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Introductory Essay on the Literature of Future Interests

Roy M. Mersky*

Mr. Mersky discusses a number of the major texts and treatises relating to the law of future interests which are useful to the practitioner as well as the scholar.

The general practice of law involves, among other things, the drafting of wills and trust agreements and the litigation of cases arising out of such instruments as drawn by other lawyers. Successful practice in this field is predicated upon adequate training in the law of future interests. This difficult and technical branch of law contains rules and procedures which are understandable only in the light of their historical background.

Professor W. Barton Leach, in writing the preface to his casebook,¹ once said, "one nice thing about this subject is that you don't have to make it hard. It takes care of that by itself."

A future interest is defined by the Department of the Treasury thus: "[A future interest in property includes] interests or estates, whether vested or contingent . . . which are limited to commence in use, possession, or enjoyment at some future date or time."² This definition of future interest can be traced back to the Congressional committee reports involved in the legislation creating section 504(b) of the Internal Revenue Act of 1932, in which the committee stated that the term future interest in property refers to any interest or estate, whether vested or contingent, limited to commence in possession or enjoyment at some future date.³

Some of the early writers in the field of future interests in England were Challis,⁴ Williams,⁵ Sugden,⁶ Preston,⁷ Fearne,⁸ and a host

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1. LEACH, W. BARTON. *CASES AND MATERIALS ON FUTURE INTERESTS*. (2d ed.). Chicago: Callaghan & Co., Preface to 1st ed. 1935.

2. Treas. Reg. § 25.2503-3(a) (1958).

3. H. R. REP. No. 353, 72d Cong. 1st Sess. 29 (1932); S. Rep. No. 665, 72d Cong., 1st Sess. 7 (1932).

4. CHALLIS, HENRY WILLIAM. *LAW OF REAL PROPERTY IN RELATION TO CONVEYANCING*. London: Butterworth, 1885. Pp. xxiv, 424.

5. WILLIAMS, JOSHUA. *PRINCIPLES OF THE LAW OF REAL PROPERTY*, London, 1845, Pp. xvi, 394.

6. SUGDEN, EDWARD BURTENSHAW. *HANDY BOOK ON PROPERTY LAW*. (2d ed.). Edinburgh, 1858. Pp. vii, 192.

7. PRESTON, RICHARD. *ELEMENTARY TREATISE ON ESTATES*. Exeter, 1791.

8. FEARNE, CHARLES. *ESSAY ON THE LEARNING OF CONTINGENT REMAINDERS AND EXECUTORY DEVICES*. London, 1772. Pp. ix, 98.

of others whose exacting lines and scholarship have adorned the pages of English law.

The first multiple treatise in the field of future interests was written by Professor Gray in 1886.⁹ He revised this work in 1906¹⁰ and 1915¹¹ and in 1942 a fourth edition¹² was published, edited by Roland Gray. Kales' treatise followed in 1920.¹³ However, Kales had written a previous book in 1905¹⁴ confining itself to this subject in Illinois.

From 1920 until 1936 there was no all-encompassing American text written on the subject of future interests. There were, of course, books dealing with trusts, wills, and real property, which included some discussion of future interests, but nothing devoted exclusively to the problems covered in the typical course in future interests. In 1936 Professor Lewis M. Simes of the Harvard Law School published his three-volume work on the subject.

The first edition of *Simes on Future Interests*¹⁵ was one of the earliest efforts to bring the subject into modern context. Professor Simes' treatise stands alongside, and fills the gap since the classics of Gray and Kales. In the preface Professor Simes formulates the purpose of his book on future interests. The purposes are (1) to state as simply as possible the existing American law of future interests in land and other things; (2) to present the complex techniques of the subject in a simple, intelligible manner; (3) while recognizing the historical background, to treat future interests as a subject that is undergoing rather rapid modern developments; (4) to discuss, rather more fully than is usual in a general treatise, the changes in common law principles that have resulted from modern statutes in the various American jurisdictions. Professor Simes succeeded in carrying out his intentions in the publishing of this work. These books were the monumental and definitive works on future interests, and dealt competently with every question that the general practitioner was apt to meet on the subject of future interests.

9. GRAY, JOHN CHIPMAN. *THE RULE AGAINST PERPETUITIES*. Boston: Little, Brown, & Co., 1886. Pp. 449.

10. GRAY, JOHN CHIPMAN. *THE RULE AGAINST PERPETUITIES*. (2d ed.). Boston: Little, Brown, & Co., 1906. Pp. 664.

11. GRAY, JOHN CHIPMAN. *THE RULE AGAINST PERPETUITIES*. (3d ed.). Boston: Little, Brown, & Co., 1915. Pp. 711.

12. GRAY, JOHN CHIPMAN. *THE RULE AGAINST PERPETUITIES*. (4th ed.). Boston: Little, Brown, & Co., 1942. Pp. 895. (Edited by Roland Gray.)

13. KALES, ALBERT MARTIN. *ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS*. (2d ed.). Chicago: 1920. Pp. 948.

14. KALES, ALBERT MARTIN. *CONDITIONAL AND FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS*. Chicago: Callaghan, 1905. Pp. 453.

15. SIMES, LEWIS M. *THE LAW OF FUTURE INTERESTS*. St. Paul: West Publishing Co.; Kansas City: Vernon Law Book Co., 1936. Pp. xv, 527; Pp. xv, 556; Pp. xv, 583. (3 volumes).

They were written in clear and forceful English, and the author's style was practical and analytical.

The first edition of *Simes on Future Interests* relied completely on English precedent to answer most questions. However, future interests has been in a process of constant evolution. The publication of the first edition of the *Restatement of the Law of Property*, which deals with future interests, resulted in a clarification of many doctrines which had previously been obscure.

In 1956, Professor Lewis M. Simes and his colleague Professor Allan F. Smith, offered the legal profession a publication¹⁶ which is as current and unique today as was the first edition in 1936. The second edition takes into consideration all the changes in American law of property in the area of future interests since the publication of the first edition. The authors use standard terminology and rely upon legal history and orthodox analysis to portray fundamental principles. The organization of the second edition into four volumes allows the practitioner ease of handling and working in the subject area, for each volume contains a complete "Summary of Contents" and a detailed "Table of Contents" which make for easy reference to other volumes. A functional aspect of the volumes is made more valuable by a 247-page table of cases, which includes around 10,000 cases; a 34-page table of statutes; and a 79-page index. The volumes are so organized as to allow the general practitioner to avoid premature conclusions and for the more practiced attorney in this subject area to find his way into the volumes with great facility.

The index is an adequate aid to researching the law in this area. There is extensive footnoting at the beginning of many of the chapters to other leading treatises and law review articles relating to the particular subject under discussion.

One of the added features of the second edition is the inclusion of model forms designed to illustrate the points under discussion and to aid the attorney faced with difficult or unfamiliar problems. The forms are not only handy for practical purposes but also serve an effective purpose as illustrative material in order to better understand the questions and points of law involved. There is an excellent 44-page introduction which seeks to define a future interest and give a brief outline of the historical development of the important future interests doctrines.

The scope of the work may be illustrated by reference to its five main parts. Part 1, *Permissible Types of Future Interests and Ex-*

16. SIMES, LEWIS M. THE LAW OF FUTURE INTERESTS. (2d ed.). St. Paul: West Publishing Co., 1956. Pp. xliii, 558; Pp. xliii, 521; Pp. xliii, 521; Pp. xliii, 667. (4 volumes).

pectancies, deals with the various types of future interests which may be created in land and personalty. It consists of 14 chapters (438 pages) and an extremely clear exposition of the common-law system. This material is of prime importance to the understanding of any future interests problems.

Part 2 (462 pages) containing 13 chapters, *The Creation of Future Interests—Construction*, discusses construction problems such as whether or not an absolute or lesser interest is created, the effect of a gifts over "on death" or "death without issue," the rules concerning the determination of classes, the Rule in Wild's Case,¹⁷ and acceleration. This is the basic section for any attorney involved in estate planning.

Part 3 (195 pages), consisting of nine chapters, deals with *Powers of Appointment* and is a well-organized treatise-within-a-treatise on an expanding phase of American property law.

Part 4 (521 pages), consists of the entire third volume, *Rules Restricting the Creation of Future Interests*, and is concerned with restraints on alienation, the Rule Against Perpetuities, statutory restrictions on restraining the absolute power of alienation, accumulations, illegal conditions, the rule in Shelley's Case,¹⁸ and the Doctrine of Worthier Title.

Part 5 (223 pages and ten chapters), *Present Legal Relations of Owners of Future Interests*, relates to a group of miscellaneous problems which arise as a result of the creation of future interests.

Part 6 (82 pages and four chapters), *Termination of Future Interests*, deals with termination by judicial role to prevent loss, termination by prescription, by adverse possession, and by statute, the effect upon possibilities of reverter and rights of entry, of changes in condition, and the effect of impossibility on conditions and limitations.

In short, it may be said that every important phase of the law of future interests is covered in these volumes.

Professor Simes' *Handbook on the Law of Future Interests*¹⁹ follows much the same outline as his three-volume book. It was designed primarily for student use and the arrangement of the subject matter is identical with his case book²⁰ on future interests.

The book is divided into five parts. Part 1, entitled *The Feudal Heritage*, contains an historical development of the law of future interests and a classification of the various interests. Part 2 deals

17. 6 Co. Rep. 16b, 77 Eng. Rep. 277 (K.B. 1599).

18. 1 Co. Rep. 886, 76 Eng. Rep. 199 (K.B. 1579).

19. SIMES, LEWIS M. *HANDBOOK ON THE LAW OF FUTURE INTERESTS*. St. Paul: West Publishing Co., 1951. Pp. xv, 495.

20. SIMES, LEWIS M. *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS*. Chicago: Callaghan & Co., 1939. Pp. xxi, 866.

with the characteristics of the various interests; Part 3 with powers of appointment. Part 4 considers certain of the more common principles of construction used by the courts in interpreting instruments. Chapter 16 on *General Principles of Construction* and Chapter 19 on *Class Gifts* are especially excellent sections. Part 5, *Restraints on Alienation and Perpetuity*, stresses the Rule Against Perpetuities as merely one manifestation of a broad policy of the law against restraints.

The study of future interests is made extremely difficult because of the historical concepts and technical legal jargon required to understand it. Professor Simes helps make this problem a bit easier for the law student, for his book includes the traditional subject matter of this field—such as powers of appointment, perpetuity, restraints on alienation, construction on limitations, historical development, classification and description for the various kinds of future interests. It is also extremely useable for the practicing lawyer who desires to make a brief survey of the general principles before tackling the difficulties and refinement of a particular case. There is ample footnoting to the appropriate sections of the *Restatement of Property*. This footnoting is valuable because the size, arrangement, and vast subject area of the *Restatement of Property* make it often difficult to use.

Professor Simes' style is clear and explicit as a result of his own rich experience of years of teaching, writing, and lecturing about the subject; and he exhibits at all times a high quality of scholarship.

Professor Simes' casebook²¹ continues to be a useful source of information regarding secondary treatises, law review articles, law review notes, and other special annotations related to the subject of future interests. Professor Simes sets out his philosophy of future interests in the Preface of his book. First in importance comes the Rule Against Perpetuities and related rules, then problems of construction; and competing with the latter in importance, powers of appointment. In this manner Professor Simes is following in the tradition established by Gray in stressing the negative side of future interests, that is, what you can't do rather than what you can do.

The book is divided into four parts which are, in order: (1) *Varieties of Future Interests*, (2) *Powers*, (3) *Problems of Construction*, (4) *General Rules of Policy Restricting the Creation of Interests*.

The cases are well selected. The great majority of them are American decisions and, through the subject breakdown, the practitioner can find leading cases in any of the problem areas of future interests

21. SIMES, LEWIS M. *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS*. (2d ed.). Chicago: Callaghan & Co., 1951. Pp. xvi, 793.

that he might be confronted with. Adequate attention has been given to statutory changes in the law and, though more than a decade has passed since its publication, it is still quite accurate, and there is considerable attention devoted to decisions under these statutes. There are excellent historical and introductory notes to the novice in the field of future interests as well as brief statements of illustrative cases with the decisions stated; there are also statements of the weight of authority and references to and quotations from the *Restatement of Property*.

In discussing the literature of future interests one cannot ignore the casebooks published in this area by some of the most outstanding scholars who have written on the subject of future interests, among these being W. Barton Leach.²²

While Professor Leach's was one of the early books prepared for the teaching of the course in future interests, a new edition²³ was recently published and it continues to serve as a valuable tool, supplying supplementary case material and references to the subject. One of the interesting features of the 1940 edition of Professor Leach's book was the glossary. This glossary was extremely helpful in refreshing the memory of the practitioner, after the long interval between his study of the course and the case he might have, as well as in assisting the law student. I'm sorry that Professors Leach and Logan did not include this glossary in their 1961 edition. However, I'm pleased to note that Professor Leach included a footnote which continues to be a masterpiece and deserves reading by all scholars of future interests, and that is his footnote on page 186 in which he describes the results of his research in the biographic mystery of that great man, Mr. Pooley. That great man Mr. Pooley is mentioned in the dialogue between Mr. Gray and the student, which Professor Leach, by the way, has reprinted from Gray's *The Rule Against Perpetuities*. This note is an especially enjoyable piece of reading. Professor Leach's book is written on the assumption that future interests is a vital and important subject. The years since the writing of his first edition have borne out the truth of this statement.

Professors Leach and Logan have made an attempt to bring a bit of levity to what might otherwise be a dull subject by including in their casebook poems written by students over the years dealing

22. LEACH, W. BARTON. *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS*. Chicago: Foundation Press, 1935. Pp. xxiv, 1025.

23. LEACH, W. BARTON & LOGAN, JAMES K. *FUTURE INTERESTS AND ESTATE PLANNING, CASES AND TEXT*. (2d ed.). Brooklyn: Foundation Press, 1961. Pp. liv, 1048. Professor Leach co-authored this book with Dean James K. Logan of the University of Kansas. This volume claims to be the successor to Leach's *Cases on Future Interests*, 2d ed. 1940. However, the authors claim that the coverage, content, and treatment are so different that it would be wrong to refer to it as the 3d edition.

with various problems of future interests. Relying not alone on the work of students, they've also managed to quote Shakespeare. Professors Leach and Logan are not the real pioneers in the introduction of verse to the subject of future interests, for in the casebook by Professor Ashbel G. Gulliver can be found a liberal sprinkling of verse. As a matter of fact, Professor Leach challenged Professor Gulliver as to which of the two casebooks had the better quality of verse.

Professor Gulliver, of Yale Law School, has also written one of the latest casebooks, *Cases and Materials on the Law of Future Interests*.²⁴ Professor Gulliver in his casebook works within a framework in which he incorporates the methodology of Gray, Kales, Simes, Leach, and the *Restatement*. Professor Gulliver's casebook is primarily concerned with (1) the problem of how donors divide their wealth through successive periods of time; (2) the relationships among the donors, immediate donees and subsequent donees; and (3) the problem of transferability of these claims to wealth, once established. He attempts to do this by first setting out in text form all the history and doctrines that one would need to grasp the importance of future interests. Second, he has brief and excellent synopses of the major cases. Third, at the end of each case Professor Gulliver poses questions that force the reader to thoroughly examine the theme presented in the case and its brief. The book consists of eight chapters. Chapter 1 is an introduction to the entire field and is well recommended to the practitioner seeking a background in the subject of future interests.

The year 1961 saw the publication of the third edition of Richard R. Powell's casebook on future interests.²⁵ Powell has taken into consideration the numerous changes and trends that have occurred in a quarter of a century, since the publication of the second edition, and has managed to include some of the new problems that have arisen as a result of these changes. The casebook very adequately treats the historical background of future interests, as well as placing substantial stress upon the "statutory ingredient" in this topic.

Another worthwhile publication in the casebook series is Professor Mechem's *Cases and Materials on Future Interests*.²⁶

In addition to the multi-volume works, the handbooks, and various

24. GULLIVER, ASHBEL GREEN. *CASES AND MATERIALS ON THE LAW OF FUTURE INTEREST*. St. Paul: West Publishing Co., 1959. Pp. x, 624.

25. POWELL, RICHARD R. *CASES ON FUTURE INTERESTS*. (3d ed.). St. Paul: West Publishing Co., 1961. Pp. 621; POWELL, RICHARD R. *CASES ON FUTURE INTERESTS*. (2d ed.). St. Paul: West Publishing Co., 1951. Pp. 1068; POWELL, RICHARD R. *CASES ON FUTURE INTERESTS*. St. Paul: West Publishing Co., 1928. Pp. xxviii, 968.

26. MECHEM, PHIL. *CASES AND MATERIALS ON FUTURE INTERESTS*. Brooklyn: Foundation Press, 1958.

casebooks on future interests, almost all the books dealing with the subject of real property devote some space to the topic of future interests. To note but a few: Burby's *Handbook of the Law of Real Property*,²⁷ presents an extremely fine coverage of the subject of future interests and the rule against perpetuities; Chapter 6 of *Tiffany on Real Property*²⁸ also covers the subject of future interests; Chapters 5-9 of Moynihan's *Introduction to Law of Real Property*²⁹ also has an excellent summary of the subject. Professor Powell's multi-volume set on real property deals with legal problems of future interests in Volume 2.³⁰ *The American Law of Property*³¹ is a multi-volume work by a group of men who have become specialists in their areas of interest by result of practice, teaching, writing, and experience. Volume 1 is devoted to the law of future interests.

In addition to the above selected books dealing with property that also have excellent sections on future interests, I will list below in alphabetical order a selected list of books on the subject of perpetuities, that should enable the practitioner to further specialize and detail his problems on future interests.

American Bar Association. *Legislators' Handbook on Perpetuities*. Chicago: American Bar Center, 1958. Pp. 40.

Fletcher, William F. *Perpetuities and Other Restraints*. Ann Arbor: University of Michigan Law School, 1954. Pp. xix, 728.

Hoope, Thomas W. *The Rules Against Perpetuities*. London, 1961. Pp. xxxi, 267.

Leach, W. Barton and Tudor, Owen. *The Rule Against Perpetuities*. Boston: Little, Brown, & Co., 1957. Pp. xiii, 265.

Morris, J. H. C. and Leach, W. Barton. *The Rule Against Perpetuities*. (2d ed.). London: Stevens & Sons, 1962. Pp. li, 352.

Rubenstein, Bernard Joseph. *Introduction to Perpetuities*. Brooklyn: Juris-Press, 1959. Pp. 288.

Whiteside, Horace C. *Statutory Rules Against Perpetuities and Accumulations*. Boston: Little, Brown, & Co., 1957.

There have been a limited number of books written on the subject of future interests by jurisdiction. Most of these are quite dated.

27. BURBY, WILLIAM E. *HANDBOOK OF THE LAW OF REAL PROPERTY*. St. Paul: West Publishing Co., 1954. Pp. xxvii, 758.

28. TIFFANY, HERBERT T. *A TREATISE ON THE MODERN LAW OF REAL PROPERTY*. Chicago: Callaghan & Co., 1940. Pp. xxxvi, 1219.

29. MOYNIHAN, CORNELIUS J. *INTRODUCTION TO THE LAW OF REAL PROPERTY*. St. Paul: West Publishing Co., 1962. Pp. xvi, 254.

30. POWELL, RICHARD R. *THE LAW OF REAL PROPERTY* (vol. 2). Albany: Matthew Bender & Co., 1950. Pp. xiii, 857.

31. CASNER, A. JAMES, Editor-in-Chief. *AMERICAN LAW OF PROPERTY*. Boston: Little, Brown, & Co., 1952. Pp. 911.

An exception is the book on future interests in Colorado by Edward C. King, former dean of the University of Colorado Law School.³² Dean King does not purport his book to be an exhaustive examination of the subject; however, it does point out some of the major problems and discusses the principal Colorado cases related to future interests.

Many current discussions of future interests by jurisdiction can be found in law reviews.³³

I would also like to call the attention of my readers to the five lectures delivered by Professor Simes at the University of Michigan in 1955 dealing with the subject of *Public Policy and the Dead Hand*.³⁴ The thesis of these Cooley lectures is basically that, "Working compromises must be found, whereby the dead are forever barred from withholding the scepter from the hand of the living." In this series of lectures Professor Simes suggests a pattern for these compromises.

There have been numerous articles written about the subject of future interests.³⁵ Harvard has selected those articles dealing with future interests, wills, and estate planning that have been published in the *Harvard Law Review* and has compiled them in one volume.³⁶ This collection contains four articles by W. Barton Leach and three articles by A. James Casner. The most classic of all articles by W. Barton Leach, *Perpetuities in a Nutshell*, has been included in this selection.

Since 1942 the *New York University Law Review* has devoted a section to the subject of future interests in its *Annual Survey of American Law*.³⁷ From 1942 until 1948 these articles were written

32. KING, EDWARD C. *FUTURE INTERESTS IN COLORADO*. Dubuque, Iowa: Wm. C. Brown Co., 1950. Pp. x, 116.

33. Comment, *Early Vesting Rule in Wisconsin*, 47 MARQ. L. REV. 548 (1964); Caeta, *Class Gifts—The Virginia Rule of Early Vesting*, 3 WILLIAM & MARY L. REV. 435 (1962); *Construction in New York of Bequests of Future Interests Subject to an Ambiguously Expressed Condition of Survivorship*, 18 N.Y.U. INTRA. L. REV. 179 (1963).

34. SIMES, LEWIS M. *PUBLIC POLICY AND THE DEAD HAND*. Ann Arbor: University of Michigan Law School, 1955. Pp. xxii, 163.

35. To mention but a few of these articles: Jones, *Reforming the Law—The Rule Against Perpetuities*, 22 MD. L. REV. 269 (1962); Comment, *Remoteness of Vesting and the Charitable Trust*, 31 FORDHAM L. REV. 782 (1963); Comment, *That 'Simple and Clear Rule'—The Common Law Rule Against Perpetuities in Mississippi*, 34 MISS. L.J. 63 (1962); Comment, *Direct Restraints on the Alienation of Property in Mississippi*, 34 MISS. L.J. 333 (1963); 61 MICH. L. REV. 609 (1963); *Possibility of Reverter in Iowa*, 12 DRAKE L. REV. 99 (1963).

36. *SELECTED ESSAYS ON THE LAW OF ESTATE PLANNING AND FUTURE INTERESTS; FROM THE HARVARD LAW REVIEW*. (6th ed.). Cambridge: Harvard Law Review Association, 1961. Pp. 556.

37. *ANNUAL SURVEY OF AMERICAN LAW*. New York: New York University School of Law (1942-date).

by the former Dean of The New York University Law School, Russel D. Niles. From 1949 to the present, these articles have been written by Professor Bertel M. Sparks of the New York University School of Law. Professor Sparks manages in a brief space of ten odd pages to give a complete annual summary of developments, both decisional and legislative, in the area of future interests in the United States.

The theory behind future interests is that in every generation, the bulk of the property of the nation changes hands. Future interests has often been referred to as the calculus of the law. The practitioner who has a background in the subject of future interests will then be prepared for that part of his practice that involves the drafting and litigating of wills and trust agreements.