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A COMPARATIVE STUDY OF JOINT (MANCOMUNADA) AND JOINT AND SEVERAL (SOLIDARIA) OBLIGATIONS UNDER THE SPANISH LAW AND AMERICAN LAW

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INTRODUCTION

The writer before beginning his treatise found himself in an embarrassing predicament in the translation of the words *"Mancomunada"* and *"In solidum"* of Spanish law. Though there is really no fear of treating the reader with the haughtiness and authority of a despot, there being no opportunity for him to censure the flagrant errors in the subsequent pages, yet it is really a dangerous procedure for no one will like to be treated as an inferior. Hence no strict and self-made translation of the words is attempted here. The precedents of our Supreme Court and the comparison of the effects of the words in question have been liberally consulted in order to free the writer from any responsibility.

According to old acceptation of the word "in solidum" it was translated into English by the word *"joint."* Justice Willard in his notes on the Civil Code came to the same conclusion by saying "the word *solidaria* is not properly translated by the word *joint.*" (See Willard notes on Civil Code, page 68.) And again the same author makes mention of this on pages 68 and 69, saying: "It seems more probable that the word *'joint'* was intended to refer to the owner of an obligation solidaria where each is responsible for the other." In Pimentel *vs.* Gutierrez, 14 Phil. Rep. 49, the Court held: "The defendants were *severally* and not *jointly* liable under the terms of the contract and that each one was liable to pay an aliquot part of said contract." Therefore the obligation incurred by these defendants is not a *joint* one—it must be understood to be several and each of them must pay half of the amount." "When the surety binds himself *jointly* with the principal debtor, the creditor may sue any of the joint debtors or all of them simultaneously." (Chinese Chamber of

Commerce *vs.* Pua Te Chung, 16 Phil. 406.) From the foregoing it is safe to deduce that *"in solidum"* is translated into *"joint"* in English and *"mancomunada ó a prorrata"* is equivalent to "several."

By Comparing the effects of the word *"in solidum"* of the Spanish law and the words *"joint"* and *"joint and several"* of the American law Mr. Justice Willard is justified in criticizing such erroneous translation. In a contract of *"in solidum"* all or any one of the debtors may be sued, which is also true of a *"joint and several obligation"* of the American law. In a *"joint contract"* in American law all the debtors must be joined to make the suit effective. (See Bishop on Contracts, Section 870, pages 359-360; Bangor Bank *vs.* Treat, 19 Am. Dec. 210; Tuckerman *vs.* Newhall, 17 Mass. 581, 583; American Bank *vs.* Doolittle, 14 Pick. 123, 126; Rowley *vs.* Stoddard, 7 Johns. 207, 210.)

Because of the anomaly above referred to, the Supreme Court of the Philippine Islands has recently made an apparent change, at least according to the opinion of the writer. In the case of Sherruf *vs.* The Tayabas Land Co., XVI Off. Gaz. 526, it was held: "In this jurisdiction at least, the word *'jointly'* when used by itself in a contract or a judgment rendered in English, is equivalent to the word *mancomunadamente*, and in order to convey the idea expressed in the Spanish term *solidariamente* (in solidum), the words *'jointly and severally'* or *'solidary'* or words of like effect must be used. A contract or a judgment based thereon, which fails to set forth that a particular obligation is a *'joint and several'* (solidary) obligation must be taken to have in contemplation a *'joint'* (mancomunada) and not a *'joint and several'* (solidary) obligation."

"A *joint obligation* in this jurisdiction binds the parties thereto only for the proportion of the debt, while in *solidary obligation*, on the contrary, binds each of the obligators for the whole debt." (This is in accordance with the law of Louisiana. Groves *vs.* Sentell, 14 Sup. Ct. 898, 901; 153 U. S. 465; 38 L. Ed. 785; See also De Leon *vs.* Nepomuceno et al., XV Off. Gaz. 1821; Luna *vs.* Arcinas, XIV Off. Gaz. 855, 857.)

In the subsequent pages therefore whenever the word *"joint"* and *"joint and several"* are used they mean *"mancomunada"* and *"solidaria"* respectively.

PRELIMINARY LECTURE

I. Obligation in General

A. *Derivation of the Word "Obligation."*

The word obligation comes from the Latin term "obligare" meaning to bind.

B. *Definitions*

1. *Roman Law.*—Obligation est juris vinculum quo necesitate adstringimur alicujus solvendas rei, secundum nostrae civitatis jura" or "An obligation is a tie of law which binds us, according to the rules of our civil law, to render something." (Institutes of Justinian, Book III, Tit. XIII; Marco Tulio, page 385.)

2. *Partidas.*—There are civil and natural obligations. Civil obligation is created by law; Natural is that created by nature. "La primera es cuando el que la faze finca obligado por ella, de guisa que, maguer el non la quiera cumplir, que lo puedan apremiar por ella e fazergela cumplir. E a esta obligacion a tal llaman en latin obligacion civil e natural, que quiere tanto decir como ligamento que es fecho segun ley e segun natura. La segunda manera de obligacion es natural solamente. E esta de tal manera, que el ome que la faze es tenido de tal cumplir naturalmente, como quier que non le pueden apremiar en juyzio que la cumpla." King Alfonso said that "it is a tie based upon the law or nature." From all these definitions we can see that in all kinds of obligations there exists a relation between two persons—one having a right and another who must execute an obligation. In common parlance they are the creditor and debtor."

The words *segun ley o segun natura* give the basis of the classification of obligations into natural, civil and mixed. (Marcc. Tulio, page 385.)

3. *Sanchez Roman.*—"The juridical necessity to comply with a prestation." (IV Sanchez Roman, page 5.) An obligation may be said to be *única individual* or simple when there is only one person who has the character of debtor and another who is the creditor. An obligation is multiple, collective or compound when there are various creditors and debtors or both. (IV Sanchez Roman, page 43.)

4. *Civil Code.*—All obligations consist in giving, doing or not doing something. (Art. 1088, Civil Code.) Different authors however have different ways of defining obligation. Some say that it is the relation between a creditor and a debtor which rests on the prestation, giving the one right to compel the other to give. This relation therefore is a tie which strengthens the right of a person to urge another which may also be termed "rigorismo civil," thus accentuating the duty of the one obliged to give as a necessity in the compliment of an obligation which may be judicially enforced against the debtor. (8 Manresa, page 11.)

All these discussions however are merely views of one thing as seen from different angles. They however agree that in an obligation there must be (1) a prestation to be complied with; (2) the right of the creditor to demand and (3) the duty of the debtor to fulfill. Obligation according to Roman Law has the following sources (1) Ex-contractu; (2) Quasi ex-contractu; (3) Ex-delicto; (4) Quasi ex-delicto. To which enumeration of the Civil Code adds "Law" as another source.

Though it is not the aim of the author to give an exhaustive dissertation of the subject yet he deems it advisable to give a brief analysis of each source of obligation which will be taken in the order given by the Civil Code. His aim is to give a basis or foundation for the discussion of the main subject which is treated more intensively.

Obligation arising from law are not presumed. This is because all those prescribed by law are not common cases and what is not ordinary is never presumed. Those obligations therefor founded on law must be definite and must not leave any doubt as to their tenor.

Obligations arising from crimes or misdemeanors shall be controlled by the provisions of the Penal Code. (Art. 1092, Civil Code.)

Obligation arising from contract has the force of law between the contracting parties and must be complied with according to the tenor of the contract. (Art. 1091, Civil Code; Pelayo *vs.* Laurel et al., 12 Phil. 453, 535.) Contracts shall only be effectual between the parties by whom hey are executed and their heirs, except with respect to the latter, in the cases where the rights and obligations originating from the contract are not transmissible either by their nature, or by act or by provision of law. Parties are given the right to make any contract with the only limitations that it must not be in contravention to any law, immoral or subverting public order. The Supreme Court of these Islands in the case of Batarra *vs.* Marcos, 7 Phil. 156, laid down the following doctrine: "A promise of marriage based upon carnal connection is founded upon an unlawful consideration and no action can be maintained by the woman against the man therefor where the woman is over the age of eighteen and hence the act does not constitute the crime of estupro. (See also Articles 1305, 1306 of the Civil Code.)

With respect to Quasi ex-contractu Article 1887 of the Civil Code provides; "Quasi contracts" are purely licit or voluntary acts by which the author thereof becomes obligated with respect to a third person and sometimes, by which there results a reciprocal obligation between the parties concerned. This will take place where any one takes the agency or administration of the business of another without the authorization of the latter who is obliged to continue managing the same until the end, or he must notify the interested person so that the latter may come and substitute him in the management should he be in a condition to do so for himself. (Art. 1888, Civil Code.) This is equivalent to the negotiorum gestio. The Supreme Court in Smith et al., *vs.* Lopez, 5 Phil. 78, where the plaintiff or proprietor of the Philippine Gas and Light Co. performed certain installations of water system in the house of the defendant under the contract entered into between the plaintiff and the father of the defendant as administrator of the property, said that, there was a quasi contract which created a reciprocal obligation between the plaintiff and the defendant for the reason that the defendant did not object to the work, so it must be presumed that they approved and ratified the unauthorized contract of the father with the contractor. When a thing through error has been delivered to a third person who has no right to claim it, there arises an obligation on the part of the receiver to restore the same. (Art. 1895, Civil Code.) The principle being that no one must enrich himself at the expense of another.

Obligations arising from ex delicto and ex maleficio are governed by the Penal Code. Every person criminally liable for a felony or misdemeanor is also civilly liable. (Art. 17, Penal Code.) Civil liability consists in three things (1) restitution; (2) reparation; and (3) indemnification for consequential damages. (Art. 119,

Penal Code.) The court is given the discretion of determining the amount, taking into account the price of the thing whenever possible, and its special value to the injured party. (Art. 121, Penal Code.) The indemnification for losses shall include not those caused to the injured party but also those sufferred by his family or by a third person by reason of the crime. (See Arts. 121 and 122, Penal Code.) The obligation however to make restitution or reparation for damages and indemnification for losses or consequential damages devolves upon the heirs of the person liable. (Art. 123, Penal Code.) Likewise the right to demand restriction, reparation and indemnification descends to the heirs of the person injured. (Art. 123:2, Penal Code.)

The last source is the quasi ex delicto or quasi ex maleficio. Article 1902, Civil Code provides "A person who by an act or omission causes damages to another where there is fault or negligence shall be obliged to repair the damage so done." This obligation is demandable not only for the personal acts and omissions but also for those of the persons for whom they should be responsible. Thus the father or in his death or incapacity, the mother, is liable for the damages caused by the minors who live with them; guardians or directors for the damages caused by the minors or incapacitated persons under their authority and live with them; owners or directors of an establishment or enterprise are equally liable for damages caused by their employees in the service of the branch in which the latter may be employed or on account of their duties; the State is liable when it acts through a special agent. (See Merritt *vs.* Government of the Philippine Islands, 14 Off. Gaz. 1077.)

II. Elements

Marco Tulio gives three essential elements in all kinds of obligations: (1) Cause or consideration; (2) Contracting parties; (3) Subject matter. (Marco Tulio, page 385.) Giorgi however differs from him and gives five requisites. Four being intrinsic and the last being extrinsic. They are (1) judicial tie or right; (2) active subject; (3) passive subject of the right; (4) a fact or prestation or service constituting the object of the obligation; and the extrinsic element is (5) the form of the obligation. (Giorgi Teoria de Obligaciones, page 13.)

Having been unwillingly detained by the somewhat lengthy discussion of the sources of contract the author will now proceed in the development of his main subject—Joint (mancomunada) and Joint and Several (solidaria) Obligations.

CHAPTER I

I. Joint (Mancomunada)

A. *Concept*

1. *Sanchez Roman.*—(a) *Juridical concept of "Mancomunada."*—The juridical meaning of the word "mancomunada" is the right to oblige in common. The right created belonging to one person of obliging several persons or vice versa concerning one obligation, constitute the common obligation. (IV Sanchez Roman,

page 44.) The word "mancomunidad" is realized by two different modes which are species of this idea,—both necessitate the plurality of subjects but under different footing. One party are creditors and the other the debtors. In order that the creditors may have the right to compel the other party, the latter, debtors must have their respective obligations in whole or in part in the common exigible prestation. When the right or obligation is imputable by shares which are divisible into as many creditors or debtors the mancomunidad and the right to the obligation is termed mancomunidad simple or a pro rata. (IV Sanchez Roman, page 44.) But on the contrary when the right or obligation is imputable or attributed in whole, the mancomunidad and the right to the obligation which is produced shall be termed mancomunidad solidaria. (IV Sanchez Roman, page 44.)

"Mancomunidad" does not convey anything other than the generic idea of association, conjunction or agreement of many to have a right in one obligation; but when it is followed by the term a pro rata it shall be understood that the obligation is demandable by shares and when mancomunidad conveys the idea of joint and several obligation (solidariamente) it is followed by "e cada uno por todo," or any other equivalent. (IV Sanchez Roman, page 45.)

2. *Manresa.*—Other codes like the Civil Code in 1851 confuse the idea of solidarity and mancomunada for they use "solidary obligation" and "mancomunada" interchangeably as conveying the same meaning.

Our code however discarding all the qualifying words of "solidaria" and "pro rata," uses mancomunada for joint obligation and solidaria for joint and several. (8 Manresa, 184; IV Sanchez Roman, page 46.)

B. *Kinds*

According to Sanchez Roman simple mancomunidad can be divided into active, passive and mixed according to the existing relations between the creditors, or debtors or of both. There is simple mancomunidad or pro rata between the creditors when various persons have the equal rights or by shares in the fulfillment of the same obligation, the effect of which if complied with by one or various debtors shall be divided between the creditors. This presupposes a plurality of creditors in the same obligation. (IV Sanchez Roman, page 47.)

C. *Presumption*

In favor of Joint (Mancomunada) Obligation.—The Novísima Recopilación in its Book X, Tit. I, Law 10 in contrast with Law 4, Tit. 18, Book III of Fuero Real (which presumes solidary obligation) provides that it will not be understood that a contract is solidary if it is not expressly stated that each one is obliged in solidum. (8 Manresa, page 186.) Our Civil Code which is in consonance with the Novísima Recopilación is also in favor of joint obligation for Article 1137 says "the concurrence of two or more creditors, or of two or more debtors, in a single

obligation does not imply that each one of the former has a right to ask nor each one of the latter is bound to comply in full with the things which are the objects of the same. This shall only take place when the obligation determines it expressly, being constituted as a joint and several obligation." (See Co-Pitco *vs.* Yulo, 8 Phil. 545; Un Pak Leung *vs.* Nigorra et al., 9 Phil. 383; Dietrich *vs.* Freeman, 18 Phil. 341; Bachrack *vs.* La Protectora et al., 16 Off. Gaz. 214; White *vs.* Enriquez, 15 Phil. 113.) The Roman Law, Partidas, Fuero Real and many States of the American Union however have the presumption in favor of solidarity.

D. *Reasons for Presumption in Favor of Joint Obligation*

The basis of the presumption is clear and well founded. Solidarity among debtors supposes an abnormal increase of a person's responsibility which includes that of another. Solidarity among creditors benefits all the others in case any one of them has a valid defense to a claim but also prejudices the rest in case of omission of any of them. Hence between the abnormal and excessive responsibility in solidary obligation and the common and normal liability in joint the law presumes in favor of joint obligation. Solidarity therefore can not be established by mere silence and vague conjecture for only those who have expressly submitted to such liability will be responsible. (8 Manresa, pages 184-185.)

E. *Exceptions to Presumption*

1. *Express stipulation.*—This hardly needs any explanation for Article 1137 of the Civil Code has laid down the rule of the presumption for joint obligation and therefore until the contrary appears the presumption is still in force. It is not however necessary to use the word "solidary" in a contract in order to convey that idea for any equivalent or analogous word is enough to rebut the established presumption. So, "where a promisory note is signed by two or more persons, promising to pay the amount of the said note 'juntos ó separadamente,' such co-makers are individually liable for the payment of the full amount of the obligation of such contract."

The phrase "juntos ó separadamente" used in a contract creates the same obligation as the phrase "mancomum ó in solidum." (Pavot *vs.* Genora, 7 Phil. 94, 97.)

The Supreme Court in deciding the case of Floriano *vs.* Delgado, 11 Phil. 157, held: "The judgment sentencing the defendants to pay the plaintiff the sum that they owe him together with interest thereon, must of course be understood as having been imposed upon them jointly in accordance with the mutual character of the obligation contracted by the debtors; and it can not be contended that each one of them has been severally sentenced to pay the whole amount stated in the document of indebtedness."

2. *Operation of Law.*—This takes place when the law itself prescribes joint and several (solidaria) obligations. The following are examples: Article 125, Penal Code reads "Notwithstanding the provision of the next preceding article, (if there are

two or more persons civilly liable for a felony or misdemeanor, the court shall determine the amount for which each must respond) the principals, accomplices and accessories each within their respective class shall be liable in solidum among themselves for the quotas, and subsidiarily for those of the other persons liable.

The subsidiary liability shall be enforced, first against the property of the principals; next against that of the accomplices and lastly against that of the accessories. Whenever the liability in solidum or the subsidiary liability has been enforced, the person by whom payment has been made shall have a right of action against the other for the amount of their respective shares. (See Mendoza *vs.* De Leon, 14 Off. Gaz. 581.) Article 127 of the Code of Commerce provides "All members of the general copartnership, be they or be they not managing partners of the same are personally and jointly liable with all their property for the results of the transactions made in the name and for the account of the partnership, under the signature of the latter, and by a person authorized to make use thereof."

In an opinion of Dec. 17, 1873, the Supreme Court of Spain declared that all the members of a general copartnership, even though they be not administrators of the capital are jointly and severally liable for the results of the transactions made in the name and for the account of the partnership, although in order that the property of the partners may be seized, it is necessary to first liquidate the property of the same. An opinion of the same court on Jan. 8, 1881, is of the same tenor, forbidding any member of such copartnership to divert any part of the fund for the payment of his own debt until the liabilities of the copartnership have been paid and cancelled.

3. *Testamentary Provisions.*—Any obligation imposed by the testator in his last will is binding against the devisees and legatees and must be strictly complied with unless said obligation imposed is contrary to law or good moral. An example of this is when X a testator owes Y, ₱1,000.00 and institutes A and B as his heirs on condition that they pay Y, ₱1,000.00. A and B shall be jointly and severally liable for the amount upon their acceptance of the inheritance.

4. *Obligations Arising from Quasi Contract.*—Article 1892, par. 2 of the Civil Code provides that, "The responsibility of managers, when there are two or more shall be joint and several. Therefore gestors are jointly and severally liable for their common administrations of the property of a third person. An application of this according to the author's opinion is when A who was having his house built had to leave for some business and B and C his neighbors simultaneously took up the management of the work for their neighbor A, without the latter's authorization. In this case B and C would be jointly and severally liable to A on his return.

But if several gestors administer the business not simultaneously but sucessively and independent of each other, there is no solidarity. This doctrine however must not be confused with the provision of Article 1723 Civil Code which says that

the liability of two or more agents even when they have been simultaneously appointed shall not be joint and several unless it has been so stated. (See Martinez *vs.* Ong Pong Co., 14 Phil. 726.)

F. *Credits and Debts Pertaining to Two or More Creditors and to Two or More Debtors*

1. *Determination of the Respective Rights of Creditors and Debtors.*—(a) *Solutions.*—(1) *Manresa.*—Article 1138 of the Civil Code provides, "If from the context of the obligations referred to in the preceding article, any other thing does not appear the credit and debt shall be presumed as divided into as many equal parts as there are creditors or debtors, being considered as credits or debts, each one different from the other." (Compañía General de Tabacos *vs.* Obed, 13 Phil. 391; Martinez *vs.* Ong Pongco, 14 Phil. 726; Isaac and Abella *vs.* Bray and Pardo, 30 Phil. 534, 536.) And Article 1139 of the Civil Code provides that "If the division should be impossible, the right of the creditors shall be only prejudiced by the collective acts of the same, and the debt shall only be recoverable by proceedings against all of the debtors. If any of the latter should be insolvent, the rest shall not be obliged to pay his share." It is evident that in determining the credits and debts of the creditors and debtors respectively we must resort to the context of the obligation itself but when this gives no light as to the nature of the obligation, the presumption in favor of joint obligation shall again operate. (8 Manresa, page 189.) The only remaining problem is the determination of the debtor of a creditor and vice versa. This state of affairs can not happen when there are only one creditor and various debtors; or when there are various creditors and one debtor. The problem presupposes an obligation with a plurality of debtors and a plurality of creditors. The solution here is the determination of the debts and credits of each one respectively when they are unequal. If the amount of the debt of one of the debtors coincides with the credit of one of the creditors the former must therefore be the debtor of the latter.

The difficulty arises when there are as many debtors as there are creditors and the presumption of equal shares does not operate. Here we can not definitely say who will be the debtor of one and who of the other. So also in the case when the number of creditors is greater or less than the number of debtors or when a debtor has to pay various creditors and vice versa. Another case of difficulty arises when the active and passive subjects are the same in number and the liabilities of the debtors do not correspond with the respective credits of the creditors. If, in an obligation of ₱500.00, A has a claim of ₱150.00, B ₱250.00 and C ₱100.00 while X one of the debtors has to answer only for ₱50.00, Y for ₱300.00 and Z for ₱150.00. The determination of the debtor of one is very important because one of the debtors may oppose prescription as his defense or because of the different securities provided by the debtor. In all these cases while the absence of proofs makes it impossible to determine the

respective debtor of each creditor, each creditor can ask from any debtor who has not yet paid his quota until the whole debt is paid. Of course no creditor can ask payment from a debtor who has already filled his share. There may be another solution according to Manresa. Any debtor can pay for his share to all the creditors in proportion to the credits owned by each creditor. (8 Manresa pages 191-192.)

(2) Sanchez Roman.—Sanchez Roman however has other solution. He contends that the share of each creditor shall be determined by their stipulations and in default thereof the presumption of equal shares shall govern. He also maintains that the creditors can bring their actions collectively against all the debtors; or each creditor can bring an action against one or more of the debtors until he is paid. (IV Sanchez Roman, page 48.)

G. *Effects of Joint (Mancomunada) Obligation*

Are the following: (1) Default on the part of any of the debtors does not prejudice the other debtors and any act of a co-creditor does not affect any of the other creditors; (2) When one of the creditors makes a demand so as to interrupt prescription, such interruption will not favor the other creditors. Similarly, an acknowledgment of debt by any of the debtors will not prejudice the other debtors in their claim for prescription; (3) Any hidden defect of any one of the obligations based on special disqualification of a certain debtor or creditor does not make the other obligations void; (4) Insolvency or noncompliance of one debtor will not increase the responsibility of the other debtors and neither will the creditor who is prejudiced by such insolvency or non-compliance be entitled to ask any share from the other creditors; (5) In divisible joint obligation the exception of the adjudicated thing (excepción de cosa juzgada) does not extend from one debtor to another.

In general therefore a debtor does not have any liability except his own, neither can each creditor have more right than what pertains to him. These are however subject to modifications in case of indivisible obligation. (8 Manresa, page 194.)

H. *Rights of Each Creditor in Case of Joint Creditors and Joint and Several Debtors.*

In case there is joint creditors (active) and passive solidarity each creditor can ask for the whole sum that belongs to him from any one of the debtors. (8 Manresa, page 195.)

I. *Indivisible joint obligation*

1. *Place.*—We shall consider here an obligation wherein concur the characteristics of the two kinds of obligations—joint and joint and several. In this case the indivisibility of subject matter makes some modification in the fulfillment of the obligation. The lack of power of each creditor to prejudice the others and the absence of obligation in each debtor to answer for the other, place this kind of obligation between joint and joint and several obligations. The fulfillment requires the con-

currence of the debtors although each one for himself. This is also true of the creditors. To cut all the unnecessary discussions an example may be advisable. If A and B contributed ₱500.00 each and bought a house from C, D and F; A can ask C, D and F to give him his share but neither C, D and F nor any one of them can comply, since, if they deliver one-half of the house to A for the other half is to B, the house is no longer a house. The same is true of C, D and F who can not deliver their respective share without the concurrence of the rest.

2. *Effect in Case of Default.*—In case C is in default he will indemnify the damages caused while D and F will only give their just share. (See Arts. 1137, 1138, 1139, 1150, 1169, 1252 of the Civil Code.)

CHAPTER II

I. Joint and Several or Solidary Obligation

A. *Derivation of the Word "Solidaridad" in General*

The word "solidaridad" is a creation of science and not of law in order to express and designate that kind of obligation which the Roman jurisconsult call *correi credendi ó stipulandi*, which conveys the idea of two or more creditors and *correi debendi ó promittendi*, when various debtors take part in the contract. (I Giorgi Teoria de las Obligaciones, page 89.)

B. *Nature*

In this kind of obligation usually there is only one object but it does not necessarily follow that there must be one tie between creditors and a debtor or between a creditor and debtors as the case may be. All depends upon the contract agreed upon by the parties. (IV Sanchez Roman, page 50.)

Article 1140 of the Civil Code provides that "Solidarity may exist even when the creditors and debtors are not bound in the same manner and for the same period and under the same conditions."

C. *Definition*

If the obligation is such that either of the creditors can demand the whole contract from joint and several debtors or when either debtor can pay to any one of the creditors it is called solidary obligation. But if the obligation is such that the debtors must pay only their proportionate part in the contract or that each creditor can demand only his proportionate interest, then it is mancomunada or joint contract. (Viso, page 69.)

D. *Essential Feature*

1. *Mutual Agency.*—The essential feature or basis, as some call it, of joint and several (solidary) obligation is the mutual agency between the interested parties taking part in the obligation. Each creditor is authorized and empowered to enforce their rights equally against the debtor or debtors but with the duty of answering for the result of such act. This mutual agency exists also among joint and several

debtors but the one who pays (for the whole obligations) has the right to ask reimbursement from the co-debtors and in case of insolvency of any one of the rest of the joint and several debtors his share shall be born and divided between the solvent debtors. Each one therefore of the joint and several debtors is a surety of the others until the obligation is fulfilled. (8 Manresa, pages 199, 216, 217.)

The author believes that the following is the application of the principle enunciated above: A, B, C and D jointly and severally (solidariamente) owe E, F and G ₱400.00. Any one of E, F and G may ask payment for the whole ₱400.00 from any one of A, B, C, and D but the one receiving the payment must give to his co-creditors their respective shares. Suppose A pays the whole ₱400.00 and asks reimbursement from his co-debtors. B is insolvent. Then the ₱100.00 which B should have paid will be divided between A, C and D, so that A will only receive ₱66.66 out of the ₱100.00 he paid for B, because A also has to bear a part of the burden.

II. Sources of Solidarity

A. *Contractual*

1. *By agreement.*—Almost all of the eminent authors are of the opinion that contract is one of the prime sources of joint and several (solidaria) obligation, for the civil code expressly provides that parties can stipulate whatever condition they may deem proper provided that it is not illegal, immoral, or contrary to law. This is in conformity with Article 1275 which provides that "contracts without consideration or with an illicit one are not effectual." A joint and several contract for example for the importation of opium will not be binding being contrary to law.

Another source of solidarity is partnership for Article 127 of the Code of Commerce provides "All the members of the general copartnership, be they or be they not managing partners of the same, are personally and jointly liable with all their property for the result of the transactions made in the name and for the account of the partnership, under the signature of the latter, and by a person authorized to make use thereof." The same is true as to limited copartnership according to Article 148 of the Code of Commerce. (See also Opinion of Supreme Court of Spain, Dec. 17, 1873; and Jan. 8, 1881.)

(a) *Is Express Word Necessary?*—1. *Spanish Law.*—The writer believes the contrary for there are various ways of conveying one and the same idea of solidarity. Giorgi writing on this point says, "It is not necessary to believe that the use of the word jointly and severally (solidariamente) is an essential element between the contracting parties." (I Giorgi Teoría de las Obligaciones, page 117.) Hence the phrase, "every debtor can be sued for the whole debts," or that "each one of the debtors obliges himself to fulfill the obligation," will be enough to convey the idea of solidarity. (8 Manresa, page 185; See also Compañía General de Tabacos *vs.* Obed, 11 Phil. 391.) This doctrine however does not operate in American law.

2. *American Law.*—Whenever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a solidary obligation or right. Words of express joinder are not necessary for this purpose. (Hill *vs.* Trucker, 1 Tannt. 7; Halsall *vs.* Griffith, 4 Tyr. 487.) On the other hand, there should be word of severance in order to produce a several responsability or a several right. (Hancock National Bank *vs.* Ellis, 172 Mass. 39; Broadway National Bank *vs.* Baker, 57 N. E. 603; Whitman *vs.* Oxford National Bank, 176 U. S. 559.)

B. *Non-Contractual*

1. *Final Sentence.*—Although Articles 1137 and 1138 of the Civil Code establish the presumption of severalty yet there are many exceptions. As in the case of final sentence the individuals thus condemned shall be jointly and severally liable. (IV Sanchez Roman, page 51.) The Supreme Court in the case of De Leon *vs.* Nepomuceno et al., 15 Off. Gaz. 1821 held: "A final judgment for costs and expenses in an election contest providing that 'the cost and expenses of the contest will be paid by the protestee and intervener' is a joint and not a 'joint and several' judgment for costs and expenses."

2. *Testamentary Provision.*—When a testator imposes the solidarity of an obligation upon the heirs as a condition, the heirs will be liable in solidum upon their acceptance of the inheritance. This is also provided for by the Argentina Code in its Article 700. (8 Manresa, pages 185, 186.)

3. *Operation of Law.*—(a) *Spanish Law.*—Legal solidarity is a burden imposed (by law) as an obligation of a debtor compelling him to assume certain liabilities at his cost at the fault of his co-debtor. (I Giorgi Teoría de las Obligaciones page 123.) An example is the Article 125 of the Penal Code which reads "Notwithstanding the provisions fo the next preceding article the principals, accomplices and accessories each within their respective class shall be liable *in solidum* among, themselves for their quotas and subsidiarily for those of the other persons liable.

The subsidiary liability shall be enforced against the property of the principals; next against that of the accomplices, and lastly against that of the accessories.

Whenever the liability *in solidum* or the subsidiary liability has been enforced, the person by whom payment has been made shall have a right of action against the others for the amount of their respective shares."

Article 39 of the Italian Penal Code provides that "person sentenced for the same crime are subject jointly and severally (solidariamente) for the reparation of the damages, fine and costs of the proceedings, while those condemned in the same trial but of different crimes are jointly liable only for the expenses incurred in the crime for which they are prosecuted and convicted." (I Giorgi Teoría de las Obligaciones, page 124; See also United States *vs.* Rosales et al., 1 Phil. 302; Insular Government *vs.* Punzalan et al., 7 Phil. 548; and Article 127, Code of Commerce.) In the same

way, a person who contracts marriage with a widow before obtaining the authorization of the family counsel to continue the administration of the property pertaining to the children of the first marriage is responsible jointly and severally with the wife regarding the part under his administration. When the administration is given to the husband he is responsible jointly and severally with the wife regarding the future property of the children of the first marriage. This is based upon the principle that the children of the first marriage are protected by law against any risk which may arise through the birth of sons of the second marriage. (I Giorgi Teoría de las Obligaciones, pages 118, 119.) Also executors appointed by a testator shall be jointly and severally liable when the duties are not definitely divided between them. (I Giorgi, Teoría de las Obligaciones, page 119.) But with respect to responsiblity of joint gestors it has already come under our consideration. To illustrate however, if a man who was building a house left it before it was finished and meanwhile two neighbors as gestors carry on the work without the owner's knowledge the two who manage the work shall be jointly and severally liable or responsible to the owner of the house.

(b) *American Law.*—All who aid, command, advise or countenance the commission of a tort by another, or who approve of it after it is done, if done for their benefit are liable in the same manner that they would be if they had done it with their own hands. (Moir *vs.* Hopkins, 63 Am. Dec. 312.) Joint tort-feasors are jointly liable for injuries which result for their concurrent negligence. This is not to be confounded with cases of trespass brought for separate acts done by two or more persons. If there has been no concert of action, no common intent, there is no joint liability. (Klander *vs.* McGrath, 78 Am. Dec. 329.)

III. Presumption in Favor of Solidarity

A. *Roman Law, Etc.*

As has been said previously Roman Law and Fuero Real presume solidary obligation. Partidas is also of the same opinion. But the Novísima Recopilación and our Civil Code have the contrary opinion. According to decision of the Court of Cassation of Naples when Domingo Capullo who built a road between two municipalities and sued both jointly and severally in 1865, solidarity is never presumed but must be expressly stipulated according to law. (I Giorgi, Teoría de las Obligaciones, page 128.) Many more citations can be given from Philippine sources but the writer abstains from making his work too long and tiresome.

B. *American Law*

As the promissors or convenantors may bind themselves severally, jointly, or jointly and severally, or in any manner or in any words, the only question is to determine the intention. If by any means the courts can construe that from the words of the instrument it will be done; if that cannot be done, then all

the circumstances of the case and the interest of the parties will be looked at, to discover their intention. Therefore if the interest of the parties be joint then in case of ambiguity of words the contract will be presumed joint, and it will be several if the interest be several. So in the case of Ernst *vs.* Bortle, 1 Johns Cas. 319 it was held that where it is the evident intent of a covenant that each of the covenantors shall be separately liable for what he stipulated to pay, such intent will be carried out. But if it clearly appears from the character of such a contract that each subscriber only intends to bind himself for his own subscription, this intention must prevail notwithstanding the joint form of the promise. (Price *vs.* Grand Rapids Railway Co., 18 Ind. 137; Davis *vs.* Belford, 70 Mich. 120; Gibbons *vs.* Bente, 51 Minn. 499; Clark *vs.* Mallory, 185 Ill. 227; See also Elliot on Contracts, Vol. 2, Sec. 1476; 2, Page on Contracts, page 1757; Clark, page 603; 3, Parson, page 12.) Promises of several persons are presumed to be joint or solidary and not several, unless a contrary intention is shown in the instrument. (Boswell *vs.* Moston, 22 Ala. 235; Brady *vs.* Reynolds, 13 Cal. 31.) But in Louisiana the rule is different and a joint and several obligation (called solidarity) is never presumed, but it must be expressly stipulated. (Mayor of New Orleans *vs.* Ripley et al., 25 Am. Dec. 175.)

IV. Kinds

Solidarity may be between creditors, between debtors or between both parties to the contract. In a short it may be active, passive or mixed. In all joint and several obligations there are the unity of prestation and the plurality of ties (vínculos). The obligation is only one so that each and every one of the joint and several creditors and debtors respectively can ask and satisfy the same prestation. Even though the obligation is extinguished by the whole payment of one debtor it does not however extinguish resulting liability among the debtors or creditors as has been seen above. (IV Sanchez Roman, page 50.)

V. The Legal Bond may be—

A. *Uniform*

It is said to be uniform when the debtors are bound by the same stipulation and clauses. The obligation of every debtor to fulfill the obligation wholly on demand of any of the creditor without regard to his other co-debtors constitute the uniformity of the obligation.

B. *Not Uniform*

This takes place when the obligors though liable for the same prestation are nevertheless not subject to the same secondary stipulations and clauses. Thus the contract may be pure as to some and with a period as to others and with a condition as to the rest. (IV Sanchez Roman, page 50.)

As to the question whether joint debtors are bound by a joint and several obligation but some with pure and others with a resolutory period and conditions, there is not much difficulty in its solution, for its juridical effects are the same; for in this case the obligation which pertains to each is immediately demandable until the conditions and period imposed be complied with. As for example, A, B and C bound to D jointly and severally to pay ₱3,000.00 as a guaranty. A without any condition; B so long as there is war; and C until five years have elapsed. Here there is no difficulty as to the effects of the obligations of A, B and C so long as the conditions imposed upon B and C are not yet fulfilled for in this case if A becomes in default before the fulfillment of these conditions, D can sue either A or B or C for the whole amount of a ₱3,000.00. This is understood however without prejudice as to the reimbursement between the joint and several debtors themselves. But the difficulty arises when several debtors are bound by a solidary obligation but one of them is bound with a pure condition, other with a suspensive one and the other with a suspensive period, for in this case their juridical effects are different and depend upon the nature of the condition or period imposed on each. This condition or period does not affect the nature of the obligation, but it remains joint and several (solidaria) just the same. (8 Manresa, page 196.) To illustrate this we have the following. Suppose A, B and C are joint and several debtors of D for ₱3,000.00. A is bound unconditionally; B bound himself on condition that D (creditor) will not defraud his co-creditors; and C after the lapse of five years. Now A is sued for the whole amount because the obligation is joint and several. But A can set up with regard to ₱1,000.00 that pertaining to B and the defense being that of non-compliance of the condition, and with regard to ₱1,000.00 pertaining to C, on the ground that the term of five years have not yet elapsed. In conclusion A can only be bound to pay ₱1,000.00. In this example it must not be forgotten of course that Article 1140 of the Civil Code which must be read in connection with the Article 1148 of the same code which provides: "A joint and several debtor may utilize against the claims of the creditor, all the exceptions derived from the nature of the obligation, and those which are personal to him. Those which personally pertain to the others may be employed by him only as to the share of the debt for which such co-debtors may be responsible."

The Supreme Court in the case of Inchausti & Co. *vs.* Gregorio Yulo, 16 Off. Gaz. 1343, held: "When the obligation is a solidary one, the creditor may bring his action in *toto* against any of the debtors obligated in solidum and although the creditor may have, by means of a subsequent instrument, covenanted with some of the solidary debtors different periods of payment and different conditions, not on this account may it be understood that the solidarity stipulated in the previous instrument has been broken."

"The solidary debtor unconditionally obligated (or whose period for payment has expired) may not, with respect to the part of the debt for which he is liable, plead the defense of prematurity of the action, which is personal to his co-debtors."

1. *Power of Court to Fix the Period.*—When the period as in the case of condition has been left to the discretion of one of the joint and several debtors the court shall be given the right to fix the period, as provided by Article 1128 of the Civil Code. This provision is made to forestall fraud since leaving the determination of the period at the will of the debtor is tantamount to putting the creditor at the mercy of the debtor. It also gives life to the contract which otherwise should have been void for if he does not determine the time the contract will remain suspended indefinitely which is almost equivalent to no contract at all.

Article 1115 of the Civil Code provides that "When the fulfillment of the obligation depends upon the exclusive will of the debtor, the conditional obligation shall be null and void." This is a complement of Article 1256 which reads: "The validity and fulfillment of the contracts can not be left to the will of one of the contracting parties." These articles prevent the creation of illusory obligation. (See also 8 Manresa, page 13.)

When the payment however has been made prematurely by one of the joint and several debtors not knowing the condition, he will only be entitled to interest but not reimbursement, the reason being that he will have to pay any way when the time comes should any of the creditors ask him to pay for the whole. Article 1126 of the Civil Code provides: "The interest is allowed since the debt is not yet due" and no man should enrich himself at the expense of another. The creditor can however demand for the fulfillment of the contract notwithstanding the period stipulated if when after the obligation has been contracted it appears that the debtor or debtors (as the case may be) is insolvent unless he gives security for the debt, (Article 1129, par. 1) or when he does not give to the creditor the security he is bound to give, (Article 1129, par. 2) or when by his own acts he has reduced such security after giving it, or when it disappears through an unforseen event unless it is immediately substituted by a new one equally safe. (Article 1129, par. 3.) This usually happens when the debtors are bound by different ties. (8 Manresa, page 197.)

2. *Obligation Complied with if Condition is Prevented by any Joint and Several Debtor.*—Article 1119 of the Civil Code provides that "The condition shall be considered as complied with when the obligated party voluntarily prevents its compliance." This refers to that act of any of the joint and several debtors which impedes the fulfillment of the obligation even though he is not the one especially affected by the contract. (8 Manresa, pages 197-8.) This article prevents any bad faith on the part of the debtor to prevent the realization of the obligation imposed upon him so that the law always tries to make the obligation effective. (8 Manresa, page 134.) Hence the writer thinks that the above provision is made to forestall fraud which any debtor may make use of in avoiding his liability.

(To be Continued.)