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DAMAGES IN CONTRACT

FOREWORD

WILLIAM B. HARVEY*

In 1931 when *Selected Readings on the Law of Contracts* was published under the auspices of the Association of American Law Schools, remedial problems played anything but a prominent role in the volume. The table of contents was almost entirely innocent of any suggestion of remedial coverage. Much of the contents might fairly be represented by such ontological disputes as that revolving around the equation of promises and offers, and the *true* nature of detriment in consideration. To be sure, a careful searcher of the index might find a few entries under such headings as Damages, Specific Performance, and Quasi-Contract. But the focus of attention was substantive rights, validated through a stately dialectic that moved with measured tread through offer, acceptance, consideration. "Hawks, pepper corns, or roundelays—they move the Court like calomel." And still Llewellyn's persistent question, "What the hell!"¹

In fairness it should be said that the "Law of Contracts" as delimited by the distinguished authors and editors of the 1931 volume respected established jurisdictional lines in the academic trade. One didn't fudge on his brothers who taught Damages, Equity or perhaps Quasi-Contract. Thus generations of law students were conditioned early to thoroughly bi-level view of rights: substantive rights, enjoying virtual immunity from the skeptical question, "So what," and remedial rights, examined in variously labeled but discrete curricular packages.

Much current scholarship, of which this symposium provides examples, and, to an increasing extent, the teaching of contract law are now emphasizing the inseparability of substance and remedy. This is gain. But there is more than one level of discussion of remedies—it doesn't suffice to talk only in terms of availability, important though that fact is. One must also ask, if a remedy is available, how good or desirable is it, compared with others which might be used. Consider, for example, the vendor of land facing his defaulting vendee. Can he maintain an action at law for the unpaid price? The evidence suggests

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¹ Llewellyn, *Ballade of the Class in Contracts*, PUT IN HIS THUMB (1931).

that in most states he probably can. But how can he realize on his judgment? Can he levy on the land itself? If so, what passes on the execution sale? If not, what is the status of his title after he removes the stay of execution on his judgment by depositing a deed in court? If such questions and any answers worth hazarding don't mark out a clear channel, and probably even if they do, the relative advantage and risk of alternative remedies remain for consideration. What about a damage action, with or without a prior resale of the land? Or foreclosure of the contract in equity? Or perhaps invoking the forfeiture clause in the contract and forgetting the whole sorry mess? Only after such a weighing and measuring, a totaling of benefit and hazard, can one talk significantly about the vendor's "contract right."

Fortunately, this symposium is not restricted to the damage remedy or those based "on the contract." Equitable relief receives an appropriate bow and several of the articles are concerned with remedies aiming at restitution. The latter area presents one of the most pressing demands for scholarly analysis and systemization of doctrine. Restitution may provide at least a backstop in situations where preferred contract relief fails, but it may offer more. For example, the dramatic results frequently encountered in quasi-contract cases where plaintiff suffers a breach while performing a loss contract suggest a highly attractive alternative to a remedy on the contract.

While trends relating to contract remedies are less dramatic than those in tort, they are nevertheless discernible. Increasing willingness to give restitutionary relief to a defaulting plaintiff and more widespread recognition that lost resale profits are often the only fair measure of compensation on breach of a sale contract characterize the decisions. Modified remedial patterns under the Uniform Commercial Code demand careful analysis and evaluation. In developing and presenting this symposium, the *Journal* makes a significant contribution to an understanding and appraisal of the actually operative law of contracts.