Louisiana Law Review

Volume 46 | Number 3
Developments in the Law, 1984-1985: A Symposium
January 1986

Obligations

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LEGISLATION

Act 331 of 1984, the long-awaited revision of the law of obligations,[1] took effect on January 1, 1985. Naturally, in the following 1985 session the Legislature did not undertake to make significant changes in this area. One of the few modifications, however, is worthy of mention.

Act 222 of 1985, amending and reenacting article 2593 of the Civil Code, provides as follows: "Lesion can be alleged only by the vendor in no other sale than one of corporeal immovables." This language was placed in the special rules of lesion, contained in section 2 of Chapter 8,[2] Title VII, Book III of the Civil Code, because former article 1862, as amended,[3] was eliminated in Act 331 of 1984. But nothing is changed by the added limitation in new article 2593, that a plea of lesion is available only with respect to the sale of *corporeal* immovables, for this position consistently has been recognized in the jurisprudence.[4]

Last year in this portion of the symposium[5] mention was made of section 10 of Act 331 of 1984 which was added by the Senate Committee on Judiciary A to reenact Louisiana Revised Statutes (La. R.S.) 9:3921. This amendment presumably was intended to negate legislatively the indemnity action of an employer against an employee when the employer is required to pay a third person damages for the tortious conduct of an employee, under article 2320 of the Civil Code, when the employee has been released by the injured creditor.[6] Since the constitutionality of La. R.S. 9:3921 was raised, comment was deferred until litigation de-

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1. For a critique of selected portions of Act 331 of 1984, see The 1984 Revision of the Louisiana Civil Code's Articles on Obligations—A Student Symposium, 45 La. L. Rev. 747-829 (1985).

2. "Of the Resolution and of the Rescission of the Sale."

3. 1978 La. Acts No. 728.

4. See, e.g., Wilkins v. Nelson, 155 La. 807, 99 So. 607 (1924).

5. Schewe, Developments in the Law, 1983-1984—Obligations, 45 La. L. Rev. 447, 447-48 (1985).

6. Id.

veloped the issue. Predictably, the question arose quickly, but it apparently has not been resolved. In *Comeaux v. Roy*,[7] the third circuit had the following to say about the newly added statute:

> Since R.S. 9:3921 was neither in effect at the time the subrogation agreements were executed nor at the time of trial on the merits, we believe it would be fundamentally unfair for this Court to consider this issue without allowing the parties an opportunity to relitigate this matter at the trial level, with leave being granted to all parties to file such amended pleadings and adduce such additional evidence as they deem necessary.[8]

Apparently, even the beginnings of the final report of paragraph B of La. R.S. 9:3921 will have to wait until next year.

JURISPRUDENCE

Again during the past judicial year, the reported opinions touched upon a range of issues: error as a vice of consent,[9] contract formation,[10] compromises,[11] compensation,[12] stipulations pour autrui,[13] conditions,[14]

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7. 469 So. 2d 478 (La. App. 3d Cir. 1985).

8. Id. at 481.

9. See, e.g., Security Nat'l Bank of Shreveport v. Terrell, 459 So. 2d 131 (La. App. 2d Cir. 1984) (A contract may be invalidated for unilateral error of fact regarding motive for formation when the other party knew or should have known of this motive for the consent to the agreement.); Hoffman v. Craftworld Int'l, Inc., 463 So. 2d 89, 92 (La. App. 3d Cir. 1985) (same).

10. See, e.g., Johnston v. Johnston, 469 So. 2d 31, 32 (La. App. 1st Cir. 1985) (When the "parties intend to reduce their negotiations to writing, they are not bound until the contract is reduced to writing and signed by them. Even if all terms of the alleged contract have been verbally agreed upon, so long as it is a part of the bargain that the contract be reduced to writing, no valid contract exists until it is reduced to writing.").

11. See, e.g., Fertitta v. Allstate Ins. Co., 462 So. 2d 159 (La. 1985); Cheramie v. Vegas, 468 So. 2d 810, 812 (La. App. 1st Cir. 1985) ("A compromise agreement . . . needs no other cause than a desire to adjust differences and put to rest all possibility of litigation.") (citing K.G. Farms, Inc. v. Louisiana Dep't of Transp. & Dev., 402 So. 2d 304 (La. App. 1st Cir. 1981)); Williamson & Diese Serv. Station Corp., 465 So. 2d 186, 188 (La. App. 3d Cir. 1985) (A compromise or transaction takes on the authority of the thing adjudged; it may not be challenged for error of law, for lesion, or on the basis that a party did not receive everything to which he may have been entitled.); Watkins v. Johns-Manville Corp., 458 So. 2d 212, 215 (La. App. 5th Cir. 1984) (similar holding); Elder Forest Prod., Inc. v. B & F Lumber & Supply Co., 458 So. 2d 644, 645-46 (La. App. 3d Cir. 1984) (Although the doctrine of res judicata is usually considered in connection with things judicially adjudged, the doctrine is of equal force when a transaction has been perfected by the parties.) (citing Thompson v. Bank of New Orleans & Trust Co., 422 So. 2d 230 (La. App. 4th Cir. 1982); Hancock v. Lincoln American Life Ins. Co., 278 So. 2d 561 (La. App. 1st Cir.), cert. denied, 281 So. 2d 754 (La. 1973); Beilewicz

novation,[15] subrogation,[16] contribution and indemnification,[17] fraud,[18]

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v. Rudisill, 201 So. 2d 136 (La. App. 3d Cir. 1967)); Mutual Fire, Marine & Inland Ins. Co. v. Electro Corp., 461 So. 2d 410, 412 (La. App. 4th Cir. 1984) (same).

12. See, e.g., Gautreau v. Southern Milk Sales, Inc., 463 So. 2d 1378, 1383 (La. App. 3d Cir. 1985) (for compensation to operate, the debts must be equally liquidated and demandable; a contested debt is not a liquidated one and cannot be used as a basis for compensation.) (citing Hartley v. Hartley, 349 So. 2d 1258 (La. 1977)); Fidelity & Deposit Co. of Maryland v. Cloy Constr. Co., 463 So. 2d 1365 (La. App. 1st Cir. 1984); Citizens Bank & Trust Co. v. Consolidated Terminal Warehouse, Inc., 460 So. 2d 663, 673 (La. App. 1st Cir. 1984).

13. See, e.g., Arrow Trucking Co. v. Continental Ins. Co., 465 So. 2d 691, 698 (La. 1985) (For a person to maintain successfully an action under a contract to which he is not a party, "the contract must clearly express the contracting parties' intent to stipulate some advantage for that (third) person.") (citing La. Civ. Code arts. 1890 & 1902 (1870); Fontenot v. Marquette Casualty Co., 258 La. 671, 247 So. 2d 572 (1971); Teacher's Retirement Sys. of La. v. Louisiana State Employees Retirement Sys., 444 So. 2d 193 (La. App. 1st Cir. 1983), rev'd on other grounds, 456 So. 2d 594 (La. 1984)).

14. See, e.g., Holley v. Singletary, 464 So. 2d 410, 413 (La. App. 1st Cir. 1985) (The law of Louisiana does not permit the common law conditional sales contract for movables; the parties cannot agree that the vendor will retain title until the full payment of the price, for the seller is divested of ownership of the movable when the purchaser is obligated to pay the price); Jones v. Jones, 459 So. 2d 1200, 1203 (La. App. 5th Cir. 1984) (A compromise providing that the former husband was obligated to pay a specific sum in alimony until the remarriage of the former wife was not an invalid potestative condition because the future and uncertain event (remarriage) was within the control of the obligee (former wife)); Moss v. Guarisco, 459 So. 2d 1, 5 (La. App. 1st Cir. 1984) ("The law does not permit a party whose obligation depends on a condition to allege as a defense the non-fulfillment of the condition where the failure of the condition was caused through his fault.") (citing George W. Garing Transfer, Inc. v. Harris, 226 La. 117, 75 So. 2d 28 (1954)).

15. See, e.g., Dunaway v. Spain, 468 So. 2d 771, 774-75 (La. App. 1st Cir. 1985); Wiger v. Meyer, 459 So. 2d 117, 119-20 (La. App. 2d Cir. 1984).

16. See, e.g., Comeaux v. Roy, 469 So. 2d 478, 480-81 (La. App. 3d Cir. 1985); Illinois Central Gulf R.R. v. Texaco, Inc., 467 So. 2d 1141, 1142-44 (La. App. 5th Cir. 1985); Jilek v. Covert, 465 So. 2d 102, 103-04 (La. App. 4th Cir. 1985); Independent Fire Ins. Co. v. Kline, 454 So. 2d 418, 419 (La. App. 3d Cir. 1984).

17. See, e.g., Sellers v. Siligman, 463 So. 2d 697, 700 (La. App. 4th Cir. 1985):

> Under tort circumstances, the question of whether the affair "concerns" only one of the solidary co-debtors in the sense of [former] article 2106 is the same as the question of whether one's negligence was actual and the other's only constructive, in which case tort indemnity is owed by one to the other. . . . In other words, in order to support a claim for tort indemnity, it must be said that the one's negligence caused some injury to the other for which the other is only liable on theoretical grounds. . . . Therefore, under Louisiana law, a party who is actually negligent or actually at fault cannot recover tort indemnity.

See also Frank's Door & Bldg. Supply, Inc. v. Double H. Constr. Co., 459 So. 2d 1273, 1276 (La. App. 1st Cir. 1984).

18. See, e.g., Stern v. Kreeger Store, Inc., 463 So. 2d 709, 711 (La. App. 4th Cir. 1984).

solidarity,[19] specific performance,[20] and interpretation of agreements.[21] The more significant decisions are collected and surveyed in this selection.

Consent: The Touchstone of Contract Formation and Contract Dissolution

Under article 1811 of the Louisiana Civil Code of 1870, offers to contract were acceptable either expressly or impliedly.[22] In addition, silence and inaction were available to show an assent to create an obligation.[23] These fundamental principles found in the Civil Code of 1870 were not changed by Act 331 of 1984.[24]

If conventional obligations may be formed by an express offer and an implied acceptance or even silence or inaction as an acceptance, a question would naturally arise whether or not an agreement may be terminated mutually by an express declaration of an intent to extinguish

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19. See, e.g., *Fertitta*, 462 So. 2d at 162-65; *Frank's Door & Bldg. Supply, Inc.*, 459 So. 2d at 1276.

20. See, e.g., Pylate v. Inabnet, 458 So. 2d 1378, 1387 (La. App. 2d Cir. 1984) (When each party is at fault in causing the termination of a contract, neither is entitled to specific performance of the terms of the agreement.).

21. See, e.g., Smith v. Ly, 470 So. 2d 326, 328-29 (La. App. 5th Cir. 1985); Acadiana Health Club, Inc. v. Hebert, 469 So. 2d 1186, 1189 (La. App. 3d Cir. 1985); Sims-Smith Ltd. v. Stokes, 466 So. 2d 480, 483-85 (La. App. 5th Cir. 1985); Harkins v. Howard Lumber Co., 460 So. 2d 772, 774 (La. App. 3d Cir. 1984); National Bench Advertising, Inc. v. Parish of Jefferson, 458 So. 2d 179, 182 (La. App. 5th Cir. 1984) ("[B]ecause a court may not impute to the parties the use of language without meaning or effect, some effect must be given to every word or clause in the contract. . . .").

22. La. Civ. Code art. 1811 (1870):

> The proposition as well as the assent to a contract may be express or implied:
>
> Express when evinced by words, either written or spoken;
>
> Implied, when it is manifested by actions, even by silence or by inaction, in cases in which they can from circumstances be supposed to mean, or by legal presumption are directed to be considered as evidence of an assent.

23. La. Civ. Code art. 1817 (1870):

> Silence and inaction are also, under some circumstances, the means of showing an assent that creates an obligation; if, after the termination of a lease, the lessee continue in possession, and the lessor be inactive and silent, a complete mutual obligation for continuing the lease, is created by the act of occupancy of the tenant on the one side, and the inaction and silence of the lessor on the other.

24. La. Civ. Code art. 1927 (1984) provides the following regarding consent:

> A contract is formed by the consent of the parties established through offer and acceptance.
>
> Unless the law prescribes a certain formality for the intended contract, offer and acceptance may be made orally, in writing or by action or inaction that under the circumstances is clearly indicative of consent.
>
> Unless otherwise specified in the offer, there need not be conformity between the manner in which the offer is made and the manner in which the acceptance is made.

the obligation followed with an implied assent to termination or even silence and inaction. A few years ago, the United States Fifth Circuit Court of Appeals supplied an affirmative answer to this query.[25] Former article 1901 of the Civil Code provided that agreements legally entered into "can not be revoked, unless by mutual consent of the parties . . . ."[26] Contractual consent, however, need not be verbalized; "[a] fortiori, that which is sufficient to create a contractual obligation is sufficient to dissolve it."[27] During the last year, the Louisiana Fifth Circuit Court of Appeal, in *Sims-Smith, Ltd. v. Stokes*[28] appeared to follow this lead.

Sims-Smith involved a disagreement regarding the services of the defendant in assisting the plaintiff in operating a retail shop at Metairie, Louisiana. The contract entered into between the litigants was for a six-month term, commencing on October 21, 1984, and ending one hundred and eighty days thereafter. One-half of the fee which the defendant charged the plaintiff was paid upon the signing of the agreement, with the balance due ninety days later. Problems developed thereafter shortly between the parties; approximately two weeks before the balance of the fee was to be paid, the plaintiff sent a letter advising the defendant that the contract was to be considered at an end and that the plaintiff wished a return on the monies already paid. The defendant received the letter but did not respond.

In affirming the decision of the trial court, largely in favor of the plaintiff, the fifth circuit concluded that the parties never entered into a contract. Alternatively, the appellate panel concluded: "Defendant's silence and inaction upon being informed that the contract was at an end constituted an implied concurrence in its dissolution."[29] This decision

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25. Allan v. Arnold, 673 F.2d 767 (5th Cir. 1982).

26. La. Civ. Code art. 1983 continues the rule and states, in part, the following: "Contracts have the effect of law for the parties and may be dissolved only *through the consent of the parties* or on the grounds provided by law." (Emphasis added.).

27. *Allan*, 673 F.2d at 770. The court supported its rationale in this fashion:

> Our conclusion is based upon settled Louisiana law. "A written contract may be modified or nullified by mutual consent of the parties." *Watson v. Haik*, 393 So.2d 173, 174 (La. App. 1980) (*citing* La. Civ. Code arts. 1901 and 1945; *Arceneaux v. Adams*, 366 So.2d 1025 (La. App. 1978)). *See Prisock v. Boyd*, 199 So.2d 373 (La. App. 1967). "And a written contract may be modified by oral agreement, provided the original contract was not required to be in writing." *Hornsby v. Ray*, 327 So.2d 146, 150 (La. App. 1976) (*citing* WWOM, Inc. v. Grapes, 181 So.2d 289 (La. App. 1965)). Finally, the proposition that the modification of a contract may be by implication, silence, or inaction," *Bank of Louisiana in New Orleans v. Campbell*, 329 So.2d 235, 237 (La. App. 1976) (*citing Alliance Mfg. Co. v. Foti*, 146 So.2d 464 (La. App. 1962)), is accepted in Louisiana.

Id. at n.3.

28. 466 So. 2d 480 (La. App. 5th Cir. 1985).

29. Id. at 485.

is eminently sensible and is completely in accord with the new rules governing dissolution of contracts, articles 2013 through 2024 of the Civil Code[30] as amended by Act 331 of 1984.

Compromises and Solidarity

The spectre of the celebrated and much criticized decision of the supreme court in *Louisiana Bank & Trust Co., Crowley v. Boutte*[31] continues to cast an unfortunately ominous shadow upon both the law of remission and solidarity. In this area, the last term of the supreme court witnessed a confusing result, for questionable reasons, in the case of *Fertitta v. All State Insurance Co.*[32]

The plaintiff, Mrs. Fertitta, was injured in a automobile accident caused by the negligence of the driver of the other vehicle. Consequently, Mrs. Fertitta instituted a law suit against the other driver, the liability insurer of the tortfeasor, and her own automobile insurance company, as the uninsured/underinsured motorist (UM) carrier. On the morning of trial, Mrs. Fertitta entered into a compromise with her UM carrier for $32,000. As a part of the transaction, the UM carrier "waived any right to subrogation or other reimbursement in the event plaintiff recovered by judgment or settlement against other parties liable for her

30. New article 2022 particularly is germane: "Either party to a commutative contract may refuse to perform his obligation if the other has failed to perform or does not offer to perform his own at the same time, if the performances are due simultaneously." La. Civ. Code arts. 2013, 2022, & 2024 additionally are worth noting. Under new article 2024, "[a] contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party." Good faith, of course, must be exercised. La. Civ. Code art. 1983; La. Civ. Code art. 2024, comment (e) ("In proceeding under this Article, the parties must comply with the overriding duty of good faith. Reasonable advance notice will usually be required to avoid unwarranted injury to the interest of the other party. See U.C.C. § 2-309(3). See also R.S. 32:1256.1 (dealing with automobile franchises).").

31. 309 So. 2d 274 (La. 1975). See Rubin, Developments in the Law, 1979-1980—Security Devices, 41 La. L. Rev. 389, 390 (1981); Rubin, The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Security Devices, 40 La. L. Rev. 437 (1976); Harrell, The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Security Devices, 36 La. L. Rev. 437 (1976); Note, Green Garden: Short Shrift for the Solidary Surety, 41 La. L. Rev. 968 (1981); Note, Aiavolasiti: A Conflict Resolved, A Conflict Ignored, 40 La. L. Rev. 483 (1980); Note, Rights of the Solidary Surety: Louisiana Bank & Trust Co. v. Boutte, 36 La. L. Rev. 279 (1975); Note, Security Rights—Suretyship—Release of Principal Debtor Does Not Discharge Solidary Surety, 49 Tul. L. Rev. 1187 (1975). If "[h]appiness is writing a symposium article on obligations and not having to discuss solidarity," Johnson, Developments in the Law, 1980-1981—Obligations, 45 La. L. Rev. 388, 390 (1982), this is not a year for joy and celebration. For one reason or another, "[o]ver the years, solidarity has occupied the greatest portion of this subject in the symposium." Johnson, Developments in the Law, 1979-1980—Obligations, 41 La. L. Rev. 355 (1981). The echo of Professor Johnson's sentiments is heard again.

32. 462 So. 2d 159 (La. 1985).

damages."[33] Trial on the merits continued against the negligent driver and her liability insurer, resulting in a judgement in the amount of $48,701.11 in favor of the plaintiff. The district court ruled that the settlement by Mrs. Fertitta with her UM carrier had no effect on the amount of judgment against the negligent driver and her insurance carrier, "since uninsured motorist coverage was designed to benefit the tort victim and not the tortfeasor."[34]

The first circuit, relying upon *Hoefly v. Government Employees Insurance Co.*,[35] noted that Mrs. Fertitta's UM carrier was a solidary obligor with the tortfeasor and the tortfeasor's liability insurer.[36] But, according to the intermediate appellate panel, no solidary obligation existed between the tortfeasor's insurer and the UM carrier until the tortfeasor's insurer fulfilled all of its obligations, or payment of policy limits.[37] The UM carrier, therefore, was classified as an "excess insurer" but "only because of its coverage over and above any protection of the tortfeasor."[38] Without a solidary obligation in existence involving the UM carrier and the tortfeasor's liability insurer, the intermediate appellate court refused to credit the tortfeasor's insurer with payments made by the UM carrier.[39] The supreme court reversed.

In reaching its decision, the court relied upon the text of former article 2091 of the Civil Code: "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.*"[40]

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33. Id. at 161.

34. Id. See 439 So. 2d 531, 535 (La. App. 1st Cir. 1983) (citing Strauss v. Allstate Ins. Co., 417 So. 2d 60 (La. App. 3d Cir.), cert. denied, 420 So. 2d 982 (La. 1982)).

35. 418 So. 2d 575 (La. 1982). See Note, Obligations—Uninsured Motorist and Insurer as Obligors in Solido, 58 Tul. L. Rev. 642 (1983).

36. 439 So. 2d 531 (La. App. 1st Cir. 1983).

37. Id. at 535.

38. Id. at 534-35.

39. As a matter of policy, "[i]n a choice of a windfall either to the liability insurer or the injured party, we choose to elect the latter." Id. From a legal perspective, the court's summary of *Hoefly* is perceptive:

> *Hoefly* held that tortfeasors and uninsured motorist carriers are solidary obligors as to the injured party, and that payment by one should exonerate the other from the creditor as to the solidary obligation. The Supreme Court cautioned, however, that although solidarily bound for the creditor's benefit, a tortfeasor and an uninsured motorist carrier might have differing relationships among themselves.

Id. at 534.

40. (Emphasis added.) While it has been said that "[i]t is the co-extensive obligation for the 'same thing' (and not the source of liability) which creates the solidarity of the obligation," *Frank's Door & Bldg. Supply, Inc.*, 459 So. 2d at 1276 (citing Narcise v. Illinois Central R.R. Co., 427 So. 2d 1192 (La. 1983)), "[o]ne decision that has not been

In other words, "when the liability is solidary, the creditor cannot collect more than the full amount of the debt for the single or combined payments of the debtors. Therefore, solidarity is not inconsistent with the purpose of providing full recovery to the tort victim."[41] As a matter of mathematics, Justice Lemmon, writing for the court, determined "that the $32,000 payment on the solidary obligation . . . must be imputed to the debt owed by . . . the other solidary obligor[s]."[42] Only Chief Justice Dixon dissented, on the ground that the majority allowed solidary debtors to plead division,[43] notwithstanding former article 2094 of the Civil Code.[44]

Amazingly, no mention is made in the majority opinion of old article 2203 of the Civil Code,[45] which, in full, reads as follows:

> The remission or conventional discharge in favor of one of the co-debtors in solido, discharges all the others, unless the creditor has expressly reserved his right against the latter.
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> In the latter case, he cannot claim the debt without making a deduction of the part of him to whom he has made the remission.[46]

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made in Louisiana Jurisprudence is precisely how the existence of solidarity will be determined." Comment, Prescribing Solidarity: Contributing to the Indemnity Dilemma, 41 La. L. Rev. 659, 677 (1981) [hereafter cited as *Prescribing Solidarity*]. Two methods appear in the reported decisions for identifying obligations in solido:

> [T]he court may decide that an obligation is solidary because all debtors are bound for the same thing to the same creditor, who may collect the whole debt from anyone. This "principal effects" standard classifies an obligation as solidary because it matches article 2091's definition of solidarity. Or, the court may decide that solidarity exists when its secondary effects, e.g., the interruption of prescription or the right of contribution, apply to the parties.

Comment, *Prescribing Solidarity*, supra, at 677.

41. 462 So. 2d at 163.

42. Id. at 164.

43. Id. at 165 (Dixon, C.J., dissenting).

44. La. Civ. Code art. 2094 (1870): "The creditor of an obligation contracted *in solido* may apply to any one of the debtors he pleases, without the debtor's having a right to plead the benefit of division."

45. This omission is surprising especially in view of the court's devotion of a part of its opinion to a discussion of former article 2206 of the Civil Code, treating imputation of payments received from sureties, since it is contained in the same section of the Code—Section 3 of Chapter 5, Title IV, Book III, entitled "Of the Remission of the Debt."

46. The author has commented previously on the workings of former article 2203. Schewe, supra note 5, at 453-55; Comment, Tilting Against Windmills: A Solidarity Rejoinder, 41 La. L. Rev. 1279 (1981) [hereinafter cited as *Tilting Against Windmills*]; Comment, *Prescribing Solidarity*, supra note 40. But perhaps no writer has contributed as much to this field as H. Alston Johnson III. Johnson, Developments in the Law, 1980-1981—Obligations, 42 La. L. Rev. 388, 390-97 (1982); Johnson, Developments in the Law, 1979-1980—Obligations, 41 La. L. Rev. 355, 355-58 (1981); Johnson, The Work

After identifying the tortfeasor, the tortfeasor's insurer, and the UM carrier as solidary obligors in favor of the plaintiff,[47] the court should have applied the second paragraph of the former article 2203 in *Feritta v. All State Insurance Co.* Thus, the court should have determined what *part* of the debt was owed by the solidary obligor released, the UM carrier. In answer to this problem, at lest three solutions are possible: (1) a dollar for dollar deduction, the method chosen by the court;[48] (2) no deduction, the argument voiced by the plaintiff, considering the released solidary debtor an accessory obligor within the meaning of former article 2106;[49] or (3) a deduction of one-third, simply by counting heads.

Many good arguments may be made in favor of adopting the second proposed solution.[50] For one, it really cannot be disputed that the true debtor is the tortfeasor, who holds no right of contribution from either the liability insurer or the UM carrier, the other solidary debtors. Accordingly, the settlement should have no effect upon the amount of the debt owed by the tortfeasor since the UM carrier elected to forego its

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of the Louisiana Appellate Courts for the 1974-1975 Term—Obligations, 36 La. L. Rev. 375, 375-82 (1976); Johnson, The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Obligations, 35 La. L. Rev. 280, 291-98 (1975); Johnson, The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Obligations, 34 La. L. Rev. 231, 231-37 (1974). Professor Johnson's works should be considered required reading.

47. This was the holding in Hoefly v. Government Employees Ins. Co., 418 So. 2d 575 (La. 1982).

48. 462 So. 2d at 163-64. A handful of dated decisions support this solution. See, e.g., Cormier v. Traders & Gen. Ins. Co., 159 So. 2d 746, 751-53 (La. App. 3d Cir.), rev'd on other grounds, 169 So. 2d 69 (La. 1964); Wilson v. Scrulock Oil Co., 126 So. 2d 429, 436 (La. App. 2d Cir. 1961); Rice v. Traders & Gen. Ins. Co., 114 So. 2d 92, 96-97 (La. App. 1st Cir. 1959); Lewis v. Travelers Indem. Co., 81 So. 2d 178, 180-81 (La. App. 2d Cir. 1955). But these opinions, plainly, are out of synch with the weight of authority in this state.

49. La. Civ. Code art. 2106 (1870): "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." Recent commentary on the subject abounds. Schewe, supra note 5, at 460-63: Johnson, Recent Developments in the Law, 1980-81—Obligations, 42 La. L. Rev. 388, 390-97 (1982); Comment, *Tilting Against Windmills,* supra note 46, at 1287; Comment, *Prescribing Solidarity,* supra note 40.

50. It may be said, for example, that the release of the UM carrier is the converse of the situation in Louisiana Bank & Trust Co., Crowley v. Boutte, 309 So. 2d 274 (La. 1975), when the creditor compromised with the principal debtor and purported to reserve rights against the accessory obligors, solidary sureties. Truly, in the sense of former article 2106 of the Civil Code, the full debt is owed by the principal obligor, the tortfeasor in *Fertitta.* The release of the UM carrier, therefore, should not benefit the tortfeasor. See Comment, *Tilting Against Windmills,* supra note 46, at 1287-94.

claim for reimbursement, via subrogation,[51] from the tortfeasor for the sums it paid to the plaintiff. This second choice, theoretically cogent and practically fair,[52] however, was discussed and rejected by the court.

Given a contest between alternative one, which the court ultimately adopted, and scenario three, it seems that the court should have chosen to adopt a more reasonable and legally more palatable view. The courts have not hesitated in counting solidary debtors by heads and deducting the fraction of the released obligors from the debt in applying former article 2203 of the Civil Code.[53] And, even aside from the prior authority for proposal three, as opposed to solution one, deducting one-third of the debt owed to the plaintiff (or $16,071.37) is more compatible with the definition of a transaction or compromise: "An agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which *everyone of them prefers to the hope of gaining, balanced by the danger of losing.*"[54]

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51. In the contract of compromise, the UM carrier "waived any right to subrogation or other reimbursement in the event plaintiff recovered by judgment or settlement against other parties liable for her damages." 462 So. 2d at 161.

52. In a similar context, Professor Johnson has asked "[w]hat public policy is . . . served by insulating the wrongdoer," the tortfeasor? Johnson, Developments in the Law, 1980-1981—Obligations, 42 La. L. Rev. 388, 396 (1982).

53. See, e.g., Wisconsin Capital Corp. v. Transworld Land Title Corp., 378 So. 2d 495, 498 (La. App. 4th Cir. 1979); Swanson v. Comeaux, 286 So. 2d 117 (La. App. 4th Cir. 1973), aff'd, 296 So. 2d 267 (La. 1974). In *Swanson*, the court held the plaintiff's UM carrier liable in solido with George Comeaux for the injuries caused by a tort committed by Steven Comeaux, Mr. Comeaux's minor son. In a *per curiam* opinion on an application for rehearing, the court, after recognizing that the UM carrier and George Comeaux were solidarily liable, even though the obligation of one (the UM carrier) arose *ex contractu* and the liability of the other (Mr. Comeaux) arose *ex delicto* (under articles 237, 2317, and 2318 of the Civil Code), held the UM carrier to be entitled to full indemnity, not merely contribution for a proportionate share, under former article 2106:

> The thrust of the applicant's complaint on this issue directs itself to the question of whether it is bound to seek contribution only for its proportionate share of whatever judgment it may pay. However, the provisions of Article 2103 relating to division into proportionate shares between the co-debtors is not applicable to the situation here. We have already referred to the provisions of Article 2092 wherein there is a different obligation between the debtors as to the payment, and additionally we refer to LSA-C.C. Article 2106, and those portions of LSA-R.S. 22:1406 applying to uninsured motorists coverage. We are of the opinion that these codal and statutory authorities show that as between the co-debtors here cast in judgment, the obligation is not simply that each is required to pay a proportionate part of the judgment to the other after payment of the judgment to the creditor, *but that the obligation is that if the insurer pays any part of the judgment, it is entitled to full recovery from the other judgment debtor. Landry v. Adam,* 282 So. 2d 590 (La. App. 4th Cir. 1973).

286 So. 2d at 127 (emphasis added).

54. La. Civ. Code art. 3071.

In *Fertitta*, when the UM carrier settled with the plaintiff, paying $32,000, it was speculation to venture what sum the plaintiff would be awarded in a judgment. In hindsight, clearly the plaintiff, Mrs. Fertitta, negotiated a favorable compromise with the UM carrier, but she, ironically, was *penalized* for it. If the court determined that the part of the solidary debt owed by the UM carrier was one-third of the obligation, the result reached by simply counting the number of debtors, then the judgment in favor of the plaintiff in the amount of $48,701.11 against the tortfeasor and the tortfeasor's insurer would have been reduced to $32,483.64, not to $16,701.11. The reduction of merely one-third makes sense when the contract of compromise between the plaintiff and the UM carrier is likened to one aleatory in nature.[55]

A deduction of one-third of the solidary obligation is fair in operation even if the plaintiff recovers more than triple the settled-for amount. For example, if the plaintiff had received a judgment of $150,000, then she properly would have be entitled to collect only 100,000 from the tortfeasor and the tortfeasor's insurer. The part of the solidary debt owed by the released obligor, the UM carrier, remains the same, one-third, which is $50,000 in this hypothetical situation. Admittedly, the plaintiff would recover more, $118,000, if only a dollar for dollar credit were given the unreleased solidary obligors, but that is a danger and a risk inherent in contracts of compromise and should be viewed as accepted by the parties to the transaction.[56]

It seems difficult to believe that the final chapter and verse has been written on the issues raised in *Fertitta*. The language found in new article 1803 of the Civil Code supports a conclusion different from the one reached by the supreme court in this case: "Remission of the debt by the obligee in favor of one obligor, or a transaction or compromise between the obligee and one obligor, *benefits the other solidary obligors in the amount of the portion of that obligor.*"[57] Accordingly, a reev-

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55. La. Civ. Code art. 1912; La. Civ Code art. 1776 (1870). According to comment (e) to new article 1912 of the Civil Code: "A contract may be aleatory not only because of its nature, but also because of the intention of the parties. Thus, an insurance contract is unquestionably aleatory as the risk involved is inherent in the nature of the contract. It is the same in the case of a wager." Really, a contract of compromise entered into between a plaintiff and a defendant to end a personal injury lawsuit is a type of wager: the defendant is awarding the plaintiff some money to dismiss the possibility of a court awarding more, although a chance of a smaller judgment exists as well; and the plaintiff is accepting the compensation, balancing the hope of a larger recovery against the risk of receiving less.

56. Article 3078 of the Civil Code provides, in part: "Transactions have, between the interested parties, a force equal to the authority of things adjudged. *They cannot be attacked on account of any error in law or any lesion.*" (Emphasis added.)

57. (Emphasis added.) The problem, of course, remains in calculating the amount of the portion of the solidary debt owned by the obligor released. While this question is

aluation is in order for the holding of and the reasoning in *Fertitta v. All State Insurance Co.*

Compensation

The decision of the first circuit in *Fidelity & Deposit Co. of Maryland v. Cloy Construction Co.*[58] is noteworthy in that the court identified "three kinds of set-off or compensation: legal, which is effected by operation of law; contractual, which is effected by the will of the parties; and, judicial, which is effected by the courts."[59] For this proposition, the court relied upon former articles 2207, 2208, and 2209 of the Civil Code and *Tolbird v. Cooper*,[60] a decision rendered by the supreme court in 1962. While it may be incorrect to identify as a type of compensation one effected by the will of the parties,[61] it may be useful to note that judicial compensation, in reality, is no more than a practice of shaping final judgements, and is invoked when compensation as a matter of law is not operable. As stated by the court in *Fidelity & Deposit Co. of Maryland v. Clay Construction Co.*, "*[j]udicial compensation* takes place when a court decides two parties are mutually indebted to each other and adjusts the amounts owed in fixing the judgment."[62] Since this form of compensation is triggered *after* a previously unliquidated debt

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not resolved in Comment, A Riddle of Solidarity: The Release of One Solidary Obligor, 45 La. L. Rev. 771 (1985), the work is commended for review.

58. 463 So. 2d 1365 (La. App. 1st Cir. 1984).

59. Id. at 1368.

60. 243 La. 306, 143 So. 2d 80 (1962). The following quotation from Planiol was relied upon by Justice Hawthorne in *Tolbird*:

> There is judicial compensation when a debtor who is sued for the execution of a debt filed a reconventional demand against the plaintiff pleading a credit in opposition to the original demand, which credit does not have or fulfill the conditions required for legal compensation. It may be, for example, that the credit claimed in the reconventional demand is not liquidated; or it may be the result of damages caused by the plaintiff to the defendant—damages that must be evaluated in order to fix the amount of the indemnity due. But the judge, having jurisdiction of the demand, can make such evaluation, and by the same judgment fix the amount of the damages and effect the compensation. The original defendant will simply be ordered to pay the excess over his own debt; it may even happen that he may obtain judgment for the difference, if the indemnity which is due him exceeds what he owes the plaintiff.

243 La. at 318, 143 So. 2d at 84 (quoting M. Planiol, Treatise on the Civil Law, no. 562, at 325 (11th ed. La. St. L. Inst. trans. 1959)).

61. The essence of compensation, a method by which obligations are extinguished, is its operation as a matter of law. Former article 2208 of the Civil Code provided that "[c]ompensation takes place of course by the mere operation of law, even unknown to the debtors; the two debts are reciprocally extinguished, as soon as they exist simultaneously, to the amount of their respective sums." The substance of this principle is reproduced in new article 1893 of the Civil Code.

62. 463 So. 2d at 1369 (emphasis in original).

or an obligation of a contested sum has been liquidated or fixed, often the situation when a plaintiff brings a petition and a defendant presents a reconventional demand, the jurisprudential gloss upon the Civil Code[63] expands the concept of compensation greatly.

Subrogation

The problems of uninsurance/underinsurance troubled the bench not only in the area of solidarity during the past year but in the context of subrogation as well.[64] Since the decision of the supreme court in *Bond v. Commercial Union Assurance Co.*, [65] a UM carrier has been able to become subrogated conventionally, primarily pursuant to a standard clause contained in policies, to its insured's rights against the uninsured tortfeasor.[66] The following year, however, the supreme court announced, in *Pace v. Cage*,[67] that an uninsured/underinsured carrier may not be subrogated to the rights of its insured after the insured has released the tortfeasor. Quite logically, the court stated that "at the time the uninsured motorist carrier made payment to the insured the insured had no rights against the former debtor to subrogate to the insurer."[68] Both *Bond* and *Pace* addressed conventional subrogations.[69]

In view of the supreme court's holding in *Hoefly v. Government Employees Insurance Co.*[70] that the UM carrier is liable solidarily with the tortfeasor and the tortfeasor's insurer in favor of the plaintiff, a

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63. See supra note 61.

64. Several years ago Professor Johnson noted in this forum that "[m]otorcycle riding can be hazardous to the consistency of the law." Johnson, The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Obligations, 36 La. L. Rev. 375, 375 (1976). Perhaps an appropriate update on his remark is to say uninsurance/underinsurance motorist carrier issues are wreaking havoc on the law of obligations. The cases of *Fertitta*, 462 So. 2d 159, *Jilek*, 465 So. 2d 102, *Hoefly*, 418 So. 2d 575, *Pace*, 419 So. 2d 443, Bond v. Commercial Union Assurance Co, 407 So. 2d 401 (La. 1981), and Niemann v. Travelers Ins. Co., 368 So. 2d 1003 (La. 1979), are recent illustrations. An excellent review of the law of uninsured/underinsured motorist coverage is found in McKenzie, Louisiana Uninsured Motorist Coverage—After Twenty Years, 43 La. L. Rev. 691 (1983).

65. 407 So. 2d 401 (La. 1981).

66. See infra note 69.

67. 419 So. 2d 443 (La. 1982).

68. Id. at 444.

69. Oddly, the issue of legal subrogation of an insurer to the rights of its insured against a tortfeasor upon payment of the claim of the insured is not only a mystery in the law of Louisiana but is mired in a Serbonian bog, using the inimatable prose of Justice Cardozo, Landress v. Phoenix Mutual Life Ins. Co., 291 U.S. 491, 499, 54 S. Ct. 461, 463 (1934) (Cardozo, J., dissenting). Professor Johnson waxed eloquent on the subject in this symposium a few years ago, and his thoughts are recommended. Johnson, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Obligations, 39 La. L. Rev. 675, 675-85 (1979).

70. 418 So. 2d 443 (La. 1982).

resolution seemed near of the longstanding dispute, whether or not insurers are entitled to subrogation as a matter of law under former article 2161 or new article 1829 of the Civil Code.[71] While all confusion in this area has not been removed, the case of *Jilek v. Covert*[72] at least raised and resolved a question unanswered in *Pace* — whether or not the insured's release of the tortfeasor precludes the UM carrier from claiming legal subrogation to the rights of its insured to pursue the tortfeasor. The answer supplied by the fourth circuit, with Chief Judge Redmann authoring the opinion, is legally sound: "Subrogation is subrogation . . . whether conventional or legal, it does no more than place the person subrogated into the position of the original creditor."[73] As a result,

> the paying UM carrier has nothing more than subrogation to the tort victim's claim. Where, as here, the tort victim has already released the tortfeasor, the UM carrier's subrogation upon payment will not enable it to recover the tort victim's claim against the tortfeasor because that claim has been released.[74]

Although undeniably correct, the decision of the *Jilek* court highlights the need for legislation on this subject. The UM carrier should not have to pay all of the claims of its insured, while the tortfeasor and, possibly, the tortfeasor's liability insurer pay nothing, if indeed the policy of this state is to require meaningful liability insurance of all drivers.[75]

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71. La. Civ. Code art. 1829 treats legal subrogation:

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

See Schewe, supra note 5, at 455-60.

72. 465 So. 2d 102 (La. App. 4th Cir. 1985).

73. Id. at 103 (citations omitted). See Reliance Ins. Co. v. Tadlock, 420 So. 2d 548, 549 (La. App. 2d Cir. 1982). ("It is well settled that a subrogee can have no greater rights than the subrogor and acquires only those rights held by the subrogor as of the time of payment.").

74. 465 So. 2d at 104.

75. See, e.g., La. R.S. 32:861 (Supp. 1977 & 1984).

Classification of Contracts

As noted last year,[76] the means for distinguishing between contracts of sale and construction agreements have been disputed and have never been very clear. During the past term, the issues significant for properly identifying a contract as one of sale or of another kind were raised in two reported opinions worth mentioning.

In *Acadiana Health Club, Inc. v. Hebert*,[77] the plaintiff commenced a lawsuit seeking, among other things, rescission of a contract for the installation of carpet in its place of business. One of the defendants, Dallas Hebert, agreed to install carpet chosen by a part-owner of Acadiana Health Club. Soon after the carpet was laid a number of seams began to open. Consequently, on several occasions, employees of defendant Dallas Hebert made repairs. More than a year after Dallas Hebert finished the work, the plaintiff commenced the action for rescission of the contract. The question of prescription, naturally, was crucial for the court's determination.[78] In this regard, the following statements by the court are noteworthy:

> There are three major factors in determining whether a contract is a contract of sale or a contract to build or to work by the job. First, in a contract to build, the "purchaser" has some control over the specifications of the object. Second, the negotiations in a contract to build take place before the object is constructed. Lastly, and most importantly, a building contract contemplates not only that the builder will furnish the materials, but that he will also furnish his skill and labor in order to build the desired object.[79]

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76. Schewe, supra note 5, at 456. See Hunt v. Suares, 9 La. 434 (1836); FMC Corp. v. Continental Grain Co., 355 So. 2d 953 (La. App. 4th Cir. 1977); Jefferson Parish School Bd. v. Rowley Co., 350 So. 2d 187 (La. App. 4th Cir. 1977); Henson v. Gonzalez, 326 So. 2d 396 (La. App. 1st Cir. 1976); Vico Concrete Co. v. Antley, 283 So. 2d 830 (La. App. 2d Cir. 1973); Kegler's, Inc. v. Levy, 239 So. 2d 450 (La. App. 4th Cir. 1970); S. Litvinoff, Sale and Lease in the Louisiana Jurisprudence 1-22 (1983); Levasseur, The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Sales, 39 La. L. Rev. 705, 709-15 (1979).

77. 469 So. 2d 1186 (La. App. 3d Cir. 1985).

78. If the contract is considered to be one of sale, then the rules of the Civil Code treating redhibition, "Of the Vices of the Thing Sold," would likely apply with a truncated period of prescription. In this respect, article 2534 of the Civil Code states, in part, as follows: "The redhibitory action must be instituted within a year, at the farthest, commencing from the date of the sale. The limitation does not apply where the seller had knowledge of the vice and neglected to declare it to the purchaser."

79. 469 So. 2d at 1189 (citing Airco Refrig. Serv. Inc. v. Fink, 242 La. 73, 134 So. 2d 880 (1961); Duhon v. Three Friends Homebuilders Corp., 396 So. 2d 559 (La. App. 3d Cir. 1981)).

In the matter at hand, the court concluded that while the plaintiff did not make specific requests regarding the carpet itself, it did have considerable input. The object of the contract "was not simply the sale of so many feet of carpet and flooring, but the job of carpeting and flooring the health club facilities."[80] Finally, and most importantly, Dallas Hebert's employees were called upon to use their skill in installing the carpeting. The court, therefore, reasoned that the contract between the plaintiff and Dallas Hebert was a construction agreement. This conclusion is sound under the existing jurisprudence[81] and is well-reasoned.

In a somewhat different context, the case of *Harkins v. Howard Lumber Co.*[82] illustrates an attempt to delineate between a redhibitory defect in a thing sold, a matter covered by the law of sales, and a breach of the obligation of a vendor to provide the purchaser with the precise thing requested, a claim not subject to the prescription of one year under article 2534 of the Civil Code.[83] Mr. Harkins commenced his lawsuit against Howard Lumber Company requesting damages for the defendant's having allegedly sold defective redwood siding. After trial, the district court awarded judgement in favor of the plaintiff. On appeal, Howard Lumber Company filed an exception of prescription, insisting that the plaintiff's claim was in redhibition and that it had prescribed, since the siding was purchased in April of 1979 and the suit was not filed until February 24, 1981. In rejecting this argument, the third circuit refused to view the problem before it as involving a "defective" product. The court explained itself in this fashion:

> It is rather a situation where the seller promised to supply a product of a certain quality but instead delivered a product of a lesser quality. The testimony adduced at trial and the purchase invoice shows that the siding purchased was to be a "clear grade" of redwood siding. "Clear grade" is a term used by the industry to rank siding as to its quality, i.e., streaking, knot holes, etc. The record firmly establishes that the siding delivered to the plaintiff was not of a clear grade but was rather of an inferior grade; therefore, the contract was breached. The plaintiff has a cause of action to rescind the contract based upon this error regardless of any action sounding in redhibition because of the "defective" nature of the product. Accordingly, the plain-

80. 469 So. 2d at 1189.
81. See supra note 76.
82. 460 So. 2d 772 (La. App. 3d Cir. 1984).
83. See supra note 78.

> tiff's cause of action is governed by a ten year prescriptive period.[84]

In supporting the position of the court, Judge Domengeaux, the author for the panel, relied upon former article 1931 of the Civil Code,[85] prior jurisprudence,[86] and scholarly commentary.[87] While the decision in *Harkins* is undeniably correct, more direct support exists for the result.

Since a contract of sale of a movable is perfected upon consent of the parties regarding the thing and the price,[88] the obligation of the vendor, in this instance Howard Lumber Company, to deliver the item purchased is controlled by articles 2477 through 2499 of the Civil Code,[89] not the general rules of obligations.[90] And claims arising under Section 1[91] of Chapter 6, Title VII, Book III of the Civil Code prescribe only after the passage of ten years. Because, therefore, the properly invoked rules contained in Title VII—"Of Sale"—concern the tradition or the delivery of the thing sold, not the vices of the thing sold, the plaintiff's action against the defendant had not prescribed.

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84. 460 So. 2d at 774 (citing La. Civ. Code art. 3544 (1870)). See La. Civ. Code art. 3499.

85. La. Civ. Code art. 1931 (1870): "A contract may be violated, either actively by doing something inconsistent with the obligation it has proposed or passively by not doing what was covenanted to be done, or not doing it at the time, or in a manner stipulated or implied from the nature of the contract." See La. Civ. Code art. 1994.

86. People's Water Serv. Co. of La. v. Menge Pump & Mach. Co., 452 So. 2d 752, 754-55 (La. App. 5th Cir.), cert. denied, 456 So. 2d 1391 (La. 1984) (citing PPG Indus. v. Industrial Laminates, 664 F.2d 1332 (5th Cir. 1982); Vico Concrete Co. v. Antley, 283 So. 2d 830 (La. App. 2d Cir. 1973); Victory Oil Co. v. Perret, 183 So. 2d 360 (La. App. 4th Cir. 1966)).

87. 2 S. Litvinoff, Obligations § 158, at 291, in 7 Louisiana Civil Law Treatise (1975).

88. La. Civ. Code art. 2456.

89. "The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer." La. Civ. Code art. 2477. In the event the vendor fails to deliver the thing sold, "the seller is liable to damages, if there result any detriment to the buyer, . . ." La. Civ. Code art. 2486.

90. La. Civ. Code art. 2438.

91. "Of the Tradition or Delivery of the Thing Sold."