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Simes & Smith: The Law of Future Interests

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RECENT BOOKS

THE LAW OF FUTURE INTERESTS. 4 vols. By *Lewis M. Simes* and *Allan F. Smith*. Second Edition. St. Paul: West Publishing Company. 1956. $60.00.

Twenty years after the appearance of the first comprehensive treatise ever written on the law of Future Interests, Professor Lewis M. Simes, the author of that first edition, together with his colleague Professor Allan F. Smith, has offered the profession a second edition which is as current and as unique in 1956 as the first edition was in 1936. The first point to be emphasized in any discussion of this second edition is that in every sense it is a completely new work. The task of up-dating the material by the addition of cases and other authorities that have become available since the first publication date is only a small part of the effort that has gone into the present treatise.

Lawyers engaged in any appreciable amount of estate work will realize that there have been many new developments in this area within the last twenty years. The Internal Revenue Code has pushed powers of appointment through a whole cycle of development. The worthier title doctrine has reached new stages of maturity and has influenced many facets of property devolution. The *Restatement of Property,* with its Powellian terminology, has made an impact upon property law trends. Much of the distasteful perpetuities legislation of an earlier period has been abandoned and a new group of reformers has appeared on the scene offering new legislative panaceas for perpetuities problems. Hovering over the entire period spanned by these two editions has been the ever present but never coherent tax policy accentuating some developments and retarding others. All of these varied and often divergent or conflicting trends have been captured and portrayed in this new treatise which is remarkable for its lucidity and for its ability to break through historical and conceptualistic underbrush to reveal the law of future interests as a means of satisfying legitimate personal, family, and business desires in an industrialized society.

Throughout the entire treatise the functional approach is paramount. The authors use traditional terminology and rely upon legal history and orthodox analysis to portray fundamental principles. But the reader is never allowed to forget that the real inquiry is how does this doctrine or this principle actually operate and what purpose does it serve under presently existing conditions. The feudal origin of a legal rule is never relied upon as a reason for either embracing or rejecting the rule. It will be remembered that the first edition of *Simes on Future Interests* was one of the earliest efforts to bring the subject into a genuinely modern context. In his examination of a given doctrine Professor Simes chose to inquire into its effect upon an estate composed of corporate stocks and bonds more than its effect upon copyhold lands of medieval England. That philosophy is carried out in the new edition with an even greater sureness of touch but without any loss of traditional and historical analysis. In both the first

and second editions legal history is recognized as being of supreme importance. But unlike so many treatises on real property both editions also recognize that history is still being made, that the cut-off date has not yet arrived.

The treatise is attractively bound, and although the pages are slightly larger than those of the earlier edition, there has been such an expansion of the material that about 535 pages have been added to the text, 35 pages to the table of cases, and 12 pages to the index. In addition to this, 32 pages of tables of American statutes and two pages of tables of English statutes have been added. This enlargement has raised the total bulk to four volumes as contrasted with the former three. The index and the tables of cases and statutes, totaling about 360 pages, appear in the final volume only. The entire table of contents, together with the full prefaces to both the first and second editions, is found in the front of each volume. It is doubtful if this quadruple repetition, amounting to about 40 pages, is worth the additional cost it must have required. On the side of economy there will also be those who would have preferred keeping the treatise within three volumes in spite of the increased bulk. However, it should be remembered that a smaller volume is more easily handled and definitely more durable. Since pocket supplements are contemplated to keep the treatise current this last item is of considerable importance.

What appears to this reviewer as an unpardonable decision on the part of the publisher is that of not numbering the volumes. The work is divided into sections in accordance with usual legal style and on the spine of each volume is indicated the section numbers included within that volume. Although the sections are numbered consecutively throughout the treatise the pages are numbered separately, each volume beginning with page 1. At the end of each chapter there is left a block of unused section numbers reserved for supplementary material. It is hoped that if and when supplementary material is added this plan will be abandoned in favor of a decimal system in order that new sections may be added where they properly belong without revising the section numbers already assigned to any existing material.

But a personal quarrel with the format of a great treatise cannot detract materially from its value. The authors' arrangement and organization are systematic and the index is complete and usable. Except for certain deviations which will be noted subsequently the material is arranged along the pattern adopted in the first edition. There are few added topics. Most of the increased bulk results from a general expansion throughout the treatise. Much of the added material is in the nature of model forms designed to illustrate the points under discussion and to aid the draftsman faced with difficult or unfamiliar problems. The forms used are not completed instruments but are clauses designed to accomplish particular purposes and appear as parts of the discussion of the purpose concerned. Thus there are forms for avoiding the dangers of the Rule Against Perpetuities, creating possibilities of reverter and rights of entry for condition broken,

creating and exercising powers of appointment, making gifts over on death without issue, and avoiding many other difficult construction problems. The inclusion of such forms as part of the text not only supplies the draftsman with the essential tools for carrying out an intended purpose, but it also provides effective illustrative material for the student who might be seeking nothing more tangible than a better understanding of the points involved.

Although it is impossible in a review to give detailed consideration to the text of a four-volume work, it is essential to devote some attention to an examination of specific items of content. In addition to a 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 treatise is divided into five major parts. Part I, "The Permissible Types of Future Interests and Expectancies," consists of thirteen chapters and is an unusually clear exposition of the common law system of estates. Not only is this material absolutely essential to the understanding of any future interests problems, but it is material which is highly commended to every teacher of first-year Property and every practicing attorney regardless of what his specialty might be. In the first edition the rule in Shelley's Case, the worthier title doctrine, and powers of appointment were all handled in Part I. These have all been removed to more appropriate parts of the treatise and the result is considerable improvement in the clarity of presentation.

As previously indicated this second edition is far more than a report of developments that have taken place within the last twenty years. The rearrangement of material and the addition of occasional sentences or paragraphs of explanation which characterize the entire revision are especially prominent in the analysis of the estate system. The additions appear calculated to enable the unskilled reader to avoid premature conclusions and the skilled reader to find his way to the heart of a problem with greater ease. Not only are the standard estates introduced, but the estate picture is completed by including within it a discussion of such related material as future interests in other future interests. The first edition delayed this subject to a remote chapter thereby leaving a sense of incompleteness in the chapter on classification. The unreal rigidity ordinarily suggested by a discussion of fixed estates is avoided in the second edition by the addition of an explanation of how flexibility is actually achieved within the existing framework.

The improvement in organization and presentation is particularly well demonstrated by the chapters on reversions, remainders, and executory interests. The chapter on reversions has been rearranged and rewritten to give a more complete picture of the reversion concept. Four chapters are devoted to distinguishing and characterizing vested remainders, contingent remainders, and executory interests. The chapter distingushing vested from contingent remainders has been completely rewritten. Distinctions are more sharply drawn. The work shows itself to be that of a master who is more sure of himself than he was twenty years ago and who is also better

qualified to communicate in a way that will reach the student and the general practitioner.

In the first edition the effort to distinguish contingent remainders from executory interests was introduced with references to the rule in Shelley's Case and the destructibility rule, neither of which had been previously discussed. The second edition introduces this subject with a series of simple illustrations of the distinctions and follows with an analysis of the legal significance of the difference between the two interests. Immediately after a full discussion of contingent remainders is an equally complete treatment of executory interests. Between these two subjects in the first edition is found a chapter on the rule in Shelley's Case and one on the worthier title doctrine thus breaking up the logical sequence and tending to leave the reader in a state of confusion. The present work disposes of the Shelley rule and the worthier title doctrine in this connection with three short sentences about restrictions upon the creation of remainders and a cross reference to the part of the treatise where that subject matter is considered.

Part II, "The Creation of Future Interests," concerns itself with construction problems and class gifts. The rules of construction are carefully analyzed both as to their origin and their modern significance. These thirteen chapters, spread over 452 pages, should be read and reread by every lawyer who suspects that he might be called upon to draft a will or a trust agreement or to give advice which in any way relates to an estate plan. The treatise should then be kept within easy reach where it can be consulted in connection with every drafting job undertaken. The possible frustrations inherent in provisions for gift over on death without issue, implied conditions of survivorship, class gifts, Wild's Case, and other pitfalls for the unwary are examined and drafts of numerous suggested clauses are given. In terms of lucid presentation, this material on the creation of future interests, especially that part dealing with class gifts, is unparalleled in other existing literature.

Part III, "Powers of Appointment," consisting of 195 pages divided into nine chapters, represents one of the most complete jobs of re-writing in the entire treatise. In the first edition this subject matter was handled in one chapter of 101 pages and was made a part of the more general subject of "Permissible Types of Future Interests and Expectancies." It is hard to find any logical justification for this former arrangement unless it is that the expectancy of an object of an unexercised power should be discussed along with other types of expectancies. The new arrangement, elevating powers of appointment to the dignity of a main subdivision of the treatise, seems much more desirable. The expectancy of an object of an unexercised power is still dealt with briefly under the general treatment of expectancies with cross reference to the powers of appointment section where the remedies of disappointed objects are considered.

The expanded treatment of powers of appointment is marked not only by an improved clearness of style but also by the addition of much new material. This is especially true as it relates to the execution of powers.

The doctrine of capture, or implied appointment where an attempted execution fails, and the somewhat related doctrine of marshalling, or allocation, had scarcely found their way into American litigation prior to 1936. Since that time there have been many cases involving both doctrines, and new stages of maturity have been achieved. The developments are carefully and fully analyzed in the new edition.

Although the treatise does not purport to deal exhaustively with the problems of inheritance and estate taxation, the foundation essential for the successful handling of such matters is clearly laid. The reader is made aware of the tax questions involved as he considers the nature of the interests or the relationships to which the tax is applied. Thus the extent to which appointive property may be considered property of the donee for succession and estate tax purposes is included under "Nature of the Donee's Interest," and the special tax problems raised by appointments in favor of takers in default are considered along with other problems in the "Execution of Powers." This type of treatment tends toward a better understanding of the fundamental policy involved but it is unfortunate that in the illustration just mentioned neither of the two sections referred to makes any reference to the other.

Part IV, "Rules Restricting the Creation of Future Interests," occupies volume 3 in its entirety. The way in which these various rules of policy are laid alongside each other and their common characteristics exposed is itself an invaluable contribution. Direct restraints on alienation and indirect restraints in the form of remote contingent interests and indestructible trusts are generally considered as having some relationship to each other. Both direct and indirect restraints are frequently thought of as having something in common with the accumulations problem. To these Simes and Smith have added such other rules of policy as those relating to the problem of attempted gifts over on failure to alienate, illegal conditions and limitations, the rule in Shelley's Case, and the worthier title doctrine.

From the standpoint of both history and logic the rule in Shelley's Case and the worthier title doctrine fall so naturally within this area that their treatment in this connection should come as no surprise. However, it is so common to see these matters dealt with near the beginning of property treatises along with the classification of estates that to see them appearing in their proper setting is unusual to say the least. The law of future interests is such a unified whole that it is difficult to decide upon the most desirable topical sequence for an orderly presentation of the entire subject matter. No doubt some will feel that a thorough treatment of the rule in Shelley's Case and the worthier title doctrine should have preceded construction problems and powers of appointment. While that arrangement definitely has its advantages, these advantages must be weighed against the confusion which results from removing any legal doctrine from the context to which it properly and logically belongs. It is doubtful if the arrangement adopted by the authors creates any serious problems.

The distinctions between direct and indirect restraints and the essential difference between the rules applicable to these two concepts are presented in a way to give the reader a workable understanding of their significance in the planning of clients' estates. The policy against restraints of whatever kind is more fully developed and there is a much greater depth of analysis of this policy than was found in the earlier edition. It appears that there was considerable reliance upon the conclusions reached in Professor Simes' recent book, *Public Policy and the Dead Hand.*

The treatment of direct restraints follows the same general outline as the earlier edition except that much new material has been added. This addition sometimes takes the form of an added sentence or paragraph designed to clarify an existing section. Some sections have been completely rewritten and some new ones have been added. An example of added material is that dealing with the doctrine of constitutional restrictions upon certain types of restraints. This doctrine was unknown to the law until 1949 and has not often been considered except in its constitutional law aspect since that time. Simes and Smith give full consideration to its impact upon the institution of property.

The authors introduce their treatment of indirect restraints on alienation by pointing out that the two principal restraints of this kind, indestructible trusts and contingent future interests, have similar effects upon the economic society in which they are tolerated and that the rules governing them have a common origin. They suggest that the rule restricting the creation of contingent future interests and the rule regulating indestructible trusts are in fact but two branches of the same rule. They recognize, however, that the two doctrines have been so separated by the American courts that it is essential to give them separate consideration in a modern treatise on future interests. This decision by the authors is in line with their consistent policy of presenting their subject matter in the form best adapted to current practice. It would appear quite reasonable to argue that Gray was wrong to confine the Rule Against Perpetuities to a rule against remote vesting of future interests. It is possible that our law would have had a more symmetrical development if he had treated it as a rule against indirect restraints on alienation with the remote vesting aspect but one type of such a restraint. But an argument along those lines would hardly be worthwhile at this late date when the courts have so completely accepted Gray's analysis.

The above incident is but one of many which could be cited as illustrative of the way in which Simes and Smith have exercised extreme care to present the law of future interests as a live and functioning organism. The emphasis is upon "what is," and the policy goals and the jurisprudential doctrines, though never neglected, are developed within that framework.

The material on the Rule Against Perpetuities has been substantially revised. All the historical and doctrinal analysis found in the first edition is still being carried, but the many new developments not yet apparent in 1936 are examined and critically evaluated. If there is any shift in empha-

sis it is that the policy goals of the rule are given fuller consideration than was true in the earlier edition. More attention is given to "why" an interest is or is not within the rule's operation. Such policy considerations are kept within the functional context adopted by the authors as the foundation for their entire structure. They are tailored to fit the needs of the practitioner who must predict the outcome of litigation on points where no direct authority exists as well as the needs of scholars, legislators, and others interested in the development of a workable system adapted to modern society. This point is well illustrated by the discussion of the option cases which are carefully distinguished from other devices closely related to options. The examination of such relationships as covenants running with the land, easements, and profits is extremely valuable, not only because of the importance of these interests, but for the light it sheds upon the nature of the rule itself.

The pension trust for employees is an example of a whole new entity which has developed since 1936. Its relationship to the Rule Against Perpetuities and the legislation which it and related interests have produced are fully developed. The "wait and see" doctrine which has recently become popular in some circles and which is so palatable to the neophyte is placed in perspective. Its effect upon property relationships and therefore upon the economic structure of a society adopting it is clearly presented.

The treatment of the Rule Against Perpetuities, as well as other parts of the treatise, contains revisions made primarily, if not exclusively, for the purpose of increasing readability by painting a more complete or a more evenly balanced picture. For instance, in the first edition the application of the rule to interests created by the exercise of a general power and to future interests subject to a general power were discussed under one heading. In the new edition separate sections are provided for these two related but different topics. Also in the new edition revocable trusts and unfunded life insurance trusts with power to change beneficiaries are discussed in connection with future interests subject to a power. The extent to which the policy of the Rule Against Perpetuities relates to executory interests limited on an event certain to occur is vividly illustrated in a way to give a clearer understanding of both executory interests and the Rule Against Perpetuities. The same is true of the treatment of the rule's possible application to what would otherwise be an executory interest but which becomes a possibility of reverter by passing through the residuary clause.

Statutory modifications of the Rule Against Perpetuities are treated on a state-by-state basis with the New York statute playing the feature role. The statutes are presented against the common law background with sufficient discussion and ample documentation to reveal the theory behind each statute and to provide the key to their practical operation.

Part V, "Present Legal Relations of Owners of Future Interests," follows the outline of this topic found in the first edition except that the chapter on "Allocation of Benefits as Between Life Tenant and Remainderman" is

not included. The ten chapters occupying the 223 pages which are devoted to this topic present a clear picture of the legal relationships of the owner of a future interest while his interest is still future. This is a study of the nature of future interests and is a necessary complement to Part I, the analysis of the estate system. Here again a problem in topical sequence is raised. Some might feel that the nature of future interests should have been considered along with their classification. As an abstract proposition this would appear desirable. As a practical matter it is more likely that the readability and the understanding of the classification material would be much impaired if it were encumbered with any extraneous matter which is not strictly speaking a part of the classification itself.

Probably the most extensive revision found in Part V is in the chapter concerning the extent to which the holder of a future interest is a necessary party in an action involving title. In the first edition there was room for disappointment with the treatment of the virtual representation doctrine. It appeared that too much attention was given to the reporting of results reached in the various situations in which a representation problem might arise. In spite of a thorough coverage of this aspect of the problem, the reader was left without a sufficient foundation in the general policy and purpose of the representation doctrine to enable him to adapt it to new circumstances with which he might be confronted in future litigation. This weakness is corrected in the second edition where the basis for representation and the varying statutory provisions affecting the doctrine are more clearly revealed. Results reached in particular types of fact situations are as thoroughly covered as they were in the first edition. The difference is that the second edition projects these particular patterns against a background of careful legal analysis in a way to present a uniform policy which may be applied to new situations as they arise.

Part VI, the final subdivision, is a complete revision of the final subdivision of the first edition. In the first edition this final part consisted of five chapters under the heading "Vesting and Termination of Future Interests." Three of these chapters more properly belonged in the discussion of construction problems and have been moved there in the second edition. The heading has now been changed to "Termination of Future Interests" and the transplanted material has been replaced by two additional chapters, one dealing with the termination of possibilities of reverter and rights of entry, and the other with the effect of impossible conditions and limitations. The material relating to the termination of possibilities of reverter and rights of entry is an especially wecome addition. In view of the recent trends toward legislative relief from these clogs upon the marketability of titles, a fuller discussion of constitutional hurdles would have been helpful.

The experienced scholar who is familiar with this field of the law will welcome the new insights to be gained from *Simes & Smith on Future Interests.* He will also discover that the treatise was not written for his exclusive benefit. The clarity of style, the completeness of analysis, and the

practicability of the techniques employed speak directly to the practitioner who might be something less than an expert in future interests. The point to be emphasized is that the treatise does speak. Although the first edition of *Simes on Future Interests* was remarkable for its utilitarian value to the practicing attorney, it appears that a dominant purpose of the authors in making the revision was that of improving this very quality. The result is a treatise which is sure to reward its reader whether that reader is an academician in search of more refined theoretical or doctrinal explanations for results reached, a draftsman seeking help in the preparation of a will, or an advocate in need of a practical suggestion to help him win a particular case. All aspects of the subject matter under consideration are presented in a manner which is both scholarly and functional and which brings depth and practicality into a common focus.

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