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OFFER AND ACCEPTANCE IN LOUISIANA LAW: A COMPARATIVE ANALYSIS: PART I—OFFER

Saúl Litvinoff*

I. INTRODUCTION

Offer and Acceptance as Consent

Meanings of Consent

The consent of parties legally capable of contracting is one of the requirements for a valid contract.¹ But the term consent, in contractual matters, bears two different connotations. In one sense, consent means the *accord of the parties' wills* on the projected contract, the uniformity of their opinion, or the meeting of their minds. In another and more restricted sense, consent means *each party's individual acquiescence* to the conditions of the projected contract,² given with the intent of creating binding legal effects.³ It is the first and broader sense that seems to have been utilized in Article 1798 of the Louisiana Civil Code when stating that "the will of both parties must unite on the same point." The second and more restricted reference of the term consent is clearly implied in Articles 1797 and 1800.

According to etymology, to consent means to will the same thing that another wills and wishes us to will.⁴ It is submitted that actually the two references of the term consent do not differ in essence. Basically, when the term is used in the first and broader sense, meaning the accord of the parties' wills, what is meant is the identity of what the parties had in mind. Their minds are supposed to meet because they are aimed at the same thing. When the term is used in the second and more restricted reference, attention is focused on what each of the parties had in mind. Since no contract will result unless

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1. LA. CIVIL CODE art. 1779 (1870): "Four requisites to the validity of a contract are: 1. Parties legally capable of contracting. 2. *Their consent legally given*. 3. A certain object, which forms the matter of agreement. 4. A lawful purpose." (Emphasis added.)

2. See 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 99 (2d ed. Esmelin 1952).

3. LA. CIVIL CODE art. 1799 (1870): "It is a presumption of law that in every contract each party has agreed to confer on the other the right of judicially enforcing the performance of the agreement, unless the contrary be expressed, or may be implied." See 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 323 (1833).

4. See 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 322 (1833).

some unity can be reasonably predicated on what both parties had in mind, no particular importance can be attached to the distinction between the two meanings of the term consent.⁵

Irrespective of the reference in which the term consent is used, its real significance cannot be discussed until the concept of consent is analyzed in its component parts—offer and acceptance.⁶ In the clear language of the Louisiana Civil Code, consent, being a mere operation of the mind, can have no effect unless it be evinced in some manner that shall cause it to be understood by the other parties to the contract.⁷ As the contract consists of a proposition and the consent to it, the agreement is incomplete until the acceptance of the person to whom it is proposed.⁸ If the one who proposes should change his intention before that consent is given, the concurrence of the two wills is wanting and there is no contract.⁹

Elements of Consent

No particular *form* is required for the offer or the acceptance.¹⁰ Either of them, the offer, as well as the acceptance of a contract, may be *express*, *implied* or *tacit*: express when evinced by words, either written or spoken; implied when manifested by actions; tacit when evidenced by silence or inaction, or when the circumstances of a particular situation, or a legal

5. In *Bender v. International Paint Co.*, 237 La. 569, 111 So.2d 775 (1959), and *Clark Warehouse & Implement Co. v. Jacques & Edmond Well, Inc.*, 152 La. 745, 94 So. 376 (1922), the court seems to imply the first and broader reference of the term consent.

6. See 1 AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 304 (1965); 2 PLANIOL, CIVIL LAW TREATISE. (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) PART I, no. 970, at 562 (1959).

7. LA. CIVIL CODE art. 1797 (1870).

8. LA. CIVIL CODE art. 1800 (1870). See TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 323 (1833).

9. *Id.*

10. See 2 PLANIOL, CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 969, at 561 (1959): "Thus tickets bearing only the price of an object exposed for sale in a store constitute an offer to sell the merchandise for the price marked and the first customer who consents to pay such price can exact its delivery. In some exceptional cases a simple fact can constitute the offer to contract. He who stations public carriages in the streets and places of the city is considered as offering them to the public at the price of the tariff. Consequently the act of the traveller who takes a place in the carriage, offering to pay the price, is the conclusion of the contract. . . ." *Id.* at 562.

A French decree of June 24, 1958, punishes the refusal to sell any merchandise or service by a professional merchant. The implication is that the mere fact of establishing himself as vendor amounts to a general offer to sell his merchandise to the public. See SAVATIER, LA THÉORIE DES OBLIGATIONS 144 (1967).

presumption directs the consideration of actions, silence, or inaction as evidence of consent.¹¹ However, as an *offer is an indispensable element* of that concurrence of the wills of which the contract consists, it is of utmost importance to determine whether a certain *declaration of will* amounts to a real offer or is merely a declaration made without an intention of becoming bound, such as a simple proposition, or a simple *pollicitation*.¹² The same problem exists when it is necessary to ascertain whether a certain declaration amounts to an *acceptance*.

An offer is a proposal to do something or to refrain from doing something in return for a counter-promise, an act, or forbearance. To be considered properly as such, the offer must fulfill the following three requirements clearly established in the Louisiana Civil Code:

(a) The design to give the other party the right of concluding the contract by his assent.¹³

(b) The offeror's intention to obligate himself.¹⁴

(c) A serious intent.¹⁵

When requirement (a) is absent, the proposition cannot be considered an offer, but an invitation to negotiate, or an expression of willingness to receive an offer from the other party. The intention required under (b) must be that of creating a legal obligation—and not one in the moral sense or a

11. LA. CIVIL CODE art. 1811 (1870). See 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 327 (1833). See also *Lyle Cashion Co. v. McKendrick*, 97 F. Supp. 1008, 1011 (E.D. La. 1951): "The rule is that acceptance of the contract as binding upon a party may be shown by his actions, and any definite and unequivocal course of conduct disclosing that the party has acceded or assented to it, is as binding on him as had he endorsed his assent in formal writing." See also *Diaz Trucking Service v. Kramer's Transfer & Stor.*, 50 So.2d 71, 74 (La. App. Orl. Cir. 1951): "Any conduct of one party to a contract for which the other party may reasonably draw the inference of a promise, is effective in law as such."

In general terms, the consent is express where words, written or spoken, or any other signs or gestures are used to manifest it. It is implied, when deduced from facts, even negative, such as omissions. See 1 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 295 (1923). See also 2 PUIG BRITAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 82-83 (1954), where a distinction between express tacit, and implied consent is suggested. Tacit would be the consent implied in fact. The expression "implied (presumed) consent," is reserved for those instances where it is implied in law. This threefold classification seems to fit very well the provisions of LA. CIVIL CODE art. 1811 (1870).

12. 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 34 (10th ed. 1953); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 143 (2d ed. Esmein 1952).

13. LA. CIVIL CODE art. 1802 (1870). See also arts. 1799 and 1803.

14. *Id.* art. 1813.

15. *Id.* art. 1815.

duty in conscience.¹⁶ Requirement (c) will exclude, as a real offer, a proposition made in jest,¹⁷ as a part of a game, or at the peak of an argument. It is, however, necessary that the joke or game be in accord with the circumstances or usages; otherwise, if the addressee of such a proposition could have reason to assume it to be a real offer, his acceptance would create a contract.¹⁸

Thus, in matters of everyday practices and dealings, it has been decided that a quotation of prices is not an offer to sell in the sense that a completed contract will arise out of the mere acceptance of the rate offered, or the giving of an order for merchandise in accordance with the proposed terms.¹⁹ But when a merchant, on request, sends a price list to a customer who orders goods in accordance with the price list, there is a contract formed between them for the price and upon conditions mentioned in the price list.²⁰ The surrounding circumstances explain sufficiently the difference between the two situations: with merchants, the sending of a price list implies the intention to contract on its terms, while with persons who are not merchants, a quotation of a price implies no such intention.

It has also been decided that an advertisement published in a newspaper may constitute an offer, the acceptance of which creates an obligation to perform in accordance with the terms of the offer.²¹

16. *Civ. Nov.* 14, 1883, S. 85, 1, 111: The obligation of a religious congregation to return a nun's monastic dowry if she leaves convent life was considered an *engagement d'honneur*, and not a legal obligation; *Req.*, Dec. 4, 1929, D.H. 1930, 3 *GAZ. PAL.* 1, 84 (1930): The one who takes an injured person to a doctor does not intend to obligate himself personally, but is acting out of pure humanity. See 6 *PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 143-44 (2d ed. Esmein 1952).

17. 6 *PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* (2d ed. Esmein 1952).

18. *Id.* at 144.

19. *Leonval v. McCall*, 4 *Orl. App.* 351 (1907): "It requires the acceptance by the one naming the price of the order so named to complete the transaction. Until thus completed, there is no mutuality of obligation." *Accord*, *Courteen Seed Co. v. Abraham*, 129 *Ore.* 427, 275 *Pac.* 684 (1929); *Nebraska Seed Co. v. Harsh*, 98 *Neb.* 89, 152 *N.W.* 310 (1915).

20. *Pere v. Dalgarn*, 3 *La. App.* 775 (*La. App. Orl. Cir.* 1926).

21. *Willis v. Allied Insulation Co.*, 174 *So.2d* 858 (*La. App. 1st Cir.* 1965); *Johnson v. Capital City Ford, Inc.*, 85 *So.2d* 75 (*La. App. 1st Cir.* 1955). The first case involved an offer of employment, the second, the sale of a car, but under rather special circumstances. In common law jurisdictions, advertisements or circular letters in relation to the sale of goods are usually interpreted as being mere invitations for offers: *Lovett v. Frederick Loeser & Co.*, 124 *Misc.* 81, 207 *N.Y. Supp.* 753 (1924); *Nebraska Seed Co. v. Harsh*, 98 *Neb.* 89, 152 *N.W.* 310 (1915). *But see* *Lefkowitz v. Great Minneapolis Surplus Store*, 251 *Minn.* 188, 191, 86 *N.W. 2d* 639, 691 (1957): "The test of

*Specifications for Consent**Express Consent*

In the cases where consent is express it must be given in language understood by the party who accepts, and the words that convey the expression of consent must be in themselves unequivocal.²² Otherwise, if the words chosen mean different things, such words could give rise to error which, as a vice, will cause the consent to be null.²³ But even when the words chosen are unequivocal and expressive of assent they may not create an obligation when from the context in which such words were written or spoken it appears that the party did not intend to obligate himself.²⁴ Therefore, it will devolve upon the party who relies on them to establish that a certain agreement was intended to create a legal obligation, that is, that the parties to it seriously contemplated the creation of legal rights and duties.²⁵

If the words are unequivocal but only expressive of mere intent, they cannot form an obligation.²⁶ Thus, the mere expression of a certain intention to do something does not form the basis of a contract,²⁷ nor is a mere statement of desire considered as giving rise to an obligation.²⁸

The parties' intent to contract must be serious.²⁹ A positive promise made in a manner that shows the lack of serious intent

whether a binding obligation may originate in advertisements addressed to the general public is 'whether the facts show that some performance was promised in positive terms in return for something requested.' 1 WILLISTON, CONTRACTS § 27 (rev. ed. 1936). See generally RESTATEMENT, CONTRACTS § 25 (1932).

22. LA. CIVIL CODE art. 1812 (1870).

23. *Id.* arts. 1812, 1820, and 1822.

24. *Id.* art. 1813. See also *id.* art. 1799.

25. *Fulton Bag & Cotton Mills v. Illinois Cent. R. Co.*, 10 Orl. App. 212 (1913).

26. LA. CIVIL CODE art. 1814 (1870).

27. *Caldwell v. Turner*, 129 La. 19, 55 So. 695 (1911): "A mere expression on the part of a deceased person of her intention to provide for a friend in her will does not form the basis of a contract; and it is not a will."

28. *Brown v. Lagemann's Succession*, 192 So. 543 (La. App. 1st Cir. 1940): "No recovery could be had against the succession on alleged agreement contained in written instrument which set forth no promise to pay, but merely stated that decedent in case of death wanted plaintiff's wife to be paid a stipulated amount for services rendered." See also *Hello World Broadcasting Corp. v. International Broadcasting Corp.*, 186 La. 589, 173 So. 115 (1937): "Statements of intention made to third persons cannot generally be considered as offers or promissory expressions."

29. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 105 (2d ed. Esmein 1952).

to contract will not create an obligation. An offer or an acceptance made in jest falls within this category.³⁰

Implied Consent

But words, either written or spoken, are not always necessary as vehicles of consent. In some instances mere actions—words excluded—will serve as evidence of consent to a contract provided they are done under circumstances that, in a natural way, carry that implication.³¹ Clear examples of this type of situation are found in Louisiana Civil Code Article 1816: (1) To use goods received from a merchant without any express promise implies a contract to pay the value,³² (2) If an offer is made for an article in deposit, and the article is received, the contract of deposit is complete,³³ (3) If a mandate is acted on, the mandatory is bound in the same manner as if he had accepted in writing.³⁴ In situations of this sort, all the terms that the one making the proposition or the delivery attaches to the acceptance of the proposition, or reception of the thing, are presumed to have been accepted by the act of receiving. According to the code example: "If the merchant, in delivering the goods, declare that they must be paid for by a certain time; if the depositor designate how the deposit is to be kept, or the mandator in what manner his commission is to be executed, he who receives and acts is obligated to the performance of all

30. Consent given *jocandi causa*, or *animus jocandi*. Also cases where one of the parties enters the contract with a mental reservation known by the other party. An obligation subject to a potestative condition—*condictio sic voluero*—should also be considered as falling within the purview of LA. CIVIL CODE art. 1815 (1870). See also LA. CIVIL CODE arts. 2024, 2034, 2035 and 2036 (1870).

31. *Id.* art. 1816.

32. *Id.* arts. 2441 and 2550. See also UNIFORM COMMERCIAL CODE § 2-201(3)(c) (1962); *id.* at Comment 2: "Receipt and acceptance either of goods or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists."

33. LA. CIVIL CODE art. 2926 (1870): "A deposit, in general, is an act by which a person received the property of another, binding himself to preserve it and return it in kind." *Id.* art. 2933: "The voluntary deposit can only be regularly made by the owner of the thing deposited, or with his consent expressed or implied. Consent is implied when the owner has carried or sent the thing to the depositary, and the latter knowing that the thing had been sent, has not refused to receive it." See 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 328 (1833).

34. LA. CIVIL CODE art. 2985 (1870): "A *mandate*, *procuracion* or *letter of attorney* is an act by which one person gives power to another to transact for him and in his name, one or several affairs." *Id.* art. 2989: "A power of attorney may be accepted expressly in the act itself, or by a posterior act. It may also be accepted tacitly; and this tacit acceptance is inferred, either from the mandatory acting under it, or from his keeping silence when the act containing his appointment is transmitted to him."

these conditions."³⁵ In all these cases the contractual will of the party performing a certain act, his consent, is presumed by the law. But where the law does not create a legal presumption of consent as arising from certain facts or when no presumption has been anticipated in the text of the law, then, as in other simple presumptions, it must be left to judicial discretion to ascertain whether the parties', or one party's, consent is to be implied from them.³⁶

Tacit Consent

There are situations where no words, either written or spoken, have been exchanged by the parties, nor specific acts carrying the implication of consent are performed by them, but an obligation will arise out of mere silence or inaction. In other words, not to speak or not to do, under certain circumstances, will be considered as evidence of consent.³⁷ In the code example, if, after the termination of a lease, the lessee continues in possession, and the lessor remains inactive and silent, a complete mutual obligation for continuing the lease is created by the act of occupancy of the tenant on the one side, and the inaction and silence of the lessor on the other.³⁸

The example chosen by the Code is one of tacit reconduction, or the extension of a contract for an additional period of time due to silence or inaction of one of the parties. But in all those or related cases where silence or inaction has to be evaluated as being evidence of consent, the relevant factors are the surrounding circumstances, since it is in them that the real meaning of the silence or the inaction is to be found.³⁹

As an old adage goes: "*qui ne dit mot consent.*"⁴⁰ But it would be very dangerous to allow unrestricted operation of the principle contained in the old saying. If that were the case, a duty to answer would be imposed upon the addressee of a proposition who would be considered bound unless he signified

35. *Id.* art. 1816.

36. *Id.* art. 1818. See 3 TOULLIER, *LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE* 328 (1833).

37. LA. CIVIL CODE art. 1817 (1870).

38. *Id.* See also *id.* arts. 2688 and 2689.

39. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 115 (2d ed. Esmein 1952); 2 PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL, PART I* 84 (1954).

40. He who does not speak assents. See 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 116 (2d ed. Esmein 1952).

his dissent. But no such conclusion can be validly reached. The lack of formalities for the expression of consent cannot be pushed so far as to abandon the requirement of establishing the factual existence of the consent.⁴¹ Therefore, in case of doubt consent should not be inferred from silence when no other circumstances lend support to the presumption. French jurisprudence asserts that, in default of any other surrounding circumstances, silence alone does not suffice as proof against the one subject to the alleged obligation.⁴² In German doctrine a principle is supported according to which silence will amount to consent only when the party who remains silent knows that his silence could be interpreted as consent. If such is the case, his contrary intent, or mental reservation, will be of no avail.⁴³

Only when surrounded by sufficiently clear corroborating circumstances, should silence or inaction be taken as acquiescence to a proposition, such as:

(1) Where the parties have agreed expressly that the silence of one of them shall be taken as acceptance of the other's proposition or where the parties have stipulated that a certain contract entered into by them for a certain duration may be extended for a determined or undetermined additional period of time in default of notice of termination before a certain term.

(2) Where previous transactions between the parties allow the court to interpret the silence of one of them as acceptance of the other's proposition, for instance, when, against the background of a certain business relationship one of the parties

41. *Id.* at 117.

42. *D. Jur. gén., supp., v^o Obligations, n^o 29, S. 84, 2, 190 GAZ. PAL. 93, 2, 162.*

43. 1 ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS*, PART II 644 (1955). See also 2 PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL*, PART I 88 (1954). The same principle seems to be supported by Louisiana jurisprudence. See *Rahler v. Rester*, 11 So.2d 87, 89 (La. App. 1st Cir. 1943): "Although the thing purchased by the wife is not a necessity in the sense of Article 120 of the Civil Code, the husband nevertheless can be held liable if he knew of the purchase and did nothing at the time the same was made to repudiate the debt and permitted the article purchased to be used for the benefit of the community. In such instance his silence and inaction are circumstance showing consent and ratification." See also *Godbold v. Harrison*, 1 McGloin 31 (La. App. 1881). In this connection it is interesting to notice *NEB. REV. STAT. § 63-101* (1943): "No person in this state shall be compelled to pay for any newspaper, magazine or other publication which shall be mailed or sent to him without his having subscribed for or ordered it, or which shall be mailed or sent to him after the time of his subscription therefor has expired, notwithstanding that he may have received it." Similar statutes are apparently in force in Florida, Oregon, and Washington, according to *FULLER & BRAUCHER, BASIC CONTRACT LAW* 368 (1964).

sends the other an order to be entered, or goods for sale, or commissions a service to be rendered within the framework of the traditional relation, and no express dissent is manifested by the party receiving the order, goods, or commission.

(3) Where according to conventional usages or practices of a certain trade the lack of an express rejection of a proposition within a certain term is considered as acceptance.

The evaluation of the relevance of the surrounding circumstances, in cases of this kind, is left, of course, to the discretion of the court.⁴⁴

Freedom of Form

Although no special formalities are required for the offer or the acceptance, when the parties have agreed to reduce the contract to writing it is necessary to ascertain their intentions. Was it their intention to subordinate the final conclusion of the contract to the making of the writing, thereby reserving the privilege of withdrawing until the moment of signing, or did they consider themselves bound from the moment their wills concurred irrespective of the signing of a writing supposed to take place afterwards?⁴⁵ In cases of the first kind, the parties' intention must be closely carried out, and, therefore, they will not be bound if the contract is not reduced to writing. The same conclusion should be reached when, in an act under private signature or by exchanged letters, the parties have agreed to make the contract by public act.⁴⁶

This is the distinction between a contract and the writing that may contain it.⁴⁷ In the clear language of the Louisiana Civil Code:

44. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 119-20 (2d ed. Esmein 1952). See *RESTATEMENT, CONTRACTS* § 72(1) (1932): "[There is a contract] (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer. (c) Where because of previous dealings or otherwise, the offeree has given the offerer reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand." It can be said that civil and common law do not differ in the basic principles underlying the doctrine of silence as expression of contractual will.

45. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 123 (2d ed. Esmein 1952).

46. 2 PLANIOL, *CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* no. 973, at 564 (1965); see also 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS - PART I* 123 (2d ed. Esmein 1952).

47. LA. CIVIL CODE art. 1762 (1870). 2 PLANIOL, *CIVIL LAW TREATISE, PART I*

"The contract must not be confounded with the instrument in writing by which it is witnessed. The contract may subsist, although the written act may, for some defect, be declared void; and the written act may be good and authentic, although the contract it witnesses be illegal. The contract itself is only void for some cause or defect determined by law."⁴⁸

The German Civil Code provides that, in case of doubt, when the parties have agreed upon reducing an agreement to writing, the contract is considered not concluded if the instrument is not written.⁴⁹ In France, where the Code Napoleon does not contain a similar provision, such a presumption is not admitted. On the contrary, French jurisprudence decided that in situations of this kind, the contract in principle is considered as definitive and concluded, and not subordinated to the making of a written instrument unless special circumstances indicate the contrary, which must be determined by the court.⁵⁰

In Louisiana, the Civil Code, as the Code Napoleon, does not contain express provisions on this matter other than Article 1762, and the jurisprudence reached conclusions not entirely dissimilar to the French decisions. As long ago as 1814 the Louisiana Supreme Court asserted that: "It is elementary in our law, that where the negotiations contemplate and provide that there shall be a contract in writing, neither party is bound until the writing is perfected and signed. *The distinction is manifest between those cases in which there is a complete verbal contract, which the law does not require to be reduced to writing, and a subsequent agreement that it shall be reduced to writing, and those in which, as in this case, it is a part of*

(AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 974, at 564 (1965).

48. LA. CIVIL CODE art. 1762 (1870).

49. BURGERLICHES GESETZBUCH § 154 (1896). See also B.G.B. § 125. A similar provision is found in the SWISS FEDERAL CODE OF OBLIGATIONS art. 16 (1911). See 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 123 (2d ed. Esmein 1952). An interesting provision pertaining to this subject is contained in the SPANISH CIVIL CODE art. 1279 (1889): "When the law requires the execution of an authentic act or any other formality in order to make effective the obligations arising out of a contract, the parties may compel each other reciprocally to fulfill the formalities from the moment consent was given and other requirements necessary for the contract to be valid were fulfilled." A similar provision is found in the CIVIL CODE OF PUERTO RICO art. 1246 (1902). See also 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 182 (1954).

50. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 124 (2d ed. Esmein 1952); S. 69, 1, 465.

the bargain that the contract shall be reduced to writing. In the first class of cases the original verbal contract is in no manner impaired by the failure to carry out the subsequent agreement to put it in writing. In the second class of cases, the final consent is suspended; the contract is inchoate, incomplete, and it cannot be enforced until it is signed by all the parties."⁵¹

There is, certainly, no problem when the agreement to reduce a contract to writing is *subsequent* to the original verbal agreement concluded by the same parties. If such is the case, the second and separate stipulation can be treated independently of the previous stipulations making up the principal verbal and binding agreement, as if it were a different contract—the object of which is the first one.⁵² The breach of this second agreement will not result in the invalidity of the previous one.

But the situation differs when the stipulation to reduce the contract to writing is not subsequent to the original one but is negotiated simultaneously. Here, it cannot be said that there is a different contract. On the contrary, the parties entered into a single agreement that must be taken as a whole⁵³ and their intentions must be scrutinized in order to ascertain the materiality that the parties vested in the stipulation to reduce their contract to writing.

The key to the solution, in situations of this second kind, lies in Louisiana Civil Code Article 1764:

"All things that are not forbidden by law, may legally become the subject of, or the motive for contracts; but different agreements are governed by different rules, adapted to the nature of each contract, to distinguish which it is necessary in every contract to consider:

"1. That which is the essence of the contract, for the want whereof there is either no contract at all, or a contract of another description. Thus a price is essential to the

51. *Villéré v. Brognier*, 3 Mart.(O.S.) 326, 349 (La. 1814); *Accord, Larousini v. Werlein*, 52 La. Ann. 424, 27 So. 89 (1899); *Fredericks v. Fasnacht*, 30 La. Ann. 117 (1878); *Bloeker v. Tillman*, 4 La. 77 (1832); *Des Boulets v. Gravier*, 1 Mart.(N.S.) 420 (1923).

52. See, e.g., *Kaplan v. Whitworth*, 116 La. 337, 40 So. 723 (1906); see also LA. CIVIL CODE arts. 1762 and 1885 (1870).

53. See *Long-Bell Petroleum Co. v. Tritico*, 216 La. 426, 43 So.2d 782 (1950); LA. CIVIL CODE art. 1955 (1870): "All clauses of agreements are interpreted the one by the other, giving to each the sense that results from the entire act."

contract of sale; if there be none, it is either no contract, or if the consideration be other property, it is an exchange.

"2. Things which, although not essential to the contract, yet are implied from the nature of such agreement, if no stipulation be made respecting them, but which the parties may expressly modify or renounce, without destroying the contract or changing its description; of this nature is warranty, which is implied in every sale, but which may be modified or renounced, without changing the character of the contract or destroying its effect.

"3. Accidental stipulations, which belong neither to the essence nor the nature of the contract, but depend solely on the will of the parties. The term given for the payment of a loan, the place at which it is to be paid, and the nature of the rent payable on a lease, are examples of accidental stipulations.

"What belongs to the essence and to the nature of each particular description of contract, is determined by the law defining such contracts; accidental stipulations depend on the will of the parties, regulated by the general rules applying to all contracts."

The clear doctrine of this article is that parties to a contract are free to stipulate as they please, if their stipulations are not contrary to good morals, public policy, or do not violate some law.⁵⁴ Therefore, the contracting parties may make any stipulations material to the contract.⁵⁵ They are free to arrive at the mutual understanding that a certain stipulation, which otherwise would be considered accidental, is essential to their contract. If that is the case, there will be no contract if one of the elements, made essential by the parties' will, is wanting. This is so even in cases in which such stipulations may seem to be of little or no value to either party.⁵⁶

The parties to a contract are equally free to characterize a certain stipulation as an accidental one, in which case the

54. *Morris Buick Co. v. Ray*, 43 So.2d 83 (La. App. 2d Cir. 1950); *Epstein v. Chaillot*, Orl. No. 8783 (La. App. 1923).

55. *Bank of Cotton Valley v. McInnis*, 143 La. 436, 78 So. 727 (1918).

56. *Id.* See also *Carrano v. Concordia Fire Ins. Co. of Milwaukee*, Orl. No. 7513 (La. App. 1919): "It lies within the power of contracting parties to make any stipulation material to the contract; although such stipulation may seem to be of little or no value to either party intelligently entering into a binding contract."

non-performance of the accidental stipulation will not invariably have the effect of abrogating the agreement, since such covenant is not of the essence of a valid contract.⁵⁷

As a consequence, when an agreement to reduce a contract to writing is not clearly subsequent to an original verbal agreement, but a stipulation contemporary with the principal stipulations of the contract, the fact to be determined is whether the parties considered it essential or accidental. It might be said that, when there are no strong indications to the contrary, there is a presumption that such a stipulation is accidental.⁵⁸ Such a presumption is well founded in Article 1764 in the clear language of which what belongs to the essence and to the nature of each particular contract is determined by the law, and stipulations that depend exclusively on the will of the parties are accidental.

57. *Lillis v. Owens*, 21 So.2d 185 (La. App. Orl. Cir. 1945); *Andrus v. Eunice Band Mill Co.*, 185 La. 403, 169 So. 449 (1936); *Moore v. O'Bannon & Julien*, 128 La. 161, 52 So. 253, 255 (1910). See also *Auto-Lec Stores, Inc. v. Ouachita Valley Camp*, 185 La. 876, 171 So. 62 (1936). In this case, the lessor failed to sign a written lease at the time agreed upon. The lessee, notwithstanding, upon his own signing thereof, went into possession of the premises after delivering to the lessor a series of rent notes and continued to occupy them for about two years and pay the rent notes as due. Plaintiff-lessee allegedly sustained damages through the loss of a sub-lease resulting from defendant-lessor's failure to sign a written lease. In suit instituted by lessee the court said: "Under this state of facts, the agreement to lease was complete; was carried out and acted upon to the letter; and thereby became an executed contract. Defendant is as firmly bound as if the contract had been reduced to writing and signed by it. The allegations of the petition, taken as true, show, in our opinion, a cause of action for damages." *Id.* at 883, 171 So. at 64. In this case the court invoked art. 1764 as authority. It is clear from this case that the plaintiff was entitled to recover damages for defendant's nonperformance of an accidental stipulation which did not prevent him being "as firmly bound as if the contract had been reduced to writing and signed by it." But the court also justified plaintiff's action vacating the premises before expiration of the contractual term, thereby creating some doubts as to the court's real understanding of the nature of the stipulation. In spite of this latter aspect, the correct doctrine was established, since all cases of this kind should be contemplated in the light of art. 1764.

58. See *Montague v. Weil*, 30 La. Ann. 50 (1878): "The reduction of an agreement to writing signed by the parties, is not necessary to its perfection as a contract, unless it clearly appears that the parties intended that it should not be complete as a contract until so written and signed." (Emphasis added.) See also *Avendano v. I. W. Arthur Co.*, 30 La. Ann. 316 (1870): "Where the evidence shows that the parties intended, originally, that the contract of lease should be reduced to writing, neither will be bound until it is signed by both." See also *Breaux Brothers Constr. Co. v. Associated Contractors, Inc.*, 226 La. 720, 77 So.2d 17 (1954); *Waldhauser v. Adams Hats*, 207 La. 56, 20 So.2d 423 (1945); *McIntire v. Industrial Sec. Corp.*, 158 So. 849 (La. App. Orl. Cir. 1935); *Johnson v. Williams*, 178 La. 891, 152 So. 556 (1934); *Reimann Constr. Co. v. Heinz*, 17 La. App. 687, 137 So. 355 (Orl. Cir. 1931); *De Soto Bldg. Co. v. Kohnstamm*, Orl. No. 7627 (La. App. 1919); *Crescent City Stock Yards & Slaughter House Co. v. Bosch & Martin*, 12 Orl. App. 366 (La. App. 1915).

Subjective Will and Objective Declaration

When one party proposes and the other assents, then the obligation is complete, and by virtue of the right that each party has impliedly given to the other, either may call for the aid of the law to enforce it.⁵⁹ After the offer is accepted, the parties are bound. In a language entirely consistent with tradition, it can be said that at that moment the parties have formulated their own law.⁶⁰

It is arguable whether the parties are bound according to their real will, or according to their will as manifested, in cases where differences are apparent between what was really intended and what was actually declared.⁶¹ It is easy to understand that this argument reflects the long-standing dispute between the subjective and objective approach to contract.⁶² A classic theory enhances the predominance of the real, the subjective, will, and asserts that the declaration or manifestation of it has only a secondary importance. It is necessary, then, to scrutinize carefully the real will in order to learn whether the contract was actually formed, and, if that is the case, to interpret it. Another doctrine asserts that the declared will should prevail. For those who support this view, the formation of the contract is determined by the accord of the parties' *declared* will. The real will of the parties, according to this theory, only exists in their soul and, therefore, cannot enter the field of the law. There would be no security of transactions if the one who manifests his will

59. LA. CIVIL CODE art. 1803 (1870). See also *id.* art. 1799. Art. 1803 gives recognition to what is, perhaps, the most important effect of obligations: the *quod adstringimur aliis solvenda rei secundum lege civitate nostram* of the classic definition. It is interesting to notice the treatment given the same subject in the ARGENTINE CIVIL CODE art. 505 (1869): "The effects of obligations, with respect to the creditor are the following:

- "1. To give him the right to have recourse to legal measures to compel the debtor to procure him that which he has undertaken to procure.
- "2. To cause it to be procured by another at the debtor's cost.
- "3. To recover damages from the debtor.

"With regard to the debtor, a specific performance of the obligation gives him the right to obtain the proper discharge, or the right to contest the actions of the creditor, if the obligation is extinguished or modified by a legal cause."

60. LA. CIVIL CODE arts. 1901, 1945 (1870). In this connection it is interesting to notice the definition of contract contained in art. 1137 of the ARGENTINE CIVIL CODE (1869): "There is a contract whenever several persons agree upon a declaration of common will, designed to regulate their rights."

61. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 109 (2d ed. Esmein 1952); 2 PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL, PART I* 92-99 (1954).

62. See CORBIN, *CONTRACTS* § 106, at 156 (1952).

were not to be considered bound to the addressee of his declaration in the terms and according to the meaning of the words he chose.⁶³

The supporters of the subjective will theory are anxious to protect, above all, the freedom of determination of the parties who engage in a contract. Those who adhere to the declared will theory give greater weight to considerations of credit and security of transactions, and, above all, to the necessity of not injuring the confidence that one places in another's manifestations.

But neither of these two approaches can be carried too far. On the one hand, the declared will theory has not been adopted in full in any modern legislation, not even in the German Civil Code. Numerous restrictions and qualifications imposed upon the operation of this theory evidence the insurmountable necessity of understanding difficult determinations of intention, and even psychological analysis. He who makes a voluntary declaration ought to know, at the moment he makes it, that the nature of his declaration is such as to permit the other party to believe that he intends to bind himself. On the other hand, if it is asserted that the real, the subjective, will is the true source of obligations, it is nonetheless necessary to take into account the declaration, the external manifestation of this will, because the declaration is the only social, objective fact on which the law can focus.⁶⁴

French jurisprudence attaches the binding force to the subjective will, and, in interpreting contracts according to Article 1156 of the Code Napoleon,⁶⁵ French courts try to ascertain the real intention of the parties beyond the literal sense of words. They have tempered the strict theory of the subjective will by resorting to several devices of interpretation. In the first place, by applying rigorously the Code Napoleon rules on admissibility of parol evidence⁶⁶ they do not allow proof of a real intention

63. See 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 109 (2d ed. Esmein 1952).

64. *Id.* at 110.

65. Similar to LA. CIVIL CODE art. 1950 (1870): "When there is anything doubtful in agreements, we must endeavor to ascertain what was the common intention of the parties, rather than to adhere to the literal sense of the terms."

66. CODE NAPOLEON art. 1341, similar to LA. CIVIL CODE arts. 2276 and 2277 (1870): "Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since." LA. CIVIL CODE art. 2276 (1870).

different from the intention expressed in writing. In the second place, by extensive interpretation of the code rules on simulation,⁶⁷ which forbid the one who makes a simulation to set up a secret act against a third party, they make the declared intention prevalent over the real intention whenever the interest of a third party is to be protected. Finally, a declaration of will contrary to the real intention may constitute a fault of such a nature as to render the one who makes the declaration responsible in the event of the nullity of the contract.⁶⁸

The dispute between the subjective will and the declared will theories, the subjective and the objective approaches to contract, is no longer realistic. A will that is purely subjective, meaning that it was never expressed, is irrelevant in the eyes of the law. Only the will that is declared or manifested, that which materializes in an objective act, may start the operation of the legal mechanism. Once this occurs, an act of human conduct has taken place, and every person called to evaluate its meaning, for instance, a judge, will have to take the act as one single phenomenon, wherein a certain intention, a subjective element, is thoroughly blended with a certain utterance, an objective element. Either of those two elements, although susceptible of being analytically isolated, is incomplete and insufficient when not taken in the context of the whole. Each of them is a component part that should never be mistaken for the whole.⁶⁹ The intention illuminates the declaration, in the same manner as the declaration purports to express the intention.

A more realistic approach to this subject calls for a distinction between intentional and unintentional differences in the

67. CODE NAPOLEON art. 1321, similar to LA. CIVIL CODE art. 2239 (1870): "Counter letters can have no effect against creditors or *bona fide* purchasers; they are valid as to all others; but forced heirs shall have the same right to annul absolutely and by parol evidence the simulated contracts of those from whom they inherit, and shall not be restricted to the legitime."

68. This is a case of *culpa in contrahendo*, where the fault is neither contractual, nor delictual. See 1 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 95-101 (1923); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT FRANÇAIS—OBLIGATIONS—PART I 111 (2d ed. Esmein 1952); 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 254-58 (1954); see also Schwenk, *Culpa in Contrahendo in German, French and Louisiana Law*, 15 TUL. L. REV. 87-99 (1941). LA. CIVIL CODE art. 2452 (1870), can be interpreted as incorporating this doctrine: "The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person."

69. 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 95-112 (1954). Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931).

subjective will and its declaration.⁷⁰ In the first case, when the differences are intentional, the will as declared prevails over the real intention for the benefit of the innocent party, and to the detriment of the party chargeable with the intentional difference.⁷¹ If both parties have contributed to the intentional difference between the real will and the declared one, as in a case of simulation, between the parties the real intention prevails over the simulated one, not because it is the "subjective" will, but because it is the "real" one. In effect, in these situations there is no case of a subjective and an objective will, since it is obvious that each party made two different "declarations" of will. One, the real declaration addressed to the other party alone that the latter understands as the true statement of intention. The other, the declaration of a simulated, fictitious will, apparently addressed to the other party, but actually intended as a notice to anyone. The other party understands the simulated character of the second declaration; otherwise it would not be possible to speak of a simulation at all.⁷² But, if the declaration of a simulated will was executed in writing, then no measure of proof will constitute convincing evidence as to the real intention since parol evidence is not admissible in such a situation.⁷³ Counter letters can be set up by one party of a simulation against the other, but can have no effect against third parties in good faith.⁷⁴

70. 2 PLANIOL, CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 1186-1190 (1959); 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 100-03 (1954).

71. See LA. CIVIL CODE art. 1847(6) (1870) and art. 1958: "But if the doubt or obscurity arise for the want of necessary explanation which one of the parties ought to have given, or from any other negligence or fault of his, the construction most favorable to the other party shall be adopted, whether he be obligor or obligee." See *Davis v. Lacaze*, 181 La. 75, 158 So. 626 (1935), followed *Lacaze v. Atkins*, 158 So. 876 (La. App. 2d Cir. 1935), where an agreement for the substitution of a mortgage note for other collateral in creditor's possession was held binding, notwithstanding the creditor's uncommunicated mental reservation, when assenting to the substitution, that he was going to look into the value of the mortgaged property.

72. 2 PLANIOL, CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1186, at 676 (1959); 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 100-03 (1954).

73. Which does not mean that only a writing may be admitted as evidence. See *Jones v. Jones*, 214 La. 50, 36 So.2d 635 (1948); *Sangassan v. Sangassan*, 181 La. 31, 158 So. 611 (1935); *Hood v. Hood*, 14 La. App. 424, 128 So. 546 (2d Cir. 1930); *Phelps v. Mulhaupt*, 146 La. 1078, 84 So. 362 (1920). In connection with LA. CIVIL CODE art. 2291 (1870) and art. 347 of the CODE OF PRACTICE (1870), see LA. CODE OF CIVIL PROCEDURE art. 1491 (1960).

74. LA. CIVIL CODE art. 2239 (1870). A simulation is not in itself a cause of nullity. See 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 679 (1959). See *Gravier's Curator v. Carraby's Executor*, 17 La. 118 (1841).

When the differences between the subjective and the declared will are unintentional, the right attitude consists in ascertaining whether the will as declared could have reasonably led the other party to rely on it and not in speculating as to which should prevail. This should not be understood as an assertion that the declared will ought to prevail over the subjective one, nor as an adoption of the objective approach. On the contrary, it should be noticed that one party may be justified in his reliance *only* when the declared will of the other party is consistent with his presumed intention. This presumption of certain intention is not complex if it is realized that a declaration of will is meaningful only when introduced as a part of the process of communication, and that the presumption is, and it has always been, relevant under the civil law.⁷⁵

In this fashion, the two component parts of the whole are duly taken into account without destroying the unity they present in reality, an old dispute is ended, and a very important interest, reliance, is recognized.⁷⁶

It is submitted that sufficient authority to support this approach can be found in the Louisiana Civil Code. As already pointed out, since consent is a mere operation of the mind, it will be of no effect, *unless it is evidenced in some manner that shall cause it to be understood by the other parties to the*

75. LA. CIVIL CODE art. 1894 (1870): "An agreement is not the less valid, though the cause be not expressed," equivalent to art. 1132 of the FRENCH CIVIL CODE (1804). See, in this connection, 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 329 (1833): "It is upon him who wishes to make the contract depend upon the reality of an unknown motive to so explain himself and to make it a condition of his obligation; it is upon him who makes a promise to investigate and to foresee beforehand what may follow and what may result against his interests. If he wishes to break his contract under the pretext of the falsity of the motive that the other party did not know of, or had not regarded as a condition of the promise which he accepted, he would lead the latter into an error the consequence of which he should repair; he is obligated to make known an intention that the other party cannot discover." Which means that, unless a different cause is manifested by the party, a presumed cause will be deemed valid and sufficient. See 1 AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 340 (1965).

76. *Accord*, Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52-96, 373-420 (1937). RESTATEMENT, CONTRACTS § 90 (1932): "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 257 (1954). See Choppin v. Labranche, 48 La. Ann. 1217, 1220, 20 So. 681, 682 (1896): "The principle of estoppel, so often applied, in controversies involving pecuniary rights, will not permit the withdrawal of promises or engagements on which another has acted." See also PUIG BRUTAU, ESTUDIOS DE DERECHO COMPARADO 124-25 (1951).

contract.⁷⁷ On the other hand, the party proposing is bound by his proposition, and his later withdrawal will be of no avail, if the other party's assent is given within the time *the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow.*⁷⁸ As a consequence, the party proposing may revoke his offer or proposition, but not without allowing a reasonable time given from the terms of his offer, *or from the circumstances he may be supposed to have intended to give to the other party to communicate his determination.*⁷⁹ A promise will create no obligation for lack of serious intent, *unless the lack of serious intent is shown by the manner in which the promise is made.*⁸⁰ No contract may be invalidated because of error in motive, *unless the other party was apprised that the mistaken element was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that the other party knew.*⁸¹ The obligation arising out of a contract extends not only to what is expressly stipulated, but also to *everything that by law, equity, or custom is considered incidental to the particular contract, or necessary to carry it into effect.*⁸² This means that the parties may be bound to more than they might have actually intended, as the law, in many instances, will substitute its determination for their real intention.⁸³ The intent of the parties is to be determined *by the words of the contract*, when these are clear and explicit and lead to no absurd consequences.⁸⁴ Certainly, the literal sense of the words is not binding *if there is anything doubtful in the agreements;*⁸⁵ if that is the case, the *common intention* of the parties should be ascertained.⁸⁶ However, when a clause is susceptible of two interpretations, *it must be understood in a sense in which it may have some effect*, rather than in a sense which would render it nugatory;⁸⁷ a presumption of the intention to become bound will prevail over a presumption that the parties did not intend to bind themselves. When the

77. LA. CIVIL CODE art. 1797 (1870). See *Lachman v. Block*, 47 La. Ann. 505, 17 So. 153, 28 L.R.A. 255 (1895).

78. *Id.* art. 1802.

79. *Id.* art. 1809.

80. *Id.* art. 1815.

81. *Id.* art. 1826.

82. *Id.* art. 1903. See also *id.* art. 1901, *in fine*.

83. *Accord*, 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 197-98 (1954).

84. LA. CIVIL CODE art. 1945(3) (1870).

85. *Id.* art. 1950.

86. *Id.*

87. *Id.* art. 1951.

intent of the parties is *doubtful*, the manner in which it was carried out by both parties, or by one of them with the express or implied assent of the other, will furnish a rule for its interpretation.⁸⁸ The agreement, in a doubtful case, is interpreted against the one who has contracted the obligation.⁸⁹ Finally, if a doubt or obscurity arises out of the want of necessary explanation which one of the parties ought to have given, or from any other negligence or fault of his, the construction most favorable to the other party shall be adopted, whether he be obligor or obligee.⁹⁰

Many of the rules indicating how the intention is to be expressed and interpreted have no equivalent in the French Civil Code.⁹¹ When all those provisions are taken in the unity of their context, the conclusion flows that the Louisiana Civil Code contemplates the intention and its expression as a whole, the parts of which support each other reciprocally.⁹² The intention is to be sought in the words by which it is conveyed, and where there is a difference giving rise to obscurity or ambiguity,

88. *Id.* art. 1956 (1870): "When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation." It is submitted that the word *executed* written into the article is ambiguous, as it might mean signing of the contract or performance of the same. The French text of the same article reads: "*Lorsque l'intention des parties est douteuse, c'est aussi une règle d'interprétation que d'expliquer cette intention par la manière dont le contrat a été exécuté par les deux parties ou par l'une d'entre elles, avec le consentement exprès ou implicite de l'autre.*" See 1 LOUISIANA LEGAL ARCHIVES, PROJET OF THE CIVIL CODE OF 1825, 262 (1936). The reference of the French word *exécuté* is more precise.

89. LA. CIVIL CODE art. 1957 (1870). Although the text of this article is very clear, after the amendment by La. Acts 1871, no. 87, it states exactly the opposite of its French original text: "*Dans le doute, la convention s'interprète contre celui qui a stipulé, en faveur de celui qui a contracté l'obligation.*" See FRENCH CIVIL CODE art. 1162 (1804). See *Robbert v. Equitable Life Assur. Soc.*, 217 La. 325, 48 So.2d 286 (1950); *Reed v. Fidelity & Guar. Fire Corp.*, 17 La. App. 567, 136 So. 757 (1931); *Schexnayder v. Capital Riverside Acres*, 170 La. 714, 129 So. 139 (1930). *But see Pratt v. Centennial Realty Co.*, 12 Orl. App. 76, 80 (La. App. 1914): "In case of doubt the conclusion must be '*in favorem solutionis*,' in the sense the least onerous to the obligor."

90. LA. CIVIL CODE art. 1958 (1870).

91. Such as *id.* arts. 1797, 1802, 1809, 1815, 1826, 1945, 1956, 1958. None are equivalents to *id.* arts. 1963-1967 found in the CODE NAPOLEON.

92. "The rights of parties to a contract are to be governed by the intention of the parties, as reflected by the terms of the contract, subject only to the law that controls the subject matter of the contract." *Robinson v. Horton*, 197 La. 919, 2 So.2d 647 (1941). *Accord*, *Lama v. Manale*, 218 La. 511, 50 So.2d 15 (1951); *Vaughn v. P. J. McInernet & Co.*, 12 So.2d 516 (La. App. 2d Cir. 1943); *Bank of Napoleonville v. Knobloch & Rainold*, 144 La. 100, 106, 80 So. 214, 216 (1918): "When persons commit their agreements to writing, their intentions cannot be sought outside the four corners of the written instrument."

the construction will be against the party who, through his negligence or fault, originated them.

It can be said that the above-stated provisions give no weight at all to a consideration of the common intent of the parties as a mythical substance, but as an element resulting from a process of communication, to be reasonably ascertained by the courts.⁹³

II. OFFER

Duration of the Offer: The Problem of Revocation

Historical Development

When the offer is accepted, the contract is complete. The acceptance must be expressed to the one who made the offer; it must conform to the terms of the proposition;⁹⁴ and, very especially, the acceptance must take place before the offer is terminated or revoked.⁹⁵

The problem to be considered now is whether an offer can be revoked at any time before it is accepted or whether the offeror is bound by the terms of his offer, and, if this is the case, within what limitations. These are problems that, in everyday life, will be usually involved in cases of contracts by correspondence. The delicate point is whether the offer can be revoked after the acceptance takes place, but before it reaches the offeror. The mere fact that the parties are not negotiating face to face plainly excuses the occurrence of situations of this sort. The two above-stated problems present a marked similarity in nature; however, for better clarification they are taken apart and analyzed separately. May he who offered revoke after the acceptance, but before its reception, irrespective of the acceptance by the offeree? May the offeror be bound not to revoke during a certain period in order to allow the offeree time for a considered decision?⁹⁶

Here, the subject of discussion will be the duration of the offer in the stricter sense.

In Roman law, an offer did not have a binding effect. Only

93. *Accord*, 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 200 (1954).

94. LA. CIVIL CODE art. 1805 (1870).

95. *Id.* art. 1800.

96. 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 200 (1954).

rarely could a unilateral promise of a public or religious nature be enforced, as a promise of a gift made to a city.⁹⁷ The regularity of business correspondence was not very developed, as the territorial expansion of trade took place mostly through agents or personal representatives.⁹⁸

It was not until after the use of the mail became common that the traditional rule of Roman origin was felt unsatisfactory. The first reaction took place in the eighteenth century, when the Prussian Code introduced a provision according to which an offer remained firm for a certain period of time.⁹⁹ This rule was not very clearly formulated, and it was not in force in all the country, but only in certain sections. In the following century, the German Commercial Code of 1861 adopted the irrevocability rule in regard to commercial transactions, and, with the advent of the German Civil Code, at the beginning of the present century, the irrevocability rule became general for Germany, irrespective of the type of transaction. Thus, he who makes an offer to enter into a contract is bound by the offer, unless he clearly signifies to the other party that he should not be considered bound.¹⁰⁰ The offer ceases to be binding when it is declined by the offeree, or when it is not timely accepted.¹⁰¹ An offer made to a person who is present may be accepted only there and then; the same rule applies in the case of an offer made by telephone. When the offeree is not present, he may accept the offer within such a period of time as the offeror may expect the answer to take under ordinary circumstances.¹⁰² If a period of time is named for acceptance, the latter may take place only within that period.¹⁰³ When the arrival of the acceptance is untimely, although transmitted in a manner to make its reception timely with ordinary forwarding, the offeror, if cognizant of the fact, must, upon reception of the acceptance, notify the acceptor immediately of the delay, otherwise the acceptance is deemed not to be untimely.¹⁰⁴

97. BUCKLAND, *A TEXTBOOK OF ROMAN LAW* 457 (1932); BUCKLAND & MCNAIR, *ROMAN LAW AND COMMON LAW* 273 (2d ed. Lawson 1952).

98. Nussbaum, *The Offer-And-Acceptance Doctrine*, 36 COLUM. L. REV. 923 (1936).

99. *Id.*

100. B.G.B. art. 145.

101. B.G.B. art. 146.

102. B.G.B. art. 147.

103. B.G.B. art. 148.

104. B.G.B. art. 149. Provisions closely similar to those in arts. 145-149 of the GERMAN CIVIL CODE are to be found in the SWISS CODE of 1907, and the JAPANESE CODE of 1898.

It is commonly asserted that in the Latin countries, the Roman rule of revocability of the offer at any time before acceptance prevails.¹⁰⁵ However, the Italian Commercial Code of 1882 provided that the offeror who exercised his power of revocation was liable for damages when the offeree, relying on the offer, prepared for performance.¹⁰⁶ The present Italian Civil Code, enacted in 1942, provides that an offer may be revoked as long as the contract is not perfected, but, when the offeree starts performance of the contract in good faith before knowing of the revocation, he may recover from the offeror the expenses and losses occasioned by the commenced performance.¹⁰⁷ On the other hand, when the offeror names a period of time during which the offer will remain firm, revocation during that period will be of no effect. Not even the offeror's death or incapacity will deprive the offer of its binding effect during this time, unless the nature of the transaction, or other special circumstances, indicate the contrary.¹⁰⁸

In France, according to classical theory, the offer, by itself, does not have binding effect until it is accepted, and, therefore, can be revoked any time before the acceptance takes place.¹⁰⁹

105. *Accord*, 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 213 (1954); Nussbaum, *The Offer-And-Acceptance Doctrine*, 36 COLUM. L. REV. 99 (1936).

106. See Nussbaum, *The Offer-And-Acceptance Doctrine*, 36 COLUM. L. REV. 924 (1936). In such a case the offeree would be entitled to recover costs of packing, storage, freight, brokerage and so on, but not the full loss inflicted by the frustration of the contract. This rule rests on the *culpa in contrahendo* theory, which differs from the principle underlying RESTATEMENT, CONTRACTS § 90 (1932).

107. ITALIAN CIVIL CODE art. 1328 (1942).

108. *Id.* art. 1329. It is of interest to notice that article 1333 of the same code regulates a type of contract that bears a certain resemblance with the typical common law unilateral contract. See 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 214 (1954); Nussbaum, *The Offer-And-Acceptance Doctrine*, 36 COLUM. L. REV. 924 (1936). According to this provision, an offer is irrevocable when the proposed contract is one that only gives rise to an obligation on the part of the proposer; the offeree may reject the offer within such period as required by usages or the nature of the contract. In default of rejection, the contract will be considered completed. See 1 STOLFI & STOLFI, IL NUOVO CODICE CIVILE COMMENTATO 150 (1949). See also Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 191, n. 51 (1939).

109. 1 AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 306 (1965); 2 CARBONNIER, DROIT CIVIL 336 (1957); 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 34 (10th ed. 1953); 2 JULLIOT DE LA MORANDIERE, PRÉCIS DE DROIT CIVIL 161 (1957); 2 PLANIOL, CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 981, at 556 (1959); 1 POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS 5 (Evans transl. 1806); 3 TOULIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 323 (1833); 3 ZACHARIAE, LE DROIT CIVIL FRANÇAIS 553 (Massé & Vergé, transl.

This basic rule has been rationalized by asserting that, as there can be no obligation without one person holding a right against another who is obligated, no one can, by his sole promise, grant a right to another, until their minds meet to acquire it, which takes place only when the promise is accepted.¹¹⁰

Another consequence of the classic approach is that the death of the offeror, or his supervenient incapacity, prior to the acceptance terminates the offer.¹¹¹ It has been said that Article 932 of the Code Napoleon reflects this doctrine, when stating that a donation *inter vivos* binds the donor only from the day of the acceptance, adding that the latter should be made during the lifetime of the donor.¹¹²

Modern French Law

But modern doctrine has voiced criticism of the classic approach, and French jurisprudence has tempered considerably its effects. In the first place, from the moment the offer is accepted, the offeror is considered bound by the tenor of his proposition, without being allowed to allege that it does not correspond to his real intent, unless there is evident error of expression or transmission.¹¹³ In the second place, in the case of offers made to the public, the offeror cannot disengage himself by asserting any reasons related to the character or nature of the person who accepted his offer.¹¹⁴ In the third place, French jurisprudence has admitted that, when a period of time for acceptance is named in the offer, the offeror is bound not to revoke during said period.¹¹⁵ Moreover, when no period of time has been expressly named, French courts have considered the offeror bound during a delay necessary for the answer to arrive,

1857). *But see* 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 143 (2d ed. Esmein 1952): "*En raison du caractère obligatoire qui est reconnu à l'offre. . . .*"

110. See 2 COLIN ET CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 45, n° 2 (10th ed. 1953); 1 POTHIER, *A TREATISE ON THE LAW OF OBLIGATIONS OR CONTRACTS* 5 (Evans transl. 1806); 3 TOULLIER, *LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE* 323 (1833).

111. 2 COLIN ET CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 45, n° 2 (10th ed. 1953); 3 TOULLIER, *LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE* 326 (1833). See D.P. 92, 1, 181., S. 95, 1, 398.

112. See 2 COLIN ET CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 34 (10th ed. 1953); 3 TOULLIER, *LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE* 325 (1833).

113. See 2 JULLIOT DE LA MORANDIÈRE, *PRÉCIS DE DROIT CIVIL* 162 (1957).

114. Thus, a statute passed on February 5, 1941, provides that a landlord cannot refuse to let premises to a person who is head of family with children. See *id.*

115. Bordeaux, Jan. 29, 1892, D. 92, 3, 390.

whether by letter or telegram, according to the circumstances of each case and prevailing conventional usages.¹¹⁶

Several theories have been advanced to justify the practical ways of tempering the effects of the classical doctrine. One of these theories attributes binding effects to the unilateral declaration of will. The will alone, according to the supporters of this view, suffices to give rise to an obligation, and, therefore, the will should be incorporated in the traditional list of the sources of obligations. Although this theory has been proposed in general terms covering not only the field of contract, but also other branches of the law, it cannot be denied that the case of the offer and its controversial binding effects constitutes, perhaps, the most relevant example constantly insisted upon by those who adhere to this particular theory.¹¹⁷

But French jurisprudence seems to prefer either the theory of abuse of right—*abus de droit*—or the preliminary contract theory. According to the first, the offeror, when withdrawing his offer, may incur a certain responsibility of a quasi-delictual nature that entitles the offeree to recover damages for the detriment he suffers when, through reliance on the offer, he makes preparation to perform. It should be noticed that this theory does not dispute the offeror's right to revoke his proposition before it has been accepted; but, under certain circumstances, the exercising of his right does not constitute a reasonable "use," but an "abuse," for which he renders himself liable.¹¹⁸ This approach has been criticized for attempting to substitute one question for another. The main question, the critics say, is whether or not the offeror has the right to revoke the offer before the expiration of the time allowed or before the lapse

116. Lyon, Dec. 19, 1917, S. 1918, 2, 40; Paris, March 13, 1917, Gaz. PAL. 1916-1917.978; Civ. Feb. 6, 1906, S. 1906, 1, 235; Cass, Feb. 28, 1870, D. 71, 1, 61, S. 70, 1, 296; Lyon, June 27, 1867, S. 68, 2, 182, D. 67, 2, 194.

117. See 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 36 (10th ed. 1953); 2 PLANIOL, CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 983, at 567-68 (1959); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 152 (2d. Esmein 1952).

118. See 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 35 (10th ed. 1953); 2 PLANIOL, CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 983, at 567-68 (1959); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 152 (2d ed. Esmein 1952). This theory is based on art. 1382 of the CODE NAPOLÉON, similar to LA. CIVIL CODE art. 2315 (1870). See generally 1 MAZBAUD & TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE ET CONTRACTUELLE 147-152 (1957). See also PIOTET, CULPA IN CONTRAHENDO 121-49 (1963).

of a reasonable period of time. If he has such a right, no liability can be incurred by exercising it under normal conditions. On the other hand, if the damages that the other party may recover amount to all the profit expected from the contract, it would be the same as saying, in effect, that the offer cannot be validly revoked. If the latter is a valid assertion, say the critics, then the abuse of right theory cannot stand because it starts from the opposite premise.¹¹⁹

According to the preliminary contract theory, a simple offer already contains the foundations of a contractual obligation on the part of the proposer. When the offer is made with a specified time for acceptance, two offers, in reality, are issued at the same time: (a) the proposition to enter into a contract, which requires the acceptance of the offeree to attain a contractual status, and (b) the offer to have the offeror bound during the named period of time. This secondary or accessory offer is of such a nature that it warrants the presumption of its being accepted by the offeree from the time it comes to his knowledge, as it is all to his advantage. From that moment, therefore, a preliminary contract is formed between the parties, whereby the offeror binds himself not to revoke the offer before the expiration of the time allowed for acceptance. If, eventually, the offeree accepts within the allowed period of time, the principal contract will be formed, and the creditor will be entitled to demand its performance.¹²⁰ Consequently, according to this approach, the one who makes the offer can withdraw it as long as it has not come to the knowledge of the offeree. The offeror, for instance, would be able to revoke by telegram, a proposition made by letter, but only before the addressee has received the offer.¹²¹

The preliminary contract theory is considered artificial and unrealistic by a vast portion of contemporary French doctrine.¹²²

119. See 2 CARBONNIER, *DRIT CIVIL* 341 (1957); 2 COLIN ET CAPITANT, *COURS ELÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 35 (10th ed. 1953); 1 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 187-88 (1923).

120. 2 CARBONNIER, *DRIT CIVIL* 341 (1957); 2 COLIN ET CAPITANT, *COURS ELÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 35-36 (10th ed. 1953); 2 JULIOT DE LA MORANDIERE, *PRECIS DE DROIT CIVIL* 163 (1957); 2 PLANIOL, *CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE)* no. 983, at 567 (1959); 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 151 (2d ed. Esmein 1952).

121. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 155 n.3 (2d ed. Esmein 1952).

122. 2 CARBONNIER, *DRIT CIVIL* 341 (1957); 2 COLIN ET CAPITANT, *COURS ELÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 36 (10th ed. 1953); 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 152 (2d ed. Esmein 1952).

The writers who criticize the theory, in spite of its support by the jurisprudence, prefer to explain the obligation of the offeror as a binding effect of his unilateral declaration of will. This approach, according to its supporters, is theoretically more consistent, and, as it is asserted, several instances of its application can be found in the French Civil Code.¹²³

But the important thing is that, irrespective of the underlying theory adopted as a justification, French doctrine and French jurisprudence agree on the conclusion that an offer has to be maintained by the offeror during a certain period of time.¹²⁴ The three following situations have been carefully distinguished:

(1) Where the offeror has named, in a precise manner, the period of time during which he is to be bound by the offer. In that case, he must maintain the proposition until the expiration of the delay, unless he is disengaged at an earlier time by the offeree's refusal. But, in default of acceptance within the named period, the offer terminates. In case of doubt, it should be understood that the acceptance was supposed to arrive, and not only be transmitted, within the allowed delay.¹²⁵

(2) Where the offeror has not named a fixed period for acceptance, but has requested an immediate answer. In such a situation the offer must be maintained during the period of time necessary for the offer and the answer to arrive at their destinations, under normal circumstances, whether by messenger, tele-

123. *Accord*, 1 BAUDRY-LACANTINERIE & BARDE, *TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL* 33 (2d ed. 1900); 2 COLIN ET CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 36 (10th ed. 1953); FRENCH CIVIL CODE art. 1373, similar to LA. CIVIL CODE art. 2297 (1870), imposing on the one who undertakes the management of another's affairs the obligation to continue with the management. See also FRENCH CIVIL CODE arts. 2184 and 873, similar to LA. CIVIL CODE art. 1433 (1870) according to which the heir who accepts the estate obligates himself to pay the debts of the same.

124. See, e.g., TRAVAUX DE LA COMMISSION DE RÉFORME DU CODE CIVIL 705 (1950): "Art. 11. The offeror may revoke his offer if it has not yet been accepted. However, when the offer sets a period for acceptance or such a period results from the circumstances of the case, the offer cannot be revoked before this period has expired, except in the case where the offer has not yet come to the attention of the offeree." *Accord*, VON MEHREN, *THE CIVIL LAW SYSTEM* 479 (1957).

125. Colmar, Feb. 4, 1936, D.H. 1936, 187; Civ. Feb. 2, 1932, Sir., 1932, 1, 68; Lyon, Dec. 19, 1917, Sir., 1918-1919, 2, 40; Civ. Feb. 6, 1906, D. 1910, 1, 234, S. 1906, 1, 235; 1 AUBRY & RAU, *COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS* (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 306 (1965); 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 155 (2d ed. Esmein 1952).

graph, or mail, plus a certain delay for consideration. This additional delay may vary according to the circumstances.¹²⁶

(3) Where the offeror has not named a delay. Then, in the case of a verbal offer when the parties are face to face, it is possible that immediate acceptance is the only one contemplated by the offeror. But this is not always so, and, actually, the question is one of fact to be decided in each case according to its circumstances. Contracts by telephone should be included in this category.¹²⁷

Since making an offer implies the obligation of maintaining it for a certain period of time, its revocation before that period has expired renders the offeror liable by having revoked, without the necessity of the offeree establishing the offeror's fault, but subject to the latter's right to prove the absence of any fault.¹²⁸

But the question has been raised as to whether the revocation of an offer that ought to be maintained should be considered as ineffectual, and the contract concluded by timely acceptance as if the concurrence of the parties' wills had taken place.

A negative answer has been given to this question by French doctrine.¹²⁹ Here, it has been said, the accord of the parties' wills is wanting, and, therefore, no contract can be considered as existent because of the lack of its essential element. It is granted that when this situation arises between parties who are not face to face, the accord of their wills cannot take place at one and the same moment, as strict theory seems to demand.¹³⁰ However, if the doctrine which considers the contract concluded in spite of the revocation of the offer is accepted, it should also be accepted that the party who withdraws the offer may, notwithstanding, invoke the formation of the contract. In the case of contracts effecting a displacement

126. *Accord*, 6 PLANIOU & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 156 (2d ed. Esmein 1952); Bordeaux, Jan. 17, 1870, S. 70, 2, 219, D. 71, 2, 96; Lyon, June 27, 1867, S. 68, 2182, D. 67, 2, 194.

127. *Accord*, 6 PLANIOU & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 156 (2d ed. Esmein 1952); Paris, Dec. 3, 1959, J.C.P. 60 IV, ed. G., 80; Beauvais, Feb. 3, 1925, GAZ. PAL., 1925, 1, 705; Lyon, Dec. 19, 1917, S. 1918, 2, 40; Paris, Feb. 5, 1910, D. 1913, 2, 1.

128. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 183-90 (1923); 6 PLANIOU & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 153 (2d ed. Esmein 1952); *Req.* Jan. 28, 1924, D.H. 1924, 121.

129. 6 PLANIOU & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 153 (2d ed. Esmein 1952).

130. See *id.* at 141-43.

of the risk of a thing from one party to the other upon consent alone, such a conclusion would allow one of the contracting parties, in spite of his revocation, to charge the other who accepted with the loss of the thing. Obviously, it is said, such a consequence is opposed to good faith.¹³¹

According to French doctrine, the court may, in such a situation, declare the contract concluded between the parties, but only at the request of the one who accepted, and as a matter of recovery of damages. The one who made the offer will be adjudged to enter the contract, or stand judgment for damages in its default. But the court is not bound to decide in this way, precisely because the contract is declared concluded only as a means of making reparation.¹³² Such a decision will be reached only when the detriment sustained by the accepting party is important enough to warrant the remedy. It might well be that the offeror's failure to conclude the contract does not cause any injury, for example, if the offeree did not prepare to perform, in which case there is no need to deem the contract concluded.¹³³

Common Law

At common law, careful distinctions must be made in the methods by which the duration of an offer is determined. The

131. *Id.* at 153.

132. See 1 MAZEAUD & TUNC, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVIL DÉLICTEUELLE ET CONTRACTUELLE* 151 (1957).

133. Although with some exceptions, when the liability arising out of the revocation of an offer is grounded on a delictual theory—*abus de droit*—French courts have awarded the offeree damages amounting to his expenses and losses in preparing for performance. See Rennes, July 8, 1929, D.H. 1929-548. See AUBRY & RAU, *COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS* (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 306 (1965); 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 186 (1923). But when the grounds for decision is the preliminary contract theory or precontractual liability, according to the approach of Saleilles, *Responsabilité Précontractuelle*, *REVUE TRIMESTRIELLE* 733 (1907), French courts will go as far as awarding the full benefit expected from the contract. This second solution seems to be the one prevailing in the modern doctrine and jurisprudence. See 2 DEMOGUE, *id.* at 187; 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 153-54 (2d ed. Esmein 1952). *Accord*, Toulouse, Jan. 18, 1912, *GAZ. PAL.* 1912, I, 215; Paris, Feb. 5, 1910, *GAZ. TRIB.*, March 1, 1910. It cannot be denied that this solution is identical with the results obtainable through application of the promissory estoppel doctrine of *RESTATEMENT, CONTRACTS* § 90 (1932). However, in a rather recent decision, the court of Pontoise returned to the restrictive approach. See Pontoise, April 17, 1960, D. 1961, som. 2. For a treatment of this problem in Swiss law, see PIOTET, *CULPA IN CONTRAHENDO* 13-23 (1963).

offeror is the principal control.¹³⁴ He creates the power¹³⁵ of acceptance in the offeree, and he determines the operation of that power. The offeree has limited freedom with regard to the negotiations, and each of his actions has a definite effect on the duration of the offer. Finally, the law draws certain conclusions from factual situations, and prescribes certain legal consequences.

In general terms, the offeror may revoke his offer at any time before the offeree accepts the offer.¹³⁶ Unless he is otherwise bound,¹³⁷ his power to revoke is not limited by any state-

134. "At the time that he makes his offer, the offeror has full control of its terms, of the person who shall have power to accept, of the mode of acceptance, and of the length of time during which the power of acceptance shall last." 1 CORBIN, CONTRACTS § 35, at 105 (1950). "As the offeror is at liberty to make no offer at all he is also at liberty to dictate whatever terms he sees fit if he chooses to make an offer." WILLISTON, CONTRACTS § 53, at 59 (Student ed. 1938).

135. 1 CORBIN, CONTRACTS § 35 (1950). This terminology had its genesis in Hohfeld, *Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). The correlative relationships espoused by Hohfeld have been very successful as a standard applied by common law courts.

136. ANSON, CONTRACTS 54, 55 (21st ed. Guest 1959); 1 CORBIN, CONTRACTS § 38 (1950); WILLISTON, CONTRACTS § 55 (Student ed. 1938); RESTATEMENT, CONTRACTS § 41 (1932); 17 C.J.S. *Contracts* § 50a (1963); 17 AM. JUR. *Contracts* § 36, 35 (1964): "The right, before acceptance, to revoke an ordinary offer, or an offer not supported by consideration, is unquestioned." 8 HALSBURY, LAWS OF ENGLAND *Contracts* 125 (3d ed. 1954). See, e.g., *Burnes v. Euster*, 240 Md. 603, 214 A.2d 807, 810 (1965): ("It is hornbook law that an offer of no specified duration must be accepted within a time reasonable under the circumstances or the offer will lapse and a subsequent attempt to accept will be of no effect."); *Halstead v. Globe Hoist Co.*, 231 F. Supp. 1012 (1964); *State v. Hall*, 6 Wash. 2d 531, 108 P.2d 339 (1940); *Rucker v. Sanders*, 182 N.C. 607, 109 S.E. 851 (1921).

This problem is strongly connected, in common law, with the doctrine of consideration. It is the lack of consideration that makes the unsupported promise unenforceable. See generally Smith, *A Refresher Course in Cause*, 12 LA. LAW REV. 31-34 (1951). A detailed discussion of this topic belongs elsewhere.

137. ANSON, CONTRACTS 56, 57 (21st ed. Guest 1959); 1 CORBIN, CONTRACTS §§ 42-46, 48 (1950); WILLISTON, CONTRACTS § 61 (Student ed. 1938); RESTATEMENT, CONTRACTS §§ 35, 45, 46, 47 (1932); 17 C.J.S. *Contracts* § 50b (1963); 17 AM. JUR. *Contracts* §§ 32, 35, 36 (1964).

The primary cause is contractual in nature, the option. See, e.g., *Cooper v. Kensil*, 31 N.J. Super. 87, 106 A.2d 27 (1954); *Sargent & Co. v. Heggen*, 195 Iowa 361, 190 N.W. 506 (1922): "An option is a continuing offer which the offeror may not withdraw until the expiration of the time fixed." *Rath v. Moeller*, 104 C.A. 72, 197 P. 62 (1921). The theory of promissory estoppel also appears. See, e.g., *Drennon v. Star Paving Co.*, 51 Cal.2d 409, 333 P.2d 757 (1962): "Reasonable reliance resulting in foreseeable prejudicial change in position affords a compelling basis for implying a subsidiary promise not to revoke an offer for a bilateral contract"; *American Handkerchief Corp. v. Frannot Realty Co.*, 17 N.J. 12, 109 A.2d 793 (1954). See also RESTATEMENT, CONTRACTS § 90 (1932). See generally *Wally v. Trinity Sand & Gravel Co.*, 369 S.W.2d 315 (Tex. 1963).

ment that he might make.¹³⁸ Whether he expressly or impliedly promises not to revoke the offer for a certain period of time, or promises to limit his freedom to revoke his offer in some other way,¹³⁹ or promises to let the offeree have a certain period within which to accept, he is free to revoke the offer. This revocation must be communicated in order to be effective.¹⁴⁰

However, the offeror's statements of duration do have an effect on the offeree's power. When the offeror states that the offer will remain open for a certain period of time, or that it may be accepted within a certain period of time, the offeree must exercise his power within that period.¹⁴¹ Unless he so does, his power to accept will terminate. If the offeror states that he requires an immediate response, the offeree is required to respond with reasonable immediacy.¹⁴² When no period of time for acceptance is stated by the offeror, the law implies that the offer will remain open for a reasonable period of time, after which it will lapse.¹⁴³ What is a reasonable period of time,

138. 1 CORBIN, CONTRACTS § 38 (1950); WILLISTON, CONTRACTS § 61 (Student ed. 1938); 17 C.J.S. *Contracts* § 50a (1963); 17 AM. JUR., *Contracts* § 36 (1964); 8 HALSBURY, LAWS OF ENGLAND *Contracts* § 125 (3d ed. 1954). See, e.g., *Sakol v. Hill*, 310 S.W.2d 19 (Mo. App. 1958); *Johnson v. Fitzke*, 234 Minn. 216, 48 N.W.2d 37 (1951); *Fuchs v. United Motor Stage Co.*, 135 Ohio St. 509, 14 Ohio Ops. 399, 21 N.E.2d 669 (1939); *Womack v. Dalton Adding Mach. Co.*, 285 S.W. 680 (Tex. Civ. App. 1926); *Night Commander Lighting Co. v. Brown*, 213 Mich. 214, 181 N.W. 979 (1921); *Krohn-Fecheimer Co. v. Palmer*, 282 Mo. 82, 221 S.W. 353 (1920).

139. 1 CORBIN, CONTRACTS § 47 (1950). Earnest money and forfeiture of down payment are examples of such limitations.

140. ANSON, CONTRACTS 59 (21st ed. Guest 1959); CORBIN, CONTRACTS §§ 39-42 (1950); GRISMORE, CONTRACTS §§ 32, 33 (Murray, 1965); WILLISTON, CONTRACTS §§ 56, 60AA (Student ed. 1938); 17 C.J.S. *Contracts* § 50d (1963); 8 HALSBURY, LAWS OF ENGLAND *Contracts* § 125 (3d ed. 1954); RESTATEMENT, CONTRACTS §§ 41, 42 (1932). *Larson v. Superior Auto Parts, Inc.*, 81 N.W.2d 505 (Wis. 1962); *Potter v. McCauley*, 196 F.Supp. 636 (D. Md. 1961); *U. S. v. Sabin Metal Corp.*, 151 F.Supp. 683 (S.D. N.Y. 1957), *aff'd*, 253 F.2d 956 (2d Cir. 1958).

141. ANSON, CONTRACTS 54 (21st ed. Guest 1959); 1 CORBIN, CONTRACTS § 35 (1950); WILLISTON, CONTRACTS § 53 (Student ed. 1938); 17 C.J.S. *Contracts* § 58 (1963); 17 AM. JUR. *Contracts* § 42 (1964); 8 HALSBURY, LAWS OF ENGLAND *Contracts* § 124 (3d ed. 1954); RESTATEMENT, CONTRACTS § 40 (1932). See generally *Midland Properties Co. v. Union Properties, Inc.*, 148 F. Supp. 150 (N.D. Ohio 1957); *Bridge v. O'Callahan*, 118 N.Y.S.2d 837 (1953); *Master Laboratories v. Chesnut*, 157 Neb. 317, 59 N.W.2d 571 (1953); *Trotter v. Lewis*, 185 Md. 528, 45 A.2d 329 (1946); *Wax v. Northwest Seed Co.*, 189 Wash. 212, 64 P.2d 513 (1937).

142. *Van Camp Packing Co. v. Smith*, 101 Md. 565, 61 A. 284 (1905). See also *Union Central Life Ins. Co. of Cincinnati, Ohio v. Burgess*, 131 Neb. 20, 266 N.W. 898 (1936), in which the court relied on the reasonableness of the offeree's interpretation of the term "immediately" on the theory that the use of the word places a reasonable interpretation of the word within the framework of the contract.

For an examination of "at once" see 17 AM JUR. *Contracts* § 56 (1964).

143. ANSON, CONTRACTS 55 (21st ed. Guest 1959); 1 CORBIN, CONTRACTS §§ 35, 36 (1950); WILLISTON, CONTRACTS § 54 (Student ed. 1938); RESTATEMENT, CONTRACTS § 40 (1932); 17 C.J.S. *Contracts* § 51b (1963); 17 AM. JUR. *Contracts* § 56

under given circumstances, is a factual determination made from the objective standpoint of what the offeree was reasonably led to believe from the circumstances of the offer, and the nature of the contract contemplated.¹⁴⁴ As a general rule, a reasonable period of time is as long as it takes to respond to the offer through the same means used to communicate it or the means that the offeror directed to be used.¹⁴⁵

A distinction must be drawn among *revocation*, *termination*, and *lapse* of the power of acceptance. The first is the result of an act of the offeror after the creation of the power, of which the offeree has no prior notice. The second is the result of an act of the offeror, at the time of the creation of the power of acceptance, of which the offeree has notice. The third is a result of the operation of the law.

The offeree may reject the offer,¹⁴⁶ in terms either express, as in the case of a direct rejection, or implied, as in the case of a counter offer.¹⁴⁷ However, the offeree can avoid the effects of a

(1964); 8 HALSBURY, LAWS OF ENGLAND *Contracts* § 124 (3d ed. 1954). State *ex rel.* Philips v. Hall, 6 Wash.2d 531, 108 P.2d 339 (1940): "An unaccepted offer terminates, by lapse of time, at the expiration of the time limited for its acceptance, or, if no time is fixed in the offer, at the expiration of a reasonable time." See also Kuskuska v. Home Mut. Hail-Tornado Ins. Co., 204 Wis. 166, 235 N.W. 403 (1931); Oliver v. Wells, 243 N.Y.S. 328, *aff'd*, 254 N.Y. 451, 173 N.E. 676 (1930); Bogart v. George K. Porter Co., 193 Cal. 197, 223 P. 959 (1924). The same is true of a counter offer, Murray v. Littitz Mut. Ins. Co., 5 Terry 447, 61 A.2d (Del. 1948).

144. ANSON, CONTRACTS 55 (21st ed. Guest 1959); 1 CORBIN, CONTRACTS § 35, at 109 (1950): "This is the time that a reasonable man in the exact position of the offeree would believe satisfactory to the offeror." WILLISTON, CONTRACTS § 54 (Student ed. 1938); RESTATEMENT, CONTRACTS § 40 (1932); 17 C.J.S. *Contracts* § 51b (1963); 17 AM. JUR. *Contracts* § 31 (1964). Coleman v. Davies, 39 Wash.2d 312, 235 P.2d 199 (1951); Coats & Williamson v. Moran & Co., 67 Cal. App. 46, 227 P. 213 (Cal. 1924).

145. 1 CORBIN, CONTRACTS § 36 (1950) reflects such a standard. RESTATEMENT, CONTRACTS §§ 40(3) and 51 (1932) are reflective of such a standard as is the jurisprudence with regard to contracts of correspondence, which will be considered at another place. 17 C.J.S. *Contracts* § 50b (1963). Williston suggests no standards in this area other than the vague reasonable man test.

146. ANSON, CONTRACTS 51, 62 (21st ed. Guest 1959); 1 CORBIN, CONTRACTS § 94 (1950); WILLISTON, CONTRACTS §§ 50, 51 (Student ed. 1938); 17 C.J.S. *Contracts* § 51a (1963); 17 AM. JUR. *Contracts* § 39 (1964); 8 HALSBURY, LAWS OF ENGLAND *Contracts* §§ 129, 132 (3d ed. 1954); RESTATEMENT, CONTRACTS §§ 35, 37 (1932). Nabob Oil Co. v. Bay State Oil & Gas Co., 208 Okla. 296, 255 P.2d 513 (1953); Cook v. Story, 89 Wash. 109, 154 P. 147 (1916); Minneapolis & St. L. R. Co. v. Columbus Rolling Mill Co., 119 U.S. 149 (1886); Hyde v. Wrench, 3 Beau. 334, 49 Eng. Rep. 132 (1840).

147. ANSON, CONTRACTS 51, 62 (21st ed. Guest 1959); 1 CORBIN, CONTRACTS § 94 (1950); WILLISTON, CONTRACTS §§ 50, 51 (Student ed. 1938); 17 C.J.S. *Contracts* § 51a (1963); 17 AM. JUR. *Contracts* § 39 (1964); 8 HALSBURY, LAWS OF ENGLAND *Contracts* § 132 (3d ed. 1954); RESTATEMENT, CONTRACTS §§ 35, 37 (1932); Schiff v. Schiff, 36 Ohio L. Abs. 626, 45 N.E.2d 132, *rehearing denied*, 48 N.E.2d 139 (1942); Wittwer v. Hurwitz, 216 N.Y. 259, 110 N.E. 433 (1915).

tacit rejection by stating that his response is not to be taken as a refusal to contract and that he still holds the offer under advisement.¹⁴⁸

Other factors will also extinguish the offeree's power of acceptance by operation of the law. Thus, if either party dies¹⁴⁹ or becomes incapable¹⁵⁰ of contracting, the offer will be extinguished. Also, the supervening death of a person or destruction of a thing essential to the contract will end¹⁵¹ the power of acceptance and the same will occur if the contract or its object is pronounced illegal by competent authority.¹⁵²

Louisiana Law

Louisiana Civil Code

In French law, as it was shown, the solutions to the problem presented by the revocability of the offer have been the creation of the doctrine and the jurisprudence, as no detailed regulations can be found in the Code Napoleon. In effect, those solutions were presented as an elaboration on Article 1108 of the French Civil Code, which enumerates the requirements for a valid contract, and, among them, consent.

In Louisiana, on the contrary, the Civil Code devotes a series of articles to the detailed regulation of offer and acceptance. Those provisions were not found in the Civil Code of 1808, which corresponded with the French model, but were first proposed in the *Projet* of the Louisiana Civil Code of 1825, and introduced into the Louisiana law with the Code enacted in that year.¹⁵³

148. ANSON, *CONTRACTS* 51, 62 (Guest 1959); 1 CORBIN, *CONTRACTS* § 90 (1950); WILLISTON, *CONTRACTS* § 51 (Student ed. 1938); 17 C.J.S. *Contracts* § 51a (1963); 17 AM. JUR. *Contracts* § 40 (1964); 8 HALSBURY, *LAWS OF ENGLAND Contracts* § 129, 132 (3d ed. 1954); RESTATEMENT, *CONTRACTS* §§ 35, 38 (1932). See, e.g., *Turner v. McCormick*, 56 W. Va. 161, 49 S.E. 28 (1904).

149. 1 CORBIN, *CONTRACTS* § 92 (1950); WILLISTON, *CONTRACTS* § 51 (Student ed. 1938); 8 HALSBURY, *LAWS OF ENGLAND Contracts* § 132 (3d ed. 1954). See generally 17 AM. JUR. *Contracts* §§ 62-66 (1964).

150. ANSON, *CONTRACTS* 54 (21st ed. Guest 1959); 1 CORBIN, *CONTRACTS* § 54 (1950); WILLISTON, *CONTRACTS* §§ 50a, 62 (Student ed. 1938); 17 C.J.S. *Contracts* § 51 (1963); RESTATEMENT, *CONTRACTS* §§ 48, 35 (1932); 8 HALSBURY, *LAWS OF ENGLAND Contracts* § 124 (3d ed. 1954).

151. 1 CORBIN, *CONTRACTS* § 54 (1950); WILLISTON, *CONTRACTS* §§ 50a, 62 (Student ed. 1938); 17 C.J.S. *Contracts* § 51c (1963); 17 AM. JUR. *Contracts* § 38 (1964); RESTATEMENT, *CONTRACTS* §§ 35, 48, 54 (1932); 8 HALSBURY, *LAWS OF ENGLAND Contracts* § 124 (3d ed. 1954).

152. WILLISTON, *CONTRACTS* § 50a (Student ed. 1938); RESTATEMENT, *CONTRACTS* § 35 (1932).

153. 1 LOUISIANA LEGAL ARCHIVES, *PROJET OF THE CIVIL CODE OF 1825* 234-36 (1936). *Accord*, Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 191 (1939).

For reasons of clarity, the articles of the Louisiana Civil Code having a direct bearing are quoted:

"Article 1800: The contract, consisting of a proposition and the consent to it, the agreement is incomplete until the acceptance of the person to whom it is proposed. If he, who proposes, should before that consent is given, change his intention on the subject, the concurrence of the two wills is wanting, and there is no contract."¹⁵⁴

"Article 1801: The party proposing shall be presumed to continue in the intention, which his proposal expressed, if, on receiving the unqualified assent of him to whom the proposition is made, he do not signify the change of his intention."¹⁵⁵

"Article 1802: He is bound by his proposition, and the signification of his dissent will be of no avail, if the proposition be made in terms, which evince a design to give the other party the right of concluding the contract by his assent; and if that assent be given within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow."¹⁵⁶

"Article 1803: But when one party proposes, and the other assents, then the obligation is complete, and by virtue of the right each has impliedly given to the other, either of them may call for the aid of the law to enforce it."¹⁵⁷

"Article 1804: The acceptance needs not be made by the same act, or in point of time, immediately after the proposition; if made at any time before the person who offers

154. See 3 TOULLIER, *LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE* 323 (1833). *Accord*, Pascal, *Duration and Revocability of an Offer*, 1 *LA. L. REV.* 184 n.17 (1939).

155. 3 TOULLIER, *LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE* 325-26 (1833): "Accustomed to deal with you, I write to you offering to sell 100 vats of wine at 600 francs, and I make clear that I will wait for your answer before selling the wine to another. I cannot, then, revoke my offer before the time necessary to receive your answer; but if it takes too long, I recover my freedom that I had only engaged for a limited time." Although *LA. CIVIL CODE* art. 1801 (1870) does not duplicate Toullier's words, it seems to reflect the same idea.

156. See *id.* § 31, at 326. *But see* Pascal, *Duration and Revocability of an Offer*, 1 *LA. L. REV.* 184 (1932).

157. See 3 TOULLIER, *LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE* 323 (1833). *Accord*, Pascal, *Duration and Revocability of an Offer*, 1 *LA. L. REV.* 184 (1939).

or promises has changed his mind, or may reasonably be presumed to have done so, it is sufficient."¹⁵⁸

"Article 1809: The obligation of a contract not being complete, until the acceptance, or in cases where it is implied by law, until the circumstances which raise such implication, are known to the party proposing; he may therefore revoke his offer or proposition before such acceptance, but not without allowing such reasonable time as from the terms of his offer he has given, or from the circumstances of the case he may be supposed to have intended to give to the party, to communicate his determination."¹⁵⁹

The meaning of Article 1800 is clear in the sense that the contract is not complete until the acceptance takes place, and that, if there is a change in the proposer's intention, there will be no contract because of the lack of an accord of the wills—the essential element. As expressed in traditional doctrine, a man can always change his will, because of his natural freedom provided *the change does not injure the right of another*.¹⁶⁰ No account has to be given for such change of will.¹⁶¹ But a question arises, then, as to whether the offer lasts indefinitely, if the offeror does not change his mind. This question has been traditionally answered in the negative, as the theory of the indefinite duration of an offer was never applied.¹⁶² The offeree, according to tradition, must give his answer promptly. He cannot, long after a proposition has been made to him, declare that he accepts it and demand performance, under pretext that the offer was never revoked. In civilian theory, therefore, an offer remains open until revoked, but, in the event of lack of revocation, is not maintained forever.¹⁶³

This invites a second question that should be raised in order to arrive at the correct interpretation of Article 1800: whether the offeror's change of intention must be expressed or whether

158. See 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 323 (1833). *Accord*, Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 184 n.21 (1939).

159. See 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 325 (1833). *Accord*, Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 184 n.23 (1939).

160. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 323 (1833).

161. *Id.*: "*L'autre partie peut les retirer avant qu'elles soient acceptées, sans qu'on puisse lui demander compte de son changement de volonté.*"

162. See PARDESSUS, COURS DE DROIT COMMERCIAL 141 (1942). *Accord*, Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 194 (1939).

163. PARDESSUS, COURS DE DROIT COMMERCIAL 141 (1942).

his mere change of mind without being expressed to the offeree will suffice to prevent the formation of the contract. Apparently, Article 1800 does not introduce the requirement that the proposer shall express his change of intention.¹⁶⁴ However, it is submitted that the principle of Article 1797 of the Louisiana Civil Code governs not only the case of expression of intention, but the case of change of intention as well. As traditionally asserted, an unknown will does not enter the field of the law—*une volonté qui n'est pas connue est, en jurisprudence, comme si elle n'existait pas*.¹⁶⁵ A change of mind, therefore, is nothing but the substitution of a new will for the previously expressed one, and, as such, cannot be operative until expressed in its turn; otherwise, legal effects would be given to something that, because of its being unknown, remains outside the legal field. But this should be understood with the following qualification: the change of intention must be expressed, or in some manner evidenced as long as the offer remains open or is deemed to remain open. It is obviously unnecessary for the offeror to express his change of intent when the offer is already terminated, because in such a situation the offeree no longer has the right of concluding the contract by his assent.¹⁶⁶

However, there is a limitation to the proposer's freedom to express his change of intention after the termination of the offer. Under Article 1801 if the offeree gives his acceptance when the offer can no longer be considered open, then the offeror must signify that he has changed his intention, otherwise he will be presumed to maintain his original proposal.¹⁶⁷

As shown above, the law does not presume that an offer remains indefinitely open. But, if the proposer does not express a change of mind, he will be presumed not to have changed it at least for a period of time. This is stated in the provisions of Article 1802: If the offeree gives his assent "*within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow,*" the

164. Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 187 (1939).

165. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 325 (1833).

166. *Id.* at 323. See LA. CIVIL CODE arts. 1799 and 1802 (1870).

167. If the acceptance arrives after too long a period of time, whether months or even years after the offer was made, according to the nature of the contract, the offeror would be released of every duty of signifying his dissent; *Accord*, Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 183, 192 (1939).

offeror's "signification of his dissent will be of no avail." In other words, the acceptance given within this period is timely, after its reception the offeror cannot allege that, before receiving it, he had changed his mind. He may change his mind before acceptance, provided he expresses this intention.¹⁶⁸

It is submitted that this is the right interpretation of Article 1801. If interpreted literally, the article might lead to the conclusion that the offer may be revoked *after* it has been accepted.¹⁶⁹ But such a literal interpretation renders the article inconsistent with Articles 1798, 1800, 1802, 1803 and 1809, and establishes an unfair rule entirely opposed to the tenets of an immemorial tradition.¹⁷⁰

Therefore, Articles 1801 and 1802 are not properly concerned with the maintainability of the offer during a certain period of time, but with the expression of the offeror's dissent after a certain period of time has elapsed. These rules have to be interpreted against the background of the traditional concepts according to which a change of intent, although not expressed, eliminates the accord of the wills and prevents the creation of the contract.¹⁷¹ It is precisely the unrestrained operation of these ideas that the articles were meant to temper, by introducing a

168. In German law, a traditional distinction is made between declarations of will that are *empfangsbedürftig* (the literal translation being "necessitous of reception"—*ayant besoin d'être reçue*, in French): see 1 ENNECCERUS-NIPPERDEY, ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II 611 (1949). See also 2 CARBONNIER, DROIT CIVIL 336 (1957), and those that are not *empfangsbedürftig*. It is agreed, for instance, that an offer is an *empfangsbedürftig* act (I ENNECCERUS at 682) as it will not be considered complete until received by the addressee. The revocation of the offer is also held an *empfangsbedürftig* act in German law; see 1 ENNECCERUS at 680-81. The consequence of this is that the revocation will be valid only when it reaches the offeree before the offer itself.

But there is a different solution in French law, where the revocation is deemed a *declaration de volonté non réceptice*, borrowing the distinction from German law. See 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 184 (1923). Therefore, the revocation is valid when expressed before the acceptance reaches the offeror. See 2 DEMOGUE at 194: "The change of mind, once expressed, becomes a known will, on its turn, to be concerned with." In French law, therefore, although the revocation is not dependent on its reception for its validity, it has to be expressed, otherwise, if the change of mind is merely subjective, it would not be operative." The same considerations are valid in Louisiana in order to properly interpret LA. CIVIL CODE art. 1800 (1870).

169. See *Boyd v. Cox*, 15 La. Ann. 609 (1860).

170. For an admirable exegetical explanation of the connection between these ideas and the German doctrine reflected in the PRUSSIAN CODE OF 1794 the knowledge of which is attributed to the code revision committee appointed in 1822, see Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 183, 193 (1939).

171. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 323 (1833); 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 190 (1923).

principle of fairness: the accord of the wills will be considered accomplished upon the acceptance whenever the offeror does not signify his dissent within a certain period of time.¹⁷²

A question has been raised as to the meaning of the words "*the situation of the parties and the nature of the contract*" in Louisiana Civil Code Article 1802.¹⁷³ It has been said that the *situation of the parties* is an expression that should be interpreted as meaning that a distinction should be made according to whether the parties are face to face, or at a distance.¹⁷⁴ This distinction seems obvious and, in its light, the words in question acquire a very clear meaning. However, these words do not only contain a reference to the location of the parties in space, but they can also mean something inherent to the parties' position, or status, such as, whether the parties are merchants or not, according to a distinction of long standing tradition in continental law.¹⁷⁵

As to the expression the *nature of the contract*, it has been suggested that the right interpretation lies in the distinction between bilateral and unilateral contracts.¹⁷⁶ To arrive at this conclusion, the possibility that the expression intended to mean the seriousness of the contemplated contract was discarded as "such an interpretation would evidently be contrary to the policy of a system which regulates the time for transmission of the acceptance, because it would introduce an element of uncertainty in the duration of the period of irrevocability."¹⁷⁷ But, if it is agreed that Article 1802 does not regulate a period of irrevocability but is concerned with a different aspect, then there is no bar to admitting that, if not the *seriousness*, at least the *importance* of the contemplated contract might be one of the elements to which the expression here discussed alludes. Moreover, the *nature of the contract* also seems to mean the special kind of contract contemplated, according to the specific types regulated in Title VI, Book III, of the Code. This interpretation seems to find support in Louisiana Civil Code Article 1816. Thus,

172. See Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 183, 192 (1939).

173. *Id.* at 190.

174. *Id.*

175. It is suggestive that the examples chosen by TOULLIER (LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 325 n.2 (1833)) concern negotiations between merchants.

176. Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 190 (1939).

177. *Id.*

the position of the offeree may vary according to whether the offer was one of a mandate to perform an urgent act or an offer to sell when no special circumstances indicate that time is of the essence.¹⁷⁸

Article 1804 of the Louisiana Civil Code, in a manner consistent with Articles 1801 and 1802, as interpreted above, recognizes that offer and acceptance do not have to take place by the same act nor at the same time. The proposition and the assent may be separated by a delay, but not by an indefinite one, since after a certain period of time, the offeror may be presumed to have changed his mind without having signified it.¹⁷⁹ The words in the article "*any time before the person who offers or promises has changed his mind,*" must be interpreted in the light of the offeror's duty to express his dissent, already discussed in connection with Article 1801.

Articles 1805 through 1808 are not applicable here, for they deal with the conformity of the acceptance to the offer. Article 1809 contains the provisions that actually deal with the problem of duration of the offer.

This article says, very clearly, that the one who proposes cannot revoke the offer:

(1) When he has given the other party a period of time to communicate his determination. In other words, if a period of time for acceptance is named by the offeror, he cannot validly revoke during this period.

(2) When no period of time is named by the offeror, before such time as he is presumed to have given the other party to make known his determination, according to the circumstances of the case.¹⁸⁰

178. See LA. CIVIL CODE art. 1933(1) (1870) for an example of distinctions to be made according to whether time is of the essence of a contract.

179. See 2 DEMOQUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 194 (1923).

180. The French text of article 1809, as found in LA. CIVIL CODE art. 1803 (1825), reads: ". . . elle peut, avant cette acceptation, révoquer son offre, après avoir toutefois laissé passer le temps raisonnable qu'elle peut avoir donné à l'autre partie, par les termes de sa proposition, ou qu'elle est censée lui avoir donné, d'après les circonstances, pour faire connaître sa détermination." In Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 188 (1939), the following translation is proposed: ". . . he may therefore revoke his offer or proposition before such acceptance, but not without having allowed to pass the reasonable time which he may have given to the other party by the terms of his proposition, or which he is presumed to have given him, according to the circumstances of the case, for making known his determination." Certainly, the French expression *qu'elle est censée lui avoir donné*, conveys a stronger meaning than the expression "he may be supposed to

Due to the similarity of the language in Articles 1802 and 1809, it has been suggested that the words "*the circumstances of the case,*" in the latter mean the same as the words "*the situation of the parties and the nature of the contract,*" in the former.¹⁸¹ This is certainly a correct interpretation, as both the parties' situation and the nature of a contract share in the circumstances of a case. But it is submitted that other important elements also find their place within the scope of the circumstances of a case, such as the experience of previous dealings between the parties, the conventional usages of a particular trade, and the nature of the thing¹⁸² which forms the object of the contract.

But what is the *reasonable time* the offeror may be supposed to have given, according to the language found in Article 1809? When the actual time has been set forth by the proposer, there is, of course, no problem, as the period of time named by him is the reasonable time meant by the article.¹⁸³ Where no such a time is named and, therefore, the presumption contained in the article is to be applied, the *circumstances* of the case should lead to finding a substitute for the offeror's intention.¹⁸⁴

It has been suggested that in such an event, the reasonable period is the time necessary for the communication of the acceptance, which "need not be more than but a moment if the parties are in the presence of each other; whereas in other situations, the time reasonably necessary would be that ordinarily required for the transmission of intelligence by the authorized or usual means of communication. In this respect, contracts made in the present day by telephone or by radio should be interpreted as contracts by parties in the presence of each other."¹⁸⁵

have intended to give" found in the official English translation of the article. Words such as "he is absolutely deemed to have given," would, perhaps, convey an idea closer to the French text.

181. Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 183, 189 (1939).

182. Whether it is perishable or not, for instance.

183. *Accord*, 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 325 (1833); Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 183, 190 (1939).

184. Since, obviously, in case of a dispute, the offeror's contention, in the vast majority of instances, will be that he did not intend to grant a delay for acceptance. See 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 143 (1933).

185. Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 190 (1939).

It is submitted that this interpretation states, very correctly, what should be considered the *minimum* reasonable time the offeror may be presumed to have given, but that, in some cases, the circumstances may very well lead to the belief that a longer time should be presumed to have been given, as where the complexities of a contract demand special study or consideration.¹⁸⁶

Thus, the existence in the Louisiana law of a period of irrevocability of an offer seems to be the natural conclusion of a correct reading of the pertinent articles in the Civil Code.¹⁸⁷

Against a similar interpretation of Article 1809, the objection has been raised that the declared will of the party is made the sole test of a binding obligation.¹⁸⁸ This, it was said, seems to be at odds with Article 1893, which declares that every obliga-

186. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 156 (2d ed. Esmein 1952). See *Housing Authority of Lake Arthur v. T. Miller & Sons*, 239 La. 966, 975, 120 So.2d 494, 498 (1960): "It is common knowledge that a reasonable delay, in this instance a 30-day period, is usually included in all bidding for public construction or works preceding formal acceptance or award of the contract."

187. The following scheme has been proposed in Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 195 (1939):

"I. An offer remains open and irrevocable:

"A. For the time expressly or impliedly given for acceptance; or

"B. If no time has been given by the proposer in his offer—for the time reasonably necessary for the acceptance and its communication to the proposer; which is computed by considering:

"1. The time required for communication to and from the party to whom the proposition was made:

"a. In face to face offers (or offers by telephone or radio), only an instant is required;

"b. In proposals to parties at a distance, only the time necessary for the transmission of the proposal and the acceptance by the authorized or usual means of communication is required; and

"2. The time required for the act of acceptance, according to the nature of the contract:

"a. In offers for bilateral contracts, this would be only the moment necessary for the making of the promise;

"b. In offers for unilateral contracts, this would be only the time necessary for the performance of the act or forbearance requested.

"II. After the expiration of the delays in IA and IB, above, the proposer is free to change his intention, and need not declare so or notify the other party of such fact;

"A. However, if the acceptance comes to his knowledge before the lapse of time mentioned in III, the proposer must immediately notify the acceptor of his change of intention or be presumed to have continued in that intention and be bound to the contract.

"III. Yet, if the acceptance comes to the knowledge of the proposer so long after his proposal that he cannot be presumed to be still of the intention which his proposal expressed, the acceptance need not be considered more than a counter offer."

188. O'Brien, *Revocation of an Offer where the Offeror has Given the Offeree a Stated Length of Time in which to Accept*, 5 TUL. L. REV. 632, 635 (1931).

tion must have a cause, as defined in Article 1896.¹⁸⁹ The following words were used: "If intention or declared will is not cause then these two articles are in conflict with Article 1809."¹⁹⁰ Although a discussion of the problem of cause cannot be undertaken here, in order to overcome the objection it is sufficient to notice that Article 1893 refers to the cause of obligations in general, while Article 1896 clearly mentions the cause of a contract, or conventional obligation.¹⁹¹ As an offer is not yet a contract until accepted,¹⁹² Article 1896 does not contribute anything to the interpretation of Article 1809. In relation to Article 1893, it should be noticed that the obligation emerging out of Article 1809 is an obligation imposed by the law, which is the ultimate source of obligations.¹⁹³ If that is the case, then it is not necessary to inquire about the motive, purpose, or end of which the cause consists, as a legal obligation arises upon the occurrence of a certain operative fact, without more.¹⁹⁴ In this case, the declaration of will by the offeror is the operative fact that suffices to start the operation of the legal mechanism.¹⁹⁵

In French doctrine, those who adhere to the preliminary contract theory in order to ground the obligation of the offeror explain the cause, or *but* (end), of it is the principal contract intended if the offer is accepted.¹⁹⁶

It is submitted that no contractual nature can be attributed, in Louisiana law, to the offeror's obligation of maintaining his proposition during a reasonable period of time. In effect, Article 1810, which has no equivalent in the French Civil Code, denies

189. "By the cause of the contract, in this section, is meant the consideration or motive for making it; and a contract is said to be without a cause, whenever the party was in error, supposing that which his inducement for contraction to exist, when in fact it had never existed, or had ceased to exist before the contract was made."

190. O'Brien, *Revocation of an Offer where the Offeror has Given the Offeree a Stated Length of Time in which to Accept*, 5 TUL. L. REV. 635 (1931).

191. For a distinction, see 2 CARBONNIER, DROIT CIVIL 369 (1957). See also Diaz Cruz, *Causa and Consideration in Contracts—Exercises in Dialectical Futility*, 1 COMP. JUR. REV. 269 n.194 (1964).

192. LA. CIVIL CODE arts. 1800, 1803 and 1809 (1870).

193. Accord, 2 PLANIOL, CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 807, at 430 (1959). See also 1 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART II 57-60 (1954).

194. See 1 LAFAILLE, CURSO DE OBLIGACIONES 34 (1940). See also Diaz Cruz, *Causa and Consideration in Contracts—Exercises in Dialectical Futility*, 1 COMP. JUR. REV. 172 n.55 (1964).

195. Accord, 1 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART II 74-81 (1954); see generally, Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 31-34 (1951).

196. CAPITANT, DE LA CAUSE DES OBLIGATIONS 54 (1923).

such a possibility. According to this article, the offer expires with the death of the offeror, his survivors not being bound by his promise.¹⁹⁷ If the obligation derived from Article 1809 were contractual, then the general rule of Article 1763 would apply. On the other hand, after a reasonable period of time, the unaccepted offer can be revoked by the sole dissent of the offeror, while the revocation of a contractual obligation requires the mutual consent of the parties.¹⁹⁸

In Louisiana law, due to the clear language of article 1809 of the Civil Code, the obligation to keep the offer open during a reasonable time is the direct effect of the proposer's declaration of will. It is not necessary, therefore, to resort to a fault theory, or a preliminary contract theory, as in French law, since, unlike the Code Napoleon, a clear provision in the Louisiana Civil Code lends support to the modern theory of the binding effects of the unilateral declaration of will.¹⁹⁹

The submitted interpretation of Article 1809 is consistent with modern law. As an example, the Uniform Commercial Code²⁰⁰ provides in Section 2-204:

"An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror."

197. The same solution prevails in French law, see AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 306 (1965); 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 160-62 (2d ed. Esmein 1952); there are, however, exceptions: see C.d'Etat, Aug. 3, 1900, S. 1903, 3, 13; *Accord*, 2 PLANIOL, CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 970, at 562 (1959). But there is a different solution in German law, where the B.G.B. § 153 provides: "The conclusion of a contract is not prevented by the fact that the offeror dies or becomes incapacitated before accepting, unless a contrary intention is to be presumed." See Succession of Aurianne, 219 La. 701, 53 So.2d 901 (1951); *Hart v. Hart*, 3 La. App. 622 (1926); *cf. Gordon v. Stubbs*, 36 La. Ann. 625 (1884).

198. LA. CIVIL CODE art. 1901 (1870): "They [agreements] can not be revoked, unless by mutual consent of the parties, or for causes acknowledged by law."

199. See 2 COLIN ET CAPITANT, COURS ELÉMENTAIRE DE DROIT CIVIL FRANÇAIS 36 (10th ed. 1953).

200. The ALLI, UNIFORM COMMERCIAL CODE (1962 official text).

This modern precept presumes that a reasonable time is given by the offeror, during which the offer is not revocable, in a manner entirely similar to Article 1809. The fact that a writing is required and a limit of three months is set for the specific case of (a) an offer *by a merchant* (b) *to buy or sell goods* implies a special regulation of the offer to enter a commercial sale of goods not incompatible with the general—and not specific—regulation found in Article 1809.

The Franco-Italian *projet* for a uniform code, drafted in 1928, provides in its Article 2 that the offeror may revoke the solicitation until the acceptance reaches his knowledge, but, if he undertakes to keep the offer open during a certain delay, or if such an undertaking may be presumed from the nature of the transaction, the revocation before the expiration of such a delay does not prevent the formation of the contract.²⁰¹

The Mexican Civil Code Article 1805, provides: "When the offer is made to a person present, without the stipulation of a period for acceptance, the offeror incurs no liability unless the acceptance is made immediately. The same rule applies to an offer made by telephone." According to Article 1806 of the same Code: "When the offer is made without the stipulation of a period for acceptance to a person who is not present, the offeror remains bound during three days, in addition to the time required for the regular dispatch and return of mails by the public post office, or in addition to the time judged by the court to be sufficient in the absence of postal service, in accordance with the distances involved and the facility or difficulty of communication."²⁰² Not only is a minimum reasonable time for acceptance allowed by this Code, which is the time necessary to communicate a determination, but an additional period of three days for advisement or consideration, provided the parties are not face to face.

Louisiana Jurisprudence: In General

The above formulated interpretation of Articles 1800-1803 and 1809 of the Louisiana Civil Code is not entirely unsupported by Louisiana jurisprudence.

In *Boyd v. Cox*²⁰³ there was an offer to buy or sell an

201. *Accord*, 2 COLIN ET CAPITANT, COURS ELÉMENTAIRE DE DROIT CIVIL FRANÇAIS 36 n.1 (10th ed. 1953).

202. MEXICAN CIVIL CODE OF 1883, for the Federal District and Territories. *Accord*, FULLER & BRAUCHER, BASIC CONTRACT LAW 257 (1964).

203. 15 La. Ann. 609, 610 (1860).

interest in a certain concern on the same terms. The parties were negotiating face to face, and no agreement was reached before they separated, but defendant's last words were that an offer to sell or buy on the same terms was always a fair one and that he was not disposed to change the offer he had made.²⁰⁴ Three days after the conversation, plaintiff telegraphed his acceptance, and, upon its reception, defendant telegraphed back: "I withdraw my proposition." Interpreting Articles 1801 and 1802,²⁰⁵ the court said that a proposition, an assent, and an immediate signification of change of intention on the part of the proposer prevented the formation of the contract. Apparently, Article 1801 is taken out of context in order to assert that an offer can be revoked after it has been accepted.²⁰⁶ But, actually, the court carefully analyzed the facts in order to ascertain whether anything in the situation of the parties or the nature of the contract may have justified the presumption that defendant intended to grant a period of time for plaintiff to make his decision, and no such grounds were found. The conclusion is, according to the court, that the defendant was not precluded by anything in the situation of the parties, or in the nature of the contract, from signifying to plaintiff his change of intention, when he received the assent of the latter three days previously. It seems clear that the court felt that, under the circumstances, the offer called for an immediate acceptance.²⁰⁷ If that is true, the decision is perfectly compatible with Code Articles 1800-1804, and 1809 also, since it follows that three days was not a *reasonable* period of time in this case.

In *Union Sawmill Co. v. Mitchell*²⁰⁸ suit was brought on several printed form contracts purporting to be sales of standing

204. In *Levy v. Levy*, 114 La. 293, 28 So. 155 (1905), the offeror was disposed to change his offer and did so while the offeree was writing out his check. The court allowed the offeror to withdraw his offer, theorizing that since the contract involved the sale of land, and since such a sale must be in writing, oral acceptance was not sufficient to complete the contract and that prior to completion either party could withdraw. The question of duration of the offer was not raised, the court concluding that, under the circumstances, the offer could be revoked at any time prior to acceptance.

205. Articles 1795 and 1796 of the Code of 1825, at the time that this case was decided.

206. A similar error was committed in *Corryalles v. Mossy*, 2 La. 504 (1831), in which the court analogized an auction and a private sale and stated that under Civil Code articles 1795 and 1796 (1825), an offer could be withdrawn by the offeror after it had been accepted by the offeree.

207. Or, that in spite of the words attributed to defendant, the offer lapsed when the parties separated.

208. 122 La. 900, 903, 48 So. 317, 318 (1909). A similar case, involving the same plaintiff, is *Union Saw Mill Co. v. Lake Lumber Co.*, 120 La. 106, 44 So. 1000 (1907), wherein the court reached the same conclusion.

timber, payable as cut and removed. The contracts were not signed by the vendees or purchasers, but it appeared that the assignees of the purchasers, several months afterwards, executed and recorded a notarial act accepting the contracts and binding themselves to all the obligations stipulated. The action was brought by the assignees trying to enjoin defendants, the alleged sellers, from cutting timber. The court said that "the contracts read as if intended to be signed by the vendee at the same time as by the vendor. Nothing on their face indicates that there was any intention to allow the vendee any delay for consideration. . . . Under the circumstances, we think no more time was intended to be allowed to the vendees than what might be required to submit the contract to them for acceptance or rejection." Not only did the court succeed in discouraging the speculative purposes of the plaintiff, but the careful evaluation of the situation of the parties and the nature of the contract²⁰⁹ indicates the correct interpretation of Articles 1801 and 1802. The comment as to the indirect application of Article 1809 is valid here, as in the previous case.

In *Picou v. St. Bernard Parish School Board*,²¹⁰ the facts differ from the two preceding cases, as the negotiations between the parties were not face to face, and there were no circumstances leading to the belief that the situation should be handled as one where an immediate acceptance was required. The plaintiff had been appointed and employed by defendant school board. A printed contract embodying the board's proposal was mailed to the plaintiff, who accepted the proposal after twelve days. The court held: "Certainly the twelve days taken up by her for deliberation was in no manner unreasonable, and constituted such delay under the provisions of our Code as are to be contemplated as reasonable, and within the intention of the parties making the offer."²¹¹ Articles 1802 and 1809 were invoked as authority for the decision, and correctly interpreted by the court, which after considering the facts reached the conclusion

209. In *Nickerson v. Allen Bros. & Wadley, Ltd.*, 110 La. 194, 195, 34 So. 410 (1903), the landowner had made a counter offer concerning the sale of standing timber "fifty cents a thousand. If you can use it at that price, you can begin cutting at any time it is convenient." The court decided that the defendant offeree should have acted before two years had elapsed, making reference to the situation of the parties and the terms of the offer.

210. 132 So. 130, 132 (La. App. Ori. Cir. 1924).

211. But see O'Brien, *Revocation of an Offer Where the Offeror Has Given the Offeree a Stated Time in Which to Accept*, 5 TUL. L. REV. 638-39 (1931), where a different interpretation of the facts is given.

that defendant could not have expected from plaintiff an immediate reply or acceptance of her appointment.²¹²

In *Miller v. Douville*,²¹³ an offer had been delivered to plaintiff in writing to sell land located in Mississippi. It seems clear that plaintiff had expressed his intention to examine the lands, which intention defendant requested him to defer. But after receiving the written offer, he proceeded to Mississippi. Meanwhile, defendant withdrew the offer by telegram, in spite of which plaintiff delivered an acceptance in writing to defendant after the revocation. After citing and analyzing common law authorities, the court reached the conclusion that a proposal may be revoked at any time before acceptance, a rule that, in the mind of the court, is consistent with Article 1800.²¹⁴

This decision contradicts, apparently, what was said before about the interpretation of the code articles dealing with duration of the offer. However, it should be noticed that Article 1800 is the only precept invoked by the court, which means, obviously, that the case is no authority for the interpretation of Article 1809. The decision was reached by isolating one single article and taking it out of its context. It is submitted that this case should be discarded any time that the interpretation of Articles 1801, 1802 and 1809 furnish the grounds for decision.²¹⁵

In *Ever-Tite Roofing Corp. v. Green*,²¹⁶ the defendants signed an instrument purporting to engage the services of plaintiff in

212. The court remarked: "It is inconceivable . . . that the school board could have expected of her an immediate reply to or acceptance of her appointment." 132 So. at 132. This suggests that it is the offeror's intent which is controlling. Properly, it is the offeree's reasonable understanding of the offeror's intent which controls. In *Lockett Land & Emigration Co. v. Brown*, 118 La. 943, 43 So. 628 (1907), the court stated the rule of appraisal in better form: "If an acceptance was necessary, it was accepted by letter, and by action within the time that the situation of the parties and the nature of the contract showed it was the intention of the defendant (offeror) to allow. Civ. Code, art. 1802." Thus, the objective standard is more apparent.

213. 45 La. Ann. 214, 12 So. 132 (1893).

214. *Id.* at 218, 12 So. at 133. The court stated: "The article of the Rev. Civil Code on the subject conveys but one meaning—if the promisor before consent changes his intention, the concurrence of the two wills is wanting and there is no contract." The court thus presupposes a right in the offeror so to act.

215. There is sufficient language in the case to show that the court thought plaintiff should have formalized a unilateral promise to sell from defendant, which he did not do, thus neglecting the opportunity of availing himself of an option. This was then possible without special consideration, since, at that time, article 2462 had not been amended. The present authority of this case is even more dubious after the amendment, as this is a case dealing with an offer to sell, and the decision cannot be taken as meaning more than what it actually decides.

216. 83 So.2d 449 (La. App. 2d Cir. 1955).

re-roofing their home. The document contained a description of the work to be done and a statement of the price to be paid in monthly installments. It was signed by the plaintiff's sales representative with whom the negotiations had been conducted, although he had no authority to accept the contract on behalf of the plaintiff. The writing contained the following provision: "This agreement shall become binding only upon written acceptance hereof, by the principal or authorized officer of the Contractor, or upon commencing performance of the work."²¹⁷ As the work was to be done entirely on credit, plaintiff had to obtain reports on defendant's credit rating and approval from the lending concern which was to finance the contract, all of which was known by defendants.²¹⁸ Plaintiff gathered the necessary information, took the required steps in approximately seven days, and obtained the financing entity's approval. The next day, plaintiff engaged several workmen, loaded two trucks with roofing materials, and proceeded from Shreveport, where its branch was located—although the central office of plaintiff was in Houston, Texas—to defendant's residence in Webster Parish. Upon their arrival,²¹⁹ plaintiff's workmen were notified by defendants that the work had been contracted to other parties two days before.

The lower court entered judgment for defendants, saying that they had timely notified plaintiff before "commencing performance of the work," and asserting that the notice given to plaintiff's workmen was sufficient to signify their intention to withdraw from the contract.

The court of appeal reversed, after quoting from the Restatement of the Law of Contracts,²²⁰ and held that the *principles there stated are recognized in the Civil Code*. The court cited Article 1809 and interpreted it as establishing that a reasonable time is contemplated where no time is expressed; what is reasonable depending upon the circumstances. The court concluded

217. *Id.* at 450 (emphasis added).

218. In *The National Roofing & Siding Co. v. Navarro*, 149 So.2d 648 (La. App. 4th Cir. 1963), the court held that the necessity of approving credit was not sufficient to raise the implication that the offeror intended that the offer be irrevocable for any period of time.

219. The question necessarily arises whether the revocation would have been sufficient if the defendant had communicated it to the plaintiff prior to the loading of the trucks. It is submitted that it would have been. See *The National Roofing & Siding Co. v. Navarro, id.*; *Loeb v. Johnson*, 142 So.2d 518 (La. App. 1st Cir. 1962); *AA Home Improvement Co. v. Cosem*, 145 So.2d 624 (La. App. 4th Cir. 1962).

220. Although not mentioned by the court, the reference is to section 40.

that the loading of the truck was the commencement of the work, which was one of the ways of accepting the offer, and took place within a reasonable time. At this moment there was a contract between the parties, a contract which defendants breached when engaging others to do the work.

This decision is consistent with what was said before about the real meaning of Article 1809. It is also consistent with Article 1802, since defendants could not validly signify their change of mind, as the acceptance had taken place within such time as the situation of the parties and the nature of the contract indicated that the defendants had allowed.

The court stressed the fact that the loading of the trucks with materials marked the commencement of performance.²²¹ It is submitted that to be convincing this characterization of the act of acceptance should have been complemented by the presumption that defendants had waived their right to have the acceptance communicated to them.²²² Such a waiver could have been found implied in the language of the contract, as the parties covenanted that "this agreement shall become binding . . . upon commencing performance of the work." The same results could have been attained by asserting that the commencement of performance took place when plaintiff's workmen arrived at the defendants' home, since their presence there, enhanced by the loaded trucks, could have no meaning other than their readiness to perform. The defendants could not then have validly expressed a revocation that they had not expressed before. In other words, the defendant's signification of dissent was untimely under the circumstances.

In sum, although this case is one that lends itself to be better understood in the light of Article 1802, the court arrived at a very clear interpretation of Article 1809.

In *National Roofing & Siding Co. v. Navarro*,²²³ the defendants signed a document offering to pay plaintiff a certain sum of money to apply aluminum siding to their residence, and deposited \$100 on account. The offer was submitted on a form prepared by the plaintiff contractor, and one of the clauses

221. This has led to suggestions that the case could be handled as an example of offer to enter a unilateral contract, as it might very well be if approached from a different perspective. See JONES, FARNSWORTH & YOUNG, *CONTRACTS* 43, 45-46 (1965).

222. See 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 189 (1923).

223. 149 So.2d 648 (La. App. 4th Cir. 1963).

provided: "This contract is binding, subject only to acceptance by an executive of the National Roofing & Siding Co., who reserves the right to reject it without liability on its part." As to the financing of the contract, it seems that plaintiff would secure a loan for defendants from a certain financing company. But the day after the offer was signed, one of the defendants telephoned the plaintiff's salesman to inform him that they had changed their minds, and desired to cancel the contract. The defendant was then advised that the "contract" had been accepted, that the materials were already on delivery, and, therefore, there could be no cancellation. That same day, a small truck containing a few materials for use in application of the siding arrived at the defendant's home, but delivery was refused. The next day, the defendants received a letter from plaintiff informing them that the offer had been accepted. The letter had been mailed a few hours after plaintiff was notified, by telephone, of the revocation. In deciding this case, the court said that the general rule relating to offer and acceptance is stated in Article 1800, and it interpreted Article 1809 as a limitation of the principle set up in the former. Of Article 1809 the court stated: "This article obviously places a limitation upon the general rule that offers may be revoked any time before they are accepted, and is applicable where the offeror has expressly stated an intention to make the offer irrevocable within a stipulated period of time or where the offer is of such a nature that from its very terminology the implication is present that the offeror intended to make it irrevocable for a reasonable period of time, within which it would be necessary for the offeree to signify his acceptance."²²⁴

Following this premise, the court finally concluded that the implication that the offeror intended to make his offer irrevocable for any period of time before acceptance cannot be supported by the necessity of procuring financing and, therefore, defendant's revocation was timely.²²⁵

The interpretation given by the court to Article 1809 in the

^{224.} *Id.* at 651.

^{225.} In this connection, the court said: "The fact that financing was necessary before the work would be performed does not raise the implication that the offer was irrevocable until the offeree had time to procure financing. Had the offer been timely accepted and ripened into a contract, then the ability to procure financing would merely operate as a suspensive condition to suspend performance until the loan was procured, or negate the contract if financing was not available." *Id.* at 653. This is a very realistic interpretation of the parties' intent.

above-quoted paragraph contradicts, to some extent, what has been said in previous pages about the manner in which the article should be read. It is submitted that the court departed from the language of the legal precept by seeking something in the *nature* of the offer, or in its *terminology*, to give rise to the implication of a reasonable time for acceptance. Instead, it should have relied on the *circumstances of the case*, as the article has it, which leads directly to the *situation of the parties* and the *nature of the contract*, as stated in Article 1802. Thus, the interpretation formulated by the court could not account for the case of a contract by correspondence, thus eliminating partially the wealth of legal significance to be found in Article 1809.

But the real thread leading to the correct understanding of this decision lies in the following words: "an executive of plaintiff who was authorized to accept the offer was apprised thereof but had not accepted before the defendants revoked."²²⁶ This language means that in the instant case, as in another to be considered below, the court meant that the offer called for an immediate acceptance, perhaps because of the parties' location, perhaps because of the very nature of the contract. The parties being reciprocally within immediate reach, the rules of contracts between absent parties, the court seems to have thought, ought to be but very carefully applied, and, without clear indications to the contrary, the rules of arms-length contracts should prevail.²²⁷ According to the circumstances of this case, the defendant could revoke the offer not immediately accepted by plaintiff. It should be observed that this conclusion is consistent with the interpretation of Article 1809 as formulated in preceding pages.

In the same case, disposing of an argument raised on the grounds of a precedent, the court said: "A case is authority for only what it actually decides."²²⁸ Such a statement formulates

226. *Id.* at 653.

227. The general rule for such contracts is that an offer may be revoked at any time if not immediately accepted. The problem arises when the courts, as they did in *Miller v. Douville*, overlook any consideration of article 1809. See, e.g., *Chapital v. Walker*, 36 So.2d 848 (La. App. Or. Cir. 1948); *Vermillon Sugar Co. v. Vallee*, 134 La. 661, 64 So. 670 (1941) (a decision involving offers to purchase stock in a new corporation, which decision has been corrected by subsequent legislation to the effect that such offers are irrevocable for a certain period); *Foster v. Morrison*, 145 So. 13 (La. App. Or. Cir. 1933); *Hanemann v. Ury*, 9 La. App. 543 (Or. Cir. 1928); *Kaplan v. Whitworth*, 116 La. 337, 40 So. 723 (1906); *Woodville v. Kantrowitz*, 115 La. 810, 40 So. 174 (1905).

228. 149 So.2d at 652.

a strict, and very wise, principle of interpretation. Taking advantage of this principle, it can be said that this case is authority for the rule that offers of this kind call for immediate acceptance, or that the reasonable time implied for acceptance is as brief as the time it will take the offeree to learn of the offer and immediately communicate his assent. As this is what was decided, the manner in which the court read Article 1809 is, therefore, *obiter dictum*, according to the very principle stated by the same court.

In *Wagenvoord Broadcasting Co. v. Canal Automatic Transmission Service, Inc.*,²²⁹ an action was brought by plaintiff broadcasting company for specific performance of a contract for radio advertising time or for damages. Plaintiff's representative had contacted the defendant, and their negotiations had ended with the latter signing an authorization order for radio advertising with plaintiff's station. According to the language of the writing: "When signed by the advertiser and accepted in writing by Broadcasting Station WWOM, this order shall become an agreement binding upon the respective parties."²³⁰ The disputed contract was accepted by plaintiff; but, several hours after the defendant signed (although prior to knowledge of the acceptance by plaintiff) the defendant communicated to plaintiff the withdrawal of its offer. At that moment, defendant was informed that the offer had already been accepted and there was a contract between the parties.

In deciding the case, the court classified the questions posed for determination, separating two problems that are, indeed, different:

"(1) Whether the acceptance of an offer must be communicated to the offeror in order to complete the contract;

"(2) During what period of time is an offer irrevocable."²³¹

As to the first question, through a quotation of Planiol,²³² the court reached the conclusion that the receipt theory of acceptance should prevail. As this matter will be discussed elsewhere, attention will be focused now on the second ques-

229. 176 So.2d 188 (La. App. 4th Cir. 1965).

230. *Id.* at 189.

231. *Id.* at 190.

232. 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL, PART I No. 984 (1907).

tion, which is, precisely, the duration of the offer. In this connection, two statements by the court deserve special notice:

- (1) "The general rule is that an offer can be revoked any time prior to its acceptance."²³³

And, after mentioning Article 1809 as an exception to the rule,

- (2) "However, the jurisprudence indicates that a strong fact situation would be necessary before the courts would imply that an offer is irrevocable for any substantial length of time."²³⁴

Proceeding on those grounds, and after quoting an example from Toullier very much in point,²³⁵ the court said: "Therefore, we conclude that the plaintiff should upon immediate acceptance of the offer which its agent submitted to it, have completed the acceptance by promptly notifying the defendant. Instead it waited until the defendant withdrew its offer by telephone. Because defendant's offer was revocable at the time of its withdrawal, no contract was ever consummated."²³⁶

The key to the court's interpretation of Article 1809 in this case lies in the words "*plaintiff should upon immediate acceptance*," as this language leads to the conclusion that the time plaintiff took to accept—and communicate its acceptance—was more than that reasonable period of time, during which the offeror, under the circumstances of the case, was bound not to

233. 176 So.2d at 191.

234. *Id.*

235. 3 TOULLIER, LE DROIT CIVIL FRANÇAIS SUIVANT L'ORDRE DU CODE 325 n.3 (1833).

236. In *Times Picayune Publishing Co. v. Harang*, 10 La. App. 242, 243, 120 So. 416 (1929), plaintiff newspaper's agent and defendant, on October 4, concluded negotiations, which contemplated a contract whereby plaintiff newspaper would carry defendant's ad beginning on March 1, with defendant making an offer to that effect to the plaintiff through the plaintiff's agent. Plaintiff did not accept the offer until February 10, and upon notification of the acceptance, the defendant refused to admit the existence of the contract and refused to pay for the ads. The court asked, "was the delay in affixing his signature unreasonable?" The court's response to the question is quite logical. "It will be recalled that, though plaintiff signed the instrument October 4, 1926, the advertising was to begin March 1, 1927, about five months thereafter. In accepting the contract February 10th, nearly one month before the first advertisement was to appear, was there not, under the very terms of the codal article cited (1802), an assent 'given within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow?' The answer must be in the affirmative." *Id.* at 242, 120 So. at 416.

revoke. If that is so, Article 1809 has been correctly interpreted and applied, since it is entirely up to the court to determine what is a reasonable period of time according to the circumstances of each case. Provided there is any degree of concern in ascertaining whether a reasonable time should be implied as having been granted, the rule of Article 1809 is applied, even if there is error in determining what is reasonable, according to the facts.

Perhaps a different decision might have been reached had the court thought that the words in the document signed by defendant, "when . . . accepted in writing . . . this order shall become an agreement," meant that defendant had resigned its right to revoke during the period of time between acceptance and communication thereof.²³⁷ Such interpretation of the facts might have resulted in a different evaluation of what was a reasonable time.

In the light of this interpretation of the decision, the two quoted statements by the court gain a different perspective. The first one certainly overstates the general rule, since the offer can be revoked any time prior to acceptance, provided that the offeror *can* validly revoke, and, for this, the requirements of Article 1809 have to be fulfilled. This is the real rule according to the Louisiana Civil Code, and the rule that, in an unmistakable manner, the court applied. In the manner in which it was stated, however, the rule becomes mere dicta.

The second statement does not deny or in any manner curtail this interpretation of Article 1809, but, on the contrary, confirms it, because, unless a period of time is named by the offeror, the court must supply the presumed intention as to the reasonable time allowed, and such a presumption should always be grounded in a "strong fact situation." To say that "the circumstances of the case," as in Article 1809, or "the situation of the parties, and the nature of the contract," as in Article 1802, should guide the decision, are words exactly to the same effect.

The reference in this decision to *Union Sawmill Co. v. Mitchell* seems to indicate very clearly that the court is of the mind that, because of the location of the parties, the situation should be handled as one where the parties are present. This is

237. See 2 DEMOGUE, *TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 189 (1923).

to say that, unless otherwise agreed by them, the acceptance should be immediate, or in the most immediate manner.

Finally, it should be said that although the two questions are clearly differentiated by the court, and constitute two very distinct problems that should be separately discussed to achieve some degree of clarity, they appear very closely linked together in the vast majority of cases. Therefore, the answer given to one of them will enlighten and complement the answer to be given to the other. Thus, the fact that, in a certain situation, the acceptance—and its communication—*can* take place immediately after the offer will cast a bright beam of light upon the problem of ascertaining what was the reasonable time for acceptance presumably intended by the offeror.²³⁸

The three preceding cases offer some similarities as to the situations involved. On the other hand, the ruling of the *Ever-Tite* case was debated in *National Co. v. Navarro*, and the latter invoked as authority in the *Wagenvoord* decision. All this, at first impression, seems to make the decisions contradictory. However, the cases present manifest differences and are clearly distinguishable. For instance, the language of the contracts in the *Ever-Tite* and *Wagenvoord* decisions is not found in *National Co. v. Navarro*. A consideration of three different locations is involved in the *Ever-Tite* case, to wit: plaintiff's principal office in Houston, Texas; plaintiff's branch in Shreveport, Louisiana; and defendants' residence in Webster Parish, Louisiana. No such circumstances are present in the other two cases, where the parties apparently were located in the same place. The special stipulation making acceptance by commencement of the work possible is also particular to the *Ever-Tite* case. In *National Co. v. Navarro*, the financing of the contract depended directly on a third party, while in the *Ever-Tite* case, credit was to be granted by plaintiff, the contract, apparently, to be eventually assigned to a third party. All these circumstances lead to the conclusion that each decision is amply supported by the facts of each situation. The careful determination of what is *obiter dictum* in each case, on the other hand, will make clear the real interpretation of Article 1809, as actual *ratio decidendi*, and not mere incidental statement. To quote the court again, "a case is authority for only what it actually decides."²³⁹

238. See also *Harding v. Metropolitan Life Ins. Co.*, 188 So. 177 (La. App. Orl. Cir. 1939); *Klefforth v. New Orleans Brew. Co.*, 8 Orl. App. 120 (1911).

239. 149 So.2d at 652.

Louisiana Jurisprudence: Bids by a Subcontractor

In situations involving bids made by a subcontractor Louisiana jurisprudence has also dealt with the problem of the revocation of the offer. Bids of that kind, which are offers, and the subsequent acceptance by the principal contractor, although peculiar in their factual circumstances, do not fall outside the general rules governing this matter. Thus, it has been decided that those general rules of communication,²⁴⁰ counteroffer,²⁴¹ mistake,²⁴² definiteness,²⁴³ and ability to perform²⁴⁴ apply. However, the question of the length of time during which the offer is supposed to remain open is still unclear in this kind of situation.

Article 1802 has not yet been analyzed by the jurisprudence in this connection, but it seems logical that the factual circumstances present in such an offer—a subcontractor's bid—would lead to no departure from the rule that the article asserts. The offer should remain open for that length of time "as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow."

In *Harris v. Lillis*,²⁴⁵ the facts seemed to fall within the purview of Article 1809. The subcontractor submitted a bid and he received a written acceptance of it. Discovering a mistake in his bid, the subcontractor attempted to revoke it and cancel the contract. The court held that the contract was completed by communication of the acceptance and could not be cancelled. The decision does not invoke any code authority at all, but it asserts, instead, that a custom exists in the building trade of New Orleans that the bid of a subcontractor cannot be revoked after it has been used by the contractor in submitting his own bid, which has been accepted by the owner of the property. In stating this, the court made no mention of communication or acceptance. However, this case was not actually decided on

240. *Metal Bldg. Products Co. Inc. v. Fidelity & Deposit of Maryland*, 144 So.2d 751 (La. App. 4th Cir. 1962).

241. *State ex rel. Range v. Madison Lumber Co.*, 6 La. App. 430 (La. App. Orl. Cir. 1927).

242. *Reimmar Const. Co. v. Heinz*, 17 La. App. 687, 137 So. 355 (1931); *Schorr v. Nosacka*, 16 La. App. 20, 132 So. 524 (1931).

243. *West Carroll Nat. Bank of Oak Grove v. West Carroll Parish School Board*, 136 So.2d 699 (La. App. 2d Cir. 1961): definiteness of offer; *Worthington Const. Co. v. Parish of Jefferson Davis*, 142 La. 659, 77 So. 492 (1918): conformability of offer and acceptance.

244. *J. G. Wagner v. City of Monroe*, 52 La. Ann. 2132, 23 So. 229 (1899).

245. 24 So.2d 689 (La. App. Orl. Cir. 1946).

grounds of the alleged custom of the building trade. The opinion discloses that the case was decided on the grounds that plaintiff, the contractor, mailed his acceptance to the defendant, the subcontractor, who did not attempt to withdraw his offer until more than one year afterwards. Therefore, the offer, having been accepted before the attempted revocation, bound the defendant.²⁴⁶ It is, thus, very clear, that the part of the opinion which discusses the prevailing custom of the building trade was not at all necessary to the decision nor intended as a general rule.²⁴⁷ In other words, that part of the opinion constitutes *obiter dictum*, as the court's real thought seems to have been that a contract is perfected by the timely acceptance, on all fours with Article 1803.

At first impression, it could be said that the alleged rule comprised in the *dictum* may find support in Article 1809,²⁴⁸ but such is not the case. The *rule* offers two different aspects, each of them meriting examination. In the first one, as the court did not state clearly that a contract was created upon acceptance of the bid, some language in the decision seems to indicate that irrevocability commences with the use of the subcontractor's bid by the contractor and its acceptance by the owner.²⁴⁹ But, within the spectrum of Article 1809, irrevocability commences, if at all, with the formulation of the offer; it is not inserted as a middle term. In this aspect, it seems clear that the decision deals, more properly, with methods of acceptance and the necessity of communicating the same to the offeror.

The second aspect of the *rule* is its connotation that the subcontractor may revoke his offer at any time prior to its use by the contractor and its acceptance by the owner. This also fails to conform to Article 1809, since it overlooks the fact that, according to the circumstances of the case, the bidder may have

246. *Albert v. R. P. Farnsworth & Co.*, 176 F.2d 198, 201 (5th Cir. 1949).

247. *Id.* at 201: "It is the law in Louisiana as well as elsewhere; that a custom cannot be looked to to change a rule of law, or to create a contract, that a custom, when relied upon to take the place of a settled principle of law, must be as definite and specific in negating the principle as the law which it assumes to supplant is in affirming it. The evidence in this case, as to custom, is wholly wanting in the requisite certainty, generality, and reasonableness."

248. See Note, *Revocation of Offer*, 23 TUL. L. REV. 286 (1949).

249. 24 So.2d 689, 691 (La. App. Or. Cir. 1946): "Moreover, it seems manifest that, in accordance with the custom prevailing in the building trade in New Orleans, an offer by a subcontractor to a general contractor to do work is irrevocable after the contractor has used the estimate of the subcontractor as a basis for his offer to the owner and the owner has accepted the general contractor's bid."

intended that his offer be irrevocable for a reasonable period of time.

In *Albert v. R.P. Farnsworth*,²⁵⁰ the federal district court took the *Harris v. Lillis* rule at its face value and held that a subcontractor, who had discovered an error in his bid, could not revoke it after it had been utilized by the contractor and accepted by the owner. Defendant's (the subcontractor) allegation was that he had revoked before he learned of the acceptance and, therefore, his change of mind was timely. The circuit court²⁵¹ reversed the judgment, and interpreted *Harris v. Lillis* according to its true holding. In the court of appeal's contention, the alleged custom of the building trade had been neither pleaded nor proved clearly, but the opinion admits that real proof of such custom or practice would be relevant in determining whether a reasonable time for acceptance was allowed.²⁵² However, as the subcontractor knows that the principal contractor will utilize the bid to complete his own and submit it to the owner, it seems clear that a reasonable period of time for acceptance is implied in such an offer, irrespective of the existence of any particular custom. Therefore, the mechanics of a transaction of this sort furnish a better ground for the application of the rule of Article 1809 than the practices of a trade.²⁵³

When the principal contractor utilizes the subcontractor's bid in making his own offer to the owner, he is accepting the subcontractor's bid, thereby giving rise to obligations that are conditional upon acceptance of the owner.²⁵⁴ In fact, both parties are perfectly aware that the principal contractor will only engage the subcontractor in case the former's bid meets the owner's

250. 79 F. Supp. 27 (E.D. La. 1948).

251. 176 F.2d 198 (5th Cir. 1949).

252. The case was remanded for a new trial, but nothing further is reported on the *Albert v. Farnsworth* conflict. In a subsequent case, *Metal Bldg. Products Co. v. Fidelity & Deposit Co.*, 144 So.2d 751 (La. App. 4th Cir. 1962), the rule in *Harris v. Lillis dictum* is acknowledged, but the decision was based upon a specific acceptance of the subcontractor's bid.

253. This kind of reasoning is not entirely alien to the district court decision in *Albert v. R. P. Farnsworth*, 79 F. Supp. 29 (E.D. La. 1948), although no article of the Code was therein invoked.

254. LA. CIVIL CODE arts. 2021, 2043 (1870). See AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 62 (1965); 2 PLANIOL, CIVIL LAW TREATISE, PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) nos. 374-88A (1959). 7 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS, PART II 370, 378 (2d ed Esmein 1952). Cf. *Blaushild v. Rockhold*, 7 La. App. 709 (2d Cir. 1927). See also 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL § 552, at 158 (1923).

approval. The parties' obligations are thus subject to a suspensive condition,²⁵⁵ but the contract of which the condition forms a part is completed by the assent of the parties,²⁵⁶ although the obligation cannot be executed until the event, of which the condition consists, takes place.²⁵⁷ If the owner does not accept the principal contractor's offer, then the contract between the latter and the subcontractor will be resolved.²⁵⁸

A consequence of this analysis is that the principal contractor is bound to communicate to the subcontractor that his bid has been submitted to the owner. As to this, the general rules that govern the acceptance are applicable, and it cannot be said that the acceptance by the principal contractor may be tacit, as the subcontractor knows that others have also been invited to submit bids. He has a right, therefore, to be apprised that his bid has been preferred to others. Until the principal contractor communicates that he has accepted the bid and submitted it to the owner, the subcontractor may revoke, but not without allowing a reasonable period of time for the contractor to decide which bid is more convenient and communicate his decision.²⁵⁹ After the contractor's acceptance and submission to the owner has been communicated, the subcontractor cannot revoke for the very simple reason that the contract is already formed, although the obligations thereof depend, ultimately, on the owner's approval. This approval should be given within the time the parties have anticipated and, if it is delayed for too long, it may become certain that the owner will not accept, in which case the contract will be dissolved.²⁶⁰

This situation should not be confused with a conditional acceptance that has no effect.²⁶¹ It is not the offeree who sub-

255. *Id.*

256. LA. CIVIL CODE art. 2028 (1870). *Cf.* Garig Transfer Co. v. Harris, 226 La. 117, 75 So.2d 28 (1954).

257. LA. CIVIL CODE art. 2043 (1870).

258. *Id.* art. 2038. See AUBRY & RAU, COURS DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) 72 (1965): "Where the suspensive condition has failed the obligation and its correlative right are *ipso facto* considered as having never existed."

259. LA. CIVIL CODE art. 1809 (1870).

260. *Id.* art. 2038 (1870). In the last instance, it is always up to the court to decide whether a condition has been fulfilled, or whether it can no longer take place. See *Cass. civ.* March 30, 1938, S. 1938, 1, 227; *Cass. civ.* April 29, 1929, S. 1930, 1, 68, GAZ. PAL., June 15, 1929. See generally 7 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 384-85 (2d ed. Esmein 1952).

261. LA. CIVIL CODE art. 1805 (1870).

jects his acceptance to a condition that was not intended by the offeror; but both parties agree, in transactions of this kind, that the obligations they are contracting are subject to a certain condition. Their will ultimately prevails.²⁶²

Conclusions

The following conclusions may be drawn. At common law, a distinction between duration of life expectancy of the offer and power of revocation by the offeror has become current.²⁶³ But this does not mean that within the period of duration the offeror cannot revoke his proposition, which should, perhaps, be the logical inference. Quite to the contrary, the duration of the offer is entirely independent of the exercise by the offeror of his power to revoke, which he can exert any time within that period.²⁶⁴

In the language of the Restatement: "An offer until terminated gives the offeree a continuing power to create a contract by acceptance of the offer."²⁶⁵ The next section clearly states that an offer may be terminated by revocation by the offeror.²⁶⁶ Common law courts have taken pains to assert that the power of acceptance should not continue forever, but only for a reasonable time, when no definite time limit was set at the inception.²⁶⁷

In Louisiana law, there is no reference to the offeree's power of acceptance, but, in a more realistic terminology, reference is made to the offeree's "right of concluding the contract by his assent."²⁶⁸ The time during which the offer is presumed to

262. At common law, an offer by a subcontractor is considered revocable unless supported by consideration, or made under seal. However, recent decisions have resorted to the "promissory estoppel" doctrine to hold that kind of offer irrevocable during a certain period of time. See *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933); *Cf. Northwestern Engineering Co. v. Ellerman*, 69 S.D. 397, 10 N.W. 2d 879 (1943); *Robert Gordon, Inc. v. Ingersoll-Rand Co.*, 117 F.2d 654 (7th Cir. 1941). See also *RESTATEMENT, CONTRACTS* § 35(e) (1932). See generally Note, *Revocation of Offer*, 23 *TUL. L. REV.* 286 (1949).

263. *GRISMORE, CONTRACTS* § 26, at 37, § 29, at 41, § 32, at 45 (Murray 1965).

264. *Id.* § 30, at 42.

265. *Id.* at § 34. See also *RESTATEMENT (SECOND) CONTRACTS (Tentative Draft No. 1, 1964)*.

266. *RESTATEMENT, CONTRACTS* § 35 (1932).

267. See generally *GRISMORE, CONTRACTS* § 28, at 39 (Murray 1965). See also *Mitchel v. Abbott*, 86 Me. 338, 29 A. 1118 (1894); *Park v. Whitney*, 148 Mass. 278, 19 N.E. 161 (1889).

268. In fact, at common law no obligation can be spoken of until the contract is concluded by the acceptance; the simple offer, unsupported by consideration, is not legally obligatory and may be terminated with impunity. As there is no obligation, therefore, no correlative right can exist, and there is no other recourse, apparently, than to speak of a power with all the

remain open is strongly connected with the time during which the offeror cannot revoke, as his right to revoke only starts at the expiration of the time he is presumed to have allowed for the acceptance, according to the circumstances of the case. A reading of Articles 1802 and 1809 leads to no other conclusion. Thus, although it might be said that 1802 deals with lapse of the offer, and 1809 with revocation of it, the irrevocability of the offer extends over all the period of time during which the offer remains open, or is so presumed according to the circumstances of the case, the situation of the parties, and the nature of the contract. The prolongation of the offer after that reasonable period of time depends entirely on the offeror's will, according to the terms of Article 1801. In a given situation, strong evidence may support the view that the offer was intended to last indefinitely.

The Contract of Option

It could be questioned whether the interpretation of Article 1809, as expounded above, can be considered valid in the light of Article 2462.²⁶⁹ The second paragraph of this article, as amended by Act 27 of 1920 reads:

"One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated, such offer, or promise cannot be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise and acceptance, may be specifically enforced by either party."

At first impression, this legal text seems to suggest that the offer or promise cannot be withdrawn *only* when *any consideration* has been paid for it. Therefore, it seems to follow that when no consideration is involved in a situation regulated by Article

Hohfeldian connotations. In Louisiana, instead, the offer binds the offeror with a legal obligation which is not contractual. It is consistent, therefore, to refer to the offeree's right of accepting thereby concluding the contract. A different approach may be taken at common law when there is a statute making an offer irrevocable. See New York Real Property Law, Part 2 § 294(4). At civil law there is no confusion at all between obligation and contract, as the latter is but one of the sources of which obligations derive. See LA. CIVIL CODE arts. 1756, 1761 and 2294 (1870).

269. See SAUNDERS, LECTURES ON THE CIVIL CODE 473 (1925); O'Brien, *Revocation of an Offer where the Offeror has Given the Offense a Stated Length of Time in which to Accept*, 5 TUL. L. REV. 639 (1931). See also Pascal, *Duration and Revocability of an Offer*, 2 LA. L. REV. 189 n.47 (1939).

1809, the offer could be withdrawn at any moment without allowing a reasonable time. But certainly this is not the case. Article 2462 describes the contract of option, which is a form of the contract of sale, and actually regulates a situation that by no means should be confused with the one regulated in Article 1809.²⁷⁰

Under French law a contract of option goes at least one step beyond the simple offer or pollicitation, as the offeree acknowledges the proposition, reserving the right of having it under advisement for the time of the option. There is, therefore, an accord of the wills of the parties. The offeree may or may not pay a consideration, as the parties are free to stipulate (or not) a certain price for the privilege. The important factor in French law, in matters of option, is the consent of both parties, and not the payment of a consideration.²⁷¹

In German law, the relevant matter is the length of the period of time itself. As the German Civil Code prescribes a minimum duration for the offer (which is the time necessary to communicate the acceptance)²⁷² when the parties have agreed on a longer period of time, they are said to have entered an option.²⁷³ It is recognized that in practice the offeree usually pays something for the option.²⁷⁴

In Louisiana, the intent of the legal precept seems to be very clear. In the first place, the second paragraph of Article 2462 should not be taken out of context. The first paragraph in Article 2462 reads: "A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immovables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same." Although containing important differences, this paragraph reflects the same idea as Article 1589 of the Code Napoleon.²⁷⁵ In the latter, the legislature's intent is that words such as "I promise to sell" or "I will sell" shall have the same

270. See 2 PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL*, PART II 50-57 (1954).

271. See 2 COLIN ET CAPITANT, *COURS ELÉMENTAIRE DE DROIT CIVIL FRANÇAIS* 554 (10th ed. 1953).

272. B.G.B. §§ 147-49.

273. See 2 ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS*, PART II 679 (1955).

274. *Id.*

275. "The promise to sell amounts to a sale, when there is mutual consent of both parties on the thing and the price." An act of July 30, 1930 introduced a second paragraph dealing with the sale of lots in subdivisions or developments.

effect as "I hereby sell." To withdraw from the transaction contemplated is possible only while there is no concurrence of the parties' wills on the thing and the price. But, from the moment the accord takes place, the sale is perfected, without necessity of considering the subtleties of the language the parties may have utilized.²⁷⁶

Article 1589 of the French Civil Code and Article 2462 (1) of the Louisiana Civil Code regulate the synallagmatic,²⁷⁷ or bilateral, promise of sale. As such a transaction involves a promise to buy, as well as a promise to sell, it amounts to a contract of sale.²⁷⁸ Article 2462 (2) of the Louisiana Civil Code, instead, regulates the unilateral promise to sell, apparently not contemplated by the French article, according to criticism voiced in French doctrine.²⁷⁹ In this case, there is only a promise to sell, but not a promise to buy. However, the parties have expressly *agreed* that one of them shall have the right to accept or reject within the stipulated time.

An *option* is, therefore, a contract in which the requirement of consent of both parties is properly fulfilled. An *offer*, instead, is a proposition, or sollicitation by one party, without any manifestation of consent by the other.²⁸⁰ The contract of option gives rise to the contractual obligation of the offeror not to revoke the offer during the stipulated time. The simple offer gives rise to a legal obligation of the offeror not to revoke during a reasonable period of time.

It could be said that, if Article 1809 pronounces the offeror bound for a certain time, the purchaser of an option would have no advantage justifying the payment of a consideration.²⁸¹ But that is not the case. The obligations arising out of an option,

276. 2 COLIN ET CAPITANT, COURS ELÉMENTAIRE DE DROIT CIVIL FRANÇAIS 556 (10th ed. 1953). See Civ. Dec. 17, 1958, D. 1959, 33; Civ. June 10, 1941, D.A. 1941, 274; Paris, July 15, 1931, D.H. 1931, 498; Chambéry, Jan. 31, 1894, D.P. 95, 2, 347, S. 96, 2, 102.

277. "A bilateral or reciprocal contract, in which the parties expressly enter into mutual engagements, each binding himself to the other." BLACK, LAW DICTIONARY (3d ed. 1933). Responds to the idea of a commutative contract as in LA. CIVIL CODE art. 1768 (1870).

278. 2 COLIN ET CAPITANT, COURS ELÉMENTAIRE DE DROIT CIVIL FRANÇAIS 556 (10th ed. 1953).

279. *Id.* at 554.

280. *Id.*

281. LA. CIVIL CODE art. 2462(2) (1870) prescribes that a consideration shall be paid for the option to make it enforceable, unlike French and German doctrinal and jurisprudential developments.

being contractual, will pass to the parties' heirs,²⁸² thus precluding the operation of Article 1810. On the other hand, the option may be transferred or assigned,²⁸³ while the simple offer or pollicitation, unless otherwise intended, is personal to the offeree and cannot be transferred by him.²⁸⁴

It has been suggested that Article 2462 applies only to options to buy or sell, and not to options to enter into any other kind of contract.²⁸⁵ It is here submitted: (a) that the provisions of the article in question, insofar as the payment of a consideration is involved, are applicable only to the specific contract of option to sell; (b) that those provisions are not applicable to options relative to other contracts; (c) that Article 2462 is inapplicable to cases of simple offers, even offers to sell, as these are regulated by Article 1809.

It could be said, perhaps, that the second paragraph of Article 2462 reflects the incorporation of the common law idea of making an offer binding through the giving of a consideration.²⁸⁶ But, actually, the common law approach consists in viewing a collateral contract as the support of the offer for the stipulated time. The same result is reached at civil law by asserting that an option is a contract unto itself, having as an object a stipulated time during which the optionee will make a decision.²⁸⁷

282. LA. CIVIL CODE arts. 1763, 1999, and 1423 (1870). For a similar solution at common law, see RESTATEMENT, CONTRACTS §§ 46-47 (1932).

283. LA. CIVIL CODE art. 2642 *et seq.* (1870). See also RESTATEMENT, CONTRACTS § 47 (1932).

284. See 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 162 (2d ed. Esmein 1952). For the same solution at common law, see RESTATEMENT, CONTRACTS § 54 (1932).

285. See Pascal, *Duration and Revocability of an Offer*, 1 LA. L. REV. 189 n.47 (1939). In 5 TUL. L. REV. 632, 639 (1931), the following language is found: "The only conclusion then that could be arrived at logically is that the article here is speaking of the *sale* of an option. If that is so then the article cannot possibly be pertinent in a discussion of our hypothetical case. The reason of it is this; if it is a matter of a *sale* of an option then the rules of sales will apply. . . . These then being present we have something more than the mere intention to be bound, something more than the mere declared will of the offeror to consider. . . ."

286. RESTATEMENT, CONTRACTS § 46 (1932): "An offer for which such consideration has been given or received as is necessary to make a promise binding, or which is in such form as to make a promise in the offer binding irrespective of consideration, cannot be terminated during the time fixed in the offer itself or, if no time is fixed, within a reasonable time, either by revocation or by the offeror's death or insanity." § 47: "An offer cannot be terminated during the term therein stated, or if no term is therein stated for a reasonable time, either by revocation or by the offeror's death or insanity, if by a collateral contract the offeror has undertaken not to revoke the offer."

287. 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 554-56 (10th ed. 1953).

The difference lies in the fact that a consideration is required at common law, while at civil law the mere consent of both parties suffices, without excluding, however, the possibility that a price be paid for the option, as a matter of usage.

Thus, as shown, irrespective of the ideas reflected, Article 2462 of the Louisiana Civil Code is perfectly susceptible of being interpreted in a manner consistent with civilian tradition.²⁸⁸

Liability for Untimely Revocation of Offer

As shown elsewhere, French jurisprudence is divided between decisions awarding only recovery of expenses incurred in reliance on the promise, and decisions awarding the full contractual expectation. In French doctrine, the view is commonly shared that the courts are sovereign in their appreciation of which remedy better befits a particular situation according to its own circumstances.²⁸⁹ The decisions of the first kind, protect-

ing only in part the reliance interest or negative contractual interest,²⁹⁰ are generally based on a delictual theory as conceptual ground for the offeror's duty not to revoke. The decisions of the second kind, protecting in full the expectation interest or positive contractual interest, generally resort to the preliminary contract theory as the basis for the same obligation.

It has been suggested that the preliminary contract theory should be likened to the concept of *culpa in contrahendo*, of German origin.²⁹¹ According to this concept, when two parties start negotiations they enter into a pre-contractual connection of an innominate kind and tacitly concluded whereby a relationship of confidence arises, imposing upon the parties a duty of

288. As shown above, the express requirement that a price be paid for the option does not alter the civilian frame of a unilateral promise to sell. See *id.*

289. MAZEAUD & TUNC, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DELICTUELLE ET CONTRACTUELLE* 151 (1963).

290. FULLER & PERDUE, *The Reliance Interest in Contract Damages*, 46 *YALE L. J.* 373 (1937); 2 PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL, PART I* 258 (1954).

291. Schwenk, *Culpa in Contrahendo in German, French and Louisiana Law*, 15 *TUL. L. REV.* 94 (1941). This theory was first formulated by Rudolf von Ihering in *Culpa in contrahendo oder Schadenersatz betnichtigten oder nicht zur Perfektion gelangten Verträgen*, which greatly influenced French doctrine and jurisprudence through the translation by de Meulenaere: 2 *VON IHERING, OEUVRÉS CHOISIES* (1893). See 6 *PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 152, n.2 (2d ed. Esmein 1952); 1 *DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL* 93-102 (1923); Saleilles, *De la Responsabilité Précontractuelle*, *REV. TRIM. DROIT CIVIL* 697 (1907); SALEILLES, *THÉORIE GÉNÉRALE DE L'OBLIGATION* 172-75 (3d ed. 1925).

diligence in regard to the other party's reliance.²⁹² This theory is not mentioned in the German Civil Code, but it seems to have inspired several isolated provisions.²⁹³ Invoking these provisions, German doctrine and jurisprudence elaborated the principle in a general fashion.²⁹⁴ It is, however, noteworthy that the *culpa in contrahendo* theory is unnecessary in matters of revocation of offers in German law, as the BGB expressly pronounces that offers are irrevocable.²⁹⁵

Obviously, the similarities between the French preliminary contract theory and the German *culpa in contrahendo* cannot be doubted. Both approaches lead to the protection of the reliance interest, or negative contractual interest, but do not grant full recovery of the expected benefits.

292. 2 ENNECCERUS-LEHMANN, *SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS* 190-91 (1958); 2 PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL, PART I* 225 (1954). The similarity with the formulation of the promissory estoppel doctrine is noteworthy; See *RESTATEMENT, CONTRACTS* § 90 (1932); *Accord*, Schwenk, *Culpa in Contrahendo in German, French and Louisiana Law*, 15 *TUL. L. REV.* 88 (1941); 2 PUIG BRUTAU, *id.* at 124-25; Snyder, *Promissory Estoppel as Tort*, 35 *IOWA L. REV.* 28-48 (1950). However, in general, the *culpa in contrahendo* theory protects the negative contractual interest, while the promissory estoppel doctrine may afford protection to the positive, or expectation, interest. See B.G.B. §§ 122, 179 and 307, and Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 402 (1937).

The distinction between the positive contractual interest (*positives Vertrags Interesse* or *Erfüllungsinteresse*) and the negative contractual interest (*negatives Vertrags Interesse* or *Vertraueninteresse*) is traditional in German law. The word *Erfüllungsinteresse* is perfectly equivalent to the expression "expectation interest," and *Vertraueninteresse* is a perfect translation of "reliance interest." But this distinction should not be confused with that of the elements of damages, namely, the "loss sustained" (*damnum emergens*) and the "gains prevented" (*lucrum cessans*)—see *FRENCH CIVIL CODE* art. 1149 and *LA. CIVIL CODE* art. 1934(3) (1870). In German law either the positive or the negative contractual interest may comprise the loss sustained and the gains prevented as well. However, when gains prevented are recovered as a measure of protection of the negative contractual interest it seems that the "gains prevented" must have been foreseeable, under the circumstances, as a probable consequence of the contract. See ENNECCERUS-LEHMANN, *SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS* 62 (1959); 2 ENNECCERUS-NIPPERDEY, *ALLGEMEINER TEIL, LEHRBUCH DES BÜRGERLICHEN RECHTS, PART II* 733-34 (1955); BUSCH, *DAS BÜRGERLICHE GESETZBUCH* (1929) annotations to §§ 122 and 252; Fuller and Perdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52, 55-56 (1937). For a discussion of the extension given in American case law to the protection of the reliance interest see Fuller and Perdue, *id.* at 401-06. See also 1 WILLISTON, *CONTRACTS* § 60A (3d ed. 1957).

293. See, e.g., B.G.B., §§ 122, 149, 179, 307, 309, 463 and 663. See 2 ENNECCERUS-LEHMANN, *SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS* 190-91 (1959).

294. ENNECCERUS-LEHMANN, *SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS* 190-91 (1959); Schwenk, *Culpa in Contrahendo in German, French and Louisiana Law*, 15 *TUL. L. REV.* 91 (1941); 58 *R.G.Z.* 406 (1904); 65 *R.G.Z.* 239 (1911); 143 *R.G.Z.* 223 (1933).

295. *Accord*, Schwenk, *Culpa in Contrahendo in German, French and Louisiana Law*, 15 *TUL. L. REV.* 91 (1941).

In spite of the impact that *culpa in contrahendo* has upon French doctrine, its incorporation into French law has been resisted on very solid grounds. This theory, it is said, is useful in German law because this system lacks a general principle of delictual and quasi-delictual liability as the one asserted in Article 1382 of the Code Napoleon.²⁹⁶ If there is no contract, due to the fault of one of the parties engaged in the negotiations, there cannot be a contractual liability, not even under the label "pre-contractual."²⁹⁷ The party whose expectations have been unjustly deceived will obtain reparation on grounds of quasi-delictual liability. This does not mean that the party will recover only the expenses he may have incurred, as the court may grant specific performance, when possible, as reparation.²⁹⁸

Although without clarifying the basis on which they were proceeding, Louisiana courts, in matters of unlawful revocation of offers, have granted recovery of the full contractual benefit, thereby affording protection to the positive contractual interest, or expectation interest.²⁹⁹ It is submitted that this solution is not only fair, but it is the one clearly suggested in the Louisiana Civil Code. A reading of articles 1802 and 1809 leads to the conclusion that the obligation of a contract is complete when the party to whom the proposition has been addressed accepts it within the time during which the proposer cannot revoke, and in spite of the latter's revocation, *as he is bound by his proposition*.³⁰⁰

296. Similar to LA. CIVIL CODE art. 2315 (1870). See 1 MAZEAUD & TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE ET CONTRACTUELLE 151 (1957); PIOTET, CULPA IN CONTRAHENDO 33 (1963). The lack of such a principle in German law causes the action on quasi-delict to be limited in its application; that is what led von Ihering to develop his doctrine in the fashion of a contractual one. Originally, von Ihering applied it in three different situations: (a) when a party was incapable of concluding a contract; (b) when the contractual object was impossible; (c) when the will, or manifestation thereof, was defective. See 2 VON IHERING, OEVRES CHOISIES 375 (1893). Accord, Schwenk, *Culpa in Contrahendo in German, French and Louisiana Law*, 15 TUL. L. REV. 88 (1941).

297. 1 MAZEAUD & TUNC, TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DÉLICTEUELLE ET CONTRACTUELLE 151 (1957).

298. *Id.*; accord, Cpr. Seine, Nov. 14, 1930, S. 1932, 2, 228; Rennes, July 8, 1929, D.H. 1929, 548.

299. *Ever-Tite Roofing Corp. v. Green*, 83 So. 2d 449 (La. App. 2d Cir. 1955); *Ryder v. Frost*, 3 La. Ann. 523 (1948); *Times Picayune Publishing Co. v. Harang*, 10 La. App. 242, 120 So. 416 (Orl. Cir. 1929); *Picou v. St. Bernard Parish School Board*, 132 So. 130 (La. App. Orl. Cir. 1924). Cf. *Johnson v. Capital City Ford Company, Inc.*, 85 So. 2d 75 (La. App. 1st Cir. 1955).

300. The same doctrine underlies LA. CIVIL CODE art. 2040 (1870): "The condition is considered as fulfilled, when the fulfillment of it has been prevented by the party bound to perform it." Although the article should be read to mean "the party bound under condition" (See Morrison v.

This means that the Louisiana law provides a solution unique in its clarity, which invites the following conclusions:

(1) There is no necessity, under the Louisiana law, of the *culpa in contrahendo* doctrine, as the Civil Code provides a general principle for delictual and quasi-delictual liability. Therefore, the objections raised in French doctrine against German theory are perfectly valid in Louisiana.³⁰¹

(2) But neither is there necessity of resorting to the general principle of quasi-delictual liability, because the Louisiana law pronounces that, when the revocation is unlawful, the one who accepted the offer timely has an action on the contract. The offeror's obligation, born as a legal one, is replaced by a contractual obligation upon the other party's timely consent. Therefore, under Louisiana law, a contract may be formed in spite of the dissent of one of the parties. This is precisely what French courts and doctrine have been trying to say when stating that the court may award performance of the contract as a remedy although the action is brought in tort.³⁰² The Louisiana solution is more consistent, as the remedy, contractual in nature, is awarded in an action on the contract.³⁰³

Public Offers of Rewards

French Law

In matters of public offers of rewards, several situations are distinguished in French law:

(a) The case where the reward is offered to the person

Mlton, 163 La. 1065, 113 So. 456 (1927)) the inference is clear that, if the condition is suspensive, the contract will be held as perfected and the obligation exigible.

301. *Contra*, Schwenk, *Culpa in Contrahendo in German, French and Louisiana Law*, 15 TUL. L. REV. 87-99 (1941). *Cf.* Note, *Measure of Recovery for Change of Position under Unenforceable Contract—Culpa in Contrahendo*, 25 TUL. L. REV. 133 (1950).

302. *Cf.* *Latter & Blum v. Metropolitan Life Ins. Co.*, 208 La. 490, 498, 23 So.2d 193, 195 (1945). Although this case is not in point, since no real problem of revocation was involved, the following statement by the court is noteworthy: "Mr. Richards could not be held in tort for the reason that he had just ground to believe that the negotiations between him and the plaintiff were terminated when his offer to purchase was in effect rejected." The question remains unanswered whether Mr. Richards would have had such an action in tort, provided evidence was to the contrary, or an action on the contract.

303. In German doctrine, the theory of *culpa post contrahendum* was developed in symmetry with *culpa in contrahendo*. As the theory belongs to the field of obligations of the parties after the contract has been performed, this is not proper occasion to discuss it. Suffice it to say that

who will render a certain service to the offeror, such as returning a lost object, or furnishing information as to the whereabouts of a missing person. In this situation, the first problem to be solved is whether the revocation of the offer can be opposed to the one who, with knowledge of the offer, has rendered the service without having learned of the revocation. Assuming that the revocation has received the same publicity as the offer, a negative answer has been advanced. It has been said that, in making an offer to the public, the offeror assumes the risk of binding himself to anyone, as he is unable to communicate the withdrawal of the offer to the one who takes action, for the simple reason that the former does not know the identity of the latter.³⁰⁴

A second problem is whether the reward can be demanded by the one who has rendered the service without knowing of the offer. An affirmative answer is given by those who adhere to the view that a unilateral declaration of will may have binding effects.³⁰⁵ Those supporting the contrary view agree that, in such a situation, there is no contract because of the lack of consent, although the offeror who benefits from the service rendered owes some kind of compensation. This, however, is not due on a contractual basis, but as a matter of *gestion d'affaires*, or unjust enrichment, which means that the final award will be determined by the court.³⁰⁶

In case the same service is rendered by several persons independently, the offeror is not bound to pay the reward to each of them, because the offer should be understood as made to the "first one" who renders the service. In other words, the one who undertakes to render the service without securing the offeror's previous accord is assuming a risk in this respect.³⁰⁷

(b) Where the reward is offered for some difficult or remarkable performance, such as a scientific discovery, or a new record in sports, the withdrawal of the offer presents the same

this matter is covered by LA. CIVIL CODE art. 1903 (1870), similar to article 1135 of the FRENCH CIVIL CODE. See DAHM, DEUTSCHES RECHT 538 (1951); *Accord*, 2 PUIG BRUTAU, FUNDAMENTOS DE DERECHO CIVIL, PART I 259 (1954).

304. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 164 (2d ed. Esmein 1952); *Cf.* 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 264 (1923).

305. See, e.g., 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 204, 267 (1923). The citation of Belgian and Italian decisions by French writers on this matter is noteworthy.

306. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 165 (2d. Esmein 1952).

307. *Ibid.*; 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 267 (1923).

problem as in the preceding situation, and the same kind of answer is advanced.

If several persons claim the same kind of achievement, it seems likely that the reward should be granted to the one who accomplished it first, and not to the one who made it known first. However, if a certain delay was fixed for making the achievement known, the reward could not be claimed after the expiration of the delay, even if accomplishment prior to that moment is invoked.³⁰⁸

Unlike the situation discussed before, in cases of this kind it is agreed that the reward can be claimed by the one who performs in ignorance of the promise. As a justification, it is asserted that the value of performances of this kind is not susceptible of being assessed in money. If the offer is not withdrawn, the contract would take place at the moment the reward is demanded.³⁰⁹ This presents a noticeable doctrinal difference from the previous case, where lack of knowledge of the offer is said to amount to lack of consent, and there is, therefore, no contract as basis for the claim.

When a reward is promised to the winner of a contest, the qualifications are determined by the language of the promise, or its interpretation according to the goals pursued.³¹⁰ If there is a jury for the contest, its decisions are sovereign provided the rules of the contest are complied with, unless fraud can be attributed to a contestant, a judge, or juror.³¹¹

(c) Where a reward is offered for proving that a certain assertion by the offeror is unwarranted, for instance, that a certain product may prevent or cure illness, it has been advanced that there was a bet, or wager, not giving rise to an action,³¹² as the promisor would not have an actual interest in having his assertion defeated. However, the reciprocal promises involved in a wager are lacking here and the mere fact of the promise evidences that the offeror has an actual interest in making it. When made by a vendor, such an offer could be validated as a

308. 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I* 165 (2d ed. Esmelin 1952).

309. *Id.* at 166.

310. *Conseil d'Etat*, Dec. 6, 1911, D. 1912, 3, 1, S. 1914, 3, 85; April 7, 1911, D. 1913, 2, 74, S. 1913, 3, 149.

311. *Rappr. Agen*, Oct. 22, 1895, *GAZ. PAL.*, 95, 2, 490.

312. FRENCH CIVIL CODE art. 1965, similar to LA. CIVIL CODE art. 2983 (1870): "The law grants no action for the payment of what has been won at gaming or by a bet. . . ."

promise of warranty styled as a penal clause,³¹³ unless the circumstances are such that third parties could never have thought that the promise was serious.³¹⁴

(d) If the act performed was the performer's duty, he should not be entitled to the reward, such as a police officer who finds stolen goods.³¹⁵

The legal nature of a promise of reward has been the subject of discussion in French doctrine. Its binding character has been attributed to the fact that such a promise should be taken as a unilateral declaration of will. This solution, it was said, is the one accounting better for the practical rules applicable.³¹⁶ But the view has been advanced that such a promise amounts to a contract at the moment it is tacitly accepted by an interested party.³¹⁷ Finally, such promises have been considered as giving rise to a contract with an undetermined party.³¹⁸ This last solution seems to explain the fact that the obligation passes to the promisor's heirs, even if he dies before the other party undertakes to perform the act.³¹⁹

German Law

In German law, the public promise of a reward is regulated in book 2, section 7 (title 9) of the Civil Code. This is the section in which the BGB deals with obligations in particular and regulates all the different transactions that constitute special contracts. However, it is generally assumed that, in the case of rewards, the German Code has abandoned the contractual approach, recognizing instead that such a promise is a unilateral binding promise.³²⁰ In the contractual approach, the promise of a reward is but an offer to contract addressed to everyone or to a certain category of persons that becomes binding when accepted by performance of the act, and is not susceptible of being

313. See FRENCH CIVIL CODE art. 1226, and LA. CIVIL CODE art. 2117 (1870).

314. 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS—OBLIGATIONS—PART I 166 (2d ed. Esmein 1952).

315. *Casale*, July 24, 1907, *Gjur.ital.*, 1907, 2, 712, cited in 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 267 (1923). It is significant that the police officer involved in the case was a foreigner whose duty was owed to a different sovereign.

316. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 267 (1923); 1 *id.* at 45.

317. See 6 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT FRANÇAIS—OBLIGATIONS—PART I 164-66 (2d ed. Esmein 1952).

318. 2 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 37 (10th ed. 1953).

319. 2 DEMOGUE, TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 267 (1923).

320. 2 ENNECCERUS-LEHMANN, SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS 676-77 (1958).

accepted in any other manner.³²¹ Thus, according to this approach, the contract is perfected only when the act is performed *with the intention of accepting the offer*. But section 657 of the BGB adopts the contrary view that the reward can be demanded even when the act has been performed without regard to the promise.³²²

Public notice is essential to this kind of promise, and the notice will be considered public only when it can reach a large number of undetermined persons, although it is immaterial that, in fact, the notice has reached only a few.³²³

Unless the promise contains a special provision to the contrary, it can be revoked before the act is performed.³²⁴ The revocation must be made in the same manner and receive the same publicity as the promise.³²⁵ If such a revocation is communicated to a person in particular, it will have effect as to this person only.³²⁶ If timely made, the withdrawal of the promise does not give a right to recover damages to the one who has incurred expense in preparation of performance.³²⁷ The power to revoke does not belong to the promisor exclusively, but it can also be exercised by his heirs.³²⁸ However, such a power can be waived; moreover, when a term has been named for the performance of the act, it shall be presumed, in case of doubt, that the promisor resigned the power to revoke.³²⁹ The public promise of a reward can be impugned because of error, violence, or fraud, but, as the promise is revocable, action on those grounds will be meaningful only after the act has been performed, or when the power of revocation has been expressly resigned.³³⁰

If the same act has been performed several times by different persons, the reward shall be granted to the one who

321. *Id.*

322. B.G.B. art. 657: "The one who by public notice announces a reward for the performance of an act, *e.g.*, for a certain achievement, is bound to pay the reward to any person who has performed the act, even when this person did not act with a view to the reward."

323. 2 ENNECCERUS-LEHMANN, SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS 677 (1958).

324. B.G.B. art. 658.

325. B.G.B. art. 658.

326. 2 ENNECCERUS-LEHMANN, SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS 677 (1958).

327. *Id.*

328. *Id.*

329. B.G.B. art. 658

330. 2 ENNECCERUS-LEHMANN, SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS 678 (1958).

performed it first,³³¹ unless the promise is to be understood as made to each and everyone performing the act.³³² If several persons performed the act at the same time, all of them shall share the reward, but, if the reward is indivisible, lots shall be drawn in order to decide who gets the reward.³³³ If several persons have contributed to the success of the undertaking, such as when a criminal is captured by more than one person, the reward shall be divided among all of them equitably, with a regard to the degree in which each one participated in bringing about the desired result.³³⁴

Special rules govern the case of contests for a prize. This situation is distinguished from the simple public promise of a reward, because the prize is not promised to anyone who will perform a certain act, but only to those, who, in the first place, enter the contest, and, in the second place, qualify to be awarded the prize.³³⁵ In situations of this kind, there must be a term fixed for the contest in the public notice, otherwise the promisor could retard indefinitely the awarding of the prize under pretext of waiting for the entry of more contestants. Because of a term being fixed, the promise of the prize becomes irrevocable in case of doubt.³³⁶ The decision as to which contestant fulfills the conditions under which the reward was promised, or which among several contestants deserves the preference, shall be made by the contest judge named in the notice of reward.³³⁷ In the absence of such a designation, the decision shall be made by the promisor.³³⁸ This decision is binding upon the interested

331. B.G.B. art. 659.

332. 2 ENNECCERUS-LEHMANN, SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS 679 (1958).

333. B.G.B. art. 659.

334. B.G.B. art. 660. The division of the reward by the promisor is not binding if inequitably made; in that case the reward shall be divided by judicial order. If the division is objected to by one of the claimants, the promisor may refuse payment or delivery of the reward until the different claimants have settled the dispute among themselves. In the case of rewards promised to those who will furnish evidence that a certain assertion by the promisor is unwarranted, German courts have, generally, declared such promises null for lack of serious intent. Art. 762 of the B.G.B.: "No obligation arises out of gaming and betting" has also been invoked to the same effect. But German doctrine criticizes this line of jurisprudence. See ENNECCERUS-LEHMANN, SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS 677-78 (1958): München Oberlandsgericht, 72 SEUFFERTS ARCHIV 36 (1917).

335. ENNECCERUS-LEHMANN, SCHULDRECHT, LEHRBUCH DES BÜRGERLICHEN RECHTS 680 (1958).

336. B.G.B. art. 661(1).

337. ENNECCERUS-LEHMANN, SCHULDRECHT LEHRBUCH DES BÜRGERLICHEN RECHTS 680 (1958); B.G.B. art. 658(2).

338. B.G.B. art. 661(2).

parties.³³⁹ If several contestants are equally deserving of the prize, it shall be divided, and, if indivisible, lots shall be drawn as in the cases previously discussed.³⁴⁰

Common Law

In common law, the promise of a reward is within the framework of the Anglo-American notion of a unilateral contract, in which an act is requested in return for a promise.³⁴¹

Can such an offer be accepted by one who does not have the knowledge of its existence, as, for instance, when a person brings about the arrest of a criminal without knowing that a reward has been offered for his capture? A few decisions have held that a contract does come into existence in such a situation.³⁴² In other instances where the promise had been made by a city or a public corporation,³⁴³ the same view has been held and supported on the theory that it is a public grant, and, therefore, it is not within the field of contract.³⁴⁴ But the majority of the courts have adhered to the view that there is no contract unless the offeree had knowledge of the offer when he performed the act constituting the alleged acceptance,³⁴⁵ otherwise,

339. B.G.B. art. 661(2).

340. B.G.B. arts. 661(3), 659(1) and (2). If the notice made clear that the promisor would be entitled to the ownership of the thing produced by the winning competitor, the former has a right to demand that the transfer be made.

341. CORBIN, CONTRACTS § 64 (1952); GRISMORE, CONTRACTS § 18, at 18, § 32 (Murray 1965); 1 WILLISTON, CONTRACTS § 33A (3d ed. 1957).

342. *Sullivan v. Phillips*, 178 Ind. 164, 98 N.E. 868 (1912); *Gibbons v. Proctor*, 64 L.T. 594 (1891); *Russell v. Stewart*, 44 Vt. 170 (1872); *Williams v. Carwardine*, in the King's Bench, 4 Barn. & Adol. 621 (1833). See CORBIN, CONTRACTS § 59 (1952); GRISMORE, CONTRACTS § 43 (Murray 1965); 1 WILLISTON, CONTRACTS § 33A (3d ed. 1957). The reason for these decisions was the court's feeling that since the defendants received the benefits which they requested and for which they were prepared to pay, they should be required to pay.

343. *Choice v. City of Dallas*, 210 S.W. 753 (Tex. Civ. App. 1919); *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S.W. 1111, 9 L.R.A. 1057 (1907); *Clinton County v. Davis*, 162 Ind. 60, 69 N.E. 680, 64 L.R.A. 780, 1 Ann. Cas. 282 (1904).

344. See CORBIN, CONTRACTS § 59, at 94 (1952): "But whether it is within this field depends solely upon the way in which we choose to delimit the field. Whether the promise of reward is public or private, it may equally well be called a 'grant'; and in either case the result is that we have an enforceable promise. The recovery is the amount or value of the performance promised, not the value of the performance rendered by the plaintiff and received by the defendant. The remedy is the customary contract remedy."

345. *Arkansas Bankers Ass'n. v. Ligon*, 174 Ark. 234, 295 S.W. 4, 53 A.L.R. 534 (1927); *Smith v. Vernon County*, 188 Mo. 501, 87 S.W. 949, 70 L.R.A. 59 (1905). See generally FULLER & BRAUCHER, BASIC CONTRACT LAW 327 (1964): "*The Weight of Authority*." For a discussion of the importance to be given the motivation for the acceptance, see GRISMORE, CONTRACTS § 44 (Murray 1965).

it is felt, there would be no conformity to the general requirement of mutual assent.³⁴⁶ This is the solution adopted in the Restatement, section 23, according to which the offeree should know that a proposal has been made to him. This rather general rule is complemented by the one in section 28 prescribing that: "An offer may be made to a specified person or persons or class of persons, or it may be made to anyone or to everyone *to whom it becomes known*."³⁴⁷ This rule has been extended to an offeree who gained knowledge of the offer after he had already rendered part performance. In such a case no contract was said to exist, in spite of the fact that the person who learns that a reward was offered after already having partly performed will generally proceed with the performance relying on the offer and with expectation of the reward.³⁴⁸ A negative reaction was contained in the first Restatement, section 53, which prescribed that the whole consideration requested by an offer must be given after the offeree *knows*³⁴⁹ of the offer. However, this view is changed in the proposed Restatement Second, and section 53 now reads: "Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance."

In matters pertaining to the revocability of such an offer, made to the world at large, an exception is introduced that the revocation is ineffective until communicated. If this were observed, it would amount to making such an offer practically irrevocable, as the offeror could never reach the hundreds, thousands, or millions of people who may have learned of his offer.³⁵⁰ Because of this, it has been held that such an offer is considered effectively revoked when the offeror has published his intent to revoke through the same medium and to the

346. See GRISMORE, CONTRACTS § 43, at 61 (Murray 1965); 1 WILLISTON, CONTRACTS § 33A, at 93 (3d ed. 1957).

347. Emphasis added.

348. See CORBIN, CONTRACTS § 60, at 95 (1952): "If the offeree's part performance rendered after he knows of the offer is not regarded as an 'acceptance,' it should be held to satisfy the requirements of the rule in RESTATEMENT, CONTRACTS § 90, wherein certain promises are declared to be binding contracts in the absence of both mutual assent and consideration. In the present instance it is not necessary to appeal to that rule." *But see* Hoggard v. Dickerson, 180 Mo. App. 70, 165 S.W. 1135, 1138 (1914). *Cf.* Henderson, Land & Lumber Co. v. Barber, 17 Ala. App. 337, 85 So. 35 (1920).

349. Emphasis added.

350. CORBIN, CONTRACTS § 41, at 68-69 (1952); GRISMORE, CONTRACTS § 33, at 51 (Murray 1965).

same extent that the original offer was published.³⁵¹ In support of this view it is advanced that the offeree should reasonably anticipate that a revocation will perhaps be made in this way; and if he neglects to keep informed, he cannot complain when his attempted acceptance is held ineffective.³⁵² This is the rule in the Restatement, section 43: "An offer made by advertisement in a newspaper, or by a general notification, to the public or to a number of persons whose identity is unknown to the offeror, is revoked by an advertisement or general notice given publicity equal to that given to the offer before a contract has been created by acceptance of the offer."³⁵³

Where the requested services are performed by more than one person so that the requested result is a joint "enterprise,"

351. *Shuey v. United States*, 92 U.S. 73, 76 (1875): "Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer. . . ." See CORBIN, *CONTRACTS* § 41, at 68 (1952): "The facts of the case were as follows: President Andrew Johnson issued a proclamation offering a reward of \$25,000 for the apprehension of John H. Surratt, believed to be implicated in the murder of Abraham Lincoln. Later he issued a similar proclamation revoking the offer. One Ste. Marie, a zouave in the service of the Papal Government knew of the original offer, recognized Surratt in the same service, and caused his arrest. This service was rendered by him after the proclamation of revocation was published but wholly without knowledge of it. The court held, as one of the reasons for refusing judgment for the reward, that the revocation was effective."

352. GRISMORE, *CONTRACTS* § 32, at 47 (Murray 1965).

353. RESTATEMENT (SECOND) *CONTRACTS* § 43 reads: "Where an offer is made by advertisement in a newspaper or other general notification to the public or to a number of persons whose identity is unknown to the offeror, the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available." For a discussion of the possibility of revoking through a radio broadcast a public offer made through a newspaper see 1 WILLISTON, *CONTRACTS* § 59A, at 185 (3d ed. 1957). Where the offeror, subsequent to the offer, learned the identity of the members of the class of offerees, notice of revocation published in the same manner was not effective since the reasonable thing to do was to communicate directly with each one; *Long v. Chronicle Pub. Co.*, 68 Cal. App. 171, 228 P. 873 (1924) (the case dealt with a subscription contest). For a discussion of revocation after commencement of performance, see generally GRISMORE, *CONTRACTS* § 33, at 51 (Murray 1965): "A satisfactory solution to the problem may be in the offing as a result of increased willingness on the part of some courts to enforce a promise which causes another to expend effort or incur expense in reliance on the promise when the promisor should reasonably anticipate that such reliance would occur. If the concept of detrimental reliance continues to gain acceptance, there is a strong probability that the cases which permit the offeror to revoke under these circumstances will be disregarded."

The similarity between the solution discussed in text and article 658 of the GERMAN CIVIL CODE is noteworthy.

it has been decided that they are jointly entitled to the reward.³⁵⁴ Where several persons have acted without collaboration, each contributing a piece of information or doing one of the requested acts, the final result being the sum total of their independent acts, it has been held that no one is entitled to the reward or to any part of it.³⁵⁵ Where the requested performance is within the public or official duties of the offeree, then the performance is not sufficient consideration for the promised reward.³⁵⁶

Louisiana Law

In Louisiana, as in France, but not in Germany, the Civil Code does not provide specifically for the case of the public offer of a reward. However, the courts have asserted without hesitation that: "The public offer of a reward for the recovery of lost or stolen property creates an obligation which may be enforced by the person through whom the property is restored."³⁵⁷ In some instances no obligation arises out of the public offer because no such power is within the scope of authority of the offeror. Thus, it was decided that school boards are not authorized to offer rewards for the detection and punishment of crime, and such an act is *ultra vires*.³⁵⁸ In interpreting the terms of public offers, Louisiana courts have been rather liberal. In

354. *Chambers v. Ogle*, 117 Ark. 242, 174 S.W. 532 (1915); see CORBIN, CONTRACTS § 64, at 105 (1952). Compare with article 660 of the B.G.B.

355. *Stair v. Heska Amone Cong.*, 128 Tenn. 190, 159 S.W. 840 (1913); Cf. *Taft v. Hyatt*, 105 Kan. 35, 180 P. 213 (1919). See CORBIN, CONTRACTS § 64, at 105 (1952): "In some cases, however, the offeror actually regards himself as bound and pays the money. The litigation, if any, is then as to the proper subdivision of the reward, the action being in the nature of an interpleader, whether brought by the offeror or by some of the claimants. In these cases, the courts have divided the reward in proportion to the service rendered, roughly estimated." See also *Maggi v. Cassidy*, 181 N.W. 27, 190 Iowa 933 (1921). Compare with articles 659 and 660 of the B.G.B.

356. *Gehrett v. Ferguson's Estate*, 83 Ind. App. 717, 149 N.E. 86 (1925); *VanBoskerck v. Aronson*, 197 N.Y.S. 809 (1923); *Gray v. Martino*, 91 N.J.L. 462, 103 A. 24 (1918). See CORBIN, CONTRACTS § 180 at 261 (1952): "Governmental offers of a reward may be made in such a way, either by legislative act or by an authorized official, that they may be accepted and the reward earned by the police or other public officers. In such cases, the public policy involved is determined by the representatives of the public duly empowered for the purpose." See also *United States v. Matthews*, 173 U.S. 381 (1899).

For the offer of a reward for the winning of a prize contest, also considered within the framework of unilateral contracts, see CORBIN, CONTRACTS § 25 at 43 (1952); see also *Scott v. People's Monthly Co.*, 209 Iowa 503, 228 N.W. 263, 67 A.L.R. 413 (1929).

357. *Wallace v. Irwin*, 4 Peltier's Orl. App. 652 (1921); *Salvadore v. Crescent Mut. Ins. Co.*, 22 La. Ann. 338 (1870); *Deslondes v. Wilson*, 5 La. 397, 25 Am. Dec. 187n. (1833).

358. *Luchini v. Police Jury*, 126 La. 972, 53 So. 68 (1910). But police juries have the power to offer rewards. *Murray v. Kennedy*, 15 La. Ann. 385, 77 Am. Dec. 139 (1860), is interesting in this connection: "Where a

Deslondes v. Wilson,³⁵⁹ for instance, where a portion of stolen property was returned, the court held that the finder was entitled to a part of the reward proportionate to the value of the recovered property as compared to the value of the whole of the lost property. In *Salvadore v. Crescent Mutual Ins. Co.*,³⁶⁰ the insurance company had offered a reward for the conviction of any person guilty of the crime of arson. Plaintiff furnished information that led to the conviction of a certain person, but defendant refused payment of the reward on the grounds that the crime reported by plaintiff had been committed before the publication of the offer, while the reward was intended for information about crimes committed after publication. The court held for plaintiff stating that the terms of the reward were determined by its wording, and not by any unrevealed intent of the offeror amounting, perhaps, to a mental reservation.³⁶¹ It has also been decided that the one who offers a reward may attach such conditions as he wishes, and that he may make himself the sole judge of what shall constitute the expected performance.³⁶² Where the requested act is within the line of duty of the person performing it, the court does not consider him entitled to the reward.³⁶³ But where a public official is involved, he is entitled to the reward if the act performed is not one of his legal duties, and if the information furnished has not been obtained from the records of his office.³⁶⁴

United States marshal offers a reward for the arrest of a fugitive from his custody, he acts as a principal, and although he may have signed with the addition of the words, U.S. Marshall, he cannot avoid liability."

359. 5 La. 397, 25 Am. Dec. 187n. (1833).

360. 22 La. Ann. 338 (1870).

361. *Cf. Cornelson v. Sun Mut. Ins. Co.*, 7 La. Ann. 345 (1852): "The offer of a reward for a crime to be committed is unusual, and the terms used refer to a past offense. Besides, the reward related to a specific crime and not one less in degree and entirely different. Defendant's obligation cannot be enlarged by implication and extended to cases not embraced within the offer."

362. *Protti v. American Bank & Trust Co.*, 179 La. 39, 153 So. 13 (1934).

363. *Taylor v. American Bank & Trust Co.*, 17 La. App. 458, 133 So. 402, *rev'd*, 135 So. 47 (La. App. Orl. Cir. 1931). In this decision, the court accepted the distinction introduced between rewards offered by private persons and those offered by the legislature. Quoting from *United States v. Matthews*, 173 U.S. 381 (1899), the court said: "The broad difference between the right of an officer to take from a private individual a reward or compensation for the performance of his official duty, and the capacity of such officer to receive a reward expressly authorized by competent legislative authority, and sanctioned by the executive officer to whom the legislative power has delegated ample discretion to offer the reward, is too obvious to require anything but statement." The court found that a municipal ordinance prohibits the receipt of such a reward by a public police officer, *id.* at 48. See Note, *Rewards—Communication of Offer and Time of Acceptance*, 16 LA. L. REV. 820-824 (1942).

364. *Pillie v. New Orleans*, 19 La. Ann. 274 (1867).

Apparently, the specific problem of the legal nature of the public offer of a reward has never been expressly considered by a Louisiana court. However, at least in one decision there is some language indicating that cases of this kind should fall within the contractual framework,³⁶⁵ thereby requiring knowledge of the offer by the person performing the requested act, in order to obtain his "consent." It is submitted that the obligation deriving from such a public promise should be considered legal and not contractual. Authority to support this view can be found by generalizing the doctrine underlying Article 1809 of the Louisiana Civil Code in order to reach the conclusion that obligations based on the promisor's unilateral declaration of will are not inconsistent with the spirit of the Louisiana law. This interpretation justifies the conclusion that the reward is to be granted to a person who performs the requested act without knowledge of the promise. It also helps to clarify the problem of the effectiveness of the revocation of the public offer of a reward, as publication of the withdrawal by the same means and for the same time as the offer would suffice.³⁶⁶ If several persons contribute to the success of the act requested by the promisor, each of them should be entitled to a share of the reward.³⁶⁷

365. *Taylor v. American Bank & Trust Co.*, 17 La. App. 458, 133 So. 402, *rev'd*, 135 So. 47, 49 (1931): "There is a vast distinction between permitting a police officer to retain a reward tendered after the performance of service, and authorizing such officer to bring suit for reward as upon contract." (Emphasis added.) In Note, *Communication of Offer and Time of Acceptance*, 16 LA. L. REV. 824 n.13 (1942), the three following alternatives are suggested: "(1) Enact a statute similar to the German provision. (2) It would be possible, unless specific terms to the contrary were contained in the offer itself, to interpret a reward offer as an offer to pay for a result rather than an offer to contract for a result, the only acceptance necessary being the submission of a claim after performance has been rendered. (3) In addition, the proper result could be achieved by reliance on the concept of quasi-contract embodied in LA. CIVIL CODE art. 2294 (1870)." It should be noticed that in the case of the third alternative, recovery would amount to the promisor's enrichment, and not necessarily to the reward offered.

366. *Cf. Murphy v. New Orleans*, 11 La. Ann. 323 (1856): The city ordinance June 28, 1813 offering a fixed reward for the apprehension and conviction of persons guilty of arson, was not to be temporary, but must have effect until repealed. *Compare with Loring v. The City of Boston*, 7 Met. (Mass.) 409 (1844).

367. In *Taylor v. American Bank & Trust Co.*, 17 La. App. 458, 133 So. 402, *rev'd*, 135 So. 47 (1931), the trial court had rendered judgment in favor of the various claimants each for his virile share of the total reward of \$5,000. *Id.* at 49. In *Van Buren v. Citizens Bank*, 6 Rob. 379 (La. 1844), it was decided that plaintiff, who arrested and procured the conviction of one of several persons engaged in circulating certain counterfeit bills, was entitled to the reward that had already been paid to another who also undertook the same endeavour in relation to other of the individuals concerned. Although defendant argued that the reward had not

In contests for prizes, the one entering a contest and fulfilling all the requirements of the offer as advertised in a newspaper creates a valid binding contract under which he is entitled to the promised reward.³⁶⁸ The rules of such a contest, in case of dispute, must be interpreted against the one who prepared them, exactly as in the stipulations of a contract.³⁶⁹ The closing of the contest before the announced term, without the contestants' consent, amounts to a breach that entitles them to recover damages.³⁷⁰

been offered for the conviction of more than one person, the court felt that because of certain ambiguity in the notice published in English and French, plaintiff was entitled to recover. *Compare with* the solution suggested in German doctrine, *supra* 73.

368. *Schreiner v. Weil Furniture Co.*, 68 So.2d 149 (La. App. Orl. Cir. 1953), where the court invoked LA. CIVIL CODE art. 1803 (1870).

369. *Id.* at 152: "Where there is a dispute over what are the provisions of a contract or what the stipulations mean, a document must be interpreted against the one who prepared it." LA. CIVIL CODE arts. 1957 and 1958 (1870).

370. *Youngblood v. Daily and Weekly Signal Tribune*, 131 So. 604 (La. App. 2d Cir. 1930).