

Michigan Law Review

Volume 54 | Issue 4

1956

Simes: Public Policy and the Dead Hand

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Recommended Citation

W. B. Leach & John H. Morris, *Simes: Public Policy and the Dead Hand*, 54 MICH. L. REV. 580 (1956).
Available at: <https://repository.law.umich.edu/mlr/vol54/iss4/18>

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RECENT BOOKS

PUBLIC POLICY AND THE DEAD HAND. The Thomas M. Cooley Lectures, Sixth Series. By *Lewis M. Simes*. Ann Arbor: University of Michigan School of Law. 1955. Pp. xxii, 163.

The foreword to this book by Howard L. Barkdull—and a very good one indeed—is for all practical purposes a headnote that would have permitted these reviewers to take a hop-skip-and-jump through the text to pick up a quote or two and then pass gladsomely to prose composition consisting chiefly of a paraphrase of Barkdull.¹

But not with this book. Satiated as we are with literature on the rule against perpetuities and all its relatives, we have read this volume of Thomas M. Cooley lectures with nourishment, admiration and delight. Too often a series of lectures calls upon a learned man to rack his brain for appropriate material and then squeeze it into the required fifty-minute packages, each sufficiently independent to hold the attention of the tourist listener but all sufficiently integrated to fall under a single title. We are happy to report, with the satisfaction that comes from saying pleasant things about one held in affectionate regard, that Professor Simes has produced a fluent, readable book crammed with thoughtful analysis and the wisdom of long experience.

The rule against perpetuities doesn't come first in the book, but it comes first with these reviewers and, we suspect, with the author. Many of those who have labored long on this subject give the impression that the skies would fall if interests were permitted to vest more remotely than lives-plus-21-years. They are apt to suggest that the rule of Gray is a kind of eleventh commandment handed down from Sinai, axiomatic, sacrosanct, immutable. But it is not Professor Simes's way to take the rule for granted. He presents a discussion of the reasons for the rule which we find most penetrating. Naturally, he is hard put to it to discover reasons, operative in the days of Nottingham and Eldon, that still hold good today. He rejects the traditional view that the rule promotes alienability, for the excellent reason that nearly all future interests today are interests in a shifting corpus which trustees have the power to invest and re-invest. His conclusion is that the rule is justified because it "strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy"; and that it "tends to prevent a long continued freezing of capital."

We now beg leave to indulge briefly our drug-like addiction to controversy. When we first noted the title of chapter III, "The Policy against

¹ Just to make sure that the reader understands the headnote, there is an analytical table of contents that summarizes the foreword. Such double distillation is reminiscent of the treatment given to Toynbee's first six volumes. D. C. Somervell provided an abridgment in one volume of 558 pages (Oxford University Press, 1947) and then summarized his abridgment in an Argument of 22 pages. This process of giving the reader an option as to what he wants to read by offering him successively abridged versions of the text is a fine idea and should be extended.

Perpetuities: Dead Hand vs. Living Hand," we suspected that this continued the Chautauqua-type debate that one of us has been conducting with the author over the past three years in various law reviews and on various platforms. Furthermore, if either he or we were to be adjudged the Dead Hand we were prepared to place a small bet on who was chosen for this honor. In general our suspicions were justified.

Our learned friend agrees that reform of the rule against perpetuities is needed but he continues to disapprove the wait-and-see provisions of either the 1947 Pennsylvania or 1953 Massachusetts statutes. To our dismay he retracts an earlier approval of a general *cy-pres* approach and recommends penny-packet correctives for age-contingency-over-21 cases, unborn widow cases, and gifts "when my estate is settled," etc. We feel bound to point out that in a later part of the book the author disapproves, in another connection, the penny-packet statutory method by quoting an English lawyer: ". . . as is ever the case, when partial correction is attempted," there results "the greater evil of swelling the mass of law." If the author has here laid himself open to the charge of inconsistency we gladly wring any possible advantage from it. (We know that this paragraph is hopeless gobbledegook except to those who have followed the development of perpetuities reform in the past few years. But the purpose of this review is to intrigue, not expound. If the reader wishes to know all about these utterly fascinating things he should read Professor Simes's book.)

Once again, as he has done before, Professor Simes warns that "if legislative changes . . . are to be made, this should not be done in haste." Of course we agree—which reduces any area of dispute to the semantics of "haste." It is perhaps more practical to observe that anyone who wants to shape the course of perpetuities reform had better start drafting bills and seeking legislative support, for in the brief period since this book was written Maine and Connecticut have adopted the Massachusetts statute,² and the British in their impetuous way have taken firm steps toward framing legislation.

In a brilliant chapter Professor Simes gives what should be the *coup de grace* to the statutes against accumulations. He rightly points out that in practical operation these statutes, an emotional reaction to the vain-glorious will of Peter Thellusson, have caused expensive litigation about things they were never intended to affect (pension plans, clauses defining principal and income, etc.) and have not found Thellusson-type predators against whom the Republic needs protection. He points out that the New York statute, the prototype from which the eight others now in force were drawn, has had to be amended eight times within a hundred years to avoid unintended applications. It is a commentary on the phenomenon of institutional survival that, although no state has found any need for an accumulations statute since the original flurry of activity induced by the New York prototype, and although all the difficulties enumerated by Professor Simes have been abundantly demonstrated, only four of the thir-

² Me. Rev. Stat. (Supp. 1955) c. 160, §§27 to 33; Conn. Public Act No. 233 (1955). See Leach, "Perpetuities Legislation, Massachusetts Style," 67 HARV. L. REV. 1349 (1955).

teen states which originally enacted accumulations statutes have repealed them in form or in effect. To their credit these are California, Illinois, Michigan and Montana.

The author, taking a hard look at gifts to charity, finds past follies and present abuses. Among the museum specimens of fatuous gifts that have been held charitable he refers to the trust to disseminate the writings of Joanna Southcote, a woman of advanced years who believed she was enceinte by the Holy Ghost of a second Messiah; a bequest to maintain forever the library of the officer's mess of a particular regiment; a devise to establish a home for the care and support of worthy white women of unquestionable character and moral reputation, not less than 50 years old, who were born in Salem County, New Jersey; and miscellaneous gifts to teach shooting at moving objects, offer chess prizes, and provide rides on elephants at the zoo.³ These oddities offer no real threat to the public weal, for their total amount is trifling. More serious are the large quantitative gifts.

Professor Simes points out that charitable excesses were once kept under control by the Mortmain Acts and that it should be possible to take similar specific measures now. We agree with him and wish him well. But each of us has had recent experience in trying to achieve the passage of legislation on technical subjects that have no political attraction. We suspect that any restriction on charities, other than to subject them to taxation when they sponsor views that are inconsistent with the prevailing political climate, will meet a type of resistance, mostly religious in origin, that will defeat them.

A first chapter on "Free Will vs. Family" brings together in thoughtful manner dower, forced shares, and other matters relating to freedom of testation. One cannot read this chapter without concluding that the variations of existing statutes, as interpreted, are a blot on American jurisprudence.

We wish we could have been present at these lectures. They make good reading and must have made good listening. Furthermore, it must have been a great satisfaction to our learned friend to have the opportunity of painting long vistas of forest with no obligation to sketch any particular tree.

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³Note by Dr. Morris: Professor Simes does not mention one of my special favorites, a gift to ring church bells on the anniversary of the restoration of the monarchy: *held*, charitable as being for the advancement of religion. In re Pardoe, [1906] 2 Ch. 184.

* The reviewers are the authors of MORRIS AND LEACH, *THE RULE AGAINST PERPETUITIES*, to be published in 1956 by Stevens & Sons, London. Both have written extensively on matters relating to the book here under review. Professor Leach is an active proponent of statutory reform of the rule against perpetuities. Dr. Morris is a member of the Lord Chancellor's Law Reform Committee which is considering the desirability of statutory reform of the rule in England.