Vanderbilt Law Review

Volume 5
Issue 2 *Issue 2 - February 1952*

Article 7

2-1952

Book Reviews

Robert J. Lynn (reviewer)

William J. Bowe (reviewer)

Samuel J. Foosaner (reviewer)

Stanley D. Ross (reviewer)

BOOK REVIEWS

HANDBOOK ON THE LAW OF FUTURE INTERESTS. By Lewis M. Simes.[1] St. Paul, West Publishing Co., 1951. Pp. xv, 495. $8.00.

In the preface to his latest work Professor Simes notes that law teachers for many years "have felt the need for a concise textbook on . . . Future Interests which could be placed in the hands of their students" (p.v.), and that the practicing lawyer too may find such a text "helpful in securing the broad view of general principles which he so often needs before examining the almost infinite ramifications of the local law pertaining to a partcicular ease." (p.v.) Cognizant of Professor Simes' eminence in the property field, we may assume that even the bench will utilize this addition to the few modern commentaries on the problems implicit in our inherited future interests structure.[2]

The contents of this member of the hornbook series, already hailed as "a clear, concise, well written book . . . by a master of the subject."[3] are subdivided as follows: Part I: The Feudal Heritage (historical introduction, classification of future interests, the destructibility rule, the Rule in Shelley's Case, the Worthier Title Doctrine); Part 2: Characteristics of Future Interests (transfer, creditors' claims, partition and judicial sale, protection against possessory holder and third parties, effect of adverse possession and like statutes); Part 3: Powers of Appointment; Part 4: Construction (including class gifts); Part 5: Restraints on Alienation and Perpetuities. This arrangement parallels that of Simes' casebook[4] and roughly approximates that of Leach's.[5] Since the problem of policy limits on dead-hand control permeates the field of future interests, the subject of restraints might have been introduced at an earlier point, but concededly that is easier said than done. The pattern followed is the traditional one.[6]

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1. Mechem Professor of Law, University of Michigan; author, THE LAW OF FUTURE INTERESTS (1936) (3 vols.).

2. Although CAREY AND SCHUYLER, ILLINOIS LAW OF FUTURE INTERESTS (1941), is recent and is comparatively short (670 pages), its emphasis on local law probably discourages its utilization by students. This is unfortunate, for it is highly readable and thought-provoking. SPITZ, CONDITIONAL AND FUTURE INTERESTS IN PROPERTY (1912), is much shorter (269 pages) but has not been brought up to date. 3 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY-FUTURE INTERESTS (1947), is part of a three volume treatise.

3. Jones, Book Review, 4 J. LEGAL EDUC. 109 (1951).

4. SIMES, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS (2d ed. 1951).

5. LEACH, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS (2d ed. 1940).

6. POWELL, CASES ON FUTURE INTERESTS (2d ed. 1937), has substantially the same arrangement as SIMES, *op. cit. supra* note 4 and LEACH, *op. cit. supra* note 5.

I do not profess expertness in the field of future interests.[7] Rather, I am one of those struggling students toward whom, in part at least, Simes' commentary is directed. As such, I'm interested not only in what the traditional statements of future interests law are, but also in where they originated and how they are used by lawyers and judges. But beyond that, I'd like to discover the purposes which underlie their manipulation in order to determine whether decisions reached square with objectives sought.

Insofar as anyone can, Simes provides answers to the initial question of most students. Indeed, the blackletter encountered in this hornbook rivals that of the *Restatement,* upon which Simes heavily relies.[8] Functional equivalents are largely ignored,[9] but then, they usually are. The accepted doctrine is set out as fully as circumstances permit. Appropriate commentary thereon is provided.

In our attempt to master the fundamentals of property law, we have been admonished not to abandon history.[10] Simes does not. He not only at an early point[11] devotes some dozen pages to the origins and the development of English land law, but also makes brief references throughout his text to pertinent historical background.[12] Such allusions are helpful. Handicapped though he is by space limitations, Simes does a good job of recounting the accepted version of where the law came from.

Furthermore, he assures us that "an effort has been made to eliminate the abracadabra so often found in discussions of this field of the law." (p.v.) The book reflects the attempt. For example, he demonstrates that "alternative

7. He is a brave man who does. I'm reminded of a passage from Leach, *Powers of Sale in Trustees and the Rule against Perpetuities,* 47 HARV. L. REV. 948, 950 (1934): "The astute reader will gather that the foregoing localized attack on the credibility of Professor Gray is the product of a fear complex. And this is correct . . . . It is a matter of some temerity to cross swords with the master upon his own battleground. But some care will be taken herein to show that he gave the problem [validity of powers of sale] little consideration and (speak it softly) misread a few cases."

8. "Throughout these pages I have treated the American Law Institute Restatement of the Law of Property as original source material and as the 'standard of perfection' in this field of law, as indeed it is." (P. v.) The appearance of the volumes of the *Restatement of Property on Future Interests* did not evoke universal acclaim. See McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform,* 55 HARV. L. REV. 1077 (1942), the last line of which reads as follows: "To make a superb inventory of Augean stables is not to cleanse them." *Id.* at 1115.

9. ". . . the possibility of reverter arising on the creation of a determinable fee or fee simple conditional is a different type of future interest from the power of termination and should not be confused with the latter." (p. 45.) *But cf.:* "It is easy to overemphasize the importance of . . . classification of future interests. For there are many situations in which a rule of law applies to two or more interests indiscriminately . . . ." (p. 24.)

10. "That key [to the understanding of the common law of real property] is the historical approach. Without it the law of real property is a meaningless puzzle, a matter of mere words. With it one understands and goes ahead to better things, for the historical approach does not mean a slavery to the past." Bordwell, Book Review, 1 J. LEGAL EDUC. 326, 327 (1948).

11. Chapter 2.

12. For example, he devotes several pages (169-71) to explaining the origins of the power of appointment.

contingent remainders" can be transformed into a "vested remainder" and an "executory interest."[13] The student seeking some familiarity with traditional statements of future interests law by muddling through case materials may thereby become aware of methods of manipulation. Illustrating techniques, as Simes does, makes perception more likely. The line between stimulating the inquiring mind and spoon-feeding the student body is difficult to draw. Fear of falling into the latter practice does not excuse abandonment of the former. Who has ever succeeded in fully disclosing how the white rabbit is produced from the future interests rag-bag? Identifying verbalisms makes the task of the student difficult rather than easy. The use of this hornbook in the law school library need not be proscribed.

So long as we ask what the law is, where it originated, and how it is handled, Simes' formulation of doctrine, his historical references, and his demonstrations of manipulation are decidedly helpful. But when we get beyond the elementary and try to discover why manipulation is resorted to and whether the results achieved through manipulation implement purported objectives, we are pretty much left floundering. Part 4 of Simes' text is devoted to construction. The initial chapter of that section (c. 16) contains some frank admissions. Consider, for example, the following:

> "We may go even farther and say that some so-called rules of construction have little or no effect in deciding cases. They are merely so much 'window dressing', used to give a more plausible appearance to conclusions already arrived at."[14]

We students like such language. In law school we thought it "realistic." Is an observation from the opposite page equally penetrating?

> "Where do courts get the assumptions which enable them to find a meaning which the testator was not aware of? It is believed that they draw upon their own knowledge and experience in determining what a normal person would do under like circumstances; and that they sometimes, consciously or unconsciously, apply ideas of sound public policy in giving a particular meaning to the written instrument. *Most important of all, they apply rules of construction.*"[15]

Is there any distinction between applying "ideas of . . . public policy" (sound or unsound) and applying "rules of construction"? When we choose between "vested" and "contingent," between saving a gift and letting it fail, between keeping wealth within the family and permitting it to pass to strangers, what underlying preferences dictate the result? What inarticulated policies do we further when applying "rules of construction"? Do such inarticulated policies reflect the preferences of most of us on a variety of unrelated problems (transfer of claims, limits on dead hand control, taxation, etc.) or do

13. SIMES, p. 35.
14. SIMES, p. 259.
15. SIMES, p. 258 (italics added).

they mirror the opinions of a powerful minority? Do our policies make sense?

Perhaps it is too much to ask of an author that he delineate answers to such questions in a book of modest length.[16] Perhaps—but I don't think so. The future interests structure, the interstitial doctrine, and the manipulation of doctrine exist to a purpose. If study of the system is to be fruitful, the purpose must be explored. When working with a small group of students, a talented teacher has an opportunity to suggest purpose. When the class is larger, the more astute students may hazard guesses largely unaided; the rest are so entangled in intricacies that they lose all sight of purpose. It is members of this latter group who turn from case materials to texts. It is regrettable that Simes' hornbook, which faithfully reproduces doctrine, serves primarily only as a vehicle for perpetuating it.[17]

ROBERT J. LYNN*

TAX SAVINGS IN REAL ESTATE TRANSACTIONS. Prepared by Bureau of Analysis, Davenport, Iowa. Chicago: Published under auspices of National Institute of Real Estate Brokers of the National Association of Real Estate Boards, 1951. Pp. 98. $5.00.

This book, designed as a handy reference for real estate brokers, discusses and illustrates the many tax savings and tax pitfalls that may be present in real estate transactions. Tax problems are involved in every purchase, sale, exchange or lease of real property. The form and timing of these transactions, being within the control of the parties, frequently present opportunities for very substantial tax savings. Conversely, failure to recognize the tax problems may result in costly and unnecessary tax burdens.

While this little volume is written for the lay reader, the general practitioner will find it extremely helpful (as a source of suggestions, warnings and tax-saving possibilities) in shaping his thinking during the preliminary negotiations between vendor and purchaser or landlord and tenant. For example, if he represents a vendor, Chapter I reminds him that real property may be a capital asset, a "117(j) asset" or an asset held primarily for resale;

16. Dean Prosser refused to be restricted by the hornbook tradition. PROSSER, TORTS (1941).

17. "As long as law students are taught in strict terms of legal formulae, the teacher need have no particular worry about the underlying political, economic, and social assumptions upon which the legal doctrines are based. The very fact that these assumptions are submerged and not examined assures that they will be acceptable to conventional forces of society." Emerson, Book Review, 1 J. LEGAL EDUC. 328, 330 (1948).

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and it points up with clear illustrations the different tax consequences which attach to each classification. It suggests methods of partly or wholly delaying recognition of gain or sale by use of an option, an executory contract, a conditional contract, a lease with purchase option, an installment sale, a deferred payment sale or an escrow agreement. Tax consequences turning on the identity of the seller—individual, partnership, corporation—with some pertinent tax-saving plans, conclude the chapter.

Chapter II deals with the problems of purchasers. The importance of advance planning becomes apparent. Buying is rarely a taxable event. But the tax consequences on a later sale not infrequently are fixed—consciously or unconsciously—at the time of purchase. Cost-basis problems and specific allocation of the price to the units purchased with future tax consequences in mind should never be ignored. The tax effects of taking title in corporate, individual, or joint names (too often overlooked) are stressed.

There follow chapters on tax-saving possibilities in real estate exchanges, in leases and in mortgages, with a final chapter covering miscellaneous deductions not elsewhere treated.

This book is recommended for careful reading by the nontax lawyer who advises on real estate matters (and what lawyer does not?). It will impress him with the value of advance planning, with the tax-saving possibilities open to his clients by properly shaping transactions. It will warn him of the tax pitfalls of careless buying, selling and leasing. It will remind him that the real estate lawyer can no longer follow the traditional patterns of the conveyancers prior to the days of the income tax. The tax share of the total purchase price or total rental is today so large that it always is or should be an important factor in the negotiations—frequently it is the factor which will seal or disrupt the deal in its formative stages. Often new tax plans may bring dead deals to life.

Since the publication of this volume the 1951 Revenue Act has introduced important changes. The long overdue relief for the seller of residential property who purchases a new home has finally become law. The change in the method of offsetting short term with long term transactions has made a few of the examples obsolete. But the new legislation has not to any appreciable extent outdated the text. If any one of the many summaries of the 1951 Act is slipped into the cover, this book should continue to be an extremely helpful and useful guide in spotting the tax problems and tax possibilities present in typical real estate transactions.

WILLIAM J. BOWE*

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INCOME TAX TREATMENT OF LIFE INSURANCE PROCEEDS AND OTHER TAX ARTICLES. By William J. Bowe. Nashville: Vanderbilt University Press, 1951. Pp. 90. $2.10.

Such a dearth of authoritative writing exists with respect to taxation of life insurance that any worthwhile discussion of the many problems prevalent in this ever-growing field merits careful review.

In his book entitled "Income Tax Treatment of Life Insurance Proceeds", Professor William J. Bowe of Vanderbilt University, presents in succinct, yet understandable fashion, an analysis of some of the more important phases of this subject.

Exploring first, the Congressional intendment in the enactment of Section 22(b) as part of the Internal Revenue Code, Professor Bowe interestingly develops the exemption of life insurance proceeds on the one hand, and the subjecting of them to income taxes in the cases of transfers for value, on the other.

The author emphasizes a number of the important ways in which life insurance constitutes a convincing response to tax problems. He persuasively stresses ways in which estate tax savings may be effectuated through lifetime gifts. He discusses tax problems which arise from the ownership of life insurance policies by corporations, touching upon Section 115(g) of the Internal Revenue Code, which entails some of the most important language in the Code affecting life insurance, and to which all too few taxpayers pay sufficient heed in connection with life insurance carried in corporate stock purchase and deferred compensation arrangements.

In spite of its brevity, Professor Bowe's book offers much enlightening information and constitutes meritorious reading for life underwriters, lawyers, accountants and trust officers.

SAMUEL J. FOOSANER*

JUSTICE ACCORDING TO LAW. By Roscoe Pound. New Haven: Yale University Press 1951. Pp. 98. $2.50.

These 91 pages consist of three lectures delivered by Dean Pound at Westminster College. From the blurbs and advertisements, the reader is apparently expected to direct his attention to the third lecture of this group. This final lecture appears after Dean Pound has discussed both Justice and Law in his own inimitable analytical and historical fashion. Let us look back on these expositions later because if things are as bad as the Dean

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suggests they might be on their way to being, the great taught tradition of our law may well be losing its significance.

Dean Pound shows that he does not like the practice of administrative law. He claims it produces executive justice rather than judicial justice. Our constitutional system was based on the principle of separation of powers. This means that judicial function should be performed by the judiciary. But we know, as the Dean says, that all govermental functions cannot be neatly and clearly assigned to one or another of the govermental departments. The legislature must make an assignment. And as the years pass, the legislature or Congress has been making such assignments. "The society of today demands services beyond those that the state which only maintained order and repaired injuries could maintain." (P. 78.) In providing these services administrative agencies were created for specific purposes. For example we have an agency to establish ceiling prices where necessary to prevent further inflation. Dean Pound does not say that such an agency is bad. He does say that those who favor this and similar agencies frequently wish to make the decisions of such agencies final and do away with judicial review. This is undesirable because "a dominant administration, not checked by law applied by an independent judiciary, means a mere preachment bill of rights, a hierarchy of superman administrative officials who *ex officio* know what is good for us better than we know ourselves, and ultimately a super-superman to give directions to and maintain order and eliminate friction in the hierarchy." (Pp. 83-84.) This point should not be labored. Dean Pound does not say that court review is gone; he is using strong language to urge vigilance in preserving judicial justice. I am sure that most of us agree on this point. Further, it should be said that the Dean's analysis of the mind of the administrative lawyer does not seem to reflect that mind as this writer has seen that mind working in some major agencies of the Federal Government. I have never heard any Government attorney fret at the necessity of defending an administrative decision in the Emergency Court of Appeals. There is never anything but enthusiasm at the prospect of a challenge to court action.

My own feeling is that the greatest needs for a lawyer today are both to get a better understanding of how our economy actually works and to have a firm grasp of sound statistical methods. These are the essential tools for more effective administrative action. The basic legal requirement is that decisions of these administrative agencies should not be arbitrary or capricious. Some pattern of rational basis should be apparent in the explanation of these decisions. But of many possible rational patterns, not all need to have any relation to actuality. Logic alone does not point to actual business practice. This is the real weakness of administrative agencies

today. It is a weakness that stems from the mind and not the heart. If we are all the recipients of a great taught tradition there is no reason to insist that we are likely to practice it only after we have donned judicial robes. The sense of justice and equity are to be found in full measure in administrative agencies.

In short, it is unlikely that any reader of this review or of Dean Pound's little work will doubt that "the real foe of absolution is law." (P. 91.) Such a reader will have been one of the recipients of our taught tradition of law. The law "presupposes a life measured by reason, a legal order measured by reason, and a judicial process carried on by applying a reasoned technique to experience developed by reason and reason tested by experience." (P. 91.) These presuppositions are examined by Dean Pound in the first two lectures of this volume.

The end of civilized life is the maximum satisfaction of human wants or expectations. To achieve this end we must have order in society. There must be "systematic adjustments and reasoned orderings according to an authoritative technique." (P. 30.) This is social engineering. "The science of law is a science of social engineering having to do with that part of the whole field which may be achieved by the ordering of human relations through the action of politically organized society." (P. 30.) Since the 16th century, the authoritative action of the political forces has held the power in society. But this power has not been necessarily exercised in a haphazard or arbitrary fashion. Where a judiciary was able to establish itself as an appropriate part of the government, as in England and America, the authoritative action of that government was strongly limited by authoritative traditional ideals as voiced by the judiciary. The expressions of the judiciary are based upon an "ideal relation among men which we seek to promote and maintain in civilized society and toward which we direct social control." (P. 2.) Thus the ends of men and the ideals of the judiciary are similar, as they should be. Rights created in accordance with such an ideal are not ethereal. They will be pragmatically founded upon the actual social order and the normal expectations of men within such order.

This brief summary does no justice at all to the learning, understanding, and clarity of Dean Pound. It is merely intended to show the framework over which the Dean wanders. This little volume is a good introduction to the work of this great legal scholar. He says it embodies the impressions of sixty years of the practice and teaching of law. Those sixty years of gigantic labor have surely served in no small measure to strengthen the taught tradition of the law in this country.

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MR. JUSTICE SUTHERLAND. By Joel Francis Paschal. Princeton: Princeton University Press, 1951. Pp. xii, 267. $4.00

The author appraises this work as "not so much a biography as an essay in government" (p. vii) and he has used as a subtitle "A Man Against the State."

The book spotlights the sources of Sutherland's political, social and economic views and the opportunities he enjoyed, during his public career, to give to his views a large practical effect.

George Sutherland was born in England in 1862 and came to Utah with his parents in 1863. He attended Brigham Young Academy (though not a Mormon himself, his father had for a time been of that faith) and studied law at the University of Michigan while Cooley was dean. He was a successful practitioner in Utah and after service in the Utah legislature he served in the Congress of the United States, first in the House (1901-03) and later in the Senate (1905-17), afterwards engaging in practice in Washington, D. C., until he was appointed in 1922 as an Associate Justice of the Supreme Court, in which capacity he served until his retirement in 1938.

He succeeded Elihu Root in 1917 as president of the American Bar Association, lectured at Columbia University, made frequent public addresses and was a national figure at the time of his appointment to the Supreme Court.

He was greatly concerned to see to it that an individual person not be subjected to governmental restraints and commands which he considered to be beyond the power of government. This concern was not confined to economic rights but extended to the great civil liberties and human freedoms which he insisted upon. He made no apology for being "a little bit conservative" but he protested that he did not stand still. He firmly believed that the general good would be best advanced by giving large scope for individual initiative. He feared government dictatorship and he opposed the making of reforms with such speed as might extinguish the flame on the torch of liberty.

His support was given to legislation to improve working conditions of seamen. He advocated adoption of a workmen's compensation statute for employees of interstate carriers, the Railway Safety Appliance Act, and the Hours of Labor Act. He favored postal savings banks and the parcel post. He strongly supported woman suffrage. These were some of the positions he had taken in his public life before he became a member of the Supreme Court.

Aside from Sutherland's firm position against governmental interference in the economic life of the individual the author notes that Sutherland played a large role in the Court's general extension of the blessings of human liberty under the Constitution and declares that Sutherland's influence in the field of the nation's power in foreign relations "today overshadows that of all other justices and it is not likely that it will ever be diminished." (P. 208.) Sutherland, says the author, won perhaps the most lasting success of his career in winning approval for the idea that the power of the United States as to foreign relations derives from "membership in the family of nations" and hence "is not subject to the usual constitutional restraints." (P. 221.)

In 1941, a year before Sutherland's death, he was awarded an honorary degree by Brigham Young University and upon this occasion he prepared an address which the author describes as:

> ". . . a valedictory, containing mellow recollections of days long gone and the sage advice of a man who had reached his goal. His goal, he suggested, had been not merely to be a good lawyer, or a good legislator, or a good judge. These were as nothing compared to the ambition of being 'a good man.'" (P. 235.)

Appendix A lists cases in which Mr. Justice Sutherland wrote opinions while he was a member of the Supreme Court. Altogether, he wrote 313 opinions which included 24 dissenting opinions and one separate concurring opinion.

Upon his retirement from active service on the bench, the other members of the Court addressed a letter to him expressing warm affection and high appreciation of distinguished ability and unremitting devotion to the work of the Court, his habit of thoroughness and precision, his tenacity of purpose, unvarying kindliness and unfailing humor.

At the October Term, 1944, Resolutions were read in memory of Mr. Justice Sutherland. Chief Justice Stone declared upon this occasion:

> "The time will come when it will be recognized, perhaps more clearly than it is at present, how fortunate it has been for the true progress of the law that, at a time when the trend was in the opposite direction, there sat upon this Bench a man of stalwart independence, and of the purest character who, without a trace of intellectual arrogance, and always with respectful toleration for the views of colleagues who differed with him, fought stoutly for the constitutional guarantees of the liberty of the individual." (P. 245.)

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