

Cause v. consideration
detrimental reliance v. unjust enrichment
estoppel in pais & equitable
estoppel v. promissory estoppel

Adcock REPORT, NOTE

DETRIMENTAL RELIANCE

As the Louisiana jurist/lawyer reads the new obligations articles in his Civil Code,¹ one article certain to attract his attention is article 1967. This article, which defines the civilian concept of "cause," also presents the common law notion of "detrimental reliance."² The new article states:

Art. 1967. Cause defined; detrimental reliance

Cause is the reason why a party obligates himself. A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

This comment will examine the origins of detrimental reliance and some of the implications of the principle's insertion into the theory of cause. Secondly, the impact new article 1967 will have on the Louisiana jurisprudence will be considered. Finally, this paper will demonstrate that the repeal of the last sentence of article 1967 is desirable and possibly the only way to allow detrimental reliance to have a full positive impact on the Louisiana jurisprudence.

Sources of Detrimental Reliance

The theory of detrimental reliance is embodied in the doctrine of promissory estoppel.³ Promissory estoppel was invented by the common law courts to cure one of the shortcomings of their rigid doctrine of "consideration."⁴ All systems of law demand that "something else" be

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1. Articles 1756-2291 of the Louisiana Civil Code of 1870 [hereinafter cited as OA (old articles)] were abrogated and replaced by new articles 1756-2057 [hereinafter cited as NA]; see 1984 La. Acts, No. 331, § 1.

2. Detrimental reliance apparently may also be regarded as a civil law notion. 1 S. Litvinoff, *Obligations* § 88, at 135 n.32, in 6 *Louisiana Civil Law Treatise* (1969).

3. The most authoritative statement of this doctrine is contained in the Restatement (Second) of Contracts § 90(1) (1979):

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. (1)

4. Although detrimental reliance may have its roots in the Civil Law, "promissory estoppel" is strictly a common law doctrine.

present in order to make any promise legally binding. At common law, that "something else" is something bargained for and given in exchange for the promise, *i.e.* "consideration."⁵ Many times, however, promises are made which induce the promisee to take some action in reliance upon the promise causing him to suffer a detriment, but the detriment suffered cannot be regarded as bargained-for consideration. In these situations, justice may only be achieved if the promisor is estopped to deny the binding force of his promise.

Promissory estoppel is the doctrine the Louisiana State Law Institute asked the reporter to the revision of the Louisiana Civil Code on Obligations to incorporate into the Civil Code.⁶ But the essence of this doctrine is not present in the revised code.⁷ Promissory estoppel is usually applied at common law to promises which would be considered purely gratuitous at civil law. Although not all gratuitous promises require formalities,⁸ the majority of them are considered donations⁹ which require a notarial act executed before two witnesses to be valid.¹⁰ If the formalities are complied with, there is no need to prove detrimental reliance because the notarial act provides the necessary "something else." But the last sentence of article 1967 clearly states that detrimental reliance cannot be used to make purely gratuitous promises enforceable if the required formalities are not met. Thus, the new Louisiana version of "promissory estoppel" is very different from its common law counterpart. The last sentence of article 1967 precludes the use of the article to solve the problems the common law doctrine of promissory estoppel was devised to handle.¹¹

In 1952, the Louisiana Supreme Court expressly stated that prom-

5. "Technically, consideration is defined as some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." 17 Am. Jur. 2d Contracts § 85 (1964).

6. Obligations Revision—Cause, Meeting of the Advisory Committee, Reporter's Note (Apr. 20, 1979) (on file with Louisiana State Law Institute, Paul M. Hebert Law Center, Baton Rouge, Louisiana). The reporter and chief drafter of the revision was Professor Saul Litvinoff.

7. Professor Litvinoff's original draft *did* capture the essence of promissory estoppel. The changes which removed this effect were made at the request of other Law Institute members. See *infra* text accompanying notes 69-71.

8. Our Civil Code provides a few gratuitous contracts which do not require formalities: the loan for use (La. Civ. Code art. 2894), the deposit (La. Civ. Code art. 2991), and the non-remunerative suretyship (La. Civ. Code art. 3035). It should also be noted that a gratuitous promise to do something which does not deplete the promisor's patrimony should not be considered a donation and therefore should be enforceable without formalities.

9. Smith, A Refresher Course in Cause, 12 La. L. Rev. 2, 15-16 (1951).

10. La. Civ. Code art. 1536.

11. The effects of this last sentence will be dealt with more extensively later in this Note.

issory estoppel was an unknown theory to Louisiana law. In *Ducote v. Oden*,¹² the plaintiff had sued for the alleged breach of a contract to remove overburden from the defendant's gravel pit. The plaintiff contended that the contract had a stipulated term of three years, but that the defendant had terminated it after seven months. The plaintiff further alleged that he had spent large sums of money on new equipment in reliance upon the defendant's promise to continue their contract for three years, thus entitling him to recovery under promissory estoppel. The court ruled that the plaintiff had failed to establish any sort of promise concerning a term for the contract. This holding should have disposed of the case regardless of the plaintiff's attempted theory of recovery. However, the court went on to reject "promissory estoppel" on a doctrinaire basis without pointing out that Louisiana uses a rough equivalent to this theory, equitable estoppel.¹³ Thus comment "d" to new article 1967 states that *Ducote v. Oden* is overruled by the new article. This is true to the extent that the statement in *Ducote* concerning "promissory estoppel" has been overruled, but the result in *Ducote* would be the same under the new law because no promise was established by the plaintiff.¹⁴

Although the immediate source of Louisiana's detrimental reliance is obviously promissory estoppel, there are at least two civil law theories which express the same basic idea. It has even been argued that the common law derived promissory estoppel from one of these theories.¹⁵ Thus, new article 1967 may have its deepest roots in the civil law.

The first of these civil law sources of detrimental reliance is the Roman principle venire contra factum proprium non valet, which translates "no one is allowed to go against (the consequences of) his own acts." It has been stated that this Roman doctrine underlies many civil code articles, such as Louisiana Civil Code article 1791.¹⁶ Article 1791 has been repealed by the 1984 revision, but venire contra factum proprium non valet apparently underlies several of the new articles, including article 1967.¹⁷

The Louisiana courts have rarely recognized this rule explicitly. The court in *Sanders v. United Distributors*¹⁸ stated that it was unsuccessful

12. 221 La. 228, 59 So. 2d 130 (1952).

13. "Such a theory [promissory estoppel] is unknown to our law . . ." *Id.* at 234, 59 So. 2d at 132. The doctrine of equitable estoppel will be discussed later in this Note.

14. The implication that Louisiana now recognizes promissory estoppel must be qualified by the preceding explanation of the effect of the last sentence of NA 1967.

15. Obligations Revision—Cause, *supra* note 6.

16. 1 S. Litvinoff, *supra* note 2.

17. For other examples see NA 1924 and NA 1928.

18. 405 So. 2d 536 (La. App. 4th Cir. 1981).

in finding any express use of this doctrine in the Louisiana jurisprudence.¹⁹ In the recent case of *Hebert v. McGuire*,²⁰ however, Justice Reddman of the Louisiana Fourth Circuit Court of Appeal, who also wrote the *Sanders* opinion, recognized *venire contra factum proprium non valet* as a valid theory for enforcing a promise. In *Hebert* the plaintiff, a doctor, sued the defendant for an unpaid surgery bill. The defendant's defense was that the doctor's employee promised to file her medical insurance claim, failed to do so, and did not inform the defendant that her bill was overdue until it was too late for her to collect from the insurance company. The court held that the promise to file the insurance claim could have been part of the contract between the doctor and his patient because it was made before the operation took place. The court then stated that even if the promise had been gratuitous it would be enforceable under either estoppel or "the civil law doctrine against contravening one's own acts."²¹ Although the court did not base its decision on *venire contra factum proprium non valet*, by recognizing this doctrine, it did lay the groundwork for its possible future application.

The second civil law forerunner of Louisiana's detrimental reliance is the German doctrine *culpa in contrahendo*. This theory, which roughly translates "fault in contracting," is used to prevent a party from damaging another party in the process of contracting. Thus, *culpa in contrahendo* is similar to detrimental reliance, although possibly a bit broader.²² This theory has also been recognized as underlying several Louisiana Civil Code articles,²³ but has not been used in the Louisiana jurisprudence as a controlling basis of recovery. In *Coleman v. Bossier City*,²⁴ however, *culpa in contrahendo* was suggested for the first time as a possible source of quasi-contractual obligations under Louisiana law. The court expressly declined to base its decision on this theory, choosing the well-recognized theory of unjust enrichment instead as the controlling principle. Nevertheless, the fact that *Coleman* recognized *culpa in contrahendo* may lend credence to the assertion that detrimental reliance has been underlying Louisiana's civil law and is not purely a common law import.

Based on the few times *culpa in contrahendo* and *venire contra factum proprium non valet* have been cited in the Louisiana jurisprudence, one might argue that article 1967 has no basis in Louisiana's civil law tradition. However, detrimental reliance in article 1967 cannot be considered a sudden invasion of promissory estoppel into our law.

19. *Id.* at 537 n.2.

20. 447 So. 2d 64 (La. App. 4th Cir. 1984).

21. *Id.* at 65.

22. See generally H. Schwenk, *Culpa in Contrahendo* in German, French and Louisiana Law, 15 Tul. L. Rev. 87 (1940).

23. *Id.* at 88.

24. 305 So. 2d 444 (La. 1974).

Louisiana has applied the doctrine of equitable estoppel (or estoppel *in pais*) for well over one hundred years.²⁵ Equitable estoppel is similar to promissory estoppel, but is broader. This theory is "the effect of the voluntary conduct of a party whereby he is barred from asserting rights against another party who has justifiably relied on such conduct and who has changed his position to his detriment as a result of such reliance."²⁶ Equitable estoppel, although based upon equity and good faith, is not favored under Louisiana law and should only be applied in extraordinary cases since estoppel by definition denies a party the ability to assert a legal right.²⁷

Equitable estoppel has been applied to a wide variety of situations in Louisiana, some of which could fall under article 1967.²⁸ This doctrine has also been applied to many situations which might not fall under article 1967, most notably in cases involving silent acquiescence as opposed to a promise.²⁹ The fact that estoppel is a well-established doctrine in Louisiana should make the insertion of detrimental reliance into our Civil Code easier. The Louisiana attorney seeking guidance from the jurisprudence on a specific question involving detrimental reliance should find help in these cases. There are numerous estoppel cases which discuss issues such as whether reliance occurred, whether it was justified, and whether there was any detriment to the promisee.³⁰ However, one must bear in mind the differences between equitable estoppel and article 1967 as one searches this case law. While equitable estoppel should not be permitted to prevail when in absolute opposition to the positive written law,³¹ article 1967 is a positive written law. Our courts also cannot start

25. See *Marsh v. Smith*, 5 Rob. 518 (La. 1843); *Montague v. Weil & Bros.*, 30 La. Ann. 50 (1878).

26. *Duthu v. Allements' Roberson Mach. Works*, 393 So. 2d 184, 186 (La. App. 1st Cir. 1980).

27. See *Shirey v. Campbell*, 151 So. 2d 557 (La. App. 2d Cir. 1963); *Breaux v. Laird*, 230 La. 221, 88 So. 2d 33 (1956).

28. See, e.g., *Sanders v. United Distributions*, 405 So. 2d 536 (La. App. 4th Cir. 1981); *Southern Discount Co. v. Williams*, 226 So. 2d 60 (La. App. 4th Cir. 1969).

29. For a thorough treatment of the requirements for basing an estoppel plea on silence, see *Duthu v. Allements' Roberson Mach. Works*, 393 So. 2d 184 (La. App. 1st Cir. 1980).

30. For example, from *American Bank and Trust v. Trinity Universal Ins.*, 251 La. 445, 205 So. 2d 35 (1967), one may extract the "rule" that reliance upon a representation of law is not justified except in extraordinary situations; from *Whitehall Oil v. Boagni*, 255 La. 67, 229 So. 2d 702 (1969), one can deduce support for the contention that a party who receives money he is not entitled to may not claim that he has suffered any detriment when the court attempts to adjudicate it to its rightful owner, even if that party was originally induced to accept the money; and in *Best Elec. Supply v. Rittiner*, 334 So. 2d 792 (La. App. 4th Cir. 1976) one finds the principle that the party basing his claim upon detrimental reliance must prove that he has been induced to do something he would not have otherwise done in order to prove that he relied upon the promise.

31. *Port Fin. Co. v. Ber*, 45 So. 2d 404 (La. App. Or. 1950).

their analysis of detrimental reliance with a statement of its unfavored status as they do with estoppel. These differences could make many holdings from estoppel cases inapplicable to article 1967 cases.³²

Some commentators have suggested that Louisiana's equivalent to estoppel is the theory of "unjust enrichment."³³ The judiciary created this equitable remedy by expanding OA 1965.³⁴ Unjust enrichment is similar to detrimental reliance in that both are based upon fairness and good faith, but as their names suggest, they focus upon different matters—unfair enrichment and unfair impoverishment. Unjust enrichment requires a corresponding impoverishment, but detrimental reliance does not require a corresponding enrichment. Despite these differences, the two theories should complement each other. When one person is unjustly enriched at the expense of another, either theory might apply. If no promise induced the unfair shift of wealth, unjust enrichment is the only appropriate remedy. On the other hand, if the elements of detrimental reliance are all met, but the detriment suffered by the promisee has not accrued to the promisor, unjust enrichment will not apply. Thus, detrimental reliance may be regarded as an equitable rule designed to fill certain gaps in the civil law's ancient rule of equity—unjust enrichment. To this extent, unjust enrichment is a source of article 1967.

Cause

Because Louisiana's new theory of detrimental reliance is found in the Civil Code article defining the requirement of cause, these two concepts are obviously meant to be related. Therefore, a brief explanation of the theory of cause is necessary in order to provide the background for an analysis of detrimental reliance.

As previously stated, all systems of law require something in addition to a bare promise in order to create an enforceable obligation. In civil law systems, the theory of cause, as opposed to the common law's

32. The implications of these basic differences are difficult to state in any more specific terms. One should just be aware that if the holding in an estoppel case seems to have been affected by this "second-class" status of estoppel, perhaps it will not be very persuasive precedent for NA 1967 cases.

33. *Department of Culture, Recreation & Tourism v. Fort Macomb Dev. Corp.*, 385 So. 2d 1233 (La. App. 4th Cir. 1980); *Burk v. Livingston Parish School Bd.*, 190 La. 504, 182 So. 656 (1938). The most common and simplest enunciation of this rule is that "one cannot accept the benefits of an act and repudiate its obligations." *Department of Culture, Recreation & Tourism*, 385 So. 2d at 1237.

34. A strict reading of OA 1965 and the preceding articles would indicate that the rules of equity stated therein, including "that no one ought to enrich himself at the expense of another," are rules meant to supplement a valid contract where the contract is silent. But the jurisprudence has often applied unjust enrichment to situations involving invalid contracts and even no contract at all. Since the official comments to NA 2055 (which basically restates the rules of OA 1965) state that NA 2055 does not change the law, the courts should continue to apply unjust enrichment as a general rule of equity.

consideration, serves this function. Cause and consideration are analogous in that both theories provide the "clothing" that makes a promise a binding obligation,³⁵ but cause is a much broader theory. Whereas consideration is only present when something of value has been bargained for and received in exchange for the promise, a valid cause is present whenever the promisor had a legal motive or reason for making his promise.³⁶ At civil law, more promises are enforceable because the civil law states that promises should be enforceable just because they are promises.³⁷ Any expression of a will to be bound is enough to bind a person, as long as it is a true expression of the will.³⁸ Thus, the theory of cause serves as a method of protecting the contractual will because any promise made without a cause cannot be a true expression of an intent to be bound.³⁹ It is, of course, impossible to conceive of a situation in which someone makes a promise for no subjective reason at all. But cause is considered as non-existent when an objective element of the will is missing. In other words, when a person makes a promise because he thinks a certain thing or state of facts exists, which does not in fact exist, his promise has no cause and is not binding.⁴⁰

Another important function of cause is contract classification. When a person makes a promise because he expects something of value in return, the contract is onerous. These are the most common contracts and the only kind of contracts recognized at common law. But civilian onerous contracts encompass more, because the benefit received in return may be purely subjective whereas consideration contemplates something of economic value. When a promisor's motive for making a promise is purely a spirit of liberality, and he is to receive nothing tangible in return, the contract is gratuitous. There are a few exceptions,⁴¹ but most gratuitous promises are considered donations.⁴² Cause is also used to classify certain special onerous contracts. Most notably, the cause of transaction or compromise is the intent to avoid litigation.⁴³

Cause also serves as a tool for judicial control over contracts, to preserve the social order. A contract which would create an illegal or

35. See generally A. Corbin, *Corbin on Contracts: One Volume Edition* §§ 110, 111 (1952).

36. For an example of how Louisiana courts should enforce promises which lack consideration under the theory of cause, see *Matthews v. Williams*, 25 La. Ann. 585 (1873).

37. Smith, *supra* note 9, at 4.

38. This statement is of course subject to certain limitations such as the requirements of formalities in Civil Code article 1536.

39. This idea was well stated in OA 1824.

40. This idea, which was expressed in OA 1896 and OA 1897, is implicit in NA 1966 and 1967.

41. See *supra* note 8.

42. Smith, *supra* note 9, at 5.

43. La. Civ. Code art. 3071.

unjust solution if enforced is said to have an unlawful cause.⁴⁴ This function of cause illustrates the fact that although the theory of cause is based on one's subjective intentions, it must be applied to objective circumstances. In recognition of this fact, the drafters of the revision changed the definition of cause from the "motive" for contracting to the "reason" one binds himself.⁴⁵ Although this change should not affect the jurisprudence, it does bring the definition of cause more in line with the manner in which it is applied.

This brief discussion of the theory of cause does not purport to fully explain this complex theory.⁴⁶ This discussion provides the background for the problem at hand: how does the insertion of detrimental reliance into the article on cause affect the theory of obligations?

Obligations Theory—The Infusion of Detrimental Reliance

One could argue that detrimental reliance has no place in our law because the theory of cause encompasses every problem contemplated by detrimental reliance.⁴⁷ If a person makes a promise, a court may enforce that promise by finding some valid reason why the party obligated himself. Civilian courts need not focus on a bargained-for exchange as common law courts do. The flaw in this argument is that if the promisor is to receive nothing in return for his promise, the promise should usually be deemed a donation and thus subject to the requirements of form.⁴⁸ Thus, detrimental reliance would be useful to enforce *informal* gratuitous promises in Louisiana when justice so demands. However, the last sentence of article 1967 precludes its use for this purpose. Assuming that the drafters intended that detrimental reliance have some utility, a careful analysis of article 1967 and its placement in the Civil Code is necessary.

The first question presented is whether detrimental reliance is a new element of contracts or a different, separate source of obligations. Article 1967 does not reveal whether detrimental reliance is a new element of contracts, a substitute for cause, or a source of contractual obligations. The article only provides that a party may be obligated by a promise in certain situations. This suggests that detrimental reliance is a new source of obligations. On the other hand, article 1967 is found in the

44. This idea was implicit in OA 1895 and is explicit in NA 1968 which states: "[t]he cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy."

45. OA 1897; NA 1967.

46. For a thorough treatment of cause, see 1 S. Litvinoff, *supra* note 2, at §§ 196-399; and Smith, *supra* note 9.

47. See Comment, Promissory Estoppel and Louisiana, 31 La. L. Rev. 84 (1970).

48. Even if the promisor receives nothing tangible in return, the agreement should not be deemed a donation if the person's reason for making the promise was actually onerous.

Civil Code section on conventional obligations and defines an essential element of these Louisiana contracts—cause; this suggests that detrimental reliance is an element of contracts.

The question of whether detrimental reliance is a new element of contracts or a separate source of obligations is important in considering whether or not the other requirements for a valid contract must be present in order to enforce an obligation on the basis of detrimental reliance. If detrimental reliance is considered as merely a substitute for cause (and thus only an element of a contract), then the other elements of contracts—capacity, consent, and object—must all be present in order to enforce a promise on this basis. On the other hand, if article 1967 creates a new source of obligations, as its explicit terms suggest, these other elements need not be present.

The problem of whether detrimental reliance is an element of contracts or a new source of obligations is also important in considering which prescriptive period applies to actions based on detrimental reliance. A strong argument could be made that detrimental reliance is more correctly considered a tort theory than a contract theory. Whenever a party argues detrimental reliance, they do so because the promise lacked something essential to forming a "regular" contract. Detrimental reliance is simply not based upon one's intent to be bound (the basis of contract). The purpose of detrimental reliance is to prevent a party from harming another party by acting as if he is willing to obligate himself. Thus, the promise may be viewed as just another "act of man that causes damage to another,"⁴⁹ as opposed to a contract.

It is doubtful whether this issue could ever be resolved by a theoretical debate. The solution to this difficult issue, therefore, lies in a practical approach to article 1967. Detrimental reliance is an equitable rule inserted in our Civil Code which must be construed in conjunction with the rules of contracts.⁵⁰ In order to enforce a promise based on detrimental reliance, the courts need only find the requirements stated in article 1967. However, the other rules of contracts should be used to help interpret article 1967. For example, if the promisor lacks capacity, reliance on his promise may not be reasonable.⁵¹ If there has been no

49. La. Civ. Code art. 2315. It is interesting to note that the Louisiana Law Institute considered moving detrimental reliance from the obligations section of the code to the quasi-contracts or quasi-delicts section. The fact that they decided not to do so indicates that they contemplated detrimental reliance as being a sort of contractual remedy despite its uncontractual nature. Obligations Revision—Council Minutes at 7 (Sept. 21-22, 1979) (on file with Louisiana State Law Institute).

50. La. Civ. Code art. 17.

51. This would depend upon whether or not the promisee had any reason to believe that the promisor was incapacitated. Whether or not the incapacitated promisor could know (or should know) that his promise would induce action by the promisee is discussed *infra* note 76.

effective offer and acceptance, perhaps no promise has been made. In considering which prescriptive period to apply, detrimental reliance should be considered as an "other personal action,"⁵² since the legislature has expressed no desire to have it considered a tort or anything else (except possibly a contract), even though it does have tort characteristics. Therefore, the general ten-year period should apply, and our courts may never have to decide the most difficult issue about detrimental reliance: they may never have to decide exactly what it is.

While detrimental reliance does not harmonize well with the civilian theory of contracts, as stated above, its placement in the code indicates that it is designed to deal with contracts' problems. This is supported by the fact that article 1967 deals with "promises," which are usually the foundation of contracts. Therefore detrimental reliance must have been designed to deal with defective contracts, *i.e.* promises that lack an essential element of a contract. More specifically, it must have been included to deal with some of the problem areas of cause.⁵³ This conclusion finds much support in the new obligations articles. The best evidence supporting this conclusion is the placement of detrimental reliance in the same article as the definition of cause. More support for this proposition lies in the fact that the other necessary elements for the formation of a contract have their own built-in detrimental reliance mechanisms. For example, the new articles concerning the irrevocability of an offer⁵⁴ protect an offeree who may rely upon an offer before he formally accepts it. These rules recognize that when an offeror either explicitly or implicitly gives the offeree time to accept an offer, the offeree will often take action in reliance upon the offer before he formally accepts it.⁵⁵ Another example of a built in detrimental reliance mechanism is contained in NA 1924. Under this rule, a minor may not avoid a contract by declaring his incapacity when doing so would cause an injustice to a party who has reasonably relied upon the minor's representation of majority. Thus, when the requirements of consent or capacity are imperfect an obligation might be created even without article 1967 if a person could be harmed by relying upon some representation by the other party. It appears, therefore that the legislature must have intended that detrimental reliance be used to deal with some problems connected with the theory of cause (although other applications are possible and will be discussed later).

Despite the drafters' apparent intentions, the most troublesome areas

52. "Unless otherwise provided by legislation, a personal action is subject to a liberative prescription of ten years." La. Civ. Code art. 3499.

53. See *infra* note 56.

54. NA 1928-1934.

55. See generally Herman, *Detrimental Reliance in Louisiana Law: Past, Present and Future?—The Code Drafter's Perspective*, 58 Tul. L. Rev. 707, 734-40 (1984).

of the application of cause⁵⁶ will not be solved by Louisiana's detrimental reliance. In most of these problem areas, the court must decide whether a promise is gratuitous or onerous in order to determine whether or not to apply the strict rules of form associated with donations. Because the last sentence of article 1967 precludes the use of detrimental reliance as a basis for enforcing gratuitous promises when the rules of form are applicable, the courts will have to use the same analysis in these cases they have always used.

Charitable subscription cases are the most notorious for causing problems in the application of cause (or consideration at common law). In these cases, a party promises to pay a certain sum to a charitable institution, receiving nothing tangible in return. The courts recognize the social need for enforcing these promises even though they lack the necessary legal "clothing."⁵⁷ In the common law charitable subscription cases, the courts historically used faulty logic to impute consideration.⁵⁸ To dispense with this necessity, the doctrine of promissory estoppel has been used. In Louisiana, analysis of charitable subscription cases has been based on the characterization of the cause of the promise as either gratuitous or onerous. If the promise is considered purely gratuitous, it should be unenforceable unless a notarial act has been executed before two witnesses. As a result Louisiana courts have resorted to questionable reasoning in characterizing these gratuitous promises as onerous. Louisiana's version of detrimental reliance will not solve this problem, as promissory estoppel has done in the common law, as illustrated by an examination of the leading charitable subscription case in the Louisiana jurisprudence.

In *Louisiana College v. Keller*,⁵⁹ the defendant subscribed to contribute \$500.00 towards the establishment of a college at Jackson, Louisiana. The defendant later refused to pay, claiming a lack of consideration for his promise. The court held that the defendant's promise was supported by a valid cause whether it was "the advantage the defendant expected to derive from the establishment of a college at his own door, . . . or it may have been a *spirit of liberality* and a desire to be distinguished as the patron of letters."⁶⁰ The court also stated that "[i]n contracts of beneficence, the intention to confer a benefit is a sufficient consideration,"⁶¹ thus, the court ignored the fact that if the cause of

56. Some of these problem areas are identified, and the leading cases presented in S. Litvinoff, *The Law of Obligations in the Louisiana Jurisprudence: A Course Book* 108-62 (1979); Herman, *supra* note 55, deals with some of these areas also in the context of detrimental reliance.

57. See 1 S. Litvinoff, *supra* note 2, § 265, at 478 n.97 and cases cited therein.

58. But see *supra* note 8.

59. 10 La. 164 (1836).

60. *Id.* at 167 (emphasis added).

61. *Id.*

the promise was the intention to confer a benefit, an authentic act should have been necessary to make the promise binding.⁶² The court obviously felt uncomfortable with inventing the "advantage" of having a college nearby as the defendant's cause. It implicitly recognized that the defendant's principal motive was to confer a benefit. But the court should have relied exclusively upon this contrived motive in order to characterize the cause as onerous, making the promise enforceable without formalities. If the last sentence of article 1967 were repealed, detrimental reliance could be utilized to enforce a promise such as the defendant made in *Louisiana College*. The court could have ruled that the institution relied upon the defendant's promise by setting out to establish the college,⁶³ and the necessity of devising an onerous cause or ignoring the effects of a gratuitous cause would be alleviated. As article 1967 is now written, a court would first have to determine that the promise was not gratuitous and, thus, not subject to the rules of form before detrimental reliance could be applied. In this case detrimental reliance would not be needed because the promise would be enforceable as an onerous contract.

The Louisiana courts have also had problems in applying the theory of cause to "innominate contracts." These are agreements which lack the necessary elements to be classified as any one of the Civil Code's enumerated contracts. In most of these cases, one of the parties claims that since the agreement cannot be classified as any specific onerous contract (such as sale), it must be a donation. The court then struggles to classify the agreement as a nameless onerous contract in order to enforce it without requiring the formalities of a donation.⁶⁴ These cases could be resolved by applying detrimental reliance, without having to wrestle with the difficult question of onerosity or gratuity, if the last sentence of article 1967 were repealed.

There are other areas in which the application of cause has been troublesome. For example, promises to remunerate for past services, promises to pay the debt of another, and natural obligations have been especially problematic at times.⁶⁵ These situations are all similar to charitable subscriptions and innominate contracts in two ways: the court must decide whether to classify the informal promise as onerous or gratuitous and the last sentence of article 1967 precludes its application to these problems.

62. In *Baptist Hosp. v. Cappel*, 14 La. App. 626, 129 So. 425 (2d Cir. 1930) the court completely ignored the need to characterize the defendant's promise as onerous in order to make it enforceable.

63. The institutions almost always enter into contracts, expecting to pay for their obligations with the promised money.

64. See *Thielman v. Gahlman*, 119 La. 350, 44 So. 123 (1907); *Moore v. Sucher*, 234 La. 1068, 102 So. 2d 459 (1958).

65. See, e.g., *Barthe v. Succession of La Croix*, 29 La. Ann. 326 (1877); *Flood v. Thomas*, 5 Mart. (o.s.) 560 (1827).

Repeal The Last Sentence

The last sentence of article 1967 creates an illogical exception to the infusion of detrimental reliance into the theory of cause. Whether detrimental reliance is a substitute for cause, an exception to cause, or a separate source of obligations, it is apparent that its purpose is to deal with some of the problems of cause.⁶⁶ If an informal promise has an onerous cause, there will be no need to apply detrimental reliance.⁶⁷ If the court can find no cause, it may nevertheless enforce the promise if all of the elements of detrimental reliance are met. If the court finds a cause, but that cause is gratuitous, then the court cannot enforce the promise even if all of the elements of detrimental reliance are established.⁶⁸ Thus, certain promises that would be enforceable if they had no cause are unenforceable because they have a gratuitous cause.

It should be noted that the original draft of article 1967 did not contain this limitation on detrimental reliance.⁶⁹ At the urging of some of the members of the Law Institute in the September 1979 meeting the last sentence was added to read "[r]eliance on a promise made without required formalities is not reasonable."⁷⁰ It was not until February of 1983 that the word "gratuitous" was added. Thus, the motive for adopting the last sentence was only to make sure that the strict requirement of formalities was never derogated from in the case of donations.⁷¹

This author is aware that the authentic act required for donations occupies a place of special importance in Louisiana law. Its function is two-fold. By requiring a person to execute a written document before a notary and two witnesses in order to promise to give away his property, the law emphasizes the seriousness and the legally binding effects of his actions. This requirement also provides an effective means of proving such promises in a court of law. In effect, the requirement of form protects one's contractual will. At civil law, the will to donate is the basis of enforceability; consideration is not necessary. But the law is skeptical when one claims that someone has promised to give him something for nothing. Formalities provide proof that the party actually did make a promise and that he knew it was legally binding, *i.e.*, that he really intended to be bound.

But the basis of detrimental reliance is not the intent to be bound,

66. See *supra* note 56 and accompanying text.

67. As long as the other necessary elements of contracts are present, *i.e.*, capacity, consent, and object.

68. But see *supra* note 8.

69. *Obligations Revision—Cause*, *supra* note 6, at 2.

70. *Obligations Revision—Cause*, Meeting of the Louisiana State Law Institute Council, Reporter's Note, Article 2, (Feb. 18, 1983) (on file with Louisiana State Law Institute).

71. Minutes of the Meeting of Council, Louisiana State Law Institute, at 6, 7 (Feb. 18-19, 1983).

since detrimental reliance is not really contractual in nature. It is based on the idea that a person should not harm another person by making promises that he will not keep. The question is not whether the promisor really intended to perform what he promised, rather it is whether the promise was made in such a manner that the promisor knew or should have known that the promisee would rely upon it, and if so, whether the promisee has in fact reasonably relied upon the promise and been damaged thereby. When the promisee can prove all of these elements he has shown that the promisor has dealt him an injustice, and the court should be free to remedy the injustice suffered by the promisee.

The last sentence of article 1967 effectively creates an irrebuttable presumption that reliance on a gratuitous promise is unreasonable. However, one does not have to think very hard to imagine situations in which it would be reasonable. If a man promises to give money to a charity, is it unreasonable for them to make contracts in reliance upon this promise? If a rich uncle promises his favorite nephew that he will pay for his education and the attendant living expenses, is it unreasonable for the nephew to sign a six month lease at an apartment near the school? The number of similar possible situations is infinite.

Of course, many situations may arise in which reliance upon a gratuitous promise is not reasonable. The point is that this determination should be left to the courts to decide in each individual case. The courts are in the best position to determine what is fair and reasonable in individual cases, not the legislature. The courts must try to fashion the most equitable result in each case, but they may only use the tools supplied by the legislature to do so.⁷² Article 1967 may be a useful new tool for the courts, but the last sentence severely limits its utility. The legislature has supplied our courts with a shiny new knife to carve out equitable solutions, but left them with a dull blade.

One must have faith that our courts will continue to seek fair results even when they have limited tools with which to work. Our courts will continue to enforce charitable subscriptions even if they have to invent an onerous cause or ignore the requirements of form to do so. A Louisiana court might even find a way to make the rich uncle from the example above fulfill his promise.⁷³ But in order to do so, the court must often resort to reasoning that borders on the absurd. Repealing the last sentence of article 1967 would make it possible to enforce such promises and stay within the bounds of logic.

Detrimental Reliance—Its Future in the Louisiana Jurisprudence

Although Louisiana's detrimental reliance will not be useful in dealing with some of the problems for which it is most needed, there are

72. La. Civ. Code art. 18.

73. The court might conclude for example that the uncle had a natural obligation to pay for his nephew's education. See NA 1760-1762.

several areas in which it will be useful. The fact that detrimental reliance deals with promises indicates that its principal utility will be in handling defective contracts. These agreements are not legal contracts because one of the elements of contracts is missing—capacity, consent, cause, or object—or because they violate a law of public policy.

For example, detrimental reliance might be useful to enforce certain contractual obligations made by incompetents when justice so demands. The civil law has always protected minors and insane people from their own improvidence by allowing them to nullify their contracts.⁷⁴ It seems unfair, however, to allow this to occur when another party who had no reason to know of their incapacity has relied to his detriment upon the incompetent's promise. NA 1924⁷⁵ provides a solution to this problem when a minor represents himself as being of majority and the other contractant relies upon this misrepresentation. However, other such situations are not specifically provided for in the Civil Code. For example, imagine a situation in which an interdict or a person temporarily deprived of reason makes an agreement with another party who has no reason to know of the incapacity. The other party then spends great sums of money in reliance upon the incompetent's promise as the incompetent knew he would.⁷⁶ The other party might be able to recover under NA 1921 which provides:

Upon rescission of a contract on the ground of incapacity, each party or his legal representative shall restore to the other what he has received thereunder. When restoration is impossible or impracticable, the court may award compensation to the party to whom restoration cannot be made.

But if the other party's expenditures have not directly accrued to the promisor, then the other party cannot fully recover for his losses under this article. The court would have at least two theories under which it could enforce the incompetent's promise. It could apply articles 1967 and 1924 by analogy, concluding that the legislature must also have intended to protect a promisee who innocently relies upon an insane person's promise. The court could also conclude that article 1967 alone could be used to enforce the promise despite the promisor's capacity. In order to support such a holding, the court would have to conclude that detrimental reliance is not an element of a contract (because only competents can contract), but a separate source of obligations. Counter arguments could be made based upon the traditional protection interdicts

74. NA 1919 retains this principle.

75. NA 1924 provides that "when the other party reasonably relies on the minor's representation of majority, the contract may not be rescinded."

76. Of course, a legal incompetent may be incapable of knowing this at all. But it is quite possible that a person who is legally interdicted could actually know that his promise would induce reliance by the promisee. Cf. *Turner v. Bucher*, 308 So. 2d 270, 275 (La. 1975) (Citing Pothier, the court drew a distinction between the insane person and the person interdicted merely because of his lavishness.).

and minors have received as well as the context of detrimental reliance in the code, which indicates that detrimental reliance is not a separate source of obligations. Our courts should decide such a case based upon the most equitable result, considering all of the applicable Code articles and the particular facts of the case. Either decision, to enforce such a promise or not, now finds support in the Code.

Detrimental reliance might also be used to enforce promises made in connection with a contract that is imperfect because of some problem of consent. An offeree is protected by the new code articles on offer and acceptance from certain dangers.⁷⁷ An offeree is now free to consider an offer and take action in reliance upon that promise for a reasonable time without the possibility of the offeror revoking it prematurely. In addition, NA 1952 protects a party who relies upon a contract which is rescinded because of an error on the other party's behalf.⁷⁸ Article 1967 could be useful in enforcing certain promises which fall between these situations.

For example, detrimental reliance might be used to enforce certain offers which are revoked before formal acceptance. Most of these situations should be covered by the new articles on irrevocable offers. But many Louisiana courts, displaying our common law influences, may be reluctant to hold an offer as irrevocable unless consideration is given or the offeror explicitly states a time for acceptance. If the offeree can prove that he has been injured by his reasonable reliance upon the offer, even the most "common law" courts in Louisiana should enforce the promise, using the principle of detrimental reliance.

Another type of promise which may be enforced on the basis of detrimental reliance is a gratuitous promise to do something. A gratuitous promise to do something, which does not involve giving anything of value to the promisee, should not be considered a donation because a donation is the giving of a thing⁷⁹ which depletes the donor's patrimony.⁸⁰ Therefore, such a promise could be enforced under article 1967 despite that article's last sentence.

Detrimental reliance may also be a useful theory to enforce obligations under certain contracts which are voided for some reason of public policy. In *Coleman v. Bossier City*,⁸¹ the plaintiff, Mr. Coleman, was a real estate developer who developed a subdivision in Bossier City. Coleman made a contract with the city whereby he would construct water and sewage facilities in the subdivision, and the city would assume

77. See supra note 54.

78. NA 1952 allows a "reasonable compensation for the loss" incurred in such a situation.

79. La. Civ. Code Art. 1468.

80. Smith, supra note 9, at 5.

81. 305 So. 2d 444 (La. 1974).

operation of the facilities and reimburse Coleman for one-half of his expenses. After Coleman completed the work, he brought an action to enforce the contract. The contract was voided by the court because it violated prohibitory laws requiring the city to pass a resolution and take public bids before entering any contract for public works. The court nevertheless enforced the city's obligation to pay Coleman under a theory of unjust enrichment. It is unclear how the court came to the conclusion that the city was enriched to the extent of the value of one-half of the plaintiff's work, but the result was fair. Article 1967 could have produced the same result with better reasoning. The court could have simply ruled that the city was obligated by its promise to repay Coleman one-half of his expenses because Coleman reasonably relied on its promise to his detriment.

The courts must be very careful, however, in applying detrimental reliance to situations such as this. In *Coleman*, the court found it equitable to enforce the city's obligation because there was absolutely no evidence of bad faith or fraud in the making of the illegal contract.⁸² Likewise, detrimental reliance should only be applied in a manner as to redress any inequities between the parties, not to allow a party to profit from an illegal contract or his bad faith.

In sum, detrimental reliance should provide ~~the~~ Louisiana courts with another theory with which to enforce promises which fail to meet all of the regular requirements of contracts. The courts may now start their analysis of a promise from the question of the harm that it may have caused instead of what the promisor is getting for his promise or what his motive was for making it. This should be especially helpful when the court is confused or unable to determine what the cause or consideration for a promise was, but knows it was not motivated purely by a desire to give.⁸³ Much like unjust enrichment, detrimental reliance may be applied in almost any situation in which a contract is invalid or incomplete, but the court perceives a need to remedy an injustice. In addition, article 1967 allows the courts to tailor the amount of recovery as justice requires.⁸⁴ The court may only allow the obligee damages for the losses he has suffered or may also allow him the benefit of the bargain. Although our courts already enjoy much discretion in assessing damages,⁸⁵ this provision should further free them to seek the most equitable remedy in detrimental reliance cases.

82. Id. at 446.

83. As pointed out, the courts must decide whether or not to classify the promise as a donation before applying NA 1967. If there are no ties of kinship or any other indication that the promise was made gratuitously (purely out of a spirit of liberality), the promise should not be classified as a donation.

84. "Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise." NA 1967.

85. See NA 1999.

Conclusion

Article 1967, as written, will have a positive impact upon the Louisiana jurisprudence. It fills some gaps in our Civil Code with a rule which is inherently fair. It is difficult to see just where this principle fits into Louisiana's obligations theory, if it fits in at all. But it is hard to imagine a situation in which its practical application would be unfair.⁸⁶ Perhaps its most fruitful application will be in cases which fall between the civilian and common law concepts of contracts.⁸⁷ In this regard, detrimental reliance can be used by a common-law-oriented Louisiana court to enforce a promise which lacks consideration but could have been enforceable under the theory of cause.

This optimism concerning article 1967 must be tempered by the effect of its last sentence. This rule cannot be applied where the need for it is most obvious. Louisiana's law without this new rule, highlighted by the theory of cause, is very effective at enforcing promises; except when the promise is purely gratuitous. Our courts must often ignore or misapply the law in order to enforce gratuitous promises made without formalities when equity so demands.

Perhaps the best solution to this problem is to change the last sentence of article 1967 instead of repealing it completely. A new article 1967 could retain the presumption that reliance on a gratuitous promise made without the required formalities is not reasonable, but make the presumption rebuttable.⁸⁸ This would protect the requirement of formalities for donations by explicitly telling the courts not to enforce these promises unless it is clearly the only equitable decision. It would also put the determination of the reasonableness of the reliance upon a promise where it belongs in all cases, in the courtroom.

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86. Although it would seldom be unfair, certain applications of detrimental reliance would be unreasonable when that concept's use would upset the public order. See *supra* text accompanying note 82.

87. See *supra* note 83 and accompanying text.

88. These are some alternatives to the present form of the last sentence: "Reliance on a gratuitous promise made without the required formalities shall be presumed to be unreasonable." or: "Reliance on a gratuitous promise made without the required formalities is unreasonable unless clear and convincing evidence suggests otherwise."

A RIDDLE OF SOLIDARITY: THE RELEASE OF ONE SOLIDARY OBLIGOR

Act 331 of 1984, effective January 1, 1985, amended and reenacted Titles III and IV of Book III of the Louisiana Civil Code.¹ One area of the law affected by this revision concerns the riddle of solidarity embodied in OA 2100, 2101, and 2203.² When these articles were read in conjunction with one another, they generated great confusion in our courts.³

The confusion arose where a creditor, upon receiving the proportionate share of one solidary obligor, renounced the solidarity in this obligor's favor without expressly reserving the debt *in solido* against the remaining obligors. Similar difficulties arose where the creditor granted a partial remission of the debt in favor of one solidary obligor without reserving his claim against the remaining obligors. In most cases, the creditor's intention was to merely make a personal discharge as to one of the solidary obligors, not to discharge the debt in its entirety. Louisiana courts consistently held, however, that according to OA 2203, the release of one solidary obligor operated to release all solidary obligors in the absence of an express reservation by the creditor. This was based upon the legal presumption that the creditor who discharged one solidary obligor obviously sought to discharge the entire debt. As a result, the riddle was: how could the obligee renounce solidarity in favor of one solidary obligor and accept his partial performance, in accordance with OA 2100 and 2101, without losing his right of action against the remaining solidary codebtors for the balance of the debt?⁴

This confusion stems from the wording and substance of the old articles.⁵ OA 2100 and 2101 made no mention of the necessity of a reservation where the creditor renounced solidarity and released one of

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1. Articles 1756-2291 of the Louisiana Civil Code of 1870 [hereinafter cited as OA (old articles)] were repealed and replaced by new articles 1756-2057 [hereinafter cited as NA]; see 1984 La. Acts, No. 331, § 1.

2. Solidarity exists in solidary obligations, also called obligations *in solido*. See NA 1794 which restates the rule of OA 2091: "An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee." See also 1 S. Litvinoff, *Obligations* § 21, at 41, in 6 Louisiana Civil Law Treatise (1969).

3. The text of these articles is set out in the text accompanying notes 29-37 *infra*.

4. For some cases where OA 2100 and 2101 should have applied, see, e.g., *Fridge v. Caruthers*, 156 La. 746, 101 So. 128 (1924); *Irwin v. Scribner*, 15 La. Ann. 583 (1860); compare *Billeaudeau v. Lemoine*, 386 So. 2d 1359 (La. 1980) (where the court applied OA 2100 and later inconsistently applied OA 2203); *Hemphill v. Strain*, 371 So. 2d 1179 (La. App. 1st Cir. 1979); *Sly v. New Orleans T. & M. Ry.*, 142 So. 276 (La. App. 2d Cir. 1932).

5. For the text of these articles, see *infra* text accompanying notes 29-37.