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## Property - Contingent Remainders - Rule of Destructibility Abolished in New Mexico

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**PROPERTY—CONTINGENT REMAINDERS—RULE  
OF DESTRUCTIBILITY ABOLISHED IN NEW MEXICO.**  
*Abo Petroleum Corp. v. Amstutz*, 93 N.M. 332, 600 P.2d 278  
(1979).

INTRODUCTION

A recent New Mexico Supreme Court case, *Abo Petroleum Corp. v. Amstutz*,<sup>1</sup> abolished the rule of destructibility of contingent remainders in New Mexico. The applicability of this common law rule had not previously been decided in New Mexico. The holding thus alters a portion of the English common law which had been adopted in New Mexico.<sup>2</sup>

The contingent remainder was developed by the English common law of estates in land. It was defined by Blackstone as an estate in remainder<sup>3</sup> which is limited to take effect either to an uncertain person or upon an uncertain event.<sup>4</sup> At common law, a contingent remainder was destructible.<sup>5</sup> Thus, if *A* conveyed land to *B* for life, remainder to *C* if he reached age 21, and *C* predeceased *B* at age 19, or if *B* died when *C* was 19, the contingent remainder in *C* was destroyed. Further, if *A* conveyed land to *B* for life, remainder to *C* if *C* reached age 21, and then *A* granted all his interest in the land by quitclaim deed to *B* in fee simple while *C* was still under age 21, the contingent remainder in *C* was destroyed. In the first example, the common law found that destruction had occurred as a result of "failure to vest" in the time allowed.<sup>6</sup> In the second example, destruction occurred under common law as a result of merger.<sup>7</sup> The

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1. 93 N.M. 332, 600 P.2d 278 (1979).

2. New Mexico adopted the common law of England as it existed in 1789 by statute. See N.M. Stat. Ann. § 38-1-3 (1978).

3. "A remainder is a future interest which is limited in favor of a transferee in such a manner that it can become a present interest upon the termination of all prior interests simultaneously created, but cannot divest any interest other than an interest in the transferor." Wright, *The Present Status of the Rule of Destructibility in Pennsylvania*, 27 Temp. L.Q. 207, 207 (1947).

4. L. Simes & A. Smith, *The Law of Future Interests* § 11 (2d ed. 1956).

5. *Id.* § 193.

6. Contingent remainders failed to "vest in time" when the normal termination of the freehold estate occurred before the contingent remainder had vested. *Id.* § 194.

7. The doctrine of merger dictates that whenever successive vested estates are owned by the same person, the larger of the two estates will absorb the smaller. C. Moynihan, Introduction to the Law of Real Property 131-32 (1962).

rule of destructibility in actual practice consists of rules with respect to situations in which contingent remainders cease to exist.<sup>8</sup>

The rule of destructibility developed from the feudal concept of seisin.<sup>9</sup> Although seisin at one time meant possession of land, in the fourteenth century the word came to mean possession under claim of a freehold estate therein.<sup>10</sup> One basic principle of the doctrine was that the seisin of land could never be held in abeyance; someone always had to be seised of any given piece of land.<sup>11</sup> The absolute rule of no abeyance is thought to have been created to protect the feudal landowner's interests.<sup>12</sup> The rule of no abeyance allowed the landowner to determine readily who was responsible for the performance of feudal obligations. The rule of destructibility was a concomitant of the rules relative to seisin. Destructibility, however, also promoted the alienability of land by insuring that land would not be tied up indefinitely while the contingent remainders continued in existence.<sup>13</sup> The rule of destructibility was maintained in the common law even after displacement of the feudal system and the diminished significance of the concept of seisin.

#### THE CASE

The precise issue in *Abo Petroleum Corp. v. Amstutz* was whether a contingent remainder could be destroyed by merger.<sup>14</sup> The grandparents of the defendants owned in fee simple the property in dispute. By two separate instruments, each dated in 1908 and each entitled "Conditional Deed," the grandparents conveyed life estates in two separate parcels to their two daughters. The deeds also conveyed contingent remainders to the children of the daughters who survived

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8. In addition to destruction by merger and "failure to vest in time" (expiration of time), contingent remainders could be destroyed by forfeiture. *Id.* at 130-31. In feudal times, forfeiture occurred when a life tenant made a feoffment in fee. This form of conveyance was regarded as a wrong to the lord. As such, the person who had the next vested estate had a right of entry. Because they had not vested at the time of forfeiture, contingent remainders which were to take effect after the life estate were destroyed. L. Simes & A. Smith, *supra* note 4, § 195.

9. Seisin was the "completion of the feudal investiture, by which the tenant was admitted into the feud, and performed the rights of homage and fealty." Black's Law Dictionary 1219 (5th ed. 1979). See note 36 *infra*.

10. C. Moynihan, *supra* note 7, at 87-88.

11. Wright, *supra* note 3, at 207.

12. *Id.*

13. L. Simes & A. Smith, *supra* note 4, § 193.

14. 93 N.M. at \_\_\_\_\_, 600 P.2d at 280.

them.<sup>15</sup> In 1911, the grandparents executed a warranty deed to one daughter. In 1916, a second warranty deed was executed to the same daughter conveying only a portion of the property. A warranty deed was executed to the other daughter in 1916. This deed's stated purpose was to correct the first 1908 deed by attempting to convey a fee simple absolute. After the execution of the deeds, each daughter had children.

Each daughter later attempted to convey her property in fee simple to the predecessors of the plaintiff.<sup>16</sup> Thus, the plaintiff in the action, Abo Petroleum Corporation, was the successor in interest to the daughters. The defendants were the children of the two daughters of the original owners of the property.

The main issue in the case was whether the grandparents' conveyances in the 1911 and 1916 deeds to the daughters of all their right, title, and interest had destroyed the grandchildren's contingent remainders.<sup>17</sup> The plaintiffs contended that the daughters' interests had merged with their parents' (the grandparents of defendants) interest in 1911 and 1916 to give the daughters a fee simple estate, thereby destroying the defendants' contingent remainders by merger. The New Mexico Supreme Court held that the rule of destructibility would not be applied; thus, the contingent remainders were not destroyed.<sup>18</sup> The court stated that the daughters had acquired no more interest in the properties through the later deeds than they possessed from the 1908 conditional deeds.<sup>19</sup> The court held that the daughters had therefore conveyed only the life estates that they had originally acquired in 1908.<sup>20</sup> The predecessors of the plaintiff thus had acquired only life interests in the properties which had expired at the deaths of the two daughters.<sup>21</sup>

#### THE CURRENT STATUS OF THE RULE OF DESTRUCTIBILITY IN THE UNITED STATES

The decision in *Abo Petroleum Corp. v. Amstutz* is in accord with modern property law in the United States. Only four states currently

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15. *Id.* at \_\_\_\_\_, 600 P.2d at 279.

16. *Id.*

17. *Id.* at \_\_\_\_\_, 600 P.2d at 280.

18. *Id.* at \_\_\_\_\_, 600 P.2d at 281.

19. *Id.*

20. *Id.*

21. *Id.* The court cited *Cook v. Daniels*, 306 S.W.2d 573 (Mo. 1957), which stands, in part, for the proposition that one normally can convey only the interest he actually owns in property and no more.

preserve the rule that contingent remainders are destructible.<sup>22</sup> Many states have completely abolished the rule by statute.<sup>23</sup> Five jurisdictions have abolished the rule only as applied to merger and forfeiture.<sup>24</sup> Four other states have abolished the rule by judicial decision.<sup>25</sup>

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22. The states preserving the rule are Florida, Oregon, Pennsylvania, and Tennessee (all by judicial decision). L. Simes & A. Smith, *supra* note 4, § 209.

In *Lewis v. City of Orlando*, 145 Fla. 285, 199 So. 49 (1940), the issue was whether a contingent remainder in an estate is destroyed upon the termination of the particular estate upon which the contingent remainder is dependent. In the opinion, which did not mention the facts of the case, the Supreme Court of Florida did not present any reasons for preserving the rule, other than stare decisis.

The Oregon Supreme Court upheld the rule in *Love v. Lindstedt*, 76 Or. 66, 147 P. 935 (1915). This case involved people holding contingent remainders in property who conveyed their interest to the life tenant. The court held that these potential contingent remaindermen's interests were merged with the life estate. Thus, the life tenant held the property in fee simple and the remaindermen's interests were destroyed. The court stated the following rule:

Contingent remainders may be defeated, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested. Therefore, when there is a tenant for life, . . . he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate before any of those remainders vest; the consequence of which is that he utterly defeats them all. Blackstone, vol. 2, p. 172.

*Id.* at \_\_\_\_\_, 147 P. at 937. Thus, the court relied on a mere restatement of the destructibility rule. This reliance on ancient doctrine is typical of those few jurisdictions which still recognize the rule of destructibility. The cases do not question the policies behind the rule.

23. The states which completely abolish the rule by statute are Alabama, Arizona, California, Georgia, Idaho, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New York, North Dakota, Ohio, South Dakota, Virginia, West Virginia, and Wisconsin. L. Simes & A. Smith, *supra* note 4, § 207.

24. These jurisdictions are Maine, Mississippi, Rhode Island, Texas, and the District of Columbia. *Id.* See L. Simes & A. Smith, *supra* note 4, § 197 for the definitions of merger and forfeiture.

25. These states are: *Indiana*: *Rouse v. Paidrick*, 221 Ind. 517, 49 N.E.2d 528 (1943); *Kansas*: *Miller v. Miller*, 91 Kan. 1, 136 P. 953 (1913); *New Hampshire*: *Hayward v. Spaulding*, 75 N.H. 92, 71 A. 219 (1908); and *Oklahoma*: *Whitten v. Whitten*, 203 Okla. 196, 219 P.2d 228 (1950). The facts of *Whitten* are substantially similar to those in *Abo Petroleum Corp. v. Amstutz*. The grantor conveyed a life estate with remainder over to the heirs of the life tenant. This conveyance at common law would have resulted in the application of the Rule in Shelley's Case. This rule held that the contingent remainder in the heirs of the life tenant became a vested remainder in the life tenant in fee simple. The doctrine of merger then would have caused the two estates to coalesce. Hence, the life tenant would then have a present estate in fee tail. C. Moynihan, *supra* note 7, at 140-41. Oklahoma, however, had a statute which abolished the Rule in Shelley's Case. Okla. Stat. Ann. tit. 60, § 41 (West 1971). Thus, the remainder over was considered to be a contingent remainder. The grantor subsequently conveyed her reversion to the life tenant. It was argued by the life tenants that the rule was applicable and, therefore, the contingent remaindermen were precluded from asserting their interests because of the doctrine of merger. The court did not address the issue of destructibility on a policy level. Rather, it held that the reversionary interest was subordinate to the contingent remainder. The court stated:

Since the effect of the conveyance was to create a contingent remainder in the entire fee, the only alienable or assignable estate remaining in the grantor was that of reversion which was subordinate to the contingent remainder because its en-

The Restatement of Property has also abandoned the rule of destructibility.<sup>26</sup> The rule was said to be an anachronism which caused confusion in the law because courts and legislatures had developed exceptions to its harsh application.<sup>27</sup>

### THE EFFECT OF THE *ABO* DECISION

Several issues regarding the effect of the *Abo* holding remain to be resolved. The first set of issues concerns the retroactive judicial abolition of a common law rule. The second set of issues concerns the impact of the decision on the rule of destructibility in New Mexico.

#### *Questions Concerning the Retroactive Judicial Abolition of a Common Law Rule*

In *Abo*, the supreme court refused to apply an existing common law rule to an ongoing dispute. The retroactive effect of the holding<sup>28</sup> may be an unconstitutional taking of property without due process of law.<sup>29</sup> Courts in other jurisdictions have, however, upheld abolishing statutes against constitutional challenges, despite the statutes' retroactive effects.<sup>30</sup> In *Jennings v. Capen*, the Illinois Supreme Court held that the legislature had constitutional power to abolish the rule of destructibility.<sup>31</sup> The court held that a legislature can change, modify, or abolish such rules because future expecta-

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joyment is dependent upon the failure of the event upon the occurrence of which the remainder was to vest.

203 Okla. at \_\_\_\_\_, 219 P.2d at 232. *But see* *Miller v. Miller*, 92 Kan. 1, 136 P. 953 (1913). The court in *Miller* acknowledged the legislature's intent, as shown in Kan. Stat. Ann. § 58-2205 (1976) (original version at Gen. Stat. 1868 c. 22, § 3), not to rely on the feudal reasons for the rule of destructibility. *See also* *Evans v. Bishop Trust Co.*, 21 Hawaii 74 (1912).

26. Restatement of Property § 240 (1936).

27. *Id.* For instance, one method of avoiding the application of the rule was to find another interposed vested estate which supported the contingent remainder. Another method was to find that trustees who were created for other purposes previously fulfilled continued to function as "trustees to preserve." *Id.* at Comment b.

28. The holding is retroactive because the predecessors of the plaintiff purchased the land many years before the decision in *Abo Petroleum Corp. v. Amstutz*. At the time of the purchase, the doctrine of merger and the rule of destructibility were part of English common law as adopted in New Mexico. *See* note 2 *supra*. Thus, purchasers could have reasonably relied on New Mexico's upholding the doctrine of merger and the rule of destructibility.

29. U.S. Const. amend. XIV, § 2; N.M. Const. art. 2, § 18.

30. *Wood v. Chase*, 327 Ill. 91, 158 N.E. 470 (1927); *Jennings v. Capen*, 321 Ill. 291, 151 N.E. 900 (1926); *People's Loan & Exch. Bank v. Garlington*, 54 S.C. 413, 32 S.E. 513 (1899).

31. 321 Ill. at \_\_\_\_\_, 151 N.E. at 902. *But see* *People's Loan & Exch. Bank v. Garlington*, note 30 *supra*, which held a similar statute constitutional because, *inter alia*, the statute only barred application of the rule after the date of the statute. Hence, the effect of the statute was to bar future action and therefore was clearly within the powers of the legislature.

tions of property (such as a future right to destroy a contingent remainder) do not rise to the level of a vested right.<sup>32</sup> Because the New Mexico Supreme Court did not address this issue in the *Abo* opinion, the court obviously considered its decision to be constitutional.<sup>33</sup>

The *Abo* holding may have been based on reasoning similar to that in *Jennings*.<sup>34</sup> Alternatively, the court might have reasoned that in light of its abolition in other jurisdictions, property holders were not justified in relying on the rule of destructibility simply because New Mexico courts had not yet addressed the rule's vitality.<sup>35</sup> In addition, the court may have realized that its decision would not disturb the grantor's intended disposition of the property. The *Abo* holding would guarantee that property will pass to the contingent remaindermen, as the grantor, testator, or intestate intended, if the remainder vests. This policy rationale, combined with other policy rationales, may have outweighed a constitutional claim of doubtful validity.

The New Mexico Supreme Court also decided in *Abo* that abolition of the common law rule was a proper subject for judicial decision.<sup>36</sup> In *Syroid v. Albuquerque Gravel Products Co.*,<sup>37</sup> the court

32. One of the parties in *Jennings* held a life tenancy and a reversion in the property in question. The court regarded his right to destroy a contingent remainder interest in the property to be a mere inchoate right which the legislature had a right to deprive him of. 321 Ill. at \_\_\_\_, 151 N.E. at 902.

33. None of the parties argued this issue in their briefs. Defendant-Appellants' Brief-in-Chief, Plaintiff-Appellees' Answer Brief, Defendant-Appellants' Reply Brief, *Abo Petroleum Corp. v. Amstutz*, 93 N.M. 332, 600 P.2d 278 (1979).

34. One distinction, however, between *Abo Petroleum Corp. v. Amstutz* and *Jennings v. Capen* is that a vested rather than an inchoate right might have been established in *Abo* because all the acts necessary to destroy the contingent remainder were performed prior to the rendering of the decision in the case. In *Jennings*, however, the acts which formerly would have destroyed the contingent remainder were not performed until after the effective date of the statute.

35. See notes 22-25 *supra*.

36. The New Mexico Supreme Court could have used a different analysis in approaching the problem in *Abo*. New Mexico currently has a statute which possibly can be construed as sufficient evidence of legislative intent to abolish the rule. The statute states:

When any possession has been or shall be conveyed limiting the remainder of the possession to the son or daughter of any person, born after the death of its parent, possession shall be taken the same as if he or she was born during the life of the parent, although no possession should have been conveyed to sustain the remainder of a contingent possession after his death, and after this an absolute possession or bequest may be made, *commencing in the future*, in writing in the same manner as by will.

N.M. Stat. Ann. § 47-1-20 (1978) (emphasis added). The fact that the legislature added the phrase "commencing in the future" seems to abrogate a premise which underlies the rule (the rule forbidding estates to commence in the future).

A question arises as to the reason the court decided to abolish the rule by judicial reasoning rather than by relying on the statute. One reason could be that the court was unaware of the statute because the attorneys did not use this statute in their briefs. Defendant-Appellants'

stated that rules of substantive law should be changed only infrequently by the courts.

[W]e are not inclined to change long established rules just for the sake of change, and we are particularly reluctant to abandon or change a long established rule with widespread ramifications in an area of substantive law, unless we can be reasonably sure that the change is very likely to improve the administration of justice. Ours is a dual responsibility of fashioning rules of law responsive to the accomplishment of justice in a changing society, while at the same time preserving established rules of law and the stability essential to the accomplishment of justice under law.<sup>38</sup>

*Syroid* dealt with a change from contributory negligence to comparative negligence, which had not received wide judicial and legislative approval at the time of the decision. *Abo* is not inconsistent with the *Syroid* holding because of the changing state of the law regarding the rule of destructibility. The court in *Abo* must have thought that applying the rule of destructibility would not be responsive to the modern needs of the people of New Mexico. Therefore, the court held that the rule of destructibility should be abolished.<sup>39</sup>

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Brief-in-Chief, Plaintiff-Appellees' Answer Brief, Defendant-Appellants' Reply Brief. Another reason could be that the statute does not indicate that livery of seisin or any other act or ceremony is not necessary to convey real property.

Kansas has a statute similar to New Mexico's which served as the basis for judicial abolition of the rule of destructibility. Kan. Stat. Ann. § 58-2205 (1976). *Miller v. Miller*, 92 Kan. 1, 136 P. 593 (1913), construed the Kansas statute which states: "Conveyances of land, or of any other estate or interest therein, may be made by deed, executed by any person having authority to convey the same . . . without any other act or ceremony whatsoever." (Emphasis added). A contingent remainder could not be created at common law without the concurrent creation of a particular estate of freehold (such as a life estate) as support for the remainder; conveyances of estates to commence *in futuro* were not allowed. Thus, in order to create an estate to commence *in futuro*, a precedent particular estate was required to support it. The livery of seisin used to convey the particular estate inured to the contingent remainderman. Therefore, if the particular estate ceased to exist, the contingent remainder was destroyed.

The precise issue, then, is whether "commencing in the future" in N.M. Stat. Ann. § 47-1-20 (1978) means that a particular estate is not required as a foundation for contingent remainder. The court in *Miller* felt that the language in Kan. Stat. Ann. § 58-2205 did not contain this requirement. Arguably, neither does the New Mexico statute. The Kansas statute does, however, do away with the requirement of livery of seisin with very explicit language while the New Mexico statute does not. Thus, an argument that the New Mexico statute does away with the requirement that a contingent remainder must always be supported by a particular estate is less forceful. On balance, however, the court in *Abo* could have read the statute as abolishing the rule of destructibility.

37. 86 N.M. 235, 522 P.2d 570 (1974).

38. *Id.* at 237, 522 P.2d at 572.

39. The court recognized that it was diverging from the common law of England, as adopted in New Mexico, by holding the rule of destructibility inapplicable in *Abo*. 93 N.M. at \_\_\_\_, 600 P.2d at 280. In so doing, the court relied on *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1976). In *Hicks*, the New Mexico Supreme Court held that the doctrine of sovereign immunity



Another related issue is whether the court should have deferred to the legislature in deciding whether to abolish the rule of destructibility. In *Hicks v. State*,<sup>40</sup> the New Mexico Supreme Court decided that it was not necessary to defer to the legislature's decision as to whether the common law doctrine of sovereign immunity should be abolished.<sup>41</sup> The court reasoned that sovereign immunity could be abolished by the courts because the doctrine had been judicially created without statutory codification.<sup>42</sup> The doctrine was codified in the statutory law merely to give the judiciary some precedential foundation on which to rely.<sup>43</sup> One can argue by analogy that the rule of destructibility had been codified for the same reason,<sup>44</sup> and that the court, therefore, acted properly in abolishing the rule.

### *The Precise Impact of the Abo Holding on New Mexico Property Law Is Not Readily Apparent*

The holding in *Abo* may apply as a general rule of law to situations which are factually different from that in the *Abo* case. The scope of the holding is quite broad. The supreme court stated: "Because the doctrine of destructibility . . . is but a relic of the feudal past, which has no justification in modern society, we decline to apply it in New Mexico."<sup>45</sup> Thus, the rule is probably abolished in all respects, including destruction by merger, forfeiture, and expira-

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was no longer applicable to present day conditions and was therefore abolished. The immunity was based on the feudal notion that the sovereign can do no wrong. The court found that, because contemporary society bears little resemblance to feudal England, sovereign immunity should be abolished. *Id.* at 588, 544 P.2d at 1155. Likewise, the court felt justified in abolishing the common law rule of destructibility because, *inter alia*, it has marginal utility in contemporary society and relied on *Hicks* as precedent for rejecting common law rules. *Abo Petroleum Corp. v. Amstutz*, 93 N.M. at \_\_\_\_\_, 600 P.2d at 280.

40. 88 N.M. 588, 544 P.2d 1153 (1976).

41. *Id.* at 590, 544 P.2d at 1155.

42. *Id.*

43. The rule of destructibility and the doctrine of sovereign immunity were both derived from the common law of England as it existed in 1789 and as adopted by statute in New Mexico. N.M. Stat. Ann. § 38-1-3 (1978). There may, however, be a statute in New Mexico which directly or indirectly controls the rule of destructibility. N.M. Stat. Ann. § 47-1-20 (1978); see note 36 *supra*.

44. This reasoning probably lessens the decision's retroactive impact. If destructibility is a common law rule, then arguably when the reason behind the rule ends, the rule itself may be ignored. In *Marchiando v. Roper*, 90 N.M. 367, 563 P.2d 1160 (1977), the New Mexico Supreme Court also considered the issue of deference to the legislature. The issue in *Marchiando* was whether tavern owners could be held liable for the negligent sale of intoxicating liquors to an inebriated person who left the tavern in an automobile. The driver struck and killed the plaintiff's deceased. The court held that the issue was for the legislature to decide. The court also held that if the legislature did not act in the future that it would not be improper for the court to act. *Id.* at 369, 573 P.2d at 1161-62.

45. 93 N.M. at \_\_\_\_\_, 600 P.2d at 281.

tion of time.<sup>46</sup> On the other hand, one can argue that this language is mere dicta and that the holding should apply to the abolition of destructibility by merger only. The latter argument would suggest that the rule can still be applied to destroy a contingent remainder by expiration of time or by forfeiture.

The holding may also affect the application of other property rules in New Mexico. For instance, the Rule Against Perpetuities may become a factor to consider more often with respect to contingent remainders because of the holding in *Abo*. If a contingent remainder will either vest or be destroyed within the perpetuity period, it is valid.<sup>47</sup> Because contingent remainders cannot be destroyed in New Mexico, the remainders must vest within the perpetuity period in order to be valid.<sup>48</sup>

### CONCLUSION

The New Mexico Supreme Court's holding in *Abo Petroleum Corp. v. Amstutz* abolishes the rule of destructibility in New Mexico. The supreme court has wisely followed the vast majority of states by abolishing a rule which has its roots in feudal England and bears little relevance to our modern society. Judicial abolition of the common law rule is constitutionally defensible and serves reasonable public policy. The future impact on property law in New Mexico, however, remains to be settled.

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46. See notes 6-8 *supra* for definitions of destructibility of contingent remainders by merger, forfeiture, and expiration of time.

47. L. Simes & A. Smith, *supra* note 4, § 1230. Thus, *A* devises land to *B* for life, remainder to *B*'s grandchildren. *B* has no grandchildren alive at *A*'s death. If a grandchild of *B* is born during *B*'s life, the remainder is valid because it vested within the perpetuity period. If a grandchild is not born during *B*'s life, the contingent remainder will be destroyed, provided the rule of destructibility is still in effect.

48. One argument in support of the rule of destructibility is that it promotes the alienability of land. Land is not tied up because the contingent remainder can be destroyed. Thus, a substantial period of time would possibly have to elapse until the contingent remainder vests except for the fact that it must vest within the perpetuity period or not at all.