CHAPTER 42
ACTIONS AND PROCEEDINGS RELATING TO PROPERTY

ARTICLE 1
EMINENT DOMAIN GENERALLY

(Repealed by Laws 1981, ch. 125, § 62; recompiled by Laws 1981, ch. 125, § 60.)

42-1-1 to 42-1-39. Repealed.

ANNOTATIONS

Repeals. - Laws 1981, ch. 125, § 62, repeals 42-1-1 to 42-1-39 NMSA 1978, relating to eminent domain, effective July 1, 1981. For provisions of former sections, see 1978 Original Pamphlet and 1980 Cumulative Supplement. For present provisions, see 42A-1-1 through 42A-1-33 NMSA 1978.

42-1-40. Recompiled.

ANNOTATIONS

Recompilations. - Laws 1981, ch. 125, § 60, recompiles 42-1-40 NMSA 1978, relating to statutes of limitations for actions against state agencies or political subdivisions, as 42A-1-31 NMSA 1978, effective July 1, 1981.

ARTICLE 2
SPECIAL ALTERNATIVE CONDEMNATION PROCEDURE

42-2-1. Declaration of intent.

The legislature hereby determines and declares that the construction of urgently needed public roads and state highways is being delayed by the inability to enter into timely possession of the condemned property; that the landowner must wait the termination of prolonged litigation before he receives compensation for his property; that the delay in possession and therefore construction of the facility results in increased construction costs and thereby injuriously affects the public. The legislature, recognizing its responsibility, intends to solve these problems by establishing a special procedure whereby the state can enter into possession at the inception of the proceeding, and the interests of the property owner are protected by providing for an adequate bond prior to vesting of title and the taking of possession and also safeguarding the property owners'

right to a speedy judicial determination of the total just compensation due. This legislation is necessary for the immediate preservation of the public peace, health, safety, the promotion of the general welfare and to minimize the economic and financial dislocation caused by highway construction.

The special procedure set forth herein shall be in addition to any other condemnation procedure now in effect and shall not be construed as repealing or amending such procedure by implication.

History: 1953 Comp., § 22-9-39, enacted by Laws 1959, ch. 324, § 1.

ANNOTATIONS

Legislative intent. - It would have been practically impossible for the legislature to have stated more clearly their intention that compensation should be paid when public property was condemned for highway purposes. The requirement for payment is clearly without regard to the nature of uses being made and accordingly includes property being used for a governmental as well as a proprietary purpose. State ex rel. State Hwy. Comm'n v. Board of County Comm'rs, 72 N.M. 86, 380 P.2d 830 (1963).

All public land, no matter how acquired, subject to condemnation. - The fact that public lands were in part or whole acquired by trust funds is immaterial. The chapter draws no such distinction. It subjects all public land to eminent domain without distinction so long as a determination has been made that the land is required for a greater public need. Laws 1959, ch. 324, gives the state and all of its political subdivisions the right to acquire public property by right of eminent domain for use of public highways. 1959-60 Op. Att'y Gen. No. 60-156.

Provision for compensation when property condemned for highway purposes. - Since highways are state projects paid for by the public of the state at large, including in many instances contribution by the federal government, it is only just and proper that the legislature in its wisdom should provide for compensation when public property is taken for highway purposes. State ex rel. State Hwy. Comm'n v. Board of County Comm'rs, 72 N.M. 86, 380 P.2d 830 (1963).

Loss of business due to restriction of direct access, noncompensable. - Loss of business or of prospective business, because the traveling public cannot reach a roadside business establishment as readily as before the restriction of direct access, amounts only to a diversion of traffic and is noncompensable. State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968).

Once reasonable access is given to the main highway system by means of frontage roads, any circuity of travel occasioned by the loss of direct ingress and egress is noncompensable. State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968).

Mere inconvenience resulting from the closing of streets or roads which requires circuity of travel by those abutting on such roads to reach the main highway system does not give rise to a legal right in one so inconvenienced, when another reasonable, although perhaps not equally accessible, means of ingress and egress is afforded. State ex rel. State Hwy. Comm'n v. Brock, 80 N.M. 80, 451 P.2d 984 (1968).

Rule relating to dismissal of actions inapplicable. - The special statutory eminent domain procedure is inconsistent with rule 41(b) and (e), N.M.R. Civ. P., relating to dismissal of actions, and these rules are therefore inapplicable to eminent domain proceedings brought under the special alternative procedure where a permanent order of entry has been made as to some part of the property being condemned. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

Effect of trial court's refusal to allow expert to testify. - The trial court's refusal to allow plaintiff's expert appraiser to testify as to the fair market value of the property in question, after a detailed and lengthy examination into the expert's qualifications was reversible error. City of Santa Fe v. Gonzales, 80 N.M. 401, 456 P.2d 875 (1969).

Law reviews. - For article, "Frontland Taking - Backland Value", 9 Nat. Resources J. 237 (1969).

42-2-2. Definitions.

As used in this act [42-2-1 to 42-2-16 NMSA 1978], "state" includes any commission, department, institution, bureau or agency thereof as well as all political subdivisions of the state.

History: 1953 Comp., § 22-9-40, enacted by Laws 1959, ch. 324, § 2.

ANNOTATIONS

State highway commission authorized by legislature to acquire property. - The state highway commission is a department of the state of New Mexico, and authorized by the legislature to acquire property for highway purposes. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

Acquiring land for county sewage disposal facility. - The governing body of a county has the power of eminent domain for the purpose of acquiring land for a county sewage disposal facility including a sewage lagoon. 1963-64 Op. Att'y Gen. No. 63-75.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 72 Am. Jur. 2d States, Territories, and Dependencies §§ 2, 3.

42-2-3. Purpose.

Unless otherwise specifically provided by law:

A. the state may acquire, either temporarily or permanently, public or privately owned lands, real property or any interests therein, including water rights or any easements deemed necessary or desirable for present or future public road, street or highway purposes by gift, agreement, purchase, exchange, condemnation or otherwise. Such lands or interests in real property may be acquired in fee simple;

B. present or future public road, street or highway purposes include the taking of personal property, land or any interest in real property, under the Highway Beautification Act [67-12-1 to 67-12-14 NMSA 1978];

C. the state may use the special alternative procedure to acquire lands or any interest therein for any public purpose for which the power of eminent domain may be properly exercised; and

D. for the purposes provided in Subsections A through C of this section, when state-owned property must be taken, the state board of finance shall first determine the greater public need, unless the state defendant in whom title is vested concedes that the purpose for which the property is sought to be taken is the greater public need.

History: 1953 Comp., § 22-9-41, enacted by Laws 1959, ch. 324, § 3; 1966, ch. 65, § 15; 1981, ch. 125, § 49.

ANNOTATIONS

The 1981 amendment added the introductory paragraph, substituted "provided in Subsections A through C of this section" for "above provided" in Subsection D and made other minor changes.

Effective dates. - Laws 1981, ch. 125, § 64, makes the act effective on July 1, 1981.

Generally. - By its title, the act (42-2-1 to 42-2-16 NMSA 1978) is one providing an alternative procedure whereby public or private property may be condemned for highway purposes. State ex rel. State Hwy. Comm'n v. Board of County Comm'rs, 72 N.M. 86, 380 P.2d 830 (1963).

Legislative approval prior to condemnation by state highway department unnecessary. - Even though legislative approval prior to condemnation by the state highway department is not necessary under this section, 13-6-2 NMSA 1978 still controls the distribution of proceeds from the sale or condemnation. 1969 Op. Att'y Gen. No. 69-144.

Condemnation of Indian lands. - The state highway department may condemn lands belonging to the intertribal Indian ceremonial association without legislative approval if the provisions of this section are complied with. 1969 Op. Att'y Gen. No. 69-144.

Law reviews. - For note, "Cultural Properties Act - Turley v. State and the New Mexico Cultural Properties Act: A Matter of Interpretation," see 13 N.M.L. Rev. 737 (1983).

42-2-4. Authority to acquire.

In connection with the acquisition of property or property rights the state may by order of the court acquire an entire lot, block or tract of land if by so doing the interests of the public will be best served.

History: 1953 Comp., § 22-9-41.1, enacted by Laws 1965, ch. 158, § 1.

42-2-5. Petition.

A. In any case where the state is the moving party to a condemnation action, a petition may be filed in the district court of the county in which such property is situated. Where the property of any defendant sought to be condemned lies partly in one county and partly in an adjoining county, the condemnation proceeding may be brought in either county. The petition shall include but not be limited to the following:

(1) a statement by the petitioner of its authority to bring the action;

(2) a general description of the public purpose for which the property is being condemned;

(3) a statement that the action is brought pursuant to this statute;

(4) an accurate surveyed description of the property to be condemned describing the same by metes and bounds and said description shall be incorporated in the petition with or without reference to maps or plats attached to said petition; the property of each defendant to be condemned shall be described separately, and each tract under separate ownerships shall be consecutively numbered for ease in identification;

(5) the names and addresses of all defendants shall be given if known;

(6) the estate to be taken shall be described;

(7) in the event that title to the property to be taken is vested in the state, a statement that the board of finance has proclaimed that the needs and purposes of the condemnor to be of a greater public need than that of the defendant in whom the title is vested;

(8) the petition shall be signed by any attorney employed by the state duly authorized to sign such pleadings;

(9) the name of such attorney and his address or the post-office box number of the state shall appear below the signature, or both addresses may be given;

(10) an allegation that the petitioner has been unable to agree with one or more of the defendants having an interest in a particular tract as to just compensation;

(11) a statement of the amount offered as just compensation for each tract affected;

(12) the petition shall include or have attached thereto a map, plat or plan of the improvement to be constructed and showing the property to be condemned.

B. Parties defendant. The petition shall name as defendants all the parties who own or occupy the property or have any interest therein as may be ascertained by a search of the county records, and if any such parties are known to the petitioner to be infants, or persons of unsound mind or suffering under any other legal disability, when no legal representative or guardian appears in their behalf, the court shall on motion appoint a guardian ad litem to protect the interest of those under any legal disability.

(1) If any property sought to be condemned belongs to the state, the head of the commission, department, institution, bureau, agency or political subdivision holding either title, or possession, shall be named as well as the commission, department, institution, bureau, agency or political subdivision itself.

(2) If the record owner of the property sought to be condemned is deceased and there has been no recorded legal disposition of the property, the deceased and his known heirs shall be named as defendants, and if the heirs are unknown to the petitioner, they shall be named and designated as defendants under the style of "the unknown heirs of . . . . . ., deceased."

(3) If the estate of any such deceased person is in the process of being administered in any court of the state, the personal representative of such deceased person shall also be named as a defendant.

(4) If the property sought to be condemned is held in trust and the petitioner has knowledge of said trust, the trustee shall be named.

(5) Where the name of the party holding title or any interest therein cannot be determined, such parties shall be designated as "unknown owners or claimants of the property involved."

C. Notice of condemnation. Upon filing of a petition in condemnation in the district court, the clerk shall issue a notice of condemnation which shall contain:

(1) the title of the action;

(2) the name or designation of the court and county in which the action is brought as well as the cause number;

(3) a direction that the defendant appear and answer to the petition within thirty days after service of the notice, and a statement that unless the defendant so appears and answers, the petitioner will apply to the court for the relief demanded in the petition;

(4) the name and address of petitioner's attorney shall appear on every notice;

(5) a general statement of the nature of the action and a general description of the proposed location of such road, street or highway, and that the land involved is more fully described in the petition on file in said cause;

(6) in the event that an ex parte preliminary order of entry is obtained by the petitioner at the time the petition is filed, the notice as required by Section 5 [42-2-6 NMSA 1978], Preliminary Order of Entry, may be incorporated in the notice of condemnation, both for the purpose of personal service and for constructive service by publication.

History: 1953 Comp., § 22-9-42, enacted by Laws 1959, ch. 324, § 4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain §§ 379, 380, 384, 395 to 398, 494, 503.

29A C.J.S. Eminent Domain §§ 172 to 177, 219, 247, 249 to 251, 253, 255 to 259, 264.

42-2-6. Preliminary order of entry.

A. A preliminary order permitting the state or any political subdivision thereof to immediately enter and occupy the premises sought to be condemned pending the action and to do such work thereon as may be required, may be obtained by the petitioner, without notice, upon the filing of the surety bond and deposit of money with the court as hereinafter provided, and a copy of such order shall be filed with the clerk of the court and notice thereof shall be served upon any defendant against whom such order is obtained, or upon his attorney of record. Such notice shall advise such defendant of the nature of the order and inform him that, unless objection thereto is filed within ten days after service thereof, the court shall deem such owner in default and shall proceed to make such preliminary order permanent and shall, without further notice, restrain said defendant from hindering or interfering with the occupation of the premises and the doing thereon of the work required, and that subsequent proceedings shall only affect the amount of compensation allowable.

B. With his application for such preliminary order, the petitioner shall submit proof by affidavit, or otherwise, of the reasons for requiring a speedy occupation, and the court shall issue or refuse to issue the preliminary order according to the equity of the case and the relative damages which may accrue to the parties. If the order is granted, the court may require the petitioner to execute and file in the court a surety bond to the benefit of the defendants, executed by any surety company authorized to do business in

the state, in a sum to be fixed by the court, but not less than the value of the premises for which possession is sought after taking into consideration the amount of the deposit, if any, and the damages which will result from such occupation and condemnation, as the same may appear to the court on the hearing, and conditioned to pay the adjudged value of the premises and all damages in case the property is condemned, and to pay all damages arising from the occupation before judgment in case the premises are not condemned. No order of entry to any property being taken from a private property owner for rights-of-way may be granted until there is deposited with the clerk of the district court the amount offered as just compensation. Money from this deposit shall be disbursed under such conditions as the court may deem appropriate, upon the demand of any person having an estate or interest in such property, and the final judgment shall not include interest from the date of said deposit on the amount of such advance deposit. Disbursements may be made only by order of court entered after expiration of the time for the filing of an answer. Any disbursement of money from an advance deposit shall be without prejudice to the right of a defendant landowner to litigate for additional compensation. The court or jury shall not award a lesser sum than that shown by the petitioner's appraised value testified to in court.

C. Upon the filing of a certificate of the clerk of the court that ten days have elapsed since service of the notice of preliminary order on all defendants, the court, upon notice to all defendants who have appeared or their attorneys of record, may proceed to hear all legal objections to the petition and order, and all objections as to the amount of the bond, if any, and all argument as to why said order should not be made permanent, and shall thereupon make such order as it deems necessary. After said order is made permanent, all subsequent proceedings shall only affect the amount of compensation allowable.

History: 1953 Comp., § 22-9-43, enacted by Laws 1959, ch. 324, § 5; 1966, ch. 40, § 1.

ANNOTATIONS

Emergency clauses. - Laws 1966, ch. 40, § 2, makes the act effective immediately. Approved March 1, 1966.

Procedure provides for permanent order permitting condemnor to enter and occupy the premises and perform work thereon, after which "subsequent proceedings shall only affect the amount of compensation allowable." State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

Right to possession vests in condemnor on date of taking. - Clearly and logically the date of taking, whether partial or whole, was the date on which the condemnor became vested with the legal right to possession, dominion and control over the real estate being condemned. State ex rel. State Hwy. Dep't v. Yurcic, 85 N.M. 220, 511 P.2d 546 (1973).

However, no taking occurs if preliminary order not made permanent. - Where the preliminary order of entry is never made permanent and there is no physical entry or disturbance of the plaintiff's possession, no taking occurs. State ex rel. State Hwy. Dep't v. Yurcic, 85 N.M. 220, 511 P.2d 546 (1973).

Condemnation deposit cannot be used to cure any default under the real estate sales contract. Trickey v. Zumwalt, 83 N.M. 278, 491 P.2d 166 (1971).

Tax liability of condemnee ends after condemnor enters. - The condemnee is not liable for taxes accruing after the condemnor has entered the land and destroyed any beneficial possession on the part of the condemnee. 1964 Op. Att'y Gen. No. 64-93.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 29A C.J.S. Eminent Domain §§ 86, 172 to 177, 180, 184, 224.

42-2-7. Service; personal or by publication.

A. Personal service, either within or without the state, of the petition, notice of condemnation and the notice of the preliminary order of entry, if any, shall be made and had in the manner as provided in the Rules of Civil Procedure, Rule 4(e), Subsections 1 to 6 inclusive [Rule 1-004 F(1) to F(6) SCRA 1986], or as they may be amended.

B. If the name or residence of any owner be unknown, or if the owners or any of them do not reside within the state, or cannot be found therein, and are not served as hereinbefore provided, the required service and notice shall be given by publication of notice thereof for two consecutive weeks, the last publication to be at least three days prior to any default date, in a newspaper published in the county in which the proceedings are pending, if one is published in that county; if no newspaper is published in such county, then a newspaper published in another county, having a general circulation in the county wherein such proceedings are pending. When the address of any defendant who resides out of state is known to the petitioner, the publication shall be made as aforesaid and in addition, a copy of the petition and required notice thereof and the notice of the preliminary order entered, if any, shall be mailed to said defendant at such address, at least ten days prior to any default date on the preliminary order.

C. Personal service outside the state of any pleading or notice shall be equivalent to publication and mailing, and such personal service of the notice of entry of a preliminary order shall commence the running of the ten-day period within which objections may be made to the granting of a permanent order. Return of such service shall be by affidavit of the person making the same.

History: 1953 Comp., § 22-9-44, enacted by Laws 1959, ch. 324, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain §§ 380, 394.

Permissible modes of service of notice of eminent domain proceedings, 89 A.L.R.2d 1404.

29A C.J.S. Eminent Domain §§ 240 to 244, 246.

42-2-8. Contents of answer.

The defendant shall set forth in his answer the following:

A. the estate or interest in each tract or parcel of property taken or described in the petition in which the defendant has any interest;

B. the name and address of anyone claiming any interest in such tract or parcel of property known to the defendant and the amount of such interest;

C. the amount which the defendant claims as just compensation for the property taken or described in the petition and the amount, if any, of the various elements of damage, including damage to any remaining portion of a contiguous tract owned or controlled by the defendant;

D. the highest and best use to which the property is adapted;

E. a description of the total tract owned by the defendant or in which he claims an interest, which has been damaged by the taking or the proposed improvement;

F. any other material or pertinent matter with regard to damages known to the defendant.

History: 1953 Comp., § 22-9-45, enacted by Laws 1959, ch. 324, § 7; 1967, ch. 207, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain §§ 397, 504.

29A C.J.S. Eminent Domain §§ 261, 262.

42-2-9. Time for answering.

The defendant or his attorney shall file his answer to the petition within thirty days after service of the petition and notice.

History: 1953 Comp., § 22-9-46, enacted by Laws 1959, ch. 324, § 8; 1967, ch. 207, § 2.

42-2-10. Intervention.

All persons in occupation of, or having or claiming an interest in, any of the property described in the petition or in the damages, if any, for the taking thereof, though not named, may appear, plead and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the petition, at any time prior to trial.

History: 1953 Comp., § 22-9-47, enacted by Laws 1959, ch. 324, § 9.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain § 392.

Right of adjoining landowner to intervene in condemnation proceedings on ground that they might suffer consequential damage, 61 A.L.R.2d 1292.

29A C.J.S. Eminent Domain §§ 232, 398.

42-2-11. Election of trial by court or jury.

Any party desiring to try the cause before a jury, shall make demand and deposit jury fees pursuant to Rule 38, Rules of Civil Procedure, [Rule 1-038 SCRA 1986] and any other applicable rules of civil procedure.

The court with or without a jury may separately try the case involving each tract of land affected which is under different ownership, or separate tracts under the same ownership.

History: 1953 Comp., § 22-9-48, enacted by Laws 1959, ch. 324, § 10; 1967, ch. 207, § 3.

ANNOTATIONS

Demand for jury by one defendant not demand for others. - In an eminent domain proceeding, the property interests of one condemnee are a claim separate from another. Therefore, each party who waives trial by jury shall be tried by the court separately (or together, unless severance is ordered) and a demand for jury trial made by certain defendants does not act as a demand for other defendants. El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain §§ 404, 407, 408, 506.

Right to have view by jury in condemnation proceedings, 77 A.L.R.2d 548.

29A C.J.S. Eminent Domain §§ 290, 292.

42-2-12. Time of trial.

A. The court, upon notice by petitioner that the time for an answer has expired as to all defendants served either personally or by publication, shall forthwith set the cause for trial giving the cause preference over all other civil causes in which the public interest is not involved.

B. The court upon such notice shall immediately impanel a special jury, if necessary, in the county in which the cause is to be tried for the sole purpose of trying said cause, unless the court in its discretion desires in the furtherance of justice to allow other matters to be tried before it at that time.

History: 1953 Comp., § 22-9-49, enacted by Laws 1959, ch. 324, § 11.

42-2-13. Argument.

In any condemnation action brought under the provisions of this act [42-2-1 to 42-2-16 NMSA 1978], the defendant shall have the burden of proceeding and the right to commence and conclude the argument.

History: 1953 Comp., § 22-9-50, enacted by Laws 1959, ch. 324, § 12.

ANNOTATIONS

Lessee bears burden in suit to apportion award. - Since, in eminent domain proceedings, the owner has the burden of establishing his damages and must open and close the evidence as well as the arguments, the burden was on lessee of condemned property to establish her damages in suit to apportion condemnation award between lessee and fee owner. State ex rel. State Hwy. Comm'n v. Sherman, 82 N.M. 316, 481 P.2d 104 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Admissibility, and effect of admission, in condemnation proceedings of plans and specifications as regards the work to be done on, or the particular use to be made of, the land in question, 89 A.L.R. 879.

Admissibility, in eminent domain proceeding, of evidence as to price paid for condemned real property during pendency of the proceeding, 55 A.L.R.2d 781.

How to obtain jury trial in eminent domain: waiver, 12 A.L.R.3d 7.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to landowner's unwillingness to sell property, 17 A.L.R.3d 1449.

Propriety and effect, in eminent domain proceeding, of argument or evidence as to source of funds to pay for property, 19 A.L.R.3d 694.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Propriety and effect of argument or evidence as to financial status of parties in eminent domain proceeding, 21 A.L.R.3d 936.

Admissibility, on issue of value of condemned real property, of rental value of other real property, 23 A.L.R.3d 724.

Admissibility of photographs or models of property condemned, 23 A.L.R.3d 825.

Admissibility of evidence of proposed or possible subdivision or platting of condemned land on issue of value in eminent domain proceedings, 26 A.L.R.3d 780.

Admissibility of testimony of expert, as to basis of his opinion, to matters otherwise excludible as hearsay - state cases, 89 A.L.R.4th 456.

42-2-14. Default.

A. If any defendant who has appeared in the cause shall fail to appear at the time set for trial, whether such trial be set before the court with or without a jury, the court shall direct that his default be entered and shall conduct such hearings as it deems necessary and proper to determine the amount of just compensation due to the defendant.

B. If any defendant has failed to appear or answer within the time allowed, and the clerk has entered his default, then the court shall conduct such hearings as it deems necessary and proper to determine the amount of just compensation due the defendant.

C. For the purpose of the hearing required in Subsection [Subsections] A and B above, the court may consider by affidavit or other proof of the value of the property taken, the damage, if any, which may result from the occupation and condemnation, and the amount offered as set forth in the petition and shall enter such judgment as it deems proper.

History: 1953 Comp., § 22-9-51, enacted by Laws 1959, ch. 324, § 13.

ANNOTATIONS

Section complies with constitutional standards. - This section contemplates that after entry of default by the clerk, the court shall conduct a hearing and determine the amount of just compensation due a condemnee. This is in recognition of N.M. Const.,

art. II, §§ 18 and 20. Board of County Comm'rs v. Boyd, 70 N.M. 254, 372 P.2d 828 (1962).

Civil rule applies to section. - Rule 1-055 B SCRA 1986 is applicable to entry of default in eminent domain proceedings filed under "special alternative procedure," and failure to give required notice requires an appellate court to reverse a default judgment. Board of County Comm'rs v. Boyd, 70 N.M. 254, 372 P.2d 828 (1962).

42-2-15. Verdict and judgment.

Notwithstanding the provisions of the Relocation Assistance Act [42-3-1 to 42-3-15 NMSA 1978]:

A. for the purposes of assessing compensation and damages, the right thereto shall be deemed to have accrued as of the date the petition is filed, and its actual value on that date shall be the measure of compensation for all property taken, and also the basis of damages for property not taken but injuriously affected in cases where such damages are legally recoverable; the amount of the award shall be determined from the evidence and not be limited to any amount alleged in the petition or set forth in the answer;

B. whenever just compensation shall be ascertained and awarded in such proceeding and established by judgment, the judgment shall include as a part of the just compensation awarded, interest at the rate of six percent a year from the date of the date the petition is filed to the date of payment or the date when the proceedings are finally abandoned;

C. the court shall have the power to direct the payment of delinquent taxes, special assessments and rental or other charges owed out of the amount determined to be just compensation, and to make such orders with respect to encumbrances, liens, rents, insurance and other just and equitable charges; and

D. when two or more estates or divided interests in any tract are the subject of a trial by a jury, and the court has determined that there shall be no division of the causes, the verdict shall be in one sum and shall be the amount of just compensation for the tract affected as of the date of the filing of the petition, and the court shall thereafter proceed to hear and determine the value of the respective interests or ownerships in said tract, and shall apportion the amount of the verdict between the defendants according to their various interests therein.

History: 1953 Comp., § 22-9-52, enacted by Laws 1959, ch. 324, § 14; 1972, ch. 41, § 21.

ANNOTATIONS

Emergency clauses. - Laws 1972, ch. 41, § 25, makes the act effective immediately. Approved February 28, 1972.

Severability clauses. - Laws 1972, ch. 41, § 23, provides for the severability of the act if any part or application thereof is held invalid.

Valuation date distinct from date of taking. - Valuation date, or the date as of which damages are assessed, fixed or determined, is different, separate and distinct from the date of taking, and is fixed by Subsection A as the date of filing the petition in condemnation. State ex rel. State Hwy. Comm'n v. Hesselden Inv. Co., 84 N.M. 424, 504 P.2d 634 (1972).

Special advantages to condemnor not proper consideration for damages. - Special advantages or value to the condemnor of the property taken is not a proper consideration in arriving at an award of damages to an owner. State ex rel. State Hwy. Comm'n v. Pelletier, 76 N.M. 555, 417 P.2d 46 (1966); Board of County Comm'rs v. Vargas, 76 N.M. 369, 415 P.2d 57 (1966).

But projected use proper consideration. - The projected use of property to be considered as an element in arriving at value should be possible and probable, but must not be based upon mere speculation that at some time in the remote future a particular use might be made of the property. State ex rel. State Hwy. Comm'n v. Pelletier, 76 N.M. 555, 417 P.2d 46 (1966).

Loss based on unfounded fears. - In a partial condemantion action, a property owner is entitled to receive as compensation the diminution in value of the remainder of the property caused by public perception of the use to which the condemned property will be put. Under this view, compensation is awarded for loss of market value even if the loss is based on fears not founded on objective standards. City of Santa Fe v. Komis, 114 N.M. 659, 845 P.2d 753 (1992).

Use of earlier appraisal reports not barred. - There is no New Mexico law barring the introduction of appraisal reports made prior to the date of the original petition. State ex rel. State Hwy. Dep't v. First Nat'l Bank, 91 N.M. 240, 572 P.2d 1248 (1977).

Fair market value of soil. - Where soil is taken in an eminent domain proceeding, fair market value is the measure of compensation and not the replacement cost of the soil. Board of County Comm'rs v. Vargas, 76 N.M. 369, 415 P.2d 57 (1966).

Interest accrues from date owner's possession invaded. - The owner of land taken in condemnation proceedings should have interest from the time his possession is invaded, either with or without an order of the court. State ex rel. State Hwy. Comm'n v. Peace Found., Inc., 79 N.M. 576, 446 P.2d 443 (1968).

Payment of interest. - This section calls for interest to be paid on the unpaid balance of the original compensation awarded, but does not provide for interest to be paid on the interest accrued on the award with the filing of the judgment. State ex rel. State Hwy. Dep't v. First Nat'l Bank, 91 N.M. 240, 572 P.2d 1248 (1977).

Where damages are awarded, interest will accrue at the rate of 6% on the unpaid portion of the principal from the date the petition in condemnation is filed until paid in full. State ex rel. State Hwy. Dep't v. First Nat'l Bank, 91 N.M. 240, 572 P.2d 1248 (1977).

Suspension of interest improper. - It is clear that Subsection B does not allow a trial court to suspend interest in condemnation proceedings under the Special Alternative Procedure Act. State ex rel. State Hwy. Comm'n v. Peace Found., Inc., 79 N.M. 576, 446 P.2d 443 (1968).

The allowance of interest from the date the petition was filed is essential to just compensation and the trial court erred by suspending interest from date of continuance until jury verdict. State ex rel. State Hwy. Comm'n v. Peace Found., Inc., 79 N.M. 576, 446 P.2d 443 (1968).

Landowners are permitted to call, as adverse witness, appraiser, who was employed and paid by the state highway commission, to appraise the property taken. State ex rel. State Hwy. Comm'n v. Steinkraus, 76 N.M. 617, 417 P.2d 431 (1966).

Jury cannot award damages in excess of highest testimony as to such damages. State ex rel. State Hwy. Comm'n v. Atchison, T. & S.F. Ry., 76 N.M. 587, 417 P.2d 68 (1966).

Amendment of petition by state, within trial court's discretion. - The trial court did not err in allowing the state to amend its petition where it did not change the date of valuation, only the extent of the condemnation on the valuation date. Amendments of pleadings are within the sound discretion of the trial court. State ex rel. State Hwy. Comm'n v. Grenko, 80 N.M. 691, 460 P.2d 56 (1969).

Law reviews. - For survey of 1990-91 property law, see 22 N.M.L. Rev. 783 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 27 Am. Jur. 2d Eminent Domain §§ 442 to 449, 472, 507.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 A.L.R.4th 308.

Method of determining rate of interest allowed on award to owner of property taken by United States in eminent domain proceeding, 56 A.L.R. Fed. 477.

29A C.J.S. Eminent Domain §§ 270, 303 to 313, 410.

42-2-16. Proof of payment; recording judgment.

After the petitioner has made payment in full to the clerk of the district court in accordance with the judgment in the condemnation action, the clerk shall certify upon the judgment that payment has been made thereon.

A copy of this judgment showing payment shall be recorded in the office of the county clerk of the county in which the property is situate, and thereupon the title or interest in the property affected shall vest in the petitioner.

History: 1953 Comp., § 22-9-53, enacted by Laws 1959, ch. 324, § 15; 1961, ch. 75, § 1.

ANNOTATIONS

Emergency clauses. - Laws 1959, ch. 324, § 18, makes the act effective immediately. Approved April 2, 1959.

Laws 1961, ch. 75, § 2, makes the act effective immediately. Approved March 8, 1961.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 26 Am. Jur. 2d Eminent Domain §§ 152 to 158; 27 Am. Jur. 2d Eminent Domain §§ 262 to 265, 469.

29A C.J.S. Eminent Domain §§ 178, 179, 183, 343.

42-2-17. Purpose of act.

The purpose of this act [42-2-17 to 42-2-21 NMSA 1978] is to clarify certain matters of practice and procedure in the special alternative procedure in eminent domain.

History: 1953 Comp., § 22-9-55, enacted by Laws 1963, ch. 248, § 1.

42-2-18. Application of Rules of Civil Procedure.

The Rules of Civil Procedure shall apply to the special alternative procedure in eminent domain except where special provisions are found in the special alternative procedure which conflict with the Rules of Civil Procedure and then the Rules of Civil Procedure shall not apply.

History: 1953 Comp., § 22-9-56, enacted by Laws 1963, ch. 248, § 2.

ANNOTATIONS

Rule and section similar in effect. - There is no material difference in the effect of Rule 1-001 SCRA 1986 and this section. Both provide that the Rules of Civil Procedure shall apply to eminent domain proceedings except where there are inconsistent rules or statutory provisions. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

Depositions and discovery by defendant permitted. - Trial court did not err in authorizing defendants to propound interrogatories, obtain production of documents and take a deposition based thereon under the statute. State ex rel. State Hwy. Dep't v. Fox Trailer Court, 83 N.M. 178, 489 P.2d 1176 (1971).

Rules for dismissal of actions is applicable to highway condemnation proceeding. State ex rel. State Hwy. Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866 (1968).

42-2-19. Disqualification of judge; effect.

A. Whenever a party or parties to any special alternative proceeding in eminent domain shall make and file an affidavit that the judge before whom the proceeding is pending, whether he be the resident judge or a judge designated by such resident judge, cannot, according to the belief of the party to said proceeding making such affidavit, preside over the same with impartiality, such affidavit shall operate as an automatic severance of the proceedings as to all tracts in which the disqualifying party or parties has an interest. Nothing herein shall be construed to authorize separate trials of different interests in the same tract.

Another judge shall be designated for the trial of the proceeding as to the severed portion thereof by agreement of counsel representing the respective parties. Upon the failure of such counsel to agree, then such facts shall be certified to the chief justice of the supreme court of New Mexico, and the chief justice shall thereupon designate the judge to try the severed portion of such proceeding.

B. Such affidavit shall be filed within the time allowed for filing objections to the preliminary order of entry and not thereafter.

History: 1953 Comp., § 22-9-57, enacted by Laws 1963, ch. 248, § 3.

42-2-20. Waiver of bond.

The surety bond required to be executed and filed by petitioner to the benefit of the defendants under Section 42-2-6B NMSA 1978 of the special alternative procedure in eminent domain may be waived by the court in its discretion.

History: 1953 Comp., § 22-9-58, enacted by Laws 1963, ch. 248, § 4.

42-2-21. Costs.

If the total amount of the final judgment exceeds the total amount offered by petitioner, excluding interest, for the tract or tracts for which the judgment is rendered, the petitioner shall bear all taxable costs or fees as in any other action or proceeding.

History: 1953 Comp., § 22-9-59, enacted by Laws 1963, ch. 248, § 5.

ANNOTATIONS

Section differs materially and substantially from 42-1-8 NMSA 1978. State ex rel. State Hwy. Comm'n v. Chavez, 80 N.M. 394, 456 P.2d 868 (1969).

42-2-22. [Flood control; appropriation of land; compensation for immediate use.]

The state or any political subdivision thereof, may also use the special alternative procedure in eminent domain set forth in Sections 42-2-1 through 42-2-21 NMSA 1978 (being Laws 1959, Chapter 324, Sections 1 through 16 and Laws 1963, Chapter 248, Sections 1 through 5) to the extent it is otherwise authorized by law to exercise the power of eminent domain to acquire, either temporarily or permanently, public or privately owned lands, real property or any interests therein for the acquisition, construction, operation or maintenance of facilities for the carrying, channeling, impounding or disposition of storm, flood or surface drainage waters.

Provided, however, that no order of entry to any property being taken under the special alternative procedure for the acquisition, construction, operation and maintenance of facilities for the carrying, channeling, impounding or disposition of storm, flood or surface drainage waters may be granted until there is deposited with the clerk of the district court a warrant for seventy-five percent of the amount offered as just compensation for the immediate use, under such conditions as the court may deem appropriate, of all persons having an estate or interest in such property, and the final judgment shall not include interest from the date of such deposit on the amount of such advance payment.

History: 1953 Comp., § 22-9-61, enacted by Laws 1964 (1st S.S.), ch. 14, § 2.

ANNOTATIONS

Cross-references. - As to right of eminent domain under Arroyo Flood Control Act, see 72-16-2C and 72-16-20C NMSA 1978.

As to right of eminent domain under Las Cruces Arroyo Flood Control Act, see 72-17-2C and 72-17-20C NMSA 1978.

Emergency clauses. - Laws 1964 (S.S.), ch. 14, § 4, makes the act effective immediately. Approved March 2, 1964.

Severability clauses. - Laws 1964 (S.S.), ch. 14, § 3, provides for the severability of the act if any part or application thereof is held invalid.

Compiler's note. - Laws 1959, ch. 324, § 16, compiled as 27-9-54, 1953 Comp., referred to in the first paragraph of this section, was repealed by Laws 1966, ch. 65, § 16.

42-2-23. Condemnation of property in excess of need; sale to prior owner; price.

In the event the state, a state agency or other entity condemns property in excess of the dimensions or amount necessary for public use, as determined by the condemnor, if such determination occurs within five years of the date of condemnation, the prior owner from whom the property was taken, or his personal representative or heirs, shall have the option to purchase the property determined to be in excess. Such persons may purchase such property at a price equal to the price paid for such excess property by the condemnor to the prior owner at the time of taking, plus interest at the rate of six percent per year, for the period beginning with the date the prior owner received final payment for the land taken, and ending when the notice of intent to dispose is mailed, less the amount of any liens which attached against the property while it was held by the condemnor.

The notice of intent to dispose shall be mailed to the last known address of the prior owner by certified mail with a return receipt requested. The notice shall notify the prior owner of his right to purchase, specify which portion of the property of the prior owner is available for purchase by him, the number of acres available, the amount of money, both the principal and interest it will require to repurchase it and the amount of any liens which may be deducted from the purchase price. If within thirty days after mailing the notice of intent to dispose, the prior owner or his personal representative or heirs elect to exercise the option to purchase, the condemnor shall enter into an agreement prepared and approved by the attorney general, if the condemnor is a state agency, and by appropriate legal officer of the entity if the condemnor is an entity other than a state agency for the sale of the surplus land to the prior owner, his personal representative or heirs.

If the prior owner, his personal representative or heirs have not elected to exercise the option within thirty days from the date of mailing the notice of intent to dispose, the condemnor shall sell the property at public sale.

History: 1953 Comp., § 22-9-62, enacted by Laws 1967, ch. 206, § 1; 1981, ch. 126, § 1.

ANNOTATIONS

The 1981 amendment deleted "and if such excess property exceeds one acre in size" preceding "the prior owner" near the middle of the first sentence of the first undesignated paragraph, substituted "the" for "an" preceding "option" near the end of the first sentence of the first undesignated paragraph and substituted "last known" for "last-known" in the first sentence of the second undesignated paragraph.

Effective dates. - Laws 1981, ch. 126, contains no effective date provision, but was enacted at the session which adjourned on March 21, 1981. See N.M. Const., art. IV, § 23.

42-2-24. Exclusion of certain property.

This act [42-2-23, 42-2-24 NMSA 1978] shall not apply to any land which at the time of condemnation was wholly within the boundary of an incorporated municipality.

History: 1953 Comp., § 22-9-67, enacted by Laws 1967, ch. 206, § 6.

ARTICLE 3
RELOCATION ASSISTANCE

42-3-1. Short title.

Chapter 42, Article 3 NMSA 1978 may be cited as the "Relocation Assistance Act".

History: 1953 Comp., § 22-9A-1, enacted by Laws 1972, ch. 41, § 1; 1989, ch. 121, § 1.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, substituted "Chapter 42, Article 3 NMSA 1978" for "This act".

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and application of state relocation assistance laws, 49 A.L.R.4th 491.

42-3-2. Definitions.

As used in the Relocation Assistance Act [this article]:

A. "agency" means any department, agency or instrumentality of:

(1) the federal government;

(2) the state;

(3) a political subdivision of the state; or

(4) any combination of the federal government, the state or a political subdivision of the state;

B. "appraisal" means a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described real property as of a specific date, supported by the presentation and analysis of relevant market information;

C. "business" means any lawful activity, except a farm operation, conducted primarily:

(1) for the purchase, sale, lease or rental of personal and real property or for the manufacture, processing or marketing of products, commodities or any other personal property;

(2) for the sale of services to the public;

(3) by a nonprofit organization; or

(4) solely for the purposes of Subsection A of Section 42-3-5 NMSA 1978, for assisting in the purchase, sale, resale, manufacture, processing or marketing of products, commodities, personal property or services by the erection and maintenance of an outdoor advertising display, whether or not the display is located on the premises on which any of the above activities are conducted;

D. "displacing agency" means any agency or person carrying out a program or project which causes a person to be a displaced person;

E. "displaced person":

(1) means any person who moves from real property or moves his personal property from real property as a direct result of:

(a) a written notice of intent to acquire or the acquisition of the real property in whole or in part for a program or project undertaken by the displacing agency on which the person is a residential tenant or conducts a farm operation or a business as defined in Subsection C of Section 42-3-2 NMSA 1978; or

(b) rehabilitation, demolition or other displacing activity as the displacing agency may prescribe, under a program or project undertaken by the displacing agency in any case in which the head of the displacing agency determines that the displacement is permanent; and

(2) means solely for the purposes of Section 42-3-11 NMSA 1978 and Subsections A and B of Section 42-3-5 NMSA 1978, any person who moves from real property or moves his personal property from real property as a direct result of:

(a) a written notice of intent to acquire or the acquisition of other real property, in whole or in part, on which the person conducts a business or farm operation, for a program or project undertaken by the displacing agency; or

(b) rehabilitation, demolition or other displacing activity as the displacing agency may prescribe, of other real property on which the person conducts a business or farm operation, under a program or project undertaken by the displacing agency where the head of the displacing agency determines that the displacement is permanent;

(3) does not include:

(a) any person that has been determined, according to criteria established by the head of the displacing agency, to be either in unlawful occupancy of the displacement dwelling or to have occupied the displacement dwelling for the purpose of obtaining assistance under the Relocation Assistance Act; and

(b) any person that is occupying the property on a rental basis for a short term or period once the displacing agency has acquired the property as set forth in that act, other than the person that was an occupant of the property at the time the property was acquired.

F. "family" means two or more individuals living together in the same dwelling unit who are related to each other by blood, marriage, adoption or legal guardianship;

G. "farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use and customarily producing such products or commodities in sufficient quantity capable of contributing materially to the operator's support;

H. "mortgage" means such classes of liens as are commonly given to secure advances on, or the unpaid purchase price of, real property under the laws of New Mexico, together with the credit instruments, if any, secured by them; and

I. "person", unless a contrary intention appears, means an individual, estate, trust, receiver, association, club, corporation, partnership, joint venture, syndicate or other entity.

History: 1953 Comp., § 22-9A-2, enacted by Laws 1972, ch. 41, § 2; 1989, ch. 121, § 2.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, substituted the present language of Subsection A for " 'agency' means any department, agency or instrumentality of the state or a political subdivision of the state or any combination of these"; added present Subsection B; redesignated former Subsection B as present Subsection C and made minor stylistic changes in Paragraph (4) thereof; deleted former Subsection C, which defined "displaced person"; added present Subsections D and E; redesignated former Subsections D through G as present Subsections F through I; and substituted "by them" for "thereby" in Subsection H.

42-3-3. Relocation program.

The displacing agency, as a part of the cost of a program or project, may establish and provide for a program providing fair and reasonable relocation and other payments for

persons displaced by a program or project and to carry out relocation assistance programs for displaced persons.

History: 1953 Comp., § 22-9A-4, enacted by Laws 1972, ch. 41, § 4; 1989, ch. 121, § 3.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, inserted "displacing" near the beginning of the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 26 Am. Jur. 2d Eminent Domain § 23; 27 Am. Jur. 2d §§ 328, 346; 39 Am. Jur. 2d Highways, Streets, and Bridges §§ 19, 131, 277.

29A C.J.S. Eminent Domain §§ 101, 102, 131, 132, 152, 153.

42-3-4. Administration.

In order to prevent unnecessary expense and duplication of functions and to promote uniform and effective administration of relocation assistance programs for displaced persons, any displacing agency may make relocation payments, provide relocation assistance or otherwise carry out the provisions of the Relocation Assistance Act [this article] by entering into an agreement to utilize the facilities, personnel and services of any agency having an established organization for conducting relocation assistance programs.

History: 1953 Comp., § 22-9A-5, enacted by Laws 1972, ch. 41, § 5; 1989, ch. 121, § 4.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, inserted "displacing" near the beginning of the section, and deleted "federal, state or local governmental" preceding "agency" near the end of the section.

42-3-5. Relocation payments.

A. Whenever a program or project undertaken by an agency will result in the displacement of any person, the displacing agency shall provide for payment to the displaced person for:

(1) actual reasonable expenses in moving himself, his family, business, farm operation or other personal property;

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate the property, as determined by the displacing agency;

(3) actual reasonable expenses in searching for a replacement business or farm, supported by documentation which the displacing agency by regulation may require; and

(4) actual reasonable expenses necessary to reestablish a displaced farm or business at its new site, in accordance with criteria to be established by the displacing agency but not to exceed ten thousand dollars ($10,000).

B. Any displaced person eligible for payments under Subsection A of this section who is displaced from a dwelling and who elects to accept the payment authorized by this subsection in lieu of the payments authorized by Subsection A of this section may receive an expense and dislocation allowance, which shall be determined according to a schedule established by the displacing agency.

C. Any displaced person eligible for payments under Subsection A of this section who is displaced from his place of business or from his farm operation, and who is eligible under the criteria established by the displacing agency may elect to accept the payment authorized by this subsection in lieu of the payment authorized by Subsection A of this section. The payment shall consist of a fixed payment in an amount to be determined according to the criteria established by the displacing agency, except that the payment shall be not less than one thousand dollars ($1,000) nor more than twenty thousand dollars ($20,000). A person whose sole business at the displacement dwelling is the rental of the dwelling to others shall not qualify for a payment under this subsection.

History: 1953 Comp., § 22-9A-6, enacted by Laws 1972, ch. 41, § 6; 1989, ch. 121, § 5.

ANNOTATIONS

Cross-references. - For payments not to affect welfare benefits, see 27-1-4 NMSA 1978.

The 1989 amendment, effective March 30, 1989, in Subsection A deleted "the acquisition of real property for" following "Whenever" in the introductory paragraph and substituted all of the language of that paragraph beginning with "displacing" for "agency may make a payment to any displaced person upon proper application as provided by regulation or ordinance of the agency for"; inserted "displacing" in Subsection A(3); added Subsection A(4); substituted all of the language of Subsection B beginning with "receive" for "receive: (1) a moving expense allowance, determined according to a schedule established by regulation of the agency, not to exceed three hundred dollars

($300); and (2) a dislocation allowance of two hundred dollars ($200)"; and rewrote Subsection C.

42-3-6. Additional payment to property owner.

A. In addition to payments authorized by Section 42-3-5 NMSA 1978, the displacing agency, as a part of the cost of the program or project, may make an additional payment not to exceed twenty-two thousand five hundred dollars ($22,500) to any displaced person who is displaced from a dwelling actually owned and occupied by the displaced person for not less than one hundred eighty days prior to the initiation of negotiations for acquisition of the property. The additional payment shall include the following:

(1) the amount, if any, which, when added to the acquisition cost to the displacing agency of the dwelling acquired by the displacing agency, equals the reasonable cost of a comparable replacement dwelling;

(2) the amount, if any, which will compensate the displaced person for any increased interest cost and other debt service costs which he is required to pay for financing the acquisition of any comparable replacement dwelling. The amount shall be paid only if the dwelling acquired by the displacing agency was encumbered by a bona fide mortgage which was a valid lien on the dwelling for not less than one hundred eighty days prior to the initiation of negotiations for the acquisition of the dwelling. The amount of the increased costs shall be equal to the excess in the aggregate interest and other debt service costs of the amount of the principal of the mortgage on the replacement dwelling which is equal to the unpaid balance of the mortgage on the acquired dwelling, over the remainder term of the mortgage on the acquired dwelling, reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits by commercial banks in the general area in which the replacement dwelling is located; and

(3) reasonable expenses incurred by the displaced person for evidence of title, recording fees and other closing costs incident to the purchase of a comparable replacement dwelling, but not including prepaid expenses.

B. The additional payment authorized by this section shall be made only to a displaced person who purchases and occupies a comparable replacement dwelling not later than the end of the one-year period beginning on the date on which he receives from the displacing agency final payment of all costs of the acquired dwelling or on the date on which the displacing agency's obligations, pursuant to Paragraph (3) of Subsection C of Section 42-3-11 NMSA 1978, are fulfilled, whichever is the later date. The displacing agency may extend this one-year period for good cause. If this one-year period is extended, the payment under this section shall be based on the costs of relocating the displaced person to a comparable replacement dwelling within one year of such date.

History: 1953 Comp., § 22-9A-7, enacted by Laws 1972, ch. 41, § 7; 1989, ch. 121, § 6.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, in the introductory paragraph of Subsection A substituted "twenty-two thousand five hundred dollars ($22,500)" for "fifteen thousand dollars ($15,000)" and made minor stylistic changes in the first sentence; substituted "displacing agency" for "agency" throughout the section; rewrote Subsection A(1); in Subsection A(2) inserted "and other debt service costs" in the first sentence and inserted "of the increased costs" in the third sentence; substituted "a comparable" for "the" in Subsection A(3); and in Subsection B substituted "comparable replacement dwelling" for "replacement dwelling which is decent, safe and sanitary" near the beginning of the first sentence, substituted "the displacing agency's obligations, pursuant to Paragraph (3) of Subsection C of Section 42-3-11 NMSA 1978, are fulfilled" for "he moves from the acquired dwelling" near the end of the first sentence, and added the second and third sentences.

42-3-7. Additional payment to tenant.

A. In addition to amounts otherwise authorized by the Relocation Assistance Act [this article], the displacing agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under Section 42-3-6 NMSA 1978 when that dwelling was actually and lawfully occupied by the displaced person for not less than ninety days immediately prior to the initiation of negotiations for acquisition of the dwelling or in any case in which the displacement is a direct result of acquisition or other event as the displacing agency shall prescribe.

B. The payment in Subsection A of this section shall consist of the amount necessary to enable the displaced person to lease or rent for a period not to exceed forty-two months a comparable replacement dwelling, but at no time shall this payment exceed five thousand two hundred fifty dollars ($5,250). At the discretion of the displacing agency, a payment under this subsection may be made in periodic installments. Computation of a payment under this subsection to a low-income displaced person for a comparable replacement dwelling shall take into account that person's income.

C. Any person eligible for a payment under Subsection A of this section may elect to apply the payment to a down payment on, and other incidental expenses pursuant to, the purchase of a comparable replacement dwelling. That person may, at the discretion of the displacing agency, be eligible under this subsection for the maximum payment allowed under Subsection B, except that, in the case of a displaced homeowner who has owned and occupied the displacement dwelling for at least ninety days but not more than one hundred eighty days immediately prior to the initiation of negotiations for the acquisition of the dwelling, this payment shall not exceed the payment the person would otherwise have received under Subsection A of Section 42-3-6 NMSA 1978 had the

person owned and occupied the displacement dwelling one hundred eighty days immediately prior to the initiation of such negotiations.

History: 1978 Comp., § 42-3-7, enacted by Laws 1989, ch. 121, § 7.

ANNOTATIONS

Repeals and reenactments. - Laws 1989, ch. 121, § 7 repeals former 42-3-7 NMSA 1978, as enacted by Laws 1972, ch. 41, § 8, relating to additional payment to tenant, and enacts the above section, effective March 30, 1989. For provisions of former section, see 1978 Original Pamphlet.

42-3-8. Miscellaneous payments.

In addition to other payments authorized by the Relocation Assistance Act [this article], the displacing agency, as part of the cost of any program or project, may reimburse reasonable and necessary expenses incurred for:

A. recording fees, transfer taxes and other expenses incidental to conveying the property;

B. penalty costs for prepayment of any mortgage then existing entered into in good faith encumbering the real property if the mortgage is on record or has been filed for record as provided by law; and

C. the pro rata portion of real property taxes paid which are allocable to the period subsequent to the date of vesting of title in the displacing agency or the effective date of the possession of the real property by the displacing agency, whichever is earlier.

History: 1953 Comp., § 22-9A-9, enacted by Laws 1972, ch. 41, § 9; 1989, ch. 121, § 8.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, inserted "displacing" preceding "agency" throughout the section.

Reimbursement provision valid. - Statutory provision for reimbursing property owner for pro rata portion or real property taxes is valid. 1973 Op. Att'y Gen. No. 73-37.

42-3-9. Reimbursement for expenses where condemnation does not result in acquisition or is abandoned.

A court having jurisdiction over a proceeding instituted by the displacing agency to acquire real property by condemnation shall, when required by federal law or by a federal grant contract governing the project or program, award the owner of any right,

title or interest in the real property a sum which will reimburse the owner for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees actually incurred because of the condemnation proceedings, if:

A. the final judgment in the proceeding is that the displacing agency cannot acquire the real property by condemnation; or

B. the proceeding is abandoned by the displacing agency.

History: 1953 Comp., § 22-9A-10, enacted by Laws 1972, ch. 41, § 10; 1989, ch. 121, § 9.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, inserted "displacing" preceding "agency" throughout the section.

42-3-10. Compensation for expenses of inverse condemnation.

A court, rendering a judgment for the plaintiff in a proceeding brought under Section 42A-1-29 NMSA 1978 awarding compensation for the actual physical taking of the property by the displacing agency, or the agency effecting a settlement of any such proceeding, shall, when required by federal law or by a federal grant contract governing the project or program, determine and award or allow to the plaintiff as a part of the judgment or settlement a sum which will reimburse the plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees actually incurred because of the proceeding.

History: 1953 Comp., § 22-9A-11, enacted by Laws 1972, ch. 41, § 11; 1989, ch. 121, § 10.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, substituted "Section 42A-1-29 NMSA 1978" for "Section 22-9-22 NMSA 1953" and inserted "displacing" preceding "agency".

42-3-11. Advisory assistance program.

A. Programs or projects undertaken by a displacing agency shall be planned in a manner that:

(1) recognizes at an early stage in the planning of programs or projects, and before the commencement of any actions which will cause displacements, the problems associated with the displacement of individuals, families, businesses and farm operations; and

(2) provides for the resolution of displacement problems in order to minimize adverse impacts on displaced persons and to expedite the program or project advancement and completion.

B. The head of any displacing agency shall ensure that the relocation assistance advisory services described in Subsection C of this section are made available to all persons displaced by the displacing agency. If the head of the displacing agency determines that any person occupying property immediately adjacent to the property where the displacing activity occurs is caused substantial economic injury as a result of the displacing activity, the head of the displacing agency may make available to any person occupying the adjacent property the relocation assistance advisory services.

C. Each relocation assistance advisory program required by Subsection B of this section shall include those measures, facilities or services that may be necessary or appropriate in order to:

(1) determine the need and make timely recommendations on the needs and preferences, if any, of displaced persons for relocation assistance;

(2) provide current and continuing information on the availability, sales prices and rental charges of comparable replacement dwellings for displaced homeowners and tenants and suitable locations for businesses and farm operations;

(3) assure that a person shall not be required to move from a dwelling unless the person has had a reasonable opportunity to relocate to a comparable replacement dwelling except in the case of:

(a) a major disaster as defined in Section 102(2) of the Disaster Relief Act of 1974;

(b) a national emergency declared by the president of the United States;

(c) any other emergency which requires the person to move immediately from the dwelling because continued occupancy of the dwelling by the person constitutes a substantial danger to the health or safety of the person;

(4) assist a person displaced from his business or farm operation to obtain and become established in a suitable replacement location; and

(5) supply information concerning federal, state and local programs which may be of assistance to displaced persons, supply technical assistance to displaced persons in applying for assistance under these programs and minimize hardships to the displaced persons in adjusting to relocation.

History: 1978 Comp., § 42-3-11, enacted by Laws 1989, ch. 121, § 11.

ANNOTATIONS

Repeals and reenactments. - Laws 1989, ch. 121, § 11 repeals former 42-3-11 NMSA 1978, as enacted by Laws 1972, ch. 41, § 12, relating to the advisory assistance program, and enacts the above section, effective March 30, 1989. For provisions of former section, see 1978 Original Pamphlet.

Disaster Relief Act of 1974. - Section 102(2) of the federal Disaster Relief Act of 1974, referred to in Subsection C(3)(a), appears as 42 U.S.C. § 5122(2).

42-3-12. Housing replacement as a last resort.

A. If a project cannot proceed to actual construction because comparable replacement sale or rental housing is not available and the displacing agency determines that the housing cannot otherwise be made available, the displacing agency may take action necessary or appropriate to provide the housing by use of funds authorized for the project.

The displacing agency may use this section to exceed the maximum amounts which may be paid under the Relocation Assistance Act [42-3-1 to 42-3-15 NMSA 1978] on a case-by-case basis for good cause as determined in accordance with such regulations as the agency or department shall issue.

B. No person shall be required to move from his dwelling on account of any project unless the displacing agency is satisfied that a comparable replacement housing is available to the person.

History: 1953 Comp., § 22-9A-13, enacted by Laws 1972, ch. 41, § 13; 1989, ch. 121, § 12.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, substituted "displacing agency" for "agency" throughout the section; added the second paragraph of Subsection A; and substituted "a comparable replacement housing" for "replacement housing in accordance with Subsection C of Section 12" in Subsection B.

State highway department may build required housing. - Any necessary action may be taken to provide housing by using funds authorized for the project. This does not necessarily mean that the state highway department must build the houses required, but as an absolutely last resort it could. 1973 Op. Att'y Gen. No. 73-47.

42-3-13. Implementing regulations.

The displacing agency may adopt regulations that it deems necessary or appropriate to implement the provisions of the Relocation Assistance Act [this article], including but not limited to regulations necessary to assure that:

A. the payments and assistance authorized shall be administered in as fair, reasonable and uniform a manner as practicable;

B. a displaced person who makes proper application for a payment authorized shall be paid promptly after a move or, in hardship cases, be paid in advance; and

C. any person aggrieved by a determination as to eligibility for relocation payments or the amount of payment under that act may have his application reviewed at a formal hearing before the head of the displacing agency or a hearing officer designated by the head of the displacing agency.

History: 1953 Comp., § 22-9A-14, enacted by Laws 1972, ch. 41, § 14; 1989, ch. 121, § 13.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, inserted "displacing" in the undesignated introductory paragraph; inserted "a" in Subsection A; and in Subsection C substituted "that act" for "this act", and twice substituted "displacing" for "acquiring".

42-3-14. Administrative hearings; court review.

A. Any persons aggrieved by a determination as to eligibility for relocation payments or the amount of payment received under the Relocation Assistance Act [this article] shall have the right to a hearing before the displacing agency or before a hearing officer designated by the displacing agency.

B. After the hearing, any person aggrieved or affected by a final administrative determination concerning eligibility for relocation payments or the amount of the payment under the Relocation Assistance Act may have the determination reviewed by the district court in conformance with the rules of civil procedure. All such appeals shall be made:

(1) upon the record of the hearing and shall not be de novo; and

(2) by filing a notice of appeal in the district court within thirty days of the date of mailing or delivery of the written decision and order of the displacing agency to the person, and if not so taken, the decision and order are conclusive.

C. Upon appeal, the court shall set aside a decision and order of the displacing agency only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence; or

(3) otherwise not in accordance with law.

History: 1953 Comp., § 22-9A-15, enacted by Laws 1972, ch. 41, § 15; 1989, ch. 121, § 14.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, inserted "displacing" preceding "agency" throughout the section; made minor stylistic changes in the introductory paragraph of Subsection B; and substituted "by filing a notice of appeal in the district court within thirty days of the date of mailing" for "within thirty days of the day of the mailing" in Subsection B(2).

42-3-15. Contingent authority of act.

The provisions of the Relocation Assistance Act [this article] are effective so long as the congress of the United States authorizes and appropriates money for the payments and services set forth in Section 211 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 for federal aid programs, that act providing for federal reimbursement of the payments and services arising out of relocation assistance as a part of the cost of construction of a project under any federal aid program.

History: 1953 Comp., § 22-9A-16, enacted by Laws 1972, ch. 41, § 16; 1989, ch. 121, § 15.

ANNOTATIONS

The 1989 amendment, effective March 30, 1989, substituted "that act" for "said act" near the middle of the section.

Compiler's note. - Section 211 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 appears as 42 U.S.C. § 4631.

ARTICLE 4
EJECTMENT AND RECOVERY OF REAL PROPERTY

42-4-1. [When ejectment maintainable.]

The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises.

History: C.L. 1897, § 2685 (250), added by Laws 1907, ch. 107, § 1 (250); Code 1915, § 4360; C.S. 1929, § 105-1801; 1941 Comp., § 25-801; 1953 Comp., § 22-8-1.

ANNOTATIONS

Cross-references. - For forcible entry and detainer suits in district courts, see 35-10-1 NMSA 1978.

For action of ejectment against persons claiming community land grants improperly, see 49-2-14 NMSA 1978.

Landlord's right to possession of premises core of action. - The very foundation of the right to maintain an action of ejectment, both at the common law and under the territorial statute, is the landlord's right to the possession of the premises. Osborne v. United States, 3 N.M. (Gild.) 337, 5 P. 465 (1894)(decided under former law).

In ejectment, the parties' rights to possession are primarily in issue. Pacheco v. Martinez, 97 N.M. 37, 636 P.2d 308 (Ct. App. 1981).

Right to possession at time of filing complaint essential. - A right to possession of the premises at the time of filing the complaint is essential to maintaining ejectment both at common law and under the statutory law of New Mexico. Kerr-McGee Corp. v. Bokum Corp., 453 F.2d 1067 (10th Cir. 1972).

For adverse possessor maintaining ejectment action. - See Quintana v. Montoya, 64 N.M. 464, 330 P.2d 549 (1958).

Determination of better title between parties. - 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).

Remedy for breach of covenant not in ejectment. - In absence of an express forfeiture provision in a lease, the lessor's remedy for breach of covenants, express or implied, is an action for damages or a suit in equity for cancellation, and not an action at law for ejectment. Kerr-McGee Corp. v. Bokum Corp., 453 F.2d 1067 (10th Cir. 1972).

Joinder of causes of action. - Both legal and equitable remedies are administered by a single court as two complementary departments of jurisprudence so that there is no error by a joinder of the causes of action. Therefore, plaintiff has the right to bring a suit in ejectment and to request a prayer for relief and defendant can counterclaim in a suit to quiet title. Martinez v. Mundy, 61 N.M. 87, 295 P.2d 209 (1956), overruled on other grounds Evans Fin. Corp. v. Strasser, 99 N.M. 788, 664 P.2d 986 (1983).

Burden of proof. - In action of ejectment, plaintiff must recover on the strength of his own title, and where the grant to him contains an exception or reservation, he must show that the land in controversy was not reserved. Maxwell Land Grant Co. v. Dawson, 7 N.M. 133, 34 P. 191 (1893), rev'd on other grounds, 151 U.S. 586, 14 S. Ct. 458, 38 L. Ed. 279 (1894).

Jury not restricted to technical definition in boundary dispute. - Where in an action in ejectment the boundaries were in dispute and the term "las lomas," the hills, was used in the deed to designate the termination of the property, it was error for the court to limit the jury to a technical definition and to exclude from their consideration parol evidence of local distinctions between "altidos," little hills, "matoral," sand hills around bushes, "lomitas," groups of hills, and "las lomas" or hills of considerable height, since "las lomas" constituted a latent ambiguity and was subject to explanation by parol. Gentile v. Crossan, 7 N.M. 589, 38 P. 247 (1894)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For survey, "The Uniform Owner-Resident Relations Act," see 6 N.M. L. Rev. 293 (1976).

For article, "Survey of New Mexico Law, 1982-83: Property Law," see 14 N.M.L. Rev. 189 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 1 to 3, 63, 88; 65 Am. Jur. 2d Quick Title § 30.

Taxes, right of owner who has in fact paid taxes in question to maintain ejectment against purchaser at tax sale, 26 A.L.R. 631.

Railroad right-of-way, ejectment as remedy for interference with, 47 A.L.R. 563.

Laches as affecting right of one whose property is taken for public use to maintain ejectment, 58 A.L.R. 684.

Mortgage foreclosure proceedings which are imperfect or irregular, ejectment by, or against, purchaser under, 73 A.L.R. 640.

Vendor in contract for sale or exchange of real property, right of, to bring suit for forfeiture or to recover possession without first giving notice or making demand for possession, 94 A.L.R. 1250.

Jurisdiction of justice of the peace (or similar court) of ejectment action, 115 A.L.R. 514.

Right to use force to obtain possession of real property to which one is entitled, 141 A.L.R. 250.

Remedy of tenant against stranger wrongfully interfering with his possession, 12 A.L.R.2d 1192.

Measure and items of recovery for improvements mistakenly placed or made on land of another, 24 A.L.R.2d 11.

Judgment involving real property against one spouse as binding against other spouse not a party to the proceeding, 58 A.L.R.2d 701.

Rule that plaintiff in ejectment need not trace title back of common source, 5 A.L.R.3d 375.

28 C.J.S. Ejectment §§ 2 to 6, 151.

42-4-2. [Wrongful ouster and detention of realty or mining claim.]

The action of ejectment will lie for the recovery of the possession of a mining claim, as well also of any real estate, where the party suing has been wrongfully ousted from the possession thereof, and the possession wrongfully detained.

History: C.L. 1897, § 2685 (251), added by Laws 1907, ch. 107, § 1 (251); Code 1915, § 4361; C.S. 1929, § 105-1802; 1941 Comp., § 25-802; 1953 Comp., § 22-8-2.

ANNOTATIONS

Court considers strength of possessory title of parties. - In this sort of possessory action, it is the duty of the court to consider the strength of the possessory title of each of the adversary parties. Winslow v. Burns, 47 N.M. 29, 132 P.2d 1048 (1943).

Priority of rights between locators. - As between the prior locator in possession and a subsequent locator, the evidence of the prior locator will be viewed in the most favorable light it will reasonably justify. Winslow v. Burns, 47 N.M. 29, 132 P.2d 1048 (1943).

Trespasser in possession may maintain action against second trespasser. - One in possession of the surface of a mining claim, even though a trespasser, may maintain ejectment against one who trespasses underneath the surface. Lincoln-Lucky & Lee Mining Co. v. Hendry, 9 N.M. 149, 50 P. 330 (1897)(decided under former law).

Recovery of government land by plaintiff without title. - Plaintiff with prior actual possession without title of government land may recover its possession by ejectment on a proper demand for restoration of such possession against a subsequent mere intruder, for the statute is broad enough to include possession wholly disconnected from the legal or even colorable title, and while such actual possession although continued indefinitely would not ripen into a legal title or constitute an equity against the United States, it will be protected against such wrongdoer. New Mexico, R.G. & Pac. Ry. v. Crouch, 4 N.M. (Gild.) 293, 13 P. 201 (1887)(decided under former law).

When distinction between ouster upon and beneath surface. - There can be no distinction between an ouster upon the surface and an ouster beneath the surface in an action of ejectment on a mining claim, except in cases arising under the mining laws by

virtue of this statute, for the rule is the same as to all character of lands. Lincoln-Lucky & Lee Mining Co. v. Hendry, 9 N.M. 149, 50 P. 330 (1897)(decided under former law).

Burden of proof. - In action in ejectment for possession of a mine claimed by plaintiff under United States patent, where plaintiff made prima facie case, and defendant undertook to establish fact that by virtue of certain act of congress, which contemplated certain state of facts and a strict compliance with the provisions and conditions of the same, they were given right to follow mineral vein or lode from or across side lines of claims, the burden of proof as to the existence of such state of facts, and the compliance with all the requirements, conditions and terms of the act, was upon defendant. Bell v. Skillicorn, 6 N.M. 399, 28 P. 768 (1892)(decided under former law).

Model used during trial, allowed in jury room. - Where miners who had worked on the property in question made a model, which they admitted was not a perfect facsimile of the mine, and the court refused to admit it as such, but did admit it for the purpose of explaining the testimony of witnesses, and several used it for both plaintiff and defendant, it was proper to permit the jury to take it to the jury room at their request. Illinois Silver Mining & Milling Co. v. Raff, 7 N.M. 336, 34 P. 544 (1893)(decided under former law).

Instructions to jury. - In action in ejectment for possession of a mine claimed by plaintiff under United States patent, which was in evidence, court properly instructed jury that if plaintiff's vein was within side lines formed by artificial monuments placed around the same at time of survey for patent, it would make no difference whether said monuments and survey were properly connected with the surveys of the public lands, but that the locations of said monuments would determine and control the location. Bell v. Skillicorn, 6 N.M. 399, 28 P. 768 (1892)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 10, 46 to 56; 54 Am. Jur. 2d Mines § 230.

Right of owner of interest in mineral in suit to maintain ejectment, 35 A.L.R. 234.

28 C.J.S. Ejectment § 6; 58 C.J.S. Mines § 139.

42-4-3. [Principles apply to equity suits.]

The principles of the provisions of this article shall apply and extend to all suits in equity when the object of the complaint or answer is for the recovery of lands and tenements.

History: C.L. 1897, § 2685 (265), added by Laws 1907, ch. 107, § 1 (265); Code 1915, § 4378; C.S. 1929, § 105-1819; 1941 Comp., § 25-803; 1953 Comp., § 22-8-3.

ANNOTATIONS

Meaning of "this article". - The words "this article" appeared in the original act. As used there, they referred to art. 14 of Laws 1907, ch. 107, compiled as 42-4-1 to 42-4-16 NMSA 1978. This section is part of art. 18 of ch. 88 of the 1915 Code, which is compiled as 42-4-1 to 42-4-19 NMSA 1978.

Joinder of causes of action. - Where appellee's amended complaint first alleged that she was the owner and entitled to possession of the land involved, then alleged that appellants constructed two houses and utility lines in such a manner as to encroach on her property to her damage, and that appellants should be required to remove the encroachments, appellee's amended complaint is that type of alternative pleading which is permissible under Rule 8(a)(2), N.M.R. Civ. P. As both legal and equitable remedies are administered by a single court, there was no error by a joinder of the causes of action. Heaton v. Miller, 74 N.M. 148, 391 P.2d 653 (1964).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 1, 45, 77 to 79, 114.

28 C.J.S. Ejectment § 62.

42-4-4. [Parties to action.]

The action shall be prosecuted in the real names of the parties, and shall be brought against the tenant in possession, or against the person under whom such tenant holds or claims possession. Any person claiming such premises may, on motion, be made a defendant.

History: C.L. 1897, § 2685 (252), added by Laws 1907, ch. 107, § 1 (252); Code 1915, § 4362; C.S. 1929, § 105-1803; 1941 Comp., § 25-804; 1953 Comp., § 22-8-4.

ANNOTATIONS

Cross-references. - For action prosecuted by real party in interest, see Rule 1-017 A SCRA 1986.

Determination of necessary party. - Any person having an interest adverse to plaintiff, or claiming title or right of possession, may be made a defendant, but such a person may, or may not, be a necessary party, the rule being subject to the principle that only persons in actual occupation are necessary parties. Latin Am. Council of Christian Churches v. Leal, 57 N.M. 502, 260 P.2d 697 (1953).

One in actual occupation, necessary and proper defendant. - Generally, in an ejectment action the person in actual occupation or possession is a necessary and proper defendant, and no other person is a necessary or proper party defendant. Latin Am. Council of Christian Churches v. Leal, 57 N.M. 502, 260 P.2d 697 (1953).

Action of ejectment against cotenant. - Ejectment lies against a cotenant, or a grantee of a cotenant, attempting to hold adversely to his cotenant. Prior possession, under such circumstances, is sufficient to maintain ejectment. Lasswell v. Kitt, 11 N.M. 459, 70 P. 561 (1902); Lockhart v. Leeds, 10 N.M. 568, 63 P. 48 (1900), rev'd on other grounds, 195 U.S. 427, 25 S. Ct. 76, 49 L. Ed. 263 (1904).

Tenant in common may sue separately in ejectment and may recover possession of the entire estate in subordination to the rights of his cotenants, if the defendant shows no title. de De Bergere v. Chaves, 14 N.M. 352, 93 P. 762 (1908), aff'd, 231 U.S. 482, 34 S. Ct. 144, 58 L. Ed. 325 (1913).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 2, 63 to 70, 87, 111, 115, 124.

28 C.J.S. §§ 50 to 54, 72, 100, 134.

42-4-5. [Contents of complaint.]

It shall be sufficient for the plaintiff to declare in his complaint that on some day, named therein, he was entitled to the possession of the premises, describing them; and that the defendant, on a day named in the complaint, afterwards entered into such premises, and unlawfully withheld from the plaintiff the possession thereof, to his damage for any sum he may name.

History: C.L. 1897, § 2685 (253), added by Laws 1907, ch. 107, § 1 (253); Code 1915, § 4363; C.S. 1929, § 105-1804; 1941 Comp., § 25-805; 1953 Comp., § 22-8-5.

ANNOTATIONS

Cross-references. - For real property description in pleading, see 47-1-46 NMSA 1978.

Failure to aver right to possession renders complaint defective. - Complaint in ejectment, failing to aver that plaintiff is entitled to the possession of the premises in question, is fatally defective. Osborne v. United States, 3 N.M. (Gild.) 337, 5 P. 465 (1885)(decided under former law).

It is not sufficient to allege that defendant unjustly withholds premises from the plaintiff. Osborne v. United States, 3 N.M. (Gild.) 337, 5 P. 465 (1885)(decided under former law).

Amendments to complaint. - Where, in complaint in ejectment, plaintiff alleges ownership in herself and, though not required by statute to do so, alleges her claim of title from defendant to plaintiff's immediate predecessor in title, plaintiff can show complete title by proof, absent objection thereto, and the complaint is considered as amended to include the omitted and necessary allegation. Herington v. Herrera, 44 N.M. 374, 102 P.2d 896 (1940).

In ejectment, plaintiff is bound by chain of title pleaded by her. Herington v. Herrera, 44 N.M. 374, 102 P.2d 896 (1940).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 48, 79 to 81.

Instructions in ejectment on rule that plaintiff must recover on strength of own title, 159 A.L.R. 646.

Rule that plaintiff in real action may recover on proof of better title from common source as applicable where plaintiff's evidence shows that the common-source title is bad, 5 A.L.R.3d 375.

28 C.J.S. Ejectment §§ 55, 61 to 65, 72.

42-4-6. [Defendant's pleadings; plaintiff's reply.]

The defendant shall plead to the complaint, as required by Sections 4106 and 4110; and the plaintiff may reply or demur.

History: C.L. 1897, § 2685 (254), added by Laws 1907, ch. 107, § 1 (254); Code 1915, § 4364; C.S. 1929, § 105-1805; 1941 Comp., § 25-806; 1953 Comp., § 22-8-6.

ANNOTATIONS

Compiler's note. - Sections 4106 and 4110 refer to the 1915 Code, §§ 4106, 4110, which are superseded by Rules 1-007 A and 1-012 B SCRA 1986.

Demurrers abolished. - Rule 1-007 C SCRA 1986 abolishes the use of demurrers.

What parties may show in their pleadings. - In ejectment, the plaintiff may show any fact which establishes his right to possession, and the defendant may show any fact to establish that the plaintiff is not entitled to possession, under the plea of not guilty. Deeney v. Mineral Creek Milling Co., 11 N.M. 279, 67 P. 724 (1902)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 41, 83, 85, 86, 93, 95.

Estoppel of tenant never in possession under lease to dispute landlord's title in action of ejectment, 98 A.L.R. 546.

Estoppel or waiver, necessity of pleading in ejectment action, 120 A.L.R. 92.

Defense of adverse possession or statute of limitations as available under general denial or plea of general issue, 39 A.L.R.2d 1426.

28 C.J.S. Ejectment §§ 34 to 47, 69, 77, 95.

42-4-7. [Ultimate facts authorizing recovery.]

It shall be sufficient to entitle the plaintiff to recover, to show that at the time of the commencement of the action the defendant was in possession of the premises claimed, and that the plaintiff had a right to the possession thereof.

History: C.L. 1897, § 2685 (255), added by Laws 1907, ch. 107, § 1 (255); Code 1915, § 4365; C.S. 1929, § 105-1806; 1941 Comp., § 25-807; 1953 Comp., § 22-8-7.

ANNOTATIONS

Right of possession deemed foundation of ejectment action. - The very foundation of the right to maintain an action of ejectment, both at common law and under the statutory law of New Mexico, is the plaintiff 's right to the possession of the premises. Burke v. Permian Ford-Lincoln-Mercury, 95 N.M. 314, 621 P.2d 1119 (1981).

In ejectment, the parties' rights to possession are primarily in issue. Pacheco v. Martinez, 97 N.M. 37, 636 P.2d 308 (Ct. App. 1981).

Right to possession at time of filing complaint essential. - Plaintiff's failure to give his month-to-month tenant valid 30-days' notice meant that plaintiff's complaint in ejectment was invalid, because he did not have the right to possession; his action in ejectment was, therefore, premature. Dickens v. Hall, 104 N.M. 173, 718 P.2d 683 (1986).

Defective deed alone will not support summary determination. - Where plaintiffs in ejectment action have shown that the deed upon which defendants' title is asserted is fatally defective, this alone will not support a summary determination of the cause where there are indications external to the deed which might support defendants' position. Jemez Properties, Inc. v. Lucero, 94 N.M. 181, 608 P.2d 157 (Ct. App. 1979), cert. denied, 94 N.M. 628, 614 P.2d 545 (1980).

Effect of conflicting calls in deed, in boundary line dispute. - In an action instituted by appellee who filed a complaint in the nature of ejectment in a boundary line dispute, when there are conflicting calls in a deed - one for distance, the other for an adjoining tract of a named person - the latter prevails only if the person named actually owns the adjoining tract. Olivas v. Garcia, 64 N.M. 419, 329 P.2d 435 (1958).

No directed verdict where conflict in evidence as to possession. - Where neither party to an action in ejectment shows legal title in himself, and the prior possession of the plaintiff and those through whom he claims as a matter upon which there is a conflict in the evidence, the court cannot properly direct a verdict, but the case should be submitted to the jury. Romero v. Herrera, 27 N.M. 559, 203 P. 243 (1921).

Hold-over tenant holds on same terms as in original lease. - A tenant holding over after expiration of a lease without the landlord's assent holds on the same terms as those of the original lease, including all covenants thereof, unless made inapplicable by changed conditions. Burke v. Permian Ford-Lincoln-Mercury, 95 N.M. 314, 621 P.2d 1119 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 43, 47, 48.

Mesne profits, right to, as compensation for crops grown by one wrongfully in possession, 39 A.L.R. 962, 57 A.L.R. 584.

Remainderman, right as against, to allowance under statute for improvements made during continuance of life estate by one in possession under mistaken claim of title to the fee, 89 A.L.R. 635.

Instructions in ejectment on rule that plaintiff must recover on strength of own title, 159 A.L.R. 646.

Rule that plaintiff in real action may recover on proof of better title from common source as applicable where plaintiff evidence shows that the common-source title is bad, 5 A.L.R.3d 375.

28 C.J.S. Ejectment §§ 16, 18, 24, 25, 77, 94.

42-4-8. [Action between cotenants; ouster to be shown.]

In any action brought by a joint tenant, or tenant in common, against a cotenant, he shall be required to prove an actual ouster or act equivalent thereto.

History: C.L. 1897, § 2685 (256), added by Laws 1907, ch. 107, § 1 (256); Code 1915, § 4366; C.S. 1929, § 105-1807; 1941 Comp., § 25-808; 1953 Comp., § 22-8-8.

ANNOTATIONS

Ouster by executing warranty deed. - The act of a part of the tenants in common in executing a deed with covenants of warranty, purporting to convey the entire estate, is an ouster of the other cotenants. Baker v. de Armijo, 17 N.M. 383, 128 P. 73 (1912); 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).

Constructive ouster by divorced spouse. - If one of the parties in a divorce case remains in possession of the community residence between the date of the divorce and the date of the final judgment dividing the community assets, then there may be a form of constructive ouster, exclusion or an equivalent act which is created as to the right of common enjoyment by the divorced spouse not in possession. This exclusion may render the divorced spouse in possession of the community residence liable to the

divorced spouse not in possession for the use and occupation of the residence between the date of the divorce and the date of the final judgment. Hertz v. Hertz, 99 N.M. 320, 657 P.2d 1169 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment § 48.

42-4-9. [Rents and profits recoverable as damages.]

If the plaintiff prevail, he shall recover for damages the value of the rents and profits of such premises to the time of the verdict or the expiration of the plaintiff's title, under these limitations:

A. if the defendant had knowledge of the plaintiff's claim or title, then for the whole time he had such knowledge;

B. if he had no such knowledge, then from the commencement of the action.

History: C.L. 1897, § 2685 (257), added by Laws 1907, ch. 107, § 1 (257); Code 1915, § 4367; C.S. 1929, § 105-1808; 1941 Comp., § 25-809; 1953 Comp., § 22-8-9.

ANNOTATIONS

Accounting by tenant in common for improvements. - A tenant in common will not be allowed to recover against his cotenant for improvements erected on the common property by his predecessor in title, without accounting to his cotenant for the rents and profits received by such predecessor in title. Neher v. Armijo, 11 N.M. 67, 66 P. 517 (1901), overruled on other grounds De Bergere v. Chaves, 14 N.M. 352, 93 P. 762 (1908).

Effect of judgment of recovery during pendency of action. - A judgment of recovery in ejectment for possession and rents and profits, during the pendency of the ejectment action, is not a bar to a further suit for rents and profits covering a period anterior to that covered by the former recovery. Neher v. Armijo, 11 N.M. 67, 66 P. 517 (1901), overruled on other grounds De Bergere v. Chaves, 14 N.M. 352, 93 P. 762 (1908).

Liability for constructive ouster of divorced spouse. - If one of the parties in a divorce case remains in possession of the community residence between the date of the divorce and the date of the final judgment dividing the community assets, then there may be a form of constructive ouster, exclusion or an equivalent act which is created as to the right of common enjoyment by the divorced spouse not in possession. This exclusion may render the divorced spouse in possession of the community residence liable to the divorced spouse not in possession for the use and occupation of the residence between the date of the divorce and the date of the final judgment. Hertz v. Hertz, 99 N.M. 320, 657 P.2d 1169 (1983).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 54 Am. Jur. 2d Mistake § 19.

28 C.J.S. Ejectment § 151.

42-4-10. [Title expiring pendente lite; judgment.]

If the plaintiff's title expire after the action is brought, but before its determination, the verdict and judgment shall be for damages and costs only.

History: C.L. 1897, § 2685 (258), added by Laws 1907, ch. 107, § 1 (258); Code 1915, § 4368; C.S. 1929, § 105-1809; 1941 Comp., § 25-810; 1953 Comp., § 22-8-10.

42-4-11. [Judgment for plaintiff.]

If the plaintiff prevail, the judgment shall be for the recovery of the possession, and for the damages and costs.

History: C.L. 1897, § 2685 (259), added by Laws 1907, ch. 107, § 1 (259); Code 1915, § 4369; C.S. 1929, § 105-1810; 1941 Comp., § 25-811; 1953 Comp., § 22-8-11.

ANNOTATIONS

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

42-4-12. [Writ of possession.]

Upon judgment for the recovery of possession, a writ of possession shall be issued, and the sheriff shall deliver to the plaintiff the possession of the premises, and also collect the damages and costs, as on execution in other cases.

History: C.L. 1897, § 2685 (260), added by Laws 1907, ch. 107, § 1 (260); Code 1915, § 4370; C.S. 1929, § 105-1811; 1941 Comp., § 25-812; 1953 Comp., § 22-8-12.

ANNOTATIONS

Effect of defendant's re-entry after plaintiff recovers in ejectment. - Where, after the plaintiff has recovered in ejectment and been put in possession, the defendant re-enters the premises, expels the plaintiff and destroys his crop, a bill will lie to restore the plaintiff to possession and to enjoin the defendant from further molesting him. Romero v. Munos, 1 N.M. 314 (1859) (decided under former law).

Law reviews. - For article, "Survey of New Mexico Law, 1979-80: Civil Procedure," see 11 N.M.L. Rev. 53 (1981).

42-4-13. [Execution; judgment for damages and costs.]

If the judgment be for damages and costs, an execution shall issue as in a personal action.

History: C.L. 1897, § 2685 (261), added by Laws 1907, ch. 107, § 1 (261); Code 1915, § 4371; C.S. 1929, § 105-1812; 1941 Comp., § 25-813; 1953 Comp., § 22-8-13.

ANNOTATIONS

Cross-references. - For executions, see 39-4-1 NMSA 1978 et seq.

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Ejectment §§ 77, 115, 143, 149, 170.

42-4-14. [Improvements and mesne profits; time; claims; notices.]

In all actions of ejectment, when the defendant or tenant in possession in such suit shall have title of the premises in dispute either by grant from the government of Spain, Mexico or the United States, deed of conveyance founded on a grant or entry for the same, tax deed or other color of title, such defendant or defendants may file at the time of the filing of the pleas in said cause a notice to the plaintiff, that on the trial of said cause he or they will prove what improvement he or they may have made on the said lands in dispute and the value thereof. After which notice being filed, the said plaintiff may file a notice within twenty days thereafter, to the said defendant or defendants or tenant in possession, that in like manner he or they will prove the amount of the mesne profits of the said premises: provided, that no improvements shall be taken into valuation and allowed for, that shall have been made after the execution of the original summons in such suit or after the plaintiff, his agent or attorney, shall have served said defendant or tenant in possession with a written notice that he or they claim title to the land, specifying in said notice the nature of the claim; nor shall any mesne profits be valued and recovered except such as may have accrued after the commencement of the suit or notice given as aforesaid.

History: C.L. 1897, § 2685 (262), added by Laws 1907, ch. 107, § 1 (262); 1909, ch. 116, § 1; Code 1915, § 4372; C.S. 1929, § 105-1813; 1941 Comp., § 25-814; 1953 Comp., § 22-8-14.

ANNOTATIONS

Compiler's note. - The compilers of the 1915 Code deleted the word "Hereafter" from the beginning of the section and deleted the phrase "which are now pending or which may hereafter be brought" following "ejectment."

Legislative intent. - The legislature intended that the true owner of a tract of land should not profit or be unjustly enriched by improvements made thereon by one who in good faith had been occupying and improving the land. Village of Cloudcroft v. Pittman, 63 N.M. 168, 315 P.2d 517 (1957).

Statutes on improvements procedural in form, but restitutory in effect. - This section to 42-4-18 NMSA 1978 while procedural in form, is substantive and restitutory in nature and effect. Madrid v. Spears, 250 F.2d 51 (10th Cir. 1957).

Section inapplicable where appellee not profiting. - Where appellants had no color or title, and appellee could in no sense be considered to be profiting or enjoying unjust enrichment, this section was inapplicable. Heaton v. Miller, 74 N.M. 148, 391 P.2d 653 (1964).

Effect of cost of improvements exceeding enhanced value. - In most cases, the cost of the improvements exceeds the enhanced value of the land, and the court is concerned lest the improver recoup more than the owner is unjustly enriched. But, cost is usually a factor in determining value, and in some cases is a limitation upon the improver's recovery, as where enhancement exceeds cost. Madrid v. Spears, 250 F.2d 51 (10th Cir. 1957).

Test of recovery. - The test of recovery is not how much the owner is enriched by the improvements, but how much he is unjustly enriched. Madrid v. Spears, 250 F.2d 51 (10th Cir. 1957).

Where enhancement exceeds cost, unjust enrichment equals cost. Madrid v. Spears, 250 F.2d 51 (10th Cir. 1957).

Squatters unable to show improvements. - Under Laws 1858 (Feb. 3, 1858); Comp. Laws 1865, ch. 33, § 13; 2270, 1884 C.L.; 3175, 1897 C.L., originally passed in Spanish, a defendant pleading not guilty and filing a notice of claim for improvements could not prove such improvements where he was a squatter and had no claim of any kind growing out of a grant from any of the three governments named, or by means of any conveyances from them, or from any authority traceable to them. Maxwell Land Grant Co. v. Santistevan, 7 N.M. 1, 32 P. 44 (1893)(decided under former law).

Raising issue of improvements. - In order to be entitled to raise the issue of improvements in an action in ejectment, defendant must have entered under some claim of title. Sandoval v. Perez, 26 N.M. 280, 191 P. 467 (1920).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 148, 150 to 159.

Measure and items of recovery for improvements mistakenly placed or made on land of another, 24 A.L.R.2d 11.

Compensation, upon eviction, for improvements made or placed on premises of another by mistake, 57 A.L.R.2d 263.

Measure and amount of damages recoverable under supersedeas bond in action involving recovery or possession of real estate, 9 A.L.R.3d 330.

28 C.J.S. Ejectment §§ 18, 115, 126, 130, 138, 139, 144, 152, 154, 160.

42-4-15. [Improvements and mesne profits; verdict; set-off; judgment; payment by plaintiff before obtaining writ of possession.]

When the jury shall find a verdict for the plaintiff in such action, they shall also find the value of the improvements in favor of the defendant or tenant in possession, proved in the manner aforesaid, and further shall find the amount of the mesne profits proved to have accrued as aforesaid, as also the value of the land in its natural state without the improvements, and if the value of the improvements should exceed the amount of the mesne profits, the balance or overplus thereof shall be found by the jury in favor of the defendant or tenant in possession, and such plaintiff or plaintiffs shall not have a writ of possession awarded or issued against the defendant or defendants until he or they shall have paid to the said defendant or defendants, their agent or attorney, the full amount of balance or overplus, which the value of the improvements is found to exceed the mesne profits as aforesaid. And if the mesne profits as aforesaid shall exceed the value of the improvements as aforesaid, the jury aforesaid shall find the amount of such balance or overplus against the defendant or tenant in possession and judgment shall be entered up against said defendant or tenant in possession for such balance or overplus so found against them.

History: C.L. 1897, § 2685 (263), added by Laws 1907, ch. 107, § 1 (263); Code 1915, § 4373; C.S. 1929, § 105-1814; 1941 Comp., § 25-815; 1953 Comp., § 22-8-15.

ANNOTATIONS

Plaintiff must raise issue of value of land in its natural state. Coleman v. Bell, 4 N.M. (Gild.) 21, 12 P. 657 (1887).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 76, 119 to 121, 123, 124, 148, 159.

Compensation, upon eviction, for improvements made or placed on premises of another by mistake, 57 A.L.R.2d 263.

28 C.J.S. Ejectment §§ 109, 111, 115, 126, 138, 144, 152, 154, 162.

42-4-16. [Improvements exceeding mesne profits; election by plaintiff; tender of deed; payment to plaintiff.]

If upon the rendition of any judgment in any such suit, the value of the improvements put upon the land by any defendant or tenant in possession as aforesaid shall exceed the net mesne profits of said land, the plaintiff or plaintiffs shall at the term of court at which said judgment is rendered, elect whether he will take his judgment and pay for the improvements so assessed against him or take pay from the defendant or defendants for the net profits and the value of the land in its natural state without the improvements, and if he elect to take pay for the net profits and the value of the land without the improvements as aforesaid, the said plaintiff or plaintiffs shall tender a warranty deed to the defendant or defendants for the said lands, upon the payment of its value as found by the jury in its natural state without the improvements, which payment shall be made to the plaintiff or plaintiffs in such reasonable term [terms] as the court may allow.

History: C.L. 1897, § 2685 (264), added by Laws 1907, ch. 107, § 1 (264); Code 1915, § 4374; C.S. 1929, § 105-1815; 1941 Comp., § 25-816; 1953 Comp., § 22-8-16.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Ejectment §§ 139, 152, 154, 164.

42-4-17. [Remedy of person deprived of possession of improvements; time; value; lien.]

When any person or his assignors may have heretofore made, or may hereafter make any valuable improvements on any lands, and he or his assignors have been or may hereafter be deprived of the possession of said improvements in any manner whatever, he shall have the right, either in an action of ejectment which may have been brought against him for the possession, or by an appropriate action at any time thereafter within ten years, to have the value of his said improvements assessed in his favor, as of the date he was so deprived of the possession thereof, and the said value so assessed shall be a lien upon the said land and improvements, and all other lands of the person who so deprived him of the possession thereof situate in the same county, until paid; but no improvements shall be assessed which may or shall have been made after the service of summons in an action of ejectment on him in favor of the person against whom he seeks to have said value assessed for said improvements.

History: Laws 1878, ch. 6, § 3; C.L. 1884, § 2581; C.L. 1897, § 3755; Code 1915, § 4375; C.S. 1929, § 105-1816; 1941 Comp., § 25-817; 1953 Comp., § 22-8-17.

ANNOTATIONS

Compiler's note. - Insofar as this section affords relief to an improver who is deprived of possession by an ejectment suit, it may be superseded by 42-4-14 to 42-4-16 NMSA 1978.

Color of title to lands required to invoke section. - This section and 42-4-18 NMSA 1978 cannot be invoked by anyone who does not have color of title to the lands. Frank A. Hubbell Co. v. Curtis, 40 N.M. 234, 58 P.2d 1163 (1936); Sandoval v. Perez, 26 N.M. 280, 191 P.2d 467 (1920).

Color of title is required in order for the dispossessed to come under the operation of this section. Cano v. Lovato, 105 N.M. 522, 734 P.2d 762 (Ct. App. 1986).

Section supplemental to 42-4-18 NMSA 1978. - This section and 42-4-18 NMSA 1978 are supplemental to each other and do not afford distinct and different remedies. Speartex Grain Co. v. West, 98 N.M. 91, 645 P.2d 447 (Ct. App. 1982).

Section was inapplicable to improvements made prior to enactment. Newton v. Thornton, 3 N.M. (Gild.) 287, 5 P. 257 (1885).

For inapplicability of section to state lands. - See Frank A. Hubbell Co. v. Curtis, 40 N.M. 234, 58 P.2d 1163 (1936).

Improvements absolute property of landowner at time of enactment. - At the time of the enactment of this section, improvements were absolutely the property of the owner of the land, and no legislature could take or destroy private property for private use, by statutory enactments, and so far as it attempted anything of that kind, it was clearly void. Newton v. Thornton, 3 N.M. (Gild.) 287, 5 P. 257 (1885).

Effect of unconfirmed Mexican land grant on lien. - A defendant claiming perfect title under a grant from Mexico, who has not had it confirmed as a United States title, cannot have a lien for improvements made on the land where plaintiff holds a United States patent, for such a lien would interfere with the disposition of public lands, and the power of congress to dispose of the public domain cannot be interfered with nor its exercise embarrassed by any state or territorial legislature, so he cannot prove the Mexican title. Chavez v. Chavez de Sanchez, 7 N.M. 58, 32 P. 137 (1893).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 43, 82, 98.

Taxes or public improvement assessments, right of purchaser at invalid sale for, to reimbursement from owner in action of ejectment, and provisions of judgment as to relief, 86 A.L.R. 1222, 28 A.L.R.3d 449.

28 C.J.S. Ejectment § 160.

42-4-18. [Possession of improvements taken; liability for value; abandonment excepted; specific and general lien.]

When any person claiming possession may have made, or may hereafter make, any valuable improvements on any land in this state, and any other person shall have taken, or may hereafter, in any manner, take from him or his assignor or assigns the possession of such improvements, or any part thereof, the person so taking possession shall be liable for the full value of such improvements so taken possession of, to the person who made the same, or to whom they may have been assigned: provided, the said possession and improvements shall not have been abandoned by the said person making the same, or those holding or claiming through him, for a greater period than six months immediately prior to so taking the possession thereof, and the value of said improvements shall be a lien upon the said improvements and the land in which they are situate until paid; as also upon all other real estate of the person so taking possession thereof situate in the same county.

History: Laws 1878, ch. 6, § 4; C.L. 1884, § 2582; C.L. 1897, § 3756; Code 1915, § 4376; C.S. 1929, § 105-1817; 1941 Comp., § 25-818; 1953 Comp., § 22-8-18.

ANNOTATIONS

Section supplemental to 42-4-17 NMSA 1978. - This section and 42-4-17 NMSA 1978 are supplemental to each other and do not afford distinct and different remedies. Speartex Grain Co. v. West, 98 N.M. 91, 645 P.2d 447 (Ct. App. 1982).

Color of title required to invoke section. - A lessee claiming to have made improvements must have color of title in order to utilize the lien provision of this section. Speartex Grain Co. v. West, 98 N.M. 91, 645 P.2d 447 (Ct. App. 1982).

For inapplicability of section to state lands. - See Frank A. Hubbell Co. v. Curtis, 40 N.M. 234, 58 P.2d 1163 (1936).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 43, 92.

42-4-19. [Sale of improvements.]

The possession of land and improvements, provided for in this article, may be sold, transferred and conveyed in the same manner as other real estate in this state; and the person so purchasing and receiving conveyance thereof shall have the same right and title and be subject to the same restrictions as the person who may take possession or make the improvements provided for in this article.

History: Laws 1878, ch. 6, § 5; C.L. 1884, § 2583; C.L. 1897, § 3757; Code 1915, § 4377; C.S. 1929, § 105-1818; 1941 Comp., § 25-819; 1953 Comp., § 22-8-19.

ANNOTATIONS

Meaning of "this article". - The compilers of the 1915 Code substituted the words "this article" for the words "this act," thereby presumably extending the reference to include

§§ 4360 to 4378 of the 1915 Code, the provisions of which are compiled as 42-4-1 to 42-4-19 NMSA 1978.

42-4-20. [Reversionary clause in deed; improvements; liens; waiver of claim.]

That any and all liens, encumbrances or money claims for improvements on lands, authorized or permitted in ejectment actions or equitable proceedings for the recovery of lands under reversionary provisions contained in deeds to reality [realty], whether heretofore or hereafter claimed, may be waived by instrument in writing executed either before or after the passage and approval of this act [this section]; provided, further, that in no event shall any such liens, encumbrances or claims be asserted by the grantee, his heirs or assigns, as against his grantor, his heirs or assigns, who becomes entitled to possession of such lands under the terms of the reversionary clauses contained in any such deed to realty.

History: Laws 1937, ch. 31, § 1; 1941 Comp., § 25-820; 1953 Comp., § 22-8-20.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Ejectment §§ 40, 41, 92.

42-4-21. [Mine or mining claim; contested application for patent; ejectment maintainable regardless of possession.]

That when an application is made for a patent to a mine or mining claim under the laws of the United States by any person, persons, company or corporation claiming to own or have an interest therein, and such application is contested by any other person, persons, company or corporation in the land office of the United States, such person, persons, company or corporation so contesting, may bring a suit of ejectment in the district court of the county in which the mine or mining claim is situated, for the recovery of the same, whether in or out of possession of such mine or claim, and the question as to who was in the possession of the mine or claim at the time when the application was made for patent, or when the suit was begun, shall not be considered by the court, except as it may be necessary in determining the interests of the respective claimants, and their right to the possession of said mine or claim.

History: Laws 1887, ch. 54, § 1; C.L. 1897, § 2290; Code 1915, § 3464; C.S. 1929, § 88-202; 1941 Comp., § 25-821; 1953 Comp., § 22-8-21.

ANNOTATIONS

Section modifies rules on ejectment under 30 U.S.C. § 30. - In suits on adverse claims under 30 U.S.C. § 30, the rules governing ordinary ejectment suits are modified by this section. Upton v. Santa Rita Mining Co., 14 N.M. 96, 89 P. 275 (1907).

When plaintiff's title denied under section. - In actions under this section, it is sufficient as a general rule to deny plaintiff's title, when evidence tending to show lack of title may be given. Chilton v. 85 Mining Co., 23 N.M. 451, 168 P. 1066 (1917).

Complaint which contains allegations of section sufficient. - A complaint containing the allegations provided for in this section is sufficient in an action in support of an adverse claim to a mining location, although in the absence of this statute more specific allegations would be required. Deeney v. Mineral Creek Milling Co., 11 N.M. 279, 67 P. 724 (1902).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Right of owner of interest in mineral in suit to maintain ejectment, 35 A.L.R. 234.

42-4-22. [Special verdict or findings; entry on mining land pending suit.]

The court, in an action for the recovery of a mine or mining claim where a patent is applied for, and the contest is pending in the land office of the United States, may, upon motion of either party to the suit, require the jury to return a special verdict, if tried by a jury; if not, then by a judge trying the same shall make a special finding as to the particular interest each party owns in the mine or claim in dispute, under and by virtue of the mining laws of the United States, which special verdict or finding shall be entered into the judgment and upon the record of the court trying the same: provided, however, there shall be no special verdict by the court or jury, except where the evidence shows both parties to the suit to have a bona fide interest in the mine or claim sued for: and, provided further, that no third person who may have entered upon such mining claim or any part thereof, for the purpose of locating or claiming the same before or during such litigation in the district court growing out of any contest in any United States land office in this state, shall acquire any interest either at law or in equity in the claim or any part thereof in dispute, and shall be deemed and declared a trespasser or trespassers, unless he or they have been, or may, during the pendency of such litigation in the district court resulting from such contest in the United States land office, by a proper application to the court, be made party or parties to such suit adverse to either of such litigants, or both, or shall have taken such legal steps to assert his or their claim in a court of competent jurisdiction within six months after the commencement of such contest in the United States land office.

History: Laws 1887, ch. 54, § 2; 1889, ch. 111, § 1; C.L. 1897, § 2291; Code 1915, § 3465; C.S. 1929, § 88-203; 1941 Comp., § 25-822; 1953 Comp., § 22-8-22.

ANNOTATIONS

Compiler's note. - The compilers of the 1915 Code substituted "if not, then by a judge" for "if not, then the judge."

Jury may render special verdicts to define respective rights of parties in the premises. Deeney v. Mineral Creek Milling Co., 11 N.M. 279, 67 P. 724 (1902).

Parties upon proper request are entitled to special findings upon questions relevant to the cause, but in the absence of such request, it is not error for the court to fail to require findings of the jury. Upton v. Santa Rita Mining Co., 14 N.M. 96, 89 P. 275 (1907).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Ejectment § 144.

42-4-23. [Working mine pending suit; waste.]

That nothing in the two preceding sections [42-4-21, 42-4-22 NMSA 1978] shall prohibit the working and development of a mine or mining claim by either party in interest who may be in possession of the mine or claim during the pendency of the suit, nor prohibit anyone from bringing an action for damages, or a suit in equity to prevent waste.

History: Laws 1887, ch. 54, § 3; C.L. 1897, § 2292; Code 1915, § 3466; C.S. 1929, § 88-204; 1941 Comp., § 25-823; 1953 Comp., § 22-8-23.

42-4-24. [Assessment work pending suit; retention of ore.]

Hereafter in any suit or action pending in any of the courts of this state, involving the right to the possession or title of any lode or placer mining claim located under the mining laws, and upon which it is necessary to do the annual assessment work to prevent the same from becoming forfeited and subject to relocation, the party or parties to any such suit out of possession, upon petition to the court in which suit or action is pending, showing that such annual assessment work has not been done on or before the first day of November in the year during which such work is required to be done, shall be entitled to an order as of course in such suit or action, permitting such party or parties to enter in and upon such mine or mining claims, with their agents and laborers, and to do and perform such annual assessment work to prevent the said mining claim or claims from becoming subject to relocation: provided, that in the doing of such work, no ore shall be removed from the boundaries of such mining claim.

History: Laws 1905, ch. 83, § 1; Code 1915, § 3455; C.S. 1929, § 88-111; 1941 Comp., § 25-824; 1953 Comp., § 22-8-24.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Ejectment §§ 57, 58, 145.

42-4-25. [Effect of performing assessment work pending suit.]

Upon the doing of any assessment work, as provided in Section 42-4-24 NMSA 1978, the said mining claim or claims shall not be subject to relocation for failure to do the annual assessment work, as against any of the parties to such suit or action.

History: Laws 1905, ch. 83, § 2; Code 1915, § 3456; C.S. 1929, § 88-112; 1941 Comp., § 25-825; 1953 Comp., § 22-8-25.

42-4-26. [Measurements and surveys of mine pending suit; authorization; expenses.]

In all actions at law, or suits in equity, in any of the district courts of this state, wherein the title or right of possession to any mining claim, or ores and minerals is in dispute, any party to such action or suit shall have the right to go upon or enter the workings of said mining claim for the purpose of measuring or surveying the same, either upon the surface or in the workings thereof, peaceably, and without molestation; the costs and expenses of such measurement or survey to be paid by the party for whose use and benefit the same was done.

History: Laws 1887, ch. 55, § 1; C.L. 1897, § 2293; Code 1915, § 3467; C.S. 1929, § 88-205; 1941 Comp., § 25-826; 1953 Comp., § 22-8-26.

ANNOTATIONS

Compiler's note. - The distinction between actions at law and suits in equity has been done away with by Rule 1-002 SCRA 1986, which provides for one form of action only.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 28 C.J.S. Ejectment § 127.

42-4-27. [Who may enter for measurements and surveys.]

The right to go upon and enter said mining claim shall be extended to the party applying therefor, as well as a surveyor and two chain carriers.

History: Laws 1887, ch. 55, § 2; C.L. 1897, § 2294; Code 1915, § 3468; C.S. 1929, § 88-206; 1941 Comp., § 25-827; 1953 Comp., § 22-8-27.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment § 45.

42-4-28. [Notice of desire to enter mine.]

Before any person may enter upon or go into the workings of such mine without the consent of the person or corporation in possession, he shall give not less than five days' notice in writing to such person in possession, or to his agent or manager, and if the

possession is held by a corporation, said notice shall be served upon the president, agent or manager of such corporation, or upon the foreman in charge of the mine, that at a certain date, specified in said notice, he desires to enter upon or go into the workings of said mine, as the case may be, for the purpose of surveying and taking a measurement of the same, in order that he may be able to present the facts on the trial.

History: Laws 1887, ch. 55, § 3; C.L. 1897, § 2295; Code 1915, § 3469; C.S. 1929, § 88-207; 1941 Comp., § 25-828; 1953 Comp., § 22-8-28.

42-4-29. [Refusing entry; court may exclude evidence, render judgment or assist entry; costs.]

If such person or corporation shall not permit any party in interest in such suit or action, to go upon or enter said mine, as contemplated in the preceding sections [42-4-26, 42-4-27, 42-4-28 NMSA 1978], after having been notified in the manner designated, the court may, upon proper showing, verified by affidavit, or otherwise, exclude all evidence offered on the trial by the party so refusing, or render judgment or decree in favor of the party giving such notice: provided, that the court may, in its discretion, make an order directing the sheriff to go upon the ground with the party applying for the measurement and survey of such mine, and place the person so applying in possession, for the purpose of measuring and surveying the same, in which case the court may direct the payment of costs as may be just and proper.

History: Laws 1887, ch. 55, § 4; C.L. 1897, § 2296; Code 1915, § 3470; C.S. 1929, § 88-208; 1941 Comp., § 25-829; 1953 Comp., § 22-8-29.

42-4-30. [Evidence of measures and surveys.]

The competency, relevancy and effect of such survey and measurement, as evidence, shall be governed by the ordinary rules of evidence in civil cases.

History: Laws 1887, ch. 55, § 5; C.L. 1897, § 2297; Code 1915, § 3471; C.S. 1929, § 88-209; 1941 Comp., § 25-830; 1953 Comp., § 22-8-30.

ANNOTATIONS

Cross-references. - For Rules of Evidence, see Judicial Pamphlet 11.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 25 Am. Jur. 2d Ejectment §§ 106, 122.

28 C.J.S. Ejectment §§ 59, 74, 79, 88, 91, 96, 112.

ARTICLE 5
PARTITION

42-5-1. [Complaint; prayer.]

When any lands, tenements or hereditaments shall be owned in joint tenancy, tenancy in common or coparcenary, whether the right or title be derived by donation, grant, purchase, devise or descent, it shall be lawful for any one or more persons interested, whether they be in possession or not, to present to the district court their complaint in chancery, praying for a division and partition of such premises, according to the respective rights of the parties interested therein, and for a sale thereof, if it shall appear that partition cannot be made without great prejudice to the owners.

History: C.L. 1897, § 2685 (266), added by Laws 1907, ch. 107, § 1 (266); Code 1915, § 4379; C.S. 1929, § 105-1901; 1941 Comp., § 25-1201; 1953 Comp., § 22-13-1.

ANNOTATIONS

Cross-references. - For an attorney receiving fee in land entitled to partition, see 42-6-10 NMSA 1978.

For real estate descriptions in pleading, see 47-1-46 NMSA 1978.

Compiler's note. - The New Mexico Rules of Civil Procedure for District Courts provide that there shall be only one form of action, "civil action," and that a civil action is commenced by filing a complaint. See Rules 1-002 and 1-003 SCRA 1986.

Partition possible notwithstanding easement. - A suit for partition may be maintained notwithstanding the land is subject to an easement. Thompson v. de Snyder, 14 N.M. 403, 94 P. 1014 (1908).

Court determines equities as between parties. - The trial court, in making any partition of lands, has the right to make a determination of the equities as between the parties. Prude v. Lewis, 78 N.M. 256, 430 P.2d 753 (1967).

For parol partitions. - See Gurule v. De Chacon, 61 N.M. 488, 303 P.2d 696 (1956).

Intervention of commissioners essential for entry of judgment. - The district court has no power to enter a judgment partitioning real estate without the intervention of commissioners; but where judgment is entered upon a report by the commissioners which is reversed on appeal, the trial court may properly refuse to enter judgment upon remand. Field v. Hudson, 25 N.M. 7, 176 P. 73 (1918).

Effect of judgment in partition suit. - A judgment in a statutory partition suit declaring the rights of all the parties, ordering partition, and appointing commissioners for such purpose is an interlocutory decree. Torrez v. Brady, 35 N.M. 217, 292 P. 901 (1930).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59A Am. Jur. 2d Partition §§ 1, 17 to 29, 32, 80 to 86, 149 to 163.

Testamentary provision prohibiting or postponing partition, 14 A.L.R. 1240, 85 A.L.R. 1321.

Pleading, right under general prayer to relief inconsistent with prayer for specific relief, 30 A.L.R. 1183.

Severance of estate in mineral from estate in surface by one or more of cotenants as affecting right to partition, 39 A.L.R. 741.

Cotenant's right to partition of oil and gas, 40 A.L.R. 1408, 91 A.L.R. 205.

Estoppel of one not party to partition by failure to disclose his interests in the property, 50 A.L.R. 791.

Different tracts of land, right to partition of, in same proceeding, 65 A.L.R. 893.

Devise or bequest of property as compensation for services, claim under contract as to, as affecting right to partition of heirs of promisor, 69 A.L.R. 87, 106 A.L.R. 742.

Taxes or local improvement assessment, right of purchaser at invalid sale for, to secure reimbursement from owner in action for partition, 86 A.L.R. 1232.

Fee simple conditional estate, partition of, 114 A.L.R. 615.

Jurisdiction of justice of the peace of partition action, 115 A.L.R. 538.

Lessees who are co-tenants, partition among, 151 A.L.R. 400.

Dower rights as affecting partition proceedings, 159 A.L.R. 1129.

Homestead rights as affecting partition proceedings, 159 A.L.R. 1152.

Acquisition by one party, pending partition suit, of all outstanding joint and common interests as affecting power of court to determine questions of controverted title, remove clouds on title, etc., 162 A.L.R. 227.

Construction and application of provision for assignment, to one of co-owners, of real estate not readily divisible, 169 A.L.R. 862.

Possessory requirements for cotenant's suit for partition, 171 A.L.R. 932.

Partition of undivided interests in minerals and place, 173 A.L.R. 854.

Rights of surviving spouse and children in proceeds of partition sale of homestead and decedent's estate, 6 A.L.R.2d 515.

Pleading in partition action to authorize incidental relief, 11 A.L.R.2d 1449.

Timber rights as subject to partition, 21 A.L.R.2d 618.

Contractual provisions as affecting right to judicial partition, 37 A.L.R.3d 962.

Modern status of Massachusetts or business trust, 88 A.L.R.3d 704.

Lack of final settlement of intestate's estate as affecting heir's right to partition of realty, 92 A.L.R.3d 473.

68 C.J.S. Partition §§ 13, 16, 19, 70 to 72, 89, 156, 172.

42-5-2. [Parties to action.]

Every person having an interest in the premises, whether having possession or otherwise, or whether such interest be based upon the common source of title or otherwise, shall be made a party to such complaint, and in cases where one or more of such parties shall be unknown, or the share or quantity or interest of any of the parties is unknown to the plaintiff, or when such shares or interest shall be uncertain or contingent, or when there may be any other impediment, so that such parties cannot be named, the same shall be so stated in the complaint.

History: C.L. 1897, § 2685 (267), added by Laws 1907, ch. 107, § 1 (267); Code 1915, § 4380; C.S. 1929, § 105-1902; 1941 Comp., § 25-1202; 1953 Comp., § 22-13-2.

ANNOTATIONS

Cross-references. - For pleading asserting a claim stating reason for omitting name, see 1-019 C SCRA 1986.

Proceedings against adverse possessors not instituted as against unknown owners. - Where persons are in actual adverse possession of the lands, proceedings in partition may not be instituted against them as unknown owners. Pankey v. Ortiz, 26 N.M. 575, 195 P. 906 (1921); Rodriguez v. La Cueva Ranch Co., 17 N.M. 246, 134 P. 228 (1912); Priest v. Board of Trustees, 16 N.M. 692, 120 P. 894 (1911), aff'd, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751 (1914).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59A Am. Jur. 2d Partition §§ 74 to 77, 109, 125, 164 to 188, 196.

Right of judgment creditor of cotenant to maintain partition, 25 A.L.R. 105.

Right of executor or administrator to bring proceedings for partition of real property, 57 A.L.R. 573.

Trustee holding legal title, right of, to maintain partition suit, 103 A.L.R. 455.

68 C.J.S. Partition §§ 2, 9, 17, 56 to 59, 73 to 75, 79, 95, 147.

42-5-3. [Unknown persons made parties.]

All persons interested in the lands, tenements or hereditaments of which partition is sought to be made, whose names are unknown, may be made parties to such partition by the name and description of unknown owners or proprietors of the premises, or as unknown heirs of any persons who may have been interested in the same.

History: C.L. 1897, § 2685 (268), added by Laws 1907, ch. 107, § 1 (268); Code 1915, § 4381; C.S. 1929, § 105-1903; 1941 Comp., § 25-1203; 1953 Comp., § 22-13-3.

ANNOTATIONS

Proceedings against adverse possessors not instituted as against unknown owners. - Where persons are in actual adverse possession of the lands, proceedings in partition may not be instituted against them as unknown owners. Pankey v. Ortiz, 26 N.M. 575, 195 P. 906 (1921); Rodriguez v. La Cueva Ranch Co., 17 N.M. 246, 134 P. 228 (1912); Priest v. Board of Trustees, 16 N.M. 692, 120 P. 894 (1911), aff'd, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751 (1914).

Obligation to inquire as to persons claiming part of estate. - Plaintiff in a partition proceeding may not sit in his office, refrain from all inquiry as to the persons claiming any part of the estate sought to be partitioned, pursue no sources of information of which he may be aware and, because in fact he does not actually know the names of the adverse claimants to the estate sought to be partition, (partitioned), he may not proceed against them as unknown owners, and thereby deprive them effectually of all of their rights and property. Pankey v. Ortiz, 26 N.M. 575, 195 P. 906 (1921).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59A Am. Jur. 2d Partition §§ 79, 81.

68 C.J.S. Partition §§ 75, 78, 81, 83, 88, 147, 216.

42-5-4. [Intervention.]

During the pendency of such suit or proceeding any person claiming to be interested in the premises may appear and answer the complaint and assert his right by way of intervention, whether such interest be derived or claimed under the common source of title or otherwise, and the court shall decide upon their [his] rights as though they [he] had been made parties [a party] in the first instance.

History: C.L. 1897, § 2685 (269), added by Laws 1907, ch. 107, § 1 (269); Code 1915, § 4382; C.S. 1929, § 105-1904; 1941 Comp., § 25-1204; 1953 Comp., § 22-13-4.

ANNOTATIONS

Cross-references. - For intervention, see Rule 1-024 SCRA 1986.

Right to intervene is given to all persons claiming interest in the land, whether under the common title sought to be partitioned or by title independent thereof. 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); Baca v. Anaya, 14 N.M. 382, 94 P. 1017 (1908).

Owner of premises can intervene, whatever origin of his title. - The owner of the whole or any part of the premises sought to be partitioned may, whatever the origin of his title, intervene for the settlement of his rights. 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).

When persons asserting adverse interests may intervene. - Persons asserting adverse interests may intervene in partition proceedings after commissioners have reported that partition cannot be made, and before further action of the court. Montoya v. Gonzales, 232 U.S. 375, 34 S. Ct. 413, 58 L. Ed. 645 (1914)aff'g; Montoya v. Unknown Heirs of Vigil, 16 N.M. 349, 120 P. 676 (1911).

Intervention prohibited for purpose of litigating rights not originally raised. - A formal party, or a person who makes himself a party by his own conduct during the litigation, is not entitled to intervene for the purpose of subsequently litigating rights which he failed to assert in the main proceeding. Baca v. Catron, 24 N.M. 242, 173 P. 862 (1917).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59A Am. Jur. 2d Partition §§ 33, 74, 87.

68 C.J.S. Partition §§ 78, 222, 236.

42-5-5. [Decree; binding effect.]

The court shall ascertain and declare the rights, titles and interests of all the parties to such proceedings and render such decree as may be required by the rights of the said parties, which said decree shall be binding upon all of the said parties, whether they be adults or not.

History: C.L. 1897, § 2685 (270), added by Laws 1907, ch. 107, § 1 (270); Code 1915, § 4383; C.S. 1929, § 105-1905; 1941 Comp., § 25-1205; 1953 Comp., § 22-13-5.

ANNOTATIONS

Purpose of decree. - A decree in partition does not create a new title, but merely segregates the right of possession, leaving the parties with the same title under which

they previously held. Rodriguez v. La Cueva Ranch Co., 17 N.M. 246, 134 P. 228 (1912).

Interlocutory decree defined. - A judgment which declares the rights of all parties, ordering partition of the premises, and appointing commissioners for such purpose, is an interlocutory decree. Torrez v. Brady, 35 N.M. 217, 292 P. 901 (1930), aff'd sub nom. Montoya v. Unknown Heirs of Vigil, 16 N.M. 349, 120 P. 676 (1911); Montoya v. Gonzales, 232 U.S. 375, 34 S. Ct. 413, 58 L. Ed. 645 (1914).

When further judgment and decree necessary. - The judgment and decree of the court declaring the rights of the parties, ordering partition, and appointing commissioners is interlocutory. It constitutes a final declaration of the rights, titles and interests of the respective parties, but further judgment and decree to vest and divest title to the respective portions upon partition, or, in the event of a sale, to confirm the sale and distribute the proceeds is required. Prude v. Lewis, 78 N.M. 256, 430 P.2d 753 (1967).

Review of interlocutory decrees. - Upon appeal from the final judgment, interlocutory orders or decrees and the proceedings upon which they are based, may be reviewed, even though an appeal might have been taken therefrom at the time entered. Torrez v. Brady, 37 N.M. 105, 19 P.2d 183 (1932).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59A Am. Jur. 2d Partition §§ 18, 88 to 109, 194 to 197.

Adjustment on partition of improvements made by tenant in common, 1 A.L.R. 1189, 122 A.L.R. 234.

Respective rights of owners of different parcels into which land subject to an oil and gas lease has been divided, 5 A.L.R. 1162, 16 A.L.R. 588, 64 A.L.R. 634.

Right to, and effect of, partition of undivided interests held respectively in fee and in life estate, with remainder, 12 A.L.R. 644, 134 A.L.R. 661.

Division of building, 28 A.L.R. 727.

Power to decree pecuniary sum as owelty to equalize shares of parties in partition, 65 A.L.R. 352.

Protection, in partition of grantee in deed purporting to convey a definite parcel by part only of the cotenants, 77 A.L.R.2d 1376.

68 C.J.S. Partition §§ 45, 112 to 114, 121, 125, 222.

42-5-6. [Commissioners; appointment; qualifications; oath; partition of land; report.]

The court, when it shall decree a partition of any premises, shall appoint three commissioners not connected with any of the parties either by consanguinity or affinity and entirely disinterested; each of whom shall take an oath before some person authorized to administer the same, fairly and impartially to make partition of the said premises in accordance with the decree of the court as to the rights and interests of the parties, if the same can be done consistently with the interests of the estate, and the said commissioners shall go upon the premises and make partition of said lands, tenements and hereditaments, assigning to each party his share by metes and bounds, and shall make report in writing, under their hands, to the court, with all convenient speed, or within the time which may be prescribed by the court, and the court may upon the coming in and filing of such report make all such orders thereon as may be necessary to a final disposition of the case.

History: C.L. 1897, § 2685 (271), added by Laws 1907, ch. 107, § 1 (271); Code 1915, § 4384; C.S. 1929, § 105-1906; 1941 Comp., § 25-1206; 1953 Comp., § 22-13-6.

ANNOTATIONS

Partition not absolute right. - A cotenant is entitled to a partition as a matter of right, not merely as a matter of grace within the discretion of the court. Although this right is sometimes said to be absolute, it can be denied where the partition would be against public policy, legal principles or equitable principles, or is waived by an agreement of the parties. Martinez v. Martinez, 98 N.M. 535, 650 P.2d 819 (1982).

Commissioners must acquire firsthand knowledge of value of premises. - The provision that the "commissioners shall go upon the premises and make partition of said lands" is directory only, requiring nothing more than that the commissioners fully acquaint themselves with and acquire firsthand knowledge of the value of the premises before making partition. Sandoval v. Sandoval, 61 N.M. 38, 294 P.2d 278 (1956).

Except where commissioners are longtime residents of area and have personal knowledge of the land, the residential properties and their respective values, there is sufficient compliance with the statute even if none of the commissioners has actually gone upon the land subsequent to their selection. Sandoval v. Sandoval, 61 N.M. 38, 294 P.2d 278 (1956).

When waiver of appointment incomplete. - Three of the defendants and the plaintiff could not effectively accomplish a total departure from the requirement of the rule that a commissioner be appointed where it nowhere appeared that the other six defendants, with interests in the property, ever agreed to waive the statutory procedure. Marquez v. Marquez, 74 N.M. 795, 399 P.2d 282 (1965).

No instruction required. - The statute contains no requirement for instruction of the commissioners and no error is committed by the court in refusing to give requested instructions. Field v. Hudson, 25 N.M. 7, 176 P. 73 (1918).

But parties may request them. - Where instructions to commissioners correctly stated the law under the statutes, and where both parties had requested the court to instruct the commissioners as to the law, no complaint could be successfully made against the instructions given. Field v. Hudson, 25 N.M. 7, 176 P. 73 (1918).

Rights, titles and interests of parties should first be determined and a decree entered accordingly so that the appraisers can then, as required by the provisions of this section, fairly and impartially make a partition of the premises in accordance with the decree of the court as to the rights and interests of the parties, if such can be accomplished. Prude v. Lewis, 78 N.M. 256, 430 P.2d 753 (1967).

Giving notice or hearing evidence not part of duties. - The commissioners are not obligated to give notice to the parties and to hear evidence, the parties interested in having their day in court when the report comes before the court for approval or rejection. Field v. Hudson, 25 N.M. 7, 176 P. 73 (1918).

Court powerless to enter judgment without report. - Under the statute, the court has no power to enter a judgment partitioning real estate without the intervention of commissioners, and the judgment of the court must be based upon the report of such commissioners. Field v. Hudson, 25 N.M. 7, 176 P. 73 (1918).

Procedure required of trial court to contravene recommendation. - The trial court, after appointing commissioners in an action for partition, may not contravene the recommendation from the commissioners without first filing findings of fact and conclusions of law expressing the reasons for not following such recommendation. Moore v. Sussman, 92 N.M. 70, 582 P.2d 1283 (1978).

Reports rejected when influence exerted. - When the conduct of an interested party influences the acts of the commissioners, the reports should be rejected. Sandoval v. Sandoval, 61 N.M. 38, 294 P.2d 278 (1956).

Court's jurisdiction dependent upon report. - Trial court lacks jurisdiction to decree a sale in partition, absent the commissioner's report. Prude v. Lewis, 78 N.M. 256, 430 P.2d 753 (1967).

Parol evidence admissible in support of exceptions to report. - Parol evidence, without restriction as to the form in which it shall be presented, is admissible in support of exceptions to a report of the commissioners. Field v. Hudson, 25 N.M. 7, 176 P. 73 (1918).

Categorizing lands by descriptive names not error. - There was no error by the trial court in its acceptance of the commissioners' report which categorized the lands involved by descriptive names rather than by metes and bounds in accordance with this section, as the applicable metes and bounds descriptions were contained in the various pleadings, exhibits and in the transcript, and there was no objection to the use of area names at the time of the hearing, and the transcript reflects that the parties were quite

alert about the particular areas in controversy. Sullivan v. Sullivan, 82 N.M. 554, 484 P.2d 1264 (1971).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59A Am. Jur. 2d Partition §§ 110 to 116, 123.

Burden of proof as regards alleged prior voluntary partition of property, 1 A.L.R.2d 473.

Compensation for improvements made or placed on premises of another by mistake, 57 A.L.R.2d 263.

Judicial partition of land by lot or chance, 32 A.L.R.4th 909.

68 C.J.S. Partition §§ 21, 46, 130, 151, 159, 164, 221, 238, 239.

42-5-7. Finding that property cannot be partitioned; appraisal; report of commissioners; contest of report; hearing; sale.

A. Should the commissioners be of the opinion that the real estate is so circumstanced that a partition thereof cannot be made without manifest prejudice to the owners or proprietors of the same, they shall proceed to appraise the real estate at its cash value at the time, deducting the amount of all liens and encumbrances against such real estate, and the commissioners shall so report to the court and file with their said report a written appraisal. Any party to the action who shall have been adjudged by the court to have an interest in the real estate appraised, may within ten days from the date of filing of said report and appraisal contest said report or said appraisal, and for such purpose shall file in the cause an affidavit setting forth wherein said report, appraisal or both is incorrect; provided, that the affidavit shall put in issue only the value of the real estate as shown by the appraisal and the question as to whether or not the real estate is so circumstanced that a partition hereof cannot be had without manifest prejudice to the owners or proprietors thereof, and the court shall hear proof touching the matters set forth in the affidavit, and if the report or the appraisal shall be found by the court to be incorrect, the court shall determine the value of the real estate and whether or not the real estate can be divided without manifest prejudice to the owners or proprietors thereof. If the report or appraisal shall be found by the court to be correct the same shall be confirmed by the court. In the event the report of the commissioners shall not be contested within the time above provided, or in the event the report of the commissioners shall be confirmed by the court, the court, in its discretion, may order the premises to be sold at public or private sale, providing in the order for reasonable public notice of such sale on such terms and conditions as it may prescribe; provided, that if the court does not order such sale to be made for cash, a cash payment of not less than one-quarter of the purchase money shall be required by the court, to be made to the person or persons, who shall be appointed by the court to make such sale, by the purchaser of such land at the time of such sale, the balance of such purchase price to be paid and secured in such manner as the court shall direct. If sale is made at private sale, same shall be made for not less than its full value as determined as aforesaid. If

the value determined as aforesaid shall be less than ten thousand dollars ($10,000) the court shall authorize sale of the property at a public sale to the highest and best bidder thereat. If such value determined as aforesaid shall be ten thousand dollars ($10,000) or more, public sale of said property shall not be made for less than two-thirds of its value as so determined and fixed. Any sale hereunder shall be subject to any and all liens deducted as provided herein in making the appraisal.

B. The person or persons who shall be appointed by the court to make sale of said real estate shall make and execute good and sufficient conveyance or conveyances to the purchaser or purchasers thereof which shall operate as an effectual bar both in law and equity against such owners and proprietors, parties to the proceedings, and all persons claiming [under] them; and the person or persons making such sale shall report their proceedings to the court and shall pay over the moneys arising therefrom to the parties entitled to receive the same under the direction of the court.

History: C.L. 1897, § 2685 (272), added by Laws 1907, ch. 107, § 1 (272); Code 1915, § 4385; C.S. 1929, § 105-1907; Laws 1939, ch. 170, § 1; 1941 Comp., § 25-1207; 1953 Comp., § 22-13-7; Laws 1959, ch. 164, § 1.

ANNOTATIONS

Report couched in language from statute, proper. - Report of commissioners in words of statute finding "that the said lots are so circumstanced that a partition thereof cannot be made without manifest prejudice to the owners of the same" is sufficient. Field v. Hudson, 25 N.M. 7, 176 P. 73 (1918).

Where prior report of commissioners for partition was invalidated under a decision of the supreme court, and the lower court properly referred the matter to new commissioners, it was proper for the court to order a sale of the land on the report of the new commissioners. Field v. Hudson, 25 N.M. 7, 176 P. 73 (1918).

Sale of tenancy in common. - A sale of a tenancy in common can be had only when commissioners report to the court that a partition cannot be made without manifest prejudice to the owners. Marquez v. Marquez, 74 N.M. 795, 399 P.2d 282 (1965).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59A Am. Jur. 2d Partition §§ 4 to 8, 39 to 60, 62, 118 to 132.

Trust arising from parol agreement to bid in property sold at partition sale for person having an interest therein, 42 A.L.R. 109, 135 A.L.R. 232, 27 A.L.R.2d 1285.

Interference by court with decision of commissioners in partition suit, 46 A.L.R. 348.

Grounds, other than defects as to title of land, resale or irregularity in sale, for relief of successful bidder from obligation to comply with bid, 63 A.L.R. 974.

Caveat emptor, doctrine of, as applied to purchaser at partition sale, 68 A.L.R. 668.

Champerty rule as applicable to partition sale or to conveyance by person claiming under such sale, 71 A.L.R. 596.

Retainer of indebtedness of heir, legatee, or distributee from proceeds of partition sale, 75 A.L.R. 884, 110 A.L.R. 1384, 164 A.L.R. 717.

Partition of partnership in real property, 77 A.L.R. 300.

Partition as affecting pre-existing mortgage or other lien on undivided interest, 93 A.L.R. 1267.

Commissioner or referee, power of court in partition proceedings to direct sale of property without aid of, or contrary to recommendation of, 95 A.L.R. 1330.

Life tenant's interest in fund realized from partition sale of property, commutation of, into estimated present value, 102 A.L.R. 969.

Legacy charged upon land devised, right of legatee to enforce payment of, as against purchaser at partition sale, 116 A.L.R. 35, 134 A.L.R. 361.

Mortgage or other lien upon premises, cotenant's right to allowance in partition in respect of amount paid to discharge, as affected by statute of limitations or laches, 117 A.L.R. 1442.

Effect of receipt of higher bid before confirmation upon confirmation of judicial sale, 152 A.L.R. 530.

Estoppel of or waiver by parties or participants regardingirregularities or defects in execution or judicial sale, 2 A.L.R.2d 6.

Rights of surviving spouse and children in proceeds of partition sale of homestead in decedent's estate, 6 A.L.R.2d 515.

Maintainability of partition action where United States or state owns an undivided interest in property, 59 A.L.R.2d 937.

Rights and remedies of one purchasing at partition sale where there was misrepresentation or mistake as to acreage or location of boundaries of tract sold, 69 A.L.R.2d 254.

68 C.J.S. Partition §§ 11, 45, 123 to 150, 152, 156 to 164, 172 to 222.

42-5-8. Allocation of costs of partition; definition.

A. In the event partition of the cotenancy is made by the commissioners appointed, the costs of partition shall by the court be apportioned among all the cotenants, and the proportion of the costs assessed against each cotenant shall be a lien upon the share of the cotenancy assigned by the commissioners to the cotenant. If partition cannot be made without manifest prejudice to the cotenants and sale of the estate is ordered, the costs of the action shall be apportioned among all the cotenants, and the proportion of the costs assessed against each cotenant shall by the court be deducted and withheld from the distributive share of the proceeds of the sale assigned to the cotenant.

B. As used in this section "costs" includes expenses incurred by commissioners, expenses incurred by agents or masters appointed by the court to conduct a sale, costs of survey and other costs incurred in physical partition or in sale which to the court seem just and proper.

C. The reasonable attorney fees of a party to an action for partition of a cotenancy may be awarded in the court's discretion, as it may deem just and equitable.

History: 1953 Comp., § 22-13-7.1, enacted by Laws 1965, ch. 31, § 1.

ANNOTATIONS

Request to award attorney fees denied. - See Landskroner v. McClure, 107 N.M. 773, 765 P.2d 189 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59A Am. Jur. 2d Partition §§ 133 to 148.

Excessiveness or adequacy of attorneys' fees in matters involving real estate - modern cases, 10 A.L.R.5th 448.

68 C.J.S. Partition §§ 234 to 239, 242 to 245.

42-5-9. [Death of party does not abate suit.]

No suit for a partition shall abate by the death of any tenant, but upon the death of any tenant being a party to said suit, the heirs or devisees of the said tenant may on motion be made parties in his stead.

History: C.L. 1897, § 2685 (272A), added by Laws 1907, ch. 107, § 1 (272A); Code 1915, § 4386; C.S. 1929, § 105-1908; 1941 Comp., § 25-1208; 1953 Comp., § 22-13-8.

ANNOTATIONS

Cross-references. - As to actions not abating, see 37-2-4 NMSA 1978.

For rule for substitution of parties because of death, see Rule 1-025 A SCRA 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59A Am. Jur. 2d Partition §§ 32, 74.

68 C.J.S. Partition §§ 33, 53.

ARTICLE 6
QUIETING TITLE

42-6-1. By and against whom action may be brought; several tracts may be included in one action.

An action to determine and quiet the title of real property may be brought by anyone having or claiming an interest therein, or by the holder of any mortgage, mortgage deed, trust deed or any other written instrument which may operate as a mortgage, in an action brought to foreclose the said mortgage, mortgage deed, trust deed or such other written instrument, whether in or out of possession of the same, against any person or persons, claiming title thereto, or parcel or portion thereof, or lien thereon, whether such lien be a mortgage or otherwise. Any number of tracts of land may be embraced in the same action, whether claimed by different persons or not; and in instances where a tract of land title to which is sought to be quieted lies within more than one county such action may be brought in any county in which part of said tract lies. Title may be quieted against the owner or holder of any mortgage, claim of lien or other encumbrance, where the owner or holder of such mortgage, lien or encumbrance has permitted same to become barred by statute of limitations, and where the record or documentary evidence reflects that the required time to bar such mortgage or other lien has elapsed, the same shall constitute prima facie evidence that the debt or obligation and lien securing same is barred, and the owner or holder of such mortgage, lien or claim shall be estopped from asserting any rights thereunder in such suit.

History: C.L. 1897, § 2685 (273), added by Laws 1907, ch. 107, § 1 (273); Code 1915, § 4387; Laws 1925, ch. 21, § 1; 1927, ch. 109, § 1; C.S. 1929, § 105-2001; Laws 1937, ch. 174, § 1; 1941 Comp., § 25-1301; Laws 1945, ch. 34, § 1; 1951, ch. 96, § 1; 1953 Comp., § 22-14-1.

ANNOTATIONS

Cross-references. - For joinder of parties plaintiff, see 42-6-6 NMSA 1978.

For state consent to be sued in quiet title actions, see 42-6-12 to 42-6-16 NMSA 1978.

For tax assessment or payment in name of nonowner not cloud on title, see 47-1-26 NMSA 1978.

Quiet title action brought by anyone, in or out of possession. - This section provides that an action to quiet title may be brought by anyone whether in or out of possession. Caranta v. Pioneer Home Imps., Inc., 81 N.M. 393, 467 P.2d 719 (1970).

And claiming interest. - Quiet title actions may be brought by anyone, in or out of possession, claiming an interest in real property. Currier v. Gonzales, 78 N.M. 541, 434 P.2d 66 (1967); Pacheco v. Martinez, 97 N.M. 37, 636 P.2d 308 (Ct. App. 1981).

The action may be maintained by one out of possession against anyone claiming title, out of possession. Corman v. Cree, 100 F.2d 486 (10th Cir. 1938).

An action to determine and quiet title of real property may be brought by anyone having or claiming an interest therein whether in or out of possession of the same against any person claiming title thereto. Marques v. Maxwell Land Grant Co., 12 N.M. 445, 78 P. 40 (1904).

For action against one with deed, but questionable possession. - See Gentile v. Kennedy, 8 N.M. 347, 45 P. 879 (1896)(decided under former law).

Effect of unconfirmed land grant. - The owner of an interest in an unconfirmed Mexican or Spanish grant must first have the grant confirmed in order to bring suit to quiet title. Lockhart v. Leeds, 10 N.M. 568, 63 P. 48 (1900), rev'd on other grounds, 195 U.S. 427, 25 S. Ct. 76, 49 L. Ed. 263 (1904);(decided under former law).

One holding judgment lien on property may bring suit. Stanton v. Catron, 8 N.M. 355, 45 P. 884 (1896)(decided under former law).

Proof of title basis of action. - Any person having or claiming an interest in real property, whether in or out of possession, may bring his bill to determine and quiet title against any person claiming title thereto, but proof of title has ever been the basis of this action. Stanton v. Catron, 8 N.M. 355, 45 P. 884 (1896)(decided under former law).

Possession under deed from grantor in possession is sufficient evidence of title to maintain the action. Holthoff v. Freudenthal, 22 N.M. 377, 162 P. 173 (1916).

Plaintiff's recovery based upon strength of his title. - In a suit to quiet title the plaintiff must recover on the strength of his own title and not on the weakness of the title of his adversary. Cubero Land Grant v. DeSoto, 76 N.M. 490, 416 P.2d 155 (1966); Esquibel v. Hallmark, 92 N.M. 254, 586 P.2d 1083 (1978); Perea v. Martinez, 95 N.M. 84, 619 P.2d 188 (1980).

Not upon weakness of his adversary's claim. - A plaintiff in an action to quiet title to real estate must recover, if at all, upon the strength of his own title and not upon the weakness of his adversary's claim. Rock Island Oil & Ref. Co. v. Simmons, 73 N.M. 142, 386 P.2d 239 (1963).

Plaintiffs' prospects for recovery in a quiet title action must rest upon the strength of their own title and not upon the weakness of the defendants' claim. Lerma v. Romero, 87 N.M. 3, 528 P.2d 647 (1974).

Action serves to remove cloud from title. - Title may be quieted against any person claiming title to lands in suit or lien thereon. A mortgage by force of statute is a cloud upon the title against which the decree will operate. State ex rel. Truitt v. District Court, 44 N.M. 16, 96 P.2d 710 (1939).

However, it is not limited to removal of mere clouds on title. It embraces any claim of interest in land adverse to plaintiff. Corman v. Cree, 100 F.2d 486 (10th Cir. 1938).

Judgment lien, although barred by statute of limitations, still cloud on title. - Even though a judgment lien has been barred by statute of limitations, it nevertheless remains a cloud upon the title and a party is entitled to seek a decree to discharge such cloud, this being especially true in view of this section. Pugh v. Heating & Plumbing Fin. Corp., 49 N.M. 234, 161 P.2d 714 (1945).

When quiet action suit improper remedy. - While the statute relative to actions to quiet title expressly provides that such action may be brought by a person either in or out of possession of the quieted premises, in the absence of the waiver, the defendant in possession of the premises is entitled as a matter of right to a jury trial, and thus, ejectment would be the proper remedy to be invoked in such a situation. Payne Land & Livestock Co. v. Archuleta, 180 F. Supp. 651 (D.N.M. 1960).

Foreclosure action and quiet title claim triable in single proceeding. - It would be logically inconsistent to hold that it is permissible to try both a foreclosure action and a quiet title claim in a single proceeding if both are asserted by the plaintiff, but it is not permissible to join them in one case if one is asserted by the plaintiff and the other arises in a defendant's counterclaim or cross-claim; this incongruous holding would be contrary to the purpose of Rule 13, N.M.R. Civ. P. [now Rule 1-013]. Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).

Quiet title is not proper remedy for establishing trust in land. Petrakis v. Krasnow, 54 N.M. 39, 213 P.2d 220 (1949).

Damages are not recoverable in suit to quiet title. Chavez v. Gomez, 77 N.M. 341, 423 P.2d 31 (1967).

Nor attorney fees. - In suit to quiet title, no damages or attorney's fees are allowable. Rosser v. Rosser, 42 N.M. 360, 78 P.2d 1110 (1938).

Interest in title required. - The interest required by this section must be an interest in the title. Holthoff v. Freudenthal, 22 N.M. 377, 162 P. 173 (1916).

Plaintiff's interest determined by instrument creating it. - The nature of a plaintiff's interest in a quiet title suit must be determined from the provisions of the instrument which created that interest. Christy v. Petrol Resources Corp., 102 N.M. 58, 691 P.2d 59 (Ct. App. 1984).

Counterclaims not within purview of statute. - The notes following this catchline in the original pamphlet have been overruled by Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).

Equitable interest in real estate may be quieted but the interest claimed must be an interest in the title. Rock Island Oil & Ref. Co. v. Simmons, 73 N.M. 142, 386 P.2d 239 (1963).

In quiet title action proper venue is jurisdictional. Pan Am. Petro. Corp. v. Candelaria, 403 F.2d 351 (10th Cir. 1968)(decided under former law).

Court's jurisdiction limited to lands in county, prior to amendment. - A quiet title suit brought in 1947 affected interests in land located in two counties. The statute then in effect § 25-1301, 1941 Comp., made no provision for bringing suit in one county covering land in another. The district court's jurisdiction was thus limited to lands in the county where the action was brought. Pan Am. Petro. Corp. v. Candelaria, 403 F.2d 351 (10th Cir. 1968)(decided under former law).

Suit brought in U.S. court only in exceptional circumstances. - Where controversy was between two groups of cotenants, the appellees not having been ousted, could not maintain an action in ejectment and no plain, adequate and complete remedy at law being available, in exceptional circumstances of this kind where diversity of citizenship and jurisdictional amount are present, suit to quiet title may be brought in the United States court. Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942).

The rule under federal law that suits in equity shall not be sustained in a United States court where there is a plain, adequate, and complete remedy at law has application even though the equity jurisdiction of state courts has been enlarged to provide that a suit to quiet title may be maintained against one in possession. Harlan v. Sparks, 125 F.2d 502 (10th Cir. 1942).

Suit may be maintained in federal court under a state statute against an adverse claimant, when by the pleadings an adequate remedy at law is excluded. Baum v. Longwell, 200 F. 450 (D.N.M. 1912).

Service of process. - Service may not be by publication upon "unknown owners" if the plaintiffs have knowledge or the means of knowledge as to persons in actual adverse possession. Pankey v. Ortiz, 26 N.M. 575, 195 P. 906 (1921); Priest v. Board of Trustees, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751 (1914), aff'g, 16 N.M. 692, 120 P. 894 (1911).

Suit to cancel mortgage deed requires personal service. - A suit to cancel a mortgage deed is a proceedings in personam and not in rem, and required personal service of process within the state. Rosser v. Rosser, 42 N.M. 360, 78 P.2d 1110 (1938).

All parties in possession not indispensable. - In a quiet title suit, owners of some of the property bordering on a right-of-way are proper but not indispensable parties in suit by party claiming title to part of property held by other parties. All parties in possession need not be joined. Alston v. Clinton, 73 N.M. 341, 388 P.2d 64 (1963).

Where joinder of defendants defeats court's jurisdiction. - A court having equitable powers cannot take jurisdiction in suit by one plaintiff against several defendants, to prevent multiplicity of suits, when the defendants have nothing in common except their source of color of title, and each defendant has a distinct, different, and separate defense. Pankey v. Ortiz, 26 N.M. 575, 195 P. 906 (1921).

Contents of complaint. - Even after a severance has occurred, a complaint in a quiet title suit describing the property and alleging a fee simple ownership is equivalent to a claim of ownership of the fee in the surface and in the minerals. If a plaintiff's claim is solely to the surface estate, then his complaint should so state. If his claim is solely to the mineral estate, then his complaint should so state. Kaye v. Cooper Grocery Co., 63 N.M. 36, 312 P.2d 798 (1957).

Complaint cannot be dismissed on ground that equities cannot be adjudicated in a quiet title action where a title holder in possession brings the suit to remove clouds caused by mechanics' liens. Petrakis v. Krasnow, 54 N.M. 39, 213 P.2d 220 (1949).

Judgment creditor or his assignee unable to maintain answer or counterclaim. - Neither a judgment creditor, nor his assignee, can maintain an answer or counterclaim in a suit to quiet title under this section and 42-6-2 NMSA 1978. Security Inv. & Dev. Co. v. Capital City Bank, 22 N.M. 469, 164 P. 829 (1917).

Section not at variance with Rule 1-013. - There is nothing specific nor inherent in this section at variance with the unrestrictive counterclaim provisions of Rule 1-013. Ortega, Snead, Dixon & Hanna v. Gennitti, 93 N.M. 135, 597 P.2d 745 (1979).

When action not barred by laches. - An action to quiet title is not barred by laches when defendant (1) had knowledge plaintiff would assert right, since plaintiff's predecessor had informed defendant and his predecessors of encroachment and offered to lease the disputed area and (2) will not injure or prejudice the defendant. Thomas v. Pigman, 77 N.M. 521, 424 P.2d 799 (1967).

Effect of inserting name in deed on burden of proof. - Suit to quiet title to land held under a deed in which the grantee was not named, but whose name was later inserted, throws the burden upon the plaintiff of proving the instrument. Jones v. Rocky Cliff Coal Mining Co., 27 N.M. 50, 198 P. 287 (1921).

Court will not disturb boundary finding when supported by evidence. - Where, in quiet title action, the court has considered all of the evidence before it and has determined the true location of the boundary, and the boundary is different from the one acquiesced in over the years, on review the court will not disturb such finding when

supported by substantial evidence. Thomas v. Pigman, 77 N.M. 521, 424 P.2d 799 (1967).

Right to jury trial dependent upon possession. - In an action to quiet title, no right to jury trial exists where neither party is in possession or the moving party is in possession. Baca v. Anaya, 14 N.M. 382, 94 P. 1017 (1908).

Filing of counterclaim waives defendant's right to jury trial. - A defendant is deemed as having waived his right to jury trial, even though ejectment would have been plaintiff's proper remedy instead of suit to quiet title, where defendant filed a counterclaim to quiet title or asks for other equitable relief. Quintana v. Vigil, 46 N.M. 200, 125 P.2d 711 (1942).

Judgment self-operating and establishes interest. - The action to quiet title is a substantive adjudication of title. The judgment is self-operating. By the judgment itself the interest is established. In such an action all matters affecting the title of the parties to the action may be litigated and determined, and the judgment therein is final and conclusive. Kaye v. Cooper Grocery Co., 63 N.M. 36, 312 P.2d 798 (1957).

Where judgment for husband and wife coplaintiffs does not give him estate. - Seemodifying Saiz v. Saiz, 74 N.M. 557, 395 P.2d 907 (1964); Kaye v. Cooper Grocery Co., 63 N.M. 36, 312 P.2d 798 (1957).

Default judgment not set aside by subsequent suit. - A default judgment in a suit to quiet title, in which the plaintiff's right and title were based upon a tax deed, invalid because the taxes for which it was issued had been paid, cannot, in the absence of fraud, be set aside by a subsequent suit for that purpose, the doctrine of res judicata being applicable. Bowers v. Brazell, 27 N.M. 685, 205 P. 715 (1922)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title §§ 8, 34, 68 to 72.

Timber, right of owner of land to have his title quieted as to timber remaining after the expiration of the time fixed in a timber contract for its removal, 15 A.L.R. 111, 31 A.L.R. 944, 42 A.L.R. 641, 71 A.L.R. 143, 164 A.L.R. 423.

Reimbursement by owner as condition of cancelation of tax sale and deed because taxes had been paid prior to the sale, 26 A.L.R. 629.

Return of payments as condition of cancelation of land contract as cloud on title, 35 A.L.R. 274.

Fraud as affecting right of one not in possession to maintain suit to remove cloud on title, 36 A.L.R. 698.

What constitutes cloud on title, 78 A.L.R. 24.

Apparent invalidity of pretended title or lien as affecting its character as cloud, 78 A.L.R. 62.

Taxes or local improvement assessments, right of purchaser at invalid sale for, to reimbursement in action to quiet title, and provisions of the decree or judgment as to, 86 A.L.R. 1208.

Covenants, remedies of grantor who has conveyed with, against third person asserting title or interest hostile to covenant, 97 A.L.R. 711.

Rescission as essential to cancelation of instrument or lien voidable for fraud or failure of consideration, 109 A.L.R. 1032.

Remaindermen's right to sue, during continuance of life estate, to remove cloud on title, as affecting character of possession of grantee under deed from life tenant purporting to convey fee as adverse during life estate, 112 A.L.R. 1048.

Jurisdiction of justice's court (or similar court) of actions to remove, or growing out of removal of, cloud from title to land, 115 A.L.R. 540.

Nonresidence or absence of defendant from state as suspending statute of limitations where relief is sought, or could have been sought, by action to quiet title to local property, 119 A.L.R. 365.

Statute of limitation, or presumption of payment from lapse of time, mortgage barred by, as cloud entitling mortgagor to affirmative relief, 164 A.L.R. 1393.

Contract for joint, mutual, and reciprocal wills, protection of rights of parties under, 169 A.L.R. 53.

Restrictive covenant, cancelation of, as a cloud on title, because of change in neighborhood or other conditions, 4 A.L.R.2d 1111.

Fences as factor in fixing location of boundary line - modern cases, 7 A.L.R.4th 53.

74 C.J.S. Quieting Title §§ 1, 95.

42-6-2. Complaint; parties; unknown claimants.

The plaintiff must file his complaint in the district court, setting forth the nature and extent of his estate and describing the premises as accurately as may be, and averring that he is credibly informed and believes that the defendant makes some claim adverse to the estate of the plaintiff, and praying for the establishment of the plaintiff's estate against such adverse claims, and that the defendant be barred and forever estopped from having or claiming any lien upon or any right or title to the premises, adverse to the plaintiff, and that plaintiff's title thereto be forever quieted and set at rest. Any or all persons whom the plaintiff alleges in his complaint he is informed and believes make claim adverse to the estate of the plaintiff, the unknown heirs of any deceased person whom plaintiff alleges in his complaint in his lifetime made claim adverse to the estate of the plaintiff, and all unknown persons claiming any lien, interest or title adverse to plaintiff, may be made parties defendant to said complaint by their names, as near as the same can be ascertained, such unknown heirs by the style of unknown heirs of such deceased person, and said unknown persons who may claim any lien, interest or title adverse to the plaintiff, by the name and style of unknown claimants of interest in the premises adverse to the plaintiff. When the plaintiff shall allege generally in his complaint that he has made due search and inquiry to ascertain whether any person whom he desires to name as party defendant in said cause is living or dead and is unable to ascertain with certainty whether such person is living or dead, such person and his unknown heirs may be made parties defendant to said complaint under the name and style of "(name of the party), if living, if deceased, the unknown heirs of (name of the party), deceased." Service of process and notice of said suit against all of such defendants shall be made as in other cases in conformity with the provisions of law and rules of court relating to the service of process.

History: Trial Court Rule 105-2002; 1941 Comp., § 25-1302; 1953 Comp., § 22-14-2; Laws 1973, ch. 199, § 1; 1977, ch. 150, § 1.

ANNOTATIONS

Cross-references. - For real property descriptions in pleading, see 47-1-46 NMSA 1978.

For service of process, see Rule 1-004 SCRA 1986.

The 1977 amendment deleted former Subsection B, relating to joinder of and service on spouses of defendants, and deleted the designation of the remainder of this section as Subsection A.

Emergency clauses. - Laws 1977, ch. 150, § 2, makes the act effective immediately. Approved April 1, 1977.

Complaint must recite facts sufficient to state cause of action. - A complaint which states that "the plaintiff by virtue of diverse deeds of conveyance, etc., from the grant of the Colony of Refugio and of long and continuous adverse possession under color of title, etc., are the owners in fee simple of the property described" is insufficient. It fails to

state facts sufficient to constitute a cause of action. Oliver v. Enriquez, 17 N.M. 206, 124 P. 798 (1912).

Use of statutory language in complaint, proper. - A complaint to quiet title to real estate in the language of the statute is sufficient. Lamport v. Tidwell, 42 N.M. 12, 74 P.2d 69 (1937); Knabel v. Escudero, 32 N.M. 311, 255 P. 633 (1927).

Facts as to derivation of title not required. - Laws 1907, ch. 107, § 1 (274) Comp. Stat. 1929, § 105-2002, did not require a party to set forth any facts, as to the derivation of his title, but simply required a statement of the ultimate fact as to his ownership, and the interest he claimed. Oliver v. Enriquez, 17 N.M. 206, 124 P. 798 (1912).

Complaint against assignee of tax sale certificate sufficient for quiet title. - Complaint against assignee of tax sale certificate seeking cancelation of the certificate was sufficient as complaint to quiet title. Lamport v. Tidwell, 42 N.M. 12, 74 P.2d 69 (1937).

Effect of omission of adverse possession claim is complaint. - Where complaint to quiet title was in the form prescribed by this section, without making mention of the fact plaintiff claimed title by adverse possession under the quitclaim deed the trial court did not err in permitting proof of adverse possession under such complaint. Lummus v. Brackin, 59 N.M. 216, 281 P.2d 928 (1955).

Unnecessary to repeat "unknown heirs of" before each individual name. - It is sufficient to use the following form to designate unknown heirs: "Unknown heirs of the following named deceased persons" followed by the names of any and all deceased persons whose unknown heirs are desired to be served and it is unnecessary to repeat the words "unknown heirs of" before each individual name. Thomas v. Meyers, 52 N.M. 164, 193 P.2d 624 (1948).

Proving estoppel. - Facts which establish estoppel in pais must ordinarily be pleaded, but this need not be done in suit to quiet title where the plaintiff does not set forth nor plead his precise claim of title, in which case estoppel may be proved under the general issue. Hoskins v. Talley, 29 N.M. 173, 220 P. 1007 (1923).

Neither judgment creditor, nor his assignee, can answer or counterclaim in a suit to quiet title. Security Inv. & Dev. Co. v. Capital City Bank, 22 N.M. 469, 164 P. 829 (1917).

Improper name of party renders action defective. - Action to quiet title to land within boundaries of land grant to town of Las Vegas, brought under Comp. Laws 1897, §§ 4010, 4011, was defective where town of Las Vegas was not made a party by its proper name. Priest v. Board of Trustees, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751 (1914).

Effect of civil rule on joinder. - Joinder of a person in possession or of one whose interest may be ascertained by ordinary diligence and inquiry so as to make possible a

joinder by name, cannot be accomplished by joinder under the designation of "unknown claimant," in view of Rule 1-004 H SCRA 1986. Murray Hotel Co. v. Golding, 54 N.M. 149, 216 P.2d 364 (1950).

Provisions for service of process strictly construed. - Provisions for the service of process upon unknown claimants by publication in actions to quiet title will be strictly construed. Priest v. Board of Trustees, 16 N.M. 692, 120 P. 894 (1911), aff'd, 232 U.S. 604, 34 S. Ct. 443, 58 L. Ed. 751 (1914).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title §§ 69 to 78, 82 to 85, 96.

74 C.J.S. Quieting Title §§ 50, 52 to 66, 70, 104, 114.

42-6-3. [Numerous claimants; suit by committee.]

Whenever any number of persons, more than ten, hold or claim the title to any tract of land as tenants in common, coclaimants, joint tenants or coparceners holding and claiming such land by adverse possession or otherwise they may elect or appoint a committee from their number who shall be authorized to commence and maintain an action in the name of such committee for the benefit and to the use of the whole number of such persons against any person or persons claiming an adverse estate or interest therein for the purpose of determining such adverse claim or of establishing their title, or of removing a cloud upon the same.

History: Laws 1907, ch. 76, § 2; Code 1915, § 4389; C.S. 1929, § 105-2003; 1941 Comp., § 25-1303; 1953 Comp., § 22-14-3.

42-6-4. [Committee may make contracts; binding effect.]

The committee so appointed may make and execute all contracts which they deem necessary or requisite for the commencement and prosecution of said action and the same shall be binding upon all the persons who participate in the selection or appointment of said committee.

History: Laws 1907, ch. 76, § 3; Code 1915, § 4390; C.S. 1929, § 105-2004; 1941 Comp., § 25-1304; 1953 Comp., § 22-14-4.

42-6-5. [Manner of appointment of committee; effect of appointment; persons not appointing committee made defendants; unknown claimants.]

The appointment of such committee may be by an instrument or instruments in writing, executed by the persons so holding or claiming such title and acknowledged as provided by law for acknowledgment of other interests affecting the title to real estate in

this state, which instrument or instruments or certified copies thereof shall be filed at the time of commencement of such action in the office of the clerk of the district court of the district in which such tract of land is situate and the decree rendered therein shall recite the names of all such persons so participating in the selection of said committee and shall be binding upon all such persons as an adjudication of their interests in the tract of land involved. All persons claiming any interest or estate in such tract of land as tenants in common or otherwise who do not participate in the selection of such committee, and all unknown claimants thereto may be made parties defendant to such action and process may be served upon them as in other civil actions.

History: Laws 1907, ch. 76, § 4; Code 1915, § 4391; C.S. 1929, § 105-2005; 1941 Comp., § 25-1305; 1953 Comp., § 22-14-5.

ANNOTATIONS

Cross-references. - As to acknowledgements, see 14-14-1 NMSA 1978 et seq.

For service of process, see Rule 1-004 SCRA 1986.

For persons refusing to join as plaintiffs, made defendants, see Rule 1-019 A SCRA 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title § 69.

42-6-6. [Joinder of parties plaintiff.]

Any two or more persons claiming any estate or interest in lands under a common source of title, whether holding as tenants in common, joint tenants, coparceners or in severalty, may unite in an action against any person or persons claiming an adverse estate or interest therein, for the purpose of determining such adverse claim, or of establishing such common source of title or of removing a cloud upon the same.

History: Laws 1907, ch. 76, § 5; Code 1915, § 4392; C.S. 1929, § 105-2006; 1941 Comp., § 25-1306; 1953 Comp., § 22-14-6.

ANNOTATIONS

Cross-references. - For necessary joinder of parties, see Rule 1-019 SCRA 1986.

As to permissive joinder of parties, see Rule 1-020 SCRA 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title §§ 69 to 78, 82.

Joinder of claims to separate parcels in suit to quiet title, or to remove cloud on, or to determine adverse claims of land, 118 A.L.R. 1400.

74 C.J.S. Quieting Title § 55.

42-6-7. [Disclaimer; costs; default.]

If the defendant, or any of them, shall appear and disclaim all right and title adverse to the plaintiff, he shall recover his costs, and in all other cases the costs shall be in the discretion of the court. If the defendant or any one of them fails to appear and answer, the court may render decree against such defendant so failing to appear in accordance with the prayer of the bill of complaint, or such other decree in the premises as to the court shall appear meet and proper.

History: C.L. 1897, § 2685 (275), added by Laws 1907, ch. 107, § 1 (275); Code 1915, § 4393; C.S. 1929, § 105-2007; 1941 Comp., § 25-1307; 1953 Comp., § 22-14-7.

ANNOTATIONS

Cross-references. - For payment of costs, see 39-2-2 NMSA 1978 et seq.

For recovery of costs in clearing title where mortgage not released, see 48-7-5 NMSA 1978.

For default, see Rule 1-055 SCRA 1986.

Pleading which denies jurisdiction facts, title, etc., not disclaimer. - A pleading by defendant in a suit to quiet title to land is not a disclaimer where it denies jurisdictional facts, denies plaintiff's title, prays for general relief, and does not entitle defendant to dismissal and cost. Corman v. Cree, 100 F.2d 486 (10th Cir. 1938).

Effect of community property. - While plaintiff out of possession may maintain suit in federal court to quiet title against defendant out of possession, in such action against husband and wife, she is not entitled to a dismissal with costs on ground that her answer was a disclaimer, where husband asserted claim to life interest in land acquired through coverture, for this constituted it community property, in which wife had a present vested interest equal to her husband. Corman v. Cree, 100 F.2d 486 (10th Cir. 1938).

When awarding of costs within court's discretion. - Under this section, if it is not contended that the defendant's disclaimed, the awarding of costs is in the discretion of the trial court. Hughes v. West, 78 N.M. 281, 430 P.2d 778 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title §§ 89, 93.

74 C.J.S. Quieting Title §§ 95, 104, 110 to 112, 114.

42-6-8. [Mines deemed real estate.]

For the purposes of this article and for all other purposes, mines shall be deemed and taken to be real estate.

History: C.L. 1897, § 2685 (277), added by Laws 1907, ch. 107, § 1 (277); Code 1915, § 4395; C.S. 1929, § 105-2009; 1941 Comp., § 25-1308; 1953 Comp., § 22-14-8.

ANNOTATIONS

Meaning of "this article". - The words "this article" were substituted for the words "this act" by the 1915 Code compilers and refer to art. 20 of ch. 88 of the 1915 Code now compiled as 42-6-1, 42-6-3 to 42-6-11 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title §§ 19, 81.

42-6-9. [Equitable procedure.]

The action contemplated by this article shall be conducted as other actions, by equitable proceedings under the rules of chancery.

History: C.L. 1897, § 2685 (276), added by Laws 1907, ch. 107, § 1 (276); Code 1915, § 4394; C.S. 1929, § 105-2008; 1941 Comp., § 25-1309; 1953 Comp., § 22-14-9.

ANNOTATIONS

Compiler's note. - The New Mexico Rules of Civil Procedure for the District Courts now govern "all suits of a civil nature whether cognizable as cases at law or in equity, except in special statutory and summary proceedings where existing Rules are inconsistent" therewith. Rule 1-001 SCRA 1986. Only one form of action is provided for, "civil action". Rule 1-002 SCRA 1986.

Meaning of "this article". - See same catchline in notes to 42-6-8 NMSA 1978.

Effect of pendency of quiet title action on federal claim. - A federal claim for deed cancellation need not be dismissed because of the pendency of a quiet title claim in the state action, and as this section provides that quiet title actions are equitable, each action may be labeled as in personam. Miller v. Miller, 423 F.2d 145 (10th Cir. 1970).

When court lacks jurisdiction to try case in equity. - The court is without jurisdiction to try the case in equity when the answer sets up title, possession and the right to possession, since there is adequate remedy at law. Pankey v. Ortiz, 26 N.M. 575, 195 P. 906 (1921)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title §§ 2, 4, 14, 29, 36, 54, 83, 91.

74 C.J.S. Quieting Title §§ 1, 3 to 6, 8, 59, 60, 70, 75, 76.

42-6-10. [Attorneys' fees payable in land; suit by attorney; intervention in other actions; partition.]

Whenever any attorney-at-law performs any legal services for the plaintiff, at the request or instance of any person interested in lands or land claims, or any part thereof, in any court which may be held in this state, either federal or state, for the purpose of confirming, quieting or establishing the title of any tract of land and it shall be agreed or it has been agreed, between such attorney and such person so interested, that such attorney shall represent the plaintiff and receive for such services any part or portion of such land, such attorney may directly institute suit against all the owners of such tract of land, known or unknown, to establish his right and title in him under said agreement to the part or portion of such land agreed to be paid to him for his services; or he may in any suit brought to quiet the title to such tract of land or any part thereof, thereafter, or to partition the same, or both, intervene and set up his claim therein for the part of such land so agreed to be paid him for his services, and it shall be the duty of the court in all such cases to decide in such suit or intervention, and if it be found that there was such an agreement, made by such person owning or interested in such lands, or any part thereof, and acting in whole or in part for the plaintiff or any of them, and also that the services were worth, according to the usual charges in this state for such service, at the time they were rendered, or agreed to be rendered, the amount so agreed to be paid for the same to adjudge or decree the amount so agreed to be paid for such services out of the lands involved in the suit or proceedings, as his property. And the same may be partitioned or set apart to him, in any partition suit then pending, or which may thereafter be pending; or if the court should find that the amount so agreed to be paid exceeds the value of the services in this state at the time they were rendered or contracted for, then the court shall allow or adjudge or decree to such attorney an amount of such land as compensation for his services as will be reasonable as aforesaid.

History: Laws 1909, ch. 120, § 5; Code 1915, § 4396; C.S. 1929, § 105-2010; 1941 Comp., § 25-1310; 1953 Comp., § 22-14-10.

ANNOTATIONS

Cross-references. - For partition, see 42-5-1 NMSA 1978 et seq.

For intervention, see Rule 1-024 A SCRA 1986.

Supreme court may not consider construction of attorney's contract for compensation since that invokes original jurisdiction. Thurman v. Grimes, 35 N.M. 498, 1 P.2d 972 (1931).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title §§ 71, 84, 93.

Excessiveness or adequacy of attorneys' fees in matters involving real estate - modern cases, 10 A.L.R.5th 448.

74 C.J.S. Quieting Title §§ 6, 29, 57, 83, 95, 96, 99, 111.

42-6-11. [Joint owners; share in expenses of suit; lien on property of co-owners; interest; no exemption.]

Whenever any joint owner of real estate, whether claimed by private land grant or otherwise, shall bring suit to establish the title thereto in any court for the benefit of himself and other owners of such real estate, and such suit shall be favorably determined, then in that case the just and reasonable expenses incurred in the prosecution of such suits, including reasonable attorney's fees, actually expended by him, shall be and remain a charge against the real property so affected of such co-owners, with lien in proportion to the several amounts of land claimed by each, and such proportionate charge shall be collected, with interest at the rate of twelve percent per annum additional, as a charge or lien upon the real property of such co-owners which was beneficially affected by such suit, and none of such real estate so beneficially affected shall be exempt from said charge or lien by virtue of any execution or forced sale exemption law in force in this state.

History: Laws 1893, ch. 37, § 1; C.L. 1897, § 2186; Code 1915, § 4397; C.S. 1929, § 105-2011; 1941 Comp., § 25-1311; 1953 Comp., § 22-14-11.

ANNOTATIONS

Request to award attorney fees denied. See Landskroner v. McClure, 107 N.M. 773, 765 P.2d 189 (1988).

42-6-12. [Consent of state in quiet title and foreclosure suits.]

Upon the conditions herein prescribed for the protection of the state of New Mexico, the consent of the state is given to be named a party in any suit which is now pending or which may hereafter be brought in any court of competent jurisdiction of the state to quiet title to or for the foreclosure of a mortgage or other lien upon real estate or personal property, for the purpose of securing an adjudication touching any mortgage or other lien the state may have or claim on the premises or personal property involved.

History: 1941 Comp., § 25-1312, enacted by Laws 1947, ch. 150, § 1; 1953 Comp., § 22-14-12.

ANNOTATIONS

Purpose of section. - This section was enacted for the limited purpose of aiding a mortgagee who discovers that the state has acquired an interest in the mortgaged property and is unable to pass a marketable title to the purchaser at a foreclosure sale unless the state can be joined in the foreclosure suit. Maes v. Old Lincoln County Mem. Comm'n, 64 N.M. 475, 330 P.2d 556 (1958).

No omnibus legislative consent to sue state. - The supreme court finds no omnibus legislative consent to bring suit against the state to quiet title. Maes v. Old Lincoln County Mem. Comm'n, 64 N.M. 475, 330 P.2d 556 (1958).

Section does not statutorily create sovereign immunity in quiet title actions against the state, as there are presently in New Mexico no conditions or circumstances which could rationally support the doctrine of sovereign immunity. Brosseau v. New Mexico State Hwy. Dep't, 92 N.M. 328, 587 P.2d 1339 (1978)(decided before enactment of 42-11-1 NMSA 1978).

State armory board, as agency of state, is immune from suit to quiet title to property city had leased to board before city filed certificate of abandonment of property for purpose for which it had been condemned. Nevares v. State Armory Bd., 81 N.M. 268, 466 P.2d 114 (1969).

42-6-13. Method of service on state; answer.

Service upon the state shall be made by serving the process of the court, with a copy of the complaint, upon the attorney general of the state and the state agency involved in the action. The complaint shall set forth with particularity the nature of the interest or lien of the state on the property. The attorney general and the state agency shall have thirty days after service as above provided, or such further time as the court may allow, within which to serve an answer or other pleading.

History: 1941 Comp., § 25-1313, enacted by Laws 1947, ch. 150, § 2; 1953 Comp., § 22-14-13; Laws 1969, ch. 111, § 1; 1970, ch. 24, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 62B Am. Jur. 2d Process § 157; 65 Am. Jur. 2d Quieting Title § 75.

74 C.J.S. Quieting Title § 50.

42-6-14. [Judicial sale; alternative remedies and priorities of state.]

Except as herein otherwise provided, a judicial sale made in pursuance of a judgment in such a suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the state as may be provided with respect to such matters by law as to all other persons. Provided, that a sale to satisfy a lien inferior to one of the state, shall be made subject to and without disturbing the lien of the state, unless the state, by its attorneys, consents that the property may be sold free of its mortgage or lien and the proceeds divided as the parties may be entitled. And provided further, that where a sale of real estate is made to satisfy a lien prior to that of the state, the state shall have nine months from the date of sale within which to redeem. In any case, where the debt owing the state is due, the state may ask, by way of affirmative

relief, for the foreclosure of its own lien or mortgage, and in any case, where property is sold to satisfy a first mortgage or first lien held by the state, the state may bid at the sale such sum not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department, bureau or other agency of the state which has charge of the administration of the laws in respect of which the claim of the state arises.

History: 1941 Comp., § 25-1314, enacted by Laws 1947, ch. 150, § 3; 1953 Comp., § 22-14-14.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title §§ 30, 31.

74 C.J.S. Quieting Title §§ 21, 76, 84, 106.

42-6-15. [Release of lien held by state.]

If any person shall have a lien upon any real or personal property, duly filed of record in the county in which the property is located and a junior lien (other than a lien for any tax) in favor of the state attaches to such property, such person may make a written request to the officer of the state charged with the administration of the laws in respect of which the lien of the state arises, to have the same extinguished. If, after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to satisfy, in whole or in part, the lien of the state, or that the claim of the state has been satisfied, or by lapse of time or otherwise, has become unenforceable, such officer shall so report to the attorney general, who thereupon may issue a certificate of release which shall operate to release the property from such lien.

History: 1941 Comp., § 25-1315, enacted by Laws 1947, ch. 150, § 4; 1953 Comp., § 22-14-15.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 74 C.J.S. Quieting Title §§ 101, 102, 105.

42-6-16. [State exempt from payment of costs or money judgment.]

No judgment for costs or other money judgment shall be rendered against the state in any suit or proceeding which may be instituted under the provisions of this act [42-6-12 to 42-6-16 NMSA 1978]. Nor shall the state be or become liable for the payment of the costs of any such suit or proceeding or any part thereof.

History: 1941 Comp., § 25-1316, enacted by Laws 1947, ch. 150, § 5; 1953 Comp., § 22-14-16.

42-6-17. Effect of decree against state.

A decree quieting title against the state is effective only against a claim, interest or lien of the state that has been set forth in the pleading served upon the state with sufficient factual detail to give the state reasonable notice of the basis of the claim, interest or lien sought to be quieted; provided, however, that service of a copy of the complaint on the state tax commission [property tax division of the taxation and revenue department], identifying the land, and setting out all delinquent taxes shown on the county tax rolls, pertaining to such land, shall be deemed sufficient notice to the state of all claims of the state arising out of delinquent ad valorem taxes or unrecorded instruments of title and any decree quieting title against the state shall be effective to cut off any claim arising from such unrecorded instrument of title or claim for unpaid taxes.

History: 1953 Comp., § 22-14-17, enacted by Laws 1965, ch. 176, § 1; 1969, ch. 111, § 2.

ANNOTATIONS

State tax commission abolished. - The state tax commission was abolished by Laws 1970, ch. 31, § 22. The 1970 act, now repealed, created the property appraisal department, to which the powers and duties of the state tax commission were transferred. Laws 1973, ch. 258, § 3 created the property tax department, to which the property, records and appropriations of the property appraisal department were transferred. Laws 1977, ch. 249, § 5 abolishes the property tax department, while Laws 1977, ch. 249, § 4 creates the taxation and revenue department, consisting of the revenue division, the property tax division and the oil and gas accounting division. See 7-2-2 and 9-11-4 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Quieting Title §§ 10, 24, 65, 87 to 92.

74 C.J.S. Quieting Title §§ 96, 103 to 108.

ARTICLE 7
SPECIFIC PERFORMANCE

42-7-1. [Contracts for sale of real estate; venue of action.]

An action to compel the specific performance of a contract of sale of real estate may be brought in the county where the defendants or any of them reside; but if any of the defendants are nonresidents of the state, it shall be brought in the county where the real estate or some part thereof is situated.

History: Laws 1933, ch. 9, § 1; 1941 Comp., § 25-1601; 1953 Comp., § 22-18-1.

ANNOTATIONS

Cross-references. - For real property descriptions in pleading, see 47-1-46 NMSA 1978.

Specific performance in payment for services not liberally applied. - While the rule allowing specific performance of contracts to convey property in payment for services, even exceptional and extraordinary in character, is not to be lightly, or too liberally, applied, there are many circumstances where the value of the services cannot be fairly and reasonably measured in dollars, and where it was never intended that they should be, and in such cases a judgment for specific performance should stand. In re McGee's Estate, 46 N.M. 256, 127 P.2d 239 (1942).

When real estate binder incapable of specific performance. - A real estate binder uncertain and indefinite as to the maturity of the deferred balance is incapable of specific performance. Edward H. Snow Dev. Co. v. Oxsheer, 62 N.M. 113, 305 P.2d 727 (1956).

Inappropriate allegations do not entitle plaintiff to suit for specific performance. - When the substance of a judgment is necessarily an adjudication that appellee is the owner of an undivided one-eighth interest in real estate, this judgment cannot be changed by calling the interest in real estate a debt which is secured by a lien on the whole lease or by a suit for specific performance even though there might have been such a suit if plaintiff's petition had disclosed appropriate allegations. Heath v. Gray, 58 N.M. 665, 274 P.2d 620 (1954).

But allegations that complainant has performed, will. - It is well established that a complainant in a suit for specific performance must allege that he has performed his part of the contract or that he is ready, able and willing to perform it. A vendor complainant in such a proceeding must by his pleading show not only that he has a legally enforceable contract but that he has complied therewith by performing or offering to perform. Hilger v. Cotter, 75 N.M. 699, 410 P.2d 411 (1966).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 71 Am. Jur. 2d Specific Performance §§ 112 to 151, 180 to 184.

Both realty and tangible personalty, as specific performance of contract for sale of, 152 A.L.R. 16.

Contract to sell land not signed by all landowners, 154 A.L.R. 768.

Specific performance of land contract where vendor will be compelled to incur expense in clearing title, 171 A.L.R. 1299.

Specific performance of option for renewal of lease of real property, 173 A.L.R. 1169.

Improvement of property by owner after execution of contract as affecting purchaser's right to specific performance, 174 A.L.R. 699.

Change of conditions after execution of contract or option for sale of real property as affecting right to specific performance, 11 A.L.R.2d 390.

Parties to action for specific performance of contract for conveyance of realty after death of party to the contract, 43 A.L.R.2d 938.

Validity, construction and effect of contract option, or provision for repurchase by vendor, 44 A.L.R.2d 342.

Indefiniteness as precluding specific performance of contract for sale or exchange of real estate failing to specify time for giving of possession, 56 A.L.R.2d 1274.

Uncertainty as to terms of mortgage or of accompanying note or bond contemplated by real estate sales contract as affecting right to specific performance, 60 A.L.R.2d 251.

Venue of action for specific performance of contract pertaining to real property, 63 A.L.R.2d 456.

Time specified in real estate contract for giving notice of exercise of option to purchase, effect of, 72 A.L.R.2d 1127.

Effect of provision in real-estate option or land sale contract making the contract subject to zoning or rezoning of the property, 76 A.L.R.2d 1195.

Necessity and sufficiency of allegation, in a suit for specific performance on a contract for the sale of land, as to the adequacy of the consideration or as to the fairness of the contract, 100 A.L.R.2d 551.

Requisite definiteness of provision in contract for sale or lease of land, that vendor or landlord will subordinate his interest to permit other party to obtain financing, 26 A.L.R.3d 855.

Marketability of title as affected by lien dischargeable only out of funds to be received from purchaser at closing, 53 A.L.R.3d 678.

Specific performance of land contract notwithstanding failure of vendee to make required payments on time, 55 A.L.R.3d 10.

Validity of governmental borrowing or expenditure for purposes of acquiring, maintaining or improving stadium for use of professional athletic team, 67 A.L.R.3d 1186.

Lessee's first privilege option to purchase or terms of similar import as requiring existence of prior offer from third party, 76 A.L.R.3d 1139.

Specific performance of agreement for sale of private franchise, 82 A.L.R.3d 1102.

Exceptions to rule that oral gifts of land are unenforceable under statute of frauds, 83 A.L.R.3d 1294.

Check given in land transaction as sufficient writing to satisfy statute of frauds, 9 A.L.R.4th 1009.

Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 A.L.R.4th 891.

Option to purchase real property as affected by optionor's receipt of offer for, or sale of, larger tract which includes the optioned parcel, 34 A.L.R.4th 1217.

Excessiveness or adequacy of attorneys' fees in matters involving real estate - modern cases, 10 A.L.R.5th 448.

81 C.J.S. Specific Performance §§ 75 to 79; 81A C.J.S. Specific Performance § 131.

42-7-2. [Service by publication.]

Service by publication may be had in all actions brought under Section 1 [42-7-1 NMSA 1978] of this act when it is made to appear by affidavit that any defendant is a nonresident of the state.

History: Laws 1933, ch. 9, § 2; 1941 Comp., § 25-1602; 1953 Comp., § 22-18-2.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 62B Am. Jur. 2d Process § 158; 71 Am. Jur. 2d Specific Performance § 186.

Constructive service on nonresident, 93 A.L.R. 621, 173 A.L.R. 985.

81A C.J.S. Specific Performance § 146.

42-7-3. [Affidavit for service by publication.]

Before service can be made by publication an affidavit must be filed in the action showing the cause to be one for the specific performance of a contract for the sale of real estate, and that the defendant to be served with process is a nonresident of the state, and it being shown to the satisfaction of the court that the defendant is in fact a nonresident, the court shall order service by publication.

History: Laws 1933, ch. 9, § 3; 1941 Comp., § 25-1603; 1953 Comp., § 22-18-3.

ANNOTATIONS

Cross-references. - For service by publication, see Rule 1-004 H SCRA 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 71 Am. Jur. 2d Specific Performance § 186.

42-7-4. [Effect of decree; compelling conveyance.]

Whenever in an action under the provisions of this act [42-7-1 to 42-7-4 NMSA 1978] a decree of specific performance is made it shall act upon the land itself and the court may compel a conveyance of the real estate by attachment or appoint a commission to make the conveyance.

History: Laws 1933, ch. 9, § 4; 1941 Comp., § 25-1604; 1953 Comp., § 22-18-4.

ANNOTATIONS

Cross-references. - For enforcement of judgment for specific acts, see Rule 1-070 SCRA 1986.

Absolute certainty in contract not required to support decree. - While a contract to convey real estate must be definite and certain before it will be enforced, absolute certainty in a contract is not required in order to support a decree of specific performance; reasonable certainty is all that is required. Whattey v. Colcott, 61 N.M. 455, 302 P.2d 514 (1956).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 71 Am. Jur. 2d Specific Performance §§ 221 to 226.

Awarding damages for delay, 95 A.L.R. 228.

Depreciation in value of property itself, or in its market price or value, subsequent to defendant's fault, right of one seeking specific performance to recover as damages amount measured by, 105 A.L.R. 1421.

81A C.J.S. Specific Performance §§ 199, 200, 208, 215 to 219.

ARTICLE 8
REPLEVIN

42-8-1. [Right of action; purpose of remedy.]

Any person having a right to the immediate possession of any goods or chattels, wrongfully taken or wrongfully detained, may bring an action of replevin for the recovery thereof and for damages sustained by reason of the unjust caption or detention thereof.

History: C.L. 1897, § 2685 (228), added by Laws 1907, ch. 107, § 1 (228); Code 1915, § 4340; C.S. 1929, § 105-1701; 1941 Comp., § 25-1501; 1953 Comp., § 22-17-1.

ANNOTATIONS

Constitutionality. - The New Mexico replevin statutes allow property to be seized without giving the possessor, any possessor, any prior notice or opportunity for hearing. These prejudgment replevin provisions are unconstitutional under the Due Process Clause of the Fourteenth Amendment insofar as they deny the right to an opportunity to be heard before chattels are taken from their possessor. Sena v. Montoya, 346 F. Supp. 5 (D.N.M. 1972). See Fuentes v. Shevin, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972).

New Mexico's present replevin statutes comply with due process standards established by United States supreme court in Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974), and are therefore constitutional. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Primary purpose of action restoration of plaintiff's property. - Replevin, under this statute, is a possessory action, the primary object of which is plaintiff's right to the immediate possession of the property and, secondarily, the recovery of damages by the plaintiff for the unjust caption, or detention thereof. Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970).

Secondary purpose, recovery of damages. - Replevin is a possessory action, the main purpose of which is to restore plaintiff to immediate possession of the property and which secondarily permits recovery also of damages for the unjust caption or detention. Johnson v. Terry, 48 N.M. 253, 149 P.2d 795 (1944).

Plaintiff recovers on strength of title or right to possession. - In replevin plaintiff must recover, if at all, on the strength of his own title or right to possession. Having no title or right of possession in himself, plaintiff cannot prevail on any claim of weakness in his adversary's title. Adams v. Heisen, 77 N.M. 374, 423 P.2d 414 (1967).

Writ accomplishes same function as summons. - The writ of replevin in an action of replevin accomplishes the same function in process, as does a summons in an ordinary civil action. Citizens Bank v. Robinson Bros. Wrecking, 76 N.M. 408, 415 P.2d 538 (1966).

Exclusive remedy for recovery of goods and chattels. - The action of replevin provided for by this statute is exclusive of all other remedies for the recovery of the possession of goods and chattels, and an action in the nature of detinue at common law is not maintainable in this jurisdiction. Troy Laundry Mach. Co. v. Carbon City Laundry Co., 27 N.M. 117, 196 P. 745 (1921).

Strict statutory compliance required. - Any replevin action initiated pursuant to New Mexico's replevin statutes must comply strictly with the statutory requirements in order not to violate a defendant's due process rights. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Section replaces common law actions of replevin and detinue. - This section provides for an action in all cases where, under the common law, either replevin or detinue might have been maintained. Troy Laundry Mach. Co. v. Carbon City Laundry Co., 27 N.M. 117, 196 P. 745 (1921).

The action of replevin is a statutory proceeding designed to take the place of the common law actions of replevin and detinue. Citizens Bank v. Robinson Bros. Wrecking, 76 N.M. 408, 415 P.2d 538 (1966).

Court cannot augment or limit provisions of statute. - Provisions of replevin statute for seizing the property under a writ of replevin cannot be dispensed with, limited or augmented by rule of court. Johnson v. Terry, 48 N.M. 253, 149 P.2d 795 (1944)(decided under former law).

And it lacks power to award possession to either party. - Since replevin under statute is a possessory action, primary purpose of which is to restore actual possession of the goods, where chattel or goods are not found or seized, court is without power or jurisdiction to award actual possession to either party. Wood v. Grau, 55 N.M. 429, 234 P.2d 362 (1951).

Where defendant claims title and possession, no demand necessary. - No demand is necessary in an action of replevin, where the defendant claims title and right to possession as incident thereto in himself. Heisch v. J.L. Bell & Co., 11 N.M. 523, 70 P. 572 (1902); Ross v. Berry, 17 N.M. 48, 124 P. 342 (1912).

Rights of lien claimant. - Lien claimant, by voluntarily parting with possession of a chattel upon which he has a lien, does not thereby waive the lien, but waives the right to possession of the chattel, and may not repossess it merely on the strength of his lien, in the absence of special circumstances. Mathieu v. Roberts, 31 N.M. 469, 247 P. 1066 (1926).

No recovery of expenses incurred in locating cattle. - Plaintiff in replevin for cattle sold by one representing himself to be plaintiff's partner was not entitled to recover expenses incurred in locating cattle prior to demand of a good-faith purchaser. Irick v. Elkins, 38 N.M. 113, 28 P.2d 657 (1933).

Right to sell includes the right to possess, and thus the right to maintain replevin to recover the possession. Kitchen v. Schuster, 14 N.M. 164, 89 P. 261 (1907).

Seizure of property requisite to trial court's jurisdiction. - Since seizure of property under the writ of replevin is a requisite to the trial court's jurisdiction to determine the

right to the possession of the property, where there has been no such seizure, the trial court does not have jurisdiction to grant a summary judgment determining right to possession. Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970).

Jurisdiction of court dependent upon issuance and service of writ. - The jurisdiction of the court, to hear and determine actions in replevin instituted pursuant to this statute, is dependent upon the issuance and service of the writ which brings under the control of the court the property for the purpose of rendering a judgment in accordance with the object and purpose of the statute. Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970).

The issuance and service of the writ of replevin is necessary to the jurisdiction of the court to hear and determine the action in replevin since it is by this means that the property is brought under control of the court for the purpose of giving judgment pursuant to the object and purpose of the statute. Johnson v. Terry, 48 N.M. 253, 149 P.2d 795 (1944).

Sufficiency of complaint. - A complaint in replevin which alleges all the facts required by statute to sustain the right is sufficient. Milliken v. Martinez, 22 N.M. 61, 159 P. 952 (1916).

In action of replevin, general verdict is sufficient, in absence of request for special findings. Gallegos v. Lopez, 27 N.M. 603, 204 P. 71 (1922).

Possession of property and damages only judgment rendered for plaintiff. - The only judgment that may be rendered, under the statute, in favor of the plaintiff, is for the possession of the property and damages for its unlawful caption or detention. Novak v. Dow, 82 N.M. 30, 474 P.2d 712 (Ct. App. 1970).

The only judgment that can be rendered in favor of a plaintiff under this statute is that of recognizing possession of the property in the plaintiff and damages for its unlawful caption or detention by the defendant. Johnson v. Terry, 48 N.M. 253, 149 P.2d 795 (1944).

Judgment on merits bars recovery in subsequent action of trespass. - A judgment in replevin for defendants, appearing to have been rendered on the merits of the controversy, is a bar to any recovery by plaintiffs in a subsequent action of trespass between the same parties for the same taking of the same goods. Lowenthal v. Baca, 10 N.M. 347, 62 P. 982 (1900)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin § 3.

Replevin to recover motion picture film, 19 A.L.R. 1015.

Replevin of undivided share in or undivided quantity of a larger mass, 26 A.L.R. 1015.

Contempt by replevying goods seized in execution, 27 A.L.R. 1225.

Right of husband or wife to maintain replevin against other, 41 A.L.R. 1054.

Recovery of expenses for storage or care of property pending action of replevin, 43 A.L.R. 90.

Executor, administrator or trustee, replevin against, in official capacity, 44 A.L.R. 655, 127 A.L.R. 687.

Replevin for bank account, 44 A.L.R. 1522.

Previous demand as a condition of replevin or trover against innocent purchaser of stolen chattels, 51 A.L.R. 1465.

Partner's right to maintain action of replevin or unlawful detainer against copartner, 58 A.L.R. 633, 168 A.L.R. 1088.

Conditional seller's action of replevin to recover possession of forfeited property, demand for payment or possession as condition precedent, 59 A.L.R. 140.

Right of joint owner of personal property to maintain replevin against third person, 110 A.L.R. 353.

Jurisdiction of justice of the peace (or similar court) in replevin action to recover fixtures on real property, 115 A.L.R. 524.

Right of plaintiff in replevin to damages for detention of property during pendency of action as affected by his failure to claim immediate possession by complying with statutory provisions in that regard, 164 A.L.R. 758.

Alternative judgment and replevin as giving option to either party in regard to payment of damages or return of property, 170 A.L.R. 122.

Sufficiency of proof of possession of defendant at time of commencement of action, 2 A.L.R.2d 1043.

Right of action for conversion as affected by assertion of rights or pursuit of remedies founded on continued ownership of the property, 3 A.L.R.2d 218.

Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 A.L.R.2d 1140.

Revocation of license to cut and remove timber as affecting rights in respect of timber cut but not removed, 26 A.L.R.2d 1194.

County that may bring replevin, or similar possessory action, 60 A.L.R.2d 487.

Recovery of value of property in replevin or similar possessory action where defendant, at time action is brought, is no longer in possession of property, 97 A.L.R.2d 896.

Modern view as to validity of statute or contractual provision authorizing summary repossession of consumer goods sold under retail installment sales contract, 45 A.L.R.3d 1233.

77 C.J.S. Replevin § 2.

42-8-2. [Cross-replevin; property in hands of officer.]

No cross-replevin or replevin for property in the hands of an officer shall be brought, except as herein provided.

History: C.L. 1897, § 2685 (229), added by Laws 1907, ch. 107, § 1 (229); Code 1915, § 4341; C.S. 1929, § 105-1702; 1941 Comp., § 25-1502; 1953 Comp., § 22-17-2.

ANNOTATIONS

Effect of third person claiming right to possession against sheriff. - An action of replevin by a third person, claiming the right to possession, against the sheriff, for the recovery of personal property seized by him under a valid writ of attachment, in the regular discharge of his duties as such, will not lie, either at common law or under the statute. Butts v. Woods, 4 N.M. (Gild.) 343, 16 P. 617 (1888)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin §§ 20, 25, 33.

42-8-3. [Replevin against officer; authorization; additional affidavit; third party may intervene and give forthcoming bond.]

Whenever the property, goods or chattels of any person not a party to the record are wrongfully seized by any officer under or by virtue of any writ of execution, mesne or other process from any court, except under a writ of replevin, such person or persons may maintain a suit in replevin for the possession of the same against such officer, by proceeding in the usual manner as now provided by law for bringing suits in replevin and making an additional affidavit that such goods and chattels have not been seized under any process, execution or attachment against the property of the plaintiff, and that the defendant or defendants in the original process by virtue of which the same were so

wrongfully seized by the officer have no interest, right or title and had no interest, right or title in the said chattels at the time of such wrongful seizure and that said plaintiff is entitled to the possession thereof or is the owner of the same: provided, that in any action of replevin, any third person claiming an interest in property replevied or the right to the possession of the same may intervene in such suit as in other suits of intervention, and; provided, further, that nothing herein shall be construed to prevent any third person in such suits from giving a forthcoming bond and retaining possession of the goods as provided by law.

History: C.L. 1897, § 2685 (230), added by Laws 1907, ch. 107, § 1 (230); Code 1915, § 4342; C.S. 1929, § 105-1703; 1941 Comp., § 25-1503; 1953 Comp., § 22-17-3.

ANNOTATIONS

Replevin against officer where his possession not actual. - Where the possession of an officer, though not actual, is such that he might maintain replevin for its recovery, replevin will lie against him. Hyde v. Elmer, 14 N.M. 39, 88 P. 1132 (1907).

Section extends right of intervention to replevin actions. Consolidated Liquor Co. v. Scotello & Nizzi, 21 N.M. 485, 155 P. 1089 (1916).

Intervenors become parties and require notice of proceedings. - Where intervening petitions have been filed, with or without leave of court, the intervenors become parties entitled to notice of any subsequent proceedings affecting them. Encino State Bank v. Tenorio, 28 N.M. 65, 206 P. 698 (1922).

Intervention by general owner permitted. - The general owner of property which is the subject of a replevin action between parties claiming a special interest therein may intervene, but it would not lie in his mouth to question the right of the plaintiff in such replevin action to make settlement with the defendant therein for any recovery by him in the general owner's behalf. Palmer v. Young, 55 N.M. 469, 235 P.2d 534 (1951).

Burden on defendant to prove price of substitute articles. - Where some of the property sought to be recovered in replevin action belongs to plaintiff, it becomes burden of defendant to tender evidence and prove the actual value, article by article, or class by class, if some of the same kind had a common value, of the property whose assessed value they elect to take in lieu of a return of the property. Palmer v. Young, 55 N.M. 469, 235 P.2d 534 (1951).

When money judgment in lieu of return of property erroneous. - In absence of proof by defendant, where some of replevied property belonged to plaintiffs, as to the value of property belonging to, or rightfully in defendant's possession, rendition of money judgment for defendants in lieu of return of replevied property is erroneous. Palmer v. Young, 55 N.M. 469, 235 P.2d 534 (1951).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin § 25.

42-8-4. [Remedy against corporation same as against individual.]

Suits of replevin may be commenced and carried to a conclusion against any incorporated company in this state in all cases that may be begun and carried against any ordinary defendants.

History: C.L. 1897, § 2685 (231), added by Laws 1907, ch. 107, § 1 (231); Code 1915, § 4343; C.S. 1929, § 105-1704; 1941 Comp., § 25-1504; 1953 Comp., § 22-17-4.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin § 38.

42-8-5. Affidavit.

Before the writ of replevin is issued, the plaintiff or some creditable person in his stead shall file in the district court an affidavit stating:

A. that the plaintiff is lawfully entitled to the possession of the property mentioned in the complaint;

B. that the same was wrongfully taken or wrongfully detained by the defendant;

C. that the plaintiff has reason to believe that the defendant may conceal, dispose of, or waste the property or the revenues therefrom or remove the property from the jurisdiction, during the pendency of the action;

D. that the right of action accrued within one year; and

E. specific facts, from which it clearly appears that the above allegations are justified.

History: C.L. 1897, § 2685 (232), added by Laws 1907, ch. 107, § 1 (232); Code 1915, § 4344; C.S. 1929, § 105-1705; 1941 Comp., § 25-1505; 1953 Comp., § 22-17-5; Laws 1975, ch. 249, § 1.

ANNOTATIONS

Strict statutory compliance required. - Any replevin action initiated pursuant to New Mexico's replevin statutes must comply strictly with the statutory requirements in order not to violate a defendant's due process rights. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Filing of affidavit is prerequisite to obtaining writ of replevin from the court. Johnson v. Terry, 48 N.M. 253, 149 P.2d 795 (1944).

Plaintiff's affidavit should be treated as his verified declaration, (now complaint) in replevin. Abren v. Brown, 2 N.M. 11 (1880)(decided under former law).

Variance between complaint and affidavit not ground to strike complaint. - A variance between the complaint and affidavit, as to the character in which the plaintiff sues, is not a ground for striking out the complaint. Ross v. Berry, 17 N.M. 48, 124 P. 342 (1912).

When error to quash writ for failure to file separate complaint. - It is error to quash a writ of replevin for failure to file a complaint separate from the affidavit, where the affidavit contains all the essential allegations of a complaint. Burnham-Hanna-Munger Dry Goods Co. v. Hill, 17 N.M. 347, 128 P. 62 (1912).

Filing of affidavit required before process may issue. - Before any process may issue in an action of replevin, there must be filed an affidavit setting up the matters specified in the statute. Troy Laundry Mach. Co. v. Carbon City Laundry Co., 27 N.M. 117, 196 P. 745 (1921).

Faulty affidavit. - Where original affidavit did not comply with Subsections C and E, trial court correctly quashed the writ of replevin it had previously entered; but where trial court granted leave to amend, amendment of affidavit relates back to date of original affidavit. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

When statute of limitations runs under conditional sales contract. - Under a conditional sales contract giving seller right to enter upon premises and retake possession of property upon default, the statute of limitations does not begin to run against the right to replevin the property upon default, until the seller elects to exercise the right to retake. Beebe v. Fouse, 27 N.M. 194, 199 P. 364 (1921).

Affidavit not conclusive evidence as to value. - Affidavit of the plaintiff as to the value of the property is competent, but not conclusive evidence of that value in any trial of that issue as against the plaintiff, including assessment of damages where the plaintiff dismisses. Lamy v. Remuson, 2 N.M. 245 (1882)(decided under former law).

On appeal to district court, amendments to affidavit permitted. - In an action of replevin, begun in justice of the peace court (now magistrate's court), and appealed to district court, the district court erred in refusing to permit plaintiff to amend the affidavit of replevin so as to show the value of the property in controversy. Romero v. Luna, 6 N.M. 440, 30 P. 855 (1892)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin §§ 61 to 63.

Necessity and sufficiency of officer's jurat or certificate, 1 A.L.R. 1568, 116 A.L.R. 587.

77 C.J.S. Replevin § 97.

42-8-6. Replevin bond; when filed; parties; conditions.

The plaintiff shall before the execution of the writ enter into bond with sufficient sureties, to the officer to whom the writ is directed, in double the value of the property, conditioned on the prosecution of the suit with effect and without delay and that he will without delay make return of the property if a return is adjudged, keep harmless the officer and pay all costs that may accrue.

History: C.L. 1897, § 2685 (233), added by Laws 1907, ch. 107, § 1 (233); Code 1915, § 4345; C.S. 1929, § 105-1706; 1941 Comp., § 25-1506; 1953 Comp., § 22-17-6; Laws 1975, ch. 249, § 2.

ANNOTATIONS

Cross-references. - As to approval and filing of bond when suit against sheriff, see 42-8-9 NMSA 1978.

For the issuance of writs by the judge of the district court, and approval of bond, see 42-8-18 NMSA 1978.

For suit on replevin bond, see 46-6-7 NMSA 1978.

Writ served only by giving bond. - Writ of replevin may be required to be served only upon the giving of the bond specified herein. Troy Laundry Mach. Co. v. Carbon City Laundry Co., 27 N.M. 117, 196 P. 745 (1921).

When failure to give bond not cause for dismissal. - Action should not be dismissed for failure to give bond prior to the issuance of the writ, where there was an appearance and pleading to the merits. Objection should have been taken by motion before pleading to the merits. Laird v. Upton, 8 N.M. 409, 45 P. 1010 (1896)(decided under former law).

Under former law, bond not jurisdictional. - Laws 1865, ch. 35, § 3, did not require the giving of the bond prior to the issuance of the writ except where the action was against the sheriff, for the giving of the bond was not jurisdictional. Laird v. Upton, 8 N.M. 409, 45 P. 1010 (1896)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin §§ 19, 33, 34, 58 to 60, 86.

Loss or destruction of property pending replevin action as affecting liability under bond given therein, 31 A.L.R. 1290.

77 C.J.S. Replevin § 104.

42-8-7. [Procedure for waiver of affidavit and bond; election to take value of property or its return.]

That if in any suit for replevin of property the plaintiff shall allege in his complaint a demand upon the defendant for the return of the property and a reasonable opportunity to comply therewith, and that he waives seizure and delivery thereof, the affidavit and bond prescribed in Sections 42-8-5 and 42-8-6 NMSA 1978 need not be filed, nor the writ issued. In such case, the verdict, if for the plaintiff, shall fix the value of the property, as well as the damages for detention; upon which verdict plaintiff shall have judgment for such damages, and either for the value of such property, as so fixed, or for the return thereof, at his election.

History: 1941 Comp., § 25-1507a, enacted by Laws 1945, ch. 14, § 1; 1953 Comp., § 22-17-7.

ANNOTATIONS

Court cannot augment or limit provisions of statute. - Provisions of replevin statute for seizing the property under a writ of replevin cannot be dispensed with, limited or augmented by rule of court. Johnson v. Terry, 48 N.M. 253, 149 P.2d 795 (1944)(decided under former law).

When suit dismissed, even though implied waiver of seizure. - Where there was no showing that defendant had either actual or constructive possession of the guns at the time of trial, the dismissal of the suit by the trial court was proper, even if there was an implied waiver of seizure and delivery of the guns as provided in this section. Piner v. Pender, 83 N.M. 502, 494 P.2d 164 (1972).

Date of wrongful detention, date for fixing property value. - The time for fixing the value of the property in case where plaintiff waived seizure and delivery of property and asked for damages was the date of the wrongful detention. Valley Chevrolet Co. v. Whitaker, 76 N.M. 488, 416 P.2d 154 (1966).

Fair and reasonable basis for determination of value necessary. - Where the evidence revealed the value of property plaintiff sought judgment for as of the date defendant obtained possession, the value of the property when wrongfully detained one week later could reasonably be inferred. A fair and reasonable basis for determination of the value is all that is required. Valley Chevrolet Co. v. Whitaker, 76 N.M. 488, 416 P.2d 154 (1966).

Slight departure in relief awarded, not ground for complaint. - In an action of replevin, where plaintiff waived seizure, affidavit and bond, and the trial court found for plaintiff, giving him an election whether to accept a return of the property subject to a lien which defendants had established on the property or take judgment for the value

thereof, less the amount of the lien held by defendants, defendants could not complain of the slight departure in relief awarded if it did not comply literally with a statutory judgment in replevin. Ace Auto Co. v. Russell, 59 N.M. 182, 281 P.2d 143 (1955).

Not separating actual value and damages, harmless error only. - Even though under this statute the actual value of the property and damages should have been separated, the error was harmless where, from an examination of the entire record, it would appear that the judgment of the trial court granted substantial justice. Therefore, it would be going too far to deprive a plaintiff of a recovery upon no better grounds than the bare informality of a verdict. Hicks v. Maestas, 70 N.M. 347, 373 P.2d 916 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Recovery of damages in replevin for value of use of property detained, by successful party having only security interest as conditional vendor, chattel mortgagee, or the like, 33 A.L.R.2d 774.

Allowance of loss of profits from deprivation of use of detained property, 48 A.L.R.2d 1053.

42-8-8. [Requiring additional security.]

Any person plaintiff or defendant in any replevin suits pending in any court in this state, may at any time before judgment, after reasonable notice to the person by whom any bond has been given in any such suit, move the court for additional security on the part of any such principal in such bond, and if, on such motion, the court is satisfied that any surety on such bond has removed from the state or that for any other reason such bond is not sufficient security for the amount thereof, it may direct a new and sufficient bond to be given within a reasonable time, to be fixed by the court, and in default thereof may make such order disposing of the property, the possession of which is held by virtue of such bond, as the failure to give such additional security may require and such orders may be made in vacation as well as in term time.

History: C.L. 1897, § 2685 (234), added by Laws 1907, ch. 107, § 1 (234); Code 1915, § 4346; C.S. 1929, § 105-1707; 1941 Comp., § 25-1508; 1953 Comp., § 22-17-8.

ANNOTATIONS

Cross-references. - As to requiring additional security from defendant or return of property, see 42-8-22 NMSA 1978.

Compiler's note. - The compilers of the 1915 Code deleted the words "attachment or" between the words "any" and "replevin suits." For similar section under attachment from the same act, see 42-9-12 NMSA 1978.

42-8-9. Replevin against sheriff.

Whenever any writ of replevin is granted against the sheriff of any county in this state, the judge of the district court shall designate a person to serve process on the defendant.

History: C.L. 1897, § 2685 (235), added by Laws 1907, ch. 107, § 1 (235); Code 1915, § 4347; C.S. 1929, § 105-1708; 1941 Comp., § 25-1509; 1953 Comp., § 22-17-9; Laws 1975, ch. 249, § 3.

42-8-10. [Manner of executing writ.]

The writ shall be executed by delivering the goods and chattels in the complaint mentioned, to the plaintiff, and by summoning the defendant to appear on the return day of the writ, to answer the action of the plaintiff.

History: C.L. 1897, § 2685 (237), added by Laws 1907, ch. 107, § 1 (237); Code 1915, § 4348; C.S. 1929, § 105-1709; 1941 Comp., § 25-1510; 1953 Comp., § 22-17-10.

ANNOTATIONS

Cross-references. - For proceedings in conversion when goods not found, see 42-9-14 NMSA 1978.

For time for return of writ, see 42-9-16 NMSA 1978.

For levy on cattle, see 39-6-1 to 39-6-4 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin §§ 68, 69.

42-8-11. [Judgment against plaintiff and sureties; value plus damages; option of defendant.]

In case the plaintiff fails to prosecute his suit with effect and without delay judgment shall be given for the defendant and shall be entered against the plaintiff and his securities for the value of the property taken, and double damages for the use of the same from the time of delivery, and it shall be in the option of the defendant to take back such property or the assessed value thereof.

History: C.L. 1897, § 2685 (239), added by Laws 1907, ch. 107, § 1 (239); Code 1915, § 4350; C.S. 1929, § 105-1711; 1941 Comp., § 25-1512; 1953 Comp., § 22-17-12.

ANNOTATIONS

Right to possession and damages object of replevin suit. - In a suit for replevin, the right to possession is not the only question, but the right to damages for unlawful detention or for the use of the property. State ex rel. Sandoval v. Taylor, 43 N.M. 170, 87 P.2d 681 (1939).

Even though statutory replevin in New Mexico is primarily a possessory action, it also involves the question of damages for the unlawful detention or loss of use. McCallister v. M-A-C Fin. Co., 332 F.2d 633 (10th Cir. 1964).

Statute takes no cognizance of party's motive in bringing wrongful replevin, nor does court find merit in the contention that recovery of damages is dependent upon proof of both "with effect" and "without unreasonable delay." Such an interpretation would result in an absurdity or irrationality. Riggs v. Gardikas, 78 N.M. 5, 427 P.2d 890 (1967).

"With effect" and "without delay" defined. - The words of this statute "with effect" mean with success, and "without delay" means without unreasonable or unnecessary delay. McCallister v. M-A-C Fin. Co., 332 F.2d 633 (10th Cir. 1964).

In construing the words "with effect and without delay" the court found the words "with effect" to mean with success and "without delay" to mean without unreasonable or unnecessary delay. Vigil v. Johnson, 60 N.M. 273, 291 P.2d 312 (1955).

Words of statute "with effect" mean with success. Riggs v. Gardikas, 78 N.M. 5, 427 P.2d 890 (1967).

Issue of damages either litigated or barred forever. - The language of this statute is mandatory and the issue of damages must be litigated in the replevin action or be barred thereafter. McCallister v. M-A-C Fin. Co., 332 F.2d 633 (10th Cir. 1964).

Defendant must show injury in order to recover under this statute. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Measure of damages based upon loss of use. - The measure of damages is based upon the loss of use of the property from the time of delivery, and doubled by the statute. McCallister v. M-A-C Fin. Co., 332 F.2d 633 (10th Cir. 1964).

Measure of damages recoverable by debtor for creditor's wrongful replevin is double damages for the use (or reasonable rental value) of property wrongfully replevied, for period of time from its wrongful taking to its tendered return. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

And valued at time and place where property taken. - The measure of damages in replevin is the value of the personal property at the time and place where it was taken, together with the damages sustained by reason of its unlawful detention. Heisch v. J.L. Bell & Co., 11 N.M. 523, 70 P. 572 (1902)(decided under former law).

Double damages. - If damages by reason of a wrongful replevin are proven, the court has no option but to double them if requested. Riggs v. Gardikas, 78 N.M. 5, 427 P.2d 890 (1967).

Where no damage proven, plaintiff recovers nominal damages. - The measure of damages where the plaintiff recovers in a replevin suit, where he has taken possession under the writ, is the damage proved for the detention of the property, and if none is proved, nominal damages. Hyde v. Elmer, 14 N.M. 39, 88 P. 1132 (1907).

Absent proof of damages, judgment should provide for nominal damages. McCallister v. M-A-C Fin. Co., 332 F.2d 633 (10th Cir. 1964).

When defendant not obligated to reduce damages. - In replevin suit to recover an automobile for nonpayment of purchase-money notes, the defense being that defendant had paid the due note to the original holder thereof without notice that it had been assigned, defendant is not obligated to produce a forthcoming bond or take other precautions to reduce the damages. The statute imposes double damages for wrongful levy, to compensate for the detriment proximately caused thereby. Giannini v. Wilson, 43 N.M. 460, 95 P.2d 209 (1939).

Attorneys fees not recoverable. - It is error to award attorneys fees to the intervenor for defending the replevin action. It seems to be well settled in this jurisdiction that absent statutory authority or rule of court, attorneys fees are not recoverable as an item of damages. Riggs v. Gardikas, 78 N.M. 5, 427 P.2d 890 (1967).

Effect of plaintiff's taking wool from replevined sheep on damages. - In replevin action, where plaintiff took wool from replevined sheep during detention, and judgment was for defendant, the wool, or its value, was recoverable, but not as damages, the statute allowing double damages for the use of the property, and the property recovered by defendant being the sheep and wool. Wirt v. George W. Kutz & Co., 15 N.M. 500, 110 P. 575 (1910).

Where plaintiff files motion to dismiss, he abandons suit, and is liable for the double damages expressly authorized. Brannin v. Bremen, 2 N.M. 40 (1880)(decided under former law).

Order sustaining objection to complaint establishes defendant's right to judgment against the plaintiff and his surety. Farmers' Cotton Fin. Corp. v. White, 39 N.M. 132, 42 P.2d 204 (1935).

This section and 42-8-19 NMSA 1978 not mutually exclusive. - This section and 42-8-19 NMSA 1978, providing for the dissolution of a writ upon disproof of the supporting affidavit with an award of damages to the defendant, are not mutually exclusive. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Debtor may pursue other remedies for other wrongs. - While debtor's remedies for wrongful replevin are limited by replevin statutes, those statutes do not preclude other causes of action that debtor may have which arose independent of any wrongful

replevin. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Effect of permitting party to plead general denial and cross-claim. - Where the plaintiff in replevin, without objection, permits defendant to plead both a general denial and a cross-action claiming judgment for unpaid portion of the purchase-price of the chattels, and joins issue with defendant on this claim, such plaintiff will not be heard to complain after verdict for defendant, that the replevin issues were not determined by the verdict. Reed v. Sibley, 35 N.M. 307, 296 P. 572 (1931).

Summary judgment granted when action barred by res judicata. - It was not error for the federal court to grant summary judgment for defendant because the conversion action was barred by the doctrine of res judicata. Plaintiff claimed prior state court judgment resolved only the issue of defendant's money damages, and that a state court judgment is an estoppel only as to fact questions in issue in that case which were essential to a decision thereon. Held, that the counterclaim in the state court was a claim for a wrongful replevin, under this section, whose purpose was to settle in one suit all questions that may arise out of the unlawful taking or detention of property, and the damages issue had to be litigated in the replevin action or be barred thereafter. Rios v. Cessna Fin. Corp., 488 F.2d 25 (10th Cir. 1973).

Burden on defendant to prove price of substitute articles. - Where some of the property sought to be recovered in replevin action belongs to plaintiff, it becomes burden of defendants to tender evidence and prove the actual value, article by article, or class by class, if some of the same kind had a common value, of the property whose assessed value they elect to take in lieu of a return of the property. Palmer v. Young, 55 N.M. 469, 235 P.2d 534 (1951).

Assessment of damages by court without jury was proper where plaintiff abandoned suit by dismissal. Lamy v. Remuson, 2 N.M. 245 (1882)(decided under former law).

Satisfaction of judgment by return of property. - If, in an action of replevin, an alternative judgment is given, and at the time of the rendition of the judgment no election is made to take the money value of the property recovered, the return of the property before a levy of execution is a satisfaction of the judgment. Johnson v. Gallegos, 10 N.M. 1, 60 P. 71 (1900)(decided under former law).

Where trial court declines to enter judgment in alternative for return of the property or for the payment of its assessed value, judgment must be reversed. Downing Bros. v. Mitchell, 48 N.M. 561, 154 P.2d 235 (1944).

Judgment of state court res judicata as to damages. - Where car dealer is sued for replevin, the replevin action is tried on the merits, judgment is entered dismissing the complaint and awarding possession of the cars to the car dealer, and no appeal is taken, the judgment becomes final and the issue of damages is not raised in the first trial; in a second suit, the judgment in the state court is res judicata as to an issue of

damages allegedly resulting from the wrongful replevin, and bars recovery. McCallister v. M-A-C Fin. Co., 332 F.2d 633 (10th Cir. 1964).

Order of restitution after judgment. - In action of replevin, where, after return of property to defendant, there was judgment for plaintiff, followed by order of restitution, the sheriff, claiming interest, was not entitled to show cause why he should be discharged from the order of restitution. Veeder v. Fiske, 6 N.M. 288, 27 P. 642 (1891)(decided under former law).

Right of appeal not hindered by previous nonsuit. - Where a plaintiff in replevin is compelled to abandon his case by an adverse decision upon a vital point therein, to which he excepts, it is not a voluntary nonsuit precluding appeal. Ward v. Broadwell, 1 N.M. 75 (1854)(decided under former law).

Failure to perfect appeal. - Where plaintiff failed to perfect appeal from order dismissing complaint, defendant had not so elected to take judgment for costs as to prevent him from afterward claiming the return of property or its value. Farmers' Cotton Fin. Corp. v. White, 39 N.M. 132, 42 P.2d 204 (1935).

Dismissal of plaintiff's appeal not to deprive defendant of recovery. - On appeal to the district court, in an action of replevin brought before a justice of the peace (now magistrate), the plaintiff by dismissal of his appeal cannot deprive defendant of his right to recover against plaintiff the value of the property and damages for its detention, nor relieve the sureties on the appeal bond. Strauss v. Smith, 8 N.M. 391, 45 P. 930 (1896)(decided under former law).

When failure to direct alternative relief not error. - Where judgment did not alternatively provide for the return of the property or to award payment of the assessed value of the property under this section, the failure to direct alternative relief was not error as the court had full authority to return the parties to their original positions when it ordered a dismissal of the case even though in an ordinary replevin case the judgment must be entered in accordance with the statute; in this particular case, however, where there was no replevin bond, an award to the defendant of the assessed value of the property would have been a useless thing. Historical Soc'y v. Montoya, 74 N.M. 285, 393 P.2d 21 (1964).

Judgment reversed for court's refusal to allow release of bondsman. - Where the affidavit for a writ of replevin was filed, the bond executed by an agent of plaintiff, and on a plea of not guilty by defendant, the cause was tried by a jury and judgment entered in favor of defendant for the value of the property with double damages and costs for the failure of plaintiff to prosecute the action, such judgment would be reversed on appeal for the refusal of the trial court to permit plaintiff to release the original bondsman and to substitute another instead in order to render such original bondsman competent as a witness, for he would then have been competent, being no longer a party. Ward v. Broadwell, 1 N.M. 75 (1854)(decided under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin §§ 59, 101 to 105.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 2 A.L.R. 200.

Right to damages as distinguished from interest for loss of use of property taken in replevin, 6 A.L.R. 478.

Amount of alternative money judgment in replevin as affected by sale of property, under foreclosure of lien of third person, while in hands of unsuccessful party, 22 A.L.R. 215.

Recovery for depreciation of property between date it was replevied and final judgment, 24 A.L.R. 1189.

Recovery of expenses for care or storage of property pending action of replevin, 43 A.L.R. 92.

Sufficiency of offer or tender to satisfy requirement of judgment or condition of bond in replevin for delivery or redelivery of chattels, 57 A.L.R. 806.

Assignment of judgment as carrying assignor's rights as to replevin bond, 63 A.L.R. 291.

Judgment in replevin as implying a direction for return of property, 65 A.L.R. 1302, 144 A.L.R. 1149.

Time for exercise of option under a judgment in replevin for return of property or payment of specified sum, 67 A.L.R. 1497.

Recovery of damages by defendant in replevin, 85 A.L.R. 674.

Basis, in case of alternative judgment in replevin, for determining value of property having different value when installed or used in connection with other property, 86 A.L.R. 111.

Interest on value of property where property itself cannot be recovered, 96 A.L.R. 132, 36 A.L.R.2d 337.

Alternative judgment in replevin as giving option to either party in regard to payment of damages or return of property, 170 A.L.R. 122.

Credit for upkeep or other expense in computing damages for use or detention of property, 7 A.L.R.2d 933.

Interest on damages allowed in replevin for period before judgment, 36 A.L.R.2d 337.

Recovery of fees as damages by successful litigant in replevin or detinue action, 60 A.L.R.2d 945.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 24 A.L.R.3d 768.

77 C.J.S. Replevin § 248.

42-8-12. [Property not returned and accepted; collection of value.]

If such property be not returned and accepted within thirty days after the judgment, the sheriff shall collect the assessed value thereof from the plaintiff and his securities as on other executions.

History: C.L. 1897, § 2685 (240), added by Laws 1907, ch. 107, § 1 (240); Code 1915, § 4351; C.S. 1929, § 105-1712; 1941 Comp., § 25-1513; 1953 Comp., § 22-17-13.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Tender or delivery by loser in replevin action of property to sheriff or other officer, 57 A.L.R. 808.

77 C.J.S. Replevin § 316.

42-8-13. [Officer damnified; suit on bond.]

Any officer damnified by the execution of a writ of replevin may maintain an action therefor on the bond by him taken.

History: C.L. 1897, § 2685 (241), added by Laws 1907, ch. 107, § 1 (241); Code 1915, § 4352; C.S. 1929, § 105-1713; 1941 Comp., § 25-1514; 1953 Comp., § 22-17-14.

42-8-14. [Defendant may sue on bond in name of officer.]

The defendant may, for any violation of the bond, bring an action thereon in the name of the officer for his use.

History: C.L. 1897, § 2685 (242), added by Laws 1907, ch. 107, § 1 (242); Code 1915, § 4353; C.S. 1929, § 105-1714; 1941 Comp., § 25-1515; 1953 Comp., § 22-17-15.

ANNOTATIONS

Cross-references. - For right to sue in name of real party in interest, see Rule 1-017 A SCRA 1986.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Depreciation of property between the date it was replevied and final judgment as element of recovery on bond, 24 A.L.R. 1189.

Damages for detention between judgment against principal and delivery or redelivery of property as covered by replevin bond or redelivery bond in replevin, 90 A.L.R. 972.

77 C.J.S. Replevin § 332.

42-8-15. [Liability of sheriff for failure to take sufficient bond from plaintiff.]

The sheriff for failing to take bond, or for taking insufficient bond from the plaintiff, shall be responsible on his official bond for all damages sustained thereby, recoverable by action in the name of the party injured.

History: C.L. 1897, § 2685 (243), added by Laws 1907, ch. 107, § 1 (243); Code 1915, § 4354; C.S. 1929, § 105-1715; 1941 Comp., § 25-1516; 1953 Comp., § 22-17-16.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin § 66.

42-8-16. Form of affidavit.

Affidavits for writs of replevin shall be in substantially the following form:

"State of New Mexico
County of ......
(Name), Plaintiff
v. Civil Docket No. ...
(Name), Defendant

AFFIDAVIT IN REPLEVIN

I, (plaintiff or attorney), being duly sworn, state that (plaintiff) is lawfully entitled to the possession of (property); that the same was wrongfully taken or wrongfully detained by (defendant); that (plaintiff) has reason to believe that (defendant) may conceal, dispose of, or waste the property or the revenues therefrom, or remove the property from the jurisdiction during the pendency of the action; that the right of action originated within one year; and that the following facts, from which it
clearly appears that the above allegations are justified, are

```
true: ..........
  ..........................................................
..............
               Sworn
.....................................................
                     Plaintiff
  Approved:
   ............
  District Court Judge".
```

History: 1953 Comp., § 22-17-17.1, enacted by Laws 1975, ch. 249, § 4.

ANNOTATIONS

Cross-references. - For suit on bond, see 46-6-7 NMSA 1978.

For replevin bond for trespassing animals in irrigation district, see 77-14-14 NMSA 1978.

Affidavit in replevin in substantial compliance with statute is sufficient, and where the form prescribed does not state the value of the property, and the statute does not require the value to be stated, an affidavit is not defective because it fails to set forth the value. Trujillo v. Tucker, 24 N.M. 339, 171 P. 788 (1918)(decided under former law).

42-8-17. Form of bond.

Replevin bonds shall be in substantially the following form:

```
  "State of New Mexico
  County of  ......
  (Name), Plaintiff
    v.       Civil Docket No.  ...
  (Name), Defendant

 REPLEVIN BOND
    We bind ourselves, our heirs, executors and administrators
to the state of New Mexico in the sum of $  ... on condition
that the plaintiff will diligently prosecute this action to
final judgment without delay, will return all property and pay
to the defendant all money found due to him in this action,
including all damages, and will keep harmless the officer
executing the writ of replevin, upon completion of which this
obligation is void.
              ..................................................
..............
              Plaintiff (Principal)
```

```
              ..................................................
..............
              Surety
              ..................................................
..............
              Surety
  Approved  .........., 19 ...
     ............
  District Court Judge".
```

History: 1953 Comp., § 22-17-17.2, enacted by Laws 1975, ch. 249, § 5.

42-8-18. Approval of bond; issuance of writ.

The judge of the district court shall, upon the filing of the affidavit and bond in conformity with Sections 42-8-5 and 42-8-6 NMSA 1978, the bond to have sufficient surety approved by the judge, issue the writs of replevin applied for by the complainant directed to the sheriff of the county and commanding him to replevy the property described in the affidavit of the complainant.

History: C.L. 1897, § 2685 (246), added by Laws 1907, ch. 107, § 1 (246); Code 1915, § 4356; C.S. 1929, § 105-1717; 1941 Comp., § 25-1518; 1953 Comp., § 22-17-18; Laws 1965, ch. 268, § 2; 1975, ch. 249, § 6.

ANNOTATIONS

Cross-references. - For alias and pluries writs, see 42-9-14 NMSA 1978.

For amendment of writ, see 42-9-14 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin § 67.

42-8-19. Motion to dissolve; damages.

A. Upon the defendant's motion before trial, the district court shall determine the truth of the facts stated in the plaintiff's affidavit at a hearing, to be held without delay. If the plaintiff fails to prove the truth of the facts stated, the writ shall be dissolved, the plaintiff shall be ordered to return the property to the defendant and an order shall be entered for the defendant against the plaintiff and his sureties for the attorney's fees incurred in the dissolution of the writ and for double damages for the use of the property from the time of its delivery to the plaintiff.

B. If the writ of replevin is dissolved, the action shall then proceed as if no writ had been issued.

History: 1953 Comp., § 22-17-18.1, enacted by Laws 1975, ch. 249, § 7.

ANNOTATIONS

Purpose of section. - The legislature, in enacting this section, intended to compensate a defendant in replevin for defending an action that is groundless, whether or not the defendant's property has actually been seized by the sheriff. Green Tree Acceptance, Inc. v. Layton, 108 N.M. 171, 769 P.2d 84 (1989).

Measure of damages recoverable by debtor for creditor's wrongful replevin is double damages for the use (or reasonable rental value) of property wrongfully replevied, for period of time from its wrongful taking to its tendered return. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Effect of failure to accept return of property. - By failing to accept plaintiff's tender to return the property, defendant limits the damages recoverable to those suffered during the period from the wrongful taking to the date of the tender. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Extent of recovery of attorney fees. - Defendant may only recover reasonable attorney fees which it may have incurred in the dissolution of the wrongfully issued writ of replevin; no attorney fees are recoverable for otherwise defending the replevin action. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

This section and 42-8-11 NMSA 1978 not mutually exclusive. - This section and 42-8-11 NMSA 1978, providing for a return of property and the payment of damages upon failure of plaintiff to prosecute his case, are not mutually exclusive. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

42-8-20. Docketing; proceedings in district court.

The district court clerk shall docket the action in replevin and the cause shall then proceed as in other civil actions.

History: 1953 Comp., § 22-17-19, enacted by Laws 1965, ch. 268, § 3.

42-8-21. [Defendant may keep property on giving forthcoming bond; time; parties; condition.]

The defendant, either in person or by his agent or attorney, at any time within five days after the service of a writ of replevin on him, and the replevin of the property thereunder, may require the return of the property replevied upon giving to the sheriff a bond with two or more sufficient sureties in double the value of the property as sworn to in the affidavit of replevin, conditioned for the delivery of the property to the plaintiff, if such delivery be adjudged, and for payment to him of such sum as may for any cause be recovered against the defendant in the suit.

History: C.L. 1897, § 2685 (248), added by Laws 1907, ch. 107, § 1 (248); Code 1915, § 4358; C.S. 1929, § 105-1719; 1941 Comp., § 25-1520; 1953 Comp., § 22-17-20.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 66 Am. Jur. 2d Replevin §§ 72, 73.

42-8-22. [Forthcoming bond; approval; return with writ to district court; additional security; sheriff's liability.]

The sheriff shall judge of the sufficiency of the sureties on the bond of the defendant, and shall return the same with the writ of replevin into the district court; and shall be responsible on his official bond on returning any property replevied; but any party interested in the result of any such cause may move the court on cause shown to require the defendant in such cases to give additional security, when that taken by the sheriff shall be deemed insufficient, or to return the property to the sheriff to be delivered over to the plaintiff, if the plaintiff has given a good and sufficient replevin bond, as required by law.

History: C.L. 1897, § 2685 (249), added by Laws 1907, ch. 107, § 1 (249); Code 1915, § 4359; C.S. 1929, § 105-1720; 1941 Comp., § 25-1521; 1953 Comp., § 22-17-21.

ANNOTATIONS

Cross-references. - For requiring additional security, see 42-8-8 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Sufficiency of offer or tender to satisfy requirement of judgment or condition of bond in replevin, 57 A.L.R. 806.

77 C.J.S. Replevin § 306.

ARTICLE 9
ATTACHMENT

42-9-1. [Grounds for attachment; unmatured debts.]

Creditors may sue their debtors before justices of the peace [magistrates] or in the district courts, by attachment, in the following cases, to wit:

A. when the debtor is not a resident of, nor resides in this state;

B. when the debtor has concealed himself, or absconded or absented himself from his usual place of abode in this state, so that the ordinary process of law cannot be passed upon him;

C. when the debtor is about to remove his property or effects out of this state, or has fraudulently concealed or disposed of his property or effects so as to defraud, hinder or delay his creditors;

D. when the debtor is about fraudulently to convey or assign, conceal or dispose of his property or effects, so as to hinder or delay his creditors;

E. when debt was contracted out of this state, and the debtor has absconded or secretly removed his property or effects into the state, with the intent to hinder, delay or defraud his creditors;

F. where the defendant is a corporation whose principal office or place of business is out of the state, unless such corporation shall have a designated agent in the state, upon whom service of process may be made in suits against the corporation;

G. where the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit is brought or obtained credit from the plaintiff by false pretenses;

H. that the debt is for work and labor, or for any services rendered by the plaintiff, or his assignor, at the instance of the defendant;

I. where the debt was contracted for the necessities of life.

An attachment may issue on a demand not yet due in any case where an attachment is authorized, in the same manner as upon demands already due.

History: C.L. 1897, § 2685 (182), added by Laws 1907, ch. 107, § 1 (182); Code 1915, § 4299; Laws 1917, ch. 113, § 3; 1929, ch. 127, § 1; C.S. 1929, § 105-1601; 1941 Comp., § 22-101; 1953 Comp., § 26-1-1.

ANNOTATIONS

Cross-references. - For intervention in attachment proceedings, see 42-9-29 NMSA 1978.

For abolition of justice of the peace, see N.M. Const., art. VI, § 31.

For jurisdiction, powers and duties of the justices of the peace transferred to the magistrate court, see 35-1-38 NMSA 1978.

For attachment procedure in the magistrate court, see 35-9-1 to 35-9-8 NMSA 1978.

For failure to execute release after forfeiture of lease for oil, gas or mineral land, see 70-1-4 NMSA 1978.

Constitutionality. - New Mexico's present replevin statutes comply with due process standards established by United States supreme court in Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974), and are therefore constitutional. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

Jurisdiction, etc., of justices of the peace transferred. - The office of justice of the peace has been abolished, and all jurisdiction, powers and duties conferred on justices of the peace have been transferred to the magistrate court. See 35-1-38 NMSA 1978.

Object of remedy. - The sole object of an attachment is to create a prior lien on the property of the attachment debtor as security on any judgment that may thereafter be obtained against him on the demands covered by the attachment. Staab v. Hersch, 3 N.M. (Gild.) 209, 3 P. 248 (1884).

Debtor must be nonresident of state where attachment is sued out, and such statutes do not require that he should be a resident elsewhere. First Nat'l Bank v. Payton, 25 N.M. 264, 180 P. 979 (1919).

Attachment proceedings are auxiliary to actions at law, but each is characterized by separate pleading and distinct practice. Staab v. Hersch, 3 N.M. (Gild.) 209, 3 P. 248 (1884) (decided under former law).

Auxiliary where personal judgment sought, but otherwise with judgment in rem. - An attachment is auxiliary where a personal judgment is sought, but it is an original attachment where a judgment in rem only is sought. Southern Cal. Fruit Exch. v. Stamm, 9 N.M. 361, 54 P. 345 (1898) (decided under former law).

Maturity of demand necessary before issue of indebtedness raised. - When attachment is resorted to, for demands and credits not due, and the grounds of attachment are traversed, a speedy determination of that issue is important; but the main issue on the indebtedness cannot be raised, nor any defense interposed, until the maturity of the demand sued on, except to show that no such demand exists on which an attachment will lie. Staab v. Hersch, 3 N.M. (Gild.) 209, 3 P. 248 (1884) (decided under former law).

Magistrate or district court proper tribunals. - Under existing legislation attachment in tort actions may be had in both district and justice (now magistrate) courts. Butler Paper Co. v. Sydney, 47 N.M. 463, 144 P.2d 170 (1943).

Allegation must state present purpose and ground. - An allegation in an affidavit that the defendant "has attempted fraudulently to convey" does not state a present purpose and does not state a ground of attachment. Torlina v. Trorlicht, 5 N.M. 148, 21 P. 68 (1889), aff'd, 6 N.M. 54, 27 P. 794 (1891).

Jury trial optional. - Issue may be tried before the court either with or without a jury as in other cases at law. Everett v. Gilliland, 47 N.M. 269, 141 P.2d 326 (1943).

Setting aside conveyance before obtaining judgment improper. - Before obtaining judgment upon his demand, an attaching creditor cannot maintain an action to have an alleged conveyance of real estate set aside. Talbott v. Randall, 3 N.M. (Gild.) 367, 5 P. 533 (1885)(decided under former law).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 1, 3, 120 to 125, 218 to 251, 264 to 266, 270 to 274.

Termination of right of stoppage in transit by seizure of goods in possession of a carrier under attachment, 7 A.L.R. 1408.

Attachment in libel and slander cases, 11 A.L.R. 378, 61 A.L.R. 1347.

Foreign attachment or garnishment as available in action of nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 A.L.R. 420.

Partner's right to sue out attachment against copartner, 21 A.L.R. 129, 58 A.L.R. 634.

What constitutes nonresidence for purpose of attachment, 26 A.L.R. 180.

Action based upon statute as one in which attachment will lie, 26 A.L.R. 563, 51 A.L.R. 1386.

Attachment or garnishment as affected by trick or device by which the property of or indebtedness to nonresident was subjected to the jurisdiction, 37 A.L.R. 1255.

Liability of estate for administrator's wrongful attachment, 44 A.L.R. 674, 127 A.L.R. 687.

Attachment under state law of railroad property in suit involving interstate shipment, 64 A.L.R. 359.

Debt, what amounts to, within statute providing for attachment before debt is due, 65 A.L.R. 1439, 58 A.L.R.2d 1451.

Attachment as affected by excessive claim, 68 A.L.R. 853.

Practice of law by corporation, procuring attachment proceedings as, 73 A.L.R. 1335, 105 A.L.R. 1364, 157 A.L.R. 282.

Action based on rescission of contract as one arising on contract express or implied, 77 A.L.R. 748, 95 A.L.R. 1028.

Right to and form of judgment against one discharged in bankruptcy in order to sustain attachment, 81 A.L.R. 81.

Affidavits stating grounds of attachment on information and belief, 86 A.L.R. 588.

Attachment statute as applicable to equity suits, 154 A.L.R. 95.

Corporation rendering services in connection with attachment proceedings as engaged in practice of law, 157 A.L.R. 299.

Intent to defraud, sufficiency of affidavit respecting as against objection that it is a mere legal conclusion, 8 A.L.R.2d 578.

What is an action for "debt" within attachment statute, 12 A.L.R.2d 787.

Foreign attachment or garnishment as available in action by nonresident against nonresident or foreign corporation upon a foreign cause of action, 14 A.L.R.2d 420.

Removability of proceeding to federal court, 22 A.L.R.2d 904.

What constitutes a fraudulently contracted debt or fraudulently incurred liability or obligation within purview of statute authorizing attachment on such grounds, 39 A.L.R.2d 1265.

Abatement on ground of prior pending action in same jurisdiction as affected by loss by plaintiff in second action of advantage gained therein by attachment, garnishment, or like process, 40 A.L.R.2d 1111.

Attachment in alienation of affections or criminal conversation case, 67 A.L.R.2d 527.

Interest of spouse in estate by entireties as subject to attachment lien in satisfaction of his or her individual debt, 75 A.L.R.2d 1172.

Potential liability of insurer under liability policy as subject of attachment, 33 A.L.R.3d 992.

7 C.J.S. Attachment §§ 3, 4, 23 to 46, 84, 92 to 96, 102 to 113, 146, 164.

42-9-2. [Attachment authorized in actions ex delicto.]

Wherever an attachment may issue against the property of any person upon any debt or other action founded upon contract, attachment may also issue upon any action founded upon a tort or other action ex delictu [ex delicto]; this law shall apply to actions which have heretofore or may hereafter accrue.

History: C.L. 1897, § 2685 (183), added by Laws 1907, ch. 107, § 1 (183); Code 1915, § 4300; C.S. 1929, § 105-1602; 1941 Comp., § 22-102; 1953 Comp., § 26-1-2.

ANNOTATIONS

Cross-references. - For exemption of workmen's compensation claims, see 52-1-52 NMSA 1978.

Section will not support an action in garnishment wherein plaintiff seeks to garnish money owing to defendant whom he is suing in tort. Sullivan v. Michelli, 35 N.M. 59, 289 P. 803 (1930).

Magistrate or district court proper tribunal. - Under existing legislation, attachment in tort actions may be had in both district and justice (now magistrate) courts. Butler Paper Co. v. Sydney, 47 N.M. 463, 144 P.2d 170 (1943).

Tract, improved with community funds, subject to sale under attachment. - See United States Fid. & Guar. Co. v. Chavez, 126 F. Supp. 227 (D.N.M. 1954).

Effect of waiver of tort action against bankrupt. - Owner of goods in the possession of a bankrupt by embezzlement, larceny, or conversion may waive any action of tort and prove a claim against the bankrupt's estate on the implied contract to pay for the goods; but if he disavows the contract and claims damages for the tort, his claim is not a provable debt under the Bankruptcy Act, 11 U.S.C. § 103. Stalick v. Slack, 269 F. 123 (8th Cir. 1920).

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. - Jurisdiction on constructive service divorce or alimony suit to reach property within state as affected by attachment, 10 A.L.R.3d 212.

7 C.J.S. Attachment §§ 7, 17.

42-9-3. [Situs of debts and intangible interest in property.]

The situs of debts and obligations for the purpose of attachment shall be the domicile of the debtor or obliger and the situs of intangible interests in property, real or personal, legal or equitable, shall be the place where such property is located.

History: Laws 1939, ch. 159, § 5; 1941 Comp., § 22-103; 1953 Comp., § 26-1-3.

ANNOTATIONS

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 25 to 29, 32, 46.

7 C.J.S. Attachment § 54.

42-9-4. [Filing complaint or statement, affidavit and bond; issuance of writ; property subject to attachment.]

A creditor wishing to sue his debtor by attachment, may place in the clerk's office of the district court of any county in this state, having jurisdiction, a complaint, or other lawful statement of his cause of action, and shall also file an affidavit and bond; and thereupon such creditor may sue out an original attachment against the lands, tenements, goods, moneys, effects, credits and any right, title, lien or interest whether legal or equitable upon, in or to real or personal, tangible or intangible property whether present or possessory or reversionary or in remainder and all property which could be reached upon execution or upon equitable proceedings in aid of execution, of the debtor in whosesoever hands they may be except such property as is now, or may hereafter be, specifically exempted from attachment or execution by law and except interests of beneficiaries in spendthrift trusts for whom spendthrift trusts are or may be created.

History: C.L. 1897, § 2685 (184), added by Laws 1907, ch. 107, § 1 (184); Code 1915, § 4301; C.S. 1929, § 105-1603; Laws 1939, ch. 159, § 1; 1941 Comp., § 22-104; 1953 Comp., § 26-1-4.

ANNOTATIONS

Cross-references. - For exemption on personal property, see 42-10-1 NMSA 1978 et seq.

For notice of levy on real estate to be filed in recorder's office, see 39-4-4 NMSA 1978.

Filing of affidavit necessary, before any writ issued. - In attachment proceedings, an affidavit and bond with the clerk's approval endorsed thereon and the petition must be filed before attachment is issued or the writ is issued without authority, and all proceedings under it are null and void. Waldo v. Beckwith, 1 N.M. 97 (1854)(decided under former law).

It may be made and verified before notary public. Robinson v. Hesser, 4 N.M. (Gild.) 282, 13 P. 204 (1887)(decided under former law).

But insufficient as complaint. - Affidavit for attachment was not sufficient as a declaration (now complaint). Staab v. Hersch, 3 N.M. (Gild.) 209, 3 P. 248 (1884)(decided under former law).

Bond requirement not waived because of wage claim action. - Sections 50-4-11 and 50-4-12 NMSA 1978 relating to wage claim actions by the labor commissioner do not waive the requirement for the furnishing of a bond in an attachment proceeding under this section and 42-9-7 NMSA 1978. Cal-M, Inc. v. McManus, 73 N.M. 91, 385 P.2d 954 (1963).

Where levy upon defendant's property has been made under valid writ of attachment in an original attachment, and service made by publication on a nonresident as required by law, although the return of the sheriff was not made until after judgment was taken, the court had jurisdiction to render a judgment in rem by default and to order sale of perishable property attached and application of its proceeds upon such judgment. Southern Cal. Fruit Exch. v. Stamm, 9 N.M. 361, 54 P. 345 (1898)(decided under former law).

Section does not authorize attachment of property in custody of court. - Since this section does not specifically allow attachment of property in the custody of a court, a judgment creditor may not attach its lien to funds of a debtor in the possession of the Court Registry prior to the conclusion of a suit involving those funds. In re Albuquerque W. Solar Indus., 54 Bankr. 174 (Bankr. D.N.M. 1985).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 255, 362, 518 to 549, 565.

Attachment for goods or money embezzled, stolen or converted, 4 A.L.R. 832.

Seal as necessary to authentication of attachment, 30 A.L.R. 734.

Trick or device by which property of nonresident was subjected to jurisdiction, 37 A.L.R. 1255.

Attorney's disbarment for failure to account for money of client as affected by attachment of attorney's funds, 43 A.L.R. 69.

Marketability of title as affected by attachment, 57 A.L.R. 1406, 81 A.L.R.2d 1020.

Mechanic's lien as waived by attachment, 65 A.L.R. 316.

Abuse of process by successive writs to reach exempt property, 65 A.L.R. 1283.

Money only, what constitutes an action for recovery of, within statute as to the character of actions in which attachment may issue, 76 A.L.R. 1446.

Vendee's or optionee's interest in respect of real property, lien of attachment on, as attaching to title acquired by completion of contract or exercise of option, 85 A.L.R. 929.

Surety on bond given to prevent, or secure release of, attachment, right to attack attachment after recovery of judgment by plaintiff, on ground of defects in, or falsity of, affidavit, 89 A.L.R. 269.

Swearing to affidavit in attachment before unauthorized person as a defect curable by amendment, 91 A.L.R. 917.

Attachment statute as applicable to equity suits, 154 A.L.R. 95.

What is an action for "debt" within attachment statute?, 12 A.L.R.2d 787.

Validity of attachment of chattels within store or building other than private dwelling, made without removing the goods or without making entry, 22 A.L.R.2d 1276.

7 C.J.S. Attachment §§ 47 to 61.

42-9-5. [Affidavit; by whom made; contents.]

The affidavit shall be made by the plaintiff, or some person for him, and shall state that the defendant is justly indebted to the plaintiff, after allowing all just credits and offsets, in a sum (to be specified in the affidavit), and on what account, and shall also state that the affiant has good reason to believe, and does believe, the existence of one or more of the causes which, according to the provision of Section 42-9-1 NMSA 1978, will entitle the plaintiff to sue by attachment.

History: C.L. 1897, § 2685 (185), added by Laws 1907, ch. 107, § 1 (185); Code 1915, § 4302; C.S. 1929, § 105-1604; 1941 Comp., § 22-105; 1953 Comp., § 26-1-5.

ANNOTATIONS

Affidavit insufficient as complaint. - Affidavit for attachment was not sufficient as a declaration (now complaint). Staab v. Hersch, 3 N.M. (Gild.) 209, 3 P. 248 (1884)(decided under former law).

It may be verified before notary public. Robinson v. Hesser, 4 N.M. (Gild.) 282, 13 P. 204 (1887)(decided under former law).

Special denial method of raising issue at common law. - Common-law declaration in attachment proceedings should be responded to by common-law plea in order to raise an issue, and if defendant desires to raise an issue on the affidavit for attachment, he should do so by special denial of some material facts contained in the affidavit. Staab v. Hersch, 3 N.M. (Gild.) 209, 3 P. 248 (1884)(decided under former law).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 254 to 275, 328, 332 to 334, 378.

7 C.J.S. Attachment §§ 72 to 113, 359.

42-9-6. [Form of affidavit.]

The form of the affidavit of attachment shall be as follows, to wit:

State of New Mexico,
ss.
County of ......
This day personally appeared before me, the undersigned clerk of the district court, A. B. (or C. D., agent for A. B., as the case may be), and being duly sworn, says that E. F. is justly indebted to the said A. B. in the sum of ..... dollars, after allowing all just offsets, and that the said E. F. is (setting forth one of the causes of attachment).

A. B. or
C. D., Agent for A. B.

Subscribed and sworn to before me this ..... day of ....., A. D. .....

.....
County Clerk.

History: C.L. 1897, § 2685 (207), added by Laws 1907, ch. 107, § 1 (207); Code 1915, § 4317; C.S. 1929, § 105-1620; 1941 Comp., § 22-106; 1953 Comp., § 26-1-6.

Compiler's note. - The codifiers of the 1915 Code substituted, in the body of the affidavit, the words "clerk of the district court" for the words "clerk of the (district court, or probate

court, as the case may be)." They also substituted, just below the line for the clerk's signature, the words "County Clerk" for the word "Clerk."

Affidavit, writ, complaint must describe plaintiff in same way. - Plaintiffs must be described in substantially the same way in the affidavit, writ, and declaration (now complaint) in attachment. If different descriptions are given in the affidavit and in the writ, it will not be presumed that the plaintiffs named in each are the same. Bennett v. Zabriski, 2 N.M. 7 (1880)(decided under former law).

Affidavit for attachment may be verified before notary public. Robinson v. Hesser, 4 N.M. (Gild.) 282, 13 P. 204 (1887)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part I," see 1 Nat. Resources J. 303 (1961).
For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Surety on bond given to prevent, or secure release of attachment, right to attack attachment after recovery of judgment by plaintiff, on ground of defects in, or falsity of, affidavit, 89 A.L.R. 269.

Swearing to affidavit in attachment before unauthorized person as a defect curable by amendment, 91 A.L.R. 917.

7 C.J.S. Attachment §§ 75, 76, 106 to 113.

42-9-7. [Bond; parties; amount; condition.]

History: C.L. 1897, § 2685 (186), added by Laws 1907, ch. 107, § 1 (186); Laws 1913, ch. 56, § 1; Code 1915, § 4303; C.S. 1929, § 105-1605; Laws 1939, ch. 159, § 2; 1941 Comp., § 22-107; 1953 Comp., § 26-1-7.

Cross-references. - As to no bond requirement attachment proceedings brought by New Mexico livestock board, see 77-8-17 NMSA 1978.

42-9-7 [Bond; parties; amount; condition.] (1978 Repl.)

Bond requirement not waived because of wage claim action. - Sections 50-4-11 and 50-4-12 NMSA 1978 relating to wage claim actions by the labor commissioner do

not waive the requirement for the furnishing of a bond in an attachment proceeding under 42-9-4 NMSA 1978 and this section. Cal-M, Inc. v. McManus, 73 N.M. 91, 385 P.2d 954 (1963).

ANNOTATIONS

Reasonable attorney's fees recoverable in suit on bond. - In suit on the bond, reasonable attorney's fees, paid in defending the attachment suit, are recoverable as a part of the damages. Territory ex rel. Leyser v. Rindskopf Bros. & Co., 5 N.M. 93, 20 P. 180 (1889)(decided under former law).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 252, 264, 333, 334, 518 to 523.

Duress, recovery upon ground of duress of money paid upon excessive or unfounded claim to avoid attachment, 18 A.L.R. 1233.

Assignment of judgment as carrying collateral rights of assignor as to attachment bond, 63 A.L.R. 291.

Attachment as affected by excessive claim, 68 A.L.R. 853.

Process in action on note or bond, not resulting in sale of mortgaged property, as precluding foreclosure of real-estate mortgage, 37 A.L.R.2d 959.

7 C.J.S. Attachment §§ 116 to 155, 412.

42-9-8. [Form of bond.]

The bond shall be executed by the plaintiff or some responsible person as principal, and two or more sureties, residents of the state, each of which sureties shall be worth the penalty of the bond over and above all debts, or by some bond company authorized to do business in this state, in a sum at least double the amount sworn to in the affidavit, or in such lesser amount as the district court in its discretion shall by order direct, payable to the defendant and conditioned that the plaintiff will prosecute his action without delay, and with effect, and will refund all sums of money that may be adjudged to be refunded to the defendant and pay all damages that may accrue to any defendant or garnishee by reason of such attachment or any process or judgment thereon.
The form of said bond shall be as follows, to wit:
Know all men by these presents, that we (A. B., principal, or C. D., agent for A. B., principal, as the case may be) and N. N. and M. M., his securities, are held and firmly

bound unto ..... (defendant), in the sum of ..... dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents, sealed with our seals and dated this ..... day of ....., A. D. .....
The condition of the above obligation is such that, whereas the above named A. B. has this day sued out an attachment before J. J., clerk of the district court, against E. F. for the sum of ..... dollars, in the district court for the county of .....
Now, if the said A. B. shall prosecute his said action without delay, and with effect, and refund all sums of money that may be adjudged to be refunded to the defendant, and pay all damages that may accrue, to any defendant or garnishee by reason of said attachment, or any process of judgment thereon, then this obligation to be null and void, otherwise to remain in full force and effect.

A. B. (L. S.)
N. N. (L. S.)
M. M. (L. S.)

History: C.L. 1897, § 2685 (208), added by Laws 1907, ch. 107, § 1 (208); Code 1915, § 4318; C.S. 1929, § 105-1621; 1941 Comp., § 22-108; 1953 Comp., § 26-1-8.

ANNOTATIONS

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 258 to 269, 333, 334.

7 C.J.S. Attachment §§ 118, 126, 252, 317.

42-9-9. [Sureties on bonds; qualifications; acknowledgments.]

The securities on attachment bonds shall be residents of this state, or a bond company authorized to do business in this state, and shall acknowledge the execution of such bond by them in the manner and before such officer as may be prescribed by law for the acknowledgment of conveyances of real estate.

History: C.L. 1897, § 2685 (187), added by Laws 1907, ch. 107, § 1 (187); Code 1915, § 4304; C.S. 1929, § 105-1606; 1941 Comp., § 22-109; 1953 Comp., § 26-1-9.

ANNOTATIONS

Cross-references. - As to release of surety on bond, see 46-6-6 NMSA 1978.

No right of action upon indemnifying bond by defendant. - This section does not confer upon the defendant in an attachment suit the right of action upon an indemnifying

bond given the sheriff, such bond not arising by virtue of the attachment laws. De Witt v. United States Fid. & Guar. Co., 20 N.M. 163, 148 P. 489 (1915).

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. - Bankruptcy of debtor within four months after attachment or execution as discharging surety on bond to release property, 36 A.L.R. 449, 107 A.L.R. 1138.

Obligation of surety on attachment bond as affected by attachment, defendant's adjudication in bankruptcy, 68 A.L.R. 1331.

7 C.J.S. Attachment §§ 121, 122, 124, 131.

42-9-10. [Approval of bond; papers filed before issuance of writ.]

The clerk shall judge of the sufficiency of the penalty and the security in the bond; if they be approved, he shall endorse his approval thereon, and the same, together with the affidavits and complaint or other lawful statement of the cause of action, shall be filed before an attachment shall be issued.

History: C.L. 1897, § 2685 (188), added by Laws 1907, ch. 107, § 1 (188); Code 1915, § 4305; C.S. 1929, § 105-1607; 1941 Comp., § 22-110; 1953 Comp., § 26-1-10.

ANNOTATIONS

Filing bond and issuing writ prima facie proof of approval. - The facts that the clerk filed an attachment bond and issued the writ are prima facie proof that he approved the bond, although he failed to endorse his approval upon it. Baca v. Coury, 27 N.M. 611, 204 P. 57 (1922).

Affidavit and approved bond must be filed before attachment issues, or the writ will be void. Waldo v. Beckwith, 1 N.M. 97 (1854)(decided under former law).

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

42-9-11. [Suit on bond.]

The bond given by the plaintiff or other person in a suit by attachment may be sued on by any party injured in the name of the state, and [he] shall proceed as in ordinary suits, and shall recover such damages as he may sustain.

History: C.L. 1897, § 2685 (189), added by Laws 1907, ch. 107, § 1 (189); Code 1915, § 4306; C.S. 1929, § 105-1608; 1941 Comp., § 22-111; 1953 Comp., § 26-1-11.

ANNOTATIONS

Cross-references. - For person interested suing on bond, see 46-6-7 NMSA 1978.

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

42-9-12. [Requiring additional security.]

Any person, plaintiff or defendant, in any attachment suits pending in any court in this state, may, at any time before judgment, after reasonable notice to the person by whom any bond has been given in any such suit, move the court for additional security on the part of any such principal in such bond, and if, on such motion, the court is satisfied that any surety on such bond has removed from the state, or that for any other reason such bond is not sufficient security for the amount thereof, it may direct a new and sufficient bond to be given within a reasonable time, to be fixed by the court, and in default thereof, may make such order disposing of the property, the possession of which is held by virtue of such bond as the failure to give such additional security may require, and such orders may be made in vacation, as well as in term time.

History: C.L. 1897, § 2685 (221), added by Laws 1907, ch. 107, § 1 (221); Code 1915, § 4333; C.S. 1929, § 105-1636; 1941 Comp., § 22-112; 1953 Comp., § 26-1-12.

ANNOTATIONS

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. - De minimis non curat lex as applied to deficiency in attachment bond, 44 A.L.R. 184.

7 C.J.S. Attachment §§ 128, 248, 259.

42-9-13. [Contents of writ.]

Original writs of attachment shall be directed to the sheriff of the proper county, commanding him to attach the defendant, by all and singular, his lands and tenements, goods, moneys, effects, credits and all other property and interests in property of whatsoever nature and kind, in whosesoever hands the same may be found, with a clause of the nature and to the effect of an ordinary citation to answer the action of the plaintiff.

History: C.L. 1897, § 2685 (191), added by Laws 1907, ch. 107, § 1 (191); Code 1915, § 4308; C.S. 1929, § 105-1610; Laws 1939, ch. 159, § 3; 1941 Comp., § 22-113; 1953 Comp., § 26-1-13.

ANNOTATIONS

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 283 to 287, 337.

7 C.J.S. Attachment § 161.

42-9-14. [Amending attachment and replevin writs; alias and pluries writs; proceeding in conversion when replevin writ not executed.]

That where an original writ of attachment or replevin has been quashed for defect in the affidavit, bond or writ, the court shall allow an amendment thereof to cure the defect, under such circumstances as amendments of ordinary pleadings are allowed by law and with like effect; and alias and pluries writs of attachment or replevin shall be issued in the following cases:

A. where on attachment under a prior writ an insufficient amount of property has been levied upon to satisfy the amount of damages claimed in the affidavit, with costs accrued or likely to accrue;

B. where a prior writ has been quashed for defect that cannot be cured by amendment;

C. where, in replevin, the property to be replevied has not been found in the county to or in which the original writ was directed or attempted to be served and the plaintiff wishes to undertake the replevin of property in another county.

Alias and pluries writs of attachment shall not be issued except upon a new affidavit and bond laying the foundation therefor the same as required of original writs; but alias and pluries writs of replevin may be issued upon the foundation laid by the original affidavit, bond to be given to the officer serving the writ as in cases of original writs of replevin.

Where the goods and chattels sought to be seized by a proceeding in replevin are not found, the action shall not abate, but may proceed as for conversion upon the facts set out in the complaint as originally stated, or as the same may be amended.

History: C.L. 1897, § 2685 (227), added by Laws 1907, ch. 107, § 1 (227); Code 1915, § 4339; C.S. 1929, § 105-1642; 1941 Comp., § 22-114; 1953 Comp., § 26-1-14.

ANNOTATIONS

Amendments to complaint necessary. - In an action to replevy goods which had been sold by defendant, summary judgment for defendant is improper, but plaintiff should be permitted to amend the complaint and thereafter to proceed in conversion. Wood v. Grau, 55 N.M. 429, 234 P.2d 362 (1951).

Amendment of affidavit in replevin relates back to the date of the original affidavit. First Nat'l Bank v. Southwest Yacht & Marine Supply Corp., 101 N.M. 431, 684 P.2d 517 (1984).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 253, 270 to 275.

Amendment of pleadings or the writ as ground for discharge of attachment, 74 A.L.R. 912.

Right of action for conversion as affected by assertion of rights or pursuit of remedies founded on continued ownership of the property, 3 A.L.R.2d 218.

Swearing to affidavit in attachment before unauthorized person as a defect curable by amendment, 91 A.L.R. 917.

7 C.J.S. Attachment § 168; 77 C.J.S. Replevin § 120.

42-9-15. [Issuance and return of writ; proceedings; judgment.]

Original writs of attachment shall be issued and returned in like manner as ordinary writs of summons; and when the defendant is cited to answer the action, like proceedings shall be had between him and the plaintiff as in ordinary actions on contracts, and a general judgment may be rendered for or against the defendant.

History: C.L. 1897, § 2685 (192), added by Laws 1907, ch. 107, § 1 (192); Code 1915, § 4309; C.S. 1929, § 105-1611; 1941 Comp., § 22-115; 1953 Comp., § 26-1-15.

ANNOTATIONS

Default judgment proper where defendant fails to plead to complaint. - In original action in attachment where the defendant traversed the affidavit for attachment, but failed to plead to the declaration, (now complaint), judgment by default was properly

entered against him. First Nat'l Bank v. George, 26 N.M. 46, 189 P. 240 (1920). See also Ripley v. Astec Mining Co., 6 N.M. 415, 28 P. 773 (1892).

Judgment rendered during vacation void. - In action of assumpsit by attachment, (now ordinary action on contract), where garnishment process was served on the defendant company, judgment rendered during vacation was void. Staab v. Atlantic & P.R.R., 3 N.M. (Gild.) 606, 9 P. 381 (1886)(decided under former law).

As well as order. - In an action of assumpsit by attachment (now ordinary action on contract), an order made during vacation, on a motion to quash the attachment proceeding argued and submitted during term, was void for being so made during vacation, and left the motion still pending and undetermined in the court below, and, on appeal from the order, the cause was stricken from the docket. Colter v. Marriage, 3 N.M. (Gild.) 604, 9 P. 383 (1886)(decided under former law).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 277, 280 to 282, 336.

42-9-16. [Time for return of writs of execution, attachment and replevin.]

All executions, writs of attachment and writs of replevin shall be returned within sixty days from the date of the delivery thereof to the sheriff or other officer or person whose duty it is, or who may be designated to serve the same.

History: Laws 1897, ch. 73, § 176; C.L. 1897, § 2685 (176); Code 1915, § 4257; C.S. 1929, § 105-1004; 1941 Comp., § 22-116; 1953 Comp., § 26-1-16.

ANNOTATIONS

Compiler's note. - An almost identical provision relating to executions will be found in 39-4-9 NMSA 1978.

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place a certain number of days before a known future date, 98 A.L.R.2d 1331.

7 C.J.S. Attachment §§ 84, 102 to 105.

42-9-17. [Service of writ; seizure or levy; return; endorsements; garnishment of inaccessible property.]

The manner of serving writs of attachement [attachment] shall be as follows:

A. the writ or other lawful statement of the cause of action, shall be served on the defendant as an ordinary summons;

B. when lands or tenements or interests or estates in real estate whether legal or equitable are to be attached, the officer shall briefly describe the same in his return, and state that he attached all the right, title and interest of the defendant to the same, and shall moreover give notice to the actual occupants, if any there be;

C. when goods and chattels, moneys, effects, evidences of debt or other personal property are to be attached, the officer shall seize the same and keep them in his custody, if accessible, and if not accessible, he shall summon the person in whose hands they may be as garnishee. If the property to be attached is an intangible interest or right either legal or equitable in personal property in the possession of someone other than the defendant, the officer in whose hands the writ of attachment is placed shall endorse an entry thereon of his levy on all of the right, title and interest, legal or equitable, of the defendant in and to said personal property describing it, and shall forthwith serve a copy of the writ of attachment so endorsed upon the person in possession of said personal property in the same manner as summons are served, and if said property be in possession of a corporation incorporated under the laws of this state or any foreign corporation doing business in this state, a copy of the writ of attachment so endorsed shall be served on said corporation by delivering the same to the agent designated by said corporation upon whom process against the corporation may be served or said copy may be served upon said corporation as provided by law for the service of process upon corporations doing business in the state of New Mexico; if service cannot thus be made, such copy shall be served by leaving the same at the usual and most notorious place of doing business of such corporation in this state, which entry and service shall amount to and be considered a seizure of all the right, title and interest of defendant, legal or equitable, in and to the personal property so described, to all intent [intents] and purposes, and may be sold under execution;

D. if any provision of this section is inconsistent with the provisions of the Uniform Commercial Code [Chapter 55 NMSA 1978] the code shall control.

History: C.L. 1897, § 2685 (193), added by Laws 1907, ch. 107, § 1 (193); Laws 1909, ch. 63, § 33; Code 1915, § 4310; C.S. 1929, § 105-1612; Laws 1939, ch. 159, § 4; 1941 Comp., § 22-117; 1953 Comp., § 26-1-17; Laws 1961, ch. 96, § 11-104.

ANNOTATIONS

Cross-references. - For notice of levy on real estate, filing, recording and indexing, see 39-4-4, 39-4-5 NMSA 1978.

For levy on cattle, see 39-6-1 to 39-6-4 NMSA 1978.

Substituted service permissible. - Service of an attachment issued on an affidavit showing that the defendant has absconded and absented himself from his usual place of abode may be made by leaving a true copy thereof at the usual place of abode of the defendant with some suitable person, and publication is not necessary. Bell v. Gaylord, 6 N.M. 227, 27 P. 494 (1891); Spiegelberg v. Sullivan, 1 N.M. 575 (1873)(decided under former law).

Filing of lis pendens notice authorized when writ seizes realty. - Writ of attachment, under which real estate is seized, affects the title to the real estate, and authorizes the filing of lis pendens notice. Bell v. Gaylord, 6 N.M. 227, 27 P. 494 (1891)(decided under former law).

Judgment rendered during vacation void. - In action for assumpsit by attachment (now ordinary action of contract), where garnishment process was served on the defendant, judgment rendered during vacation was void. Staab v. Atlantic & P.R.R., 3 N.M. (Gild.) 606, 9 P. 381 (1886)(decided under former law).

When writ of attachment has been discharged, jurisdiction to order the garnishee to perform or desist from performing any particular act is thereby terminated. Albuquerque Nat'l Bank v. Second Judicial Dist. Court, 77 N.M. 603, 426 P.2d 204 (1967).

Personal and immediate custody over property not required. - It is not essential to the keeping of attached property in custodia legis that the sheriff maintain personal and immediate custody over it, and he may do so indirectly through his servant or through a custodian appointed by him and responsible to him. Hart v. Oliver Farm Equip. Sales Co., 37 N.M. 267, 21 P.2d 96 (1933).

A valid attachment lien, created by constructive seizure and appointment of custodian, was not lost by mere temporary absence of custodian from premises where the property was situated. Hart v. Oliver Farm Equip. Sales Co., 37 N.M. 267, 21 P.2d 96 (1933)(decided under former law).

Effect of judgment against attached property. - A legal judgment against attached property is a prerequisite to a valid judgment against garnishee. Smith v. Montoya, 3 N.M. (Gild.) 13, 1 P. 175 (1883), overruled on other grounds Field v. Otero, 35 N.M. 68, 290 P. 1015 (1930).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 295, 319, 344, 562.

Service of process on foreign corporation doing business in state, 113 A.L.R. 140.

Foreign corporation as a nonresident for purposes of attachment law of state in which it is doing business or is domesticated, 114 A.L.R. 1378.

7 C.J.S. Attachment §§ 11, 70, 170 to 193, 196, 197, 199, 253, 374.

42-9-18. [Service by publication; personal service outside state.]

Whenever property of a defendant has been attached and it shall appear from the affidavit for attachment and the return of the sheriff, that such defendant cannot be personally served with process, the court shall order a publication to be made stating the nature and amount of the plaintiff's demand, and notifying the defendant that his property has been attached, and that unless he appears at the return day named in said publication, judgment will be rendered against him and his property sold to satisfy the same; which notice by publication shall be published in the same manner prescribed by law for the publication of other notices from the district courts; provided that personal service of such notice of suit upon the defendant outside the state of New Mexico, made in the same manner as now provided by law for the personal service of summons outside the state of New Mexico, shall be equivalent to publication.

History: C.L. 1897, § 2685 (196), added by Laws 1907, ch. 107, § 1 (196); 1913, ch. 53, § 1; Code 1915, § 4311; Laws 1927, ch. 91, § 2; C.S. 1929, § 105-1614; 1941 Comp., § 22-118; 1953 Comp., § 26-1-18.

ANNOTATIONS

Generally. - If the nonresident defendant has property within the territorial jurisdiction of the court, the same may be reached by attachment properly instituted, and the court, upon seizure of the property under the writ of attachment and proper notice by publication, so far acquires jurisdiction of the property as a proceeding in rem as to ascertain the pecuniary obligations of the defendant, and to apply the proceeds of the attached property in satisfaction of the same. Smith v. Montoya, 3 N.M. (Gild.) 13, 1 P. 175 (1883), overruled on other grounds Field v. Otero, 35 N.M. 68, 290 P. 1015 (1930).

Mailing copy of complaint and summons to nonresident, unnecessary. - An affidavit for attachment, where defendant is a nonresident, need not state his residence or that his residence is unknown, nor is it necessary that a copy of the complaint and summons be mailed to him. Glasgow v. Peyton, 22 N.M. 97, 159 P. 670 (1916).

Defective notice. - In proceeding in assumpsit by attachment (now ordinary action on contract) against nonresident defendants, failing to appear, where the citation and notice by publication contained no notice to the defendants that property has been

attached, or that such property would be sold to satisfy the judgment that would be rendered against them on their failure to appear, such notice was void. Smith v. Montoya, 3 N.M. (Gild.) 13, 1 P. 175 (1883), overruled on other grounds Field v. Otero, 35 N.M. 68, 290 P. 1015 (1930).

Where notice of suit was bad, attempted service was bad, the levy itself was defective, the officer's return was imperfect and the bond carried no penalty, there were enough fatal defects to render the attachment proceeding bad even in a collateral attack. Larkin v. Folsom Town & Inv. Co., 61 N.M. 441, 301 P.2d 1091 (1956).

Service by registered mail in lieu of publication ineffective for jurisdiction. - Where service on nonresident defendant in attachment suit was by registered mail instead of by publication, it was ineffective to give the court jurisdiction, so that default judgment in personam for plaintiff was void and subject to collateral attack. Walter v. Richardson, 62 N.M. 152, 306 P.2d 643 (1956).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 14, 26, 73, 392, 562.

Notice to nonresident principal essential to attachment, 92 A.L.R. 570.

7 C.J.S. Attachment §§ 179, 185, 378, 379.

42-9-19. [Default after service by publication; judgment; effect.]

When the defendant shall be notified, by publication as aforesaid, and shall not appear and answer the action, judgment by default may be entered, which may be proceeded on to final judgment as in ordinary actions, but such judgment shall only bind the property attached, and shall be no evidence of indebtedness against the defendant in any subsequent suit.

History: C.L. 1897, § 2685 (197), added by Laws 1907, ch. 107, § 1 (197); Code 1915, § 4312; C.S. 1929, § 105-1615; 1941 Comp., § 22-119; 1953 Comp., § 26-1-19.

ANNOTATIONS

Where levy made upon defendant's property under valid writ of attachment, and service made by publication on a nonresident, although the return of the sheriff was not made until after judgment was taken, the court had jurisdiction to render a default judgment and to order sale of perishable property attached and apply the proceeds.

Southern Cal. Fruit Exch. v. Stamm, 9 N.M. 361, 54 P. 345 (1898)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment § 388.

42-9-20. [Forthcoming bond.]

When property of the defendant found in his possession, or in the hands of any other person, shall be attached, the defendant or such other person may retain possession thereof by giving bond and security to the satisfaction of the officer executing the writ, to the officer or his successor in double the value of the property attached conditioned that the same shall be forthcoming when and where the court shall direct, and shall abide the judgment of the court.

History: C.L. 1897, § 2685 (198), added by Laws 1907, ch. 107, § 1 (198); Code 1915, § 4313; C.S. 1929, § 105-1616; 1941 Comp., § 22-120; 1953 Comp., § 26-1-20.

ANNOTATIONS

Giving bond not release property from lien. - Under Kearny Code, Attachments, § 13; Comp. Laws 1865, ch. 31, § 12; Comp. Laws 1897, § 2704, repealed by Laws 1907, ch. 107, § 1 (300), which was identical with the present section, the giving of a forthcoming bond in attachment did not release the property from the attachment lien. It simply constituted the defendant the bailee of the sheriff for the safe-keeping of the property, and for its return to the sheriff in case the plaintiff should recover, and in default of which the liability of the bond attaches to the defendant and his sureties. It did not constitute a general appearance. Holzman v. Martinez, 2 N.M. 271 (1883)(decided under former law).

Action by sheriff for breach. - An action may be brought for breach of a forthcoming bond by the sheriff for the use and benefit of the real parties in interest. Romero v. Wagner, 3 N.M. (Gild.) 167, 3 P. 50 (1884)(decided under former law).

And without joinder of principal. - Action was maintainable on forthcoming bond in attachment without joining principal or without showing judgment against principal and exhaustion of remedies against the principal. Romero v. Wagner, 3 N.M. (Gild.) 167, 3 P. 50 (1884)(decided under former law).

Principals and sureties jointly and severally liable. - Principals and sureties on forthcoming bond in attachment were jointly and severally liable. Romero v. Wagner, 3 N.M. (Gild.) 167, 3 P. 50 (1884)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 523, 529, 531, 541, 542, 544, 547, 616.

Bankruptcy of debtor within four months after attachment or execution as discharging surety on bond given to release property seized thereunder, 36 A.L.R. 449, 107 A.L.R. 1138.

Right of obligor in action on forthcoming bond or receipt for return of property seized under process to set up title in himself, 37 A.L.R. 1402.

7 C.J.S. Attachment §§ 248, 249, 258, 259, 268 to 274, 290, 316, 367.

42-9-21. [Officer's return.]

The officer executing the writ of attachment shall return, with the writ, all bonds taken by him in virtue thereof, a schedule of all property and effects attached, and the names of all the garnishees, the times and places when and where respectively summoned.

History: C.L. 1897, § 2685 (199), added by Laws 1907, ch. 107, § 1 (199); Code 1915, § 4314; C.S. 1929, § 105-1617; 1941 Comp., § 22-121; 1953 Comp., § 26-1-21.

ANNOTATIONS

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

42-9-22. [Officer's liability on failure to return bond.]

If the officer wilfully fail to return a good and sufficient bond in any case where bond is required by law, he shall be held and considered as security for the performance of all acts and the payment of all money to secure the performance of which such bond ought to have been taken.

History: C.L. 1897, § 2685 (200), added by Laws 1907, ch. 107, § 1 (200); Code 1915, § 4315; C.S. 1929, § 105-1618; 1941 Comp., § 22-122; 1953 Comp., § 26-1-22.

ANNOTATIONS

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

42-9-23. [When court acquires jurisdiction; survival of action.]

From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings in relation thereto; and if after the issuing of the order, the defendant being a person, should die, or a corporation, and its charter should expire by limitation, forfeiture or otherwise, the proceedings, shall be carried on, but in all such cases other than where the defendant was a foreign corporation, his legal representatives shall be made parties to the action.

History: C.L. 1897, § 2685 (220), added by Laws 1907, ch. 107, § 1 (220); Code 1915, § 4332; C.S. 1929, § 105-1635; 1941 Comp., § 22-123; 1953 Comp., § 26-1-23.

ANNOTATIONS

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 13 to 39; 20 Am. Jur. 2d Courts § 149.

Retaining indebtedness of heir, legatee or distributee as against attaching creditor, 1 A.L.R. 1034, 30 A.L.R. 775, 75 A.L.R. 878, 110 A.L.R. 1384, 164 A.L.R. 717.

Receiver, effect of appointment of, for corporation, upon enforcement of attachment lien, 8 A.L.R. 459.

Death of principal defendant as abating or dissolving attachment, 21 A.L.R. 272, 131 A.L.R. 1146.

1 C.J.S. Abatement and Revival § 152; 7 C.J.S. Attachment §§ 214, 343.

42-9-24. [Perishable property; petition for sale; hearing; order.]

In all suits in the district courts by attachments, when the property attached shall be of a perishable nature and liable to be lost or diminished in value before the final adjudication of the case, and the defendant shall not give bond to retain the possession of the same, the plaintiff or defendant may make out a petition in writing setting forth the kind, nature and condition of the property, and present said petition to the judge of the district in vacation; and if he shall find it sufficient in form and conditions, he may hear the testimony of witnesses as to the property, and if he shall believe that the interests of both plaintiff and defendant will be promoted by the sale of the property, may order such sale to be made, and direct the manner thereof.

History: C.L. 1897, § 2685 (209), added by Laws 1907, ch. 107, § 1 (209); Code 1915, § 4319; C.S. 1929, § 105-1622; 1941 Comp., § 22-124; 1953 Comp., § 26-1-24.

ANNOTATIONS

Cross-references. - For sales of alcoholic liquors to be made only to licensed dealers, see 60-9-5 NMSA 1978.

Wheat, barley and oats subject to sale. - Wheat and barley in the shock and oats growing in field are subject to sale under this section. Mundil v. Hutson, 33 N.M. 388, 268 P. 566 (1928).

Good faith purchaser takes perfect title. - Good faith purchaser of perishable property sold under this section takes perfect title. Jones v. Springer, 15 N.M. 98, 103 P. 265 (1909), aff'd, 226 U.S. 148, 33 S. Ct. 64, 57 L. Ed. 161 (1912).

And succeeds to title of judgment creditor. - Purchaser at sale made under perishable goods statute stands upon different ground than the ordinary purchaser at a judicial sale, upon execution, after judgment, and not only succeeds to the title of the judgment creditor but to the rights of all parties to the suit which may be afterwards determined, and the rights of all the parties to the suit attach to the proceeds of the sale in lieu of the thing sold. Jones v. Springer, 15 N.M. 98, 103 P. 265 (1909), aff'd, 226 U.S. 148, 33 S. Ct. 64, 57 L. Ed. 161 (1912).

Right of trustee in bankruptcy to proceeds of sale. - Territorial court, which had custody of perishable property by virtue of receivership proceedings, and attachment levied on such property by receiver, before bankruptcy proceedings were commenced, may order same sold and transfer claim of trustee in bankruptcy to the proceeds of the sale. Jones v. Springer, 226 U.S. 148, 33 S. Ct. 64, 57 L. Ed. 161 (1912).

Court has jurisdiction to render judgment in rem, where a valid levy of defendant's property has been made under a valid writ of attachment, although return of the officer was not made until after judgment was taken. Southern Cal. Fruit Exch. v. Stamm, 9 N.M. 361, 54 P. 345 (1898)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 97, 459, 510.

Attachment creditor as purchaser, within rule that first of two purchasers to obtain possession will prevail, 21 A.L.R. 1031.

Construction and effect of provision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 A.L.R.3d 593.

7 C.J.S. Attachment §§ 275, 277, 278.

42-9-25. [Designating person to make sale; requiring bond.]

In such case the judge may appoint someone to make such sale, and require such bond and security to be given for the faithful performance of the same and the accounting for the proceeds and paying the same over, as the nature of the case may demand.

History: C.L. 1897, § 2685 (210), added by Laws 1907, ch. 107, § 1 (210); Code 1915, § 4320; C.S. 1929, § 105-1623; 1941 Comp., § 22-125; 1953 Comp., § 26-1-25.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Injunction against waste to protect attachment lien, 103 A.L.R. 387.

7 C.J.S. Attachment §§ 277, 278, 281.

42-9-26. [Receiver; appointment; bond.]

The judge may, if he shall find the safety of the property or the security of the proceeds shall require it, appoint a special receiver to take possession of the same, after giving such bond and security as the judge shall approve.

History: C.L. 1897, § 2685 (211), added by Laws 1907, ch. 107, § 1 (211); Code 1915, § 4321; C.S. 1929, § 105-1624; 1941 Comp., § 22-126; 1953 Comp., § 26-1-26.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 209, 210, 593; 65 Am. Jur. 2d Receivers § 23; 66 Am. Jur. 2d Receivers §§ 260, 261.

7 C.J.S. Attachment §§ 2, 106 to 113, 149 to 155, 254 to 257, 263.

42-9-27. [Disposition of proceeds of sale.]

All such proceeds of sale of property shall be delivered to such person as the judge or court shall determine entitled to the same upon the final disposition of the suit.

History: C.L. 1897, § 2685 (212), added by Laws 1907, ch. 107, § 1 (212); Code 1915, § 4322; C.S. 1929, § 105-1625; 1941 Comp., § 22-127; 1953 Comp., § 26-1-27.

ANNOTATIONS

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Judicial Sales § 327.

7 C.J.S. Attachment §§ 284, 285.

42-9-28. [Expenses in connection with receivership and sale.]

The judge or court may allow to the receiver or person making said sale a reasonable compensation for his services, and the necessary costs for keeping and preserving the property.

History: C.L. 1897, § 2685 (213), added by Laws 1907, ch. 107, § 1 (213); Code 1915, § 4323; C.S. 1929, § 105-1626; 1941 Comp., § 22-128; 1953 Comp., § 26-1-28.

42-9-29. [Intervention in attachment proceedings.]

Any person owning or claiming any property, or a lien thereon, which has been attached in any proceeding to which he is not a party may intervene therein at any time before the trial thereof begins, by filing a petition, under oath, setting up his right, and thereafter said cause shall proceed as in other cases of intervention.

History: Laws 1917, ch. 75, § 1; C.S. 1929, § 105-1613; 1941 Comp., § 22-129; 1953 Comp., § 26-1-29.

ANNOTATIONS

Cross-references. - For intervention, see Rule 1-024 SCRA 1986.

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 577 to 586.

Attorney's fees for wrongful attachment, right of successful intervenor or claimant of property to, 25 A.L.R. 604, 65 A.L.R.2d 1426.

Right of attaching creditor to intervene in suit of prior attachment creditor, 39 A.L.R. 1505.

Reformation of deed or mortgage as against intervening rights of attaching judgment creditor, 44 A.L.R. 109, 79 A.L.R.2d 1180.

Surety of building contractor who completes contract as entitled to moneys earned by contractor but unpaid before default, as against attaching creditors of contractor, 45 A.L.R. 388, 134 A.L.R. 738, 164 A.L.R. 613.

Relief to successful intervenor or interpleader in attachment, nature and extent of, 66 A.L.R. 908.

7 C.J.S. Attachment §§ 298 to 315.

42-9-30. [Bond discharging attachment and garnishment; restitution of property.]

If the defendant or other person on his behalf at any time before judgment cause a bond to be executed to the plaintiff, by one or more sureties, possessing the same qualifications required of sureties on bonds for the issuance of attachment, to the effect that the defendant shall perform the judgment of the court, the attachment in such action shall be discharged and restitution made of any property taken under it or the proceeds thereof. Such bond shall also discharge any garnishee from liability in said cause.

History: C.L. 1897, § 2685 (225), added by Laws 1907, ch. 107, § 1 (225); Code 1915, § 4337; C.S. 1929, § 105-1640; 1941 Comp., § 22-130; 1953 Comp., § 26-1-30.

ANNOTATIONS

Motion to dissolve attachment does not lie after bond given. Leusch v. Nickel, 16 N.M. 28, 113 P. 595 (1911).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Answering to merits or giving bond for release of attachment as waiver of objections to attachment, 72 A.L.R. 120.

7 C.J.S. Attachment § 316.

42-9-31. [Answer denying truth of fact stated in attachment affidavit; trial of issue; decision.]

In all cases when properties or effects shall be attached, defendant may within the time limited in the writ of attachment, put in his answer, without oath, denying the truth of any material fact contained in the affidavit, to which the plaintiff may reply; and trial of the truth of the affidavit shall be had and on such trial the plaintiff shall be held to prove the existence of the facts denied, as set forth in the affidavit as the ground of attachment, and if the issue shall be found for plaintiff, the cause shall proceed, but if it be found for the defendant, the attachment shall be dismissed at the costs of plaintiff.

History: C.L. 1897, § 2685 (201), added by Laws 1907, ch. 107, § 1 (201); Code 1915, § 4316; C.S. 1929, § 105-1619; 1941 Comp., § 22-131; 1953 Comp., § 26-1-31.

ANNOTATIONS

Denial of affidavit's allegation puts case at issue. - In proceeding under the territorial statute to test the truth of the allegations of an affidavit for attachment, the affidavit is the complaint in the case, and a simple denial of its truth puts the case at issue, and the trial proceeds before the court and jury as in other cases of law. Talbott v. Randall, 3 N.M. (Gild.) 364, 5 P. 537 (1885); Staab v. Hersch, 3 N.M. (Gild.) 209, 3 P. 248 (1884)(decided under former law).

Issue upon traverse of affidavit in attachment is the existence of the stated ground for attachment, not affiant's belief of its existence, or good reason to so believe. Mundil v. Hutson, 33 N.M. 388, 268 P. 566 (1928).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

42-9-32. [Issues found for defendant; attachment dismissed; properties released; suit unabated.]

In all cases commenced by attachment, in which the truth of the affidavit for attachment, or of any material allegation therein contained shall be denied, and the issue thus formed shall, upon the trial be found for the defendant, the attachment shall be dismissed and all property, rights, effects and credits held or affected thereby, or thereunder, shall be released and discharged from the operation thereof; but such dismissal of the attachment shall not abate the suit, but the same shall proceed as in ordinary cases.

History: C.L. 1897, § 2685 (216), added by Laws 1907, ch. 107, § 1 (216); Code 1915, § 4326; C.S. 1929, § 105-1629; 1941 Comp., § 22-132; 1953 Comp., § 26-1-32.

ANNOTATIONS

Default judgment proper where defendant fails to plead to complaint. - In an action of assumpsit (now ordinary action on contract), by attachment, on a demand due, where the defendant answered traversing the affidavit for attachment, but failed to plead to the declaration (now complaint), judgment by default was properly entered. Ripley v. Astec Mining Co., 6 N.M. 415, 28 P. 773 (1892)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Recovery of value of use of property wrongfully attached, 45 A.L.R.2d 1221.

Posting of redelivery bond by defendant in attachment as waiver of damages for wrongful attachment, 57 A.L.R.2d 1376.

Right to recover attorneys' fees for wrongful attachment, 65 A.L.R.2d 1426.

Liability of creditor for excessive attachment or garnishment, 56 A.L.R.3d 493.

7 C.J.S. Attachment §§ 284, 285, 394, 402, 403.

42-9-33. [Appeal from order discharging attachment; supersedeas.]

When an order or judgment discharging an attachment is rendered in the district court, and the party who obtained such attachment shall seek to have the proceedings, on the trial of the issue on the affidavit for the attachment or the action of the court in cases where such trial was not had, reviewed in the supreme court, he shall have the right to do so upon appeal or writ of error [as] in other cases. Upon his giving bond for a supersedeas, as in other cases, the lien of his attachment shall be preserved until the final review and determination of his right to his lien in the court of final appellate jurisdiction.

History: C.L. 1897, § 2685 (223), added by Laws 1907, ch. 107, § 1 (223); Code 1915, § 4335; C.S. 1929, § 105-1638; 1941 Comp., § 22-133; 1953 Comp., § 26-1-33.

ANNOTATIONS

Cross-references. - For appellate jurisdiction of the supreme court, see N.M. Const., art. VI, § 2; 39-3-2 NMSA 1978.

For appeals, see Rules 12-201 to 12-203 SCRA 1986.

For supersedeas, see Rule 12-207 SCRA 1986.

Order dissolving attachment interlocutory, not final judgment. - An order dissolving an attachment which is made before final judgment is rendered in the main suit as to the indebtedness, is only an interlocutory order or decree, and is not a final judgment. Machen v. Keeler, 11 N.M. 413, 68 P. 937 (1902)(decided under former law).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Attachment and Garnishment §§ 319, 444, 529, 867.

Exercise of option to purchase, as dissolving attachment levied between giving and exercise of the option, 50 A.L.R. 1321.

Amendment of pleadings or the writ as ground for discharge of attachment, 74 A.L.R. 912.

Appeal as suspending dissolution of attachment, 115 A.L.R. 598.

Appealability, prior to final judgment, of order discharging or vacating attachment or refusing to do so, 19 A.L.R.2d 640.

7 C.J.S. Attachment § 372.

42-9-34. [Appeal before final judgment.]

It shall not be necessary that a final judgment as to the indebtedness claimed by the plaintiff in attachment shall be rendered, before the questions arising on the attachment proceedings may be reviewed on appeal or writ of error, but such appeal or writ of error may be sued out either before or after rendition of judgment on the indebtedness sued for.

History: C.L. 1897, § 2685 (224), added by Laws 1907, ch. 107, § 1 (224); Code 1915, § 4336; C.S. 1929, § 105-1639; 1941 Comp., § 22-134; 1953 Comp., § 26-1-34.

ANNOTATIONS

Cross-references. - For appellate jurisdiction of the supreme court, see N.M. Const., art. VI, § 2; 39-3-2 NMSA 1978.

For interlocutory appeals, see 12-203 SCRA 1986.

Appeal to supreme court, either before or after judgment. - This section allows appeal to the supreme court in attachment cases on the attachment issue, either before or after the rendition of the judgment on the indebtedness sued for. First Nat'l Bank v. George, 26 N.M. 46, 189 P. 240 (1920).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Appealability, prior to final judgment, of order discharging or vacating attachment or refusing to do so, 19 A.L.R.2d 640.

4 C.J.S. Appeal and Error §§ 122, 123.

42-9-35. [Judgment against sureties on bond given to discharge attachment.]

If upon the trial of said cause judgment shall be rendered against the defendant on the demand sued for, such judgment shall also be rendered against the sureties on said

bond given for the discharge of said attachment; and the giving of said bond shall have the effect of conferring jurisdiction upon the court to render said judgment against the said sureties, for the amount of the damages recovered against the defendant, without further process or notice.

History: C.L. 1897, § 2685 (226), added by Laws 1907, ch. 107, § 1 (226); Code 1915, § 4338; C.S. 1929, § 105-1641; 1941 Comp., § 22-135; 1953 Comp., § 26-1-35.

ANNOTATIONS

Judgment against sureties. - When judgment by default is rendered against the defendant on the indebtedness sued on, judgment may be rendered against sureties on the bond. Leusch v. Nickel, 16 N.M. 28, 113 P. 595 (1911).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

42-9-36. [Sale of attached realty after judgment for plaintiff.]

If plaintiff receives judgment, any real estate belonging to defendant or right, title, estate or interest therein whether legal or equitable which has been attached may be sold to satisfy said judgment and the district court of the county in which said property is located shall upon application appoint a special master to sell the same, who shall publish notice of said sale describing the property to be sold, giving the time and place of sale, and the amount of plaintiff's judgment including interest and costs of suit.

History: Laws 1939, ch. 159, § 6; 1941 Comp., § 22-136; 1953 Comp., § 26-1-36.

ANNOTATIONS

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Attachment or execution creditor as purchaser within rule that first of two purchasers to obtain possession will prevail, 21 A.L.R. 1031.

Estoppel of or waiver by parties or participants regardingirregularities or defects in execution or judicial sale, 2 A.L.R.2d 6.

7 C.J.S. Attachment §§ 281, 283.

42-9-37. [Sale of attached personalty after judgment for plaintiff.]

Any personal property belonging to the defendant or right, title or interest therein legal or equitable which has been attached may be sold under an execution issued on such attachment as in other cases of ordinary execution to satisfy plaintiff's judgment.

History: Laws 1939, ch. 159, § 7; 1941 Comp., § 22-137, 1953 Comp., § 26-1-37.

ANNOTATIONS

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7 C.J.S. Attachment §§ 281, 283.

42-9-38. [Ancillary attachments; affidavit; bond; writ.]

In any civil suit, when the summons against the defendant has been returned, executed, the plaintiff, his agent or attorney, may, at any time, before judgment, file an affidavit with the clerk of the court in which the suit is pending, and give bond with security as in cases of original attachments; and thereupon the clerk must issue an attachment, returnable as in other cases of original attachments.

History: C.L. 1897, § 2685 (214), added by Laws 1907, ch. 107, § 1 (214); Code 1915, § 4324; C.S. 1929, § 105-1627; 1941 Comp., § 22-143; 1953 Comp., § 26-1-43.

ANNOTATIONS

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7 C.J.S. Attachment §§ 2, 368.

42-9-39. [Procedure in suit containing ancillary attachment.]

In all cases when attachments are sued out ancillary to the original suit, the suit must thereafter proceed in all respects as if it had been commenced originally by attachment.

History: C.L. 1897, § 2685 (215), added by Laws 1907, ch. 107, § 1 (215); Code 1915, § 4325; C.S. 1929, § 105-1628; 1941 Comp., § 22-144; 1953 Comp., § 26-1-44.

ANNOTATIONS

Ancillary attachment is proceeding in aid of personal action where the debtor has been served or has appeared in court so as to be liable to a personal judgment.

Southern Cal. Fruit Exch. v. Stamm, 9 N.M. 361, 54 P. 345 (1898); Staab v. Hersch, 3 N.M. (Gild.) 209, 3 P. 248 (1884)(decided under former law).

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

ARTICLE 10
EXEMPTIONS

42-10-1. Exemptions of married persons or heads of households.

Personal property in the amount of five hundred dollars ($500), tools of the trade in the amount of fifteen hundred dollars ($1,500), one motor vehicle in the amount of four thousand dollars ($4,000), jewelry in the amount of twenty-five hundred dollars ($2,500), clothing, furniture, books, medical-health equipment being used for the health of the person and not for his profession and any interest in or proceeds from a pension or retirement fund of every person supporting another person is exempt from receivers or trustees in bankruptcy or other insolvency proceedings, fines, attachment, execution or foreclosure by a judgment creditor. Property exempted shall be valued at the market value of used chattels.

History: 1953 Comp., § 24-5-1, enacted by Laws 1971, ch. 215, § 1; 1979, ch. 182, § 1; 1981, ch. 113, § 1; 1983, ch. 69, § 1.

ANNOTATIONS

Cross-references. - As to exemption from legal process for Public Employees Retirement Act benefits, see 10-11-135 NMSA 1978.

As to exemption from legal process for Judicial Retirement Act benefits, see 10-12B-7 NMSA 1978.

As to exemption from legal process for Magistrate Retirement Act benefits, see 10-12C-7 NMSA 1978.

For national guard equipment and uniforms, see 20-5-2 NMSA 1978.

As to exemption from legal process for Educational Retirement Act benefits, see 22-11-42 NMSA 1978.

For exemption for public welfare assistance, see 27-2-21 NMSA 1978.

For state police pension funds, see 29-4-10 NMSA 1978.

As to exemption from legal process for interest from state police pension fund, see 29-4-10 NMSA 1978.

For exemption of materials from attachment or execution for purchaser's debts, see 48-2-15 NMSA 1978.

As to exemption of unemployment compensation benefits, see 51-1-37 NMSA 1978.

For exemption for workmen's compensation claims, see 52-1-52 NMSA 1978.

For property exemptions where assignments for benefit of creditors, see 56-9-44 NMSA 1978.

As to rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801, respectively.

As to form for claim of exemptions on executions, see Form 4-803.

As to form for order on claim of exemption and order to pay in execution proceedings, see Form 4-804.

As to form for application for writ of garnishment and affidavit, see Form 4-805.

As to form for notice of right to claim exemptions from execution, see Form 4-808A.

As to form for claim of exemption from garnishment, see Form 4-809.

Repeals and reenactments. - Laws 1971, ch. 215, § 1, repeals 24-5-1, 1953 Comp., relating to property exemptions for the family head and widows, and enacts the above section.

The 1979 amendment substituted "is exempt" for "may be held exempt" following "supporting another person" near the middle of the first sentence and substituted "exempted" for "to be exempted" near the beginning of the second sentence.

The 1981 amendment inserted "tools of the trade in the amount of fifteen hundred dollars ($1,500)" and deleted "tools of the trade" preceding "books" near the beginning of the first sentence.

The 1983 amendment inserted "in the amount of four thousand dollars ($4,000), jewelry in the amount of twenty-five hundred dollars ($2,500)" in the first sentence.

Effective dates. - Laws 1981, ch. 113, contains no effective date provision, but was enacted at the session which adjourned March 21, 1981. See N.M. Const., art. IV, § 23.

Laws 1983, ch. 69, § 3, makes the act effective on July 1, 1983.

Constitutionality. - The postjudgment execution statutes are unconstitutional as not providing adequate notice of allowable exemptions and the right to a hearing. Aacen v. San Juan County Sheriff's Dep't, 944 F.2d 691 (10th Cir. 1991).

Purpose of exemption statutes. - The exemption statutes were designed to protect debtors from becoming destitute as a consequence of unforseeable indebtedness, but it was never suggested that such statutes be construed to deprive an individual of his rights of ownership in the exempt property. If the law permits a person to sell his exempt property, surely it permits the less drastic step of encumbering it. Hernandez v. S.I.C. Fin. Co., 79 N.M. 673, 448 P.2d 474 (1968).

Support of debtor's family, intent of section. - Laws 1887, ch. 73, this section prior to amendment, was not intended to encourage extravagance and the evasion of just debts, but for the necessary support of the debtor's family and himself. New Mexico Nat'l Bank v. Brooks, 9 N.M. 113, 49 P. 947 (1897)(decided under former law).

Exemption may be claimed out of wages which have been garnished in lieu of a homestead. McFadden v. Murray, 32 N.M. 361, 257 P. 999 (1927)(decided under former law).

Amendment of schedules of exempt property. - Debtors may amend their schedules listing exempt property at any time prior to the closing of a bankruptcy case, subject to objections filed by any party adversely affected by the amendment. In re Vest, 18 Bankr. 241 (Bankr. D.N.M. 1982).

No right of setoff. - A bank may not exercise its right of setoff against debtors' funds that constitute exempt property under 11 U.S.C. § 522 and this section. In re Wilde, 85 Bankr. 147 (Bankr. D.N.M. 1988).

Exemptions not available for child support liens. - Statutory exemptions for debtors in foreclosure actions set forth in this article are unavailable to a parent as against a lien for child support obligations under 40-4-15 NMSA 1978. D'Avignon v. Graham, 113 N.M. 129, 823 P.2d 929 (Ct. App. 1991).

No exemption for tools of a spouse's trade. - This section does not include language which would permit a debtor to claim a tools of the trade exemption for tools of a spouse's trade. In re Bryan, 126 Bankr. 108 (D.N.M. 1991).

Doctor's spouse was not allowed an exemption for medical equipment as tools of the trade where she was not engaged in the trade of medicine. In re Bryan, 126 Bankr. 108 (D.N.M. 1991).

Stacking motor vehicle exemptions. - The plain language of this section permits each debtor to exempt $4,000.00 worth of equity in a single motor vehicle. The only apparent limiting language, other than the maximum $4,000.00 exemption, is that a debtor is precluded from exempting equity in more than one car. Nothing in the statute prevents

debtors from stacking their motor vehicle exemptions in the same vehicle. Jones v. Boyd, 134 Bankr. 431 (D.N.M. 1991).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For note, "Debtor Exemptions in New Mexico," see 6 Nat. Resources J. 467 (1966).

For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

For article, "Survey of New Mexico Law, 1979-80: Commercial Law," see 11 N.M.L. Rev. 69 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Exemptions §§ 2, 8, 16 to 18, 64 to 137, 144 to 171, 263 to 275.

Retainer by personal representative of indebtedness of heir, legatee or distributee as affected by right to exemption, 1 A.L.R. 1030, 30 A.L.R. 775, 75 A.L.R. 878, 110 A.L.R. 1384, 164 A.L.R. 717.

"Tools," "implements," "instruments," "utensils," or "apparatus," within the meaning of Debtor's Exemption Laws, 2 A.L.R. 818, 9 A.L.R. 1020, 36 A.L.R. 669, 52 A.L.R. 826.

Individual partner's right to exemption in partnership property, 4 A.L.R. 300.

Effect of exemptions as against fines, penalties, and costs, 10 A.L.R. 770.

Exemptions from attachment or execution of property brought by nonresident witness or litigant who comes into state in connection with the litigation, 13 A.L.R. 368.

Landlord's distress for rent, implements of trade as privileged from, 62 A.L.R. 1118.

Waiver, estoppel, loss, or destruction of exemption, 63 A.L.R. 1295.

Deposit of exempt funds as affecting debtor's exemption, 67 A.L.R. 1203.

Voluntary disposition of part of the larger sum, or some of the articles of the exempted class, as affecting debtor's limited exemption, 81 A.L.R. 922.

Laches or delay as waiver of, or estoppel to assert, debtor's exemption, 82 A.L.R. 648.

Marriage of debtor after levy or service of process to reach property as entitling him to exemption enjoyed by married debtor, 82 A.L.R. 739.

Landlord's lien for rent, exemption of tools and implements as against, 96 A.L.R. 256.

Judgment for costs, as one for "debt" within exemption law, 108 A.L.R. 1042.

Debtor's exemption of personalty as attaching to proceeds of sale or exchange thereof, 119 A.L.R. 467.

Set-off as between judgments, as affected by exemption laws, 121 A.L.R. 501.

Motor vehicle as exempt from seizure for debt, 37 A.L.R.2d 714.

Value of room and board furnished to servant as included in total salary or earnings for purpose of statute exempting wages, 51 A.L.R.2d 947.

Enforcement of claim for alimony or support, or for attorneys' fees and costs incurred in connection therewith, against exemptions, 54 A.L.R.2d 1422.

Validity of contractual stipulation or provision waiving debtor's exemption, 94 A.L.R.2d 967.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

Employee retirement, pension benefits as exempt from garnishment, attachment, levy, execution or similar proceedings, 93 A.L.R.3d 711.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses, 94 A.L.R.3d 176.

Choice of law as to exemption of property from execution, 100 A.L.R.3d 1235.

Debts for alimony, maintenance, and support as exceptions to bankruptcy discharge, under § 523(a)(5) of Bankruptcy Code of 1978 (11 USCS § 523(a)(5)), 69 A.L.R. Fed. 403.

35 C.J.S. Exemptions §§ 31, 46, 52, 54, 63 to 65.

42-10-2. Exemptions of persons who support only themselves.

Personal property other than money in the amount of five hundred dollars ($500), tools of the trade in the amount of fifteen hundred dollars ($1,500), one motor vehicle in the amount of four thousand dollars ($4,000), jewelry in the amount of twenty-five hundred dollars ($2,500), clothing, furniture, books, medical-health equipment being used for the

health of the person and not for his profession and any interest in or proceeds from a pension or retirement fund of every person supporting only himself is exempt from receivers or trustees in bankruptcy or other insolvency proceedings, executors or administrators in probate, fines, attachment, execution or foreclosure by a judgment creditor. Property exempted shall be valued at the market value of used chattels.

History: 1953 Comp., § 24-5-2, enacted by Laws 1971, ch. 215, § 2; 1979, ch. 182, § 2; 1981, ch. 113, § 2; 1983, ch. 69, § 2.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 215, § 2, repeals 24-5-2, 1953 Comp., relating to unmarried woman holding certain property exempt from execution, etc., and enacts the above section.

The 1979 amendment substituted "is exempt" for "may be held exempt" near the middle of the first sentence and substituted "exempted" for "to be exempted" near the beginning of the second sentence.

The 1981 amendment inserted "tools of the trade in the amount of fifteen hundred dollars ($1,500)" and deleted "tools of the trade" preceding "books" near the beginning of the first sentence.

The 1983 amendment inserted "in the amount of four thousand dollars ($4,000), jewelry in the amount of twenty-five hundred dollars ($2,500)" in the first sentence and substituted "himself" for "themselves," also in the first sentence.

Effective dates. - Laws 1981, ch. 113, contains no effective date provision, but was enacted at the session which adjourned March 21, 1981. See N.M. Const., art. IV, § 23.

Laws 1983, ch. 69, § 3, makes the act effective on July 1, 1983.

Constitutionality. - New Mexico's post-judgment execution statutes are constitutionally deficient because they do not require that sufficient notice be given. Aacen v. San Juan County Sheriff's Dep't, 944 F.2d 691 (10th Cir. 1991).

Effect of creation of exemptions. - By creating exemptions from execution, New Mexico has granted judgment debtors a property interest in retaining their exempt property. While the state need not grant such exemptions, once given, the property rights they create are entitled to due process protection. Aacen v. San Juan County Sheriff's Dep't, 944 F.2d 691 (10th Cir. 1991).

Exemptions not available for child support liens. - Statutory exemptions for debtors in foreclosure actions set forth in this article are unavailable to a parent as against a lien for child support obligations under 40-4-15 NMSA 1978. D'Avignon v. Graham, 113 N.M. 129, 823 P.2d 929 (Ct. App. 1991).

Self-induced insolvency is not protected under the New Mexico exemption statutes. Albuquerque Nat'l Bank v. Zouhar, 10 Bankr. 154 (Bankr. D.N.M. 1981).

Nor is wholesale sheltering of assets. - While a bankrupt is entitled to adjust his affairs so that some planning of one's exemptions under bankruptcy is permitted, a wholesale sheltering of assets which otherwise would go to creditors is not permissible. Albuquerque Nat'l Bank v. Zouhar, 10 Bankr. 154 (Bankr. D.N.M. 1981).

Exemption for furniture. - This section does not set a dollar limit on furniture so that a lien on furniture may be avoided under the federal bankruptcy law regardless of amount, provided that the furniture falls within the bankruptcy statute. Reid v. ITT Fin. Servs., 121 Bankr. 875 (Bankr. D.N.M. 1990).

Factors in determining voidable transfers. - The noninclusive enumeration of factors contained in 56-10-18 NMSA 1978 and 56-10-19 NMSA 1978 are to be considered when determining whether the funds that ordinarily would be exempt from attachment under this section and 42-10-3 NMSA 1978 should be set aside as the result of a voidable transfer. Dona Ana Sav. & Loan Ass'n v. Dofflemeyer, 115 N.M. 590, 855 P.2d 1054 (1993).

Funds are not automatically protected. - The conversion of nonexempt funds into funds that are ordinarily exempt under this section and 42-10-3 NMSA 1978 are not automatically protected from attachment by creditors without an analysis of whether the transfer served the underlying purpose of the exemption statutes and was not in furtherance of an intent to defraud creditors. Dona Ana Sav. & Loan Ass'n v. Dofflemeyer, 115 N.M. 590, 855 P.2d 1054 (1993).

Law reviews. - For note, "Debtor Exemptions in New Mexico," see 6 Nat. Resources J. 467 (1966).

For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Exemptions §§ 64 to 137, 144 to 171.

Employee retirement, pension benefits as exempt from garnishment, attachment, levy, execution or similar proceedings, 93 A.L.R.3d 711.

35 C.J.S. Exemptions §§ 46, 52, 56.

42-10-3. [Life, accident and health insurance benefits.]

The cash surrender value of any life insurance policy, the withdrawal value of any optional settlement, annuity contract or deposit with any life insurance company, all weekly, monthly, quarterly, semiannual or annual annuities, indemnities or payments of

every kind from any life, accident or health insurance policy, annuity contract or deposit heretofore or hereafter issued upon the life of a citizen or resident of the state of New Mexico, or made by any such insurance company with such citizen, upon whatever form and whether the insured or the person protected thereby has the right to change the beneficiary therein or not, shall in no case be liable to attachment, garnishment or legal process in favor of any creditor of the person whose life is so insured or who is protected by said contract, or who receives or is to receive the benefit thereof, nor shall it be subject in any other manner to the debts of the person whose life is so insured, or who is protected by said contract or who receives or is to receive the benefit thereof, unless such policy, contract or deposit be taken out, made or assigned in writing for the benefit of such creditor.

History: Laws 1937, ch. 223; § 1; 1941 Comp., § 21-503; 1953 Comp., § 24-5-3.

ANNOTATIONS

Construction of section. - The language of this section is broad and expansive. It does not limit the type of payment, form of payment, or person to receive the payment. Finch v. Schrock, 119 Bankr. 808 (Bankr. D.N.M. 1990).

Unlimited exemptions allowed as to insurance. - The New Mexico statutes permit unlimited exemptions in bankruptcy proceedings with respect to insurance, and with respect to pension and retirement plans. Albuquerque Nat'l Bank v. Zouhar, 10 Bankr. 154 (Bankr. D.N.M. 1981).

Exemption by person not a beneficiary. - Debtor could exempt insurance proceeds he was to receive as an heir of his parents' probate estate even though he was not a named beneficiary on the policies. Finch v. Schrock, 119 Bankr. 808 (Bankr. D.N.M. 1990).

Factors in determining voidable transfers. - The noninclusive enumeration of factors contained in 56-10-18 NMSA 1978 and 56-10-19 NMSA 1978 are to be considered when determining whether the funds that ordinarily would be exempt from attachment under 42-10-2 NMSA 1978 and this section should be set aside as the result of a voidable transfer. Dona Ana Sav. & Loan Ass'n v. Dofflemeyer, 115 N.M. 590, 855 P.2d 1054 (1993).

Funds are not automatically protected. - The conversion of nonexempt funds into funds that are ordinarily exempt under 42-10-2 NMSA 1978 and this section are not automatically protected from attachment by creditors without an analysis of whether the transfer served the underlying purpose of the exemption statutes and was not in furtherance of an intent to defraud creditors. Dona Ana Sav. & Loan Ass'n v. Dofflemeyer, 115 N.M. 590, 855 P.2d 1054 (1993).

Law reviews. - For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Exemptions §§ 179 to 181, 186 to 188, 190 to 194, 198, 200, 220 to 223, 245, 246.

Constitutionality of statute exempting proceeds of life or benefit insurance, 1 A.L.R. 757.

Period of duration of exemption under statute exempting money or benefit "to be paid" under insurance policy or certificate, 6 A.L.R. 610.

Debtor's exemption of proceeds of insurance on property itself exempt, 63 A.L.R. 1286.

Impairment of obligation of contracts by statute exempting insurance proceeds, 93 A.L.R. 182.

Exemption of property purchased with exempt proceeds of insurance, 96 A.L.R. 410.

Accident insurance as life insurance within exemption law, 111 A.L.R. 61.

War risk insurance proceeds as exempt from creditors, 158 A.L.R. 1445.

Proceeds of life insurance left with insurer after maturity of policy as subject to claims of creditors of beneficiary, 164 A.L.R. 914.

Assignee of insurance policy, exemption of proceeds as available to, 1 A.L.R.2d 1031.

Right with respect to exempt proceeds of life insurance, of one whose funds have been wrongfully used to pay premiums, 24 A.L.R.2d 672.

Retirement or pension proceeds or annuity payment under group insurance as subject to attachment or garnishment, 28 A.L.R.2d 1213.

Endowment policy as life insurance within exemption law, 30 A.L.R.2d 751.

35 C.J.S. Exemptions §§ 31, 39 to 42, 61, 132.

42-10-4. [Benefits from benevolent associations.]

Any beneficiary fund not exceeding five thousand dollars [($5,000)], set apart, appropriated or paid, by any benevolent association or society, according to its rules, regulations or bylaws, to the family of any deceased member, or to any member of such

family, shall not be liable to be taken by any process or proceedings, legal or equitable, to pay any debts of such deceased member.

History: Laws 1887, ch. 37, § 7; C.L. 1897, § 1741; Code 1915, § 2315; C.S. 1929, § 48-105; 1941 Comp., § 21-504; 1953 Comp., § 24-5-4.

ANNOTATIONS

Law reviews. - For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Construction and effect of statutory exemptions of proceeds of workmen's compensation awards, 31 A.L.R.3d 532.

42-10-5. [Life insurance proceeds.]

The proceeds of any life insurance are not subject to the debts of the deceased, except by special contract or arrangement, to be made in writing.

History: C.L. 1884, § 1422, substituted by Laws 1889, ch. 90, § 21; C.L. 1897, § 2042; Code 1915, § 2316; C.S. 1929, § 48-106; 1941 Comp., § 21-505; 1953 Comp., § 24-5-5.

ANNOTATIONS

Compiler's note. - Laws 1889, ch. 90, § 21 commenced as follows: "Sections 1410 to 1422, both inclusive, of the Compiled Laws of 1884, are repealed, and the following sections, bearing the same numbers respectively, are hereby substituted in place of said repealed sections:" and then set out sections numbered §§ 1410 to 1422. The provisions of said § 1422, as set out in the 1889 law, are set out in the text of the present section.

Compiled Laws 1884, § 1422 being Laws 1871-1872, ch. 17, § 1, read: "When either the husband or wife dies without legitimate children the one surviving shall be heir to all the acquired property of the marriage community."

Indemnification for funeral expenses permitted. - This section would not prevent provision in a life insurance contract authorizing the insurance company to pay to any person who was subjected to expense incident to the burial of the deceased a sum equal to the money thus expended. 1947-48 Op. Att'y Gen. No. 5164.

Law reviews. - For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Exemptions §§ 179 to 182, 184 to 188, 190 to 194, 198.

Right, with respect to exempt proceeds of life insurance, of one whose funds have been wrongfully used to pay premiums, 24 A.L.R. 672.

Assignee of insurance policy, exemption of proceeds available to, 1 A.L.R.2d 1031.

Endowment policy as life insurance within exemption law, 30 A.L.R.2d 751.

35 C.J.S. Exemptions §§ 39 to 42.

42-10-6. Personal property used as a security under the Uniform Commercial Code is not exempt.

A secured creditor who has personal property of the debtor as security as provided by the Uniform Commercial Code [Chapter 55 NMSA 1978] may proceed according to the terms of the security instrument and the Uniform Commercial Code. The debtor cannot exempt personal property given to a secured creditor as security unless there be more property than is necessary to pay the debt to the secured creditor. The debtor may claim an exemption out of the surplus.

History: 1953 Comp., § 24-5-6, enacted by Laws 1971, ch. 215, § 3.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 215, § 3, repeals 24-5-6, 1953 Comp., relating to exemptions for draymen and heads of family engaged in agriculture or medicine, and enacts the above section.

Federal lien avoidance provision superior to section. - The lien avoidance provision of the federal Bankruptcy Code takes priority over this section in a bankruptcy proceeding. Yparrea v. Roswell Prod. Credit Ass'n, 16 Bankr. 33 (Bankr. D.N.M. 1981).

Law reviews. - For note, "Debtor Exemptions in New Mexico," see 6 Nat. Resources J. 467 (1966).

For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 31 Am. Jur. 2d Exemptions § 31.

Farmer as within description of persons entitled to protection of debtor's exemption statute, 107 A.L.R. 614.

35 C.J.S. Exemptions §§ 27 to 30, 47.

42-10-7. Taxes and garnishment excepted.

This article is not applicable to taxes or garnishment.

History: 1953 Comp., § 24-5-7, enacted by Laws 1971, ch. 215, § 4.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 215, § 4, repeals 24-5-7, 1953 Comp., relating to exemptions for head of family engaged in law practice, and enacts the above section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Family allowance from decedent's estate as exempt from attachment, garnishment, execution, and foreclosure, 27 A.L.R.3d 863.

42-10-8. Repealed.

ANNOTATIONS

Repeals. - Laws 1979, ch. 182, § 5, repeals 42-10-8 NMSA 1978, relating to the filing of claims of exemptions. For provisions of former section, see 1978 original pamphlet.

42-10-9. Homestead exemption.

Each person shall have exempt a homestead in a dwelling house and land occupied by him or in a dwelling house occupied by him although the dwelling is on land owned by another, provided that the dwelling is owned, leased or being purchased by the person claiming the exemption. Such a person has a homestead of thirty thousand dollars ($30,000) exempt from attachment, execution or foreclosure by a judgment creditor and from any proceeding of receivers or trustees in insolvency proceedings and from executors or administrators in probate. If the homestead is owned jointly by two persons, each joint owner is entitled to an exemption of thirty thousand dollars ($30,000).

History: 1953 Comp., § 24-6-1, enacted by Laws 1971, ch. 215, § 6; 1973, ch. 277, § 1; 1979, ch. 9, § 1; 1979, ch. 182, § 3; 1987, ch. 193, § 1; 1993, ch. 44, § 1.

ANNOTATIONS

Cross-references. - For municipal housing authority projects, see 3-45-1 NMSA 1978.

For exemption from execution for claims to public lands of United States, see 19-3-3 NMSA 1978.

As to no exemption for property subject to quiet title suit for failure of coowner to pay share of suit, see 42-6-11 NMSA 1978.

For property exemption due assignments for benefit of creditors, see 56-9-44 NMSA 1978.

As to rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801, respectively.

As to form for claim of exemptions on executions, see Form 4-803.

As to form for order on claim of exemption and order to pay in execution proceedings, see Form 4-804.

As to form for application for writ of garnishment and affidavit, see Form 4-805.

As to form for notice of right to claim exemptions from execution, see Form 4-808A.

As to form for claim of exemption from garnishment, see Form 4-809.

Repeals and reenactments. - Laws 1971, ch. 215, § 6, repeals 24-6-1, 1953 Comp., relating to family homestead exemption and inapplicability of section to mortgages and statutory liens, and enacts the above section.

The 1979 amendments. - Laws 1979, ch. 9, § 1, substituting "twenty thousand dollars ($20,000)" for "ten thousand dollars ($10,000)" near the beginning of the second sentence, was approved March 7, 1979. Laws 1979, ch. 182, § 3, also amended this section by substituting "shall have" for "may hold" following "supporting another person" near the beginning of the first sentence, substituting "has" for "may claim" following "Such a person" near the beginning of the second sentence and making the same substitution in the second sentence as made in Laws 1979, ch. 9, and was approved April 2, 1979. The section is set out above as amended by Laws 1979, ch. 182, § 3. See 12-1-8 NMSA 1978.

The 1987 amendment, effective June 19, 1987, substituted "Each spouse" for "A married person" at the beginning of the section and added the last sentence.

The 1993 amendment, effective July 1, 1993, deleted "spouse, widow, widower or person who is supporting another" following "Each" in the first sentence and substituted "thirty thousand dollars ($30,000)" for "twenty thousand dollars ($20,000)" in the second and third sentences.

Purpose of homestead exemption. - The purpose of the Homestead Act exemption statute is to "prevent families from becoming destitute as the result of misfortune through common debts which generally are unforseen." Laughlin v. Lumbert, 68 N.M. 351, 362 P.2d 507 (1961).

Exemption statutes should be liberally construed. Laughlin v. Lumbert, 68 N.M. 351, 362 P.2d 507 (1961); McFadden v. Murray, 32 N.M. 361, 257 P. 999 (1927)(decided under former law).

Exemption under New Mexico law allows exemption against United States. - One entitled to an exemption of homestead under the laws of New Mexico may hold the same against the United States. United States v. Lesnet, 9 N.M. 271, 50 P. 321 (1897)(decided under former law).

Constitutionality. - The postjudgment execution statutes are unconstitutional as not providing adequate notice of allowable exemptions and the right to a hearing. Aacen v. San Juan County Sheriff's Dep't, 944 F.2d 691 (10th Cir. 1991).

"Supporting another person". - This section as it read prior to the 1993 amendment did not require the claimant of a homestead exemption to have legal custody of his children, to be their sole supporter, or to have his children reside with him. It required only that the claimant be "supporting" another person. Ruybalid v. Segura, 107 N.M. 660, 763 P.2d 369 (Ct. App. 1988).

"Occupied" defined. - The word "occupied" must not be construed so narrowly as to deprive a debtor of a homestead exemption she would be entitled to but for actual physical occupancy. In re Wells, 132 Bankr. 966 (Bankr. D.N.M. 1991).

"Hold" defined. - The word "hold" meant to keep, retain, or to preserve exempt from sale, or judgment, or order, and did not measure the character of the occupancy of the homestead. Corn v. Hyde, 26 N.M. 36, 188 P. 1102 (1920)(decided under former law).

Equitable as well as legal owners of real property are entitled to claim a homestead exemption. Nesset v. Blueher Lumber Co., 33 Bankr. 326 (Bankr. D.N.M. 1983).

Right to claim exemption includes judgment debtors. - A judgment lien attaches to the equitable interest of a purchaser of real estate under a contract; the judgment lien may be foreclosed in the same manner as ordinary suits for the foreclosure of mortgages; and if the land in question is the judgment debtor's homestead, he may claim an exemption of $10,000 (now $30,000). Such a reading prevents a debtor from placing his assets beyond his creditor's reach and precludes the possibility of fraud being perpetrated upon the commercial community. Mutual Bldg. & Loan Ass'n v. Collins, 85 N.M. 706, 516 P.2d 677 (1973).

Family homestead exemption was available to judgment debtors in foreclosure of a lien of a judgment obtained in a suit on a note. Laughlin v. Lumbert, 68 N.M. 351, 362 P.2d 507 (1961).

Claim of exemption under original execution did not remain effective to prevent a sale under a second or alias execution. Meyers Co. v. Mirabal, 27 N.M. 472, 202 P. 693 (1921)(decided under former law).

Waiving exemption by mortgage. - The owner of real estate can by mortgage or other act waive his exemption. Tomson v. Lerner, 37 N.M. 546, 25 P.2d 209 (1933)(decided under former law).

Abandonment of homestead. - Debtor, who physically moved from the property because creditors had taken judgments against her, transcribed those judgments, and told her she was going to lose the house, did not abandon her homestead since it was undisputed that she intended to return to the house if allowed the exemption. In re Wells, 132 Bankr. 966 (Bankr. D.N.M. 1991).

When mortgagors not entitled to exemption. - Mortgagors were not entitled to a homestead exemption against junior judgment lienholders since they had an opportunity to advance claims for such exemption in their answers to cross claims which sought foreclosure of the liens, but failed to do so, and thereby failed to comply with 39-4-15 NMSA 1978, which required that such claim be made in answer to foreclosure suit. Nor were proceeds of sale shielded by this section from operation of writs of garnishment. Speckner v. Riebold, 86 N.M. 275, 523 P.2d 10 (1974).

When owner not entitled to exemption. - When the owner of a homestead voluntarily sells the property, the proceeds of sale are not exempt. In re Blair, 125 Bankr. 303 (D.N.M. 1991).

Garnishment of exemption to satisfy different judgment improper. - District court judgment permitting a family homestead exemption was not subject to garnishment to satisfy a judgment recovered in another New Mexico court since the first district court had jurisdiction in the premises and did not act erroneously. Laughlin v. Lumbert, 68 N.M. 351, 362 P.2d 507 (1961).

Effect of homestead claimant voting in different precinct. - The fact that a homestead claimant voted in another precinct than that in which his homestead is situated is not conclusive evidence of abandonment. Corn v. Hyde, 26 N.M. 36, 188 P. 1102 (1920)(decided under former law).

Prior to 1979 amendment, exemption had to be claimed. - To be entitled to a homestead exemption under 39-4-15 NMSA 1978 and this section (prior to the 1979 amendment of this section), a party had to claim the exemption in his answer to a foreclosure action; otherwise, he could not claim it. Uslife Title Ins. Co. v. Romero, 98 N.M. 699, 652 P.2d 249 (Ct. App. 1982).

Increased exemption may not be claimed against lien attached prior to effective date of increase. - A legislative increase in the amount of the homestead exemption may not be claimed against a judgment lien which attaches prior to the effective date of

the statutory amendment increasing the exemption. Ranchers State Bank v. Vega, 99 N.M. 42, 653 P.2d 873 (1982).

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

For article, "Attachment in New Mexico - Part II," see 2 Nat. Resources J. 75 (1962).

For note, "Debtor Exemptions in New Mexico," see 6 Nat. Resources J. 467 (1966).

For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

For article, "The Community Property Act of 1973: A Commentary and Quasi-Legislative History," see 5 N.M.L. Rev. 1 (1974).

For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 40 Am. Jur. 2d Homestead §§ 1 to 3, 27, 32, 86 to 112.

Exemption of proceeds of voluntary sale of homestead, 1 A.L.R. 483, 46 A.L.R. 814.

"Owner," scope and import of term, in homestead exemption statutes, 2 A.L.R. 793, 95 A.L.R. 1085.

Recovery of damages for breach of contract to convey homestead where only one spouse signed contract, 5 A.L.R.4th 1310.

Imprisonment as affecting abandonment of homestead, 5 A.L.R. 259.

Validity of statute abolishing vested right of homestead exemption as against particular classes of claims, 6 A.L.R. 1143.

Wife's right to exclude husband from possession, use or enjoyment of homestead owned by her, 21 A.L.R. 745.

Failure of head of family to claim homestead exemption as affecting other members of family, 33 A.L.R. 611.

Separation agreement as affecting right in homestead, 35 A.L.R. 1518, 34 A.L.R.2d 1040.

Divorce as affecting homestead, 36 A.L.R. 431, 84 A.L.R.2d 703.

Wife's loss of homestead rights through absence enforced by act of husband, 42 A.L.R. 1162, 129 A.L.R. 305.

Reformation of instrument as against wife claiming homestead, 44 A.L.R. 118, 79 A.L.R.2d 1180.

Validity and effect of alienation or encumbrance of homestead without joinder or consent of wife, 45 A.L.R. 395.

Reconveyance or encumbrance of homestead by husband without joinder of wife, to settle purchase-money debt, validity of, 45 A.L.R. 413.

Validity of contract waiving homestead exemption, 94 A.L.R.2d 981.

Tax collector's bond, homestead as subject to lien of, 47 A.L.R. 512, 54 A.L.R. 1285.

Estoppel to claim homestead rights in property by failure to disclose interest, 50 A.L.R. 804.

Option, exercise of, as affecting intervening declaration of homestead, 50 A.L.R. 1329.

Rights of surviving spouse and children in proceeds of sale of homestead in decedent's estate, 6 A.L.R.2d 515.

Insurance on homestead property, exemption of proceeds of, 63 A.L.R. 1296, 65 A.L.R. 1209.

Inclusion of different tracts or parcels in homestead, 73 A.L.R. 116.

Tax sale of property as cutting off homestead rights, 75 A.L.R. 438.

Marshaling assets, homestead law as affecting rule as to, 77 A.L.R. 371.

Cloud on title, execution sale or judgment lien affecting homestead as, 78 A.L.R. 266, 272.

Nonclaim statute as applied to homestead mortgages, 78 A.L.R. 1143.

Time as of which, and extent to which, homestead exemption attaches to property received in exchange for homestead, 83 A.L.R. 54.

Estate or interest in real property to which a homestead claim may attach, 89 A.L.R. 511, 74 A.L.R.2d 1355.

Wife's homestead rights as affected by fact that she does not live in state, 92 A.L.R. 1054.

Impairment of obligation of contracts by homestead exemption law, 93 A.L.R. 181.

Estoppel to claim, or waiver of, homestead by direction of judgment debtor to levy on real estate, 101 A.L.R. 851.

Specific performance of parol agreement for exchange of land where wife or plaintiff has released her homestead rights by deed made with husband to defendant, 101 A.L.R. 1107.

Direction in will for payment of debts and expenses as subjecting exempt homestead to their payment, 103 A.L.R. 257.

Alimony, enforcement of claim for, against homestead, 110 A.L.R. 904.

Business purposes, character of property as homestead as affected by its use for, as well as for residence purposes, 114 A.L.R. 209.

Laborers, servants or the like, who are, within constitutional or statutory provision subjecting homestead to claims of, 114 A.L.R. 767.

Mental incompetency of one spouse as affecting transfer or encumbrance of homestead property, 155 A.L.R. 312.

Lien or encumbrance as affecting extent of exemption of proceeds of voluntary sale of homestead, 161 A.L.R. 1256.

Lien of judgment on excess value of homestead, 41 A.L.R.4th 292.

35 C.J.S. Exemptions §§ 1, 70, 110; 40 C.J.S. Homesteads §§ 51 to 69.

42-10-10. Exemption in lieu of homestead.

A. Any resident of this state who does not own a homestead shall in addition to other exemptions hold exempt real or personal property in the amount of two thousand dollars ($2,000) in lieu of the homestead exemption.

B. Where the resident does not own a homestead, the sheriff or any other person or officer seeking to attach, execute or foreclose by judgment on property shall provide the resident with written notification of the resident's right to exemption in lieu of homestead as described in Subsection A of this section, together with a simple form by which the resident may designate that he is aware of the exemption and does or does not desire to claim the exemption. Where the resident refuses to make the election provided for in this section, the sheriff, other person or officer shall proceed to attach, execute or foreclose on the resident's property. Where the resident claims his exemption in lieu of homestead, the sheriff, other person or officer making attachment, execution or foreclosure by judgment shall file as part of his return a description, including the

resident's stated value, of the property claimed as exempt bearing the resident's signature witnessed by the sheriff, other person or officer seeking to attach, execute or foreclose.

History: 1953 Comp., § 24-6-2, enacted by Laws 1971, ch. 215, § 7; 1979, ch. 9, § 2; 1979, ch. 182, § 4.

ANNOTATIONS

Cross-references. - As to rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801, respectively.

As to form for claim of exemptions on executions, see Form 4-803.

As to form for order on claim of exemption and order to pay in execution proceedings, see Form 4-804.

As to form for application for writ of garnishment and affidavit, see Form 4-805.

As to form for notice of right to claim exemptions from execution, see Form 4-808A.

As to form for claim of exemption from garnishment, see Form 4-809.

Repeals and reenactments. - Laws 1971, ch. 215, § 7, repeals 24-6-2, 1953 Comp., relating to the homestead exemption for persons owning the superstructure of a dwelling house, but not the land, and lessees, and enacts the above section.

The 1979 amendments. - Laws 1979, ch. 9, § 2, substituting "two thousand dollars ($2,000)" for "one thousand dollars ($1,000)" near the end of the section, was approved March 7, 1979. Laws 1979, ch. 182, § 4, also amended this section by designating the previously undesignated paragraph as Subsection A, substituting "shall" for "may" preceding "in addition to" near the middle of Subsection A, adding Subsection B and making the same substitution near the end of Subsection A as made in Laws 1979, ch. 9, and was approved April 2, 1979. The section is set out above as amended by Laws 1979, ch. 182, § 4. See 12-1-8 NMSA 1978.

Constitutionality. - The postjudgment execution statutes are unconstitutional as not providing adequate notice of allowable exemptions and the right to a hearing. Aacen v. San Juan County Sheriff's Dep't, 944 F.2d 691 (10th Cir. 1991).

Effect of creation of exemptions. - By creating exemptions from execution, New Mexico has granted judgment debtors a property interest in retaining their exempt property. While the state need not grant such exemptions, once given, the property rights they create are entitled to due process protection. Aacen v. San Juan County Sheriff's Dep't, 944 F.2d 691 (10th Cir. 1991).

Law reviews. - For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 35 C.J.S. Exemptions §§ 7, 39, 56, 88, 138.

42-10-11. When homestead exemption does not apply.

The provisions of this article [42-10-9 to 42-10-12 NMSA 1978] do not apply or extend to taxes, garnishment, recorded liens of mortgagees or lessors or recorded liens of laborers or materialmen for labor or materials furnished for the construction or repair of the dwelling house.

History: 1953 Comp., § 24-6-3, enacted by Laws 1971, ch. 215, § 8.

ANNOTATIONS

Repeals and reenactments. - Laws 1971, ch. 215, § 8, repeals 24-6-3, 1953 Comp., relating to exemption of decedent's realty, and enacts the above section.

Law reviews. - For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

For comment, "A Comparison of State and Federal Exemptions: 11 U.S.C. § 101-1330 (Supp. II 1978)," see 10 N.M.L. Rev. 431 (1980).

42-10-12. Repealed.

ANNOTATIONS

Repeals. - Laws 1979, ch. 182, § 5, repeals 42-10-12 NMSA 1978, relating to filing homestead exemption claims. For provisions of former section, see 1978 original pamphlet.

42-10-13. Claim of exemption or priority.

Any person desiring to claim that property is exempt from execution or is subject to execution only after other property is used to satisfy a debt under the provisions of Sections 40-3-10 and 40-3-11 NMSA 1978 shall file his claim of exemption or priority in the appropriate court, or the right to claim such exemption is waived as between a spouse and the creditor.

History: 1953 Comp., § 24-7-1, enacted by Laws 1975, ch. 246, § 1.

ANNOTATIONS

Cross-references. - As to rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801, respectively.

As to form for claim of exemptions on executions, see Form 4-803.

As to form for order on claim of exemption and order to pay in execution proceedings, see Form 4-804.

As to form for application for writ of garnishment and affidavit, see Form 4-805.

As to form for notice of right to claim exemptions from execution, see Form 4-808A.

As to form for claim of exemption from garnishment, see Form 4-809.

Constitutionality. - The postjudgment execution statutes are unconstitutional as not providing adequate notice of allowable exemptions and the right to a hearing. Aacen v. San Juan County Sheriff's Dep't, 944 F.2d 691 (10th Cir. 1991).

ARTICLE 11
GOVERNMENT IMMUNITY

42-11-1. Granting immunity; providing for exceptions.

The state of New Mexico and its political subdivisions or any of their branches, agencies, departments, boards, commissions, instrumentalities or institutions are granted immunity from and may not be named a defendant in any suit, action, case or legal proceeding involving a claim of title to or interest in real property except as specifically authorized by law.

History: Laws 1979, ch. 110, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Applicability of judicial immunity to acts of clerk of court under state law, 34 A.L.R.4th 1186.

ARTICLE 13
EQUINE LIABILITY

42-13-1. Short title.

This act [42-13-1 to 42-13-5 NMSA 1978] may be cited as the "Equine Liability Act".

History: Laws 1993, ch. 117, § 1.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 117 contains no effective date provision, but, pursuant to N. M. Const., art. IV, § 23, is effective on June 18, 1993, 90 days after adjournment of the legislature. See Volume 14 of the NMSA 1978 for "Adjournment Dates of Sessions of Legislature."

42-13-2. Legislative purpose and findings.

The legislature recognizes that persons who participate in or observe equine activities may incur injuries as a result of the numerous inherent risks involved in such activities. The legislature also finds that the state and its citizens derive numerous personal and economic benefits from such activities. It is the purpose of the legislature to encourage owners, trainers, operators and promoters to sponsor or engage in equine activities by providing that no person shall recover for injuries resulting from the risks related to the behavior of equine animals while engaged in any equine activities.

History: Laws 1993, ch. 117, § 2.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 117 contains no effective date provision, but, pursuant to N. M. Const., art. IV, § 23, is effective on June 18, 1993, 90 days after adjournment of the legislature. See Volume 14 of the NMSA 1978 for "Adjournment Dates of Sessions of Legislature."

42-13-3. Definitions.

As used in the Equine Liability Act [42-13-1 to 42-13-5 NMSA 1978]:

A. "equine" means a horse, pony, mule, donkey or hinny;

B. "equine activities" means:

(1) equine shows, fairs, competitions, rodeos, gymkhana, performances or parades that involve any or all breeds of equines and any of the equine disciplines;

(2) training or teaching activities;

(3) boarding equines;

(4) riding an equine belonging to another whether or not the owner has received some monetary consideration or other thing of equivalent value for the use of the equine or is permitting a prospective purchaser of the equine to ride, inspect or evaluate the equine;

(5) rides, shows, clinics, trips, hunts or other equine occasions of any type, however informal or impromptu, connected with any equine or nonequine group or club; and

(6) equine racing;

C. "behavior of equine animals" means the propensity of an equine animal to kick, bite, shy, buck, stumble, bolt, rear, trample, be unpredictable or collide with other animals, objects or persons; and

D. "rider" means a person, whether amateur or professional, who is engaged in an equine activity.

History: Laws 1993, ch. 117, § 3.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 117 contains no effective date provision, but, pursuant to N. M. Const., art. IV, § 23, is effective on June 18, 1993, 90 days after adjournment of the legislature. See Volume 14 of the NMSA 1978 for "Adjournment Dates of Sessions of Legislature."

42-13-4. Limitation on liability.

A. No person, corporation or partnership is liable for personal injuries to or for the death of a rider that may occur as a result of the behavior of equine animals while engaged in any equine activities.

B. No person, corporation or partnership shall make any claim against, maintain any action against or recover from a rider, operator, owner, trainer or promoter for injury, loss or damage resulting from equine behavior unless the acts or omissions of the rider, owner, operator, trainer or promoter constitute negligence.

C. Nothing in the Equine Liability Act [42-13-1 to 42-13-5 NMSA 1978] shall be construed to prevent or limit the liability of the operator, owner, trainer or promoter of an equine activity who:

(1) provided the equipment or tack, and knew or should have known that the equipment or tack was faulty and an injury was the proximate result of the faulty condition of the equipment or tack;

(2) provided the equine and failed to make reasonable and prudent efforts to determine the ability of the rider to:

(a) engage safely in the equine activity; or

(b) safely manage the particular equine based on the rider's representations of his ability;

(3) owns, leases, rents or otherwise is in lawful possession and control of the land or facilities upon which a rider sustained injuries because of a dangerous condition that was known to the operator, owner, trainer or promoter of the equine activity;

(4) committed an act or omission that constitutes conscious or reckless disregard for the safety of a rider and an injury was the proximate result of that act or omission; or

(5) intentionally injures a rider.

History: Laws 1993, ch. 117, § 4.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 117 contains no effective date provision, but, pursuant to N. M. Const., art. IV, § 23, is effective on June 18, 1993, 90 days after adjournment of the legislature. See Volume 14 of the NMSA 1978 for "Adjournment Dates of Sessions of Legislature."

42-13-5. Posting of notice.

Operators, owners, trainers and promoters of equine activities or equine facilities, including but not limited to stables, clubhouses, ponyride strings, fairs and arenas, and persons engaged in instructing or renting equine animals shall post clearly visible signs at one or more prominent locations that shall include a warning regarding the inherent risks of the equine activity and the limitations on liability of the operator, owner, trainer or promoter.

History: Laws 1993, ch. 117, § 5.

ANNOTATIONS

Effective dates. - Laws 1993, ch. 117 contains no effective date provision, but, pursuant to N. M. Const., art. IV, § 23, is effective on June 18, 1993, 90 days after adjournment of the legislature. See Volume 14 of the NMSA 1978 for "Adjournment Dates of Sessions of Legislature."