

# Trusts Future Interests and All That Being Again a Review of Reviews To Which Are Both Prefixed and Appended Certain Thoughts on the Present Discontents

Francis W. Jacob

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TRUSTS, FUTURE INTERESTS, AND ALL THAT:  
BEING AGAIN A REVIEW OF REVIEWS; TO  
WHICH ARE BOTH PREFIXED AND AP-  
PENDED CERTAIN THOUGHTS ON  
THE PRESENT DISCONTENTS<sup>1</sup>

FRANCIS W. JACOB\*

Christopher Columbus Langdell believed that law should be studied from the cases. *Compendia sunt dispendia; et melius est petere fontes quam sectari rivulos.*<sup>2</sup> He discovered that to use the reports wore out the library. So he made him a book of cases; and his students used the book. This started something. Or, to rise from the colloquial to the classic.—

“genus unde Latinum  
“Albanique patres, atque altae moenia Romae.”<sup>3</sup>

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\*Venue: In the County of Coke, Commonwealth of Blackstone, to wit, at Cheapside in the County of Douglas.

<sup>1</sup>It has recently been pointed out by Mr. Zechariah Chafee that the average run-of-mine student has an inadequate background for the appreciation of literary references. We are all glad that this has at last been said publicly; though it will probably have to be reiterated a good many times before it will do much good.

Apropos comes this: A class of fifty-eight students in a Personal Property course at the University of Kansas Law School; fourth meeting of the class—discussion of *Young v. Hichens*; no student knew how many shillings make a pound, but seven (mostly from western Kansas) knew how many feet make a fathom. This was extraordinarily puzzling; recently, in conversation at Chicago, Mr. Campbell hit upon the explanation, which is obvious enough when suggested. Fathoms are mentioned in the Bible; the boys learned about them in Sunday-School.

In view of the now well-recognized incompetence of the law teaching profession (see text of this paper, and notes *passim*), the law teacher is an *a fortiori* case for the application of Mr. Chafee's statement.

Accordingly we are providing a gloss for most of our literary quotations and allusions. This gloss is placed in the notes. A note inserted for this purpose is, in deference to Mr. Chafee, who will not need them, called a “Z.C.-note”. Occasionally, in exceptionally obvious and in very abstruse instances, no Z.C.-note is employed.

First Z.C.-note: *Thoughts on the Present Discontents* is not original with us. It is the name of an essay written in 1770 by Mr. Edmund Burke, and is not to be confused with Mr. Thomas Paine's *Common Sense*.

<sup>2</sup>(Z.C.-note) We did not originate this passage. It was Langdell's motto, and being translated means approximately: We can get along without cisterns, and it is better to drink from a spring than to put chlorine in river-water. For a discussion of the whole matter, see the Centennial History of the Harvard Law School, published by the Law School Association in 1918; at page 229.

<sup>3</sup>(Z.C.-note) We did not make up this Latin. These are the last part of the sixth, and all of the seventh, lines (if the four pre-lines sometimes attributed to the poet be not counted) of the Aeneid of Publius Virgilius Maro, and being translated mean: “Whence the Latin race, the Alban fathers, and the walls of lofty Rome”.

The case system, soon degenerated into a case-book system, was for some little time well received. But it is matter of common knowledge, upon which a good deal has been said,<sup>4</sup> that since the later years of Langdell there has been no teacher of law—with possible slight allowance for Ames, whose work, while undoubtedly characterized by earnestness and industry, is regarded in some quarters as a bit juvenile—there has been, we repeat, no teacher of law who has done more than follow blindly in the footsteps of his own instructors, treading the fertile and beautiful fields of jurisprudence with unseeing eyes. There are, of course, two present exceptions.<sup>5</sup> These aside, there is an extraordinarily strong presumption that a teacher of law is a conservative; and not only a conservative, but a routinist, a recluse, remote from the ebb and flow of throbbing life that courses through the veins of Manhattan and other important places.<sup>6</sup>

Again, to bring the matter closer home, there is a certain heresy called conceptualism. This heresy, unknown to the civilian lawyer, bade fair for a time to work havoc in law and the teaching of law, and to tear the very foundations from beneath the temple of justice. For justice looks to the facts.

Finally, different people write different sorts of case-books still, even though the day of cases (for worth-while teaching of the law) is past. And some, like Mr. Scott and Mr. Powell, even include old cases. And some, like Mr. Campbell and Mr. Powell, even invent new methods of presenting case material. And some, like Mr. Powell, make up case- and material-books which seem to require a reorganization of the whole curriculum for their use.

With all these matters (to mention a few only) disquieting the public mind, surely somebody ought to write something.

\* \* \* \*

Within a very short time, relatively speaking (for the law is long), Mr. Scott has produced the Second Edition of his *Cases on Trusts*;<sup>7</sup> Mr. Powell has published his *Cases on Future Interests*,<sup>8</sup> and one volume of his *Cases on Trusts and Estates*<sup>9</sup> (his second volume being

<sup>4</sup>See note 51, and our text, *passim*.

<sup>5</sup>It has not yet been ascertained who is to be cast for the role of the Holy Ghost.

<sup>6</sup>"Nur die alten Professoren bleiben stehen, in dieser allgemeinen Bewegung, unerschütterlich fest, gleich den Pyramiden Aegyptens, nur dass in diesen Universitätspyramiden keine Weisheit verborgen ist." (Z.C.-note) This passage is not original with us. It is to be found in Heinrich Heine's *Harzreise* (s. 6, Heinz Amelungs Ausgabe), and being translated means: "Only the old professors continue, in this general activity, unshakably firm, like the Egyptian Pyramids, only that in these university-pyramids there is concealed no wisdom."

<sup>7</sup>Published by the Editor, Langdell Hall, Cambridge, 1931.

<sup>8</sup>1928, The West Publishing Company. <sup>9</sup>1932, The West Publishing Company.

well advanced in preparation); Mr. Carey has got up for the Commerce Clearing House his *Cases on Trusts*;<sup>10</sup> Mr. Fraser (very recently indeed) has had printed his *Cases and Readings on the Law of Property*;<sup>11</sup> most of these books have been reviewed by presumptively incompetent reviewers; and there have been, aside from this, Restatements; Conventions;<sup>12</sup> Law Review Articles; Seminars; Correlations; Promotions and Demotions; and even, once in a while (though shame-facedly and surreptitiously) some study of the Law.

This is surely far better than a cycle of Cathay.<sup>13</sup>

And if it were not to be regarded as a phase of the heresy of conservative conceptualism, one might even cite a passage from Webster about a storm-tossed mariner;<sup>14</sup> and at any rate there is surely no harm in sitting back and taking a look at it all.

\* \* \* \*

Now it will seem perhaps that the best way to do this will be to gather up such opinion as we can from the cities and the back counties. These straws may indicate the direction of the wind, and even to a certain extent its velocity.<sup>15</sup> After that, if we are any better off than we were before, it will be surprising.

#### MR. SCOTT'S BOOK

Mr. Scott's reviewers number an even dozen. Of their reviews, four—Mr. J. B. Fordham's,<sup>16</sup> Mr. J. W. Curran's,<sup>17</sup> Mr. W. E. Lang's,<sup>18</sup> and Mr. A. T. Vanderbilt's<sup>19</sup>—are unfortunately not available to us. One of the remaining eight was oral, and will be discussed later. The other seven<sup>20</sup> we may well examine.

<sup>10</sup>1931, The Commerce Clearing House, Inc.

<sup>11</sup>1932, The Commerce Clearing House, Inc.

<sup>12</sup>Not to mention a junket to New Orleans.

<sup>13</sup>(Z.C.-note) The last three words are not original with us. They are to be found in line 184 of the poem *Locksley Hall*, by Alfred, Lord Tennyson. The poem was first published in 1842.

<sup>14</sup>Webster (Daniel), *op. non cit., pl. obl.*

<sup>15</sup>This passage does not constitute the mixed metaphor that it seems to. It is plagiarized from the American political idiom of the nineteenth and twentieth centuries.

<sup>16</sup>(1931) 37 W. VA. L. Q. 459.

<sup>17</sup>(1931) 1 DETROIT L. J. 152.

<sup>18</sup>(1931) 15 MARQ. L. REV. 238.

<sup>19</sup>(1931) 1 MERCER BEASLEY L. REV. 81.

<sup>20</sup>Mr. C. Zollman's, (1931) 17 A. B. A. J. 404; Mr. E. E. Cheatham's, (1931) 44 HARV. L. REV. 1307; Mr. A. G. Gulliver's, (1932) 41 YALE L. J. 786; Mr. J. W. MacDonald's, (1931) 17 CORNELL LAW QUARTERLY 200; Mr. D. E. Snodgrass's, (1931) 20 CAL. L. REV. 106; Mr. A. E. Evan's, (1931) 20 KY. L. REV. 106; and a review by "L. C. C.", (1931) 19 GEORGETOWN L. J. 518.

We start out, of course, with the presumption already mentioned,<sup>21</sup> that these gentlemen, being law teachers, don't know their stuff. We shall, for their benefit, do as much to rebut the presumption as possible.

A reviewer is to be known by the adjectives he heaps; and since these gentlemen all really had to say about the same thing concerning Mr. Scott's book, we shall first inquire who picked out the best adjective to say it. Only top adjectives count, so we have picked top adjective from each review. They are as follows:

Mr. Zollman.....	superb (close second, "well-bound")
Mr. Cheatham.....	unusually good
Mr. MacDonald.....	valuable
Mr. Snodgrass.....	notable
Mr. Evans.....	valuable (extraordinarily)
"L.C.C.".....	"distinct pre-eminence" (no good adjectives)
Mr. Gulliver.....	able

"As to the Adjective; when in doubt, strike it out." (Pudd'nhead Wilson's Calendar.)<sup>22</sup> On this basis "L.C.C." wins. There are other theories.

Several of these reviews we can deal with briefly.

Mr. Zollman believes that the matter on Charitable Trusts really ought to have been left out for treatment in a separate course. We expected this. "L.C.C." thinks there is not enough material on Charitable Trusts. Mr. Scott will probably draw his own conclusions.

"L.C.C.", again, thinks the book certainly can't go into its inevitable Third Edition with so cavalier a disregard of the Massachusetts Trust. Mr. Gulliver would have none of it. Actually, Mr. Scott puts in *Rhode Island Hospital Trust Company v Copeland*.<sup>23</sup> The book itself, and its reviewers on this point, demonstrate convincingly that Massachusetts Trusts is taught in other courses at Harvard and Yale, and that perhaps the teacher of Trusts does most of the work on it at Georgetown.

Mr. Gulliver and Mr. Cheatham get together on the proposition that a good deal of the material should be taught elsewhere. Mr. MacDonald, on the other hand, is "pleased to find a similar aim, although the emphasis may have shifted. The aim is still to demand as exact a knowledge of the law as possible. No one doubts that it is the law of trusts he is studying. Enough material then is provided that the teacher himself may relate law to modern life, if that has

<sup>21</sup>See note 6.

<sup>22</sup>(Z.C.-note) *Pudd'nhead Wilson*, by Mark Twain (Samuel L. Clemens); scope-note to Chapter XI.

<sup>23</sup>At 609. The case is 39 R. I. 193 (1916).

become his goal." Mr. Gulliver and Mr. Cheatham were rather expected to get together on their point. Mr. MacDonald's review is recommended to followers of the ancient faith; it occupies less than a page, and it says a great deal in that small compass.

Mr. Snodgrass seems to be the only one of the reviewers who comments especially on the extensive incorporation by reference of the First Edition. Parol, among the profession, this matter has been somewhat discussed. Really it is difficult to see, not that it isn't objectionable, but that it isn't an extraordinarily good thing.

Mr. Evans' review looks at first glance to be of the table of contents type; but it turns out to be not that at all; and he makes two suggestions as to minor modifications of which Mr. Scott will very possibly take advantage.

Says Mr. Zollman: "The second as compared with the first edition shows clearly that the author is making distinct progress in his understanding of charities." It is gratifying to know that Mr. Scott is getting ahead. We understand, from confidential sources, that Mr. Williston is beginning to feel at home in the field of third party beneficiaries.—No, Mr. Zollman, you can't do that. Mr. Scott is getting into his late forties.

Mr. Zollman makes the point that between private trusts and charitable trusts there is nothing in common but the name trusts.<sup>24</sup> FAIRFAX. This matter is a good store for discussion when the others come, &c.<sup>25</sup>

Mr. Cheatham's review is orthodox. Coming from one who probably sits on the other side of some of the fences, it strikes the reader as a fair and dispassionate estimate.

And so we come to Mr. Gulliver.<sup>26</sup> This is no mere matter of surface, though we must look at the surface first. Mr. Gulliver is the only one of the crowd who comes anywhere near close on his estimate of how many cases are new in the Edition, of how many of the unsuitable English cases have been omitted,<sup>27</sup> of what proportion of the

<sup>24</sup>Irwin v Swinney, 44 F. (2nd) 172 (1931), is good elementary reading on the matter.

<sup>25</sup>(Z.C.-note) This passage is not original with us. It is to be found at the conclusion of an Anonymous Case (1468), Y.B. 8 Ed. IV. fol. 6, pl. 1; Scott, Second Edition, 668.

<sup>26</sup>"Here come those dog-goned Elis

"You ask us how we know. . ."—*Old Harvard Chantey*

<sup>27</sup>The process of excision must have been a painful one to Mr. Scott, to whom each case had a personality. We hope, and are sure, that he will never deprive us of the delightful anti-climax of *Merry v. Abney the Father, Abney the Son and Kendall*. We shall get on a bit more comfortably, however, without *In re Balls and Ex parte Broad; In re Neck*—honi s— (No no no no.—Ed.)

cases come from what courts. He has the percentages worked out; and the reader is warned not to go to any of the less accurate reviewers when he has need of these data.

"A far more drastic reduction [in the number of English cases] would seem desirable in the light of student reactions." And it is going to be fun, gentle reader, to watch Mr. Scott react to the student reactions down at Yale.

Mr. Gulliver pays high tribute to the care with which Mr. Scott has done the general work of revision and emendation; and he does it in language that can be used only by a man who is himself a careful worker.

This review of Mr. Gulliver's is a first-rate review; it has the merit of coming right out and saying "I" instead of hiding behind "the writer."<sup>28</sup> It is written in a vigorous, aggressive, straightforward fashion. He "definitely disagrees with the basic assumption" of all Mr. Scott's work. A lot of us definitely disagree with a basic assumption of Mr. Gulliver's; but our disagreement is not of such sort that his work can not go on.

Mr. Gulliver writes a review in the same straightforward fashion in which he delivers a paper. He is persuasive; and he would be convincing if one could get very excited about his major premise. This premise undoubtedly is: The materials in the general field of which Trusts forms a part need reorganization. We don't stick at his premise; likely enough it is sound.

Our objection is more fundamental. It is this: Mr. Gulliver is living in the wrong syllogism, and he's wasting his time there (as much as Mr. Gulliver would be likely to waste his time anywhere). There is another and much greater syllogism whose premise is: We are to produce lawyers of intelligence and integrity, and to advance the substantive law. Possibly Mr. Gulliver's major is a minor in this syllogism; very possibly it is not. Some of us think the real minor premise in this syllogism is a chap who sits at the end of a log.<sup>29</sup>

We have not had the pleasure of knowing Mr. Gulliver except as we have heard him at Chicago. He seems to us to be much better suited to be a valuable minor premise in the big syllogism than to be out tilting with windmills.<sup>30</sup> We are the more convinced of this

<sup>28</sup>Having been fed Macaulay (Z.C.-note—an English essayist) at an early age, we use "we"; but we must confess ourselves pleased that he uses "I".

<sup>29</sup>(Z.C.-note) "Mark Hopkins at one end of a log and a student at the other" has long been the manner in which conservatives describe their ideal of the educative process.

<sup>30</sup>(Z.C.-note) This allusion, rather surprisingly, is to Spanish and not to Dutch literature. With this lead, the matter will be left to the class to look up.

by the opening paragraph of his review. A man to write that sort of a paragraph must himself have a good many of the qualities he describes.

The field of Trusts is just a chess-board anyhow. There is Mr. Scott, whom Mr. Gulliver accuses of moving on the file of conceptualism; and there is Mr. Gulliver, who says it's important to move only on the rank of the facts. Then there is Mr. Carey, who is a bishop and moves only on the diagonal; and there is Mr. Powell, who can move on rank, file, or diagonal at will. True, the Messianic<sup>31</sup> doctrine is that we are all kings, and move but one square at a time; but for the moment we are talking sense.

Now none of us believes that Mr. Gulliver really sticks to the rank. We know perfectly well that if he wants to mate in three he'll use the knight just like the rest of us.

How about it, Mr. Gulliver? We like you; we think you'd like us. Why not come over on our side of the fence for a while?—These judges, and these teachers, have been at this thing for years and years and years. After all, we don't want, and you don't want, to reconstruct the universe; we want to train men to engage in a profession, and so (vicariously, it is true) to make life a bit more sensibly livable. Let's get over all this damned nonsense that allows the machinery of the case-book to dominate the man without whom the best volume in the world is a dead thing; let's forsake publicity (we don't mean that *you're* a publicizer) and consider substance; and, while it may be too late for *our* generation, let's at least go out and prepare the way for another generation of great teachers of the Law.

#### *The Prize-Winning Review*

Mr. Anderson's review was oral, and probably appears now for the first time in print. Mr. Anderson was at the time a student in the Law School of the University of Oklahoma, and is now in the practice.<sup>32</sup> In answer to an inquiry as to how Trusts was getting along down at Norman, Mr. Anderson said: "We're half way through the semester, and are really getting well started on *A Trust Distinguished from an Equitable Charge*, and what we don't know about the law involved in the first ninety pages isn't worth knowing.

<sup>31</sup>See note 5.

<sup>32</sup>For a long time people have seemed to think that the dignity of the profession demands our saying "student suggestion", "student comment". Isn't it time we quit this? In fact, if a leading authority on pedagogy is right, we teachers of the law are rather a stupid lot; whereas almost any member of the average student body is competent to master about any subject after he gets by his first month or so.



Possibly we may have to skip a few cases to get through the book."

As the distinguished Mr. Edward Warren used to say: "Now hasn't Mr. Anderson just about gone to the root of the matter?" Of course, a tribute had to be paid to Mr. Scott's scholarship, ability, and industry; but that's just a choice of adjectives, on which the awards go to "L.C.C." and to Mr. Zollman. The main thing is that in a book of this sort one could reasonably devote a semester to any twenty pages, and still not leave the road surveyed by Mr. Scott. And the only caution to the user of the book is not to be tempted into doing it.

So, when it comes to grading the papers, there are a lot of good B reviews, and we are inclined to add a plus for Mr. MacDonald and Mr. Gulliver. Mr. Anderson gets the A; and he didn't even know he was taking the course. It so often happens that way.

#### MR. POWELL

A distinction is to be taken between Mr. Powell's work and Mr. Powell's works.

#### *Mr. Powell's Work*

It certainly should not be overstating the case to say that the profession at large looks on Mr. Powell's work with respect and admiration. His services as Reporter of the *Property Restatement* in no way suffer detracton by reason of the adverse criticism to which certain phases of that *Restatement* are being, perhaps properly, subjected. Probably his predecessor and he have each undertaken his monumental task with full consciousness that perhaps not even a majority would like it when it was done.

Similarly in his especial fields of Future Interests and Trusts Mr. Powell has done something of major significance. He has succeeded in getting nearly everybody into disagreement with him; and his capacities (not merely his position) are such that it is a man-sized job to disagree effectively. In these especial fields he has accomplished this by getting out case-books that, without all sorts of reorganization, none but he can teach; by putting in these case-books Questions, most of which make every instructor provoked because he wants the credit for having thought up the bright ideas himself, and some of which show that Mr. Powell is ahead of most of us; and by annotating the cases so exhaustively that the book is a challenge to every teacher of the subject to do some substantial work in the field.

All this is genuine contribution, and distinctly real twentieth century contribution, to legal thought. It is sincere contribution;

not for advertising purposes; which is not inevitably true these days.<sup>33</sup> Mr. Powell, like Mr. Joseph Addison long before him, has done much to bring philosophy down out of heaven to inhabit among men.

So much for Mr. Powell's work. Let us now consider

*Mr. Powell's Works*

For our purposes these are two: (1) his *Cases on Future Interests*; and (2) his *Cases on Trusts and Estates*. Upon the former, we shall (except by occasional implication) be silent; the earlier reviewers will be heard. Upon the latter, no reviews having as yet appeared, we must perforce produce our own review.

First, then, as to Mr. Powell's *Cases on Future Interests*. His reviewers seem to number four; to wit, Mr. Bordwell,<sup>34</sup> Mr. Madden,<sup>35</sup> Mr. Roberts,<sup>36</sup> and Mr. Arnold.<sup>37</sup> Their reviews have been examined with care. Of course there is a strong presumption against the gentlemen; they are all law teachers. But none of the reviews which they write seems actually to involve self-stultification. And it is believed that west of the Hudson all are well thought of, in a quiet, modest way.

Mr. Bordwell needs no encomium. There he stands, the Massachusetts of the Law of Real Property.<sup>38</sup>

His review involves a comparison of the collections of Gray, Kales, and Powell, and is for the most part impersonal in its attitude. His comment runs upon the varying functions of the case-book at different times and for different purposes. He considers from a perspective point of view the whole problem of the organization of the field of property. This is natural.

The review was written in 1931. It is evident from a comment of his at the foot of page 325 that already at that time the approaching influx of civilianism was visible on the horizon at Iowa City. To many of us it was first evident as an influx at Chicago much more recently.

Mr. Bordwell says frankly what a good many people feel—that there can be too much of this publisher-influence in the arranging of the curriculum and in the naming of courses. His point of approach is: "Why teach about reversions and vested remainders in a course on *Future Interests*?" Many of us have asked that question

<sup>33</sup>We kept tabs, together with Mr. Frank Rowley, at Chicago, and counted six good sales-talks.

<sup>34</sup>(1931) 16 IOWA L. REV. 323.

<sup>35</sup>(1929) 14 CORNELL LAW QUARTERLY 258.

<sup>36</sup>(1928) 17 KY. L. J. 74.

<sup>37</sup>(1929) 23 ILL. L. REV. 633.

<sup>38</sup>See note 14.

of ourselves and of each other; and we have wondered too where rights in land end and titles begin.

Mr. Bordwell votes for the preservation of the old cases, at least to the extent that a teacher be still able in good conscience to tell a student that the cases are worth reading; and the case-book seems to satisfy him in that regard. He speaks with strong commendation of Mr. Powell's hypothetical situations in Chapter Two. He is not enthusiastic in his comment on the *Questions*; chief objection, last year's notes will give this year's answer.—Guess the boys are pretty much alike everywhere.

Mr. Bordwell says he is using the book. This, from this source, is of itself tribute enough.

Next reviewer, Mr. Madden. Mr. Madden opens his review by a first-rate metaphor upon the matter of discarding the English cases. His first two paragraphs are strongly recommended not only to the teacher, but for citation to students in the subject, who will be mature enough in the law (if not *prima facie* so without legal training) to profit in their thinking from a consideration of the pedagogical problem.

Mr. Madden views with a little more alarm than Mr. Bordwell does. Whereas Mr. Bordwell says: ". . . just another casebook and not something different", Mr. Madden says: "This interesting book is a real departure from the traditions." It may be that Mr. Bordwell saw, or heard, more of the book while it was yet in its formative processes than Mr. Madden did, and so got used to the idea. Or it may be that there is a difference between the views of the two men as to what constitute the traditions. It can't matter greatly.

Mr. Madden dislikes the *Questions*, just as Mr. Bordwell does. His stated reasons are slightly different; and we may believe that his stated reasons are his genuine ones, for he doesn't hesitate to bring out into the open the intellectual vanity argument, which he puts very neatly. Another and more objective criticism is this, that one can't, in teaching, pass the *Questions* by without feeling that he's omitted something, and at the same time if he takes them all up he'll never finish the course. It will be recalled that an objection similar to this last was raised as to Mr. Campbell's somewhat differently conceived *Questions* in his case-book on Bills and Notes. That book, however, has not by that criticism been retarded in its progress to the position of pre-eminence which it deservedly enjoys.

Whereas Mr. Bordwell especially liked Chapter Two, Mr. Madden especially likes Chapter One. Thus, from two reviewers, we have managed to get out praise for the first two chapters.

Mr. Roberts, our third reviewer, satisfactorily takes care of the rest of the book by saying: "It is certainly a case-book of the first order". He especially likes the introductory chapter, and seems to have less objection to the diminution of the English cases than either Mr. Bordwell or Mr. Madden.

The *Questions* are treated in this way by Mr. Roberts: Point 1, they are suggestive; Point 2, they ought to have been left out (not, of course, said as roughly as that). "... lacking the element of surprise. It would seem to put the class discussion on a level with the work of a course in Mathematics". Well, well, Mr. Roberts; there is (or are) Mathematics *and* Mathematics.

Mr. Arnold's review is of the table-of-contents type. Such a review may be of two sorts. One sort indicates that the writer has examined the table of contents. The other sort is used by a superficial reviewer who fails to grasp in any way the thread of the organization, and who attempts to poke fun at something he doesn't understand by listing the materials in order with an occasional turn of phrase which is as much as to say: "Am I not clever and isn't this stuff silly!" The former type of table-of-contents review is innocuous; the latter is equally innocuous, but is a rather nauseating kind of intellectual exhibitionism. Neither type of review requires much brains; nor does an orthodox table-of-contents review, on the other hand, in any way indicate lack of capacity in the writer—he may be busy, or he may *have* to write the review and yet not want to express his opinions.

Mr. Arnold's review is not at all of the second type mentioned above. Mr. Arnold makes the comment which seems to be expressed or implicit in all the reviews—that most of us will have to organize the material, and will prefer to organize the material, for ourselves; and that the main thing is that a case-book editor give us something to organize. Mr. Arnold's review is, then, a table-of-contents review of the first class.

If the merit of a book is to be judged by the number of reviews of it which are written, we must express it as our opinion that Mr. Powell's book on *Future Interests* is a departure from this rule, and is distinctly under-reviewed.

\* \* \* \*

As we said before, we shall have to write our own review of Mr. Powell's *Cases on Trusts and Estates*.

\* \* \* \*

Formal Comment: This book originally appeared as "*Materials*" in 1928. It is now coming out in two volumes. It purports to cover

Trusts (so far as not elsewhere provided for at Columbia); the drafting of Wills; and once so-called Future Interests. In harmony with Mr. Bordwell's views, the name "Future Interests" is gone. At this early date, no tears have as yet fallen on the grave.

The informal review follows.

\* \* \* \*

There is no analytical reason why one should not regard Broadway as running ENE by WSW, and connecting Brooklyn and the Bronx; or why one shouldn't take a seat in the upper tier at Yankee Stadium hoping to get a good view of the Battery. For a more or less extensive period of time these things have been otherwise; but if one is reasonably indifferent to metropolitan tradition and to geographic persistence, and doesn't mind having friends look him up at a Greenwich Village address when in fact his home is out beyond Harlem, no convincing reason appears why he should not take the outstanding features of Manhattan, drape them for an hour or two about the neck and upstretched arm of the Statue of Liberty, for the sake of convenience and of symbolism, and then replace them nearer to the heart's desire.

In the course of this process, for example, one might well have a topic (functionally—or, in neo-ultra-modern nomenclature *factually*) labelled TRAVEL; and under such a topic he would well juxtapose, let us say, Grand Central, the Pennsylvania Station, and the Cunard Docks (from which one starts); the Metropolitan Museum (which provides the inspiration); the lower East Side (because not especially reminiscent of Alaskan travel); the corner of Broad and Wall (where one gets the money to travel); and, conceivably, Grant's Tomb (because Grant did most of his travelling in his later years, his earlier life having been a study in Creditors' Rights—an entirely different subject). When these should all have been gathered together, they would *au cours de propriété* be placed in dark blue covers on Morningside Heights. A new subway station would be opened with proper fanfare of trumpets.

The only danger in such a process is that all the railroad trains, steamboats, automobiles, subways, aeroplanes and taxicabs might be left hanging on the Goddess of Liberty, and then it would be extraordinarily difficult for people to go places. And the only serious criticism that can possibly be made of the more aggressive proponents of such a process is that they are a bit prone to be insistent that Grant's Tomb is at the corner of Broad and Wall; whereas so many people think that there are two views of the matter.

None of the foregoing material is upon any construction to be

deemed as reflecting upon Mr. Powell. This is merely to furnish the necessary background, against which Mr. Powell will stand out in relief—in fact, quite a bit of a relief to some of us.

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Now of course Mr. Havighurst has rearranged things thoroughly above the Loop. Wrigley Field has suffered especially. The box seats are down at Fifty-ninth and the Midway; the grandstand has been conveniently placed before the "Panorama of the World's Legal Systems", next to the Planetarium; the bleachers, owing to irresistible popular demand, have been taken to the northwest corner of State and Van Buren; the outfield is somewhere off Navy Pier; and what used to be regarded as the infield has disappeared entirely, except that the pitcher's box has been given to Mr. Leon Green.

Mr. Scott naturally has done nothing of the sort. True, a few of the old banking firms have been moved into new quarters, and Scollay Square has been widened and straightened out, to the infinite advantage of Cambridge-bound traffic. But Boston is still Boston; just as hard to get around in as ever, if you don't know your way; just as stimulating and as fascinating as ever, whether you know your way or not. And T Wharf and the Old North Church and the home of Paul Revere and the Old Union Oyster House are just where they have been for better than a century.

Mr. Powell does a good deal of this sort of thing. But it is to be observed that *he really has to*. For he follows the whirlwind,<sup>39</sup> the earthquake, and the fire; and, while his is not exactly the still small voice, it is a good clear voice, and an exceedingly intelligent one; and as he directs the laborers in the task of reconstruction we from Trans-Appalachiana watch, and wonder, with genuine admiration, how he manages to leave so few things hanging around the Statue of Liberty. For he leaves few; and those that he does leave will be mentioned hereafter with charity.

This book is probably going to be just as impossible as a text-book (except of course for Mr. Powell, who knows what what's where for) as was his last. The great majority of his *Questions* is going to be just as irritating to teachers whose intellectual vanity is offended by having their thunder stolen. A small number of the *Questions*, as was true in the last book, will suggest to teachers things that they never had thought of, and that they know right well that they ought to have thought of. So much for the book as a text-book.

As a case-book, this publication will be hard to work into the

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<sup>39</sup>See note 51.

curriculum at many schools. Many schools will be unable to use it, at least for several years, until the entire Columbia reorganization is finished *and* until the profession is convinced that the Columbia reorganization amounts to much anyhow.

If any teacher west of the Hudson ever gives a course based on this book, he will not merely be challenged, he will be compelled, to work out still another organization of the material, which he himself will understand; he will use this book as a first book of reference; he and his students will be stimulated by the thoroughness of its scholarship and by their (wholly intellectual) animosity to Mr. Powell's method of organization; and, granted a competent instructor,<sup>40</sup> it will be one of the best courses ever given in this country in any field of the law.

#### MR. CAREY'S BOOK

Mr. Carey rushed in where angels fear to tread. Mr. Carey is no fool. He has already made, as will be seen, a worth-while contribution; and he will make many more. But he certainly was let into something by his publishers.

His publishers gave him what was probably the toughest assignment (of this general sort) since Samuel Johnson undertook the Dictionary. As nearly as the events can be reconstructed, now that the accident is a thing of the past, his publishers called him in one morning, and said: "How's to run out to the office and whack together a ease-book on Trusts?" "O.K.," said Mr. Carey; and the lid was off Pandora's box.<sup>41</sup>

Mr. Carey is to be criticised not at all for his book, which would seem a very able case-book on Trusts if it weren't for Mr. Scott's, but for signing a contract such as he must have. It is within the present decade that his publishers decided to go into this line; the decade is even now only at early '33; and yet Mr. Carey is already off the press for over a year. In the vernacular: "That is sump'n."

Just consider what he was up against: (1) The toughest field of the lot, any way you look at it—functional<sup>42</sup> situations by the myriad in which the judiciary (that minor *fact*<sup>43</sup>) have turned to the "trust device",—with every known concept<sup>44</sup> trying to get inside; (2) a field

<sup>40</sup>See note 6.

<sup>41</sup>(Z.C.-note) This mythological allusion is plagiarized from Mr. John McArthur Maguire, class discussion in the law of Evidence, January 26, 1925. For reference to an exhaustive text treatment, see 1 Harvard Law Revue (ed. May 8, 1932) 15, note 20.

<sup>42</sup>*Neo-obsolescent*. See "fact".

<sup>43</sup>*Neo-ultra-modern* for "functional".

<sup>44</sup>Archaic.

the extent of whose area and the relative position of whose salient features is matter of widest divergence of opinion; (3) already well established in the field, the results of the combined scholarship of Ames and Scott, over a period of six decades, gathered together into one of the outstanding case-books of the entire period of case teaching.

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Mr. Carey's reviewers are an anonymous book-note writer in the *Harvard Law Review*,<sup>45</sup> Mr. R. C. Tisdale, of Grand Forks, North Dakota,<sup>46</sup> and Charles H. Kinnane, of Loyola University.<sup>47</sup>

The *Harvard Law Review* note writer is pretty impersonal. Mention is made of the treatment of administrative problems, and of the periodical citations in the footnotes. Quoting: "It is interesting to note that the editor twice characterizes the efforts to define the legal relationship between the depositor and the bank taking paper for collection as idle and futile speculation." A good many of us felt that Mr. Carey let himself in for that.

Mr. Tisdale's review is of the we-aim-to-please type.

Mr. Kinnane's review is, since early January, being circulated as advertising matter by the Commerce Clearing House, and can undoubtedly be obtained on request. A summary is therefore scarcely necessary. In the circular Mr. Kinnane's discussion is referred to as "appearing in the *Illinois Law Review*, January, 1933". Probably volume and page numbers will be indicated in reprints of the circular.

We ourselves have only one quarrel with Mr. Carey. We know "constructive trust", and we are coming to know "remedial trust"; we do not know, and doubt whether we want to know, "fiction trust". Frankly, our reasons are these: (1) remedial trust is sensible, for the word "trust" is often used to characterize a remedy; (2) constructive trust, as two words, is stupid, but as one word (like chain-of-title or file-of-sole) it has the sanction of usage and nobody doubts what it means; (3) fiction trust immediately suggests the query, What is the fiction? If the fiction is thought to be in legal consequences, there is practically none; for the very similarity of the legal relations in the express trust and in the remedial device was what led to calling the latter a trust. If the fiction is in the matter of the presence of the element of trust in the colloquial sense—reposal of confidence—then surely, every once in a while, there is an express trust which is also a fiction trust. And if what is meant is that some trusts are

<sup>45</sup>(1931) 45 HARV. L. REV. 423.

<sup>46</sup>(1932) 4 DAKOTA L. REV. 94.

<sup>47</sup>See text.



created deliberately as trusts, while in some situations trust consequences attach to conduct not so intended, the line of distinction is clear enough, but where is the fiction?

Mr. Carey is not to be criticised for his product. For the amount of time he had on it, he produced a book that can certainly be profitably used in classes. He has a first-class treatment of Administration, with excellent and ample notes. His selection and arrangement of cases is commendable. He by no means deserves the reviewer-ostracism to which he has been subjected. But his publishers have something to live down. It is matter of no small pleasure to turn to our final review to observe that they are beginning to live it down already.

#### MR. FRASER'S BOOK

This book is called *An Introduction to Real and Personal Property*.

This really is a book that we have all been waiting for, though nobody knew who was going to perform this greatly needed service until Mr. Fraser did the job.<sup>48</sup> The book is so recently off the presses that there has not been opportunity for exhaustive examination; but a good case-book has certain ear-marks; and this has them. Mr. Fraser had, of course, practically no problem of organization; for in this field alone, of all the law, there is pretty substantial agreement as to where things belong. But a wretched mess can be made of a real property book if one doesn't go at it right. Mr. Fraser went at it right.

In the first place, Mr. Fraser doesn't give us a lot of new names for things; he uses words which are understood without a glossary, and in an order which conveys definite thought to the mind. In the second place, neither the fact that there are farmers in the Minnesota legislature, nor the fact that Manhattan is going civilian, deters him in the least from inserting *Doe d. Lloyd v. Passingham* and *Armstrong d. Neve v. Wolsey*, rather than *Hanson v. Jensen*, 519 N. W. (2nd) 1377, 348 Minn. 233, 54 S.N.A.R.L. 17, commented on 35 Alaska L. J. 20 (student note). In the third place, Mr. Fraser does his duty by the Law Institute Restatement. In the fourth place, Mr. Fraser dares write in some excellent text of his own without, apparently, worrying one way or the other as to whether people will say he is going functional. In the fifth place, Mr. Fraser does not cite a law review article unless it's worth the trouble of looking up. In the sixth place, Mr. Fraser has made an exceedingly skilful

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<sup>48</sup>There are other excellent books in the field, notably Mr. Warren's and Mr. Bigelow's. But each of them binds the reader to a whole Property Series; whereas from Mr. Fraser's one can go anywhere he likes.

selection of Readings from the major sources, which will relieve the wear and tear on many a library in these days of small maintenance funds. In the seventh place, the distance from cover to cover is short enough to permit the teaching of everything which is treated.

The reader will perhaps gain the impression that we think Mr. Fraser's book a good one. This impression is correct.

Waterloo was won on the playing fields of Eton;<sup>49</sup> and the Battle of Future Interests, when it is won, is almost always won in the first year real property course; otherwise, the best that hard and clear-headed work in the third year can do is to enable the student to say: "I have fought a good fight; I have finished the course; and perhaps later I will get my faith back again."

Mr. Fraser's book will be used with first year students; Future Interests (by whatever name) will uniformly be taught in the third year; Mr. Fraser's book, in our modest opinion, is destined to be, for many years, while perhaps not indigenous, yet the most important book in the teaching of Future Interests.

#### CONCLUDING THOUGHTS ON THE PRESENT DISCONTENTS

There once was a time, oh best-beloved,<sup>50</sup> known as the good old days. It was away way back. It was before the depression; before the boom. It was while "function" still had a biological connotation, and long before it ceased to have any connotation at all. It was before the days when the Boy Orator from the North River, seizing the Zeitgeist by the tail and waving it around his head like a black panther or some other sort of lion,<sup>51</sup> and chanting all the while his paean of "Goods, Goods, Goods, Facts, Facts, Facts," led the serried ranks of the civilians upon the wavering forces of the emasculated professors of the common law, his blood-red banner streaming afar,<sup>52</sup> emblazoned with the device "Compendia sunt florendia, et melius sectari rivulos quam petere fontes"<sup>53</sup>—and thus brought about the burning of the Bastille, the capture of Jehol, the falling of the walls of Jericho, the triumph of the proletarian revolution, and the adoption of the Five Year Plan. Yes, reader, it was before that.

<sup>49</sup>(Z.C.-note) Attributed to the Duke of Wellington. Possibly it was the Marquis of Queensberry, or Mr. Amos Alonzo Stagg.

<sup>50</sup>(Z.C.-note) This is a term of art from Kipling, and not necessarily an expression of endearment addressed to the reader.

<sup>51</sup>"And be your oriflamme to-day the helmet of Navarre."

(Z.C.-note) Macaulay, *Ivry*. See also note 28.

<sup>52</sup>(Z.C.-note) This passage is from a hymn by Reginald Heber, b. 1783, d. 1826. The hymn was written in 1812. Heber was born in Cheshire, and died in Trichinopoly, India, having been, since 1823, Bishop of Calcutta. <sup>53</sup>See note 2.

And in those high and far-off times, oh best beloved, there was somebody known as bona fide purchaser for value without notice.

There was also holder in due course. They are at least sisters under their skins,<sup>54</sup> and Mr. Zechariah Chafee would say<sup>55</sup> that they are twin sisters, for to Mr. Chafee maturity doesn't matter.<sup>56</sup>

Now observe what happened to them. Holder in due course was put in a statute; in fact, as Mr. Beutel would have it, into the greatest statute of all time.<sup>57</sup> This did something to holder in due course; holder in due course thus became a *fact*, and tributes without number are showered at her feet.

But (at any rate so far as Trusts is concerned) bona fide purchaser for value without notice remained a concept, despised and rejected of men. A lonely few cherish her, and she still lives in the hearts of her devoted admirers of ancient days; but she is spoken of only in whispers at the Convention, and there is arising a generation that knew her not at all.

Mr. Scott is steadfast in his devotion. No one who has marched the straight and narrow way that leads from *Wetmore v. Porter* to *Bischoff v. Yorkville Bank* (or to *Newman v. Newman*, as it is in the Second Edition) will entertain doubt that bona fide purchaser for value without notice has meant something, and will always mean something, to Mr. Scott.

Mr. Carey, too, does a good job of it. At the beginning of his section,<sup>58</sup> and less frequently in the latter part, he does a bit of this "decided in the Mississippi Valley area since 1928" stuff; but the good, tough, teachable cases are there, arranged in intelligent order. Mr. Carey's cases on the subject are to be found without difficulty by an examination of the table of contents; and when they are found they are all right.

Mr. Powell, however, came precious close to leaving our heroine draped around the Statue of Liberty; though at the last minute he rushed back after her.<sup>59</sup> No mention is made of her in Volume I,

<sup>54</sup>(Z.C.-note) The allusion is not to dermatology; nor are the last four words of the clause original with us. These are the concluding words of a poem, *The Ladies*, by Rudyard Kipling.

<sup>55</sup>(1918) 31 HARV. L. REV. 1104, 1139, 1140.

<sup>56</sup>Nor to us.

<sup>57</sup>For a contrary view of the matter, see Mr. Campbell's opinion as interpreted (correctly, we must believe; for we did it) at (1930) 15 CORNELL LAW QUARTERLY 339.

<sup>58</sup>Chapter VI, section 3.

<sup>59</sup>"He was her man,

"—he done her wrong."

(Z.C.-note) Old negro spiritual, lately done into chamber music by Mr. Frank Tinney and others.

now available; but she is to appear in the second volume (a bit inconspicuously, it is true) under Chapter 36, Section 5, subtopic C—Unprivileged power to transfer and resultant tracing. There are those of us who hope that if it is humanly possible the glass slipper will be made to fit;<sup>60</sup> and, if it is, that Mr. Powell will dress her up in decently respectable apparel so that she can move about without embarrassment among those who still love her.

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Finally, there is this fundamental question: Shall the case-book be organized primarily for purposes of students who are going into the eastern metropolitan offices; or shall consideration be given to those problems which will rarely arise east of the Hudson, but may be common in other parts of the country? This, from the point of view of the editor of a case-book, must be a first consideration; but there is no harm if we consider it last.

An instance will suffice. Probably the great bulk of businesses in the eastern cities to-day is incorporated; though there must be a good many sole traders left. In a great area of the country the sole trader is, and will continue to be, a common phenomenon. It is in nature that these sole traders will die; and when they do, if anyone goes right on with the business, he will certainly be one sort or other of trustee. Busy practitioners of the better class say that it's a rare time when something of this character isn't in the office.

The situation as to this matter, as concerns our three Trusts case-books, is rather amusing. Mr. Scott, who is at any rate a Legist, and who is, we suspect, delightfully close to being a conceptualist at heart, gives the matter his customary thorough and condensed treatment on pages 596-605, with a note which is brief but which opens the whole matter. Mr. Carey (who is probably neither conceptualist nor factualist, but free-thinker) certainly gets the matter in; to find it, look in the case-index for *Willis v. Sharp*. Mr. Powell, who is the most out-and-out factualist of the three, has left the entire bunch of decedent sole traders draped around the Statue of Liberty.

Mr. Powell has done so much for us that this certainly is to be pointed out in no other manner than with a kindly smile of friendship. And as has already been said, it is marvelous that the decedent sole traders are out there practically alone.

But it does seem fitting that this summary should close with this observation. For, to us who sit on the conservative side of the fence, Mr. Powell is outstanding among the factualists. And, in the light

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<sup>60</sup>(Z.C.-note) The reference is to Cinderella.

of this, it is, is it not, an interesting commentary on a number of things?

FIAT LUX, RUAT COELUM

We asked Mr. Jacob to write a certain thing for us, and he wrote something entirely different.

After due consideration, it was decided that a consensus of opinion among Mr. Jacob's friends should be obtained. This was done in proper form; and it turned out that they thought Mr. Jacob would be properly understood.

The most significant of the comments were accordingly gathered together and follow.

—*The Editors*

QUEM AD FINEM SESE EFFRENATA JACTAT AUDACIA?

1. CONSENSUS: Your purpose seems to be to show up the buncombe in legal education. Permit me to congratulate you. ANSWER: Maybe. Or this: there is so much buncombe being written these days that I owe it to myself to write some in order to keep up with the parade.
2. CONSENSUS: Your second main thesis seems to be that there is a concerted effort to oust the common law and to introduce in its stead the civil system. Can you point to any instances of such an effort, other than Mr. Beutel and Mr. Llewellyn? ANSWER: Frankly, I cannot. But it has seemed to me (and others) that where there is so much smoke there must be *some* fire. A friend even went so far as to suggest to me that Mr. William Draper Lewis is the stoker; but I don't believe it.
3. CONSENSUS: Don't you lay yourself open to the charge of being yourself a publicizer? ANSWER: Very likely. I take this difference: I don't confine the publicity to myself and my intimates.
4. CONSENSUS: Isn't there a likelihood that some of what you write will be thought to be tinctured with animus? ANSWER: Isn't it true that all satire, good or bad, is tinctured with animus? I am frank to say that one of my minor mottoes is that of the Golden Dog of the City of Quebec. Animus is after all, is it not, a stimulant that we all use? There certainly ought to be stimulants;

if there strikes you any instance where animus looks to be used not as a stimulant but as an end, I want to correct it.

5. CONSENSUS: Why do you take such pains to poke fun at Mr. Chafee? Won't some of your readers think that your Z.C.-notes go on almost *ad nauseam*? ANSWER: You mistake me entirely. I regard Mr. Chafee as a teacher in whose classes I took great delight (except that he spent too much time on *Lumley v. Wagner*); as one whose latest proposition is deserving of vigorous and whole-hearted support; and as a literary allusioner too many of whose allusions I hope I did not miss. As for the *ad nauseam* aspect, try writing Z.C.-notes yourself, and see how it gets a hold on you.
6. CONSENSUS: Don't you anticipate trouble with General Grant's heirs?—They are noted for their family pride. ANSWER: Even assuming the matter is defamatory this would be one of the minor libel actions.
7. CONSENSUS: Some of my friends once came around and asked me to run for Mayor. ANSWER: I see what you're coming at; but there are two answers. (1) I have a good deal of confidence in my friends. (2) Ladies and Gentlemen, my heart is in the cause, and at whatever personal sacrifice I am determined to clear the name of our fair city so far as etc. etc. etc.
8. CONSENSUS: Do you or don't you try to make a joke of Mr. Powell? ANSWER: Most emphatically I don't. I am too greatly in debt both to Mr. Powell's work and to Mr. Powell's works to be such an ingrate. —never took a formal course in Future Interests, and feel that Mr. Powell has influenced beyond measure the course of whatever little respectable thinking I do in his field.
9. CONSENSUS: Have you a good or a bad opinion of Mr. Gulliver's abilities? ANSWER: I thought I was plain enough. It's nothing in derogation of Mr. Gulliver that he is on the Yale crew; and for that matter they've had some good football teams down at Yale, though I remember that Iowa once beat them 7-0, to the great astonishment of the entire Atlantic seaboard. I should like to sit in on one of Mr. Gulliver's classes. This, from this source, is of itself tribute enough.
10. CONSENSUS: That "honi soit qui mal y pense" is the best touch in the whole thing. CONSENSUS: A good many people will take the rest of the note in stride; but they will stick at "honi soit qui

mal y pense". ANSWER: I didn't start this business; Mr. Scott did. However, I'll try to take care of both of you.

11. CONSENSUS: Will you please clear up the ambiguity upon the matter of what you think of Mr. Fraser's book? ANSWER: I think the book is a good one.
12. CONSENSUS: Have you ever done any farming, or can you make money at any trade, or anything of that sort, to which you can turn, so that we shan't have to pass the hat indefinitely after this thing is published? ANSWER: I once had a State of Maine guide's license; and anyhow my tastes are simple.