BOOK REVIEWS

Public Policy and the Dead Hand (The Thomas M. Cooley Lectures, Sixth Series), by Lewis M. Simes. Ann Arbor, University of Michigan Law School, 1955. i-xxii, 1-163 pp., with indexes.
Perpetuities and Other Restraints, by William F. Fratcher, with a Foreword by Lewis M. Simes. Ann Arbor, University of Michigan Law School, 1954. i-xix, 1-728 pp.

In Simes' book, *Public Policy and the Dead Hand*, are contained the Thomas M. Cooley lectures for the year 1955. They are unencumbered by the formidable battery of footnotes with which scholars impede the flow of their argument and soothe the *amour propre* of their fellow-scholars. Strangely, Professor Simes feels bound to apologise for this absence of a full citation of authority, and relies upon the fact that the book is a reprint of speeches rather than of articles. The book is an appeal to the intelligence of the profession and, as the author says in his preface: "If the conclusions set forth in these lectures have any merit it is not because they are supported by any counting of judicial noses, but rather because they appeal to thoughtful intelligent members of the Bar as inherently sound." Because of these features their audience is not confined to the lawyers of Michigan, but reaches to all countries in which the fundamental doctrines of English property law are recognised. The broad problem with which Professor Simes is concerned in these lectures is the free movement of property and the limits to which the wishes of a deceased testator will be permitted to operate to restrict that movement.

One lecture concerns the relationship of freedom of testation to the interests of the family. The achievement in England of absolute freedom to alienate the property by will without regard to the claims of the family has been one of the mysteries of English legal history and this mystery is not made in the least startling by Simes' comparison of the development in the United States of protection for the claims of the wife and family. Institutions such as Dower, which ceased to be effective and were later abolished in England and Australia, have not completely collapsed in the United States, and rights analogous to Dower have been created by statute or even in some States by judicial decision. The extent to which freedom of testation is to be restrained in the interests of the wife and family is still a live issue of policy in the U.S.A. Though Dower still survives in some States the general scheme is to give the wife the right to elect to take a portion of the estate against the will.

In Australia and New Zealand the problem of the disinherited spouse and family has been dealt with by the legislature laying down certain broad principles to ensure their proper maintenance, the working out of these principles in the individual case depending upon the exercise of a judicial discretion. Simes adverts to this type of solution but considers what he calls "New Zealand type" legislation does not go far enough in that it does not give the wife a fixed interest independent of her own property in that of her husband. He

considers that the children's claim upon the estate of their deceased parents should be confined to maintenance and so, presumably, would regard the New Zealand type legislation as adequately meeting their needs, but draws a distinction between the position of children and the wife.

The reasons he gives for advocating the giving to a wife an indefeasible interest in her husband's estate cannot be regarded as satisfactory. He starts from the basis that freedom of testation is only to be departed from in pursuit of a clear recognised public policy and says:

> While as a matter of history a claim by a wife to a distributorial share in American law doubtless started as a device for necessary support in lieu of or in addition to, Dower, it has become something quite different. It is primarily a recognition of the right of a spouse to have a share of a husband's estate by reason of the close family relationship (p. 22).

The same reasoning would justify a husband being given the right to elect against his wife's will. It would seem to follow from this approach that children should also enjoy some guaranteed share in their parents' estate, but this is rejected.

Assuming that the community had come to regard each spouse quite independently of their own financial position as having a right to a share in the other's property, this does not provide a reasonable basis for the author advocating the adoption of this policy. The responsibility for advocating policies involving legal change cannot be transferred from the masters of the law to the general public who cannot know the alternative solutions. A Gallup poll is no substitute for a legal philosophy.

Simes does not only rest upon the present recognition of the spouse's claim, but suggests that it should be extended. The attempts to protect the claims of spouses either by giving the spouse a right to elect against the other spouse's will, or to apply to the court for proper maintenance, as in Australia or New Zealand, have been defeated by *inter vivos* gifts. Simes suggests that the provisions of estate duty taxation statutes whereby certain property of which the testator has divested himself in his lifetime, is included in his estate for dutiable purposes, should be adapted and made the basis for further protection of the disinherited spouse.

The reasons given by Professor Simes for differentiating the position of spouses and children are a sharp commentary on American society. Restrictions on testamentary powers are necessary in the later years as testators frequently become estranged from their spouses. Children, however, are seldom disinherited except for good cause. It is to be noted that the claims of children are rejected on objective grounds and not on the grounds of lack of public recognition.

In a lengthy discussion of the rule against perpetuities Simes contends that the usual justification of the rule that it is required to ensure the commercial use of property is no longer true. Contingent future interests are almost always created by the intervention of trustees and as trustees have, or can acquire, power to deal with the property, the property is not rendered sterile. However, he points out that our society needs risk capital and property should not be permanently subjugated to the protection accorded to trust property, also that it is important that not only income but capital should be available for spending. The United States has seen a number of attempts to dispense with the rule. Though he concedes the need for legislative reform of certain aspects of the rule, Simes considered that it should be retained.

Dealing with the limitations on accumulation of income which are always connected with the famous will of Peter Thellusson, he points out that if it had not been for the dramatic features of this famous will, special legislation dealing with accumulations would probably have never occurred and he suggests that there is no justification for the differentiation between capital and income, which the Thellusson Act legislation has brought about. He advocates that the period during which accumulations should be permitted should be the same

as the period during which perpetuities are permitted. The final type of "Dead Hand" control discussed is the devotion of property to charitable purposes and necessary reforms in the law of charities.

The book combines a mastery of the detail of property law with a largeness of view which is unusual amongst such masters.

Fratcher's book, *Perpetuities and Other Restraints*, is a detailed study of the law of perpetuities, accumulations and other restraints on alienation under the common law of England and under the law of Michigan. The law of Michigan has been enormously complicated by the introduction of statutory provisions derived from New York replacing the rule against perpetuities as regards realty and chattels real. After more than a century of this experiment the State of Michigan in 1949 abolished these innovations and reverted to the classical rule. The book traces the difficulties experienced in Michigan with the substitute for the rule against perpetuities and supports Professor Simes' contention that the attempts in the United States to dispense with the rule have been unwise.

At the same time as Michigan introduced its substitute for the rule against perpetuities, it introduced restriction on accumulations. In 1952, it repealed these statutes so that accumulations are now permitted in Michigan within the limits allowed by the rule against perpetuities. The influence of Simes' view may perhaps be seen here.

The exposition of the history of the common law rules does not contain anything original but is admirably clear. A book dealing with the law of Michigan presents an impossible task to a reviewer but the history of Michigan's attempts to make the substitutes for the rule against perpetuities work should deter others from trying likewise.

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International Law, A Treatise (Vol. 1, Peace), by L. Oppenheim, M.A., LL.D., 8th ed. 1955 by H. Lauterpacht, LL.D. London, Longmans, Green & Co., lvi and 1072 pp. with index. (£6/17/9 in Australia).

There have been three editions of this famous classic of international law since 1947 and each has shown, with increasing clarity, the hand of the editor Professor (now Judge) Lauterpacht. Indeed, in the preface to this edition, Professor Lauterpacht estimates that the Sections written by Oppenheim now "comprise only one-third—or less—of the total contents of the work" and adds that "even those Sections—or what is left of them—have undergone changes of substance and of form."

The eighth edition, despite the fact that many obsolete references and the voluminous table of "Treaties Establishing International Unions" have been omitted, is about one hundred and fifty pages longer than the seventh edition. At a conservative estimate, at least one fifth of the new edition has been contributed for this edition by the editor, and the first question which the reviewer of this work must face is a rather obvious one: just whose book is it? For Oppenheim has become an occasionally untidy conglomeration of the remnants of the original work written by the clear-thinking positivist, Lassa Oppenheim, and the views inserted (or superimposed) by Roxburgh, McNair and Lauterpacht in successive editions.

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