

SUBJECTIVITY IN THE FORMATION OF A CONTRACT—A PUZZLING POSTSCRIPT

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*The Court of Appeal has suggested in a recent case that the test for establishing whether the parties have arrived at a “convention” might be an objective test, as in English law, rather than the subjective test affirmed by a differently constituted Court of Appeal in *Marett v Marett* in 2008. This note argues that the suggestion is misconceived.*

Introduction

1 In *Home Farm Developments Ltd v Le Sueur*¹ the Court of Appeal allowed an appeal against a striking out order by the Master, and reinstated the proceedings to a limited extent and upon certain terms. None of this would merit comment in this *Review* save for a postscript in the following terms—

“POSTSCRIPT

59. We have mentioned at para 43 above that Advocate Taylor drew our attention to the decision in *Marett*.² Although the point was not argued in this appeal, and we do not need to decide it, we would nevertheless observe that the question whether an objective or a subjective test should be adopted was not argued in *Marett* either: it was simply assumed by the court to be correct (see para 55), and indeed the court expressly said that ‘This is not the time for a detailed analysis of the Jersey law of contract’. Advocate Taylor drew our attention to earlier case-law such as *Leach v Leach* 1969 JJ 1107 where an objective approach had been adopted. We would therefore be concerned if a body of opinion were to develop regarding *Marett* as the last word on the point. We would be concerned because we consider that there are potentially powerful arguments against the adoption of a subjective test. We cannot express a concluded view as to which arguments ought to prevail, but we do express the view that the

¹ [2015] JCA 242, 25 November 2015, unreported (Crow, Martin and Birt JJA).

² *Marett v Marett* (CA) 2008 JLR 384.

arguments have yet to be deployed, and as a result the point has not yet been definitively resolved.”

2 At para 43 of its judgment in *Home Farm Developments* the Court recorded that counsel had accepted for the purposes of the appeal that Jersey law determines the question of consent (being one of the essential requirements for a valid contract) by applying a subjective test. In other words, the court has regard to the subjective intention of the parties in deciding whether they have in fact reached an agreement.

3 The observation in *Home Farm Developments* is plainly *obiter*, but it may be thought to be a puzzling comment from the Court of Appeal for three main reasons.

Reason one

4 Although it is true that the question was not actually argued in *Marett*, that can only be because the Court of Appeal (as then constituted)³ considered the matter to be so well established as to be beyond argument. Furthermore, the remarks of Pleming JA in *Marett* as to the nature of a *convention* in Jersey law were not *obiter*. The Court was considering whether a consent order, which it treated as if it were a contract, should be set aside on the ground of *erreur obstacle* (i.e. an error that prevented a meeting of minds) or *erreur vice du consentement* (i.e. there was a meeting of minds but consent was impeachable for some other reason). The assessment of what was a contract in Jersey law and how it was made were directly in point.⁴ To cast doubt upon the reasoned pronouncement of a court of equivalent jurisdiction in such a way is surely unusual.

5 It is also true that some decisions of the Royal Court at a certain period have proceeded upon the assumption that the English objective approach to the issue was part of Jersey law. *Leach v Leach*⁵ was one. A study of *Leach v Leach* reveals, however, that no law appears to have been drawn to the attention of the Court by counsel; certainly not a single legal authority is referred to in the judgment. The case concerned a dispute as to the division of family assets, and whether or not an agreement had been reached in relation to certain items. The high point in favour of the English objective approach comes in a passage of the judgment where Ereaut, Bailiff states—

³ A strong court which included Sumption JA, a celebrated common lawyer who is now Lord Sumption and a judge of the Supreme Court.

⁴ See para 38 *et seq.*

⁵ 1969 JJ 1107.

“We have considered whether we can, by applying an objective test to the statements and conduct of the parties and their lawyers and by endeavouring to draw a reasonable inference from the whole of the circumstances leading to the settlement, impute to the parties an intention that one or other should take the disputed items. We have regretfully concluded that we cannot.”⁶

But the Court did not apparently hear any argument on either side as to whether this was the correct approach. It may of course be that, on the facts of that case, argument was unnecessary—that is, the Court would have come to the same decision whether a subjective or an objective approach were adopted.

6 Another case of that era adopting the objective approach of *Leach v Leach*, not mentioned in *Home Farm Developments*, but overruled by *Marett*, was *Mobil Sales & Supply Corp v Transoil (Jersey) Ltd*.⁷ This was a case where the issue was whether there was a binding contract for the supply of oil. Again, no legal argument appears to have been addressed to the Court. There appears to have been an assumption that the law of Jersey was represented by English law, and the only authority cited in the judgment (by the same judge) was an extract from a standard textbook on the English law of contract, *Cheshire and Fifoot*.⁸ The Royal Court stated—

“If, whatever a man’s real intention may be he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself is equally bound as if he had intended to agree to the other man’s terms.”⁹

⁶ *Ibid*, at 1118.

⁷ 1981 JJ 143.

⁸ Oxford, 15th ed, 2007.

⁹ *Ibid* at 159. It is a moot point as to whether the Court was actually applying Jersey law. Unfortunately the judgment is one of a series before professional law reporting was introduced in 1985 and the law which the Court was applying is not mentioned. On the facts set out in the judgment, it would appear that the place with which the contract had the closest connection was New York. The contract was made in New York by the American plaintiff through a New York broker with the Jersey registered defendant for the supply of oil to Sardinia. The plaintiff may have sued in Jersey only because that was the place of incorporation of the defendant. The proper law of the contract may have been New York law, in which case it is unsurprising that the Court adopted the objective test of English and New York law. Expert evidence was certainly given by a member of the New York Bar.

The assumption that Jersey law could be found by casual resort to a textbook on English law is not one that now finds favour with the courts.¹⁰ In *Incav Equatorial Guinea Ltd v Luba Freeport Ltd*, for example, the Royal Court stated unequivocally (at para 24)—

“The defendant submitted that it was useful to look at *Chitty on Contracts*, a textbook on English contract law, and the authorities referred to therein. There seems little doubt that, if one were seeking to ascertain the English law of contract, *Chitty* would be a good place to start. It may indeed be a helpful textbook in assisting the Royal Court in construction cases, where the language of a particular contract which is under consideration in the Royal Court is similar to the language which has been under consideration in the English courts. Nonetheless it is clearly a textbook which is to be approached with some caution insofar as the law of Jersey is concerned, as the basic principles of our law do not have the same provenance.”

7 *La Motte Garages Ltd v Morgan*¹¹ was another such case, and it will be examined in more detail below. But for present purposes the Court applied an objective test to the question whether an agreement was reached. Hamon, Commr, stated, after citing an extract from *Pothier*—

“It is perhaps somewhat disappointing that neither party chose to mine the rich lodes of our ancient French law but to rely on English law. It may well be that their conclusions would have been the same if they had¹² . . . If we have to ascertain the ‘sense of the promise’, it seems to us that we must ascertain by the objective test what a reasonable man would have assumed it to mean.”

This case was considered by the Court of Appeal in *Marett*. Pleming JA stated¹³—

“the Jersey law of contract determines consent by use of the subjective theory of contract (see *Pothier, Treatise on the Law of Obligations or Contracts . . .*) And see . . . *La Motte Garages Ltd*

¹⁰See, e.g. *Incav Equatorial Guinea Ltd v Luba Freeport Ltd* 2010 JLR 287; see also *Sutton v Insurance Corporation of the Channel Islands* 2011 JLR 80, at para 45.

¹¹ 1989 JLR 312.

¹² In this respect the learned Commissioner was unfortunately wrong.

¹³ At para 57.

v Morgan (which must now be considered *per incuriam* on this specific point in the light of *Selby v Romeril*¹⁴ . . .)."

Fresh life would have to be breathed into such disapproved judgments if the objective approach were to be introduced.

Reason two

8 More importantly, the Court of Appeal's statement in *Marett* that "the Jersey law of contract determines consent by use of the subjective theory of contract" finds strong support in the customary law. All Jersey lawyers will be familiar with the maxim "*La convention fait la loi des parties*".¹⁵ In *Doorstop Ltd v Gillman*¹⁶ it was described as having "been enshrined in Jersey law for centuries". Le Gros described it as "*un principe en quelque sorte sacré*"—a sacred principle.¹⁷ One of the important consequences of the principle is the implicit emphasis upon the mutual consent of the parties. William Bailhache, Deputy Bailiff (as he then was) expressed it in this way in *Incav Equatorial Guinea Ltd v Luba Freeport Ltd*¹⁸—

¹⁴ The author makes a declaration of interest that he presided over the Royal Court in *Selby v Romeril*.

¹⁵ Bois, Deputy Bailiff, stated in *Wallis v Taylor* 1965 JJ 455 that "It is an established principle of Jersey law that "*la convention fait la loi des parties*" and that the Court will enforce agreements provided that, in the words of Pothier—"elles ne contiennent rien de contraire aux lois et aux bonnes moeurs, et qu'elles interviennent entre personnes capable de contracter". In *Basden Hotels Ltd v Dormy Hotels Ltd* 1968 JJ 911, Bois, Deputy Bailiff, stated, at 919,

"But we cannot leave this matter without referring to another maxim. It is the oft quoted maxim '*la convention fait la loi des parties*'. Like all maxims, it is subject to exceptions, but what it amounts to is that courts of justice must have high regard to the sanctity of contracts and must enforce them unless there is a good reason in law, which includes the grounds of public policy, for them to be set aside."

In *Donnelly v Randalls Vautier* 1991 JLR 49, Tomes, Deputy Bailiff stated at 57—

"The solution to the instant case is surely to be found in the ancient maxim of Jersey customary law, *la convention fait la loi des parties*. The maxim undoubtedly enunciates an important principle of Jersey law (*Macready v Amy* 1959 JJ 11 [per CT Le Quesne QC, Lieutenant Bailiff])."

¹⁶ 2012 (2) JLR 297, at para 18.

¹⁷ *Traité du Droit Coutumier de L'Ile de Jersey* (1943) at 350.

¹⁸ 2010 JLR 287 at 294.

“21. . . . [I]t is noteworthy that these requirements for the creation of a valid contract go some way to explaining the ancient maxim: *la convention fait la loi des parties*, which reflects art. 1134 of the French *Code Civil*, which is in these terms ‘*Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*’. [Agreements which have been lawfully formed bind those who have entered into them].

22. At the heart of this provision in the French *Code Civil* and behind the maxim to which we are so accustomed in Jersey is the concept that the basis of the law of contract is that each of the contracting parties has a *volonté*, or will, which binds them together and requires that the mutual obligations which they have agreed be given effect by the courts. The notion of *volonté* as the foundation of the contract is sometimes thought to result from the political liberalism of the age of reason and of the economic liberalism of the 19th century, where obligations imposed from outside should be as few as possible. A man is bound only by his will, and because he is the best judge of his own interests the best rules are those freely agreed by free men. However, it is to be noted that rather earlier the same rationale appears in the commentaries of Berault, Godefroy & d’Aviron on *La Coutume Reformée de Normandie*, vol 1 at 74, this edition being published in 1684, where the authors say this: ‘*Car la volonté est le principal fondement de tous contrats, laquelle doit avoir deux conditions, la puissance & la liberté . . .*’ before going on to consider the restrictions which the law imposes on the making of contracts which are contrary to good morals or otherwise unlawful, notwithstanding the *volonté* which existed in the contracting parties.”

9 It is true that the underlying substance of the theory of the autonomy of the will, although expressed in language which is unfamiliar to an English lawyer, is not far removed from the classical English theory of contract. Professor Nicholas expresses it in this way—

“It is clear therefore that the analysis of contract in terms of a free agreement of wills (or, in English terms, a meeting of minds) is common to both the French and the English classical theories of contract and remains part of the currency of both systems.

Where the two systems differ, as we shall see, is partly in the intellectual rigour with which the analysis is carried through to detailed consequences, and partly in the way that agreement is understood: as a subjective meeting of two minds or as the objective appearance of agreement. English law usually favours the latter approach, as being the more practical and the more conducive to the certainty which commercial convenience

demands, whereas French law inclines to the former, though sometimes with a corrective which yields much the same practical result as the objective approach.”¹⁹

10 The difficulty with the suggestion that an objective approach to the question of consent might be the law of Jersey lies not only in its dissonance with centuries of legal assertions that Pothier and other civilian authorities are the source of contract law. To adopt the English objective approach to consent would open the door to wholesale confusion in terms of other aspects of the law of contract. When Jersey lawyers use the expression *cause* rather than “consideration”, do they really mean it? Is it open to counsel to cite authorities on the meaning of “consideration” in English law when construing *cause* in the circumstances of the case? How would this be reconciled with the fact that Jersey law does not recognize an instrument of deed which can be used in England to circumvent the exigencies of the doctrine of consideration? What about *erreur*? Can counsel legitimately turn to *Chitty on Contracts* and the discussion of “mistake” for elucidation? Professor Nicholas opines that there are fundamental difference between *erreur* and “mistake”. He states—

“The courts have given to [*erreur*] a very wide and flexible interpretation which contrasts markedly with the restrictive attitude of English law to mistake. Mistake is in consequence a much more common ground of relief than it is in English law. We shall consider the implications of this when we have examined all the *vices du consentement*.²⁰

Furthermore, if one aspect of the law of *erreur* (that is, whether or not the parties had a misunderstanding as to what was agreed between them) were to be governed by English law, how would that affect the rest of the law of *erreur*? Could one aspect be governed by English law and another (e.g. whether there was *erreur sur la substance*) be governed by Jersey/French law? That would be an impossibly confusing state of affairs.

11 The issue of what “consent” means arose recently in *Flynn v Reid*²¹ where the Royal Court had to consider whether the written arrangements made by an unmarried couple for the purchase of a property constituted a contract. They had bought the property in the name of one of them because the other did not have housing

¹⁹ Nicholas, *Introduction to the Law of Contract*, 2nd ed (Clarendon Press Oxford, 1992) at 35.

²⁰ *Op cit* at 83–84.

²¹ 2012 (1) JLR 370.

qualifications and the statute did not permit joint purchase in such circumstances. The relationship broke down. The Court found that the agreement was—

“a wholly artificial arrangement reflecting an intention that the plaintiff would share in the equity of the property but, as a contract setting out their mutual obligations, it was meaningless in the sense that the parties paid no attention to it from the very beginning.”

The Court referred to the four requirements for a valid contract set out in *Selby v Romeril*²² and continued—

“We do not in any way dissent from that summary of essential requirements, but we add that, in relation to the requirement for consent of the parties undertaking the obligations, there must be shown a true consent, a true desire, or, adopting the French word ‘volonté’ that the arrangements become legally binding between them. We do not doubt that both the plaintiff and the defendant agreed with what was in the agreement as broadly setting out the position at that time. It reflected the fact that they were indeed a couple and were embarking on a family home together. If, however, the parties had intended its terms to operate in their day-to-day dealings, they would have set up their arrangements quite differently. Advocate Hall described this as a domestic contract rather than a commercial contract and she relied on a case of *Wade v Grimwood*²³ for the submission that, in such contracts, the formal requirements of a commercial contract between strangers can be disapplied. We are not sure what the results of any such distinction might be. Does it mean then in a domestic contract any of the rules on novation, *lésion*, *dol* or *erreur* should be disapplied? If the court followed this approach, how does anyone then know which legal rules apply and which do not?”

It is submitted that precisely the same point could be made in relation to the undermining of a fundamental principle concerning the formation of a contract.

12 Professor Nicholas suggests that in many instances the practical application of the subjective/objective approach leads to the same result. Not always. *La Motte Garages Ltd v Morgan*²⁴ repays closer analysis. This was a case where the defendant saw a car on the garage

²² 1996 JLR 10.

²³ [2004] EWCA Civ 999.

²⁴ 1989 JLR 312.

forecourt for sale at £4995 and agreed to buy it. In part-exchange for her current car she was offered £2000. The salesman told her that the garage would pay off the existing hire purchase debt of £2270. A sales invoice was drawn up, £2000 was deducted from the sales price, and she was asked to pay the garage £2995, which she did. Shortly after, it was discovered that the salesman had omitted to include on the invoice the hire purchase debt of £2770. He called at the defendant's place of work and explained the situation to her. It took 10 minutes for her to understand the explanation. She decided to take legal advice because she felt that she could not afford the extra money. She was advised that she need not pay the hire purchase debt and could keep the car. The garage sued.

13 Hamon, Commr stated (correctly) that "Mistake has long been accepted as negativing agreement" and referred to an extract from *Pothier* while regretting that the parties "did not mine the rich lodes of our ancient French law" but chose instead to rely upon English law. He applied an objective test to the question whether, when the salesman said that he would settle the hire-purchase debt, a reasonable man would have understood that Miss Morgan would be required to repay him. The garage accordingly succeeded in its action, and the defendant was ordered to pay £2770. The net result was the defendant had to pay £5265 (rather than £4995) for her new car,²⁵ which she had felt she could not afford. It could be argued that this was a very unjust conclusion. If a subjective test had been applied to the question whether there was a "meeting of minds", or consent, the court would have concluded that there was not, and the *status quo ante* would have been restored. Miss Morgan would not have been held to an agreement which she did not make. A subjective test makes for more individualised justice.

²⁵ In addition of course to legal costs.

Reason three

14 It is respectfully submitted that the judiciary should not usurp the functions of the legislature. If it is desired to introduce an objective test into the question whether there has been a meeting of minds between the parties (consent), that is a matter for legislation. The legislature could then consider in the round all the conflicting political, moral and practical considerations before deciding whether it is appropriate or not. The courts may legitimately innovate in order to fill gaps in the law—to legislate interstitially, as it is sometimes put. They may develop the law in the way that they apply ancient principles which have otherwise outlived their usefulness so as to adapt them to a changed social order. But that is hardly relevant to the question whether the consent of the parties should be ascertained by applying an objective or subjective approach. The subjective approach has indeed been rooted in Jersey's customary law for centuries.²⁶ But it is also the basis of contemporary French law and many other civilian systems too. To change judicially a fundamental aspect of the law of contract by undermining the traditional notion of consent embodied in the maxim "*La convention fait la loi des parties*" would be, it is submitted, a usurpation of legislative power.

15 The notion that judges of the Court of Appeal trained in England might consider that English law produces a more satisfactory solution to the question of consent in the formation of a contract is of course understandable. Lord Steyn expressed it well in an article in the *Law Quarterly Review* in the following terms—

“It is a defensible position for a legal system to give predominance to the subjective intentions of the parties. Such a policy can claim to be committed to the ideal of perfect individualised justice. But that is not the English way. Our law is generally based on an objective theory of contract. This involves adopting an external standard given life by using the concept of the reasonable man. The commercial advantage of the English approach is that it promotes certainty and predictability in the resolution of contractual disputes. And, as a matter of principle, it is not unfair to impute to contracting parties the intention that in the event of a dispute a neutral judge should decide the case applying an objective standard of reasonableness.”²⁷

²⁶ See Pothier, *Treatise on the Law of Obligations or Contracts* (1806 translated Evans) para 4 at 4; para 91 at 53; para 98 at 59; and Appendix V at 35.

²⁷ Steyn, “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” (1997) 113 LQR 433.

16 That may be the English approach, but it is not the Jersey approach. Litigants in Jersey are entitled to expect that their judges will apply Jersey law to the resolution of their disputes. That is a constitutional privilege that goes back many centuries. The 1562 Charter of Queen Elizabeth may be called in aid. At para 5 it provides

“[O]f our further grace by these presents we ratify approve establish and confirm all and singular the laws and customs duly and lawfully used in the Island . . . granting to our aforesaid Bailiff and Jurats . . . full complete and absolute authority power and faculty to have the cognisance jurisdiction and judgment concerning and touching all and all sorts of pleas processes lawsuits actions disputes and causes of any kind whatsoever arising in the Island and . . . to . . . decide and put their sentences in execution *according to the laws and customs of the Island . . .*”
[Emphasis added.]²⁸

The Royal Charter was given before the creation of the Court of Appeal in 1961. Nonetheless, it is clear that the duty to give judgments in accordance with the laws and customs of the Island applies to ordinary judges of the Court of Appeal as it does to judges of the Royal Court.²⁹

Conclusion

17 The Jersey law of contract has been criticized on many occasions for inconsistency in relation to the different sources upon which the courts have relied, and the consequential impact upon legal certainty. The Jersey Law Commission identified many of these inconsistencies in its consultation paper on the law of contract in 2002.³⁰ On the question whether consent is determined objectively or subjectively, there are, on the one hand, a number of judgments which have adopted, usually without reasoned analysis or even proper consideration of the arguments, an objective approach. Several of these judgments are mentioned in the text above. A more recent example is *Daisy Hill Real Estates Ltd v Rent Control Tribunal*³¹ where Hamon, Deputy Bailiff, stated that “It seems to us that it matters

²⁸ See “The Royal Charter of Elizabeth I of 27 June 1562” (2016) 20 *Jersey and Guernsey Law Review* 78 at 85 *et seq.*

²⁹ The oath of ordinary judges requires them to uphold and defend the “*usages et anciennes coutumes dudit Bailliage, vous opposant à quiconque les voudrait enfreindre*”. See Court of Appeal (Jersey) Law 1961, Schedule I.

³⁰ <https://jerseylawcommission.files.wordpress.com/2015/06/2002-jersey-law-of-contract.pdf>

³¹ 1995 JLR 176.

not what the parties had in their minds, but what inference reasonable people would draw from their words or conduct".³² But it is clear from the context of this statement that the judge had not been directed to the relevant authorities, probably because they were not regarded as relevant to the real procedural issue that the Court had to determine. On the other hand, there is the considerable weight of authority from Berault, Godefroy & d'Aviron, and other commentators, and from Domat, and from Pothier on the meaning of "*convention*", and the mass of judgments testifying to the importance of the maxim "*La convention fait la loi des parties*" in Jersey law. In *Marett* the Court of Appeal settled the question, as practitioners thought, by stating unequivocally "The Jersey law of contract determines consent by use of the subjective theory of contract".³³ One element of inconsistency had been eradicated. It is surprising, therefore, that a differently constituted Court of Appeal has cast doubt upon the clarity of that statement and sown the seeds of more uncertainty, particularly as the principles set out in *Marett* have been applied by the Royal Court in several subsequent cases.³⁴

18 It is surprising, and unnecessary. The difference between the English objective and the French subjective approaches is not a finely tuned and rigorously precise distinction. As Professor Fairgrieve observes in the Institute of Law's study guide for the law of contract³⁵—

"The English law attachment to objectiveness is however tempered, in certain circumstances, by subjective elements. An example of this is the exchange of an offer and acceptance. In this respect, Cartwright^[36] notes that: 'the courts adopt an objective test which asks how a reasonable person, placed in the position of the parties themselves, would have interpreted their communications; but that the subjective understandings of the parties are not wholly excluded.'"³⁷

³² *Ibid* at 179.

³³ 2008 JLR 384, 407 at para 57.

³⁴ *E.g. Sutton v Insurance Corp of the Channel Islands Ltd* 2011 JLR 80, *Flynn v Reid* 2012 (1) JLR 370, and *Fogarty v St Martin's Cottage Ltd* [2016] JRC 073.

³⁵ Jersey Law Course 2015–2016.

³⁶ J Cartwright, *Contract Law: An Introduction to English Law for the Civil Lawyer* (Hart Publishing, 2007).

³⁷ *Ibid* at 89.

19 Conversely, French law occasionally adopts a mixture of objective and subjective approaches. The standard approach is consistent with the Court of Appeal's *dictum* in *Marett*. Larroumet states that—

“On considère traditionnellement que le Code Civil français, issu de conceptions individualistes, aurait opté pour la volonté interne, et, par conséquent, dans l'interprétation d'un contrat, le juge devrait toujours rechercher la volonté réelle des parties.”³⁸

But in practice the desire for legal certainty has on occasion caused the subjective approach to be modified. Professor Terré, Simler and Lequette state—

“En pratique, aucune de ces conceptions n'est en droit français appliquée dans toute sa rigueur. La volonté déclarée l'emportera sur la volonté réelle si l'on ne peut parvenir à prouver leur discordance. La sécurité juridique est à ce prix. Mais lorsque la volonté réelle est établie, celle-ci prime . . .”³⁹

20 It would be open to the Jersey courts to adopt a more flexible approach, if they wished, without undermining one of the fundamental principles of the Jersey law of contract.

Sir Philip Bailhache was Bailiff of Jersey and President of the Jersey Court of Appeal between 1995 and 2009.

³⁸ Larroumet (Ch.) *Les obligations, Le contrat, Tome III, 1^{ère} partie, Conditions de formation* (6th ed, Economica, coll. Droit civil, 2007, no. 151, at 132).

³⁹ *Op cit* nos 207 and 208, at 220–221.