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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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(*Continued from last issue*)

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CHAPTER III

I. ACTIVE SOLIDARITY

A. Nature

The essence of solidarity between creditors consists in the authority of each to claim and enforce the rights of all with the resulting obligation of paying every co-creditor what belongs to him. There is no renunciation of rights but only a mutual representation. Therefore the essential feature of this obligation in its active form is that it is a mutual agency. (8 Manresa, page 199.)

B. Definition

"It is a tie between various creditors of the same obligation by virtue of which one of them is creditor only of his part with respect to his co-creditors and with respect to the common debtor he represents all the co-creditors in regard to the collection of the debt which without altering the nature of the obligation is sure and easily demandable." (I Giorgi, Teoria de las Obligaciones, page 89.)

C. Elements

There are three essential requisites in all active solidarity: (1) plurality of creditors; (2) unity of prestation; and (3) willingness of the party assuming or of the one imposing the obligation to have this solidarity between creditors.

The first element hardly requires any comment for more than one creditor must exist to justify the employment of the word solidarity. There must be a unity of prestation for if each creditor can ask for his share irrespective of the rights of the others a simple obligation result wherein there are several creditors against one debtor. There will, therefore, be as many distinct obligations as there are creditors and as

many different prestations. With respect to the third element an express stipulation is necessary in order to rebut the presumption in favor of joint obligation. (I Giorgi, Teoria de las Obligaciones, page 91.)

II. Power Inherent to each Joint and Several Creditor

A. *Beneficial Act to Co-creditors*

1. *French Code.*—The French solution maintains that each creditor is authorized by law to carry into effect the rights of all creditors, not prejudicial to any of the co-creditors. (8 Manresa, page 199.) The basis of it is perhaps that each creditor is not considered as the agent of other creditors and there is no fiction of mutual representation between them.

B. *Beneficial and Prejudicial Act*

1. *Roman Law.*—It must not be forgotten that the Roman Law sustains a different view from that adopted by the French Code, for the Roman Law provides that a joint and several creditor can do not only what is beneficial to others but also the prejudicial acts as if he were the only creditor. (8 Manresa, page 199.) This, of course, admits the principle of mutual agency or representation but without prejudice to the liability or injury that he may cause his co-creditors.

2. *Civil Code.*—Having had a brief glance of the opposing theories of the Roman Law and the French Code we can see which solution is followed by our Civil Code. At first it might seem that our Code has followed the French Code according to article 1141, but since that article must be read with article 1143 it is doubtless that the Roman Law principle pervades the spirit of our Code. This view is supported by article 1141-1 as confirmed by article 1143. (8 Manresa, pages 199-200.) The following are the articles from where the above conclusion is based.

Article 1141. "Each one of the joint and several creditors can do whatever may be profitable but not what may be injurious to the others.

Actions enforced against any one of the joint and several debtors, shall be to the injury of all of them."

Article 1143. "Novation, compensation, confusion or remission of the debt made by one of the joint and several creditors, or with any one of the debtors of the same class, extinguishes the obligation without prejudice to the provision of article 1146."

III. Assignment or Revocation of a Right of a Joint and Several Creditor

A. *Assignment of a Right to a Stranger*

If it is true that the basis of active solidarity is a mutual agency which presupposes personal capacities and denies the extension of such confidence to others not considered at the time of the contract, substitution may be done, if not prohibited expressly

by the stipulations, as in any other contract of agency; the one substituting must however give a guaranty similar to those provided by article 1721 of our Civil Code. (8 Manresa, page 201.)

Article 1721. "An agent may appoint a substitute when the principal has not forbidden him to do so, but he shall be liable for the acts of the substitute.

1. When the power to appoint such substitute was not given him.

2. When such power was granted to him but without designating the person, and the person appointed is well known to be incapacitated or insolvent.

What is done by the substitute, appointed against the prohibition of the principal, shall be void.

Article 1722. In the case included in the two numbers of the preceding article, the principal may furthermore bring an action against the substitute.

I. Exception

(a) *Partnership.*—Article 1696 of the Civil Code provides: "Every partner may associate another person in his share, but said person shall not enter the partnership without the unanimous consent of the other partners, even when the former is the manager." The reason for this exception is because all the members in the partnership are selected and chosen and it is but just that only those members unanimously elected must become members thereof.

(b) *Revocation of Solidarity.*—It might seem at the first glance that solidarity being mutual agency is extinguished by death or insolvency of any member thereof as in any case of agency, but there is no law nor dictum and the Suprme Court does not warrant such a hasty conlusion. Besides, the similarity between active solidarity and agency is but a mere conclusion and not a direct affirmation of law. (8 Manresa, page 201.)

A distinction must however be made between express and implied active solidarity. When active solidarity has been agreed upon expressly by the contracting parties as in the case of two creditors jointly and severally loaning to another a certain amount the death of one does not extinguish the solidarity but it continues with the heirs of the deceased or his representatives. But when the active solidarity is implied as when two persons appointed a person as their agent (Article 1731, Civil Code) or when two or more persons form a general merchantile partnership, active solidarity is revoked by the death of one of the creditors or partners respectively. (8 Manresa, page 201.)

Giorgi however has a different view. He maintains that solidarity exists between the estate of the deceased as a whole and the other creditors inasmuch as the estate of the deceased prolongs his personality. Because the heirs represent the estate of the deceased, they therefore are considered as joint and several creditors with the rest,

and they therefore like the rest can ask as a body for the whole compliance of the obligation. But such heirs are not joint and several creditors among themselves and each is a creditor only of his proportional share for the tie of solidarity between heir and heir is lacking. (I Giorgi, Teoria de las Obligaciones, pages 93-94.) Rodiere however propounds this question. Does a change of condition of a joint and several creditor (as in the case of civil interdiction) extinguish solidarity, thus depriving the other co-creditors of the right to demand for the whole fulfillment of the obligation? The eminent author above quoted solves this question in the negative. But two things must not be confounded. Complete change in the personal condition of a joint and several creditor amounts to depriving him of the power of exercising by himself certain rights thereby altering somewhat the tie of Solidarity. Article 42 of the Penal Code provides: "Civil interdiction shall deprive the offender, during the time of his sentence of the rights of parental authority, of guardianship either as to the person or property of the ward, of the right of membership in the family council, of marital authority, of the right to manage his property and of the right to dispose such property by any act inter vivos." Hence tho this article prevents an interdicted person from managing the property, he has the right to ask another to manage it for him who in turn will be clothed with the power pertaining to a joint creditor if the owner he is representing is such a creditor.

IV. Demand of Payment of a Creditor Against any or all of Joint and Several Debtors Simultaneously

A. Right of Creditors to Choose among the Debtors

1. *Spanish Law.*—The right of the creditor to demand payment from any one of the joint and several debtors is beyond any shadow of doubt. It is a right given to the creditor to demand from another joint and several debtor even if he has asked fulfillment from a joint and several debtor who had failed to comply with his demand, fully or partially. (8 Manresa, page 213; See Inchausti & Co. *vs.* Yulo, 16 Off. Gaz. 1343.) The debtor however is protected from overpayment by article 1252 of the Civil Code.

The Supreme Court of Spain on April 3, 1903 said that each heir is responsible jointly and severally (solidariamente) for the debts of the deceased and should a judgment be rendered against one of the heirs without the knowledge of the other, the lack of notification will not bar the plaintiff from demanding from the other heir.

Even tho the law gives the right to the creditor of demanding from any one or all of the joint and several debtors, yet it does not entitle the creditor to demand for the whole prestation from each one of the joint and several debtors for otherwise it will foment fraud and trouble. The right is granted only to spare the creditor the trouble of going to see every debtor and ask for his pro rata share, and to decrease the risk

of not being paid because of insolvency of one of the joint and several (solidario) debtors. (IV Sanchez Roman, page 52.)

Article 1144 of the Civil Code provides: "A creditor may sue any of the joint and several debtor or all of them simultaneously. The actions instituted against one shall not be an obstacle for those that may be brought subsequently against the others, so long as it does not appear that the debt has been collected in full." This is in conformity with the law of Partidas, Art. 8, Tit. XII, Part 5. The article is clear and is easy to apply. But suppose a question should arise as the following: A, B, C and D, jointly and severally owe ₱400 to E, F and G. Can E ask that A pay ₱1. B ₱2, C ₱5 and D the rest of the debt? The author believes so because the creditor has a right to demand from the debtors any amount as long as the sum of all does not exceed the whole debt; and besides the debtors are left to themselves to settle the matter by reimbursement.

Article 1142 of the Civil Code provides: "A debtor may pay the debt to any one of the joint and several creditors; but should it have been sued by any one of them, he must make the payment to the latter."

The article according to Manresa does not discriminate between judicial and extrajudicial demand. If judicial demand was made and another extrajudicial was subsequently made, the debtor can pay to the latter demand but he will be responsible for mora for the judicial demand for the benefit of all the joint and several creditors The indemnification for damages shall include the time from the judicial demand up to the payment of the obligation. (8 Manresa, page 203.)

2. *American Law.*—Suit must be against all. All the joint promissors must be joined in the suit, if living and within the jurisdiction of the court (Page *vs* Brant 18 Ill. 37; Eller *vs.* Lacy, 137 Ind. 436; New Orleans *vs* Ripley, 35 Am. Dec. 175; Ripley *vs* Crooker, 74 Am. Dec. 49; See also Vol. I, Modern American Law, page 154) unless the rule is changed as it is in some jurisdiction by statute, where the action may be brought against all or any of the joint obligors. (Bradford *vs.* Toney, 30 Ark. 763; Davis *vs.* Sanderhn, 23 N. C. 389; Johnson *vs.* Byrd, 13 Fed. Cas. No. 7, 376.) Where one of the joint obligors or debtors is dead or without the jurisdiction of the court, or has been discharged from the debt by bankruptcy or insolvency proceedings, or where he has exercised a right, because of infancy or otherwise, to avoid the contract or the debt is barred as against him by the statute of limitation, the other debtor or debtors may be sued without joining him. (Robertson *vs.* Smith, 9 Am. Dec. 227; 9 Cyc. 655.) Each party to a joint contract is therefore severally liable in the sense that if he is sued severally and does not plead in a abatement he is liable to pay the entire debt. (Bonnon *vs.* Urton, 3 Greene (Iowa) 228; Robertson *vs.* Smith et al., 18 Johns. 477; Mason *vs.* Eldred, 6 Wall (U. S.) 231; 9 Cyc. 655 and note; Wilson *vs.* Mc Cornnick, 11 S. E. Rep. 976; Alder *vs.* Thompson, 13 Gray (Mass.) 91; Maurer

vs. Midway, 25 Neb. 575; First National Bank *vs.* Hamor, 49 Fed. Rep. 45; Lieberman *vs.* Brothers, 26 Atl. Rep. 828.) And if the judgment is obtained against less than all joint debtors, it merges or extinguishes the right of action as against all. Suit cannot afterwards be brought against the others, for they are entirely relieved from liability. (Mason *vs.* Eldred, 6 Wall. 231; 2 Elliot on Contracts, Sec. 1492 and note.) But in case of a joint and several obligation, an ancient and familiar rule of law forbids it to be treated as several as to some of the obligors, and joint as to rest. The obligee has the right to choice between the two methods of proceeding; but he must resort to one or to other exclusively and can not combine both, that is, he must proceed either severally against each or jointly against all. (3 Parsons on Contract, page 13; Bishop on Contracts, section 870, pages 359-360.) In the same way, where a promise is made to several jointly they are entitled jointly and not separately, and must as a rule all join in a suit on the promise. (Archer *vs.* Bogne, 4 Ill. 526; Hayden *vs.* Snell, 9 Gray, 365; Moric *vs.* Garrison, 83 N. Y. 14.) In the case of Clark *vs.* Northern Railway Co., 81 Fed. Rep. 282 it was held that "where a number of persons jointly contributed to procure a right of way for a railroad through a city in consideration of the company's agreement to give certain rates, all must join in a suit to rescind the contract for failure of the company to comply." Therefore if one is not joined as plaintiff, the defendant may plead in abatement, but failure to do so, unlike the case of non-joinder of joint debtors will not constitute a waiver of the defect.

B. *Effect*

1. *Extinguish the Obligation.*—Once the debt is paid by one of the joint and several debtors the obligation is extinguished. This however creates a new obligation between the co-creditors and co-debtors respectively for the reimbursement to be made for the share corresponding to each one respectively.

2. *Creditor Becoming Debtor of his Co-creditors.*—Because in agency a settlement of accounts is made after the end of business so also in case of the receipt of the debt by one joint and several creditor there being mutual agency between them. Whatever may be the benefit received by a joint and several creditor, he can be compelled by others to divide the same, even though the said creditor had contracted for it for his own exclusive interest and tho he had demanded only what pertains to his share In case the obligation is rescinded or declared void with regard to one joint and several creditor his share will be deducted from the debt and it will not increase the shares of the others, except when the creditors had resolved that nothing will pertain to the first creditor even tho the obligation itself has not been declared void with respect to him. (I Giorgi, Teoria de las Obligaciones, pages 111, 112.)

3. *Distribution of Profits.*—(*a*) *Basis of such Distribution.*—In case the whole amount has been paid by one joint and several debtor and received by one joint and

several creditor it is necessary to distinguish: (1) the basis of such distribution or reimbursement; (2) the sources which govern the distribution or reimbursement; and (3) actions to render them effective.

As to basis of distribution it may be by special agreement or by nature of obligation. With respect to special agreement there is no need of explanation since the law gives freedom to parties in their stipulations. The nature of the obligation may be:

(*a*) Quasi contract in which case the presumption of equal shares in distribution governs:.

(*b*) *Mutual Agency.*—Inasmuch as in agency the agent must render account to his principal at the end of the business, it therefore follows that in active or passive solidarity, being founded on mutual agency, there must be a rendering of account by the one who received the whole payment to his co-creditors or reimbursement from his co-debtors in case one of the joint and several debtors made the whole payment;

(*c*) Nature of the subject matter which may be divisible or indivisible shall be governed by that part of the Civil Code regarding divisible or indivisible obligation.

(*d*) *Economical End of the Object of Solidarity.*—If one of the creditors is very badly in need of the use of the thing he can make an exclusive demand for himself and the other co-creditors must therefore be reimbursed by the one who made the demand for his own use. The market value of the thing at the time of the compliance of the obligation must be taken into consideration, and if such value can not be determined it will be decided by experts.

As to sources which govern the distribution, they may be by special agreement or nature of the obligation.

Regarding actions to render them effective may be *ex stipulatu* if there is an agreement or quasi contract if there is none. (See Giorgi, Teoria de las Obligaciones, page 99.)

C. Refusal of a Joint and Several Creditor to Receive Payment.

Since the debtor can choose to whom to pay among the joint and several creditors, in case the one chosen does not like to receive the amount, the debtor who is paying will be justified in depositing it to any other co-creditor and the debtor will be exempt from liability with respect to the amount so deposited. (I Giorgi, Teoria de las Obligaciones, page 99.)

D. Liabilities of Sureties

1. *Under Spanish Law.*—Article 1822 of the Civil Code provides that "By security a person binds himself to pay or to comply with some obligation for a third party in case the latter fails to do so.

"If the surety binds himself jointly and severally with the principal debtor, the provision regarding joint and joint and several obligations, shall be observed."

Thus the Supreme Court in the case of Molina *vs.* De la Riva, 7 Phil. 345. *Held:* The sureties on the supersedeas bond given in this particular case, were jointly and

severally (solidariamente) liable with the principal debtor and that an execution might issue against their property concurrently with the execution against the property of the principal. (See also Articles 1831, 1822-2 and 1144 of the Civil Code; Chinese Chamber *vs.* Pua Te Ching, 16 Phil. 806.)

A surety can not be compelled to pay a creditor until a levy has been previously made upon all the property of the debtor. (Article 1830, Civil Code.) These however are subject to exceptions which are the following: 1. When the surety has expressly renounced such privilege; 2. When he has bound himself jointly and severally with the debtor; 3. In case of bankruptcy or general assignment of the debtor; and 4. When the debtor can not be judicially sued within the Philippine Islands (Art. 1837, Civil Code.) But in case there are many sureties for the same debt the liability shall be divided among them. The creditor can only claim from each surety the corresponding portion which he has to pay, unless the solidarity has been expressly stipulated. (Art. 1837, Civil Code.) In case the surety paid for the debtor the reimbursement by the debtor will include the interest of the amount paid from the time such payment was made known to the debtor tho such sum did not bear interest in favor of the creditor. This will also include the expenses caused to the surety after the latter has notified the debtor of the payment with damages and injuries when proper. (Article 1838, Civil Code.) But if the debt is for a term and the surety pays before the expiration of such term the surety can not demand reimbursement from the debtors until the term accrues. (Article 1841, Civil Code.)

2. *Under American Law.*—In contracts of guaranty or suretyship made between the creditor and the principal debtor and his sureties, the principal debtor and the sureties are usually all made debtors, in equal degree to the creditor who may recover the whole debt against all or any of them. As between themselves however, the principal is solely liable; and, if the surety is called upon by the creditor to pay part of the debt, he may, upon payment, recover the amount from the principal debtor. So, where there are several sureties, who are all principally liable for the whole debt to the creditor and one of them is called upon to pay each of the co-sureties becomes ratably indebted to him for contribution; and the statute of limitations begins to run only from the date of such payment. (Bushnell *vs.* Bushnell, 77 Wis. 435; Jackson *vs.* Murray, 77 Tex. 644; Taylor *vs.* Savage, 12 Mass. 98.) A surety therefore may enforce contribution against the estate of a deceased co-surety. (Bachelder *vs* Fiske,, 17 Mass. 464; Handley *vs.* Hefein, 84 Ala. 600.) But when a surety liable for contribution is insolvent, contribution must be in proportion to the number of solvent sureties. (2 Elliot on Contracts, Sec. 1491; Henderson *vs.* McDuffee, 20 Am. Dec. 557.) But the creditor is bound upon principle of equity to abstain from any dealing with the debtor which may prejudice the surety. If he binds himself to give further

time to the debtor, without the consent of the surety, the latter is discharged. (Gordon *vs.* Bank, 441 U. S. 97; Chemical Co. *vs.* Pegram, 17 S. E. Pep. 298.) But if the surety or guarantor in a joint obligation is directly benefited from the contract, his estate will not be discharged from liability. (Boyd *vs.* Bell, 69 Tex. 735.) However, if a joint obligor dying be a surety, he is not liable for the debt irrespective of the obligation, and his estate is absolutely discharged, both at law and in equity, the survivor only being liable. And it makes no difference that the surety died after a judgment was rendered against him and the principal. (Susong *vs.* Vaiden, 30 Am. Rep. 50; United States *vs.* Price, 9 How (U. S.) 83.)

E. As to Res Adjudicata (Judicata)

Article 1252 of the Civil Code provides that "In order that the presumption of a final sentence may be effective in another suit, it is necessary that between the case determined by the sentence and that in which the same is involved, there shall be the most perfect identity between the things, the causes and the persons of the litigants and the capacity under which they litigated. Paragraph 3 of the same article reads: "It is understood that there is identity of persons whenever the litigants of the second suit hold rights under those litigated in the preceding suit or when they are united to them by liens of solidarity or by the relations established by the indivisibility of prestations among those having a right to demand them, or the obligation to satisfy the same. And Section 307 of the Code of Civil Procedure provides that "It is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged or while was actually and necessarily included therein or necessary thereto."

V. DEATH OF ONE OF THE JOINT AND SEVERAL CREDITORS (SOLIDARY)

A. Under Spanish Law

As has been said before, while Giorgi maintains that death of a joint and several creditor does not extinguish the solidarity, for his personality is prolonged by his estate represented by his heirs, yet Manresa believes that such death of one of the parties will not extinguish the obligation, only when there is an express stipulation to that effect. This is not however applicable to solidarity created by law as when two persons appoint a third person as a common agent, for in that case article 1731 of the Civil Code governs. Since there is no express provision of law regarding the death of one of the joint and several creditors the writer is of the opinion that it will be more practical to follow the general provisions of the Civil Code and solve by analogy any point which may come under any solution of the Civil Code. As in case of article 659 saying that "Inheritance embraces all the property, rights and obligations of a person, which are not extinguished by his death." This means that in general all rights and property are transmitted to the heirs excepting those contracts wherein

the special knowledge of the deceased had been taken into consideration. Since article 1112 says that "all rights acquired by virtue of an obligation are transmissible, subject to law, should there be no stipulation to the contrary," therefore the solidarity of an obligation must by analogy be transmissible to the heirs of the deceased. This view seems to be confirmed by article 1259 providing "contracts shall only be effectual between the contracting parties 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, by pact or by provision of law." Besides section 698 of the Code of Civil Procedure is also in accord with this solution in providing that "When two or more persons are indebted on a joint and several contract, or upon a judgment founded on a joint and several contract, and either of them dies, his estate shall be liable therefore, and it shall be allowed by the committee, as if the contract had been with him alone or the judgment against him alone. But the estate shall have a right to recover contribution from the other joint and several debtor."

B. *Under American Law*

Where one of several joint creditors or promisees dies, the legal right under the contract devolves upon the survivors, and only can sue on the contract. The representative of the deceased creditor can not be joined nor can he sue alone. (Trammell *vs.* Harrell, 4 Ark. 602; Vandenhenvel *vs.* Storrs, 3 Conn. 203; Smith *vs.* Franklin, 1 Mass. 480; Walker *vs.* Maxwell, 1 Mass. 104; Hedderly *vs.* Downs, 31 Minn. 183; See also 9 Cyc. 656.) And if all die, the action must be brought by the representative of the last survivor. (Anderson *vs.* Martindile, 1 East. 497; 2 Elliot on Contracts, Section 1486; 2 Page on Contracts, page 1762.) But if the right under the Contract be several the representatives of the deceased party may sue, although the other obligees are living. (Shaw *vs.* Sherwood, Cro. E. 729.) This is therefore different from Spanish Law for in Spanish law the credit devolves upon the heirs of the deceased.

VI. Effect of Novation, Compensation, Confusion or Remission of a Debt

A. *Stipulation to Contrary is Void*

If article 1143 of the Civil Code is to be interpreted rigidly it is susceptible to dangerous consequences. So that as a remedy parties are given the freedom to stipulate the contrary. These are mere supplementary and not essential part of the obligation. (See 8 Manresa, pages 205-206.)

B. *Novation*

Article 1203 provides that "Obligation can be modified by any of the following conditions:

1. "By change of object or their principal conditions;
2. By substituting the person of the debtor;
3. By substituting a third party in the rights of the creditor."

This substitution or change of obligation by a subsequent one extinguishes or modifies the prior one. This kind of substituting of the obligation must have taken place subsequently in order to have the desired effect of novation. It may be in the same document or in a separate one but in all cases it extinguishes the old one and gives birth to a new obligation in its place. In order to have novation the prior contract must have existed at the time of the novation. It might have been conditional, rescindible or with a period and the novation shall not prejudice the effects which such period or condition may have. (See 8 Manresa, page 418.)

Article 1208 provides "Novation is null if the original obligation is also so unless the cause of nullity can be claimed by the debtor only or the ratification gives validity to acts which were null in their origin." This is evident since an obligation which did not exist can not be novated and hence a null contract can neither be novated. The change referred to in article 1208, Civil Code in order to have the force of novation must refer to the principal matter otherwise it will be a mere modification. (8 Manresa, page 419.)

Because article 1204 provides that "in order that the obligation may be extinguished by another which substitutes it, it is necessary that it should be so expressly declared or that the old and the new be absolutely incompatible in all points." So we can conclude that novation may be expressly or impliedly done. In case of an express agreement concerning the extinguishment of the former obligation it can be done in any way which conveys the meaning since it is the intent of the parties that gives life to a contract.

In conclusion the Supreme Court in the case of Inchausti & Co. *vs.* Gregorio Yulo, 16 Off. Gaz. 1343, *held:* A new instrument, in which a former one containing an obligation to pay a certain sum of money is ratified is not renewed by merely altering the period for payment and adding other obligations not incompatible with the one already covenanted in the old instrument. (See also decisions of the Supreme Court of Spain of June 28, 1904, and July 8, 1909.)

1. *Change of Creditor.*—Article 1203, par. 3 of the Civil Code provides that "Obligation can be modified by subrogating a third party in the right of the creditor." Article 1143 also provides that "Novation, compensation, confusion or remission of debt made by one of the joint and several creditors or with any of the debtors of the same class, extinguishes the obligation without prejudice to the provisions of article 1146.

A creditor who has executed any of these acts and also the person who collects the debt shall be responsible to the others for the part pertaining to them in the obligation."

Article 1146 of the same code reads: "The waiver or remission made by the creditor of the part affecting one of the joint and several debtors does not release the

latter from his liability with regard to the co-debtors in case the debt should have been paid in full by any of them."

The object of these articles is to prevent connivance between a creditor and debtors to defraud the co-debtor who has made the payment.

Manresa says that a co-creditor can put third person in place of his co-creditors after indemnifying the latter of their respective claim in the obligation. The change of creditor does not refer to the case where a third party is subrogated in place of the creditor who makes the substitution for in this case it is a mere cession of credits. (See Manresa, page 210.)

2. *Change of Debtor.*—(*a*) *Spanish Law.*—According to article 1203 of the Civil Code "obligation can be modified by substituting the person of the debtor." This of course extinguishes the relation between the creditor and the former debtor but the creditor who assented to the change will be responsible to his co-creditors in case of any damage or injury caused by such change. (8 Manresa, page 210.)

This change of the debtor can be effected without the knowledge and consent of the debtor but never without the consent of the creditor according to article 1205, for in both cases it is the creditor who will have to suffer the damages. (See also Article 1205, Civil Code.)

Novation may be by expromission or by delegation. Expromission takes place when a third person takes the place of the debtor without his knowledge and consent but with the consent of the third person and creditor. This should not however be confused with "novacion del pago" wherein the third person can force the creditor to accept even against his will. There is delegation when the debtor offers and the creditor accepts the third person who consents to the change. In this case the consent of the delegante, delegatorio and delegado must appear. The consent may be simultaneous or it may be subsequent. (8 Manresa, page 425.)

The obligation, however, contracted by a third person as a surety of a debtor is not novation for there is no change of debtor but simply an addition of guaranty. (8 Manresa, page 424.)

Article 1266, Civil Code provides "the insolvency of the new debtor who has been accepted by the creditor, shall not revive the action of the latter against the original debtor, unless such insolvency has been prior and public or known to the debtor when he transfers his debt."

(*b*) *American Law.*—Accord and satisfaction. The law is well settled that the acceptance by a creditor of the liability of a third person in full satisfaction of an existing debt, is an extinguishment of the original indebtedness. But properly to be called accord and satisfaction as distinguished from payment or purchase, the third person must become a party to a valid contract to that effect. (3 Elliot on Contracts, Section 2079.) Thus where one of two or more joint creditors make an accord and

satisfaction with the debtor, this puts an end to the debt. (Wallace *vs.* Helsale, 7 M and W. 264.) Thus, where three creditors sue on a joint demand and the debtor pleaded an accord and satisfaction with one of the creditors, by a payment in cash, and a set-off of a debt due for that one to the debtor the plea was held good. (3 Elliot on Contracts, Sec. 2081.)

3. *Alteration of Principal Stipulation.*—Article 1203 of the Civil Code provides "Obligation can be modified by change of object or their principal obligation."

The Supreme Court in deciding the case of Inchausti & Co. *vs.* Gregorio Yulo, 16 Off. Gaz. 1343. *Held*: "In order that an obligation may be extinguished by another which substitutes it, it is necesary that it should be so expressly declared or that the old and the new be incompatible in all points. (Article 1204, Civil Code.) It is always necessary to state that it is the intention of the contracting parties to extinguish the former obligation by the new one. (Judgment in Cassation, July 8, 1909.)

A new instrument, in which a former one containing an obligation to pay a certain sum of money is ratified, is not renewed by merely altering the period for payment and adding other obligation not incompatible with the one already covenanted in the old instrument." (Decisions of the Supreme Court of Spain of June 28, 1903 and July 8, 1909.)

C. Compensation

1. *Total Compensation.*—(*a*) *Effect.* In order to have compensation it is necessary that two persons, are reciprocally creditors and debtors of each other. (Article 1195, Covil Code.)

Article 1196 provides: "In order that compensation may be proper, it is required:

(1) That each of the persons bound should be so principally, and that he be at the same time the principal creditor of the other.

(2) That both debts consist of a sum of money or, when the things due are perishable, that they be of the same kind and also of the same quality, if the latter should have been stipulated.

(3) That both debts be due.

(4) That they be determined and demandable.

(5) That none of them is subject to any retention or suit instituted by a third person, and of which due notice has been given the debtor."

The debtor can ask for compensation for what the creditor owes him and not his surety. The surety however can demand compensation against the demand brought by the creditor when he is sued. (8 Manresa, page 396.)

If the debtor consented to the assignment of the credit to a third party he can not set up a counterclaim against the assignee. (Art. 1198, par. 1, Civil Code.) Suppose A and B are joint and several debtors of C for ₱30.00. C owes A for ₱50.00, but C assigns his right to D with the consent of A; if A is sued by D, A can not set

off the debts owed by C, because D is a mere assignee and is not responsible for the debts of the assignor.

But if the creditor gave notice of the assignment ot the debtor and the latter did not consent to it, he may oppose compensation for the debts prior to the assignment but not those contracted afterwards. (Art. 1198, par. 2, Civil Code.)

If the assignment was made with the knowledge of the debtor, he can oppose compensation for the credits prior to it and for those contracted subsequently until he has been informed of the assignment. (Art. 1198, par. 3, Civil Code.)

Some authors believe that total compensation is limited to one debtor so that a debtor can only set off the share pertaining to him. Our Code however is not animated with the same spirit for total compensation even in favor of one debtor extinguishes the whole obligation so that no creditor can have any action against any one of the debtors. (8 Manresa, pages 209, 210.)

Article 1202. "The effect of compensation is to extinguish the debts to the concurrent amount even when the creditor and debtor have no knowledge of it." Therefore there are two effects: (1) extinguishment of the obligation as to the amount compensated and (2) creditor becomes debtor of his co-creditors.

2. *Partial Compensation.*—Since there is no express provision of the Civil Code regarding partial compensation we can have no solution other than the provisions pertaining to computation of payment. (8 Manresa, page 209.) This must be governed by the following articles of the Civil Code.

Article 1201. "When a person has against himself different debts which may be compensated, the provisions referring to imputation of payment shall be observed in the order of compensation."

Article 1172. "A person having several debts of the same class in favor of a single creditor can declare at the time of making a payment, to which of them it must be applied.

When the debtor accepts a release from the creditor in which the application of the payment is made, he can not make a claim against it unless some cause has intervened which may invalidate the contract."

Article 1173. "If the debt bears interest, the payment cannot be considered as made on account of the principal, until the interest is covered."

Article 1174. "When the payment can not be imputed, according to the preceding rules the debt which is most onerous for the debtor among those which have matured shall be considered as the one paid.

When they have the same nature and lien the payment shall be imputed to all pro rata."

D. *Merger or Confusion*

1. *When it Takes Place.*—Whenever the capacities of creditor and debtor are merged in the same person, the obligation becomes extinguished.

The case in which this confusion takes place by title of inheritance is excepted when such inheritance has been accepted under benefit of inventory. (Art. 1192, Civil Code.)

2. *Effect.*—The common question in case of merger or confusion is this,—What is the effect in case of merger by inheritance of the persons of the creditor and debtor, will the credit be extinguished as a whole or only to the amount pertaining to the creditor? The Roman text writers and other modern commentators have not given any solution but the majority of modern authors maintain with reason that the merger or confusion does not extinguish the total amount of the debt but only as to that part pertaining to the creditor whose share was merger with the debt of the debtor. (I Giorgi Teoria de las Obligaciones, pages 109-110.)

Article 1194. "Confusion does not extinguish debts in severalty except as to the part which corresponds to the creditor or debtor in whom both capacities are merged."

But in case of merger or confusion of solidary obligation the merger is as to the total debt according to the provision of article 1143 with subsequent reimbursement among the creditors or debtors. (8 Manresa 389; See also Art. 1193, Civil Code.)

E. Waiver or Remission

1. *Concept.*—(*a*) *Spanish Law.*—According to the Civil Code "A remission may be made either expressly or tacitly. Both shall be subject to the provisions governing illegal gifts. An express remission must, furthermore, conform to the forms of a gift." (Art 1187.) So that a voluntary surrender made by a creditor to his debtor of a private document which bears evidence of a credit implies the renunciation of the action which the former had against the latter. When for the purpose of invalidating this renunciation it is claimed that it is inofficious, the debtor and his heirs may support it by proving that the delivery of the document was made on account of the payment of the debt. (Art. 1188.) Whenever a private document from which the debt appears is in the possession of the debtor it shall be presumed that the creditor delivered it by his own will unless the contrary is proven. (Art. 1189.) It follows therefore that the remission of the principal debt shall extinguish the accessory obligation, but the remission of the latter shall leave the former existing. (Art. 1190.) Therefore the accessory obligation of a pledge shall be considered remitted when the pledge, after having been delivered to the creditor is found in the possession of the debtor. (Art. 1191.) This form of extinguishment had always been the center of much discussion. Article 1198 of the French Code recognizes the effect of remission made by one creditor with respect to the part of the credit which only pertains to him. Its reason is that the power of each creditor is extended for the execution of the contract but not for its extinction without any benefit in return. Remission when done without cause is an act of kindness or liberality which the rest

of the creditors can not be supposed to authorize. Besides if this were otherwise simulated remission may be effected by some of the debtors thereby exposing the law into ridicule.

Contrary to this theory is a principle that solidarity carries with it the power which each creditor can exercise as an act of all, that even though the power to remit is dangerous yet the law ought not to be so anticipating (previsora) as to contradict the will of the parties who might have agreed in authorizing every member of the solidary obligation to act by himself for all of them. Besides if remission by one creditor is prohibited, since each and every one of them can receive payment, such law (if it would exist) can be easily evaded by simulating a payment of one debtor or all of them to one creditor who can put his co-creditors in the same predicament as if there were no law at all. (8 Manresa, pages 206-207)

(b) *American Law.*—The payment of a debt to one of two persons to whom it is jointly one is effectual. Therefore a release by any one of several joint promises is good as against all. (Myrick *vs.* Dame, Cush. 248; Eastman *vs.* Wright, 6 Pick. 316; Allen *vs.* Shad Burne, 25 Am. Dec. 121; Baldwin *vs.* Gray, 16 Am. Dec. 169; Berny *vs.* Guilis, 43 Am. Dec. 584.) But a covenant by the creditor not to sue one joint or joint and several debtor is a different thing from release. Such a covenant, if perpetual, will be permitted to bar the covenantor's suit against the covenantee where there are no other parties litigant, because thereby circuity of action is avoided. (Cuyer *vs.* Cuyer, 2 Johns. 186; Harrison *vs.* Close, 3 Am. Dec. 444; Harvey *vs.* Harvey 3 Ind. 473.) But this reason shows, what is settled in authority, that such covenant is not properly a release, that it will not avail the co-promissor and that it cannot be set up if he also is a defendant. This is also equivalent to a release with reservations. (Rowley *vs.* Stoddard, 7 Johns. 270, 210; Crame *vs.* Alling, 3 Green, N. J. 423; See also Bishop pages 360, 362.)

2. *Elements.*—In order to have a valid remission the following requisites must be present:

(a) *It Must be Gratuitous.*—If something equivalent to given in return it is no longer remission but novation if the object and circumstances of the obligation is changed; or imputation of payments if other things are received instead of money. (8 Manresa, page 355.)

(b) The obligation must be demandable at the time of the remission for if there is a period fixed within which the payment is to be made and such period has not yet elapsed then the right to demand has not yet accrued and therefore the creditor or creditors can not yet dispose of the same; this is also true if the right has prescribed. (8 Manresa, page 356.)

(*c*) The creditor or creditors must have legal capacity for in remission ownership is transferred so that minors, insane persons and the like are disqualified from exercising this right.

(*d*) It must not be exercised to defraud creditors. (Law 12, Tit. XV, Partidas V, VI, VII, Tit. XXXII, Book XI, Nov. Recopilación.)

(*e*). Since the remission is but a kind of donation it follows that the laws granting donation and inofficious gift shall be observed. (See Arts. 1187-2, 630, 631, 632, 534 to 646, 654, 820 and 1036-8; also 8 Manresa, pages 357-362.)

3. *General Classification.*—(*a*) Total remission of the obligation or debt—

(1) *By all the creditors to all the debtors.*—The effect of this is the total extinguishment of the obligation.

(2) By all creditors to one of the debtors only.—The following are the necessary effects: (*a*) Extinguishment of the obligatory relation between the remitted debtor and the creditors; (*b*) Reduction of the pro rata share on the part of the debtors in case of reimbursement when one of them pays the whole debt. So if there are four debtors owing ₱100.00 and there is no stipulation as to their proportional responsability, in case all the creditors remit one of the debtors the debt will be reduced to ₱75.00; (*c*) Creation of responsability of the creditors who remitted the debt, for which in case some of the remaining debtors become insolvent the remitted debtor would be responsible.

(3) *By one of the creditors to all the debtors.*—The effects are: (*a*) Extinguishment of the obligatory relation of all the debtors with the remitting creditor, thus diminishing the number of creditors;—(*b*) Reduction in the corresponding part of the obligation of the debtors.

(4) *By one of the creditors to one of the debtors only.*—(*a*) Extinguishment of the obligation of said debtor to the remitting creditor; (*b*) But his obligation to the rest of the creditors still subsists. The other creditors could still demand the whole debt from any of the debtors but the remitting creditor can ask from any one of the debtors except the one he remitted; (*c*) If any one of the creditors other than the one remitting collected the whole debt, the one who remitted his credit against one debtor would still receive his full share but he must however reimburse that share pertaining to the remitted debtor.

(*b*) Partial remission of the obligation or debt—

(1). *By all the creditors to all the debtors.*—It reduces the obligation of the debtors with respect to all creditors in the part remitted thereby causing the corresponding reduction in the pro rata reimbursement among the debtors themselves when one of them has paid.

(2) *By all the creditors to one of the debtors only.*—It reduces the obligation in the amount remitted so that there will also be reduction of the amount reimbursed by each debtor in case of payment of the whole debt by any one of them.

(3) *By one of the creditors to all the debtors.*—(*a*) It reduces the obligation in favor of all the debtors in that part which should correspond and be delivered to the remitting creditor after the whole debt is collected by any one of the creditors.

(4) *By one of the creditors only to one of the debtors.*—(*a*) With regard to the other debtors the obligation remains subsisting. The creditors can still demand the whole debt from any one of the debtors but the remitting creditor can not demand the whole debt since there must be a reduction of the same in the part remitted; (*b*) If any one of the creditors other than the remitting creditor makes the collection, the one remitting will still receive his full share as if no remission has taken place but he must however reimburse that part remitted to the debtor in whose favor it is made.

(*c*) *Remission of Solidarity.*—(1) *By all the creditors to all debtors.*—The tie that binds the creditors and debtors is extinguished and the obligation is divided into as many separate independent parts as there are creditors and debtors. The action may be brought by the joint and several creditors against the joint debtors in a solidary form with respect to the creditors but in metes and bounds against the debtors according to the responsibility of each of the latter; or a pro rata according to the number of the debtors; or each creditor to his respective debtor or to any one but only for his part not exceeding his share of his credit and not exceeding the corresponding responsability of the debtor.

(2) *By all the creditors to one debtor only*—(*a*) The solidary obligation shall still subsist with respect to the debtors who have not been affected by the said remission; (*b*) The debtor in whose favor the remission of solidarity was made will answer only for his proportionate share of the obligation which in turn will be divided into as many parts as there are creditors or according to the agreement; (*c*) In case of insolvency of any of the remaining joint and several debtors the remitted creditors will be substituted in the place. If A, B and C for example are joint and several debtors to D, E, and F for ₱300.00, and A is remitted by all the creditors; then A will only answer for ₱100.00 while B and C still remain solidary debtors for ₱200.00. But if B becomes insolvent the remitting creditors will bear the loss in the same part which the debtor remitted would have answered if there were no remission.

(3) *By one of the creditors only to all the debtors.*—(*a*) The obligation subsists in the same solidary terms in which it was contracted with respect to the rest of the creditors and all the debtors; (*b*) With respect to the remitting creditor there is a partial novation because the obligation becomes divided into as many independent parts as there are debtors who are liable jointly; (*c*) The remitting creditor can demand only for his share which he must collect from all the debtors in proportion

to their share in the obligation according to the agreement or in default of which a *pro rata*.

(4) *By one of the creditors only to one of the debtors.*—(*a*) The solidary obligation continue between the creditors who have not remitted on one hand and all the debtors not remitted on the other; (*b*) The relation between the remitting creditor and the remitted debtor is novated and is changed from solidary into pro rata; (*c*) As a consequence any one of the creditors who have not remitted can ask fulfillment from any one of the debtors including the remitted one, and the remitting creditor can demand fulfillment from any one of the debtors except from the one he remitted in the solidary obligation.

The above discussion was taken from Sanchez Roman. (IV Sanchez Roman, pages 57-60.) But Manresa maintains a slight difference in classification though it has the same effect as those stated by Sanchez Roman. Manresa says that remission may be made by all, one or some of the creditors, for the benefit of all, one, or some of of the debtors; in case of debts bearing interest, whether it refers to the capital and interest or to either of them only; whether it refers to the tie of solidarity; and finally the remission may be express or implied. Manresa also maintains the fact (Where Sanchez Roman is silent) that the simple remission of the solidarity in favor of one debtor, various or all does not make the duty of the remitting creditor to indemnify the others for his act, since the obligation ceases to exist, and his responsibility remains uncertain and undermined until the time of the demand, where it may be possibly known whether the lack of solidarity was the cause of the damages. (8 Manresa, pages 206-207.)

Both authors however agree in the view that if the remission is made in favor of any one of the solidary debtors, it favors all for the creditor in remitting one debtor impliedly remits all. (See Arts. 1143 and 1146; also 8 Manresa, pages 368-370.) Also in case the remission be expressed and the debtors jointly and severally liable and if such remission is specially done only in favor of one of the debtors the rest are still liable deducting of course the amount remitted. But it is not less true that remission in favor of the principal debtor liberates the surety, but remission in favor of the surety does not liberate the principal debtor. When it is made in favor of one of the sureties not solidarity liable the rest are not discharged. (Art. 1190, Civil Code; See also 8 Manresa, pages 371-373.) However the accessory obligation of pledge is presumed to be remitted if the thing pledged after delivery to the creditor has been made, be found in the hands of the debtor. (Art. 1191, Civil Code; 8 Manresa, pages 374-378.) According to Roman law this is a conclusive presumption but Manresa says it is prima facie. (IV Sanchez Roman, page 462; 8 Manresa, page 877.)

4. *Is notification necessary?*—Because no article provides the necessity of remission it may be concluded in the negative, and it is enough that the proof on the

part of the debtor that he has paid in good faith is destroyed, who without his knowledge had renounced his credit. (I Giorgi Teoria de las Obligaciones, page 111.)

F. Prescription

In general prescription does not create the right to demand or reclamation among the joint and several co-creditors, since such a right could never have existed unless there had been a general abandonment of the exercise of their right against the debtors. There is however an exception to this rule and this is when a co-creditor who is materially incapable to interrupt prescription made a demand against the debtors. In this case the same creditor can have an action against those creditors who could prevent and avoid prescription. (8 Manresa, page 211.) The rule however is different in case of joint (mancomunada) obligation. It must be remembered that the demand directed against any of the joint and several debtors or the recognition of the credit made by one of them, interrupts the prescription with respect to the others. (IV Sanchez Roman, page 52.)

(To be continued).