

*Obligations, Book 2*, by Saül Litvinoff, West Publishing Company, 1975. Pp.xxiv, 618 (\$39.00).

The traditional matrix of consensual arrangements is the abstract notion of correlative rights and duties. It is the mortar of civil code<sup>1</sup> articles on conventional obligations which in turn support the titles concerning contracts<sup>2</sup> gratuitous and onerous, unilateral and bilateral. Perhaps it is the pervasiveness of this duty-right notion which makes the obligations course among the most difficult and challenging in the curriculum. Mastery of this abstraction comes slowly.

Professor Litvinoff's latest treatise, the sixth in the series *Louisiana Civil Law Treatise*<sup>3</sup> sponsored by the Louisiana State Law Institute, illuminates many of the problems confronting the student of obligations. Written in the classical style of doctrinal writers such as Planiol and Puig-Brutau, this volume and its companion first volume form the single most comprehensive contribution to Louisiana scholarship on obligations. Equally important, the two volumes are major English contributions to the general comparative literature on the subject of obligations.

The volume under review is divided into fifteen chapters. In traditional fashion, it opens with a chapter on general principles. Chapters 2, 3, 4, 5 and 7 treat obligations to give and the transfer of ownership. Chapter 6 focuses on the *bona fide* purchaser doctrine, chapter 8 deals with transfer of risk, chapter 9 deals with obligations to do or not to do, and chapters 10 through 15 constitute an exposition of putting in default. The volume ends with several tables of case citations and statutory materials and an impressive bibliography of general works on obligations and legal theory.

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<sup>1</sup> This statement applies equally to the Louisiana Civil Code and civil codes of nations and provinces that received and codified the Roman law.

<sup>2</sup> I limit the scope of the duty-right concept to contracts to avoid hazy problem areas such as statutory duties of filial devotion. But a strict positivist, invoking the maxim *ubi ius ibi remedium*, could regard the entire fabric of law as no more than correlative rights and duties.

<sup>3</sup> The other volumes are: Volume 2, Yiannopoulos, *Civil Law of Property: Things, Real Rights, Real Actions* (1966); Volume 3, Yiannopoulos, *Personal Servitudes: Usufruct, Use, Habitation* (1968); Volume 6, Litvinoff, *Obligations, Book I: General Theory, Classification of Contracts, Formation of Contracts* (1969); Volume 10, Oppenheim, *Successions and Donations* and Volume 10, part 6, Nathan, *Louisiana Inheritance, Estate Transfer and Gift Taxes* (1973). An excellent discussion of the Law Institute's publications appears in Dainow, *Civil Law Translations and Treatises Sponsored in Louisiana* (1975) 23 Am.J. Comp.Law 521. ]

The volume is an important contribution to general comparative literature principally because of the analytical framework within which the author presents his topic. For example, he opens the discussion of the suspensive condition with a general presentation of the problems it presents and then refines his analysis by moving serially to the positions of Louisiana jurisprudence, French jurisprudence, the jurisprudence of other civilian jurisdictions, and the common law (§§64-67). For the English-speaking lawyer needing a comparative overview of special topics but unschooled in the requisite foreign languages and literature, Professor Litvinoff's work is a natural research tool.

For all its erudition and lucidity, however, the book leaves me with a disquieting sense of the opaqueness of this important legal subject and of its distance from ordinary human experience. This sense, I suggest, results from the author's typically modern oscillation between two poles of argumentation: formal rule exegesis, which interprets the code articles quite literally (tacitly assuming their beneficence and neutrality) and value judgments which make no such assumption.<sup>4</sup> These judgments are instead based upon a subjective balancing of competing interests and suggest an enlarged scope of social cooperation beyond the radius envisioned by the codifiers. The word "subjective" as used here is not pejorative; it merely suggests that these judgments derive their force more from an intuitive sense of fairness than from specific enactments.

Given the combination of intellectual gymnastics and subjective value judgments needed to explain certain institutions and doctrines, one wonders if an intelligent, well-intentioned person would behave according to the prescribed legal norms even if he knew them and wanted to follow them. This is not a criticism directed particularly at Professor Litvinoff's work, but rather, an indictment of legal technicality. The law cannot lose its intelligibility and keep its legitimacy in the layman's eyes. The remainder of this review illustrates the oscillation described and offers some tentative explanations for it. I do not suggest any escape from the oscillation, which seems a permanent feature of contemporary legal experience.

<sup>4</sup> This is the classical philosophical distinction between deontological and teleological reasoning. In the former, the legitimacy of a command, such as a biblical commandment, is assumed *a priori* without regard for the consequences of its execution. In the latter, the legitimacy of a command hinges upon its consequences.

### The instability

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### The Instability of Subjective Moral Assertions

Subjective moral prescriptions abound in the sections treating notions central to the theory of obligations: good faith and abuse of right. A shift away from the classical creditor-debtor antagonism and toward increased cooperation is notable in the sections which follow.<sup>5</sup>

#### Section 4. GOOD FAITH

According to traditional doctrine, as a contract engenders a credit-right in favor of one or both of the parties, this right will automatically produce consequences through the operation of such additional rights as the right to demand performance and the right to recover damages. A contract, however, not only ought to be but actually is performed otherwise. In modern times, the emphasis once placed upon the individual end pursued by each of the parties has been shifted to the end pursued in common by all the parties, as if every contract were a joint venture — almost a partnership — where the idea of opposed interests dividing the parties yields to the idea of a certain union of interests among them. Thus, insofar as the expected performance is concerned, the creditor is no longer a creditor without more; he also becomes a debtor with a duty of collaboration, an obligation to cooperate in the attainment of the mutual ends, which need no longer be accomplished solely through the means originally conceived by the parties but may be achieved by other means supplied by the will of the parties or by judicial fiat. The door is thus opened for the modification of contracts.

The principle of good faith, so broadened in this modern approach, may serve to remove harshness sometimes implicit in the obligor's necessity to perform. The question will be: should the obligor be held to perform exactly what he has promised or only what is necessary for the attainment of contemplated mutual ends? The answer is clear once it is accepted that obligations do not exist for their own sake but for the accomplishment of societal ends which are focused, mainly, on the usefulness of results (pp.6-7).

#### Section 5. CREDITOR'S DUTIES

It is the creditor's obligation not to overburden his debtor but to facilitate his performance through positive action. Moreover, he must do whatever is required of him, in order to enable the debtor to perform; hence the doctrine that the creditor's default releases the debtor from liability to damages (p.9).

The creditor owes a duty not to abuse his right; prerogatives arising out of contracts should not be exercised in an unrestrained fashion. . . . Where the creditor is a professional man, he owes his debtor the benefit of his superior knowledge and experience, and therefore he ought loyally to warn the other about conditions or consequences of the contemplated performance (p.10).

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<sup>5</sup> I quote at length to give readers a sense of Litvinoff's style and to allay concerns that his arguments are out of context.

In these passages the subjectivity of Professor Litvinoff's value choices is apparent. One wonders if a hardbargaining professional would necessarily subscribe to Professor Litvinoff's suggested duty of disclosure to his debtor. Is the notion of a contract as a "joint venture" to achieve societal ends clear? What is clear is that the quoted passages rest upon a modernized vision of increased social responsibility in a market place in which the strict exercise of absolute rights is tempered by social needs.

### The frustrations of technical analysis

To glimpse Professor Litvinoff's analytical prowess at its best, consider his explanation of the lay-away sale, a modern security device designed to promote credit transactions.

The conventional "lay-away sale" is an agreement between the buyer and seller looking toward a transfer of ownership in property. The parties usually agree as to some specific thing, which is laid aside by the seller, until the buyer pays the price. However, it sometimes happens that only a class of thing is agreed upon, with no specific thing being appropriated until the time of delivery. Because of the buyer's inability to pay the full price in cash, the seller extends a period of credit, but retains possession of the thing until the price is paid in full. Most lay-away agreements provide for a fixed amount to be paid in regular installments. It is sometimes provided that if the buyer defaults in payment, the amount paid toward the price will be forfeited, and the thing returned to stock for resale. It is the custom of seller, however, to give notice of default to the buyer before such action is taken (p.111).

In such a sale, a major question is when title and risk of loss pass to the buyer.

"To find a right approach to this problem", argues Professor Litvinoff, "it becomes necessary to determine the type of agreement the 'lay-away sale' purports to be. He continues:

If it is intended as a sale in which the buyer becomes bound to pay the entire price while the seller retains possession of the goods, then it would seem that ... title should pass immediately to the vendee. If on the other hand, the agreement contemplates merely that the prospective purchaser will put some money down on the object he wants to buy, and the owner will hold the object aside so that the former can acquire the thing — possession and title — later if he so desires, then the agreement resembles an option and the prospective purchaser, quite clearly, will not become owner until he exercises the option.

... While the purchaser can be regarded as entering into a contract with a store to purchase the thing that is "laid away" it is not entirely clear that he ever becomes bound to pay the total price; it would seem that he does not. Usually it is understood that if the purchaser should decide not to buy the thing, he can simply forfeit what he has already paid. In such an approach, the amounts paid by the prospective purchaser rather than

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"consideration" given for an option, would resemble a deposit of earnest money in a contract to sell. Considering the marked dislike of Louisiana courts for "lopsided" agreements, they would probably regard such a version of a "lay-away sale" as a sale with reservation of title, and hold that ownership is transferred to the vendee upon the making of the deposit. It is not difficult to see that such a solution is *highly undesirable* with respect to risk of loss. It does not seem that in transactions of this kind the parties intend that any loss occasioned by a fortuitous event should be borne by the purchaser. The selling store usually carries adequate insurance to cover such losses, and if the "laid-away" goods are reflected in the premiums paid by the seller, the insurer would receive an *unjustifiable advantage* if the loss was placed upon the buyer and the insurer was thus relieved of any obligation to pay (p.112) (emphasis added).

Here Professor Litvinoff's subjective interest balancing and rule exegesis collide head-on. Certainly he is uncomfortable with literal interpretation of the code. So he moves to arguments of fairness. Nevertheless, it is unclear why the insurer's advantage would be unjustifiable if the insurer cut the retailer's premiums in recognition of real savings which he could then pass to the consuming public in the form of lower prices.

Professor Litvinoff's conclusion frustrates the reader and suggests the author's own consternation:

In sum, although no "lay-away sale" has yet been analyzed by a Louisiana court, . . . the prior jurisprudence concerning sales with reservation of title give strong reason to believe that, in Louisiana, title would be held to pass to the vendee in transactions of this kind. Neither proper reasoning nor sound public policy, however, lends support to such a solution (p.113).

#### A tentative diagnosis

The oscillation between argument based on classical exegesis and argument derived from subjective value choices is an inevitable consequence of the quest for two opposing ideals in rulemaking: formal symmetry of results in all cases of a certain class and substantive fairness (however intuitive and amorphous the term seems) in any particular case of the class. According to traditional civil law doctrine, a set of formally precise rules should yield predictable results in a given class of cases. But the search for fairness subverts an absolute commitment to formal symmetry. For example, a judge may realize that a case of a certain class presents mitigating factors, *e.g.*, the buyer in the lay-away case may have paid installments faithfully, the destruction of the object was not attributable to the seller's neglect, the insurer has been unjustifiably enriched. In such a case, the harsh result dictated by mechanical application of the maxim *res perit domino* cries out for tempering and modification.

And to promote the lay-away sale as a device for encouraging the extension of credit, a judge could easily rationalize such modification under the special circumstances I have suggested.

### Legal formality<sup>6</sup> and the supreme legislator

In contemporary civil law jurisdictions, the quest for formal symmetry in adjudication and legislation is associated with the eighteenth century rationalist view that human beings could write down and codify an entire scheme of laws to govern all their relationships. At a deeper level, a coherent formal framework was seen as necessary because of a deeply pessimistic vision of men as highly individualistic, insatiable wills, randomly exchanging some objects for others.<sup>7</sup> These wills could be restrained by nothing less than a positivist state, represented by a superhuman impartial legislator, an evil necessary to fend off anarchy.<sup>8</sup>

To express the general will in positive enactments, this super-legislator theoretically must transcend the competing demand, of particular interests.<sup>9</sup> His neutrality was the source of public respect and hence of his apparent legitimacy.<sup>10</sup>

The binding effect of the supreme legislator's laws was predicated on their formality. In other words, the laws should be generally applicable to all citizens of the state (the notion of *erga omnes*);<sup>11</sup> autonomous and independent of socio-economic pressures and official caprice; publicly known or knowable, and positive, that is, enacted by a duly constituted body. This system of formal rules was designed to hedge in the actions of officials and to avoid their arbitrary behavior.

<sup>6</sup> Provocative contemporary treatments of legal formality appear in Unger, *Law in Modern Society* (1976), 203-16 and Kennedy, *Legal Formality* (1974) 2 J. Legal Studies 351. This book review, in a sense, attempts to test certain of Unger's and Kennedy's arguments by placing them in a civil law setting.

<sup>7</sup> See e.g., Hobbes, *Leviathan*, vol.1, ch.13-14, "Of the Natural Condition of Mankind as Concerning their Felicity and Misery", in Molesworth (ed.), 3 *The English Works of Thomas Hobbes* (1839), 110-17.

<sup>8</sup> Compare e.g., Rousseau, *The Social Contract* (1964), ch.7, "The Legislator", 42-43 with Portalis's depiction of the legislator in Levasseur, *Code Napoleon or Code Portalis* (1969) 43 Tul.L.Rev. 762, 767. A concise treatment of legislation as an "embodiment of wills" appears in Herman, *Excerpts from a Discourse on the Code Napoleon by Portalis* (1972) 18 Loy.L.Rev. 23.

<sup>9</sup> See Rousseau, *supra*, note 8, 30-31.

<sup>10</sup> The following question shows the fictional nature of the legislator's neutrality: How can a "neutral" legislator, conscious of gross maldistributions of wealth, sanctify the institution of private property?

<sup>11</sup> A short English introduction to this notion appears in Merryman, *The Civil Law Tradition* (1969), 141-47. See also Rousseau, *supra*, note 8, 39-40.

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The formality of the system permitted its interpreters, executive officers, judges and doctrinal writers alike, to justify their legal conclusions by reference to the hermeneutical interaction of the rules themselves<sup>12</sup> without regard for value choices involving fairness or utility. But purely formal exegesis, which assumes the moral rightness of a code, finds a natural antagonist in the intuitive sense of justice in a particular case. Because this sense of justice cannot be codified in a body of generally applicable rules, the formalist would regard it as dangerous and tyrannical. This antagonism pervades Litvinoff's treatments of good faith and abuse of rights, in which he sacrifices formal rules in favour of increased social cooperation reached by subjective interest balancing.

Unger has recently offered an explanation for this radical shift to moral assertion and value judgment in contemporary legal experience. In his view, the harshness of formal rule application generates "a greater willingness to regard as part of the law certain moral conceptions insusceptible of development and application consistent with ideals of generality and autonomy. For these conceptions cannot be reduced to rules or divorced from views of moral obligation".<sup>13</sup> In private law, Unger suggests, two such moral conceptions are good faith and abuse of rights. Both conceptions present an insoluble dilemma for they moderate the unrestrained opposition of the wills of the parties; in each case, they require the creditor and debtor to find "a mean between the principle that one party may disregard the interest of the other in the exercise of his own rights and the counter principle that he must treat those interests exactly as if they were his own".<sup>14</sup> Professor Litvinoff's discussions of good faith and abuse of right reflect his struggle toward that mean. They also signal an abrupt break from the uncontrolled wills of laissez-faire economics, and toward restraint upon individuals in the market place. In his quest for the ideals of formal symmetry and fairness, Professor Litvinoff has intertwined an innovative vision of social responsibility with lucid doctrinal writing. His latest treatise merits careful study.

Shael Herman\*

<sup>12</sup> This approach is evident in Kelsen, *Pure Theory of Law; its method and fundamental concepts* (1934) 50 L.Q.R. 474.

<sup>13</sup> Unger, *supra*, note 6, 210.

<sup>14</sup> *Ibid.*

\* Professor of law, Loyola University, New Orleans.