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SIMES ON FUTURE INTERESTS [1]

Charles C. White [2]

IT IS encouraging that the law teachers are turning their talents to the writing of treatises. Recent examples are Professor Bogert's monumental work on *Trusts* and Professor Griswold's volume on *Spendthrift Trusts*. And now comes this comprehensive work on *Future Interests*, about which little has heretofore been written with an especial appeal to the average practitioner. Too much of the law teacher's energy has gone into editing case books and writing law review articles. And case books and law review articles are not read by lawyers in general.

There is a theory of literary criticism, sometimes called the Croce-Spingarn theory, which says that the function of criticism is to answer two questions. "What has the writer proposed to himself to do?" And "How far has he succeeded in carrying out his own plan?" Judged by these two criteria this work is eminently a success. In his preface Professor Simes has formulated his purposes and a reading of the work convinces one that he has succeeded in carrying out his plan.

And what are these purposes? (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.

A brief statement of the plan of the work may not be out of place. Part 1, which comprises the whole of Volume 1, treats of "The Permissible Types of Future Interests and Expectancies." Professor Simes recognizes that the traditional forms of future interest, the remainder, the reversion, the executory interest, the right of entry, and the possibility of reverter, "are still working tools which the lawyer in this field will sometimes need," although "the differences in these varieties of future estates are gradually being minimized by courts and legisla-

[1] THE LAW OF FUTURE INTERESTS. 3 vols. By *Lewis M. Simes*—Professor of Law, University of Michigan. St. Paul and Kansas City: West Publishing Co. and Vernon Law Book Co. 1936. Pp. xv, 527; xv, 556; xv, 583. $25.

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tures." He also recognizes that there are varieties of future interests that can not be fitted into the five classic categories.

Wisely, it seems to me,[3] the author "has indulged in few innovations in terminology"; as he says, he has tried to redefine old terms rather than invent new ones. There is no doubt, for example, that "power of termination" is a more logical and scientific term than "right of entry for condition broken," but the average lawyer, for whom this work is written, understands "right of entry" and would be puzzled by the use of "power of termination."

Part 2, and the rest of the book, are devoted to what the author has called "the life history of a future interest." Part 2 deals with the creation of future interests and is largely concerned with questions of construction. And it is surprising to what a great extent the law of future interests deals with problems of construction. But it is not so surprising after all, since the problem is to try to fit the nebulous ideas of the testator, and the ofttimes inexpert formulation of those ideas by the draftsman, into the classic categories of future estates.

Part 3 is a discussion of "Restraints on Alienation," both direct and indirect, in so far as they restrict the creation of future interests. As the author says, much of the material on direct restraints has no special application to future interests, but is put in to furnish an adequate background for the rule against perpetuities, which he discusses largely as an indirect restraint on alienation. This approach to the rule is not altogether orthodox.

Part 4 "deals with the characteristics of the future interest after it has been properly created." It may or may not be significant that the author has nowhere used the term "constituent characteristics."[4] The general heading of Part 4 is "Present Legal Relations of Owners of Future Interests" and after all it is the *present* rights, powers, privileges and immunities of the owners of future interests in which we are chiefly interested. Part 4 is in many respects the most practical part of the work, as it treats of the remedy for waste against the life tenant, the allocation of burdens and benefits between the life tenant and the owner of future interests,[5] partition, and the highly important practical

[3] It is, of course, unorthodox to use the pronoun of the first person singular in a law review article. But the use of circumlocutions to avoid saying "I" and "me" seems hardly worth the trouble. When the law writer says "It is believed" what he means is "I believe," or "It seems to me," or "I am telling you." And just what does he mean when he says "It is conceived"?

[4] See almost any page of the Property Restatement.

[5] The writer derived considerable personal satisfaction from the fact that the

question as to what extent it is necessary to make the owner of future interests a party to actions involving title. Part 4 also has four chapters on the alienability and descendibility of future interests, and the liability of such interests to be subjected to the rights of creditors.

The last division of the book, Part 5, concerns "Vesting and Termination of Future Interests." It deals with the questions: (1) What happens to future interests when the prior interest fails or is renounced? (2) What happens to the prior interest when the future interest fails? Under (1), the question of acceleration is dealt with; the author contends that the cases ordinarily treated as problems of acceleration are usually questions of construction. He shows that the common statements that vested future interests are always accelerated, and contingent future interests never, do not get one very far in explaining the cases. What the court usually *does* as distinguished from what it *says* is to reconstruct the will in the light of what has happened. If acceleration makes no substantial change in the testator's general scheme, the future interest is accelerated whether it be vested or contingent. But if acceleration seems unduly to favor the life tenant at the expense of the remainderman, the courts will "sequester" the life estate for the benefit of the disappointed owners of future interests. "Sequestration" of something which has ceased to exist is a metaphysical problem that the courts do not worry about.

Under question (2), "Failure of Succeeding Interest" the author discusses the difficult questions raised by the English cases, *Jackson v. Noble*[6] and *Doe & Blomfield v. Eyre*[7] and by the American cases, *Proprietors of Church in Brattle Square v. Grant*,[8] and *First Universalist Society v. Boland*.[9] The author's conclusion as to the American law (Section 770) is that when a void executory interest follows a defeasible fee simple, the prior fee simple becomes absolute, unless it clearly appears that the prior interest was to terminate whether the gift over takes effect or not. The question seems to be "Is the happening of the event the thing which terminates the preceding estate, or is

author does not subscribe (see Section 702) to the American Law Institute's proposition as to "delayed income." See PROPERTY RESTATEMENT (Tentative Draft No. 3), § 165 (1931), and Professor Oliver Rundell's statement on page 236 of the same draft.

[6] 2 Keen 590, 48 Eng. Rep. 754 (1838).

[7] 5 C. B. 713, 136 Eng. Rep. 1058 (1848).

[8] 3 Gray (69 Mass.) 142 (1855).

[9] 155 Mass. 171, 29 N. E. 524 (1892). The author says that this case and the case at note 8, supra, are distinguishable. Gray argued quite strenuously that they could not be distinguished. See GRAY, THE RULE AGAINST PERPETUITIES, 3rd ed., § 40 (1915).

it the happening of the event plus the taking effect of the gift over?"

Chapter 50 deals with the termination of future interests by adverse possession. The statement is made in Section 775 that by adverse possession a new title is vested in the adverse possessor. This is probably true and yet it sometimes seems that what one gets is the title of the disseized owner, especially where the disseized owner was a life tenant. But of course the old idea was that by possession one always got a fee simple title.

This reviewer once wrote an article [10] maintaining the theory that where the quiet title statute, as in Ohio,[11] gives the owner of a future estate, although not in possession, the right to bring a quiet title action, the owner of the future estate should be barred when the statutory period for adverse possession has run. The author does not think much of this theory (see Section 778), although there are decisions in its favor in four of the six jurisdictions in which such a statute exists. Possibly this is one of those situations where "counting noses" does not determine that indefinable something known as "the weight of authority."

The last chapter deals with the termination of future interests by judicial sale. This is an extremely practical question and is provided for by statute in most of the states. However, aside from statutes, future interests may be terminated by judicial sale; but in jurisdictions where no statutory proceedings exist, the question of such termination is largely at the discretion of the court. The author concedes that the doctrine that, without the aid of a statute, a court of equity may decree the termination of future interests by judicial sale, is a development of American law, and is of comparatively recent origin.

This review might well end here.[12] Enough has been written to show the scope and content of the book and it may be said that the plan of the author, as formulated in the preface, has adequately been carried out. But the writer of this review has read this work with such

[10] See White, "Quiet Title and Adverse Possession," 24 OHIO L. REP. 401 (1926).

[11] Ohio Ann. Gen. Code (Page 1926), § 11901.

[12] This note is for the statistically minded and for those who want to know what proportionate share of the book is taken up with their peculiar hobby. The number of pages taken up by various topics are as follows: acceleration, 32; alienability, 56; chattels real and personal, 50; class gifts, 140; powers of appointment, 100; rule against perpetuities, 120; statutes relating to perpetuities, 54; direct restraints on alienation, 58; restraining devolution on intestacy (otherwise known as gifts over on intestacy), 32; Shelley's case, 62; general theory of construction, 16. This accounts for a little over half of the book.

growing enthusiasm that he would like, if possible, to point out some things that may induce others to be curious enough to see whether or not his enthusiasm is warranted. And then again the function of a critic is to criticize and there are some parts of the book with which one ventures to disagree. As briefly as possible a few topics will be singled out for discussion.

That the Rule in Shelley's case is amply treated is evidenced by the fact that its discussion takes up sixty-two pages of text. The vitality of this rule, in jurisdictions where it has not been abolished by statute, is one of the mysteries of legal history. Surely no one can read what Professor Simes has to say about this hoary relic of antiquity without wondering why it has not long since been abolished in all jurisdictions. And just why it should sometimes be abolished in wills and not in deeds is not clear. In states, like Ohio, that have abolished the rule as to wills [13] it does not cause much trouble. In thirty years experience in examining Ohio titles I have had occasion to apply the rule once. But even in such jurisdictions it may catch the unwary draftsman of deeds to a trustee with equitable life interests and equitable remainders.[14] There seems to be need of some legislative lobbying on the part of teachers of future interests. Some of the energy used by them in explaining the rule might well be used in attempts to abolish it by statute.

An even more unsatisfactory rule of law (if it be a rule) is discussed in Chapter 8 under the caption "Remainders to the Conveyor's Heirs." The Rule in Shelley's case forbids the vesting of title as purchasers in the heirs of the grantee life tenant. The so-called rule treated in this chapter forbids the vesting of title by purchase in the conveyor, or his heirs. A like rule is supposed to exist to the effect that when one devises land to his heirs, the heirs take as heirs and not as purchasers. In a recent case in Ohio [15] there was a devise of the residue to the testator's heirs at law as determined by the statute of descent and distribution. It certainly would have surprised an Ohio lawyer to be told that the takers under the will took by descent, and not by purchase. Offhand I can not imagine what difference it would make, but both branches of the so-called rule have always seemed to me rank nonsense. Whether

[13] Ohio Ann. Gen. Code (Page Perm. Supp. 1935), § 10504-70.

[14] See People v. Emery, 314 Ill. 220, 145 N. E. 349 (1924); Neff v. Albert, 9 Ohio App. 286 (1918).

[15] Davey v. Climo, 30 Ohio N. P. (N. S.) 457 (1933); Oakley v. Davey, 49 Ohio App. 113, 195 N. E. 406 (1934).

it be a rule of law or a rule of construction (see Section 147), it should be abolished, bag and baggage.

As stated in the preface, Part 2, comprising about half of Volume 2, deals with problems of the creation of future interests, and is largely devoted to questions of construction. As a preliminary to this part of the work, there is a very interesting common sense chapter on "Theories of Construction." The author makes short shrift of the *saying* that "intent is the pole star of construction." Too often the testator had no intent, and the logical thing for the court to say would be "this testator left a validly executed will but died intestate." But that sort of thing is not done. Professor Simes says that "construction is something more than mere finding intent" and "that it involves the application of considerations of policy." The famous English case of *Forth v. Chapman* [16] which decided that in the will in question "death without issue" meant definite failure of issue as to chattels real and indefinite failure of issue as to real property could not possibly be based upon the testator's intent. But the author says that we should frankly recognize that the court was dealing with a question of policy. Simes' theory may be all wrong, but it appeals to the writer as being extremely sensible. It explains what the courts *do* rather than what they *say*.

The proportionate amount of space allotted to class gifts may to some seem excessive. But it is an extraordinarily difficult subject which calls for clear thinking and keen analysis. Some of the most difficult problems of construction arise in connection with class gifts. To the reviewer this is the toughest part of the book, but he believes that he has been amply repaid for reading and re-reading these chapters.

In connection with class gifts, Sections 426 and 432 deal with "per capita" or "per stirpes" distribution. Nearly every lawyer thinks he knows what these terms mean, but they hide a lot of trouble. Some day I hope that some one will write a real treatise on the subject, for the last word has not been said yet.[17] The subject is not as simple as it seems.

The rule against perpetuities is the sacred cow of the teachers of future interests and I am not going to lay myself open to assaults by the "restaters" by pretending to know enough about the subject to review adequately what Professor Simes has to say in the one hundred and

[16] 1 P. Wms. 663, 24 Eng. Rep. 559 (1720).

[17] See an article by Professor William L. Eagleton, "Introduction to the Intestacy Act and the Dower Rights Act," 20 IOWA L. REV. 241 (1935), in which he uses the terms (a) per capita, (b) per capita with representation, (c) per stirpes.

twenty pages he devotes to the subject. However, I venture to say that much that he has written is unorthodox and would stink in the nostrils of John Chipman Gray. Verily there hath grown up a generation which knew not Gray. He has the audacity to say that the rule is something more than a rule against remoteness of vesting, that it is a rule forbidding indirect restraints on alienation, that there are still vestiges of the original idea of a perpetuity as a perpetually inalienable interest. In fact he treats the subject as one phase of restraints on alienation, the general subject of restraints being divided into direct restraints on alienation and indirect restraints, and the subject of perpetuities is placed under the heading of indirect restraints on alienation. I am not saying that this is not the right way to treat the subject, but it does seem, to one who has learned what little he knows about perpetuities from Gray, to be somewhat unorthodox. It would require more space than is at my command to say what I would like to say about Professor Simes' treatment of perpetuities.

Professor Simes contends that the "rule against perpetuities may also apply to a trust which does not involve future interests." To my way of thinking, Chapter 31, which treats of "Trusts as Perpetuities," is the least satisfactory one in the book, largely because the author is laboring to prove that there is a rule when there is no rule. The author's statement of the so-called rule is as follows: "A private trust cannot be made indestructible by the provisions of the creating instrument, for a longer period than a life or lives in being and twenty-one years." He then says: "It must be conceded that the rule just stated is only tentative." [18] He contends that there are either two rules against perpetuities and that one rule is that against indestructible trusts, or that there are two branches of the same rule. Gray would certainly turn over in his grave could he read such a heterodox notion.

Ever since the *Claflin* case,[19] the pundits have felt that something should be done to prevent private trusts from lasting too long. But that there is such a rule as Simes says there is has never been proven. The rule may be on its way, but it is not yet here. Would any one contend that the sort of trust that is established for the purpose of issuing land trust certificates is void as violating any supposed rule against perpetuities? If the courts start destroying such trusts "The carnage will be terrific," to quote what Professor Leach has said about the destruction of certain other forms of trust.[20]

[18] 2 SIMES, FUTURE INTERESTS, § 553, p. 432 (1936).
[19] Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889).
[20] LEACH, CASES ON FUTURE INTERESTS 821 (1935).

There is no doubt in America that rights of entry and possibilities or reverter are not subject to the rule against perpetuities. Ever since Gray, the writers on future interests have contended that such future interests should be subject to the rule, and Professor Simes so argues. Possibly rights of entry and possibilities of reverter should be subject to the rule, and to make them so subject would solve some of the troubles of the title man. But it has always seemed to me that, if such interests were subject to the rule, it would make most determinable fees and fees subject to condition subsequent void from the beginning. It is true that such estates *could* be so created as to come within the rule. An example is given by Professor Simes in Section 509. But the fact remains that few of such estates have been so created as to bring the termination within lives in being and twenty-one years.

Just a word about the *Copps* case [21] which has caused so many of the professors to chortle with glee. It is true that the court did not know the difference between a fee upon condition subsequent and a determinable fee, but the result would have pleased Gray, since the practical effect of the decision was that there is no such thing as a determinable fee. And the result ought also to please those who so strenuously contend that a possibility of reverter ought to be subject to the rule against perpetuities. For had that question been raised in the *Copps* case and had the court held that the rule against perpetuities made void the possibility of reverter claimed by the heirs of the original grantor, the result would have been the same. So why do the professors "rage together so furiously"? [22]

The subject which Gray in his *Restraints on Alienation* treats under the heading of "Gifts over on Intestacy" is treated by Professor Simes in Chapter 34 as "Restraining Devolution on Intestacy." This is a subject on which the courts have always been wrong, but there does not seem to be anything one can do about it, except to settle the matter by statute. Such a statute has been passed in Ohio, although our author seems not to have discovered it. There is a well-founded suspicion that the writer of this review is the author of this statute, a copy of which is found in the footnote.[23]

[21] In re Copps Chapel Methodist Episcopal Church, 120 Ohio St. 309, 166 N. E. 218 (1929).

[22] The Copps case is referred to in Section 178 and Section 181 and does not seem to give Simes the jitters. This is not the only case where courts have reached the right result for a wrong reason.

[23] "An estate in fee simple may be made defeasible upon the event of the death of the holder thereof without having conveyed or devised the same, and the limitation

One must stop somewhere, although the temptation to go on and on is strong. This is a wonderful work which deals competently with every question in future interests that is apt to be met by the general practitioner. It is the definitive work on future interests and I predict for it an enthusiastic reception by the profession.

Not the least merit of the work is that it is written in clear and forceful English. One may have to re-read paragraphs because of the difficulty of the subject matter. But one will never have to re-read because the author has not expressed himself clearly.

It is a great book by a master of the subject.

And the publishers are to be congratulated upon the mechanics of their book-making. The binding, the typography, the general arrangement of the subject matter, are excellent. The publishers have clothed a worthy book in a worthy format.

over upon such event shall be a valid future interest. For the purpose of involuntary alienation, such a defeasible fee shall be deemed a fee simple absolute." Ohio Ann. Gen. Code (Page Perm. Supp. 1935), § 10512-7.

See also, White, "Life Estate or Fee," 1 UNIV. CIN. L. REV. 405 (1927); White, "Life Estate or Fee?: A Sequel," 6 UNIV. CIN. L. REV. 429 (1932).