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REVIEWS

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CONSTITUTIONAL REVOLUTION, LTD. By Edward S. Corwin. Claremont, Calif.: Claremont Colleges, 1941. Pp. ix, 121. $2.00.

THE CONSTITUTION AND WHAT IT MEANS TODAY. By Edward S. Corwin. Princeton: Princeton University Press, 1941. Seventh revised edition. Pp. xiv, 277. $2.50.

PROFESSOR Corwin can probably claim to have been the first critical student of the Supreme Court's work to identify, isolate and assess the most important doctrinal innovation of the Old Court, between 1918 and 1937, in the direction of limiting federal power—the revival of the concept of "dual federalism." For a generation prior to the War the Court had drawn with apparently inexhaustible invention on the due process clause of the Fourteenth Amendment in improvising, multiplying and refining instruments for the limitation of state power. It continued to do so with added vigor after the War, notably in the fields of taxation, business regulation, the review of administrative action, and latterly, of civil liberties. But in the matter of restricting the scope and content of national action the Court was conspicuously circumspect in using the identical language of the Fifth Amendment. Whether Congress behaved itself better than its country-cousin legislatures in the states, or whether the Court was conscious of the greater hazards it risked in thwarting a coordinate branch, the fact was of record. The Fifth Amendment never realized the procreative possibilities of the Fourteenth, and until 1935 hardly half a dozen federal statutes were found wanting in due process. If the Court was to deny Congressional will on a broad front, it needed a more plausibly convincing argument than its own bald assertion of unreasonableness. When natural law was announced as due process in the *Adair* and *Adkins* cases the audience knew that though the hand was the hand of McCarthy, the voice was the voice of Bergen.

The need was felt in the *Income Tax* case in 1895, when the Court rested on a revolutionary rereading of the direct tax clause; that method was not apt for ready generalization. A narrow definition of commerce served the purpose in the *Knight* case and a few others. But that definition was inconvenient when the Court approved the national action, as it did too often for consistency's sake. A nearly ideal solution was finally hit upon when the first *Child Labor* case was decided: the existence of the states in a federal system must be an independent source of limitation on the purposes for which delegated national powers may be used in domestic affairs, if the "federal equilibrium" is to be preserved.

This concept, originated in Jefferson's time as a means of dignifying Republican opposition to Federalist policy, and later adapted to the dialectic needs of the slave-owning interests, was thought to have been put at rest by the outcome of the Civil War. But "ideas are weapons" heedless of the intent of their users, and this one was suitable for any opponent of dominant national policy. So when the Sutherland Court set its hand against the trend of federal legislation it invoked the doctrine of "dual federalism" to do a due process job. It was better rhetorically than the doctrine that legislative

power cannot be delegated, contemporaneously evolved by Chief Justice Hughes to the same end, for it appealed to a symbol better grounded in tradition and feeling, and it could not be so simply frustrated by the reenactment of invalidated codes. It was used more frequently than due process to check New Deal exercises not only of the commerce but also of the taxing and bankruptcy powers, and it promised for a while to control the spending power as well.

The same discernment that made Professor Corwin a pioneer in spotting this development for what it was in its early stages also characterizes his three recent lectures here published. Succinctly, with clarity and wit, and with an unmatched breadth of perspective, he reviews the rise and decline of judicial review in the course of the New Deal's career in Court. The background material is familiar, but it has never been more skillfully summarized. Attitudes toward what are appropriate governmental functions lie at the heart of concepts of governmental structure. Questions of public policy, reflecting these attitudes, become questions of power in a system of constitutional law judicially enforced. The effective intervention of courts in determining these questions depends upon the availability of alternative and opposing doctrines for the interpretation of vague phrases in the Constitution. There were enough of these. The conversion of the Court to laissez faire thus both enabled and inclined it to challenge the entire range of legislative action in response to the depression. A novel feature of this account is the attention to the personalities and activities of the American Bar Association, "a sort of juristic sewing circle for mutual education in the gospel of Laissez Faire." The story of New Deal troubles and triumphs in Court is less detailed than that in Jackson's *The Struggle for Judicial Supremacy,* but not less penetrating. It is also less partisan; the note of geniality that pervades the whole is broken only once for an unkind, if well-deserved, thrust at Mr. Justice Frankfurter's opinion in the *Gobitis* case. And Corwin prefers to dwell on the "intracurial" rather than the external factors that produced the "revolution."

The appraisal of the results since the turnabout in 1937 is equally discriminating and comprehensive. The abandonment of laissez faire as a criterion of the functions of government means the acceptance of a concentration of governmental power, first in the national Government, and second, in the executive branch. Cooperation supplants competition as the guiding principle in the division of federal and state powers; the twilight zone is gone. Judicial power to intervene has shrunk importantly in the very act of expressing a disinclination to use it: "those doctrines . . . which have been hitherto the chief sources of [the Court's] broadly supervisory powers over congressional legislation have simply dried up." By choosing one set of formulas and suppressing the antagonistic set, the power of further choice itself, on which the possibility of review depends, is abandoned. And, finally, liberty *through* government has displaced liberty *against* government as the prime objective in constitutional interpretation. For those who find these consequences little to their liking, the author, with a glance at events abroad, offers a concluding crumb of consolation: "from the most formidable dangers which today beset us the Supreme Court could scarcely have shielded us even in the heyday of its power."

Along with writing these lectures, Professor Corwin has found time to bring down to date again his well-known handbook of clause-by-clause constitutional exposition, the most useful of pint-size commentaries on a quart-size subject.

HARVEY C. MANSFIELD †

THE FINANCIAL POLICY OF CORPORATIONS. By Arthur Stone Dewing. New York: The Ronald Press, 1941. 4th Ed. 2 vols. pp. xxii, 1550. $10.00.

SOME twenty years ago Mr. Dewing published a practical little book on the way in which corporations raise the money needed for their business. With the passage of time, the little book went through two more editions, fatter each time, and approached the stature of a classic. Now, as befits a classic, it has become two volumes, decked out in handsome format, and with much new matter.

These are not the only developments in the history of the book. From edition to edition, Mr. Dewing has come to think of his handiwork as being less of a practical manual and more of a vehicle for the expression of personal views about the economic and political universe. In the third edition these views were barely hinted at, though apparent enough; in this edition a good many pages are bespangled with apologetics and polemics. Doubtless there have been some bad fellows among corporate directors; however, in general, they "carry out the purposes and obligations of representation of the stockholders in the management of corporate enterprices, with apparently greater success and greater moral approbation than the people's representatives direct the political corporations."[1] There isn't any point to emphasizing the danger of abuse of voting trusts because "everything in this world is subject to the dangers of abuse, from man's procreative powers to gooseberry tarts at Thanksgiving."[2] Industrial depressions are inescapable phenomena and there is nothing we can do about them because "man is impotent in the presence of economic laws."[3] The thing for government to do is to do nothing, for does not the reason for the aggravation of the last depression lie in the fact that "a political administration destroyed the confidence and paralyzed the initiative of business men . . ."?[4] Indeed, these bureaucrats are a bad lot, so bad that one must express surprise at "a common sense remark even from a member of the Interstate Commerce Commission."[5]

Since Mr. Dewing's views are generally the good old laissez-faire, anti-bureaucracy sentiments which adorn the campaign oratory of our more

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1. Vol. I, p. 95.
2. Vol. I, p. 129.
3. Vol. II, p. 755.
4. Vol. II, p. 751.
5. Vol. I, p. 388.

conservative statesmen, it might be thought that there is not much reason for dwelling on them. But Mr. Dewing knows a good deal more of the realities of modern business than its usual oratorial glorifiers, and the net resultant of his polemics against the New Deal is edifying. When he comes down from his economic Nirvana and grapples with real problems, he often finds it necessary to talk somewhat differently.

Thus, our author seems especially put out by the Securities and Exchange Commission's Protective Committee Study. At least three times[6] he decries the report as "prepared for the purpose, often thinly veiled, of creating prejudice against existing financial methods" and establishing "an ostensible factual basis for stricter governmental regulation." Yet each time he grudgingly admits that there is something to what the report says, and when he comes to the Chandler Act itself, one of the end products of this bureaucratic conspiracy to trample on business, he has no serious word of criticism. His discussion of the *Los Angeles Lumber* case[7] completes the conversion. He cannot share in the "strictures" of those who "hailed" it as a New Deal decision. "To the unprejudiced eye it would seem to be Old Deal rather than New Deal legal philosophy in that it supported the substance rather than the mere form of debtor-creditor contracts."[8] And even though Mr. Justice Douglas "may have carried out the implications of his report on protective committees and . . . may have lent an attentive ear to his former colleagues on the Securities and Exchange Commission who, through Mr. Jackson,[9] presented the Government's brief — arguing for the absolute priority theory of creditors' rights," he also followed the *Boyd* case and other cases going back over half a century,[10] which is a pretty fine thing for an ex-bureaucrat to do.

Or take the Securities Act of 1933. This is government interference with a vengeance and many men of Mr. Dewing's economic faith have poured vials of wrath on it. But our author knows a good deal about the ways in which investors were bilked by corporate directors in those good old days. So long as he can assure himself that "it was not intended as a politically conscious means for expressing an economic ideology" but solely to estop the offering of securities without giving adequate information to prospective investors,[11] then he thinks the Act is pretty good. He even finds it possible to speak of "socially significant and economically beneficial results

6. Vol. 1, p. 173; Vol. II, p. 1247; Vol. II, p. 1290.

7. Case v. Los Angeles Lumber Products Co., 308 U. S. 106 (1939).

8. Vol. II, p. 1366.

9. One does not quite know what to make of this Mr. Jackson. At Vol. II, p. 1364, he is described as "Robert Jackson, Esq., who presented an erudite and carefully reasoned brief for the United States, as *amicus curiae*." But it appears immediately thereafter, that "Jackson cared not a farthing for Case [the plaintiff] or his bonds and prayed to the court to set aside the Los Angeles reorganization plan in order to conform to a specific theory of creditor rights in reorganization technique. To this end Case and the Los Angeles Lumber Company were guinea pigs in the Washington laboratory."

10. Vol. II, p. 1367.

11. Vol. II, p. 1125.

of the Act,"[12] and, *mirabile dictu*, of "wise" administration by the Commission.[13] Of course, he cannot resist taking a back handed slap or two even here,[14] but the New Dealers will have to take some bitter with so much unexpected sweet.

The Public Utility Holding Company Act is, naturally, a somewhat different matter since it was in part prompted by the "ideological purpose of extending further the bureaucratic control of government over the utilities."[15] We are therefore not surprised to see that the SEC has been given power to "estop an issue [of securities by a utility operating company] for no reason except an arbitrary whim or fancy expressed in terms of public interest,"[16] or to see its jurisdiction described as "usurpation of authority."[17] Yet, even here, in the full flood of his Jeremiad, the author's practical sense wins mastery over emotion. He knows his holding companies too well. The "dominant purpose" underlying many of the public utility holding companies is the control of large amounts of capital with a small investment, "in spite of the veiled eleemosynary purposes alleged by their apologists."[18] And in the end, what is the objection to the Public Utility Holding Company Act: "Other forms of the holding company are ignored; and the evils arising from the parent-subsidiary relation in the utility, the industrial, the railroad and the banking fields are focussed on the electric and gas industries."[19] Mr. Dewing will, no doubt, object if these words are read to mean that the trouble with the Act is that it does not go far enough. This, however, is the one concrete criticism which he offers, and there are many who will agree with it.

And so, despite all the sound and fury of campaign oratory, Mr. Dewing's thunder is thunder in the footnotes. His book is still, even more than ever, the classic description of the practice of corporate finance; still the indispensable manual not only of the corporate managers but of those who are called upon to regulate the managers. Here is where the thunder echoes with sardonic irony. Never could the politicians and bureaucrats, of whom the author speaks so scornfully, have been able to do their job so thoroughly and so informedly, if Mr. Dewing, and others of his knowledge and perspicacity, had not opened the cupboards wherein lurked the corporate skeletons. Those of us who believe that the high purposes of business pursuits had become so perverted that only the restraining hand of Government could set them again on the road of the public interest, will say: "More power to you, Mr. Dewing. Have your fling at us in the footnotes, but may you live to give us a fifth and a sixth edition!"

A. H. FELLER†

12. Vol. II, p. 1129.
13. Vol. II, p. 1132.
14. Especially to be noted is the somewhat heavy-handed (if Mr. Dewing will pardon me) comment at Vol. II, p. 1126, footnote c. See also Vol II, p. 1132, footnote j.
15. Vol. II, p. 1059.
16. Vol. II, p. 1135.
17. Vol. II, p. 1136.
18. Vol. II, p. 1043.
19. Vol. II, p. 1065.

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CLARENCE DARROW — FOR THE DEFENSE. By Irving Stone. New York: Doubleday, Doran & Co., Inc. 1941. Pp. 570, $3.00.

WHEN Clarence Darrow died in 1938 at the age of 81, few disputed that he was one of the great advocates of his generation. There were other lawyers in his lifetime who contributed more to the development of legal science, who rose to positions of greater influence, or who won larger financial rewards, but perhaps none who could equal Darrow's eloquence before a jury or who could match his record as a rough and tumble crusader for the common man.

Mr. Stone has written an excellent account of Darrow's turbulent career at the bar. From the day when, as a young lawyer, Darrow left his comfortable job with a big railroad and set out to defend Eugene Debs and his associates in the American Railway Union who were accused of criminal conspiracy in connection with the now famous Pullman Company strike, Darrow was in the midst of many violent lawsuits which laid bare such crucial social problems as racial prejudice, religious freedom, the rights of labor, free speech and capital punishment. Again and again, when it appeared that he was returning to a more or less humdrum practice in Chicago, he was called upon to take over the burden of representing another "cause."

He was at the trial table representing the striking Amalgamated Wood Workers' International Union on charges of conspiracy in Wisconsin. He acted as attorney for John Mitchell and the United Mine Workers when they presented their claims before the Commission appointed by Theodore Roosevelt to inquire into working and wage conditions in the eastern coal mining fields. He fought for the lives of officials of the Western Federation of Miners in the notorious *Coeur d'Alene* matter, where the Union had been charged with responsibility for the horrible murder of an ex-Governor of Colorado. He was counsel for the McNamara brothers in the famous Los Angeles Times bombing episode, out of which grew false charges which led to his own indictment for jury tampering, in the subsequent trial of which he took over the substantial burden of his own successful defense. When the World War came he defended the conscientious objectors and others who were caught up in the meshes of Attorney General Palmer's red raids. In the colorful Scopes trial he entered the Bible Belt to champion the theory of evolution against the arch-fundamentalist, William Jennings Bryan. Finally, he acted as counsel for Leopold and Loeb, seizing the opportunity presented by their abnormal crime to bring before the American public his passionate distaste for capital punishment and the need for recognizing the psychiatric and physiological factors which contribute to crime.

The cases Darrow tried involved basic issues which are still unsolved today. When he proposed that laboring men should be given the right to bargain with their employer, or when he espoused the cause of the negro seeking equality in the eyes of the law, he was confronted with opposition which seems almost incredible today. The press, large portions of the bar, and the substantial preponderance of opinion in the communities affected were all aligned against him. But the author feels that there is little evidence that Darrow ever allowed himself to be permanently broken by the bitter-

ness of public opinion which his activities brought down upon his head. He seemed to realize that his were unpopular causes and that by understandable processes it was his lot to become the personification of the ideas for which he battled as counsel.

Darrow had no axe to grind. He was not a reformer. He had no program for a better state, nor did he warmly espouse the political beliefs of any particular group or party. He seems primarily to have been impelled by an inner sympathy and understanding of those who challenged existing ways of thought. Perhaps this was because he himself had no use for the conventional thinking of his time and liked to shock people with his blunt talk.

Because of Darrow's great interest in literature and his close acquaintance with authors, social workers and agnostics of all kinds, his home became a center for liberal intellectuals of Chicago. Free thinkers, single taxers, atheists, social workers and young economists and lawyers came to his home to hear him discuss matters of current interest and to answer his provocative questions concerning racial equality, capital punishment and free love. He was a man of great tolerance in spite of his many unconventional ideas and his own life is full of many revealing inconsistencies which the author happily does not feel required to explain. His keen tongue and ready wit made him much sought after as a lecturer, and during some periods of his life he spent days and weeks on the road lecturing and debating.

Darrow's courage, his ability to experience deep emotion, his earnestness, his fighting spirit and staying power cannot be questioned. A student of human nature, he was a master of psychology and apparently possessed an unusual ability to make his juries appreciate the broader implications of the decision they were called upon to render. Darrow was widely read in both literature and the sciences. A penetrating cross-examiner, he never let a witness leave the stand, it is said, until he had made at least one advantageous point. So broad was his background, so sympathetic his understanding, and so well ordered his mind that when, at the conclusion of a trial, he stood on his feet to make his final plea, which often ran for two or three days on end, he never had need of a note, and his arguments as they flowed forth were both cogent and full of passionate conviction.

In recent years most attorneys have not sought to become proficient trial lawyers. Advocacy in the conduct of lawsuits for clients has given way before the rise of the desk practitioner who counsels and advises on intricate corporate problems. There are few, if any, who can lay claim to Darrow's mantle today. Indeed, so many of our outstanding attorneys have gravitated to business or politics or as corporation lawyers have become removed from positions of public prominence, that it is not surprising there are few biographies of noted American lawyers who have spent their professional life in the active practice of the law. This life of Darrow is, therefore, doubly welcome, first, as an account of the life of an active practitioner, and, second, because it serves to recall to mind the great professional opportunities which await the lawyer who succeeds at the trial table.

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CASES AND MATERIALS ON FIDUCIARY ADMINISTRATION. By Lewis M. Simes. Chicago: Callaghan and Company, 1941. Pp. xx, 533. $5.50

IN a series of casebooks designed for three separate courses Professor Simes has reorganized and enlarged topics traditionally covered in the courses in Wills, Trusts and Future Interests. The first in the sequence — not yet published in printed form — deals with intestate succession, execution and revocation of wills, and the creation of trusts. The second covers the administration of decedents' estates and testamentary and other forms of express trusts. The third, published in 1939, is concerned with the tying up of property by means of future interests and trusts. The second, which is the volume under review, calls for the most original effort and represents the major element of pioneering in the series.

In the preface Professor Simes gives credit to Dean Gulliver of the Yale Law School for originating the idea of a separate course in fiduciary administration and acknowledges having profited from Dean Gulliver's discussion at a meeting of the Association of American Law Schools some years ago. The reviewer recalls taking part in some such discussion in which Professor Simes outlined his plan for combining treatment of administration of decedents' and trust estates and of developing this treatment through the parallel use of materials from two or three jurisdictions. In a feeble fashion the reviewer opposed both the combination idea and the suggested technique of development. Objection to the combination idea was based upon the differences in origin and function of personal representatives and trustees, and upon the fact that administration by the former has routine supervision by the court of probate while the trustee traditionally acts independently of judicial supervision except in so far as some interested person may start an action or suit for a particular purpose in an ordinary court of trial jurisdiction.

After use of the book in the classroom the reviewer concedes freely that Professor Simes has demonstrated that these objections can be overcome and that the combination is workable. At no point does his book slur over the divergencies between the two kinds of fiduciaries. With consummate skill the editor has developed both the contrasts and the similarities of the two offices in a thoroughly teachable manner. After brief introductory matters, the bulk of Part I deals with jurisdiction in the administration of decedents' estates and an excellent chapter on the vital topic of the necessity and effect of probate and administration. Part II is denominated "the office of the fiduciary" and includes the topics of appointment, qualification, removal and compensation. Part III takes up more than sixty per cent of the book and covers management of the fiduciary estate. It includes treatment of the following matters: deviation from the creating instrument; power to borrow, mortgage, pledge, lease or sell; delegation of powers; duties of loyalty, of care, to preserve and to earmark and to separate; accounting; co-fiduciaries; exculpatory clauses; creditors' claims; carrying on decedents' business; investments; benefits and burdens between life tenant and remainderman; distribution of trust estates; problems of interest, abatement, charge of debts and retainder in connection with decedents' estates; applica-

tion for instructions.[1] Part IV is concerned with liabilities of the fiduciary and third persons arising out of breach of fiduciary duty.

Professor Simes has abandoned his former plan of developing the law of two or three contrasting jurisdictions throughout the various topics. The geographical distribution of cases is well balanced with New York predominating and other important jurisdictions well represented. The editor has varied his method of statutory treatment and has sometimes set forth the statutes of his own state, Michigan,[2] elsewhere included several typical statutes,[3] and again merely summarized and grouped the relevant legislation.[4] In the main the latter seems the preferred method for a general casebook because law students should consult their local statutes and generally receive little aid and still less comfort from the statutory details of other jurisdictions. Portions of the Restatement of Trusts, the pertinent uniform acts and other text materials are set forth at appropriate places. Footnotes contain extensive and valuable references and frequently suggest interesting problems. Many of the chapters are prefaced by helpful forecasts of the questions to be considered. The book is remarkably free from typographical errors.[5] Extremely able editing[6] gives the book a compactness which may be misleading; there is enough material for forty or more class meetings, and in a two semester hour course omission of some topics will be necessary.

The book is a success not only mechanically but from the standpoint of broad training of lawyers and the ultimate betterment of the law. Several factors inherent in the subject matter contribute to this success and the editor has utilized them to the maximum in his development. In the first place courts of probate in many states now have jurisdiction over testamentary trustees as well as over personal representatives and the steps in judicial administration such as qualification, inventory and accounting are the same with respect to both sorts of officers. Statutes frequently use the

1. The cases on application for instructions contained in Chapter 27 can be considered advantageously in connection with the cases on pp. 41 to 52. This is the only point upon which the reviewer differs from the editor with respect to the arrangement of materials.

2. See pp. 6–7, 325–32. *Cf.* pp. 16–20.

3. See pp. 116–18.

4. *E.g.,* pp. 58–59, 70–71, 126.

5. The citations to Evans v. Anderson, p. 56 n., and to Westfall v. Dungan and Dunlap v. Robinson, both p. 339 n., should be Ohio St. instead of Ohio. The sections to the Restatement of Trusts in the last paragraph of p. 160 n., should be 242, 243 instead of 232, 233.

6. In Howard v. Howard the report is faithfully followed but after a summary of the pleadings it merely declares: "The demurrer is over-ruled for the reasons in the last case." Some editorial comment is justified here, particularly as the case referred to is itself somewhat obscure. In the condensation of Simpson v. Cornish on p. 85, line 13 the word "thereafter" is confusing and should be omitted, though its inclusion was doubtless induced by the language of the report. Cross references from text or notes to cases printed elsewhere in the book would be helpful. See reference to Allen v. Dundas (p. 21) printed on p. 71 and reference to Johnson v. Lawrence (p. 156) printed on p. 168.

term fiduciary to refer to the trustee, the executor, the administrator and the guardian and provide certain procedures common to all. Regardless of such unifying statutory procedure, the general powers and duties of all sorts of fiduciaries are usually the same. This is true with reference to such matters as the delegation of powers, the earmarking of estate property, liabilities in representative and individual capacities and the general theory of accounting. Combined treatment tends to emphasize that the personal representative is a fiduciary — a point too frequently overlooked in practice and possibly in teaching as well. Then too where the rules of law may differ as between trustees and personal representatives, as in case of powers of co-fiduciaries and of investments, there are marked advantages in presenting the contrasts. Again combined treatment facilitates consideration of certain problems such as distinguishing between an executorship and a trusteeship where the same person is selected for both offices. Along the same line the cases in Chapter XXI, studied with the background of the preceding material, offer an excellent opportunity for a discussion of the interesting problem as to whether one who carries on the business of a decedent by virtue of authority given by will, statute, court order or consent is to be treated always as a trustee — apparently the orthodox theory — or whether he may not be regarded as an executor or administrator with increased functions — a point of view which the reviewer submits is in accordance with what usually happens in courts of probate.

Perhaps most important of all, the use of the casebook will guarantee that law students may obtain some familiarity with the administration of estates. Very often, and particularly in case of decedents' estates, the subject of administration is "covered" in the last two or three class-meetings or is entirely omitted. While the present casebook cries for a preceding course based upon a casebook similar to the editor's unpublished first volume, it can be used in schools which retain separate courses in Wills and Trusts omitting therefrom the topics of administration. Even with the traditional Trusts course which includes the administration of trust estates, the present volume with appropriate omissions is a splendid vehicle for a separate course in the administration of decedents' estates. In some law schools the necessary curricular adjustments will be thought to be insurmountable obstacles to the adoption of the work. This will be particularly true where different instructors handle the courses in Wills and Trusts. In addition, some faculties will believe that legal education calls for a single basic course in Trusts including both express and implied trusts and trust administration as well. The whole problem is one upon which reasonable minds may differ. There should be no doubt, however, that Professor Simes has done a difficult job well and has produced a notable contribution to the study of this field of the law.

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