SOME PROBLEMS OF JOINT LIABILITY

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JOINT liability may be roughly defined as requiring that one or more persons should be bound to another or others by one obligation, the emphasis being placed on the "one obligation." From this follow the clear general principles of the law that any release of one joint debtor releases all, for it discharges the only obligation, and that the debt merges in any judgment on it even though against only one debtor.

I am going to assume the existence of a joint debt, and discuss only its discharge, and it will appear that the substantive law is not altogether as clear and as logically consistent as one is entitled to expect in such an important matter of commercial law. It will be seen, however, that concealed "in the interstices of procedural enactments" legislation has now considerably changed the Common Law position.

A debt is usually discharged by satisfaction, and when a debt of any kind is paid in full by any person, the creditor's rights against the debtor are at an end. But payment in full in legal tender is not the only way a debt can be discharged, and there are many sets of circumstances which "A" may allege and "B" deny to be a discharge. This is always a question of intention, often as to a matter to which neither party has given any expression or even thought. For example a cheque can be given and accepted as a discharge of a debt absolutely, or merely conditionally on its being honoured. There is more scope for the occurrence of such difficulties in cases of joint liability, because any transaction between the creditor and one debtor has to be considered also from the point of view of its effect on debtors not a party to it. Three cases will serve as examples. In *Bedford v. Deakin*,[1] a creditor taking a promissory note from one debtor, expressly reserved his right against the others, and the debt was clearly only conditionally discharged; in *Watters v. Smith*,[2] a prior action against a co-debtor of the defendant had been settled on payment of part of the debt and this was held no defence, as the evidence showed that the payment was not intended to be a discharge of "the whole demand for which a prior action was brought;" in *Bailey v. Haines*,[3] on the other hand, several actions had been brought against three joint debtors and in two verdicts had been obtained but judgment was not signed, when the defendant in the other paid the debt and the costs of his action; thereon the first two defendants were held entitled to have proceedings stayed without any order being made as to costs.

Although a release of one joint debtor discharges the obligation and releases all the debtors, yet it has been held that any agreement purporting to release one debtor is to be construed "with reference to the purpose it was intended to effect and to the particular

1. [1818] 2 B. & Ald. 210.
2. [1831] 2 B. & Ad. 889.
3. [1850] 15 Q.B. 533.

intention to which it was made," and hence a release of one debtor expressly or impliedly reserving rights against others is in fact no release, but rather in the nature of a covenant not to sue (*Solly v. Forbes*[4]). In fact the law was so stated by Parke B. in *Henderson v. Stodart,*[5] in which case it does not appear that there was any express saving of rights against the others. Another reason why such an agreement could not operate as a release is that if the sum due is subsequently recovered from a co-debtor he will have a right to contribution from which the creditor cannot free any debtor. A compromise is in no different position in this respect from any other release, see *Rice v. Reed,*[6] where, as in *Solly's* case, there was an express saver.

I have had occasion to refer to the distinction between a true release and a covenant not to sue; but in the case of several debts there is no such distinction and such a covenant operates as a discharge. This illogical difference seems to have resulted from considerations of convenience under the old law when, if such a covenant were no discharge, it could be enforced only by separate action. Whatever the reason be, the distinction has been repeatedly upheld in cases of joint liability, *e.g., Lacy v. Kinnaston,*[7] *Fitzgerald v. Trant.*[8]

The right of a creditor to sue any one or more of a number of joint debtors without giving any reason is rather surprising in view of the strictness of early English pleading; an early case in which the defendant sought to set up the defence that it was not his debt was a case of a specialty debt. The plea was *non est factum.* (*Whelpdale's* case[9].) Now English law as to the liability of parties to a deed is very strict (compare that of an agent), and it may well be that this case merely applied these rules. Lord Mansfield held, in *Rice v. Shute,*[10] that the law was the same even in the case of a simple contract debt. Even under the old procedure, a defendant could secure the joinder of his co-debtors if he could prove they were alive and within the jurisdiction of the Court by having the action stayed, and this in spite of any covenant not to sue into which the plaintiff might have entered. (In Tort, however, this plea in abatement was not available.) Now, under *O. XVI* r. 11, and by means of the Third Party Procedure a defendant can in most cases, obtain the joinder of his co-debtor.

By the operation of the principles of merger and estoppel once a judgment has been obtained on a joint debt, even be it unsatisfied and against the only debtor known to the plaintiff, the right of action has gone. From the wealth of authority for this we may cite *Brinsmead v. Harrison,*[11] *King v. Hoare,*[12] and *Kendall v.*

4. [1820] 4 Moore (C.P.) 448.
5. [1850] 5 Ex. 99.
6. [1900] 1 Q.B. 54.
7. [1701] 1 Ld. Raym. 688.
8. [1709] 11 Mod. Rep. 254.
9. [1604] 5 Co. Rep. 119a.
10. [1770] 5 Burr. 2611.
11. [1872] L.R. 7 C.P. 547.
12. [1844] 13 M. & W. 494.

Hamilton.[13] The practical effect of this principle is neatly illustrated by the case of *Re Tyler*[14]: a creditor was not allowed to prove against the joint estate of two bankrupt partners because he had, just before the bankruptcy of either partner, obtained a judgment against one alone. There are exceptions to this rule where one debtor is beyond the seas at the time of the original action, in the case of the estate of a deceased partner, and where the defendant has successfully raised a defence which is personal to himself, *e.g.*, infancy; a discharge in bankruptcy is a similar exception.

Several attempts have been made to set aside by consent a judgment obtained against one debtor and then to bring an action against all; such attempts have usually met with failure; the judgment kills the debt and such artificial methods of resuscitation are of no avail. (*Hammond v. Scholfield*[15]; *Bank of Australasia v. Miller*[16].) Where such a judgment had in fact been set aside by order of the Court, this was held a good reply to a defence based on it, even though the order was obtained after delivery of the defence. (*Greig Murray & Co. Ltd. v. Hutchinson.*[17])

Exceptions have also grown up with the changes in procedure when joint debtors are sued together and one defaults in appearance or defence. Originally the plaintiff could enter interlocutory judgment against the defaulter, which was of no avail to him unless he prosecuted and succeeded in his action against the others, the judgment in which action would bind the defaulter. Under the Common Law Procedure Acts the plaintiff was given an alternative to this course; he could abandon his claim against all but the defaulter and get final judgment against him alone, the debt merging in the judgment.

Under the 1916 Rules of the Supreme Court, in three cases, the plaintiff can enter final judgment against one defendant without prejudice to his rights against the others; thus we can get two or more final judgments on the one cause of action—but all are of course obtained in the one action. Moreover, in such a case a successful counterclaim can be enforced in spite of the contrary judgment already on the record. These three cases are under *O. XIII* r. 4 (default of appearance), *O. XXVII* r. 3 (default of defence), and *O. XIV* r. 5, where on a summons for final judgment one defendant is refused leave to defend; this latter provision has been extended by analogy to a case where defendants appear at different times, and the plaintiff issues a summons against each as he appears (*Currie v. Lee*[18]), while an extension of *O. XXVII* r. 3, to cover cases of unliquidated claims was refused by the Court of Appeal in *Parr v. Snell.*[19]

It is important to remember that a debt will only merge in a

13. [1879] 4 App. Cas. 504.
14. 3 De G. & J. 33.
15. [1891] 1 Q.B. 453.
16. [1885] 6 A.L.T. 234.
17. [1890] 16 V.L.R. 334.
18. [1932] V.L.R. 178.
19. [1923] 1 K.B. 1.

judgment actually on the debt. Where one partner gives a cheque for a joint debt which is accepted as a conditional discharge only, and which is dishonoured, the creditor can sue that partner on either the debt or the cheque, and if he chooses the latter course his rights against the others are unimpaired till his judgment is satisfied. See *Wegg Prosser v. Evans*[20] and *Goldrei Foucard & Son v. Sinclair*.[21]

The position in the lower Courts differs from that in the Supreme Court even more than their different procedures require. In the County Court Rules there is no rule corresponding to *O. XIII* r. 4, or *O. XXVII* r. 3; but *O. XXIII* r. 12 corresponds to *O. XIV* r. 5. On the other hand *O. IV r. 8b*,[22] of the County Court Rules, apparently gives a right of contribution as between joint tortfeasors, a right which the general law does not give (*Dall v. Blue Wren Taxi Co.*[23]). In dealing with Courts of Petty Sessions, the Justices Act 1928, goes even further, for Sec. 79 says in effect: "An order may be obtained against any of two or more persons jointly answerable notwithstanding that others jointly liable have not been served or sued, and every person who has satisfied such an order shall have the same rights as if he had been sued in the Supreme Court, provided that such process and order shall not prevent the complainant from afterwards proceeding in respect of such demand against the other persons jointly liable in case such order is not satisfied . . . ." Thus we seem to have not only different procedures in our various Courts, but substantially different law as well, and the choice of Court may well be a matter of some moment in cases where a joint debt is the subject of litigation.

20. [1895] 1 Q.B. 108.
21. [1918] 1 K.B. 180.
22. Whether this rule is within the rule-making power conferred by the County Court Act, and, if not whether it can be questioned, may possibly be arguable, but is not within the scope of this article.
23. [1926] V.L.R. 365.