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Obligations

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OBLIGATIONS

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LEGISLATION

A significant part of the law that has developed regarding solidarity over the past decade[1] may now recede into the collective memory of the bench, the bar, and the academic community. Act 373 of 1987, amending and reenacting article 2324 of Civil Code, substitutes joint liability[2] for in solido responsibility in instances when the obligation arises from a fact,[3] either delictual or quasi-dilectual, with the exception

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1. E.g., Diggs v. Hood, 772 F.2d 190 (5th Cir. 1985); Fertitta v. Allstate Ins. Co., 462 So. 2d 159 (La. 1985); Hoefly v. Gov't Employees Ins. Co., 418 So. 2d 575 (La. 1982); Sampay v. Morton Salt Co., 395 So. 2d 326 (La. 1981); Foster v. Hampton, 381 So. 2d 789 (La. 1980); Thomas v. W & W Clarklift, Inc., 375 So. 2d 375 (La. 1979); Schewe, Developments in the Law, 1985-1986—Obligations, 47 La. L. Rev. 377 (1986); Schewe, Developments in the Law, 1984-1985—Obligations, 46 La. L. Rev. 595 (1986); Schewe, Developments in the Law, 1983-1984—Obligations, 45 La. L. Rev. 447 (1985); Schewe, Debtors in Solido: On Plain Language and Uncertainty with Mention of the Revocatory Action, 32 Loy. L. Rev. 13 (1986); Johnson, Developments in the Law, 1980-1981—Obligations, 42 La. L. Rev. 388 (1982); Johnson, Developments in the Law, 1979-1980—Obligations, 41 La. L. Rev. 355 (1981); Johnson, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Obligations, 39 La. L. Rev. 675 (1979); Johnson, The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Obligations, 36 La. L. Rev. 375 (1976); Johnson, The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations, 35 La. L. Rev. 280 (1975); Johnson, The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations, 34 La. L. Rev. 231 (1974).

2. La. Civ. Code art. 1788:

> When different obligors owe together just one performance to one obligee, but neither is bound for the whole, the obligation is joint for the obligors.
>
> When one obligor owes just one performance intended for the common benefit of different obligees, neither of whom is entitled to the whole performance, the obligation is joint for the obligees.

3. La. Civ. Code art. 2292:

> Certain obligations are contracted without any agreement, either on the part of the person bound or of him in whose favor the obligation takes place.
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> Some are imposed by the sole authority of the laws, others from an act done by the party obliged, or in his favor.
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> The first are such engagements as result from tutorship, curatorship, neighborhood, common property, the acquisition of an inheritance, and other cases

of multiple, conspiratorial debtors.[4] The full text of new article 2324, with the significant material noted, reads as follows:

> A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.
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> B. *If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages*; however, when the amount of recovery has been reduced in accordance with the preceding article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of fault has been attributed. Under the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution. *Except as described in Paragraph A of this Article, or as otherwise provided by law, and hereinabove, the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.*[5]

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of a like nature.

The obligations, which arise from a fact, personal to him who is bound, or relative to him, result either from quasi contracts, or from offenses and quasi-offenses.

4. Comment, Prescribing Solidarity: Contributing to the Indemnity Dilemma, 41 La. L. Rev. 659, 686 (1981):

> By conniving together or acting in concert according to a plan, joint tort-feasors are viewed statutorily as either coaching or participating in the wrongful deed. Thus, perfect solidarity of all culpable parties is not only logical but also socially beneficial. As a matter of common sense, it is obvious that two working together might occasion greater damage than one operating alone; consequently, the law's sanctions represent the societal view that multiple-party actions directed toward unlawful aims should be deterred. Furthermore, society deems joint action in carrying out a wrongful mission reprehensible. The members of the group that planned the scheme or aided in its execution are punished; the punishment is that each person who planned, assisted, or acted is liable to the plaintiff-creditor for the full amount of the debt. This notion of punishing wrongdoing not only favors the plaintiff-creditor, but benefits society as a whole.

See Newsom v. Starns, 142 So. 704 (La. App. 1st Cir. 1932) (those participating in the tarring and feathering of another are joint tortfeasors).

5. 1987 La. Acts 373 (emphasis added).

The language "as otherwise provided by law" presumably refers to other *legislation*,[6] not jurisprudence.[7] Furthermore, new article 2324 provides that non-conspiratorial joint tortfeasors are statutorily defined as joint debtors, rather than solidary obligors with all of the attendant statutory duties,[8] including the requirement that any one must, upon demand of the creditor, render the whole performance. One of the major benefits to the creditor of passive solidarity[9]—that an act sufficient to interrupt the running of prescription regarding one debtor is effective against all obligors in solido[10]—has, therefore, been suppressed. As a benefit to the plaintiff/creditor, however, any one debtor may have to pay one-half of the recoverable damages, providing that the fault of the plaintiff/creditor has not exceeded that of the paying obligor.

Unfortunately, the legislature has not addressed specifically the problem of identifying the portion or the share of responsibility of those only secondarily or derivatively liable, through articles 2318,[11] 2319,[12] and 2320[13] of the Civil Code, while also answerable in solido to the plaintiff/creditor with another, primarily responsible, obligor. For instance, since *Foster v. Hampton*[14] an employer and an employee have been solidarily liable to a plaintiff/creditor injured through the negligence of the employee while acting within the course and scope of his duties.

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6. E.g., La. R.S. 22:655 (1978).

7. See La. Civ. Code art. 17.

8. La. Civ. Code art. 1794:

> An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.

9. Schewe, Debtors in Solido: On Plain Language and Uncertainty with Mention of the Revocatory Action, supra note 1, at 13 n.1.

10. La. Civ. Code art. 1799.

11. La. Civ. Code art. 2318:

> The father and the mother and, after the decease of either, the surviving parent, are responsible for the damage occasioned by their minor or unemancipated children, residing with them, or placed by them under the care of other persons, reserving to them recourse against those persons.
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> The same responsibility attaches to the tutors of minors.

12. La. Civ. Code art. 2319: "The curators of insane persons are answerable for the damage occasioned by those under their care."

13. La. Civ. Code art. 2320:

> Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.
>
> Teachers and artisans are answerable for the damage caused by their scholars or apprentices, while under their superintendence.
>
> In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

14. 381 So. 2d 789 (La. 1980).

But the employer and the employee are not joint tortfeasors,[15] because the employer has no "fault," within the meaning of article 2315,[16] other than that imposed upon it by law (article 2320 of the Civil Code), unless it can be charged with other negligence (possibly in the lack of adequate steps in the hiring or in the training of the employee). Thus, it may be asserted that the employer's true share of the solidary debt is 0% and that the employee's responsibility is 100%.[17]

Viewed in this context, employers and other derivatively responsible solidary obligors bound with actually negligent debtors/defendants may argue that the spirit of Act 373, in amending article 2324 of the Civil Code, is that plaintiffs/creditors may demand only the share of each respective defendant and that secondarily liable debtors truly owe nothing. In all likelihood, contentions of this nature will fail, as they should, for the legislature probably did not contemplate the interplay of articles 2318, 2319, 2320, and 2324 of the Civil Code, not to mention article 1812 of the Code of Civil Procedure.[18] As a result an anomaly may

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15. Id. at 790.

16. La. Civ. Code art. 2315:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
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> Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

17. E.g., Rowell v. Carter Mobile Homes, Inc., 482 So. 2d 640, 647-48 (La. App. 1st Cir. 1984), aff'd on other grounds, 500 So. 2d 748 (1987).

18. La. Code Civ. P. art. 1812:

> A. The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event, the court may submit to the jury written questions susceptible of categorical or other brief answer, or may submit written forms of the several special findings which might properly be made under the pleadings and evidence, or may use any other appropriate method of submitting the issues and requiring the written findings thereon. The court shall give to the jury such explanation and instruction concerning the matter submitted as may be necessary to enable the jury to make its findings upon each issue. If the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue omitted unless, before the jury retires, he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding, or if it fails to do so, it shall be presumed to have made a finding in accord with the judgment on the special verdict.
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> B. The court shall inform the parties within a reasonable time prior to their argument to the jury of the special verdict form and instructions it intends to submit to the jury and the parties shall be given a reasonable opportunity to make objections.
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> C. In cases to recover damages for injury, death, or loss, the court may submit to the jury special written questions inquiring as to:
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> (1) Whether a party from whom damages are claimed, or the person for whom

surface. Consider this scenario: XYZ, Inc. is a defendant in two different lawsuits; in Action No. 1, XYZ, Inc. is held responsible to the plaintiff/creditor with three other defendants and is assessed a 15% share of the damages of $100,000; in Action No. 2, XYZ, Inc. is not independently liable—for its answerability is through E, the employee who negligently injured the plaintiff/creditor—but it is cast in judgment, in solido, with its employee for $100,000. Under new article 2324, in Action No. 1, XYZ, Inc., a truly responsible, negligent debtor, could pay from $15,000 to $50,000, depending upon the solvency of the other obligors and the relative fault of XYZ, Inc. and the plaintiff/creditor. In contrast, in Action No. 2, XYZ, Inc., free of any negligence or independent fault, will have to satisfy all of the judgment of $100,000. The concept of sanctioning culpability may not be served and, admittedly, other policy considerations are involved in this example; nonetheless, the foregoing appears to be in the manner in which new article 2324 of the Civil Code will operate.

Although Louisiana Revised Statutes 9:3921[19] is not new from this session of the legislature, it seems appropriate to isolate the early gloss

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such party is legally responsible, was at fault, and, if so:
(a) Whether such fault was a legal cause of the damages, and, if so:
(b) The degree of such fault, expressed in percentage.
(2) If appropriate, whether another person, whether party or not, other than the person suffering injury, death, or loss, was at fault, and, if so:
(a) Whether such fault was a legal cause of the damages, and, if so:
(b) The degree of such fault, expressed in percentage.
(3) If appropriate, whether there was negligence attributable to any party claiming damages, and, if so:
(a) Whether such negligence was a legal cause of the damages, and, if so:
(b) The degree of such negligence, expressed in percentage.
(4) The total amount of damages sustained as a result of the injury, death, or loss, expressed in dollars.
D. The court shall then enter judgment in conformity with the jury's answers to these special questions and according to applicable law.

19. La. R.S. 9:3921 (Supp. 1987):
A. Notwithstanding any provision in Title III of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950 to the contrary, every master or employer is answerable for the damage occasioned by his servant or employee in the exercise of the functions in which they are employed. Any remission, transaction, compromise, or other conventional discharge in favor of the employee for such damage shall be valid as between the damaged creditor and the employee and the employer shall have no right of contribution, division, or indemnification from the employee nor shall the employer be allowed to bring any incidental action under the provisions of Chapter 6 of Title I of Book II of the Louisiana Code of Civil Procedure against such employee.
B. The provisions of this Section are remedial and shall be applied retrospectively and prospectively to any cause of action for damages arising prior to, on, or after the effective date of this Section.

in this portion of the symposium. *Barbin ex rel Barbin v. State*[20] involved the liability of the state through the Department of Education and the State Board of Elementary and Secondary Education and of a woodworking instructor for the personal injuries of a student, suffered when operating a table saw without a safety guard. In affirming in part and reversing in part the judgment of the trial court, the Louisiana First Circuit Court of Appeal weighed the relative fault of the instructor, an actually negligent actor, and of the State, responsible either as the owner of a defective saw,[21] the injury-causing instrument, or under the doctrine of respondeat superior[22] or both.[23] The conclusion, 80% fault to the instructor and 20% to the State,[24] compelled the appellate panel to confront the issue of the State's claim for indemnity against the instructor/employee and his insurer.[25] In response, the employee and his insurer urged La. R.S. 9:3921 as a defense to the demand for reimbursement. The court properly permitted indemnification with the following reasoning:

> Appellants contend that this general rule [of indemnity] is inapplicable because of La. R.S. 9:3921. This statute provides that a derivatively liable employer is not entitled to indemnity or contribution from the primarily liable employee. However, its application is limited to occasions where the employee has entered into a transaction or compromise or conventional discharge with the damaged creditor. It is not applicable in this case because neither . . . [the employee] nor . . . [his insurer] have entered into a transaction or compromise or conventional discharge with plaintiff. Consequently, the state is entitled to indemnity for the 80% of its liability attributable to the negligence of [the employee]. . . .[26]

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20. 506 So. 2d 888 (La. App. 1st Cir. 1987).

21. La. Civ. Code art. 2317:

> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

22. La. Civ. Code art. 2320.

23. 506 So. 2d at 891.

24. Id. at 893.

25. In this regard, the court noted the following:

> When an employer's liability is derivative and imposed by law for the negligence of its employee, the general rule is that the employer is entitled to indemnity from the employee. La. C.C. art. 1804; see Thomas v. W & W Clarklift, Inc., 444 So. 2d 1300 (La. App. 4th Cir.), writ denied, 448 So. 2d 113 (La. 1984). Consequently, we must consider the right of the state as the employer . . . to indemnity from . . . [the employee] for the 80% fault attributable to . . . [him].

Id. at 894.

26. Id.

JURISPRUDENCE

During the past year, the reported opinions treated a number of subjects, including capacity,[27] stipulations pour autrui,[28] putting in default,[29] conditions,[30] solidarity,[31] contribution,[32] indemnification,[33] accord and satisfaction,[34] interest,[35] compensation,[36] novation,[37] proof of obligations,[38] parol evidence,[39] interpretation of contracts,[40] quantum mer-

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27. E.g., Julius Cohen Jeweler, Inc. v. Succession of John E. Jumonville, 506 So. 2d 535, 540 (La. App. 1st Cir. 1987) (the party attacking the contract has the burden of proving (1) that the alleged incompetent was deprived of reason at the time of contracting, and (2) that the other party knew or should have known of his incapacity (citing La. Civ. Code art. 1925)).

28. E.g., Dartez v. Dixon, 502 So. 2d 1063 (La. 1987); A. F. Blair Co. v. Haydel, 504 So. 2d 1044 (La. App. 1st Cir. 1987); Williams v. Gervais F. Favrot Co., 499 So. 2d 623 (La. App. 4th Cir. 1986), writ denied, 503 So. 2d 19 (1987); Central Progressive Bank v. Bradley, 496 So. 2d 525 (La. App. 1st Cir. 1986), reversed and remanded 502 So. 1017 (1987).

29. E.g., Grover v. Carter, 498 So. 2d 132, 134 (La. App. 5th Cir. 1986), writ denied, 500 So. 2d 422 (1987) (a putting in default is not necessary for breaches of contracts stipulating that they must be executed within a specific time).

30. E.g., Gibbs Constr. Co. v. Thomas, 500 So. 2d 764 (La. 1987).

31. E.g., Joseph v. Ford Motor Co., 509 So. 2d 1 (La. 1987).

32. E.g., Guillotte v. Department of Transp. & Dev., 503 So. 2d 618 (La. App. 4th Cir. 1987); T. J. Trucking, Inc. v. Paxton Nat'l Ins. Co., 502 So. 2d 1141 (La. App. 4th Cir. 1987).

33. E.g., Butler v. Intersouth Pipeline, 655 F. Supp. 587 (M.D. La. 1986); Meloy v. Conoco, Inc., 504 So. 2d 833 (La. 1987); Carter v. Deitz, 505 So. 2d 106 (La. App. 4th Cir. 1987); Booth v. New Orleans Dep't of Utilities, 499 So. 2d 1231 (La. App. 4th Cir.), writ denied, 501 So. 2d 230 (1987); Moorhead v. Waelde, 499 So. 2d 387, 389 (La. App. 4th Cir. 1986) (citing Hebert v. Blakenship, 187 So. 2d 798 (La. App. 3d Cir. 1966); Smith v. Ly, 498 So. 2d 128, 130 (La. App. 5th Cir. 1986) ("[P]rescription on a claim for indemnification does not begin to run until the party seeking indemnification has been cast in judgment.") (citing Blue Streak Enterprises, Inc. v. Gulf Coast Marine, 370 So. 2d 633 (La. App. 4th Cir. 1979); Guidry v. Hoogvliets, 411 So. 2d 629 (La. App. 4th Cir. 1982)).

34. E.g., Derouen v. Derouen, 502 So. 2d 305 (La. App. 3d Cir. 1987); Oubre v. Bank of St. Charles & Trust Co., 499 So. 2d 602 (La. App. 5th Cir. 1986), writ denied, 503 So. 2d 20 (1987).

35. E.g., SBS-S. College Medical Center v. Trahan, 505 So. 2d 969 (La. App. 3d Cir. 1987); St. Tammany Manor, Inc. v. Spartan Bldg. Corp., 499 So. 2d 616 (La. App. 4th Cir. 1986), reversed and remanded, 509 So. 2d 424 (1987).

36. E.g., Rosenthal v. Oubre, 504 So. 2d 1102 (La. App. 5th Cir. 1987).

37. E.g., Scott v. Bank of Coushatta, 501 So. 2d 1032 (La. App. 2d Cir.), cert. granted, 504 So. 2d 868 (1987).

38. E.g., Lee Eyster & Assoc. v. Favor, 504 So. 2d 580 (La. App. 4th Cir.), cert. denied, 507 So. 2d 232 (1987); Hall v. Turner, 500 So. 2d 853 (La. App. 1st Cir. 1986).

39. E.g., Phillips Oil Co. v. OKC Corp., 812 F.2d 265 (5th Cir. 1987); Jones v. Hebert & LeBlanc, Inc., 499 So. 2d 1107 (La. App. 3d Cir. 1986).

40. E.g., Bank of Coushatta v. Patrick, 503 So. 2d 1061 (La. App. 2d Cir.), cert. denied, 506 So. 2d 1231 (1987); Fontenot v. Waste Management of Lake Charles, Inc., 493 So. 2d 904 (La. App. 3d Cir. 1986).

uit,[41] and unjust enrichment.[42] The more unusual or the more noteworthy of the decisions are highlighted in the following selection.

Contract Formation or Obligation Subject to a Condition?

"I shall sell you my car if I want to."[43] From this simple statement springs one of the many theoretical divergences between the analyses of the common law and the civil law, although the results from the application of the varying rules should not differ.

Under article 2034[44] of the Civil Code of 1870[45] a disection of the quoted language, if accepted, apparently would produce the conclusions that (i) an agreement to sell the car had been reached (that there had been an offer and an acceptance), but that (ii) because of a purely potestative condition, suspending the obligation of the vendor, the contract "is null." For an obligation to be null by reason of a suspensive, purely potestative condition, the occurrence of the condition[46] has to depend upon the *whim* of the debtor,[47] solely upon the exercise of his

41. E.g., Royal Constr. Co. v. Sias, 496 So. 2d 1301 (La. App. 3d Cir. 1986).

42. E.g., Charrier v. Bell, 496 So. 2d 601 (La. App. 1st Cir.), cert. denied, 498 So. 2d 753 (1986).

43. A. Levasseur, Precis in Conventional Obligations: A Civil Code Analysis 10 (1980).

44. La. Civ. Code art. 2034 (1870): "Every obligation is null, that has been contracted, on a potestative condition, on the part of him who binds himself."

45. See Schewe, Developments in the Law, 1983-1984—Obligations, supra note 1, at 447 n.2.

46. Generally, under the law in existence prior to the effective date of Act 331 of 1984, a condition was a future and uncertain event. La. Civ. Code art. 2021 (1870). According to new article 1767 of the Civil Code, a condition need not be a future event. Comment (e) to new article 1767 explains the change:

> Under this Article, a condition need not be a future event. Though a condition has universally been defined as a future and uncertain event on which the origination or extinction of an obligation depends (and C.C. Art. 2043 (1870) defines a suspensive condition in those terms), C.C. Art. 2021 (1870), describes a condition obligation as one which depends merely on an uncertain event. Moreover, C.C. Art. 2043 (1870), following Article 1181 of the Code Napoleon, alludes to uncertainty as to an event that has already occurred. That approach has been criticized by an important portion of French doctrine. See 7 Planiol et Ripert, Traite pratique de droit civil francais 370-371 (2nd ed. Esmein 1954). In more recent civilian doctrine, however, the principle of C.C. Art. 2043 (1870) has been recognized as useful, though with the qualification that in such a case the true "event" upon which the condition depends is the advent of some proof that a past event has actually occurred. See 1 De Gasperi & Morello, Derecho civil 290-291 (1964); see also 5 Merlin, Repertoire universel et raisonne de jurisprudence, Conditions 373 (5th ed. 1825).

47. E.g., Franks v. La. Health Services & Indem. Co., 382 So. 2d 1064 (La. App. 2d Cir. 1980). Comment (e) to new article 1770 delineates the differences between "whim," the exercise of unbridled discretion or arbitrariness, and "judgment" or considered and

will.[48] As Professor Levasseur has noted, "[t]he reason for the nullity is that a debtor under such a condition is not seriously bound[;] . . . he really intends to deceive the other party."[49] When the condition is suspensive and simply potestative, by contrast, the obligation is valid and enforceable.

A common law lawyer, reflecting upon the declaration "I shall sell you my car if I want to," likely thinks in terms of illusory promises[50] rather than null obligations. The common law view generally is that no contract is formed because the seller is not making an offer susceptible of acceptance. No consideration may be found to support the buyer's promise, since the vendor is not agreeing to do anything.

As is demonstrated in *Gibbs Construction Co. v. Thomas*,[51] involving an analogous question, the application of the civilian view by the court makes the outcome of the litigation perhaps somewhat more difficult to explain, but the conclusion should not differ from that which obtains in a common law jurisdiction.

The pertinent facts in question are rather straight-forward. Gibbs Construction Co. ("Gibbs"), a general contractor, entered into a subcontract with A.C. Thomas d/b/a L&L Painting and Drywall Company. In lieu of a performance bond, Mr. Thomas was obligated to deliver to Gibbs a letter of credit, through an addendum to the subcontract: "This contract [the subcontract] is valid upon receipt of acceptable $25,000 letter of credit from a FDIC insured bank."[52] Shortly thereafter, Mr. Thomas obtained a letter of credit conforming to the stipulation in the subcontract, but he did not deliver it to Gibbs.[53] Before any of

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reasoned discretion:

> Thus, in the traditional example, an obligation to buy a house if the obligor moves to Paris is valid rather than null because it is assumed that moving to Paris or not will be decided according to serious reasons such as obtaining a position there or securing admission to a school in that city. It is assumed, in other words, that the obligor will not decide not to move to Paris for the sole purpose of deceiving the other party. See 3 Toullier, Le droit civil francais 508-509 (1833); see also 7 Planiol et Ripert, Traite pratique de droit civil francais 376-377 (2d ed. Esmein 1954).

48. La. Civ. Code art. 2035 (1870).

49. A. Levasseur, supra note 43.

50. Dr. Litvinoff, in his seminal treatment of the law of obligations, has listed several of the leading common law authorities. E.g, G. Grismore, Contracts § 57 (J. Murray 1965); Corbin, The Effect of Options on Consideration, 34 Yale L.J. 571 (1925); Patterson, Illusory Promises and Promisor's Options, 6 Iowa L. Bul. 129 (1921) (cited in 1 S. Litvinoff, Obligations § 258, at 463 n.36, in 6 Louisiana Civil Law Treatise (1969)). For a sampling of the case law, see Carlson v. Johnson, 275 Mich. 35, 265 N.W. 517 (1936), and Strong v. Sheffield, 144 N.Y. 392, 39 N.E. 330 (1895).

51. 500 So. 2d 764 (La. 1987).

52. Id. at 765.

53. Id.

his performance was due, Mr. Thomas wrote to Gibbs "rescinding the subcontract, stating his reasons were unavailability of materials and increased costs of acquisition."[54] Gibbs eventually sued Mr. Thomas for the difference between its higher cover costs and the subcontract price.

At the trial level, the court viewed the delivery of the $25,000 letter of credit by Mr. Thomas to Gibbs as a suspensive condition to the obligations under the subcontract. Since the letter of credit had not been received by Gibbs, the court exonerated Mr. Thomas, ruling that no breach of contract had occurred since the contract itself had not ripened.[55] The intermediate court of appeals affirmed, stating that the delivery or not of the letter of credit by Mr. Thomas to Gibbs was a purely potestative condition, and, therefore, the subcontract was void.[56] Notwithstanding dissents by Chief Justice Dixon[57] and Associate Justices Calogero[58] and Watson,[59] the supreme court reversed. For the reasons that follow, the opinion of the majority of the court is both fair and correct as a matter of law, a highly satisfactory combination.

Very significantly, the supreme court identified Mr. Thomas as serious about working for Gibbs; the reference to a letter of credit in lieu of a performance bond in the subcontract addendum did not signal his reluctance to be bound.[60] In the parlance of the common law, the representations of Mr. Thomas, accordingly, were *not* illusory. Thus, under the Civil Code,

> [t]his obligation [delivering to Gibbs a letter of credit] did not depend solely upon the will, whim, or caprice of . . . [Mr. Thomas]. Nor was it evident from the face of the contract the obligor could or could not fulfill the obligation as he desired. Instead, the condition impliedly imposed upon [Mr.] Thomas the duty of making a good faith effort to obtain and deliver the letter of credit.[61]

Armed with this determination, it was rather a simple matter to place upon Mr. Thomas the duty of good faith[62] in attempting to bring on

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54. Id.
55. Id.
56. Id.
57. 500 So. 2d at 770 (Dixon, C.J., dissenting).
58. 500 So. 2d at 770 (Calogero, J., dissenting).
59. 500 So. 2d at 771 (Watson, J., dissenting).
60. 500 So. 2d at 769. See supra notes 47 and 50 and accompanying text.
61. Id.
62. La. Civ. Code art. 1901 (1870).

> Agreements legally entered into have the effect of laws on those who have formed them.
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> They can not be revoked, unless by mutual consent of the parties, or for causes acknowledged by law.
>
> They must be performed with good faith.

the occurrence of the condition,[63]—the delivery to Gibbs of the letter of credit[64]—an event partially within his power to control. Consequently, the court held that Mr. Thomas' "failure to deliver and thus totally fulfill the suspensive condition waive[d] the condition. . . ."[65] With the suspensive condition waived or considered as occurred, the contract was wholly binding and enforceable.

The basic position of the three dissentors is summarized by Justice Watson:

> The majority reads something into the contract which is not there when it infers that Thomas was under some sort of good faith obligation to attempt to obtain a letter of credit. Gibbs said in effect to Thomas: If you want the job, bring us a letter of credit. For reasons best known to Thomas, he declined to do so and he did not get the job. No letter of credit equals no contract. The majority errs in a thorough and scholarly analysis by finding responsibility for damages under a contract which never came into existence.[66]

While this is a plausible overview of the background of the dispute, it is fundamentally belied by the evidence demonstrating that both Mr. Thomas and Gibbs considered themselves bound at the time of the execution of the subcontract and its addendum. And if the parties deemed themselves tied to their obligations—a notion supported by Mr. Thomas' immediate efforts (following the signing of the addendum) to procure a suitable letter of credit—the issues of offer and acceptance would no longer be significant, even to a common law lawyer.[67]

Compromises and Solidarity: The World Rightside Up

For the past two years,[68] *Fertitta v. Allstate Insurance Co.*[69] has been a subject of discussion in this symposium. While the prior prediction that "[p]erhaps solidarity will not demand so much attention next year,"[70]

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63. Indeed, the frustration by Mr. Thomas of the happening of the condition was not, La. Civ. Code art. 2040 (1870), and is not, La. Civ. Code art. 1772, permitted. *Gibbs*, 500 So. 2d at 768.

64. 500 So. 2d at 768.

65. Id.

66. 500 So. 2d at 771 (Watson, J., dissenting).

67. See, e.g., Blish v. Thompson Automatic Arms Corp., 30 Del. Ch. 538, 64 A.2d 581 (1948); Restatement (Second) of Contracts §§ 78 and 79 (1972); see also supra note 50.

68. Schewe, Developments in the Law, 1984-1985—Obligations, supra note 1, at 600-06; Schewe, Developments in the Law, 1985-1986—Obligations, supra note 1, at 387-89.

69. 462 So. 2d 159 (La. 1985).

70. Schewe, Developments in the Law, 1985-1986—Obligations, supra note 1, at 389.

has not proven accurate, the decision of the Supreme Court of Louisiana in *Joseph v. Ford Motor Co.*[71] is laudable and should put to rest the uncertainties caused by *Fertitta v. Allstate Insurance Co.*

In *Joseph v. Ford Motor Co.*, four plaintiffs sued an automobile dealership and the manufacturer of the vehicle for damages caused by an accident, allegedly due to a defective braking system.[72] After a trial, a jury awarded the plaintiffs $1,954,000 plus interest[73] against the two defendants.[74] Thereafter, the automobile dealership and its insurers compromised with the plaintiffs and paid $1,976,575.05;[75] the plaintiffs reserved their rights against the manufacturer,[76] and the manufacturer appealed the judgment entered upon the jury's findings. Ultimately,[77] the fourth circuit reduced the amount of the judgment to a total of $610,000 for the four plaintiffs.[78] In addition, the appellate panel viewed the settlement between the plaintiffs and the automobile dealership as a satisfaction of the judgment because, after the modification of the jury award, the plaintiffs had received all to which they were entitled.[79]

In the post-*Fertitta* world the disposition by the fourth circuit appeared correct.[80] Happily, however, the supreme court reversed.

With Chief Justice Dixon writing the opinion, the court phrased the issue for decision succinctly:

> An obligee's release of a joint tortfeasor reduces the amount recoverable against the remaining tortfeasors amount of the virile

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71. 509 So. 2d 1 (La. 1987).

72. Id.

73. La. R.S. 13:4203 (1968): "Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, 'ex delicto,' which may be rendered by any of the courts."

74. 509 So. 2d at 2.

75. Although it is now accepted that a judgment may be the subject of a contract of compromise, it is worth noting that not long ago the courts struggled with this concept. E.g., Reinecke v. Pelham, 199 So. 521 (La. App. Orl. 1941). See S. Litvinoff, supra note 50, § 393, at 663-66 for a thorough discussion.

76. The requirement of a specific reservation of rights was contained in article 2203 of the Civil Code of 1870. Often, this rule operated "as a trap for an unwary plaintiff-creditor in reaching a settlement agreement with one of several solidary debtors." Schewe, supra note 45, at 454. New article 1803 of the Civil Code eliminates the necessity of a reservation of rights. See Comment, A Riddle of Solidarity: The Release of One Solidary Obligor, 45 La. L. Rev. 771 (1985).

77. Initially, the manufacturer successfully appealed the judgment, with the fourth circuit concluding that the plaintiffs had not proven their case against the manufacturer. 472 So. 2d 185 (La. App. 4th Cir. 1985). The supreme court reversed and remanded the matter for consideration of the award of damages. 483 So. 2d 934 (La. 1986).

78. 499 So. 2d 428, 432 (La. App. 4th Cir. 1986).

79. Id. at 432.

80. Schewe, Developments in the Law, 1984-1985—Obligations, supra note 1, at 600-06.

> (pro rata) share of the one released, since the plaintiff, in releasing a joint tortfeasor, has prejudiced the remaining tortfeasors by depriving them of their right of contribution from the one so released.[81]

As a consequence, the plaintiffs were entitled to recover from the remaining defendant, but the manufacturer was allowed a 50% reduction ($305,000). Significantly, the court proclaimed as "irrelevant"[82] the dollar amounts the plaintiffs received from the automobile dealership; "[t]he damage award against the remaining tortfeasors is reduced by the share of the settling joint tortfeasor regardless of the amount a settling tortfeasor actually pays to compromise the plaintiff's claim."[83] Nothing more need be said.

Treasure Hunt: actio de in rem verso

The case of *Charrier v. Bell*[84] attracts attention for its novel background and for the application of the five-factor measure[85] of a "claim de in rem verso,"[86] set forth in *Edmonston v. A-Second Mortgage Co.*[87] In short, the plaintiff, an "amateur archeologist,"[88] brought a lawsuit seeking to have himself declared the owner of a cache of Indian artifacts[89]

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81. 509 So. 2d at 3 (citing Wall v. Am. Employers Ins. Co., 386 So. 2d 79, 82 (La. 1980); Canter v. Koehring Co., 283 So. 2d 716, 727-28 (La. 1973); Harvey v. Travelers Ins. Co., 163 So. 2d 915, 920-22 (La. App. 3d Cir. 1964)). Moreover, the court referenced new article 1803 of the Civil Code and noted that it "codified the Harvey rule." 509 So. 2d at 3.

82. 509 So. 2d at 3.

83. Id. To lay to rest the converse, the court remarked, although unnecessary to its decision, that "[i]f plaintiffs had compromised their claims . . . for less . . . [the manufacturer] would still be entitled to a 50% reduction of the judgment of the court of appeal." Id.

84. 496 So. 2d 601 (La. App. 1st Cir.), cert. denied, 498 So. 2d 753 (1986).

85.(1) there must be an enrichment,

(2) there must be an impoverishment,

(3) there must be a connection between the enrichment and resulting impoverishment,

(4) there must be an absence of justification or cause for the enrichment and impoverishment, and

(5) there must be no other remedy at law available to plaintiff.

Charrier, 496 So. 2d at 606.

86. Id.

87. 289 So. 2d 116 (La. 1974).

88. 496 So. 2d at 602.

89. At trial, the evidence established that the excavated items—including beads, European ceramics, stoneware, glass bottles, kettles, knives, muskets, gun flints, crucifixes, rings bracelets, and pottery—were likely buried by the Tunica and Biloxi Indians. Id. at 603.

which he had unearthed in the area of the Trudeau Plantation.[90] Following a determination by the court in favor of the Indians asserting title to the recovered property, Mr. Charrier urged that he was entitled to a money judgment in compensation for his efforts, to prevent an unjust enrichment. Because, however, the plaintiff knew or should have known that most of his work "was done at a time when . . . he was on property without the consent of the landowner,"[91] the claim in unjust enrichment did not lie.[92] Aside from the other four parts of the standard that must be satisfied in full, with respect to enrichment the court reasoned as follows:

> An enrichment will be unjustified "only if no legal justification for it exists by reason of a contract or provision of law *intended* to permit the enrichment or the impoverishment or to bar attack upon the enrichment."[93]

The Supreme Court of Louisiana has recognized claims for damages for mental anguish resulting from desecration of a cemetery[94] and the availability of injunctive relief to prevent the unauthorized disinterment of deceased relatives;[95] the Indian tribe owning the artifacts, therefore, enjoyed both the right to seek damages from Mr. Charrier and the right to enjoin the digging.[96] Because these rights "would be subverted if descendants were obliged to reimburse for the expenses of excavation[,] . . . [t]here is a legal justification for any enrichment received by the Tribe and plaintiff is not entitled to invoke the equitable theory."[97]

The opinion in *Charrier v. Bell* is sound. Perhaps the decision represents the "judicial message . . . necessary to show clearly the strict limitations"[98] upon the claim of unjust enrichment.

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90. In the words of the court, the "Trudeau Plantation consists of approximately 150 acres located on a bluff in the southeast quadrant of the meeting of the Mississippi River and Tunica Bayou." Id. at 602 n.1.

91. Id. at 606.

92. Id. (citing Minyard v. Curtis Products, Inc., 251 La. 624, 205 So. 2d 422 (1967); Brignac v. Boisdore, 288 So. 2d 31 (La. 1973); Comment, Actio De In Rem Verso in Louisiana; Minyard v. Curtis Products, Inc., 43 Tul. L. Rev. 263 (1969)). The appellate panel, in analyzing the criteria of impoverishment in light of the law of France, recited it is "met only when the factual circumstances show that it was not a result of the plaintiff's own fault or negligence or was not undertaken at his own risk." 496 So. 2d at 606.

93. 496 So. 2d at 607 (quoting Tate, The Louisiana Action for Unjustified Enrichment, 50 Tul. L. Rev. 883, 904 (1976)).

94. Humphreys v. Bennett Oil Corp., 195 La. 531, 197 So. 222 (1940).

95. Choppin v. LaBranche, 48 La. Ann. 1217, 20 So. 681 (1896).

96. 496 So. 2d at 607.

97. Id. (citing V & S Planting Co. v. Red River Waterway Comm'n, 472 So. 2d 331 (La. App. 3d Cir.), cert. denied, 475 So. 2d 1106 (1985); G. Woodward Jackson Co. v. Crispens, 414 So. 2d 855 (La. App. 4th Cir. 1982)).

98. Schewe, supra note 45, at 465.