

1 General introduction

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What is at issue in the law of mistake, fraud and duties to inform?

Why did we choose to look at mistake, fraud and duties to inform? At first sight, the choice appears straightforward: in order to examine the world of European contract law it is quite logical to start at the beginning with contract formation. The general theory of defects of consent provides a safe starting place.¹ The title indicates perhaps that civil law² inspires this enquiry. These three initial assumptions will be examined shortly. Before turning to the heart of this study however, a preliminary terminological explanation is required. Mistake has been adopted for the sake of consistency throughout even though it is the term for an English legal concept; ‘mistake’ thus covers the Scots law of *error*, as well as *erreur* (French and Belgian law), *errore* (Italian law), *erro* (Portuguese law), *Irrtum* (Austrian and German law), *dwaling* (Dutch law) and *plani* (Greek law). It was generally agreed that the use of an English legal term was innocuous in this instance. Likewise, fraud has been used to refer to *dol* (French and Belgian law), *dolo* (Italian law), *dolo* (Portuguese law), *arglistige Täuschung* (Austrian and German law), *bedrog* (Dutch law) and *apatí* (Greek law). In contrast, the term ‘duty to inform’ has been chosen so as to avoid using specifically English legal concepts (misrepresentation and duties of disclosure) to denominate concepts existing in other legal systems where such a transposition would be both erroneous and misleading. Thus the term ‘duties (or duty) to inform’ has

¹ However, no attempt to be exhaustive has been made since this study only examines some defects of consent.

² See H. P. Glenn, *Legal Traditions of the World* (Oxford, 2000), ch. 5 on the civil law tradition (reference is also made to the civilian tradition). On the meaning given to ‘civil law’ see also fn. 65 below.

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been coined. Of course, a choice of terms is never innocent: there is an obvious semantic difference between ‘disclosing’ and ‘informing’, perhaps connoting a tacit conceptual choice made by the various national laws.³

First then is it accurate to assume that a study of mistake, fraud and duties to inform is confined to contract formation? Far from being limited to remedies for contract formation, as opposed to contractual non-performance or breach of contract, we will see that mistake, fraud and duties to inform cross this conceptual bridge (which is, in any event, more accentuated in certain, notably civil law, systems, than in others), in a very significant way. Indeed, this overlap – between remedies under the heads of defective consent and breach of contract – is common to all national systems examined and brings to the forefront a commonality of approach, at least in this particular respect. The historical foundations of mistake will explain, to some extent, this apparent incoherence.⁴

Secondly, can we likewise assume that mistake, fraud and duties to inform fit into a general theory of defects of consent? Four criticisms can be levelled at this assumption. In the first place is it actually true that a general theory of defects of consent exists in all of the legal systems examined? Two exceptions of a different nature exist: Scandinavian⁵ contract laws contain general invalidity regulations⁶ that are not based on defects of consent. The emphasis on invalidity is not linked to a vitiated will.⁷ More specifically, the invalidity rules of Scandinavian contract law have primarily been developed with the intention of remedying the abuse to which contractual freedom might lead.⁸ This has

³ If a person is under a duty to disclose, the assumption is he has something to hide, the law thus obliges him to reveal something he may not have chosen to reveal himself; if a person is under a duty to inform, he is under a positive duty to help or behave transparently towards the other contracting party. The emphasis is slight perhaps, but nevertheless important.

⁴ Cf. Martin Josef Schermaier, in ‘Mistake, Misrepresentation and Precontractual Duties to Inform: the Civil Law Tradition’, pp. 39–64.

⁵ Scandinavia is used here to refer to Danish, Norwegian and Swedish law. There are many similarities in the law of obligations and property and it should be recalled that the Contract Act and the Sale of Goods Act have been constructed on a cooperative basis by Denmark, Norway and Sweden.

⁶ See for example §§ 33 and 36 of the Norwegian Contract Act.

⁷ Reference is made to an ‘invalid declaration of will’ (*ugyldige viljeserklæringer*) or an ‘invalid juridical act’, cf. PECL, ch. 4, notes to art. 4: 101.

⁸ A Norwegian jurist, Stang (1867–1941) developed a specific theory about invalidity rules, called *densynbare viljesmangel* (obvious lack of consent), see in particular the

partly been accomplished by establishing rules concerning bad faith and dishonesty on the part of the promisee,⁹ and partly by rules concerning unreasonable contracts. These rules are not based on ‘a general theory of defect of consent’. However, concepts expressing this kind of thinking do exist, for instance in the rules relating to ‘fraud’ and ‘lack of capacity’.¹⁰ England, Ireland and Scotland provide another exception. These legal systems do have a theory of defects of consent – it might be more controversial to assert, however, that there is such a thing as a general theory. Controversy about the existence of a general theory in the common law can take two forms: either it can be submitted that there is no general ‘theory’ since the common law does not work in this way, according to general (deductive) principles,¹¹ or that there is no underlying trend constituting a ‘theory’ as such.¹²

In the second place, in the legal systems which do admittedly contain a general theory of defects of consent, namely France, Belgium, Germany, Greece, Italy, Spain, Portugal and the Netherlands, further preliminary questions arise: what is the content of such a general theory and even more simply, what is its function? In other words, why does the law need a general theory of defects of consent?¹³ It is precisely this question which enables us to focus on the choice made in this enquiry. Contract formation (at least apparently) and defects of consent have been chosen to test the truthfulness of the various assumptions outlined above. Moreover, we will attempt to demonstrate that even if the enquiry is inspired by civil law preoccupations, it is certainly not limited to them, to the exclusion of other national legal systems. In the third place, a theory of defects of consent is old-fashioned, because it is based on the assumption

condition that ‘the other party knew of or should have known of the error’.

A development of this theory is that it is (probably) not required that the person concerned possesses knowledge of the condition. It is sufficient that he ought to have possessed such knowledge. The rule, in other words, has been made normative.

However, the doctrine was never awarded much general support.

⁹ There is also in Scandinavian law a non-statutory doctrine of failed contractual assumptions. For a further explanation of the doctrine of failed contractual assumptions, see the Norwegian report in Case 1.

¹⁰ In order to indicate in which way § 36 of the Contract Law (the ‘General Clause’) differs from § 33, the latter is sometimes referred to as ‘the little General Clause’. I am grateful to Lasse Simonsen for making this clear.

¹¹ G. Samuel, *The Foundations of Legal Reasoning* (Antwerp, 1994).

¹² *Contra*, J. Cartwright, *Unequal Bargaining* (Oxford, 1991).

¹³ By analogy, see the enquiry made by E. Savaux as to the truthfulness of the existence of general theory of contract in French law, in *La théorie générale du contrat: mythe ou réalité?* (Paris, 1997). According to this author, such a general theory is nothing other than a doctrinal construction.

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that the binding force of contracts is based on will, intention¹⁴ and autonomy and thus represents a nineteenth-century conception of contract law. In the fourth place, some may submit that the theory of defects of consent is *politically* wrong because it is based on the assumption that the binding force of contract is based on party autonomy (free consent), whereas the binding force of contract is (also) based on solidarity.¹⁵

Thirdly, what is the source of inspiration of our enquiry? We will take as our starting point a pattern which has emerged in say French law with regard to the development of the duty to inform (*l'obligation d'information*), which will help to explain the seeds of our enquiry. French case law has increasingly recognised the duty to inform since 1958.¹⁶ A twofold development can now be identified in case law: the existence of the duty was first brought to light by penalising active fraudulent behaviour in failing to disclose information which would have had a material effect on inducing a party to contract. Then, passive fraudulent behaviour, that is silence, became reprehensible in certain contexts, thus giving rise to the idea that a positive duty to inform pre-existed, since otherwise the silence would not be subject to challenge. An extension of this fraudulent concealment (*réticence dolosive*) has enabled the law to identify the circumstances in which a duty to inform exists, absent all allegations of fraud.¹⁷ As a starting point this phenomenon raises a number of comparative challenges and a central theme of our enquiry is to examine whether or not this development is a common occurrence in Europe, and if so, to what extent.

¹⁴ See K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (translated by T. Weir, Oxford, 1998), p. 423, who suggest that 'the doctrine of intention, traces of which still lurk in Continental rules relating to mistake, is socially inappropriate'.

¹⁵ I am indebted to Martijn Hesselink for objections three and four. For a discussion of the theory that the binding force of contracts is also based on solidarity, cf. T. Wilhelmsson, *Social Contract Law and European Integration* (Aldershot, 1995); B. Lurger, *Vertragliche Solidarität, Entwicklungschancen für das allgemeine Vertragsrecht in Österreich und in der Europäischen Union* (Baden-Baden, 1998); J. B. M. Vranken, 'Over partijautonomie, contractsvrijheid en de grondslag van gebondenheid in het verbintenissenrecht' in J. M. Barendrecht, M. A. B. Chao-Duivis and H. A. W. Vermeulen (eds.), *Beginnelsen van contractenrecht: Opstellen aangeboden aan B. W. M. Nieskens-Isphording* (Deventer, 2000); C. Jamin, 'Plaidoyer pour le solidarisme contractuel', in G. Goubeaux et al. (ed.), *Études offertes à Jacques Ghestin; Le contrat au début du XXIe siècle* (Paris, 2001); M. W. Hesselink, 'The Principles Of European Contract Law: Some Choices Made by the Lando Commission' in M. W. Hesselink, G. de Vries, *Principles of European Contract Law* (Deventer, 2001), pp. 5–95.

¹⁶ Cass civ, 19 May 1958, Bull civ I, p. 198; cf. for a detailed explanation, J. Ghestin (ed.), *Traité de droit civil, La formation du contrat* (3rd edn, Paris, 1993), no. 566, pp. 535 ff.

¹⁷ See the synthesis in Ghestin, *La Formation du contrat*, no. 626, p. 610.

Legal theories about mistake: protection versus legal certainty

Mistake has common origins deriving from Roman law and the Aristotelian scholastic tradition. Nonetheless, even though it may be contended that mistake has developed uniformly, in comparison with say the duty to inform,¹⁸ a closer look at mistake shows that this contention must be qualified. It is of course true that mistake has developed along with theories about contractual validity and in this sense, mistake is a good pointer for theories about contract law in general. However, it will be seen that from these common roots a diversity of legal theories about mistake, and consequently contract law theory, has evolved. In this respect, it will be seen that even though civilian legal systems share a common origin, the evolution of the concept of mistake in the French and German legal traditions has been very different. As far as the English concept of mistake is concerned, even if it has been suggested that English law ‘borrowed’ from Pothier and the natural lawyers in the nineteenth century to give a theoretical foundation to mistake based on the autonomy of the will,¹⁹ so that it could be argued that English law shares common Roman law origins with civilian legal systems, the comparison stops short. The English concept of mistake is in fact very different from its civilian counterparts²⁰ and recent developments show that this continues to be the case.²¹ In other words, the European legal systems considered do not share the same conception of mistake today despite its common origins. In order to get a flavour of these differences, two historical enquiries have been included.²² This eclectic choice fails to be representative of all the legal systems considered but concentrates on contextualising and explaining the historical background of certain themes essential to our study.

It is somewhat trite to assert that mistake is inextricably linked to the question of consent and the validity of contract. The first obvious issue that mistake raises is the following; if it can be inferred from a mistake

¹⁸ Cf. Schermaier in ‘Mistake, Misrepresentation and Precontractual Duties to Inform: the Civil Law Tradition’, pp. 39–44.

¹⁹ A. W. B. Simpson, ‘Innovation in Nineteenth Century Contract Law’ (1975) 91 LQR 265–9; J. Gordley, *The Philosophical Origins of Modern Contract* (Oxford, 1991), pp. 142 ff.

²⁰ See John Cartwright, ‘The Rise and Fall of Mistake in the English Law of Contract’, see below pp. 65–86.

²¹ See, for example, *Great Peace Shipping v. Tsavliris Salvage (International) Ltd* (2002) 4 All ER 689.

²² See Schermaier in ‘Mistake, Misrepresentation and Precontractual Duties to Inform: the Civil Law Tradition’ (see pp. 39–64) and Cartwright, ‘The Rise and Fall of Mistake in the English Law of Contract’ (see pp. 65–86).

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that the parties have not consented, then there is no contract. In the simplest sense, this is a question of fact: have the parties agreed and on what? If not, there is no agreement. The mistake is one of essence,²³ it touches on the heart of the matter: it is said that mistake destroys the parties' consent.²⁴ This theoretical explanation of mistake can be traced back to Roman law but also to Aristotelian and Thomistic analyses that the essence or end-purpose of the contract (what kind of contract, what is the object of the contract?) does not exist if a mistake has been made.²⁵ This is expressed in the idea that there is no *consensus ad idem*. French law, for example, has identified this sort of situation by the doctrine of *erreur-obstacle*.²⁶ To simplify, we could say that this type of mistake affects the existence of the contract. An interrelated question that mistake raises is that of the will and intention of the parties: in the event of a material mistake or misapprehension, the voluntariness of the act of one or both contracting parties is at stake. Medieval jurists thus added on the question of autonomous intention and will to the Roman law conception of mistake. Ibbetson suggests that Pothier confounded these two logically distinct situations in order to arrive at 'an apparently unified theory'.²⁷ This type of mistake does not destroy consent: it merely negatives consent, or to simplify again, the mistake concerns the validity of the contract. The second issue is clearly highly problematic for the will theory of contract that became increasingly important for legal theory in the nineteenth century.²⁸

The advent of the will theory marks a more clear-cut divergence of mistake theories in European legal systems. If the 'real task of contract law (is) to enforce the will of the parties', then mistake as a legal doctrine confronts this issue head-on since it addresses the question of the parties' consent.²⁹ In France, for example, contractual validity and consent were amalgamated into an enquiry as to the subjective intention of the parties. French nineteenth-century jurists pursued, *inter alia*, a distinction

²³ In the Aristotelian sense of the word, *ousia*.

²⁴ Gordley, *The Philosophical Origins of Modern Contract*, p. 187; D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), pp. 225 ff. G. H. Treitel, *The Law of Contract* (11th edn, London, 2003), uses the expression that the mistake nullifies consent, pp. 286–98.

²⁵ Gordley, *The Philosophical Origins of Modern Contract*, pp. 85 ff.; pp. 187 ff.

²⁶ P. Gaudefroy, *L'erreur-obstacle*, PhD thesis (Paris, 1924); Ghestin, *La formation du contrat*, no. 495, p. 459.

²⁷ Ibbetson, *A Historical Introduction to the Law of Obligations*, p. 226.

²⁸ P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979).

²⁹ Gordley, *The Philosophical Origins of Modern Contract*, pp. 186–7.

between mistakes as to substance and as to *qualities substantielles*³⁰ but more crucial is the fact that mistake became embedded in the will theory in which overriding value is given to the protection of consent and the subjective intention of the parties. By the same token, it is suggested that the law focuses on the parties' subjective intention when it enquires whether the subject matter of the mistake was important for the mistaken party.³¹ In England, the situation became increasingly complex where, apart from being influenced by a French version of mistake,³² certain writers on contract, Chitty for example, adopted an objective interpretation of the contract, in accordance with Paley's theories.³³ It is hard to fit the two theoretical bases into one coherent theory.³⁴ The line of development traceable in French law contrasts nicely with the evolution of the concept of mistake in German law. This latter development represents a real divergence in theory and outlook. Following Savigny's theory, a mistake did not affect consent in that a party had actually consented to the contract but an analysis had to be made at a prior stage in the proceedings: what counted for Savigny was the distinction between the will and what preceded the outward declaration of the will. In his view, in the event that the internal will of the party does not correspond with the outward declaration of his will, giving relief for the subsequent mistake will be justified.³⁵ This analysis is linked to the declaration of will being considered as the legal foundation for contracts as juristic acts (*Rechtsgeschäft*). The emphasis is put on the communication of intent (a shift from the intent *per se*) and, more importantly, on the subsequent and objective reliance on that declaration by the other party.³⁶

³⁰ Gordley suggests, *ibid.* at p. 193, that this sort of reflection led to a 'mystical' analysis about the characteristics that determine the species of an object.

³¹ See below on unilateral, mutual and shared mistakes, p. 18.

³² See A. W. B. Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 LQR 247 at pp. 265 ff.

³³ Ibbetson, *A Historical Introduction to the Law of Obligations*, p. 221.

³⁴ Indeed criticism of the incoherence of the rules of mistake in English law has attributed the cause to the evils of legal transplants: see Simpson, 'Innovation in Nineteenth Century Contract Law', p. 268 who refers to 'an unhappy piece of innovations' and the more vigorous criticism of H. Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11 OJLS 396, at p. 398 who comments '... hopelessly confused – a confusion which could have been avoided if English law had resisted the meddling transplants of Victorian contract lawyers'.

³⁵ Gordley, *The Philosophical Origins of Modern Contract*, pp. 190–7 at pp. 190–1.

³⁶ See Schermaier, 'Mistake, Misrepresentation and Precontractual Duties to Inform: the Civil Law Tradition', see below pp. 39–64, who suggests that this is a result of theories of language developed by Hobbes and Puffendorf.

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To summarise, two distinct strands can be identified: the first relates to a conception of the will theory and the subjective intention of the parties as opposed to the second that emphasises the declaration of the will of the parties and analyses their intention objectively. A tension exists between these two distinct sets of values, as the will theory (*Willenstheorie*) of subjective intention versus the theory of declaration (*Erklärungstheorie*) of objective reliance. It is contended that the English view of mistake does not fit either of these theories perhaps because mistake in England has developed in isolation and in somewhat different contexts.³⁷ The fact that a large majority of English (common law) cases on mistake concern commercial contracts no doubt explains these differences since the judges' immediate concerns about mistake arose in fact-specific situations giving rise to a need for adjudication, where priority had to be given to finding a balance between giving relief and protecting commercial interests.³⁸ In other words, the little theorising about mistake that was done happened during or as a consequence of litigation.

An aim of this enquiry is therefore to examine to what uses mistake, fraud and duties to inform are put today in European contract law and what light this sheds on contemporary theories of contract law.

The meaning and scope of protection

What is the purpose of a theory of defects of consent? A simple answer may be that its aim is to protect a party's consent to the contract. One of our aims is to consider empirically and critically whether the protection offered by mistake and fraud suffice in European contract law today. In this respect, it is therefore also necessary to examine the significance of the emergence of duties to inform and its relationship with mistake and fraud. We will need to enquire as to the purposes of duties to inform: are they protective, efficient and useful? It has been submitted that three distinct categories of defects of consent can be identified,³⁹

³⁷ See Gordley, *The Philosophical Origins of Modern Contract*, pp. 142 ff. who points out that English judges were preoccupied by a variety of practical concerns such as the innocent reliance of the mistaken party or the healing power of Equity etc.

³⁸ See also H. Beale, 'The "Europeanisation" of Contract Law' in R. Halson (ed.), *Exploring the Boundaries of Contract* (Aldershot, 1996), pp. 23 ff. at p. 40, who suggests that common lawyers' conception of mistake is closely linked to the sort of commercial cases they are used to see being brought before the courts.

³⁹ M. Fabre-Magnan, 'Defects of Consent in Contract Law' in A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra and E. du Perron (eds.), *Towards a European Civil Code* (2nd edn., Nijmegen, 1998), p. 219.

two of which are of interest to us.⁴⁰ The first, mistake, is to protect a mistaken party to a contract. The second, fraud, is to punish the behaviour of a party who has fraudulently induced the other party to contract. The term ‘punish’ requires a parenthesis. Its connotations, e.g. of punitive damages, which may come to the mind of lawyers whose jurisdictions recognise such a concept, must be discarded. It is submitted that in some legal systems legal rules clearly have moralistic⁴¹ overtones, so that it may not appear surprising to talk of ‘punishing’⁴² a person’s fraudulent behaviour. Admittedly, this idea does not transpose very well into English legal terminology and may lead to misleading and unfortunate associations.⁴³ It is not just the signifier that is at issue; it is the signified. It may therefore be less controversial to say that the law treats fraudulent behaviour with greater severity, because of the fraud.⁴⁴ This detail reveals a difference in legal mentality since it can be inferred from the law’s severe treatment of fraudulent behaviour that fraud should be discouraged, not punished. The end-purpose is somewhat different.⁴⁵ From the aggrieved party’s point of view it may be more helpful to see the remedies given for defects of consent as a form of protection. Annulment is deemed to be a protective measure although of course the efficacy of such *post hoc facto* protection is subject to doubt. In the event that fraud has operated, a reinforced protection for the aggrieved party will be given in the form of compensatory damages. This protective approach, admitting of degrees, may be used as a starting point. In order to examine the meaning of protection it must be considered whether the focus of the law is on protecting the aggrieved party and/or taking the other (non-mistaken) party’s behaviour into account. Legal systems diverge on this point. We will see that some protect the mistaken party regardless of the other party’s behaviour. Reasons for not protecting the mistaken party arise from, *inter alia*, the mistaken party’s behaviour.⁴⁶ Others do

⁴⁰ The third relates to the concepts of duress, violence, threat, abuse of circumstances etc. summarised by the concept of ‘undue pressure’, *ibid.*, p. 222.

⁴¹ See G. Ripert, *La règle morale dans les obligations civiles* (4th edn, Paris, 1949).

⁴² The appropriate term in French is ‘*sanctionner*’, which in a non-penal context can be both repressive and compensatory – cf. G. Cornu (ed.) *Vocabulaire juridique* (8th edn, Paris, 2000).

⁴³ For example, ‘punishment’ is generally reserved for criminal law, ‘punishing’ along with damages leads to ‘punitive damages’ etc.

⁴⁴ I am grateful to John Cartwright for having pointed out this semantical confusion to me.

⁴⁵ A twofold end-purposes analysis may be insufficient.

⁴⁶ See French and Belgian reports in Case 1 on the issue of excusability. Of course, protection may be refused for other reasons e.g. the security of transactions.

take the non-mistaken party's behaviour into consideration. Illustrations of the latter viewpoint can be found in the Austrian and German view of mistake, for example, where the end-purpose of protection is recognised by granting the remedy of annulment but such a right is qualified by a duty on the mistaken party to compensate for the annulment (German law) or even as an objection to annulment (in Austrian law) where the non-mistaken party's protection prevails.

In contrast, when a mistake is induced by fraudulent behaviour the aggrieved party has a choice: he⁴⁷ can base his claim on mistake or fraud. French law, to take one example, will allow the aggrieved party to claim annulment⁴⁸ on the basis of defects of consent (mistake under art. 1110 and fraud under art. 1116 *Code civil*). In addition, should the claim be based on fraud, an additional claim for damages for tortious liability may be founded under arts. 1382–3 of the Civil Code.⁴⁹ Another example may be given by German law since §123 BGB (called 'fraudulent misrepresentation') provides that where a mistake has been caused by fraud, the mistaken party seeking annulment does not have to compensate the other contracting party for its reliance interest, unlike the claims under §119 and §122 of the BGB for mistake. Such a remedy may be considered justified by the fraudulent behaviour of the non-mistaken party who has thus lost all entitlement to protection. Here it could be said that protection is not opposed to taking the other party's behaviour into account: on the contrary it is precisely because of that other party's (fraudulent) behaviour that protection is reinforced. Sometimes, however, we will see that these two priorities do conflict when there is no fraud; some legal systems enhance protection exclusively whereas other systems try to find a balance between protection and weighing it up against the attitude or state of mind of the non-mistaken party. The reliance of that other party is used to denote this idea. This is important to bear in mind when looking at the law's attitudes towards duties to inform.

If it is accepted that the overall end-purpose of mistake is to protect a mistaken contracting party; of fraud to grant even greater protection

⁴⁷ For the avoidance of doubt, where the masculine is used throughout to refer to a person, it is deemed to include the feminine.

⁴⁸ It should be noted that we have chosen to use the term 'annulment' throughout this study as it was considered to be the most neutral term. We have thus set aside other terms such as rescission or avoidance.

⁴⁹ This is not to exclude the possibility of making a claim for damages in addition to annulment for mistake where the presence of a *faute* has been identified, though it is rare in practice. See Ghestin, *La formation du contrat*, no. 519, p. 481; no. 623, p. 605.