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Contracts—Modifications in Common Law

Joint Liability.*

At common law joint obligors had to be sued jointly¹ with a few exceptions.² This strict rule was applied to parties who were jointly liable on a bill or note³ and a few states still follow it.⁴ Others have relaxed its severity.

* The general scope of this note is limited to the joinder and non-joinder of co-obligors in an action on a joint contract or negotiable instrument. Some consideration is given to substantive rules. There are a number of questions which might arise concerning the general subject. For example, it might be questioned whether the statutes making joint contracts joint and several include negotiable instruments, as in Delaware, *infra* note 19. Also, a number of states have a statute saying that "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants." This statute is usually interpreted as referring to the necessity that all the plaintiffs have the same interest and all the defendants likewise. It does not refer to the necessary parties who must sue or be sued, but refers only to those who are actually involved in the suit. N. C. CODE (Michie, 1931) §457 is a statute of this type. On partnership liabilities, see Burdick, *Joint and Several Liability of Partners* (1911) 11 COL. L. REV. 101. On notice to joint indorsers, see note (1925) 11 CORN. L. Q. 57. On the effect of the death of a joint obligor, see (1929) 9 ORE. L. REV. 76. As to payment to one joint payee, see Note (1929) 8 N. C. L. REV. 46.

¹ 1 CHITTY, PLEADING 42; BLISS, LAW OF PLEADING (3d ed. 1894) §91; CLARK, CODE PLEADING (1928) 257; McINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §235; 20 R. C. L. 677; 8 C. J. 849; §1110; 47 C. J. 85, §169. If only one joint obligor were sued, he could demur or plead in abatement for non-joinder of necessary parties. If he did not object and plaintiff obtained a judgment against him, the plaintiff lost his rights in regard to the other joint obligors; the judgment against one merged the debt of all. BLISS, *op. cit. supra* §92. As to what are considered joint, several, and joint and several promissory notes see: BIGELOW, THE LAW OF BILLS, NOTES AND CHECKS (3d ed. 1928) §§162, 164; 8 C. J. 66-69, §§96-104. The Restatement of the law of contracts follows the common law. 1 CONTRACTS RESTATEMENT (Am. L. Inst. 1932) c. 5, pp. 129-150.

² If one of the joint obligors was out of the jurisdiction or was under a disability such as infancy at the time of making the contract, or had been discharged by operation of law after the contract had been made, or was a dormant partner, plaintiff could sue the other joint obligors. CLARK, CODE PLEADING (1928) 257-258 and cases there cited; same material, CLARK AND BROWNELL, *Joinder of Parties* (1927) 37 YALE L. J. 28, at 41-54.

³ RANDOLPH, COMMERCIAL PAPER §1665; 8 C. J. 849, §1110.

⁴ Florida, Georgia, and South Carolina have direct holdings which follow the common law rule.

Nelson v. Ziegfeld, 131 So. 316 (Fla. 1930).

Graham v. Marks, 95 Ga. 38, 21 S. E. 986 (1894); Almand v. Hathcock, 140 Ga. 26, 78 S. E. 345 (1913) (prom. note); Gate City Cotton Mills v. Alexander, 143 Ga. 42, 43, 84 S. E. 118 (1915); Elrod v. Camp, Flanigan and Toole, 150 Ga. 48, 102 S. E. 357 (1920); Dickenson v. Hawes, 32 Ga. App. 173, 122 S. E. 811 (1924); Exchange Bank of Savannah v. Harper, 35 Ga. App. 786, 134 S. E. 789 (1926); Smith v. Moore, 45 Ga. App. 708, 165 S. E. 765 (1932); Locher v. Gray, 168 S. E. 909 (Ga. 1933). Georgia also holds that rendition of a judgment against one of several joint obligors merges the entire cause of action and bars any subsequent suit on the same contract against the other debtors. Scarborough & Co. v. Yarborough, 13 Ga. App. 792, 79 S. E. 1131 (1913). An exception to the general rule is made by statute in Georgia pro-

A number of states which still hold that joint obligors must be sued jointly have added the provision that non-joinder can be taken advantage of only by a plea in abatement or by demurrer;⁵ otherwise the defendant will waive the defect.⁶ The plaintiff can then

viding that the plaintiff may proceed by attachment against the joint obligor who is liable to attachment, without making the other joint obligors parties to his declaration in attachment. GA. CODE (Michie, 1926) §5067; Clark v. Maddox, 41 Ga. App. 807, 154 S. E. 728 (1930). A note signed by apparent principal makers reciting, "We promise to pay," is *prima facie* a joint undertaking, Locher v. Gray, *supra*. Also on the subject, see Evans v. Williams, 29 Ga. App. 126, 113 S. E. 703 (1922).

Boykin v. Watson's Administrators, 3 Brev. 260 (S. C. 1812) (contract); *id.*, 1 Tread. Const. 157 (S. C. 1812); Ayer v. Wilson, 2 Mill, Const. 139, 12 Am. Dec. 677 (S. C. 1818) (contract) (non-joinder bars the action); McCall v. Price, 1 McCord 82 (S. C. 1821) (bond). However, by statute if the action is against two or more defendants jointly indebted upon contract and the summons is served on one or more but not on all, the plaintiff may proceed against the defendant served unless the court directs otherwise, [this much of the statute was held constitutional in Allnut v. Lancaster, 76 Fed. 131 (C. C. D.S.C. 1896), and a statute similar to it in Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. ed. 242 (1885)] and a judgment can be recovered against all the defendants jointly which is enforceable against the joint property of all and the separate property of the one served. S. C. CODE (Michie, 1932) §438. See, also, *infra* note 15. It is also provided that if a judgment is so obtained, those who were not originally summoned may be summoned to show cause why they should not be bound in the same manner as if they had been originally summoned. S. C. CODE (Michie, 1932) §810.

Idaho, Massachusetts, Ohio, and Wyoming probably also follow the common law.

An Idaho case contains the statement that a promissory note executed and signed by two persons and reading "we promise to pay" is on its face a joint and several liability. Tritthart v. Tritthart, 24 Idaho 186, 133 Pac. 121 (1913); but an earlier case says that all parties jointly liable on a contract must be made defendants in an action on it. People v. Sloper, 1 Idaho 159 (1867) (appearance bond). IDAHO CODE (Lee, Ross, and Lukens, 1932) §5-510 provides that if the action is against two or more defendants jointly liable on a contract and the summons is served on one or more but not on all, the plaintiff may proceed against the defendants served as if they were the only ones, and by §12-201 if a judgment is recovered against those served, those not originally summoned and not appearing may be summoned to show cause why they should not be bound by the judgment.

Bazell v. Belcher, 31 Ohio St. 572 (1877); Hamilton v. Ohio State Bank & Trust Co., 20 Ohio App. 493, 152 N. E. 731 (1925) (prom. note).

Wyoming, with a code of practice based on Ohio's, probably follows Ohio on this point, WYO. COMP. STAT. ANN. (1920) §§5531 to 6452, and see Fisher v. Chadwick, 4 Wyo. 379, 34 Pac. 899 (1893).

The United States Supreme Court will dismiss an appeal if the judgment sought to be reviewed is joint and both or all the joint parties do not join in the appeal. Hartford Accident & Indemnity Co. v. Bunn, 285 U. S. 169, 52 Sup. Ct. 354, 76 L. ed. 685 (1932), and will deny a writ of certiorari if the judgment sought to be reviewed is joint and the record fails to disclose summons and severance. Missouri State Life Insurance Company v. Johnson, 53 Sup. Ct. 404, 77 L. ed. 655 (1933).

⁵ As to the effect of these pleas, see CLARK, CODE PLEADING (1928) 341, 342, 410-414.

⁶ Bledsoe v. Irvin, 35 Ind. 293 (1871) (prom. note); Boots v. Boots, 84 Ind.

proceed to judgment against the non-objecting defendant, but with either of two results: one group of states holds that such judgment would merge the debt of the other obligors;⁷ another group has passed laws providing that a judgment against one co-obligor does not discharge the rest.⁸ Several states have statutes providing that

171 (1882); *Sharp v. Baker*, 51 Ind. App. 547, 99 N. E. 44 (1912) (prom. note).

Dennett v. Chick, 2 Greenl. 176 (Me. 1823) (prom. note); *Hughes v. Littlefield*, 18 Me. 400 (1841) (prom. note); *Hapgood v. Watson*, 65 Me. 510 (1876) (prom. note); see also ME. REV. STAT. (1930) c. 95, §§105, 106.

Maurer v. Midmey, 25 Neb. 575, 41 N. W. 395 (1889); *Beeler v. First Nat. Bank of Larned*, 34 Neb. 348, 51 N. W. 857 (1892) (prom. note); *Perkins County v. Miller*, 55 Neb. 141, 75 N. W. 577 (1898) (official bond); *Bates-Smith Inv. Co. v. Scott*, 56 Neb. 475, 76 N. W. 1063 (1898). Nebraska also provides that if service cannot be had on all, action may proceed against those served. *Fox v. Abbott*, 12 Neb. 328, 11 N. W. 303 (1882) (action on judgment); *Bowen v. Crow*, 16 Neb. 556, 20 N. W. 850 (1884); *Council Bluffs Sav. Bank v. Griswold*, 50 Neb. 753, 70 N. W. 376 (1897); *Gyger v. Courtney*, 59 Neb. 555, 81 N. W. 437 (1900); *Young v. Joseph Bros. & Davidson*, 5 Neb. (Unof.) 559, 99 N. W. 522 (1904) (bond); *Wolfenburger v. Britt*, 105 Neb. 773, 181 N. W. 932 (1921); the voluntary release of one of two joint makers of a promissory note will release the other. *Banking House of Cas-tetter v. Rose*, 78 Neb. 693, 111 N. W. 590 (1907). Where a judgment against joint debtors is sought to be revived, all those jointly liable should be made parties to the action; but where all are made parties and a summons is issued against all, the fact that one or more of the parties cannot be found will not abate the action against those found and properly served. *Clark v. Commercial Nat. Bank of Columbus*, 68 Neb. 764, 94 N. W. 958 (1903).

Markoe v. Seaver, 2 Wis. 148 (1853) (prom. note).

⁷ *Kamm v. Harker*, 3 Ore. 208 (1870) (prom. note); *Ryckman v. Manerud*, 68 Ore. 350, 136 Pac. 826 (1913), Ann. Cas. 1915C 522; *Anderson v. Stayton State Bank*, 82 Ore. 357, 159 Pac. 1033 (1916).

WASH. COMP. STAT. (Remington, 1922) §143; *Warren v. Rickles*, 129 Wash. 443, 225 Pac. 422 (1924); *Pacific Southwest Trust & Savings Bank v. Mayer*, 138 Wash. 85, 244 Pac. 248 (1926). Also a joint judgment against two or more persons for a tort committed by their employee, though reversed as to one of the parties appealing, remains in force as against another not appealing. *Shreeder v. Davis*, 43 Wash. 129, 86 Pac. 198 (1906). Also a judgment on a joint obligation is a bar to an action thereon against obligors not parties to the judgment. *Warren v. Rickles*, 129 Wash. 443, 225 Pac. 422 (1924).

⁸ MD. PUB. GEN. LAWS (1924) art. 50, §10; *Brown v. Warram*, 3 Harr. & J. 572 (Md. 1815) (prom. note); *Pike v. Dashiell's Adm'r.*, 7 Harr. & J. 466 (Md. 1823) (prom. note); *Merrick v. Trustees of Bank of Metropolis*, 8 Gill 59 (Md. 1849) (prom. note); *State v. Wheeler*, 14 Md. 108 (1859) (official bond); *Kent v. Holliday*, 17 Md. 387 (1861) (bill of exchange) (and if complaint shows there is a co-obligor, the non-joinder must be accounted for or the complaint is bad); *Lorrey v. Bailey*, 43 Md. 10 (1875); *Westheimer v. Craig*, 76 Md. 399, 25 Atl. 419 (1892) (contract); *Rosenthal v. Heft*, 159 Md. 302, 150 Atl. 850 (1930); on subject generally, see MD. PUB. GEN. LAWS (1924) art. 26, §§14, 21; art. 50, §§1 through 12.

Robertson v. Smith, 18 Johns. 459, 9 Am. Dec. 227 (N. Y. 1821); *Delaware County Nat. Bank v. King*, 109 App. Div. 553, 95 N. Y. Supp. 956 (1905); *Jones v. Gould*, 200 N. Y. 18, 92 N. E. 1071 (1910); *Trusts & Guarantee Co. v. Sawyer*, 146 App. Div. 63, 130 N. Y. Supp. 582 (1911); *Hawksworth v. Durant*, 93 Misc. Rep. 149, 156 N. Y. Supp. 1026 (1916) (contract); *O'Con-*

an action cannot be abated or defeated for non-joinder of defendants.⁹ Three states further provide that the court can order the other co-obligors joined, apparently on its own motion;¹⁰ and one state allows a defendant named in any action to sue out, as of course, a writ of *scire facias* to bring upon the record as an additional defendant any other person alleged to be jointly liable with him and the suit then proceeds as though all of the parties had originally been joined.¹¹ Other states which still require that co-obligors be joined in an action have other variations of the common law rule in that: (1) if all the joint obligors are not summoned and plaintiff obtains judgment against those summoned, he may later proceed

nell v. Ryan, 127 Misc. Rep. 350, 216 N. Y. Supp. 590 (1926); N. Y. CONS. LAWS (Cahill, 1930) ch. 12, §232.

Keller v. Blasdel, 1 Nev. 491 (1865); NEV. COMP. LAWS (Hillyer, 1929) §3701.

Miller v. Reed, 27 Pa. St. 244 (1856); *Mintz v. Tri-County Natural Gas Co.*, 259 Pa. 477, 103 Atl. 285 (1918); PA. STAT. (1920) §§12798, 12799, 12803, 16643, 16646, 16652.

UTAH, LAWS 1929, c. 61, §2. Also, in Utah, if the action is against two or more defendants jointly liable and all are not served, the plaintiff may proceed to judgment against the one or ones served, UTAH COMP. LAWS (1917) §6558, and then the others may be summoned to show cause why they should not be bound by the judgment. *Id.* §6874.

VT. GEN. LAWS (1917) §§1827, 1828. However, in Vermont, the common law rule that the death of a joint promisor left the survivor liable for the whole debt, which rule applies to the husband and wife when joint debtors, is still in effect. *Congdon v. Torrey*, 95 Vt. 38, 112 Atl. 202 (1921).

WIS. STAT. (1931) §113.02.

* CONN. GEN. STAT. (1930) §5646.

MICH. COMP. LAWS (1929) §14021. See also on this subject, *Searles v. Reed*, 63 Mich. 485, 29 N. W. 884 (1886); *Dumanoise v. Townsend*, 80 Mich. 302, 45 N. W. 179 at 180 (1890); *Dillenbeck v. Simons*, 105 Mich. 373, 63 N. W. 438 (1895); *Beasore v. Stevens*, 155 Mich. 414, 119 N. W. 431 (1909); *McKnight v. Lowitz*, 196 Mich. 368, 163 N. W. 94 (1917).

N. H. PUB. LAWS (1926) c. 334, §10.

Bright v. Hand, 16 N. J. L. 273 (1837); *Grazioso v. Hirschfield*, 128 Atl. 541 (N. J. 1925); *Lieberman v. Brothan*, 55 N. J. L. 379, 26 Atl. 828 (1893) (prom. note); *Blessing v. McLinden*, 81 N. J. L. 379, 79 Atl. 347 (1911); *Lapayowker v. Levitzky*, 130 Atl. 627 (N. J. 1925); N. J. COMP. STAT. (Supp. 1924) §163-285.

N. Y. CIV. PRAC. ACT (Cahill, 1931) §192; *O'Connell v. Ryan*, 127 Misc. Rep. 350, 216 N. Y. Supp. 590 (1926); see also *supra* note 8.

Providence County Savings Bank v. Vadrias, 25 R. I. 295, 55 Atl. 754 (1903); R. I. GEN. LAWS (1923) §4871.

VT. GEN. LAWS (1917) §§1798, 1830; see also *supra* note 8.

VA. CODE ANN. (Michie, 1930) §6102; see also *infra* note 17.

W. VA. CODE (1930) c. 56, art. 4, §34.

¹⁰ N. J. COMP. STAT. (Supp. 1924) §163-284; see also *Blessing v. McLinden*, 81 N. J. L. 379, 79 Atl. 347 (1911); and *supra* note 9.

R. I. GEN. LAWS (1923) §4871; see also *supra* note 9.

VT. GEN. LAWS (1917) §1830; see also *supra* notes 8, 9.

¹¹ Act of June 22, 1931. Pa. P. L. 663 (No. 236); see also *supra* note 8.

against the rest as though they were alone liable;¹² or (2) if the action is against two or more jointly liable and all are not served, a judgment may be rendered against all which is good against the joint property of all and the individual property of the ones served,¹³ and when the judgment is docketed, those not summoned may be ordered to show cause why they should not be bound;¹⁴ or (3) one of several joint obligors can confess judgment whether or not the others have been served with a summons, and it is enforceable against the joint property of all and the separate property of the one confessing.¹⁵

One state has a law providing that a principal obligor in a contract may be sued either alone or jointly with any other partly liable thereon.¹⁶

A group of states, even more liberal, has enacted procedural statutes providing that a plaintiff may sue any one or more of the parties to a joint contract,¹⁷ with three more states adding a further

¹² IND. ANN. STAT. (Burns, 1926) §§340, 341; *Martin v. Baugh*, 1 Ind. App. 20, 27 N. E. 110 (1891) (prom. note); *Capital City Dairy Co. v. Plummer*, 20 Ind. App. 408, 49 N. E. 963 (1898) (prom. note); see also *supra* note 6.

¹³ WASH. COMP. STAT. (Remington, 1922) §236; see also *supra* note 7.

¹⁴ WASH. COMP. STAT. (Remington, 1922) §436; see also *supra* notes 7, 13.

¹⁵ ORE. CODE ANN. (1930) §2-1203; see also *supra* note 7.

South Carolina, *supra* note 4, and Washington, *supra* note 13, have similar statutes as well as New York, N. Y. CIVIL PRAC. ACT (Cahill, 1931) §§1197-1201, and North Carolina, N. C. CODE ANN. (Michie, 1931) §497. They all provide in substance that if the action is against several jointly liable and all are not served, a judgment can be rendered good against the joint property of all and the individual property of those served. It is questioned whether these statutes are constitutional if applied to any joint debtors except partners in that they seem to allow a plaintiff to deprive a joint debtor of his share of joint property without giving him a day in court. For, as said in a comment in (1926) 26 COL. L. REV. 771, at 772, "although serving one partner might be sufficient notice to the others of an action against the firm, it seems clear that service upon one of several persons who are connected only by the fact that they became jointly indebted in one transaction cannot be sufficient notice to those not served that the plaintiff is trying to procure a judgment which can be executed against, and is a lien on, all the property which they own jointly with him who was served."

¹⁶ TEX. REV. CIV. CODE (Vernon, 1925) art. 1986; *Hinchman v. Riggins*, 1 White & W. Civ. Cas. Ct.-App. §§294 & 295 (Tex. 1882); *Miller v. Sullivan*, 89 Tex. 480, 35 S. W. 362 (1896); *Brainerd v. Bute*, 93 Tex. 137, 44 S. W. 575 (1898), 53 S. W. 1017 (1899); *Clark v. Turk*, 50 S. W. 1070 (Tex. 1899) (contract); *McDonald v. Cabiness*, 100 Tex. 615, 102 S. W. 721 (1907) (contract).

¹⁷ IOWA CODE (1927) §10975 (including parties to negotiable paper); *Poole, Gillam & Co. v. Hintrager*, 60 Iowa 180, 14 N. W. 223 (1882); *Cole v. Harvey*, 142 Iowa 574, 120 N. W. 97 (1909) (contract).

KY. CODES ANN. (Carroll, 1932) Civil Prac. §27; *Hughes v. Gray*, 1 Ky. Opin. 1 (1866); *Gossom v. Badgett*, 6 Bush 97 (Ky. 1869) (bill of exchange); *Williams v. Rogers*, 14 Bush 776 (Ky. 1879); *Daugherty v. Bell Nat. Bank*, 175 Ky. 513, 194 S. W. 545 (1917) (prom. note).

Sec. 2 of Act 103 of 1870, printed at p. 19 of Acts of Louisiana of 1871, reads: "Hereafter, in all suits against joint obligors it shall be unnecessary to make all the obligors parties to the suit, but each of the joint obligors may be sued and judgment obtained against them separately for the proportion of the debt or obligation due by them respectively, whether all are joined in the suit or not." This is also §1932 of the LA. GEN. STAT. (Dart, 1932). According to *Alpha v. Rose*, 171 La. 753, 132 So. 222 (1931), the law in Louisiana is that it is not necessary to make all the joint obligors parties to a suit on a joint obligation; see also *Carolina Portland Cement Company v. Southern Wood Distillates and Fiber Company*, 137 La. 469, 68 So. 831 at 833 (1915). However, there seems to be some confusion on this point so far as the statutes are concerned. Sec. 2085 of the LA. CIV. CODE (Dart, 1932) reads: "In every suit on a joint contract, all the obligors must be made defendants, and no judgment can be obtained against any, unless it be proved that all joined in the obligation, or are by law presumed to have done so." This is the same as §2080 of the CODE of 1825 and is as enacted in the REV. CIV. CODE of 1870. There are a number of annotations under this section, but they are of cases before 1871. The following two sections of the CODE (Dart, 1932) also refer to joint obligors: §2086 says that the judgment on joint obligations must be rendered against each defendant separately for his proportion of the debt, and §2087, that even though one of the joint obligors has performed his part he must be joined in the suit. The only reference at this place in the CIV. CODE as published in 1932 to the present law is the first annotation which reads "obligors sued separately, see Dart's Stat. 1932, §1932." Thus, a person unfamiliar with Louisiana law would be led to believe by looking at the CODE that Louisiana still has what is substantially the English common law rule. And a person using the GEN. STAT. (Dart, 1932) to find law on this point would have difficulty because §1932 is indexed under "bonds," subdivision "judicial proceedings," further subdivision "separate action against joint obligors."

Further confusion arises from the fact that Act 103 of 1870, referred to *supra*, is entitled "Relative to bonds taken in cases of arrest, attachment, sequestration and provisional seizure, and to suits against joint obligors." The first section of the Act [which is §1931 of the GEN. STAT. (Dart, 1932)] concerns the giving of bonds as indicated by the title. Now the question arises as to whether §2 of the Act refers to all joint obligations or only to joint bonds given under §1 (and in the GEN. STAT. §1932 is titled "Parties to suit on bonds") or whether §3 of Act 103 of 1870 which repeals all laws in conflict with the provisions of the Act repeals not only §2085 of the CODE but also §§2086 and 2087.

GEN. STAT. §1932 does not have the usual effect when a suit against one of several joint obligors is allowed because the suit must be against the joint debtor for his proportion of the debt. In *Alpha v. Rose*, *supra*, the plaintiff brought suit against one of two joint debtors for one-half of unpaid attorney's fees.

However, the joint obligation seems to be seldom used in Louisiana any more; and when there are two or more obligors, they are generally bound either severally or *in solido*, thus eliminating this problem if a lawyer draws the contract (letter from Louisiana attorney to writer).

MISS. CODE ANN. (1930) §2028; *Thompson v. The Planters' Bank*, 2 Smedes & M. 476 (Miss. 1844) (prom. note); *Crump & Co. v. Wooten*, 41 Miss. 611 (1868) (prom. note); *White's Garage v. Boyd*, 149 Miss. 383, 115 So. 334 (1928).

N. C. CODE ANN. (Michie, 1931) §459; *Davis v. Sanderlin*, 23 N. C. 389 (1841) (prom. note); *Lane v. Richardson*, 79 N. C. 159 (1878); *Ruffy v. Claywell, Powell & Co.*, 93 N. C. 306 (1885).

Sec. 459 of the N. C. CODE (Michie, 1931) was originally passed in 1797 and then read, "That in all cases of joint obligations, or assumptions of co-partners in trade, or others, such suits may be brought, and prosecuted on the

and desirable provision for joining the other parties or consolidating the actions under some circumstances.¹⁸

A number of states have passed statutes changing the common law conception of joint contracts as a matter of substantive law and have thus affected the procedure. Some declare that joint obliga-

same against the whole, or any one or more of such persons making such obligations, assumptions, or agreements; any law or usage heretofore to the contrary notwithstanding." P. L. 1797, c. 475, §2. This was in force, with various slight changes in the wording, until 1868 when it was left out of the Code of Civil Procedure adopted in that year. This omission was pointed out in *Merwin v. Ballard*, 66 N. C. 168 (1871), and the legislature of 1871-72 then passed the statute as it is to-day. P. L. 1871-72, c. 24, §1.

There are promissory notes used in North Carolina which contain, among other things, provisions that "each of the makers, endorsers, sureties and guarantors hereof hereby agrees that in the event any suit . . . may be instituted or prosecuted in any Court to enforce the payment of this obligation . . . such suit may be . . . prosecuted against such of said makers . . . as the holder hereof may elect to sue or proceed against, and *the one or ones so sued or proceeded against hereby expressly waive the right to require that any other maker . . . shall be made a party to any such suit.*" (Author's italics). The first provision merely says what is provided by §459 of the N. C. CODE, *supra*. But the latter provision, in italics, seems to interfere with the Court and attempt to restrict its power to add parties. It would seem that this provision is of no effect because if the one sued does violate his agreement and ask to have another party joined and the plaintiff objects, the Court can nevertheless in the exercise of its discretion order the other parties to be joined and disregard the plaintiff's objection. See N. C. CODE ANN. (Michie, 1931) §460. And in jurisdictions like Arizona, the District of Columbia, Minnesota, and Rhode Island, where the Court is specifically given power to order additional parties who are liable to be brought in, this provision would seem to be of no value.

VA. CODE ANN. (Michie, 1930) §§6263, 6265; *Colley v. Summers Parrott Hardware Co.*, 119 Va. 439, 89 S. E. 906 (1916) (prom. note); *Reed & Rice Co. v. Wood*, 138 Va. 187, 120 S. E. 874 (1924) (contract); see also *supra* note 9.

¹⁸ ARIZ. CODE (Struckmeyer, 1928) §3836: ". . . the Court may, however, require the plaintiff to bring in as defendants all parties jointly liable on the obligation in the action, and any subsequent judgment shall be for the amount unsatisfied." *U. S. Fidelity & Guaranty Co. v. Alfalfa Seed & Lumber Co.*, 38 Ariz. 48, 297 Pac. 862 (1931) (contractor's bond).

D. C. CODE (1929) tit. 24, c. 10, §261 makes joint obligations joint and several; by *id.* tit. 24, c. 9, §251, plaintiff may sue one of several joint obligors, "but if separate actions be brought unnecessarily against the several parties to such contract, the said actions may on motion be consolidated, and the plaintiff shall be allowed the costs of one action only." *Burdette v. Bartlett*, 95 U. S. 637, 24 L. ed. 534 (1877); *White v. Connecticut General Life Ins. Co.*, 34 D. C. App. 460 (1910) (prom. note).

Under MINN. STAT. (Mason, 1927) §9411, plaintiff may sue one or more of joint obligors, including parties to negotiable paper, . . . "provided, that the Court, upon its own motion or on application of any interested party, may require the plaintiff to bring in as defendants all the parties jointly liable on the obligation in suit." *Sundberg v. Goar*, 92 Minn. 143, 99 N. W. 638 at 639 (1904) (bond); *Hoatson v. McDonald*, 97 Minn. 201, 106 N. W. 311 (1906); *Frykland v. Great Northern Ry. Co.*, 101 Minn. 37, 111 N. W. 727 (1907); *Morgan v. Brach*, 104 Minn. 247, 116 N. W. 490 (1908) (contract); *Singer v. Singer*, 173 Minn. 57, 214 N. W. 778, 216 N. W. 789 (1927).

tions are to be construed as though they were joint and several.¹⁹ Others have provided that "where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several,"²⁰ although

¹⁹ ARK. DIG. STAT. (Crawford & Moses, 1921) §6229; *Johnson v. Byrd*, Fed. Cas. No. 7,376 (1841) (prom. note); *Hamilton v. Buxton*, 6 Ark. 24 (1845) (contract); *Walker & Faulkner v. Walker*, 7 Ark. 541 (1846) (bill of exchange); *Burgen v. Dwinal*, 11 Ark. 314 (1851) (contract); *Hicks v. Branton*, 21 Ark. 186 (1860) (contract); *Bradford & Co. v. Toney*, 30 Ark. 763 (1875) (prom. note); *Sawin v. Kenny*, 93 U. S. 289, 23 L. ed. 926 (1876) (contract); *Meledon v. Leflore*, 62 Ark. 387, 35 S. W. 1102 (1896) (prom. note); *LaMew v. Wilson-Ward Co.*, 106 Ark. 340, 153 S. W. 261 (1913) (prom. note); *Heard v. Farmers' Bank of Hardy*, 295 S. W. 38 (Ark. 1927) (prom. note).

COLO. ANN. STAT. (Mills, 1930) §4155; *Mattison v. Childs*, 5 Colo. 78 (1879) (prom. note); *Hughes v. Fisher*, 10 Colo. 383, 15 Pac. 702 (1887); *Hamill v. Ward*, 14 Colo. 277, 23 Pac. 330 (1890) (prom. note); *Warren v. Hall*, 20 Colo. 508, 38 Pac. 767 (1894); *Smith v. Woodward*, 51 Colo. 311, 117 Pac. 140 (1911). However, this rule seems to be restricted in the case of a partnership obligation in that a judgment on it must be rendered against the co-partnership jointly and the partner summoned or appearing, whether the summons is served on all or one or more. *Jones v. Langhorne*, 19 Colo. 206, 34 Pac. 997 (1893); *Blythe v. Cordingly*, 20 Colo. App. 500, 80 Pac. 495 (1905).

ILL. STAT. ANN. (Callaghan, 1924) c. 76, par. 3; *id.* c. 98, par. 88; *id.* c. 110, par. 39; *Gage v. Mechanics' National Bank of Chicago*, 79 Ill. 62 (1875) (joint guarantors of promissory note held liable jointly and severally); *Kaestner v. First Nat. Bank*, 170 Ill. 322, 48 N. E. 998 (1897) (joint guarantors of prom. note); *Northeastern Coal Co. v. Tyrrell*, 133 Ill. App. 472 at 477 (1907) (dictum construing c. 76, par. 3 as applying to negotiable instruments before the N. I. L.); *Harrison v. Thackaberry*, 248 Ill. 512, 94 N. E. 172 (1911) (prom. note, case cited *Kaestner v. Bank* as construing c. 76, par. 3 and did not decide point by c. 98, par. 88); *Hochschild v. Goddard Tool Co.*, 233 Ill. App. 56 at 62 (1924) (says c. 98, par. 88 did not change the prior law in Illinois that the obligation of a firm could not be set off against an individual claim of one of the partners); *Wisner v. Catherwood*, 225 Ill. App. 471 (1922) (says c. 110, par. 39 allowing discontinuance as to a joint defendant does not change or modify the rule that an intermediate number of joint obligors, more than one or less than all, cannot be sued upon the joint obligation).

Delaware has a statute which makes an obligation, or written contract, of several persons joint and several, unless otherwise expressed, DEL. REV. CODE (1915) §2628; but the court refused to apply this statute in an action against one of the joint makers of a negotiable promissory note and gave judgment against the plaintiff, *Gale v. Myers*, 4 Houst. 546 (Del. 1873); but even if the court had held that the statute applied and was intended to include promissory notes, the question arises whether or not the words "we promise to pay" expresses a specific intention to make it joint.

²⁰ CAL. CIV. CODE (Deering, 1931) §1659.

MONT. REV. CODE (Choate, 1921) §7550; *Wibaux v. Grinnell Live-Stock Co.*, 9 Mont. 154, 22 Pac. 492 (1889).

N. D. COMP. LAWS ANN. (1913) §5919.

OKLA. COMP. STAT. ANN. (Bunn, 1921) §5062; *Outcalt v. Collier*, 8 Okla. 473, 58 Pac. 642 (1899) (prom. note) (says that obligations appearing to be joint will be presumed to be joint and several until such presumption is in some manner overcome, thus seeming to add a further judicial presumption to that raised by the statute); *Schowalter v. Beard*, 10 Okla. 454, 63 Pac. 687

three of them have restricted this statute by providing that ordinarily an obligation imposed upon several persons is presumed to be joint and not several unless it comes within the class just mentioned.²¹

Another group of states has both procedural and substantive law statutes which not only declare that a joint contract is to be deemed joint and several but also expressly provide that a plaintiff may sue any one or more of joint contractors.²²

(1900); *McMarter v. City Nat. Bank of Lauton*, 23 Okla. 550, 101 Pac. 1103, 138 Am. St. 831-n. (1909) (prom. note, construes other statutes in connection with §5062); *Continental Gin Co. v. Huff*, 25 Okla. 798, 108 Pac. 369 (1910) (prom. note); *Rutherford v. Holbert*, 42 Okla. 735, 142 Pac. 1099 (1914) (contract); *Bilby v. Gibson*, 133 Okla. 196, 271 Pac. 1026 (1928) (contract).
S. D. COMP. LAWS (1929) §889.

²¹CAL. CIV. CODE (Deering, 1931) §1431; *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456 (1886) (contract); *Farmers' Exch. Bank v. Morse*, 129 Cal. 239, 61 Pac. 1088 (1900) (held that in the case of a note joint in form, made under an agreement in terms joint, no intention to make the note joint and several appearing, the presumption of §1659, *supra* note 20, will not be indulged, but the note will be treated as joint and hence all parties thereto must be made defendants in an action thereon); *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 105 Pac. 130 (1909) (held that a note reading "we promise to pay" was a joint note and had to be enforced according to its express terms). However, in *Leonard v. Leonard*, 138 Cal. xix, 70 Pac. 1071 (1902) it was held that where a note was given by two persons to obtain money for the benefit of one of them, the obligation was joint as well as several, §§1659 and 1431 being cited. Also, in *Gummer v. Mairs*, 140 Cal. 535, 74 Pac. 26 (1903), the court held that a writing signed by two persons who had purchased certain land, taking title in themselves, obligating them to pay an additional sum therefor on specified conditions, was their joint and several promise, bringing the case within §1659. *Woods v. Berry*, 111 Cal. App. 675, 296 Pac. 332 (1931) says that in an action on a joint obligation, all persons jointly liable must be united as defendants. See also *McKee v. Cunningham*, 2 Cal. App. 684, 84 Pac. 260 (1906), and *Bell v. Adams*, 150 Cal. 772, 90 Pac. 118 (1907) (contract).

N. D. COMP. LAWS ANN. (1913) §5767; *Grovenor v. Signor*, 10 N. D. 503, 88 N. W. 278 (1901) (prom. note with "we promise to pay" held joint); *Clements v. Miller*, 13 N. D. 176, 100 N. W. 239 (1904) (court held that in the absence of language in a contract showing a contrary intention, the obligations of parties to a contract are presumed to be joint and not several); see also, *supra* note 20.

S. D. COMP. LAWS (1929) §725; *Central Banking and Trust Co. v. Posey*, 22 S. D. 223, 116 N. W. 1126 (1908) (it was assumed in the case that a promissory note signed by several people was joint and not joint and several). See also *supra* note 20.

²²ALA. CODE (Michie, 1928) §5719; *Duramus v. Harrison & Whitman*, 26 Ala. 326 (1855) (prom. note); *Willis v. Neal*, 39 Ala. 464 (1864) (prom. note); *Lewis v. Grace*, 44 Ala. 307 (1870) (prom. note); *McKee v. Griffin*, 60 Ala. 427 (1877) (official bond); *Steed v. McIntyre*, 68 Ala. 407 (1880) (contract); *Steed v. Barnhill*, 71 Ala. 157 (1881) (prom. note); *Carothers v. Callahan*, 207 Ala. 611, 93 So. 569 (1922) (prom. note).

District of Columbia, see *supra* note 18.

KAN. REV. ST. ANN. (1923) §§16-101, 16-104; *Board Comm'rs. Jefferson Co. v. Swain*, 5 Kan. 225 (1870) (contract); *Rose v. Williams*, 5 Kan. 292 at 296 (1870) (prom. note); *Prints v. Jacobin*, 12 Kan. 50 at 55 (1873) (prom. note); *Whitlanhall v. Korber*, 12 Kan. 618 (1874) (prom. note);

The confusion which exists on this point because of the number of variations among the several states concerning this subject can readily be seen. In view of the purpose of the National Conference of Commissioners on Uniform State Laws to obtain uniform laws throughout the United States,²³ it seems that the problem of the joinder of joint obligors, including not only those who make joint negotiable instruments but also those who make other joint contracts, should be dealt with by it more fully than has been done in the present Uniform Joint Obligations Act and Uniform Negotiable Instruments Act.

Section 2 of the Uniform Joint Obligations Act provides that "a judgment against one or more of several obligors, or against one or more of joint, or of joint and several obligors shall not discharge a co-obligor who was not a party to the proceeding wherein the judgment was rendered."²⁴ It appears that this Act has not gone far enough in dealing with the aforementioned confusion and in resolving it into a uniform rule. This could be attained by changing the Act so as to read:

"All contracts which, by the common law, are joint only, shall be construed to be joint and several."²⁵

Furthermore, the pertinent section of the Negotiable Instruments Law provides only that "joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."²⁶ Illinois and

Howard v. Yost, 6 Kan. App. 374, 50 Pac. 1098 (1897) (release of one joint maker does not release any of the others); Bank of Topeka v. Eaton, 95 Fed. 355 (C. C. D. Mass. 1899) (contract).

Mo. Rev. Stat. (1929) §§2953, 2956; McElroy v. Ford, 81 Mo. App. 500 (1899); State v. Flora, 109 Mo. 293, 19 S. W. 95 (1892) (prom. note); Bagnell Timber Co. v. Mo., K. & I. Ry. Co., 242 Mo. 11, 145 S. W. 469 (1912) (contract); McArthur v. Fruit Supply Co., 191 S. W. 1126 (Mo. 1917) (contract); Welch-Sandler Cement Co. v. Mullins, 31 S. W. (2d) 86 (Mo. 1930).

N. M. STAT. ANN. (Courtright, 1929) §§105-110, 105-112.

TENN. ANN. CODE (Williams, Shannon, Harsh, 1932) §§8611, 8613; Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15 (1897) (prom. note).

W. VA. CODE (1930) c. 46, art. 5, §9; *id.* c. 55, art. 8, §7. See also *supra* note 9.

²³ Its constitution, art. I, §2, says that "its object shall be to promote uniformity in state laws on all subjects where uniformity is deemed desirable and practicable." HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1932) 542; *id.* 540.

²⁴ 9 U. L. A. 215.

²⁵ This is the form of the pertinent statute in Kansas and Missouri. KAN. REV. STAT. ANN. (1923) §16-101; Mo. Rev. Stat. (1919) §2155.

²⁶ 5 U. L. A. 472; BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED (5th ed. 1932) 33. For minor and erroneous variations of the language of this section, see *ibid.*

West Virginia have settled the questions concerning the joinder or non-joinder of parties to negotiable paper by amending the last part of this section so as to make all joint parties jointly and severally liable.²⁷ The statute as enacted by these two states has taken away the arbitrary distinction made between joint payees and joint indorsees on the one hand and joint makers, drawers, and acceptors on the other²⁸ and tends to make joint notes more readily negotiable by making them more easily collectible. It has also achieved a simplification of procedure.

It is submitted that the last sentence of Section 68 of the Uniform Negotiable Instruments Act be amended so as to read:

“All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable.”²⁹

ROBERT H. SCHNELL.

Contracts—Sufficiency of Consideration for Industrial Pension.

The president of a corporation wrote an old employee on the day of his retirement, commending him for his fine service and stating that he would receive \$100 per month as long as he maintained his “present attitude of loyalty to the company and its officers” and was “not engaged in any competitive occupation.” Payments were made from 1927 until 1931, when plaintiff was notified that the company no longer intended to continue them. Plaintiff did not enter any occupation. Suit is based on the letter as a contract. The lower court sustained, and the upper overruled a demurrer.¹

Four possible legal effects are inherent in such a letter: (1) It may be a conditional gratuity which is not binding.² (2) It may be

²⁷ ILL. STAT. ANN. (Callaghan, 1924) c. 98, par. 88; W. VA. CODE (1930) c. 46, art. 5, §9.

²⁸ See (1900) 14 HARV. L. REV. 241, 252, and (1901) 10 YALE L. J. 84, 94, as to the Ames-Brewster Controversy concerning the N. I. L. Specific amendments to the N. I. L. have been suggested by Ames in (1903) 16 HARV. L. REV. 255, by Britton in (1928) 22 ILL. L. REV. 815, and by Kent in (1928) 22 ILL. L. REV. 833, but apparently they have overlooked the desirability and necessity of amending §68.

²⁹ As in Illinois, *supra* note 27.

¹ Langer v. Superior Steel Corp., 161 Atl. 571 (Pa. Super. Ct. 1932).

² Kirsey v. Kirsey, 8 Ala. 131 (1845) (promise to support widowed sister-in-law and her children). *Contra*: Prince v. Alabama State Fair, 106 Ala. 340, 17 So. 449, 28 L. R. A. 716 (1895) (promise to send a picture for exhibition); Richards Ex'rs. v. Richards, 46 Pa. 78 (1863) (promise to furnish money to a friend to complete payments on land). I WILLISTON, CONTRACTS (1st ed. 1920) 330, §148.