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Vices and Consent, Error, Fraud, Duress and an Epilogue on Lesion

Saul Litvinoff

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VICES OF CONSENT, ERROR, FRAUD, DURESS AND AN EPILOGUE ON LESION

*Saul Litvinoff**

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I. CONSENT, FREEDOM AND STABILITY OF TRANSACTIONS

Consent and Freedom

Autonomy of the will is the basic idea that underlies the doctrine of juridical acts implicit in the civil codes of France and Louisiana.¹ From the vantage point of that idea, a person's declaration of will produces the intended legal effects when the consent it expresses is informed by a reason, a cause, and is also free from interfering circumstances that frustrate its intention.² As clearly stated in the Code Napoleon, consent is invalid when it has been given through error, extorted by duress, or obtained by fraud.³ When such is the case, though consent has come into existence, it is impaired, defective, it is tainted by a vice that affects its freedom.

The impairment that may invalidate a person's consent can be of a subjective or of an objective nature. In the case of error, the impairment results from a sort of accident that takes place in a person's subjective process of assembling an act of volition. Under certain circumstances, such an abnormal operation of a person's mind deserves the attention of the law as it would be socially harmful to hold that a declaration of will produces legal effects always, even if the person who made it does not obtain through it what he really wanted.⁴ In the case of duress, on the other hand, especially when exerted through physical violence or a threat clearly expressed, the circumstance that interferes with the freedom of the victim's consent can be objectively perceived.⁵ The same can be said of the case of lesion, which, in its Louisiana version, depends on whether a formula is met that measures the relative values of a performance and the return performance, which can be objectively perceived also.⁶ Where both duress and lesion are concerned, the law intervenes because, in such instances, a person sacrifices valuable, though perhaps remote, interests for the satisfaction of immediate needs, a choice that may not conform to the general interest of the social group at large, as social groups must concern themselves more and more with the future in order to subsist.⁷ In the case of fraud, the nature of the blemish that

1. See 1 S. Litvinoff, *Obligations* § 4, at 14-15, in 6 *Louisiana Civil Law Treatise* (1969).

2. See A. Weill et F. Terré, *Droit civil—Les obligations* 180 (3d ed. 1980).

3. French Civil Code art. 1109 (1804).

4. S. Litvinoff, "Error" in the Civil Law, in *Essays on the Civil Law of Obligations* 222, 224 (J. Dainow ed. 1969).

5. *Id.*

6. See La. Civ. Code art. 2589 for example.

7. See 1 R. Demogue, *Traité des obligations en général* 357 (1923). See also S. Litvinoff, *supra* note 4, at 222, 224.

impairs the freedom of a person's consent is both subjective and objective, as fraud consists of an error, subjective in origin therefore, that has been induced through a scheme designed for that purpose, a scheme that must be proved as an objective circumstance.⁸

Be that as it may, those circumstances that affect the freedom of a person's consent do not destroy that consent, but only impair it, as a defect or structural vice impairs the usefulness, or the value, of a thing without negating its existence. That approach, so peculiar to the civil law, cannot be properly understood without a historical perspective of the matters involved.

Historical Development

In regard to error, fraud, duress and lesion, the concepts of the civil codes have been framed against the background of the Roman tradition as tempered by the Canon law.⁹

Because of the great importance that primitive Roman law bestowed upon formalities, freedom of consent received little or no attention in that system. A contract was always valid if it was made in compliance with the prescribed formalities.¹⁰ In a way, it was form, rather than consent, that created the obligation.¹¹ If the form was present, it mattered not if a party's consent had been obtained by fraud or extorted by duress. That rigorous approach was changed through the work of the *Praetor*, who took it upon himself to see to it that certain principles of loyalty and honesty were observed in the conclusion of contracts.¹² Nevertheless, the change was originally accomplished in a roundabout way through a resort to the law of delict. Thus, in principle, a contract was validly formed, even if fraud or duress had intervened, because of the axiomatic nature of the adage *coactus voluit sed tamen voluit*—he willed under coercion but he willed nevertheless—, but fraud—*dolus*—and *duress*—*metus*—gave rise to the repressive sanctions attached to delicts. If the contract had not yet been performed, the *Praetor* would allow the victim of fraud or duress a defense based on the wrongdoing of the party demanding performance, a defense known as *exceptio doli* or *exceptio metus*, respectively.¹³ If the contract had been performed, the *Praetor* would order the wrongdoer to repair the damage caused by his delict, a reparation to be accomplished by means of *restitutio in integrum*, or restitution, but the contract was not annulled, the restitution of

8. See La. Civ. Code arts. 1953 and 1955.

9. A. Weill et F. Terré, *supra* note 2, at 181.

10. See B. Nicholas, *An Introduction to Roman Law* 159-60 (1962).

11. A. Weill et F. Terré, *supra* note 2, at 181.

12. See P. Girard, *Manuel élémentaire de droit romain* 40-41 (1911).

13. *Id.* See also A. Weill et F. Terré, *supra* note 2, at 181.

whatever had been given in performance of that contract instead having the color of indemnification for a delict.¹⁴

For the same reasons of strict adherence to a formal approach to contract, error did not fare any better in primitive Roman law, with the aggravating circumstance that no remedy for error could be found through the circuitous way of delictual remedies since error is no delict. Under the influence of the idea of *equitas*, however, slowly and by short steps, and at least for those *bona fides* contracts such as sale, account started to be taken of the most serious kinds of error such as error as to the substance—*error in substantia*, an error that was held to cause the destruction, rather than the mere impairment, of a party's consent, and therefore gave rise to an absolute, rather than a relative, nullity.¹⁵ Nevertheless, no general doctrine of error can be found in Roman law even after that system outgrew its primitive stage of formalism, since each particular situation was given a peculiar solution according to its own circumstances.¹⁶

For the Canon law, by contrast, the problem has been approached as one of conscience. The ecclesiastic judge must determine whether a party who has failed to fulfill a promise committed a sin, for which purpose the promise itself is scrutinized, and, if it is found that the promise was made because of an error, or obtained by fraud, or extorted by duress, the failure to perform it does not constitute a sin. For that system, thus, the problem exceeds the scope of the individual will and becomes one of morality.¹⁷

The Civil Code, Autonomy of the Will and Security of Transactions

The idea of the autonomy of the will to which the redactors of the French Civil Code adhered so closely called for a departure from the Roman rules based on a strictly formal approach to contract formation, and also from rules based on principles of objective morality. It seems that the French redactors were aware, however, that once the psychological processes of contracting parties were taken into account, great uncertainty would result concerning the stability of transactions. Indeed, the kinds of errors contracting parties can make are as innumerable as the kinds of more or less devious schemes a party may devise to induce another into a contract. On the other hand, distressing circumstances that may compel a party into making a contract even against his will cannot always be readily discerned. The Roman rules, by contrast, had

14. P. Girard, *supra* note 12, at 40.

15. *Id.* at 461.

16. See F. Schwind, *Römisches Recht* 265 (1950). See also S. Litvinoff, *supra* note 4, at 222, 226.

17. A. Weill et F. Terré, *supra* note 2, at 181.

not only been practiced for a long time but also lent themselves well to the task of upholding the security of transactions without entirely overlooking psychological aspects, at least where duress and fraud were concerned.¹⁸

The concept of a vice of consent thus came into existence as a practical solution that allows the paying of respect to the autonomy of the parties' will without overlooking the need to maintain the security of transactions. The Roman categories were preserved but with a change in nature. Fraud and duress were rescued from the delictual field, at least in part, and given the same contractual remedies allowed for error. On the other hand, error no longer destroyed consent, as in those special instances contemplated by the Roman rules, but only blemished it.

Vices of Consent, Degree, and Judicial Discretion

According to the concept of vices of consent, not every circumstance that interferes with a party's will suffices to invalidate the consent expressed through that will. To produce an invalidating effect such a circumstance must be of a certain degree. Thus, if it is error it must involve the cause of the obligation.¹⁹ If it is fraud, it must consist of a scheme susceptible of overcoming the victim's ability to find out the truth by himself.²⁰ If it is duress, it must be forceful enough as to constrain the will of a person of ordinary firmness.²¹

Such an approach does not confine the courts to a mere analysis of the psychological processes of parties claiming that the freedom of their consent has been frustrated by an intervening circumstance, but encourages judicial efforts to ascertain whether prevailing standards of morality and stability of transactions, indispensable for commerce, will be better served by invalidating or upholding a contract because, or in spite, of a defect, a blemish, in other words, a vice, in the consent of one of the parties. The flexibility of such an approach does not deny that certain instances of fraud or duress may fall, or perhaps remain, within the delictual field.²²

Vice, Obstacle, and Nullity

The kind of nullity to which error, fraud, duress and lesion give rise adds precision and clarity to the concept of vices of consent. Indeed, since vices or defects are susceptible of being cured, when a vice involves

18. *Id.*

19. See La. Civ. Code art. 1949.

20. See La. Civ. Code art. 1954.

21. See La. Civ. Code art. 1959.

22. See generally A. Weill et F. Terré, *supra* note 2, at 182.

the consent of a party it gives rise to a nullity that is only relative, which means that it may be cured either through confirmation by the party of interest or through the passing of time.²³ On the other hand, if error, fraud, duress and lesion were destructive of a party's consent, then such consent would be absent and therefore the attending nullity would be absolute for the lack of an indispensable requirement for the formation of a juridical act that needs such consent.²⁴

Extensive discussion was given to those ideas in connection with the French doctrine of *erreur-obstacle*, or error-obstacle.²⁵ That doctrine places great emphasis on the language of the only article of the Code Napoleon that speaks of error, an article that only mentions error as to a substantial quality of a thing and error as to the person. Other kinds of error, such as errors involving the nature of the contract, or the thing which is the contractual object, or the cause of the obligation arising for one party, because they are not mentioned in that article, would under that view not be mere vices of consent, but rather obstacles to the formation of the contract because of the destruction, and therefore the absence, of the consent of the party in error.²⁶ Thus, for example, if a party made a contract that he thought was a sale while the other party believed that he was only accepting a donation, consent would be absent, thereby giving rise to a nullity that is absolute.

That doctrine, though useful for the purpose of clarifying the concept of a vice of consent, does not enjoy the support of contemporary French legal thought.²⁷ It is now believed that the pertinent article of the Code Napoleon was not intended to provide an exclusive listing of errors that are vices of consent, thereby allowing the implication that other errors are obstacles to contract formation, but rather offers a few examples in the intendment that all kinds of error are just vices of consent. Indeed, there is no valid reason to prevent parties from confirming, through an informed and free expression of their will, a contract made with a wrong belief concerning its nature.²⁸

It can be said that, since the revision of 1825, there is no room in the Louisiana Civil Code for the doctrine of *erreur-obstacle*, because of its careful enumeration of different categories of error, all of which are

23. See La. Civ. Code art. 2031. See also La. Civ. Code art. 2595.

24. See La. Civ. Code arts. 2029 and 2030.

25. See S. Litvinoff, *supra* note 4, at 222, 230-34.

26. See French Civil Code art. 1110. See also A. Weill et F. Terré, *supra* note 2, at 188.

27. See 6 M. Planiol et G. Ripert, *Traité pratique de droit civil français* 207-09 (P. Esmein trans. 2d ed. 1952); A. Weill et F. Terré, *supra* note 2, at 188-89.

28. Modern French doctrine finds a solid base for its rejection of the doctrine of *erreur-obstacle* in early views expressed by Pothier; see 2 *Oeuvres de Pothier—Traité des obligations* 13-15 (Bugnet ed. 1861).

just vices of consent and give rise to a nullity which is only relative.²⁹

II. ERROR

GENERAL PRINCIPLES

Error and Consent

Error is a false representation of reality.³⁰ It may result from ignorance of the existence of something that really exists or from a wrong belief in the existence of something that actually does not exist.³¹ Thus defined, error may occur in the course of any intellectual process, but the law concerns itself with error when the intellectual process in which it occurs involves the making of a juridical act such as a contract. In that perspective, and in general terms, error is a false or inexact idea that a party to a contract has of an element of that contract.³²

Since consent is the expression of a party's will, if such an expression is prompted by an error it does not then express the party's true will, and therefore the consent thus given should be ineffective because a party in error is consenting to something to which he did not intend to consent.³³ Thus, a party's error challenges the validity of a contract as no valid contract can be made without the valid consent of the parties.

Error and Stability of Transactions—Theory vs. Reality

Where error is concerned, the rigors of theory and conceptual consistency do not conform to the needs of practical reality. Indeed, according to theory, the error of one of the parties at the making of the contract prevents the coming into existence of a valid consent as an expression of that party's true will, and therefore also prevents the coming into existence of a valid consent as a meeting of the parties' minds or concurrence of their wills.³⁴ Error, however, is a psychological event that takes place in a person's subjectivity. If an allegation of error without more were enough to obtain the annulment of a contract, that kind of solution, though consistent with theory, would greatly endanger the stability of transactions so much needed for orderly social and business intercourse, and would even provide an easy way out for a party who,

29. See La. Civ. Code arts. 1950 and 1824-1846 (1870).

30. A. Weill et F. Terré, *supra* note 2, at 185.

31. See La. Civ. Code art. 1821 (1870).

32. A. Weill et F. Terré, *supra* note 2, at 185; see also S. Litvinoff, *supra* note 4, at 222, 225, 226.

33. See I S. Litvinoff, *supra* note 1, at 210-11.

34. *Id.*

in bad faith, might have changed his mind concerning the advantages to be derived from a contract.³⁵

A realistic doctrine of error must therefore reach a compromise between the need to protect the freedom of the will of parties through the granting of appropriate relief to those whose will has been frustrated by error, and the need to protect the stability of transactions, which is strongly connected to the need to protect the interest of the other party who might not have shared the error of his cocontractant. That compromise is reached by a limitation of the circumstances that make an error operative, that is, that make it grounds for the annulment of a contract. That limitation is of a dual nature in that it refers to circumstances that concern the party in error and also circumstances that concern the other party.

THE PARTY IN ERROR

Error and Cause

For a contract to be annulled because of an error incurred by one of the parties the error must have determined that party's consent, that is, the error must affect the reason why the party consented to obligate himself or, in other words, it must be clear that the party would not have bound himself if such error had not been made.³⁶ In the Louisiana Civil Code, the reason why a party binds himself by an obligation is called the *cause* of the obligation.³⁷ That explains the assertion that error vitiates consent only when it concerns a cause without which the obligation would not have been incurred.³⁸ Indeed, a party may bind himself for more than one reason.³⁹ In the case of a contract, for instance, past events, or events expected to occur in the future, may create for a person the need to obtain a certain thing, of a particular quality, with which he intends to achieve a certain result, for which purpose he makes a contract of a certain kind with a particular person. A reason for the person to bind himself may be found in just one, or in a few, or in all of those analytical steps. What matters is that the person would not have contracted were it not for the reason, or reasons, involved in one or more of the analytical steps, and that the error he claims to have made affects that reason.

35. See J. Ghestin, *La notion d'erreur dans le droit positif actuel* 6-8 (1963); L. Jossierand, *Les mobiles dans les actes juridiques du droit prive* 52-54 (1928); A. Weill et F. Terré, *supra* note 2, at 186.

36. See J. Ghestin, *supra* note 35, at 29; S. Litvinoff, *supra* note 4, at 222, 239.

37. See Litvinoff, *Still Another Look at Cause*, 48 *La. L. Rev.* 3, 26 (1987).

38. *La. Civ. Code art.* 1949.

39. See 1 S. Litvinoff, *supra* note 1, at 396, 408.

For example, in need of information on a particular subject, a person may walk into a bookstore and, after advising the attendant of his interest, buy a book that, in spite of its misleading title, does not deal with that subject. It is clear in such a case that the reason that prompted the person to bind himself to pay a price was to obtain a book on a certain subject and that an error was made concerning the subject treated in the book he bought. Such an error should entitle that person to obtain rescission of the contract of sale he made at the bookstore. On the other hand, if the book actually deals with the subject of his interest, the purchaser should not be allowed to obtain rescission on grounds of an error in the quality of the paper of that book, as it can be readily concluded that the quality of the paper was not the reason why he bought the book.⁴⁰ Likewise, a lessee of commercial property may not obtain annulment of the contract of lease because of an alleged error concerning installation of a sign pole by the lessor when it is clear that the availability of such a sign pole was not the reason that prompted the lessee to enter the contract of lease.⁴¹ A different result would obtain, nevertheless, if the book involved in the second example were not just any book on a certain subject but a numbered copy of an edition for bibliophiles allegedly made with the finest materials and the highest craftsmanship, or if the sign pole involved in the third example were a must for the success of the lessee's commercial operation.⁴²

A similar conclusion prevails at common law, where it is said that, in order to be operative, a mistake must involve a basic assumption of the parties.⁴³ In Louisiana the formulation is that error may concern a cause, and thus be operative, when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.⁴⁴

Error as to the Nature of the Contract

In this context, the nature of the contract means the kind of contract a party intends to make, a kind that may be comprised among the special contracts subject to particular regulation in the civil code under

40. See L. Jossierand, *supra* note 35, at 50; 2 Oeuvres de Pothier, *supra* note 28, at 14.

41. See *Thieneman v. Kahn*, 433 So. 2d 761 (La. App. 5th Cir.), writ denied, 440 So. 2d 731 (1983).

42. See 11 G. Baudry-Lacantinerie et Barde, *Traité théorique et pratique de droit civil—Des obligations* 103-04 (2d ed. 1900).

43. See Restatement (Second) of Contracts §§ 152, 153 (1979).

44. La. Civ. Code art. 1950.

a well-defined name, such as sale or lease, or belong in the general category of contracts designated as innominate because no well-defined name is provided for them in the civil code although they are perfectly valid contracts governed by the general rules of obligations.⁴⁵ Indirectly, the nature of the contract also alludes to the other category or categories in which a particular contract belongs according to the classification of contracts in general.⁴⁶ Thus, a party may believe that he is entering a contract of sale while, through an error, he is actually executing a donation. Quite clearly the party intended to make a bilateral and onerous contract while he was actually making a unilateral and gratuitous one.⁴⁷ On the other hand, intending to make a contract of sale, a party may actually enter a contract of lease. There is still error, even though both, sale and lease, are bilateral and onerous contracts.⁴⁸

In French doctrine, rather than a vice of consent, an error in the nature of the contract is an insurmountable obstacle to the formation of a binding agreement, which results in an absolute rather than a relative nullity.⁴⁹ A contract affected by such an error is regarded as nonexistent.⁵⁰ For a portion of French doctrine, on the other hand, such an error is not truly an error in the nature of the contract but rather an error that concerns the object of the parties' obligations, which would bring that kind of error closer to the notion of error in the object of the contract.⁵¹ Be that as it may, without abounding in reasons, French decisions have annulled contracts where a party who intended to obtain a regular policy from an insurance company had actually joined a mutual insurance association through an error.⁵² Likewise, French decisions have annulled contracts where a party who intended to take a long term loan had erroneously consented to enter a deferred credit contract.⁵³

The Louisiana jurisprudence has granted rescission on grounds of error in the nature of the contract where a party who intended to buy immovable property had actually entered a time sharing agreement for that property.⁵⁴ Likewise, rescission was granted where an option to

45. See La. Civ. Code Book III, Titles VI-XIX; see also La. Civ. Code arts. 1914-1916; see also 1 S. Litvinoff, *supra* note 1, at 197-99.

46. See La. Civ. Code arts. 1907-1914. See also 1 S. Litvinoff, *supra* note 1, at 142-44.

47. See La. Civ. Code arts. 1907-1910.

48. See La. Civ. Code arts. 2439 and 2669.

49. See L. Jossierand, *supra* note 35, at 47-48; A. Weill et F. Terré, *supra* note 2, at 187-89.

50. See R. Demogue, *supra* note 7, at 409-12.

51. See 11 G. Baudry-Lacantinerie et Barde, *supra* note 42, at 74-76; J. Ghestin, *supra* note 35, at 90-96.

52. See Req. May 6, 1878, D.P. 80.1.12, S. 80.1.125.

53. See Rennes, October 26, 1950, Gaz. Pal. 1951.1.27.

54. See *Agrawal v. Rault Club Ten, Inc.*, 464 So. 2d 951 (La. App. 4th Cir. 1985), *aff'd in part, rev'd in part*, 482 So. 2d 184 (La. App. 4th Cir. 1986).

purchase was contained in a contract of lease of movable property, but such option was invalid for the lack of a necessary requirement.⁵⁵

Error in the nature of the contract leads to nullity not only when a party makes a contract of a kind different from the one he truly intended, but also when a party has made a contract although he truly intended to execute a juridical act of a different sort. Thus, rescission is an appropriate remedy when a person intends to sign a mere receipt for a sum of money, but he has actually signed a contract of transaction or compromise which releases the other party from further obligation.⁵⁶ Persons who make that kind of error in distressed circumstances, such as the victims of accidents, are thus effectively protected.⁵⁷

Error as to the Thing That is the Contractual Object

Parties may make a contract involving a thing they have in sight, as in the case of a sale that takes place in a store once the purchaser has selected a particular article. Many times, however, the thing involved is not in the presence of the parties, in which case it is usually described by some of its relevant features such as location, or, if the thing is an immovable, boundaries and size. The possibility of an error occurring in the first kind of situation is only slight, as the purchaser's action seems to show that the thing he selects is what he really wants, and the naming of a price by the seller expresses his willingness to sell that particular thing for that price. The second kind of situation is a more fertile ground for error sufficient to vitiate the consent of the parties. In a proverbial example, while away from home, a person sold a portrait of a statesman that hung behind his desk in his study, but, unbeknownst to him, that person's wife had hung another portrait of the same statesman in that place during his absence.⁵⁸ In such a case there is an error that bears on the identity of the thing and therefore affects the seller's consent, as he sold a thing different from the one he intended to sell. Such error may affect the consent of the buyer also if he intended to acquire not just any portrait of that statesman, but the one that originally hung behind the seller's desk.

In exceptional cases, an error as to the thing that is the contractual object may occur even when that thing is present at the time and place a contract is made. Thus, parties may conclude a sale of certain bars they believe to be of gold, but such bars are only of brass. Here again

55. See *Becker & Assoc., Inc. v. Lou-Ark Equip. Rentals Co.*, 331 So. 2d 474 (La. 1976).

56. See *Davenport v. F.B. Dubach Lumber Co.*, 112 La. 943, 36 So. 812 (1904); *Davis v. Whatley*, 175 So. 422 (La. App. 1st Cir. 1937).

57. See *Wise v. Prescott*, 244 La. 157, 151 So. 2d 356 (1963).

58. An example taken from German doctrine, see J. Ghestin, *supra* note 35, at 3-4.

the error affects the consent of at least one party, who may claim rescission of the contract on such grounds.⁵⁹ It is noteworthy that the error involved in that case is not one that bears on the substance of which a thing is made, as when a candlestick is believed to be made of solid silver but is actually made of silver-plated copper, but is an error that bears on the identity of the thing itself, as it is clear that what was intended as the contractual object was gold, which happened to be fractioned in bars for handling purposes, and not the bars as such.⁶⁰

In more accurate language, what is usually termed error in the contractual object is actually an error that bears on the object of the performance of one of the parties.⁶¹ In the perspective suggested by such language it becomes clear that rescission may be obtained not only by a party who made an error concerning the performance of his cocontractant, but also by a party who made an error concerning his own performance. In other words, rescission may be granted not only to a purchaser who, because of an error, did not buy the thing he really intended to acquire, but also to a seller who, because of an error, sold a thing other than the one he intended to sell.⁶² Likewise, annulment may result from an error made by a purchaser who agreed to pay a price considerably higher than the one he thought he was binding himself to pay.⁶³

Error as to a Substantial Quality of the Thing

According to the French Civil Code, this kind of error is a cause of nullity of an agreement only when it bears on the very substance of the thing that is its object.⁶⁴ An error of this kind must be distinguished from an error that bears on the identity of an object, as when a person agrees to buy and another agrees to sell a painting, but the buyer has in mind a certain one while the seller has in mind another painting that hangs next to the one the buyer wants, which is the kind of situation discussed in the preceding section.

Error that bears on the substance of the thing that is the contractual object is an error that concerns certain qualities of the object that are regarded as substantial, or essential, and are distinguishable from other

59. See *Gullette v. Woods*, 448 So. 2d 856 (La. App. 2d Cir. 1984). See also La. Civ. Code art. 1842 (1870).

60. See 2 *Oeuvres de Pothier*, supra note 28, at 13-14. See also La. Civ. Code art. 1844 (1870).

61. See *J. Ghestin*, supra note 35, at 3-4 and 90-96.

62. See *Lawrence v. Mount Zion Baptist Church*, 1 La. App. 404 (Orl. 1925), where, for the price of a lesser piece of property, a party sold a piece of land more valuable than the one he intended to sell.

63. See Civ. Nov. 28, 1973, D. 1975, 21; *Gaz. Pal.* 1974.I.353.

64. French Civil Code art. 1110.

qualities that are only secondary, as an error that bears on the latter is not a cause of annulment.⁶⁵ That conclusion was reached in France after considerable debate between an objective and a subjective viewpoint. In a strict approach that follows the Roman tradition, error in the substance is limited to error that bears on the material of which a thing is made. Thus, if a person buys a thing that he believes is made of gold but that is actually made of brass, the contract is null.⁶⁶ The material determines the nature of the object and therefore the validity or nullity of the contract. On the one hand such a conception offers the advantage of establishing a precise criterion, but, on the other, because it is too narrow, it leads to unfair consequences that disregard the true will of contracting parties. Thus, according to an eminent Roman jurist, if a person buys a thing he believes is made of gold but, though it is mainly made of brass, that thing contains a very small proportion of gold, the contract of sale is valid because, after all, some gold has been sold.⁶⁷ That example suffices to show the shortcomings of an objective criterion. It is clear that such a solution does not respect the true will of the party who intended to acquire a thing of solid gold.⁶⁸

A remedy for such shortcomings was sought in a subjective approach originated in an example offered by Pothier which is now regarded as classic:⁶⁹ If a person intending to acquire candlesticks of solid silver buys candlesticks that are actually made of silver-plated copper, that error is one that bears on the substance and is grounds for annulment of the contract if the metal with which the things were made was the "substantial quality," in the sense of reason or inducement, that prompted the buyer to make the contract. On the other hand, the same kind of error would not taint the buyer's consent, and therefore would not be grounds for annulment, if he bought the candlesticks because they were rare, or antique, or of great artistic value, and not because of the metal, which, in the mind of the buyer, was only a secondary quality of the things at the time he made the contract.⁷⁰

In that view "substance" and "substantial quality" are brought together in an attempt to make more flexible the succinct language of the French Civil Code, and both are explained as included within that "quality" of a thing that the parties contemplated when they entered the contract. That conclusion differs diametrically from the one that results from the use of an objective criterion. In the subjective approach,

65. See L. Josseland, *supra* note 35, at 78-81; A. Weill et F. Terré, *supra* note 2, at 190.

66. Ulpian, D. XVIII.1.14.

67. *Id.*

68. See A. Weill et F. Terré, *supra* note 2, at 190.

69. See 2 Oeuvres de Pothier, *supra* note 28, at 13-14.

70. A. Weill et F. Terré, *supra* note 2, at 191.

the substantial quality of a thing is not the quality that determines objectively its specific nature, regardless of the intent, or wishes, of contracting parties, but that quality that the parties to a contract, or one of them, had primarily contemplated—the quality that actually determined or led their will into the contract, a quality such that, had they known the thing did not have it, they would not have made the contract.⁷¹

The practical consequences of the subjective view differ from those that result from the use of an objective one. Rescission will be granted under one where it would be refused under the other. Thus, where the objective approach of Roman origin would uphold the contract because the brass bars contained at least some proportion of gold, the subjective approach leads to rescission on grounds of error that bears on the substantial quality of the thing when the purchaser's will was determined by the belief that the bars were of solid gold. The converse is also true, as annulment may be granted in an objective approach where it would be refused in a subjective one. Thus, if a person buys a piece of antique furniture, signed by a renowned cabinet maker, in the belief that it is made of a certain kind of wood while it is actually made of a wood of a different kind, annulment should be granted if an objective approach is used as the error bears on the very substance of which the thing is made, but it would be refused in a subjective approach because the substantial quality that determined the purchaser's consent to buy was the antique nature of the piece of furniture and not the material, or substance, with which it was made.⁷²

French doctrine has come to prefer the subjective approach, a preference justified by the belief that the redactors of the French Civil Code actually intended to give legislative formulation to the ideas expressed by Pothier.⁷³ That approach also prevails in modern French jurisprudence. Thus, concerning transactions regarding antiques and works of art, which are such a fertile ground for error, rescission has been granted when either the buyer or the seller was in error concerning the authenticity or antiquity of the contractual object.⁷⁴ Rescission was refused, however, for an error involving the identity of the person who sat for a painting, or the exact dimensions of the canvas on which a painting was executed.⁷⁵

71. *Id.*

72. *Id.* at 192.

73. See 6 M. Planiol et G. Ripert, *supra* note 27, at 218-21; A. Weill et F. Terré, *supra* note 2, at 192.

74. See Civ. Oct. 16, 1979, *Gaz. Pal.* 1980.1. Som. 60; Civ. Feb. 22, 1978, D. 1978.600, with a note by Malinvaud. See generally Fournier, *De la protection des parties dans les ventes d'antiquités et d'objets d'art* (Thesis, Dijon, 1936); Celice, *L'erreur dans les contrats* (Thesis, Paris, 1922).

75. *Trib. Paix Nantes*, Jan. 23, 1947, D. 1947.220; *Trib. Civ. Seine*, Dec. 8, 1950, D. 1951.50.

It was also refused to a party who alleged that he erroneously believed that the painting he bought had once hung in the studio of the artist who signed it.⁷⁶ In a different order of transactions, rescission was granted for an error concerning the rent that the purchaser of immovable property could expect to obtain, as he thought that a certain sum was payable by the lessee every month while it was actually supposed to be paid every quarter.⁷⁷

Though sale is the kind of contract where error seems to occur most often, it is not, of course, the only kind of contract that may be annulled because of error in a substantial quality of its object. Thus, a lease of rural property may be annulled because of an error in the agricultural potential of the land in terms of the amount of work required to prepare the property for farming.⁷⁸

A subjective approach prevails also in Louisiana where, in deciding whether to grant or to refuse rescission on grounds of error, courts give great weight to the reason that prompted a party to contract for a certain object. As a result, rescission is granted when the error concerns that reason, even though nothing may be wrong with the object itself if objectively considered. Thus, a contract for the sale of rice was annulled on grounds of error upon a showing by the buyer that the rice he received had not been processed in the mill whose location was the reason why the order had been placed with that particular seller.⁷⁹ Likewise, a contract for the sale and installation of air conditioning equipment was rescinded on grounds of error upon a showing by the buyer that he had entered the contract in the belief that he would obtain component parts of a certain brand, and that the parts actually installed were of a different one.⁸⁰ Concerning works of art, error determined the annulment of the sale of a painting when the buyer showed that the reason why he purchased was to acquire an original work by a certain artist, but that the painting he obtained was not such a work.⁸¹ Concerning contracts other than sale, a lease was annulled because of an error involving the kind of building to be constructed by the lessor for the lessee's occupancy, as the kind of building that he expected was the reason why the lessee had agreed to the contract.⁸² Likewise, a transaction or compromise was

76. See Trib. Civ. Seine, Dec. 8, 1950, D. 1951.50.

77. Fontainebleau, Dec. 9, 1970, D. 1972.89, with a note by Ghestin.

78. See Civ. May 4, 1956, D. 1957.313.

79. Lyons Milling Co. v. Cusimano, 161 La. 198, 108 So. 414 (1926).

80. Ouachita Air Conditioning, Inc. v. Pierce, 270 So. 2d 595 (La. App. 2d Cir. 1972).

81. See *Voitier v. Antique Art Gallery*, 524 So. 2d 80 (La. App. 3d Cir.), writ denied, 531 So. 2d 271 (1988).

82. See *Laborde v. Aymond*, 172 La. 905, 135 So. 913 (1931). For another instance of error in a contract of lease, see *Becker & Assoc., Inc. v. Lou-Ark Equip. Rentals Co.*, 331 So. 2d 474 (La. 1976).

annulled upon a showing that it was made for no other reason than an erroneous prognosis of the injuries caused by an accident.⁸³

Error as to the Person

An error may be made by a party concerning the person of his cocontractant. When such is the case, that error may be grounds to invalidate the contract if the identity or quality of the other party is a reason without which the party in error would not have made the contract.⁸⁴

Since the time of the Romans, it has been clear that parties would not give their consent to certain contracts without a careful consideration of the person of the other party, while, for other contracts, that consideration may be indifferent or immaterial. Thus, it can be presumed that a person would not enter a contract of mandate or a contract of partnership without making himself certain that he is contracting with the right kind of person, as contracts of those kinds give rise to a relation of trust and confidence. On the other hand, in the case of a sale, for example, the buyer is less concerned with the person of the seller than he is with the thing he intends to acquire, and the seller is less concerned with the person of the buyer than he is with the price he wants to obtain. The former kinds of contract are traditionally labelled contracts *intuitus personae* in order to express the idea that personal qualities of the other are material for either party.⁸⁵

The view has been expressed that gratuitous contracts are always *intuitus personae* while onerous contracts are not.⁸⁶ It can be said, indeed, that a donation, or a gratuitous loan, is always made to a particular person whom the donor, or lender, wants to benefit, while a lease may be entered with any person in a position to furnish the required thing or to pay the required rent. That distinction cannot be carried too far, however. It is clear that in some instances donations are made not in order to benefit certain persons but for the purpose of accomplishing a certain beneficent end, as in the case of donations made to charitable institutions.⁸⁷ On the other hand, some onerous contracts are clearly *intuitus personae*, as one made with an artist for the painting of a

83. *Saunders v. New Orleans Pub. Serv., Inc.*, 387 So. 2d 603 (La. App. 4th Cir.), writ denied, 394 So. 2d 614 (1980).

84. See 2 *Oeuvres de Pothier*, supra note 28, at 14. See also J. Ghestin, supra note 35, at 233-42.

85. See 1 S. Litvinoff, supra note 1, at 407-08.

86. For a full discussion and criticism, see L. Josserand, supra note 35, at 57-71. Cf. La. Civ. Code arts. 1835 and 1836 (1870).

87. See A. Weill et F. Terré, supra note 2, at 196-98.

portrait, or even a sale when the focus is on the implied obligation of warranty.⁸⁸

In sum, the decisive criterion to determine whether nullity should be granted because of error in the person is not the kind of contract in the making of which the error occurred, but whether the importance given by the party in error to the person of the other party is such that he would not have made the contract had he known he was not binding himself to the person he had in mind. Thus, if because of prior transactions, a party makes an offer to enter a new contract with a certain person but that offer is accepted by another who, unbeknownst to the offeror, had taken over the intended offeree's business, the contract is null though onerous in nature.⁸⁹

An error of that kind suffices to invalidate a contract not only when it bears on the identity but also when it bears on a certain quality of a person. Thus, if a teacher is engaged to render services at a Catholic school in the firm belief that he is married, but he is actually divorced, the contract for services is null.⁹⁰ The religious affiliation of the school clearly explains that its authorities would not have contracted with that teacher had they known his true social status. Likewise, if a party engages the services of a teacher on the basis of a firm belief that such teacher has a good record of professional performance, the contract is null if, unbeknownst to the employer, the person he hired had been dismissed from previous employment, which casts a warranted doubt on the character and professional ability of that person.⁹¹

Where the solvency of a person is concerned, French jurisprudence is reluctant, in general terms, to annul contracts because of an error that bears on that particular quality.⁹² That attitude has been criticized in French doctrine, however, and the opinion voiced that such an error should suffice to invalidate a contract whenever the consent of a party to the contract has been determined by an erroneous belief in the solvency of the other party.⁹³ The latter view should prevail in Louisiana when it is clear that a party's solvency was a reason for the other to enter the contract, provided that the alleged insolvency existed at the time of formation and did not arise after the conclusion of that contract.⁹⁴

88. See La. Civ. Code arts. 2476, 2500 and 2520.

89. See *National Crankshaft Co. v. Natural Gas Indus., Inc.*, 158 So. 2d 370 (La. App. 2d Cir. 1963), judgment annulled, 246 La. 395, 165 So. 2d 1 (1964).

90. See *Bischoff v. Brothers of the Sacred Heart*, 416 So. 2d 348 (La. App. 4th Cir. 1982). See also La. Civ. Code art. 1838 (1870).

91. See *Ostrolenk v. Louise S. McGehee School*, 402 So. 2d 237 (La. App. 4th Cir.), writ denied, 404 So. 2d 1259 (1981).

92. See D.P. 1875.I.105; see also D.P. 1898.2.51 and *Gaz. Trib.*, 1917.2.420.

93. See J. Ghestin, *supra* note 35, at 244.

94. See La. Civ. Code arts. 1949 and 1950 and comment (d) to article 1950.

The Louisiana Civil Code contains occasional references to error in the person in connection with particular contracts such as transaction or compromise.⁹⁵ Because of its special nature, the contract of marriage is subject to rules of its own concerning vices of consent.⁹⁶

Error of Law

Roman law did not recognize error of law as grounds for nullity on the basis of *nemo legem ignorare censetur*, that is, no one may avail himself of ignorance of the law.⁹⁷ Nevertheless, while the French *ancien droit* was in force the attitude towards error of law became more flexible, and, finally, the operative effect of that kind of error was recognized in modern law.⁹⁸ Though the Code Napoleon deals with error of law only in an incidental manner, the Louisiana Civil Code has dealt expressly with that matter since the Revision of 1825.⁹⁹ It is now clear in the law of Louisiana that a party may seek the annulment of a contract when an erroneous understanding of the law was the reason that prompted him to make that contract.¹⁰⁰

At first blush there is a contradiction between disallowing ignorance of the law as an excuse, on the one hand, and allowing error of law as grounds for nullity on the other. That contradiction is only apparent, however. Ignorance of the law is of no avail because, otherwise, a person could invoke it in order to escape application of a law that would have effects negative to his interest, which runs counter to the basic principle that asserts that laws are of general application. A party to a contract who invokes error of law, on the other hand, does so in order to seek an annulment that, if granted, would deprive the contract of existence, thereby eliminating not only the disadvantage but also the advantage he might have derived from that contract.¹⁰¹ In the former case, without denying the validity of a law, a person claims that that law should not apply to him because he ignored its existence, while in the latter a party claims that, because of an error of law, a contract is invalid.

The opinion has been voiced that *nemo legem ignorare censetur* refers only to the criminal law.¹⁰² In Louisiana, however, the criminal code

95. See La. Civ. Code art. 3079.

96. See La. Civ. Code art. 93. See also *Delpit v. Yöung*, 51 La. Ann. 923, 25 So. 547 (1899); see also *Stier v. Price*, 214 La. 394, 37 So. 2d 847 (1948). Cf. *Succession of Pizzatti*, 141 La. 645, 75 So. 498 (1917). Cf. La. Civ. Code art. 1834 (1870).

97. See La. Civ. Code art. 5.

98. See J. Ghestin, *supra* note 35, at 52-53.

99. See French Civil Code arts. 2052 and 1356; La. Civ. Code art. 1846 (1870). See also 3 Louisiana Legal Archives Part II 1018-20 (1942).

100. See La. Civ. Code art. 1950 and comment (e).

101. J. Ghestin, *supra* note 35, at 53.

102. H. et L. Mazeaud et J. Mazeaud, 2 *Leçons de droit Civil* 140 (1965).

distinguishes between ignorance of the law, which is no excuse, and mistake of law which, under certain circumstances, is recognized as a valid excuse.¹⁰³

It is noteworthy that, where contracts are concerned, the invalidating force of error of law does not rest on the misunderstanding or misinterpretation of the law *per se*, but rather rests on the realization that such misunderstanding or misinterpretation has led a party into an erroneous understanding of the contractual object. Thus, for example, an heir who sells property he has inherited in the erroneous belief that, under the law of successions, he had received only the naked ownership while, according to the right application of that law, he had actually received the full ownership of that property, is entitled to the rescission of the contract of sale because his error of law led him to sell more than he intended.¹⁰⁴ Indeed, it is easy to realize that, had the heir known that he had inherited the full ownership, he would not have sold the property, at least for that price. Likewise, if a person buys immovable property that, according to his erroneous interpretation of the zoning regulations, may be used for a certain purpose, when actually the property may not be so used under the right interpretation of those regulations, the contract should be annulled because the person acquired an object of a quality different from the one he had in mind.¹⁰⁵ It is clear from those examples that a contracting party's error of law produces as an immediate consequence a significant alteration of the intended contractual object, which brings error of law very close to error of fact.

Be that as it may, the conclusion that error of law can be reduced to error of fact does not mean that the concept of error of law lacks all usefulness of its own. On the contrary, error of law is quite useful where proof is concerned, as it allows a party to show a misunderstanding of the law as the point of departure of a wrong course of reasoning ultimately leading to an error of fact that might be difficult to prove if the allegation of the initial error of law were not allowed.¹⁰⁶

Not every contract may be invalidated on grounds of error of law. The most traditional example of a contract sheltered against attack on such grounds is transaction or compromise.¹⁰⁷ Since uncertainty as to the law, or its interpretation, is often the most powerful reason that parties settle their differences through such a contract, to allow a party to attack a contract for the same reason that led him to enter it would amount

103. See La. R.S. 14:17 (1987). See also comment (c) to La. Civ. Code art. 5.

104. See Cass. Civ. Nov. 17, 1930, D.P. 32.1.61.

105. See Paris, July 9, 1924, Gaz. Trib. 1927.12.1924.

106. See J. Ghestin, *supra* note 35, at 57; see also Decottignies, *L'erreur de droit*, 49 *Revue Trimestrielle de droit civil* 309 (1951).

107. See La. Civ. Code art. 3078.

to a contradiction in terms.¹⁰⁸ As a matter of policy, moreover, transactions or compromises are favored by the law.¹⁰⁹ That a transaction or compromise may not be annulled because of an error of law is a conclusion often asserted by Louisiana courts.¹¹⁰

Other contracts not susceptible to invalidation on grounds of error of law are the onerous contracts that result from the promise to perform natural obligations.¹¹¹ Thus, if a person promises to make payment of a debt in the firm belief that such debt is still enforceable, he will not be allowed to claim error of law when he finds out that the debt was actually prescribed.¹¹² That is so because the debt, though prescribed, still lingers in the form of a natural obligation, and it would not be possible to ascertain—or a court at least would not endeavor to do it—whether at the moment of promising to pay the person was acting under an error of law or yielding to his moral duty to perform.¹¹³

Likewise, certain acts other than contracts are sheltered against allegations of error of law, as in the case of payment of a thing not due.¹¹⁴ Thus, to complement the example offered above, if a person pays a debt in the firm belief that it is still enforceable, though it has actually prescribed, he will not be allowed to invoke error of law in order to recover what he paid, for reasons of the same order as those already explained.¹¹⁵ A judicial confession is another act expressly excluded from the scope of error of law.¹¹⁶

The Louisiana jurisprudence has recognized the invalidating effects of an error consisting in the belief that a certain thing is the separate property of one spouse when that thing actually belongs to the community, which is an error as to the law governing the property of spouses under the community property regime.¹¹⁷

108. See 3 C. Toullier, *Le droit civil français* 336 (1833).

109. See *Succession of Teddlie*, 385 So. 2d 902 (La. App. 2d Cir.), writ refused, 393 So. 2d 742 (1980).

110. See *Hill v. Hill*, 173 La. 574, 138 So. 107 (1931); *Succession of Teddlie*, 385 So. 2d 902 (La. App. 2d Cir.), writ refused, 393 So. 2d 742 (1980).

111. See La. Civ. Code art. 1761 and comment (b).

112. See La. Civ. Code art. 1762(1).

113. See 3 C. Toullier, *supra* note 108, at 338.

114. See La. Civ. Code art. 2303.

115. It is noteworthy that the opposite solution prevails in France where the Code Napoleon does not contain an article equivalent to La. Civ. Code art. 2303; see 3 Louisiana Legal Archives Part II 1262 (1942); 3 C. Toullier, *supra* note 108, at 342; A. Weill et F. Terré, *supra* note 2, at 206.

116. See La. Civ. Code art. 1853; 3 C. Toullier, *supra* note 108, at 340-42.

117. See *Wilberding v. Maher*, 35 La. Ann. 1182 (1883). Cf. *Nelson v. Holden*, 219 La. 37, 52 So. 2d 240 (1951).

Error as to Other Circumstances

Error may be invoked as grounds for annulment of a contract even when it bears on a circumstance other than the nature of the contract, or the thing that is the contractual object, or the person of the other party, or the law, provided that the circumstance is one that the parties regarded, or should in good faith have regarded, as a cause of the obligation.¹¹⁸ In other words, error is a ground for invalidation when it bears on a circumstance that determined the will of the party in error as the principal reason for which that party consented to obligate himself.¹¹⁹ It is required, however, that the other party knew, or should have known, that that circumstance was such a reason for the party in error.¹²⁰ Thus, if a person consents to buy a residence primarily because he thinks that it can be remodeled through the addition of more living space but that is in fact not possible because of the size of the lot, the contract of sale may not be annulled if the other party was not apprised, nor could that party have surmised, that the main reason why the purchaser entered the contract was the erroneous belief that the residence could be expanded.¹²¹ Likewise, if a person agrees to buy a house because the company for which he works has decided to transfer him to the city where the house is located, but the company's decision is later changed so that the person must remain in his original place of employment, the agreement to purchase can be rescinded if the other party was aware that the purchaser's reason for buying the house was his erroneous belief in his forthcoming transfer.¹²²

Error as to Other Circumstances and Contractual Conditions

An error as to any circumstance suffices to invalidate the contract if the parties have made a condition of the reality of that circumstance.¹²³ Thus, in one of the examples offered above, the contract would have been null had the parties stipulated as a condition that the size of the lot should allow the building of an additional bedroom. In a way, since under Louisiana law conditions need not be express but may be implied by the law, or the nature of the contract, or the intention of the parties, a person's awareness that a certain circumstance is the reason why the other party consented to the contract makes the reality of that circum-

118. La. Civ. Code art. 1950.

119. See La. Civ. Code arts. 1949 and 1967.

120. See La. Civ. Code art. 1949 and comment (d).

121. See *Bordelon v. Kopicki*, 524 So. 2d 847 (La. App. 3d Cir. 1988).

122. See *Carpenter v. Williams*, 428 So. 2d 1314 (La. App. 3d Cir. 1983).

123. See La. Civ. Code art. 1767. See also J. Ghestin, *supra* note 35, at 62-63 for a discussion of express condition as only means in French law to give invalidating force to an error that falls on a circumstance that may be identified with a party's motive.

stance a sort of implied condition of the contract, and an error that involves such reality amounts to the non-fulfillment of the condition, as in the example, also offered above, where the seller knew that the buyer's reason for entering the contract was the transfer to that city of the buyer's site of employment.¹²⁴ Such a conclusion should not be reached, however, unless it is clear that a party's belief in the reality of a particular circumstance was a reason without which that party would not have made the contract.¹²⁵

Error and Motive

A recurring question is whether an error in a party's motive is sufficient grounds to invalidate a contract.¹²⁶ In a celebrated example, a person rents a house at the seashore with the intention of spending his vacation there but because of an error that concerns the time of his annual leave he is unable to enjoy the house he rented.¹²⁷ In another example, upon the death of his ancestor, of whom he believes himself to be the only heir, a person agrees to purchase several expensive things, but a later-discovered testament of the ancestor deprives the person of any rights to the inheritance.¹²⁸ In French law, the answer to the question whether the lease in one case, and the sale in the other, may be annulled because of error is negative.¹²⁹ That is so because, according to the French Civil Code, error is operative only when it involves the substance of the contractual object and, therefore, an error which is extrinsic to that object, as when it involves the intention to use it for a certain purpose, or the provenance of the funds necessary to pay for it, cannot be given invalidating force.¹³⁰ Nevertheless, the harshness of that approach has been tempered by the French doctrine and jurisprudence through the conclusion that error in the motive may be given invalidating force when the motive on which the error lies can be identified with the cause of the obligation contracted by the party in error.¹³¹ It is yet unsettled in French law, however, whether cause is a subjective element, such as a party's motive, or an objective one, such as the counterperformance expected from the other party.¹³²

124. See La. Civ. Code art. 1768 and comment.

125. See La. Civ. Code art. 1967.

126. See 3 C. Toullier, *supra* note 108, at 329-31.

127. See J. Ghestin, *supra* note 35, at 61.

128. *Id.* at 59.

129. 11 G. Baudry-Lacantinerie et Barde, *supra* note 42, at 103-04; J. Ghestin, *supra* note 35, at 60-67. But see G. Ripert, *La règle morale dans les obligations civiles* 77-79 (4th ed. 1949).

130. See French Civil Code art. 1110.

131. For a full discussion see J. Ghestin, *supra* note 35, at 59-82.

132. See 1 S. Litvinoff, *supra* note 1, at 382-405.

That result may be different in Louisiana, where the civil code clearly states that error is a ground for nullity only when it concerns a cause without which the obligation would not have been incurred.¹³³ For greater clarification, the Civil Code of Louisiana further states that cause is the reason why a party obligates himself.¹³⁴ In many instances that reason is nothing but a certain motive.¹³⁵ When such concepts are arranged in a full picture, it becomes clear that error in the motive is operative, that is, is grounds for nullity in Louisiana, provided that the motive, or reason, in question was known or should have been known to the other party.¹³⁶ An error that concerns a motive, or reason, that was never communicated to, or surmised by, the other party would lack invalidating force also in Louisiana.¹³⁷

The conclusion prevails, thus, that the answer that is negative in French law would be positive in Louisiana if the other party was aware of the motive that prompted the party in error, and that motive was the reason why the erring party consented to the contract.

Error as to Value

An error that concerns the value of the contractual object is not regarded as grounds for nullity, in general terms.¹³⁸ That is so because, to paraphrase the words of a Louisiana court, such an error is neither one of fact nor one of law, but rather an error of judgment for which the errant party should obtain no relief.¹³⁹

For that conclusion to prevail, however, the error as to the value should not result, as a direct consequence, from another error that concerns the object itself or a substantial quality of that object. For example, if a person buys a painting in the belief that it is the work of a famous master, but the painting is actually the work of a lesser artist, the error that bears on the object also entails an error as to its value, as the work of a master is no doubt more valuable than the work of an artist who is not well known. In such a case, however, though an error as to the value of the painting is involved, annulment may be granted, but only because of the error that bears on a substantial quality of the painting—namely, the artist who authored it—not because of error as to the value.¹⁴⁰ On the other hand, if a person buys a painting for

133. La. Civ. Code art. 1949.

134. La. Civ. Code art. 1967.

135. See Litvinoff, *supra* note 37, at 14-18.

136. La. Civ. Code arts. 1949, 1950.

137. See La. Civ. Code art. 1950 comment (f).

138. See 11 G. Baudry-Lacantinerie et Barde, *supra* note 42, at 103.

139. *Citizens' Bank of Louisiana v. James*, 26 La. Ann. 264 (1874).

140. See J. Ghestin, *supra* note 35, at 76-78.

a certain price but later finds out that the object he acquired is less valuable than he thought, though there is no doubt concerning the authenticity or provenance of the painting, his error, which only involves value, will not be a ground for nullity.

In sum, error as to value is not operative when it consists of a wrong economic appraisal a party has made of the right facts.¹⁴¹ It can be readily seen, moreover, that, even when a wrong idea of its value is the reason why a person consents to buy a thing—that is, when such error concerns the cause of the obligation incurred by that person—it cannot be said that the other party was aware of that cause.¹⁴² Indeed, a person who buys a thing for what he thinks is a bargain price, in the expectation of making a profit by reselling the thing for what he thinks is its true market value, will certainly not disclose his idea of the value to the seller, but will rather keep that idea in the realm of his subjectivity. If his expectation is later disappointed because the price he paid was not a bargain price, he has only himself to blame as his true reason to buy was concealed from the seller. The same reasoning would apply if he thought the sum he paid was the fair market price of the thing, but actually that sum was in excess of that price. It should be noticed that a different conclusion will be reached if error as to the value of the thing is induced by the other party, or if the circumstances clearly indicate that any value attributed to the thing was a condition of the contract.¹⁴³

Error and Lesion

The conclusions expounded above concerning error as to value recognize an exception in those jurisdictions where a remedy is given for lesion, that is, the lack of equivalence between the reciprocal performances of parties to a bilateral and onerous contract.¹⁴⁴ The law of Louisiana contains a limited version of lesion for the protection of a vendor of immovable property who has sold it for less than one-half of its fair market value, for the protection of a party who has given immovable property in exchange for other property worth less than one-half of the value of the property he gave, and for the protection of a party to a partition whose share is smaller, by more than one-fourth, than the share assigned to other parties.¹⁴⁵ It is easy to realize that an error as to value is present in all those situations, but here it is an error that can be determined by a contrast between the price actually received and market price at the time of the contract, as an objective standard, while in those

141. *Id.* at 83.

142. See La. Civ. Code art. 1949; see also *supra* p. 25.

143. See *infra* p. 52 and *supra* p. 25.

144. See La. Civ. Code art. 1965. See also J. Ghestin, *supra* note 35, at 74-89.

145. See La. Civ. Code arts. 1398, 2589, 2665 and 2666. See also *infra* p. 109-10.

situations where error as to value is not operative, the alleged error consists of the difference between a price actually paid, or received, and a subjective evaluation, more often than not speculative in intent, made by the party who claims to have erred.

Be that as it may, it should be remembered that, according to the source of the particular doctrine in legal systems of the French family, lesion is the result of implied error or imposition, since parties to commutative contracts are supposed to receive equivalents of what they give.¹⁴⁶ On that basis, the scope of lesion in some civil law jurisdictions is considerably wider than in Louisiana.¹⁴⁷

Error and Future Events

An error may be claimed concerning an event that, at the time a contract is made, was expected to take place in the future, but does not take place. The question whether such an error, consisting of the wrong belief that something will occur in the future—hence, error in prediction or forecast—is operative has so far received a negative answer. If the erroneous belief dwelled only in the party's subjective motivation and was never communicated to the other, it is easy to conclude that the alleged error is not one that concerns a cause of the obligation and is not therefore a ground for nullity.¹⁴⁸ Even when the other party knew, or should have known, of such a belief, the general conclusion is that the chance of a future event happening or not is a risk assumed by the party whose expectations will materialize if the event happens or will be frustrated if the event does not happen, a risk that in no manner should affect the other party's right to rely on the stability of transactions.¹⁴⁹ That is the conclusion reached in some Louisiana decisions.¹⁵⁰

Thus, if a person buys a large quantity of goods in the belief that the market for those goods will remain stable, but that market collapses, or he buys the goods in the firm belief that the market price of those goods will increase so that he will realize a large profit, but prices in

146. See 1 M. Pothier, *A Treatise on the Law of Obligations* 21 (Evans trans. 1806). See also La. Civ. Code art. 1860 (1870). An indication of the prevalence of that approach can still be seen in La. Civ. Code art. 1398.

147. See, e.g., German Civil Code, Section 138 (1900) and Swiss Code of Obligations art. 21 (1911). See also, J. Ghestin, *supra* note 35, at 76-82. See also *infra* p. 112.

148. See *supra* p. 12-13.

149. J. Ghestin, *supra* note 35, at 62-63.

150. See *Hanover Petroleum Corp. v. Tenneco Inc.*, 521 So. 2d 1234 (La. App. 3d Cir.), writ denied, 526 So. 2d 800 (1988); *City of New Orleans v. United Gas Pipe Line Co.*, 517 So. 2d 145 (La. App. 4th Cir. 1987), cert. denied, 109 S. Ct. 273 (1988); *Desonier v. Golden Gulf Marine Operators*, 474 So. 2d 1314 (La. App. 5th Cir.), writ denied, 476 So. 2d 336 (1985). Cf. *Aluminum Co. of America v. Essex Group*, 499 F. Supp. 53 (W.D. Pa. 1980).

fact go down, the person should be held to stand for the risk he assumed. It has been said, in this connection, that a wrong prediction of events that are expected to occur or of circumstances that are expected to materialize after the contract is made is not an error, as the law of error is concerned only with the risk of error that involves the state of affairs at the time of the agreement, and does not concern itself with the risk of error that involves future matters.¹⁵¹ It has to be noticed, however, that the distinction between a clear error as to an existing fact and an erroneous prediction as to a circumstance that does not yet exist is oftentimes blurred.¹⁵² Moreover, a different conclusion will obtain if the parties have made of a future event a condition, either suspensive or resolutive, or when the circumstances are such as to compel the conclusion that the occurrence of a future event was a condition implied by the terms of the contract.¹⁵³

The consequences of erroneous predictions, thus, serve as a bridge between the doctrine of error and the doctrine of failure of cause and the *théorie de l'imprévision*.¹⁵⁴

THE OTHER PARTY

Knowledge of the Cause vs. Knowledge of the Error

For error to be operative as a ground for nullity it is necessary not only that the error concern a cause without which the party in error would not have incurred the obligation, but it is also necessary that the other party knew, or should have known of that cause, that is, the reason why the party in error consented to bind himself.¹⁵⁵

The second requirement calls for some clarification, as knowledge of the cause differs from knowledge of the error and the latter is not a requirement, though it may lead to the same result on different grounds.¹⁵⁶ For example, a person buys a painting and he declares to the seller that he is buying it because it is a work of the Flemish School. Through that declaration the buyer has made the seller aware of the reason why he, the buyer, is consenting to the contract of sale and incurring the obligation to pay the price. If it is later found out that the painting does not belong to the Flemish School but to a different one, the buyer may obtain rescission of the contract since the error involved concerns

151. E. Farnsworth, *Contracts* 650 (1982).

152. *Id.* at 650-51. See also *Leasco Corp. v. Taussig*, 473 F.2d 777 (2d Cir. 1972).

153. See *supra* p. 25.

154. See Litvinoff, *Force Majeure, Failure of Cause, and Theorie De L'Imprévision: Louisiana Law and Beyond*, 46 *La. L. Rev.* 1, 47 (1985).

155. See *La. Civ. Code arts. 1949 and 1967*. See also *supra* p. 12-15.

156. See *La. Civ. Code art. 1949 comment (d)*.

the cause of his obligation and that cause was known to the other party. It is not necessary that the seller knew that the painting was not of the Flemish School, in which case the seller would have known that the buyer was making an error and, according to the circumstances, he, the seller, might have committed fraud.¹⁵⁷ Nor is it necessary for the seller to have shared the buyer's belief concerning the school to which the painting belongs. Had that been the case, then the situation would have been an instance of bilateral or mutual error also giving rise to rescission.¹⁵⁸ The fact is, however, that mere unilateral error, that is, error of one party alone, suffices as grounds for invalidation, provided that that error concerns a cause of the obligation and the other party was aware of that cause.¹⁵⁹

In sum, an error that is unilateral may suffice to invalidate a contract even though the other party is in a position of neutrality concerning the error itself, as he needs neither know it nor share it. It suffices for rescission that the other party knew the reason why the party in error obligated himself and that the error concerned that reason.¹⁶⁰

Thus, if a person buys a vehicle for the purpose of reselling it, a reason known to the other party, but the vehicle cannot be profitably resold because, unbeknownst to the buyer, it had been reconstructed after an accident, the contract may be rescinded on grounds of the buyer's error concerning the marketability of the object.¹⁶¹ Likewise, if a person, as lessee, enters the lease of a tractor-trailer rig because he believes the thing is equipped with a needed feature, a fact of which the lessor is aware, but the thing does not possess such feature, the lease may be annulled because of the lessee's error concerning a material element—or substantial quality—of the object.¹⁶² On the other hand, if a person purchases an antique armoire because he believes it will aesthetically fit in his office, a reason which he does not communicate to the seller, the sale may not be rescinded on grounds of error if the armoire does not thusly fit.¹⁶³ Likewise, if a person signs a promissory note for the sole purpose of protecting a corporation in which he has an interest, but the intended protection is of no avail, the contract embodied in the note may not be annulled on grounds of error if the

157. See *infra* p. 32 and 51.

158. See *infra* p. 34.

159. See J. Ghestin, *supra* note 35, at 169-71.

160. La. Civ. Code arts. 1949 and 1950.

161. See *Cochran Ford, Inc. v. Copeland*, 499 So. 2d 509 (La. App. 2d Cir. 1986).

162. See *Ouachita Equip. Rental Co. v. Trainer*, 408 So. 2d 930 (La. App. 2d Cir. 1981).

163. See *Valiulis v. L'Atelier Wholesale Antiques Ltd.*, 519 So. 2d 312 (La. App. 2d Cir.), writ denied, 521 So. 2d 1154 (1988).

payee did not know, nor had any reason to know, that the note had been signed for that purpose.¹⁶⁴

Error and Fraud

Although, as a matter of principle, unilateral error is a ground for nullity even in the absence of any knowledge of such error by the other party, the fact is that in the vast majority of cases where courts recognize nullity on that ground the circumstances seem to allow some doubt as to whether the other party, the defendant in most instances, was truly unaware of the plaintiff's error. Thus, in a case where the plaintiff, when ordering a special fur coat, had clearly stated that her reason for buying it was to obtain a coat made of continuous strips of fur, but the coat delivered to her had been made of fur strips that had been pieced together, the Louisiana court granted rescission on grounds that the plaintiff's unilateral error concerned the reason why she had made the contract, and that reason was known to the other party. It is difficult to believe, however, that the defendant, an experienced furrier, did not know that the coat could not be made as the plaintiff wanted, a circumstance that merited a comment by the court.¹⁶⁵ Likewise, in a case where a person had leased certain premises and bought certain fixtures therein contained for the purpose of operating a bar, a reason that was clearly communicated to the other party, but no liquor license could be obtained for that place, the court granted rescission on grounds of error, rejecting an allegation of fraud, though it is difficult to believe that the lessor, who had previously leased the premises to other parties for the same purpose, did not know that a liquor license would not be issued for that place.¹⁶⁶

In all such cases the question is warranted whether the situation involves fraud rather than error, but the answer must be negative. In the case of fraud the victim's error must be induced, provoked, by the misrepresentation or suppression of the truth of which fraud consists.¹⁶⁷ In the examples examined, instead, though the conduct of the other party may give rise to the suspicion that he knew that his cocontractant was making an error, he neither induced nor provoked it through any scheme, but merely took advantage of the error he had not created.¹⁶⁸ That kind of conduct is reprehensible, no doubt, as is always the case with bad faith, but it does not make the party not in error liable for fraud.

164. See *Tri-Parish Bank & Trust Co. v. Richard*, 280 So. 2d 850 (La. App. 3d Cir.), writ denied, 283 So. 2d 499 (1973). See also La. Civ. Code art. 1950 comment (f).

165. *Deutschmann v. Standard Fur Co.*, 331 So. 2d 219 (La. App. 4th Cir. 1976).

166. *Marcello v. Bussiere*, 284 So. 2d 892 (La. 1973).

167. See La. Civ. Code arts. 1953 and 1955.

168. *J. Ghestin*, *supra* note 35, at 113.

In the practice of litigation it is not infrequent for a complainant to bring an action based solely on error, disregarding any fraudulent overtones that might be involved in the facts he states, because, otherwise, he will have the increased burden of showing not only that he made an error without which he would not have entered the contract, but also that the error was induced by the other party. Since the latter may present some difficulties, a plaintiff may feel that his interest is sufficiently protected if the court grants him rescission on grounds of error alone.¹⁶⁹

At common law unilateral error is grounds for nullity if known to the other party.¹⁷⁰ That, however, is not the case in the civil law of Louisiana. As already shown, it suffices that the other party knew the reason that prompted the party in error to make the contract, and that the error concerns that reason. It is clear, however, that the other party's knowledge of the error, and not only of the cause or reason on which the error bears, will always expedite the obtaining of relief by the party in error.

Error, Tolerance, Morals, and the Courts

When the error is known to the other party, the fraudulent overtones arise from the nondisclosure of facts, also known to that party, the awareness of which would dispel the wrong belief in the mind of the party in error and also discourage him, no doubt, from entering the contract. As explained above, the other party does not induce the error, but takes advantage of it.¹⁷¹ If that were regarded as fraud, though in a nontechnical sense, then it would seem that some degree of fraud—or at least bad faith—is tolerated by the law, as is the case with the *bonus dolus* of the Romans and, to some extent, with the nonfraudulent or innocent misrepresentation at common law.¹⁷² Moreover, in at least one area, the law of Louisiana distinguishes between a failure to disclose and a false assertion, providing different effect for one and the other.¹⁷³

Perhaps because a finding of fraud implies a judgment on the morals of the party suspected of having committed it, or perhaps because in many instances it is very difficult to distinguish candor from honesty, courts prefer not to have to make moral judgments, and thus limit themselves to a finding of error as grounds for the relief they are willing to grant to the disadvantaged party.¹⁷⁴ Be that as it may, even when a

169. *Id.* at 105-09.

170. See Restatement (Second) of Contracts § 153 (1979).

171. See *supra* p. 32.

172. J. Ghestin, *supra* note 35, at 108 and E. Farnsworth, *supra* note 151, at 239.

173. See La. Civ. Code arts. 2545 and 2547 where a distinction is made between a seller who knows that the thing he sells has a defect but omits to declare it, and a seller who asserts that the thing he sells has a quality that he knows it does not have.

174. See J. Ghestin, *supra* note 35, at 126; E. Farnsworth, *supra* note 151, at 238.

court does not speak of a party's fraud, or bad faith, it may as well use it to reach the conclusion that such party knew the reason why the party in error made the contract, as it is easy to infer that the concealment or nondisclosure was perpetrated for the purpose of preventing the party in error from discovering that error.¹⁷⁵

Mutual Error

Error is mutual, or bilateral, when both parties to a contract share a wrong belief concerning a cause without which the contract would not have been entered.¹⁷⁶ Perhaps the clearest example is the very frequent situation where seller and buyer share the belief that the thing which is the object of their contract of sale is not defective, but a defect appears once the thing has been delivered.¹⁷⁷ In such a case the buyer may obtain either rescission of the contract, or reduction of the price, provided the defect is such that it can be presumed that he would not have bought the thing had he known of the defect.¹⁷⁸ Likewise, both parties may believe that a certain painting is the original work of a known artist, but it is only a copy.¹⁷⁹ In some instances the mutual error of the parties is induced by wrong information conveyed by a third. Thus, both parties may be induced to believe that a tract of land contains a certain number of acres as a result of wrong measurements made by a surveyor.¹⁸⁰ Likewise, a transaction or compromise may be entered into between an insurance company and the victim of an accident in the belief that the injuries suffered by the victim are only minor, a belief induced by an inaccurate medical report.¹⁸¹

In all such cases the party adversely affected by the error may obtain relief. It can be said that a party able to show that the error is mutual will have a lighter burden in persuading the court that such relief ought to be granted.¹⁸²

It is noteworthy that for a portion of modern French doctrine any error is mutual, though made by only one party, when either party was aware of the other's reason for contracting.¹⁸³ In spite of the prestige

175. See J. Ghestin, *supra* note 35, at 127.

176. See La. Civ. Code art. 1949 comment (d).

177. See La. Civ. Code arts. 2520 and 2531.

178. La. Civ. Code art. 2531.

179. See *Voitier v. Antique Art Gallery*, 524 So. 2d 80 (La. App. 3d Cir.), writ denied, 531 So. 2d 271 (1988), where the facts show that insofar as the relation between plaintiff and one of the defendants is concerned both parties thought the painting was an original.

180. See *Calhoun v. Teal*, 106 La. 47, 30 So. 288 (1901).

181. See *Saunders v. New Orleans Pub. Serv.*, 387 So. 2d 603 (La. App. 4th Cir.), writ denied, 394 So. 2d 614 (1980).

182. For reformation as a remedy see *infra* p. 45.

183. See G. Ripert, *supra* note 129, at 81-82; see also J. Ghestin, *supra* note 35, at 180-83.

of some of the authorities expressing it, such a conclusion seems a precipitate manner of stating that no error of one party may invalidate a contract unless the other party knew, or should have known, the reason why the party in error entered the contract, a conclusion that is clearer if stated that way.¹⁸⁴

Mutual Error and Misunderstanding

Situations that involve a misunderstanding, or *malentendu*, of the parties are not easy to distinguish from situations involving mutual error, but, whether or not they are distinguished, the results are the same. Actually, "misunderstanding" should be reserved to allude to those instances where each party attributes a different meaning to a certain word.¹⁸⁵ Since a contract is based on mutual consent, it is clear that such consent is lacking when the parties actually had different things—or meanings—in their minds. Thus, when one party orders "rice" in the belief that the other party knows that he means rice of a certain origin, but the other party understands "rice" as meaning, quite simply, rice of any origin, it can be said that the parties misunderstood each other, and the contract may be rescinded on grounds of error consisting not in a wrong belief shared by both parties, but in the wrong belief of each one concerning what the other had in mind.¹⁸⁶

REMEDIES

Rescission

Nature of Nullity

When the error made by one party at the time of contracting concerns a cause without which he would not have incurred the obligation, and the other party knew or should have known of that cause, that is, when the requirements to make of an error a cause of nullity are met, the party in error may obtain rescission of the contract.¹⁸⁷

184. See *supra* p. 30.

185. See J. Ghestin, *supra* note 35, at 117; E. Farnsworth, *supra* note 151, at 487.

186. See *Lyons Milling Co. v. Cusimano*, 161 La. 198, 108 So. 414 (1926). For a French case involving different meanings attributed by the parties to the expression "*meubles massifs*"—massive furniture—see decision rendered by the court of the city of Limoges on June 21, 1935, S. 1935.2.240. For the proverbial English case involving two vessels named *Peerless*, see *Raffles v. Wichelhaus, H. & C.* 906, 159 Eng. Rep. 375 (1864); see also *Frigalimont Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116 (S.D.N.Y. 1960) concerning the commercial meaning of "chicken."

187. La. Civ. Code art. 1952(1).

The nullity that arises from error is only relative, that is, it is the kind of nullity that arises from the violation of a rule intended for the protection of private parties, such as the rule that provides that, for the formation of a valid contract, consent must be freely given.¹⁸⁸ The pertinent action can be brought only by the party for whose protection the nullity has been established, namely the party in error, and is subject to a prescriptive period of five years.¹⁸⁹ It should be noticed that there is no room in the law of Louisiana for the French doctrine of *erreur-obstacle*, under which an absolute nullity arises from some instances of error, as the Louisiana Civil Code contains express provisions the absence of which gave rise to that doctrine in French law.¹⁹⁰

Excusable and Inexcusable Error

Since finding that an error, according to the particular circumstances of a case, should be given invalidating force is the sovereign prerogative of the trier of fact, and because in the process of arriving at such finding it is inevitable to delve into the subjectivity of the party alleging error, courts will refuse rescission unless they can conclude that the error, besides meeting the requirements already discussed, is also excusable,¹⁹¹ that is, that the party in error did not fail to take elementary precautions that would have avoided his falling into error, such as making certain that he was reasonably informed.¹⁹² Otherwise the error is regarded as inexcusable, in which case the party does not obtain relief. It is noteworthy that the same approach can be noticed in the jurisprudence of France, Louisiana and American common-law jurisdictions.¹⁹³

Whether an error is excusable or inexcusable should be determined *in concreto*, that is, according to the circumstances surrounding a particular case, rather than according to an abstract standard. Thus, personal circumstances of the party in error, such as age, experience and profession, are to be taken into account. An error made by a professional person concerning a matter within his field of expertise would no doubt be regarded as inexcusable.¹⁹⁴

If an architect claims to have made an error when he purchased a certain tract of land because it is not legally possible to erect thereon the kind of building he had in mind, his error will be regarded as

188. See La. Civ. Code arts. 1927 and 2031. See also *supra* p. 6 and *infra* p. 37-38.

189. La. Civ. Code arts. 2031 and 2032.

190. See *supra* p. 14.

191. See S. Litvinoff, *supra* note 4, at 222, 247-59.

192. A. Weill et F. Terré, *supra* note 2, at 203-04.

193. See J. Ghestin, *supra* note 35, at 146-65; S. Litvinoff, *supra* note 4, at 222; E. Farnsworth, *supra* note 151, at 667.

194. A. Weill et F. Terré, *supra* note 2, at 204.

inexcusable if the seller had apprised him of the existence of zoning regulations that the architect neglected to check.¹⁹⁵ On the other hand, when a nonprofessional person neglects to check zoning regulations, the existence of which he was not apprised, his error concerning the zoning classification of a piece of property will be regarded as excusable, and he will be therefore entitled to the rescission of the contract whereby he bought that property.¹⁹⁶ Likewise, if an experienced collector seeks to avoid the purchase of a painting that was offered to him as attributed to a certain master because it proved not to be an authentic work of that master, the alleged error will be regarded as inexcusable.¹⁹⁷

Inexcusable Error and Unread Instruments

The most fertile ground for the healthy growth of the notion of inexcusable error is the often-recurring situation where a party claims to have made an error that bears on a cause of his obligation but further explains that he omitted to read the writing to which the contract giving rise to that obligation was reduced. In such a context Louisiana courts have said that a party may not avoid the provisions of a written contract he signed but failed to read or have explained to him.¹⁹⁸ That is so because, "Signatures to obligations are not mere ornaments."¹⁹⁹ If a party can read, it behooves him to examine an instrument before signing it, and if he cannot read, it behooves him to have the instrument read to him and to listen attentively.²⁰⁰

It seems quite clear that, unless induced to do so by outright fraud, a party who signs an instrument without reading it thereby fails to exercise elementary prudence that, if observed, would have prevented him from making his alleged error. As such contract-making conduct cannot be excused, so the resulting error cannot be excused either.

Inexcusable Error, Fault, and Good Faith

Error in itself does not constitute fault, as it is rather a risk that occurs in social interaction, a sort of accident against which nobody is

195. See decision rendered by the *Cour de cassation* on March 2, 1964, Bul. 1964.I.122.91. In a comment to that decision by Chevallier in 64 *Revue Trimestrielle de droit civil* 112 (1965), it is said that courts in France may not use the words "excusable" or "inexcusable" when analyzing error and rather prefer to assert, when they deem an error inexcusable, that it is an error that bears on the principal cause. The same can be said of the courts of Louisiana.

196. See *C.H. Boehmer Sales Agency v. Russo*, 99 So. 2d 475 (La. App. Or. Cir. 1958).

197. See decision rendered by the *Cour de cassation* on Dec. 16, 1964, D. 1965.136.

198. *Tweedel v. Brasseaux*, 433 So. 2d 133 (La. 1983); *Brabham v. Harper*, 485 So. 2d 231 (La. App. 3d Cir. 1986).

199. *Boult v. Sarpy*, 30 La. Ann. 494, 495 (1878).

200. *Snell v. Union Sawmill Co.*, 159 La. 604, 608, 105 So. 728, 730 (1925); *Barras & Breaux v. Champeaux*, 526 So. 2d 1231 (La. App. 3d Cir. 1988).

entirely sheltered, according to popular sayings.²⁰¹ In some instances, nevertheless, an error, like an accident, may be prevented by the exercise of ordinary diligence by a party making a contract, such as gathering elementary information about the thing which is the object of that contract. The question may be asked whether a failure to take such precautions—not the error itself but that failure—constitutes fault. If there is a duty to exercise a certain standard of diligence in situations of that kind, then a dereliction of that duty may very well be regarded as fault. Perhaps such a duty is a natural consequence of the overriding, and therefore wider, duty of good faith that must govern the conduct of the parties in whatever pertains to the obligation.²⁰² Another question is whether such fault, if found, can possibly be of a contractual nature in light of the fact that, in the natural sequence of events, it would seem to precede the actual making of the contract.²⁰³ Some time ago such fault might have been regarded as an instance of *culpa in contrahendo*, that is, fault incurred in the process of making a contract.²⁰⁴ That kind of *culpa*, however, is nowadays regarded as quasi-delictual in nature.²⁰⁵ Be that as it may, in an attempt to shelter the doctrine of error against a conquering invasion of quasi-delictual notions, the conclusion may be reached that the one who fails to inform himself properly concerning the contractual object only has himself to blame, and, by virtue of a very basic principle of general character, the court will not come to his aid if he seeks relief for his own blameworthiness.²⁰⁶

It is noteworthy that, more often than not, the failure for which a party in error is to blame consists of not having advised the other party properly concerning what was expected from the contractual object, which brings close together situations where the party in error has failed to act with ordinary diligence and situations where he failed to reveal his reason for contracting to the other party.²⁰⁷ In the one and the other kind of situation, and for the one or the other reason, the party in error may not obtain rescission.

201. See J. Ghestin, *supra* note 35, at 138.

202. La. Civ. Code art. 1759.

203. For a distinction between contractual and quasi-delictual fault, see 2 S. Litvinoff, *Obligations* § 182, at 341-44 in *Louisiana Civil Law Treatise* (1975); 6 M. Planiol et G. Ripert, *supra* note 27, at 499-504; *Lewis v. Sohio Petroleum Co.*, 528 So. 2d 1084, 1090 (La. App. 3d Cir.), writ granted and rev'd, 532 So. 2d 754 (1988).

204. See 1 S. Litvinoff, *supra* note 1, at 274-76.

205. See G. Durry, *La distinction de la responsabilité contractuelle et de la responsabilité délictuelle* 64-65 (1986).

206. See S. Litvinoff, *supra* note 4, at 222, 252. See also J. Dabin, *Erreur inexcusable et nullité des conventions*, in *Études de droit civil* 38 (1947). See also Palmer, *Contractual Negligence in the Civil Law—The Evolution of a Defense to Actions for Error*, 50 Tul. L. Rev. 1, 11-14 (1975).

207. See *supra* p. 27.

The Other Party's Willingness to Rectify Error

A party may not avail himself of his error in order to obtain rescission if the other party is willing to perform the contract as intended by the party in error.²⁰⁸ Thus, if because of an error a party entered a time-sharing agreement on certain property though he actually intended to buy it, he may not invoke his error in order to put an end to the contractual relation with the other party if the latter consents to a sale of that property. Likewise, if a party intended to buy a painting by a certain artist but, because of his mistake, he obtained the work of a different painter, he cannot avail himself of the error if the other party offers to deliver a painting by the artist originally intended by the buyer. In those situations there is a dissolution of the contract tainted by error and a substitution of a new one in its place, although without accomplishing a novation.²⁰⁹

The solution just explained is but another consequence of the overriding duty of good faith that governs the conduct of the parties in whatever pertains to the obligation.²¹⁰ Indeed, if the other party consents to give the party in error that which was truly wanted, the latter has no reason to complain, and any insistence on his error as grounds for rescission could be taken as an indication that he has simply changed his mind and wants to recede from the contract using his error as an excuse. Such conduct would be an utter violation of the duty of good faith and cannot therefore be condoned.

In the matter of redhibition, which has error at its roots as explained before, the Louisiana Civil Code contains a clear example of a situation where a party who has bought a thing in the erroneous belief that it was perfect when it actually contained a hidden defect must allow the other party, who also did not know of the existence of that defect, an opportunity to repair the thing, that is, to make it perfect.²¹¹ It is clear that the seller's efforts in repairing the thing evince his willingness to perform the contract as intended by the disappointed purchaser.

*Damages**Damages for the Party Not in Error*

According to the Louisiana Civil Code, a party who obtains rescission on grounds of his own error is liable for the loss sustained by the other

208. La. Civ. Code art. 1951.

209. See La. Civ. Code art. 1881.

210. La. Civ. Code art. 1759 and comment.

211. See La. Civ. Code art. 2531 as amended by 1974 La. Acts No. 673.

party, unless the latter knew or should have known of the error.²¹² That precept introduces a flexible alternative to the upholding of the contract as a manner of protecting the interest of the party not in error.

Before the enactment of that alternative, Louisiana courts could find no reason to award damages in situations where rescission was granted on account of error.²¹³ Thus, it was said, if a contract was null and void, the remedy was to rescind it and to put the parties in the position in which they had been prior to the attempted agreement, and therefore a request for damages stated no cause of action in that context.²¹⁴ That was so in spite of the fact that some situations where such a recovery is allowed in case of error have long been contemplated in the Louisiana Civil Code. Thus, according to an earlier article, the party not in error could recover damages upon rescission in case of error in the person.²¹⁵ Likewise, in the case of sale of a thing which does not belong to the seller, another instance of nullity that oftentimes results from error, the buyer who did not know of that circumstance may recover damages.²¹⁶ It can be said that French courts have shown the same reluctance to recognize a right to damages to the party not in error.²¹⁷

Be that as it may, the cause of action, the absence of which used to be bemoaned, has now been given legislative recognition. Nevertheless, the party not in error is not entitled to recover the damages he might have sustained because of the rescission when he knew, or had reason to know, that the person with whom he entered the contract was acting under the influence of a wrong belief.²¹⁸ When such is the case the party not in error has failed to comply with the overriding obligation of good faith, which makes him ineligible to have his interest protected by an award of damages.²¹⁹

Even when the party not in error is in good faith, that is, when he did not know, or have reason to know, of the error of his cocontractant, he may not be entitled to recover damages if the error upon which rescission is granted is excusable in light of the circumstances surrounding the contract.²²⁰ When the error, though not excusable, is not so inex-

212. La. Civ. Code art. 1952.

213. See La. Civ. Code art. 1952 comment (b).

214. *First Nat'l Mortgage Corp. v. Manhattan Life Ins. Co.*, 360 So. 2d 264, 267 (La. App. 4th Cir. 1978).

215. See La. Civ. Code art. 1837 (1870).

216. See La. Civ. Code art. 2452. See also *Nelson v. Holden*, 219 La. 37, 52 So. 2d 240 (1951) where the right to recover liquidated damages was asserted where performance of a contract to sell was impossible because of an error.

217. See J. Ghestin, *supra* note 35, at 163. For views to the contrary expressed in French doctrine see A. Weill et F. Terré, *supra* note 2, at 208.

218. La. Civ. Code art. 1952.

219. See *supra* p. 37-38.

220. See La. Civ. Code art. 1952 comment (d). See also *supra* p. 36.

cusable as to merit that the contract be upheld, then the trier of fact must inquire whether the party not in error changed his position and consider the importance of such change.²²¹ If a sufficiently important change in position is found, the damages to be awarded should not exceed the amount of the loss actually sustained by the party not in error—that is, his reliance interest, since full protection of the interest of that party, which would include also the profit of which he was deprived, may be better achieved by upholding the contract, except in exceptional circumstances.²²²

Allowing Damages vs. Upholding the Contract

Before enactment of the rule discussed in the preceding paragraphs, whenever error was invoked, Louisiana courts approached the problem as one admitting only two possible solutions, either the granting or the refusal of rescission. Because of that, any carelessness of a party sufficed to turn his error into an inexcusable one, a conclusion that led to a refusal of the rescission sought by that party and, therefore, to the upholding of the contract. It was said, thus, that if an error was made in a bid, that error was the result of the bidder's own carelessness for which he could obtain no relief.²²³ Other times, after weighing the respective interests of the parties, Louisiana courts stated that where one of two innocent parties must suffer, the one who caused the error must bear the consequences.²²⁴

It seems clear that upholding the contract was deemed to be the only appropriate solution whenever the party not in error would suffer a detriment if rescission was granted, even when the error involved a cause and was not clearly inexcusable. In the view of some writers, French courts also prefer to uphold the contract in that kind of case, as a solution that seems simpler and more economic than granting rescission to a party because he made an error in the first place, and holding the same party for damages for having made that error in the second.²²⁵ There is no doubt that such a solution may be the most reasonable one in many instances, but not in all. In some situations, to hold a party to a contract he did not intend to make, in order only to protect the interest of the other party, seems a harsh solution, especially when that interest can be sufficiently protected through an award of damages, as is the case, more often than not, when the party not in

221. *Id.*

222. See S. Litvinoff, *supra* note 4, at 222, 251-52.

223. *Schorr v. Nosacka*, 16 La. App. 20, 21, 132 So. 524, 525 (La. App. Orl. 1931).

224. *Cox-Hardie Co. v. Rabalais*, 162 So. 2d 713, 715 (La. App. 4th Cir. 1964).

225. See L. Jossierand, *supra* note 35, at 82; G. Ripert, *supra* note 129, at 77-79.

error has not yet changed his position before being advised of the error made by his cocontractant.

Nevertheless, a court may refuse rescission when the interest of the party not in error can be effectively protected only if the contract is upheld, as when that party has changed his position substantially before learning that his cocontractant entered the contract because of a wrong belief.²²⁶

Damages for the Party In Error When the Contract is Upheld

The Louisiana Civil Code prescribes that a reasonable compensation for the loss he has sustained may be granted to a party in error to whom rescission is refused when the effective protection of the other party's interest requires that the contract be upheld.²²⁷ Before enactment of that rule a party in error had no grounds to obtain that kind of compensation, which made of the upholding of the contract a solution fair to the other party, but rather harsh to the party in error who might thereby sustain an unfair detriment. Thus, if because of an error, a party conveys to another a piece of property considerably more valuable than the one he intended to sell, and the transferee then builds valuable improvements upon the property, it would seem that the interest of the transferee can be protected only by the upholding of the contract, but he will obtain a great advantage from such a solution since he received a different property worth considerably more than what he paid for it.²²⁸ In such a situation, a reasonable compensation awarded to the transferor makes the solution fair for both parties. Such an approach is perfectly consistent with equity as defined in the Louisiana Civil Code.²²⁹

For example, in a case where an error was made concerning the quantity of land comprised in the granting of a right of way for the construction of an utility transmission line, the Louisiana court refused to rescind the contract, in spite of the excusable nature of the error, because the line was built and had been in operation for a long time, but allowed the landowner in error to recover damages measured by the difference between the quantity of land comprised in the right of way actually held by the other party and the quantity of land that the owner had intended to be so comprised.²³⁰ Similarly, in a case where a knowledgeable purchaser acquired a painting by a great master from a seller who thought the painting was only attributed to that master, a French

226. La. Civ. Code art. 1952(2).

227. *Id.*

228. See *Lawrence v. Mount Zion Baptist Church*, 1 La. App. 404 (1924).

229. See La. Civ. Code art. 2055; see also La. Civ. Code art. 1965 (1870).

230. *Myles v. Louisiana Power and Light Co.*, 375 So. 2d 752 (La. App. 4th Cir. 1979).

court, which could not grant the rescission sought by the seller on grounds of his error because the purchaser had resold the painting to the Louvre Museum after establishing its authenticity, granted to the seller, as damages, the difference between the price he had obtained from the purchaser and the price the latter had obtained from the museum, which was about one hundred times the amount he had paid to the seller.²³¹

Likewise, when error has occurred in a bid by a contractor or a subcontractor, to uphold the contract is often the only effective way of protecting the interest of the general contractor, or of the owner, whose position might have changed substantially because of the erroneous bid, or who may no longer be in a position to readvertise for new bids without considerable expense and delay. In such a situation, a contractor or subcontractor who has chosen to perform in spite of his error, rather than exposing himself to an action for breach by the other party, should be allowed some reasonable compensation to alleviate his loss, provided, of course, that the error is such that it would have justified rescission were it not for the need to protect the interest of the other party.²³² As the pertinent rule prescribes, the compensation to be allowed in that kind of case need only be reasonable and not necessarily the full amount of the loss sustained by the party in error.²³³ The court may exercise great discretion in making such an award.²³⁴

Damages for the Party In Error When the Contract is Rescinded

In general terms, a party to whom the annulment of a contract is granted because of his own error is not entitled to damages, as his interest is sufficiently protected by the rescission thus obtained. That is a view almost taken for granted in French doctrine.²³⁵ Nevertheless, French courts have allowed damages to a party in error, upon rescission of the contract, in some exceptional situations where reprehensible bad faith of the other party has been clearly shown.²³⁶ The same approach has been

231. Decision rendered by the Civil Chamber of the *Cour de cassation* on Oct. 16, 1979, reported in *Gaz. Pal.* 1980, 1, Som. 60. The decision suggests an application of the doctrine of lesion to the sale of a movable thing, a solution which is not alien to French law; see J. Ghestin, *supra* note 35, at 85-89; see also A. Weill et F. Terré, *supra* note 2, at 207-08. Cf. *O'Brien v. LeGette*, 254 La. 252, 223 So. 2d 165 (1969).

232. See *Lemoge Elec. v. County of San Mateo*, 46 Cal. 2d 659, 297 P.2d 638 (1956).

233. La. Civ. Code art. 1952(2).

234. La. Civ. Code art. 1999.

235. See J. Ghestin, *supra* note 35, at 123-26; cf. A. Weill et F. Terré, *supra* note 2, at 207-08.

236. See decision rendered by the court of the city of Orleans on Jan. 21, 1931, D.H. 1931.172; see also decision rendered by the court of the city of Rennes on Oct. 26, 1950, *Gaz. Pal.* 1951.1.27.

followed by French courts in some borderline cases where error has been intertwined with redhibition or with a failure to perform.²³⁷

It is noteworthy that Louisiana courts have reacted in the same way in similar situations. Thus, where a lessor knew that the lessee had entered the contract for the purpose of operating a lounge, separate from a restaurant, in the leased premises, but the lessor also knew that, because of zoning regulations and opposition of the neighbors, a liquor license would not be granted for that purpose, the court not only rescinded the contract at the lessee's initiative, but also granted him recovery of the considerable expense he had incurred in preparing to carry out his plans.²³⁸ In another case where a painting was sold as the original work of a certain artist, although it was not such an original, upon rescission of the contract the purchaser was allowed to recover not only the expenses he incurred which were occasioned by the sale, but also compensation for his mental anguish, as an agent of the seller, though in good faith, had represented the painting as an original.²³⁹

Though no express provision of either of their civil codes addresses the right to damages of a party in error, French and Louisiana courts are warranted in availing themselves of such means of achieving decisional fairness, means that can be perfectly justified by a flexible use of analogy.²⁴⁰

Error, Loss, Benefit, and Risk

It is clear that, in the context of the doctrine of error, remedies are aimed at protecting the party in error against unfair loss. Thus, Louisiana courts have said that in case of doubt as to error in the motive of one of the parties courts will lean heavily in favor of the one seeking to avoid loss and against the one seeking to obtain a gain.²⁴¹ It is also clear, however, that a party may occasionally benefit from his own error, as when, for a reasonable price, he buys a thing that is actually worth many times more than what he thought. In the absence of operative error by the other party, the purchaser will reap the benefit of his own misconception in such a case.

237. See decision rendered by the court of the city of Bordeaux on Nov. 13, 1905, D. 1908.2.287.

238. *Guaranty Sav. Assurance Co. v. Uddo*, 386 So. 2d 670 (La. App. 1st Cir.), writ denied, 389 So. 2d 1126 (1980), is a case that, though decided on grounds of error, contains some aspects of nonperformance.

239. *Voitier v. Antique Art Gallery*, 524 So. 2d 80 (La. App. 3d Cir.), writ denied, 531 So. 2d 271 (1988), is a case that, though decided on grounds of error, also contains some redhibition overtones.

240. See La. Civ. Code arts. 2452 and 2545.

241. *Dorvin-Huddleston Dev., Inc. v. Connolly*, 285 So. 2d 359 (La. App. 4th Cir. 1973), rev'd on other grounds, 298 So. 2d 734 (1974), on remand, 320 So. 2d 253 (La. App. 4th Cir. 1975).

There are situations, however, where a party may attempt to derive an unfair benefit from his error. Thus, when the error is mutual or bilateral and the risk of the transaction prompted by error is borne by one of the parties, the one not at risk is not entitled to any unexpected profit that such transaction might bring. In an interesting Louisiana case, a broker and his client, through mutual error, used the word "sell" when "buy" was intended. The broker carried out the sale transaction but, upon realizing the error, the client's account was corrected as if the purchase the client had intended had taken place. The sale transaction, however, which had been finalized because of the error, yielded an unexpected profit that the client claimed as his since the erroneous transaction was the result of his initiative. The court concluded that the client had borne no risk because his account was credited as if the transaction had been the one he intended and, therefore, he was not entitled to profits resulting from the risk assumed by the other party.²⁴²

Reformation of Instruments

Mutual Error

When a contract is reduced to writing, an error may occur in the drafting of the instrument so that the written text does not reflect the true intention of the parties. When such is the case, upon proof that the error is mutual, that is, that neither party intended the contract to be as reflected in the writing, the court may decree the reformation of the written instrument, rather than the rescission of the contract, so that the writing, once reformed, will express the parties' true intention.²⁴³

In the view expressed by Louisiana courts, an action to reform a written instrument is an equitable remedy, and it lies only to correct errors in a written instrument that does not express the true agreement of the parties.²⁴⁴ The reference to the "equitable" nature of the remedy probably alludes to the fact that in the Anglo-American system, at an earlier time, a suit had to be brought in equity for reformation before an action could be started at law to enforce the contract as reformed, although today a party may seek both reformation and enforcement in the same action.²⁴⁵ Be that as it may, other Louisiana decisions have concluded that reformation finds its foundation in those articles of the

242. *Rogillio v. Merrill Lynch, Pierce, Fenner & Smith*, 448 So. 2d 1340 (La. App. 4th Cir. 1984).

243. See La. Civ. Code art. 1949 comment (d).

244. *Ober v. Williams*, 213 La. 568, 35 So. 2d 219 (1948). See also *Brabham v. Harper*, 485 So. 2d 231 (La. App. 3d Cir. 1986).

245. See E. Farnsworth, *supra* note 151, at 467-68.

Louisiana Civil Code where "equity" is used with the reference of the French *équité*.²⁴⁶

An action to reform a written instrument is a personal action, even when applied to real estate, and the burden of establishing the mutual error by clear and convincing proof rests on the party seeking reformation.²⁴⁷ Parol evidence is admissible for that purpose.²⁴⁸ Louisiana courts have granted reformation of writings containing contracts of sale of immovable property.²⁴⁹ Likewise, they have also granted reformation of insurance policies.²⁵⁰ They have also concluded that, provided the required kind of error is established, a written instrument containing a contract of lease may be subject to reformation.²⁵¹

French courts have shown the same preoccupation with *équité* in expressing their preference for the granting of reformation in order to uphold a contract, rather than granting rescission of the same for the mere fact that the writing that contains it does not express the parties' true intent.²⁵²

The Revision

The Earlier Articles

Following its French model, the Louisiana Digest of 1808 contained only one article devoted to error.²⁵³ In the Revision of 1825, however, that article was eliminated, and error became the subject of five subsections comprising twenty-seven articles that find their origin in the work of Toullier.²⁵⁴ Those articles classified error first into error of fact and error of law and then into the traditional Roman categories of error *in*

246. See *Leon A. Minsky, Inc. v. Providence Fashions, Inc.*, 404 So. 2d 1275 (La. App. 2d Cir.), writ denied, 407 So. 2d 731 (1981). See also La. Civ. Code arts. 4 and 2055, and La. Civ. Code arts. 21 and 1965 (1870).

247. *Fontenot v. Lewis*, 215 So. 2d 161 (La. App. 3d Cir. 1968).

248. *Catyb v. Deville*, 246 So. 2d 41 (La. App. 3d Cir. 1971). See also La. Civ. Code art. 1848.

249. *Wilson v. Levy*, 234 La. 719, 101 So. 2d 214 (1958); *Brabham v. Harper*, 485 So. 2d 231 (La. App. 3d Cir. 1986).

250. *Leon A. Minsky, Inc. v. Providence Fashions, Inc.*, 404 So. 2d 1275 (La. App. 2d Cir.), writ denied, 407 So. 2d 731 (1981).

251. *O'Neill v. Sonnier*, 195 So. 2d 724 (La. App. 1st Cir. 1967). See generally Comment, *Reformation of Instruments in Louisiana*, 30 Tul. L. Rev. 486 (1956).

252. See 1 R. Demogue, *supra* note 7, at 417-18; 6 M. Planiol et G. Ripert, *supra* note 27, at 226-27. For the concern shown by French courts for *équité* see Legrand, *Judicial Revision of Contracts in French Law: A Case-Study*, 62 Tul. L. Rev. 963, 977, 993 (1988).

253. Louisiana Digest of 1808 art. 10, at 262.

254. La. Civ. Code arts. 1820-1846 (1870). See 3 C. Toullier, *supra* note 108, at 328-42.

negotio, error *in personam* and error *in substantia*—that is, error in the nature of the contract, error as to the person, and error in the substance of the contractual object—but error in the motive was added to the Roman list, thereby giving rise to some confusion.

Indeed, according to one of the articles introduced in 1825, although an error may be made concerning any of the circumstances related to a contract, not every error is a valid ground for annulling that contract, since, to have such effect, the error must concern some point which was a “principal” cause for making the contract, and it may be either as to the motive for making the contract, as to the person with whom it is made, or as to the subject matter of the contract itself.²⁵⁵ According to another article, however, the “principal” cause is called the *motive*, and means that “consideration” without which the contract would not have been made.²⁵⁶ Though some of the uncertainty results from the introduction into the English translation of words that have no counterpart in the French original, reading those two articles together it is not clear whether error in the cause is a higher category comprising error as to the person, error in the nature of the contract and error as to the substance of the contractual object as species, or whether error in the cause is another kind of operative error on an even footing with the others.²⁵⁷ On the other hand, if cause is, by definition, motive, it is then quite strange to say that error in the “principal” cause *may* be an error that bears on the motive.²⁵⁸

As stated in another of the articles introduced in 1825, no error in the motive can invalidate a contract unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it.²⁵⁹ Reading that article together with the other two discussed above, it is not clear whether the other party must be aware of the error, or whether the other party must be apprised only of the cause, or *motive*, that is, *why* the party in error intended to bind himself. Furthermore, assuming that the more accurate interpretation is that it suffices that the other party be aware of the cause, and not of the error, that premise appears to be in outright contradiction with the tenet of other articles in the Civil Code of 1870. Thus, for the case of error as to the person, it does not seem necessary that the other party knew that the personal qualities of the cocontractant were the cause for which the party in error consented to bind himself, according to the pertinent article.²⁶⁰ The same contra-

255. La. Civ. Code art. 1823 (1870).

256. La. Civ. Code art. 1825 (1870).

257. See 3 Louisiana Legal Archives Part II 1008-09 (1942).

258. See La. Civ. Code arts. 1823 and 1825 (1870).

259. La. Civ. Code art. 1826 (1870).

260. La. Civ. Code art. 1837 (1870). See also La. Civ. Code art. 1838 (1870).

diction is suggested by the article dealing with error in the substance of the thing which is the contractual object.²⁶¹

The Louisiana Jurisprudence

Louisiana courts solved the riddle presented by the articles on error of the Civil Code of 1870 by reaching two clear conclusions: First, for an error to be a valid ground for rescission, it must bear on the cause of the obligation, and, second, that cause must have been known, or should have been known, to the other party.²⁶² The article requiring knowledge of the cause by the other party was elevated to the rank of a fundamental article, as if it prescribed a rule that presided over all the others dealing with error, though it is not exactly clear whether that was the intention of the redactors of 1825 or even the idea of Toullier when he wrote the text from which that article was taken.²⁶³

In reaching those conclusions the Louisiana jurisprudence might have been guided by the conceptual proximity between the civilian notion of a cause known to the other party and the common-law notion of a unilateral error known to the other party.²⁶⁴ Though that proximity is certainly not a similarity, in certain formulations the two ideas may seem more alike than they really are. Be that as it may, it is noteworthy that the theory of error the Louisiana jurisprudence was able to construct is strikingly similar to, if not identical with, views expressed in contemporary French doctrine concerning error that bears on the cause, a kind of error the recognition of which is in France a creation of the jurisprudence and doctrine, as the Code Napoleon is silent on that matter.²⁶⁵

Clarification and Simplification

The latest revision of the Louisiana Civil Code articles on error attempted to eliminate the ambiguities latent in the earlier articles in

261. La. Civ. Code art. 1843 (1870).

262. See, e.g., *American Bank & Trust Co. v. Fontenot*, 347 So. 2d 1187 (La. App. 1st Cir. 1977); *Marchand v. United Companies Mortgages & Inv. of Hammond*, 335 So. 2d 795 (La. App. 1st Cir. 1976); *Talley v. Blake*, 322 So. 2d 877 (La. App. 1st Cir. 1975).

263. See *Del Cryer v. M & M Mfg. Co.*, 273 So. 2d 818 (La. 1973); *Ouachita Air Conditioning Inc. v. Pierce*, 270 So. 2d 595 (La. App. 2d Cir. 1972); *Gour v. Daray Motor Co., Inc.*, 373 So. 2d 571 (La. App. 3d Cir.), writ granted, 376 So. 2d 1270, writ dismissed 377 So. 2d 1033 (1979).

264. See E. Farnsworth, *supra* note 151, at 667; *Tyra v. Cheney*, 129 Minn. 428, 430, 152 N.W. 835, 835 (1915). See also *Rushlight Automatic Sprinkler Co. v. City of Portland*, 189 Or. 194, 219 P.2d 732 (1950).

265. See L. Jossierand, *supra* note 35, at 90-92; J. Ghestin, *supra* note 35, at 251-89; G. Ripert, *supra* note 129, at 75-79. See also H. Capitant, *De la cause des obligations* 208-13 (1923); decision rendered by the *Cour de cassation* on March 16, 1898, reported in S. 1902.1.331.

order to improve clarity in the formulation of the law. Out of the earlier twenty-seven articles, only five contained substantial rules.²⁶⁶ Those rules have been preserved although compressed into only two new articles.²⁶⁷ Definitions and examples, which were not always clear, have been eliminated together with the articles that contained them.²⁶⁸ Provisions pertaining to matters that are addressed elsewhere in the Louisiana Civil Code have been eliminated also to avoid repetition.²⁶⁹ Ambiguity and obscurity in the original articles whose substance is preserved have been removed by adoption of the conclusions reached by the Louisiana jurisprudence in interpreting those articles.²⁷⁰ It can be said, thus, that, concerning the basic framework of the doctrine of error contained in the civil code, the revision has effected no change in the law.

The Other Party's Willingness to Perform

A new provision in the latest revision prescribes that a party may not avail himself of his error in order to seek rescission if the other party is willing to perform the contract as intended by the party in error.²⁷¹ In spite of its novelty, it cannot be said that this provision effects a change in the law, since it only states a conclusion that can be directly derived from the overriding obligation of good faith and from a very basic principle of interpretation.²⁷² A clear statement of that conclusion, however, facilitates the task of the interpreter and makes the system more readily accessible, an approach followed in the drafting of some modern civil codes.²⁷³

Another new provision addresses the matter of damages and allows recovery by a party when a contract is rescinded because of an error made by the other.²⁷⁴ It cannot be said that this solution entails a change in the law, as it only generalizes a principle underlying some earlier articles.²⁷⁵ Nevertheless, a section of that provision effects a partial change by allowing a party in error to obtain some compensation for his loss whenever rescission is refused in order to protect the interest of the other party.²⁷⁶

266. See La. Civ. Code arts. 1820, 1823, 1825, 1826 and 1837 (1870).

267. La. Civ. Code arts. 1949 and 1950.

268. See La. Civ. Code arts. 1821, 1822, 1824, 1827, 1832, 1834-1836, 1838-1840, 1841-1846 (1870). See La. Civ. Code art. 1950 comments (b), (c), (d), (e), (f) and (h).

269. See La. Civ. Code arts. 1828-1833 (1870).

270. See *supra* p. 32.

271. La. Civ. Code art. 1951.

272. See La. Civ. Code arts. 1983 and 2054.

273. E.g., Swiss Code of Obligations art. 26 (1911) and Ethiopian Civil Code art. 1703 (1960).

274. La. Civ. Code art. 1952(1).

275. See La. Civ. Code art. 1837 (1870). See also *supra* p. 39-40.

276. La. Civ. Code art. 1952(2) and comment (e). See also *supra* p. 42.

III. FRAUD

GENERAL PRINCIPLES

Definition

In the context of the vices of consent, fraud consists in inducing a person into an error by means of a misrepresentation or a suppression of the truth, made with the intention either to obtain an unjust advantage for the inducer or to cause a loss or inconvenience to the one so induced, in the process of making a contract.²⁷⁷ Thus, fraud takes place, for example, when the benefit that can be expected from a business is falsely represented by one party in order to entice the other to acquire that business.²⁷⁸ Likewise, fraud takes place when the substantial qualities of a thing are falsely represented by one party in order to induce the other to purchase that thing.²⁷⁹

Terminology

In the English version of the Louisiana Civil Code, the word "fraud" is used as a translation of *dol*, which is the word used in the Code Napoleon and the French version of the Louisiana Digest of 1808 as well as in the Louisiana Civil Code of 1825.²⁸⁰ In a technical sense, *dol* has a wider meaning than "fraud," as it encompasses both the devious intent and the scheme, or material means, through which that intent is carried out. In Anglo-American legal terminology, on the other hand, the word "fraud" refers to the devious or malicious intent—which is usually more clearly signified in the expression "fraudulent intent"—while the word "misrepresentation" is used to allude to the material means through which the "fraud" is implemented.²⁸¹ Semantic reasons sufficiently explain the choice made by the translators, as no word in the English language traces its etymological roots to the Latin *dolus*, from which the French *dol* derives.²⁸²

277. La. Civ. Code arts. 1953 and 1955.

278. See *Overby v. Beach*, 220 La. 77, 55 So. 2d 873 (1951). See also A. Weill et F. Terré, *supra* note 2, at 208, 211.

279. See La. Civ. Code art. 2547.

280. See French Civil Code art. 1116 (1804); 3 Louisiana Legal Archives Part II 1020-24 (1942). In the translation of the French Civil Code by John H. Crabb (1977), *dol* is translated as "deceit."

281. See, e.g., E. Farnsworth, *supra* note 151, at 235-43.

282. See Black's Law Dictionary 606 (3d ed. 1933).

In sum, when "fraud" means a vice of consent, a preliminary terminological discussion is necessary to explain the difference between the two aspects actually involved, the subjective aspect and the objective one.

SUBJECTIVE ASPECT

Intention

The intention—or "fraudulent intent," to use a very clear Anglo-American expression—is, of course, a psychological element consisting of the voluntary undertaking, the *will*, to induce another to make an error. If there is no such intention, or if it is not proved, rescission on grounds of fraud cannot be granted. For that reason, as an example, there is no fraud if one party deceives another simply because he started by deceiving himself, a situation that is better handled by the rules governing mutual or bilateral error.²⁸³

Fraud, Error, and Vice of Consent

Intentionally induced error is, thus, a component part of fraud as one of the traditional categories of vices of consent.²⁸⁴ The conclusion is compelling, however, that when a person falls victim to fraud practiced in order to induce him to make a contract, that which vitiates his consent is the error resulting from the fraud and not the fraud itself, as the latter is exterior to the will of the consenting party, while the error thus induced is located, precisely, in that person's will.²⁸⁵ It is noteworthy, in that context, that the French Civil Code makes no express reference to error in the only article it devotes to fraud, while the Louisiana Civil Code, since the revision of 1825, clearly asserts that error is an indispensable element of fraud as a vice of consent.²⁸⁶

Although it is generally undisputed that error is encompassed in the notion of fraud, at least one celebrated French decision annulled certain acts of transfer on grounds of fraud because the transferor had been victimized by certain *manoeuvres* of the transferees, though such maneuvers had not induced the transferor, who happened to be a lady of advanced age, into an error but rather into a state of exhaustion, but without constituting duress.²⁸⁷ That decision, which can find support in

283. See A. Weill et F. Terré, *supra* note 2, at 210. See also decision rendered by the court of the city of Brest on Nov. 5, 1974, D. 1975.295, with a note by Schmidt.

284. La. Civ. Code art. 1955.

285. See A. Weill et F. Terré, *supra* note 2, at 208.

286. See French Civil Code art. 1116 and La. Civ. Code art. 1847(1) (1825).

287. See decision rendered by the court of the city of Colmar on Jan. 30, 1970, reported in D. 1970.297 and also in Sem. jur. 1970.II.16609 with a note by Loussouarn.

the language of the pertinent French article, separates fraud from error and places fraud between error and duress in the general framework of vices of consent, which could make of fraud a useful instrument to handle situations where undue influence is exerted on a person in order to distort his will.²⁸⁸ Be that as it may, though praised by some commentators, that decision has not yet succeeded in changing the views of the vast majority of French doctrine, where induced error is still regarded as a component part of fraud.²⁸⁹

Unfair Advantage, Loss, or Inconvenience

Perhaps the most salient aspect of the intentional element of fraud is the purpose of either obtaining an unfair advantage for one party—usually but not necessarily the one who resorts to fraud—or causing a loss or inconvenience to the other.²⁹⁰ Thus, when circumstances are misrepresented in order to enhance the value of a thing, the higher price thus obtained constitutes the unfair advantage for which the fraud was made. By the same token, if circumstances are misrepresented in order to show that a thing is of little value, although it is actually quite valuable, the lesser price for which the thing is thus obtained is the unfair advantage for which the fraud was practiced.

In most instances the unfair advantage obtained by one party is a loss for the other. Thus, when a person resorts to fraud in order to sell a thing for more than it is worth, the surplus obtained by the seller is a loss for the buyer, and, conversely, if the fraud is resorted to in order to buy for less, the advantage thus obtained by the buyer is a loss for the seller. That, however, is not indispensable, as mere inconvenience for one of the parties constitutes fraud when it is the result of devious means. In an interesting Louisiana case, for example, because the owner of a strip of land, for personal reasons, adamantly refused to sell it to the owner of a neighboring property, the latter persuaded one of his employees to represent himself as having recently acquired the neighboring property, and the owner of the strip found no obstacle to sell it to the person he believed to be his new neighbor with whom he had no personal differences. Shortly thereafter the employee transferred the strip of land to his employer. When the scheme was discovered the seller sued for rescission on grounds of fraud and the court granted it although the seller, who had been paid a fair price, had not sustained an economic loss.²⁹¹ According to the court, the conspiracy between the ultimate buyer and his employee had been designed to cause inconvenience to the seller,

288. See B. Starck, *Droit civil—Obligations* 424-26 (1972).

289. A. Weill et F. Terré, *supra* note 2, at 209.

290. La. Civ. Code art. 1953.

291. *Orr v. Walker*, 236 La. 740, 109 So. 2d 77 (1959).

namely, to induce him to transfer property to a person to whom he did not want to transfer it.²⁹²

OBJECTIVE ASPECT

Means

The victim of fraud is induced into an error through a misrepresentation or suppression of the truth.²⁹³ In a way, every misrepresentation is, by itself, a suppression or dissimulation of the truth, as it consists in the creation of a false appearance. Earlier Louisiana law used the word "artifice" in order to signify the falsity that lies at the root of fraudulent means designed to create the impression that something exists when actually it does not, or that something does not exist when it actually does, or the impression that something that exists is different from what it actually is.²⁹⁴ According to the Louisiana Civil Code, such a false impression may be created also by mere silence or inaction.²⁹⁵ In other words, the victim of fraud may be induced into an error not only through action taken by the one who practices the fraud but also through the purposefully designed inaction of that one.

Fraudulent Action

Scheme

Misrepresentation or suppression of the truth may result from a scheme designed for such purpose, as when the creation of a false impression requires the concerted action, or conspiracy, of two or more persons who indulge in the production of a sort of dishonest playlet, as when several employees of a jewelry store combine their efforts to give the seller of a ring the impression that the ring is less valuable than it actually is.²⁹⁶ Perhaps the clearest example of a scheme in the context of fraud is the classical one reported by Cicero where the seller of a waterfront villa, in order to make a prospective buyer believe that fishing was good in that area—a matter whose decisive importance for the buyer was known to the seller—made arrangements with the owners of several fishing boats for them to sail in front of the villa while the buyer was inspecting it.²⁹⁷ An effective scheme may consist of less elaborate ma-

292. *Id.* at 747, 109 So. 2d at 80.

293. La. Civ. Code art. 1953.

294. La. Civ. Code art. 1847(5) (1825).

295. La. Civ. Code art. 1953.

296. See *Griffing v. Atkins*, 1 So. 2d 445 (La. App. 1st Cir. 1941).

297. Cited in 4 J. Carbonnier, *Droit civil—Les obligations* 89 (11th ed. 1982).

neuers, however. Thus, intentional alteration of business records in order to create the impression that the financial situation of a certain concern is better than it actually is constitutes such a scheme.²⁹⁸ Likewise, quoting the value of an inventory on the basis of current retail prices rather than on the basis of original cost in order to induce a buyer into acquiring a going business is another example of misrepresentation made through a scheme.²⁹⁹

False Assertion

The misrepresentation or suppression of the truth of which fraud consists may be accomplished through a false assertion, a lie. The Louisiana Civil Code contains a clear example of that when it prescribes that a declaration made by a seller that the thing he sells has a certain quality that he knows it does not have comes within the definition of fraud.³⁰⁰ In the same order of ideas, to induce a person to sign an instrument through an assertion that he is signing it as a witness, while he is actually signing it in his capacity as naked owner of certain property, constitutes fraud on the strength of which the transaction may be annulled.³⁰¹ Likewise, fraud is committed when the amount of rent to be obtained from certain property is falsely asserted for the purpose of inducing an investor to buy that property.³⁰² Also, there is fraud when an attorney induces a client to sign an appeal bond upon the false assertion that no liability will result from the signing.³⁰³

Because of the language of the pertinent article of the Code Napoleon, it was discussed in early French doctrine whether a lie, a *mensonge*, could constitute a *manoeuvre* of the kind required by the French article, since, at first blush, a lie seems distinguishable from a conspiracy, machination or stratagem. The conclusion now prevailing in French doctrine is that a *mensonge* does constitute such a *manoeuvre* when used with the intention of inducing a person into a contract he would not have made were it not for the deception.³⁰⁴ A lie, in sum, is a simple form of scheme designed to misrepresent a certain state of affairs, and that is, precisely, the very essence of fraud.

Promissory Statements

The common law used to adhere to the view that statements promissory in nature and relating to future actions do not constitute fraud,

298. See *Strauss v. Insurance Co. of N.A.*, 157 La. 661, 102 So. 861 (1925).

299. See *Loretta Glod Interiors v. Liles*, 496 So. 2d 656 (La. App. 3d Cir. 1986).

300. La. Civ. Code art. 2547.

301. See *El Paso Exploration Co. v. Olinde*, 527 So. 2d 511 (La. App. 1st Cir. 1988).

302. See *Overby v. Beach*, 220 La. 77, 55 So. 2d 873 (1951).

303. See *Lupo v. Lupo*, 475 So. 2d 402 (La. App. 1st Cir. 1985).

304. See 1 R. Demogue, *supra* note 7, at 539; A. Weill et F. Terré, *supra* note 2, at 211.

for which purpose the false statements must relate to facts then existing or which have previously existed.³⁰⁵ That view has been accepted by the Louisiana jurisprudence.³⁰⁶ It is noteworthy, however, that French doctrine does not distinguish between false assertions related to present or past facts and false assertions related to future facts. Moreover, the majority of common-law jurisdictions hold nowadays that the making of a promise without intention to perform it is a misrepresentation of fact, since an intention dwells in a person's mind and the state of a person's mind is, no doubt, a fact.³⁰⁷ The Louisiana Civil Code does not distinguish between present or past facts and future facts as the object of a misrepresentation. Indeed, a false assurance of a future performance is quite effective as a fraudulent misrepresentation when it induces a party to enter a contract on the strength of that assurance. The Louisiana jurisprudence would be more consistent with the civil code if it changed the view that excludes promissory statements from the ambit of fraud.

Impersonation

A false assertion of identity, as when a person represents that he is somebody else, is, of course, a lie, but it may also be part of a scheme designed to deceive another person, and thereby induce the latter to enter a contract that he would not have made with the impersonator had he known his real identity, as when forged documents of identification are shown, or when the impersonator knows that his victim will check the false identity through means calculated to effect the deception. Louisiana courts have had opportunity to grant rescission of contracts where a party's consent was obtained by fraud perpetrated through impersonation.³⁰⁸

Concealment

It can be said that every false assertion involves concealment of the truth, and also that every scheme designed to deceive involves concealment of the true state of affairs. Nevertheless, fraud may be committed through an act of concealment which is neither verbal, as in a lie, nor conspiratorial, as in the case of certain schemes. Thus, a thing may be painted

305. 12 R. C. L. 244, 254, §§ 14, 21.

306. See *Orr v. Walker*, 236 La. 740, 109 So. 2d 77 (1959); see also *Orr v. Walker*, 104 So. 2d 226, 230 (La. App. 2d Cir. 1958); *Brenard Mfg. Co. v. Gibbs*, 9 La. App. 137, 119 So. 483 (La. App. 2d Cir. 1928).

307. *J. Calamari and J. Perillo, Contracts* 365 (3d ed. 1987); see also *Keeton, Fraud—Statements of Intention*, 15 *Tex. L. Rev.* 185, 195 (1937).

308. See *Port Finance Co. v. Ber*, 45 So. 2d 404 (La. App. Orl. Cir. 1950). See also *Freeport & Tampico Fuel Oil Corp. v. Lange*, 157 La. 217, 102 So. 313 (1924). See generally, 2 *S. Litvinoff, supra note 203*, at 155-57.

over in order to conceal an otherwise visible defect, so that the thing can be sold as free from that defect.³⁰⁹ Likewise, to paraphrase an example offered in earlier Louisiana law, a document may be hidden in order to conceal its existence from a person and induce him thusly to enter a transaction or compromise to which he would not have consented had he known that that document existed.³¹⁰

Misrepresentation of Legal Age

As an exception to the basic rule, a mere misrepresentation of majority made by a minor does not prevent him from seeking rescission of the contract thusly made on grounds of his own incapacity.³¹¹ That being the case, it is clear that such misrepresentation does not constitute fraud. The interest of both the minor and the party of legal age that contracted with him is sufficiently protected by the possibility of annulment or confirmation of the contract at the initiative of the party of age or of the minor's representative.³¹²

In French law a minor may commit fraud through a dissimulation of his age when he makes more than a mere misrepresentation, as when, for example, he forges a document of identification where the date of birth is stated.³¹³ In such a case the minor incurs quasi-delictual liability and, as an alternative remedy, a French court may refuse rescission to such a minor if he sues for it on grounds of incapacity.³¹⁴ In Louisiana, on the other hand, when the other party has reasonably relied on the minor's representation of majority the contract may not be rescinded, regardless of whether the minor merely misrepresented his age or designed a more elaborate scheme for that purpose.³¹⁵

Fraudulent Inaction

Silence

The Code Napoleon makes no reference to silence as a means of committing fraud, but the French doctrine and jurisprudence agree that

309. For an interesting example from a different jurisdiction see *DeJoseph v. Zambelli*, 392 Pa. 24, 139 A.2d 644 (1958).

310. La. Civ. Code art. 1830 (1825); see also 6 M. Planiol et G. Ripert, *supra* note 27, at 241.

311. La. Civ. Code art. 1924.

312. La. Civ. Code art. 1920.

313. A. Weill et F. Terré, *supra* note 2, at 212.

314. See 6 M. Planiol et G. Ripert, *supra* note 27, at 250; Agalstein, *Le dol et la fraude des incapables dans les contrats* (Thesis, Paris, 1928). See also decision rendered by the *Cour de cassation* on June 3, 1902, reported in D.P. 1902.1.452 and S. 1902.1.485. See also A. Weill et F. Terré, *supra* note 2, at 218.

315. La. Civ. Code art. 1924; cf. *Farrar v. Swedish Health Spa*, 337 So. 2d 911 (La. App. 3d Cir. 1976). See also *Bunkie Bank and Trust Co. v. Johnston*, 385 So. 2d 1264 (La. App. 3d Cir. 1980).

a party may intentionally induce another into an error through silence or inaction.³¹⁶ The Louisiana Civil Code, since the revision of 1825, expressly contemplates that fraud may result from silence or inaction.³¹⁷ Indeed, silence may lead to error in the course of negotiations where information, or some other form of clarification, can reasonably be expected from one party and is needed for the other to have a clear understanding of the circumstances of the transaction. In such a situation, the silence that substitutes for words that ought to be spoken becomes reticence, which is fraudulent when the omission of words is prompted by an intention to deceive.³¹⁸

Fraudulent Reticence

Not every instance of reticence constitutes fraud. Moreover it has occasionally been asserted that reticence may not be regarded as reflective of fraudulent intent, although that assertion has been criticized for its failure to take morals into account.³¹⁹ In general terms, nevertheless, parties to a contract have opposing interests and there can be no doubt that each one is the best guardian of his own interest.³²⁰ Thus, the one who fails to give another information that the other should have found by himself commits no fraud since it can be said that any error made in such a situation results not so much from one party's reticence as from the other's lack of diligence in protecting his own interest. It is different, however, when the circumstances are such as to impose on one party a duty to inform the other concerning certain facts, a duty that seems to appear whenever a party's silence, or failure to inform or to disclose, is a flagrant abuse of the other party's ignorance.³²¹

Be that as it may, it is not easy to draw a line between mere reticence, or bare nondisclosure, and fraudulent reticence. When the main, or only, feature of a particular situation is just silence, the traditional aphorism comes to mind, "*celui qui ne dit rien ne trompe pas*"—the one who says nothing does not deceive.³²² Reticence, however, does not occur in a void. Strange as it may seem, silence has a way of exteriorizing itself through the circumstances that surround it, circumstances that do

316. See French Civil Code art. 1116; J. Ghestin, *Traite de droit civil—Les obligations* 525-27 (1988); A. Weill et F. Terré, *supra* note 2, at 211-13.

317. La. Civ. Code art. 1953; La. Civ. Code art. 1847(5) (1870); 3 Louisiana Legal Archives Part II 1020-24 (1942).

318. See A. Weill et F. Terré, *supra* note 2, at 211.

319. See 10 M. Duranton, *Cours de droit français* 185-87 (3d ed. 1834); 8 R. Beudant, *Cours de droit civil français—Les contrats et les obligations* 94-95 (2d ed. 1936). For criticism see G. Ripert, *supra* note 129, at 89.

320. G. Ripert, *supra* note 129.

321. *Id.* at 89.

322. See M. Planiol, *Dol civil et dol criminel*, 22 *Revue critique de législation et de jurisprudence* 545, 570 (1893).

not consist of an omission, such as silence, but are positive acts or facts. It is in the light of such circumstances that silence may appear tainted with fraudulent intent and therefore becomes fraudulent reticence.³²³ Thus, if in the course of negotiations one party states his impression of the contractual object and asks from the other, "Tell me if I am wrong," the other's silence amounts to an assertion that the asking party is right, and will constitute fraudulent reticence if the one who remains silent knows that the other's impression is false and resorts to silence to confirm that impression to his own advantage. Courts should enjoy great discretion in deciding whether a party was under a duty to speak or to disclose information to the other, and it has been suggested that in reaching such conclusions the courts should not hold parties to a very high moral standard beyond what is necessary to see to it that honesty and decency prevail in legal transactions.³²⁴

Duty to Disclose

The process of ascertaining the nature and the consequences of reticence is greatly facilitated in those exceptional situations where the law prescribes a duty to disclose. The Louisiana Civil Code offers a distinct example of an express duty to disclose when it asserts that a seller is bound to explain himself clearly respecting the extent of his obligations.³²⁵ As a complement to that rule, another one prescribes extensive liability for a seller who knows the thing he sells has a non-apparent defect but fails to declare it to the buyer.³²⁶

Other examples of an express duty to disclose are contained in special legislation. Such a duty is imposed, for example, on lending financial institutions.³²⁷ Likewise, such a duty is provided for persons involved in the business of commercial advertising.³²⁸ There is such a duty, also, for persons applying for special kinds of insurance.³²⁹

Duty to Disclose and Good Faith

In the absence of an express provision to that effect, an answer to the question whether a person is under a duty to speak, or to disclose,

323. Guyot, *Dol et reticence*, in *Études de droit civil a la mémoire de Henri Capitant* 287, 297 (1939).

324. G. Borda, *Tratado de derecho civil—Parte general* II 326 (7th ed. 1980).

325. La. Civ. Code art. 2474.

326. La. Civ. Code art. 2545; but see La. Civ. Code art. 2547 where a distinction is made that is not contained in the Code Napoleon, 3 Louisiana Legal Archives Part II 1399 (1942).

327. See 15 U.S.C. § 1601 et seq. (1982); La. R.S. 9:3510 et seq. (Supp. 1988) (Consumer Credit Law).

328. See 15 U.S.C. §§ 52-58 (1973); see also 15 U.S.C. §§ 1114, 1125 (1973); La. R.S. 22:411-413 (1987).

329. La. R.S. 22:619 (Supp. 1988).

in a certain situation is sought among the cluster of ideas of which the elusive notion of good faith is comprised.³³⁰ When the question involves disclosure or nondisclosure of circumstances that are extrinsic to the contractual object itself, classical French writers have analyzed the problem in light of the example, offered by Cicero, of a grain merchant from Alexandria who arrived at Rhodes in a time of great scarcity of foodstuffs, with a cargo of grain and having passed on his way other vessels with similar cargoes which had already sailed from Alexandria for Rhodes.³³¹ Cicero raised the question whether the merchant was bound in conscience to disclose that fact to his buyers or, if not so bound, whether he was then free to remain silent and sell his grain for the very high price that a seller's market allows. Unhesitatingly, Cicero answered that the merchant was bound to disclose. Strangely enough, the great writers of the Natural Law School expressed a contrary view, asserting that the merchant should be allowed to benefit from his diligence since, after all, he arrived first.³³² Pothier, after paraphrasing the opinion of those writers, concludes that the *equite* involved in every commutative contract forbids either party to take unfair advantage of the other, as each party is supposed to receive the equivalent of what he gives. Thus, neither should a seller be allowed to conceal information concerning events that would cause the price of the contractual object to come down, nor should a purchaser be allowed to conceal information concerning events that would cause the price to go up.³³³

It is noteworthy that, in a case that originated in Louisiana, the United States Supreme Court had an opportunity to look into the problem.³³⁴ In that case, a New Orleans merchant learned that a treaty had been signed as a result of which a blockade would be lifted, thereby causing the price of tobacco to go up. Without disclosing that information he bought a large quantity of tobacco, which the seller refused to deliver when the information was made public. The buyer sued for damages and the trial court directed a verdict in his favor. The United States Supreme Court remanded the case, but, in a famous dictum, Justice Marshall said that a purchaser of goods is not bound to communicate to the seller information concerning extrinsic circumstances which might influence the price of the commodity and which is exclusively within the knowledge of the purchaser, especially when the means of acquiring such information are equally accessible to both parties, although each party

330. See La. Civ. Code art. 1759.

331. Cicero de Officiis, lib. 3 sec. 12-17; see also 2 Kent's Commentaries 491 (3d ed. 1836).

332. For a critical discussion see 2 Kent's Commentaries 491 (3d ed. 1836).

333. 3 Oeuvres de Pothier—Traité du contrat de vente 97-99 and 119-20 (Bugnet ed. 1861). See also 2 Oeuvres de Pothier, supra note 28, at 19-20.

334. Laidlow v. Organ, 15 U.S. (2 Wheat.) 178.

must take care not to say or do anything tending to impose upon the other.³³⁵ The attorney for the plaintiff had quoted extensively from Pothier in his brief, not only from the passage where the great writer expounded his conclusion, but also from those in which he analyzed the views of the natural law scholars, which no doubt allowed Justice Marshall a choice of doctrinal opinions.³³⁶ Be that as it may, and in spite of criticism, Marshall's view is now regarded as an accurate statement of the law, which would seem to mean that good faith does not demand that a party disclose information that he can use to his advantage, provided he does not mislead the other party.³³⁷

Relation of Confidence Between the Parties

An exception must be made to the above-discussed conclusion when the parties to a transaction are bound by a relation of confidence that inclines one of them to rely on the other, even uncritically.³³⁸ That kind of relation exists, for example, between the member of a profession and his client, or patient, and also between family members. Thus, Louisiana courts have found that attorneys are under a duty to disclose all relevant information even when they engage with their clients in dealings of a private nature.³³⁹ The confidence that must exist in the relation between spouses imposes upon a husband the duty to disclose the existence of a retirement fund to his wife.³⁴⁰ Louisiana courts have found, also, that a relation of confidence exists between the officers of a succession and the heirs, so that when such officers seek to acquire an heir's share of certain property of the succession they are under a duty to disclose to that heir the higher price a third person has offered.³⁴¹ Similarly, the confidence that must exist between employer and employee imposes upon the latter a duty to disclose that a certain insurance policy is subject to limitations.³⁴² In all such cases, a violation of the duty to disclose renders the reticence either fraudulent or negligent.

Nature of the Parties and Nature of the Contract

Another exception is made in view of the particular nature of a party or of a contract. Thus, the manifest frailty of a person of advanced

335. *Id.* at 195.

336. *Id.* at 185-90; see also 3 Oeuvres de Pothier, *supra* note 333, at 97-99 and 119-20.

337. See Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 *Journal of Legal Studies* 1, 11 (1978).

338. See La. Civ. Code art. 1954.

339. See *Boisdore v. Bridgeman*, 502 So. 2d 1149 (La. App. 4th Cir. 1987).

340. See *Hodson v. Hodson*, 292 So. 2d 831 (La. App. 2d Cir. 1974). See also *Holcomb v. Kincade*, 406 So. 2d 650 (La. App. 2d Cir. 1981), writ denied, 410 So. 2d 650 (1982).

341. See *delaVergne v. delaVergne*, 514 So. 2d 186 (La. App. 4th Cir. 1987).

342. See *Dohmann v. United Gas Pipeline*, 457 So. 2d 307 (La. App. 3d Cir. 1984).

age should put the other party on notice that such a person may not be able to exercise the diligence necessary to inform himself concerning all the circumstances of the contract, so, in such a case, the other party is under a duty to inform the elderly person on the nature and consequences of the instruments to be signed.³⁴³ Similarly, when additional terms are introduced into a contract, terms that either bind one party to accessory obligations or give to one party a special advantage, thereby modifying the nature of the contract, the party who benefits from the accessory obligation or from the advantage has a duty to inform the other concerning the full import of those terms.³⁴⁴

Towards a Precontractual Obligation to Inform

For some time now, and based on an attempt at generalizing the conclusions of some French decisions, continental doctrine has been involved in increasing the scope of a person's duty to disclose, or to furnish the party with whom he is contracting all information that may be relevant to the contract. As a result, the existence of an *obligation de renseignements*, or obligation to inform, is now asserted.³⁴⁵ It is said that a person's right to shroud in silence his knowledge of certain circumstances that, if known to the other party, might dissuade the latter from entering the contract, is a remnant of the individualism prevailing in the nineteenth century, and that the social, economic and political changes that took place in the twentieth century call for change also in the criteria with which the honesty and sincerity of contracting parties ought to be judged.³⁴⁶

Indeed, it cannot be denied that considerable expansion of the duty to disclose has already been effected through enactments aimed at preventing abuse in contracts of adhesion, through important legislative initiatives that provide legal means of consumer protection, and through special legislation that imposes a duty to disclose, very wide in scope, on the parties to certain legal transactions, and on parties who address the public at large through mass media of communication.³⁴⁷ The public policies underlying those developments are viewed as reflective of a trend toward a greater moralization of contract law.³⁴⁸

343. See *Chrysler Credit Corp. v. Henry*, 221 So. 2d 529 (La. App. 4th Cir. 1969).

344. See *Hayman v. Holliday*, 405 So. 2d 1304 (La. App. 3d Cir. 1981); see also *Lottinger v. Mark II Elec.*, 179 So. 2d 644 (La. App. 4th Cir. 1965).

345. See de Juglart, *L'obligation de renseignements dans les contrats*, 43 *Revue trimestrielle de droit civil* 1 (1945). For extensive discussion and analysis of French jurisprudence see J. Ghestin, *Traité de droit civil—Le contrat—Formation* 502-66 (1988).

346. de Juglart, *supra* note 345, at 7-9.

347. See *supra* p. 58-59.

348. de Juglart, *supra* note 345; Ripert, *supra* note 129, at 90-91.

It is not asserted, however, that such obligation to inform exists in every case without more. On the contrary, whether a party was bound by that obligation at the moment a contract was entered into should be a conclusion to be reached after a careful examination of a number of circumstances, such as the kind of information in possession of the obligor of that obligation, the ignorance *vel non* of such information by the obligee, whether the obligee had a duty to obtain that information by himself and, in that case, whether he could have gained access to the means to obtain it.³⁴⁹ Great emphasis is placed on subjective and objective aspects of the parties themselves and their respective positions.³⁵⁰ The obligation to inform is enhanced for professional persons, which includes not only members of the learned professions, but also those whose business activity requires the making of a large number of contracts, as is the case with professional sellers.³⁵¹

As created by doctrine, the obligation to inform is a cluster of principles taken from redhibition, error and fraud.³⁵² It is not yet clear, however, whether the *obligation de renseignements* is an addition to the doctrine of vices of consent, primarily as an aspect of *dol* or fraud, or whether the remedy for the violation of that obligation, when it is found that a person was so bound, should be borrowed from the general theory of quasi-delict, or tort.³⁵³ In other words, it is not clear whether, in such a case, redress for breach is contractual in nature, or quasi-delictual, or perhaps a combination of both.³⁵⁴ It should be noted that the source of redress is not a matter of mere academic value, since the kind of redress to be granted, rescission or just damages, depends on a proper classification of the *obligation de renseignement*.

It is not clear, either, whether the information which is the object of that obligation comprises only circumstances that are extrinsic to the contractual object, or circumstances that are both extrinsic and intrinsic.

Be that as it may, that interesting doctrinal development, when contrasted with a well-known dictum by an American court, gives rise to a question whether the law has reached the point of imposing an idealistic standard of behavior upon the frailties of human nature.³⁵⁵ If

349. J. Ghestin, *supra* note 345, at 532-66.

350. *Id.* at 538-40 and 552-54.

351. See, e.g., Mazeaud, *La responsabilité civile du vendeur-fabricant*, 54 *Revue Trimestrielle de droit civil* 611, 615 (1955), where the matter is examined from the viewpoint of contractual and quasi-delictual liability; see also Jourdain, *Le devoir de 'se' renseigner; contribution à l'étude de l'obligation de renseignement*, D. 1983, *chron.* 139.

352. See J. Ghestin, *supra* note 345, at 540-49.

353. See Schmidt, *La sanction de la faute precontractuelle*, 73 *Revue trimestrielle de droit civil* 46, 65-73 (1974).

354. Louisiana courts are not adverse to combining sources of redress; see *Philippe v. Browning Arms Co.*, 395 So. 2d 310 (La. 1980).

355. *Swinton v. Whitinsville Sav. Bank*, 311 Mass. 677, 42 N.E. 2d 808 (1942).

that question were rephrased, replacing the term "idealistic" with "higher standard of good faith," then an affirmative answer would be consistent with the expansion of the obligation of good faith effected by the Louisiana Civil Code, which expansion is wide enough to cover precontractual stages.³⁵⁶

The Economic Value of Scientific or Technical Information

Nevertheless, it is not denied that oftentimes scientific or technical information that concerns a particular quality of a contractual object, or a circumstance extrinsic to that object, is the result of research done with great expense and effort.³⁵⁷ Scientific knowledge and technological advancement thus obtained contribute significantly to the improvement of the quality of life of the people at large and should therefore be encouraged. If no reward were allowed to those who make the effort and defray the expense of gathering information of that kind, scientific research, technological invention, and exploration of new fields of endeavor would be discouraged, which would have negative consequences for the welfare of the people at large. A way to reward those who make such efforts is to allow them to reap the immediate benefits from them. Thus, if a person acquires knowledge of the hidden potential of a thing and, without disclosing that knowledge, buys the thing for a price less than the one the seller would command if he also had such knowledge, to say that the involved nondisclosure is fraudulent would be a harsh and impractical conclusion.³⁵⁸ It has been said that the possessor of socially useful information obtained through deliberate and costly research or inquiry has a right to deal with others without disclosing that information, because such right is actually a property right.³⁵⁹

A distinction should be made, in sum, between information acquired with effort and difficulty and information acquired only casually. The trend of the law is to find that no duty is breached when the former is not disclosed, and to look with diffidence upon the nondisclosure of

356. La. Civ. Code art. 1759. See also *supra* p. 58-59.

357. See J. Ghestin, *supra* note 345, at 541; Kronman, *supra* note 337, at 12-15.

358. The Texas Gulf Sulphur Company, through aerial searches for electromagnetic mineralization anomalies, discovered the existence of very valuable ore deposits and acquired options from the owners of the land containing such deposits without disclosing the results of the company's search. When the information was made public one of the landowners sued the company alleging the unfairness of the nondisclosure. In Kronman, *supra* note 337, at 20, it is asserted that the case was settled. See *Leitch Gold Mines, Ltd. v. Texas Gulf Sulphur*, 1 Ont. Rep. 469, 492-93 (1969). For a full report and discussion of the many incidents of such discovery see Shulman, *The Billion Dollar Windfall* (1969).

359. Kronman, *supra* note 337, at 33.

the latter.³⁶⁰ Some Louisiana decisions offer support for those conclusions.³⁶¹

Information, Silence, Bad Faith, and Fraud

If silence does not constitute fraudulent reticence when the nondisclosed information has been acquired through deliberate and costly efforts, the conclusion seems compelling that the law allows a certain margin of bad faith.³⁶² Indeed, it cannot be denied that the party who in such circumstances remains silent and fails to disclose information that he knows the other party would be eager to learn, though committing no wrong, is not acting in good faith.³⁶³ That allows a distinction between fraud and bad faith, a distinction the result of which is that the former is never condoned while the latter may be tolerated in certain circumstances.

Though that distinction meets the approval of commentators who take a pragmatic approach to the law, it has been resisted by scholars who advocate a greater moralization of legal principles.³⁶⁴ As viewed by the latter scholars, since bad faith must be understood as the opposite of good faith and good faith consists of a certain harmony between action and intention, which calls for sincerity in informing, and cooperating with, the other party, to withhold information in order to obtain an advantage makes the advantage thus obtained unfair, and also arguably makes the withholding party guilty of fraud.³⁶⁵

The conflict between the need to protect the stability of transactions and the security of commerce, on the one hand, and the need to protect individual interests on the other, is quite manifest in the opposing ideas outlined above. It is noteworthy that such debate does not concern

360. *Id.* See also *Guaranty Safe Deposit & Trust Co. v. Liebold*, 207 Pa. 399, 56 A. 951 (1904).

361. See *Zadeck v. Arkansas Louisiana Gas Co.*, 338 So. 2d 303 (La. App. 2d Cir. 1976).

362. See Lyon-Caen, *De l'évolution de la notion de bonne foi*, 44 *Revue trimestrielle de droit civil* 75, 81 (1946).

363. See *supra* p. 58-59.

364. See G. Ripert, *supra* note 129, at 1-3 and 287-89; see also L. Josserand, *supra* note 35, at 254-58.

365. See J. Ghestin, *supra* note 35, at 99. See also 6 R. Demogue, *supra* note 7, at 9; Gorphe, *Le principe de la bonne foi* 9-11 (1928); 2 S. Litvinoff, *supra* note 203, at 6-9. On the unsurmountable difficulties of defining "good faith" see Summers, *Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 *Va. L. Rev.* 195, 201 (1968), where it is said that the expression is an "excluder," that is, something defined by what it is not. Cf. Lyon-Caen, *supra* note 362, at 77-79.

continental doctrine only, but also pervades contemporary common-law doctrinal writings.³⁶⁶

The matter is far from settled, and a choice between the opposing trends of opinion cannot be easily made without exploration in depth of some problems of legal philosophy.³⁶⁷ On the other hand, the wealth and variation of legal experience is so great that perhaps just one answer may never be satisfactory. Indeed, a contract between two neighbors may call for one solution, while a contract between a consumer and a retailer, or a retailer and a manufacturer, may call for another, and a solution that may befit a contract between a farmer and an oil company may not be appropriate to a contract between two powerful corporations.

In sum, the nature of the parties, the nature of the contract, the kind of information involved and the particular circumstances that surround a case are to be taken very especially into account any time the settling of a dispute must tread upon the flimsy borderline between bad faith and fraud, a borderline which may very well defy generalization.

The Need for Different Solutions

The preceding discussion shows that a conflict exists between the need to reward the finding of socially useful information in order to encourage costly research, and the need to promote fair dealing in legal transactions. When the advantage a party derives from permissible non-disclosure is excessive because the uninformed other party gave something of great value for a mere pittance, the feeling of justice is offended. Perhaps the traditional solutions so far offered by the law, either rescission on grounds of fraudulent reticence or upholding of the contract for lawful nondisclosure, are no longer satisfactory and other possible solutions should be explored.

A recent French decision is worthy of comment in that context. A congregation of nuns made a lump sale of the contents of a barn to a dealer in second-hand objects. Among the things found in the barn was an old painting which the dealer sold to a young artist for a small sum. After patient restoration, the artist was inclined to believe that the painting could have artistic significance, and, through extensive research in Italy, he was able to establish that it was the work of a prominent renaissance

366. See C. Fried, *Contract as Promise* 74-85 (1981); Reiter, *Good Faith in Contract*, 17 Val. U.L. Rev. 705, 718-729 (1983). See also Burrows, *Contractual Cooperation and Implied Terms*, 31 Mod. L. Rev. 390 (1968); Kessler & Fine, *Culpa in Contrahendo*, *Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401 (1964). See also L. Fuller, *The Morality of Law* 27-30 (1963).

367. See, e.g., Reiter, *supra* note 366, at 732-34, for an analysis of the connection between good faith and solidarity. Cf. J. Cueto Rua, *Judicial Methods of Interpretation of the Law* 229 (1981). See also Cossio, *Meditación sobre la cooperación y la solidaridad*, 84 La Ley 893 (1956).

master, a finding on the basis of which the artist sold the painting to the French government for the Louvre Museum for several million francs. Upon learning of the great value of the painting, the congregation brought action in an attempt to annul the series of transactions that led the painting from the barn to the Louvre, on grounds that the congregation had never intended to sell *such* a painting. The court dismissed the action brought by the congregation and also the artist's reconvention for moral damages. In an interesting dictum, however, the court expressed the view that, had the action been brought on more solid grounds that would have allowed rescission, then there should be no doubt that the artist would be entitled to recover for the value of his discovery.³⁶⁸ Commenting on that dictum, one writer has suggested that a basis for the artist's recovery could be found in the concept of management of another's affairs.³⁶⁹ In Louisiana, an alternative ground for such recovery could be found through a flexible interpretation of the new provisions on error.³⁷⁰

In sum, so long as no special legislation is enacted in order to address that problem, solutions can be searched for in the principles of the basic private law; and can be found when those principles are interpreted in light of the need of always achieving *justice contractuelle*—contractual justice.³⁷¹

THE ERROR INDUCED BY FRAUD

Fraud and Cause

In order to vitiate consent, the error induced by fraud need not concern the cause of the obligation assumed by the party against whom the fraud is perpetrated.³⁷² That error, in other words, does not have to fall on the reason why that party consented to obligate himself, but it must concern a circumstance that has substantially influenced the consent of that party.³⁷³ That is so because in the case of fraud the victim is innocent of the error into which he is induced and, since *fraus omnia corrumpit*—fraud corrupts whatever it touches—the dishonesty involved in fraud simply cannot be condoned.

368. Decision rendered by the Tribunal de grande instance of the city of Paris on March 6, 1985, cited as unreported in J. Ghestin, *supra* note 345, at 541.

369. *Id.* See La. Civ. Code arts. 2295 and 2299.

370. See La. Civ. Code art. 1952. See also *supra* p. 39-40.

371. See S. Litvinoff, *La justice contractuelle*, in *Codification: Valeurs et langage, Actes du colloque international de droit civil compare* 315 (Quebec, 1981); J. Ghestin, *La justice contractuelle*, *eadem* at 309.

372. La. Civ. Code art. 1955.

373. *Id.* See also La. Civ. Code arts. 1949 and 1950. See also *supra* p. 12.

A significant difference between error and fraud as vices of consent is thereby established. For example, the installation of a sign-bearing pole on certain premises might not be the paramount reason why a tenant consented to a contract of lease of the premises, that is, it might not be the cause why he consented to bind himself, and in such a case a simple error that he made as to the existence of such pole would not be sufficient to invalidate the contract, but if the lessor misrepresented the installation of the pole, the error into which the tenant was induced thereby would become an integral part of the fraud perpetrated against him, and he could obtain rescission on that ground, as it can be readily understood that the availability of such a pole, though not a decisive reason, could be a circumstance of sufficient importance to influence a party's consent in a substantial manner.³⁷⁴ On the other hand, a misrepresentation, though fraudulently made, is not sufficient to constitute fraud if it does not influence at all the consent of the party alleging fraud. Thus, to continue with the same kind of example, if a lessor represented to a prospective tenant that another person had already leased another part of the property, and that was not true, the tenant would not be able to avail himself of fraud as a way out of the contract if it was clear that the quality, or the existence, of other tenants was immaterial, or indifferent, to him. That is so because in such a case the fraud does not succeed, and if the law were to repress even innocuous dishonesty it would be too easy for disappointed contracting parties to turn themselves into alleged victims of fraud in order to obtain rescission, which would greatly affect the stability of transactions.³⁷⁵

In French law a distinction is made between *dol principal*, or material fraud, and *dol incident*, or incidental fraud.³⁷⁶ The former is a fraud that decisively influences the consent of the victim, while the latter does not so influence the victim's consent but only induces him to accept terms more onerous than he would have accepted were it not for the fraud. *Dol principal* is a ground for rescission, while *dol incident* gives the victim an action to obtain a reduction of his performance by way of damages.³⁷⁷ The distinction is criticized in French doctrine, in the first place, because of the difficulties involved in ascertaining the degree to which fraud has influenced a party's consent and, in the second, because even when the *dol* is *principal* the victim may prefer to recover damages rather than seeking rescission of the contract.³⁷⁸

374. Cf. *Thieneman v. Kahn*, 433 So. 2d 761 (La. App. 5th Cir.), writ denied, 440 So. 2d 731 (1983). See also La. Civ. Code art. 1955 comment (b).

375. See La. Civ. Code art. 1847(11) (1870).

376. See A. Weill et F. Terré, *supra* note 2, at 214.

377. See 4 C. Aubry & C. Rau, *Droit Civil Français* 317 (La. St. L. Inst. trans. 6th ed. 1965).

378. See A. Weill et F. Terré, *supra* note 2, at 214-15; see also J. Ghestin, *supra* note 345, at 483-86.

The French distinction has not been universally followed, though some other civilian systems expressly provide different effects for material and incidental fraud.³⁷⁹ Louisiana law makes no distinction between material and incidental fraud, although it is not ruled out that a party claiming to have been the victim of fraud may seek only damages, rather than rescission, a solution expressly provided by the Louisiana Civil Code for the case of redhibitory vices.³⁸⁰ Moreover, the great discretion Louisiana courts enjoy for the granting of relief may allow them to award only damages to a party who seeks rescission on grounds of fraud when such an award is a reasonable manner of protecting the interest of that party under the circumstances.³⁸¹

Louisiana courts have asserted on several occasions that the error induced by fraud need not concern the cause of the obligation.³⁸²

Persuasive Expressions Not Regarded as Fraud

In the course of negotiating a transaction persons may indulge in expressions that deliberately exaggerate the quality of a thing, for example, or the reasonableness of a named price, or the uniqueness of a proposed bargain. Through a centuries-old tradition that has its roots in the Roman tolerance of the *dolus bonus*, such expressions are not regarded as the reflection of a fraudulent intent.³⁸³ Indeed, a seller who says to a prospective buyer, "This is the best thing you can get for your money," or "Nobody will sell this thing for less," though he knows that what he says is not true, does not say it with the intention to deceive the other person, but rather to persuade him to buy. If such a seller's conviction is that he is offering a reasonable deal, he then lacks the intention either to derive an unfair advantage for himself or to inflict a detriment to the other person, which shows the absence of the intentional element that defines fraud.³⁸⁴ Louisiana courts call such expressions "sales talk," or "puffing," which at most could be taken as an innocuous opinion and not as a declaration of quality.³⁸⁵

In sum, expressions of that kind are not intended to induce the listener into error. If an error results, the alleged victim has only his own gullibility or naïveté to blame. Expressions utilized in contemporary

379. See Argentine Civ. Code art. 934 (1969).

380. La. Civ. Code art. 2547.

381. See La. Code Civ. P. art. 1841.

382. See *Strauss v. Insurance Co. of N.A.*, 157 La. 661, 102 So. 861 (1925); *Lacoste v. Handy*, 1 Man. Unrep. Cas. 348 (La. 1880).

383. See *A. Weill et F. Terré*, supra note 2, at 212.

384. See supra p. 51-52.

385. See *Goode-Cage Drug Co. v. Ives*, 133 So. 813 (La. App. 2d Cir. 1931). See also *Gulf Oil Corp. v. Federal Trade Comm.*, 150 F.2d 106 (5th Cir. 1945).

advertising practices through mass media are treated in the same way.³⁸⁶

The Diligence of the Complaining Party

Closely related to the matter just discussed is the subject of the diligence a party is expected to use in the protection of his own interest, even when fraud, or attempted fraud, is involved. Thus, fraud does not vitiate consent when the party against whom it has been directed could have ascertained the truth without difficulty, inconvenience, or special skill.³⁸⁷ Many times, indeed, a fraudulent misrepresentation can be easily uncovered just by looking elsewhere or asking for another opinion, which can be accomplished with the minimum of diligence expected from a reasonable person. Other times, however, an inquiry into the truth of a representation may require the individual examination of a large number of items that are to be acquired in bulk, which presents a difficulty, or the taking of a trip, which creates an inconvenience, or familiarity with peculiar technicalities, which calls for a special skill. When such is the case, it can be said that the person against whom fraud is directed does not have at hand the means of finding out the truth and therefore cannot be blamed for lack of diligence.

Louisiana courts have asserted that when the means of gaining knowledge are equally available to both parties and the contractual object is open for their inspection, the party who does not avail himself of those means and opportunities will not be heard to say that he was deceived by the misrepresentations of the other.³⁸⁸ Subjective aspects such as a party's business experience or professional capacity must be taken into account. Thus, a person inexperienced in transactions of a certain kind will be regarded as more vulnerable to the fraudulent intent of another than an experienced party.³⁸⁹ For greater reasons, when the alleged victim of a misrepresentation took action to verify the information he received from the other party he could not claim fraud, as it was clear that he had relied on his own findings, perhaps mistakenly, rather than on the other party's assertions.³⁹⁰

Relation of Confidence

A party's lack of diligence in ascertaining the truth of an assertion made to him by another is justified when a relation of confidence exists between such parties so that one of them is inclined to rely on the

386. But see *supra* p. 58-59.

387. See La. Civ. Code art. 1954.

388. *Rocchi v. Schwabacher & Hirsch*, 33 La. Ann. 1364, 1368 (1881).

389. See *Forsman v. Mace*, 111 La. 28, 35 So. 372 (1903).

390. *La Croix v. Recknagel*, 230 La. 842, 89 So. 2d 363 (1956).

judgement or statements of the other. Fraud vitiates consent in such a case even if the victim took no steps whatsoever to ascertain the truth by himself, or merely made no room for any doubt in his mind. An article of the Louisiana Civil Code contemplates such situation expressly.³⁹¹ That kind of confidence may result not only from a long or stable relation between the parties but also from an occasional or even accidental one. The relation between spouses is an example of the former.³⁹² The relation established at a first appointment between a professional and his client is an example of the latter. Thus, if in order to have a diamond appraised a person calls for the first time on a jeweler, who makes a deliberately low appraisal thinking that he might be able to buy the diamond for the low sum he has named, the jeweler thereby betrays the confidence he has invited as a professional appraiser, and his low valuation constitutes fraud.³⁹³ A different result would obtain if the person had simply asked the jeweler to name a price for which he would buy the diamond, and the person had then sold the diamond to the jeweler for that price.³⁹⁴

FRAUD BY A THIRD PERSON

Not a Ground For Rescission

Fraud is a ground for rescission when committed by one party to a contract against the other. It is not such a ground when the fraud is perpetrated by a third person.³⁹⁵ That marks a difference between fraud and duress, as the latter may be invoked as a cause for nullity regardless of whether it has been exerted by a party to the contract or by a third person.³⁹⁶ The reasons to regard fraud by a third person in such a way are historical. At Roman law fraud was considered a delict rather than a vice of consent and gave rise to an action that, because it was criminal in nature, could be brought only against the perpetrator and not against another person even if the latter had benefitted from the fraud.³⁹⁷ That approach should have been abandoned when modern law turned fraud into a vice of consent, but it was not, perhaps because of the weight of tradition.³⁹⁸

391. La. Civ. Code art. 1954.

392. See *supra* p. 60.

393. See *Griffing v. Atkins*, 1 So. 2d 445, 450 (La. App. 1st Cir. 1941).

394. *Id.*

395. See *A. Weill et F. Terré*, *supra* note 2, at 216. Cf. La. Civ. Code art. 1847(9) (1870).

396. See La. Civ. Code art. 1852. See also *infra* p. 87.

397. *A. Weill et F. Terré*, *supra* note 2, at 216.

398. *Id.* at 209-10 and 216.

As a result of those historical reasons, in French law the contract is upheld when one of the parties has been the victim of fraud perpetrated by a third person. That conclusion is further justified by asserting, on the one hand, that a contrary solution would be unfair to the other party who is innocent of the fraud, and, on the other hand, that the victimized party may always recover damages in quasi-delict from the perpetrator.³⁹⁹ Such assertions have been criticized, however, because, regardless of who perpetrates it, the victim of fraud is induced into an error that vitiates his consent, and a vice of consent is as much of an obstacle to the validity of a contract when it results from the agency of a third person as when it results from the agency of the other party.⁴⁰⁰

Exceptions

French law recognizes several exceptions to the principle discussed above. First, the fraud committed by a mandatary in exercise of the mandate is regarded as fraud committed by the principal by virtue of the rules governing representation.⁴⁰¹ Therefore, when a party to a contract is represented by another, the fraud of the latter is regarded as the fraud of the former and not as the fraud of a third person.⁴⁰²

The general principle concerning fraud by a third person does not obtain either when the contracting party who benefits from the fraud is actually an accomplice of the perpetrator, which is probably the most frequent case since, in a contract-making context, a third person who designs a fraudulent scheme normally does so in connivance with a party to the contract. In all such cases rescission may be sought against that contracting party.⁴⁰³

The French jurisprudence has recognized another exception for the case of donations, which may be annulled because of fraud perpetrated by a third person.⁴⁰⁴ That conclusion is justified by the peculiar nature of the contract of donation where the cause is a spirit of liberality, since freedom of the will is of the essence of liberalities. On the other hand, a donee, who stands to lose only a benefit for which he gave nothing in return, is less affected by a nullity than a party who has entered an onerous contract.⁴⁰⁵

399. Id. at 216.

400. See J. Ghestin, *supra* note 345, at 477-78.

401. See decision rendered by the *Cour de cassation* on Nov. 20, 1905, reported in S. 1906.1.124. See also La. Civ. Code art. 3021.

402. A. Weill et F. Terré, *supra* note 2, at 216.

403. Id. at 216-17.

404. Id. at 217.

405. Id.

The Louisiana Rule

In Louisiana, fraud committed by a third person vitiates the consent of a contracting party if the other party knew or should have known of the fraud.⁴⁰⁶ Under this rule, knowledge of the fraud by the party who benefits from it amounts to the complicity that, under French law, makes a party to a contract liable for the fraud of a third person.⁴⁰⁷ On the other hand, when fraud has been perpetrated by a third person without the knowledge of the party who benefits from it, the other party, the victim of the fraud, that is, is still bound.⁴⁰⁸ When such is the case, however, although the contract may not be attacked on grounds of fraud, relief may nevertheless be obtained in Louisiana on grounds of error, provided the requirements for the granting of such relief are present.⁴⁰⁹

Fraud by a third person vitiates a party's consent not only when the other party actually knew of the fraud, but also when that party should have known of it.⁴¹⁰ That rule contemplates situations where circumstances demand that a party exercise a special, or higher, standard of diligence for the purpose of keeping himself informed of certain facts. Thus, in a Louisiana case where husband and wife were both officers of a corporation and a document was forged through the agency of the wife, the court granted rescission of a contract to secure financing made on the basis of that document because the husband, who was the president of the corporation, could not have ignored, or should have known, the part his wife played in the forgery.⁴¹¹

Liability of the Third Person

A third person whose fraud vitiates the consent of a party to a contract is liable in quasi-delict.⁴¹² That is so when the contract is upheld because the other party did not know of the fraud, and also when the contract is annulled because the other party knew or should have known of the fraud, and even when the contract, though upheld, gives rise to

406. La. Civ. Code art. 1956.

407. See *supra* p. 71.

408. See La. Civ. Code art. 1956 comment (b).

409. See La. Civ. Code art. 1956 comment (c). See also La. Civ. Code art. 1847(9) (1870).

410. La. Civ. Code art. 1956.

411. *George A. Broas Co. v. Hibernia Homestead and Sav. Assoc.*, 134 So. 2d 356 (La. App. 4th Cir. 1961).

412. See *A. Weill et F. Terré*, *supra* note 2, at 217. See also La. Civ. Code art. 1847(9) (1870).

a remedy for the victim of the fraud, as in a case of *quanti minoris*.⁴¹³

PROOF OF FRAUD

Different Jurisprudential Trends

Earlier Louisiana law provided that fraud, like every other fact, must be proved by the party who alleges it, but it may be proved by simple presumptions or by legal presumptions, as well as by other evidence, since the maxim that fraud is not to be presumed means no more than that it is not to be imputed without legal evidence.⁴¹⁴ Nevertheless, Louisiana courts have asserted at times that a party who alleges ill faith is bound to the strictest proof.⁴¹⁵ They have further asserted that the charge of fraud is a most serious one and that the maxim of law is that fraud is never to be imputed to anyone except upon legal and convincing evidence.⁴¹⁶ Some decisions have expressed that the law requires exceptionally strong proof to sustain a charge of fraud.⁴¹⁷ Others have said that proof of fraud must be stronger than a mere preponderance of the evidence.⁴¹⁸

That jurisprudential trend has been contradicted in other decisions asserting that because of the inherent difficulty of establishing fraud by direct evidence an inference of fraud may be drawn from the existence of highly suspicious conditions or events.⁴¹⁹ In some cases even circumstantial evidence was found sufficient.⁴²⁰

The same ambivalence can be noticed at common law, where some decisions require proof that is clear and satisfactory to an extent in

413. See *Rabai v. First Nat'l Bank of Gonzales*, 492 So. 2d 90 (La. App. 1st Cir.), writ denied, 496 So. 2d 354 (1986), where the court ruled that the other party and the third person are solidarily liable; see also La. Civ. Code arts. 2541 and 2543. See also *Turner v. Willow Tree Townhomes Partnership*, 533 So. 2d 107, 108 (La. App. 4th Cir. 1988), writ denied, 535 So. 2d 743 (1989), where the court enhances the quasi-delictual nature of the liability of a third person whose misrepresentation induces a party to enter into a contract with another.

414. La. Civ. Code art. 1848 (1870).

415. *Fort v. Metayer*, 10 Mart. (o.s.) 436, 439 (La. 1821).

416. *Strauss v. Insurance Co. of N.A.*, 157 La. 661, 102 So. 861, 865 (1925).

417. *Metcalf v. Mousour*, 195 La. 570, 197 So. 235, 236 (1940).

418. *Woodward v. Barringer*, 24 So. 2d 200, 203 (La. App. 2d Cir. 1945). See also *Pierce v. Kyle*, 241 So. 2d 604 (La. App. 2d Cir. 1970); *Fedele v. St. Romain*, 242 So. 2d 912, 915 (La. App. 1st Cir. 1970), writ denied, 257 La. 992, 244 So. 2d 860 (1971).

419. *Chrysler Credit Corp. v. Henry*, 221 So. 2d 529, 532 (La. App. 4th Cir. 1969); *George A. Broas Co. v. Hibernia Homestead & Sav. Assoc.*, 134 So. 2d 356, 360 (La. App. 4th Cir. 1961); *Griffing v. Atkins*, 1 So. 2d 445 (La. App. 1st Cir. 1941).

420. *Ordner v. Fire Ins. Co. of Quaker City*, 467 So. 2d 619, 621 (La. App. 3d Cir. 1985).

proportion to the seriousness of the fraud charged.⁴²¹ Other decisions have required that fraud be proved beyond a reasonable doubt.⁴²² Nevertheless, many common-law courts have criticized decisions requiring a burden of proof greater than a preponderance of the evidence.⁴²³ Early authorities asserted that fraud might be established by less than a preponderance of the evidence at equity.⁴²⁴ According to one commentator, while fraud is not to be presumed, a court of equity will act on a lower degree of proof than that which would be required in a court of law.⁴²⁵ More recently, exercising concurrent law and equity jurisdiction, courts have sometimes required more proof than a mere preponderance of the evidence.⁴²⁶

The Reason for the Ambivalence

At common law, at least, the reason for ambivalence in the jurisprudence may lie in the fact that "fraud" is a generic term that alludes to more than one actionable wrong.⁴²⁷ Fraud may become important either for the purpose of giving the defrauded person the right to sue for damages in an action for deceit or for the purpose of enabling him to rescind the contract.⁴²⁸ It has been said that the distinction between a claim for damages for intentional deceit and a claim for rescission is well-defined.⁴²⁹ Deceit is a tort action, and it requires a certain degree of culpability on the part of the one who misrepresents a fact. Thus, a party who brings an action of deceit based on fraud has the burden of proving that the defendant knew that the statements he made were false and that he intended to deceive the plaintiff.⁴³⁰ In other words, the intentional element known as *scienter* must be very clearly proved.⁴³¹ On the other hand, a party who has been induced by fraud to enter into a contract may elect to rescind the contract in order to recover what he paid under it. In such an action based on contract *scienter* has never

421. *Neacy v. Milwaukee County*, 144 Wis. 210, 128 N.W. 1063 (1910); *Maldaner v. Smith*, 102 Wis. 30, 78 N.W. 140 (1899). See also *Adams v. Gillig*, 199 N.Y. 314, 92 N.E. 670 (1910).

422. *Haynes v. Peterson*, 125 Va. 730, 100 S.E. 471 (1919).

423. *Gehlert v. Quinn*, 35 Mont. 451, 90 P. 168 (1907); *Baver Grocery Co. v. Sanders*, 74 Mo. App. 657 (1893); *Watkins v. Wallace*, 19 Mich. 57 (1869).

424. *Warner v. Daniels*, 1 F. Cas. 90 (1845) (No. 17181). See also *Sullivan v. Murphy*, 212 Iowa 159, 232 N.W. 267 (1930).

425. J. Smith, *Equity Jurisprudence* No. 107 (2d ed. 1878).

426. *Kackley v. Webber*, 310 Ky. 285, 220 S.W. 2d 587 (1949); *Jones v. McComas*, 92 W.Va. 596, 115 S.E. 456 (1922).

427. See *Halpert v. Rosenthal*, 267 A.2d 730, 733 (R.I. 1970).

428. 12 S. Williston, *Contracts* 322 (Jaeger 3d ed. 1970).

429. *Halpert v. Rosenthal*, 267 A.2d 730, 733 (R.I. 1970).

430. See W. Prosser, *Law of Torts* 728-29 (5th ed. 1984).

431. *Id.* at 741.

had the same force as in tort, very probably because of the equitable character of rescission.⁴³²

The vulnerability to common law influence of the Louisiana legal system may explain the jurisprudential ambivalence where the proof of fraud is concerned. Indeed, the criminal overtones of fraud are well-reflected in those Louisiana decisions asserting that fraud should be proven to that degree of certainty which warrants the conviction of a person who is charged with the commission of a crime, that is, beyond a reasonable doubt.⁴³³

The Louisiana Civil Code

According to the Louisiana Civil Code, fraud need only be proved by a preponderance of the evidence and may be established by circumstantial evidence.⁴³⁴ That rule leaves no room for ambivalence. In its light, any conclusion that fraud requires exceptionally strong and clear proof is deprived of foundation.⁴³⁵ That is so because, as occasionally recognized by courts, it is extremely difficult for the victim of fraud to prove it by positive and direct testimony, since those who perpetrate fraud generally prepare themselves in such a manner as to cover up and leave no traces of their practice behind them.⁴³⁶

Concerning the pleading of fraud, the Louisiana Code of Civil Procedure provides that the circumstances constituting fraud, like those constituting error, shall be alleged with particularity, while malice, intent, knowledge, and other conditions of mind of a person may be alleged generally, a procedural rule by all means consistent with the substantive one on proof of fraud contained in the Civil Code.⁴³⁷

REMEDIES

Rescission

A party who has been enticed into a contract through fraud perpetrated by the other party may obtain rescission of that contract.⁴³⁸ In

432. Halpert v. Rosenthal, 267 A.2d 730, 734-35 (R.I. 1970).

433. See American Guar. Co. v. Sunset Realty & Planting Co., 208 La. 772, 23 So. 2d 409, 430 (1945); Belcher v. Booth, 164 La. 514, 114 So. 116, 118 (1927).

434. La. Civ. Code art. 1957.

435. See La. Civ. Code art. 1957 comment (b). Cf. Pierce v. Kyle, 241 So. 2d 604, 605 (La. App. 2d Cir. 1970).

436. See Griffing v. Atkins, 1 So. 2d 445, 450 (La. App. 1st Cir. 1941). See also Bank of Coushatta v. Patrick, 503 So. 2d 1061, 1068 (La. App. 2d Cir.), writ denied, 506 So. 2d 1231 (1987).

437. See La. Code Civ. P. art. 856; Levatino v. Levatino, 506 So. 2d 858, 862-63 (La. App. 1st Cir. 1987).

438. La. Civ. Code art. 1958.

granting rescission the court declares such contract null because it lacks one of the requirements for its formation, namely, consent free from vice.⁴³⁹ The nullity in such a case is only relative as the contract was made in violation of a rule intended for the protection of private parties.⁴⁴⁰ As a consequence, rescission may be sought only by the party for whose interest the ground for nullity was established, namely, the victim of the fraud, who is free not to seek rescission if he prefers that the contract be carried out, and to limit himself to seeking reparation of whatever damage he might have sustained because of the fraud.⁴⁴¹

If rescission is granted, however, the parties are restored to the situation that existed before the contract was made, and the victim of the fraud may thereby recover whatever performance he rendered under the contract.⁴⁴²

It is noteworthy that, in some instances, a refusal, rather than a granting, of rescission is the best way of protecting the victim of fraud, as when the nullity of a contract is sought by a minor who misrepresented his age by fraudulent means.⁴⁴³

Damages

The victim of fraud may recover damages from the perpetrator.⁴⁴⁴ In some instances protection of the victim's interest is sufficiently accomplished by the rescission of the contract, but if he has suffered any damages occasioned by the contract, such as expenses or loss of opportunity to make other transactions, he may recover such damages from the perpetrator of the fraud.⁴⁴⁵ Recovery in such a case is governed by the general provisions on damages.⁴⁴⁶

The party victimized by fraud may obtain rescission and damages, or, if he so chooses, only damages, when the fraud has been perpetrated by the other party to the contract. When the fraud has been perpetrated by a third person the victim is limited to recovering only damages from that person.⁴⁴⁷

439. La. Civ. Code art. 2029.

440. La. Civ. Code art. 2031.

441. See *supra* p. 36. See also A. Weill et F. Terré, *supra* note 2, at 215, 218.

442. La. Civ. Code art. 2033.

443. See A. Weill et F. Terré, *supra* note 2, at 218. See also *supra* p. 56.

444. La. Civ. Code art. 1958.

445. See 1 R. Demogue, *supra* note 7, at 582; 6 M. Planiol et G. Ripert, *supra* note 27, at 250. See also *Smith v. Everett*, 291 So. 2d 835 (La. App. 4th Cir. 1974).

446. See La. Civ. Code art. 1958 comment (b).

447. See *supra* p. 72. See also La. Civ. Code art. 1958 comment (c).

Attorney Fees

The pertinent rule asserts that the party against whom rescission is granted is liable not only for damages but also for attorney fees.⁴⁴⁸ That is one of the instances where the law allows that kind of recovery—the general principle is that attorney fees are recoverable only when the law so provides or where the parties have so agreed.⁴⁴⁹ In a closely related situation, when a seller fails to disclose to the buyer that the thing sold has a hidden defect, attorney fees are recoverable by the buyer also by express provision of the law.⁴⁵⁰

The question may be raised whether a party who was enticed into a contract through the fraud of the other party may recover attorney fees if he chooses not to seek rescission but only damages. Through analogy to the closely related situation already mentioned, and further alluded to below, the answer should be affirmative, unless the circumstances are such that the court in its discretion finds that the action is based only on quasi-delict, since there is no general rule allowing recovery of attorney fees in quasi-delictual actions.⁴⁵¹

Judicial Discretion

Another question that may be relevant in this context is whether, upon action for rescission on grounds of fraud brought by the victim, the court may refuse that remedy to the plaintiff and grant him only damages. In French law the answer is negative because, as it is asserted, the choice should be the victim's and not the court's, though it is not denied that the court may refuse the rescission sought if the plaintiff fails to prove fraud.⁴⁵² In Louisiana, the Civil Code suggests a different answer. Indeed, for the case where a seller has declared that the thing he sells has a quality that he knows it does not have, one article subjects the seller's declaration to the rules of fraud and provides that either rescission of the contract or reduction of the price may be granted to the buyer according to the circumstances.⁴⁵³ A related article further

448. La. Civ. Code art. 1958.

449. See *Nassau Realty Co. v. Brown*, 332 So. 2d 206, 210 (La. 1976); *Rutherford v. Impson*, 366 So. 2d 944, 947 (La. App. 1st Cir.), writ denied, 369 So. 2d 140 (1979).

450. See La. Civ. Code art. 2545.

451. Under La. Civ. Code art. 2545, in case of concealment of a defect by a seller who knows of it, the buyer may be granted a reduction of the price by way of damages, rather than rescission, and also attorney fees; see *Abercrombie v. V.P. Pierret Realty & Construction Co., Inc.*, 532 So. 2d 212 (La. App. 3d Cir. 1988); *Harper v. Coleman Chrysler-Plymouth-Dodge, Inc.*, 510 So. 2d 1366 (La. App. 3d Cir. 1987). Under La. Civ. Code art. 2547, reduction of the price rather than rescission may take place even in case of misrepresentation by a seller. In both instances, however, the action is based on contract.

452. See 6 M. Planiol et G. Ripert, *supra* note 27, at 249.

453. La. Civ. Code art. 2547.

provides that in an action for rescission brought by a buyer on account of a hidden defect the court may grant a mere reduction of the price.⁴⁵⁴ If that is so in one instance of fraud, such an approach could be generalized in order to reach the same conclusion in other situations where a court feels that a defendant's conduct, though it may be seen as fraudulent, is not reprehensible enough to warrant rescission of the contract and that the interest of the other party is sufficiently protected by an award of damages.

Fraud and Quasi-Delict

The notion of fraud is permeated by delictual overtones.⁴⁵⁵ As an act of a party that causes damage to another, fraud is comprised in the general principle of quasi-delictual liability.⁴⁵⁶ That is why the party against whom fraud is perpetrated is given the choice of suing in contract in order to obtain rescission and damages, if any, or suing on grounds of the quasi-delict in order to obtain just damages while the contract is allowed to subsist. That theoretical conclusion is confirmed in the jurisprudence of Louisiana and France.⁴⁵⁷ Moreover, as a quasi-delict, fraud does not require an intentional element, as mere negligence suffices to give rise to liability.⁴⁵⁸

Because of a basic procedural rule under which a final judgment must grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief, a Louisiana court will oftentimes orient a decision in a contractual or quasi-delictual direction according to the circumstances of a particular case.⁴⁵⁹ Nevertheless, a court should not impose the nullity of a contract on grounds

454. La. Civ. Code art. 2543.

455. See A. Weill et F. Terré, *supra* note 2, at 210. See also R. Ottenhof, *Le droit civil et la formation du contrat civil* 42-44 (1970).

456. See La. Civ. Code art. 2315. See also J. Ghestin, *supra* note 345, at 480-83.

457. See *Haggerty v. March*, 480 So. 2d 1064 (La. App. 5th Cir. 1985); *Bunkie Bank & Trust Co. v. Johnston*, 385 So. 2d 1264 (La. App. 3d Cir. 1980). In *McDonald v. Menutis*, 417 So. 2d 1 (La. App. 4th Cir. 1982), the court clearly asserted that a decision rendered upon a quasi-delictual action brought on grounds of fraud did not constitute *res judicata*, that would prevent bringing a subsequent action based on contract. See also decision by the *Cour de cassation* rendered on February 4, 1975, reported in J.C.P. 1975.II.18100, and decision by the *Cour de cassation* rendered on March 14, 1972, reported in D.1972.653, with a comment by Ghestin.

458. See La. Civ. Code art. 2316. See also *Turner v. Willow Tree Townhomes Partnership*, 533 So. 2d 107 (La. App. 4th Cir. 1988), writ denied, 535 So. 2d 743 (1989).

459. See La. Code Civ. P. art. 862. See *Haggerty v. March*, 480 So. 2d 1064 (La. App. 5th Cir. 1985); *Bunkie Bank & Trust Co. v. Johnston*, 385 So. 2d 1264 (La. App. 3d Cir. 1980).

of fraud on a party who does not seek it, because such a nullity is only relative.⁴⁶⁰

Concerning prescription, in spite of some debate in French law, the conclusion should obtain that each of these two types of action is subject to its own prescriptive period.⁴⁶¹

FRAUD AND ERROR

Apparent Duplication

As vices of consent fraud and error are so intertwined that the question is warranted whether the law in its conception of fraud indulges in a duplication of that which actually is a single ground for nullity, namely, error, whether spontaneous or induced by a scheme.⁴⁶² The alleged duplication is only apparent, however, and its relevance would be only theoretical. From a practical vantage point, fraud and error are clearly distinguishable, to wit:

Proof

Where proof is concerned, the success of an action for nullity on grounds of error requires that the plaintiff overcome the difficulty of proving the psychological fact of error through presumptions and indicia furnished by the elements of the actual or presumed cause of his obligation, while in order to succeed in an action for nullity on grounds of fraud the required proof is less burdensome to produce as it does not so much revolve around the error itself but around the ways in which it was induced or provoked, which points in the direction of objective facts that can be shown without great difficulty.⁴⁶³

Application

Concerning the application of one or the other doctrine to a particular set of facts, it is noteworthy that fraud prevails as a ground for nullity even in those situations where the resulting error is not of the kind that would lead to nullity by itself, as in the case of error that concerns the value of a thing, because the error induced by fraud need not concern the cause of the obligation in order to vitiate consent.⁴⁶⁴ That is so

460. See *Haggerty v. March*, 480 So. 2d 1064 (La. App. 5th Cir. 1985); see *Morris, Business Associations, Developments in the Law, 1985-1986*, 47 La. L. Rev. 235, 258 (1986).

461. See *J. Ghestin*, *supra* note 345, at 481-82. See La. Civ. Code arts. 2032 and 3492.

462. See *supra* p. 32. See also *A. Weill et F. Terré*, *supra* note 2, at 209.

463. *Id.*

464. See *supra* p. 66-68. See also La. Civ. Code art. 1955.

because the remedies for fraud are granted for reasons of a nature different from those that underlie the granting of remedies for simple or spontaneous error. Indeed, though a vice of consent, fraud undermines social mores, violates basic notions of fair dealing and loyalty, and may even constitute a criminal act. Greater rigor is justified, then, in not condoning fraud.⁴⁶⁵

Remedy

In most instances the remedies for fraud are more effective than the remedies for simple error. Since fraud involves a fault of the perpetrator, the victim may recover for the residual damage resulting from the fraud which is not repaired by the rescission alone.⁴⁶⁶ Though the same kind of reparation may be obtained in cases of simple error, it is beyond doubt that damages are more readily and more frequently allowed where fraud is concerned because of the unquestionable presence of fault in such cases.⁴⁶⁷

THE REVISION

Clarification and Simplification

Following its French model, the Louisiana Digest of 1808 contained just one article on fraud, which stated that fraud vitiates consent only when the artifice is such that without it the other party would not have contracted.⁴⁶⁸ In the revision of 1825 three articles were substituted for the earlier one.⁴⁶⁹ The first of those articles contained no less than twelve sections, many of which consisted of doctrinal statements.⁴⁷⁰ The revision enacted in 1984 clarified and simplified the rules contained in those articles, although some changes were introduced in the following areas.

Relation of Confidence

An earlier article of the Louisiana Civil Code provided that a false assertion as to the value of the contractual object does not constitute a fraudulent scheme when the object is of such a nature that the party to whom the assertion was addressed could have detected the falsehood through ordinary attention.⁴⁷¹ A revised article generalizes that principle

465. A. Weill et F. Terré, *supra* note 2, at 209-10.

466. See *supra* p. 43.

467. A. Weill et F. Terré, *supra* note 2, at 210.

468. See Louisiana Digest of 1808 art. 16, at 262.

469. See 3 Louisiana Legal Archives Part II 1020-25 (1942).

470. See La. Civ. Code art. 1847 (1870).

471. La. Civ. Code art. 1847(4) (1870).

so as to cover false assertions of circumstances other than value or quality of the contractual object.⁴⁷² That generalization had already been effected by the Louisiana jurisprudence through the proper use of analogy.⁴⁷³

By way of exception, another revised article provides that such an assertion concerning the value or quality of a thing does constitute fraud when, because of a relation of confidence, the party to whom the assertion is addressed is induced to rely on the other's representation.⁴⁷⁴ That warranted exception had already been contemplated by the Louisiana jurisprudence before it was given legislative formulation.⁴⁷⁵

Damages and Attorney Fees

Another revised article states that a party who perpetrates fraud is liable for damages.⁴⁷⁶ That liability, though not asserted in general terms in earlier articles, has always been consistent with general principles.⁴⁷⁷ Concerning attorney fees, the same revised article provides for all instances of fraud a general rule of recovery that the Louisiana Civil Code previously provided for one instance in particular, since there is no apparent reason to confine the rule to that instance only.⁴⁷⁸

IV. DURESS

GENERAL PRINCIPLES

Duress, Fear, and Consent

Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation.⁴⁷⁹ In the case of error, either spontaneous or induced by fraud, a party's consent is vitiated because he is not informed of the truth, while in the case of duress a party's consent is vitiated because it is not free, as the term "duress" suggests a constraint exerted upon a party's will to force him to make a contract,

472. La. Civ. Code art. 1954.

473. See *Forsman v. Mace*, 111 La. 28, 35 So. 372 (1903); see also *Rocchi v. Schwabacher & Hirsch*, 33 La. Ann. 1364 (1881).

474. La. Civ. Code art. 1954.

475. See *Griffing v. Atkins*, 1 So. 2d 445 (La. App. 1st Cir. 1941).

476. La. Civ. Code art. 1958.

477. See *supra* p. 77.

478. See *supra* p. 78. See also La. Civ. Code art. 2547.

479. La. Civ. Code art. 1959.

a constraint that usually results from threats of serious injury. It is clear, thus, that the vice of consent is not the duress itself but the fear it provokes, which deprives the victim of his free choice.⁴⁸⁰ Roman law utilized a more realistic terminology when it characterized the vice of consent consisting in lack of freedom as *metus*—fear. The same can be said of the Swiss Code of Obligations, which speaks of *crainte*—fear—rather than duress or violence.⁴⁸¹ Duress is actually that which causes the vice rather than the vice itself. The terminological aspect is of practical, and not merely academic, importance, since placing the emphasis on the cause rather than the effect could lead to the misconception that the doctrine of duress aims at punishing those who exert constraint upon the will of others, while it actually aims at providing redress, through the nullity of the contract or other juridical act, to those whose will has been imposed upon.⁴⁸²

Objective Aspect

A person's will may be coerced by a threat, or menace, of impending evil, such as an injury to be suffered if he refuses to enter a certain transaction, in which case the party will give his consent in order to prevent the feared injury. That is the situation to which French law refers as *violence morale*—psychological duress.⁴⁸³ It is noteworthy that in such a case, though coerced, the person gives his consent. As the Roman maxim has it, *coactus voluit sed voluit*—he willed through coercion but he willed all the same. On the other hand, duress may be exerted through violence to a person's body rather than a person's mind, a situation to which French law refers as *violence physique*—physical duress.⁴⁸⁴ Thus, a person's hand may be physically forced to affix a signature, or drugs may be administered to a person so that he will not resist having his hand guided through the affixing of his signature as evidence of his consent to a contract.

It is clear that the nullity resulting from *violence morale* is relative as in the case of all vices of consent. In the case of *violence physique*, however, a question was raised in French doctrine whether that kind of duress should give rise to an absolute nullity, since it is clear that in that kind of situation there is a total absence of the victim's consent rather than a consent that, though vitiated by duress, is still consent. The weight of opinion, however, favors equal treatment for *violence morale* and *violence physique*, that is, the resulting nullity should be

480. See A. Weill et F. Terré, *supra* note 2, at 218.

481. See Swiss Code of Obligations art. 29 (1905).

482. See *infra* p. 85.

483. See A. Weill et F. Terré, *supra* note 2, at 219.

484. *Id.*

relative regardless of the way in which duress is inflicted.⁴⁸⁵ That is also the Louisiana solution, as the pertinent rules make no distinction.⁴⁸⁶

Besides the manner in which it is effected, in order to be operative as a vice of consent duress must present two other features among its objective elements, namely, it must be such as to compel the victim to give his consent, and it must be unlawful or unjust.

The first of those features cannot be entirely isolated from subjective considerations, but, in an effort to set aside personality traits of the victim, it can be said that duress must be such as to cause a reasonable fear, which should be taken to mean that it must be such as to inspire fear in a reasonable person. Here modern law departs from Roman law, which recognized duress only when it inspired a *metus atrox*, or the kind of fear that would overcome even a person of great courage, in order to adopt the lesser standard of a fear that would overcome the will of a reasonable person, a standard that, in spite of a pretense of objectivity, must always be applied *in concreto*, that is, taking into account the particular circumstances of the given situation, which include the victim's personality.⁴⁸⁷ Be that as it may, when duress is exerted by means of a threat, the materialization of the threatened injury must appear as believable to a reasonable person. Thus, a threat of physical injury to be caused by battery is effective if made by a party of a size and strength sufficient to make of resulting injury a real possibility in the mind of the victim, or if made by a party with the known determination, or lack of scruple, necessary to engage the assistance of others to carry out the threatened intention. Such a threat would not be effective if made by a party whose personal traits were such as to defeat the seriousness of the announced intention. A threat of unjust legal action would be effective if made by a person who was sufficiently malicious or one who had the means at his disposal. It would not be effective if made by a party whose circumstances made the threat unbelievable or moot.

Duress must also be unlawful or unjust in order to be effective as a vice of consent.⁴⁸⁸ A threat to take lawful action is no doubt a manner of exerting constraint upon the will of the party to whom the threat is addressed, but such constraint is lawful if it results from the exercise of another party's right, or from another party's attempt to protect a legitimate interest. Such constraint is likewise lawful if exerted for the purpose of obtaining performance of the threatened party's obligation. Thus, in situations where a person's will is constrained as the result of

485. See *id.*

486. See La. Civ. Code art. 2031. See also La. Civ. Code art. 1855 (1870).

487. See French Civil Code art. 1112 (1804). See also A. Weill et F. Terré, *supra* note 2, at 220-21.

488. See generally J. Ghestin, *supra* note 345, at 499-502.

the lawful act of another there is no duress as a vice of consent. In the classical approach, duress, like fraud, has quasi-delictual aspects that must be present for the law to intervene.⁴⁸⁹ In the absence of such aspects, as when a person threatens to do what he has a right to do, the other person thus threatened cannot avail himself of a vice of his consent.

Constraint of a party's will is, however, unlawful when it results from a threat to do an act that, though not *per se* unlawful, is unrelated to the transaction for which the consent is exacted. Thus if a threat of revealing a person's adultery is made for the purpose of obtaining that person's consent to a contract of suretyship, the consent thus obtained is vitiated by duress because there is no connection between the adultery the disclosure of which is threatened and the contract for which consent is exacted.⁴⁹⁰

In many situations, the party whose will is imposed upon incurs an obligation for which the inflicted duress is not the only cause. Thus, as the result of threats, a party may consent to sell his property for a very low price, in which case the obligation he incurs, though prompted by duress as a cause, also has another cause in the price he receives. In such a situation duress may be operative as a vice of consent if it meets the objective and subjective requirements. Duress is always unlawful, however, and therefore effective as a vice of consent when there is no other cause for the obligation imposed upon the victim, as when a person consents to pay a utility bill owed by a former tenant of the premises he occupies because of a threat to discontinue the service made by the utility company.⁴⁹¹

The threatened injury may be one to be suffered by the victim in his physical entity, such as bodily harm or deprivation of freedom, or may be one to be suffered by the victim in his patrimony, such as destruction of property by fire or vandalism or great financial loss resulting from the prevention of favorable business opportunities. The feared injury may also be one to be suffered by the victim in his reputation, as when threats are made to reveal events or situations of the victim's private life, or of the victim's past, and other instances of blackmail.⁴⁹²

489. Physical violence is always unlawful and quasi-delictual in nature, even if exerted to compel the victim to perform an obligation; see J. Ghestin, *supra* note 345, at 500.

490. See decision rendered by the *Cour de cassation* on April 6, 1903, reported in S. 1904.1.505.

491. See La. Civ. Code art. 1859 (1870). See also *New Orleans Gas, Light and Banking Co. v. Paulding*, 12 Rob. 378 (1845).

492. See J. Ghestin, *supra* note 345, at 493. See also G. Ripert, *supra* note 129, at 82-84.

Contemporary jurisprudence, in Louisiana and in France, occasionally regards economic dependence of one party on the other as an objective circumstance indicative of the dependent party's vulnerability to duress and, therefore, of his weak bargaining position to negotiate, modify, or dissolve a contract.⁴⁹³

Subjective Aspect

Whether the fear inspired by duress is reasonable is a question to be answered after taking into account the age, health, disposition and other personal circumstances of the victim.⁴⁹⁴ In other words, the reasonableness of the fear is strongly connected to the reasonableness of the person who experiences it. It seems clear that either a very young or a very old person will be more vulnerable to fear than a person of middle or mature age. A person whose health is undermined by illness may lack the strength necessary to stand up to a threat and may therefore yield to it without resistance. By the same token, a person of feeble mind, though neither a lunatic nor an interdict, is more impressionable, and therefore more prone to surrender to a threat, than a person of firm mind.⁴⁹⁵

It has been shown above that efforts have been made to arrive at an objective standard of reasonableness for the fear inspired by duress. Along those lines it has been asserted that the law expects from persons a certain degree of temerity in the face of threat or adversity.⁴⁹⁶ Nevertheless, where duress is concerned, modern law does not stop at objective standards but goes on to take into account purely subjective aspects of the victim's personality in order to annul obligations extorted from persons whose will is weakened by illness or advanced age, or from persons whose ignorance or intellectual limitations make them too vulnerable to threats.⁴⁹⁷ On the other hand, modern law likewise takes into account the knowledge and experience of the alleged victim of duress in order to refuse annulment of a contract when the fear inspired by an alleged threat could have been readily overcome on the basis of that knowledge or that experience.⁴⁹⁸

493. See *Standard Coffee Serv. Co. v. Babin*, 472 So. 2d 124 (La. App. 5th Cir. 1985). See also decision rendered by the court of the city of Paris on May 25, 1978, reported in *Gaz. Pal. of July 13, 1978*.

494. See *La, Civ. Code art. 1959*.

495. In this connection an example is *Nalty v. Nalty*, 222 La. 911, 64 So. 2d 216 (1953).

496. See *Carrier v. William Penn Broadcasting Co.*, 426 Pa. 427, 233 A.2d 519 (1967).

497. 6 M. Planiol et G. Ripert, *supra* note 27, at 232.

498. *Id.*

Interrelation of Objective and Subjective Aspects

In sum, to be grounds for annulment, the fear inspired by duress need not be such as to cause total loss of the victim's self-control. Nullity on grounds of duress may be declared even if the inspired fear is less ominous than that, as in some situations of self-defense. It suffices that the threatened evil be of such a nature as to compel acceptance of the demanded sacrifice in order to avoid it.⁴⁹⁹

That conclusion is always based on a close interrelation between the objective and subjective aspects of duress. When a party seeks the nullity of a contract on grounds of duress, a court will react, first, on the basis of a conviction that the degree of duress or the nature of threats which in law vitiates a party's consent must be weighed in reference to persons of ordinary composure and nerve and not in reference to imaginative alarmists.⁵⁰⁰ Second, however, the standard will be tempered if the claimant can show some personal circumstances that made him especially vulnerable to threats. That order may be inverted without altering the result. In the words of a Louisiana court, a proper interpretation of the pertinent rules must be necessarily focused on objective and subjective aspects, and "This can be done by first determining the subjective characteristics of the individual who claims he or she was forced by violence or threats into agreeing to a contract and then deciding whether other reasonable persons with the same subjective characteristics would have felt forced into signing the contract under the same type of threat or violence."⁵⁰¹

The Threatened Person

The threatened person need not be the party whose consent to a contract has been vitiated by duress. There is a ground for nullity because of duress even when the threatened injury is one to be suffered by the spouse, or by an ascendant or descendant of that party.⁵⁰² That is so because, as discussed above, the true vice of the consent is the resulting fear and not the duress itself, and fear of injury to a beloved person is as efficient to coerce the will as fear of injury to the person of the one who fears. In the case of a spouse, or a descendant or ascendant, the law presumes the existence of a strong affection.⁵⁰³ Those persons, however, are not the only ones whose injury may be feared so intensely

499. *Id.* at 233; see also *Union Pacific R.R. v. Public Serv. Comm.*, 248 U.S. 67, 39 S. Ct. 24 (1918).

500. See *Couder v. Oteri*, 34 La. Ann. 694, 697 (1882).

501. *Lewis v. Lewis*, 387 So. 2d 1206, 1210 (La. App. 1st Cir. 1980).

502. See La. Civ. Code art. 1960.

503. See *A. Weill et F. Terré*, *supra* note 2, at 221.

as to invalidate consent given upon a threat of causing them harm. According to French doctrine, a threat of injury to a person other than a spouse, ascendant or descendant, such as other relative or a close friend, may be grounds for nullity, but the party seeking rescission on such grounds cannot avail himself of a presumption and he will therefore have to prove that his consent was given for no other reason than to prevent injury to a person for whom he feels great affection.⁵⁰⁴

Louisiana law takes a different approach. Thus, if the threatened injury is directed against a person other than a spouse or a descendant or ascendant, the granting of relief is left to the discretion of the court, which means that, according to the nature of the relation shown and the circumstances of a particular case, the court may favor a claimant with a presumption that his consent was coerced by the threat, or may expect that the claimant prove that his consent was given for no other reason than to prevent injury to a person to whom he is bound by a relationship productive of strong affection.⁵⁰⁵

It is noteworthy that whenever the fear instilled by threat is one of injury to be suffered by a person other than the consenting party it is irrelevant whether the threat is initially communicated to that party or to the other person. That is so because the vitiating factor is fear, which can be efficiently provoked regardless of the identity of the addressee of the threats, so long as the consenting party knows of them.⁵⁰⁶

Duress by a Third Person

A party's consent may be vitiated even when the duress is exerted not by the other party to the contract but by a third person.⁵⁰⁷ A difference is thus established between duress and fraud, as the latter is effective as a vice of consent only when perpetrated by the other party to the contract.⁵⁰⁸ That difference is hard to justify when the focus is made on the victim's will since that will is equally thwarted in both instances, but is more readily justified when the focus is made on the social interest, as duress, by either physical or psychological means, is a more dangerous offense against societal order than fraud.⁵⁰⁹ It has also

504. 6 M. Planiol et G. Ripert, *supra* note 27, at 233. In the opinion of some French writers, however, there is no such presumption and the court should always determine whether a threat has influenced a party's consent even in those cases where the threat is directed against a spouse, descendant or ascendant, which are listed by the law as mere examples; see 2 G. Marty et P. Raynaud, *Droit civil—Les obligations* 132-33 (1962).

505. See La. Civ. Code art. 1960 and comment (c). See also La. Civ. Code art. 1852.

506. See La. Civ. Code art. 1960 comment (b); see also Giroux v. Vinet, 24 Cour Supérieure 1 (Quebec, 1903).

507. La. Civ. Code art. 1961.

508. See *supra* p. 69-70.

509. See A. Weill et F. Terré, *supra* note 2, at 224.

been said that the difference is justified because duress is more difficult to prove than fraud and, further, that it is more difficult for a party to protect himself against duress than it is to protect himself against fraud.⁵¹⁰ Those reasons do not seem to be very persuasive in modern times when, more often than not, duress is exerted through psychological means. Be that as it may, the rule governing duress by third persons gives effective protection to the victim, since only rarely will the other party, the one who benefits from the duress exerted by another, be unaware of such duress.⁵¹¹

Reverential Fear

Fear of a person in the ascending line, that is, a party's apprehension of incurring the displeasure of such a person if the party fails to make a certain contract—like its counterpart, that is, the willingness to please such a person by making a certain contract—is not operative as duress sufficient to invalidate a party's consent.⁵¹² That kind of fear is called reverential in order to allude to the feelings of respect, or perhaps intimidation, that may warrantedly inspire it. Such fear does not constitute duress by itself since any intimidation a child may feel out of love and respect for his father, mother or grandparent is certainly not unlawful, which clearly indicates the absence of a relevant feature of effective duress.⁵¹³ That is so whether a party attempts to avail himself of that kind of fear to seek annulment of a contract made with a person other than the feared one, in which case the alleged duress would be one exerted by a third person, or whether a party invokes that fear to seek the nullity of a contract made with the same person that intimidated him through reverential fear.

A different result obtains, however, if the revered person exerts actual physical or psychological duress upon the will of his descendant, in which case such duress is effective as a vice of consent.⁵¹⁴ That is why the rule that excludes reverential fear from the scope of duress refers only to reverential fear alone, unaccompanied by threats of physical violence. Nevertheless, the kind of relation that gives rise to reverential fear may very well be one of the subjective circumstances of the party imposed upon that must be taken into account in order to ascertain whether

510. 6 M. Planiol et G. Ripert, *supra* note 27, at 234.

511. *Id.*

512. See French Civil Code art. 1114 (1804) and La. Civ. Code art. 1854 (1870). See also *id.* at 222.

513. 6 M. Planiol et G. Ripert, *supra* note 27, at 238.

514. See A. Weill et F. Terré, *supra* note 2, at 222; see also decision rendered by the court of the city of Angers on March 19, 1956, reported in D. 1957.22 with a comment by Prevault.

duress has been effectively exerted, so that in a given situation a mild threat made by a person to a descendant whose disposition makes him especially vulnerable to the danger of harm may constitute duress although it would not be effective as such in the absence of that kind of relation between the threatening person and the intimidated one.⁵¹⁵

The Louisiana Civil Code is now silent on that matter because the general principles just discussed suffice to conclude that mere reverential fear, in the absence of actual duress, is not effective as a vice of consent.⁵¹⁶

Contract With a Third Person in Good Faith

The Louisiana Civil Code provides that a contract made with a third person to secure the means of preventing threatened injury may not be rescinded for duress if that third person was in good faith and not in collusion with the party exerting duress.⁵¹⁷ That rule, which has no equivalent in the Code Napoleon, can be traced to the opinion of classical French writers.⁵¹⁸

Although its fairness cannot be doubted, that rule may suggest some contradiction with the more general one under which a contract is null when the consent of one of the parties has been coerced by duress exerted by a third person.⁵¹⁹ That contradiction is only apparent, however, as can be readily understood if the situations contemplated in one and the other rule are clearly distinguished. If A exerts duress upon B for B to make a certain contract with C, that contract is null even if C does not know of the duress exerted by A. On the other hand, if A exerts duress upon B who, to prevent the threatened injury makes a contract with C, that contract is valid if C is in good faith. In the first situation A wants B to make a contract with C, and that contract is the reason for the duress exerted by A. In the second, A does not intend that B make any particular contract with a third person, he merely demands something from B and does not care about the way in which B will secure the means to meet A's demand. Thus, if A exerts duress upon B for B to borrow money from C, the loan between B and C is null even if C is unaware of the duress exerted by A, but if A kidnaps B's child for ransom and B has no alternative but to borrow money from C to pay the ransom, the contract between B and C is valid.⁵²⁰ In the first situation

515. See French Civil Code art. 1114 (1804) and La. Civ. Code art. 1854 (1870). See also *supra* p. 84-85.

516. See *infra* p. 106.

517. La. Civ. Code art. 1963.

518. See 2 *Oeuvres de Pothier*, *supra* note 28, at 17; 3 C. Toullier, *supra* note 108, at 345.

519. See *supra* p. 87.

520. See La. Civ. Code art. 1858 (1870).

the contract is the direct result of A's unlawful design. In the second it is not, as A does not care whether B has any liquid assets of his own, or whether he has to sell property to obtain the ransom money or whether he has to borrow the needed amount. In the first situation, contracting with C is the only alternative left to B. In the second, contracting with C is an alternative chosen by B.

A different result will obtain, of course, if the third person is in collusion with the party exerting duress.⁵²¹ The contract is null in such a case either because the third person is in the same position as if he had exerted the duress himself, or because he is actually perpetrating fraud on the victim of the duress, or because he will not be allowed to benefit from his own wrong, or a combination of those equally valid reasons.

The Louisiana Civil Code also requires good faith of the third person not exerting duress.⁵²² Quite obviously, collusion between that person and the one who actually inflicts duress on the other party would destroy that good faith, as it constitutes bad faith to say the least. On the other hand, the third person's mere knowledge that the party with whom he is making a contract is under duress does not destroy his good faith if he is not involved in the cause of the duress or with the party exerting it.⁵²³

Nevertheless, the third person, though innocent of the duress, might take advantage of the dire circumstances of the other party and demand that the contract be made in terms excessively onerous for the victim of the duress. In the opinion of Pothier, that kind of situation gave rise to a kind of lesion that allowed the court to reduce the performance owed by the victim of duress.⁵²⁴ In modern law a solution to that problem calls for a more flexible approach to duress.⁵²⁵

EXERCISE OF A RIGHT

No Duress as a General Principle

As a matter of general principle, a threat of doing a lawful act or a threat of exercising a right does not constitute duress.⁵²⁶ That conclusion

521. La. Civ. Code art. 1963.

522. Id.

523. Cf. La. Civ. Code art. 523.

524. 2 Oeuvres de Pothier, supra note 28, at 17.

525. See infra p. 95. See also Legrand, supra note 252, at 985-87. Also R. Demogue, De la violence comme vice du consentement, 13 Revue trimestrielle de droit civil français 435, 466 (1914).

526. La. Civ. Code art. 1962.

results from an even more general principle according to which the normal exercise of a right or the performance of an obligation may not be regarded as an unlawful act.⁵²⁷

The simplest, and perhaps clearest, example is a threat by a creditor to file suit against his debtor if the latter persists in not paying his debt. If the debtor yields to such threat and pays the debt, it is possible to say that his will has been coerced because his intention was not to pay and he changed that intention only to avoid the inconvenience of a lawsuit. That may be so, but the fact is that the threatening creditor only demands that which the debtor is bound to do. Therefore, by virtue of a presumption that a person should want to do what the law binds him to do, the creditor is not truly demanding that the debtor do anything against his own will. In this perspective, the creditor's threat lacks unlawfulness, and, thus, one of the objective features of the kind of duress which is operative as a ground for nullity is missing.⁵²⁸

Besides the simple example of payment of a debt upon threat of suit by the creditor, many others can be offered. Thus, a wife may not claim duress in order to annul a contract of suretyship that she made for the purpose of ensuring payment of her husband's debt after the creditor had threatened the husband with a lawsuit.⁵²⁹ By the same token, a seller may not seek rescission of the contract of sale alleging that he consented to sell because he needed the price money in order to pay a creditor who had threatened him with a lawsuit.⁵³⁰ Louisiana courts have concluded that a stockholder who agrees to sell his stock to a creditor of the corporation when the creditor threatens to seize and sell the corporate property may not claim duress in order to obtain nullity of the stock sale.⁵³¹ They have also concluded that a letter inviting a person to call at an attorney's office in order to settle a delicate matter and avoid the cost, publicity and annoyance of a lawsuit does not allow that person to invoke duress in order to annul a contract whereby the alluded delicate matter was settled, as such letter is only a threat to take lawful action.⁵³² It is noteworthy, in that context, that exerting some pressure on a party's will to cause him to turn a natural obligation into a civil one is not regarded as duress.⁵³³

527. Argentine Civil Code art. 1071 (1869). See also Digest, L.55: *Nollus videtur dolo facere, qui suo jure utitur*—No one shall be regarded as doing wrong for availing himself of his right.

528. See *supra* p. 83.

529. See decision of the *Cour de cassation* rendered on February 25, 1879, reported in D.P. 79.1.158.

530. See generally A. Weill et F. Terré, *supra* note 2, at 223.

531. *Patorno v. Vacaro*, 153 La. 364, 95 So. 864 (1923).

532. *Couder v. Oteri*, 34 La. Ann. 694 (1882).

533. See A. Weill et F. Terré, *supra* note 2, at 223. See also *Wortmann v. French*, 410 So. 2d 290 (La. App. 4th Cir.), writ denied, 412 So. 2d 1109 (1982).

On the other hand, if physical violence, rather than a threat of lawful action, is used in order to obtain performance of an obligation, there is duress that gives rise to quasi-delictual liability for the one exerting it.⁵³⁴

Mere Appearance of Lawfulness

On the other hand, a threat of doing an act that is lawful in appearance only may constitute duress.⁵³⁵ That is the case of a threat of unfounded litigation or a threat of pressing unfounded or dubious criminal charges. It is clear that in situations of that kind the threatened act is lawful in appearance only, as the party making the threat is not truly interested in the fair settlement of a dispute through the judicial process or in the preservation of order in the community through the investigation of criminal activity, but is only coercing the other party's will by presenting him with the choice of either doing that which the maker of the threat is asking for or facing the inconvenience, expense, publicity and other negative consequences of litigation or criminal prosecution. The natural purpose of the judicial mechanism is thwarted when a party declares his readiness to resort to that mechanism not in pursuit of justice, but only for the satisfaction of a selfish interest.⁵³⁶

In that context, Louisiana courts have had no hesitation in declaring the nullity of a guaranty obtained from the vice-president of a bank by means of a threat of unwarranted criminal prosecution.⁵³⁷ Likewise, Louisiana courts have decided that even a threat to quit work is unlawful when made by a contractor for the purpose of obtaining immediate payment of an arbitration award while an appeal of that award was pending.⁵³⁸

The quasi-delict of malicious prosecution, recognized by and well established in the Louisiana jurisprudence, can be of help in weighing the unlawfulness of a threat of doing an act that is lawful only in appearance, because a threat of prosecution that would be malicious if carried out would clearly constitute duress.⁵³⁹ The quasi-delict of false imprisonment is helpful, likewise, for the same purpose. Thus, Louisiana courts have declared the nullity of a release granted by a person while

534. J. Ghestin, *supra* note 345, at 500.

535. La. Civ. Code art. 1962.

536. See A. Weill et F. Terré, *supra* note 2, at 223.

537. *Bernstein v. Commercial Nat'l Bank*, 161 La. 38, 108 So. 117 (1926).

538. *Jung v. Gwin*, 174 La. 111, 139 So. 774 (1932), *aff'd*, 176 La. 962, 147 So. 47 (1933).

539. See *Miller v. East Baton Rouge Parish Sheriff's Dept.*, 511 So. 2d 446 (La. 1987). See also *Dean v. Nunez*, 534 So. 2d 1282 (La. App. 4th Cir. 1988), *rev'd*, 536 So. 2d 1203 (1989).

detained without probable cause, as that detention clearly constituted duress that vitiated that person's consent.⁵⁴⁰

When performance of an obligation, such as payment of a debt, is forced by means of acts lawful only in appearance, or even through acts that constitute the delict or crime of blackmail or extortion, though the act of performance is not annulled, the party exerting that kind of duress is liable for the mental anguish and the injury to the reputation of the victim. Louisiana courts have reached that conclusion also in the case of creditors who avail themselves of excessive means to obtain the collection of debts.⁵⁴¹

Abuse of Rights

In many instances, or perhaps in all, the actual unlawfulness of acts that are lawful only in appearance can be readily explained in light of the modern doctrine of abuse of rights.⁵⁴² It is the basic tenet of that doctrine that not all rights are absolute or discretionary, but many, or most, are subject to some reasonable limitations on their exercise, the first of which is the scope of the rights of others, so that the exercise of a right with total disregard for the rights of another constitutes an abuse of that right that the law cannot condone. Thus, the filing of an action for the sole purpose, and the malicious intention, of annoying the defendant is such an abuse.⁵⁴³ Likewise, a threat of bringing a lawsuit made for the purpose of obtaining an advantage in excess of the right of the threatening party is a clear abuse of that right.⁵⁴⁴ The same conclusion prevails when the threat of filing an action is made for the purpose of obtaining an advantage entirely unconnected to the grounds of the threatened action, as when a threat is made to a wife of instigating a suit for divorce on grounds of adultery in order to obtain from her the settlement of a pecuniary claim of the threatening party.⁵⁴⁵

The doctrine of abuse of rights applies to acts of public entities also. Thus, a city council commits an abuse of rights when it refuses to grant a building permit unless the applicant renounces his right to compensation for an expropriation of other property of his decreed by the city, and if such renunciation is made it may be annulled on grounds

540. See *Chelette v. Wal-Mart Stores, Inc.*, 535 So. 2d 558 (La. App. 3d Cir. 1988), writ denied, 537 So. 2d 1170 (1989).

541. See *Quina v. Roberts*, 16 So. 2d 558 (Orl. App. 1944). See also *Tuyes v. Chambers*, 144 La. 723, 81 So. 265 (1919).

542. See *A. Weill et F. Terré*, *supra* note 2, at 224 and 713-21.

543. See *Mignon*, *Les instances actives et passives et la théorie de l'abus du droit*, D. 1949, Chron. 183.

544. See *J. Ghestin*, *supra* note 345, at 501.

545. Cf. decision rendered by the *Cour de cassation* on April 6, 1903, reported in S. 1904.1.505, with a comment by *Waquet*.

of *violence morale*.⁵⁴⁶ Likewise, the abuse of a right tantamount to duress is grounds for the annulment of a gratuitous transfer of immovable property exacted by a city council in return for the granting of a building permit indispensable for the business activities of the transferor.⁵⁴⁷

Although the doctrine of abuse of rights has not yet been given express legislative formulation in the Louisiana system, it lies at the root of several articles of the Louisiana Civil Code.⁵⁴⁸ It can also be said that the doctrine has already made some inroads in the Louisiana legal literature and jurisprudence.⁵⁴⁹ Reception of that doctrine in the context of vices of consent will be a step forward in the search for answers to difficult questions and will make an important contribution towards the elaboration of a more flexible approach to duress.⁵⁵⁰

DURESS AND DISTRESS

Consent and Adverse Circumstances

A question arises when a person faces circumstances that are so harsh that, in order to overcome them, he consents to a contract that imposes upon him an obligation which is excessively onerous either because he must promise to give too much or must resign himself to receive too little.⁵⁵¹ That is the kind of situation characterized in French law as *état de nécessité*, where the freedom of a party's consent is not restricted by duress consisting of a personal act of the other party, but results rather from circumstances that allow the other party to take an unfair advantage. The preferred example is the case of the captain of a shipwrecked vessel who has no alternative but to promise to pay an excessive sum for the salvaging services of another vessel.⁵⁵²

The question is whether a party's consent is vitiated in such a situation or, in other words, whether duress may result also from distressing circumstances and not only from acts of another person.

546. See decision by the *Cour de cassation* of November 9, 1971, reported in Bull. civ. III, p. 387, No. 541.

547. See decision rendered by the *Cour de cassation* on October 16, 1962, reported in Bull. civ. I, p. 363.

548. See La. Civ. Code arts. 667 and 1962.

549. See Cueto Rua, Abuse of Rights, 35 La. L. Rev. 965 (1975); Herman, Classical Social Theories and the Doctrine of "Abuse of Right," 37 La. L. Rev. 747 (1977); Morse v. J. Ray McDermott & Co., 344 So. 2d 1353 (La. 1976); Onorato v. Mestri, 173 La. 375, 137 So. 67 (1931).

550. See *infra* p. 95.

551. See J. Ghestin, *supra* note 345, at 495-96; A. Weill et F. Terré, *supra* note 2, at 225-28. See also R. Savatier, *L'état de nécessité et la responsabilité civile extra-contractuelle*, in *études de droit civil à la mémoire d'Henri Capitant* 729 (1939).

552. A. Weill et F. Terré, *supra* note 2, at 225.

The Classical Approach

Roman law did not allow the annulment of a contract when the consent of one of the parties had been given under the stress of difficult circumstances. That was so because duress, which gave rise to the criminal action of *metus causa*, constituted a delict that required an intentional element, and, since such an intention can be attributed only to a person, there was no duress unless it had been intentionally exerted by a person who could be prosecuted therefor.⁵⁵³

Pothier expressed a similar view, though he conceded that an obligation contracted by a party in distressing circumstances that gave rise to an extreme need could be reduced if found excessively onerous.⁵⁵⁴ Other classical writers asserted that a contract made by a party in distressing circumstances could be annulled on grounds of lack of capacity because circumstances of that kind have upon a person's mind the same effect as temporary derangement or insanity.⁵⁵⁵ Upon a declaration of nullity on such grounds, the other party who has already performed may be granted compensation equivalent to the value of the rendered performance, either on the basis of unjust enrichment or of the management of the affairs of another.⁵⁵⁶

It is generally believed that the language in the pertinent article of the Code Napoleon should lead to the conclusion that the French drafters contemplated only *violence* exerted by a person upon another as a vice of consent, and not the kind of duress that results from distressing circumstances.⁵⁵⁷

A Modern Approach—Judicial Reaction

In a modern approach the focus is made on the consent of the party victimized by duress and not on the origin of the duress. Thus, if that consent is not freely given the contract should be annulled regardless of whether duress has been exerted by the other party or has resulted from distressing circumstances.⁵⁵⁸ That solution, it is said, is more consistent with the one that prevails when duress is exerted by a third person.⁵⁵⁹ The classical approach—the one that recognizes duress as grounds for nullity only when it is exerted by a person upon another—makes an

553. P. Girard, *supra* note 12, at 417-20.

554. 2 Oeuvres de Pothier, *supra* note 28, at 17.

555. See 15 Laurent, *Principes de droit civil* 596 (2d ed. 1876); cf. *id.* But see 3 C. Toullier, *supra* note 108, at 345.

556. See 2 F. Murlon, *Répétitions écrites sur le deuxième examen du code Napoléon* 472 (4th ed. 1855). Cf. 24 C. Demolombe, *Cours de code Napoléon* 142 (1877).

557. See A. Weill et F. Terré, *supra* note 2, at 255.

558. 6 M. Planiol et G. Ripert, *supra* note 27, at 234-37.

559. A. Weill et F. Terré, *supra* note 2, at 226.

unwarranted difference between error and duress, it is further said, since error is effective as a ground for nullity regardless of whether it is induced by the act of another or not.⁵⁶⁰ The social consequences of upholding the validity of contracts made by persons in distressing circumstances would be negative, especially when account is taken of the fact that, more often than not, the other party is aware of such circumstances.⁵⁶¹

Some decisions by French courts have accepted that more flexible approach to duress. Thus, in a well-known case where the captain of a ship in danger of capsizing was forced by those distressing circumstances to submit to the excessive demands of the master of the rescuing tugboat, the court granted nullity of the contract and reduced considerably the compensation owed for the salvage.⁵⁶² In another case where in the face of imminent death a patient agreed to pay an excessive fee to a surgeon for an operation, the court decreed the nullity of the contract after the patient's death and allowed the surgeon to recover only a reasonable compensation for his services.⁵⁶³ Contracts precipitatedly made by members of persecuted minorities in order to preserve their freedom during the German occupation have been likewise annulled.⁵⁶⁴ There are also decisions to the contrary, however.⁵⁶⁵ In one case arising in a commercial context, the French court did not deny that a situation of economic duress may result from adverse circumstances, although nullity was refused for lack of conclusive evidence.⁵⁶⁶

In American common law the distressing effects of some economic circumstances have been recognized as tantamount to duress, and new expressions such as "duress of goods" and "economic compulsion" have been coined in order to designate situations where a party's consent is not free from coercion.⁵⁶⁷ In a manner consistent with that trend of

560. *Id.*

561. See L. Jossierand, *supra* note 35, at 105-10.

562. Decision rendered by the *Cour de cassation* on April 27, 1887, reported in D.P. 88.1.263, S. 87.1.372.

563. Decision rendered by the court of the city of Le Havre on Jan. 16, 1897, reported in 1898 Pand. fr. per. II 75. See Legrand, *supra* note 252, at 986-87.

564. Decision rendered by the court of the city of Saumur on June 5, 1947, reported in Gaz. Pal. 1947.2.59. See also decision rendered by the *Cour de cassation* on July 26, 1949, reported in Gaz. Pal. 1949.2.363.

565. See, for instance, decision rendered by the Trib. civ. Seine on Feb. 23, 1907, reported in 1910 D.P. II 53. For a full discussion see J. Ghestin, *supra* note 345, at 495-96.

566. See decision by the *Cour de cassation* of May 20, 1980, reported in Bull. civ. IV, No. 212, p. 170, reversing a decision of the Court of Appeal of the city of Paris rendered on Sept. 27, 1977, reported in D.S. Jur. 690. See also Legrand, *supra* note 252, at 987-88.

567. See *Austin Instrument, Inc. v. Loral Corp.*, 29 N.Y.2d 124, 272 N.E.2d 533 (N.Y.

thought, a threat made to a person who finds himself in such circumstances is unlawful if it leads to an exchange on unfair terms.⁵⁶⁸

Similarities and Differences—A Need for Distinctions

The kind of situation here discussed offers some similarity to, and therefore some possibility of confusion with, the case of a contract made with a third person in order to secure the means to prevent threatened injury, which was analyzed earlier.⁵⁶⁹ In the latter, however, it is assumed that duress through a threat of injury is exerted by a person, although not a party to the contract, while here the threat of injury is created by distressing circumstances not brought about by anyone in particular.

It has been shown that, when duress is exerted by a person, a contract made by the victim with a third person in order to secure the means to prevent threatened injury is valid, but only if the third person is in good faith and not in collusion with the person exerting duress.⁵⁷⁰ It has been shown also, through the judicial decisions examined above, that a contract made by a person in distressing circumstances may be annulled when the other party not only is aware of those circumstances but also takes an unfair advantage of the lack of alternatives of the person in distress by demanding an excessive compensation.⁵⁷¹ Such an unfairness is an outright violation of the principle of equity as defined in the Louisiana Civil Code.⁵⁷² In both of those situations, then, a distinction must be made between the good or bad faith of the party contracting with a person victimized either by duress exerted by another or by dire circumstances that leave him no alternative. Exacting an unfair advantage, when the party demanding it knows that the other has no alternative but to submit, constitutes the kind of bad faith that lies at the root of every abuse of right.⁵⁷³

In sum, the making of a contract to secure means with which to prevent threatened injury makes the two situations similar. The origin of the threatened injury makes a difference between them. Good or bad faith of the party who through the contract provides such means is the distinction needed to find the proper rule in each situation.

App. 1971); see also *King Enter. v. Manchester Water Works*, 122 N.H. 1011, 453 A.2d 1276 (1982); *McCubbin v. Buss*, 180 Neb. 624, 144 N.W. 2d 175 (1966). Also Dawson, *Economic Duress—An Essay in Perspective*, 45 Mich. L. Rev. 253, 282 (1947); Patterson, *Compulsory Contracts in the Crystal Ball*, 43 Colum. L. Rev. 731, 741 (1943).

568. See Restatement (Second) of Contracts § 176(2) (1981).

569. See *supra* p. 89.

570. *Id.*

571. See *supra* p. 96.

572. See La. Civ. Code art. 2055.

573. See *supra* p. 93.

The Basis for a Solution

Whenever a party takes an unfair advantage of distressing circumstances in which the other is immersed it is clear that the excessive obligation assumed by the latter is stricken at least by a partial, if not by a total, absence of cause.⁵⁷⁴ Indeed, it is because of such circumstances that the party in distress consents to obligate himself to give more than he would have obligated himself to give in a situation that allowed other alternatives. The consent of that party is, thus, not free. That absence of cause is the same that can be noticed in a more typical situation of physical or psychological duress exerted by a party upon the other. When properly understood, thus, absence of cause explains the similarity between *violence* and *état de nécessité*, between duress and distress resulting from dire circumstances, a similarity that justifies the governing of one and the other situation by the same rules.⁵⁷⁵

The Louisiana Jurisprudence

In a case where the victim of an accident sought the nullity of a transaction or compromise he made with an insurance company on grounds that he had found himself in dire economic circumstances at the time the contract was made, a Louisiana court expressed the view that the kind of duress that is grounds for nullity is the one that connotes an actor performing an exterior act which gives rise to the duress, rather than the entire set of objective circumstances causing the victim to act as he does.⁵⁷⁶ It must be said that the terms of the transaction or compromise did not seem to be very unfair in that case, however.⁵⁷⁷ Years later, in a case involving a business contract for consulting services, a Louisiana court found that contract null because one of the parties, though neither clearly nor directly threatened, had signed it under the pressure of circumstances.⁵⁷⁸ The economic dependence of one party on the other has been regarded as sufficient to explain the dependent party's fear to lose his employment if he refused to consent to an arbitration clause, which was therefore annulled.⁵⁷⁹ In yet another case, the court concluded that conflicting emotions caused by the strain of going through a critical period in a person's life do not constitute duress.⁵⁸⁰ In a

574. See 1 S. Litvinoff, *supra* note 1, at 425-26.

575. See A. Weill et F. Terré, *supra* note 2, at 225.

576. *Wilson v. Aetna Casualty and Sur. Co.*, 228 So. 2d 229, 232 (La. App. 3d Cir. 1969).

577. *Id.* at 231.

578. *Dunham v. Anderson-Dunham, Inc.*, 466 So. 2d 1317, 1322 (La. App. 1st Cir.), writ denied, 472 So. 2d 29 (1985).

579. *Standard Coffee Serv. Co. v. Babin*, 472 So. 2d 124 (La. App. 5th Cir. 1985).

580. *Adams v. Adams*, 503 So. 2d 1052, 1057 (La. App. 2d Cir. 1987).

dissenting opinion to another case, however, it was asserted that great anxiety and guilt feelings associated with the support of a child were circumstances sufficient to invalidate a mother's consent to the surrender of the child for adoption.⁵⁸¹ Such contrary views may well indicate that the Louisiana jurisprudence may be receptive to a more flexible approach to duress whenever the circumstances of a case are sufficiently strong to lead to the conclusion that fairness can be accomplished only through the reception of such an approach.⁵⁸²

Duress, Abuse of Circumstances, and Undue Influence

At common law, undue influence is the unfair persuasion of a party who is under the domination of the person exercising that persuasion or who, by virtue of the relation between them, is justified in assuming that the persuader will not act in a manner inconsistent with his, the persuaded party's, welfare.⁵⁸³ When a party's consent is induced by undue influence exerted by the other party, the contract is voidable by the victim.⁵⁸⁴

A difference between duress and undue influence is readily noticeable. Although both are exerted for the purpose of constraining a party's consent, duress is based on fear, while undue influence is based on either dominance or reliance.⁵⁸⁵ Nevertheless, even when based on reliance, as when the parties are involved in a relation of confidence, or even when the persuader takes advantage of the inexperience or need of the other party, undue influence results in an unfair advantage that the persuader obtains through an abuse of the circumstances in which the other party finds himself, which brings undue influence close to duress as understood in the flexible approach examined above and justifies a discussion of undue influence here.⁵⁸⁶

581. *F.D. v. Associated Catholic Charities of New Orleans, Inc.*, 480 So. 2d 380, 383 (La. App. 4th Cir. 1985), writ denied, 481 So. 2d 1353 (1986), cert. denied, 479 U.S. 870, 107 S. Ct. 237 (1986).

582. See, e.g., *Standard Coffee Serv. Co. v. Babin*, 472 So. 2d 124 (La. App. 5th Cir. 1985), where an employee, given the alternatives of signing a new contract with an arbitration clause or being fired, was found to be the victim of duress because he was faced with deprivation of his economic security. See also *Jung v. Gwin*, 174 La. 111, 139 So. 774 (1932), aff'd, 176 La. 962, 147 So. 47 (1933), concerning a threat to quit work unless payment was made of an arbitral award that was pending from appeal.

583. Restatement (Second) of Contracts § 177(1) (1981).

584. *Id.* at § 177(2) (1981).

585. See Comment, *Duress and Undue Influence—A Comparative Analysis*, 22 *Baylor L. Rev.* 572, 577 (1970).

586. See *supra* p. 95.

It is asserted that the civilian tradition does not recognize undue influence as a vice of consent.⁵⁸⁷ Indeed, the Louisiana Civil Code does not list undue influence among such vices and, where the law of successions is concerned, expressly bars the proof of suggestion or captation that might be alleged to attack the validity of a testament.⁵⁸⁸ In spite of that, occasional references to undue influence can be found in the Louisiana jurisprudence in cases where the nullity of a contract is declared either on grounds of the temporary incapacity of a party or on grounds of fraud perpetrated by the other.⁵⁸⁹

As a matter of fact, as grounds for nullity, lack of capacity and fraud are flexible enough to provide redress for the victims of abusive persuasion, thereby eliminating the need for another category of vice of consent such as undue influence. Indeed, as once stated, it is clear that the weak, the timid, the anxious and the submissive are precisely those who receive the greatest protection through the concept of undue influence at common law.⁵⁹⁰ Flexible rules on contractual incapacity suffice to furnish efficient protection to such persons in the Louisiana system as well.⁵⁹¹ On the other hand, as recognized by the Louisiana jurisprudence, a contract with a person of weak mind furnishes the most vehement presumption of fraud.⁵⁹² Finally, since age, health, disposition and other personal circumstances must be taken into account in order to ascertain whether a person has been the victim of duress, many situations where undue influence would be found at common law can be handled in Louisiana in light of the precepts governing duress.⁵⁹³ The same approach to *captation* as a vice of consent prevails in French law.⁵⁹⁴

587. See Holstein, *Vices of Consent in the Law of Contracts*, 13 Tul. L. Rev. 560, 573 (1939). See also Hartkamp, *Civil Code Revision in the Netherlands: A Survey of its System and Contents, and its Influence on Dutch Legal Practice*, 35 La. L. Rev. 1059, 1078-79 (1975).

588. La. Civ. Code art. 1492.

589. See *Nalty v. Nalty*, 222 La. 911, 64 So. 2d 216 (1953); *Chevalier v. Whately*, 12 La. Ann. 651 (1857). See also *Wilson v. Aetna Casualty and Sur. Co.*, 228 So. 2d 229 (La. App. 3d Cir. 1969).

590. See Dawson, *supra* note 567, at 265.

591. See La. Civ. Code arts. 422, 1918 and 1925.

592. See *Davenport v. F.B. Dubach Lumber Co.*, 112 La. 943, 36 So. 812 (1904).

593. See La. Civ. Code art. 1959. See also *supra* p. 85.

594. See Guyenot, *La suggestion et la captation en matière de libéralités dans leurs rapports avec la notion de dol*, 62 *Revue trimestrielle de droit civil* 199 (1964).

REMEDIES

Rescission

A party whose consent has been extorted by duress may obtain rescission of the contract.⁵⁹⁵ In that case rescission has the same effects already discussed in connection with fraud.⁵⁹⁶ The nullity that rescission entails is only relative as it is intended for the protection of the interest of private parties, and therefore prescribes in five years.⁵⁹⁷ In French law a distinction was attempted between duress exerted through physical violence and duress exerted through psychological violence such as a threat, in order to conclude that the former should give rise to absolute nullity, since in such a case it can be said that there is no consent of the victim at all, while the latter would give rise only to a relative nullity, since the victim gives consent in such a case though that consent is vitiated by the fear instilled by duress.⁵⁹⁸ That distinction is alien to the Louisiana law where, whatever its kind, duress gives rise to a relative nullity. It is noteworthy that the same conclusion currently prevails in French law also.⁵⁹⁹

There is no reason to prevent the victim of duress from seeking only damages if he prefers that the contract into which he was forced be preserved and is satisfied with the compensation for the injury his interest might have thereby suffered.⁶⁰⁰ In case of duress exerted by a third person, both parties to the contract, if both are innocent of the duress, should have the same choice.⁶⁰¹

When duress has been exerted to obtain the victim's consent to a juridical act other than a contract, such as the renunciation of a right for example, that act may be annulled at the victim's initiative.

Damages

The person whose consent has been vitiated is entitled to recover damages from the other party when the duress has been exerted by that party, or when that party knew of the duress though he did not exert it.⁶⁰² The victim of duress may recover damages together with the rescission of the contract, or damages without rescission if, as already explained, that is his choice.

595. La. Civ. Code art. 1964.

596. See supra p. 75.

597. La. Civ. Code arts. 2031 and 2132.

598. See A. Weill et F. Terré, supra note 2, at 228.

599. Id. at 219.

600. See J. Ghestin, supra note 345, at 492.

601. La. Civ. Code art. 1964.

602. Id.

When duress has been exerted by a third person not a party to the contract, both parties to that contract may recover damages from the third person. For that purpose both parties must be innocent of the duress. If one of them knew of the duress and attempted to benefit from it, his recovery of damages from the third person would be barred by the general principle that prevents a party from invoking his own wrongdoing.⁶⁰³

Also when duress is exerted by a third person the parties to the contract may recover damages from the third person even if they prefer not to seek rescission of the contract.⁶⁰⁴ If one of the parties is not innocent of the duress he may not recover damages from the third person for the reason already explained.

A party who knew that the other party's consent was extorted by duress exerted by a third person partakes of the latter's liability for damages to the victim of the duress.⁶⁰⁵

Attorney Fees

A party who exerts duress upon the other, or who knows that the other party's consent has been so extorted, and a third person who exerts duress upon a party to a contract are liable also for attorney fees.⁶⁰⁶ Since the antisocial overtones of duress are even worse than those of fraud, those who exert duress should be liable for attorney fees for reasons greater than in the case of fraud. That liability is expressly provided for in the Louisiana Civil Code, thereby complying with the general principle according to which attorney fees are recoverable only when the law or the contract so provides.⁶⁰⁷

It should be clear that the liability of a third person who exerts duress upon a party to a contract is of a quasi-delictual nature since that person, by hypothesis, makes no contract with the victim.⁶⁰⁸ In that context, the rule that makes that person liable for attorney fees is an exception to the more general one under which attorney fees are not recoverable in an action on quasi-delict.⁶⁰⁹

603. See La. Civ. Code art. 2033 comment (c).

604. La. Civ. Code art. 1964.

605. *Id.* That liability should be regarded as solidary when it involves both a third person and a party to a contract who knows of the duress; see La. Civ. Code arts. 1797 and 2324(A).

606. La. Civ. Code art. 1964.

607. See *Rhodes v. Collier*, 215 La. 754, 41 So. 2d 669 (1949); see also Comment, *Attorney's Fees as an Element of Damages: The General Rule and its Exceptions*, 20 La. L. Rev. 389 (1960).

608. See *J. Ghestin*, *supra* note 345, at 492.

609. See Comment, *Attorney's Fees as an Element of Damages in Louisiana*, 34 Tul. L. Rev. 146 (1959).

Duress and Quasi-Delict

As an act of man that causes damage to another, duress, besides being a vice of consent, is a quasi-delict that gives rise to the liability entailed by acts of that kind.⁶¹⁰ Thus, when duress is exerted not to force a party into a contract but to obtain an act of performance, such as payment of a debt, Louisiana courts have recognized that such duress gives rise to quasi-delictual liability.⁶¹¹ To that effect they have asserted that whether or not a debt is justly due, the law recognizes a debtor's right to be free from unreasonable coercion and allows him to recover general and special damages in tort for violations of that right.⁶¹² That conclusion has been reached in cases where the creditor's coercive means consisted either in reporting the failure to pay directly to the debtor's employer or in threatening the debtor with making such a report, thereby causing the debtor's reasonable fear of losing his job.⁶¹³ Some decisions have observed that coercion of that kind is compounded with outright invasion of the debtor's privacy and the intentional infliction of unreasonable emotional disturbance, actionable grounds of quasi-delictual liability which are not necessarily interdependent or exclusive of each other.⁶¹⁴

Where extortion—blackmail—is concerned, Louisiana courts have asserted that it is a criminal felony that entitles the victim to recover damages for mental anguish, because the illegal act has for its main object the bringing about of such a mental condition as will induce compliance with the unlawful demand, and the rule that says that extortion is a crime has been enacted for the specific purpose of protecting the mental equilibrium of everyone.⁶¹⁵

Also at common law there are cases that hold that duress is a tort in itself, though, generally, duress is used as a means to invalidate consent given to a tortfeasor.⁶¹⁶ It has been suggested that the development of the intentional infliction of emotional distress as an independent tort provides a remedy for some of the more extreme cases of duress.⁶¹⁷

A victim of duress who elects to sue on quasi-delict, or who enhances the quasi-delictual aspects of his action, may recover for the mental anguish, aggravation and other nonpecuniary damages caused by the

610. See La. Civ. Code art. 2315. See also A. Weill et F. Terré, *supra* note 2, at 228.

611. See *Booty v. American Fin. Corp. of Shreveport*, 224 So. 2d 512 (La. App. 2d Cir. 1969); *Passman v. Commercial Credit Plan of Hammond*, 220 So. 2d 758 (La. App. 1st Cir. 1969); *Pack v. Wise*, 155 So. 2d 909 (La. App. 3d Cir. 1963).

612. *Pack*, 155 So. 2d at 912.

613. Besides cases already cited, see also *Quina v. Roberts*, 16 So. 2d 558 (Orl. App. 1944).

614. *Pack*, 155 So. 2d at 913.

615. *Tuyes v. Chambers*, 144 La. 723, 81 So. 265, 268 (1919).

616. See W. Prosser, *Law of Torts* § 121 (5th ed. 1984).

617. *Id.*

duress.⁶¹⁸ When a third person has exerted the duress, the victim's action against that person is quasi-delictual in nature.

Judicial Discretion

In French law, in an action brought by the victim of duress the court in its discretion may declare the contract null only in part, that is, the court may reduce the excessive advantage the defendant obtained through an unlawful threat or other form of duress, and uphold the contract after having thus introduced a certain fairness, or equivalence, between the parties' performances.⁶¹⁹ For some writers that solution implies an extension of the remedy for lesion beyond the scope to which lesion is reduced in the Code Napoleon.⁶²⁰ For others, such a judicial diminution of a party's performance entails a veritable revision of the contract by the court.⁶²¹

In Louisiana, without denying that the same result could be reached in some cases, the approach would not be the same, and different possible situations must be considered. Thus, if neither party has yet performed, a contract tainted by duress should be annulled at the victim's initiative, as that is the best way of expressing disapproval of the defendant's antisocial behavior. If the party who exerted duress has already performed, but the victim has not yet done so, the contract should be annulled for the same reason, but here some further distinctions are called for. If the performance received by the victim is such that it can be returned it should be so returned to the party who exerted duress, since, by virtue of the nullity, the parties must be restored to the situation that existed before the contract was made.⁶²² If the performance received by the victim cannot be returned, as in the case of services rendered by the party who exerted duress, the nullity should not prevent a claim of that party, but only for a reasonable compensation commensurate with the benefit the victim received from the services. If both parties have performed, the victim should have a choice between seeking either nullity of the contract, plus damages, or just recovery of whatever damages he sustained because of the duress, but the court should grant nullity whenever the victim of duress asks for it. Through a grant of damages Louisiana courts may provide for the victim of duress the same protection

618. See *Tuyes*, 144 La. 723, 81 So. 265.

619. See decision rendered by the *Cour de cassation* on April 27, 1887, reported in D.P. 88.1.263, S. 87.1.372.

620. See 6 M. Planiol et G. Ripert, *supra* note 27, at 239-40; A. Weill et F. Terré, *supra* note 2, at 228. See also French Civil Code art. 1118 (1804) and La. Civ. Code art. 1965.

621. Legrand, *supra* note 252, at 984-89.

622. See La. Civ. Code art. 2033.

that French courts provide through the granting of partial nullity, but in a manner more consistent with the basic policy of depriving a party of whatever advantage he obtained through the exertion of duress.⁶²³

THE REVISION

Terminology

The revision enacted in 1984 substituted the word "duress" for the expression "violence or threats" utilized in earlier articles of the Louisiana Civil Code.⁶²⁴ Indeed, "duress" means an unlawful constraint exercised upon a person in order to force him to do some act that he otherwise would not have done, a constraint that may be exercised by depriving the person of his liberty, or by violence, beating or other actual injury, or by threats of imprisonment or great physical injury or death.⁶²⁵ In sum, "duress" is a word of art or technical word in the English language, which expresses exactly that which is meant by "violence or threats" in the earlier articles. For obvious reasons of linguistic usage, Louisiana courts have oftentimes preferred the word "duress" over "violence or threats," even when the earlier articles were in force.⁶²⁶ It should be added that, should a flexible approach to that vice of consent be taken, coined expressions such as "economic duress" or "duress of goods" would be hard to compound if words such as "violence" or "threats" had to be used.⁶²⁷

Nevertheless, the adoption of the word "duress" was not intended as a means to incorporate conclusions incompatible with the tradition of the Louisiana law, such as the difference made at common law between the effects of duress by physical means, which results in a void contract, and duress by psychological means, which results in a voidable contract, a difference rejected by contemporary civil law doctrine.⁶²⁸

Duress Directed Against Third Persons

A new article makes duress effective as a vice of consent not only when directed against a spouse, an ascendant, or a descendant of a party to a contract, but also when directed against others, such as a person toward whom a party may feel strong friendship or with whom a party

623. See *supra* p. 101-102.

624. See La. Civ. Code art. 1959 comment (b).

625. See Black's Law Dictionary (4th ed. 1968).

626. See, e.g., *Wilson v. Aetna Casualty and Sur. Co.*, 228 So. 2d 229 (La. App. 3d Cir. 1969).

627. See *supra* p. 96.

628. See Restatement (Second) of Contracts §§ 174, 175 (1981).

may have a close relationship either based on or productive of strong affection.⁶²⁹ In such a case the court is allowed the discretion necessary to find whether a particular relation between a party to a contract and a third person is of a nature such as to make that party vulnerable to duress exerted through the creation of a situation of danger to the third person.⁶³⁰ That solution, which is perfectly consistent with societal values, is recommended by French doctrine.⁶³¹

Damages and Attorney Fees

A new article allows the victim to recover damages and attorney fees either from the other party or from the third person who exerted the duress that invalidates the contract.⁶³² Where damages are concerned, that rule only gives legislative formulation to a solution that, even in the absence of such a formulation, could be readily reached by reasoning *a fortiori* from provisions on fraud contained in the Louisiana Civil Code of 1870.⁶³³ That solution, an earlier formulation of which can be traced to the Seventh Partida, has been strongly recommended in French doctrine.⁶³⁴ Where the recovery of attorney fees is concerned, the new provision is consistent with a legislative policy already reflected in other articles of the Louisiana Civil Code.⁶³⁵

Removal Without Change

An earlier article concerned with reverential fear has been eliminated without effecting a change in the law.⁶³⁶ As explained elsewhere, in the absence of an actual threat or other act, the mere intimidation that may result from the authority, legal or moral, of an ascendant is not unlawful and therefore does not constitute duress as a matter of general principle.⁶³⁷

Another earlier article that made of any threat, even of slight injury, effective as duress when the obligation assumed by a party had no other cause than such duress has been eliminated also, but, again, without effecting a change in the law since, as a matter of general principle, absence of cause suffices to invalidate such an obligation.⁶³⁸

629. La. Civ. Code art. 1960.

630. *Id.*

631. See A. Weill et F. Terré, *supra* note 2, at 221-22. See also 6 M. Planiol et G. Ripert, *supra* note 27, at 233. See also *supra* p. 96.

632. La. Civ. Code art. 1964.

633. See *supra* p. 81.

634. See La. Civ. Code art. 1964 comment (c).

635. See La. Civ. Code art. 1964 comment (b).

636. La. Civ. Code art. 1854 (1870).

637. See *supra* p. 88.

638. See S. Litvinoff, *supra* note 37, at 6.

It is also quite clear that an earlier article that explained that a contract induced by duress could be ratified by the victim is unnecessary since duress, like other vices of consent, gives rise to a nullity that is only relative.⁶³⁹ Elimination of that article simply avoids unnecessary repetition.

Language and Prospective Change

The language of the new articles, and the concise manner in which the rules are expressed, may permit a more flexible approach to duress under which distressing circumstances in which a party might be immersed may be regarded, perhaps, as effective to vitiate consent when the other party has abused such circumstances to obtain an excessive advantage.⁶⁴⁰

V. LESION

GENERAL PRINCIPLES

The Concept

Lesion is the injury sustained by a party who, at the time of contracting, agrees to receive in return a performance which is not equivalent to the one he has engaged to render, or, in other words, the injury a party sustains when there is a lack of balance between the reciprocal advantages stipulated in an onerous contract.⁶⁴¹ Thus, for example, there is lesion when a person agrees to sell his property for a vile price, and also when a person agrees to buy some property for an excessive price, or even when a laborer agrees to work for a compensation which is inferior to a normal salary.⁶⁴² For lesion to take place, however, that lack of balance or equivalence must be present at the time the contract is made, since it is at that time that the reciprocal performances must be evaluated for that purpose.⁶⁴³ For that reason there is no lesion when one of the agreed performances becomes even excessively more onerous, or even considerably less onerous, because of a circumstance, or an event, which is subsequent to the time of making of the contract.⁶⁴⁴ It is, of

639. La. Civ. Code art. 1855 (1870). See La. Civ. Code art. 2031.

640. See *supra* p. 95.

641. See 6 M. Planiol et G. Ripert, *supra* note 27, at 251; G. Ripert, *supra* note 129, at 92-97; A. Weill et F. Terré, *supra* note 2, at 229. See also Demontés, *Observations sur la théorie de la lésion dans les contrats*, in *études de droit civil à la mémoire d'Henri Capitant* 171 (1939).

642. A. Weill et F. Terré, *supra* note 2, at 229.

643. See La. Civ. Code art. 2590.

644. See A. Weill et F. Terré, *supra* note 2, at 229.

course, quite obvious that there is no room for lesion in gratuitous contracts.⁶⁴⁵

Contrasting Interests

In a way, the concept of lesion is a sort of arena for a much-debated confrontation between contractual freedom and contractual fairness. Consistency with freedom of contract seems to require that the law abstain from granting a remedy to a party aggrieved by a lesionary contract precisely because parties are free and therefore they can provide for the protection of their own interests as they see fit. Nothing is wrong, therefore, if a more powerful, or more competent, or better-informed party, in the negotiation of a contract, succeeds in imposing on the other obligations that are in flagrant disproportion with the value of the advantages the other can expect from the contract. Thus, the principle of freedom of contract seems to lead to the conclusion that the law should not concern itself with the equivalence of reciprocal performances. From a more practical and less philosophical vantage point it can be added that a contrary conclusion would create a serious challenge to the stability of transactions. If his consent has been free from error, fraud, or duress, a party aggrieved by a lesionary contract should not be entitled to claim any other remedy.⁶⁴⁶

The feeling of fairness, the sentiment of justice, however, revolts against the logic of drawing from the principle of contractual freedom consequences that are so rigorous. That feeling is attended by an imperative to protect by way of annulment, rescission, or reduction of his obligations, a party who, because of weakness, ignorance or need has agreed to give too much or has consented to receive an advantage which is entirely out of proportion with the value of the performance he must render in return. In times of economic crisis or significant political changes that problem becomes very serious.⁶⁴⁷

From Roman Law to the Civil Code

Originally Roman law did not provide a remedy for lesion, mainly because of the formal approach to contract formation that prevailed in that system.⁶⁴⁸ Only those persons below the legal age, which was then twenty-five years, were protected against their improvident transactions through *restitutio in integrum*. Under the Christian emperors, however, a remedy for lesion was granted to persons of legal age, especially to

645. See *McWilliams v. McWilliams*, 39 La. Ann. 924, 3 So. 62 (1887).

646. 6 M. Planiol et G. Ripert, *supra* note 27, at 252-54.

647. See A. Weill et F. Terré, *supra* note 2, at 230.

648. See I S. Litvinoff, *supra* note 1, at 357-58.

those who had sold immovable property for less than one half of its value. That kind of lesion, or *laesio enormis*, was recognized in order to protect small landowners who, during the late empire, overburdened with taxes and threatened by economic insecurity, were forced to sell their immovable property to neighboring owners of large land holdings or *potentiores*.⁶⁴⁹

The scope of the doctrine of lesion was considerably expanded during the Middle Ages under the influence of the Canon law, which opposed all kinds of usurious injustice in the making of contracts, not only where loans at interest were concerned, but also in regard to any transaction that gave an excessive advantage to one party at the other's expense. That expansion of lesion was deeply rooted in ideas expounded by the great theologians such as St. Thomas Aquinas who demanded a *justum contrapassum*, a fair and reasonable return, for every contractual performance.⁶⁵⁰

Those ideas that enhanced the morality of Christian philosophy were received by the French *ancien droit*, where they prevailed as general principles that made unnecessary the formulation of particular rules. A reaction started during the eighteenth century when, because of economic problems, litigation on grounds of lesion increased considerably, which not only overburdened the courts but led to the realization that the availability of a remedy for lesion seriously jeopardized the stability of transactions.⁶⁵¹ For that reason, rescission on grounds of lesion was eliminated by special public act, even for contracts involving immovable property, during the first years after the revolution.⁶⁵² It was later reinstated, however, and finally a remedy for lesion found its way into the French Civil Code through the influence of Napoleon himself.⁶⁵³

A Restrictive Approach

The version of lesion received by the Code Napoleon, from which it passed to the Louisiana Civil Code, is restricted in the number of transactions to which it applies, as to the object of such transactions, and as to the parties that may invoke it. Thus, where persons of legal age are concerned, the French Civil Code contemplates lesion only in the cases of sale and partition.⁶⁵⁴ The Louisiana Civil Code added to

649. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* 486 (2d ed. 1950); Sohm, *Institutes of Roman Law* 403 (3d ed. 1907).

650. See A. Weill et F. Terré, *supra* note 2, at 230-31.

651. *Id.*

652. Public Act of 14 Fructidor, Year III.

653. See 17 G. Baudry-Lacantinerie et Saignat, *Traité théorique et pratique de droit civil—De la vente et de l'échange* 598-600 (1900); 10 M. Planiol et G. Ripert, *Traité pratique de droit civil français—Vente* 254-57 (1932).

654. French Civil Code arts. 887 and 1674; La. Civ. Code arts. 1398 and 2589.

the regulation of the contract of exchange rules that are not present in the Code Napoleon.⁶⁵⁵ In both codes lesion is restricted to only one kind of contractual object, namely, immovable property, no doubt in the belief that the price of that kind of property is subject to less fluctuations than the price of movables, and also because of the persuasive authority of the adage *res mobilis res vilis*, which reflects a traditional, though perhaps unwarranted, bias concerning the unimportance of movable things.⁶⁵⁶ In both codes lesion may be invoked only by one party, namely, the transferor of rights, a restriction no doubt based on the belief that need may force a person to sell but may not force a person to buy property, which leads to the conclusion that a person who pays an excessive price for a thing he buys does so out of his free will, a belief that is not always confirmed by reality as when, for example, a person is in desperate need to secure an abode for his family.⁶⁵⁷

In sum, lesion may be invoked by the seller of a corporeal immovable when he has received a price which is less than one half the value of the property at the time of the sale, hence, lesion beyond moiety or *lesion outre moitié*.⁶⁵⁸

Rescission on grounds of lesion differs from rescission on grounds of error, fraud or duress. The latter results in a declaration of nullity, while in cases of the former the buyer has an option between returning the thing and recovering the price he paid, which is the effect of rescission, or paying a balance up to a fair purchase price.⁶⁵⁹ In the case of error, fraud and duress the pertinent action prescribes in five years, while the action for lesion prescribes in four.⁶⁶⁰

Not all civil codes have incorporated the notion of lesion. Those which have offer remarkable differences concerning the parties who may avail themselves of the remedy, the amount of the detriment that gives rise to the remedy and the kinds of contractual objects to which it applies.⁶⁶¹

655. La. Civ. Code arts. 2664-2666. Articles 2665 and 2666 have no equivalent in the Code Napoleon and have their origin in the *Projet du Gouvernement*; see 3 Louisiana Legal Archives Part II 1454-56 (1942). Article 1706 of the Code Napoleon excludes lesion from the contract of exchange; see 17 G. Baudry-Lacantinerie et Saignat, *supra* note 653, at 863-64.

656. French Civil Code art. 1674 (1804) and La. Civ. Code arts. 2589 and 2593. See also A. Weill et F. Terré, *supra* note 2, at 232.

657. French Civil Code art. 1683 (1804); La. Civ. Code art. 2589. See also A. Weill et F. Terré, *supra* note 2, at 232.

658. La. Civ. Code art. 2589. Cf. La. Civ. Code arts. 2665 and 2666. According to the formula of article 1674 of the Code Napoleon, the injury must exceed seven twelfths of the fair value, which means that a seller can claim lesion when he has sold an item for less than five twelfths of the fair value.

659. La. Civ. Code art. 2591.

660. La. Civ. Code arts. 2032 and 2595.

661. See 1 R. Demogue, *supra* note 7, at 684-95.

Lesion and Consent

Pothier expounded a conception of lesion as a vice of consent. For that eminent writer, the selling of a thing for less than one half of its value could only be the result of implied error or imposition, since parties to commutative contracts are supposed to receive in return an equivalent of what they give.⁶⁶² At first blush the idea is persuasive that only a defect, a vice, in the seller's consent can explain the making of such an unfair transaction. That persuasiveness is considerably attenuated, however, by a rule that allows a seller of immovable property to claim lesion even if at the moment of the sale he has declared that he knows the disproportion between the price and the value of the thing and that he is donating the surplus.⁶⁶³ Clearly, such a rule seems to allow an action for lesion even in the absence of an error on the part of the seller, although, according to one eminent authority, a declaration of that sort is unto itself an indicium of imposition or duress.⁶⁶⁴

It is therefore not surprising that, as with so many subjects at law, the nature of lesion has given rise to subjective and objective theories.⁶⁶⁵ For supporters of a subjective approach lesion is, in fact, a vice of consent, which would be the main reason why the Code Napoleon addresses it in the same section as and right after error, fraud and duress. That theory goes so far as to assert that the party who claims lesion must prove not only the disproportion between price and value according to the formula, but also the underlying error, or duress, or even fraud, an assertion that has been followed in some isolated French decisions.⁶⁶⁶ That conclusion is criticized because it makes lesion really unnecessary. Indeed, if error, or fraud, or duress can be shown, then a party has no need to claim lesion in order to obtain annulment of the contract that aggrieves him.⁶⁶⁷

For supporters of an objective approach, lesion, although still listed among the vices of consent, is actually an instrument of public policy that, within certain limitations, allows the judicial policing of certain contracts that, because of unfairness that can be objectively shown, are inconsistent with the welfare of the community and therefore contrary to the public order. Both theories were vigorously advocated in the course

662. 3 Oeuvres de Pothier, supra note 333, at 149-50.

663. French Civil Code art. 1674 (1804); La. Civ. Code art. 2589.

664. 3 Oeuvres de Pothier, supra note 333, at 149-50.

665. See 6 M. Planiol et G. Ripert, supra note 27, at 261-65; A. Weill et F. Terré, supra note 2, at 240-44.

666. See decision by the court of the city of Paris rendered on April 25, 1928, reported in Gaz. Pal. 1928.1.733.

667. A. Weill et F. Terré, supra note 2, at 241.

of the *travaux préparatoires*.⁶⁶⁸ Be that as it may, it is clear that the jurisprudence of France and Louisiana has always preferred to treat lesion in an objective fashion, which permits the court to set aside the kind of subjective inquiry called for when error, fraud or duress are invoked.⁶⁶⁹

It can be said, in sum, that, in spite of its place in the code, lesion differs from the three traditional categories of vices of consent and, insofar as the law of Louisiana is concerned, is more akin to an instrument of public policy, a detailed regulation of which now belongs to the law of sale, primarily, rather than to the general law of obligations.⁶⁷⁰

Lesion in the Twentieth Century, A Comparative View

Economic crisis, political problems and gradual recognition of the idea that fairness demands from courts a more active intervention in the contracts of private parties have promoted a departure from the restrictive approach to lesion that prevails in the Code Napoleon, giving rise to a wider approach that can be noticed in the legislation and the jurisprudence since the dawn of the twentieth century.⁶⁷¹ As an example, a French public act gives an action for rescission to the purchaser of seeds and plants for agricultural purposes who has paid an excessive price.⁶⁷² In allowing such an action to a buyer of movable things the French lawmaker has gone far beyond the *code civil*, which allows such an action only to the seller of immovable things. Also, French courts have shown flexibility in handling claims of parties to allegedly lesionary contracts, circumventing the limitations of the code in a respectful manner by resorting to the all-pervading idea of cause.⁶⁷³ It is quite clear, indeed, that whenever a party has made a contract that, since its inception, has not given him the advantage he is entitled to expect, the cause of the obligation he is contracting in return is at least partially absent.⁶⁷⁴ A glimmer of the same approach can be found in some Louisiana decisions.⁶⁷⁵

668. See 2 Recueil complet des discours prononcés lors de la discussion du code civil 576-77 (1841).

669. See Comment, Lesion Beyond Moiety in the Law of Sale, 14 Tul. L. Rev. 249 (1940). Some Louisiana decisions have declared that the "imposition" is technical, that is, not related to fraud but a direct result of the inadequacy of the price; see *Block v. Hirsch*, 145 La. 427, 82 So. 394 (1919); *Russell v. Sprigg*, 10 La. 421 (1836).

670. See La. Civ. Code art. 1965. Cf. La. Civ. Code arts. 1860-1882 (1870).

671. See A. Weill et F. Terré, *supra* note 2, at 233.

672. French Public Act of July 8, 1907, amended by public act of March 10, 1937.

673. For a full discussion see A. Weill et F. Terré, *supra* note 2, at 237-40.

674. Litvinoff, *supra* note 37, at 6-7 and 16-18.

675. See *Carter v. Sims*, 400 So. 2d 1162 (La. App. 1st Cir. 1981).

Modern civil codes of other countries have given to lesion a very wide scope. Thus, an article of the prestigious Swiss Code of Obligations provides that in case of manifest disproportion between the performances promised by the parties, the one thereby aggrieved may terminate the contract within one year from the time it was made whenever lesion has occurred because of abuse by one party of the inexperience, distressing circumstances, or ignorance of the other.⁶⁷⁶ Other codes have followed suit.⁶⁷⁷ The wider scope of lesion in the modern legal world is bringing that centuries-old notion very close to the contemporary idea of unconscionability.⁶⁷⁸

THE REVISION

Return to the Source

The revision of the law of obligations enacted in 1984 confines lesion to a single article that says that a contract may be annulled on grounds of lesion only in those cases provided by law.⁶⁷⁹ In that way, where lesion is concerned, the Louisiana Civil Code returns to the scheme of the Code Napoleon that had been followed in the Louisiana Digest of 1808.⁶⁸⁰

The extensive regulation of lesion that had been introduced into the subsection on vices of consent in the revision of 1825 has thus been eliminated, although for systematic and not for substantive reasons. The fact is that the first of those articles defined lesion in its widest scope, but following articles reduced that scope so as to deprive lesion of generality.⁶⁸¹ That being the case, the language that alluded to lesion as a vice that may affect all kinds of contract became unrealistic, and the articles that denied the accuracy of that allusion by restricting the applicability of lesion became redundant, as an equally detailed regulation of lesion is contained in the title that the Louisiana Civil Code devotes to the contract of sale.⁶⁸²

Minors

The revision of 1825 added to the regulation of lesion several articles concerning minors, to whom an action for simple, that is, unrestricted,

676. Swiss Code of Obligations art. 21 (1911).

677. See, e.g., Draft Quebec Civil Code art. 37 (1977).

678. See Hersbergen, *Unconscionability: The Approach of the Louisiana Civil Code*, 43 La. L. Rev. 1315, 1401-16 (1983). See also U.C.C. § 2-302 (1988).

679. La. Civ. Code art. 1965.

680. French Civil Code art. 1118 (1804) and Louisiana Digest of 1808 art. 18, at 262, 263.

681. See La. Civ. Code arts. 1860-1863 (1870).

682. La. Civ. Code arts. 2589-2600.

lesion was given, although with significant exceptions.⁶⁸³ Those articles duplicated others contained in the section of the same code devoted to the nullity or rescission of agreements.⁶⁸⁴ One of the added articles, however, clearly explained that minors need not claim lesion, as it suffices for them to invoke their lack of capacity.⁶⁸⁵ That being the true case, the articles on lesion concerning minors appeared as redundant and for that reason were eliminated in the latest revision. Nevertheless, one of those articles allowed minors to claim simple lesion even in those contracts in the making of which they had been duly represented and where all the required formalities had been complied with.⁶⁸⁶ Such a rule, which went beyond its French source, reflected a policy no longer valid and ran counter to the principles underlying the new regulation of the contractual capacity of minors.⁶⁸⁷ The elimination of that article marks the only change in the written law that, concerning minors and lesion, has been effected by the suppression of the pertinent articles, a change which is consistent with the approach to minority that prevails in contemporary society.

Lesion and Sale

Other articles on lesion introduced by the revision of 1825 merely duplicated rules also contained in the title devoted to sale in Book III of the Louisiana Civil Code.⁶⁸⁸ The elimination of those articles in the revision effected, thus, no change, although certain matters of systematic detail merit some comment.

One of the eliminated articles expressly stated that lesion was not available to the buyer.⁶⁸⁹ The elimination of that article in no way implies the adoption of a contrary rule, as the basic article states that lesion takes place in a sale of immovable property when the seller receives as a price less than one half of the value of the thing.⁶⁹⁰

Another of those articles expressed that lesion cannot be claimed if the value of the thing increases because of events subsequent to the sale.⁶⁹¹ The elimination of that article may not be taken to imply the adoption of a contrary rule, as it is quite clear that, for purposes of

683. See La. Civ. Code arts. 1864-1869, 1872-1875 (1870).

684. See La. Civ. Code arts. 2222-2228 (1870).

685. La. Civ. Code art. 1866 (1870).

686. La. Civ. Code art. 1867 (1870).

687. See La. Civ. Code arts. 1922 and 1924. See also La. Civ. Code art. 1924 comment (b) and La. Civ. Code art. 1965 comment (c). See also French Civil Code art. 1305 (1804).

688. La. Civ. Code arts. 2589-2600.

689. See La. Civ. Code art. 1861(2) (1870).

690. See La. Civ. Code art. 2589.

691. La. Civ. Code art. 1871 (1870).

lesion, the value of the property must be determined as of the time of the sale.⁶⁹²

Another article stated that the length of time allowed the buyer for payment of the price had to be taken into account in order to determine the proportionality of that price to the value of the property at the time of the sale, through adding to that price interest for the period by which the time allowed exceeded the usual term for such a transaction, or subtracting interest for the period in which the time allowed fell short of the usual term.⁶⁹³ The elimination of that article effects no change, as such calculations are part of the technicalities of appraising the property and determining the proportionality of the price, in the unusual situation that article contemplated.⁶⁹⁴

Another of those articles stated that the court should make compensation of the respective claims of the parties in order to determine the balance to be paid, and by which party it should be paid.⁶⁹⁵ That is a procedural matter that does not belong in the substantive law.⁶⁹⁶ Elimination of that article has effected no change.

Still another of those articles prescribed that, in case of rescission for lesion, the buyer was liable for deteriorations that the thing might have suffered because of his neglect or fault.⁶⁹⁷ That article contradicted another found in the title on sale according to which the buyer is not liable for such deteriorations that might have occurred, even through his fault, before a demand for lesion was instituted.⁶⁹⁸ The elimination of the former does away with the contradiction and enhances the clarity of the latter.

Conclusion

It can be said that the revision of the law of obligations enacted in 1984 has not changed the Louisiana law of lesion in any significant manner.

692. La. Civ. Code art. 2590.

693. La. Civ. Code art. 1870 (1870).

694. That article was first considered by a Louisiana court shortly before enactment of the 1985 revision and only in a tangential way; see *Guerin v. Guerin*, 449 So. 2d 1053 (La. App. 1st Cir. 1984).

695. La. Civ. Code art. 1880 (1870).

696. See La. Code Civ. P. arts. 1062 and 1841.

697. La. Civ. Code art. 1879 (1870).

698. See La. Civ. Code art. 2597.

