

tacitly ignored. A fairer impression of our law would have been given had Professor Corbin cited the later case of *Robinson v. Graves*¹⁵ which shows that the modern English doctrine is very much that for which he argues.

Before concluding perhaps I may venture upon one suggestion for the second edition which will undoubtedly be called for shortly. It seems to me that the practical utility of the work would be still further increased if each volume had its own Index and Table of Cases in addition to the consolidated Index and Tables in Volumes Seven and Eight. I can well understand that, having accomplished the amazing achievement of producing the whole work at one time, Professor Corbin is anxious to emphasize its essential unity. Nevertheless it would be valuable, especially to the practitioner, if each Volume could be used, for example in Court, on its own.

On reading the foregoing I am acutely aware that it is all too inadequate an appreciation of a major work of legal scholarship. My excuse must be that of a great English lawyer and jurist, Lord Wright, in commenting on the equivalent sections of Williston's book.¹⁶ "I confess," he said, "that I found it, however ably and brilliantly done, somewhat depressing. There is no principle involved. It is all directed to construing badly drawn and ill-planned sections of a statute which was an extraneous excrescence on the Common Law. . . ." It is the great strength of Corbin's treatment that he almost succeeds in concealing that "it is all devoted to . . . badly drawn and ill-planned sections" and in persuading the reader that there is some principle. But not even he can make the Statute of Frauds a really thrilling or fascinating chapter in our legal story. Had your Editor entrusted me with the volume on Mistake or Frustration then indeed I might have been able to do myself, and Professor Corbin, better justice, but I can well understand that the competition was keen and that charity begins at home. So this review must end as it began, with envy—this time of the deservedly fortunate champions among whom I am privileged to offer this very humble but very sincere tribute.

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VOLUME THREE

PART III: INTERPRETATION—PAROL EVIDENCE—MISTAKE §§ 532-621.

PATIENT genius made this book. A first class legal education could rest largely on Corbin's 95 page discussion of the so-called "parol evidence rule."¹

14. § 476, p. 623.

15. [1935] 1 K.B. 579.

16. Wright, *Williston on Contracts*, 55 L.Q. REV. 189, 204-5 (1939).

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1. For that discussion does not, remaining on the aloof, relatively calm, upper court level, content itself with an exposition of legal rules and their complexities. It also refers

His Part III alone entitles him to lasting fame. Press of work prevents my doing it justice at this time, and I shall therefore limit myself here to sketching a few impressionistic responses.

Corbin, here as everywhere, shows up not only as an exquisitely nice legal analyst but also as a philosopher and wise student of society. More, he has a poetic imagination, a sensitive awareness of the individual human beings involved in law suits, and an eagerness that their unique sayings and doings shall not be ignored. His interest is in having justice done in each case, not in contriving a neat system of rules to satisfy the lazy or those with such callow sensibilities that only smooth-flowing harmonies satisfy them.

In the pages here under scrutiny, Corbin explores the legal aspects of one of mankind's most baffling problems—that of communication. Because he has philosophic and poetic insights, this part of his treatise should be studied by all who, in legal and other fields, concern themselves with that problem. He begins by saying, "Interpretation is the process whereby one person gives a meaning to the symbols of expression used by another person."² This opens up the question whether communication can ever be perfect, or (as we sometimes put it) whether a man's words ever have a completely discoverable "objective" meaning. Corbin warns that such perfection is seldom attainable, that there exist no devices which "will infallibly lead to one correct understanding and meaning," because, in dealing with others' words, "men certainly see through a glass, darkly." Of a writer who maintained that there is "only one true meaning of any particular group of words," Corbin says that the trouble is that there is no "one true meaning" of the phrase "one true meaning."³ For "language at its best is always a defective and uncertain instrument,"⁴ and "words do not define themselves."

A 14th century civilian lawyer, Lucas De Penna,^{4a} warned against "bold and rash interpretations which neglect the text," while he exposed the ill-effects of mechanical literal interpretation; he pointed to the dangers in the "isolation of words from their context," maintained that words are but "vehicles of expression," and scorned those who thought that interpretation consists solely of "finding dictionary equivalents" for the words men use.^{4b}

repeatedly to the more turbulent trial court level: it points out, again and again, that legal rules cannot exclude oral testimony, so that most decisions turn on the reactions of trial judges or juries to disagreeing orally-testifying witnesses.

2. § 532, p. 2.

3. § 835, p. 16 n. 18.

4. Compare the popular notion of the uncertain consequences of contractual language at least when confined to an oral exchange between the parties: "A verbal contract isn't worth the paper it's written on." *Collector's Item*, a play by Lillian Day and Alfred Golden.

4a. ULLMAN, *THE MEDIEVAL IDEA OF LAW AS REPRESENTED BY LUCAS DE PENNA*, 21, 113, 114, 120; see also 43, 121-2 (1946).

4b. Judge Learned Hand has said that it is "one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary. . . ." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

In 1816 Mr. Justice Johnson said, in a dissenting opinion,⁵ "Language is essentially defective in expression; more so than those are aware of, who are not in the habit of subjecting it to philological analysis." More than a century later, Max Radin, noting that lawyers, often unwittingly, practice philology every day, went on to remark:

"Philologists may love words but they do not venerate them, nor very much respect them. And above all, they are not afraid of them. Now, no one is really more afraid of a word than a lawyer, unless it is an exact scientist. Both have a dread of what may be contained in the few syllables of the words they use, a fear which is only equalled by some tribes of primitive men. If lawyers had the experience of philological training, they would know words for what they are, and would not hang desperately on a wretched explosion of breath when their task required them to do justice between man and man."⁶

Corbin has sloughed off the fear Radin described. "The less one knows," Corbin writes, "about the history and evolution of language, the more likely he is to suppose that he knows the 'true meaning' of words, and the more likely he is to hold that the words of the contracting parties have a 'plain and clear' meaning."⁷ Elsewhere he says, "Words have no meaning; it is users who give them meaning."⁸ He observes "that to elucidate the meaning of the word 'mean' requires fourteen long columns of fine print in the Oxford Dictionary."⁹

Corbin is in substantial accord with those who recognize that communication "is and must always be an approximation," since "a man talks out of a private world of his own," each man taking every word "into his own consciousness ringed about with a special context of associations, differing from the associations of everyone else hearing it," so that our "speech is a compromise between the ultimate incommunicability of one person with another and the conventional communication values attached to certain symbols."¹⁰

Corbin's stress on the obstacles to perfect communication stems, however, from no smart-aleck desire to "draw the cork out of an old conundrum, and watch the paradoxes 'fizz.'"¹¹ He aims to persuade judges that, often, interpretation of other men's words calls for the most painstaking inquiry.

5. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 374 (U.S. 1816).

6. Radin, *A Juster Justice, A More Lawful Law* in *ESSAYS IN HONOR OF ORRIN, KIM McMURRAY* 537 (1935).

7. § 579, p. 256.

8. § 540, p. 58 n. 65.

9. § 542, p. 70 n. 83.

10. SCHLAUCH, *THE GIFT OF TONGUES* 113 (1942).

Dr. Allan Gregg suggests "that man is the only animal whose means of communication have grown so complicated that he frequently conveys ideas which he never had in mind at all." Commencement Address delivered at the Jefferson Medical College on March 4, 1943.

11. MacNeice, *Goodbye Now, Plato and Hegel* in *AUTUMN JOURNAL* 51 (1939).

The judges should be willing to heed Corbin, as every judge frequently finds with dismay that his own personal utterances have been misunderstood by lawyers or other judges. To be sure, some of these misunderstandings derive from inevitable elliptical expressions.¹² For, as Jespersen notes, "only bores want to express everything, but even bores find it impossible. . . ."¹³ Sometimes judges resent—on occasions, justifiably—the lawyers' misinterpretation of their opinions.¹⁴ The judges should remember that resentment when they seek to interpret what laymen have said.

As part of his campaign for improved efforts by judges to understand litigants' language, Corbin courageously criticizes the mighty: he dares vigorously to attack what he considers mistaken notions voiced by Holmes,¹⁵ Cardozo,¹⁶ and Learned Hand.¹⁷ He even goes so far as to suggest that these great judges sometimes expressed themselves with avoidable ambiguity. Corbin also ventures to criticize parts of the *Contracts Restatement*; his criticisms bite but are kindlier than Leach's recent statement, vis-à-vis another Restatement, that the A.L.I. "forbade criticism of existing law and even encouraged 'rationales' for rules which no one connected with the enterprise considered sound," as a consequence of which "the Restatement is a compendium of case law as it is, including all its mistakes. . . ."¹⁸

Referring to the job of a judge who tries to comprehend the writings of other men, Corbin comments:

12. Cf. § 568, p. 197. "It is the universal custom of mankind to speak elliptically and to assume the existence and the understanding of things not expressed in words."

13. JESPERSEN, *THE PHILOSOPHY OF LANGUAGE* 309 (1924).

14. See, e.g., *United Shipyards, Inc. v. Hoey*, 131 F.2d 525, 526-7 (2d Cir. 1942): "It would be time-saving if we had a descriptive catalogue of recurrent types of fallacies encountered in arguments addressed to the courts, giving each of them a number, so that, in a particular case, we could say, 'This is an instance of Fallacy No. —.' Such a device would be helpful here. For the fallacy of the appellee's argument is of a familiar kind: In formulating the reasons for their decisions, judges often adopt rulings made in previous decisions in which the facts were somewhat similar, saying, in effect, 'This situation is sufficiently like those which we have previously considered so that we can disregard the differences and restrict ourselves to the resemblances.' And, thus ignoring—for the purposes immediately at hand—the unlikenesses, the situations are, frequently, spoken of as identical. But elliptical discussions of cases partly alike, as if there were complete identity, is merely for convenience. There is present, although it may be unexpressed, an 'as if,' a 'let's pretend'—a simile or metaphor. Such 'as if' or metaphorical thinking is invaluable in all provinces of thought (not excepting that of science). However, some of the greatest errors in thinking have arisen from the mechanical, unreflective, application of old formulations—forgetful of a tacit 'as if'—to new situations which are sufficiently discrepant from the old so that the emphasis on the likenesses is misleading and the neglect of the differences leads to unfortunate or foolish consequences."

15. § 544, p. 84 n. 96, § 579 pp. 253-4.

16. § 536, pp. 20-21 n. 20.

17. § 537, p. 32 n. 32, § 538 p. 46 n. 53, p. 47 n. 54, § 539, pp. 51-2 n. 58, § 542, p. 69 n. 83.

18. Leach, *Perpetuities in Perspective*, 65 HARV. L. REV. 721, 747 (1952).

"It is conceivable that . . . the best that a judge can do is to put himself so far as possible in the position of that person or persons, knowing their history and experience and their relations with other men and things, and then to determine what his own meaning and intention would have been. To do this requires a lively imagination, full and complete information obtained from the document and extrinsic testimony, and . . . sound judgment and common sense."¹⁹

Those sentences contain a whole philosophy of criticism—applicable, within the legal realm, to contracts or wills or statutes, and, outside the legal realm, to history, philosophy, biography, autobiography, essays, poetry, fiction, and the fine arts in general.

You'll see at once the bearing of his theory on the attitude of that legal school which inveighs against the use of "legislative history." But it bears also on the very similar attitude of that school of literary critics which rejects the biographical approach to poetry, urging that the poem is the thing, not its context in the life or the times of the poet.²⁰ When such literary critics demand that readers concentrate on Shelley's poems and forget his love affairs, they sound much like those lawyers and judges who want to dwell on the text of a statute and forget its context.²¹ Few literary or legal critics carry out such an attitude to its logical (or illogical) extreme.²² But those who tend too far in that direction would do well to listen to Corbin's warning: "A word, appearing suddenly, in empty space and with no history, would express nothing at all. To be expressive of any meaning, all words must have a context and a history. . . ."²³

No matter of what school, intelligent literary critics assert, as does Corbin, that the critic—*i.e.*, one who judges—must have a "lively imagination." But where, in any other solemn legal treatise on such a subject as "Contracts" will you see it asserted that the judicial judge—the critic on the bench—should be vitally imaginative, an artist, if you please, quick with empathy, the capacity to feel himself into the minds and moods of other men?

It is Corbin's own lively imagination, his artistry, his "critical tact," that lends to his work its enduring worth. Not the least valuable product of this

19. § 536, p. 23. The reader will perceive the Aristotelian note in the suggestion that the judge "determine what his own meaning and intention would have been."

20. See, *e.g.*, London Times, Literary Supplement, Dec. 14, 1951: "There is a contemporary school of critics which likes to insist that the biographical approach to poetry is a waste of time, or worse. All that we need to know about a poem, it is claimed, is there on the printed page; and to interest ourselves in the poet's life, or character, or motives, or intentions is to get away from what the poem says, and may even lead us to prejudge the poem and approach it with irrelevant considerations in mind."

21. This is a theme I hope someday soon to expand.

22. See, *e.g.*, the avowals in the "1950 Postscript" to BROOKS AND WARREN, UNDERSTANDING POETRY xx-xvi (1951).

23. § 540, p. 57.

quality is Corbin's insistence that able judges cannot live by rules alone. Rules (one learns from Corbin) nudge the judge, give him hints, strong hints he must seldom disregard; but a judge who knows nothing but the rules will be a judicial routinier, a dispenser of injustice, since (as Corbin teaches) the art of judging really lies in the ability to cope with the unruly.²⁴

JEROME FRANK†

PART IV: CONSTRUCTION AND LEGAL OPERATION OF CONTRACT—CONDITIONS OF LEGAL DUTY. §§ 622-771.

To review *Corbin on Contracts* was a pleasure long hoped for,¹ and in the event it was to this reviewer richly rewarding. Here is a work that expresses the meditation and the wisdom, the insights and the subtleties of one of America's pre-eminent legal scholars—expresses it with clarity and candor, with caution and modesty and in a graceful style. Legal literature can be useful without being dull. The counselor will find here recognition of his need for the predictive use of law, the judge will find that the difficulties of deciding concrete and complex cases by the use of legal tools have been stated and simplified and the law teacher will see new meanings in the old standby cases which he has taught many times.² The chief danger of their using it as a reference work is that they will be beguiled into reading it straight through, as one does a novel. Exposition at its best can be more exciting than narrative.

The portion of the work assigned to this reviewer deals with many of the most important problems of the performance stage of contracts: express and constructive conditions, entire and divisible contracts, peculiar constructions of aleatory contracts, "conditions subsequent," and waiver or prevention as ways of eliminating the effects of conditions. Professor Corbin was chiefly responsible for the introduction of the term, "constructive condition," now used in the *Restatement of Contracts*,³ to supplant the old, ambiguous "implied condition." This shift in terminology has helped judges in the present century to realize that when troubles arise in the performance stage of a contract, what is called for is not merely an exegesis of the language in the contract—though this is not to be disregarded—but also a constructive evaluation of the

24. See, e.g., § 543, p. 76: "In the process of interpretation, it is the court and not the parties who should be reasonably or even remarkably intelligent."

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1. In reviewing CORBIN'S ANSON ON CONTRACTS (5th Amer. ed. 1930), I expressed the hope that Professor Corbin would produce his own treatise, 18 VA. L. REV. 343, 349 (1932).

2. E.g., the exposition of *Constable v. Cloberie*, § 633, p. 522.

3. RESTATEMENT, CONTRACTS § 253 (1932).