

CASES AND TEXT
ON
FUTURE INTERESTS AND
ESTATE PLANNING

Being the Successor to Leach, Cases and Materials
on the Law of Future Interests,
Second Edition, 1940

By
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PREFACE

This is shop-talk for teachers. The Foreword is orientation for students, if anybody can get them to read it.

This volume is the successor to Leach, *Cases on Future Interests* (2d ed. 1940); but the coverage, content, and treatment are so different that it would not be reasonably descriptive to call it a third edition. It is the start of a new stirps.

In the teaching of the functional area which the practitioner calls Estate Practice law schools differ considerably in curriculum arrangement. But, somehow or other, the students in all schools get offerings of Wills, Future Interests, and the essential ingredients of tax law as it affects family dispositions. Estate Practice teaching should be doubly oriented: (a) to planning and drafting and (b) to litigating issues of the validity and interpretation of dispositive instruments. This book is intended to cover this functional area with this double orientation, and we do not conceive that it is very important how the area is consolidated or split up in course structure. Since the book was written when one of us was teaching at Harvard and the other at Kansas we naturally thought of it in terms of these schools. Leach will use this book at Harvard in a third-year course (formerly a second-year course) two hours throughout the year, which is charged with responsibility for Wills, Future Interests and Estate Planning with ancillary responsibility for the tax aspects of family dispositions. Logan visualizes the book as the basis for the Kansas course structure: a two-hour course in Future Interests with Wills, Estate Planning, and Estate and Gift Taxation taught separately. We should be glad to offer suggestions as to use of the book in any particular curriculum arrangement that a given teacher is faced with—long or short courses with varying coverage.

Overlap with various other courses. In the use of this case-book selection of student assignments will somewhat depend upon other course coverage. For example, where students have used Casner & Leach, *Cases and Text on Property*, there will be little but review in Chapters I, III, and IV. Chapter II adds a new dimension to anything in Casner & Leach concerning possibilities of reverter and rights of entry, but it may largely duplicate parts of various courses in Titles or Conveyances. Chapter I may also overlap with Trusts, and a good many items with courses in Taxation. However, it is our view that (a) an integrated treatment of the subject is desirable and (b) a certain amount of overlap is not only inevitable but actually beneficial.

PREFACE

Coverage

The Table of Contents indicates that we start from a Future Interests base which isn't much different from what you would find in the old books of Gray and Kales.

Estate Planning; Drafting. We handle this by one complete estate plan and will (with comments) in Chapter XXVIII, a chapter on taxation of powers (Chapter XV), estate planning notes appended to all relevant chapters, two special notes on planning for the farmer and small businessman, and Problems throughout the book raising tax and drafting considerations.

Tax Aspects. Everyone knows that the statutory changes beginning with the Revenue Act of 1942 require the estate planner to achieve a mastery of the essentials of income, estate and gift taxation relevant to wills and trusts. This book does not seek to make the student a "tax man" capable of answering any and all questions which might be pertinent in an estate planning context. It seeks to attain the fairly modest goal of giving the student a basic knowledge of the tax structure which enables him to handle the usual situations, to ask the right questions of his client, and to know when to consult a tax expert and what questions to ask him. We hope the student will acquire enough basic training so that he can utilize the detailed treatment in the tax services and literature. The detailed analysis of the tax problems of J. Albert Thomas in Chapter XXVIII offers a case study which should bring down to the realm of practical application the various slices of tax law distributed throughout the book.¹

What we do not do in the planning-tax area. It has been wisely said that in writing a casebook or planning a course the hard problem is what to leave out. The best way to see what judgment we have made in this matter is to examine the table of contents of Professor A. James Casner's compendious *Estate Planning*, of which a third edition will appear nearly simultaneously with the publication of this book. Some of the things we omit are short-term trusts, charitable dispositions, life insurance policy options, and employee benefits. For coverage of such items and for elaboration of those we cover, we

1. There has been much comment of late that under the Kennedy administration the tax laws will be substantially revised. But we doubt there will be basic changes in the general approach to the tax problems discussed in this book. For example, we cannot believe the marital deduction will be eliminated or that taxation of powers of appointment will be

greatly changed. Perhaps the five-year-throwback rule will undergo revision. It could stand some simplification. But we do not expect what we say in this book about taxes to become obsolete in the near future. If we are wrong, we can only promise to make corrections by issuing a supplement.

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commend to the student the Casner book (with its annual supplements), a volume which both of us keep constantly at the elbow.

Wills. It has never seemed to us that Wills is a "hard" subject; any competent student can pick it up from a text book. Furthermore, a good deal of it—probate (or Surrogate or Orphans' Court) practice—is essentially local, well within the capabilities of a bar-review course. Still, there are basic doctrines with which a student should be familiar before he leaves law school. Most of these we have introduced by a process of infiltration—sneaking them into chapters primarily designed to analyze future interests problems. The will and commentaries in Chapter XXVIII have been so contrived as to include problems of ademption, satisfaction, execution of wills, and incorporation by reference. Cases or Problems in various chapters deal with dependent relative revocation, the effect of divorce upon a pre-divorce will, the election (dissent) of the surviving spouse to take against the will, lapsed legacies and anti-lapse statutes, election of a devisee whose own property is "devised" by the testator, investment by an executor and his power to carry on a business, and devolution on intestacy. These infiltrated items may be used by the professor as a springboard for such more extended treatment (general or local, according to circumstances) as seems appropriate.

Method

The opinions have been rigorously cut down and statements of facts condensed in most instances. This is, in our opinion, a matter of simple fairness to students. They should read these cases—there is a "feel" to the law of property that cannot be acquired except through familiarity with judges' manners of thought and speech—but their time should not be wasted or their patience exhausted. No paragraph has been reprinted without a conviction that it contributes to education, in one way or another.

Problem cases have been inserted where they seem to serve a purpose, without design to spread them out evenly. They suggest applications or developments of the principal cases or probe related fields which should be kept in mind. Usually the parties are indicated by the letters of the alphabet, but occasionally names have been retained where the characters have acquired personality for us and may for the reader. *Biggs v. McCarty* (p. 350) may be a problem in the Rule in *Wild's Case* but it would be a callous soul indeed who could read a bare recital of its facts without sensing the high hopes and tragic end of the Kentucky Forty-niner and the struggles, obstetrical and economic, of the heroic Angeline. And who would rele-

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gate to the lustreless anonymity of A and B, Solomon Gottschalk Goldschmidt and his wife, Theobaldina (p. 388)?²

The introductory notes to the various chapters seek to make case-reading more profitable by orienting the mind to the problems involved—and possibly more enjoyable by whetting the appetite. We also provide substantial slices of text where, in our judgment, development through cases is unwieldy or unworkable. The obvious objection to this is that too much may be afforded to students by way of exposition, thus defeating the first purpose of the case method. But one nice thing about this subject is that you don't have to make it hard. It takes care of that by itself. Hence in many instances a degree of exposition is desirable which might be excessive elsewhere.

As to the Rule against Perpetuities we do not go as far as John Chipman Gray who said that the Rule *is* the law of future interests; but we do think it deserves extensive treatment, especially since the current (1961) wave of academic controversy, judicial re-thinking, and legislative reform provides an unusual opportunity to probe the economic and sociological policies back of the Rule. To our minds one way to teach jurisprudence—at least with a small “j”—is to examine a specific current problem where various desiderata of public policy come in conflict. We also inject perpetuities cases early and often in the discussion of other subjects. In planning estates and drafting instruments you cannot put the Rule off in a corner and deal with it when you feel so inclined. It is an everpresent threat. Some distributive treatment of the Rule therefore seems to us essential if competent planners and draftsmen are to be trained. We tell in all its detail the horror-story of the T. Jefferson Coolidge Trust litigated in *Sears v. Coolidge* (Chapter XXIII) in the hope that students using this book will go forth determined to give the lie to the cynical aphorism that it is the function of the probate court to distribute decedent estates fairly and equitably among the members of the probate bar.

Despite all the efforts of estate planning courses much litigation is going to arise in the future, and the economic security of many widows and children is going to depend on skillful representation in court. We do obeisance to the tour de force of Albert M. Kales in conceiving and successfully expounding the delicate distinction of *Aetna Life Insurance Company v. Hoppin* in Chapter IV. We point

2. The verbal voluptuary will find other attractions between these covers. There is an engaging lilt to Doe dem. Dolley v. Ward (p. 280). Giesbert Pottgieser (p. 392) had some claim to fame in his own right but assured

himself of immortality of a sort by naming his son Giesbert Pottgieser, Jr. And somehow the marital difficulties of Frank and Veronica Nogaj (Chapter II, n. 29) couldn't happen to two people named Jones.

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out in *Clapp v. Ingraham* (Chapter XVI) that the attorneys involved in that situation made, not one, but four successive mistakes. We dig into the unpublished materials on *Sears v. Coolidge* (Chapter XXIII) to suffer along with the battalion of lawyers engaged by the regiment of parties. We present, as it appeared to counsel for the widow in *Boston Safe Deposit & Trust Co. v. Waite* (Chapter XIII, Section 1), the torturing issue of settlement which he faced. We suggest that in *Estate of Bunnell* (Chapter XIII, Problem 11) counsel overlooked a mine of authorities collected in a law review article on the precise point at issue. And so on. In studying these cases it is an intriguing and valuable experience for the student to be asked whether, and how, the losing party could have done better than he did in court.

Nonsense

Over the years literally hundreds of poems have been submitted by students; we have included those which we consider worthy of publication—with only mild ethical doubts as to capitalizing on these efforts of students and even colleagues. Mostly we have requested permission for publication, which has been granted. To give an appropriate tone to the enterprise we have incorporated Shakespeare in the second footnote to the Foreword, but we cannot in candor state that all of the student verse is of Shakespearean quality. Still, it has made others laugh, laughter is a recognized lubricant to the mental processes, and if anyone thinks poetry inappropriate he has the obvious expedient of leaving it unread.³

Division of Labor Between the Editors

It is right that the nature of any co-authorship should be set forth. Logan has taken primary responsibility for Chapters V (Alienability), IX (Gifts to Classes), all of Part III (Powers of Appointment) and all tax and estate planning matters. Leach has taken primary responsibility for the rest. The operative word in the two previous sentences is “primary”; each chapter, as first drafted, has been submitted to the co-author and revised in accordance with comments thus induced. Consequently this book is a joint

3. Professor Ashbel G. Gulliver has rather taken the heat off us in this respect; his recent *Cases on Future Interests* (1959) contains a liberal sprinkling of verse. But we wish to state without reservation that the verse in the present volume is superior to his in (a) quantity, (b) brashness, and even possibly (c) artistic merit. Anyone who chooses case-books on the basis of verse should

have no difficulty. We court challenge on this, to be settled either by a jury of suitably prejudiced experts or trial by battle with iambic pentameters at the distance between Cambridge and New Haven. As distinguished precedent for both Gulliver and us, we cite Sir Frederick Pollock's *Leading Cases Done Into English* (1876).

PREFACE

product to such a degree that both of us take full responsibility for the whole, except as the opposite is stated in specific instances (e. g. Chapters XV and XXV).

Standard Text References. Throughout this book we give general references to the following works:

American Law of Property (Casner, ed. 1952, with supplements)
Casner, Estate Planning (2d ed. 1956 with supplements)⁴
Powell, Real Property (1949-1958, with supplements)
Restatement, Property (1936-1944 with supplements 1948, 1954)
Simes & Smith, Future Interests (2d ed. 1956 with supplements)

We also provide more specific references to passages in American Law of Property. In Appendix B we provide a bibliography of other standard texts, U. S., British, and local. We expect to include in a Teacher's Manual a fairly extensive bibliography of law review materials.

Addendum by Leach

Missionary v. Objective Attitudes. Any book for classroom use should raise the questions, present the alternatives, and induce student thought as to the answers. Mostly we conform to this principle; but three chapters do not, and I am responsible for all of them. Feeling as strongly as I do about the content of these chapters, I have not been able to resist the temptation to carry the torch.

(a) Chapter II (Possibilities of Reverter and Rights of Entry Broken) is arguably not *in pari materia* with the rest of this book anyway, dealing as it does with clogs on land titles created by these refugees from antiquity. Still, they are future interests, and if they are not treated here they are unlikely to get full treatment elsewhere. I have inveighed against these interests, sponsored legislation to get them under control, and in Chapter II have sought to cause the student to shun them as a draftsman and have shown him how to beat them as an advocate. The Woburn Baptist Church Case, with its off-the-record background, is used as the horrible example.

(b) In Chapter XII (Estates by Implication) I have argued against American unthinking acceptance of the English cliché that the court is powerless "to make a new will for

4. As this book goes to press Professor A. James Casner's third edition of his Estate Planning is also going to press. It is published in two formats but with identical paging: (1) a lawyer's edition in two volumes, containing answers to the numerous Prob-

lems, (2) a student's edition in one volume, not containing the answers. In a Teacher's Manual, which we will prepare for use in the fall of 1961, we shall try to correct the references to Casner so that they will encompass the third edition.