

Louisiana Law Review

Volume 49 | Number 5

May 1989

The Liability of Co-Makers of Promissory Notes: Joint or Solidary?

Gary Finis Strickland

Repository Citation

Gary Finis Strickland, *The Liability of Co-Makers of Promissory Notes: Joint or Solidary?*, 49 La. L. Rev. (1989)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol49/iss5/5>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

THE LIABILITY OF CO-MAKERS OF PROMISSORY NOTES: JOINT OR SOLIDARY?

Several recent Louisiana cases demonstrate that the liability of co-makers of promissory notes may turn on the difference between a parenthesis and a slash. For example, one court found that a promissory note containing the promissory language "I/We promise to pay," followed by the signatures of the two co-makers, created solidary liability among the debtors.¹ Conversely, another court held that several promissory notes with the wording "I(We) promise to pay" created only joint liability among the co-makers.²

Obviously many judicial interpretations of the language in contracts rest on the placement of key punctuation marks. In the realm of negotiable instruments law, however, certainty is premier. Such case-by-case adjudication invariably leads to inconsistencies among the courts, thereby defeating this goal. The very nature of negotiable promissory notes demands that there be uniformity in interpretation of the promissory language in that type of commercial transaction.

The ambivalence of Louisiana courts in the interpretation of promissory language affecting the liability of co-makers of promissory notes results from a longstanding but now anomalous Louisiana jurisprudential rule. This rule states that a promissory note signed by two or more makers with the language "We promise to pay" creates only joint liability among the debtors,³ while the language "I promise to pay" creates solidary liability.⁴ Because the usage of "I" or "We" determines the liability of the makers, instruments that contain both pronouns require judicial interpretation, in the absence of legislation, to determine which pronoun is to be given legal effect.

Alternative use of the pronouns "I" or "We" is not problematic in the other states: All states except Louisiana have adopted the uniform version of section 3-118(e) of the Uniform Commercial Code,⁵ which was specifically drafted to eliminate any question regarding the liability

Copyright 1989, by LOUISIANA LAW REVIEW.

1. See *Evangeline Fed. Sav. and Loan v. Catha*, 520 So. 2d 1314 (La. App. 5th Cir. 1988), discussed *infra* text accompanying notes 40-45.

2. See *Gavin v. Superior Applicators, Inc.*, 484 So. 2d 792 (La. App. 1st Cir.), writ denied, 487 So. 2d 439 (1986), discussed *infra* text accompanying notes 34-39.

3. See *Watkins v. Haydel*, 172 La. 826, 135 So. 371 (1931), discussed *infra* text accompanying notes 14-29.

4. See La. R.S. 10:3-118(e) (1983), discussed *infra* text accompanying notes 9-14.

5. See *id.* comment. Louisiana alone has retained the old Negotiable Instruments Law § 17(7), formerly La. R.S. 7:17(7).

of makers of notes containing alternative promissory language. Accordingly, in all states except Louisiana, regardless of the wording used, joint and several liability—common law solidarity⁶—is the presumed effect of negotiable instruments signed by two or more makers.⁷

For the reasons set forth in the discussion that follows, Louisiana should adopt the uniform version of section 3-118(e) of the Uniform Commercial Code in order to bring its commercial law into accord with modern commercial practices and accepted negotiable instruments law. Before proceeding to this discussion, however, a review of the decisions and legislation that have shaped the current state of the law will clarify the discrepancy between Louisiana law and uniform commercial law.

I. THE CURRENT STATE OF LOUISIANA LAW

In 1975, ostensibly unifying its commercial law with that of the other states, Louisiana adopted article three (Commercial Paper) of the Uniform Commercial Code.⁸ One of the provisions that the legislature declined to adopt was the uniform text of section 3-118(e).⁹ As adopted by the other forty-nine states, section 3-118(e) provides that "unless the instrument otherwise specifies, two or more persons who sign as maker, . . . as a part of the same transaction, are jointly and severally liable even though the instrument contains such words as 'I promise to pay.'" ¹⁰ This provision creates a presumption of joint and several liability, the common law equivalent of *in solido* liability. It is intended to provide rules of construction for any ambiguity that may arise when the liability of the parties is not expressed in the instrument. The section

6. Joint and several liability at common law is considered to be synonymous with solidary liability at civil law. See *Johnson v. Jones-Journet*, 320 So. 2d 533, 537 (La. 1975). The Louisiana Legislature retained the common law term "joint and several" in Revised Statutes 10:3-118(e) instead of replacing it with "solidary." In this note, the term "joint and several" liability will be used interchangeably with "solidary" liability. The reader should be cautioned, however, that "joint" liability at common law is not synonymous with "joint" liability at civil law, where the terms have a different meaning. See discussion *infra* text accompanying notes 19-24.

7. This does not mean that the co-makers cannot unequivocally express in the note liability other than joint and several. For example, a note signed by two or more co-makers with the language "We *jointly* promise to pay" will create only joint liability among the debtors. U.C.C. § 3-118(e) merely creates the presumption of joint and several liability if the liability of the parties is not expressed in the note. By contrast, the rule in Louisiana is precisely the opposite, i.e., the presumption is against solidary (joint and several) liability.

8. See 1974 La. Acts No. 92, § 1.

9. The legislature instead replaced the uniform text with the text of the old Negotiable Instruments Law § 17(7), formerly La. R.S. 7:17(7). See La. R.S. 10:3-118(e) comment (1983).

10. U.C.C. § 3-118(e). Cf. Uniform Negotiable Instruments Law § 17(7).

uses the language "I promise to pay," followed by the signature of two or more makers, as an example of promissory language that creates a presumption of "joint and several" liability even though it is not stipulated on the instrument. Accordingly, common law jurisdictions have concluded that the language "We promise to pay," followed by the signatures of two or more makers, also creates a presumption of joint and several liability.¹¹ Thus, unless language expresses a clear intent otherwise, each co-maker is bound for the whole sum.

By contrast, Louisiana replaced the official text of section 3-118(e) with the following provision: "When an instrument containing the words 'I promise to pay' is signed by two or more persons, they are deemed to be jointly and severally liable thereon."¹² The only difference between the official version and Louisiana's version that appears to be significant is that the uniform version's language, "*such words as* 'I promise to pay,'" indicates that "I promise to pay" is merely illustrative of joint and several language. Therefore, language such as "We promise to pay" also can be construed as creating joint and several liability. Louisiana's version does not indicate whether the language "I promise to pay" is also illustrative of language that creates solidary liability; nothing in Louisiana's version indicates the effect of the replacement of "I" with its plural, "We." Were it not for the comment following Louisiana Revised Statutes 10:3-118(e), one could argue that Louisiana Revised Statutes 10:1-102(5)(a), which states that "words in the singular number include the plural, and in the plural include the singular,"¹³ should apply and provide for solidary liability regardless of the use of "I" or "We." The comment to Louisiana Revised Statutes 10:3-118(e) makes it clear, however, that the legislature replaced the uniform version of the text with the old law in order to "preserve the rule of *Watkins v. Haydel*."¹⁴

II. THE RULE OF *WATKINS v. HAYDEL*

In *Watkins v. Haydel*,¹⁵ the plaintiff sought judgment against two defendants who had signed a promissory note worded "We promise to pay." One debtor had signed an acknowledgment of the debt within the five-year prescriptive period, while the other had not. If the defendants were bound in solido, the acknowledgment by one debtor would have interrupted prescription with respect to the other debtor. The Louisiana Supreme Court held that the words "We promise to pay"

11. See *Simpson v. Wages*, 119 Ga. App. 324, 167 S.E. 2d 213 (1969); *Ghitter v. Edge*, 118 Ga. App. 750, 165 S.E. 2d 598 (1968).

12. La. R.S. 10:3-118(e) (1983).

13. La. R.S. 10:1-102(5)(a) (1983).

14. See La. R.S. 10:3-118(e) comment (1983).

15. 172 La. 826, 135 So. 371 (1931).

created only joint, not solidary, liability among the debtors. Therefore, the claim against the nonacknowledging debtor had prescribed.¹⁶

The *Watkins* court based its holding on three very early Louisiana decisions¹⁷ that had also construed "We promise to pay" language as creating only joint liability, and "I promise to pay" language as creating joint and several liability.¹⁸ In these decisions, the courts looked to the law merchant of England as well as the common law of the other states to make their determinations.¹⁹ It should be noted, however, that joint liability at common law is not equivalent to civil law joint liability.²⁰

Procedurally, both common law and civil law joint liability have the same effect: all the obligors are necessary parties to an action to enforce a joint obligation,²¹ and interruption of prescription with respect to one party does not interrupt prescription with respect to the others.²² On the other hand, the substantive effect of joint liability among debtors at common law is not equivalent to the substantive effect of joint liability at civil law. At common law each obligor is liable for the whole performance,²³ while at civil law a joint obligor is only liable for his virile share.²⁴ The substantive equivalent at civil law to common law

16. *Id.* at 827, 135 So. 371.

17. *Mayor of New Orleans v. Ripley*, 5 La. 120, 25 Am. Dec. 175 (1833); *Barrow v. Norwood*, 3 La. 437 (1832); *Bennett v. Allison*, 2 La. 419 (1831).

18. *Bank of Louisiana v. Sterling*, 2 La. 60 (1830).

19. See *Barrow*, 3 La. at 438.

20. See Restatement (Second) of Contracts § 289(1) (1981): "Where two or more parties to a contract promise the same performance to the same promisee, each is bound for the whole performance thereof, whether his duty is joint, several, or joint and several." The comment to this section distinguishes the liability of joint obligors at common law from the liability of joint obligors in Louisiana:

In the civil law system of Louisiana, promises of the same performance create "joint" liability on the part of each promisor . . . "Joint" liability (in Louisiana) means liability only for an aliquot share of the total obligation . . . Common Law terminology and results are quite different: promises of the same performance may create joint duties, several duties, or joint and several duties; and each promisor is liable for the whole performance promised.

21. See La. Code. Civ. P. art. 643. Cf. Restatement (Second) of Contracts § 290 (1981).

22. See Restatement (Second) of Contracts § 291 & comment (b) (1981). See also *Watkins v. Haydel*, 172 La. 826, 135 So. 371 (1931). While there is no provision in the Louisiana Civil Code that states specifically that interruption of prescription with respect to one joint obligor will not interrupt prescription with respect to the other joint obligors, this jurisprudential rule follows by virtue of the distinction between joint liability and solidary liability.

23. Cf. Restatement (Second) of Contracts § 289(1) & comment (a) (1981) (each obligor is liable for the whole performance).

24. See La. Civ. Code art. 1789, which provides that "each joint obligor is bound to perform . . . only his portion."

joint liability is solidary liability.²⁵

In one of those early decisions upon which *Watkins* is based the court noted that the effects of joint liability were different under each system, but stated that "a joint note in Louisiana must have whatever effect her laws give to such an obligation."²⁶ This assertion cannot withstand analysis. If joint liability at common law is not synonymous with joint liability at civil law, treating the two as if they are identical is a fallacy of equivocation. The function of the court in a contract dispute is to construe the language of the agreement so that it corresponds to the parties' intent. If the court bases its determination of that intent on what the common law has labeled "joint liability," then the court should render its decision in terms of what is equivalent at civil law to common law joint liability. Unfortunately, there is no real equivalent at civil law.²⁷

Ironically, the court's holding in *Watkins* that the defendants were joint obligors at civil law was in accord with the then existing common law rule.²⁸ The issue in that case concerned only the procedural effects of imposing joint liability, which are the same for both common law and civil law. Unfortunately, the holding was based on earlier decisions that wrongly equated civil law "joint liability" with the common law term, irrespective of their distinction.

The rule of *Watkins* appears to be supported by Louisiana Civil Code article 1796, and Louisiana courts have frequently utilized that article to negate arguments in favor of solidarity.²⁹ The article states that "[s]olidarity of obligation shall not be presumed. A solidary obligation arises from a clear expression of the parties' intent or from the law."³⁰ Although the law is settled that "I promise to pay" is an expression of solidarity, no Louisiana court has explained why the wording "We promise to pay" is any less clear an expression of the parties' intent to be bound solidarily. At any rate, Louisiana courts

25. See La. Civ. Code art. 1794: "An obligation is solidary for the obligors when each obligor is liable for the whole performance."

26. *Barrow v. Norwood*, 3 La. 437, 438 (1832).

27. As previously stated, joint liability at common law is equivalent to in solido liability at civil law in its substantive effect, but it is equivalent to civil law joint liability in its procedural effect.

28. Common law jurisdictions later added "several" liability to the joint liability already imposed on co-makers of promissory notes containing the language "We promise to pay." See Restatement (Second) of Contracts § 289(3) (1981): "By statute in most states some or all promises which would otherwise create only joint duties create joint and several duties." This change was codified in section 3-118(e) of the U.C.C. See Restatement (Second) of Contracts § 289 comment (d) (1981).

29. See *Johnson v. Jones-Journet*, 320 So. 2d 533 (La. 1975); *Swan v. Mayer*, 211 So. 2d 346 (La. App. 4th Cir. 1968).

30. La. Civ. Code art. 1796.

have consistently held that, absent any other evidence showing that the makers intended to be solidarily bound, only notes containing the wording "I promise to pay" followed by the signatures of two or more the parties creates a presumption of solidarity.³¹

The uncontradicted law in Louisiana with respect to the liability of co-makers of negotiable promissory notes may be summarized as follows: When two or more persons sign a promissory note as makers with the language "I promise to pay," they are deemed to be solidarily bound,³² however, when two or more persons sign a promissory note as makers with the language "We promise to pay," they are deemed to be only jointly bound.³³

III. INSTRUMENTS CONTAINING ALTERNATIVE WORDING

As a result of the perceived distinction between "I promise to pay" and "We promise to pay" a more important problem of interpretation has arisen in the Louisiana circuit courts. This involves the interpretation of promissory language on notes containing both the "I" and "We" wording, followed by the signatures of two or more makers. For example, in *Gavin v. Superior Applicators, Inc.*,³⁴ the plaintiff, holding five promissory notes in the amount of \$50,550.00, sued five defendants, each of whom had signed all the notes as makers. Each note was drafted on a standardized form containing the wording "I(We) promise to pay."³⁵ The plaintiff argued that the defendants were liable in solido, stressing that the word "I" in the notes created solidary liability, regardless of the inclusion of "We."³⁶ The court, however, agreed with the defendants' contention that the parenthetical "We" was analogous to standard forms containing words such as "person(s)," whereby the "(s)" would be read in or out depending upon how many people were being referred to in the document.³⁷ The court reasoned, "[I]n common usage, the 'I' would be read out of the sentence as more than one party was being referred to, and the pronoun '(We)' would be used. We will not presume that the language 'I(We) promise to pay' with no additional language creates solidary liability."³⁸ If this reasoning is correct, then

31. See *Ford Motor Credit Co. v. Soileau*, 323 So. 2d 221 (La. App. 3d Cir. 1975); *Shreveport Bank and Trust Co. v. Tyler*, 275 So. 2d 451 (La. App. 2d Cir. 1973).

32. See *Ford Motor Credit Co.*, 323 So. 2d at 225; *Shreveport Bank and Trust Co.*, 275 So. 2d at 452. See also La. R.S. 10:3-118(e) (1983).

33. See *Johnson*, 320 So. 2d at 536; *Watkins v. Haydel*, 173 La. 826, 135 So. 371 (1931); *Swan*, 211 So. 2d at 349.

34. 484 So. 2d 792 (La. App. 1st Cir.), writ denied, 487 So. 2d 439 (1986).

35. *Id.* at 794.

36. *Id.*

37. *Id.*

38. *Id.*

a note containing the promissory language "I promise to pay" followed by the signature of two or more parties makes no sense grammatically. The court here merely concluded that if the note is signed by more than one person the pronoun must be "We." The court should have interpreted the "I(We)" language as creating an ambiguity, allowing the introduction of parol evidence. In such a case, the presumption would be against solidarity,³⁹ but could be overcome by such evidence.

By contrast, the court in *Evangeline Federal Savings & Loan v. Catha*⁴⁰ construed a promissory note containing both "I" and "We" language as creating solidary liability among the co-makers. In this case two defendants had signed "individually and as agents for their wives"⁴¹ a three-hundred-thousand dollar promissory note containing the typed language "I/We promise to pay."⁴² The court distinguished the slash, or virgule, in this note from the parentheses in the *Gavin* note. The use of the parentheses in *Gavin* resulted in a reading out of the "I," while the slash in *Evangeline* did not. The court then affirmed the trial court's finding based upon parol evidence that the defendants were solidarily liable. The evidence included a mortgage note in which the defendants had expressly bound themselves in solido.⁴³ This decision is more soundly reasoned than *Gavin*. In *Gavin* the court reasoned that the "I(We)" promissory language did not create an ambiguity, but required that the pronoun "I" be read out because more than one maker signed the note. On the other hand, the *Evangeline* court recognized both that the "I/We" language was ambiguous and that solidarity could not be presumed; but this did not prevent the plaintiff from introducing evidence to defeat this presumption.⁴⁴

The problems exemplified by the two cases above would, of course, not arise if words expressly stipulated the liability of the makers of the promissory notes. Because it is impractical to have an attorney present to ensure that the liability of the parties is expressed in every note drafted, one can expect continuing litigation in this area, particularly with the increasing proliferation of the pre-printed form. Until the Louisiana Legislature takes remedial action by adopting the uniform version of section 3-118(e), lawyers should be aware of our courts' peculiar treatment of this problem.

39. La. Civ. Code art. 1796.

40. 520 So. 2d 1314 (La. App. 5th Cir. 1988).

41. *Id.* at 1317.

42. *Id.*

43. *Id.*

44. The *Gavin* court did not consider the "I(We)" language as creating an ambiguity whereby solidarity could not be presumed, in which case, it would have been proper to look to usage or parol evidence to determine the liability of the makers. Rather, the court ruled that this language created joint liability.

In summary, the Louisiana courts have construed the liability of co-makers of promissory notes containing alternative promissory language in the following two situations:⁴⁵ First, the "I(We) promise to pay" language followed by the signatures of two or more makers creates joint liability. Only the *Gavin* court has ruled in this instance. Second, the "I/We promise to pay" language followed by the signatures of two or more makers creates solidary liability. The *Evangeline Federal Savings and Loan v. Catha* court held that such wording creates solidary liability, but it should be noted that the decision rested on strong parol evidence indicating solidary liability. The court distinguished the slash used here from the parentheses used in the *Gavin* case.

The Louisiana Supreme Court has not ruled on either of the situations presented above. Should such a case come before the court, any decision requiring the court to choose between the words "I" or "We" will create an opportunity for it to re-examine both the interpretation given to Louisiana Revised Statutes 10:3-118(e) and the rule of *Watkins v. Haydel*. Ideally, the Louisiana Legislature will some day amend Louisiana Revised Statutes 10:3-118(e) to legislatively overrule *Watkins* and bring about the much desired uniformity of Louisiana's negotiable instruments law with the rest of America. The following discussion will examine some of the problems in keeping the status quo.

IV. WATKINS AND THE CONCEPT OF NEGOTIABILITY

The comment to Louisiana Revised Statutes 10:3-118(e) states that the official text of subparagraph (e) was replaced in order to preserve the *Watkins*⁴⁶ rule that a promissory note signed by two or more co-makers with the wording "We promise to pay" creates only joint liability. This rule is offensive to the modern understanding of the concept of negotiability.

The formal requisites of negotiability of a promissory note are directly related to the risks and administrative costs incurred by the holder of the note.⁴⁷ The purpose of the formal requisites, indeed, the very idea of negotiability, embodies the notion of minimizing the risks and administrative costs to the payee or holder. The risks are measured by the likelihood that the payee or holder will be paid the sum owed

45. The United States Fifth Circuit Court of Appeals has ruled on a similar issue, construing language in a promissory note that read "I, We, or either of us promises to pay" as creating solidary liability among the co-makers. The court stated that the inclusion of "either of us" eliminated any ambiguity by indicating that the holder could look to either party for payment of the sum stated in the note. See *Federal Sav. and Loan Ins. Corp. v. Murry*, 853 F.2d 1251, 1257 (5th Cir. 1988).

46. 172 La. 826, 135 So. 371 (1931).

47. See *Hawkland & Lawrence*, Uniform Commercial Code Series, § 3-104:01 (1984).

when payment is due. The administrative costs include costs of collection as well as costs incurred by the payee or holder in accessing the risks involved in the loan. Interest rates are also affected by these costs and risks. Any rule that two or more co-makers are only jointly liable, as defined by Louisiana law, increases the risk that the holder may receive only a portion of the sum due. Furthermore, the administrative costs in assessing those risks are increased. In the event of a default, the holder must pursue all of the parties, thereby increasing attorney's fees as well as the procedural risks effected by joint liability. The U.C.C. lowers these risks and costs.

The stated policy behind the uniform version of section 3-118(e) is "to protect holders and to encourage the free circulation of negotiable paper by stating rules of law which will preclude a resort to parol evidence for any purpose except reformation of the instrument."⁴⁸ The rule of *Watkins* defeats this policy for three reasons: First, it fails to protect holders from the risk of non-payment by giving the debtor the defense of being merely a joint obligor, liable only for his virile share; second, it discourages the free circulation of negotiable paper (discounting)⁴⁹ by increasing risks and administrative costs (both actual and potential); third, it encourages the introduction of parol evidence to ascertain the intent of the parties in such cases as exemplified by *Gavin* and *Evangeline*. Moreover, the overall purpose of the Uniform Commercial Code expressed both in the official text and in Louisiana Revised Statutes 10:1-102(2)(c) is "to promote uniformity of the law among the various jurisdictions."⁵⁰ This goal is clearly subverted by Louisiana's version of section 3-118(e) and the *Watkins* rule. As interstate banking becomes a reality in our credit economy the effects of this disunity acquires more significance.

V. THE LOUISIANA CIVIL CODE

As mentioned above, proponents of maintaining the status quo have frequently based their arguments on Louisiana Civil Code article 1796.⁵¹ This article provides that there is no presumption of solidarity except as evidenced by the clear expression of the parties or by law. The use of this article in the commercial paper context is unfortunate, stemming

48. U.C.C. § 3-118 comment 1.

49. Payees of negotiable promissory notes often sell the notes at or near face value in order to raise cash. This process is known as discounting. The purchaser then becomes a holder of the instrument and is entitled to collect from the maker the sum due. One can easily see, then, that a note carrying a high risk of collection is harder to discount. Hence, it is less marketable.

50. La. R.S. 10:1-102(2)(c) (1983).

51. See *Johnson v. Jones-Journet*, 320 So. 2d 533, 535 (La. 1975).

from Louisiana's failure to adopt a commercial code distinct from the law pertaining to civil matters. The use of a presumption of solidary liability in commercial matters is not contrary to civilian tradition.⁵² In France, for example, solidarity is presumed among the co-signers of promissory notes.⁵³ French law distinguishes between civil matters, where the Code Napoleon requires that solidarity must be expressly stipulated, and commercial matters, where "usage supplies the stipulation of solidarity."⁵⁴ This usage guides courts' search for the intent of the parties.

The notion of interpreting ambiguous terms in a contract by referring to custom or usage is not alien to Louisiana law. Both prior jurisprudence⁵⁵ and Louisiana Civil Code article 2053 dictate that ambiguous terms of a contract must be interpreted in light of usage.⁵⁶ In order to achieve uniformity with respect to negotiable instruments law, while remaining consistent with civil law tradition, our courts should adopt the accepted "usage" of all the other states in construing the language of promissory notes—the uniform version of section 3-118(e).

Even without following the French and distinguishing between negotiable instruments law and civil law, it is still possible to argue that co-makers of promissory notes should be treated as liable in solido. Louisiana Civil Code article 1818 provides that "[a]n indivisible obligation with more than one obligor or obligee is subject to the rules governing solidary obligations."⁵⁷ Likewise, Louisiana Civil Code article 1789 states that "[w]hen a joint obligation is indivisible, joint obligors or obligees are subject to the rules governing solidary obligors or solidary obligees."⁵⁸ "Although no presumption of solidarity is created,"⁵⁹ "an indivisible joint obligation is given the same effects as if it were solidary."⁶⁰ The issue, then, is whether a joint promise to pay, such as

52. 2 Planiol et Ripert, *Traité Élémentaire De Droit Civil*, § 739A (La. St. L. Inst. trans. 11th ed. 1959). Under French commercial law, co-signers of bills of exchange or promissory notes are deemed to be solidarily liable.

53. *Id.*

54. *Id.* at § 736.

55. See *Southern Bitulithic Co. v. Algiers Ry. & Lighting Co.*, 130 La. 830, 58 So. 588 (1912), where it was said that "usage enters into every contract" and may be shown for the purpose not only of elucidating it, but also of completing it. See also *Fontenot's Rice Drier, Inc. v. Farmers Rice Milling Co.*, 329 So. 2d 494 (La. App. 3d Cir.), writ denied, 333 So. 2d 239 (1976), where the court concluded that "custom" may be employed not only to modify or restrict a contract but also to enlarge it.

56. La. Civ. Code art. 2053: "A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties."

57. *Id.* art. 1818.

58. *Id.* art. 1789.

59. *Id.* comment (d).

60. *Id.* comment (a).

that created on a promissory note with the language "We promise to pay," is an indivisible obligation. Article 1815 states that "[a]n obligation is indivisible when the object of the performance, because of its nature or *because of the intent of the parties*, is not susceptible of division."⁶¹ The latter type of indivisibility is contractual. This is not a question of whether the sum stated on the promissory note is divisible, nor whether money is divisible. These are always divisible. Rather, it must be determined whether the parties, both obligor and obligee, as evidenced on the note, contemplated partial performance.⁶² The use of Civil Code article 1796 in this context rests on the friction that the parties did not contemplate individual liability for the total amount borrowed. Yet, if each of the makers of the note only intended to borrow his virile share and be liable for that share only, reason dictates the conclusion that each maker would have executed a note individually for the amount he intended to borrow. Clearly, then, a single promissory note stating an unconditional promise to pay a sum certain at a fixed time or on demand does not comport with the notion that the parties intended partial performance of the promise.⁶³ Hence, the obligation on a negotiable promissory note should be regarded as indivisible, and the makers of such notes should be deemed solidarily bound.

VI. SUMMARY

Certainty is of utmost importance in the law of negotiable instruments. This concern is reflected in the Uniform Commercial Code sections detailing the formal requisites of negotiability.⁶⁴ The degree of certainty in which a holder of a promissory note can expect performance of the promise directly effects the negotiability of the note. Because the co-makers of promissory notes are generally well acquainted with one another, they are in a much better position to assess the risk that one of the parties may be unwilling or unable to honor the promise of payment. Therefore, the makers, not the payee or holder, should bear

61. *Id.* art. 1815 (emphasis added).

62. Planiol, *supra* note 52, at § 787: Contractual Indivisibility—The indivisibility is contractual when the thing which makes the object of the obligation is in all respects divisible, but the parties intend that the obligation should be executed as if it were indivisible. See also *id.* at § 790, where it is stated that "[i]ndivisibility can result indirectly from a particular circumstance," such as when "the intention of the contracting parties was that the debt should not be partially discharged."

63. It is very likely that the parties did not contemplate performance at all. Loans of this nature are almost always for some commercial enterprise in which the parties think that the obligation will be paid from the profits of the enterprise. The intent of the parties, therefore, should be determined by what "usage" generally provides for in such instruments.

64. U.C.C. §§ 3-104 through 112.

that risk by assuming solidary liability on the note. If one or more of the parties fails to honor the promise, the other promisors still have the right of contribution.⁶⁵ In this way, the risks for the holder of the note are reduced, and thus the negotiability of the note is enhanced.

As the economies of the various states have become increasingly integrated, uniformity with respect to negotiable instrument laws has become an overriding policy consideration. This policy resulted in the drafting of the Uniform Commercial Code, which sought to create uniform laws governing negotiable instruments. Accordingly, Louisiana should unify itself with the rest of the country with regard to this special area of commercial law by adopting the uniform version of section 3-118(e) of the Uniform Commercial Code. Until the legislature acts, Louisiana courts should seek to construe negotiable instruments in light of the prevailing constructions placed on such instruments by the other jurisdictions.

Gary Finis Strickland

65. La. Civ. Code art. 1804: "Among solidary obligors, each is liable for his virile portion."