

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.<sup>24</sup>

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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,<sup>1</sup> 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.<sup>2</sup> 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*,<sup>3</sup> 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).

complex factors of risk and expectation, of inconvenience and burden, as they are presented when the trouble occurs. The judgment is a result of the weighing or appraising of these various factors, not merely by a simple process of substitution of values in an if-then proposition—"if S fails to deliver the first installment of goods on time, *then* B is entitled to rescind"—but by a method which is partly intuitive and inarticulate. To distinguish the latter process from the former I have elsewhere suggested the term "operative factors,"<sup>4</sup> meaning the type of risk and inconvenience and merit and fault which enter into the evaluative judgment but are not logically decisive in the same way that is presupposed by the somewhat more mechanical conception of "operative facts," the Hohfeldian term. My terminology is a mild innovation, but the method is old. The *Restatement of Contracts*, for example, summarizes the "circumstances" that are "influential" in determining the "materiality" of a total or partial failure to perform a contractual promise.<sup>5</sup> These "circumstances" are not strictly "rules," as the section title unfortunately indicates, but rather classes of factors to be ascertained and appraised, with respect to the degree of their influence, in the facts of the particular case. Roughly speaking, they comprise the extent of hardship to each party, the duty-breaker and the right-holder, that will result from finding or not finding materiality, the greater or less risk to the right-holder, and the greater or less fault of the duty-breaker. No scale is provided by which to weigh these counterpoised circumstances. No legal rule prescribes that "if" certain circumstances exist, "then" the breach is conclusively material, and the other party is thereby discharged of his "agreed exchange" duty. The attempts of nineteenth century judges and writers to reduce this complex problem to a simple set of rules were unsuccessful. For instance, neither the supposed rule that a failure to deliver an initial installment of goods on time was always material, nor the other, that a wilful breach, however trivial in extent, was always fatal, was a reliable guide to judicial decisions.

The nineteenth century judges were often not aware of the operative factors that influenced their determinations of materiality, or at least they did not deem it proper to set them forth fully in their opinions and thus to reveal their partly rational and partly intuitive process of evaluation. Professor Corbin mildly criticizes the leading case of *Norrington v. Wright*:<sup>6</sup>

"Perhaps the court weighed many unreported factors and reached a just result; but the opinion of the court indicates only an attempt to state a general rule and to decide the case solely by a deductive process."<sup>7</sup>

By "deductive" Professor Corbin means a simple, formal syllogism: "If the seller commits a material breach with respect to one installment, then the

4. PATTERSON, AN INTRODUCTION TO JURISPRUDENCE §§ 2.22, 3.26 (mimeo. 1951).

5. RESTATEMENT, CONTRACTS § 275 (1932).

6. 115 U.S. 188 (1885).

7. § 691, p. 724.

buyer is discharged. This delivery of only 400 tons of steel rails when 1,000 tons was called for was a material breach. Therefore" etc. "Material" is in this context not a descriptive term denoting a class of things but a word of legal art, a primarily connotative term<sup>8</sup> implying several kinds of legal consequences. Professor Corbin wants the lawyers to prove, the trial courts to appraise and the appellate courts to state in their opinions the facts which influenced a determination in favor of or against materiality. With this conclusion I agree.

However, it is well to note some necessary or probable consequences of this method. In the first place, the predictability of decisions turning on materiality may be diminished by the increase in the number of variables that are avowedly legally relevant in influencing the decision. For instance, the more that hardship stories are listened to the less likely it will become that contract-breakers will get their just deserts. To this it may be answered that the enumeration of operative factors makes more explicit the grounds for a decision which was formerly reached by inarticulate hunch or by secret reasons, which gave fewer clues to be used in prediction. Secondly, the operative factors of a century ago do not throw much light on what will be or should be deemed "material" today. An example is Professor Corbin's full discussion of the nineteenth century English case of *Ellen v. Topp*.<sup>9</sup> There the plaintiff covenanted to instruct the defendant's minor son in the business of auctioneer, appraiser and corn factor, for five years; but after three years the plaintiff ceased to instruct in the business of corn factor. This was held fatal to his recovery of damages for the son's leaving service. Who can tell in 1951 how important in 1850 was the vocation of corn factor relative to the other two callings? A third result is, apparently, that a full exposition of the operative factors in a published opinion makes for long opinions<sup>10</sup> and thus increases the burden of case law.

The clarity and cogency of the Corbin presentation is dependent in large part upon a method which raises some interesting metaphysical questions. He arranges the "facts" of contracting in a time continuum, and the basis of selection of the "facts" that are to be placed in this continuum is that "operative facts create legal relations."<sup>11</sup> Now this statement may be taken to imply that values are inherent in facts and the human observer has only to discover them. Such a position may, I think, be not unfairly ascribed to the phenomenologists, a school of German metaphysicians who have some following in this country.<sup>12</sup> From this viewpoint a given sequence of acts and events (*e.g.*, a newspaper advertisement) is inherently an "offer" or not an "offer," *i.e.*, confers or does not confer on some person (offeree) a power of accept-

8. See DEWEY, LOGIC: THE THEORY OF INQUIRY 355-6 (1938).

9. 6 Ex. 424 (1851), discussed in § 660.

10. See, for example, the thorough but overly long opinion in *Continental Grain Co. v. Simpson Feed Co.*, 102 F. Supp. 354 (E.D. Ark. 1951).

11. This is not a literal quotation but is implied in several passages in §§ 622, 623.

12. See KÖHLER, THE PLACE OF VALUE IN A WORLD OF FACT (1933).

ance. The "hunch" method thus implied is somewhat congenial to our traditional use of judicial precedents as analogies: either this sequence is "like" that of Case 1, or it is like that of Case 2, with contrary consequences. Such a method minimizes the search for principles of evaluation and, when expounded in judicial opinions, reduces guidance-value.

But it is not necessary to impute to Professor Corbin such an ethically benumbing metaphysic. He has made it clear that the analysis of "operative facts" is a means to the end of determining legal consequences:

"The truth is that legal relations are nothing other than groups of facts that enable us to predict with some degree of accuracy the future action of the judicial and administrative officials of an organized society of men."<sup>13</sup>

"Facts" are "operative" only in the sense that, when presented to an adjudicative official, they will lead to a definite kind of evaluative conclusion, such as, "S is (at this point in the time-sequence) under a legal duty to deliver a specified radio to B, on certain conditions." That some occurrences or non-occurrences, "facts" in some sense, are sometimes influential on judicial decisions and are *not* within the scope of the Corbin-Hohfeld "operative facts" can scarcely be denied. The latter, then, are selected from the total stream of acts and events by the use of legal norms or precepts which constitute the chief subject matter of Professor Corbin's treatise. By analyzing his problems into increasingly narrower categories of legal consequences he reveals the ambiguity or multiguity of some traditional rubrics.

A striking example of the usefulness of his method is shown in his analysis of "divisibility" into fourteen kinds of legal consequences.<sup>14</sup> His treatment of this theme is the high spot of the present volume. Here he is presenting the effects of constructive conditions of exchange, yet he includes divisibility in relation to the Statute of Frauds, limitations and illegality. With respect to the last, the terms of the contract are less important than the gravity of the offense that constitutes the illegality. An unlicensed plumber, though denied compensation for his labor, has been allowed to recover (in quasi-contract) for lawfully supplying materials,<sup>15</sup> although the agreement made no explicit separation of labor and materials. On the other hand, an attorney who performed services for two promised compensations, one of which was contingent on his success in influencing the enactment of legislation and the other was payable in any event, was denied recovery of either on the ground that the illegality tainted the entire agreement.<sup>16</sup> An analogous kind of appraisal is involved in many other determinations of divisibility: should the loss to the plaintiff and the enrichment of the defendant outweigh the loss to the

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13. § 624, p. 505.

14. § 695.

15. *Lund v. Brufat*, 159 Wash. 89, 292 Pac. 112 (1930).

16. See *Noonan v. Gilbert*, 68 F.2d 775 (D.C. Cir. 1934).

defendant in not receiving the remainder of the performance promised him? Professor Corbin's discussions of particular kinds of installment contracts clarify the factors involved.

Since nothing is perfect in this world, not even *Corbin on Contracts*, this reviewer would be less than candid did he not mention a few mild criticisms. The principal one is a consequence of Professor Corbin's virtues. He is such a just man and such a subtle and thorough analyzer of the competing grounds of decision that he often ends his discussion of two mutually exclusive views without telling us which one he deems preferable. An illustration, perhaps of diminishing importance, is his evenly balanced statement of the pros and cons of the New York rule that the condition (in a building contract) calling for production of the architect's certificate, is dispensed with whenever the architect "unreasonably" (i.e., as later determined by court and jury) withholds it.<sup>17</sup> The New York construction has elsewhere been criticized. Are not the New York lawyers and judges entitled to have Professor Corbin's preferences made explicit?

Two disagreements as to insurance contracts must be noted. One relates to the group of cases in the United States which have held that a vendor, under contract to sell and convey improved real property, who has been paid by his insurer for fire damage to the building occurring after the making of the contract to sell and before conveyance, is obliged to account to the vendee for such proceeds, if the risk of loss was on the vendee. Referring to these decisions, Professor Corbin says:

"This holding has the effect of making the vendee a beneficiary or assignee of the insurance policy, in cases where the insurance company has assented to no such beneficial interest or assignment."<sup>18</sup>

This is an easy conclusion for a logical mind to reach; yet my search over a period of more than twenty years for an American decision allowing the vendee to recover judgment against the insurer in an action on the policy has thus far been unsuccessful. The denial may seem arbitrary, yet the line must be drawn arbitrarily between the principle that the insurer must be allowed to select his insured ("fire insurance is a personal contract") and the principle that the vendor should not be unjustly enriched, which Professor Corbin states a little further on<sup>19</sup> as the true basis of the vendor's obligation.

The Corbin treatment of constructive conditions of aleatory contracts seems somewhat better than that of the *Restatement of Contracts*.<sup>20</sup> The former recognizes that a life insurance contract, at least term insurance, is aleatory; the *Restatement* rejects this view on the ground that death is certain.<sup>21</sup> Since both the typical insured (a married man with dependents) and the insurer

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17. § 651, pp. 596-8.

18. § 670, p. 665.

19. *Ibid.*

20. *RESTATEMENT, CONTRACTS* §§ 291-3 (1932).

21. *Id.* at § 292, Illus. 2 (1932).

regard the *time* of death as important, and since the time of its occurrence is "fortuitous," for whatever the category of "aleatoriness" is worth this one seems to belong in the category. Most of the discussion of the "independence" of promises where one is aleatory turns on a few atypical transactions which resulted in poorly reasoned decisions. Perhaps the constructive conditions for uncompensated sureties should not be applicable to vocational sureties nor to insurers. At any rate, I can find no basis for believing that, *apart from an express provision in the contract* (either a conditional clause or a cancellation clause) any insurer could "rescind" its aleatory promise merely because the insured had not paid his premium note.<sup>22</sup> Professor Corbin proposes this rule:

"A promisor in an aleatory contract is discharged by an unjustified action by the other party that substantially increases the promisor's risk of suffering loss by having to perform his promise."<sup>23</sup>

In support of this surprising statement he remarks that a fire insurance company is not liable for loss by fire deliberately caused by the insured and that the life insurance company is discharged from its duty to the beneficiary who murders the insured. (In the latter case the insurer is ordinarily under a duty to pay the insured's administrator.) Neither of these analogies supports the view that a mere *increase of risk* by act of the insured discharges the insurer. Indeed, it is well settled that mere lack of care by the insured in not safeguarding his property against fire does not relieve the fire-insurer of liability. Nor does the fact that a man who has insured his life indulges in riotous living which tends to hasten his death, discharge the life-insurer, even though the period of contestability has not expired. Apparently thinking of life insurance, Professor Corbin remarks that the insurance company's promise "is usually made expressly conditional upon the payment of stated premiums by the insured."<sup>24</sup> This is true of life insurance and annuity contracts; it is not generally true of fire insurance nor of casualty insurance. These latter types usually guard against the credit risk by cancellation clauses. Because of settled usages and contract clauses in the insurance business, there is but little need for such gap-filling devices as constructive conditions of exchange.

*Corbin on Contracts* does not purport to cite all the cases; it will, however, be a good case-finding tool because usually it goes straight to the crucial ones. It should serve to increase the prestige among American judges and lawyers of principle over exact analogy and of expert opinion over judicial fiat. In the years ahead it will become one of the most influential of the treatises on American law.

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22. Cf. § 730; RESTATEMENT, CONTRACTS § 293(2) (1932).

23. § 730, p. 847.

24. § 731, p. 850.

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