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REVIEWS

DES CONTRATS D'APRÈS LA RÉCENTE CODIFICATION PRIVÉE FAITE AUX ETATS-UNIS. By Gilbert Madray. Paris: Libraire Générale de Droit et de Jurisprudence, 1936. 8.° 310 pp.

"IN THE history of legal institutions, the Restatement of Contracts will constitute not only a step towards the unification of the law of the United States but also a contribution to the international unification of law." This sentence of the concluding paragraph of M. Madray's book points to a by-product, and certainly not an unimportant one, of the great work undertaken by the American Law Institute. At present, there is hardly a legal system less known abroad than that of the United States. Spread over tens of thousands of volumes of reports and statutes, and different in every one of the forty-eight states, it is a secret science even to the majority of the growing number of European scholars of comparative law. For the first time, the Restatement will render the law of the United States available to foreign lawyers who are eagerly waiting for an access to this vast body of law of a country where creative activity in the law is probably greater today than in any other part of the world.

To American readers, Professor Madray's book will prove that the unrest pervading American law is not restricted to this country, and will demonstrate the eagerness of Europeans to utilize world-wide experiences and ideas for the solution of world-wide problems. It will also indicate to them how American law appears to a foreigner who derives his knowledge thereof almost exclusively from the Restatement. And they will probably be less astonished to see that in some respects the picture is almost comically distorted than to find that it is mostly quite correct and accurate. M. Madray's book bears testimony to the skill of the restaters.

The first two hundred pages survey those topics of the Restatement which appear to the author to be remarkable either because of their intrinsic importance or because of their bearing on current discussions in France. In a good many places he praises the solutions of the Restatement as superior to those of the law of France. While in French law assignment of debts, for instance, is treated under the head of sales, American law treats it, like German law, as a transaction *sui generis*.[1] Obviously, the treatment of an assignment made as a gift is facilitated by such an approach. Under the provisions of the Code Napoleon, now more than one hundred and thirty years old, third party beneficiary contracts are a constant source of trouble to French lawyers. The author finds that the provisions of the Restatement satisfy present-day needs more adequately. Voidability of a contract because of undue influence is unknown as such in French law and can be achieved by other devices only in rare instances; it is praised by M. Madray as an institution tending to promote a desirable convergence of law and ethics. The French Code does not contain any provision determining the moment when

1. RESTATEMENT, CONTRACTS (1932) c. 7.

a contract becomes binding, and the courts did not succeed in establishing a generally accepted solution of this important problem. Until recently, the Court of Cassation declared the determination of this moment to be a question of fact, left to the sovereign discretion of the trial courts. In 1932, that Court finally declared itself in favor of the so-called "system of expedition," according to which a contract becomes binding when the acceptance is expedited by the offeree.[2] M. Madray rejoices in finding the same solution in the Restatement, and leads the attention of French lawyers to the elaborate provisions concerning questions of detail.

Yet his treatment of this last problem reveals that M. Madray has not always penetrated through surface appearances. He writes: "The advantages presented by such a solution [i.e., by the "system of expedition"] are incontestable: it allows a gain of time in the conclusion of bargains, and it avoids the difficulty of evidence which presents itself when it must be proved, under the 'system of information,' that the offeror has obtained actual knowledge of the acceptance." The author overlooks the fact that this difficulty is avoided likewise in the "system of reception," which was adopted by the German Code and under which the bargain is struck as soon as the acceptance has come into the hands of the offeror so that he can obtain actual knowledge thereof. This latter system avoids the difficulties which arise under the system of expedition when the letter of acceptance is lost in the mail or does not reach the offeror within the period indicated by him. In a recent article Professor Nussbaum has suggested that the theory of expedition has its proper place in the common law where, because an offer is not binding, the acceptor's interests require that the binding force of the contract takes place at the earliest possible moment. It is not required, however, in a legal system which has no difficulties in depriving an offeror of the power of revoking at any moment his offer.[3] M. Madray himself points out quite properly how much easier it is to treat an offer as binding in French law than under the Restatement.

There are other points where he believes that American law could profit from studying French law, *e.g.*, in its treatment of contracts concluded with oneself,[4] its detailed case law with respect to contractual clauses limiting or excluding the liability of carriers, utilities, and other persons. He overlooks, however, the elaborate American rules on this problem, which, it is true, are not to be found in the Restatement of Contracts. M. Madray's belief that the French system of *astreintes* is capable of wider application and greater flexibility than the American remedy of specific performance seems, likewise, to be based on the erroneous notion that the chancellor's decrees are enforced specifically and directly, and not, as the French *astreintes*, indirectly through the threat of punishment. If M. Madray were familiar with the German Code of Civil Procedure, he would find that the maximum scope

2. Decision of March 21, 1932, D. 1933. 1. 65.

3. Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine* (1936) 36 COL. L. REV. 920.

4. RESTATEMENT, CONTRACTS (1932) § 15, Comment (a).

of applicability and flexibility of specific performance is achieved when the methods of direct and indirect enforcement are combined.[5]

In spite of such and similar misunderstandings, M. Madray's work contains enough suggestions to render it worth while reading to Americans, especially its second part, entitled "The Spirit of the Restatement," where the author deals with three problems of acute present interest to French lawyers: the relation between intention and declaration of a contracting party; the relation between law and ethics; and the role of the judge.

Bent on discovering general truths and principles, the German Pandectists of the 19th century and their predecessors, the natural law scholars, asked what created the binding force of a contract, the "intentions" of the contracting parties, or their "declarations." Taking up this controversy, the restaters of the American law of contracts declare themselves emphatically in favor of the latter view. Our author demonstrates that they were not able to carry out this so-called "objective" theory consistently, and that under the Restatement rules the courts are ordered to regard the actual intentions of the parties in so many crucial points that in reality the restaters' system appears to be based on the "subjective" theory, which is regarded as the only true one in prevailing French doctrine. M. Madray states a whole list of sections of the Restatement where one role or another is ascribed to the "intention" of the parties, *e.g.*, in the determination of whether or not an act of execution constitutes an acceptance of an offer to a unilateral contract, or whether or not an offer is accepted by mere silence, or whether a scroll or other mark constitutes a seal, or whether a certain conduct is an offer or a mere proposition. He calls attention to Section 504, according to which the true intention of the parties is the aim sought in rectification of a contract, and he sees the "triumph of the internal will over the declared intention" in Section 507, Comment (a), where it is stated that a court may order a contract to be performed in accordance with the real will of the parties, as if it were rectified, even without a preceding decree of rectification. He finds an expression of the subjective theory, also, in Section 526, Comment (b), where a contract is declared to be illegal because of usury when the parties have hidden behind the subterfuge of "costs" or "commission" the excessive rate of interest on which they have really agreed.

However, this and other instances of "simulated" agreements have little to do with the problem of the relation between intention and declaration.

5. There are a good many other points where M. Madray's judgment is influenced by his lack of familiarity with the background of the Restatement of Contracts, as, for example, his critique of the American terminology with respect to the distinction between damages for corporeal and non-corporeal harm. He takes it for granted that this distinction corresponds to the French distinction between *dommage matériel* and *dommage moral,* which is due to the fact that in French law, as a general principle, compensation is granted only for such consequences of a wrongful act as affect the plaintiff's assets in money or money's value, while damages for pain and suffering appear as an exception. There is no doubt whatever in American law that the victim of a wrongful act is entitled to damages for pain and suffering where such pain and suffering are caused by a bodily impact. Difficulties do not arise except where mental pain and suffering are caused, without a bodily impact.

The parties have simply made two different declarations, and the real intentions of the parties come into play only insofar as that declaration prevails which is conformable to the intention of the parties, while the law discards the other declaration which is meant to be no more than a pretext for the deception of third parties or of the authorities of the state. But even beyond such doubts, in reading M. Madray's discussion one cannot avoid feeling that both the restaters and their critic overestimate the importance of the controversy between the objective and the subjective theory. The binding force of a contract is, of course, "created" neither by the "intention" of the parties nor by their "declarations," but by the legal order. The legal order alone—this expression can, of course, be further analysed as meaning the complex phenomenon of the wills of those individuals who establish and enforce the so-called rules of law—"creates" legal relations. It orders that under certain circumstances certain individuals shall have certain rights and duties. In our type of civilization one of the most important circumstances assumed by the legal order as an occasion for creating rights and duties is the will of the individuals immediately concerned. Within limits, the law disposes that individuals shall be bound by such duties as they voluntarily undertake to be bound by, and that other individuals shall have corresponding "rights." Thus the "intention" of the parties undoubtedly appears as the immediate source of all those rights and duties which "arise" from "contracts" and other voluntary transactions. Intentions are unknowable, however, unless they are declared, and words as well as any other symbols are imperfect means of conveying meanings. On its face, no declaration is absolutely unambiguous, and nobody hearing another's declaration can ever be certain whether he has really understood the meaning "meant" by the declarant. This phenomenon confronts the legal order with the problem of determining which one of several possible meanings of a declaration shall prevail, the meaning meant by the declarant, or the meaning understood by the declaree, or some other meaning, perhaps the meaning understood by certain third persons, judges, for instance, or members of a jury. This problem cannot be solved by any method of scientific discovery, but can be answered only by considerations of policy and expediency. And it is answered differently in different legal systems. While French law is inclined to protect the expectations of a declarant, English and American law tend more towards protecting the expectations of the declaree, and German law attempts to find a compromise.[6] These differences of policy may be expressed by the antithesis between objective and subjective theory. But those terms become dangerously misleading, when they are taken as expressions of general truths or principles instead of guiding maxims of legal policy.

In his chapter on "Contract and Ethics," M. Madray touches on a problem of fundamental importance in the evolution of law in general. Always and everywhere the law necessarily tends to express and enforce the prevailing ethical ideals of the time and place. By their very nature, as rules of conscience, however, ethical rules must be infinitely flexible, while rules of law

6. See this reviewer's statement in 5 WILLISTON ON CONTRACTS (2d ed. 1937) § 1600e.

must have at least a minimum amount of generality, certainty, and predictability. Every law of the world is a compromise between the conflicting ideals of stability and flexibility, and legal history may be looked upon as a history of fluctuations towards one or the other pole. There are periods when the ideal of ethical flexibility prevails and others where the law tends to become rigid and inflexible. Max Weber has shown that the capitalistic system needs for its existence a law of great stability, certainty, and predictability. It is based on long-range calculations and investment, and the willingness to invest is increased by the existence of a legal system where debts and other contracts are promptly and rigidly enforced. Our own times witness a world-wide reaction against the capitalistic spirit; it finds expression in such radical movements as communism or national-socialism, but also in the "legal romanticism"[7] of countries like France which have not repudiated the capitalistic system as such. In the United States, farmers and other small middle-class elements have always mitigated the influence of big business and influenced legal developments in the interests of debtors. No wonder, therefore, that M. Madray finds in American law a good many expressions of those tendencies which, resulting in mitigating the rigor of the formal law and in producing a greater convergence of legal rules and ethical commands, have also found increasing weight and attention in postwar developments of France. Without being aware of the deeper connections and problems involved, he states these similarities as an encouragement to his French colleagues to proceed on those paths of legal idealism.

Any attempt to give legal expression to ethical ideals must necessarily result in rules of law expressed in elastic, flexible terms. To a considerable extent, clear-cut formulations of narrow legal rules must yield to expressions of standards the application of which leaves much room to the creative activity of the law-enforcing agencies. This necessary connection is overlooked by M. Madray. Though fervently approving of the increasing influence on the law of the "règle morale," he disapproves of recent developments in French law granting to the courts certain powers to adapt contractual relations to changing economic conditions. When he finds in the Restatement such an indefinite concept as that of "impossibility in a business sense," he holds it before his French colleagues as a warning example of the horrible consequences to which such tendencies might lead. Never should French lawyers give up the clear-cut formulations of their Code for such indefinite expressions as "reasonable," "material," "honestly," of which the Restatement abounds and which give such a dangerously wide play to judicial arbitrariness. In dealing with American law, M. Madray is apparently unaware of the existence of the jury, which could not fulfill its very purpose of keeping the law in accordance with popular ethical ideals if the law, instead of using "indefinite" standards, were expressed throughout in narrow rules and formulas. In dealing with his own law, his dislike for attempts to protect debtors against the disastrous consequences of the economic crises of the War and the depression causes him to overlook the wide field of discretion left to the

7. Term invented by Professor Julien Bonnecase in LA PENSÉE JURIDIQUE FRANÇAISE DEPUIS 1804 A L'HEURE PRÉSENTE (1933).

courts by a good many of the provisions of the Code Napoleon, for example, in the field of torts, by articles 1382, 1383 of the Code Napoleon. Even in the field of contracts, French law places broad discretionary powers in the hands of the courts. The determination of so fundamental a question, for instance, as whether one party's breach of contract is so material as to entitle the other party to withdraw from the contract, is entirely left to the discretion of the trial courts, which find no guidance whatever in the provisions of the Code[8] and very little in the case law of the Court of Cassation. The trial courts are entirely free in granting or denying a term of grace to a defaulting debtor, or in distinguishing the proximate from the remote consequences of a breach of contract.[9] Neither in America, nor in England, Germany, Austria, Switzerland, or Italy are trial courts so free from control by their supreme courts as they are in France. It is true, the French ordinary courts[10] have resisted attempts to enlarge the concept of "impossibility of performance" for the purpose of granting relief to promisors whose duties have become more burdensome as a result of unforeseen changes in the economic situation of the country, but French law is more lenient than others to defaulting debtors in general, and can protect them quite efficiently by other means. In no event, however, does this phenomenon justify the assertion that the rules of French law are generally expressed in terms more definite than those used in the Restatement.

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CASES AND MATERIALS ON THE CONFLICT OF LAWS. By Ernest G. Lorenzen. Fourth Edition. St. Paul: West Publishing Co., 1937. Pp. xxxvi, 1138. $6.00.

THIS, in a word, is the most comprehensive and exhaustive collection of cases and related materials describing the doctrines as to the conflicts of laws, as applied in the courts of the United States, which has thus far appeared. It is, one might add, not a work to be produced *uno ictu*, but rather the last epitome of the cumulative study and experience of one who has long been recognized as an authority in this complex and increasingly significant phase of law. It succeeds three earlier editions of 1909, 1924, and 1932, each of which had an enviable success. It follows no less than three competing and meritorious casebooks which have appeared during the past three years. Like them, it reflects the increasing volume of decisions, law-review notes, articles, and treatises dealing with the varied problems of conflicts of laws by which the legal literature of this country has been recently enriched. To take adequate account of these developments has required, as the author intimates in the preface, a thorough-going revision, which substantially ad-

8. Art. 1184.
9. Art. 1151.
10. The French administrative courts are steering a different course.
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