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on the note. By basing its decision on section 40, the court kept the Louisiana rule in conformity with the Louisiana decisions prior to the adoption of the NIL,[11] but missed an opportunity to clarify the law. If the suggested solution to the conflict between NIL sections 40 and 34 is sound, and if the only issue had been the necessity of a special endorsee's endorsement, defendant was correct in arguing that GMAC's endorsement was necessary for plaintiff to be able to sue on the note since the note was originally order paper, converted into bearer paper by an endorsement in blank, and subsequently specially endorsed. It is submitted that sections 34 and 9(5) of the NIL should have been applied, rather than sections 40 and 48, with the result that GMAC's endorsement was necessary for negotiation of the note. The equitable result reached in the instant case could have been obtained by another method, however, and all conflict under the NIL could have been avoided. Since the plaintiff in the instant case *reacquired* the specially endorsed instrument, he would be "remitted to his former rights" under section 121 of the NIL. Thus, by applying section 48, he is entitled to strike out his endorsement and all subsequent ones, and sue on the note in his former right as one to whom the note was originally issued.[12]

A. L. Wright II

CIVIL PROCEDURE — COMPROMISE WITH JOINT TORTFEASOR — EFFECT ON THIRD PARTY DEMAND

Plaintiff, a guest passenger, was injured in an automobile collision allegedly caused by the concurrent negligence of his host driver and the employee-driver of the other vehicle. Plaintiff sued his host's insurer and the owner of the other vehicle

11. *E.g.*, Wood v. Tyson, 13 La. Ann. 104 (1858); Squier v. Stockton, 5 La. Ann. 120 (1850). The court, however, did not purport to rely on these decisions. Query: is there any inference to be drawn from the fact that Louisiana adopted the NIL subsequent to these decisions? If anything, adoption would seem to indicate an intent to deviate from these decisions rather than intent to codify them.

12. Under the provisions of NIL § 184 and § 191, a note made payable to the order of the maker is not *issued* until it is endorsed by the maker and delivered to a party who takes it as a holder. NIL § 191 provides that "'Issue' means the first delivery of the instrument, complete in form, to a person who takes it as a holder," and under NIL § 184, "a note drawn to the maker's own order . . . is not complete until endorsed by him."

and its insurer. In return for a cash settlement, plaintiff compromised with his driver's insurer, agreeing to release it from liability, to dismiss suit against it, and to indemnify it for any further claim which it might be condemned to pay as a result of the accident, but reserving his right of action against the other defendants. The other defendants filed a third-party demand to bring the released insurer back into the action to determine its solidary liability. The trial court dismissed the third-party demand. The Third Circuit Court of Appeal affirmed. *Held,* when the injured party compromises with one joint tortfeasor,[1] reserving his rights against another, the remaining tortfeasor cannot maintain a third-party demand against the released party for contribution, but the injured party must reduce his demand against the remaining tortfeasor by the virile part of the released party. *Harvey v. Travelers Ins. Co.,* 163 So. 2d 915 (La. App. 3d Cir. 1964).

Solidary obligations arise either by convention[2] or by law.[3] In either case, as each solidary obligor is separately bound for the same debt, the creditor can require any one of them to pay the full amount of the debt, and such payment releases the other debtors from their obligations toward the creditor.[4] Among the debtors themselves, however, the liability is divided.[5] The debtor

1. This court did not decide that either driver was in fact a tortfeasor. In order to determine the probable effect of the compromise agreement upon the plaintiff's claim, and thus to decide the third-party demand issue, it was necessary to assume that the drivers were joint tortfeasors.

2. LA. CIVIL CODE art. 2082 (1870): "When several persons obligate themselves to the obligee by the terms *in solido,* or use any other expressions, which clearly show that they intend that each one shall be separately bound to perform the whole of the obligation, it is called an obligation *in solido* on the part of the obligors."

3. *Id.* art. 2093. "An obligation *in solido* is not presumed; it must be expressly stipulated.

"This rule ceases to prevail only in cases where an obligation *in solido* takes place of right by virtue of some provisions of the law."

4. *Id.* art. 2091: "There is an obligation *in solido* on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor."

For comparative studies of multiparty obligations in general, and solidary obligations in particular, see Comments, 14 LA. L. REV. 828 (1954), 25 TUL. L. REV. 217 (1951) respectively.

5. The right of solidary debtors to seek contribution from co-debtors is established in LA. CIVIL CODE art. 2103 (1870). Prior to its amendment in 1960, article 2103 stated: "The obligation contracted *in solido* towards the creditor, is of right divided amongst the debtors, who, amongst themselves, are liable each only for his part and portion." See the present version of article 2103, quoted in note 20 *infra.*

who pays the whole debt is entitled to claim from each co-debtor contribution for his virile part of the debt.[6] This right to contribution flows from the legal subrogation of the co-debtor who pays the debt to the rights of the creditor against the other co-debtors.[7] Of course, in order for one debtor to be subrogated to a creditor's rights against another, necessarily the other must be legally obligated to the creditor at the time satisfaction is made by the one seeking to be subrogated.[8]

It is well settled that joint tortfeasors are solidarily liable for the damage which they cause.[9] Prior to 1961, however, the courts seemed to take the view that the tort itself created a substantive right only in favor of the injured person against the tortfeasor. No rights existed between the tortfeasors until they had been judicially determined to be joint tortfeasors, and therefore debtors *in solido,* in a suit brought by the injured person.[10] Once one of two joint tortfeasors judicially condemned *in solido* to pay damages paid the full judgment, he then had the right to demand contribution from his co-debtor for half the amount,[11]

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6. *Id.* art. 2104: "If one of the codebtors *in solido* pays the whole debt, he can claim from the others no more than the part and portion of each.

"If one of them be insolvent, the loss occasioned by his insolvency must be equally shared amongst all the other solvent codebtors and him who has made the payment."

7. See Shropshire v. His Creditors, 15 La. Ann. 705 (1860): A. Ledoux & Co. v. Rucker, 5 La. Ann. 500 (1850); Howe v. Frazer, 2 Rob. 424 (La. 1842).

Subrogation is the substitution of one person for another with reference to a lawful claim, demand, or right. See Comment, 25 TUL L. REV. 358 (1951).

LA. CIVIL CODE art. 2161 (1870): "Subrogation takes place of right:

". . .

"3. For the benefit of him who, being bound with others or for others, for the payment of the debt, had an interest in discharging it."

8. See Ledoux v. Durrive, 10 La. Ann. 7 (1855).

9. Joint tortfeasors are parties who either act together in committing a wrong, or whose independent acts unite in causing a single injury. LA. CIVIL CODE art. 2324 (1870) states: "He who causes another person to do an unlawful act, or assists or encourages in the commission of it, is answerable, *in solido,* with that person, for the damage caused by such act." This has been held to etablish the solidary liability of joint tortfeasors, including joint tortfeasors through concurrent negligence. See Reid v. Lowden, 192 La. 811, 180 So. 286 (1939); Quatray v. Wicker, 178 La. 289, 151 So. 208 (1963); Peats v. Martin, 133 So. 2d 920 (La. App. 2d Cir. 1961).

10. See Aetna Life Ins. Co. v. De Jean, 185 La. 1074, 171 So. 450 (1936); Sincer v. Heirs of Bell, 47 La. Ann. 1548, 18 So. 755 (1895); De Cuers v. Crane Co., 40 So. 2d 61 (La. App. Orl. Cir. 1949).

11. Quatray v. Wicker, 178 La. 289, 151 So. 208 (1933); Note, 9 TUL. L. REV. 125 (1934). There is a right to contribution when there is a common burden which in equity should be equally borne. For historical analyses of contribution between joint tortfeasors in Louisiana, see Holloman, *Contribution Between Tortfeasors: Treatment by the Courts of Louisiana,* 19 TUL. L. REV. 254 (1944); Comments, 22 LA. L. REV. 818 (1962), 37 TUL. L. REV. 525 (1963).

Contribution is distinguished from indemnity, where one party reimburses another for all that the latter is required to pay. See Appalachian Corp. v.

on the basis of articles 2103 and 2161 of the Civil Code, which were held applicable to delictual as well as contractual solidary obligations.[12] But the injured party alone could institute the initial action, and he could institute it against any or all of those who might be liable to him.

If the plaintiff chose to sue one of two alleged tortfeasors, there was unfortunately no procedure in Louisiana law prior to 1961 by which the defendant could call in the other alleged tortfeasor.[13] In 1954, the Louisiana legislature had authorized third-party practice in all civil proceedings in the Louisiana courts,[14] thereby allowing the defendant in a principal action to bring into the action any person who is or may be liable to him for all or part of the principal demand.[15] *Kahn v. Urania Lumber Co.*,[16] however, held that this act was merely procedural, and did not change the substantive Louisiana rule denying contribution between joint tortfeasors until and unless one of them pays

Brooklyn Cooperage Co., 151 La. 41, 91 So. 539 (1922); Stewart v. Roosevelt Hotel, Inc., 170 So. 2d 681 (La. App. 4th Cir. 1965); American Employers' Ins. Co. v. Gulf States Util. Co., 4 So. 2d 628 (La. App. 1st Cir. 1941); Rumpf v. Callo, 16 La. App. 12, 132 So. 763 (Orl. Cir. 1931), granting indemnity to one required to pay damages, if he is only technically or constructively at fault, from one primarily responsible for the act which caused the damages. See also Note, 4 LA. L. REV. 451 (1942); *but see* Meunier v. Duperron, 3 Mart. (O.S.) 285 (La. 1841), where indemnification was not allowed for a criminal fine.

12. In Loussade v. Hartman, 16 La. 117, 120 (1840), the court stated: "We are of opinion, that being without a rule given us by the legislature for the prosecution of joint actions, on obligations arising from trespasses, we cannot resort to an arbitrary one, but are bound to adopt that given in cases that have the greatest analogy to the one before us. Now, suits in actions on joint obligations resulting from contracts, have the greatest analogy to suits on joint obligations arising from trespasses. We, therefore, adopted the rule in the code relative to conventional obligations." This reasoning is no less applicable to solidary obligations arising from delict. See Leblanc v. Pennsylvania Cas. Co., 209 La. 435, 24 So. 2d 678 (1946); Reid v. Lowden, 192 La. 811, 189 So. 286 (1939); Orr & Lindsley v. Hamilton, 36 La. Ann. 790 (1884); American Employers' Ins. Co. v. Gulf States Util. Co., 4 So. 2d 628 (La. App. 1st Cir. 1941); Recile v. Southern United Ice Co., 17 La. App. 611, 136 So. 769 (1st Cir. 1931).

13. For a comparative discussion of the call in warranty and the third-party demand, see *Survey of 1954 Louisiana Legislation: Courts and Judicial Procedure*, 15 LA. L. REV. 38, 46 (1954).

14. La. Acts 1954, No. 433 (originally appearing as LA. R.S. 13:3381 (1950), now incorporated into LA. CODE OF CIVIL PROCEDURE arts. 1111-1116 (1960).

15. LA. CODE OF CIVIL PROCEDURE art. 1111 (1960): "The defendant in a principal action by petition may bring in any person, including a codefendant, who is his warrantor, or who is or may be liable to him for all or part of the principal demand.

"In such cases the plaintiff in the principal action may assert any demand against the third party defendant arising out of or connected with the principal demand. The third party defendant thereupon shall plead his objections and defenses in the manner prescribed in Articles 921 through 969, 1003 through 1006, and 1035. He may reconvene against the plaintiff in the principal action or the third party plaintiff, on any demand arising out of or connected with the principal demand, in the manner prescribed in Articles 1061 through 1066."

16. 103 So. 2d 476 (La. App. 2d Cir. 1958).

a judgment rendered against both *in solido* in a suit brought by the injured party.[17] Since contribution arises on the theory that payment by one discharges all, no right of contribution could arise from the payment of a debt for which the others were not bound, and the tortfeasor who satisfied a judgment had no action for contribution against a co-tortfeasor not adjudged liable.[18]

To overrule *Kahn,*[19] the Louisiana legislature amended article 2103 of the Civil Code[20] to allow the initial defendant to implead a co-tortfeasor as a third-party defendant, whether the co-tortfeasor was sued initially by the plaintiff or not.[21] Subsequently the Louisiana Supreme Court held that the initial defendant was entitled to implead an alleged co-tortfeasor under article 1111 of the Code of Civil Procedure, because the amendment to article 2103 created a right to contribution between joint wrongdoers in favor of the one who pays the demand.[22]

17. *Id.* at 481: "The [third-party demand] statute is clearly procedural in character and a study thereof discloses no intention on the part of the Legislature to effectuate a change in the substantive law as pertains to the right of contribution as between joint tort-feasors. Had the Legislature intended such a change, its intent could have been expressed unequivocably (sic) and in no uncertain terms, in which event there would be no necessity for an attempt to interpolate, under the guise of interpretation, a provision which was not incorporated in the statute."

Id. at 479 "[T]here is no substantive law in this State granting or conferring a right upon a joint tort-feasor to contribution from another tort-feasor as such and simply because of such relationship. *The right of contribution exists as between them only when they have become solidary obligors as judgment debtors, and then where one has paid the obligation, or a portion thereof, at least, in excess of his pro rata share.*"

18. Sincer v. Heirs of Bell, 47 La. Ann. 1548, 18 So. 755 (1895).

19. See Vidrine v. Simoneaux, 145 So. 2d 400 (La. App. 3d Cir. 1962); McMahon, *Explanatory Note,* in LSA — CIVIL CODE art. 2103, at 67 (Supp. 1964): "Amended on the recommendation of the Louisiana State Law Institute to provide a substantive law base for the enforcement of contribution among joint tort feasors through the third party demand. This article, as amended, implements Arts. 1111-1116, LSA — Code of Civil Procedure, and overrules legislatively Kahn v. Urania Lumber Co."; *Louisiana Legislative Symposium: 1960 Regular Session — Torts,* 21 LA. L. REV. 78 (1960).

20. LA. CIVIL CODE art. 2103 (1870), as amended, La. Acts 1960, No. 30, § 1: "When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi contract, an offense, or a quasi offense, it should be divided between them. As between the solidary debtors, each is liable only for his virile portion of the obligation.

"A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary co-debtor by making him a third party defendant in the suit, as provided in Articles 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff."

21. See Breaux v. Texas & Pac. Ry., 147 So. 2d 693 (La. App. 1st Cir. 1962).

22. Brown v. New Amsterdam Cas. Co., 243 La. 271, 142 So. 2d 796 (1962). In *Brown* the tort occurred prior to January 1, 1961, the effective date of the

Since the right between joint tortfeasors to contribution is based on the subrogation of the tortfeasor who satisfies the debt to the rights of the injured person, the conventional discharge of one debtor, which affects the remaining rights of the creditor,[23] has important effects on the right of contribution. A compromise with or release of one solidary debtor, without the express reservation in writing of the creditor's rights against the other co-debtors, releases all the solidary debtors. Since there is but one debt for which all are bound, the law concludes, unless expressly contradicted, that the creditor who renounces the debt in favor of one of the solidary debtors intends to renounce his right against all of the debtors.[24] This rule has uniformly held true whether the solidary obligations arose *ex contractu*[25] or *ex delicto*.[26]

If there is an express reservation of the creditor's rights against the other co-debtors, a release of one debtor does not discharge the others. However, such a discharge impairs the other co-debtor's right to be subrogated to the creditor's rights against the released debtor.[27] The creditor must therefore reduce his demand against the remaining solidary debtors by the virile part of the released debtor. To the extent that the creditor has impaired the debtor's right of subrogation, he is prohibited from collecting from the debtor.[28]

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amended article 2103, but the suit was filed after the article was in effect. The Supreme Court reversed the dismissal of defendant's third-party demand, holding that the amendment could not affect any substantive rights, because prior to the amendment there were no rights between tortfeasors, and the effect of the amendment was to create rights where there had been none. See also Emmons v. Agricultural Ins. Co., 245 La. 411, 158 So. 2d 594 (1963), and Vidrine v. Simoneaux, 145 So. 2d 400 (La. App. 3d Cir. 1962), where it was held that an appeal by a condemned defendant brings a judicially released defendant before the appellate court.

23. LA. CIVIL CODE art. 2203 (1870): "The remission of 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 can not claim the debt without making a deduction of the part of him to whom he has made the remission."

For a discussion of the types and effects of remission see Comment, 2 LA. L. REV. 365 (1940).

24. Fridge v. Caruthers, 156 La. 746, 101 So. 128 (1924).

25. *Ibid.*; Lynch v. Leathers, 17 La. Ann. 118 (1865); Irwin v. Scribner, 15 La. Ann. 583 (1860).

26. See Reid v. Lowden, 192 La. 811, 189 So. 286 (1939); *but see* Guarisco v. Pennsylvania Cas. Co., 209 La. 435, 24 So. 2d 678 (1945), noted 20 TUL. L. REV. 615 (1946), holding that voluntary abandonment or dismissal of a claim against an alleged co-tortfeasor who is not in fact at fault does not release the others because there is no solidary liability between them.

27. See Succession of Daigle, 15 La. Ann. 594 (1860).

28. See A. Ledoux & Co. v. Rucker, 5 La. Ann. 500 (1850).

Prior to the amendment of article 2103, however, this latter rule was held inapplicable when an injured party either did not sue a person who might be jointly responsible for his injury, or released an alleged tortfeasor prior to judgment, reserving his right against any other person responsible for his injury.[29] If payment was made by a joint tortfeasor who was released or not sued, the courts required only that the amount received in settlement be deducted from the full amount of the judgment,[30] so that the injured party, while receiving fair and just compensation commensurate with his loss, would not be granted double recovery. As the right to contribution depended upon the caprice of the victim, each of two tortfeasors had a "sporting chance" of escaping all liability.

In the instant case, the court relied upon the amended article 2103 to hold that a tortfeasor has a substantive right to contribution from a co-tortfeasor, whether the latter is sued initially by the plaintiff or not. From the text of the amended article, the court reasoned that there should be no distinction in the application of the code articles to solidary obligations merely because the obligation arose from a delict. The court then applied to the delictual obligors the rules already applied to conventional obligors. The basis on which the solidary debtor who satisfies the debt claims contribution is legal subrogation to the rights of the creditor.[31] If the injured plaintiff settles with and releases one of two joint tortfeasors, the plaintiff no longer has any rights against that tortfeasor to which the unreleased tortfeasor can be subrogated. Thus the plaintiff deprives the unreleased tortfeasor of his right to enforce contribution, and can

29. See De Cuers v. Crane Co., 40 So. 2d 61 (La. App. Orl. Cir. 1949) (one alleged tortfeasor not sued); Lewis v. Travelers Indem. Co., 81 So. 2d 178 (La. App. 2d Cir. 1955) (release with reservation). The reason that this distinction in the application of article 2203 to contractual and delictual debts arose seems to be that no independent rights were recognized between tortfeasors prior to a judgment against them *in solido*.

30. *E.g.*, if *A* and *B* were joint tortfeasors liable to *C*, and *C* settled with and released *B* for $500, then if *C* subsequently was awarded a judgment against *A* for $10,000, *A* would be required to pay $9,500. See Cudd v. Great American Ins. Co., 202 F. Supp. 237 (W.D. La. 1962); Cormier v. Traders & Gen. Ins. Co., 159 So. 2d 746 (La. App. 3d Cir. 1964); Roux v. Brickett, 149 So. 2d 456 (La. App. 3d Cir. 1963); Peats v. Martin, 133 So. 2d 920 (La. App. 2d Cir. 1961).

31. *Cf.* Smith v. Southern Farm Bureau Cas. Ins. Co., 174 So. 2d 122 (La. 1965), where it was held that interspousal immunity is a mere procedural bar personal to the spouses, and is no defense against a suit by a subrogee. *But see* Johnson v. Housing Authority of New Orleans, 163 So. 2d 569 (La. App. 4th Cir. 1964), which held that since an unemancipated minor cannot sue his parent, an injured child has no rights against his parent to which one who was a co-tortfeasor with the parent could be subrogated.

therefore recover from the unreleased tortfeasor only one half, or his virile share, of the total amount of damages sustained. Since the released tortfeasor cannot be liable to the unreleased tortfeasor for all or part of the sum that the latter may be required to pay, the unreleased tortfeasor cannot implead the released party on a third-party demand.

It is submitted that the court, in deciding the instant case, was guided by the manifest intention of the legislature to erase any distinction between delictual and contractual solidary liability. To force a debtor released by a compromise with the creditor to contribute to an unreleased debtor who has been compelled to pay more than his virile share would destroy the effectiveness of a compromise and release, unless all parties could be brought into the settlement negotiations. This court, by applying article 2203 in full to delictual obligations, holds that discharge of one solidary debtor discharges his proportionate share of liability. The decision encourages compromise as a method that is preferable to litigation for effective settlement of tort liability without impairing the unreleased debtor's rights or doing inequity to the claimant.

David E. Soileau

CIVIL PROCEDURE—FILING SUIT IN COURT OF INCOMPETENT JURISDICTION

Plaintiffs, in a joint action, seek to recover damages for the alleged wrongful death of their husband and father who was electrocuted on March 1, 1960, while working near power lines of defendant, a Florida corporation with its principal place of business in New Orleans. Plaintiffs, citziens of Louisiana, filed suit in federal district court on February 6, 1961, which was within the one-year prescriptive period;[1] however, due to administrative delay, service of citation was not made on defendant corporation until the prescriptive period had expired.[2] The federal district court, on its own motion, dismissed the action for lack of diversity of citizenship jurisdiction. The present action

1. LA. CIVIL CODE art. 3536: "The following actions are prescribed by one year: That for . . . damages . . . resulting from offenses or quasi offenses . . . ."

2. Service of citation was made on March 3, 1961, or 24 days after the suit was filed in United States District Court.