Toward Clarification of New Mexico's Real Property Statutes

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Recommended Citation
Available at: https://digitalrepository.unm.edu/nrj/vol1/iss1/9
Most of the ambiguous sections of New Mexico's real property statutes are the product of its first territorial legislature, which body was composed in part of lawyers who came from Missouri or Kansas. Many of New Mexico's real property statutes were modelled upon the legislation of those territories. Their statutes were originally drafted in English, and were, in the main, free from ambiguity. Our supreme court placed the responsibility for the present confusion where it belongs when it said:

In interpreting this section [N.M. Stat. Ann. § 70-1-12 (1953)] it must be noted that it was enacted in Spanish. "Lineal and collateral securities" was "lineales y colaterales aseguramientos." We have no doubt of the correctness of the contention that "aseguramientos" should be translated "warranties." The statute then has a well-defined purpose and meaning. Cf. 2 Blackstone Comm. 301, as to warranties, lineal and collateral. It is scarcely to be doubted that the Spanish original is a translation from an English draft. The two translations have proven too much for the word "warranties" and it has become "securities." Thus understood, the section has no bearing here.

It is unfortunate that when the time came for the second translation, back into English, the compilers of the statutes did not use the original English version as their source.

The writer has taught the courses in real property at The University of New Mexico School of Law, for thirteen years. Each year it has been necessary to explain the obscure meanings of a number of those sections of the New Mexico real property statutes which impinge upon common law rules and doctrines of property law. Practicing attorneys who acquired their legal education in schools outside the state must indeed be puzzled upon first acquaintance with these sections of the statutes. There is no reason why this state of affairs should continue when, with the backing of the State Bar, revision of the ambiguous language used in the statutes can so easily be accomplished.

My primary purpose is not to suggest substantive reform in the field of real property law in New Mexico, but to propose changes that will eliminate the

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1. See e.g., New Mexico Bar Ass'n Proc. 25 (1895); New Mexico Bar Ass'n Proc. 42 (1904).
ambiguities in our present statutes. However, where substantive reform has become necessary, it is indicated.

1. Definition of Real Estate

N.M. Stat. Ann. § 70-1-1 (1953). "Real estate" defined.—The term real estate, as used in this chapter, shall be so construed as to be applicable to lands, tenements, and hereditaments, including all real movable property.

Suggested revision of § 70-1-1. Construction of the term "real estate."—"Real estate," as used in this chapter, shall be construed as coextensive in meaning with lands, tenements and hereditaments, and as embracing all chattels real.

The revision is based on Mo. Rev. Stat. § 442.010 (1949), but substituting "as used in this chapter" for "as used herein," and deleting "the term" preceding "real estate." The phrase "real movable property" is self-contradictory. On the other hand the words "chattel real" have always had a clear common law meaning, i.e., the interest created by virtue of an estate less than freehold, including a leasehold estate. The supreme court of Missouri, like that of New Mexico, has held that this section does not attempt to convert what was personal property at common law into real estate, but only to bring leasehold estates within the compass of the conveyancing statutes.

2. Abolition of Primogeniture

N.M. Stat. Ann. § 70-1-2 (1953). Perpetuities, monopolies, primogeniture and entailments prohibited.—Perpetuities and monopolies are contrary to the genius of free government and shall never be allowed, nor shall the law of primogeniture or entailments ever be in force in this state.

Suggested revision of § 70-1-2. Primogeniture.—The law of primogeniture is not in force in this state.

The revision is the writer's own wording. The existing section is a hodgepodge. Article IV § 38 of the New Mexico Constitution states: "The legislature shall enact laws to prevent trusts, monopolies and combinations in restraint of trade." Any reference to these matters should appear in Chapter 49, and

3. "In respect to property, real and personal correspond very nearly with immovables and movables of the civil law. By the latter 'biens' is a general term for property; and these are classified into movable and immovable, and the latter are subdivided into corporeal and incorporeal. Guyot, Repert. Biens." 3 Bouvier's Law Dictionary 2816 (Rawle's 3d rev. 1914).

4. "Real chattels are interests which are annexed to or concern real estate: as, a lease for years of land." See also citations of decisions in 6 Words and Phrases 713-15 (perm. ed. 1940).


not in the conveyancing statutes. An attempt to rely upon the prohibition against monopolies contained in this section has been made in only one case involving real property (restrictive covenants), and there was disallowed.\(^7\) It is awkward to tie legislative approval of the rule against perpetuities to abolition of primogeniture. It is better to follow the lead of California and Wyoming and adopt the Model Act\(^8\) or else, following the lead of a number of states, to consider new legislation on the subject.\(^9\) Finally, the prohibition of entailments more logically should be made when revising N.M. Stat. Ann. § 70-1-15 (1953), with the construction of an instrument attempting to create a fee tail.

3. **Conveyance Authorized**

N.M. Stat. Ann. § 70-1-3 (1953). *Conveyance authorized.—* Any person or persons, or body politic, holding or who may hold, any right or title to real estate in this state, be it absolute or limited, in possession, remainder or reversion, may convey the same in the manner and subject to the restrictions prescribed in this chapter.

Suggested revision of § 70-1-3. *Conveyance authorized.—* No right, title or interest, whether absolute or limited, legal or equitable, or present or future, in real estate may be conveyed or affected by any person or persons, or body politic, save in the manner and subject to the restrictions prescribed in this chapter. Any conveyance made in the manner and in compliance with the restrictions in this chapter shall serve to transfer all types of real estate which might have been conveyed either at common law or under the Statute of Uses, except as any such estates or interests shall have been abolished by other provisions of this chapter.

The New Mexico Supreme Court would probably construe the existing section to authorize the conveyance of executory interests or limitations, without

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8. The Model Rule Against Perpetuities Act reads: "§ 1. When Interest Must Vest.—No interest in real or personal property shall be good unless it must vest not later than twenty-one years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous nor so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this statute to make effective in this state the American common law rule against perpetuities." Cal. Civ. Code § 715.2; Wyo. Stat. Ann. § 34-40 (1957).
9. While many states have made legislative modifications of the "Rule against Perpetuities," or the "rule against suspension of the power of alienation," some quite recently, the very considerable literature on the subject indicates such steps should be taken only after careful and serious study of the possible consequences thereof. See e.g. Leach, Perpetuities: New Absurdity, Judicial and Statutory Correctives, 73 Harv. L. Rev. 1318 (1960); Leach, Perpetuities Legislation, Massachusetts Style, 67 Harv. L. Rev. 1349 (1954); Niles, Two Lives Down—and Goal to Go, 98 Trusts & Estates 104 (1959); Mechem, Further Thoughts on the Pennsylvania Perpetuities Legislation, 107 U. Pa. L. Rev. 965 (1959); Palsey, The 1960 Amendments to the New York Statutes on Perpetuities and Powers of Appointment, 45 Cornell L.Q. 679 (1960); Powell, Changes in the New York Statutes on Perpetuities and Accumulations: A Report and a Proposal, 58 Colum. L. Rev. 1196 (1958); Simes, Reform of Rule Against Perpetuities: Qualified Endorsement, 92 Trusts & Estates 770 (1953).
resorting to the Statute of Uses. However, the second sentence in the revision will clarify the legislative intent.

4. **Lineal and Collateral Warranties Abolished**


   Lineal and collateral securities in all cases are hereby forbidden, but the heirs and legal claimants of any person who may have made any written contract or agreement shall be responsible for said contract or agreement to the extent of the lands limited or bequeathed, in such case, and in the manner prescribed by law.

   Suggested revision of § 70-1-12. *Lineal and collateral warranties abolished.*—Lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who has made any covenant or agreement, shall be answerable, upon such covenant or agreement, to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law; and devisees shall be answerable to the same extent as provided by law in the case of heirs.

   The revision consists of Mo. Rev. Stat. § 442.500 (1949) which dates back to 1845, and is an obvious source of N.M. Stat. Ann. § 70-1-12 (1953). In essence it provides that heirs and devisees are chargeable only on the covenants of their ancestor for the value of the property that descends to them, and not according to ancient common law doctrines of lineal and collateral warranties and their incidents.

5. **Statutory Covenants of Title Implied in Bargain and Sale Deed**

   N.M. Stat. Ann. § 70-1-13 (1953). *Effect of words "bargained and sold."*—The words, bargained and sold, or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect:

10. "... [I]n a jurisdiction where the Statute of Uses is not in force, it may be asked, on what theory can an executory limitation be created by deed? If one seeks for an historical argument, it may be answered that, where there is a statute providing for the formalities necessary in the execution of deeds of land, such a statute is a sufficient substitute for the common-law livery of seisin, and permits the freehold to shift as effectually as the Statute of Uses did [citing Abbott v. Holway, 72 Me. 298 (1881)]. Or it may be said that, after all, the Statute of Uses has little to do with conveyancing in these modern days even in those jurisdictions where it can be said to be a part of the law, and that the modern doctrine is, not merely that one may create an estate of freehold to begin in the future by a conveyance operating under the Statute of Uses, but simply that the rule prohibiting the creation by deed of an estate of freehold to begin in the future is no longer law." 1 Simes, Law of Future Interests § 158, at 279-80 (1st ed. 1936). Cf. Bunch v. Nickls, 50 Ark. 367, 7 S.W. 563 (1888); Wilson v. Carrico, 140 Ind. 533, 40 N.E. 50 (1894); Miller v. Miller, 91 Kans. 1, 136 Pac. 953 (1913); Sabledowsky v. Arbuckle, 50 Minn. 475, 52 N.W. 920 (1892); Jones v. Caird, 153 Wis. 384, 141 N.W. 228 (1913). See also 4 Tiffany, Law of Real Property § 958 (3d ed. 1939).

11. See Foote v. Clark, 102 Mo. 394, 14 S.W. 981 (1890); Barlow v. Delaney, 86 Mo. 583 (1885).
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First. That the grantor, at the time of the execution of said conveyance, is possessed of an irrevocable possession in fee simple to the property so conveyed.

Second. That the said real estate, at the time of the execution of said conveyance, is free from all encumbrance made or suffered to be made by the grantor, or by any person claiming the same under him.

Third. For the greater security of the person, his heirs and assignees, to whom said real estate is conveyed by the grantor and his heirs, suits may be instituted the same as if the conditions were stipulated in the conveyance.

Suggested revision of § 70-1-13. Construction of “grant, bargain and sell.”—In a conveyance of an estate of inheritance, the words “grant, bargain and sell,” unless restricted by express terms in the conveyance, shall have the full force and effect of the following words: “The grantor for himself, his heirs, executors, administrators and successors, covenants with the grantee, his heirs, successors, and assigns, that he is lawfully seized of an indefeasible estate in fee simple of the premises so bargained and sold, and that the premises are free from all encumbrances made or suffered to be made by the grantor or by any person under whom he claims.”

The suggested revision is my own, worded to conform in style with N.M. Stat. Ann. § 70-1-35 (1953), entitled “Effect of warranty covenants in conveyances.” The source of the existing statute undoubtedly is Mo. Rev. Stat. § 442.410 (1949), though our statutory language has wandered far from the parent Missouri statute. The Missouri statute uses the words “grant, bargain and sell,” and New Mexico’s the words “bargained and sold.” The Missouri statute properly avoids the phrase “or words to the same effect.” The New Mexico statute makes the grantor liable for encumbrances created by persons claiming under him, whereas the Missouri statute makes him liable for the encumbrances made by any person under whom he claims. Missouri’s statute also makes the grantor liable on a covenant for further assurances, but it is not advisable to include this little-used covenant.

12. N.M. Stat. Ann. § 70-1-31 (1953) provides that “no covenant shall be implied from the use of the word ‘grant.’ ” From ancient times the words “bargain and sale” have had a clear and unmistakable meaning—a contract or bargain by the owner of land, in consideration of money or its equivalent paid, to sell to another person, called the “bargainee,” whereupon a use arises in favor of the latter, to whom the seisin is transferred by force of the statute of uses. III. Am. Law of Property § 12.12 (1952); 1 Devlin on Deeds § 23 (1887). It does not seem desirable to open the door to construction or to speculation as to whether other expressions by the bargainor may have the same meaning or statutory effect.

13. No grantor with the mental capacity to convey would undertake to covenant against encumbrances made by his successors in interest. The language of the Missouri statute is in the usual form of the covenant against encumbrances.

14. The covenant for further assurance, which contemplates that the grantor upon demand will perform acts necessary to give further assurance of title, has not been adopted very extensively in the United States. Rawle, Covenants for Title, at 195 (4th ed. 1873), cited in Burby on Real Property, 474 n. 24, (2d ed. 1954).
6. Fee Tail Abolished; Statutory Consequences

N.M. Stat. Ann. § 70-1-15 (1953). Entailed estates.—Whenever a conveyance or bequest is made wherein the conveyor or testator shall hold possession of property, be it land or tenements, in law or equity, as under the English Statute of Edward the First, styled the entail statute, and said property is to be perpetuated in the family, each one of said conveyances or bequests shall only invest the conveyors or testators with possession during their lifetime, who shall possess and hold the right and title to said premises, and no others, the same as a tenant for life is recognized by law; and at the death of said conveyor or testator said lands and tenements shall descend to the children of said conveyor or testator, to be equally divided among them as absolute tenants in common; and if there should be but one child, it shall descend absolutely to it; and if any child should die, the part which he or she should have received shall be given to his or her successor, and if there should be no such successor, then it shall descend to his or her legal heirs.

Suggested revision of § 70-1-15. Estate in Fee Tail Abolished.—Where, by the common law, a person might become seised of a fee tail of land by virtue of a devise, gift, grant or other conveyance, or by other means, such person, instead of being seised thereof in fee tail, shall be seised thereof in fee simple. This section shall not change the effect of any instrument made and executed prior to

OR

Alternate suggested revision of § 70-1-15. Entailed estates abolished; statutory consequences.—The estates known at common law as the fee simple conditional and the fee tail are abolished in this state. If any conveyance or devise of real estate in this state has been or shall hereafter be made in a form which would have been construed as a fee tail at common law, the named first taker shall have a life estate only, and the remainder shall pass as a fee simple absolute to such of the children of the first taker it would have passed to as a fee tail at common law under the words of the conveyance or devise; Provided, however, that if any of said children shall predecease the first taker, the share of such child shall immediately vest in its child or children as a fee simple absolute, but if said child of the first taker shall have had no child, then its shares shall go to its legal heirs. It is the intent of this section that the remainder in fee simple shall not be contingent upon survivorship of the life tenant.

The first suggested revision, which the writer prefers, would modify the existing law in giving the first taker a fee simple absolute rather than a life estate with remainder over to his children. The second suggested revision would improve the wording of the existing section without changing its legal meaning.
The Restatement suggests that the New Mexico statute was modelled upon the Illinois statute. However, Professor Manley O. Hudson said in 1912 that the New Mexico statute was copied from the New Jersey statute then in effect. At any rate, the existing statutes of Illinois, New Mexico, Arkansas, Colorado, and Missouri all provide that a limitation formerly sufficient to create an estate tail now confers an estate for life upon the first taker and a remainder estate in fee simple absolute upon the next taker. New Jersey and Vermont formerly were in the same category, but New Jersey, in 1934, and Vermont in 1941 revised their statutes to provide that a limitation formerly sufficient to create an estate tail now creates an estate in fee simple absolute in the first taker. In so doing, they joined the ranks of at least twenty-two other states.

Such a disposition does no more violence to the intent of the donor than New Mexico's present provision. Furthermore, giving a fee simple absolute to the

15. 1 Restatement, Property § 209.
17. Estates Tail in Missouri, 7 Ill. L. Rev. 356 n. 6. Hudson goes on to say, at 356-57, that the original Missouri statute of 1816 was copied in Illinois in 1827, in Arkansas in 1837, in Vermont in 1840, and in Colorado in 1867. He also says the New Jersey statute probably was responsible for the 1816 Missouri statute; that in its 1845 revision Missouri more closely copied it; but that in a final revision in 1865, Missouri restored its statute of 1825 which had superseded that of 1816.
24. The five states listed in the five preceding footnotes are now the only ones making such a disposition of an attempted fee tail. Cf. 1 Restatement, Property, Special Notes at 208-90.
27. See 1 Restatement, Property, Special Notes at 208-09.
28. Statute of Westminster the Second (De Donis Conditionalibus), 1285, 13 Ed. 1, c. 1, by virtue of which the estate tail became a part of the system of common law estates, was intended to prevent abuses which had arisen by reason of judicial construction of the operation of the fee simple conditional. The statute expressly provided, "that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition shall have no power to alien the land so given, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail, either by reason that there is no issue at all, or if any issue be, it fail by death, the heir of such issue failing." In due course, fictitious actions—the recovery and the fine—were developed allowing the first donee to bar the entail—the issue—from inheriting, and in the case of the recovery also barring the reversioners or remaindermen. By these means the first donee could in effect convey a fee simple absolute (or a fee simple on executory limitation), and if he wished, have a fee simple conveyed back to himself. Publick General Acts, 1833, 3 & 4 William IV, c. 74, abolished fines and common recoveries but at the same time authorized a tenant in tail to alien the land in fee simple, or otherwise, and thus bar the expectations of his issue and that of the reversioner. Most, if not all, of the states which still recognize the fee tail, either by
named donee removes all restraint upon his power of alienation. It also eliminates troublesome problems of construction raised by a statute like New Mexico's. For example, the courts are at odds as to the nature of the remainder over after the life estate in the first taker. Difficult questions also arise in connection with additional limitations over, as for example where O conveys to A and the heirs of his body, but if A should die without issue, to B and his heirs. These problems of construction are eliminated if the attempted creation of an

statute or judicial decision, authorize the barring of the entail by an ordinary conveyance. 1 Restatement, Property, at 203, Special Note 2 (1936). Once it is established that the donee could bar the entail, then a statute abolishing the fee tail and giving the donee of an attempted gift of an estate tail a fee simple absolute comes closer to emulating the later state of the common law than one which gives the first taker a life estate (thus preventing him from barring the entail) with a remainder over in fee simple absolute to children or issue.

29. As has been said, free alienability of land is not of such tremendous importance when it is useful for agricultural purposes only. But where land is to be devoted to industrial or commercial development, residential subdivisions, and the like, a perfect and indefeasible title becomes highly essential. See Ely, Can an Estate Tail be Docked During the Life of the First Taker?, 45 U. Mo. Bull. L. Ser. 3, at 20-21 (1931).

30. Steiner, Estates Tail in Missouri, U. Kan. City L. Rev. 93 (1939), reviews many of the decisions construing the Missouri statute abolishing estates tail, and setting up a disposition similar to New Mexico's. He concludes at page 108: "It is submitted that the above discussion and authorities clearly demonstrate the necessity of understanding the principles of the Common Law as well as the statute DeDonis and the Rule in Shelley's Case, to properly interpret the present statutes pertaining to estates tail in Missouri. It is not enough for the present day conveyancer to read the statutes. He must have delved deep into the lore of the Middle Ages, he must have carefully followed the development of the Missouri cases and statutes dealing with estates tail and their characteristics if he is to properly advise his clients as to rights arising under particular instruments."

31. Arkansas, Missouri and Vermont (under its old statute) are in agreement that a conveyance by O to A and his bodily heirs, or to A and the heirs of his body, and the like, create a life estate in A with a remainder in fee simple to A's issue, which is contingent not only upon their birth but also upon their survival of A, for only then, it is said, can the heirs of A's body be determined. See e.g. Le Sieur v. Spikes, 117 Ark. 366, 175 S.W. 413 (1915) (with which cf. Landers v. People's Bldg. & Loan Assn., 190 Ark. 1072, 81 S.W.2d 917 (1935), where it was held that a grant of an estate to the grantee and bodily heirs which named the children alive at the time of the conveyance gave a vested remainder to such children, subject to open to let in afterborn children, and that upon a showing that the life tenant was past the age of giving birth to a child, the remaindermen might join with the life tenant in giving a marketable title) ; Horsley v. Hillburn, 44 Ark. 438 (1884) ; Pixlee v. Petty, 274 S.W.2d 257 (Mo. 1955) ; Clarkson v. Hatton, 143 Mo. 47, 44 S.W. 761 (1898) ; Clarkson v. Clarkson, 125 Mo. 381, 28 S.W. 446 (1894) ; In re Kelso, 69 Vt. 272, 37 Atl. 747 (1896) ; Thompson v. Carl, 51 Vt. 408 (1878) ; Giddings v. Smith, 15 Vt. 344 (1843). To the contrary, Illinois has consistently held that such a conveyance vests a life estate in A, with a fee simple absolute to his children, contingent until their birth, and vested thereafter, subject to open and let in after-born children. Doney v. Clipson, 285 Ill. 75, 120 N.E. 571 (1918) ; Aetna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N.E. 669 (1911) ; Lehndorf v. Cope, 122 Ill. 317, 13 N.E. 505 (1887). The remainder is not subject to being divested by the death of a remainderman prior to the death of the life tenant, but descends in that event to the remainderman's heirs. Stearns v. Curry, 306 Ill. 94, 137 N.E. 471 (1922). Up to 1957 there had been no Colorado decisions on the question.

32. See Hudson, Estates Tail in Missouri, 7 Ill. L. Rev. 355, at 372-80; 1 Simes, Law of Future Interests § 190 (1st ed. 1936).
estate tail is treated as vesting a fee simple absolute in the first taker. Therefore, New Mexico should follow the existing Vermont statute.33

If, however, the legislature desires to retain the existing disposition of a life tenancy in the named donee followed by a fee simple absolute in the children of such donee, their issue or legal heirs, then adoption of the second proposed revision of § 70-1-15 is advisable. This revision is intended first, to bring into conjunction the statute abolishing fees tail with that which states the legal consequences thereof; second, to eliminate the misuse of the words “conveyors or testators” and some of the awkward language of the existing section; third, to guard against the admittedly remote possibility of a decision that the fee simple conditional still exists in New Mexico;34 fourth, to give effect to the intention of a donor who wishes to limit the gift to certain issue only, rather than all the issue of the donee, as where the grant or devise is to A and the heirs of his body by his wife, B; and, fifth, to make clear the nature of the remainder as it probably would be construed under the existing statute.35

7. DEFINITE FAILURE OF ISSUE

N.M. Stat. Ann. § 70-1-16 (1953). “Heirs” and “successors” defined.—When a balance or residue, in lands or tenements, goods or property, is limited by writing or otherwise to take effect after the decease of any person without heirs, or succession, the words heirs and successors shall be so construed as to mean heirs or successors living, at the time of the decease of the person styled ancestor.

Suggested revision of § 70-1-16. Indefinite failure of issue; definite failure of issue.—In the case of instruments disposing of property, of which the following is a type: “A and B and his heirs but if B dies without issue, then to C and his heirs,” the common law rule of interpretation that indefinite failure of issue is indicated shall not be applied. Definite failure of issue is indicated, that is, death of B without having issue living at the time of his death. B’s death without living issue need not occur in the lifetime of the maker of the instrument. The rules here presented apply when the limitation is on death “without heirs” or “heirs of the body,” or “issue,” or “children,” or “offspring,” or “descendants,” or any such relative however described. Enactment of this statute shall not be regarded as a legislative recognition that the common law indefinite failure of issue presumption has ever been a part of the law of this state.

34. The courts of at least four states have declared the fee simple conditional an existent estate. See e.g.: Shope v. Unknown Claimants, 174 Iowa 662, 156 N.W. 850 (1916); Myers v. Myers, 109 Nebr. 230, 190 N.W. 491 (1922); Lytle v. Hulen, 128 Ore. 483, 275 Pac. 45 (1929); Davis v. Strauss, 173 S.C. 99, 174 S.E. 908 (1934).
35. It seems reasonably clear to me that the existing statute does not contemplate survivorship by a child of its parent as a condition precedent to vesting in view of the provisions that if any child die its share shall go to its successors (i.e., issue or children), and if no issue (successors or children) then to such deceased child’s (child of first donee) legal heirs.
The suggestion revision is in the language of the Kansas statute adopted in 1939 upon the recommendation of the Kansas Judicial Council.\textsuperscript{30} The present New Mexico section is couched in almost the same language as Mo. Rev. Stat. § 442.480 (1949). The Missouri statute has been construed by the courts on several occasions.\textsuperscript{37} New Mexico's statute has never been construed by the supreme court. Perhaps the purpose of this statutory provision has been most clearly expressed by Professors Willard L. Eckhardt and Paul M. Peterson as follows:

There is a problem as to what "death without issue" means where A conveys to B and his heirs, but if B dies without issue, over to C and his heirs. At common law there was a presumption that "death without issue" meant "if the line of issue ever runs out." Consequently B "died without issue" only when all descendants had died, no matter of how remote a degree. This is an "indefinite failure of issue" construction.

V.A.M.S. § 442.480, first enacted in 1845, provides for a "definite failure of issue" construction. Thus B has "died without issue" only when he is not survived by descendants at his death. This rule is of particular importance because it prevents an application of the rule against perpetuities in this type of limitation.\textsuperscript{38}

Although the revision is much longer than the present section, its length is justified by the clarity achieved.

8. \textbf{Rule in Shelley's Case Abolished}

\textit{N.M. Stat. Ann. § 70-1-17 (1953). Rights of heirs of life tenant when made remaindermen.—When the remainder of a possession is...}

\textsuperscript{36} Kan. Gen. Stat. Ann. § 58.504 (1949). A comment after the statute says: "The common law rule was one of construction of instruments. Under it, when the instrument was construed as indicating an indefinite failure of issue, an estate tail was held to have been created. It had many refinements. Since we are doing away with the common law rules of estates tail this rule should be eliminated. There appear to be differing opinions among our attorneys as to whether the common law rule was ever recognized in this state.... letter of Dean Burch in Judicial Council Bulletin, October, 1937, p. 101."

\textsuperscript{37} For other Missouri decisions construing Mo. Rev. Stat. § 442.480 (1949), see Humphreys v. Welling, 341 Mo. 1198, 111 S.W.2d 123 (1937); Owens v. Men and Millions Movement, 296 Mo. 110, 246 S.W. 172 (1922). This statute was enacted for the purpose of abrogating the early common law rule under which the words "die without leaving issue" were construed to mean an indefinite failure of issue. Brown v. Bibb, 356 Mo. 148, 201 S.W.2d 370 (1947). Deed conveying land to named grantee and her bodily heirs by named person granted a life estate to named grantee with a contingent remainder to her bodily heirs by name person living at grantee's death, and upon grantee's death predeceased by named person and her children by him surviving grandchildren constituted such "bodily heirs," Ewart v. Dalby, 319 Mo. 108, 5 S.W.2d 428 (1928). Under devise to wife for life, then to daughter, "and if she dies single and unmarried and without issue" to others, daughter surviving testator and wife took indefeasible fee simple estate.

limited to the heir or heirs of the body of a person who holds said property as a life estate, in these premises the persons who at the termination of said life estate, are to be the heirs or heirs of the body of said life estate, shall be authorized to purchase the same [take as purchasers] by virtue of the remainder of the possession so limited to them.

Suggested revision of § 70-1-17. Rule in Shelley's Case abolished.—The common law rule of construction and law known as the Rule in Shelley's Case has never had any existence in either the Territory or State of New Mexico. Instead, any instrument disposing of property in this state employing language to which the Rule in Shelley's Case would have applied at common law is to be construed according to its natural meaning and intent.

The language of the revised section is the writer's. A commentator once re-marred of the existing section:

The influence of the pioneer upon American real property law is strikingly illustrated by . . . [provision in New Mexico with regard to the Rule in Shelley's case], originally adopted by the New Mexico territorial legislature [1851-52], and still part of the statute law of that state. . . . The task of construing the provision, still in abeyance, will obviously call for two-gun pioneer justice.39

9. Remainder to Posthumous Child

N.M. Stat. Ann. § 70-1-18 (1953). Remainder to unborn child.—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.

Suggested revision of § 70-1-18. Remainder to unborn child, how disposed of.—When an estate has been or shall be by any conveyance or devise, limited in remainder to the son or daughter, or to the use of the son or daughter of any person to be begotten, such son or daughter born after the decease of its parent or parents, whether father or mother or both, shall take the estate in the same manner as if he or she had been born in the lifetime of the parent or parents.

OR

Alternate suggested revision of § 70-1-18. Remainder to posthumous child, how disposed of.—When a future estate is limited to heirs,

issue or children, posthumous children shall take as if born before the
death of the parent.

The first proposed revision is substantially the same as Mo. Rev. Stat. Ann.
§ 442.510 (1949), which is the apparent source of the New Mexico statute.
(1956). The Missouri statute refers only to a child born after the decease of
its father, but it sometimes occurs that a child is born after the death of its
mother. The revision modifies the Missouri statute in this respect. Missouri's
statute concludes with the clause "although no estate shall have been conveyed
to support the contingent remainder after . . . [the death of the parent or
parents]." This is tautological and has, therefore, been omitted. The final sen-
tence of New Mexico's existing section, which also appears in the Missouri
statute, provides for springing uses in conveyances not operating under the
Statute of Uses. Whether it provides also for shifting uses under the same
§ 70-1-3 (1953) eliminates the need for this sentence in N.M. Stat. Ann.
§ 70-1-18 (1953).

The origin of N.M. Stat. Ann. § 70-1-18 (1953) perhaps is obvious. At
common law the gap in the seisin between the death of the parent and the birth
of the posthumous child destroyed the contingent remainder. In the celebrated
case of Reeve v. Long it was held that the posthumous child could take where
the limitation was by will. By statute the same exception was extended to limi-
tations by deed. Thus one small breach was made in the common law rule of
destructibility of contingent remainders.

New Mexico really should have a statute abolishing the destructibility rule
in all its aspects, whether by natural gap in seisin, by tortious feoffment and
forfeiture, or by merger of the particular estate and the reversion. England and
at least nineteen states have taken this forward step, among them Arizona. Its
statute was adopted from Wisconsin and Texas, and appears to be one of the
most clearly stated:

Indestructibility of contingent remainders.

A. A remainder valid in its creation is not defeated by determina-
tion of the precedent estate before the contingency occurs upon which
the remainder is limited to take effect. If the contingency occurs after
the determination of the precedent estate, the remainder shall take

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40. See Eckhardt and Peterson, Commentary, Possessory Estates, Future Interests
42. Posthumous Children's Act, 1699, 10 & 11 W. & M., c. 16.
43. For discussion of effect if contingent remaindermen are begotten but not born, see
44. Ibid.
effect as if the precedent estate had continued to the time when the contingency occurs.

B. The alienation of a particular estate upon which a remainder depends, whether the alienation is by deed or will or by the union of such particular estate with the inheritance by purchase or by descent, shall not operate to defeat, impair or in any way affect such remainder.


10. **Effect of Birth of Posthumous Child Upon Limitation Over**

   N.M. Stat. Ann. § 70-1-19 (1953). Future possession dependent on death without heirs—Effect of birth of posthumous child.—A future possession depending upon the contingency of the death of a person without heirs shall be revoked by the birth of a posthumous son or daughter of said person capable of succeeding him.

   Suggested revision of § 70-1-19. Effect of posthumous children upon limitation over.—A future estate contingent upon the death of a person without heirs, issue or children is defeated by birth of posthumous child of such person, capable of taking by descent.

   The suggested revision employs the same language as Ariz. Rev. Stat. Ann. § 33-237-B (1956), which in turn is in almost the same language as Mo. Rev. Stat. § 442.520 (1949). A comparison of New Mexico's existing section with the suggested revision reveals the awkward result of the translation process—i.e., from English to Spanish, and then back to English.

11. **Attornment of Tenant Made Unnecessary or Void**

   N.M. Stat. Ann. § 70-1-20 (1953). Grants of rents, returns or remainders.—Grants of rents, returns, or remainders of possession shall be valid without the previous ceremonies of the tenants, but no tenant having paid any rent to the grantor before receiving notice of the transfer shall be injured thereby.

   Suggested revision of § 70-1-20. Attornment of tenant unnecessary; payment of rent; attornment of tenant to a stranger void.—A conveyance of real estate or of any interest therein by a landlord shall be

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47. Paragraph A of the Arizona statute prevents destruction of a contingent remainder by reason of normal termination of the preceding freehold, and Paragraph B prevents destruction by reason of destruction of the preceding freehold either by forfeiture or by merger. Cf. 1 Simes, Law of Future Interests §§ 99, 100, 102 (1st ed. 1936).
valid without the attornment of the tenant; but the payment of rent by his tenant to the grantor at any time before notice of sale is given to said tenant shall be good against the grantee. The attornment of a tenant to a stranger shall be void, and shall not affect the possession of his landlord unless it be made with the consent of the landlord, or pursuant to a judgment, order, or decree of a court.

The suggested revision combines Kan. Gen. Stat. Ann. §§ 67-512 and 67-514 (1949). Mo. Rev. Stat. §§ 441.140 and 441.150 (1949) are similar to the Kansas statutes except that they additionally provide that the attornment of a tenant to a stranger will affect the possession of a landlord if made “to a mortgagee, after the mortgage has been forfeited.” This provision does not appear to be in harmony with the respective rights of a mortgagor and a mortgagee to possession under the lien theory of mortgages applied in New Mexico. The word “attornment” was translated into the word “ceremonies” in the New Mexico statute. The inaccuracy is understandable since attornment was one of the numerous ceremonies prevalent under the feudal system, but the distortion created by the translation should be eliminated.

12. ALIENATION OF REVERSIONARY INTERESTS AUTHORIZED

N.M. Stat. Ann § 70-1-21 (1953). Transfer of reversionary interests authorized; rights of transferee.—The possibility or right of reversion for breach or violation of condition or conditions subsequent contained in any deed or other instrument conveying real estate in the state of New Mexico, is hereby made assignable, and the grantor in any such instrument heretofore or hereafter made affecting real estate in the state of New Mexico, is given the right to assign and transfer such future contingent right of re-entry, forfeiture and reversion for violation or breach of such condition or conditions subsequent.

N.M. Stat. Ann. § 70-1-22 (1953). Rights of transferee of reversion.—The assignee of or any successor to the right of re-entry, forfeiture and reversion for breach or violation of condition or conditions subsequent, is hereby given upon such assignment, all of the rights and privileges of the original grantor for the enforcement of re-entry, forfeiture and reversion when any such condition or conditions subsequent shall have been breached or broken, including all legal and equitable remedies for the judicial enforcement of such right or rights.

48. This contemplates the situation in which a mortgagor makes a lease of mortgaged property, and the lessee, to avoid eviction by the mortgagee in a state following the “title” theory of mortgages, agrees to pay the rent to the mortgagee. Actually, an entirely new lease is created between the mortgagee and tenant. In a “lien” theory state such as New Mexico, such a lessee cannot be ousted by the mortgagee until his interest is foreclosed and foreclosure sale is made. See N.M. Stat. Ann. § 61-7-1 (1953). Therefore, there is no occasion for the lessee to attorn to the mortgagee. See generally, Osborne, Mortgages §§ 144, 146 (1951).
Suggested revision of § 70-1-21. Transfer of reversionary interests authorized; rights of transferee.—Possibilities of reverter and powers of termination [rights of entry for condition broken] are declared to be freely alienable, either by conveyance or devise, both before and after the happening or non-happening of the event constituting the special limitation in the case of the possibility of reverter, or the breach of condition subsequent from which the power of termination arises. The transferee of the possibility of reverter or power of termination shall have all the rights, privileges and remedies which his transferror might have asserted or exercised had the transfer not been made.

The purpose of the existing sections is commendable if intended to make possibilities of reverter as well as powers of termination freely alienable. I believe this was the intent. However, the revision would eliminate any ambiguity. Existing N.M. Stat. Ann. §§ 70-1-21 and 70-1-22 (1953) are combined in the suggested revision for greater simplicity.

13. ABOLITION OF THE RULE IN WILD'S CASE AND THE DOCTRINE OF WORTHIER TITLE

Two obsolete relics of the common law should be abolished by the legislature to further modernize New Mexico's real property law. The language of the two sections following is suggested by the Kansas statutes:

Suggested § 70-1-22: Common law rule in Wild's Case abolished.—In the case of instruments disposing of property of which the following is a type: “A to B and his children,” the doctrine of the common law known as the rule in Wild's Case shall not apply, and the instrument shall create a life interest in B and a remainder in his children. The rule herein prescribed applies when the expression is “children,” or “issue,” or words of similar import.

Suggested § 70-1-22.1. Common law doctrine of worthier title abolished.—In the case of a conveyance or of a will to heirs, or the next of kin of the grantor or testator, the common law doctrine of worthier title is abolished, and the grantee or grantees, or devisee or devisees shall take under the conveyance or the will and not by descent.

The common law rule of Wild's Case consists of two rules or resolutions, applicable as rules of construction where A transfers an interest in Blackacre to B “and his children,” to B “and his issue,” and the like. The first rule

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50. 2 Simes, Law of Future Interests § 401 (1st ed. 1936). Simes points out that neither rule was necessary to the decision in Wild's Case.
51. 2 Simes, Law of Future Interests § 403 (1st ed. 1936).
52. 2 Simes, Law of Future Interests § 401 (1st ed. 1936).
provides that if B has no children in existence at the time of the conveyance or devise, 53 B takes an estate tail. 54 The second rule provides that if B does have children in existence at the time of the conveyance or devise, 55 then B and his children take equally as joint tenants for life. 56

The first rule assumes: first, that the testator contemplates an immediate gift, and second, that he intends the children to take. But if the testator intends an immediate gift, and B has no children at the time, then the only way children subsequently born to B can take is by way of a fee tail. 57 But is it not more reasonable to assume that the testator desired to have the children of B take after B (as if we had a limitation to B for life, remainder to the children of B), than that they take concurrently with B? 58 Of course the second argument for the first

53. The first rule applies only to devises. 2 Simes, Law of Future Interests § 406 at 208, n. 17 (1st ed. 1936). "The authorities in this country are to the effect that the significant time is not the making of the will but the death of the testator, and that whether or not a fee tail is created depends upon the existence of children at the latter time." 2 Simes, Law of Future Interests § 404, at 204 (1st ed. 1936). The English view appears to be the same, id. at 205 n. 9.

54. "A deed to A 'and his children' does not, at common law, convey an estate tail. The word 'children' can have no effect as a word of limitation defining the interest conveyed, and must take effect, if at all, as a word of purchase, generally giving the children living at the time of the grant a joint interest in the property. But in a devise to 'A and his children,' while it is presumed that 'children' is a word of purchase, and not of limitation, if the context shows that the word was used in the sense of heirs of the body, an estate tail arises. An intention that the word shall take effect as a word of limitation is presumed from the fact that A has no children at the time of the devise, since otherwise his children would take nothing, and in such case, at common law, A takes an estate tail, this being the 'rule in Wild's Case.'

"In states where a fee tail has been converted into a fee simple, or otherwise changed, the devisee will take a fee simple or such other estate as the statute substitutes." Tiffany, Real Property § 47 (Abr. ed. 1940) [footnotes omitted].

55. The second rule applies to both devises and conveyances. 2 Simes, Law of Future Interests § 408, at 408 n. 29 (1st ed. 1936).

56. Id. § 401.

57. Cf. note 54 supra.

58. "The argument for the first resolution . . . is based upon two things—that the testator contemplates an immediate gift, and that he intends the children to take. This is regarded as excluding the possibility of a remainder in the children of A and as making the fee tail construction the only possible solution where A has no children. It would seem that the court entirely overlooked the possibility of construing it as a gift to a class, capable of opening and letting in after-born members as long as A lives. Yet if there be a devise or bequest to the children of A, there would be no difficulty about such a construction. If A had no children at the testator's death, and there was no preceding gift, all children of A subsequently born should take as a class. But, if A had children at the testator's death, the class would close at that time, and the solution would be substantially the same as in the case of a gift to A and his children, where A has children. After all, it seems more probable that the testator did desire to have the children take after A than that they take concurrently with him. And, while the language if taken literally, indicates an immediate gift, it would seem that in most cases the testator's wishes would be best effectuated by construing the limitations as creating a life estate in A with a remainder in his children. It is believed that it is no more forced than the fee tail construction. . . ." 2 Simes, Law of Future Interests § 402, at 202-03, nn.5 & 6 (1st ed. 1936). Note that the Kansas statute construes the limitation as a life estate in A with a remainder in A's children. See note 49, supra.
rule—that of insuring a gift to B’s children—fails completely where a jurisdiction has a statute converting an estate tail into a fee simple in the first taker. In a jurisdiction like New Mexico, where an estate tail is turned into a life estate in the first taker, B, with a remainder in the issue or children, abolition of the first resolution in Wild’s Case is of relative unimportance. However, it does seem unnecessarily inconsistent to abolish fees tail and at the same time recognize a rule of construction which embodies them.

Simes says the second rule in Wild’s Case—when B has no children at the death of the testator, or at the time of the conveyance, B and his children taking as cotenants—“is widely followed in the United States.” The arguments in favor of abolishing the second rule as well as the first are two: first, that “where there is a gift to B and his children, B having children at the time the creating instrument takes effect, the ordinary doctrines as to class gifts apply”; and, second, that if the first resolution in Wild’s Case be abolished, consistency suggests that the second likewise be abolished.

The Kansas statute abolishing “the doctrine known as the rule of Wild’s Case” may be deemed to be addressed to both the rules or resolutions in that case. The statute then goes on to lay down the construction that the named donee shall have a life estate with a remainder to his children. The nature of this remainder is not specified. Presumably it will be construed according to the ordinary rules applicable to class gifts.

The other suggested new legislation would abolish the doctrine of worthier title in New Mexico. Under the English common law this doctrine provided

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59. Cf. 2 Simes, Law of Future Interests § 406, at 207 (1st ed. 1936) who notes that, nevertheless, a considerable number of jurisdictions with such statutes will recognize the existence of the first rule in Wild’s Case. The reader is reminded that it has been suggested that New Mexico adopt this disposition of an attempted fee tail, i.e., a fee simple in the first taker.

60. This is because the result reached by application of the fee tail statute to the first rule in Wild’s Case is substantially the same as that reached by abolition of the rule in Wild’s Case, i.e., the life estate in the first taker with a remainder in fee simple in his issue. This is the disposition made by N.M. Stat. Ann. § 70-1-15 (1953).

61. 2 Simes, Law of Future Interests § 408, at 209-10 n. 27 (1st ed. 1936).

62. If the second rule were to be recognized in New Mexico, presumably B and the children would be tenants in common in fee simple, since N.M. Stat. Ann. § 70-1-4 (1953) establishes the presumption of a tenancy in common, and N.M. Stat. Ann. § 70-1-32 (1953) does away with the necessity of the word “heirs” in creating a fee simple. See also 2 Simes, Law of Future Interests § 409 (1st ed. 1936).

63. This has long been the position taken by the Pennsylvania courts. See e.g., Forest Oil Co. v. Crawford, 77 Fed. 106 (C.C.A. Pa. 1896). In re Vaughan’s Estate, 230 Pa. 554, 79 Atl. 750 (1911); Elliott v. Diamond Coal and Coke Co., 230 Pa. 423, 79 Atl. 708 (1911); Cf. E. H. Shelman & Co. v. Livers’ Ex’x, 229 Ky. 90, 16 S.W.2d 800 (1929); Hall v. Wright, 121 Ky. 16, 87 S.W. 1129 (1905).


that if an owner of land in fee simple attempted to convey a life estate or estate tail, with a remainder in the grantor's heirs, the remainder was void and the grantor had a reversion. Also, if a testator devised to his heir the exact interest in land which the latter would have inherited but for the devise, the heir was regarded as taking by descent and not by purchase, i.e., as an heir and not as a devisee. The name of the doctrine comes from the argument that title by descent is a worthier title than that taken by devise. The real reason for the rule was to protect overlords in some of the feudal incidents, particularly wardship and marriage.

In this country it is not even certain whether the doctrine is a positive rule of law, as was seen in Shelley's Case, or merely a rule of construction, although the tendency of modern courts is toward the latter view. It is as difficult to think of valid reasons for keeping the doctrine of worthier title alive today as it is to retain the Rule in Shelley's Case. Perhaps the only argument for either rule is that their application tends to make land more readily alienable. This seems to be as inadequate a reason for the retention of the rule in one case as in the other. England abolished the doctrine of worthier title by statute as early as 1833. Although still generally followed in the United States, the doctrine is treated merely as a rule of construction, and applied to inter vivos transfers only. No sound reason appears for retaining it in New Mexico, even in this limited role.

67. Id., § 145, at 261 n. 8.
68. Id., § 144, at 260 nn.4 & 5; § 145.
69. Id., § 147.
70. This effect is particularly clear in the case of a conveyance, since the conversion of the remainder into a reversion makes the estate freely alienable by the grantor.
71. The first territorial legislature of New Mexico abolished the rule in Shelley's Case. N.M. Stat. Ann. § 70-1-17 (1953), and see Legislative Attacks Upon the Rule in Shelley's Case, 45 Harv. L. Rev. 571 (1931-1932).
72. An Act for the Amendment of the Law of Inheritance, 1833, 3 & r Will. IV., c. 106, § 3.