

REVIEWS

CORBIN ON CONTRACTS

A Comprehensive Treatise on The Rules of Contract Law. By Arthur Linton Corbin. St. Paul: West Publishing Company, 1950. 8 volumes. \$100.00.

VOLUME ONE

PART I: FORMATION OF CONTRACT §§ 1-274.

CORBIN'S mastery of the technical side of the law of contracts and his gift both for analysis of factual material and for re-examining and improving many a traditional doctrine mark his success in weaving together the vast body of our case law of contracts into understandable patterns. However, a reviewer of *Corbin on Contracts* who confined his praise to these features alone would ignore its most significant characteristic. The greatness of Corbin's contribution to the law of contracts lies in his approach, in his richness of creative ideas, in his rare sensibility and power of communication. He has received from his life-long study of Anglo-American law much more than most men working in his field will ever receive. And he transmits what he has received with a penetrating force, an intellectual honesty, an admirable moderation which drive his contribution deep into the reader's mind. The great institutions and doctrines of the common law of contracts, their gradual evolution by trial and error, the daring advances made by great judges, as well as the fumbling of many a court, speak directly to you.

Unlike Williston,¹ Corbin has not tried to restore the lost unity of the law of contracts by returning to principles which underlie the whole field and which are equally applicable to the humble transactions of our daily experience as well as to the most complex contractual arrangements of modern industrial society. With the pragmatic thesis that "all rules of law may with advantage be called Working Rules,"² Corbin sets out to develop the working rules in the fields of contract—the rules which "truly represent past human transactions and influence those that are to come." But in describing and creating these rules, he reminds his readers constantly to be aware of their tentative character:

"Any form in which they are stated is an experiment, by a writer, a legislator, or a judge, to see how it will work and whether it will work at all. A writer or a law institute states a rule and tries it on the bench

1. See 1 WILLISTON ON CONTRACTS vii (Rev. ed. 1936), discussed in Cook, *Williston on Contracts*, 33 ILL. L. REV. 497, 504 (1939).

2. Cf. Commons' treatment of law as "working rules of going concerns," LEGAL FOUNDATIONS OF CAPITALISM 134 *et seq.* (1924).

and bar. A legislature constructs a rule as a direction for the future and submits it to the mercies of judges and administrators. A judge selects and words a rule, puts it to work on the litigants before him, and submits it for use in other cases, if lawyers and judges believe that it is a good working rule for them."³

A monotheistic approach, therefore, would rob our concepts of their cultural substance. Any attempt to unify the law of contracts must inevitably do violence to the complexity of the living law. For the law of contracts covers such vast areas of human conduct that we should not be surprised to discover, instead of unity, a rich polytheism of values reflected in and frequently hidden behind "fundamental principles." Rules and counter-rules expressing different ideals of social policy and of justice are constantly competing with one another in a struggle for recognition in the marketplace of ideas. General principles cannot be relied upon to decide concrete cases. The choice between rule and counter-rule—often in delicate balance—can be made only with reference to public policy and with the help of our sense of justice.

Corbin very explicitly admits that a treatise on contracts cannot avoid a discussion of the underlying jurisprudence, that inevitably it must reflect the author's philosophy of law. Quite readily he concedes that "the soundness of the critical opinions expressed" is not to be judged by "the accuracy and clarity of his analysis of the facts of cases and of existing legal relations" alone but by "the character of the general theories of law" held by the author.⁴ Corbin has summarized his philosophy of law in his preface, and his ideas on public policy in a remarkable section in the sixth volume.⁵ But these observations are by no means exhaustive. Again and again in the treatment of individual issues through the text, Corbin raises problems of justice and of public policy. In fact, the reader may find in many a little paragraph or footnote an illuminating commentary on the general discussion of law and justice in the preface. To be sure, Corbin can sometimes do no more than point to the existence of a question of public policy without elaborating in detail the policy problems involved. The answers to many questions have to wait till we have reliable field studies. But he has gone further than other general treatments of the law of contracts in challenging the reader constantly to ask:⁶ What is a given institution or doctrine meant to do? Does it do what we want it to do? Can its purpose be attained more economically or efficiently by other means? The number of questions which can find better answers by open discussion of means and ends with regard to contract as a principle of order can hardly be exaggerated. This should be admitted even

3. The quotations are taken from the Preface, pp. iv and v.

4. Preface, p. iii.

5. § 1375.

6. He is thus raised to a high level of responsibility, an approach which has influenced and found expression in many detailed studies which in turn have been a challenge to his imagination.

by readers who are impressed with Hume's thesis that "it is not . . . reason, which is the guide of life, but custom"⁷ and who feel that institutions must sometimes serve to prevent us from raising unanswerable questions to the detriment of peace within society.

This reviewer can well imagine that there will be some students who will take fright when reading this book because their sense of security requires a diet of black letter law, an oversharpening of doctrinal issues, and a treatise which makes things simpler and clearer than they are, which is rich in myth, and which unquestioningly accepts rationalizations at face value. But if the student is willing to hear out the author with patience, he will be richly rewarded. He will begin to realize that the security he is longing for is a false security; that our living law of contracts is not a closed system of harmonious rules but an open system of social action rich in dynamic complexity and full of contradictions; that the scenes where ideals are in conflict are constantly shifting. A reading of the book will therefore be a constant invitation to work at the concretization of our notions of justice and to create working rules of our own.

I can even imagine that some practitioner may suffer acute discomfort because of Corbin's daring and that he will not like constantly to be reminded of his role in the judicial process which forces him again and again to take a stand on questions of social policy and justice. To be sure, judges most of the time legislate only interstitially, if for no other reason than because they, unlike commissions, are not able to examine carefully all the ramifications of the problems involved but see only the narrow aspect of the total problem shaped by the accident of litigation. "A court cannot postpone decisions until all possible evidence is in."⁸ It is, therefore, all the more important that the judge should be as articulate as possible in expressing his value judgments so that his preferences can be tested by elaborate field research and weighed by the democratic process. Furthermore, as Corbin suggests, "a better brand of justice may be delivered by a court that is clearly conscious of its own processes, than by one that states hard-bitten traditional rules and doctrines and then attains an instinctively felt justice by an avoidance of them that is only half-conscious, accompanied by an extended exegesis worthy of a medieval theologian."⁹ The constant expression of a preference for rational processes may be challenged in some quarters. It may be pointed out by way of criti-

7. AN ABSTRACT OF A TREATISE OF HUMAN NATURE 16 (Keynes & Scraffa ed. 1938); for emphasis on the non-logical aspects of law see 1 PARETO, THE MIND AND SOCIETY c. 2 and *passim* (Livingstone ed. 1935). For a corrective of this point of view emphasizing the significance of rationality for capitalistic systems of law, see Weber, *Rechtssoziologie* 3(2) GRUNDRISS DER SOZIALOEKONOMIK 407, 510 (2d ed. 1925); GESAMMELTE AUFSATZE ZUR RELIGIONSSOZIOLOGIE 437 *et seq.* (1934), discussing the differences in rationalization achieved by the common law and the civil law.

8. § 1375, p. 451.

9. § 561, p. 164. Holmes has expressed the same insight unforgettably. See *Common Carriers and the Common Law*, 13 AM. L. REV. 609, 630-1 (1881).

cism that progress can often be achieved only with the help of fiction and even a mistaken application of a given doctrine.¹⁰ To be sure, it is no psychological accident that judges frequently deny the need for discussing the validity of a contractual arrangement in terms of public policy because, as they say, the agreement is invalid anyhow for lack of consideration.¹¹ Yet there is no danger really that some readers of the book will behave like the centipede in the famous fable "who never walked again after he was asked by a malicious toad how he operated all his hundred legs at once."¹²

An author who never tires of stressing the problem of justice has created in his reader legitimate expectations concerning what he has to say about the ideals of justice underlying the law of contracts. The law of contracts, in Corbin's view, "attempts the realization of reasonable expectations that have been induced by the making of a promise." "Doubtless," he adds, "this is not the only purpose by which men have been motivated in creating the law of contracts; but it is believed to be the main underlying purpose, and it is believed that an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose."¹³

The dynamic of contracting and expanding promissory liability is one of the most significant features in the evolution of the law of contracts. And yet the social significance of this process is more precisely revealed if viewed in the context of the conflict which has centered around the great ideal of private autonomy.¹⁴ However admirably this ideal and its limitations have been dealt with by Corbin in many chapters,¹⁵ this reviewer is inclined to believe that the all-important question of the domain of freedom of contract should from the outset be made one of the central themes, if not the central theme, in any text on contracts.

Such a change in emphasis will increase the reader's awareness of the deep tension between private autonomy and social control which permeates the

10. The impact of Corbin's legal realism on the British judicial process is an interesting example confirming this point. See Gower, *Book Review infra*, note 1 and text.

11. *Stilk v. Myrick*, 2 Camp. 317, 170 Eng. Rep. 1168 (1809); *McDevitt v. Stokes*, 174 Ky. 515, 192 S.W. 681 (1917); for a discussion of the policy problems involved, see CORBIN §§ 175, 183, 184, 172, 176, 179. Consult further, *Calamita v. Trademens National Bank*, 135 Conn. 326, 64 A.2d 46 (1949). The wastefulness of this procedure is illustrated by *Hackley v. Hadley*, 45 Mich. 569, 8 N.W. 511 (1881), 50 Mich. 43, 14 N.W. 93 (1883). These and many similar cases indicate an unwillingness on the part of the courts to admit that consideration is not a static concept, and that every phase in the evolution of consideration is but a reflection of our changing attitudes with regard to the range of enforceable promises. To overcome this unwillingness, as Holmes suggested, judges perhaps "need something of Mephistopheles." COLLECTED LEGAL PAPERS 295 (1921).

12. STONE, *THE PROVINCE AND FUNCTION OF LAW* 678 (1946).

13. § 1, p. 2.

14. Gardner, *An Inquiry into the Principles of the Law of Contracts*, 46 HARV. L. REV. 1, 23, 25 (1932); Cohen, *The Basis of Contract*, 46 *id.* 553, 585 *et seq.* (1933); Fuller, *Consideration and Form*, 41 COL. L. REV. 799, 806 (1941).

15. *E.g.*, §§ 127, 644, 701, 1054, 1057, 1295, 1376, 1382.

whole law of contracts, and it will induce him to give most careful thought to methods of adjusting and readjusting the conflict. We are all too readily inclined to gloss over the existing tension, and yet, as the change in our definition of contract seems to indicate, we are dimly aware of it. To the generation of great lawyers who succeeded in working out the principles of an individualistic law of contracts it was axiomatic to define a contract in terms of agreement.¹⁶ Convinced that the individual, although not a perfect judge of his own ends, is certainly "a better judge, and especially a more impartial judge than the government or any other person likely to claim the right to judge for him,"¹⁷ contract came to be regarded as the ideal principle of order in a free society. The feeling became rather widespread that with the progress of differentiation within society contractual relations would tend to drive out all other patterns of organization.¹⁸ The making of a contract, in this view, is a private affair based on the consent of the parties freely given. Parties are free to enter or not to enter into contractual arrangements¹⁹ and are free to determine the contents of their agreements.²⁰ It is not within the province of a court, as we are told, to make contracts for the parties or to tamper with an improvident bargain; its function is limited to carrying out the intention of the parties, and to making certain that minimum standards of decency and fair dealings are observed. And yet despite the great emotional appeal of these ideals which have exercised a tremendous influence on case law and legal lore, the modern tendency has been not to stress the agreement character of a contract, but to define contract as a "promise enforceable at law directly or indirectly."²¹ Corbin in defending this definition offers an interesting explanation: "To define contract as an 'agreement' seems to exclude 'unilateral' contracts to be hereafter analyzed and illustrated. There are indeed various types of contracts made by the act of one party alone, requiring neither assent nor consideration by the other. The word 'agreement'

16. LEAKE, *THE ELEMENTS OF THE LAW OF CONTRACTS* 7 (1867); CORBIN § 3.

17. KNIGHT, *FREEDOM AND REFORM* 54 (1947).

18. For a discussion of Maine's famous thesis, that the movement of all progressive societies has hitherto been a movement from status to contract, see Isaacs, *The Standardizing of Contracts*, 27 *YALE L. J.* 34 (1917).

19. "It is a part of man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the reason rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern." COOLEY ON TORTS 278 (1880) quoted in *Great Atlantic & Pac. Tea Co. v. Cream of Wheat*, 227 Fed. 46 (2d Cir. 1915); *Boston Ice Co. v. Potter*, 123 Mass. 28 (1877). For a discussion of the evolution of the *Cream of Wheat* case doctrine in the light of the Antitrust Laws, see Comment, *Refusals to Sell and Public Control of Competition*, 58 *YALE L. J.* 1121 (1949); Timberg, *The Rights of Customer-Seller Selection* in C.C.H. ANTITRUST LAW SYMPOSIUM 151 (1951); Comment, *The Schweyermann Case and Fair Trade*, 61 *YALE L. J.* 381, 398 (1952).

20. §§ 1376, 1382.

21. Cf. RESTATEMENT, CONTRACTS § 1 (1932); but see Uniform Commercial Code §§ 1-201 (Final Text ed. 1951).

is not clearly descriptive of such a contract."²² This explanation does not tell the full story: in Corbin's hypothetical unilateral contracts performance of the requested act is an expression of consent.²³ And the presence of ten sections in the *Restatement* under the heading, "Informal Contracts Without Assent or Consideration"²⁴ should not worry us too much either. Is there, for instance, a great departure from the idea of agreement when we hold a debtor promising to pay a debt barred by the Statute of Limitations bound by virtue of his promise? Is not the very fact that the creditor remains silent a sufficient indication of his assent?²⁵

There is, however, another passage in the same section of Corbin which gives a more plausible defense. By defining contract as a promise that is enforceable at law, "it brings into the definition," as the author says, "the element of legal operation and effect. Such a definition as this does not inform us as to what kind of facts will be operative to create legal rights and duties; it merely gives us a mode of describing such operative facts after we have found by other means that they do have legal operation."²⁶

Thus the modern definition of contract is an indication of the extent to which we have left behind the attitude, represented by Locke and his school, that contract is an institution of natural law which is the sole source of the parties' obligation and whose existence does not depend on the approval and enforcement of society. Realistically, contract is an institution; it is "not sufficient into itself, but is possible only thanks to a regulation . . . which is originally social."²⁷ To be sure, there are still wide areas in the whole field of contract law where despite the ever-increasing trend toward social control over private volition the principle of private autonomy is still the dominant ideal, and rightly so. And yet there is an ever-increasing area of contracts affected with a public interest, supposed or real, where social control in one form or another has become the predominant principle. That does not necessarily mean (as the field of insurance indicates) that the requirement of consent is altogether lacking, but that consent may have become relegated to

22. § 3, p. 6.

23. § 21. The "pure" unilateral contract is illustrated by cases which hold the offeror of a reward bound to the performer of the requested act even though the latter is not aware of the outstanding promise.

Emphasizing the presence of a consent on the part of the performer should not mean that the offeror is to be given the unlimited power to revoke before completion because until then there has been no acceptance. If we were to do this, legitimate expectations of businessmen that the deal is on might easily be frustrated. See Corbin's discussion of § 45 of the *RESTATEMENT* in § 63; Llewellyn, *Our Case-Law of Contract: Offer and Acceptance*, 48 *YALE L. J.* 1, 31 *et seq.*, and 786 *et seq.* (1938-9); Note, *Acceptance of Unclear Offers*, 60 *YALE L. J.* 1043 (1951).

24. *RESTATEMENT, CONTRACTS* §§ 85-94 (1932).

25. *Id.* at § 104 (1932) may serve as an analogy.

26. § 3, p. 5.

27. DURKHEIM, *ON THE DIVISION OF LABOR IN SOCIETY* 192 (Simpson transl. 1933) as paraphrased in PARSONS, *STRUCTURE OF SOCIAL ACTION* 311 (1949).

being a mere prerequisite for establishing a relation, the terms of which are either totally or in part prescribed by the law. Indeed there are even areas within the law of contracts where the element of consent freely given is altogether lacking.²⁸

Of particular interest for our understanding of the social function of contract are the many borderline areas where it cannot safely be said which one of the two competing principles dominates. Again, the field of insurance furnishes a striking illustration. To be sure, the instances are still very rare where an insurance company like a public utility has to serve all comers.²⁹ Theoretically, at least, it is still true that a life insurance company, for instance, is free to turn down an application, however acceptable the risk. And yet in a considerable number of jurisdictions an insurance company can no longer afford to take an unreasonably long time in processing an acceptable application.³⁰ Should, as a result of such "undue delay," the applicant die uninsured, the company will be liable in tort.³¹ A few jurisdictions go even further and rationalize recovery on the basis of either a breach of an implied promise to act promptly or of an implied acceptance by silence.³² This adjustment of the principles of contract to the special needs of the insurance field has been severely criticized as unrealistic.³³ Typically, however, the socio-economic philosophy underlying such criticism has been cloaked in the harmless guise of a detached discussion of the "nature" of the implied contract.³⁴

28. Lenhoff, *The Scope of Compulsory Contracts Proper*, 43 COL. L. REV. 586 (1943); Patterson, *Compulsory Contracts in the Crystal Ball*, *id.* at 731.

29. MASS. GEN. LAWS, c. 175, § 113 A-D (Ter. Ed. 1932), introducing compulsory motor vehicle liability policies, may serve as an illustration for such a duty. Concerning the duties to insure under the statute, consult *Factory Mut. Liability Ins. Co. of America v. Superior Court*, 300 Mass. 513, 16 N.E.2d 38 (1938).

30. Funk, *The Duty of an Insurer to Act Promptly on Applications*, 75 U. OF PA. L. REV. 207 (1927); Prosser, *Delay in Acting on an Application for Insurance*, 3 U. OF CHI. L. REV. 39 (1935); Schultz, *The Special Nature of the Insurance Contract: A Few Suggestions for Further Study*, 15 LAW & CONTEMP. PROB. 376 (1950).

31. The cases pro and con are collected in § 75, and in the articles, note 27 *supra*.

32. *American Life Ins. Co. of Alabama v. Hutchinson*, 109 F.2d 424 (6th Cir. 1940), noted in 40 COL. L. REV. 1071 (1940). *Swentusky v. Prudential Ins. Co.*, 116 Conn. 526, 534, 165 Atl. 686, 688 (1933), involving a tort action, has summed up the arguments against the theory of an implied contract in the following dictum: "It is of course true that failure to act upon it may, in such a case as this, cause loss to the applicant or to those to be named beneficiaries in the policy, against which he expected to secure protection. That situation is not, however, peculiar to the insurance law; for example, one may make an offer to buy goods which he needs at a certain price, having reason to believe the price will advance, and may incur loss through the failure of the one to whom it is made to act upon the offer within a reasonable time."

33. "If a court should hold that a contract to decide expeditiously on the proposal did exist, it is believed that, within a short time, all insurance companies doing business in that jurisdiction would incorporate in their applications stipulations expressly negating any such promise." Funk, *supra* note 30, at 224.

34. Prosser, *supra* note 30, at 49.

"It is undisputed that there is a clear moral obligation upon the company to act without unreasonable delay; and it may very well be that there is a vague undefined understanding that it intends and is expected to do so. But a contract implied in fact must rest upon the intent of the parties; it requires an agreement, a meeting of minds, an intent to promise and be bound; it does not differ from an express contract, except that it is circumstantially proved. Before the company can be held upon such an agreement, it must be found as a reasonable implication from the circumstances and the conduct of the parties that it intended to bind itself by a promise of prompt action. In the ordinary case, this is simply contrary to fact. The form of the transaction indicates no such intent."

The shortcomings of this approach are beautifully brought out in Corbin's delicate handling of the insurance material:³⁵

"There are cases holding that the insurance company's unreasonable or negligent delay in acting on an application is tortious. This raises problems of general public policy and the nature of the insurance business quite different from the problems of offer and acceptance. . . . Nevertheless the existence of established tort law is relevant in the drawing of inferences of assent from inaction and silence."

This passage, however cautiously phrased, is remarkable not only for its blending of tort and contract doctrine but also for its insights into the nature and social function of the "implied contract." It typifies his entire treatment of the subject. Traditional analysis, oriented along individualistic lines, has bequeathed a sharp and clear-cut distinction between expressed, implied in fact, and implied in law contracts.³⁶ Corbin's sophisticated discussion of the matter brings out clearly that this categorization, even when applied to the areas governed by the principle of freedom of volition, amounts to an oversimplification and ignores the institutional character of contracts. Under the traditional approach, the attempts on the part of courts to develop techniques for dealing with the implied contract would teach us very little about the social structure of contract in general. In reality, courts confronted with the issue of whether to imply or not to imply a contract are faced with the complex task of finding objective criteria for determining the intention of the parties in the light of the circumstances surrounding the transaction. A court which wants to avoid the arbitrariness of random behavior, so as not to disappoint the reasonable expectations of litigants and to make future decisions predictable has to go, whenever possible, to the facts of general business experience and understanding. But on the basis of their experiences with implied contracts the courts have learned that their task

35. § 75, p. 239 n. 44.

36. *Hertzog v. Hertzog*, 29 Pa. 465 (1857); *Sceva v. True*, 53 N.H. 627 (1873).

of interpreting and enforcing an express contract is not fundamentally different. "The meaning to be given to all modes of expression of a contractual intent is found by a process of implication and inference. In this sense, all contracts are implied contracts."³⁷ Even an express contract is not an isolated act which can be divorced from the environment in which the parties have conducted their negotiations and the framework of some more general relation. Contracts "are actually entered into in accordance with a body of rules which are not part of the ad hoc agreement . . . but exist prior to and independently of such agreements."³⁸

Equally penetrating is Corbin's treatment of the so-called indefinite contract and the axiom that courts do not make contracts for the parties. To make contract a workable instrument a court "[i]n considering expressions of agreement . . . must not hold the parties to some impossible, or ideal or unusual standard. It must take language as it is and people as they are. All agreements have some degree of indefiniteness and some degree of uncertainty."³⁹ In this connection Corbin's incisive discussion of the judicial process of interpretation and construction provides a vast source of helpful ideas to which courts may turn when confronted with the task of drawing the line between filling gaps and denying the existence of a contract for lack of completeness.⁴⁰

Following Corbin's inquiries into the validity of traditional analysis still further, we learn that "considerations of equity and morality play a large part in the process of finding a promise by inference of fact as well as in constructing a quasi-contract without such inference at all. The exact terms of the promise that is 'implied' must frequently be determined by what equity and morality appear to require after the parties have come into contact."⁴¹ Thus, the implied contract and the implied term are tools enabling a court to impose or to deny liability in accordance with demands of cultural setting.

If there is merit in the foregoing analysis, a reader of Corbin's text will not be greatly disturbed by the abundance of evidence showing that the struggle between freedom and social control has deeply affected the vast complex of dogmas which go under the name of consideration. Despite occasional heroic attempts to square the requirement of consideration with the ideal of freedom of contract, it is not an altogether unfounded criticism to say that the consideration doctrine, as typically applied, is a most serious limitation of that freedom.⁴² To be sure, the famous doctrine could not avoid paying homage

37. §§ 18, 19, 562.

38. DURKHEIM, *op. cit. supra* note 27, at 192, as paraphrased in PARSONS, *STRUCTURE OF SOCIAL ACTION* 311 (1949); *cf.* *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

39. § 95, p. 290.

40. §§ 532-72.

41. § 19, p. 38, citing *Parev Products Co. v. Rokeach*, 124 F.2d 147 (2d Cir. 1941).

42. This criticism is implicit in Lord Wright's famous article, *Ought the Doctrine of Consideration To Be Abolished from the Common Law?*, 49 *HARV. L. REV.* 1225 (1936). See further Sharp, *Pacta Sunt Servanda*, 41 *COL. L. REV.* 783 (1941).

to the great principle of private autonomy; the adequacy of consideration, short of an unconscionable bargain, will not be looked into, as the language of the case law informs us again and again.⁴³ It may even be argued quite plausibly that in theory the common law has succeeded admirably in mitigating the harshness of the doctrine without abandoning its good features: its channeling function and its objectives of assuring deliberation, preventing coercion, and denying enforceability to promises which are of insufficient social significance. Corbin's treatment of past consideration, the pre-existing legal obligation rule, and the doctrines of *Foakes v. Beer* afford ample evidence that the "germs of corrective development"⁴⁴ are in existence in the form of an ingenious and elaborate system of counter-rules which can be invoked for the protection of freedom of contract whenever socially desirable. In addition, § 75 of the *Restatement* has a corrective in § 90,⁴⁵ and the latter section in turn may be capable of expansion to include the risk of reliance.⁴⁶

But the reviewer cannot help wondering, on Corbin's own showing, whether under the doctrine as practically applied freedom of contract has not frequently been denied its due share to the detriment of legitimate business transactions.⁴⁷ Has not consideration in all its complexity become such a delicate instrument that its adequate handling requires an unusual amount of sophistication, making it very difficult always to heed Corbin's advice that consideration is

43. § 127; Note, *The Peppercorn Theory of Consideration and the Doctrine of Fair Exchange in Contract Law*, 35 COL. L. REV. 1090 (1935).

44. Havighurst, *Consideration, Ethics and Administration*, 42 COL. L. REV. 1, 31 (1942).

45. For a beautiful discussion, see §§ 193 *et seq.*

46. Note, *Promissory Obligations Based on Past Benefits or Other Moral Consideration*, 7 U. OF CHI. L. REV. 124, 133 (1939); Fuller, *Consideration and Form*, 41 COL. L. REV. 799, 811 (1941).

47. The case law dealing with the revocability of so-called firm offers, as it emerges in §§ 41 *et seq.* may serve as a further illustration. Contrast, Sharp, *Promissory Liability*, 7 U. OF CHI. L. REV. 1, 10 (1939); Fuller, *supra* note 14, at 818; Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. OF CHI. L. REV. 237 (1952); Sharp, *Promises, Mistake and Reciprocity*, 19 *id.* at 236. But see Havighurst, *Consideration, Ethics and Administration*, 42 COL. L. REV. 1, 23 *et seq.* (1942).

With regard to benevolent promises, as distinct from promises connected directly or in "ancillary" fashion with business transactions, much can be said for the preservation of the doctrine. It affords a means for denying enforcement to promises made without sufficient deliberation or which are not "of sufficient importance to our social and economic order to justify the expenditure of time and energy necessary to" warrant enforcement. Fuller, *supra* note 14, at 799. In this field the line between enforceable and non-enforceable promises can be drawn with the help of a wise application of the doctrine of detrimental reliance. In the light of the experience gained from a study of the case law dealing with detrimental reliance as a prerequisite for making an informal gift promise binding (c. 8) the wisdom of the flat common law rule making promises under seal binding irrespective of such reliance may well be questioned, particularly since the deterioration of the seal. Uneasiness on this score may have been one of the factors contributing to the abolition of the common law effect of the seal in many jurisdictions.

not one but many doctrines?⁴⁸ We cannot eliminate the problems which consideration attempts to solve by eliminating the doctrine. "Should we get rid of the doctrine," as Corbin reminds us, "we should . . . instantly be obliged to consider, under other descriptions, the factors that will make a promise enforceable."⁴⁹ But why not start at the other end and try to work out in systematic fashion the categories dealing with our reasons for *not* enforcing a given promise?⁵⁰ We should never cease asking whether the legitimate functions of the consideration doctrine cannot be fulfilled more rationally and economically by different doctrines, resulting in a greater simplification of the law of business transactions. "Much of the work that is now being done by doctrines of consideration could be handled more discriminatingly and systematically by notions of duress, fraud, mistake, supervening difficulty, forfeiture, or more general and less easily defined notions of public policy."⁵¹ Preoccupation with attempts to solve too many questions of social control with the consideration doctrine has resulted in its deterioration and a lack of adequate development of better doctrines.⁵² Hence, unlike Corbin, I do not

48. § 109, p. 344 *et seq.*

49. § 111, p. 353.

50. In making this suggestion, the reviewer has been encouraged by Corbin's own presentation of the consideration materials which have convinced him that workable results can be reached in the way advocated here. While these results are not fundamentally different from the solution proposed by Corbin, they can be reached by a less complex procedure.

51. Sharp, *Pacta Sunt Servanda*, 41 *COL. L. REV.* 783, 796 (1941).

52. This is all the more important since the protective function of the consideration doctrine can be escaped without too much difficulty. A few illustrations must suffice. A debtor, for instance, who is careful enough to insist on a release under seal and to stay clear of fraud and duress, as technically defined, may defeat the creditor's claim in a jurisdiction which has preserved the common law effect of the seal, *Jackson v. Security Mutual Life Ins. Co.*, 233 Ill. 161, 84 N.E. 189 (1908), unless a court with the help of some magic finds a way to regard the release as not made under seal. *Woodbury v. U.S. Casualty Co.*, 284 Ill. 227, 120 N.E. 88 (1918), discussed in § 241. The problem of adequately protecting the creditor against the squeeze play on the part of the debtor continues to exist in jurisdictions which have replaced the release under seal by a written release. Finally the creditor must be protected against unconscionable attempts on the part of the debtor to settle a non-liquidated claim for a nominal or unfairly small amount, *Fitts v. Panhandle & Santa Fe R.R.*, 222 S.W. 158 (Tex. Comm. App. 1920); *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757 (2d Cir. 1946); and against abuse of the technique of rescission made popular by *Schwartzreich v. Bauman-Basch Inc.*, 231 N.Y. 196, 131 N.E. 887 (1921), criticized in §§ 175, 176. But it is equally true, that "[i]f . . . it is clear that the party who promises additional compensation means to make a gift, with no element of fraud or duress, there is no strong reason why the court should not enforce the new promise. In such a case, however," the author adds significantly, "it is better not to make a specious argument that old rules are still applied and that old precedents are being followed." § 186. In this connection Corbin refers to the "excellently reasoned arguments" in *Watkins v. Carrig*, 91 N.H. 459, 21 A.2d 591 (1941). This reviewer, though admitting that the reasoning of the court presents a great advance, still prefers a more straightforward kind of argument. And he is not even certain of the social desirability

feel quite so charitable towards the doctrine, and my uneasiness has not been dispelled by this treatise.

Although this reviewer does not always share Corbin's policy judgments, he feels sure that the vast majority of Corbin's audience will say again and again of this great work: "This is what I have always felt and thought, but have never been able to put clearly into words even for myself."⁵³

FRIEDRICH KESSLER†

VOLUME TWO

PART II: STATUTE OF FRAUDS §§ 275-531.

IT is a great honour for an English lawyer to have been asked to review a volume of Professor Corbin's *magnum opus* and thus to be privileged to participate in the tributes to the life-work of a great American jurist. Professor Corbin has an assured reputation throughout the common law world and is especially well-known to English lawyers for his article on "Contracts for the Benefit of Third Persons," published in the *Law Quarterly Review* in 1930. This article had a powerful influence on our legal development, although not, it must be confessed, an entirely beneficial one. As he pointed out in the article, English judges, without openly admitting it, had been in a fair way towards introducing a consistent principle of third party rights into the English law of contract. Alas, once Professor Corbin drew their attention to what they were doing they hastily recoiled, and since his article appeared there has been a recession rather than a further advance. In England, "lawyers' law reform" must be effected surreptitiously; an open attack has little chance of success and often does more harm than good. This makes the task of the professing reformer a thankless one—as our most progressive judge is discovering.¹ But the unintended consequences of Professor Corbin's illuminating intervention cannot be laid to his door—the fault is not in our stars (of whom Corbin is one of the brightest) but in ourselves.

The object of inviting an Englishman to participate in this series was presumably to obtain his comments on the English reactions to the work as a whole and to Volume Two in particular. Our first reactions, certainly, are wonder and envy. Wonder at the physical resources and research facilities

of the actual result reached. Does the opinion reveal enough about the fact situation involved to convince the reader that plaintiff's threat to break his contract to which defendant "yielded without protest" was within legitimate bounds?

53. The passage is taken from Aldous Huxley, *Tragedy and the Whole Truth* in WILLIAMS, A BOOK ON ENGLISH ESSAYS 325 (1951).

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1. See, e.g., *Howell v. Falmouth Boat Construction Co.*, [1951] A.C. 837; *British Movietonews v. London & District Cinemas*, [1951] 2 All E.R. 617.