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Book Review: Future Interests in Colorado

Dicta Editorial Board

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GRADUATE LAW DRAFTEES MAY BE ADMITTED WITHOUT BAR EXAMINATION

On October 23, 1950, the Supreme Court of Colorado adopted the following new rule, numbered Rule 220A:

"Until further order of Court, any bona fide resident of the State of Colorado who has successfully completed the law course in an accredited law school and obtained a degree therefrom, but who is prevented from taking the next succeeding Bar Examination by reason of being recalled to or drafted into the military service of the United States prior to the date of such Bar Examination, may, upon satisfactory proof of these conditions, be immediately licensed as an attorney and counselor at law; provided his application receives a favorable report from the Bar Committee. Proof of his educational and military status shall be made to the Chairman of the Law Committee and by him certified to the Clerk of this Court; provided further that any such applicant who has previously failed in two examinations for admission to the Bar, irrespective of the State or jurisdiction in which said examinations were taken, may not be admitted under this rule."

TO MEMBERS OF THE BAR

Remodelling of the Supreme Court Library is expected to begin within the next two or three weeks and will require a month to six weeks to complete. An effort will be made to keep the library in operation for the use of members of the bar, notwithstanding the inconvenience, noise and confusion necessarily attendant during construction.

FLOYD F. MILES, *Librarian.*

BOOK NOTICE

Review of FUTURE INTERESTS IN COLORADO by Edward C. King.[1] Dubuque: Wm. C. Brown Company, Publishers. 1950. Pp. 116. $3.50.

"Future Interests in Colorado!" The very title of this book will shock all those Colorado lawyers who have from time to time so confidently declared that they have never had any future interests problems in their offices. Dean King has found more than fifty such cases in the Colorado reports.

Many lawyers had been aware of the existence of future interests cases in Eighteenth Century England and in Nineteenth Century Massachusetts because they were included in the standard law school casebooks on the subject, but it was generally be-

[1] Dean, School of Law, University of Colorado.

lieved that our forefathers had protected us from such evils in Colorado by adopting only that part of the common law of England which was suited to the genius of our people.

Dean King was well aware of this happy state of mind. He writes, "Probably the very inability of lawyers to recognize some of these (future interests) questions is a blessing in disguise. If, through oversight, errors are made in the drafting of instruments, it is not unlikely that there will be similar oversights when the time comes for construction of the instruments; and lawyer and client will live and die in blissful ignorance that a supposed right or title was no right or title at all" (p. 3).

So far so good, but then comes this statement upon which the justification of the book is based and for which no authority is cited, "No lawyer, however, wishes to build his reputation upon such an insecure foundation as reliance upon the mistakes of his brethren in the profession" (p. 3).

In other words, the book is written in answer to a dire need which has not yet been felt. A book with such a purpose must necessarily partake of the nature of a missionary endeavor. It must reveal hitherto unsuspected shortcomings; it must impart zeal for a better way of life; and it must point the way. All of these things Dean King does.

He writes modestly and with deference, but he does not hesitate to point his finger at the mistakes of those in high places. For example, "It is the writer's opinion, however, based on his own experience and lack of knowledge concerning these (executory) interests, that a misconception regarding their validity has been and is common among members of the bar. This is illustrated by an occurrence which took place at the 1948 meeting of the American Bar Association in Seattle. In the section on Real Property, Probate Law and Trusts, a report was made by a committee on uniform forms for wills. As I recall, a suggested form contained a provision substantially to the effect that the widow should take if she should survive the testator by 30 days. Objection was immediately made from the floor that such a gift to the widow would not be good. 'Where,' it was asked, 'will the title be during the 30 days?' There seemed to be a quite general opinion that such future estate could not be created except through the medium of a trust. The gift would be good, of course, as an executory devise" (p. 84).

Another example: "The Supreme Court (of Colorado) held that the life estate in Harriet with power to alienate gave her a fee simple absolute.

"While this ruling of the court may have been dictum, it was made after considerable discussion and citation of authorities. The court distinguished *Blatt v. Blatt* but did not mention *Barnard v. Moore,* in which there was a flat holding that a limitation of a

life estate, with power to alienate in the life tenant, does not give the life tenant a fee simple absolute.

"The court's dictum in this *McLaughlin* case is contrary to the great weight of authority in the United States, and poses a serious problem in the examination of titles to real property in Colorado" (pp. 72-73).

The two examples which have been quoted are typical of the way in which Dean King discloses sins of commission and of omission at the bar and on the bench.

The book begins with an exhortation: "More than a hundred years ago Lord Chancellor Hardwicke said that there was hardly any estate of consequence without a trust. He might have added, with equal truth, that there was hardly a trust without a problem of future interests. Today, with the importance and number of trusts increased almost beyond calculation, Lord Hardwicke's dictum may be repeated with even greater conviction than was possible in his time, and we may also say that almost every trust, every family settlement, every estate, every will of any consequence, involves some question of future interests. Moreover, almost every deed which restricts the use of land, or which creates a terminable estate of any kind, raises a future interests problem.

"If this be true—if future interests do assume this importance in modern law—it would seem that no lawyer should attempt to draft any but the simplest deed, or any trust instrument, or any will in which disposition of property is postponed beyond the earliest possible distribution date, unless he is reasonably familiar with the law of future interests" (p. 1).

Dean King sums up the problem which he has thus created in these words, "Is there any way in which the average practicing lawyer can obtain the insight, the clue, the tip-off—one might even say the clairvoyance—that leads to expert draftsmanship or to real advocacy in cases involving future interest?" (p. 3).

To this question he responds, "The answer, if there be an answer, is to be found in simplification. It seems possible that the most common future interests problems might be classified and distinguished in such way as to make them fairly understandable, the general rules as to each problem stated, and the case and statutory law of a particular state such as Colorado compared with the general rules in such a way as to give the practicing attorney a manual of some practical use. That is the general purpose of this book" (pp. 3-4).

A chapter is devoted to each of the following subjects: reversions (nine pages), possibilities of reverter (eleven pages), rights of entry for condition broken (eighteen pages), remainders (thirty-seven pages), executory interests (nine pages), the rule against perpetuities (twenty-one pages), powers and miscellaneous (three pages). It is obvious from this listing that the chapter on powers is much too short, and this defect becomes still more disappointing when it is discovered that the chapter deals only with the

Nicholson case,[2] which involved the power to terminate a trust, but had nothing to do with powers of appointment. The fact that such powers need to be more fully understood by Colorado lawyers is manifested by *Johnson v. Shriver*.[3]

The organization of all the other chapters follows closely a well defined pattern: (1) definition of the interest, (2) hypothetical examples and comparisons with similar interest, (3) the Colorado cases, (4) practical illustrations of mistakes to be avoided, (5) a brief summary of matters to be borne in mind when dealing with the interest.

Many of the points included in subdivisions (4) and (5) are made with heartfelt emphasis, and some are even put in the second person. For example, "Be consistent. Don't describe the children of John in one place as 'his issue,' in another place as 'his lawful issue' and in another place as 'his heirs.' Find the properly descriptive term and stick to it" (p. 78).

Subdivisions (1) and (2) are for the most part orthodox, with chief reliance placed upon the Restatement, Leach, and Simes. In a book of this size there have of course been instances of oversimplification and attention should be called to the author's words, "The reader is warned, however, that what here follows is intended only for ready reference and as *a suggestion of the problems that may be involved in the everyday work of examining abstracts, and of drafting and construing deeds, wills, and direct agreements.* Once the problem is spotted, the attorney should form his own opinion as to the law by direct reference to the Colorado cases or to some one or more of the fine articles and texts on future interests. If this (book) puts you upon notice that in a given situation *a problem exists,* it will have served its purpose. It makes no pretense to technical perfection" (p. 4).

In the chapter on reversions, for example, no reference is made to the freehold subject to a term, nor to the problem of *Egerton v. Massey*.[4] The rule stated in *Pibus v. Mitford*,[5] that "a man cannot either by conveyance at the common law, by limitation of uses, or devise, make his right heir a purchaser," is confused with and miscalled the doctrine of worthier title (which applies only to wills and does not require the use of the word "heirs"); and a fee simple appears to be defined as "an estate which may last forever" (p. 8). This failure to consider the possibility of a springing use limited upon the happening of an event certain to occur is closely related to the error which Dean King observed at the Seattle meeting of the American Bar Association.

Similar instances of oversimplification are to be found in every chapter, but only one other will be mentioned. That is the definition "for Colorado purposes" of an executory interest (p. 81), which does not include the interest limited to a third person

[2] 104 Colo. 561, 93 P. 2d 880 (1939).
[3] — Colo. —, 216 P. 2d 653 (1950).
[4] 3 C.B. (N.S.) 338, 140 Eng. Rep. 771 (1857).
[5] 1 Vent. 372, 86 Eng. Rep. 239 (1674).

following a freehold in a term. Shades of the *Duke of Norfolk!*[6]

Subdivision (3) of each chapter deals with the Colorado cases in a way which may be well surmised from the language with which the book ends: "If the writer has seemed at times over critical of our courts, it has been in the interests of accuracy and consistency, and never from any disrespect for those courts or for the high-minded gentlemen who have graced our appellate benches" (p. 113).

As a matter of fact, the author criticizes, either as to the result or as to the analysis, or both, about a third of all the Colorado cases cited, and this takes into account many which were merely named without any comment.

It seems fair to conclude that Colorado lawyers were wrong when they asserted that they had no future interests problems, but that their apparent blindness was merely the external manifestation of sensitive defense mechanisms.

Dean King's book should mark the beginning of a new era. Every Colorado lawyer should read it from cover to cover annually (in connection perhaps, with the yearly physical check-up and for a similar purpose), and all Colorado decisions prior to the publication of this book should be revalued in its light.

T. G. M.

[6] 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682). But the Duke never came to Colorado.