

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.

of the American law schools and institutions which have enabled such works as the *Restatement*, *Williston on Contracts*, *Williston on Sales*, and *Corbin on Contracts* to appear in quick succession. We have long experienced these feelings and in me they were stimulated afresh before I even received the book itself. "The length of the review," wrote your Editor, "is a matter of your discretion." In paper-deprived England this would have read, "We must insist that the review be as short as possible and, in any case, not longer than. . . ." At the risk of being accused of sour grapes and of abusing your hospitality dare I suggest that enjoyment of unlimited resources is not an unmixed blessing? It has sometimes seemed to us in England that it has tended to produce in current American legal literature a repetitive and diffuse style of writing² which, we like to think, we generally avoid—not because of any particular virtue but because we must, if we are to be published at all. Hence, it is only when we read a book like *Corbin*, which shows none of these defects, that our wonder is accompanied by unrestrained envy.

But even in Corbin's case we cannot help feeling a faint regret that both he and Williston should have devoted their lives to the same field with the result that this has twice been thoroughly tilled while other areas remain buried in weeds. *Williston* was so immeasurably superior to anything produced on this side of the Atlantic that it seemed inconceivable to us that there should be a further work of the same magnitude for many years to come. The results prove us to be wrong. Whether, on the whole, *Corbin* is superior to *Williston* it is not for me to say, nor am I qualified to do so, but so far as the treatment of the Statute of Frauds is concerned *Corbin* seems indeed even better. We in England have nothing comparable; good students' books there are—*Anson* and *Cheshire & Fifoot* in particular—but the nearest approach to a comprehensive treatise is, I suppose, *Chitty*, which was originally written in 1825 and which in its latest (1947) edition tries to cover in 1300 pages not only the general law of contract but also special types of contract such as sale, hire-purchase, agency and the like. The result can be left to the imagination of those fortunate enough not to have to make use of it.³

Turning now, to the subject matter of Volume Two, here again the first reaction is one of bewilderment. The Statute of Frauds was enacted in the Mother Country 300 years ago. It has been restrictively construed and animadverted on by common-law judges, emasculated by Equity, excoriated by text-book writers and recommended for repeal by the English Law Revision Committee; yet its principal Sections (4 & 17) still hold sway not only in England but throughout the greater part of the English-speaking world, including, appar-

2. Only in the obscurity of a footnote would one dare to hint that this has sometimes been discernible in contributions by distinguished jurists to this august Journal.

3. In fairness to the last editorial board it should be said that the result is not quite so bad as might have been expected.

ently, nearly all the United States. It is true that it has received its share of praise, some of it fulsome, but Professor Corbin's quotations make it clear that the blame greatly exceeds the praise⁴ which, in general, comes from notoriously reactionary quarters.⁵ The reasons for its original enactment are not difficult to understand; the jury was then an imperfect instrument and the rules as to competency and admissibility were illiberal. But its survival and extension seem inexplicable. Today it is our boast that our jury system and the oral examination of witnesses are the most perfect instruments for ascertaining the truth and infallible detectors of fraud. Yet in order to prevent fraud we reject oral testimony and insist on written evidence—the despised instrument of the civil law countries. On the face of it this seems to be an abject confession of failure. What is the explanation? Professor Corbin finds it in “the juristic habit of courts and lawyers for two hundred and seventy years” and considers that “the total repeal of the statute would involve such a wrench to the mental habits of bench and bar that it is very unlikely to occur.”⁶ This explanation seems unsatisfying; it might account for its survival in England but hardly for its widespread adoption elsewhere. And even in England my impression is that in fact it runs counter to our habits of juristic thought so that the lawyer who pleads it feels slightly ashamed of himself, rather as if he had laid his opponent a stymie. Having abolished the stymie why boggle at the Statute? The explanation, I suspect, is pure apathy. The man-in-the-street understands the laws of golf and will agitate if they are unfair; but litigation is a more mysterious game of chance and he leaves its rules to the professional until some *cause célèbre* makes their injustice too glaring. The Statute has produced litigation in plenty—one has only to glance at the footnotes to this book to realise how much—but it still lacks a really sensational *cause célèbre*. And as for the professionals, well, there is not much they can do, for the Statute is, after all, a statute which judge-made law cannot repeal. Considering that, as Lord Nottingham cynically observed two centuries ago, every line of the Statute has been worth a subsidy to lawyers, it is perhaps commendable that they have been so openly critical of it.

Throughout the pages of this book there are points of interest and of immediate practical value to the English lawyer. I know of no other treatment in which the many problems to which the Act gives rise are subjected to a more searching and stimulating investigation or in which the authorities are so exhaustively collected. Professor Corbin quotes extensively from English decisions and literature although there are certain noticeable omis-

4. See § 275, p. 10 *et seq.*

5. To avoid the risk of a libel action by Professor Karl Llewellyn, see 40 *YALE L. J.* 747 (1931), I hasten to add that I do not regard him as a reactionary (notorious or otherwise) and that his praise of the Statute, although unexpected, is not intemperate.

6. See § 275, p. 14.

sions.⁷ Hence our students will here find an unmatched guide through the labyrinths of a highly technical branch of the law, and our practitioners an invaluable weapon in their armoury. Not only is Professor Corbin rightly critical of many of our decisions but, as his pages make clear, there are points which have not yet arisen in England but which have been thoroughly explored in the States. Unhappily English practitioners are not yet accustomed to make the use that they should of American authorities, and for this they cannot be altogether blamed, for no English law library possesses the necessary facilities for enabling them to undertake research into the primary sources. It is, I think, infinitely more common for English decisions to be cited in American Courts, and, of course, it is correspondingly easier for Americans to keep track of the relatively few reported decisions of our one High Court than it is for us to follow the mass of case-law produced by your States and Federal jurisdictions. But if the unity of Anglo-American jurisprudence is to be preserved it is essential that there should be a true cross-fertilization of ideas—English law is certainly in need of the revivifying influence of new blood. Works such as the *Restatement* and, to an even greater extent, within a narrower sphere, *Williston* and *Corbin*, are therefore especially welcome because they make available to the Old World the legal wealth of the New. Already there are signs of a greater awareness of the opportunities thus provided. The *Restatement* is frequently cited in our Courts, and *Candler v. Crane Christmas & Co.*⁸ is a recent example of the Court of Appeal supporting their decision by a reference to the American *Ultramarcs* case—although it is significant that this was not cited by counsel but drawn to the judges' attention by Professor Goodhart acting as a kind of extra-mural amicus curiae. Hitherto, so far as I am aware, English advocates have not turned to the States for assistance when arguing cases on the Statute of Frauds, but such cases are frequent and often difficult and now that they have *Corbin* to hand they will be foolish indeed if they do not avail themselves of it.

Nevertheless, an Englishman in reading this Volume is struck by the extent to which the unity of Anglo-American law has been preserved even in a field where one might expect to find divergences. As Professor Corbin points out, the actual wording of the Statutes in the various States differs substantially. Some adopt the original formula that "no action shall be brought" on a contract which does not comply with the Statute; others declare that it shall be "void" or "invalid." These differences seem to have made surprisingly little difference to the practical results, so that although the Statute is not part of the Common Law, "there is a common *statutory*

7. *E.g.*, I looked in vain for any reference to Dr. William's book, which is our most scholarly discussion of the Statute; to the report of the Law Revision Committee; or to Denning L. J.'s article in 41 L.Q. REV. 79 (1925), recently quoted in the case of *James v. Kent* [1951] 1 K.B. 551, which itself will merit a reference in the next edition.

8. [1951] 2 K.B. 164.

law which has been the basis for a great mass of judicial law. . . ."⁹ Even the States which adopt the original wording have, in the main, found no difficulty in avoiding the conclusion of the English Courts, in the much criticised case of *Leroux v. Brown*, that the Statute lays down a mere rule of procedure. And even in England the practical effect of this decision seems to be limited to the Conflict of Laws. Professor Corbin demonstrates that the Statute should be regarded as laying down a rule of substance and that *Leroux v. Brown* cannot be supported.¹⁰ Most English lawyers would agree, and will welcome him as a powerful ally. It is greatly to be hoped that, if the House of Lords has an opportunity of re-considering the decision, the American authorities and Corbin's trenchant criticisms will be drawn to their attention.

It would appear to be in connection with Sale of Goods that the greatest differences between the two systems are discernible, and this is not surprising since both countries have fairly recently re-enacted and modified the original provisions of § 17. The English Sale of Goods Act, 1893, continues to exclude choses in action and expressly defines "acceptance." The American Uniform Sales Act includes choses in action and gives a different definition of "acceptance." The consequences of the first divergency need no illustrating; as regards the second, however, it may be of interest to point out that whereas in America a rejection cannot as such constitute acceptance, in England, paradoxically, it may. Acceptance, for the purpose of § 4 of the Sale of Goods Act means "any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not." Hence, it was held in the leading case of *Abbott v. Wolsey*¹¹ that the ill-advised statement by the buyer that "this hay is not to my sample and I shall not have it" was a sufficient acceptance for the purpose of the section so that the buyer could not rely on the absence of a memorandum! Professor Corbin makes it clear that this would not be supported in the States either under the original § 17 or under the Uniform Sales Act.¹²

Elsewhere, however, differences even as regards Sales of Goods appear to be trifling and accidental, and all too often we seem to share the same errors. But I think that Professor Corbin occasionally does England less than justice. Thus I do not agree that the English cases establish that receipt of a cheque in conditional payment is not part payment for the purposes of the Statute.¹³ Moreover, it just is not true that the ruling of Blackburn J. in *Lee v. Griffin*, that a contract to fit a set of false teeth is a contract for the sale of goods, "gives reasonable satisfaction in England."¹⁴ On the contrary it gave so little satisfaction that, although never formally over-ruled, it is

9. § 278, p. 18.

10. §§ 293-4.

11. [1895] 2 Q.B. 97.

12. § 483.

13. § 495.

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

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

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

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VOLUME THREE

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

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

14. § 476, p. 623.

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

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

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