

## STILL ANOTHER LOOK AT CAUSE

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The traditional set of ideas known as the theory of cause has had a most eventful existence. It has been praised as the quintessence of wisdom, deprecated as a truism, and blamed as a nebulous abstraction.<sup>1</sup> It has also been made to reflect all kind of changing philosophies ranging from the natural law ideas of the canonists, through the liberalism that inspired the redaction of the Code Napoleon, the first Civil Code, and to the socio-economic approach of some contemporary doctrine. The outcome could be neither too clear nor too consistent after so many historical accidents. Nevertheless, if no great satisfaction can be derived from the notion of cause in its theoretical aspects, a different conclusion can be reached if the focus is made on the functions performed by cause in the practical life of the law.<sup>2</sup>

Besides consent free of vice given by parties with legal capacity the law requires that, in order to be valid, a contract must give rise to obligations with a lawful cause. That is so because an obligation cannot exist without a lawful cause.<sup>3</sup> On the other hand, the cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.<sup>4</sup>

In primitive law, agreements gave rise to an action only exceptionally because a rule prevailed according to which no agreement was enforceable unless good reasons were given to justify enforceability.<sup>5</sup> The opposite view prevails in modern law where the basic principle is that agreements shall produce binding legal effects unless good reasons are given to exclude those effects.<sup>6</sup> At common law, lack of consideration is a good reason to deny enforceability of a promise. In civilian systems derived from the French, such as the Louisiana system of private law, absence of cause, or unlawfulness or immorality of the cause, is a good reason to deprive an obligation of its legal effect.

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1. 1 S. Litvinoff, *Obligations* § 242, at 439, in 6 *Louisiana Civil Law Treatise* (1969).
2. *Id.*
3. La. Civ. Code art. 1966. See also La. Civ. Code art. 1893 (1870).
4. La. Civ. Code art. 1968. See also La. Civ. Code art. 1895 (1870).
5. See R. Pound, *Interpretations of Legal History* 54-55 (1946).
6. 2 J. Puig Brutau, *Fundamentos de derecho civil*, Pt. I 10 (1954). See also 1 S. Litvinoff, *Obligations* § 196, at 354-55, in 6 *Louisiana Civil Law Treatise* (1969).

In spite of emphatic declarations contained in principles such as autonomy of the will and freedom of contract, the fact is that consent alone is not enough to engender legal binding force. Something else is required.<sup>7</sup> In the early stages of Roman law a promise was enforceable, that is, it gave rise to a binding obligation, when certain formalities, such as the *stipulatio*, were observed.<sup>8</sup> The question why was a person bound could be readily answered at that time by saying that he had made a solemn promise. Compliance with a formality accounted then for the binding force of an obligation.

The needs of commerce, however, called for more, and perhaps faster, ways of making promises enforceable. At a later stage, Roman law held a party bound to perform his obligation whenever the other party to an agreement had already performed his. Thus, the borrower of a thing was bound to return it once the lender had delivered the thing to the borrower.<sup>9</sup> When a party had agreed to render a service in return for a service to be rendered to him, he was bound to perform once the other party had performed his part of the agreement.<sup>10</sup> The question why was a person bound could be readily answered at this stage by saying that he was bound because the other party had already given or done what he had engaged to give or do.

It can be seen that, so far, the binding force of obligations was made to rest on an objective or material element, be it a formality consisting of some sort of ceremony conducted in front of witnesses, or an act of delivery or other performance by the other party. The increasing demands of business and social intercourse, however, called for even more, and perhaps more agile, ways of making promises enforceable. In an even later stage, thus, Roman law allowed persons to be bound by the mere fact of having given their consent.<sup>11</sup> Perhaps

7. 1 S. Litvinoff, *Obligations* § 196, at 353, in 6 *Louisiana Civil Law Treatise* (1969).

8. For a full discussion, see 1 S. Litvinoff, *Obligations* § 198, at 357-58 in 6 *Louisiana Civil Law Treatise* (1969).

9. For a full discussion of contracts of this kind, called *real* because they started with the delivery of a thing—*res*, see W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* 462-81 (2d ed. 1950). See also 1 S. Litvinoff, *Obligations* § 199, at 359-60, in *Louisiana Civil Law Treatise* (1969); cf. La. Civ. Code arts. 2893, 2910, 2926, and 3133; Jobard-Bachelier, *Existe-t-il encore des contrats reels en droit français? ou la valeur des promesses de contrat reel en droit positif*, *Revue trimestrielle de droit civil* 1 (1985).

10. For a full discussion of this kind of contracts, called *innominate* because they did not fall under any of the categories until then recognized, see P. Girard, *Manuel élémentaire de droit romain* 587-97 (5th ed. 1911); R. Leage, *Roman Private Law* 344-47 (C. Ziegler 2d ed. 1948); 1 S. Litvinoff, *Obligations* § 200, at 361-62, in 6 *Louisiana Civil Law Treatise* (1969). See also La. Civ. Code art. 1914.

11. See H. Jolowicz, *Historical Introduction to the Study of Roman Law* 301 (2d ed. 1952).

because Roman jurists feared some danger in allowing enforceability to flow from mere consent, they expressed their caution in limiting the binding force of consent alone to just four types of contracts, to wit, sale, lease, partnership and mandate.<sup>12</sup> The question why parties such as sellers, or lessors, or partners, or mandataries were bound could be readily answered, at that later stage, by saying that they had consented to a sale, or a lease, or a partnership, or a mandate. In those situations the binding force of obligations was made to rest on consent, provided it was given to enter any of the limited number of contractual types.<sup>13</sup>

It is not an overstatement to say that in the many centuries that have elapsed since Roman times all contracts have become consensual, that is, all contracts, with very few exceptions, can be validly formed by mere consent.<sup>14</sup> It is as if the classic Roman category of consensual contracts, originally limited to four types, was expanded to cover the whole spectrum of contract. As a result of that expansion, for which jurists of the canonist school take a great part of the responsibility, modern legal systems of the French family allow private parties to bind themselves by their consent alone provided that, perhaps as a remnant of Roman caution, such consent is given for a reason, or cause, and further provided that such reason, or cause, is lawful.

A promisee, thus, may not rest assured on the basis of the promisor's consent without more. Through the centuries that have elapsed since Roman law came into being, the idea of cause, with increased sophistication, keeps furnishing a firm criterion to determine whether an obligation is truly binding.<sup>15</sup>

Some of the difficulties surrounding the idea of cause may be overcome if the functions it performs in legal systems of the French family are properly understood.

#### FUNCTIONS

##### *Protection of the Parties' Will*

###### *Absence of Cause*

If there is no cause, the obligation is as ineffectual as a Roman *nudum pactum*.<sup>16</sup> In demanding a cause in order to give binding force

12. See W. Buckland & A. McNair, *Roman Law & Common Law* 267-268 (2d ed. Lawson 1952); 2 J. Puig Brutau, *Fundamentos de derecho civil*, Pt. I 15 (1954). See also La. Civ. Code arts. 2439, 2669, 2801, and 2985.

13. See 1 S. Litvinoff, *Obligations* § 201, at 364-66, in 6 *Louisiana Civil Law Treatise* (1969).

14. See 3 C. Toullier, *Le droit civil français* 316-17 (1833).

15. See 1 S. Litvinoff, *Obligations* § 242, at 439, in 6 *Louisiana Civil Law Treatise* (1969).

16. 1 G. Gorla, *Il contratto* 322-23 (1954).

to an obligation, the law makes certain that persons have a reason to limit their freedom by the bond of obligation. If there is no such reason then there is no bond, and freedom from obligation is restored to the person who bound himself thusly. The will of contracting parties is thereby protected without encroaching upon their freedom, as it must be presumed that reason governs human choices.

Thus, if at the time a contract of sale is made the thing which is its object has been destroyed, it is clear that the buyer bound himself to pay the price for no reason as he cannot acquire something which no longer exists. His obligation then lacks a cause—therefore, it is not an obligation at all.<sup>17</sup> Likewise, the promise of a gift made in contemplation of a future marriage is not enforceable if the marriage does not take place.<sup>18</sup> Here again the obligation lacks a cause as the reason for the promise proved to be absent.

Cause is also absent when the obligation is contracted as the result of violence or threats, or duress.<sup>19</sup> Consent given in such circumstances does not express the party's true will, as that will is being imposed upon and no reason existed, therefore, for the party to bind himself. A different aspect may be seen where one already bound by an obligation refuses to perform it unless the counterperformance is increased. If the other party consents in such a situation, the obligation thereby incurred lacks a cause as he had no true reason to promise more in return for a performance already owed to him.<sup>20</sup> It is different, however, if an increase of the return performance is voluntarily offered by the party to whom the performance is owed, as an intention to reward is a good reason for such party to bind himself.<sup>21</sup>

The cause of an obligation may be only partially absent. That is the case, for example, when the thing sold has perished only in part at the time of the sale. When that occurs the buyer may free himself of his own obligation if his reason for contracting it was to acquire the thing as a whole, or he may accept a reduced obligation commensurate with that part of the thing that remains.<sup>22</sup>

#### *False Cause*

No obligation exists when its cause is false, as in the case of error.<sup>23</sup> Thus, if a party buys a thing believing it to be of a certain quality but

17. See La. Civ. Code art. 2455.

18. 3 C. Toullier, *Le droit civil français* 380 (1833); La. Civ. Code art. 1897 (1870).

19. See La. Civ. Code art. 1959.

20. Cf. *Solomon v. Copping*, 112 So. 2d 749 (La. App. Orl. 1959); *United States Fidelity & Guar. Co. v. Crais*, 13 La. App. 691, 127 So. 414 (Orl. 1930).

21. See I R. Pothier, *A Treatise on the Law of Obligations or Contracts* 27 (Evans transl. 1806).

22. See La. Civ. Code art. 2455.

23. See La. Civ. Code art. 1949.

it actually is of a different one, his reason for engaging to pay the price is false, and he is not truly bound.<sup>24</sup> The will of that party is thereby protected as the law frees him from obligation when he does not attain what he intended to attain through the contract. For the sake of fairness, however, that result can obtain only when the other party knew or should have known that acquiring a thing of a certain quality was the reason why the party in error consented to the contract.<sup>25</sup>

There is a certain conceptual proximity between false cause and absence of cause. It may even be said that both result from error. Nevertheless, absence of cause occurs when an objective element is not there, such as a thing that no longer exists because it has been destroyed, while false cause intervenes when subjective elements, such as beliefs, prove to be wrong.<sup>26</sup>

A false cause that results from involuntary error must be distinguished from an untrue cause voluntarily expressed in an agreement. In the latter case, the obligation is still effective if another cause, true and valid, can be shown.<sup>27</sup> Indeed, through a relative simulation parties may disguise an intention to give gratuitously under the garb of an intention to transfer for a price.<sup>28</sup> In such a situation the true intention, the true cause, prevails, and an invalid sale may result in a valid donation if the formal requirements are met.<sup>29</sup>

#### *Failure of Cause*

A cause may exist at the inception of an obligation and then fail. When such is the case the obligation ceases to exist when its cause fails.<sup>30</sup> Thus, if a leased thing is totally destroyed during the term of the contract of lease, the lessee's obligation to pay rent comes to an end since the reason why he bound himself for the rent was to be allowed the enjoyment of the thing, a reason that disappeared upon the destruction of the thing.<sup>31</sup> As in the case of the lease, in other situations where the entire performance owed by one party becomes impossible because of a fortuitous event, the obligation of the other party comes

24. See S. Litvinoff, "Error" in the Civil Law, in *Essays on the Civil Law of Obligations* 222, 228 (J. Dainow ed. 1969).

25. See La. Civ. Code art. 1949; see also La. Civ. Code art. 1826 (1870).

26. For a full discussion see I S. Litvinoff, *Obligations* § 235, at 426, in 6 *Louisiana Civil Law Treatise* (1969).

27. See La. Civ. Code art. 1970.

28. See La. Civ. Code art. 2027; *McWilliams v. McWilliams*, 39 La. Ann. 924, 3 So. 62 (1887).

29. See La. Civ. Code art. 2464.

30. See I S. Litvinoff, *Obligations* § 302, at 545-46, in 6 *Louisiana Civil Law Treatise* (1969).

31. See La. Civ. Code art. 2697; see also La. Civ. Code art. 1899 (1870).

to an end as the contract is dissolved.<sup>32</sup> That is so because obtaining his co-contractant's performance is the reason why the other party bound himself, a reason, or cause, that failed—ceased to exist—when that performance became impossible. The will of contracting parties is thus protected as the law liberates them from obligation when, through no fault of their own, that which they intended to attain through the contract can no longer be attained.

A cause may fail only in part. Thus, if a leased thing is only partially destroyed, if the reason to bind himself to pay rent was not to obtain the enjoyment of only the whole thing, the lessee may accept an obligation to pay a reduced rent commensurate with that portion of the thing which subsists.<sup>33</sup> Likewise, when a fortuitous event has made a party's performance impossible in part, the court may reduce the other party's counterperformance proportionally.<sup>34</sup>

To determine whether a failure of cause occurred in a given situation the nature of the contract involved may have to be carefully scrutinized. Thus, if one party's performance becomes impossible, the cause of the other's obligation fails if the contract is commutative, but not necessarily if the contract is aleatory since the reason that prompts parties to bind themselves through contracts of the latter kind consists in the expectation of an advantage rather than an assumed certainty of that advantage.<sup>35</sup>

#### *Presumption of Cause*

"An obligation may be valid even though its cause is not expressed."<sup>36</sup> There is, thus, a presumption that a cause is present in an obligation.<sup>37</sup> The will of contracting parties is protected by presuming that they have bound themselves for a reason rather than forcing them to prove that reason in every case. The freedom of that will is respected through a recognition of the fact that lawful reasons are not always disclosed in human interaction. Further protection is given to the parties' will by allowing them to disprove such a reason. A principle that would negate such a presumption would be less respectful of human initiative.

#### *Protection of the Public Order*

##### *Unlawful Cause*

An obligation must not only have a cause, but that cause must be lawful, that is, neither illegal nor immoral, nor contrary to public

32. See La. Civ. Code art. 1876.

33. See La. Civ. Code art. 2697.

34. See La. Civ. Code art. 1877.

35. See La. Civ. Code arts. 1911, 1912, 2450, 2451, and 2456; La. Civ. Code art. 1898 (1870); *Losecco v. Gregory*, 108 La. 648, 32 So. 985 (1901).

36. La. Civ. Code art. 1969.

37. See 3 C. Toullier, *Le droit civil français* 381-82 (1833).

policy.<sup>38</sup> A cause is illegal when it is forbidden by law.<sup>39</sup> It is immoral when it runs counter to the moral standards of the community.<sup>40</sup> It is against public policy when it is contrary to values recognized as paramount by the community.<sup>41</sup> As the enforcement of obligations with an unlawful cause would produce results prohibited by the law, or reprobated by morals, or against public policy, the public order is protected when an obligation is deprived of effects because of its unlawful cause.<sup>42</sup>

This function of cause makes it a very useful instrument in the hands of courts. Because of this function, courts in those civilian systems where cause prevails are adamant in preserving it in spite of the devastating attacks of writers who deny the usefulness of the idea of cause.<sup>43</sup> Through cause, indeed, courts are allowed, when necessary, to delve deeply into the parties' subjectivity in order to uncover the unlawfulness of the reasons that prompted them to bind themselves. In that way, something like a policing of contracts takes place for the preservation of the public order.<sup>44</sup> Here, a proper understanding of the matter requires a clear distinction between cause and object.

Resorting to a simple example such as a contract of sale of immovable property, it can be readily seen that the object of the seller's obligation is a performance consisting of transferring and delivering the property sold to the buyer, while the object of the buyer's obligation is a performance consisting of paying the price. Nothing is wrong with such objects as it is perfectly lawful to deliver a house or to pay money.<sup>45</sup> Nevertheless, the reason that prompted the parties to bind themselves thusly may be an intent to operate a brothel in the property sold. It is that reason, that cause, that is unlawful, and therefore will deprive the obligations of effect, rather than the object, which is neutral from the viewpoint of lawfulness.<sup>46</sup>

By the same token, the cause is illicit in obligations arising out of a contract for the transfer of property made for the purpose of de-

38. La. Civ. Code arts. 1966 and 1968.

39. See *Cahn v. Baccich & De Montluzin*, 144 La. 1023, 81 So. 696 (1915), where an agreement to stifle bids at an auction was involved.

40. See *Baucum & Kimball v. Garrett Mercantile Co.*, 188 La. 728, 178 So. 256 (1937), involving a forward sale where no bona fide delivery was intended, but rather a mere compensation for differences in the quotation of commodity prices.

41. See *Succession of Butler*, 294 So. 2d 512 (La. 1974), where the obligation to pay a fee was made contingent on the termination of a marriage.

42. See La. Civ. Code art. 1968.

43. See 1 S. Litvinoff, *Obligations* §§ 236, 242, at 428, 439-40, in 6 *Louisiana Civil Law Treatise* (1969).

44. 1 S. Litvinoff, *Obligations* § 236, at 428, in 6 *Louisiana Civil Law Treatise* (1969).

45. *Id.* at 428-29.

46. See H. Capitant, *De la cause des obligations* 228-30 (1923); 1 S. Litvinoff, *Obligations* § 236, at 428, in 6 *Louisiana Civil Law Treatise* (1969).

frauding creditors.<sup>47</sup> The same is true of an agreement entered into for the purpose of stifling bids at an auction.<sup>48</sup> An obligation to pay an attorney a fee contingent on the termination of a marriage has a cause contrary to public policy, and the contract where it originates is therefore null.<sup>49</sup> The same conclusion obtains regarding contracts where payment of a fee is made contingent on the securing of evidence leading to the termination of a marriage.<sup>50</sup> The cause is illicit also in obligations involving the rendering of legal services by a party who is not an attorney.<sup>51</sup>

Even when object is at stake, its lawfulness or unlawfulness depends on the reason, or purpose, for which it is placed in commerce. Certain things, thus, may be regarded as drug paraphernalia when sold to be used with a controlled substance, even though the same things are susceptible of other and more innocent uses.<sup>52</sup> It is noteworthy, in this connection, that unlawful object and unlawful cause may appear together in a synallagmatic contract. Thus, if things that are unmistakably drug paraphernalia are sold, the seller's obligation is null for having an unlawful *object*, and the buyer's obligation is null also but on account of an unlawful *cause*.<sup>53</sup>

#### Nullity

An obligation with an unlawful cause cannot exist.<sup>54</sup> The result of any attempt to give rise to such an obligation is a nullity of an absolute character.<sup>55</sup>

The main problem in this area is whether an unlawful cause prevents the existence of an obligation, and therefore of the contract where such obligation originates, when it lies in the mind of one of the parties alone, or only when it is mutual to the parties or, at least, known to the other party.<sup>56</sup> For onerous contracts the answer should be clear. French jurisprudence annulling contracts for giving rise to obligations with unlawful cause usually makes clear that the reprobate reasons of which that cause consists could be found in the mutual intention of the

47. See *Gravier's Curator v. Carraby's Ex'r*, 17 La. 118 (1841); *Mulhollan v. Voorhies*, 3 Mart. (n.s.) 46 (La. 1824).

48. See *Cahn v. Baccich & De Montluzin*, 144 La. 1023, 81 So. 696 (1915).

49. See *Meyer v. Howard*, 136 So. 2d 805 (La. App. 4th Cir. 1962).

50. See *McMahon v. Hardin*, 10 La. App. 416, 121 So. 678 (Orl. 1929).

51. See *Duncan v. Gordon*, 476 So. 2d 896 (La. App. 2d Cir. 1985).

52. See *A Better Place, Inc. v. Gianl Inv. Co.* 445 So. 2d 728 (La. 1984).

53. See 1 S. Litvinoff, *Obligations* § 236, at 428, in 6 Louisiana Civil Law Treatise (1969).

54. La. Civ. Code art. 1966.

55. See La. Civ. Code art. 2033.

56. See 1 S. Litvinoff, *Obligations* § 236, at 429-31, in 6 Louisiana Civil Law Treatise (1969).

parties, or that one of them knew that such were the reasons that prompted the other to bind himself.<sup>57</sup> In Louisiana, some decisions assert that in order to affect the contract the alleged illegal intent must have been mutual and that such intent in one party alone will not avail.<sup>58</sup>

That approach shows concern for the interest of the innocent party and also for the stability of transactions, but if followed to the letter it may lead to undesirable conclusions.<sup>59</sup> A satisfactory solution to that problem calls for a careful analysis of different possibilities which may be better explored with the aid of a simple example such as the lease of immovable property where, unbeknownst to the lessor, the lessee intends to operate a house of ill repute from the leased premises. The lessee, in such a case, cannot be allowed to enforce the contract if he needs to disclose his spurious reasons for that purpose. Indeed, such a disclosure would amount to an allegation of his own turpitude on the basis of which he cannot seek the aid of the court by direct application of the principle *nemo propriam turpitudinem allegare potest*.<sup>60</sup> The lessor, on the other hand, should be allowed to seek the nullity of the agreement as soon as he learns of the reasons that prompted the lessee to contract. To assert that, because of his innocence, the lessor can seek only enforcement rather than the nullity of the contract is not a reasonable way of protecting the interest of the innocent party.<sup>61</sup> If, still ignorant of the lessee's spurious reasons, the lessor seeks enforcement of the contract, the lessee cannot avail himself of the unlawfulness of his reasons simply because, if totally unknown to the lessor, the lessee's reason for contracting might have been his motive, but not the cause of the obligation for him deriving from the contract.<sup>62</sup>

#### Criterion for the Classification of Contracts

##### Cause of the Obligation and Kind of Contract

It is noteworthy that, in most instances, cause is the criterion for the detailed classification of contracts contained in the Louisiana Civil

57. See Civ. Dec. 27, 1945, Gaz. Pal. 1946.1.88, involving a contract of lease where both parties knew that the premises were to be used for the operation of a brothel.

58. See *Conner & Hare v. Robertson*, 37 La. Ann. 814, 818 (1885); cf. *Mahood v. Tealza*, 26 La. Ann. 108 (1874).

59. See 1 S. Litvinoff, *Obligations* § 236, at 429-30, in 6 Louisiana Civil Law Treatise (1969).

60. See *infra* pp. 21-22.

61. See 1 S. Litvinoff, *Obligations* § 236, at 429-30, in 6 Louisiana Civil Law Treatise (1969). Further distinctions can be made according to whether the lessor learns of the lessee's spurious reason before or after occupation of the premises by the lessee. In the latter case the lessor can also avail himself of breach by the lessee according to La. Civ. Code arts. 2710(1) and 2729.

62. See *infra* pp. 17-18.

Code.<sup>63</sup> Indeed, a contract is onerous because the reason that prompts the parties to bind themselves is to obtain an advantage in return.<sup>64</sup> A contract is gratuitous because the reason that prompts a party to bind himself is to confer a benefit on the other party.<sup>65</sup> Although the function of cause as a criterion for classification can be more readily perceived in distinguishing onerous from gratuitous contracts, it also operates in other categories. Thus, when the reason why a party binds himself is the reciprocal obligation incurred by the other party, the contract is bilateral or synallagmatic.<sup>66</sup> When that reason is the performance of the other party's obligation, the contract is commutative.<sup>67</sup> When the reason that prompts a party to incur an obligation is to protect himself against a risk that may not occur, or to procure an advantage that may not materialize, the contract is aleatory.<sup>68</sup>

It must be noticed, in this connection, that oftentimes courts avail themselves of this particular function of cause in order to assert that a contract is valid, though as one belonging to a category different from that into which it would fall according to the cause expressed by the parties. In fact, it is the sovereign prerogative of courts to declare the true nature of a contract irrespective of the name given to it by the parties.<sup>69</sup> The following are examples of situations of that kind.

#### *Invalid Gratuitous Contract But Valid Onerous Contract*

An act which, as a donation, is invalid for the lack of proper form may be, however, a valid onerous contract. Thus, if a manual gift is made of a promissory note signed by the donor, the donation is invalid because, since such note is actually an incorporeal thing, a donation thereof must be made by authentic act.<sup>70</sup> Nevertheless, if it can be shown that the note was given not with donative intent but as recompense for services rendered in the past by the one to whose order the note is made, or in fulfillment of a natural obligation, then the giving of the promissory note, though an invalid donation, is classified as a valid onerous contract.<sup>71</sup> Likewise, a transfer of immovable property where

63. See La. Civ. Code arts. 1907-1914.

64. La. Civ. Code art. 1909.

65. La. Civ. Code art. 1910.

66. La. Civ. Code art. 1908.

67. La. Civ. Code art. 1911.

68. La. Civ. Code art. 1912.

69. See 1 S. Litvinoff, *Obligations* § 237, at 431, in 6 *Louisiana Civil Law Treatise* (1969); *Murray v. Barnhart*, 117 La. 1023, 1031-34, 42 So. 489, 492 (1906); *Howard Trucking Co. v. Stassi*, 474 So. 2d 955 (La. App. 5th Cir. 1985), *aff'd*, 485 So. 2d 915 (La. 1986), *cert. denied*, 107 S. Ct. 432 (1986).

70. See La. Civ. Code art. 1536.

71. See *Barthe v. Succession of Lacroix*, 29 La. Ann. 326 (1877).

the transferee assumes an obligation to support the transferor is invalid as a donation if not made by authentic act. Nevertheless, the same act is valid as an onerous contract which is also innominate and aleatory.<sup>72</sup>

Charitable subscriptions are examples of the same kind of situation. By definition, indeed, such a subscription is a gratuitous act and is therefore invalid if made by writing under private signature rather than by an authentic act. Nevertheless, since the satisfaction of some interest, such as the promotion of education or the arts, can be said to be the reason that prompted the subscriber to bind himself to give, that suffices for courts to conclude that a charitable subscription not made in authentic form is nevertheless an enforceable onerous contract.<sup>73</sup>

#### *Invalid Onerous Contract But Valid Gratuitous Contract*

Sale is, no doubt, the onerous contract *par excellence*. If no price is paid, however, because the parties never intended for the price to be paid, that onerous contract is invalid for the lack of one of its requirements.<sup>74</sup> Nevertheless, if an intention to donate immovable property can be gleaned from the circumstances, and the invalid sale was made by authentic act, the invalid onerous contract is a valid donation.<sup>75</sup>

#### *Invalid Onerous Contract And Invalid Gratuitous Contract*

An apparently onerous contract that is invalid for a lack of cause in the obligation of one party may not be a valid gratuitous contract, in spite of the existence of a donative intent, if the requirement of form has not been met. Thus, when a promissory note is given for an alleged loan but it is proved that such loan was never made and that the maker of the note actually intended to make a gift to the alleged lender, no valid donation can be found if the act was not made by an authentic act.<sup>76</sup>

72. See *Thielman v. Gahlman*, 119 La. 350, 44 So. 123 (1907); *Kirk v. Kansas City S. & G. Ry.*, 51 La. Ann. 667, 674-76, 25 So. 457, 460-61 (1899). For a full discussion, see 1 S. Litvinoff, *Obligations* § 102, at 174-75, in 6 *Louisiana Civil Law Treatise* (1969).

73. See *Baptist Hosp. v. Cappel*, 14 La. App. 626, 129 So. 425 (2d Cir. 1930); *Louisiana College v. Keller*, 10 La. 164 (1836). See also J. Overstake, *Essai de classification des contrats spéciaux* 198-99 (1969).

74. See La. Civ. Code art. 2439.

75. *McWilliams v. McWilliams*, 39 La. Ann. 924, 3 So. 62 (1887); *D'Orgenoy v. Droz*, 13 La. 382 (1839). See also *Stevens v. Stevens*, 476 So. 2d 883 (La. App. 2d Cir.), *writ denied*, 478 So. 2d 908 (La. 1985).

76. See *Heirs of Cole v. Cole's Ex'rs*, 7 Mart. (n.s.) 414 (La. 1830). Cf. *Succession of Miller*, 405 So. 2d 812 (La. 1981).

## DEFINITION

*Terminology*

In the course of time cause has been defined in terms of motive, purpose, end, or reason.<sup>77</sup> There is no doubt great similarity of meaning between motive, purpose, and reason to do something. Even if other words were added to the list, such as incitement or inducement, the pattern of signification would still be the same, namely, something that stimulates the will. Though subtle differences can be found in the words listed, a shade of distinction is not a solid ground for certain legal effects.<sup>78</sup> At first blush the word "end" seems to introduce an orientation towards the future in the meaning of cause. It is clear, nevertheless, that whenever the question of cause is involved, the contemplation of the future only counts in the measure of its *present* consideration by the parties. Because of that, compound expressions such as "motive-end" have occasionally been used. In general terms, although laden in many instances with future-oriented overtones, the word "motive" has invariably recurred whenever the theoreticians of cause have struggled for a definition.<sup>79</sup>

*Classical Theory—Objective Cause*

It has been said, however, that not every motive can be promoted to the superior category of cause.<sup>80</sup> Here is where confusion starts and concepts blur.

If not every motive can be considered as the cause, then *that* motive which is the cause requires some additional connotations, such as being the "principal motive," or "determining motive," or even the "immediate motive." Adding another word, however, still does not furnish a guideline for drawing practical distinctions. Underneath these many attempts to isolate one of many motives in a series in order to speak of it with certainty as being the cause of an obligation lies the realization that motive is something eminently subjective, and that it would be rather dangerous to make the stability of transactions rest on the realm of subjectivity alone. That justifies the strenuous efforts made to turn cause into something objective. Such efforts warrant the question whether

77. See 1 S. Litvinoff, Obligations § 240, at 435, in 6 Louisiana Civil Law Treatise (1969).

78. Id.

79. Id.

80. See 3 C. Toullier, Le droit civil français 329-30 (1833); La. Civ. Code art. 1825 (1870).

motives can ever be objective, a question never answered in the heat of theoretical discussions.<sup>81</sup>

In search of objectivity, attempts at definition went so far as to make of cause a mere abstraction. Indeed, for the classical theory, the cause of the respective obligations is always the same in a given category of contracts.<sup>82</sup> In a contract of sale, thus, that motive of the vendor that must be isolated as the cause of his obligation to give the thing is to obtain the price, and that motive that deserves the same treatment on the part of the vendee is, always, to obtain the thing sold. In this way, there is no need to pay any attention to whatever is in the back of the parties' minds. No doubt, the danger of subjectivity is thereby avoided, but at the cost of rendering the idea of cause useless. Indeed, that approach turns cause into something so objective, though abstract, that it can hardly be distinguished from the *object* of the parties' obligations, or even the object of the contract, leaving no practical function to be performed by the idea of cause.<sup>83</sup>

*Intermediate Theories—Anticausalism and Dualism*

The uselessness of an objective cause, that is, a cause that is always the same in obligations arising from a given kind of contract, gave rise to the school of thought known as anticausalism, according to which cause is regarded as an artificial notion the legal system can do without.<sup>84</sup> Anticausalist writers are no doubt correct in asserting that an objective or abstract cause can hardly be unlawful. Indeed, neither the vendor's desire to obtain the price nor the vendee's desire to obtain the thing can be unlawful by itself unless, of course, either party's subjective motivation is explored in depth.

That school starts from a distinction between onerous and gratuitous contracts based on the intention of the parties and explains the interdependence of obligations arising from a contract by the fact that the contract is onerous. On the other hand, if the contract is gratuitous, its very nature explains that the obligation it gives rise to is not correlative

81. See 1 S. Litvinoff, Obligations § 240, at 435-36, in 6 Louisiana Civil Law Treatise (1969).

82. H. Capitant, De la cause des obligations 25-27 (1923).

83. 2 M. Planiol, Traité on the Civil Law, Pt. I No. 1039 (Louisiana State Law Institute transl., 11th ed. 1959).

84. The theory of cause was seriously criticized first in Ernst, La cause est elle une condition essentielle pour la validité des conventions?, 1 Bibliothèque du juriste et du publiciste 250-64 (1826). Next followed 6 F. Laurent, Principes de droit civil français 145-237 (2d ed. 1876). It was Planiol, however, who enlarged and systematized the criticism, becoming the leader of anticausalism; see 2 M. Planiol, Traité élémentaire de droit civil No. 1037 (1899). See also 1 S. Litvinoff, Obligations § 215, at 384, in 6 Louisiana Civil Law Treatise (1969).

of any other one.<sup>85</sup> Unlawfulness of an obligation, for that school, emanates from its object and not from the so-called cause.<sup>86</sup>

In an attempt to overcome that criticism, and still preserve the notion of an objective, or abstract, cause, a theory has been developed that asserts that cause is actually two things. One is the cause that means more or less the same as in the classical theory, an abstract *reason* which is always the same for each category of contracts, namely, the contemplated counterperformance in the case of synallagmatic contracts, or the spirit of liberality, detached from every concrete motivation, in the case of donations.<sup>87</sup> That is the objective meaning of cause. Absence of cause in that sense prevents the obligation from coming into being. The other is the cause that appears as a subjective notion which, besides the mere abstraction, incorporates into itself some of the parties' concrete motivation. In other words, besides the cause of the obligation, here presented as a sort of abstract and intrinsic motive for contracting, the existence is asserted of a more subjective cause that is identified with motives extrinsic to the act, motives that vary with each particular person. The latter is referred to as *cause of the contract*, in contradistinction to the *cause of the obligation*.<sup>88</sup> It can readily be seen that, in this approach, it is the cause of the contract that may be unlawful when such are the motives of the parties or, in some instances, the motive of one of them alone.<sup>89</sup>

That approach, known as the *dualist theory* of cause, which still enjoys great popularity in French doctrine, is not without contradiction in its foundations and finds no support in the language of the civil code which, in listing the requirements for a valid contract, speaks of *une cause licite dans l'obligation*—a licit cause in the obligation—and not of a lawful cause for the contract.<sup>90</sup>

Be that as it may, anticausalism on the one hand and dualist theory on the other are theoretical developments which clearly show that, devoid of subjectivity, the idea of cause loses its usefulness.

#### *Subjective Cause as a Practical Reality*

A fruitful manipulation of the idea of cause, in sum, calls for a recognition of its subjective nature which explains the need of exploring

85. See 1 S. Litvinoff, *Obligations* § 215, at 386, in 6 *Louisiana Civil Law Treatise* (1969).

86. 2 M. Planiol, *Traité élémentaire de droit civil* No. 1037 (1899).

87. See generally 2 G. Marty et P. Raynaud, *Droit civil, Les obligations* Pt. I 163 (2d ed. 1962). See also 1 S. Litvinoff, *Obligations* §§ 229-231, at 412-20, in 6 *Louisiana Civil Law Treatise* (1969).

88. See J. Baudouin, *Les obligations* 188-89 (1983).

89. See 1 S. Litvinoff, *Obligations* § 231, at 419, in 6 *Louisiana Civil Law Treatise* (1969).

90. See French Civ. Code art. 1108 and La. Civ. Code art. 1779 (1870), whose original French text can be seen in 3 *Louisiana Legal Archives*, Pt. II 982 (1942).

it in the sphere of motivation. The fact that not every motive can be treated as the cause of an obligation is better explained in terms of communication, or presumption, rather than alleged objectivity. Indeed, that motive which is the cause is the one that has been expressed as such between the parties, or the one that can be presumed to be the cause under certain circumstances.<sup>91</sup> Parties are free to make manifest or to withhold their reasons for binding themselves through an obligation, their motives to enter into a contract. If those motives are expressed, if the other party is made aware of them, then, according to the almost proverbial expression, they have entered the contractual field—they become the cause.<sup>92</sup> If no special motive is expressed, however, the law will presume that *the* motive is *that* one which can be taken as a stimulation for a person's will in the circumstances that surround a contract-making situation. Thus, if a person is about to purchase a thing, he may state his reasons, or requirements, in the clearest possible way, thereby making the seller aware of for what it is that he—the purchaser—wants the thing. The buyer's motives are thereby communicated to the other party who now knows *why*—for what *cause*—the buyer is willing to obligate himself to pay the price. On the other hand, if the buyer does not state his concrete motivation, he will be deemed to have been motivated by a desire to have the thing sold without more. Thus, the cause of the buyer's obligation will always be his willingness to have the thing, in every contract of sale, *provided he did not express a more precise motivation*. Confined within such limits, as a general presumption, the basic tenet of the classical theory of cause still holds, but it is clear that such presumption can be overcome by proof that a more precise motivation of a party was revealed in the contract-making situation.<sup>93</sup>

A motive that is communicated abandons the realm of strict subjectivity. Though it cannot be said that it thereby becomes objective, it can be understood readily that it acquires a certain inter-subjectivity. That inter-subjectivity is the guideline that allows courts to isolate the motive which is the cause from the other simple motives that cannot be elevated to that category. In the words of a distinguished French authority, the limits between the cause and the motive lies in the measure in which courts can scrutinize private affairs.<sup>94</sup>

91. See 1 S. Litvinoff, *Obligations* § 240, at 436, in 6 *Louisiana Civil Law Treatise* (1969).

92. The connection between cause and the cooperation the parties owe themselves reciprocally is expounded in 1 Venezian, *Opere giuridiche, Causa nei contratti* 391, cited in 2 R. Demogue, *Traité des obligations en général* 544 (1923).

93. See 1 S. Litvinoff, *Obligations* § 240, at 436-37, in 6 *Louisiana Civil Law Treatise* (1969).

94. H. Capitain, *De la cause des obligations* 11 (1923).

In sum, since not just any of a party's motives to bind himself through an obligation can be regarded as the cause, but only that motive that is either understood through communication or presumed from the circumstances, "reason" is perhaps a better word than "motive" for a definition of cause.<sup>95</sup> Indeed, "reason" alludes to understanding and to deriving consequences from known circumstances, which is, precisely, the process through which a court—as ultimate appraiser of the positive or negative signs in human conduct—concludes whether an obligation has a cause and whether that cause is lawful.

The importance of the inter-subjectivity of the motive, or reason, that qualifies as the cause of an obligation can be readily explained. The party who communicates his reason is asking for a certain cooperation from the other in order to attain a desired result. The kind or amount of cooperation requested also serves as an aid in determining which motive is the reason, the cause, that prompts a party to obligate himself.<sup>96</sup> Thus, whatever motive of one of the parties remains outside the other's ability to cooperate will not be regarded as a determining motive, that is, it will not be regarded as the reason or cause.

That is all the objectivity the idea of cause requires in order to protect the parties and the stability of transactions as well.<sup>97</sup>

#### DETRIMENTAL RELIANCE

##### *The Principle*

After defining cause as the reason why a party binds himself, the Louisiana Civil Code provides that "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."<sup>98</sup> The formulation of that principle in the law of Louisiana requires some discussion.

##### *Problem and Solution At Common Law*

At common law a consideration is needed to make a promise binding. That consideration must be given by the promisee to the promisor as a sort of price for the promise. Moreover, it does not suffice that the promisee give anything to the promisor. That which is given is a true

95. For a full discussion, see I S. Litvinoff, *Obligations* § 240, at 437, in 6 *Louisiana Civil Law Treatise* (1969).

96. 2 R. Demogue, *Traité des obligations en général* 544 (1923).

97. See La. Civ. Code art. 1966 and comment (b) thereto.

98. La. Civ. Code art. 1967.

consideration only if it has been bargained for as such by the recipient.<sup>99</sup> In many instances, however, a promise is made for which no consideration is given, and the promisee, though the promise is not technically enforceable, relies on it to his detriment. In a proverbial example, a grandfather gives his granddaughter a promissory note and tells her that he is giving her the note because he does not want her to have to work for a living. The grandfather does not ask that the granddaughter give up her employment, nor does he make it a condition of his promise, which should be taken to mean that he does not request a consideration for the note. Nevertheless, relying on her grandfather's promise, the young lady resigns her position with a business concern. As is further proverbial in situations of that sort, the old gentleman dies without having paid the note, and when the granddaughter demands payment from the promisor's estate the executor raises the defense of a lack of consideration.<sup>100</sup>

In situations of that kind an American common law court and, to some extent, an English one also, will conclude that the promise is enforceable because it induced the promisee's reliance and that reliance substitutes itself for consideration.<sup>101</sup> In a slightly different approach it is said, also, that in that kind of situation a promise is enforceable *without* consideration.<sup>102</sup>

##### *Detrimental Reliance and Civil Law*

Since, at common law, reliance either substitutes for consideration or justifies the exceptional enforceability of a promise in the absence of consideration, it could be said that, in receiving detrimental reliance as grounds to hold a party bound by his promise, the law of Louisiana is also indirectly receiving the doctrine of consideration. That, however, is not so. In the law of Louisiana a promise is enforceable when it gives rise to an obligation with a lawful cause and not because it is supported by a consideration. Moreover, in spite of some confusion created by imprecise language in the Louisiana Civil Code of 1870, it is now clearly explained that cause is not consideration.<sup>103</sup>

Why then *reliance*, it may be asked, if there is no occasion for detrimental reliance to substitute itself for anything precisely because no consideration is required at civil law to make an obligation enforceable? Indeed, if a party offers to do something gratuitously and another party accepts, the result is a very simple unilateral and gratuitous contract

99. See Restatement (Second) of Contracts § 71 (1981).

100. See *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

101. See P. Atiyah, *The Rise and Fall of Freedom of Contract* 463 (1979).

102. See Restatement (Second) of Contracts § 90 and caption to §§ 82-90 (1981).

103. See La. Civ. Code art. 1967 comment (c).

that is perfectly enforceable since the existence of a lawful cause is always presumed.<sup>104</sup> If there has been an acceptance, thus, it would seem immaterial whether or not the offer or promise was relied on by the one to whom it was addressed.

In the realm of pure concepts such reasoning appears to be impeccable. Nevertheless, when pure concepts are confronted with the reality of practical experience the objection loses strength.

Thus, when an offer is made to allow the use of a thing free of charge, or to keep things in deposit free of charge to the offeree, only very seldom do the parties take the time to execute a writing evidencing such a gratuitous contract or take other steps leading the offeror to the clear realization that he is now bound. Moreover, experience shows that in situations of that kind only seldom is there a clear and unmistakable acceptance. Of course, an acceptance need not be express, as it may also be implied from action or even inaction by the offeree.<sup>105</sup> Nevertheless, an acceptance thus implied very often gives rise to the question whether or not it was reasonably communicated to the offeror. In all those instances the fact that, in reliance on the offer or promise, the offeree or promisee took action that would result in his detriment unless the promise was enforced is the paramount fact that inclines the court to speak in terms of a reasonably communicated implied acceptance that concluded a binding contract. Thus, in a celebrated case decided by a French court in the past century, quite exceptionally, the parties had taken the time to execute a writing whereby one of them, an innkeeper, promised the other, a stagecoach operator, that the latter would have free use of certain space in the former's hotel for the purpose of setting up an office to conduct business related to the transportation of persons and goods. When the invalidity of such an agreement was raised by the innkeeper now turned defendant, the court concluded that the best proof of the binding force of such contract was the fact that it had induced the plaintiff to rely on it to his detriment.<sup>106</sup> In other cases French decisions have asserted that an offer made to the public is binding, in spite of its having been revoked, because plaintiff, a particular member of the public, relied on such offer prior to, or without knowing of, the revocation, and the party responsible for the offer should have known that reliance would be induced by the publication.<sup>107</sup>

In the situations just discussed French courts have arrived at the same kind of solution that a common law court would reach through

104. See La. Civ. Code art. 1969.

105. See La. Civ. Code art. 1927.

106. *Fellmann v. Mathebs*, Colmar, May 8, 1845, *Sirey*, 1847, 2, 117.

107. See *Bordeaux*, March 11, 1858, S. 1858, 2, 669; Paris, Feb. 5, 1910, *Gaz. Trib.* of March 1, 1910; Lyon, June 13, 1894, S. 1896, 2, 147, D. 1895, 2, 292. See also 2 R. Demogue, *Traité des obligations en général* 140, 152, and 155 (1923).

the doctrine of promissory estoppel. That should surprise no one since, regardless of the names used, the idea of estoppel is not a creation of the Anglo-American system of law. The Roman law achieved the same results under a doctrine expressed in the formula *venire contra factum proprium*, under which no one is allowed to ignore or deny his own acts, or the consequences thereof, and claim a right in opposition to such acts or consequences.<sup>108</sup>

#### *The Louisiana Jurisprudence*

In a case decided in the past century the defendant had attempted to remove the remains of the plaintiff's ancestor from a sepulchre belonging to the defendant's family, despite an earlier promise that the remains would never be disturbed. The Louisiana court granted a permanent injunction to prevent the removal of the remains and asserted that the principle of estoppel, often applied in controversies involving pecuniary rights, does not permit the withdrawal of promises or engagements on which another has acted.<sup>109</sup>

In a later case plaintiff asserted that, in reliance on defendant's assurances, he had incurred heavy expenditures in purchasing equipment necessary to perform the obligation arising from his contract with defendant and argued that the latter should have reasonably expected that his representations would induce the substantial change in plaintiff's position and, further, that refusal to enforce defendant's promise would result in injustice. This time, however, the Louisiana Supreme Court rejected plaintiff's contention and asserted that the theory of promissory estoppel is unknown to the Louisiana law.<sup>110</sup>

That decision notwithstanding, Louisiana courts held promises enforceable on grounds of detrimental reliance in other decisions. Thus, in a later case, the defendant had promised to confine a cat for the

108. See 2 S. Litvinoff, *Obligations* § 94, at 168, in 7 *Louisiana Civil Law Treatise* (1975); J. Puig Brutau, *La doctrina de los actos propios* 97, in *Estudios de derecho comparado* (1951). See also J. Dawson, *Gifts and Promises* 188-89 (1980); Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 52 (1936); Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 373 (1937); Herman, *Detrimental Reliance in Louisiana Law—Past, Present, and Future (?)*: *The Code Drafter's Perspective*, 58 *Tul. L. Rev.* 707, 714 (1984). See also, very especially, *Herbert v. McGuire*, 447 So. 2d 64 (La. App. 4th Cir. 1984).

109. *Choppin v. Dauphin*, 48 *La. Ann.* 1217, 1220, 20 *So.* 681, 682 (1896). See also 1 S. Litvinoff, *Obligations* § 135, at 227-28, in 6 *Louisiana Civil Law Treatise* (1969).

110. *Ducote v. Oden*, 221 *La.* 228, 59 *So. 2d* 130 (1952). The decision was praised in Smith, *The Work of the Louisiana Supreme Court for the 1951-1952 Term—Conventional Obligations*, 13 *La. L. Rev.* 236, 241 (1953). That praise is criticized in Herman, *supra* note 108, at 717. See also S. Litvinoff, *The Law of Obligations in the Louisiana Jurisprudence* 161-62 (1985).

period of observation necessary to establish if the animal was rabid. The cat, however, was allowed its usual freedom and it disappeared before the required period elapsed. As a consequence, plaintiff, who had been bitten by the cat, was forced to undergo precautionary treatment that produced an injurious reaction. The court allowed recovery on grounds that, while no initial duty was imposed upon defendant, that party had given an express promise upon which plaintiff had relied.<sup>111</sup> Louisiana courts have resorted to reliance in order to hold an insurer bound even before the pertinent policy was issued.<sup>112</sup> Reliance was found to be the basis to enforce an employer's offer of a benefit plan at the employer's expense when the employee to whom the offer was made, relying thereon, remained in the employer's service.<sup>113</sup> Likewise, a pipeline owner's promise of payment to a vessel owner was enforced on grounds that the latter relied upon the promise to his detriment.<sup>114</sup>

More recently the Louisiana jurisprudence, in a clear manner, has traced the ancestry of reliance as basis for obligation back to the civilian *venire contra factum proprium*.<sup>115</sup>

It can no longer be denied that reliance has conquered a place for itself in the Louisiana jurisprudence.

#### Usefulness

It is granted that wherever it is found that a promise is enforceable on grounds of reasonable reliance detrimental to the promisee, the same conclusion could be reached on different grounds such as the existence of a unilateral gratuitous contract of an innominate nature. Oftentimes, however, the difficulty of ascertaining the parties' intent or doubt concerning those acts that constitute an alleged implied acceptance make the conclusion questionable that a contract of any kind existed before the claimant took action in reliance on the promise made to him.<sup>116</sup> Even where no obstacle lies in the way to such an assertion, one party's reliance induced by the other's promise offers the advantage of clear and concrete facts over abstract, and therefore less clear, concepts. Indeed, the proverbial dynamism of business and social intercourse in

111. *Marsalis v. LaSalle*, 94 So. 2d 120 (La. App. Orl. 1957).

112. See *Thomas v. Life Ins. Co.*, 219 La. 1099, 55 So. 2d 705 (1951).

113. *Robinson v. Standard Oil Co.*, 180 So. 237 (La. App. 1st Cir. 1938).

114. *Continental Casualty Co. v. Associated Pipe & Supply Co.*, 447 F.2d 1041 (5th Cir. 1971).

115. See *Hebert v. McGuire*, 447 So. 2d 64 (La. App. 4th Cir. 1984); *Sanders v. United Distrs.*, 405 So. 2d 536 (La. App. 4th Cir.), writ denied, 410 So. 2d 1130 (La. 1981).

116. See *supra* p. 20.

today's world seems to leave little room for the idea of a pure *convention* consisting of an offer, an acceptance, and a lawful cause, regardless of subject matter.<sup>117</sup>

Detrimental reliance can perform its efficient auxiliary function not only in the many instances already contemplated by the Louisiana jurisprudence, but also in others such as charitable subscriptions where a charity's reliance on the subscriber's promise may be a grounds for enforcement more persuasive than finding onerousness in a typically gratuitous donation.<sup>118</sup> In the case of bids by sub-contractors, reliance by the general contractor to his detriment can help in reaching the conclusion that the bid was irrevocable for a certain time.<sup>119</sup>

It is noteworthy, in this context, that the protection of induced reliance lies at the basis of some new articles of the Louisiana Civil Code such as those governing offers calling for performance as acceptance, and those allowing damages to be recovered by the innocent nonmistaken party.<sup>120</sup>

It must not be believed that detrimental reliance is grounds for enforcement only in situations where a contract would be gratuitous if there is a contract at all. Reliance may perform its efficient auxiliary function where the contract at stake is a business, that is onerous, contract.<sup>121</sup>

#### Reasonableness

As required by the Louisiana Civil Code, the promisee must be reasonable in his reliance for the latter to become grounds for enforcement of the promise. A promisee, thus, may not place his reliance on just any promise. For example, if the promise exceeds the promisor's ability to perform, reliance by the promisee would be unreasonable, as when the promisor engaged to give something beyond his means. Reliance is likewise unreasonable if the promisee attributes to the promise a scope greater than the promisor, under his own standard of reasonableness,

117. See 1 S. Litvinoff, *Obligations* § 239, at 433, in 6 *Louisiana Civil Law Treatise* (1969).

118. See *Louisiana College v. Keller*, 10 La. 164 (1836).

119. See *W.M. Heroman & Co. v. Saia Elec.*, 346 So. 2d 827 (La. App. 1st Cir.), writ denied, 349 So. 2d 1271 (La. 1977).

120. See La. Civ. Code arts. 1939, 1940, and 1952. See also *Herman*, *supra* note 108, at 737-50.

121. See *Coleman v. Bossier City*, 305 So. 2d 444 (La. 1974). In *Ducote v. Oden*, 221 La. 228, 59 So. 2d 130 (1952), the court might have been reluctant to protect plaintiff's reliance because of the business nature of the contract.

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could possibly have intended.<sup>122</sup> Reliance is unreasonable, also, if on such basis the promisee acts to his detriment but in a manner the promisor could not have expected from the promisee, as when money is promised for the promisee not to have to work for a livelihood and, in reliance on that promise, the promisee indulges in raising his standard of living.<sup>123</sup>

Reliance is also unreasonable when placed on the kind of gratuitous promise for the validity of which a formality is required, and the promise has been made only informally.<sup>124</sup> In other words, a party should place no reliance on his belief that he has entered a gratuitous contract when the formality prescribed for the validity of such a contract has been omitted. Thus, reliance on a gratuitous donation not made in authentic form is not reasonable.<sup>125</sup> That instance of unreasonableness introduces an important limitation to the use of reliance as grounds for enforcement. That is so in spite of the fact that distinguished civilian authority can be found for the proposition that reliance should be effective in situations where a fair solution calls for circumventing the requirement of a certain form.<sup>126</sup> On the other hand, that limitation may lead to the conclusion that, as a paradox, more promises are enforceable when promissory estoppel substitutes for consideration at common law than under the wider and more flexible theory of cause at civil law.<sup>127</sup> Be that as it may, the limitation may be justified by the lawmaker's prudence. Indeed, a donation is a liberality that depletes the donor's patrimony.<sup>128</sup> Further, it may involve immovable property. The cautionary function that formalities perform may warrant that reliance not be regarded as sufficient to overcome the need for authentic form when such form is required.<sup>129</sup>

122. That would be the case, for example, if in a separation agreement a spouse promises to support the other without a time limitation and the promisee relies on the promise, assuming that the obligation will be fulfilled even if the promisee remarries. Cf. *Lamb v. Lamb*, 460 So. 2d 634 (La. App. 3d Cir. 1984), writ denied, 462 So. 2d 1249 (La. 1985).

123. See E. Farnsworth, *Contracts* 95 (1982).

124. La. Civ. Code art. 1967.

125. See La. Civ. Code arts. 1523 and 1536. Nevertheless, comment (f) to La. Civ. Code art. 1967 explains that the article does not intend to overrule the jurisprudential conclusion that a promise to make a disposition mortis causa is enforceable against the promisor's estate when the formal disposition was not made. See La. Civ. Code art. 1570. Comment (f) adds that close analysis of those decisions where that conclusion was reached reveals that the promise involved was made in return for a counterperformance requested by the promisor. See *Succession of Gesselly*, 216 La. 731, 44 So. 2d 838 (1950).

126. See I G. Gorla, *Il contratto* 364 (1954).

127. For a full discussion, see I S. Litvinoff, *Obligations* § 280, at 497-99, in 6 *Louisiana Civil Law Treatise* (1969).

128. See I S. Litvinoff, *Obligations* § 99, at 167, in 6 *Louisiana Civil Law Treatise* (1969).

129. See S. Litvinoff & W. Tete, *Louisiana Legal Transactions: The Civil Law of Juridical Acts* 127-29 (1969).

implies circularity

### *Recovery May Be Limited*

Recovery by the promisee may be limited to the expenses he incurred or the damages he suffered as the result of his reliance on the promise.<sup>130</sup> In other words, the court may not grant specific performance to the disappointed promisee, but only damages, and, moreover, the court may limit the damages thus granted to the expenses actually incurred.<sup>131</sup> Of the two traditional elements of damages, namely, *damnum emergens* and *lucrum cessans*—loss actually sustained and profit of which he has been deprived—the promisee may recover only one, and that at the court's discretion.<sup>132</sup> When the promise that induced reliance can be viewed as an offer that would result in a gratuitous contract when accepted, that limitation is consistent with other provisions of the Louisiana Civil Code according to which an obligation with a gratuitous cause is less rigorously enforced.<sup>133</sup>

When an obligation is enforced on grounds of detrimental reliance Louisiana courts may, thus, adjust the extension of the remedy to the circumstances of each case. In many situations recovery of the loss actually sustained by the promisee, that is the protection of his restitution interest, will satisfy the demands of fairness.<sup>134</sup> Other situations may be such, however, that only specific performance will give adequate protection to a disappointed promisee.

### *Reliance by a Third Party*

When the promise is such that its performance would benefit a party other than the promisee it is foreseeable that the beneficiary may rely on the promise. If such is the case the promise should be enforceable for the same reasons that make the promisee's justifiable reliance a ground for enforcement. When a contract contains a *stipulation pour autrui* there is ample opportunity for that kind of reliance by the intended third party beneficiary.<sup>135</sup> Even reliance by a third party who is not the intended beneficiary of the promise may lend additional strength to the claim of the promisee or of the beneficiary.

130. La. Civ. Code art. 1967.

131. See La. Civ. Code art. 1967 comment (e).

132. See La. Civ. Code art. 1995.

133. See La. Civ. Code art. 2937 for gratuitous deposit, and La. Civ. Code art. 3003 for gratuitous mandate.

134. See Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 52 (1936).

135. See La. Civ. Code arts. 1978-1982. See also *Muntz v. Algiers & G. Ry.*, 114 La. 437, 38 So. 410 (1905).

## THE REVISION

*Definition*

The Louisiana Civil Code of 1870 defined the cause of the contract as the consideration or motive for making it.<sup>136</sup> The revision eliminated the reference to the "cause of the contract" in order to make it clear that cause is needed for an obligation rather than for a contract.<sup>137</sup> Indeed, if the contract is synallagmatic the obligation of each party will have a cause different from the cause of the obligation of the other, which makes imprecise the notion of a cause of the contract. The revision also eliminated the reference to "consideration" in order to avoid the confusion that results if that word is understood in its common law signification.<sup>138</sup> Finally, the revision explains cause as the reason, rather than the motive, why a party binds himself. That cause is motive is an idea the Louisiana redactors of 1825 took from the work of Toullier.<sup>139</sup> Though that writer spoke of *motif*, he did so in the sense of *pourquoi*—why an obligation is incurred. In that context, "motive" and "reason" are practically interchangeable. Nevertheless, "reason" carries the connotation of something supposed to be understood, which may rescue cause from the depths of subjectivity into which it is plunged when put in terms of motive. Further, the word "reason" may enhance the role of a court's discretion in ascertaining, ultimately, *that* which, in given circumstances, appears as the inducement, purpose, or presumable *motive* that prompted a party to incur an obligation.<sup>140</sup>

*Absence and Failure of Cause*

Those articles of the Louisiana Civil Code of 1870 dealing with absence of cause and failure of cause are doctrinal in nature and contain principles that are elsewhere expressed in the code.<sup>141</sup> For that reason those articles have been eliminated without intending any change in the law.

*False Cause*

The reference to false cause has been eliminated from the basic principles asserting that an obligation cannot exist without a lawful cause

136. La. Civ. Code art. 1896 (1870).

137. See I S. Litvinoff, Obligations § 239, at 432-35, in 6 Louisiana Civil Law Treatise (1969).

138. See La. Civ. Code art. 1967 comment (c).

139. See 3 C. Toullier, Le droit civil français 378 (1833).

140. See La. Civ. Code art. 1967 comment (a).

141. La. Civ. Code arts. 1897-1899 (1870). Compare La. Civ. Code art. 1898 (1870) with La. Civ. Code art. 2552; La. Civ. Code art. 1899 (1870) and La. Civ. Code art. 2697.

in order to avoid contradiction with the principle that allows a conventional obligation to subsist in spite of a recited untrue cause if another and valid cause can be shown.<sup>142</sup>

*Detrimental Reliance—Place in the Civil Code*

It might be said that it was unnecessary to introduce detrimental reliance into the Civil Code of Louisiana because, in the kind of situation where that principle may provide a solution, the liability of the offeror or promisor is actually delictual rather than contractual.<sup>143</sup> In other words, a promisor who refuses to honor his promise on the basis of a technicality can be regarded as inflicting damage to the other party because of the promise, and the making of a promise is no doubt an act of the promisor, which clearly seems to fall within the scope of the general principle of the civil codes of France and Louisiana according to which whatever act of man causes damage to another binds that man to make reparation.<sup>144</sup>

Such an objection can be readily overcome. It must be remembered, in the first place, that there is no liability unless there is damage and that in the situations here contemplated there would be no damage unless the offer or promise is susceptible of inducing reliance, and the offeree or promisee actually relies to his detriment. It is then the induced reliance that would seem to give rise to the quasi-delictual liability. That being so, even in a quasi-delictual perspective, the new article of the Louisiana Civil Code formulates a mere rule clearly derived from the general principle. Clear rules are never unnecessary, especially when they are appended to principles that are so general as to encompass practically everything. In handling a principle of that kind a conscientious court may hesitate or perhaps abstain from deriving one consequence more because of a feeling that the scope of the principle would be thereby exceeded. The enactment of a clear rule relieves the judicial conscience of that kind of scruple without doing violence to the general principle. In the second place, however, the new article of the Louisiana Civil Code subtracts induced reliance from the quasi-delictual field and places it where it belongs, in contract. Indeed, to turn an unfulfilled promise into a quasi-delict for the purpose of justifying recovery is a method as roundabout as forcing a gift into the frame of an onerous contract

142. See La. Civ. Code art. 1893 (1870) and La. Civ. Code art. 1966 comment (b). See also Exposé des motifs 35 (West's Special Pamphlet, 1986).

143. See I S. Litvinoff, Obligations § 282, at 501, n.42, in 6 Louisiana Civil Law Treatise (1969); Comment, Promissory Estoppel and Louisiana, 31 La. L. Rev. 84 (1970); G. Gilmore, The Death of Contract (1974). See also Snyder, Promissory Estoppel as Tort, 35 Iowa L. Rev. 28 (1949).

144. See French Civ. Code art. 1382 and La. Civ. Code art. 2315.

for the sake of protecting the interest of an unfairly disappointed promisee. As in the case of an obligor who fails to perform a valid conventional obligation, the realm of contract is more hospitable than the realm of tort to the case of a promise which is not fulfilled because the promisor pretends that he is not bound even though his promise induced the other party to rely on it to his detriment.

The question may be raised whether detrimental reliance is a true cause for an obligation since neither the promisee's reliance nor his detriment seems to originate in the promisor's intent.<sup>145</sup> The answer is that, though the promisee's detrimental reliance is certainly not a *motive* of the promisor, it is, however, a *reason* why he should be bound. In the new article of the Louisiana Civil Code, thus, induced reliance is another instance of the *cause raisonable et juste* that some French decisions have asserted as grounds for the enforceability of a promise.

145. See Herman, *supra* note 108, at 720.

## PROOF OF ECONOMIC POWER IN A SHERMAN ACT TYING ARRANGEMENT CASE: SHOULD ECONOMIC POWER BE PRESUMED WHEN THE TYING PRODUCT IS PATENTED OR COPYRIGHTED?

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### INTRODUCTION

In a tying arrangement, a seller conditions a buyer's purchase of one product on the buyer's willingness to take a second product as well. The buyer can obtain the desired "tying" product only by agreeing to also take the seller's less desirable "tied" product.<sup>1</sup> Over the years, various tying arrangements have been held illegal under section 1 of the Sherman Act<sup>2</sup> and under section 3 of the Clayton Act.<sup>3</sup>

According to the most recent Supreme Court tying arrangement case, the Sherman Act case of *Jefferson Parish Hospital District No. 2 v. Hyde*,<sup>4</sup> the "essential characteristic of an invalid tying arrangement lies

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1. The Supreme Court has defined a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6, 78 S. Ct. 514, 518 (1958). Other terms which courts have used for this type of contract include "tie-in," "tying agreement," and "tying device."

2. 15 U.S.C. § 1 (1982).

3. 15 U.S.C. § 14 (1982). For section 3 of the Clayton Act to apply, the tying and tied products must be "goods, wares, merchandise, machinery, supplies, or other commodities."

Legal scholars versed in economics have been highly critical of the Supreme Court cases developing the prohibition against tying arrangements. See, e.g., R. Bork, *The Antitrust Paradox* 372-74 (1978); Bowman, *Tying Arrangements and the Leverage Problem*, 67 *Yale L.J.* 19 (1957); Markovits, *Tie-Ins, Reciprocity, and the Leverage Theory*, 76 *Yale L.J.* 1397 (1967); Pearson, *Tying Arrangements and Antitrust Policy*, 60 *Nw. U.L. Rev.* 626 (1965); and Posner, *Exclusionary Practices and the Antitrust Laws*, 41 *U. Chi. L. Rev.* 506, 508-15 (1974). Economists' criticisms are discussed more fully at *infra* notes 48-61 and accompanying text.

4. 466 U.S. 2, 104 S. Ct. 1551 (1984). The other Supreme Court tying arrangement cases are *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 97 S. Ct. 861 (1977) [*Fortner II*]; *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 89 S. Ct. 1252 (1969) [*Fortner I*]; *United States v. Loew's Inc.*, 371 U.S. 38, 83 S. Ct. 97 (1962); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 73 S. Ct. 872 (1958); *Times-*