XI.

OF THE NATURE AND EXTENT OF A PARTNER'S LIABILITY.

HARALSON vs. CAMPBELL.

Supreme Court of Alabama, 1879.

63 Ala. 278.

Appeal from a judgment denying a petition to supersede or quash an execution. The opinion states the facts.

Bragg and *Thorington*, for appellants.

L. A. Dobbs, contra.

STONE, J. Partnership debts and liabilities, except in limited partnerships, are equally the debts of the firm and each member thereof; and the individual property of the several members, as well as the partnership property, may be taken in executon for the payment of such partnership debt. Partnership debts (under the code in this state, though not at common law) are joint and several, if evidenced by promise in writing, and may be sued on against the members jointly or severally. Code of 1876, Sec. 2905, *Emanuel vs. Bird*, 19 Ala. 596; *Waldron vs. Simmons*, 28 Ala. 629; *Van Wagner vs. Chapman*, 29 Ala. 172. A modification of this principle exists, in cases of bankruptcy and insolvent administration, and a marshalling of assets will sometimes be decreed; but that doctrine has no application to this case, as no bankruptcy or insolvency is averred.

The suit and the judgment in the present case are against W. J. Haralson and Terrence Reynolds, defendants, under the firm name of W. J. Haralson & Co. The mandate of the exe-

cution is, that the sheriff cause the amount of the judgment to be made "of the goods and chattels, lands and tenements, of William J. Haralson and Terrence Reynolds." There was a motion in the court below to quash the execution, because it directed the money to be made out of the individual effects of the defendants, and not out of the partnership property. The circuit court overruled the motion. This suit is not governed by Sec. 2904 of the Code. That section contemplates a suit against the partnership, in its partnership name merely, without naming the individual members composing the firm. In this case the individuals are named, and sued as such. The individual property of each partner is liable to seizure in satisfaction of this judgment. * * *

The judgment is affirmed.

NOTE.—See Mechem's Elem. of Partn. §§ 209 215
See also the two cases next following herein.

JUDD OIL CO. vs. HUBBELL.

Court of Appeals of New York, 1879.

76 N. Y. 543.

Appeal from an order made upon a motion to set aside a judgment, obtained by the Oil Co. against Hubbell and one Taylor, as copartners. The opinion states the facts.

Charles H. Tweed, for appellant.

George H. Forster, for respondent.

DANFORTH, J. (After disposing of other matters.) At the outset the plaintiff was called upon "to show cause why the judgment should not be vacated and set aside as irregular, in that a several judgment is entered against the defendant, Hubbell, for $40,950.29, and a several judgment is entered against the defendant, Taylor, for $43,420.70, instead of a judgment against the defendants jointly, pursuant to the summons and complaint; also as unauthorized by law." The moving papers establish beyond controversy that the cause of action was a joint liability on the part of Hubbell and Tay-

lor as copartners. This the complaint alleged, the defendant Hubbell by his default admitted, and the defendant Taylor has had that fact found against him by a referee, and by his silence acquiesces in the finding. Upon that determination the plaintiffs, at the same time and by means of the same record or judgment roll, took judgments against the defendants separately, as stated in the order to show cause. This was clearly irregular; but we think it was nothing more. The plaintiffs did not adhere "to the prescribed rule or mode of proceeding," by which they were entitled to a joint judgment, and which a due and orderly conduct of the suit required them to take. But this defect was merely technical and does not affect any substantial right of the adverse party. It does not in any way increase the liability of the defendant, for upon each partner rests an absolute liability for the whole amount of every debt due from the partnership. Parsons on Partnership (2d Ed.) 63; and although originally a joint contract, it may be separate as to its effects. Though all are sued jointly and a joint judgment obtained and a joint execution taken out, yet it may be enforced against one only. Each partner is answerable for the whole, and not merely for his proportionable part; and as the judgments were taken against each partner, for a partnership debt, the partnership property is bound to the same extent as if there had been but one judgment, for the whole, against both partners. *Brinkerhoff vs. Marvin*, 5 Johns. Ch., 326. Nor does the form of the judgment in any way affect the debtor's relations with his copartner; for if he pays the debt or judgment, he will be entitled to contribution or to a credit for the sum paid, in any accounting respecting the partnership affairs.

Motion to set aside judgment denied.

NOTE.—See Mechem's Elem. of Partn., §§ 209, 215, 216.

MASON vs. ELDRED.

Supreme Court of United States, 1867.

6 Wall. 231, 18 L. Ed. 783.

Mason sued, in the circuit court for Wisconsin, Anson Eldred, Elisha Eldred, and one Balcom, trading as partners, upon a partnership note of theirs. Process was served on Anson Eldred alone, who alone appeared, and pleaded *non assumpsit.* On the trial, the note being put in evidence by the plaintiff, Eldred offered the record of a judgment in one of the state courts of Michigan, showing that Mason had already brought suit in that court on the same note against the partnership; where, though Elisha Eldred was alone served and alone appeared, judgment in form had passed against all the defendants for the full amount due upon the note.

The evidence being objected to by the plaintiff, because not admissible under the pleadings, and because it appeared on the face of the record that there was no judgment against either of the defendants named except Elisha Eldred, who alone, as appeared also, was served or appeared, and because it was insufficient to bar the plaintiff's action, the question whether it was evidence under the issue in bar of, and to defeat a recovery against Anson Eldred, was certified to this court for decision as one on which the judges of the circuit court were opposed.

G. W. Lakin, for plaintiff.

J. W. Cary, contra.

FIELD, J. (After stating the facts.) If the note in suit was merged in the judgment, then the judgment is a bar to the action, and an exemplification of its record is admissible, for it has long been settled that under the plea of the general issue in assumpsit evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit. *Young vs. Black*, 7 Cranch, 565; *Young vs. Rummell*, 2 Hill, 480. On the other hand, if the note is not thus merged,

it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question then for determination relates to the operation of the judgment upon the note in suit.

The plaintiff contends that a copartnership note is the several obligation of each copartner, as well as the joint obligation of all, and that a judgment recovered upon the note against one copartner is not a bar to a suit upon the same note against another copartner; and the latter position is insisted upon as the rule of the common law, independent of the joint debtor act of Michigan.

It is true that each copartner is bound for the entire amount due on copartnership contracts; and that this obligation is so far several that if he is sued alone, and does not plead the non-joinder of his copartners, a recovery may be had against him for the whole amount due upon the contract, and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exist. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises, upon which the action is brought were made jointly with another and not with the defendant alone, a plea which would be without meaning, if the copartnership contract was the several contract of each copartner.

The language of Lord MANSFIELD in giving the judgment of the king's bench in *Rice vs. Shute*, 5 Burr. 2611, "that all contracts with partners are joint and several, and every partner

is liable to pay the whole," must be read in connection with the facts of the case, and when thus read does not warrant the conclusion that the court intended to hold a copartnership contract the several contract of each copartner, as well as the joint contract of all the copartners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each copartner was so far several that in a suit against him judgment would pass for the whole demand, if the non-joinder of his copartners was not pleaded in abatement.

The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same note against another copartner, the plaintiff relies upon the case of *Sheehy vs. Mandeville & Jamesson*, decided by this court, and reported in 6 Cranch, 254. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a copartnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant, Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded in numerous instances by the highest tribunals of different states. It was elaborately reviewed by the supreme court of New York in the case of *Robertson vs. Smith*, 18 Johnson, 459, where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication.

In the supreme court of Massachusetts a ruling similar to that of *Robertson vs. Smith* was made. *Ward vs. Johnson*, 13 Mass. 148. In *Wann vs. McNulty*, 2 Gilman, 359, the supreme court of Illinois commented upon the case of *Sheehy vs. Mandeville*, and declined to follow it as authority. The court observed that notwithstanding the respect which it felt for the opinions of the supreme court of the United States, it

was well satisfied that the rule adopted by the several state courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law, and was supported by better reasons.

In *Smith vs. Black*, 9 Sergt. & Rawle, 142, the supreme court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract, and was not discovered until after the judgment. "No principle," said the court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless indeed where the cause of action is joint and several, which, certainly, actions against partners are not."

In its opinion the court referred to *Sheehy vs. Mandeville*, and remarked that the decision in that case, however much entitled to respect from the character of the judges who composed the supreme court of the United States, was not of binding authority, and it was disregarded.

In *King vs. Hoar*, 13 Meeson & Welsby, 495, the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other, was presented to the court of exchequer and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that by the judgment recovered the original demand had passed *in rem judicatam*, and could not be made the subject of another action. In the course of the argument the case of *Sheehy vs. Mandeville* was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice MARSHALL, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice STORY, in *Trafton vs. The United States*, 3 Story, 651, refers to this case in the exchequer, and to that of *Sheehy vs. Mandeville*, and observes that in the first case the court of exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case, that he had for years entertained great doubts of its propriety.

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons, bars an action against

the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered, being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

If, therefore, the common-law rule were to govern the decision of this case, we should feel obliged notwithstanding *Shechy v. Mandeville*, to hold that the promissory note was merged in the judgment of the court of Michigan, and that the judgment would be a bar to the present action. But, by a statute of that state, compiled laws of 1857, vol. 2, chap. 133, page 1219, the rule of the common law is changed with respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that, "such judgment shall be conclusive evidence of the liabilities of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them, personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded. *D'Arcy vs. Ketchum*, 1 Howard 165. Nor is the demand against the parties not sued merged in the judgment

against the party brought into court. The statute declares what the effect of the judgment against him shall be with respect to them; it shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power of the state to limit the operation of the judgment thus recovered. The state can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand, as it can modify the operation of the judgment in any other particular.

A similar statute exists in the state of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterward before the court, if found within the state, that such parties may be sued upon the original demand.

In *Bonesteel vs. Todd*, 9 Mich. 379, an action of covenant was brought against two parties to recover rent reserved upon a lease. One of them was alone served with process, and he appeared and pleaded the general issue, and on the trial, as in the case at bar, produced the record of a judgment recovered against himself and his co-defendant under the joint debtor act of New York, process in that state having been served upon his co-defendant alone. The court below held the judgment to be a bar to the action. On error to the supreme court of the state this ruling was held to be erroneous. After referring to decisions in New York, the court said, "No one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished. And, inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment, or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued."

In *Oakley vs. Aspinwall*, 4 N. Y. 513, the court of appeals of New York had occasion to consider the effect of a judgment recovered under the joint debtor act of that state upon the

original demand. Mr. Justice BRONSON, speaking for the court, says: "It is said that the original demand was merged in, and extinguished by the judgment, and consequently, that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so if both the defendants had been before the court in the original action. But the joint debtor act creates an anomaly in the law. And for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff mus. be allowed to sue on the original demand. There is no difficulty in pursuing such a course; it can work no injury to any one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action which is, in truth, no cause of action at all, and then to recover on proof of a different demand."

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that state, we answer the question presented in the certificate, that the exemplification of the record of the judgment recovered against the defendant, Elisha Eldred, offered by the defendant, Anson Eldred, is not admissible in evidence in bar of, and to defeat, a recovery against the latter.

NOTE: See Mechem's Elem. of Partn., §§ 210, 211.

HALE vs. SPAULDING, *et al.*

Supreme Court of Massachusetts, 1888.

145 Mass. 488, 14 N. E. Rep. 584, 1 Am. St. Rep. 475.

Contract, upon an instrument under seal, dated May 23, 1885, by the terms of which the defendants, six in number, agreed to pay to the plaintiff, on demand, six-sevenths of any loss to which he might be subjected as the indorser of a certain note for a corporation.

Aaron H. Saltmarsh alone defended. He filed an answer alleging that the plaintiff, since the execution of the contract declared on, had executed and delivered the following paper, under seal, to one of the joint obligors under the contract:

"Received of L. V. Spaulding $1060.84, in full satisfaction for his liability on the document" signed, etc., and dated May 23, 1885.

At the trial in the Superior Court before HAMMOND, J., it appeared that on September 20, 1886, the defendants, except Saltmarsh, settled with the plaintiff for their proportionate part of the amount alleged to be due under the agreement declared on, and the plaintiff executed the paper under seal, annexed to the answer, and delivered it to the defendant Spaulding. The plaintiff offered to prove facts showing that, in giving said sealed paper annexed to the answer, there was no intention of releasing the defendant Saltmarsh. The judge ruled that said offer was not material, and that said sealed paper released the defendant Saltmarsh, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

W. H. Moody for the plaintiff.

H. N. Merrill for Saltmarsh.

C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule, that a release to

one joint obligor releases all. *Wiggin vs. Tudor*, 23 Pick. 434, 444. *Goodnow vs. Smith*, 18 Pick. 414. *Pond vs. Williams*, 1 Gray, 630, 636. But this result is avoided when the instrument is so drawn as to show a contrary intention. 1 Lindl. Part. 433. 2 Chit. Con. (11th Am. ed.) 1154 *et seq.* Ex parte Good, 5 Ch. D. 46, 55. The difficulty with the plaintiff's case is, that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose; or the instrument is put in the form of a covenant not to sue. See *Kenworthy vs. Sawyer*, 125 Mass. 28; *Willis vs. DeCastro*, 4 C. B. (N. S.) 216; *North vs. Wakefield*, 13 Q. B. 536, 541. Parol evidence to show the actual intention is incompetent. *Tuckerman vs. Newhall*, 17 Mass. 580, 585. The instrument given in this case was a mere receipt under seal of money from one of several joint obligors, in full satisfaction for his liability on the document signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.

NOTE.—See Mechem's Elements of Partn., § 212.

GOODNOW vs. SMITH.

Supreme Court of Massachusetts, 1836.

18 Pick. 414, 29 Am. Dec. 600.

Assumpsit on a joint and several promissory note for five hundred and fifty-one dollars, executed by the defendants Smith and Adams. Plea, by the defendant, Smith, the general issue, the defendant, Adams being defaulted. Smith's defense was, that before the note was due the plaintiff agreed with him, if he would pay half the note and take at par a certain note for a small sum of one Willis, indorsed by the plaintiff, without recourse, he would exonerate and discharge him from payment of the other half; and that he, the said Smith, then paid said

half and took Willis' note as agreed. The jury were instructed: 1. That the consideration for said agreement was sufficient. 2. That the agreement was a covenant not to sue Smith, and as the plaintiff had recourse against the other debtor alone, the agreement must be taken as equivalent to a release to avoid circuity of action. 3. That the agreement was admissible in evidence under the general issue.

Farley and *Mellen* for the plaintiff.

Hoar and *Mann* for the defendant.

By Court, WILDE, J. This case turns on the distinction between a technical release and a covenant not to sue one of two joint obligors or promisors. The distinction is, that a release to one of two joint and several obligors discharges both, whereas a covenant with one not to sue him is not to be construed as a release, so as to discharge the other obligor. This distinction is well founded on principle, and is supported by all the authorities. In the case of *Lacy vs. Kynaston*, 2 Salk. 575, which was an action on a joint and several obligation, it was decided that a covenant not to sue one of the obligors would not operate as a defeasance or release, because to construe it so would discharge the other obligor; but if the covenantee had been the sole obligor, then the covenant, although not a release in its nature, should be so construed, to avoid circuity of action. The same principles were laid down in the case of *Dean vs. Newhall*, 8 T. R. 168. That also was an action on a joint and several bond, and the defendant pleaded a release to Taylor, the other obligor, upon which issue was joined. At the trial it appeared that the plaintiff had covenanted not to sue Taylor, and in the deed of covenant he had agreed that in case he should sue, etc., that deed "should be a sufficient release and discharge to all intents and purposes, both at law and in equity, to and for the said C. Taylor, etc., and as such should and might be pleaded in bar by him the said C. Taylor." Notwithstanding this agreement, it was held that covenant could not be pleaded in bar as a release and discharge, on the distinction laid down in the case of *Lacy vs. Kynaston*, and in other cases there cited. And these decisions are approved and confirmed in *Hutton vs. Eyre*, 6 Taunt. 289; in *Rowley vs. Stoddard*, 7 Johns. 207; in *Shed vs. Pierce*, 17 Mass. 623; and in *Harri-*

son vs. Close,2 Johns. 448 (3 Am. Dec. 444). It is therefore a well-established principle that although an actual release to one of two joint and several obligors or promisors is a discharge of the debt, and consequently may be pleaded in bar by both of the obligors or promisors, yet that a covenant or agreement with one of several joint obligors, not to sue him, cannot be so pleaded. For if such a covenant or promise not to sue were allowed to operate as a discharge of one of several joint promisors or obligors, the creditor could have no remedy against the other obligor or promisor, although he had expressly or impliedly reserved the right to proceed against him.

This consequence would not follow if the obligation or promise were joint and several; for in such a case the creditor might sue the party with whom no agreement had been made, and there would be no necessity for his resorting to a joint action. But if on this distinction the matter relied on by the defendant, Smith, would amount to a defense to the whole action at common law, the plaintiff being entitled to a separate action against Adams, yet since the stat. 1834, c. 189, no such defense can be maintained. For by that statute the plaintiff is entitled to have judgment against Adams, and Smith may defend himself, we think, in this action in the same manner as he could if the action had been brought against him alone.

It is objected that there was no consideration for the agreement with Smith, but certainly the payment of half the note before it was due, and taking the note of Willis at par, was a sufficient consideration.

We are of opinion therefore that the plaintiff is entitled to judgment against Adams, and that Smith is entitled to judgment for his costs.

NOTE.—See Mechem's Elements of Partn., § 212.