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Rights of the Solidary Surety: Louisiana Bank & Trust Co. v. Boutte

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NOTES

RIGHTS OF THE SOLIDARY SURETY: LOUISIANA BANK & TRUST CO. V. BOUTTE

Claiming the balance due on several promissory notes, a creditor bank sued the corporate maker of the notes and four shareholders who had signed a "continuing guaranty" agreement and by the terms of the agreement had bound themselves *in solido* with the principal debtor. Before trial, the creditor bank released the principal debtor and three of the shareholders through compromise agreements that involved a transfer of their property to the bank. The remaining defendant, against whom the bank had reserved its rights, contended that the guaranty agreement obligated him as a surety and that he was discharged by the release of the principal debtor and the creditor's acceptance of the debtor's property. Rejecting his argument, the Louisiana Supreme Court *held* that a compromise and release of the principal debtor, in which the creditor reserves his rights against a surety, is insufficient to discharge a surety who has bound himself *in solido* with the principal debtor since the surety's obligation is governed by the rules of the Louisiana Civil Code regulating ordinary solidary obligors. *Louisiana Bank and Trust Co. v. Boutte*, 309 So. 2d 274 (La. 1975).

Suretyship is a contract governed by the provisions of the Louisiana Civil Code.¹ The suretyship contract is distinct from the contract between a creditor and debtor² and is constituted by the accessory promise of the surety to the creditor to perform the obligation of the principal debtor upon the principal debtor's default.³ Being accessory, a surety's obligation presupposes the existence of an underlying principal obligation⁴ and ceases upon the extinction of that obligation.⁵

1. LA. CIV. CODE arts. 3035-70. A "guaranty" in Louisiana has traditionally been interpreted as subject to suretyship rules. *Brock v. First State Bank*, 187 La. 766, 175 So. 569 (1937); *Citizen's Bank & Trust Co. v. Barthelet*, 177 La. 652, 148 So. 906 (1933); *Lachman v. Block*, 47 La. Ann. 505, 17 So. 153 (1894). *But see* *La. & N.W.R.R. v. Dillard*, 5 La. Ann. 1484, 26 So. 451 (1899).

2. Compare LA. CIV. CODE art. 1771 with arts. 3035-36 and 3038.

3. LA. CIV. CODE art. 3035.

4. LA. CIV. CODE arts. 1771, 3035; *Andrus v. Chretien*, 3 La. 48 (1831); 4 AUBRY & RAU, DROIT CIVIL FRANCAIS § 304 (6th ed. Bartin 1942) in A. YIANNOPOULOS, 1 CIVIL LAW TRANSLATIONS 91 (1965) [hereinafter cited as AUBRY & RAU]; 2 M. PLANIOL, CIVIL LAW TREATISE pt. 2, no. 2324(2) at 336 (11th ed.

Payment by the debtor,⁶ prescription of the debtor's obligation,⁷ remission by the creditor to the debtor,⁸ compromise,⁹ novation,¹⁰ and compensation¹¹ of the debtor's obligation, and defenses "inherent in the debt"¹² are available as defenses to a surety. Furthermore, since the debt is not his, if the surety pays the creditor, he is entitled to recourse against the debtor¹³ and subrogation to all of the creditor's rights and collateral security interests pertaining to the debt.¹⁴ If a creditor

La. St. L. Inst. transl. 1959) [hereinafter cited as PLANIOL]; 2 R. POTHIER, OBLIGATIONS pt. 2 § 6 at 195 (3rd American ed. Evans trans. 1853) [hereinafter cited as POTHIER]; R. SLOVENKO, TREATISE ON CREDITOR'S RIGHTS UNDER LOUISIANA CIVIL LAW 3-4 (1968) [hereinafter cited as SLOVENKO]; Hubert, *The Nature and Essentials of Conventional Suretyship*, 13 TUL. L. REV. 519, 521 [hereinafter cited as Hubert]; Note, 15 LA. L. REV. 865 (1955). See 1 S. LITVINOFF, OBLIGATIONS § 111 in 6 LOUISIANA CIVIL LAW TREATISE 195 (1969).

5. This result can be inferred from LA. CIV. CODE art. 3060 which provides that a surety may assert against the creditor all defenses "inherent to the debt." Consequently, LA. CIV. CODE art. 2205 dictates that release of the principal entails release of the surety, but the converse is not true. The benefit of any transaction between a creditor and debtor accrues to the surety "because his obligation is only an accessory to that of the principal debtor." LA. CIV. CODE art. 3076. See *Dickson v. Bell*, 13 La. Ann. 249 (1858) (judgment relieving principal relieves surety); *Citizen's Bank v. Dugue*, 5 La. Ann. 12 (1850) (release of the maker of a note releases the surety); *Freeland v. Briscoe*, 3 La. Ann. 255 (1848) (when principal's indebtedness does not exist neither does surety's); *Shields v. Brundige*, 4 La. 326 (1832) (prescription of the principal obligation extinguishes the accessory); *Andrus v. Chretien*, 3 La. 48 (1831) (there can be no accessory obligation apart from the principal obligation); AUBRY & RAU § 304 at 92; 2 PLANIOL nos. 2369-70 at 351; POTHIER p. 2 c. 6 § 1 at 300, 306; Hubert at 521. This result is clearly illustrated in the analogous situation of mortgage. LA. CIV. CODE arts. 3284-85.

6. Compare LA. CIV. CODE art. 2134 with art. 3060. This result is also fairly obvious because of the surety's promise to pay only if the debtor does not.

7. LA. CIV. CODE art. 3553.

8. *Id.* art. 2205.

9. *Id.* art. 3076.

10. *Id.* art. 2198.

11. *Id.* art. 2211.

12. *Id.* art. 3060.

13. *Id.* arts. 3052-53. This recourse, sometimes called the personal action of the surety, is based either upon *mandatum*, when the surety is engaged at the request of the debtor, or upon *negotiorum gestio* when the debtor does not acknowledge the surety's contract. This action allows recovery of principal, interest, and costs from the day of payment. 2 PLANIOL pt. 2 nos. 2353-60.

14. The surety paying the debt is also entitled to legal subrogation as one "bound with others, or for others" with an interest in payment of the debt. LA. CIV. CODE art. 2161(3). Legal subrogation invests the surety with all

does not preserve intact the rights and security interests to which a surety may become subrogated,¹⁵ accepts the debtor's property in payment,¹⁶ or grants an extension to the debtor,¹⁷ the Louisiana Civil Code discharges the surety to the extent that he is prejudiced, in effect imposing an obligation upon the creditor and imparting to the contract a bilateral nature.¹⁸

In addition to having the defenses inherent in the bilateral and accessory nature of the suretyship contract, a surety is protected by the devices of discussion¹⁹ and division.²⁰ Before payment, he may demand that the creditor discuss (seize) the debtor's property,²¹ and if obligated along with other sureties, he may require that the creditor's demand against him be divided (reduced to his pro rata share) among the solvent sureties.²²

rights, privileges, mortgages, and accessory guarantees of the original creditor. 2 PLANIOL pt. 2 nos. 2353-60.

15. LA. CIV. CODE art. 3061; *Hereford v. Chase*, 1 Rob. 212 (La. 1841); *Walters Air Cond. Co. v. Fireman's Fund Ins. Co.*, 252 So. 2d 919 (La. App. 2d Cir. 1971).

16. LA. CIV. CODE art. 3062.

17. *Id.* art. 3063; *Allison v. Thomas*, 29 La. Ann. 732 (1877); *Calliham v. Tanner*, 3 Rob. 299 (La. 1842); *Millaudon v. Arnous*, 3 Mart. (N.S.) 596 (La. 1825). However, to operate as a discharge, the extension must be a binding agreement that will prejudice the surety rather than a mere forbearance. *Elmore v. Robinson*, 18 La. Ann. 651 (1866); *Fireman's Fund Ins. Co. v. Richard*, 209 So. 2d 95 (La. App. 2d Cir. 1968). In any case, the surety's discharge under this article only takes place *pro tanto*. *Gosserand v. Lacour*, 8 La. Ann. 75 (1853).

18. The articles of the Louisiana Civil Code dealing with suretyship can be traced through the Code Napoleon to the different Roman forms of suretyship. 2 PLANIOL pt. 2 nos. 2316, 2383. One of these Roman forms was the *mandatum pecuniae credendae*, an application of the contract of mandate which came to be widely used because of its advantages to the surety. Unlike *fideiussio*, the simple unilateral form of suretyship, *mandatum pecuniae credendae* was a synallagmatic contract which obligated the mandatory (creditor) to preserve his rights and securities against the debtor. The mandator (surety) was released from his obligation to indemnify the mandatory (creditor) if any of the rights or securities had been lost or abandoned by the latter. W. BUCKLAND, A TEXTBOOK OF ROMAN LAW 308, 324-28 (2d ed. rev. 1965). Suretyship has, in the Louisiana Civil Code, some bilateral aspects—the obligations imposed by the *mandatum pecuniae credendae*. See LA. CIV. CODE arts. 3061-63; *Amory v. Boyd*, 5 Mart. (O.S.) 414 (La. 1818); 2 PLANIOL pt. 2 nos. 2324(1), 2382-84.

19. LA. CIV. CODE arts. 3045-46.

20. *Id.* art. 3049.

21. *Id.* arts. 3045-46.

22. *Id.* art. 3049.

The essence of the surety's contract is its accessory nature; all suretyship contracts are accessory.²³ Therefore, every contract of suretyship is extinguished upon the extinction of the principal obligation. If a contract may not be characterized as accessory, it is not a contract of suretyship though so denominated.

However, those conditions²⁴ that confer upon the suretyship contract its bilateral nature may be modified by an agreement between the surety and the creditor without altering the accessory nature of the suretyship contract.²⁵ Similarly, the exceptions of discussion and division may not only be waived, but are lost if not specifically pleaded upon the creditor's institution of suit against the surety.²⁶

Discussion and division are also denied to the surety if he is bound *in solido* with the principal debtor;²⁷ Louisiana Civil Code article 3045²⁸ expressly denies the right of discussion to the surety bound *in solido* with the debtor, and division is inimical to the essential nature of solidarity, *i.e.*, the creditor's ability to collect the entire amount from any party solidarily bound.²⁹

In commercial practice a surety often binds himself *in solido* with the debtor, but the precise nature of such a mod-

23. The accessory nature is of the "essence of the contract, for want whereof there is no contract at all, or a contract of another description," LA. CIV. CODE art. 1764(1), since (1) suretyship is defined as an "accessory promise," LA. CIV. CODE art. 3035, (2) contracts are either principal or accessory "in relation to their substance," LA. CIV. CODE art. 1767, and (3) suretyship is an accessory contract since its object is to insure the performance of a previous contract, LA. CIV. CODE art. 1771.

24. LA. CIV. CODE arts. 3061-63. See text at note 18, *supra*.

25. LA. CIV. CODE art. 1764(2).

26. LA. CIV. CODE arts. 3046, 3049.

27. *Hibernia Bank & Trust Co. v. Succession of Cancienne*, 140 La. 969, 74 So. 267 (1917); *Edward Bruce Co. v. Lambour*, 123 La. 969, 49 So. 659 (1909); *McCausland v. Lyons*, 4 La. Ann. 273 (1849); *New Orleans Canal & Banking Co. v. Escoffie*, 2 La. Ann. 830 (1847); *Smith v. Scott*, 3 Rob. 258 (1842); *Thibodeau v. Patin*, 1 Mart. (N.S.) 478 (La. 1823); *Etzberger v. Menard*, 11 Mart. (O.S.) 434 (La. 1822); *Aston v. Morgan*, 2 Mart. (O.S.) 336 (La. 1812).

28. LA. CIV. CODE art. 3045: "The obligation of the surety towards the creditor is to pay him in case the debtor should not himself satisfy the debt; and the property of such debtor is to be previously discussed or seized, unless the security should have renounced the plea of discussion, or should be bound *in solido* jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors *in solido*."

29. See LA. CIV. CODE arts. 2091-94.

ified suretyship contract has been difficult for the courts to articulate. Article 3045 provides that when a surety does solidarily bind himself with the debtor, "the effects of his engagement are to be regulated by the same principles which have been established for debtors *in solido*." Because the principles of solidarity to which the article makes reference do not expressly mention the discharges available to a surety by reason of the bilateral and accessory nature of his contract, one might argue that the effect of solidarity would be to deprive the surety of those rights. Some Louisiana cases have rejected such an expansive interpretation, viewing the basic contractual implications of suretyship as unaffected by solidarity except to the extent that they are incompatible with the explicit language of article 3045 or the essential nature of solidarity.³⁰ Other cases, however, have seemingly construed article 3045 and the effect of solidarity as bases for the treatment of the solidary surety as an ordinary solidary co-obligor.³¹

30. *Alter v. Zunts*, 27 La. Ann. 317 (1875); *Succession of Daigle*, 15 La. Ann. 594 (1860); *Jones v. Fleming*, 15 La. Ann. 522 (1860); *Ade v. Metoyer*, 1 La. Ann. 254 (1846). *Cf.* *Brewer v. Foshee*, 189 La. 220, 179 So. 87 (1938).

In *Ade*, *supra*, a creditor extended time to the debtor without the surety's consent. The surety was discharged. The court specifically rejected the argument that the surety *in solido* could not maintain the defenses of suretyship and implicitly the argument of defense counsel that while solidarity might broaden the liability of a surety it left intact his rights as a surety. *Jones v. Fleming*, *supra*, arrived at a similar interpretation, reasoning that if the articles which granted the surety such rights had required exception, they, like article 3045, would have contained them.

31. *Bonart v. Rabito*, 141 La. 970, 76 So. 166 (1917); *American Bank & Trust Co. v. Blue Bird Restaurant & Lounge*, 279 So. 2d 720 (La. App. 1st Cir. 1973); *Central Savings Bank & Trust Co. v. Oil Field Supply & Scrap Material Co.*, 12 So. 2d 815 (La. App. 2d Cir. 1942); *Elmer Candy Co. v. Bauman*, 150 So. 427 (La. App. 2d Cir. 1933). *Bonart*, *supra*, construed the cumulative effect of LA. CIV. CODE arts. 3045 and 2106 as denying the benefit of LA. CIV. CODE art. 3063 (see text at note 17, *supra*) to the solidary surety since "a person may be only a surety as to his co-obligor *in solido* and at the same time be liable primarily to the common creditor." 141 La. at 986, 76 So. at 174. The court in the instant case relied upon *Bonart* as authority to disregard *Jones v. Fleming*, 115 La. Ann. 522 (1860). The conclusion in *Bonart* from LA. CIV. CODE arts. 3045 and 2106 is dicta and does not in any case compel the treatment of the surety as a principal. *Bonart* involved the liability of an endorser of a negotiable note. Primary liability towards the holder of a negotiable note means simply that there are no conditions precedent to the holder's execution against the party primarily liable, and is not equivalent to liability as a principal since a party may still be a surety or "accommodation party" entitled to suretyship defenses. LA. R.S. 10:3-415 (1975). As in the instant case,

In the instant case, the Louisiana Supreme Court followed the rationale of the latter cases in interpreting the cumulative effect of articles 3045 and 2106.³² Article 2106 provides that solidary co-debtors may be interested or uninterested in the debt and therefore, among themselves, entitled to varying amounts of contribution. Under this article, one co-debtor may even be entitled to full recourse against the other, and this possibility suggests a similarity to the surety's right of recourse for the whole amount of the debt. However, Article 2106 seems to limit this suretyship-like effect to the relation of the debtors themselves and exclude any effects upon the creditor. The court apparently concluded, on the basis of this article, that actual suretyship involving solidarity should be limited in the same way since, although the court stated that the "legal classifications . . . of surety and solidary obligor are not mutually exclusive,"³³ it concluded that "as between the creditor and the solidary surety, the obligations of the surety are governed by the rules of solidary obligors."³⁴ Accordingly, the court applied the provisions of the Civil Code that determine the effect of a compromise upon an ordinary solidary co-debtor,³⁵ rather than the provision that specifically regards sureties when the creditor has compromised with the principal.³⁶ Further, the court indicated that the solidary surety would not be entitled to a discharge upon acceptance of property by the creditor in payment of the

where the contract derives from a separate agreement rather than a mere indorsement, *Bonart* becomes particularly inapplicable.

Blue Bird and *Oil Field* were handled differently by the Louisiana Supreme Court. In *Oil Field*, 12 So. 2d 819 (La. App. 2d Cir. 1942), an endorser, although primarily liable under the *Bonart* holding, was entitled to the preservation of securities given with the note, and in the absence of them due to the holder's fault, was discharged to the same extent. A narrower reading of *Bonart* is possible, and would leave the solidary surety's rights under LA. CIV. CODE art. 3061 intact. *Blue Bird*, *supra*, is discussed at note 40, *infra*.

32. Louisiana Bank & Trust Co. v. Boutte, 309 So. 2d 274, 277-78 (La. 1975). LA. CIV. CODE art. 2106 provides: "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."

33. Louisiana Bank & Trust Co. v. Boutte, 309 So. 2d 274, 277 (La. 1975).

34. *Id.* at 278.

35. LA. CIV. CODE art. 3077.

36. *Id.* art. 3076.

debt as would a simple surety under article 3062.³⁷ The net effect of the court's treatment of the solidary surety is to make him a principal co-obligor³⁸ as a legal effect of his solidarity regardless of the nature of his agreement itself. This result is not supported by the Louisiana Civil Code, because articles 3045 and 2106 do not necessarily exclude all of the effects of the contract of suretyship between a creditor and a solidary surety.

Article 2106 does not address solidary suretyship; like the other code articles regulating the effects of solidarity, it presupposes that a co-debtor *in solido* has contracted with the creditor as a principal interested in the debt. Since the co-debtor *in solido* has normally contracted with the creditor that the debt is to some extent his, article 2106 implies that if, in fact, he is not interested in the principal debt, he can assert his lack of interest only against his co-debtor *in solido*.³⁹ Article 2106 is not applicable in any way to a solidary

37. Louisiana Bank & Trust Co. v. Boutte, 309 So. 2d 274, 279-80 (La. 1975).

38. This result could have been reached on grounds other than the effects of solidary suretyship. The language of the instrument alone might have disposed of the defendant's assertion that he was a surety. Defendant expressly granted the right to "grant releases and discharges" and made himself a party to all of the obligations of the principal as if contracted in person. Under these circumstances the description of the instrument as a "guaranty" should not have obscured its nature as a principal undertaking. Justice Barham's concurrence emphasizes the importance of assessing the instrument itself. In his view, "all of the defendants were principal co-obligors." 309 So. 2d at 288. This approach was utilized in a recent case involving a similar relationship. American Bank & Trust Co. v. Blue Bird Restaurant & Lounge, 279 So. 2d 720 (La. App. 1st Cir. 1973), *aff'd*, 290 So. 2d 302 (1974). The opinion of the appellate court in *Blue Bird* had responded to the guarantor's contention of release through the provisions of LA. CIV. CODE art. 3063 by noting that he had explicitly granted to the bank the right to grant extensions without his consent. 279 So. 2d 720, 724. But the opinion went on to cite *Bonart* to the effect that, as a solidary surety, the defendant was not entitled to the benefit in any case. 279 So. 2d at 724. All through the appellate court's discussion the defendant was treated as a surety. The supreme court, on the other hand, nowhere in its opinion considered the defendant as a surety. The defendant was bound as a principal through the effect of his agreement. His contention of release under article 3063 was futile because of his express waiver of any right possibly accruing thereunder. 290 So. 2d 302, 306.

39. This article does not unequivocally exclude the assertion of an uninterested party's rights against the creditor. The phrase "with regard to him [the principal debtor]" does not necessarily insulate the creditor from the

surety, who by denominating himself as a surety, has represented to the creditor that he is not at all interested in the principal debt.⁴⁰

Moreover, although Louisiana Civil Code article 3045 does provide that the effects of the solidary surety's engagement are regulated by the principles of solidarity, these principles do not require that the accessory⁴¹ and bilateral nature⁴² of the surety's contract be ignored. Solidarity is merely a classification independent of whether the contract is principal or accessory.⁴³ The substance of the contract itself determines its nature as principal or accessory, while solidarity is, in the language of the Louisiana Civil Code, only an accidental stipulation.⁴⁴ Whenever solidarity is introduced into a contract it should conform to the nature of the contract which is the source of the obligation.⁴⁵

Many of the articles of the Louisiana Civil Code that treat the solidary co-debtor to some extent as a principal recognize that he is to the same extent an accessory. Thus article 2203,⁴⁶ which provides that the creditor may release

effects of suretyship. It merely makes clear that the article is applicable to contribution and the relationship between the debtors. Suretyship is a contract not between the debtor and the surety, but between the creditor and the surety. Even should article 2106 be interpreted as an implied limitation upon the effects of suretyship, its purpose might well be to indicate that such sureties should not enjoy the benefits of discussion and division, rather than to negate their nature as sureties entirely.

40. On occasion, the jurisprudence has correctly recognized that LA. CIV. CODE art. 2106 contemplates the situation of an uninterested third party bound *in solido* as a principal obligor and who is therefore entitled to full recourse against his co-debtor but not accorded the special benefits of suretyship. *See, e.g.,* Moriarty v. Bagnetto, 110 La. 598, 34 So. 701 (1903); Walker v. Delahoussay, 116 So. 2d 884 (La. App. 1st Cir. 1959).

41. 6 AUBRY ET RAU, DROIT CIVIL FRANÇAIS n° 423 at 271 (6th ed. 1946) [hereinafter cited as AUBRY ET RAU]: "The solidarity which the surety can assume does not relieve him of the character of his engagement as an accessory" (author's translation). *Id.* Slovenko states, "The subsidiary character of suretyship exists even in the case of solidary surety." SLOVENKO at 30. *See* Hubert at 521. *Cf.* Hubert at 523.

42. AUBRY ET RAU n° 423 at 271, n° 429 at 301-02; PLANIOL at nos. 2352, 2383-84; SLOVENKO at 72. *See* Note, 49 TUL. L. REV. 1187 (1975) (succinct yet thorough assessment of the French doctrinal and jurisprudential position on this matter).

43. LA. CIV. CODE arts. 1995-96.

44. *Id.* arts. 1764(3), 1995-96.

45. *See id.* art. 1760.

46. *Id.* art. 2203: "The remission or conventional discharge in favor of one of the co-debtors *in solido*, discharges all the others, unless the creditor has

one of the co-debtors *in solido* yet reserve his rights against the other, treats the remaining co-debtor as a principal only with regard to his part of the debt. He is discharged from the released debtor's part precisely as if he had been an accessory or surety for that part.⁴⁷ The Civil Code articles on solidarity also expressly permit that one of the debtors may be "obliged differently."⁴⁸ Thus if one co-debtor should stipulate with the creditor that his obligation is contingent upon the existence of the principal obligation of the other co-debtor, and the creditor's preservation of the other securities, there is no reason why such a contract, though solidary, should not be enforceable. Likewise, the surety who has by the nature of his contract itself stipulated both that he has no part in the debt and that his obligation will be contingent, should remain undisturbed in the enjoyment of those provisions even though he becomes solidarily bound.⁴⁹

expressly reserved his right against the latter. In the latter case, he can not claim the debt without making deduction of the part of him to whom he has made the remission."

47. Similarly, LA. CIV. CODE art. 3077, which seems to allow the creditor to compromise with one of the solidary co-debtors independently of the others and without releasing them, must be read in the light of LA. CIV. CODE art. 2100, which provides that the division of the debt necessary to effect a compromise with only one party operates a release of others to the extent of the share of the compromising party.

48. LA. CIV. CODE art. 2092.

49. Convincing support for this argument can be adduced from a consideration of "imperfect solidarity." In *Gay & Co. v. Blanchard*, 32 La. Ann. 49 (1880), a purchaser who had assumed the original mortgage debt was released by the creditor and suit was filed against the first purchaser. The court stated, "We take the rule to be that where two persons are bound to a third, for the same debt, and where one of these obligors has upon payment of the debt, a right of subrogation thereto, and of recourse for the amount paid, upon his co-debtor, any contract between the creditor and the ultimate debtor, whereby delay is granted or securities surrendered or diminished, will discharge the obligor entitled to such recourse and subrogation if his consent be not obtained. The creditor in such case must maintain a position that will enable him to subrogate the party paying to all the original rights, privileges, and actions incident to the debt." This statement was modified on rehearing to the effect that, "Where the obligors are bound by separate contracts, the creditor must have accepted both obligations, and be privy to and have knowledge of the contract out of which grows this right of subrogation." Although a solidary surety's promise is expressly *in solido* he also meets the requirements established for imperfect solidarity. Moreover, the surety's rights in such a situation would not only be ethically grounded, but also specifically granted by codal provisions. This clearly illustrates the weakness of any argument that solidarity requires that the surety should not be entitled to these benefits. It should also be noted that *Gay, supra*,

The majority's conclusion that a solidary surety is a principal obligor seems unfounded. Solidary debtors need only be "obliged for the same thing, so that each may be compelled for the whole."⁵⁰ As the earlier jurisprudence realized, this might be accomplished simply by a waiver of discussion and division. This result is suggested not only by the literal terms of article 3045, which equates solidarity with a waiver of discussion, but also by the location of this article within a subdivision of the Louisiana Civil Code dealing only with discussion and division. If the phrase in article 3045 which alludes to the effect of solidarity were intended to have a greater effect, it would hardly be expressed as an exception to an article of such a narrow context. In contrast, the accessory nature of the surety's contract is reiterated within each section of the Louisiana Civil Code dealing with extinction of obligations.⁵¹ To deprive a solidary surety of any more than discussion and division grants no benefit to the creditor that he cannot obtain by simply requiring the party to contract as a principal. It interferes unnecessarily in a situation that might reflect the actual bargain of the parties and allows a creditor to defeat his own obligation through the use of equivocal language. The contract of a solidary surety is accessory by its nature and should remain so even though the surety be solidarily bound. Likewise, he should be benefitted by all other terms of his suretyship contract that are not incompatible with solidarity.

Steve G. Durio

ADMIRALTY: COMPARATIVE NEGLIGENCE IN COLLISION CASES

A negligently navigated tanker ran aground on a breakwater which the Coast Guard had failed to illuminate properly. Although determining that the vessel bore 75% of the blame and the Coast Guard only 25%, the federal district court applied the century-old rule of equally divided damages and ordered the Coast Guard to pay half the vessel's damages. The Second Circuit Court of Appeals affirmed,¹ but on

reaches the same result that would occur should one of the parties be recognized as an accessory.

50. LA. CIV. CODE art. 2091.

51. See, e.g., *id.* arts 2198, 2205, 2211, 3076, 3060-63.

1. *United States v. Reliable Transfer Co.*, 497 F.2d 1036 (2d Cir. 1974).