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WILLISTON ON CONTRACTS

REVISED EDITION BY SAMUEL WILLISTON AND GEORGE J. THOMPSON—A REVIEW

HORACE E. WHITESIDE

The first edition of Williston on Contracts, published in 1920, was a comprehensive treatment of the law of contracts from the pen of a great teacher and scholar and has remained in the small class of great books of the law. Practitioners have relied upon its remarkably accurate statement of the law; judges have enriched their opinions from its masterly exposition; and teachers and students have found within its pages the story of the law's development together with a critical discussion of its foundations and an analysis of its reasoning.

Four volumes of the Revised Edition were published in 1936 and a fifth in 1937. The sixth will appear within a few months, completing the text.[1] After pointing out the scope of this work, with reference both to the subject matter covered and the detail and method of treatment, this review will discuss briefly the inter-relation of the Revised Edition and the Restatement of Contracts. A number of topics will then be examined for the purpose of indicating the extent to which the general views and conclusions of the first edition have been modified.

SCOPE OF THE WORK

This work, even more than the original edition, might be called the law of obligations. It contains the basic principles of the law of contract and a complete treatment of its specialized branches, such as bills and notes, contracts of suretyship, contracts for the sale of goods, contracts for the sale of land, contracts of bailees and innkeepers, and contracts of common carriers. In addition, much of the law governing relational rights and duties is included.[2] Thus, the imposed duties of common carriers and other public service companies are considered in detail, as well as the rights and duties of husband and wife, parent and child, and landlord and tenant. So also, the fiduciary rights and duties of trustees and agents are frequently discussed.

[1]A seventh volume containing forms only is in preparation and will be ready as soon as the text is completed. The eighth volume will contain the index and table of cases, a table of law review articles, and a table of sections of the Restatement of Contracts. The table of cases will contain approximately 80,000 cases, twice the number in the first edition, indicating the tremendous amount of work and eare that has gone into the preparation of this book.

The original edition contained very few references to legal periodieals, but in the Revised Edition the authors have added numerous references to articles in legal periodicals and notes on recent cases. The best of these discussions are also available in the Selected Readings on the Law of Contracts and references to that publication have been included.

[2]See § 32A.

True, these topics are covered in part for the purpose of comparison with the duties undertaken by contract, but the treatment is sufficiently comprehensive and detailed to give to the practitioner a reasonably well-rounded discussion of their subject matter.

The detail with which special topics are treated is shown by an examination of Chapter XXXVI dealing with the transportation contracts of common carriers. This chapter contains extended discussions of charter parties, bills of lading and legislation with reference thereto, the duties and liabilities of a common carrier for goods and passengers, the duty to load and unload goods in carriage by ship and by railroad and the related problems of demurrage for detention of vessels and railroad cars, credit instruments, and bank regulations of export commercial credit instruments. Section 1113A discusses the modern problem of contracts of carriage in international transportation by air, including a full discussion of the Warsaw Convention of 1929; Section 1114A, federal legislation regulating messages by wire and radio; and Section 1134B, the United States Carriage of Goods by Sea Act of 1936.

The pervasiveness of the authors' treatment and the varying types of new material are shown by sampling a few sections, especially those new to the Revised Edition. For example, Section 59A covers general offers and the revocation thereof by radio; and Sections 90 to 90E, implication of assent and counter-promises arising from conduct, including the signing or acceptance of a document, telegraph blank, bill of lading, ticket, etc., or the acceptance of goods or services. Section 401A discusses the mortgagee's rights under a fire insurance policy procured by the mortgagor; Section 421A, the assignment of requirement or output contracts; Section 438A, informal gifts of intangible rights; and Section 438B, gifts by deed or formal writing of rights not represented by documents.

The discussion of incontestable clauses in policies of life insurance has been expanded, and suicide clauses and provisions excluding or limiting risks, distinguished (§ 811). The section following contains a general discussion of the effect of merger clauses in written contracts, the relation of such clauses to the parol evidence rule, and whether evidence of prior fraudulent representations of either principal or agent is excluded by reason of such clauses.

Much of the material in Chapter XXX on conditions implied in fact and independent duties is new and represents a development that has taken place since the publication of the original edition. This chapter includes a classification of independent duties and considers whether breach of a separate contract furnishes an excuse for non-performance, whether mutual debts cancel one another, and the problem of retention of debts, non-performance of an aleatory promise as an excuse, and the rescission of aleatory contracts. Chapter XXXII contains an excellent discussion of transfer of risk in land contracts, including the statute recommended by the Commissioners on Uniform State Laws and comments on the Roman Law and Civil Law.

The following sections in Volume V are of special interest: the detailed treatment of measure of damages for non-acceptance of goods (§§ 1378 *et seq.*); damages for breach of contracts to devise or bequeath property (§ 1411A); specific performance in employment contracts (§ 1423A); specific performance in coöperative marketing contracts (§ 1423B); and specific enforcement of negative covenants in employment and other contracts (§§ 1450A, 1450B). Chapter XLVIII on contracts in restraint of trade contains an excellent analysis of illegality in contracts. The sections on restraint of trade and labor problems have been thoroughly revised in accordance with recent developments. State and federal legislation dealing with resale price maintenance, price fixing, price discrimination, bargains of coöperative associations of agricultural producers, and the remedies for unlawful restraint of trade have been carefully considered.

Statutes

Throughout the work valuable references to statutes, and in many instances detailed discussions of statutory material affecting the law of contracts, have been included. The discussions and annotations of the many uniform statutes governing commercial transactions are surprisingly complete and accurate. These include not only the Negotiable Instrument Law, the Sales Act, and the Bills of Lading Acts, but also the Conditional Sales Act, the Warehouse Receipts Act, the Written Obligations Act, The Bank Collection Code and the Uniform Bank Collection Act, and the Joint Obligations Act.

References to and discussions of federal regulatory legislation are particularly full and important. The treatment of the Interstate Commerce Act in Chapter XXXVI is worthy of special mention. Other statutes, the discussion of which enriches Volume V, are the Securities, Securities Exchange, and Public Utility Holding Company Acts (§ 1516B); and in the chapter on contracts in restraint of trade, the Anti-Trust Acts, Federal Trade Commission Act, National Labor Relations Act, the Robinson-Patman Act, and many others.

Section 1777, in the sixth volume as yet unpublished, covers state regulation of the production and distribution of natural resources within the borders of the state and points out the possibility of such regulation by interstate compacts under the Federal Constitution. Section 1777A contains a full discussion of the important decisions and statutes dealing with the police power of the states over public utility contracts with municipalities. It covers also the closely analogous problem of state regulation of public utility affiliates even when such affiliates are engaged in interstate commerce, state regulation of bargains for intrastate or interstate use of the state's highways, and state regulation of bargains for the issuance and sale of securities by public utility corporations. Finally, this section points out the recent extension of state police power into the fields of price fixing, resale price maintenance, and

regulation of contracts of private industries (other than public utilities), when such industries are "affected with a wide-spread public interest arising from general economic conditions operating upon a paramount industry intimately related to the public welfare."[3]

On the other hand, Section 1778 covers in detail the extension of federal regulation into the fields of intrastate bargains affecting interstate commerce, issuance of securities by interstate carriers, the Public Utility Holding Company Act of 1935, Securities Exchange Act of 1934, Communications Act of 1934, Federal Power Act of 1935, Tennessee Valley Authority Act, Federal Rural Electrification Act of 1936, Federal Air Commerce Act of 1926, the National Labor Relations Act of 1935, the Home Owners Loan Act of 1933, the National Housing Act of 1934, and the now defunct Bituminous Coal Conservation Act of 1935 and National Industrial Recovery Act of 1933.

Relation to Restatement of Contracts

As is stated in the preface, the American Law Institute's Restatement of the Law of Contracts is in large measure based upon the original edition; Professor Williston was the Reporter of the Restatement and Professor Thompson was one of his Advisers. Hence, it was to be expected that the experience of the Reporter in drafting the Restatement, aided and modified both by the critical discussions with his Advisers and suggestions from the members of the Institute, would enrich and color the Revised Edition of the book. In this connection the preface says:

> "[The authors] have made it a primary purpose in their undertaking to provide such an exposition of the decisions and reasons supporting the rules of the Restatement as might fairly take the place of the treatise which was originally planned as a part of the Institute's publication. To this end the presentation of the law in the revised treatise has been carefully collated with the Restatement, the various sections of which are referred to, wherever appropriate, throughout the text and notes. The distinctive contributions of the Restatement are pointed out and evaluated and the position of the Restatement on all controversial subjects defined and supported."

This somewhat surprising statement cannot mean that a Revised Edition of Williston on Contracts was needed to support the Restatement of Contracts, but rather that the purpose of the authors is to provide in the Revised Edition an exposition of the modern law of contract including and emphasizing the siguificant developments embodied in the Restatement.

The discussion of topics which were developed or expanded in the Restatement is most helpful. Section 1570A illustrates the point. The Restatement of Contracts, Section 503, declares that differing mistakes of each of the parties to a contract do not make the contract voidable where the respective mistakes relate to different matters, since such mistakes are equivalent merely

[3]Citing Nebbia v. New York, 291 U. S. 502, 54 Sup. Ct. 505, 78 L. ed. 940, 89 A. L. R. 1469 (1933), *affirming* 262 N. Y. 259, 186 N. E. 694 (1933). See also § 1658 B.

to unilateral mistakes on each side, but "if the mistakes relate to the same matter, the power of avoidance is not precluded because the mistakes of the parties as to that fact are not the same." The rule announced in the Restatement is predicated upon the basic assumption test, i.e., that avoidance for mistake should be permitted where the parties were mistaken (though in different ways) as to the basic assumptions upon which they contracted. By way of illustration:[4]

> *A* contracts to sell *B* a specific stone. *A* believes it to be a topaz and *B* believes it to be a tourmaline. It is in fact a yellow diamond of vastly greater value than either a topaz or tourmaline. *A* can avoid the contract. The mistake as to the character of the stone is mutual.

This hypothetical case is based on the *Wood v. Boynton*,[5] where the plaintiff sold to a jeweler for one dollar a straw-colored stone which she had found. The plaintiff had been told the stone was a topaz, and the jeweler thought it might be so, but both realized they were ignorant of its exact nature and value. It proved to be a rough diamond worth seven hundred dollars. The Wisconsin court did not allow avoidance since it found no mistake as to the identity of the object sold but merely as to its value. Under the Restatement, however, avoidance is possible if each party is mistaken as to the type of stone, even though the mistakes differ, and probably also where both are grossly mistaken as to its value. Section 1570A, when read with the accompanying sections, presents fully the reasoning upon which the Restatement is based, together with the authorities pro and con, as well as the orthodox common law decisions.

Another illustration of changes resulting from the work on the Restatement of Contracts may be observed in the discussion of indirect communication of revocation of an offer. The criticism of this doctrine both on grounds of theory and practical convenience is continued in the Revised Edition, but the doctrine as announced in the Restatement with respect to contracts for the sale of land and specified personal property is accepted.[6] The influence of the Restatement is particularly noticeable in the discussion of the interpretation of offers of unilateral contracts (§ 31A), the revocation of such offers, and the effect of tender (§§ 60-60B); the doctrine announced in Section 45 of the Restatement is followed, and the corresponding rules of the Civil Law are stated for purposes of comparison. As was to be expected, the Restatement is emphasized in the treatment of promissory estoppel[7] and other exceptions to

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[4] RESTATEMENT OF CONTRACTS § 503, Illustration 3.

[5] 64 Wis. 265, 25 N. W. 42 (1885).

[6] §§ 57, 57A; RESTATEMENT § 42.

[7] §§ 139, 140. Notwithstanding the emphasis on promissory estoppel and the espousal of that cause as announced in the Restatement, the Revised Edition does not approve a somewhat similar doctrine which has been generally accepted by the courts, under one theory or another, that performance of or a promise to perform a prior contractual duty to the promisee will support a promise of additional consideration (§§ 130, 130A; RESTATEMENT § 76). The notion that parties should perform their contractual duties even at a loss without asking for additional pay has impressed the authors more than it has impressed the courts. But the stigma of contract-breaker does not attach to a party who bargains for an additional reward for performing or promising to perform his

the consideration requirement (Chapter VII). So also, the analysis of the Restatement is followed in the sections on acceptance of offers by silence, including the effect of the offeree's intent in remaining silent or his previous direction to the offeror to treat silence as acceptance.[8] The effect of the Restatement is again apparent in Section 1293A, which presents an excellent treatment of implied promises not to prevent or hinder performance by the other party and not to prevent the happening of a condition on which the other party's duty is dependent, together with the situations in which no such promise would be implied.

General Viewpoint

A considerable shift in viewpoint is to be found in the treatment of a number of important topics. For example, Chapter XIV on contracts for the benefits of third persons has been expanded and in some sections entirely reorganized. Much of the argument of the first edition has been retained, as, for example, the argument that a court of equity is the proper forum for enforcing the right of a beneficiary,[9] though most American jurisdictions allow a suit at law by either donee or creditor beneficiary. But in general, a more sympathic attitude toward the third party beneficiary doctrine is found throughout this chapter. The emphasis on the "sole beneficiary" found in the first edition has largely disappeared, and the more helpful classification[10] of donee beneficiaries, creditor beneficiaries, and incidental beneficiaries has been adopted from the Restatement. A new Section 356A contains a valuable discussion of the tests by which the courts determine what beneficiaries are within the protected types. And Section 364A considers the limitations on the beneficiary's right imposed by the terms and conditions of the contract. At times the changed viewpoint is apparent even in the section headings; for example, in Section 361 of the first edition the heading reads "Contract to discharge a debt of the promisee", while in the Revised Edition the heading is "Creditor beneficiary may enforce a promise to discharge the promisee's debt to him." The scope of the revision in this chapter is further illustrated by the expanded discussion of statutes (§ 365), the detailed statement of the law in the several states including a valuable summary of the recent New York trend (§ 368), the discussion of rights under statutory bonds and bonds given to secure the payment of laborers and materialmen under building contracts (§ 372), and a new section on the beneficiary problem in collective bargaining agreements and coöperative marketing agreements (§ 379A).

In the treatment of the doctrine of anticipatory breach, however, the

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prior contractual duty to a third person. Such performance or promise is accepted as sufficient consideration by the authors though it is not generally so accepted by the courts (§§ 131, 131A).

[8] §§ 91-91D; RESTATEMENT § 72.

[9] §§ 358, 359.

[10] § 356.

analysis and conclusions of the original edition have been changed but little. In fact, the doctrine is attacked even more vigorously in the Revised Edition. The authors recognize fully that a contracting party is liable for breach of promises fairly to be implied in the contract, i.e., "any promises which a reasonable man in the position of the promisee would be justified in understanding were included,"[11] as in many instances an implied promise of coöperation, and including also in most cases an implied promise not to prevent or hinder performance by the other party and not to prevent the happening of any other condition on which the promisor's duty is dependent.[12] But, except in the case of a promise to marry,[13] they reject as unsound in logic the notions that there can be a breach of a promise to perform an act before the time for performance has arrived and that a suit by the injured party can be instituted before that time on the basis of such anticipatory repudiation.[14]

One argument is that the doctrine of anticipatory breach could not have arisen before the decline of technical rules of common law pleading, since the injured party could not have framed a declaration in special assumpsit.[15] The value of this argument to the authors appears when we appreciate that it does not prevent the party injured by an anticipatory repudiation from relying upon it as an excuse for not performing his own contractual promise, or defending an action brought against him, or rescinding the contract.[16] In short, the doctrine of anticipatory breach could not have arisen had sound principles of pleading been observed and had the distinction between defense and right of action been recognized.[17] Even the supposed practical convenience of the doctrine[18] and its general acceptance by the courts[19] do not impress the authors.

In the Restatement of Contracts,[20] the doctrine of breach by anticipatory repudiation was accepted "Except in the cases of a contract originally unilateral and not conditional on some future performance by the promisee, and of a contract originally bilateral that has become unilateral and similarly unconditional by full performance by one party." Thus, apparently, unilateral promises in insurance contracts were treated as subject to the doctrine where such promises were conditional on some future act or performance by the promisee. But in the Revised Edition practically all unilateral obligations, especially where for the payment of money, are excluded from the doctrine. In Section 1330A it is strongly urged that the doctrine should not apply to insurance contracts for the payment of money in future installments (for

[11] § 1293.
[12] § 1293A.
[13] § 1320.
[14] § 1296.
[15] § 1306.
[16] § 1316.
[17] § 1315.
[18] § 1321.
[19] § 1314.
[20] § 318.

example, disability payments), though conditional upon some act or performance by the insured. In this instance, the authors have not supported the doctrine as announced in the Restatement. The reason may be found in two recent decisions by the Supreme Court of the United States,[21] repudiating the earlier contrary authority in the lower federal courts. Whether these decisions by the Supreme Court will be generally accepted by state courts remains an open question.

It is worth noting that doctrines somewhat analogous to anticipatory breach have recently been developed in the Civil Law, especially in Germany.[22]

In the discussions of restitution, also, the authors have modified but little the general analysis and views of the original edition. Chapter XLIV is entitled "Rescission and Restitution for Breach of Contract; Quasi-Contractual Recovery," and in Section 1455 of this chapter it is stated that "the right of rescission and restitution generally exists as an alternative remedy to an action for damages where there has been repudiation or a material breach of a contract, and is most commonly exercised when the aggrieved party has performed fully or in part, and wishes to recover what he has given or its value." The authors insist that after a total breach or repudiation of a contract the injured party may, when he has performed fully or in part under the contract, *rescind* the contract and secure restitution as an alternative to an action for damages. Moreover, the recovery is repeatedly spoken of as quasi-contractual. About one third of the chapter is devoted to recovery by a party in default under a contract and the measure of such recovery; and several sections relate to rescission for breach of warranty in a sale of goods.

The Restatement of Contracts treats restitution as an alternative remedy for a total breach of contract[23] and does not dwell upon the supposed rescission by the injured party following the breach. Moreover, the Restatement does not label the recovery "quasi-contract." The Restatement does, however, treat under the same topic recovery by a person who is himself in default and recovery for performance under a contract discharged by impossibility.

Both in the Restatement[24] and in the Revised Edition (Section 1454) it is stated that the recovery in restitution is for the value of the performance rendered by the injured party and *received* by the other party. In the Restatement, however, the supposed requirement that the performance be received by the other party is so completely diluted in the Comment and Illustrations that it practically disappears; and in the Revised Edition very little point is made of this requirement although there are certain rather

[21] Mobley v. New York Life Ins. Co., 295 U. S. 632, 55 Sup. Ct. 876, 79 L. ed. 1621, 99 A. L. R. 1166 (1935); Viglas v. New York Life Ins. Co., 78 F. (2d) 829 (1935) reversed 297 U. S. 672, 56 Sup. Ct. 615, 80 L. ed. 604 (1936).
[22] § 1337A.
[23] §§ 326, 347.
[24] § 348.

confusing statements in Sections 1480 to 1483 dealing with recovery by a plaintiff in default.

As is stated in Section 1455, it may be admitted "This choice of remedies [the choice between damages and restitution] was not allowed by the early English law, and there are still many exceptions and inconsistencies[25] in the application of the rule, which are due in part to the fact that it has been developed very largely under cover of the fictitious declaration in *indebitatus assumpsit,* and of equally fictitious inferences that a refusal to perform a contract indicates assent to rescind it and restore what has been given under it." The emphasis on rescission, receipt of benefits, and quasi-contract certainly does not help in clearing up the inconsistencies and confusion which exist with reference to restitution as a remedy for breach of contract. Among the questions that will continue to puzzle the courts so long as this emphasis is continued are the following: restitution after part performance by the defendant (§ 1460), whether plaintiff must return all consideration received by him before suing for restitution at law (§ 1460A), rescission following repudiation or a total breach where no performance has been rendered by the injured party (§§ 1465-1467), and whether notice of rescission or manifestation of an election to rescind is required of the injured party (§ 1469).

It is a strange notion that the only action on a contract or for the enforcement of a contract is an action which could have been brought in special assumpsit under the technical rules of common law pleading, while an action in general assumpsit to recover the value of the performance rendered by a party under the contract is not an action on the contract but is quasi-contract. Certainly, the notion is strange to one who does not mourn the passing of special pleading. In substance, a plaintiff who sues for the value of his performance under a contract after a total breach by the other party invokes and relies on the contract as definitely and completely as a plaintiff who in this situation sues for damages.

To say that the remedy of damages and the remedy of restitution are alternative remedies for breach of contract makes sense. To say that a suit for damages is an action on the contract while a suit for restitution involves rescission and quasi-contract is to give more influence and cogency to the doctrines of special pleading than they can possibly have in the modern law.

It is an added source of confusion to treat under the heading of restitution such differing and inconsistent topics as (a) recovery of the value of his performance by a party injured by a total breach of contract, and (b) recovery on the basis of unjust enrichment by a party who has himself committed a total breach of contract, and (c) recovery for performance rendered under a contract unenforceable because of non-compliance with the Statute of Frauds,[26] and (d) recovery for part performance under a contract where

[25] § See § 1471.
[26] §§ 534-536; RESTATEMENT OF CONTRACTS § 355.

further performance has been excused and the contract discharged by impossibility.[27] True, a common bond in these four types of cases is that under the technical requirements of special pleading the action in each was in general assumpsit, but that accident of history has far less significance today than the essential differences.

The first type of case stated above involves merely an alternative remedy for breach of contract. The second involves a quasi-contractual recovery of the net benefit conferred upon the defendant, on the basis of unjust enrichment, where the plaintiff by reason of his default cannot base his claim on the contract.[28] The third involves a contract which is unenforceable against the defendant but not void, and after the plaintiff's part performance under the terms of the contract, the defendant cannot refuse to go on without paying for the plaintiff's performance as in (a).[29] The fourth involves a situation where the parties had a contract but by reason of circumstances beyond their control it is discharged and the law adjusts their rights under the part that has been performed.[30] Because of these differences, varying measures and theories of recovery are found.[31] It does not help to call the recovery restitution in each case unless we at the same time define exactly what kind of restitution is meant.

In the Retatement of Contracts three of these situations are discussed in one topic under the title "Restitution," and the fourth, though treated elsewhere,[32] is also labeled "restitution." In the Revised Edition, Chapter XLIV is devoted primarily to the first two, but all four are discussed there or elsewhere[33] under the general headings of restitution and quasi-contract. Moreover, the difficulties incident to the study of restitution in its varying senses are increased by discussions of the meaning of "rescission" (§ 1454A), rescission after repudiation or breach where no performance has been rendered by the

[27]See RESTATEMENT OF CONTRACTS § 468. In this situation the contract is discharged without the fault of either party, and the measure of recovery is affected thereby. The RESTATEMENT says that the remedy available to a party who has rendered a performance under the contract is "restitution" and that he is entitled to recover the value of what he has rendered less the value of what he has received; and the value of a performance is to be measured by "The benefit derived from the performance in advancing the object of the contract, not exceeding, however, a ratable portion of the contract price." In other words, a party can recover to the extent that his performance has forwarded the object of the contract, but not in excess of a ratable portion of the contract.

[28] See §§ 1480-1483.

[29]§ 536; RESTATEMENT § 355.

[30]See note 27 *supra*.

[31]See §§ 1478-1483, discussing primarily the measure of recovery by a plaintiff who is himself in default; § 536, stating that the measure of recovery by one who has rendered a performance under a contract unenforceable because of non-compliance with the Statute of Frauds is the "reasonable value of the detriment suffered by the plaintiff," or "the reasonable value of his performance if it was bargained for." This recovery is labeled "restitution" and (in § 534) "quasi-contract". See also § 1977, measure of recovery where full performance is prevented by impossibility is the fair value of the performance rendered and prima facie a pro rata part of the contract price and not the benefit to the other party. In § 1977 it is pointed out that this case must be distinguished both from cases where plaintiff has been in fault and from cases where defendant has been in fault.

[32]§ 468.

[33]See §§ 534-536, 1972-1977.

aggrieved party (§ 1465), and rescission for breach of warranty in a sale of goods (§§ 1461 *et seq.*)

The Revised Edition is no mere supplement or revision bringing the original materials down to date. Every topic has been re-examined and revised in the light of new decisions, recent legislation, and changes in business practice. Additions and modifications, in detail, are found in practically every section. A considerable volume of new material, much of it statutory, has been assimilated and integrated with the old. Notwithstanding the tremendous scope of the work, the discussions of topics on the remote fringes of contract law are quite complete and remarkably accurate. In the Revised Edition, however, the general viewpoint and spirit of the first edition remain; in most instances the arguments and conclusions are substantially unchanged.

This book is a worthy successor to the original Williston, enriched by the authors' experience with the Restatement of Contracts. To the ripe scholarship and rich experience of Professor Williston have been added the fruits of the untiring investigation and independent study of the subject by his disciple and collaborator, Professor George J. Thompson.