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# TWELVE LETTERS FROM ARTHUR L. CORBIN TO ROBERT BRAUCHER ANNOTATED

JOSEPH M. PERILLO\*

In 1964 the *Yale Law Journal* published a bibliography of Professor Arthur Corbin's publications.<sup>1</sup> The bibliography quotes a letter from Arthur Corbin to a *Yale Law Journal* editor<sup>2</sup> in which Corbin states that he had written a "one man revision" of the first *Restatement of Contracts*, which he sent in hand-written form to Judge Herbert Goodrich, then Director of the American Law Institute. Corbin said that Judge Goodrich "had each such installment typewritten and multigraphed for the use by the revision reporter and his committee and perhaps by others."<sup>3</sup> Diligent search by law librarians has failed to locate a copy of this revision of the *Restatement* by Corbin in any law library. The search for such a copy led me to the

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The author wishes to express his gratitude to Friedrich Kessler and Eugene Rostow, Sterling Professors *Emeriti* of Yale University for their permission, in their capacities as literary editors of Arthur L. Corbin's writings, to publish these letters. I am also grateful to the Harvard Law School Library for its permission, in the capacity of custodian of the Braucher papers, for the publication of these letters.

1. *Bibliography of the Published Writings of Arthur Linton Corbin*, 74 *YALE L.J.* 311 (1964) [hereinafter *Bibliography*].

2. Michael A. Varet, now a member of Varet, Marcus & Fink in New York City. Mr. Varet confirms receipt of the letter and still possesses it. Letter of Michael A. Varet to the author (Sept. 23, 1992) (on file with author).

3. *Bibliography*, *supra* note 1, at 322-23 n.22. The quotation in full, as edited in the bibliography, is as follows:

Is it possible at this point to include a statement as to [the] Revision of the Contracts Restatement, now being prepared . . . by Professor Braucher as Reporter and a Committee of Advisers? I was asked by the Council of the A.L. Institute through its Director [the late] Judge Herbert Goodrich, to go through the Restatement I and indicate the sections in need of revision. This was about 5 years ago. I agreed to do as requested. I immediately observed that practically *all* of the Sections needed revision. This was proved by the results of my 30 years of research and publications, including my 8-volume treatise. Instead of merely indicating the Sections in need of revision (including *all* of them), I at once proceeded to prepare a "one-man revision" of the entire Restatement (excluding only the Chapters on Remedies, which had been drafted by myself as Associate Reporter). I worked steadily on this for about 18 months, covering the black letter sections, the comment[s] and illustrations. Many sections I rewrote entirely, especially Chapter 9 on Interpretation and the Parol Evidence Rule. As I completed my Revision of each Chapter, I sent it in handwritten form to Judge Goodrich . . . . He had each such instalment typewritten and multigraphed for use by the Revision Reporter and his Committee and perhaps by others. Thus far the Reporter has made steady use of my revision, although [he is] in no respect bound to follow it. . . .

*Id.*

Braucher archives at the Harvard Law School Library where references to this work abounded but no copy was found. Robert Braucher, professor at the Harvard Law School, was the original Reporter for the revision of the *Restatement of Contracts*. In 1971, when the *Restatement (Second)* was about one-half completed, Professor Braucher resigned as Reporter to take the position of Associate Justice of the Supreme Judicial Court of Massachusetts. He gave his copy of Corbin's revision to Professor E. Allan Farnsworth, who made little use of it, crediting Corbin's treatise as a more influential source for the part of the *Restatement (Second)* for which he was responsible.<sup>4</sup> His copy no longer exists.<sup>5</sup> The American Law Institute kept a copy,<sup>6</sup> but it has disappeared.<sup>7</sup> Corbin gave his copy to Professor Friedrich Kessler who presented it to a Yale Law Librarian but it had disappeared from the library shelf when he later sought it out.<sup>8</sup> The Yale Law Library does not have it in its catalog. Professor Corbin's assertion that Judge Goodrich caused it to be multigraphed and distributed to the advisers appears incorrect. Although Braucher had a copy, the advisers apparently did not. Braucher used to read to the advisory committee from Corbin's revision,<sup>9</sup> which may not have been quite the thorough revision of each section that Corbin's description to the *Yale Law Review* editor implies.<sup>10</sup>

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4. Letter from E. Allan Farnsworth to the author (Dec. 7, 1992) (on file with author); see also E. Allan Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 3, 5 (1981). Corbin's influence on Braucher's work on the RESTATEMENT (SECOND) is acknowledged in Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 616 (1969).

5. Letter from E. Allan Farnsworth, *supra* note 4.

6. See Letter from Paul Wolkin, American Law Institute Assistant Director, to Michael A. Varet, cc: to Professor Robert Braucher (Oct. 23, 1964) (Robert Braucher Papers, Harvard Law School Library, MS Box 17, Folder 6) ("I have the Corbin Manuscript. The original manuscript consisted of handwritten notes on the margins of the first Restatement of Contracts. These handwritten notes were transcribed and the copy I have is a transcribed copy.").

7. Letter from Harry Kyriakodis, American Law Institute Librarian, to the author (Jan. 19, 1993) (on file with author).

8. Letter from Friedrich Kessler to the author (received Oct. 20, 1992) (on file with author).

9. See Letter from Stewart Macauley to the author (Nov. 19, 1991) (on file with author) ("[W]e mere advisors didn't get to see the sacred document. Bob Braucher used to read from it in respectful tones."); see also Letter from Arthur von Mehren to the author (Dec. 1, 1992) (on file with author) ("I distinctly remember references to the Corbin revision of the first Restatement of Contracts. However, I have no recollection of having received a copy of the revision as an adviser to the Reporter."); Letter from Chief Justice Ellen A. Peters to the author (Oct. 29, 1992) (on file with author) ("I regret that I cannot help you locate Arthur Corbin's commentary on the first Restatement of Contracts. I came to the Restatement late and never had a copy although I recall hearing about its existence.").

10. See Letter from Paul A. Wolkin, *supra* note 6 ("I have only one copy that runs over 1,000 pages. Many of these pages have no notes on them at all. . . ."); Letter from E. Allan Farnsworth, *supra* note 4 ("Bob Braucher handed on to me some photocopies of pages from the student edition of the Restatement. In the wide margins to some sections there were some comments and occasional redrafts by Corbin—perhaps retyped by a secretary.").

In this unsuccessful quest for a copy of Corbin's Restatement, I found in the Braucher archives at the Harvard Law School Library twelve extraordinarily interesting letters that Corbin wrote to Braucher in Braucher's capacity as Reporter.<sup>11</sup> These letters shed much light on the preparation of the first *Restatement of Contracts*, and on the relationship between Samuel Williston and Arthur Corbin, the two scholars most responsible for its preparation. They show much about the history of the Yale and Columbia law schools, the realist movement, Corbin's position on the margins of that movement,<sup>12</sup> and his assessment of some of its central figures. For these reasons, these letters deserve publication. The annotations I supply are mainly for the younger reader for whom the cast of characters who move through these letters may be only dim historical shades.

In these letters, Corbin's essential thinking stands out. From first to last he was an evolutionist and his corollary tenet was that evolution made for uncertainty. Writing early in his career, he stated: "[there] will always be two large fields of legal uncertainty—the field of the obsolete and dying, and the field of the new born and growing."<sup>13</sup> Fifty years later he was to write in the same vein, but more poetically: "Our system of evolutionary man-made law is also 'natural law.' It is as 'natural' as rain, as 'natural' as birth and death."<sup>14</sup> In his eighty-seventh year, in a letter printed below,

11. Robert Braucher Papers, Harvard Law School Library, MS Box 17, Folders 5-7A.

12. Although Corbin is frequently labelled a realist, he saw himself differently. He wrote to Llewellyn: "I can join cheerfully with you in your kind of 'Realism,' but I never wanted to belong to the 'Realistic School' or any other school (except, perhaps, the Yale Law School). There are too many self-styled 'Realists' whose eyes were opened and yet saw nothing." LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* 241 n.83 (quoting Letter from Arthur L. Corbin to Karl Llewellyn (Dec. 1, 1960) (R/13/15, Llewellyn Papers, University of Chicago Law School Archives)).

Corbin wrote Karl Llewellyn in 1960 of 'a crisis' he had faced a 'fight for life as a law teacher' in the late 1920s, when he had 'to drive a good beginning class' to study the law of contracts against the competition of Hutchins and two others, 'all three telling these beginners that there is 'no law,' only separate cases—that each decision is a 'chigger' or stomach burp—that there are no organized molecules, only individual atoms—and all three (however green behind the ears) telling it with explosive, atomic power.

*Id.* at 107.

13. Arthur L. Corbin, *The Law and the Judges*, 3 *YALE REV.* 234, 243 (1914).

14. Arthur L. Corbin, *Sixty-Eight Years at Law*, 13 *U. KAN. L. REV.* 183, 188 (1964). For the contrast between Corbin's notions of the cultural evolution of the law and Williston's, see Daniel J. Klau, Note, *What Price Certainty? Corbin, Williston, and the Restatement of Contracts*, 70 *B.U. L. REV.* 511 (1990), pointing out that Williston believed law had evolved and was now explicable on the basis of rather static general principles, while Corbin believed that society constantly changes and that legal rules are tentative generalizations deduced from the vast outpouring of cases. The fact of these two very different perspectives explains one major difference between their two treatises. Williston states rules and principles in the text and supports them with string citations. Corbin's description of and quotations from cases in the footnotes and texts forms the bulk of his treatise.

Despite their professional differences, the two men showed great respect, even affection, for each other. Williston died at the age of 101, and in memorial of him, Corbin wrote

he stated "I have read all the contract cases for the last 12 years; and I know that 'certainty' does not exist and the illusion perpetrates injustice."<sup>15</sup>

21 Robinwood Road  
Hamden 17, Conn.  
Sept. 23, 1959

Professor Robert Braucher,  
Harvard Law School

Dear Mr. Braucher:

I greatly appreciate your very kind letter. It would give me pleasure to serve as your adviser and to meet with your Revising Committee; but I am now 85, my sight is failing badly, and my hearing is defective. By this time you may have seen (or heard about from Judge Goodrich) the results of some very hard labor that I put in this summer up in Maine. Judge Goodrich asked me to go over the Rest. Contracts and indicate the places that I thought needed revision. I agreed to do so. On beginning, I found at once that a very thorough revision of the whole is necessary. I am too deeply interested in the Restatement to make that statement and stop work.<sup>16</sup> Instead it was necessary for me to demonstrate (even to myself) both the why and the how of it. The effort was pleasant but exhausting. To draft a generalization that deserves to be printed in black face (almost an impossibility—did you ever look into the "Hornbook Series" of texts?),<sup>17</sup> on the

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"Samuel Williston was to me like an older brother. . . . Never actually in his classroom . . . he was nevertheless my chief teacher in the law of contracts." Arthur L. Corbin, *Samuel Williston*, 76 HARV. L. REV. 1327, 1327 (1963); see also *infra* note 19 (quoting passages from Williston's autobiography complimenting Corbin).

15. Letter from Arthur L. Corbin to Robert Braucher (Nov. 13, 1961) (Robert Braucher Papers, Harvard Law School Library, MS Box 17, Folder 7).

16. Many observers have expressed surprise that a "Realist" such as Corbin participated in the making of a Restatement. Realists have little faith in the relevance of rules. But Corbin had a strong belief in rules as working tools. For an excellent exposition of this, see Klau, *supra* note 14, at 511-30. Occasionally, he could be quite firm as to the need for a rigid rule. Addressing the "mailbox rule" he stated, "[w]e need a definite and uniform rule as to this." 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 78, at 337 (1963). More typical, however, is the following comment in the same section: "Dogmatic statements wherever they are found, in court opinions, in learned treatises, in official 'Restatements,' cannot be relied on. . . ." *Id.* at 335. One could multiply examples, but it is the rigid side of Corbin that more often escapes notice. Consider his comment on *Pym v. Campbell*, 6 El.& Bl. 370 (Q.B. 1856) (holding that condition precedent to formation of contract may be shown by parol evidence because there is no contract): "Even though the court's reasoning was unsound, the decision rendered has been followed in far too many cases to be disapproved now." CORBIN, *supra*, § 83 n.97.

For Corbin's considered and mature statement as to "rules," see *infra* note 47.

17. Corbin here refers to the now discontinued practice of the West Publishing Company. Books in its Hornbook Series used to have in bold type at the beginning of each section a short summary of the rules contained in the section. For example, PROSSER ON TORTS contained such "Blackletter" summaries in its first edition (1941) and its second edition (1955), but not in the third (1964) and later editions.

basis of our complex, inconsistent and immense system of law, requires all the intellectual resources that any man or group of men possesses. We found it so in the Twenties; and you will find it so in the Sixties. I worked happily with Sam Williston for 10 years<sup>18</sup> (more than half of that time without pay), feeling most of the time that we were not competent for the job. At the same time, I was sure that the effort was worth while—it was so beneficial to me. I am still sure that the results were worth while. There are Chapters and Sections in which we eliminated some dismal swamps, recognized areas of evolutionary progress, and effected some analytical improvements. At other points, there was failure to do any of these things. You certainly have a “revising job”; but there is something worth revising.

First of all—and above all—let me assure you that in sending the mass of stuff to Goodrich (stuff that they will reduce to type, if they can, in Phila.) I did not have the slightest notion that I “had revised” the document or had submitted anything as the last word. In my young experience there is no “last word.” My “stuff” was submitted merely to be as helpful as I can. You and your Committee are to use it and abuse it just as you see fit. I expect to continue work, although I can not hope to cover the whole Restatement. From first to last, Sam Williston begged his advisers to submit alternative drafts (not merely to criticize orally). I complied with his request,

18. In a tribute to Cornell Professor George Jarvis Thompson, Corbin briefly described his collaboration with Williston on the first RESTATEMENT thus:

For nearly ten years, between 1922 and 1932, I worked many days with George, Samuel Williston and others in preparing the two volumes known as the RESTATEMENT OF THE LAW OF CONTRACTS published by the American Law Institute. It involved about four conferences per year, some of them a week in length, our small group associating together both at meals and at work. In summer, this occurred by the blue water on the coast of Maine; during the Christmas holidays, we met at a club near Pinehurst, N.C. It was a most harmonious and industrious group; and the mind and personality of George Thompson supplied a full share of the industry and added much to the harmony and to the value of the work. Samuel Williston, the chief Reporter, was 94 years of age September 24, of this year. I myself have been retired from active teaching at Yale for 12 years. George was like our younger brother, always helpful, suggestive, and affectionate.

Arthur L. Corbin, *To Professor George Jarvis Thompson*, 41 CORNELL L.Q. 4 (1955).

Williston's recollection of the locale of these meetings is somewhat more detailed: Except during the summer and at the time of the Christmas vacation most of our conferences were held in the Law School of one of the teachers who took part in the discussion. Many were held in Cambridge, many in New Haven, where I enjoyed the hospitality of the Graduates' Club; two were in Ithaca, where the Willard Straight Hall gave us excellent living quarters; one or more were in Philadelphia.

SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 312 (1941).

George Jarvis Thompson was the professor who taught me contract law. He was the co-author, with Williston, of the revised (second) edition of Williston's treatise. He was an effective teacher, one of the best at Cornell. He struck the class as a thoroughly decent and pleasant human being. Toward the end of the academic year, he and his wife gave a party for the first year class. It came as a shock to us when we learned that every student received an invitation except the two black students. This was the spring of 1953. *Brown v. Board of Education*, 347 U.S. 483 (1954), was decided one year later.

in fact submitting at his special request a complete first draft of the Chapter on Assignment. There is one page in Sam's autobiography that I greatly appreciate.<sup>19</sup> The Chapters on Judicial Remedies were prepared by me as his Co-Reporter. No draft ever remained unaffected by the discussions and criticisms of 4 Conferences. I should like to take part in your conferences; but that is impossible. If in the course of the work you are in New Haven, I should deeply welcome the chance to talk over with you some of your problems. Probably no one else knows the contents and the history of this Restatement as well as I do.

Yours most sincerely,  
Arthur L. Corbin

You will understand that I have to hurry, hurry.

21 Robinwood Road  
Hamden 17, Conn.  
Nov. 2, 1959

Professor Robert Braucher,  
Harvard Law School

Dear Mr. Braucher:

I have now finished my notes on the chapters on Third Party Benef., "Joint" Contracts (God Save us!), and Assignment.<sup>20</sup> You may be surprised,

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19. Because of the context of the letter, Corbin presumably refers to this passage: My greatest indebtedness [in preparing the Restatement] was to Arthur Corbin. His mastery of the law of contracts was only equalled by his generosity in contributing his best efforts to a work that for the most part would pass under another's name. He had moreover made a special study of terminology, and his keen eye for ambiguities and inexactness of expression saved me in many slippery places. His friendship and that of the Director [William Draper Lewis] and Professor Thompson remain major benefits to me of my work with the Institute. For a part of the *Restatement of Contracts* Arthur Corbin assumed the position of reporter and I acted as one of the advisers.

WILLISTON, *supra* note 18, at 312.

There is another passage in Williston's autobiography concerning Corbin that bears mentioning. During their summer stay in Maine, Williston generally played golf at the end of the working day.

Here Arthur Corbin began to allow his increasing years to swerve him from his youthful devotion to tennis to a game supposed to be more suitable to the elderly. At first, he merely walked around the links with us. Younger and stronger than I, he would generously carry my clubs; but as often happens, it was not long before the caddy's game was far superior to that of the man whose clubs he had carried.

*Id.* at 313. Was this last clause about golf, or a metaphor for larger things? When I first read it some years ago, I understood it as metaphor.

Williston's autobiography is often gripping in its compelling frankness concerning Williston's frequent bouts with mental illness.

20. Presumably these "notes" are the notes in the margin of the Restatement that Mr. Wolkin, Assistant Director of the ALI, received in 1964. See Letter from Paul Wolkin, *supra* note 6.

as I was, at the extent and difficulty of the necessary revision. I still hope that other chapters will not need so much. Of late, I have not felt very well; but the work goes on. I have 3 other jobs in process.

You will find great variance in the usefulness of "advisors." Some will need more advice than they give. Few, if any, will go over the subject matter with the laborious and constructive care that any Reporter needs. All of them may be helpful critics, calling attention to lapses and failures to take account of legal progress. I will suggest a few names, although my close contacts are few.

Friedrich Kessler (Y.L.S.) a scholar, a clear thinker, and a lovely man. I have tested him in many ways. He probably knows my own treatise more thoroughly than anyone else. That his early work was German is an advantage.<sup>21</sup> He is working too hard here to take on much additional labor.

Grant Gilmore (Y.L.S.) former student of mine—scholarly man.<sup>22</sup> I think that he did good work on the Uniform Com'l Code.

Addison Mueller (U.C.L.A., formerly YLS).<sup>23</sup> My best student, in his time was one of our best teachers here. Nothing against him in his resigning

21. Friedrich Kessler received his *Dr. jur.* in Berlin. Some of his finest and most influential writings are partly comparative in nature. These include Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

A precursor to the current law and economics movement was Friedrich Kessler & Richard H. Stern, *Competition, Contract and Vertical Integration*, 69 YALE L.J. 1 (1959).

Professor Kessler is co-author of a contracts casebook that is used by many law teachers. The original edition was FRIEDRICH KESSLER & MALCOLM PITMAN SHARP, *CONTRACTS: CASES AND MATERIALS* (1953). The current edition is FRIEDRICH KESSLER, GRANT GILMORE & ANTHONY KRONMAN, *CONTRACTS: CASES AND MATERIALS* (3d ed. 1986).

For a tribute to Professor Kessler, see Grant Gilmore, *Friedrich Kessler*, 84 YALE L.J. 672 (1975).

22. Grant Gilmore was one of the major actors in twentieth century law. Perhaps his best work was *THE AGES OF AMERICAN LAW* (1977). He was also co-editor of FRIEDRICH KESSLER & GRANT GILMORE, *CONTRACTS: CASES AND MATERIALS* (1970). His most useful works for the legal profession were GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* (1957) and the two volume treatise, *SECURITY INTERESTS IN PERSONAL PROPERTY* (1965), which stemmed from his work in drafting Article 9 of the Uniform Commercial Code. He is remembered by Anthony Jon Waters, *For Grant Gilmore*, 42 MD. L. REV. 65 (1983), and by various colleagues, *In Memory of Grant Gilmore*, 92 YALE L.J. 1 (1982). A bibliography of his writings appears in 92 YALE L.J. 12 (1982).

Contract scholars know him best by his *DEATH OF CONTRACT* (1974), a book which apparently was intended to be taken largely tongue-in-cheek, a spoof, that took its title from the "death of God" theologians who were fashionable at the moment. Surprisingly, many took it to be quite serious. According to its parody of history, the concept of contract was invented by Christopher Columbus Langdell, perfected by Oliver Wendell Holmes, and propagated by a scrivener named Samuel Williston. Certainly, Gilmore was having fun, and knew better. Dozens of books entitled "Contracts" preceded Langdell's efforts on this planet. Although Gilmore knew better, some of his junior colleagues in the teaching profession took him too seriously.

23. Addison Mueller's innovative casebook, *CONTRACT IN CONTEXT* (1952), is described in KALMAN, *supra* note 12, at 189-90:



here. I got him his job here (and was chief influence in getting his professorship at 20,000 in U.C.L.A.) Original, tough-minded, hard worker, fine man, knows my work well, but no "yes-man". 10 yrs in Lumber business.

Harold Shepherd (Stanford) You probably know him and his work.<sup>24</sup> I spent one day with him at Stanford and liked him.

Karl Llewellyn & Soia Ment[s]chikoff (U. Chi.) They were at H.L.S. with you. Karl was as stimulating a student as I ever had. A bit poetic and

The casebook provided a step-by-step account of the problems of a businessman, Mr. Ohner, encountered in having an apartment house built. Each chapter covered a set of events Ohner faced, from borrowing money to pay for the structure, to obtaining plans from the architect, to completion of the poorly constructed building. . . . In short, Mueller tried to provide a context for contract law. He included no index because 'its pinpoint type reference' could not be reconciled with 'his basic idea that students should not be encouraged to read the law out of context.' He organized the book on functional lines to eliminate 'the artificial one-concept-at-a-time organization of the traditional course.'

*Id.*

One can infer that the book did not succeed as a teaching tool. In 1971 he published *CONTRACT LAW AND ITS APPLICATION*, the successor to which is *ARTHUR ROSETT, CONTRACT LAW AND ITS APPLICATION* (4th ed. 1988). Rosett explains that, like earlier editions, "[t]he book continues to be divided in two parts: an initial introductory survey of the essential concept of contract law, followed by three chapters that look at the special context of sales, personal services, and construction contracts through materials organized around practical problems. *Id.* at xx. Rosett explains that Addison Mueller's "career was a bridge between the era of the great systemizers, particularly his mentor, Professor Arthur Corbin, and the school of skeptical pragmatists and critical analysts." *Id.*

Professor Mueller also contributed to the periodical literature. Perhaps foremost among these publications are Addison Mueller, *Contracts of Frustration*, 78 *YALE L.J.* 576 (1969); Addison Mueller, *Contract Remedies: Business Fact and Legal Fantasy*, 1967 *Wis. L. Rev.* 833. In this last article he takes the position that contract remedies are largely irrelevant to the resolution of disputes. On this point I have publicly disagreed, arguing that legal remedies are "weapon[s] of last resort when other methods of obtaining one's goals fail. Similarly the reluctance of many to resort to law to resolve contract disputes may indicate a healthy social system rather than the irrelevance of contract law." JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 11 (3d ed. 1987). This passage first appeared in the second edition in 1977 at page 11. Today, after some years as an arbitrator and consultant, I am more inclined to believe that the unwillingness of many to resort to contract remedies is more a function of the high emotional and financial cost of obtaining a remedy than it is a function of the irrelevance of contract law or the health of our social system.

24. Harold Shepherd had a varied academic career, having taught at Wyoming, Stanford, Chicago, Cincinnati, Washington and Duke, serving as Dean at Wyoming, Washington and Duke. In an era when the number of Contracts casebooks was small, in 1939 Foundation Press published his *CASES AND MATERIALS ON THE LAW OF CONTRACTS* (1939), which was a revision of GEORGE P. COSTIGAN, *CASES ON CONTRACTS* (3d ed.). A second edition followed in 1946. A new edition with a transformed title appeared in 1952: *CONTRACTS AND CONTRACT REMEDIES* (3d ed. 1952). In 1957 a fourth edition appeared with HARRY H. WELLINGTON as co-editor. In 1960, a new casebook, *HAROLD SHEPHERD & BYRON D. SHER, LAW IN SOCIETY, AN INTRODUCTION TO FREEDOM OF CONTRACT, CASES & MATERIALS* (1960), was launched. With others, Shepherd prepared the Washington State annotations to the *RESTATEMENT OF CONTRACTS*.

emotional;<sup>25</sup> but there is no better man on a legal problem.<sup>26</sup> A N. City Bank V.P. wanted to fire him (as a law clerk). The Legal V.P. said "No you don't". The Chairman of Columbia Bd. of Trustees wanted to fire him. Dean Young B. Smith laid his own resignation on the table. After Karl's preliminary pamphlet on Uniform Com'l Code—Sales, the Columbia Trustee said that he had been mistaken (having carefully studied it). Judge Swan, Willard Luther, Sterry Waterman & I were Karl's advisors on U.C.C. Sales. Karl was the best and most original Reporter that I have known. No "pride of opinions", quick to understand and appreciate, not easy to knock out.<sup>27</sup> Wm Draper Lewis told me that Karl made the best report to the A.L.I.

25. A recent article demonstrates rather convincingly the strong influence of the German Romantic tradition on Llewellyn and on his work. James Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156 (1987). Llewellyn's biographer, however, expresses doubt that German legal thought played any significant role in molding his thoughts. William Twining, Book Review, 100 YALE L.J. 1093, 1097 (1991) (reviewing KARL LLEWELLYN, *THE CASE LAW SYSTEM IN AMERICA* (Paul Gewirtz ed., Michael Ansaldi trans., 1989) (written by Llewellyn in German for German lawyers)). He makes no reference to Whitman's thesis.

As in the case of Friedrich Kessler, Llewellyn was fluent in German. Although he was born in the United States and his family background was not Germanic, he had studied in a German high school. At the outbreak of World War I, he volunteered for, and was inducted into the Prussian army, where he was awarded the Iron Cross. He was discharged for refusing to take an oath of allegiance to the Kaiser. Such an oath would have jeopardized his American citizenship. See WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 91, 479-87 (1973) (describing Llewellyn's war experiences). Despite his reputation as a hard-drinking man, his productivity was enormous. He wrote over 250 published works. Despite what his biographer charitably describes "as one of the most exotic prose styles in all legal literature," *id.* at *ix*, he was undoubtedly the most influential and productive of the "realists." A selected bibliography of his works appears in Twining's biography. *Id.* at 555-61. Among his most significant works were *THE BRAMBLE BUSH*, first printed for students at Columbia in 1930, but later published by Oceana in 1951. Many law students found this their somewhat jolting introduction to law. His culminating works were, *THE COMMON LAW TRADITION—DECIDING APPEALS* (1960), and *JURISPRUDENCE; REALISM IN THEORY AND PRACTICE* (1962). His papers at the Library of the University of Chicago are described in WILLIAM TWINING, *THE KARL LLEWELLYN PAPERS* (1968), and supplemented in RAYMOND M. ELLINWOOD, JR. & WILLIAM L. TWINING, *THE KARL LLEWELLYN PAPERS: A GUIDE TO THE COLLECTION* (1970). See also N.E.H. Hull, *Some Realism About the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Correspondence, 1927-31*, 1987 WIS. L. REV. 921 (examining Llewellyn's perception of and Dean Roscoe Pound's criticism of Realist movement).

26. Llewellyn co-authored with E. Adamson Hoebel, a prominent anthropologist, a case study of Cheyenne law, *THE CHEYENNE WAY* (1941). Hoebel later wrote of this collaboration as follows:

I had with each case carried the analysis of its import to the limits of my ability. Yet again and again, as our discussions proceeded, he would challenge or add, defending what he had added, if defending were needed, with inexhaustible brilliance, until I in awe one day queried, "Karl, how do you do it?" "Why, Ad," he replied, with more pride in his profession than in himself, "I am a case-trained lawyer—and what is more, I am one of the three best in America."

E. Adamson Hoebel, *Karl Llewellyn: Anthropological Jurisprudence*, 18 RUTGERS L.J. 735, 742-43 (1964).

27. See Arthur L. Corbin, *A Tribute to Karl Llewellyn*, 71 YALE L.J. 804 (1962); Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813 (1962).

Council that he had heard (and he had heard them all). Soia M., Karl's wife, is a fine supplement to Karl, very clear mind, sound masculine<sup>28</sup> legal judgment,<sup>29</sup> keeps Karl's feet on the ground. They both call me "Dad." Not surprising that I like 'em. P.S. Karl had signed a round robin letter to Pres. Butler asking him not to appoint Smith as Dean.<sup>30</sup> But quite unlike

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28. To Corbin, whose social formation was in the nineteenth century, the description masculine was highly complimentary. Soia Mentschikoff, a student of Llewellyn's, became Llewellyn's third wife. Llewellyn was lured to Chicago from Columbia. Both Llewellyn and Mentschikoff were made offers at the same time. The President of the University of Chicago was Robert Hutchins, who had almost certainly been a student of Llewellyn's at Yale.

29. Soia Mentschikoff was on the faculty of the University of Chicago from 1951 to 1974, when she became Dean of the University of Miami Law School. She continued as Dean until 1982, when she became Distinguished Professor Emeritus at that School. When Corbin states that she was with Braucher at the Harvard Law School, he presumably refers to her status there as a visiting professor in the years 1947-49. She worked with Karl Llewellyn, from 1942-51, on the revision of the Sales Act and ultimately the creation of the Uniform Commercial Code. She authored *COMMERCIAL TRANSACTIONS: CASES AND MATERIALS* (1970), and co-authored, *SOIA MENTSCHIKOFF & IRWIN P. STOTZKY, THE THEORY AND CRAFT OF AMERICAN LAW—ELEMENTS* (1981). The strength of her personality expressed as a teacher, lecturer, and advocate for the enactment of the Uniform Commercial Code is captured in E. Allan Farnsworth et al., *In Memoriam—Soia Mentschikoff*, 16 U. MIAMI INTER-AM. L. REV. 1 (1984).

30. When Dean Huger W. Jervy resigned the Columbia deanship in 1928, Professor Young B. Smith was appointed Acting Dean. The faculty was divided on the permanent succession. The realists supported Professor Herman Oliphant while others supported Professor Smith.

President [Nicholas Murray] Butler appears to have been fully aware of the situation and he despaired of the Faculty coming to any agreement. At last, after consulting with Harlan F. Stone, Judge Benjamin N. Cardozo, then a Trustee of Columbia, and other eminent alumni, he decided to take matters into his own hands. Without drawing into his confidence the Faculty's special committee on the deanship the President announced. . . . he would recommend to the Trustees that Professor Smith be appointed Dean.

President Butler's announcement created an immediate uproar. Many members of the Faculty, particularly those who supported Professor Oliphant's candidacy, felt that Butler's action was autocratic and in flagrant disregard of what they conceived to be the Faculty's traditional prerogatives. A plenary session of the Faculty was convened at the Men's Faculty Club on 117th Street to protest the action; absent members were summoned from as far away as Virginia. The Faculty sat all day Sunday, May 6 [1928], and well into the night. . . . The great meeting of protest thus broke up without accomplishing anything. . . . [T]he Trustees made Young B. Smith Dean.

The dissident professors were not disposed to acquiesce in the revolt, a fact of which other institutions were aware. William O. Douglas, Assistant Professor of Law, resigned in protest against what he said was President Butler's highhanded action. . . . [h]e accepted Dean Robert Hutchin's invitation to join the Yale Law School Faculty. Hessel E. Yntema, Associate Professor of Roman Law, also resigned. . . . He and Leon C. Marshall, Visiting Professor, whose temporary appointment terminated the same day, went to Johns Hopkins University, where an Institute of Law was being set up under Walter Wheeler Cook to translate into institutional form his plans for a research school of jurisprudence that would be devoted to the objective study of law as a social institution. Herman Oliphant, Professor of Law, also left to join

Oliphant,<sup>31</sup> Karl did not resign. Instead, he worked the harder. He has a loyal heart. Karl overworked on the U.C. Code; he had to get by many "practical men." Karl is probably "fed up" with codifying.

Get advisors who have written and published (first class stuff), if you can. You should have a Judge or two. I had some help from Cardozo. But he must be a live wire.

Judge Tom Swan (my old pal still, and former Dean.) Hohfeld and I chose him.<sup>32</sup> There is none better (see L. Hand's opinion).<sup>33</sup> A fine critic with the best judgment. But he is nearly 82.

Judge Roger Traynor (Calif. Sup. Ct.)<sup>34</sup> Formerly a professor in Calif. L.S. His court has rendered some excellent Contract opinions. I give Roger much of the credit. I talked with him a few times in Berkeley (1949-50) and liked him.

Judge Wyzanski—you know him.<sup>35</sup> I like his opinions. I heard him take part in a Council discussion with Karl and others.

Cook at Johns Hopkins. . . . Underhill Moore, Professor of Law was invited to Johns Hopkins, too, but he regarded that venture as unsound, and remained at Columbia, speaking to no one, not even to say 'Good Morning,' while he negotiated with the authorities at Yale. Moore finally resigned as of January 1, 1930 to accept a position with Yale's Institute of Human Relations at an annual salary of \$15,000.

STAFF OF THE FOUNDATION FOR RESEARCH IN LEGAL HISTORY UNDER THE DIRECTION OF JULIUS GOEBEL, JR., HISTORY OF THE SCHOOL OF LAW OF COLUMBIA UNIVERSITY 304-05 (1955) (footnotes omitted).

31. Corbin makes it clear in the two references to Herman Oliphant in these letters that Oliphant was not one of his favorite people. Oliphant was *the* leader of the "Realists." Other than a few law review articles, and statistical surveys, his contributions were ephemeral. One of his students, the late Orville H. Mann, confided in me that he could remember only one point from Oliphant's course in contracts—there is no such thing as law. Having been denied the Columbia deanship, he departed for the Johns Hopkins Institute of Law, a research institute that quickly floundered. The Institute of Law "was set up as an independent school of the University in June, 1928, and began its work in October of that year." JOHN C. FRENCH, A HISTORY OF THE UNIVERSITY FOUNDED BY JOHNS HOPKINS 247 (1946). "Early in 1933 the financial situation of the University reached such a point that the Trustees were unwilling to incur further deficits for the Institute. Reluctantly they voted that its work should be suspended indefinitely on July first of that year." *Id.* at 248.

32. Yale President Arthur Twining Hadley appointed "Corbin and Hohfeld heads of a committee to select a new dean." KALMAN, *supra* note 12, at 99.

33. Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167 (1947) (remarks on the occasion of Judge Swan's seventieth birthday).

34. Roger Traynor was a Justice of the California Supreme Court from 1940 to 1964 and Chief Justice from 1964 to 1970. His opinions are the subject of a symposium issue, 13 STAN. L. REV. 717-864 (1961). Included therein is Stewart Macauley, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812 (1961). Many of Traynor's achievements are recorded in a California Law Review symposium. 53 CAL. L. REV. 5 (1965). Professor Bernard Schwartz ranks Roger Traynor with the likes of Marshall, Kent and Cardozo as one of the ten greatest judges in American history. Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 S. ILL. U. L.J. 405, 407. Memorials to Justice Traynor can be found at 35 HASTINGS L.J. 741 (1984); 71 CAL. L. REV. 1037 (1983); 69 VA. L. REV. 1381 (1983).

35. Judge Charles Wyzanski, appointed in 1941, at the age of 35, to the United States District Court for Massachusetts by Franklin Roosevelt, was one of the great Federal District

Judge Hammond (Md. Sup. Ct.) Don't know him. I have merely seen a few of his opinions; they read well.<sup>36</sup>

Judge Chas. E. Clark (former Dean here)—a first rate legal mind. I suppose that his work as Reporter for the Fed Code of Procedure was excellent; and he must have been able to work with others.<sup>37</sup> [But as Dean he often misunderstood others and others often misunderstood him. This is off the record.]<sup>38</sup>

There may be a man on the N.J. Sup. Ct. How about Harry Heher?<sup>39</sup>

Yours sincerely,  
Arthur L. Corbin

Court Judges of the twentieth century. See Derek C. Bok et al., *In Memoriam: Charles E. Wyzanski, Jr.*, 100 HARV. L. REV. 705 (1987); see also Mark L. Wolf, *Few are Chosen: The Judicial Appointments of Oliver Holmes, Jr., and Charles Edward Wyzanski, Jr.*, 74 MASS. L. REV. 221 (1989).

36. Hall Hammond later became Chief Judge of the Maryland Court of Appeals. Corbin must recently have read such decisions as *Lutz v. Porter*, 112 A.2d 480 (Md. 1955), and *Dove v. White*, 126 A.2d 835 (1956). They are lucid, well-reasoned, but otherwise unremarkable.

37. While Charles Clark was a faculty member, he and Robert Hutchins, another future Yale Dean, sought to change the school to "the first honors or research school in America." KALMAN, *supra* note 12, at 105 (quoting a press release prepared by Hutchins). Corbin and Swan are said to have expressed disgust with the proposal. *Id.* at 106. Hutchins' realization that the press release "created enormous consternation" is recorded in Robert Whitman, *Soia Mentschikoff and Karl Llewellyn: Moving Together to the University of Chicago Law School*, 24 CONN. L. REV. 1119, 1121 (1992). A related proposal, involving the reduction of the number of students, was put into effect over Corbin's objections. KALMAN, *supra* note 12, at 106.

Clark's body of writings "includes by one count 14 books and 157 articles. . . ." Steven Flanders, *Comments on Procedural Law and Judicial Administration: A Parable from the Career of Charles E. Clark*, 12 JUST. SYS. J. 85, 88 (1987). Clark, consistent with a major strain of realism which looked toward the social sciences for guidance, poured an immense amount of energy into empirical-statistical studies of civil procedure, but "[h]ardly ever . . . did he succeed in drawing precise prescriptions from clear empirical findings." *Id.* at 88. On the general failure of the realists to actualize their aspiration of blending law with the social sciences, see KALMAN, *supra* note 12, at 88-97.

Clark is perhaps best known as the primary drafter of the Federal Rules of Civil Procedure, for his role as Judge and Chief Judge of the United States Court of Appeals for the Second Circuit, and for his hornbook, CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* (1928, 2d ed. 1947). Charles Alan Wright and Harry M. Reasoner edited and published a collection of Clark's essays on procedure in *PROCEDURE, THE HANDMAID OF JUSTICE; ESSAYS OF JUDGE CHARLES E. CLARK* (1965). Clark's papers are collected in the Sterling Library of Yale University. See MARY BENJAMIN, *THE CHARLES E. CLARK PAPERS* (1982).

A paper that should be of special interest to contracts and remedies scholars is Arthur J. Jacobson, *The Equitable Administration of Long-Term Relations: An Appreciation of Judge Clark's Opinion in Parev Products*, in JUDGE CHARLES EDWARD CLARK 45 (Peninah Petruck ed., 1991). The book in which the paper appears was published in commemoration of the 100th anniversary of Clark's birth.

38. Corbin apparently was reluctant to issue this mild criticism of Clark's personality. For comments by other colleagues and acquaintances, see KALMAN, *supra* note 12, at 116-17. Especially frank are the comments of Clark's son, Elias Clark, *Memories of My Father*, in JUDGE CHARLES EDWARD CLARK 153, 160-63 (Peninah Petruck ed., 1991).

39. Corbin, whose preoccupation with issues surrounding the admissibility of parol evidence was nearly an obsession, must have found Judge Heher's opinions in cases such as

21 Robinwood Road  
Hamden 17, Conn.  
June 3, 60

Professor Robert Braucher,  
Harvard Law School

Dear Mr. Braucher:

The patient survived; and hopes to go to Maine for the summer within a few days. My address there will be West Boothbay Harbor, Maine. Probably the sea air there will help to build up my depleted energy.

Of course, you found the revision a much bigger job than you expected. I hope that my notes will assist in producing a result that will deserve to last another 30 years. My steady work for 30 years discovered many weak spots and accumulated much new factual background. Sam & I were likely to depend on one case that we had accepted and taught—especially if the opinion was by Holmes, Cardozo, Hand. A very striking example is § 197. But a major weakness of Rest. I is due to 30 more years of life with their multitudes of decisions. We must write the generalizations of 1960.

Yours sincerely,  
Arthur L. Corbin

21 Robinwood Road  
Hamden 17, Conn.  
Jan. 22, 1961

Professor Robert Braucher,  
Harvard Law School

Dear Mr. Braucher:

I have made a careful reading of your Preliminary Draft, §§ 1-74; and I find it exceedingly good. I have sent some notes and comments on it to Judge Goodrich, requesting him to have them typewritten and sent to you in time for your consideration before the February Conference.

Many of my notes are very limited in character. There are a few Sections to which I devoted a good deal of time and effort. In every such instance, the Section is excellent; but I hope that you will find some of my suggestions worth while.

I hope that some of your other advisors are able and willing to add constructive suggestions. About all that Williston and I ever got was intelligent listening and comment at the Conference table.

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Atlantic Northern Airlines v. Schwimmer, 96 A.2d 652 (N.J. 1953) and Harker v. McKissock, 96 A.2d 660 (N.J. Super. Ct. Ch. Div. 1953), gratifying indeed. They are entirely consistent with, and draw heavily from, Corbin's treatise. They preceded, by fifteen years, Roger Traynor's better-known opinions in Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641 (Cal. 1968), and Masterson v. Sine, 436 P.2d 561 (Cal. 1968).

My sight grows more impaired and at times makes my work difficult. It is not impossible that I have at times overlooked something in the Draft. I should much like to take part in the Conference in Phila, especially to support some of the amendments you have made to the first Edition; but it is not possible.

Please be well assured that I take great satisfaction in your Draft and have not the least doubt that the Revision is and will be a vast improvement over Edition 1. The amendments that I suggest are really very few—fewer than any Draft of mine would have had to accept. Your draft gives evidence of immense labor. It would have been very pleasant to discuss matters with you in person. But I am lucky enough to be able to keep on working as much as I do (at 86) in my chimney corner.

Yours sincerely,  
Arthur L. Corbin

21 Robinwood Road  
Hamden 17, Conn.  
Jan 27, 1961

Dear Mr. Braucher:

Your draft is so good that I could not withhold expression of approval, to both you and Judge Goodrich. It may help a bit also if (at my decrepit 86) I relate some of the experience of the original Committee. I have not met your advisors; but I feel sure that all of them will be intent on producing the best Revision possible rather than on demonstrating their own superiority. That was true of all of Williston's advisers. Oliphant, however, was too impatient and self-confident and he resigned after perhaps a year.

The criticisms of your draft will test it for weak spots, the critic picking his shot; so that you will (at first) feel on the defensive. I felt that strongly when I moved from Adviser to Reporter on Remedies. But you have appointed advisers for just that purpose. I judge that it has never disturbed your equanimity to admit uncertainty (or even error) to your students. Hold your ground, let them argue against each other, ask them to draft a substitute, and after enough discussion dictate the result to the stenographer and reserve it for further consideration. [A stenog. report of the whole discussion is useless.]

No doubt Williston felt less "trepidation" in 1923 than you do; but I would have felt more. He was older than the advisers (13 yrs older than I) and he had published much more. Also, he had had large contacts with bench and bar, and "he had a way with him." He asked his advisers (if they would) to go through his treatise and point out spots needing correction or amendment. Nobody did this but me. I went over his Vol. 1 page by page, covering the margins with pencilled notes. Then I shipped the volume to him. On receiving his first draft, I sent him 65 typed pages of comment. He treated me so well at the Conference that it never ceased to be a pleasure to work with him—even when we differed. At his request, I wrote the first draft of the Chapter on Assignment and he made it the basis of his first draft. He often said that

§ 90 was my Section; but the fact is that it is now in exactly the form in which he first submitted it. Every other adviser opposed it; but we bludgeoned them until they seemed to be convinced.<sup>40</sup>

Williston was hard to move from a position (justly so); but he could be moved (and was in Third Party Benefs. and Assignment).

I am glad that you refer so often to the Uniform Com. Code. Karl L. was a prime Reporter (quick, scintillating, no "pride of opinion"). He had good helpers on Sales—especially Tom Swan, Willard Luther, Soia—besides me. New York slowed up its enactment (not because of the Sales part); but it will make its way, and will be used as much as the Restatement, even if not enacted.

Some attacks will be directed at me rather than at you. The Courts have not abused my treatise; but many judges continue to repeat that parol evidence for interpretation of an "integration" (assumed to exist) is not admissible if the words are "plain and clear" and "unambiguous." In most such cases

40. Section 90 gave the black letter formulation of the doctrine of promissory estoppel. Although the RESTATEMENT OF CONTRACTS avoided the phrase "promissory estoppel," the term was used and perhaps coined by Samuel Williston in his 1921 treatise on contracts. See 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 139 (1921), where the cases that foreshadowed the doctrine are collected, woven together, and given sympathetic treatment and the label "promissory estoppel." Williston there toys with a more expansive theory whereby promissory estoppel and consideration would be fused. He puts forward and then rejects a tentative definition of consideration "as any legal benefit to the promisor or legal detriment to the promisee given or suffered by the latter in reasonable reliance on the promise," but adds that "[s]uch a definition eliminates the necessity of a request by the promisor for the consideration. The proposition is by no means without intrinsic merit, but it should be recognized that if generally applied it would much extend liability on promises, and that at present it is opposed to the great weight of authority." *Id.* at 313.

Grant Gilmore relates the substance of various conversations with Corbin in the 1950s on the source of RESTATEMENT OF CONTRACTS § 90, while confessing the possible slippage between fact and memory. According to this narrative, Williston wrote and got approval for a narrow definition of consideration in RESTATEMENT OF CONTRACTS § 75 which enshrined the notion that consideration necessarily involved a bargained-for exchange. Corbin then convinced the Restaters of the need to provide for the many cases where the court had found for the plaintiff because of unbargained-for reliance on a promise. GRANT GILMORE, THE DEATH OF CONTRACT 62-65 (1974). Corbin in this letter credits to Williston the authorship of section 90. He neither confirms nor denies having convinced Williston of the need for a section of this kind. Note that he speaks of their partnership in bludgeoning the other Advisers into accepting the doctrine. Some of Corbin and Williston's contemporaries credited the doctrine to Williston. See, e.g., William J. Lloyd, *Consideration and the Seal in New York—An Unsatisfactory Legislative Program*, 46 COLUM. L. REV. 1, 26-27 (1946) (stating that promissory estoppel was "promoted by Professor Williston because of his conviction that the area of enforceability of promises should be expanded to include many gift promises. . ."). Lloyd had been teaching at Syracuse since 1938. A more telling source is Karl Llewellyn. In an article "dedicated to Arthur L. Corbin, my father in the law," he credits Williston with inventing the topic of "contracts without consideration," while preserving the idea of consideration as bargained-for detriment. "In this lies a fine compromise between honor to the past and furtherance of case-law reform as has ever been in our system conceived." Karl N. Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243, 1262 n.48 (1938). The dedication appears in the initial footnote. Further doubt is cast on Gilmore's version of the origins of Section 90 by Klau, *supra* note 14, at 533-39.



(not in all) in which this is said, counsel have merely argued for an “after-thought” interpretation without offering any substantial parol evidence to support it. The old Restatement supports the judges to a large extent. On this subject I have drafted a series of brief, limited, definite generalizations that may help to win assent. I inclose them herewith for such use (or disuse) as you may wish to make. Don’t trouble to write to me concerning them; you are already overworked.

If at any time I can support you against attack, or can assist in a solution, don’t fail to let me know. Both my time and my capability grow more limited.

No doubt, Judge Goodrich will be at your right hand. I have confidence in him. Director Lewis always opened our Conferences and was always helpful—sometimes obtuse (not posing as a specialist) but always ready to join in a laugh at himself.

Yours sincerely,  
Arthur L. Corbin

*Interpretation. Some general statements.*

1. The primary and ultimate purpose of interpretation of the words of a contract is to determine and make effective the Intention of the Contracting Parties.

2. No contract should ever be interpreted and enforced with a meaning that neither party gave to it.

3. There is no rule of law or language that requires a party to a contract to comply with any standard of usage or interpretation in choosing the words used in the contract.

4. No party to a contract should ever be bound by an interpretation that is determined exclusively by the linguistic education and experience of the Court (trial or appellate).

5. When a court excludes relevant evidence of the meaning given to the words of a contract by the parties thereto, on the ground that the words are not “ambiguous,” it is making interpretation depend exclusively on its own linguistic education and experience.

6. When a court enforces a contract in accordance with an interpretation that seems “plain and clear” to the court and excludes relevant convincing evidence that the parties intended a different interpretation, it is “making a contract for the parties,” one that they did not themselves make.

7. No word or group of words in any language has an “objective” meaning separate from and independent of its actual use by one person to convey his thoughts to another person.

8. No writing is ever an “integration” of the terms of a contract unless the parties thereto have manifested their assent to it as such.

9. No writing, whatever its form and content, is sufficient to establish its existence and operation as an “integration” assented to as such by the parties.

10. When a valid contract (written or oral) is made, the parties thereby discharge and displace antecedent agreements and negotiations (written or oral) that are inconsistent with it.

11. There is no way to determine whether evidence of an antecedent agreement or negotiation varies or contradicts an "integration" until after the "integration" has been interpreted.

12. A party to a bargaining exchange (written or oral) is never bound in accordance with an interpretation different from the one that he gave to its words, if he neither knew nor had reason to know that the other party gave them a different interpretation.

13. A party to a bargaining exchange (written or oral) may be bound in accordance with an interpretation that he did not give to its words, if

(a) he knew or had reason to know that the other party in fact gave *that* interpretation to the words, *and*

(b) the other party neither knew nor had reason to know that the first party did not give the words *that* interpretation.

14. One who makes a promise in a unilateral contract that is not a bargaining exchange, and in reasonable reliance on which neither the promisee nor an intended beneficiary substantially changes his position in a manner that the promisor had reason to foresee, is not bound in accordance with an interpretation of his expressions that is different from his own interpretation and intention.

21 Robinwood Road  
Hamden 17, Conn.  
Nov. 13, 1961

Dear Mr. Braucher:

I received your new proposals in re "Consideration" some two weeks ago; but I was too old and weary to clarify my thoughts at once and to write to you at once. Now, I am still old and weary; but my "thoughts" are handwritten. I have thought best to send them to Herbert Goodrich to be put in type, so that you may have them in that form. They were not easy of expression.

I have sent to him for typing, also, my critical discussion of *Sokoloff v. Strick*, 172 A.2d 302 (Pa. 1961),<sup>41</sup> dealing with the "parol evidence rule." It

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41. This case is noted at great length and strongly criticized in 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 577 n.34 (Supp. 1992). The criticism of this case in the Pocket Parts and in the passage in the letter referring to the case reflects Corbin's consuming concern with the tendency of courts to give great respect to writings at the expense of the parties' actual intent, which is often more fully articulated in oral discussions. This concern is found throughout his treatise and in many passages of his letters to Robert Braucher.

In his last writings he more pithily described the holding of *Sokoloff v. Strick*: "[P]laintiff sought a decree that a deed of trust and a promissory note were inoperative for the reason that they had expressly been executed as a 'sham,' the court threw out the case without even requiring the defendant to file an answer. The court said that the plaintiff was making an 'attempt to evade, circumvent and nullify the parol evidence rule,' a rule which 'must be firmly maintained if the

may assist you later on. My analysis of that "rule" and its operation gives great offense to the "illusion of certainty," beloved of many. But I have read all the Contract cases for the last 12 years; and I know that "certainty" does not exist and that the illusion perpetrates injustice.

Undoubtedly, I am a disturbing "reagent"; I hope also a "catalyst."

Yours sincerely,  
Arthur L. Corbin

21 Robinwood Court  
Hamden 17, Conn.  
March 7, 1962

Dear Mr. Braucher:

Friday, March 16, 10 A.M. will be quite convenient. I shall be glad to see you.<sup>42</sup> I am very deaf and I have only half an eye; but I can talk with you. I have been hit hard; but I am on an even keel and would like to see you.

Karl Llewellyn was almost my son. He and Soia have known me as "Dad" for years.

On March 1, my third son, David, aged 51, went down with the jet plane in N.Y. He was chief counsel for the Underwriters for United, Pan Am., Douglas, and others, in charge of hundreds of crash suits.<sup>43</sup> He was

integrity of written instruments is to be sustained instead of being rendered meaningless,' even the integrity of an instrument that has no 'integrity'! The decision is shown no mercy in the author's note in the 1964 Pocket Supplement to vol. 3, Section 577, note 34. The judge who wrote the opinion repeated his language in two subsequent cases, but in *Caplan v. Saltzman*, two judges dissented, saying: 'While the parol evidence rule may be a 'Rock of Gibraltar' in the sea of contracts, it must not also be a Rock of Scylla upon which contractual obligations are shipwrecked and destroyed,' and in *Kready v. Bechtel, Lutz & Jost*, the court held that the parol evidence was admissible, the judge who repeats his words in *Sokoloff* being a lone dissenter, saying: 'The majority decision unintentionally, but without the slightest doubt *realistically* undermines a myriad of recent and controlling decisions of this court.' How necessary it is for a lawyer and a judge to keep abreast of the decisions and formulations (not merely a few) as 'the law' proceeds in its evolutionary growth.

Corbin, *supra* note 13, at 191 (emphasis in the original) (footnotes omitted).

42. On January 26, 1962, Judge Henry Friendly wrote to Robert Braucher suggesting "it would be a most gracious thing, if . . . you could stop in New Haven and see the old gentleman." Letter from Henry Friendly to Robert Braucher (Jan. 26, 1962) (Robert Braucher Papers, Harvard Law School Library, MS Box 17, Folder 7).

43. See N.Y. TIMES, Mar. 2, 1962, at A15 (reporting death of David Lee Corbin). The Times reported David Corbin's death as follows:

Mr. Corbin was a leading specialist in aviation law and was a partner in the firm of Haight, Gardner, Poor & Havens of 80 Broad Street.

Mr. Corbin, 51, had been on a business trip. He was the secretary and director of United States Aviation Underwriters, Inc., of 110 William Street.

Mr. Corbin lived with his family at Pheasant Lane, Greenwich, Conn. He was a

commuting almost weekly to Los Angeles, where he was in charge of a suit by 30 or 40 plaintiffs against United and the U.S.A. (the Las Vegas collision). David was the best man and the soundest and most effective lawyer, that I have ever known. But my family and my case work for the Pkt. Supp. are keeping me alive. I have revised Vol. 6 into 2 volumes, with much rewriting on Arbitration. The galley proofs will soon be coming. Reading and noting all the Contract cases for the last 12 years have kept me on the front line. I shall be looking for you.

Yours sincerely,  
Arthur L. Corbin

[Letter includes hand drawn map with directions]

Restatement  
West Booth Harbor, Me.  
August 31, 1964

Professor Robert Braucher,  
Harvard Law School

Dear Mr. Braucher:

I have received Prelim. Draft No. 5 and have given it one reading. It is in your usual clear style and seems to be an improvement on Restatement I.

Here in Maine I have no copy of my own Treatise or of my previous revisions. My Pocket Supplement, to be published in September, contains notes on some late cases.

In § 143, it might be well to note that § 142 does not require any express provision to make the obligation to the third party irrevocable.

The oculist required me to give up the dilation eye-drop. Since May 18, I have read no reports of decisions.

I return home, 21 Robinwood Road, Hamden 17, Conn. on Sept 8. I shall be 90 in October, very deaf and bad vision.

Yours sincerely,  
Arthur L. Corbin

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graduate of Yale College and Yale Law School.

He is survived by his widow, Margaret; two sons, David and Philip, and a daughter, Margaret, his father, Arthur, and two brothers, Herbert and Arthur, Jr.

*Id.*

21 Robinwood Road  
Hamden 17, Conn.  
October 29, '64

Mr. Robert Braucher,  
Harvard Law School

Dear Mr. Braucher:

Glaucoma has just caught the reading spot in my remaining eye; but I must write this letter. Your name is on the G.O.P. list of professors for Goldwater. I too expect to vote for him, even though his campaign has been ineffective and his inept use of the English language has made him vulnerable to attack and misrepresentation. He is the more honest of the candidates and the less likely to get us into a nuclear war. Also, he is himself more sympathetic with the Negro than is Johnson.

My vote next week will be my 18th vote in a presidential election. In every case I have had firm convictions and a definite choice. But since joining the Yale faculty in 1903 I have never taken part in a political campaign. This is because I concentrated on the building up of the Yale Law School and upon the understanding and improvement of the "law" as a part of the evolutionary process of life.

There are 3 articles in the Readers Digest for Sept., Oct., and November that ought to elect Goldwater but of course will have little effect: September article by a Cuban on the Bay of Pigs—the most disgraceful episode in American history.<sup>44</sup> October article from McArthur's account on the Korean War—an equally disgraceful and injurious episode.<sup>45</sup> The November article by Nixon, well written, restrained, verifiable in every respect except as to Nixon's personal conversations with Castro and Kennedy.<sup>46</sup>

My 90th anniversary—a most undesired one—came and went. Altho deaf and blind and my law work ended, I could not refuse a request of the editor of the Kansas Law Review, representative of my native State and my Alma Mater. The article will appear in the December number.<sup>47</sup>

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44. Mario Lazo, *Decision for Disaster: At Last the Truth about the Bay of Pigs*, READER'S DIGEST, Sept. 1964, at 241.

45. Douglas MacArthur, *No Substitute for Victory*, READER'S DIGEST, Oct. 1964, at 263.

46. Richard M. Nixon, *Cuba, Castro and John F. Kennedy, Some Reflections on United States Foreign Policy*, READER'S DIGEST, Nov. 1964, at 281.

47. See Corbin, *supra* note 14. In this article Corbin articulated his theory as to "rules" and "certainty" in the law. Surprisingly, it was consistent throughout his lengthy career. The statement is as follows:

What then is 'the law'? And is there no certainty in 'language'? Are there not rules of law 'fixed and settled' by which judges as well as other men are bound, expressed in words that are 'plain and clear' with one true and 'objective' meaning? A long-time researcher must reply that there are no such 'rules' and no such 'words.' Nevertheless, the 'law' consists of 'rules,' an increasing multitude of them as time goes on. They are not to be scorned merely because they are 'tentative working rules,' growing and changing with the conditions of human life, and with the

My mind ranges over many of the other 17 presidential elections; I still "writhe" over many episodes, when the wrong man was elected for bad reasons. I could not avoid expressing at least this much to you.

With my high regards,  
Arthur L. Corbin

21 Robinwood Road  
Hamden 17, Conn.  
Jan. 27, '65

Dear Mr. Braucher

Some time ago I sent to you the briefs on appeal in a New Jersey case. The appellant's counsel, having won his case, has sent to me a copy of the opinion of the Sup. Ct. of N.J.<sup>48</sup> I herewith inclose it for your use.

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developing *mores* of mankind. Without them the world would be a chaotic and guideless world, with every man acting in accordance with his own vagrant emotion and desire. Also, a 'rule' is not to be scorned merely because it is supported by one 'authority' and not by another. 'Authorities' vary greatly in merit and wisdom. The 'rules' that they support are often conflicting, and after a longer or shorter time are always modified or supplanted by later 'authorities.' Therefore, every student, writer, and judge has a responsibility of his own. He must make a choice among 'authorities,' among 'rules,' and among interpretations of the words by which a rule is expressed. The author is not downgrading the 'authority' of his own treatise when he invites every reader to make a critical study of the sources on which its many 'tentative working rules' are based. Justice Cardozo, saintly and wise and understanding and sympathetic, was never able to find a 'solid land of fixed and settled rules' or the 'Paradise of a Justice' that would declare itself, and yet he went from the highest court in New York to the highest court of the United States. In spite of his 'doubts and misgivings, hopes and fears,' he had to depend upon his own 'vacillating mind and conscience.' In every case that a judge decides, he must realize that his decision and the 'rule' or 'principle' that he adopts and applies to the unique set of facts before him will constitute one more datum to be added to the multitude of those that preceded it, on the basis of which students and writers and other judges will create new rules and principles and doctrines to modify and supplant those that have served earlier days. What industry, what clarity of mind, and what nobility of conscience are required in this judicial process!

*Id.* at 194-95.

48. The slip opinion attached to the letter with a paper clip is noted in the pocket parts to 4 ARTHUR L. CORBIN, CORBIN ON CONTRACTS, A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 801 (1951), as follows:

This section, at p. 179 (as well as § 793) is cited in *Schlanger v. Federal Ins. Co.*, 206 A.2d 874, 44 N.J. 17 (1965) where the condition of the bond was that contractor pay all persons supplying material for the contract. In ordering recovery on the bond for a materialman, the court noted that intent of the promisee and promisor is too complex for consideration and not decisive. Taking together the contractor's promise in the main contract to pay for all materials and the condition of the bond, there was clearly a promise to pay persons such as the plaintiff, and not merely a promise of indemnity.

It seems likely that surety bond cases such as this were a primary reason why the RESTATEMENT (SECOND) dropped the distinction between creditor and donee beneficiaries. See RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d, illus. 12 (1979).

I wish that I were still able to read the current reports. I hope that you are not overworking.

Yours sincerely,  
Arthur L. Corbin

21 Robinwood Road  
Hamden 17, Conn.  
March 5, '65

Dear Mr. Braucher:

Altho I must write this without seeing clearly the words written, I wish to send to you a note that I had earlier prepared to send to you. It may suggest something in reference to statutes.

I recommend *Hammes v. Tucson Newspapers*, 324 F. 2d 101 (C.A.9th, 1963); and *U.S. v. Ray Thomas Gravel Co.*, 373 SW 2d 333, 338 (Tex.Civ.App. 1963). Both are noted in my 1964 Pkt. Supp. to Vol. 4, § 903, p. 195.

Failure to record, as provided by statute, should probably never be held to invalidate the assignment, or prevent the assignee from having a prior right as against a second assignee who had actual notice. The statute should merely protect innocent purchasers for value. Of course, statutory wording is variable.

I regret that I shall not be able to make a second edition of Vol 4, incorporating the Pkt. Supp. cases and notes. Good luck to you. I wish that I were able to help you more.

Yours sincerely,  
Arthur L. Corbin

Additional cases:

Pocket Supp. § 902, *Employers Ins. Co. v. School Dist.*, 99 N.H. 188 (1954) and other cases.

21 Robinwood Road  
Hamden 17, Conn.  
Jan. 28, 1966

Dear Mr. Braucher:

Yes, I am still alive. I received from Hdqrs. a copy of your last Draft on Assignment, with their special request for Comment. They had not sent me the earlier draft or drafts, I am so nearly blind that I cannot read this as I write it; but I struggled hard and read your Draft until I could read no longer, I observed no major departures from Rest. I, unless involved in the U.C. Code (which of course you must follow). I wonder whether you have encountered any important opposition. My hearing is so bad that (even with my hearing aid) the reading process is too exhausting. My mind remains

so clear that I regret my inability to take part in controversies, both governmental and legal. Last summer, I was able to write to the House of Rep. Banking Comm. a reasoned disapproval of the Dist. Ct. decision against the Mfrs-Hanover Bank & Trust Co.

I shall be curious to see what you do with the Statute of Frauds. Of course, old § 17 should be wholly replaced by the U.C. Code. In view of that Code and of the English statutory action, as well as the many variations in the U.S., it is my inclination to omit any attempt by the ALI to generalize, substituting a mere Resume of the present situation. Doubtless, that would offend many lawyers.

I hope that I live long enough, with ability to read your Revision of Chap. 9; but I cannot expect to have that pleasure. Of course, you have seen the Cornell reprint of my late Sections in my Pocket Supp. for 1964.<sup>49</sup> Please note that I personally read every important Contract decision in the U.S.A. between 1951 and May 18, 1964. The Second edition of Vols. 1, 3, 5, and 6, along with my Pocket Supplement of 1964, brought my opinions on all 12 volumes down to May 18, 1964. I would have made a second ed. of Vol 4 also except for my blindness. But the Pocket Supp. contains more than 300 pages, with full casenotes and some new Sections. My 2d ed. of Vol 3 has a Supplement of over 300 pages.

You certainly have reason to approve my repeated urgings to Herbert Goodrich (and Wechsler) that you must not be hurried in your work. [Are we likely to have reason to regret the death of Judge Goodrich?]<sup>50</sup>

I have assigned to Yale all my copyrights and Royalties. Rostow and Kessler welcomed that. I have given to Kessler my only copy of my own extensive Suggestions on the Revision of Cont. Restatement I.

I have a notion that I might enjoy a discussion of "The Great Society" with you.

Sincerely yours,  
Arthur L. Corbin

Kessler and Rostow will control all subsequent additions to and revisions of my works. It looks to me now as if Lou Pollak will make an excellent Dean.

Arthur Corbin died in 1967. Robert Braucher did not select any of the people Corbin suggested as advisors. Braucher turned over the job of

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49. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161 (1965).

50. Judge Goodrich died on June 25, 1962. A telegram from Paul A. Wolkin to Robert Braucher, of that date reads: "I AM SORRY TO INFORM YOU THAT JUDGE GOODRICH DIED EARLY TODAY." Telegram from Paul A. Wolkin to Robert Braucher (June 25, 1962) (Robert Braucher Papers, Harvard Law School Library, MS Box 17, Folder 7). Herbert Wechsler replaced Goodrich as director of the American Law Institute. Corbin seems to be concerned that Wechsler might pressure Braucher to speed up the preparation of the RESTATEMENT (SECOND).



Reporter to E. Allan Farnsworth in 1971. Begun in 1962, the *Restatement (Second)* was finally completed in 1979. The Foreword to the *Restatement (Second)* credits Corbin with leaving the restaters “a rich legacy in his elaborate written notes.”<sup>51</sup>

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51. RESTATEMENT (SECOND) OF CONTRACTS Foreword, at vii (1979).

## APPENDIX

## REPRODUCTIONS OF ORIGINAL LETTERS

YALE UNIVERSITY  
LAW SCHOOL  
NEW HAVEN, CONNECTICUT

ARTHUR L. CORBIN  
PROFESSOR OF LAW EMERITUS

21 Robinwood Road  
Hamden 17, Conn.

Sept 23, 1959.

Professor Robert Braucher,  
Harvard Law School.

Dear Mr. Braucher;

I greatly appreciate your very kind letter. It would give me pleasure to serve as your adviser and to meet with your Revising Committee; but I am now 85, my sight is failing badly, and my hearing is defective. By this time you may have seen (or heard about from Judge Goodrich) the results of some very hard labor that I put in this summer up in Maine. Judge Goodrich asked me to go over the Rest. Contracts and indicate the places that I thought needed revisions. I agreed to do so. On beginning, I found at once that a very thorough revision of the whole is necessary. I am too deeply interested in the Restatement to make that statement and stop work. Instead it was necessary for me to demonstrate (even to myself) both the Why and the How of it. The effort was pleasant but exhausting. To draft a generalization that deserves to be printed in black face (almost an impossibility — did you ever look into the "Hornbook Series" of texts?), on the basis of our complex, inconsistent and immense system of law, requires all the intellectual resources that any man or group of men possesses. We found it so in the Twenties; and you will find it so in the Sixties. I worked happily with Sam Williston for 10 years (more than half of that time without pay), feeling most of the time that we were not competent

(over)

for the job. At the same time, I was sure that the effort was worth while — it was so beneficial to me.

I am still sure that the results were worth while. There are Chapters and Sections in which we eliminated some dismal swamps, recognized areas of evolutionary progress, and effected some analytical improvements. At other points, there was failure to do any of these things. You certainly have a "revising job"; but there is something worth revising.

First of all — and above all — let me assure you that in sending the mass of stuff to Goodrich (stuff that they will reduce to type, if they can, in Phila.) I did not have the slightest notion that I "had revised" the document or had submitted anything as the last word. In my young experience there is no "last word". My "stuff" was submitted merely to be as helpful as I can. You and your Committee are to use it and abuse it just as you see fit. I expect to continue work, although I can not hope to cover the whole Restatement. From first to last, San Williston begged his advisers to submit alternative drafts (not merely to criticize orally). I complied with his request, in fact submitting at his special request a complete first draft of the Chapter on Assignment. There is one page in San's autobiography that I greatly appreciate. The Chapters on Judicial Remedies were prepared by me as his Co-Reporter. No draft ever remained unaffected by the discussions and criticisms of 4 Conferences. I should like to take part in your conferences; but that is impossible. If in the course of the work you are in New Haven, I should deeply welcome the chance to talk over with you some of your problems. Probably no one else knows the contents and the history of this Restatement as well as I do. Yours most sincerely,

Arthur S. Barber

You will understand that I have to hurry, hurry.

YALE UNIVERSITY  
LAW SCHOOL  
NEW HAVEN, CONNECTICUT

21 Robinwood Road  
Hamden 17, Conn.  
Nov. 2, 1959.

ARTHUR L. CORBIN  
PROFESSOR OF LAW

Profess Robert Bracher,  
Harvard Law School.

Dear Mr. Bracher:

I have now finished my notes on the chapters on Third Party Benef., "Joint" Contracts (God Save ~~us~~!), and Assignment. You may be surprised, as I was, at the extent and difficulty of the necessary revision. I still hope that other chapters will not need so much. Of late, I have not felt very well; but the work goes on. I have 3 other jobs in process. You will find great variance in the usefulness of "advisors." Some will need more advice than they give. Few, if any, will go over the subject matter with the laborious and constructive care that any Reporter needs. All of them may be helpful critics, calling attention to lapses and failures to take account of legal projects. I will suggest a few names, although my close contacts are few.

Friedrich Kessler (Y.L.S.) a scholar, a clear thinker, and a lovely man. I have tested him in many ways. He probably knows my own treatise more thoroughly than anyone else. That his early work was German is an advantage. He is working too hard here to take on much additional labor.

Grant Gilmore (Y.L.S.) former student of mine - scholarly man. I think that he did good work on the Uniforms, Com'l Code.

Addison Mueller (U.C.L.A. formerly Y.L.S.) My best student, in his time was one of our best teachers here. Nothing against him in his resignation here. I got him his job here (and was chief influence in getting his professorship, at 20000 in U.C.L.A.) Original, tough-minded, hard worker, fine man, knows my work well, but no "yes-man". 10 yrs in lumber business.

Harold Shepherd (Stanford) You probably know him and his work. I spent one day with him at Stanford and liked him.

Karl Lewellen } (U. Chi.) They were at H.L.S. with you. Karl was  
+ Sonia Mentakhtoff } as stimulating a student as I ever had. A bit poetic and emotional; but there is no better man on a legal problem. A N. City Bank V. P wanted to fire him (as a law clerk). The Legal Rep said "No, you don't". The Chairman of Columbia Bd of Justices wanted to own

fire him. Dean Young B. Smith laid his own resignation on the table. After Karl's preliminary pamphlet on Uniform Civil Code - Sales, the Columbia Trustee said that he had been mistaken (having carefully studied it). Judge Swann, Willard Luther, Terry Waterman, & I were Karl's advisors on U.C.C. Sales. Karl was the best and most original Reporter that I have known. No "pride of opinion"; quick to understand and appreciate, not easy to knock out. Wm. Draper Lewis told me that Karl made the best report to the A.L.J. Council that he had heard (and he had heard them all). Sonia M., Karl's wife, is a fine supplement to Karl, very clear mind, sound masculine legal judgment, keeps Karl's feet on the ground. They both call me "Dad". Not surprising that I like 'em. P.S. Karl had signed a round robin letter to Pres. Butler asking him not to appoint Smith as Dean. But quite unlike Elephant, Karl did not resign. Instead, he worked the harder. He has a loyal heart. Karl overworked on the U.C. Code; he had to get by many "practical men." Karl is probably "fed up" with codifying. Get advisors who have written and published <sup>(how many)</sup> of you can.

You should have a Judge or two. I had some help from Cardozo. But he must be a live wire.

Judge Tom Swann (my old pal still, and former Dean.) Hobfelf and I chose him. There is none better (see L. Hand's opinion). A fine critic with the best judgment. But he is nearly 62.

Judge Roger Traynor (Calif. Sup. Ct.) <sup>Formerly a Justice in Calif. S.</sup> His court has rendered some excellent Contract opinions. I give Roger much of the credit I talked with him a few times in Berkeley (1949-50) and liked him.

Judge Wyzanski - you know him. I like his opinions. I heard him take part in a Council discussion with Karl and others.

Judge Hammond (Md. Sup. Ct.) Don't know him. I have merely seen a few of his opinions; they read well.

Judge Chas. E. Clark (former Dean here) - a first rate legal mind. I suppose that his work as Reporter for the Fed Code of Procedure was excellent; and he must have been able to work with others. [But as Dean he often misunderstood others and others often misunderstood him. This is off the record.]

There may be a man on the N.J. Sup. Ct. How about Harry Hacker?  
Yours sincerely, Arthur L. Corbin

21 Robinwood Road  
Hamden 17, Conn.  
June 3, 60

Professor Robt Braucher  
Harvard Law School.

Dear Mr. Braucher:

The patient survived; and hopes to go to Maine for the summer within a few days.

My address there will be  
West Boothbay Harbor, Maine.

Probably the sea air there will help to build up my depleted energy.

Of course, you found the revisions a much bigger job than you expected. I hope that my notes will assist in producing a result that will deserve to last another 30 years. My steady work for 30 years discovered many weak spots and accumulated much new facts background. Sam & I were likely to depend on one case that we had accepted and taught — especially if the opinion was by Holmes, Cardozo, Hand. A very striking example, is §197. But a major weakness of Rest. I is due to 30 more years of life with their multitudes of decisions. We must write the generalizations of 1960.

Yours sincerely, Arthur S. Corbin

YALE UNIVERSITY  
SCHOOL OF LAW  
NEW HAVEN, CONNECTICUT

21 Robinwood Road  
Hamden 17, Conn.  
Jan. 22, 1961.

ARTHUR L. COBBIN  
PROFESSOR OF LAW

Arthur L. Cobbin  
Professor Robert Braucher,  
Harvard Law School.

Dear Mr. Braucher:

I have made a careful reading of your Preliminary Draft, §§ 1-74; and I find it exceedingly good. I have sent some notes and comments on it to Judge Goodrich, requesting him to have them typewritten and sent to you in time for your consideration before the February Conference.

Many of my notes are very limited in character. There are a few Sections to which I devoted a good deal of time and effort. In every such instance, the Section is excellent; but I hope that you will find some of my suggestions worth while.

I hope that some of your other advisers are able and willing to add constructive suggestions. About all that Williston and I ever got was intelligent listening and comment at the Conference table.

My sight grows more impaired and at times makes my work difficult. It is not impossible that I have at times overlooked something in the Draft. I should much like to take part in the Conference in Philadelphia, especially to support some of the amendments you have made to the first Edition; but it is not possible.

Please be well assured that I take great satisfaction in your Draft and have not the least doubt that the Revision is and will be a vast improvement over Edition 1. The amendments that I suggest are really very few — fewer than any Draft of mine would have had to accept. Your draft gives evidence of immense labor. It would have been very pleasant to discuss matters with you in person. But I am lucky enough to be able to keep on working as much as I do (at 86) in my chimney corner.

Yours sincerely,

Arthur L. Cobbin

21 Robinwood Road  
Hamden 17, Conn.  
Jan 27, 1961-

Dear Mr. Braucher:

Your draft is so good that I could not withhold expressions of approval, to both you and Judge Goodrich. It may help a bit also if (at my deficit 86) I relate some of the experience of the original Committee. I had not met your advisers; but I feel sure that all of them will be intent on producing the best Revision possible rather than on demonstrating their own superiority. That was true of all of Williston's advisers. Oliphant, however, was too impatient and self-confident; and he resigned after perhaps a year.

The criticisms of your draft will test it for weak spots, the critic picking his spot; so that you will (at first) feel on the defensive. I felt that strongly when I moved from Adviser to Reporter on Remedies. But you have appointed advisers for just that purpose. I judge that it has never disturbed your equanimity to admit uncertainty (or even error) to your students. Hold your ground, let them argue against each other, ask them to draft a substitute, and after enough discussion dictate the result to the stenographer and reserve it for further consideration. [A stenog. report of the whole discussion is useless.]

No doubt Williston felt less "trepidation" in 1923 than you do; but I would have felt more. He was older than the advisers (13 yrs older than I) and he had published much more. Also, he had had large contacts with bench and bar, and "he had a way with him." He asked his advisers (if they would) to go through his treatise and point out spots needing correction or amendment. Nobody did this but me. I went



over his Vol. 1 page by page, covering the margins with pencilled notes. Then I shipped the volume to him. On ~~the~~ receiving his first draft, I sent him 65 typed pages of comment. He treated me so well at the Conference that it never ceased to be a pleasure to work with him — even when we differed. At his request, I wrote the first draft of the Chapter on Assignment and he made it the basis of his first draft. He often said that § 90 was my Section; but the fact is that it is now in exactly the form in which he first submitted it. Every other adviser opposed it; but we bludgeoned them until they seemed to be convinced.

Williston was hard to move from a position (justly so); but he could be moved (and was in Third Party Benef. and Assignment).

I am glad that you refer so often to the Uniform Com. Code. Karl L. was a prime Reporter (quick, scintillating, no "pride of opinions"). He had good helpers on Sales — especially Tom Swan, Willard Luther, Soia — besides me. New York slowed up its enactment (not because of the Sales part); but it will make its way, and will be used as much as the Restatement, even if not enacted.

Some attacks will be directed at me rather than at you. The Courts have not abused my treatise; but many judges continue to repeat that parol evidence for interpretation of an "integration" (assumed to exist) is not admissible if the words are "plain and clear" and "unambiguous." In most such cases (not in all) in which this

is said; counsel have merely argued for an <sup>(3)</sup> "after-thought" interpretation without offering any substantial parol evidence to support it. The old Restatement supports them to a large extent. On this subject I have drafted a series of brief, limited, definite generalizations that may help to win assent. I inclose them herewith for such use (or disuse) as you may wish to make. Don't trouble to write to me concerning them; you are already overworked.

If at any time I can support you against attack, or can assist in a solution, don't fail to let me know. Both my time and my capacity grow more limited.

No doubt, Judge Goodrich will be at your right hand. I have confidence in him. Director Lewis always opened our Conferences and was always helpful — sometimes obtuse (not posing as a specialist) but always ready to join in a laugh at himself.

Yours sincerely,

Arthur L. Corbin

## Interpretation. Some general statements. (1)

1. The primary and ultimate purpose of interpretation of the words of a contract is to determine and make effective the intention of the Contracting Parties.
2. No contract should ever be interpreted and enforced with a meaning that neither party gave to it.
3. There is no rule of law or language that requires a party to a contract to comply with any standard of usage or interpretation in choosing the words used in the contract.
4. No party to a contract should ever be bound by an interpretation that is determined exclusively by the ~~education and experience~~ linguistic education and experience of the Court (trial or appellate).
5. When a court excludes relevant evidence of the meaning given to the words of a contract by the parties thereto, on the ground that the words are not "ambiguous", it is making interpretation depend exclusively on its own linguistic education and experience.
6. When a court enforces a contract in accordance with an interpretation that seems "plain and clear" to the court and excludes relevant convincing evidence that the parties intended a different interpretation, it is "making a contract for the parties", one that they did not themselves make.
7. No word, <sup>or group of words</sup> in any language has an "objective" meaning separate from and independent of its actual use by one person to convey his thought to another person.
8. No writing is ever an "integration" of the terms of a contract unless the parties thereto have manifested their assent to it as such.
9. No writing, whatever its form and content, is sufficient to establish its existence and operation as an "integration" assented to as such by the parties.

- (2)
10. When a valid contract (written or oral) is made, the parties thereby discharge and displace antecedent agreements and negotiations (written or oral) that are inconsistent with it.
  11. There is no way to determine whether evidence of an antecedent agreement or negotiation varies or contradicts an "integration" until after the "integration" has been interpreted.
  12. A party to a bargaining exchange (written or oral) is never bound in accordance with an interpretation different from the one that he gave to its words, if he neither knew nor had reason to know that the other party gave them a different interpretation.
  13. A party to a bargaining exchange (written or oral) may be bound in accordance with an interpretation that he did not give to ~~his~~ words, if
    - (a) he knew or had reason to know that the other party in fact gave that interpretation to the words, and
    - (b) the other party neither knew nor had reason to know that the first party did not give the words that interpretation.
  14. One who makes a promise in a unilateral contract that is not a bargaining exchange, and in reasonable ~~reliance~~ reliance on which neither the promisee nor an intended beneficiary substantially changes his position in a manner that the promisor had reason to foresee, is not bound in accordance with an interpretation of his expressions that is different from his own interpretation and intention.

21 Robinwood Road  
Hamden 17, Conn.  
Nov. 17, 1961

Dear Mr. Braucher:

I received your new proposals in re "Consideration" some two weeks ago; but I was too old and weary to clarify my thoughts at once and to write to you at once. Now I am still old and weary; but my "thoughts" are handwritten. I have thought best to send them to Herbert Goodrich to be put in type, so that you may have them in that form. They were not easy of expressions.

I have sent to him for typing; also, my critical discussion of Sokoloff v. Strick, 172 A.2d 302 (Pa. 1961), dealing with the "parol evidence rule". It may assist you later on. My analysis of that "rule" and its operation gives great offense to the "illusion of certainty" beloved of many. But I have read all the Contract cases for the last 12 years; and I know that "certainty" does not exist and that the illusion perpetrates injustice.

Undoubtedly, I am a disturbing "regent"; I hope also a "catalyst."

Yours sincerely,

Arthur L. Corbin

21 Robinwood Road  
Hamden 17, Conn.  
March 7, 1962

Dear Mr. Braucher:

Friday, March 16, 10 A.M.

will be quite convenient. I shall be glad to see you. I am very deaf and I have only half an eye; but I can talk with you. I have been hit hard; but I am on an even keel and would like to see you.

Karl Rlewellyn was almost my son. He and Eric have known me as "Dad" for years.

On March 1, my third son, David, aged 51, went down with the jet plane in N.Y. He was chief counsel for the Underwriters for United, Pan Am., Douglas, and others, in charge of hundreds of crash suits. He was commuting almost weekly to Los Angeles, where he was in charge of a suit by 30 or 40 plaintiffs against United and the U.S.A. (the Las Vegas collision). David was the best man and the soundest and most effective lawyer that I have ever known.

But my family and my case work for the Pkt. Supp. are keeping me alive. I have revised Vol. 6 into 2 volumes, with much rewriting on Arbitration. The gallery proofs will soon be coming. Reading and writing all the Contract cases for the last 12 years have kept me on the front line. I shall be looking for you.

Yours sincerely, Arthur L. Corbin

Restatement  
West Boothbay Harbor, Me.  
August 31, 1964.

Professor Robert Braucher,  
Harvard Law School.

Dear Mr. Braucher:

I have received Prelim. Draft No. 5 and have given it one reading. It is in your usual clear style and seems to be an improvement on Restatement I.

Here in Maine I have no copy of my own Treatise or of my previous revisions. My Pocket Supplement, to be published in September, contains notes on some late cases.

In § 143, it might be well to note that § 142 does not require any express provision to make the obligation to the third party irrevocable.

The oculist required me to give up the dilation eye-drop. Since May 18, I have read no reports of decisions.

I return home, 21 Robinwood Road, Hamden 17, Conn. on Sept 8. I shall be 90 in October, very deaf and bad vision.

Yours sincerely,

Arthur L. Corbin

21 Robinwood Road  
 Hamden 17, Conn.  
 October 29, '64.

Mr. Robert Braucher,  
 Harvard Law School

Dear Mr. Braucher:

Glaucousma has just caught the reading spot in my remaining eye; but I must write <sup>this</sup> letter. Your name is on the GOP list of professors for Goldwater. I too expect to vote for him even though his campaign has been ineffectual and his inept use of the English language has made him vulnerable to attack and misrepresentation. He is the more honest of the candidates and the less likely to get us into a nuclear war. <sup>Also,</sup> he is himself more sympathetic with the negro than is Johnson.

My vote next week will be my 18th vote in a presidential election. In other words I have had firm convictions and a definite opinion. But since joining the Yale faculty in 1953 I have never taken part in a political campaign. This is because I concentrated on the building up of the Yale Law School and upon the understanding and improvement of the "Law" as a part of the evolutionary process of life.

There are 3 articles in the



2.

Readers Digest for Sept., Oct., and November, that ought to elect Goldwater but of course will have little effect: September article by a Cuban on the Bay of Pigs — the most disgraceful episode in American history. October article from McArthur's account on the Korean War — an equally disgraceful and injurious episode. The November article by Nixon, well written, restrained, verifiable in every respect except as to Nixon's personal conversations with Castro and Kennedy.

My 90th anniversary — a most undesired one — came and went. Altho deaf and blind and my law work ended, I could not refuse a request of the editors of the Kansas Law Review, representative of my native state and my Alma Mater. The article will appear in the December issue.

My mind ranges over many of the other 17 presidential elections; I still "writhe" over many episodes, when the wrong man was elected for bad reasons. I could not avoid expressing at least this much to you.

With my high regards,

Arthur I. Garbis

21 Robinwood Road  
Harden 17, Conn.  
Jan. 27, '65

Dear Mr. Braucher

Some time ago I sent to you the briefs on appeal in a New Jersey case. The appellant's counsel, having won his case, has sent to me a copy of the opinion of the Sup. Ct. of N.J. I herewith inclose it for your use.

I wish that I were still able to read the current reports. I hope that you are not overworking

Yours sincerely,

Arthur L. Corbin

21 Robinwood Road  
Hamden, CT, Conn.  
March 5<sup>th</sup>, '65

Dear Mr. Braucher:

Altho I must write this without seeing clearly the words written, I wish to send to you a note that I had earlier prepared to send to you. It may suggest something in reference to statutes.

I recommend *Hammes v. Tucson Newspapers*, 324 F.2d 101 (CA9, 1963), and *U.S. v. Ray Thomas Gravel Co.*, 373 S.W.2d 333, 338 (Tex. Civ. App. 1963). Both are noted in my 1964 Pkt. Supp. to Vol. 4, § 503 at p. 195. ~~Also § 503, p. 195.~~

Failure to record, as provided by statute, should probably never be held to invalidate the assignment, or prevent the assignee from having a prior right as against a second assignee who had actual notice. The statute should merely protect innocent purchasers for value. Of course, statutory wording is variable.

I regret that I shall not be able to make a second edition of Vol. 4, incorporating the Pkt. Supp. cases and notes. Good luck to you. I wish that I were able to help you more.

Yours sincerely,  
over

Arthur L. Corbin.

Additional cases:  
Pocket Supp. § 902,  
Employers Tr. Co. v. School Dist., 99 N.H. 188 (1954)  
and other cases

21 Robinwood Road

Hamden 17, Conn.

Jan. 28, 1966

Dear Mr. Braucher:

Yes, I am still alive. I received from Hdqrs. a copy of your last Draft on Assignment, with their special request for comment. They had not sent me the earlier draft or drafts, I am so nearly blind that I cannot read this as I write it; but I struggled hard and read your Draft until I could read no longer. I observed no major departures from Rest-I, unless involved in the U.C. Code (which of course you must follow) I wonder whether you have encountered any important opposition. My hearing is so bad that (even with my hearing aid) the reading process is too exhausting. My mind remains so clear that I regret my <sup>in-</sup>ability to take part in controversies, both governmental and legal. Last summer, I was able to write to the House of Rep. Banking Comm. a reasoned disapproval of the Dist. Ct. decision against the Mfrs-Hanover Bank & Trust Co.

I shall be curious to see what you do with the Statute of Frauds. Of course, old § 17 should be wholly replaced by the U.C. Code. In view of that Code and of the English statutory action, as well as the many variations in the U.S., it is my inclination to omit any attempt by the ALI to generalize, substituting a mere Resume of the present situation. Doubtless, that would offend many lawyers.

I hope that I live long enough, with ability to read your Revision of Chap. 9; but I cannot

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expect to have that pleasure. Of course, you have seen the Cornell reprint of my late Sections in my Pocket Supp. for 1964. Please note that I personally read every important Contract decision in the U.S.A. between 1951 and May 18, 1964. The Second editions of Vols. 1, 3, 5, and 6, along with my Pocket Supplement of 1964, brought my opinions on all 12 volumes down to May 18, 1964. I would have made a second ed. of Vol 4 also except for my blindness. But the Pocket Supp. contains more than 300 pages, with full case notes and some new Sections. My 2d ed. of Vol 3 has a Supplement of over 300 pages.

You certainly have reason to approve my repeated urgings to Herbert Goodrich (and Wechsler) that you must not be hurried in your work. [Are we likely to have reason to regret the death of Judge Goodrich?] I have assigned to Yale all my copyrights and Royalties. Rootwin and Kessler welcomed that. I have given to Kessler my only copy of my own extensive Suggestions on the Revision of Cont. Restatement I.

I have a notion that I might enjoy a discussion of "The Good Society" with you.

Sincerely yours,

Arthur J. Corbin.

Kessler and Rootwin will control all subsequent additions to and revisions of my works. It looks to me now as if Love Pollak will make an excellent Dean.

