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OBLIGATIONS

*H. Alston Johnson III**

SOLIDARY OBLIGATIONS

In *Wooten v. Wimberly*,¹ the supreme court addressed the problem of whether vicarious liability under the Civil Code includes solidary liability between the actual tortfeasor and the person "answerable" for the tort.² Plaintiff's son was injured on May 7, 1965, when his bicycle and an automobile driven by another minor, Howard Wimberly, Jr., collided. Plaintiff brought suit on April 6, 1966 naming Howard Wimberly, Sr. (the driver's father) and the senior Wimberly's liability insurer as defendants. Howard Wimberly, Jr. was not made a defendant in that suit.³ The trial court found young Wimberly free of fault and denied any recovery against the father. The court of appeal affirmed,⁴ and the supreme court denied writs.⁵ Shortly before the supreme court denied writs, plaintiff filed a second suit in the same court against Howard Wimberly, Jr., now a major, alleging the same cause of action against this "new" defendant. Defendant interposed exceptions of prescription, res judicata, collateral estoppel and improper division of a cause of action; the plea of prescription was sustained by the trial court, and the plaintiff's suit dismissed. The other exceptions were not reached.⁶ The court of appeal affirmed the dismissal, and the supreme court granted plaintiff's application for a writ of review, resulting in the decision presently under discussion.

Plaintiff's main argument to save the second suit was that the father and the son were solidarily liable to him, and that the suit against the father had interrupted prescription against the son.⁷ In

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1. 272 So. 2d 303 (La. 1973). The case is to be the subject of a student note in a future issue of this *Review*.

2. The specific persons involved were a parent and a minor child, and the parent's responsibility under Civil Code article 2318. But the court's remarks seem broad enough to encompass the liability of a curator for the damages occasioned by an insane person under his care, masters for their servants, employers for their employees, teachers for their scholars and artisans for their apprentices. See LA. CIV. CODE arts. 2319-20.

3. Brief for Defendant-Respondent at 2, *Wooten v. Wimberly*, 272 So. 2d 303 (La. 1973). It is also pointed out in defendant's brief that at the time the first suit was filed, the minor was in fact a major and could have been sued in his own right.

4. *Wooten v. Wimberly*, 233 So. 2d 682 (La. App. 3d Cir. 1970).

5. *Wooten v. Wimberly*, 256 La. 359, 236 So. 2d 496 (1970).

6. Brief for Defendant-Respondent at 3, *Wooten v. Wimberly*, 272 So. 2d 303 (La. 1973).

7. One objection to the plaintiff's argument is that the issue of the father's liabil-

ruling against plaintiff and affirming the dismissal on a plea of prescription, the supreme court held that a parent is not solidarily liable with a minor child for the torts of that child.⁸

The real objection to the second suit, of course, is that it was an attempt at relitigation of the identical issue already decided adversely to the plaintiff: was there actionable negligence on the part of the minor? It is certainly true that "the plaintiff should not twice vex the court system and the same family and liability insurer with the identical claim."⁹ And to the extent that Civil Code article 2286 would not bar such an effort as *res judicata*,¹⁰ it should perhaps be amended.

But, as correctly pointed out by the dissent, the only issue before the court was whether the ruling on the plea of prescription was correct, the exception of *res judicata* not having been reached by the trial court. The essential question was thus that of solidarity between the father and the son. The court was sharply divided on whether the articles of the Civil Code are properly read to deny solidarity between a parent and a minor child for the torts of the latter.

Although the question is admittedly not free of difficulty, it is submitted that the more reasonable interpretation of the articles is that solidarity is intended.¹¹ It should be remembered that solidarity

ity to him (and the insurer's liability) was *res judicata*, regardless of the outcome of his second suit. It is thus difficult to see how he can maintain that a suit against persons not liable to him at all interrupted prescription against a second person, whether or not the claimed liability is solidary. LA. CIV. CODE art. 3552 provides: "A citation served upon one debtor in *solido* . . . interrupts the prescription with regard to all the others and even their heirs." See also LA. CIV. CODE art. 2097. The judgment that the father and the insurer are *not* debtors, solidary or otherwise, is final, and therefore the citation served upon them is not one upon a "debtor" and did not interrupt prescription as to the son. Disposing of the issue in this fashion would have obviated the discussion of solidarity in the opinion.

8. The court was divided 5-2 on the result, but apparently 4-3 on the issue of solidarity.

9. 272 So. 2d at 310 (concurring opinion of Tate, J.).

10. Barham, J., dissenting, suggests that article 2286 would be sufficient to bar plaintiff's second suit on the theory that the demand is between the same parties, since as to the plaintiff in a suit on a solidary debt one solidary obligor is the same as the other solidary obligor. 272 So. 2d at 312.

11. The opposite position was taken by the four justices who believed the obligation to be non-solidary, and their reasoning can be summarized as follows. Regardless of whether an obligation *in solido* is claimed to arise from a contract or from a provision of law, solidarity is not to be presumed in either case. Though no words are sacrosanct, "the law which creates the solidary obligation should clearly set forth the requisite elements of a solidary obligation." 272 So. 2d at 305. Article 2318, although providing the elements of vicarious liability between parent and child, does not set forth the requisite elements of a solidary obligation. Specifically, the parent is not a joint tort-

of debtors is principally for the benefit of the creditor; he may compel any one of the solidary debtors to pay the entire debt.¹² The eventual settling among the debtors after one has paid the debt is of no concern to the creditor,¹³ and may be based upon their own relationship, be it one in contract¹⁴ or one imposed by the law itself.¹⁵ The articles recognize that debtors solidary as to the creditor may have differing relationships among themselves: one may be bound conditionally while the other is bound "pure and simple,"¹⁶ or the debt may "concern only one" of the solidary debtors, in which case, *among the debtors*, he cannot seek contribution from the others.¹⁷ Absent a special relationship of this kind, it is true that a debtor who is solidarily bound with others to the creditor and discharges the whole debt can

feasor under article 2324 and thus cannot be solidarily liable under its provisions. His liability is secondary and derivative, and there is no right of contribution in favor of the child against the father. Without such a right of contribution, "the father . . . is also without right to claim contribution from the son, contribution being a right accorded to *all* solidary obligors. See La. Civil Code arts. 2103, 2104." 272 So. 2d at 306. In sum, "the legal *consequences* attaching to solidary obligations properly-so-called do not necessarily extend to the legal responsibility of the father for the torts of his minor child. For these reasons, the father in this instance was not a solidary co-debtor with his minor son for the alleged tortious conduct of the son." 272 So. 2d at 307. (Emphasis added.)

12. LA. CIV. CODE arts. 2082, 2091. It is significant that the definition of a solidary obligation in article 2091 is from the point of view of the creditor looking toward the debtors: "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."

13. As an example, it matters not to the creditor that one of the debtors was or becomes insolvent, for this burden is borne by the other debtors. LA. CIV. CODE art. 2104. This is, of course, one of the great advantages of solidarity for the creditor.

14. An insured and a liability insurer are, as to the insured party, solidarily liable. LA. R.S. 22:655 (Supp. 1973). The contract of insurance usually provides that the company will pay any and all sums for which the insured may be held liable for injuries arising from the insured activity, but there is no question of further contribution on the insured's part after he has paid his premiums for protection. On the other hand, the contract of suretyship, though possibly *in solido* as to the creditor (*see* LA. CIV. CODE art. 3045), would normally permit the surety to recover from the principal any amount he is compelled to pay on the debt. LA. CIV. CODE arts. 3052, 3053.

15. The relationships of parent and child or employer and employee, for example, give rise under the law to a full liability of either member of the relationship to an injured party, but the right of reimbursement from the tortfeasor to the "answerable" defendant has been recognized. *See, e.g., Williams v. Marionneaux*, 116 So. 2d 57 (La. App. 1st Cir. 1959).

16. LA. CIV. CODE art. 2092.

17. LA. CIV. CODE art. 2106: "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 codebtors, who, with regard to him, are considered only as his securities."

seek the virile share of the others.¹⁸ But the mere fact that, for other reasons thought to be important by the law, this does not always occur is no reason to withdraw the advantages of solidarity from the creditor.¹⁹

The majority opinion placed particular emphasis on article 2093, which provides that a solidary obligation is not presumed and must be expressly stipulated, with the exception that 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."²⁰ Finding no provisions in the vicarious liability articles referring to solidarity (expressly or otherwise), the court felt even the exception in article 2093 was unsatisfied.

This approach overlooks the rationale behind article 2093. Solidarity among contractual debtors creates an unusually strong remedy in the creditor, and it is reasonable to conclude that the lawmaker wanted an express stipulation of solidarity in order to warn the debtors—presumably, but often not, bargaining from an equal position with the creditor—that they are creating this right in the creditor. The same reasoning does not apply when the debtor or debtors are tortfeasors or those "answerable" for their torts. The imposition of solidarity arises from the law, not from the bargaining of the parties, and there is no particular reason, or even an opportunity, to warn a tortfeasor that he may be creating solidarity between himself and those answerable for his acts in favor of the injured victim.²¹ In this

18. LA. CIV. CODE arts. 2103, 2104.

19. This viewing of the effects of solidarity of debtors from the creditor's side (to whom it is the more important) rather than the debtors' would have avoided the difficulty encountered by the court in *Wooten* and shown in its statement that the liability of the father-son relationship cannot be characterized as solidary because nothing in the relationship enables the son to seek contribution from the father if the son pays the debt. See 272 So. 2d at 307. The majority does not take notice that even without the specific provision in the direct action statute, the courts have characterized the relationship between the liability insurer and the insured as solidary, and certainly there is nothing in their relationship that permits either of them to seek contribution from the other. *Hidalgo v. Dupuy*, 122 So. 2d 639, 643 (La. App. 1st Cir. 1960). The accident did not occur in Louisiana in *Dupuy*, but due to the terms of the policy "both the insurer and its insured are obligated for the same debt (namely the insured's tort liability covered by the policy), and payment made by either of them satisfied the liability of the other, so that within the statutory definition they are solidary obligors for the payment of the damages for which the insured is legally liable within the coverage of the insurance policy."

20. LA. CIV. CODE art. 2093.

21. It might even be said that the redactors intended that solidarity be easily inferred in delictual vicarious responsibility, since it would work to the benefit of a party free of any fault.

instance, the “exception” in article 2093 simply means that when the law creates a relationship between creditor and debtors which has the characteristics described in article 2091,²² the debtors are solidary as to the creditor, regardless of their relationship among themselves and regardless of whether the words are used or not. The majority opinion recognizes that both father and son are bound for the same debt, either can be compelled for the whole and that payment by one exonerates the other and presumably these characteristics result from some provisions of law, but then it rejects solidarity.²³

Academic arguments aside, *should* vicarious liability include solidarity? The court’s opinion indicates that the only advantage a plaintiff will lack when faced with vicarious but non-solidary liability is the possibility of interrupting prescription by suing any one of the possible defendants.²⁴ Is this an advantage that plaintiff should have?²⁵

It might be appropriate to notice that the principal reason for the existence of vicarious liability is to provide the injured plaintiff with a financially responsible defendant or at least one who is able to spread the burden of the risk in some way.²⁶ This is also the basic principle of liability insurance. And as to the injured victim, we have chosen to provide that the insured and the liability insurer are solidarily liable, even though there is no right of contribution between

22. See note 12 *supra*.

23. 272 So. 2d at 305-06.

24. This is not in itself a novel result. In *Broussard v. Rosenblum*, 5 La. App. 245 (Orl. Cir. 1927), it was held that suit against a defendant who happened to be a minor did not interrupt prescription against his father, even though the father lived in the same house and may have had actual notice of the litigation.

25. At least one modern civil code denies to the creditor any interruption of prescription as to those solidary debtors whom he does not sue, but the same code grants a five-year prescriptive period on torts in order to give plaintiff time to get his case in order. See GREEK CIV. CODE arts. 486, 491, 492, 937. Louisiana’s short prescriptive period may dictate a different approach. Suppose that plaintiff on the last day of the prescriptive period sues an employee tortfeasor and the employer on whose payroll that employee seems to be, only to learn later that the defendant employer can prove that in fact he is the *borrowed* employee of another employer. If the employee and the borrowing employer, because of their relationship, are solidarily liable, the suit against the employee will have interrupted prescription as to the borrowing employer, who is the real employer. But if their relationship is one of vicarious but non-solidary liability, the borrowing employer can escape on a plea of prescription if sued, and the lending employer on an exception of no cause of action, leaving only the employee to respond to plaintiff. Is this a desirable result? “Relation back” of an amendment naming the proper defendant might not be granted.

26. If he is an entrepreneur, he can spread the cost to his customers, or may spread the burden through insurance. See *Smith, Frolic and Detour*, 23 COLUM. L. REV. 444, 461 (1923).

them.²⁷ This protects the plaintiff from bankruptcy of one defendant as well as dire consequences of pleading errors. It would be consistent to argue under the present provisions or to provide with specific amendments that, for the protection of the injured party, there is solidary liability between an "answerable" defendant and the tortfeasor, but, for the protection of the "answerable" defendant, there is the possibility of reimbursement from the tortfeasor.

And even if it is not desired to permit a plaintiff faced with a vicarious liability situation to interrupt prescription as to all defendants by suing any defendant, at least it should be provided that a suit against the "primary" defendant (the tortfeasor) will interrupt prescription as to any "answerable" defendant. This is consistent with the present approach in the Code to the analogous situation of a principal and a surety, in which a citation served on the principal will interrupt prescription on the surety,²⁸ but not vice versa.²⁹

The holding in *Wooten* has produced some interesting arguments. In *Tabb v. Norred*,³⁰ for example, plaintiff sought recovery for injuries suffered from a gunshot wound inflicted by Norred, a minor. Plaintiff sued Norred, Norred's father and their liability insurer as well as Vincent (another minor), Vincent's father and their liability insurer. Plaintiff's theory was that the two minors were joint tortfeasors and solidarily liable under Civil Code article 2324.

The Norreds and their insurers settled with plaintiff prior to trial. At the close of the trial against the remaining defendants, a judgment was entered on the jury verdict of \$300,000.00. The judgment condemned the remaining defendants "jointly, severally and in solido" to pay to plaintiff the specified amount, but with the provision that as to the minor, the principal amount be reduced by one-half "as the result of his right of contribution from his co-tortfeasor," the other minor, who had settled.³¹

Relying on the decision in *Wooten* and the fact that the judgment did not reflect a right of contribution by the father of the re-

27. LA. R.S. 22:655 (Supp. 1958), as amended by La. Acts 1972, No. 471 § 1.

28. LA. CIV. CODE art. 3553.

29. Succession of Voorhies, 21 La. Ann. 659 (1869). The expression to the contrary in *Cohen v. Golding*, 27 La. Ann. 77 (1875) is dicta, since there the principal was sued first. And in *Richard v. Bufman*, 14 La. Ann. 144 (1859), cited by the court in *Cohen*, the principal and the surety were bound *in solido*. The other cases cited by the court in *Cohen* were instances in which the principal was sued first.

30. 277 So. 2d 223 (La. App. 3d Cir. 1973).

31. *Id.* at 230, and agreed to by the parties. *Cunningham v. Hardware Mut. Cas. Co.*, 228 So. 2d 700 (La. App. 1st Cir. 1969); *Harvey v. Travelers Ins. Co.*, 163 So. 2d 915 (La. App. 3d Cir. 1964); LA. CIV. CODE art. 2103.

maining tortfeasor, the plaintiff contended that the father had no right of contribution and could be compelled to pay the entire \$300,000.00 regardless of the earlier settlement. The Third Circuit rejected that argument on several grounds, the first being that article 2318 nowhere indicates that the person "answerable" for another's torts must pay more than that person might be compelled to pay.³² The second was that the *fathers* of the two minors were solidarily liable between themselves, and the prior settlement as to the first father deprived the second of his right to contribution and entitled the second father to a reduction in the judgment to one-half the verdict.³³

Although certainly the decision is just on the facts before the court, one might wonder how this squares with the *Wooten* reasoning about solidarity. If we are to reject solidarity between two individuals unless we find it clearly expressed by some provision of law, whence comes the solidarity *between the fathers* of these two joint tortfeasors?³⁴ And is it at all logical to say that a plaintiff can interrupt prescription as to Parent A, father of one minor tortfeasor, by suing Parent B, father of another minor tortfeasor, but cannot do so by suing either A's own child or the other minor tortfeasor?

The majority opinion in *Wooten* appears to classify vicarious liability, an obligation with multiple debtors, as neither several, joint nor solidary³⁵ but somewhere in between. The situation should be clarified by judicial reconsideration or legislative amendment.

32. Cf. LA. CIV. CODE art. 3037: "The suretyship can not exceed what may be due by the debtor, nor be contracted under more onerous conditions."

33. 277 So. 2d at 232.

34. The court cites *Sutton v. Champagne*, 141 La. 469, 75 So. 209 (1917) in support of its conclusion. It is true that the judgment entered in that case against two different parents of two different minors was denominated "*in solido*," but that is the only time the phrase appears in the opinion, and there is no discussion of the solidary nature of the liability and certainly no discussion of any foundation in the Code for such a conclusion. And the court specifically granted to one of the "solidary" debtors the right to have "judgment over against" the other "for whatever amount is thus paid by her." Such a right of indemnity rather than contribution is a factor which led the court in *Wooten* to hold such an obligation not solidary at all. The remaining cases cited by the court in *Tabb* as approving *Sutton* did so on the point that it recognized the right of the vicariously liable defendant or the "technically" or "constructively" liable defendant to complete recovery against the actual tortfeasor.

35. LA. CIV. CODE art. 2077: "Where there are more than one obligor or obligee named in the same contract, the obligation it may produce may be either several or joint or *in solido*, both as regards the obligor and the obligee."

USURY

A spate of recent decisions on usury³⁶ prompts a brief discussion of Louisiana law on the subject, including the provisions of the new Louisiana Consumer Credit Law,³⁷ effective January 1, 1973. To say that usury is the charging or collecting of an illegal rate of interest for the lending of money is obviously only to scratch the surface of the problem, given the number of statutes which deal with "legal" rates of interest and the ingenuity of lenders in discovering means of charging interest.

In a very early case, the court was faced with characterizing usury either as immoral and thus *malum in se* or merely illegal and thus only *malum prohibitum*.³⁸ Plaintiff brought suit to recover a sum of money paid by him to defendant for money lent at an allegedly usurious rate of interest. Defendant objected that the money, even if it represented a usurious rate of interest, had been paid in response to a natural obligation as defined in articles 1757(2) and 1758(1) of the Civil Code³⁹ and thus could not be recovered, citing article 1759(1).⁴⁰ Rejecting a contrary opinion of Pothier, the court held usury to be *malum prohibitum*,⁴¹ producing a natural obligation which would defeat any suit for recovery of money paid in compliance with the obligation.

An ingenious plaintiff, a few years later in *Rosenda v. Zabriskie*,⁴² reasoned that since an agreement for usurious interest created a natural obligation, and since a natural obligation is sufficient cause for a

36. *Budget Plan of Baton Rouge, Inc. v. Talbert*, 276 So. 2d 297 (La. 1973) (retention of jurisprudential rule that borrower cannot demand rebate of capitalized interest if he accelerates payment of the note, in the absence of fraud or coercion; refinancing was undertaken at borrower's request and thus capitalized interest from first note deemed properly payable in second); *Thrift Funds of Baton Rouge, Inc. v. Jones*, 274 So. 2d 150 (La. 1973); *Epps v. Bowie*, 271 So. 2d 611 (La. App. 1st Cir. 1972); *Miley v. Steedley*, 269 So. 2d 522 (La. App. 1st Cir. 1972).

37. La. R.S. 9:3510-68 (Supp. 1973).

38. *Perrillat v. Puech*, 2 La. 428 (1831).

39. Article 1757(2) provides: "2. A natural obligation is one which can not be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice."

Article 1758(1) provides: "Natural obligations are of four kinds: 1. Such obligations as the law has rendered invalid for the want of certain forms or for some reason of general policy, but which are not in themselves immoral or unjust. . . ."

40. "Although natural obligations can not be enforced by action, they have the following effect: 1. No suit will lie to recover what has been paid, or given in compliance with a natural obligation."

41. 2 La. at 430-31.

42. 4 Rob. 493 (1843).

new contract,⁴³ a renewal note containing usurious interest from a prior rate is not vulnerable to a plea of usury. The court correctly rejected the argument, visualizing the distinct possibility that “recovery could be had for any amount of usurious interest, if the contract had been reduced to writing, and then renewed.”⁴⁴

This meant, in effect, that the courts were not open to litigants seeking refunds of usurious interest already paid or seeking collection of usurious interest contracted for. Since that time, a number of special statutes have been passed.⁴⁵ One of these, the Small Loan Law, authorized very high rates of interest on loans under \$300.00, but also provided that any interest charged or received in excess of the amount permitted would render the contract “void and the licensee shall have no right to collect or receive any principal, interest or charges whatever.”⁴⁶

Loans in excess of \$300.00⁴⁷ remained subject to the general principles of Civil Code article 2924, the basic article on usury, but it, too, had undergone some changes over the years. A specific right of recovery of usurious interest paid was recognized, first with a prescription of one year⁴⁸ and then two years.⁴⁹ Shortly after the *Rosenda* decision, a statute was passed⁵⁰ which was interpreted to permit “discounting”

43. LA. CIV. CODE art. 1759(2).

44. Significantly, the court added: “neither the renewal of the contract, nor any devices to evade the law can be countenanced.” 4 Rob. at 498. At the time, the practice of discounting or capitalizing interest was not authorized by article 2924. The legal rate of interest was then 10 percent. La. Civ. Code art. 2895 (1825). Perhaps another reason for rejecting the plaintiff’s argument would have been that although article 1759 states that a natural obligation is a “sufficient” cause for a new contract, it does not address itself to the “legality” of the cause, which is of course also a requirement. LA. CIV. CODE art. 1893.

45. Among these were the Louisiana Small Loan Act, La. R.S. 6:571-93 (now repealed by the Louisiana Consumer Credit Law); the Motor Vehicle Sales Finance Act; La. R.S. 6:951-64 (specifically recognized by Louisiana Consumer Credit Law and conflicts with the consumer credit law to be resolved in favor of Motor Vehicle Sales Finance Act); and the Direct Vehicle Loan Company Act, La. R.S. 6:970-76 (now repealed by the Louisiana Consumer Credit Law).

46. La. R.S. 6:583 (1950), *repealed by Acts 1972, No. 454 § 2* (as it read prior to repeal). But even in the face of that statute, it was held that a defendant who had received \$250.00 through two loans from plaintiff later held to be unenforceable because of excess interest could not recover on his reconventional demand for the \$190.00 he had paid on the notes. *Commonwealth Finance Co. v. Livingston*, 12 So. 2d 44 (La. App. Or. Cir. 1943). The theory of this decision was apparently that there was always a natural obligation to repay at least the principal.

47. And made with security other than motor vehicles.

48. La. Acts. 1844, No. 25 § 2.

49. La. Acts 1908, No. 68 § 1.

50. La. Acts 1860, No. 62 § 1.

to avoid the eight per cent maximum interest rate otherwise provided by article 2924, and that provision was included in the revised article 2924 in the 1870 code, now appearing as article 2924(7).⁵¹ Under this provision, as long as the lender precomputed the interest and included it in the face amount of the note, there was no limit to the amount of capitalized interest which might be included provided that a maximum of eight per cent interest after maturity could be included.⁵² The jurisprudence recognized this practice in a number of cases.⁵³ The jurisprudence also established a corollary: although the lender had to rebate the proportionate unearned interest if he chose to accelerate the note,⁵⁴ the borrower could not demand rebate of the precomputed interest if he chose to accelerate the note.⁵⁵ As to all of

51. Louisiana Civil Code article 2924 as it appeared after the minor prescriptive amendment of 1908 and prior to the amendments of 1970 and 1972 provided: "Interest is either legal or conventional. Legal interest is fixed at the following rates, to wit:

"At five per cent on all sums which are the object of a judicial demand. Whence this is called judicial interest;

"And on sums discounted at banks at the rate established by their charters.

"The amount of the conventional interest cannot exceed eight per cent. The same must be fixed in writing; testimonial proof of it is not admitted in any case.

"Except in the cases herein provided, if any persons shall pay on any contract a higher rate of interest than the above, as discount or otherwise, the same may be sued for and recovered within two years from the time of such payment.

"The owner or discounter of any note or bond or other written evidence of debt for the payment of money, payable to order or bearer or by assignment, shall have the right to claim and recover the full amount of such note, bond or other written evidence of debt and all interest not beyond eight per cent per annum interest that may accrue thereon, notwithstanding that the rate of interest or discount at which the same may be or may have been discounted has been beyond the rate of eight per cent per annum interest or discount; but this provision shall not apply to the banking institutions of this State in operation under existing laws.

"The owner of any promissory note, bond or other written evidence of debt for the payment of money to order or bearer or transferrable [transferable] by assignment shall have the right to collect the whole amount of such promissory note, bond or other written evidence of debt for the payment of money, notwithstanding such promissory note [,] bond or other written evidence of debt for the payment of money may include a greater rate of interest or discount than eight per cent per annum; provided such obligation shall not bear more than eight per cent per annum after maturity until paid.

"Provided however where usury is a defense to a suit on a promissory note or other contract of similar character, that it is permissible for the defendant to show said usury whether same was given by way of discount or otherwise, by any competent evidence."

52. See Note, 29 LA. L. REV. 562 (1969).

53. Budget Plan of Baton Rouge, Inc. v. Talbert, 276 So. 2d 297 (La. 1973); Mayfield v. Nunn, 239 La. 1021, 121 So. 2d 65 (1960); Vosbien v. Leopold, 230 La. 21, 87 So. 2d 715 (1956); General Sec. Co. v. Jumonville, 216 La. 681, 44 So. 2d 702 (1950); Clasen v. Excel Fin. Causeway, Inc., 170 So.2d 924 (La. App. 4th Cir. 1965).

54. Berger v. DeSalvo, 156 So. 2d 323 (La. App. 4th Cir. 1963).

55. Williams v. Alphonse Mort. Co., 144 So. 2d 600 (La. App. 4th Cir. 1962).

these practices, the lender's principal worry was a forfeiture of interest statute providing simply that "any contract for the payment of interest in excess of that authorized by law shall result in the forfeiture of the entire interest so contracted."⁵⁶ Would that include excess capitalized interest, supposedly authorized by article 2924 and the jurisprudence?

That question was resolved in the recent term in *Thrift Funds of Baton Rouge, Inc. v. Jones*.⁵⁷ Defendant Jones applied to plaintiff for a loan of \$650.00. To obtain that sum, Jones signed a note in 1967 promising to pay \$1152.00 in 48 installments of \$24.00 each. The face amount represented the sum of the actual cash advanced (\$650.00) plus \$50.00 to an attorney furnished by the finance company and \$452.00 of capitalized interest—32½ per cent per annum interest on the declining balance of a \$700.00 loan. The 1967 note also provided for annual eight per cent interest on each installment from maturity until paid.

During the next 28 months, Jones paid to plaintiff a total of \$682.00 (28 payments of \$24.00 plus a \$10.00 "extension fee" on a missed installment). Because of various "late charges" assessed against Jones, however, plaintiff's records credited him with a lower amount paid and showed a balance due of \$522.00 on October 18, 1969.

On that date, Jones sought to borrow another \$100.00. This time, he signed a note with a face amount of \$1277.76, payable in 48 installments of \$26.62 each. This amount represented actual cash advanced of \$100.00; \$7.00 for "recordation and cancellation charges"; \$522, balance of old note; and finance charges of \$650.76—41 per cent per annum. This note bore interest at eight per cent per annum on any unpaid balance at maturity on November 20, 1973. Certain payments on the second note were delinquent by 15 days, and "default charges" were assessed against Jones for this reason. When Jones ceased payments on the second note after five payments, plaintiff brought suit for the alleged balance due of \$1144.66 plus interest and attorney's fees.

Citing Civil Code article 2924(7), the court held that the various "late charges" assessed against Jones constituted usurious interest,

56. LA. R.S. 9:3501 (1950). The source of this statute was Rev. St. 1870, § 1884, which was in turn drawn from the provisions of La. Acts 1844, No. 25 § 1 and La. Acts 1855, No. 291 § 2. The acts of 1844 and 1855 had each limited conventional interest rates to eight per cent in place of the former ten per cent, "under pain of forfeiture of the entire interest so contracted." This phrase was not, however, included in the revised article 2924 of the Code of 1870.

57. 274 So. 2d 150 (La. 1973).

because they were far in excess of the eight per cent per annum from *maturity* authorized on notes already containing capitalized interest, or "discount." This conclusion compelled consideration of the meaning of "entire interest" to be forfeited under R.S. 9:3501.

Noting a conflict in the prior jurisprudence and noting the statute's intent to penalize usurious creditors,⁵⁸ the court concluded that plaintiff would have to forfeit the capitalized interest as well as the clearly usurious interest. It reached the laudable and logical conclusion that interest under any other name costs just as much:

We conclude, therefore, that, when (as here) illegally usurious interest is exacted by virtue of a contractual arrangement, La. R.S. 9:3501 requires the forfeiture of *all* interest under the contract, whether such be stipulated interest, capitalized interest, or other charges for the use of or the delay in paying money, howsoever, denoted.⁵⁹

But Jones was not finished. He also claimed that, since *all* interest on the 1967 note was also forfeited under R.S. 9:3501 because of the "late charges," the actual amount advanced to him in 1969 was the principal balance due on the 1967 note (no more than \$128.00) plus the new advance of \$107.00—a total of \$235.00. This brought the 1969 loan within the Small Loan Act⁶⁰ and its stringent sanction of forfeiture of "principal, interest or charges whatever" by a usurious lender.⁶¹ The court agreed with that contention and as a consequence dismissed plaintiff's suit on the note altogether.⁶²

Jones was of course litigated prior to the effective date of the Louisiana Consumer Credit Law, but it is nonetheless instructive since the two together appear to forge some effective protections for the debtor. Space does not permit, and the writer is not competent to provide, an exhaustive analysis of the new law. But several observations can be made.

First, the ruling should certainly apply to all notes contracted prior to January 1, 1973. Second, although the new law repeals the

58. *Id.* at 155-56.

59. *Id.* at 157.

60. La. R.S. 6:571-93 (1950) repealed January 1, 1973 by the Louisiana Consumer Credit Law, LA. R.S. 9:3510-68 (SUPP. 1973).

61. La. R.S. 6:583 as it read prior to repeal.

62. 274 So. 2d at 161. The court further strengthened the debtor's position by correctly interpreting article 2924(5) as a two-year prescription on actions to *recover* usurious interest paid, not on *defenses* to an action brought on a note on which usurious interest is sought to be, or has been, collected.

Small Loan Act⁶³ which was so helpful to Jones and provides new interest limitations on specified loan amounts,⁶⁴ it does not expressly repeal La. R.S. 9:3501. Thus, a debtor might now choose a defense based upon the interest-rate limitations of the new law and the sanctions of the forfeiture statute, which broadly reaches contracts with interest "in excess of that authorized by law." The new law does provide its own sanctions (refund of "all loan finance charges"⁶⁵ plus three times that amount together with reasonable attorney's fees),⁶⁶ but this is only available when the debtor proves an "intentional violation," a difficult burden as defined by the Act.⁶⁷

This combination of the old forfeiture rule as interpreted in *Jones* and the interest-rate limitations in the new statute may permit a debtor to escape payment of usurious interest, capitalized or otherwise, in a situation in which he cannot discharge the burden of proving an intentional violation. In such a situation, the consumer credit law requires only that "the court may require the extender of credit to correct the violation."⁶⁸ This may or may not include forfeiture of *all* interest; it could just as well be interpreted to involve rebate of the usurious interest only. If the latter be the interpretation, the

63. La. Acts 1972, No. 454 § 2.

64. LA. R.S. 9:3519 authorizes a maximum of "36 per cent per year for that portion of the unpaid principal amount of the loan not exceeding \$800.00" and smaller percentages on larger amounts.

65. LA. R.S. 9:3516 (20) defines these as "the sum of (a) all charges payable directly or indirectly by the consumer and imposed directly or indirectly by the lender as an incident to the extension of credit, including any of the following types of charges that are applicable: interest or any amount payable under a point, discount, or other system of charges, however denominated, premium or other charge for any guarantee or insurance protecting the lender against the consumer's default or other credit loss; and (b) charges paid by the consumer for investigating the collateral or credit worthiness of the consumer or for commission or brokerage for obtaining the credit, irrespective of the person to whom the charges are paid or payable unless the lender had no notice of the charges when the credit extension was made. The term does not include default charges, delinquency charges, deferral charges, or any of the items enumerated in [subsection 3(b) of this section]." This appears to indicate that "late charges" such as those imposed upon Jones would, if agreed upon and if within the "5% of the unpaid amount of the installment but not exceeding \$5.00" limitation of R.S. 9:3525, be collectible and would not constitute a higher rate of interest than the amount specified in R.S. 9:3519.

66. LA. R.S. 9:3552A(1)(a) (Supp. 1972) (effective 1973).

67. See LA. R.S. 9:3552 (Supp. 1972) (effective 1973).

68. LA. R.S. 9:3552A(2)(a) (Supp. 1972) (effective 1973). The act adds "but the consumer is not entitled to the civil remedies granted by this section." This is presumably intended to apply to the earlier treble-damage provision, and could well be interpreted to indicate a limitation on recovery to only those amounts constituting a violation, in those situations where the debtor can only prove an "unintentional" violation.

debtor who cannot prove an intentional violation has more protection now against the unscrupulous lender than he would under the new Act.