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Rethinking the Doctrine of Nullity

Ronald J. Scalise Jr.

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Rethinking the Doctrine of Nullity

*Ronald J. Scalise Jr.**

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INTRODUCTION

Nullity is the concept or the doctrine (or perhaps the most common doctrine) that deprives legal acts of their effects.¹ In common law terms, it is the concept of voidness or voidability. Eminent authority has called this subject “one of the [most] crucial subjects of the law,”² probably because of the extent of its application. Unlike contract law or property law, the concept of nullity is not specific to one series of transactions or one substantive area of the Civil Code. Nullity applies equally and perhaps as significantly in the areas of contracts, property, sales, marriages, community property arrangements, successions, and many others. In short, it applies and is relevant across all aspects of private law and even public law. Despite its importance, the concept of nullity has been noted to be one of the “most obscure in the field of the civil law.”³ A thorough-going analysis of nullity has eluded many well-respected scholars, not the least of which is Domat, who it is said

1. See, e.g., PHILIPPE MALAURIE ET AL., *LES OBLIGATIONS* 333–36 (4th ed. 2009) (discussing the distinctions between various causes of inefficacy of acts); ALAIN BÉNABENT, *DROIT CIVIL: LES OBLIGATIONS* 143–45 (9th ed. 2003).

2. SAÛL LITVINOFF & W. THOMAS TÊTE, *LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS* 162 (1969).

3. 1 MARCEL PLANIOL, *TREATISE ON THE CIVIL LAW* PT. 1, No. 328, at 219 (photo. reprint 2005) (La. State L. Inst. trans., 12th ed. 1959). See also BÉNABENT, *supra* note 1, at 145 (“*La théorie des nullités est complexe et, sur bien des points, reste très incertaine.*”).

“completely failed in his attempt” to explain nullities.⁴ Pothier, it is said, “did not succeed any better.”⁵

This contribution attempts to add some clarity to the law of nullity in Louisiana. It does not attempt to prescriptively reform or rewrite the law of nullity. Rather, its goals are modest in attempting to descriptively analyze existing law in a coherent fashion and under a new theory. Part I of this Article briefly examines the history of the doctrine of nullity from Roman times to modern Louisiana law. In Part II, the current law of nullity is examined in a critical and more descriptive fashion in an attempt to spell out an aspect of the law of nullity commonly ignored by the traditional scheme. Part III critiques the current understanding of nullity and suggests that the categories of absolute and relative nullities are more nuanced than traditionally believed. Part IV posits the existence of a new category of nullities—mixed nullities—and offers a new model for thinking about nullities that moves away from the traditional dichotomous scheme and embraces an entire spectrum for null transactions.

I. A BRIEF HISTORY OF NULLITY

Like so many civilian institutions, the concept of nullity in Louisiana law can only be fully understood by going back to the Romans. A proper exposition of the history of nullity requires a basic overview of the treatment of nullities in Roman law, as the basic concept of nullity in the civil law owes much to the Romans. Although the Romans themselves did not employ the terms “absolute” and “relative nullities,” they did recognize the same basic effects that today are prescribed for nullities of each type.

A. Roman Law

As many others have noted, explaining the Roman system of nullity is not an easy task. The Romans were not interested in classifying nullities but rather were interested in whether an action was available in a particular context or situation.⁶ Unfortunately, however, “they did not pay too much attention to a neat analysis of why an action could not be granted under certain circumstances and what further ramifications that entailed.”⁷ Some insight, however, can be gleaned. As Planiol noted:

4. PLANIOL, *supra* note 3, at 221.

5. *Id.*

6. REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION* 679 (photo. reprint 1992) (1990).

7. *Id.*

There were, at Roman law, two ways in which an act could become null. There was the civil nullity which took place automatically by operation of law and, besides that, there was the Praetorian nullity, which required that a suit be brought and which could become effective only by judgment.⁸

Acts in violation of law or public policy were null. Thus, in the law of marriage, Modestinus wrote that “it is always necessary to consider not just what is lawful but also what is decent.”⁹ For example, marriage between members of certain social classes with divergent social statuses could be viewed, in Roman times, as null. Because actors in Roman times were the subjects of social prejudice and *infamia*,¹⁰ the daughter of a Senator, a member of the highest social rank,¹¹ could not marry a member of this low social order. Thus, the Digest stated that “[i]f the daughter . . . of a senator marries . . . someone who was an actor, . . . the marriage will be void.”¹²

Unlike arrangements that were void *ab initio*, agreements entered into under some vices of consent presented situations in which the praetor could grant relief.¹³ For instance, under Roman law, parties who entered into agreements under duress could be allowed relief and repudiation of the act.¹⁴ Paul, in the Edict, provided that “[i]f under duress I have entered upon an inheritance, . . . I am to have *restitutio* through the agency of the praetor so that the power of repudiation is granted to me.”¹⁵ Similarly, acts done by parties without capacity (at Roman law, those under 25) bear the indicia of the modern relative nullity, namely, that the nullity is one established for the protection of a vulnerable party and the act can be confirmed or ratified once the person reaches the age of majority.¹⁶ Thus, Ulpian wrote:

8. PLANIOL, *supra* note 3, at 220.

9. DIG. 23.2.42 (Modestinus, Formation of Marriage), in 2 THE DIGEST OF JUSTINIAN 662 (A. Watson, trans. & ed., 1985).

10. *Id.* DIG. 3.2.1, at 82.

11. JÉRÔME CARCOPINO, DAILY LIFE IN ANCIENT ROME: THE PEOPLE AND THE CITY AT THE HEIGHT OF THE EMPIRE 53 (1940).

12. 2 THE DIGEST OF JUSTINIAN, *supra* note 9, DIG. 23.2.42, at 662.

13. *See id.* DIG. 4.2.1, at 113 (“The praetor says: ‘I will not hold valid what has been done under duress.’”); *id.* DIG. 4.3.1, at 119 (“And in fact these are the words of the edict: ‘Where something is alleged to have been done with a malicious or fraudulent intent . . . I will grant an action.’”).

14. *See id.* DIG. 4.2.1, at 113 (“The praetor says: ‘I will not hold valid what has been done under duress.’”).

15. *Id.* DIG. 4.2.21, at 118.

16. *Compare id.* DIG. 4.4.1, 4.4.3, at 125, with LA. CIV. CODE art. 2031 (2014).

The praetor following natural equity has issued this edict . . . [for] the protection of *minores*. For since all agree that persons of this age are weak and deficient[,] . . . the praetor has promised them relief in this edict and help against imposition. . . . And it is settled . . . that if anyone having become adult should ratify what he had done as a minor, *restitutio* is not applicable.¹⁷

As prevalent as the concept was, however, the Roman approach does not provide much insight into modern day problems with the doctrine of nullity. The Roman concept of nullity—unlike many other Roman concepts, e.g., sale—was an incoherent jumble of concepts. Scholars have noted that the Romans used “[a]bout 30 different terms” to describe the results of nullity.¹⁸ Part of the problem, which has already been hinted at above, existed because some nullities were decreed by the *ius civile*, while others were a result of the *ius honorarium* and thus developed by the praetors.¹⁹ Some have even noted that to attempt to explain the Roman system of nullity, with all its terminological distinctions, in a coherent manner “would be an absolutely hopeless task.”²⁰

B. The Spread in Europe

The medieval commentators of the *ius civile* did not fare much better. One court in South Africa appropriately noted that in attempting to systematize the Roman idea of nullity these scholars “were like blind men looking in a dark room for a black cat which wasn’t there.”²¹ Nonetheless, kernels of the Roman concept of nullity spread throughout Europe and became embedded in, among others, both early Spanish and French law. The *Siete Partidas* evidences the distinction between acts that are null on their own and acts that must be declared null. For example, if a eunuch attempted to marry, the marriage was null for reasons of public policy.²² That is, even though eunuchs could consent to marriage, such a marriage would not be valid because “they cannot unite themselves carnally with their wives, so as to beget children.”²³ For contractual vices of consent, however, rescission of the sale or annulment was available,

17. 1 THE DIGEST OF JUSTINIAN, *supra* note 9, DIG. 4.4.1, 4.4.3, at 125.

18. ZIMMERMANN, *supra* note 6, at 679.

19. *Id.* at 679–80.

20. *Id.* at 679.

21. *Id.* at 678.

22. See THE LAWS OF LAS SIETE PARTIDAS, partida 4, tit. II, law 6, at 457 (L. Moreau Lislet & Henry Carleton, trans. 1820).

23. *Id.*

rather than the contract being null *ab initio*.²⁴ Thus, “[i]f a man buys or sells any thing through force or fear, the purchase or sale . . . may . . . be rescinded.”²⁵ Similarly, if “any person, through fraudulent motives, should prevail on [another] . . . to sell [an estate, a house, a vineyard, or anything else] the sale may be rescinded.”²⁶

Early French sources also demonstrate the effects of the idea of nullity, but a consistent and coherent theme appears absent. In Domat’s famous work, *The Civil Law in Its Natural Order*, he discussed nullities, but it is difficult to find any order—natural or otherwise—in it.²⁷ Despite the seeming confusion, he was careful to distinguish between contracts that are null in their origin and those that are dissolved.²⁸ In the former category, he included not only things that are “contrary to good manners”²⁹ and contracts about “things which cannot be bought or sold, such as things set apart to a holy use [and] things belonging to the public,”³⁰ but also contracts made by those incapable,³¹ those subject to error and violence,³² and those without cause.³³ In the latter category are contracts dissolved by mutual consent,³⁴ contracts resolved by the fulfillment of some condition,³⁵ and contracts annulled for fraud.³⁶ In short, after reading through Domat, one is tempted to agree with Planiol that the result is merely a

Pothier, whose work was very influential in the drafting of the French Civil Code, did not discuss the topic of nullity as such, but he did present the seeds of the modern idea of nullity in the discussion of the effects of various contracts.³⁸ He seems to have recognized that some acts have no effect at all and are invalid *ab initio*, whereas others are merely the cause for annulling an otherwise existing contract.³⁹ In the former class, Pothier discussed

24. See *id.* partida 5, tit. V, law 56, at 167.

25. *Id.*

26. *Id.* partida 5, tit. V, law 57, at 170.

27. JEAN DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* 187, 192 (William Strahan trans., Luther S. Cushing ed., 1850).

28. *Id.* at 192.

29. *Id.* at 188.

30. *Id.* at 190.

31. *Id.* at 188.

32. *Id.* at 190.

33. *Id.* at 191.

34. *Id.* at 192.

35. *Id.* at 193.

36. *Id.* at 194.

37. See PLANIOL, *supra* note 3, at 219.

38. DOMAT, *supra* note 27, at 193.

39. *Id.*

certain types of error.⁴⁰ He wrote that error as to the nature of the transaction or as to the price that prevents the meeting of the minds results in no contract at all:

[I]f one means to sell me a thing, and I mean to receive it as a loan or a gift, there will be in this case no sale, no loan or a gift. . . . If one means to sell me a thing for a certain price, and I mean to buy it for a less price, in all such cases there is no sale.⁴¹

Similarly, errors as to the person and errors as to a substantial quality of the thing render the contract null.⁴²

In the second class, Pothier categorized both violence and fraud: “If the assent of one of the contracting parties has been extorted by violence,” the contract exists, but it is “defective.”⁴³ “[I]t cannot be said, as in the case of error, that there has been absolutely no contract.”⁴⁴ Similarly, in the case of fraud, “the contract is not absolutely and essentially void . . . because an assent . . . is still an assent” but defective and thus annulable.⁴⁵

As confusing as some of the French doctrine has been, the dual system of nullities from Roman law, i.e., acts null by operation of law and acts that must be declared null, was preserved in French law.⁴⁶ Article 1117 of the Code Napoleon declared that “[a]n agreement contracted by error, violence or deceit is not void as a matter of law; it only gives rise to an action in nullity or rescission.”⁴⁷ Such acts are today described as “relatively null” or “annulable.”⁴⁸ On the other hand, article 1339 made clear that absolute nullity exists in certain situations, such as when a donation

40. *Id.*

41. ROBERT JOSEPH POTHIER, TREATISE ON OBLIGATIONS, CONSIDERED IN A MORAL AND LEGAL VIEW 14 (Martin & Ogden trans., 1802).

42. *Id.* at 15–16.

43. *Id.* at 18.

44. *Id.* at 23.

45. *Id.*

46. PLANIOL, *supra* note 3, § 335, at 224. This is not to suggest, however, that the Roman and French treatment of error, fraud, and duress, which produce nullities, was necessarily consistent. On this topic and the philosophical foundations underlying the Roman and French treatment of these concepts, see JAMES GORDLEY, PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 57–61, 180–90 (1991).

47. CODE CIVIL [C. CIV.] art. 1117 (Fr.). See also PLANIOL, *supra* note 3, § 335, at 224.

48. See, e.g., MALAURIE ET AL., *supra* note 1, at 342; BÉNABENT, *supra* note 1, at 150; Denis Talon, *Contract Law*, in INTRODUCTION TO FRENCH LAW 221 (G. Berman & E. Picard eds. 2012).

inter vivos is executed in the wrong form.⁴⁹ Other articles of the French Civil Code, such as articles 181, 183, 503, and 1304, also suggested the preservation of the dual concept of nullities.⁵⁰

Modern scholars still recognize the dualist approach to nullities but explain the concept of nullities in terms of their effects. Relative nullities exist to protect a private interest; they can be invoked only by the protected party and can be confirmed.⁵¹ Absolute nullities, however, protect the public order, can be asserted by all interested parties, and cannot be confirmed.⁵²

C. Louisiana Law

1. From 1808 to 1984

Prior to the 1984 revision to the Obligations articles of the Civil Code, the law of nullity in Louisiana was not clear. The law was marked with an absence of a cohesive regime, and rules on nullity, invalidity, voidness, and voidability were littered throughout the Code.⁵³ Sometimes the terminology used concepts of nullity and voidness interchangeably, as is evidenced by article 12 of the Civil Code of 1870, which stated that “[w]hatever is done in contravention of a prohibitory law, is *void*, although the *nullity* be not formally directed.”⁵⁴ Other times the Code left the reader to wonder what the consequences of nullity were and whether there was an absolute or relative nullity: “The sale of a thing belonging to

49. CODE CIVIL [C. CIV.] art. 1339 (Fr.). See also PLANIOL, *supra* note 3, § 335, at 225.

50. PLANIOL, *supra* note 3, § 335, at 225. See also 9 P.A. FENET, RECUEIL COMPLET DES TRAVAUX PRÉPARATOIRES DU CODE CIVIL 52 (1968) (discussing the differences between absolute and relative nullities in context of marriage at a legislative session in 1801).

51. MALAURIE ET AL., *supra* note 1, at 342.

52. *Id.* at 343.

53. See, e.g., LA. CIV. CODE arts. 12 (discussing voidness and nullity), 1595 (discussing nullity and voidness), 1823 (discussing invalidity), 1827 (discussing voidness), 1829 (discussing voidness), 1830 (discussing voidness), 1831 (discussing invalidity), 1832 (discussing invalidity), 1834 (discussing invalidity), 1838 (discussing invalidity and voidness), 1841 (discussing voidness), 1842 (discussing invalidity), 1845 (discussing invalidity), 1846 (discussing invalidity), 1850 (discussing voidness and invalidity), 1852 (discussing voidness), 1853 (discussing nullity), 1854 (discussing invalidity), 1855 (discussing invalidity), 1857 (discussing invalidity), 1858 (discussing invalidity), 1859 (discussing invalidity), 1881 (discussing voidability), 1892 (discussing voidness), 1897 (discussing voidness), 2447 (discussing nullity), and 2452 (discussing nullity) (1870).

54. *Id.* art. 12 (emphasis added).

another person is null”⁵⁵ There were even articles that clearly invoked the consequences of nullity without expressly using the concept at all. Article 1893 stated that “[a]n obligation without a cause, or with a false or unlawful cause, can have no effect.”⁵⁶

The important articles on vices of consent seemed to vacillate and express contrary views as to whether a contract afflicted with a vice was “void” and “absolutely null” or “voidable” and “relatively null.” Articles 1841 and 1850 stated clearly that “[e]rror as to the nature of the contract will render it void”⁵⁷ and “[c]onsent to a contract is void, if it be produced by violence or threats.”⁵⁸ On the other hand, article 1881 stated the contrary position that “[e]ngagements made through error, violence, fraud or menace, are not absolutely null, but are voidable by the parties.”⁵⁹ In short, the law contained an array of confusing principles, and commentary and scholarship were essential to navigating the uncertain waters of nullity in the prior Civil Code.⁶⁰

2. *The 1984 Revision and the Classic Division of Nullities*

In the 1984 revision of the Civil Code, Louisiana adopted modern French theory on absolute nullities being nullities of public order and relative nullities being nullities of private interest. The 1984 revision of the Louisiana law of Obligations, effective January 1, 1985, marked a milestone change in the law of nullity in Louisiana.⁶¹ For the first time, the Louisiana Civil Code included not only specific articles on nullity but an entire Chapter of Book III on the topic.⁶²

It is currently black letter law that nullities in Louisiana law are of two types, absolute and relative.⁶³ Absolute nullities are so called because their effect is absolute and they operate similarly with respect to all members of society, not just the parties to the

55. *Id.* art. 2452.

56. *Id.* art. 1893.

57. *Id.* art. 1841.

58. *Id.* art. 1850.

59. *Id.* art. 2452.

60. *See, e.g.,* LITVINOFF & TÊTE, *supra* note 2, at 161–90; *see also* ALAIN LEVASSEUR & DAVID GRUNING, *LOUISIANA LAW OF OBLIGATIONS: A PRÉCIS* 49–53 (2d ed. 2011).

61. *See* EXPOSÉ DES MOTIFS OF THE PROJET OF TITLES III AND IV OF BOOK III OF THE CIVIL CODE OF LOUISIANA 70 (1983) (noting that prior to the revision “[t]he distinction between absolute and relative nullities ha[d] long been a source of confusion in Louisiana”).

62. *See, e.g.,* LA. CIV. CODE arts. 2029–2035 (2014).

63. *Id.* arts. 2030, 2031.

transaction.⁶⁴ The purpose of this effect is obvious; because an absolute nullity is one that “violates a rule of public order,” it should have no effect with respect to anyone.⁶⁵ Moreover, an absolute nullity, being an issue of state policy, does not prescribe.⁶⁶ In other words, the mere passage of time cannot cure an act done in contravention of a law or policy of the State. Likewise, an absolute nullity may not be confirmed⁶⁷ and “may be invoked by any person or may be declared by the court on its own initiative.”⁶⁸

Relative nullities, on the other hand, exist for the “protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made.”⁶⁹ These nullities are relative in the sense that their effects are relative only to the members of the transaction and, even more specifically, only relative to the person in whose interest it is designed to protect.⁷⁰ Consequently, a court may not declare a relative nullity on its own initiative.⁷¹ Because this kind of nullity is not of a “public policy” type, the party in whose interest the nullity is established may confirm the null contract.⁷² A relative nullity must be raised “within five years from the time the ground for nullity either ceased, as in the case of incapacity or duress, or was discovered, as in the case of error or fraud.”⁷³

Although the above discussion, taken directly from the Louisiana Civil Code, presents a rough picture of the basic outline of nullity in the Louisiana Civil Code, it does not present an accurate account of the current law of nullity. In addition to the defects underlying the theory of nullity, amendments to the Louisiana Civil Code and the jurisprudential gloss that has been placed on the concept of nullities require a more nuanced approach to nullities.

II. THINKING ABOUT NULLITY

To “rethink” the doctrine of nullity, as the title states, it is helpful and imperative to first “think” about the law of nullity, not just in a textualist way in which it is written into the Civil Code but in a textured way that embraces the multifaceted nature of law and

64. *Id.* art. 2030.

65. *Id.*

66. *Id.* art. 2032.

67. *Id.* art. 2030.

68. *Id.*

69. *Id.* art. 2031.

70. *See id.*

71. *Id.*

72. *Id.*

73. *Id.* art. 2032.

jurisprudence on the subject. The above recitation of the civil code articles on nullity obscures and disguises the multitude of issues lying beneath the surface of the written law. A detailed examination of nullities reveals that beneath the dichotomous characterization, there are unexplored issues of scope, kinds, and classifications of nullities.

A. Ambit of the Law of Nullities

Although the articles on nullity are placed in Title IV of Book III, which concerns Conventional Obligations or Contracts, they have a much broader ambit and applicability. Just as in Roman law, the concept of nullity in Louisiana law applies to all types of juridical acts, not just to contracts.⁷⁴ Article 1917 of the Louisiana Civil Code makes that clear in stating that “[t]he rules of this title [i.e., Title IV] are applicable also to obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations.”⁷⁵ The law on nullity is one such example that is applicable not only to contracts but also to all “declarations of will contained in unilateral acts.”⁷⁶ For example, an authentic act of adoption of an adult is not a contract, but if done without the concurrence of the spouse of the adoptive parent, the act is “absolutely null.”⁷⁷ In this instance, the consequence of an absolutely null act of adoption that lacks the consent of the relevant spouse is the same as the consequence would be if it involved a contract.

Similarly, acts that purport to be testaments but fail to follow the prescribed form requirements are also examples of absolutely null acts outside the context of contracts. A testament, as the Civil Code clearly states, is not a contract but an “act” that has effect upon the death of the testator.⁷⁸ In fact, a testament is a unilateral juridical act because it has only one party to the act,⁷⁹ namely the testator, and is a “licit act intended to have legal consequences.”⁸⁰ Execution of a

74. *Id.* art. 1917.

75. *Id.*

76. *Id.* cmt. b.

77. *Id.* art. 213. *See also id.* cmt. c (describing the public policy underlying this requirement); *id.* art. 1619 (stating that an act of disinheritance not done expressly or for just cause is absolutely null).

78. *Id.* art. 1469.

79. Although successors are presumed to accept legacies, it would be theoretically incorrect to think of such an acceptance as the manifestation of the donee’s consent to a contract, as the operative time for acceptance is after the death of the testator, which is an impossibility in the contractual context. *See id.* arts. 962, 1932.

80. *Id.* art. 3483 cmt. b.

will in a form other than that prescribed by law results in an absolute nullity.⁸¹ Countless other acts are treated similarly, but the point is obvious; despite their placement in the Civil Code, the articles on nullity are not limited in their application to contracts. They apply to all juridical acts, including those that are unilateral.

B. Kinds of Nullities: Express v. Tacit

In addition to the idea that the concept of nullity applies well beyond the limited realm of contract law—despite its placement in the Civil Code—it is important to note that the general law of nullity applies not only to acts expressly declared null but also to acts the contravention of which may not specifically be designated as a nullity by legislation. Some actions clearly result in nullity when they are violated, and the Civil Code provides for such nullity “expressly.” For instance, agreeing that a seller is not liable for the eviction of a buyer when the eviction is occasioned by the seller’s own act is, in all cases, an absolute nullity.⁸² The Civil Code makes this clear, and no further elaboration is necessary.

Nonetheless, other actions may result in the same consequence, even though legislation does not expressly so declare. In other words, very often a nullity may be tacit, but its effects are still felt. Article 7, for instance, provides that “[p]ersons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.”⁸³ As the comments note, this provision is not new.⁸⁴ Rather, it is based on articles 11 and 12 of the Civil Code of 1870.⁸⁵ Article 12 of the 1870 Code, however, stated explicitly what is now implicit in article 7 of the current Civil Code—namely, that nullities may not themselves be evident or obvious.⁸⁶ In many instances, the law merely prohibits a particular action or particular conduct. It does not state explicitly that actions in contravention of the stated laws are nullities. Article 12 of the 1870 Code made clear that “[w]hatever is done in contravention of a prohibitory law, is void, although the nullity be not formally directed.”⁸⁷ Article 7 now

81. *See id.* art. 1573 (“The formalities prescribed for the execution of a testament must be observed or the testament is absolutely null.”).

82. *Id.* art. 2503.

83. *Id.* art. 7.

84. *Id.* cmt. a.

85. *Id.*

86. *Compare* LA. CIV. CODE art. 12 (1870), *with* LA. CIV. CODE art. 7 (2014).

87. LA. CIV. CODE art. 12 (1870). Portalis proposed a provision in the preliminary book of the French Civil Code, which provided that “[p]rohibitory laws carry with them the penalty of nullity, even though this penalty be not

leaves that implicit by equating “laws enacted for the protection of the public interest” with the concept of “prohibitory laws.”⁸⁸ Thus, the analysis should be the same in trying to ascertain whether a particular action is a nullity: Has the act violated a prohibitory law or a law established for the public interest? If so, the act is an absolute nullity, even if the law itself does not so formally direct it.

Consider, for instance, murder for hire. Section 28.1 of the Louisiana Criminal Code defines the crime of “solicitation for murder” as “the intentional solicitation by one person of another to commit or cause to be committed a first or second degree murder.”⁸⁹ The penalty for such conduct is “imprisonment at hard labor for not less than five years nor more than twenty years.”⁹⁰ Surely, a contract of murder for hire is absolutely null, even though no law states it and even though the law already prescribes a penalty of prison time. No one would be able to commit murder pursuant to a contract and, after being caught and convicted, legally demand payment from the solicitor. The prohibition of murder and, indeed, murder for hire is both a prohibitory law and one designed to protect the public interest.

Consider, however, the case of a prohibitory law concerning a subject less offensive than murder, such as a law that prohibits the obstruction of passageways: “No person shall willfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway . . . by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.”⁹¹ Question remains as to what the consequences would be if *A* agrees to pay *B* \$100 to obstruct passage on the sidewalk. Would such an agreement be a violation of a prohibitory law in contravention of the public interest and therefore absolutely null? Or would the agreement itself be enforceable because there is no statement in any law stating that an agreement to violate this provision is absolutely null? Article 12 of the 1870 Code made clear that the law need not expressly declare such an agreement null for it to be so; if the law were prohibitory, then agreements in contravention would be null. The current Civil Code is less explicit

form[all]y expressed.” PLANIOL, *supra* note 3, § 337, at 226 (recognizing that such a provision was not ultimately adopted).

88. LA. CIV. CODE art. 7 cmt. d (2014).

89. LA. REV. STAT. ANN. § 14:28.1 (2007).

90. *Id.*

91. LA. REV. STAT. ANN. § 14:100.1 (2012).

and leaves one to ponder whether the act was in derogation of a law protected for the public interest.⁹²

Some, however, have argued that when the Legislature has already provided for the appropriate consequence in case of a violation, the law ought not necessarily superimpose an additional concept of nullity or voidness upon the transaction.⁹³ For instance, in the case of obstructing the sidewalk, the statute provides that “[w]hoever violates the provisions of this Section shall be guilty of a misdemeanor . . . and shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both fined and imprisoned.”⁹⁴ After all, obstruction of a passage might be prohibited, but it is not a *malum in se* offense,⁹⁵ such as a murder, but rather merely a *malum prohibitum* offense.⁹⁶ Under this analysis, *B* might be able to collect the \$100, but upon commission of the act, *B* risks losing \$500, spending time in jail, or both.⁹⁷

The courts have wrestled with ascertaining the civil effects of an agreement to violate a law and have noted the following:

[T]here is considerable authority for the view that, where a criminal statute imposes specific penalties for its violation, if the thing prohibited is not *malum in se*, unless the statute declared that contracts made in violation thereof shall be unenforceable, it is to be inferred that it was not the intention of the lawmakers to render such contracts unenforceable.⁹⁸

In Williston’s famous treatise on contracts, he notes that “some contracts, considered *malum prohibitum*, have been found enforceable as not violating the public policy underlying those

92. On a different, but related note, see Louisiana Civil Code article 1769, which states that “a suspensive condition that is unlawful . . . makes the obligation null.”

93. See, e.g., *John E. Rosasco Creameries, Inc. v. Cohen*, 11 N.E.2d 908, 909 (N.Y. Ct. App. 1937) (“If the statute does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual punishment, the right to recover will not be denied.”).

94. § 14:100.1.

95. “*Malum in se*” is defined as a “crime or an act that is inherently immoral, such as murder, arson, or rape.” BLACK’S LAW DICTIONARY 1045 (9th ed. 2009).

96. “*Malum prohibitum*” is defined as “[a]n act that is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral.” *Id.*

97. Cf. *Lusardo v. Harper*, 116 N.Y.S. 2d 734 (N.Y. Ct. 1950) (holding that a plumber who, in violation of law, had provided professional services without having obtained an occupational license in the relevant area was still able to recover under contract for services rendered); RESTATEMENT OF CONTRACTS § 600 (1932).

98. *Fix-It-Shop v. Roy*, 68 So. 2d 332, 335 (La. Ct. App. 1953) (emphasis added).

statutes.”⁹⁹ Similarly, other treatises state that “[v]iolation of a statute that is merely *malum prohibitum* will not necessarily render a contract illegal and unenforceable.”¹⁰⁰ One federal court has explained the distinction well:

The general rule that an illegal contract is void and unenforceable is, however, not without exception. It is not universal in its application. It is qualified by the exception that where a contract is not evil in itself, and its invalidity is not denounced as a penalty by the express terms of or by rational implication from the language of the statute which it violates, and that statute prescribes other specific penalties, it is not the province of the courts to do so, and they will not thus affix an additional penalty not directed by the lawmaking power.¹⁰¹

Louisiana, however, takes a different approach. In *J.C. Yochim Co., Inc. v. Piper’s Estate*, a Louisiana court of appeal considered this very issue.¹⁰² In *Yochim*, a wholesale liquor dealer sued the defendant’s heirs to recover the price due by the defendant for alcohol sold by the plaintiff.¹⁰³ The defendant’s heirs denied liability on the grounds that the sales were null and in violation of the law because the plaintiff–dealer was not licensed to sell at retail.¹⁰⁴ In fact, the law at the time imposed a fine and possible jail time for vendors who sold alcohol without appropriate permits and licenses.¹⁰⁵ The court, however, did not hesitate to strike this transaction with the penalty of nullity, despite the explicit penalty already imposed by statute.¹⁰⁶ The court noted, “The various sales of liquor . . . by plaintiff, without a retail dealer’s license, being prohibited by law, were void and the vender could not maintain an action against him or, upon his death, against his heirs who have accepted his succession unconditionally.”¹⁰⁷ Notably, the *Yochim* court did not—as Williston and some other courts have done¹⁰⁸—eschew the civil effect of nullity from attaching to an act in

99. 8 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 19:46, at 545 (4th ed. 2010) (emphasis added).

100. 17A AM. JUR. 2d *Contracts* § 303 (2004).

101. *Dunlop v. Mercer*, 156 F. 545, 555 (8th Cir. 1907), *quoted in* WILLISTON, *supra* note 99, § 19:46, at 547.

102. 192 So. 140 (La. Ct. App. 1939).

103. *Id.* at 140.

104. *Id.*

105. *Id.* at 141.

106. *Id.*

107. *Id.*

108. *See* WILLISTON, *supra* note 99, § 19:46, at 533–51.

contravention of a prohibitory law. Rather, it forthrightly and unambiguously imposed the penalty of nullity, even though statutory law had already imposed an explicit penalty.¹⁰⁹

Thus, Louisiana maintains not only a concept of tacit nullities but also a broader one than many jurisdictions. Even though the above examples contained a situation involving the violation of a criminal law, acts in violation of civil laws that are mandatory rather than suppletive should be treated similarly. The law, at least implicitly, recognizes this fact as well. Consider, for instance, the issue of forced heirship, a civil law concept regulated by the Louisiana Civil Code that limits in certain circumstances complete freedom of testation.¹¹⁰ Article 1494 of the Civil Code explicitly states in prohibitory fashion that “[a] forced heir may not be deprived of the portion of the decedent’s estate reserved to him by law.”¹¹¹ Article 1494 is clearly a mandatory civil law, the violation of which should be an absolute nullity. And, but for a statement of positive law to the contrary, the necessary consequence of violating Louisiana Civil Code article 1494 would be such a nullity. Because, however, a different consequence is desired, a specific Civil Code article exists to prevent the effect of nullity from attaching.¹¹² Article 1503, then, provides that “[a] donation, *inter vivos* or *mortis causa*, that impinges upon the legitime of a forced heir is not null but is merely reducible to the extent necessary to eliminate the impingement.”¹¹³

C. Classification of Nullities: Bilateral and Unilateral

Aside from merely observing that there are absolute and relative nullities, it is important to note that both absolute and relative nullities can be classified as either unilateral or bilateral in their effects. Relative nullities, it will be recalled, are those designed for the protection of a person and thus many cases (perhaps most) are unilateral because the prohibition being violated is designed solely

109. Similarly, as has been the subject of recent media attention, the violation of the public fraud statute should also result in the violative act being considered an absolute nullity. See Lee Zurik, *Dirty Deeds*, FOX8, <http://www.fox8live.com/category/238094/dirtydeeds> (last visited Feb. 14, 2014) [<http://perma.cc/Q6M3-JRX7>] (archived Mar. 15, 2014). That is, when a public official uses his or her influence in the expenditure of public funds for his or her own private gain, the contract redounding to the private benefit should be considered an absolute nullity. See, e.g., LA. REV. STAT. § 14:140(A)(2) (2011).

110. See LA. CIV. CODE arts. 1493–1497 (2014).

111. *Id.* art. 1494.

112. See *id.* art. 1503.

113. *Id.*

for the protection of one party.¹¹⁴ Thus, when a merchant contracts with a minor, the contract is unilaterally relatively null because only the minor can invoke the nullity.¹¹⁵ On the other hand, a contract may be bilaterally relatively null and allow the possibility of either or both parties to pursue the nullity, such as the case in which two minors contract with each other or when both parties to a contract operate under fraud or duress. Although the likelihood of this occurring is rare, clarity in thinking about nullities requires express recognition that the ability of multiple parties to invoke the nullity of a contract is not necessarily a hallmark of an absolute nullity. Importantly, however, one difference between a bilaterally relatively null contract and one that is absolutely null remains that the relative nullity may prescribe or be ratified.¹¹⁶

This same observation regarding the effects of nullity is equally true regarding absolute nullities, which are conversely much more likely to be bilaterally null than unilaterally. Most absolute nullities fit the classic definition and are characterized as such because they violate rules of public order. Article 12 of the Civil Code makes this point indisputably clear by noting that “[p]ersons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.”¹¹⁷ Bilateral nullities that affect both parties to the transaction are very common. Article 1976 states that a contract that has as its object the “succession of a living person” is absolutely null, meaning the act is deprived of effect for both parties.¹¹⁸ A contract whose cause is unlawful insofar as “the enforcement of the obligation would produce a result prohibited by law or against public policy” is absolutely and bilaterally null.¹¹⁹ Thus, a promise to pay an unenforceable gambling debt has an unlawful cause and is thus an absolute nullity for both parties involved.¹²⁰ Similarly, courts have stated that a provision in a settlement agreement that restricts a testator’s ability to dispose of separate property “impinges on her testamentary rights,” is against the public policy of the State of Louisiana, and is null with respect to both parties to the settlement.¹²¹

114. See *id.* art. 2031; *supra* Part I.C.2.

115. See LA. CIV. CODE arts. 28, 1919 (2014).

116. See *id.* arts. 2031, 2032.

117. *Id.* art. 7.

118. *Id.* art. 1976. Although article 1976 states that a contract for the succession of a living person “may not be the object” of a contract, this is but one instantiation of the concept of absolute nullity. See *id.*; *infra* Part III.B.2.a.–c.

119. LA. CIV. CODE art. 1968 (2014). See *infra* Part III.B.2.a.

120. *Mobley v. Harrel*, 571 So. 2d 662 (La. Ct. App. 1990).

121. See, e.g., *Ackel v. Ackel*, 696 So. 2d 140, 143 (La. Ct. App. 1997).

Surprisingly, and somewhat contradictorily, there are unilateral absolutely null contracts too. These are contracts that are null for public policy reasons, cannot be confirmed, do not prescribe, and can be raised by anyone.¹²² In rare instances, however, an absolutely null contract may only produce the effects of the nullity for one of the parties to the transaction. Consider the case of the marriage contract. Article 94 states that a “marriage is absolutely null when contracted without a marriage ceremony, by procuration, or in violation of an impediment, such as, for instance, a same sex marriage or marrying in the face of an already existing marriage.”¹²³ That, of course, means that a marriage procured under any situation set forth in article 94 has no effect at all. If two same-sex individuals attempt to marry, have a ceremony, and lawfully give their consent to marry each other, nothing—legally speaking—has been done. On the other hand, if the impediment is that one party to an otherwise valid marriage is still married, i.e., one party is committing bigamy, article 96 states that “[a]n absolutely null marriage nevertheless produces civil effects in favor of a party who contracted it in good faith for as long as that party remains in good faith.”¹²⁴ That means, of course, that the marriage may be only void *ab initio* or absolutely null for one party. The other party still receives all the civil benefits that might flow from the regime of marriage. In other words, this violation of public policy—this absolute nullity—renders the contract unenforceable but only operates (at least sometimes) unilaterally.

In both instances—bilateral and unilateral absolute nullities—the effect of a contract being absolutely null is that it does not exist.¹²⁵ It has no effect. Although this effect can ordinarily be raised and observed by anyone, somewhat ironically, absolute nullities involving unlawful cause may be raised by anyone except, in some instances, the obligor to the transaction.¹²⁶ That is, if the debtor who executed a promissory note with an unlawful cause attempts to sue to recover what he or she paid on an absolutely null obligation, the courts will often not entertain the claim.¹²⁷ This limitation, however,

122. See LA. CIV. CODE arts. 2030, 2032 (2014).

123. *Id.* art. 94.

124. *Id.* art. 96.

125. SAÛL LITVINOFF, OBLIGATIONS § 17.3, in 5 LOUISIANA CIVIL LAW TREATISE 542–43 (2d ed. 2001).

126. LA. CIV. CODE art. 2033 (2014).

127. See *Boatner v. Yarborough*, 12 La. Ann. 249, 251 (La. 1857) (“[J]udicial tribunals should not be called upon to adjust the balance of profit and loss between joint adventurers in iniquity. . . . The law, whose mission is to right the innocent and to enforce the performance of licit obligations only, leaves parties who traffic in forbidden things and then break faith with [each] other, to such mutual redress

is not a product of the law of nullity but rather a recognition of the unclean hands doctrine or, as is commonly stated, *in pari causa turpitudinem potior est conditio possidentis*.¹²⁸ Nonetheless, this principle has been codified since 1984 as part of the law of nullity in paragraph two of article 2033, which states that “a performance rendered under a contract that is absolutely null because its object or its cause is illicit or immoral may not be recovered by a party who knew or should have known of the defect that makes the contract null.”¹²⁹ For example, in *Pique Severn Avenue Partnership v. Ballen*, the court considered a claim for unjust enrichment by a lessor who paid real estate commissions to an out-of-state broker not licensed in Louisiana and thus not authorized to receive commissions.¹³⁰ In reversing summary judgment in favor of the lessor, the court noted, among other things, that at that point it had not been determined if the lessor “knew or should have known that its commission contract with [the lessee’s broker] may be an absolute nullity.”¹³¹

On the other hand, if the nullity is invoked before the purpose of the illicit contract has been achieved, performance may be recovered.¹³² As the comments to article 2033 indicate, “a party who has knowingly lent money to another for the purpose of gambling may recover the amount lent before the intended wager takes place.”¹³³ In *Dugas v. Dugas*, the court refused to allow the

as their own standard of honor may award.”); *see also* LA. CIV. CODE art. 2983 (2014) (“The law grants no action for the payment of what has been won at gaming or by bet”); *Id.* art. 2984 (“In all cases in which the law refuses an action to the winner, it also refuses to suffer the loser to reclaim what he has voluntarily paid”).

128. *See, e.g.*, art. 2033 cmt. c; *see also* Gravier’s Curator v. Carraby’s Executor, 17 La. 118, 127 (1841); Mulhollan v. Voorhies, 3 Mart. (n.s.) 46 (La. 1824) (“They who come into the court with such unclean hands, ought to be told . . . the temple of justice in your country is the house of God—it should not be made a den of thieves.”). This idea can also be traced to Roman law. *See, e.g.*, 1 THE DIGEST OF JUSTINIAN, *supra* note 9, DIG. 12.5.9, at 378 (“If the basis of your promise to Titus is evil you can defeat his action by the defense of fraud. . . . Yet, despite that, if you pay, you cannot recover.”).

129. Art. 2033. *See also id.* cmt. c.

130. 773 So. 2d 179 (La. Ct. App. 2000).

131. *Id.* at 181. *See also* “We the People” Paralegal Servs., L.L.C. v. Watley, 766 So. 2d 744, 750 (La. Ct. App. 2000) (Caraway, J., dissenting) (arguing that in an illegal contract involving fee splitting for legal services between a law firm and paralegal services company, “the relatively new and untested article of our Civil Code [article 2033] is broad enough to stand as the specific rule of law which can afford relief in this instance”).

132. Art. 2033.

133. *Id.* cmt. e.

application of this exception to a plaintiff who transferred property to his daughter to hide it from his creditors.¹³⁴ When he sued for return of the property, his daughter refused, and the court affirmed her right to retain ownership because by virtue of his illicit transfer, he forfeited his right to have the property returned to him.¹³⁵ The court continued by stating that the plaintiff could not avail himself of the exception in paragraph two of article 2033 “because he waited until his purpose was achieved; i.e., the danger, which his creditors posed, had passed, to attempt to withdraw the transfers.”¹³⁶

Moreover, there remains a second, underutilized, and little known exception in paragraph two of article 2033, which allows for performance under an absolutely null contract to be recovered in all cases in which “in the discretion of the court, that recovery would further the interest of justice.”¹³⁷ Although this avenue of relief has been little explored, at least one court has observed its existence and noted that “[s]uch recovery would appear to be permissible even though Article 2033 also provides that a party to an absolutely null contract who knew or should have known of the defect, specifically an illicit or immoral object or cause, that makes the contract null may not recover a performance rendered.”¹³⁸ Comment (g) to article 2033 attempts to elucidate this element by stating that performance may be recovered “if denial of the recovery would leave the object of that performance in the hands of one whose control of it would be contrary to the public interest, or would render the legal situation of that object so uncertain as to seriously hinder its alienation.”¹³⁹ An example of the former would presumably be the intentional and illicit sale of a firearm to a known felon convicted of a crime of violence.¹⁴⁰ The criminal law precludes such individuals from possessing firearms, and the intentional and knowing transfer to such a person in exchange for money would be illicit and an absolutely null transaction.¹⁴¹ Nonetheless, even after performance has been rendered, presumably the transferor may, in the discretion of the court, be able to reclaim the gun and return the money because doing so would “further the interest of justice.”¹⁴² The last

134. 804 So. 2d 878, 879 (La. Ct. App. 2002).

135. *Id.* at 882.

136. *Id.*

137. Art. 2033. For similar language referring to the “interest of justice” in the Civil Code, see Louisiana Civil Code article 1848.

138. “We the People” Paralegal Servs., L.L.C. v. Watley, 766 So. 2d 744, 749 (La. Ct. App. 2000).

139. Art. 2033 cmt. g.

140. LA. REV. STAT. ANN. § 14:95.1 (2012).

141. *Id.* § 14:95.1.1.

142. Art. 2033; §§ 14:95.1, :95.1.1.

line of comment (g) to article 2033 arguably provides another example in which a court may allow recovery of property pursuant to an absolutely null contract, such as when property is delivered pursuant to a gambling wager to a stakeholder who was to deliver it to the winner but who was notified of the transferor's claim before it was delivered to the winner.¹⁴³ In this instance, failure to allow the party who gave the property to recover it would leave the stakeholder's control over the property uncertain, and thus the stakeholder would be unable to alienate it.

Finally, even the party who knew of the defect may still raise the absolute nullity of the contract as a defense. Although this idea is currently embodied in paragraph three of article 2033, its origins in Louisiana date back to the mid-19th century.¹⁴⁴ In *Hertz v. Wilder*, the Louisiana Supreme Court allowed a defendant to allege his own criminality in defense of a suit on promissory notes made as "part of a scheme of fraud and perjury, concocted . . . for the purpose of screening [the defendant] from a criminal prosecution."¹⁴⁵ In explaining this exception, the Court noted that only by allowing a defendant to allege his own turpitude can the logical maxim "*ex turpi causa non oritur actio*"¹⁴⁶ be given effect in light of the maxim "[*n*]emo allegans suam turpitudinem est audiendus."¹⁴⁷ Similarly, in *Gil v. William & Davis*, the Louisiana Supreme Court noted that a defendant could resist payment under an illicit contingency fee contract by which the plaintiff was promised payment if he successfully petitioned the Legislature for a change in the law.¹⁴⁸ The exception to the clean hands doctrine, the Court noted, is "founded upon the necessity of the case, and the paramount interest of the public."¹⁴⁹

D. Scope of Nullity

Although nullities often lurk tacitly in the law, even express nullities may have limited scope in terms of their effects. That is, article 2034 makes explicit that "[n]ullity of a provision does not

143. Art. 2033 cmt. g.

144. *Id.*

145. See 10 La. Ann. 199, 201 (La. 1855).

146. This Latin phrase can be translated as no action arises from an immoral cause. See BLACK'S LAW DICTIONARY 666–67 (9th ed. 2009).

147. *Hertz*, 10 La. Ann. at 201. This maxim means that "one who invokes his own turpitude as grounds for a claim will not be heard." LITVINOFF, *supra* note 125, § 10.6, at 284.

148. 12 La. Ann. 219, 221 (La. 1857).

149. *Id.*

[necessarily] render the whole contract null.”¹⁵⁰ Rather, one provision or clause may be annulled and the remainder of the contract preserved. Thus, one may willingly and freely execute a will but be defrauded into granting one particular legacy. In that case, the will is still valid, but the defective legacy is null. Similarly, a prenuptial agreement waiving permanent spousal support may be valid even though a provision in the same agreement waiving interim spousal support is null.¹⁵¹ Thus, the scope of nullity can be confined to a partial nullity.

In some instances, however, when the *cause* of the contract is an illicit one, severability is not an option.¹⁵² This is often true when the very nature of the provision renders the whole contract null because it can be assumed that the contract would not be made without the null provision.¹⁵³ For example, in *Baker v. Maclay Properties, Co.*, the court invalidated an entire fee agreement between in-state and out-of-state real estate brokers, not merely the fee-splitting provision, because “the contract would not have been made without the null provision.”¹⁵⁴

Moreover, if it is evident from the “intention of the parties” that the contract would not have been made without the null provision, then again, the whole contract should be treated as null.¹⁵⁵ For instance, in *State v. Johnson*, the court remanded a case involving an illicit plea bargain that preserved a right to appeal for a factual determination as to whether the preservation of the right to appeal was only a component of the agreement or “constituted a cause of the plea bargain.”¹⁵⁶

E. Effect of Nullity on Third Persons

Although the above discussion has been confined to the effects of nullity between the parties, third parties who rely on contracts

150. LA. CIV. CODE art. 2034 (2014). Cf. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Jan. 22, 2002, BUNDESGESETZBLATT [BGBl. I], as amended, § 139 (Ger.).

151. *Barber v. Barber*, 38 So. 3d 1046 (La. Ct. App. 2010).

152. Art. 2034; MALAURIE ET AL., *supra* note 1, at 351–54; BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Jan. 22, 2002, BUNDESGESETZBLATT [BGBl. I], as amended, § 139 (Ger.). See also *Lebouef v. Liner*, 396 So. 2d 376 (La. Ct. App. 1981). For an analogous situation, see *Succession of Thompson*, 49 So. 651 (La. 1909), in which the court, due to the impossibility of the donor’s cause, invalidated the entirety of a donation, despite article 1519’s declaration that unlawful conditions are severable in the context of donations.

153. Art. 2034.

154. 648 So. 2d 888, 896 (La. 1995).

155. Art. 2034.

156. 687 So. 2d 524, 526 (La. Ct. App. 1996).

that are null must also briefly be considered. Article 2035 of the Louisiana Civil Code provides that “[n]ullity of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.”¹⁵⁷ This provision, the comments state, “merely articulates the doctrine[] of the bona fide purchase[r].”¹⁵⁸ Although the Louisiana Civil Code contains only the shadows of the former good faith purchaser doctrine, the essence of the idea is obvious enough: One who acquires property by onerous contract, such as a sale or exchange, rather than gratuitously, such as by donation, and who does so honestly and reasonably believing the transferor is the owner is protected against other parties asserting the nullity of the original transfer.¹⁵⁹ For instance, if a vendor sells property that the vendor acquired from a minor or pursuant to an illicit cause, the new vendee is protected from the effects of the nullity affecting the original transaction, as long as the vendee was in good faith and acquired the property via onerous title.

If the contract involves immovable property, however, the principles of recordation apply to a third person acquiring an interest in the property whether by onerous or gratuitous title. In other words, the public records doctrine, now embodied in the articles on registry in the Civil Code, governs the interests of third parties dealing with immovable property.¹⁶⁰ Thus, if a vendor sells immovable property that the vendor acquired pursuant to an illicit cause, the new vendee is protected from the effects of the nullity affecting the original transaction, provided the vendee acquired the property in the absence of a recorded document evidencing the claims of a third party.¹⁶¹

III. CRITIQUE OF THE CURRENT DOCTRINE AND REFINEMENT OF THE CLASSIC DIVISION

Although the above clarifications have elucidated some doctrinal distinctions that usually operate *sub silentio*, nothing has yet been said to gainsay the traditional definitions that relative nullities operate to protect private interests and absolute nullities to protect

157. LA. CIV. CODE art. 2035 (2014).

158. *Id.* cmt. a.

159. LA. CIV. CODE art. 520 (1980) (repealed 1981). For background on the repeal of the good faith purchaser doctrine in Louisiana, see Tanya Ann Ibieta, Comment, *The Transfer of Ownership of Movables*, 47 LA. L. REV. 841 (1987). The remaining vestiges of the good faith purchaser doctrine are embodied in a series of disconnected articles. See, e.g., LA. CIV. CODE arts. 521–525, 1565, 1856, 2035 (2014).

160. See LA. CIV. CODE arts. 3338–3353 (2014).

161. *Id.* arts. 3338, 3342.

public ones. This Section takes up that challenge and critically examines the defining distinctions between the nullities. In doing so, it proceeds in two parts, first dispelling some myths and concluding what nullity is *not* about and then more specifically discussing what nullity *is* about.

A. What Nullity Is Not About

Before attempting to classify and define the various types of nullities, consideration of what nullity is not about is necessary. As discussed below, nullity is neither about the severity or significance of the violation of law nor the scope of the interest being protected by the nullity. The understanding of the contours of nullity is considered in Subsection B.

1. Not Severity or Significance of Violation

When one considers the definitions of nullities—i.e., an absolute nullity violates a rule of public order and a relative nullity only violates a rule established for the protection of a private person—there is a tendency to think that an absolute nullity is something more serious than a relative nullity. Although no one seriously posits this as the criteria for distinction or basis, the thought often persists in the sort of common intellectual culture in Louisiana. For example, eminent authority has written that

acts which are contrary to the rules pertaining to the organization of the state and the nation are . . . absolutely null. This would be the case of private dealings entered into with the enemy in times of war¹⁶²

Relative nullities, on the other hand, are often thought of as more private and less serious than wrongs dealing with the enemy in times of war. Thus, the Civil Code article on relative nullities provides the paradigmatic example of a relative nullity: “when a party lacked capacity or did not give free consent at the time the contract was made.”¹⁶³

The very terms “absolute” or “radical” nullity and the concept of violating “public policy” or “public order” seem to suggest an egregious wrong, as opposed to the lesser implications of a relative nullity or something in the private interest. The jurisprudence also reinforces the idea—at least sometimes—that absolute nullities are more severe than relative ones. For example, an agreement between

162. LITVINOFF & TÊTE, *supra* note 2, at 170.

163. LA. CIV. CODE art. 2031 (2014).

two candidates for sheriff that the winner would name the loser as deputy sheriff and pay him half the salary of the office violates public policy and is unenforceable.¹⁶⁴ Whereas a contract has been held to be relatively null where an agent for a property owner lacked the technical authority to sign an option to purchase, but the property owner subsequently ratified it.¹⁶⁵

As the French scholars, the Mazeauds, have pointed out, it is incorrect to think of absolute nullities as more offensive than relative ones.¹⁶⁶ Absolute and relative nullities have nothing to do with the severity of the legal violation, and in many ways, their effects are identical.¹⁶⁷ Two examples make this very clear. Consider the example of two friends playing cards when one runs out of money and the first friend lends money to the second so that the game may continue.¹⁶⁸ The second friend signs a promissory note evidencing the indebtedness and loses the money, and then the first eventually tries to collect. The first friend will be precluded from enforcing the promise of the second because the contract has an illicit or immoral cause and is thus an absolute nullity.¹⁶⁹ On the other hand, if the first friend threatens to kill the second at gunpoint unless he loans the money, this loan is only relatively null because the contract was confected under duress.¹⁷⁰ Clearly, the second example, the one involving only the relative nullity, is more severe and more offensive than the first, but in only the first example is the nullity an absolute one.

2. *Not the Scope of the Interest Protected*

Most French and Louisianan authors, though, would undoubtedly agree with the above and argue that the true distinction between the nullities is whose interest is being protected by the nullity and thus who can raise it.¹⁷¹ This is certainly a distinction that can be employed in standard cases. For example, most nullities

164. *Glover v. Taylor*, 38 La. Ann. 634 (La. 1886).

165. *Bradstreet v. Kinchen*, 10 So. 3d 331 (La. Ct. App. 2009).

166. MAZEAUD ET AL., *OBLIGATIONS: THÉORIE GÉNÉRALE* 292 (8th ed. 1991).

167. *Id.*

168. *See, e.g.*, LA. CIV. CODE art. 2983 (2014); *see also* *Lamy v. Will*, 140 So. 2d 794 (La. Ct. App. 1962); *Lauer v. Catalanotto*, 522 So. 2d 656 (La. Ct. App. 1988). *But see* *TeleRecovery of La., Inc. v. Major*, 734 So. 2d 947 (La. Ct. App. 1999); *Players Lake Charles, LLC v. Tribble*, 779 So. 2d 1058 (La. Ct. App. 2001).

169. *See* LA. CIV. CODE art. 2030 (2014).

170. *See, e.g., id.* arts. 1959–1964.

171. MAZEAUD ET AL., *supra* note 166, at 292 (explaining the French view: “*La différence essentielle entre les nullités absolues et relatives tient au nombre des personnes qui se trouvent protégées et peuvent exercer l'action*”).

of the relative type fit the basic definition of the Code and thus are established for the “protection of private parties.”¹⁷² The Code itself provides a number of examples of this type of nullity, such as “when a party lacked capacity or did not give free consent at the time the contract was made.”¹⁷³ Most nullities of the absolute kind, on the other hand, are violative of rules of public order, such as when the object of a contract is illegal.¹⁷⁴

As a matter of positive law, the above statements are incontrovertible. Unfortunately, they are also relatively unhelpful, as stating that an act is null for public policy reasons or for reasons of private protection is only really helpful, as some French scholars have noted, when there is already a settled rule establishing what kind of nullity exists.¹⁷⁵ The above distinctions are good post-hoc explanations but provide little guidance to lawyers, judges, and scholars in need of a system to discern the character of a nullity when the law does not otherwise prescribe.

Consider, for example, article 2447, which states that “[o]fficers of a court, such as judges, attorneys, clerks, and law enforcement agents, cannot purchase litigious rights under contestation in the jurisdiction of that court.”¹⁷⁶ In fact, the article states plainly that “[t]he purchase of a litigious right by such an officer is null and makes the purchaser liable for all costs, interest, and damages.”¹⁷⁷ The article does not, however, define what type of nullity is at issue. On the one hand, this rule appears to strike “officers of the court” with an incapacity to hold or enjoy this right, not an incapacity to exercise a right, such as one that affects a minor who needs help to enter a contract. Prior law imposed such absolute incapacities to hold or enjoy rights on doctors who tended the sick during their last illness and thus suffered an absolute incapacity to receive a donation from them.¹⁷⁸ The basis for the nullity of article 2447 could easily be seen as protection of the integrity of the courts and the impartiality of the administration of justice. Thus, it is understandable why modern cases have characterized this nullity as absolute.¹⁷⁹

172. LA. CIV. CODE art. 2031 (2014).

173. *Id.*

174. *Id.* art. 2030.

175. BARRY NICHOLAS, THE FRENCH LAW OF CONTRACT 79 (2d ed. 1992).

176. LA. CIV. CODE art. 2447 (2014).

177. *Id.*

178. LA. CIV. CODE art. 1489 (1870).

179. *See D’Albora v. Roussel*, 182 So. 2d 124, 129 (La. Ct. App. 1966) (stating that the court believed the nullity was absolute).

Older cases, however, held to the contrary and concluded that the nullity involved in this context is a relative one.¹⁸⁰ French jurisprudence and commentary are in accord with regard to the corresponding article 1596 of the Code Napoleon in concluding the nullity involved in this instance is relative, not absolute.¹⁸¹ In support of this conclusion, one could easily find a private, rather than public, purpose embodied in this article. Some French authors have concluded that “one could accuse the enumerated persons of having taken advantage of their positions to acquire the litigious rights very cheaply.”¹⁸² Similarly, at the time of the presentation of the French Civil Code to the Corps Legislative, it was stated that the prohibition was established for “the safeguard of the litigants” as well as “a necessary consequence of religious principles which safeguard the sanctity of their ministry.”¹⁸³

In short, the line between private and public interest is not always obvious.¹⁸⁴ Unfortunately, Louisiana law is replete with examples in which the law declares an act “null” without further refining the type of nullity involved.¹⁸⁵ When the law does not make clear the type of nullity that exists, the parties, courts, and scholars must assess the content of the nullity based upon the characteristics and definitions of the nullities. Thus, a clear distinction between the types of nullities becomes imperative.

B. What Nullity Is About: Temporary v. Permanent Defects

If the basis of nullity is not about the seriousness of the violation or whose interest is being protected, the true nature of nullity must be examined. Although typically considered an effect of a nullity, a helpful criterion in distinguishing between absolute and relative nullities is the permanency of the defect or problem.

1. Temporary Defects: Relative Nullities

Just as with absolute nullities, most relative nullities fit the basic definition of the Code and thus are established for the “protection of

180. *Lane v. Cameron*, 36 La. Ann. 773, 778 (La. 1844); *New Orleans Gaslight Co. v. Webb*, 7 La. Ann. 168, 168 (La. 1852).

181. LA. CIV. CODE art. 1596 (2014); 2 COLIN & CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS 24 (Ctr. of Civil Law Studies trans., 8th ed. 1935). *But see* Cour de cassation [Cass.] [supreme court for judicial matters] 3e civ., May 15, 1991, Bull. civ. III, No. 140 (Fr.).

182. COLIN & CAPITANT, *supra* note 181, at 24.

183. 14 FENET, *supra* note 50, at 117 (author translation).

184. MALAURIE ET AL., *supra* note 1, at 345.

185. *See, e.g.*, LA. CIV. CODE arts. 1529–1531, 1619, 1733, 3123, 3471 (2014).

private parties.”¹⁸⁶ The Code itself provides a number of examples of this type of nullity, such as “when a party lacked capacity or did not give free consent at the time the contract was made.”¹⁸⁷ The typical cases of nullity are clearly identified in the Code. Lack of free consent, such as when a party was under duress in contracting, is a relative nullity.¹⁸⁸ Thus, the nullity is established not for public policy reasons but as a protective device for the party in whom fear of “unjust and considerable injury” has been instilled.¹⁸⁹ The nullity of such a contract, then, can only be raised by the party against whom the duress was directed, and such party can, if he or she desires, confirm the contract after the duress has ceased.¹⁹⁰ Finally, a contract entered into under duress is subject to a five-year prescriptive period, which commences on the date on which the duress ceases.¹⁹¹

Relative nullities, of course, exist in a multitude of other cases, such as when an unemancipated minor enters into a contract.¹⁹² In such as case, the unemancipated minor suffers from an incapacity to exercise certain rights, despite the ability to hold those rights, and thus needs the assistance of a parent or tutor to fully exercise them.¹⁹³ Once again, this nullity is established not for reasons of state public policy but for the protection of the minor. Thus, if the unemancipated minor enters into a contract, despite incapacity, he or she may have the contract annulled.¹⁹⁴ The contract, being a relative nullity, however, “may be rescinded only at the request of [the unemancipated minor] or his legal representative.”¹⁹⁵ It may, of course, be confirmed by the unemancipated minor or a legal representative once the minor acquires capacity.¹⁹⁶ The minor’s ability to raise this nullity prescribes five years from the date on which the incapacity ceases.¹⁹⁷

186. *Id.* art. 2031.

187. *Id.*

188. *Id.*; *id.* art. 1959.

189. *Id.* art. 1959.

190. *Id.* art. 2031.

191. *Id.* art. 2032.

192. *Id.* art. 1919 (“A contract made by a person without legal capacity is relatively null . . .”).

193. Incapacities to enjoy or hold certain rights are to be distinguished from incapacities to exercise, which allow individuals to hold rights but not exercise them without assistance of another, such as a tutor or curator. For more on the distinction, see LITVINOFF & TÊTE, *supra* note 2, at 58–104; MAZEAUD ET AL., *supra* note 166, at 285.

194. Art. 1919.

195. *Id.*

196. *Id.* art. 1920.

197. *Id.* art. 2032.

The important feature of relative nullities, as opposed to absolute ones, however, is not who is protected by the nullity but whether the nullity is temporary so that once the offending element ceases, the parties can redo the contract such that it has retroactive effect to when the contract was first executed. In other words, the parties can confirm it.¹⁹⁸ Consider contracts involving an incapacity or under fraud, duress, or error. If an actor is under the age of 16 and makes a contract, the contract is relatively null.¹⁹⁹ The relative nullity is obvious because once the minor becomes 18, the offending element of the contract disappears and the contract can be ratified such that it has effect and has had effect since the minor was 16.²⁰⁰ This is not an entirely different test from public versus private interest, but it does provide a more effective way to discriminate among the different null transactions that exist in the law. In addition to the incapacity of minority ceasing when a party reaches majority, so too does a nullity affecting transactions entered into under fraud or duress. Once the fraud or duress ceases, the transactions can be pursued and executed in free and fully effective form.

2. Permanent Defects: Absolute Nullities

Although the category of absolute nullity is a necessary one, it is not entirely accurate to characterize, as the Civil Code does, all absolute nullities as those that “violate a rule of public order.”²⁰¹ Just as with relative nullities, the important element of absolute ones is that the defect or invalidity is permanent insofar as the offending transaction cannot be fixed in a way that gives it effect. The transaction must simply be redone without the offending element. Acts that violate “public order” are only one subset of defective acts that suffer from a permanent defect and thus only one subset of absolute nullity. Other types of absolute nullities also exist, namely, those that arise due to a failure to follow certain form requirements or the prerequisites required for the formation of particular juridical acts.

a. Public Order Nullities

Most absolute nullities do fit the classic definition and are characterized as such because they are rules of public order. Article 12 of the Civil Code makes this point indisputably: “Persons may

198. *See id.* art. 2031.

199. *See id.* arts. 29, 1919.

200. *See id.* art. 2031.

201. *Id.* art. 2030.

not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.²⁰²

For example, a contract that has as its object the “succession of a living person” is absolutely null,²⁰³ as would be a contract for illicit drugs. In both cases, the object of the contract is illegal, as is the cause.²⁰⁴ And a contract with unlawful cause would clearly be an absolute nullity, as the Civil Code states that a “cause . . . is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.”²⁰⁵ A promissory note given as evidence of money owed on unlawful gambling debts contains an unlawful cause and is thus an absolute nullity.²⁰⁶ Similarly, courts have stated that a provision in a settlement agreement that restricts a testator’s ability to dispose of separate property “impinges on her testamentary rights, and her legal usufruct of [her husband]” and is against the public policy of the State of Louisiana.²⁰⁷ In all of the above cases—sales of succession rights, illicit drugs, and gambling debts—the defects are permanent. The contracts cannot be fixed or confirmed.

Numerous cases exist, of course, outside the contracts context. In the realm of successions, prohibited substitutions are absolute nullities.²⁰⁸ Prohibited substitutions are “dispositions by which a thing is donated in full ownership to a first donee, called the institute, with a charge to preserve the thing and deliver it to a second donee, called the substitute, at the death of the institute.”²⁰⁹ This rule attempts to limit dead-hand control and keep property in commerce and thus serves one of the same purposes as the common law rule against perpetuities.²¹⁰ Therefore, it is considered a matter of public policy, the violation of which is an absolute nullity.²¹¹ Similarly, actors suffer from incapacities to enjoy certain rights,²¹² such as the ability to marry a person of the same sex, which results

202. *Id.* art. 7.

203. *Id.* art. 1976.

204. *See id.* art 1968.

205. *Id.*

206. *Mobley v. Harrel*, 571 So. 2d 662 (La. Ct. App. 1990).

207. *Ackel v. Ackel*, 696 So. 2d 140, 143 (La. Ct. App. 1997).

208. LA. CIV. CODE art. 1520 (2014).

209. *Id.*

210. Ronald J. Scalise Jr., *Prohibited Substitutions: Louisiana’s Experience with a French Institution*, 48 LOY. L. REV. 715, 747–51 (2002).

211. *Id.* at 735–39.

212. Incapacities to enjoy or hold certain rights are to be distinguished from incapacities to exercise, which allow individuals to hold rights but not exercise them without assistance of another, such as a tutor or curator. For more on the distinction, see LITVINOFF & TÊTE, *supra* note 2, at 58–104.

in an absolute nullity because the rule prescribed is one of public policy.²¹³ Here, the Code is clear that “[p]ersons of the same sex may not contract marriage with each other” and “a purported marriage contracted in contravention of . . . article [89] is an absolute nullity.”²¹⁴ All of the above instances are examples of juridical acts that are against public policy, permanently defective, and absolutely null.

b. Violation of Solemn Form Requirements

Another subclass of absolute nullity exists that, although demonstrating the characteristics of an absolute nullity (i.e., it produces no effect, is not subject to prescription, and can be raised by anyone), does not meet the general definitional requirement in the Civil Code of “violat[ing] a rule of public order.”²¹⁵ This second subclass involves certain acts that derogate from solemnly prescribed form requirements and can be better explained by considering the permanency of the kind of defect it creates.²¹⁶

Form requirements can have many purposes. Some requirements of form exist for cautionary reasons; others for evidentiary reasons. Solemnities in juridical acts exist for the cautionary reason, and the violation of solemn form requirements is an absolute nullity.²¹⁷ The reason is not clear at first. Solemn form requirements exist to communicate the seriousness and solemnity of the act being entered into. In other words, solemnities exist to allow a party to consider deliberatively the consequences of the act and change his or her mind before doing so. As Professor Litvinoff stated:

In some instances the formality of a writing is required by the law *ad solemnitatem*, that is, as a solemnity without which an act cannot have any effect and cannot therefore give rise to any obligation. There is a good policy reason for this turning of a formality into a solemnity whenever a person, through the process of executing the formality, must be given a chance of becoming clearly aware of the

213. See LA. CIV. CODE art. 89 (2014).

214. *Id.* art. 89; *id.* cmt. b.

215. *Id.* art. 2030.

216. French doctrine is in accord. See, e.g., BÉNABENT, *supra* note 1, at 151.

217. See LA. CIV. CODE art. 1573 (2014); see also BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Jan. 22, 2002, BUNDESGESETZBLATT [BGBl. I], as amended, § 125 (Ger.) (noting that legal transaction is void for lack of compliance with form requirements.); BASIL MARKESINIS ET AL., THE GERMAN LAW OF CONTRACT: A COMPARATIVE TREATISE 84 (2d ed. 2006) (“Where form is required, its absence will typically make the transaction void . . .”).

consequences of the intended act. In such cases, the formality may be said to perform a *cautionary* function.²¹⁸

The classic case of solemn form requirements is the form required for wills—the form requirements could not be more essential and do not exist primarily for evidentiary reasons but for cautionary ones. A testator cannot make an oral will or a videotaped will.²¹⁹ A testator has the option to execute either a notarial will or an olographic one.²²⁰ Article 1573 unequivocally states that “[t]he formalities prescribed for the execution of a testament must be observed or the testament is *absolutely null*.”²²¹ Because the purpose is cautionary, it is more protective of the testator than of society and thus is hard to characterize as a matter of public order. That being said, because the form is a solemn one and solemn form requirements are “of the essence” for wills, violation of the form requirements results in a permanent defect that produces an absolute nullity.

Another important example exists in the case of marriage. For a marriage to be valid, a “marriage ceremony” must occur.²²² The purpose of the ceremony is a cautionary one to allow the parties to appreciate the significance of the commitment being undertaken.²²³ In fact, prior to the revision of the marriage articles in 1987, the Code of 1870, rather than using the term “marriage ceremony,” required that the marriage contract be entered into “pursuant to the forms and solemnities prescribed by law”—clearly indicating the purpose of the ceremony is predominantly a cautionary one rather than an evidentiary formality.²²⁴ With the above in mind, it is

218. LITVINOFF, *supra* note 125, § 12.12, at 294.

219. See LA. CIV. CODE arts. 1570, 1574–1576 (2014).

220. *Id.* arts. 1570, 1574.

221. *Id.* art. 1573 (emphasis added).

222. *Id.* art. 87 (“The requirements for the contract of marriage are . . . [a] marriage ceremony.”).

223. This cautionary function is furthered by the 72-hour waiting period that must elapse between issuance of a marriage license and performance of the ceremony. LA. REV. STAT. ANN. § 9:241 (2008). Note, however, that the violation of the waiting period does not annul the marriage but merely subjects the officiant to a penalty. *Id.* § 9:243.

224. LA. CIV. CODE art. 90 (1870). Although the requirement of “two competent witnesses of full age” seems to suggest the ceremony also has an evidentiary function, LA. REV. STAT. ANN. § 9:244 (2008), the courts have stated that the requirement of witnesses is “merely directory to the celebrant, and that the failure to technically observe these formalities does not strike the marriage with nullity.” *Parker v. Saileau*, 213 So. 2d 190 (La. Ct. App. 1968); *Tennison v. Nevels*, 965 So. 2d 425 (La. Ct. App. 2007).

obvious why the Civil Code declares that “[a] marriage is absolutely null when contracted without a marriage ceremony.”²²⁵

Not every form requirement, however, produces an absolute nullity upon its violation. Unlike the cautionary or solemn form requirements discussed above, some form requirements exist not to communicate the seriousness or solemnity of the transaction but to avoid contestations of proof and disputes as to the actual occurrence of an event. Noncompliance with these formalities should not be null as a matter of law if other equally reliable evidence exists to support the existence of the transaction.

For example, article 1839 of the Civil Code requires that the transfer of immovable property be made “by authentic act or by act under private signature.”²²⁶ However, a transfer of immovable property made in any other way, e.g., by oral contract, is not necessarily null. The reason why such a transfer would not be absolutely null is because if delivery has occurred, the sale will be valid despite the absence of the requisite formalities if “the transferor recognizes the transfer when interrogated on oath.”²²⁷ Thus, in this case, the formalities of a writing under private signature or an authentic act are not solemnities that exist for cautionary reasons but are rather evidentiary requirements to ensure that an actual transfer took place. Consequently, when equally reliable evidence exists, the transaction is valid and not subject to nullification.

Similarly, article 3072 requires that “[a] compromise shall be made in writing.”²²⁸ Just as above, however, failure to execute a compromise in writing does not necessarily result in a nullity, provided that equally reliable evidence exists.²²⁹ Appropriately, then, article 3072 provides that a compromise may still be valid if it is “recited in open court, in which case the recitation shall be susceptible of being transcribed from the record of the proceedings.”²³⁰

Furthermore, in addition to requiring a ceremony for a valid marriage, Louisiana law requires the presence and signature of “two competent witnesses of full age.”²³¹ The requirement of witnesses exists not for cautionary purposes but for evidentiary ones. As such, their absence does not result in the absolute nullity of the

225. LA. CIV. CODE art. 94 (2014). Similarly, Louisiana Civil Code article 3038 states that “suretyship must be express and in writing.” *Id.* art. 3038.

226. *Id.* art. 1839.

227. *Id.*

228. *Id.* art. 3072.

229. *See id.*

230. *Id.*

231. LA. REV. STAT. ANN. § 9:244 (2008).

marriage.²³² Rather, this form requirement is treated as merely “directory to the celebrant,” and the failure to observe it does not invalidate the marriage.²³³

Once again, Professor Litvinoff explained as follows:

In other instances the formality of a writing is required by the law *ad probationem*, that is, for evidentiary purposes, in which case the juridical act may produce effects even when the formality has been omitted, although subject to the uncertainty of securing proof other than witnesses or presumptions. That is why such a formality is evidentiary rather than cautionary. Such is the case of an orally-made sale of immovable property, for example, which is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated on oath. In addition to the written formality, the law may sometimes require that the writing must be approved by the court or an administrative law judge. Such is true with compromise agreements in workers' compensation cases and community property partitions.²³⁴

In conclusion, although the requirements of formalities for certain transactions may be incorporated into the basic law of nullity, the general description of absolute nullities as “public policy” nullities and relative nullities as those established for the protection of private parties does not explain the importance of form requirements and the consequences of noncompliance. In fact, use of the traditional explanation of nullities may lead one astray in thinking about formalities. After all, cautionary formalities, or those that provide for certain solemnities in transactions, appear to exist for the protection of parties, i.e., to ensure that a party in fact wants to go forward with the transaction, but these types of defects result not in relative nullities but in absolute ones.

c. The Curious Case of Inexistent Acts

Apart from the above theories of absolute nullity, a third and lesser-known subclass of these types of nullities exists. This final subclass of absolute nullities consists of acts that are null not because they violate public policy but because they are permanently defective insofar as they are not really juridical acts at all; they are

232. *Parker v. Saileau*, 213 So. 2d 190, 191 (La. Ct. App. 1968); *Tennison v. Nevels*, 965 So. 2d 425, 427 (La. Ct. App. 2007).

233. *Parker*, 213 So. 2d 190; *Tennison*, 956 So. 2d 425.

234. LITVINOFF, *supra* note 125, § 12.12, at 294.

inexistent acts. As Planiol has noted, “An act is inexistent when it lacks an element essential to its formation and when this element is such that the act cannot be conceived of with this feature absent from it.”²³⁵ Thus, a purported contract lacking in capacity, cause, consent, or object would not be a contract but rather an inexistent act. That is, “[i]f two persons wished to make a sale, and failed to fix a price, there is no sale. Nothing has been done.”²³⁶

At first appearance, the idea of discussing acts that do not exist seems bizarre. Although an act lacking capacity, consent, cause, or object can be said to be an inexistent contract, it could also be an inexistent sale, donation, or lease. That is, there is something metaphysical in the discussion of acts that do not exist. After all, there are an infinite number of inexistent acts (sales, leases, etc.) that occur (or, more properly fail to occur) every day.

Aside from that theoretical discussion, though, there is a practical reason for entering into the amorphous terrain of inexistent acts. Because many acts that are juridically inexistent seem valid in appearance, a theory and understanding of their defects and juridical inexistence is necessary. For example, if *A*, wanting to buy *B*'s house, concocts a fake act of sale, signs his name as buyer, and forges *B*'s name as seller, no sale has occurred because the purported act of sale, lacking consent (namely of *B*), does not legally exist.²³⁷ It is a juridically inexistent act and therefore without effect.

The origin of the theory of inexistent acts appears to come from German scholars, but French writers were quickly attracted to the idea to solve a practical problem in their Code.²³⁸ Namely, the theory of inexistent acts was endorsed “to deprive certain [marital] unions of all civil effect even though the law had omitted to pronounce their nullity. . . . It has since then been adopted by all the commentators, happy to find in it a means of getting out of an embarrassment and of annulling marriages without a text.”²³⁹

Although the theory of “inexistent acts” is well known in continental legal scholarship, scholars do not all agree on how to explain it. The French commentator Gaudemet explained that the classical division of nullities separated absolute from relative nullities but that later commentators added a third category of

235. PLANIOL, *supra* note 3, § 345, at 231.

236. *Id.* § 348, at 233. *See also* Cour de cassation [Cass.] [supreme court for judicial matters] 1^{re} civ., Mar. 5, 1991, Bull. civ. I, No. 89-17167 (Fr.).

237. *See* LA. CIV. CODE art. 2439 (2014) (listing the requirements for the perfection of a sale to include thing, price, and consent).

238. PLANIOL, *supra* note 3, § 332, at 221–22.

239. *Id.* § 347, at 232.

“inexistence.”²⁴⁰ Gaudemet explained that the original purpose of the distinction between absolute and relative nullities was that contracts that lacked an essential element of formation did not exist and thus were absolutely null and those that were affected with vices were annulable.²⁴¹

Therefore, the difference of the two sanctions is explained by the difference in their reasons for being. In the first case, the contract is not viable. It is missing an essential organ. It is born dead. In the second, the contract is complete, but affected with a vice. It is a sick organism that will fight (confirmation) or die (annulment).²⁴²

The concept of relative nullity, and thus annullability, was born of a praetorian procedure for contracts entered into by minors, by which the praetor did not declare the contract null but allowed the party to address the praetor for relief.²⁴³ “Therefore it appeared, precisely in the modern case of annullability, the idea of a provisionally valid contract, but which can be rendered ineffective by a decision of the magistrate.”²⁴⁴

The idea of inexistence was created to separate two subclasses of absolute nullity, namely those acts that violate a provision of law and are truly null, and those acts that are missing an element and are more accurately inexistent.²⁴⁵ The practical difference between inexistent acts and absolutely null ones in French law is that inexistent ones need not be judicially declared but absolutely null ones do.²⁴⁶ Many authors, however, have rejected this distinction as without utility and have observed that the absence of a factual element of a transaction or contract should not be considered different from the absence of a legal element.²⁴⁷

Despite the above debate, most authors consider it impossible to reject the category of inexistent acts, even though many consider “[i]nexistence . . . [a]s entirely distinct from cases of nullity.”²⁴⁸ In

240. EUGÈNE GAUDEMET, *THÉORIE GÉNÉRALE DES OBLIGATIONS* 142–43 (photo. reprint 1965) (1937).

241. *Id.* at 142.

242. *Id.*

243. *Id.* at 142–43.

244. *Id.* at 142.

245. *Id.* at 143.

246. *Id.*

247. *Id.*

248. PLANIOL, *supra* note 3, § 346, at 232. *See also* CHARLES GUYARD, *ÉTUDE SUR LES CARACTÈRES DES NULLITÉS DES ACTES JURIDIQUES POUR VICES DE FORME* 4 (1920) (noting that the majority of French authors view inexistence as separate from nullity). *But see* MAZEAUD ET AL., *supra* note 166, at 283 (characterizing the category of inexistent acts as “*inutile et fausse*”).

discussing inexistent acts, Planiol noted that “[t]here is no need of considering cases of inexistence except when the act has been made out in fact and proof of this is given.”²⁴⁹ Thus, as a general matter inexistent acts need not be considered; those acts that appear to exist but which are legally ineffective, however, merit attention. In contrast to an inexistent act, which lacks one of the prerequisites necessary for creation of the act, “[t]he [absolutely] null act is one which has all the elements necessary to its existence but is not given effect because it contravenes a command or a prohibition of the law.”²⁵⁰

Louisiana law, however, appears to leave no doctrinal room for the existence of a distinct category of “inexistent acts” separate and apart from the absolute nullity. Article 2029 provides that “[a] contract is null when the requirements for its formation have not been met.”²⁵¹ The requirements for contract formation are well known: capacity, consent, cause, and object.²⁵² Thus, it is clear that in Louisiana, article 2029 limits all problems with contracts to either absolute or relative nullities, relative when a defect exists with regard to a particular element, e.g., consent is tainted with fraud, and absolute when an element does not exist at all.

The treatment of inexistent acts as a subclass of absolute nullity in Louisiana is important for a number of reasons. By classifying these acts (or lack of acts) as absolute nullities, it is clear that their invalidity could always be attacked and would never prescribe.²⁵³ Moreover, their nullity could be raised by anyone or even by the court.²⁵⁴ While these two consequences hardly seem significant enough to merit discussion, the third effect of absolute nullity is important, namely, the ability *vel non* of confirming an inexistent act.

For example, if *A* grants a mortgage to *B*, which *B* duly accepts and records, but *A* forgets to sign the act of mortgage, the mortgage is clearly null and without effect.²⁵⁵ If *A*'s omission was unintentional and *A* wishes to remedy the mistake, question remains as to whether *A* must execute the mortgage anew or whether *A* can

249. PLANIOL, *supra* note 3, § 346, at 232.

250. *Id.* § 332, at 221–22 (internal quotations omitted).

251. LA. CIV. CODE art. 2029 (2014).

252. *Id.* art. 2029 cmt. b. *See also id.* arts. 1918, 1927, 1966, 1971.

253. *See id.* art. 2030.

254. *Id.*

255. *Id.* art. 3287 (“A conventional mortgage may be established only by written contract. No special words are necessary to establish a conventional mortgage.”); *id.* art. 1832 (“When the law requires a contract to be in written form, the contract may not be proved by testimony or by presumption, unless the written instrument has been destroyed, lost, or stolen.”).

merely confirm the earlier putative act. If *A* must execute the mortgage anew, the mortgage will have effect only from the day of its new execution.²⁵⁶ On the other hand, if *A* can confirm the previous “inexistent” mortgage, then *B*’s right as mortgagee will be given effect from the date of the original failed attempt to execute the mortgage, a right that could be very significant if intervening security interests are created.²⁵⁷ Because the original attempted mortgage was inexistent, the law classifies it as an absolute nullity, deprives it of effect, and precludes it from being confirmed. Thus, *B*’s rights as mortgagee would date only from the time of execution of the new mortgage.²⁵⁸

i. A Case Study in Contract Formation

It is hornbook law that “[i]n order to form a valid contract, the parties must have sufficient capacity, give their consent freely for a certain object, and the contract must have a lawful purpose.”²⁵⁹ Omission of or defect in any of the above elements results in nullity, but not all defects or omissions are of equal significance. Where consent to a contract is obtained under duress, the contract is not void *ab initio* but results in an enforceable contract that must be annulled to deprive it of its effect.²⁶⁰ A mistake as to price or thing in a sale, on the other hand, may result in no “meetings of the minds” and thus “no enforceable contract” at all.²⁶¹ For example, in *Marcantel v. Jefferson Door Co.*, where the plaintiffs ordered all-wood cabinets and the defendant had cabinets delivered that were partially made of laminated particle board, the court found that no meeting of the minds had occurred and “no contract existed between

256. BÜRGERLICHES GESETZBUCH [BGB] [Civil Code], Jan. 22, 2002, BUNDESGESETZBLATT [BGBl. I], as amended, § 141(1) (Ger.) (stating that the confirmation of a void legal transaction is considered a renewed undertaking).

257. LA. CIV. CODE art. 1844 (2014).

258. It should be clear that acts that fail to comply with solemn formalities are, in truth, just an example of “inexistent” acts. *See, e.g.*, *Cawthon v. Kimbell*, 15 So. 101, 103 (La. 1894) (“We have said that donations *inter vivos* are solemn contracts, subjected to certain forms, without which they are inexistent.”). Although Planiol argued that “[t]his manner of looking at things is not rigorously correct,” his argument was based upon his treatment of “inexistent acts” as only those acts that are factually inexistent as opposed to legally inexistent. PLANIOL, *supra* note 3, § 346, at 232. The above discussion includes both because, in the opinion of this author, there is no practical reason for discussing factually inexistent acts.

259. *Michael v. City of Minden*, 704 So. 2d 409, 412 (La. Ct. App. 1997).

260. LA. CIV. CODE arts. 1959, 2031 (2014).

261. *Bieber-Guillory v. Aswell*, 723 So. 2d 1145, 1149–50 (La. Ct. App. 1998).

the parties Because there was no contract perfected, ownership of the cabinets did not transfer to the” plaintiffs.²⁶² In other words, contracts lacking formative elements are void or absolutely null, whereas those contracted defectively are merely voidable or relatively null.

The theory and concept of inexistence is necessary for a complete understanding of juridical acts. As will be demonstrated below, the absence of an element of contract formation—capacity, consent, cause, and object—prevents the formation of a contract or juridical act, so the concept of inexistence is needed for a proper explanation.

(a) *Capacity*

A minor child who executes an act of sale for a home has no capacity to enter into the contract and execute the act of sale.²⁶³ The child does not suffer from a total absence of capacity but rather defective capacity. That is, the child has the capacity of personhood, although not a level of mental capacity sufficient to enter into contractual relations.²⁶⁴ In fact, total absence of capacity is difficult to envision indeed, at least for natural persons, as the concept of natural capacity requires only biological existence.²⁶⁵ Prior law, however, furnished an example. Article 1489 of the 1870 Code provided that “[d]octors of physic or surgeons, who have professionally attended a person during the sickness of which he dies, can not receive any benefit from donations *inter vivos* or *mortis causa* made in their favor by the sick person during that sickness.”²⁶⁶ Such individuals did not have a defective capacity by which they needed assistance in accepting donations, but rather they suffered from a complete and total incapacity under which they could not receive donations by virtue of their incapacity. Thus, a

262. *Marcantel v. Jefferson Door Co., Inc.*, 817 So. 2d 236, 240 (La. Ct. App. 2002). Moreover, in *DB Orban Co. v. Lakco Pipe & Supply, Inc.*, the court, after examining a dispute between the parties over the price of pipe to be sold from the plaintiff to the defendant, noted that there was “no meeting of the minds and therefore no contract between the parties.” 496 So. 2d 1382, 1385 (La. Ct. App. 1986). It also stated, “We also note that the trial court properly found that the pipe was never actually sold to Lakco, thus there cannot be any rescission.” *Id.*

263. See LA. CIV. CODE art. 28, 29 (2014).

264. See *id.* art. 25 (stating that natural personality commences “at the moment of live birth”); *id.* art. 28 (providing that a natural person who has achieved the age of majority has capacity to enter into juridical acts).

265. See *id.* arts. 24, 25.

266. LA. CIV. CODE art. 1489 (1870).

purported contract of donation with one of the above persons resulted in “no juridical act at all.”²⁶⁷

Further, one can better envision the problem in the context of juridical persons. Consider, for example, a situation in which a partnership, whose foundational document excludes it from owning immovable property, enters into an act of sale for a tract of land. Here, the juridical person has capacity by virtue of its foundational documents.²⁶⁸ However, its ability to enter into a transaction by which it acquires immovable property is not defective but rather nonexistent. It is not as if the partnership needs help or assistance (as a minor child would) in acquiring immovable property. It is expressly prohibited from doing so and thus suffers from an incapacity to hold the right, rather than a mere incapacity to enjoy it. Therefore, a purported contract by such a corporation for the acquisition of land would be missing one of the essential elements for contract formation, rendering it nonexistent and absolutely null.

(b) Consent

By far, the most common instances of problematic consent involve fraud, duress, or certain types of error, which vitiate consent and render the contract relatively null.²⁶⁹ For example, when jewelry store employees scheme to make a customer think a ring is worth less than its actual value, fraud can vitiate the contract and render it relatively null.²⁷⁰

Be that as it may, there are some vices of consent that prevent contract formation and thus result in absolute nullities or nonexistent acts. French doctrine sometimes refers to these kinds of vices that prevent formation of a contract as *erreur-obstacle* because the error serves as an obstacle to the creation of a contract.²⁷¹ Although common in French doctrine, the concept of *erreur-obstacle* is not well accepted in Louisiana scholarship. Professor Litvinoff stated that “since the revision of 1825, there is no room in the Louisiana Civil Code for the doctrine of *erreur-obstacle*, because of its careful enumeration of different categories of error, all of which are just vices of consent and give rise to a nullity which is only relative.”²⁷²

Louisiana courts, however, have recognized a kind of error that prevents contract formation, though under the Anglo-American

267. LITVINOFF & TÊTE, *supra* note 2, at 63.

268. LA. CIV. CODE art. 24 (2014).

269. *See id.* art. 1948.

270. *Griffing v. Atkins*, 1 So. 2d 445 (La. Ct. App. 1941).

271. NICHOLAS, *supra* note 175, at 78.

272. Saúl Litvinoff, *Vices of Consent, Error, Fraud, Duress and an Epilogue on Lesion*, 50 LA. L. REV. 1, 10–11 (1989).

concept rather than the French. What the French consider *erreur-obstacle*, Anglo-American courts find a lack of a “meeting of the minds.”²⁷³ Or, “[t]o put the argument in the form in which it is familiar in English law, *erreur-obstacle* is not so much a mistake as a failure of the acceptance to coincide with the offer.”²⁷⁴

Whatever the name given to the kind of error that prevents contractual formation, the concept is a useful one that has been recognized in the jurisprudence. In the famous case of *Lyons Milling Co. v. Cusimano*, the plaintiff needed high gluten flour to make macaroni and ordered from the defendant Telegram flour, “f.o.b. Lyons,” Kansas, by which he intended Telegram flour from the Lyons mill.²⁷⁵ The defendant, however, sent him Telegram flour from his mill in Hudson, Kansas (which had a lower gluten content) but paid the freight to transport it from Lyons to New Orleans.²⁷⁶ In short, the plaintiff meant one thing, and the defendant meant another. Thus, the contract lacked the essential element of consent from its formation. In other words, the parties did not have a meeting of the minds on the type of flour to be bought and sold, or suffered from an *erreur-obstacle*.

Moreover, in *Kaufman v. Audubon Ford/Audubon Imports, Inc.*, the court considered a situation in which one party to an automobile sale contract concealed that he was the agent for a third party from Taiwan to whom the cars would be exported in violation of the manufacturer’s export agreement policy.²⁷⁷ The district court found that the concealment “was sufficient to vitiate the contract for want of consent on the part of the Appellant.”²⁷⁸ In affirming the district court’s opinion, the court of appeal stated that “there must be a meeting of the minds” and that error could vitiate the necessary consent.²⁷⁹ In conclusion, the court stated:

[T]he concealment by the Appellant of the fact that Mr. Vee was the intended purchaser and that the Appellant intended to export the vehicles was sufficient, therefore, in the case at bar, to vitiate the contract for want of consent on the part of the Appellee; thus, there is no valid contract.²⁸⁰

273. NICHOLAS, *supra* note 175, at 78.

274. *Id.* See also JACQUES GHESTIN, *DROIT CIVIL: LA FORMATION DU CONTRAT* 459–62 (3d ed. 1993).

275. 108 So. 414, 414–15 (1926).

276. *Id.* at 415.

277. 903 So. 2d 486 (La. Ct. App. 2005).

278. *Id.* at 489.

279. *Id.*

280. *Id.* at 490.

(c) *Cause*

It is almost unthinkable to discuss ineffectual cause in terms other than those of absolute nullity. Cause either exists and is lawful, in which case the contract is valid, or it does not exist and is unlawful, in which case the contract is absolutely null.²⁸¹ Defective cause does not exist the way defective consent does, and thus problems with cause result in absolute nullities and not relative ones.²⁸² For example, a contract to stifle bids at an auction has an illegal or illicit cause and renders the contract an absolute nullity.²⁸³ A private detective contract, the compensation for which depends on the dissolution of a marriage, is similarly against public policy and null.²⁸⁴

Although no relative nullities exist with respect to cause, there are instances of problematic “cause” that more clearly are examples of inexistent acts insofar as they preclude contractual formation, as opposed to invalidating a contract for reasons of public policy. In other words, “[i]f there is no cause, the obligation is as ineffectual as a Roman *nudum pactum*.”²⁸⁵ For example, if at the time a contract of sale is made the thing that is its object has been destroyed, then the buyer cannot be bound to pay the price as ownership of a nonexistent thing cannot be transferred. The obligation then lacks a cause—therefore, it is not an obligation at all. Likewise, the promise of a gift made in contemplation of a future marriage is not enforceable if the marriage does not take place.²⁸⁶ Again, the obligation lacks a cause as the reason for the promise proved to be absent.²⁸⁷ Thus, if the cause of an obligation is “absent,” no contract exists, and any act that purports to be so is inexistent.

(d) *Object*

As with cause, most classic cases of problematic contractual objects involve situations of illicit objects leading to public policy nullities. Cases involving absolute nullities due to objects contrary to public policy include contracts for drug paraphernalia²⁸⁸ and

281. See LA. CIV. CODE art. 1966 (2014) (“An obligation cannot exist without a lawful cause.”).

282. Cf. *id.* art. 1966; *id.* art. 1968.

283. *Cahn v. Baccich & De Montluzin*, 181 So. 696 (La. 1915).

284. *Succession of Butler*, 294 So. 2d 512 (La. 1974).

285. Saúl Litvinoff, *Still Another Look at Cause*, 48 LA. L. REV. 3, 5 (1987).

286. *Id.*

287. *Id.* at 5–6 (footnotes omitted).

288. *A Better Place, Inc. v. Giani Inv. Co.*, 445 So. 2d 728 (La. Ct. App. 1984).

gambling debts.²⁸⁹ But other types of absolute nullities may exist even in the face of an object not obviously contrary to public policy. That is, in cases in which no object exists or when an object is not “determined at least as to its kind” an absolute nullity results, not because it is clearly contrary to public policy but because of the nonexistence of an object altogether, thus resulting in an inexistent juridical act.²⁹⁰

For example, in *Kite v. Gus Kaplan, Inc.*, the Court examined whether a provision in a lease granting a store owner authority to relocate one of its tenants gave it the authority to do so without prior notice and without adequately ensuring suitability for the tenant’s jewelry business.²⁹¹ The Louisiana Supreme Court correctly held that “[a]n obligation to provide changed space, without specifying in what respect(s) the space could be changed, is one indefinite as to its object within the contemplation of La. Civ. Code art. 1973.”²⁹² Quoting Planiol, the Court stated that “[t]he obligatory relationship is not formed when the object of the obligation is not determined.”²⁹³ Although the Court rescued this lease due to vague provisions and concluded that under the rules of contractual interpretation and obligations of good faith the lease did not provide for such authority, had the lease been more specific, the object would have been indeterminable and thus resulted in an inexistent act.²⁹⁴

ii. Sales, Marriages, and Other Contracts

Aside from the basic exposition of contract formation law, the theory of inexistent acts can readily be seen in all varieties of legal transactions. Consider the case where *A* agrees to buy sweet potatoes from *B* for the “market price.”²⁹⁵ No market, however, is stated, and extrinsic evidence reveals that *A* and *B* did not even tacitly or impliedly agree on which market, much less how the market price would be determined. Here, the parties, despite the external statements to the contrary, have not confectioned a sale. Article 2464 of the Louisiana Civil Code states that “[t]he price must be fixed by the parties in a sum either certain or determinable through a method agreed by them. There is no sale unless the parties

289. *Britt v. Davis Bros.*, 43 So. 248 (La. 1907).

290. LA. CIV. CODE arts. 1971, 1973 (2014).

291. 747 So. 2d 503, 505 (La. 1999).

292. *Id.* (emphasis omitted).

293. *Id.*

294. *Id.*

295. The facts in this hypothetical are taken from *Princeville Canning Co. v. Hamilton*, 159 So. 2d 14 (La. Ct. App. 1963).

intended that a price be paid.”²⁹⁶ As Planiol observed, “If two persons wished to make a sale, and failed to fix a price, there is no sale. Nothing has been done.”²⁹⁷ Thus, the attempted sale is inexistent and an absolute nullity. French doctrine and jurisprudence is in accord.²⁹⁸

In the family law context, the absence of one or more of the necessary elements for marriage likewise results in an inexistent act and thus an absolute nullity. Although article 95 provides that “[a] marriage is relatively null when the consent of one of the parties to marry is not freely given,”²⁹⁹ article 94, detailing those instances when a marriage is an absolute nullity, curiously does not include the absence of consent—the very issue raised in *City of Shreveport v. Burling*.³⁰⁰ In *Burling*, the city of Shreveport sought to terminate Ms. Young’s retirement benefits, which she had been receiving as a widow, because she was alleged to have remarried.³⁰¹ The city’s belief appears to have been well-founded because Ms. Young and Mr. Burling, who had an existing relationship, concocted a “sham marriage” “in order to placate [Ms. Young’s elderly] mother, her daughter, and avoid an appearance of impropriety to the live-in grand-daughter.”³⁰² The ceremony, although presided over by a reverend, “did not include an exchange of rings or any statement of consent to be married.”³⁰³ Similarly, the reverend “did not pronounce them man and wife,” and the attending witnesses testified that the event “did not appear to be a marriage ceremony.”³⁰⁴ Although the court correctly concluded that no marriage existed, its explanation was based upon the lack of the parties’ intent to marry.³⁰⁵ More precisely, however, the marriage did not exist because the essential element of consent was completely absent, as well as, perhaps, the marriage ceremony.

In fact, the Civil Code itself provides at least two other explicit examples of inexistent acts. The first involving the sale of a thing of another in article 2452, and the second involving the annuity contract in article 2782. Although article 2452 declares somewhat

296. LA. CIV. CODE art. 2464 (2014).

297. PLANIOL, *supra* note 3, § 348, at 233.

298. See, e.g., ALAIN BÉNABENT, DROIT CIVIL: LES CONTRATS SPÉCIAUX CIVILS ET COMMERCIAUX 29 (4th ed. 1999) (“*L’indétermination du prix prive la vente d’une de ses conditions d’existence. C’est pourquoi la jurisprudence la sanctionne d’une nullité absolue . . .*”).

299. LA. CIV. CODE art. 95 (2014).

300. 535 So. 2d 1164, 1165 (La. Ct. App. 1988).

301. *Id.*

302. *Id.*

303. *Id.* at 1166.

304. *Id.*

305. *Id.* at 1167.

cryptically that “[t]he sale of a thing belonging to another does not convey ownership,”³⁰⁶ this situation is best described as an example of an inexistent act.³⁰⁷ In a case involving the sale of a thing of another, the seller has nothing to transfer to the buyer, who has paid for a thing the seller does not own and cannot transfer. Here, the sale of a thing of another is a sale without an object, and thus one of the formative elements of the contract of sale is missing.³⁰⁸ As has been explained elsewhere, “[t]he transmission of ownership is the object of the sale,”³⁰⁹ and thus a sale where no ownership can be transferred has no object and is missing a constituent element. This was, in earlier times, the widespread opinion in France.³¹⁰ And Louisiana scholars have noted that “[i]n the situation contemplated in article 2452 the contract fails because of legal impossibility.”³¹¹

Prior to the 1984 Obligations revision, article 2452 of the 1870 Code, the predecessor to current article 2452, stated unequivocally that “[t]he sale of a thing belonging to another is null.”³¹² Moreover, the official comments to the current article indicate that although the article is “new” and “[i]n spite of its different language, it does not

306. LA. CIV. CODE art. 2452 (2014).

307. *But see* LEVASSEUR & GRUNING, *supra* note 60, at 28 (“Such a sale looks very much like a sale under a suspensive condition that the seller acquires ownership of the thing so as to transfer it to the buyer.”). Unfortunately, however, this approach explains neither the context of the article, the historical evolution of the article, nor its application in all circumstances. The placement of the article in the Civil Code, under the Chapter Heading “Of Things Which May Be Sold,” rather than in the Chapter on “Perfection” of a sale (where, in fact, the other articles dealing with effective sales that suspend the transfer of ownership, e.g., article 2460, are placed) further lends credence to the idea that this article concerns not merely the “effects” of a sale but rather its formation. Moreover, if the drafters intended such a result, they certainly knew how to say so. *See, e.g.*, LA. CIV. CODE art. 2450 (2014) (stating that in the case of a sale of a future thing, “the coming into existence of the thing is a condition that suspends the effects of the sale”); *Id.* art. 2460 (stating that in a sale on view or trial, “ownership is not transferred from the seller to the buyer until the latter gives approval of the thing”). Finally, although this approach accurately explains the effects of a sale between parties who contemplate that the owner will in the future acquire a thing, which would in turn be transferred to the buyer, it does not explain the situation in which a seller, knowing he or she is not the owner of a thing, deceptively sells someone else’s property to the buyer. To say that this is a valid sale, the effects of which are suspended until the seller acquires the thing (which he or she has no intention of doing) from the true owner, would be curious indeed.

308. *See* LA. CIV. CODE art. 1971 (2014).

309. 14 Fenet, *supra* note 50, at 157 (author’s translation).

310. PHILIPPE MALAURIE, LAURENT AYNES, & PIERRE-YVES GAUTIER, *LES CONTRATS SPÉCIAUX* 131 (2011) (“*Rationnellement – au XIX^e siècle dernier ce fut une opinion répandue . . . la nullité aurait dû être absolue, puisque manqué à la vente une élément essentiel, la chose.*”).

311. SAÛL LITVINOFF, *OBLIGATIONS* 52 (1969).

312. LA. CIV. CODE art. 2452 (1870).

change the law as stated in the source article.”³¹³ French Civil Code article 1599, the source article to the Louisiana provision, likewise declares such sales “null.”³¹⁴ The comments to 2452 similarly recognize that the buyer may bring an “action for nullity.”³¹⁵

Similarly, article 2782, which prescribes the termination point for the annuity contract, provides that “[i]n the absence of a designated term, an annuity established . . . in favor of a juridical person is without effect.”³¹⁶ Early drafts of the article vacillated between whether the effect of not stipulating a term would create a relative or absolute nullity.³¹⁷ In the end, the term “nullity” was removed from the article entirely, and the circumlocution of the annuity being “without effect” was agreed upon.³¹⁸ The terminological obfuscation notwithstanding, this article provides a clear instance of an absolute nullity that is created by virtue of an act’s inexistence. Article 2781 creates the foundational requirement that all annuity contracts must be “for the lifetime of a designated natural person, or alternatively, for a period of time.”³¹⁹ The comments to article 2782 make clear the importance of the

313. LA. CIV. CODE art. 2452 cmt. a (2014).

314. CODE CIVIL [C. CIV.] art. 1599 (Fr.).

315. Art. 2452 cmt. e. Similarly, a sale is inexistent when the “thing” or the “object” of a sale is already owned by the buyer. Article 2443 of the Louisiana Civil Code provides that “[a] person cannot purchase a thing he already owns.” *Id.* art. 2443. The comments make clear that the nullity involved here is an absolute one as the “transaction whereby a person purchases a thing he already owns clearly results from the legal impossibility to make such a purchase.” *Id.* cmt. b. The 1870 version of the Civil Code was clearer and, at the same time, more opaque. Article 2443 of the 1870 Code stated that “[h]e who is already the owner of a thing, cannot validly purchase it. If he buys it through error, thinking it the property of another, the act is null, and the price must be restored to him.” LA. CIV. CODE art. 2443 (1870). Although the effect of such a sale was clearly decreed to be a nullity, the use of the term “through error” created the risk that it may be mistaken for a relative nullity because of a vice of consent, rather than an absolute one due to a lack of object.

316. LA. CIV. CODE art. 2782 (2014).

317. See RENTS OF LANDS & ANNUITIES COMM., LA. STATE LAW INST., DRAFT DOCUMENT FOR THE COUNCIL MEETING ON FEBRUARY 10, 2012, at 8 (2012) (characterizing an annuity without a term in favor of a juridical person as a relative nullity); RENTS OF LAND & ANNUITIES COMM., LA. STATE LAW INST., PROPOSED REVISIONS TO LOUISIANA CIVIL CODE, BOOK III—TITLE X. OF RENTS AND ANNUITIES, PREPARED FOR THE MEETING OF THE COUNCIL ON FEBRUARY 11, 2011, at 10 (2011) (characterizing an annuity without a term in favor of a juridical person as absolutely null); RENTS OF LAND & ANNUITIES COMM., LA. STATE LAW INST., PROPOSED REVISIONS TO LOUISIANA CIVIL CODE, BOOK III—TITLE X. OF RENTS AND ANNUITIES, PREPARED FOR THE MEETING OF THE COUNCIL ON MAR. 12, 2010, at 8 (2010) (characterizing an annuity without a term in favor of a juridical person as merely null).

318. Art. 2782.

319. *Id.* art. 2781.

designated period of time and its status as a foundational element of the annuity contract: “[A]n annuity established in favor of a juridical person is without effect because a substantive legal requirement for the formation of the contract has not been met.”³²⁰ In other words, a foundational requirement for the annuity contract is missing, and thus the purported contract is without effect because it cannot exist.

Although the classic explanation of absolute or public policy nullities and relative or private interest ones covers many of the common instances of nullity, it is ill-equipped to explain the full range of absolute nullities that exist. Defects in solemn form requirements are not obviously violative of public policy but are absolute nullities nonetheless. Similarly, contracts that are missing an essential element are juridically inexistent and therefore properly classified as absolute nullities as well, even though the relation of these acts to public policy is tenuous at best. Only the permanency of the defects that affects all of these transactions, it is posited, can fully explain their proper classifications and effects.

IV. MIXED NULLITIES

Although relative and absolute nullities exhaust the universe of categories recognized explicitly in the Code, both legislation and jurisprudence recognize a series of transactions that do not easily fit within one of the above-defined categories. As discussed, absolute nullities are imprescriptible, are not confirmable, and may be invoked by anyone.³²¹ Contrastingly, relative nullities are prescriptible, may be confirmed, and can only be invoked by the parties in whose favor they are established.³²² Questions exist as to how to characterize nullities that show elements of each.

The presentation of merely two kinds of nullities is too simplistic.³²³ “The simple dichotomy of ‘void’ and ‘voidable’ (or absolute and relative nullity) is not adequate to describe the various ways in which the law refuses to a greater or less[er] extent to give effect to contracts, marriages and other juristic acts.”³²⁴ There are at least three different types of nullities: absolute, relative, and mixed. Thus, this Article proposes that the more appropriate way of thinking about nullities is along a spectrum ranging from absolute to relative with many mixtures of the two in between.

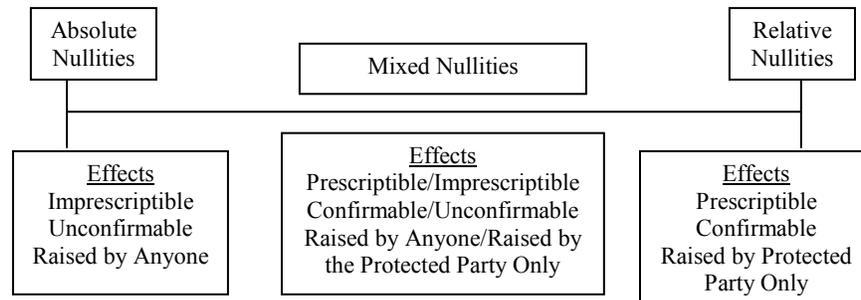
320. *Id.* art. 2782.

321. *Id.* arts. 2030, 2032.

322. *Id.* arts. 2031, 2032.

323. MAZEAUD ET AL., *supra* note 166, at 310.

324. A. M. Honoré, *Degrees of Invalidity*, 75 S. AFRICAN L. J. 32 (1958).



A. Cases of Mixed Nullities

A mixed nullity contains elements of absolute nullity and relative nullity. As such, one cannot merely assume, for example, that because a nullity is subject to a prescriptive period, it bears all the hallmarks of a relative nullity. Similarly, one cannot simply conclude that because a nullity can be invoked by anyone that it demonstrates all elements of an absolute nullity.

For example, if *A* attempts to make a donation to *B* by virtue of an act under private signature, the donation is null. Prior to the revision in 2008, article 1536 simply stated that “[a]n act shall be passed before a notary public and two witnesses of every donation *inter vivos* . . . under the penalty of nullity.”³²⁵ It did not, however, discuss the character of the nullity.

Ascertaining whether a nullity is absolute or relative is not an easy task. Form requirements, in general, require close examination. To ascertain whether a nullity is absolute or relative, one needs to ask whether the grounds for which the form requirements are established are cautionary or evidentiary. As discussed above,³²⁶ when the form requirements exist for evidentiary purposes, failure to follow the form does not necessarily result in an absolute nullity. That is, “the juridical act may produce effects even when the formality has been omitted, although subject to the uncertainty of

325. LA. CIV. CODE art. 1536 (1870). This article specifically made reference to donations of “immovable property or incorporeal things.” *Id.* Article 1538, however, required that a donation, “even of movable effects,” “be passed of the same.” *Id.* art. 1538. Article 1539, however, created an exception for corporeal movables, which may be donated by “manual gift . . . accompanied by real delivery.” *Id.* art. 1539. The current law now makes clear that all donations must be confected by authentic act, except those of corporeal movable things and those of certain other incorporeal movables. LA. CIV. CODE arts. 1541, 1543, 1550 (2014).

326. *See supra* Part III.B.2.b.

securing proof other than witnesses or presumptions. That is why such a formality is evidentiary rather than cautionary.”³²⁷

With regard to donations, however, “it is elementary that . . . form is of the essence, and that, to have a binding force, the act shall be passed before a notary public and two witnesses.”³²⁸ In other words, the form requirements here serve a solemn or cautionary function, rather than an evidentiary one. That is, the form requirement is imposed out of a concern about the gratuitous nature of the disposition and out of a concern that the donor fully and freely appreciates the consequences of his or her act. By virtue of “the process of concurring to the execution of a writing with such a high degree of formality, the donor is given an opportunity to realize that he is irrevocably divesting himself of the property he donates.”³²⁹ Moreover, the jurisprudence is clear: “We have said that donations *inter vivos* are solemn contracts”³³⁰

Thus, the nullity that exists here clearly appears to be an absolute one, and the jurisprudence in Louisiana supports this view. In *Ducote v. Ducote*, the court in examining an *inter vivos* donation in improper form clearly stated that because

the act before us is not authentic, we reject the contention that it can be made effective through action provided in either of the above articles. The purported donation of immovable and incorporeal property can be considered as nothing more than an act under private signature duly acknowledged and, as such, is absolutely null.³³¹

The recent revision to the donations *inter vivos* articles in 2008 makes this point nearly incontrovertible.³³² Article 1541 now states that “[a] donation *inter vivos* shall be made by authentic act under the penalty of absolute nullity, unless otherwise expressly permitted by law.”³³³

Appearances, however, may be deceiving. Although the form requirements for a donation *inter vivos* exist for solemn or cautionary purposes and appear to give rise to an absolute nullity, if such were the case, a donation null for lack of form would be imprescriptible and unconfirmable.³³⁴ Article 1845, however, provides that “[a] donation *inter vivos* that is null for lack of proper

327. LITVINOFF, *supra* note 125, § 12.12, at 294.

328. *Cawthon v. Kimbell*, 15 So. 101, 103 (La. 1894).

329. LITVINOFF, *supra* note 125, § 12.12, at 294.

330. *Cawthon*, 15 So. at 103 (emphasis added).

331. 442 So. 2d 1299, 1301–02 (La. Ct. App. 1983).

332. See LA. CIV. CODE art. 1541 (2014).

333. *Id.*

334. *Id.* arts. 2030, 2032.

form may be confirmed by the donor but the confirmation must be made in the form required for a donation.”³³⁵ The confirmation of a donation available under article 1845 is one of the classic hallmarks of a *relative nullity*, not an *absolute* one.³³⁶ This confirmation is to be distinguished from the re-execution of the donation anew, which would be required if the original donation was absolutely null.³³⁷ The confirmation available for relative nullities and the re-execution allowed for absolute ones differ in an important way. Although the re-execution of an act invalid for reasons of form has effects from the day of re-execution, “[a] valid confirmation . . . has effects retroactive to the date of the original invalid donation.”³³⁸ Having seen that an *inter vivos* donation that is null for want of form has indications of both absolute (i.e., solemnity of form) and relative nullities (i.e., confirmability), the appropriate classification then is that this kind of nullity falls in the middle of the spectrum and results in a “mixed” nullity.³³⁹

The above example is not an isolated anomaly. In fact, the Civil Code and jurisprudence are littered with mixed nullities. Consider, again, the issue of article 2447.³⁴⁰ Article 2447 states that “[o]fficers of a court, such as judges, attorneys, clerks, and law enforcement agents, cannot purchase litigious rights under contestation in a jurisdiction of that court.”³⁴¹ If such a purchase occurs by one afflicted with this incapacity, “[t]he purchase of a litigious right by such an officer is [absolutely] null.”³⁴² Assuming the more recent cases are correct in their characterization, one could reasonably conclude that any purported purchase of litigious rights by an officer of a court where the rights are under contestation has no effect, is imprescriptible, is unconfirmable, and can be raised by anyone—the necessary consequences of an absolute nullity.³⁴³

Such a conclusion, however, would be too hasty. The jurisprudence has repeatedly stated that the nullity can only be

335. *Id.* art. 1845.

336. *See id.* art. 2031.

337. *Id.* art. 2030.

338. *Id.* cmt. b.

339. Given this classification, one must ask a further question with regard to the prescriptive period for challenging the nullity here and who has the right to do so. If the nullity is an absolute one, the challenge to the donation could be brought by anyone, and the nullity would be imprescriptible. *Id.* arts. 2030, 2032. If, on the other hand, the nullity is relative, then only the party in whose favor the nullity was established could challenge it, and he or she would have to do so within five years. *Id.* arts. 2031, 2032.

340. *See supra* Part III.A.2.

341. LA. CIV. CODE art. 2447 (2014).

342. *Id.*

343. *Id.* arts. 2030, 2032, 2033.

invoked by the other party against whom the right is exercised.³⁴⁴ The comments to article 2447, written after the 1993 revision, also reflect this limitation on suit.³⁴⁵ If such is the case, then one of the necessary consequences of an absolute nullity, i.e., the ability to be raised by anyone, does not occur here. Thus, once again, the Code provides an example of an instance that fits neither on the absolute or relative end of the nullity spectrum and more appropriately belongs somewhere in-between.

B. Cases of Jurisprudential Confusion Not Resulting in a Mixed Nullity

The existence of the category of mixed nullity is not posited to suggest that every instance of confused jurisprudential application can be easily dispensed with by tossing it into the bin of mixed nullities. Consider, for instance, article 1498 of the Civil Code governing the issue of donations *omnium bonorum*, which are acts by which individuals gratuitously divest themselves of all of their goods.³⁴⁶ The Code declares such an act to be null if the donor has failed to reserve enough for subsistence.³⁴⁷ This prohibition has existed in Louisiana law since the Code of 1825 but has no history or correspondence in the Code Napoleon. Instead, this article is traceable to the Spanish law, namely the *Recopilacion de Castilla*.³⁴⁸

To ascertain the type of nullity involved, courts have looked to the purpose of the prohibition. Most recently, in 2007, the court in *Trahan v. Bertrand* stated that “[i]t is well settled that the public policy behind this statute is to prevent a donor from divesting him/herself of all of their property such that they become a ward of the state.”³⁴⁹ As such, it would clearly be an absolute nullity and thus imprescriptible, which the courts have recognized.³⁵⁰ But, if the nullity established by a donation *omnium bonorum* is an absolute

344. *Saint v. Martel*, 47 So. 413 (La. 1918). *See also* *Gilkerson-Sloss Com'n Co. v. Bond*, 11 So. 220 (La. 1892); *Swords v. Cortinas*, 4 La. App. 145 (La. Ct. App. 1926); *McCarty v. Splane*, 8 La. Ann. 482 (La. 1852).

345. Art. 2447 cmt. b (stating “that nullity can be invoked only by the party to the suit against whom the right is to be exercised”).

346. *Id.* art. 1498.

347. *Id.*

348. *Lagrange v. Barre*, 11 Rob. 302, 306 (La. 1845).

349. *Trahan v. Bertrand*, 952 So. 2d 809, 812 (La. Ct. App. 2007).

350. *Lagrange*, 11 Rob. 302; *Trahan*, 952 So. 2d 809; *Broussard v. Doucet*, 107 So. 2d 448 (La. 1958); *Abshire v. Levine*, 546 So. 2d 642 (La. Ct. App. 1989); *Owen v. Owen*, 325 So. 2d 283 (La. Ct. App. 1975); *Givens v. Givens*, 273 So. 2d 863 (La. Ct. App. 1973).

one, then it also cannot be confirmed and can be raised by anyone.³⁵¹

Numerous cases have considered the issue of who can raise the nullity of a donation *omnium bonorum*. Although it is clear that the donor can raise the nullity that afflicts a donation *omnium bonorum*, others generally cannot. Courts have denied this right to collateral heirs³⁵² but granted it to forced heirs after the death of the donor.³⁵³ In addressing the very issue of how an act that is absolutely null can be raised only by a select group of individuals, the Louisiana Supreme Court has confusingly stated that “[t]he nullity declared by article 1497 of the Civil Code is absolute only relatively to the particular persons in whose special interest it was passed.”³⁵⁴

Similarly, although it was argued above that an *inter vivos* donation in improper form is a mixed nullity, such is not the case for a donation *mortis causa* not executed in the form of a valid testament. Here, the difference, although technical and not motivated by the strongest policy reasons, is clearly recognized in the provisions of the Civil Code. Article 1573 unequivocally states that “[t]he formalities prescribed for the execution of a testament must be observed or the testament is *absolutely null*” and no other provision of the Civil Code casts doubt upon this classification.³⁵⁵

Article 1573 came in anew with the 1997 revision to the law of successions, but the sparse comments indicate that “[i]t does not change the law” and is based on article 1595 from the Code of 1870.³⁵⁶ In the Code of 1870, article 1595 provided that “[t]he formalities, to which testaments are subject by the provisions of the present section, must be observed; otherwise the testaments are null and void.”³⁵⁷ Although the language is not identical, article 1595 of the 1870 Code was substantively similar to its predecessor in the Code of 1825, the Digest of 1808, and the French Code Napoleon of

351. See LA. CIV. CODE art. 2030 (2014).

352. See, e.g., *Bernard v. Noel*, 13 So. 737 (La. 1893).

353. See, e.g., *Succession of Turgeau*, 58 So. 497 (La. 1912); *Maxwell v. Maxwell*, 156 So. 166 (La. 1934); *Haynes v. Haynes*, 848 So. 2d 35 (La. Ct. App. 2003); *Owen*, 325 So. 2d 283; *Succession of Moran v. Moran*, 25 So. 2d 302 (La. Ct. App. 1946).

354. *Bernard*, 13 So. at 738. *But see* *Pardue v. Turnage*, 383 So. 2d 804 (La. Ct. App. 1980) (reviewing a trial court opinion finding the existence of a donation *omnium bonorum* raised not by the parties, but by the court itself).

355. LA. CIV. CODE art. 1573 (2014) (emphasis added). With respect to donations *inter vivos*, however, see *id.* art. 1845 (regarding confirmation of donations *inter vivos* executed in improper form).

356. *Id.* art. 1573.

357. LA. CIV. CODE art. 1595 (1870).

1804.³⁵⁸ In short, a donation *mortis causa* not in proper form is an absolute nullity.³⁵⁹ This means, of course, that it can be raised by anyone, cannot be confirmed, and most importantly is imprescriptible.

Be that as it may, courts have routinely held that the ability to challenge a will based upon a defect in form is subject to a liberative prescriptive period. Article 3479 states that “[a]n action for annulment of a testament” is “subject to a liberative prescription of five years.”³⁶⁰ This article was added to the Code in 1983, but the prior versions of it date back to the Civil Code of 1825 and provide essentially the same thing—that testaments could not be annulled after five years.³⁶¹ Under the old law, the courts treated this prescription on nullifying testaments as applying to formal defects in wills. For example, as far back as the 1800s, the Louisiana Supreme Court stated that “[i]t is true, defects of form in a will are absolute nullities, but we think it is well settled that such nullities may be cured by the lapse of time.”³⁶²

The actual genesis of the prescriptive period here stems from the Louisiana Supreme Court’s decision in *State v. Martin*, a case that involved former Justice of the Louisiana Supreme Court, Francois Xavier Martin.³⁶³ In that case, the Court stated the issue as follows: “Could *Francois Xavier Martin*, after he became blind, make any dispositions *mortis causâ*, in the olographic form?”³⁶⁴ In answering its own question, the Court concluded:

We are called upon to decree the nullity of a solemn act of last will, neither declared to be null, nor expressly prohibited, by law. The nullity alleged is purely one of form, as it is conceded that the testator, notwithstanding his blindness, might lawfully have made a nuncupative will. It is not, in legal intendment, an absolute nullity, since it may be cured by lapse of time, or by voluntary execution or ratification on the part of the heirs at law, and, if enforced, leaves them under a natural obligation to execute the will. Civil Code, arts. 3507, 1751. 7 Toullier, nos. 554 to 565. It is not asked by the foreign heirs, on the ground that the

358. LA. CIV. CODE art. 1588 (1825); LA. CIV. CODE art. 108 (1808); C. CIV. (Fr.) Art 1001 (1804).

359. Art. 1573.

360. *Id.* art. 3497.

361. See Act No. 173, 1983 La. Acts 429; LA. CIV. CODE art. 3542 (1870); LA. CIV. CODE art. 3507 (1825).

362. *Callais v. Semere*, 10 La. Ann. 684 (La. 1855).

363. 2 La. Ann. 667 (La. 1847).

364. *Id.* at 715.

defendant is a person interposed. One of them has judicially recognised the validity of the will, and the others are silent. The nullity is sued for on behalf of the fisc, exclusively for fiscal purposes, on the assumption that its capacity to maintain the action is the same as that of the heirs.³⁶⁵

The Court again repeated itself in a 1902 case, *Cox v. Lea's Heirs*, in which it had the following to say:

It follows, therefore, that a testament, void by reason of certain defects, may nevertheless exist, within the contemplation of law, and that such defects are forgiven by the law, and, by operation of the law, are presumed to be forgiven by those who might complain of them, unless their complaints are made within the time prescribed.³⁶⁶

Even as recently as 1962, Louisiana courts, under the old law, continued the same kind of rationale:

[A] complete absence of the reading of a nuncupative will by private act, necessary to its validity as is also true in the case of the nuncupative will by public act (LSA-C.C. arts. 1582 and 1578), is a defect of form cured by the prescription of five years under Civil Code Article 3542.³⁶⁷

Modern scholars maintain the same and state that “[w]here a testament is alleged to be null for failure to observe the formalities required by the Code in the confection thereof, the action must be brought timely, otherwise it will be barred by the prescription of five years of article 3497.”³⁶⁸

Once again, it appears that there exists another instance of mixed nullity, which the law clearly classifies as absolute but which the jurisprudence and other code articles seem to make prescriptible within a five-year timeframe. This, however, would be an erroneous conclusion. In this instance, the nullity involved in a will defective for lack of form requirements *is* an absolute one and thus *ought* to properly be considered imprescriptible, a line of jurisprudence notwithstanding to the contrary.

The above cases that interpret article 3497 to mean that a testament defective in form prescribes in five years misapply article 3497, which deals not with “void” or “null” testaments but with

365. *Id.*

366. 35 So. 275, 276–77 (1902).

367. Succession of Centanni, 142 So. 2d 636, 638–39 (La. Ct. App. 1962).

368. CYNTHIA SAMUEL, KATHERINE S. SPAHT, RONALD J. SCALISE JR. & MELISSA T. LONEGRASS, SUCCESSIONS, DONATIONS, AND TRUSTS: CASES AND READINGS 506 (2010).

“voidable” or “annullable” testaments. After all, the article states that “[a]n action for *annulment* of a testament” prescribes in five years.³⁶⁹ In other words, article 3497 applies only to those issues that are grounds for “voidability” of testaments, i.e., grounds for relative nullity, not those issues that are grounds for a testament being “void,” i.e., absolutely null. For example, incapacity, fraud, duress, and undue influence are all grounds for annulling a testament and thus examples of relative nullities.³⁷⁰ Article 2031 gives examples of grounds for the relative nullity of contracts: “when a party lacked capacity or did not give free consent.”³⁷¹ These would be instances in which the law would create the nullity of a contract or will to protect a party (i.e., the testator), and thus only the testator (or his or her representative) could invoke the nullity. It would clearly be one of the grounds that would prescribe in five years under article 3497. To read article 3497 as a basis for subjecting a “null” will to a five-year prescriptive period is to continue a 200-year-old mistake. In short, this instance, despite jurisprudential confusion, is not a proper example of a mixed nullity.

In conclusion, although jurisprudential confusion abounds as to the classification and treatment of nullities, the dichotomous division between absolute and relative nullities is insufficiently sensitive to the various gradations of nullity that exist. The category of mixed nullities is suggested not only for classification purposes but also to give recognition to those nullities whose effects can neither be cabined in the absolute or relative groups. A proper mixed nullity combines the effects of both.

CONCLUSION

This modest contribution attempts to survey the existing legal landscape on the law of nullity by examining its history and the current state of the law. Moreover, using insights from foreign contemporary civil law scholarship, it attempts to provide a more accurate schematic than has existed for the understanding of the law of nullity in the Louisiana Civil Code.

This Article is certainly not an exhaustive or comprehensive catalogue of all of the types of nullity that exist. Indeed, such a task would be impossible as the types of nonexistent acts, by themselves, are infinite. Rather this Article uses examples from all major substantive areas of the civil law (e.g., family law, property, obligations, matrimonial regimes, successions) to demonstrate the

369. LA. CIV. CODE art. 3497 (2014) (emphasis added).

370. *Id.* arts. 1478, 1479.

371. *Id.* art. 2031.

inadequacy of the current theory and to provide a new schematic for understanding the current law. It is hoped that future contributions will further develop the ideas here and further explore their implications.