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."[24] 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.[25] 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.[26] 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,"[27] 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.[1] 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,[2] 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.

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

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

zations are tentative working rules;[3] courts are human;[4] and facts, not legal doctrines, play the major role in judicial decision.[5]

These expressions, it will be noted, embody many of the tenets of the movement we have come to know as legal realism. With this movement Professor Corbin appears to be sympathetic and with it he is no doubt pleased in many ways to be identified.

Yet there are aspects of the treatise which do not seem to me to be characteristic of the methods usually associated with legal realism. There is, for example, less stress upon pragmatic values than is to be found in much of modern legal writing. Pragmatic tests of decision or doctrine lead inevitably to a certain amount of disorder. Although they make possible an escape from the involved metaphysics that has characterized some academic studies, they nevertheless tend toward greater complexity and they broaden the scope of relevant inquiry. To one who places a high value on tidiness this may well appear as messiness.

No one could make such an accusation against Corbin's treatise. The impression created by the work is one of solid simplicity. Possibly its most meritorious attribute lies in its clear and accurate exposition of difficult areas of contract law so that even one approaching the subject for the first time may obtain enlightenment. In other words, the author, through the treatise as in the classroom, is first of all a great teacher.

*Discharge.* But if the work, generally speaking, is one of solid simplicity, it must be observed that portions of it are more solid than simple and others are more simple than solid. In the former category—and I confine specific references to matter within my assignment—are included the several chapters which appear under the general topic of "Discharge of Contract" and cover such subjects as release, executory accord, accord and satisfaction, novation, account stated and merger. Here are to be found brilliant analyses and enlightening commentaries upon how the law has developed and how the various issues, within the necessity of historical continuity, can and ought to be resolved today.

The views of the author, as expressed in these chapters, are frequently critical of certain legal trends and judicial pronouncements. For the most part, however, they are in accord with the position taken by the majority of contemporary scholars. Practically all modern opinion, for example, is in accord with the rule that a contract to forbear for a limited time, whether in connection with an executory accord or otherwise, should operate as a defense during the stated period. Not quite so unanimous, perhaps, is the opinion supporting the view that, where the effect of the seal has been abolished, the delivery of a written release, without consideration, should be effective to discharge an obligation.

The treatment of the rule that the release of a debt in exchange for part payment is invalid, often referred to as the rule in *Foakes v. Beer,* deserves comment. It is discussed in the chapter dealing with releases and also in the

3. § 1331, p. 282, § 1374, p. 446.

4. § 1284, p. 117.

5. § 1303, p. 177.

chapter covering accord and satisfaction. The author's attitude toward this rule is not clear-cut. At the point where it receives principal attention in connection with the subject of accord and satisfaction, no position is taken. We do find, however, that elsewhere in supporting the contention that a disputed claim should be discharged by payment of a part admittedly due, the argument is advanced that a release is an executed transaction, not an executory promise, and should therefore require no consideration.[6] This argument could, of course, be directed with equal force against the rule in *Foakes v. Beer*.[7] On the other hand, there is the statement that "the doctrine . . . will be very acceptable to a court when the debtor is a large employer and the creditor a small workman."[8]

A further indication that the author has some difficulty in unreservedly condemning the rule is to be found in the very interesting distinction made in connection with the discussion of releases. Here it is said that where there is part payment, the transaction is one of bargain and is to be distinguished from a release where the intention of the creditor was to make a gift. The latter, he maintains, should be effective even if the release in exchange for part payment is not. The reviewer, favoring the rule in *Foakes v. Beer*, principally because in most instances the transaction is the result of pressure by an economically strong debtor upon a weak creditor,[9] would be glad to be able to agree. But this position involves the paradox that if the debtor pays something the release is invalid, whereas if he pays nothing it is effective. Although there would seem to be a sound basis for saying this, it is probably too subtle ever to gain acceptance. If discharge by delivery of an instrument of release is recognized, it is believed that the rule in *Foakes v. Beer* would have to be confined to oral releases.

Although all of the chapters under the heading of discharge are solid and informative, I would like to make special mention of the one on the account stated. Here, I believe, Professor Corbin has made a very valuable contribution in explaining and clarifying a subject that has been attended with innumerable confusions. There are in this area no sharply disputed issues, and we may accept the word of the author that the confusions have led to no serious injustices in the decisions. This, no doubt, makes for less interesting reading; but the chapter will be an exceedingly helpful tool to lawyers and judges confronted with a problem having to do with this subject.

*Impossibility.* Under this heading are discussed questions concerning the effect of intervening or subsequently discovered circumstances not mentioned in the contract which either make performance far more difficult than was anticipated or greatly diminish the expected value of a performance. In other

6. § 1289. The same argument is made in § 1240, p. 977.

7. This argument has been repeatedly urged by Ferson against the rule in *Foakes v. Beer*. To the reviewer it is completely unconvincing. The law has required consideration for both promise and release; and no reason is advanced as to why the doctrine does not work as well in one application as in the other.

8. § 1281, pp. 106-7.

9. See Havighurst, *Consideration, Ethics and Administration*, 42 COL. L. REV. 1, 26-9 (1942).

words, to use the terms which have been common in England and are now increasingly used in this country, the treatise here deals with both frustration of performance and frustration of purpose.

The search for a satisfactory formula to focus judgment in cases of this kind has never been entirely successful. There is little uniformity in the cases, the emphasis being placed sometimes upon "impossibility," sometimes upon "destruction of the subject matter," sometimes upon the "tacit assumption of the parties." For the most part the question has been regarded as one of construction and of implied condition.

The American Law Institute's *Restatement of Contracts,* which made several valuable contributions to the development of contract law, fell far short, in my opinion, in its attempt to provide a set of working rules for dealing with these questions of risk allocation. The *Restatement* would approach the problem presented by increased difficulty of performance through the term "impossibility," which is given a fictional meaning. It deals quite independently with the closely related issue presented by frustration of purpose, and fails to recognize that practically every subsidiary principle stated in connection with "impossibility" has its counterpart in connection with frustration of purpose.

Professor Corbin does not break sharply with the *Restatement.* He appears to accept "impossibility" as the key word in the formula which is to be used in the judging of risk allocation. Throughout the discussion of the topic, however, it is quite plain that the *Restatement* treatment is far from satisfying to him. He is quite severe in his criticism of the section covering frustration of purpose and its complete separation from the statement of the rules concerning impossibility of performance.[10] Although these rules are not directly criticized, the general tenor of the discussion suggests that they omit many significant considerations.

For him there are many factors which affect judgment in cases of this kind. No one factor is controlling. Perhaps the most important element is, to use his favorite word, the prevailing "mores" of the time and place.[11] This emphasis, which has seldom been accorded its proper significance, is surely a sound one. Although the mores are often elusive, especially when the intervening circumstance is something that has never happened before, nevertheless the conscious effort to diagnose them should in many cases contribute toward more acceptable results.

The reviewer, however, confesses to some disappointment that in the end the only solution offered is that "where neither custom nor agreement determines the allocation of a risk, the court must exercise its equity powers and pray for the wisdom of a Solomon."[12] Black letter rules can, of course, contribute less than nothing. The "impossibility" formula is not only inadequate but often misleading. And no single test, I am sure, could ever be devised that would

10. § 1322, p. 261.

11. § 1331, p. 282.

12. § 1333, pp. 293-4.

give an automatic solution. But the answer to the court's prayer might come in more abundance if wisdom were instructed by a careful analysis and catalogue of the various elements that should be taken into account in determining the effect of the intervening event upon the contract obligation, and where further performance is excused, in determining the extent of restitution for the performance already rendered.

Professor Corbin, however, does go further than any earlier writer in pointing out what might be called submerged factors. In connection with the building contract, for example, he recognizes that the relative ability of the parties to bear the risk and the situation with respect to insurance coverage may well be taken into account in determining the question of recovery for the value of repairs upon a building which is destroyed before the work has been completed.[13]

The proposed Uniform Commercial Code is cited in a number of places and always with approval. But in view of the fact that the proposed Code was still in a draft stage when the treatise was assuming its final form and the fact that the extent of its adoption is still in the realm of doubt, it is quite understandable that its provisions are not fully analyzed and that some of its interesting novelties, relating to duties of the seller when specific goods are destroyed, are not fully explored.

Although novel frustrations constantly arise, there are many which recur in respect of particular types of contracts. Here the precedents afford the basis for the formulation of narrower rules to determine the allocation of risk when the contract makes no provision. In the case of the employment contract, for example, the death of one of the parties presents questions which have repeatedly come before the courts. Although there is no effort in the treatise to deal with questions of construction that have arisen with reference to common contract provisions covering specific risks, the discussions of the rules of law are ample and helpful.

I have only one comment here which might be regarded as in the nature of a criticism. This has to do with the section on the effect of the death of the employer during the course of performance of an employment contract. It is rather plain that some courts hold that when this occurs, the obligations of the employment contract are terminated regardless of the circumstances, whereas others will not so hold if the employee was not to work under the employer's direction and his death does not bring about such a change in the situation as to frustrate the purpose of the contract. The treatise, it may be said, raises all of the relevant considerations, but except for the cases involving the death of a member of a partnership, no conflict in the authorities is recognized.[14] It is doubtless the thought that the first group of cases for the most part can be reconciled on their facts.

13. § 1372.

14. § 1335, pp. 302-3.

*Illegal Bargains.* When earlier in this review I dropped the observation that some parts of the treatise were more simple than solid, I had principally in mind the introductory chapter on Illegal Bargains. No doubt the rather striking difference in the level of the discussion here as compared with that of earlier chapters is to be attributed in part to the difference in the subject matter. Yet it is difficult to believe that this material was prepared for the same audience. The temper is less restrained; the literary dress suggests a different climate.

Nevertheless this characterization is not intended as derogatory. There is in this chapter an abundance of wisdom adorned with occasional flashes of gentle eloquence. One brief quotation may serve to convey the mood. In making the point that notions of public policy change from time to time, the author says that "experiment is demanded by the miserable and the discontented, always to the grief and dislike of those who are neither; and 'wise' men arise to tell the multitude that old truth has become falsehood and to point out the shining new road to fortune."[15]

There are some who might think that such reflections are out of place in a legal treatise. They do not appear to enhance its value as a working tool. But they do impart a certain human quality which, though unusual in a work of this kind, is not unwelcome.

Four chapters following the introductory chapter on Illegal Bargains are devoted to Restraint of Trade. This is of course a large subject which in most of its aspects transcends the law of contracts. The writer of a treatise such as the one under review must find great difficulty in deciding what to do with it. He might concentrate upon a few of the problems that arise frequently in private litigation, such as those concerned with the covenant of an employee not to work for another employer after the termination of his employment, and either omit or treat very generally the problems connected with the enforcement of the antitrust laws. This might well be enough.

Professor Corbin is not content, however, thus to dispose of the subject. In addition to adequate discussions of the enforceability of some common types of private contracts, he includes a miniature treatise on the antitrust laws in which he touches upon most of the larger problems. These chapters start with an apology,[16] and it is clear that there is no thought of offering a definitive treatment of the antitrust laws. Perhaps because much of the discussion is fragmentary, the author cites in these chapters numerous law review articles. Other parts of the treatise being complete, no reference is made to any articles.

The justification for including the Sherman Act cases Professor Corbin finds in the fact that this act adopted the common law concepts of restraint of trade, and, although the cases lie within the fields of crime and tort, "the torts and crimes in question are agreements and combinations in restraint

15. § 1375, p.452.

16. § 1381, p. 472.

of trade."[17] There is thus an indication that the author felt under some compulsion to deal with them. One suspects, however, that he has developed a real interest in these problems and welcomed the opportunity to discuss them. Although much of the text is uncomplicated exposition of the "law," the emphasis often reveals attitudes and there are a few statements of opinion which, if not entirely forthright, are at least easily discoverable.

These opinions are well balanced. That the author is no rabid trustbuster appears in the warmth of his reception of the *Appalachian Coals* decision, which leans toward the view that price-fixing under certain circumstances may be legal,[18] and in his statement that "the inescapable strain for consistency . . . will perhaps lead to modification of the dogmatic assertion that price-fixing agreements are always unreasonable."[19] Some sympathy for resale price maintenance and the Fair Trade Acts is also to be detected.[20] On the other hand an express if rather dubious approval is given to the decision in the *Associated Press* case which goes far in extending the application of the antitrust laws.

Following the chapters on "Restraint of Trade" are very substantial discussions of numerous other illegal contracts. These will be exceedingly helpful to lawyers in advising clients and in preparing cases. To them the occasional points on which there is controversy are of relatively little importance. A reviewer, however, needs grist, and must of necessity magnify disagreement.

As the basis for an argument, then, I quote the following statement made with reference to illegal contracts:

> "It is not the part of either wisdom or justice for the representatives of the state to assume a 'holier than thou' attitude and to refuse a remedy in pious fear that the 'judicial ermine' might otherwise be soiled."[21]

The reviewer does not go along with this statement. In the first place it carries much too far and in a wrong direction the idea that judges are human. Although in many of the relationships of life a man may well be influenced in his conduct by the desire to avoid a "holier than thou" attitude, this should not have any influence whatever upon a judge acting in his judicial capacity. Quite apart from the moral character of the man who serves as a judge, the institution is "holier" than even the most upright litigant. The "judicial ermine," not being the possession of any *man,* the judge cannot in a spirit of generosity permit it to be soiled, nor even place its cleanliness in jeopardy.

The more basic objection to the statement, however, is that it denies, or at least minimizes, the validity of what is probably the chief reason for denying relief to parties who have engaged in an illegal transaction. In fact, the only other reason is that such denial helps to effectuate the public policy involved

17. § 1381, p. 473.
18. § 1403, pp. 583-4.
19. § 1403, p. 585.
20. § 1408, p. 611.
21. § 1534, p. 1058. The "holier than thou" theme appears also in § 1463, p. 828.

by discouraging the conduct that is disapproved. Mere denial of contractual and quasi-contractual remedy rarely has a substantial effect in discouraging illegal conduct. A man who is hired to perform a murder is not in the least deterred by the fact that the courts are not open to him to collect his fee. Such a man has other methods of enforcement, and they are in fact more effective than legal process. The same is true in varying degrees where less heinous forms of illegal conduct are involved. Even in the matter of usury it was found that mere denial of enforcement was of little value in the effort to eliminate the loan shark. And restraints of trade were not curbed to an appreciable extent until contracts in restraint of trade were made criminal.

In most instances, then, the protection of the good name of the judicial institution must provide the principal reason for the denial of a remedy to one who has trafficked in the forbidden. This is, moreover, a very good reason. The first duty of an institution is to preserve itself, and if the courts to any appreciable extent busied themselves with "justice among thieves," the community, as Professor Corbin himself says at another point, would be shocked [22] and the courts would be brought into disrepute.

But with the main thought that runs throughout the topic of illegality the reviewer is in full accord. This is to the effect that at very many points the courts have been far too chary in the matter of granting a remedy. When refusal to enforce the contract and denial of restitution will not have a deterrent effect or will actually encourage improper action by parties who might hope to gain from the court's abstention, and the conduct in question also involves little or no moral turpitude, the courts should not withhold their processes.

Among the particular "illegal bargains" treated under the chapter heading "Bargains Harmful to the Administration of Justice," arbitration is included. One might well doubt the propriety of the classification, since the question of the legality of agreements to arbitrate is fairly incidental to the whole subject and for the most part only of historical interest. This criticism is trivial, but it does suggest the comment that there would be some advantage in including in a treatise on contracts at least a part containing chapters each one of which would be devoted to the special problems that arise in connection with a particular kind of contract or provision.

Actually in the treatise the question of the illegality of arbitration agreements serves merely as a point of departure for a discussion of all of the contract problems presented by arbitration agreements. Apart from the fact that the very short section on arbitration statutes seems to understate their significance, there is little to which one can take exception in this most excellent development of the subject.

The treatise crowns a notable career. But to say only that we are grateful for this embodiment of the thought of a great teacher and scholar

22. § 1530, p. 1038.

is to miss much of the significance of its publication. For, apart from its association with a personality, it constitutes a most valuable and useful addition to the literature of the law of contracts. Williston's treatise has for a number of years dominated the field; now it must face a worthy competitor. There is, however, a sufficient difference in the respective philosophies of the two treatises to negative any thought of the wastes of competition. Corbin brings to the law of contracts the spirit of modern legal thought. To this work the profession has long looked forward; to Professor Corbin it will long be indebted.

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