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OBLIGATIONS

*H. Alston Johnson, III**

LEGISLATION

The 1981 Regular Session of the Louisiana Legislature was a quiet one, as usual, for matters having to do with conventional obligations. Nonetheless, there were a few pieces of legislation which will affect the practitioner, and which will be briefly reviewed before turning to the cases decided during this past term.

Judicial and Conventional Interest

As a consequence of the inflationary times in which we live, the legislature has acted several times during the past few years to increase the rates of both judicial and conventional interest. The most recent attempt, however, is marred by conflicting provisions on the subject. Act 574, amending articles 1938 and 2924 of the Civil Code and indicating by its title that its purpose was to increase the rate of judicial interest, provided for a rate of judicial interest of 12 percent.¹ The Act made no changes in the unnumbered paragraph of article 2924 which provides for conventional interest at a maximum of 8 percent.

Act 639, on the other hand, amending the same two articles and indicating by its title that its purpose was to increase the rate of both judicial and conventional interest, amended article 2924 so that it would read in pertinent part:

Art. 2924. Rates of legal and conventional interest; usury

Art. 2924. Interest is either legal or conventional. Legal interest is fixed at the following rates, to wit:

At ten percent per annum on all sums which are the object of a judicial demand. Whence this is called judicial interest; . . .

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1. The Act also provides for pending judicial demands:

The judicial interest of twelve percent per annum shall apply to all lawsuits pending or filed on or after September 11, 1980. Suits pending on or before September 11, 1980, shall be computed at seven percent per annum from the date of judicial demand until September 12, 1980. Suits pending on or before September 10, 1980 shall be computed at ten percent per annum from the date of judicial demand until September 11, 1981. . . .

The judicial interest of twelve percent per annum shall apply to all lawsuits pending, or filed, on or after September 11, 1981. . . .

Act 639 amended the conventional-interest paragraph of article 2924 as well, to provide for a 12 percent interest rate. Both acts amended article 1938 of the Civil Code to provide for a 12 percent interest rate for "all debts" from the time "they become due, unless otherwise stipulated."²

The ordinary rules for resolving legislative conflicts are of no assistance. The latest expression of legislative will as to each act occurred on the same day (July 7), when each house concurred in the amendments proposed by the other.³ Gubernatorial signature is not part of the expression of legislative will, but in any event took place on the same day, probably within the same hour.⁴

The only solution to this particular conflict appears to be legislative correction.

*Recordation of Donations of Immovables*⁵

Article 1554 of the Civil Code has required in some form or another ever since 1808 that donations *inter vivos* of property that "may legally be mortgaged" be recorded "in a separate book kept for that purpose by the register of mortgages." Louisiana Revised Statutes 9:2371 has also provided that such donations be recorded in accordance with article 1554 or in the conveyance records of the parish "where the immovable is situated." These provisions may

2. See 1981 La. Acts, No. 665, which adds LA. R.S. 9:3509 (Supp. 1981) to provide that any person borrowing money for commercial or business purposes may agree to any rate of interest.

3. Act 574 began as Senate Bill 204 and was finally passed on July 7, 1981 when the Senate concurred in House amendments to the bill. OFFICIAL JOURNAL OF THE SENATE OF THE STATE OF LOUISIANA, 7th Reg. Sess. at 19-20 (July 7, 1981). This action took place after 1:30 p.m. on July 7. SENATE JOURNAL, *supra*, at 1 (July 7, 1981). Act 639 began as House Bill 1085 and was finally passed on July 7, 1981, when the House concurred in Senate amendments to the bill. OFFICIAL JOURNAL OF THE HOUSE OF THE STATE OF LOUISIANA, 7th Reg. Sess. at 80 (July 7, 1981). This action took place after 1:15 p.m. on July 7. HOUSE JOURNAL, *supra*, at 65 (July 7, 1981).

4. Acts are numbered in order of gubernatorial signature, and thus Act 639 must have been signed after Act 574, both on July 20, 1981. But gubernatorial signature had nothing to do with the latest expression of legislative will. Were it not so, the governor could frustrate the expression of legislative will by rearranging the order of signature.

5. Unfortunately, the enrolled Act requires registration in the parish "in which the *movable* is situated" (emphasis added), when the remainder of the Act refers to immovables. This is clearly a typographical error, which can be corrected by the Law Institute. LA. R.S. 24:253 (1950).

have been in conflict. If one recorded the donation of an immovable only in the conveyance records and not in a separate book kept for that purpose (if any indeed were available), would the donation nonetheless be valid? And did article 1554 extend to only immovables (as might have been the case when it was originally written), or to any property which might now be legally mortgaged, including movables?

Act 798 amended article 1554 and should have eliminated any conflict. The reference to recordation in a separate book kept for that purpose had been deleted, and the article now simply calls for registration "within the time prescribed for the registry of mortgages in the register of conveyances of the parish" of a donation which "comprehends immovables or rights thereto."

JURISPRUDENCE

Solidarity

Happiness is writing a symposium article on obligations and not having to discuss solidarity. Partial happiness is writing a symposium article on obligations and having to discuss solidarity only briefly, referring the reader to not one, but two excellent student comments on the subject.⁶ Only partial happiness can be achieved this year.

The decision in *Sampay v. Morton Salt Company*⁷ during this term confuses the concept of solidarity again, and at the same time discourages amicable settlement of personal injury litigation. The plaintiff in *Sampay* was injured when his vehicle was rear-ended by a van driven by one Davis, who was carrying Morton Salt products. The precise employment status of Davis was unclear, and the claimant ultimately filed a law suit against Davis personally and in the alternative against Morton Salt as his employer (and its insurer) or Davis Truck Service as his employer (and its insurers). Prior to trial, the plaintiff settled with and released Davis personally, Davis Truck Service, and the insurers of Davis Truck Service. He reserved rights against Morton and its insurer.⁸ After that settlement was reached,

6. See Comment, *Prescribing Solidarity: Contributing to the Indemnity Dilemma*, 41 LA. L. REV. 665 (1981); Comment, *Tilting Against Windmills: A Solidary Rejoinder*, 41 LA. L. REV. 1279 (1981).

7. 395 So. 2d 326 (La. 1981).

8. The various opinions in *Sampay* proceed on the unstated assumption that the insurer of Morton Salt Company provided coverage only to Morton Salt as the employer of Davis, thus permitting the insurer to argue that if the employee is released, then the employer is released; and if the employer is released, then the insurer of the employer is released as well since there would then be no basis upon which to hold

Morton and its insurer sought and were granted a summary judgment on the ground that the settlement released Davis, and thus released his alleged employer (Morton). The summary judgment in favor of Morton Salt was affirmed by the first circuit,⁹ but the supreme court reversed.

Ever since *Williams v. Marionneaux*¹⁰ was decided in 1960, it has been settled in Louisiana law that the release of an employee releases the employer as well. The *Williams* opinion was based upon the concept that the employee is "primarily" liable and the employer only "secondarily" liable, and that settlement with the employee repairs the wrong done to the plaintiff. The opinion in *Williams* cited in passing the opinion in *Cox v. Shreveport Packing Company*,¹¹ which had held that a suit against an employee does not interrupt prescription running against an employer. The *Cox* opinion involved some unusual facts, which may have been more responsible for the decision than some deep-seated feeling that employees and employers should not be deemed solidarily liable to the injured party.

The plaintiff in *Cox* was injured in October, 1941, by a vehicle operated by one Sentell, and timely filed suit against him some eight months later. That suit was still pending in May, 1945, when the plaintiff filed another suit, this time against Shreveport Packing Company, alleging that it was the employer of Sentell at the time in question. Apparently some doubt existed about the strength of the employment claim,¹² but in the end the supreme court did not reach the merits of the question. The court reasoned that in the absence of any express statement of solidarity between employee and employer to the victim, in the light of the difficulty of gathering and presenting evidence which an employer would have under these facts, it would be erroneous to conclude that an employee and an employer were bound solidarily to the victim. Thus the court did not have to reach the merits of the question, since no interruption of prescription would have taken place even if the plaintiff could have demonstrated the employment relationship.

the insurer liable. Nothing is said of policy language, nor was the record available for review at the time of this writing. Suppose that the policy could be read, as well it might be, to insure Davis as an additional insured. Might it be argued by Sampay that even if Davis was released and even if that release accomplished the release of Morton Salt as well, the insurer was nonetheless retained because it was solidarily liable with Davis to Sampay? This argument would not prevail, of course, if the insurer could show that its liability depended upon the liability of Morton Salt *as employer*.

9. Sampay v. Morton Salt. Co., 388 So. 2d 62 (La. App. 1st Cir. 1980).

10. 240 La. 713, 124 So. 2d 919 (1960).

11. 213 La. 53, 34 So. 2d 373 (1948).

12. The appellate court had held that Sentell was not in the course of his employment. *Cox v. Shreveport Packing Co.*, 28 So. 2d 617 (La. App. 2d Cir. 1946).

Cox was a difficult decision on hard facts, but nonetheless the decision was almost certainly erroneous. It was recently and properly overruled in *Foster v. Hampton*.¹³ Its overruling seriously undermined the foundations of other decisions on the issue of interruption of prescription, and properly so.¹⁴ But in *Sampay*, the supreme court believed that it seriously undermined the foundation of other decisions having nothing to do with interruption of prescription, such as *Williams*.

The court's reasoning process was direct and simple, and may be stated in the form of a syllogism: if *Williams*, relying on *Cox*, held that an employer was released from further liability by the release of his employee, and if *Cox* was properly overruled in *Foster v. Hampton*, then it follows ineluctably that *Williams* must now be overruled, and an employer is not released by the release of an employee. However, the statement of the major premise contains an error. The decision in *Williams* does not rely upon *Cox*. Indeed, its only reference to *Cox* is a passing one, observing that an employer's responsibility is only secondary in nature. Curiously, this is the one aspect of the *Williams* opinion that the court in *Sampay* specifically approves. Apart from that, the *Williams* opinion makes no other reference to *Cox*, for there was no need to do so. *Cox* was simply a decision that primarily and secondarily liable persons are not cast *in solido* for purposes of prescription without an express statement to that effect, and especially not in a factual situation when a number of years have passed since the incident in question. *Williams*, on the other hand, was a decision that the release of the primarily liable person by the plaintiff's own choice releases the secondarily liable person.

The court's error in *Sampay* was its failure to see that solidarity is a multi-faceted legal relationship, and that mere recitation of the word will not instantly require that all solidary obligors will necessarily have the same relationships among themselves. Solidarity may dictate one set of relationships between the solidary obligors and the creditor, and another set among the solidary debtors.¹⁵ When viewed from the creditor's point of view, solidarity produces

13. 381 So. 2d 789 (La. 1980).

14. For example, *Wooten v. Wimberly*, 272 So. 2d 303 (La. 1973), which held that a parent and a child are not solidarily bound to the victim of the child's conduct, is clearly inconsistent with the decision in *Foster*. See Johnson, *Developments in the Law, 1979-1980—Obligations*, 41 LA. L. REV. 355, 357-58 (1981). But even if *Wooten* is overruled, the court should not hold that one could release the child and still sue the parent, or that the parent has no right of indemnity against the child for loss suffered by the parent due to the child's conduct.

15. See Johnson, *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations*, 34 LA. L. REV. 231 (1974).

some very important consequences of great benefit to the creditor. In the usual case, any one of the debtors may be compelled to pay the entire amount.¹⁶ A suit against one solidary obligor will interrupt prescription running against the others.¹⁷ And we have gradually agreed that obligors may be solidarily bound to a creditor even in the absence of a specific legal or contractual provision to that effect, if they are bound for the same debt.¹⁸ But none of these consequences—so important and justifiable when viewed from the creditor's standpoint vis-à-vis the debtors—necessarily establishes the relationship between the debtors.

Once the creditor is guaranteed these advantages, and especially once the obligation has been performed with reference to the creditor, it is of no moment to the creditor how the obligors divide the obligation among themselves. And the division among the debtors is in turn *not* determined by the mere existence of solidarity in the creditor's favor. Some obligors who are solidarily bound to the creditor share the obligation by heads (virile shares).¹⁹ Some share the obligation by percentage of fault.²⁰ Some "secondarily" liable obligors bear all of the loss as against the "primarily" liable obligor, though both are bound solidarily to the creditor.²¹ And until *Sam-*

16. LA. CIV. CODE art. 2091. The amendments introducing pure comparative negligence into Louisiana law provide some instances in which that will not be the case. Suppose an injured person is deemed to be 20 percent at fault, with Defendant A 15 percent at fault, and with the remaining 65 percent responsibility in Defendant B. If Defendant B is insolvent, the injured person may not collect any more than 15 percent from Defendant A. LA. CIV. CODE art. 2324. In that instance, one of the "solidary" debtors (Defendant A) may not be compelled to pay even the 80 percent of loss for which he is solidarily bound with Defendant B. His "share" is limited to the 15 percent which he caused.

17. LA. CIV. CODE art. 2097.

18. *Commercial Ins. Agency, Inc. v. Wilson*, 293 So. 2d 246 (La. App. 3d Cir. 1974) (plaintiff insurance agency bound with insured to insurer, even though the two had not signed an agreement together to the insurer and no tort had been committed); *Foster v. Hampton*, 381 So. 2d 789 (La. 1980) (employer and employee solidarily bound to victim of employee's tort, despite any express statutory statement to that effect). See Johnson, *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations*, 35 LA. L. REV. 280, 291-98 (1975).

19. This is the case of obligors on a standard promissory note who bind themselves *in solido* to the creditors. LA. CIV. CODE art. 2103. Unless there is a contrary agreement among those obligors, the division of the debt *among themselves* is by heads, or by virile shares.

20. This is the case, after the comparative negligence amendments, of tortfeasors who are determined to have been responsible for different "degrees" of fault in causing the claimant's injury.

21. This is the case of a liability insurer and an insured. They are solidarily liable to the victim under LA. R.S. 22:655 (1950 & Supp. 1958 & 1962). But the insured is not liable to the insurer at all for amounts paid out under the policy, even though the insurer is arguably only "secondarily" liable to the victim.

pay, some "primarily" liable obligors bore all of the loss as against the "secondarily" liable obligor, even though both were bound solidarily to the creditor.²² The plain fact is that the existence of solidarity does not, and should not, determine the question of allocation of loss among the obligors.

This principle is clearly expressed in article 2106 of the Civil Code, which the court in *Sampay* failed to mention at all:

If the affair for which the debt has been contracted *in solido*, concern only one of the coobligors *in solido*, that one is liable for the whole debt towards the other codebtors, who, with regard to him, are considered only as his securities.

The *Sampay* court observed briefly that an employer cannot be assimilated to the "simple surety" because the employer does not have the benefit of discussion, as would a surety.²³ But again, that principle focuses upon the relationship between the creditor and the debtor, not among the debtors: the "surety" would only enter a plea of discussion when sued by the creditor, and that plea is not at issue among the debtors themselves.

The only possible analogy supporting the court's decision in *Sampay* is the relationship of tort victim, tortfeasor, and liability insurer. Louisiana law makes the tortfeasor and the liability insurer solidary obligors to the tort victim within the policy limits.²⁴ As a consequence, a suit against the tortfeasor interrupts prescription as to the liability insurer, and vice versa.²⁵ And release of the tortfeasor ("primarily liable" obligor) does not release the liability in-

22. This is, or was, the case of the employer and the employee, or the parent and the child.

23. 395 So. 2d at 328.

24. LA. R.S. 22:655 (1950 & Supp. 1958 & 1962).

25. See generally Johnson, *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Obligations*, 36 LA. L. REV. 375, 382-87 (1976). The holding in *Simmons v. Travelers Insurance Co.*, 295 So. 2d 550 (La. App. 3d Cir. 1974) (suit against four executive officers and insurer of "all" executive officers interrupted prescription against fifth executive officer, otherwise not timely sued, because suit against the liability insurer who was or might be solidarily liable with the fifth executive officer interrupted prescription as to that fifth officer) seems to be that a suit against the insurer will interrupt prescription as to the tortfeasor. And it seems even clearer that suit as to the tortfeasor will interrupt prescription running against the liability insurer. In this connection, see *Baker v. Payne & Keller of Louisiana, Inc.*, 390 So. 2d 1272 (La. 1980), decided during this term. The family of a deceased employee brought suit against his employer and the employer's liability insurer (Maryland Casualty). The court held that the exclusive remedy against the employer was in workers' compensation and dismissed the proceeding as to the employer. However, the insurer was retained in the lawsuit and the plaintiffs were given fifteen days to amend and state a cause of action against the insurer. The amended petition was filed more than a year

surer ("secondarily liable" obligor).²⁶ One might argue from this analogy that the result in *Sampay* is appropriate, since after *Foster v. Hampton* a suit against either the employer or the employee interrupts prescription as to the other, and the holding in *Sampay* is simply that the release of the primarily liable obligor does not release the secondarily liable obligor.

But there is a very important difference. The liability insurer, even though a "secondarily liable" obligor, has no right of indemnification against the insurer tortfeasor. The nature of their contractual relationship is that in exchange for a designated premium, the insurer agrees to pay those sums for which the insured may become (primarily) legally liable, without any right of reimbursement from the insured. Thus no injury is done to the rights of the liability insurer by the release of the insured, because the liability insurer had no rights against the insured in any event.

An employer is bound solidarily with the tortfeasor employee to the victim, as is a liability insurer with the insured. And an employer is bound "secondarily" as is a liability insurer (a point conceded by the court in *Sampay*). But the employer is a "secondarily liable" obligor who has rights of indemnification against the tortfeasor—unlike the situation of a liability insurer. And injury is done to the rights of an employer if *Sampay* is carried to its logical conclusion.

from the death and named certain executive officers of the employer as defendants, and again named Maryland Casualty, this time as liability insurer of the executive officers. The court held that the original timely petition interrupted prescription as to the second petition, presumably on the ground that although the insurer had first been named in its capacity as liability insurer of a clearly non-liable person (the employer), it was nonetheless also named (somehow) as the eventual liability insurer of defendants (the executive officers) who might be liable. The court distinguished its own decision in *Trahan v. Liberty Mutual Insurance Co.*, 314 So. 2d 350 (La. 1975), but in fact the decision in *Baker* seems inconsistent with *Trahan*. Like *Trahan* (in which a plea of prescription was upheld), *Baker* appears to be a case in which the claimant first timely sued an insured who was not liable to him, and only after prescription sued one who was or could be liable to him. In *Trahan*, the court viewed the naming of the insurer in the first suit as only in the capacity of insurer of a non-liable person, and thus not a ground for interruption of prescription. The court refused to do the same thing in *Baker*. The decision in *Baker* appears to open the possibility to an employee faced with a near prescription date to bring an action against the employer and the employer's liability insurer, and much later drop the employer and substitute the appropriate executive officers, hoping to establish that they are also insured by the same insurer.

26. See, e.g., *Cunningham v. Hardware Mut. Cas. Co.*, 228 So. 2d 700 (La. App. 1st Cir. 1969). The "release" of the insured tortfeasor while "reserving" rights against the liability insurer is almost a misnomer. For all practical purposes, the tortfeasor is not liable within the policy limits; the liability insurer is. The liability insurer is not bound beyond the policy limits, and the only person released by the release of the tortfeasor is the tortfeasor himself, as to his personal exposure.

Assume that a claimant like *Sampay* recovers \$10,000 in his settlement against Davis. Davis secures a release and understandably believes that this role in the affair is at an end, since the claimant has expressly proclaimed that the obligation as against Davis has been performed. If the claimant can reserve rights against Davis' employer, is the employer entitled to any reduction due to the settlement?²⁷ If so, how much?²⁸ And if the employer is made to pay any additional amount to the claimant at all, does the employer still retain any rights against the tortfeasor employee? If it does not retain any rights, by what authority are those rights denied? And what public policy is being served by insulating the wrongdoer from even the possibility of relieving his employer of the burden of his wrongdoing?

If the employer does retain rights against the employee, what is the source of those rights if the tort victim has already released the employee?²⁹ Why cannot the employee justly complain that he has already been made to answer for the harm done and should not be twice vexed with the same claim? Why should an employee ever settle a claim if he will then only find himself at the tail end of the claim now being pressed against his employer?

These were the issues before the court in 1960 in *Williams*. Having settled with the employee tortfeasor, the claimant then turned on the employer, who understandably third-partied the employee tortfeasor. In turn, the employee tortfeasor third-partied the plaintiff, asserting that the plaintiff had agreed in the settlement to hold the tortfeasor harmless for any future liability arising out of the accident. This inefficient and circuitous pleading morass was solved by the *Williams* court in the manner in which it should have been solved in the *Sampay* decision: release of the employee released the employer, making the various third-party demands moot.

27. LA. CIV. CODE art. 2203 requires the deduction of "the part" of the employee. There is a good argument that "the part" of the employee is in fact the whole debt. See Comment, *Tilting Against Windmills: A Solidary Rejoinder*, 41 LA. L. REV. 1279 (1981).

28. The determination of the appropriate deduction may depend in the future upon the percentages of fault reached under the comparative negligence provisions. But what "degree" of fault should be assigned to an employer who by definition is only vicariously liable because no fault can be charged to him at all?

29. Ordinarily, we would expect that the principle of subrogation would operate in favor of a solidary obligor who pays the debt. But if an obligor has already been released when the debt is paid by another obligor, there is nothing to which the paying obligor may be subrogated. And this is in fact the reason for the deduction principle found in LA. CIV. CODE art. 2203. If subrogation is not the source of the employer's rights against the employee, what is?

If the claimant believes the settlement with the employee is fair and discharges the obligation to his satisfaction, then he ought to settle and the law ought to make him abide by his bargain. If he does not believe the settlement is fair, then he ought to reject it and seek a remedy by litigation. He is only entitled to one satisfaction of his claim, regardless of the number of obligors he may pursue and regardless of whether that satisfaction comes from his own act or from execution of an appropriate judgment.

The decision in *Sampay* was not required by *Foster v. Hampton*. It needlessly complicates solidarity, and indeed produces more problems than it solves. It can be overruled without doing violence to the cases establishing the important consequences of solidarity as to the creditor, and the law can at the same time deal fairly and appropriately with the relationship among the debtors according to the nature of the relationship.

Lesion Beyond Moiety

The decision in *Clark v. Davis*³⁰ correctly recognized that the plaintiff was entitled to a remedy based upon lesion beyond moiety, even though an erroneous statement of the remedy was used. Two individuals (Palermo and Clark) purchased a tract of land which contained standing timber. Subsequently, they sold to the defendant Davis all of the merchantable timber situated on the tract, with a fixed time for removal of the timber. The price recited was \$3,500, but the agreement also called for the defendant to construct at his own expense "a roadbed suitable for dedication per the attached drawing"³¹

Subsequent to that agreement, one of the original owners (Palermo) sold his interest in the land to a Louisiana corporation. The defendant Davis, meanwhile, sold a one-fourth interest in the timber estate and all the timber-cutting rights to one Sanders, for a total of \$26,150.³² Davis incurred expenses (including the initial amount paid to Clark and Palermo for the timber) of some \$8,146, meaning that he realized a profit of some \$18,000 on the sale to Sanders. An ex-

30. 386 So. 2d 1001 (La. App. 3d Cir. 1980).

31. *Id.* at 1003.

32. The appellate opinion reflects this transfer without explaining why Sanders would pay that much for a one-fourth interest in the "timber estate" for which his sellers had paid \$3,500. He also received for that price all the timber cutting rights, but that would be a necessary concomitant in any event if he is to do the cutting. But the sale to Sanders was not at issue; the sale from Palermo and Clark to Davis was. The court mentioned the sale to Sanders because it might have indicated the profit which Davis made on the resale of the timber estate.

pert testified that the fair market value of the timber at the time of the first sale was over \$48,000.

The court of appeal correctly held that the corporation was a successor in title to Palermo and was entitled to bring the lesion action. It was also held correctly that a plea of lesion was available to the vendors and their successors in title. But its statement of the appropriate test to be used to determine whether lesion has occurred, and the measure of the remedy, was incorrect.

The trial judge had concluded that when the \$3,500 price and the cost of the construction of the roadbed was weighed against the value of the timber estate, "the value of the timber exceeds the sales price by more than one-half."³³ The appellate court made its own calculations, doubling the "sales price" (cash plus cost of roadbed) and finding that the doubled figure still did not equal the actual value of the timber estate. Thus the court concluded that the vendors "were aggrieved for more than one-half the value of the timber estate sold."³⁴ In the instant case, the error in stating the test made no difference, though it might in a case posing different facts.³⁵ The correct statement of the formula, drawn from articles 1861 and 2591 of the Civil Code, is that lesion will lie if a corporeal immovable has been sold for less than one-half of its value at the time of sale. Thus in the present case, lesion was available because a corporeal immovable worth \$48,000 was sold for (at best) some \$17,000 in value.

Having concluded that lesion would lie, the trial judge rendered an interlocutory judgment measuring the vendor's recovery by the amount of profit eventually realized by the vendee on the resale of the timber, citing *O'Brien v. LeGette*.³⁶ This disposition merely repeats and compounds the error made in *O'Brien v. LeGette*, which has previously been discussed in these pages.³⁷ The proper measure of a vendor's recovery in the instance (as here) in which the property has been resold by the vendee and may not be returned in kind is the difference between the actual price paid and the fair market value. In the present case, the vendors' remedy should be measured

33. 386 So. 2d at 1006.

34. *Id.*

35. Suppose the value of the timber estate was \$48,000, and suppose that the sale price was \$30,000. Under the formula adopted by the trial court and quoted by the appellate court, the value of the timber (\$48,000) exceeds the sales price (\$30,000) by "more than one-half." Under that formula, an action for lesion would still lie. But under the correct test, the immovable has not been sold for less than half its value. Only a sale for less than \$24,000 should be a ground for an action for lesion beyond moiety.

36. 254 La. 252, 223 So. 2d 165 (1969).

37. See Johnson, *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations*, 35 LA. L. REV. 280, 286-89 (1975).

by the difference between the \$17,385 which the court found had been paid for the timber (price plus roadbed construction obligation) and the \$48,485 which the expert testimony indicated was the fair market value. That difference amounts to approximately \$30,000—considerably more than the \$18,000 figure which the trial judge used in the final judgment.

The plaintiffs in *Clark* thus won, and properly so, but for the wrong reasons and in the wrong amount.

Negotiorum Gestio

*Hobbs v. Central Equipment Rentals, Inc.*³⁸ is a correct and appropriate use of the doctrine of *negotiorum gestio*³⁹ to resolve a dispute between the parties in a fairly common factual situation. Two gentlemen named Hobbs and a man named Hance were partners in the operation of three oil wells. The parties operated without benefit of any written documents. Upon Hance's death, his widow was sent into possession of his interest. She then executed a general power of attorney in favor of her son.

There was an unwritten agreement between the Messrs. Hobbs and the son (as there had been with the father) that the Hobbs would provide the expertise for the drilling operation and Hance would provide a laborer to work on the wells and hold up his end of the financial burdens of the business. Only one of the wells was a producer, and ultimately it also ceased production. The original mineral leasee (Chevron) for which the drilling was being done, called upon the Hobbs and Hance (as well as Central Equipment, the Hance corporation, which was actually the record operator of the well) to clean, plug, and properly abandon the wells as called for in the assignment of the leases.

Hance set about to get a bid for that to be done, but the Hobbs brothers rejected it as too high. Then the parties were unable to agree, although each was apparently free to seek bids for dismantling the rigs. Finally, the Hobbs brothers told Mrs. Hance that they were financially unable to support the cost of clean-up operations. At that point, Hance found what he thought was a good bid, which included the right of the dismantler to salvage whatever he could of the equipment. In light of the situation, Hance contracted the work

38. 382 So. 2d 238 (La. App. 3d Cir. 1980).

39. LA. CIV. CODE arts. 2295-3000. Consider especially the language of article 2299: "Equity obliges the owner, whose business has been well managed, to comply with the engagements contracted by the manager, in his name, to indemnify the manager in all the personal engagements he has contracted; and to reimburse him all useful and necessary expenses."

to be done, and the successful bidder did in fact salvage some of the equipment. Mrs. Hance later testified that though she was "disgruntled" with the Hobbs, she "felt sorry for them" and was not planning to seek reimbursement for the amounts paid to those who dismantled the rigs.

Shortly thereafter, the first Mideast oil embargo occurred and the value of oil field equipment escalated dramatically. The Hobbs apparently decided that they had been deceived by the salvage operation, and claimed a large amount of money from the Hances and the contractor who dismantled the rigs. Their theory was that had they been permitted to do that themselves, they could have realized a large profit from the sale of the salvaged equipment.

The trial judge rejected the Hobbs' demand and instead granted the reconventional demand of the Hances that the Hobbs be cast for two-thirds of the amount spent by the Hances to accomplish the dismantling operation. The appellate court affirmed. Both courts properly held that the Hances occupied the position of a *negotiorum gestor*, who had in light of the factual situation and the Hobbs' expressed inability to manage the affair themselves, conducted the business with "all the care of a prudent administrator" under article 2298 of the Civil Code. Having done that, the Hances were clearly entitled to be reimbursed the expenses which they had incurred for the share of the business owned by the Hobbs.

Legal Subrogation

The court in *Southern Farm Bureau Casualty Insurance Company v. Sonnier*⁴⁰ was able to avoid the issue previously discussed in a symposium article⁴¹ of whether an insurer is legally subrogated to the rights of its insured upon payment to the insured of the insured risk. In the case at hand, defendant's son had been killed when his vehicle collided with a Missouri Pacific train. The plaintiff insurer had paid the parents under the medical payments coverage of the automobile policy for funeral expenses. Subsequently, the parents' law suit against the railroad terminated in a successful verdict of some \$100,000, including an award for the same funeral expenses. The insurer claimed to have received notice of the judgment by virtue of a newspaper story and immediately pressed its claim for reimbursement for the funeral expenses. Before the parents' attorney responded to the insurer's claim, the case against the railroad was settled, without appeal. Then the parents' attorney in-

40. 396 So. 2d 996 (La. App. 3d Cir. 1981).

41. See Johnson, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term - Obligations*, 39 LA. L. REV. 675 (1979).

formed the insurer that the reimbursement claim would not be honored. The insurer brought suit against the parents for reimbursement, relying upon the general subrogation clause of the policy to the effect that "upon payment of any loss covered under this policy, the Company shall succeed to all the rights of recovery of the insured. . . ."

The appellate court noted that the trial judge had granted recovery for the insurer on the grounds that it had a "legal subrogation" against the railroad upon settlement with the parents. However, the court declined to express an opinion on the correctness of that determination since the insurer had a conventional subrogation by virtue of the policy provision. The court also held that the settlement between the parents and the railroad destroyed any rights which the insurer might have had against the railroad, since it terminated any rights to which the parents might have subrogated the insurer. Thus the court determined that the parents had breached the insurance contract, and owed the insurer the loss it had suffered by the breach (the reimbursement claim).

The reasoning seems flawed, in the light of the fact that the first part of the opinion indicates that the subrogation of the insurer to the rights of the parents against the railroad took place *upon the payment* of the funeral expenses by the insurer.⁴² If that is true, then how could a later act by the parents (settlement with the railroad) destroy those rights to which the insurer had already been subrogated? How can a contract to which the insurer is not a party (the settlement) destroy the insurer's rights which were gained upon payment of the insured risk? If the truth be known, the parents had no right to recover any amount for funeral expenses from the railroad at all; accordingly, the insurer should have proceeded against the railroad rather than the parents. However, the insurer might have faced problems of prescription in doing so.⁴³

42. The court had earlier quoted LA. CIV. CODE art. 2160(1), which requires that conventional subrogation "must be expressed and made at the same time as the payment." The court concluded that this requirement "does not mean the agreement cannot be entered into before the payment, but that it cannot be entered into *after* the payment." 396 So. 2d at 997 (emphasis added). The obvious reason for that line of reasoning was to permit the conclusion that the agreement to subrogate, effected in the policy itself long before any payment was due or made, would be sufficient since made *before* the payment even though not made simultaneously with it. It follows that subrogation of the insurer to the parents' rights took place *no later than* the payment of the funeral expenses by the insurer. The subrogation could not have been contingent upon the settlement by the parents, because that took place after the payment.

43. *Id.* at 998. The parents argued that the insurer's claim against them had prescribed because the insurer as subrogee of the parents could have no greater rights than the parents themselves had against the railroad. The parents had one year from

The settlement which the parents made with the railroad released any claims which they might have had against the railroad. But it could not and did not affect any rights which the insurer had (by subrogation upon its payment to the parents, or by legal subrogation) against the railroad. Both the insurer and the railroad must be presumed to know that, and to conduct themselves accordingly. If the railroad settles without calculating upon a subrogation right still extant in another claimant, it may have to pay that claimant in due course. If the insurer acquires a subrogation right and fails to exercise it timely, it should have to bear the loss for its own inaction. But the insured should not have to suffer for the mistakes of the tortfeasor and the insurer by having his negotiated settlement reduced by a claim which he has transferred long before to the insurer to pursue.⁴⁴

the death of their son to bring the action, including the claim for funeral expenses. Thus the insurer, as subrogee, should have had the same period of time to assert those rights of reimbursement. The court avoided discussion of the issue, though it noted in passing that the insurer "now has no cause of action against" the railroad. The court held that there was a cause of action against the parents for loss suffered through breach of the insurance contract by settlement of the case, and that the suit was filed timely since it was commenced within seven days of the settlement.

44. The railroad is obviously not in a position to argue the so-called collateral source rule as a bar to recovery by the subrogated insurer. The collateral source rule prohibits a tortfeasor from securing a windfall by claiming not to be liable for damages which he caused but for which the victim has recovered from some other source, such as under a major medical policy. Thus even if no subrogated insurer is in the law suit, the railroad cannot refuse to pay the parents the funeral expenses simply because they might be or are recoverable from another source. And there is nothing inconsistent with the collateral source rule when a subrogated insurer is in the litigation. The railroad is liable for the funeral expenses to whatever entity has suffered that "loss." The parents suffered it first, but due to the payment by the insurer and their subrogation of the insurer, they have no longer suffered it. The insurer has now suffered this "loss" and has a right to claim it from the railroad. The collateral source doctrine has nothing to do with the resolution of the controversy between the railroad and the subrogated insurer.