Litvinoff 1976

BOOK REVIEW

7 LOUISIANA CIVIL LAW TREATISE: OBLIGATIONS, BOOK 2. By Sául Litvinoff. St. Paul: West Publishing Co. 1975. Pp. 618.

This book is the most recent to appear in the Louisiana Civil Law Treatise Series.[1] It is the complement of an initial volume by the same author, 6 *Louisiana Civil Law Treatise: Obligations, Book 1*, which appeared in 1969. Together, they constitute an invaluable research tool for the law of Louisiana and are of great benefit to the legal profession generally.

A sound grasp of obligations is, of course, essential to the practice of Louisiana law because it pervades every field of law. Louisiana Civil Code article 1756 states, "An obligation is, in its general and most extensive sense, synonymous with duty."[2]

Professor Sául Litvinoff has established himself as an authority in the Louisiana law of obligations. In his first work, *Obligations, Book 1*, he expounded the civilian concepts of legal and conventional obligations. In his treatment of the Louisiana law of obligations and the sources of that law, he offered a comparative analysis of several civilian jurisdictions and the American common law. As he discoursed on conventional obligations, he focused on the Louisiana approach to the formation of a contract. He dealt thoroughly with the theory of cause, with particular emphasis on its development in Louisiana.

In *Book 2*, Professor Litvinoff begins with the premise that a conventional obligation has come into being; the contract exists. After an introduction to the obligation to give, the author examines the things that are subject to the transfer of ownership, such as things that will exist in the future, things in a lump, things to be weighed or measured, and things to be viewed and tried. The suspensive condition in a contract to give is examined. The author then draws the distinction between the requirements for the transfer of ownership of im-

[1] The Louisiana State Law Institute, a legislatively created body functioning as a legal research and reform committee to recommend code and statutory enactments, is the sponsor of this series. When completed, it should constitute a comprehensive treatise on the basic civil law of Louisiana.

[2] La. Civil Code art. 1756 (1870).

movables and movables. Chapter 6 recognizes the common law concept that only the owner of personal property can pass all title. It is noted that the French doctrine, *la possession vaut titre*, is not accepted in Louisiana law. From this follows a thorough comparative analysis of the bona fide purchaser doctrine peculiar to Louisiana law[3] and the principle as applied at common law and codified in the Uniform Commercial Code (UCC).[4] The author proposes the retention of the Louisiana jurisprudential development of a basis for the bona fide purchaser doctrine but would use Roman, French, and, indeed, Louisiana *equity*[5] as a sound and consistent rationalization to secure that basis.

One of the most difficult problems in Louisiana is examined in detail under the chapter dealing with the postponement of the transfer of ownership by the parties' consent. Therein Louisiana Civil Code article 2462, which provides for the consequences of a promise to sell, is closely scrutinized. An excellent comparative analysis of the bilateral promise of sale or contract to sell follows, including discussions of French, Louisiana, and common law.

Most important to the lawyer practicing in the commercial field is the book's treatment of the transfer of risk. Separate

[3] The sources of the doctrine are Civil Code articles 3506 and 3507:

> If a person has possessed in good faith and by a just title, as owner, a movable thing, during three successive years without interruption, he shall acquire the ownership of it by prescription unless the thing was stolen or lost.

Id. art. 3506.

> If, however, the possessor of a thing stolen or lost bought it at public auction or from a person in the habit of selling such things, the owner of the thing cannot obtain restitution of it, without returning to the purchaser the price it cost him.

Id. art. 3507.

[4] Uniform Commercial Code § 2-403.

[5] *Equitas* (Roman), or *équité* (French) is considered as an expression "of fairness that lies at the foundation of all Western systems of law." 2 S. Litvinoff, Louisiana Civil Law Treatise § 94, at 169 (1975). Louisiana equity is defined in Civil Code article 21 as "an appeal . . . to natural law and reason," and in the obligations articles:

> Equity, usage and law supply such incidents only as the parties may reasonably be supposed to have been silent upon from a knowledge that they would be supplied from one of these sources.

La. Civil Code art. 1964 (1870).

> The *equity* intended by this rule is founded in the christian [religious] principle not to do unto others that which we would not wish others should do unto us; and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land, and that which the parties have made for themselves by their contract, are silent, courts must [may] apply these principles to determine what ought to be incidents to a contract, which are required by equity.

Id. art. 1965.

treatment is necessary for contracts engendering obligations to give and obligations to do. The important difference in the rights and duties in each category is presented. The author suggests that in the contract to give the French and traditional Anglo-American approach, that risk is transferred together with ownership, should be scrutinized in light of modern trends toward shifting risk at the moment of delivery without requiring ownership to be transferred simultaneously.

Almost half of *Book 2* deals with the perplexing problem of putting an obligor in default. In everyday practice, putting in default is of utmost importance. In contracts of every description, the lawyer must constantly decide what constitutes a breach and, beyond this, what constitutes an active or a passive breach. When must an obligor be put in default and what action must the lawyer take to put someone in default? The timing of a putting in default is extremely important in determining the nature of damages to be recovered. The distinction between damages caused by the definitive nonperformance of the obligor (compensatory) and damages caused by the obligor's delay in performing the obligation (moratory) must be recognized when suing on a point of breach. It is presumed that the inexecution of an obligation causes harm to the obligee, although some qualifications may be necessary, depending upon whether nonperformance is total or only partial. If performance of the obligation is merely delayed, however, it does not necessarily follow that damage is caused to the creditor. In the latter case, the burden is on the creditor to show that the obligor's failure has injured his interest. This is the policy behind the requirement of putting in default. Thus, the nature of the putting in default has effect upon the type of damages recoverable.

Clearly, both volumes are of great use to Louisiana attorneys, but the works can also be of aid to those in common law jurisdictions. As comprehensive codification has grown more prevalent in the United States, civilian methodology, previously limited to foreign jurisdictions and Louisiana, becomes a tool with which to approach such legislation.[6] The Uniform Commercial Code is the most obvious example of an important contemporary common law document in codified form. Although the UCC is not to be equated with a code in the civilian

[6] Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. Ill. L.F. 291, 313-20.

tradition, civilian methodology in code interpretation can be utilized. Hesitant and insecure interpretations and misinterpretations of the UCC by the courts can often be attributed to the lack of familiarity of common law attorneys with a comprehensive legislative scheme intended to encompass all problems to be encountered in a specific area of law. This two-volume set provides an excellent illustration of the conceptual approach required to solve problems under such a statute and even for traditional common law problems in contractual relations. *Book 1*, particularly, is useful because of similarities in basic concepts and because of its explicit comparative approach. For example, cause in the civil law is compared and contrasted with its common law counterpart, consideration. We in Louisiana consider it invaluable to our comprehension of *cause* to understand clearly the common law concept of *consideration*. Cannot the common law concept of *consideration* be better applied when compared with *cause*? Similar comparative treatment is given to remission of debt and transaction or compromise. *Book 2* may likewise be helpful, in that it discusses the UCC in connection with transfer of ownership, stolen and lost things, and transfer of risks. Examination of *Book 2* may provide insight as to the policies underlying civil law concepts and thus illuminate by contrast those underlying the UCC.

At present, civil and common law jurisdictions, often widely separated on substantive issues, are drawing closer together in matters of method. Louisiana has adopted much of the UCC and yet continues to apply these provisions within the framework of our own Civil Code obligations articles, particularly in the area of commercial paper. Even though we have not adopted the sales article of the UCC we may improve our own system through an examination of it. As common law jurisdictions begin to rely less heavily on cases and more on legislation, they also may benefit by reference to different systems of law.

It is widely accepted that the UCC presages a future trend toward codification in many areas of law. Time spent by common law attorneys mastering the rudiments of a civilian approach through these volumes would surely not be wasted or limited in application to the UCC alone. When order and stability in law become goals which can be achieved only by compact but comprehensive legislation, these attorneys will be pre-

pared to attack problems which arise under these schemes. These books have the obvious advantages of being written in English and of dealing with familiar American situations, as opposed to the vast majority of civilian treatises. Thus, common law attorneys will be presented with a fully developed code approach, which, with necessary modifications, can be transferred to their particular jurisdictions.

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