

doctrine from the influence of what may have been some of its sources, the doctrines which we have just observed about excuse, splitting, and mitigation of damages. He argues strongly, to the reviewer's mind unanswerably, for the extension of liability for anticipatory repudiation to all types of contracts.

In connection with one interesting set of problems usually involving both present breach and anticipatory repudiation, Professor Corbin anticipates the flexible treatment of problems of remedy which he carries forward in Volume Five. It has been observed both by other writers and by courts that the treatment of the recovery of the insured in case of "total" and "permanent" disability under a disability insurance policy is introducing a new principle among the principles governing the relationship between what have been called "legal" and "equitable" remedies in our system. As in the case of the recovery by the promisee who has secured the promisor's indefeasible obligation to a donee beneficiary, the "legal" remedy in the case of total and permanent disability is at best clumsy and ineffective to give a sure equivalent of performance. Under these circumstances, and perhaps in a considerable range of "splitting" problems, it will be increasingly recognized by courts that recovery of damages should be refused while a decree for specific performance may be granted. As this evolution proceeds, it may be expected to develop a flexible attitude toward available remedies generally. Subject to whatever safeguards about jury trial may be thought necessary, courts will increasingly feel free to apply whatever remedy will most effectively protect the security of transactions, which is the leading concern of contract law.

The readable character of Professor Corbin's treatise is one significant feature of a group of related qualities. They include a sense of form and motion, of stability and growth, which pervades the whole work. There is shrewd but quiet criticism of points of current doctrine, together with respect for others' views, and for the law as it is. To one who does not know the author, the book conveys the impression of someone who combines to a marked degree the qualities of urbanity and vitality.

MALCOLM SHARP†

## VOLUME FIVE

### PART VI: BREACH OF CONTRACT—JUDICIAL REMEDIES §§ 990-1227.

I COUNT it an honor and a privilege to be asked to review a volume of *Corbin on Contracts*. And I am especially pleased that the assignment is of my favorite Volume, number Five, dealing with Remedies.

It seems to me that I can claim some sort of at least avuncular or nepotal relationship to the work. When, as a student, I watched with bated breath the offeree desperately trying to reach the top of the flag pole in time, I knew, as we all did then, that he—or at least some lineal descendant—was eventually to be captured in book form. By the time I joined the Yale faculty, over

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thirty years ago, the book was so far under way that it provided an unimpeachable alibi against undue evening diversions. I must admit that at times we suspected—and envied—this excuse. And from then on, the book's ultimate publication became a prime objective of all the author's colleagues, as well as himself. We share the deep satisfaction which must be his on the successful accomplishment of his appointed task and upon the deserved acclaim the book is receiving.

It is interesting now in retrospect to see how the work proves the validity of those excuses against unnecessary intrusions. For it contains its own repeated demonstrations of the years that have gone into its making. Instances abound where the author has left the text in its original form—it has not required change—while a footnote shows how the judges in the cases criticized have shifted ground over the years. The wash of precedents, and even of statutes, has not diverted him from his own appointed course.<sup>1</sup> I must confess here, too, to some envy and awe of such fortitude of plan so unusual in the modern legal author.

This illustrates an outstanding characteristic of the entire work. Most law writers become overwhelmed by the plethora of precedents. And many a legal text is but a seriatim statement of cumulated cases. But one could expect that this would not be Arthur Corbin's approach. What he has done has been to select carefully the cases he has found worth discussing, either to be emulated or to be guarded against. He has made no fetish of the recent case. The modern law office purchaser may be surprised at this, and perhaps concerned. And I do not see how the plan can be followed in every field—procedure, for example, where the governing principles are in flux and in reform. Occasionally where such a topic comes up, I find a little lack of contemporaneity, as, for example, the explanation for the absence of discussion of that now general remedy, the declaratory judgment, as being not only "very largely statutory," but also "in its early stages of development."<sup>2</sup> But in the over-all picture of the law of contracts, I am quite clear that it was a proper approach, and quite probably the only feasible approach, as events show. I find no lack of coverage of subject matter in all details and ramifications; and a whole volume of table of cases, recent and ancient, demonstrates that we still have plenty of citations before us. But we are not submerged by useless baggage; there are always cases enough to start us on the trail which the ordinary citators may carry us along so far as we wish to go. Nor is there any real

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1. For an example in the use of statutes, see § 284, pp. 37-8, dealing with the statute of frauds; in treatment of precedents, § 1254, p. 11 n. 14, which shows that the criticism expressed in the text was based on a case of 1929 and that "after the above was written" the precedent suffered various fates, including ultimate reversal in 1931. When the author does me the honor of citing my text on CODE PLEADING it is to the First Edition of 1923, not the Second of 1947. § 1219, p. 902 n.28.

2. § 991, p. 5. But the declaratory judgment is now a settled auxiliary or entire remedy, available in at least 44 of the American states and territories under reasonably settled and effective principles of law. CLARK, CODE PLEADING 333-7 (2d Ed. 1947); BORCHARD, DECLARATORY JUDGMENTS (2d Ed. 1941).

lack of modernity; in his views Arthur Corbin is more advanced, more progressive, than nine-tenths of the text writers.

The feature just discussed is a fair indication of what we should have expected from the author and actually do find throughout: a sturdy independence of thought; a sweet reasonableness of view; but a continued insistence on cutting through legal fog to reach common sense. One can find his lifetime principles continuously reiterated—starting with his Preface insistence upon legal principles as “Working Rules.”<sup>3</sup> Even in this volume they are too many to quote; but countless students will recognize such statements as “The common law never has been and cannot be a system of cut-and-dried unchangeable rules, principles, or doctrines.”<sup>4</sup> Or “The dream of a mechanical justice is recognized for what it is—only a dream and not even a rosy or desirable one.”<sup>5</sup> Like disposal is made of seductive legalisms; thus use of “proximate” (with “cause”) “should be abandoned, in both contract and tort cases”;<sup>6</sup> “the word ‘mutuality’ has been so used that it has become a pitfall and a snare”;<sup>7</sup> the “equitable” remedy of restitution;<sup>8</sup> the “inevitable reason” for any rule of law.<sup>9</sup> So, too, we may note the common-sense tip as to the award of profits, that where the mind of the court is certain they would have existed, they will be awarded, “even though the amount of profits prevented is scarcely subject to proof at all.”<sup>10</sup>

These observations bring me to that part of the work particularly committed to me for examination. If there is one field of the law where the approach should be by way of common sense and practicality—but generally is not—it is the law of remedies or of procedure. Here especially Arthur Corbin’s approach is a model for all teachers of substantive law to follow, though rarely have they done so. Generally speaking, the pedagogues in the more solid and ancient fields think procedure too lowly and offensive to notice except as they look to the pleading courses to provide those explanations of boring historicisms too esoteric to be explained by them to the interruption of their more worth while, or at least attractive, tasks. Nor are they unique in this attitude; for the greatest of judges likewise spurn the subject except where they may—occasionally—turn off decision by an ad hoc procedural maxim.<sup>11</sup> Not so Arthur Corbin. He instead has carried the same elements of sweet reason and common sense that he has had for his substantive problems

3. Preface iv.

4. § 1190, p. 819.

5. § 1136, p. 610.

6. § 997, p. 19.

7. § 1178, p. 787.

8. § 1103.

9. § 1111, p. 488 n.45.

10. P. 125.

11. See Chorley, *Procedural Reform in England* in DAVID DUDLEY FIELD CENTENARY ESSAYS 98, 99-102 (1949); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493 (1950); CLARK, CODE PLEADING 69-71 (2d Ed. 1947).

over into the field of remedies, and explored and illuminated that field as thoroughly as any he has touched.

I think I can truly say that my own procedural thinking has been largely shaped by the teaching of two men, of different temperaments and modes of expression, but curiously alike in their over-all approach to law. Those were Walter Cook and Arthur Corbin. And in my own writings I have consciously tried to follow those same dictates of practicability which I have seen in their work, particularly in the field of adjective law. (I hasten to add that of course my mentors are in no way responsible for those excesses in my work which so many seem to be now discovering.) Perhaps this close affinity is one reason why I have always found the chapter on remedies of the *Restatement of Contracts* the most workable and useful of all the restatements.<sup>12</sup> For that chapter Professor Corbin served as reporter, and this volume now at long length provides the background material for the law there "restated."<sup>13</sup>

The concise simplicity and realism that dominate his approach to the law of remedies are so thoroughly illustrated throughout this volume that I shall content myself here with only a few examples. One of the best is that mire for so many writers and jurists, the union of law and equity and its meaning in the way in which relief should be accorded a deserving litigant. I have referred above to his discussion of the *equitable* nature of the remedy of restitution. In a forcible expression that the remedy cannot properly be described as either "legal" or "equitable" in "any narrowly restricted signification of those terms" and a side glance at the thorough justification for the American Law Institute to include "both common law doctrines and the law of 'constructive trusts' in its 'Restatement of the Law of Restitution,'" he has this to say:

"It no longer accords with our system of law and justice that a plaintiff should be refused the remedy of restitution merely on the ground that he is seeking it 'at law' instead of 'in equity,' or because he has not stated his case in the old form of a 'bill for rescission and restitution' or a 'bill for reformation' or for 'equitable relief.' If the facts alleged by the plaintiff justify the legal result that he would have been entitled to under former equity rules and procedure, he is not now to be refused relief merely because he does not use that procedure and makes no reference to 'equity.'"<sup>14</sup>

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12. RESTATEMENT, CONTRACTS c. 12, "Judicial Remedies for Breach of Contract" (1932). See Clark, *The Restatement of the Law of Contracts*, 42 YALE L. J. 643, 658 n. 34 (1933).

13. See Clark, *supra* note 12, at 657, referring to the value of Corbin's explanatory notes in RESTATEMENT, CONTRACTS (Proposed Final Draft No. 12, 1932), but not available in the ultimate product.

14. § 1103, p. 459. See in general CLARK, CODE PLEADING c. 2 and elsewhere *passim* (2d Ed. 1947); CLARK, CASES ON MODERN PLEADING 213-261, 545-610 (1952); and note such a suggestive article as Levin, *Equitable Clean-up and the Jury: A Suggested Orientation*, 100 U. OF PA. L. REV. 320 (1951).

And then he utters this common-sense "warning":

"Judges, like all other men, find it difficult to escape from the mental habits and procedural ruts of the past. A lawyer may lose his case if he fails to take note of decisions that are not in harmony with the reasoning in the text above, however sound that reasoning may be. Bar examiners may fail a candidate for the bar because he adopts that reasoning without noting that local decisions are in conflict with it."<sup>15</sup>

Then the proof of the pudding comes in an all-too-recent decision of the New York Court of Appeals refusing restitution because the plaintiff had written the defendant merely offering to return the consideration, an act falling short of the formal tender which was necessary "at law" as discovered by the court.<sup>16</sup> And so the gently devastating critique continues:

"This was in spite of the fact that the legislature had abolished the court of Chancery and the forms of action and had substituted the present system of courts with a uniform procedure. The court was itself as much a court of 'equity' as a court of 'law'; and it was empowered and in duty bound to award restitution if the facts shown were sufficient to justify such a decree 'in equity,' even though not sufficient 'at common law.' All that was necessary was for the court to require the defendant to return the money on condition that the certificates were delivered into court and to adjust court costs as might be equitable.

"Instead, the long litigation through all the courts was thrown away; and the greatly injured plaintiff, after great expense, was required to start all over again by making a physical tender that would be refused, or by bringing a new suit that he would describe as his 'bill in equity' on exactly the same facts as before and ask for a conditional decree such as former chancellor Kent would have granted."<sup>17</sup>

15. § 1103, pp. 459-60 n.2.

16. *E. T. C. Corp. v. Title Guarantee & Trust Co.*, 271 N.Y. 124, 2 N.E.2d 284, 105 A.L.R. 999 (1936).

17. § 1103, p. 460 n. 2. Other criticisms of this case appear at § 1105, pp. 471-2 (criticizing also the decision of Cardozo, J., in *Schank v. Schuchman*, 212 N.Y. 352, 106 N.E. 127, 1914), and § 1116, p. 519; at the latter point it is aptly pointed out that such a decision "would be equally unjust and erroneous" in the federal courts today and even in New Jersey, where the statute still provides that the reformed court shall operate in "chancery" and "law" divisions, for there is no reason even to require a transfer. See also the criticism, § 1103, p. 460 n. 2, of the earlier case relied on, *Gould v. Cayuga Co. Nat. Bank*, 86 N.Y. 75 (1881), finding a difference between the actions as broad as a gulf: "When the 'theory' is abandoned, the figurative 'gulf' becomes invisible." Compare CLARK, *CASES ON MODERN PLEADING* 244 (1952); also Kharas, *A Century of Law-Equity Merger in New York*, 1 SYRACUSE L. REV. 186, 190, 191 (1949), pointing out that change had to come by way of statute in 1946 on recommendation of the New York Law Revision Commission. N.Y. CIV. PRAC. ACT §§ 112-e and g; Leg. Doc. (1946) No. 65(B). The author might well have referred to these statutes.

As might be expected against this background, the treatment of the "equitable" remedy of specific performance is equally direct. I like particularly the section "Is Specific Performance a Discretionary Remedy?" dealing with the innumerable cases so stating. After pointing out that the actions of a lower court are reviewable, that the exercise of power must not be arbitrary, and that actually there are reasonably well established working rules and standards by which courts are governed in granting and refusing the remedy, the author observes: "The rules and standards of the common law operate with not much greater definiteness and certainty than this."<sup>18</sup>

I shall venture specific mention of only two more topics, because both have traditionally collected more fog than even the foggiest area of the law deserves and because I know of nothing among the many studies in these areas which approaches the Corbin chapters in bringing light and clarity into the murk. The first is the chapter entitled "Restitution in Favor of a Plaintiff in Default."<sup>19</sup> Here we have not merely clarification, but a fine sense of fairness applauding the tendency of judges to be just even to a contracting party in major default or one that is "wilful"—with a nice touch as to that emotive word: "Its use indicates a childlike faith in the existence of a plain and obvious line between the good and the bad, between unfortunate virtue and unforgivable sin."<sup>20</sup> And the chapter ends with the statement that its text, as published in article form, "was used in preparing the rules in Restatement, Contracts, § 357," and—with deft understatement—"It is believed that those rules and the accompanying comment are in substantial harmony with the present text."<sup>21</sup>

The other topic is "Election of Remedies,"<sup>22</sup> that morass of "waiver," "estoppel," "ratification," "merger," "res judicata," and what not. Here all fall into proper place and the meaning and necessity of choice as affecting the law of remedies is made definite, with proper emphasis on the basic element of estoppel.<sup>23</sup> Let me pick out for ready reference the material dealing with the bringing of suit as an election; though the entire topic of election has procedural significance this particular part of the law clearly turns upon the procedural reactions of the adjudicators. Certainly a litigant might be held to have made a binding election upon bringing suit and by the manner he sues; when in the old days one purchased his writ for a particular form of action from the clerks in chancery, that would seem a fair and useful idea. And so the rule started. But how far away that is from any modern concepts. "In such cases, he has made an election; but his choice is wrong. In making such an election, the plaintiff is not a wrongdoer; and, indeed, he may not even have an incompetent attorney. The law of remedies is not so clear in all cases that

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18. § 1136, p. 609.

19. §§ 1122-35.

20. § 1123, p. 545.

21. § 1135, p. 606.

22. §§ 1214-27.

23. § 1220.

he who runs may read; and the particular facts on which the availability of a remedy depends are not always possible of ascertainment before bringing suit."<sup>24</sup> Even further, suit may now be brought with alternative counts or claims, as for damages or for restitution, which "certainly cannot be regarded as indicating an election"; and amendment is now free, allowing the plaintiff to seek a different remedy, or, the author might have added, to substitute different claims for relief on other facts, or offer different theories of law.<sup>25</sup> Consequently no election should be had until verdict or judgment; and at times even that may not be decisive or show any unfairness or estoppel in a further shift.<sup>26</sup> And election is properly as simple as that!

Publishers are often exuberant when they contemplate their own fine products. But this time when they say "The Final Word—Corbin on Contracts,"<sup>27</sup> I do believe they are right.

CHARLES E. CLARK†

## VOLUME SIX

PART VII: DISCHARGE AND IMPOSSIBILITY §§ 1228-1372.

PART VIII: ILLEGAL BARGAINS §§ 1373-1541.

It has been said of Cézanne that, like the Impressionists, he wanted to paint from nature, and yet to hold on to the sense of order and solid simplicity that had distinguished the art of the academic masters like Poussin.<sup>1</sup> I am not sure that writing a treatise on the law of contracts can properly be compared to painting a picture. Perhaps in a fanciful moment one may think so. Be that as it may, the words used in describing Cézanne's approach to his art strongly suggest to me Corbin's approach to the law of contracts.

For there are indications that Professor Corbin has striven to "paint from nature." He recognizes the realities of the judicial process, the non-legal elements that often share in producing a given decision,<sup>2</sup> the pragmatic development of doctrine, often in curious ways, somehow to make possible results that square with life and yet do not break with a traditional rule that has served its day but has not quite ceased to be. He does not, as many scholars do, insist that there is only one correct meaning for every legal term. For him all generali-

24. § 1218, p. 898.

25. § 1219. See the recent New York statutes, cited *supra* note 17 and CLARK, CODE PLEADING c. 12 (2d Ed. 1947) ("Amendment and Aider of Pleadings"), which is here cited in the earlier edition; *cf.* note 1 *supra*.

26. *Ibid.* See also CLARK, CODE PLEADING 493-8 (2d ed. 1947) (§ 77, "The Election of Remedies").

27. See, *e.g.*, Federal Reporter, Second Series, March 3, 1952, outside cover page. †Circuit Judge, United States Court of Appeals, Second Circuit.

1. GOMBRICH, THE STORY OF ART 405-6 (1950).

2. See, *e.g.*, discussions § 1293, pp. 154-5, § 1409, pp. 622-4.