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Obligations

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LEGISLATION

The Regular Session of the Louisiana Legislature in 1984 was monumental in this area of the law; Titles III and IV of Book III of the Civil Code were amended by Act 331, the culmination of the revision of the law of obligations proposed by the Louisiana State Law Institute. A complete analysis of Act 331 will appear in a subsequent issue of the *Review*.[1] Accordingly, the new obligations articles will be mentioned only if the disposition of a discussed judicial opinion would be altered or if part of the new law would clarify a confusion presently existing in the jurisprudence.[2] One section of Act 331, however, deserves comment.

Not part of the proposal of the Louisiana State Law Institute, Section 10 of Act 331, added by the Senate Committee on Judiciary A to reenact Louisiana Revised Statutes 9:3921, substantively provides as follows:

> 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.

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1. 45 La. L. Rev. No. 3 (1985) (forthcoming).

2. For present purposes, and to avoid confusion, the revised articles of the Civil Code are referred to as "new" and the prior law is designated as existing in the Civil Code of 1870.

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.

The ostensible purpose of this statute is to negate legislatively the indemnity action of the employer against the employee,[3] in the event the employer is required to pay a third person damages for the tortious conduct of the employee under article 2320 of the Civil Code,[4] when the employee has been released by the injured creditor. The wisdom of this change aside, paragraph B of Louisiana Revised Statutes 9:3921 is of dubious constitutionality.[5] Undoubtedly, this statute will spur litigation and further discussion is deferred until then.

JURISPRUDENCE

While the impact of the reported opinions during the past year is not as dramatic as the revision of the Civil Code, the decisions encompassed a variety of subjects, including error as a vice of consent,[6] the requisite of a binding contract of compromise,[7] unjust

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3. See Jobe v. Hodge, 253 La. 483, 218 So. 2d 566 (1969); Williams v. Marionneaux, 240 La. 713, 124 So. 2d 919 (1960), overruled on other grounds, Sampay v. Morton Salt Co., 395 So. 2d 326 (La. 1981); Little v. State Farm Mut. Auto. Ins. Co., 177 So. 2d 784 (La. App. 1st Cir. 1965); Comment, The Employer's Indemnity Action, 34 La. L. Rev. 79 (1973); see also Comment, Tilting Against Windmills: A Solidary Rejoinder, 41 La. L. Rev. 1279 (1981) [cited hereinafter as Tilting Against Windmills]; Comment, Prescribing Solidarity: Contributing to the Indemnity Dilemma, 41 La. L. Rev. 659 (1981) [cited hereinafter as Prescribing Solidarity]; Comment, Master's Vicarious Liability for Torts Under Article 2320: A Terminological "Tar-Baby," 33 La. L. Rev. 110 (1972).

4. The germane part of article 2320 reads as follows: "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."

5. See, e.g., Green v. Liberty Mut. Ins. Co., 352 So. 2d 366, 369 (La. App. 4th Cir. 1977), cert. denied, 354 So. 2d 210 (La. 1978).

6. E.g., Arena v. K Mart Corp., 439 So. 2d 528, 531 (La. App. 1st Cir. 1983) (stating that an erroneous sale of a television set for $341.05 instead of $609 negated the contract *ab initio*).

7. E.g., Crowley Corp. v. Shreveport Packing Co., 440 So. 2d 1345, 1352 (La. App. 2d Cir. 1983) (A separate stock purchase agreement—between maker of a note and the wife of the president of a corporation which held the note for purchase of the corporate assets—referring to the remaining balance on the note as thirty payments in certain amounts each did not result in a compromise of dispute because the wife did not sign in her capacity as an officer of the corporation, but in her individual capacity, and there was no written agreement which clearly comprehended that the difference of dispute of balance would be regulated; since the agreement relied upon was not honored any alleged compromise contained therein failed for lack of consideration.); Williams v. Winn Dixie, 447 So. 2d 8, 10 (La. App. 4th Cir. 1984) (A "unilateral release" without any shown or proven consideration does not meet the legal requirements for a valid compromise under article 3071 of the Civil Code.); Allan E. Amundson, Inc. v. Hoppmeyer, 442 So. 2d 1254, 1257 (La. App. 5th Cir. 1983) (stating that contract of compromise must be

enrichment,[8] indemnification agreements,[9] interpretation of contracts,[10] and proof of obligations.[11] Surveyed in this selection are the more noteworthy of these subjects.

Error as a Vice of Consent

Article 1779 of the Civil Code of 1870 specifies four elements to a valid contract: (1) parties legally capable of contracting; (2) consent of the parties lawfully given; (3) a permissible object forming the subject matter of agreement; and (4) a lawful cause. One opinion this year illustrates the difficulties courts may encounter when considering the effects of agreements erroneously confected.

Arena v. K Mart Corp.[12] is troublesome not so much for its ultimate disposition but because of the posture of the litigants. A husband and a wife brought suit against K Mart in connection with these facts: they, with their three children, entered a K Mart outlet at Slidell intending to purchase a new television set; in the display area an assistant manager aided in selecting a set and advised them that the chosen model sold for $609.00, plus tax; after the plaintiffs indicated a desire to buy, the assistant manager informed the cashier that the sale price was $341.05; this price, plus tax, was paid with a check; the plaintiffs, assisted by a stock boy, took the television outside of the store and waited for a

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signed by both parties) (citing Felder v. Georgia Pac. Corp., 405 So. 2d 521 (La. 1981)); Harrington v. Aetna Life & Cas. Co., 441 So. 2d 1255, 1257 (La. App. 1st Cir. 1983) (unilateral action by a creditor in altering an indorsement on a check from payment in full to partial payment in negotiating the instrument will not change the legal import of its acceptance as an acknowledgment of payment in full satisfaction of the obligation) (see Hersbergen, The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Commercial Paper and Bank Deposits and Collections, 40 La. L. Rev. 606, 611-15 (1980); Hersbergen, The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Commercial Paper and Bank Deposits and Collections, 38 La. L. Rev. 384, 392-94 (1978); Litvinoff, The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Contracts in Particular, 36 La. L. Rev. 417, 426 (1976); Hawkland, The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check, 74 Com. L.J. 329 (1969)).

8. E.g., Creely v. Leisure Living, Inc., 437 So. 2d 816 (La. 1983); Vicari v. Melancon, 446 So. 2d 899 (La. App. 1st Cir. 1984).

9. E.g., Sears, Roebuck & Co. v. Shamrock Constr. Co., 441 So. 2d 379, 383-84 (La. App. 5th Cir. 1983).

10. E.g., Chevron USA v. Martin Exploration Co., 447 So. 2d 469, 472 (La. 1984) (the word preliminary, by itself, does not necessarily connote a tentative or non-binding agreement); Franks Petro., Inc. v. Mayo, 438 So. 2d 696, 699 (La. App. 2d Cir. 1983) (A right, title, and interest deed is not necessarily indicative of an intent to quitclaim and, therefore, may permit the operation of the after acquired-title doctrine.).

11. E.g., Mitchell v. Clark, 448 So. 2d 681, 685 (La. 1984) (A verbal sale of an immovable is effective if delivery has been made and if the sale is confessed by the vendor under oath.).

12. 439 So. 2d 528 (La. App. 1st Cir.), cert. denied, 443 So. 2d 585 (La. 1983).

friend to take them home; the assistant manager then realized that he had told the cashier the wrong price for the set and so advised the store manager who instructed the stock boy to retrieve the television; the manager called the police department and two officers arrived at the scene; the plaintiffs were advised to obtain a refund and depart. The plaintiffs subsequently instituted a lawsuit containing an allegation, apart from other contentions, of conversion.[13]

The district court found for the defendant and dismissed the action. On appeal, the first circuit affirmed and invoked the principle that "a contract may be invalidated by a unilateral error . . . where the other party knew or should have known it was the principal cause."[14] Since the court was convinced that the plaintiffs knew the true sale price to be $609.00, and not $341.05, the consent necessary for a valid sale was vitiated.[15] The claim of conversion therefore fell because the appellate panel agreed with "the findings of the trial court regarding the status of the contract for the sale of the television set . . . ."[16]

In dissent, Judge Watkins noted that under article 1881 of the Civil Code of 1870,[17] "[e]ngagements entered into through . . . error are not absolutely null, but are voidable by the parties."[18] As a consequence, it was "necessary for K Mart to pursue action in the courts to set aside the sale. For the employees of K Mart to attempt by force to obtain the return of the television set constituted a tortious violation of the Arenas' right of ownership."[19]

Judge Watkins' statements are insightful and correct. The type of self-help action undertaken by the employees of K Mart should not be countenanced in the law.[20] As was ultimately proven in this lawsuit, K

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13. The plaintiffs also sued for damages resulting from mental and emotional stress.

14. 439 So. 2d at 530 (citing La. Civ. Code arts. 1819 & 1823 (1870)). See Nugent v. Stanley, 336 So. 2d 1058 (La. App. 3d Cir. 1976); Deutschmann v. Standard Fur Co., 331 So. 2d 219 (La. App. 4th Cir. 1976).

15. The written reasons of the district court were quoted:

> Receiving the sum of $609.00 plus tax was certainly the principal cause that K Mart had for entering into the sales contract with the Arenas. The court is also convinced that Mr. Arena knew that the true sale price amounted to $609.00, and that he elected to take advantage of Callaway's mistake. Under these circumstances the error of fact on the part of Callaway vitiated the consent necessary to make the transaction a valid sale.

439 So. 2d at 530.

16. Id.

17. La. Civ. Code art. 1881 (1870) ("Engagements made through error, violence, fraud or menace, are not absolutely null, but are voidable by the parties, who have contracted under the influence of such error, fraud, violence or menace, or by representatives of such parties.").

18. 439 So. 2d at 531 (Watkins, J., dissenting).

19. Id.

20. The writer previously has reflected upon the denial of "the concept of self-help" in the law of Louisiana. Comment, Civilian Thoughts on U.C.C. Section 9-503 Self-Help

Mart labored under material error (by reason of the inadvertedness of its employees) in forming a contract with the plaintiffs, but this error cast upon the agreement only the shadow of a relative nullity.[21] Presumptively, the contract of sale was valid and, consequently, ownership of the television set passed to Mr. and Mrs. Arena.[22] While "K Mart was free to pursue action in the courts to have the sale set aside for error . . . until judgment was secured . . . the television set belonged to the Arenas."[23] Simply put, the contract cannot be said to have been *void*.

Certainly, the limited stress and privacy intrusion suffered by the purchasers influenced the outcome of the case; after all, they were barely outside of the store when the problem arose. Be that as it may, the employees of K Mart had no more right unilaterally to declare the contract rescinded and take back the television set in the parking lot than if the buyers had arrived home before the price discrepency was detected. In the latter situation, no one should question the lack of authority of employees of K Mart to recover the television without judicial supervision.

Lawful Cause and Objects for Agreements

Occasionally issues are raised concerning the validity of agreements by reason of alleged unlawfulness of cause or object.[24] In at least two instances during the past year the illegality of objects of agreements resulted in the rejection of contractual claims brought by plaintiffs.

Schwegmann v. Schwegmann[25] essentially involved a palimony claim with the plaintiff asserting, among other things, a right to recover compensation for services rendered to Mr. Schwegmann under a theory of either quasi-contract or *quantum meruit*. In support of this contention, the plaintiff stated that she had performed domestic services, including

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Repossession: Reasoning in a Historical Vacuum, 42 La. L. Rev. 239, 267 (1981). As a philosophical matter, "the law aids the person physically detaining the thing because of this fact, not by reason of a presumed right to possess . . .; the [possessory] action is for the benefit of the person and not the property. In denying self-help, admittedly, the factual status quo is maintained. But, even more importantly, the individual liberty of persons and the maintenance of public order are guaranteed." Id. at 259 (citing F. v. Savigny, Treatise on Possession or the Jus Possessionis of the Civil Law 27 (E. Perry trans. 6th ed. 1848)).

21. La. Civ. Code art. 1881 (1870). Under the authority of article 1882 of the Civil Code of 1870, K Mart may have pursued an action to avoid the contract.

22. La. Civ. Code art. 2456.

23. 439 So. 2d at 531 (Watkins, J., dissenting).

24. E.g., Rosenblath v. Sanders, 150 La. 882, 91 So. 252 (1922) (lease for purposes of prostitution); Martin v. Seabaugh, 128 La. 442, 54 So. 935 (1911) (gambling); Lamy v. Will, 140 So. 2d 794 (La. App. 4th Cir. 1962) (gambling).

25. 441 So. 2d 316 (La. App. 5th Cir. 1983).

cooking, cleaning, chauffeuring, and nursing. She also admitted, however, that she and Mr. Schwegmann had engaged in sexual activities throughout the relationship.[26] It was undisputed that the sexual relationship was one of the reasons Mr. Schwegmann supported the plaintiff. Since it was established by the evidence that the domestic services performed by the plaintiff were "inextricably interwoven with sexual services in a concubinage relationship,"[27] the court concluded that any promise of support made by the defendant was "unenforceable because it is an unlawful contract for meretricious services."[28]

The declaration by the court that illicit sexual services cannot be separated from other lawful activities appears to be consistent with the views expressed by the courts of Illinois,[29] New York,[30] and Georgia.[31] Given the exceedingly strong public policy concerns at play, if a different resolution is desired, "[p]erhaps the legislature should take the lead in searching for solutions to this problem."[32] In any event, as one writer has remarked, the "legal system will have to deal with this complex and troublesome problem with increasing frequency, and society has a

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26. In the words of the fifth circuit, she and Mr. Schwegmann had sexual relations "(1) on their first date in October or November of 1958; (2) throughout the time they dated before living together; (3) while they lived together in his house; and (4) when she visited after she left his house . . . ." Id. at 324.

27. Id.

28. Id. (citing Sparrow v. Sparrow, 231 La. 966, 93 So. 2d 232 (1957); Delamour v. Roger, 7 La. Ann. 152 (1852); Foshee v. Simkin, 174 So. 2d 915 (La. App. 1st Cir. 1965)). In order for a concubine to recover on the quasi-contract theories put forth by the plaintiff, presumably "strict and conclusive proof" is required that the lawful services were not intertwined with sexual favors. This is the test for property disputes. Broadway v. Broadway, 417 So. 2d 1272, 1276 (La. App. 1st Cir.), cert. denied, 422 So. 2d 162 (La. 1982).

29. E.g., Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). A commentator has accurately capsulized the background in *Hewitt*:

> In this case the non-marital cohabitation commenced while the parties were in college and continued for seventeen years. During this period the man completed his education (in dentistry), established a successful practice, and the couple had raised three children. As a successful dentist, the man had accumulated considerable property, all in his name. The Illinois Appellate Court had held that the complaint stated a cause of action, relying heavily on Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106 (1976), but the Illinois Supreme Court reversed, rejecting the Marvin holding that the property agreement could be separated from the cohabitation, and relying on the long standing Illinois rule as to the illegality of such agreements, held that the agreement was not enforceable. . . . The court felt that a change in long standing public policy was a matter for the legislature, not the courts.

W. McClanahan, Community Property in the United States § 5:27, at 325 n.9 (1982).

30. E.g., Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592, 413 N.E.2d 1154 (1980).

31. E.g., Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977).

32. W. McClanahan, supra note 29, § 5:27, at 327.

right to expect that the legislatures and the courts will produce results that are fair and equitable and acceptable . . . ."[33]

In *A Better Place, Inc. v. Giani Investment Co.*,[34] the supreme court considered the illegality of an object of a contract in a more novel setting. The plaintiff had commenced separate lawsuits against the defendant to recover the balances due on open accounts for merchandise sold and delivered, including drug paraphernalia removed from the permissible stream of commerce by the Drug Paraphernalia Act of 1980.[35] According to the court, a determination that the contraband items were included in the sales from the plaintiff to the defendant mandated no recovery for that portion of the sued upon shipments because "a judicial demand for payment of obligations relating to objects which are illegal or contrary to public order or morals will not be entertained."[36]

Extinguishment of Obligations

Article 2130 of the Civil Code of 1870 contains a list of the methods of extinguishment of obligations.[37] Recited therein is remission, and its special rules are stated in articles 2199 through 2206. Of the provisions on remission, article 2203 probably has generated as many disputes over the years as any other part of the Civil Code treating devices of extinguishing obligations.[38] On its face, the tenor of the statute appears relatively clear:

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33. Id.

34. 445 So. 2d 728 (La. 1984).

35. La. R.S. 40:1031-1036 (Supp. 1980), added by 1980 La. Acts, No. 669. The constitutionality of the act was upheld in Tobacco Accessories & Novelty Craftsmen Merchants Ass'n v. Treen, 681 F.2d 378 (5th Cir. 1982).

36. 445 So. 2d at 732.

37. La. Civ. Code art. 2130 (1870) ("Obligations are extinguished: By payment. By novation. By voluntary remission. By compensation. By confusion. By the loss of the thing. By nullity or rescission. By the effect of the dissolving condition, which has been explained in the preceding chapter. By prescription, which shall be treated in a subsequent title.").

38. E.g., Sampay v. Morton Salt Co., 395 So. 2d 326 (La. 1981); First Nat'l Bank v. Green Garden Processing Co., 387 So. 2d 1070 (La. 1980); Louisiana Bank & Trust Co. v. Boutte, 309 So. 2d 274 (La. 1975); Wisconsin Capital Corp. v. Trans World Land Title Corp., 378 So. 2d 495 (La. App. 4th Cir. 1979). See Rubin, Developments in the Law, 1979-1980—Security Devices, 41 La. L. Rev. 389, 390 (1981); Rubin, The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Security Devices, 40 La. L. Rev. 572, 572 (1980); Harrell, The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Security Devices, 36 La. L. Rev. 437, 443-44 (1975); Note, Green Garden: Short Shrift for the Solidary Surety, 41 La. L. Rev. 968 (1981); Note, Aiavolasiti: A Conflict Resolved, A Conflict Ignored, 40 La. L. Rev. 483 (1980); Note, Rights of the Solidary Surety: Louisiana Bank & Trust Co. v. Boutte, 36 La. L. Rev. 279 (1975); Note, Security Rights—Suretyship—Release of Principal Debtor Does Not Discharge Solidary Surety, 49 Tul. L. Rev. 1187 (1975).

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

In construing article 2203, however, the courts consistently have been faced with two problems: (1) a working definition of the "expressly reserved" language in the first paragraph;[39] and (2) the meaning of the second paragraph.[40]

In the aftermath of the decision in *Fridge v. Caruthers*,[41] the first portion of the article has been read in the following manner:

> This article of our Code is a literal translation of article 1285 of the French Code. The French commentators are unanimous in holding that the article means just what it says: From the fact that the creditor renounces his right as to one (of the solidary debtors) the law concludes that he intends to renounce his right as to all. Each of the solidary obligors is liable for the whole debt as principal debtor to the creditors and is only liable as surety to his codebtors, and that is why the creditor may not discharge one without discharging the others.[42]

Article 2203, consequently, may operate as a trap for an unwary plaintiff-creditor in reaching a settlement agreement with one of several solidary debtors.[43] If claims are not reserved expressly against the unreleased solidary obligors, then the debtors *in solido* who were likely not intended to be discharged would be released nonetheless. To counter this harsh result, the courts have adopted this rule:

> There is nothing sacramental about the form in which the reservation shall be made, and, since no one is presumed to renounce a right unless it clearly appear that he intended to do so, it follows that it suffices that the intention to reserve the right against codebtors may be inferred from any expression in the release of one codebtor which negatives the intent to release the other codebtors.[44]

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39. E.g., Cusimano v. Ferrara, 170 La. 1044, 129 So. 630, 632 (1930); Fridge v. Caruthers, 156 La. 746, 752, 101 So. 128, 130 (1924). See also Honeycutt v. Town of Boyce, 341 So. 2d 327, 331 (La. 1977); Dobard v. State Farm Ins. Co., 437 So. 2d 366, 367 (La. App. 4th Cir. 1983).

40. E.g., First Nat'l Bank v. Green Garden Processing Co., 387 So. 2d 1070 (La. 1980); Louisiana Bank & Trust Co. v. Boutte, 309 So. 2d 274 (La. 1975).

41. 156 La. 746, 101 So. 128 (1924).

42. 156 La. at 752, 101 So. at 130.

43. E.g., Billeaudeau v. Lemoine, 386 So. 2d 1359 (La. 1980).

44. Cusimano v. Ferrara, 170 La. 1044, 1047, 129 So. 630, 632 (1930).

In this vein, during the past term, the supreme court somehow managed to construe the following language to contain an express reservation of rights:

> It is further agreed that in the event other parties are responsible to me/us for damages as a result of this accident, the execution of this agreement shall operate as a satisfaction of my/our claim against such other parties to the extent of the pro-rata share of the parties herein.[45]

While the correctness of this interpretation is open to debate, for good or for bad, this subject will soon occupy nothing more than an historical footnote. New article 1803 of the Civil Code, effective January 1, 1985, states that the remission of the debt by the obligee in favor of one obligor "benefits the other solidary obligors in the amount of the portion of that obligor." Recognition is given in the reporter's comments that the law previously reflected by article 2203 has been changed insofar as the "remission of debt in favor of one obligor does not extinguish the solidary obligation, but only reduces it for the other obligors in the amount of the remitted share."[46] So goes another trap for the unwary.

Subrogation

In a cryptic opinion, *Aizpurua v. Crane Pool Co.*,[47] the supreme court dealt with issues of subrogation and the distinctions between sales and building contracts, but resolved neither. The facts of the case are fairly straightforward: the plaintiffs, a husband and a wife, purchased a house on December 6, 1977; prior to the purchase of the home, specifically in 1976, Crane Pool Company constructed and installed a swimming pool in the yard; problems with the pool, including separation of the liner from the cement wall and cracks in the coping, first appeared in December of 1979; and on May 29, 1981, the plaintiffs filed a lawsuit against their vendors, Crane Pool Company and/or Corey Crane, and the property development company. In the trial court, Crane Pool Company and Corey Crane raised the peremptory exceptions of no cause

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45. Roy v. U.S.A.A. Cas. Ins. Co., 453 So. 2d 564, 567 (La. 1984).

46. In this connection, comment (b) provides the following:

> In case of transaction, compromise, or settlement between the obligee and one of the solidary obligors, the liability of the other solidary obligors is reduced in the amount of the portion of that obligor, as in the case of settlement between the victim of a tort and one joint tort-feasor. See Wall v. American Employers Insurance Company, 386 So. 2d 79 (La. 1980); Canter v. Koehring Company, 283 So. 2d 716 (La. 1973); Cunningham v. Hardware Mutual Casualty Company, 228 So. 2d 700 (La. App. 1st Cir. 1969); Harvey v. The Travelers Insurance Company, 163 So. 2d 915 (La. App. 3d Cir. 1964).

47. 449 So. 2d 471 (La. 1984).

of action, no right of action, and prescription which were sustained upon the basis that the actions in redhibition and tort had prescribed and that no privity of contract existed between the plaintiffs and Crane Pool Company and/or Corey Crane. These rulings were affirmed by the intermediate appellate court.[48]

In reversing in part and affirming in part, the court, through Justice Watson, noted "[t]he trial court correctly found that any actions in tort and redhibition against Crane had prescribed."[49] Thus, the question remaining for resolution was "whether plaintiffs had a right of action against Crane for breach of any implied or express warranty in the Crane building contract with the Smiths [the vendors]."[50] The phrasing of this query necessarily indicates, without explanation or analysis, that the proper classification of the agreement entered into between the vendors of the plaintiffs and Crane Pool Company and/or Corey Crane was a lease of labor or industry[51] or a so-called "building contract," not a contract of sale. Although this conclusion may have been right, no account is given why the primary obligation of Crane Pool Company was not one to give, in the sense of delivery (an obligation flowing from the contract of sale),[52] but rather an obligation to do.[53] It should not be overlooked that the lines of demarcation between contracts of sale and building contracts have been hotly contested and never have been particularly clear in the jurisprudence.[54] Since few facts are detailed in the opinion of the supreme court, it is difficult to determine whether or not the conclusion reached is proper.[55]

Less unsatisfactory from an analytical standpoint, and commendable from a result-oriented perspective, is the treatment of subrogation:

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48. Aizpurua v. Crane Pool Co., 439 So. 2d 572 (La. App. 1st Cir. 1983).

49. 449 So. 2d at 472 (citing La. Civ. Code arts. 2546 & 3536).

50. Id.

51. See La. Civ. Code arts. 2756-2777.

52. See Levasseur, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Sales, 39 La. L. Rev. 705, 709-15 (1979).

53. See La. Civ. Code arts. 1761 & 1905 (1870).

54. E.g., Hunt v. Suares, 9 La. 434 (1836); FMC Corp. v. Continental Grain Co., 355 So. 2d 953 (La. App. 4th Cir. 1977); Jefferson Parish School Bd. v. Rowley Co., 350 So. 2d 187 (La. App. 4th Cir. 1977); Henson v. Gonzalez, 326 So. 2d 396 (La. App. 1st Cir. 1976); Vico Concrete Co. v. Antley, 283 So. 2d 830 (La. App. 2d Cir. 1973); Kegler's v. Levy, 239 So. 2d 450 (La. App. 4th Cir. 1970). See also S. Litvinoff, Sale and Lease in the Louisiana Jurisprudence 1-22 (1983); Levasseur, supra note 52, at 710-15.

55. Perhaps a reiteration of the sentiments expressed by Professor Levasseur several years ago in this *Review* is appropriate at this juncture:

> A faithful characterization of a contract should, therefore, include an analysis of the requirements of: first, the subjective cause of the contract; second, the requirement of consent, especially under its aspect of error as to the person which is almost always irrelevant in a contract of sale but quite important in a contract of industry; and third, an analysis of the object of the contract.

Levasseur, supra note 52, at 713.

> The Aizpuruas were subrogated to the Smiths' rights and actions in warranty against "all others." LSA-C.C. Art. 2503. This article has been interpreted as including only actions against other vendors. See LeBlanc v. Ellerbee Builders, Inc., 317 So.2d 1 (La. App. 1 Cir. 1975). This reading of the article erroneously qualifies its literal language. "[T]he right to sue for breach of warranty of quality is transmitted with the object of the sale." XIV Tul. L. Rev. at p. 471. The implied warranty of materials and workmanship in a building contract is one to which a subsequent purchaser is subrogated. Media [Production Consulting, Inc. v. Mercedes-Benz of North America, Inc., 262 La. 80, 262 So.2d 377 (1973)]. Despite lack of privity, one who acquires immovable property can enforce a contract made for the improvement of the property by the person from whom he acquired it. LSA-C.C. art. 2011; Breaux v. Laird, 223 La. 446, 65 So. 2d 907 (1953).[56]

Notably absent from this discussion is any mention of a conventional subrogation of the plaintiffs to the right of the vendors against Crane Pool Company and/or Corey Crane.[57] The statements of the court and the rationale for the decision, therefore, are matters of law, not contractual interpretation.

To the extent the court in *Aizpurua v. Crane Pool Co.* relied upon article 2011 of the Civil Code of 1870[58] to support its ruling, the reasoning is of doubtful validity and will be short-lived. Admittedly, three decades ago the court interpreted article 2011 to permit a purchaser of a house to sue the surety on the contractor's performance bond for alleged non-completion of the construction contract and defective work, when the bond and the building contract were viewed as inseparable.[59] Without doubt, the court again read article 2011 literally but, unfortunately, did not consider the possible impact of its analysis upon the meaning of real rights and real obligations.

The contract entered into between Crane Pool Company and the vendors of the Aizpuruas certainly does not fit within the modes listed in article 2012 of the Civil Code of 1870 for creating real obligations.[60]

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56. 449 So. 2d 473. A good discussion of the *Media Production Consulting* case is contained in Note, Sales—Implied Warranty—Wholesale Distributor Liable for Retail Price of Defective Foreign Automobile, 47 Tul. L. Rev. 473 (1973).

57. The deed was not submitted in evidence at the trial.

58. Article 2011 of the Civil Code of 1870 states as follows:

> Not only the obligation, but the right resulting from a contract relative to immovable property, passes with the property. Thus the right of servitude in favor of immovable property, passes with it, and thus also the heir or other acquirer will have the right to enforce a contract made for the improvement of the property by the person from whom he acquired it.

59. Breaux v. Laird, 223 La. 446, 449-52, 65 So. 2d 907, 908-09 (1953).

60. Article 2012 of the Civil Code of 1870 provides this:

To amplify, it should seem unusual to conclude that Crane Pool Company held corresponding real rights against the Aizpuruas, say for any unpaid credit portion of the pool, merely because of the sale of the property with the improvement,[61] without the necessity of filing notice of a lien.[62] Moreover, the agreement between Crane Pool Company and the vendors of the Aizpuruas did not affect the *ownership* of the property, which is truly the issue in classifying real rights and real obligations.[63]

Fortunately, an extended canvassing of this subject is not needed. Article 2011 of the Civil Code of 1870 has been suppressed legislatively. New article 1764 of the Civil Code treats the effects of real obligations:

> A real obligation is transferred to the universal or particular successor who acquires the movable or immovable thing to which the obligation is attached, without a special provision to that effect.
>
> But a particular successor is not personally bound, unless he assumes the personal obligations of his transferor with respect to the thing, and he may liberate himself of the real obligation by abandoning the thing.

Although not entirely clear from the text of new article 1764, comment (d) specifically addresses the problem raised in *Aizpurua*:

> Real obligations may be created in three ways:
> 1. By the alienation of immovable property, subject to a real condition, either expressed or implied by law.
> 2. By alienating to one person the immovable property, and to another, some real right to be exercised upon it.
> 3. By the creation of a right of mortgage upon the immovable property.
>
> All these contracts give rise to obligations purely real on the part of those who acquire the land, under whatever species of title they possess it; they are not personally liable, but the real property is, and, by abandoning it to the obligee, they relieve themselves from all responsibility.
>
> A sale subject to a rent charge, or to a right of redemption as consideration of the sale, are examples of the first kind of obligations; servitudes, the right of use and habitation and usufruct, are examples of the second; and the several kinds of mortgages, and the creation of a rent charge, of the third.

61. The solution to this problem offered by article 2012 of the Civil Code of 1870 does not appear satisfactory: The contracts "give rise to obligations purely real on the part of those who acquire the land, under whatever species of title they possess it; they are not personally liable, but the real property is, and, by abandoning it to the obligee, they relieve themselves from all responsibility."

62. See La. R.S. 9:4801-4842 (Supp. 1982).

63. "Strictly speaking, real obligations are always duties incidental and correlative to real rights. They are obligations in the sense that they are duties imposed on a particular person who owns or possesses a thing subject to a real right, and they are real in the sense that, as correlative of a real right, these obligations attach to a particular thing and are transferred with it without the need of an express assignment or subrogation." A. Yiannopoulos, Property § 143, at 381-82, in 2 Louisiana Civil Law Treatise (2d ed. 1980). For Professor Yiannopoulas's critique of article 2011, see id. § 141, at 371-72.

> A particular successor, that is, one who acquires a thing by particular title, is not bound by the personal obligations of his author with respect to the thing, unless he has assumed these obligations by delegation. Conversely, a particular successor does not acquire, without stipulation to that effect, any personal rights that his author has with respect to the thing. For example, if the owner of an immovable who has made a contract for its repair sells the immovable, the purchaser is not bound to perform the obligation of the owner under the repair contract unless he assumes that obligation. Conversely, the purchaser is not bound to perform the obligation of the owner under the repair contract unless he assumes that obligation. Conversely, the purchaser does not acquire any right under the repair contract unless such a right is assigned to him. Civil Code Article 2011 (1870) has been suppressed because its provisions are conceptually inconsistent with other provisions of Louisiana law.[64]

Under the holding of *Aizpurua v. Crane Pool Co.*, however, an assignment or conventional subrogation in favor of the purchaser is not necessary for the buyer to acquire rights under a repair contract entered into by the vendor and a third person concerning the property sold. The purchaser is subrogated, according to the expansive interpretation of article 2503 of the Civil Code, to the rights of the seller.[65]

The next inquiry is what type of subrogation is thereby effected. New article 1829 of the Civil Code provides an answer in its treatment of legal subrogation:

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64. Furthermore, comment (g) notes that articles 2011 through 2014 and 2016 through 2019 of the Civil Code of 1870 "have not been reproduced because they are unnecessary in light of other provisions of the Civil Code."

65. This conclusion is not new. McEachern v. Plauche Lumber & Constr. Co., 220 La. 696, 707, 57 So. 2d 405, 408 (1952) (noting that "the buyer is subrogated to the seller's right to action in warranty against all others, Article 2503, Civil Code"). Mack Barham, former Associate Justice of the Supreme Court of Louisiana and former Professor of Law at Tulane University, has written that while "[e]xtending article 2503 in this manner meets the problem of the privity requirement . . . there are several problems encountered in extending the article as the courts have done." Barham, Redhibition: A Comparative Comment, 49 Tul. L. Rev. 376, 383 (1975). The difficulties are at least twofold: for the action in warranty to be available, the defect in the thing or the work must have existed at the time of the sale; and if the immediate vendor's right of action has prescribed then the purchaser can claim nothing by reason of subrogation, since "[i]t is well settled that a subrogee can have no greater rights than the subrogor." Reliance Ins. Co. v. Tadlock, 420 So. 2d 548, 549 (La. App. 2d Cir. 1982). Accordingly, Mr. Barham has offered this suggestion:

> Rather than extending article 2503 as the courts have tended to do in the past, an alternative, consonant with civilian methodology and our heritage of civil law, would be to analogize to the warranty against eviction in article 2503 when dealing with a case involving a warranty against redhibitory vices. Article 2475 states that the seller is bound to two principal obligations, that of delivering

Subrogation takes place by operation of law:

(1) In favor of an obligee who pays another obligee whose right is preferred to his because of a privilege, pledge, or mortgage
(2) In favor of a purchaser of movable or immovable property who uses the purchase money to pay a creditor holding any privilege, pledge, or mortgage on the property;
(3) In favor of an obligor who pays a debt he owes with others or for others and who has recourse against those others as a result of the payment;
(4) In favor of an heir with benefit of inventory who paid the debts of the estate with his own funds; and
(5) In other cases provided by law.[66]

Surely, the construction of article 2503 allowing the subrogation of purchasers to the rights of vendors is a case provided by law, within the meaning of paragraph 5 of new article 1829.

Contribution and Indemnification

Just over five years ago, the supreme court in *Thomas v. W & W Clarklift, Inc.*[67] foreshadowed its later redefinition of solidary obligors in *Foster v. Hampton*[68] by viewing a company which had repaired an overhauled machine causing personal injury as a potential solidary obligor with executive officers of the employer of the claimant. In *Thomas*, the plaintiff, an employee of Dennis Sheen Transfer Company, was injured when a forklift fell on him. The machine had been purchased as a used item from W & W Clarklift, which had overhauled it. A lawsuit was instituted against W & W Clarklift and its insurer under theories of negligence and breach of warranties. Twenty-nine months after the employee's action had been filed, the principal defendants brought third party demands against officers and supervisory personnel of Dennis Sheen Transfer Company, alleging negligence in failing to discover the forklift's unsafe condition and seeking contribution or indemnity. After the fourth circuit affirmed on the basis of prescription,[69] the Supreme Court of Louisiana reversed and ruled that W & W Clarklift may have been a solidary obligor with the Dennis Sheen Transfer Com-

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and that of warranting the thing which he sells. It is arguable that these two obligations are conjunctive and indivisible because delivery constitutes title, and eviction or redhibitory vices result in the buyer not having bought what he intended to buy, and, figuratively speaking, he is dispossessed of title in the thing he thought he had purchased. Thus, if an object purchased is unfit for the use intended, the end result parallels dispossession and is analogizable thereto.

Barham, supra (footnote omitted).

66. La. Civ. Code art. 1829.
67. 375 So. 2d 375 (La. 1979).
68. 381 So. 2d 789 (La. 1980).
69. 365 So. 2d 913, 918 (La. App. 4th Cir. 1979).

pany's supervisory employees and that therefore an intradebtor action potentially was available.[70] The case was remanded to the trial court.

In the ensuing years, the demands brought by the personal injury plaintiff were settled and the third-party claim of W & W Clarklift was dismissed after a trial on the merits. An appeal was taken and the fourth circuit affirmed the judgment of the district court in a significant opinion.[71] To the appellate panel, with Judge Redmann as the author, the primary issue was whether the assumed solidary liability of W & W Clarklift and the executive officers of Dennis Sheen Transfer Company to the personal injury plaintiff entitled W & W Clarklift to contribution under article 2103 of the Civil Code of 1870 or whether the "affair . . . concern[ed] only one of the co-obligors in solido," in which case "that one is liable for the whole debt toward the other co-debtors," as envisioned by article 2106 of the Civil Code.[72] The court resolved the contest in favor of the executive officers:

> We conclude that any liability the [executive officers] might have is not the result of their personal fault but only of a vicarious or strict liability for the fault of Clarklift, and that therefore, in the words of C.C. 2106, the affair concerns only Clarklift and Clarklift is liable for the whole debt towards the [executive officers].[73]

In so ruling, the fourth circuit confirmed the prediction of the United States Fifth Circuit Court of Appeals in *Carter v. EPSCO, Inc.*[74]

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70. 375 So. 2d at 378.

71. 444 So. 2d 1300 (La. App. 4th Cir. 1984).

72. Id. at 1302. The full text of article 2106 of the Civil Code of 1870 reads as follows: "If the affair for which the debt has been contracted in solido, concern only one of the co-obligors in solido, that one is liable for the whole debt towards the other co-debtors, who, with regard to him, are considered only as his securities." The policy underlying article 2106 of the Civil Code of 1870 has been carried forth in new article 1804 which states that "[i]f the circumstances giving rise to the solidary obligation concern only one of the obligors, that obligor is liable for the whole to the other obligors who are then considered only as his sureties."

73. 444 So. 2d at 1302. Essays on the subject of contribution and indemnification include: Holloman, Contribution Between Tort-Feasors: Treatment By the Courts of Louisiana, 19 Tul. L. Rev. 254 (1944), Redmann, Louisiana Civil Code Principles of Contribution and Indemnity: Solidary Obligations and Suretyship, 17 Loyola L. Rev. 297 (1971), Tilting Against Windmills, supra note 3, at 1285-90, and Prescribing Solidarity, supra note 3, at 701-06.

74. 681 F.2d 1062, 1066-67 (5th Cir. 1982):

> An "innocent" debtor held liable *in solido* for the creditor's protection may have the recourse of indemnification against a co-obligor who is the actual wrongdoer. This equitable adjustment of rights among solidarily bound debtors has been recognized by the Supreme Court of Louisiana. *Appalachian Corp. v. Brooklyn Cooperage Co.* and *Sutton v. Champagne* are early examples. See Johnson, *Developments in the Law, 1979-1980—Obligations*, 41 La. L. Rev. 355, 358 (1981). And we find in the Civil Code section titled "Of the Rules Which Govern Obligations with Respect to Debtors In Solido," article 2106,

on this matter and decided in accord with the views recently expressed in this *Review*.[75]

Very recently, in *Dusenbery v. McMoran Exploration Co.*,[76] the supreme court, in reversing the rulings of the trial and the intermediate appellate courts, correctly followed the principles set forth previously in *Appalachian Corp. v. Brooklyn Cooperage Co.*[77] and summarized the following standard regarding indemnification: "When liability *to the injured party* is imposed on one party on the basis of strict liability only and on a second party on the basis of negligence or actual fault, the strict liability defendant may recover full indemnity by incidental demand against the party actually at fault."[78] The rationale for this rule is simple and straightforward:

> While both defendants are liable to the injured party, the defendant who is liable *only* as the owner of the unreasonably dangerous structure should be made whole by the defendant who actually caused the unreasonably dangerous condition for which the owner is strictly liable. As between the two defendants, ultimate responsibility rests with the party who was actually at fault, and the fact that the law imposed liability on the owner to the injured party does not detract from the owner's right to indemnification against the party who actually created the dangerous condition.[79]

These statements are consistent with the analysis of the fourth circuit in *Thomas v. W & W Clarklift, Inc.*

Although much is to be applauded in the *Dusenbery* opinion, footnote 1, gratutitious in that an employer-employee situation was not before the court, is bothersome. In an attempt to explain its position on indemnification in cases involving vicarious liability, the court noted, "[i]t is doubtful that indemnity would be allowed to an employer against an employee for simple negligence, since such recovery is contrary to the very purpose of imposing vicarious liability on an employer who benefits from the services of the employee in the course of his em-

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which, while somewhat cryptic in its phraseology, supports this ultimate apportionment of the responsibility of solidary obligors. Article 2106 ordains that "if the affair for which the debt has been contracted in solido, concerns only one of the coobligors in solido, that one is liable for the whole debt towards the other codebtors, who, with regard to him, are considered only as his securities."

75. See Johnson, Developments in the Law, 1979-80—Obligations, 41 La. L. Rev. 355, 358 (1981); Tilting Against Windmills, supra note 3, at 1285-90; Prescribing Solidarity, supra note 3, at 710-15.

76. 458 So. 2d 102 (La. 1984).

77. 151 La. 41, 91 So. 539 (1922).

78. 458 So. 2d at 105 (emphasis in original).

79. Id. (emphasis in original).

ployment."[80] Perplexing indeed is the idea that an employer is not entitled to indemnification or reimbursement from its negligent employees because of the principles of vicarious liability, for indemnification has been the long standing judicial rule and was ordered as recently as 1981 by the first circuit.[81] While the issue of indemnification of an employer by an employee may soon be academic,[82] pause should be caused by the statement that reimbursement is contrary to the purposes of vicarious responsibility. The liability of an employer, "purely legal or statutory in nature," merely provides "the plaintiff-creditor with a solvent obligor . . . ."[83] The statutory grounding of the answerability under article 2320 of the Civil Code, even as a solidary debtor, however, is not significant between the employer and the employee. Once the plaintiff-creditor has been satisfied, no reason exists to suggest that the employer should bear all of the loss. Upon this premise, Professor Johnson astutely has asked the following question: "[W]hat public policy is being served by insulating the wrongdoer from even the possibility of relieving his employer of the burden of his wrongdoing?"[84]

A re-thinking of the validity of the sentiments expressed in footnote 1 of *Dusenbery v. McMoran Exploration Co.* seems in order. If the issues of contribution and indemnification between and among solidary obligors are to be resolved properly, careful analysis is needed of the tenets underlying each obligor's indebtedness. And debtors actually at fault should be required to indemnify other obligors *in solido*, called upon to pay creditors.

Unjust Enrichment

In the seventeen years since life was breathed into the *actio de in rem verso*, or unjust enrichment action, by the supreme court in *Minyard*

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80. Id. at 104 n.1.

81. Curry v. Iberville Parish Sheriff's Office, 405 So. 2d 1387, 1391 (La. App. 1st Cir. 1981), cert. denied, 410 So. 2d 1130 (La. 1982). See Robertson, Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana, 44 La. L. Rev. 1341, 1383 (1984). Caution is urged in reviewing this work, however. Although Professor Robertson's article is very thought provoking and illuminating in many respects, the writer completely disagrees with the suggestion that Sampay v. Morton Salt Co., 395 So. 2d 326 (La. 1981), "implicitly overruled the right of indemnification" of the employer. Robertson, supra, at 1384. This reading of *Sampay* is at least as "radical" as the idea that the released "tortfeasor employee is no longer protected by the receipt and release from an indemnity action." Id. at 1383-84 n.223. Critical commentary exists regarding *Sampay v. Morton Salt Co.*; see Johnson, Developments in the Law, 1980-1981—Obligations, 42 La. L. Rev. 388 (1982); Tilting Against Windmills, supra note 3.

82. La. R.S. 9:3921 (Supp. 1984). See supra notes 3-5 and accompanying text.

83. Prescribing Solidarity, supra note 3, at 695.

84. Johnson, supra note 81, at 396.

v. Curtis Products, Inc.,[85] many plaintiffs otherwise unable to bring claims to a successful end have seized upon the theory. Relatively few, however, are able to satisfy the five criteria for the action, as outlined in *Minyard* and the later seminal opinion in *Edmonston v. A-Second Mortgage Co.*:[86] (1) an enrichment on the part of the defendant; (2) an impoverishment on the part of the plaintiff; (3) a connection between the enrichment and the impoverishment; (4) an absence of justification or cause for the enrichment and impoverishment; and (5) the unavailability of any other legal remedy. The case of *Creely v. Leisure Living, Inc.*[87] dramatizes the difficulty in pursuing an *actio de in rem verso*.

Upon a suit initiated by the attorney-notary who passed an act of sale of immovable property to determine the rightful claimant to a real estate commission between the builder/seller, Leisure Living, Inc. ("Leisure Living"), and the real estate broker, Jesse Martin Realty Mart, a demand of unjust enrichment was made by the realtor. Factually, Leisure Living had entered into a six-month listing agreement with Jesse Martin Realty Mart on July 24, 1979, in an effort to sell five houses in a particular subdivision in Jefferson Parish. On October 24, 1979, an agreement to purchase a home to be constructed by Leisure Living was executed by prospective purchasers. The contract bore the Jesse Martin Realty Mart letterhead and included a typical condition of financing. The contract also specified that the purchase of the house to be built was "predicated on sale of purchaser's home . . . listed for sale with Jesse Martin Realty Mart."[88] Loan approval for the house to be constructed was not secured by the stipulated deadline, January 8, 1980, through no fault of any party to the contract. Thus, the agreement to buy was no longer enforceable.

The prospective vendees apparently told the agent for Jesse Martin Realty Mart that they had decided to purchase elsewhere directly from a builder. In truth, the potential buyers were disenchanted with the real estate broker and were concerned about the broker's loyalty to Leisure Living. In late January of 1980, the loan application made by the prospective purchasers in connection with the October 24, 1979, agreement was approved. The attorney-notary for the lender discovered that the purchase agreement had lapsed, and he contacted the borrowers-purchasers to learn whether or not a release had been prepared. A release subsequently was signed on behalf of Leisure Living and by the prospective purchasers; the agent for Jesse Martin Realty Mart then returned the deposit given at the time of the execution of the agreement to buy.

At trial, the agent for Jesse Martin Realty Mart testified that she

85. 251 La. 624, 205 So. 2d 422 (1967).
86. 289 So. 2d 116 (La. 1974).
87. 437 So. 2d 816 (La. 1983).
88. Id. at 818.

was under the impression the purchasers were buying directly from another builder. To the contrary, a new purchase agreement was executed by Leisure Living and the purchasers for the same property covered by the lapsed contract of October 24, 1979. No mention was made of any realtor's commission to be paid by the seller. The act of sale was passed on March 18, 1980. At that time, the attorney-notary, anticipating Jesse Martin Realty Mart might claim a commission, withheld monies from the sale, and instituted the concursus proceeding. In rejecting the contention of unjust enrichment raised by Jesse Martin Realty Mart the supreme court failed to discern an absence of justification or cause for the enrichment and impoverishment, since "the agent had no legal right to the fee either under contract or under our jurisprudence concerning procuring cause . . . ."[89] Accordingly,

> the profit that the builder enjoyed on the sale of his property after expending time, money, and energy to complete construction of the house is not a windfall, nor somehow undeserved. Rather it is a profit to which he is properly entitled. Admittedly this profit is increased slightly by his not paying a commission. But, as discussed before, there was no obligation on his part, by contract or otherwise to pay a commission.[90]

No flaw is apparent in the analysis of the supreme court, demonstrating the problems in pursuing the *actio de in rem verso*. Nevertheless, the claim of unjust enrichment continues to be raised as one of last resort. Perhaps a strong judicial message is necessary to show clearly the strict limitations, and the reasons therefore,[91] upon the action.

Interference with Contractual Relations

Although this is a subject more properly covered in another part of this Symposium, twice during the past term the supreme court indicated that intentional and willful interference with contractual relations should be actionable,[92] notwithstanding the holding in *Forcum-James Co. v. Duke Transportation Co.*[93] If this laudible change does come about in the near

89. Id. at 822-23. The jurisprudence on the subject of procuring cause is canvassed in Comment, The Law of Real Estate Brokerage Contracts: The Broker's Commission, 41 La. L. Rev. 857, 899-904 (1981).

90. Id. at 823.

91. Ironically, Professor Nicholas, the author of the very influential article on unjust enrichment which likely prompted the revival of the interest in the action, commented in-depth on the "reasons for the hostility which the doctrine . . . has sometimes encountered." Nicholas, Unjustified Enrichment in the Civil Law and Louisiana (pt. 1), 36 Tul. L. Rev. 605, 606 (1962). It is submitted that a more hostile response by the courts is justified to the meritless invocations of the *actio de in rem verso*.

92. Sanborn v. Oceanic Contractors, Inc., 448 So. 2d 91, 95 n.5 (La. 1984); PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058, 1059 n.1 (La. 1984).

93. 231 La. 953, 93 So. 2d 228 (1957).

future, the law of Louisiana finally would be aligned with the rule prevailing in every other jurisdiction in this country, as was noted by Professor Malone twenty years ago.[94]

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94. Malone, The Work of the Louisiana Appellate Courts for the 1963-1964 Term—Torts, 25 La. L. Rev. 334, 341 (1965) ("Unfortunately, Louisiana is the only remaining American jurisdiction where the malicious inducement of a breach of contract is not regarded as an actionable wrong.").