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## JOINT OBLIGATIONS- EFFECT OF RELEASE OR COVENANT NOT TO SUE

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JOINT OBLIGATIONS — EFFECT OF RELEASE OR COVENANT NOT TO SUE — Defendants mortgaged their farm to plaintiff and later conveyed to one Ahart, who assumed the mortgage indebtedness. In a written extension agreement between all three parties it was provided that the defendants and Ahart should be jointly and severally liable for the debt.<sup>1</sup> After foreclosure proceedings were started, Ahart and the plaintiff entered into a written contract by which the plaintiff agreed to release Ahart from all personal liability on the mortgage indebtedness in consideration of a deed to the farm. Thereafter the plaintiff sought a deficiency judgment against the defendants. *Held*, the defendants were not discharged from their personal liability by the agreement between the plaintiff and Ahart because it was not a release but rather a covenant not to sue.<sup>2</sup> *Federal Land Bank of Omaha v. Christiansen*, (Iowa, 1941) 298 N. W. 641.

<sup>1</sup> A mortgagor and his grantee assuming the mortgage debt are not ordinarily joint debtors of the mortgagee. *Gilliam v. McLenore*, 141 Miss. 253, 106 So. 99 (1925).

<sup>2</sup> Where the obligors are principal and surety, the rules on the operation of a release or covenant not to sue vary considerably from the rules where both are principals. See 2 WILLISTON, CONTRACTS, 2d ed., §§ 339, 340 (1936). Iowa holds that, so far as the mortgagee is concerned, the mortgagor is a principal debtor along with his grantee assuming the mortgage debt (see principal case, 298 N. W. at 643), whereas

The rule that the release of one joint obligor releases the other has long been criticized as over-technical and accomplishing results not intended by the parties.<sup>3</sup> The court in the instant case announces a trend away from the rule. This trend has had its most definite expression in statutes,<sup>4</sup> but the rule still prevails in a large number of states, though restricted in varying degrees according to the court's ingenuity in evading it. While at least two cases seem flatly to reverse the rule,<sup>5</sup> the courts usually avoid it by holding that the contract is not a release, which destroys the obligation, but rather a covenant not to sue. This leaves the obligation intact and merely binds the obligee not to enforce it against the one with whom he entered into the contract.<sup>6</sup> The question, then, is whether the contract between the obligee and one of the joint obligors is a release or only a covenant not to sue. Most courts find little difficulty in interpreting the contract as a covenant not to sue if it contains an express reservation of rights against the other joint obligors.<sup>7</sup> The intent of the parties in such a case is so obviously inconsistent with the operation of a release that it is hard for the courts to ignore it. Similarly it has been held that when the contract on its face clearly indicates an intent to discharge only the one joint obligor it will be considered a covenant not to sue, even though it does not expressly reserve rights against the others.<sup>8</sup> The instant case goes a step beyond these

most jurisdictions hold that the mortgagor is only surety and the grantee is the principal debtor. 41 C. J. 734 (1926).

<sup>3</sup> For an enumeration and criticism of the reasons courts have given for the rule, see 2 WILLISTON, CONTRACTS, 2d ed., § 333 (1936). Where, as in the instant case, the obligation is joint and several, the rule is the same but even more unreasonable. I CONTRACTS RESTATEMENT, § 123 (1932), suggests the following rule: "Where the obligee of joint and several contractual promises discharges a promisor by release, rescission or accord and satisfaction, the other promisors are thereby discharged from their joint duty, but not from their several duties, except in the cases and to the extent required by the law of suretyship." The writer has been unable to find any cases in which this rule has been adopted.

<sup>4</sup> Colo. Stat. Ann. (1935), c. 92, § 5; Conn. Gen. Stat. (1930), § 5557; Kan. Gen. Stat. (1935), § 16-105; Mich. Stat. Ann. (1935), § 20.135; Minn. Stat. (Mason, 1927), § 9412; Miss. Code Ann. (1930), § 2027; Mo. Rev. Stat. (1939), § 3348; Mont. Rev. Code (1935), § 9768; 12 N. Y. Consol. Laws (McKinney, 1916), § 230; Ohio Code Ann. (Throckmorton, 1940), § 8084; 59 Pa. Stat. (Purdon, 1930), § 135; R. I. Gen. Laws (1938), c. 428, § 7; S. C. Code (1932), § 7038; Vt. Pub. Laws (1933), § 1626; Va. Code (1930), § 5763.

<sup>5</sup> *Lipe v. Webster*, (Tex. Civ. App. 1925) 278 S. W. 246; *Tinkham v. Wright*, (Tex. Civ. App. 1914) 163 S. W. 615. However these have been modified by *Pennington v. Bevering*, (Tex. Civ. App. 1928) 9 S. W. (2d) 401.

<sup>6</sup> On the difference in operation between a release and a covenant not to sue, see: *Baldwin v. Ely*, 127 Pa. Super. 110, 193 A. 299 (1937); 2 WILLISTON, CONTRACTS, 2d ed., § 342 (1936); I CONTRACTS RESTATEMENT, § 124 (1932).

<sup>7</sup> *Baldwin v. Ely*, 127 Pa. Super. 110, 193 A. 299 (1937); *Dodson v. Continental Supply Co.*, 175 Okla. 587, 53 P. (2d) 582 (1935); *North Pacific Public Service Co. v. Clark*, 185 Wash. 132, 52 P. (2d) 1255 (1936); *Van Meter v. Gurney*, 251 Ill. App. 184 (1929).

<sup>8</sup> *Couch v. Mills*, 21 Wend. (N. Y.) 424 (1839); *Line & Nelson v. Nelson & Smalley*, 38 N. J. L. 358 (1876); *Johnson v. Stewart*, 1 Wash. (2d) 439, 96 P. (2d) 473 (1939).

decisions. The contract does not express an intent to discharge only the one joint obligor, nor does it contain an express reservation of rights against the others. It would be hard to conceive a case falling more squarely within the rule that the release of one joint obligor releases the others. Yet the court holds that it is a covenant not to sue rather than a release because extrinsic circumstances show that the plaintiff did not intend to discharge all the joint obligors. In other words, the intent which in the other cases was expressed by the contract is here shown by parol and given the same effect. While the cases are not numerous on the point, the weight of authority is that parol evidence of such an intent is not admissible to vary the terms of a written release.<sup>9</sup> However, in a similar case,<sup>10</sup> parol evidence of the releasor's intent was allowed on the ground that the parol evidence rule applies only to cases where both litigants are parties to the contract. A possible objection to this decision is that the parol evidence rule applies even to cases between a party to the contract and a stranger to it, when the stranger claims rights under the contract.<sup>11</sup> This objection can be met in the principal case on the ground that the effect of a release is to destroy rights, not to create them. The result obtained by such a distinction may be commended as pointing to a means which the courts have thus far largely overlooked in their attempts to escape the onerous results of the rule that the release of one joint obligor releases the others.

<sup>9</sup> *Pettigrew Machine Co. v. Harmon*, 45 Ark. 290 (1885); *Hale v. Spaulding*, 145 Mass. 482, 14 N. E. 534 (1888); *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099 (1900).

<sup>10</sup> *Pennington v. Bevering*, (Tex. Civ. App. 1928) 9 S. W. (2d) 401. This case is supported by another of the same jurisdiction involving a release to one joint tortfeasor. *Pearce v. Hallum*, (Tex. Civ. App. 1930) 30 S. W. (2d) 399. As to this limitation on the parol evidence rule generally, see 22 C. J. 1292 (1920). In addition, there is a group of cases which seem to say, by way of dictum, that parol evidence is admissible in cases similar to the principal case. *Benton v. Mullen*, 61 N. H. 125 (1881); *Parmelee v. Lawrence*, 44 Ill. 405 (1867); *Johnson v. Stewart*, 1 Wash. (2d) 439, 96 P. (2d) 473 (1939). In these, however, the point is touched on only briefly and no attempt is made to reconcile the statement with the parol evidence rule.

<sup>11</sup> *County Trust Co. of New York v. Mara*, 242 App. Div. 206, 273 N. Y. S. 597 (1934), *affd.* 266 N. Y. 540, 195 N. E. 190 (1935); *Ex parte St. Paul Fire & Marine Ins. Co.*, 236 Ala. 543, 184 So. 267 (1938).