

Cases on Future Interests (Book Review)

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precise terms in law has always failed. Legal terms are the legal tender of the law, to be used and applied as lawyers and judges understand them.

The author's review of the rights which are included within the concept of property, particularly his treatment of the doubtful questions of what is and what is not property, so important in the fields of equity and constitutional law, is far more valuable and significant than his criticisms of legal terms in common use and the occasional misuse of those terms in opinions by the courts as cited in the appendix. It would require a volume to adequately answer these criticisms. It is enough to say that in the great majority of cases cited the terms used carry very exact meanings, in the light of the context, to the average lawyer and judge. Nevertheless it is good for students of the law to consider the possible meanings which a student of economics may attach to legal phrases. Definitions and disputed meanings of mere words and phrases, so important to scientists, are very much less important to legal scholarship. The law teacher and writer has little difficulty in expounding legal principles with the use of the legal vocabulary which has been handed on to him. His interest is in the substance of the subject, not in mere definitions and possible double meanings of terms actually understood in practical use.

WILLIAM F. WALSH.*

CASES ON FUTURE INTERESTS. By Albert M. Kales. Second edition. By Horace E. Whiteside. St. Paul: West Publishing Co., 1936, pp. xvi, 781.

This book is a second edition, prepared by Professor Whiteside of Cornell, of a casebook of Professor Kales which appeared in 1917. Professor Kales was a student and successor at Harvard Law School of Professor Gray, and quite naturally was greatly influenced by his preceptor and predecessor. One particular in which Kales follows Gray is in the large percentage of English (as opposed to American) cases found in the collection.¹

Probably no subject in the undergraduate curriculum offers such a wide difference of opinion as to the best method of treatment, from a pedagogical standpoint, as a course on real property in general, and future interests in particular. Professor Walsh tells us that most of the modern New York law of future estates consists in the application of the rule against perpetuities.² About thirty per cent of the present work is devoted to that subject. The nature and location of the law school may have a lot to do with the way a course in future interests is handled. This involves the complicated and controversial question of the extent to which cases and statutes of other jurisdictions should be referred to. Assuming that the chief aim of law schools is to fit their students for the practice of the law in the jurisdictions in which they

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¹ See note 6, *infra*.

² WALSH, FUTURE ESTATES IN NEW YORK (1931) 68, 76, 77.

intend to settle, it is certainly a plausible argument that the needs of the students of law schools such as St. John's University Law School (almost all of whom intend to practice in New York) and of Newark University Law School (almost all of whom intend to practice in New Jersey) will differ considerably from the needs of the students of so-called "national" law schools, such as Yale, Michigan or Harvard, which may have as many as thirty different jurisdictions represented among their students. Assuming that Professor Walsh is correct,³ there seems to be considerable justification for so-called "local" law schools, situated in New York State, devoting a major portion of the course on future interests to the peculiar New York statutes on the subject, and to cases construing those statutes. It may well be that the best way to train students for the practice of the law in New York State is to give them a good general theoretical and historical background in the law, including future interests, and hope that they can take such things as local statutes in stride.

All this leads the present reviewer to the conclusion that casebooks on future interests should be divided into two classes—one to be used in New York law schools, and one to be used elsewhere. A middle ground seems hopeless. Possibly a general book could be prepared, with a separate supplement for New Yorkers. While it is true that at times many states have passed statutes (many since repealed) modelled more or less upon the New York statute, at the present they are not very serious, for a skilled legal draughtsman can, in every state except New York (and Louisiana, which may be disregarded because it is a civil law state), set up in effect a trust of land measured by any number of lives in being, through various judicial and legislative devices, such as the doctrine of equitable conversion, transferring land to a real estate holding company and tying up the shares of the holding company in those states where the rule has been held not to apply to personal property, *etc.*⁴ And, so far as New York itself is concerned, it is not impossible that some day our rule against perpetuities will be changed by the legislature, and a lot of decisions and pedantic learning will be cast into the limbo of forgotten curiosities, along with dower, curtesy, fines and recoveries, co-parcenary, and other student nightmares.⁵

For the above reasons, it seems proper, if not necessary, before criticizing a casebook on future interests, to learn for what purposes and for what students it is designed. Professor Kales, in his preface to the first edition in 1917, stated that the work was an abridgement of a larger edition, the abridged edition being suitable for a course of two lectures a week for half a year. It was prepared for use in law schools in all parts of the country. Professor Kales also stated that the work follows Professor Gray's collection of cases and the latter's analysis of the subjects. In his preface to the present or second edition, Professor Whiteside says that he has followed the arrangement

³ WALSH, *loc. cit. supra* note 2.

⁴ *E.g.*, Michigan and Wisconsin (pp. 538, 539).

⁵ The Law Revision Commission of the State of New York published last year an elaborate study, prepared by Professor Whiteside, in collaboration with Professor Powell of Columbia Law School, recommending a change so as to permit limitations based upon any number of lives and actual minorities, or, in the alternative, 21 years. (1936 N. Y. Leg. Doc. No. 65 (H).) The practicing lawyer as well as the law teacher will find this study very valuable.

of Professor Kales, and has retained much of the historical material. A chapter on statutory modifications of the rule against perpetuities has been added (Chapter 24), which includes references to all important modifying statutes and case material illustrating the operation of the principal statutory system—that of New York. Professor Whiteside is one of New York's outstanding authorities on future interests. It would be very interesting to see what he would do if he had a free hand, and was not bound by the order and content of a former work.

Since it is based upon Gray's treatment of the subject, the work follows orthodox lines. It is divided into five parts: Part I, Origin and Development in General, including Reversions, Remainders, Executory Interest and the Rule in Shelley's Case; Part II, Construction of Limitations; Part III, Powers; Part IV, The Rule Against Perpetuities; and Part V, Illegal Conditions and Restraints. All the well-known landmarks, English and American, are included. There are 198 principal cases, of which 108 are English decisions. Since publishers of casebooks designed to have a national market have often been accused, perhaps unjustly, of attempting to increase their appeal, and hence their sale, by unduly emphasizing geography rather than quality in the selection of cases, it is interesting to note that the present collection has cases from 24 American states, 10 of which are represented by only one case each, 41 cases (10 from New York) having been decided since 1917. Superstitious Republicans may attach some significance to the fact that this book, which appeared in the midst of the presidential campaign of 1936, concludes Chapter 13 with two cases from Maine and Vermont!⁶

⁶ Professor Bolich, of Duke, in a recent review of another casebook on the same subject (Book Review, *Leach, Cases and Materials on the Law of Future Interests* (1935), Bryan Bolich (1936) 25 GEO. L. J. 243), points out that in 1928 Professor Powell broke away from Gray and Kales and greatly reduced the number of English cases in his compilation. Professor Bolich has made the following interesting computation of English and American cases in four leading casebooks on future interests, the book of Kales being the unabridged one:

(The years are the dates when the cases were decided)

	Prior to 1800	1800-1850	1851-1899	1900-1908	1900-1917	1900-1920	1921-1928	1921-1935
Gray (1908).....	96 Eng.	93 (83 Eng. 10 Am.)	106 (85 Eng. 19 Am. 2 N.S.W.)	11 (10 Eng. 1 Am.)				
Kales (1917)....		91 Eng. 10 Am.)	85 (75 Eng. 10 Am.)	143 (96 Eng. 47 Am.)	39 (11 Eng. 28 Am.)			
Powell (1928)..	26	19 (13 Eng. 6 Am.)	67 (23 Eng. 44 Am.)	59 (2 Eng. 57 Am.)	42 (2 Eng. 40 Am.)			
Leach (1935)...	30 Eng.	26 (24 Eng. 2 Am.)	83 (40 Eng. 43 Am.)	54 (9 Eng. 45 Am.)	54 (7 Eng. 47 Am.)			

These figures are principal cases only, *i.e.*, considered by the editors to be such.

There are many extracts from books on legal history—a useful, in fact, indispensable, aid to the student. I think there might have been more extracts from Holdsworth, though this is a matter of purely personal preference. There are elaborate footnotes containing many references to law review articles of recent date, and a great many citations to New York cases. In fact, paradoxical as it may seem, although this book seems not especially well adapted for New York law students—because of the comparative paucity of New York cases—nevertheless, because of the unusual richness of the footnotes, it should be a very useful book, for the next few years at least, for the New York practitioner who has any sort of a practice in estates and trusts, for he would have, in a single volume of reasonable size and expense, material which would refresh his recollection of his law school course and which would, at the same time, give him speedy references to current material: this would be invaluable in preparing a brief, or drawing a will or trust.

There are several passages in the book which appeal to one's sense of humor, although a casebook on future interest ordinarily holds out meager prospects along such lines. A New York trust was held invalid because "limited on the lives of three dogs, two cats and one retired policeman"—a decision, by the way, of our Surrogate Wingate.⁷ There is a reference to a case of the Green Mountain State involving a lease for "as long as grass grows and water runs".⁸ The very first case in the book cites with approval a textbook by the editor (Professor Kales), thus creating the proper respect and awe on the part of students towards the author-teacher in the very first recitation.⁹ We learn how some Englishmen about the time of the American Revolution diverted their ample leisure—they indulged in a controversy over the Rule in Shelley's Case!¹⁰ Students of Roman law who have some familiarity with *res sacrae* and *res religiosae*, and those who have orthodox or fundamentalist ideas concerning just what is sacrosanct and holy, will be interested to read about the "sacred rule" to the effect that no limitation shall be construed as an executory or shifting use which can by any possibility take effect by way of remainder.¹¹ We derive some consolation from the doleful admission in an opinion of a brilliant and erudite British judge, "What I have said is hardly intelligible * * *"—a conclusion which we see no sound reason for disputing.¹² We get a certain amount of malicious glee in learning that the counsel for that indefatigable and indomitable litigant, the Commissioner of Internal Revenue, occasionally has to earn his salary by struggling with such things as powers of appointment.¹³ And we feel that we would very much like

⁷ P. 473, Matter of Howells' Estate, 145 Misc. 557, 260 N. Y. Supp. 598 (1932), note in 42 YALE L. J. 1290. The present writer was of counsel in this case. However, he did *not* prepare the will!

⁸ P. 25, Univ. of Vermont v. Ward, 104 Vt. 239, 158 Atl. 773 (1932).

⁹ P. 8, North v. Graham, 235 Ill. 178, 85 N. E. 267 (1908).

¹⁰ P. 137, citing Fearn, 155-173, and 3 CAMPBELL, CHIEF JUSTICES (3d ed.) 305-312.

¹¹ P. 503, *In re Ashforth*, L. R. 1 Ch. 535 (1905), quoting Lord St. Leonards' views on *Purefoy v. Rogers*, 2 Wms. Saunders 768 (1699).

¹² P. 609, Jessel, M. R., in *Miles v. Harford*, 12 Ch. D. 691, 702-705.

¹³ P. 330, *Mississippi Valley Trust Co. v. Commissioner of Internal Revenue*, 72 F. (2d) 197 (C. C. A. 8th, 1934), *cert. denied*, 293 U. S. 604, 693,

to meet Professor Whiteside personally, and that he must be gifted with both a sense of humor and of balance, or otherwise he, a teacher of future interests of national reputation, would not have concluded the chapter on the rule against perpetuities with a footnote containing the following bitter blast:

"It is a matter of common knowledge that Future Interests is not properly a course but an obsession, and that teachers of it in time develop a complex, akin perhaps to the Jehovah-complex, which leads them to think that the law school exists for the sole purpose of teaching Future Interests."¹⁴

FRANKLIN F. RUSSELL.*

HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY. By Max Radin. St. Paul: West Publishing Co., 1936, pp. xxiv, 612.

One of the most encouraging manifestations of the growing interest in legal history in American law schools is found in the fact that the two leading lawbook publishers in this country have included in their textbook series works devoted to the history of the common law and written by men of high scholarly standing. It is heartening to specialists in American legal institutions to learn that the present text gives some attention, at least, to the experience of the common law when transplanted to this continent in colonial times, and also to more recent developments.

This book does not pretend to be for the specialist but is in the nature of an elementary treatise for the law student and follows the general pattern of the "Hornbook Series." It has the virtues of simplicity and comprehensiveness, and includes useful sections on such special subjects as Agency, Corporations, and the Family, often ignored in legal history texts, and also on American codification, the judges, and the literature of the law. Professor Radin, who has achieved special distinction as a civilian, confesses to no first-hand knowledge of the English manuscript sources, and has in large measure relied upon the standard secondary authorities. He has, however, made every endeavor to acquaint himself with the latest views of the specialists. Many of the desirable innovations and virtues of the volume are due to the fact that the author is a Romanist and a civilian,—and to this also must be attributed some of its insufficiencies.

In matters of organization and distribution of space, text writers should be free to follow their personal predilections, checked only by the element of peda-

55 Sup. Ct. 122 (1934). This case points an obvious moral to third-year law students who intend to enter large law offices after graduation—you cannot shake the dust of future interests from off your feet by the simple expedient of going into the tax department of a law office; future interests may catch up with you even in that haven!

¹⁴ P. 509. From a book review by Professor Philip Mechem, 19 IOWA L. BULL. 146, 149.

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