18-0634-cv

United States Court of Appeals

for the

Second Circuit

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,

Plaintiff-Appellant,

– v. –

THE METROPOLITAN MUSEUM OF ART,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX
Volume 2 of 2 (Pages A-294 to A-513)

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EXHIBIT B

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The methods of enforcing acts and sentences are governed by the law of the place in which the performance occurs.

Art. 11

Criminal and police and public safety laws obligate all those persons who are on the territory of the kingdom.

Art. 12

Notwithstanding the provisions of the previous sections, on no case may the laws, acts and sentences between a foreign country, and private provisions and agreement setting aside the prohibitive laws of the Kingdom that concern persons, property or acts, nor the laws relating in any way to public order and public morality.

3.

The subject matter of contracts.

1116. Only chattels that are in commerce can be the subject of a contract.

1117. The chattel that constitntes the subject of the contract must be determined at last as to its specie.

The quantity of the chattel can be uncertain provided it can be determined.

1118. Future chattels can be the subject of a contract.

However it is not possible to renounce an inheritance that has not been opened, nor make any stipulation relating to same, either with the person whose estate it is nor with third parties, regardless of consent by same.

4.

The consideration of contracts.

1119. An obligation without consideration, or based on a fraudulent or unlawful consideration cannot have any effect.

1120. A contract is valid, even if the consideration is not stated.

1121. The consideration is presumed until the contrary is proved.

1122. The consideration is unlawful when it is contrary to law, public morality or public order.

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Italian Civil Code (1865) Article 12

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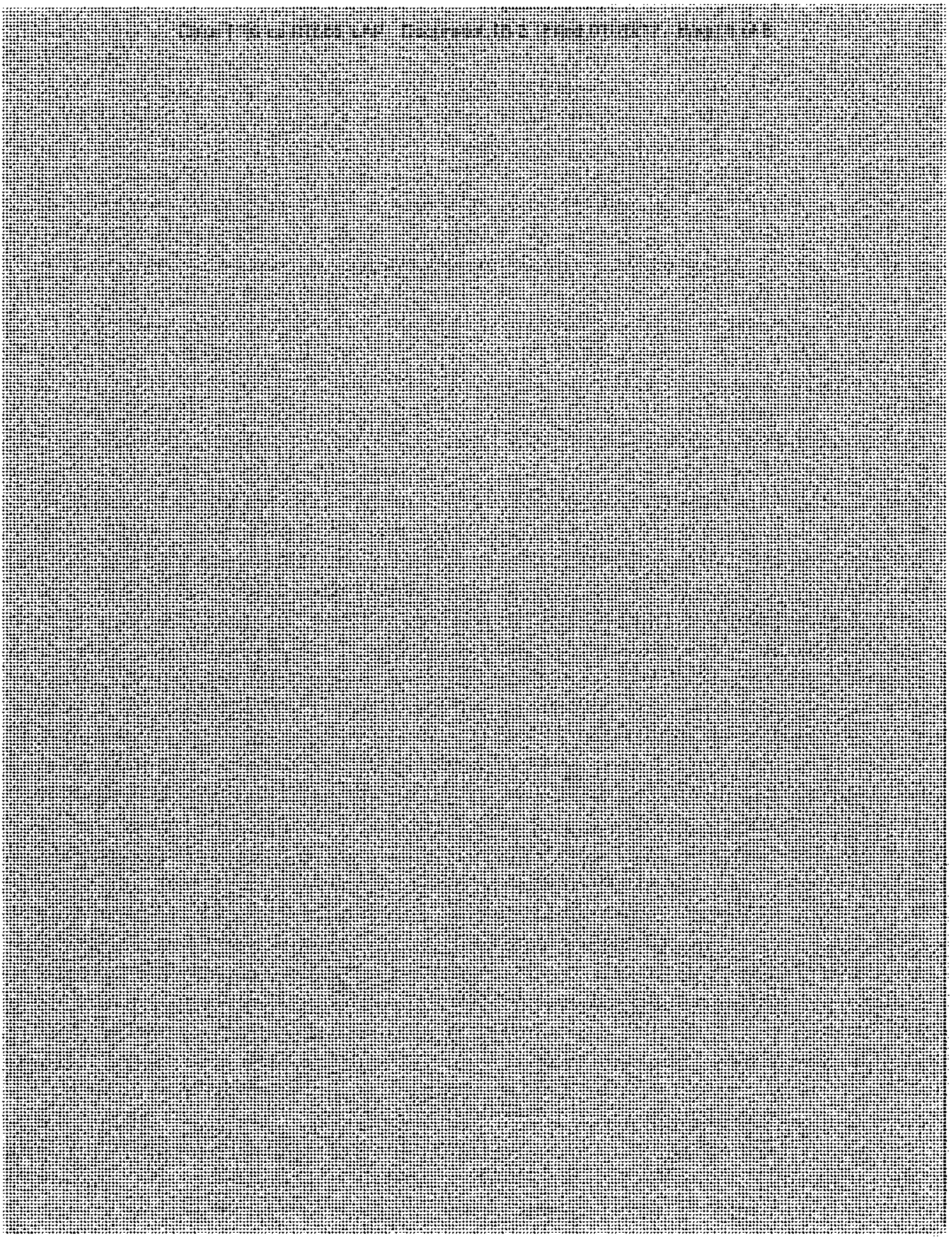

I modi di esecuzione degli atti e delle sentenze sono regolati dalla legge del luogo in cui si procede all'esecuzione.

ART. 11.

Le leggi penali e di polizia e sicurezza pubblica obbligano tutti coloro che si trovano nel territorio del regno.

ART. 12.

Non ostante le disposizioni degli articoli precedenti, in nessun caso le leggi, gli atti e le sentenze di un paese straniero, e le private disposizioni e convenzioni potranno derogare alle leggi proibitive del regno che concernano le persone, i beni o gli atti, nè alle leggi riguardanti in qualsiasi modo l'ordine pubblico ed il buon costume

§.

Dell'oggetto dei contratti.

1116. Le sole cose che sono in commercio, possono formare oggetto di contratto.

1117. La cosa che forma l'oggetto del contratto, debb'essere determinata almeno nella sua specie.

La quantità della cosa può essere incerta, purchè si possa determinare.

1118. Le cose future possono formare oggetto di contratto.

Non si può rinunziare però ad una successione non ancora aperta, nè fare alcuna stipulazione intorno alla medesima, sia con quello della cui eredità si tratta sia con terzi, quantunque intervenisse il consenso di esso.

§.

Della causa dei contratti.

1119. L'obbligazione senza causa, o fondata sopra una causa falsa od illecita non può avere alcun effetto.

1120. Il contratto è valido, quantunque non ne sia espressa la causa.

1121. La causa si presume sino a che non è prova il contrario.

1122. La causa è illecita, quando è contraria alla legge, al buon costume o all'ordine pubblico.

EXHIBIT C

CIVIL CODE

Royal Decree No. 262 issued March 16, 1942 – Approving the text of the Civil Code

(Official Gazette No. 79 published April 4, 1942)

PROVISIONS OF THE LAW IN GENERAL

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ENACTING PROVISIONS

Art. 1343 Confirmation

Unlawful *causa*.
The *causa* is unlawful when it is contrary to mandatory rules, public order, or morals.

Art. 1418 Confirmation

Causes of voidness of the contract.

(1) A contract that is contrary to mandatory rules is void, unless the law provides otherwise.

(2) A contract is rendered void by the lack of one of the requisites indicated in Art. 1325, unlawfulness of *causa*, unlawfulness of the motives in the case indicated in Art. 1345, and lack in the object of the requisites set forth in Art. 1346.

(3) A contract is also void in other cases established by law.

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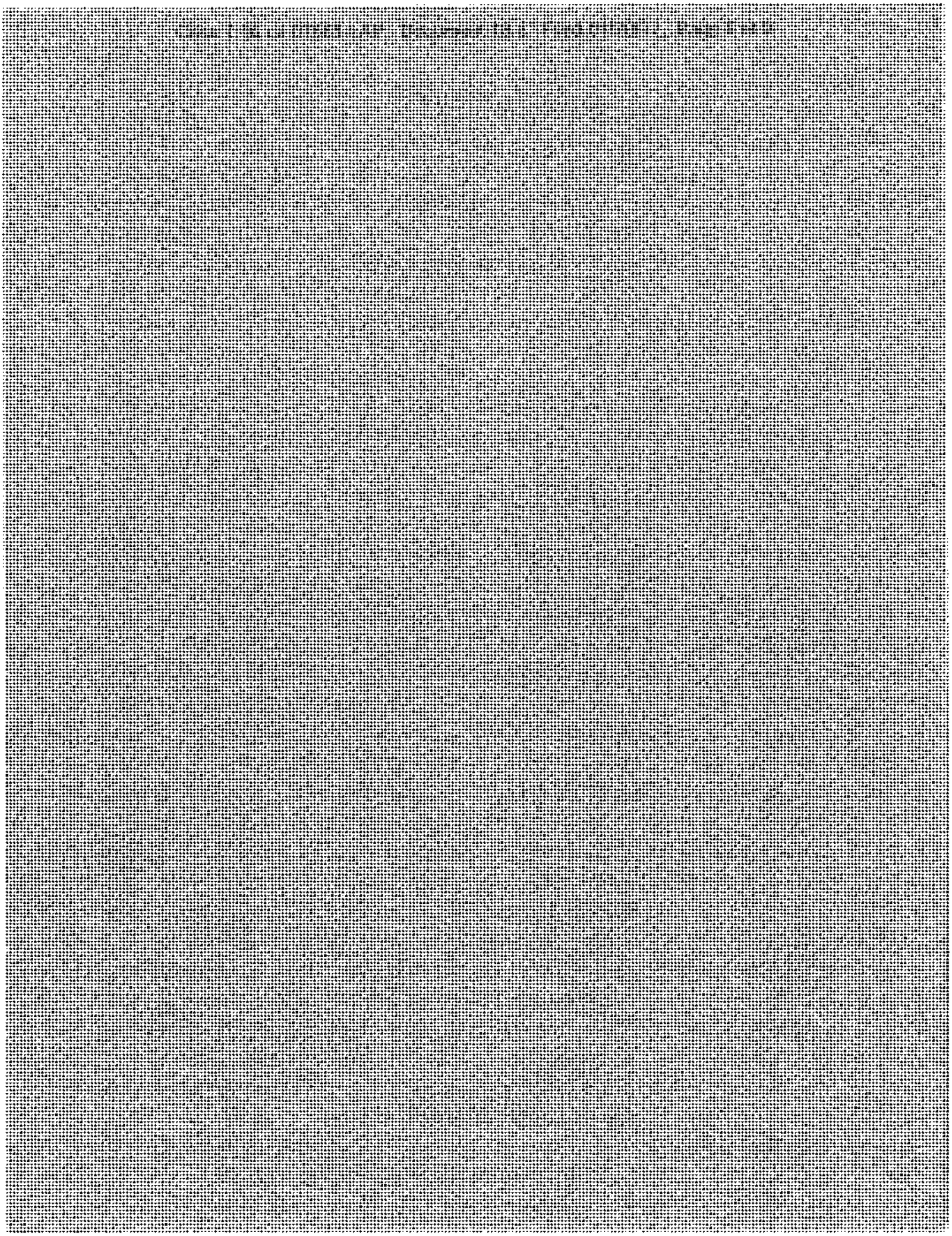

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CODICE CIVILE

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(*Gazzetta Ufficiale, n. 79 del 4 aprile 1942*)

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LIBRO TERZO - Della proprietà

LIBRO QUARTO - Delle obbligazioni

LIBRO QUINTO - Del lavoro

LIBRO SESTO - Della tutela dei diritti

DISPOSIZIONI DI ATTUAZIONE

Art. 1343 Convalida

Causa illecita.
La causa è illecita quando è contraria a norme imperative, all'ordine pubblico o al buon costume.

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Art. 1418 Convalida

Cause di nullità del contratto.

(1) Il contratto è nullo quando è contrario a norme imperative, salvo che la legge disponga diversamente.

(2) Producono nullità del contratto la mancanza di uno dei requisiti indicati dall'articolo 1325, l'illiceità della causa, l'illiceità dei motivi nel caso indicato dall'articolo 1345 e la mancanza nell'oggetto dei requisiti stabiliti dall'articolo 1346.

(3) Il contratto è altresì nullo negli altri casi stabiliti dalla legge.

EXHIBIT D

[Civil Code of the Kingdom of Italy, published in Milan in 1865 by Francesco Pagnoni]

[Book III, Title IV, Obligations and Contracts in General: Section II, Essential Requirements for Validity of Contracts, Subsection 2—*Consent*, pp. 301-302]

2. Consent

1108. Consent is invalid if it was given in error, extorted by violence, or extracted with deceit.

1109. ...

1110. ...

1111. Violence applied against a person accepting an obligation makes the contract null and void, even though it may have been applied by someone other than the person to whose advantage an agreement is being adopted.

1112. Consent is deemed extorted by violence, when it is of such a nature as to impress a reasonable person and to cause him to fear that he or his property will be exposed to an unjust and considerable injury. In this respect, the age, sex and condition of the persons shall be considered.

1113. Violence makes the contract void also when the threatened evil is addressed to the person or assets of the contracting party's spouse, ascendant or descendant. If other persons were involved, the judge shall decide whether the contract is void taking into account all relevant circumstances.

1114. Overwhelming fear without violence is not sufficient to make the contract void.

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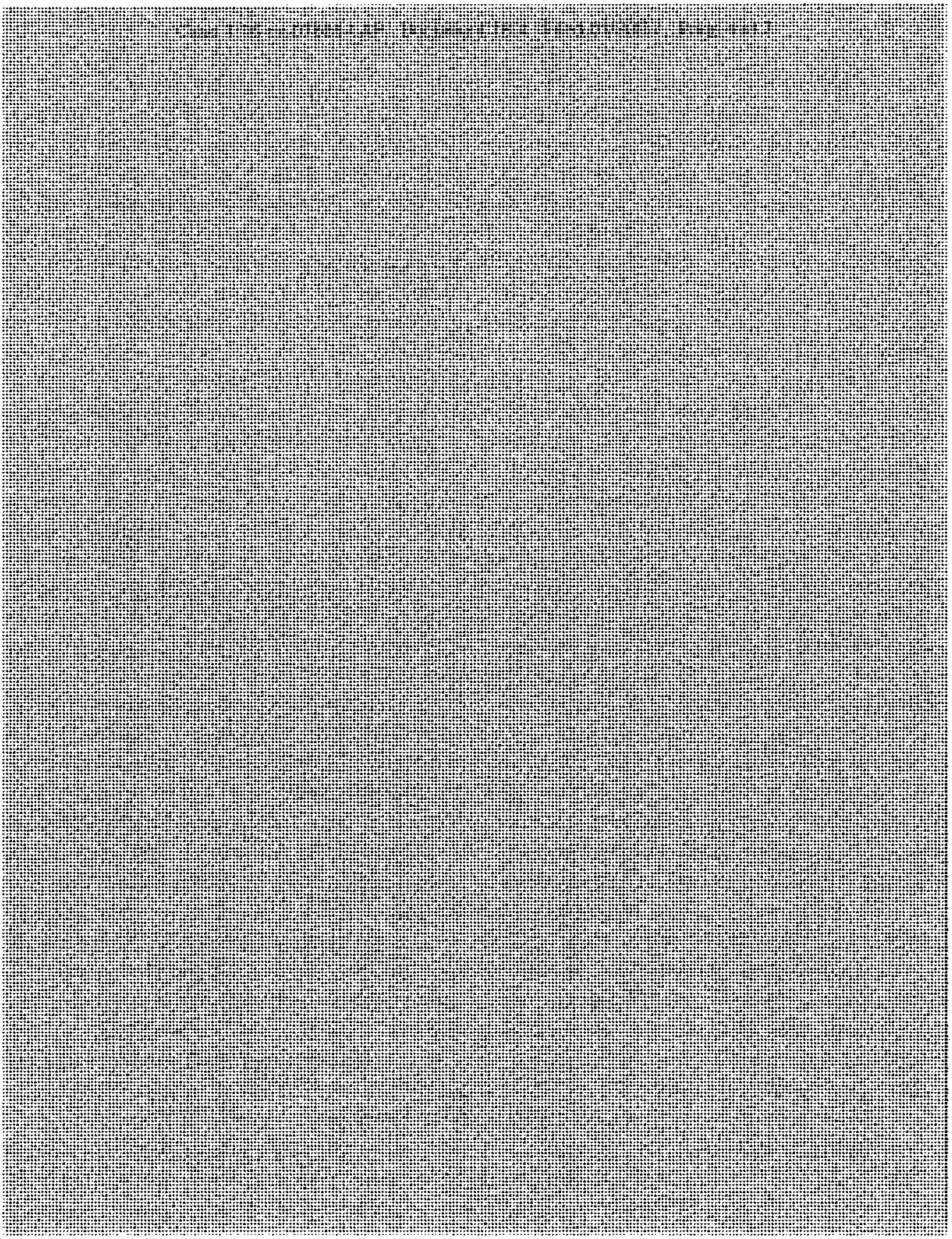

CODICE CIVILE

DEL

REGNO D'ITALIA

MILANO
FRANCESCO PAGNONI, TIPOGRAFO EDITORE
1865

Lorenzo Nicola 1865

§ II.

Dei requisiti essenziali per la validità dei contratti.

1104. I requisiti essenziali per la validità di un contratto sono:

La capacità di contrattare;

Il consenso valido dei contraenti;

Un oggetto determinato che possa essere materia di convenzione;

Una causa lecita per obbligarsi.

1.

Della capacità delle parti contraenti.

1105. Qualunque persona può contrattare, se non è dichiarata incapace dalla legge.

1106. Sono incapaci di contrattare nei casi espressi dalla legge:

I minori,

Gl'interdetti,

Gl'inabilitati,

Le donne maritate,

E generalmente tutti coloro ai quali la legge vieta determinati contratti.

1107. La persona capace di obbligarsi non può opporre l'incapacità del minore, dell'interdetto, dell'inabilitato o della donna maritata, con cui essa ha contrattato.

L'incapacità però derivante da interdizione per causa di pene si può opporre da chiunque vi ha interesse.

2.

Del consenso.

1108. Il consenso non è valido, se fu dato per errore, estorto con violenza o carpito con dolo.

1109. L'errore di diritto produce la nullità del contratto solo quando ne è la causa unica o principale.

1110. L'errore di fatto non produce la nullità del contratto, se non quando cade sopra la sostanza della cosa che ne forma l'oggetto.

Non produce la nullità quando cade soltanto sulla persona colla quale si è contrattato, eccetto che la considerazione della persona colla quale s'intende contrattare sia la causa principale della convenzione.

1111. La violenza usata contro colui che ha contratta l'obbligazione è causa di nullità, ancorchè sia stata usata da una persona diversa da quella a vantaggio della quale si è fatta la convenzione.

1112. Il consenso si reputa estorto colla violenza quando questa è di tal natura da far impressione sopra una persona sensata, e da poterle incutere ragionevole timore di esporre sè o le sue sostanze ad un male notabile. Si ha riguardo in que-

sta materia all' età, al sesso ed alla condizione delle persone.

1113. La violenza è causa di nullità del contratto anche quando il male minacciato sia diretto a colpire la persona o i beni del coniuge, di un discendente o di un ascendente del contraente. Trattandosi di altre persone, spetta al giudice di pronunziare sulla nullità secondo le circostanze.

1114. Il solo timore riverenziale, senza che sia intervenuta violenza, non basta per annullare il contratto.

1115. Il dolo è causa di nullità del contratto quando i raggiri usati da uno dei contraenti sono stati tali, che l'altro senza di essi non avrebbe contrattato.

3.

Dell' oggetto dei contratti.

1116. Le sole cose che sono in commercio possono formare oggetto di contratto.

1117. La cosa che forma l'oggetto del contratto debb'essere determinata almeno nella sua specie.

La quantità della cosa può essere incerta, purchè si possa determinare.

1118. Le cose future possono formare oggetto di contratto.

Non si può rinunziare però ad una successione non ancora aperta, nè fare alcuna

stipulazione intorno alla medesima, sia con quello della cui eredità si tratta, sia con terzi, quantunque intervenisse il consenso di esso.

4.

Della causa dei contratti.

1119. L'obbligazione senza causa, o fondata sopra una causa falsa od illecita, non può avere alcun effetto.

1120. Il contratto è valido, quantunque non ne sia espressa la causa.

1121. La causa si presume sino a che non si prova il contrario.

1122. La causa è illecita quando è contraria alla legge, al buon costume o all' ordine pubblico.

§ III.

Degli effetti dei contratti.

1123. I contratti legalmente formati hanno forza di legge per coloro che li hanno fatti.

Non possono essere rivocati che per mutuo consenso o per cause autorizzate dalla legge.

1124. I contratti debbono essere eseguiti di buona fede, ed obbligano non solo a quanto è nei medesimi espresso, ma anche a tutte le conseguenze che secondo l'equità, l'uso o la legge ne derivano.

EXHIBIT E

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ENACTING PROVISIONS

Art. 1427 Confirmation

Error, violence, and malice.

The contracting party whose consent was given in error, extorted by violence, or given over by deceit, may ask that the contract be voided, in accordance with the following provisions.

Art. 1434 Duress

Duress is cause for annulment of a contract even if exerted by a third person.

Art. 1435 Characteristics of duress

Duress must be of such a nature as to impress a reasonable person and to cause him to fear that he or his property will be exposed to an unjust and considerable injury. In this respect, the age, sex and condition of the persons shall be considered.

Art. 1436 Duress directed against third persons

Duress is also cause for annulment of the contract when the threatened injury is directed toward the person or property of the spouse or of an ascendant or descendant of the contracting party.

If the threatened injury is directed toward other persons, annulment of the contract is left to the prudent appraisal of the circumstances by the court.

Art. 1437 Reverential fear

Mere reverential fear is not cause for annulment of a contract.

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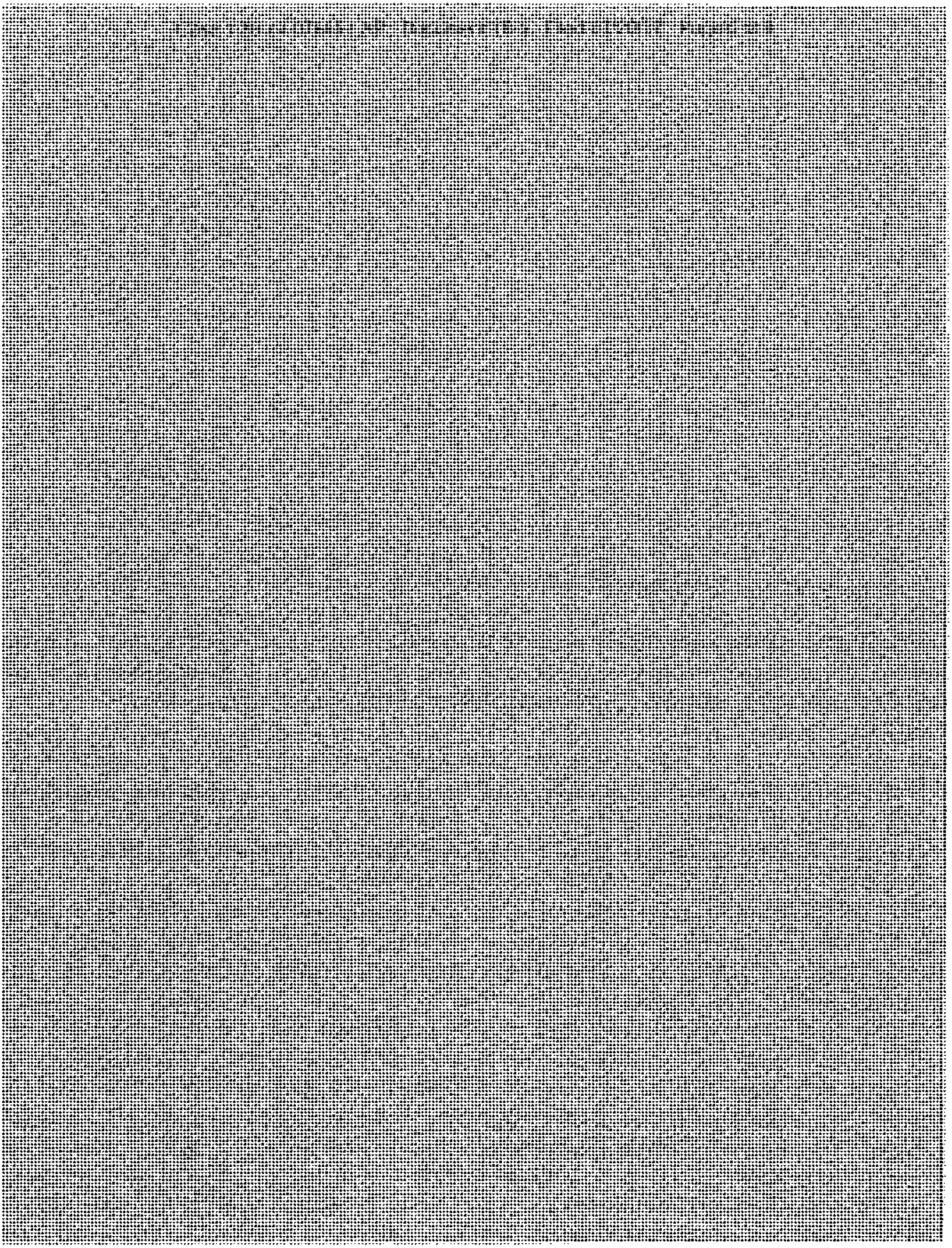

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DISPOSIZIONI DI ATTUAZIONE

Art. 1427 Convalida

Errore, violenza e dolo.

Il contraente, il cui consenso fu dato per errore, estorto con violenza, o carpito con dolo, può chiedere l'annullamento del contratto, secondo le disposizioni seguenti.

Art. 1434 Violenza

La violenza è causa di annullamento del contratto, anche se esercitata da un terzo.

Art. 1435 Caratteri della violenza

La violenza deve essere di tal natura da far impressione sopra una persona sensata è da farle temere di esporre se o i suoi beni a un male ingiusto è notevole. Si ha riguardo, in questa materia, all'età, al sesso e alla condizione delle persone.

Art. 1436 Violenza diretta contro terzi

La violenza è causa di annullamento del contratto anche quando il male minacciato riguarda la persona o i beni del coniuge del contraente o di un discendente o ascendente di lui.

Se il male minacciato riguarda altre persone, l'annullamento del contratto è rimesso alla prudente valutazione delle circostanze da parte del giudice

Art. 1437 Timore riverenziale

Il solo timore riverenziale non è causa di annullamento del contratto.

EXHIBIT F

1309.

The act of confirmation or ratification of an obligation, against which the law admits the invalidity action, is not valid unless it contains the substance of the obligation, the reason that makes it defective and the declaration that is aimed at correcting the defect on which such an action is founded.

In the absence of the instrument of confirmation or ratification, it is sufficient for the obligation to be wholly or primarily performed voluntarily by whoever knows the defect after the time in which the obligation could have been validly confirmed or ratified.

The confirmation, ratification or voluntary performance according to the forms and periods determined by law produces a renunciation of the means and objections that can be opposed to such an act, notwithstanding the rights of third parties.

The provisions of this article do not apply the rescission action for injury.

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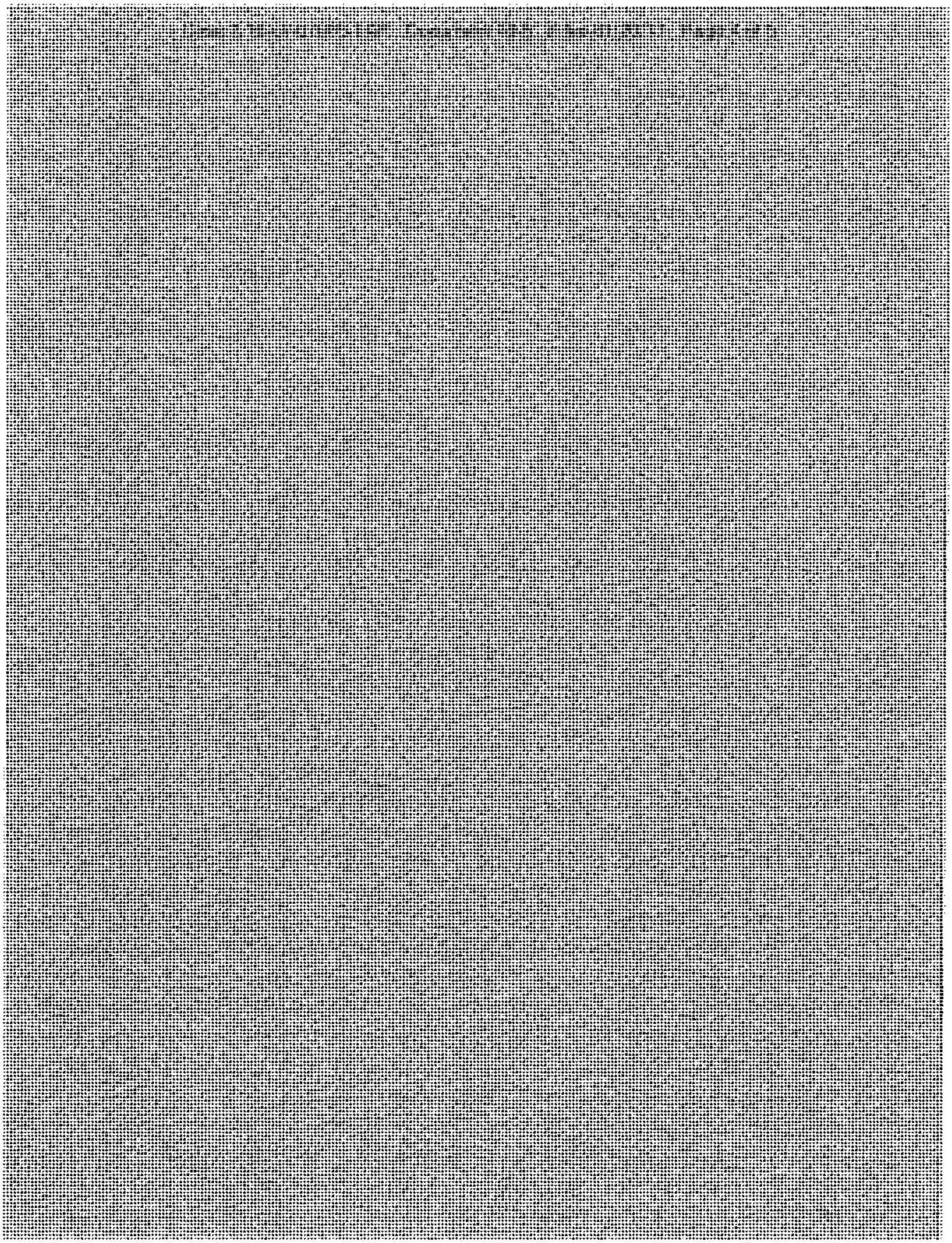

litato o a una donna maritata in forza di un'obbligazione che rimanga annullata, ove non provi che quanto fu pagato venne rivolto a vantaggio dei medesimi.

1308. L'azione di rescissione per causa di lesione non si può proporre, ancorchè si tratti di minori, se non nei casi e sotto le condizioni specialmente espresse nella legge.

La detta azione, nei casi in cui è ammessa, non produce effetto a danno dei terzi, i quali hanno acquistato diritti sugli immobili anteriormente alla trascrizione della domanda di rescissione.

1309. L'atto di conferma o ratifica di una obbligazione, contro la quale la legge ammette l'azione di nullità, non è valido, se non contiene la sostanza della stessa obbligazione, il motivo che la rende viziosa e la dichiarazione che s'intende di correggere il vizio su cui tale azione è fondata.

In mancanza d'atto di conferma o ratifica, basta che l'obbligazione venga in tutto o nella maggior parte eseguita volontariamente da chi conosce il vizio dopo il tempo, in cui l'obbligazione stessa poteva essere validamente confermata o ratificata.

La conferma, ratifica o esecuzione volontaria secondo le forme e nei tempi determinati dalla legge produce la rinunzia ai mezzi ed alle eccezioni che potevano opporsi contro tale atto, salvi però i diritti dei terzi.

Le disposizioni di quest'articolo non si applicano all'azione di rescissione per causa di lesione.

1310. Non si possono sanare con veruu atto confermativo i vizi di un atto nullo in modo assoluto per difetto di formalità.

EXHIBIT G

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ENACTING PROVISIONS

Art. 1444 Confirmation

(1) The contacting party entitled to sue for annulment can confirm the voidable contract by a declaration containing a reference to the contract and to the cause for voidability thereof, and a declaration of intention to confirm it.

(2) A contract is likewise confirmed if the contracting party entitled to sue for annulment, knowing the voidability, has voluntarily performed it.

(3) The confirmation has no effect if the person who does it is not in a condition to validly conclude the contract (1423, 1451).

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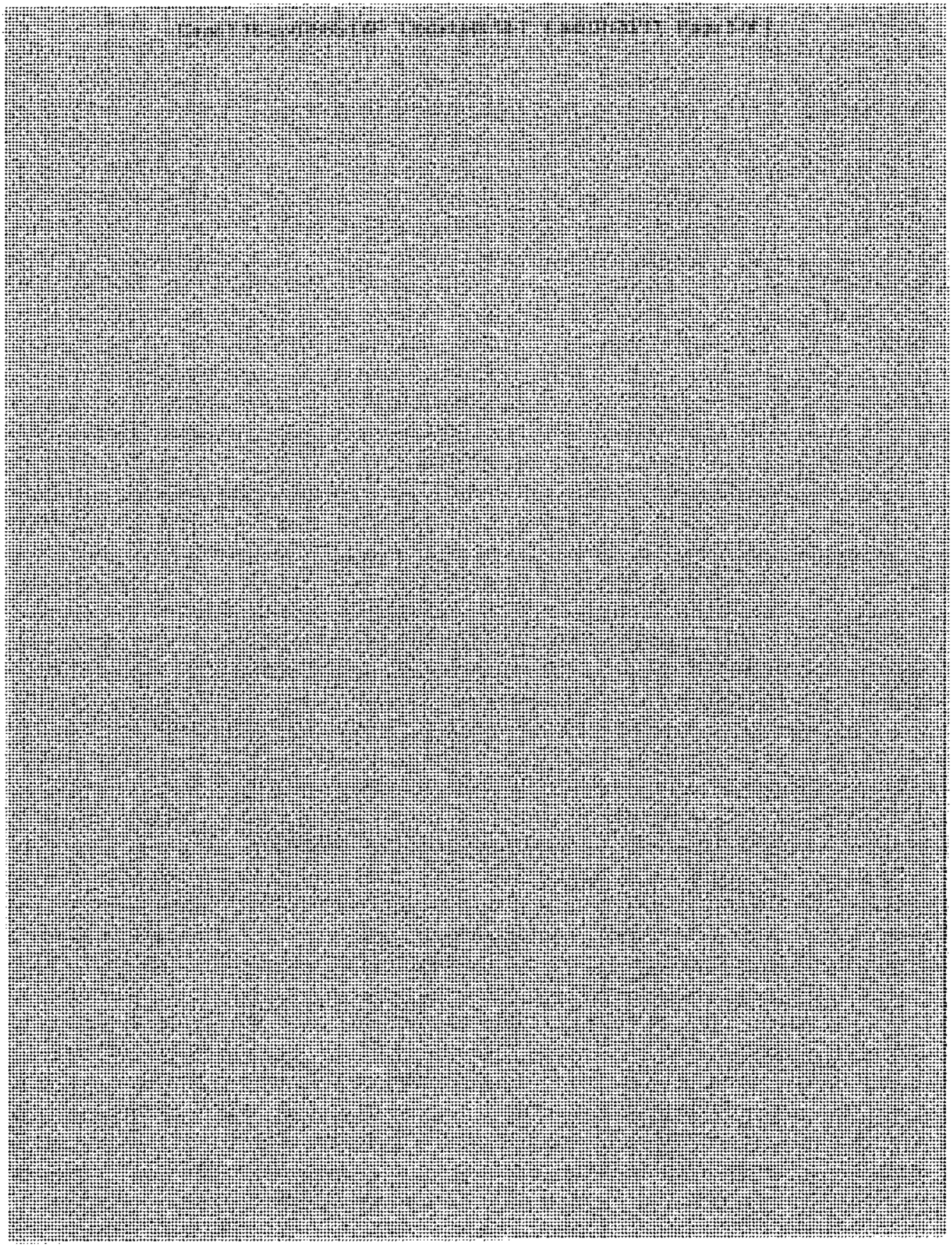

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Art. 1444 Convalida

(1) Il contratto annullabile può essere convalidato dal contraente al quale spetta l'azione di annullamento, mediante un atto che contenga la menzione del contratto e del motivo di annullabilita, e la dichiarazione che s'intende convalidarlo.

(2) I1 contratto è pure convalidato, se il contraente al quale spettava l'azione di annullamento vi ha dato volontariamente esecuzione conoscendo il motivo di annullabilità.

(3) La convalida non ha effetto, se chi l'esegue non è in condizione di concludere validamente it contratto (1423,1451).

EXHIBIT H

[hw:] CURRENT TEXT

LIEUTENANT'S LEGISLATIVE DECREE April 12, 1945, no. 222 (Official Gazette, May 22, no. 61) – Supplemental integrative and implementation regulations for the Lieutenant's Legislative Decree of January 20, 1944, no. 26 for the indemnification of Italian and foreign citizens whose economic rights were impacted by racial provisions (1).
(1) Decree repealed starting on December 16, 2009 by Article 2, section 1 of Legislative Decree no. 200 of December 22, 2008. Subsequently, the efficacy of this article was restored by Article 1, section 2 of Legislative Decree no. 179 of December 1, 2009.

Art. 19

For sales contracts stipulated by people affected by the racial provisions after October 6, 1938 – the date when the directives on racial matters issued by the former regime were announced – , the rescission is allowed pursuant to Articles 1448 and following of the Civil Code until one year after the end of the state of war, so long as the damages exceed one fourth of the value of the item sold at the time of the contract.

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Article 19 of legislative decree lieutenant April 12, 1945, no. 222
Italian Civil Code (1865) Articles 1108, 1111-1114
Italian Civil Code (1865) Articles 1119, 1122
Italian Civil Code (1865) Article 1309

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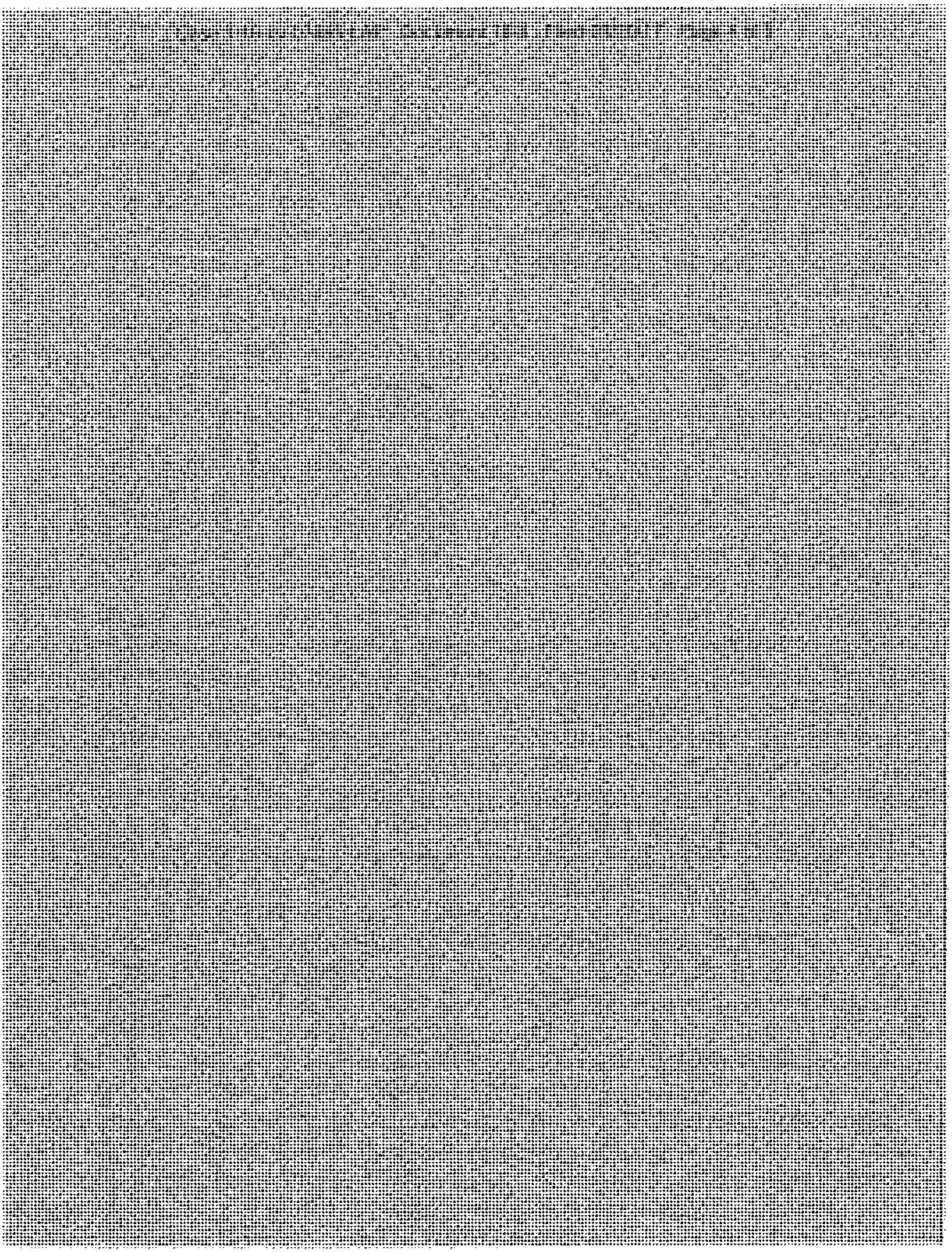

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TESTO VIGENTE

DECRETO LEGISLATIVO LUOGOTENENZIALE 12 aprile 1945, n. 222 (in Gazz. Uff., 22 maggio, n. 61). - Norme complementari integrative e di attuazione del decreto legislativo Luogotenenziale 20 gennaio 1944, n. 26, per la reintegrazione dei cittadini italiani e stranieri colpiti dalle disposizioni razziali nei loro diritti patrimoniali (1).

(1) Decreto abrogato, a decorrere dal 16 dicembre 2009, dall'articolo 2, comma 1, del D.L. 22 dicembre 2008 n. 200. Successivamente l'efficacia del presente articolo è stata ripristinata dall'articolo 1, comma 2, del D.Lgs. 1° dicembre 2009, n. 179.

Art. 19.

Per i contratti di alienazione posti in essere dalle persone colpite dalle disposizioni razziali dopo il 6 ottobre 1938, data nella quale vennero ufficialmente annunziate le direttive del cessato regime in materia razziale, è ammessa l'azione di rescissione ai sensi degli articoli 1448 e seguenti del Codice civile sino ad un anno dopo la cessazione dello stato di guerra, sempre che la lesione ecceda un quarto del valore della cosa alienata al momento del contratto.

EXHIBIT I

CIVIL CODE

Royal Decree No. 262 issued March 16, 1942 – Approving the text of the Civil Code

(Official Gazette No. 79 published April 4, 1942)

PROVISIONS OF THE LAW IN GENERAL

BOOK ONE – On Individuals and the Family

BOOK TWO – On Inheritance

BOOK THREE – On Property

BOOK FOUR – On Obligations

BOOK FIVE – On Labor

BOOK SIX – On the Safeguarding of Rights

ENACTING PROVISIONS

Art. 1448 Confirmation

Art. 1448 – General action of rescission for injury

If there is a disproportion between the performance of one party and that of the other, and such disproportion was the resnlt of a state of need of one party, of which the other has availed himself for his advantage, the injured party can demand rescission of the contract.

The action is inadmissible where the injury does not exceed half of the value of the executed or promised performance by the damaged party at the time of the contract.

The injury must have continued up to the time when the action is filed.

Hazardous contracts may not be rescinded for cause (1934, 1970).

The provisions about rescinding distributions (761 and following) are not affected.

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1. Italian Civil Code (1942) Article 1343
2. Italian Civil Code (1942) Article 1418
3. Italian Civil Code (1942) Article 1434-1437
4. Italian Civil Code (1942) Article 1444
5. Italian Civil Code (1942) Article 1448
6. Italian Civil Code (1942) Article 1427
7. Republican Italian Constitution of 1948, Article 2

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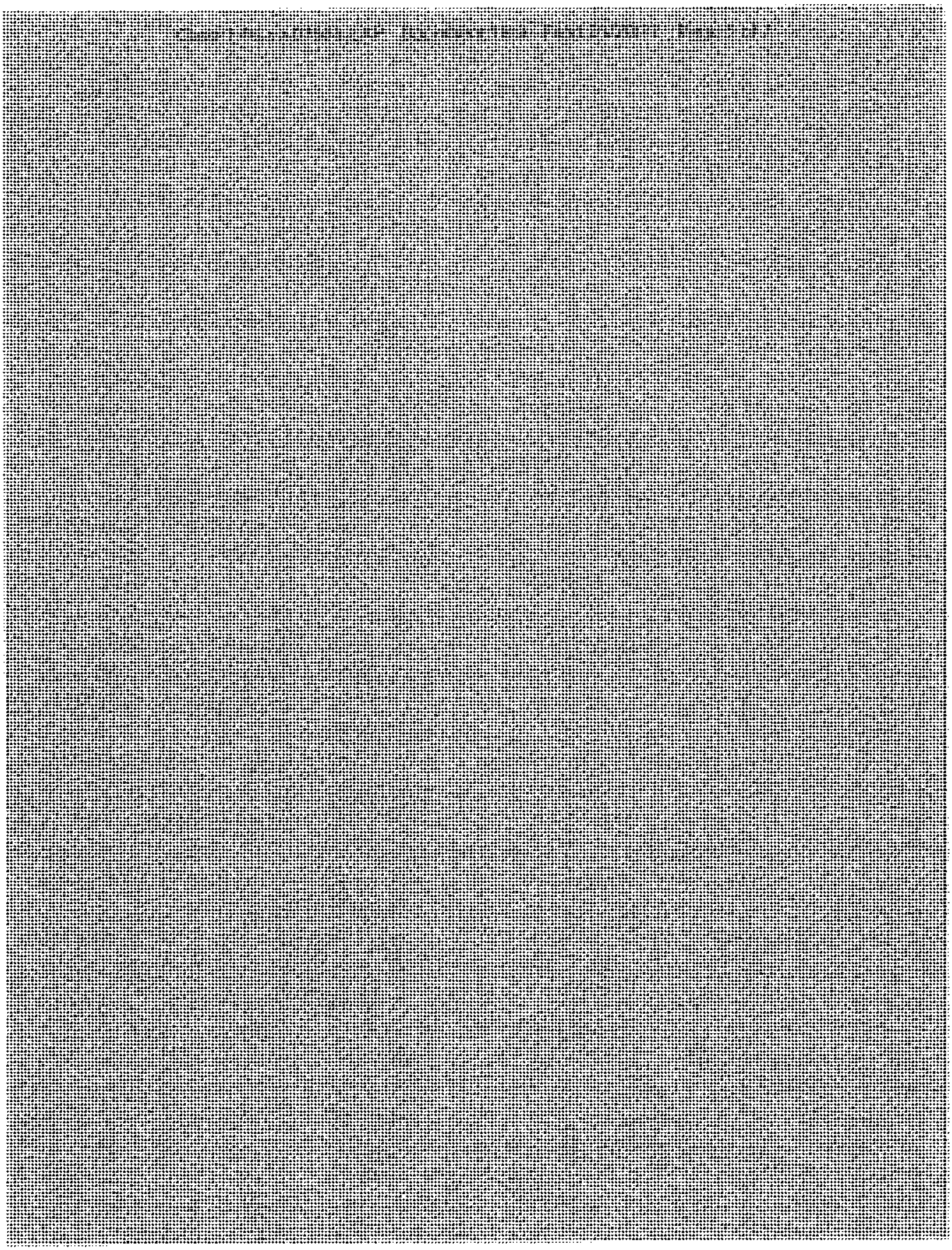

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CODICE CIVILE

R.D. 16 marzo 1942, n. 262 - Approvazione del testo del Codice Civile

(*Gazzetta Ufficiale, n. 79 del 4 aprile 1942*)

DISPOSIZIONI SULLA LEGGE IN GENERALE

LIBRO PRIMO - Delle persone e della famiglia

LIBRO SECONDO - Delle successioni

LIBRO TERZO - Della proprietà

LIBRO QUARTO - Delle obbligazioni

LIBRO QUINTO - Del lavoro

LIBRO SESTO - Della tutela dei diritti

DISPOSIZIONI DI ATTUAZIONE

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Art. 1448 Convalida

Art. 1448 – Azione generale di rescissione per lesione

Se vi è sproporzione tra la prestazione (att.166) di una parte e quella dell'altra, e la sproporzione è dipesa dallo stato di bisogno di una parte, del quale l'altra ha approfittato per trarne vantaggio, la parte danneggiata può domandare la rescissione del contratto.

L'azione non è ammissibile se la lesione non eccede la metà del valore the la prestazione eseguita o promessa dalla parte danneggiata aveva al tempo del contratto.

La lesione deve perdurare fino al tempo in cui la domanda è proposta.

Non possono essere rescissi per causa di lesione i contratti aleatori (1934, 1970).

Sono salve le disposizioni relative alla rescissione della divisione (761 e seguenti).

EXHIBIT J

Constitution Article 2

The Republic recognizes and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed. The Republic requires that the fundamental duties of political, economic and social solidarity be fulfilled.

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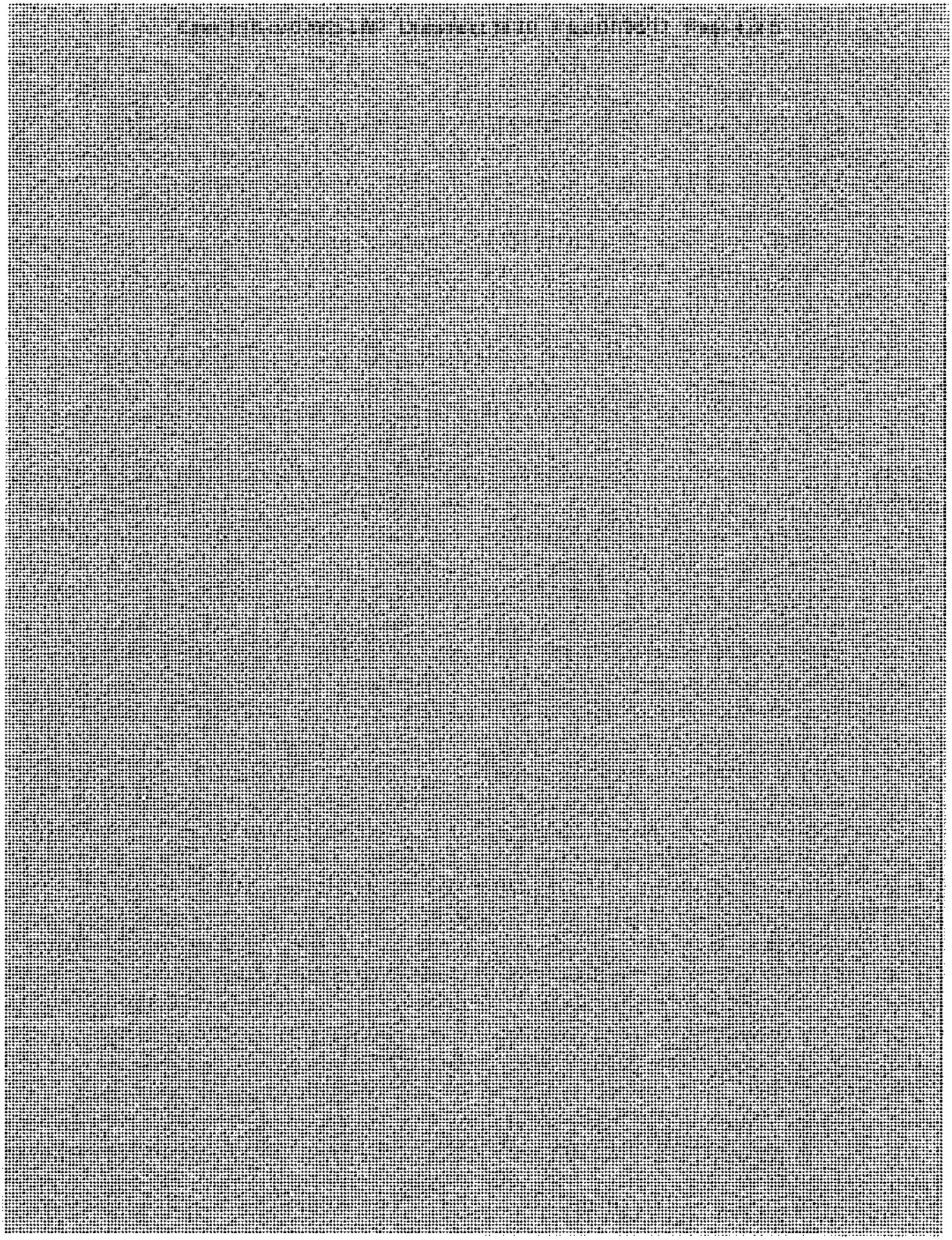

Costituzione Articolo 2

La Repubblica riconosce e garantisce i diritti inviolabili dell'uomo, sia come singolo sia nelle formazioni sociali ove si svolge la sua personalità, e richiede l'adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,	:	
Plaintiff,	:	16 CIV 07665 (LAP)
vs.	:	(Oral Argument Requested)
THE METROPOLITAN MUSEUM OF ART,	:	
Defendant.	:	

REPLY BRIEF IN FURTHER SUPPORT OF DEFENDANT THE METROPOLITAN MUSEUM OF ART'S MOTION TO DISMISS THE AMENDED COMPLAINT

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TABLE OF AUTHORITIES

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Cases

In defending its ownership of the Painting, the Museum does not seek to diminish the persecution that the Leffinanns and millions of Jews and persecuted persons across Europe suffered during the Nazi era. Plaintiff's case at its core, however, is a plea to treat an open market sale for value as if it were a forced sale at the hands of Nazis. Her theory is that transactions involving Jews or other persecuted persons could not have been truly voluntary given a general state of fear in Fascist Italy. This goes far beyond legal precedent, which has wrestled with and acknowledged the hardships of the time. Plaintiff says she "does not ask the Court to override precedent or ignore the law," Opp. 4, but that is exactly what would be required to reach back 79 years to ondo a voluntary open-market transaction where no Nazis or Fascists took actions to compel or restrict the Sale, or were otherwise involved in the Sale. As Plaintiff has alleged, Leffmann spent months offering the Painting for sale on the international art market, negotiated with multiple parties, and ultimately accepted the highest offer in an arms'-length sale through a private dealer in Paris to two other private French dealers. Mot. 5-6 (citing AC ¶¶ 14, 28, 32-33, 36-37, 43, 47). These allegations are fatal to her claim.

Calling attention to Plaintiff's pleading failures should not be mistaken for "flippancy" or "dismissiveness." Opp. 4. The Museum remains deeply sympathetic to the tragic plight of Jews and other persecuted persons in the Nazi era and is steadfastly committed to handling Nazi-era claims in accordance with the highest standards and principles. Mot. 1-2. This explains why the Museum has returned works in other cases and spent years in this case investigating the facts surrounding the 1938 Sale, provided all relevant documents and information to Plaintiff and her counsel, and tried through years of good-faith negotiations to reach a common understanding of the relevant facts and legal analysis. Having engaged in that full and fair process, the Museum should not be attacked for having concluded that Plaintiff's claim fails as a matter of law—both

procedurally and on the merits—for many reasons that now require dismissal of this lawsuit: she lacks authority to represent the Estate (*infra* I), fails to plead duress under New York law or Italian law (*infra* IV-V), cannot rebut ratification or the good-faith purchaser defense (*infra* VI-VII), and cannot revive a claim that expired more than a half-century ago (*infra* VIII).

I. This Action Must Be Stayed Or Dismissed Without Prejudice Because Plaintiff Lacks Authority To Represent The Estate

Plaintiff contends that her ancillary letters are "conclusive evidence" of her authority to represent the Estate in this matter, Opp. 7, but her own allegations demonstrate fatal defects in those letters. She makes the vague statement that the Surrogate's Court "was advised" that the originally appointed-executor, UBS AG, "disavows responsibility" to represent the Estate in this matter, Opp. 9, but even if true, that would not satisfy the requirement to file a formal, written renunciation from the executor. N.Y. Surr. Ct. Proc. Act ("SCPA") §§ 1417, 1604(1)(b); *see also* Mot. 7-9 (citing Surrogate's Court Petition, Bowker Decl. Exh. 1 ¶¶ 28-30). Plaintiff further alleges that the "identified" beneficiaries were provided notice and took no action, Opp. 9, but New York law requires an applicant for ancillary letters to file "the acknowledged … consent of all of the beneficiaries;" and Plaintiff does not allege that the Public Administrator received the required citation. SCPA §§ 1418(2), (6), 1604(1)(d); *see also* Mot. 8 (citing Surrogate's Court Petition, Bowker Decl. Exh. 1 ¶¶ 23, 38-39, 46, 48-51). Because of these and other defects in her ancillary letters, Plaintiff lacks authority to represent the Estate. Mot. 7-9.[1]

Tellingly, Plaintiff does not attempt to defend her ancillary letters on the merits; instead, she takes the untenable position that neither this Court nor Surrogate's Court can examine them. Opp. 7-8. Plaintiff is wrong that this Court is "without authority" to do so. Opp. 8; *see, e.g.*, *Meehan v. Cent. R.R. Co.*, 181 F. Supp. 594, 600 (S.D.N.Y. 1960) (exercising authority to

[1] Contrary to Plaintiff's suggestion, Opp. 4, the Museum raised this issue years ago, and also raised it in litigation at the first possible opportunity.

examine alleged defects in letters of administration). Regardless of whether this Court may vacate or modify Plaintiff's ancillary letters, it undoubtedly may determine whether Plaintiff has standing and capacity to represent the Estate in this action, including by examining her ancillary letters. Plaintiff must establish that she is the Estate's "duly appointed representative," Mot. 8-9 (quoting *Matter of Peters v. Sotheby's Inc.*, 821 N.Y.S.2d 61, 65 (App. Div. 2006)), and she has not met that burden because her ancillary letters are patently defective under New York law. She therefore lacks standing and capacity to bring this lawsuit on behalf of the Estate. *See* Mot. 9.

Plaintiff is wrong that the Surrogate's Court cannot adjudicate the Museum's challenge to her letters, *see, e.g.*, SCPA §§ 711(4), 719(10), and, in any case, that is for the Surrogate's Court to decide. Nor does it matter that the process "may take a substantial period of time." Opp. 9. Nearly 79 years have passed since the 1938 Sale, 50 years have elapsed since the Estate passed to the beneficiaries, and six years have passed since Plaintiff obtained her defective letters. Any potential benefit of avoiding further delay would be far outweighed by the risks of wasting judicial resources and causing irreparable harm to the Museum—and the absent Estate and beneficiaries—if this case were allowed to proceed in the absence of a properly-appointed representative of the Estate. Accordingly, in the event this Court does not dismiss this suit with prejudice for failure to state a claim and lack of timeliness, this litigation must be halted—by a dismissal without prejudice or a stay—pending adjudication of the petition in Surrogate's Court.

II. A Choice-Of-Law Analysis Is Unnecessary Because There Is No Dispositive Difference Between New York And Italian Law

It is irrelevant that New York and Italian Law are not "identical." Opp. 22, n.16. What matters is that there are no differences "upon which the outcome of the case is dependent." *See Bakalar v. Vavra*, 619 F.3d 136, 139 (2d Cir. 2010); Mot. at 10, n.5. Given the absence of such a material conflict, a choice-of-law analysis is unnecessary. *Bakalar*, 619 F.3d at 139-40.

III. In Any Event, New York's Choice-Of-Law Analysis Points To New York Law

In the event of a true conflict of laws, Plaintiff and the Museum agree that New York employs an "interest analysis" to determine the applicable law. Opp. 20. The "[i]nterest analysis … is the bedrock principle that underlies New York's entire choice-of-law regime." *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 336-37 (2d Cir. 2005) (citation omitted). The interest analysis identifies "the jurisdiction that has the greatest interest in, and is most intimately concerned with, the *outcome* of a given litigation." *John v. Sotheby's, Inc.*, 858 F. Supp. 1283, 1289 (S.D.N.Y. 1994), *aff'd*, 52 F.3d 312 (2d Cir. 1995) (emphasis added) (citing *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 226-27 (1975)). The rule is the same in disputes concerning artworks allegedly transferred under duress in the Nazi era. *See Bakalar*, 619 F.3d at 144 ("New York choice of law rules require the application of an 'interest analysis,' in which 'the law of the jurisdiction having the greatest interest in the litigation [is] applied.") (quoting *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002)).

Here, New York has the "greatest interest in the litigation" and its "outcome." The Painting has been in New York since at least 1941, when it was sold through a New York dealer to a New York collector. AC ¶ 53. It was donated to the Museum, a "New York not-for-profit corporation operating as a public museum located in … New York," where it has been for the past 65 years. AC ¶¶ 5, 7, 54. In these circumstances, New York's interests in the litigation and its outcome far exceed those of any other jurisdiction. *See Bakalar*, 619 F.3d at 144 (holding that New York law applies because New York's interests exceeded those of Austria and Switzerland, where painting was allegedly transferred under duress in Austria, subsequently sold in Switzerland, and later "delivered in New York to a New York art gallery, which sold it in New York" to a Massachusetts resident). As the Second Circuit has explained, New York's interest is

paramount—exceeding even the interest of a European jurisdiction where the alleged Nazi-era duress occurred—where, as here, the artwork was transferred to New York in the post-War years and was eventually sold by a New York gallery. *Id.* at 144-45 (reasoning that "[t]he application of New York law may cause New York purchasers of artwork to take greater care in assuring themselves of the legitimate provenance of their purchase").

Contrary to Plaintiff's assertion, New York's "interest analysis" cannot be combined with the "center of gravity test" to create what she calls a "hybrid test" that points to Italian law. Opp. 21 (citing *Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009)). As the Second Circuit has held, "the conflation of the two tests is improper." *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531, 1539 n.5 (2d Cir. 1997)[2]; *see also John*, 858 F. Supp. at 1289 (applying "interest analysis" in property dispnte over ownership of painting where underlying contract qnestions also at issue); *cf. Bakalar*, 619 F.3d at 138-39, 143 (applying "interest analysis" in property dispute over ownership of painting where validity of underlying transfers also at issue). In any event, Plaintiff's own "hybrid test" does not point to Italian law. Plaintiff contends that Italy has the greatest interest because the 1938 Sale was "Italian-centric," Opp. 21, but her allegations belie that claim. The Painting was never in Italy and the sale did not occur there. AC ¶¶ 13-14, 36-37 (alleging that the Painting was in Switzerland until it was sold in France throngh a Paris dealer to French counter-parties). Although the Leffmanns were in Italy at the time of the 1938 Sale, they were not Italian citizens, had no intention of staying, and moved to Switzerland several months later. AC ¶ 2. With only a passing connection to Italy, the 1938 Sale cannot he said to have occurred there and, in any case, the "situs" of the events in

[2] *See also Granite Ridge Energy, LLC v. Allianz Glob. Risk U.S. Ins. Co.*, 979 F. Supp. 2d 385, 392 (S.D.N.Y. 2013) (distinguishing between the two tests) (citing *GlobalNet Fin. Com, Inc. v. Frank Crystal & Co., Inc.*, 449 F.3d 377, 383 (2d Cir. 2006).

question are irrelevant. *See Bakalar*, 619 F.3d at 143-44 (rejecting traditional "situs" rule and holding that "interest analysis" governs choice-of-law in Nazi-era duress case).

IV. The Amended Complaint Fails To State A Claim Under New York Law

If New York law applies, it requires dismissal. Even Plaintiff concedes—by not contesting—that she cannot state a claim under New York law. *See* Mot. 9-17. Under New York law, Plaintiff must plead and show that the 1938 Sale "was procured by means of (1) a wrongful threat that (2) precluded the exercise of [Leffmann's] free will … and (3) permitted no other alternative." Mot. 9 (quoting *Interpharm, Inc. v. Wells Fargo Bank, N.A.*, 655 F.3d 136, 142 (2d Cir. 2011)). Plaintiff must also plead and show that the threat was made by the counterparty. Mot. 9 (citation omitted). Plaintiff does not contest that she failed to plead these elements. Mot. 10-13. Dismissal is therefore required under New York law.

V. The Amended Complaint Also Fails To State A Claim Under Italian Law

A. The Amended Complaint Fails To Allege Duress Under Italian Law

Plaintiff does not even attempt to argue that allegations of a general "state of fear" arising from "the circumstances" suffice to plead ordinary duress under Italian law. Under Italian law, Plaintiff must plead and prove (1) a specific and concrete threat of harm that induced her consent to a contract that he would not otherwise have entered into, and (2) the threat was purposefully presented to extort such consent. *See* Bowker Reply Decl. Exh. 1 ("Trimarchi Op.") ¶¶ 13, 26; *see also* Trimarchi Op. ¶ 20 n.6 (citing, *inter alia*, Court of Cassation, 28 July 1950, No. 2150 (contract voidable for duress where owner forced to choose between selling vehicle and risking seizure by Nazi army); Court of Palermo, 14 June 1946, No. 113 (contract voidable for duress where owner was forced to choose between selling land and risking retaliation)). Here, the conclusory allegation that Leffmann was "forced *by the circumstances* in Fascist Italy" to consent to the 1938 Sale, AC ¶ 9 (emphasis added), falls short because it fails to identify any

specific or concrete threat made for the purpose of "extorting" his consent to the 1938 Sale.

Under Italian law, it is not enough to allege a general "'state of fear' generated by a political party or regime" based on a threat that "can lurk in the future." Opp. at 24. Claims based on "[t]he generic and wholesale persecutions exerted by the Fascists against their political opponents … where there is no specific and direct relationship between such persecutions and the agreement concluded allegedly as a result of duress ['violenza'] do not amount to duress." Trimarchi Op. n.5 (quoting Court of Appeal of Rome, 9 April/31 August 1953). Italy's highest court has held that "the mere fear of retaliation, easy to arise in the mind of citizens during the [F]ascist regime" does not suffice, "but a real threat of retaliation must have actually occurred." Trimarchi Op. ¶ 20 (quoting Court of Cassation, 21 March 1963, No. 697).

Italian courts have consistently rejected "political duress" claims where, as here, the plaintiff fails to allege that a specific and concrete threat was made for the purpose of extorting the victim's consent to a particular transaction. In a case where Fascist officials were directly involved in a sale (which has not been alleged here), an Italian court rejected plaintiff's claim of duress because there was no genuine threat with a "specific and direct relationship" to the contract in question.[3] Even in a case where Fascist officials expressly threatened the seller (which, again, has not been alleged here), an Italian court rejected a claim of duress for failure to allege that the threats related directly to the transaction in question.[4] Here, the Amended Complaint's generic allegation of duress based on "the circumstances" thus falls well short of the standard for pleading duress under Italian law.[5]

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[3] *See* Trimarchi Op. nn.5 & 8 (citing Court of Appeal of Rome, 9 April/31 August 1953).
[4] *See* Trimarchi Op. n.9 (citing Tribunal of Bologna, 26 February 1952 (no duress where sale of land followed threats by Fascist leaders, because threats deemed too generic)).
[5] To the extent Plaintiff alleges duress based on the theory that Leffmann sold the Painting to "[t]ry[] to raise as much cash as possible for the flight and whatever the future would bring," AC

B. Italian Notions Of "Public Order" Or "Public Morals" Cannot Save The Amended Complaint

Although the Amended Complaint pleads a theory of duress, AC ¶ 9, Plaintiff's brief takes a new tack to try to avoid dismissal, relying heavily on Italian public order and public morals. This approach fails, however, because these concepts are inapposite. Under Italian law, contracts violate public order or public morals when parties seek to achieve unlawful ends. Trimarchi Op. ¶ 52. Here, there is no allegation that any of the parties to the 1938 Sale sought to accomplish an illegal objective through that Sale. To the contrary, it is undisputed that the Sale was for value on the international art market in Paris. The Sale has nothing in common with contracts that have been ruled null and void based on Italian public order or morals, *e.g.*, where spouses agreed to release themselves from the civil law obligation of fidelity; parties agreed to transact in certain goods during a time when the law required all of those goods to be transferred to the State; licensed business owners agreed to lease a business to an unlicensed individual; and parties entered a loan agreement to finance an illegal business. Trimarchi Op. n.30.

Plaintiff points to no examples of contracts resembling the 1938 Sale that have been deemed violations of Italian public order or morals.[6] She relies instead on a "set of post-War rules providing for particularly strong protections of Jewish individuals persecuted by the anti-Semitic laws," Opp. 22-23, but those rules did not apply to the 1938 Sale. As Plaintiff's own expert notes, they applied only to contracts formed "after October 6, 1938—the date when the directives on racial matters issued by the [Fascist] regime were announced" and only where the claimant could establish a certain level of damages." Frigessi Decl. ¶ 35, n.14; *see also*

¶¶ 28, 36, Opp. 23, that does not state a claim for duress, because there is no duress under Italian law when an individual makes a sale due to his financial needs. *See* Trimarchi Op. ¶¶ 44-50. In any case, the allegation that Leffmann sold the Painting to obtain cash in part for "whatever the future would bring," AC ¶ 36, contradicts her theory of urgent financial need.

[6] A 1988 review of cases regarding contracts Jews entered into during the Fascist era revealed no cases finding that the contracts violated public order or morals. Trimarchi Op. ¶ 57.

Trimarchi Op. ¶¶ 47, 62. Here, Plaintiff apparently concedes that the 1938 Sale does not meet either condition. Even if it did, the result would be to render the transaction *voidable* at the option of the victim (not void *ab initio*) and, even then, only for a period of one year following the War. *See* Frigessi Decl. ¶ 35 n.14; *see also* Trimarchi Op. ¶ 47 (recognizing that the period was extended by two years to 1948). Here, there is no allegation that the Leffmanns ever sought to void or otherwise repudiate the 1938 Sale.

Nor is there any authority for Plaintiff's new argument that it would be a violation of Italian public order and morals to enforce any contract where parties to a contract allegedly have taken advantage of a counter-party's state of necessity. Under Italian law, such contracts are generally enforceable, unless they fit within one of two special circumstances set forth in the Italian Code: one involving real estate and the other involving rescues at sea. Neither of these circumstances is remotely applicable here and, in any case, such contracts are voidable, not void *ab initio*. Trimarchi Op. ¶¶ 44-50.[7]

VI. Even If Plaintiff Had Adequately Alleged Duress, The Amended Complaint Fails To State A Claim Because The Leffmanns Ratified The 1938 Sale

Plaintiff concedes that even if Leffmann had sold the Painting under duress (which he did not), that would have rendered the 1938 Sale voidable (and not void *ab initio*), such that the Leffmanns would have had the choice of repudiating or ratifying it. Opp. 24. One who wishes to repudiate a sale made under duress must do so promptly after the duress subsides; if he fails to do so, he will be deemed to have ratified it. *See* Mot. 14-16 (discussing both New York and Italian law); Trimarchi Op. ¶¶ 28-31. Plaintiff concedes—by not disputing—that the New York law of ratification is fatal to her claim. And despite her effort to avoid dismissal by applying the Italian law of ratification, Opp. 25, it is equally fatal to her claims. Under Italian law, unless the

[7] In the event that the 1938 Sale is deemed a violation of public order or public morals, that would lead to the conclusion that the statute of limitations has expired. *See infra* n.9.

victim of duress repudiates a contract within five years after the duress subsides, it cannot be voided and Italian law will deem it to be ratified. *See* Trimarchi Op. ¶¶ 28-31 (citing 1865 Italian Civil Code, art. 1300 ("Actions for nullity or rescission may be brought within five years" after "the Violenza [duress] has ceased.")); *see also* Mot. 14, n.9 (citing same).

Plaintiff's argument that Italian law will not deem a contract to be ratified by "the lack of repudiation" within the five-year statutory period has no support. Plaintiff cites her Italian law expert for that proposition, who, in turn, offers no authority to support his conclusory assertion. Opp. 25 (citing Frigessi Decl. ¶¶ 71-72 (citing nothing)). In contrast, there is ample Italian authority to support the black letter rule that unless an individual repudiates a contract formed under duress within five years after the duress ends, the contract is enforceable. Trimarchi Op. nn. 16-17 (citing authorities). A failure to repudiate within the allowable period is deemed to be ratification. Trimarchi Op. ¶¶ 28-31. Here, the Leffmanns survived the 1938 Sale by eighteen and twenty-eight years, respectively, and the end of the War by eleven and twenty-one years, respectively, yet there is no allegation that they repudiated the contract. To the contrary, Plaintiff alleges that they received and accepted the proceeds of the 1938 Sale, which they allegedly continued to spend years after leaving Italy. AC ¶¶ 46-48. On these allegations, the law of ratification is fatal to Plaintiff's claims. Mot. 13-16.

Plaintiff tries to avoid the consequences of ratification by suggesting that it was somehow improper for the Museum to assume that the Leffmanns had the capacity in the post-War years to affirmatively repudiate the 1938 Sale or that they had any "viable avenue" for making post-War claims. Opp. 25; *see also* Frigessi ¶ 72. As Plaintiff knows from her own investigation and from extensive records of the Leffmanns' post-War claims (which the Museum obtained from government archives and shared with Plaintiff and her counsel and which Plaintiff or her counsel

also independently obtained), the Leffmanns had both the means and the capacity to engage sophisticated counsel who helped them successfully pursue numerous post-War claims for Nazi-era losses.[8] These claims contained no mention of the Painting. Leaving aside whether it was proper to omit such facts from the Amended Complaint, Plaintiff should not be heard to suggest that the Leffmanns were unable to submit post-War claims.

VII. Even If There Was Duress And No Ratification, The Amended Complaint Fails To State A Claim Because Title Subsequently Passed To A Good-Faith Purchaser

Plaintiff does not dispute that Foy was a good-faith purchaser in 1941 when she bought the Painting from a New York gallery that had it from Rosenberg. Nor does she dispute that "'[a] person with voidable title has power to transfer a good title to a good-faith purchaser for value.'" Mot. 16 (quoting *Solomon R. Guggenheim Found. v. Lubell*, 550 N.Y.S.2d 618, 623 (App. Div. 1990) (quoting UCC 2-403(1)), *aff'd*, 569 N.E.2d 426 (N.Y. 1991)). Instead, Plaintiff attempts to avoid the good-purchaser defense by asking this Court to treat the 1938 Sale like a theft that transferred *void* title, such that good title could not pass even to a good-faith purchaser. Opp. 26. However, that position directly contradicts Plaintiff's (correct) concession two pages earlier that, under Italian law, if Leffmann had sold the Painting under duress in 1938 he would have transferred *voidable* title, Opp. 24, and it also contradicts New York law, which says the same. *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 122 (2d Cir. 2001) ("[a] contract … which is induced by duress, is voidable"). Plaintiff's argument that this Court can treat a *voidable* foreign duress sale as a theft rests on misreading of *Schoeps*. That case involved a transfer allegedly made under "threats and economic pressures by the Nazi government" in Germany in 1935, which German law would have treated as *void*. *Schoeps*, 594 F. Supp. 2d at

[8] The Court may consider information beyond the four corners of the complaint for purposes of a Rule 12(b)(6) motion where, as here, "plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991).

465-66. *Schoeps* reasoned that if the sale was void under German law, the purchaser's title would be no better than a thief's because both would result in void title, and under New York law a good-faith purchaser cannot subsequently obtain valid title from a possessor of void title. 594 F. Supp. 2d at 466-67. But *Schoeps* says nothing to support treating *voidable* foreign duress sales as "thefts"; nor does it support Plaintiff's assertion that the 1938 Sale should be treated as *void*, contrary to both New York law and Italian law.[9]

VIII. The Amended Complaint Is Time-Barred

A. The Statute Of Limitations Bars Plaintiff's Claim

Plaintiff argues that her claim is not subject to the three-year statute of limitations because the HEAR Act revives certain claims for property "lost … because of Nazi persecution." Opp. 10. Plaintiff's position is that the Painting was "lost … because of Nazi persecution," even though it was safely in Switzerland and was sold on the open market through a dealer to private individuals in Paris, without any involvement by the Nazis or Fascists. But this position has no support in the text of the HEAR Act or her own Amended Complaint.

The Act, by its terms, protects "[t]hose seeking recovery of Nazi-confiscated art." Holocaust Expropriated Art Recovery Act of 2016 ("HEAR Act"), Pub. L. No. 114-308 § 2. The Act's stated purpose is to change the "laws governing claims to Nazi-confiscated art" for purposes of ensuring "that claims to artwork … stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations." HEAR Act § 3 ("Purposes"). The HEAR Act's purpose is thus to revive certain claims for artworks "confiscated," "stolen," or "misappropriated" by the Nazis. This is not such a case. Plaintiff cites paragraphs in her

[9] If the 1938 Sale were treated as a "theft," this action would be untimely because the "statute of limitations for conversion and replevin automatically begins to run against a bad faith possessor on the date of the theft or bad faith acquisition." *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 481-82 (S.D.N.Y. 2010), *aff'd*, 403 F. App'x 575 (2d Cir. 2010). *See supra* n.6.

Amended Complaint that supposedly allege the Painting was "lost" because of Nazi persecution, Opp. 11 (citing AC ¶¶ 3, 9, 26-28, 42, 47), but those paragraphs never once use the word "lost"; instead, they use words like "disposed of" (AC ¶ 3), "sell … under duress" (AC ¶ 9), "explore the possibility of selling" (AC ¶ 28), "turn … into cash" (AC ¶ 28), "sold" (AC ¶ 42), and "received from the sale" (AC ¶ 47). The HEAR Act's reference to art "lost … because of Nazi persecution" cannot be stretched to encompass a voluntary transaction for cash, which—according to Plaintiff's own allegations—was a negotiated "sale" on the open market through a Paris dealer to two French dealers, and where no Nazis or Fascists took actions to compel or restrict that Sale, or were otherwise involved in it.

Plaintiff argues that if the HEAR Act does not apply, her claims are still timely because New York's demand-and-refusal rule tolled the limitations period for many decades. As discussed above, however, even if the Leffmanns once had a claim for duress, they ratified the 1938 Sale by not promptly bringing that claim in the post-War years, *see supra* VI; and, in any event, title would have passed in 1941 to Foy as a good-faith purchaser, *see supra* VII. Thus, neither of the Leffmanns had a viable claim for duress at the time of his or her death in 1956 and 1966, respectively.[10] Nor can Plaintiff confer upon the Estate a claim that was extinguished before the Leffmanns died many decades ago simply by making a demand that the Museum refuses. *See Estate of Young*, 367 N.Y.S.2d 717, 722 (Sur. Ct. 1975) ("A personal representative acquires only such title as the decedent had."); *see also Grosz*, 772 F. Supp. 2d at 482 ("plaintiffs have no more right to *Poet* than Grosz would have had if he were still alive").

[10] Plaintiff cannot use *Republic of Turkey v. Metropolitan Museum of Art*, 762 F. Supp. 44 (S.D.N.Y.1990), to avoid the conclusion that any claim to undo the Sale expired during the Leffmanns' lives. Opp. 12. The *Turkey* court's holding—that an owner's delay in bringing a replevin claim for stolen items did not bear on the statute of limitations defense against that claim—does not affect this case, where the Leffmanns sold the Painting and then took no action to undo it within the prescribed limitations period (or ever).

In any event, demand-and-refusal does not apply because the Museum has openly possessed and displayed the Painting as its own since 1952. *See SongByrd, Inc. v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000). Plaintiff tries to distinguish *SongByrd* on the ground that it involved a "shift in character of the possession" of the music recordings when the custodian began to openly treat them as his own, Opp. 13, but the "shift" is irrelevant here. There is no dispute that the Museum has openly treated the Painting as its own, *e.g.*, by accepting the donation, AC ¶ 54, adding it to the Museum's permanent collection, or putting it on public display. *See Del Piccolo v. Newburger*, 9 N.Y.S.2d 512, 513 (1st Dep't 1939) ("[T]o establish a conversion it is unnecessary to show a demand when the holder exercises an act of ownership inconsistent with the ownership and dominion of the true owner, as such an act itself constitutes an unlawful misapplication amounting to a conversion."). Here, the Amended Complaint makes clear that the Museum has treated the Painting as its own, in a way that was clearly inconsistent with Leffmann's (and the Estate's) alleged ownership. AC ¶¶ 52-67. In this circumstance, demand-and-refusal cannot revive a claim that expired many decades ago.

B. Laches Bars Plaintiff's Claim

A dismissal based on laches prior to discovery would not be "premature." Opp. 14-15. The parties have spent years investigating the facts and the Museum has shared with Plaintiff and her counsel all relevant documents and information it possesses. Mot. 1-2. As a result, the facts material to a laches defense are known to both parties: neither the Leffmanns nor the Estate has made a prior claim against the Museum, and the instant claims come nearly eight decades after the 1938 Sale, more than seven decades after the end of the War, and more than six decades after the Museum acquired the Painting. These are unreasonably long delays. Plaintiff suggests the Leffmanns may have been too elderly or incapable of finding the Painting in the post-War years, but the Leffmanns survived the War by many years, retained sophisticated counsel, and

successfully brought other post-War claims. *See supra* 10-11. Moreover, the Museum has been prejudiced by the delay because the Leffmanns, Rosenberg, Hugo Perls, Kate Perls, Foy, and other would-be witnesses are deceased. "[W]here the original owner's lack of due diligence and prejudice to the party currently in possession are apparent, [laches] may be resolved as a matter of law." *Matter of Peters*, 821 N.Y.S.2d at 69.

Plaintiff cannot avoid a laches dismissal by accusing the Museum of failing at the time of the acquisition to "discover[], through due diligence … the circumstances under which [Leffmann allegedly] was compelled to dispose of the Painting because of Nazi and Fascist persecution." Opp. 17-18. Even the most thorough diligence at that time would have revealed the same "circumstances" now alleged in Plaintiff's Amended Complaint, *i.e.*, that the Leffmanns spent months offering the Painting for sale on the international art market, negotiated with multiple parties, and ultimately accepted the highest offer in an arms-length sale through a dealer in Paris to two French dealers, and no Nazis or Fascists took actions to compel or restrict that Sale, or were otherwise involved in the Sale. Mot. 5-6 (citing AC ¶¶ 14, 28, 32-33, 36-37, 43, 47).

Nor can Plaintiff avoid a laches dismissal by accusing the Museum of "unclean hands" based on an alleged failure to discover that the Painting had been "misappropriated." Opp. 17. Not only was the Painting never "misappropriated" (and therefore the Museum cannot be penalized for failing to discover that it was), but also this accusation is undermined by Plaintiff's prior assurance (in her effort to preserve the demand-and-refusal rule) that she "makes no such allegation" of a bad faith acquisition by the Museum. Opp. 13.

CONCLUSION

For the foregoing reasons, the Museum respectfully requests that this Court dismiss the Amended Complaint, or stay the case pending resolution of the petition in Surrogate's Court.

Dated: New York, New York
February 27, 2016

Respectfully submitted,

/s/ David W. Bowker

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Attorneys for Defendant The Metropolitan Museum of Art

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,	:	
Plaintiff,	:	16 CIV 07665 (LAP)
vs.	:	(Oral Argument Requested)
THE METROPOLITAN MUSEUM OF ART,	:	
Defendant.	:	

DECLARATION OF DAVID W. BOWKER IN SUPPORT OF THE METROPOLITAN MUSEUM OF ART'S REPLY BRIEF IN FURTHER SUPPORT OF THE MOTION TO DISMISS THE AMENDED COMPLAINT

I, David W. Bowker, declare as follows:

1. I am counsel to Defendant The Metropolitan Museum of Art ("Museum") in the above-captioned matter, and I am competent to testify to the matters below. I submit this declaration in support of the Museum's Reply Brief in Further Support of the Motion to Dismiss The Amended Complaint.

2. Attached hereto as **Exhibit 1** is a true and correct copy of the opinion of Professor Pietro Trimarchi, a professor of civil law at the Law School of the State University of Milan, on Italian law issues that are relevant to this litigation.

3. Attached hereto as exhibits are true and correct copies of the following Italian decisions, along with certified English translations; these are some of the key decisions that appear in Professor Trimarchi's opinion:

- **Exhibit 2:** Court of Cassation, No. 697, 21 March 1963, in *Giur. it.*, 1963, I, column 858 et seq., which appears in paragraphs 20-21 and footnote 5 of Professor Trimarchi's opinion.
- **Exhibit 3:** Court of Appeal of Rome, 9 April/31 August 1953, in *Rass. Mens. Avv. Stato*, 1954, page 25 et seq., which appears in footnotes 5 and 8 of Professor Trimarchi's opinion.
- **Exhibit 4:** Court of Cassation, No. 2150, 28 July 1950, in *Giur. compl. cass. civ.*, 1950, III, page 718 et seq., which appears in footnote 6 of Professor Trimarchi's opinion.
- **Exhibit 5:** Court of Palermo, No. 113, 14 June 1946, in *Rep. Foro it.*, 1947, "*Obbligazioni e contratti*", which appears in footnote 6 of Professor Trimarchi's opinion.
- **Exhibit 6:** Court of Cassation, 17 March 1954, in *Giust. civ.*, 1954, page 657 et seq., which appears in paragraph 20 and footnote 7 of Professor Trimarchi's opinion.
- **Exhibit 7:** Court of Bologna, 26 February 1952, in *Temi*, 1952, page 355 et seq., which appears in footnotes 7 and 9 of Professor Trimarchi's opinion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Washington, D.C. this 27th day of February, 2017.

/s/ David W. Bowker
David W. Bowker

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,	:	16 CIV 07665 (LAP)
Plaintiff,	:	
vs.	:	
THE METROPOLITAN MUSEUM OF ART,	:	
Defendant.	:	

EXPERT OPINION OF PROFESSOR PIETRO TRIMARCHI

1. I have been asked by counsel for The Metropolitan Museum of Art to provide my expert opinion on the Italian law applicable in 1938 to contracts entered into under duress or on unfair terms in a situation of financial need.

2. I am a member of the Italian Bar and maintain a practice focused on civil litigation, contract and tort liability and commercial law. I have been a professor of civil law at the Law School of the State University of Milan since 1967 and am now a professor emeritus.

3. I have published five monographs on tort, contract, unjust enrichment and company law, and papers on tort, breach of contract, antitrust, company law, and economic analysis of the law. I have published a handbook of civil law, "*Istituzioni di diritto privato*" (21st edition in 2016).

4. I am an Honorary Member of the European Association of Law and Economics (EALE) and Honorary President of the SIDE-Società Italiana di Diritto ed Economia (Italian Association of Law and Economics). I was Chairman of the Committee for the drafting of the statute on products liability (1988); Member of the Committee for the reform of company law (2002); and Member of the Committee for the reform of arbitration law (2004-2005).

5. I graduated in law from the Law School of the State University of Milan. My curriculum vitae contains additional details on my background, experience and publications. It is attached hereto as Appendix 2.

6. I have been retained by The Metropolitan Museum of Art. I am compensated for my work on this matter at the rate of € 1,000 per hour. My compensation is not dependent on the substance of my testimony or the outcome of this matter.

7. This report is a statement of opinions in this matter and the basis and reasons for those opinions. In forming the opinions expressed in this report, I have relied on my education, experience and knowledge of the subjects discussed. I have also reviewed, considered and relied upon the authorities cited herein.

PRELIMINARY REMARKS REGARDING ITALIAN LAW

8. My opinion regarding Italian law is based upon the 1865 Italian Civil Code, which was in force until it was replaced in 1942 and takes into account as well a statute enacted in 1945 (which was partially amended by a statute of 1947), which was declared retroactively applicable to some contracts entered into by persons affected by racial laws, on or after 6 October 1938. My opinion is based on the Italian doctrine, judicial decisions and commentary interpreting and applying that Code and relevant statutes. It must be borne in mind that under Italian law, as under other civil law legal systems, judicial precedents are not binding, but merely reflect authoritative interpretations and applications of the law by Italian courts. Judicial decisions may be more or less authoritative, depending on the persuasive force of the analysis and reasoning, whether they come from the higher or lower courts, and whether they are isolated or instead part of a broader trend over time.

9. Furthermore, under the Italian legal framework of civil law, the views expressed in the legal literature or commentaries may also be important, again with a greater or lesser weight depending on the persuasive force of the arguments put forward, and whether they are isolated opinions, or instead positions generally

accepted by courts, scholars, and commentators.

10. It is also important to note that the 1865 Civil Code was replaced in 1942 by a new civil Code. Some cases subseqnent to 1942 and related doctrinal comments are also cited below, which are relevant here to the extent that they relate to events prior to 1942, decided iu accordance with the provisions of the previous Code.

OPINION

Based on my knowledge and the materials cited herein, the following report represents my expert opinion on Italian law.

Duress ("*Violenza*") as a cause of voidability of a contract

11. Article 1108 of the 1865 Civil Code provides that *"Consent is not valid if it was given by mistake, extorted by duress ("violenza"), or obtained by fraud"*.

12. In this provision, the word ***Violenza*** (*i.e.*, "duress") means the threat of unjust harm made in order to force a person to enter into a contract, which otherwise would not have been concluded. In other words, the threatened person is faced with the alternative: either enter into a particular contract, or meet the threatened unjust harm. If the person under threat yields, considering the contract he was reqnested to conclude the lesser evil, the contract is voidable for duress.

13. In order for duress to render a contract voidable, it is first necessary that it was a **determining cause**, *i.e.*, that the contract would not have been entered into but for the threat. In other words, the fear induced by a specific and concrete threat of harm, purposefully presented by its author to extort the victim's consent, must have induced the victim to enter into a contract that would not otherwise have been concluded.

14. One author has expressed the opinion that, if the contract would have been signed anyway, but at different terms, voidahility wonld be excluded and only damages conld be claimed, applying, by analogy, the provision dictated by the

Code in relation to fraud[1]. But, to my knowledge, this view has remained isolated: the generally accepted view was that, if the threat forced the victim to accept terms and conditions he would not otherwise have accepted, the contract is voidable[2].

15. The harm threatened must be **unjust**. The threat to have recourse to legal action is not unjust, provided it is merely intended to help enforce an existing right. Thus, it is legitimate to make use of the threat of legal enforcement to ensure that the debtor provides a lien or a mortgage to secure the debt: here the creditor seeks to obtain greater certainty of receiving what is due, and nothing more. It is equally permissible to threaten legal enforcement to ensure that the debtor undertakes to pay a fair rate of interest until the debt is repaid: here the creditor aims at obtaining only a fair consideration for the deferred payment granted to the debtor. But if the threat to have recourse to legal action is made to obtain something more than what is owed, or to obtain something that does not constitute a mere reinforcement of that right, or a fair consideration for an extension granted, it is unjust and renders the contract voidable.

16. The threat has to be **serious**. Article 1112 of the 1865 Civil Code provides that "*Consent is deemed to have been extorted by duress* (violenza) *when the latter is of such nature as to impress a reasonable person and to strike reasonable fear of exposing that person, or that person's assets, to considerable harm*". The same provision states that, in assessing the seriousness of the threat and its causal effectiveness, reference is made to the age, gender, and condition of the person threatened. This means that, while, on the one hand, a threat that no reasonable person would take seriously cannot cause voidability, voidability cannot be excluded for the mere reason that a stronger and more courageous person would resist the threat.

17. Article 1113 of the 1865 Civil Code then specifies that duress may render a contract voidable even in cases where the threatened harm is directed against a party who is not one of the contracting parties: "*Duress may invalidate the contract even when the threatened harm is directed against the person, or the assets, of the spouse, the descendant, or the ascendant of the contracting party*". If

[1] GIORGI, (1891), page 94 et seq.
[2] BOCCA, (1904), page 63 et seq.

it concerns other people, it is up to the judge to assess the causal effectiveness of the threat, according to the circumstances (Article 1113 of the 1865 Civil Code): a threat of harm to the spouse, the descendant or the ascendant is deemed in any case to be effective; not necessarily so a threat concerning other persons.

18. Mere awe ("*metus reverentialis*"), that is the timidity or fear of disapproval of the parent, a superior, or a person of authority, is not a cause of voidability (Article 1114 of the Italian 1865 Civil Code).

19. The mere fear of reprisals or retaliation does not render the contract voidable if they are only assumed by a contracting party and not actively threatened (so-called *"metus ab intrinseco"*)[3]. It must be considered, however, that the threat need not be explicitly made with words, but may result from behavior, and can be interpreted as actively threatened in view of the behavior in similar cases[4].

20. In applying this principle, the Court of Cassation has repeatedly held that "*it is not the mere fear of retaliation, easy to arise in the mind of citizens during the fascist regime, in case of refusal of the requests from the dominant political party, or from some of its leaders, that could render void on the grounds of duress the contract concluded with the fascist party or its leaders, who requested and solicited that contract, but a real threat of retaliation must have actually occurred. Such threats may even be presented latently or discreetly, or at least presumed in view of the behavior of the fascist party in similar cases*"[5]. In other words, "political violenza", as a cause of voidability of contract, must be a specific and concrete threat[6], be it expressly made with words, or implicitly suggested by

[3] Court of Appeal of Florence, 20 June 1953, in *Rep. Giur. It.*, 1953, "*Obbligazioni e contratti*", n. 245.
[4] JEMOLO, (1963), column 859 et seq.
[5] Court of Cassation 21 March 1963, No. 697, in *Giur. it.* 1963, I, column 858 et seq.; Court of Appeal of Rome, 9 April/31 August 1953, in *Rass. Mens. Avv. Stato,* 1954, page 26 ("The generic and wholesale persecutions exerted by the Fascists against their political opponents … where there is no specific and direct relationship between such persecutions and the agreement concluded allegedly as a result of duress ['violenza'] do not amount to duress"); Court of Cassation 10 June 1957, No. 2154, in *Mass. Giur. it.* 1957, column 482 et seq.; Court of Cassation 5 May 1955, No. 1264, in *Rep. Foro. it.* 1955, page 222, no. 58.
[6] Such as in the following cases of threats by the fascists or by the occupying German army: Court of Palermo, 14 June 1946, in *Rep. Foro it.*,1947, "*Obbligazioni e contratti*", n° 113 (contract voidable for duress where owner was forced to choose between selling land and risking retaliation); Court of Cassation 28 July 1950, No. 2150, in *Giur. compl. cass. civ.*, 1950, III, page 718 (contract voidable for duress where owner was forced to choose

recommendations that in similar cases were followed by retaliation if not acted upon, purposefully aimed at extorting the victim's consent to the specific contract. Failing this, the contract is not voidable: for instance, a sale of real estate to a local fascist party was not held voidable for "*political violenza*" because the court established that: *(i)* the fascist leaders had not made any express threat to extort the other party's consent; and *(ii)* the seller had previously refused other solicitations from the fascist party leaders without suffering any prejudice[7].

A general climate of persecution against political opponents of Fascism does not render a contract voidable for duress, if persecution was not threatened to extort consent to the contract[8].

A mere suspicion of a threat is not enough[9].

21. Above all, an implicit threat cannot be said to exist, of course, if the contract is not proposed or recommended by, or beneficial to, a person or entity that under the circumstances can be presumed to be likely to retaliate if the contract is not entered into. Court of Cassation, decision N° 697 of 21 March 1963, cited above, states that threats can be presumed implicit in case of "*requests from the dominant political party or from some of its leaders*" and refers to "*the contract concluded with the fascist party or its leaders, who requested and solicited that contract*". Court of Cassation, decision N° 376 of 15 February 1950, refers to a gift to a Fascist organization (in a case where, moreover, the threats had been explicit). The Court of Palermo, decision of 7 March 1972, refers to a contract solicited by a mafia leader.

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between selling vehicle and risking seizure by Nazi army); Court of Naples, 25 June 1947, in *Dir. giur.*, 1947, page 159 et seq.; Court of Avezzano, 9 February 1949, in *Rep. Foro. It.*, 1950, "*Obbligazioni e contratti*", n° 504; Court of Cassation, 26 March 1949, n° 684, in *Foro pad.*, 1949, IV, page 196; Court of Appeal of Palermo, 22 May 1953, in *Rep. Giur. It.*, 1953, "*Obbligazioni e contratti*", n° 237; Court of Appeal of Bologna, 28 January 1956, in *Giust. Civ.-Mass. App.*, 1956, page 172, n° 37.

[7] Court of Cassation, 17 March 1954, in *Giust. civ.*, 1954, page 657 et seq., which upheld the decision of Court of Appeal of Florence, 21 March 1952, in *Giur. tosc.*, 1952, page 458 et seq. See also Court of Appeal of Bologna, 18 May 1948, in *Rep. Giur. It.*, 1949, v. "*Obbligazioni e contratti*", n° 275; Court of Bologna, 26 February 1952, in *Temi*, 1952, page 355 et seq. (no duress where sale of land followed threats by Fascist leaders, because threats deemed too generic).

[8] Court of Appeal of Rome, 9 April/31 August 1953, in *Rass. Mens. Avv. Stato*, 1954, page 26.

[9] Court of Bologna, 26 February 1952, in *Temi*, 1952, page 355 et seq.

22. Dnress as a cause of voidability of the contract may originate from the counterparty, or a **third party**: "*Duress used against a contracting party may invalidate the contract even if it was used by a person other than the one in whose favor the contract was entered into*" (Article 1111 of the 1865 Civil Code). It is only necessary that the threat, whoever it originates from, is specific and concrete and is purposefully presented to extort the victim's consent to the specific contract at issue, which would otherwise not have been accepted.

23. If the threat is made by a third party, it is not necessary that snch threat is known to the contractual counterparty of the victim[10]. Thus, for example, if a serious threat of harm was made by a member of the fascist party to compel someone to sell something to another member of the party, the sale is voidable even if the threat was not known to the fascist party member who was the buyer.

24. *Violenza* as a cause of voidability must be a threat made for the purpose of obtaining consent to the specific contract. The contract concluded on unfair terms in a situation of financial need caused by the illicit action of a third-party which, however, was not aimed at forcing the conclusion of that specific contract could not be deemed voidable for *Violenza*[11]. Thus, for example, the contract is not voidable for duress in case of a sale entered into because of the need of obtaining a large amount of money demanded by a third party -- a blackmailer. This is, instead, an instance of *necessity*, not of duress, as discussed below, *see infra* ¶¶ 44-49.

25. It must be mentioned here that, under the 1865 Civil Code, according to a minority opinion a contract could be deemed voidable for *Violenza* even if entered into in an instance of necessity, such as the one described in the previous paragraph[12]. This opinion was however rejected, because it was incompatibile with

[10] MATTEI, (1874), page 30. As to judgments: Court of Appeal of Casale, 12 June 1882, in FADDA, PORRO, RAIMONDI, VEDANI, (1919), vol. V, page 177, no. 34. *Contra:* Court of Appeal of Palermo, 28 October 1899, *therein*, page 177, no. 36.

[11] Court of Cassation of Palermo, 18 July 1893, in FADDA, PORRO, RAIMONDI, VEDANI, (1919), vol. V, page 177, no. 38; Court of Appeal of Napoli, 2 May 1906, *therein*, page 177, no. 38; Court of Cassation, 23 April 1935, in *Mass. Giur. it.*, 1935, column 395, no. 1427; Court of Cassation, 3 July 1936, in *Mass. Giur. it.* 1936, column 639, no. 2343.
As to the legal literature: N. COVIELLO, (1915), page 397 et seq.; FUNAIOLI, (1927), page 154 et seq.; SANTORO-PASSARELLI, (1947), page 161.

[12] Court of Cassation of Turin, 30 January 1895, in FADDA, PORRO, RAIMONDI, VEDANI, (1919), vol. V, page 177, no. 41; GIORGI, (1891), page 100 et seq.; BOCCA,

the provision of law requiring consent to have been "*extorted*" by *Violenza*[13]. Therefore, the old judgement of the Court of Cassation of Turin (1895) cited in footnote 12, which was in contrast with other judgements of the same period[14], was superseded by the constant later judgements, in accord with the anthoritative legal writers already cited[15].

26. In conclusion, according to the 1865 Civil Code, for a contract to be voidable for duress, the following requirements must be met:

a. the specific and concrete threat of a present or future harm, directed against the person or the assets of the claimant, the spouse, a descendant, or an ascendant; if the threat concerns other people, the judge can, depending on the circumstances, rule that the threat established a causal link to the conclusion of the contract;
b. the threatened harm has to be "considerable" and "unjust";
c. the threat has to be serious, i.e. of "*such nature as to impress a reasonable person and to strike reasonable fear*";
d. the consent to enter into a contract that the victim would not otherwise have concluded has to be "extorted" by the threat, *i.e.*, the threat must have been purposefully presented to extort the victim's consent to the specific contract.

27. When even only one of the above-mentioned requirements is not pleaded and proved, courts will not find duress and the contract cannot be held voidable for *duress*.

Action for annulment and statute of limitations

28. To remove the effects of the contract entered into under duress a judgment is required, granting the claim brought by the victim (or his/her heirs) against the other contracting party (or his/her heirs).

29. Also under the 1865 Civil Code (as well as under the current Civil

(1904), page 101; SCOGNAMIGLIO, (1953), page 386 et seq.
[13] N. COVIELLO, (1915), page 397.
[14] Court of Cassation of Palermo, 18 July 1893; Court of Appeal of Napoli, 2 May 1906, cited in footnote 11 above.
[15] See footnote 11 above.

Code) the time bar for the annulment action is five years, running from the day the *Violenza* ceased: "*Actions for nullity or rescission may be brought within five years in all cases where such limitation period is not reduced by a more specific provision. This statute of limitations starts to run when the Violenza has ceased ...*" (Article 1300 of the 1865 Civil Code).

30. A contract extorted by duress and performed by the victim (which is voidable, not void) can only be voided if an action is brought by the victim within the five-year limitation period[16]; failing this, it is effective without interruption. This means that if an alleged victim of duress wishes to repudiate a contract after having performed it, he must do so within the five-year time limit. Inaction during the time limit for repudiation of a fully performed contract therefore effectively results in ratification of the contract.

If the contract has not been fully performed, the victim of duress, if sued for performance, can at any time plead voidability of the contract. In other words: the action, not the defence, is time-barred.

31. Therefore, the victim can ratify the contract, either by a specific covenant or voluntary performance in the awareness of the duress, pursuant to Article 1309 of the 1865 Civil Code, or by both having performed the contract and not bringing an action for annulment within the five-year limitation period, pursuant to Article 1300[17].

32. Misunderstanding should not arise out of the fact that the provisions of the 1865 Civil Code regarding duress refer to "*nullità*" of the contract. This is the same word which the code uses for the voidability of contracts made by mistake, obtained by fraud, or made by minors, all of which are subject to the same rules concerning the right to bring the action for annulment, the five-year limitation period and the possibility of confirmation (Articles 1300, 1301 and 1309 of the 1865 Civil Code). In all these cases it is up to the party protected by the law (the

[16] *See, e.g.*, Court of Cassation of Turin, 13 May 1914, in FADDA, PORRO, RAIMONDI, VEDANI, (1925), vol. VI, page 894, no. 213; Court of Cassation of Florence, 3 February 1908, in FADDA, PORRO, RAIMONDI, VEDANI (1925), vol. VI, page 900, no. 302; Court of Cassation of Rome, 10 April 1907, in FADDA, PORRO, RAIMONDI, VEDANI (1925), vol. VI, page 897, no. 246; Court of Appeal of Trani, 12 May 1905, in FADDA, PORRO, RAIMONDI, VEDANI, (1925), vol. VI, page 896, no. 235.

[17] LOMONACO, (1890), page 511.

victim of duress, or fraud, the party in error, the minor) to decide whether to bring an action for annulment, or not, within the five-year limitation period; in this regard Article 1300 of the 1865 Civil Code provided that "*This limitation period starts to run, in the case of duress, when the threat has ceased; in the case of mistake or fraud, when these are discovered;...in the case of contracts entered into by minors, when they come of age...*".

33. In all these cases the 1865 Civil Code uses the word "*nullità*". In the cases of nullity *ab initio* because of lack of the form required by the law (donation not made by notarial act: Article 1056; oral transfer of real estate, Article 1314) the 1865 Civil Code also uses the words "*nullo, nullità*" but then specifies, with Article 1310, that these are cases of "*nullità assoluta*" (absolute nullity), which cannot be remedied by confirmation. Other instances of "*nullità assoluta*" are contracts illicit on grounds of public policy (*e.g.*: hiring someone to commit a crime) and contracts devoid of a necessary element (for instance: acceptance not corresponding with the offer; sale of a nonexistent thing; a contract of sale that gives no indication concerning the price). Other wordings for the nullity *ab initio* were: "*nullità ipso jure*"[18], or "*nullità radicale*" (radical nullity)[19].

34. In the legal literature and in the judgments of the time the words "*nullità relativa*" were sometimes used, instead of the simple "*nullità*", in order to stress the difference with the "*nullità assoluta*"[20]. Other scholars and judgements used the terms "*annullabile, annullabilità, annullamento*" (voidable, voidability, voidance/annulment) for all cases (such as mistake, fraud, duress, minority) where the action can be brought only by the protected party within a certain limitation period and the contract can be confirmed[21], and often used these words

[18] MATTEI, (1874), page 31.
[19] Court of Cassation, 6 February 1948, N° 193, in *Foro it.*, 1948, I, page 614; Court of Cassation of Rome, 28 June 1911, in *Foro it.* 1911, I, page 1256.
[20] GIORGI, (1891), page 46, ¶ 37; LOMONACO, (1890), page 502 et seq. Court of Cassation of Rome, 28 June 1911, in *Foro it.* 1911, I, 1256; Court of Cassation of Rome, 15 October 1912, in *Foro it.*, 1913, I, 13; Court of Appeal of Milan, 14 April 1891, in FADDA, PORRO, RAIMONDI, VEDANI (1925), page 895, n° 215.
[21] BORSARI, (1877), page 767 et seq.; SIMONCELLI, (1921), page 321; BOCCA, (1904), page 115; N. COVIELLO, (1915), page 398 et seq.; N. STOLFI (1931), page 763 et seq.; MARTINEZ, (1936), pag. 655 and footnote 1504 *therein*. Court of Cassation of Rome, 28 June 1911, in *Foro it.* 1911, I, 1256; Court of Cassation of Rome, 15 October 1912, in *Foro it.*, 1913, I, 13.

interchangeably with the words "*nullo*" or "*nullità*"[22], or stressing that the word "*annullabile*" (voidable) would be more precise than the word "*nullo*" used by the code, and therefore preferable[23] (the term "*annullabile*" was later adopted by the new 1942 Civil Code).

In particular, the terms "*nullità relativa*" and "*annullabilità*" (*i.e.*, voidability) were used in respect of contracts tainted with *Violenza*[24].

35. Actions based on "*nullità assoluta*" (voidness) significantly differ from those with "*nullità relativa*" (voidability) as a cause of action. Actions involving the "*nullità assoluta*" may be pleaded by any interested party; the nullity may be found *ex officio* by the judge; the contract cannot be remedied by confirmation; and the actions are effectively time-barred only by the statute of limitation for property-related claims and the relevant period for prescriptive acquisition ("*azioni reali e personali*": Article 2135 of the 1865 Civil Code)[25]. Actions involving "*nullità relativa*" or "*annullabilità*", provided for the protection of a contracting party (the victim of duress, or fraud, the party in error, a minor), may be pleaded only by the interested contracting party, whose action is time-barred after five years, and the contract can be remedied by confirmation[26].

36. Once a voidable contract has been voided, it loses effect. Consequently, the contractual parties are entitled to demand from the respective counterparty restitution for any performance rendered under the contract. If the voidable contract has not been voided by a judgment granting the annulment requested by the victim by an action brought within the five-years limitation period, it remains in effect and is binding and enforceable.

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[22] Court of Cassation of Rome, 9 November 1893, in *Fora it.*, 1894, I, 1-4; Court of Appeal of Venice, 29 December 1887, in *Foro it.*, 1888,I, 526; CHIRONI, (1889), page 49, ¶ 289; LOMONACO, (1890), page 504, 511; SIMONCELLI, (1921), pages 314-323; BOCCA, (1904), page 115.

[23] N. STOLFI, (1931), §1029, page 758; MARTINEZ, (1936), page 655, footnote 1504.

[24] MATTEI, (1874), page 527, ¶ 13; BORSARI, (1877), page 767 et seq.; SIMONCELLI, (1921), page 321; BOCCA, (1904), page 115; N. COVIELLO, (1915), page 398 et seq.; N. STOLFI, (1931), ¶ 1045, page 763 et seq.; MARTINEZ, (1936), ¶ 329, page 665. Court of Appeal of Venice, 29 December 1887, in *Foro it.*, 1888, I, 526.

[25] MARTINEZ, (1936), ¶ 327, page 658 et seq..

[26] N. STOLFI, (1931), ¶ 1046, page 764 et seq.; MARTINEZ, (1936), ¶ 327, page 666 et seq.

Effect of the action for voidability against third party assignees

37. As mentioned above, the action for annulment of a contract formed under duress has to be brought against the contractual counterparty (or his/her heirs). Unless the contract has been previously adjudged invalid in the proper lawsuit, no action can be brought against any third-party assignee[27].

38. The annulment, if properly obtained within the five-year limitation period, has retroactive effect: the counterparty of the victim is considered as if he or she had never had title. Under the 1865 Civil Code this meant that, if the good sold by means of the contract subsequently voided for *Violenza* had been meanwhile sold, or donated, by the purchaser to a third party, this latter was obliged to return it to the original owner[28], except what is specified in the next sections.

39. The 1865 Civil Code (as well as the present 1942 Civil Code) provided protection of the third party assignee, *i.e.*, the subsequent owner, of movable goods, if the following requirements were met: (a) that the third party had entered into a valid contract for the acquisition (purchase, donation, and so on); (b) that the movable good had been delivered to him/her; and (c) that the third party was in good faith at the time of delivery. In fact, Article 707 of the 1865 Civil Code provided (as does Article 1153 of the current Civil Code) that "*With regard to goods movable by their nature and bills of exchange, possession provides third parties in good faith with the same effect title would*", which means that possession transferred by delivery to the third party-assignee remedies the possible defect in the seller's entitlement (a defect which would ensue from the annulment of the acquisition contract concluded by the seller), so that the assignee immediately acquires a full title to the good.

40. In this respect, Article 702 of the 1865 Civil Code (as well as Article 1147 of the 1942 Civil Code) provides that it is sufficient that good faith - *i.e.*, the unawareness of infringing on another's right - is present at the time of delivery. Furthermore, it provides that good faith is presumed, which means that the burden of proving bad faith is on the claimant.

41. Concerning the annulment of voidable contracts, Article 1445 of the

[27] N. COVIELLO, (1915), page 399.
[28] LOMONACO, (1890), page 556; N. STOLFI, (1931), ¶ 1047, page 764 et seq.

new Italian Civil Code, which entered into force in 1942, has further extended the protection of third-party good-faith buyers to any right (not only movables) and, in case of movables, even if the good has not been delivered (the case of transfer of real estate is governed by further special provisions). Article 165 of the transitional provisions then rules that "*The effects of the annulment ... of contracts on third parties are governed by the provisions of the 1865 Civil Code if the action was brought before the new code entered into force*".

42. Therefore, if the action for annulment of a contract entered into before 1942 is brought today and successful, a previous good faith purchase by a third party of the movable good that was the object of the contract subsequently voided for duress would not be challengeable even if the movable good had not been delivered. This is added to the protection described above at ¶ 39.

43. If the title of the third party assignee is not challengeable, the good can validly be further transferred by any contract (sale, donation, and so on) and the entitlement of the successor is equally safe.

Contracts entered into on unfair terms because of financial need

44. The Italian Civil Code of 1865, which was in force in the 1930s, did not provide a general rule of invalidity of the contracts entered into on unfair terms by contracting parties in a state of financial need. There were two special rules for contracts entered into under such circumstances, neither of which applies here. One special rule was laid down only for sales of real estate. Another rule provided for protection in cases of rescue at sea. As discussed below, contracts entered into in those circumstances were voidable, not void *ab initio*.

Both rules referred to situations, which are completely different from the one discussed here. I will briefly describe them further, though, to provide a general survey of the overall legal framework related to this issue.

45. As to sales of real estate, Article 1529 of the Italian 1865 Civil Code provided that: "*A seller that was harmed in excess of one half of the fair price of real estate is entitled to seek rescissian of the sale, even if in the contract the seller expressly waived his right to seek such a rescission and stated that he was donating the exceeding portion of the price*".

Article 1531, paragraph 1, added that: "*The claim is barred after two years have elapsed since the date of the sale*".

Article 1308 provided that:

"*1. An action for rescission on grounds of harm ('lesione') cannot be brought, even where minors are involved, except in the cases and under the conditions expressly set forth by law.*

2. Such action, in the cases in which it is admissible, cannot be enforced to the detriment of third parties that obtained rights to the real estate before the claim for rescission was registered".

As mentioned above, these provisions do not apply outside the context of real estate.

46. With regard to rescue at sea, article 7 of law N° 938 of 14 June 1925 provided that:

"*Any agreement regarding assistance or rescue entered into at the time of and under the influence of the danger may, at the behest of one of the parties, be voided or modified by the court if the court believes that the terms agreed to are unfair*".

Again, this provision does not apply outside the context of rescues at sea.

47. General rules for the invalidity of contracts entered into on unfair terms by contracting parties in a state of need or danger were enacted only with the Italian 1942 Civil Code and, therefore, are not applicable to contracts entered into previously, with an exception, within specific legal limits, established in 1945 for the benefit of persons affected by racial laws.

The statutory provision in question (Article 19, Lieutenancy Legislative Decree N° 222 of 12 April 1945) provides as follows:

"*For contracts of sale entered into by persons affected by the racial laws after 6 October 1938, the date when the directives on racial matters issued by the former regime were announced, an action for rescission pursuant to article 1448 et seq. of the Italian Civil Code is allowed until one year after the end of the state of war, provided that the harm ('lesione') exceeds one fourth of the value, at the time of the contract, of the good sold*".

Subsequent Decree N° 771 of 31 July 1947 provided that the action for rescission could be brought until 15 April 1948.

These provisions are limited to contracts formed after 6 October 1938, when the racial laws were announced, and only by persons affected by those laws, where the harm exceeded one-fourth of the value of the asset, and the actions could only be brought before 15 April 1948.

48. Article 1448, paragraphs 1 and 2, of the new Italian Civil Code, cited in the above Decree, provides as follows:

"*If there is a disproportion between one party's performance and that of the other party, and the disproportion resulted from one party's state of need, of which the other party took advantage, the harmed party may seek rescission of the contract. The action may not be brought if the harm ('lesione') does not exceed one half of the value that the performance made or promised by the harmed party had at the time of the contract*".

Article 1452 provides that:

"*Rescission of the contract shall not impair rights acquired by third parties, subject to the effects of registering the action for rescission*".

(the last words mean that the assignee of real estate is not protected, if he registered his title with the land registry after the registration of the action for rescission).

49. The plaintiff has the burden of proving the disproportion, the state of need and the causal relationship between the state of need and the unfair terms[29].

The rescission is only applicable to contracts entered into on or after 6 October 1938 (Article 19, Lieutenancy Legislative Decree N° 222 of 12 April 1945).

50. Apart from the cases expressly set forth in the laws cited in the preceding sections, entering into a contract on unfair terms by a contracting party in a state of need did not give rise to invalidity.

[29] Court of Milan, 21 October 1948, in *Foro it.*, 1949, I, column 739 et seq.

Whether a contract entered into on unfair terms in a state of need could be considered invalid due to illicituess

51. The question of validity, or invalidity of a contract must be decided on the basis of the legal rules and principles in force when it was concluded (Article 2 of the preliminary provisions of the Italian 1865 Civil Code and Article 11 of the preliminary provisions of the Italian 1942 Civil Code), unless an exception to this general rule is laid down in a statute stating that this or that specific rule is to be applied retroactively.

52. Under the Italian Civil Code of 1865 a contract is illicit and void if its content is contrary to law, public order, or public morals (Articles 1119 and 1122 Italian 1865 Civil Code).

Specifically, the contract is illicit when the performance that is bargained for is illicit (*e.g.*, hiring someone to commit a crime), or when, even though the promised performance is lawful, it is illegal to associate it with a price (*e.g.* an action required of a public official is lawful, and even appropriate; but it is unlawful to agree to pay the official a fee). In such cases it is said that the contract has an illicit "*causa*", the "*causa*" being the contractual scheme[30].

53. The "*causa*" of a sale and purchase agreement is the exchange of a good for a consideration and, as a general rule, it is lawful, unless the exchange is prohibited by law.

As a general rule, the price can be freely fixed by the parties, except in situations and cases in which the law imposes specific limits (*e.g.*, price capping, or limits on loan interest; in these cases the contract is not void: only the clause

[30] Examples of contracts that have violated Italian public order or morals include cases where: spouses agreed to release themselves from the civil law obligation of fidelity (*e.g.*, Court of Cassation, Criminal Division, 21 July 1939, in *Foro it.*, II, 1940, page 169 et seq.); Court of Cassation, 17 May 1949, Decision No. 1218, in *Foro it.*, 1950, I, page 47 et seq.); parties agreed to buy and sell goods to one another during a time when the law required all of those goods to be transferred to the State (*e.g.*, Court of Cassation, 2 February 1957, Decision No. 406 (wheat), in *Foro it.*, 1957, I, page 555 et seq.; Court of Foggia, 10 June 1949 (olive oil), in *Foro it.*, 1949, I, page 1261 et seq.; licensed business owners agreed to lease a business to an unlicensed individual (*e.g.*, Court of Appeal of Milan, 21 February 1956 (licensed pub owner entrusted pub management to unlicensed individual), in *Foro it.*, 1956, I, page 1835 et seq.; Court of Voghera, 7 July 1949 (individual leased pharmaceutical business without required authorizations), in *Giur. it.*, 1950, page 697 et seq.); parties entered into a loan agreement to finance gambling (*e.g.*, Court of Cassation, 17 June 1950, Decision No. 1552, in *Foro it.*, 1951, I, page 185 et seq.).

relating to the price or interest is void and automatically replaced by the legal rules).

54. The difference between "*nullità*" or "*nullità assoluta*" ("nullity", or "absolute nullity") and "*annullabilità*" or "*nullità relativa*" ("voidability" or "qualified nullity") in effect under the 1865 Civil Code has been set out *supra* (¶ 32 et seq.).

Under Italian law, a contract entered into under duress is "*annullabile*" (voidable), whereas a contract concluded on unfair terms due to a state of need is "*rescindibile*" (subject to rescission). The difference between annulment (*annullamento*) and rescission (*rescissione*) lies in the following: (i) the period of limitation is different; (ii) the rescission cannot be enforced against any third-party assignees, whether purchasers or donees, regardless of any investigation into their good or bad faith (while, in case of annulment, acquiring in good faith and for a consideration is requisite for the protection of third party assignees of movables: *supra*, ¶¶ 39-43). Since these are minor differences, in the following sections I will occasionally use "voidable" as translation for both "*annullabile*" and "*rescindibile*".

55. An illicit contract is void: Article 1119 of the Italian 1865 Civil Code provided that an obligation founded on an illicit "*causa*" "*has no effect*".

On the other hand, the remedy provided by the law to protect a party that concluded a contract on unfair terms due to a state of need consisted of the contract being voidable.

Remarks can be made here that are fully similar to those already made regarding a contract rendered voidable under duress.

56. In fact, with regard to the sale of real estate for a price less than one half of the proper price, Article 1529 of the Italian 1865 Civil Code did not impose absolute nullity, but gave the harmed seller the right to request the court to rescind the contract within a two-year limitation period. Moreover, the rescission was not enforceable against subsequent third-party purchasers of the real estate that registered their purchase in the real estate registers before the action for rescission was registered.

Likewise, contracts for rescue concluded at sea on terms that were unfair at the time of, and under the influence of, danger where not void (*i.e.*, automatically

and necessarily of no effect), but could be annulled or modified by a court order sought by the injured party (Article 7 of Decree N° 938 of 14 June 1925).

Thus again, and finally, the action for rescission provided for by Article 1448 of the new Italian Civil Code, which the Decree cited above (¶ 47) made retroactively applicable to contracts concluded after 6 October 1938 by persons affected by racial laws, provides for mere voidability: in fact, that article states that the contract can be annulled by a court order sought by the harmed party within the related statute of limitations, and that the effects of the rescission are not enforceable against subsequent third-party assignees (*supra*, ¶ 48).

In all of these cases the contract cannot be ratified before the expiry of the limitation period (Article 1309, 4th paragraph, of the Italian 1865 Civil Code; Article 1451 of the Italian 1942 Civil Code). However, not bringing an action for rescission within the limitation period has *de facto* the same effect of confirming the contract (Articles 1529 and 1531, paragraph 1, of the Italian 1865 Civil Code; Article 1449 of the Italian 1942 Civil Code; Decree N° 771/1947).

57. Public order and public morals are subsidiary rules aimed at completing the legal system with rules to be applied to situations not expressly regulated by code or statute[31]. Therefore, a contract concluded on unfair terms due to a state of need cannot be considered void due to illicitness, because the issue has been expressly regulated by code and statute.

In this regard it must be noted that, according to Article 1449, paragraph 1, of the Italian 1942 Civil Code (which falls among the rules that Decree N° 222/1945, cited above at ¶ 47, declared applicable to contracts previously concluded by persons that were affected by racial laws), the contract is voidable (not: *void*) even when the taking advantage of the other party's state of need is of such a nature that it constitutes a crime.

In fact, that Article states that "*The action for rescission is subject to a limitation period of one year from the conclusion of the contract; but if the fact is a crime, the last paragraph of Article 2947 is applicable*" (this paragraph provides for a longer limitation period).

[31] F. FERRARA, (1914), No. 4, page 4.

This regulation ruled out the opinion expressed in the legal literature[32] and accepted by judicial decisions[33], that, if the contract in question constituted a crime, it could be considered void for the '*causa*' being illicit: in fact, it is not possible to assert that, in situations in which the law expressly provides that the contract is voidable, the contract should instead be considered void.

58. Besides, the existence of this retroactive law confirms that contracts entered into on unfair terms due to a state of need were not void based on the subsidiary rules of public order and public morals. If it was the case that such contracts were void based on the general rule, then the Legislator would have had no need to provide specific rules in that regard: consistent with the rule set forth further on (¶ 61), Decree 222/1945 implies that no action of nullity was given. In fact, a survey of the judicial decisions on the matter of contracts concluded by Jews during the fascist regime, published in 1988, only mentions decisions of "*rescissione*" and does not report any case where a contract had been declared void based on the rules of public order and public morals[34].

59. Since Italian law sets out the above requirements for a plaintiff wishing to establish the invalidity of a contract concluded on unfair terms in a state of need, it cannot be maintained that a contract entered into in circumstances that fall outside of those requirements can be considered void based on the notions of public order or public morals: that would be tantamount to annulling such requirements.

60. Moreover, it would be illogical to take the position that, although specific legislation designed to address contracts entered into under the most dire circumstances rendered the sale only *voidable*, the rules of public order and public morals would apply to contracts that fall outside of those most dire circumstances and would render them *void*.

61. Finally, the rule of voidability established by the 1942 Civil Code is consistent with the general principle that a contract is void when its content is illicit, not when the contract was concluded as a result of illicit behavior of one of

[32] *E.g.*, DEGNI, (1932), page 13 et seq.
[33] *E.g.*, Court of Cassation, 15 May 1940, no. 1572, in *Foro it.*, 1941, I, column 457 et seq.; Court of Cassation, 29 April 1941, no. 1255, in *Mass. Foro it.* 1941.
[34] BENVENUTO, (1988), page 83 et seq.

the parties[35]. For instance: fraudulent misrepresentation, which is a behavior contrary to law, public order and public morals, indeed a crime, renders the contract voidable, not void (Article 1439 of the Italian 1942 Civil Code)[36]. The illicitness that makes a contract void must concern the transaction, so as to involve both parties; on the contrary, when the illicitness concerns the behavior of one contracting party that causes a prejudice to the other party in the conclusion of the contract, the law gives the victim the choice whether or not to maintain the contract: the contract is voidable, not void.

Conclusion

62. In conclusion, it is my opinion that:

a. With respect to the question of duress:

1. There can be no duress if there was:
   i. no specific and concrete threat; or
   ii. no connection between any threat and the specific contract at issue; or
   iii. no intention to use the threat to extort consent.
2. Even when a plaintiff asserts political duress, he/she must establish a specific and concrete threat that was intended to induce the plaintiff to consent to the specific contract at issue.
3. If a sale is made under duress, then the sale is voidable, not void.
4. If a sale has been performed and an action to void it for duress has not been brought within the five-year limitation period, the victim of duress loses any duress claim and is no longer able to bring such a claim. Inaction for the duration of the time limit for repudiating a fully performed contract *de*

[35] F. FERRARA, (1914), page 95 et seq.; G.B. FERRI, (1975), page 288 et seq.
[36] Court of Cassation, 31 March 2011, No. 7468, in *Foro it.*, 2011, I, page 3369 et seq.; Court of Cassation, 26 May 2008, n. 13566, in *Rep. Foro it.*, 2008, "*Contratto in genere*", No. 472; Court of Cassation, Criminal Division, Fifth Section, 31 January 1990, Lo Giusto, in *Rep. Foro it.*, 1991, "*Contratto in genere*", n. 357.

facto results in ratification of the contract.

b. With respect to the question of a contract entered into on unfair terms due to a state of necessity:

1. Applicable Italian laws in force until 1942 did not establish a general rule that contracts entered into on unfair terms due to a state of need were invalid. There were only special rules regarding contracts for sale of immovable goods and rescue at sea, which are not applicable to the case at hand.

2. A 1945 retroactive Italian law established that contracts could be invalidated if they were formed: (a) after 6 October 1938 (when the racial laws were announced); (b) by persons affected by those laws; (c) where harm exceeding one-fourth of the value of the good could be established; and (d) provided that rescission actions were brought before 15 April 1948. This law however does not apply here because the sale occurred before 6 October 1938. Even if it did apply, the claim would be untimely.

3. A contract entered into on unfair terms due to one party's state of need was not void; it could be rescinded in the cases and within the limits stated by the law, and in that event the rescission, which had to be sought by the harmed party within the limitation period, could not be enforced against subsequent third-party assignees.

c. With respect to the question of violations of public order or public morals:

1. Public order and public morals are subsidiary rules aimed at completing the legal system with rules to be applied to prevent illicitness in situations not expressly regulated by code or statute. A contract entered into on unfair terms by a contracting party in a state of need is a situation expressly regulated by code and statute, and thus does not implicate the applicability of the subsidiary rules of public order and

public morals.

2. The notion of public order or public morals may not be invoked to declare that contracts entered into on unfair terms due to one party's state of need are void. The specific legislation in force at the time designed to address such contracts provided for *voidability* only.

d. With respect to the question of third-party assignees:

1. In case of annulment for duress of the contract third-party assignees are protected if they acquired the right or good in good faith for a consideration;
2. In case of rescission of a contract entered into on unfair terms due to a state of need all third-party assignees are protected;
3. In any case a good faith assignee is protected if a movable good is acquired and delivered to him/her based on a valid contract (special rules are applicable to real estate).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: 24 February 2017
Milan, Italy

Professor Pietro Trimarchi

Appendix 1
LIST OF MATERIALS

Code and statute, Articles:
Italian 1865 Civil Code, Articles 702, 707, 1056, 1108, 1111, 1112, 1113, 1114, 1119, 1122, 1300, 1308, 1309, 1314, 1529, 1531, 2135. General provisions on the law in general, Article 2.
Italian 1942 Civil Code, Articles 1147, 1153, 1439, 1448, 1449, 1452. Temporary provisions of the 1942 Civil Code, Article 165. Provisions on the law in general (preliminary to the Italian 1942 Civil Code), Article 11.
Law No. 938 of 14 June 1925, Article 7.
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555 et seq.;
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Appendix 2

CURRICULUM VITAE

Professor of civil law at the University of Milan from 1967 (formerly at the University of Urbino from 1960 to 1963 and at the University of Genoa from 1964 to 1966). Now professor emeritus of the University of Milan.

Practicing attorney in Milan since 1974.
Served as arbitrator in more than 100 arbitration panels.

Honorary Member of the European Association of Law and Economics (EALE);
Honorary President of SIDE-Società Italiana di Diritto ed Economia (Italian Society of Law and Economics);
Chairman of the Committee for the drafting of the statute on products liability (1988);
Member of the Committee for the reform of company law (2002);
Member of the Committee for the reform of arbitration law (2004-2005).

Author of the following books:
Invalidita' delle deliberazioni di assemblea di società per azioni (1958)
Rischio e responsabilità oggettiva (1961)
L'arricchimento senza causa (1962)
Causalita' e Danno (1967)
Istituzioni di diritto privato (1st ed. 1973) (21 editions to date)
Il contratto: inadempimento e rimedi (2010).

Main papers:
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"Per una riforma della responsabilità civile per danno all'ambiente", Milano 1994;

"Interesse positivo e interesse negativo nella risoluzione del contratto per inadempimento", 48:5 *Rivista di diritto civile* 637-648 (2002);

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EXHIBIT 2

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CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Italian into English of the attached Civil Cassation Court, Section I, Decision No. 697 of March 21, 1963.

Dustin Paul Richard, Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me
this 26th day of February, 2017.

HOA WIN LY
Notary Public, State of New York
No. 01LY6323702
Qualified in New York County
Term Expires April 27, 2019

[...]

[...]

CIVIL CASSATION COURT, SECTION I, DECISION NO. 697 OF MARCH 21, 1963 – VARALLO, Presiding Judge – FAVARA, Judge Rapporteur – CRISCUOLI (in agreement) in Nuova Cooperativa Consorziale Borgo Pantano (Atty. Ronconi) vs. the Tax Authority (Attorney General).

Confirmation of Ancona Appeals Court Ruling of May 8, 1960.

[...]

PART ONE – Sec. 1

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Obligations and contracts – Intense fear due to an objective factual situation – Irrelevance for purposes of the voidability of the contract – Subject matter.

The metus ab intrinseco [awe] *deriving from fear inspired by an objective factual situation or intrusions from the outside into the psyche and mind of an individual is not a cause for the invalidity of a legal transaction. This instead requires that the fear must come from the outside, be caused by an individual using duress or threats, whether this be the counterparty or a third party, and that the unjust duress impacts the process of the formation of intent, such that it eliminates the freedom of determination that must inform every contractual negotiation* (1). *Therefore, the mere fear of reprisals arising in the mind of a citizen during the twenty years of Fascism, from a rejection to a request from the party in power*

[…]

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or its individual officials may not invalidate, due to duress, the legal transaction entered into with the Fascist party or its officials who requested and solicited it. To this end, there must instead be a veritable threat of reprisals that effectively occurred, in however circumspect or discreet a fashion, or at least presumably, given the conduct expressed on other similar occasions by bodies within the Fascist party. The lower court's assessment of the existence and relative effectiveness or ineffectiveness of a threat or duress to coerce a person's will in terms of obligations and contracts is a judgment of fact that the Cassation Court cannot object to when properly and fairly grounded (2).

Omitted – Grounds: The first ground objects that the decision ruled out the existence of the facts constituting the inferred duress, because the documents do not reveal

[…]

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any indication of the intimidation and coercion allegedly suffered, and the witness testimony did not seem conclusive for the purposes of the decision. According to the appellants, the grounds are instead lacking and unsatisfactory, as: a) the lower court did not sufficiently examine the documents exhibited, because if it had done so, it would have seen that only three of one hundred shareholders and one of three liquidators were present at the general shareholders' meeting on January 1, 1940, which was presided over by a member of the Fascist party; b) when it analyzed the witness testimony and declared it immaterial in terms of the circumstances inferred, the Court had not considered the specific circumstances contained in the proposed evidence such as the change in company name, the Provincial Consortium's absorption by the Consumer Cooperatives, and the removal of the cooperative's assets before its sale; c) even though the Court had examined the individual pieces of evidence and declared them to be irrelevant, it then failed to engage in an overall evaluation.

The complaints in the ground are lacking in merit and mostly concern assessments by the lower court that are irrefutable.

In fact, it should be recalled that – as shown by the case law of this Cassation Court (see Cassation Court decisions No. 872 of March 17, 1958, No. 678 of February 28, 1958, etc.) – an assessment by the lower court, which dismisses the request of the admission of a witness testimony because it is useless, thereby denying any relevance of the facts used as evidence, for ruling on this dispute, is not subject to the Cassation Court's judgment when (as in this case) such a decision is substantiated by adequate, logical, legal correct grounds.

Similarly, the evaluation of the oral and documentary evidence is submitted for the lower court's assessment, which the Cassation Court cannot object to when it is adequately substantiated and inspired by exact legal criteria.

The lower court decision accurately examined the parties' documents and arguments, scrutinized the results, and remained convinced that the alleged duress had not occurred, using an impeccable reasoning that cannot be refashioned or objected to by this Cassation Court.

Similarly, the lower court considered all the factual circumstances used as evidence as irrelevant, analytically demonstrating their irrelevance. This Cassation Court could certainly not contradict this opinion or revise this judgment of irrelevance, which was made in detail for each piece of evidence and definitively for the whole by deeming all this evidence to be irrelevant. The ground in question is therefore lacking in legal merit and must be dismissed.

The second ground objects that the decision was mistaken when it held that, for the purposes of an annulment of the legal transaction due to duress, the duress must specifically seek to extort consent to the transaction in dispute, and the harm threatened must impact the formation of intent. However, in the appellants' opinion, the Court did not consider it necessary to refer to the environment and climate of the Fascist regime, because something that carries no weight in a situation of freedom and security may instead decisively paralyze someone's will in a situation of political insecurity. Therefore, excluding a sense of reverential fear, one should have concluded that there was a coercion of the consent granted.

The objections in this second ground are also lacking in merit.

This Cassation Court has already asserted on other occasions (see Cassation Court Decision No. 1264 of May 5, 1955, No. 2154 of June 10, 1957, etc.) that the simple fear of reprisals likely to be conjured in the mind of a citizen during the twenty-year period of Fascism, resulting from a rejection to a request by the party in power or its individual officials, may not invalidate, due to duress, the legal transaction entered into with the Fascist party or its officials who requested and solicited it. To this end, there must instead be a veritable threat of reprisals that effectively occurred, in however circumspect or discreet a fashion, or at least presumably, given the conduct expressed on other similar occasions by bodies within the Fascist party.

This is because the *metus ab intrinseco* deriving from fear inspired by an objective factual situation or intrusions from the outside into the psyche and mind of an individual is not a cause of a legal transaction's invalidity. This instead requires that the fear come from the outside, be caused by an individual using duress or threats, whether the counterparty or a third party, and that the unjust duress impacts the process of the formation of intent, such that it eliminates the freedom of determination that must inform every contractual negotiation.

Lastly, we must recall that the lower court's assessment of the existence and relative effectiveness or ineffectiveness of a threat or duress to coerce a person's will in terms of obligations and contracts is a judgment of fact that the Cassation Court cannot object to when properly and fairly grounded.

In the case before us, the lower court ruled out the existence of any duress, as – in an entirely correct application of the legal principles recalled above – it had excluded duress from the general circumstance of a fear of reprisals from bodies of the Fascist party, and it had also excluded all actual acts of duress or threats from the other contracting party or a third party, as well as any other actual oppressive conduct that would lead one to fear unfair harm and that would coerce the other party's intent.

In this case, having excluded any legal error in the decision herewith appealed and a flaw in procedure or grounds, the rulings handed down are immune to any objection by this Court; consequently, the main appeal must be dismissed in full. Lastly, we must also dismiss the cross-appeal, the sole ground of which sought to find that, in any case, the alleged duress would not have lasted until the fall of the Fascist regime, and instead – if anything – ended at the time of the contract's execution. It is clear that the exclusion of duress renders this further inquiry useless (even when conducted to object to the expiration of the period of limitations for the proceeding) and that it would not be possible pursuant to Art. 1442 of the Civil Code to exclude in theory that the duress in certain cases could extend past the contract's execution date. Consequently, it is inexact to maintain as a rule that, once five years have passed from entering into the contract, annulment proceedings due to duress may no longer be filed when the duress extends past this date.

Given the minimal weight of the dismissal of the cross-appeal, the trial costs are assigned to the main appellants, who lose their deposit under this ruling. – *Omitted.*

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del diritto di surroga previsto dall'art. 1916 codice civile (1).

Gli effetti della surrogazione dell'assicurazione si identificano con quelli di una cessione, all'assicuratore stesso, del credito dell'assicurato nei confronti del terzo responsabile, e pertanto all'assicuratore è attribuito anche il credito accessorio degli interessi non ancora scaduti (2).

La successione dell'assicuratore nel credito dell'assicurato verso il terzo responsabile ha luogo indipendentemente dalla conoscenza, da parte di quest'ultimo, dell'avvenuta corresponsione dell'indennità assicurativa, valendo la relativa comunicazione o notifica soltanto ad escludere che il pagamento, eventualmente effettuato dal debitore ceduto a favore dell'originario titolare del credito, assuma efficacia liberatoria, come si evince dal disposto dell'art. 1264 codice civile (3).

Omissis. — Motivi: Il primo motivo del ricorso proposto dall'Amministrazione delle ferrovie dello Stato investe la pronuncia con la quale il giudice di merito l'ha condannata al pagamento degli interessi legali sul valore capitale della rendita liquidata a favore degli eredi dell'infortunato, fissando la decorrenza degli interessi stessi dal 9 febbraio 1954, giorno immediatamente successivo a quello dell'evento e data corrispondente a quella della costituzione della rendita.

L'Amministrazione ricorrente sostiene che gli interessi sulla somma come innanzi capitalizzata non presentino carattere compensativo e non possano pertanto decorrere da data anteriore a quella dell'atto di costituzione in mora, coincidente con la formale richiesta di pagamento. Invero, soggiunge la ripetuta Amministrazione, l'obbligo del responsabile civile di rivalere l'I.N.A.I.L. di quanto il medesimo abbia corrisposto agli aventi diritto in dipendenza del fatto dannoso, pur riallacciandosi a questo, trae, tuttavia, origine dal rapporto assicurativo, in relazione al quale non possono invocarsi i principi attinenti al risarcimento del danno derivante da fatto illecito. Infine, prosegue la stessa Amministrazione, l'I.N.A.I.L., per provvedere al pagamento della rendita agli eredi dell'infortunato, non ha dovuto far luogo all'effettiva immobilizzazione del relativo capitale: sicchè non si sarebbe verificata la perdita necessaria a giustificare l'erogazione di interessi compensativi.

Le esposte censure sono destituite di giuridico fondamento e vanno, pertanto, respinte. Invero, come questo Supremo Collegio ha già avuto occasione di precisare (sent. n. 1231 del 24 maggio 1961, in *Mass. Giur. ital.*, 1961, 354), la facoltà di regresso attribuita all'I.N.A.I.L. dall'art. 5 del R. D. 17 agosto 1935, n. 1765, ha la stessa portata del diritto di surroga contemplato dall'art. 1916 codice civile in virtù del quale l'assicuratore prende il posto dell'infortunato nel rapporto obbligatorio originato dal fatto illecito ed avente per oggetto il risarcimento del danno. Gli effetti di tale surroga si identificano con quelli di una cessione all'assicuratore del credito dell'assicurato nei confronti della persona civilmente responsabile del danno (sent. n. 4174 del 7 novembre 1956, in *Mass. Giur. ital.*, 1956, 875), cessione che, per il disposto dell'art. 1263 codice civile comprende anche il credito accessorio degli interessi non ancora scaduti. La decorrenza di questi interessi sulla somma destinata dall'assicuratore al pagamento della rendita va fatta coincidere con la data di costituzione della rendita stessa, essendo questo il fatto generativo del diritto dell'assicuratore al rimborso del capitale accantonato, per detto scopo, tra le partite passive del proprio bilancio.

La compiuta equiparazione tra le surrogazione legale dell'assicuratore che abbia pagato l'indennità nei diritti dell'assicurato verso il responsabile civile del danno e la cessione del credito relativo al risarcimento del danno stesso consente, altresì, di porre in evidenza che la successione dell'assicuratore nel credito dell'assicurato verso il terzo responsabile ha luogo indipendentemente dalla conoscenza da parte di quest'ultimo dell'avvenuta costituzione della rendita, valendo la relativa comunicazione o notifica solo ad escludere che il pagamento eventualmente effettuato dal debitore ceduto a favore dell'originario titolare del credito assuma efficacia liberatoria, come si evince dal disposto dell'art. 1264 codice civile.

Le esposte considerazioni di ordine giuridico, con le quali si è dimostrato che la decorrenza degli interessi sul capitale destinato all'erogazione della rendita debba farsi risalire alla data della quale l'ente assicuratore è istituzionalmente obbligato a sostenere detto onere, e cioè dal giorno successivo a quello della morte dell'assicurato, trovano rispondenza nel vigente sistema di calcolo del capitale di copertura della rendita, sistema per il quale l'importo del capitale stesso è determinato moltiplicando l'annuo ammontare della rendita per il coefficiente di capitalizzazione corrispondente all'età che l'assicurato aveva all'iniziale data di decorrenza della detta prestazione assicurativa (artt. 5 e 49 del R. D. 17 agosto 1935, n. 1765, e tabelle di cui ai DD. MM. 16 febbraio 1938 e 3 luglio 1942 improntate ai medesimi criteri seguiti dalle tabelle approvate con R. D. 9 ottobre 1922, n. 1403, per la costituzione di rendite vitalizie in materia di responsabilità civile da illecito). Posto che i predetti coefficienti di capitalizzazione sono determinati tenendo conto degli interessi che, per il principio della naturale fecondità del denaro, il capitale è destinato a produrre dal giorno della costituzione della rendita a quello del pagamento delle singole annualità, ne consegue che il tardivo rimborso del capitale stesso, ove non fosse accompagnato dal versamento dei maturati interessi, non risulterebbe adeguato all'effettivo costo della ripetuta operazione, cosicchè — come questo Supremo Collegio ha osservato nella citata sentenza del 1961, n. 1231 — bisognerebbe rifare il calcolo di capitalizzazione con riferimento alla data della domanda giudiziale od a quella della liquidazione della rendita, aggiungendovi i ratei precedenti « con evidente maggiore aggravio per il terzo responsabile ».

Nelle esposte considerazioni trovano confutazione tutti gli argomenti enunciati dal ricorrente a sostegno delle censure formulate con il primo mezzo di impugnazione. — *Omissis*.

CASSAZIONE CIVILE, I SEZIONE, 21 marzo 1963, n. 697 — VARALLO *Presidente* — FAVARA *Estensore* — CRISCUOLI *P. M.* (conf.). — Nuova Coop. Cons. Borgo Pantano (avv. Honconi) - Finanze (avv. gen. Stato).

Conferma App. Ancona, 8 maggio 1960.

(1-3) In senso sostanzialmente conforme v. Cass., 24 maggio 1961, n. 1231, in *Mass. Giur. ital.*, 1961, 354, citata in motivazione.

Sui rapporti fra l'art. 1916 codice civile e l'art. 5 R. D. 17 agosto 1935, n. 1765 v. Cass., 26 luglio 1962, n. 3119, in *Giust. civ.*, 1962, I, 1632.

Sull'identificazione degli effetti della surrogazione prevista all'art. 1916 codice civile con quelli della cessione di crediti, v. Cass., 7 novembre 1956, n. 4174, *ivi*, 1956, 875, pure citata in motivazione, nonchè Cass., 4 aprile 1963, n. 888, in *Giust. civ.*, 1963, I, 1263.

Per ulteriori richiami sui problemi della surrogazione dell'assicuratore si veda la rassegna di CASTELLANO, *Assicurazioni in generale*, in *Rin. dir. civ.*, 1961, II, pag. 286 e segg.

Obbligazioni e contratti — Intimo timore per uno stato di fatto oggettivo — Irrilevanza ai fini dell'annullabilità del contratto — Fattispecie.

Il metus ab intrinseco *derivante dalla paura inspirata da uno stato di fatto oggettivo, o da intrusioni dall'esterno nella psiche e nella coscienza di un soggetto non può essere causa invalidante di un negozio giuridico, occorrendo, invece, a tal fine, che il timore provenga dall'esterno, ad opera di un soggetto, che usi violenza o minaccia, sia esso l'altro contraente od un terzo e che la violenza ingiusta sia tale da incidere sul processo di formazione della volontà così da fare venire meno quella libertà di determinazione cui deve essere informata ogni contrattazione* (1).

Pertanto, il semplice timore di rappresaglie facile ad insorgere nell'animo del cittadino durante il ventennio fascista, da una ripulsa a richiesta del partito dominante, o delle singole sue gerarchie non può invalidare per violenza il negozio giuridico concluso col partito fascista, o con i suoi gerarchi che lo richiesero e sollecitarono, ma è invece necessaria, al predetto fine, una vera e propria minaccia di rappresaglie, effettivamente intervenute, sia pure in modo circospetto o discreto, o quanto meno presunto per effetto del comportamento altre volte tenuto in casi analoghi, da quegli organi del partito fascista. L'apprezzamento del giudice del merito sull'esistenza, nonchè sull'efficacia o inefficacia di una minaccia o violenza a coartare la volontà di una persona in tema di obbligazioni e contratti, si risolve in un giudizio di fatto incensurabile in Cassazione, se correttamente e congruamente motivato (2).

Omissis. — *Motivi*: Col primo mezzo, si censura la sentenza per avere escluso che risultassero gli estremi della dedotta violenza, in quanto dai documenti non tra-

(1-2) **Metus ab intrinseco.**

È mio vecchio convincimento che il diritto trovi una materia docile a lasciarsi regolare finchè si muove sul terreno economico; non più quando si sposta da questo.

Gli affetti umani, le reazioni dell'uomo, sono troppo varie ed inafferrabili perchè il diritto riesca a dominarle; allorchè forma i suoi istituti, le sue caselle, subito la materia si rivela indocile a lasciarsi da queste contenere.

Cos'è il *metus ab intrinseco*? Come in tutta la dottrina sulla violenza, i canonisti hanno avuto parte eminente pure in questa nozione; e mi sembra abbiano fissato che tale *metus*, come dice il suo nome, non proviene da un fatto esterno, da un altro soggetto che sia *metum incutiens*, bensì da moti dell'anima e della coscienza; in materia matrimoniale è il timore di chi paventa che la fidanzata se abbandonata si ucciderebbe, o che il proprio padre morrebbe di un attacco cardiaco s'egli rompesse il fidanzamento cui il genitore tanto tiene; e taluni scrittori aggiungono anche esempi in cui non compare sull'orizzonte alcun terzo: quello di chi sposa perchè crede che morrebbe osservando la castità o di chi teme di non poterla conservare e di dannarsi.

Ma a mio avviso è male invocato il *metus ab intrinseco* allorchè vi sia un terzo prepotente, noto per le sue violenze, per i mali che ha inflitto a chi si è ribellato alla sua volontà: se anche questi non abbia minacciato alcun male a quegli che si piega pavido al suo volere.

Dire che in questo caso il *metus* è quello stesso dell'uomo angosciato, che da qualsiasi suo atto temo provengano conseguenze dannose ed è sempre in uno stato di timore (che giustamente il diritto considera irrilevante), equivale a negare un dato di esperienza comune: che il massimo terrore che un violento, un dittatore od un aguzzino od un bandito può imporre, ha ad effetto di spezzare ogni resistenza, di rendere tutti proni alla sua volontà; pure intimamente odiandolo, si cerca di soddisfare, anzi di prevenire i suoi desideri. Persino nelle favole che ascoltavamo bambini, ci si comportava così di fronte all'orco.

Chi ha bisogno di minacciare non ha ancora ottenuto la massima prostrazione dei suoi soggetti.

Non si era a questo punto nella famiglia della monaca di Monza; e tuttavia dubiterei molto che si potesse dire che essa aveva pronunciato i voti solo con un *metus ab intrinseco* per ciò che il principe padre non le aveva minacciato alcun male se non volesse essere monaca (solo la aveva detto una volta che dopo quel fanciullesco scambio di biglietti col paggio, da cavaliere d'onore, doveva dismettere il pensiero, se mai l'avesse avuto, di collocarla nel mondo).

La decisione della Cassazione finisce da ultimo per aderire a quella ch'è nella mente di tutti la rappresentazione della realtà, allorchè dice che la minaccia di rappresaglie può anche essere presunta per effetto di comportamento altre volte tenuto in casi analoghi da quegli organi del partito fascista.

Precisamente questo è il vero terreno della causa; ed, allora, a meglio specificare occorrerebbe dire che l'esperienza del ventennio mostra che la paura di rappresaglie era fondata allorchè per ottenere un certo intento si adoperava un'autorità fascista di un certo grado (un segretario federale, un console della milizia) o persona particolarmente stimata nel partito per sue benemerenze, o persona nota per violenza compiute; fondata sempre allorchè si sarebbe dovuto ritogliere al partito qualcosa che aveva rappresentato un suo trionfo politico, il collocamento di una sua impresa (chi avrebbe pensato di poter fare restituire la camera del lavoro di Torino, o cooperative rosse e bianche prese di assalto, o logge massoniche devastate ed occupate stabilmente?).

Sta altresì che occorreva naturalmente meno coraggio per non fare, non accedere ad una domanda, che non per agire, per convenire in giudizio una Federazione fascista, od una istituzione cara al regime, o, peggio ancora, per denunciare o chiedere danni ad un gerarca in vista.

E come sempre quando sorga una questione di annullamento per violenza, devesi anche guardare alle persone che assumono di avere soggiaciuto a violenza: un generale a riposo od un vescovo avevano molto meno da temere di un impiegatuccio, un professionista di grande città un po' meno di uno di paese; un borghese sempre un po' meno di un operaio, e l'appartenere ad una grande famiglia dell'aristocrazia meno ancora di entrambi.

Questo è ciò che dice l'esperienza.

Non amo fare un quadro più nero di quel che sia stata la realtà; ci furono persone che poterono resistere a certe richieste degli organi centrali e locali del fascismo; ma la gran parte non era in grado di farlo.

E non si trattava di *metus ab intrinseco*; allorchè c'è stata in origine una serie di violenze, e violenze ancora, sia pure sporadiche, ai danni di chi tuttavia osi ribellarsi, il timore non è affatto *ab intrinseco*, bensì nasce da quel convincimento, fondato, che il diniego o la resistenza darebbe luogo a rappresaglie, di cui non si è in grado di prevedere la portata.

A trattare il tema della violenza nel ventennio occorrerebbe ancora considerare quella che chiamerei la via breve: volere l'adesione per ottenere subito ciò che potrebbe conseguirsi con mezzi legali; la vendita del bene, che potrebbe formare oggetto di espropriazione o di requisizione: ipotesi avvicinabile alla categoria canonistica della violenza ingiusta *quoad modum*. Ed ove penso giaci ancora la nullità, in quanto non basta la possibilità di conseguire per altre vie il risultato ultimo (e non è mai dato sapere con certezza se quel risultato sarebbe stato raggiunto; probabilmente i titolari del potere di esproprio o di requisizione avrebbero acceduto alla richiesta degli organi politici locali; ma certezza non si dà) per togliere l'ingiustizia della minaccia.

Un'ultima osservazione, non giuridica.

Queste cause, quando sono — come quasi sempre — dirette contro lo Stato o contro Amministrazioni di enti locali, spesso rette da elementi di sinistra, mostrano una delle tante anomalie della nostra vita nazionale: il divario tra legislazione ed amministrazione, tra legislatori e burocrati (che sono poi gli effettivi reggitori delle amministrazioni centrali e locali); legislazione riparatrice dei torti che date categorie abbiano subito ad opera del fascismo, ma strenua resistenza, in ogni caso, a chi chieda per le vie giudiziarie riparazione.

A. C. Jemolo.

spariva neppure un indizio della pretesa intimidazione e coercizione subita e la prova testimoniale non appariva concludente ai fini del decidere. Secondo i ricorrenti, invece, la motivazione al riguardo sarebbe manchevole e non appagante perchè: *a*) i documenti esibiti non erano stati esaminati a sufficienza dalla Corte che altrimenti avrebbe visto che all'assemblea generale del 1° gennaio 1940 vi erano stati solo tre soci presenti su un centinaio ed un liquidatore su tre, con la presidenza tenuta da un esponente fascista; *b*) nell'analizzare i capitoli della prova testimoniale per dichiararla inconferente nelle sue circostanze dedotte, la Corte non aveva tenuto conto di specifiche circostanze contenute nei capitoli proposti, quali la modifica della denominazione sociale, l'assorbimento del Consorzio provinciale fra le Cooperative di consumo, e la privazione dei cespiti della cooperativa prima ancora che se ne deliberasse l'alienazione; *c*) per di più la Corte, pure avendo esaminati i singoli capitoli di prova per dichiararne l'irrilevanza, ne aveva, poi, omessa la valutazione globale.

Le doglianze del mezzo sono infondate e si rivolgono, nella maggior parte, contro apprezzamenti incensurabili del giudice del merito.

Infatti, va ricordato che — come è giurisprudenza di questa Suprema Corte (cfr. Cass., 17 marzo 1958, n. 872; 28 febbraio 1958, n. 678, ecc.) — l'apprezzamento del giudice di merito, che disattende la richiesta di ammissione di una prova per testi, perchè frustranea, negando ogni rilevanza ai fatti dedotti a prova, ai fini della decisione della controversia, sfugge al sindacato della Cassazione, ove sia (come nella specie) sorretto da motivazione adeguata e logicamente e giuridicamente corretta.

Analogamente, la valutazione dei risultati della prova orale e documentale è rimessa al giudice di merito, il cui apprezzamento al riguardo è incensurabile in Cassazione, quando sia adeguatamente motivato ed ispirato ad esatti criteri giuridici.

La sentenza di merito ha accuratamente esaminati i documenti e le argomentazioni delle parti, ne ha vagliato le risultanze e si è convinta dell'inesistenza della dedotta violenza attraverso un ragionamento impeccabile che non può essere rifatto, o censurato da questa Corte suprema.

Analogamente, la Corte del merito ha ritenuto prive di rilevanza tutte le circostanze di fatto dedotte a prova, analiticamente dimostrando tale irrilevanza di esse: non potrebbe certo questa Suprema Corte andare in contrario avviso, o rifare tale giudizio di rilevanza, condotto in dettaglio per ogni capitolo e definitivo anche per il complesso dei capitoli stessi, attraverso la ritenuta inconferenza della prova. Il mezzo in esame è, perciò, privo di fondamento giuridico e va rigettato.

Col secondo motivo, poi, si censura la sentenza per avere a torto ritenuto che, ai fini dell'annullamento del negozio giuridico per violenza, sia necessario che la violenza sia specificamente diretta ad estorcere il consenso, in relazione al negozio impugnato, e che il male minacciato sia di tale natura da incidere sul processo di formazione della volontà. A parere dei ricorrenti, invece, la Corte non avrebbe tenuto presente che occorreva fare riferimento all'ambiente ed al clima del regime fascista, perchè ciò che non impressiona in una situazione di libertà e sicurezza, può invece risultare determinante a paralizzare la volontà di una situazione di insicurezza politica. In tal caso, escluso il timore reverenziale, occorreva convenire che vi era stata la dedotta coartazione del consenso prestato.

Anche le censure di questo secondo mezzo sono, tuttavia, infondate.

Questa Suprema Corte ha già altre volte avuto occasione di affermare (*cfr.* Cass., 5 maggio 1955, n. 1264; 10 giugno 1957, n. 2154, ecc.) che non il semplice timore di rappresaglie, facile ad insorgere nell'animo del cittadino durante il ventennio fascista, da una ripulsa a richiesta del partito dominante, o delle singole sue gerarchie, può invalidare per violenza il negozio giuridico concluso col partito fascista, o coi suoi gerarchi che lo richiesero e sollecitarono, bensì solo una vera e propria minaccia di rappresaglie, effettivamente intervenute, sia pure in modo circospetto o discreto, o quanto meno presunto per effetto del comportamento altre volte tenuto in casi analoghi da quegli organi del partito fascista.

Ciò perchè il *metus ab intrinseco*, derivante dalla paura inspirata da uno stato di fatto oggettivo, o da intrusioni dall'esterno nella psiche e nella coscienza di un oggetto non può essere causa invalidante di un negozio giuridico, occorrendo, invece, a tal fine che il timore provenga dall'esterno, ad opera di un soggetto che usi violenza, o minaccia, sia esso l'altro contraente, od un terzo e che la violenza ingiusta sia tale da incidere sul processo di formazione della volontà così da fare venire meno questa libertà di determinazione cui deve essere informata ogni contrattazione.

Deve, infine, ricordarsi che l'apprezzamento del giudice di merito sull'esistenza, nonchè sull'efficacia od inefficacia di una minaccia, o violenza, a coartare la volontà di una persona in tema di obbligazioni e contratti, si risolve in un giudizio di fatto incensurabile in Cassazione, se corretto e congruamente motivato.

Ora, nella specie, la Corte del merito ha escluso l'esistenza stessa di ogni violenza, avendo — in applicazione del tutto corretta dei principi di diritto sopra ricordati — esclusa la violenza nella circostanza generica del timore di rappresaglie da parte degli organi del partito fascista, avendo altresì escluso ogni fatto concreto di violenza, o minaccia da parte dell'altro contraente, o di terzi, così come ogni comportamento vessatorio concreto idoneo a fare temere un male ingiusto ed a coartare la volontà dell'altra parte.

In questa circostanza, escluso ogni errore di diritto nella sentenza denunciata ed ogni vizio *in procedendo*, o nella motivazione, le pronuncie adottate sfuggono ad ogni censura in questa sede, con la conseguenza che il ricorso principale deve essere rigettato integralmente. Va, infine, parimenti rigettato anche il ricorso incidentale, il cui unico mezzo si propone di accertare che, in ogni caso, la pretesa violenza non sarebbe durata fino alla caduta del regime fascista, ma si sarebbe, se mai, esaurita al momento del contratto. È chiaro da un canto che l'esclusione della violenza rende inutile tale ulteriore indagine, anche se condotta ai fini dell'eccepita prescrizione dell'azione, e, dall'altro, che non è possibile ai sensi dell'art. 1442 codice civile, escludere, in ipotesi, che la violenza, in determinati casi, possa anche protrarsi oltre la data di conclusione del contratto, con la conseguenza che non è esatto ritenere, come regola, che decorsi cinque anni dalla stipulazione del contratto l'azione di annullamento per violenza non possa più essere esperita, ove la violenza si protragga oltre tale data.

Quanto alle spese, attesa la minima incidenza del rigetto del ricorso incidentale, esse vanno messe a carico dei ricorrenti principali, che vanno anche condannati alla perdita del deposito. — *Omissis.*

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EXHIBIT 3

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)
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CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Italian into English of the attached Court of Appeals of Rome, 1st Civil Section, Decision of April 9–August 31, 1953.

Dustin Paul Richard, Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me
this 24th day of February, 2017.

HOA WIN LY
Notary Public, State of New York
No. 01LY6323702
Qualified in New York County
Term Expires April 27, 2019

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YEAR VII – NO. 1-2 *79* *C* JANUARY-FEBRUARY 1954

MONTHLY REVIEW

BY THE ATTORNEY GENERAL'S OFFICE

SERVICE PUBLICATION

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[...]

POSITIONS IN LOWER COURT CASE LAW

OBLIGATIONS AND CONTRACTS – Flaw in consent – Duress – Determinative cause of the contract – Persecution applied in application of legislative measures: irrelevance – Statute of limitations on an action for annulment due to duress: when it begins to run. (Court of Appeals of Rome, 1st Civil Section, Decision of April 9-August 31, 1953 – Presiding Judge Varallo, Judge Rapporteur Cesaroni – Ministry of Finance and Public Education vs. Soc. An. U.R.B.S.)

For duress to have legal significance as a vitiation of consent that invalidates a legal transaction, it must be a determinative cause of the transaction.

The generic, indiscriminate persecutions of fascism against its political opponents (in this case, the Freemasons) do not constitute legally significant duress pursuant to Art. 1108 of the 1865 Civil Code (Art. 1427 of the current Civil Code) when there is no specific, direct relationship between these persecutions and the legal transaction alleged to have been carried out under this act of duress.

The persecutions and abuses of power carried out by the fascist government against its political opponents in application of legislative provisions do not constitute duress that is legally significant in the sense indicated above.

The five-year period of limitations for the annulment of a contract allegedly brought about by the duress imposed by the fascist government begins on the execution date of the contract, and not that of the fall of the fascist government.

The annotated decision was handed down by the Court of Appeals of Rome in a case brought by the Società Anonima U.R.B.S., which is the expression and nominee of the Italian Freemasonry, against the Ministries of Finance and Public Education, which case involves the well-known Palazzo Giustiniani of Rome.

To begin with, we believe it is worthwhile to succinctly explain the aspects of the dispute.

In a document dated February 16, 1911, the brothers Riccardo and Emilio Questa sold to the Società U.R.B.S. the Palazzo Giustiniani which, in 1909, in an order served on the owners at that time, had been declared to be of significant historical and artistic interest pursuant to Law No. 364 of June 20, 1909.

The sale was not reported to the Ministry of Public Education either by the sellers or the purchasing Company, and thus the period of time established by law for the State to exercise its right of first refusal never began.

That right was then exercised with a Decree from the Ministry of Public Education dated January 20, 1926, which stated that, as by law, ITL 1,055,000 would be paid to the Società U.R.B.S., which was the price stated in the purchase agreement between the Questa brothers and the Company.

U.R.B.S. brought a petition against that decree before the Council of State alleging, in the first place, that the encumbrance of historical and artistic importance on the Palace should be deemed null and void, because of a defect in serving the document that had declared that importance; in the second place, that, since the Ministry of Public Education had long known of the transfer of the Palace by the Questa brothers to Società U.R.B.S., even without the formal notification required by law, the two-month period beginning with that notification for the exercise of the first refusal right should be deemed to have lapsed.

At the same time, Società U.R.B.S. brought an action in trial court seeking a ruling, in any event, that such Company had by then irrevocably become the owner of the Palace due to the ten-year statute of limitations period under Art. 2137 of the Civil Code of 1865, because it purchased that real property by virtue of a duly recorded deed that was not void due to a defect in form and because it had possessed that real property in good faith for more than ten years.

Following proposals by the two courts, the parties conducted negotiations, which led to the execution on June 13, 1927 of an agreement in which the State Property Office agreed to pay to the Company ITL 4,000,000, rather than the ITL 1,055,000 stated in the decree of first refusal, while the Società U.R.B.S. agreed to waive all claims regarding the first refusal right exercised by the State against the Palace and withdrew both actions.

The agreement was fully implemented. In a decision of July 4-December 13, 1930, the Company's petition to the Council of State was quashed, as was the action before the trial court.

Many years passed, during which the State remained the clear and uncontested owner of the Palace.

In a complaint dated October 22, 1947, Società U.R.B.S. sued the Administration of the State Property Office in the Court of Rome, alleging that the agreement of June 13, 1927 was the result of duress by the fascist government. It asked that the agreement thus be held null and void due to a lack of consent and that the State Property Office be ordered to return the Palazzo Giustiniani to it.

The defendant Administration made an appearance in court and, pointing out that the purchase document giving the State ownership of the Palazzo Giustiniani was the Decree of first refusal, an administrative document obviously of a discretionary nature, it alleged, as a preliminary matter, that the ordinary court called to rule lacked jurisdiction.

Then, exercising the right granted by Art. 41 of the Code of Civil Procedure, the Administration of the State Property Office and the Administration of Public Education, which in the meantime had been impleaded in the case, filed a petition with the Joint Sections the of Cassation Court for a ruling on jurisdiction.

In a decision of March 23, 1950, the Joint Sections held that ordinary jurisdiction existed to hear the issues regarding the voidability, due to a lack of consent, of the Agreement of June 13, 1927; it held that administrative jurisdiction existed to hear all issues concerning the lawfulness of the ministerial decree of first refusal; and it held the temporal unsuitability of the counts of the complaint against the Government Administration seeking restitution of the Palazzo Giustiniani, the finding of a ten-year usucaption, and compensation for the damages resulting from the allegedly unlawful exercise of the first refusal right..

With the case then resumed by the Società U.R.B.S. before the Court of Rome for a ruling on the issues regarding the voidability of the Agreement of June 13, 1927, that Court, in a decision of July 28-October 10, 1951, invalidated the aforementioned agreement due to a lack of consent because of moral duress, and ordered the two Government Administrations to pay court costs.

The Court, believing it having been demonstrated that Società U.R.B.S. was the expression and nominee of the Italian Freemasonry of Palazzo Giustiniani, came to its own conclusions, disregarding all the arguments that had been made on behalf of the Government Administrations.

In particular, it disregarded the argument that the action alleging duress was barred by the five-year period of limitations under Art. 1300 of the Civil Code of 1865.

Counsel to the State argued that, even if U.R.B.S.'s consent to enter into the agreement had been induced by a specific situation of duress, that situation ended upon the agreement's execution and did not persist over time. But the Court had [illegible] that argument, stating:

"We cannot ignore the particular nature of Società U.R.B.S.'s situation, since the alleged duress did not come from an individual but from a totalitarian party, which had significant powers of intimidation, including through the authority of the State, which by then had fallen into its hands (police imprisonment, measures before the Special Court for the defense of the State); therefore, while private duress can normally only play out temporarily, due to the difficulty of those particular favorable conditions continuing over the years and the possibility of that duress being neutralized through the intervention of law enforcement and, in general, public authority, in this case it cannot be said that the state of intimidation and terror of those persecuted by Fascism could go away while the Fascists remained in power; to the contrary, the transformation of the party into a regime consolidated its supremacy in the life of the country ... Lastly, it is obvious that the action specifically aimed at forcing the Freemasonry to waive all rights to its Palazzo Giustiniani headquarters, even if it was actually carried out, ended with the transaction of June 13, 1927, but it is likewise obvious that it would have restarted if the annulment of that transaction had been sought."

On the merits, counsel to the State had alleged that the requirements for the duress to which the law attributes legal effects in contractual matters were not met in this case. Counsel argued that it would have been necessary for the duress to be exercised specifically in relation to the contract sought to be voided, and Fascism's fight against and generic and indiscriminate persecutions of the Freemasonry does not amount to that type of duress.

Counsel added that its argument was supported by an ancient tradition: the principle that, for duress to be considered a vitiation of consent given to enter into a contract, the duress must be the determinative cause of the contract, that it specifically be the basis for entry into the contract (see GIORGI: Teoria generale delle obbligazioni [General Theory of Obligations], *vol. IV). Thus, it does not suffice to cite a generic, even if significant, situation of duress, which could have induced the Freemasonry to manage its interests in the manner deemed most appropriate given the political climate of the time; rather, it is necessary to allege and demonstrate that that specific legal transaction was entered into under the effect of duress that was imposed specifically to bring about the consent. Counsel cited the teaching of Coviello* (Manuale di diritto civile [Manual of Civil Law], p. 395) *according to which: "It cannot be forgotten that the law did not have so much concern for the psychological condition of the person acting, as it does for the cause; it does not speak of fear, but of duress; it does not invalidate a contract if there was a lack of freedom of consent, but holds the consent invalid if it was extorted by duress." And, lastly, counsel observed that in Fascism's fight against the Freemasonry, starting in 1925 an extralegal phase was followed by a legal phase, in which persecutions were carried out pursuant to specific legislative measures.*

However, the Court, although it was unable to deny the need for specific duress that was the determinative

cause of the legal transaction, took itself first and foremost outside of the reality of the facts, affirming as established facts that the plaintiff Company not only had not demonstrated but had not even alleged, thereby holding that depriving the Freemasonry of its headquarters at Palazzo Giustiniani was one of the objectives of the fight against the Freemasonry unleashed by the political class that predominated at that time; it also held that the Fascist duress had, among other purposes, the goal of inducing U.R.B.S. to desist from the judicial proceedings begun after the first refusal right was exercised.

In the second place, the Court, completely forgetting that the issue submitted for its examination could and had to be resolved only in accordance with the legal concepts regarding duress and the lack of consent, shaped a kind of duress that was completely different from the duress that legal rules and principles supported by an ancient tradition recognize as leading to a lack of consent in a contractual context. Probably conditioned by the indisputably dramatic aspects of Fascism's fight against the Freemasonry, the Court managed to associate duress with the political principles underlying the Fascist regime as well as in the entire legal-administrative apparatus constructed by the Fascist State to eliminate its opposition.

The Court's decision was appealed on behalf of the Government Administration. The Court of Appeals, in a decision that was truly laudable and articulated in simple and clear terms, brought the dispute back within its proper bounds, thus arriving at those conclusions which should have been reached had factual situations different from the actual ones not been theorized and questions of law been formulated in accordance with principles.

The Court resolved the dispute by upholding the preliminary defense that the annulment action due to duress brought by U.R.B.S. was barred due to the five-year statute of limitations, but to evaluate that defense, it had to examine the case on the merits, because in substance the questions on the merits were combined and confused with the issues relating to the argument that the period of limitations had expired. It thus required determining, as a matter of principle, whether the legal-administrative apparatus created by the Fascist regime against its opponents could constitute the duress to which private law attributes an effect on the validity of a legal transaction.

To begin with, the Appeals Court related the facts of the case to the historical reality, which the Lower Court had studiously distanced itself from, recognizing that the devastation and plundering of the Masonic headquarters buildings and the violence against the masons and their property (except for an isolated incident that occurred in Genoa in November 1926) ended in 1925, when the assassination attempt against Mussolini by the honorable Zaniboni provided the regime with the impetus to impose a series of laws and police measures intended to destroy all remaining opposition and to give a legal guise to Fascism's fight against its political enemies, for which, according to Mussolini's own expression, from then on "the duress had to come, in its tools and in its ends, solely from the State."

As a consequence, in the second phase of the fight against the Freemasonry, the persecutions and abuses of the Masons (disbanding Masonic lodges; dismissing Masons from service as State officials because they were considered contrary to the government's political directives; imprisonment of the Freemasonry's leaders and proceedings before the Special Court) were carried out pursuant to the cited legislative and police orders. Thus, the Court of Appeal's decision correctly observed: "if all of that occurred pursuant to the laws, one could speak of unjust laws, of laws harming every principle of justice and liberty ...." But any reference to the laws themselves and to the serious and unjust measures that resulted from them against the Masonic directors as the basis of an argument in support of the proposed annulment action is manifestly futile ... In that manner, the coercion inherent in any legal order would be confused with the threat used by a private party to force others with whom it has entered into business relationships to bend to its will ... More specifically, it could be held that a given transaction, entered into to avoid the sanctions threatened by an unfair law and in the state of intimidation produced by the law itself and the persecuting measures already taken pursuant to the law, would be subject to annulment because of a defect in consent. However, placing that psychological condition on the same level as the duress that invalidates consent in a contractual context subverts the legal concept of duress, as gleaned from the codified laws, which, moreover, conform to the applicable traditional principles; the concept, that is, for there to be duress able to vitiate the consent of a contracting party and invalidate a transaction that was entered into, the duress must be purposely exercised to extort consent to that specific transaction ... Avoiding that concept of compulsion is not possible and is always in relation to this concept that one must overcome the broadest defensive construct of the appellee Company, which from that concept extends the scope to have it apply in relation to the abuses of power suffered during a time preceding the enactment of the cited legislative measures and in relation to the subsequent consolidation of the Fascist dictatorship with the resulting creation of a persistent climate of political duress, which prevented any expression contrary to the will of the regime. This type of duress could have created a state of subjugation in Freemasonry's leaders which could have led them to accept the transaction in question for reasons of temporary expediency, but this psychological state has nothing to do with duress in the contractual sphere."

The Court thus fully upheld the arguments made on behalf of the Government Administrations, replacing that forced construction which the Lower Court had made of duress as a lack of consent in the contractual context with concepts that were taken from an exact interpretation of the legislative rules and developing those concepts with a clear precision, which immediately renders their merit convincing.

The Court's decision upheld the arguments of counsel to the State also as to another point, stating: "Nor could the fact that, in the period 1924-1925, there were various assaults by Fascists, specifically at Palazzo Giustiniani, followed, after Zaniboni's assassination attempt, by the temporary occupation by the State Police of the palace for police purposes, lead us to have a contrary opinion, since that episode, contextualized within the significant indiscriminate duress and abuses of power committed against the Masons and their property, which had ceased some years before the time of the contested transaction, cannot, due to their very indiscriminate purpose and because long ago in time, be considered acts of duress as still having an effect and which sought to dispossess the Freemasonry of its headquarters under the guise of a normal agreement."

Having determined that the duress contemplated by Art. 1108 of the Civil Code of 1865 (Art. 1427 of the current Civil Code) could not be found "in the climate caused by the political-legal apparatus of the Fascist State and, more particularly, in that totality of unjust persecutions of which the Italian Freemasonry was a victim", the Court of Appeal, as a logical consequence, upheld the preliminary defense that the period of limitations period had run out, which, though having aspects in common with the question on the merits, procedurally preceded it.

The dispute will probably have subsequent phases but – in our view – the decision of the Court on the merits constitutes, in its clear and precise statement and resolution of the questions presented, a milestone that is not easily reversible.

G. ALBISINNI

[...]

ANNO VII – N. 1-2 GENNAIO-FEBBRAIO 1954

RASSEGNA MENSILE
DELL'AVVOCATURA DELLO STATO

PUBBLICAZIONE DI SERVIZIO

Esemplari fuori-commercio per la distribuzione agli effetti di legge

SOMMARIO

ORIENTAMENTI GIURISPRUDENZIALI DELLE CORTI DI MERITO

OBBLIGAZIONI E CONTRATTI - *Vizio del consenso - Violenza - Causa determinante del contratto - Persecuzioni operate in applicazione di provvedimenti legislativi irrilevanza - Prescrizione dell'azione di annullamento per violenza decorrenza.* (Corte di Appello di Roma, Sez. I civ., 9 aprile-31 agosto 1953 - Pres.: Varallo; Est.: Casaroni - Ministero Finanze e Pubblica Istruzione contro Soc. An. U.R.B.S.).

Perchè la violenza possa avere giuridica rilevanza quale vizio del consenso, atto ad invalidare un negozio giuridico, è necessario che essa sia stata causa determinante del negozio.

Non costituiscono violenza giuridicamente rilevante, per gli effetti di cui all'art. 1108 Codice civile 1865 (ora, 1427 Codice civile vigente) le persecuzioni generiche ed indiscriminate compiute dal fascismo contro i propri oppositori politici (nella specie Massoneria), quando non sussista una specifica e diretta relazione fra dette persecuzioni ed il negozio giuridico che si assume compiuto sotto l'azione della violenza.

Non costituiscono violenza, giuridicamente rilevante, per gli effetti dianzi indicati, le persecuzioni e i soprusi compiuti dal governo fascista contro i propri oppositori politici in applicazione di provvedimenti legislativi.

Il termine di prescrizione quinquennale dell'azione di annullamento di un contratto che si assuma determinato dalla violenza operata dal governo fascista decorre dalla data della conclusione del contratto e non da quella della caduta del regime fascista.

La sentenza che si annota è stata resa dalla Corte di Appello di Roma in causa promossa dalla Società Anonima U.R.B.S., che si assume espressione e prosecuzione della Massoneria italiana, contro i Ministeri delle Finanze e della Pubblica Istruzione, causa che ha per oggetto il noto Palazzo Giustiniani di Roma.

Riteniamo anzitutto interessante esporre, succintamente, i termini della controversia.

Con atto del 18 febbraio 1913 venne venduto dai fratelli Riccardo ed Emilio Questa alla Società U.R.B.S. il Palazzo Giustiniani, dichiarato, fin dal 1909, con provvedimento notificato ai proprietari del tempo, di importante interesse storico ed artistico, ai sensi e per gli effetti della legge 20 giugno 1909, n. 364.

La vendita non fu denunziata al Ministero della Pubblica Istruzione nè dai venditori nè dalla Società acquirente e pertanto non ebbe mai ad iniziarsi il decorso del termine stabilito dalla legge per l'esercizio da parte dello Stato del diritto di prelazione.

Tale diritto veniva quindi esercitato con decreto del Ministero della Pubblica Istruzione del 20 gennaio 1926, stabilendosi con lo stesso provvedimento, come per legge, che sarebbe stata corrisposta alla Società U.R.B.S. la somma di lire 1.055.000, corrispondente al prezzo portato nell'atto di compravendita tra i fratelli Questa e la Società.

Avverso l'indicato decreto la U.R.B.S. propose ricorso al Consiglio di Stato, assumendo, in primo luogo, che dovesse ritenersi inesistente il vincolo di importanza storica ed artistica del Palazzo, per difetto di notifica dell'atto con il quale tale importanza era stata a suo tempo dichiarata; in secondo luogo che, essendo noto da tempo al Ministero della Pubblica Istruzione il trasferimento del Palazzo dai fratelli Questa alla Società U.R.B.S., doveva, anche in mancanza della formale notifica prescritta dalla legge, ritenersi decorso il termine di due mesi stabilito, con decorrenza da tale notifica, per l'esercizio del diritto di prelazione.

Contemporaneamente la Società U.R.B.S. promosse azione innanzi alla Magistratura ordinaria richiedendo che fosse, in ogni caso, dichiarato che essa Società era ormai divenuta, irrevocabilmente, proprietaria del Palazzo per la prescrizione decennale di cui all'art. 2137 del Codice civile del 1865, avendo acquistato l'immobile in virtù di un titolo debitamente trascritto e non nullo per difetto di forma ed avendo posseduto detto immobile per oltre un decennio in buona fede.

Successivamente alla proposizione dei due giudizi, furono scelte fra le parti trattative di accordo, che portarono alla stipula, in data 13 giugno 1927, di una convenzione, con la quale il Demanio dello Stato assumeva obbligo di corrispondere alla Società la somma di lire 4.000.000, in luogo di quella di un milione 055.000, portata nel decreto di prelazione, mentre la Società U.R.B.S. dichiarava di essere tacitata di ogni pretesa relativa al diritto di prelazione esercitato dallo Stato sul Palazzo e rinunziava ad entrambi i giudizi iniziati.

La convenzione ebbe piena esecuzione. Con decisione del 4 luglio-13 dicembre 1930 il ricorso della Società al Consiglio di Stato veniva dichiarato perento e perento andò anche il giudizio innanzi al Tribunale ordinario.

Trascorsero così molti anni, durante i quali lo Stato rimaneva pacifico ed incontrastato proprietario del Palazzo.

Con atto di citazione del 22 ottobre 1947 la Società U.R.B.S. conveniva in giudizio, innanzi al Tribunale di Roma, l'Amministrazione del Demanio dello Stato, assumendo che la convenzione del 13 giugno 1927 era stata determinata con la violenza dal governo fascista. Chiedeva che pertanto la convenzione fosse dichiarata nulla per vizio di consenso e che il Demanio dello Stato fosse condannato a restituire ad essa istante il Palazzo Giustiniani.

L'Amministrazione convenuta si costituiva in giudizio e, ponendo in rilievo come il titolo di acquisto da parte dello Stato della proprietà del Palazzo Giustiniani fosse costituito dal Decreto di prelazione, atto amministrativo sicuramente di carattere discrezionale, eccepiva, in via pregiudiziale, il difetto di giurisdizione dell'adita Autorità giudiziaria ordinaria.

Quindi, avvalendosi della facoltà concessa dall'art. 41 Codice procedura civile, l'Amministrazione del Demanio e quella della Pubblica Istruzione, frattanto chiamate ad intervenire nella causa, proponevano ricorso alle Sezioni Unite della Cassazione per regolamento di giurisdizione.

Le Sezioni Unite con decisione del 23 marzo 1950, dichiaravano la competenza della giurisdizione ordinaria a conoscere delle questioni concernenti l'annullabilità, per vizio di consenso, dell'accordo risultante dalla Convenzione 13 giugno 1927; dichiaravano la competenza della giurisdizione amministrativa a conoscere di tutte le questioni concernenti la legittimità del decreto ministeriale di prelazione; dichiaravano la improponibilità temporanea nei confronti della Pubblica Amministrazione dei capi della domanda diretti ad ottenere la restituzione del Palazzo Giustiniani, l'accertamento della usucapione decennale ed il risarcimento dei danni conseguenziali al dedotto illegittimo esercizio del diritto di prelazione.

Riassunta la causa a cura della Società U.R.B.S., innanzi al Tribunale di Roma, per la decisione delle questioni concernenti l'annullabilità della Convenzione 13 giugno 1927, detto Tribunale, con sentenza 28 luglio-10 ottobre 1951, annullava, per vizio di consenso a causa di violenza morale, la convenzione indicata e condannava le due Amministrazioni dello Stato al pagamento delle spese del giudizio.

Il Tribunale, ritenuto dimostrato che la Società U.R.B.S. fosse espressione e prosecuzione della Massoneria italiana di Palazzo Giustiniani, era pervenuto alle proprie conclusioni, disattendendo tutte le eccezioni che erano state dedotte nell'interesse delle Amministrazioni dello Stato.

In particolare aveva disatteso la eccezione di estinzione della azione di violenza per la prescrizione quinquennale di cui all'art. 1300 Codice civile del 1865.

Si era dedotto dalla difesa dello Stato che, ove anche il consenso della U.R.B.S. fosse stato determinato alla stipula della convenzione da una specifica situazione di violenza tale situazione si sarebbe comunque esaurita a seguito della avvenuta stipula dell'atto e non sarebbe più stata permanente nel tempo. Ma il Tribunale aveva disatteso l'eccezione, affermando:

« Ma non deve negligersi la particolarità della situazione in cui venne a trovarsi la Società U.R.B.S., in quanto la asserita violenza proveniva non già da una persona fisica, ebbene da un partito totalitario, il quale disponeva di gravi poteri di intimidazione anche a mezzo della potestà dello Stato, ormai caduto nelle sue mani (corpi di polizia, provvedimenti avanti il Tribunale speciale per la difesa dello Stato); conciachè mentre la violenza del privato può normalmente esplicarsi solo in via temporanea, per la difficoltà che si perpetuino attraverso gli anni quelle particolari favorevoli condizioni e per la possibilità che essa venga neutralizzata dall'intervento della forza pubblica o in genere della pubblica autorità, nella specie non può dirsi che lo stato di intimidamento e di terrore del perseguitato dal fascismo sia scomparso sinchè esso fascismo rimase al potere, chè anzi la trasformazione del partito in regime ne consolidò la supremazia nella vita del paese... È ovvio, infine, che l'azione specificamente rivolta a costringere la Massoneria a rinunziare ad ogni suo diritto sulla sede di Palazzo Giustiniani, anche se effettivamente fu esplicata, cessò con la transazione 13 giugno 1927 ma è altrettanto ovvio che essa sarebbe stata ripresa, ove si fosse chiesto l'annullamento di tale transazione ».

Nel merito la difesa dello Stato aveva sostenuto che non ricorressero nella specie gli estremi della violenza, a cui la legge fa conseguire effetti giuridici nella materia contrattuale. Sarebbe stato necessario — si osservava — che la violenza fosse stata esercitata proprio in relazione al contratto, di cui si chiedeva l'annullamento e ad integrare tale tipo di violenza non potevano dirsi idonee la lotta e le persecuzioni generiche ed indiscriminate compiute dal fascismo contro la Massoneria.

Si aggiungeva come fosse confortato da una ambita tradizione il principio secondo cui, perchè la violenza possa essere considerata vizio del consenso prestato nella conclusione di un contratto, è necessario che essa sia stata causa determinante del contratto, che si sia specificamente posta come causa ad effetto rispetto alla conclusione del contratto (cfr. GROSSO: Teoria generale delle obbligazioni, vol. IV). Non bastava quindi far richiamo ad una generica, sia pur grave, situazione di violenza, che avesse potuto indurre la Massoneria a regolare i propri interessi nel modo ritenuto più opportuno in relazione al clima politico del tempo, ma sarebbe stato necessario addurre e dimostrare che quel determinato negozio giuridico fosse stato stipulato sotto l'azione di una violenza posta in essere proprio per determinare il consenso. Si richiamava l'insegnamento del Coviello (Manuale di diritto civile, p. 395) secondo il quale: « Non si può dimenticare che la legge non ebbe tanto riguardo alla condizione psicologica di chi agisce quanto alla causa; non parla di timore, ma di violenza; non dice nullo il contratto se ci fu mancanza di libertà di consentire ma dichiara non valido il consenso se fu estorto con violenza ». Ed, infine, si osservava che nella lotta del fascismo contro la Massoneria fin dal 1925 ad una fase extralegale era succeduta una fase legale per cui la persecuzione venne operata in applicazione di specifici provvedimenti legislativi.

Ancorchè il Tribunale, che pur non aveva potuto disconoscere la esistenza di una specifica violenza

che fosse stata la causa determinante del negozio giuridico, si era anzitutto posto al di fuori della realtà dei fatti, affermando come verificatesi circostanze che la Società attrice non soltanto non aveva dimostrate ma non aveva nemmeno dedotte, ritenendo cioè che quello di privare la Massoneria della sua sede di Palazzo Giustiniani fosse uno degli obiettivi della lotta contro di essa scatenata dalla classe politica allora predominante; ritenendo altresì che la violenza fascista perseguiva, tra gli altri fini, quello di indurre la U.R.B.S. a desistere dalle procedure giudiziarie iniziate a seguito dell'esercizio del diritto di prelazione.

In secondo luogo, il Tribunale, del tutto dimenticando che la questione sottoposta al suo esame non poteva e non doveva essere risolta se non secondo i concetti giuridici in materia di violenza — vizio del consenso, si era foggiato un tipo di violenza del tutto diversa da quella a cui le norme legislative nonchè i principi confortati da una antica tradizione attribuivano efficacia come vizio del consenso nella materia contrattuale. Probabilmente suggestionato dagli aspetti indubbiamente drammatici assunti dalla lotta del fascismo contro la Massoneria, il Tribunale era pervenuto ad identificare la violenza negli stessi principi politici ispiratori del regime fascista nonchè in tutto l'apparato giuridico-amministrativo costruito dallo Stato fascista per eliminare i propri oppositori.

Avverso la decisione del Tribunale venne proposto appello nell'interesse della Amministrazione dello Stato e la Corte di Appello, con sentenza veramente pregevole, che si articola in proposizioni semplici e chiare, ha ricondotto la lite entro i suoi giusti termini pervenendo quindi a quelle conclusioni alle quali logicamente si doveva pervenire quando non si fossero ipotizzate situazioni di fatto diverse da quelle reali e le questioni di diritto fossero state impostate in aderenza ai principi.

La Corte ha risolto la controversia accogliendo la eccezione pregiudiziale di estinzione, per prescrizione quinquennale, della azione di annullamento per violenza proposta dalla U.R.B.S., ma proprio per far luogo a tale eccezione ha dovuto esaminare la causa nel merito, perchè nella sostanza le questioni di merito si unificavano e si confondevano con quelle relative alla detta eccezione di prescrizione. Si trattava cioè di stabilire, in via di principio, se l'apparato giuridico-amministrativo creato dal regime fascista contro i propri oppositori potesse costituire quella violenza alla quale il diritto privato attribuisce efficacia determinante sulla validità di un negozio giuridico.

La Corte ha in primo luogo riportato i fatti della causa a quella realtà storica, da cui il Tribunale si era artificiosamente allontanato, riconoscendo che le devastazioni e i saccheggi delle sedi massoniche, le violenze contro i massoni e le loro case ebbero, salvo un episodio isolato avvenuto in Genova nel novembre 1926, le loro ultime manifestazioni nel 1925, allorchè l'attentato a Mussolini dell'onorevole Zaniboni fornì al regime l'occasione per imporre una serie di leggi e di misure di polizia, destinate ad abbattere ogni superstite opposizione e a dare veste legale alla lotta del fascismo contro i suoi nemici politici, per cui, secondo la espressione dello stesso Mussolini, da allora in poi «la violenza doveva essere, negli strumenti e nei fini, esclusivamente statale».

Di conseguenza, nella seconda fase della lotta contro la Massoneria, le persecuzioni e i soprusi in danno dei Massoni (scioglimento delle logge massoniche; dispensa dal servizio dei funzionari dello Stato massoni, in quanto ritenuti contrari alle direttive politiche del governo; assegnazione al confino degli esponenti della Massoneria e provvedimenti innanzi al Tribunale Speciale) furono operati in applicazione dei richiamati provvedimenti legislativi e di polizia. Eppertanto esattamente osserva la sentenza della Corte di Appello «se tutto ciò avvenne in applicazione delle leggi, potrà parlarsi di leggi inique, di leggi lesive di ogni principio di giustizia e di libertà... ». Ma è manifestamente inutile qualsiasi richiamo alle leggi stesse ed ai gravi ed ingiusti provvedimenti che ne conseguirono a carico dei dirigenti massonici per trarne argomento a favore della proposta azione di annullamento... In tal guisa si confonderebbe la coazione che è insita in ogni comando giuridico con la minaccia usata dal privato per costringere altri con cui sia venuto in rapporti negoziali ad di aderire alla propria volontà... Più precisamente si verrebbe a sostenere che un determinato negozio, compiuto per sfuggire alle sanzioni minacciate da una legge iniqua e nello stato di intimidazione prodotto dalla legge stessa e dai provvedimenti persecutori, già presi in applicazione di essa, sarebbe suscettivo di annullamento per vizio di consenso. Ma, ponendosi la detta condizione psicologica sullo stesso piano della violenza invalidatrice del consenso in tema contrattuale, si sconvolge il concetto giuridico di questa, quale si ricava dalle norme codificate, conformi, del resto, ai principi tradizionali in materia, il concetto, cioè che per aversi violenza, atta a viziare il consenso di un contraente ed a produrre l'annullamento del concluso negozio è necessario che la violenza venga appositamente esercitata per estorcere il consenso a quel determinato negozio... Evadere da questo concetto della via compulsiva non è possibile ed è sempre in relazione ad esso che si deve superare il più ampio costrutto difensivo della Società appellata, che di quel concetto estende la portata per farlo operare sia in rapporto alle sopraffazioni subite in epoca precedente alla emanazione dei richiamati provvedimenti legislativi sia in rapporto al successivo consolidamento della dittatura fascista con la conseguente determinazione di un persistente clima di violenza politica, che avrebbe impedito qualsiasi manifestazione contraria alla volontà del regime. Questo tipo di violenza potrà aver creato negli esponenti della Massoneria uno stato di soggezione, che avrà potuto eventualmente consigliare di accettare, per ragioni di contingente convenienza, la transazione in parola ma questo stato psicologico non ha nulla a che vedere con la violenza in materia contrattuale ».

La Corte ha così pienamente accolto le difese svolte nell'interesse delle Amministrazioni dello Stato, sostituendo a quella artificiosa costruzione, che della violenza, quale vizio del consenso nella materia contrattuale, aveva fatto il Tribunale, concetti tratti da una esatta interpretazione delle norme legislative e sviluppando tali concetti con una chiara precisione, che immediatamente convince della fondatezza di essi.

Anche su un altro punto la decisione della Corte ha accolto le deduzioni della difesa dello Stato, affermando: « Nè potrebbe indurre in contrario avviso il fatto che, nel periodo 1924-1925, si ebbero vari assalti, da parte dei fascisti, proprio al Palazzo Giustiniani, seguiti, dopo l'attentato Zaniboni, dalla temporanea occupazione da parte della P.S. del palazzo stesso per fini di polizia, giacchè questo episodio, inquadrandosi fra le tante violenze e sopraffazioni indiscriminate consumate contro le cose e le persone dei massoni, già da qualche tempo cessate all'epoca della impugnata transazione, non possono, per il loro stesso fine indiscriminato e perchè lontano nel tempo, ritenersi come atti di violenza ancora efficienti, diretti a spossessare della sua sede la Massoneria, solo forma di una regolare convenzione ».

Escluso che la violenza prevista dall'art. 1108 Codice civile 1865 (art. 1427 Codice civile vigente) potesse ravvisarsi « nel clima determinato dall'apparato politico-giuridico dello Stato fascista e più particolarmente in quel complesso d'ingiuste persecuzioni, di cui fu vittima la Massoneria italiana », la Corte di Appello, ha, per logica conseguenza, assolto la eccezione pregiudiziale di prescrizione, che pur avendo aspetti comuni con la questione di merito, rituralmente la precedeva.

La controversia probabilmente avrà successive fasi ma — a nostro avviso — la sentenza della Corte di merito costituisce, nella chiara e precisa impostazione e risoluzione delle questioni prospettate, un punto fermo, non facilmente superabile.

G. ALBISINNI

COMPROMESSO ED ARBITRI - *Appalto di opere pubbliche - Controversie - Istanza di arbitrato - Termine.* (Collegio arbitrale, lodo del 18-23 aprile 1953 - Pres.: Bengiorgio; membri: Miraglia, Galdi, Dalla Valle, Taddeucci - Impresa Quercardo Antonio contro Ministero Lavori Pubblici).

Il termine di 30 giorni stabilito dall'art. 45 del Capitolato generale sulle opere pubbliche è perentorio, e l'istanza di arbitrato che venisse successivamente proposta dall'Impresa è inammissibile.

La pronuncia del Collegio arbitrale è particolarmente rilevante anche per aver escluso che il termine per l'istanza di arbitrato potesse ritenersi riaperto da un provvedimento puramente confermativo di quello ordine di servizio di rigetto delle riserve che l'impresa non impugnò tempestivamente.

EXHIBIT 4

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)
) ss
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CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Italian into English of the attached Civil Cassation Court, 1st Section, Decision No. 2150 of July 28, 1950.

Dustin Paul Richard, Mauaging Editor
Geotext Translations, Inc.

Sworn to and subscribed before me
this 28th day of February, 2017.

HOA WIN LY
Notary Public, State of New York
No. 01LY6323702
Qualified in New York County
Term Expires April 27, 2019

[...]

1966) Civil Cassation Court, 1st Section, Decision No. 2150 of July 28, 1950, Presiding Judge Anichini, Judge Rapporteur Liguori, Public Prosecutor Caruso (in agreement) in *Soc. An. Daldi vs. Massetti.*

Contracts – Duress – Subject Matter – On Sales – Evidence – Confession – Statements by the parties – Summons and agent's petition – Evidence – Confession – Statements by the parties – Denial of decision-making value – Nonappealability – Cassation – Failure to examine decisive fact – Decision other than the one adopted – Cassation – Briefs – New questions – Inadmissibility.

The contract for the sale of an automobile may be annulled due to duress during the period of Nazi-Fascist power in Italy when the owner of a "protected" industry, after procuring a list of automobiles lacking their registration from the German command for the purpose of choosing one that suited his needs by acquiring it directly from the owners, presents himself to the owner of such a vehicle or forces said owner to sell him the car with the threat of otherwise demanding its seizure by the German command (1).

Refusing, even implicitly, the value of confession to a statement by a party to the proceeding constitutes an assessment of fact to which the Cassation Court cannot object (2).

One may not consider as being of confessional value the content of a marked summons of the plaintiff by an agent of the party (whose powers are furthermore unknown) when this refers to factual circumstances involving other people that are contradicted by the witness testimony [illegible] by the lower court (3).

One remains outside the provision of Art. 360, No. 5 of the Code of Civil Procedure whenever the fact whose allegedly omitted examination is not certain or is evaluated in a sense that deviates or is simply different from the one maintained by the plaintiff, or which occurs as a piece of evidence not considered relevant for the decision, as the court is not obligated to discuss all the evidence provided by the parties, merely that evidence that substantiates its opinion (4).

The Cassation Court may not hear questions raised for the first time in the explanatory notes to the appeal, and which, as they do not concern the public order, should not be raised *ex officio* (5).

(1) On the concept of duress recently, Cass. Court Decision No. 331 of 04/05/50, in this *Rivista [Review]* XXIX 1st no. 158 with citations; no. 827 of 03/28/50, *ibid.* no. 687 with citations.

(2) Confirmed Cass. Court Decision No. 2542 of 12/06/49 in this *Rivista* XXVIII 5th no. 2520 with citations.

(3) On the value of admissions contained in complaints, see Cass. Court Decision No. 2236 of 07/30/50, in this *Rivista* XXIX 1st no. 60 with memorandum of MONTESANO, *In tema di confessione giudiziale [On Judicial Confession];* Court of Appeals of Genoa 05/15/40 in RepFI 47 see *Confessione civ.* 10; see also Cass. Court Decision No. 359 of 03/06/45, in this *Rivista* XXVII 1st no. 314; no. 391 of 02/19/43 in RepFI 43-45 see *Confessione civ.* 12.

(4) Well-settled case law. See Cass. Court Decision No. 1018 of 04/17/50 in this *Rivista* XXIX 1st no. 820; no. 1942 of 05/25/49, *ibid.* XXVIII 2nd no. 1172, with memorandum of citations.

(5) See Cassation Court Decision No. 707 of 03/30/49, in this *Rivista* XXVIII 1st no. 707; no. 546 of 03/15/40, *ibid.* no. 449, with memorandum of citations.

[...]

EXHIBIT 5

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STATE OF NEW YORK)
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CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Italian into English of the attached Palermo Court, June 14, 1946, *Florio vs. Gioventù Italiana, Foro sin.* 1947, pg. 26.

Dustin Paul Richard, Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me
this 26th day of February, 2017.

HOA WIN LY
Notary Public, State of New York
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Qualified in New York County
Term Expires April 27, 2019

[...]

113. It is possible to annul, due to violence, the sale of a property to which the owner has agreed because he was given the choice between either suffering the wrath of the extremely powerful authority of the Fascist mayor or the Fascist party, with the consequent dangers known to all, such as the "infamy" of being accused of incomprehension, the withdrawal of one's identification document, or even exile or the loss of one's personal liberties (detainment by the police), or selling his property. – Palermo Court, June 14, 1940, *Florio vs. Gioventù Italiana* ["Italian youth"], *Foro sin.* 1947, pg. 26.

[...]

102. Pertanto, se (e non è necessario tale forma) detta richiesta sia stata proposta con citazione, quest'ultima deve essere notificata nel termine fissato in tale sentenza; nè la parte che vi ha provveduto può pretendere di eseguire alla domanda per tardività della notifica, allegando e provando di aver posto tutta la diligenza possibile per rintracciare l'indirizzo della controparte, non potendo le formalità della notificazione alle controparte essere surrogate dalla diligenza comunque usata per giungere a questa fine, la quale non ha alcun significato, all'infuori dell'ipotesi di dolo o di frode della destinataria nel mutare l'impedita. — Cass., 12 giugno 1947, Ghirardo c. Cimarelli (rass. n. 849 [mss.]).

103. Tanto meno è possibile tener conto di quella diligenza, invero dalla volta esigerne di notificazione, quando più la parte interessata abbia omesso di valersi dell'art. 142 c. p. c. — A. Torino, 5 novembre 1945, Bonfi c. Soc. accom. di Solicchi» novità, Foro padano, 1947, II, 7 (m).

104. Il giudice presso al fini dell'art. 1512 n. 4, 1362 deve accertare la esistenza generale risultante dal regime di alienazione od ogni altra volta che al creditore dedivi dal vizio contenuto del contratto nel momento insistere e nelle fasi delle sue eventualità. — Cass., 12 giugno 1947, Ghirardo c. Cimarelli (rass. n. 849 [mss.]).

106. Pertanto la compravendita di generi alimentari, la consegna da parte del venditore di merce mancante dei requisiti della commerciabilità (vegana la consegna di «fiori per mele» onde in tale ipotesi deve farsi luogo all'azione contrattuale e non già a quella redibitoria. — Cass., 6 febbraio 1947, Com. c. Nadi (rass. n. 122 [mss.]).

106. La commerciabilità è qualità essenziale della merci dichiarate all'alienazione; il difetto di esse dà quindi luogo all'azione contrattuale, non soggetta ai termini di decadenza stabiliti dal n. n. 1005 per l'azione redibitoria. — Cass., 7 luglio 1947, Zaivi c. Antonelli (rass. c. 1947 [mss.]).

107. Ammessa l'azione contrattuale tanto per la fornitura di merce in quantità inferiore a quella pattuita quanto per la consegna di un «aliud pro alio», ogni altra questione in relazione alla suddetta merce, o che separatamente considerata dovrebbe formare oggetto di azioni redibitoria, resta assorbita nell'ambito dell'azione contrattuale. — A. Genova, 9 gennaio 1947, Maldonati c. Merelli, Temi, 1947, 345 (m).

108. La mancata ricezione di un pezzo da parte del compratore non può essere considerata estremo per l'esistenza del contratto per mancanza di causa, potendo questa esistere a titolo di liberalità. — A. Palermo, 7 marzo 1947, Di Quarto c. Di Quarto, Foro sic., 1947, 184 (m).

108. Non è nulla perchè contraria alla causa (mancanza nel bilancio dei prezzi della merci, il contratto di vendita di un autoveicolo usato se esso stesso conviene fra privati a prezzo superiore a quello normale. — A. Milano, 21 marzo 1947, Vigini c. Grassi, Temi, 1947, 510 (m).

110. Violazione dell'articolo, incensurabilità in quanto perchè non contenuta alle prescrizioni delle leggi annonarie, dove eccezionali nulle il contratto di compravendita di tale prodotto conviene procedere mediante dal produttore

111. Dannia nullità comminata per il produttore l'obbligo, oltre che di vendere la merce a rivenditori ai consumatore il prezzo e le spese di questi incontrate, anche di rimborsi i danni del compratore subiti in quanto determinati da un comportamento illecito del venditore, verso un compratore ignaro dell'illecità dell'oggetto del contratto. — A. Genova, 16 aprile 1945, Soc. Bertolazzi c. Franchetti, Temi, 1945, 900 (m).

112. È nulla per mancanza di oggetto la vendita di animali affetti da peste suina, ancorchè la malattia non sia manifesta all'atto della materiale tradizione. — A. Firenze, 19 aprile 1947, Marotti c. Giovannelli, Foro. tosc., 1947, 209.

È annullabile, per violenza, la vendita di un immobile ottenuta al fine di impedire il pignoramento coattivamente, qualora posto nella alternativa di subire le tre dalla sopportante subirità di ritirare o del partito bastata, non i pericoli conseguenti a tutti i tre nei quali s'intende al mero tentativo di contrapposizione, il ritiro dalla tassazione e perfino l'esilio a la persuasione della libertà personale (confino di polizia) avverso di vendere la sua proprietà. — T. Palermo, 14 giugno 1940, Florio c. Giovanni Ik, Foro sic., 1947, 26.

114. Le alienazioni di autoveicoli destinati al trasporto di cose, effettuate sotto l'impero del R. D. L. 22 marzo 1945, n. 225,

115. Delle nullità del contratto perchè avente causa illecita deve la rivendibilità delle prestazioni effettuate in esecuzione di esso, non essendo l'illecità dipendente da contratto conosciuta dal buon costume, ma solo da contrarietà a norme
A di legge. — T. Torino, 7 marzo 1947, Bonzio c. Prevosto, Foro padano, 1947, I, 636; V. pure: Foro, 1946, I, 716 (n).

116. È giudizio di fatto quello con cui il giudice di merito, interpretando le volontà contrattuali delle parti, ritenga che la causa vendita di beni immobiliari, oggetto di privata scrittura, il prezzo non sia i contenenti si siano riferiti al solo corrispettivo di godimento del contratto nel termine fissato per la stipulazione dell'atto pubblico, pagando non pensa, inattinente una cauzione successiva; pertanto la manifestazione di recesso, non data, a pena di nullità, mediante di atto scritto, può provarsi con l'allegata dal trasferimento dell'immobile al venditore, per non aversi mai la vendita perfezionata siccome subordinata alla condizione sospensiva pel verificarsi
B — Cass., 28 luglio 1947, Ramanelli c. Lampani (rass. mass. Foro 1947 [mss.]).

117. La condizione secondo la quale un contratto abbia esecuzione nelle ipotesi che entro un certo termine la merce non sia collocata presso altro acquirente è sospensiva e non risolutiva. — A. Bologna, 8 febbraio 1947, Barella c. Malinari, Foro padano, 1947, II, 81 (m).

118. La condizione sospensiva subordinante il diritto del venditori ad un acquirente nel caso in cui alcuno, acquistando ad esempio per costruzione di case popolari ed economiche, o tale scopo non vendesse salvo un rateando utile, è valida, ed verificata ed avverato in cui il piano regolatore di
D sposa una diversa utilizzazione delle aree. — A. Milano, 29 marzo 1947, Motta c. Cons. Milano, Mon. trib., 1947, 287.

119. Un contratto di compravendita di legna da lavoro dalla provinciale di Rieti a Milano, conchiuso il 18 aprile 1945, non era nullo per essere la legna priva necessario, ma subordinato alle limitazioni e alle autorizzazioni richieste dal d. l. 10 ottobre 1945, n. 1148, e dalle ordinanze prefettizie che disciplinavano le prestazioni, la distribuzione e il controllo della legna.

120. L'autorizzazione del comando della polizia forestale competente costituisce una condizione sospensiva, non risolutiva
E degli la quale il contratto non acquistava sebbene giuridica
— A. Milano, 21 aprile 1947, Orsenna c. Venturoncin, Foro padano, 1947, II, 47 (m).

121. In caso di inadempimento dell'obbligato che, in un contratto di compravendita di autoveicoli utilizzi a pubblico servizio, sottoposto alla condizione sospensiva del consenso della pubblica amministrazione, trattandosi di clausola data esclusivamente a favore dell'alienante, è applicabile la norma dell'art. 1359 c. c. e può il giudice dichiarare avverata la condizione, come con ciò consegnato all'obbligato inadempitore.

122. La negata che abbiamo il diritto di alienazione della vettura subito ad autoservizi di linea senza il preventivo consenso del titolare della concessione non è nulla, bensì dalla legislazione antifascista esclusiva della pubblica amministrazione che è la sola legittimata a farlo valere.

123. Il consensualmente non può pertanto invocare sotto diversi nei confronti del terzo, al quale abbia trasferito la proprietà
F di cui di lui vettura. — T. Agrigento, 4 febbraio 1947, Gandilori c. Lombino, Arch. circolaz. giur., 1947, 183 (m).

124. Per la vendita di un immobile, a corpo e non a misura, non crisi in cui la piccola eccedenza, se pure in via approssimativa si le differenze che viene poi discostato da superiore o ribasso, la legge dà diritto al venditore di ottenere il supplemento di prezzo; od al compratore il diritto di ottenere una diminuzione di prezzo o, di recedere dal contratto.

125. Ma la manifestate azioni debbono essere esercitate, a pena di decadenza, entro un anno dalla stipulazione del contratto o non importano, per il venditore, il diritto di ritenere, da parte che aspetti la misura specificata nel contratto.

126. Nella vendita a corpo e non a misura di un immobile, giudice, per dovendo dare la prevalenza, per la decisione ai risultati specificati nell'atto di vendita, non deve limitarsi a dare constatazione alla presunzione risultante da tali pendenze ma deve tener conto di tutta la circostanza della quale

nato, a soddisfacimento indivisibile l'obbligazione del venditore verso più acquirenti, in mancanza di espressa contraria volontà delle parti. — T. L'Aquila, 1 dicembre 1943. Ciechetti c. Cheloti, Mon. trib., 1947, 47.

127. La clausola «a parte chiusa» inserita in un contratto di compravendita di un immobile non ha valore complementare nel senso che possa estendersi anche a quella cosa che trovasi accidentalmente nell'immobile al momento della vendita.

128. Il venditore può, perchè possa essere esente da ogni responsabilità, a tenore ed avvertire il compratore della presenza accidentale della cosa, salvochè l'accidentalità non risulti dalla natura stessa della cosa, in rapporto alle particolari caratteristiche dell'immobile venduto.

129. La prova testimoniale vertente sulle circostanze che il venditore avverti il compratore della presenza accidentale della cosa, è ammissibile non essendo in contrasto con il divieto di cui all'art. 2722 c. c., giacchè non riguarda un patto aggiunto o contrario al contenuto di un documento scritto, ma riflette invece i presupposti di fatto nei limiti dei quali deve applicarsi la clausola «a parte chiusa». — T. Lucca, 25 giugno 1945, Soc. ofcinali Fabi c. Nicoli, Arch. circolaz. giur., 1945, 404 (m).

130. L'art. 1522 c. c. non prescrive alcuna formalità circa la forma e la conservazione del consenso; ma la per prescrizione concernente la esistenza del consenso può significare giuridica elaborata dalla dottrina e dalla giurisprudenza.
— A. Milano, 19 luglio 1947, Sanna c. Soc. ali. mecc. Minoletti, Foro padano, 1947, II, 73 (m).

131. Non va confuso la con delle vendita obbligatoria, il cui effetto è quello di attribuire al compratore soltanto un diritto di credito ad avere in un tempo futuro la cosa, dalle promesse di vendita: nella prima il venditore si è obbligato al trasferimento della proprietà e quindi non assume con ciò alcuna manifestazione di consenso pendili dalle trasformazioni abbia ad effettuare; nella seconda, oggetto del negozio è la stipulazione di un contratto di vendita, per la quale occorre una nuova manifestazione di volontà. — Cass., 13 agosto 1947, Grimoc c. Pascali, Giur. ass. riv., 1947, vol. XXVI, 402.

132. Non possono essere revocati per causa di lesione altre elezioni i canonici elezioni, già nella disposte dal codice abrogato del 1855 ma nuova disposta dal cod. civ. vigente.

134. Non può essere ostacolata la cassazione l'apprezzamento di fatto con il quale il giudice di merito ritiene che, nell'economia delle convenzioni, il consistere discreto imprenda il contratto, anche se la merce dall'acquirente si limita a parte della cosa venduta. — Cass., 19 giugno 1947, Mascunci c. Forte (rass. n. 974 [mss.]).

135. È elastica e di natura all'azione di risoluzione in base all'art. 1454 c. c. il contratto di compravendita di barattoli conclusa mentre intervenuti una tregua di parte delle truppe tedesche che si trovavano nella località ove la contrattazione avvenire e quindi il prezzo della vendita venire determinato in relazione al rischio nel l'oggetto della vendita stesso era esposto. — Cass., 31 luglio 1947, Pieroni c. Burchi (rass. n. 1015 [mss.]; nel 1947; nel 1948 v. Temi, 133).

136. Proponibile dalla parte dell'art. 1478 c. c., per cui è vietata la vendita della cosa altrui, è che succede i contenenti ne siano consapevoli.

137. Se invece il compratore ne ignora la alienità, allora va applicata la disposizione dell'art. 1479 stesso codice, la quale concede al solo compratore non più l'azione di nullità, stabilita dal codice del 1865, ma quella di risoluzione del contratto; la quale può essere invocata solo se sul fondamento
H venditore diventi proprietario della cosa venduta.

138. Il possesso a venditore di cosa altrui è tenuto a conoscenza al compratore ignaro della alienità, salvo l'onere di giustizia da parte del rei proprietari. — Cass., 17 luglio 1947, Leonardi c. Poli (rass. n. 1126 [mss.]).

134. L'avere il compratore acquistato in buona fede la cosa mobile non esclude che egli possa rivalersi al suo venditori, chiedendo la risoluzione del contratto, quando venga a conoscenza, successivamente alla vendita, che la cosa non era di proprietà del venditore e che vi è pericolo della evizione.
— A. Bari, 6 maggio 1946, Lolarro c. Amicella, Temi giudiz., 1947, 77 (m).

140. In materia di commercio il venditore di cosa altrui è obbligato a pena del risarcimento dei danni. — A. Napoli, 11 maggio 1946, Lolaro c. Donadio, Dir. e giur., 1947, 48 (m).

141. Quando, per errore materiale in un atto di compravendita immobiliare, sia stata scambiata la determinata misura di mezzo non relativo al fondo cui questa oggetto del contratto, si ha, in riguardo al fondo contemplato a detto numero, inesistenza del titolo di trasferimento della proprietà, e pertanto un può validamente l'acquisto di questa da parte del compratore, nè esso si trova in tutti di fondo appartenente ad un terzo, e dal venditore successivamente acquistato, nè può ravvisare a carico dell'ultimo l'obbligo della garanzia per evizione. — Cass., 21 dicembre 1946
K Ubaldi c. Pelotti (rass. n. 1077 [mss.]).

142. La compravendita i cui effetti sono delle parti rivivali all'opera della revoca del proclama alleato che vietava i trasferimenti immobiliari, deve considerarsi come una compravendita sottoposta a termine iniziale. — A. Napoli, 21 giugno 1946, Vitale c. Gaeta, Dir. e giur., 1947, 49 (m).

143. Se un immobile venduto ha alcuni locali adibiti al servizio e l'acquirente si è impegnato a farvi celebrare la prescrizione le sono ignorati, contravviene agli al patto ignaro al mancato dei fervi pentiere le cerimonie religiose ed altre cui apportino realmente che rendano le chiese inadatte al servizio divino.

144. Mancia nelle limitate discrezionali inindacabile dall'autorità occlesiastica. Ricorrente pensavvivere le condizioni che vennero tese di edificare nell'orbrio secondo il decreto e le esigenze del culto ed il compratore può essere giudizialmente costretto ad ottemperarvi. — A. Milano, 21 dicembre 1945, Zivolla c. Cattaneo, Foro padano, 1947, II, 13 (m).

145. L'area acquistabile ad un edificio, edificabile separatamente dal medesimo, può costituire oggetto di vendita separatamente dall'edificio stesso; ma se le parti non la considerazione erano entità patrimoniale distinta dall'edificio, esse devon considerarsi come compresa nella vendita per il principio che l'area è accessoria dell'edificio. — A. Palermo, 30 dicembre 1946, Morello c. Aiuto, Foro sic., 1946, 78 (m).

146. Dal solo fatto dell'accettazione di alcune parziali consegne ripetute tardive non è data desumere nessun altro la rinuncia del compratore al termine convenuto per l'esecuzione totale dell'obbligazione dal venditore. — Cass., 21 febbraio
P 1947, Soc. cemiti emiliai c. Isaacs (rass. n. 1069 [mss.]).

147. Se in un contratto di vendita di cosa mobile viene previsto un termine per il ritiro della cosa venduta ed il pagamento del prezzo da parte del compratore, e questo termine è da considerarsi essenziale, il compratore che entro tal termine non abbia provveduto a ritirare la cosa e a pagare il prezzo, può senza alcuna inadempienza senza che all'uopo sia necessaria che il venditore gli faccia l'intimazione perentoria dell'art. 1454 c. c. — Cass., 31 luglio 1947,
Q Calvisi c. Gnocchi (rass. n. 1046 [mss.]).

148. Il termine apposto al un contratto preliminare di vendita immobiliare deve, per la natura stessa del negozio, ritenersi essenziale, in questo, secondo proposito alla formazione di altro negozio definitivo, non può lasciare illimitatamente incerto la situazione giuridica creatasi fra le parti, anche in seguito avvenuta delle modificazioni del mercato dei valori fondiari. — A. Napoli, 6 febbraio 1946, Bianchi
R c. Fasolo, Dir. e giur., 1947, 70 (m).

149. La possibilità che abbia il compratore, dopo la sentenza del tribunale stabilire per la consegna della merce, di effettuarne da altri l'acquisto al medesimo prezzo, non gli preclude di chiedere l'adempimento del contratto fino a che non ne abbia domandato la risoluzione, salvo che il termine per la consegna della merce abbia carattere essenziale, nel qual caso, era voglia sia la persistenza sia negativa, deve conformarsi al disposto dell'art. 1457 c. c. (art. 66 del codice
S c. comm.). — Cass., 12 giugno 1947, Consorzio Bonaudo c. Bianconi (rass. n. 1030 [mss.]).

150. In un contratto di vendita di vino, la clausola a saggio campione può essere predisposta allo a fine di subordinare il perfezionamento del contratto al gradimento del compratore, ma a fine di accertare la rispondenza della qualità della merce consegnata a quella precedentemente pervista e pattuita.

151. Qualora, esaminate le risultanze di fatto, il giudice di merito decida in senso favorevole alla seconda ipotesi, spetta al compratore la prova che la merce non aveva le caratte-

EXHIBIT 6

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CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Italian into English of the attached Section 1 of Case Law:

Cassation Court, dated March 17, 1954.

Dustin Paul Richard, Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me
this 26th day of February, 2017.

HOA WIN LY
Notary Public, State of New York
No. 01LY6323702
Qualified in New York County
Term Expires April 27, 2019

765 – Section I – March 17, 1954 – Presiding Judge Acampora, Judge Rapporteur Liguori, Public Prosecutor Caruso (concluding in agreement) in Dell'Agnello vs. the Tax Authority

(Confirmation of Florence Appeals Court Ruling of March 21, 1952)

Obligations and contracts – Flaws in consent – Duress – Contracts entered into by the Fascist party and its officials – Case-by-case evaluation.
Obligations and contracts – Flaws in consent – Duress – Details.
(Civil Code, Art. 1435).

The laws containing sanctions against fascism have not considered all the activities carried out by the Fascists for more than twenty years as illegitimate, such that one cannot claim that every legal transaction involving the Fascist party or its officials is retroactively vitiated by violence; therefore, in the absence of a relevant instrument that served to consolidate the Fascist regime, one must establish whether the counterparty's consent was extorted violently on a case-by-case basis, using the rules of common law(1).

For the violence to cause the contract's invalidity, it must not only come from the counterparty or a third party. It must also be such that, given the threat of future harm, it impacts the process of the formation of intent and alters the freedom of determination that must inform every contractual transaction. The harm threatened must be unfair and significant, unfair meaning against the law and significant, that it intimidates an average, reasonable person (2).

(*Omitted*) – As shown by the provision of Articles 1334 and 1335, Civil Code, for violence to cause the contract's invalidity, it must not only come from the counterparty or a third party. It must also be such that, with the threat of future harm, it impacts the process of the formation of intent and alters the freedom of determination that must inform every contractual dealing. The harm threatened must be unfair and significant, unfair meaning against the law and significant, that it intimidates an average, reasonable person. These principles brought to the lower court's attention were precisely understood and applied in the case at hand.

In fact, the Appeals Court found that Fascist party officials had not engaged in any violence to compel Mr. Dell'Agnello to sell, and that this sale, which was performed at a price below or equal to the value of the property sold, had a clearly determined reason, namely the plaintiff's need to obtain cash due to the troubles of the company in which he was one of the biggest shareholders. The ruling out of the alleged violence, the specification of the sale performed, and the finding that the price corresponded to the property's value are all elements that compromise the basis of the claims advanced.

Well aware that the assessment of the evidence acquired during this proceeding and submitted for the lower court's irrefutable judgment cannot be reexamined on this occasion, Mr. Dell'Agnello attempts to circumvent the obstacle by alleging flaws in logic, errors in law, and deficient activities that are nonexistent, and which, even if they did exist, would not suffice to annul the appealed decision, because they concern circumstances that are anything but significant. The exclusion of actions that constitute the alleged violence to one's person, a finding that the plaintiff is shown to ignore, as was inferred from the statements by the witnesses heard, constitutes the truly decisive element that informs the ruling. At any rate, the alleged logical flaws do not occur, as the lower court's sovereign assessment of the facts in the proceeding enables it to infer the existence of an unknown fact from a known one; therefore, the Appeals Court did nothing illogical or untruthful by inferring that, based on Dell'Agnello's refusal in 1941 to entertain the solicitations of the Fascists in Lucca to sell the property at the heart of this proceeding, one could easily consider the disputed sale as freely intended. We observed to the contrary that it is not exactly true that Fascism had attenuated its rigor as it began to collapse, but the observation, which of course does not constitute a logical flaw, cannot be objected to in this setting, because

(1-2) Cassation Court, Decision No. 225 of January 30, 1954 in this Review, 1954, Vol. I, pg. 143.

the assessment expressed that was, in the Court's opinion, inferred from facts that are part of everyday experience, does not exceed the limits of reasonable credibility and truthfulness. (*Omitted*)

[...]

758 - Sez. Un. - 16 marzo 1954 - Pres. Galizia - Est. Tavolaro - P. M. Eula (concl. conf.) - Min. Industria Commercio c. Ditta Welcome.

(Dichiara inammissibile ricorso avverso Commis. ricorsi brevetti).

Competenza e giurisdizione - Regolamento di giurisdizione - Proposto da chi non è stato parte in causa davanti al giudice di merito - Inammissibilità - Eccezioni.
(Cod. proc. civ., art. 41 e 368).

E inammissibile, per mancanza di legittimazione, il ricorso per regolamento preventivo di giurisdizione proposto da chi non sia stato parte in causa davanti al giudice di merito, fatta eccezione per la ipotesi di conflitto di attribuzione prevista e regolata dal capoverso dell'art. 41 c.p.c. e dall'art. 368 del medesimo codice.

Per un caso particolare di regolamento di giurisdizione sollevato dal prefetto cfr. Cass., Sez. un., 30 novembre 1950 n. 2663, *Giur. it. Mass.* 1950, 642. In dottrina cfr. in generale D'Onofrio, *Commento*, vol. I, p. 477 ss.

759 - Sez. Un. - 16 marzo 1954 - Pres. Galizia - Est. Tavolaro - P. M. Eula (concl. conf.) - Min. Industria e Commercio c. The Welcome.

Conforme alla sentenza della Cass. 16 marzo 1954 n. 758, *supra*.

760 - Sez. Un. - 16 marzo 1954 - Pres. Galizia - Est. Tavolaro - P. M. Eula (concl. conf.) - Min. Industria e Commercio c. Candin.

Conforme alla sentenza della Cass. 16 marzo 1954 n. 758, *supra*.

761 - Sez. Un. - 16 marzo 1954 - Pres. Galizia - Est. Civiletti - P. M. Eula (concl. conf.) - De Romanis c. Giunta prov. amm. Roma.

(Cassa App. Roma 1 aprile 1953).

Sentenza - Collegio giudicante - Illegittima composizione - Inesistenza della pronunzia e difetto assoluto di pronunzia - Gravame - Rimessione al primo giudice - Fattispecie.
(Cod. proc. civ., art. 161).

La pronuncia dell'organo giurisdizionale non costituito nei modi voluti dalla legge, in ragione del numero dei suoi componenti e della qualità che ciascuno di essi deve avere per fungere da giudice, è giuridicamente inesistente, considerata quale atto a sè e sotto l'aspetto della sua rilevanza per il diritto, nonchè viziata da difetto di giurisdizione, considerata sotto l'aspetto della potestà dell'organo che la emise.

Pertanto, non trattandosi di una nullità che possa farsi valere soltanto con l'impugnazione della sentenza, a norma dell'art. 161 c.p.c. comma I, il giudice di secondo grado non può giudicare il gravame nel merito, ma deve rimettere le parti davanti al primo giudice. (Applicazione, in tema di contestazioni in materia elettorale, ad una decisione della Giunta provinciale amministrativa, composta con i due membri elettivi più anziani di età, anzichè con i due membri eletti con maggior numero di voti).

Sulla prima parte della massima cfr. Cass. 28 novembre 1953 n. 3626, in questa *Rivista* 1953, fasc. 12, p. 3389.
Sulla seconda parte in senso conforme Cass. 7 febbraio 1953 n. 313, in questa *Rivista* 1953, fasc. 2-3, p. 410. La sentenza cassata leggesi in *Temi Romana* 1953, 127 e *Riv. provinciale* 1953, 101.

765 - Sez. I - 17 marzo 1954 - Pres. Acampora - Est. Liguori - P. M. Caruso (concl. conf.) - Dell'Agnello c. Amm.ne Finanze.

(Conferma App. Firenze 21 marzo 1953).

Obbligazioni e contratti - Vizi del consenso - Violenza - Contratti stipulati dal partito fascista e dai suoi gerarchi - Valutazione caso per caso.
Obbligazioni e contratti - Vizi del consenso - Violenza - Estremi.
(Cod. civ., art. 1435).

Le leggi contenenti sanzioni contro il fascismo non hanno considerato illegittime tutte le attività poste in essere dai fascisti per oltre un ventennio, sì da far ritenere retroattivamente viziato da violenza ogni negozio giuridico in cui siano state parti il partito fascista o i suoi gerarchi, e quindi, ove non ricorra un atto rilevante diretto al consolidamento del regime fascista, occorre stabilire caso per caso, alla stregua delle norme di diritto comune, se il consenso dell'altra parte sia stato estorto con violenza (1).

La violenza, per assurgere a causa di invalidità del contratto, deve non solo provenire dalla controparte o da un terzo, ma essere tale da incidere, con la minaccia di un male futuro, sul processo di formazione della volontà, alterando quella libertà di determinazione cui deve essere informata ogni contrattazione. Il male minacciato deve essere ingiusto e notevole; ingiusto, cioè contrario al diritto; notevole, ossia tale da impressionare il tipo medio di una persona sensata (2).

(Omissis). — Come emerge dal disposto degli art. 1434 e 1435 c.c. la violenza, per assurgere a causa di invalidità del contratto, deve non solo provenire dalla controparte o da un terzo, ma essere tale da incidere con la minaccia di un male futuro, sul processo di formazione della volontà alterando quella libertà di determinazione cui deve essere informata ogni contrattazione. Il male minacciato deve poi essere ingiusto e notevole, ingiusto e cioè contrario al diritto, notevole ossia tale da impressionare il tipo medio di una persona sensata. Principi questi, che presenti all'attenzione dei giudici di merito, sono stati esattamente intesi ed applicati nel caso che ne occupa.

La Corte di Appello, infatti, non solo ha accertato che nessuna violenza fu posta in essere dai gerarchi fascisti per indurre il Dell'Agnello alla vendita, ma che essa, eseguita per un prezzo se non inferiore, corrispondente al valore dell'immobile alienato, ebbe una causale ben determinata costituita dalla necessità per il ricorrente di disporre del danaro liquido a causa del dissesto della società della quale egli era uno dei maggiori interessati. Esclusione dell'allegata violenza, precisazione dei motivi della conclusa vendita ed accertamento della rispondenza del prezzo al valore dell'immobile, elementi tutti che stroncano alla base le mosse doglianze.

Ben conscio che l'apprezzamento delle prove acquisite al processo, rimesso all'insindacabile valutazione dei giudici di merito, non è suscettibile di riesame in questa sede, il Dell'Agnello cerca di girare l'ostacolo ipotizzando pretesi vizi logici, errori di diritto e difetti di attività non solo insussistenti, ma che anche se ricorressero non varrebbero ad indurre all'annullamento dell'impugnata sentenza siccome relativi a circostanze tutt'altro che rilevanti; dopo l'accertata esclusione di atti idonei a configurare la dedotta violenza morale, accertamento questo che il ricorrente mostra di ignorare e che, desunto invece dai riferimenti dei testi escussi, costituisce l'elemento veramente decisivo ed informatore dell'adottata pronuncia. Non ricorrono, comunque gli allegati vizi logici, in quanto potendo il giudice di merito nel sovrano apprezzamento delle emergenze di causa, desumere da un fatto noto la esistenza di altro ignoto, in nessuna illogicità ed inverosimiglianza è incorsa la Corte di Appello per avere dal rifiuto opposto dal Dell'Angelo nel 1941 alle sollecitazioni dei fascisti di Lucca per la vendita dell'immobile per cui è causa senza subire alcun fastidio, tratto argomento per ritenere la impugnata vendita liberamente voluta. Si è osservato in contrario che non è punto esatto che il fascismo avesse in prossimità del crollo attenuato il proprio rigore, ma il rilievo che non vale, certo, a configurare un vizio logico non può essere censurato in questa sede, in

(1-2) Cass. 30 gennaio 1954 n. 225, in questa *Rivista* 1954, fasc. 1, p. 147.

quanto l'espresso apprezzamento desunto, ad avviso della Corte, da fatti rientranti dalla comune esperienza non trascende i limiti di una ragionevole credibilità e verosimiglianza. *(Omissis)*

766 - Sez. I - 17 marzo 1954 - Pres. ACAMPORA - Est. BIANCHI D'ESPINOSA - P. M. MACCARONE (concl. conf.) - Sacco c. Banco di Roma.

(Cassa App. Catanzaro 18 agosto 1952).

Mandato - Eccesso - Sussistenza - Estremi - Apprezzamento - Incensurabilità.
[Cod. civ., art. 1711].
Fallimento - Concordato - Cessione dei beni ai creditori - Mandato a gestire e liquidare i beni - Effetti.

Perchè possa parlarsi di eccesso di mandato, non basta che questo ponga dei limiti ai poteri del mandatario, ma occorre anche che quest'ultimo, nell'esecuzione del mandato affidatogli, persegua uno scopo diverso ed incompatibile con quello prefissogli dal mandante, o quanto meno tale da non corrispondere all'espressa volontà di lui.

Lo stabilire se il mandatario abbia ecceduto i limiti stabiliti dal mandante costituisce indagine di fatto, incensurabile in Cassazione.

In sede di concordato concluso sotto l'impero del codice di commercio abrogato, la cessio bonorum alla massa dei creditori e per essa ad un comitato di liquidazione, non produce il trasferimento dei beni ma consisteva nel semplice conferimento di un mandato a gestire ed a liquidare, con diritto, perciò, al mandante di ottenere il rendimento della gestione e con conseguente legittimazione ad agire dello stesso mandante per ottenere il risarcimento dei danni a lui cagionati da colpa nell'esecuzione del mandato. (1).

(Omissis). — Le doglianze dei ricorrenti non sono fondate sotto alcun profilo. La Corte di merito si è data cura di esaminare le asserite violazioni commesse dai membri del Comitato di liquidazione, di fronte alle condizioni stabilite nel concordato, sottoponendo ad accurata indagine i poteri dello stesso Comitato, quali risultavano dal concordato, relativamente alla vendita dei beni immobiliari; e proprio in relazione alla tesi proposta dagli eredi Sacco, della nullità delle vendite per eccesso di mandato. A proposito di questo, ha stabilito esattamente il principio di diritto, del resto più volte riaffermato da questa Corte Suprema (da ultimo, sentenza 5 maggio 1951 n. 1063), che, perchè possa parlarsi di eccesso di mandato non basta che questo ponga dei limiti ai poteri del mandatario, ma occorre anche che quest'ultimo nella esecuzione del mandato affidatogli persegua uno scopo diverso ed incompatibile con quello prefissogli dal mandante, o quanto meno tale da non corrispondere alla espressa volontà di lui. E, con sobria ma esauriente motivazione, prendendo in esame le irregolarità denunziate dagli eredi Sacco (fra cui, la più importante ritenne quella consistente nell'avere effettuato le vendite in questione a prezzo inferiore a quello di stima), ha ritenuto e dimostrato che i liquidatori svolsero la loro attività entro binari loro prefissi dal mandante, e perseguendo lo scopo avuto di mira da lui, la vendita dei beni immobiliari, ed il soddisfacimento, col ricavato, delle ragioni dei creditori. Anche su questo punto, quindi (ed è del resto indagine di fatto, incensurabile in questa sede, lo stabilire se, nella specie, il mandatario abbia ecceduto i limiti del mandato) la sentenza impugnata resiste alle censure dei ricorrenti, allorchè ha ritenuto che, ferma la validità degli atti posti in essere dai liquidatori nei limiti del mandato, i liquidatori stessi debbano essere tenuti soltanto a rispondere, verso il mandante, delle conseguenze

(1) Vedasi ampiamente da ultimo MICCIO, *La cessione dei beni nel concordato*, Milano 1953, p. 156 ss.; SALVI, *La cessione dei beni ai creditori*, Milano 1947, p. 223 ss.; CARRARO, *Il mandato ad alienare*, Padova 1947, p. 61 ss.

(2) Cfr. Cass. 5 maggio 1951 n. 1063, *Giur. compl. cass. civ.* 1951, III, n. 2795.

dannose delle irregolarità commesse, a norma dell'art. 356 del cod. di commercio abrogato. *(Omissis)*

Il rigetto del ricorso principale dispensa la Corte dal prendere in esame il ricorso incidentale della Società Ladoga, che è stato proposto soltanto condizionatamente all'accoglimento, totale o parziale, di quello. Vanno, invece, esaminati i ricorsi incidentali del Filippi e del Banco di Roma, rivolti entrambi contro il capo della sentenza che ha condannato i due suddetti ricorrenti, in solido, al risarcimento del danno cagionato al Sacco dalle irregolarità commesse dal Comitato di liquidazione (ed in specie, dall'aver venduto a prezzi inferiori a quelli stabiliti nelle condizioni del concordato).

L'unico motivo del ricorso del Filippi, ed il primo motivo del ricorso del Banco (analoghi fra loro) sono in parte, fondati. Non sono esatte le censure rivolte alla sentenza impugnata, per la parte in cui questa esaminando la portata e gli effetti della *cessio bonorum* effettuata dal Sacco, giunse alla conclusione che tale contratto non produce trasferimento dei beni, ma consiste nel semplice conferimento di un mandato a gestire ed a liquidare con diritto, perciò, al mandante, di ottenere il rendiconto della gestione e con conseguente legittimazione ad agire dello stesso mandante, per ottenere il risarcimento dei danni a lui cagionati da colpa dell'esecuzione del mandato. Sotto questo profilo, la Corte di merito interpretò ed applicò esattamente le disposizioni degli art. 1977 e ss. cc., conforme del resto all'interpretazione costante datane da questa Corte Suprema (da ultimo, con la sentenza 17 aprile 1946 n. 455); ed in particolare gli art. 1982 e 1983, in virtù dei quali il debitore ha diritto al rendiconto, ed a ottenere il residuo che avanza dopo la ripartizione delle somme ai creditori. La Corte poi, ritenne che nessuna deroga poteva apportare la clausola, inserita nelle condizioni del concordato, per cui la cessione veniva fatta «senza alcuna ingerenza da parte del fallito nella gestione e liquidazione», interpretando questa clausola (e detta interpretazione della volontà delle parti, sorretta da ampia motivazione, si sottrae ad ogni censura in Cassazione), nel senso che con essa si volle escludere ogni intromettenza del fallito durante la gestione, ma fermo il diritto dello stesso al rendiconto, e a richiedere il risarcimento dei danni, a gestione terminata, per eventuali abusi verificatisi durante le operazioni di liquidazione. *(Omissis)*

768 - Sez. I - 17 marzo 1954 - Pres. CANNADA BARTOLI - Est. SAGNÀ - P. M. FAVONIO (concl. conf.) - Lloyd Triestino c. Miranda.

(Conferma App. Napoli 4 dicembre 1952).

Obbligazioni e contratti - Vizi del consenso - Errore di fatto - Annullabilità del negozio, anche unilaterale.
(Cod. civ., art. 1429).

L'errore di fatto che vizia la volontà e la sua manifestazione è causa di annullamento di qualsiasi atto giuridico, anche unilaterale, e toglie allo stesso ogni effetto.

Cfr. Cass. 17 gennaio 1953 n. 124, *Foro it. Mass.* 1953, 29.

769 - Sez. Un. - 18 marzo 1954 - Pres. GALIZIA - Est. NASO - P. M. DE MARTINI (concl. conf.) - Min. Trasporti c. Cocco.

(Regolamento di giurisdizione).

Ferrovie e tramvie - Alloggi a ferrovieri - Concessioni di cose economiche - Disposizioni in materia di sfratto - Competenza del giudice ordinario - Conflitto di attribuzione - Inesistenza.
(L. 23 maggio 1950 n. 253).

Le disposizioni sugli sfratti, contenute nel capo V della l. 23 maggio 1950 n. 253, trovano

EXHIBIT 7

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)
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CERTIFICATION

This is to certify that the attached translation is, to the best of my knowledge and belief, a true and accurate translation from Italian into English of the attached excerpts from Bologna Court – Section I, dated February 26, 1952.

Dustin Paul Richard, Managing Editor
Geotext Translations, Inc.

Sworn to and subscribed before me
this 24th day of February, 2017.

HOA WIN LY
Notary Public, State of New York
No. 01LY6323702
Qualified in New York County
Term Expires April 27, 2019

[...]

BOLOGNA COURT – SECTION I
(February 26, 1952)

Presiding Judge Grassi – Judge Rapporteur Sbrocca
De Nicolò vs. The Finance Ministry

Obligations and contracts – Action for annulment – Contract entered into before the current Civil Code – Relationships between the parties – Applicability of current laws.
Obligations and contracts – Duress – Threat based on a political situation – Cessation of the threat – Details.
Obligations and contracts – Moral duress – Details – Reference to the victim's actual conditions.
Obligations and contracts – Duress – Consequence of property damage to the victim – Irrelevance.

In relations between the parties, the action to annul a contract entered into before the entry into effect of the new Civil Code is governed by the rules and regulations in the current laws in effect (1).

When violence against one of the contracting parties is committed on the basis of a given political situation (in this case, threats by former Fascist party officials), we maintain that the state of coercion of a person's will lasted until the end of that political situation (specifically, until July 25, 1943, the date on which the Fascist regime fell) (2).

For moral violence (threats) to cause a contract's annulment, it must be real, serious (and not just suspected), unfair, occur in the form of a serious, significant harm (metus maioris malitatis) *and be such that it impacts a reasonable person, with reference not to the abstract type of the average person (neither too strong nor too weak), but rather to the particular physical and psychological conditions of the individual suffering the violence* (3).

In order to constitute violence, it is not necessary for the vitiated contract to result in a material injury to the victim (4).

(Omitted) – We should begin by noting that the rules for bringing an annulment action are contained in the new Civil Code, even if the contract in dispute was entered into before the Code's entry into effect, because according to Art. 165 of the transitional regulations, the previous rules and regulations apply only to the effects of the annulment or of the contract's termination on third parties if the request was made before the implementation of the new Civil Code, which is not the case here.

(1-4) The first ruling is based on Art. 165 of the Transitional Regulations, pursuant to which the effects of the annulment *on third parties* are governed by the provisions of the Civil Code of 1865, if the claim was filed before the new Code went into effect.

On the second ruling, as to the ability to take advantage of the fear of retaliation to overcome the passive party's contrary intent during the climate created during the fascist regime, see Cass. Court Decision No. 376 of February 15, 1950 in *Foro pad.*, 1950, Vol. I, pg.1946; *ibid.* see memorandum by COTTINO, "*Violenza privata e violenza politica [Private Duress and Political Duress]*"

Similar to Art. 1300 of the abrogated Civil Code, Art. 1442 of the Civil Code establishes that the period of limitations for annulment actions expires after five years—when there is an allegation that the contract's consent was vitiated by violence—starting from the day when the violence ceased.

The defendant government agency objected on a pre-judicial basis that the period of limitations for the proceeding had expired, because, even if one were to admit that the violence was committed at the time of the contract's execution (June 15, 1940), the plaintiffs did not even attempt to prove that the threats persisted in the years following until the fall of the Fascist regime, such that the proceedings brought more than nine years later with a writ of summons dated August 2, 1949 would have been timely.

We do not agree with this argument, and the objection that the period of limitations has expired must be dismissed.

It is in fact true that there is no general rule in positive law that establishes any presumption of the duration of the violence, in the sense that, even when one establishes that this occurred for a certain period of time, one cannot presume that it continued thereafter.

It is also true that, in the absence of such a presumption, the ordinary rule for the burden of proof applies to this issue, namely that the person alleging a fact must prove it. In other words, the burden of proof that the vitiation of consent did not stop before the filing of the annulment action falls upon the person bringing the action, because the passage of time already constitutes a presumption in the defendant's favor.

However, if the presumption is true and exact in general terms, one should in such a case observe that the violence allegedly consisted of threats of political reprisals against the counterparty and his family members by officials of the Fascist party that were rendered possible and feasible by the existence of the Fascist regime. Therefore, against the presumption of the passing of time, there arises the strongest, most valid presumption that only the fall of the Fascist regime could put an end to the state of coercion of a person's will, as the situation in which the vitiation of consent took place thereby ceased to exist.

Now, the Fascist regime fell on July 25, 1943, but the period of limitations, suspended as of the following September 8 by Royal Decree-Law No. 1 of January 3, 1944, did not resume (as an effect of the Royal Lieutenant's Legislative Decree No. 792 of January 24, 1944) until 6 months after the end of the war, on October 16, 1946. Therefore, one can readily calculate that at the moment of filing the legal claim (August 12, 1949), the five-year period had not yet expired. Therefore we must examine the merits of the case, and on the merits, we must state that the action is entirely lacking in merit.

On the question – regarding whether the period of limitations has run out – considered by the decision in question, namely, that "the duress must be deemed to have ended with the fall of the fascist regime," see Court of Naples, June 25, 1947, in *Rev. giur. it.*, 1947-48, col. 1677, no. 475.

On the third ruling, it should be noted that the wording of Art. 1435 of the Civil Code ("the duress must such that it impacts a reasonable person ..."), seems to allude to the theoretical type, average (of that given age, of that gender, of

In fact, for moral violence to be a cause of the contract's invalidity, it must impact a reasonable person to the extent that it makes him afraid to expose himself or his assets, or expose the person or assets of the contracting party's spouse, a descendant, or ascendant, to an unfair, significant harm with regard to the age, sex, and conditions of the persons (Articles 1435 and 1436 of the Civil Code).

Legal theory and case law have specified the requirements for violence as follows.

First of all, the threat must be real and serious, and not simply suspected, in the sense that the fear incited is based on the probable assumption that the harm threatened will actually be inflicted. As Article 1435 now establishes, the violence must also be unfair, that is, illegally committed either against the relationship between the persons or against its intended purpose. Third, the harm threatened must be serious or significant (*metus maioris malitatis*); serious generally means something that, compared to the declaration being extorted, involves a greater damage than the declaration itself, such that the coerced contracting party chooses the lesser of the two evils. Fourth, the lesser one must be reasonable, meaning that there cannot be a clear disproportion between the harm threatened and the resistance that every person can muster. The law talks of violence that impacts a reasonable person, but the extent of the proportion is not always provided by the abstract type of the reasonable person, who is neither too strong nor too weak, and must instead come from a case-by-case consideration of the individual's specific conditions, namely age, sex, and so on. Lastly, there must be a causal link between the threat and the declaration, that is, the former is used to extort the latter, even if the use was made by a third party (Art. 1434, Civil Code).

When we apply these principles to the case at hand, the Court finds that the violence inflicted on the contracting party De Nicolò lacks the requirements of seriousness and reasonableness of the fear incited.

The witness testimony in fact clarified that, in the absence of the intimidations exercised by Cattolica Fascist party officials against De Nicolò and his son Elvino, who conducted the negotiations on his behalf, De Nicolò would never have been compelled to sell the piece of land; therefore, one cannot doubt the seriousness of the threat or its unfairness, because it sought to obtain a consent that would not otherwise have been granted, or the causal link between threat and declaration, because the former was used to obtain the latter.

However, the harm threatened was not significant, nor was De Nicolò's resistance proportionate.

In fact, the witness testimony clearly showed that the threats were entirely generic, because a few members of Cattolica's Fascist party merely told De Nicolò that if he didn't sell the land,

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under those conditions); however, some courts – such as, specifically, the Court of Milan – took the approach of comparing the nature of the duress to the victim's *actual personal* conditions; see most recently Court of Appeal of Venice, December 1, 1949, in *Mon. trib.*, 1950, pg. 196; contra, by reference to the theoretical average type, Court of Lecce, March 2, 1946, in *Rep. cit.*, col. 1676, no. 467; Cass. Court Decision No. 1822 of July 16, 1949, in *Rep. foro it.*, 1949, col. 1162, no. 398; and most recently see Cass. Court Decision No. 1247 of May 18, 1951, in *Mass. giur. it.*, 1951, col. 344.

they would be accused of responsibility for the failure to build the Fascist party building, and this in relation to the urgency of the works, because otherwise the sum allocated for this purpose by the Forlì Federation would have been used elsewhere.

Specifically, neither political reprisals nor incarceration was ever mentioned to the contracting parties as possible consequences of their resistance. Therefore, if De Nicolò (who was not gravely ill at the time of the facts) or his son Elvino had been firmer in their position and not let themselves be unreasonably intimidated by a few heavy-handed comments by local Fascist party officials, the contract would never have been entered into. The resistance was not proportional to the danger threatened, which was totally generic and consisted of empty words, which emphasizes, again, the evidence produced, also in relation to the persons of the members of the Cattolica Fascist party, that the witnesses declared to be devoid of any violence.

As further proof of the violence, the plaintiffs claim that the price of the land imposed by the Fascist Federation was far below its actual value.

Aside from the fact that a material injury deriving from the vitiated contract is not required, because the violence consists of a lack of consent and the illegal seizure from someone of the power to act as they deem best suits their interests, represents sufficient injury, the low price is not even a factor in this case. (*Omitted*).

The last ruling considers a question that is not yet settled in our case law. The requirement that the person exercising the duress have an objective of obtaining improper advantage is imposed by Art. 1438 of the Civil Code in relation to the "threat to enforce a right." That detail is not required by Art. 1435, which instead considers the nature of the duress in general. The unjust and significant wrong, which that Article refers to, does not equate to property damage to the victim and the corresponding unjust profit for the person imposing the duress. In fact, it could be that a contract is imposed on the reluctant passive party that reflects market terms or even better; the duress is still present, since the victim, had he been free, would not have agreed to enter into the contract; the investigation must be limited to whether there was freedom of will. In accord with the decision's ruling, namely, that an objective to obtain an unjust profit does not constitute an essential element of moral duress, see Court of Milan, June 22, 1950, in *Rep. giur. it.*, 1950, col. 1810, no. 289; contra, see Court of Appeal of Bari, March 6, 1946, in *Rep. giur. it.*, 1947-48, col. 1677, no. 471.

perchè l'attuale convenuta è erede; in secondo luogo non è sostenibile la tesi della novabilità la quale, pur una volta affermata dalla Suprema Corte 4-7-1937 n. 2236 (in *Foro It.* 1939, I, col. 38), fu tanto vivamente contrastata in dottrina che il codice vigente, con l'art. 2034, ha espressamente statuito che l'obbligazione naturale un solo effetto produce, quello della *soluti retentio*, e non altro, escluso quindi quello della possibile novazione o conversione in obbligazione civile per la medesima originaria causa.

In conclusione, adunque, Maria Minganti deve a fraterna e liberale benevolenza quel che ebbe dal defunto Giuseppe Minganti e per i suoi eventuali diritti, attuali o futuri, potrà rivolgersi, se ed in quanto, agli altri fratelli. (*Omissis*).

Ma se la convenzione manchi o non sia riconosciuta per difetto di un prescritto elemento o requisito, si resta nel nulla giuridico, salvi gli effetti particolari, in taluni casi, della esecuzione volontaria.

L'obbligazione naturale nasce da un dovere morale o sociale; e con un tale antecedente la spontaneità della prestazione, assumendo il carattere della giuridicità, legittima la retentio.

Senza un tal presupposto, pertanto, non è dato parlare di obbligazione imperfetta o di debito senza responsabilità, nè si può, in conseguenza, sollevare la pur discussa questione della trasmissibilità della obbligazione naturale, che secondo taluni può verificarsi quale puro stato di fatto, allo stesso modo come si trasmette uno stato di diritto (Romano, op. cit., § 22, p. 62; De Crescenzio, *Obblig.*, in Enc. giur., n. 36; Carnesi, *Irripetibilità del pagamento effettuato dal debitore, dopo l'ingiusta sentenza di assoluzione* in Riv. Dir. Civ., 1940, pag. 536).

Concludendo, anche qui, per far discendere nel patrimonio dell'erede il dovere di prestare, bisogna necessariamente richiamarsi ad un titolo idoneo e non alla semplice promessa del *de cuius*, che ha carattere personale senza riflessi permanenti sul patrimonio e presuppone una manifestazione di volontà che si rinnova ogni qualvolta si determini alla prestazione; volontà che spegnendosi con la morte non si può intendere lecitamente trasmissibile all'erede.

Avv. Ignazio Moscudella
Patrocinante in Bologna

TRIBUNALE DI BOLOGNA - SEZ. I
(26 febbraio 1952)

Pres. Grassi - Est. Sbrocca
De Nicolò c. Ministero Finanze

Obbligazioni e contratti — Azione di annullamento — Contratto stipulato prima dell'attuale c. c. — Rapporti tra le parti — Applicabilità delle vigenti norme.
Obbligazioni e contratti — Violenza — Minaccia fondata su una situazione politica — Cessazione della minaccia — Estremi.
Obbligazioni e contratti — Violenza morale — Estremi — Riferimento alle condizioni concrete della vittima.
Obbligazioni e contratti — Violenza — Conseguenza di danno materiale alla vittima — Irrilevanza.

Nei rapporti tra le parti l'azione di annullamento di un contratto, stipulato prima dell'entrata in vigore del nuovo codice, è regolata dalla disciplina dettata dalle norme attualmente vigenti (1).

Quando la violenza su uno dei contraenti sia stata esercitata sulla base di una data situazione politica (nella specie minacce di ex gerarchi fascisti), si deve ritenere che lo stato di costrizione della volontà sia durato fino alla cessazione di quella situazione politica (nella specie, fino al 25 luglio 1943, caduta del regime fascista) (2).

Perchè la violenza morale (minaccia) sia causa di annullamento di un contratto, occorre che sia vera, seria (e non solo sospettata), ingiusta, si concreti in un male grave e notevole (metus maioris malitatis); sia infine tale da fare impressione su una persona sensata, con riferimento, non già al tipo astratto dell'uomo medio (nè troppo forte nè troppo vile), bensì alle particolari condizioni fisiche e psichiche del soggetto passivo della violenza (3).

A integrare gli estremi della violenza non si richiede che dal negozio viziato derivi un danno materiale alla vittima (4).

(*Omissis*). - Occorre preliminarmente osservare che la disciplina della promossa azione di annullamento è dettata dal nuovo codice civile, quantunque il contratto impugnato sia stato stipulato anteriormente alla sua entrata in vigore, perchè secondo l'art. 165 delle disposizioni transitorie la disciplina previgente si applica soltanto agli effetti dell'annullamento o della risoluzione del contratto nei confronti dei terzi, qualora la domanda sia stata proposta prima dell'attuazione del nuovo codice, il che non si verifica nella fattispecie in esame.

(1-4) La prima massima si fonda sull'art. 165 Disp. Trans., per cui gli effetti dell'annullamento rispetto ai terzi sono regolati dalle disposizioni del codice civile del 1865, se la domanda sia stata proposta anteriormente all'entrata in vigore del nuovo codice.

Sulla seconda massima, in tema di possibilità di avvalersi, nel clima creatosi durante il regime fascista, del timore di rappresaglie per vincere la diversa volontà del soggetto passivo, cfr. Cass. 15 febbraio 1950, n. 376, in Foro pad., 1950, I, 1146; ivi v. nota del Corrado « *Violenza privata e violenza politica* ».

L'art. 1442 cod. civ. stabilisce, al pari dell'art. 1300 del codice abrogato, che l'azione di annullamento si prescrive in cinque anni, i quali cominciano a decorrere, quando il contratto sia impugnato per vizio del consenso da violenza, dal giorno in cui la violenza è cessata.

Eccepisce pregiudizialmente l'Amministrazione convenuta che l'azione è prescritta, perchè, anche ammesso che la violenza sia stata esercitata al momento della conclusione del contratto (15 giugno 1940), gli attori non hanno neppure offerto di provare che le minacce siano persistite anche negli anni successivi fino alla caduta del regime fascista, così da rendere tempestiva l'azione instaurata, oltre nove anni dopo, con l'atto di citazione 2 agosto 1949.

La tesi non può essere accolta, e l'eccezione di prescrizione deve essere rigettata.

E' vero, infatti, che non esista alcuna norma generale di diritto positivo che stabilisca una presunzione circa la durata della violenza, nel senso che, anche stabilito che questa sia stata in un certo tempo esercitata, non si presume che sia perdurata successivamente.

Ed è pure esatto che, in mancanza di tale presunzione, vale, nella subbietta materia, la norma ordinaria circa l'onere della prova, e cioè che chi allega un fatto deve provarlo. In altri termini, la prova che il vizio del consenso non è cessato da più lungo tempo di quello utile per l'esperimento dell'azione di annullamento deve far carico a chi esperimenta l'azione, perchè il decorso del tempo costituisce già una presunzione a vantaggio del convenuto.

Ma se quanto si è premesso è vero ed esatto in termini generali, va nel caso particolare osservato che la violenza sarebbe consistita in minacce di rappresaglie politiche a carico dell'altro contraente e dei suoi familiari, poste in essere da gerarchi fascisti e rese possibili e sempre attuabili per l'esistenza del regime fascista. Cosicchè contro la presunzione di decorrenza del tempo si oppe la più forte e valida presunzione che soltanto la caduta del regime fascista avrebbe fatto cessare lo stato di coartazione del volere, in quanto sarebbe venuta meno la situazione, nella quale si concreterebbe nella specie il vizio del consenso.

Orbene, il regime fascista cadde il 25 luglio 1943, ma i termini prescrizionali, sospesi dall'8 settembre successivo per il R.D.L. 3 gennaio 1944 n. 1, non ripresero a decorrere, per effetto del D.L.L. 24 gennaio 1944, n. 792, che sei mesi dopo la cessazione dello stato di guerra, e cioè il 16 ottobre 1946. Onde è facile il calcolo che al momento della proposizione della domanda giudiziale (12 agosto 1949) il quinquennio non era ancora consumato. Occorre, pertanto, esaminare il merito della causa, e nel merito deve riconoscersi che l'azione è del tutto infondata.

Sulla questione — in tema di decorrenza della prescrizione — trattata dalla sentenza in esame, e cioè che «la violenza deve ritenersi cessata con la fine del regime fascista», cfr. Trib. Napoli, 25 giugno 1947, in *Rep. giur. it.*, 1947-48, col. 1677, n. 475.

Sulla vera massima è da osservare che l'art. 1435 c.c., nella sua formulazione («la violenza deve essere di tal natura da fare impressione sopra una persona sensata...»), sembra alludere al tipo astratto, medio (di quello dove ed, di quel sesso, di

Perchè, infatti, la violenza morale sia causa di invalidazione del negozio deve essere di tal natura da fare impressione sopra una persona sensata e da farle temere di esporre sè o i suoi beni, oppure la persona o i beni del coniuge, di un discendente o di un ascendente del contraente, a un male ingiusto e notevole, avendosi riguardo all'età, al sesso e alla condizione delle persone (art. 1435 e 1436 cod. civ.).

Dottrina e giurisprudenza hanno così precisato i requisiti della violenza.

Occorre anzitutto che la minaccia sia vera e seria, e non semplicemente sospettata, in quanto il timore incusso sia fondato sulla verisimile supposizione che il male minacciato sarà realmente irrogato. Occorre inoltre, come ora testualmente stabilisce l'art. 1435, che la violenza sia ingiusta, cioè illegittimamente operata o per il rapporto in cui sono le persone tra loro o in relazione al fine a cui tende. E' richiesto in terzo luogo che il male minacciato sia grave o notevole (metus maioris malitatis); grave è in generale quello che, comparato alla dichiarazione da estorcere, importi un maggior danno che non la dichiarazione stessa, sicchè tra i due mali il contraente coartato sceglie il minore. In quarto luogo è necessario che il minore sia ragionevole, e cioè che non si abbia un'evidente sproporzione tra il pericolo minacciato e la resistenza che ogni uomo può opporre. La legge parla di violenza di tal natura da fare impressione sopra una persona sensata, ma la misura della proporzione, non può essere data sempre dal tipo astratto dell'uomo sensato, nè troppo forte nè troppo vile, ma dev'essere fornita caso per caso dalle particolari condizioni del soggetto, con riferimento all'età, al sesso e così via. Occorre da ultimo che sussista un nesso di causalità tra la minaccia e la dichiarazione, e cioè che la prima sia stata usata per estorcere la seconda, anche se l'uso sia stato fatto da un terzo (art. 1434 cod. civ.).

Facendo applicazione degli esposti principi alla fattispecie in esame, ritiene il Collegio che la violenza esercitata sul contraente De Nicolò abbia difettato dei requisiti della gravità e della ragionevolezza del timore incusso.

La prova per testi ha, infatti, chiarito che senza le intimidazioni esercitate dai gerarchi fascisti di Canicattì sul De Nicolò e sul figlio Elvino, che per lui condusse le trattative, il De Nicolò non si sarebbe mai indotto alla vendita del terreno; e perciò non può dubitarsi sia della serietà della minaccia, sia della ingiustizia di essa, in quanto diretta ad ottenere un consenso che non sarebbe stato altrimenti prestato, sia infine del nesso di causalità tra minaccia e dichiarazione, poichè la prima fu impiegata per ottenere la seconda.

Tuttavia, non fu notevole il male minacciato, nè proporzionata la resistenza che il De Nicolò oppose.

Invero, la prova testimoniale ha chiaramente dimostrato che le minacce furono del tutto generiche, poichè qualche esponente fascista di Canicattì

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quelle condizioni); invece qualche magistratura — come appunto il Tribunale di Milano — si è orientata nel senso di conformare i caratteri della violenza con le condizioni *personali*, concrete, della vittima; cfr. da ultimo App. Venezia, 1 dicembre 1949, in *Mon. trib.*, 1950, 196; contra, per riferimento al tipo medio astratto, Trib. Lecce, 2 marzo 1946, in *Rep. cit.*, col. 1676, n. 467; Cass., 16 luglio 1949, n. 1822, in *Rep. foro it.*, 1949, col. 1162, n. 398; e da ultimo v. Cass., 18 maggio 1951, n. 1247, in *Mass. giur. it.*, 1951, col. 344.

si limitò a dire al De Nicolò che, se non avessero ceduto il terreno, sarebbero stati combattuti, come responsabili della mancata costruzione della casa del fascio; e tutto ciò in relazione all'urgenza dell'opera, perchè altrimenti la somma stanziata all'uopo dalla Federazione di Forlì avrebbe ricevuto altra destinazione.

In particolare, nè rappresaglie politiche, nè confino furono mai prospettati ai contraenti come possibili conseguenze della loro resistenza. Se, quindi, il De Nicolò (che non è risultato che fosse all'epoca dei fatti gravemente malato) o il figlio Elvino avessero tenuto un contegno più fermo e non si fossero, fuori di ogni ragione, intimiditi di fronte a qualche frase un po' forte dei gerarchi locali, il contratto non sarebbe stato concluso. La resistenza non fu proporzionata al pericolo minacciato, del tutto generico e risolventesi in vane parole, come, ripetesi, ha messo in evidenza la prova espletata, anche in relazione alle persone dei gerarchi di Cattolica, che i testi dichiarano alieni da ogni violenza.

A riprova della violenza gli attori adducono che il prezzo del terreno, imposto dalla Federazione fascista, fu di gran lunga inferiore al valore reale di esso.

Ora, a parte il rilievo che non è richiesto un danno materiale derivante dal negozio viziato, perchè la violenza è posta tra i vizi del consenso ed è lesione sufficiente quella che si riscontra nel togliere con mezzi illeciti ad un soggetto il potere di provvedere come meglio creda ai propri interessi, sta di fatto che neppure l'esiguità del prezzo nella specie ricorre. (Omissis).

L'ultima massima considera una questione non ancora pacifica nella nostra giurisprudenza. La colpevole destrezza in chi esercita la violenza, di conseguire vantaggi ingiusti è posta dall'art. 1438 c.c. in riferimento alla « minaccia di far valere un diritto ». Tale estremo non è invece richiesto dall'art. 1435 che considera i caratteri della violenza, in generale. Il male ingiusto: è notevole, a cui accenna il detto articolo, non equivale al danno materiale della vittima e al corrispondente ingiusto profitto per l'autore della violenza. Può darsi infatti che al soggetto passivo ripugnante sia imposto un contratto a condizioni corrispondenti a quelle di mercato o anche superiori; la violenza sussiste sempre, dato che la vittima, se libera, non avrebbe acconsentito alla stipulazione del contratto; la indagine va limitata alla libertà o meno del volere. Nel senso affermato dalla sentenza e cioè che non costituisce elemento essenziale della violenza morale il fine di conseguire un ingiusto profitto, cfr. Trib. Milano, 22 giugno 1950, in Rep. giur. it., 1950, col. 1810, n. 289; in senso contrario v. App. Bari, 6 marzo 1946, in Rep. giur. it., 1947-48, col. 1677, n. 471.

TRIBUNALE DI PARMA - SEZ. I
(30 giugno 1951)

Pres. Est. Belli
Toscani c. Toscani

Simulazione — Natura dell'azione — Accertamento.
Simulazione — Interesse ad agire da parte di terzi — Non sussiste del diritto — Irrilevanza.
Simulazione — Legittimazione attiva e passiva.
Simulazione — Impugnativa del legittimario durante la vita dell'autore — Inammissibilità.
Simulazione — Donazione mascherante dazio in solutum — Azione delle parti verso i futuri eredi legittimari. — Inammissibilità.
Procedimento civile — Legittimatio ad causam — Rilevabilità d'ufficio.
Simulazione — Prova per testimoni o per interrogatorio — Limiti.

L'azione di simulazione è un'azione dichiarativa o di mero accertamento, in quanto ha valore e funzione ricognitiva di una determinata situazione giuridica (1).

Nelle azioni di mero accertamento l'interesse processuale è determinato dalla necessità di ricorrere alla tutela giurisdizionale per evitare il danno che deriverebbe dalla mancata rimozione dell'incertezza. Sussiste, quindi, l'interesse ad agire per far dichiarare la simulazione di un negozio da parte di terzi che, pur non avendo attualmente alcun diritto sperimentabile, lo avrebbero in avvenire sul presupposto della realtà del negozio simulato (2).

La legittimazione attiva e passiva (legittimatio ad causam) *rispetto all'azione di simulazione è in diretto rapporto con gli effetti sostanziali della simulazione fra le parti e rispetto ai terzi* (3).

L'erede legittimario, che difende il suo diritto alla quota di riserva, agendo iure proprio, è nella stessa condizione giuridica del terzo, onde non può, durante la vita del suo autore, impugnare di simulazione gli atti compiuti dal medesimo (4).

Le parti di un negozio di donazione che si assume simulato (in quanto mascherante una dazio in solutum) non possono, a successione non ancora aperta, sperimentare l'azione di simulazione nei confronti dei futuri eredi legittimari del simulato alienante, non avendo i medesimi veste legittima per contraddire, anche se abbiano prestato assenso alla donazione (5).

L'indagine sulla legittimatio ad causam ha carattere di ordine pubblico ed è esperibile di ufficio dal giudice indipendentemente dal comportamento delle parti, al cui potere dispositivo è sottratta ogni questione inerente; nè possono le parti, prive di legittimazione ad agire o a contraddire, restare in giudizio per un mero impulso di carattere morale (6).

La prova per testimoni della simulazione è ammissibile inter partes entro i limiti per essa previsti dagli art. 2721, 2722 c. c. con le eccezioni di cui all'art. 2724. Ammissibile senza limiti è, invece, la prova per interrogatorio, potendosi con la confessione della controparte provare la simulazione anche di un negozio giuridico per cui sia richiesta la forma scritta ad substantiam (7).

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March 6, 2017

VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Room 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratrix of the estate of Alice Leffmann v. The Metropolitan Museum of Art*, 16-civ-07665 (LAP)

Dear Judge Preska:

As counsel for Plaintiff in the captioned action, we write to respectfully apprise this Court of new authority pertinent to Defendant's motion to dismiss the Complaint (the "Motion").

In the Motion, Defendant argues, *inter alia*, that this action must be stayed pending the adjudication of proceedings recently commenced by Defendant in Surrogate's Court, or dismissed without prejudice, because "Plaintiff lacks authority to represent the Estate."

In its opposition to the Motion, Plaintiff — the Ancillary Administratrix of the estate of Alice Leffmann, as duly appointed by the Surrogate's Court in 2010 — argued, *inter alia*, that as a matter of statutory law, Defendant has no standing to challenge Plaintiff's appointment just because it is a defendant in a lawsuit brought by the estate.

Recently, in *Matter of Stettiner*, 2017 NY Slip Op 01168 (1st Dep't Feb. 14, 2017), the Appellate Division, First Department reaffirmed its prior holding in *Matter of Chabrier*, 281 A.D.2d 346 (1st Dep't 2001) — relied on by Plaintiff in her opposition to the motion to dismiss — that "a defendant in an action brought by an estate is not an interested person" and, accordingly, "does not have standing to seek revocation of the letters."

A copy of this decision, rendered after Plaintiff submitted her opposition, is annexed hereto.

Respectfully submitted,

Ross L. Hirsch

Enclosure

cc: All Counsel (via ECF)

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Richard T. Andrias
Karla Moskowitz
Marcy L. Kahn, JJ.

Index 1705/13A
2364

In re Estate of Oscar Stettiner,
Deceased.
- - - - -
International Art Center,
Petitioner-Appellant,

-against-

The Estate of Oscar Stettiner, et al.,
Respondents-Respondents.

Petitioner appeals from the order of the Surrogate's Court, New York County (Nora S. Anderson, S.), entered August 10, 2015, which dismissed the petition to revoke ancillary letters of administration issued to respondent George W. Gowen.

Aaron Richard Golub, Esquire, P.C., New York (Nehemiah S. Glanc of counsel), for appellant.

McCarthy Fingar LLP, White Plains (Phillip C. Landrigan of counsel), for respondents.

TOM, J.P.

The genesis of this litigation was in 1939, when, with the Nazi invasion imminent, decedent Oscar Stettiner, a Jewish art collector, abruptly fled Paris, leaving his art collection behind. His art collection was later sold by the Nazis, including an early twentieth century painting by the Italian artist Amedeo Modigliani, which Stettiner's heir seeks to recover. The issue before this Court is whether petitioner International Art Center, S.A. (IAC), which purchased the painting in 1996 for $3.2 million, has standing to challenge the ancillary letters of administration issued to the heir's representative for purposes of commencing litigation to recover the painting. We hold that petitioner lacks standing, and that, in any event, the limited ancillary letters were properly issued.

In the immediate aftermath of World War II, the United States and its allies took on the task of locating and returning the many great works of art systematically looted by the Nazis. While millions of works were recovered and returned to the rightful owners, individual Holocaust victims and their heirs have struggled for decades to obtain restitution.

The efforts to recover these treasures have been recently popularized in movies including 2014's "Monuments Men," and 2015's "Woman in Gold," which chronicled Maria Altmann's pursuit

of her family's paintings looted in Austria, including Gustav Klimt's "Portrait of Adele" (1907), of which Altmann won restitution following litigation that reached the United States Supreme Court (*see Republic of Austria v Altmann*, 541 US 677 [2004]).

While this great theft may have taken place more than 70 years ago, a resolution was not possible until a combination of scholarship and technology allowed for the creation of databases compiling lists of missing works, and until nations agreed to international guidelines on art restitution such as those laid out in the 1998 Washington Principles on Nazi-Confiscated Art. Even at the tail end of 2016, the United States Congress felt it necessary to pass additional legislation to aid victims of Holocaust-era persecution and their heirs to recover works of art confiscated or misappropriated by the Nazis, and to ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner. This legislation became law on December 16, 2016 (*see* Holocaust Expropriated Art Recovery Act of 2016 (Pub L 114-308, 130 US Stat 1524, amending 22 USC § 1621 *et seq.*).

The painting at issue is known as "Seated Man With a Cane" (1918) and is currently owned by petitioner. It is alleged to

have been confiscated by the Nazis from decedent, who resided in Paris in the 1930s.

Respondents, the Estate of Oscar Stettiner (Estate), Philippe Maestracci, and George W. Gowen, as Limited Ancilliary Administrator of the Estate of Oscar Stettiner, contend that in 1930 decedent Oscar Stettiner purchased a painting, which he subsequently loaned to the 1930 Venice Biennale, a world-famous art exhibition. The painting was listed as number 35 in the exhibition, and, according to respondents, a label on the back of the painting by the Venice Biennale establishes it is the same painting as the one at issue in this case.

In 1939, before the Nazi invasion, decedent fled Paris to his home in what became the unoccupied zone of France. In 1941, the Nazis appointed a temporary administrator to sell Jewish property and turn the proceeds over to the Third Reich. On July 3, 1944, the subject painting was sold by the temporary administrator to J. Van der Klip.

In 1946, decedent sought the return of his painting in a French court and received an emergency summons voiding the forced sale and directing Van der Klip to return the painting to him. Van der Klip claimed that he did not know the whereabouts of the painting, having sold it to an unknown American officer in a café. Respondents contend that the painting was secreted by the

Van der Klip family for 52 years.

Decedent died intestate in France on February 25, 1948. Respondent Philippe Maestracci, a French domiciliary, is decedent's only surviving grandson and sole heir.

In 1996, Van der Klip's only surviving daughter and her nephew consigned a painting bearing the same title and artist in issue to Christie's in London, for auction on June 25, 1996. The catalogue for the auction stated that the painting was listed as number 16 at the 1930 Venice Biennale. Respondents contend that the artwork designated number 16 was not listed as belonging to decedent.

On June 25, 1996, petitioner IAC, a Panamanian entity, allegedly formed and controlled by the family of Hillel (Helly) Nahmad, owner of Helly Nahmad Gallery, Inc., purchased a painting for $3.2 million. Nahmad was a New York resident, and the Gallery, a New York corporation, was located in Manhattan and abroad. Respondents allege that the painting was the same painting that was stolen from decedent. In 2008, it was valued by Sotheby's at between $18 and $25 million.

The painting was exhibited at the Gallery's London location in 1998; at an art museum in Switzerland in 1999; at the Gallery in New York in 2005; and at the Royal Academy of Arts in London in 2006, "courtesy of Helly Nahmad."

In 2008, IAC consigned the painting to Sotheby's for sale in New York. The catalogue for the sale noted under "provenance" decedent's "possible" prior ownership and stated that the painting was exhibited as number 35 at the 1930 Venice Biennale.

There were no bids for the painting, and it was returned to IAC's storage facility in Switzerland in December 2008, where it remained until April 2016. Respondents contend that the painting was transported to Switzerland after Nahmad learned from Sotheby's that it had been stolen from decedent and potential bidders were concerned about title. It has been reported that in April 2016 Swiss authorities confiscated the painting as part of a criminal investigation into the ownership of the painting.

Although Maestracci demanded return of the painting from the Gallery in 2011, he received no response. Accordingly, that same year he commenced an action against the Gallery in the United States District Court for the Southern District of New York, seeking a declaratory judgment and asserting claims for conversion and replevin of the painting. The federal action was withdrawn without prejudice on March 27, 2012, possibly due to Maestracci's inability at that time to represent the Estate.

On March 7, 2013, respondent George W. Gowen, an attorney for Maestracci, and a New York resident, petitioned Surrogate's Court, New York County, for ancillary letters of administration

to commence litigation in Supreme Court, New York County, for return of the painting, which was allegedly under the control of the Gallery, Nahmad, and David Nahmad (agent for the gallery), New York residents (collectively, Nahmads), and IAC, a foreign entity transacting business in New York. The petition stated that there was no personal property of decedent in New York, and stated that the sole purpose of seeking appointment or an administrator was to commence a legal action by a New York resident against foreign parties.

To establish jurisdiction pursuant to SCPA 206, Gowen provided an affidavit from Edward W. Greason, Esq., an associate at the firm representing Maestracci. Greason recounted the history of the painting and stated that in order to commence a proceeding to recover it, appointment of a fiduciary for the Estate was necessary to act as the proper party in interest. Because Maestracci was not an American citizen, he did not qualify, so with Maestracci's consent, Gowen was seeking to act as administrator of decedent's ancillary New York estate.

In a second affidavit, Greason stated that pursuant to SCPA 103(44), a "chose in action" was defined as property, and the Estate had the right to commence an action in New York to recover the painting because the Nahmads were New York residents and the Gallery was a New York corporation. Greason also stated that the

painting was believed to be in New York in the possession of the Nahmads.

On June 27, 2013, the Surrogate's Court, New York County, issued limited ancillary letters of administration to Gowen. Thereafter, in 2014, respondents commenced an action in Supreme Court, New York County, against IAC and the Nahmads. Jurisdiction over IAC was based on allegations that it did business at the same office in Manhattan as the Gallery, purposely transacts business in New York, and that it was an offshore entity used by the Nahmad family as an instrument to hold their personal family interests in art, most of which were located in Switzerland. The complaint requested a declaratory judgment that Maestracci was the owner of the painting, and asserted claims for conversion and replevin.

On March 2, 2015, IAC filed a petition before the Surrogate's Court seeking to revoke the limited ancillary letters of administration issued to Gowen. Initially, IAC alleged that it had standing to seek the relief because it was a person "interested" in the Estate as the owner of the painting and a defendant in the action. The petition also alleged that resolution of whether the Surrogate's Court had subject matter jurisdiction to issue the ancillary letters might moot the action, and claimed the issuance of the letters was based on

material misstatements in that respondents falsely claimed that the Estate's sole asset, the painting, was located in New York, when it was returned to Switzerland in 2008.

In support of the petition, IAC submitted affidavits of Adelino Semedo, an officer of a storage facility in Switzerland, who detailed the location of the painting since it was received at the facility in Switzerland from Christie's London on March 21, 1997. In particular, he stated that the painting was shipped to Sotheby's New York on September 18, 2008, and returned to the facility on December 18, 2008, where it remained.

IAC also submitted affidavits of Harco Van Den Oever, and Julie Kim, International Business Director, and acting Director, respectively, for the Impressionist and Modern Departments of Christie's affiliates globally, stating that IAC purchased the painting at an auction on June 25, 1996. Further, IAC provided an affidavit of Daisy Edelson, senior vice president and business director of Sotheby's Impressionist and Modern Art Departments in New York, stating that the painting was consigned for auction by IAC, not Gallery and was returned to Switzerland on December 4, 2008.

IAC argued that the Surrogate's Court lacked subject matter jurisdiction for the issuance of the ancillary letters. IAC also maintained that factual misrepresentations were made to secure

the letters in that the painting was not in New York, and was purchased by IAC, not the Nahmads.

Respondents responded that IAC's wrongful refusal to return the painting was a tortious act amenable to suit in New York under CPLR 302 and SCPA 210(1) and (2)(a). They asserted that SCPA 103(44) and 2103(2) provided that a "chose in action" was an asset of an estate. Moreover, they claimed that IAC lacked standing as an interested person under SCPA 103(39) because it was not a beneficiary of the Estate or a trustee in bankruptcy or receiver, and that IAC's interest was in the painting and the action, not in the Estate. In addition, they argued that there was no other forum with jurisdiction over all parties, and equity favored a prompt resolution of the Estate's claims. They noted that IAC had avoided discovery and that Maestracci was over 70 years of age and contended that IAC was seeking to prolong the proceedings. Finally, they claimed they did not make material misstatements to the court to obtain the letters.

Surrogate's Court dismissed IAC's petition, finding that IAC lacked standing to bring the application to revoke the limited ancillary letters issued to Gowen. In addition, the court concluded that the ancillary letters were not obtained by misrepresentations and that it had jurisdiction over estates of nondomiciliaries with a claim in New York under SCPA 2103(2). We

now affirm.

In order to seek revocation of ancillary letters of administration based on any of the grounds listed in SCPA 711, one must be "a co-fiduciary, creditor, person interested, any person on behalf of an infant or any surety on a bond of a fiduciary." While IAC maintains it qualifies as a "person interested," that term is defined as "[a]ny person entitled or allegedly entitled to share as beneficiary in the estate or the trustee in bankruptcy or receiver of such person" (SCPA 103 [39]). However, IAC is neither a beneficiary nor a creditor of the Estate, and provides no other basis for a conclusion that it is a "person interested." Moreover, a defendant in an action brought by an estate is not an interested person (*see Matter of Chabrier*, 281 AD2d 346 [1st Dept 2001]). Accordingly, IAC does not have standing to seek revocation of the letters.

Nevertheless, SCPA 719 permits the court to revoke letters when it becomes aware of facts supporting grounds for revocation. In this case, IAC alleges that Gowen obtained his letters by fraud. In particular, IAC claims that Gowen procured the letters by falsely claiming that the painting was located in New York when it was in fact located in Switzerland. This allegation stems from a statement in one affidavit that indicated a belief that the painting was in New York. However, the petition for the

letters explicitly stated that the Estate had no property in New York, other than the right to commence an action. In other words, the petition did not assert that the painting was in New York, and there is no reason to believe that this assertion in one affidavit played a part in the court's determination to issue the ancillary letters.

IAC also challenges whether the Surrogate's Court had jurisdiction to entertain this matter. SCPA 206(1) provides that the Surrogate's Court has jurisdiction over the estate of any nondomiciliary decedent who leaves property in the state. The Surrogate's Court should decline to exercise jurisdiction only when the controversy in no way affects the affairs of a decedent or the administration of the estate (*see Matter of Piccone*, 57 NY2d 278, 288 [1982]).

Significantly, although the authority of the Surrogate's Court over a nondomiciliary's estate in an ancillary proceeding is generally limited to estate assets within New York (*see Matter of Obregon*, 91 NY2d 591, 601 [1998]), property includes a "chose in action," e.g. a cause of action in New York (*see* SCPA 103[44]).

Accordingly, contrary to IAC's contention, SCPA 206(1) does not require the physical presence of the subject property in New York at the time the proceeding for ancillary letters was

commenced. It is sufficient that the Estate had a valid "chose in action" against two New York domiciliaries (the Nahmads), a New York corporation (the Gallery), and IAC, a foreign entity alleged to be owned and controlled by New York residents and doing business in New York.

IAC's reliance on cases where, unlike the "chose in action" here, the estate property was not located in New York is misplaced (*see e.g. Leve v Doyle*, 6 AD2d 1033 [1st Dept 1956]). IAC similarly misplaces reliance on *Obregon* which involved the estate pursuing claims against parties and trust assets in the Cayman Islands and not in New York.

Nor is there merit to IAC's personal jurisdiction claim. Initially, Surrogate's Court did not require personal jurisdiction over IAC in order to determine whether or not to revoke the grant of ancillary letters of administration since ICA was not a respondent in that proceeding. In any event, a court may exercise personal jurisdiction over any nondomiciliary who, in person or through an agent, transacts any business within the state or contracts anywhere to supply goods or services in the state or commits a tortious act within the state or regularly does or solicits business or engages in any other persistent course of conduct (CPLR 302[a][1] and [2]). The commission of some single or occasional acts of an agent in a state may be

enough to subject a corporation to specific jurisdiction in that state with respect to suits relating to that in-state activity (*see International Shoe Co. v Washington*, 326 US 310, 318 [1945]; *Daimler AG v Bauman*, __US__, __, 134 SCt 746, 754 [2014]; *see also LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 214-216 [2000]).

In this case, personal jurisdiction was acquired based on IAC's admitted agreement with Sotheby's to act as its agent to sell the painting in New York in 2008. Further, personal jurisdiction over IAC may be based on respondents' allegations that IAC transacted business in New York through the Nahmads at the Gallery's office in Manhattan.

Respondents' motion to enlarge the record (M-5552) is denied.

Accordingly, the order of the Surrogate's Court, New York County (Nora S. Anderson, S.), entered August 10, 2015, which dismissed the petition to revoke limited ancillary letters of

administration issued to respondent George W. Gowen, should be affirmed, without costs.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: FEBRUARY 14, 2017

CLERK

WILMERHALE

March 17, 2017

David W. Bowker
+1 202 663 6558 (t)
+1 202 663 6363 (f)
david.bowker@wilmerhale.com

VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Suite 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratix Of The Estate Of Alice Leffmann v. The Metropolitan Museum of Art, 16-civ-07665 (LAP)*

Dear Judge Preska:

As counsel for Defendant, the Metropolitan Museum of Art, I write in response to Plaintiff's March 6, 2017 letter, and the new authority she attached to that letter, which she claims bears on the Museum's standing in Surrogate's Court to challenge Plaintiff's appointment to represent the Estate. *See* ECF No. 23.

The new authority cited by Plaintiff does not help her case in this Court. As the Museum has explained, it is Plaintiff who lacks standing and capacity to bring *this* lawsuit on behalf of the Estate. Her letters of appointment supply the sole basis for her purported standing in this lawsuit, and those letters are patently defective. Because the Museum has filed a petition in Surrogate's Court identifying those defects and requesting that the letters be revoked, this litigation should be halted—by a dismissal without prejudice or a stay—pending adjudication of the Museum's petition in Surrogate's Court. *See* ECF No. 12 at 7-9; ECF No. 21 at 2-3.

Moreover, whether the Museum has standing in Surrogate's Court to challenge Plaintiff's ancillary letters is undoubtedly a question for the Surrogate's Court to decide and, in any case, is beside the point. The authority Plaintiff's letter cites, *In re Estate of Stettiner*, 46 N.Y.S.3d 608 (App. Div. 2017), supports the Museum's argument that—regardless of any standing analysis—"SCPA 719 permits the [Surrogate's] court to revoke letters when it becomes aware of facts supporting grounds for revocation." 46 N.Y.S. 3d at 614 (ECF No. 23-1 at 11). Here, in contrast to *Stettiner*, the facts plainly require revocation. As discussed in the Museum's submissions in this Court, and further detailed in the Museum's Surrogate's Court petition, Plaintiff's letters should be revoked because she never filed a written renunciation by the executor, never obtained written consent from the community of heirs or the beneficiaries of the Estate, never provided the required citation to the Public Administrator, and did not issue citation to six necessary parties. *See* ECF No. 12 at 7-9; ECF No. 13-1 (Museum's Surrogate's Court petition); ECF No. 21 at 2-3. Under these circumstances, the Surrogate's Court is plainly empowered to revoke Plaintiff's letters.

WILMERHALE

The Museum would have addressed the *Stettiner* case in its Reply brief, but Plaintiff waited to send her letter until after that brief was filed. Thank you for your Honor's consideration of these points in rebuttal.

In addition, I write to bring to the Court's attention another recent development related to the petition the Museum filed in Surrogate's Court: In response to the Museum's petition, on March 13 the Surrogate's Court issued a Citation ordering Plaintiff to show cause by May 23, 2017 why the Surrogate's Court should not vacate the decree that issued ancillary letters of administration to Plaintiff. The Citation is attached here as Exhibit 1.

Sincerely,

/s/ David W. Bowker

David W. Bowker

cc: All Counsel (via ECF)

EXHIBIT 1

File No. 2010-2964/A

SURROGATE'S COURT - COUNTY OF NEW YORK

CITATION

THE PEOPLE OF THE STATE OF NEW YORK
By the Grace of God Free and Independent

To: Laurel Zuckerman
Nicholas John Day
Dahlia Damas, Public Administrator of New York County
The New York Attorney General

A Petition having been duly filed by The Metropolitan Museum of Art, whose address is 1000 Fifth Avenue, New York, New York, 10028.

YOU ARE HEREBY CITED TO SHOW CAUSE before the Surrogate's Court, County of New York at 31 Chambers Street, New York, New York, 10007, on the 23rd day of MAY 2017, at 10:00 o'clock in the fore noon of that day, why the Court should not grant a Decree:

(A) Vacating this Court's Decree dated October 18, 2010, which issued ancillary letters of administration c.t.a. to Laurel Zuckerman and admitted Alice Leffmann's Last Will and Testament to ancillary probate; and

(B) Granting such other and further relief as the Court deems just, proper, and equitable.

Dated, Attested and Sealed, Hon. Rita Mella Surrogate

March 13, 2017 Chief Diana Sanabria
Clerk of the Court

Name of Attorneys: Joseph T. La Ferlita, Esq. Farrell Fritz, P.C. Telephone Number: (516) 227-0714

Address of Attorneys: 1320 RXR Plaza, Uniondale, New York 11556-1320

[Note: This citation is served upon you as required by law. You are not required to appear; however, if you fail to appear it will be assumed you do not object to the relief requested. You have a right to have an attorney appear for you.]

PROOF OF SERVICE MUST BE FILED
TWO DAYS PRIOR TO THE RETURN DATE
Court Rule 207.7 (c)

FF\6040233.1

HERRICK

Ross L. Hirsch
Partner
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Fax: 212.545.2330
rhirsch@herrick.com

March 20, 2017

VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Room 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratrix of the estate of Alice Leffmann v. The Metropolitan Museum of Art*, 16-civ-07665 (LAP)

Dear Judge Preska:

As counsel for Plaintiff, we write in response to Defendant's letter, dated March 17, 2017. We see no need to substantively respond to Defendant's letter. However, we write to address one procedural issue.

Defendant's letter notified this Court that the Surrogate's Court issued the "Citation" on Defendant's application to vacate Plaintiff's appointment as ancillary administratrix of the estate of Alice Leffmann. We write to further advise this Court that Plaintiff intends to move in Surrogate's Court to dismiss Defendant's application, with an expected return date of May 23, 2017. If requested by this Court, we will supply Your Honor with a copy of the motion when filed.

Respectfully submitted,

Ross L. Hirsch

Enclosure

cc: All Counsel (via ECF)

HERRICK

Ross L. Hirsch
Partner
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Fax: 212.545.2330
rhirsch@herrick.com

May 25, 2017

VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Room 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratrix of the estate of Alice Leffmann v. The Metropolitan Museum of Art*, 16-civ-07665 (LAP)

Dear Judge Preska:

As counsel for Plaintiff, we write to respectfully apprise the Court of a material development impacting Defendant's motion to dismiss the Complaint (the "Motion").

In the Motion, Defendant argues, *inter alia*, that this action must be stayed, or dismissed without prejudice, pending the adjudication of a petition filed by Defendant in Surrogate's Court to vacate the decree appointing Ms. Zuckerman as ancillary administratrix of the estate of Alice Leffmann.

Thereafter, Plaintiff moved in Surrogate's Court to dismiss Defendant's petition. At a hearing held in open court on May 23, 2017, the Surrogate's Court ruled from the bench, granting Plaintiff's motion and *dismissing Defendant's petition*. The Snrrogate's Court found, *inter alia*, that Defendant had no standing to file the petition and that Defendant did not raise any grounds for the Court to, *sua sponte*, vacate the appointment of Ms. Zuckerman.

Accordingly, the corresponding portion of Defendant's Motion in this Court is now moot and need not be addressed by this Court. We will provide the Court with the Surrogate Court's short-form order when it is issued.

Respectfully submitted,

Ross L. Hirsch

HERRICK

cc: All Counsel (via ECF)

HERRICK

Ross L. Hirsch
Partner
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June 12, 2017

VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Room 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratrix of the estate of Alice Leffmann v. The Metropolitan Museum of Art*, 16-civ-07665 (LAP)

Dear Judge Preska:

As counsel for Plaintiff, we hereby enclose the Decision from the Surrogate's Court, as referenced in our May 25th letter to the Court.

Respectfully submitted,

Ross L. Hirsch

Encl.

cc: All Counsel (via ECF)

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---x

Petition of the Metropolitan Museum of Art to Vacate the Decree, dated October 18, 2010, Granting Ancillary Letters of Administration c.t.a. in the Estate of

ALICE LEFFMANN,

Deceased.

DECISION
File No.: 2010-2964/A

---x

M E L L A, S.:

The following papers were considered in deciding a motion to dismiss this petition:

Papers	Numbered
Notice of Motion to Dismiss, Affidavit of Gary B. Freidman, Esq., in Support, with Exhibits 1 – 8, Affirmation of Gian Paolo Romano, Affirmation of Marc-Andre Renold, with Exhibit A, and Memorandum of Law in Support of Motion to Dismiss	1, 2, 3, 4, 5
Affirmation of John J. Barnosky, Esq., in Opposition to Motion to Dismiss, with Exhibits A and B, and Affirmation of Alexander Jolles	6, 7
Affirmation of Benjamin A. Friedman, Reply Affirmation of Foreign Law of Professor Gian Paolo Romano, Reply Memorandum of Law in further Support of Motion to Dismiss	8, 9, 10

In this proceeding, the Metropolitan Museum of Art ("the Met") seeks to vacate the decree of this court dated October 18, 2010, which admitted decedent's foreign will to probate and issued ancillary letters of administration c.t.a. to respondent Laurel Zuckerman. May 23, 2017, was the return date of Respondent's motion to dismiss the Met's petition. After hearing extensive oral arguments, the court granted the motion and dismissed the petition for the reasons that follow.

As a threshold matter, the Met, in its capacity as the defendant in a lawsuit commenced in federal court by Zuckerman, as ancillary administrator c.t.a. of this estate, has no standing to petition to vacate this court's decree (CPLR 5015[a]) or to revoke the letters issued by this court (SCPA 711; *Matter of Chabrier*, 281 AD2d 346 [1st Dept 2001]; *Matter of Menis*, 137 AD2d 692 [2d Dept 1988]).

In addition, there is no basis for the court to vacate this decree sua sponte. First – and setting aside the fact that this court lacks authority to vacate a decree sua sponte pursuant to CPLR 5015 – the petition does not bring any fact to the attention of the court that would provide grounds for revocation of Zuckerman's letters under SCPA 711 (*see* SCPA 719[10]). Contrary to the Met's argument, the petitioner in the ancillary probate proceeding did not misrepresent any material fact upon which the court relied in issuing its decree.

Second, a reasonable reading of the ancillary probate application in this case leads to the conclusion that the Surrogate exercised her discretion to determine the parties who were cited with process pursuant to SCPA 1609(2) (*see also* SCPA 1419). UBS, the party that had priority for the issuance of ancillary letters under SCPA 1604(1)(b), was cited and did not appear in response to the citation or otherwise object to the relief requested in it. Because no party was "acting" in 2010 in Switzerland to administer the assets of this decedent, who had died in 1966, the court could not have appointed – or required the service of process on – any party pursuant to SCPA 1604(1)(c). The court, therefore, properly relied on SCPA 1604(1)(d) and 1604(2) and issued letters of ancillary administration c.t.a., pursuant to SCPA 1418, to Zuckerman, an eligible person who had been designated by Nicholas Day, a party who was entitled to so designate (SCPA 1604[2], 1418[1][b]).

On the application before this court at this time, the court declines to disturb the decree.

This decision, together with the transcript of the May 23, 2017 proceedings, constitutes the order of the court.

Clerk to notify.

Dated: June 5, 2017

SURROGATE

HERRICK

Ross L. Hirsch
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June 16, 2017

VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Room 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratrix of the estate of Alice Leffmann v. The Metropolitan Museum of Art*, 16-civ-07665 (LAP)

Dear Judge Preska:

As counsel for Plaintiff, we write in response to Defendant's letter, dated June 16, 2017. We oppose Defendant's further attempt to "stay or suspend" this action pending its yet-to-be-filed re-argument motion in Surrogate's Court and/or appeal to the Appellate Division.

In Defendant's motion to dismiss the Complaint (the "Motion"), Defendant argued, *inter alia*, that this action must be stayed, or dismissed without prejudice, pending the adjudication of a petition filed by Defendant in Surrogate's Court to vacate the decree appointing Ms. Zuckerman as ancillary administratrix of the estate of Alice Leffmann.

As we have informed the Court in our prior correspondence, the Surrogate's Court *has now fully adjudicated* Defendant's petition. After briefing and argument, Surrogate Mella dismissed Defendant's petition, finding, *inter alia*, that Defendant had no standing to file the petition and, regardless, that Defendant did not raise any grounds for the Court to vacate the appointment of Ms. Zuckerman. That is, in 2010, the Surrogate's Court appointed Ms. Zuckerman as the ancillary administrator of the estate of Alice Leffmann, and now, in 2017, the Surrogate's Court has reaffirmed that this appointment was validly made and that Ms. Zuckerman has authority to represent the estate in the proceedings before this Court. Contrary to Defendant's "concern," Plaintiff is the duly-authorized representative of the estate of Alice Leffmann.

Accordingly, that portion of Defendant's Motion in this Court is now moot. Nevertheless, Defendant persists with its demand that this action be put on hold indefinitely while it rehashes meritless positions already rejected by Surrogate Mella.

What makes this request so specious is that Defendant *admits* (as it must) that it had no standing in Surrogate's Court to move to vacate Ms. Zuckerman's appointment.[1] Now, Defendant

[1] At oral argument, Defendant's counsel conceded: "under 719 we do not have direct standing to seek removal . . . ." The transcript from this argument is attached, so the Court can see that Defendant had ample opportunity to present its arguments and that Surrogate Mella's rejection of the petition was carefully reasoned.

HERRICK

threatens to go to the Appellate Division — where it, again, will have no standing — to argue that the Surrogate's Court failed to exercise its discretion to, *sua sponte*, vacate an appointment made nearly seven years ago to which none of the interested parties has ever objected, despite notice. Defendant's abusive tactics are part of its litigation strategy to cause delay, to avoid resolution on the merits, and to escalate Plaintiff's litigation costs.

Plaintiff respectfully asks this Court to deny Defendant's request for a "stay" or "suspension."

Respectfully submitted,

Ross L. Hirsch

Encl.

cc: All Counsel (via ECF)

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x File # 2010-2964A

In the Matter of the Estate of

ALICE LEFFMANN,

Deceased.

----------x

Start
10:19:25 a.m.

End
10:50:07 a.m.

May 23, 2017

31 Chambers St.
New York, NY 10007

BEFORE: HONORABLE RITA MELLA
Surrogate Judge

APPEARANCES: JOHN J. BARNOSKY, ESQ.
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APPEARANCES:

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LISA MARY BARBIERI, ESQ.
Attorney General State of New York
120 Broadway
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COURT CLERK: Applications 5 and 8, Alice Leffman.

MR. FRIEDMAN: Good morning, Your Honor, Gary Friedman and Jeffery Sheetz, Greenfield Stein & Senior, co-counsel for Laurel Zuckerman, as Ancillary Administrator. And my co-counsel, Ross Hirsch, from Herrick Feinstein LLP.

MR. BARNOSKY: John J. Barnosky, Farrell Fritz, P.C., Attorney for the Metropolitan Museum of Art. And my colleague, Joseph La Ferlita.

MR. FINKELSTEIN: Good morning, Your Honor, Steven Finkelstein, counsel to the Public Administrator, County of New York.

MS. BARBIERI: Lisa Barbieri, Attorney General, State of New York. Good morning, Your Honor.

THE COURT: Good morning. Before I say anything, I should tell you that I know that I'm going to sound like I'm sucking up to you, but I think these papers are just so well-written and I very much enjoyed reading them. In the way that you can enjoy reading legal papers of course.

(Laughter.)

MR. BARNOSKY: Thank you, Your Honor.

MR. FRIEDMAN: Thank you.

THE COURT: But thank you. And this applies to papers for both sides. Including yours, Ms. Barbieri, who didn't file any papers.

MS. BARBIERI: Easy to read, Your Honor.

(Laughter.)

THE COURT: Okay. So, Mr. Barnosky, you represent the Petitioner here. It's an interesting application. I'm assuming that you do not dispute that the museum, the Metropolitan Museum, does not have any standing to make this application to vacate a decree?

MR. BARNOSKY: Not exactly, Your Honor. We believe that under 719 we do not have direct standing to seek removal, but we obviously have, we believe under 719.10, the ability to bring it to the Court's attention, and there is case law that supports that. But in addition, we didn't seek removal directly, we proceeded to seek a vacatur of the decree itself for lack of personal jurisdiction over all necessary parties. An ancillary effect of that, of course, is that the appointment of the fiduciary would be negated, but we're not seeking directly removal.

THE COURT: Well, it's good that you say that, because I mean immediately I noticed that you didn't actually style it as a petition to revoke the letters that had been issued to Ms. Zuckerman. You actually styled it as a petition to vacate a decree.

MR. BARNOSKY: Correct.

THE COURT: So, petitions to vacate decrees are

governed by CPLR 5015, correct? And so, I think you would agree with me that under 5015, only an interested party who has been affected by the decree can actually move to vacate the decree. And the Metropolitan Museum in no way can claim to have been affected by that decree, other than the fact that they were sued by the Ancillary Administrator. So, in essence what you're doing, Mr. Barnosky, is you're asking me to vacate this decree *sua sponte*.

MR. BARNOSKY: Correct.

THE COURT: Based on information that you have provided to me concerning what you believe is a lack jurisdiction over necessary parties at the time the decree was issued, correct?

MR. BARNOSKY: Correct, Your Honor.

THE COURT: Okay. Mr. Friedman, you would agree that 5015 is the governing provision here?

MR. FRIEDMAN: Yes, Your Honor. And we think that if the Court were even to consider the arguments advanced by the Met, you would be opening the flood gates to a collateral attack to the issuance of letters in every case, every wrongful death action brought in the State of New York, every case where an estate is a Plaintiff. Then the defendant, the tort defendant, the commercial defendant in the other action would come to this Court, would litigate the issue of whether or not there was some

irregularity, some defect in the appointment process. I mean it could lead to in a probate proceeding, because of the Court's duty under 1418 to be satisfied as to the validity of the will, to allow a complete stranger to come in and try and argue that the will is not valid.

THE COURT: And by the way, Ms. Barbieri, are you going to take a positon on this application?

MS. BARBIERI: The office is not taking a position, but I just have to say that they're not arguing to invalidate the will; they're arguing to reopen the probate.

THE COURT: Correct. So, Mr. Barnosky, is it safe to say that if this decree admitted a foreign will to probate, but did not issue letters to Ms. Zukerman, that you wouldn't be here today?

MR. BARNOSKY: Well, it's that part of the process that was not complied with, because the people who had priority were not given notice. So, I think if the decree, even if it admits the will to probate, is not done in a way that joins all proper parties, the decree itself is to be set aside. Whether it admits the will to probate, or it appoints the fiduciary. I mean a bad decree is a bad decree.

THE COURT: Correct. But you wouldn't be here, right? Because it wouldn't affect the Met in any way. If

this decree did not issue any letters --

MR. BARNOSKY: Well, then nobody would be suing us.

THE COURT: Exactly. So, the point that I'm trying to make is that in essence what this is, is an application to revoke the letters that are issued to Ms. Zuckerman, correct?

MR. BARNOSKY: Essentially, that's correct.

THE COURT: Correct. Because in reality, the decree, the ancillary decree by itself is that the issuance of letters does not affect in any way your client. Correct?

MR. BARNOSKY: That's correct.

THE COURT: So, we get to the point where we then have to look at 711 and 719 of the SCPA in order to look at who can actually bring a petition, who has standing to bring a petition to revoke letters that were issued by this Court. And I think that it's clear that a party that has been sued by a person to whom letters were issued by this Court is not one of the parties listed under 711 as having standing to bring this petition.

So, again, what you're hoping for is that by bringing these issues to my attention, you would convince me to, on my own, vacate this decree. And will that open the flood gates as Mr. Friedman just said?

MR. BARNOSKY: Well, there's statutory authority for it, so, it isn't a question of the policy of flood gates or not. 719.10 says that anyone can bring to the attention of the Court misrepresentations that were made in the petition. In the *Matter of Stettner*, the appellate division, while they did and affirmed as to the lack of standing, they said ah, but of course, you do have the right to bring it to the attention of the court. And even though they spend a half a page on standing, they spend eight pages in their decision doing the analysis of whether there was proper jurisdiction. And they concluded in this case, there were no material representations in that case.

In the *Matter of Young*, which was coincidentally our case, Judge McCarty did grant it. We didn't have standing, our client, but they brought it to the attention of the court, and Judge McCarty said you're absolutely right, and *sua sponte* vacated the decree. And that's our position here, that the Court has a duty to make sure that a good decree is -- and remember, we're going to be at risk to any -- if there are people here who are unbound because there wasn't good service, six people, who were not cited, and their heirs and fiduciaries, we could make a deal with them, the federal court could decide whatever it decides, but we would still be at risk, whichever way it goes, to those people who were not properly cited.

THE COURT: Mr. Barnosky, if you believe that they were necessary parties, why didn't you cite UBS and all of these people that were cited and the ones that were not cited in your petition to vacate a decree that would directly affect them?

MR. BARNOSKY: Because it's the Petitioner's job to do that.

THE COURT: No, you are the Petitioner.

MR. BARNOSKY: No, it's a petition in the other --

THE COURT: In your petition, if you believe that there were necessary parties for the issuance of the decree, the necessary parties were vacated in that decree. Especially, UBS who most definitely was named executor on the will that was admitted to probate, or actually, that was read and accepted by the authorities in Switzerland. So, again, you believe that there were necessary parties here, so why not cite them here then in your petition?

MR. BARNOSKY: We thought the appropriate relief was to ask the Court to go order, if you will, the decree vacated, and they have to do it over. If it was defective because of their fault and what they didn't do, very frankly, it's not our job to correct it. And 719 doesn't require that.

THE COURT: Again, this is not an application

pursuant to 719. We just agreed that this is a petition to vacate a decree, which has to be governed by 5015 of the CPLR. And anybody who would be affected by the vacatur of the decree should be again cited or given notice.

Let's say that I agree with you, and I look at 719, and then I had to go back to 711 to see what are the grounds. The grounds for revocation of letters. So, what are the grounds here, Mr. Barnosky?

MR. BARNOSKY: Well, the original probate petition, as we pointed out in our papers, listed these six heirs as people who had to be cited, and then they filed an amended petition and took them out. They averred that they were necessary parties, but then they moved them from the non-citation portion of the probate petition to the notice of probate portion. We think that was wrong, and they didn't have the right to do that. The statute says things could be dispensed with by order of the court, but there was no order of the court. They didn't even apply for it. They didn't ask that there be a dispensation. They didn't do any due diligence to speak of. There was no guardian ad litem. And as we pointed out, we found one of these people in five minutes. And they said under oath that they couldn't find any information on any of these people. So, that's what they should have done.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: Your Honor, the standard is a false suggestion of a material fact. As the Ben Friedman affirmation makes clear, those six persons were initially listed on the citation; they are listed in the papers that were filed in this Court. They were moved at the direction of someone in the probate department in 2010. So, there's clearly no false suggestion of material fact. The issue of due diligence, the ancillary probate statute does not require a filing of an affidavit of due diligence. And obviously in 2017, your ability to conduct internet research is a lot different than it was in 2010. And the fact that the Met was able to locate someone in 2017, while Ms. Zuckerman and her counsel were unable to locate in 2010 doesn't prove anything.

And we haven't been put to the test or required to submit an affidavit explaining the laborious efforts that Ms. Zuckerman made to try and find all the people that may have an interest in the Alice Leffman estate. As Your Honor can see from the probate filing, an enormous amount of work had to be done to list all of the people that were listed both in the persons who are required to be cited, those who are merely required to get notice of probate, and those people did get notice of probate.

So, the bottom line is here, Your Honor, six and a half years have gone by since 2010, and no one with any

interest in the Alice Leffmann estate has come forward to challenge Laurel Zuckerman's right to serve. And under the court of appeals' decision in *Matter of Campbell*, once letters issue, unless someone with a superior right to letters comes along, those letters remain in effect.

THE COURT: Unless there is a ground to --

MR. FRIEDMAN: To remove.

THE COURT: -- revoke those letters under 711, correct?

MR. FRIEDMAN: Absolutely. Of course. Of course.

THE COURT: Correct. And Mr. Finkelstein, for the Public Administrator, are you going to take a position on this application?

MR. FINKELSTEIN: No, Your Honor. To the extent that the Public Administrator was not cited, we would stand and accept the jurisdiction of the Court, we would submit to the jurisdiction of the Court, but we see no reason to append the letters as they presently are.

THE COURT: So, one big issue here is whether there was a false suggestion of a material fact, because I believe that's the only ground on which Petitioner is relying here, out of the grounds listed in 711 of the SCPA. And Mr. Barnosky just mentioned listing people originally under question five, and then moving them to question six,

and not providing information about these people under oath. About six of them under oath. So, was it false what they said? Was it false, or did the Court look at this back then in 2010? And ask you know, I was not here. This is not my decree. Did the Court look at it? Looked at the application, and it made an evaluation of jurisdiction, and then proceeded to issue the decree. Isn't that a more likely scenario here since the probate department and chambers do look at these applications, and they make an evaluation and determination as to whether jurisdiction has been completed to the satisfaction of the Court? Isn't the Court then sort of an intervening factor here, an intervening cause that would make these representations not false?

MR. BARNOSKY: Well, Your Honor, we don't know what happened then. Even if we take what they say as true, the statute says that any dispensation has to be by order of the court. I think the word "order" is pretty clear that it means an order of the court. I don't think a probate clerk saying move this from 5A to 6 is an order of the court. And so, I don't think they complied with the statute.

But aside from those six people, I think one of the more important things here is that the Petitioner represented that he was a representative of the community

of heirs. I think you probably read the papers that Switzerland has this procedure where there's something called the community of heirs. That all the heirs act jointly, and their expert conceded this, unless one of them steps forward in the Swiss court and says hey, I want to be the representative of the heirs.

Their expert, who has now done a bit of a flip-flop in his second opinion, but in his first opinion, their expert and ours both agreed that under Swiss law, the community of heirs must act jointly unless they go through this procedure of one of them seeking to be the representative. And the Petitioner here represented to this Court and in the papers that he was a representative of the community of heirs. And he wasn't. He didn't go through procedure; he didn't get consent; he didn't get renunciations from all the members. And both of the experts said that the community of heirs must act jointly.

THE COURT: What makes you think that this person, the Petitioner, Mr. Day, Mr. Day is the name of the Petitioner in the ancillary application; what makes you think that he actually represented to the court that he was a representative of the community of heirs?

MR. BARNOSKY: Because that's what would give him standing. Under the statute, under 1604, he has standing by virtue of being one of the people who was a residuary

beneficiary. And then the statute says, you've got to go in the order. You only get to do a designation if all the people above said we don't want to serve. And he didn't serve them; he certainly didn't get their consent; and so, he lacked the standing to file a designation because two only kicks in under 1604 if you've blown through all the orders in one.

THE COURT: How about in 1604, subdivision D?

MR. BARNOSKY: For sure. Because 'D' sends you over to 1418, which has its own order of priorities. And in there it's even more clear the interest there. It has specific language about heirs or their fiduciaries. So, 1418 actually adds a level of person who has to be cited in the proceeding.

THE COURT: Actually, 1418 refers to the people who apply already. 1418 is not the statute that actually talks about the process or the procedure to cite people in an Administration CTA application. That statute is 1419 actually. I cannot believe that I know all of these statutes.

(Laughter.)

MR. BARNOSKY: I'm impressed. I didn't know until recently.

THE COURT: What is this about? I should have better things to do with my memory and my time. I do agree

of course that 1604 is where we start. And that under subdivision 1(b) of 1604, UBS, who had been appointed in the original jurisdiction in Switzerland to act as executor as the party with priority here. UBS recited, refused to do anything, did not come here. In fact, told the attorney for the Petitioner, which the Petitioner then relayed to the Court in an affirmation, that they were not going to do anything. So, the Court had to go down the list. It seems to me that 1604 is the guiding statute here.

And I know, Mr. Barnosky, that you have indicated that the Court should have given notice to these parties to actually force them to renounce, to say either you renounce, or I'm going to deem that you have renounced by a certain date. But could I really force people to renounce here? Could I force them to file a renunciation?

MR. BARNOSKY: Well, there's a procedure of course in 1416 that says that if a person refuses to renounce, you can cite them to be appointed, and if they fail to qualify, they'll be deemed to renounce. So, the statute contemplates how that happens.

THE COURT: You think that applies here, that 1416? This not a will that actually was admitted to probate. I mean it's not a will that was meant to be admitted to probate in New York.

MR. BARNOSKY: Well, it certainly applies to UBS

because it says so. That a person named in the will.

THE COURT: Mr. Friedman?

MR. FRIEDMAN: Two points, Your Honor. 1604(2) makes it clear that's not what has to happen. 1604(2) says if the person entitled and named as executor in the foreign jurisdiction doesn't qualify, then you go to the waterfall in 1604(1). And here, it's beyond dispute that UBS declined to qualify. So, in 1419, it just doesn't matter.

And more importantly, in the statement that the Petitioner, Nicholas Day, is the fiduciary of her residuary beneficiary, and therefore is entitled under 1418 to designate, which he did. And quite frankly, I think the Swiss law, although interesting, is rather irrelevant to the disposition of the application by the Met.

THE COURT: I agree with that. I mean it was interesting to read from Mr. Romano and Mr. Jonas about what happens in Switzerland, and how things are doing, and how things work, but I don't see the relevance of any of that to our proceeding here, and to whatever happened in that application. And I think you said 1419 does not matter. I think you meant, Mr. Friedman, that 1416 does not matter.

MR. FRIEDMAN: 1416, Your Honor. I misspoke.

THE COURT: So, going down the list of 1604, we get to subdivision 1(c), which then talks about anyone

acting in the foreign jurisdictions to administer the assets. And this even had at point being dead for about 42 years or so or more. And so, there was no one out there. So, the court had to go to (d). And under (d), meaning go back to 1418, anybody would be entitled to Letters of Administration CTA. Then we get to Mr. Day.

MR. BARNOSKY: But we're missing 1604(c), which --

THE COURT: No, I just talked about it. I said no one was acting in the jurisdiction --

MR. BARNOSKY: And the Swiss counsel have opined that the community there, if you will, automatically gets resurrected if a new asset is discovered. And that's what's being alleged here. It's true the estate was closed. I'm sure the community of heirs and the executor gave up acting, but now, there's an allegation that there's a new asset of the estate, and the Swiss counsel has said, well, when that happens, that resurrects the community of heirs, and that would put you into 1604(1)(c).

THE COURT: But it says acting to administer the assets. It doesn't say acting as in filling the seat, or occupying the seat and name. It says acting to administer the assets. There was no one acting at that point. So, again, the court, it seems to me as I said before, was justified in going down to (d), to subdivision (d). If

someone were listening to us talking, they probably would think we have lost our minds.

(Laughter.)

THE COURT: With the 1416 and the 1604 and the 1418. So, I guess you see where I'm going with this. Is there anybody else who would like to say anything at this point?

(No response.)

THE COURT: So, I'm prepared to rule on this application. And what I'm going to do is grant the motion to dismiss the petition to vacate this Court's decree, dated October 18, 2010, which admitted the decedent's foreign will to ancillary probate. The Petitioner in its capacity as the defendant in a law suit commenced in federal court by Laurel Zuckerman, the Ancillary Administrator CTA, to whom letters were issued by this Court, has no standing to petition to vacate this Court's decree under CPLR 5015(a), or to revoke the letters issued by this Court under SCPA 711.

In addition, the Court finds that there is no basis for Court to vacate this decree *sua sponte*. First, the petition does not bring any fact to the attention of the Court that would provide grounds for revocation of Ms. Zuckerman's letters under 711 of the SCPA. Contrary to Petitioner's argument, the Petitioner in the ancillary

probate proceeding did not misrepresent any material upon which the Court relied in issuing its decree. And that is setting aside the fact that under CPLR 5015 the Court cannot act sua sponte to vacate a decree.

Second, a reasonable reading of the ancillary probate application in this case leads to the conclusion that the Surrogate exercise her discretion to determine the parties who were cited with process pursuant to SCPA 1609(2). UBS, the party who had priority (indiscernible) of ancillary letters under SCPA 1604(1)(b) was cited and did not appear in response to the citation, or otherwise object to the relief requested in it.

In addition, in an affirmation, counsel for the Petitioner in the ancillary probate proceeding provided the Court with information that UBS was not included to quality in this case, and the Court properly relied on this information. Because no party has "acted" in 2010 in Switzerland to administer the assets of this decedent, who had died in 1966, the Court could not have appointed or required process on any party pursuant to SCPA 1604(1)(c). The Court therefore properly relied on SCPA 1604(1)(d) and SCPA 1604(2) and issued Letters of Ancillary Administration CTA pursuant to SCPA 1418 to Ms. Zuckerman, an eligible person who had designated by Mr. Day, a party he was entitled to so-designate.

On the application before this Court at this time, the Court is not inclined to disturb the decree. Thank you very much.

ALL COUNSEL: Thank you, Your Honor.

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C E R T I F I C A T E

I, Rochelle V. Grant, certify that the foregoing transcript of the proceedings held before Surrogate Judge Rita Mella on 5/23/17 in the Surrogate's Court of the State of New York, County of New York, in the Estate of Alice Leffman, File Number 2010-2964A, was prepared using the required transcription equipment and is a true and accurate record of the proceedings to the best of my ability.

Rochelle V. Grant

Rochelle V. Grant

Date transcribed:

May 28, 2017

WILMERHALE

June 16, 2017

David W. Bowker

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VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Suite 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratix Of The Estate Of Alice Leffmann v. The Metropolitan Museum of Art, 16-civ-07665 (LAP)*

Dear Judge Preska:

As counsel for Defendant, the Metropolitan Museum of Art, I write in response to Plaintiff's June 12, 2017 letter attaching the Surrogate's Court's June 5, 2017 Decision granting Plaintiff's motion to dismiss the Museum's petition to vacate the decree appointing Ms. Zuckerman as ancillary administratrix of the estate of Alice Leffmann. *See* ECF No. 27.

I write to notify Your Honor that the Museum intends to file with the Surrogate's Court a motion to reargue/renew, and to file a notice of appeal. The Museum continues to have concerns that any judgment Your Honor issues in this litigation brought by Ms. Zuckerman may not be binding on the many heirs of the Estate of Alice Leffmann and therefore may be vulnerable to challenge at a later date. The Museum helieves that asking Surrogate Mella to address certain issnes on a motion to reargue/renew, and perhaps asking the appellate court to address certain issues on appeal, will help ensure that if Ms. Zuckerman is permitted to represent the Estate in this litigation any judgment Your Honor issues will not be vulnerable to challenge at a later date.

We will provide written updates to Your Honor on the status of further litigation in the Surrogate's Court and the appellate court. The Museum respectfully requests that the above-captioned litigation pending before this Court be stayed or suspended pending the resolution of that further litigation.

Sincerely,

/s/ David W. Bowker

David W. Bowker

cc: All Counsel (via ECF)

WILMERHALE

July 12, 2017

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VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Suite 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratrix Of The Estate Of Alice Leffmann v. The Metropolitan Museum of Art, 16-civ-07665 (LAP)*

Dear Judge Preska:

On behalf of Defendant The Metropolitan Museum of Art (the "Museum"), I write in response to Plaintiff's letter of June 16, 2017 to make clear that the Museum does not seek "to cause delay, to avoid resolution on the merits, [or] to escalate Plaintiff's litigation costs." Quite the contrary, the Museum is eager to have this case resolved on the merits, for the reasons expressed in its motion to dismiss. The Museum's concern, however, is that any resolution on the merits could be subject to collateral attack on the ground that Plaintiff obtained her Ancillary Letters to represent the Estate without notifying all twelve of the heirs of Alice Leffmann or their fiduciaries. This is not a new concern. Long before Plaintiff filed suit, the Museum expressed its concerns about her apparent lack of authority to represent and bind the heirs and their successors, and when Plaintiff brought this lawsuit, the Museum promptly filed its petition in Surrogate's Court expressing this concern. Because these issues go to the heart of Plaintiff's standing and to this Court's jurisdiction in the litigation pending before Your Honor, the Museum continues to maintain that they must be resolved before this action can proceed.

Sincerely,

/s/ David W. Bowker

David W. Bowker

cc: All Counsel (via ECF)

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July 12, 2017

VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Suite 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratrix Of The Estate Of Alice Leffmann v. The Metropolitan Museum of Art, 16-civ-07665 (LAP)*

Dear Judge Preska:

On behalf of Defendant The Metropolitan Museum of Art (the "Museum"), I write in response to Plaintiff's letter of June 16, 2017 to make clear that the Museum does not seek "to cause delay, to avoid resolution on the merits, [or] to escalate Plaintiff's litigation costs." Quite the contrary, the Museum is eager to have this case resolved on the merits, for the reasons expressed in its motion to dismiss. The Museum's concern, however, is that any resolution on the merits could be subject to collateral attack on the ground that Plaintiff obtained her Ancillary Letters to represent the Estate without notifying all twelve of the heirs of Alice Leffmann or their fiduciaries. This is not a new concern. Long before Plaintiff filed suit, the Museum expressed its concerns about her apparent lack of authority to represent and bind the heirs and their successors, and when Plaintiff brought this lawsuit, the Museum promptly filed its petition in Surrogate's Court expressing this concern. Because these issues go to the heart of Plaintiff's standing and to this Court's jurisdiction in the litigation pending before Your Honor, the Museum continues to maintain that they must be resolved before this action can proceed.

Sincerely,

/s/ David W. Bowker

David W. Bowker

cc: All Counsel (via ECF)

Plaintiff shall respond to the above by letter no later than July 21.

7/14/17

SO ORDERED
Loretta A. Preska
LORETTA A. PRESKA
UNITED STATES DISTRICT JUDGE

HERRICK

Ross L. Hirsch
Partner
Phone: 212.592.5961
Fax: 212.545.2330
rhirsch@herrick.com

July 19, 2017

VIA ECF
The Honorable Loretta A. Preska
United States District Court
Southern District of New York
500 Pearl Street, Room 12A
New York, New York 10007

Re: *Laurel Zuckerman, As Ancillary Administratrix of the estate of Alice Leffmann v. The Metropolitan Museum of Art*, 16-civ-07665 (LAP) (the "Action")

Dear Judge Preska:

As counsel for Plaintiff, we write in response to Defendant's letter, dated July 12, 2017, and in opposition to Defendant's continued efforts to delay the Court's adjudication of Defendant's motion to dismiss in this Action (the "Motion").

In its letter, Defendant argues that this Action should be put on an indefinite hold until the Surrogate's Court addresses its petition (the "Petition") challenging Plaintiff's appointment as ancillary administrator of the estate of Alice Leffmann. The Petition was filed in November 2016, days before Defendant filed the Motion in this Court.

Defendant's letter fails to acknowledge that the Surrogate's Court has, after extensive (and expensive) briefing and argument, *already rejected and dismissed Defendant's Petition*. In prior correspondence (*see* letters, dated June 12 and June 16), we provided the Court with the decision and the transcript from oral argument in Surrogate's Court. These materials speak for themselves in showing that Surrogate Mella carefully considered the "concerns" raised by Defendant and rejected every one of them, finding that Defendant has no standing to file the Petition and, regardless, that Defendant did not raise any grounds for the Court to vacate the appointment of Plaintiff.

The result reached in Surrogate's Court is correct and is the precise result anticipated by Plaintiff in opposing the Defendant's Motion.[1] Defendant's effort to sway this Court by suggesting that a resolution on the merits in this Action would be subject to collateral attack was likewise raised in Surrogate's Court where it was swiftly rejected. Critically, this scare tactic is vitiated by the fact

[1] In opposing the Motion, we argued as follows with respect to Defendant's Petition:
"This tact rings loudly of sharp practice, especially considering that the Museum has no standing in Surrogate's Court, as a matter of statutory law, to challenge the Letters of Administration; and, even if it had standing, the Museum fails to invoke any valid statutory basis for vacating the appointment years later. The proceeding before this Court should not be "stayed" or otherwise impeded by the Museum's "Hail Mary" effort to strip away the rights of the Leffmann estate via collateral proceedings."

HERRICK

that nearly *7 years* after Plaintiff's appointment by the Surrogate's Court — after notice was provided in the manner directed by the Surrogate's Court — no one (other than Defendant, now) has challenged, or lodged an objection to, Plaintiff's appointment or her fitness to represent the estate. As a matter of law, Plaintiff is a duly appointed representative of the estate of Alice Leffmann.

Regardless, Defendant asks this Court to put this Action on further hold while it reargues the identical positions already rejected by Surrogate Mella and pending its *yet-to-be-perfected* appeal of Surrogate Mella's decision — an appeal that Defendant has no standing to make.[2] Though Defendant suggests in its letter that it is "eager" to have this case resolved on the merits, Defendant's conduct tells a very different story. Defendant, in its Motion filed on November 30, 2016, argued that this Action "should be dismissed without prejudice . . . or stayed or suspended pending the Surrogate's Court resolution of the Museum's petition." That "*resolution*" has now been reached, but Defendant still fights to delay this Court's determination of the Motion.

Plaintiff respectfully asks this Court to deny Defendant's request for a "stay" or "suspension."

Respectfully submitted,

Ross L. Hirsch

Encl.

cc: All Counsel (via ECF)

[2] Defendant's motion for re-argument was noticed with a return date of September 1, 2017.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN

(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

THE METROPOLITAN MUSEUM OF ART

(List the full name(s) of the defendant(s)/respondent(s).)

16 CV 07665 (LAP)

NOTICE OF APPEAL

Notice is hereby given that the following parties: LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN

(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit

from the ☒ judgment ☐ order entered on: 02/07/2018

(date that judgment or order was entered on docket)

that: granted Defendant's motion to dismiss the Amended Complaint.

(if the appeal is from an order, provide a brief description above of the decision in the order.)

3/5/18
Dated

James M. Kaye
Signature

Kaye, Lawrence, M.
Name (Last, First, MI)

2 Park Avenue	New York	NY	10016
Address	City	State	Zip Code

212-592-1410	lkaye@herrick.com
Telephone Number	E-mail Address (if available)

*Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

Rev. 12/23/13