring of an indebtedness or liability or the accrual of a cause of action against him or the entry of judgment against him in this state, a debtor shall have been or shall be absent from or out of the state or concealed within the state, the time during which he may have been or may be out of or absent from the state or may have concealed or may conceal himself within the state shall not be included in computing any of the periods of limitation above provided.

History: Laws 1880, ch. 5, § 9; C.L. 1884, § 1868; C.L. 1897, § 2921; Laws 1903, ch. 62, § 1; Code 1915, § 3352; C.S. 1929, § 83-107; 1941 Comp., § 27-108; 1953 Comp., § 23-1-9.

ANNOTATIONS

Strict construction. - Although the law favors the right of action rather than the right of limitation, exceptions to statutes of limitation must be construed strictly. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

Liberal construction. - The law favors right of action rather than right of limitation, so that a statute which tolls the statute of limitations should be liberally construed to accomplish that purpose. In re Goldsworthy's Estate, 45 N.M. 406, 115 P.2d 627 (1941).

"In this state". - In this section the qualifying phrase, "in this state," appearing after the phrase "entry of judgment against him," immediately preceding, does not extend to the more remote antecedent, "incurring of an indebtedness or liability or the accrual of a cause of action against him," under the doctrine of the last antecedent, by which expressions are to be applied to words or phrases immediately preceding them, for statutes are to be read according to their grammatical sense, unless something different apparently was intended. In re Goldsworthy's Estate, 45 N.M. 406, 115 P.2d 627 (1941).

Section applies only to judgments rendered within state. Northcutt v. King, 23 N.M. 515, 169 P. 473 (1917).

Section inapplicable to foreign judgment. - This section, which exempts application of the statute of limitations in the event of absence from the state or concealment within the state, applies only to judgments rendered within the state. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970); Tenorio v. Cohen, 96 N.M. 756, 635 P.2d 311 (Ct. App. 1981).

Place of accrual of cause. - There is no apparent reason why the legislature intended to discriminate in application of statute tolling statute of limitations as to the place where cause of action accrued, in favor of its own citizens as against nonresidents, unless such intention is plain; so the fact that it arose out of state is sufficient to save the statute from running in favor of party to be charged until he comes within its jurisdiction. In re Goldsworthy's Estate, 45 N.M. 406, 115 P.2d 627 (1941).

Residence at accrual of cause. - To come within the exception and to prevent the running of the statutes of limitation, the defendant must be a resident of the territory at time the cause of action accrues and depart thereafter. Heisel v. York, 46 N.M. 210, 125 P.2d 717 (1942); Lindauer Mercantile Co. v. Boyd, 11 N.M. 464, 70 P. 568 (1902).

Foreign residence. - This section applies to debtor's residence in another country at time of and since execution of note sued on. Bunton v. Abernathy, 41 N.M. 684, 73 P.2d 810 (1937).

Section inapplicable where service obtainable. - The tolling statute should not be applied if a defendant could be served with process, either actual or substituted, as the purpose of the tolling statute was to prevent injustice by stopping the operation of the statute of limitations where there could be no service of process. Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967); Tenorio v. Cohen, 96 N.M. 756, 635 P.2d 311 (Ct. App. 1981).

Failure to show impossibility of service bars application of section. - Where plaintiff did not attempt to serve personal process on defendants who were out of the

country, did not attempt, what would apparently have been successful, substitute service of process on defendants, and did not even file the complaint within the applicable limitation period, the plaintiff has not met his burden of showing impossibility of service to make this section applicable. Tenorio v. Cohen, 96 N.M. 756, 635 P.2d 311 (Ct. App. 1981).

As under "long-arm" provisions. - If process could have been served under long-arm provisions, plaintiff would not be entitled to this statutory exception. Kennedy v. Lynch, 85 N.M. 479, 513 P.2d 1261 (1973).

Where there may be service, as under the "long-arm" statute, the tolling statute simply does not apply. Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967).

Burden on plaintiff. - When a party claims the benefit of an exception from the operation of the statute, the burden is on him to show that he is entitled to it; all presumptions are against him since his claim to exemption is against the current of the law and is founded upon exceptions. Kennedy v. Lynch, 85 N.M. 479, 513 P.2d 1261 (1973).

Showing of impossibility required. - When the plaintiff relies upon the defendant's absence as interrupting the running of the statute, it is necessary for him to show such absence on the part of the defendant, and plaintiff must also show that it is not possible to serve process on the defendant. Kennedy v. Lynch, 85 N.M. 479, 513 P.2d 1261 (1973).

Concealment not shown. - Where plaintiff was aware of defendant's location in foreign state, from which he made some payments, the fact that he had made no payments after job transfer to New Mexico was not sufficient by itself to establish concealment. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

This section is retrospective in operation. Orman v. Van Arsdell, 12 N.M. 344, 78 P. 48 (1904).

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitation of Actions §§ 154 to 169, 193.

Provision in statute of limitations as to absence from state as applied to a nonresident individual who has an office or place of business in the state, 61 A.L.R. 391.

Provision suspending limitations while defendant is a nonresident or without the state as affected by nonresidence of party asserting cause of action, 83 A.L.R. 271.

Nonresidence or absence of defendant from state as suspending or tolling statute of limitations where relief is sought, or could have been sought, by an action or proceeding in rem or quasi in rem, 119 A.L.R. 331.

Provision of statute of limitation excluding period of absence of debtor or defendant from state as applicable to action on liability or cause of action accruing out of state, 148 A.L.R. 732.

Right to enter judgment by confession as affecting suspension of statute of limitations during absence of debtor from state, 172 A.L.R. 997.

Provision of statute excluding period of defendant's absence from the state as is applicable to a local cause of action against individual who was a nonresident when the same arose, 17 A.L.R.2d 502.

Absence of judgment debtor from state as suspending or tolling running of period as to judgment, 27 A.L.R.2d 839.

Imprisonment of party to civil action as tolling statute of limitations, 77 A.L.R.3d 735.

When statute of limitations begins to run as to cause of action for development of latent industrial or occupational disease, 1 A.L.R.4th 117.

54 C.J.S. Limitations of Actions §§ 98 to 104.

37-1-10. Minors; incapacitated persons.

The times limited for the bringing of actions by the preceding provisions of this chapter shall, in favor of minors and incapacitated persons, be extended so that they shall have one year from and after the termination of such incapacity within which to commence said actions.

History: Laws 1880, ch. 5, § 10; C.L. 1884, § 1869; C.L. 1897, § 2922; Code 1915, § 3353; C.S. 1929, § 83-108; 1941 Comp., § 27-109; 1953 Comp., § 23-1-10; Laws 1975, ch. 257, § 8-116.

ANNOTATIONS

Meaning of "this chapter". - The words "this chapter" refer to ch. 68 of the 1915 Code, which is compiled as 37-1-1 to 37-1-4, 37-1-6 to 37-1-19, 37-1-21, 37-1-22, 37-1-25, 37-1-26 NMSA 1978.

Purpose of section. - Statutes of limitation begin to run against everyone, including minors, when the cause of action accrues, and tolling statutes only extend the time for completing the bar of the statute so that the minor shall have an opportunity to act for

himself after the disability caused by his minority has been removed. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

Personal privilege. - The disability which saves a person from the operation of the statute of limitations is a personal privilege of the person under the disability only, and cannot confer rights on persons asserting independent actions. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

Strict construction. - Although the law favors the right of action rather than the right of limitation, exceptions to statutes of limitation must be construed strictly. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

Persons "under legal disability" do not include convicts serving a term in the penitentiary at the time of the alleged personal injury. Musgrave v. McManus, 24 N.M. 227, 173 P. 196 (1918)(case decided under wording of section prior to 1975 amendment).

Exceptions contained in statutes of limitation are to be strictly construed and persons imprisoned are not under any legal disability within the meaning of the statute (as it read prior to 1975 amendment). Chavez v. Kitsch, 70 N.M. 439, 374 P.2d 497 (1962).

Appointment of guardian does not start statute of limitations. - This section would not bar claims of mentally incompetent children until one year after the termination of incapacity, even if a guardian was appointed for the children who could legally sue on their behalf. Desert State Life Mgt. Servs. v. Association of Retarded Citizens, 939 F. Supp. 835 (D.N.M. 1996).

Section applies to proceedings in probate court. Browning v. Estate of Browning, 3 N.M. (Gild.) 659, 9 P. 677 (1886); Bent v. Thompson, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891).

But not to death by wrongful act statute. Natseway v. Jojola, 56 N.M. 793, 251 P.2d 274 (1952).

Nor to negligence suits against municipalities. - This section does not apply to actions for negligence against municipalities which must be commenced as provided by 37-1-24 NMSA 1978 and a claim of disability did not postpone operation of that section. Noriega v. City of Albuquerque, 86 N.M. 294, 523 P.2d 29 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

Nor to suit against builder. - Section 37-1-27 NMSA 1978 is not a part of "this chapter," as referred to in this section, and the extension effected herein does not apply to suit brought by minor against a builder covered under provisions of 37-1-27 NMSA 1978. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Section does not apply to time limitation for filing a workmen's compensation claim. Lent v. Employment Sec. Comm'n, 99 N.M. 407, 658 P.2d 1134 (Ct. App. 1982), cert. quashed, 99 N.M. 226, 656 P.2d 889 (1983); Howie v. Stevens, 102 N.M. 300, 694 P.2d 1365 (Ct. App. 1984).

Plaintiff not entitled to statutory disability. - The trial court erred in concluding that plaintiff was entitled to the disability which the statute grants to a minor personally for a period of one year after his disability is removed, where the action filed by plaintiff was not in favor of the minor but was her own cause of action seeking a money judgment in her name alone based upon a foreign judgment in her favor. Slade v. Slade, 81 N.M. 462, 468 P.2d 627 (1970).

Reprobate of will. - A person has no standing in court to ask for reprobate of a will four years after attaining his majority. Bent v. Thompson, 138 U.S. 114, 11 S. Ct. 238, 34 L. Ed. 902 (1891).

Law reviews. - For note, "Tort Law - Either the Parents or the Child May Claim Compensation for the Child's Medical and Nonmedical Damages: Lopez v. Southwest Community Health Services," see 23 N.M.L. Rev. 373 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitation of Actions §§ 178 to 191, 193 to 199.

Taking disabilities for purposes of the statute of limitations, 53 A.L.R. 1303.

Statute providing that an insane person, minor or other person under disability may bring suit within specified time after removal of disability as affecting right to bring action before disability removed, 109 A.L.R. 954.

One wrongfully adjudged or committed as insane within benefit of provision of statute of limitations allowing time to sue after removal of disability, 166 A.L.R. 960.

Proof of unadjudged incompetency which prevents running of statute of limitations, 9 A.L.R.2d 964.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Time of existence of mental incompetency which will prevent or suspend running of statute, 41 A.L.R.2d 726.

Appointment of committee for incompetent or guardian for infant as effecting running of statute of limitations against him, 86 A.L.R.2d 965.

Tolling of state statute of limitations in favor of one commencing action despite existing disability, 30 A.L.R.4th 1092.

Tolling of statute of limitations, on account of minority of injured child, as applicable to parent's or guardian's right of action arising out of same injury, 49 A.L.R.4th 216.

Wrongful death: surviving parent's minority as tolling limitation period on suit for child's wrongful death, 54 A.L.R.4th 362.

Local government tort liability: minority as affecting notice of claim requirement, 58 A.L.R.4th 402.

Medical malpractice statutes of limitation minority provisions, 62 A.L.R.4th 758.

Emotional or psychological "blocking" or repression as tolling running of statute of limitations, 11 A.L.R.5th 588.

Posttraumatic syndrome as tolling running of statute of limitations, 12 A.L.R.5th 546.

Medical malpractice statutes of limitation minority provisions, 71 A.L.R.5th 307.

54 C.J.S. Limitation of Actions §§ 105 to 120.

37-1-11. [Effect of death.]

If the person entitled to a cause of action die within one year next previous to the expiration of the limitation above provided, the representatives of such persons shall have one year after such death within which to commence said action.

History: Laws 1880, ch. 5, § 11; C.L. 1884, § 1870; C.L. 1897, § 29-23; Code 1915, § 3354; C.S. 1929, § 83-109; 1941 Comp., § 27-110; 1953 Comp., § 23-1-11.

ANNOTATIONS

Effect of section. - This section would allow the bringing of suit within one year from the date of death of an incompetent, provided the injury sued upon did not result in death. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

Section held applicable to claim on note against decedent's estate. Browning v. Estate of Browning, 3 N.M. (Gild.) 659, 9 P. 677 (1886).

Section applies to proceedings in probate court. Browning v. Estate of Browning, 3 N.M. (Gild.) 659, 9 P. 677 (1886).

Section inapplicable to wrongful death. - The Wrongful Death Act, and not this section, applies where the injury sued upon resulted in death. Kilkenny v. Kenney, 68 N.M. 266, 361 P.2d 149 (1961).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitation of Actions §§ 194, 195.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Entry or indorsement by creditor on note, bond or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

Statute of limitations: effect of delay in appointing administrator or other representative on cause of action accruing at or after death of person in whose favor it would have accrued, 28 A.L.R.3d 1141.

54 C.J.S. Limitations of Action §§ 118, 119.

37-1-12. [When commencement of action stayed or prevented.]

When the commencement of any action shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation.

History: Laws 1880, ch. 5, § 15; C.L. 1884, § 1875; C.L. 1897, § 2928; Code 1915, § 3358; C.S. 1929, § 83-113; 1941 Comp., § 27-111; 1953 Comp., § 23-1-12.

ANNOTATIONS

Pendency of an appeal. - The statute of limitations does not run during the pendency of an appeal. United States Fire Ins. Co. v. Aeronautics, Inc. 107 N.M. 320, 757 P.2d 790 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitation of Actions § 171.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

54 C.J.S. Limitations of Actions §§ 124, 125.

37-1-13. [When action deemed commenced.]

The filing in the proper clerk's office of the petition, declaration, bill or affidavit, upon the filing of which process is authorized by law to be issued, with intent that process shall issue immediately thereupon, which intent shall be presumed, unless the contrary appear, shall be deemed a commencement of the action.

History: Laws 1880, ch. 5, § 8; C.L. 1884, § 1867; C.L. 1897, § 2920; Code 1915, § 3367; C.S. 1929, § 83-124; 1941 Comp., § 27-112; 1953 Comp., § 23-1-13.

ANNOTATIONS

Cross references. - As to commencement of civil action, see Rule 1-003.

For pleadings allowed, see Rule 1-007.

Legislature lacks constitutional power to prescribe procedural rules, invalidating section. - Under the constitution, the legislature lacks the power to prescribe by statute rules of evidence and procedure; this section is procedural and, therefore, invalid; Rule 1-003, N.M.R. Civ. P. is controlling. Prieto v. Home Educ. Livelihood Program, 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980).

Conditional suspension of statute. - Although usually the act of filing a complaint conditionally suspends the statute of limitations and it is not necessary to serve process before the expiration of the limitation period, the rule is not without qualification. Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957).

Section recognizes need for good faith in filing of actions and of due diligence in the issuance of process in order to toll the statute of limitations. Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957).

Reasonable diligence is essential to effective suspension of statute of limitations. Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957).

Plaintiff's suit dismissable for failure to prosecute with due diligence. - The statute of limitations is tolled by the timely filing of the complaint, but the trial court, in the exercise of its inherent power and in its discretion, independent of statute, may dismiss a case for failure to prosecute when it is satisfied that plaintiff has not applied due diligence in the prosecution of his suit. Prieto v. Home Educ. Livelihood Program, 94 N.M. 738, 616 P.2d 1123 (Ct. App. 1980).

Filing without requisite intent. - Filing of complaint one week before asserted cause of action would be barred did not toll statute of limitations where service of process was not procured for over 13 months, appellant having filed his complaint for the very purpose of tolling the statute of limitations and having had no intent to issue process immediately. Murphy v. Citizens Bank, 244 F.2d 511 (10th Cir. 1957).

Effect of pursuing wrong remedy. - Notice of appeal of state board of education's dismissal of teacher, and purported issuance of a so-called writ of certiorari by the clerk of the court, did not constitute the filing of a "petition, declaration, bill or affidavit" upon which process was "authorized by law to be issued," as the only remedy available for reviewing the actions of the board was certiorari issued by order of the court upon proper application. Roberson v. Board of Educ. 78 N.M. 297, 430 P.2d 868 (1967).

Scire facias as an action. - While it is true that scire facias for an execution is ordinarily a judicial writ to continue the effect of the former judgment, yet it is in the nature of an action because the defendant may plead to it. Browne v. Chavez, 181 U.S. 68, 21 S. Ct. 514, 45 L. Ed. 752 (1901).

Leaving papers with clerk. - A paper left with the clerk for filing in a cause, whether marked "filed" or not, is a paper in the cause. In re Lewisohn, 9 N.M. 101, 49 P. 909 (1897).

Law reviews. - For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M.L. Rev. 213 (1976).

For annual survey of New Mexico law relating to civil procedure, see 12 N.M.L. Rev. 97 (1982).

For article, "Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Restraints," see 15 N.M.L. Rev. 407 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitation of Actions §§ 200 to 231.

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 A.L.R. 236, 51 A.L.R.2d 388.

Ancillary proceedings as suspending or removing bar of statute of limitations as to judgment, 166 A.L.R. 767.

54 C.J.S. Limitations of Actions § 217.

37-1-14. [When second suit deemed continuation of first action.]

If, after the commencement of an action, the plaintiff fail therein for any cause, except negligence in its prosecution, and a new suit be commenced within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

History: Laws 1880, ch. 5, § 12; C.L. 1884, § 1872; C.L. 1897, § 2925; Code 1915, § 3355; C.S. 1929, § 83-110; 1941 Comp., § 27-113; 1953 Comp., § 23-1-14.

ANNOTATIONS

Construction. - The "exception" in this section goes to the status of a new suit as a continuation of the first and not to the right to file a new suit within the period of the statute of limitations. Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967); City of Roswell v. Holmes, 44 N.M. 1, 96 P.2d 701 (1939).

The words "for the purposes herein contemplated" referred only to the subject matter of the particular act enacting the section (Laws 1880, ch. 5). Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967).

Claim of continuation must be made in trial court and reflected in the record (though not necessarily in the pleadings). State ex rel. Brown v. Hatley, 80 N.M. 24, 450 P.2d 624 (1969).

Failure to claim continuation. - Action filed after statute had run, subsequent to dismissal of timely first action, was properly dismissed by trial court where no reference to or request for recognition of the first action was made therein. Miller v. Smith, 59 N.M. 235, 282 P.2d 715 (1955).

Substantial similarity required. - For a complaint to be considered a continuation of a prior complaint, both must be substantially the same, involving the same parties, the same cause of action and the same right, and this must appear from the record. Rito Cebolla Invs., Ltd. v. Golden W. Land Corp. 94 N.M. 121, 607 P.2d 659 (Ct. App. 1980).

New remedy qualified by time limitation on exercise of right. - Where a statute grants a new remedy and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as the remedy and, in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), overruled on other grounds Bracken v. Yates Petroleum Corp. 107 N.M. 463, 760 P.2d 155 (1988).

Second cause as continuation of first. - Where dismissal of first suit was not based upon the discretionary power of the court to dismiss stale claims, nor was there any finding or conclusion regarding negligence of plaintiffs in prosecuting that cause, the second cause having been filed within six months after the dismissal of the first was a continuation thereof and not barred by the statute of limitations. Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967).

Action not barred. - Where the record in the trial court adequately shows that the mandamus action by teacher seeking hearing on termination and tenure is a continuation of the older one, being based on substantially the same cause of action and involving substantially the same parties, it is not barred by statute of limitations. State ex rel. Brown v. Hatley, 80 N.M. 24, 450 P.2d 624 (1969). For subsequent appeal, see State ex rel. Brown v. Hatley, 84 N.M. 694, 507 P.2d 441 (1973).

Negligent prosecution of first suit. - The statute of limitations on a cause of action is tolled if a new suit setting forth essentially the same cause of action between the same parties is commenced within six months after a dismissal, except when the dismissal was based on the plaintiff's failure to pursue his claim. United States Fire Ins. Co. v. Aeronautics, Inc. 107 N.M. 320, 757 P.2d 790 (1988).

Where there was negligence in the prosecution of the first case, the second complaint was not a continuation of the first, and was barred by the statute of limitations. Benally v. Pigman, 78 N.M. 189, 429 P.2d 648 (1967).

Failure to prosecute and negligence in the prosecution are one and the same for purposes of this section. Barbeau v. Hoppenrath, 2001-NMCA-077, N.M. , 33 P.3d 675.

Summary judgment for defendants was proper and personal injury plaintiffs were not entitled to the protection of the savings statute where they negligently failed to file suit until two days before the expiration of the statute of limitations and filed their complaint in the wrong jurisdiction, then sought relief under the savings statute. Barbeau v. Hoppenrath, 2001-NMCA-077, N.M. , 33 P.3d 675.

A dismissal for failure to prosecute is functionally the same as a dismissal for negligence in prosecution. Gathman-Matotan Architects & Planners, Inc. v. State, Dep't of Fin. & Admin. 109 N.M. 492, 787 P.2d 411 (1990).

Where an action is dismissed without prejudice because of a failure to prosecute, the action will be deemed not to interrupt the running of an otherwise applicable statute of limitations, and a subsequent suit filed on the same claim as the first after the statute has run will be barred. Gathman-Matotan Architects & Planners, Inc. v. State, Dep't of Fin. & Admin. 109 N.M. 492, 787 P.2d 411 (1990).

No continuation of null suit. - Complaint brought against a defendant who is dead or nonexistent may not be amended, after the period of the statute of limitation has expired, so as to bring in a defendant having the capacity to be sued, the rule of relation back not applying since there was no suit to relate back to. Mercer v. Morgan, 86 N.M. 711, 526 P.2d 1304 (Ct. App. 1974).

Judgment upon merits would operate as bar to new suit. Cartwright v. Public Serv. Co. 68 N.M. 418, 362 P.2d 796 (1961).

This section applies only where the original action has failed other than on the merits or where no final judgment on the merits has been entered in the first action; it is inapplicable where the original action has been dismissed after a trial on the merits, or where the judgment entered therein is a final judgment on the merits or where the judgment is res judicata. Cartwright v. Public Serv. Co. 68 N.M. 418, 362 P.2d 796 (1961); Rowe v. LeMaster, 225 F.3d 1173 (10th Cir. 2000).

Section is inapplicable to New Mexico Wrongful Death Act. Perry v. Staver, 81 N.M. 766, 473 P.2d 380 (Ct. App. 1970).

This section does not apply to actions under Tort Claims Act, Article 4 of Chapter 41. Estate of Gutierrez v. Albuquerque Police Dep't, 104 N.M. 111, 717 P.2d 87 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds Bracken v. Yates Petroleum Corp. 107 N.M. 463, 760 P.2d 155 (1988).

Section 37-1-17 NMSA 1978 prohibits this section from applying in workmen's compensation and occupational disablement cases, since both the Workmen's Compensation Act and the Occupational Disablement Law contain specific statutes of limitations, 52-1-31 and 52-3-16 NMSA 1978, and neither act provides a saving clause allowing for an extension of the specified time limit for filing a claim. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), overruled on other grounds Bracken v. Yates Petroleum Corp. 107 N.M. 463, 760 P.2d 155 (1988).

This section does not apply to breach of contract suits against the state. Gathman-Matotan Architects & Planners, Inc. v. State, Dep't of Fin. & Admin. 109 N.M. 492, 787 P.2d 411 (1990).

Contractual limitation not extended. - Limitation contained in insurance policy for bringing suit (which was issued prior to enactment of statute prohibiting issuance of other than standard policies) was contractual, and not statutory, and was not extended by statutory provision that, for purpose of computing limitations, a new suit commenced within six months after a former suit has failed, shall be deemed a continuance of the first. Davis v. United States Fire Ins. Co. 35 N.M. 381, 298 P. 671 (1931).

Amendment of complaint. - An amended complaint will take effect by relation, avoiding the bar of the statute if the original pleading was timely, and if the identity of the cause has been preserved, and does not bring in a new cause of action. A complaint in suit on notes abandoning the allegation that defendant executed the notes in his own name, and alleging by amendment that he executed the notes as of a partnership, is not a new cause of action. Harris v. Singh, 38 N.M. 47, 28 P.2d 1 (1933).

"Equitable" or nonstatutory tolling doctrine. - New Mexico has adopted an "equitable" or nonstatutory tolling principle alongside the statutory tolling provisions in this chapter. This nonstatutory tolling doctrine, however, should be subject to the same exception or limitation as applies in the statutory situations: Where an action is dismissed for failure to prosecute (negligence in its prosecution), the limitations period will not be interrupted. Gathman-Matotan Architects & Planners, Inc. v. State, Dep't of Fin. & Admin. 109 N.M. 492, 787 P.2d 411 (1990).

Law reviews. - For comment on Cartwright v. Public Serv. Co., 66 N.M. 64, 343 P.2d 654 (1959), see 8 Nat. Resources J. 727 (1968).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitations of Actions §§ 301 to 315.

Defective pleading as within proviso or saving clause permitting new action after failure of previous action notwithstanding general limitation period has run, 77 A.L.R. 495.

Character or kind of action or proceeding within operation of statute which permits new action after expiration of period of limitation, upon failure of previous action commenced within the period, 120 A.L.R. 376, 79 A.L.R.2d 1309.

Statutes permitting new action after failure of original action commenced within period of limitations as applied in cases where original action fails for reasons relating to the writ or process or service thereof, 142 A.L.R. 1184.

State statute permitting new action within specified time after judgment or decree not on the merits in a previous action, as applicable where either the first action or the new action was brought in or removed to a federal court, 156 A.L.R. 1097.

Pleading last clear chance doctrine, 25 A.L.R.2d 254.

Statute permitting new action, after failure of original action timely commenced, as applicable where original action was filed in another state, 55 A.L.R.2d 1038.

Voluntary dismissal or nonsuit as within provision of statute extending time for new action in case of dismissal or failure of original action otherwise than upon the merits, 79 A.L.R.2d 1290.

Character or kind of action or proceeding within operation of statute permitting new action after limitation period, upon failure of timely action, 79 A.L.R.2d 1309.

Statute permitting new action, after failure of original action commenced within period of limitation, as applicable in cases where original action failed for lack of jurisdiction, 6 A.L.R.3d 1043.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on the merits, 16 A.L.R.3d 452.

54 C.J.S. Limitation of Actions §§ 240 to 249.

37-1-15. Setoffs or counterclaims not barred; defendant not to receive excess.

A setoff or counterclaim may be pleaded as a defense to any cause of action, notwithstanding such setoff or counterclaim may be barred by the preceding provisions of this chapter, if such setoff or counterclaim so pleaded was the property or right of the party pleading the same at the time it became barred and at the time of the commencement of the action, and the same was not barred at the time the cause of action sued for accrued or originated; but no judgment for any excess of such setoff or

counterclaim over the demand of the plaintiff as proved shall be rendered in favor of the defendant.

History: Laws 1880, ch. 5, § 14; C.L. 1884, § 1874; C.L. 1897, § 2927; Code 1915, § 3357; C.S. 1929, § 83-112; 1941 Comp., § 27-114; 1953 Comp., § 23-1-15.

ANNOTATIONS

Cross references. - For rule regarding counterclaims, see Rule 1-013.

Compiler's notes. - The compilers of the 1915 Code substituted the words "preceding provisions of this chapter" for the words "provisions of this act."

Meaning of "this chapter". - The words "this chapter," refer to Chapter 68 of the 1915 Code, which is compiled as 37-1-1 to 37-1-4, 37-1-6 to 37-1-19, 37-1-21, 37-1-22, 37-1-25, 37-1-26 NMSA 1978.

Recoupment claim not prohibited. - This section does not prohibit a party from asserting the defense of recoupment, even if that party would be barred from bringing an action for affirmative relief under 37-1-24 NMSA 1978. City of Carlsbad v. Grace, 1998-NMCA-144, 126 N.M. 95, 966 P.2d 1178.

Section allows common-law recoupment, not affirmative relief. - Where a counterclaim for personal injuries is barred at the commencement of an action, this section expressly allows the assertion of the counterclaim only to the extent that it seeks relief in the form of common-law recoupment, but it does not make allowance for affirmative relief. Hartford v. Gibbons & Reed Co. 617 F.2d 567 (10th Cir. 1980).

Defense to quiet title suit. - In suit to quiet title to land, which title was held void 15 years earlier, defendant's counterclaim that the deed was void on the basis of previous court proceedings was not barred; he was able to set up the invalidity of the deed as a defense under this section, since it was a defense, and was valid at the time the cause of action accrued. Gabaldon v. Westland Dev. Co. 485 F.2d 263 (10th Cir. 1973).

Judgment lien barred. - Defendant's right, if any, under a certain judgment lien, which was the basis of his counterclaim, became barred at the same instant of time that plaintiff's cause of action to quiet title against defendant accrued or originated, as plaintiff could not have quieted title against the judgment lien until that lien had been barred. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Contract claims. - To an action arising on contract, any other cause of action arising also on contract, though barred by limitations, may be interposed as a counterclaim, but no judgment for excess can be had. Great W. Oil Co. v. Bailey, 35 N.M. 277, 295 P. 298 (1930).

Gambling losses. - In action to recover money lost at gambling, within one year prior to the bringing of the action, moneys won at gambling by plaintiff from defendant more than one year prior to the bringing of plaintiff's action were not within the terms of this statute, and could not be pleaded as a setoff or counterclaim. Mann v. Gordon, 15 N.M. 652, 110 P. 1043 (1910).

Burden of showing avoidance. - A defendant who relies upon an avoidance of limitations upon the right to assert a counterclaim carries the burden and should procure a finding of the trial court showing the facts constituting such avoidance. Pacheco v. Fresquez, 49 N.M. 373, 164 P.2d 579 (1945).

Plea of statute initial court. - Plea of the statute of limitations in answer to defendant's counterclaim and considering exception by plaintiff was sufficient to raise claim in trial court that counterclaim was barred when plaintiff's cause of action originated. Pacheco v. Fresquez, 49 N.M. 373, 164 P.2d 579 (1945).

Assignment of error. - Contention that counterclaim was barred when plaintiff's cause of action originated was raised sufficiently by assignment of error which charged error in allowing defendant's counterclaim on ground that it was barred by limitations. Pacheco v. Fresquez, 49 N.M. 373, 164 P.2d 579 (1945).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitation of Actions §§ 78, 79.

Commencement of action as suspending running of limitation against claim which is subject to setoff, counterclaim or recoupment, 127 A.L.R. 909.

Claim barred by limitation as subject of setoff, counterclaim, recoupment or cross bill, 1 A.L.R.2d 630.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

54 C.J.S. Limitations of Actions § 224.

37-1-16. Revival of causes of action.

Causes of action founded upon contract shall be revived by the making of any partial or instalment payment thereon or by an admission that the debt is unpaid, as well as by a new promise to pay the same; but such admission or new promise must be in writing, signed by the party to be charged therewith. Such a cause of action shall be deemed to have accrued upon the date of such partial or installment payment, admission of indebtedness or promise to pay. Provided, that no admission that the debt is unpaid or new promise to pay the same shall be effective to extend the lien of any mortgage upon real estate or any interest therein given to secure the original indebtedness, unless the payment is accompanied by an admission or promise and unless such admission that the debt is unpaid or new promise to pay the same, signed by the party to be charged

therewith and acknowledged by such party in the form prescribed by law for the acknowledgments of instruments affecting real estate, shall be filed for record in the office of the county clerk where said original mortgage is of record, prior to the date when any action to foreclose said mortgage lien would otherwise be barred under existing law; and provided further, that the foregoing proviso shall not be applicable to any recorded mortgage upon real estate or any interest therein until after three months from the effective date of this act.

History: Laws 1880, ch. 5, § 13; C.L. 1884, § 1873; C.L. 1897, § 2926; Code 1915, § 3356; C.S. 1929, § 83-111; Laws 1939, ch. 71, § 1; 1941 Comp., § 27-115; 1953 Comp., § 23-1-16; Laws 1957, ch. 170, § 1.

ANNOTATIONS

Cross references. - For form prescribed for acknowledgments, see 14-14-8 NMSA 1978.

Effective dates. - The proviso at the end of this section first appeared in the 1939 amendatory act. Laws 1939, ch. 71, contained no effective date, but was enacted at a session which adjourned on March 11, 1939. See N.M. Const., Art. IV, § 23.

Either admission or promise sufficient. - A debt may be revived by either an admission in writing, that the debt is unpaid, or by a new promise in writing to pay the same. Both are unnecessary, but either will suffice. Romero v. Hopewell, 28 N.M. 259, 210 P. 231 (1922).

Time of admission or promise. - The provisions of this section are equally applicable to admissions and new promises made before indebtedness becomes barred and to such admissions and new promises made after statute has run. Petranovich v. Frkovich, 49 N.M. 365, 164 P.2d 386 (1945).

Unconditional admission. - An admission that the debt is unpaid, which is unconditional, unlimited and reasonably certain is sufficient and operates to revive the cause of action founded upon the contract. Reymond v. Newcomb, 10 N.M. 151, 61 P. 205 (1900).

Treatment of debt as subsisting. - This section does not prescribe any particular language for an acknowledgment or promise sufficient to lift its bar, but it is enough if the language shows the writer has treated the indebtedness as subsisting and one for which he is liable and willing to pay. Marine Trust Co. v. Lord, 51 N.M. 323, 184 P.2d 114 (1947).

Acknowledgment sufficient to revive. - When an acknowledgment or promise in writing indicates that the writer thereof treats an indebtedness as subsisting, that he is liable for it and that he is willing to pay, it is sufficient to revive a cause of action founded on a contract. Marine Trust Co. v. Lord, 51 N.M. 323, 184 P.2d 114 (1947).

New promise unnecessary for admission. - To be sufficient to revive a debt barred by statute of limitations, it is not necessary that an admission amount to a new promise to pay, express or implied. Joyce-Pruit Co. v. Meadows, 27 N.M. 529, 203 P. 537 (1921).

Judgment in prior action as admission. - Where a stipulated judgment in a prior action specifically provided "that [the mortgagor] remains personally and individually liable to [the mortgagee] on the obligations secured by the mortgage from him to [the mortgagee] . . . ," it may be inferred from the record of the prior action that there was only one debt owed to the mortgagee by the mortgagor, and that stipulated judgment can be treated as an admission reviving the cause of action on the debt which otherwise would have been barred by the statute of limitations. Citizens Bank v. Teel, 106 N.M. 290, 742 P.2d 502 (1987).

Letter as admission. - Letters written by a debtor promising to pay as soon as he could, and offering a partial payment, constitute an admission of debt to revive action. Cleland v. Hostetter, 13 N.M. 43, 79 P. 801 (1905).

Letter denying indebtedness. - A letter referring to the note upon which suit was later brought, but recognizing no debt as unpaid, and claiming that there was no indebtedness, would not revive the cause of action nor defeat the bar of the statute. Gregg v. Pioneer Abstract Co. 35 N.M. 11, 289 P. 71 (1930).

Letters causing forbearance to sue after running of statute. - In case where statute of limitations had already run, letters written by the maker to the payee of a check which allegedly caused payee to forbear suit did not estop the maker from successfully interposing the statute as a defense. Wilson v. Black, 49 N.M. 309, 163 P.2d 267 (1945).

Acknowledgment of loan in letter. - Where debtor in letter indicates he borrowed specific sum from the lender and pledged stock as security, that he wanted to do whatever he could for lender's widow and the like, and will do so when able financially was a sufficient acknowledgment of the indebtedness and constitutes a promise to pay the same. Marine Trust Co. v. Lord, 51 N.M. 323, 184 P.2d 114 (1947).

Answers under protest not basis for revival of lien. - Answers to interrogatories made under protest and in obedience to court order cannot be made the basis for revival of judgment lien. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Admission in deposition. - Cause of action on note barred by statute of limitations was revived by admission that debt was unpaid, made in deposition in answer to cross-interrogatories, taken for a different case between the same parties on the same subject. Joyce-Pruit Co. v. Meadows, 27 N.M. 529, 203 P. 537 (1921).

Statute not tolled by attorney's statements. - Though attorney's letter contained acknowledgment that a judgment had not been paid, it was not sufficient to toll the statute of limitations in the absence of showing that he was authorized by his debtor-client to make the admission. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Statement of plaintiff's attorney in answer to counterclaim, neither admitting nor denying ownership of a judgment, but admitting that plaintiff had paid no part thereof, and specifically denying that same was justly due defendant, even if it could be treated as admission that judgment was unpaid, would not come within statute providing for revival of causes, since admission was not signed by party to be charged therewith. Pugh v. Heating & Plumbing Fin. Corp. 49 N.M. 234, 161 P.2d 714 (1945).

Possession by mortgagee insufficient as admission. - Although possession by the mortgagee, with the consent of the mortgagor, may be considered as prima facie evidence that the debt is not paid, such an admission does not fall within the terms of this section. Buss v. Kemp Lumber Co. 23 N.M. 567, 170 P. 54 (1918).

Request for delay insufficient. - A debtor may be estopped from pleading the statute of limitations where his conduct is such as to produce a reliance upon his acknowledgment of the obligation, but a mere request for delay or forbearance in bringing suit, absent fraudulent representations, is not enough to accomplish this result. Wilson v. Black, 49 N.M. 309, 163 P.2d 267 (1945).

Promissory note. - The payment of interest on a promissory note does not toll the running of the statute of limitations; nor does part payment on a note already outlawed revive it. 1921-22 Op. Att'y Gen. 185.

Verbal promise. - Verbal promise to pay an old debt in monthly installments in consideration for extension of time for paying balance due was not a new contract superseding original loan contracts and did not toll running of statute of limitations. Petranovich v. Frkovich, 49 N.M. 365, 164 P.2d 386 (1945).

This section applies to acknowledgments and new promises made both during and subsequent to the running of the period of limitation, and testimony tending to show a parol promise made before the six-year period of limitation expired did not avail as a new promise. Bullard v. Lopez, 7 N.M. 561, 37 P. 1103 (1894).

Representations not amounting to promises. - Representations other than promises to pay, including those made by persons in fiduciary relationships, are insufficient to deny the defense of the statute of limitations to a debtor. Wilson v. Black, 49 N.M. 309, 163 P.2d 267 (1945).

Partial payment on oral loans. - Partial payments made upon indebtedness under three oral loans did not serve to revive right to litigate thereon nor avoid the bar of the statute of limitations on actions. Gentry v. Gentry, 59 N.M. 395, 285 P.2d 503 (1955).

New cause of action. - Cause of action arising from defendant's admission in his answer filed in prior suit on a debt, which was the cause of action upon which plaintiffs brought the present suit, was a new cause of action and not the same cause upon which plaintiffs brought their prior suit, which had been dismissed by court order. Smith v. Walcott, 85 N.M. 351, 512 P.2d 679 (1973).

Section is to be rigorously enforced. Petranovich v. Frkovich, 49 N.M. 365, 164 P.2d 386 (1945).

Rebutting presumption of payment. - Any competent evidence tending to show that the debt was not paid is sufficient to rebut the presumption of payment. Heisel v. York, 46 N.M. 210, 125 P.2d 717 (1942).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitation of Actions §§ 319 to 390.

General acknowledgment or promise in statement addressed to public as removing bar of limitation, 8 A.L.R. 1258.

Unaccepted offer to compromise debt as tolling or removing bar of statute of limitations, 12 A.L.R. 544.

Check in payment of interest or installment of principal as tolling statute of limitations, 28 A.L.R. 84, 125 A.L.R. 271.

Payment on account as removing or tolling statute of limitations, 36 A.L.R. 346, 156 A.L.R. 1082.

Acknowledgment or payment to one of several obligees as tolling statute of limitations in favor of others, 40 A.L.R. 29.

Part payment or acknowledgment of indebtedness on bond or note as tolling statute on mortgage securing same, 41 A.L.R. 822.

Payment, acknowledgment or new promise by one spouse as tolling statute of limitations against obligation of community, 47 A.L.R. 548.

Rendition of services, transfer of property, or similar benefits, other than money or obligation to pay money, as part payment tolling, or removing bar of statute of limitations, 139 A.L.R. 1378.

Necessity and sufficiency of identification of part payment with the particular debt in question, for purposes of tolling, or removing bar of, statute of limitations, 142 A.L.R. 389.

Subrogation of mortgagee in forged or unauthorized mortgage, proceeds of which are used to discharge valid lien, interruption of limitations, 151 A.L.R. 418.

National service life insurance, interruption of statutes in action on policy of, 155 A.L.R. 1446, 156 A.L.R. 1445, 157 A.L.R. 1445, 158 A.L.R. 1445.

Interruption of statute of limitations by realization of security, 165 A.L.R. 1400.

Collateral, giving of, as acknowledgment and new promise to pay, tolling statute of limitations, 171 A.L.R. 315.

New cause of action as stated by amendment, after limitation period, of allegations of negligence, 171 A.L.R. 1087.

Adverse possession: Mortgagee's possession before foreclosure as barring right of redemption, 7 A.L.R.2d 1131.

Entry or endorsement by creditor on note, bond or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

When statute of limitations commences to run against promise to pay debt "when able," "when convenient," or the like, 28 A.L.R.2d 786.

Authority of agent to make payment on behalf of principal, as regards the statute of limitations, 31 A.L.R.2d 139.

Necessity and sufficiency, in order to toll statute of limitations as to debt, of statement of amount of debt in acknowledgment or new promise to pay, 21 A.L.R.4th 1121.

When statute of limitations commences to run against promise to pay debt "when able," "when convenient," or the like, 67 A.L.R.5th 479.

54 C.J.S. Limitations of Actions §§ 252 to 268.

37-1-17. [Other statutes prescribing limitations unaffected.]

None of the preceding provisions of this chapter shall apply to any action or suit which, by any particular statute of this state, is limited to be commenced within a different time, nor shall this chapter be construed to repeal any existing statute of the state which provides a limitation of any action; but in such cases the limitation shall be as provided by such statutes.

History: Laws 1880, ch. 5, § 16; C.L. 1884, § 1876; C.L. 1897, § 2929; Code 1915, § 3359; C.S. 1929, § 83-114; 1941 Comp., § 27-116; 1953 Comp., § 23-1-17.

ANNOTATIONS

Compiler's notes. - The compilers of the 1915 Code substituted the words "preceding provisions of this chapter" for the words "provisions of this act."

Meaning of "this chapter". - The words "this chapter" refer to ch. 68 of the 1915 Code, which is compiled as 37-1-1 to 37-1-4, 37-1-6 to 37-1-19, 37-1-21, 37-1-22, 37-1-25, 37-1-26 NMSA 1978.

New remedy qualified by time limitation on exercise of right. - Where a statute grants a new remedy and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as the remedy and, in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), overruled on other grounds Bracken v. Yates Petroleum Corp. 107 N.M. 463, 760 P.2d 155 (1988).

Annexation. - Former statute limiting time for appeal by property owners from municipal resolution of annexation to 30-day period began to run upon the passage of the resolution, and action not brought within that period was barred. Leavell v. Town of Texico, 63 N.M. 233, 316 P.2d 247 (1957).

Gaming statutes. - A demurrer to a counterclaim pleading a cause of action under the gaming statutes, which cause was barred by one-year statute of limitations, was properly sustained. Mann v. Gordon, 15 N.M. 652, 110 P. 1043 (1910).

Extensions for disability. - Section 37-1-10 NMSA 1978, extending period of limitations for minors and incapacitated persons, does not apply to actions for negligence against municipalities. Noriega v. City of Albuquerque, 86 N.M. 294, 523 P.2d 29 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

Wrongful Death Statute. - Section 37-1-10 NMSA 1978 is not applicable to wrongful death statute. Natseway v. Jojola, 56 N.M. 793, 251 P.2d 274 (1952).

Section 37-1-14 NMSA 1978 does not apply to actions under Tort Claims Act, Article 4 of Chapter 41. Estate of Gutierrez v. Albuquerque Police Dep't, 104 N.M. 111, 717 P.2d 87 (Ct. App.), cert. denied, 103 N.M. 798, 715 P.2d 71 (1986), overruled on other grounds Bracken v. Yates Petroleum Corp. 107 N.M. 463, 760 P.2d 155 (1988).

This section prohibits 37-1-14 NMSA 1978 from applying in workmen's compensation and occupational disablement cases, since both the Workmen's Compensation Act and the Occupational Disablement Law contain specific statutes of limitations, 52-1-31 and 52-3-16 NMSA 1978, and neither act provides a saving clause allowing for an extension of the specified time limit for filing a claim. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), overruled on other grounds Bracken v. Yates Petroleum Corp. 107 N.M. 463, 760 P.2d 155 (1988).

Thus, one-year statute of limitations in Workmen's Compensation Act bars second suit begun after the expiration of that year. Ortega v. Shube, 93 N.M. 584, 603 P.2d 323 (Ct. App. 1979), overruled on other grounds Bracken v. Yates Petroleum Corp. 107 N.M. 463, 760 P.2d 155 (1988).

Law reviews. - For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Action to recover money or property loss and paid through gambling as affected by statute of limitations, 22 A.L.R.2d 1390.

37-1-18. [Limitations not to run against trust actions fraudulently concealed.]

None of the provisions of this chapter shall run against causes of actions originating in or arising out of trusts, when the defendant has fraudulently concealed the cause of action, or the existence thereof from the party entitled or having the right thereto.

History: Laws 1880, ch. 5, § 17; C.L. 1884, § 1877; C.L. 1897, § 2930; Code 1915, § 3360; C.S. 1929, § 83-115; 1941 Comp., § 27-117; 1953 Comp., § 23-1-18.

ANNOTATIONS

Meaning of "this chapter". - For meaning of "this chapter," see compiler's note under 37-1-17 NMSA 1978.

Action for accounting barred. - An action for an accounting based on a letter from defendants allegedly creating an express trust in certain motel property in plaintiff's favor was barred by six-year statute of limitations, where there was no evidence of fraudulent concealment. Fidel v. Fidel, 87 N.M. 283, 532 P.2d 579 (1975).

Failure to enforce rights. - Where a cestui que trust failed to institute proceedings to enforce alleged rights under an equitable trust for eight years, the court will not aid in the enforcement of his claim. Patterson v. Hewitt, 11 N.M. 1, 66 P. 552 (1901), aff'd, 195 U.S. 309, 25 S. Ct. 35, 49 L. Ed. 214 (1904).

Law reviews. - For survey, "Article VII of the New Probate Code: In Pursuit of Uniform Trust Administration," see 6 N.M. L. Rev. 213 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitations of Actions §§ 146 to 151.

54 C.J.S. Limitations of Actions §§ 88 to 90.

37-1-19. [Applicability of limitations.]

The above limitations and provisions shall not apply to evidences of debt intended to circulate as money; but shall, in other respects, be applicable in all other actions brought by or against all bodies corporate or politic, except when otherwise expressly declared.

History: Laws 1880, ch. 5, § 19; C.L. 1884, § 1879; C.L. 1897, § 2932; Code 1915, § 3361; C.S. 1929, § 83-116; 1941 Comp., § 27-118; 1953 Comp., § 23-1-19.

ANNOTATIONS

Statute of limitations does not run against the state and is not made applicable to the state itself by the wording of this section, which makes the limitations applicable only to actions brought by "all bodies corporate or politic." Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

Unless expressly provided or necessarily implied, statutes of limitation do not apply to the sovereign. In re Will of Bogert, 64 N.M. 438, 329 P.2d 1023 (1958).

The state is not included in "bodies politic and corporate." 1925-26 Op. Att'y Gen. 67.

Action by state on official bond. - Two-year limitation statute was not applicable to a state's action against a surety on official bond of delinquent tax collector, where state was not mentioned in statute or included by implication. State v. Roy, 41 N.M. 308, 68 P.2d 162 (1937).

Statute of limitations does not run against the state in action to recover on official bond. 1947-48 Op. Att'y Gen. No. 5019.

Statute runs against county and other political subdivisions, including school districts, unless such may be deemed to be an arm of the state because of the particular governmental functions or purposes involved. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

This section is the exception that causes the statutes of limitations to run against subdivisions of the state. 1969-70 Op. Att'y Gen. No. 70-25.

School district or board. - If a school district or board of education has the power or duty to contract, lease, issue bonds, sue and be sued and hold both real and personal property then it is a body corporate and politic, and where the obligation sued upon is one owed solely to the school district as administered by board of education, it is the real party in interest, against which the statute of limitations may run. Board of Educ. v. Standhardt, 80 N.M. 543, 458 P.2d 795 (1969).

County or municipal hospital. - A county or municipal hospital would be either a "corporate" or "politic" body as defined in this section. 1969-70 Op. Att'y Gen. No. 70-25.

Recovery of wrongfully collected unemployment benefits. - Suit by the New Mexico department of labor to collect unemployment compensation benefits wrongfully collected by debtor while employed was an action for the benefit of a state fund, not for a private individual or corporation, and the state was the real party in interest. New Mexico Dep't of Labor v. Valdez, 136 Bankr. 874 (Bankr. D.N.M. 1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 51 Am. Jur. 2d Limitations of Actions §§ 397, 399 to 402, 409 to 412, 416 to 421; 53A Am. Jur. 2d Money §§ 1, 5, 6, 8, 9, 10.

Claim of government as within provision of nonclaim statute, 34 A.L.R. 1003.

Limitation period as affected by requirement of notice or presentation of claim against governmental body, 3 A.L.R.2d 711.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

54 C.J.S. Limitations of Actions §§ 17 to 19, 32.

37-1-20. [No sale upon mortgages, etc., when action barred.]

No lands, tenements, hereditaments, goods or chattels shall be sold under any power of sale contained in any mortgage, deed of trust or other written instrument of like effect, where an action or suit upon the indebtedness secured thereby is barred by the provisions of Chapter 68, New Mexico Code of 1915.

History: Laws 1927, ch. 10, § 1; C.S. 1929, § 83-120; 1941 Comp., § 27-119; 1953 Comp., § 23-1-20.

ANNOTATIONS

Cross references. - For prohibition against selling real property under power of sale, see 48-7-7 NMSA 1978.

Compiler's notes. - Chapter 68 of the 1915 Code is compiled as 37-1-1 to 37-1-4, 37-1-6 to 37-1-19, 37-1-21, 37-1-22, 37-1-25, 37-1-26 NMSA 1978.

This section is not unconstitutional impairment of obligations of contract as applicable to one who holds a past due real estate mortgage as security for indebtedness on which action is barred approximately a year and nine months after passage of the section. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Sections not conflicting. - Section 48-7-7 NMSA 1978, prohibiting the selling of real estate under power of sale, does not conflict with provision of this section limiting time within which chattels, goods and land may be sold under power of sale in mortgage. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Time for enforcing mortgage lien not extended. - Where 1929 act (48-7-7 NMSA 1978, prohibiting the selling of realty under power of sale) intervened before lien resulting from a 1921 mortgage had been enforced and a "renewal" mortgage was executed, time for enforcing the 1921 mortgage lien was not extended because remedy by foreclosure under power of sale had been withdrawn by the legislature which allowed a reasonable time for enforcing the remedy before it took effect. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Effect of new note. - A new note promising to pay one year later the face amount of earlier note barred by limitations but not interest accrued thereon represented a new contract insofar as effect of intervening statutes limiting the time for exercising power of sale arising under real estate mortgage given to secure the old note. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Mortgagee in possession. - Though foreclosure of mortgage is barred by limitations, a mortgagee in possession under contract with mortgagors did not lose the status of a mortgagee in possession by ineffective attempt to sell the land under power of sale, but was entitled to retain possession until mortgage debt was paid. Davis v. Savage, 50 N.M. 30, 168 P.2d 851 (1946).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 55 Am. Jur. 2d Mortgages § 679 et seq.

Entry or endorsement by creditor on note, bond or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

37-1-21. Real property held under governmental deed, devise or grant; ten years possession confirms title; exception for persons under disability.

In all cases where any person or persons, their children, heirs or assigns, shall have had possession for ten years of any lands, tenements or hereditaments which have been granted by the governments of Spain, Mexico or the United States, or by whatsoever authority empowered by said governments to make grants to lands, holding or claiming the same by virtue of a deed or deeds or [of] conveyance, devise or grant 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 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, or grant 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 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 as aforesaid for the term of ten years, shall have a good and indefeasible title in fee simple to such lands, tenements or hereditaments; provided, however, that the person or persons claiming possession, his predecessors or grantors of such lands, tenements or hereditaments shall have for the period mentioned in this section continuously paid all state, county and municipal taxes which during the ten-year period have been assessed against the property; provided, further, 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 majority, then the time for commencing such action shall in favor of such persons be extended so that they shall have one year after the termination of such disability to commence such action; but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued and to no other.

History: Laws 1857-1858, p. 64; C.L. 1865, ch. 73, § 1; C.L. 1884, § 1880; C.L. 1897, § 2937; Laws 1899, ch. 63, § 1; Code 1915, § 3364; C.S. 1929, § 83-119; 1941 Comp., § 27-120; 1953 Comp., § 23-1-21; Laws 1973, ch. 138, § 14; 1979, ch. 354, § 1.

ANNOTATIONS

I. General Consideration.
II. Statutory Requisites.
A. In General.
B. Color of Title.
C. Possession.
D. Payment of Taxes.
III. Procedure.

I. GENERAL CONSIDERATION.

Cross references. - For extensions of limitations in favor of minors and incapacitated persons, see 37-1-10 NMSA 1978.

For general adverse possession section, see 37-1-22 NMSA 1978.

As to rights of persons in possession under Spanish or Mexican grants, see 47-1-25 NMSA 1978.

For vesting in state of title to highways after one year of use, see 67-2-5 NMSA 1978.

One form of action. - The New Mexico Rules of Civil Procedure, governing all cases cognizable in law and at equity, provide for only one form of action, known as "civil action." See Rules 1-001 and 1-002.

Due process. - This section does not deprive one of property without due process of law. Montoya v. Gonzales, 232 U.S. 375, 34 S. Ct. 413, 58 L. Ed. 645 (1914).

Equal protection. - This section does not deny the equal protection of laws, even if confined to Spanish and Mexican grants. Montoya v. Gonzales, 232 U.S. 375, 34 S. Ct. 413, 58 L. Ed. 645 (1914).

Section was not intended to be statute of limitation and repose merely, but was also intended to grant affirmative relief by way of conferring title upon the pioneer agricultural settlers, as a reward of honest toil and diligence. Montoya v. Unknown Heirs of Vigil, 16 N.M. 349, 120 P. 676 (1912), aff'd sub nom. Montoya v. Gonzales, 232 U.S. 375, 34 S. Ct. 413, 58 L. Ed. 645 (1914); United States v. Garcia, 762 F.2d 862 (10th Cir. 1985).

Section applies to property acquired within Spanish or Mexican grant. Ward v. Rodriguez, 43 N.M. 191, 88 P.2d 277, cert. denied, 307 U.S. 627, 59 S. Ct. 837, 83 L. Ed. 1511 (1939).

Section 37-1-22 NMSA 1978 is a general statute of limitations as distinguished from this section which applies to property acquired under a Spanish or Mexican land grant. Ward v. Rodriguez, 43 N.M. 191, 88 P.2d 277, cert. denied, 307 U.S. 627, 59 S. Ct. 837, 83 L. Ed. 1511 (1939).

Open, adverse, continuous possession of land, part of Mexican land grant, by defendant who claimed title in fee through the grant and act of confirmation, for more than 10 years before bringing of action for possession by plaintiff, who claimed title through collateral heirs of original grantee, was a bar to plaintiff's recovery, where no one in plaintiff's chain of title had ever been in possession of the lands. Gildersleeve v. New Mexico Mining Co. 6 N.M. 27, 27 P. 318 (1891), aff'd, 161 U.S. 573, 16 S. Ct. 663, 40 L. Ed. 812 (1896).

This section applies to lands that were part of a Spanish or Mexican land grant. Stacy v. Simpson, 91 N.M. 350, 573 P.2d 1205 (1978).

Acquisition of common lands. - Title to common and unallotted lands of a community grant could be acquired by adverse possession. H.N.D. Land Co. v. Suazo, 44 N.M. 547, 105 P.2d 744 (1940). See also Merrifield v. Buckner, 41 N.M. 442, 70 P.2d 896 (1937).

No title to public lands can be obtained by adverse possession, laches or acquiescence. United States v. Gammache, 713 F.2d 588 (10th Cir. 1983).

Conflicting grants. - Claimants under confirmed Mexican grant and United States patent were entitled to enjoin claimants under subsequent and inchoate Mexican grant from appropriating, improving and irrigating such land, title to which had been acquired under adverse possession. Waddingham v. Robledo, 6 N.M. 347, 28 P. 663 (1892).

Indian Pueblos are entitled to benefit of this act. Garcia v. United States, 43 F.2d 873 (10th Cir. 1930).

Law reviews. - For article, "Adverse Possession in New Mexico - Part One," see 4 Nat. Resources J. 559 (1964).

For article, "Adverse Possession in New Mexico - Part Two," see 5 Nat. Resources J. 96 (1965).

For annual survey of New Mexico property law, see 16 N.M.L. Rev. 59 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 3 Am. Jur. 2d Adverse Possession §§ 9, 26, 138, 143 to 151, 170, 184, 190, 191, 196; 51 Am. Jur. 2d Limitation of Actions §§ 120, 182 to 193, 198.

Loss of easement by adverse possession, or nonuser, 1 A.L.R. 884, 66 A.L.R. 1099, 98 A.L.R. 1291, 25 A.L.R.2d 1265.

Adverse possession as against vendor by one who enters under executory contract, 1 A.L.R. 1329.

Adverse possession by third party or stranger of property held in trust, 2 A.L.R. 41.

Right of vendee to record title where vendor to covenants to furnish abstract showing title, 7 A.L.R. 1166.

Adverse possession of commons, 9 A.L.R. 1373.

Actual possession necessary to give title by adverse possession under invalid tax title, 22 A.L.R. 550.

Act of trespasser as interrupting adverse possession, 22 A.L.R. 1458.

Possession by one claiming under or through deed or mortgage by cotenant as adverse to other cotenant, 27 A.L.R. 8, 32 A.L.R.2d 1214.

Dower as affected by adverse possession, 41 A.L.R. 1115.

Adverse possession as against one under disability of infancy, coverture or mental incompetency, 43 A.L.R. 941, 147 A.L.R. 236.

Adverse possession of railroad right-of-way, 50 A.L.R. 303.

Scope and application of the doctrine that one cannot successfully claim adverse possession under color of title where he has deprived himself or been deprived of the color relied on, 136 A.L.R. 1349.

Right of grantee to attack adverse possession by his predecessor of parcel beyond that called for by deed under which he claims, 17 A.L.R.2d 1128.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Adverse possession based on projection or inclination of wall or other structure, 2 A.L.R.3d 1005.

Use of property by public as affecting acquisition of title by adverse possession, 56 A.L.R.3d 1182.

Presumptions and evidence respecting identification of land on which property taxes were paid to establish adverse possession, 36 A.L.R.4th 843.

2 C.J.S. Adverse Possession § 229; 54 C.J.S. Limitations of Actions §§ 58, 59.

II. STATUTORY REQUISITES.

A. IN GENERAL.

Elements of adverse possession. - Before title can ripen under the provisions of this section, three elements must be presented: (1) actual, visible, exclusive, hostile and continuous possession; (2) under color of title; (3) for a period of 10 years. Flores v. Bruesselbach, 149 F.2d 616 (10th Cir. 1945).

To constitute adverse possession the occupancy of one so claiming must be actual, visible, exclusive, hostile and continuous. Merrifield v. Buckner, 41 N.M. 442, 70 P.2d 896 (1937).

Continuous and uninterrupted possession with the exercise of complete dominion, together with manifestation of ownership under color of title for the requisite length of time, established title in the possessor. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

The elements necessary to establish title by adverse possession in a grant are: (1) actual, visible, exclusive, hostile and continuous possession; (2) under color of title; and (3) for a period of 10 years. Esquibel v. Hallmark, 92 N.M. 254, 586 P.2d 1083 (1978).

In order to prove title by adverse possession under this section, the claimant must also meet the elements set forth in 37-1-22 NMSA 1978. Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

Distinct acts asserting title. - Requirements of adverse possession largely depend upon the situation of the parties, the size and extent of the land, and the purpose for which it is adapted; the acts relied on 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 of ownership adverse to his title is being asserted. Lopez v. Barboa, 80 N.M. 338, 455 P.2d 842 (1969); Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

B. COLOR OF TITLE.

Purposes served by color of title requirement. - Color of title serves to define boundaries and serves the purpose of establishing the requisite intent. Quarles v. Arcega, 114 N.M. 502, 841 P.2d 550 (Ct. App. 1992).

Color of title is required under both adverse possession statutes. Thomas v. Pigman, 77 N.M. 521, 424 P.2d 799 (1967).

Plaintiff must recover on strength of his own title and cannot rely on any weaknesses in a defendant's title. Baker v. Benedict, 92 N.M. 283, 587 P.2d 430 (1978).

Adequate description necessary. - The requirement of a description from which the land could be located is necessary in the "color of title" document under this section. Griego v. Roybal, 81 N.M. 202, 465 P.2d 85 (1970).

Description adequate. - Deed furnishing color of title gave an adequate description of land where witnesses testified with certainty that from the description they could locate the property on the ground and that the survey description covered the land in the deed. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Undescriptive devise not color of title. - Where property was devised by will under a residuary clause without description of property, it did not constitute color of title which would ripen into good title in the prescriptive period. Green v. Trumbull, 37 N.M. 604, 26 P.2d 1079 (1933).

Patent from government gives color of title. Ward v. Rodriguez, 43 N.M. 191, 88 P.2d 277, cert. denied, 307 U.S. 627, 59 S. Ct. 837, 83 L. Ed. 1511 (1939).

Effect of color of title. - Less notoriety, and even less frequency of acts of ownership, is required with possession under color of title than without it. Jackson v. Gallegos, 38 N.M. 211, 30 P.2d 719 (1934); Baker v. de Armijo, 17 N.M. 383, 128 P. 73 (1912).

Absence of color of title dispositive. - Appellant having had possession for only six months before commencement of suit to quiet title, and color of title, an essential condition in order to establish title by adverse possession under this section, having been found to be absent, it is unnecessary to review the evidence of possession of the land in controversy by appellant's predecessors in title. Sunmount Co. v. Bynner, 35 N.M. 527, 2 P.2d 311 (1931).

Evidence of claimant as to holding under color of title for 10 years was held insufficient to entitle him to claim under this section or 37-1-22 NMSA 1978. Bradford v. Armijo, 28 N.M. 288, 210 P. 1070 (1922).

Mistaken boundary. - Boundary line fixed under a mistake of fact will not give title by adverse possession. Ward v. Rodriguez, 43 N.M. 191, 88 P.2d 277, cert. denied, 307 U.S. 627, 59 S. Ct. 837, 83 L. Ed. 1511 (1939).

Concession to other's claim as break in continuity. - It may be safely assumed as a general proposition that if a defendant in possession of disputed territory concedes the true title to be in another, and offers to purchase from him, the continuity of adverse possession is broken. Chambers v. Bessent, 17 N.M. 487, 134 P. 237 (1913).

Hostile nature of possession interrupted. - Letters sent by person claiming property under a tax deed to former owner, indicating question as to whether tax deed should have been issued, interrupted the requisite continuous hostile possession. Heron v. Conder, 77 N.M. 462, 423 P.2d 985 (1967).

Fee simple title acquired in addition to statutory bar. - This section grants affirmative relief in the nature of a fee simple or statutory title in addition to the bar of the statute, in favor of persons in possession of Spanish or Mexican grants for 10 years under conveyance of an estate in fee simple, and possession of any part of the tract extends to the exterior boundaries of the lands described. Montoya v. Unknown Heirs of Vigil, 16 N.M. 349, 120 P. 676 (1911), aff'd sub nom. Montoya v. Gonzales, 232 U.S. 375, 34 S. Ct. 413, 58 L. Ed. 645 (1914).

Possession for 10 years under deed purporting to convey a fee simple, of any lands which have been granted by Spain, Mexico or the United States, gives a title in fee to the quantity of land specified in the deed, if, during the 10 years, no claim by suit in law or equity, effectually prosecuted, shall have been set up. Christmas v. Cowden, 44 N.M. 517, 105 P.2d 484 (1940); Montoya v. Gonzales, 232 U.S. 375, 34 S. Ct. 413, 58 L. Ed. 645 (1914); Gray v. Taylor, 15 N.M. 742, 113 P. 588 (1910), aff'd, 227 U.S. 51, 33 S. Ct. 199, 57 L. Ed. 413 (1913).

Where plaintiff's right of action is based upon adverse possession of land within a grant, for 10 years, claiming through conveyance purporting to convey estate in fee simple, with no challenging claim prosecuted, title by adverse possession is established. First Nat'l Bank v. Town of Tome, 23 N.M. 255, 167 P. 733 (1917).

Vesting of title. - One who has held possession according to the statute thereby acquires complete title thereto, and also defeats the right of the prior owner to effectually maintain a suit to recover the same. Hoskins v. Talley, 29 N.M. 173, 220 P. 1007 (1923).

Uninterrupted occupancy of land adverse to the true owner, by one who had no title, not only defeated the title of the true owner, but also vested in such occupant a complete title. Manby v. Voorhees, 27 N.M. 511, 203 P. 543 (1921).

C. POSSESSION.

Possession essential. - Under either this section or 37-1-22 NMSA 1978 possession is an essential element of proof which one claiming under it must sustain. Tietzel v. Southwestern Constr. Co. 48 N.M. 567, 154 P.2d 238 (1944).

Nature of possession. - The possession required to be proved under this section is no different from that required under 37-1-22 NMSA 1978; it must be established as adverse under both. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Open and notorious occupancy. - Adversely possessing property requires the possessor to use the disputed property as an ordinary owner would, and his occupancy must only be sufficiently open and notorious to give the true owner adequate notice of his claim, so an ironclad fence in perfect repair is not required to give rise to an adverse possession claim. Pueblo of Santa Ana v. Baca, 844 F.2d 708 (10th Cir. 1988).

Possession required need not be complete occupancy of entire area claimed, and where there is no question as to the property claimed and a part is actually physically occupied, and visible and notorious acts of ownership are manifested, nothing more is required. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Presumption from possession of part. - Possession of part of the land described in a fee simple deed is presumed to extend to the limits of the description. Garcia v. United States, 43 F.2d 873 (10th Cir. 1930).

Honest, but mistaken, belief in ownership. - Statements made by the plaintiffs that they only intended to claim what was in their deeds did not establish that the plaintiffs lacked the necessary hostile intent to establish a claim for adverse possession; a distinction exists where a person takes possession of the land of another intending to claim only to the true boundary and a situation in which acting on a mistake as to the true boundary, a person takes possession of the land of another believing it to be his own. In the first situation the possession is not adverse; in the second the intent to retain possession under an honest belief of ownership is adverse possession. Quarles v. Arcega, 114 N.M. 502, 841 P.2d 550 (Ct. App. 1992).

Character of possession dependent on land. - Continuous possession for 10 years is necessary to perfect a limitation title, though the character of possession depends upon uses to which the land can be applied. Merrifield v. Buckner, 41 N.M. 442, 70 P.2d 896 (1937).

Interruptions in use of the property must be equivalent in force to the possession to defeat adverse possession. Pueblo of Santa Ana v. Baca, 844 F.2d 708 (10th Cir. 1988).

Time of possession. - Ten years' possession required hereunder need not be 10 years next preceding suit. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Prior possession. - In ejectment, where no legal title is shown in either party, the party showing prior possession in himself, or those through whom he claims, will be held to have the better title. Romero v. Herrera, 27 N.M. 559, 203 P. 243 (1921).

Possession through permittee. - Adverse claimant will not be denied 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. Jackson v. Gallegos, 38 N.M. 211, 30 P.2d 719 (1934).

Possession by cotenant. - There is a presumption in cotenancy that one cotenant acts for the benefit of all cotenants unless definite proof indicates otherwise and statutes relating to adverse possession cannot be invoked against cotenant in view of such presumption. Tietzel v. Southwestern Constr. Co. 48 N.M. 567, 154 P.2d 238 (1944).

The possession by a husband, cotenant with other heirs, of the wife's separate property, after her death, was the possession of all, and not adverse. Torrez v. Brady, 37 N.M. 105, 19 P.2d 183 (1932).

The actions of a cotenant paying the taxes and erecting a fence on the common land do not place another cotenant on notice that the former is claiming adversely to the latter's interest, especially since this section does not require the payment of taxes, and also since a cotenant is allowed to make reasonable improvements to the common land. Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

Until a cotenant is placed on notice of another cotenant's adverse claim to the common land, the former does not realize that a cause of action exists. Since tenants in common are each entitled to the reasonable use, occupancy, benefit and possession of the common property, nothing short of clear notice to the cotenants apprising them of the adverse claim will be sufficient to cause the statutory 10-year period to begin to run. Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

Use by claimant and owner. - Adverse possession was not established as to that part of a large tract of land which was used for grazing purposes both by the adverse claimant and the true owner. Montoya v. Catron, 22 N.M. 570, 166 P. 909 (1917).

Plaintiff not in possession. - Doctrine that where rightful owner is in actual occupancy of a part of the land described in his deed and there is no mixed possession as to the remainder, his possession will be deemed coextensive with the calls in his deed, does

not avail a plaintiff who does not show himself in actual possession of any part of the disputed area. Tietzel v. Southwestern Constr. Co. 48 N.M. 567, 154 P.2d 238 (1944).

Adverse possession not established. - Where the only proof of acts of dominion over property came from testimony that horses were grazed thereon for several months and that some rental payments were received in consideration of allowing signs to be erected on the property in question or some adjoining property, and there was no evidence that the description in the deed relied on was sufficient to identify the property claimed, the evidence was not sufficiently clear and convincing to compel reversal of finding against adverse possession claim. Lopez v. Barboa, 80 N.M. 338, 455 P.2d 842 (1969).

Payment of taxes and occasional cutting of timber is not adverse possession. Merrifield v. Buckner, 41 N.M. 442, 70 P.2d 896 (1937).

In a suit for specific performance of a contract of exchange of New Mexico land for Missouri land, the evidence was examined and held to be insufficient to establish title to the Missouri land by adverse possession. Gehman v. Lair, 35 N.M. 17, 288 P. 604 (1930).

Clear and convincing evidence. - For adverse possession to be found, New Mexico law requires clear and convincing evidence that possession is actual, visible, exclusive, hostile, and continuous. Pueblo of Santa Ana v. Baca, 844 F.2d 708 (10th Cir. 1988).

Adverse possessor's claim fails for lack of substantial evidence to support a finding of exclusive and continuous possession. Blumenthal v. Concrete Constructors Co. 102 N.M. 125, 692 P.2d 50 (Ct. App. 1984).

D. PAYMENT OF TAXES.

Payment of taxes during adverse holding is not required under this section, whereas, under 37-1-22 NMSA 1978, it is required. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Although 37-1-22 NMSA 1978 requires the adverse claimant to pay the taxes on the property, under this section, that is not a requirement for adverse possession. Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

Effect of amendment. - The fact that the legislature by Laws 1899, ch. 63, amended this section and 37-1-22 NMSA 1978 with respect to the disability provisions, but only 37-1-22 NMSA 1978 with respect to the payment of taxes, making the payment thereof a constituent element of adverse possession, and did not amend this section in this respect, indicates that it was not intended to make the requirement contained in the amendment of universal application. Tafoya v. New Mexico State Police Bd. 81 N.M. 710, 472 P.2d 973 (1970).

Claimants under federal act required to pay. - Claimants of Pueblo lands under the federal Pueblo Lands Act, authorizing plea of limitations to be raised against the government by, inter alia, those in possession of Pueblo lands without color of title from 1889 through 1924, were to prove the adverse possession described and were, pursuant to the federal act, to have paid all taxes assessed and levied in conformity with New Mexico laws to the extent required by 37-1-22 NMSA 1978 and not by this section. United States v. Wooten, 40 F.2d 882 (10th Cir. 1930).

Recovery of taxes. - Grantee in void deed having paid taxes and failed to prove adverse possession was entitled to recover taxes from the title holder on quieting of title. Merrifield v. Buckner, 41 N.M. 442, 70 P.2d 896 (1937).

III. PROCEDURE.

To establish adverse possession, proof must be clear and convincing. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

The doctrine of adverse possession is to be taken strictly, and it is not to be made out by inference, but by clear and positive proof. Merrifield v. Buckner, 41 N.M. 442, 70 P.2d 896 (1937); Montoya v. Catron, 22 N.M. 570, 166 P. 909 (1917).

Mere conjecture not enough. - To prove possession by adverse possession, or any single element thereof, the evidence should be clear and convincing, and such possession or element cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture. Merrifield v. Buckner, 41 N.M. 442, 70 P.2d 896 (1937).

Burden and presumptions. - The burden of proving title by adverse possession is on him who asserts it, and all presumptions are in favor of the holder of legal title. Ward v. Rodriguez, 43 N.M. 191, 88 P.2d 277, cert. denied, 307 U.S. 627, 59 S. Ct. 837, 83 L. Ed. 1511 (1939).

The burden of proving title by adverse possession is upon him who asserts it. Esquibel v. Hallmark, 92 N.M. 254, 586 P.2d 1083 (1978).

Opinion evidence inadmissible. - Testimony of the opinions of witnesses as to who had possession of land is inadmissible. Romero v. Herrera, 30 N.M. 139, 228 P. 604 (1924).

Review. - Where evidence tending to establish adverse possession is conflicting, and there is substantial evidence warranting the trial court in reaching its conclusion, that conclusion will not be set aside on appeal. Smith v. Borradaile, 30 N.M. 62, 227 P. 602 (1922).

37-1-22. Title in fee simple by adverse possession; action after ten years barred; definition; payment of taxes.

In all cases where any person or persons, their children, heirs or assigns, shall have had adverse possession continuously and in good faith under color of title for ten years of any lands, tenements or hereditaments 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 years, then and in that case, the person or persons, their children, heirs or assigns, so holding adverse possession as aforesaid, shall be entitled to keep and hold in possession such quantity of lands as shall be specified and described in some writing purporting to give color of title to such adverse occupant, in preference to all, and against all, and all manner of person or persons whatsoever; and any person or persons, their children or their heirs or assigns, who shall neglect or who have neglected for the said term of ten 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 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 majority, then the time for commencing such action shall in favor of such persons be extended so that they shall have one year after the termination of such disability to commence such action; but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued and to no other. "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.

History: Laws 1857-1858, p. 64; C.L. 1865, ch. 73, § 2; C.L. 1884, § 1881; C.L. 1897, § 2938; Laws 1899, ch. 63, § 2; 1905, ch. 76, § 1; Code 1915, § 3365; C.S. 1929, § 83-122; 1941 Comp., § 27-121; Laws 1947, ch. 145, § 1; 1953 Comp., § 23-1-22; Laws 1973, ch. 138, § 15.

ANNOTATIONS

I. General Consideration.
A. In General.
B. Applicability.
C. Procedure.

II. Elements of Adverse Possession.
A. In General.
B. Color of Title.
C. Good Faith.
D. Payment of Taxes.
E. Possession.
1. In General.
2. Notice of Hostile Character.
3. Continuity.
F. Application.
III. Prescription.

I. GENERAL CONSIDERATION.

A. IN GENERAL.

Cross references. - For extensions of limitations in favor of minors and incapacitated persons, see 37-1-10 NMSA 1978.

As to adverse possession of real property held under governmental deed, devise or grant, see 37-1-21 NMSA 1978.

For provision that rights of the state in highways may not be divested by adverse possession, see 67-2-5 NMSA 1978.

For presumption of grant for use of irrigation ditch in use for five years, see 73-2-5 NMSA 1978.

As to conservancy district's rights not being subject to loss by adverse possession, see 73-17-21 NMSA 1978.

One form of action. - The New Mexico Rules of Civil Procedure governing all cases cognizable in law and at equity, provide for only one form of action, known as "civil action." See Rules 1-001 and 1-002.

This is a general statute of limitations as distinguished from 37-1-21 NMSA 1978 which applies to property acquired within a Spanish or Mexican land grant. Ward v. Rodriguez, 43 N.M. 191, 88 P.2d 277, cert. denied, 307 U.S. 627, 59 S. Ct. 837, 83 L. Ed. 1511 (1939); Bradford v. Armijo, 28 N.M. 288, 210 P. 1070 (1922).

One who seeks to establish title by adverse possession must found his rights upon the authority of this section. Ward v. Rodriguez, 43 N.M. 191, 88 P.2d 277, cert. denied, 307 U.S. 627, 59 S. Ct. 837, 83 L. Ed. 1511 (1939).

Section is a defensive provision, and is a general statute of limitations, not confined in its operation to land grants. Bradford v. Armijo, 28 N.M. 288, 210 P. 1070 (1922).

Defense to ejectment. - Under statute of limitations, in an action for ejectment, defendant's adverse possession under claim of title for 10 years before suit was instituted was a good defense. Probst v. Trustees of Bd. of Domestic Missions, 129 U.S. 182, 9 S. Ct. 263, 32 L. Ed. 642 (1889).

Effect of section. - This section does not purport to confer fee-simple title as is provided for in 37-1-21 NMSA 1978. It simply raises the bar of the statute against the bringing of actions for the possession of lands held adversely for 10 years under color of title and with payment of taxes. Montoya v. Unknown Heirs of Vigil, 16 N.M. 349, 120 P. 676 (1911), aff'd sub nom. Montoya v. Gonzales, 232 U.S. 375, 34 S. Ct. 413, 58 L. Ed. 645 (1914).

An uninterrupted occupancy of land by a person, who in fact has no title thereto, for a period of 10 years adversely to the true owner, operates to extinguish the title of the true owner thereto and vests the title of the property absolutely in the occupier. Maxwell Land Grant Co. v. Dawson, 151 U.S. 586, 14 S. Ct. 458, 38 L. Ed. 279 (1894); Probst v. Trustees of Bd. of Domestic Missions, 129 U.S. 182, 9 S. Ct. 263, 32 L. Ed. 642 (1889). See also Manby v. Voorhees, 27 N.M. 511, 203 P. 543 (1921).

No slander of title in action on adverse possession. - Although a quiet title action may also include a cause of action for slander of title, if the claim of title is based on adverse possession which has not yet been decreed, rather than chain of title, there is no basis for slander of title. This is true because the adverse possession is not established until the actual decree. Lopez v. Adams, 116 N.M. 757, 867 P.2d 427 (Ct. App. 1993).

Law reviews. - For article, "Adverse Possession in New Mexico - Part One," see 4 Nat. Resources J. 559 (1964).

For article, "Adverse Possession in New Mexico - Part Two," see 5 Nat. Resources J. 96 (1965).

For comment on Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968), see 9 Nat. Resources J. 101 (1969).

For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

For note, "Clouded Titles in Community Property States: New Mexico Takes a New Step," see 21 Nat. Resources J. 593 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 3 Am. Jur. 2d Adverse Possession § 1 et seq.

Loss of easement by adverse possession, or nonuser, 1 A.L.R. 884, 9 A.L.R. 423, 33 A.L.R. 807, 66 A.L.R. 1099, 98 A.L.R. 1291, 25 A.L.R.2d 1265.

Writing as essential to color of title in adverse occupant of land, 2 A.L.R. 1457.

Rule that title subsequently acquired by grantor or assignor inures to the benefit of the grantee or assignee as affecting question of color of title, 6 A.L.R. 1430.

Scope and application of the doctrine that one cannot claim adverse possession under color of title where he has deprived himself or been deprived of the color relied on, 136 A.L.R. 1349.

Validity and construction of war enactments in United States suspending operation of statute of limitations, 137 A.L.R. 1440, 140 A.L.R. 1518.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Sufficiency, as regards continuity, of seasonal possession other than for agricultural or logging purposes, 24 A.L.R.2d 632.

Statute of limitations applicable to action for encroachment, 24 A.L.R.2d 903.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

Void tax deed, tax sale certificate, and the like, as constituting color of title, 38 A.L.R.2d 986.

Acquisition by user or prescription of right-of-way over unenclosed land, 46 A.L.R.2d 1140.

Forged deed or title as constituting color of title, 68 A.L.R.2d 452.

Judgment or decree as constituting color of title, 71 A.L.R.2d 404.

Fences as factor in fixing location of boundary line - modern cases, 7 A.L.R.4th 53.

Way of necessity over another's land, where a means of access does exist, but is claimed to be inadequate, inconvenient, difficult or costly, 10 A.L.R.4th 447.

Way of necessity where only part of land is inaccessible, 10 A.L.R.4th 500.

Adverse possession between cotenants who are unaware of cotenancy, 27 A.L.R.4th 420.

Presumptions and evidence respecting identification of land on which property taxes were paid to establish adverse possession, 36 A.L.R.4th 843.

Grazing of livestock, gathering of natural crop, or cutting of timber by record owner as defeating exclusiveness or continuity of possession by one claiming title by adverse possession, 39 A.L.R.4th 1148.

Scope of prescriptive easement for access (easement of way), 79 A.L.R.4th 604.

2 C.J.S. Adverse Possession § 1 et seq.

B. APPLICABILITY.

Pleading by United States. - A statute of limitations may be pleaded for the benefit of the United States although it is not expressly named therein, and although its prerogative of sovereignty would protect it from the use of such plea against it. Garcia v. United States, 43 F.2d 873 (10th Cir. 1930).

Indian Pueblos are entitled to benefits of this section. Garcia v. United States, 43 F.2d 873 (10th Cir. 1930).

But limitations cannot be pleaded against Pueblo Indians without consent of the United States. Garcia v. United States, 43 F.2d 873 (10th Cir. 1930).

No title to public lands can be obtained by adverse possession, laches or acquiescence. United States v. Gammache, 713 F.2d 588 (10th Cir. 1983).

Common lands. - Title by adverse possession may be acquired as to common lands of a community grant. H.N.D. Land Co. v. Suazo, 44 N.M. 547, 105 P.2d 744 (1940).

Municipal streets and alleys. - Title to an interest in the streets and alleys of a municipality cannot be acquired by adverse possession; the statute requires 10 years' actual, visible, exclusive and hostile possession, and if one or more of these elements are missing, no rights are required. City of Roswell v. Mountain States Tel. & Tel. Co. 78 F.2d 379 (10th Cir. 1935).

Railroad right-of-way. - Title may be gained by adverse possession to portions of a railway company's right-of-way. City of Raton v. Pollard, 270 F. 5 (8th Cir. 1920).

Obstruction and appropriation of water. - This section applies to suit for damages for obstruction of flow and appropriation of waters of a creek. New Mexico Prods. Co. v. New Mexico Power Co. 42 N.M. 311, 77 P.2d 634 (1937).

C. PROCEDURE.

Complaint to quiet title. - Proof of adverse possession may be made under ordinary complaint to quiet title. Garcia v. United States, 43 F.2d 873 (10th Cir. 1930).

Party seeking to establish title by adverse possession has burden of proving it by clear and convincing evidence. Frietze v. Frietze, 78 N.M. 676, 437 P.2d 137 (1968).

Plaintiff must prove the statutory elements by clear and convincing evidence. Castellano v. Ortega, 108 N.M. 218, 770 P.2d 540 (Ct. App. 1989).

To establish adverse possession, the proof must be clear and convincing. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Adverse possession cannot be established by inference or implication. Frietze v. Frietze, 78 N.M. 676, 437 P.2d 137 (1968).

Raising defense of adverse possession. - Defendants in suit for recovery and possession of patented mining claim and damages could not avail themselves of defenses of adverse possession and prescriptive right on appeal, where throughout their trial they prosecuted their defense on the theory that the vein or lode from which the ore was extracted, although located within the boundaries of plaintiff's claim, had its apex within the boundaries of their own claim and was therefor their own property. Papa v. Torres, 60 N.M. 448, 292 P.2d 322 (1956).

Applicability of laches. - A new trial should be granted for determining whether laches was available as a defense to defendant in quiet title suit, where it is necessary to reverse the trial court by reason of erroneous application of the 10-year statute of limitations and trial court did not determine whether plaintiff was estopped from claiming title by reason of laches. McGrail v. Fields, 53 N.M. 158, 203 P.2d 1000 (1949).

Bill in equity to enforce trust in certain mining locations may be defeated by laches, although statutory time for filing action has not expired. Patterson v. Hewitt, 195 U.S. 309, 25 S. Ct. 35, 49 L. Ed. 214 (1904).

II. ELEMENTS OF ADVERSE POSSESSION.

A. IN GENERAL.

Statutory requirements for adverse possession. - Under this section the plaintiffs were required to prove that they and their predecessors had been in adverse possession of the land continuously and in good faith for a period of 10 years, under color of title, and plaintiffs must have paid taxes on the property during these years. Richardson v. Duggar, 86 N.M. 494, 525 P.2d 854 (1974).

The statute requires for a successful claim of adverse possession, color of title, 10 years of continuous adverse possession, payment of taxes and good faith. Heron v. Conder, 77 N.M. 462, 423 P.2d 985 (1967).

Before title can ripen by adverse possession, three elements must be presented: (1) actual, visible, exclusive, hostile and continuous possession; (2) under color of title; and

(3) for a period of 10 years. Payne Land & Livestock Co. v. Archuleta, 180 F. Supp. 651 (D.N.M. 1960).

A person claiming ownership of land in the Albuquerque town grant, by limitations, must have been in the actual, visible, exclusive, hostile and continued possession for 10 years, the same as if conveyed to private individual. Marques v. Maxwell Land Grant Co. 12 N.M. 445, 78 P. 40 (1904); Johnston v. City of Albuquerque, 12 N.M. 20, 72 P. 9 (1903).

In order to prove title by adverse possession under 37-1-21 NMSA 1978, the claimant must also meet the elements set forth in this section. Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

Establishing title by adverse possession requires color of title, acquired in good faith, with open, exclusive, notorious, continuous, and hostile possession, and payment of taxes for the statutory period. Castellano v. Ortega, 108 N.M. 218, 770 P.2d 540 (Ct. App. 1989).

A party claiming ownership of land by adverse possession must prove by clear and convincing evidence continuous adverse possession for 10 years under color of title, in good faith, and payment of taxes on the property during those years. Williams v. Howell, 108 N.M. 225, 770 P.2d 870 (1989).

Color of title and payment of taxes are indispensable to gaining title to real estate by adverse possession. Weldon v. Heron, 78 N.M. 427, 432 P.2d 392 (1967).

Absence of any element fatal. - If any one of the elements necessary to constitute adverse possession, namely, actual, visible, exclusive, hostile and continuous possession, is lacking, then no title by adverse possession can ripen. Pan Am. Petro. Corp. v. Candelaria, 403 F.2d 351 (10th Cir. 1968).

B. COLOR OF TITLE.

Color of title is required under both adverse possession statutes. Thomas v. Pigman, 77 N.M. 521, 424 P.2d 799 (1967).

Plaintiff must recover on strength of his own title and cannot rely on any weaknesses in a defendant's title. Baker v. Benedict, 92 N.M. 283, 587 P.2d 430 (1978).

Where there is no evidence that wife ever had "color of title" upon which to initiate a claim of adverse possession in herself, either as a sole possessor or as a possessor in community property, the abandonment by the husband of his claim of adverse possession destroys the basis upon which the wife could have claimed a community interest as an adverse possessor, since her community interest must necessarily depend upon such an interest first being found in her husband. Mundy & Mundy, Inc. v. Adams, 93 N.M. 534, 602 P.2d 1021 (1979).

Color of title must be supported by writing or conveyance of some kind purporting to convey land under which the claim of title is asserted. Currier v. Gonzales, 78 N.M. 541, 434 P.2d 66 (1967).

Where the statute requires adverse possession to be "under color of title," some writing purporting to give title to an adverse occupant is essential, and oral transactions, however effective they may be between the parties, do not constitute color of title; neither does actual adverse possession. Sandoval v. Perez, 26 N.M. 280, 191 P. 467 (1920); Armijo v. Armijo, 4 N.M. (Gild.) 57, 13 P. 92 (1887).

Deed requirements inapplicable. - Strict requirements for the validity of a deed have no application to the color of title requirement for adverse possession because the interests of the legal owner, the public, and a purchaser are adequately served by compliance with all elements of the doctrine of adverse possession. Williams v. Howell, 108 N.M. 225, 770 P.2d 870 (1989).

Recorded quitclaim deed. - Color of title fair on its face was established by plaintiff who took by quitclaim deed which was executed and acknowledged on one day and recorded the next with plaintiff taking immediate possession. Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946).

Certificate of sale for taxes conveys color of title. Chambers v. Bessent, 17 N.M. 487, 134 P. 237 (1913).

Patent from government gives color of title. Ward v. Rodriguez, 43 N.M. 191, 88 P.2d 277, cert. denied, 307 U.S. 627, 59 S. Ct. 837, 83 L. Ed. 1511 (1939).

Void deed as color of title. - A tax deed even though void for failure of title in the grantor may constitute color of title. Gutierrez v. Ortiz, 58 N.M. 187, 268 P.2d 979 (1954).

Deed lacking signature. - A deed is sufficient for the purpose of color of title even though it is void because it lacks the signature of a member of the community. Romero v. Garcia, 89 N.M. 1, 546 P.2d 66 (1976).

District court judgment. - The judgment of a district court purporting to vest title to the land of a husband in his wife is generally color of title on which prescription can be based, in absence of fraud. Apodaca v. Hernandez, 61 N.M. 449, 302 P.2d 177 (1956).

Decree quieting title may furnish color of title. Currier v. Gonzales, 78 N.M. 541, 434 P.2d 66 (1967).

Where there was nothing to show fraud or bad faith in obtaining quiet title decree made in favor of appellant's husband in 1927, and the evidence showed that appellant and her husband had possession of the property under the quiet title decree and paid taxes thereon for more than the 10-year statutory period, the quiet title decree of 1927 by

which appellant's husband was decreed to be the owner of the property constituted color of title. Quintana v. Montoya, 64 N.M. 464, 330 P.2d 549 (1958).

Special master's deed. - Under this section title was perfected in plaintiff, who claimed ownership through a special master's deed purporting to convey the fee to the entire tract to his predecessor as purchaser at a foreclosure sale despite the fact that in the foreclosure proceedings no service was ever had against the owner of a one-fifth interest in the tract. Westmoreland v. Curbello, 58 N.M. 622, 274 P.2d 143 (1954).

Purchase agreement. - Possession of tract of land by defendant for eight years under a lease from person with claim of title, and for 23 years as the purchaser of the property from that person under the parol agreement to purchase, upon which two-thirds of purchase price had been paid, was sufficient to establish color of title in defendant for adverse possession purposes, since he and vendor, or the representatives of vendor's estate, were at all material times in privity. Archuleta v. Pina, 86 N.M. 94, 519 P.2d 1175 (1974).

Unprobated will. - Holding of real property by plaintiff under the will of his mother, which was never probated and which failed to define the boundaries of the land claimed, was not a holding under color of title which could ripen into a good title by adverse possession. Green v. Trumbull, 37 N.M. 604, 26 P.2d 1079 (1933).

Mortgage cannot constitute color of title for purposes of acquiring title by adverse possession, as a mortgage does not purport to convey title to property. Slemmons v. Massie, 102 N.M. 33, 690 P.2d 1027 (1984).

Instrument must purport to convey land involved to constitute color of title. Sanchez v. Garcia, 72 N.M. 406, 384 P.2d 681 (1963).

When description adequate. - A deed is not void for want of proper description if, with the deed and with extrinsic evidence on the ground, a surveyor can ascertain the boundaries. Romero v. Garcia, 89 N.M. 1, 546 P.2d 66 (1976).

If the description of land in a conveyance furnishes sufficient means of identification to warrant the introduction of extrinsic evidence, even though in the Spanish language, it constitutes color of title. Garcia v. Pineda, 33 N.M. 651, 275 P. 370 (1929).

Deed furnishing color of title gave adequate description of land where witnesses testified with certainty that from the description they could locate the property on the ground and that the survey description covered the land in the deed. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Where two deeds which had been intended to convey the lands in question mistakenly mentioned the wrong quarters, but the land in dispute was a triangular tract as described, a surveyor could have ascertained what lands were intended to be conveyed, and inquiries of the grantors and grantees named in the deeds would have

further confirmed this conclusion, as would the fact that the grantees went into possession of the lands in question pursuant to the grants in the deeds and remained in possession without objection or complaint from the grantors, it was held that plaintiff's possession was under color of title. Richardson v. Duggar, 86 N.M. 494, 525 P.2d 854 (1974).

Indefinite and uncertain description may be clarified by subsequent acts of the parties. Romero v. Garcia, 89 N.M. 1, 546 P.2d 66 (1976).

Subsequent acts of the parties in erecting a house and pointing to the land for the surveyor were sufficient to ascertain the boundaries. Romero v. Garcia, 89 N.M. 1, 546 P.2d 66 (1976).

Effect of insufficient description. - Even though a void tax deed might otherwise constitute color of title, it cannot do so if the description of the land is insufficient to locate or identify it, and cannot be made sufficient. Sanchez v. Garcia, 72 N.M. 406, 384 P.2d 681 (1963).

Validity of claim. - The right given by the statute of limitations does not depend upon, and has no necessary connection with, the validity of the claim under which the possession is held. Manby v. Voorhees, 27 N.M. 511, 203 P. 543 (1921); Neher v. Armijo, 9 N.M. 325, 54 P. 236 (1898), overruled on other grounds De Bergere v. Chaves, 14 N.M. 352, 93 P. 762 (1908); Probst v. Trustees of Bd. of Domestic Missions, 129 U.S. 182, 9 S. Ct. 263, 32 L. Ed. 642 (1889).

It is the essence of the statute of limitations that whether the party had a right of possession or not, if he entered under the claim of such right and remained in the possession for 10 years, the right of action of one who had a better right is barred by that adverse possession. Probst v. Trustees of Bd. of Domestic Missions, 129 U.S. 182, 9 S. Ct. 263, 32 L. Ed. 642 (1889).

C. GOOD FAITH.

"Good faith" defined. - "Good faith," in the creation or acquisition of color of title, is freedom from a design to defraud the person having the better title. Palmer v. Denver & R.G.W.R.R. 75 N.M. 737, 410 P.2d 956 (1966).

Good faith required. - Although a given paper may constitute color of title, no prescription can be based thereon, unless the claimant entered thereon honestly and in good faith. Apodaca v. Hernandez, 61 N.M. 449, 302 P.2d 177 (1956).

Presumption of good faith. - Color of title of a person who claims through adverse possession is presumed to have been obtained in good faith and that the parties so entered into and continued to hold the possession. Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946).

One who disputes the good faith of an adverse possessor who meets all other requirements of acquiring title by adverse possession holds a burden of clearly overcoming presumption of good faith. Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946).

Knowledge of adverse claim. - The knowledge of an adverse claim to or lien upon property does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien. Palmer v. Denver & R.G.W.R.R. 75 N.M. 737, 410 P.2d 956 (1966).

Knowledge of an adverse claim to land does not of itself indicate bad faith on the part of a person who creates or acquires color of title and creation of the adverse interest is not evidence of bad faith except when improper means are used to defeat the adverse claim. Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946).

Creating invalid claim. - Where a conveyance which furnishes claimed color of title is created and obtained with knowledge of its invalidity by one claiming title by adverse possession, there is an absence of that good faith required by the statute. Palmer v. Denver & R.G.W.R.R. 75 N.M. 737, 410 P.2d 956 (1966).

Where the quitclaim deed relied upon as color of title is the creature solely of those claiming title by adverse possession, the same being secured with the knowledge of its invalidity, the policy of the law prohibits such a transaction, because one may not indirectly acquire that which the law will not allow him to acquire directly. Apodaca v. Hernandez, 61 N.M. 449, 302 P.2d 177 (1956).

Where a conveyance to decedent of former wife's interest in certain community property was secured by fraud, those claiming under him were prevented from meeting the "good faith" requirement of this section. Trujillo v. Padilla, 79 N.M. 245, 442 P.2d 203 (1968).

Bad faith not shown. - Bad faith cannot be imputed to a plaintiff where evidence indicates that the owner of a one-half interest in land executed a quitclaim deed which purported to convey the entire premises to the plaintiff when there is no showing that plaintiff knew he received only a one-half interest. Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946).

Purchase of tax deed by cotenant. - Since all cotenants have the duty to pay tax due on land, purchase of tax sale certificate by defendant was a delayed performance of her duty to pay taxes and a redemption of the property on behalf of all the tenants in common; hence, color of title under the tax deed was not a good faith claim adverse to the plaintiffs. Reed v. Nevins, 77 N.M. 587, 425 P.2d 813 (1967).

Finding of "adverse possession" connotes good faith. - It is presumed by supreme court that when trial court found plaintiff had been in "adverse possession" of certain land, the term was used as defined by statute and that it included element of good faith. Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946).

Although not specifically set forth, a finding of good faith is included in a finding that plaintiff had good title by adverse possession. Lummus v. Brackin, 59 N.M. 216, 281 P.2d 928 (1955).

D. PAYMENT OF TAXES.

Payment of taxes on disputed tract is a specific requirement of the adverse possession statute and lack of that evidence would defeat a claim for title whether or not any other elements of adverse possession were present. Platt v. Martinez, 90 N.M. 323, 563 P.2d 586 (1977).

Title by adverse possession, except as to property acquired within a Spanish or Mexican land grant, is established only under this act, which, since the amendment of 1899, requires of the claimant or his predecessors or grantors, that they have, for their period of 10 years' occupancy, paid all the taxes. Christmas v. Cowden, 44 N.M. 517, 105 P.2d 484 (1940).

As distinguished from other section. - Payment of taxes during the period of adverse holding is not required under 37-1-21 NMSA 1978 whereas, under this section, it is required. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Although this section requires the adverse claimant to pay the taxes on the property, under 37-1-21 NMSA 1978, that is not a requirement. Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

Taxes required of Pueblo land claimants. - Claimants of Pueblo lands under the federal Pueblo Lands Act, authorizing plea of limitations to be raised against the government by, inter alia, those in possession of Pueblo lands without color of title from 1889 through 1924, were to prove the adverse possession described, and were, pursuant to the federal act, to have paid all taxes assessed and levied in conformity with New Mexico laws to the extent required by this section and not by 37-1-21 NMSA 1978. United States v. Wooten, 40 F.2d 882 (10th Cir. 1930).

Nonpayment fatal. - Where defendants pleaded title under both this section and another section, failure to show tax payments for the full period of time required eliminated a consideration under the record on appeal of title under this section. Jackson v. Gallegos, 38 N.M. 211, 30 P.2d 719 (1934).

Payment of taxes by vendor. - Where defendant occupied land for 23 years under a parol contract with former landlord for sale of the land, on which two-thirds of the purchase price had been paid, and where vendor had claim of title, payment of taxes by vendor for benefit of the defendant during the 23-year period was sufficient to satisfy the requirement of this section that taxes must be paid for 10-year period by party claiming adverse possession, his predecessor or grantors. Archuleta v. Pina, 86 N.M. 94, 519 P.2d 1175 (1974).

Dual payment without knowledge of other's claim. - Where both parties, apparently without knowledge of the double assessment or of the other's claim, paid taxes in good faith on a property, the fact that one may have paid all or a portion of the respective assessment prior to payment by the other was no indication of an inconsistency on the part of either of their claims of ownership in good faith, and the requirement of the payment of taxes under the statute was satisfied. C & F Realty Corp. v. Mershon, 81 N.M. 169, 464 P.2d 899 (1969).

Assessor's mistaken reference not harmful. - There could be no reasonable doubt that plaintiffs' predecessors returned and paid taxes on the land in dispute where the tax schedules prepared by the tax assessor, although erroneously locating it in accordance with the erroneous deed description, and mistakenly referring to the wrong page number in the deed book for some years, related to the land covered by plaintiffs' deeds, and the only acreage which could have been covered by these schedules, returns and payments were the acres covered by these two deeds. Richardson v. Duggar, 86 N.M. 494, 525 P.2d 854 (1974).

Where taxes in fact paid. - Although defendant paid taxes on a tract designated "Hortiliza 26" while plaintiff paid taxes on tracts designated "Hortilizas 25 and 28," nevertheless the taxes paid by them were actually on the lands enclosed within their respective fence lines, and that was all that was required. Hobson v. Miller, 64 N.M. 215, 326 P.2d 1095 (1958).

Payment prior to issuance of tax deed. - Where appellee had been in arrears several times, but did pay the taxes in each case before a tax deed was issued to the state, appellee complied substantially with the continuous payment of taxes requirement of adverse possession under this section. Romero v. Garcia, 89 N.M. 1, 546 P.2d 66 (1976).

If a settler has paid all the taxes assessed, with penalties and interest for all the years involved, prior to the filing of the suit, and prior to tax sale, he has complied with the taxpaying requirement of this act. United States v. Wooten, 40 F.2d 882 (10th Cir. 1930).

Redemption not equivalent to "payment of taxes". - As used in limitation statute, redemption of property from tax sale is not the equivalent of "payment of taxes." McGrail v. Fields, 53 N.M. 158, 203 P.2d 1000 (1949).

Payment to redeem from tax sale was not a "payment of taxes" within the meaning of this section. Pueblo De Taos v. Gusdorf, 50 F.2d 721 (10th Cir. 1931).

Redemption from tax sale as protection of rights. - The right to acquire title by adverse possession is capable of protection by means of redemption from a tax sale; however, by redeeming, the defendants secured nothing more than the right to continue pursuit of title by adverse possession. Morris v. Ross, 58 N.M. 379, 271 P.2d 823 (1954).

Effect of void tax sale. - The provisions of this act are not applicable where property was conveyed by county treasurer under correct description for taxes, when taxes had been paid thereon by the record owner, but under an incorrect description, since sale of the property by the treasurer to the state was void and the subsequent sale of the property by the state was likewise a nullity. Pratt v. Parker, 57 N.M. 103, 255 P.2d 311 (1953).

E. POSSESSION.

1. IN GENERAL.

Possession required. - This section clearly requires that in addition to claiming under color of title there must be an actual, visible, exclusive, hostile and continuous possession for 10 years. Jones v. Tate, 68 N.M. 258, 360 P.2d 920 (1961); Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

Character of premises determinative. - 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. Stull v. Board of Trustees, 61 N.M. 135, 296 P.2d 474 (1956).

The character of the land and the use to which it is adapted largely controls the acts necessary to be exercised in order to constitute open, hostile and exclusive possession. Prince v. Charles Ilfeld Co. 72 N.M. 351, 383 P.2d 827 (1963); Lummus v. Brackin, 59 N.M. 216, 281 P.2d 928 (1955).

But acts to be as distinct as possible. - Determination of adverse possession 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 on 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 of ownership adverse to his title is being asserted. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Possession required to establish title need not be complete occupancy of the entire area claimed, and where there is no question as to the property claimed and a part is actually physically occupied, and visible and notorious acts of ownership are manifested, nothing more is required. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Constructive possession of land described. - When one is in possession of land under color of title, holding under adverse possession, such person is constructively in possession of all of the land which is described in the instrument giving color of title. Quintana v. Montoya, 64 N.M. 464, 330 P.2d 549 (1958).

Where one was in actual possession of a portion of a tract under color of title, generally, it could be presumed that such possession extended to the limits of the land described in his deed. Gallegos v. War, 78 N.M. 796, 438 P.2d 636 (1968).

Improvements unnecessary. - To constitute an adverse possession there need not be a fence, building or other improvement made, if visible and notorious acts of ownership be exercised for the statutory period, after an entry under claim and color of title. Stull v. Board of Trustees, 61 N.M. 135, 296 P.2d 474 (1956); First Nat'l Bank v. Town of Tome, 23 N.M. 255, 167 P. 733 (1917); Baker v. de Armijo, 17 N.M. 383, 128 P. 73 (1912).

Sections compared. - The possession required to be proved under this section is no different from that required under 37-1-22 NMSA 1978. It must be established as adverse under both. Marquez v. Padilla, 77 N.M. 620, 426 P.2d 593 (1967).

Acts of dominion sufficient. - Where plaintiffs, after acquiring premises, which were covered with brush, greasewood and sand dunes, established corners (with markers and later with iron pipes), cut a path several feet wide around the exterior boundaries, posted "no dumping" signs, blocked some old roads across the premises and paid all taxes, these acts of dominion were sufficient to give notice to defendants that the property claimed adversely to them. Stull v. Board of Trustees, 61 N.M. 135, 296 P.2d 474 (1956).

Prior possession. - In ejectment, where no legal title is shown in either party, the party showing prior possession in himself, or those through whom he claims, will be held to have the better title. Romero v. Herrera, 27 N.M. 559, 203 P. 243 (1921).

2. NOTICE OF HOSTILE CHARACTER.

"Hostility" defined. - "Hostility" as a requirement of adverse possession need not be "ill-will" or "evil intent," but a mere showing that the one in possession of the land claims the exclusive right thereto and denies either by word or act the owner's title. Heron v. Conder, 77 N.M. 462, 423 P.2d 985 (1967).

Factors determining hostility. - The hostile character of possession under the statute depends upon the occupant's own views and intentions, not upon those of his adversary, and it also depends upon the relationship of the parties and the nature of their holdings. C & F Realty Corp. v. Mershon, 81 N.M. 169, 464 P.2d 899 (1969).

Notice of hostile claim. - Divestiture of title by adverse possession rests upon the proof or presumption of notice to the true owner of the hostile character of possession. Apodaca v. Hernandez, 61 N.M. 449, 302 P.2d 177 (1956); Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

When mere possession not enough. - Where the original entry or occupation is permissive, the statute of limitation will not begin to run until an adverse holding is declared and notice of such change is brought to the knowledge of the owner, and, for

this purpose, mere possession is not enough. Apodaca v. Hernandez, 61 N.M. 449, 302 P.2d 177 (1956).

Disclaimer of owner's rights. - Where possession is consistent with the rights of owners of record title, nothing but clear, unequivocal and notorious disclaimer and disavowal will render it adverse; there must be something which amounts to an ouster, either actual notice or acts and conduct that will clearly indicate that the original permissive use has changed to one of an adverse character. Prince v. Charles Ilfeld Co. 72 N.M. 351, 383 P.2d 827 (1963); Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

Hostile possession by tenant. - Possession originating in tenancy is presumably permissive, not hostile, and therefore divestiture of title by adverse possession under a tenancy rests upon the proof or presumption of notice to the true owner of the hostile character of possession. Prince v. Charles Ilfeld Co. 72 N.M. 351, 383 P.2d 827 (1963).

Tenant's disclaimer. - A purchase by a tenant of an adverse title, or claiming under it, or any other disclaimer of tenure with the knowledge of the landlord, was a forfeiture of his term and his possession became adverse, beginning limitations in his favor, and the landlord could sustain ejectment against him without notice to quit. Andrews v. Rio Grande Livestock Co. 16 N.M. 529, 120 P. 311 (1911).

Notice to relatives. - The nature of the occupation may be sufficient to give notice of its adverse character to interested parties who are strangers and yet not sufficient as to persons standing in more intimate relationship. Apodaca v. Hernandez, 61 N.M. 449, 302 P.2d 177 (1956).

Permissive occupation of the family estate by one of the family is so usual that acts of occupation thereof to show hostile possession as to strangers are not sufficient as between near relatives. Apodaca v. Hernandez, 61 N.M. 449, 302 P.2d 177 (1956).

The parties were not in a relationship (i.e., brother and sister) that supported an inference of permissive possession. Hernandez v. Cabrera, 107 N.M. 435, 759 P.2d 1017 (Ct. App. 1988).

Acquiescence distinguished from permission. - Acquiescence is not necessarily the same as permission. On the contrary, there may be adverse possession where possession by the claimant is with forbearance of the owner who knew of such possession and failed to prohibit it. Hernandez v. Cabrera, 107 N.M. 435, 759 P.2d 1017 (Ct. App. 1988).

Possession originating in cotenancy is presumably permissive, not hostile. Apodaca v. Hernandez, 61 N.M. 449, 302 P.2d 177 (1956).

There is a strong presumption against claim of cotenant that he holds title in opposition to his cotenants. Frietze v. Frietze, 78 N.M. 676, 437 P.2d 137 (1968).

There must be express denial of title of fellow cotenants brought home to the latter openly and unequivocally. Frietze v. Frietze, 78 N.M. 676, 437 P.2d 137 (1968).

Sufficiency of notice to cotenants. - Until a cotenant is placed on notice of another cotenant's adverse claim to the common land, the former does not realize that a cause of action exists. Since tenants in common are each entitled to the reasonable use, occupancy, benefit and possession of the common property, nothing short of clear notice to the cotenants apprising them of the adverse claim will be sufficient to cause the statutory 10-year period to begin to run. Apodaca v. Tome Land & Imp. Co. 91 N.M. 591, 577 P.2d 1237 (1978).

Ouster and disseizin of cotenants. - Plaintiffs' possession, under color of title via separate deeds from two cotenants, was not only sufficient to convert their possession into adverse possession but it operated as an ouster and disseizin of all cotenants. Stull v. Board of Trustees, 61 N.M. 135, 296 P.2d 474 (1956).

Acts of ouster insufficient. - Since possession in cotenancy is presumably permissive and not hostile, the mere possessing, mortgaging, leasing and the payment of taxes and water assessments are not sufficient acts as to notify a cotenant of intent to oust him and retain hostile possession against him. Frietze v. Frietze, 78 N.M. 676, 437 P.2d 137 (1968).

Deed by one cotenant. - Where one cotenant conveys the entire estate to one who takes possession claiming the exclusive title, this operates as a disseizin of the other cotenants and converts the possession of the grantee into an adverse possession. Baker v. de Armijo, 17 N.M. 383, 128 P. 73 (1912).

Quitclaim by cotenant. - A quitclaim by a cotenant of his entire undivided one-half interest in realty to a stranger constitutes a repudiation of the cotenancy. Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946).

Renunciation by life tenant. - Before a life tenant can start statute of limitations running against the remaindermen he must do more than proclaim loudly that he is the sole proprietor; he must cease to be a life tenant, renounce that relation and bring it home to the remaindermen by an actual notice of renunciation, disclosing also that he is claiming the title under some other and different source of title. Lotspeich v. Dean, 53 N.M. 488, 211 P.2d 979 (1949).

Claim against remaindermen. - Where a life tenant conveys by deed purporting to transfer the entire fee, the grantee's possession is not adverse as to the remaindermen until death of the life tenant so that statute of limitations does not begin to run against such remaindermen until the life tenant dies. Lotspeich v. Dean, 53 N.M. 488, 211 P.2d 979 (1949).

Recordation of quitclaim deed as notice. - A grantee of a quitclaim deed who records the instrument after its delivery to him thereby gives other claimants to interests in the

real estate constructive notice of the adverse character of his claim. Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946).

Recognition of boundary. - Long recognition and acquiescence by the parties themselves affords ample evidence of the true boundary between their respective tracts of land and give rise to a presumption that plaintiff held the tract under fence adversely to defendant. Hobson v. Miller, 64 N.M. 215, 326 P.2d 1095 (1958).

Requesting quitclaim deed. - Where eldest brother, administrator of mother's estate and guardian of minor brothers, acquired some 25 years after her death a tax deed to her property, after it had been sold to the state for delinquent taxes (his former wife and two brothers having been coowners at that time), and informed the brothers that he had acquired the tax deed, requesting a quitclaim deed from them, failure of brothers for another 16 years to assert any rights adverse to the eldest permitted sustaining of defense of adverse possession in his favor. Garcia v. Sanchez, 64 N.M. 114, 325 P.2d 289 (1958).

Effect of owner's forbearance. - There may be adverse possession where possession is with forbearance of the owner who knew of such possession and failed to prohibit it. Weldon v. Heron, 78 N.M. 427, 432 P.2d 392 (1967).

3. CONTINUITY.

Possession to be continuous. - In order to perfect title by adverse possession, such possession must be continuous for the entire period prescribed by the statute of limitations. Pratt v. Parker, 57 N.M. 103, 255 P.2d 311 (1953).

Where there had been a break in the continuity of hostile possession, the appellant's claim of 10 years of adverse possession had not been established. Heron v. Conder, 77 N.M. 462, 423 P.2d 985 (1967).

But substitution of tenants permissible. - Any break or interruption of the continuity of the possession will be fatal to an adverse claim, but temporary vacancies, caused by substitution of one tenant for another, will not destroy the running of the statute. Johnston v. City of Albuquerque, 12 N.M. 20, 72 P. 9 (1903).

Continuity of possession is interrupted by forfeiture to state for taxes in determining the running of the statute of limitations in favor of an adverse occupant, and a purchaser from the state who was in possession eight years, could not combine his period of possession with the period title was in the state under tax sale, in order to bring him within the adverse possession statute, because adverse possession did not start to run while state was the owner under the tax deed. Pratt v. Parker, 57 N.M. 103, 255 P.2d 311 (1953).

Since limitations inapplicable against state. - Where, during the running of the statute of limitations in favor of the adverse occupant of land, the land is forfeited to the

state for taxes, the general rule is that continuity of possession is interrupted for the reason that the statute of limitations does not run against the state in the absence of some special provision to that effect. Greene v. Esquibel, 58 N.M. 429, 272 P.2d 330 (1954).

Concession of another's title. - If a defendant in possession of disputed territory concede that the true title is in another and offer to purchase from him, the continuity of possession is broken. Chambers v. Bessent, 17 N.M. 487, 134 P. 237 (1913).

Affidavit not disclaimer. - Affidavit by a plaintiff to the effect that his grantor was coowner of a one-half interest in land and that the other one-half interest belongs to the heirs of a named individual does not constitute a disclaimer by the plaintiff of his own claim of right nor does it constitute recognition of the claim of any other person. Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946).

Effect of foreclosure by city. - A person who has been in adverse possession under color of title and has continuously paid taxes for more than 10 years may nevertheless have his color of title wiped out by sale under foreclosure of paving liens. City of Albuquerque v. Huddleston, 55 N.M. 240, 230 P.2d 972 (1951).

Adverse possessor's claim fails for lack of substantial evidence to support a finding of exclusive and continuous possession. Blumenthal v. Concrete Constructors Co. 102 N.M. 125, 692 P.2d 50 (Ct. App. 1984).

F. APPLICATION.

No rights acquired by sporadic trespasses. - Under dual claims of adverse possession and prescriptive right, defendants established no rights to the subject property or to easements for pasturage, wood hauling and timber cutting, where their past actions consisted of occasional, sporadic and isolated instances of trespass on the lands in question accomplished by surreptitious destroying of fences together with some isolated instances in which specific permission was given. Payne Land & Livestock Co. v. Archuleta, 180 F. Supp. 651 (D.N.M. 1960).

Alley with public access. - Where general public had free access to alley, an adjoining landowner was not in possession so as to acquire title to it under statute of limitations because he was not in adverse possession of the land under these conditions. Nickson v. Garry, 51 N.M. 100, 179 P.2d 524 (1947).

Use of easement. - Allowing a brother and sister-in-law to use a roadway across a tract to gain access to their residence was not an act inconsistent with the claimant's use. Possession may be exclusive, notwithstanding that the land is subject to nonpossessory rights, such as easements. Hernandez v. Cabrera, 107 N.M. 435, 759 P.2d 1017 (Ct. App. 1988).

Placing of signs. - The placing of three "For Sale" signs on property was not necessarily evidence of clear and convincing exclusiveness under this section. C & F Realty Corp. v. Mershon, 81 N.M. 169, 464 P.2d 899 (1969).

Time too short. - Although the owner had abandoned the land for over 40 years, where defendants had acquired their interest in the land only five years and three months prior to the time the owner brought action to quiet title, the 10-year period required by this section had not elapsed. Morris v. Ross, 58 N.M. 379, 271 P.2d 823 (1954).

Pueblo land. - Uninterrupted, open, visible, notorious, exclusive and adverse possession for more than 10 years before suit of a tract of land in the Pueblo of Nambe, entry being made under an alleged deed of conveyance long prior to the confirmation by congress of the grant, vests a perfect title by adverse possession. Pueblo of Nambe v. Romero, 10 N.M. 58, 61 P. 122 (1900).

Claims of heirs of insane grantor were barred 10 years after the delivery of the deed and grantee's entry into possession of the property. Field v. Turner, 56 N.M. 31, 239 P.2d 723 (1952).

Highway. - Continuous and adverse use by the public for the requisite time is sufficient to show acceptance of a highway. City of Raton v. Pollard, 270 F. 5 (8th Cir. 1920).

III. PRESCRIPTION.

Public right-of-way by prescription may be established by usage by the general public continued for the length of time necessary to create a right of prescription if the use had been by an individual, provided that such usage is open, uninterrupted, peaceable, notorious, adverse, under claim of right and continued for a period of 10 years with the knowledge, or imputed knowledge, of the owner. Village of Capitan v. Kaywood, 96 N.M. 524, 632 P.2d 1162 (1981).

Use presumed to be adverse. - In the absence of proof of express permission, the general rule is that a use will be presumed to be adverse under claim of right. Village of Capitan v. Kaywood, 96 N.M. 524, 632 P.2d 1162 (1981).

Prescription distinguished from adverse possession. - Adverse possession is distinguished from prescription in that it is, properly speaking, a means of acquiring title to corporeal hereditaments only, and is usually the direct result of the statute of limitations, while prescription is the outgrowth of common-law principles, with but little aid from the legislature, and has to do with the acquisition of no kind of property except incorporeal hereditaments. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646 (1937).

Law governing prescription. - There is no specific statute in this state under which title to an easement or other incorporeal hereditament can be obtained by prescription. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646 (1937).

Way claimed by prescription must be definite and precise strip of land. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646 (1937).

Prescriptive right cannot grow out of strictly permissive use, no matter how long the use. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646 (1937); Village of Capitan v. Kaywood, 96 N.M. 524, 632 P.2d 1162 (1981).

When owner charged with knowledge. - If user by claimant of easement by prescription was open, adverse, notorious, peaceable and uninterrupted, the owner would be charged with knowledge of such user, and acquiescence in it would be implied. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646 (1937).

Length of prescriptive period. - The New Mexico prescriptive period is 10 years, as is the period for adverse possession. This being so, it follows that the period during which one must sue to enforce an easement is 10 years. Jinkins v. City of Jal, 73 N.M. 173, 386 P.2d 599 (1963).

Where the court's decision is based upon a statute of limitations as distinguished from laches, in a suit to enjoin a restrictive covenant or negative easement, the applicable period of limitation is the period of prescription. Jinkins v. City of Jal, 73 N.M. 173, 386 P.2d 599 (1963).

In this state the period of use necessary to create an easement by prescription is 10 years following our statute of limitations with reference to adverse possession of land. Southern Union Gas Co. v. Cantrell, 56 N.M. 184, 241 P.2d 1209 (1952).

The period of use necessary to create an easement by prescription is 10 years, following our statute of limitations with reference to adverse possession of land. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646 (1937); Archuleta v. Jacquez, 103 N.M. 254, 704 P.2d 1130 (Ct. App. 1985).

Effect of unrecorded written easement. - Where gas company acquired easement for right-of-way by written instrument which was not recorded and the easement was not visible or open, a third-party purchaser without knowledge of the easement was not bound thereby, since gas company did not have prescriptive easement in the land. Southern Union Gas Co. v. Cantrell, 56 N.M. 184, 241 P.2d 1209 (1952).

Review. - District court's finding and judgment that defendant had title by prescription to right-of-way over plaintiff's land would not be disturbed on appeal, if there was substantial evidence to support the finding and judgment. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646 (1937).

37-1-23. Contractual liability; statute of limitations.

A. Governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract.

B. Every claim permitted by this section shall be forever barred unless brought within two years from the time of accrual.

History: 1953 Comp., § 22-23-1, enacted by Laws 1976, ch. 58, § 24.

ANNOTATIONS

Cross references. - For provisions of the Tort Claims Act, see 41-4-1 NMSA 1978 et seq.

Repeals and reenactments. - Laws 1976, ch. 58, § 24, repeals 22-23-1, 1953 Comp., relating to suits allowed against the state, and enacts the above section.

Compiler's notes. - Laws 1978, ch. 28, § 2, and Laws 1978, ch. 166, § 17, repeal Laws 1976, ch. 58, § 24, which provided that Laws 1976, ch. 58, § 24, which enacted this section, would terminate on July 1, 1978.

Constitutionality. - It is not a denial of equal protection to provide for a shorter statute of limitations for contracts with governmental entities than with private entities because the greater volume of contracts with which governmental entities are involved would tend to cause the memory to fade as to any one contract. Sena School Bus Co. v. Board of Educ. 101 N.M. 26, 677 P.2d 639 (Ct. App. 1984).

Effect of section. - This section, as it read in 1963, made the state or its public agencies subject to suit for breach of its contracts which were lawfully entered into. 1963-64 Op. Att'y Gen. No. 64-74.

Nature of statute. - Subsection A is an immunity statute and not a statute of frauds, because of the policy favoring governmental immunity; and because a court considering a statute of frauds defense at the summary judgment stage resolves facts in favor of the non-movant and views the evidence in the light most favorable to a trial on the merits, a court must ensure that a plaintiff has affirmatively overcome the assertion of immunity. Campos de Suenos, Ltd. v. County of Bernalillo, 2001-NMCA-043, 130 N.M. 563, 28 P.3d 1104, cert. denied, 130 N.M. 484, 27 P.3d 476 (2001).

This section cannot be made applicable to cities because 37-1-24 NMSA 1978, specifically applies to cities and these sections contain conflicting and irreconcilable provisions; the two statutes are inconsistent concerning the binding effect that written or unwritten contracts will have upon a city and the length of the statute of limitations to be applied. Spray v. City of Albuquerque, 94 N.M. 199, 608 P.2d 511 (1980).

Extension provision inapplicable. - Section 37-1-14 NMSA 1978, which extends the statute of limitations for an additional six months, does not apply to breach of contract suits against the state. Gathman-Matotan Architects & Planners, Inc. v. State, Dep't of Fin. & Admin. 109 N.M. 492, 787 P.2d 411 (1990).

Immunity not available to purely statutory action. - Governmental immunity was not available to the state general services department when an offeror expended money and time in reliance upon an award of a contract since the action was purely statutory, based solely upon a right granted in the New Mexico Procurement Code (13-1-28 to 13-1-117 and 13-1-118 to 13-1-199 NMSA 1978). Renaissance Office, LLC v. State, 2001-NMCA-066, 130 N.M. 723, 31 P.3d 381, cert denied, 130 N.M. 713, 30 P.3d 1147 (2001).

Validity of time-to-sue provisions. - Time-to-sue provisions are contractual clauses agreed to between the state and insurers to apply to a specific issue, and more closely resemble a statute of limitations that by its terms expressly is applied against the state than a statute of general applicability. A public contract should not be construed liberally in favor of the public interest when to do so would be unreasonable and require abrogation of accepted rules of contract interpretation. State ex rel. Udall v. Colonial Penn Ins. Co. 112 N.M. 123, 812 P.2d 777 (1991).

Issue of governmental immunity is jurisdictional in nature and it may be raised at any time during the proceedings. Spray v. City of Albuquerque, 94 N.M. 199, 608 P.2d 511 (1980).

Review of governmental immunity determination. - As a general matter, the limited exception to the rule of finality known as the collateral order doctrine applies to district court determinations regarding governmental immunity under Subsection A, and such determinations are subject to review by writ of error. Handmaker v. Henney, 1999-NMSC-043, 128 N.M. 328, 992 P.2d 879.

Applicable to unjust enrichment claims. - Even though an action for unjust enrichment is not "based on contract" in a strict theoretical since, it is so closely related to an action which is based on contract that this section should be construed to extend immunity to an unjust enrichment claim as well as to a claim founded on a true, but unwritten, contract. Hydro Conduit Corp. v. Kemble, 110 N.M. 173, 793 P.2d 855 (1990).

Payment of utility rates. - A state agency's obligation to pay a utility rate is statutory. A utility's tariff is not a contract; it is the law. 1988 Op. Att'y Gen. No. 88-80.

Indian tribe engaged in off-reservation activity. - The district court may exercise jurisdiction over an Indian tribe when the tribe is engaged in activity off of the reservation as an unincorporated association registered and authorized to do business in this state and is sued in that capacity for breach of a written contract to pay for the performance of contractual obligations accomplished or intended to be accomplished in connection with this off-reservation activity of the tribe. Padilla v. Pueblo of Acoma, 107 N.M. 174, 754 P.2d 845 (1988), cert. denied, 490 U.S. 1028, 109 S. Ct. 1767, 104 L. Ed. 2d 202 (1989).

Proportionate share of attorney's fees in hospital lien. - When a public hospital held liens to be paid from the proceeds of the patients' personal injury claims, the patients did not have enforceable claims against the hospital for a proportionate share of attorney's fees and costs incurred in obtaining recovery because the claims were, in effect, based on contract and were not supported by writing. Eaton, Martinez & Hart v. University of N.M. Hosp. 1997-NMSC-015, 123 N.M. 76, 934 P.2d 270; Schroeder v. Memorial Medical Ctr. 1997-NMSC-046, 123 N.M. 719, 945 P.2d 449.

Misleading bid specifications. - Contractor's characterization of misrepresentations issued by authorities for bidding purposes as "negligent" did not determine the nature of the cause of action; what was determinative was the allegation that conditions found in the area of the project were not as warranted, necessitating extra work and expenses, so that, contractor's action was based on a written contract within the meaning of this section and could be maintained against the state and its highway commission. Vinnell Corp. v. State, 85 N.M. 311, 512 P.2d 71 (1973).

Contractual obligation for liability not found. - Since the application for participation in a summer day camp operated by a town made no mention of ensuring the safety of the children enrolled and expressly stated that the town would not do so, the town did not undertake a contractual obligation for liability in the event of injury to a child. Espinoza v. Town of Taos, 120 N.M. 680, 905 P.2d 718 (1995).

Wrongful termination of contract. - If an existing contractor's school bus service contract has been wrongfully terminated by a school board, he has recourse in the form of a legal action against the school board for wrongful breach of contract. 1965-66 Op. Att'y Gen. No. 66-78.

Implied employment contracts. - The waiver contained in Subsection A incorporates an implied employment contract that includes written terms as set forth in a personnel policy. Garcia v. Middle Rio Grande Conservancy Dist. 1996-NMSC-029, 121 N.M. 728, 918 P.2d 7.

Oral promise of employment. - County commissioners were not estopped from denying the existence of a two-year employment agreement which was orally promised to a county employee, and from asserting the provisions of this section to deny contractual liability. The employee had no right to rely on the oral representations made to him. Trujillo v. Gonzales, 106 N.M. 620, 747 P.2d 915 (1987).

Implied-in-fact contract. - Trial court erred by denying a county's motion for summary judgment, which claimed county was immune from suit, where the court found that there was an implied-in-fact contract between the county and a builder which waived the county's immunity. Campos de Suenos, Ltd. v. County of Bernalillo, 2001-NMCA-043, 130 N.M. 563, 28 P.3d 1104, cert. denied, 130 N.M. 484, 27 P.3d 476 (2001).

Late charges or interest penalties. - This section implies that no late charges or interest penalties may be assessed against the state unless based upon written contract. 1987 Op. Att'y Gen. No. 87-51.

Punitive damages. - Punitive damages are not recoverable from a governmental entity which is liable for breach of contract. Torrence County Mental Health Program, Inc. v. New Mexico Health & Env't Dep't, 113 N.M. 593, 830 P.2d 145 (1992).

Law reviews. - For note, "Contracts - Implied Employment Contracts Based on Written Policy Statements Are Not Subject to Governmental Immunity: Garcia v. Middle Rio Grande Conservancy District," see 27 N.M.L. Rev. 649 (1997).

For note, "Trends in New Mexico Law, 1995-96 - Contracts - Implied Employment Contracts Based on Written Policy Statements Are Not Subject to Governmental Immunity: Garcia v. Middle Rio Grande Conservancy District," see 27 N.M.L. Rev. 649 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 72 Am. Jur. 2d States § 88.

Tortious breach of contract as within consent by state to suit on contract, 1 A.L.R.2d 864.

Statute of limitations as bar to arbitration under agreement, 94 A.L.R.3d 533.

81A C.J.S. States §§ 172, 194.

37-1-24. [Suits, etc., against cities, towns and villages or officers thereof.]

No suit, action or proceeding at law or equity, for the recovery of judgment upon, or the enforcement or collection of any sum of money claimed due from any city, town or village in this state, or from any officer as such of any such city, town or village in this state, arising out of or founded upon any ordinance, trust relation or contract written or unwritten, or any appropriation of or conversion of any real or personal property, shall be commenced except within three years next after the date of the act of omission or commission giving rise to the cause of action, suit or proceeding; and no suit, action or proceeding to recover damages for personal injury or death resulting from the negligence of any city, town or village, or any officer thereof, shall be commenced except within one year next after the date of such injury. All such suits, proceedings or actions not so commenced shall be forever barred, provided, however, that as to all such actions heretofore accrued, suit to recover thereon may be instituted at any time on or before December 31, 1941, but not otherwise.

History: Laws 1941, ch. 181, § 1; 1941 Comp., § 27-122; 1953 Comp., § 23-1-23.

ANNOTATIONS

Cross references. - For provisions of the Tort Claims Act, see 41-4-1 NMSA 1978 et seq.

Equal protection. - This section does not violate the equal protection clauses of state and federal constitutions. Espanola Hous. Auth. v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977).

Rational basis for time limitation. - Since cities in this state are clearly limited in their expenditures and in their ability to raise money to meet extraordinary expenses, a rational basis exists for limiting the time period in which a suit may be brought against a city to one year, as opposed to a three-year period for suits against the county or state. Espanola Hous. Auth. v. Atencio, 90 N.M. 787, 568 P.2d 1233 (1977).

No impairment of contract. - Application of the saving clause of this section does not unconstitutionally impair the obligations of contract where reasonable time was allowed for pursuit of a cause of action accruing prior to the statute. Hoover v. City of Albuquerque, 58 N.M. 250, 270 P.2d 386 (1954).

Not special legislation. - Prohibition against special legislation does not apply to this section, since it is framed in general terms and operates on all causes of action distinguished by a reasonable classification. Hoover v. City of Albuquerque, 58 N.M. 250, 270 P.2d 386 (1954).

Violation of trust. - The legislative intent was to exclude necessity of repudiation of trust relation, or notice thereof, and to bar actions founded upon trust relations with municipalities within the time limited. Hoover v. City of Albuquerque, 58 N.M. 250, 270 P.2d 386 (1954).

Appropriation of realty. - This section is specifically made applicable to actions for any appropriation of real property. Buresh v. City of Las Cruces, 81 N.M. 89, 463 P.2d 513 (1969).

Inverse condemnation. - The three-year limitation of this section applied to an "inverse condemnation" action against a municipality and to a purported written promise to pay growing out of the same matter. Buresh v. City of Las Cruces, 81 N.M. 89, 463 P.2d 513 (1969).

The three-year limitation set forth in this section applies to an inverse condemnation action against a municipality. McClure v. Town of Mesilla, 93 N.M. 447, 601 P.2d 80 (Ct. App. 1979).

Nuisance causing personal injury. - An action for personal injuries based on negligence of a city which is filed more than one year after the date of injury is barred by this section, even where the negligent conduct of the city constitutes maintenance of a nuisance. Seiler v. City of Albuquerque, 57 N.M. 467, 260 P.2d 375 (1953).

Section inapplicable to negligence suit involving public employee of public utility. - Section 41-4-15 NMSA 1978 of the Tort Claims Act, allowing two years to bring suit, and not the one-year limitation of this section, applies to a suit for negligence of a public employee in the operation of a public utility. Cozart v. Town of Bernalillo, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983).

Action accrues when employment contract initially breached. - When city employees alleged breach of an employment contract because they did not receive pay raises when their job duties were expanded as required under the city's merit system ordinance, the action accrued at the time of the initial breach by the city, not with each paycheck that did not include the raise. Tull v. City of Albuquerque, 120 N.M. 829, 907 P.2d 1010 (Ct. App. 1995).

Extensions for disability inapplicable against municipalities. - Section 37-1-10 NMSA 1978, extending the period of limitations for minors and incapacitated persons, does not apply to actions against municipalities, which must be commenced as provided by this section. Noriega v. City of Albuquerque, 86 N.M. 294, 523 P.2d 29 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

Action revived. - An action filed December 29, 1941, was revived under this section though previously barred and this is true even though there was only an implied or resulting trust. Crist v. Town of Gallup, 51 N.M. 286, 183 P.2d 156 (1947).

Mistake of one party. - Oil company's claim that it overpaid oil and gas royalties to city for sixteen years was barred by the statute of limitations; the period of limitations was not tolled by the mistake of the oil company, where the mistake could have been discovered any time during the sixteen-year period, had the oil company examined its accounting records. City of Carlsbad v. Grace, 1998-NMCA-144, 126 N.M. 95, 966 P.2d 1178.

Section 37-1-23 NMSA 1978 cannot be made applicable to cities because this section specifically applies to cities and these sections contain conflicting and irreconcilable provisions; the two statutes are inconsistent concerning the binding effect that written or unwritten contracts will have upon a city and the length of the statute of limitations to be applied. Spray v. City of Albuquerque, 94 N.M. 199, 608 P.2d 511 (1980).

Recoupment defense permitted. - It is generally recognized that equitable recoupment is allowed as a defense in oil and gas cases, even if the party asserting the defense would be barred from bringing an action for affirmative relief under this section. City of Carlsbad v. Grace, 1998-NMCA-144, 126 N.M. 95, 966 P.2d 1178.

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Property," see 11 N.M.L. Rev. 203 (1981).

For note, "Trends in New Mexico Law, 1995-96 - Contracts - Implied Employment Contracts Based on Written Policy Statements Are Not Subject to Governmental Immunity: Garcia v. Middle Rio Grande Conservancy District," see 27 N.M.L. Rev. 649 (1997).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Entry or endorsement by creditor on note, bond or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

Death action against municipal corporation as subject to statute of limitations governing wrongful death actions or that governing actions against a municipality for injury to person or property, 53 A.L.R.2d 1068.

Recovery of exemplary or punitive damages from municipal corporation, 1 A.L.R.4th 448.

State statute of limitations applicable to inverse condemnation or similar proceedings by landowner to obtain compensation for direct appropriation of land without the institution or conclusion of formal proceedings against specific owner, 26 A.L.R.4th 68.

64 C.J.S. Municipal Corporations § 2201; 54 C.J.S. Limitations of Actions §§ 18, 19, 262.

37-1-25. [Suit, etc., on municipal and other local governmental bonds or coupons.]

No suit, action or proceeding at law or equity, for the recovery of judgment upon, or the enforcement or collection of, any bond of any county, city, town, school district or other municipality in this state, or upon any coupon thereto attached, shall be commenced except within ten years next after the date of the maturity of such bond or coupon, and all such suits or action not so commenced shall be forever barred.

History: Laws 1907, ch. 68, § 1; Code 1915, § 3362; C.S. 1929, § 83-117; 1941 Comp., § 27-123; 1953 Comp., § 23-1-24.

ANNOTATIONS

Cross references. - For the Public Securities Limitation of Action Act, see 6-14-4 NMSA 1978 et seq.

One form of action. - The New Mexico Rules of Civil Procedure, applicable to all civil suits cognizable at law or in equity, provide for only one form of action, known as "civil action." See Rules 1-001 and 1-002.

Limitations start running on interest coupons from coupons' maturity date rather than from the date of maturity of the bonds for which they represent interest payments. 1943-44 Op. Att'y Gen. No. 4570.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 12 Am. Jur. 2d Bonds §§ 75 to 79; 51 Am. Jur. 2d Limitation of Actions § 24; 64 Am. Jur. 2d Public Securities and Obligations §§ 500 to 505.

Statute of limitations applicable to coupons detached from bonds or other instruments, 62 A.L.R. 270.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

Entry or endorsement by creditor on note, bond or other obligation as evidence of part payment which will toll the statute of limitations, 23 A.L.R.2d 1331.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

When limitations begin to run against actions on public securities or obligations to be paid out of a special or particular fund, 50 A.L.R.2d 271.

20 C.J.S. Counties § 259; 64 C.J.S. Municipal Corporations § 1973; 79 C.J.S. Schools and School Districts § 375.

37-1-26. [Questioning of privilege or franchise granted by municipal corporation.]

No action or suit shall be brought to call in question any privilege or franchise granted by any municipal corporation, unless the same shall be brought within six years after the same shall have been granted, or claimed to have been granted, and any such privilege or franchise heretofore granted by any municipal corporation shall, after six years from the date of the granting of the same, or within six years after the same shall have been claimed to have been granted, shall [sic] be deemed valid in all respects.

History: Laws 1893, ch. 47, § 1; C.L. 1897, § 2918; Code 1915, § 3363; C.S. 1929, § 83-118; 1941 Comp., § 27-124; 1953 Comp., § 23-1-25.

ANNOTATIONS

Compiler's notes. - Laws 1893, ch. 47, § 1, contained a preliminary provision indicating that it was amending Laws 1884, ch. II, tit. XXXIII, § 1865.

Section is limited to express grants from municipality, and does not apply to an asserted grant under a state statute, nor to an implied prescriptive right. City of Roswell v. Mountain States Tel. & Tel. Co. 78 F.2d 379 (10th Cir. 1935).

This section limits actions to call in question, any privilege or franchise granted by any municipal corporation; and the holder of a valid franchise is entitled to injunction against interference by a city council with its rights under such franchise. Agua Pura Co. v. Mayor of Las Vegas, 10 N.M. 6, 60 P. 208 (1900).

Section inapplicable to cancellation or forfeiture. - This section provides a limitation on actions to challenge the validity of a franchise, but does not limit actions to establish a cancellation for forfeiture for default. 1971-72 Op. Att'y Gen. No. 72-4.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R.2d 1249.

64 C.J.S. Municipal Corporations §§ 1741, 2153.

37-1-27. Construction projects; limitation on actions for defective or unsafe conditions.

No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or wrongful death, arising out of the defective or unsafe condition of a physical improvement to real property, nor any action for contribution or indemnity for damages so sustained, against any person performing or furnishing the construction or the design, planning, supervision, inspection or administration of construction of such improvement to real property, and on account of such activity, shall be brought after ten years from the date of substantial completion of such improvement; provided this limitation shall not apply to any action based on a contract, warranty or guarantee which contains express terms inconsistent herewith. The date of substantial completion shall mean the date when construction is sufficiently completed so that the owner can occupy or use the improvement for the purpose for which it was intended, or the date on which the owner does so occupy or use the improvement, or the date established by the contractor as the date of substantial completion, whichever date occurs last.

History: 1953 Comp., § 23-1-26, enacted by Laws 1967, ch. 193, § 1.

ANNOTATIONS

Constitutionality. - The abrogation effect of this section on claims which accrue after the 10-year period does not violate the constitution. Terry v. New Mexico State Hwy. Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982).

Rational basis scrutiny, rather than intermediate scrutiny, applies to assess the constitutionality of this section. Applying rational basis scrutiny, this section is constitutional. Coleman v. United Eng'rs & Constructors, Inc. 118 N.M. 47, 878 P.2d 996 (1994).

Due process. - Where plaintiff was injured at site of a building that was completed more than 10 years previously, his claim that he had no cause of action at the time of the injury and that due process was violated because this section deprived him of a cause of action was without merit, since plaintiff had no right to damages when this section was enacted, and since the constitution did not forbid the abolition of old rights recognized by the common law, to attain a permissible legislative object. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Fundamental considerations of due process require that the 10-year limitation of this section not be applied to actions accruing within but close to the end of the 10-year period. Terry v. New Mexico State Hwy. Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982).

Reasonable basis for classification. - This section does not violate equal protection and is not special legislation under N.M. Const., art. IV, § 24, since there is a reasonable basis for distinguishing between those covered by the section and owners, tenants and materialmen. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Title adequate. - Reference in the title to "limitation on actions" logically and naturally connects with the no action provision of this section, and as the title provides reasonable notice of the subject matter, it does not violate N.M. Const., art. IV, § 16. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Purpose. - This section was designed to provide a reasonable measure of protection against the increased hazards of builders. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Scope. - The "no action" of this section does not distinguish between types of negligence, nor does it exclude strict liability claims, although it does refer to warranty claims. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Joint tortfeasors. - Plaintiff's suit against school district for wrongful death stemming from a faulty lighting system on school property was not barred even though the independent contractors who constructed the system were immune under this provision. There is no reason not to impose full responsibility on a joint tortfeasor subject to strict liability for breach of a nondelegable duty despite the fact that plaintiff's suit against other tortfeasors is barred. Saiz v. Belen Sch. Dist. 113 N.M. 387, 827 P.2d 102 (1992).

Meaning of "improvement". - The word "improvement," as used in the context of this section, means the enhancement or augmentation of value or quality: a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs. Mora-San Miguel Elec. Coop. v. Hicks & Ragland Consulting & Eng'r Co. 93 N.M. 175, 598 P.2d 218 (Ct. App. 1979).

Physical improvement to real property. - A gas line replacement and relocation constitutes a "physical improvement to real property" within the meaning of this section. Delgadillo v. City of Socorro, 104 N.M. 476, 723 P.2d 245 (1986).

Duty of reasonable care remains. - This section does not eliminate the duty to exercise reasonable care in the design, construction, planning, or inspection of an improvement in the first place; it merely forecloses suit for redress after ten years have passed since the substantial completion of an improvement. Coleman v. United Eng'rs & Constructors, Inc. 118 N.M. 47, 878 P.2d 996 (1994).

Time of negligence immaterial. - This section is not worded in terms of when negligence occurred; it does not matter if the alleged negligence occurred before there was substantial completion, during the 10 years after substantial completion or more than 10 years after substantial completion. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Negligent maintenance or failure to warn. - Claims of negligent maintenance and negligent failure to warn asserted against a general contractor and an architect, which arose out of defective or unsafe conditions of improvements designed and supervised by the architect and constructed by the general contractor, should not have been exempted from the summary judgments granted those persons. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Material manufacture and supply. - This section does not apply to a materialman who does no more than manufacture or supply materials. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Design and installation. - To the extent that defendant, who manufactured, designed, sold and installed glass at the site, was sued as manufacturer or seller of the glass, this section was not applicable, but it was applicable to the extent that defendant was sued as designer or installer of the glass. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Installation of power lines deemed "improvement". - Since a given parcel of land which has electrical service available is more valuable than a comparable parcel without such service, the installation of a power line is a physical improvement which comes within the intent and design of this section. Mora-San Miguel Elec. Coop. v. Hicks & Ragland Consulting & Eng'r Co. 93 N.M. 175, 598 P.2d 218 (Ct. App. 1979).

When independent contractor not liable to third parties. - Although, generally, an independent contractor may be liable to third parties who may have been foreseeably endangered by the contractor's negligence, even after the owner has accepted the work, this rule is subject to two limitations: (1) the independent contractor should not be liable if he merely carefully carried out the plans, specifications and directions given him, at least where the plans are not so obviously dangerous that no reasonable man would follow them; and (2) if the owner discovers the danger, or it is obvious to him, his

responsibility may supersede that of the contractor. Terry v. New Mexico State Hwy. Comm'n, 98 N.M. 119, 645 P.2d 1375 (1982).

Inconsistent warranty terms. - Where plaintiff did not demonstrate on appeal that the warranties alleged contained express terms inconsistent with this section, as was his obligation, summary judgment for defendants was proper. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Extensions for disability inapplicable. - The extension of 37-1-10 NMSA 1978 does not apply to a suit brought by minor against a builder covered under the provisions of this section. Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct. App.), cert. denied, 91 N.M. 3, 569 P.2d 413 (1977).

Law reviews. - For annual survey of civil procedure in New Mexico, see 18 N.M.L. Rev. 287 (1988).

For survey of construction law in New Mexico, see 18 N.M.L. Rev. 331 (1988).

For note, "Tort Law - New Mexico Imposes Strict Liability on a Private Employer of an Independent Contractor for Harm From Dangerous Work, but Bestows Immunity on a Government Employer: Saiz v. Belen School District," see 23 N.M.L. Rev. 399 (1993).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Liability of contracter and contractor inter se with respect to injuries sustained while the stipulated work is in course of performance, 44 A.L.R. 891.

Estoppel against defense of limitation in tort actions, 77 A.L.R. 1044.

Estoppel to rely on statute of limitations, 130 A.L.R. 8, 24 A.L.R.2d 1413.

Validity and construction, as to claim alleging design defects, of statute imposing time limitations upon action against architect, 93 A.L.R.3d 1242.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract or warranty in connection with construction of home or other building, 7 A.L.R.4th 1178.

54 C.J.S. Limitations of Actions § 167.

37-1-28. Real estate; limitation on actions for defects of title.

A. After fifteen years from the date an instrument affecting title to real estate is recorded, no action shall be brought for recovery of the real estate because:

(1) the instrument was not signed by the proper officer of a corporation;

(2) the record does not show any authorization for the instrument by the board of directors or stockholders, or both, of a corporation;

(3) the instrument was executed by a corporation:

(a) that had been dissolved;

(b) whose articles of incorporation had expired;

(c) whose certificate of incorporation had been cancelled or revoked; or

(d) whose certificate of authority to transact business in this state had been revoked or withdrawn;

(4) the executor, administrator, guardian, assignee, receiver, master, agent or trustee or other agency making the instrument signed or acknowledged it individually rather than in his representative or official capacity;

(5) the instrument was executed by a trustee without record of judicial or other determination of his authority or of the verity of the facts recited in the instrument;

(6) the officer, who took the acknowledgment of the instrument and who had an official seal, did not affix his seal or show the date of the expiration of his commission on the certificate of acknowledgment; or

(7) the wording of the consideration in the instrument may or might create an implied lien, other than an express vendor's lien, in favor of the grantor.

B. If the action is not barred by limitation or otherwise and if the instrument is of record fourteen years or more prior to the effective date of this section, no action for the recovery of real estate because of any defect listed in Subsection A shall be brought after one year from the effective date of this section.

C. If any person, who is entitled to bring an action for the recovery of real estate is imprisoned, of unsound mind or under the age of majority when the cause of action first accrues, the time for commencing the action by such person is extended one year after the termination of the disability. No cumulative disability shall prevent the bar of the limitation of this section. This subsection applies only to disabilities that existed when the cause of action first accrued.

D. This section does not apply to:

(1) forged instruments; or

(2) instruments given by any community land grant corporation, as defined by law; or

(3) actions that were pending or that were determined prior to July 1, 1971.

History: 1953 Comp., § 23-1-27, enacted by Laws 1971, ch. 313, § 1; 1973, ch. 138, § 16.

ANNOTATIONS

Severability clauses. - Laws 1971, ch. 313, § 2, provides for the severability of the act if any part or application thereof is held invalid.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 13 Am. Jur. 2d Cancellation of Instruments § 44; 51 Am. Jur. 2d §§ 119, 120, 182 to 193.

Estoppel to rely on statute of limitations, 130 A.L.R. 8, 24 A.L.R.2d 1413.

Fences as factor in fixing location of boundary line - modern cases, 7 A.L.R.4th 53.

Slander of title: sufficiency of plaintiff's interest in real property to maintain action, 86 A.L.R.4th 738.

54 C.J.S. Limitations of Actions §§ 32, 40 to 46.

37-1-29. Limitation [on parent-child relationship determination]

An action to determine a parent and child relationship shall be brought no later than three years after the child has reached the age of majority.

History: 1978 Comp., § 37-1-29, enacted by Laws 1985, ch. 105, § 18.

37-1-30. Action for damages due to childhood sexual abuse; limitation on actions.

A. An action for damages based on personal injury caused by childhood sexual abuse shall be commenced by a person before the latest of the following dates:

(1) the first instant of the person's twenty-fourth birthday; or

(2) three years from the date of the time that a person knew or had reason to know of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury to the person, as established by competent medical or psychological testimony.

B. As used in this section, "childhood sexual abuse" means behavior that, if prosecuted in a criminal matter, would constitute a violation of:

(1) Section 30-9-11 NMSA 1978, regarding criminal sexual penetration of a minor;

(2) Section 30-9-13 NMSA 1978, regarding criminal sexual contact of a minor; or

(3) the Sexual Exploitation of Children Act [30-6A-1 to 30-6A-4 NMSA 1978].

History: Laws 1993, ch. 136, § 1; 1995, ch. 63, § 1.

ANNOTATIONS

The 1995 amendment, effective June 16, 1995, in Paragraph (2) of Subsection A, inserted "of the childhood sexual abuse and that the childhood sexual abuse resulted in an injury to the person" and deleted "that an injury was caused by childhood sexual abuse; or" at the end of the paragraph, and deleted former Paragraph (3) of Subsection A which provided for an action for damages within a three year period following the beginning of treatment for repressed or forgotten childhood sexual abuse.

Effective dates. - Laws 1993, ch. 136, § 2 makes the act effective on July 1, 1993.

Running of statute of limitations. - The qualifying phrase "as established by competent medical or psychological testimony" applies to the entire preceding clause. Therefore, the statute of limitations begins running at the time a plaintiff knew or had reason to know of the connection between the alleged childhood sexual abuse and the injury, as established by competent medical or psychological testimony. Kevin J. v. Sager, 2000-NMCA-012, 128 N.M. 794, 999 P.2d 1026, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

Since the causal connection between the alleged abuse and the injury under Subsection A(2) is to be established by competent medical or psychological testimony, facts alone are insufficient to determine when an individual knew or had reason to know of the connection between the abuse and the injury. Kevin J. v. Sager, 2000-NMCA-012, 128 N.M. 794, 999 P.2d 1026, cert. denied, 128 N.M. 688, 997 P.2d 820 (2000).

ARTICLE 2
ABATEMENT AND REVIVOR

37-2-1. What causes of action survive.

In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same. The cause of action for wrongful death and the cause of action for personal injuries, shall survive the death of the party responsible therefor.

History: Laws 1884, ch. 5, § 1; C.L. 1884, § 2138; C.L. 1897, § 3087; Code 1915, § 4264; C.S. 1929, § 105-1202; Laws 1941, ch. 79, § 1; 1941 Comp., § 19-701; 1953 Comp., § 21-7-1.

ANNOTATIONS

Cross references. - As to death of party to pending action, see 37-2-4 NMSA 1978.

As to survival and revivor of suit, action or proceeding by or against head of agency or other state officer despite executive reorganization, see 9-1-10 NMSA 1978.

For nonabatement of partition suit on death of tenant, see 42-5-9 NMSA 1978.

For rule concerning substitution of parties, see Rule 1-025.

Legislative intent. - Language of this section indicates that the legislature intended the specified causes of action to survive but had no intent concerning nonsurvival of actions under the common-law rule. Rodgers v. Ferguson, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Alteration of common law. - While legislative intent was that survival of causes of action not specified in this section depend on the common law, there is no indication of a legislative intent to preserve the ancient common-law rule which existed when the statute was enacted; therefore, the court of appeals could adopt a "new" common-law rule allowing an action to recover damages for personal injuries between accident and victim's unrelated death to survive that death. Rodgers v. Ferguson, 89 N.M. 688, 556 P.2d 844 (Ct. App.), cert. denied, 90 N.M. 7, 558 P.2d 619 (1976).

Will contest. - An action to contest a will for undue influence by heirs at law of testatrix will survive, although they claimed interest in the estate through their father, and the father died after probate of the will. In re Morrow's Will, 41 N.M. 723, 73 P.2d 1360 (1937).

Injuries to reputation or privacy. - Libel, slander, defamation and, more recently, invasion of privacy did not survive the death of the injured party at common law, and because they are not mentioned in this section, they do not survive hereunder. Gruschus v. Curtis Publishing Co. 342 F.2d 775 (10th Cir. 1965).

Survival of wrongful death suit formerly. - Prior to the 1941 amendment to this section, cause of action for death, asserted against defendant as personal representative of alleged wrongdoer, a common carrier, did not survive the latter's death irrespective of the statute creating right of action against the carrier, by reason of this survival statute. Ickes v. Brimhall, 42 N.M. 412, 79 P.2d 942 (1938).

Accrual of cause before death. - Even though cause of action accrues but very short time before death of the wrongdoer, survival results. Cash v. Addington, 46 N.M. 451, 131 P.2d 265 (1942).

Finding that wrongdoer was "instantly killed" in an automobile collision in which plaintiff was injured does not connote that his death occurred before injury of the plaintiff and

evidence was sufficient in particular case to permit supreme court to determine that the decedent lived long enough for cause of action to accrue. Cash v. Addington, 46 N.M. 451, 131 P.2d 265 (1942).

Under this section, the order of death (e.g., in the case of a husband whose death may have been preceded by that of his wife) is not an element of the plaintiff's case. It is sufficient if the husband's death was occasioned by his wife's otherwise actionable act or neglect occurring while she was still living, even if her death precedes his. Corlett v. Smith, 107 N.M. 707, 763 P.2d 1172 (Ct. App. 1988).

Assignability of survivable cause. - A surety company, which had paid a shortage of a county treasurer and had been assigned county's rights, could sue a bank which aided in concealing the shortage, since this form of action survives and statutes making actions ex delicto survivable make them also assignable. McInnes v. American Sur. Co. 12 F.2d 212 (8th Cir.), cert. denied, 273 U.S. 707, 47 S. Ct. 99, 71 L. Ed. 850 (1926).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 53 et seq.

Survival of right to compensation under workmen's compensation acts upon the death of the person entitled to the award, 15 A.L.R. 821, 24 A.L.R. 441, 29 A.L.R. 1426, 51 A.L.R. 1446, 87 A.L.R. 864, 95 A.L.R. 254.

Survival of action or cause of action for wrongful death against representative of wrongdoer, 61 A.L.R. 830, 171 A.L.R. 1392.

Survival of liability on joint obligations, 67 A.L.R. 608.

Survival of cause of action for personal injury or death against tort-feasor killed in same accident, 70 A.L.R. 1319.

Survival of action or cause of action for personal injuries upon death of tort-feasor, 78 A.L.R. 600.

Assignability or survivability of cause of action to enforce civil liability under securities acts, 133 A.L.R. 1038.

Survival of action or cause of action for wrongful death against representative of wrongdoer, 171 A.L.R. 1392.

Liability or additions to deficiencies for fraud, imposed by income tax laws, as surviving taxpayer's death, 15 A.L.R.2d 1036.

Fingerprints, palm prints, or bare footprints as evidence, 28 A.L.R.2d 1115, 45 A.L.R.4th 1178.

Claim for negligently damaging or destroying personal property as surviving tort-feasor's death, 40 A.L.R.2d 533.

Statutory liability for physical injuries inflicted by animals as surviving defendant's death, 40 A.L.R.2d 543.

Who may enforce guaranty, 41 A.L.R.2d 1213.

Medical malpractice action as abating upon death of either party, 50 A.L.R.2d 1445.

Death as terminating coexecutor's, coadministrator's or testamentary cotrustee's liability for defaults or wrongful acts of fiduciary in handling, 65 A.L.R.2d 1126.

Abatement or survival of action for attorney's malpractice or negligence upon death of either party, 65 A.L.R.2d 1211.

Survivability of cause of action created by civil rights statute, 88 A.L.R.2d 1153.

Survival of cause of action under Civil Damage Act, 94 A.L.R.2d 1140.

Effect of death of beneficiary upon right of action under death statute, 13 A.L.R.4th 1060.

Defamation action as surviving plaintiff's death, under statute not specifically covering action, 42 A.L.R.4th 272.

When is death "instantaneous" for purposes of wrongful death or survival action, 75 A.L.R.4th 151.

1 C.J.S. Abatement and Revival §§ 130, 131.

37-2-2. [Transfer pendente lite; no abatement.]

No action shall abate by the transfer of any interest therein during its pendency.

History: Laws 1880, ch. 6, § 9; C.L. 1884, § 2155; C.L. 1897, § 3104; Code 1915, § 4281; C.S. 1929, § 105-1219; 1941 Comp., § 19-702; 1953 Comp., § 21-7-2.

ANNOTATIONS

Cross references. - For rule as to transfer of interest, see Paragraph C of Rule 1-025.

Assignment of interest prior to entry of judgment. - If successful litigant assigns his interest after trial and announcement of decision, but before entry of final judgment, judgment may be entered in name of litigant of record and assignees need not be substituted as parties. Dietz v. Hughes, 39 N.M. 349, 47 P.2d 417 (1935).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 39 et seq.

1 C.J.S. Abatement and Revival §§ 107, 108.

37-2-3. [Marriage; conviction of crime; suit against prisoner.]

No action shall abate by the marriage or conviction of crime of a party, if the cause of action survive or continue, but the court may order the same to proceed, and an action may be brought or prosecuted to final judgment against any person in prison for crime, regardless of such imprisonment.

History: Laws 1897, ch. 73, § 130; C.L. 1897, § 2685 (130); Code 1915, § 4263; C.S. 1929, § 105-1201; 1941 Comp., § 19-703; 1953 Comp., § 21-7-3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 C.J.S. Abatement and Revival § 94.

37-2-4. [Death of party to pending action; no abatement; exceptions.]

No action pending in any court shall abate by the death of either, or both, the parties thereto, except an action for libel, slander, malicious prosecution, assault or assault and battery, for a nuisance or against a justice of the peace [magistrate] for misconduct in office, which shall abate by the death of the defendant.

History: Laws 1884, ch. 5, § 2; C.L. 1884, § 2139; C.L. 1897, § 3088; Code 1915, § 4265; C.S. 1929, § 105-1203; 1941 Comp., § 19-704; 1953 Comp., § 21-7-4.

ANNOTATIONS

Cross references. - As to death before commencement of action, see 37-2-1 NMSA 1978.

For rule relating to substitution upon death of party, see Rule 1-025.

Bracketed material. - The bracketed word "magistrate" was inserted in this section by the compiler, as the office of justice of the peace has been abolished, and its jurisdiction, powers and duties transferred to the magistrate court. See 35-1-3 and 35-1-38 NMSA 1978. The bracketed material was not enacted by the legislature and is not part of the law.

Effect of section. - This section gives survivability to all causes of action which are in suit when death of party occurs, except certain specified causes which abate upon the

death of a defendant only. Frampton v. Santa Fe N.W. Ry. 34 N.M. 660, 287 P. 694 (1930).

Section does not apply to appeals of criminal convictions. State v. Doak, 89 N.M. 532, 554 P.2d 993 (Ct. App. 1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 43 et seq.

Survival of action or cause of action for wrongful death against representative of wrongdoer, 61 A.L.R. 830, 171 A.L.R. 1392.

Effect of death of party to divorce or annulment suit before final decree, 158 A.L.R. 1205.

Constitutionality and construction of statute authorizing continuation of pending action against foreign representative of deceased nonresident driver of motor vehicle, arising out of accident occurring in state, 18 A.L.R.2d 544.

Death of putative father before, pending or after judgment as affecting bastardy proceedings, 53 A.L.R.3d 188.

Claim for punitive damages in tort action as surviving death of tortfeasor or person wronged, 30 A.L.R.4th 707.

Abatement of state criminal case by accused's death pending appeal of conviction - modern cases, 80 A.L.R.4th 189.

1 C.J.S. Abatement and Revival §§ 117 to 130.

37-2-5. [Death or cessation of power; procedure when right of action survives to or against coparty.]

Where there are several plaintiffs or defendants in an action, and one of them dies, or his powers as a personal representative cease, if the right of action survives to or against the remaining parties, the action may proceed, the death of the party or the cessation of his powers being stated on the record.

History: Laws 1884, ch. 5, § 3; C.L. 1884, § 2140; C.L. 1897, § 3089; Code 1915, § 4266; C.S. 1929, § 105-1204; 1941 Comp., § 19-705; 1953 Comp., § 21-7-5.

ANNOTATIONS

Cross references. - As to powers of surviving personal representative, see 45-3-718 NMSA 1978.

For rule regarding substitution of parties in the event of various contingencies, see Rule 1-025.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 45 et seq.

1 C.J.S. Abatement and Revival §§ 122 to 124, 162.

37-2-6. [Proceeding with remaining parties when no survival of action.]

Where one of several plaintiffs or defendants dies, or his powers as a personal representative cease, if the cause of action do [does] not admit of survivorship, and the court is of opinion that the merits of the controversy can be properly determined, and the principals applicable to the case fully settled, it may proceed to try the same as between the remaining parties, but the judgment shall not prejudice any who were not parties at the time of the trial.

History: Laws 1884, ch. 5, § 4; C.L. 1884, § 2141; C.L. 1897, § 3090; Code 1915, § 4267; C.S. 1929, § 105-1205; 1941 Comp., § 19-706; 1953 Comp., § 21-7-6.

ANNOTATIONS

Cross references. - As to powers of surviving personal representative, see 45-3-718 NMSA 1978.

For rule relating to substitution of parties upon the happening of various contingencies, including death of a party, see Rule 1-025.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 45 et seq.

1 C.J.S. Abatement and Revival §§ 122 to 124.

37-2-7. [Revivor in name of representative or successor authorized.]

When one of the parties to an action dies, or his powers as a personal representative cease before the judgment, if the right of action survive in favor of or against his representative or successor, the action may be revived and proceed in their names.

History: Laws 1884, ch. 5, § 5; C.L. 1884, § 2142; C.L. 1897, § 3091; Code 1915, § 4268; C.S. 1929, § 105-1206; 1941 Comp., § 19-707; 1953 Comp., § 21-7-7.

ANNOTATIONS

Cross references. - As to revival of actions founded on contract, which have become barred by statute of limitations, see 37-1-16 NMSA 1978.

As to substitution of successor personal representative, see 45-3-613 NMSA 1978.

For rule relating to substitution of parties upon the happening of various contingencies, see Rule 1-025.

Filing against estate unnecessary. - The revival of a suit pending against a decedent at the time of his death, within the time for filing claims against the estate, dispenses with filing the claim against the estate. Romero v. Hopewell, 28 N.M. 259, 210 P. 231 (1922).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 110 et seq.

1 C.J.S. Abatement and Revival §§ 155 to 158.

37-2-8. [Order of revivor.]

The revivor shall be by a conditional order of the court, if made in term, or by a judge thereof if in vacation, that the action be revived in the names of the representatives or successor of the party who died, or whose powers ceased, and proceed in favor of or against them.

History: Laws 1884, ch. 5, § 6; C.L. 1884, § 2143; C.L. 1897, § 3092; Code 1915, § 4269; C.S. 1929, § 105-1207; 1941 Comp., § 19-708; 1953 Comp., § 21-7-8.

ANNOTATIONS

District court term. - Section 34-6-2 NMSA 1978 provides that the district court shall always be in session.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 124.

1 C.J.S. Abatement and Revival § 179.

37-2-9. [Publication of notice where representatives of defendant nonresidents, etc.; when action revived.]

When the plaintiff shall make an affidavit that the representatives of the defendant, or any of them, in whose name the action may be ordered to be revived, are nonresidents of the state, or have left the same to avoid the service of the order, or so concealed themselves that the order cannot be served upon them or that the names and residence of the heirs or devisees of the person against whom the action may be ordered to be

revived, or some of them are unknown to the affiant, a notice may be published as provided in Chapter XCIV, notifying them to appear on a day therein named and show cause why the action should not be revived against them, and if sufficient cause be not shown to the contrary, the action shall stand revived.

History: Laws 1884, ch. 5, § 9; C.L. 1884, § 2146; C.L. 1897, § 3095; Code 1915, § 4272; C.S. 1929, § 105-1210; 1941 Comp., § 19-709; 1953 Comp., § 21-7-9.

ANNOTATIONS

Cross references. - For statutory provisions relating to publication of notice, see 14-11-1 NMSA 1978 et seq.

For rule governing service of process, including service by publication, see Rule 1-004.

Meaning of "chapter XCIV". - The words "Chapter XCIV" refer to Code 1915, ch. 94, §§ 4644 to 4652, the operative provisions of which are compiled as 14-11-9, 14-11-11 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 117 et seq.

1 C.J.S. Abatement and Revival § 175.

37-2-10. [Revivor on death of plaintiff.]

Upon the death of the plaintiff in an action, it may be revived in the names of his representatives to whom his rights have passed; where his right has passed to his personal representatives the revivor shall be in his name; where it has passed to his heirs or devisees who could support the action if brought anew, the revivor may be in their names.

History: Laws 1884, ch. 5, § 10; C.L. 1884, § 2147; C.L. 1897, § 3096; Code 1915, § 4273; C.S. 1929, § 105-1211; 1941 Comp., § 19-710; 1953 Comp., § 21-7-10.

ANNOTATIONS

Cross references. - For limitation on revivor in name of plaintiff's representative or successor, absent consent, see 37-2-14 NMSA 1978.

For rule relating to substitution of parties, see Rule 1-025.

"May". - The use of the word "may" in this section has no bearing upon the question of who are and who are not indispensable parties; it simply permits certain individuals to take the initiative in making the litigation go forward. Keirsey v. Hirsch, 58 N.M. 18, 265

P.2d 346 (1953). See also State ex rel. Skinner v. District Court, 60 N.M. 255, 291 P.2d 301 (1955), for proceedings discharging writ of prohibition following remand of this case.

Passing of decedent's rights. - At the moment decedent died, his interest in certain land by virtue of contract of sale belonged to his heirs, who were entitled to possession and damages, and not to administratrix. Keirsey v. Hirsch, 58 N.M. 18, 265 P.2d 346 (1953)See also; State ex rel. Skinner v. District Court, 60 N.M. 255, 291 P.2d 301 (1955)for proceedings discharging writ of prohibition following remand of this case.

Indispensable parties. - Heirs of decedent, the original plaintiff in suit for specific performance, were indispensable parties, as was the administratrix, by reason of her obligation to pay the purchase price. Keirsey v. Hirsch, 58 N.M. 18, 265 P.2d 346 (1953)See also; State ex rel. Skinner v. District Court, 60 N.M. 255, 291 P.2d 301 (1955)for proceedings discharging writ of prohibition following remand of this case.

Adding indispensable parties. - Trial court's action permitting amendment of complaint seeking specific performance, so as to add heirs of original plaintiff as parties, and relating it back to timely substitution of administratrix upon plaintiff's death, was not improper. State ex rel. Skinner v. District Court, 60 N.M. 255, 291 P.2d 301 (1955).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 119.

Effect of death of beneficiary upon right of action under death statute, 13 A.L.R.4th 1060.

1 C.J.S. Abatement and Revival § 158.

37-2-11. [Revivor on death of defendant.]

Upon the death of a defendant in an action, wherein the right of any part thereof survives against his personal representatives, the revivor shall be against him, and it may also be against the heirs or devisees of the defendant, or both, when the right of action or any part thereof survives against them.

History: Laws 1884, ch. 5, § 11; C.L. 1884, § 2148; C.L. 1897, § 3097; Code 1915, § 4274; C.S. 1929, § 105-1212; 1941 Comp., § 19-711; 1953 Comp., § 21-7-11.

ANNOTATIONS

Cross references. - For limitation on revivor against representative or successor of a defendant, absent consent, see 37-2-13 NMSA 1978.

As to substitution of parties upon the occurrence of various contingencies, including death of a party, see Rule 1-025.

Revival of actions at law is purely statutory, and they may be revived only as prescribed by this section. A.J. Armstrong Co. v. Hufstedler, 75 N.M. 408, 405 P.2d 411 (1965).

Against whom revivor may be had. - This section does not permit a revivor against either the personal representative or the heirs or devisees, at the plaintiff's election and without regard to the nature of the action; revivor may only be against the person against whom the right of action involved in the litigation survives. A.J. Armstrong Co. v. Hufstedler, 75 N.M. 408, 405 P.2d 411 (1965).

"Personal representative". - The personal representative of a decedent's estate, within the meaning of the survival statute, is his executor or administrator. A.J. Armstrong Co. v. Hufstedler, 75 N.M. 408, 405 P.2d 411 (1965).

Revivor against personal representative essential. - A pending action cannot be prosecuted after the death of a party defendant, so as to affect his estate, until it is revived against his personal representative or successor in interest. A.J. Armstrong Co. v. Hufstedler, 75 N.M. 408, 405 P.2d 411 (1965).

Where the action brought against decedent prior to his death was on account of an alleged breach of an agreement to execute a note, and unquestionably affected his personal estate, since it would require payment by the personal representative in the event of a money judgment, the action could only continue after his death against his estate, and revivor would have to be against his personal representative, an indispensable party. A.J. Armstrong Co. v. Hufstedler, 75 N.M. 408, 405 P.2d 411 (1965).

Failure to revive against personal representative. - Judgment in plaintiff's favor following substitution by court order of widow of defendant, who had died pendente lite, as his heir and "personal representative," where in fact no personal representative had been appointed for the estate, would be dismissed for failure to revive against decedent's personal representative. A.J. Armstrong Co. v. Hufstedler, 75 N.M. 408, 405 P.2d 411 (1965).

Claim against estate unnecessary. - The revival of a suit pending against a decedent at the time of his death, within the time for filing claims against the estate, dispenses with filing the claim against the estate. Romero v. Hopewell, 28 N.M. 259, 210 P. 231 (1922).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 120.

1 C.J.S. Abatement and Revival § 164.

37-2-12. [Revivor of action concerning real estate on death of defendant.]

Upon the death of a defendant in an action for the recovery of real property only, or which concerns only his rights or claims to such property, the action may be revived against his heirs or devisees, or both; and an order therefor may be forthwith made, in the manner directed in the preceding sections [37-2-5, 37-2-7 to 37-2-9, 37-2-11 NMSA 1978].

History: Laws 1884, ch. 5, § 12; C.L. 1884, § 2149; C.L. 1897, § 3098; Code 1915, § 4275; C.S. 1929, § 105-1213; 1941 Comp., § 19-712; 1953 Comp., § 21-7-12.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 99.

1 C.J.S. Abatement and Revival §§ 150, 160, 165.

37-2-13. [Consent required for revivor against defendant's representative or successor; exception.]

An order to revive an action against the representatives or successor of a defendant, shall not be made without the consent of such representative or successor, unless in one year from the time it could have been first made.

History: Laws 1884, ch. 5, § 13; C.L. 1884, § 2150; C.L. 1897, § 3099; Code 1915, § 4276; C.S. 1929, § 105-1214; 1941 Comp., § 19-713; 1953 Comp., § 21-7-13.

ANNOTATIONS

Cross references. - As to revivor on death of defendant, in general, see 37-2-11 NMSA 1978.

For rule relating to substitution of parties, see Rule 1-025.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 115 et seq.

1 C.J.S. Abatement and Revival §§ 172, 173.

37-2-14. [Revivor in name of plaintiff's representative or successor; revivor on both sides.]

An order to revive an action in the names of the representatives or successor of a plaintiff may be made forthwith, but shall not be made without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but where the defendant shall also have died, or his power have ceased in the

meantime, the order of revivor on both sides may be made in the period limited in the last section [37-2-13 NMSA 1978].

History: Laws 1884, ch. 5, § 14; C.L. 1884, § 2151; C.L. 1897, § 3100; Code 1915, § 4277; C.S. 1929, § 105-1215; 1941 Comp., § 19-714; 1953 Comp., § 21-7-14.

ANNOTATIONS

Cross references. - As to revivor on death of plaintiff, in general, see 37-2-10 NMSA 1978.

For rule relating to substitution of parties, see Rule 1-025.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 115 et seq.

1 C.J.S. Abatement and Revival §§ 172, 173.

37-2-15. [When action to be stricken from docket.]

When it appears to the court by affidavit that either party to an action has been dead, or where a party sues, or is sued as a personal representative, that his powers have ceased for a period so long that the action cannot be revived in the names of his representatives or successor, without the consent of both parties, it shall order the action to be stricken from the docket.

History: Laws 1884, ch. 5, § 15; C.L. 1884, § 2152; C.L. 1897, § 3101; Code 1915, § 4278; C.S. 1929, § 105-1216; 1941 Comp., § 19-715; 1953 Comp., § 21-7-15.

ANNOTATIONS

Cross references. - For rule relating to substitution of parties, see Rule 1-025.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 115 et seq.

1 C.J.S. Abatement and Revival §§ 172, 173.

37-2-16. [Death of plaintiff; procedure by defendant to obtain revivor or dismissal.]

At any term of the court succeeding the death of the plaintiff, while the action remains on the docket, the defendant having given to the plaintiff's proper representative, in whose names the action might be revived, ten days' notice of the application therefor, may have an order to strike the action from the docket, and for costs against the estate of the plaintiff, unless the action is forthwith revived.

History: Laws 1884, ch. 5, § 16; C.L. 1884, § 2153; C.L. 1897, § 3102; Code 1915, § 4279; C.S. 1929, § 105-1217; 1941 Comp., § 19-716; 1953 Comp., § 21-7-16.

ANNOTATIONS

Cross references. - For rule relating to substitution of parties, see Rule 1-025.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 C.J.S. Abatement and Revival § 158.

37-2-17. [No postponement of trial upon revivor.]

When, by the provisions of the preceding sections of this article, an action stands revived, the trial thereof shall not be postponed by reason of the revivor, if the action would have stood for trial at the term the revivor is complete, had not death or cessation of powers taken place.

History: Laws 1884, ch. 5, § 17; C.L. 1884, § 2154; C.L. 1897, § 3103; Code 1915, § 4280; C.S. 1929, § 105-1218; 1941 Comp., § 19-717; 1953 Comp., § 21-7-17.

ANNOTATIONS

Meaning of "this article". - The compilers of the 1915 Code substituted "preceding sections of this article" for "preceding sections," thereby presumably extending the reference to include Code 1915, §§ 4263 to 4279, the operative provisions of which are compiled as 37-2-1, 37-2-3 to 37-2-16 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Abatement, Survival and Revival § 114.

1 C.J.S. Abatement and Revival § 180.