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# NOTES

## Inducing Breach of Contract

[*Editor's Note:* This article is an adaptation from a Moot Court brief argued before the Louisiana Supreme Court, urging the proposition that Louisiana adopt the tort of inducing breach of contract.]

The great weight of authority in civil law[1] and common law[2] jurisdictions is that a contracting party has a remedy in tort against one who has induced a breach of that contract. Therefore, if *A* has a legal contract with *B*, and a third party *C*, having knowledge of this contract, intentionally and without legal justification induces *B* to breach his contract with *A*, *A* will have a remedy against *C* for damages or an injunction.[3]

At present, Louisiana does not recognize such a cause of action. The purpose of this Note is to examine why this position is maintained and to advocate Louisiana's acceptance of the tort of inducing breach of contract.

Liability for interference with contractual relations has developed in response to changing economic and social conditions.[4] Prior to the twentieth century, economic wealth was in land and labor. The law which had traditionally protected land and the master-servant relationship extended its protection in 1853 to personal services contracts in the famous English case of *Lumley v. Gye*.[5] In the twentieth century the great development in industry and trade resulted in business relations replacing land as the major source of economic wealth. Under laissez-faire economics, this new wealth was not afforded the protection given to the traditional forms of wealth, as it was theorized that freedom of action would yield maximum economic benefit. The absence of governmental or legal restraint, however, led to economic conflict and injustice. It became apparent that legal protection had to be afforded business relations. Responding to this need, almost all common law and civil law jurisdictions began in the 1900's to secure contractual relations from unjusti-

1. 2 H. Pinner, World Of Unfair Competition Law 450-54 (1965).
2. Annot., 26 A.L.R.2d 1227 (1952).
3. Campbell v. Gates, 236 N.Y. 457, 460, 141 N.E. 914, 915 (1923).
4. "Desiring now to follow the majority view, we now embrace generally the conclusion of the majority opinion in *Lumley v. Gye* . . . And our change of view has been brought about by our present belief that rights of the parties to an existing contract are of such importance in the business world that such rights should be protected from intentional and unjustifiable interference by a third person." Downey v. United Weather-Proofing, Inc., 363 Mo. 852, 859, 253 S.W.2d 976, 981 (1953). *See* W. Prosser, Handbook on the Law of Torts 950 (3d ed. 1964).
5. 118 Eng. Rep. 749 (1853).

fied outside interference.[6] It was during this transitional period, when the amount of protection afforded contractual relations was unsettled, that the Louisiana Supreme Court decided to give only limited protection to contracts.[7]

In other states the tort has developed a procedural framework similar to that of defamation. Initially the burden is on the plaintiff to show intentional interference with contract. This establishes the prima facie tort. The burden then shifts to defendant to show justification or privilege for his conduct. There are five requisite elements in establishing the prima facie tort: (1) existence of a legal contract, (2) knowledge of the contract by defendant at the time of interference, (3) intention to interfere, (4) conduct amounting to an inducement, and (5) conduct causing the breach.[8] In determining what conduct amounted to an actionable inducement, early common law decisions[9] made a distinction between lawful and unlawful means. These early decisions required that defendant's conduct amount to violence, fraud, deceit, or actual ill will in order to be actionable. However, it became evident that contractual relations needed protection from any unjustifiable persuasion. For this reason, all that is required in American jurisdictions today is intentional but unjustifiable interference.

*Louisiana Jurisprudence*

American courts, making no distinction between lawful and unlawful means of inducement, have almost unanimously protected contractual relations from unjustifiable interference. Louisiana, however, has limited recovery to interferences where the means are in themselves unlawful as in cases of deceitful, fraudulent, or malicious conduct. Contrary to the majority American position, emphasis seems to be placed on deterring the unlawful means rather than protecting the contractual relationship itself from outside interference.

In all cases involving inducing breach of contract in Louisiana prior to 1900, the defendant was motivated solely by ill

6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 954 (3d ed. 1964).
7. Kline v. Eubanks, 109 La. 241, 33 So. 211 (1902).
8. W PROSSER, HANDBOOK OF THE LAW OF TORTS 950, 954 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS (Tent. draft) § 766 (i) (d), (i), (j), (k), (o) 1968.
9. Boyson v. Thorn, 98 Cal. 578, 33 P. 492 (1893); McCann v. Wolff, 28 Mo. App. 447 (1888).

will towards the plaintiff or used unlawful means of inducement.[10] But in 1902 the Louisiana Supreme Court was confronted with a factual situation in which the defendant's conduct was limited to lawful means (defendant without the use of fraudulent or malicious means persuaded a person to breach his contract). This case, *Kline v. Eubanks*,[11] has been cited extensively as authority for the present Louisiana position that inducing breach of contract is not actionable unless tortious means in themselves are used to induce the breach. The court held that the defendant's conduct was not actionable under Louisiana Civil Code art. 2315[12] for the following reasons: (1) The person who breached the contract with the plaintiff was the proximate cause and the inducer-defendant's conduct was only a remote cause: (2) Any remedy in this area would have to be based on legislative enactment—Justice Breaux's opinion indicated that article 2315 is limited to torts known at the inception of the article; and (3) The common law jurisdictions did not recognize a cause of action in such situations.[13]

At the time of the decision in *Kline v. Eubanks*, the tort of inducing breach of contract was in its formative stages in most jurisdictions. Therefore, the rationale of the supreme court in 1902 should be re-examined in light of the relatively rapid development that the tort has undergone in the last seventy years.

The inducer's conduct usually can be established as one of the causes of the plaintiff's injury, but there remains the additional question of proximate cause—whether the inducer should be held legally responsible for this injury. Although many for-

10. Graham v. St. Charles R.R., 47 La. Ann. 214, 16 So. 806 (1895) (defendant's coercion of his employees not to patronize plaintiff's store); Dickson v. Dickson, 33 La. Ann. 1261 (1881) (threatening plaintiff's laborers to abandon their employment contracts); Irish v. Wright, 8 Rob. 428 (La. 1844) (removal of plaintiff's slaves from the state in order to defeat attachment).

11. 109 La. 241, 33 So. 211 (1902). The plaintiff contracted with a laborer, leasing to him a place to live in return for a proportion of the laborer's crop. The plaintiff, relying on the contract, made improvements on the land which he would not have otherwise made. The defendant, with knowledge of the contract, enticed the laborer away from the plaintiff's plantation. The plaintiff sued the defendant for damages suffered from the useless improvements and losses from the unproductive land. The court held that the defendant's conduct was not actionable under Civil Code article 2315.

12. LA. CIV. CODE art. 2315: "Every act whatever of man that causes damage to another obliges him whose fault it happened to repair it."

13. The court as authority for the American position cited cases in Maryland, Kentucky, Missouri, California, and T. COOLEY, A TREATISE ON THE LAW OF TORTS (2d ed. 1888). Kline v. Eubanks, 109 La. 241, 33 So. 211 (1902). *See* notes 21-24, *infra*.

mulas have been employed to define "proximate cause,"[14] the real issue involved is a weighing of policy considerations which determine if defendant should be liable for the consequences of his conduct.

In the tort of inducing breach of contract the primary policy consideration is defendant's interest in freedom of action versus the plaintiff's interest in security of his contract. When the requisite elements of the tort (knowledge of the contract, intentional conduct amounting to inducement, and conduct a "cause-in-fact" of the breach) are present, the interest of the plaintiff should override that of the defendant. In such cases the conduct of the defendant should be considered the proximate cause of the injury.[15]

No legislative enactment should be needed to make inducing breach of contract actionable in Louisiana. Justice Breaux's opinion is an undue limitation on an article designed as a principle of law to be interpreted in light of changing times and social patterns.[16] If article 2315 is limited to torts known at the time of the adoption of the article, Louisiana would have been unable to introduce into its law other modern tort doctrines such as intentional infliction of emotional distress.[17] Article 2315 provides for a concept of fault which cannot be fixed to nineteenth century standards of conduct. This article viewed in context with the equitable principles of article 21,[18] should make legislative enactment unnecessary.

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14. W. PROSSER, HANDBOOK ON THE LAW OF TORTS 285 (3d ed. 1964).

15. "Some of the earlier decisions denying liability argued that defendant's conduct can never be a proximate cause of the breach, since there is an intervening voluntary act of the third party promisor; but where that act is intentionally brought about by the defendant's inducement, or is even a part of the foreseeable risk which he has created, it seems clear that the result is well within the limits of 'proximate.'" W. PROSSER, HANDBOOK OF THE LAW OF TORTS 959 (3d ed. 1964).

16. "[E]qually, if not more disappointing is the opinion of Breaux in the case of *Kline v. Eubanks*, when he apparently limits the effects of Art. 2315 to problems which were known to the drafters of the Code at the time when the Code was drafted, and so would limit its general character as a principle." Stone, *Tort Doctrine in Louisiana*, 16 TUL. L. REV. 489, 512 (1942).

17. At the inception of article 2315, the law did not generally allow recovery for intentional invasion of a person's interest in peace of mind. If damages for emotional distress were allowed, they were usually an added element to recovery of the physical damages sustained by the plaintiff. In Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920) (pot of gold case), the court held that infliction of emotional distress independent of any physical contact was a tort under article 2315.

18. Although article 2315 provides a principle of law as guidance, there is no express law on inducing breach of contract. Article 21 provides that

The supreme court in *Kline* gave great weight to the fact that other American jurisdictions at that time did not recognize a cause of action for inducing breach of contract. The court relied on the 1902 status of the tort in four jurisdictions. But each of these jurisdictions—Maryland,[19] Missouri,[20] Kentucky[21] and California[22]—have subsequently reversed or modified their position. An earlier California case,[23] taking a position similar to *Kline*, required that unlawful means be used before the inducement is actionable. But in 1941 the California Supreme Court removed this limitation, and even lawful means of inducement became actionable.[24] The court held that a competitor cannot justify inducing a breach of contract merely because he is seeking to further his own economic advantage at the expense of the plaintiff. Justice Traynor noted:

> "Whatever interest society has in encouraging free and open competition by means not in themselves unlawful, contractual stability is generally accepted as of greater importance than competitive freedom."[25]

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where there is no express law, the judge is bound to proceed according to equity. Between a plaintiff who has suffered damages because of a broken contract and a defendant whose inducement has caused this breach, an equitable result is reached if such a defendant is subjected to liability.

19. Kimball v. Harman, 34 Md. 407, 6 Am. Rep. 340 (1871), was cited in *Kline* for the proposition that the inducer was not the proximate cause. The Maryland courts have subsequently held that a competitor is not justified in inducing a breach and that such conduct can be proximate cause of the damages. Cumberland Glass Mfg. Co. v. DeWitt, 120 Md. 381, 87 A. 927 (1913), *aff'd* 237 U.S. 447 (1915).

20. McCann v. Wolff, 28 Mo. App. 447 (1888), was cited in *Kline* for the proposition that inducing breach of contract is not actionable in the absence of actual malice or fraud. The Missouri Supreme Court expressly overruled this requirement in 1953. "The term 'maliciously' in this connection alludes to malice in its technical legal sense, that is, the intentional doing of a harmful act without justification or excuse, and does not necessarily include actual malice, that is, malice in the sense of spite or ill will." Downey v. United Weather-Proofing, Inc., 363 Mo. 852, 858, 253 S.W.2d 976, 980 (1953).

21. Boulier v. MaCauley, 15 S.W. 60, 34 Am. St. Rep. 171 (1891) was also cited in *Kline*. W. PROSSER HANDBOOK ON THE LAW OF TORTS 954 n.64 (3d ed. 1964) cites Louisiana and "apparently" Kentucky as the only jurisdictions which still require unlawful means in themselves be used. Although there is still some confusion as to the tort's status in Kentucky, it seems their position has been modified by H. Friedberg, Inc. v. McClary, 173 Ky. 579, 191 S.W. 300 (1917). In this case injunctive relief was allowed against a third party inducer.

22. Boyson v. Thorn, 98 Cal. 578, 33 P. 492 (1893), was noted by the court in *Kline*. But the California position has been changed by Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631 (1941).

23. Boyson v. Thorn, 98 Cal. 578, 33 P. 492 (1893).

24. Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631 (1941).

25. *Id.* at 36, 112 P.2d at 633.

A survey of subsequent Louisiana Supreme Court decisions in this area indicate that *Kline* is the major foundation for the Louisiana position. In 1904 the court (citing *Kline* and *Cooley on Torts* 2d ed.) denied recovery for inducing breach of contract in *B. J. Wolf & Sons v. New Orleans Tailor Made Pants.*[26] Great reliance was given to the fact that *Kline* was in line with the great weight of authority in the United States.[27]

In *Moulin v. Monteleone*[28] a husband was denied recovery in an action against a third party for alienation of his wife's affection. The court reasoned than since marriage is a civil contract,[29] *Kline's* denial of an action for inducing breach of contract should apply to the marriage contract; therefore no cause of action exists for alienation of affections.

The fear of overturning the *Moulin* case gave great impetus to continuing the *Kline* doctrine. But the tort of alienation of affections should not be equated with the tort of inducing breach of contract. The court in *Moulin* admitted that marriage is a unique contract.[30] The husband cannot recover damages against his spouse, whereas damages are allowed against a party who defaults on his contract. In alienation cases there is also a problem of determining the amount of recovery to be given the injured spouse. When dealing with emotional damages, courts hesitate to speculate as to the amount of monetary damages inflicted on the injured. Because of the uniqueness of the marriage contract and because of the other grounds upon which *Moulin* rests, it seems that a reversal of Louisiana position on inducing breach of contract would not lead to an automatic cause of action for alienation of affections.

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26. 113 La. 587, 37 So. 2 (1904). Under the factual situation in this case recovery would have been very doubtful even at common law because of the absence of the requisite elements of knowledge of the contract and affirmative conduct amounting to inducement.

27. *Id.* at 395, 37 So. at 5: "Our ruling in *Kline v. Eubanks* is in accord with the weight of jurisprudence in this country . . . ."

28. 165 La. 169, 115 So. 447 (1927). The decision was based on several grounds: (1) recovery would amount to payment of punitive damages—contrary to Louisiana policy; (2) loss of affection of a human being is not a property right; (3) the alienation is a criminal matter because it involves a public wrong causing private injury; and (4) the wife and defendant could not be answerable in solido for damages to the husband.

29. LA. CIV. CODE art. 86: "The law considers marriage in no other view than as a civil contract."

30. "It is true that marriage is something more than an ordinary contract in which the parties alone are concerned, for it is a status in which society itself is concerned." Moulin v. Monteleone, 165 La. 169, 175, 175 So. 447, 450 (1927).

In the 1939 case of *Hartman v. Green*[31] the Louisiana court denied recovery for inducing breach of contract in an action brought under article 2324.[32] The supreme court—again citing *Kline* and *Cooley on Torts*—held that a breach of contract is not an unlawful act; therefore one who encourages such a breach is not liable. Recently Louisiana courts have been citing *Cust v. Item*[33] as authority for the present position. But this 1942 decision contains no new rationale justifying this unique position. The *Cust* decision merely cited *Cooley on Torts, Kline*, and all subsequent supreme court decisions which in turn rely on *Kline*. *Cooley* was originally cited by *Kline* to indicate that Louisiana was in line with her sister jurisdictions. But the supreme court's continual citing of this 1888 edition is misleading because of the implication that the status of the tort has not changed. Even the 1932 fourth edition of *Cooley on Torts*[34] shows the trend of cases changing in favor of allowing recovery for the tort.

The harshness of the Louisiana position was demonstrated by the decision of *Templeton v. Interstate Electric Co.*[35] The plaintiff owned a franchise with the defendant companies and was seeking to liquidate his account with them. With their assurance

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31. 193 La. 234, 190 So. 390 (1939). In this case the plaintiff had contracted with a bank for the advancement of certain sums of money. The defendant, president of the bank, advised the bank to breach its contract with the plaintiff. The plaintiff claimed a cause of action against the defendant under article 2324 (one who assists or encourages another person to do an unlawful act is answerable in solido with the wrongdoer). The court held if there ever was such a right of action, it was in tort and therefore was barred by one year prescription (article 3536). Under the common law principles of this tort, the president of a bank would be privileged to give advice to the bank unless motivated by some ill will toward the plaintiff. Fiduciaries because of their position, are privileged to give such advice. RESTATEMENT (SECOND) OF TORTS § 769 (1968).

32. LA. CIV. CODE art. 2324: "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, in solido, with that person, for the damage caused by such act."

33. 200 La. 515, 8 So.2d 361 (1942). The factual situation in *Cust* involved inducing breach of a contract which was terminable at will (with one month's notice). American courts also would have denied recovery, but for different reasons. The policy consideration advanced in dealing with such contracts is that the inducer is not encouraging the breach of a legal duty, but is merely influencing the exercise of a legal option—the termination of the contract. If a party wishes to have greater security in his contractual relations he should enter into a contract which is not terminable at the will of the other party.

34. "One who maliciously or without justifiable cause induces a person to break his contract with another will be liable to the latter for the damages resulting from such a breach . . . Malice is proved if it appears that the defendant with knowledge of the contract, intentionally and without justification induced one of the contracting parties to break it." 2 T. COOLEY, A TREATISE ON THE LAW OF TORTS § 227 (4th ed. 1932).

35. 214 La. 334, 37 So.2d 809 (1948).

that approval of a transfer was a mere formality, the plaintiff entered into a contract to sell the franchise to another. Later the defendant companies refused approval of the transfer unless the plaintiff paid up his account. The defendant companies, by offering an independent franchise, induced the purchaser to breach his sales contract with the plaintiff. The supreme court recognized that the plaintiff was attempting to liquidate his account by the sale[36] and that the defendants were insincere in their refusal to approve the transfer.[37] But the court was tied to the "well settled" law of Louisiana (citing *Cust*) and denied recovery against the defendants.

In not deterring such unjustified conduct by the defendant, the difficulty of the *Kline* doctrine becomes apparent. If the defendants were in fear of liability for inducing breach of contract, approval of the transfer would have been very probable. This would have permitted the plaintiff to sell his franchise and to liquidate his account. The purchaser would have acquired his franchise from the plaintiff and there would have been no litigation between the parties. Such a result is surely desirable.

Since 1948 the Louisiana Supreme Court has not been called upon to deal directly with the tort of inducng breach of contract.[38] The tort was a minor issue in *New Orleans Opera Guild v. Local 174, Musician Mut. Protective Union*[39] in 1961. The predominant issue was whether a labor union's use of an "unfair list" against an employer (plaintiff) was an unfair labor practice under state statutes. The plaintiff had also alleged that the union should be liable for inducing breach of contract. It was decided that the union's conduct was privileged under the circumstances. A determination that the conduct was privileged should have precluded any recovery for inducing breach of con-

36. "[T]he plaintiff, instead of receiving the cooperation he was so earnestly seeking, was being met with every manner of coercion that an official of the company could exert . . . ." Templeton v. Interstate Elec. Co., 214 La. 334, 342, 37 So.2d 809, 812 (1948).

37. "This clearly shows the insincerity of the companies . . . since by their very action the most expeditious liquidation of this account was being thwarted by them." Templeton v. Interstate Elec. Co., 214 La. 334, 343, 37 So.2d 809, 812 (1948).

38. There have been numerous appellate court decisions denying a cause of action but all of them rely strictly on *Cust*. *See* Roussel Pump & Electric Co. v. Sanderson, 216 So.2d 650 (La. App. 4th Cir. 1969); Delta Finance Co. of Louisiana v. Graves, 180 So.2d 85 (La. App. 2d Cir. 1965); Franzella Realty, Inc. v. Kolb, 152 So.2d 837 (La. App. 4th Cir. 1963); Hale v. Gaienne, 102 So.2d 324 (La. App. Orl. Cir. 1958).

39. 242 La. 134, 134 So.2d 901 (1961).

tract.[40] But the majority opinion proceeded to briefly mention the tort and concluded that it was not per se actionable in Louisiana (citing *Cust*).

Examination of the jurisprudence indicates why Louisiana maintains the position that inducing breach of contract is not actionable unless unlawful means are used. First, the Louisiana Supreme Court has not reevaluated the tort since the *Templeton* decision in 1948. Second, the foundation of the Louisiana jurisprudence is *Kline v. Eubanks*, a decision which relies upon an undue limitation of article 2315, giving great weight to the law of other jurisdictions which have subsequently changed and the second edition of *Cooley on Torts* which has been updated and changed in the fourth edition.

*Fault in Inducing Breach of Contract*

The general law of torts in Louisiana is based on the concept of fault in article 2315. This concept is primarily concerned with the question of what type of conduct is wrongful under a given factual situation. Louisiana courts have been reluctant to equate this concept of fault with common law tort principles.[41] Louisiana civil law traditions prevent extensive reference to common law principles in many areas of law (*e.g.*, successions and property), but in the law of torts human conduct is at issue. The standards of human conduct acceptable to the American public, while not rigidly uniform, are much the same throughout this country. Therefore, justification certainly exists for Louisiana courts to examine and consider the development of the tort in other American jurisdictions.

In determining what standard of conduct is to apply in tort cases, Louisiana courts have made some reference to principles which are unanimously accepted by the common law jurisdictions.[42] Louisiana courts should give weight to such common law tort principles without the necessity of integrating all common law torts into our civilian concept of fault. This may be done by examining the concept of fault and its relations to con-

40. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 123 (3d ed. 1964).

41. Daggett, Dainow, Hebert & McMahon, *The Civil Law in Louisiana*, 12 TUL. L. REV. 12, 33 (1937).

42. *See* Boudreaux v. All-State Finance Corp., 217 So.2d 439 (La. App. 1st Cir. 1968). The court, recognizing the right to recovery of damages for the intentional infliction of emotional disturbance, referred to RESTATEMENT (SECOND) OF TORTS § 46 (1968).

tract rights to determine whether inducing breach of contract constitutes "fault" under article 2315.

Article 2315, like its French equivalent,[43] provides for a concept of fault which escapes any precise definition. The French commentators have attempted to define "fault" under the French Code. Toullier states that one is at fault when he does that which he has no right to do.[44] Planiol and Ripert write of fault in terms of one not doing that which he ought to do.[45] These definitions do not define what conduct constitutes fault. Changes in social and legal standards prevent a fixed concept of what one has a right to do or what one ought not to do. Fault must be a dynamic concept not limited to a certain time or system of values,[46] because new circumstances develop which result in new standards of conduct. The *Kline* decision, by limiting the application of fault to problems known at the inception of the article, has placed an undue restriction on this principle of law.

Establishing that fault is a dynamic concept does not necessarily mean that inducing breach of contract is actionable. It must be determined what relationship "contract rights" have to the concept of fault. The underlying policy of the Civil Code provisions on obligations is to provide security of contract by establishing a legal relationship between the contracting parties which can be the basis of a remedy against a defaulting party. Civil Code article 1756 provides that obligation is synonymous with duty, while article 1757 places in the obligee a right to enforce the obligor's performance by law. When an obligor enters into a valid contract, a legal duty to perform arises, and any violation or breach of this duty gives the obligee an action in damages or specific performance. But the obligor has no legal option to perform or pay damages.

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43. FRENCH CIV. CODE art. 1382 (Wright's transl. 1908): "Any person who causes injury to another by any act whatsoever is obligated to compensate such other person for the injury sustained."

44. XI TOULLIER, DROIT CIVIL FRANÇAIS nº 119-120 (4th ed. 1824) *cited in* Stone, *Tort Doctrine in Louisiana*, 17 TUL. L. REV. 159, 204 (1942).

45. VI PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 477 (1930), cited in Stone, *Tort Doctrine in Louisiana*, 17 TUL. L. REV. 159, 205 (1942).

46. "Louisiana, with her heritage of civilian doctrine in a broad principle of tort liability of which 2315 . . . is a great example, is possessed of a system of liability at once simple and coherent which is broad enough to encompass the changing behavior pattern of the people and developing social and legal notions of wrongful conduct." Stone, *Tort Doctrine in Louisiana* 16 TUL. L. REV. 489, 511 (1942).

The defaulting obligor may be forced to pay damages in lieu of performance, but when this occurs there has been a breach of his legal duty to perform. Any third party inducement to breach a contract is not aimed at the obligor's exercise of a legal option, but is meant to cause the breach of a legal duty owed to the obligee. Our Civil Code, by establishing a legal duty to perform and a legal right to specific performance, has placed even greater emphasis on security of contract than common law jurisdictions. Some American authorities[47] recognize payment of damages as an acceptable alternative to performance. The Louisiana Civil Code indicates a policy of greater contract security by favoring specific performance to payment of damages. Conduct which undermines this policy should be considered tortious.

The obligee has a dual "interest" in his contract. His interest with respect to the obligor is to receive performance of the contract. This performance is secured by contract law. The obligee in relation to third persons also has an interest in having this contract right which he has against the obligor free from outside interference.[48] Tort law secures this interest in relation to third persons, and one who invades the obligee's interest by inducing a breach of contract should be subject to liability.

In the nineteenth century this latter interest of an obligee was protected only from third party invasions in which unlawful means were used. But in the twentieth century the need for security of contract in business and commercial relations requires that this interest be given greater protection from third party invasions.[49] Contracting parties in order to perform their commitments may have to enter into contracts with other parties. The default by one contracting party may cause repercussions in an entire network of commercial relations. These new circumstances result in a new standard of conduct—an obligee's interest in his contract should be given greater protection than the interfering party's freedom of action. By applying a dynamic concept of fault to these new circumstances, Louisiana can and should make inducing breach of contract a tort under article

47. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

48. Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 732 (1928).

49. Downey v. United Weather-Proofing, Inc., 363 Mo. 852, 253 S.W.2d 976 (1953). *See* note 4 *supra*.

2315 without equating this article to all common law tort doctrines.

*Effects on Civilian Doctrine*

Two aspects of our civil law doctrines must be examined before inducing breach of contract is considered as fault. The first is the personal nature of a contract, and the second involves the difference between civil law and common law measures of recovery for breach of contract.

A cause of action for inducing breach of contract does not destroy the personal nature of a contract under civilian concepts. The over-all similarity of the French and Louisiana Codes would produce similar problems in the acceptance of this tort. Both Codes contain articles indicating the personal nature of a contract and articles providing for a concept of fault.[50] French Civil Code article 1165 provides that contracts are to have effect only between the contracting parties and do not affect third persons. Louisiana Civil Code articles 1901 and 1997[51] imply this same limitation. Both Codes seem to contain what can be called an apparent conflict between the personal nature of a contract and tort law subjecting to liability one who interferes with that contract.

The French, in allowing recovery for interference with contractual relations,[52] have found no conflict between French Civil Code articles 1165 and 1382 because each has its own dominion of application.[53] Although a contract is binding only on its parties and does not affect third persons, there should be no inference that third persons have a right to interfere with the obligee's interest in the performance of the legal duty owed by the obligor.[54] Such an interference would be actionable under

50. *Cf.* FRENCH CIV. CODE art. 1382; LA. CIV. CODE art. 2315.

51. LA. CIV. CODE art. 1901: "Agreements legally entered into have the effect of laws on those who have formed them . . . ." LA. CIV. CODE art. 1997: "An obligation is strictly personal when none but the obligee can enforce the performance."

52. 27 mai. 1908 D.P., 1908.1.459, S. 1910.1.118; Paris, 24 nov. 1904, S. 1905.2.284; Req. 3 mai. 1920, S. 1921.1.158.

53. "Le conflit des articles 1165 et 1382 n'existe pas en réalité; à chacun son domaine d'application." A. WEILL, LA RELATIVITÉ DES CONVENTIONS EN DROIT PRIVÉ FRANÇAIS 521 (1939).

54. Id. at 436; *"L'article 1165 ne confère pas aux tiers le droit d'ignorer légalement les conventions qui leur sont étrangères."* (Article 1165 does not confer upon third parties the right to legally ignore the contract to which they are strangers) [transl. by authors].

Toullier's concept of fault because the third party is doing something he has no right to do. It is the concept of fault, not the law of obligations, which subjects the third person to liability; therefore the personal nature of the contract is not affected.

The measure of contract recovery differs in civil law and common law jurisdictions. Louisiana Civil Code article 1934(1) makes a distinction between good faith and bad faith breach of contract. Similar to a tort recovery, damages which are the immediate and direct consequences of a bad faith breach are allowed in a contract action against the breaching party. Since such a breach of contract under another's inducement is usually in bad faith, the injured party has a contract remedy which is similar to that of a tort action. In common law jurisdictions contract remedy does not rest on a distinction between a good or bad faith breach. In order to encourage entry into commercial transactions,[55] the common law remedy for breach of contract is limited to damages foreseeable when the contract was made.[56] The injured party's recovery for other damages foreseeable at the time of the breach is limited to possible actions against a third party for inducing breach of contract.

In Louisiana the injured party may get full recovery in contract; whereas limitations on contract remedy at common law may force the party to resort to a tort action for full recovery. This observation should not lead one to the conclusion that inducing breach of contract is a unique development of the common law in response to inadequate contract remedy. Although this limitation on contract recovery gave added reason to the common law action for inducing breach of contract, this was not the primary reason for the tort's development. The principal reason is that the law's preference of performance to payment justifies deterring third parties from interfering with contractual relations.[57]

The emphasis of this tort is on securing performance, not payment of damages. In American jurisdictions the overwhelming majority of cases for inducing breach of contract involve actions for injunctions or situations where the defaulting con-

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55. Comment, 77 HARV. L. REV. 888, 967 (1964).

56. A CORBIN, CONTRACTS § 1007 (1964).

57. Comment, 77 HARV. L. REV. 888, 959 (1964).

tract party is insolvent.[58] In such cases any limitation on contract recovery is not the moving consideration in plaintiff's decision to go against the third party inducer.

The tort of inducing breach of contract cannot be dismissed as a unique common law phenomenon. This is evidenced by the fact that civil law jurisdictions such as France and Belgium[59] subject a third party to liability when he interferes with a contract. The French jurisprudence requires only simple knowledge of a contract by the third party.[60] French courts evidently go further than most common law courts which require knowledge plus some affirmative act amounting to inducement. The French position has not been examined in order to advocate its acceptance. Reference to French law has been limited to two purposes. First, the French position demonstrates that there are no inherent civilian concepts which make it difficult to fully accept this tort. Second, the French concern for security of contract evidences the fact that inducing breach of contract is not a unique common law phenomenon.

*Conclusion*

The twentieth century development of business and commercial relations has caused common law and civil law jurisdictions to recognize a cause of action for inducing breach of contract, thereby affording greater security to contracts. Louisiana has severely limited recovery in this area by requiring that means used by the defendant be unlawful in themselves. This position unduly limits the application of article 2315 and relies on the decisions of other jurisdictions which have subsequently been reversed.

By applying a dynamic concept of fault to the needs of

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58. W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 123 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS (Tent. draft § 774A(1) (1968).

59. In Belgium contractual relations are protected by the civil law—a person who knowingly participates in the violation of a contractual engagement undertaken with one of his competitors and profits thereby has committed a fault. H. PINNER, WORLD UNFAIR COMPETITION LAW 450 (1965).

60. A. WEILL, LA RELATIVITÉ DES CONVENTIONS EN DROIT PRIVÉ FRANÇAIS § 254 (1939): *"Le tiers peut être rendu responsable de la violation du contrat dès qu'il apparait en fait qu'il en a eu connaissance. Il est donc inexact de dire . . . que la jurisprudence . . . cherche toujours à découvrir comme base de la responsabilité du tiers une fraude."* (A third person can be held liable for violation of a contract as soon as it appears that he did in fact have knowledge of it. It is thus incorrect to say that the cases search to expose as a base of liability of the third person a fraud.) [transl. by authors].

modern business and commercial transactions, Louisiana should make inducing breach of contract actionable under article 2315. This tort can be introduced without equating this article to all common law tort doctrines or impairing any civilian concepts. In accord with the Civil Code's emphasis on performance, a cause of action for inducing breach of contract will result in greater security of contract in Louisiana.

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### SALES—LESION BEYOND MOIETY—ACTION AGAINST FIRST VENDEE AFTER RESALE TO THIRD PARTY

Plaintiff sold the timber on his property to defendant for $12,800. Defendant resold the timber for $30,000 to a third party. Plaintiff then filed suit against defendant for rescission of the sale, subsequently amending his petition to include the third party purchaser as a defendant. On a motion for summary judgment, the suit against the third party purchaser was dismissed. The first vendee and remaining defendant filed an exception urging no cause of action which was primarily based on the ground that since the ownership of the timber had passed into the hands of a third party, the plea of lesion was no longer available to the vendor. The district court sustained the exception and the court of appeal affirmed.[1] The Supreme Court of Louisiana reversed the judgment of the court of appeal, overruled the exception of no cause of action, and remanded the case to the district court for a trial on the merits. The court concluded that where immovable property is sold for a lesionary consideration and the purchaser subsequently resells the property, the original seller can recover from the original purchaser the proceeds from the original purchaser's sale to the third party. Or, in other words, the first vendor can recover the difference between the price at which he sold and the price which the vendee received when he subsequently resold. *O'Brien v. LeGette*, 254 La. 252, 223 So.2d 165 (1969).

The Louisiana Civil Code defines lesion as "the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract."[2] It further specifies that when a vendor of an immovable has received less than one-half the value of the estate sold by him, lesion beyond moiety has occurred and the

1. O'Brien v. LeGette, 211 So.2d 427 (La. App. 1st Cir. 1968).
2. LA. CIV. CODE art. 1860.