§ 1.1 Definition

The word "obligation" has more than one meaning. As is generally the case with words that mean more than one thing; the precise signification intended by one who speaks or writes such a word depends on the context in which it is used. Thus, in its more general acceptance, the word "obligation" means something that the law or morals command a person to do, a command that is made effective by the imposition of a sanction if the person fails to obey or comply. When given that reference, the word "obligation" is made synonymous with the word "duty." In that sense it is said, for example, that all citizens of a certain age are under an obligation to fulfill their military duties, that all members of an organized community are under an obligation to pay taxes, that all landowners are under an obligation to comply with municipal ordinances that concern their property. The same meaning is intended when reference is made to an obligation to help those in need.

In another sense, the word "obligation" means an instrument in writing, however informal, whereby one party contracts with another for the payment of a sum of money. In commercial law, for example, the word "obligation" may mean a negotiable instrument, such as a promissory note or draft, or a bond or debenture issued by a corporation or a public agency.

In the technical terminology of the civil codes, however, the word "obligation" means a legal bond that binds two persons in such a way that one of them, the creditor or obligee, is entitled to demand from the other, the debtor or obligor, a certain performance. Thus, for example, when two persons make a contract of sale, one of them, the buyer, may demand from the seller delivery of the thing sold, and the seller may demand from the buyer payment of the price. Likewise, when because of his fault a person causes damage to another, the victim of the wrong may demand reparation from the wrongdoer.

The Louisiana Civil Code uses the word "obligation" in its technical meaning when it defines it as a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. The same definition further explains that the performance may consist of giving, doing, or not doing something.
Thus defined, it is clear that, in the technical meaning of the civil codes—the Louisiana one in particular—obligation means more than just duty. In a legal relation, which presupposes at least two parties, the duty is confined to one of them, the debtor or obligor, who is the one subjected, or "under," the obligation, so that his way in which he must conduct himself in order to render that which is expected from him. At the other end, however, on the part of the creditor or obligee, there is a right that entitles him to demand performance of the duty. As an abstract bond, the obligation, the legal relation, links the right to the duty and makes those concepts correlative, so that they cannot exist—nor can they even be thought of—the one without the other.

It can be said, in this perspective, that every obligation contains a duty as a necessary element, but that not every duty amounts to an obligation. Thus, the existence of a duty of charity, or of social solidarity, cannot be denied in the moral realm, but the nonexistence of a right to demand charity from others clearly explains that such duty is not an obligation. Even at law, the general duties not related to a definite, particular and concrete performance, such as the duty not to cause injury to another or the duty to act with ordinary prudence, though undoubtedly "legal" in the sense that legal consequences may be attached to the dereliction of such duties, are not obligations in a technical sense.

§ 1.2 Patrimonial Aspect, Credit-Right

A further restriction to the civil code concept of obligation is the connection that exists between obligation, in its technical sense, and patrimony, so that the right that an obligation gives the creditor or obligee is a patrimonial right, that is, a right the purpose of which is the satisfaction of the creditor's economic needs by means of the performance that the debtor must render. If the debtor does not perform voluntarily, the creditor, through the aid of the court, may compel him so to do, and, if specific performance is not possible, the creditor's interest may be satisfied by an award of damages. For that purpose, the debtor is liable with all his patrimony, which is the common pledge of his creditors.

The economic value of the performance a debtor or obligor must render is relevant in order to determine that a certain bond constitutes an obligation in its strict technical sense. That is explained in modern civilian terminology by saying that a legal relation is technically an obligation when it gives the obligee a credit-right. As an asset in his patrimony, the creditor or obligee may transfer or assign the obligation to another if he so wishes. Also, the debtor may substitute another person at his end of the relation. In both instances the obligation remains the same, however.

In this perspective, the relation involved in an obligation in the technical sense has to be distinguished from the one existing in other situations such as, for example, the parents-child relation. Thus, a child is under duty to obey his parents and the parents have a right to demand obedience from their child. It could be said, then, that a legal relation exists between those parties whereby one is bound to render a certain performance to another, which constitutes, precisely, an obligation, very much as in the case of lender and borrower, where the latter is under a duty to return the money he borrowed and the former has a right to demand that the money be returned. That is not so, however. What is expected from the child is not the kind of performance a creditor may demand from his debtor when they are bound by an obligation in the technical sense. In the case of the child, the duty he owes is not for the satisfaction of any particular interest of the parents as creditors or obligees, but for the attainment of values that transcend the interest of the parties involved and rank very high in the scale of the community, such as the welfare of children, their education, and the strengthening of family ties. In that situation, as in many
others of the same kind, such as the relation existing between spouses who owe each other reciprocally a duty of fidelity, the obligation that exists is called institutional, because the parties are immersed in an institution which, in this context, is to be understood as a situation existing between persons, or between persons and things, regulated by the law according to ideas and patterns of behavior deeply rooted in societal life and intended to last for a long time.

Institutional obligations lack the patrimonial aspect, they are not a part of a person's patrimony, and therefore they may not be transferred or assigned. That is the feature that distinguishes institutional obligations from obligations in a technical sense. Nevertheless, an obligation in the civil code sense may result from an institutional relation. Thus, as administrator of his child's estate, a father may be liable to his child for a strictly pecuniary debt. When that is the case, because of a bond institutional in origin, the parties find themselves bound by the same kind of bond that exists, for example, between lender and borrower, since there is a well-defined creditor, there is also a well-defined debtor, and the latter must render to the former a performance which is patrimonial in nature.

§ 1.3 Structure: Subjects, Legal Bond and Object

From an analytical viewpoint it can be seen with immediacy that an obligation is comprised of three elements: the subjects, the legal bond that links them, and an object.'

There is in every obligation an active subject, the creditor or obligee, to whom the right to demand performance belongs, and a passive subject, the debtor or obligor, who is under the duty to perform. In general terms, any person can be the active or passive subject of an obligation. If the focus is placed on the active subject it can be said, resorting to modern terminology, that every person, natural or juridical, even an unborn natural person, can be the holder of a credit-right. It is noteworthy that the general ability to engage, actively or passively, in obligations constitutes the essential feature of legal personality. Although at least one creditor and one debtor are necessary for an obligation, there can be more than one person at either end, or both ends, of the relation. The number of persons involved is one of the criteria according to which obligations are classified since, whenever there is more than one person at either of the ends, or at both, the obligation may be either several, or joint, or in solido.

The legal bond, the vinculum juris, that binds the subjects contains the legal substance of an obligation. It is to the legal bond that the main effect of an obligation in a technical sense is appended, namely, the creditor's power and ability to exercise his right and enforce the debtor's duty.' It is in connection with the legal bond that the state places the might of its organs at the creditor's disposal in order to compel performance from a debtor who does not render it voluntarily. The presence of those organs in the background as an essential feature has prompted the assertion of modern doctrine that, in a technical sense, an obligation is actually a tripartite relation between a creditor, a debtor, and the state. It is that presence that makes of an obligation a legal one and distinguishes it from a moral obligation, which, for the lack of a legal bond, is not enforceable at law. The different forms in which the legal bond binds the parties furnish the basis to distinguish between civil and natural obligations, as they are enforced in different ways.

The belief is common that the object of an obligation is a thing. Some basis for that belief can be found in the Louisiana Civil Code, which, following its French model, asserts in one article that the effect of obligations is one of the modes of acquiring the ownership of things or property. The origin of that conception can be readily traced to Pothier, who, at least in connection with
obligations arising from contract, discussed their object almost with the overtones of something tangible. That approach is only partial, however. As seems to flow from another, and more to the point, article of the Louisiana Civil Code, the true object of an obligation is a performance that the creditor expects and the debtor must render: it is not the thing that the debtor is supposed to give or to do, or even to abstain from doing, but his act of giving, doing, or not doing. A more subjective approach is thus substituted for a purely objective one. If the creditor's expectation is used as a vantage point, the subjective approach proves to be realistic. Thus, even when a tangible thing is involved, as when the obligation is to pay a sum of money, circumstances such as the debtor's capacity, his reliability, his ability to pay, and his willingness to pay at a certain time and place are material for the creditor who takes them into account as grounds for his expectation that the debtor will perform. If the obligation is one to make repairs on a certain thing, the repairman's technical skill and his record of performance of similar obligations are no doubt contemplated by the owner of the thing in his selection of that particular person to do the required work. It is because the object of an obligation stricto sensu consists of acts of the obligor or debtor, namely a performance, that the law demands good faith from the subjects of an obligation and also that they behave according to certain standards of care and diligence. Closer analysis discloses without difficulty that those acts of the debtor that constitute his performance are intended for the satisfaction of some need of the creditor which may be accomplished by giving him a thing, or rendering to him a service, or even by the debtor's abstaining from taking a particular course of conduct. In other words, the performance has an object of its own that may be, but is not always a corporeal thing. The conclusion is compelling that, as an object of its own is comprised in a performance, that object is as much a part of the creditor's expectation as the performance itself, which is the object of the obligation.

The object of the performance is used in modern continental doctrine as a criterion to distinguish obligations de resultat, or obligations to provide a certain result, from obligations de moyens, or obligations to provide certain means. In the former, the object of the performance is to provide a certain desired result, while in the latter, that object is to provide only certain means, without implying any promise of achieving a specific result. That classification is relevant where the burden of proof is concerned. A failure to perform an obligation to provide a certain result gives rise to a presumption of fault on the part of the obligor, while in the case of failure to perform an obligation to provide certain means the obligor's fault must be proved by the obligee.

§ 1.4 To Give, to Do and Not to Do

The object of the performance is the criterion for the traditional classification of obligations in three categories, namely, obligations to give, obligations to do, and obligations not to do. In the first two categories the performance consists of positive acts such as giving or doing something, while in the third category the obligor is bound to perform through negative acts of abstention or forbearance.

The obligation to give is one whereby the obligor binds himself to transfer to the obligee the ownership of a thing or to grant him some other real right in a thing. The essential feature of such an obligation is that it is performed simultaneously with the act from which it arises. In the case of a contract of sale of an individualized thing, for example, ownership is transferred to the buyer as soon as the parties express their consent, and the seller's additional obligation to deliver the thing to the buyer is an obligation to do, rather than one to give. On the other hand, when the thing on which the parties are contracting is not individualized but is something that must be segregated from a mass of things of the same kind, as in a sale by weight, tale, or measure,
the obligation of the seller is one to do until
the time the thing or things are individualized.
It has been said that obligations to give are
rare in the system of the civil codes of French
origin.

The obligation to do is one whereby the
obligor binds himself to carry out or execute
an act, or a series of acts, other than the
transferring of a real right, such as making or
manufacturing something or rendering a
service. Thus, when a painter binds himself to
paint a portrait, or a workman binds himself to
work for a certain employer, or a lessor binds
himself to allow the peaceful enjoyment of a
thing to the lessee, the obligation resulting
from such a situation is one to do.' The
essential feature of such obligations is that the
obligor may not be physically compelled to
perform, so that in many instances the
obligee's remedy in case of nonperformance is
limited to a recovery of damages.

An obligation not to do is one whereby
the obligor binds himself to abstain from
undertaking a certain course of action. Thus
when a person binds himself not to build on
his land a building taller than a certain height
or not to use his property for a certain
purpose, or when the seller of a business binds
himself not to compete with the buyer in the
same trade, the resulting obligation is one not
to do. The essential feature of obligations of
that kind is that, in certain instances of
nonperformance, the obligee's remedy may
consist in the destruction of whatever the
obligor has done in violation of the obligation.
It is noteworthy, also, that, for public policy
reasons, the law may restrict a person's
freedom to restrict his freedom.

§ 1.5 Obligation, Personal Rights and Real
Rights

It has been shown that, in its technical
sense, an obligation gives the obligee a
credit-right. That is so to the point that, in the
obligee's perspective, the obligation is a
credit-right. Such a right differs significantly
from a real right in spite of the fact that both
credit-rights and real rights are part of a
person's patrimony, that is, they share a
patrimonial nature.

A real right requires only one subject, the
holder, who exerts a direct and immediate
power over the thing which is the object of the
right. A credit-right, on the other hand, is just
one end of an obligation and as such
presupposes an active subject, the creditor or
obligee, and a passive one, the debtor or
obligor.

Because it is exerted directly over a
thing, a real right is absolute in the sense that
the one to whom it belongs holds it against
everybody. A credit-right, on the other hand,
is only relative because its holder may demand
performance only from the debtor.

Because it is absolute, a real right entails
a right to follow the thing subject to that right
to whatever hands that thing may pass, and
also a right of preference, which is the holder's
prerogative to prevail over, or be preferred to,
other claimants who have only credit-rights
against the person in possession of the thing or
real rights of an inferior rank over that thing.
A credit-right, on the other hand, entails
neither a right to follow nor a right of
preference. Within the framework of an
obligation, a creditor seeking to enforce his
credit-right can seize only that property that is
found in the patrimony of the debtor, and
lacks the right to follow, or seize, any property
that is no longer in that patrimony. All those
holding only credit-rights against the same
debtor are on an even footing concerning
property in the debtor's patrimony without
being allowed to claim any preference.
Nevertheless, a credit-right may be secured
with a real right, as when a debt arising from
a contract of loan is secured by a real right of
mortgage granted over his property by the
debtor. When such is the case that creditor is
preferred to other and unsecured creditors of
that debtor, but that is so by virtue of the real
right given as security and not as a result of
the credit-right alone.

As shown, a real right may be granted along with, or for the purpose of securing, a credit-right, in which case the real right is accessory to the credit-right. Conversely, however, a credit-right may arise because of the existence of a real right, as is the case with the real right of usufruct, which may give rise to a credit right of the naked owner against the usufructuary for expenses of the former for which the latter is responsible because of the usufruct he holds.

Because of those differences it is commonly asserted that in an obligation the creditor enjoys a personal right, since it can be exercised only against a person, the debtor, as opposed to a real right, which is exercised against all.

Modern doctrine has addressed vigorous criticism against the differences just discussed and asserts that between real and personal rights the difference is not one of nature, as both kinds of rights are component parts of obligations, but lies only in the number of passive subjects, namely obligors, at the other end of the obligation giving rise to the rights of one or the other kind. Be that as it may, the traditional differences are analytically useful in order to enhance the distinct functions that the legal system attaches to real and personal rights.