

apparent in the criticisms which they receive from the commentators on the French code (1). Almost all of those specified are shewn to be inaccurate, and they are declared by Toullier to be of little practical utility. As reasons then for their rejection, it may be stated, 1st., that they are not and cannot easily be made exact, and may therefore occasion doubts and difficulties; 2nd., they are not complete, as they do not include mixed contracts, contracts principal and accessory, contracts subject by law to certain forms and those not so, and other distinctions equally well founded; 3rd. they are of no practical utility even if rendered exact and complete. Moreover, they belong to a class of subjects which, by a sound philosophical adjustment, ought rather to be committed to the learning of the courts, than confined within the inflexible terms of positive legislation. The only definitions which should be adopted, are those which are imperative and sacramental, and those which involve some rule of law, or are so inseparable from a particular rule, that by their omission it would become ineffectual or obscure.

(1) ff. *Lib.* 50, tit. 17, L. 202, *Omnis definitio in jure civili periculosa est. Parum est enim ut non subverti possit.*
6 Toullier, No. 2, pp. 17 to 21.
3 Zachariæ, §§. 610, 611, and notes.
6 Duranton, No. 30.
4 Marcadé, No. 383 & seq. to 392.
4 Boileux, p. 341 & seq. to 345.

Chap. 1, sec. 1. Of the requisites to the validity of contracts, Arts. 7 to 10. Printed Copy 3 to 6, 1108, 1133-4-5 C. N.

The articles numbered from 3 (*) to 6 (10), require little special remark. On comparing them with the corresponding articles of the French code, it will be found that they differ from the latter in the form of expression; and in No. 5 (9), certain classes of persons incapable of contracting are designated, who are not included in the article of that code. The rule with respect to married women is also differently stated in conformity with our law; but it may be observed that the special rules as to the incapacity of married women, are reserved for the title of marital authority.

§ 2. Of consent, and Sec. II. Of causes of nullity. Arts. (11) to (33.) P. C. Arts. 7 and 10 to 31. C. N. 1108 to 1133 and 1305 to 1314.

Among the articles treating of the requisites to the validity of contracts and causes of nullity in them, there are several upon which some explanatory observations may be useful. But before referring to any article in particular, it is well to state, that in dealing with the subject of those articles which relate to consent and the vices of contracts, the Commissioners have avoided, as subtle and useless, the questions so much discussed by civilians, whether a consent which is surprised or constrained be a consent at all, and whether error, fraud and violence vitiate contracts directly, because they destroy the consent, or indirectly because it would be immoral to sustain contracts made under their influence. These questions and the cognate one, whether the effect of these vices be that they prevent the formation of the contract, or merely that they render the contract bad, are absolutely without practical consequence. The result is always the same in giving to the parties interested and to no other, a right of action to avoid liability under the contract. The duty of the Commissioners is to prepare a series of articles, expressing the practical rules by which civil rights are regulated and determined, and not to theorize upon nice and unprofitable distinctions, however logical they may seem to be.

It will be perceived by a comparison of the articles relating to consent and the vices of contracts, with the art. 1109 and following articles, on corresponding subjects in the French code, that an effort has been made to give a greater clearness and completeness to the treatment of the subject, by a careful wording and an extension of the rules, with a view to meet all cases. This has been done, particularly in the articles relating to violence. No modification of the old rules has been introduced, but a clearer expression has been given to them than is found in the French code. The addition of the word *fear* to violence, as a cause of avoidance of contracts, restores in expression the rule of the Roman law, which has always really been, and still is, that of the law of France.

C. N. 1109, 1111, 1112, 1113, 1114, 1115.

* The first number is that of the printed copies now submitted, the other within brackets refers to the draft.