Public Policy and the Dead Hand (Lewis M. Simes, 1955)

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BOOK REVIEW


Two authorities on future interests are encouraging a trend that I wish to deplore. Professor Lewis M. Simes, of the University of Michigan Law School, is the author of the most comprehensive American treatise on the subject. The essays of Professor W. Barton Leach, of the Harvard Law School, represent the best in legal analysis and style. Both scholars now urge a flurry of statutory reform. Since they disagree as to just what statutes the legislatures should pass, there is yet hope that future interests will remain essentially an area for judicial supremacy, uncluttered by statutes other than those necessary to meet exigencies arising from extreme applications of the stare decisis doctrine. This is not to deny that changes along the lines proposed by Professors Simes and Leach may be desirable. But, in memory of Lord Nottingham, let the judges rather than the legislators make the adjustments.

Aside from the proposals for legislative action, Public Policy and the Dead Hand makes enjoyable reading. Professor Simes presents a variety of problems of interest to anyone concerned with wills, trusts, fiduciary administration, and estate planning. Moreover, he adds to that small body of literature containing insight into the processes of the law, without undue footnotes or Germanic sentence structure.

In the first of five chapters Professor Simes discusses the degree to which the state should permit the owners of wealth to disinherit their families. He describes the conflicting claims and the law as it is generally administered in the United States. He then argues for a model American statute (p. 29), despite his earlier statement that "I see no value in discussion of freedom of testation in the abstract" (p. 5).

In the two succeeding chapters he moves on to the Rule Against

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1Law of Future Interests (1936); see also Simes and Smith, Law of Future Interests (2d ed. 1956).

2E.g., Perpetuities in a Nutshell, 51 Harv. L. Rev. 638 (1938).

3In Florida, for example, the Supreme Court has clearly stated that it will not eliminate the doctrine of the destructibility of contingent remainders; it has practically invited legislative change. See Popp v. Bond, 158 Fla. 185, 28 So.2d 259 (1946); Smith, Destructibility of Contingent Remainders in Florida, 3 U. Fla. L. Rev. 319 (1950).
Perpetuities, conceding that tax statutes today generally replace it as a tool for the distribution of wealth but finding two practical modern-day policies to support it. First, the rule, within reason, permits persons to dispose of property at death as they please. Second, the rule fundamentally permits the living rather than the dead to control the wealth of the country. The question then arises whether the rule is a satisfactory device to achieve these aims. It is here that Professor Simes comes to grips with Professor Leach. Both agree that the courts in applying the rule occasionally upset wills that do not violate any recognizable public policy. To eliminate this ruthlessness, both scholars advocate remedial legislation. Indeed, Professor Simes says, "It is, I think, obvious that nothing short of legislative action can adapt the Rule to the requirements of modern society. The limitations of judicial action prevent adequate reform by judicial decision. On the other hand I believe it would be unwise and even futile to attempt to wipe the slate clean and start with a new rule to restrict tying up of property" (p. 71). His argument continues by conceding that "all attempts to substitute a new rule have proved to be unsatisfactory" but that "history demonstrates that amendments to the existing Rule can be quite successful" (p. 72). And Professor Leach has stated, "The Rule is basically sound. The job is one for the repair shop, not the scrap yard."4 The point of disagreement arises in Professor Leach's advocacy of statutory enactment of the wait-and-see doctrine and Professor Simes' preference for less drastic change through multiple statutes establishing a preferred rule of construction and incorporating, to some degree, the _cy pres_ doctrine. These various proposals cannot be meaningfully discussed in a book review but are available for study in Professor Simes' book and in law review articles.5 It should be noted, however, that Professor Leach's proposal has been enacted by at least four state legislatures.6 The trend gains force.

The fourth and fifth chapters discuss accumulations and gifts to charity. As to the former, Professor Simes concludes that "legislation restricting accumulations to a shorter period than that of the Rule Against Perpetuities has been a breeder of litigation and is undesirable" (p. 105). As to charitable gifts, however, he advises that "it would be

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desirable in this country to go part way in the direction of the Scottish legislation and the English proposals” (p. 139). In other words, legislation, once thought useful, should now be repealed as unworkable, but new legislation should be added with confidence to solve other problems.

Professors Simes and Leach are essentially satisfied with the legal framework of future interests; they seek merely to improve weak portions of it. Another school of thought, headed by Professor Myers S. McDougal, makes frontal attacks on this method of approach. It argues that the reason for most of the unfortunate decisions is that judges are being asked to decide cases by a completely inadequate analysis and observation of environmental and predispositional factors. Those sharing this view hold that reform is not possible either under the traditional rules or under new legislation, so long as doctrines remain divorced from social reality and couched in normatively ambiguous terms. They believe that the teachers, the bar, and the bench can become scientifically trained to make policy arguments and judgments and that this orientation deserves the emphasis, not legislative attempts to patch up systems.7

In Public Policy and the Dead Hand Professor Simes has made another contribution to future interests, masterfully continuing to explain and clarify what Mr. Justice Frankfurter has called the “unwitty diversities of the law of property.”8 As to his proposed reforms, however, the truth is that none might be necessary if all deeds, wills, and trusts were competently drafted. Whether a legislature should pass statutes in an area long considered the glory of the common law merely to protect victims of incompetent craftsmanship raises a serious question, to say the least. Even if a particular reform has substantive merit, not enough has been made of the possibility of obtaining the change through the courts, as was recently done along the lines advocated by Professor Leach, in New Hampshire,9 and perhaps earlier in Florida.10

7See McDougal, Future Interests Restated: Tradition Versus Clarification and Reform, 55 HARV. L. REV. 1077 (1942); see also Lasswell and McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 YALE L.J. 203 (1943).
10Story v. First Nat’l Bank and Trust Co., 115 Fla. 436, 156 So. 101 (1934). For a diverse view as to whether this case adopts the wait-and-see doctrine advocated
In addition to the five chapters by Professor Simes, the book contains an excellent preface by Howard L. Barkdull, past president of the American Bar Association. The foreword can only gratify teachers of future interests, who tend to become slightly despondent when the old cases are so frequently poured into new bindings and labeled "estate planning" or linked with tax decisions, presumably in order to appear practical. Implicit in Mr. Barkdull's discussion is the recognition that problems in future interests, although circumscribed by the tax laws, are of cardinal importance to lawyers who seek to advise clients as to the transmission of property.

Now that Professor Simes has given us, through his treatise and other writings, a comprehensive statement of future interests, it would be of benefit if he or others with the facilities and funds for research would gather data upon which realistic reform, if needed, could be based. Such a study would involve a statistical treatment of the number of wills actually defeated by the Rule Against Perpetuities, the frequency of eccentric devises and bequests, the size of fortunes since the New Deal estate tax program, and the relationship between the transfer of wealth and the control of other values, such as power and education. To aid this study, legal philosophers might re-examine the premises for freedom of testation in terms of twentieth century America. Perhaps Hobhouse in 1880 did not write the final words.11

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11The Dead Hand (1880).