10-1-1966

Book Review

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BOOK REVIEW

Preface to Estates in Land and Future Interests. By Thomas F. Bergin and Paul G. Haskell. Brooklyn: The Foundation Press, Inc., 1966. Pp. XV, 237. $6.00.

This little book was intentionally designed not to be a scholarly work, weighted down with the customary freight of citations and authority. The style is informal, casual, and chatty. It was written for the law student, and one of its major goals is to anticipate many of his questions in advance of classroom confrontation. The major purpose of the authors is to give the reader an advance acquaintance with the "language and concept tools necessary to cope with the cases."[1] Hopefully, this will free the instructor from having to devote an excessive number of classroom hours to these basic matters, thereby permitting an inquiry as to how our traditional concepts might more effectively serve the needs of the twentieth century.

The authors have taken their task seriously, and have succeeded amazingly well. Part I of the book, consisting of four chapters comprising 122 pages, takes the reader through the classifications and characteristics of possessory estates and future interests, from the Norman Conquest through the Statute of Uses and down to the present day. The genesis of the twin concepts of potentially infinite ownership and free alienability is lucidly set forth. Part II contains five chapters covering 112 pages, and deals principally with future interests, *i.e.*, conditions of survivorship, class gifts, powers of appointment, the Rule Against Perpetuities, together with a final catch-all chapter covering miscellaneous constructional problems.

Although their purpose is not primarily to crusade for reform of this venerable subject matter, the legal realism of the authors and their quest for a workable, modern set of rules is frequently interjected after the evolution of an obsolete or ill-suited doctrine has been sketched. The student, for example, is forewarned in Chapter 2 that the conceptual distinctions between possessory and non-possessory interests "are empty vessels until judges fill them with real-world meaning."[2] After classifying the various estates according to their lengths, the point is made that this "is pure policy choice dressed up as legal conceptualism."[3] In commenting on the "mechanical rules" which are used to determine whether a condition of survivorship is precedent or subsequent, the authors parenthetically inquire: "May real-world consequences turn on such gossamer stuff as this? Sadly enough, they sometimes do."[4]

1 BERGIN & HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS at ix (1966).
2 *Id.* at 22.
3 *Id.* at 50.
4 *Id.* at 75.

There is an occasional welcome touch of sardonic humor. After patiently explaining that B's contingent remainder in the classic example "To A for life, then if B reaches 21, to B and his heirs" was irretrievably lost at common law if B had not reached 21 at A's death, Bergin and Haskell wistfully conclude: "If B is a good citizen, he will take comfort from the fact that although he does not get the property, at least the definition of a remainder will have been preserved."[5]

The reader is led to the conclusion that the definition of a remainder "was nothing but a *function of the rules of seisin*,"[6] and that the modern executory interest "serves the *sole function of preserving the conceptual purity of the remainder*."[7] Bergin and Haskell leave to the classroom the question whether the traditional definition of an executory interest, *i.e.*, a future interest created in a transferee which is not a remainder, "ought to be part of the stuff of modern law."[8] There is no doubt, however, as to the appropriate answer.[9]

The now discredited "divide-and-pay-over" rule is characterized as "linguistic thaumaturgy at its worst,"[10] and the "petty legal verbalisms"[11] employed to determine whether a gift is vested with possession and enjoyment postponed or contingent upon survivorship are aptly referred to as "another constructional bromide."[12]

The traditional scope and operation of the Rule Against Perpetuities is concisely sketched, along with a criticism of the "all-or-nothing" rule as it applies to class gifts. The Rule is indicted as a "monument to modern man's capacity to complicate his existence,"[13] a statement with which all students and most instructors will surely agree. Statutory reforms in the nature of wait-and-see and cy pres are denominated as "palliatives" which do not go to the heart of the matter.[14] Although no specific solution is proposed, the authors suggest that a "vesting in possession" test within a certain period, say 60 years, might be a workable substitute.

The book is much more than criticism and quest for reform. In fact

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5 *Id.* at 82.

6 *Id.* at 91.

7 *Id.* at 118.

8 *Ibid.*

9 In various places a number of other questions are posed but left to the classroom for further discussion. Example: Are there any policy reasons sufficient to justify the differences in result obtained by employing a possibility of reverter rather than a power of termination? *Id.* at 68.

10 *Id.* at 134. I had to check the meaning of this word. "Thaumaturgy" is the performance of miracles or wonders, as if by magic. WEBSTER, NEW INTERNATIONAL DICTIONARY 2368 (3d ed., unabridged, 1961).

11 BERGIN & HASKELL, *op. cit. supra* note 1, at 135.

12 *Ibid.*

13 *Id.* at 184.

14 *Id.* at 228.

most of its pages are devoted to explaining how these traditional dogmas originated and what combination of forces and circumstances produced our inherited conceptual framework. The doctrinal superstructure is there, laid bare for all to see and comprehend. Very little is iconoclastic, and where criticism is directed, the authors have carefully explained what is being criticized and why. The numerous hypothetical examples increase the utility of the book as a basic teaching device.

In some areas, however, the author's insights do not go far enough in the direction of change. For example, in the treatment of class gifts they apparently accept the rule of convenience without adequate exploration of the alternatives.[15]

As might be expected, the book has a few other shortcomings. The manner in which the authors divided up the major responsibility for the initial preparation of certain sections of their book is not known, but the style was not uniformly casual and lucid throughout. For example, Chapter 5 dealing with lapse and conditions of survivorship struck me as a bit strained and difficult to follow. It lacked the cohesive organization and incisive presentation of some of the other chapters. The chapter on class gifts[16] in its opening paragraphs should have explicitly dealt with the meaning of class closing, *i.e.*, that nobody born after that time can share. This is a point which frequently is missed by students, and is too important and fundamental to be left to implication.

The three-page discussion on adverse possession[17] did little to clarify the meaning of seisin, and seemed out of context. I felt that the development of the notion of "conceptually longer" estates in Chapter 2 was overdrawn and a bit strained. It made for needlessly difficult reading, was repetitious in spots, and might serve more to confuse the student than to help him.

Doubtless it was the modesty of the authors that caused them to disavow, in discussing the "divide-and-pay-over rule," any attempt to instruct in "drafting dispositive instruments."[18] This is not an estate planning work, to be sure, but one could hardly read their book without receiving a number of drafting hints.

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15 The authors do mention the alternative of requiring a bond from the executor, but meekly conclude that "the law has not seen fit to take this route." *Id.* at 144. They also assert that it is "equally compelling" to close the class at the testator's death in a per capita class gift. *Id.* at 150. It is nonsense to assume that the residue cannot be distributed in these cases without first closing the class. See Parker v. Leach, 66 N.H. 416, 31 Atl. 19 (1890). For a good discussion of the rule of convenience as rebuttable presumption, see Cole v. Cole, 259 N.C. 757, 51 S.E.2d 491 (1949), 28 N.C.L. Rev. 219 (1950).

16 Bergin & Haskell, *op. cit. supra* note 1, at ch. 6.

17 *Id.* at 44-47. The authors themselves suggest that it be skipped by readers who are unacquainted with adverse possession.

18 *Id.* at 134.

The book contained the usual number of typographical errors,[19] but despite these minor faults, it is fundamentally good. I applaud the authors on meeting their goal, and welcome their work to the existing literature in this field.

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[19] A random check of proofreading errors reveals the following:
p. 26—"irresistable" instead of "irresistible"
p. 85—"feudal tendency" should be "feudal tenancy"
p. 94—"seisen" instead of "seisin"
p. 99—"determinable estate for years in O" should be "in A."