

READING RELEASE: HOW TO EXTINGUISH A SOLIDARY OBLIGATION

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This Article explores how the Louisiana Civil Code uses a few key words to describe what happens when a creditor intentionally extinguishes the obligation of a debtor. While the Code provides fairly detailed rules and even some definitions of contracts and other methods that extinguish obligations, the Code does not do so for the term of art “release,” which it nevertheless employs several times in several contexts. Exploring the meaning of this term of art takes us through the process of the revision of the Louisiana Civil Code of 1870, and shows how some important decisions were made, particularly regarding the nominate contract of compromise, whose full effects might not have been fully appreciated. The awkward connection between “release” and “concession” is suggested. Thus, the goal of this Article is to illuminate some of the difficulties, if not embarrassments, that occur in attempting to put law into words, whose meanings we understand, or ought to.

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“*Oeuf* means ‘egg.’ *Chapeau* means ‘hat.’ It’s like, those French have a different word for *everything!*”¹

I. INTRODUCTION

The Louisiana Civil Code is written in a foreign language. Just ask any first-year law student studying the law of contract as the Civil Code presents it. The Code appears to be in English, the student will say, but it is not. First, some of the words are in fact nothing but French words in English dress. Such words include “synallagmatic,” “redhibition,” and “lesion beyond moiety.” Words like these are not like the English equivalent of *oeuf* and *chapeau*, the French words meaning “egg” and “hat.” Instead, such words are highly specialized terms of art in French, and merely anglicizing them does not make their meanings any clearer. Moreover, the student will continue, the Louisiana Civil Code contains words that appear to be in ordinary English, which in a just world would carry their ordinary meaning, but they do not: for example, term, condition, immovable, consent. And sometimes the Code uses a term of art when there is an ordinary word that does the job perfectly well. “Conventional obligation? What’s that? An ordinary obligation?” the student asks. “Oh, that means ‘contract.’ Well, then, if the Code *means* ‘contract,’ why doesn’t the Code just *say* ‘contract,’ for heaven’s sake?”

To top it off, the Code acts as if it were a combination lexicon-and-usage manual, giving careful definitions to terms of art that are supposed to apply throughout the book. What is immovable in Book II² is also immovable in Books I, III, and IV. The same is true of movables.³ And likewise for contracts and

1. *Steve Martin: A Wild and Crazy Guy* (NBC television broadcast Nov. 22, 1978) (originally published as an audio recording on vinyl).

2. LA. CIV. CODE ANN. arts. 448, 462, 464 (2018).

3. LA. CIV. CODE ANN. art. 475 (2018) (“All things, corporeal or incorporeal, that the law does not consider as immovables, are movables.”). Professor Yiannopoulos skillfully elicited with a simple question from his class in Property, Tulane Law School, spring 1980, exactly how this article worked. His lesson was to show how “negative inference” worked as a tool in the Civil Code.

conventional obligations, the principal concern of this Article. The Civil Code defines contract as an “agreement” that “create[s], modify[ies], or extinguishe[s]” an “obligation.”⁴ And it defines an obligation as a “legal relationship” that requires an “obligor” to “render a performance” to an “obligee.”⁵ Because the Civil Code does these things, the reader is encouraged to believe that the Code will define important terms of art or otherwise make their meanings clear, but this is not always the case.⁶ The Code’s lack of attention to the meaning of a term of art, however, does not indicate that it is unimportant. And that means that the reader or student of the Civil Code must take some care to nail down the meaning as best as possible.⁷ “Release” is one such undefined, but significant, term of art. It is necessary to get at its meaning because the text of the Civil Code uses it, indeed relies upon it, as do the official revision comments and the *Exposés des motifs*. This Article therefore endeavors to explore the meaning of that word.

4. LA. CIV. CODE ANN. art. 1906 (2018).

5. LA. CIV. CODE ANN. art. 1756 (2018).

6. The Code also might not focus on definitions and meanings when they are in the process of being developed through doctrinal analysis. A well-known example in French law is the doctrinal elaboration of the distinction between obligations of means and obligations of result. Moreover, the French Civil Code, even in its most recent revision, does not articulate the distinction nor the terms of art but has permitted them to remain in the field of doctrine, beside legislation. The analysis in French doctrine is attributed to René Demogue. CHRISTIAN LARROUMET & SARAH BROS, LES OBLIGATIONS: LE CONTRAT ¶52, in 3 TRAITÉ DE DROIT CIVIL 43–44 (Christian Larroumet ed., 8th ed. 2016) (citing 5 RENÉ DEMOGUE, TRAITÉ DES OBLIGATIONS EN GENERAL ¶1237 (1923–1925)). Accord CHRISTOPHE SAINT-PAU, DROIT A REPARATION: CONDITIONS DE LA RESPONSABILITÉ CONTRACTUELLE, JurisClasseur Civil Code, art. 1146 à 1155 ¶95 (updated Nov. 27, 2017).

7. It is the assumption of this Article that words have meanings, and that the words the Civil Code uses in particular ought to have meanings. See generally Stanley Cavell, *Must We Mean What We Say?*, in ORDINARY LANGUAGE: ESSAYS IN PHILOSOPHICAL METHOD 75–112 (V. C. Chappell ed., 1969), updated and republished in STANLEY CAVELL, MUST WE MEAN WHAT WE SAY? (2002). Cavell’s essay was based, he said, on a “philosophical appeal to the ordinary” as a means of “uncovering the necessary conditions of the shared world.” STANLEY CAVELL, MUST WE MEAN WHAT WE SAY?, at xx (2002). Thus, for law to function, language must be able to function. For civil law in particular, Professor Yiannopoulos alluded to the necessary conditions of private law, indeed of all Louisiana law, in his comment as Reporter to the revision of article 1 of the Preliminary Title of the Civil Code. “Article 1 makes no reference to sources of law such as the Constitution of the United States, federal legislation and executive orders, international treaties, and the Louisiana Constitution. These sources of law are the prius of all Louisiana legislation and need not be mentioned in Article 1 of the Civil Code.” LA. CIV. CODE ANN. art. 1 cmt. (d) (2018) (enacted by La. Acts 1987, No. 124, § 1, effective Jan. 1, 1988). Professor Yiannopoulos was the reporter for the revision of the Preliminary Title.

This Article looks at release in the context of the rules of the Code that govern the extinction of a contractual obligation.⁸ It will principally examine the extinction of the obligation of one obligor when there is one obligee and there are at least two obligors.⁹ Often, in this context, creditors and debtors will use the word “release” to describe what it is they are doing, yet its meaning is not always clear. Using the tools of interpretation, this Article suggests that the meaning can be made clear and its use more sure.

Three groups of articles in the Code help to get at the meaning of this word. The first group provides the rules for contracts and obligations in general. Those rules appear in Book III of the Civil Code, which bears the long heading, “Of the Different Modes of Acquiring the Ownership of Things.” Title III of Book III deals with obligations in general; Title IV with contracts or conventional obligations, conventional here signifying “by agreement.” Titles III and IV were revised together, going into effect January 1, 1985 (the 1985 Obligations Revision).¹⁰ The second group of articles, also in Book III, are those governing suretyship. The suretyship articles appear in Title XVI, which the legislature revised effective January 1, 1988 (the 1988 Suretyship Revision).¹¹ A third group of articles on

8. This Article omits discussion of the function of the term of art “release” in other contexts. For example, article 2376 of the Code of Civil Procedure deals with the release of real security. LA. CODE CIV. PROC. ANN. art. 2376 (2018). Nor does this Article discuss several other terms of art akin to release, such as renunciation, as in renunciation of a servitude under Louisiana Civil Code article 771, or renunciation of a succession under Louisiana Civil Code articles 963 through 966.

9. Professor Yiannopoulos included among his many contributions to civil-law doctrine in Louisiana a translation of Aubry & Rau’s analysis of extinction of obligations. See 4 C. AUBRY & C. RAU, COURS DE DROIT CIVIL FRANÇAIS: OBLIGATIONS (La. St. L. Inst. trans., A.N. Yiannopoulos trans., 1965) (English trans. of the 6th French ed. by Étienne Bartin (1942)).

10. Act No. 331, 1984 La. Acts 719. Professor Saúl Litvinoff was the reporter. Act 331 stated that it amended and reenacted Titles III and IV of the Louisiana Civil Code of 1870. The use of that formula was criticized in Vernon V. Palmer, *Death of a Code—Birth of a Digest*, 63 TUL. L. REV. 223 (1988). It provoked a critical response in Julio Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 TUL. L. REV. 147 (1989), followed by Vernon V. Palmer, *Revision of the Code or Regression to a Digest? A Rejoinder to Professor Cueto-Rua*, 64 TUL. L. REV. 177 (1989–1990), and by a symposium that discussed the issue: Hon. James Dennis, Julio Cueto-Rua, David Gruning, Shael Herman, Vernon Palmer, Cynthia Samuel & A.N. Yiannopoulos, *The Great Debate Over the Louisiana Civil Code’s Revision*, 5 TUL. CIV. L.F. 49 (1990). The original article was republished in VERNON VALENTINE PALMER, *The Death of a Code—The Birth of a Digest*, in THE LOUISIANA CIVILIAN EXPERIENCE: CRITIQUES OF CODIFICATION IN A MIXED JURISDICTION 135–76 (2005).

11. Act No. 409, 1987 La. Acts 985. Professor Tom Harrell of the Paul M. Hebert

compromise is also relevant. The articles on compromise appear in a separate title of Book III, Title XVII (articles 3071 through 3083). Title XVII was revised separately, effective August 15, 2007 (the 2007 Compromise Revision).¹² The rules on extinction of obligations, including conventional obligations, appear in Chapter 6 of Title III.¹³ It should be noted that while “release” is not defined or described systematically by the Code, other means of extinguishing obligations are not similarly neglected. Those classic means of extinguishing obligations include: performance,¹⁴ payment,¹⁵ novation,¹⁶ remission,¹⁷ compensation,¹⁸ and confusion.¹⁹ And while compromise has earned a place as a nominate contract in its own right,²⁰ it is also a classic method of extinguishing contractual obligations.

As a last introductory note, generally the extinction of the obligation of one obligor has no effect on the obligation of another obligor. This is an application of the principle *res inter alios pro aliis acta non nocet neque nocere neque prodesse potest*, that is, a thing done between two persons neither hurts nor helps other

Law Center, Louisiana State University, was the reporter for the revision of Title XVI.

12. Act No. 138, 2007 La. Acts 1289. Professor Litvinoff was also the reporter for the revision of Title XVII. Thus, two different reporters and two different committees worked on the two main projects, the 1985 Obligations Revision and the 1988 Suretyship Revision. But they were aware of each other’s work and sometimes dealt with the same problems. Perhaps as a result, difficulties appear around the extinction of certain obligations (the rules on extinction of obligations are in Title III) created by contract (Title IV) for which a surety exists (Title XVI). Those difficulties appear in part because of the technical terms used to describe certain actions or acts by contract parties or by a surety, or the effects of those actions or acts.

13. The rules on remission of debt appear in Section 4 of Chapter 6 (articles 1888 through 1892), and the rules on remission are closely related to those on compromise. The connection between remission and compromise is discussed *infra* Part V.

14. LA. CIV. CODE ANN. arts. 1854–1863 (2018).

15. LA. CIV. CODE ANN. arts. 1864–1869 (2018).

16. LA. CIV. CODE ANN. arts. 1879–1887 (2018).

17. LA. CIV. CODE ANN. arts. 1888–1892 (2018).

18. LA. CIV. CODE ANN. arts. 1893–1902 (2018).

19. LA. CIV. CODE ANN. arts. 1903–1905 (2018) (a perennial favorite of students). All of these classic methods of extinction of obligations are contractual in nature. They are all agreements that extinguish obligations. The Code also lists impossibility among these contractual methods, although it does not occur through agreement. LA. CIV. CODE ANN. arts. 1873–1878 (2018). Whether payment is, in general, truly contractual in nature can be doubted, but for the purposes of this Article we need not decide whether it is a contract or another kind of juridical act based upon agreement. For one thing, the payment that is made by the debtor in an accord and satisfaction, coupled with its acceptance by the creditor, clearly seems to be contractual in nature.

20. See LA. CIV. CODE ANN. arts. 3071–3083 (2018).

persons.²¹ But, there is an exception to this principle that the Civil Code expresses quite clearly, namely, the remission of one solidary obligor's debt does affect another solidary obligor's debt.²² And the renunciation of the solidarity of one solidary obligor's debt does affect another solidary obligor's debt.²³ And finally, if the creditor renounces the solidarity of one solidary obligor's debt and a second solidary obligor becomes insolvent, the entire loss arising from that second obligor's insolvency may not be directed to a third, solvent solidary obligor, but instead the solidary obligor as to whom solidarity was renounced must shoulder some of the loss.²⁴

II. THE BASIC SITUATION AND SOME VARIATIONS

We may begin with a simple pattern. There is one creditor (or obligee) and more than one debtor (or obligor). This Article uses creditor and obligee interchangeably, likewise debtor and obligor.²⁵ The debtors owe the creditor a sum of money, and the creditor has a corresponding claim against them.²⁶ Thus, performance of the obligation is simply the payment of the debt or the satisfaction of the claim.

Call the creditor Kate. Call the debtors Art, Bea, and Cal. The debt is \$120, which we can express in two ways: the debtors owe Kate a debt of \$120, and Kate has a claim against the debtors for \$120.

21. 2 HENRI ROLAND & LAURENT BOYER, ADAGES DU DROIT FRANÇAIS 900–08 (2d ed. 1986).

22. LA. CIV. CODE ANN. art. 1803 (2018).

23. See LA. CIV. CODE ANN. art. 1802 (2018).

24. LA. CIV. CODE ANN. art. 1806 (2018).

25. The terms creditor and obligee are “synonymous,” as are the terms debtor and obligor. LA. CIV. CODE ANN. art. 1756 cmt. (b) (2018). First, creditor and debtor fit easily for the purposes of this Article because the only example used here is a claim for payment of money or a debt to pay money. Second, using creditor and debtor is not an invitation to common-law ways of thinking. Third, obligor and obligee do not accord with ordinary speech; creditor and debtor do. In addition, the words obligee and obligor are close to each other and can be easily confused.

26. This Article uses “claim” as a synonym for “credit-right.” See SAÚL LITVINOFF, OBLIGATIONS: BOOK 1 § 7, in 6 LOUISIANA CIVIL LAW TREATISE 24–25 (1969) [hereinafter LITVINOFF OBLIGATIONS (1969)]. Credit-right is a translation of the French term of art *droit de créance*. Both the original and the translation of this term are accurate but somewhat awkward. Credit-right is surely not idiomatic in English, nor does *droit de créance* appear to be idiomatic in standard French. It is curious that such a basic legal term of art is artificial and not borrowed or adapted from ordinary language. Accord SAÚL LITVINOFF, THE LAW OF OBLIGATIONS: PART I, OBLIGATIONS IN GENERAL § 1.2, in 5 LOUISIANA CIVIL LAW TREATISE 3–5 (2d ed. 2001) [hereinafter LITVINOFF OBLIGATIONS IN GENERAL (2001)].

On these facts, the Civil Code gives three, and only three, possible characterizations of the debtors and the debt (or their debts).

First, they may owe the debt **severally**, that is, they may be several debtors. This means that we treat each obligor as owing a separate and distinct obligation to the creditor.²⁷ Thus, if Art, Bea, and Cal owe Kate this debt severally, then each of them owes \$40 to Kate, and Kate's total combined claim is \$120. In fact, however, the three debts (and the three claims) are completely unrelated. Each debt (and claim) is independent of the others. Kate may, and in fact must, deal with each of them individually. Any dealings between Kate and Art have no effect on Kate's claim against Bea or Kate's claim against Cal. Art may pay Kate \$40 (or \$30 or \$10), and Art's payment combined with Kate's acceptance of it have no effect on the other two debtors. Or Kate may permit her claim against Art to prescribe, intentionally or unintentionally. Or Kate may intentionally remit Art's debt to her. None of these actions or acts affects either the debts owed by Bea or Cal to Kate or the claims that Kate has against Bea or Cal.²⁸ This can be depicted as in Diagram 1.²⁹

DIAGRAM 1. SEVERAL DEBTS

Art	\$40	→	Kate
Bea	\$40	→	Kate
Cal	\$40	→	Kate

Second, Art, Bea, and Cal may owe the debt of \$120 **jointly**, that is, they may be joint debtors or joint obligors.³⁰ This means

27. LA. CIV. CODE ANN. art. 1787 (2018).

28. See ALAIN LEVASSEUR, *Obligations with Multiple Persons*, in LOUISIANA LAW OF OBLIGATIONS IN GENERAL: A PRÉCIS 55–69 (3d ed. 2009) [hereinafter LEVASSEUR OBLIGATIONS (2009)]. LITVINOFF OBLIGATIONS (1969), *supra* note 26, §§ 15–24, at 36–43.

29. No claim of originality accompanies these diagrams. Compare those in MICHAEL H. RUBIN, LOUISIANA LAW OF SECURITY DEVICES: A PRÉCIS, chs. 2–8 *passim* (2d ed. 2017). My colleagues Dian Tooley-Knoblett and Nikolaos Davrados have shared with me the diagrams they use in their classes in obligations and security rights, and I have shared mine with them.

30. LA. CIV. CODE ANN. art. 1788 (2018).

that together they owe \$120, but Kate may pursue Art, Bea, and Cal each for a maximum of \$40, and not a penny more. We may accurately say, then, that the debt of \$120 is divided among the three of them, but their three debts are linked. Hence, the three debts may be placed in the same field visually, to represent the connection. The joint debt or debts may be pictured in the following way:

DIAGRAM 2. JOINT DEBTS

Art	\$40	→	Kate
Bea	\$40	→	
Cal	\$40	→	

If Kate recovers \$40 from Art, Art has no claim against Bea or Cal. Kate must also pursue Bea and Cal for payment of their shares of the debt. Art, however, cannot pursue either Bea or Cal to recover any part of the \$40 that Art paid. This remains true even if Kate entirely extinguishes (for example, by remission) Bea's debt and Cal's debt.

Third, Art, Bea, and Cal may owe \$120 to Kate **solidarily**.³¹ In this case, Kate may pursue any one of the three debtors for the entire amount of the debt, the whole \$120. Once Kate has recovered that amount from Art, for example, Kate may not pursue either of the remaining debtors for a single dollar. Art, on the other hand, may and can pursue both Bea and Cal to obtain contribution of their respective shares of the debt, \$40 each, that Art paid. Diagramming this relationship accurately, however, requires showing that each of the debtors can be made to pay \$120 to Kate, but that the share each will pay after contribution occurs is \$40. Diagram 3 attempts to depict this result:

DIAGRAM 3. SOLIDARY DEBTS

Art	\$120/40	⇒	Kate
Bea	\$120/40		
Cal	\$120/40		

It should be apparent that after Art pays \$120 to Kate, Art's

31. LA. CIV. CODE ANN. art. 1790 (2018).

claims for contribution against Bea and Cal are joint, that is, Bea and Cal are Art's joint obligors, not solidary obligors.³² They are together bound for \$80 to Art, but each is only bound for \$40, as illustrated in Diagram 4:

DIAGRAM 4. JOINT OBLIGATIONS TO CONTRIBUTE

Bea	\$40	→	Art
Cal	\$40	→	

III. SOLIDARITY AS SECURITY

Eminent authorities view solidarity among debtors as a form of security for the creditor. No less an authority than Josserand states that the purpose of passive solidarity is to give the creditor “greater security.”³³ Naturally, the form of security that solidarity most closely resembles is suretyship, the fundamental form of personal security. The general pledge of the solidary debtors' assets, then, will hover potentially over not just one patrimony but over the patrimonies of all of the solidary obligors, a “series” of patrimonies.³⁴ Indeed, from the point of view of the creditor, solidarity and suretyship will have substantially the

32. See LA. CIV. CODE ANN. art. 1788. It is also possible to argue for a categorization of the obligations of Bea and Cal as several. This would be quite inconsistent with the effect of the obligation of a formerly solidary obligor to contribute to make up for the loss arising from the insolvency of another solidary obligor after the latter's insolvency. LA. CIV. CODE ANN. art. 1806 ¶2 (2018). Part IX *infra* makes this argument.

33. 2 LOUIS JOSSERAND, COURS DE DROIT CIVIL POSITIF FRANÇAIS: THÉORIE GÉNÉRALE DES OBLIGATIONS; LES PRINCIPAUX CONTRATS DU DROIT CIVIL; LES SURETÉS §§ 760–761, at 413–14 (2d ed. 1933).

34. *Id.*

Le but de cette combinaison est de donner au créancier une plus grande sécurité: au lieu d'un débiteur unique, il en aura deux, trois ou davantage; son droit de gage général, au lieu d'être limité à un patrimoine, planera sur une série de patrimoines; la solidarité passive est une forme de sûreté personnelle. . . . Le rapprochement vient aussitôt l'esprit avec une autre forme de sûreté personnelle, le cautionnement. Et il est bien vrai qu'à aller au fond des choses, les codébiteurs solidaires jouent, dans la réalité, le rôle de cautions.

The purpose of this combination is to give to the creditor a greater security; instead of one debtor only he will have two, three, or more; his right of general pledge, instead of being limited to one patrimony, will float over a series of patrimonies; passive solidarity is a form of personal security. . . . The connection with another form of personal security comes to mind immediately, suretyship. And it is certainly true that at bottom solidary co-debtors in reality play the role of sureties.

Id. (emphasis added) (trans. by author).

same effect. But the points of view of the solidary debtors and the surety or sureties are quite different.³⁵

Assume the solidary debtors enter their contract together. They may be selling an asset to several buyers (their creditors as to the ownership of the thing sold and as to the warranties the solidary sellers owe the buyers). The sellers will necessarily share the same cause, namely, to get the obligation of the buyer to pay the price. The buyers will necessarily share the same cause, namely, to get the ownership of the thing sold. We can label this cause, which is the same for all sellers and all buyers in every contract of sale, as the objective cause. The sellers and especially the buyers might have other reasons why they obligate themselves; other causes might include qualities of the thing sold (for example, a family heirloom, or the capacity to spin at one thousand revolutions per minute, etc.). If the parties agree in light of those other causes, those may become principal causes, as to which the parties might be in error, or as to which one party might defraud the other.

Using this vocabulary, the objective cause of the creditor is to obtain personal security for the debt of another person. This purpose, indeed, is the objective cause of suretyship, as it is the same for every creditor in every contract of suretyship. Thus, it is "the" objective reason why the creditor accepts the contract of suretyship, whatever may be the creditor's particular reason for accepting this contract of suretyship (perhaps the enterprise of the debtor is one that the creditor happens to admire). Likewise, the surety's objective cause will be to provide security to the creditor for the debtor. That cause is the same for every surety in every contract of suretyship, and therefore is objective. The subjective, potentially principal, cause of the surety will be some other reason, for example, that the principal obligor is the surety's long lost son. Or that the principal debtor is a close corporation of which the surety is the majority shareholder. Likewise, the surety may agree to undertake the suretyship in return for a payment by the creditor. This reason or cause, notionally, is a subjective one that becomes, through the parties' intent, a principal cause of their contract.

Thus, both solidarity and suretyship provide the creditor access to the patrimonies of additional persons if a principal

35. See generally Nadia San Miguel, Comment, *Please Release Me: A Comparative Study of Louisiana Suretyship Law*, 40 LOY. L. REV. 955 (1995).

obligor defaults.

IV. RENUNCIATION OF SOLIDARITY

If we begin with three obligors bound solidarily to one obligee, the obligee may transform his solidary obligors into joint obligors.³⁶ How do we know this? Article 1802 so provides. It reads: “Renunciation of solidarity by the obligee in favor of one or more of his obligors must be express. An obligee who receives a partial performance from an obligor separately preserves the solidary obligation against all his obligors after deduction of that partial performance.”³⁷

It might help to break this sole paragraph of article 1802 into two:

¶1 Renunciation of solidarity by the obligee in favor of one or more of his obligors must be express.

¶2 An obligee who receives a partial performance from an obligor separately preserves the solidary obligation against all his obligors after deduction of that partial performance.³⁸

This makes a bit clearer that article 1802 contains two entirely different rules that would fit better in two distinct articles. For one thing, the second paragraph does not follow from the first. A solidary obligor who pays a part of his own virile share of the whole debt or who pays more than his virile share but still less than the whole debt does not obtain a renunciation of solidarity by so doing.

The first paragraph of article 1802 tells us several things. First, it imposes the requirement that a renunciation of solidarity must be “express.” Thus, a renunciation may not be inferred from the obligee’s silence or action or inaction: there is no tacit renunciation of solidarity.³⁹ Curiously, by contrast, remission of debt may be tacit.⁴⁰ Yet, from the creditor’s perspective, remission has a greater effect because it extinguishes an obligation altogether, whereas renunciation of solidarity, even as to all the solidary obligors, leaves intact the amount of the whole

36. In theory, the obligee might also transform joint obligors into several obligors, and indeed might even do the same for solidary obligors. But for what purpose? So, we leave this possibility to the side.

37. LA. CIV. CODE ANN. art. 1802 (2018).

38. *Id.*

39. *See* LA. CIV. CODE ANN. arts. 1888–1889 (2018).

40. *See* LA. CIV. CODE ANN. art. 1888 (2018).

obligation owed.

Nevertheless, the creditor need not use the word “renounce” or “renunciation.” Rather, it is enough that the creditor’s expression in fact indicates the creditor’s intention to renounce solidarity. Comment (a) to article 1802 supports this view. Comment (a) opines that the creditor must “clearly indicate” his intent.⁴¹ If this statement means that there is a heightened proof requirement beyond the usual preponderance of the evidence, it would seem to be incorrect. If an application of the rules of contract interpretation allow the inference of an intent from some expression made by the creditor, that should suffice.⁴² The requirement of a “clear” indication, however, does echo the requirement of article 1796 that in order to create solidarity through contract there must be “a clear expression of the parties’ intent.”⁴³ That article is also the source of the command that solidarity of obligation shall not be presumed.⁴⁴

Second, the first paragraph of article 1802 tells us that an obligee may renounce solidarity for one of his obligors, for more than one of his obligors, and even for all of his obligors. Indeed, renunciation of solidarity of all the obligors is perhaps the basic situation, from a logical point of view, for the effect of renunciation of solidarity of all obligors is to do away with solidarity of the obligation altogether. The end result is to convert the solidary obligations into another kind of obligation. There are only two possibilities: joint obligations and several obligations. The formerly solidary obligation becomes a joint obligation because the formerly solidary obligors together do owe the whole performance. As article 1788, paragraph 1, states: “When different obligors owe together just one performance to one obligee, but neither is bound for the whole, the obligation is joint for the obligors.”⁴⁵

41. LA. CIV. CODE ANN. art. 1802 cmt. (a) (2018).

42. See LA. CIV. CODE ANN. arts. 2045–2057 (2018).

43. LA. CIV. CODE ANN. art. 1796 (2018).

44. See LA. CIV. CODE ANN. art. 1802 (2018). French doctrine and jurisprudence are in accord. The creditor’s manifestation of intent to remit must be unequivocal (*la “manifestation de volonté non équivoque du créancier”* is necessary). JEROME FRANÇOIS, LES OBLIGATIONS: RÉGIME GÉNÉRAL ¶313, in 4 TRAITÉ DE DROIT CIVIL 299 n.1 (Christian Larroumet ed., 4th ed. 2017). See also LA. CIV. CODE ANN. art. 1802 cmt. (a) (2018).

45. LA. CIV. CODE ANN. art. 1788 (2018). “Different” is not the adjective one would expect to modify obligors here. Perhaps “many,” “more than one,” “two or more,” or even “several.” Of course, the last will not suit since it has been preempted by the odd, nearly empty set of “several obligations” and “several obligors.” See LA.

The first paragraph of article 1802, however, also makes clear that the obligee may renounce solidarity as to more than one obligor, but not necessarily all of them, and indeed may renounce solidarity as to only one obligor of many.

Here, the idea of division of the debt appears. Indeed, one can say that a creditor divides a debt as to only that debtor or obligor. The effect of dividing the solidary obligation as to the renounced obligor is to transform that obligor's solidary obligation into a joint obligation to pay his virile share. The remaining obligors are jointly bound to pay the balance. But the two remaining obligors are still solidarily bound with each other to pay that balance. Using the labels set out above, assume Kate has renounced Art's solidarity only. Diagram 5 represents this situation:

DIAGRAM 5. SOLIDARITY RENOUNCED AS TO ONE OBLIGOR

Art	\$40	→	Kate
Bea	\$80/40	⇒	
Cal	\$80/40		

Generally, the right of an obligor to plead division of a debt would belong only to a joint obligor whom the creditor incorrectly sued for the full amount of the debt. Whether the right of an obligor to plead division is or was substantive or procedural is an intriguing question. It is an example of a right that appeared both in the Civil Code of 1870 and in the Code of Civil Procedure of 1961, but in connection with suretyship in both codes. There, the plea of division was available to a surety whose contract had not eliminated it under the Civil Code of 1870.⁴⁶ Now that the

CIV. CODE ANN. art 1787 (2018).

46. The 1870 Civil Code stated:

Art. 3049. When several persons have become sureties for the same debt, each of them is individually liable for the whole of the debt, in case of insolvency of any of them.

Any one of them may, however, demand that the creditor should *divide* his action by reducing his demand to the amount of the share and portion due by each surety, unless the sureties have *renounced* the *benefit of division*.

Art. 3050. A creditor can by no means claim the whole sum from the surety who applied for a *division*, when the other sureties have become insolvent since the time of that application. The same thing takes place if the creditor has himself *voluntarily divided* his action.

LA. CIV. CODE arts. 3049–3050 (1870) (emphasis added). Former article 3049 referred

legislative support for the plea has been removed,⁴⁷ the parties can choose to include it in their contract. If a contract now provides for it, the old rules and former understandings presumably would guide interpretation and implementation of that provision of the contract. As a practical matter, however, the issue is not likely to arise.⁴⁸

Here, the second paragraph of article 1802 is helpful and suggests the context in which this act might occur. It contemplates that an obligor may render a “partial performance.”⁴⁹ That partial performance, if of a money debt, would most naturally be the obligor’s virile share of the whole solidary debt. In such a case, the obligee might expressly declare that he renounces the solidarity of an obligor in return for the obligor’s payment of his virile share of the whole debt.

Note that this is the full performance of the share of the debt the obligor will ultimately pay the obligee, *if* the other obligors likewise pay their virile shares of the debt. Nevertheless, payment of the virile share of one obligor is only an incomplete, partial performance of the entire solidary obligation. The effect of the renunciation of solidarity, then, is that the obligee may not

to a surety’s renunciation, presumably in the written contract that created the suretyship, of the benefit of division. Procedurally, the benefit of division was exercised as a plea. At first, the defendant raised division via peremptory exception. LA. CODE CIV. PROC. ANN. art. 927 cmt. (a) (rev. 1960) (citing *McCausland v. Lyons*, 4 La. Ann. 273 (1874); *Kilgore v. Tippit*, 26 La. Ann. 624 (1874)). In 1961, the revised Code of Civil Procedure treated the plea of division as an affirmative defense because “[i]ts function is not to defeat the demand, but only to regulate the enforcement of the judgment.” *Id.* The plea of division remained an affirmative defense in article 1005 of the Code of Civil Procedure until 2009. Act No. 824, 2008 La. Acts 3213–14 cmt. (e).

The Code of Civil Procedure was simply catching up with the substantive law here. The plea of division, in fact, was always a matter of suppletive law that the parties could alter by contract to remove it, which suretyship contracts, often drafted by creditors or their counsel, invariably did. The 1988 Suretyship Revision removed the suppletive rule that if there are more than one surety, each could plead division of the debt as an affirmative defense. LA. CIV. CODE ANN. art. 3045 (2018) (surety liable “without benefit of division”). Of course, today a creditor and surety in their contract may provide that a surety would have the benefit of division. And the creditor might grant the benefit of division to one or more sureties after the principal debtor’s default and litigation against the sureties had either commenced or was imminent.

47. The Exposé des Motifs for the revision of Title XVI on Suretyship explains the reasons for the change. LA. CIV. CODE ANN. bk. III, tit. XVI, at 410 (2005) (Exposé des Motifs) (surety lacks benefit of division and discussion even if solidarity not stipulated).

48. But as one tells one’s students, never say never.

49. LA. CIV. CODE ANN. art. 1802 (2018).

pursue the obligor whose solidarity is renounced for any amount in excess of his virile share.⁵⁰

An interesting feature of the renunciation of solidarity appears here. For how to categorize this renunciation, exactly? It might be a unilateral juridical act. As such, it would become effective without any juridical act on the part of the obligor whose solidarity has been renounced. Its effectiveness would not depend on an acceptance by the obligor. Just as an offeror's simple offer is an effective unilateral juridical act, so also by analogy is a renunciation of solidarity. Again, note that remission of debt is different—the obligor may accept or reject a remission of debt by the creditor.⁵¹ It is a mode of extinction of an obligation that is bilateral. It is a contract.⁵²

50. At least, not directly. We will see below that the Civil Code clearly states that the obligor whose insolvency is renounced must “contribute” to make up for the loss arising upon the subsequent insolvency of one of the remaining solidary obligors. LA. CIV. CODE ANN. art. 1806 ¶2 (2018). And that contribution action only arises after the creditor has recovered from another obligor, whose solidarity was not renounced, the virile share of that obligor and the virile share of the subsequently insolvent obligor. Thus, the Code does not provide that the creditor enjoys a direct action against the obligor whose solidarity she renounced to recover what that obligor otherwise would have owed the creditor if his solidarity had not been renounced and after the renunciation another solidary obligor became insolvent. *Id.* (negative inference).

51. LA CIV. CODE ANN. art. 1890 (2018).

52. Professor Yiannopoulos wrote: “[T]he creditor of an obligation cannot renounce his right to a certain performance unilaterally.” A.N. YIANNPOULOS, LOUISIANA CIVIL LAW SYSTEM: COURSEBOOK, PART I 131 (1977). As proof of that proposition, he continued: “The remission of a debt is a contract and the consent of the debtor is indispensable.” *Id.* Nevertheless, it seems a more than merely arguable reading of today's Civil Code that a creditor may renounce solidarity unilaterally. Whether such a renunciation in Louisiana law is an abstract juridical act, as opposed to an obligatory juridical act, is not made clear, at least in these legislative texts (including the comments). See *id.* at 137 for a brief discussion of the difference between the two sorts of juridical acts, where he classifies remission of debt as an abstract juridical act, which seems in tension with the claim at page 131 of the same work. Another work on juridical acts produced in Louisiana does not discuss the distinction between abstract and obligatory juridical acts. SAÚL LITVINOFF & W. THOMAS TÊTE, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 144–54 *passim* (1969). French jurisprudence recognizes an institution known as *remise des poursuites*, or a renunciation of the right to bring an action for payment; this renunciation, however, does not extinguish the obligation. FRANÇOIS, *supra* note 44, ¶155, at 144; 4 JEAN CARBONNIER, DROIT CIVIL: LES OBLIGATIONS ¶137, at 516 (7th ed. 1972) (*Dimittimus debitoribus nostris*) (need only be in the heart of the creditor). See also *Matthew* 6:9–13. Carbonnier notes that the remission of debt accomplished by returning the writing that constitutes the debt is a rare example in French law of an abstract act, not “caused,” according to the celebrated author, because it could occur with a simple payment of a debt, or a remission of debt either gratuitous or onerous. CARBONNIER, *supra*. The Louisiana Code of Civil Procedure

Before the creditor renounces solidarity as to a particular obligor, that obligor *in fact* owes the whole debt to the creditor, including his own virile share as well as all the virile shares of the other solidary obligors.⁵³ The creditor may demand from that particular obligor his virile share *and* the balance of the whole debt. After renunciation of the solidarity, however, that obligor no longer owes the excess to the creditor. And what of the excess liability that the “renounced” obligor used to owe the creditor? It seems that we must recognize that the creditor has extinguished the obligation of that obligor as to the excess. We will see, however, that the Code has a surprise in store for us.⁵⁴ Furthermore, it seems quite natural to describe the commitment by the creditor to forgo the creditor’s action against the solidary debtor for this excess as a concession.⁵⁵

It should be clear by this point in the analysis that to label a renunciation of solidarity as a “remission” of solidarity risks confusion and should be avoided.⁵⁶ The Civil Code of 1870 did so.⁵⁷

It is noteworthy, and perhaps troubling, that comment (a) to article 1802 uses another term of art instead of renunciation,

recognizes the abandonment of a claim by a plaintiff. Usually, abandonment is inadvertent, but it could also be intentional. LA. CODE CIV. PROC. ANN. art. 561 (2018).

53. See LA. CIV. CODE ANN. art. 1794 (2018).

54. See *infra* note 105 and accompanying text.

55. “Concession” is a key term of art in the definition of a compromise in article 3071, introduced in the 2007 Compromise Revision. LA. CIV. CODE ANN. art. 3071 (2018). Compromise is discussed in the next section of this Article.

56. See ALAIN A. LEVASSEUR, RANDALL A. TRAHAN & SANDI VARNADO, LOUISIANA LAW OF OBLIGATIONS: A METHODOLOGICAL AND COMPARATIVE PERSPECTIVE: CASES, TEXTS AND MATERIALS 487 n.1, 488–89 (2013) (remission of solidarity “confusing”) (excerpting French doctrine that uses the phrase, however). Note that this text adopts “release” in this context as a term of art that might include both remission of debt and renunciation of solidarity.

The distinction turns on the intent of the parties to the release, in particular, on precisely from what the obligee intends to release the obligor. . . . If the obligee intends to release the obligor only from solidarity, in other words, to relieve him of the unique burdens associated with being a solidary obligor, thereby transforming him into an “ordinary” obligor (that is, a joint obligor), then the release is a “renunciation of solidarity.”

Id. at 487–88 n.1 (citing LITVINOFF OBLIGATIONS IN GENERAL (2001), *supra* note 26, § 7.83, at 189–90). The second edition of this treatise maintains the point in the same numbered section.

57. *E.g.*, LA. CIV. CODE art. 2101 (1870) (referring to both renunciation and remission of solidarity); LA. CIV. CODE art. 2105 (1870) (renunciation of “action” in solido and discharge of “debt” in solido).

namely, “waiver.”⁵⁸ In this particular context, however, to “waive solidarity” in favor of an obligor can only mean to “renounce solidarity” in favor of that obligor. This variant term of art, however, is not helpful. Indeed, the basic definition of waiver in Anglo-American common law is that it may be tacit (or implied).⁵⁹ Even though the blackletter definition of waiver in American common law is the “intentional or voluntary relinquishment of a known right,”⁶⁰ a waiver may be tacit, or in common-law phrasing, implied from conduct.

A waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver.⁶¹

V. REMISSION AND COMPROMISE OF THE DEBT OF ONE SOLIDARY OBLIGOR

Remission of debt, as noted above, is a contract in Louisiana law, for it requires an agreement. Yet it appears in Title III of the revised Civil Code, as Section 4 of Chapter 6 on Extinction of Obligations. Thus, it is a contractual method of extinguishing an obligation, as opposed to other ways an obligation may be extinguished, for example, liberative prescription, confusion, compensation, or impossibility.⁶² The difficulty, however, is that if there is an agreement that goes beyond the simple extinction of the debt as such, the attraction to describe the event as a compromise instead of as a remission will be strong.

Some doctrinal writing seems to support this attraction. The connection between a remission and a compromise can seem unclear. Professor Litvinoff held the view that a remission could be gratuitous, and even that in general it was gratuitous, but he also wrote on various occasions that a remission of debt could be onerous as well. Thus, in his initial draft of what eventually became article 1888 in the 1985 Obligations Revision, he included

58. LA. CIV. CODE ANN. art. 1802 cmt. (a) (2018).

59. DAVID M. WALKER, THE OXFORD COMPANION TO LAW 1282 (1980) (“*Waiver*”).

60. *Waiver*, BLACK’S LAW DICTIONARY (3d ed. 1933) (also requiring reliance and detriment by the other party) (citations omitted).

61. *Id.*

62. Whether any of these is a juridical act other than a contract exceeds the scope of this Article.

a comment that read:

Under this article a valid remission may be either gratuitous or onerous; see *Hicks v. Hicks*, 145 La. 465, 82 So. 415 (1919). When onerous, however, a remission of debt is included in some other contract such as a transaction or compromise or an innominate contract; see *Reinecke v. Pelham*, 199 So. 521 (La. App. Orl. 1941); 7 *Planiol et Ripert, Traite pratique de droit civil francais* 715 (2nd ed. 1954); 1 *Litvinoff, Obligations* 626 (1969).⁶³

In other publications, Professor Litvinoff again referred to the connection he saw between remission of debt and compromise. In the *Exposé des Motifs* to the 1985 *Obligations Revision*, he wrote:

The principle that a remission of debt extinguishes an obligation has been preserved. See Article 1888. As under prior law, a remission may be express or tacit. *Id.* The remission referred to in Articles 1888 through 1892 of the revision is primarily gratuitous. In its more general sense, however, “remission” refers to any of a number of acts whereby a creditor releases a debtor, and in such cases the creditor usually does so because of some advantage offered to him by the debtor. This occurs, for instance, in the case of . . . a “transaction compromise [sic].” . . . In a transaction or compromise, the remission of the debt takes place through reciprocal concessions that the parties make to each other. See C.C. Art. 3071 (1870). . . . Nevertheless, in all such cases where the remission is onerous, it is entirely involved in another act that has a special designation. This is why the term, “remission” is reserved almost entirely for those occasions where the release takes place gratuitously.⁶⁴

So here, the view is expressed clearly that remission in particular means the contract the Civil Code defines and treats in

63. Louisiana State Law Institute, *Revision of the Louisiana Civil Code of 1870 Book III: Obligations Revision: Remission of Debt*, Reporter's note, at 1 (Saúl Litvinoff, Reporter, Aug. 24, 1979) [hereinafter *Litvinoff Revision* (1979)] (prepared for a meeting of the Committee).

64. LA. CIV. CODE ANN. bk. III, tit. III, ch. 6, at 28 (2008) (*Exposé des Motifs*). The *Exposé des Motifs* also refers to novation, stating: “In a novation, a remission of the original debt is made by the creditor in return for the creation of a new debt.” *Id.* This statement is problematic; treating it must await another occasion. The text also states: “The same result obtains when the creditor accepts as payment a thing different from that originally owed to him. See C.C. Art. 2655 (1870).” *Id.*

Title III, which is a gratuitous contract. But in a different and more general sense, remission still denotes various releases that, because the creditor gets some advantage in each, are onerous rather than gratuitous. In the case of the creditor's voluntary extinguishment of the debt for an advantage, the contract would not be a gratuitous remission of debt but an extinction of an obligation for an advantage. And that contract appears quite plainly in article 3071.⁶⁵ If the debtor pays his virile share of the debt, or something less, that payment is arguably of some advantage to the creditor, even though the creditor has the right to insist on payment of the balance of the debt in excess of the virile share paid. That means we have the reciprocal concessions envisioned in former article 3071.⁶⁶

Again, in the 1969 Obligations Treatise, Professor Litvinoff wrote that remission is “[i]n principle . . . gratuitous and constitutes a liberality,” that is, a gift or donation.⁶⁷ We could suggest that in all such gratuitous contracts, all transferors have in common the same objective cause, namely, to dispose of the ownership of a thing, or of money, or of a right, without obtaining anything in return. In any particular gratuitous contract, however, each transferor will have a different principal cause: each transferor, for one thing, will have a particular transferee in mind. And if it turns out that the transfer was made to the wrong person, the transferor may seek to rescind based on error,

65. LA. CIV. CODE ANN. art. 3071 (2018).

66. In addition, revised article 3071 does not require that litigation be in the wings. Instead, the parties need only face “an uncertainty” concerning an obligation. LA. CIV. CODE ANN. art. 3071 (2018). The revised article ends with the phrase “or other legal relationship.” Perhaps this is merely redundant, since “obligation” is itself defined as a legal relationship in article 1756. LA. CIV. CODE ANN. art. 1756 (2018). The text of the article then would mean, literally, an “uncertainty concerning an obligation or other obligation.” According to a report that the Reporter prepared for the Transaction or Compromise Committee, the final phrase might have been included to make clear that the revised article embraced certain compromises known in practice, such as Mary Carter agreements and high-low settlements, and agreements to settle. Louisiana State Law Institute, *Revision of the Louisiana Civil Code of 1870: Book III, Title XVII: Transaction or Compromise*, Reporter's note, at 3–4 (Saúl Litvinoff, Reporter, Aug. 9, 2002) [hereinafter Litvinoff *Revision* (2002)] (prepared for a meeting of the Committee). It is interesting that the note “From the Reporter” that accompanies the draft states that the revised article “presupposes that the parties make reciprocal concessions” when they compromise. *Id.* Yet the article itself expressly and clearly states only one party need make a concession (or concessions), in which case it (or they) cannot be the reciprocal concession (or concessions) of anything.

67. LITVINOFF OBLIGATIONS (1969), *supra* note 26, § 360, at 626.

even his own unilateral error.⁶⁸ Likewise with remission of debt. If the creditor has two twin obligors, Jacob and Esau, and the creditor intends to remit the debt of Esau but remits the debt of Jacob by mistake, the creditor may seek to rescind based on the error.

But may a remission of debt be onerous? Litvinoff wrote that it could be onerous because a remission of debt does not “[i]n practice . . . always imply the intention of making a liberality” and “[t]he creditor may consent to remit because of some advantage offered him by the debtor.”⁶⁹ This can occur with a compromise:⁷⁰ “In a transaction or compromise, the remission of the debt takes place through reciprocal concessions the parties make to each other.”⁷¹ Here, it is the definition in the 1870 Civil Code that the author cites. He concludes: “But in the cases where the remission of the debt is onerous, it is entirely involved in another act of a special designation; this is why the remission of the debt, in proper sense, is almost entirely reserved for those occasions where it takes place gratuitously.”⁷² That is, a remission must be onerous if it is “involved” in another contract, such as a compromise.⁷³

But the contrary view seems stronger. A contract is either a gratuitous remission or a compromise—there is no overlap. On this view, the designation of the contract as an onerous remission is inaccurate.⁷⁴ The revised provisions on compromise reinforce the view that if only one party grants a concession to the other,

68. See LA. CIV. CODE ANN. arts. 1949–1950, 1952 ¶1 (2018).

69. LITVINOFF OBLIGATIONS (1969), *supra* note 26, § 360, at 626.

70. The text cited also refers to novation as a possible advantage the debtor might offer the creditor. *Id.* Analysis of this intriguing suggestion must await another occasion.

71. *Id.*

72. *Id.* “Special designation” would include a nominate contract, but might also include onerous and remunerative donations that satisfy the arithmetical tests of articles 1526 and 1527 respectively, which not all would agree are distinct, nominate contracts. Moreover, remission of debt can also occur within a testament, and can be made subject to a charge.

73. *Id.*

74. This is one reason why onerous and remunerative donations are so intriguing: the boundary between a donation subject to the rules “peculiar” to donations *inter vivos* and a “donation” that is not subject to those rules, and therefore is not truly a donation at all, can appear, perhaps, arbitrary. See LA. CIV. CODE ANN. arts. 1526–1528 (2018). Another approach might have been to split mixed donations into their gratuitous and onerous components, just as incomplete performances may have effects and preserve the contract from an action to dissolve. LA. CIV. CODE ANN. arts. 2014, 2018 ¶2 (2018).

this is a compromise, not a remission of debt. As revised, article 3071 provides two distinct rules. The first rule is that parties to a contract may “settle” a dispute about “an obligation.”⁷⁵ How? By making “concessions.”⁷⁶ But both parties need not make a concession; a concession need be made only “by one” of them.⁷⁷ That is the second rule.

Professor Litvinoff again referred to the concept of “includ[ing]” remission of debt within another nominate contract in the second edition of his treatise on obligations in general.⁷⁸ An obligee is able to remit a solidary obligation of an obligor, and this remission might be “included in a transaction or compromise,” but need not be.⁷⁹ Thus, for him, remission of debt could be onerous as well as gratuitous. But just how is a remission “included” within a compromise? The usage seems to be plainly metaphorical, perhaps even a legal fiction. What does the turn of phrase intend to convey? Once included within another contract, another contract that is onerous and not gratuitous, it would seem necessary that the remission of debt must cease to exist as a distinct contract. Borrowing a metaphor offered in French doctrine, the remission is “absorbed.”⁸⁰ If Eve donates an apple to Adam, and Adam donates a dollar to Eve, it is possible that the two donations have nothing to do with each other. But it is much more likely, and the description is more economical, to describe their two contracts as a sale. All that is required is that each of them acts and consents to act because the other acts and consents to act.

75. LA. CIV. CODE ANN. art. 3071 (2018).

76. *Id.*

77. *Id.*

78. LITVINOFF OBLIGATIONS IN GENERAL (2001), *supra* note 26, § 7.83, at 173. After Professor Litvinoff’s death, Professor Ronald J. Scalise, Jr. now edits the treatise.

79. *Id.*

80. FRANÇOIS, *supra* note 44, ¶156, at 145 (“*la qualification de remise de dette est en réalité absorbée par celle de transaction*”) (“the qualification of remission of debt is in fact absorbed by that of compromise”) (trans. by author). The idea of absorption here or the idea of inclusion of remission in compromise relied upon by Professor Litvinoff in the draft comment to article 1888, *supra* note 63, seems odd. Do we speak of a lease with an option to buy as absorbed or included in the eventual sale, or even of a purchase agreement being absorbed or included in the eventual sale? (We don’t.) In any event, Professor François is in accord with the view that a remission of debt nevertheless may be onerous, and describes French jurisprudence from the Court de Cassation in support. FRANÇOIS, *supra* note 44, ¶156, at 145. Yet, if a remission may be onerous, what need is there for a distinct, special contract of compromise?

VI. REMISSION OF DEBT OR RELEASE

Early in the process of revision, the Reporter stated that he hesitated between continuing to use the label “remission of debt” and switching to a different label entirely, namely, “release.”⁸¹ He wrote: “The reporter chose to preserve the expression ‘remission of debt’ after carefully weighing the advisability of adopting the term ‘release,’ which has a clearer sense in English.”⁸² Against the adoption of that term, however, was the fact that a release in Anglo-American common law required common-law consideration in order to be effective.⁸³ Therefore, remission of debt remained the label.⁸⁴

Indeed, it seems a bit strange to regard any institution, including release, to be clearly expressed at all if its clarity is in any way linked to the Anglo-American common-law requirement

81. Litvinoff *Revision* (1979), *supra* note 63, at 1.

82. *Id.*

83. *Id.*

84. Another reason is that a gratuitous remission of debt, even one in which the creditor’s cause is transparently donative, escapes the form requirements imposed upon other *inter vivos* donations. Changing the label might threaten this understanding. As the second circuit stated:

While the forgiveness of a debt may in some respects appear to be a donation because of the gratuitous intent manifested by the act of forgiveness, in specific terms it is the remission of a previous obligation. It therefore must be considered within the context of our law on remission.

As Professor Levasseur explains:

When remitting a debt, the creditor is usually motivated by a gratuitous intent (*animus donandi*). Such a gratuitous juridical act is tantamount to a donation and should, therefore, be subjected to the conditions of substance applicable to liberalities (collation, reduction, revocation ...). However, the conditions of form pertaining to donations are not applicable (LCC 1536 et seq).

A. Levasseur, *Précis in Conventional Obligations: A Civil Code Analysis*, at 84 (1980). Accord, S. Litvinoff, 6 *Louisiana Civil Law Treatise: Obligations*, § 371 (1969); See also *Hicks v. Hicks*, 145 La. 465, 82 So. 415 (1919).

The redactors comment (b) to the new Article 1888 is succinctly in accord with Professor Levasseur:

(b) Although *remission* is an act gratuitous in principle, it is considered a sort of indirect liberality not subject to the requirements of form prescribed for donations. See 4 Aubry et Rau, *Cours de droit civil français—Obligations* 223 (Louisiana State Law Institute trans. 1965); 2 Colin et Capitant, *Cours élémentaire de droit civil français* 403 (10th ed. 1953); 7 Planiol et Ripert, *Traité pratique de droit civil français* 716 (2nd ed. 1954); 1 Litvinoff, *Obligations* 627–628 (1969). See also *Hicks v. Hicks*, 145 La. 465, 82 So. 415 (1919); *Reinecke v. Pelham*, 199 So. 521 (La.App.Orl.1941). [Emphasis ours]

Therefore, while a remission may involve a donative intent on the part of the creditor, the authentic form requirements of LSA–C.C. Art. 1536 do not apply. A remission may be perfected by an oral agreement and appellant’s evidence which sought to establish an oral remission was relevant.

Arledge v. Bell, 463 So. 2d 856, 858–59 (La. Ct. App. 2d Cir. 1985).

of consideration. In the common law of contract, as is well known, consideration still remains troublesome—especially when combined with detrimental reliance as a consideration substitute or as a consideration replacement.⁸⁵ Professor Litvinoff enjoyed a reputation for irony. This might be an example.⁸⁶

Now that we have seen how the Civil Code treats this set of events using a consistent set of terms of art, we can ask what happens when the Civil Code and other legislation chooses to indulge in what at first glance might appear to be merely elegant variation.⁸⁷ Instead, there seems to be a suspicion that the terms of art that the Civil Code uses, even those that may be foundational and structural in character,⁸⁸ are inadequate for the task at hand.

Several words surround this issue. Some of the them appear in the Civil Code and have meanings that one can access with a minimum of work. Others do not appear in the text of the Civil Code but appear in the Code of Civil Procedure or in the forms and writings used by lawyers. The latter sources might derive from forms, written contracts, and other writings, in which the influence of non-Louisiana, non-civilian private or commercial law is apparent.

85. A good exposition of the distinction between substitutes for consideration and independent causes of action related to consideration appears in Professor Randy Barnett's common-law contracts casebook. Chapter 11 on promissory estoppel treats it first when it functions as a substitute for consideration, therefore supporting an action for breach of contract, and second when it functions as an independent basis for liability outside contract. See RANDY BARNETT, *The Doctrine of Promissory Estoppel*, in *CONTRACTS: CASES AND DOCTRINE* (1st ed. 1995). The chapter is carried forward in the second and third editions.

86. Meaning he had the reputation and he enjoyed it.

87. BRYAN A. GARNER, *A DICTIONARY OF MODERN ENGLISH USAGE* 370–71 (1998) (“*Inelegant Variation*”).

88. For example, note the use of “interest,” LA. CIV. CODE ANN. art. 1952 ¶2 (2018), or “material interest,” LA. CIV. CODE ANN. art. 1847 cmt. (d) (2018), when principal cause or object would fit. The example of material interest in a comment to article 1847 undeniably announces a legislative rule when the text upon which it comments fairly understood contradicts the comment, or at the very least does not support it, while the comment recognizes adoption of the idea in prior jurisprudence. See generally Melissa T. Lonergass, *Hidden Law: Taking the Comments More Seriously*, 92 TUL. L. REV. 265, 310 (2017) (noting one function of comments is to “subvert” the text). See also David Gruning, *Mapping Society Through Law: Louisiana Civil Law Recodified*, 39 TUL. EUR. & CIV. L.F. 1, 28 (2004) (revised Civil Code article 96 cmt. (e) recommends that a spouse in an absolutely null marriage may succeed in a claim that he or she is a good faith putative spouse even if the parties did not go through any marriage ceremony at all, as in *Succession of Marinoni*, 164 So. 797 (La. 1936)).

VII. RELEASE

Release, as noted above, was considered at length by the Reporter as a possible substitution for the traditional remission of debt.⁸⁹ In part, it was an appealing choice because of its origin in the Anglo-American common law. This fact is evidence that the Reporter had a substantial attraction for common-law solutions or techniques.⁹⁰ Despite the attraction, as noted above, the decision was made to maintain remission of debt as the name of the (usually gratuitous) forgiveness of debt by a creditor. And yet the Civil Code as revised in 1985 uses “release” as a term of art, whose meaning one must parse.

In article 1892, the 1985 Obligations Revision uses “release” in this way. The first paragraph of the article states: “Remission of debt granted to the principal obligor releases the sureties.”⁹¹ Release here could then be a synonym for remission of debt. The predecessor article of the Civil Code of 1870 used “discharge” instead of release, and discharge was a literal translation from the source article of the French Civil Code.⁹² On the other hand, the extinction of the obligation of the surety is no more than the necessary effect of the extinction of the principal obligation by remission. That action, and the reason why the creditor did it, presumably have nothing to do with a desire to extinguish the obligation of the surety. It would, therefore, in general, be strange to consider the secondary effect of the creditor’s action toward the principal obligor, which is presumptively gratuitous, to be gratuitous toward the surety also. The effect on the surety is incidental as a general matter.

Article 1892 continues: “Remission of debt granted to the

89. See *supra* notes 81–86 and accompanying text.

90. Additional evidence is the inclusion by the 1985 Obligations Revision of detrimental reliance as cause for the creation of an obligation. LA. CIV. CODE ANN. art. 1967 ¶2 (2018). The second paragraph of article 1967 came from section 90 of the Restatement (Second) of Contracts and its recognition of this reliance-based substitute for consideration. Shael Herman, *Detrimental Reliance in Louisiana Law—Past, Present, and Future (?)*: The Code Drafter’s Perspective, 58 TUL. L. REV. 707, 734–35 (1984).

91. LA. CIV. CODE ANN. art. 1892 (2018).

92. “The remission or even conventional discharge granted to a principal debtor, discharges the sureties.” LA. CIV. CODE art. 2205 (1870). The French version, which derived from the French Civil Code of 1804, was: “*La remise ou décharge conventionnelle accordée au débiteur principal, libère les cautions.*” Thus, we see that the article is focused on personal security—suretyship. 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA 1239 (Joseph Dainow ed., West 1973) [hereinafter 1972 COMPILED EDITION].

sureties does not release the principal obligor.”⁹³ The same observation applies: release again appears to be a synonym for remission of debt. And the predecessor article used “discharge,” not “release.”⁹⁴ Note, remission applies properly when the debtor is in default and the creditor may accordingly enforce the obligation of the surety. But “remission” does not seem to fit if the debtor has not yet defaulted. If that is so, the creditor may not pursue the surety for payment. And hence to remit the debt of the surety also sounds awkward because the surety is not yet, in fact, a debtor of an enforceable obligation but only the debtor of a conditional obligation: the surety’s debt may only be enforced if the suspensive condition of the debtor’s default occurs.⁹⁵

Still further, article 1892 states: “Remission of debt granted to one surety releases the other sureties only to the extent of the contribution the other sureties might have recovered from the surety to whom the remission was granted.”⁹⁶ Here again, instead of “release,” the reader would expect to read “remission of debt.”⁹⁷ On the other hand, the effect on the sureties not directly remitted would be incidental; it is simply the effect of the action with regard to the surety whose debt the creditor remits.

In the final paragraph of article 1892, we read: “If the obligee grants a remission of debt to a surety in return for an advantage, that advantage will be imputed to the debt, unless the surety and the obligee agree otherwise.”⁹⁸ Here, the text of the Civil Code

93. LA. CIV. CODE ANN. art. 1892 (2018).

94. LA. CIV. CODE art. 2205 (1870).

95. Comment (c) to article 1892 refers to the liability of the surety as contingent. This is the term that would be used in financial accounting, so it is not incorrect. LA. CIV. CODE ANN. art. 1892 cmt. (a) (2018); *see also Contingent Liability*, BLACK’S LAW DICTIONARY (Brian A. Garner ed., 7th ed. 1999); JOHN D. AYER, GUIDE TO FINANCE FOR LAWYERS § 29.02, at 289 (2001). But it is not the term of art the Civil Code uses. This is another example that appears to avoid use of the terms of art the Code primarily adopts.

96. LA. CIV. CODE ANN. art. 1892 (2018).

97. Comment (b) to article 1892 states:

Under the third paragraph of this Article, if remission is granted to a surety who would have been bound to make contribution to other sureties if they had paid the debt, the other sureties are released, but only to the extent of that contribution. See C.C. Art. 3058 (1870). Thus, if two or more sureties are several obligors inter se, a remission granted to one does not affect the obligations of the others to any extent. If they are solidary sureties or solidary co-obligors of the principal obligor, on the other hand, then there is a right to contribution, and for the amount of that contribution the other sureties should be released if one obtains a remission. The importance of this distinction was explored in a different context in *Teutonia Nat. Bank v. Wagner*, 33 La. Ann. 732 (1881).

LA. CIV. CODE ANN. art. 1892 cmt. (b) (2018).

98. LA. CIV. CODE ANN. art. 1892 (2018).

plainly reflects the view that a remission of debt may be onerous. Certainly, the remission of a debt is an advantage to the debtor. What advantage can the debtor provide the creditor?

Certainly, any payment at all by the solidary debtor—whether of the solidary debtor’s virile share, or less than that share, and certainly more than that share—will be an advantage to the creditor. Any of these payments is clearly a partial payment of the amount owed under the solidary obligation and therefore should be imputed to that debt and reduce it accordingly. This will be true if the debtor has defaulted.

But if the debtor has not yet defaulted, this paragraph of the article is also relevant. Assume that the surety wants to jettison the contingent liability that the suretyship creates. Or assume that the surety is getting out of the suretyship business altogether. In such cases, the surety could offer to return any payment that the creditor has paid the surety. If the creditor accepted the offer, then the creditor and surety would simply have agreed to extinguish the surety’s obligations and their contract. In that case, it would be odd to impute that payment to the debt itself, for the debt is not yet in default. The payment just described is a simple unwinding of the contract, returning the parties to their pre-contractual position. And just as surely, the creditor and the surety would expect to label the document evidencing the event a “release.”

There is also another possibility. Assume that although the debtor is not yet in default, the risk of default is greater than it was when the surety created the suretyship. Now the surety must pay a bit more than the sum of money the surety received from the creditor in order to compensate the creditor for that increased risk. Again, that payment should not be imputed to the debt itself—and it will not be unless the creditor and surety neglect to take advantage of the opportunity afforded in the fourth paragraph of article 1892 (which was a change in the law).⁹⁹

99. LA. CIV. CODE ANN. art. 1892 cmt. (c) (2018). Comment (c) to article 1892 reads:

Under the fourth paragraph of this Article, any payment received by the obligee in return for a remission granted to a surety is imputed to the principal obligation. Nevertheless, obligee and surety may agree to the contrary, that is, that the payment is made only to release the surety of his contingent obligation without reducing the amount of the principal obligation.

Note the repetition of release as a term of art in Comment (c).

Complicating the analysis is the fact that the Civil Code uses “release” as a term of art not only here but also in several other places, sometimes along with its close cousin “discharge.”¹⁰⁰

VIII. INSOLVENCY AFTER THE DEBT IS EXTINGUISHED BY REMISSION OR COMPROMISE

Assume the creditor has begun to pursue the three obligors for payment. At this point, Bea becomes insolvent. The risk of loss due to the insolvency of a solidary obligor is borne by the other solidary obligors in proportion to their portion.¹⁰¹ Here, their portions are equal.

DIAGRAM 6. SOLIDARITY AND INSOLVENCY—STEP 1

Art	\$120 / 40		Kate
Bea	\$20 		
	\$20 		
Cal	\$120/40		

DIAGRAM 7. SOLIDARITY AND INSOLVENCY—STEP 2

Art	\$120 / 40 + 20		Kate
Cal	\$120 / 40 + 20		

The arrows in Diagram 6 show how the loss from Bea’s insolvency is distributed to Art and Cal, half each.

To analyze the next interpretive difficulty, we will take events in separate steps: first, the creditor extinguishes the debt of one solidary obligor; second, another solidary obligor becomes insolvent; third, the effect that insolvency has on the liability of the remaining solvent obligors (principal or accessory); and

100. See, e.g., LA. CIV. CODE ANN. arts. 333, 582, 588–590, 1601, 1792, 1821, 1823, 1885, 1891–1892, 2302, 2818–2819, 2913, 3057, 3356 (2018). In addition, there are numerous uses of the term release in the Code of Civil Procedure. Analysis of these provisions exceeds the scope of this Article.

101. Article 1806 ¶1 states: “A loss arising from the insolvency of a solidary obligor must be borne by the other solidary obligors in proportion to their portion.” LA. CIV. CODE ANN. art. 1806 (2018).

fourth, how this result changes if the creditor has renounced solidarity of a solidary obligor without extinguishing the debt entirely.

In the first step, the creditor extinguishes the debt of one solidary obligor, either by remission or by compromise. Article 1803 clearly provides that the effect is to eliminate the virile share of that solidary obligor from the equation.¹⁰² Thus, the effect is the same, regardless of whether we have a traditional gratuitous remission of debt, a compromise that is by definition onerous, or a remission of debt that is onerous but is not a compromise. To use our cast of characters, suppose Kate remits the debt of Art. This results in Diagram 8.

DIAGRAM 8. EFFECT OF REMISSION OR COMPROMISE OF ONE SOLIDARY DEBTOR

Art	0		Kate
Bea	\$80/40		
Cal	\$80/40		

In the second step, after the extinction of the obligation of one solidary debtor, one of the remaining two solidary obligors becomes insolvent.¹⁰³ Assume it is Bea. This takes us to step three. To understand the effect of Bea's insolvency on the remaining obligor, Cal, it is helpful to recall what would have occurred if Kate had not remitted Art's debt. If Art were still in the picture, Kate could have recovered \$120 from Cal on the debt itself, and Cal then could have recovered \$60 from Art in contribution. Art would have ultimately paid his virile share and no more, and Cal would have paid his virile share and no more. This is the effect of the basic rule that solidary obligors bear the

102. LA. CIV. CODE ANN. art. 1803 (2018). Civil Code article 1803 ¶1 states:

Remission of 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.

The second paragraph of article 1803 deals with the effect of the obligee's returning the promissory note to a solidarity obligor, which is to create a presumption that the creditor by doing so remits the whole obligation.

103. "An obligor is insolvent when the total of his liabilities exceeds the total of his fairly appraised assets." LA. CIV. CODE ANN. art. 2037 (2018). This rule does not appear to be mandatory in character, and the parties should be free to define insolvency by some other test, such as the inability of the obligor to meet his debts as they fall due.

risk of the insolvency of another solidary obligor according to their virile shares. But Art is now out of the picture because Kate has extinguished Art's debt by remitting it. Yet it is Kate who has voluntarily taken Art out of the picture. Therefore, it is unfair for Kate to be able to shift any part of the risk of loss arising from Bea's insolvency, that Art would have shouldered, onto Cal. Thus, it is Kate who will effectively bear that portion of the risk of loss arising from Bea's insolvency that Art would have borne.¹⁰⁴

Could the contract that binds Art, Bea, and Cal empower Kate to remit the debt of one of them or even two of them and still be able to pursue the remaining obligors or the sole remaining obligor for the entire, original debt? In other words, is the rule of paragraph one of article 1803 a rule of public order? It would clearly seem not to be; for any obligor could agree to be bound for the whole debt in any case, even without any other obligor being present. The presence of other obligors provides a prospect that an eventual liability will be shared with other obligors, but it does not seem to be true that the availability of that relief is a matter of general concern in any way. The Code, then, provides a suppletive rule for how the risk of insolvency is to be shared. Whether the arrangement could be changed mid-course after the

104. LA. CIV. CODE ANN. art. 1803 cmt. (d) (2018). Comment (d) to article 1803 states: "In case of insolvency of a solidary obligor after the obligee has remitted the debt in favor of another, the loss must be borne by the obligee." An Editor's Note in the pamphlet edition of the Louisiana Civil Code characterizes this comment as "enigmatic," since according to the Note it can be read to suggest that the creditor must absorb the entire loss arising from the insolvency of a solidary obligor, and not merely the part of that loss that would have borne by the solidary obligor but for the creditor's remission of that obligor. This is surely correct. The Note, however, addresses whether the creditor is or is not "liable" for the whole loss or only a portion of it, and the creditor would not be obligated to pay any one on account of the loss. LA. CIV. CODE ANN. art. 1803 cmt. (d) (2018). The Code does not use "liable" or "liability" to describe the creditor's shouldering of such a loss. *Accord* LA. CIV. CODE ANN. art. 1794 (2018) ("liability" of solidary obligors "toward the obligee"). As authority for the main proposition, comment (d) and the Editor's Note cite 13 BAUDRY-LACANTINERIE ET BARDE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL 112 (2nd ed. 1905). The Note helpfully points out that this is in section 1792 of the treatise. The discussion of the issue in the 1924 edition of the work agrees.

The Editor's Note first appeared in the 2018 West Pamphlet edition of the Civil Code, the first edition edited by Professor Ron Scalise after the death of Professor Yiannopoulos. Ronald J. Scalise, Jr., *Preface* to LOUISIANA CIVIL CODE, at XI (2018). Professor Yiannopoulos edited this edition of the Code beginning with the 1980 edition; he passed away on February 1, 2017. Cathy Hughes, *A.N. 'Thanassi' Yiannopoulos, who revised Louisiana's civil code, dies at 88*, THE ADVOCATE (Feb. 1, 2017), https://www.theadvocate.com/baton_rouge/news/education/article_07c07df4-e74b-11e6-813b-1b67fe457f25.html.

obligation is in default could raise questions of vices of consent, such as error, fraud, or even duress (since economic duress is a potential claim). As a matter of principle, however, the parties should be able to adjust their obligations freely so long as they are cognizant of the effects of doing so.

IX. INSOLVENCY AFTER SOLIDARITY IS RENOUNCED

Now, what would have occurred if Kate had merely renounced Art's solidarity, without remitting or compromising his debt entirely? Assume Art has paid his \$40 portion in return for the renunciation of solidarity. Here is the surprising result alluded to earlier;¹⁰⁵ for it is clear that upon Bea's insolvency, Art can be brought back in to bear half of the risk of the insolvency of another solidary obligor, namely, Bea, or \$20 more than his virile share of \$40. Article 1806 states this quite clearly: "Any obligor in whose favor solidarity has been renounced must nevertheless contribute to make up for the loss."¹⁰⁶ Of course, this does not decide the argument. One explanation is that when the obligee voluntarily remits the obligation of a solidary obligor, the obligee thereby voluntarily reduces the overall amount of the debt by the portion of the obligor remitted. But when the obligee renounces solidarity as to that same obligor, the obligee is not truly reducing the amount of the debt overall.¹⁰⁷

Litvinoff writes that an obligor who has not paid anything and whose solidarity the creditor has renounced remains "separately" bound to pay that amount.¹⁰⁸ Why that adverb? Because the creditor can divide the debt as to that obligor alone. This means that the renounced obligor becomes bound to pay his share only, and his obligation to pay that share is a joint obligation. This is because that obligor remains bound with the other obligors for one performance, even though the obligor whose solidarity was renounced is only bound for his virile share. By the same token, the obligors whose solidarity the creditor did not renounce remain bound for the balance of the debt, less the portion of the renounced obligor. This is the natural result of the

105. See *supra* note 54 and accompanying text.

106. LA. CIV. CODE ANN. art. 1806 ¶2 (2018). As Jean Pineau, late of the law faculty at the University of Montreal and a principal laborer on the revised Civil Code of Québec, used to say when confronted with an inconvenient implication of a text in that Code, "*Mais c'est écrit.*" "But it's written." (trans. by author).

107. LITVINOFF OBLIGATIONS IN GENERAL (2001), *supra* note 26, § 7.74, at 159.

108. *Id.* at 172 (assuming solidary debtor made no payment on the debt as to which solidarity had been renounced, he becomes "separately" bound for his virile share).

division of the debt as to one obligor; the act of renunciation necessarily divides the debt as to the other obligors as well. Bea and Cal together are one side of the divided debt; Art is the other. Bea and Cal, however, are bound solidarily to pay that balance. The creditor having divided the debt, Bea and Cal are bound with each other solidarily to pay the balance of the debt. This line of reasoning assumes that Art does eventually pay his share.

But why must Art do so in order for the creditor to divide the debt? If Kate renounces Art's solidarity, it must mean that Kate may pursue Art for his share but that Kate may not pursue Art for more than his share. The second sentence of article 1802, then, is misleading when it states that if an obligee receives a "partial performance," presumably from the renounced obligor, the solidary obligation remains intact against "all his obligors after deduction of that performance."¹⁰⁹ "All" obligors here must exclude the renounced obligor, or renunciation of solidarity is meaningless. The purpose of that phrasing was not to accomplish an absurd result, but to change the law. The law under the 1870 Code, as interpreted in the jurisprudence, was to presume that an obligee who received a payment of an obligor's share and renounced solidarity as to that obligor (usually by giving him a writing that "released" the obligor) thereby waived his claims against the remaining obligors unless he "expressly reserved his right" to pursue the remaining obligors.¹¹⁰

What if there are only two solidary obligors? Assume that Cal, in our example, never existed; we have only Art and Bea. Now Kate renounces Art's solidarity, as before. And the next step is Bea's insolvency. Does the risk of loss due to the insolvency of a solidary obligor (Bea) fall on Art's shoulders? If so, the result would be consistent with the result immediately above. But the Code does not literally provide for this result. Rather, article 1806 uses a term of art to describe how that risk of loss arising from the insolvency of Bea would be shifted to the remaining solidary obligors, namely, through "contribution."¹¹¹ The obligor whose solidarity the creditor has renounced, as article 1806 carefully states, must "contribute to make up for the loss."¹¹² But

109. LA. CIV. CODE ANN. art. 1802 (2018).

110. LA. CIV. CODE art. 1802 cmt. (a) (1870). LA. CIV. CODE ANN. bk. III, tit. III, ch. 6, at 13–14 (2008) (*Exposé des Motifs*) (citing LA. CIV. CODE art. 2203 (1870) & *Fridge v. Carruthers*, 156 La. 746, 101 So. 128 (1924) (opting to follow article 2203 of the 1870 Civil Code)).

111. *See* LA. CIV. CODE ANN. art. 1806 (2018).

112. LA. CIV. CODE ANN. art. 1806 (2018).

contribution only occurs if a solidary obligor pays more than its virile share and then seeks that excess from another solidary obligor. An action by the creditor, however, against a solidary debtor at no time can be an action in contribution simply because that action is not available to the creditor. This is so because the creditor does not have a virile share of the debt at all; only debtors have virile shares.

Moreover, what if the creditor renounces solidarity as to Art and as to Cal, and then Bea becomes insolvent? Surely, the creditor cannot pursue either of them for any amount in excess of their virile shares, because the effect of renouncing the solidarity of each is to make each a joint obligor for the virile share of each. Therefore, there can be no action in contribution between them. The entire risk of loss arising from the insolvency of Bea would fall on the creditor. This is a problem, for the effect of renouncing solidarity as to Art and Cal makes each of them a joint obligor for their shares. But Bea would remain bound for the whole amount. At least, Kate could intend this result. But even if Kate intended that Bea remain solidarily bound, even if Kate subjectively believed in her heart of hearts that Bea would remain her solidary obligor, and even if Bea shared that belief, they would be wrong. Bea cannot be solidarily bound with herself. Instead, Bea would simply remain liable for the whole amount to Kate, if Art and Cal did not pay their shares.¹¹³

The second paragraph of article 1806 renders a solidary debtor (Debtor One), whose solidarity was merely renounced, vulnerable to an action in contribution calling upon that debtor to share the loss arising from the insolvency of another solidary debtor (Debtor Two). In support of that rule, the official comment offers reliance as one reason for this result. The comment maintains that it is “important”¹¹⁴ to state who will bear the loss in this situation, because Creditor might have “relied” on the solvency of Debtor Two when she “released” Debtor One. The

113. Consider also what happens if Creditor has three solidary obligors, X, Y, and Z. Creditor renounces solidarity as to all three. Article 1806 ¶2 commands that X must contribute to make up for the loss arising from the insolvency of Y at this point. But, because Creditor has divided the debt for all three, there is logically no loss arising from the insolvency of Y that matters. For such a loss to matter, there must be another solidary obligor left on the playing field in addition to the solidary obligor who becomes insolvent. Creditor having divided the debt, however, or what means the same thing, Creditor having renounced solidarity as to all three solidary obligors, there is no solidary obligor who would have to bear an extra burden because of the insolvency of Y.

114. See LA. CIV. CODE ANN. art. 1806 cmt. (b) (2018).

implication, then, is that the creditor's reliance interest must be protected here. The revised article wants to support that reliance; it wants to encourage Creditor to accept "piecemeal" payments of less than the entire debt from Debtor One, and for that piecemeal payment Creditor will grant Debtor One a "release." According to the comment, then, revised article 1806 protects Creditor's reliance that the loss arising from the insolvency of Debtor Two will shift to Debtor One, whose solidarity was merely renounced. Creditor may accept a partial payment from Debtor One when she renounces Debtor One's solidarity and converts Debtor One's debt into a joint debt. The comment assumes that Creditor will count on the availability of Debtor One's patrimony to absorb part of the insolvency of Debtor Two. It is fairly certain, though, that most creditors and most debtors will not have this idea in mind. And if they do, they will insist that the obligors and their sureties promise to absorb the potential risk of loss arising from insolvency on these facts.

Note that this confusion existed in the source of article 1806,¹¹⁵ article 2105 of the 1870 Civil Code, which read:

In case the creditor has renounced his action *in solido* against one of the debtors, and one or more of the other codebtors become insolvent, the portion of the insolvent shall be made up, by equal contribution, by all the debtors, and even those precedently discharged from the debt by the creditor *in solido*, shall contribute their part.¹¹⁶

Article 2105 of the 1870 Civil Code seems to have elided the distinction between the renunciation of solidarity and the remission of the debt of a single solidary obligor by using renunciation of solidarity and "discharge from the debt" as if they refer to the same action. The confusion may persist under today's article 1806 if we interpret that article to express the view of article 1806, comment (b).

The protection of the reliance interest here is not without parallel. Another example occurs in suretyship. Article 3055 of the Civil Code states:

Co-sureties are those who are sureties for the same obligation of the same obligor. They are presumed to share the burden

115. LA. CIV. CODE ANN. art. 1806 cmt. (a) (2018) (citing articles 2104 and 2105 as sources of revised article 1806).

116. LA. CIV. CODE art. 2105 (1870).

of the principal obligation in proportion to their number unless the parties agreed otherwise or contemplated that he who bound himself first would bear the entire burden of the obligation regardless of others who thereafter bind themselves independently of and in reliance upon the obligation of the former.¹¹⁷

If the sureties agree, expressly or tacitly, to alter the equality of their shares, this new contract or modification of an existing contract presents no problem. But then the article also states that the sureties may alter the rule of equal shares by mere “contemplation” that the surety who bound himself first would indemnify a surety who bound himself later and “in reliance” on the earlier surety. Whose “contemplation”? The later surety’s, surely. But it is not clear that the “surety who bound himself first” must likewise “contemplate” this result.

X. A ROLE FOR CAUSE

What effect does cause have on the analysis?

Many textbooks for teaching the Louisiana civil law of obligations and contracts use remission of debt as an application of cause. This approach begins with the casebooks prepared by J. Denson Smith. He presented remission of debt as part of the exposition of the law of cause. Specifically, he used it to present cause as a tool to categorize conventional obligations. In the chapter of his textbook on cause, he included a section entitled “Its Role in Contract Characterization: Liberalities and Non-Liberalities.”¹¹⁸ In addition to remission of debt, that section included the topics of past services, self-interest, charitable subscriptions, natural obligations, and the debt of a third party.¹¹⁹ In a later chapter on extinction of obligations, remission appears as a topic, but the text simply cross references the earlier material in the chapter on cause.¹²⁰ The other topics in that chapter are payment, novation, compensation, and confusion. Compromise is not a separate topic.

In 1979, Saúl Litvinoff published his textbook, which carried on the structure and many of the case choices in Smith’s earlier

117. LA. CIV. CODE ANN. art. 3055 (2018).

118. J. DENSON SMITH, LOUISIANA AND COMPARATIVE MATERIALS ON CONVENTIONAL OBLIGATIONS iii (4th ed. 1973).

119. *Id.*

120. *Id.* at 385.

work.¹²¹ This 1979 textbook continued to treat remission in the chapter on application of the theory of cause, but it differed from its predecessor by including a section on transaction or compromise that contrasted that institution with both remission and accord and satisfaction.¹²² Professor Litvinoff maintained that structure in later editions of his textbook.¹²³

This way of presenting remission emphasizes the distinction between gratuitous cause and onerous cause. A distinct pedagogical approach that follows the order of the Civil Code does not directly make this connection.¹²⁴

A creditor may remit a debt in a contract that otherwise could only be described as a gift. Thus, assume Mother lends \$10,000 to Son in Year One to pay for his living expenses and tuition for a year of education. Son signs a promissory note payable at the end of twenty-four months. Mother and Son both intend that after a year of study Son will be able to earn more income with which he will be able to repay the loan in Year Two. But in Year Two, Son cannot find work that pays well enough to fulfill the shared plan. Mother remits the debt by returning the promissory note to Son marked “canceled.” Mother’s cause is purely gratuitous in two senses. As a matter of objective cause, she wishes to extinguish her claim against her Son and to do so for nothing in return. But she also has a subjective cause for taking this action, namely, the fact that the Son, through no fault of his own, cannot pay the debt. Note that if that second cause turned out to be false, because Son, having won \$500,000 in the lottery could easily have repaid the loan, then Mother could seek rescission based on error.¹²⁵

121. SAÚL LITVINOFF, *THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE: A COURSEBOOK* (1979). This edition was dedicated to J. Denson Smith, by whom it was “inspired.” *Id.* at acknowledgments page and overleaf preceding page i.

122. LITVINOFF, *supra* note 121, at ii, 196–214. Professor Litvinoff included excerpts from his own doctrinal writing in LITVINOFF OBLIGATIONS (1969), *supra* note 26, as well.

123. See SAÚL LITVINOFF & RONALD J. SCALISE, JR., *THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE: A COURSEBOOK* ii, 214–32 (6th rev. ed. 2008). This was the final edition prepared before Professor Litvinoff’s death; it took account of the revision of Title XVII on Compromise (formerly Transaction and Compromise).

124. This more traditional approach is adopted in a recent casebook. LEVASSEUR, TRAHAN & VARNADO, *supra* note 56. This casebook presents obligations in general first, followed by conventional obligations. It does treat extinction of obligations, including remission of debt, in Part Two on conventional obligations.

125. LA. CIV. CODE ANN. art. 1949 (2018). Indeed, fraud by silence is another

Note that if Mother writes on the note that she “releases” Son from the debt, this does not alter the correct characterization of the remission as gratuitous.

Consider a distinct case. Vlad and Leon form a business partnership to make movies. Vlad agrees to contribute his managerial acumen and Leon his imaginative talents. Vlad borrows \$1000 from Ivan; Leon spends \$600 of that sum recklessly, in Vlad’s opinion. Leon, however, thinks Vlad has not been sufficiently attentive to the affairs of the partnership, depriving Leon of future profits. They decide to dissolve the partnership. Leon offers to pay Vlad \$400 to end any potential dispute; Vlad accepts. This satisfies the idea of a compromise under article 3071.¹²⁶ There are arguably concessions by both of them. This satisfies both the new article 3071 and its predecessor under the 1870 Civil Code.¹²⁷

New article 3071 literally requires a concession from only one party.¹²⁸ Nevertheless, Professor Litvinoff, as Reporter for the 2007 Revision of Title XVII, wrote in a comment on an early draft of revised article 3071 that “[t]his article presupposes that the parties make reciprocal concessions” in a compromise.¹²⁹ This is the “modern approach.”¹³⁰ “Thus, modern civil codes uniformly provide that mutual concessions by the parties are a necessary element” of a compromise.¹³¹ “Clearly, a ‘compromise’ or settlement of rights in which one of the parties receives no concession for what he gives may well be a donative transfer, an acknowledgment of a debt, or another valid juridical act, but it is not a compromise.”¹³²

possible theory of the case. LA. CIV. CODE ANN. art. 1953 (2018).

126. LA. CIV. CODE ANN. art. 3071 (2018) (“A compromise is a contract whereby the parties, through concessions made by one or more of them, settle a dispute or an uncertainty concerning an obligation or other legal relationship.”).

127. LA. CIV. CODE art. 3071 (1870) (“A *transaction* or *compromise* is 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 every one of them prefers to the hope of gaining, balanced by the danger of losing. This contract must be reduced into writing.”).

128. LA. CIV. CODE ANN. art. 3071 (2018).

129. Louisiana State Law Institute, *Revision of the Louisiana Civil Code of 1870: Book III, Title XVII: Transaction or Compromise*, Reporter’s note, at 3 (Saúl Litvinoff, Reporter, May 9–10, 2003) [hereinafter Litvinoff *Revision* (2003)] (prepared for a meeting of the Council).

130. *Id.*

131. *Id.*

132. *Id.* at 3.

On the other hand, the necessity of matched concessions was also the dominant interpretation of article 3071 of the Civil Code of 1870, despite the fact that the article did not literally require this. It cannot be ignored, however, that Professor Litvinoff in the same comment on the draft of revised article 3071 made a statement that is very difficult to square with the remark above. As for “[t]he traditional approach,” he wrote that it:

[M]ay no longer be realistic especially in light of the incorporation in another article of the practice of accord and satisfaction The draft Article makes no reference to ‘reciprocal’ concessions, in view of the fact that another draft article incorporates the notion of ‘accord and satisfaction’ where concessions may not be reciprocal. Under this Article, a transaction and compromise is valid even if only one of the parties makes a concession.¹³³

The article that would enact the common-law technique of accord and satisfaction is revised article 3079, which states: “A compromise is also made when the claimant of a disputed or unliquidated claim, regardless of the extent of his claim, accepts a payment that the other party tenders with the clearly expressed written condition that acceptance of the payment will extinguish the obligation.”¹³⁴

This remark makes clear that the reason the primary article, article 3071, recognizes that a compromise occurs if only one party makes a concession is because of the enactment of article 3079. This seems, however, to have turned the exception, article 3079, into the rule. It would have been better that article 3071 unambiguously state the main rule, a requirement of mutual or reciprocal concessions, with accord and satisfaction as a manageable, reasonable exception to that rule.

Article 3079 is not only an exception to article 3071; it is more basically an exception to the general rule on partial performance. If an obligor tenders a partial performance to the obligee, as a general rule, the obligee is not bound to accept it.¹³⁵ Yet, if the obligation is to pay money and the amount is “disputed in part” and therefore is agreed on the other part, the obligee must accept payment of the part on which they agree—the

133. Litvinoff *Revision* (2003), *supra* note 129, at 4.

134. LA. CIV. CODE ANN. art. 3079 (2018).

135. LA. CIV. CODE ANN. art. 1861 (2018) (“An obligee may refuse to accept a partial performance.”).

undisputed part.¹³⁶ Indeed, the obligor must pay the undisputed part, if the obligee insists.¹³⁷ In both cases, the obligee may still claim entitlement to the disputed part. In the comment to article 1861, the Reporter describes how these rules do not exclude accord and satisfaction, which at the time of the 1985 Obligations Revision had not been expressed in the Civil Code itself, but had only been recognized in the jurisprudence and as a matter of business practice.¹³⁸ One effect of the enactment of article 3079, however, is to make absolutely clear that consideration, as understood in the Anglo-American common law of contract, is unnecessary to make a valid compromise, just as it is unnecessary to the formation of any contract in Louisiana.

XI. A RELEASE FOR A CONCESSION

In order for a compromise to occur, each side to the compromise must give and each side must receive. This is surely the ordinary meaning of the word “compromise.”¹³⁹ Thus, to

136. LA. CIV. CODE ANN. art. 1861 (2018) (“Nevertheless, if the amount of an obligation to pay money is disputed in part and the obligor is willing to pay the undisputed part, the obligee may not refuse to accept that part. If the obligee is willing to accept the undisputed part, the obligor must pay it. In either case, the obligee preserves his right to claim the disputed part.”).

137. *Id.*

138. LA. CIV. CODE ANN. art. 1861 cmt. (b) (2018). Comment (b) to article 1861 states:

This Article is not intended to apply where there is an “accord and satisfaction.” When a creditor asserts that the debtor owes a certain amount, but the debtor only admits owing a certain lesser amount, the latter amount becomes what is known as the “lesser undisputed amount.” See 1 C.J.S. 555; *Nassoio v. Tomlinson*, 148 N.Y. 326, 42 N.E. 715 (C.A.1896). If the debtor tenders the lesser amount under the express condition that it be accepted in full payment, and the creditor takes the money or cashes the check, the result is accord and satisfaction which extinguishes the debt. But see R.S. 10:1-207. See *Meyers v. Acme Homestead Assn.*, 138 So. 443 (La. App. Orl.1931); see also *Berger v. Quintero*, 170 La. 37, 127 So. 356 (1930). Louisiana courts have accepted this solution in spite of doubts about its consistency with the Louisiana Civil Code of 1870 and misgivings concerning the “consideration” that validates such an “accord.” See 1 Litvinoff, *Obligations* 657-662 (1969); Litvinoff, “The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Accord and Satisfaction,” 36 La. L. Rev. 426-434 (1976); *Charles X. Miller, Inc. v. Oak Builders, Inc.*, 306 So.2d 449 (La. App. 4th Cir.1975).

139. “To adjust or settle by mutual concessions; to settle by compromise; to compound; as, to *compromise* a dispute.” *Compromise*, WEBSTER’S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (William Allan Neilson et al. eds., 2d ed. 1942). One can view reciprocity of concessions in a compromise as simultaneous. One can distinguish such reciprocal concessions or advantages from those that are not simultaneous but are nevertheless mutual. Thus, in a paradigmatic case, Nephew assists Aunt on Aunt’s farm gratuitously and later Aunt recompenses Nephew by giving him some advantage that may qualify as a remunerative donation under article 1527 of the Civil Code. LA. CIV. CODE ANN. art.

speak as the Code speaks, the essence of a compromise is that it is onerous—each party must grant an advantage to the other party, as the other party sees the situation subjectively. This was the basic rule in article 3071 of the Civil Code of 1870, which read:

*A transaction or compromise is 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 every one of them prefers to the hope of gaining, balanced by the danger of losing.*¹⁴⁰

The 2007 Compromise Revision of Title XVII, which contained the basic rules on compromise, maintained this basic principle of reciprocity.¹⁴¹ But article 3079 cut the minimum number of concessions for a valid compromise from two to one. Instead of two concessions—one from each party—the revised article required only one concession by only one party.¹⁴²

1527 (2018). *See, e.g.*, Succession of Lawrence, 94-977 (La. App. 3 Cir. 2/1/95); 650 So. 2d 398. One may describe the advantages or concessions here as mutual; they surely relate to each other, although they are by definition and in fact not simultaneous.

140. 1972 COMPILED EDITION, *supra* note 92, at 35. The second paragraph required a form for a compromise. It read:

This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form.

141. One can give distinct meanings to reciprocity and mutuality. With reciprocity, one understands that one prestation is given for a counter-prestation. The obligation of Party One to perform (or do) a certain and agreed Prestation for Party Two is undertaken in order to get the obligation of Party Two to perform (or do) a certain and agreed Counter-Prestation. In other words, a this for a that, a *quid* for a *quo*, a tit for a tat. This was the formula of the *stipulatio* in Roman Law. *See generally* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVIL LAW TRADITION 534–35 (1990). On the other hand, one can speak of mutuality if Person Three performs or does a certain benefit for Person Four, but this was done without a prior agreement between Persons Three and Four in place. After receiving the benefit, Person Four commits to perform or do something for Person Three, and performs or does it or promises to perform or do it. One can describe these two actions now as mutual in character. This approach appears consistent with the views appearing in D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS 141–45 *passim* (Oxford 1999) (thorough analysis of English cases and doctrine from the origins in English common law of contract and tort, emphasizing reciprocity as key for the doctrine of consideration at common law, in the light of civilian and natural law analogues).

142. It is clear from documents of the committee and the Council of the Law Institute during revision that the adoption of accord and satisfaction in article 3079 had this effect on article 3071. In January 1998, the initial drafts of article 3071

Is there a minimum advantage, or a minimum reason, a creditor needs in order to compromise with his debtor or his debtor's surety, so that the contract is not a gratuitous remission? Assume the creditor finds dealing with a particular debtor, or a particular debtor's surety, so inconvenient that the creditor is willing to forgo pursuit of the debtor or surety simply to be done with him. In such a case, then, the passive obligor on the debtor's side need not concede anything: he simply agrees to go away. The obligor makes no concession at all; only the creditor makes a concession. It is submitted that if this is all that the debtor can offer, this must be a remission of debt. The creditor's purported advantage is none at all. His interest and the debtor's transfer both appear to be too insubstantial for the law to find an advantage here. And yet, article 3071, as revised in order to accommodate the rule of article 3079, would characterize this act as a compromise.¹⁴³

Perhaps more difficult is the more realistic and common case in which the debtor frankly admits inability to pay the full, liquidated debt, but can pay, and in good faith offers to pay, a part of it.¹⁴⁴ For example, assume we are dealing with Mother and Son as before, and Son is unable to pay back the full \$10,000, but he can pay \$6,000. And Mother does not intend a liberality; she in fact needs the full payment because of her circumstances.

included "reciprocal concessions." Louisiana State Law Institute, *Revision of the Louisiana Civil Code of 1870: Book III, Title XVII: Transaction or Compromise*, at 1 (Saúl Litvinoff, Reporter, Jan. 23, 1998) (prepared for a meeting of the Committee). In April 1999, "reciprocal" appeared in brackets. Louisiana State Law Institute, *Revision of the Louisiana Civil Code of 1870: Book III, Title XVII: Transaction or Compromise*, at 1 (Saúl Litvinoff, Reporter, Apr. 9, 1999) (prepared for a meeting of the Committee). In January 2000, in a draft presented to the Council, "reciprocal" is omitted. Louisiana State Law Institute, *Revision of the Louisiana Civil Code of 1870: Book III, Title XVII: Transaction or Compromise*, at 1 (Saúl Litvinoff, Reporter, Jan. 14–15, 2000) (prepared for a meeting of the Council). Notes from the Reporter justify the omission because the text of article 3079 adopts accord and satisfaction, "where concession may not be reciprocal." *Id.* at 3. In August 2002, a report to the Committee notes that the Council adopted "concessions by one or more" on March 15, 2002. Litvinoff *Revision* (2002), *supra* note 66, at 1. Throughout, however, the comments remain largely the same.

143. Article 3079 does not apply, because the claim is not truly disputed by the debtor. Yet as revised, article 3071 does seem to apply. The debtor makes no concession; the creditor does make a concession; and there is an "uncertainty concerning the obligation," namely, whether the debtor can perform it. Thus, article 3071 would apply.

144. Note that this fact pattern cannot be remedied by article 3079 literally, which deals with disputed or unliquidated claims only. See generally Sally Brown Richardson, Comment, *Civil Law Compromise, Common Law Accord and Satisfaction: Can the Two Doctrines Coexist in Louisiana?*, 69 LA. L. REV. 175 (2008).

But Son has other creditors who will be visiting him certainly in three or four months.

If Son pays this fraction of the debt, and enough time passes, Mother, as creditor, reduces her loss. If she insists on full payment, doing so will trigger bankruptcy proceedings, in which Mother (unsecured here) faces a much greater loss. If Mother grants Son a release for this reason alone, is that an onerous remission, a gratuitous remission, or a compromise?¹⁴⁵ If Creditor achieves this goal, Creditor is better off, given the alternative. But, because Creditor receives less than what is truly owed, it is strange to characterize this as an advantage and therefore the act as onerous.

XII. CONCLUSION

Should readers of the Code read “release” to mean that the creditor who uses it extinguishes his debtor’s obligation gratuitously? Or should the reader presume, as a default rule, that the creditor’s cause in releasing a debt is onerous, that is, always to obtain some advantage from the obligor? In most cases involving commercial contracts, the presumption should be strong that the creditor does not act out of a purely liberal, or gratuitous, intention to make a donation when dealing with another contract party.¹⁴⁶ Thus, the law ought to respect whatever advantage an obligee expects to gain, and therefore does not intend a gratuitous remission of debt. On the other hand, the renunciation of solidarity as to one solidary obligor should likewise be treated as either a gratuitous remission of debt or a compromise. If the

145. Note that this was the reason expressed by the creditor in *Fridge v. Caruthers*, 101 So. 128 (La. 1924), the seminal case under the old law of solidarity.

146. There are, of course, mere matters of accommodation, in which a contract party cedes an interest simply to smooth the performance of the obligations on both sides of the contract. The letter of the contract might entitle a contract party to insist on a certain performance by a certain date, entitling that party to an action for breach. But the party enjoying that entitlement would much prefer not to insist on the letter in order to obtain the essential elements of the other party’s performance. Furthermore, the party who grants some accommodation—additional time, a slightly different performance—to the other does so very often because he anticipates that the other party will do likewise when the shoe, so to speak, is on the other foot. This situation, however, seems distinct from the one analyzed here, if only because by hypothesis here the extinction of the obligation ends the relationship between creditor and debtor definitively. Our view is, in the classroom and elsewhere, if the Code does not explain the simple cases, it will not do much better with the complex cases. Quite often, however, given the strategic use of bankruptcy proceedings by debtors and by creditors, the prospect of future dealings is not only realistic but is anticipated. That complex problem is beyond the scope of this Article.

creditor accepts a solidary debtor's payment of his virile portion, that should, in all but the clearest cases, be deemed either a gratuitous remission of the creditor's right to pursue that debtor for the whole debt or a compromise that could in turn be based on whatever advantage the creditor might perceive in the circumstances.

In sum, must the Civil Code mean what it says, that is, must every term of art the Code uses have a clearly defined meaning? Certainly, it does not. This Article has examined the Code's use of one term of art whose meaning is not clearly defined: release. It can mean receipt, renunciation, waiver, compromise or remission, agreement to undo a contract, and even unilateral abandonment of a claim. It can also mean the extinction of an obligation incidentally or even unintentionally, as when the creditor's extinction of a principal obligation extinguishes the accessory contract and obligation of the surety. Moreover, the idea of release, as part of the process of compromise in general or accord and satisfaction in particular, is linked to the idea of concession. And whereas release might be read to mean one of several different things, concession means something altogether different—something more general, problematic, and troublesome.