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Substantive and Procedural Aspects of Joint, Several, and Joint and Several Obligations

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Comments

Substantive and Procedural Aspects of Joint, Several, and Joint and Several Obligations

Since the turn of the century, there has been a considerable infiltration of common law into the Louisiana field of cumulation of actions or, as it is now termed by practicing lawyers, "joinder of parties." It is the purpose of this comment to examine the rules of substantive law dealing with the multipartied obligations, which ordinarily give rise to cumulation of actions. It is

from such obligations that problems of cumulation of plaintiffs or defendants most frequently stem. By demonstrating the fundamental differences between the common law and the civil law in this area, it is hoped that the solution for the proper application of the Louisiana procedural rules will be facilitated.

In order to simplify the presentation, the discussion will be centered on the rules relating to the enforcement of obligations against joint, several, and joint and several obligors. Generally, these rules also apply to the enforcement of the rights of joint, several, and joint and several obligees; and in those few instances where different rules have been formulated, special mention will be made.

COMMON LAW

In traditional common law theory, contracts of two or more promisors are classified into joint, several, and joint and several. A division of obligations into these three classes is but the initial step in ascertaining the applicable procedural rules.

Since these concepts originated and were developed in the area of contract law, and since the greatest difficulty is encountered in this field, more emphasis will be placed there. While an exhaustive consideration of joint tortfeasors is beyond the scope of this comment, the procedural aspects of this subject may be briefly summarized. If the tortfeasors are acting in concert, or their acts of negligence concur to contribute proximately to the plaintiff's injury, their liability is joint and several.[1] On the other hand, if the negligent acts of the tortfeasors are separated by time, or space or degree, their liability is several.[2]

Since the law of joint, several, and joint and several promises

1. COOLEY, A TREATISE ON THE LAW OF TORTS § 85 (4th ed. 1932); PROSSER, HANDBOOK OF THE LAW OF TORTS § 109 (1941); 2 WILLISTON, CONTRACTS § 338 A (rev. ed. 1936); Note, 13 CORN. L.Q. 473 (1928).

The one distinction between contractual and tort liability joint and several is that the former is for a liquidated amount, while the latter, even if due, is highly unliquidated and without a definite standard by which it can be measured. As a result of this distinction, courts are not inclined to view favorably a release with reservation of rights, but seem more disposed to disregard the reservation. The reason for this holding is that deception is available to the injured creditor, for he may attempt to reserve his rights against *A*, after being paid by *B* under a compromise agreement, thus availing himself of double compensation. Ducey v. Patterson, 37 Colo. 216, 86 Pac. 109 (1906); Lanasa v. Beggs, 159 Md. 311, 151 Atl. 21 (1930), 29 MICH. L. REV. 263; McBride v. Scott, 132 Mich. 176, 93 N.W. 243 (1903); Larson v. Anderson, 108 Wash. 157, 182 Pac. 957 (1919). See also notes 27 and 89 *infra*.

2. PROSSER, TORTS § 109.

covers only contracts in which several persons obligate themselves for the same performance, it is fundamental that these rules must be limited to cases where the debtors promise but one identical performance, not two or more separate and distinct performances.[3] The common bail bond, for instance, whereby different persons agree to be secondarily liable for different amounts, aggregating the amount of the bail, would not fall within any of the above categories, for the sureties are obligating themselves for different performances. Once it has been ascertained that but one duty exists under a multipartied contract, the distinction between the three possible types becomes important in applying the widely variant substantive and procedural rules.

Because there are three different sets of rules, it is necessary to consider the criteria by which the various types of obligations are distinguished before the rules applicable to the different types can be examined.[4] The historical approach of the Anglo-American courts was to establish a presumption of law that the obligation of two or more parties to any agreement for the performance of one duty was joint.[5] No special words evidencing intention to contract jointly were necessary to bring into effect this legal presumption, which could be overcome only by adding express words of severance, or by a clear showing of a contrary intent or interest on the part of the contracting parties.[6]

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3. Some difficulty is experienced in making such a distinction, but it is entirely necessary, for the law of joint, several, and joint and several obligations applies only to contracts for the same performance. 4 CORBIN, CONTRACTS §§ 925, 926 (1951).

See generally on this subject, 2 WILLISTON, CONTRACTS § 316 *et seq.* (1936).

4. RESTATEMENT, CONTRACTS § 128, comment (1932); Farni v. Tesson, 1 Black 309 (U.S. 1861); Hall v. Leigh, 8 Cranch. 50 (U.S. 1814).

5. Hill v. Tucker, 1 Taunt. 7, 127 Eng. Rep. 731 (C.P. 1807); 4 CORBIN, CONTRACTS § 925; 2 WILLISTON, CONTRACTS § 322.

In SHEPPARD, TOUCHSTONE OF COMMON ASSURANCES, OR, A PLAIN AND FAMILIAR TREATISE (1840), as reprinted in 2 WHARTON, THE LAW LIBRARY 211, § 375 (1841), it is said that, "If two, three, or more bind themselves in an obligation, thus, *obligamus nos*, and say no more, the obligation is, and shall be taken to be joint only, and not several."

The relatively recent case of United States Printing and Lithographing Co. v. Powers, 233 N.Y. 143, 152, 135 N.E. 225, 227 (1922), said, "It is a general presumption of law that, when two or more persons undertake an obligation, they undertake jointly; words of severance being necessary to overcome this primary presumption." See also RESTATEMENT, CONTRACTS § 112 (1932), and 1 PARSONS, THE LAW OF CONTRACTS 11 *et seq.* (6th ed. 1873); 2 WILLISTON, CONTRACTS § 322. *Cf.* RESTATEMENT, CONTRACTS § 113 (1932).

6. The interests of the parties may be so clearly several that courts will disregard the usual presumption. Shipman v. Straitsville Mining Co., 158 U.S. 356 (1895); Spangenberg v. Spangenberg, 19 Cal. App. 439, 126 Pac. 379 (1912). In this last cited case the court held that a contract of seven heirs to equally

The early common law could not visualize the relations of the obligors *inter sese* for it regarded these agreements as embodying a single indivisible promise, creating a single indivisible obligation—a single *vinculum juris*, in which the plural parties were conceived to be but one person. This unity of obligation and indivisibility of liability of a joint debt has been maintained by the common law to the present date and forms the foundation of all modern theories of joint contracts.[7]

It was, of course, always possible for several persons to promise separately by signing different documents, even though they promised one single performance. In such cases no difficulty was encountered in recognizing more than one separate, completely unrelated promise, and consequently several distinct duties, each enforceable by a separate action.[8]

It soon became possible for parties, even though they signed one single document, to produce this juridical result through the use of the magic word "several."[9] As a consequence, it appears that, although the identical performance was promised, the all-embracing *vinculum juris* had been loosened and the obligors were looked upon as being indebted personally and individually and in a manner completely unrelated to one another. In these instances, the obligee had separate and distinct causes of action against each of the several obligors.

Eventually creditors sought to obtain the benefit of both concepts in the same contract, and the courts recognized such agreements as a joint and several liability, which, as its name implies, is a mere consolidation of the previously developed forms

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divide the estate of their father was a several undertaking, and consequently the objection of nonjoinder was not properly taken. In Lovell v. Commonwealth Thread Co., 272 Mass. 138, 172 N.E. 77 (1930), where two parties defendant had hired the plaintiff for employment purposes in their respective businesses, the court felt that the division of the interest on the part of the defendants created a several contract.

See 2 WILLISTON, CONTRACTS § 323; RESTATEMENT, CONTRACTS §§ 113, 115, 116 (1932). The UNIFORM NEGOTIABLE INSTRUMENTS LAW § 68 (1898) provides that the obligation of joint payees or joint endorsees who sign the instrument shall be joint and several. See, generally, 1 PARSONS, CONTRACTS c. 2, § 1, n. B, and cases cited therein (6th ed. 1873).

7. RESTATEMENT, CONTRACTS § 112 (1932). From this principle of joint contracts stems all the collateral theories which are still applied, *e.g.*, RESTATEMENT, CONTRACTS §§ 121, 125, 129-132 (1932).

8. 4 CORBIN, CONTRACTS § 925.

9. Mathewson's Case, 5 Co. Rep. 22b, 77 Eng. Rep. 84 (C.P.); Collins v. Prosser, 1 B. & C. 682, 107 Eng. Rep. 250 (K.B. 1823).

of contract involving more than one person.[10] There was still only one document, and one performance to be rendered. This novel development enabled the jurists in early English law to construe the contract to contain one more promise than there were parties, for every promisor was severally bound; but, at the same time, all were jointly obligated. This combined form of contract was favored by the creditors, for it had the advantages of both the joint and the several forms.[11]

With the aid of the presumption in favor of joint contracts previously referred to, it was at one time assumed that the only test of the particular type of contract entered into by more than one person was the interest of the parties in the subject matter of the contract, so that if their concern was deemed to be joint, no words, however specific, could justify a finding of several liability and vice versa.[12] Under the present law, however, it ap-

10. Typical language would be "*A* and *B* jointly and severally promise" or "We bind ourselves and each of us . . . ." See, *e.g.*, Olmstead v. Bailey, 35 Conn. 584 (1869).

The use of the first person singular, as "I promise . . . Signed *A*, *B*, and *C*" indicated that the parties contemplated liability both singularly and as a group, thus jointly and severally. But such words may be overcome by other expressions or by extrinsic factors commonly used in interpretation. See Hurlbut v. Quigley, 180 Cal. 265, 180 Pac. 613 (1919); RESTATEMENT, CONTRACTS §§ 114, 115 (1932); 4 CORBIN, CONTRACTS § 937 (1951); 2 WILLISTON, CONTRACTS § 324 (1936).

Apparently, the creditors did not have the unrestricted option of suing either jointly or severally, but must proceed jointly if possible, so the qualification is chiefly procedural, and is evidenced by the following cases: Keightley v. Watson, 3 Ex. 716, 154 Eng. Rep. 1034 (Ex. 1849); James v. Emery, 5 Price 529, 146 Eng. Rep. 685 (Ex. 1818); Scott v. Godwin, 1 Box. & Pul. 67, 126 Eng. Rep. 782 (C.P. 1797); Petrie v. Bury, 3 B. & C. 353, 107 Eng. Rep. 764 (K.B. 1824); Spencer and Durant, Comb. 115, 90 Eng. Rep. 376 (K.B.); Eccleston v. Clipsham, 1 Wms. Saund. 153, 85 Eng. Rep. 158 (K.B. 1677); Slingsby's Case, 5 Co. Rep. 18b, 77 Eng. Rep. 77 (K.B.).

If, however, the interest of the covenantees of a joint and several contract is completely several, they clearly may so sue, with the liberty to proceed jointly. This development might be attributed to a protection of the debtor from undue harassment due to repeated suits by his creditors. Many statutes now provide that all joint obligations shall be classified as joint and several. See Burdick, *Joint and Several Liability of Partners*, 11 COL. L. REV. 101 (1911); 2 WILLISTON, CONTRACTS § 336 (1936).

11. 1 PARSONS, CONTRACTS 14 (1873). The creditor was given the privilege of treating his debtors as jointly liable, thereby invoking the benefits and being subjected to the disadvantages of that form, or as severally bound, in which case, the doctrine of several liability would come into play. See note 10 *supra*.

12. The interest which is prominent as a criterion must be an interest in the contract and not in any sum of money or other benefit to be received from the contract. It is strictly a legal and technical interest, created by the contract, and does not depend upon the condition or state of the parties aside from the contract. Hopkinson v. Lee, 6 Q.B. 964, 115 Eng. Rep. 363 (K.B. 1845); Anderson v. Martindale, 1 East. 497, 102 Eng. Rep. 191 (K.B. 1801).

pears settled that the interest of the parties is merely one of the many factors considered for purposes of interpretation. These factors have replaced the conclusive presumption favoring joint obligations, which must now yield certainly to an express statement, and probably to any indication in the contract of a different will of the parties.[13] The modern approach places special emphasis on the intentions of the parties, and any contractual interpretation should have as its goal the ascertainment of that element.[14]

Regardless of the type of obligation undertaken by the parties, all persons liable for the same performance owe the debt in its entirety. All promisors, whether they be joint, several, or joint and several, are obligated to perform the totality of the duty if so called upon by the creditor.[15] Even though in the case of a joint liability a joint judgment against all obligors must be rendered, nevertheless, such judgment may be satisfied upon the property of any debtor severally and individually.[16] Thus, the extent of the duty of each promisor is the same, regardless of the form of obligation he has imposed upon himself. This rule is

13. Farni v. Tesson, 1 Black 309 (U.S. 1861); Petroleum Midway Co. v. Moynier, 205 Cal. 733, 272 Pac. 740 (1928); Shurtleff v. Udall, 97 Vt. 156, 122 Atl. 465 (1923); Sorsbie v. Park, 12 M. & W. 146, 152 Eng. Rep. 1146 (Ex. 1843); 2 WILLISTON, CONTRACTS § 325 (1936).

For an interesting discussion and historical development of this problem, see 1 PARSONS, CONTRACTS 14, n. (j) (1873).

14. Starrett v. Gault, 165 Ill. 99, 46 N.E. 220 (1896); Peters v. McDonough, 327 Mo. 487, 37 S.W.2d 530 (1931); Montague Mfg. Co. v. Homes Corp., 142 Va. 301, 128 S.E. 447 (1925); RESTATEMENT, CONTRACTS §§ 115, 128 (1932); 4 CORBIN, CONTRACTS § 937 (1951); 2 WILLISTON, CONTRACTS § 324 (1936).

It has been said that the consideration furnished is of importance and especially so if other features of the contract do not conflict with this view. *In re* Rose Co., 275 Fed. 409 (2d Cir. 1921); Satler Lumber Co. v. Exler, 239 239 Pa. 135, 86 Atl. 793 (1913); RESTATEMENT, CONTRACTS § 115 (1932).

15. *Joint obligations:* Leinkauff v. Munter, 76 Ala. 194 (1884); Saunders v. Reilly, 6 N.Y. 452, 12 N.E. 170 (1887); Baum v. McAfee, 125 S.W. 984 (Tex. Civ. App. 1910); Savings & Loan Corp. v. Bear, 155 Va. 312, 154 S.E. 587 (1930); 4 CORBIN, CONTRACTS § 928 (1951); 2 WILLISTON, CONTRACTS § 207 (4th ed. 1931).

Several obligations: 4 CORBIN, CONTRACTS §§ 927, 928 (1951).

Joint and several obligations: Joint and several liability, merely giving the creditor his choice of the two above discussed forms, both of which obligate all debtors for complete performance, must, of necessity, have the same result regardless of the form chosen by the obligee. Consequently, while the different types of multipartied contracts did occasion differences of method, they in no way affected the parties' liability to the creditor.

16. Leinkauff v. Munter, 76 Ala. 194 (1884); Clayton v. May, 68 Ga. 27 (1881); Hardy v. Overman, 36 Ind. 549 (1871); 4 CORBIN, CONTRACTS § 928 (1951). See note 18 *infra.*

Although joint obligors were primarily viewed as unitarily liable, since they seldom held joint property, each must have been conceived in such a case as bound individually in a somewhat metaphysical way, though not subject to being sued alone.

no doubt predicated on the requisite that there be only one single performance contemplated, and one duty owed. Even though some magic words might have severed the parties, they remain liable for the entire amount for they all have combined to make but one promise, and no distinction should be made in the quantum of duty of each. Otherwise, if the liability of each were distinct and ratable, there would be more than one duty; each party would then owe a separate and distinct performance. However, differences of procedure and other collateral doctrines draw sharp lines of demarcation between the different forms of liability.

Although at common law all the debtors were liable for the complete performance, the obligee was never entitled to more than one complete performance whether rendered by one debtor, or by all for the aggregate amount.[17] The moment the creditor had received full satisfaction of his claim, all legal relations between creditor and debtors were extinguished, the further consideration of equitable distribution of the burden between the parties being left to the implied or actual agreement between the debtors.

In addition to performance, other methods of discharging the duty of two or more promisors exist, which, while not peculiar to the law of multiple parties, raise difficulties not encountered in any other field. It is, for example, possible for the obligee to release the debt as to all or only part of the debtors. No problem is presented if the release extends to all the parties, for the manifested intention of the parties would be efficacious, assuming the presence of all formal elements. But if less than all the obligors are released, resort must be had to the form of the particular agreement and to the theory upon which the obligation is founded for a determination of the ultimate outcome of the transaction. Since a joint promise of several parties produces one undivided duty and calls for only one performance, it was early held that a release of one person jointly bound releases all so bound.[18] As the creditor has released the bond by which he held

17. 4 CORBIN, CONTRACTS § 928 (1951). This is a necessary corollary of the primary theory that but one promise has been made, and but one duty incurred.

18. Reference is here made only to a strict release with no reservation. Lunt v. Stevens, 24 Me. 534 (1845); Hale v. Spaulding, 145 Mass. 482, 14 N.E. 534 (1888); Rowley v. Stoddard, 7 Johns 207 (N.Y. 1810); North Pacific Mortgage Co. v. Krewson, 129 Wash. 239, 224 Pac. 566 (1924); Brooks v. Stuart,

the promisors bound, it follows that all are freed of their duty. There can be little difficulty in aligning this result with the fundamental theory of joint obligations, that one single performance is due and only one promise has been made.

Reasons other than the unitary nature of a joint promise have been offered to justify the rule under discussion. It has been thought that a discharge of but one joint obligor would prejudice the rights of contribution held by the others.[19] For instance, of joint debtors, *A*, *B*, and *C*, creditor *X* releases *A* alone of his obligation, choosing to hold *B* and *C*. While joint debtors are primarily liable for the entirety of the debt, there generally exists between the obligors an agreement, tacit or express, for some distribution of the burden.[20] Either the duty of *A* to contribute will be abrogated without the consent of the other parties, or he will nevertheless be bound to indemnify his co-obligors for their payment, which is unjust, for then *A* will be released from noth-

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9 Ad. & E. 854, 112 Eng. Rep. 1437 (K.B. 1839); 4 CORBIN, CONTRACTS § 931 (1951); 2 WILLISTON, CONTRACTS § 333 (1936).

Another rationale for such a rule, although most often attributed to the unitary nature of joint duties, has been concisely refined to: "The reason why a simple release of the principal debtor discharges the surety is that it would be fraud on the principal debtor to profess to release him, and then sue the surety who in turn could sue him." Mellis, L.J., in Nevill's Case, L.R. 6 Ch. 43, 47 (1870).

This problem is thoroughly discussed in Williston, *Releases and Covenants Not to Sue Joint, or Joint and Several Debtors*, 25 HARV. L. REV. 203 (1912). Many states have statutes providing that the discharge or compromise of one joint obligor shall not release the others, if the intention of the parties is that they shall not be freed. 4 CORBIN, CONTRACTS § 931 (1951); 2 WILLISTON, CONTRACTS § 336 (1936). These statutes in effect make a release of one joint debtor the equivalent of a covenant not to sue. In the opinion of this writer, such statutes are advisable for two reasons: (1) They tend to give effect to the intent of the parties and (2) they avoid the trap into which many an unwary obligee has fallen by graciously releasing one of his debtors only to find that he has actually discharged the entire obligation. For examples of situations corrected by such statutes, see Clark v. Mallory, 185 Ill. 227, 56 N.E. 1099 (1900); Bonney v. Bonney, 29 Iowa 448 (1870); Fox v. Hudson's Ex'x, 150 Ky. 115, 150 S.W. 49 (1912); Merritt v. Bucknam, 90 Me. 146, 37 Atl. 885 (1897); Brooks v. Neal, 223 Mass. 467, 112 N.E. 78 (1916); Crawford v. Roberts, 8 Ore. 324 (1880); North Pacific Mortgage Co. v. Krewson, 129 Wash. 239, 224 Pac. 566 (1924).

19. Ward v. Fleming, 18 Ga. App. 128, 88 S.E. 899 (1916). *But see* Beam v. Barnum, 21 Conn. 200 (1851), where a release of *A* was held to bar an action against *A*, but not against *B*, his joint co-obligor, nor was it a bar in an action by *B* against *A* for contribution. But, it is manifestly unjust for the released creditor to be liable subsequently for contribution, for then he has been released from nothing. The total debt should be reduced proportionately to the part of him released. See, *e.g.*, Lord Eldon in *Ex parte* Gifford, 6 Ves. Jun. 805, 31 Eng. Rep. 1318; 1 Ves. Jun. Supp. 660, 34 Eng. Rep. 968 (Ch. 1802).

20. See page 839 *infra*.

ing.[21] It is now well settled, however, that a release of one joint debtor relieves all so bound.[22]

Following the reasoning given at common law for legal discharge of joint debtors by a release of one, it might be assumed that a contrary rule would obtain concerning joint and several debtors, for their duties may be considered separate and distinct at the choice of the creditor. The common law courts, however, have generally held that a release of less than all joint and several debtors effectuated a discharge of all.[23] The best reason advanced for this position is that however distinct may be the duty of the respective parties, they are nevertheless bound for one single performance.[24] In effect, the unitary characteristic of joint and several liability is accorded predominance over the severance incorporated in the same contract. Since the rendition of one performance certainly discharges the obligation of all, it is reasoned that the same result should follow from a substituted payment received in full satisfaction. Hence, the courts might think that the release was given for performance rendered, or should be so construed.[25] Consequently, any liability suffered by other joint and several obligors theoretically amounts to double compensation to the obligee. However, it should be noticed that any presumption of satisfaction accorded to the release may

21. 2 WILLISTON, CONTRACTS 968, § 333 (1936) takes the position that no release by a creditor of one joint debtor should affect the right of contribution, for to do so would be to sanction the deprivation of the other debtors of substantial rights without their consent. That appears proper, for the total debt should be proportionately reduced.

22. RESTATEMENT, CONTRACTS § 121(1) (1932): "Where the obligee of a joint contractual promise discharges a promisor by release, rescission or accord and satisfaction, the other joint promisors are thereby discharged."

23. This principle was established quite early. Cocke v. Jennor, Hobart 66, 80 Eng. Rep. 214 (K.B. 1724); Clayton v. Kynaston, 2 Salk 573, 91 Eng. Rep. 483 (K.B. 1699); Hammon v. Roll, March N.R. 202, 82 Eng. Rep. 475 (K.B. 1642). The more modern rule appears to be the same. Bradford v. Prescott, 85 Me. 482, 27 Atl. 461 (1893); American Bank v. Doolittle, 14 Peck 123 (Mass. 1833); Frink v. Green, 5 Barb. 455 (N.Y. 1849); Crawford v. Roberts, 8 Ore. 324 (1880); Ellis v. Esson, 50 Wis. 138, 6 N.W. 518 (1880); 2 WILLISTON, CONTRACTS § 334 (1936).

24. 4 CORBIN, CONTRACTS § 281 (1951); 2 WILLISTON, CONTRACTS § 334 (1936). If the reason predicated on the solidary nature of performance due was sound, it should follow that a release of several debtors would likewise discharge others; but, apart from suretyship principles, that has never been asserted.

25. Benjamin v. McConnell, 9 Ill. 536 (1847). In Colby v. Walker, 86 N.H. 568, 571, 171 Atl. 774, 776 (1934), it was said that ". . . it is not the fact of release of one but of compensation made that bars the later suit. It is not the mere act of releasing, but the implication therefrom of full recompense which is vital." The court, however, in the same opinion, properly recognized that the legal presumption of satisfaction will be disregarded where there are words in the release from which a different intent can be drawn.

well be, and often is, erroneous, since other reasons might have motivated the action of the creditor; the result in this case is that the obligee receives no compensation for his contract right, which is grossly inconsistent with the original intentions of the parties.

Because of the questionable rationale given for the rule that a release of fewer than all joint and several debtors without reserving rights against certain debtors discharges all co-obligors, the American Law Institute has departed from the common law by stating that in this situation the other debtors are "discharged from their joint duty but not from their several duties."[26] This more logical and practical rule brings the law of release into harmony with the common law principle that judgment against one joint and several obligor discharges the joint obligation without impairing the several duties of the promisors.[27]

26. RESTATEMENT, CONTRACTS § 123 (1932): "Where the obligee of joint and several contractual promises discharges a promisor by release, rescission, or accord and satisfaction, the other promisors are thereby discharged from their joint duty, but not from their several duties. . . ." This rule of the American Law Institute was suggested by Gillespie v. Smith, 229 Fed. Cas. 760 (N.D. W. Va. 1918) and Krbel v. Krbel, 84 Neb. 160, 120 N.W. 935 (1909).

27. RESTATEMENT, CONTRACTS § 119(1)(3) (1932): "(1) A judgment rendered by a court of competent jurisdiction within the United States against one or more joint promisors, or against one or more joint and several promisors, upon a joint promise, discharges the joint duty of the other promisors.

". . .

"(3) The several duty of a promisor who is severally, or jointly and severally bound with others is not discharged by judgment for or against one or more of the others."

See, to the same effect, United States v. Ames, 99 U.S. 35 (1878); Sessions v. Johnson, 95 U.S. 347 (1877); Simonds v. Center, 6 Mass. 18 (1809); Noble v. Beeman-Spaulding-Woodard Co., 65 Ore. 93, 131 Pac. 1006 (1913).

As a result of extensive legislative activity in this field, a summary can consist of no more than a reiteration of well-recognized concepts, with reference being provided to the various statutes.

The Uniform Joint Obligations Act, § 5(a) provides that if the releasing obligee knows or has reason to know that the released obligor did not pay as much of the debt as he was bound to pay, according to the contract or relations with his co-obligors, the claim shall be satisfied to the amount the released debtor should have paid.

If the creditor is unaware of any such contract or relationship between his debtors, paragraph (b) provides that the obligation shall be satisfied (1) in the amount of the fractional share of the released obligor; or (2) equal to the amount such obligor was bound by contract or relation to pay, whichever of these alternatives is lesser.

Section 3 of the act introduces rules of suretyship into the theory of release, without express reservation of rights, to the extent that the other co-obligors will be considered released in the amount which their rights of indemnification are impaired. See N.Y. DEBTOR AND CREDITOR LAW § 231 *et seq.* (1950) (statutory developments in this field are plentiful); 2 WILLISTON, CONTRACTS § 336 (1936), but it is to be noted that a statute converting joint liability into joint and several would not modify the basic rule of complete release, for they are as well applicable to joint and several contracts as to joint. See notes 1 and 16 *supra.*

Seeing their intentions to release only one debtor thwarted by the courts, creditors sought to circumvent the operation of the rule of complete discharge by explicitly stating in the release of one debtor that they reserved complete rights against all other debtors. The courts nevertheless held such attempts to be ineffective as attempting to accomplish something which was impossible in the nature of things.[28] Since a release had been held to discharge the debt in its entirety, the courts could not consistently at the same time "reserve other rights" and continued to hold that the debt was entirely released.

Apart from these cases it had been held since the earliest recorded cases that a contract to forbear perpetually to sue was a bar to the original cause of action.[29] Labeled a covenant not to sue, such an agreement affords a simple method of accomplishing the purpose of releasing one joint debtor, while retaining the others. Through such an agreement, the obligee actually does not remit the debt of any of the obligors.[30] Here a joint or joint and several debtor, although he has received a covenant not to be sued, must nevertheless submit to a joint judgment being rendered against him. His protection under the covenant manifests itself only by preventing execution of the judgment upon his property, thereby achieving the same practical result as if the favored debtor had been individually released initially.[31]

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28. Kearsley v. Cole, 16 M. & W. 128, 153 Eng. Rep. 1128 (Ex. 1864); Webb v. Hewitt, 3 K. & J. 438, 69 Eng. Rep. 1181a (K.B. 1857); Nicholson v. Revill, 4 Ad. & E. 675, 111 Eng. Rep. 941 (K.B. 1836).

Consistent with the indivisible theory of joint obligations, it was felt that the obligee must either retain all obligors or release all of them. He could not divide his legal right into different parts and hold some while dropping others, for that was seeking to obtain that which was contradictory by terminology.

29. Flinn v. Carter, 59 Ala. 364 (1877); Foster v. Purdy, 5 Met. 442 (Mass. 1843); Stebbins v. Niles, 25 Miss. 267 (1852); Thurston Gardner & Co. v. James, 6 R.I. 103 (1859); Ford v. Beech, 11 Q.B. 842, 116 Eng. Rep. 689 (Q.B. 1848); Smith v. Mapleback, 1 T.R. 441, 99 Eng. Rep. 1186 (K.B. 1786); Hodges v. Smith, Cro. Eliz. 623, 78 Eng. Rep. 864 (K.B. 1598).

This was to avoid circuity of action, for if the obligee were allowed recovery on his claim the obligor could recover precisely the same damages for the breach of the covenant not to sue. Consequently, the courts simply said that such an agreement extinguished the original debt. RESTATEMENT, CONTRACTS § 405(1) (1932); 4 CORBIN, CONTRACTS §§ 932, 933 (1951); 2 WILLISTON, CONTRACTS § 338 (1936).

30. Mason v. Jouett's Admr., 2 Dana 107 (Ky. 1834); Durell v. Wendell, 3 N.H. 369 (1837); Couch v. Mills, 21 Wend. 424 (N.Y. 1839); Hutton v. Eire, 6 Taunt. 289, 128 Eng. Rep. 1046 (C.P. 1815); Fitzgerald v. Trant, 11 Mod. 254, 88 Eng. Rep. 1022 (K.B. 1710); Lacy v. Kinnaston, 3 Salk. 298, 91 Eng. Rep. 835 (K.B. 1701); RESTATEMENT, CONTRACTS § 121(2) (1932).

31. Roberts v. Strong, 38 Ala. 566 (1863); Kendrick v. O'Neill, 48 Ga. 631 (1873); Snyder v. Miller, 216 Ind. 143, 22 N.E.2d 895 (1939); Shed v. Pierce,

Because of the unsatisfactory treatment of releases with reservation in the early cases, the covenant not to sue was generally adopted as a method for accomplishing the results intended by the parties. In time, releases with reservation came to be construed not as a release of the named obligor, for such a simple holding was precluded by the earlier jurisprudence to the contrary, but as a covenant to forbear to sue.[32] Thus, any objection must now be directed to the circuitous manner of reaching the result or to the questionable use of one rule of interpretation to frustrate another substantive rule of law. The ultimate goal, however, the recognition and enforcement of the intention of the parties, finally was attained.

Since all co-debtors from the same promise were liable for complete performance and a joint judgment could be executed in its entirety upon the property of any one debtor, a need for some adjusting or equalizing device to distribute the burden more equitably was early recognized. The parties began to agree among themselves, prior to undertaking an obligation, that each should

17 Mass. 623 (1822); Benton v. Mullen, 61 N.H. 125 (1881); Rowley v. Stoddard, 7 Johns 207 (N.Y. 1810); 2 WILLISTON, CONTRACTS § 338 (1936).

32. Northern Ins. Co. v. Potter, 63 Cal. 157 (1883); Bradford v. Prescott, 85 Me. 482, 27 Atl. 461 (1893); Colby v. Walker, 86 N.H. 568, 171 Atl. 774 (1934); Hubbell v. Carpenter, 5 N.Y. 171 (1851); 4 CORBIN, CONTRACTS § 932 (1951); 2 WILLISTON, CONTRACTS § 338C (1936).

The early jurists never receded from the position that a "release" of one included all, or from the belief in the unitary nature of joint obligations. For instance, see Coleridge, J., in Price v. Barker, 4 El. & Bl. 760, 119 Eng. Rep. 281 (Q.B. 1855). "We quite agree with the doctrine laid down by Lord Denham in Nicholson v. Revill, . . . as explained by Baron Parke in Kearsely v. Cole . . . that if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities . . . to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release. It is impossible to suppose for a moment that the parties to this deed could have contemplated the extinguishment of their rights as against parties jointly liable."

But why the necessity for such circuitous reasoning, merely to obtain a result which is obvious? See Rutledge, J., in McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943). See also Dwy v. Connecticut Co., 89 Conn. 74, 92 Atl. 883 (1915), especially the concurring opinion of Wheeler, J., 89 Conn. 74, 97, 92 Atl. 883, 890 (1915).

The rules herein discussed apply equally as well to joint and several obligations. The covenant not to sue (release with reservation) can be of no concern if the obligee chooses to proceed severally against other parties than the covenantee. Of course, a several action against the covenantee himself is subject to the same rules as though he were the sole obligor, *i.e.*, he has a perfect defense. However, should the creditor elect to pursue his cause against the debtors jointly, the above discusion is pertinent. Thompson v. Lack, 3 C.B. 540, 136 Eng. Rep. 216 (C.P. 1846); RESTATEMENT, CONTRACTS §§ 123, 130 (1932); 4 CORBIN, CONTRACTS §§ 931 *et seq.*, 937 (1951); 2 WILLISTON, CONTRACTS §§ 334, 338 (1936).

be liable only for a ratable share or for a determined part of the performance. Such a contract, of course, could not affect the rights of the obligee. His privilege of proceeding for the full amount against the property of any obligor remained unaffected by an agreement between the co-debtors.[33] But the courts did give effect to the agreement as concerned the parties' relationship with one another, each party mutually having the right and duty of contribution in the previously determined proportion.[34]

Special problems arise in those cases where no such prior specific agreement exists, and the prejudiced debtor seeks contribution as a matter of right. This right to contribution depends upon the type of contract liability the parties have assumed and their peculiar relationship to one another, such as guarantor or surety, the liability of each party being proportionate to his interest in the matter.[35]

Although the principal debtor and his sureties are usually made obligors in equal degree in contracts of surety or guaranty, so that complete recovery may be had against any of the parties, as between themselves, only the principal debtor must ultimately

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33. RESTATEMENT, CONTRACTS § 117 (1932). See notes 13 and 14 *supra*.

34. For examples of such contracts, see Williams v. Riehl, 127 Cal. 365, 59 Pac. 762 (1899), where sureties had restricted their liability to a certain portion of the whole. The court allowed some of the sureties who had been assigned for value the judgment against them to collect an aliquot share from their co-sureties. *Quaere*: Was this a promise of one performance, to which the doctrine of contribution was properly applicable?

Wilmarth v. Hartman, 238 Mich. 20, 213 N.W. 73 (1927), where the agreement stated, "It is hereby agreed that the proportionate share of each respective signer shall be absolutely limited to their share in the capital stock . . . as set opposite our names. . . ." The court held that liability must be proportioned between the parties on the basis of the contract.

Armitage v. Pulver, 37 N.Y. 494 (1868), where contribution was allowed between co-sureties on a bond, as a matter of equity and common sense, in proportion to the number of parties.

35. *Re* Charles B. Toole, 274 Fed. 337 (2d Cir. 1921); Waters v. Waters, 110 Conn. 342, 148 Atl. 326 (1930); Asylum of St. Vincent De Paul v. McGuire, 239 N.Y. 375, 146 N.E. 632 (1925), 35 YALE L.J. 92 (1925); Taylor v. Everett, 188 N.C. 247, 124 S.E. 316 (1924); 4 CORBIN, CONTRACTS § 936 (1951); 2 WILLISTON, CONTRACTS § 345 (1936).

It is clear, therefore, that the party primarily liable has no rights to compensation, for he was obligated to pay the debt in its entirety, while secondary obligors are entitled to full indemnification from the primary debtor. Often this problem will be circumvented by conditioning the duty of the secondary obligor upon the failure of the primary obligor to meet the performance.

Consequently, the conclusion may well be drawn that the equitable doctrine of contribution is applicable only to those debtors laboring under a common and equal burden. Phillips v. Preston, 5 How. 278 (U.S. 1847); Gillespie v. Campbell, 39 Fed. Cas. 724 (C.C.N.D. Ill. 1889); King v. Price, 212 Ala. 344, 102 So. 702 (1935); J. F. Elkins Const. Co. v. Naill Bros., 168 Tenn. 165, 76 S.W.2d 326 (1934); RESTATEMENT, RESTITUTION § 81 (1936).

bear the loss, since he alone has an interest in the subject matter of the agreement. Consequently, any recovery against a surety or guarantor gives rise to a right of contribution against the principal debtor.

Between equally interested obligors, *inter sese*, as is usually the case where there are several debtors, each is indebted for his ratable share.[36] Joint obligors, generally being equally interested in the contract, have rights and duties to pay their proportionate share and no more.[37] The debtor who has been prejudiced by overpaying his part cannot recover the complete performance, or payment, but only that which exceeds his share.[38]

No rights or duties of contribution attach to several liability, since the obligors themselves have severed their relations with one another by making their contract in this form, each having elected to stand in his own right for complete performance. There is no legal connexity between the parties, each being liable under a different cause of action, since two separate promises were originally made.

The cases indicate that the right of contribution between joint and several debtors depends for its existence upon the election of the creditor to sue jointly. An election to sever by the creditor places the legal relations back into the classification of

36. United States Fidelity and Guaranty Co. v. Naylor, 237 Fed. 314 (8th Cir. 1916); Garrett v. Snowden, 226 Ala. 30, 145 So. 493 (1933); Willmon v. Koyer, 168 Cal. 369, 143 Pac. 694 (1914); Lorimer v. Julius Knack Coal Co., 246 Mich. 214, 224 N.W. 362 (1929); RESTATEMENT, RESTITUTION § 105 (1936); 2 WILLISTON, CONTRACTS § 945 (1936).

The obligation of those debtors owing contribution is a several one, bearing all effects of that type liability, and not joint, even though the original liability was of a joint nature. Meyrowitz v. Wattel, 149 Misc. 862, 267 N.Y. Supp. 591 (N.Y. Munic. Ct. 1933); Fletcher v. Jackson, 23 Vt. 581 (1851).

37. See note 25 *supra*. Generally contribution is not available in the absence of statutory enactments to joint tortfeasors. Turner v. Kirkwood, 49 F.2d 590 (10th Cir. 1931); Merryweather v. Nixan, 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799); PROSSER, TORTS 1111, § 109 (1941).

As concerns joint and several obligors, it would seem that the right to contribution in favor of the debtors depends upon the particular type of liability which the creditor chooses to pursue. Clearly, contribution would lie under a joint action, as such a case is exactly the same as though the duty was originally joint. Should the creditor choose to proceed severally, it is doubted that the debtor selected to be sued would be entitled to claim indemnification against his joint and several debtors. See note 37 *infra*.

38. Unlike the rules of indemnity and exoneration, the party entitled to contribution is permitted to recover only the amount he has paid in excess of his aliquot share, not the entire amount paid out by him. Houck v. Graham, 106 Ind. 195, 6 N.E. 594 (1886); Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930); RESTATEMENT, RESTITUTION § 85 (1936); 2 WILLISTON, CONTRACTS § 945 (1936).

several obligors and deprives the debtors of their right of contribution.[39]

Perhaps the most controversial doctrine attaching to obligations of two or more persons is that of survivorship. Following the analogy of survivorship in joint estates in land, the common law holds that upon the death of any joint obligor, the whole duty devolves upon the remaining debtors, the estate of the deceased being in no way responsible for his liability.[40] The last surviving obligor thereby becomes liable for the entire amount by a process of elimination. Upon his death, the debt is imposed upon his estate.[41]

The purported basis for this sometimes harsh doctrine is that none of the debtors or any of their executors made a separate promise; thus the joinder of surviving obligors with the executor of the deceased is prohibited.[42] Since the original parties made one indivisible promise, the death of one merely destroys a possible party to the performance, and precludes joinder of that party; but the estate of the deceased does not succeed to the debt. The real reason is that the early procedure was not sufficiently adaptable to allow a judgment requiring two kinds of execution: one against the remaining obligors for the full amount of the debt, and another against the executor of the deceased,

39. There is some authority for the position that several obligors are not entitled to contribution [McArthur v. Board, 119 Iowa 562, 93 N.W. 580 (1903); Cunningham v. Cunningham, 158 Md. 372, 148 Atl. 444 (1930)], but notice the confusion of the court in calling the contract "several" in the *Cunningham* case, when each obligor labored under an entirely separate duty. Note, 98 AM. ST. REP. 31 (1903).

The scarcity of authority demonstrates the highly academic nature of the problem, so it should be dismissed with the suggestion that contribution is presumed to exist in all contracts involving more than two parties for the same performance and requires a clear showing of a contrary intent of the parties to defeat it, with the touchstone being that he who has removed a common burden and established a mutual gain is entitled to indemnification. Taylor v. Morrison, 26 Ala. 728 (1855); Waldref v. Dow, 172 Minn. 52, 214 N.W. 767 (1927); Screven v. Joyner, 1 Hill Eq. 252 (S.C. 1833) 2 WILLISTON, CONTRACTS § 345 (1936).

40. Packersgill v. Lahens, 15 Wall. 140 (U.S. 1873); Carter v. Mizell, 214 Ala. 182, 106 So. 846 (1926); Davis v. Van Buren, 72 N.Y. 587 (1878); McLaughlin v. Head, 86 Ore. 361, 168 Pac. 614 (1917); 2 WILLISTON, CONTRACTS § 345 (1936).

41. Buckley v. Wright, 2 Root 10 (Conn. 1793); Gere v. Clark, 6 Hill 350 (N.Y. 1844).

42. See note 47 *et seq. infra* for rules of joinder at common law. Suffice it to say at this point that all joint obligors were necessary parties to a suit on the obligation, exclusive of everyone else. Consequently, *A* could no longer be joined after his death, and neither his executor nor his estate was a party to the original contract.

also for the full amount, but to be executed only against the estate of the deceased promisor.[43]

All too often this worked undue hardship, both on creditors and debtors alike. The creditor might be completely deprived of any effective redress, should the financially irresponsible obligor outlive the solvent debtors, making satisfaction of any judgment impossible for the creditor. The debtors themselves might be prejudiced in some cases, for the surviving debtor could ultimately be faced with a liability greater than he ever anticipated.[44]

The legislatures of many states, probably motivated by the hardships caused by the doctrine of survivorship, have provided by statute that common law joint obligations shall be construed to be joint and several, thereby eliminating the application of survivorship and relegating it to mere academic importance in modern law.[45] In Massachusetts the statute simply authorizes action against the executor of the deceased debtor.[46]

Perhaps the most important area of difference between the

43. May v. Hanson, 6 Cal. 642 (1856); Eggleston v. Buck, 31 Ill. 254 (1863); Ayer v. Wilson, 9 S.C. (2 Mill) 319 (1818); Fisher v. Chadwick, 4 Wyo. 379, 34 Pac. 899 (1893); 2 WILLISTON, CONTRACTS § 344 (1936).

44. Although the debtor who survives retains his right of contribution against the estates of his joint obligors, he will nevertheless be subjected to immediate hardship by loss of his right to joinder and benefits flowing therefrom. Defenses of the deceased parties die with them; immediate distribution by demands or corollary contribution are lost; and the surviving debtor is forced to seek contribution through the often indirect and slowly moving channels of judicial recourse, without acquiring it in the same suit.

45. 4 CORBIN, CONTRACTS § 930 (1951); 2 WILLISTON, CONTRACTS §§ 336, 344 (1936). See further the UNIFORM JOINT OBLIGATIONS ACT, § 6: "On the death of a joint obligor in a contract, his estate shall be bound as such jointly and severally with the surviving obligor or obligors." Sisto v. Bambara, 228 App. Div. 456, 240 N.Y. Supp. 121 (2d Dep't 1930).

The modern law has sounded the death knell of survivorship by giving the obligee an equitable remedy against the estate of the deceased obligor whenever necessary. Ely Walker Dry Goods Co. v. Blake, 59 Okla. 103, 158 Pac. 381 (1916); Hengst's Appeal, 24 Pa. 413 (1855); Boyd v. Bell, 69 Tex. 735, 7 S.W. 657 (1888); 4 CORBIN, CONTRACTS § 930 (1951).

In some cases the court has permitted a proceeding against the estate of the deceased obligor on the reasoning that while the party was alive, he had received part of the consideration given for the joint promise. United States v. Price, 50 U.S. 83 (1850); Dorsey v. Dorsey, 2 Har. & J. 480 (Md. 1894); Wood v. Fisk, 63 N.Y. 245 (1875).

46. MASS. ANN. LAWS c. 227, §§ 14, 15; c. 223, § 32; c. 228, § 7 (1933); Lee v. Blodget, 214 Mass. 374, 102 N.E. 67 (1913). Thus, legislative whittling has reduced the rigors of the former rule of survivorship to its present place among historical relics. Furthermore, all statutes which make obligations of two or more several as well as joint, even though executed in joint form, destroy the supposed oneness of the promise and effectively divide the *vinculum juris*, in which case survivorship has no application. See Bowman v. Kistler, 33 Pa. 106 (1859).

three types of multipartied contracts is found in the various procedural rules applicable to the different rights and duties created. The conceptual divergencies of the different forms of contract directly result in wide variations of procedural rules.

Originally the unitary character of the joint promise made by two or more persons was considered so important that if the creditor brought action against fewer than all the creditors, a plea of the general issue or a demurrer to the declaration would be sustained, since it was deemed that no such promise as declared on had been made. Judgment could not be obtained against fewer than all joint obligors if objection was properly made.[47]

Such practice could produce delay and injustice, for the unjoined debtor might be dead, or outside the jurisdiction of the court. Lord Mansfield's intellectual vigor led to a revision of this irrational situation. He held that the only method of objecting to non-joinder was by a plea in abatement, sustainable only by naming a debtor not joined who is alive and amenable to process.[48] Failure of defendant to object properly would permit definitive judgment to be rendered against him, as he must not only object timely, but also in proper form.[49] This important procedural change has been followed in England[50] and in America[51] with the result that objection to non-joinder must be taken by affirmative answer in jurisdictions where pleas of abatement have been suppressed.

If one of the joint obligors, when sued alone, did not plead in abatement, or by affirmative answer, the other obligor being alive and within the jurisdiction of the court, the judgment ob-

47. First National Bank of Clarion v. Hamor, 49 Fed. 45 (9th Cir. 1892); Tweedy v. Jarvis, 27 Conn. 42 (1858); Richards v. Heather, 1 B. & Ald. 29, 106 Eng. Rep. 11 (K.B. 1817); Abbott v. Smith, 2 Black W. 947, 96 Eng. Rep. 559 (K.B. 1774); CHITTY, A TREATISE ON PLEADING 40 *et seq.* (13th Am. ed. 1867); CORBIN, CONTRACTS § 929 (1951); 2 WILLISTON, CONTRACTS §§ 326, 327 (1936).

48. Rice v. Shute, 5 Burr. 2611, 98 Eng. Rep. 374 (K.B.), 2 W. Bl. 695, 96 Eng. Rep. 409 (K.B. 1770). Such a ruling clearly expedites judicial progress by requiring the party who would object to the nonjoinder to give the plaintiff a better writ than that on which he sues.

"If, however, it expressly appears on the face of the declaration, or some other pleading of the plaintiff, that the party omitted is still living, as well as that he jointly contracted; in that case, the defendant may demur, or move in arrest of judgment or sustain a writ of error." CHITTY, PLEADING 46 (13th Am. ed. 1867).

49. Camp v. Gress, 250 U.S. 308 (1919); 4 CORBIN, CONTRACTS § 929 (1951); 2 WILLISTON, CONTRACTS § 327 (1936).

50. Powell v. Layton, 2 B. & P.(N.R.) 365, 127 Eng. Rep. 669 (C.P. 1806); 4 CORBIN, CONTRACTS § 929 (1951); 2 WILLISTON, CONTRACTS § 327 (1936).

51. See note 50 *supra.*

tained against the defendant was held to bar any subsequent action against the party not joined.[52] The most plausible reason given for this rule is that the unjoined debtor has the same right not to be sued alone as had the debtor who was previously sued. He should not be deprived of that right of joinder by the mere fact that one of the debtors had neglected to object to his absence. However, if the unjoined debtor is outside the jurisdiction of the court, the defendant debtor is unable to plead in abatement, for he can provide no better writ, so the proceeding against him will not bar subsequent action against the absent joint obligor, either by the creditor for full satisfaction or by the judgment debtor for contribution.[53] This is apparently a recognition of the fact that in some instances separate actions are not unjust against joint promisors.

The common law concept of unity of obligation concerning joint duties requires the joinder of all such debtors. Failure to object to non-joinder, however, will permit judgment to be rendered against only those joined. This last rule shows some degree of inconsistency, for if the *vinculum juris* theory is to be religiously observed, no valid judgment should be possible against fewer than all the debtors. The parties sued without their co-debtors, in fact made no such promise as declared upon. The obligation incurred emanated from an entity comprising one or more debtors not present in the suit.

In the case of several obligations it is apparent from their very nature and purpose that the promisors must be sued separately and individually.[54] Each being individually bound, has reserved the right of individual defense and perpetuated the privilege of being sued individually. It would perhaps be more

52. Pirie v. Richardson [1927] 1 K.B. 448; King v. Hoare, 13 M. & W. 494, 153 Eng. Rep. 206 (Ex. 1844); 4 CORBIN, CONTRACTS § 929 (1951); 2 WILLISTON, CONTRACTS § 327 (1936). One of the reasons given for this result was that the original obligation was completely merged and satisfied by the judgment. Momentary reflection will prove that that is really no reason at all, but is a mere restatement of the result.

53. Camp v. Gress, 250 U.S. 308 (1919); Wood v. Watkinson, 17 Conn. 500 (1846); 2 WILLISTON, CONTRACTS § 327 (1936). The inconsistency of such a doctrine is obvious, for it violates the most fundamental concept of joint obligations, the oneness of duty. See Dill v. White, 52 Wis. 456, 9 N.W. 404 (1881), where the court sought to attain consistency by entertaining the second suit against the formerly absent joint obligor on a rule to show cause why the judgment already obtained should not be enforced against the now present defendant, a so-called *scire facias* proceeding.

54. Oliver v. Gilmore, 52 Fed. Cas. 562 (C.C. Mass. Cir. 1892); Franklin v. Ferguson, 112 Ore. 641, 229 Pac. 683 (1924); Isaacs v. Salbstein [1916] 2 K.B. 139; CHITTY, PLEADING 42a (13th Am. ed. 1867).

correct to say that the creditor has bargained, in the making of the contract, to obtain a form of obligation in which the rigors of necessary joinder are absent. The debtor who is severally bound is proceeded against on the basis of his individual contract, with no relation to his co-debtor.

Concerning joint and several obligations, the rule was established in *Slingsby's Case* that the duty of each obligor is either joint or several at the discretion of the creditor.[55] Consequently, the obligee may proceed against each of the obligors severally or against all of them jointly, at his discretion; but his only remedies are those two, and he may not choose the middle ground of joining more than one but less than all obligors.[56] Once his choice is manifested by instituting suit against more than one (joint obligation) or against one only (several obligations), his cause then becomes subjected to the rules peculiar to the form of action which he has chosen.

Thus far only the effect of omission of a proper party—nonjoinder—has been considered. Different rules prevail, however, if improper parties are joined in the suit with the defendant, where the obligee has not only sued all the obligors, but has thrown in an extra party for good measure—misjoinder. For this mistake by declarant, he can be nonsuited, since proof of a joint contract between the named parties would be impossible.[57] It seems that a further and quite important feature peculiar to misjoinder is that the objection can be raised only by persons improperly joined and is available neither to a properly joined

55. 5 Coke 18b, 77 Eng. Rep. 77 (K.B. 1588). See CHITTY, PLEADING 43 (1867).

56. Poullain v. Brown, 80 Ga. 27, 5 S.E. 107 (1887); Bangor Bank v. Treat, 6 Greenl. 207 (Me. 1829); Mintz v. Tri County Natural Gas Co., 259 Pa. 477, 103 Atl. 285 (1918); CHITTY, PLEADING 43 (13th Am. ed. 1867).

In this field we encounter a distinction between joint and several obligees and like obligors. While the single plaintiff may freely elect to sue his joint and several debtors either together or individually, it appears that such obligees (plaintiffs) must nevertheless all collaborate to seek their remedy if at all possible. Hatsell v. Griffith, 2 C. & M. 679, 149 Eng. Rep. 933 (Ex. 1834); Petrie v. Burie, 3 B. & C. 353, 107 Eng. Rep. 764 (K.B. 1824); Slingsby's Case, 5 Coke 18b, 77 Eng. Rep. 77 (K.B. 1588); Spencer v. Durant, Comb. 115, 90 Eng. Rep. 376 (K.B.); Eccleston v. Clipsham, 1 Wms. Saunders 153, 85 Eng. Rep. 158 (K.B. 1677); CHITTY, PLEADING 8a (13th Am. ed. 1867).

57. CHITTY, PLEADING 44b, 45 (13th Am. ed. 1867), and cases cited therein. Furthermore, the court would not permit amendment to cure the defect. Of course, if the vice was apparent from the face of the pleadings, the demurrer, arrest of judgment, or writ of error were available remedies to the defendants. At this point, it should be noticed that the penalty for misjoinder was much harsher than those for nonjoinder; consequently, the trap was avoided by joining only those who are certainly proper parties. CHITTY, PLEADING 44a, 45 (14th Am. ed. 1867).

defendant nor to the plaintiff who had caused the joinder.[58] Apparently this view is based upon the notion that a proper party is in no way prejudiced by the presence of others and consequently should have no objection. The courts seemingly felt that if the improper defendant was willing to submit to judgment against himself, a party truly responsible for the debt should not object to such a charitable act. But how can the fact that it was the real debtor who so often raised the objection be explained?

The rules of procedure regulating the rights or duties of more than one party were highly technical. While the theory of the various forms of obligations generally provided the basis for the reasoning of courts, injustices nevertheless occurred, probably due in part to the inexorable, narrow logic of the courts. Most of the difficulties, it is true, have been obviated by modern statutory enactments, but the historical background will serve both as a guide to a better understanding of the present day modifications and as a basis for a comparison of civilian theory.

LOUISIANA LAW

While the discussion of the common law involved detailed historical exposition, the Louisiana law, typically civilian, is primarily codified, and thus much less intricate. Because most of the present Louisiana rules on joint, several and solidary contracts are identical with Roman and French law, little specific reference is necessary to those systems.

Of the various kinds of obligations provided for in the Louisiana Civil Code, the classification into joint, several and *in solido*, very similar to like divisions in the common law, is designed to regulate that field of law "where there are more than one obligor or obligee named in the same contract. . . ."[59] This classification of our Civil Code clearly includes promises to perform several different acts in the same writing. A vital difference between our Code and the common law is thereby established, for the civilian doctrines do not restrict the law of multipartied con-

58. Kelly v. Carmichael, 217 Ala. 534, 117 So. 67 (1928); Gardner v. Samuels. 116 Cal. 84, 47 Pac. 235 (1897); Hopson v. Harrell, 56 Miss. 202 (1878). *Contra:* Cunningham v. Town of Orange, 74 Vt. 115, 52 Atl. 269 (1902).

Some courts have qualified this rule by permitting the objection by one properly joined if it appears that his rights will be prejudiced thereby. Gardner v. Samuels, 116 Cal. 84, 47 Pac. 935 (1897); Lowery Lock Co. v. Wright, 154 Ga. 867, 115 S.E. 801 (1922). This rule apparently grew out of equity pleading [STORY, EQUITY PLEADINGS 472, § 544 (10th ed. 1892)], but it has been applied in actions at law as well. See cases cited *supra*.

59. Art. 2077, LA. CIVIL CODE of 1870.

tracts to promises of the same performance. Thus, the criterion of singularity of duty so important at common law is of less value in our system.

The pattern established by the Civil Code of Louisiana is an extremely simple one, in fact, startlingly so, when one compares it with the intricacies of the Anglo-American equivalents. Louisiana has since 1825[60] expressly classified as several in nature[61] those agreements wherein several promisors obligate themselves to perform different acts, although contained in the same contract. Thus there is from the very beginning an important difference in terminology. Judge Saunders in his *Lectures on the Civil Code* urged that, as a practical matter, several obligations existed only theoretically, for no business man would unite more than one contract in the same writing. The learned jurist stated that "as a matter of fact people never make their contracts in that way,"[62] for complications would be presented in return for which no appreciable reward was realized. It is now clear, however, that several liabilities do exist, at least in the form of the ordinary bail bond, whereby several persons obligate themselves for a stated portion of the total amount.[63] In such cases, the ultimate duty of each party is not the total amount covered by the agreement, but the amount of his personal promise. The advantages of such an obligation are present in the bail bond, permitting several persons to make up the totality, but to limit their primary liability to the amount set opposite their respective names.

Louisiana's two remaining forms of contract, however, are restricted to the performance of one duty, for the joint and the solidary contract are different types of agreement with different substantive effects available for several persons to promise to perform the same act. It is clearly contemplated by the Civil Code that promises of two or more persons in the same writing shall be joint in nature,[64] except where the term *in solido* or

60. Arts. 2073, 2074, LA. CIVIL CODE of 1825.

61. Arts. 2078, 2079, LA. CIVIL CODE of 1870; Green, Harding & Co. v. Relf & Co., 14 La. Ann. 828 (1859).

62. SAUNDERS, LECTURES ON THE CIVIL CODE 426 (1925).

63. The bail bond ordinarily embodies the agreement of two or more persons to be liable for stated amounts, all of which, when added together, comprise the whole of the obligation to be bonded. For instance, "We obligate ourselves to stand as surety for the amount set opposite our names: *A* .... $100; *B* .... $200; *C* .... $700" making up the whole of a $1000 bond. It is obvious that the parties are promising to perform different duties, having no relation to one another other than being made in the same writing.

64. Arts. 2080, 2081, LA. CIVIL CODE of 1870.

other expression indicating an intent to be so bound is used,[65] for the solidary undertaking is not to be presumed.[66] This situation may be analogized to the presumption established in favor of a joint contract in common law.

With the clear and definitive Code authority available, the jurisprudence has contributed little more than tests for determining whether the promise is for a single performance or for more than one. In *Nabors v. Producers Oil Co.*[67] several landowners granted a mineral lease upon their property to the defendant, with a clause requiring the oil company to drill within a certain period of time to maintain the operation of the lease. After the defendant had drilled on the property of two lessors, the others instituted suit seeking the forfeiture of their lease on the ground that their right was severable and had not been satisfied, the time allowed for drilling having passed. In finding a joint contract, the court, through Justice O'Niell, emphasized the fact that the true test of the nature of the contract should be the intent of the parties, as revealed by the language of their contract and the subject matter to which it refers. The object of the contract at hand was the payment of consideration by the oil company in a lump sum. Thus, the court eliminated several liability by finding one single duty owed to all the lessors jointly, and subsequent compliance with that duty by drilling on the land of any plaintiff.[68] It is clear that this contract could not have been construed as establishing rights *in solido*, for such an intention was not clearly set forth.

The intention of the parties determines whether there is one or more performances due. In the absence of a clearly evidenced intent to be subject to a solidary liability, the contract will be joint. Perhaps some cases have gone too far in finding the requisite showing of intent to contract *in solido* by holding that the use of the first person singular ("I promise . . . signed: *A*, *B*, and

65. Arts. 2082, 2083, LA. CIVIL CODE of 1870.

66. Art. 2093, LA. CIVIL CODE of 1870. This rule ceased to prevail only in cases where an obligation *in solido* takes place of right, by virtue of some provision of the law. See Arts. 1681, 2113, 2324, 2804, 2872, 2905, 2957, 3026, LA. CIVIL CODE of 1870. See the excellent comment on solidary obligations under common law, Roman law, French law and Louisiana law, 25 TULANE L. REV. 217 (1951).

67. 140 La. 985, 74 So. 527 (1917).

68. See also A. Veeder Co. v. Pan American Production Co., 205 La. 599, 17 So.2d 891 (1944); Louisiana Canal Co. v. Heyd, 189 La. 903, 181 So. 439 (1938); Shell Petroleum Corportion v. Calcasieu Real Estate & Oil Co., 185 La. 751, 170 So. 785 (1936).

C.") creates an obligation *in solido*.[69] It is doubtful that the intention of the parties actually adverted to the quite important distinction between signing that agreement and one phrased in the first person plural ("We promise . . . signed: *A*, *B*, and *C*."), which would bind the promisors only jointly.[70] It seems that a clearer expression of intent should be required for imposing the rather stringent duties of liability *in solido*. The redactors of our Code obviously sought to protect the unwary debtors and the court should not, under the guise of contractual interpretation, confer benefits of solidarity upon the creditor unless the requisite indication in the language of the contract is present.

The intention test is applicable not only for the purpose of solving the problem of whether there is one promise or more, in order that the appropriate provisions of the Code may be applied, but also for determining whether the contract is joint or solidary. To create liability *in solido*, the existence of a clear intent is necessary.

As opposed to the highly technical common law doctrine which obligates all co-debtors in the same writing for the totality of the performance, regardless of the particular type of liability intended, the Civil Code of Louisiana specifically defines the proportion of liability incurred by each promisor. Co-obligors severally indebted, each having promised separate and distinct performances, are responsible only for their individual obligations and not for the aggregate of their promises.[71] No difficulty or injustice is created by the rule, for hardly any other result could have been contemplated by the parties.

Joint undertakings do not obligate the individual obligors for the debt in its entirety. Each party is held to have bound himself only for his aliquot share, proportionate to the number

69. Watkins v. Haydel, 172 La. 826, 135 So. 371 (1931); Taylor v. Loeb, 13 La. App. 327, 127 So. 637 (1930); Bennett v. Allison, 2 La. 419 (1831); New Orleans v. Ripley, 5 La. 120 (1833); Bank of Louisiana v. Sterling, 2 La. 60 (1830). *But see* Stowers v. Blackburn, 21 La. Ann. 127 (1869). The rule apparently was an infiltration from the common law, since the earlier cases on this subject liberally quoted Chitty. In view of the very clear expression in Art. 2093, LA. CIVIL CODE of 1870, such action was entirely unjustified. In addition, it is somewhat surprising to note that many Louisiana tribunals use the expression "joint and solidary" or "joint and several" to mean no more than solidary liability.

70. See note 69 *supra*.

71. Art. 2084, LA. CIVIL CODE of 1870: "Several obligations, although created by one act, have no other effects than the same obligations would have had, if made by separate contracts; therefore they are governed by the rules which apply to all contracts in general."

of debtors, in the absence of a contrary agreement.[72] This result seems to be in accord with the normal intentions of the parties entering into a joint contract, a result which cannot be attained in Anglo-American law. The circuity and uncertainty of leaving the proper distribution of the debt to the theory of contribution is avoided by a proper allocation of the debt in the original action.

On the other hand, solidary duties impose liability for complete performance upon each co-debtor.[73] The words *in solido* mean "for the full obligation," so a finding of this form of contract will confer the benefit upon the creditor of demanding performance in full from any of the obligors, limited, of course, by the rule that no creditor is ever entitled to more than one complete performance. Solidary liability is very similar to the common law category of joint and several, and some courts have gone so far as to say that they are exactly the same.[74] Such a statement will be examined and questioned hereafter, especially from a procedural point of view. The rule of complete liability imposed upon solidary debtors probably points up the basic reason for requiring specific expression of solidarity, or at least a clear manifestation of intent, and preventing its inference. Otherwise, unintentional liability *in solido* might result, which is undesirable because of its burdensome character. The courts have consistently applied the provisions establishing liability to attain the clear pattern established by the Code providing for simple rules for each type of contract.[75]

As was noticed in the common law part, it often happens that the creditor, rather than demand performance of the debtors, chooses, for reasons of his own, to release all or some of them. Since several obligors undertake different duties, no authority is

72. Art. 2086, LA. CIVIL CODE of 1870. But the judgment for costs against joint obligors is to be rendered in solido. Art. 2087, LA. CIVIL CODE of 1870; Hunter v. Laurtent, 158 La. 874, 104 So. 747 (1925).

73. Arts. 2082, 2083, 2088, LA. CIVIL CODE of 1870. It is also provided by Art. 2092, LA. CIVIL CODE of 1870, that the fact that the duties of the different parties vary does not necessarily preclude solidary liability, for one obligor may be absolutely bound and the other one conditionally.

74. Garland v. Coreil, 17 La. App. 17, 134 So. 297 (1931).

75. *Several:* Teutonia National Bank v. Wagner, 33 La. Ann. 732 (1881); Green Harding & Co. v. J. M. Relf & Co., 14 La. Ann. 828 (1859); New Orleans Improvement & Banking Co. v. Citizens' Bank of Louisiana, 10 Rob. 14 (La. 1845).

Joint: Kohn v. Hall, 8 Rob. 149 (La. 1844); Thompson v. Chretine, 3 Rob. 26 (La. 1842); Oxnard v. Locke, 13 La. 447 (1839).

In solido: Cole v. Central Contracting Co., 5 La. App. 513 (1927); Hyde v. Wolff, 8 Mart. (N.S.) 702 (1830); Arts. 2091, 2904, LA. CIVIL CODE OF 1870. See also Comment, 25 TULANE L. REV. 217, 228 *et seq.* (1951).

needed to support the proposition that one may be released without affecting the others.[76] Even though no reservation of rights is explicit in the release agreement, several contracts should be governed by the rules of contracts in general, as if they were created by separate act.

A release of one joint debtor likewise should not effect a release of all so bound, for although there is but one duty, it is divided into equal parts among the obligors.[77] Thus, since the parties to the contract are presumed to be aware of their divisible duty, it cannot be supposed that the obligee intended to discharge the debt in its entirety. The Louisiana law concludes that such a partial release of the joint obligation is not impossible in the nature of things, nor has it been necessary to attain this result through the circuitous route of the common law covenant not to sue or any like device.

While no problem has resulted from the release of all the debtors, for elementary contract principles control, the Louisiana courts have encountered difficulties in construing a release of fewer than all the debtors. Considerable confusion has resulted from application of several provisions of the Civil Code regarding discharge of solidary obligors.

> Article 2100. "The creditor who consents to the division of the debt with regard to one of the co-debtors still has an action *in solido* against the others, but under the deduction of the part of the debtor whom he has discharged from the debt *in solido*."
>
> Article 2101. "The creditor who receives separately the part of one of the debtors without reserving in the receipt the debt *in solido* or his right in general renounces the debt *in solido* only with regard to that debtor.
>
> "The creditor is not deemed to remit the debt *in solido* to the debtor when he receives from him a sum equal to the portion due by him, unless the receipt specifies that it is for his part."

76. Art. 2084, LA. CIVIL CODE of 1870. Obviously enough, if the several contract is no more than a combination of two or more separate obligations, no connexity exists on which to argue for complete discharge.

77. While no direct authority has been found for such a statement, the *vinculum juris* has been shattered by the division of the debt, and no other argument in support of a complete discharge is conceivable. The civil law should resort to the intention of the obligee, which is, in this case, clearly to release only the named party.

The phrase "debt *in solido*" used in the above articles is apt to cause difficulties. It does not refer to the "debt" as such, but to its characteristic as a solidary debt. The term *solidarité* was used in the French version of the corresponding articles of the Code of 1825, and was improperly translated as "debt *in solido*."[78] The articles were meant to refer only to releases from solidarity, or a division of the debt, so that the parties no longer owed the total amount, but each a determinate part. They were not to apply to releases of the "debt" where the actual amount is reduced. The creditor may grant this release of solidarity to one debtor without prejudice to his rights to hold the other co-debtors *in solido*, for they too receive benefits in the form of a reduction in the amount of their total liability; since the solidarity is in favor of the creditor, he may certainly waive it and make the obligation a divisible one.[79] The effect of such a release of solidarity only, if extended to all debtors, is to transform the solidary liability into joint liability.[80] It is only with remission of the solidarity, or division of the debt, with which Articles 2100 and 2101 were intended to deal, having no reference to a release of the debt.

On the other hand, Article 2203 provides:

> "The remission or conventional discharge in favor of one of the co-debtors *in solido* discharges all others, unless the creditor has expressly reserved his right against the latter.
>
> "In the latter case, he can not claim the debt without making a deduction of the part of him to whom he has made the remission."

This article is contained in the section of the Code dealing with remission or release of the debt and not merely with abrogation of the solidarity or division of the total amount among the debtors. It is apparent from the text of the article that the unrestricted release or remission of one of the debtors extinguishes

78. *Compiled Editions of the Civil Codes of Louisiana*, 3 LA. LEGAL ARCHIVES 1150-1 (1942); Comment, 2 LOUISIANA LAW REVIEW 365 (1940).

79. 2 POTHIER, OEUVRES, TRAITÉ DES OBLIGATIONS 131, nº 277 (2d ed. 1861).

80. *Id.* at 327, nº 617; 5 DEMANTE, COURS ANALYTIQUE DE CODE CIVIL 231, nº 144, *bis* I (2d ed. 1883); 2 PLANIOL, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL 270, nº 773 (11th ed. 1937); 17 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 346-47, nºs 344-46 (2d ed. 1876). This last mentioned commentator divides renunciations of solidarity into the classes of absolute and relative. He designates those discharges of solidarity which extend to all the debtors as absolute, and the release of less than all of the duty of completed performance, as relative. This is merely new terminology for Pothier's standard categories of personal and real by dividing the personal into two possibilities.

the obligation in its entirety, while the release with reservation effectuates the intent of the creditor and discharges only the debtors specifically named. If there is a reservation of rights against all others, the total amount of the debt owed is decreased by "the part of him to whom he has made the remission."[81]

Our courts have often been faced with cases involving the application of this article. *Fridge v. Caruthers*,[82] the landmark case in this field, involved the following facts: Of four solidary obligors, one satisfied by personal note one-fourth of the total obligation, receiving in return a receipt worded in part as follows: ". . . in full settlement of his obligation as one of the guarantors. . . ." In holding the debt to be discharged completely, the court based its reasoning on Article 2203, and the fact that no express reservation of right was contained therein, suggesting on rehearing that any conflict between Articles 2100 and 2203 must, for reasons of consistency, be resolved in favor of the latter. Chief Justice O'Niell concurred, but found no conflict between the articles. The complete compatibility of the articles has already been demonstrated, each referring to a release of an entirely different relationship.

Article 2203, following the French Code,[83] establishes the presumption that when the creditor grants a remission or conventional discharge to one of his co-debtors *in solido*, he intends to remit the debt itself, thus discharging all of the debtors, unless he reserves his rights against the others.[84] In such event the presumption that a real remission is intended is overcome and the intention to grant only a personal discharge is established.[85] Having a number of co-debtors *in solido*, a creditor may, if he wishes, agree that each shall be no longer liable to him for the whole but only for his proportionate share. If he does so, he thereby divides the debt. This may also be called a remission of the solidarity.[86] If a creditor receives payment from one of the

81. Art. 2203, LA. CIVIL CODE of 1870. The reservation must be express, but its form is apparently not sacramental, so long as a clear intention to restrict the operation of the discharge appears. Williams v. De Soto Bank & Trust Co., 189 La. 245, 179 So. 303 (1938); Cusimano v. Ferrara, 170 La. 1044, 129 So. 630 (1930).

82. 156 La. 746, 101 So. 128 (1924).

83. Arts. 1210, 1211, 1285, FRENCH CIVIL CODE.

84. 5 DEMANTE, COURS ANALYTIQUE DE CODE CIVIL 231, nº 144, *bis* I; 2 PLANIOL, TRAITÉ ELÉMENTAIRE DE DROIT CIVIL 270, nº 773 (11th ed. 1937); 7 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS nº 1095 *et seq.* (2d ed. 1954); 2 POTHIER, OEUVRES, TRAITÉ DES OBLIGATIONS 129, nº 275 (2d ed. 1861).

85. 2 POTHIER, *op. cit. supra* note 84, at 327, nºs 616, 617.

86. *Id.* at nº 585.

solidary debtors of an amount equal to his proportionate share and gives him a receipt therefor (as, for example, "received from *X* $500") no division of the debt occurs. *X* still remains bound *in solido*. But, if the receipt given reads "received from *X* $500 for his part," this establishes the creditor's intention to divide the debt in behalf of *X*, or to release him from the solidarity.[87] At the same time, the words "for his part" necessarily negative an intention to release the debt or remit the remainder, and establish clearly the applicability of Article 2101 and not of 2203.[88]

After determining the two types of release or remission, the next problem is how to resolve whether the parties sought merely to divide the debt or to effect a complete discharge of the obligation. It is submitted that the result should be controlled by the intent of the creditor, as determined from the language used and a realistic appraisal of the entire transaction. When one debtor *in solido, X*, pays "his part in full," the application of either Article 2101 or 2203 could be supported by strong argument. Yet the use of one or the other article will produce completely different results. Under Article 2101, only the solidary feature of the obligation of *X* would be discharged, without affecting his co-debtors, except to reduce proportionately the amount of their liability. But, if Article 2203 is found applicable, the creditor finds himself completely divested of all recourse against any debtor. While Pothier's intention test has not been accepted by our Article 2203, it should be used to determine whether the transaction was a real or a personal remission, and whether one or the other article should be employed. In this respect, *Fridge v. Caruthers* is subject to criticism. From the fact that only one-fourth of the debt was paid by the released debtor, it could have been concluded that the intent of the creditor was to release that party of his solidarity only, thereby invoking the provisions of Civil Code Article 2101 and retaining all rights *in solido* against the remaining debtors.

It was seen that at common law the theory of contribution was necessary to equalize the ultimate burden of the co-debtors. In Louisiana, since joint debtors owe only their proportionate share and several debtors obligate themselves only for the amount specifically promised, it is obvious that no equalizing device is

87. Art. 1285, FRENCH CIVIL CODE.

88. 18 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS 395, nº 368 *et seq.* (2d ed. 1876).

needed. Consequently, the doctrine of contribution is not applicable to either form of contract.

On the other hand, an obligor *in solido* undertakes to perform the contract in its entirety and must submit to complete recovery against him. However, Article 2103 of the Civil Code provides that the solidary contract is divided of right among the debtors and that each is liable only for his proportionate share.[89] Therefore, if one of the co-debtors *in solido* pays the entire debt, he is entitled to indemnification from the others for their share.[90] It would appear that the debtor who has paid more than his share has a joint action against his co-debtors, each of whom becomes liable only for his aliquot share.[91] In case of insolvency of one co-debtor, his proportion must be borne equally by all other solvent debtors, including even those previously discharged from the solidarity.[92] The general rule of contribution does not apply to a surety-principal relationship, for there, although solidarity may be expressed, it was contemplated between the parties that the principal alone should ultimately satisfy the debt.[93]

Thus, the attempt to distribute the burden among co-debtors, which creates complicated problems in the common law, in Louisiana reduces itself to a mere division of all debts in proportion to the intent of the co-debtors and thereby produces an equitable result; even the part of an insolvent debtor is shared by the other obligors.

The theory of survivorship, in which the death of a joint debtor removed him as one of the obligors and did not create a proportionate liability upon his estate, was one of the most irrational theories in the common law. Only the device of contribu-

89. Art. 2103, LA. CIVIL CODE of 1870; May v. Cooperative Cab Co., 52 So.2d 74 (La. App. 1951). See also Comment, 25 TULANE L. REV. 217, 235 (1951). The right to contribution among solidary obligors has been litigated chiefly in a context of joint tortfeasors. Common law accessions to that area have completely altered the rule of Article 2103. From the relatively simple rule of the article it has been anomalously developed into one of limitless complexities. The subject defies presentation in this restricted article, but has been adequately covered elsewhere. Note, 1 LOUISIANA LAW REVIEW 235 (1938); Note, 4 LOUISIANA LAW REVIEW 451 (1942); Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LOUISIANA LAW REVIEW 125 (1945); Note, 7 LOUISIANA LAW REVIEW 592 (1947); Note, 9 TULANE L. REV. 125 (1934); Holloman, *Contribution between Tort-Feasors: Treatment by the Courts of Louisiana*, 19 TULANE L. REV. 254 (1944).

90. Art. 2104, LA. CIVIL CODE of 1870.

91. *Ibid.*; Wunderlich v. Palmisano, 177 So. 843 (La. App. 1938).

92. Arts. 2104, 2105, LA. CIVIL CODE of 1870; Abat v. Holmes, 3 La. 351 (1832).

93. Arts. 2106, 3052, LA. CIVIL CODE of 1870.

tion introduced a proper solution. The civil law has never been encumbered with the principle of survivorship.

The extreme technicalities inherent in the procedure for asserting or defending joint, several, or joint and several contracts at common law has already been pointed out. After noting the great differences among those contracts, and their counterparts in the civil law, it should not be surprising that the civilian theory of cumulation of actions prevailing in Louisiana is quite different from the common law concepts of joinder. The presence of several parties on one side or the other represents, in theory at least, a cumulation of different rights of action.[94] Thus, problems of cumulation of actions are presented both by joining more than one party on either side of a suit and by urging several causes against the same defendant. Both situations are looked upon as "cumulation of actions," the former referring to plurality of plaintiffs or defendants, and the latter to plurality of actions, with virtually identical rules applicable to each. As a practical matter, it was early recognized that where the cumulation was by several plaintiffs or against several defendants, an additional requirement of juridical connection between the causes would be necessary for the sake of convenience.[95]

Contrary to what one might expect, this subject has not been much discussed in the French legal literature. Pigeau, the leading procedural commentator of the pre-revolutionary period, recognized the general rule that "two or more actions . . . may be cumulated, that is to say, combined in the same suit even though based on different grounds," but this is immediately qualified by the suggestion that the actions must be of a similar nature, to avoid confusion on the trial.[96] While no provision of the French codes dealt with this particular facet of procedure,[97] the deficiency has been partially filled by the concepts of *cumul des actions*[98]

94. Millar, *The Joinder of Actions in Continental Civil Procedure*, 28 Ill. L. Rev. 26 (1933).

95. To permit *P* to sue *A* on one cause of action and *B* on another completely unrelated one in the same suit would invite complications and difficulties undreamed of in mere joinder of unrelated causes against a single defendant.

96. 1 Pigeau, La Procédure du Chatelet de Paris 37 (ed. 1789).

97. But see Art. 1346, French Civil Code, requiring joinder of all claims of a single creditor, which are in writing; and Art. 26, French Code de Procédure Civil (1806) prohibiting cumulation of the petitory and possessory actions.

98. Garsonnet et Cézar-Bru, Traité Theorique et Pratique de Procédure Civile et Commerciale 691 *et seq.* (12th ed. 1922).

and *réunion de plusieurs demandes.*[99] But the French themselves make no complaints on the present score, probably, as said by Professor Millar, because "It simply means the leaving of a wide field to the judicial discretion and so long as this is wisely administered, the system is perhaps all the better for the added flexibility."[100]

Las Siete Partidas indicate that prior to the eighteenth century the fundamental principles of cumulation of actions was accepted in Spain.[101] While they were primarily concerned with cumulation of causes of action by a single plaintiff against a single defendant, it is evident that the same rules were equally applicable to cumulation of actions by plural plaintiffs or against plural defendants.[102]

The Louisiana Code of Practice of 1825, in Articles 148, 149, 151, and 152 retained the Spanish rules of cumulation. The redactors' notes indicate the *Partidas* and *Febrero* as the source of these articles.[103] Although it is clear that the redactors intended to include both types of cumulation within the application of the Code provisions, their failure to provide this expressly later proved to be unfortunate.[104] The general rule of unrestricted cumulation was limited by requiring that the several causes be not inconsistent, just as voiced by the *Partidas.*[105] It is obvious

99. 1 GLASSON ET TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE D'ORGANIZATION JUDICIARE, DE COMPÉTENCE ET DE PROCÉDURE CIVILE 466-67 (3d ed. 1925). Furthermore, the subject has been considerably narrowed at French law by the rigid requirements of *connexité*, to the effect that all connected actions must be filed in the same court. ORDONNANCE CIVILE of 1667, tit. xx, art. 6; STEIN, GESCHICHTE DES FRANZOSISCHEN STRAFRECHTS UND DES PROZESSES 641-42 (2d ed. 1875).

100. Millar, *The Joinder of Actions in Continental Civil Procedure*, 28 ILL. L. REV. 177, 181 (1933).

101. PARTIDAS 3.10.7; HEVIA BOLANOS, CURIA FILIPICA 63-65.

102. 1 FEBRERO, LIBRERIA DE ESCRIBANOS 61, nº 76 (ed. 1790): "The plaintiff in one petition may make civil demands against a number of persons with respect to the same thing, or fact or with respect to various things or facts." The degree of connexity required is not disclosed, but the rule was probably of Romano-canonical origin, which required the cumulated actions to arise *ex eodeum facto.* Millar, *The Joinder of Actions in Continental Civil Procedure*, 28 ILL. L. REV. 177, 194 (1933).

103. *Projet of the Code of Practice of 1825*, 2 LA. LEGAL ARCHIVES 27, 38 (1938).

104. The initial article, 148, broadly provides that "Separate actions may be cumulated except in cases hereafter expressed; this is termed cumulation of action[s]." Recalling the civilian theory, it should be perfectly clear that the subjective cumulation, or joinder of parties, was thought to be covered by this provision.

105. PARTIDAS 3.10.7; HEVIA BOLANOS, CURIA FILIPICA 63-65; Art. 149, LA. CODE OF PRACTICE of 1825. See also Art. 150, LA. CODE OF PRACTICE of 1825, adopting one of the few rules of French procedure and providing that the petitory and possessory actions could not be united in the same suit.

that well-settled civilian precepts were sought to be incorporated into the laws of Louisiana in 1825.

During the first half century when these provisions were applied by the courts, no departure from the purpose of the redactors is perceivable, for the general rules of cumulation were being applied to a plurality of plaintiffs or defendants as well as to multiplicity of causes.[106] These earlier cases, clearly applying the rules as intended, did no more than establish tests for the requisite connexity. While the language of the cases is neither clear nor precise, there exists a tendency toward the idea of requiring that the cause arise from the same facts—*ex eodem facto*. One case, in 1843, demands that the claims be "connected";[107] another in 1859, that the several defendants have a "joint liability or privity of contract";[108] still another, just a year later, conversely insists that the plural plaintiffs have a "joint interest or privity of contract."[109]

Shortly thereafter, we first encounter the infiltration of the common law. The common law term "misjoinder of parties" came to be employed as a synonym for "improper cumulation of actions" in cases involving several plaintiffs or defendants.[110] This usage most probably stems from the inability of attorneys to handle the French and Spanish texts and a consequent turning to English texts. Also, it appears that the test of proper cumulation underwent a restatement. During the era following 1856, cumulation of parties is permissible only in cases involving a "community of interest,"[111] or "mutuality of interest."[112] But it appears to this writer that the change was one of terminology rather than of substance.

In 1907, Justice Provosty in the leading case of *Gill v. City of Lake Charles*[113] paved the way for the subsequent influx of common law rules of joinder. Presented with a question con-

106. Dyas v. Dinkgrave, 15 La. Ann. 502 (1860); Mavor v. Armant, 14 La. Ann. 181 (1859); Waldo & Hughes v. Angomar, 12 La. Ann. 74 (1857); Theurer v. Schmidt, 10 La. Ann. 293 (1855); Kennedy v. Oakey, 3 Rob. 404 (La. 1843). See generally on this subject, McMahon, *Parties Litigant in Louisiana—III*, 13 TULANE L. REV. 385, 390 (1939).

107. Kennedy v. Oakey, 3 Rob. 404 (La. 1843).

108. Mavor v. Armant, 14 La. Ann. 181 (1859).

109. Dyas v. Dinkgrave, 15 La. Ann. 502 (1860).

110. Cane v. Sewall, 34 La. Ann. 1096 (1882); State v. Wrotnowski, 17 La. Ann. 156 (1865); Brewer v. Cook, 11 La. Ann. 637 (1856).

111. Favrot v. Parish of East Baton Rouge, 30 La. Ann. 606 (1878).

112. State *ex rel.* Johnson v. Tax Collector, 39 La. Ann. 530, 2 So. 59 (1887).

113. 119 La. 17, 43 So. 897 (1907).

cerning the cumulation of actions by several plaintiffs, the learned Justice unfortunately seized upon the opportunity to investigate the source of the applicable rules. On this point, he said:

> "The Code is singularly silent on the subject of joinder of parties. The provision bearing nearest upon the subject is that contained in article (148) et seq., dealing with 'Cumulated Actions', where the cumulation of several demands is expressly authorized, provided they are not inconsistent. This, apparently, leaves the door open for several plaintiffs to join their suits against several defendants, regardless of privity or connection between them, so long as the demands are not inconsistent. But no one ever understood that the intention was to sanction anything of that kind, and this court soon had occasion to discountenance such a practice, declaring that it was 'at variance with well settled rules of pleading' [citing earlier Louisiana cases], and that the 'law' did not favor a 'multiplicity of actions against different parties in the same suit' . . . . But the court did not say where this 'law' and those 'well-settled rules of pleading' were to be found.
>
> "We look in vain for them in the Spanish and French systems of procedure prevailing at the time of the adoption of our Code of Practice; but we find them in the common law books, and we know that our Code of Practice was derived largely from that system, while our Criminal Procedure was taken bodily from it."[114]

The result reached in the case is not subject to criticism, but the dictum is unfortunate and misleading. The irony of the case is that although saying that the "common law books" were the true source of Louisiana procedure, the only non-Louisiana authorities cited were equity precedents on multifariousness, which, if followed, would have caused but minor disruption of the civilian system. But the syllabus, which reminded future courts that "We have to be guided in that regard by the well settled rules of pleading as found in the books of common law" has been repeated by subsequent decisions and interpreted as meaning "common law procedure."[115] Thus, the technicalities of

114. 119 La. 17, 19-20, 43 So. 897, 898 (1907).

115. Lykes Bros. Ripley S.S. Co. v. Wiegand Marionneaux Lumber Co., 185 La. 1085, 171 So. 453 (1936); Dubuisson v. Long, 175 La. 564, 143 So. 494

the common law, with the maze of rules and exceptions, began to be superimposed upon a system conceived to provide utmost simplicity. Neglect to state specifically that the Louisiana articles on "cumulation of actions" applied equally well to cumulation by several plaintiffs or against several defendants was, no doubt, the real cause of this deviation from the purpose of the articles. It is apparent that the *Gill* case as interpreted affords authority for the position that all joint debtors must be sued together and that several obligors cannot be sued together, for such is the status of the common law, although that was never contemplated in the theory of obligations of the same name in Louisiana.

It was at one time provided by the Civil Code of Louisiana[116] that all joint obligors "must be made defendants." The article was recognized at an early date as conducive to inconvenience and delay, and possibly as sanctioning such palpable injustice as to render it absurd.[117] Since each joint obligor owes only his ratable share, and cannot be condemned to payment in full, there is no need for any rule of required joinder. Consequently, the Louisiana legislature repealed that article and permitted separate suit against joint obligors, at precisely the same period when an identical provision in the common law was prominent.[118] No constructive purpose was served by the rigidity of the former article, for no joint obligor is prejudiced by being sued alone for his share. Nor did the rule prevent harassment of the debtor by several obligees, for the simple reason that the provisions of the article were limited in application to joint *debtors*.[119] But, has the former rule of required joinder been revived by the decision of the *Gill* case as it has been applied?

(1932); Chappuis & Chappuis v. Kaplan, 170 La. 763, 129 So. 156 (1930); Reardon v. Dickinson, 156 La. 556, 100 So. 715 (1924); Davidson v. Frost-Johnson Lumber Co., 126 La. 542, 52 So. 759 (1910); Dilzell Engineering & Construction Co. v. Lehmann, 120 La. 273, 45 So. 138 (1907); Gates v. Bisso Ferry Co., 172 So. 829 (La. App. 1937); Succession of Coles v. Pontchartrain Apartment Hotel of New Orleans, 172 So. 28 (La. App. 1937); Jones v. Vernon Parish School Board, 161 So. 357 (La. App. 1935); Shaw v. Gwin, 154 So. 392 (La. App. 1934); Wells v. Davidson, 149 So. 246 (La. App. 1933); McCaskey Register Co. v. Barnes, 146 So. 714 (La. App. 1933). See also Brandon v. Kansas City Southern Ry., 3 F. Supp. 818 (W.D. La. 1933).

116. Art. 2080, LA. CIVIL CODE of 1825; Art. 2085, LA. CIVIL CODE of 1870.

117. Brown v. Robinson & Hassam, 6 La. Ann. 423 (1851); Bryne v. Riddell, 3 La. Ann. 670 (1848).

118. La. Acts 1870 (E.S.), No. 103, § 2, p. 19.

119. Art. 2085, LA. CIVIL CODE of 1870: "In every suit on a joint contract, all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so."

The article, as reading, cannot even purport to prevent harassment of

It has never been doubted that debtors severally bound can be joined in a single action if the creditor so desires. The necessary connexity is presented by the single contract. While the stringencies of required joinder are repugnant to a liberal system of pleading, to stifle expeditious procedure by prohibiting joinder is equally undesirable. But for the *Gill* case and the interpretation placed thereon in subsequent decisions, Louisiana procedure would be free from both difficulties and governed only by the simple rules of cumulation. The anomalous character of this landmark decision is now manifest, for it engrafts common law rules upon a civilian system, a result hardly contemplated by the court when it rendered the *Gill* decision. Because of the vast difference between the three forms of contract at common law and those of Louisiana, not only in the basic theory, but also in the rules regulating the quantum of performance owed, it is inappropriate to apply common law rules of joinder to the joint or the several obligation in Louisiana law.

At the present time, under the Louisiana jurisprudence, it might well be contended that the familiar common law rule, that if "joint and several" (solidary) obligors are to be sued jointly they must all be joined, is applicable in this state. Yet the earlier Louisiana cases are quite to the contrary.[120]

The misleading language of the *Gill* case was transformed

debtors by joint creditors, for it did not apply to joinder of obligees. Thus, it was completely undesirable.

120. Hillebrandt v. Home Indemnity Co., 177 La. 349, 148 So. 254 (1933). It is interesting to note the opinion of Justice Marshall on the status of Louisiana law of cumulation of actions against several defendants, which is also pertinent to the joinder of solidary obligors. He said, in the case of Breedlove v. Nicolet, 7 Pet. 413, 429 (U.S. 1833): "The first error assigned, that the suit is brought against two of three obligors, might be fatal at common law. But the courts of Louisiana do not proceed according to the rules of the common law. Their code is founded on the civil law, and our inquiries must be confined to its rules.

"The note being a commercial partnership contract, is what the law of Louisiana denotes a contract *in solido*, by which each party is bound severally as well as jointly, and may be sued severally or jointly. . . .

". . . .

"The Civil Code, so far as we are informed, does not affirm or deny that a suit may be sustained on such a contract against two of three obligors. . . . He might have obtained a judgment against each for the whole sum, but not, it is said, against two of them, in one action. *If this be the rule of the common law, it is a mere technical rule, not supported by reason or convenience.* No reason other than what is merely technical can be assigned for requiring the additoinal labor and expense of two actions for the attainment of that which may be as well attained by one. *We have no reason for supposing that this technical principle has been engrafted on the civil law.*" (Italics supplied.)

The language should be compared with that of Judge Provosty in the *Gill* case, 119 La. 17, 43 So. 897 (1907).

into reality within only a quarter of a century. The court relied upon the literal meaning of Justice Provosty's language and invoked the well-settled rule of common law that the exception of "misjoinder of parties" was available only to a party improperly joined.[121] The difficulties implicit in such a holding were soon detected by an appellate court, for in some cases it would be virtually impossible to determine which party was and which was not properly joined.[122] Who would be permitted in such a case to object to improper joinder of parties? *Dubuisson v. Long*[123] restricted the objection to misjoinder to the parties not joined properly. In this case, *P* brought suit against *A*, *B*, and *C*, seeking solidary judgment. *A* and *B* were sued *ex contractu*, and *C* was joined in tort as the instigator of the transaction in question. *P* had valid actions against *A* and *B*, on the one hand, and against *C* on the other, but it was assumed that there was no interest or connection between the two sets of parties to allow cumulation. It was held that *A* and *B* were properly joined and could not, therefore, object to the improper joinder of *C*. The only basis for finding *A* and *B* properly joined, and *C* not, appears to have been that they outnumbered him; and, since he was in the minority, he was deemed to be joined improperly. The court merely counted the parties in each group of defendants, and upon finding that those who had objected were in the majority, concluded that they were properly joined and therefore could not avail themselves of the objection.[124] No solution was suggested for a similar situation in which both sets of defendants were equal in number.

Precisely such circumstances were presented in *Delesdernier Estate v. Zettwoch*,[125] where two groups of defendants, thirteen persons in each group, were sought to be sued together. The court, being unable to determine who was and who was not properly joined, could not determine who could object to the joinder and *dismissed the suit.*[126]

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121. Dubuisson v. Long, 175 La. 564, 143 So. 494 (1932).

122. Gates v. Bisso Ferry Co., 172 So. 829, 832 (La. App. 1937). McCaleb, J., said: "[I]t occurs to us that there must often arise cases in which the question [of determining which party is improperly joined] would present great difficulty."

123. 175 La. 564, 143 So. 494 (1932).

124. See McMahon, *Parties Litigant in Louisiana—III*, 13 TULANE L. REV. 385 (1939).

125. 175 So. 137 (La. App. 1937).

126. See Davidson v. Frost-Johnson Lumber Co., 126 La. 542, 52 So. 759 (1910). *Contra:* Darden v. Garrett, 130 La. 998, 58 So. 857 (1912).

Even more serious, perhaps, than the rule limiting the exception of misjoinder to parties improperly sued, is the penalty imposed—dismissal of the action. Article 152 of the Code of Practice and the earlier cases would merely require the plaintiff to elect which cause he would pursue.[127] Dismissal of the entire suit, however, has been imposed by later cases, probably on the mistaken belief that common law rules were to be applied.[128] Although these rules cannot possibly prove workable in Louisiana, they are completely adequate at common law, where no difficulty is experienced in determining the party improperly joined. Under the common law, three simple rules are applied: (1) all joint debtors must be joined; (2) several debtors cannot be joined; and (3) if joint and several debtors are to be joined at all, every one of them must be made a party. But, Louisiana law cannot possibly function under these rules, for here the theory behind the particular type of promise is totally different and does not lend itself to arbitrary and technical requisites of joinder or non-joinder.

Probably the court in the *Gill* case did not anticipate the judicial distortion which would result from their ambiguous terminology. From the unfortunate use of the phrase "common law books" has grown a series of rules which lead only to injustice. First, only the parties improperly joined can object; and second, if the court is unable to determine the person improperly joined, it cannot determine who has a right to object and, hence, dismisses the suit. Such reasoning creates a vicious circle which results ultimately in substantial deprivation of rights.

Because of the almost total absence of any requirements of necessary joinder in Louisiana, the exception of non-joinder is seldom encountered. If there are no parties who are necessarily made litigants, it can never be objected that such parties are omitted. In but one case, suit by beneficiaries under wrongful death provisions, have the courts erected impediments of required joinder, and there it seems to be predicated particularly on the

127. St. Geme v. Boimare, 117 La. 232, 41 So. 557 (1906). *Cf.* Cane v. Sewall, 34 La. Ann. 1096 (1882).

128. Delesdernier Estate v. Zettwoch, 175 So. 137 (La. App. 1937); McGee v. Collins, 156 La. 291, 100 So. 430 (1924); Strong v. Robbins, 137 La. 680, 69 So. 93 (1915); Davidson v. Fletcher, 126 La. 535, 52 So. 761 (1910); Davidson v. Frost-Johnson Lumber Co., 126 La. 542, 52 So. 759 (1910); Copellar v. Britt, 188 So. 403 (La. App. 1939).

desire to prevent excessive harassment of an obligor by statutorily linked creditors.[129]

The system presented to us by our early procedural codes was founded in utmost simplicity and was far in advance of any competing body of American law. As was said by the foremost student of comparative procedure in the United States:

> "And it is also interesting to reflect that if the framers of the American code procedure had turned their eyes to the procedure of Louisiana—utilizing as it did, for the basis of its law of joinder the rules of the *Partidas* which permitted the cumulation of actions not contrary to each other, and a rule moreover which had been found entirely compatible with trial by jury—they would have had at command the key to a vastly simpler and infinitely better system than that which their mis-applied ingenuity succeeded in constructing. In either case, the subsequent path of our procedure would have been less thickly strewn with the wrecks of litigation fallen afoul of the gratuitous technicalities of the system in being."[130]

Thus far, though, the accretions of the common law have distorted only the two basic civilian principles mentioned above, so it will not be too difficult to restore the traditional civilian rules of cumulation of parties. Any delay, however, in the legislative action might allow time for further destruction of civilian principles.

The Louisiana State Law Institute recently published studies and recommendations for the revision of the Code of Practice[131] which will eliminate most of the present difficulties arising in the field of cumulation of actions. On the basis of the Institute's studies and recommendations, it is submitted that any legislation in this field should comply with at least the following basic requirements:

(1) Care and specificity should be exercised to include cumulation of plural plaintiffs or against plural defendants within the general scheme.

129. Art. 2315, LA. CIVIL CODE of 1870; Pierce v. Robertson, 190 La. 377, 182 So. 544 (1938); Reed v. Warren, 172 La. 1082, 136 So. 59 (1931).

130. Millar, *The Joinder of Actions in Continental Civil Procedures*, 28 ILL. L. REV. 177, 203 (1938).

131. Arts. 11, 12, Book I, Preliminary Titles, Title III, Civil Actions, 1 Exposé des Motifs No. 5, pp. 26-56 (Louisiana State Law Institute, May 3, 1954).

(2) Cumulation of parties should be permitted if there be either a community of interest, or if the causes arise out of the same facts—*ex eodem facto.*

(3) If the cumulation of parties is improper, any litigant should be free to avail himself of the objection, for it is apparent that his rights in the matter will be influenced and probably prejudiced thereby.

(4) If the objection is sustained, the plaintiff should have at least the prerogative of election and, possibly, if deemed feasible, should receive the benefit of judicial division of his claims, each to be tried separately, in the interest of expeditious judicial action.

William D. Brown III

Article 1030, Louisiana Civil Code of 1870—The Prescription of Acceptance or Renunciation of Successions

Article 1030[1] states that: "The faculty of accepting or renouncing a succession becomes barred by the lapse of time required for the longest prescription of the rights to immovables." This article is a literal translation of Article 789[2] of the French Civil Code and has appeared in all three of the Louisiana Civil Codes.[3] To the French commentator Marcadé its real meaning seemed "facile."[4] Justice McCaleb, in a recent case,[5] observed: "[T]he literal meaning of the Article is perfectly clear and presents no problem of interpretation. . . ." But he added: "Yet, there is probably no other provision of our Code which has caused a greater diversity of opinion than this Article." Judge Saunders, speaking of Articles 1030 and 1031, says: "Now I do not know,

1. LA. CIVIL CODE of 1870.

2. *"La faculté d'accepter ou de répudier une succession, se prescrit par le laps de temps requis pour la prescription la plus longue des droits immobiliers."*

3. LA. CIVIL CODE of 1808, 3.1.94, p. 164; Art. 1023, LA. CIVIL CODE of 1825.

4. 3 MARCADÉ, EXPLICATION DU CODE CIVIL 167 (7th ed. 1873): *"Pour nous, ces interprétations multipliées et si contradictoires nous ont toujours étonné, et le vrai sens de l'article nous a toujours paru facile."*

5. Sun Oil Co. v. Tarver, 219 La. 103, 115, 52 So.2d 437, 441 (1951).