

2003

Corbin and Fuller's Cases on Contracts (1942?): The Casebook that Never Was

Scott D. Gerber

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook that Never Was*, 72 Fordham L. Rev. 595 (2003).

Available at: <https://ir.lawnet.fordham.edu/flr/vol72/iss3/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

CORBIN AND FULLER'S CASES ON CONTRACTS (1942?): THE CASEBOOK THAT NEVER WAS

*Scott D. Gerber**

Arthur L. Corbin (1874-1967) and Lon L. Fuller (1902-1978) are two of the giants of American legal education. In June of 1940 they agreed to collaborate on a Contracts casebook. A series of letters between the two, unpublished until now, sheds considerable light on law teaching both then and today. More specifically, the correspondence reveals that the pedagogic question that most divides modern Contracts teachers—whether to start the course with formation or remedies—has its origins in the planned Corbin-Fuller casebook. The consequence of the disagreement between Corbin, who preferred to start with formation, and Fuller, who was determined to begin with remedies, was not simply that their joint casebook fell apart: It also set in motion a string of events that makes plain that the ghost of Christopher Columbus Langdell (1826-1906)—the doyen of legal formalism and the father of the casebook method—continues to haunt the halls of America's law schools.

I. INTRODUCTION: THE CHICKEN OR THE EGG

No course is more closely associated with the first-year law school experience than Contracts. Indeed, mere mention of the first-year experience likely brings to students' minds the imposing visage of John Houseman calling on "Mr. Hart" in perhaps the most famous scene in the most famous movie ever made about law school, *The Paper Chase*.¹ Those steeped in the first-year experience also are not

* Assistant Professor of Law, Claude W. Pettit College of Law, Ohio Northern University. Ph.D., J.D., University of Virginia; B.A., The College of William and Mary. I am grateful to the Harvard Law School Library for its permission, in its capacity as custodian of the Lon L. Fuller Papers, for the publication of correspondence between Lon L. Fuller and Arthur L. Corbin concerning their proposed Contracts casebook. I am also grateful to Gustaf W. Olson for research assistance and to George Athan Billias, Barbara Aronstein Black, William R. Casto, Howard N. Fenton, Daniel S. Guy, Stewart Macaulay, Sandra F. McDonald, Joseph M. Perillo, Stephen B. Presser, John Henry Schlegel, Stephen C. Veltri, and G. Edward White for comments on a draft. The Article is dedicated to Professor Perillo for his many contributions to Contracts. See generally Symposium, *A Tribute to Professor Joseph M. Perillo*, 71 *Fordham L. Rev.* 623 (2002).

1. *The Paper Chase* (Twentieth Century Fox 1973). The movie was based on John Jay Osborn, Jr.'s 1971 novel of the same name.

likely to forget what a central role Contracts occupied in Scott Turow's memoir *One L*.²

Contracts is, of course, more than merely the stuff of award-winning motion pictures (Houseman won an Oscar for his performance as Professor Kingsfield)³ and best-selling trade books (Turow went on to even greater fame and fortune as an author of legal thrillers).⁴ It is the consummate law school course: rich in history, doctrine, and theory. However, Contracts is also a course—perhaps more than any other—about which law teachers disagree pedagogically. And the disagreement is not simply over which cases to assign. It is about where to begin.

The choices of where to start a Contracts course are principally three: at the formation stage (i.e., offer and acceptance), at the remedies stage (i.e., post-breach), or with a brief introduction to remedies before the formation materials are addressed in depth. John D. Calamari and Joseph M. Perillo's *Cases and Problems on Contracts* is probably the leading contemporary casebook that begins at the formation stage.⁵ Although Calamari and Perillo do not explain why they do so, Professor Perillo was kind enough to tell me why: "It seems natural. That's how the textbooks and treatises run."⁶

John P. Dawson, William Burnett Harvey, and Stanley D. Henderson's *Contracts: Cases and Comment*⁷ is likely the leading contemporary example of the remedies-first approach. Professor Henderson explains in the preface why the casebook is organized in this fashion:

The authors of this book have believed that contract law is best understood—the broad conceptions as well as the formal rules and technical formulations—if it is approached through a remedy-centered study. The underlying purposes of contract law (what it seeks to protect, and how it hopes to accomplish its aims) are revealed most clearly when problems are looked at from a perspective of taking care of harms or losses, or gains held unjustly. We think it important that students see that the limitations of

2. Scott Turow, *One L* (1977).

3. <http://academyawards.20m.com/award46.htm> (last visited Oct. 13, 2003).

4. E.g., Scott Turow, *Presumed Innocent* (1987).

5. John D. Calamari & Joseph M. Perillo, *Cases and Problems on Contracts* (1978). The casebook is now in its third edition. John D. Calamari et al., *Cases and Problems on Contracts* (3d ed. 2000). Professor Helen Hadjiyannakis Bender joined Professors Calamari and Perillo on the second edition. John D. Calamari et al., *Cases and Problems on Contracts* (2d ed. 1989). Calamari is deceased.

6. E-mail from Joseph M. Perillo, Distinguished Professor of Law, Fordham University School of Law, to Scott D. Gerber, Assistant Professor of Law, Claude W. Pettit College of Law, Ohio Northern University (Apr. 24, 2003, 11:52:19 EDT) (on file with author).

7. John P. Dawson, William Burnett Harvey & Stanley D. Henderson, *Contracts: Cases and Comment* (8th ed. 2003). I was a student of Professor Henderson at the University of Virginia School of Law.

contract in our society are no small part of the story of its functions, and that the business of “enforcing” (perhaps dismantling) unkept bargains has much to contribute in the fixing of those limits and, accordingly, the forming of a working understanding of the law of contract as a whole. In a word, when a dispute over an obligation voluntarily assumed ends up in court, the great question of “when” to enforce cannot be detached from the also-great question of “how” to enforce.⁸

E. Allan Farnsworth, William F. Young, and Carol Sanger’s *Contracts: Cases and Materials*⁹ is almost certainly the leading example of the hybrid approach. Professors Farnsworth, Young, and Sanger do not explain in the casebook itself why they have adopted a hybrid approach, but they do so in the teacher’s manual that accompanies it.¹⁰ Their rationale is very similar to that of Dawson, Harvey, and Henderson:

Why have we put this brief introduction to remedies first? The introductory text addresses this question. Before asking what promises the law will or should enforce, it is helpful to know what is meant by *enforce*. Although the general treatment of remedies is deferred to Chapter 5, the present section makes two points. (1) The law of contract remedies is generous in that it usually protects the injured party’s expectation. (This is an essential point in discussions in Chapter 1 of situations, notably those related to Restatement Second § 90, in which recovery is limited to the reliance interest, and in Chapter 2 of situations in which courts are reluctant to find agreement.) (2) The law of contract remedies is stingy in protecting no more than a party’s expectation. (This is an essential point for an understanding of breach of contract, which generally carries no punitive damages, is only exceptionally sanctioned by specific relief, and sometimes leaves the party that has broken the contract better off than if the contract had been performed.)¹¹

Farnsworth, Young, and Sanger devote the first section of their first chapter to this task (the balance of the chapter concerns the traditional bases for enforcing promises). They then spend three chapters on formation, return to remedies in chapter five, and close with chapters on interpretation, performance and breach, basic assumptions, third party beneficiaries, and assignment and delegation.

I have never taught *Contracts* in the manner suggested by Professors Farnsworth, Young, and Sanger. I have taught the course in the other two ways, however. I have found it better for the students to begin with formation. They seem to find it much easier to

8. *Id.* at iii.

9. E. Allan Farnsworth et al., *Contracts: Cases and Materials* (6th ed. 2001).

10. E. Allan Farnsworth et al., *Contracts: Cases and Materials, Manual for Teachers* (6th ed. 2001).

11. *Id.* at 1-2.

understand in the opening days of their law school experience what an “offer” is, for example, than what the “reliance interest” is. This said, my two colleagues at Ohio Northern University College of Law who teach Contracts on a regular basis prefer the hybrid approach, and many a law professor around the country thinks that it is best to start with remedies. For example, Professor Christopher W. Frost of the University of Kentucky College of Law writes as follows in an article in a recent symposium on teaching Contracts:

There is considerable pedagogical value to starting contract problems by focusing on the stakes. In a general sense, the early focus on remedies reinforces students’ appreciation of the fact that the law is intended to do something. It exists to right wrongs in a meaningful way. This approach sets a purposive tone for the course that forces students to move from abstraction to real effect. More specifically, Fuller and Perdue’s methodology provides an early opportunity to engage students in standard legal reasoning. The formulaic approach channels their consideration of the facts of a specific case leading them to predictable numerical results. With a common starting point, the instructor is free to challenge the normative bases of the analysis and the factual assumptions on which the results rely.¹²

Again, I personally believe that Contracts teachers such as Professor Frost underestimate the difficulty beginning law students have with the remedies-first approach. As will be seen in a moment, Arthur L. Corbin felt this way too.¹³ In fact, Corbin’s disagreement with Lon L. Fuller on this pedagogic point—Frost mentions Fuller in his article—has had profound implications for Contracts teachers and students alike. It is to the basis of that disagreement that I now turn.

II. THE CORBIN-FULLER CORRESPONDENCE

During the process of trying to locate Corbin’s papers for an article I was hoping to write about his theory of Contracts, I stumbled upon a

12. Christopher W. Frost, *Reconsidering the Reliance Interest*, 44 St. Louis U. L.J. 1361, 1362 (2000).

13. See *infra* Part II. Professor Douglas L. Leslie of the University of Virginia School of Law argues for the “casefile” approach that is common in the nation’s business schools. Perhaps for the purpose of making a persuasive case for his preferred alternative, Leslie mocks the question at the heart of the present article. He writes:

It is hard to believe that a book’s structure (how it orders the materials) ought to count for much. I have heard it said that Lon Fuller’s choice to begin his contracts casebook with damages, rather than offer and acceptance, was a breakthrough. If I may quibble; starting a course in contracts with remedies for breach may well have been revolutionary, and the very best way to teach Contracts; but a professor can do it with any contracts casebook. Just begin the course with Chapter Nine.

Douglas L. Leslie, *How Not to Teach Contracts, and Any Other Course: Powerpoint, Laptops, and the Casefile Method*, 44 St. Louis U. L.J. 1289, 1300 (2000).

file in the Fuller Papers at Harvard Law School that contains a series of letters between Corbin and Fuller, unpublished until now, about a Contracts casebook they had agreed to co-edit.¹⁴ Corbin (1874-1967) and Fuller (1902-1978) are two of the giants of American legal education. Corbin taught at Yale Law School from 1903 to 1943.¹⁵ He also served as president of the Association of American Law Schools,¹⁶ he was a teacher and “father in the law” to Karl N. Llewellyn,¹⁷ a friend and protector of Wesley Newcomb Hohfeld,¹⁸ a devotee of Benjamin N. Cardozo,¹⁹ the chief aide to Samuel Williston on the *Restatement of Contracts*,²⁰ arguably one of the original legal realists,²¹ and the author of what has been called the “greatest law book ever written”²²—his multi-volume treatise on Contracts.²³

Fuller spent the first part of his law teaching career at the universities of Oregon and Illinois and at Duke University.²⁴ He taught at Harvard Law School from 1939 until his retirement in 1972.²⁵ He has been called by his biographer “one of the four most important American legal theorists” of the twentieth century (the other three being Oliver Wendell Holmes, Jr., Roscoe Pound, and Karl Llewellyn).²⁶ He published widely on the relation of law to morality and reason,²⁷ legal process,²⁸ legal method,²⁹ and legal education.³⁰ Although his writings on contract law are few in number, his article

14. For more on my search for Corbin’s papers, and for a catalog of those I managed to find, see Scott D. Gerber, *An Ivy League Mystery: The Lost Papers of Arthur Linton Corbin*, 53 S.C. L. Rev. 605 (2002).

15. See Laura Kalman, *Legal Realism at Yale, 1927-1960*, at 98-144 (1986).

16. Robert H. Jerry, II, *Arthur L. Corbin: His Kansas Connection*, 32 Kan. L. Rev. 753, 759 (1984).

17. William Twining, *The Karl Llewellyn Papers* 111 (1968).

18. See, e.g., Arthur L. Corbin, *Foreword* to Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions: As Applied in Judicial Reasoning* vii, vii-xv (reprint 1978) (Walter Wheeler Cook ed., 1919). Corbin was greatly influenced by Hohfeld’s conceptual approach to the law, and he convinced Williston to adopt it in the *Restatement of Contracts*. *Id.* at xii.

19. Corbin was responsible for persuading Cardozo to deliver the series of Storrs Lectures at Yale Law School that resulted in Cardozo’s classic book, *The Nature of the Judicial Process*, published in 1921. Arthur L. Corbin, *The Judicial Process Revisited: Introduction*, 71 Yale L.J. 195, 196-98 (1961).

20. Samuel Williston, *Life and Law: An Autobiography* 312 (1940).

21. William Twining, *Karl Llewellyn and the Realist Movement* 26-40 (1973).

22. Grant Gilmore, *The Death of Contract* 63-64 (Ronald K.L. Collins ed., rev. ed. 1995).

23. Arthur L. Corbin, *Corbin on Contracts: A Comprehensive Treatise on the Rules of Contract Law* (1950).

24. Robert S. Summers, *Lon L. Fuller* 1 (1984).

25. *Id.*

26. *Id.*

27. See, e.g., Lon L. Fuller, *The Morality of Law* (1964).

28. See, e.g., Lon L. Fuller, *The Problems of Jurisprudence* (temp. ed. 1949).

29. See, e.g., Lon L. Fuller, *The Law in Quest of Itself* (1940).

30. See, e.g., Lon L. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. Legal Educ. 189 (1948).

*The Reliance Interest in Contract Damages*³¹ remains one of the most influential in the field.

In that article, co-written with his research assistant William R. Perdue, Jr., Fuller maintained that the appropriate measure of damages for breach of contract cannot be ascertained without understanding the function contract damage awards are supposed to perform. He identified three purposes or “interests” as central: the expectation interest, the restitution interest, and the reliance interest. Importantly, it was *The Reliance Interest in Contract Damages*, or more precisely, the importance Fuller placed on that article as a pedagogic device, that eventually led to the abandonment of the Corbin-Fuller Contracts casebook.³²

A. *The Publishing Agreement*

Corbin and Fuller entered into a three-page contract with West Publishing Company on June 8, 1940, “to prepare a casebook known as Corbin and Fuller’s Cases on Contracts.” The manuscript was to be completed by October 1, 1941. The publishing agreement is reproduced below:

THIS AGREEMENT, made in triplicate this eighth of June A.D. 1940, by and between Arthur L. Corbin of New Haven, Connecticut, and Lon L. Fuller of Cambridge, Massachusetts, Parties of the first part (hereinafter called the authors) and West Publishing Company, of St. Paul, Minnesota, party of the second part (hereinafter called the publisher)

WITNESSETH THAT:

1. Agreements by Authors.

To prepare a casebook on the subject of Contracts to be known as Corbin and Fuller’s Cases on Contracts, containing about 1200 pages of text in the typography of the American Casebook Series, for the use of teachers and students in law schools, conforming to the style of treatment and arrangement of the American Casebook Series.

Will prepare their manuscript in printed or typewritten form and

31. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 Yale L.J. 52 (1936) (classifying contract damages in terms of expectation, restitution, and reliance interests). The article, characterized as “gospel” by many Contracts scholars, see, e.g., Randy E. Barnett, *Perspectives on Contract Law* 3 (2d ed. 2001), is not without its critics, see, e.g., Richard Craswell, *Against Fuller and Perdue*, 67 U. Chi. L. Rev. 99 (2000) (arguing that Fuller and Perdue’s three-way classification scheme is no longer a useful analytic tool).

32. See *infra* Part II.E.

deliver the complete manuscript of said casebook to the publisher on or before the first day of October, 1941, said manuscript to be satisfactory to the publisher. Manuscript is to be prepared by said Fuller and to be submitted to said Corbin, Fuller's decision to be final in case of any differences subject only to judgment of Warren A. Seavey, General Editor of American Casebook Series.

To cite both the various units of the National Reporter System and the State Reports to each case authority, so that the work may be equally usable with the Reporters or State Reports.

To cite only primary authorities, i.e. the adjudicated cases, and not refer to compilations of authorities such as digests, encyclopedias, etc., except as occasionally incident to other primary authorities. The above is not intended to exclude the citation of law review articles and notes.

To submit, as soon as conveniently possible, a fair sample of manuscript in reasonably complete form for publisher's examination and suggestions.

Will not use, in the preparation of said work, any material, the copyright of which is not owned by the publisher, or for which the authors or publisher have not received a license authorizing said use.

As soon as said manuscript has been accepted by the publisher and put into type, will read and revise the proofs as rapidly as furnished and will do all usual and necessary things to expedite publication of the work.

[W]ill prepare a subject matter index under an alphabetical arrangement.

Except as provided below, will not edit, prepare or publish, under their own name or otherwise, or allow to be prepared or published, under their own name, any work—which may injure or interfere with the sale of said casebook.

Will pay any costs in excess of fifty dollars for making alterations in copy requested by them after same has been set in type.

2. Agreements by Publisher.

Upon receipt and acceptance of said manuscript, to put it into type promptly and to provide authors with proofs promptly for reading, checking and indexing.

To provide all paper, stationery, etc., usual to such undertakings, as authors may require to complete the work.

To provide, in the form of signatures from the National Reporter System, or photostatic copies, any cases that the authors may require for the text of their casebook.

Will pay to authors, in consideration of said completed manuscript, a royalty in the amount of 18% of the net selling price on all books sold said royalty to be divided as follows: 6% to Arthur L. Corbin and 12% to Lon L. Fuller.

Will render to authors an accounting upon sales and royalties and pay all accrued royalties the first day of February and August, yearly.

To prepare, without expense to authors, a Table of Cases for said work.

Will supply authors, promptly upon publication, with 8 copies each of said work, without charge.

3. Miscellaneous Agreements.

Nothing herein contained shall be construed as preventing the publisher from publishing another work on the same subject.

Copyright of said work shall be taken out in the name of the West Publishing Company.

Style of said work, as well as number of volumes, price, distribution, advertising, etc., shall be decided by the publisher.

In case a new edition, revision or supplement to said work shall become necessary, publisher shall have the option of publishing same.

At the end of five years from date of publication of the above casebook said West Publishing Company agrees to arrange for the publication of a new edition of said casebook which shall be in the name of said Fuller, the royalties on such edition to be paid to said Fuller and to be not less than the royalties on this edition now paid to Corbin and Fuller, or in the alternative, if it does not then desire to publish a new edition, to permit said Fuller to publish a casebook on the subject using such material of the present book as he sees fit.

IN WITNESS, WHEREOF, the parties have hereunto set their hands the day and year first above written.

Witness

Arthur L. Corbin
Author

Winifred N. Russell
Witness

Lon L. Fuller
Author

J. E. Turner
Witness

WEST PUBLISHING COMPANY

By W. A. Ammons, Pres.

B. *Fuller Makes an Early Push for a Remedies-First Approach*

The structure of the publishing agreement, in terms of both royalty allocation and decision-making authority, makes clear that Fuller was to be responsible for the lion's share of the work on the casebook. The following October 7, 1940, letter from Fuller to Corbin suggests why: Fuller was being asked to bring out Corbin's existing casebook in a third edition. Although the correspondence archived at Harvard does not indicate the reason Corbin was essentially turning over his casebook to Fuller—the publication agreement reproduced above provides that any subsequent edition would be Fuller's alone—it was almost certainly so that Corbin could devote more of his time and attention to his Contracts treatise.³³ The October 7 letter also makes plain how early in the project Fuller had decided to begin the third edition with remedies.

October 7, 1940

Professor Arthur L. Corbin
Yale University Law School
New Haven, Connecticut

Dear Professor Corbin:

I have been intending to write you for a long time to give you a report on my work on the third edition of your casebook, but had delayed until I could furnish a fairly definite prospectus. Naturally I want to take just as large an advantage as I can of your counsel; on the other hand, I understand perfectly that the real labor of the revision is mine, and that because of your work on your treatise you don't want to be bothered with details. I don't know as yet how we can best work together. If you would like for me to do so, I shall be glad to make a trip down to New Haven sometime in the course of the winter so that we can talk over the whole matter. Or would you prefer for me to send along to you the individual chapters as I get them ready?

By the way of purely "Inoperative Preliminary Negotiation" I should like to list the principal changes I would like to introduce into the book. These are naturally in addition to the substitution of new cases for some of those in the book, changes in order, etc. I list these changes in the approximate order of their importance to me, i.e., in

33. See Corbin, *supra* note 23. It is unclear precisely why Corbin agreed to let Fuller be the one to take over his casebook. The only reference to the matter that I have managed to locate appears in a September 9, 1940, letter from Corbin to Karl N. Llewellyn. The reference, which comes at the end of a paragraph in which Corbin talks about the cases Fuller cited in his reliance article, is: "Fuller is using my casebook; and I have agreed to let him get out a new edition of it. This indicates respect." Letter from Arthur L. Corbin, Professor Emeritus, Yale Law School, to Karl Llewellyn, Professor of Law, Columbia University School of Law (Sept. 9, 1940) (on file with the D'Angelo Law Library, University of Chicago).

the order of their importance from the standpoint of my own use of the book in class.

(1) I should like to introduce a new introductory section running about 15 cases, to be entitled something like, "The General Scope of the Legal Protection Accorded Promissory Expectancies." (I would prefer a less highbrow designation for this chapter; perhaps something less forbidding will suggest itself later.) This section would deal with the problem of enforcement in general terms. I have worked out the details of the chapter pretty well, and if you would like I would be glad to send you a list of the cases I want to include, and some indication of the character of the notes. My object in this section will be to bring home to the student the fact that back of the question, "Is there a contract?" there always lies a more specific problem of enforcement. I believe that the cases I have selected are also sufficiently simple, and stand sufficiently on their own feet, so that this first section can also serve to introduce him to the problem of abstracting and analyzing cases generally. I should include cases illustrating in very general terms the various measures of recovery for breach of contract, illustrating what might be called a "qualified enforcement" such as New York gives the contract to pay an attorney's fee. I should also include *Clark v. Marsiglia* (or *Wigent v. Marrs*) and *Hadley v. Baxendale* to illustrate the limits on enforcement. (I find it very difficult [to] discuss *Offord v. Davies* and *Rague v. New York Evening Post* without the principle of mitigating damages.) At the end of the chapter I should insert a note on specific performance. This chapter would incidentally take up the problem of indefinite contracts, and show how restitution would be granted generally no matter how vague the contract, that what I call "the reliance interest" would, in case the contract were a little more definite, receive either direct (see *Kearns v. Andree*, 107 Conn. 181) or indirect (see *Morris v. Ballard*) recognition, and that the courts would be least inclined to protect the expectancy.

(2) I should like to insert at the beginning of the section on consideration a rather long textual analysis of the problem of consideration and the seal, which would be partly based on the present introductory notes, but which in part would go considerably beyond them.

(3) As a part of the same scheme, I should like to cut down the present section on sealed contracts, substituting text for a good many of the cases, and move the whole section up between the proposed new note on consideration and the seal and the cases on consideration. (I have taught the thing this way now for about five years.)

(4) I should like to introduce into the section on "Reliance on a Promise as Consideration" three cases on estoppel in pais, which will serve to bring out the relation between "promissory estoppel"

and “estoppel in pais,” and will also illustrate the problem of the measure of relief to be granted.

(5) I should like in various places (particularly in the chapter on Assignment) to substitute an introductory note on the history of the subject for the older cases now included. This is, of course, simply in order to save time. (As you perhaps know, we have only five hours for contracts here, and the tendency over the country as a whole seems to be to cut down the time allowed for the subject.)

(6) Though I have no very definite opinion about the matter as yet, I am inclined toward moving the chapters on Assignment and Beneficiaries toward the middle of the book. From the standpoint of correlating contracts with other first-year courses, particularly agency, I believe that an arrangement which takes up these subjects at an earlier time is better.

(7) I should like to include a short section on the parole evidence rule.

This seems, as one glances over it, a rather formidable list, but it affects, after all, only a small portion of the total work. Naturally all of these plans are tentative, and I want to get all the help and advice I can from you before reaching any definite decisions. Particularly I should like to know what changes you would consider desirable, other than those I have mentioned.

I have thought some of sending out a questionnaire to those now using the book, asking them for suggestions. What do you think of the idea?

If the proposals I have enumerated are too extensive to make it convenient for you to discuss them in a letter, and you would prefer for me to come down to see you before going[] to work on them, please let me know. On the other hand, if they meet with your approval in a general way, I would be glad if you would say so, as I would then feel fairly confident in going ahead with the actual work of writing the notes, abridging the cases, etc.

Sincerely yours,

LLF:HGL

P.S. If in your use of the casebook in class you have worked out a scheme of omissions or rearrangements I should like to have a copy as soon as possible.

Corbin responded on November 7, 1940, in a letter that suggests he had failed to appreciate how revolutionary at least one of Fuller’s proposed revisions was: the one—the first in importance to Fuller himself—about opening the third edition with remedies. Corbin

addresses some of Fuller's suggestions about remedies, but he does not say a word about the plan to open the casebook with them.

YALE UNIVERSITY
SCHOOL OF LAW
NEW HAVEN, CONNECTICUT

ARTHUR L. CORBIN

Professor of Law

November 7, 1940.

Professor Lon L. Fuller

Harvard Law School

Cambridge, Mass.

Dear Mr. Fuller:

Here at Yale, I am now compelled to teach the subject of "Contracts" in two parts:

/ 2 hours through year

Contracts I in about 60 class-room hours of the First year;

/ 3 hours one semester

Contracts II in about 45 hours of the Second year.

This has led me to subdivide the materials as follows, probably somewhat as you have yourself been doing:

Contracts I

Mutual Assent

Consideration

Seal

Discharge

[3d Parties (Beneficiaries
(Assignees

Joint and Several

Contracts II

Operative Effect of Contract

(being the character and limits of the rights, duties, powers, etc., that are consequent upon a contract)

Interpretation

Constructive Conditions

Impossibility and

other like factors

Repudiation (and other Breaches, Anticipatory, etc.)

Judicial Remedies

Damages

Restitution

Spec. Performance ←?

Illegality
Statute of Frauds

I write this to suggest the possibility of publishing the new edition in two separate and somewhat smaller volumes, at least for such schools as would like to divide the subject into two courses. For other schools it would still be possible to bind the material in a single volume.

Perhaps this would make desirable a very moderate expansion of the material dealing with Judicial Remedies. Even in a school that offers such separate courses as Damages, Quasi Contracts, and Specific Performance, the students can seldom elect them all.

I feel strongly that in all schools, the Remedies available for enforcement should be considered along with the other parts of Contract law. Without doubt, the same may be said of Property and Torts. I do not go so far as to include Court Procedure. There is much overlapping that is unavoidable; within limits, it is very profitable.

Please do not feel that an answer to this letter is necessary. My purpose is served by giving you the above information, as a basis for consideration as you proceed with the work of revision.

Yours sincerely,

Arthur L. Corbin

ALC:V

Fuller's next letter, dated November 25, 1940, does not address the remedies question. Instead, he focuses on Corbin's suggestion about publishing the casebook in two volumes.

November 25, 1940

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

This is to thank you somewhat belatedly for your letter of November 7. I have not had time to give much consideration to the casebook during the past two weeks, nor shall I until after the first of the year. I'm not sure Turner told you that before the matter of the casebook came up I had already made two commitments: one to write a short philosophic sketch for a volume being put out by the Northwestern people, and the other (on which I am working now) to write an article on Consideration for the symposium to be published by the Columbia Law Review. This article will occupy most of my time between now and the first of the year. After that I shall go to work in earnest on the casebook.

It may be that it would be wise to put the book out in two volumes, as you suggest. Frankly, I am not at all keen about the division of contracts into two courses. I believe that the subject matter of Contracts II, as taught at Yale and Columbia, is an integral part of the whole subject, and is necessary to round out a picture which is left misleading when the course stops with Consideration, Mutual Assent, Beneficiaries, and Assignments. Furthermore, it seems to me that the content of Contracts II is something which should come in the first year, since it has an important bearing on various second-year courses.

I have toyed myself several times with the idea of a different line of division: a Contracts I course which would survey the whole field, and then a Contracts II course which, like Havighurst's course, would put the emphasis on special kinds of contracts: Real Estate Broker's Contracts, Construction Contracts, Employment Contracts, etc. Even if there were only one course and one book, the division of chapters in the book might be along these lines.

I am writing to the West people to get a list of the men at present using the book, and I plan to put in some of my spare time during the next month composing a questionnaire to be sent out to the users of the book – that is, if this plan is agreeable to you. Naturally I would submit the questionnaire to you before sending it out. I would try to find out what the general view was with regard to the proper arrangement of subjects, etc. I would, of course, ask for reactions on the proposal of two volumes.

Soon after the first of the year, I shall try to draw up a fairly definite list of suggestions and make a trip down to New Haven to talk them over with you. Meanwhile, it would be of great assistance to me if you would forward to me your list of omissions, — assuming you do omit some of the cases. Also any variations in the order of the cases you may have found advisable.

Sincerely,

LLF:HGL

Lon L. Fuller

C. The Potential for Disagreement Emerges

Nearly four months passed before Fuller again wrote Corbin. As the previous letter described, Fuller had other writing projects he had to complete before he could devote the bulk of his time and energy to revising Corbin's casebook. Fuller's lengthy March 26, 1941, letter, reproduced below, indicates that he had finally turned his "full time" attention to the casebook. This letter is the first of the correspondence in which Fuller seems to identify the "problem" of "distinguishing between the work of the two editors." Although

Fuller mentions only the consideration³⁴ material in the letter, he states that the “introductory section” on remedies is “practically finished.” (He also vents, in a fashion not uncommon for a law professor, about an unrelated review of one of his books that had appeared recently in the *Yale Law Journal*.)³⁵

March 26, 1941

Professor Arthur L. Corbin
Yale University Law School
New Haven, Connecticut

Dear Professor Corbin:

I have been putting off writing you from week to week because I could not make up my mind whether it would be better to make a trip down to New Haven to talk to you. As things stand now, I think it would probably be best to postpone a personal conference until later in the year. I am now working “full time” on the casebook, but since I have worked here and there throughout the book I have as yet little to show for it. The new introductory section I mentioned previously, running about 16 cases, is practically finished, with note[s], and I have been working on Mutual Assent, Consideration, and Assignment.

There are several specific questions I should like to put to you. In the first place, I am very eager to cut down the length of the book, and I am somewhat embarrassed by the fact that you use the book for a second course at Yale, which I take it, necessitates a fairly extensive quantity of material. As you know, we have only five hours for contracts here, and the general tendency over the country seems, regrettably, to be to cut down the course.

What I would like to do is to “sweat” certain sections radically by using fairly long introductory text statements, following them with several interesting and typical cases, of the “harder” variety, which can serve as a basis for classroom discussion and as a means of tying down the textual material to something concrete. This is a method I became familiar with in using Steffan’s Agency Cases and I should like especially to use it in the following subjects: Joint Contracts, Illegality, and the Statute of Frauds. Do you at present teach the cases now contained in those sections? Will you let me know what sections you “slight” and how extensive the slighting is?

Another problem I have encountered (which is aggravated by my desire to use text specially prepared for the book) is that of

34. The second of Fuller’s two articles on Contracts jurisprudence was devoted to consideration. See Lon L. Fuller, *Consideration and Form*, 41 Colum. L. Rev. 799 (1941).

35. See Myres S. McDougal, *Fuller v. The American Legal Realists: An Intervention*, 50 Yale L.J. 827 (1941) (reviewing Lon L. Fuller, *The Law in Quest of Itself* (1940)).

distinguishing between the work of the two editors. I want to carry over a good deal, in fact most of the text which you yourself prepared; in one case, that relating to consideration, I should like to tie in an additional extended statement of my own. How can we indicate editorially whose is which? I have thought about this a good deal, and I haven't been able to find any satisfactory or graceful solution for it. Will you pass on to me your reactions to the problem?

I have talked to several people who have used the book and they all think that there are too many Hohfeldian notes. I am inclined to think that we ought either to cut down the number of these notes or print, somewhere in the book, your article on the Hohfeldian system. With only five hours[], I have been forced to skip over many of the Hohfeldian problems raised in your notes, and that has the disadvantage that it gives the student the notion that the questions raised in the notes are generally not important. Will you let me know how you feel about this matter, and how important these notes are to you in your own teaching?

The final problem has to do with citations of authorities in the footnotes. I think it would be impossible for me to bring these up to date and retain their present form. Furthermore, the publication of your treatise will to a large extent obviate the necessity for doing this. What I would like to do, therefore, is to cut out "see accord . . . but see contra" notes and substitute for them brief abstracts of cases which are useful for purposes of comparison, or which will broaden the student's conception of what can happen in the judicial process. Is this agreeable to you?

I enjoyed reading your article in the All-Yale issue of the Journal. Reed Powell, who is just as doubtful as ever of the Supreme Court's competence, also thinks they probably pulled a brodie in overruling *Swift v. Tyson*.

While I am on the subject of the All-Yale issue, I would like to say something about the review of my recent book (or was it of me?) which it contained. It is a safe guess from the style in which this review is written that its author is not without a certain curiosity to know what kind of impression he created. I will not burden you with my opinion of his discussion of the issues raised by my book, except to say that it shows the dangers which confront a good soil-erosion lawyer when he ventures into legal philosophy. Nor will I [s]ay anything about the reviewer's style, although to accuse us poor seekers after the Right Way of indulging in "infamous thobbing" seems a little harsh, or would seem harsh, I suspect, if I knew what "thobbing" meant. I was a little bit more concerned with the report which the reviewer gave of what was said in my book. In this carefree world it is a disgraceful fact that many people form their opinions of authors not from a reading of their books but from a reading of reviews of those books. I had always supposed the

existence of this negligent practice placed a certain obligation on the reviewer – even the reviewer who was very obviously “out to do a job” – to be reasonably accurate in reporting what the author said. I had supposed, for example, that when the author’s thought was paraphrased, it would be better not to put the paraphrase in quotes, since this might lead some careless reader to thin[k] that the author had said it. Again, when the author discusses a book by Kelsen on democracy, better practice would call for labeling the views under discussion as those of Kelsen and not those of the American realists, even though the latter form of statement serves the reviewer’s purpose in creating an issue between the author and the realists. When the author says that Kelsen disagreed with the previous positivists because they entertained a certain view, it would be better not to attribute this view to Kelsen himself, even though doing so suits the reviewer’s purpose in creating an impression that the author’s book is all one “big, blooming, buzzing confusion.” When the author speaks of the collapse of democracy in “Germany and Spain” it would be better to say “Germany and Spain” and not “Germany and France,” even if one found the author’s thought so confused that the substitution seemed of little importance.

From your experience in university life and your familiarity with the course little tempests like this one are apt to take you will realize that there are always gossips who like to give a kind of institutional interpretation to the quarrels of the professors, as if our great universities were swatting at one another and accusing each other of things like “idiosyncratic myopia.” In the light of this you will not take it amiss if I report the amusement of one of my less charitably inclined colleagues on discovering the following passage in the review: “The record of the realists, considering their institutional handicaps, is more impressive than is sometimes imagined.”

I hope that you will not think that I am really peeved by the review. To tell you the truth, I am more puzzled than peeved. I am particularly puzzled because I had received a letter from my good friend, its author, last spring asking my forgiveness “if a naturally perverse disposition forces me to pick a few piddling quarrels with a great book!” In a letter written just before the review appeared, he said that the review “is rougher in terms than I had intended” and that he hoped that “the vigor and amount of the attention I pay you will bear full testimony to you and to others of the great respect I bear you.” I have a suspicion that there will be occasional readers who will not detect “the great respect” implicit in the review, and there are others who would be surprised to learn that a book which, according to the last note in the review, is so preposterous that it is perhaps a mistake to take it seriously, is, in the privately-expressed opinion of its reviewer “a great book.” Oh well, it was anciently said that the devil himself knoweth not the mind of man, and I shall not attempt to fathom this one.

Will you let me have your answer to my questions about the

casebook as soon as possible, as I have reached the point where some of these things have to be decided before I can go on effectively.

Sincerely,

LLF:HGL

Lon L. Fuller

Corbin responded almost immediately to Fuller's letter. He states, in a handwritten letter on March 28, 1941, that the casebook was to be Fuller's, although he does allude prophetically to the possibility that co-editors could "violently disagree" about a matter concerning a book.

YALE UNIVERSITY
SCHOOL OF LAW
NEW HAVEN, CONNECTICUT

ARTHUR L. CORBIN

Professor of Law

Charlottesville, Va.

March 28, '41

Dear Mr. Fuller:

Your letter was forwarded to me here. I shall write a brief reply in order to help you along, reserving more detailed comment for the future.

Go ahead with your plans, without worrying about me. I have confidence in your judgment and reasonableness (and so has McDougal) and also in your willingness to discuss matters when they become specific. Treat the chapters on Joint Contracts, Illegality, and Statute of Frauds as you please. They are not my favorite children. As now printed they are inadequate as a basis for any synthesis of doctrine; but I have thought that first year men ought to be given at least a bowing acquaintance with these topics. I have frequently been unable to cover these chapters.

I am not wedded to "Hohfeldian notes." Are there really very many of them? I give a couple of introductory lectures and then proceed to analyze cases as I please. It is my belief that students get most benefit out of exact analysis of facts, rather than out of my footnotes or introductory notes.

Footnote citations render little service. Abbreviated statements of cases are all right if clear and accurate and not too numerous. They seem overdone in Handler's Cases on Vendor and Purchaser, a book that I am now teaching.

Why is it necessary to distinguish in any way between your note work and mine. It will appear in preface that it is your edition of my

earlier book. If after discussion we should violently disagree on something, we can deal with that as a special and horrible example.

Don't let McDougal's review trouble you. He is an able and interesting man who is on his way. He is making intellectual discoveries that seem very important to him. This leads him at present to be rather assertive, critical, and dogmatic. At the same time he is warm-hearted and friendly; and I know that he holds you in affectionate respect. It has long been my practice to let anything that I have published fight its own battles.

Yours sincerely,

Arthur L. Corbin

Fuller's next letter, dated May 20, 1941, mentions that he hopes to meet with Corbin during a trip Corbin was scheduled to make to Cambridge. Fuller reiterates his concern about the length of the casebook.

May 20, 1941

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

I have just learned through Mr. Turner that you will be in Cambridge next Monday. I am very eager to have a chance to talk with you about the general scope of the casebook, though I shall try to avoid burdening you with matters of detail. I am particularly interested to know what the minimum requirements for your own courses in Contracts would be since I should like to cut down the length of the book as much as possible.

I don't know what your schedule is, of course, but if you could stay over in Cambridge Monday night my wife and I would be delighted to have you stay with us. I know that you always like to have a get-together with Mr. Williston when he is here, but he seems to be away now, and I don't know whether he will have returned by then or not. In any event, without burdening you and without interfering with your other plans, we want you to know that the latchstring is out with us and we should like to have you spend as much time as you can with us.

Sincerely yours,

LLF:HGL

Lon L. Fuller

In a November 5, 1941, handwritten letter, Corbin wishes Fuller luck in his efforts to prune the length of the casebook, but Corbin indicates that he does not hold out much hope that Fuller will be able

to do it. Corbin also reminds Fuller, as he often did, to keep the material “factually interesting” for the students.

YALE UNIVERSITY
SCHOOL OF LAW
NEW HAVEN, CONNECTICUT

ARTHUR L. CORBIN
Professor of Law

Nov. 5, '41

Dear Mr. Fuller:

Please send me Ms. chapter by chapter, as soon as is convenient to you. It will be much better for me not to have a large quantity to consider during a short time. Just now my vitality is a bit reduced by reason of some kidney gravel that hurt like hell.

I have a notion that your chapters on “Special problems” in this and that will reorganize the chapter on “Conditions.” I have often thought of segregating its material more specifically. In my judgment, it is in the field of performance of contract, with its wealth of factors unforeseen by the parties, that the most profit will be found in segregation by trade, business, profession, etc.

I often wonder how successful you are going to be in keeping down the total number of pages. Don't try to do too much; and be sure to keep your material factually interesting.

With my kind regards,

Arthur L. Corbin

D. Fuller and Corbin Disagree about the Merits of a Remedies-First Approach

In a November 10, 1941, letter, Fuller reaffirms his plan to begin the casebook with remedies rather than formation. His objective is to make the students “remedy-minded.”

November 10, 1941

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

To minimize the consequences of a possible loss of any of the manuscript, I am sending you herewith only the first chapter. Though the cases in this chapter may seem at first to be drawn from rather different fields of law, my intention is that they should be discussed as a series, with each case having some relation to what

precedes it and what follows it. Thus *Clark v. Marsiglia* and *Hadley v. Baxendale* are qualifications on *Hawkins v. McGee*, qualifications which need to be explained. I do not intend to cover the whole problem of remedies exhaustively in this first chapter; some of the missing parts will be picked up en route; some will be taken care of in a later chapter on damages, following the subject of conditions. The purpose of the first chapter is partly to make the student "remedy-minded" (I recall in this connection your own note to the chapter on remedies), as well as to give him that minimum of information about remedies and damages necessary to get an adequate perspective of the cases which intervene before a more intensive study of remedies in a later chapter.

When you are through with this chapter, I'll send along the chapter on mutual assent.

Sincerely,

LLF:HGL

Corbin responded on November 21, 1941, with an objection that rings familiar to many modern ears: the remedies-first approach is too complicated for beginning law students.

YALE UNIVERSITY
SCHOOL OF LAW
NEW HAVEN, CONNECTICUT

ARTHUR L. CORBIN
Professor of Law

November 21, 1941.

Professor Lon L. Fuller
Harvard Law School
Cambridge, Mass.

Dear Mr. Fuller:

Along with this letter I am mailing to you your first chapter of cases. You may remember that I expressed some doubts as to the desirability of an introductory chapter such as this. At the same time I recognized that it was yours to experiment.

A study of the cases in your chapter does not remove my doubts; instead it intensifies them. While I sympathize with your wish to make the students "remedy minded" as early as possible, it seems to me that you are asking too much of beginners. My belief is that their first problems should be as simple and as closely related to their past experience as possible.

In this chapter you throw them at once into the complexities and uncertainties of damages: liquidated and unliquidated, penalties,

unjust enrichment, expenditures in reliance, expected gains both speculative and otherwise.

The last six or eight cases require the analysis and comparison of contract and quasi-contract. In my first edition I tried this on a small scale. Among these last cases, *Boo[n]e v. Coe* involves the statute of frauds and the "part performance" doctrine, as to which Kentucky is in a small minority. The Anonymous case, p. 86, like so many old-time reports, will puzzle the beginner, making a distinction without discussion. The last case, p. 92, illustrates one of the rules of remedy in land sale cases.

I can see your plan of working through this series in class; but I believe that you will not get the results that you desire. Even for the introductory understanding that you are working for, the students will need more cases than you include. At the same time, you can not expect to complete the discussion of these topics in the first chapter.

What I have written above is of course no news to you. You must have chosen these cases for the very reason that they involve all the matters mentioned. My point is that even after a large amount of explanatory lecture by you the students will remain bewildered. Also I predict that not many other teachers will use the chapter.

My present suggestion is that you have the chapter mimeographed, or printed, and use it in your classes next October before the casebook is completed and bound up. Such a test may demonstrate that I am in error. In any case I leave the final decision to yourself.

Yours sincerely,

ALC:V

Arthur L. Corbin

Fuller offers a powerful defense of his remedies-first approach in a lengthy November 24, 1941, letter to Corbin. Fuller draws heavily in the letter on his seminal article on remedies.³⁶ He acknowledges that his proposed approach to teaching Contracts is "revolutionary," but he asks Corbin to keep an "open mind" about it. The letter is almost certainly the most important of the correspondence between the two men.

36. See Fuller & Perdue, *supra* note 31.

November 24, 1941

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

I have received a return of the first chapter and your comments on it. As to the minor matter of M[e]ssrs. Meddle and Peel your criticism was very much in point, and I shall try to rephrase the case to take account of it.

As to the more important matter of the coherence and/or teachability of the whole Chapter. I have no doubt that it will be fairly hard going for first-year men. On the other hand, I don't think it will be quite as hard as you imply. The first-year man is in the fortunate position of being unaware that the materials of this section are drawn from the diverse fields you mention. Many of the things which disturb you I am sure will not disturb him.

Your remarks about particular cases make it clear that the chapter does not have the continuity for you that it does for me. Perh[ap]s it would be well for me to spell out what I am driving at in this first chapter. I have become convinced that contract law must be analysed in terms of what I called, in my Yale article, a hierarchy of interests. A court may interfere where a promise is broken (1) to prevent unjust enrichment of the promisor, (2) to reimburse the promisee's reliance or (3) to give the promisee the value of the promised performance. The incentives to judicial intervention to protect these interests decrease in the order in which I have named the interests. As to the first, courts will protect this often even in the absence of a promise, or where the promise is oral and "unenforceable" under the statute of frauds, etc.

To my mind the significance of these interests is written across the whole field of contracts. For example, take two problems raised in your very first chapter on "Inoperative Preliminary Negotiation." The problem of the offer made in jest taken seriously by the offeree raised the following questions: (1) If the jesting offeror is held to "the contract" will the measure of recovery against him be the offeree's expected profit or his losses through reliance? (2) In the absence of "a contract," will there be any quasi-contractual recovery? I know that it is often assumed that if any relief is granted on the contract it must be measured by the lost profit. But I am frank to say that I see no warrant for this either on the authorities, or, as it used to be fashionable to say, "on principle." It seems to me impossible to discuss whether there "ought to be a contract" without knowing what difference that makes.

Your present first section also raises the problem of

“indefiniteness.” This in turn raises the following questions: (1) Will reliance by the plaintiff cure the objection of “indefiniteness” and make the court willing to enforce a contract it would not enforce in the absence of such reliance? (2) If the basis of judicial intervention is the protection of reliance, will the measure of recovery be in terms of reliance, or in terms of the expected profit? (There are cases both ways.) (3) If the court declares the contract too vague to give rise to any suit “on” it, is there a chance of quasi-contractual recovery?

In my opinion the questions I have raised about the “interest protected” are not only important to fill out the student’s knowledge of the kinds of relief available, but must be taken into account to understand any particular kind of relief.

I could go through the whole subject of mutual assent, consideration (cf., § 90), conditions, [] impossibility, the statute of frauds, and almost every other branch of contract law (except perhaps joint and several contracts) and show the significance of these interests.

I do not claim that this is an original discovery of mine. Many writers have in discussing particular cases made distinctions along the lines I have mentioned. I recall, for example, your own discussion of the Cole-McIntyre case, in which you point to the absence of any benefit received by the silent offeree. The difference between my view and that of others is in the matter of emphasis, and in the fact that I have developed this idea more systematically and pervasively than have most other writers.

Naturally the general problem I have mentioned is made most explicit in the law relating to remedies, because it exercises there a direct and obvious influence on the measure of recovery. It is for that reason that I like to start the subject of contracts with remedies. I have for a number of years devoted the first hour or two of the course to raising the questions dealt with in the proposed first section, including that of *Timmerman v. Stanley*. I have found that this enriches the subsequent discussion, and that students are not permanently bewildered by this approach. Indeed, I have been surprised how interested they become in the problems of “how much,” which is certainly no more remote from their previous interests than, say, *Stanton v. Dennis*.

Now as to how I would teach this first section myself. Throughout I would put the following questions: (1) Did the court grant the plaintiff the full monetary equivalent of actual performance? (2) If it did not, what did it actually give him? (3) What was the rationale of the particular kind of relief it gave? When the cases are considered in the light of these inquiries, I submit they lose the hodge-podge character you seem to attribute to them. *Hawkins v. McGee* says that plaintiff gets the monetary equivalent of performance. Why, then, the limitations in *Clark v. Marsiglia*, and *Hadley v. Baxendale*? Incidentally, does the student

gain insight into the problems raised in those two cases by studying offer and acceptance and consideration? On the other hand, do not these limitations come up constantly in offer and acceptance? (Cf., *Offord v. Davies*, *Rague v. New York Evening Post*, *Mott v. Jackson*, § 45, etc.)

Again, what preparation for the subject of liquidated damages does the student get from studying offer and acceptance, impossibility, etc.? On the other hand, is not the problem, how far will a court go in giving the plaintiff the monetary equivalent of what was promised him (which is involved in this subject), one which cuts across many of the problems raised under the conventional rubrics? I think particularly of your case on page 649.

About the two cases you mention specifically. *Boone v. Coe* was a case where the defendant contracted orally to give the plaintiff a lease on property in Texas. In reliance on the oral promise the plaintiff moved from Kentucky to Texas, where he was not permitted to go into possession of the premises. He sues for the cost of moving. The court denies this recovery, but says it would have given him a return of benefits had any been conferred on the defendant. I would ask about this case: (1) How far does the court go here in protecting the promisee? (2) Why did it stop where it did? (3) Why is it more willing to compel a return of benefits than to reimburse reliance?

You say that the case involves a peculiar Kentucky doctrine of part performance. I don't follow this. The performance here was not of a type to take the contract out of the statute according to § 197 of the Restatement. I know there are cases holding that the contract is taken out by partial performance not satisfying § 197. But why raise that question at all? It is not mentioned by the court, and I see no reason to bring it into the discussion. My object in this first chapter is not to teach all of the law surrounding these cases; but to give the student an awareness of this problem of the three interests I have mentioned, which incidentally, of course, do not need to be called "interests."

You also mention the abstracted case, *Rabinovitz v. Marcus*, 100 Conn. 86. That case held that the buyer under a land contract could, on default by the seller, recover (1) payments made and (2) reimbursement for reliance. It was put in to be compared with *Timmerman v. Stanley*, which held that a plaintiff could not sue "on" the contract for losses through reliance, and recover benefits conferred, since the two recoveries were inconsistent with one another. (Incidentally, is not *Hadley v. Baxendale* hovering in the background here?)

You say of the *Rabinovitz* case that it "illustrates one of the rules of remedy in land sales cases," and I take it you have inferred that that was its significance for me. I see no reason in discussing this case to go into the problem of the conflict about the measure of

recovery in the land cases. For me it illustrates a more general problem, can the plaintiff get restitution of benefits and reimbursement of reliance in one suit?

As a matter of fact Connecticut is cited by McCormick as a jurisdiction following the loss-of-bargain rule. But even in such jurisdictions, as the Rabinovitz case illustrates, probably the plaintiff can restrict his demand to a reimbursement of reliance. But I see no reason to drag all this into the discussion.

I talked yesterday with Seavey about this first chapter. He shares your doubts about its teachability. On the other hand, he and Thurston in their new book are including restitution in their discussion of deceit. In other words, they have encountered exactly the same difficulty in dealing with one aspect of deceit in isolation from other aspects than I have encountered in contracts. I called this to his attention. His answer was that this was only a small part of their course. I said, "Yes, in the one branch of tort law where the problem I am concerned with is involved, you adopt substantially the approach I do. But the problem is written across the whole of contract law."

When I taught Personal Property I made a reform in the course which corresponds almost exactly to the one I propose for Contracts. The usual order in that course is to take up first, What is possession? and then, What are the legal consequences of possession? I reversed this order. I was told that it would be impossible to teach the subject this way; that students would want to know what possession was before talking about its legal consequences; that the problem, What is possession? was something within the scope of their previous experience while the problem of legal remedies and consequences was one foreign to that experience. Yet I taught the subject this way for three years, without any of these difficulties manifesting themselves. In my own opinion the new order was an immense improvement over the old from the standpoint of imparting a functional conception of legal rules. Naturally, my experience in Personal Property does not guarantee a similar success in Contracts. On the other hand, it has given me a certain immunity to the cry of "impossible."

I talked yesterday with Turner and he is quite agreeable to bringing the book out in pamphlet form. This will enable me to adopt your excellent suggestion that the chapter be tried in practice before being definitely incorporated in the book.

As a result of your suggestions I am also going to see to it that the rest of the book can stand independently of the first chapter, so that those who don't like it can leave it out. Toward this end I am making a minor modification in the second section, on "inoperative preliminary negotiation."

Within the next two or three days I'll send you on about half the

subject of mutual assent, along with a typewritten list of the materials in the second half. The entire subject is now finished, but I don't like to entrust the whole thing to the mails at once. I'm reasonably confident that you will feel that I am treading on more certain ground from now on. The first chapter is indeed the only thing which can be called "revolutionary" about my arrangement. I'm going to try to keep an open mind about its advisability, and I hope you will do the same.

Sincerely,

LLF:HGL

The next day, Fuller wrote a much shorter letter to Corbin. He enclosed some of his revisions to the mutual assent chapter, but says nothing further about remedies.

November 25, 1941

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

I enclose about half the subject of mutual assent, along with a list of the cases and notes for the remainder of the subject. I also enclose a list of the section headings for this chapter.

I have included the three cases on mutual mistake of fact (as contrasted with "misunderstanding" as in the Peerless case) because I have found it very difficult to study the cases of unilateral mistake without a background of these cases. You will notice that *Jones v. Great Northern* and its notes tend to integrate the subject matter of the section and reveal the relation between the parol evidence rule and the problems discussed at the beginning of the section.

Sincerely,

LLF:HGL

On December 3, 1941, Corbin penned a response to Fuller's letters of November 24 and 25. Corbin comments on Fuller's revisions to the mutual assent material, reiterates his famous distaste for the parol evidence rule,³⁷ and, most important of all, acknowledges Fuller's valiant effort in the November 24 letter to defend "your own system" of teaching remedies first.

37. See, e.g., Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 Cornell L.Q. 161 (1965); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 Fordham L. Rev. 761, 768 & n.27 (2002) ("Professor Scott D. Gerber has recently referred to Arthur Corbin as 'the leading opponent of the parol evidence rule.'").

YALE UNIVERSITY
SCHOOL OF LAW
NEW HAVEN, CONNECTICUT

ARTHUR L. CORBIN

Professor of Law

December 3, 1941.

Professor L. L. Fuller

Harvard Law School

Cambridge, Mass.

Dear Mr. Fuller:

I have given your manuscript on *Mutual Assent* a "once-over", reading the new cases and notes and observing changes in order and in emphasis. Of the 30 old cases that are omitted I shall miss a few: some because they are simple and clear illustrations such as *Port Huron v. Wohlner*, *Carlill v. Smoke Ball Company*, 3. & *M. R. R. Co. v. Bartlett*; others because I usually spend some effort on their analysis, such as *Mott v. Jackson*, *Bishop v. Eaton*, *Wheeler v. McStay*, *Cooke v. Oxley* and *Hopkins v. Racine Iron Company*. It may well be, however, that the book has had too many cases and that your omissions are justified for reasons that include an economy of time and space.

I have not had time or energy to consider critically either your new arrangement of the cases or the "teachability" of the new cases. My impression was generally good, although the opinion in *Scammell v. Ouston* did not impress me very well. Also I have some question about including the parol evidence rule in the first chapter. I have written a chapter on that rule in my treatise; and I do not admire its operation in the courts. It is a handy doctrine by which to disregard flimsy and dishonest testimony. When used for more than that it is likely to do serious injustice. The courts have frequently disregarded it without giving it a thought. Just as in the case of your *Introductory Chapter*, however, I know that it is not here your intention to exhaust the subject.

Every teacher has personal opinions as to analysis and order of presenting topics and cases. You are entitled to try your own experiments along this line.

Mistake is indeed a hard subject for either analysis or synthesis. I have not yet written my chapter on it; but I have run against it here and there, as in *Mutual Assent* and *Interpretation*.

Your reply to my criticism of the *Introductory Chapter* was very interesting. I have no doubt that, like most other people, you can make your own system work. It is my hope that you may present your materials in so convincing a form that others will understand and be convinced. Your ideas about Remedies are not far removed

from mine except in the matter of the Introductory Chapter. Our presentation to the students may not be very different.

My brief comments on your first chapter and on specific cases in it were inadequate. *Boone v. Coe* called to my mind my study of the part performance doctrine, made subsequently to the making of the Restatement. Section 197 of that document does not truly represent the cases. Just as in the case of the parol evidence rule the courts have manhandled the statute of frauds in order to prevent it from doing serious injustice. Of course you can use the Kentucky case, or some special land case, for your limited purpose without considering whether or not it lays down a minority rule or even a good rule.

Your treatment of “possession,” its facts and its consequences, does no offense to my analytical notions. No doubt the term expresses both fact and legal relation. We must continually work from one element to the other and back again. [*Usually, however, I start with facts, followed immediately with their juristic effects (substantive rules and remedies).*]

I am mailing to you simultaneously with this the manuscript of *Mutual Assent*.

Yours sincerely,

Arthur L. Corbin

ALC:V

E. *The Collaboration Falls Apart*

Three months later, Fuller wrote to Corbin to “discontinue” their collaboration on the casebook. He specifies a pending “fling” in private practice as the reason and expresses the hope that a quick resolution of World War II will permit him to return both to law teaching and to work on the casebook. This letter was to be the last in the series between the two men.

March 11, 1942

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Mr. Corbin:

I have been wanting to write you for a long time, but my plans have been so uncertain that I have put it off until I could say something definite about the work on the casebook. The definite thing that I now have to say is that I shall be compelled to discontinue work on it, probably for the duration. Among the less immediate consequences of Pearl Harbor is the fact that Harvard now has a considerable surplus of law professors. Naturally, those

of us who thought that we stood some chance of getting a job elsewhere have felt a certain obligation to look about for such a chance. While I was debating between staying here and going to Washington, the Boston firm of Ropes, Gray, Best, Coolidge and Rugg came through with an offer which I accepted on a trial basis. According to present plans, I shall start reporting for duty with them about the first of April.

No doubt you will be as distressed as I am to see the work suspended. As you know, I have practically finished the whole subject of Consideration and Mutual Assent. Certain other subjects, especially Conditions, Assignments, and Third Party Beneficiaries, I have outlined and put in shape to assemble rather rapidly. On those subjects I have made a classified card index of all the cases printed in the leading casebooks, as well as of recent cases that I have dug out for myself.

I am writing to Mr. Turner today. My guess is that West is not especially eager to bring out new books during the war, though it is possible that they, like the rest of us, are trying to carry on as usual as long as they can.

Needless to say, the interruption of this work is the most irksome aspect of my own impending fling at law practice. My hope is that a speedy termination of the war will permit me to pick it up again without too much loss of momentum.

Sincerely yours,

LLF:HGL

Lon L. Fuller

III. CONCLUSION: LANGDELL'S GHOST

The war ended and Fuller resumed his law teaching career. However, he never returned to work on Corbin's casebook. His biographer suggests that the reason was that he "wanted to open the book with some cases on remedies, and Corbin was not enthusiastic."³⁸ Indeed, in 1947 Fuller published his own casebook, *Basic Contract Law*, that opened with the desired chapter.³⁹ Curiously, though, particularly in light of Fuller's previously described earnest efforts to persuade Corbin of the merits of opening a Contracts casebook with remedies—an approach Fuller himself had acknowledged in the correspondence was "revolutionary"—Fuller did not explain why he did so in his own casebook. There was no preface, let alone an introduction, to the book. Fuller simply began Chapter 1, "The General Scope of the Legal Protection Accorded Contracts,"

38. Summers, *supra* note 24, at 123.

39. Lon L. Fuller, *Basic Contract Law* (1947).

with *Hawkins v. McGee*—the famous “hairy hand” case about the expectation interest.⁴⁰

Preface or no preface, Professor Harold Shepherd published a review of Fuller’s casebook in the 1948 inaugural issue of the *Journal of Legal Education* that makes clear that Fuller’s organizational innovation was not lost on him. Shepherd wrote: “How does *Basic Contract Law* differ from other leading casebooks in the field? One significant difference appears in the very first chapter. It begins on a remedial theme”⁴¹

More recent scholars have referred to the significance of Fuller’s innovation in even more sweeping terms. For example, three decades after Shepherd’s review, Professor Karl E. Klare characterized Fuller’s casebook as “probably the first post-realist contracts text.”⁴² (Corbin, as noted above, is often described as one of the original legal realists, although there is some disagreement in the scholarly literature about the accuracy of that appellation.)⁴³ Klare maintained that Fuller’s bold step of opening his casebook with remedies signaled a central message of the legal realist: “[I]t is impossible to understand the nature of legal rights and relationships or to logically deduce remedial conclusions from them without knowing what courts can and actually will do to and for litigants.”⁴⁴

Farnsworth points out in a comprehensive article on Contracts anthologies that Fuller’s remedies-first organizational structure soon found favor with other casebook editors.⁴⁵ Fuller himself continued the practice in the second and third editions of his casebook. Professor Robert Braucher, who was to serve for a time as the Reporter on the Restatement (Second) of Contracts before an appointment to the Massachusetts Supreme Judicial Court caused him to turn over that assignment to Farnsworth,⁴⁶ was Fuller’s co-editor on the 1964 second edition.⁴⁷ Professor Melvin Aron Eisenberg replaced Braucher as Fuller’s co-editor on the 1972 third edition. (Braucher

40. *Id.* at 1. In Fuller’s October 7, 1940, letter to Corbin—the first in the series about the casebook—Fuller had titled the chapter “The General Scope of the Legal Protection Accorded Promissory Expectations.” He mentioned that he hoped to come up with a “less highbrow designation” for the chapter—something “less forbidding”—but was apparently unable to do so.

41. Harold Shepherd, *Book Review*, 1 J. Legal Educ. 151, 152 (1948).

42. Karl E. Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U. L. Rev. 876, 882 (1979) (reviewing Charles L. Knapp, *Problems in Contract Law: Cases and Materials* (1976)).

43. Compare Twining, *supra* note 21, with Kalman, *supra* note 15, and John Henry Schlegel, *American Legal Realism and Empirical Social Science* (1995).

44. Klare, *supra* note 42, at 882.

45. E. Allan Farnsworth, *Contracts Scholarship in the Age of the Anthology*, 85 Mich. L. Rev. 1406, 1437 (1987).

46. See Joseph M. Perillo, *Twelve Letters From Arthur L. Corbin to Robert Braucher Annotated*, 50 Wash. & Lee L. Rev. 755, 756 (1993).

47. Lon L. Fuller & Robert Braucher, *Basic Contract Law* (2d ed. 1964).

was appointed to the Massachusetts Supreme Judicial Court in 1970 and was therefore unable to participate in the third edition.)⁴⁸

The long-awaited third edition of Corbin's casebook was published in 1947⁴⁹—with Corbin as the sole editor—the same year as the first edition of Fuller's casebook. Almost certainly, then, it was the fundamental difference of opinion over whether to open their planned joint casebook with remedies that caused these two giants of American legal education to go their separate ways. Interestingly, Corbin, like Christopher Columbus Langdell⁵⁰ and Samuel Williston⁵¹ before him, had included nothing on remedies in the first edition of his casebook, published in 1921.⁵² He added a chapter on the subject to the second edition, published in 1933,⁵³ but as the correspondence detailed above makes plain, he did not open the edition with it. In the third edition—the one on which Fuller had agreed to serve as co-editor—Corbin “cut down” significantly on remedies (omitting entirely any cases on restitution and specific performance).⁵⁴ Corbin published a supplement in 1953 to the third edition,⁵⁵ but the casebook was not issued in a fourth edition.

Fuller's casebook, in contrast, continues to be reissued. Amazingly, though, the 1981 fourth edition of the book—the first without Fuller's active participation (he died in 1978)—dropped the remedies-first organizational approach for which the book was famous.⁵⁶ Eisenberg justified the reorganization in terms Corbin would have known and loved: “[T]he new organization reflects a pedagogical judgment—that the policy issues presented by consideration tend to be more accessible to students just beginning law school than the issues raised by remedies, which are often technically complex and laden with special economic implications.”⁵⁷ The sixth, and most recent, edition of Fuller's casebook (Fuller's name is still listed first) continues the practice adopted in the fourth.⁵⁸

The significance of Fuller's own casebook abandoning Fuller's

48. Lon L. Fuller & Melvin Aron Eisenberg, *Basic Contract Law* xiii (3d ed. 1972).

49. Arthur L. Corbin, *Cases on the Law of Contracts: Selected from Decisions of English and American Courts* (3d ed. 1947).

50. Christopher Columbus Langdell, *A Selection of Cases on the Law of Contracts: With References and Citations* (1871).

51. Samuel Williston, *A Selection of Cases on the Law of Contracts* (1903).

52. Arthur L. Corbin, *Cases on the Law of Contracts: Selected from Decisions of English and American Courts* (1921).

53. Arthur L. Corbin, *Cases on the Law of Contracts: Selected from Decisions of English and American Courts* (2d ed. 1933).

54. Corbin, *supra* note 49, at viii.

55. Arthur L. Corbin, *Supplement to Cases on the Law of Contracts: Selected from Decisions of English and American Courts* (3d ed. Supp. 1953).

56. Lon L. Fuller & Melvin Aron Eisenberg, *Basic Contract Law* (4th ed. 1981).

57. *Id.* at XVI.

58. Lon L. Fuller & Melvin Aron Eisenberg, *Basic Contract Law* (6th ed. 1996).

organizational innovation was not lost on Contracts teachers. SUNY-Buffalo law professors Alfred S. Konefsky, Elizabeth B. Mensch, and John Henry Schlegel went so far as to publish an “In Memoriam” piece on the matter in the *Buffalo Law Review*. They wrote:

[Fuller’s decision] to break radically with tradition and begin a contracts casebook not with formation and consideration, but with remedies, was a powerful message that he had accepted, if only in part, the realists’ critique of the late nineteenth and early twentieth century doctrinal universe. . . . In this important way Fuller’s book came to signify the digestion of realism in the academy. We were all realists then

Eisenberg’s decision to begin with formation rather than remedies reveals a subtle acceptance of the recent neo-formalist shadows as reality. We can be influenced without understanding where we are being led. That is what separated Lon Fuller from most law teachers—most of the time he knew where he was going.⁵⁹

Many pages in the nation’s law reviews have been filled criticizing legal formalism: the scientific theory of law⁶⁰ that Dean Langdell attempted to put into practice at Harvard Law School in the late nineteenth century. Langdell’s pedagogic philosophy was fully embodied in his landmark casebook, *A Selection of Cases on the Law of Contracts*.⁶¹ His objective was to train law students to derive “the few, ever-present, and ever-evolving and fructifying principles, which constituted the genius of the common law”⁶² and he believed that compiling the critical cases in a book was the best way to accomplish it.⁶³

No less a figure than Oliver Wendell Holmes, Jr. regarded Langdell’s approach as ultimately doomed to irrelevance.⁶⁴ Indeed, in a scathing review of the second edition of Langdell’s casebook, Holmes referred to Langdell’s formalist approach as a species of “theological” speculation.⁶⁵ “The life of the law has not been logic,” Holmes famously wrote, “it has been experience.”⁶⁶ However, Holmes went on to concede the usefulness of Langdell’s casebook as a

59. Alfred S. Konefsky et al., *In Memoriam: The Intellectual Legacy of Lon Fuller*, 30 *Buff. L. Rev.* 263, 263-64 (1981).

60. See, e.g., David Dudley Field, *Magnitude and Importance of Legal Science* (address at the opening of the Law School of the University of Chicago, Sept. 21, 1859), in 1 *Speeches, Arguments, and Miscellaneous Papers of David Dudley Field* 517 (Abram Pulling Sprague ed., 1884).

61. Langdell, *supra* note 50.

62. Lawrence M. Friedman, *A History of American Law* 531 (1973).

63. Langdell, *supra* note 50, at v-vii.

64. Oliver Wendell Holmes, Jr., *Book Review*, 14 *Am. L. Rev.* 233, 234 (1880), reprinted in *Law and Philosophy: An Introduction with Readings* 106 (Thomas W. Simon ed., 2001).

65. *Id.*; see generally Christopher Columbus Langdell, *A Selection of Cases on the Law of Contracts: With a Summary of the Topics Covered by the Cases* (2d ed. 1880).

66. Holmes, *supra* note 64, at 106.

method of preparing students for the legal profession. He concluded his review as follows:

But it is to be remembered that the book is published for use at a law school. . . . A professor must start with a system as an arbitrary fact, and the most which can be hoped for is to make the student see how it hangs together, and thus to send him into practice with something more than a rag-bag of details. For this purpose it is believed that Mr. Langdell's teachings, published and unpublished, have been of unequaled value.⁶⁷

Grant Gilmore, author of *The Death of Contract*,⁶⁸ once characterized Langdell as "an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius."⁶⁹ Although Langdell's "great idea" was the casebook itself, rather than a particular organizational approach to a Contracts casebook, it is interesting to note that Langdell opened his Contracts book with formation.⁷⁰ As the fate of Fuller's remedies-first casebook suggests—recall that post-Fuller editions of Fuller's book have dropped the remedies-first organization scheme—perhaps Langdell had it right from the start. Corbin seemed to think so.

67. *Id.* at 107.

68. Gilmore, *supra* note 22.

69. Grant Gilmore, *The Ages of American Law* 42 (1977).

70. Langdell, *supra* note 50.

APPENDIX

REPRODUCTION OF ORIGINAL CORRESPONDENCE

Notes & Observations

THIS AGREEMENT, made in triplicate this...^{eight}.....

of June A.D. 1940, by and between Arthur L. Corbin
of New Haven, Connecticut, and Lon L. Fuller of
Cambridge, Massachusetts,

Parties of the first part (hereinafter called the authors)
and West Publishing Company, of St. Paul, Minnesota, party
of the second part (hereinafter called the publisher)

WITNESSETH THAT:

1. Agreements by Authors.

To prepare a casebook on the subject of Contracts to be known as Corbin and Fuller's Cases on Contracts, containing about 1200 pages of text in the typography of the American Casebook Series, for the use of teachers and students in law schools, conforming to the style of treatment and arrangement of the American Casebook Series.

will prepare their manuscript in printed or type-written form and deliver the complete manuscript of said casebook to the publisher on or before the first day of October, 1941, said manuscript to be satisfactory to the publisher. Manuscript is to be prepared by said Fuller and to be submitted to said Corbin, Fuller's decision to be final in case of any differences subject only to judgment of Warren A. Seavey, General Editor of American Casebook Series.

To cite both the various units of the National Reporter System and the State Reports to each case authority, so that the work may be equally usable with the Reporters or State Reports.

To cite only primary authorities, i.e. the adjudicated cases, and not refer to compilations of authorities such as digests, encyclopedias, etc., except as occasionally incident to other primary authorities. The above is not intended to exclude the citation of law review articles and notes.

To submit, as soon as conveniently possible, a fair sample of manuscript in reasonably complete form for publisher's examination and suggestions.

will not use, in the preparation of said work, any material, the copyright of which is not owned by the publisher, or for which the authors or publisher have not received a license authorizing said use.

As soon as said manuscript has been accepted by the publisher and put into type, will read and revise the proofs as rapidly as furnished and will do all usual and necessary things to expedite publication of the work.

will prepare a subject matter index under an alphabetical arrangement.

Except as provided below, will not edit, prepare or publish, under their own name or otherwise, or allow to be prepared or published, under their own name, any work—which may injure or interfere with the sale of said casebook.

Will pay any costs in excess of fifty dollars for making alterations in copy requested by them after same has been set in type.

2. Agreements by Publisher.

Upon receipt and acceptance of said manuscript, to put it into type promptly and to provide authors with proofs promptly for reading, checking and indexing.

To provide all paper, stationery, etc., usual to such undertakings, as authors may require to complete the work.

To provide, in the form of signatures from the National Reporter System, or photostatic copies, any cases that the authors may require for the text of their casebook.

will pay to authors, in consideration of said completed manuscript, a royalty in the amount of 18% of the net selling price on all books sold said royalty to be divided as follows: 6% to Arthur L. Corbin and 12% to Lon L. Fuller.

Will render to authors an accounting upon sales and royalties and pay all accrued royalties the first day of February and August, yearly.

To prepare, without expense to authors, a Table of Cases for said work.

Will supply authors, promptly upon publication, with 8 copies each of said work, without charge.

3. Miscellaneous Agreements.

Nothing herein contained shall be construed as preventing the publisher from publishing another work on the same subject.

Copyright of said work shall be taken out in the name of the West Publishing Company.

Style of said work, as well as number of volumes, price, distribution, advertising, etc., shall be decided by the publisher.

In case a new edition, revision or supplement to said work shall become necessary, publisher shall have the option of publishing same.

At the end of five years from date of publication of the above casebook said West Publishing Company agrees to arrange for the publication of a new edition of said casebook which shall be in the name of said Fuller, the royalties on such edition to be paid to said Fuller and to be not less than the royalties on this edition now paid to Corbin and Fuller, or in the alternative, if it does not then desire to publish a new edition, to permit said Fuller to publish a casebook on the subject using such material of the present book as he sees fit.

IN WITNESS, WHEREOF, the parties have hereunto set their hands the day and year first above written.

.....
Witness
Wm. Fred. N. Russell...
Witness
J. E. Turner.....
Witness

Arthur L. Corbin
Author
Leon L. Fuller
Author

WEST PUBLISHING COMPANY
By *[Signature]*

October 7, 1940

Professor Arthur L. Corbin
Yale University Law School
New Haven, Connecticut

Dear Professor Corbin:

I have been intending to write you for a long time to give you a report on my work on the third edition of your case-book, but had delayed until I could furnish a fairly definite prospectus. Naturally I want to take just as large an advantage as I can of your counsel; on the other hand, I understand perfectly that the real labor of the revision is mine, and that because of your work on your treatise you don't want to be bothered with details. I don't know as yet how we can best work together. If you would like for me to do so, I shall be glad to make a trip down to New Haven sometime in the course of the winter so that we can talk over the whole matter. Or would you prefer for me to send along to you the individual chapters as I get them ready?

By the way of purely "Inoperative Preliminary Negotiation" I should like to list the principal changes I would like to introduce into the book. These are naturally in addition to the substitution of new cases for some of those in the book, changes in order, etc. I list these changes in the approximate order of their importance to me, i.e., in the order of their importance from the standpoint of my own use of the book in class.

(1) I should like to introduce a new introductory section running about 15 cases, to be entitled something like, "The General Scope of the Legal Protection Accorded Promissory Expectancies." (I would prefer a less highbrow designation for this chapter; perhaps something less forbidding will suggest itself later.) This section would deal with the problem of enforcement in general terms. I have worked out the details of the chapter pretty well, and if you would like I would be glad to send you a list of the cases I want to include, and some indication of the character of the notes. My object in this section will be to bring home to the student the fact that back of the question, "Is there a contract?" there always lies a more specific problem of enforcement. I believe that the cases I have selected are also sufficiently simple, and stand sufficiently on their own feet, so that this first section can also serve to introduce him to the problem of abstracting and analysing cases

generally. I should include cases illustrating in very general terms the various measures of recovery for breach of contract, illustrating what might be called a "qualified enforcement" such as New York gives the contract to pay an attorney's fee. I should also include Clark v. Marsiglia (or Wigent v. Marra) and Hadley v. Baxendale to illustrate the limits on enforcement. (I find it very difficult discuss Offord v. Davies and Rague v. New York Evening Post without the principle of mitigating damages.) At the end of the chapter I should insert a note on specific performance. This chapter would incidentally take up the problem of indefinite contracts, and show how restitution would be granted generally no matter how vague the contract, that what I call "the reliance interest" would, in case the contract were a little more definite, receive either direct (see Kearns v. Andree, 107 Conn. 181) or indirect (see Morris v. Ballard) recognition, and that the courts would be least inclined to protect the expectancy.

(2) I should like to insert at the beginning of the section on consideration a rather long textual analysis of the problem of consideration and the seal, which would be partly based on the present introductory notes, but which in part would go considerably beyond them.

(3) As a part of the same scheme, I should like to cut down the present section on sealed contracts, substituting text for a good many of the cases, and move the whole section up between the proposed new note on consideration and the seal and the cases on consideration. (I have taught the thing this way now for about five years.)

(4) I should like to introduce into the section on "Reliance on a Promise as Consideration" three cases on estoppel in pais, which will serve to bring out the relation between "promissory estoppel" and "estoppel in pais," and will also illustrate the problem of the measure of relief to be granted.

(5) I should like in various places (particularly in the chapter on Assignment) to substitute an introductory note on the history of the subject for the older cases now included. This is, of course, simply in order to save time. (As you perhaps know, we have only five hours for contracts here, and the tendency over the country as a whole seems to be to cut down the time allowed for the subject.)

(6) Though I have no very definite opinion about the matter as yet, I am inclined toward moving the chapters on Assignment and Beneficiaries toward the middle of the book. From the standpoint of correlating contracts with other first-year courses, particularly agency, I believe that an arrangement

October 7, 1940

which takes up these subjects at an earlier time is better.

(7) I should like to include a short section on the parol evidence rule.

This seems, as one glances over it, a rather formidable list, but it affects, after all, only a small portion of the total work. Naturally all of these plans are tentative, and I want to get all the help and advice I can from you before reaching any definite decisions. Particularly I should like to know what changes you would consider desirable, other than those I have mentioned.

I have thought some of sending out a questionnaire to those now using the book, asking them for suggestions. What do you think of the idea?

If the proposals I have enumerated are too extensive to make it convenient for you to discuss them in a letter, and you would prefer for me to come down to see you before going to work on them, please let me know. On the other hand, if they meet with your approval in a general way, I would be glad if you would say so, as I would then feel fairly confident in going ahead with the actual work of writing the notes, abridging the cases, etc.

Sincerely yours,

LLF:HCL

P.S. If in your use of the casebook in class you have worked out a scheme of omissions or rearrangements, I should like to have a copy as soon as possible.

YALE UNIVERSITY
SCHOOL OF LAW
NEW HAVEN, CONNECTICUT

ARTHUR L. CORBIN
PROFESSOR OF LAW

November 7, 1940.

Professor Lon L. Fuller
Harvard Law School
Cambridge, Mass.

Dear Mr. Fuller:

Here at Yale, I am now compelled to teach the subject of
"Contracts" in two parts:

Contracts I in about 60 ^{2 hours through night} class-room hours of the First year;

Contracts II in about 45 hours of the Second year. ^{3 hours one semester}

This has led me to subdivide the materials as follows,
probably somewhat as you have yourself been doing:

Contracts I

Mutual Assent

Consideration

Seal

Discharge

3d Parties (Beneficiaries

(Assignees

Joint and Several

Contracts II

Operative Effect of Contract

(being the character and limits of the rights
duties, powers, etc., that are consequent upon
a contract)

Interpretation

Constructive Conditions

Impossibility and

other like factors

Repudiation (and other Breaches Anticipatory, etc.)

Judicial Remedies

Damages

Restitution

Spec. Performance ← ?

Illegality

Statute of Frauds

I write this to suggest the possibility of publishing the
new edition in two separate and somewhat smaller volumes, at least
for such schools as would like to divide the subject into two courses.
For other schools it would still be possible to bind the material in
a single volume.

Perhaps this would make desirable a very moderate expansion of the material dealing with Judicial Remedies. Even in a school that offers such separate courses as Damages, Quasi Contracts, and Specific Performance, the students can seldom elect them all.

I feel strongly that in all schools, the Remedies available for enforcement should be considered along with the other parts of Contract law. Without doubt, the same may be said of Property and Torts. I do not go so far as to include Court Procedure. There is much overlapping that is unavoidable; within limits, it is very profitable.

Please do not feel that an answer to this letter is necessary. My purpose is served by giving you the above information, as a basis for consideration as you proceed with the work of revision.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Arthur L. Corbin".

ALC:V

November 25, 1940

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

This is to thank you somewhat belatedly for your letter of November 7. I have not had time to give much consideration to the casebook during the past two weeks, nor shall I until after the first of the year. I'm not sure Turner told you that before the matter of the casebook came up I had already made two commitments: one to write a short philosophic sketch for a volume being put out by the Northwestern people, and the other (on which I am working now) to write an article on Consideration for the symposium to be published by the Columbia Law Review. This article will occupy most of my time between now and the first of the year. After that I shall go to work in earnest on the casebook.

It may be that it would be wise to put the book out in two volumes, as you suggest. Frankly, I am not at all keen about the division of contracts into two courses. I believe that the subject matter of Contracts II, as taught at Yale and Columbia, is an integral part of the whole subject, and is necessary to round out a picture which is left misleading when the course stops with Consideration, Mutual Assent, Beneficiaries, and Assignments. Furthermore, it seems to me that the content of Contracts II is something which should come in the first year, since it has an important bearing on various second-year courses.

I have toyed myself several times with the idea of a different line of division: a Contracts I course which would survey the whole field, and then a Contracts II course which, like Havighurst's course, would put the emphasis on special kinds of contracts: Real Estate Broker's Contracts, Construction Contracts, Employment Contracts, etc. Even if there were only one course and one book, the division of chapters in the book might be along these lines.

I am writing to the West people to get a list of the men at present using the book, and I plan to put in some of my spare time during the next month composing a questionnaire to be sent out to the users of the book - that is, if this plan is agreeable to you. Naturally I would submit the questionnaire to you before sending it out. I would try to find out what the general view was with regard to the proper arrangement of subjects, etc. I would, of course, ask for reactions on the proposal of two volumes.

Soon after the first of the year, I shall try to draw up a fairly definite list of suggestions and make a trip down to New Haven to talk them over with you. Meanwhile, it would be of great assistance to me if you would forward to me your list of omissions, --assuming you do omit some of the cases. Also any variations in the order of the cases you may have found advisable.

Sincerely,

LLF:HGL

Lon L. Fuller

March 26, 1941

Professor Arthur L. Corbin
Yale University Law School
New Haven, Connecticut

Dear Professor Corbin:

I have been putting off writing you from week to week because I could not make up my mind whether it would be better to make a trip down to New Haven to talk to you. As things stand now, I think it would probably be best to postpone a personal conference until later in the year. I am now working "full time" on the casebook, but since I have worked here and there throughout the book I have as yet little to show for it. The new introductory section I mentioned previously, running about 16 cases, is practically finished, with notes, and I have been working on Mutual Assent, Consideration, and Assignment.

There are several specific questions I should like to put to you. In the first place, I am very eager to cut down the length of the book, and I am somewhat embarrassed by the fact that you use the book for a second course at Yale, which I take it, necessitates a fairly extensive quantity of material. As you know, we have only five hours for contracts here, and the general tendency over the country seems, regrettably, to be to cut down the course.

What I would like to do is to "great" certain sections radically by using fairly long introductory text statements, following them with several interesting and typical cases, of the "harder" variety, which can serve as a basis for classroom discussion and as a means of tying down the textual material to something concrete. This is a method I became familiar with in using Steffan's Agency Cases and I should like especially to use it in the following subjects: Joint Contracts, Illegality, and the Statute of Frauds. Do you at present teach the cases now contained in those sections? Will you let me know what sections you "slight" and how extensive the slighting is?

Another problem I have encountered (which is aggravated by my desire to use text specially prepared for the book) is that of distinguishing between the work of the two editors. I want to carry over a good deal, in fact most of the text which you yourself prepared; in one case, that relating to consideration, I should like to tie in an additional extended statement of my own. How can we indicate editorially whose is which? I have thought about this a good deal, and I haven't been able to find any satisfactory or graceful solution for it. Will you pass on to me your reactions to the problem?

I have talked to several people who have used the book and they all think that there are too many Hohfeldian notes. I am inclined to think that we ought either to cut down the number of these notes or print, somewhere in the book, your article on the Hohfeldian system. With only five hours, I have been forced to skip over many of the Hohfeldian problems raised in your notes, and that has the disadvantage that it gives the student the notion that the questions raised in the notes are generally not important. Will you let me know how you feel about this matter, and how important these notes are to you in your own teaching?

The final problem has to do with citations of authorities in the footnotes. I think it would be impossible for me to bring these up to date and retain their present form. Furthermore, the publication of your treatise will to a large extent obviate the necessity for doing this. What I would like to do, therefore, is to cut out "see accord . . . but see contra" notes and substitute for them brief abstracts of cases which are useful for purposes of comparison, or which will broaden the student's conception of what can happen in the judicial process. Is this agreeable to you?

I enjoyed reading your article in the All-Yale issue of the Journal. Reed Powell, who is just as doubtful as ever of the Supreme Court's competence, also thinks they probably pulled a brodie in overruling Swift v. Tyson.

While I am on the subject of the All-Yale issue, I would like to say something about the review of my recent book (or was it of me?) which it contained. It is a safe guess from the style in which this review is written that its author is not without a certain curiosity to know what kind of impression he created. I will not burden you with my opinion of his discussion of the issues raised by my book, except to say that it shows the dangers which confront a good soil-erosion lawyer when he ventures into legal philosophy. Nor will I say anything about the reviewer's style, although to accuse us poor seekers after the Right Way of indulging in "infamous thobbing" seems a little harsh, or would seem harsh, I suspect, if I knew what "thobbing" meant. I was a little bit more concerned with the report which the reviewer gave of what was said in my book. In this carefree world it is a disgraceful fact that many people form their opinions of authors not from a reading of their books but from a reading of reviews of those books. I had always supposed the existence of this negligent practice placed a certain obligation on the reviewer - even the reviewer who was very obviously "out to do a job" - to be reasonably accurate in reporting what the author said. I had supposed, for example, that when the author's thought was paraphrased, it would be better not to put the paraphrase in quotes, since this might lead some careless reader to think that the author had said it. Again, when the author discusses a book by Kelsen on democracy, better practice would call for labelling the views under discussion as those of

Kelsen and not those of the American realists, even though the latter form of statement serves the reviewer's purpose in creating an issue between the author and the realists. When the author says that Kelsen disagreed with the previous positivists because they entertained a certain view, it would be better not to attribute this view to Kelsen himself, even though doing so suits the reviewer's purpose in creating an impression that the author's book is all one "big, blooming, buzzing confusion." When the author speaks of the collapse of democracy in "Germany and Spain" it would be better to say "Germany and Spain" and not "Germany and France," even if one found the author's thought so confused that the substitution seemed of little importance.

From your experience in university life and your familiarity with the course little tempests like this one are apt to take you will realize that there are always gossips who like to give a kind of institutional interpretation to the quarrels of the professors, as if our great universities were swatting at one another and accusing each other of things like "idiosyncratic myopia." In the light of this you will not take it amiss if I report the amusement of one of my less charitably inclined colleagues on discovering the following passage in the review: "The record of the realists, considering their institutional handicaps, is more impressive than is sometimes imagined."

I hope that you will not think that I am really peeved by the review. To tell you the truth, I am more puzzled than peeved. I am particularly puzzled because I had received a letter from my good friend, its author, last spring asking my forgiveness "if a naturally perverse disposition forces me to pick a few piddling quarrels with a great book!" In a letter written just before the review appeared, he said that the review "is rougher in terms than I had intended" and that he hoped that "the vigor and amount of the attention I pay you will bear full testimony to you and to others of the great respect I bear you." I have a suspicion that there will be occasional readers who will not detect "the great respect" implicit in the review, and there are others who would be surprised to learn that a book which, according to the last note in the review, is so preposterous that it is perhaps a mistake to take it seriously, is, in the privately-expressed opinion of its reviewer "a great book." Oh well, it was anciently said that the devil himself knoweth not the mind of man, and I shall not attempt to fathom this one.

Will you let me have your answer to my questions about the casebook as soon as possible, as I have reached the point where some of these things have to be decided before I can go on effectively.

Sincerely,

LLF:HGL

Lon L. Fuller

ARTHUR L. CORBIN
PROFESSOR OF LAW

Charlottesville, Va.
Mch 28, '41.

Dear Mr. Fuller:

Your letter was forwarded to me here. I shall write a brief reply in order to help you along reserving more detailed comment for the future.

Go ahead with your plans, without worrying about me. I have confidence in your judgment and reasonableness (and so has McDougal) and also in your willingness to discuss matters when they become specific. Treat the chapters on Joint Contracts, Illegality, and Statute of Frauds as you please. They are not my favorite children, as now printed they are inadequate as a basis for any synthesis of doctrine; but I have thought that first year men ought to be given at least a bowing acquaintance with these topics. I have frequently been unable to cover these chapters.

I am not wedded to "Hobfeldian notes." Are there really very many of them? I give a couple of introductory lectures and then proceed to analyze cases as I please. It is my belief that students

get most benefit out of exact analysis of facts, rather than out of my footnotes or introductory notes.

Footnote citations render little service. Abbreviated statements of cases are all right if clear and accurate and not too numerous. They seem overdone in Handler's Cases on Vendors and Purchasers, a book that I am now teaching.

Why is it necessary to distinguish in any way between your note work and mine. It will appear in preface that it is your edition of my earlier book. If after discussion we should violently disagree on something, we can deal with that as a special and horrible example.

Don't let McDougal's review trouble you. He is an able and interesting man who is on his way. He is making intellectual discoveries that seem very important to him. This leads him at present to be rather assertive, critical, and dogmatic. At the same time he is warm-hearted and friendly, and I know that he holds you in affectionate respect. It has long been my practice to let anything that I have published fight its own battle.

Yours sincerely,

Arthur I. Corbin

May 20, 1941

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

I have just learned through Mr. Turner that you will be in Cambridge next Monday. I am very eager to have a chance to talk with you about the general scope of the casebook, though I shall try to avoid burdening you with matters of detail. I am particularly interested to know what the minimum requirements for your own courses in Contracts would be since I should like to cut down the length of the book as much as possible.

I don't know what your schedule is, of course, but if you could stay over in Cambridge Monday night my wife and I would be delighted to have you stay with us. I knew that you always like to have a get-together with Mr. Williston when he is here, but he seems to be away now, and I don't know whether he will have returned by then or not. In any event, without burdening you and without interfering with your other plans, we want you to know that the latchstring is out with us and we should like to have you spend as much time as you can with us.

Sincerely yours,

LLF:HGL

Lon L. Fuller

ARTHUR I. CORBIN
PROFESSOR OF LAW

Nov 5, '41

Dear Mr. Fuller:

Please send me the chapters by chapter, as soon as is convenient to you. It will be much better for me not to have a large quantity to consider during a short time just now my vitality is a bit reduced by reason of some kidney gravel that hurt like hell.

I have a notion that your chapters on "Special problems" in this and that will reorganize the chapters on "Conditions". I have often thought of segregating its material more specifically. In my judgment, it is in the field of performance of contract, with its wealth of factors unforeseen by the parties, that the most profit will be found in segregation by trade, business, profession, etc.

I often wonder how successful you are going to be in keeping down the total number of pages. Don't try to do too much; and be sure to keep your material factually interesting.

With my kind regards,

Arthur I. Corbin

November 10, 1941

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

To minimize the consequences of a possible loss of any of the manuscript, I am sending you herewith only the first chapter. Though the cases in this chapter may seem at first to be drawn from rather different fields of law, my intention is that they should be discussed as a series, with each case having some relation to what precedes it and what follows it. Thus Clark v. Marsiglia and Hadley v. Bazendale are qualifications on Hawkins v. McGee, qualifications which need to be explained. I do not intend to cover the whole problem of remedies exhaustively in this first chapter; some of the missing parts will be picked up en route; some will be taken care of in a later chapter on damages, following the subject of conditions. The purpose of the first chapter is partly to make the student "remedy-minded" (I recall in this connection your own note to the chapter on remedies), as well as to give him that minimum of information about remedies and damages necessary to get an adequate perspective of the cases which intervene before a more intensive study of remedies in a later chapter.

When you are through with this chapter, I'll send along the chapter on mutual assent.

Sincerely,

LLF:HGL

YALE UNIVERSITY
SCHOOL OF LAW
NEW HAVEN, CONNECTICUT

ARTHUR L. CORBIN
PROFESSOR OF LAW

November 21, 1941.

Professor L. L. Fuller
Harvard Law School
Cambridge, Mass.

Dear Mr. Fuller:

Along with this letter I am mailing to you your first chapter of cases. You may remember that I expressed some doubts as to the desirability of an introductory chapter such as this. At the same time I recognized that it was yours to experiment.

A study of the cases in your chapter does not remove my doubts; instead it intensifies them. While I sympathize with your wish to make the students "remedy minded" as early as possible, it seems to me that you are asking too much of beginners. My belief is that their first problems should be as simple and as closely related to their past experience as possible.

In this chapter you throw them at once into the complexities and uncertainties of damages: liquidated and unliquidated, penalties, unjust enrichment, expenditures in reliance, expected gains both speculative and otherwise.

The last six or eight cases require the analysis and comparison of contract and quasi-contract. In my first edition I tried this on a small scale. Among these last cases, *Boome v. Coe* involves the statute of frauds and the "part performance" doctrine, as to which Kentucky is in a small minority. The Anonymous case, p. 86, like so many old-time reports, will puzzle the beginner, making a distinction without discussion. The last case, p. 92, illustrates one of the rules of remedy of land sale cases.

I can see your plan of working through this series in class; but I believe that you will not get the results that you desire. Even for the introductory understanding that you are working for, the students will need more cases than you include. At the same time, you can not expect to complete the discussion of these topics in the first chapter.

What I have written above is of course no news to you. You must have chosen these cases for the very reason that they involve all the matters mentioned. My point is that even after a large amount of explanatory lecture by you the students will remain bewildered. Also I predict that not many other teachers will use the chapter.

My present suggestion is that you have the chapter mimeographed, or printed, and use it in your classes next October before the casebook is completed and bound up. Such a test may demonstrate that I am in error. In any case I leave the final decision to yourself.

Yours sincerely,

Arthur L. Corbin

ALC:V

November 24, 1941

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

I have received a return of the first chapter and your comments on it. As to the minor matter of Messrs. Meddle and Peel your criticism was very much in point, and I shall try to rephrase the case to take account of it.

As to the more important matter of the coherence and/or teachability of the whole Chapter. I have no doubt that it will be fairly hard going for first-year men. On the other hand, I don't think it will be quite as hard as you imply. The first-year man is in the fortunate position of being unaware that the materials of this section are drawn from the diverse fields you mention. Many of the things which disturb you I am sure will not disturb him.

Your remarks about particular cases make it clear that the chapter does not have the continuity for you that it does for me. Perhaps it would be well for me to spell out what I am driving at in this first chapter. I have become convinced that contract law must be analysed in terms of what I called, in my Yale article, a hierarchy of interests. A court may interfere where a promise is broken (1) to prevent unjust enrichment of the promisor, (2) to reimburse the promisee's reliance or (3) to give the promisee the value of the promised performance. The incentives to judicial intervention to protect these interests decrease in the order in which I have named the interests. As to the first, courts will protect this often even in the absence of a promise, or where the promise is oral and "unenforceable" under the statute of frauds, etc.

To my mind the significance of these interests is written across the whole field of contracts. For example, take two problems raised in your very first chapter on "Inoperative Preliminary Negotiation." The problem of the offer made in jest taken seriously by the offeree raised the following questions: (1) If the jesting offeror is held to "the contract" will the measure of recovery against him be the offeree's expected profit or his losses through reliance? (2) In the absence of "a contract," will there be any quasi-contractual recovery? I know that it is often assumed that if any relief

is granted on the contract it must be measured by the lost profit. But I am frank to say that I see no warrant for this either on the authorities, or, as it used to be fashionable to say, "on principle." It seems to me impossible to discuss whether there "ought to be a contract" without knowing what difference that makes.

Your present first section also raises the problem of "indefiniteness." This in turn raises the following questions: (1) Will reliance by the plaintiff cure the objection of "indefiniteness" and make the court willing to enforce a contract it would not enforce in the absence of such reliance? (2) If the basis of judicial intervention is the protection of reliance, will the measure of recovery be in terms of reliance, or in terms of the expected profit? (There are cases both ways.) (3) If the court declares the contract too vague to give rise to any suit "on" it, is there a chance of quasi-contractual recovery?

In my opinion the questions I have raised about the "interest protected" are not only important to fill out the student's knowledge of the kinds of relief available, but must be taken into account to understand any particular kind of relief.

I could go through the whole subject of mutual assent, consideration (cf., §90), conditions, impossibility, the statute of frauds, and almost every other branch of contract law (except perhaps joint and several contracts) and show the significance of these interests.

I do not claim that this is an original discovery of mine. Many writers have in discussing particular cases made distinctions along the lines I have mentioned. I recall, for example, your own discussion of the Gale-McIntyre case, in which you point to the absence of any benefit received by the silent offeree. The difference between my view and that of others is in the matter of emphasis, and in the fact that I have developed this idea more systematically and pervasively than have most other writers.

Naturally the general problem I have mentioned is made most explicit in the law relating to remedies, because it exercises there a direct and obvious influence on the measure of recovery. It is for that reason that I like to start the subject of contracts with remedies. I have for a number of years devoted the first hour or two of the course to raising the questions dealt with in the proposed first section, including that of *Timmerman v. Stanley*. I have found that this enriches the subsequent discussion, and that students are not permanently bewildered by this approach. Indeed, I have been surprised how interested they become in the problems of "how much," which is

certainly no more remote from their previous interests than, say, *Stanton v. Dennis*.

Now as to how I would teach this first section myself. Throughout I would put the following questions: (1) Did the court grant the plaintiff the full monetary equivalent of actual performance? (2) If it did not, what did it actually give him? (3) What was the rationale of the particular kind of relief it gave? When the cases are considered in the light of these inquiries, I submit they lose the hodge-podge character you seem to attribute to them. *Martins v. McGee* says that plaintiff gets the monetary equivalent of performance. Why, then, the limitations in *Clark v. Marsiglia*, and *Hadley v. Baxendale*? Incidentally, does the student gain insight into the problems raised in those two cases by studying offer and acceptance and consideration? On the other hand, do not these limitations come up constantly in offer and acceptance? (Cf., *Offord v. Davies*, *Ragus v. New York Evening Post*, *Mott v. Jackson*, §45, etc.)

Again, what preparation for the subject of liquidated damages does the student get from studying offer and acceptance, impossibility, etc.? On the other hand, is not the problem, how far will a court go in giving the plaintiff the monetary equivalent of what was promised him (which is involved in this subject), one which cuts across many of the problems raised under the conventional rubrics? I think particularly of your case on page 649.

About the two cases you mention specifically. *Boone v. Coe* was a case where the defendant contracted orally to give the plaintiff a lease on property in Texas. In reliance on the oral promise the plaintiff moved from Kentucky to Texas, where he was not permitted to go into possession of the premises. He sues for the cost of moving. The court denies this recovery, but says it would have given him a return of benefits had any been conferred on the defendant. I would ask about this case: (1) How far does the court go here in protecting the promisee? (2) Why did it stop where it did? (3) Why is it more willing to confer a return of benefits than to reimburse reliance?

You say that the case involves a peculiar Kentucky doctrine of part performance. I don't follow this. The performance here was not of a type to take the contract out of the statute according to §197 of the Restatement. I know where are cases holding that the contract is taken out by partial performance not satisfying §197. But why raise that question at all? It is not mentioned by the court, and I see no reason to bring it into the discussion. My object in this first chapter is not to teach all of the law surrounding these cases; but to give the student an awareness of this problem of the three interests I have mentioned, which incidentally, of course, do not need to be called "interests."

You also mention the abstracted case, *Rabinovitz v. Marcus*, 100 Conn. 86. That case held that the buyer under a land contract could, on default by the seller, recover (1) payments made and (2) reimbursement for reliance. It was put in to be compared with *Timmerman v. Stanley*, which held that a plaintiff could not sue "on" the contract for losses through reliance, and recover benefits conferred, since the two recoveries were inconsistent with one another. (Incidentally, is not *Hadley v. axendale* hovering in the background here?)

You say of the *Rabinovitz* case that it "illustrates one of the rules of remedy in land sales cases," and I take it you have inferred that that was its significance for me. I see no reason in discussing this case to go into the problem of the conflict about the measure of recovery in the land cases. For me it illustrates a more general problem, can the plaintiff get restitution of benefits and reimbursement of reliance in one suit?

As a matter of fact Connecticut is cited by McCormick as a jurisdiction following the loss-of-bargain rule. But even in such jurisdictions, as the *Rabinovitz* case illustrates, probably the plaintiff can restrict his demand to a reimbursement of reliance. But I see no reason to drag all this into the discussion.

I talked yesterday with Seavey about this first chapter. He shares your doubts about its teachability. On the other hand, he and Thurston in their new book are including restitution in their discussion of deceit. In other words, they have encountered exactly the same difficulty in dealing with one aspect of deceit in isolation from other aspects than I have encountered in contracts. I called this to his attention. His answer was that this was only a small part of their course. I said, "Yes, in the one branch of tort law where the problem I am concerned with is involved, you adopt substantially the approach I do. But the problem is written across the whole of contract law."

When I taught Personal Property I made a reform in the course which corresponds almost exactly to the one I propose for Contracts. The usual order in that course is to take up first, What is possession? and then, What are the legal consequences of possession? I reversed this order. I was told that it would be impossible to teach the subject this way; that students would want to know what possession was before talking about its legal consequences; that the problem, What is possession? was something within the scope of their previous experience while the problem of legal remedies and consequences was one foreign to that experience. Yet I taught the subject this way for three years, without any of these difficulties

November 24, 1941

manifesting themselves. In my own opinion the new order was an immense improvement over the old from the standpoint of imparting a functional conception of legal rules. Naturally, my experience in Personal Property does not guarantee a similar success in Contracts. On the other hand, it has given me a certain immunity to the cry of "impossible."

I talked yesterday with Turner and he is quite agreeable to bringing the book out in pamphlet form. This will enable me to adopt your excellent suggestion that the chapter be tried in practice before being definitely incorporated in the book.

As a result of your suggestions I am also going to see to it that the rest of the book can stand independently of the first chapter, so that those who don't like it can leave it out. Toward this end I am making a minor modification in the second section, on "inoperative preliminary negotiation."

Within the next two or three days I'll send you on about half the subject of mutual assent, along with a typewritten list of the materials in the second half. The entire subject is now finished, but I don't like to entrust the whole thing to the mails at once. I'm reasonably confident that you will feel that I am treading on more certain ground from now on. The first chapter is indeed the only thing which can be called "revolutionary" about my arrangement. I'm going to try to keep an open mind about its advisability, and I hope you will do the same.

Sincerely,

LLF:HCL

November 25, 1941

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Professor Corbin:

I enclose about half the subject of mutual assent, along with a list of the cases and notes for the remainder of the subject. I also enclose a list of the section headings for this chapter.

I have included the three cases on mutual mistake of fact (as contrasted with "misunderstanding" as in the Peerless case) because I have found it very difficult to study the cases of unilateral mistake without a background of these cases. You will notice that Jones v. Great Northern and its notes tend to integrate the subject matter of the section and reveal the relation between the parol evidence rule and the problems discussed at the beginning of the section.

Sincerely,

LLF:HGL

YALE UNIVERSITY
SCHOOL OF LAW
NEW HAVEN, CONNECTICUT

ARTHUR L. CORBIN
PROFESSOR OF LAW

December 3, 1941.

Professor L. L. Fuller
Harvard Law School
Cambridge, Mass.

Dear Mr. Fuller:

I have given your manuscript on Mutual Assent a "once-over", reading the new cases and notes and observing changes in order and in emphasis. Of the 30 old cases that are omitted I shall miss a few: some because they are simple and clear illustrations such as Port Huron v. Wolters, Carlill v. Smoke Ball Company, B. & M. R. R. Co. v. Bartlett; others because I usually spend some effort on their analysis, such as Mott v. Jackson, Bishop v. Eaton, Wheeler v. McStay, Cooke v. Oxley and Hopkins v. Racine Iron Company. It may well be, however, that the book has had too many cases and that your omissions are justified for reasons that include an economy of time and space.

I have not had time or energy to consider critically either your new arrangement of the cases or the "teachability" of the new cases. My impression was generally good, although the opinion in Scammell v. Ouston did not impress me very well. Also I have some question about including the parol evidence rule in the first chapter. I have written a chapter on that rule in my treatise; and I do not admire its operation in the courts. It is a handy doctrine by which to disregard flimsy and dishonest testimony. When used for more than that it is likely to do serious injustice. The courts have frequently disregarded it without giving it a thought. Just as in the case of your Introductory Chapter, however, I know that it is not here your intention to exhaust the subject.

Every teacher has personal opinions as to analysis and order of presenting topics and cases. You are entitled to try your own experiments along this line.

Mistake is indeed a hard subject for either analysis or synthesis. I have not yet written my chapter on it; but I have run against it here and there, as in Mutual Assent and Interpretation.

Your reply to my criticism of the Introductory Chapter was very interesting. I have no doubt that, like most other people, you can make your own system work. It is my hope that you may present your materials in so convincing a form that others will understand and be convinced. Your ideas about Remedies are not far removed from mine except in the matter of the Introductory Chapter. Our presentation to the students may not be very different.

My brief comments on your first chapter and on specific cases in it were inadequate. Boone v. Coe called to my mind my study of the part performance doctrine, made subsequently to the making of the Re-statement. Section 197 of that document does not truly represent the cases. Just as in the case of the parol evidence rule the courts have manhandled the statute of frauds in order to prevent it from doing serious injustice. Of course you can use the Kentucky case, or some special land case, for your limited purpose without considering whether or not it lays down a minority rule or even a good rule. *Usually, however, I start with facts,*

followed immediately with their juristic effects (substantive rules and remedies)

Your treatment of "possession," its facts and its consequences, does no offense to my analytical notions. No doubt the term expresses both fact and legal relation. We must continually work from one element to the other and back again.

I am mailing to you simultaneously with this the manuscript of Mutual Assent.

*Sorry?
put this in
my file.*

Yours sincerely,

Arthur L. Corbin

ALC:V

March 11, 1943

Professor Arthur L. Corbin
Yale University School of Law
New Haven, Connecticut

Dear Mr. Corbin:

I have been wanting to write you for a long time, but my plans have been so uncertain that I have put it off until I could say something definite about the work on the casebook. The definite thing that I now have to say is that I shall be compelled to discontinue work on it, probably for the duration. Among the less immediate consequences of Pearl Harbor is the fact that Harvard now has a considerable surplus of law professors. Naturally, those of us who thought that we stood some chance of getting a job elsewhere have felt a certain obligation to look about for such a chance. While I was debating between staying here and going to Washington, the Boston firm of Hopes, Gray, Best, Coolidge and Rugg came through with an offer which I accepted on a trial basis. According to present plans, I shall start reporting for duty with them about the first of April.

No doubt you will be as distressed as I am to see the work suspended. As you know, I have practically finished the whole subject of Consideration and Mutual Assent. Certain other subjects, especially Conditions, Assignments, and Third Party Beneficiaries, I have outlined and put in shape to assemble rather rapidly. On those subjects I have made a classified card index of all the cases printed in the leading casebooks, as well as of recent cases that I have dug out for myself.

I am writing to Mr. Turner today. My guess is that West is not especially eager to bring out new books during the war, though it is possible that they, like the rest of us, are trying to carry on as usual as long as they can.

Needless to say, the interruption of this work is the most irksome aspect of my own impending fling at law practice. My hope is that a speedy termination of the war will permit me to pick it up again without too much loss of momentum.

Sincerely yours,

LLF:HOL

Lon L. Fuller