JOHNSON V. AMSTUTZ, 1984-NMSC-030, 101 N.M. 94, 678 P.2d 1169 (S. Ct. 1984)

**GERALD I. JOHNSON AND GERALDINE JOHNSON, his wife,
Plaintiffs-Appellants,
vs.
RUBY TURKNETT AMSTUTZ, JAMES W. AMSTUTZ, JEWELL AMSTUTZ, MARGARET ELLEN AMSTUTZ CAMERON, A. G. CAMERON, JOAN MARTHA AMSTUTZ CLARK, JOE CLARK, SYLVIA RUBY AMSTUTZ WONG, LAWRENCE CHUNG-NIG WONG, L. A. SCOTT, VIRGINIA L. SCOTT, and MARY FRANCES JOHNSON (MASKEW),
Defendants-Appellees.**

No. 14919

SUPREME COURT OF NEW MEXICO

1984-NMSC-030, 101 N.M. 94, 678 P.2d 1169

March 14, 1984

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY, Paul Snead, District Judge

Motion for Rehearing denied April 11, 1984

COUNSEL

Martin & Behles, W. T. Martin, Jr., Carlsbad, New Mexico, for Appellants.

Montgomery & Andrews, Walter J. Melendres, Santa Fe, New Mexico, Hinkle, Cox, Eaton, Coffield & Hensley, David L. Spoede, Roswell, New Mexico, for Appellees.

JUDGES

Riordan, J., wrote the opinion. WE CONCUR: HARRY E. STOWERS, JR., Justice, MARY C. WALTERS, Justice

AUTHOR: RIORDAN

OPINION

RIORDAN, Justice.

{1} George I. and Geraldine Johnson (Johnsons) were among several plaintiffs in a quiet title action against numerous defendants. The district court found for the Johnsons, and on appeal we reversed. **Abo Petroleum Corp. v. Amstutz,** 93 N.M. 332, 600 P.2d 278 (1979). We held in pertinent part that the contingent remainders in the heirs of the grantors the in Johnsons' chain of title were not destroyed by the 1916 deed. Thereafter, the Johnsons brought an action for declaratory judgment to determine their rights in and to certain real property and the value of improvements made to such real property. The district court granted defendants' motion to dismiss Count I, which is the subject of this appeal. The Johnsons appeal. We affirm.

{2} The sole issue we address is whether the doctrine of destructibility of contingent remainders has ever been the law in New Mexico.

{3} In **Abo,** we recognized that even though New Mexico adopted the common law of England, pursuant to NMSA 1978, Section 38-1-3, if the common law is not applicable to our condition and circumstances, we will not give it effect. Therefore, we declined to apply the doctrine of destructibility of contingent remainders because the doctrine "is but a relic of the feudal past, which has no justification or support in modern society[.]" **Abo,** 93 N.M. at 335, 600 P.2d at 281.

{4} In this appeal, the Johnsons argue that until the decision in **Abo,** the doctrine of destructibility of contingent remainders was the law in New Mexico. In other words, they argue that **Abo** did not declare that the doctrine has never been the law in New Mexico, but simply declared that the doctrine would not be applied in modern New Mexico society. We disagree with the Johnsons' argument.

{5} In **Abo,** 93 N.M. at 334, 600 P.2d at 280, we stated that:

*{*95}* The doctrine of destructibility of contingent remainders has been almost universally regarded to be obsolete by legislatures, courts and legal writers. **See, e.g., Whitten v. Whitten,** 203 Okl. 196, 219 P.2d 228 (1950); 1 L. Simes and A. Smith, **Law of Future Interests** § 209 (2d ed. 1956). It has been renounced by virtually all jurisdictions in the United States, either by statute or judicial decision, and **was abandoned in the country of its origin over a century ago.** Section 240 of the **Restatement of Property** (1936) takes the position that the doctrine is based in history, not reason. Comment (d) to § 240 states that "complexity, confusion, unpredictability and frustration of manifested intent" are the demonstrated consequences of adherence to the doctrine of destructibility. Furthermore, because operation of the doctrine can be avoided by the use of a trust to support the contingent remainder, the doctrine places a premium on the drafting skills of the lawyer. 49 Mich.L. Rev. 762, 764 (1951). (emphasis added).

{6} In analyzing the reception of the English common law doctrine of destructibility of contingent remainders in American states, we look to the cited authority relied upon in **Abo,** and again find ourselves in agreement with **Restatement of Property** Section 240 comment c (1936), that provides in pertinent part:

The English rule as to the "destructibility of contingent remainders" originated in the then already outmoded feudal concepts of seisin * * *. Its unsuitability to the circumstances of its country of origin is evidenced by the quick development in England of conveyancing devices and construction tendencies narrowing its significance close to the vanishing point * * *. The conditions of the New World were even less appropriate for an acceptance of this anachronism. During the colonial period the colonial law was supposed to agree with the common law, but after the revolution when courts were deciding the extent of reception of the English common law the doctrine was settled that only those rules of the common law appropriate to the conditions obtaining in the New World were intended by the so-called reception statutes. The English rule as to the "destructibility of contingent remainders" was not, and is not, thus appropriate. Consequently **that rule can reasonably be declared never to have become a part of the law of an American state, by the reception of the English common law.** (emphasis added).

Therefore, we specifically hold that the doctrine is not now and has never been the law in New Mexico.

{7} In light of this determination, the other issue raised in this appeal is moot.

{8} The decision by the district court is affirmed.

{9} IT IS SO ORDERED.

WE CONCUR: STOWERS, JR., Justice, WALTERS, Justice